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Socrates' New Clothes: Substituting Persuasion for Learning in Clinical Practice Instruction

Robert J. Condlin
rcondlin@law.umaryland.edu

SOCRATES' NEW CLOTHES: SUBSTITUTING PERSUASION FOR LEARNING IN CLINICAL PRACTICE INSTRUCTION

ROBERT J. CONDLIN*

You can fool all of the people
some of the time,
And some of the people
all of the time.
But you shouldn't try to fool
all of the people all of the time.

Rick Abel — 1981

Clinical practice instruction is strategic intervention[1] by law teachers in student performance of lawyering tasks.[2] In intervening, the teacher evaluates the quality of the student's performance, criticizes its

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* Associate Professor of Law, University of Maryland. Many people commented on earlier drafts of this article and I am grateful to them. Kenneth Abraham, Thomas Bergin, Martin Levin, and Stephen Saltzburg made special contributions for which I am particularly thankful.

1. Intervene may be an unfamiliar concept in this context. I shall use it to mean to enter into an ongoing system of relationships, to come between or among persons, groups, or objects for the purpose of helping them. . . .

[In intervening, one] acknowledges interdependencies between [teacher] and [student] but focuses on how to maintain, or increase, the [student's] autonomy; how to differentiate even more clearly the boundaries between the [student] and the [teacher]; and how to conceptualize and define the [student's competence] independently of the [teacher's]. A [teacher], in this view, assists a [student] to become more effective in problem solving, decision making and decision implementation in such a way that the [student] can continue to be increasingly effective in these activities and have a decreasing need for the [teacher] . . . .

[The necessary conditions to effective intervention are] the generation of *valid information* . . . [the providing of opportunity for] free, informed choice . . . [and the presence in the student of] *internal commitment* to the choices made.

C. ARGYRIS, INTERVENTION THEORY AND METHOD: A BEHAVIORAL SCIENCE VIEW 15–16 (1970) (emphasis in original). *See generally* H. HORNSTEIN, B. BUNKER, W. BURKE, M. GINDES & R. LEWICKI, SOCIAL INTERVENTION (1971). *See also* C. WEGENER, LIBERAL EDUCATION AND THE MODERN UNIVERSITY 160 (1978).

2. For most, the distinctive feature of clinical practice instruction is this last element — its setting in the world of actual law practice — where "[f]acts may be unavailable, obscure, disputed, or distorted. The law may be unclear, or in flux. The goals of other persons — clients, adversaries, and decision-makers, to name a few — may be cloudy or may conflict with those of the lawyer. The lawyer may be caught in a bind between two or more conflicting ethical values, or between an ethical value and a very important practical goal. Choice of the best strategy may require him to estimate and weigh probabilities. The lawyer rarely feels that he has enough time in which to do the most thorough job that he could." Meltsner & Schrag, *Report from a CLEPR Colony*, 76

implicit theories of effective lawyering, and analyzes the connection between the two.[3] Practice instruction is said to be more humane,

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COLUM. L. REV. 581, 584 (1976) (based in part on P. Schrag, My Clinical Teaching — A Review 2–3 (August 1976) (unpublished memorandum to the Faculty of Law, Columbia University)).

For years clinical instruction was nearly synonymous with student practice, and the worth of such instruction was thought to be measured in major part by the range of lawyering experiences that it provided. *See* W. PINCUS, CLINICAL EDUCATION FOR LAW STUDENTS xii, 28, 70–71 (1980). The principal funding agency for clinical programs conditions inclusion in its annual survey of clinical education on the adoption of this definition of "clinical." *See* COUNCIL ON LEGAL EDUCATION FOR PROFESSIONAL RESPONSIBILITY, FIFTH BIENNIAL REPORT 1977–78, at 22–23; SURVEY AND DIRECTORY OF CLINICAL LEGAL EDUCATION 1978-1979, at xxiii. Some still argue for fieldwork as the litmus test for clinical instruction. *See, e.g.*, Barnhizer, *The Clinical Method of Legal Instruction: Its Theory and Implementation*, 30 J. LEGAL EDUC. 67, 71 (1979) [hereinafter cited as Barnhizer, *Clinical Method*]; Barnhizer, *Clinical Education at the Crossroads: The Need for Direction*, 1977 B.Y.U. L. REV. 1025, 1041–49 [hereinafter cited as Barnhizer, *Clinical Education*]. Robert Stevens has described this view — I believe correctly — as the "compulsory chapel" approach. *See* Stevens, *Preface*, 1977 B.Y.U. L. REV. 689, 692–94. The equation of practice experience with practice instruction is fundamentally wrong. It is not experience itself that is valuable as much as it is the interpretation of experience, both one's own and others' (including that represented on video tapes of lawyers' performances and used as teaching aids in classrooms), from a conscious conceptual framework of what ought to be done.

Proponents of the "experiencing" view frequently add that student lawyering experiences should be "supervised," *see* W. PINCUS, *supra*, at xii, 314, 394 (1980), and few would quarrel with this, but supervision can mean dogmatic and simplistic lecture in rules of thumb for handling cases that are seen as typical, as easily as it can mean candid and detailed analysis of carefully collected empirical data (as opposed to impressions, *see* note 35 *infra*) about work product. For supervision to be helpful it must proceed from a clear and explicit conception of how particular lawyering and learning tasks ought to occur. It is the absence of such a theory of lawyering or of instruction (except to say that one "learns by doing" — doing *what* is rarely addressed) in the clinical literature that leads to the inference that its authors are concerned primarily about providing experiences rather than interpretation. *See, e.g.*, G. GROSSMAN, CLINICAL LEGAL EDUCATION: AN ANNOTATED BIBLIOGRAPHY 40–55 (1974); Berryhill, *Clinical Education — A Golden Dancer?*, 13 U. RICH. L. REV. 69, 89–97 (1978); Bratt, *Beyond the Law School Classroom and Clinic — A Multidisciplinary Approach to Legal Education*, 13 NEW ENG. L. REV. 199, 207–12 (1977).

3. This definition omits several familiar issues. Chief among them are the administrative questions surrounding the time, place, and manner of supervision. These topics have been discussed carefully and at length by others. *See, e.g.*, Barnhizer, *Clinical Method*, *supra* note 2; Kreiling, *Clinical Education and Lawyer Competency*, 40 MD. L. REV. 284 (1981); M. Hermann, On Looking at Lawyering: An Examination of Observation and Critique (May 1977) (unpublished paper) (copy on file with R. Condlin).

This definition may obscure another important issue: whether clinical instruction should be thought of primarily as a methodology, a new subject matter, or both. Gary Bellow describes clinical instruction as a new methodology for law study. *See* Bellow, *On Teaching the Teachers: Some Preliminary Reflections on Clinical Education as Methodology*, in CLINICAL EDUCATION FOR THE LAW STUDENT 374, 379 (CLEPR 1973). *See also* M. KELLY, LEGAL ETHICS AND LEGAL EDUCATION 19–20 (1980) (approving of Bellow's approach); Barnhizer, *Clinical Education*, *supra* note 2, at 1027–28, 1050 (discussing clinical instruction as if the question of methodology versus subject matter did not exist); Meltsner & Schrag, *supra* note 2, at 584–85 (same). Professor Bellow, however, probably

personal, sensitive, and democratic than its classroom equivalent because the sometimes dominating and manipulative technique of the classroom[4] is more difficult to use when the teaching relationship is

does not mean it literally when he says that recognized role-taking, learning grounded in student experience, and the use of role adjustment tensions to motivate are new with or distinctive to clinical study. Those characteristics also describe most of the pedagogy of the first year of law school during which students assume the law firm associate role of an intellectual apprentice who solves analytical puzzles within a mentor's definition of a problem. The difference between first-year study and clinical instruction is that the roles are different, but that is not a methodological distinction. *See* Condlin, *The Myth of the Clinical Methodology,* 2 CLINICAL LEGAL EDUC. PERSPECTIVE 9 (1978).

An equally distinctive attribute of clinical study is that it concerns a new and separate subject matter in law school instruction. That subject matter is best described as the psychology, politics, and philosophy of the interpersonal processes that make up law practice: for example, learning, bargaining, decision-making, and argument, or facsimiles thereof. *See id.* at 10. In varying combinations these processes constitute almost all lawyer interpersonal behavior. Some describe this subject matter in terms of its role-specific tasks of interviewing, negotiation, argument, and the like, *see* W. PINCUS, *supra* note 2, at 78–79, 370–71, but, focusing on underlying processes makes it easier to incorporate the insights and frameworks of other disciplines and to identify the threads that link lawyering tasks together. The result should be more sophisticated cognitive maps of each lawyering interaction.

William Simon has pointed out, correctly, that clinical teachers have neglected the political dimension of this subject matter. *See* Simon, *Homo Psychologicus: Notes on a New Legal Formalism,* 32 STAN. L. REV. 487, 487–490 (1980).

The question of subject matter versus methodology is more than a matter of whether the glass is half empty or half full. Within the law school culture, a characterization of clinical instruction as a "subject matter" would press teachers more firmly towards explication of idea content, research agenda, and basic theory than does the characterization "methodology." If clinical teachers were pressed harder to identify, explain, and test what they purport to teach, several benefits might follow. The ideas that this writing would produce could become a core cognitive content that would allow clinical instructors to make more use of classroom and pre-planned simulation pedagogy than they do now. Fieldwork programs could become the final rather than the first or only setting in which clinical instruction occurred. Clinical instruction could occur in "courses" (as much as in "programs") that could proliferate, be subdivided by subject matter, and be arranged in sequences, each building on the learning of its predecessors. The per-unit cost of such instruction would decrease, as fieldwork programs were used less to carry the burden of such instruction. I offer this conception not as an ideal, but simply as an improvement upon the present reality. Experiments like Professor Bellow's Legal Services Institute hold the most promise for developing new types of organizations for educating lawyers. *See* G. Bellow, J. Kettleson, M. Lipsky, P. Newman, W. Simon, & K. Stone, The Legal Services Institute: A Proposal (Mar. 16, 1978) (grant proposal submitted to the Legal Services Corporation) (copy on file with R. Condlin).

4. I do not discuss the criticisms of law classroom methodology as dominating and manipulative. Those criticisms are well known and speak for themselves. *See, e.g.,* Kennedy, *How the Law School Fails: A Polemic,* 1 YALE REV. L. & SOC. ACT. 71, 72–74 (1970); Savoy, *Toward a New Politics of Legal Education,* 79 YALE L.J. 444, 457–62, 480–87 (1970); Stone, *Legal Education on the Couch,* 85 HARV. L. REV. 392, 406–18 (1971); Watson, *The Quest for Professional Competence: Psychological Aspects of Legal Education,* 37 U. CIN. L. REV. 93, 109–14 (1968). This domination can be perceived as well as real. *See* note 16 *infra.* Nor do I discuss the inappropriateness of domination and manipulation (as opposed to influence) to an instructional relationship. My point is that clinical teachers believed these criticisms to be true and relevant and sought to avoid

one-to-one.[5] This difference, it is asserted, has a positive effect on the kinds of lawyers law students become.[6]

This claim is intuitively appealing but it may be factually incorrect. This article suggests that only the more stylized forms of manipulative classroom technique may be absent from clinical practice instruction — that the substance of practice instruction may track the patterns that clinical teachers profess to avoid. If this is correct, the effect, far from positive, is that practice instruction encourages students to be superficial, authoritarian, close-minded, and amoral.[7]

This investigation is preliminary and its conclusions are speculative.[8] But the substance of the hypothesis is sufficiently troublesome and the evidence for it sufficiently widespread that the speculation requires serious investigation. The article is not critical of

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dominating and manipulative practices in their own teaching. *See, e.g.,* Barnhizer, *Clinical Method, supra* note 2, at 67, 75, 104–07; Bratt, *supra* note 2, at 199, 203; Meltsner & Schrag, *Scenes From a Clinic,* 127 U. PA. L. REV. 1, 22–23 (1978). Domination and manipulation are not the only objections that clinical teachers had to traditional law instruction. *See, e.g.,* Bellow, *supra* note 3, at 394–97.

5. Bellow, *supra* note 3, at 384–85; Bellow & Johnson, *Reflections on the University of Southern California Clinical Semester,* 44 SO. CALIF. L. REV. 664, 693 (1971); Meltsner & Schrag, *supra* note 4, at 6; Barnhizer, *Clinical Method, supra* note 2, at 105, 134–35. Not all clinical teachers claim to avoid dominating and manipulative teaching behaviors; some simply agree that they should. For the relevance of my analysis, this latter view is enough.

6. Meltsner & Schrag, *supra* note 2, at 625–26; Meltsner & Schrag, *supra* note 4, at 10–11, 20–23; Barnhizer, *Clinical Method, supra* note 2, at 75, 104–05. *See also* GUIDELINES FOR CLINICAL LEGAL EDUCATION 67 (1980) (Report of the AALS-ABA Committee on Guidelines for Clinical Legal Education). *But see* note 112 *infra*; Himmelstein, *Reassessing Law Schooling: An Inquiry into the Application of Humanistic Educational Psychology to the Teaching of Law,* 53 N.Y.U. L. REV. 514, 541 (1978).

7. I mention these effects because I believe that they are implicit throughout my analysis. I do not deliver fully, however, on the promise, implied in the text, to discuss these effects directly. I discuss the effects generally, *see* text accompanying notes 101 to 106 *infra* and note 112 *infra,* and outline some of the forms that they take, *see* note 112 *infra,* but a full-blown discussion of the pedagogy, politics, and morality of practice instruction will be the subject of a future article. This article is primarily descriptive — I do not use that term pejoratively — of a set of communication difficulties in practice instruction that seem to have been missed or ignored by those in the field.

8. *See* note 66 *infra.* This will be the first of a series of articles analyzing the communication patterns of law trained people. In one sense, this article is a table of contents of what is to follow. *See* note 7 *supra* and notes 20, 22, 45, 53, 59, 64, 102, and 111 *infra.* I plan to examine several typical and representative law communication situations, to identify unselfconscious habit and underlying ideology, and to evaluate the appropriateness of each. In the process, I hope to refine both the conceptual apparatus and the data collection procedures used in this article and to make many of this article's footnotes into text. Those familiar with that process will understand how much more than retyping such a task entails.

clinical[9] practice instruction *per se*. Such instruction is a potentially significant addition to legal education.[10] Before this potential can be

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9. I do not use the term "clinical" eagerly. Like "Socratic," it has as many meanings as there are people who use it. In addition, for many law teachers, the term is pejorative, conjuring up images of mechanistic instruction in the administrative routine of law practice. These concerns notwithstanding, I use the term because other labels might be more confusing.

10. In addition to its subject matter contributions, *see* note 3 *supra*, clinical instruction has the potential to add to the study of substantive law doctrine and policy, *see* Jenkins, *Theory and Practice in Law*, 19 U. FLA. L. REV. 404, 405–13, 423–24 (1966) (discussing the philosophical basis for this assertion), and to the development of positive legal theory. For example, a substantive course in criminal law, taught from the Model Penal Code, dissects in detail the logic, wisdom, clarity, and elegance of the Code's doctrinal categories. But the experience of representing a defendant under such a statutory scheme might suggest other questions: for example, does the proliferation of offenses under such a rationalist code increase the likelihood that defendants will plead guilty? For a discussion of why this might be unacceptable as a matter of policy, see Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3, 9 (1978). To answer this question, one would need more information than is available in law school classrooms about how defendants make decisions regarding pleas. *See* Sudnow, *Normal Crimes: Sociological Features of the Penal Code in a Public Defender Office*, 12 SOC. PROB. 255 (1965). This data is virtually unavoidable in the clinical practice process and often is the source of the greatest anxiety in such work. Many such issues arise when one looks at the manner in which humans implement rule frameworks.

Clinical instruction also can contribute to positive legal theory. For example, a direct relationship has been identified between party control of aspects of the adjudication process and subsequent party perceptions of the justice of the results of that process. *See* Thibaut & Walker, *A Theory of Procedure*, 66 CALIF. L. REV. 541 (1978). For a comprehensive discussion of the rationale for party control, see Spiegel, *Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 U. PA. L. REV. 41, 73–112 (1979). *See also* Lehman, *The Pursuit of a Client's Interest*, 77 MICH. L. REV. 1078, 1080–81 (1979) (more limited discussion); Luban, The Lawyer as Papa: Paternalism in the Legal Profession and the Problem of Imputed Ends (unpublished paper) (copy on file with R. Condlin) (discussion of philosophical justification for client control). This control must be real, not illusory, and must be held by the parties directly. Thibaut & Walker, *supra*, at 545–47. If lawyers can silently subvert a rule system providing for party control, as clinical experience might suggest, *see* note 112 *infra*, that fact would have important implications for the foregoing theory.

Clinical instruction also may contribute a distinct reformist perspective to the study of law by focusing on the individual lawyer as a vehicle for social reform. (For a pessimistic view of what lawyers can do, individually or collectively, see Abel, *Socializing the Legal Profession*, 1 LAW & POL'Y Q. 5, 39–42 (1979).)

But see MacIntyre, *Regulation: A Substitute for Morality*, HASTINGS CENTER REP., Feb. 1980, at 33. The individual as a vehicle of reform is a theme of much great literature and perhaps some social theory, including some that is currently fashionable. *See, e.g.*, B. LEVY, BARBARISM WITH A HUMAN FACE (1979) (the individual rather than social systems, institutions, or rule structures ought to be the focus of political reform); Sheehan, *Paris: Moses and Polytheism*, N.Y. REV. BOOKS, Jan. 24, 1980, at 13, 13–15 (describing how Levy is currently fashionable). Moreover, in order to succeed, it is arguable, reform of rules, systems, and institutions must be accompanied by reform of individuals' theories of action. *See* C. ARGYRIS, *supra* note 1, at 1–8. *See also* W. KAUFMANN, WITHOUT GUILT AND JUSTICE (1973). If clinical teachers made this perspective the intellectual basis of their work, the

realized, however, clinical teachers must deal more adequately with this possible contradiction between their own theory and practice.[11]

I. BACKGROUND CONCEPTS — THE PERSUASION AND LEARNING MODES

To understand the possible weaknesses of clinical practice instruction,[12] one must first understand the intrinsic ambiguity of teacher-student dialogue. For a number of reasons, most instructional statements by clinical teachers and students are inevitably ambiguous. First, everyone understands the world in a slightly idiosyncratic way; each person's understanding is influenced by values, intelligence, experience, ideology, imagination, and emotional sensibilities that are mixed uniquely. These unique mixes, in turn, produce patterns of understanding that are as distinctive as fingerprints. These patterns dictate not only the way that an individual explains reality to himself but also the way that he listens to and interprets other people's

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major unstudied variable in the justice of the legal system — the patterned behavior of individual lawyers — would receive its due weight. *See* L. BROWN & E. DAUER, PLANNING BY LAWYERS: MATERIALS ON A NONADVERSARIAL LEGAL PROCESS xix (1978).

11. Clinical instruction has a more serious, and I suspect related, hurdle to overcome before realizing its potential. It needs a more articulate theory of lawyer operations. There has been some development in this area, *see* Probert & Brown, *Theories and Practices in the Legal Profession*, 19 U. FLA. L. REV. 447 (1966); Rutter, *A Jurisprudence of Lawyer's Operations*, 13 J. LEGAL EDUC. 301 (1961), but almost all of this work remains to be done.

12. I do not intend my analysis to apply to law instruction generally. Although my conceptual framework may be adaptable to evaluating other parts of legal education, there are significant differences between classroom instruction and one-to-one instruction. One such difference is the classroom teacher's unique concern with avoiding a "leaderless group." To the extent that a classroom teacher does not provide structure and direction, the class may flounder, or even act destructively with respect to instructional ends. This concern about leading will influence the teacher's judgments about how long to engage in dialogue before summarizing, with whom to speak, at what concept and language level to aim discussion, and how to maintain nonspeaker mental participation in the class. These concerns will often cause the teacher to behave differently in conversation than he would if only one other person were present.

In addition, classroom teachers, particularly in the second and third years, are less interested in helping students to practice legal analysis than in transmitting a body of information (settled doctrine, conceptual frameworks, intellectual technique, lore) about their subjects. Choices of with whom to speak, for how long, and the like, are made primarily with an eye toward the orderly and sophisticated articulation of this information, not toward the development of individual student analytical skills. Because it is a different enterprise to engage in legal problem-solving than to lay an informational foundation, classroom teachers will make use of different instructional techniques from practice supervisors. Thus, the same analysis of teaching interaction may have different implications for substantive law and clinical practice instruction. Substantive law teaching and practice teaching also have many attributes in common. *See* Condlin, *supra* note 3, at 9–11.

explanations.[13] Even descriptions that use familiar language and concepts, plausibly can be interpreted in ways that are different from those intended.[14]

Language itself is a second source of ambiguity. When a person transforms a thought into words, his entire meaning does not come through. Words are less precise, and less rich, than ideas and feelings; a verbal statement represents only a part of the underlying thoughts and emotions.[15] This problem exists in proportion to the speaker's skill at articulation, but is always present.

Ambiguity also is produced by conventions and norms that regulate instructional discourse to promote values other than clarity. For example, knowledge of motive is important in understanding

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13. For sophisticated discussions of the way that people explain reality to themselves, see G. BATESON, MIND AND NATURE 114–18 (1979); P. BERGER & T. LUCKMAN, THE SOCIAL CONSTRUCTION OF REALITY 129–83 (1966); F. HAYECK, THE COUNTER REVOLUTION OF SCIENCE 49–50 (1979); Habermas, *Towards a Theory of Communicative Competence,* 13 INQUIRY 360 *passim* (1970). For another description of this process, drawing on the literature of neurolinguistic programming, see J. Barkai, A New Model for Legal Communication: Sensory Experience and Representational Systems 2–26 (unpublished manuscript) (copy on file with R. Condlin). *See also* Abraham, *Statutory Interpretation and Literary Theory: Some Common Concerns of an Unlikely Pair,* 32 RUTGERS L. REV. 676 (1979) (discussing the influence of institutional and systematic factors on the social construction process using statutory and literary interpretation as examples).

For illustrations of the pervasiveness of the ambiguity phenomenon, see Hoffman, *The Crisis in the West,* N.Y. REV. BOOKS, July 17, 1980, at 71 (describing how multiple interpretations of the same data permeate East-West international relations); Derrida, *Limited Inc. Abc,* 2 GLYPH, JOHNS HOPKINS TEXTUAL STUDIES 181–91 (1977) (discussing the multiple, even contradictory, interpretations made of the same textual data by Jacques Derrida and John Searle).

14. *See* A. SMITH, COGNITIVE STYLES IN LAW SCHOOLS 3–9 (1979). For the description of a promising methodology for investigating the "social construction" process, see E. Olson, The Mind's Collage: Physic Composition in Adult Life (May 1976) (unpublished Ph.D. thesis, Harvard University). Hayeck describes the subjective character of this attributed meaning as the quality that distinguishes the basic data of social science from the data of natural science. *See* F. HAYECK, *supra* note 13, at 41–60.

15. For more sophisticated discussions of this very complex topic, see Derrida, *supra* note 13, at 198–217; S. LANGER, PHILOSOPHICAL SKETCHES 54–65 (1962) [hereinafter cited as LANGER, SKETCHES]; S. LANGER, PHILOSOPHY IN A NEW KEY 39 (1971); J. HABERMAS, COMMUNICATION AND THE EVOLUTION OF SOCIETY 6–7 (1979) (and sources cited therein); Habermas, *On Systematically Distorted Communication,* 13 INQUIRY 205, 210–15 (1970); C. MUELLER, THE POLITICS OF COMMUNICATION 13–17 (1973); W. OATES (ed.), BASIC WRITINGS OF SAINT AUGUSTINE 201–02 *Confessions,* BK XI, Ch. XXVIII (1948).

The relationship between meaning and language is a major issue in a considerable body of twentieth century philosophy. *See, e.g.,* J. AUSTIN, HOW TO DO THINGS WITH WORDS (1975); J. DERRIDA, OF GRAMMATOLOGY (1976); J. SEARLE, SPEECH ACTS (1969); W. QUINE, FROM A LOGICAL POINT OF VIEW (1961); L. WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS (1958). In its philosophical dimensions, this issue is not only much more complicated than the text suggests, but also well beyond the scope of this article.

meaning.[16] A teacher's purpose gives his statements emphasis, nuance, or even content that words alone do not convey, yet often conventions and norms make it inappropriate for him to explain motive in advance.[17] These good reasons notwithstanding, a student's ignorance of motive makes a teacher's statements less clear.[18]

The important point, therefore, is that how to respond to ambiguity is a pervasive, yet often unrecognized, issue in almost all instructional

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16. Perhaps the easiest illustration is classroom questioning of students. When a teacher asks a substantive question, the student is frequently uncertain about the question's purpose. It could be primarily to help the student to struggle with and succeed at a learning task, to establish the fact that the teacher knows more than the student, to impress listeners with the teacher's ability to think of provocative questions, or to emulate the teacher's own teachers. This ambiguity is no small problem, as a high percentage of student objection to law school centers on teacher motive, which students ordinarily impute rather than investigate. For an example of such imputation, see Dallimore, *The Socratic Method — More Harm Than Good,* 3 J. CONTEMP. L. 177 (1977). For considerably more sophisticated examples, see Kennedy, *supra* note 4, at 72–75; Stone, *supra* note 4, at 401–05.

17. *E.g.,* explaining motives can take a long time and cause one person to dominate the discussion; a speaker's understanding of his motives could be inaccurate or partial, so that efforts to describe them unilaterally would mislead; or the listener could be uninterested in motive.

18. Just as there are factors that increase ambiguity, there are those that reduce it. One factor that reduces ambiguity is context. The stylized language of argument associated with classroom discussion has a different meaning at social gatherings with non-law-students. For examples of such stylized language, see the student's opening statement and the teacher's two closing statements in the transcript at text accompanying notes 67 and 68 *infra.* For an interesting discussion of the way in which context influences understanding, see G. BATESON, *supra* note 13, at 114–23; Mishler, *Meaning in Context: Is There Any Other Kind?* 49 HARV. EDUC. REV. 1, 2 (1979) (criticism of social science theoretical work for trying to formulate general laws that are "context independent"). *See also* Kinder & Weiss, *In Lieu of Rationality,* 22 J. CONFLICT RESOLUTION 707 (1978) (a collection of criticisms of the rationality paradigm of social science, which abstracts data from context, and an attempt to formulate an alternative paradigm); H. MARCUSE, ONE-DIMENSIONAL MAN 170–99 (1964) (criticism of positivist philosophy as insufficiently empirical because of its neglect of historical context); T. HASKELL, THE EMERGENCE OF PROFESSIONAL SOCIAL SCIENCE 12 (1977) (description of the theory of the interconnectedness of all things).

Other factors reducing ambiguity are: prior relationship; complexity of the subject matter; relative status, power, responsibility, and maturity of the participants; and the compatibility of conversational styles. *See, e.g.,* Neely, *The Unmaking of the Legal Technocrat,* 3 J. CONTEMP. L. 216 (1977).

> If there is a body of basic literature that everyone has read, then communication is facilitiated by inclusion by reference of highly complex ideas. One is capable, for example, of explaining a highly complicated interpersonal relationship by the simple statement: "It is like the relationship between Swann and Odette." In a community in which most people have read *Swann's Way,* the statement is concise. If the analogy between the real and fictional situations is accurate, the statement quickly explains a complex relationship far more accurately than detailed discussion.

Id. at 222. *See also* Abraham, *supra* note 13, at 685–86 (describing the above factors as forming "communities of interpretation").

dialogue.[19] There are two pure types of response, here designated the persuasion mode and the learning mode.[20] The persuasion mode is a response to ambiguity in which a person is concerned primarily with asserting or developing his own conception of the meaning of the ambiguity. The learning mode is a response in which a person is concerned more with investigating, understanding, and clarifying the ambiguity in an interdependent fashion.[21] These modes are comprised of

19. This point cannot be overstated. It rarely occurred to the teachers and students I observed that what they heard in conversations was as much assumption and attribution as it was recognition of meaning. Listening in this way was so ingrained that to think of listening differently was a difficult proposition. It should be added that this problem of ambiguity in communication is fundamental, not derivative or parasitic. Ambiguity exists not solely as a result of "defects" in speech skills or language, that someday will be "cured," but also because the experience of reality, by its nature, consists of constant and unavoidable interpretation if meaning is to be produced at all. *See* Abraham, *supra* note 13, at 689–90. I am indebted to Gary Bellow for helping me see the centrality of the concept of ambiguity to my analytical framework.

20. "Persuasion" and "learning" are emotionally evocative words, and may be pejorative to some people. Some readers, therefore, may attribute a subtle bias to this choice of terms, inferring an authorial preference for the behaviors of one or the other mode. *See* C. STEVENSON, ETHICS AND LANGUAGE 81–110 (1944) (labeling the process of biasing a reader's reaction to definitions by using emotionally charged words "persuasive definition"). I do not have this preference and do not intend to communicate this bias. In my view, the persuasion and learning modes complement rather than compete with one another, and law teachers and students ought to be able to move between and combine the modes as the situation requires.

No reader of this article in manuscript form has believed this assertion. This could be for two reasons. I do not yet differentiate sufficiently between unsocial (for example, abusing others gratuitously) uses of the persuasion mode on the one hand, of which most would disapprove, and strategic (*see* note 54 *supra*) and structuring uses (for example, deciding preliminary and ancillary issues in conversations unilaterally to focus discussion) on the other, of which most would approve. For illustrations of possible strategic and structuring uses, see notes 42 and 45 *infra*. I plan to discuss these distinctions in more detail in a future article.

The second reason has to do with the way the article may conflate two main points. The first point is that there are two modes of discourse present in and appropriate to clinical practice instruction, each of which is adapted to certain circumstances and purposes, and when used otherwise, is more harmful than helpful. The second point is that clinical teachers use one mode — the persuasion mode — most of the time, even when it is inappropriate. Because I am usually criticizing use of the persuasion mode, it may appear that I do not approve of it under any circumstances. This is not the case. It just happens that overuse of the persuasion mode is the particular problem in my data.

Another possible source of reader difficulty with the terms persuasion and learning lies in the terms themselves. These words have connotations in everyday discourse not always intended by the specialized usage in this article. One effect of this is that the article will sometimes seem to use persuasion and learning in contradictory ways. For example, the processes of "persuasion" and "learning" (in the ordinary sense) necessarily involve the use of both learning and persuasion mode behavior. I do not think that these uses are contradictory, but recognize that they may be confusing. On occasion this may require close reader attention to avoid attributing more meaning than I have intended to communicate.

21. While this model is based on the work of Argyris and Schön, *see* note 22 *infra*, the dualistic notion of interactional modes has ample historical precedent. For example, Sir

different types of behaviors and are based on different values and beliefs. Yet they also blend together at their edges as two parts of a whole.[22] More importantly, the modes are intellectual constructs rather than literal descriptions of reality; they are abstractions within which to

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Francis Bacon recognized and employed the distinction between the two modes, labeling them the magistral method and the initiative method: "The magistral method teaches; the initiative intimates. The magistral requires that what is told should be believed; the initiative that it should be examined." F. BACON, DE AUGMENTIS SCIENTIARUM (1623), *quoted in Introduction* to F. BACON, A SELECTION OF HIS WORKS 4 (S. Warhaft ed. 1965).

22. The two modes taken together represent a conceptual framework for evaluating the effectiveness of practice instruction. In developing this framework, I have tried to avoid two problems: scientism, that is, defining the world of experience in terms of only those aspects of it that can be observed physically and measured with mathematic-like precision, *see* Chomsky, *The Case Against B.F. Skinner,* N.Y. REV. BOOKS, Dec. 30, 1971, at 18; F. HAYECK, *supra* note 13, at 19–24; *see also* R. BERNSTEIN, THE RESTRUCTURING OF SOCIAL AND POLITICAL THEORY 190 (1976) (alternate but complementary definition of scientism); H. MARCUSE, *supra* note 18, at 12–14 (describing same process as operationalism); C. MUELLER, *supra* note 15, at 108–12 (discussion of the ideological properties of scientism); D. BAKAN, ON METHOD xi–xv (1974) (description of difference between scientistic and scientific research), and motivism, that is, defining the world of experience in terms of all interpretations possible from a metapsychology, *see* W. BOOTH, MODERN DOGMA AND THE RHETORIC OF ASSENT 24–25 (1974); *see also* Leff, *Economic Analysis of Law: Some Realism About Nominalism,* 60 VA. L. REV. 451, 458 (1974). Thus, I have included as data the underlying thoughts and feelings of participants (*see* note 70 and accompanying text *infra)* as well as their literal words, but I have not analyzed this data from a set of interpretive concepts, such as the ego defense mechanisms of dynamic psychology. The use of interpretive psychological categories does not necessarily entail motivism. But the context, purposes, and resources (including participant abilities) of most interactions of law school and law practice do not auger well for sophisticated psychological analysis. It is my plan, ultimately, to extend this framework to an analysis of lawyer interaction. *See* note 112 *infra.*

This framework is in its early stages of development, is tentatively held, and has not been tested in law teaching settings in other than an impressionistic, albeit empirical, way. My conceptualization of this framework began in a study of the work of Chris Argyris, Lee Bolman, and Donald Schön, who have done a good deal of empirical testing of a closely related framework. *See, e.g.,* C. ARGYRIS, BEHIND THE FRONT PAGE (1974); C. ARGYRIS, INCREASING LEADERSHIP EFFECTIVENESS (1976) [hereinafter cited as ARGYRIS]; C. ARGYRIS & D. SCHÖN, THEORY IN PRACTICE (1974); Bolman, *Learning and Lawyering: An Approach to Education for Legal Practice,* in C. COOPER & C. ALDERFER, ADVANCES IN EXPERIENTIAL SOCIAL PROCESSES 111 (1978). I owe these people, particularly Professors Argyris and Bolman, substantial intellectual debts. For a criticism of Argyris's and Schön's thinking and, by extrapolation, my analysis to some extent, see Sennett, *The Boss's New Clothes,* N.Y. REV. BOOKS, Feb. 22, 1979, at 42, 43–44; H. MARCUSE, *supra* note 18, at 108–14 (criticism of the "industrial sociology" tradition within which Argyris writes).

See also Simon, *supra* note 3, at 531–37 (criticizing Argyris's theory for having a bias against politics and a tacit hostility to authority). A second important Simon article in the last two years, Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics,* 1978 WIS. L. REV. 30, makes valuable and accurate criticisms of the implicit theoretical content (or lack thereof) of much clinical instruction, *see* note 3 *supra,* but it is unimaginative in its reading of Argyris. Simon ignores important elements (*e.g.,* internal commitment, free choice) of Argyris's theory that do not support his (Simon's) indictment, and does not seem to see potential links between Argyris's work and the

order and assess teacher and student behavior.[23] They should not be reified. The actual behavior of any individual teacher or student will always consist of some combination of the two modes, though emphasis will vary from person to person and from situation to situation.

A. *The Persuasion Mode*

The persuasion mode has three distinct aspects. In the first aspect, the listener attributes meaning to the ambiguous parts of a speaker's statement, so that the listener hears a statement which he believes is clear. In reality, however, the listener unconsciously combines the speaker's statement and the listener's own interpretation. In the second aspect (usually the first conscious stage), the listener privately evaluates the perceived communication to determine whether he agrees or disagrees and why. In the third aspect, the listener publicly responds[24] to the speaker's statement. This response itself is ambiguous and brings the mode full circle.

Attribution of meaning[25] is a private, preconscious mental process that can take many forms, although two are most common.[26] In the

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critical theory of society. *See* note 53 *infra*. Argyris does not develop these aspects of his work (his choice), but that does not mean that they are not present. Others developed the critical content in psychoanalytic theory, *see* P. ROBINSON, THE FREUDIAN LEFT 1–7 (1969); T. MCCARTHY, THE CRITICAL THEORY OF JURGEN HABERMAS 193 (1978) (and sources cited therein), and the same might be true for Argyris's work. I might add, Simon has an annoying tendency "to present . . . the heart of a complicated body of hard thinking in . . . almost parodic form [perhaps] to heighten the power of [his] own critical stance." Leff, *Unspeakable Ethics, Unnatural Law*, 1979 DUKE L.J. 1229, 1233 n.6. In that tendency he reminds one of Susanne Langer's debater. *See* note 28 *infra*. This practice is no less annoying because Simon acknowledges it. *See* Simon, *supra*, at 489.

23. The persuasion and learning modes are not modes of instruction in the way that lecture, dialogue, demonstration, and interrogation are. They are modes of interaction which cut across and are found in all modes of instruction. Moreover, the persuasion and learning mode constructs are intended to be only heuristic devices. The test of their usefulness is the extent to which they suggest insights about interaction that otherwise would be unavailable. The constructs are not intended to explain all of the data in instructional interaction, and they do not.

24. This can include an attempt not to respond.

25. The attribution process in social discourse has recently become a separate specialty within the field of social psychology. *See generally* E. JONES, D. KANOUSE, H. KELLEY, R. NISBETT, S. VALINS, & B. WEINER, ATTRIBUTION: PERCEIVING THE CAUSES OF BEHAVIOR (1972); Hansen & Donoghue, *The Power of Consensus: Information Derived from One's Own and Others' Behavior*, 35 J. PERSONALITY & SOC. PSYCH. 294 (1977); Hansen & Lowe, *Distinctiveness and Consensus: The Influence of Behavioral Information on Actors' and Observers' Attributions*, 34 J. PERSONALITY & SOC. PSYCH. 425 (1976); Storms, *Videotape and the Attribution Process: Reversing Actors' and Observers' Points of View*, 27 J. PERSONALITY & SOC. PSYCH. 165 (1973). For an interesting synopsis of the same process in literary criticism, see Ehrenpreis, *Lit. in Trouble*, N.Y. REV. BOOKS, June 28, 1979, at 40–41.

26. J. MARSHALL, LAW & PSYCHOLOGY IN CONFLICT 25–41 (2d ed. 1980).

first, the listener confirms rather than tests expectations, assumptions, and preconceived notions. A listener hears what a speaker "must have meant" because he believes that, for example, (1) only one plausible meaning is consistent with the speaker's language, (2) people like the speaker always believe or say the understood meaning, or (3) the language must be interpreted that way for the listener to make a preplanned response.

The other common method of attributing meaning involves making private and unilateral interpretive judgments. The listener attends to the speaker's verbal and nonverbal communications; considers tacitly both types of communication in the context of the problem, the setting, and his knowledge of the speaker's past behavior on similar issues; and makes an interpretation. This type of attribution differs from testing, a related element in the learning mode,[27] in that it is a private and unilateral process. The listener does not articulate publicly his judgments about speaker meaning, ask the speaker to confirm or deny these judgments, or discuss the differences between speaker and listener understanding of the statement. This second type of attributed meaning often seems more trustworthy than that based on preconceptions, because of its superficial similarity to testing.

Evaluation, the second aspect of the persuasion mode response to ambiguity, is a conscious process in which the listener internally appraises the speaker's statement. These internal appraisals take many forms: for example, agreeing or disagreeing with the speaker's position; commenting on the worth of the undertaking; or assessing the speaker's competence to fulfill the undertaking. Evaluation is a distinctive feature of the persuasion mode when it is an automatic and pervasive reaction to the statements and actions of others.[28] Rather than

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27. *See* note 36 and accompanying text *infra*.

28. Susanne Langer has described an academic variation of this process, the risks it involves for learning, and one way in which those risks may be reduced.

> All too many readers approach a new theory in the spirit instilled and cultivated by the debating society of their school or college days — the forensic spirit that treats every expositor of ideas as an opponent and seeks, above all, to refute whatever he says, and if possible make it appear as utter nonsense. The chance that the key ideas of any professional scholar's work are pure nonsense is small; much greater the chance that a devastating refutation is based on a superficial reading or even a distorted one, subconsciously twisted by the desire to refute. To attack an error is one thing; to throw out a whole theoretical speculation because it contains an error is another. A serious attack on a fallacious development may set it right, if that is the critic's ambition. Such criticism is co-operative and aims at truth; and it steers its course by checking with the proponent: Is this what you mean? Is that really what you would say?

S. LANGER, *supra* note 15, at ix.

consciously suspend judgment, seek clarification, or acknowledge confusion, the listener agrees or disagrees solely on the basis of speaker communication and listener interpretation. The listener acts as if he believes his purposes are furthered by taking evaluative stands quickly prior to or as a form of inquiry.

In the final aspect of the persuasion mode the listener takes public action based upon his evaluation. His actions can include expressing his evaluation accurately, in the language he uses to describe it to himself, diplomatically, or in overstated terms. The listener also can attempt to hide his evaluation by changing the subject, talking around the issue, or ending the conversation. Whatever form it takes, the listener's public action will itself be ambiguous and thus start the cycle anew.[29]

B. *The Learning Mode*

The learning mode also has three aspects:[30] inquiry, the process of obtaining information about others' statements; owning up, the process of sharing with others both intellectual and emotional reactions to their statements; and testing, the process of eliciting and assessing reaction to one's own views in order to decide whether to agree or disagree. Inquiry is the panoply of behaviors through which one investigates ambiguity. Through inquiry, a person discovers the detail of a position not offered at the outset, the description of experiences on which the position is based, the inferences or interpretations made from those experiences, and the theoretical views that inform the speaker's

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29. A variation of the persuasion mode deserves mention. Many students try to avoid acquiring persuasion mode habits (without using that terminology) by doing the opposite of what the mode suggests. Thus, they withdraw from law school (that is, they participate minimally in classes, corridor conversations, and discussions with professors), see themselves as low-key or "laid back," and take their greatest pride in comments of strangers that they "do not sound like law students." As understandable as this reaction is, the feeling of security that it provides is often illusory. The opposite of the persuasion mode is not the same as the learning mode, *cf.* ARGYRIS, *supra* note 22, at 150 (acting in opposition to "Model I" behavior does not equal progression to "Model II" behavior), and students who believe that it is, mistake a problem of substance for a problem of form. Talking less will not insulate one from attributing meaning or evaluating statements prematurely, nor will it help one to learn to inquire, own up, or test. *See* notes 30 to 37 and accompanying text *infra*. Quiet students learn the persuasion mode; they just learn it quietly. Duncan Kennedy has insightfully described the dilemma of the quiet student. *See* Kennedy, *supra* note 4, at 76–78.

30. The learning mode construct comes more from intellectual invention and extrapolation than from patterns in instructional incidents. The clinical teachers in my data rarely have acted systematically in this mode, though many used particular behaviors from it. For a considerably more complicated discussion of the nature of learning (in the ordinary sense) mode discourse, see McCarthy, *A Theory of Communicative Competence*, 3 PHIL. SOC. SCI. 135, 145–48 (1973).

judgment. Inquiry might consist of suspending judgment rather than making statements, asking questions rather than agreeing or disagreeing, or nonverbally encouraging others to continue speaking rather than appearing ready to jump into the exchange.[31]

Owning up is sharing relevant ideas and feelings, including those that are difficult to express, in ways that the listener can understand.[32] This category of behavior usually includes communicating strongly held evaluative ideas, both positive and negative, and expressing feelings that are commonly associated with discomfort in our culture (for example, embarrassment, confusion, pride, anger, and admiration). Owning up does not dominate discussion, however, and is not an automatic first response to the statements of others. When, how, and to what one owns up is a matter of judgment rather than reflex. Some thoughts may be new and not yet intelligible; some persons may not be able or willing to discuss the difficult thoughts of another; some relationships may lack time or circumstances to work through difficult

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31. None of these behaviors is necessarily a learning mode, as even questions can make a point rather than explore one. *See* R. Rorty, Method and Morality 15 (unpublished paper) (copy on file with R. Condlin). For a catalogue of behaviors that could encourage another to continue to speak, see A. BENJAMIN, THE HELPING INTERVIEW 108–53 (2d ed. 1974).

32. This sharing is most useful when it produces intellectual and emotional dilemmas that others identify and feel competent to resolve. A dilemma is an experience that is perceived as a conflict in need of reconciliation between two or more important aspects of one's world. To illustrate, when a teacher disagrees with a student about the effectiveness of the student's performance, a dilemma exists if the student believes in the correctness of his initial effort, his reflective judgment, and the teacher's judgment to the contrary. If the dilemma is challenging, yet manageable, *see* note 97 *infra*, a student will work to resolve it and, in the process, will learn.

Dilemmas occur in many forms (for example, from the urge to understand why one succeeds, to the intellectual challenge present in crossword puzzles) but the dilemma on which formal schooling seems to be built is the nonconfirming experience — the experience of having someone (for example, judge, jury, teacher, friend) say, in effect, to a student that he has partly or totally failed. This is uncomfortable for most, but even more so for persons who prize consistency, do not like conflict, and believe that authority figures should be taken seriously. Students who are confronted with dilemmas will not always work to resolve them. They may deny that the dilemmas exist, suppress them, ignore them, or distract their attention through some mental trick. These options are turned to most commonly when dilemmas appear beyond one's ability to resolve. *See* note 97 *infra*. The cognitive dissonance basis to this view of learning and teaching is recognizable. *See* L. FESTINGER, A THEORY OF COGNITIVE DISSONANCE 1–4 (1976). *See also* C. ARGYRIS & D. SCHÖN, *supra* note 22, at 6–11, 30–34; W. TORBERT, LEARNING FROM EXPERIENCE 24–25 (1972).

thoughts; and some thoughts, while accurate and difficult, may also be irrelevant to the work at hand.[33]

Owning up is not the same as rapid-fire exchange in which pejorative language (for example, characterizing another's ideas as "absurd," "silly," "irrational," or "dumb")[34] and tone carry the major part of one's message. A person owning up often presents balanced reactions — both positive and negative aspects of his views — and the difficulty of owning up, if present, is itself often expressed. Most importantly, owning up includes the articulation of direct data[35] or evidence from which evaluative ideas arise. If such data are not available, one's views are withheld. Owning up is only part of a total interactional process. Unlike evaluation, which often is nearly the whole of the persuasion mode, owning up works best in combination with inquiry and testing. By itself, owning up usually produces confusion, anger, and other similar feelings.

Testing, the final aspect of the learning mode, is the comparison of one's beliefs with others' views and experiences and the measuring of

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33. Owning up can also be described as "fair argument." Argument is fair when it includes the data base, *see* notes 32 *supra* and 35 *infra*, from which it proceeds, is structured to leave room for and encourage others to express contrary experiences or theory, includes known and reasonable objections to itself not raised by others, locates itself within larger scientific, philosophical and political traditions, avoids *[ad hominem]* attack, and relies upon idea content rather than rhetorical flourish to produce understanding rather than victory. In this respect, owning up may be similar to William Simon's principle of non-professional advocacy — "advocate and client . . . each justifying himself to the other." Simon, *supra* note 22, at 133. Simon's expression captures much of the spirit of what I intend to convey. If there is a difference between my and Simon's construction it may be that I am more concerned than Simon with the style in which an argument proceeds. Simon says nothing explicit about style, even insofar as it constitutes content, but the tone he adopts to articulate his views, *see* note 43 *infra*, indicates that he is not stylistically neutral.

34. This does not mean that these words could never represent learning mode behavior. If the words signal unambiguously one's wish to inquire, test, and own-up (as they might in some relationships), they would be in the learning mode. The key concept, again, is that of ambiguity. The trouble with these words is that they are not generally thought of as expressing curiosity or interest.

35. Direct data is a concept that is frequently abused. For example, in discussing a student's interview of a client, it is not enough to say, "I thought that you were too tied to your outline because on three occasions the client gave you important information outside your questions that you did not follow up." The statement that the client gave information that was not followed up is an interpretive judgment and not data. Direct data would be the client's and student's specific statements. The same would be true if the teacher paraphrased the client's and student's words. Teacher and student must understand specifically what the client intended to communicate, and this analysis must start from the client's and student's own words. For an illustration of the substitution of interpretive summary and paraphrase for direct data, see, *e.g.*, Meltsner & Schrag, *supra* note 4, at 27–28. Because there will not be time in practice instruction to discuss all issues in this detail, teachers must select representative and recurring issues and relevant supporting data for analysis in each instructional meeting.

both against criteria of validity.[36] Testing includes admitting that one's beliefs are tentative and inviting others to evaluate those beliefs, collecting data systematically about the patterns in one's beliefs and behaviors, candidly analyzing the data generated, working in places and with persons likely to provide accurate feedback, and changing one's views when faced with accurate contradictory evidence and analysis. Testing can take many forms, depending on circumstance and personality. Some people test by prodding with argument and others by asking questions. Both approaches work as long as ambiguity is minimized and all parties to the exchange know that testing is taking place.[37]

C. *Additional Characteristics*

Additional characteristics distinguish the persuasion from the learning mode.[38] Persuasion mode behavior is competitive rather than additive, private rather than public, self-protective rather than risk-taking, and rational rather than emotional.[39] In their application these characteristics sometimes overlap and occur in combination, and in their definition as concepts they sometimes blur together. Yet each pair

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36. For a description of one such (compatible) criterion, see McCarthy, *supra* note 30, at 141–45.

37. There is no perfect combination of the elements of the learning mode. They circle in and out of one another in so many ways that drawing generalized blueprints for their use is not possible. What will work best in particular situations will require judgments about circumstance, setting, personality, and objective. In addition, the learning mode changes the focus in conversations from opening statements to subsequent analysis. Because a speaker will not be able to put a point unambiguously, it matters not so much how he puts it initially as how he develops it in response to listener reaction. In this mode, complicated substantive points are seen as communicated through a series of statements, back and forth between speakers, rather than in comprehensive and perfectly put opening remarks.

38. Recall that those terms identify constructs of pure types of behavior and are intended as definitional rather than descriptive for purposes of my analysis. *See* notes 20 to 23 and accompanying text *supra*.

39. For each set of additional characteristics, I have used labeling words from ordinary usage. Throughout, however, I intend these words to be words of art, with specified narrow definitions. I use dichotomous categories to illustrate. I do not say that they capture the complexity of the reality they identify. *See* Ferrarotti, *The Destiny of Reason and the Paradox of the Sacred*, 46 SOC. RES. 648, 650–54 (1979). *See also* R. RORTY, PHILOSOPHY AND THE MIRROR OF NATURE 17–69 (1979) (discussing the inadequacy of dualistic thinking about knowing). To their credit, dichotomous categories make dialectical reasoning possible. *Cf.* Heilbroner, *The Dialectical Vision*, THE NEW REPUBLIC, Mar. 1, 1980, at 25–26 (discussing the advantages of dialectical reasoning).

identifies a discrete distinction between persuasion and learning mode interaction.[40]

Persuasion mode behavior is competitive[41] when a speaker, for the sake of being impressive, tries to produce more ideas, with greater eloquence, conviction, and self-assurance than other parties to the conversation.[42] There are some familiar though not inevitable earmarks

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40. Two important qualifications should be re-emphasized. First, both learning and persuasion mode behavior can produce "learning" and "persuasion" in the ordinary sense of those terms. *See* note 20 *supra*. Second, almost any activity of teachers or students can fall into either the learning or persuasion mode, depending upon the context. *See* note 34 and accompanying text *supra*.

41. For a recent discussion of "competitiveness" in law school generally, see Schwartz, *How Can Legal Education Respond to Changes in the Legal Profession*, 53 N.Y.U. L. REV. 440, 444–47 (1978). Professor Schwartz is correct when he says that student competitiveness is attributable to more than the socializing effect of contentious law school dialogue. On the other hand, he may miss the point that more than competitiveness is involved in law student adversarial style, and, more importantly, that it does not matter so much who is to blame for this interactional style, as it does who can help to understand and control it. *See also* Boyer & Cramton, *American Legal Education: An Agenda for Research and Reform*, 59 CORNELL L. REV. 221, 258–70 (1974) (and sources cited therein).

On the point of law school socialization and the power of teacher behavior to influence student beliefs, attitudes, and values, see Barry & Connelly, *Research on Law Students: An Annotated Bibliography*, 1978 A.B.F. RES. J. 751; Erlanger & Klegon, *Socialization Effects of Professional School*, 13 LAW & SOC. REV. 11 (1978) (and sources cited therein); Rathjen, *The Impact of Legal Education on the Beliefs, Attitudes and Values of Law Students*, 44 TENN. L. REV. 85 (1976); Schwartz, *Law, Lawyers, and Law School: Perspectives From the First Year Class*, 30 J. LEGAL EDUC. 437 (1980); Stevens, *Law Schools and Law Students*, 59 Va. L. Rev. 551, 585–86, 681–82 (1973) (and sources cited therein). For a summary of the current theories of law school socialization, see Pipkin, *Law School Instruction in Professional Responsibility: A Curricular Paradox*, 1979 A.B.F. RES. J. 247, 256–72. For a summary of research on value and personality changes among law students, see Hedegard, *The Impact of Legal Education: An In-Depth Examination of Career-Relevant Interests, Attitudes and Personality Traits Among First Year Law Students*, 1979 A.B.F. RES. J. 791, 798-806.

42. Competitive dialogue is designed to coerce rather than inform. Dialogue is coercive when it relies heavily on factors other than the weight of reasons to convince others to agree. A common example is the situation in which a person refuses to accept an understanding listener's good faith disagreement and continues to make the same argument, often in different language or with greater emotional force. *Cf.* Habermas, *Hannah Arendt's Communications Concept of Power*, 44 SOC. RES. 3, 4 (1977) (discussing philosophical objections to coercive dialogue). There are instances in practice instruction when coercive behavior would be appropriate. For example, if a student fails to contact a client to close material gaps in the client's story and the deadline for filing pleadings approaches, the teacher may raise his voice or tie the failure to contact the client to some external sanction. These actions are coercive, in that they are threats rather than new substantive arguments about the correctness of contacting the client but would often be appropriate for letting the student know that client interest in competent representation takes priority over student freedom to choose whether to be competent. *See* note 45 *infra*.

For a thoughtful discussion of the coercion concept in the context of "indoctrination" as used in moral psychology, see Oldenquist, *Moral Education Without Moral Education*, 49 HARV. EDUC. REV. 240, 245 (1979).

of competitive dialogue: long, well-edited, soliloquy-like statements; dense, complicated substantive positions; rapid pace; intimidating expression; and automatic, rapid-fire rebuttals of contrary views.[43] By contrast, additive behavior consists of sharing ideas to produce joint intellectual products without regard to authorship.[44] A person who acts additively draws others out by listening to, questioning, or reinforcing others' statements. He supplements others' ideas by revealing analogous experiences and insights to the extent they modify or augment those ideas. Gratuitous demonstrations of erudition, redundant explication or rephrasing of points already made, and interminable soliloquies are avoided.[45]

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43. Competitive reactions to others' ideas occur even in legal scholarship. For example, the wish to compete may explain William Simon's strong reaction to Charles Fried's provocative article on lawyer role. *See* Simon, *supra* note 22, at 106–13; Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relationship,* 85 YALE L.J. 1060 (1976). In a generally thoughtful article, Simon's critique of Fried is strident in proportion to the analytical objections Simon makes. Simon's analysis is correct. Fried trivializes friendship by making it nonreciprocal, and does not provide for the exercise of lawyer autonomy, except to subordinate that autonomy to another. *See* Fried, *supra,* at 1066-67, 1071. To his credit, however, Fried identifies friendship as an appropriate metaphor for lawyer-client relations, *see id.,* and his discussion of the metaphor is the first philosophically serious analysis of lawyer role. *Cf. Professional Responsibility: Report of the Joint Conference,* 44 A.B.A. J. 1159 (1958) (lawyer's allegiance is to a set of adversary procedures that constitute a dialectical decision process); Curtis, *The Ethics of Advocacy,* 4 STAN. L. REV. 3 (1951) (lawyer's allegiance is to pure craft). Simon seems to agree with Fried's choice of metaphor, *see* Simon, *supra* note 22, at 112–13, 133, so the tone of Simon's attack is hard to explain. Possibly he wanted to replace rather than add to Fried's analytic framework. Seeing the relationship between one's own and others' views as either-or, rather than complementary or developmental, is a common characteristic of competitive discourse.

The cause of Simon's seeming anger is, no doubt, more complicated than this. My point is that the tone of Simon's comments may discourage Fried from considering them. For many, in fact (and there is circumstantial evidence about Fried, *see* Freid, *Author's Reply,* 86 YALE L.J. 584 (1977) (response to a critical article, finding it "querulas"), Simon's tone would make dialogue seem pointless. I might add, Fried seems willing to learn. In a subsequent public discussion of the friendship analogy Fried modified his position in the direction of criticisms that Simon and others had made. *See* C. FRIED, RIGHT AND WRONG 179 (1978).

44. In the additive view, the social relationship rather than the single individual is the principal instrument of intellectual production. This view of intellectual exchange is most commonly associated with scholarship in the natural sciences, though this association is sometimes more theory than practice. *See, e.g.,* J. WATSON, THE DOUBLE HELIX (1968); R. MERTON, THE SOCIOLOGY OF SCIENCE 286–324 (1973).

45. The relationship between competitiveness and additiveness, as with all the sets of additional characteristics, is more complicated. For example, in writing a memorandum of law to a court, a teacher and a student must identify the possible ways in which the issues may be argued. Each person's ideas must be drawn out, elaborated on, and supplemented by the other — an additive task. When brief-writing reaches the stage at which a unifying theme must be chosen and editing done, each person must express preferences and argue for the wisdom of his choices. To the extent that these choices are mutually exclusive and

Persuasion mode behavior is private in that one tries to convince others while minimally disclosing one's motives or purposes. Like the person who has no movie preference until the group chooses against his wishes, private people keep their full range of objectives secret until it becomes necessary or opportune to act to protect them.[46] Consideration of others' ideas is reserved for private moments and the fruit of this private reflection is infrequently shared or tested, except implicitly in the form of changed or confirmed views in the future. Because of this behavior, others often must guess at a persuasion mode speaker's plans or beliefs.[47] By contrast, public behavior consists of maximum articulation (under the circumstances) of relevant thought. Tentative or ill-formed ideas are expressed, although described as tentative or ill-formed. One shares uncertainty, confusion, indecision, and curiosity in the hope of triggering clarifying responses or useful suggestions. Issues of group objectives and strategies are raised directly rather than indirectly. Motives and purposes are not concealed and colleagues are not forced to guess at their content.

Persuasion mode behavior is self-protective in that undeveloped and uncomfortable thoughts are suppressed and positions are taken only when they can be defended fluently and fully. Self-protective behavior also occurs when the limits of experience, insight, and understanding are concealed except when concealing them would be a more negative

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are strongly held, this could be a competitive task. Moreover, if one of the parties were to decide that identifying possible arguments is unquestionably the right place to begin, he might react competitively to any suggestion to begin elsewhere. He would, in effect, compete in order to be additive. In this competition over agenda, he might act coercively, unilaterally, and self-protectively, and his decision to do this, viewed from a state of perfect knowledge, might be correct. In such decisions there is considerable risk of self-contradiction and a thorny conceptual problem of when learning (in the ordinary sense) justifies the use of persuasion mode behavior. (In part, this is a problem of defining the relationship between one's political and psychological theories of law practice. Simon has described the inadequacy of clinical scholarship on this issue. *See* Simon, *supra* note 3, *passim.*) Habermas discusses this problem under the concept of "strategic action," *see* note 53 *infra*, but I do not treat the issue in this article.

46. In a further elaboration, a person who acts privately often does not take responsibility for his actions. In the persuasion mode, people analyze the success or failure (usually failure) of events in which they are implicated without regard to their own role in those events. The best law school example of this disassociative behavior occurs after a particularly bad class. The teacher charges that students did not respond to questioning and that this passivity squelched developing dialogue. Students charge that teacher questioning was too simple, confused, or complex. For an exception to this pattern and a thoughtful discussion on taking responsibility in law learning relationships, see Brest, *On My Teaching*, STAN. LAW., Spring/Summer 1979, at 23.

47. David Bakan has described this behavior pattern as the "mystery-mastery" complex: mastery of others is achieved, in part, by maintaining mystery about oneself. *See* D. BAKAN, *supra* note 22, at 37–49 (1967). *See also* W. TORBERT, *supra* note 32, at 12.

comment on one's intelligence than the ignorance itself. By contrast, in the learning mode one regularly raises topics that involve strong feelings or produce conflicts, examines questions without prior knowledge of the outcome, speculates publicly about ideal systems that have no immediate pragmatic application, and returns to difficult issues rather than seeks paths of less resistance.[48]

Finally, persuasion mode behavior is rational in that it limits communication to the world of ideas.[49] Ideas are the only topics discussed and only idea statements are made. Relevant feelings are either intellectualized or suppressed.[50] The learning mode also is respectful of ideas, but as they are embodied in feelings.[51] Feeling is both an appropriate topic for discussion and a proper form of communication. It need not be translated into idea statements to be useful.[52]

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48. There is a special variation of this distinction between self-protection and risk-taking. In a limited way, the persuasion mode is self-sealing rather than self-reflective. In the persuasion mode there is an avoidance of conversation about conversation — an absence of critical reflection on how one knows. Knowledge is thought of as having a fixed content, capable of being grasped with certainty, and existing objectively in the universe independent of the process through which it is known. *Cf.* note 18 *supra*. By contrast, in the learning mode, persons study not only what they know, but how they know it.

49. Because there is no affectively neutral way to speak, this is, in a sense, impossible. One will be serious, indifferent, whimsical, angry, sad, suspicious, or guarded, and these feelings to some extent will be apparent to a listener. It is, however, possible to control the topics about which one speaks and the literal contents of one's words.

50. *See, e.g.*, Cramton, *The Ordinary Religion of the Law School Classroom*, 29 J. LEGAL EDUC. 247, 250–51, 260–62 (1978). For an interesting discussion of the ideological tensions inherent in the rational-emotional dichotomy, see Lehman, *supra* note 10, at 1082–83, 1091–96.

51. As used here, the term "feeling" is an umbrella concept for human behavior and includes both thinking and feeling. *See generally* S. LANGER, SKETCHES, *supra* note 15, at 8–11.

52. This completes the description of my conceptual framework. The relationship between stage I (the "attribution-inquiry" cycle) and stage II (the "additional-characteristic" dichotomies) is not as clear as it needs to be. In a sense, stage I describes the ways in which meaning is constructed in clinical practice communication, and stage II describes the ways in which this same meaning is responded to. Because constructing meaning is often and ultimately the same process as responding to meaning, there is also an overlap in my description of these two stages. Single pieces of behavior fit easily and simultaneously into categories in both stages. I want to retain the meaning/constructing — meaning/responding distinction for the present because each process contributes in a different way to the communication difficulties in practice instruction. A conceptual framework that separates the two stages, I believe, will produce more insight than a framework that collapses the two stages into one. I recognize, however, that the definitional relationship between the two stages needs a good deal of development.

There is another point about this framework which should be mentioned. The framework is obviously inadequate as a theoretical statement about persuasion and learning. On the nature of theory, see ARGYRIS, *supra* note 22, at 3–19; R. BERNSTEIN, THE

The persuasion and learning modes[53] help to achieve complementary but different ends and are only partly interchangeable. When either mode is used in an unsuitable setting, ineffective and even harmful behavior can result. For example, even when interaction in a relationship is cordial and supportive, exclusive use of the persuasion mode is destructive of learning (in the ordinary sense) because the mode's pervasive evaluation of others and of self triggers uncomfortable feelings which cannot be discussed. To minimize these feelings, participants break off conversations sooner, talk about fewer and safer topics, and form fewer relationships that run the risk of creating discomfort. For many, the emotional costs of learning from certain people are judged as worth less than the intellectual benefits.

RESTRUCTURING OF SOCIAL AND POLITICAL THEORY 11–16 (1976); M. BLOOM, THE PARADOX OF HELPING 53–67 (1975); S. TOULMIN, HUMAN UNDERSTANDING: THE COLLECTIVE USE AND EVOLUTION OF CONCEPTS 123–26 (1972). I have not yet tried to write theory, but have instead tried to identify communication patterns of clinical teachers that have negative effects on student learning, and whose presence has not previously been acknowledged. The persuasion/learning mode framework is mostly a construct within which to organize these comments.

53. There is another dimension to the foregoing framework, alluded to earlier, *see* notes 3, 13, 15, 36, 42, and 45 *supra*, which ought to be identified explicitly but whose development is beyond the scope of this article. The learning and persuasion mode construct may be the seeds from which a critical theory of law learning and perhaps practice, *see* note 112 *infra*, and which Jürgen Habermas lays the metatheoretical foundations. *See generally* J. HABERMAS, *supra* note 15; J. HABERMAS, KNOWLEDGE AND HUMAN INTERESTS (1971); J. HABERMAS, LEGITIMATION CRISIS (1975); J. HABERMAS, THEORY AND PRACTICE (1973). *See also* R. BERNSTEIN, SUPRA note 22, at 185–225; T. McCarthy, *supra* note 22, *passim*. Habermas grounds his "critical" theory of society (*i.e.*, theory which does not accept prevailing ideas, actions, and social conditions, but seeks to improve them, in part, through a self-conscious understanding of the ideological constraints which influence one's understanding of the social world and through the use of transcendental critical principles, *see* R. BERNSTEIN, *supra* note 22, at 173–85; J. HABERMAS, KNOWLEDGE AND HUMAN INTERESTS *supra*, at 310) in the dialogic interaction of self-reflective and communicatively competent subjects. In a three-tiered theoretical construct, Habermas argues that communicative competence is linked to the moral and social development of the individual and the political evolution of society. *See* J. HABERMAS, *supra* note 15, at xvii. Habermas bases his theory on an epistomology which insists that knowledge is grounded in fundamental human interests and identifies three such interests and the types of thinking to which they give rise: (1) technical knowledge produced by the empirical/analytical sciences — which gives rise to reason that is means-oriented, its object being the manipulation and control of objectified processes; (2) practical knowledge associated with the historical/cultural sciences — which gives rise to reason that is ends-oriented, its object being understanding and consensus; (3) emancipatory knowledge associated with the critical social sciences — which gives rise to reason that is self-reflective, its object being the dissolution of internal and external ideological constraints on understanding. *See* J. HABERMAS, KNOWLEDGE AND HUMAN INTERESTS, *supra*, at 195–98, 308–11.

My framework connects with Habermas's model in several ways, but the most fundamental point of congruence is in my assertion that instrumental or technical

Use of only the persuasion mode also causes information shared in work discussions to be incomplete and untrustworthy. When the primary underlying concerns are protecting self and securing agreement, people convey fewer and more defensible ideas and express more

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thinking predominates in clinical instructional interaction almost to the exclusion of self-reflective and practical reasoning. *See* J. HABERMAS, TOWARD A RATIONAL SOCIETY 75 (1970).

Other points of connection include a similarity between inappropriate use of the persuasion mode and what Habermas calls "systematically distorted communication." *See* J. HABERMAS, *supra* note 15, at 205–07. Distorted communication occurs when ideological constraints operate in conversation to create illusory consensus but at the same time make genuine consensus impossible. *Id.*; T. MCCARTHY, *supra* note 22, at 145. *See also* H. MARCUSE, *supra* note 18, at 84–120, 145–48 (describing how distorted communication closes the universe of discourse).

In addition, the learning mode may correspond to Habermas's notions of the ideal speech situation. *See* T. MCCARTHY, *supra* note 22, at 145–48. Like Habermas's model, the learning mode presupposes that understanding and consensus can be arrived at by dialogical interaction between self-reflective and communicatively competent subjects, but that for this to happen many existing interaction patterns must be critically transformed. J. HABERMAS, THEORY AND PRACTICE, *supra,* at 17–19.

Once a consensus is reached, communicative interaction often will give way to strategic action, which, for Habermas, means the struggle for political power and influence. *See* J. HABERMAS, THEORY AND PRACTICE, *supra,* at 33, 39. For me, strategic action may describe the appropriate use of the persuasion mode (based on the "consensus" arrived at by the use of the learning mode) in the adversarial aspects of the interactions of learning and lawyering. *See* note 45 *supra.*

Habermas's work, while preliminary by his own description, *see* J. HABERMAS, *supra* note 15, at xvi, is too sophisticated and subtle to be described adequately in this note. I plan to write more about the connections between Habermas's system and my own system in a future article. I am grateful to Joseph Keefe for help in synopsizing these points of possible connection.

The pragmatism of Richard Rorty is a more modest but, perhaps, a more defensible metatheory into which the learning and persuasion mode construct may fit. Rorty rejects Habermas's use of transcendental principles, critical or otherwise, *see* R. Rorty, Pragmatism, Relativism and Irrationalism 19 (Presidential Address, given on Dec. 29, 1979, to the Eastern Division of the American Philosophical Association) (copy on file R. Condlin), rejects the "absolute conception of reality," *see* R. Rorty, *supra* note 31, at 4, and holds that the distinctions between fact and value, science and morality, and description and evaluation are unhelpful. *See also* T. MCCARTHY, *supra* note 22, at 179–93 (describing an ongoing debate between Habermas and Hans-Georg Gadamer over the possibility of and necessity for transcendent critical principles). Rorty sees these views as "reactionary" shibboleths, R. Rorty, *supra* note 31, at 10, a residue of a "neurotic Cartesian quest for certainty which [was] one result of Galileo's frightening new cosmology . . . one reaction to Darwin and . . . the neo-Kantian response to Hegelian historicism." R. Rorty, Pragmatism, *supra,* at 3. Along with William James, Rorty holds that "truth is not the sort of thing which has an essence"; that, instead, "it is the vocabulary of practice rather than of theory, of action rather than contemplation, in which one can say something useful about truth." For the pragmatist, "the pattern of all inquiry . . . is deliberation concerning the relative attraction of various concrete alternatives. . . . It is the urge to answer questions like 'Why believe what I take to be true?' and 'Why do what I take to be right?' by appealing to something more than the ordinary, retail, detailed, concrete reasons which have brought one to one's present view"; "there are no wholesale constraints on inquiry . . . — derived from the nature of the objects, or of the

commitment to those ideas than they may in fact have.[54] This commitment may influence others not to pursue issues further. Yet the speaker may prefer, and the wiser course for learning may be, further dialogue.

The persuasion mode's emphasis on rationality removes from work dialogues much of the emotional insight of participants. An example of such insight is an intuitive reaction that a particular approach will not work or that a particular outcome is wrong. These intuitions are only sometimes accurate, but often signal the need for more analysis. Left unexplored they linger to influence discussion in inexplicit and sometimes unhelpful ways.

By not permitting its discussion, the persuasion mode intensifies emotion often to such a point that it distracts attention from the intellectual work at hand. The mode's argumentative style encourages focusing too quickly on single, simple explanations for complex phenomena, rather than generating and testing more sophisticated hypotheses. The premium the mode places on taking and defending positions causes people to concentrate on the quality of their own comments often to the detriment of hearing the valuable aspects of others' statements.[55]

The learning mode is similarly limited where the goal is persuasion (in the ordinary sense). Its methods are often too slow and open-ended to maintain the interest of those to be persuaded. A tentative attitude

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mind, or of the language, but only those retail constraints provided by the remarks of our fellow inquirers. . . . The only sense in which we are constrained to truth is that . . . we can make no sense of the notion that the view which can survive all objections might be false." R. Rorty, Pragmatism, *supra*, at 3–9.

Rorty's views are also more sophisticated than this, but a full description of them is beyond the scope of this note. *See generally* R. RORTY, *supra* note 39, for a comprehensive statement of Rorty's views. In the long run, I suspect that Rorty is closer than Habermas to providing a philosophical dimension to Argyris's technical theories. *See* note 22 *supra*. For purposes of my own views, it is too soon to say. I am indebted to David Luban for introducing me to Rorty's work.

54. *See* Deutch, *Conflicts: Postive and Destructive*, in CONTEMPORARY SOCIAL PSYCHOLOGY 161–62 (D. Johnson ed. 1973). These patterns are present in each of the instructional dialogues discussed. *See* notes 67 to 100 and accompanying text *infra*.

55. Perhaps the most damaging effect of the persuasion mode on learning is that it (the persuasion mode) retards the development of critical consciousness. *See* note 53 *supra*. Passing on information, *see* note 12 *supra*, may be unimpeded and even helped by persuasion mode dialogue. But obtaining critical perspective on how and what one knows (so as not to be the captive of ideology, one's own or others') requires a responsible, self-reflective, and bilateral learning style. Other people are needed to help identify and dissect one's defenses to learning. At the same time, control of the process of progressing beyond defenses must be shared by the one who is defensive. This is because becoming autonomous (a requirement of effective instruction, *see* note 1 *supra*) requires the taking of responsibility. One cannot be ordered to be free. The persuasion mode produces fealty rather than autonomy.

accompanies the learning mode, which may convey a lack of conviction.[56] The mode also disappoints those who believe that problems have right answers capable of being transferred in a limited number of declarative sentences. In many settings where law-trained people must operate (for example, courts), the need to make decisions quickly, the inevitable absence of perfect information, and an aversion to risk-taking endemic to such settings, cause decision-makers to use criteria of decision-making that would be thought superficial in less constrained settings. Simplistic arguments delivered forcefully and quickly often convince more readily than sophisticated ones that are more difficult and time consuming to comprehend.[57] The learning mode takes minimal account of these factors and thus leads to ineffective performance in such settings.[58]

In addition to doing the work for which they are principally adapted, the persuasion and learning modes[59] also regularly do the work of each other. New insights, perspectives, and analytical structures are often a product of adversarial exchange. Similarly, the deliberate, detailed, and open-ended exploration of new substantive ideas can ultimately persuade and, in some circumstances, is the only method of discourse that could produce that result. This overlap notwithstanding, the two modes are not interchangeable — neither does the job of the other as well or as often as it does its own.[60]

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56. *Cf.* E. LOFTUS, EYEWITNESS TESTIMONY 19 (1979) (discussing the relative importance of speaker conviction in the persuasion process).

57. Not all courtroom argument is simplistic, forcefully stated, and quick. Most courtroom exchange contains some learning mode behavior and in some instances such behavior can predominate. Nevertheless, in the ordinary litigation of entry level courts widespread learning mode behavior would be confusing indeed. For a discussion of this litigation process, see ROUGH JUSTICE 153–344 (J. Robertson ed. 1974); Harris, *Annals of Law in Criminal Court* (pts. 1&2), NEW YORKER, Apr. 14, 21, 1973, *passim;* Neely, *supra* note 18, at 220-21.

58. Put another way, there are worlds in which persuasion mode behaviors are the norm, and operating effectively in these worlds requires the use of these behaviors. It might be better if these worlds could be more in the learning mode, but often they are not, and are not likely to be within the time frame in which a lawyer must act. *See* Bellow & Kettleson, *From Ethics to Politics: Confronting Scarcity and Fairness in Public Interest Practice,* 58 B.U. L. REV. 337, 384-86 (1978).

59. It is important to remember that the persuasion-learning mode construct is only a typology of means. Nowhere in the article is there an equivalent typology of ends, a "politics" of practice instruction. *See* Simon, *supra* note 3, *passim.* Ends are implicit at several points, *see, e.g.,* notes 1, 53 and 58 *supra* and notes 60 and 101 *infra* and text accompanying notes 38 to 52 *supra* and notes 88 to 97 *infra,* but ultimately they must be stated more explicitly and systematically.

60. It should also be noted that one can learn the learning and persuasion modes in one of two ways. In the first, one understands the nature of each mode, sees it as a means rather than an end, and performs it proficiently. Ineffectiveness arises if one uses the mode where inappropriate. In the second variation, one sees the mode as an end in itself,

Clinical practice instruction should teach about and through the learning and persuasion modes.[61] This is because persuasion[62] and learning mode skills[63] are needed in the interpersonal tasks of law

performed for its own sake rather than as a means to other substantive ends. One does not recognize this explicitly, but simply does not understand beyond the technique dimension of the behavior. In this second situation, the performance of the chosen mode frequently is overdrawn and ends up caricaturing the properties of the original mode itself. The caricatured use of the learning and persuasion modes is a more blatant problem, but the inappropriate use may be more widespread.

61. *See* Cox, *The Lawyer's Independent Calling*, 67 KY. L.J. 5, 14–25 (1978–79) (discussing how good law practice requires a careful blending of the substance of these two modes). *See also* Jones, *Lawyers & Justice: The Uneasy Ethics of Partisanship*, 23 VILL. L. REV. 957 (1977–78).

62. I must admit to nagging doubts about the term "persuasion." Often it seems a misnomer. In many circumstances described as persuasion-oriented, control, manipulation, or influence seems a more accurate characterization of what is intended. For example, arguing a motion will not always require that the judge be "persuaded" with respect to the ultimate wisdom of one's substantive analysis. It is enough that the judge grant the motion, substantive ignorance or error notwithstanding, and all efforts to convince are ended when the motion is granted. This difficulty notwithstanding, the term "persuasion" is retained for two reasons. First, a person acting in the persuasion mode is trying to persuade in the literal sense. In the argument on a motion, for example, the advocate always is trying to persuade the judge to perform the physical act of signing the order granting the motion. This is a limited form of persuasion, no doubt, but nonetheless an attempt to persuade. Second, persuasion is a positive term for people trained in law. It has fewer pejorative associations than manipulation or control, and this may aid in seeing the persuasion mode as an integral part of a total theory of lawyering relations.

63. The word "skills" also may have unfortunate associations. There is a view of clinical instruction that its principal purpose is to train in lawyer "practical skills." *See* Ferren, *Goals, Models and Prospects for Clinical-Legal Education*, in CLINICAL EDUCATION AND THE LAW SCHOOL OF THE FUTURE 94, 94–95 (E. Kitch ed. 1970); Gee & Jackson, *Bridging the Gap: Legal Education and Lawyer Competency*, 1977 B.Y.U. L. REV. 695, 882–84; Lowry & Kennedy, *Clinical Law in the Area of Mental Health*, 1979 WIS. L. REV. 373, 385. What this term means is never made clear, but one gets the feeling, perhaps erroneously, that "skills training" is thought of as a lower order of learning. *See* Kitch, Foreword to CLINICAL EDUCATION AND THE LAW SCHOOL OF THE FUTURE 5, 13–14 (E. Kitch ed. 1970). The point is sometimes put another way; clinical instruction is said to be "practical," and substantive law instruction "theoretical." *See* Finesilver, *The Tension Between Practical and Legal Theoretical Education: A Judge's View of the Gap*, 1977 B.Y.U.L. REV. 1061, 1061–62. Yet, when trying to perform any process, whether swinging a tennis racket, cross-examining a witness, or evaluating a judicial decision, one first must know the elements constituting the process, their relationship, causal and otherwise, to each other, and the effect of various stimuli on the process under specified conditions. Often this knowledge is unsophisticated, and frequently it is preconscious or "tacit," *see* M. POLANYI, PERSONAL KNOWLEDGE (pt. 2) (rev. ed. 1962) (discussing "tacit" knowledge); F. HAYECK, *supra* note 22, at 124–28 (describing the operation of tacit theory in the work of historians), but it is always theoretical. Without such an understanding, all operations would be equally attractive and a person would be paralyzed to act. Theoretical knowledge is thus a prerequisite to the exercise of practical skill and the study of any subject is neither inherently practical nor inherently theoretical; it is both, and the emphasized aspect depends on student and teacher choice.

As for the theoretical orientation of substantive law school instruction, there is reason to believe that this assertion is as much theory as practice. In the first year, for example, students learn to describe, assess, and generalize about excerpts from judicial

practice[64] and because persuasion and learning mode strategies are needed in the interactions of law instruction. In teaching about these subjects, clinical teachers should identify the intellectual differences between the two modes and should demonstrate each mode in operation. Equally important, clinical teachers should determine what combination of the two modes is appropriate for teaching about each of the modes in particular instructional situations. If this decision is routinized or left to habit, instruction will suffer. Examination of actual dialogues between clinical teachers and students, in Part II below, reveals that the clinical teachers failed to distinguish between the persuasion and learning modes and taught the persuasion mode pervasively.[65]

II. EXAMPLES AND ANALYSIS

The following teacher-student exchanges illustrate the ambiguity of instructional dialogue and the operation of the persuasion mode as a

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opinions: mental operations that involve the development of analytical and analogical "skills." Teachers are more interested in having students perform these processes than in having them describe or criticize the processes' operation. In this emphasis, the first year of law school is "clinical" in the "skills-training" sense of that term. *Cf.* Holmes, *Education for Competent Lawyering — Case Method in a Functional Context,* 76 COLUM. L. REV. 535 (1976) (viewing the first year as developing valuable case skills that need to be supplemented by the development of other lawyering skills in the final two years).

64. How one determines the appropriate combination of the learning and persuasion modes for any given situation is not addressed systematically in this article. Ultimately, such a theory of "appropriateness" must be developed.

65. "Taught" means acted almost exclusively in the behaviors of the persuasion mode. This unconscious practice creates the risk that students will see these behavior patterns as models and seek to emulate them. *See* Memo to the Faculty from the Center from Research on Learning and Teaching, The University of Michigan, No. 43 (Dec. 1970), at 43–44 (copy on file with R. Condlin); *id.,* No. 48 (Apr. 1972), at 52 (copy on file with R. Condlin). *See generally* R. GLASER, THE NATURE OF REINFORCEMENT (1971). *See also* Pipkin, *supra* note 41, at 252–53 (describing the reinforcement process in terms of the sociological concepts of "latent" and "manifest" curriculum).

The risk is two-fold. First, students may conclude that the persuasion mode will help them to learn (this is only partly true, *see* text accompanying notes 53 to 60 *supra*) or, that it will help them to influence others — that it embodies a sophisticated theory of persuasion (this also is only partly true). This risk is greater for clinical teachers because they profess to teach about learning and persuasion (in the ordinary sense). Students may take them at their word and follow the example of their deeds. In this respect, the process of practice instruction is also its content (more so than with traditional law instruction). The second risk is that students might construct their theories of collaborative or adversarial effectiveness as a reaction to their teachers' persuasion mode behavior — trying principally to avoid the mode's more disagreeable features. But collaborative behavior is not the opposite of persuasion mode behavior, *see* note 28 *supra,* and persuasive behavior at the highest levels requires more than persuasion mode motor skills.

response to that ambiguity.[66] The first dialogue occurred at the ten-minute mark of the first meeting of a clinical practice course at an American law school. Immediately prior to the exchange, the teacher had described the subject matter of the course. He had begun to describe the course structure when the following conversation occurred:

> *S*:[67] I wonder if my feeling about learning law is the antithesis of what this course is about. To me everything we're talking about now is very intellectual and I do feel that the important part of learning law to me is to conquer the way I'm feeling about something. And when we plug in a lot of information and make a decision and can write all the reasons for the decision that you still don't have a lot of confidence in what you're doing. There are two reasons over here, and six over here, but you're still going to go with the two reasons. And I think that learning that confidence in the way you feel about material that you can't articulate, that you can't say where it came from, your experience that you aren't even consciously aware of, I guess I feel that's part of learning law too.

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66. Though I work with empirical data, this article does not report the findings of empirical research. I use data from practice instruction to illustrate my hypothesis, not to prove it. The pool from which this data was selected is "soft" in several ways that indicate that it might not represent clinical teachers generally. The pool is composed of a small number of teachers (eleven) and students not randomly selected, who are from an even smaller number of law schools (seven), which are somewhat geographically concentrated, and most of which agree intellectually on their approach to clinical instruction. The data pool basically represents my teaching behaviors and those of a number of my friends now teaching at other law schools.

In using transcripts as a data base, I purposely accord teacher-student language an implicit priority over other sources of data about clinical instruction. This is because instructional language is the most extensive and least manipulable form of data now available, and also can be a rich source of insight into underlying ideology. *See* G. KRESS & R. HODGE, LANGUAGE AS IDEOLOGY 4–7, 13, 62–82, 122–28 (1979).

67. The student is female, in her third year, and has worked in a law firm off and on for five years. The teacher is male, in his second year of teaching, and espouses a commitment to behaving in the learning mode, though he did not use that term.

Considerable additional detail could be provided about the political and historical context in which this and subsequent dialogues in this article occurred. Ultimately, a complete analysis of these dialogues would include that context. *See* note 18 *supra* and note 68 *infra*. I focus only on language, however, to isolate verbal communicative incompetence as a serious problem in its own right and as an aggravating factor of more fundamental problems. I suspect that many conflicts described as ideological are, in fact, communication problems or communication aggravated problems. Many of these communication patterns, particularly those that contradict espoused teacher and student theory, can be changed by combined and sustained acts of the intellect and will. Ideological adjustment would be not necessary.

T: I'm trying to figure out how that's different from what I want you to do. If what you're saying is that learning involves developing confidence . . .

S: Yeah, in decisions that you can't articulate or can't intellectualize.

T: Learning law involves sort of trusting in one's intuitive processes? I don't know, is that what you say.

S: I don't like the word intuitive because I think that suggests some mystical power, but I do think that there's a lot of stuff that we gain from experience that we can't articulate or intellectualize.

T: I think that's right.

S: We should learn to act on it. I know in my own life, everything I've ever done has been intellectual. It's really taken me a struggle to learn to have confidence in my gut reaction.

T: Now that's interesting. If you were . . . I would assume that not only you but there's a healthy suspicion of intellectualizing in everybody in the room, because people have been through it for so long and had it drilled into them that everybody would be suspicious. Then the question is why wouldn't people be equally suspicious of emotional reactions. Why would you treat either one differently and why aren't they a check on one another. If there's discord between your feeling and where your rational process takes you, why wouldn't that be a reason to investigate both the basis of your feeling as well as the logic of your thought? Why wouldn't thought be a check on strong feeling and strong feeling a check on thought rather than one dominating the other?

S: I think it would be. I guess I felt that what we'd talked about to this point was intellectualizing rather than . . .

T: It is, it is. But I think I started with the notion that I'd like to construct a theory. Let me say why. I said earlier that there are contradictions often between theories of behaving, say, and what people do. My prediction would be that these contradictions will continue to exist. If that's not true then that would be interesting. It'd be important information in understanding this topic. If it is, these contradictions will

provide some interesting problems for our study and at this point constructing a theory of this is an intellectual process. Although what you're saying is that this theory should make room for feeling. That seems to me accurate . . . . I don't know how to put it in . . . [writes "feeling" on blackboard outline]. Let me just speed it up.

S: (Silence)

For purposes of analysis[68] the dialogue will be reproduced piecemeal, with a left-hand column added to the transcript.[69] This column contains

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68. Several perspectives could be used to analyze the effectiveness of the teacher's behavior. The conversation took place in public, between people with different roles, status, power, abilities, sexes, knowledge, experience, values, beliefs, objectives, and needs, as well as in the context of a professional culture and educational setting, both of which have ideological, economic, racial, sex, and class preferences. Each one of these factors helped in some way to determine the content of the dialogue. The possibilities for analysis are almost limitless, and the significance of these factors should not be minimized. There is a complex interplay among all such aspects of an interaction through which each aspect is mutually defined. The anthropological concept "thick" is often used to describe the nature of such interactions and, by extrapolation, the type of analysis that the interactions would require to be understood fully. *See, e.g.*, Cover, *Dispute Resolution: A Foreword*, 88 YALE L.J. 910, 912 (1979). (Professor Cover presumably borrowed the phrase from Clifford Geertz, *see* C. GEERTZ, INTERPRETATION OF CULTURES 3–30 (1973), who, in turn, borrowed it from Gilbert Ryle. *See* Walters, *Signs of The Times: Clifford Geertz and Historians*, 47 SOC. RES. 537, 542 (1980).) Thick understanding, which is desirable, should not be confused with "total" understanding which is illusory. *See* F. HAYECK, *supra* note 22, at 119–22.

69. This new type of transcript is a product of the work of Argyris and Schön. *See* C. ARGYRIS & D. SCHÖN, *supra* note 22, at 38–42. It helps to overcome a persistent problem in clinical scholarship. Notwithstanding the well known distorting effects of memory and perception, *see generally* J. MARSHALL, *supra* note 26, at 9–41; E. LOFTUS, *supra* note 56, at 20–87, even the most insightful writing about clinical practice instruction relies heavily and at critical points on teacher summaries of student action. *See, e.g.*, Lowry & Kennedy, *supra* note 63, *passim*; Meltsner & Schrag, *supra* note 4, at 27, 30, 40. There is no way for a reader to determine whether he would have summarized the raw data in the same way. Yet most differences of opinion about instructional effectiveness bog down over what happened rather than what should be done.

For an earlier use of transcript analysis to evaluate the effectiveness of law teaching, see Kelso, *Teaching Teachers: A Reminiscence of the 1971 AALS Law Teachers Clinic and a Tribute to Harry W. Jones*, 24 J. LEGAL EDUC. 606 (1972). For a discussion of the usefulness of transcripts in the study of closely-related lawyering behavior, see Cloyd, *Prosecution's Power, Procedural Rights and Pleading Guilty: The Problem of Coercion in Plea Bargaining Drug Cases*, 26 SOC. PROB. 452, 465 (1979). For thoughtful discussions of other efforts to develop new methods for collecting data about the processes of instruction, see C. ARGYRIS & D. SCHÖN, *supra* note 22, at 6–11, 30–34; ARGYRIS, *supra* note 22, at 251–80; W. TORBERT, *supra* note 32, at 137–201; Mehan, *Structuring School Structure*, 48 HARV. EDUC. REV. 32, 35–37 (1978); Mishler, *supra* note 18, at 9–17; P. Johnson, M. Johnson, & R. Little, Expertise in Oral Advocacy: An Inquiry into Its Nature and Development 16–32 & n.30–31, 38–39, 42, 45–46 (Aug. 14, 1978) (unpublished paper) (copy on file with R. Condlin).

the teacher's and student's recollections of their underlying thoughts and feelings during the dialogue.[70]

UNDERLYING THOUGHTS AND FEELINGS	*DIALOGUE*
I feel that his class discussion is emphasizing analytical, intellectual approaches without giving value to gut responses.	S: I wonder if my feeling about learning law is the antithesis of what this course is about. To me everything we're talking about now is very intellectual and I do feel that the

70. The following procedure was used in filling in the left-hand column. Each participant was given a verbatim transcript of the dialogue and asked to write what he or she remembered thinking or feeling at the time of each of her or his statements. Each was asked to fill in only her or his own thoughts, and the two sets of underlying thoughts thus produced were combined to complete the transcript. The entire process was completed within three weeks of the classroom discussion itself. For a description of an almost identical set of instructions, see ARGYRIS, *supra* note 22, at 56.

There are several ways in which the content of this left-hand column could be distorted. The column possibly contains, intermingled with memory, the new thoughts and feelings triggered by the reading of the transcript itself. In addition, the parties probably assimilated lessons from the classroom conversation, which, in turn, influenced their perceptions of their past states of mind. Underlying thoughts and feelings may be more articulate and coherent as reconstructed, because the instruction to reconstruct causes more attention to be given to underlying thoughts than did the original conversation. There is also the risk that the parties determined what appropriate underlying thought would be and reported them as their own.

These potential distortions notwithstanding, people whuq8ave filled in the left-hand column report that memories of their feelings come rushing back, immediately, without noticeable effort on their part. *See* Nisbett & Wilson, *Telling More Than We Can Know: Verbal Reports on Mental Processes*, 84 PSYCH. REV. 231, 255 (1977) (recent empirical research finding that people have "little or no direct introspective access to higher order cognitive processes" but do have direct access to their "focus of . . . attention . . . current sensations . . . emotions, evaluations and plans"). *See also* R. RORTY, *supra* note 39, at 70–127 (discussing how and what individuals report when reporting on internal states). Moreover, "[e]ach individual's data overwhelmingly challenged his competence [and] [i]t is difficult to see why people would write distorted cases that make them appear incompetent." C. ARGYRIS & D. SCHÖN, *supra* note 22, at 66.

If the participants reported present rather than past feelings, this distortion does not necessarily undercut the usefulness of the method. For teaching purposes, in fact, present reactions may be more useful. If the dialogue situation is typical, it helps more in preparing for its recurrence to know how one reacts in the present than how one reacted in the past.

The exchange reported in the text is brief in comparison with the entire class from which it was taken, and this may also distort. Two pages may not capture the nuance of conversational strategies. On the other hand, each person studied was remarkably uniform in his instructional behavior (even when the behavior was experienced as different), at least at the level of abstraction of the patterns I discuss. For that reason, two or three pages of representative dialogue have been enough. For a similar conclusion, see ARGYRIS, *supra* note 22, at 251–52.

> important part of learning law to me is to conquer the way I'm feeling about something. And when we plug in a lot of information and make a decision and can write all the reasons for the decision that you still don't have a lot of confidence in what you're doing. There are two reasons over here, and six over here, but you're still going to go with the two reasons. And I think that learning that confidence in the way you feel about material that you can't articulate, that you can't say where it came from, your experience that you aren't even consciously aware of, I guess I feel that's part of learning law too.

The student began the exchange by stating that "what the course is about" was "very intellectual" and not "the important part of learning law." Assume she intended this as a description of what she thought she heard and saw. Her description may have been correct, but possibly the teacher's behavior was more ambiguous than she recognized. The class was the first of the semester, it was only a few minutes old, and the teacher had not yet completed the course overview. It is unlikely that the teacher had yet said or done enough to allow the student or anyone to determine "what the course [was] about." The student more likely attributed meaning to a limited amount of teacher behavior based on prior information about this teacher in particular and expectations about law teachers and law classes in general.[71]

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71. Another possibility is that the student was projecting her own values and attitudes onto the professor. *See* Carrington & Conley, *Correspondence — Negative Attitudes of Law Students: A Replication of the Alienation and Dissatisfaction Factors*, 76 MICH. L. REV. 1036, 1040–41 (1978). *See also* Carrington & Conley, *The Alienation of Law Students*, 75 MICH. L. REV. 887 (1977).

The student also may have evaluated negatively what she heard the teacher to say. "[M]y feeling about learning is the antithesis of what this course is about . . . [t]he important part of learning law" is to conquer feeling, and "learning confidence in the way you feel about material . . . that's part of learning law too." She apparently believed that the teacher emphasized intellect over emotion and that this emphasis was unwise. Until she heard the teacher's reasons for his choice, rejecting the teacher's emphasis (if it was his emphasis) may have been premature.

The student's public action was to own up, an act of courage and energy in this context. Whether her owning up was accurate is hard to know because the intensity of her underlying thoughts does not appear in the left-hand column. On the other hand, some of her language suggests an attempt to be diplomatic: "I wonder," "I do feel," "I guess I feel that's part . . . too."[72] Other parts suggest overstatement: "antithesis"; "course" instead of the word "class" used in the left-hand column; and "the important part of learning law."

The student could have tested her assessment of the course being overly intellectual by simply waiting to see if an "emphasis" in the overview did in fact appear. If she intended to test by speaking up, her method made it difficult for the teacher to respond — she did not identify which aspect of the overview she judged overly intellectual and did not ask whether the teacher planned to add to the overview. She "tested" only in the sense that she challenged the teacher to defend his statements against a charge of overintellectualization.[73]

I feel defensive, as if what I've said has been attacked. Besides, I agree with what she says, so why would she attack me.	*T*: I'm trying to figure out how that's different from what I want you to do. If what you're saying is that learning involves developing confidence . . .
	S: Yeah, in decisions that you can't articulate or can't intellectualize.

72. This language could be interpreted as asking a question, though the absence of questioning in the left-hand column may indicate that the words represent only student deference to authority. If a question was intended, the length, and repetitive, almost didactic, structure of the statement, make that question hard to hear.

73. The interpretations presented in the article are meant to be suggestive rather than exhaustive. To the extent that one sees the exchanges another way, it is further evidence for the central point, that statements in clinical practice dialogue are intrinsically ambiguous.

The teacher responded somewhat in kind. The left-hand column indicates that he understood no single meaning in the student's first statement. His reaction was internally contradictory, finding both an attack and an agreement. These meanings were attributed, however, because the student's intended meaning was far from clear.[74] The student could have been challenging or agreeing with the teacher's views, as he hypothesized, but she also could have been asking a question, expressing frustration, making a request, attempting to impress, speaking out of habit without conscious intent, or making a point suppressed in another class. Each of these meanings would call for a different response. An accurate public reaction (though not necessarily effective, at least by itself), therefore, probably would have been confusion, defensiveness, and, perhaps, anger.[75]

Evaluation does not appear prominently in the language of the teacher's first response, although all his statements may suggest that he attributed anti-intellectualism to the student from the outset and evaluated it negatively. He may have communicated this belief nonverbally, but the literal content of his language vacillated between inquiry and paraphrase. However, he did not inquire directly, did not own up to his feelings of defensiveness, and did not acknowledge his contradictory reactions to her statement. While his remarks may look more learning-oriented than those of the student, on closer examination, they have many of the same persuasion-oriented qualities.[76]

Before the teacher finished, the student interrupted,[77] perhaps to agree with what she heard as a statement of position, to answer what

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74. Some might say that the teacher owned up, at least privately, to feelings that were difficult to acknowledge. Not everyone expresses defensiveness so readily, nor reacts to it with confusion rather than anger, though subsequent events may indicate that this teacher did not either. But private admission is only part of owning up.

75. As with the student's first statement, the teacher's language could be interpreted as expressing some of these sentiments. For example, "I'm trying to figure out" could convey confusion, and the repetition of this theme may indicate defensiveness. Expecting the student to discover these meanings, however, may have been unrealistic.

On a second point, if the teacher had heard the student's statement as ambiguous, he might have found this nearly as difficult to express. Saying that one has heard no clear meaning in another's words is hard, because the other may attribute negative evaluation to that comment.

76. The difference in outward form between teacher and student communication may have been due to the teacher's familiarity with the substance of the persuasion-learning dichotomy and a consequent attempt to use the learning mode. He therefore may have been torn between an intellectual commitment to behave in the learning mode and the habit of behaving in the persuasion mode. At this stage of his development and at this level of stress, he may have been able to capture the appearance of inquiry and perhaps a part of its spirit, but not its substance.

77. An interruption is often interpreted as a signal to go faster. Picking up the pace of a conversation, however, increases the pressure on both sides to attribute meaning.

she heard as a question, or to prevent the teacher from saying what she did not want to hear. Whatever her intention, the teacher apparently had not finished, and, to respond, the student had to attribute meaning to teacher language that was not then clear.

Let me be sure that I've heard her right.	*T*:	Learning law involves sort of trusting in one's intuitive processes? I don't know, is that what you say.
I feel like he overstated my position or that I haven't communicated what I wanted.	*S*:	I don't like the word intuitive because I think that suggests some mystical power, but I do think that there's a lot of stuff that we gain from experience that we can't articulate or intellectualize.
Nobody would disagree with that.	*T*:	I think that's right.
I feel as if we're in conflict — he continues to emphasize articulating and intellectualizing when I feel the need to stress the value of accepting hunches sometimes without probing.	*S*:	We should learn to act on it. I know in my own life, everything I've ever done has been intellectual. It's really taken me a struggle to learn to have confidence in my gut reaction.

The teacher's underlying thoughts indicate that he did not yet understand the student's position. He publicly summarized her position as "sort of trusting in one's intuitive processes" and asked her if that is what she had said. Although the language seems inquiring, the inquiry may not have been bona fide. The teacher may have decided that he understood the student's position and found it anti-intellectual. This judgment becomes more explicit in his next three statements and may have been near the surface here.

He restates the student's position as trusting in "intuition." Yet intuition does not have much currency in law school. The teacher's comment may have suggested subtly that the student had not learned the first-year lesson that analytical, not intuitive, thought is called for in classrooms. Because it is unclear that the student extolled intuition, the teacher may have attributed an incorrect meaning and evaluated that meaning negatively without a fair test. At a minimum, his

comments were ambiguous enough to have been heard by the student in this way.

The student objected to the "intuitive" characterization, perhaps for the above reason,[78] and restated her position. The teacher then said that the student's statement was "right," although her meaning was unclear. His underlying thought was phrased differently and possibly indicated an evaluation of the student's mental process ("she's belaboring the obvious") rather than simple agreement. The student may have sensed this lack of congruence between public and private statements because she continued to give reasons for her position. Her response, however, was again ambiguous. She could have been lecturing the teacher (that is, implying that she had matured and the teacher needed to), attempting to give data to support her general assertions, expanding the analysis into what she perceived as the second level, trying to reduce tension by owning up to an embarrassing self-admission, or making a statement to herself about self-growth. Whatever she intended, the teacher seemed to have heard something that was now clear, for at this point his statements seemed to lose any mixed quality of learning and persuasion and became entirely persuasion oriented.

I agree that is important. But it's also important to think about gut reactions. Nobody's gut is inherently trustworthy. And she may be minimizing the importance of thinking.

T: Now that's interesting. If you were . . . I would assume that not only you but there's a healthy suspicion of intellectualizing in everybody in the room, because people have been through it for so long and had it drilled into them that everybody would be suspicious. Then the question is why wouldn't people be equally suspicious of emotional reactions. Why would you treat either one differently and why aren't they a check on one another. If there's discord between your feeling and where your rational process takes you,

78. Because intuiting is sometimes stereotyped as a female mode of thought, the teacher's use of the word may have seemed sexist, adding to the student's negative reaction to the word.

why wouldn't that be a reason to investigate both the basis of your feeling as well as the logic of your thought? Why wouldn't thought be a check on strong feeling and strong feeling a check on thought rather than one dominating the other?

That's a response I can't quarrel with but I still feel that the emphasis of the class discussion to this point has been on dissecting, without positively asserting the value of simply responding as a whole person.

S: I think it would be. I guess I felt that what we'd talked about to this point was intellectualizing rather than . . .

She's probably right. I haven't said much about feelings. I almost never do until I'm reminded. But there are a number of other parts of this framework I want to get out. I'm going to have to move along.

T: It is, it is. But I think I started with the notion that I'd like to construct a theory. Let me say why. I said earlier that there are contradictions often between theories of behaving, say, and what people do. My prediction would be that these contradictions will continue to exist. If that's not true then that would be interesting. It'd be important information in understanding this topic. If it is, these contradictions will provide some interesting problems for our study and at this point constructing a theory of this is an intellectual process. Although what you're saying is that this theory should make room for feeling. That seems to me accurate. . . . I don't know how to put in

	. . . [writes "feeling" on blackboard outline]. Let me speed it up.
I feel that the discussion somehow has been shut off, that the subject has been pigeonholed.	*S*: (Silence)

In this sequence, the teacher made his most explicit attribution of anti-intellectualism, evaluated that attitude negatively, and diplomatically — thus ambiguously — communicated his point. His language is noteworthy. Rather than explicitly stating his feelings, he described the student's position as one others had taken, perhaps to lessen the appearance of personal attack. The student, however, could have taken this statement to mean that her views were commonplace. He explained her belief as conditioned rather than chosen, perhaps to absolve her from responsibility; but the student could have thought he meant her level of self-awareness was low and her ability to choose limited. He objected to her perceived anti-intellectualism not in declarative sentences but in rhetorical questions, perhaps to avoid indicting her directly as an individual; but the student could have interpreted this statement as an attempt to protect her from difficult information that (the teacher believed) she could not put in perspective by herself.

The teacher's last two statements are marked by their length, single-mindedness, density, emphasis, and rhetorical quality. The statements may have signaled to the student that the teacher wanted the discussion ended. She qualified her last public comment and seemed to back away from the issue. The teacher's response may have played out this backing-away ritual. He agreed with the student's charge that the discussion had been intellectualized — his first such acknowledgement — but buried this acknowledgment under a long justification and a *pro forma* gesture to assimilate her contribution. He did not say that she had reminded him that he often deemphasized feeling nor did he communicate that his true reason for wanting to cut off discussion was to move along. Either factor would have given the student more data to consider in making her final judgments.[79]

When asked to reconstruct the left-hand column, both teacher and student remembered vividly only the feelings of discomfort experienced

79. As a reason for ending dialogue, "moving along" is often as acceptable to students as it is to teachers. For one thing, it says that a conversation has not finished and may be revived at a later time and place. Even if offensive, it is often no more so than a long-winded argument that serves as its proxy.

during the dialogue. Before reading the transcript, neither could recall the topic of the exchange, the resolution, or the specific statements. Each, however, was clear that the experience had been unpleasant and that he and she were not likely to repeat it. Their reasons for discomfort had many of the same qualities as their thought patterns in the dialogue. Each worried that the other (as well as the remainder of the class) would think negatively of her or him, and each attributed this judgment to the other. Each person was angry at the other for making the attributed judgment because, in the view of each, the judgment was unjustified. At no point did either person recall being confused about what the other had said or curious about the tone of the exchange.[80]

In the next illustration a teacher and student are reviewing three interviews that the student has conducted with separate clients (C_1, C_2, and C_3). The excerpt reproduced below occurred in the first few minutes of the meeting after an agenda had been agreed upon and after a brief introductory discussion about criteria of good interviewing had been concluded.[81]

UNDERLYING THOUGHTS AND FEELINGS	*DIALOGUE*
I'm suspicious of people wanting clients to like them and a little troubled that *S* has made it such an important element of his definition of a good attorney-client relationship. At least he makes being competent an equally important aspect of a good relationship. I wonder how he uses that criterion to evaluate his own behavior.	*T*: [Student has just finished stating that it was important to him that a client like him as a person and as a lawyer.] How did you feel about the three interviews? I mean did you get the feeling that those three clients did like you or that the relationship was beginning to develop?
	S: I thought that in C_1 like I said, because a lot had to do

80. The irony is that both teacher and student argued over a point on which they essentially agreed and in a manner that affected their ability to understand one another and their willingness to work together in the future. Irony notwithstanding, "cognitive conflict", one in which the actual interests of the parties coincide even though they perceive their interests as antagonistic, *see* Thibaut & Walker, *supra* note 10, at 543 (and sources cited therein), is commonplace in the teacher-student dialogues I have recorded. Many seeming cognitive conflicts are in fact ideological, *see* note 66 *supra*, and thus more difficult to resolve.

81. In these transcripts only the teacher was asked to fill in the left-hand column. *See* note 70 *supra*.

with C_1. I think that he's that kind of person.

I wasn't that enamored of C_1 because he kept pressing us to get the interview over. His girl friend was outside and occasionally she'd come to the window to check on when it would end. I think S was as important to the interview going well as C_1. I agree that it went well though and maybe part of it is that S and C_1 are a lot alike.

T: You share a lot of experiences, you're about the same age, and may have some similar attitudes about life generally.

S: Yeah, right. C_2 also, I think that I got along pretty well with C_2, she was fairly intelligent and well, I don't know, I just felt good after that interview, felt that, and just the phone calls and, you know, the whole thing about getting her scheduled, whereas C_3 was the toughest. Maybe it was because there was a big difference between C_3 in kind of life style you know, being on parole and being on welfare. I mean there is more of a distance between C_3 and me, naturally. So it was tougher there and also, C_1 was in the office so many times he was used to it but C_3 seemed nervous in the office.

I don't think C_2 and C_3 interviews went all that well. In C_3's case a lot of what we prepared for was irrelevant so S can't really be faulted. In C_2's case, however, it was a simple case where the preparation was not difficult. I don't want to reinforce his feeling that C_2's interview went well. This is an example of how good feelings about an interview are not a substitute for doing a good

T: That's interesting. I think that I, I mean that I agree with your impressions for the C_1 interview that, at least on that aspect of it. I think that the two of you did hit it off pretty well and I think that it was a combination of the fact that he had seen a lot of law students and lawyers and he was pretty socialized to the process

job. I thought that he cut her off, discouraged her from talking with his constant note taking and didn't seem relaxed at all.

The C_1 interview, on the other hand, wasn't that bad. *S* knew that case a lot better and as a result, knew what to ask. I'll reinforce that but only the aspect of preparation. It's more important that he prepare than that he feel good about clients relating to him.

and you went more than half way to make it a good interview, and on that level, I mean I think there were some informational level problems in the interview, but in relating to his personality, I agree with you there. I think that it went pretty well. It was an interview in which the case had gone along the furthest and you knew the most about the case of any of the ones you'd worked on. In some ways you knew specifically what you wanted in the way of answers and one of my impressions was that that relaxed you. That one of the reasons you were relaxed and you were able to concentrate on conducting a good interview, hitting it off with him, was because you knew the case very well.

S: Yes.

T: Yeah, and you knew the law and you didn't have to write out his whole answer when he gave you one because a few key words were enough for you to remember. So my impression was, you know, that it did go well. I guess I didn't see you and him as having as much in common as you did. But in any event, he did seem, I mean he seemed less communicative than you would ordinarily be. He was friendly but it

was kind of that he smiled a lot and everything, but he never really said very much or he never really gave extended answers or he never really looked like he was there to make another friend because he'd been through that.

S: Oh, yeah, well right.

T: But I got the feeling that you were more relaxed in that interview than others and my interpretation of that was just that, it was how much you knew. I mean you felt good about that case. You'd been through it. You could handle it.

In this exchange, the teacher apparently tried to coerce the student into agreeing with the teacher's private, untested, and, perhaps, spontaneous[82] analysis of the student's performance. The teacher distrusted client affection as a criterion of interviewing success. He wanted the student instead to focus on knowing legal theories and on questioning about evidence that would support these theories.[83] He could have said that directly and discussed the reasons for his emphasis, but he kept his view and reasons private.

If he did not want to reveal his criteria for effective interviewing he had other options. He could have asked the student to describe what it meant to have someone "like him as a person and as a lawyer," why this was part of good interviewing, what in the interview led the student to conclude that the client had liked him, and what methods he had used to verify this reading of the client's feelings.

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82. For example, the belief that the student and client were "a lot alike," and that this factor played a role in the success of the interview, may have occurred to the teacher for the first time as he spoke. The idea does not appear until the end of his second underlying thought (significant if his reconstruction was intended as sequential), is qualified with a "maybe," and is expressed in language different from "a lot alike."

83. In a later discussion the teacher defined "competent" (see the first paragraph of the teacher's left-hand column) as spotting legal theories in stories told by clients and being able to question for evidence to support these theories.

Possibly the student also thought that questioning was the most important part of the interview but believed that the clients had liked him because he questioned well. The student alternatively might have believed that the relationship issues were as important as the information issues on which the teacher had focused,[84] and, in effect, might have been suggesting a different agenda from the teacher's;[85] or he simply might have been noting a feeling (common to many first-time interviewers) that it is nice to be appreciated, a point with which the teacher could easily agree. In other words, the student might have been saying the same thing as the teacher but in a different way, or suggesting interpretations that added to and complemented those of the teacher. The teacher's unwillingness or inability to make his thoughts public may have caused the teacher to miss these possibilities and perhaps to choose an emphasis that was unnecessary or confusing.

The teacher was nearly as secretive in his thoughts about other issues. He stated that C_1 and the student liked one another because they were alike, but he did not state the reasons for this belief. He also did not express the full extent of his negative feelings about C_1 or his disagreement with the student's more positive reaction to that client.[86] Perhaps the teacher left these issues unexamined because he had determined that the principal topic of the meeting was to be the value of preparation and knowledge, the central themes of the last half of the exchange.

Unfortunately, the last half of the "dialogue" was a soliloquy. The teacher controlled air time with repetitive statements about the value of preparation to good interviews. He did not test his assertion that the student performed well because he was well prepared, nor did he describe what led him to that conclusion. The student did not stop these soliloquies and ask for evidence perhaps because he lacked the stature,

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84. There is considerable scholarship suggesting that relationship issues are important in interviewing. *See, e.g.*, A. BENJAMIN, *supra* note 31, at 33–56; D. BINDER & S. PRICE, LEGAL INTERVIEWING AND COUNSELING 6–19 (1977); R. KAHN & C. CANNELL, THE DYNAMICS OF INTERVIEWING 22–64 (1957); A. WATSON, THE LAWYER IN THE INTERVIEWING AND COUNSELING PROCESS 6–11 (1976).

85. There is some evidence to support this different order of importance. During the course of his interview, the client revealed the names of two new witnesses to the incident in question. He had kept these names secret, he explained, because the witnesses were friends and he did not want to get them involved. It may have been his trust for the student that convinced the client to reveal the names. In starting with client feelings, the student may have been suggesting this nexus.

86. For example, late in the exchange the teacher expressed his negative reaction to C_1 indirectly, briefly, and diplomatically. Yet, when the student responded equivocally, possibly to suggest disagreement or doubt, the teacher dropped the subject immediately.

formal authority, and perspective to question the teacher's interpretations or perhaps because the teacher was complimenting the student. Moreover, the student may have determined, reasonably, that the teacher did not want to be interrupted and that the student should only pay attention and take mental notes. The teacher's point about preparation is a good one in the abstract and worthy of emphasis at some appropriate moment, but an instructional comment requires more than abstract goodness to be timely.

In the soliloquies, the teacher also repeatedly interjected disagreement with the student's analysis without allowing these competing diagnoses to be tested. He hinted that he might not agree that the C_2 and C_3 interviews went well and mentioned some "informational level problems" in the interview of C_3, yet he neither gave examples nor elaborated on either point. Moreover, he made these references at the beginning of a long statement about preparation, where they would be difficult for the student to recognize and remember. Had the teacher wanted to explore these issues in detail, he could have raised them separately, given examples, and invited a response.

In the next example a teacher and student are editing an appellate brief that the student had written. This excerpt comes from the forty-minute mark of a meeting that lasted for one hour. The teacher began the exchange by asking a question about particular language that the student had used in his draft of an argument.

UNDERLYING THOUGHTS AND FEELINGS	*DIALOGUE*
"Hopelessly entangled" is a type of caricatured writing that you see in a lot of briefs written by people who figure that being adversarial means overstating or being belligerent. It stands out in this first paragraph because most of the rest of it is quite good. To leave in an expression such as that would drag the rest of the argument down. I don't want to say that though because it will look like I'm handing down a pronouncement. I would like C_2 to come to that conclusion for himself. I'm not sure why he used	*T*: The beginning, the introduction, is there some other reason that would support a request for an interpretation of Chapter 22 section 9A other than the case had been "hopelessly entangled" in a complicated web of statutory construction. *S*: Well, another reason, I guess, would be that we want to set a precedent here so that future proceedings under 22 § 9A, if there are any after this mess, it'll be a

this language. I think its because he thinks that it's persuasive. It's also consistent with some of the way he relates to me in person. He sometimes is dogmatic and perhaps a little arrogant. I don't like those traits particularly and will do what I can to reinforce them negatively.

little bit clearer what the exact standard the trial board and municipal court should follow.

I wonder whether he's even seen that there's a problem with this language. Maybe if I show him how it could be argued against us, or at least an internal inconsistency in his argument, he'll get the point.

T: Does that strike you, saying that the case is hopelessly entangled, strike you as being a two-edged sword?

S: In that we may have contributed to the entanglement?

It doesn't sound as good as I thought it would. I'd better drop the whole point and get on to something more important. It also doesn't look as if it's making any impact on *S*. He doesn't seem to think that my argument of inconsistency is that strong. I'll get the language out of the brief later, but now I'd better move on.

T: Not so much that, but if it is in fact hopelessly entangled, well, I guess just in saying that it's hopeless, is it more than you want to say? Because in a sense you're going to argue that it's not. That the single justice did understand what he was doing and that the result he reached was correct.[87] And so, in a sense that may be overstating your position a little bit. But in any event, let me do this with stuff like this. I will make an effort at rewriting and then we can go over it, and you can do the same thing.

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87. The student's client had prevailed at trial, in part, because the trial judge — "the single justice" — had construed the language of the statute in the client's favor.

The teacher appears to have tried diplomatically to communicate a strongly worded and incompletely thought-out[88] evaluation of the student and his work. In the process, the teacher expressed something different from his thinking. Although he thought the student's writing was "caricatured," he merely asked the student two ambiguous questions. He also withheld his judgment that the student was "sometimes dogmatic and perhaps a little arrogant," although the judgment may have influenced his choice of language and action. The teacher then wondered privately "whether he's even seen that there's a problem with this language." The question is appropriate but was never asked out loud. The teacher then dropped the subject because "it doesn't look as if it's making any impact." His evaluation was probably correct, but for reasons different from those the teacher suspected.

The teacher may have withheld his judgment of "caricature" for fear that it would lead into an emotionally uncomfortable discussion of the student's alleged arrogance. If so, this created a new dilemma. The teacher could avoid discussing dogmatism and arrogance only by avoiding negative statements, yet he could not teach unless he disclosed his evaluative reactions, some of which would be negative.

In refusing to test his judgment of "caricature" because of possible unpleasantness, the teacher may not have recognized the impact of his choice on the effectiveness of his instruction. "Arrogant" and "dogmatic" are unusually strong words and seem disproportionate to the error that the student allegedly committed.[89] If these words were disproportionately strong, the teacher's reaction, itself, may have been a caricature, which is, ironically, the same failing that he found in the student. Yet the teacher's failure to test his analysis may have prevented him from discovering his own caricature.[90] Moreover, his

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88. The teacher seems confused about how to raise his reaction, says that his questions do not sound as good as he thought they would, and does not specify the connection, even privately, between his judgment of arrogance and dogmatism and the student's work product.

89. The teacher possibly referred to prior experiences as his data base for the judgment that the student is arrogant and dogmatic. Yet if these experiences are triggered by the present work product, presumably something about that work product also strikes the teacher as dogmatic and arrogant. The teacher says as much when he describes the student's writing as "consistent with some of the ways he relates to me in person . . . sometimes . . . dogmatic and perhaps a little arrogant."

90. If this was true, it produced an interesting bind for the student. The teacher was criticizing the student for using caricature yet implicitly approving of caricature by using it to communicate his own (the teacher's) criticism. No doubt the student did not understand this explicitly, but if he picked up these contradictory signals at some sensory level, deciding what to believe would have been difficult indeed. The teacher's ability to recognize caricature in the student, but not in himself, may be an example of disassociative behavior. *See* note 46 *supra*.

unilateral[91] and private strategy of rewriting the argument himself, might have been an outgrowth of this caricatured feeling. If so, strong feelings that he could not discuss may have influenced the instructional course that he took and confused rather than clarified an issue.

When a colleague later suggested that he should have communicated his judgment accurately, the teacher responded that it would have been too threatening to the student.[92] For several reasons, his conclusion is suspect. This student did not enjoy negative evaluations but he also did not like being misled, "protected" from difficult experiences, talked to in code, or screened from information about his impact on others. Given an awareness of these trade-offs, the student might have chosen the short-term discomfort of negative feedback over the long-range consequences of its alternatives.[93]

Also, articulating and discussing the judgment of arrogance[94] might have involved less risk than the teacher thought. Some of the discomfort resulting from negative evaluation comes from the manner in which it is expressed. A general statement that this student was arrogant,

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91. The unilateral properties of the teacher's behavior appear most prominently in his reaction to the student's efforts to participate in the analysis and redrafting. When the teacher suggested that the argument could be better, the student attempted to discuss the subject. The teacher rebuffed these efforts and ended the discussion by telling the student that he (the teacher) would rewrite the argument.

92. Another possibility is that saying what he thought would have been too threatening to the teacher. Assigning responsibility for events solely to people outside one's self is often an example of disassociative behavior. *See* note 45 *supra*.

93. The difficulty is that this commonplace choice is seldom apparent to students. In addition to this choice being hard to identify as the issue, the long-term consequences of lost opportunity, ineffective habit, and retarded ambition are hard to predict for people who are young. This means that teachers frequently must make the decision to discuss or to avoid negative evaluations. To be able to do this, teachers must have a perspective that goes beyond the immediate and an emotional ability to delay gratification; they must make their instructional decisions for positive reasons and not simply react to the most immediate student feeling. The teacher's best course in this exchange may have been to act on his own judgment rather than on the fear of negative student reaction.

94. This is not to suggest that the teacher should have said to the student, "I find your behavior arrogant and dogmatic." Among other reasons for withholding this information is that the teacher's beliefs may have been more complicated. For example, the teacher also believed that it was inadvisable to "hand down a pronouncement." Perhaps this was because he feared pronouncing would inhibit student learning, or perhaps because he was uncertain of any idea about which he would feel tempted to pronounce. Whatever his additional feelings and beliefs, they may have qualified his evaluation in ways he would want to know about before discussing it with the student. If so, it made sense to hold back and to, "first, do no harm." But suspending judgment is not the same as taking a judgment into account privately, and the teacher may have done the latter instead. He mentions that he "will do what [he] can to reinforce [arrogance and dogmatism] negatively," and tries to do so through the proxy topic of "caricatured writing." Yet the student may have taken the teacher's language at face value and been confused.

without evidence or examples, would have been difficult to hear because it would have been difficult to test. When the student knew what behavior the teacher interpreted as arrogant, he could determine for himself and discuss with the teacher whether the behavior occurred, whether the teacher's is the only or best interpretation, and whether it is the meaning that he, the student, intended. Put another way, the judgment of arrogance, when substantiated with data, could have been tested more thoroughly for accuracy, and if accurate, used as a guide for behaving in a less arrogant manner in the future.[95] The unsubstantiated assertion of arrogance, communicated indirectly, offered neither of these options.[96]

Even if the student could not hear and the teacher could not express negative evaluation comfortably, the teacher should not necessarily hold back his negative evaluation. Learning, to paraphase Francis Allen, is "a contact sport" in which emotional comfort is a necessary but not sufficient condition.[97] Neither the teacher nor the student benefits from failing, however slightly, to evaluate honestly.

A final feature of the transcript warrants brief discussion. The teacher devised and began to execute a strategy for convincing the student that the student's language was ill-advised. Once begun, the teacher determined that his argument did not "sound as good as [he] thought it would." He dropped it because, he later admitted, he did not

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95. For an illustration of presenting negative comment as hypothesis and testing for accuracy, see ARGYRIS, *supra* note 22, at 84–94.

96. Negative evaluation also is easier to hear from someone who understands that such evaluation can be uncomfortable, does not intend the discomfort, and has overcome a discomfort of his own in communicating such thoughts. While these feelings of discomfort are present in most people who share evaluative thoughts regularly, often that fact is not apparent to a listener. For this reason, one sometimes should express one's honest discomfort in giving negative evaluation (even though this, too, can be uncomfortable), encourage a listener's critical reaction to the evaluation, and leave the subject when one's thoughts have been communicated and understood. It is not necessary that the listener agree before the discussion moves on. Unfortunately, the teacher did none of these things in this case.

97. Letter to Robert J. Condlin from Francis Allen at 3 (Sept. 22, 1977) (copy on file with R. Condlin). *See also* Allen, *The New Anti-Intellectualism in American Legal Education*, LAW QUADRANGLE NOTES, No. 3, 1977, at 6.

Emotional comfort here means the absence of disabling anxiety. To learn, students must struggle with challenging problems within their grasp under conditions of "psychological success." *See* C. ARGYRIS, *supra* note 1, at 39, 44; W. TORBERT, *supra* note 32, at 16–17. To be challenging, problems must have solutions that are not self-evident, and to be within a student's grasp, the solutions must be discoverable with struggle. The absence of self-evident solutions and the need for struggle will and should produce anxiety. But teachers can and should keep such anxiety at a level that is energizing, not paralyzing. *See also* Gaylin, *Vegetalotry*, HASTINGS CENTER REP., June 18, 1979 (discussing the role of emotional comfort in learning).

want to "look bad" in front of the student.[98] The teacher did not want to argue for a position that would eventually lose. The teacher saw the evaluation of work product with the student as a competitive process in which success as a teacher depended upon winning exchanges about interpretation. The prospect of putting forward a view that did not hold up under scrutiny threatened his self-image.

The final illustration is taken from the forty-five-minute mark in an hour and one-half meeting near the end of the semester to discuss issues of the student's choosing. The teacher and student had worked well together in the semester and each had reported separately that he trusted and respected the other.

UNDERLYING THOUGHTS AND FEELINGS	*DIALOGUE*
	S: One thing, I have fear, the idea that I'm being taken possibly by these clients, by some of them anyway. With C_4 I would naturally believe anything he told me because he seemed, he said, "I was going to forget about the whole thing until Ruthie made me, she forced it on me so I decided, O.K., I'll do it." Since he doesn't have such a vested interest in getting the money back; whereas C_5, I mean I was just thinking to myself, suppose he picked up a big rock and threw it through his front window because he was mad. How would I know. I mean, I know I tend to believe people too much and it bothers me that some people can somehow be able to tolerate it when somebody puts some-

98. Another view is that it would "look bad" to refuse to explore an intellectual issue before one could argue convincingly for a single position.

thing over on them. Then I believed everything C_5 told me. If the landlord came in and told me his story I'd probably believe everything he told me.

I don't know how to tell for sure whether clients are lying or not. If I began to think about that it would probably screw up everything. Besides, does it make a lot of difference that C_5 might be lying. He's in the worst possible position to pay for the window and the landlord is in the best. So what does it matter that C_5 may have broken his own window. The lying client is more of a concern for corporate or criminal lawyers, not for lawyers for legal services.

T: How does that relate to your notion of what, as a lawyer, you should be doing? In other words, given the fact that you're performing now as a lawyer, how do those feelings fit in with your notion of what your obligation is to someone who comes in? If you're worried about that person lying to you, what are your criteria for deciding what you should do? Given the fact that you're . . .

S: Well, I think I have some sense of, you know, which side of the given issue I'd want to be on for myself. I mean if the landlord came in, I don't think I could properly handle this case at all.

The student began by describing recurrent feelings in the representation of two clients. He was fearful and intolerant of deception, and yet also believed that he was unable to recognize it. The student admitted to feelings of ignorance, gullibility, and dependence, which embarrassed him and made him uncomfortable. The trust and respect the student had for the teacher made possible these difficult admissions. The teacher, ironically, had similar feelings about deception but did not share them. He also did not share the "political analysis" (the landlord has more money) that he (and eventually the student) used to justify his refusal to consider the issue.

The teacher responded to the student's act of risk-taking by changing and intellectualizing the subject. The question of "how do I know when a client is lying?" became "what does lawyer role obligation require me to do for a client I suspect to be lying?" The second, more

personal question of "how do I live with the fact that I have been lied to?" was dropped out of the discussion altogether. A lawyer's professional obligations regarding lying is an important issue, one that the teacher and student should have considered at some point; but the personal question of dealing with strong feelings of distrust arising spontaneously in a relationship with another was intertwined and more timely.

By changing the question to one of lawyer role obligation, the teacher may have seemed to suggest that lawyers should not think about topics of personal feeling. "Lawyer role obligation" could be a code, as it often is in practice, for the suggestion that lawyers should not dawdle over such emotional, personal, subjective questions to which there are no answers.[99] The teacher's use of the expression may indicate to the student that, except where the problem is so severe as to jeopardize trial credibility, a lawyer should not worry about the truth-telling propensities of a client or a witness.

Possibly because the teacher was embarrassed by his own assertions or was uncomfortable with a topic that involved personal feelings, he asked his question in a number of ways and did not stop talking until interrupted. His statement may have been nervous talk, intended to fill time until the anxiety aroused by the topic went away or was controlled. The teacher may have intellectualized both his own and the student's emotional response to a moral dilemma in the student's work. In the process he may have suggested subliminally that there are no satisfactory answers to such dilemmas, only simplistic rationalizations which excuse the failure to struggle with such issues.[100]

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99. Not dawdling over emotion is one of the teachings of the "rationality" characteristic of the persuasion mode. *See* text accompanying notes 39 and 49 to 52 *supra*.

100. An instructional method that ignores the substance of emotional response risks setting a student up for such future beliefs. The harm in this, as William Simon has pointed out, is that it tends to alienate the individual from his own ends. *See* Simon, *supra* note 22, at 114. Suppressing discussion of private moral and political beliefs is commonplace in practice instruction. *See* note 112 *infra*. The problem is also present in new associate training in law firms where economic self-interest is added to the ego constraints that operate in law school practice teaching. It is the essence of university teaching to draw out such private views, in major part, to add to the development of a critical ideal against which to measure lawyer work choices, not only for instrumental effectiveness but also for moral and political legitimacy. The moral and political critique of lawyering is not valued so highly in law firm training where time must be billed. This difference in interests is the principal response to the often asked question of why law schools, rather than law firms, should "train" students in "practical skills." *See* C. WEGENER, *supra* note 1, at 37–41 (1978); L. VEYSEY, THE EMERGENCE OF THE AMERICAN UNIVERSITY 149–50 (1965).

In all of the foregoing examples[101] the teachers' behavior was replete with private diagnoses of what the students should learn, and unilaterally chosen strategies for having the students acquire that learning.[102] These teachers often were coercive in their gratuitous repetition of pre-selected themes and self-protective in their reluctance to discuss those themes other than diplomatically and indirectly. Little data were given to support conclusions and little open-ended, candid testing of analysis was encouraged. Strong feeling, when present, was sidestepped, transmogrified, or suppressed. While the histrionics and exaggeration of courtroom discourse rarely were present, the substance of the discussions tracked the persuasion mode.[103] In a subtle and thus hard to confront manner, the teachers in these excerpts dominated and manipulated their students and taught their students how to do the

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101. Some have criticized the content of these excerpts as trivial or mundane. It is true that only the last excerpt contains a discussion of explicit political or moral questions. But each excerpt involves issues of how power and responsibility are divided, whether decision processes will be democratic or authoritarian, whether domination and manipulation will be permitted, and whether persons will be treated as ends not as means. Moreover the commonplace nature of the content of these dialogues is part of their point. Because they occur routinely, such dialogues have a greater potential for developing and reinforcing habits. *See* note 65 *supra*. Ultimately, these habits, through a kind of adverse possession, may mature into values that determine ideologies. This is the familiar notion of "you become what you do." *See, e.g.*, R. COLES, ERIK H. ERIKSON: THE GROWTH OF HIS WORK 339 (1970).

102. Having described the behavior in the foregoing excerpts as persuasion mode, I do not give examples of contrasting learning mode behavior. This makes it difficult for the reader to determine if the learning mode construct refers to a known or realizable reality. I acknowledge this as a shortcoming of the present article. I have not provided such examples, partly because I do not know all of the participants in these excerpts well enough to speculate on this point. If I knew them I would still be hesitant, consistent with my theory, to provide such examples unilaterally. Equally important, the task of illustrating the learning mode is too substantial for inclusion within this already long article. Argyris has given examples of learning mode behavior in another context. *See* C. ARGYRIS, BEHIND THE FRONT PAGE 110–37 (1974).

In addition, I have discussed the persuasion and learning modes throughout as a set of behavioral practices, disembodied from an underlying ideology. In part, the modes are just that — unselfconscious habits which can be controlled through acts of the intellect and will. On the other hand, the pervasiveness of the persuasion mode, the way in which it circumscribes the universe of discourse, and the instrumental advantage it provides to law teachers (or lawyers in practice settings), suggests the presence of an underlying ideology of "persuasiveness."

103. These transcripts demonstrate the risks in emphasizing "experiencing" over "interpreting" in clinical practice instruction. *See* note 2 *supra*. Experience can develop bad habits as well as good ones, even when "supervised." If the teachers and students in the foregoing excerpts did not understand the communication patterns in their conversations with each other it would have been better for these teachers and students to have looked more deeply into the patterns in these excerpts than to have moved on to handle more cases.

same to others.[104] The irony is that these teachers were interested in establishing bilateral relationships with their students in which understanding was publicly and collaboratively pursued. They were surprised to discover the patterns that emerged as their behavior was examined. They were unaware of the contradictions between their intended and actual methodologies and unaware that they were unaware.[105] Unfortunately, these excerpts are representative of the clinical practice instruction I have studied.[106]

III. IMPLICATIONS, CAUSES, AND CONCERNS

If the foregoing communication patterns are widespread in clinical practice instruction there are obvious possible consequences for student learning[107] and law practice,[108] but there is also a special lost opportunity dimension to their use. Law school instruction, in its totality, seeks to develop certain habits of mind. One commentator describes these habits as: "a skeptical attitude toward generalizations; an instrumental approach to law and lawyering; a 'tough-minded' and

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104. The students also acted in the persuasion mode. But the teachers' greater skill, stature, and formal power enabled them to impose their views. What outcomes an evenly-balanced persuasion-mode contest would have produced is difficult to determine.

105. For a description of this discrete state, see Nisbett & Wilson, *supra* note 70, at 255–57; C. ARGYRIS & D. SCHÖN, *supra* note 22, at 112–13.

106. The excerpts were selected, initially, not for their qualities of persuasion or learning, but because they occurred near the beginning, middle, or end of an instructional session. When their similarities were discovered, the rest of the recordings from which they were taken were screened for behavior that was different; all of the behavior was substantially the same. This conclusion has implications for the current debate about lawyer competence and morality. *See* Cramton, *Rising Expectations in Law Practice and Legal Education*, 7 N. KY. L. REV. 159 (1980) (and sources cited therein); *cf.* note 128 *infra*. Many of the participants in this debate do not seem to recognize the ambiguous nature of the lawyer behavior that they evaluate. *See, e.g.*, J. LIEBERMAN, CRISIS AT THE BAR (1977); A. STRICK, INJUSTICE FOR ALL (1977). These writers do not discuss the possibility that they could be attributing meanings to this behavior that their lawyer subjects did not intend or that other observers would not agree with. In this respect, these analyses are not philosophically "critical." *See* note 53 *supra*. These writers seem to assume that lawyers agree that their (the lawyers') actions are asocial or amoral, but persist in them anyway, usually (it is charged) for th money. The possibility that lawyer "amorality" could be misinterpreted persuasion mode behavior, used unselfconsciously and innocently out of habit, in situations where it did not belong, is not considered. In discussing lawyer amorality, however, it is necessary to differentiate between people who are evil, on the one hand, and people who are ignorant, lazy, and immature, on the other. By assuming the worst case (conscious malingering) in most instances, much current scholarship is often offensive as well as beside the point. This is known intuitively by many to whom the proposals for reform in such scholarship are addressed, and may often be the reason for the rejections of these proposals. Put another way, many writers use the persuasion mode to condemn the persuasion mode, and do not discuss the contradiction implicit in this action.

107. *See* text accompanying notes 53 to 55 and 104 *supra*.

108. *See* note 112 *infra*.

analytical attitude toward legal tasks and professional roles; and a faith that man, by the application of his reason and the use of democratic processes, can make the world a better place."[109] All of law school joins in this process — it is one theme that ties all law instruction together. The process is pursued more explicitly in the first than in subsequent years, but it occurs constantly.

In most law courses it is difficult for teachers to give individualized instruction in habits of mind. Classes are too large to have separate and continuous dialogues with each student, and the obligation of passing on information distracts attention from this task. In three years, most students will have few conversational opportunities to think deeply about a subject with their teachers. For most, the development of these intellectual habits will be a vicarious and private process.

Clinical practice instruction, with one-to-one relationships as its norm, provides a unique opportunity to do individualized instruction in habits of mind. Moreover, this instruction can be done continuously over time so that these habits can be understood fully and take hold. For some students this instruction would be advanced and for others remedial, but for each it would build upon and reinforce the equivalent instruction in other law school classes. In this way, clinical instruction would be one developmental stage in the student's acquisition of the intellectual habits of law. It is a central challenge of clinical instruction to perform this task. For clinical teachers to pass up this opportunity or worse, to use it only to reinforce the habits and values of domination and manipulation, is particularly sad.[110]

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109. Cramton, *supra* note 50, at 248. One could describe these habits differently, *see* G. BELLOW & B. MOULTON, THE LAWYERING PROCESS: MATERIALS FOR CLINICAL INSTRUCTION IN ADVOCACY 32–33 (1978), and Cramton does in his discussion of each. Cramton, *supra* note 50, at 248–52. I am not myopic in my view of the habits and values that make up the legal intellectual framework. They can produce evil as well as good, and can become straitjackets as well as heuristics. *See* J. SHKLAR, LEGALISM 9–10 (1964); *See also* Elkins, *The Legal Persona: An Essay on the Professional Mask* 64 VA. L. REV. 735, 738–41 (1978). In their design and potential effect, however, the legal habits of mind are liberating rather than constraining.

110. By using law school thinking methods in practice contexts clinical teachers also could demonstrate the ways in which analytical skills are eminently practical, and thus show the "relevance" of law classroom instruction.

Why clinical teachers[111] would use persuasion mode behavior so pervasively is difficult to discern but hypotheses are possible.[112] Because the foregoing data were collected before the persuasion mode

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111. I continue to limit my conclusion to clinical practice instruction. *See* note 12 *supra*. Communications that regularly would be ambiguous in a classroom might be clear face-to-face, or vice versa; and behaviors consistently perceived as manipulative and stifling (*i.e.*, persuasion mode) in one setting, might be seen consistently as structuring and stimulating (*i.e.*, learning mode) in the other. The persuasion/learning mode construct might be a useful heuristic device for analyzing classroom instruction, but systemic differences between one-to-one and one-to-many relationships suggest a separation of classroom and practice instruction for purposes of this analysis.

These reasons notwithstanding, some have suggested that it is disingenous to pretend that this article is not about law instruction generally. It is obvious from the analysis, they say, that overuse of the persuasion mode is a problem in traditional law teaching as much as it is in clinical teaching. I do not intend to be coy on this issue. I believe that my basic thesis is true of traditional law teaching. However, the explication of that thesis on the basis of data from traditional settings would be different in important respects from what I have said here. I want to be careful to avoid the charge that I have extrapolated too freely from limited data. I am collecting data about traditional law instruction and I plan to write about that subject in the future.

112. The consequences of this pervasive teaching of the persuasion mode may not be limited to the learning of law. The clinical students I have observed regularly behaved toward clients and colleagues in ways that strikingly resemble the persuasion mode. For example, in interviewing, students often reconstructed past events incompletely by missing or by filling in ambiguity in factual reports; unnecessarily controlled decisions about topic choice, emphasis, and the nature of significant evidence; avoided relevant issues where strong feelings were present; and "protected" others from embarrassing or threatening topics by not discussing these topics.

In counseling, students regularly narrowed options selectively and secretly; argued for preferences subliminally and indirectly; predicted outcome in unconfrontable and self-reinforcing ways; and manipulated expectations through selective release of information about procedures, customs, institutions, and personnel. In working with peers and supervisors, students routinely suppressed relevant ideas and feelings that were different from those held by persons in authority; uncritically accepted suggestions of superiors without probing statements such as "my experience is"; filled up days with technical tasks to the exclusion of reflective analysis; avoided review of their work by minimizing contact with supervisors; staked out idiosyncratic positions and held stubbornly to them, even when obstructionist; and "forgot" to consult supervisors before acting materially to affect their casework.

Often, the students' use of the persuasion mode was quite subtle. For example, in the following discussion a student wanted to determine whether a legal aid client would consent to having her interview videotaped.

Student/Attorney: First, thank you for coming . . . first of all, for cooperating with this. We've done it before and it's worked out successfully, but if there's anytime you feel at all uptight about it, or at all nervous, tell me, and we can just click it off like that. Thank you for also, umh, for coming in from _____ umh. We usually, we're very new on this appointment basis, and we know that makes clients have to wait a few weeks, but it does help out, and we

hypothesis was articulated, however, participants were not questioned for motive, purpose, or justification. Thus a discussion of causes must necessarily be speculative.[113] Perhaps clinical teachers have not identified the patterns of persuasion mode behavior in themselves and in clinical law instruction, reduced these patterns to descriptive statements, and analyzed them explicitly for usefulness and limits.[114] Clinical teachers' theories of instruction may be no more than catalogues of maxims dictating avoidance of those parts of their own legal education they found most objectionable. Their understanding may be symptomatic, however, and cause them to believe that changing the outward tone of teacher-student interaction is the same as changing its substance.

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	think we can give better service. So I thank you for that also. You're in for a divorce case?
Client:	Yeah.
Student/Attorney:	Why don't you begin to tell me something about . . . (client interrupts).

Prior to the meeting, the client had been asked by a receptionist if she would agree to the taping, and she "consented." The student had decided to "test" this. Yet his method all but guaranteed that the conclusion would be confirmed. He began with a presumption in favor of taping, thanked the client for agreeing and then said (implicitly) that those who tape are "cooperative" and "successful," and not "uptight" or "nervous," leaving the client to conclude that those who do not tape are ungrateful, obstructionist failures, constantly on edge. He left little room for the client to react before changing the topic and thanking her again. The student smiled throughout and used a tone of voice that was friendly. What the client would have done had she been told that taping was a choice, that how she chose would not affect her representation, that cooperative, successful, and relaxed people sometimes chose not to tape, and that her tape would be shown to large classes of law students in the same city and across the country, is difficult to know. It is such domination through subliminal signaling, the same process used by the clinical teachers in the excerpts in the text, that is the most widespread form of client control in the clinical practice I have observed.

The suggestion that clinical students may transfer persuasion mode habits, learned from or reinforced by their teachers, to law practice is admittedly speculative. Longitudinal studies have not been done on the participants in my data, and the additional variables that influence practice behavior are legion. On the other hand, the assumptions underlying such a suggestion — that law schooling (including practice instruction) socializes, *see* note 41 *supra*, that socialization develops habits, and that habits transfer from setting to setting — are not startling. *See* Stone, *supra* note 4, at 422.

113. *See* Bakan, *supra* note 22, at xiii–xiv.

114. There is a subcategory to this lack of awareness explanation. Each of the teachers in these excerpts may have had objectives for these meetings that were in conflict with effective instruction. For example, without knowing it, each may have wanted to avoid issues that troubled him emotionally or intellectually, to compete successfully with his students in evaluation of work product, to wield power unilaterally, or to convince the student of the "correct" interpretation of whatever was being discussed. These objectives may have been strongly but tacitly felt and the teachers may have pursued them unselfconsciously but strategically (as one would expect). Compare the behavior of the student as illustrated in note 112 *supra*.

There are factors suggesting that such incomplete understanding might exist. For example, in the early models of clinical instruction, maximizing lawyering experiences for students was the most important priority, and elaborate fieldwork mechanisms were developed to respond to this felt need. These programs became bureaucratic nightmares, turning "instructors" into office managers, who had all they could do to see that deadlines were met. The Council on Legal Education for Professional Responsibility (CLEPR), despite its many beneficial contributions to clinical instruction, had much to do with this "experiencing" emphasis.[115]

One consequence of this emphasis was that clinical instructors found themselves in worlds where scholarship was impossible because all of their fingers were in dikes, and where the adoption of a critical perspective on their teaching was too threatening to contemplate because there was not time to act on critical insights, even if present. This noncritical "experiencing" tradition may still be dominant, even though the scope of most fieldwork programs has begun to be controlled and, in some places, perhaps cut back.[116] This emphasis may not have prevented clinical teachers from teaching effectively at first, but in an insidious way, it may have set them on a course of self destruction.[117]

115. *See* note 2 *supra*. CLEPR is also a synonym for William Pincus, the only director the organization has ever had. In the preface to a new edition of his essays, Pincus reports that "CLEPR has been credited with having had the most significant impact on legal education since Christopher Columbus Langdell gave the case system of instruction to the law schools a century ago. We would agree . . . ." W. PINCUS, *supra* note 2, at xi. Pincus does not say who gave CLEPR this credit or why. Moreover, he does not seem to appreciate that the secret of Langdell's success was a new intellectual paradigm for law study, capable of justification (albeit, within a "community of interpretation," *see* Abraham, *supra* note 13, at 685–86), at then sophisticated levels of philosophical and scientific thought, as well as productive of practical results. The power of the so-called Langdellian innovation was that it was both intellectual and practical; in some ways all things to all people.

Proponents of clinical education, particularly CLEPR (Pincus) have not yet provided the intellectual equivalent of Langdell's famous "law study as science" argument. One feels guilty about criticizing Pincus's writing for the absence of an intellectual justification for clinical teaching. In some ways, it is like condemning a dinghy for not being a destroyer. But the fact that Pincus's work is viewed as serious scholarship by many clinical teachers, and the patent irresponsibility of spending ten million dollars on a dinghy, make the criticism necessary. I appreciate that the foregoing paragraph may not be in the learning mode.

116. *See* Memorandum from the Special Committee on Clinical Education of University of Michigan Law School to Faculty (Mar. 30, 1979), at 17–18. *But see* Memorandum from the Committee on Clinical Education of Harvard Law School to Faculty and Students (Mar. 20, 1979), at 6 (copy on file with R. Condlin).

117. Eventually, students do not enroll in courses in which the idea content does not evolve. *Cf.* Pipkin, *supra* note 41, at 257–65 (discussing the effect on student enrollment of the failure to develop idea content in the professional responsibility field). This is particularly threatening to clinical instruction because much of its presence in law school is attributable to student demand.

Since the idea content of clinical instruction has not developed in scholarship,[118] it may be that there are now very few clinical ideas, new

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118. Most clinical "scholarship" is found in such journals as the *Newsletter of the Council on Legal Education for Professional Responsibility (CLEPR), The Journal of Legal Education, Clinical Legal Education Perspective,* and bar association journals. In a fashion that reminds one of grant proposals, these articles usually guide the reader over the surface of some new (or not so new) course of study offered by the authors at their respective schools. *See, e.g.,* G. GROSSMAN, *supra* note 2, at 40–55 (representative examples). "Reflections on my semester" seems to be the organizing theme, though more often than not "reflections on" means "mechanical description of." This format may have been borrowed from an early article that was truly reflective, *see* Bellow & Johnson, *supra* note 5, but in most cases little more than the word reflections has been transferred. For representative examples of a still separate category of writing that I would term "opinion evidence" on the value of clinical instruction, see articles written by Pincus and Brickman cited in G. GROSSMAN, *supra* note 2, at 18–19, 32. *See also* W. PINCUS, *supra* note 2, where all of the Pincus scholarship is collected in a single volume. The foregoing literature evidences few, if any, of the characteristics of university scholarship. For example, discussion of unproductive teaching methodologies or substantive ideas about law practice is virtually non-existent. One looks in vain, as Herbert Dreyfus did into the early scholarship about artificial intelligence, "for a few carefully documented failures." H. DREYFUS, WHAT COMPUTERS CAN'T DO: THE LIMITS OF ARTIFICIAL INTELLIGENCE 2 (rev. ed. 1979). The most recent addition to the clinical "literature" is the long awaited Report by the AALS-ABA Clinical Guidelines Committee. It is, unfortunately, the proverbial camel, that is, a horse built by a committee.

The time for the development of clinical scholarship is early, however, and there are promising signs. There are three new, excellent clinical coursebooks, *see* G. BELLOW & B. MOULTON, *supra* note 107; L. BROWN & E. DAUER, *supra* note 10; R. REDMOUNT & T. SHAFFER, LEGAL INTERVIEWING AND COUNSELING (1980); a number of thoughtful new texts about lawyering processes, *see* D. BINDER & S. PRICE, *supra* note 84; K. HEGLAND, TRIAL AND PRACTICE SKILLS IN A NUTSHELL (1978); T. SHAFFER, LEGAL INTERVIEWING AND COUNSELING IN A NUTSHELL (1976); A. WATSON, *supra* note 84; and a flurry of new writing in the law journals which, although mixed in quality, has begun to address basic conceptual questions from explicit intellectual frameworks. While little, if any, of this scholarship is "mature" in a larger sense, *see* T. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 10–15 (1962) (describing the characteristics of mature scholarship in scientific research); Derrida, *supra* note 13, at 210–12 (illustrating theoretical dispute in the mature scholarship of the philosophy of language), there is a subtle and promising evolutionary trend in these articles. *Compare* J. Barkai, *supra* note 13; Simon, *supra* note 3; G. Lowenthal, A General Theory of Negotiation Process, Strategy and Behavior (1980) (unpublished paper) (copy on file with R. Condlin); Meltsner & Schrag, *supra* note 4; *and* Lowry & Kennedy, *supra* note 63, *with* the articles in COUNCIL ON LEGAL EDUCATION FOR PROFESSIONAL RESPONSIBILITY, CLINICAL EDUCATION FOR THE LAW STUDENT (1973) *and* CLINICAL EDUCATION AND THE LAW SCHOOL OF THE FUTURE (1971). For a more positive assessment of the foregoing literature, dividing it into schools of thought, see C. Menkel-Meadow, The Legacy of Clinical Education: Theories about Lawyering (unpublished paper) (copy on file with R. Condlin). If the gauntlet of Simon's attack on the "psychological vision" is picked up, as it should be, *see* Simon, *supra* note 3, the first disciplinary dispute within clinical scholarship may result. It is ironic, though perhaps not surprising, that Simon was not a university law teacher at the time that he wrote his attack. For an example of how such disputes can contribute to the maturation of a subject, see B. KUKLICK, THE RISE OF AMERICAN PHILOSOPHY 256–337 (1977) (describing the disputes between William James and Josiah Royce and the effect of those disputes on the development of their respective philosophies).

to students, to teach. If so, clinical teachers may be compensating for this deficiency by becoming increasingly authoritarian.

Clinical teachers also lack certain resources the presence of which would make understanding their subject easier. For example, they do not have elaborately developed teaching materials embodying alternative conceptions of subject matter, nor mentors or colleagues who have identified and can transfer finely honed subject matter insights and pedagogical techniques. Clinical teachers must manufacture or discover these resources (which their non-clinical colleagues take for granted) in the first instance, while simultaneously meeting instructional commitments. This problem is exacerbated by the idiosyncratic nature of the clinical subject matter whose time frame, setting, and data base differ substantially from those of traditional law teaching.[119]

In addition, clinical teachers may fear that a self-conscious examination of the (persuasion and learning mode) values underlying their teaching would result in "indoctrination" of students in teacher values.[120] These teachers may believe that they should remain neutral about such issues and that silence equals neutrality. The difficulty with this understandable wish to remain neutral is that neutral vantage points do not exist.[121] A clinical law teacher cannot avoid taking sides in the continual conflicts between competitive and collaborative values in law relationships. He must choose, and his choices will be apparent to the world around him. A belief in neutral vantage points can hide these facts from a teacher; and unselfconsciousness about such a belief, perhaps present in the preceding illustrations of practice supervision, can prevent a teacher from becoming aware of his "neutral" ideological constraint.

The irony is that the unavoidable argument for particular value preferences that the teacher will make (if only in the way he acts) is more likely to indoctrinate when it successfully anesthetizes the skeptical faculties of the student, for example, by convincing him that the teacher is neutral. A clinical teacher can avoid indoctrination only by identifying and discussing noncoercively[221] the value preferences implicit in his teaching; this action puts a student on notice that he must provide the argument and evidence that the teacher will not.

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119. *See* note 2 *supra*.

120. Indoctrination is an academic *bête noir*, and a preoccupation with its avoidance has stunted growth in several fields of instruction in recent years. *See* Oldenquest, *supra* note 42, at 243–46; Bennett & Delattre, *Moral Education in the Schools*, THE PUBLIC INTEREST 81 (1980).

121. *See* Bellow, *supra* note 3, at 376.

122. *See* note 42 *supra* (describing noncoercive dialogue).

Clinical teachers' refusal to consider value perferences explicitly, perhaps a paternalism based upon a low opinion of their students abilities to think for themselves,[123] creates a more serious risk of indoctrination than anything else that clinical teachers could do.

Another possible explanation for clinical teacher persuasion mode behavior, and this is more difficult to assess, is that many clinical teachers may not conceive of themselves as teachers, even though they say that they do. Many have come recently from practice and may not have adjusted their role conception or values from those of lawyer to those of teacher.[124] They may have one understanding of the technique of law practice and feel a natural inclination to convince others of that understanding. Critically examining their own first premises, in public, against an ideal, for the purpose of understanding may be an unfamiliar process.

Finally, in using the persuasion mode pervasively, clinical teachers may be doing no more than carrying out their part of a tacitly shared institutional and cultural task. Persuasion mode behavior is used throughout law school dialogue for tacit instruction in "adversarial skills," and it appears in the culture at large[125] perhaps as one manifestation of the aggressive instinct. As such, the mode is second nature to teachers and students and a process that they are implicitly asked to perfect.

IV. CONCLUSION

It would be ironic and sad if, in fact, clinical teachers suggested and reinforced habits likely to be ineffective in much of law learning and practice. Ironic because the clinical teachers I have studied did not intend to teach ineffective habits, and when they discovered this content

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123. *See, e.g.*, notes 88 to 97 and accompanying text *supra*, where this kind of paternalism seems to be at the basis of the teacher's refusal to raise and discuss his judgment that the student was arrogant.

124. *Cf.* W. PINCUS, *supra* note 2, at 105. The tension between scholarship and practice interests is a familiar one, about which commentators have written insightfully and eloquently. *See, e.g.*, Bergin, *The Law Teacher: A Man Divided Against Himself*, 54 VA. L. REV. 637 (1968); Redmount, *The Transactional Emphasis in Legal Education*, 26 J. LEGAL EDUC. 253.

125. *See, e.g.*, D. RIESMAN, INDIVIDUALISM RECONSIDERED (1954); P. SLATER, THE PURSUIT OF LONELINESS (1970). This raises the question of whether persuasion mode behavior is unique to legal education or whether it is found in professional education generally. Considerable recent scholarship suggests that patterns in the socialization of lawyers parallel similar patterns in the socialization of other professionals. *See, e.g.*, B. BLEDSTEIN, THE CULTURE OF PROFESSIONALISM (1976); T. HASKELL, THE EMERGENCE OF PROFESSIONAL SOCIAL SCIENCE (1977); M. LARSON, THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS (1977).

in their teaching, they repudiated and began to correct it.[126] Moreover, clinical teachers as a group have been concerned about issues of teaching and learning out of proportion to their numbers in law school. They write almost exclusively about methodology,[127] experiment with new forms and systems of instruction, and, according to their reports, incorporate the end products of this reformist effort into their teaching. It would be sad if clinical teachers taught such habits, not only because one-to-one law school instructional opportunities are a resource too precious to waste, but also because, in their own way, clinical teachers would then contribute to the causes of the popular dissatisfaction with lawyers.[128] This is the opposite of their objective but may, in fact, be the

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126. For these teachers, precise knowledge of their ineffectiveness has produced learning dilemmas, *see* note 32 *supra,* which the teachers felt competent and encouraged to resolve. *See* note 87 *supra.* It has not been necessary for them to investigate clinically (in the psychological sense) the causes of their behavior before beginning to change it. (However, some issues may mobilize strong defenses, which will prevent resolution by acts of intellect and will — a separate issue not addressed here.) Argyris has described the change process in more detail. *See* C. ARGYRIS & D. SCHÖN, *supra* note 22, at 110–36; ARGYRIS, *supra* note 22, at 23–26.

127. "Methodology" is not the precise term, *see* note 3 *supra,* but it is close enough to lead clinical teachers to the patterns I have discussed.

128. *See* note 112 *supra.* Over the years lawyers and their activities have been disliked. *See, e.g.,* M. BLOOMFIELD, AMERICAN LAWYERS IN A CHANGING SOCIETY 1776-1876, 32–34, 44, 46, 49–52, 84–85, 136–37 (1976); J. HURST, THE GROWTH OF AMERICAN LAW 250–52, 275, 277, 278 (1950); D. MELLINKOFF, THE CONSCIENCE OF A LAWYER 12 (1973). At the moment, this dislike appears to be particularly intense. *See, e.g.,* Auerbach, *As Lawyers Multiply, Civilization Decays,* LEARNING & L., Summer 1977, at 10; J. LIEBERMAN, *supra* note 106; A. STRICK, *supra* note 106. For a qualified and, to some extent, contradictory view, see Botein, *Professional History Reconsidered,* 21 AM. J. LEGAL HIST. 60, 70–78 (1977); Botein, *Reflections on the New Humanism in Law,* 22 WAYNE L. REV. 1295 (1976).

Lawyers are criticized for four generic failings: (1) unsociability — that they manipulate and control people, are insensitive to the nontechnical and personal dimensions of relationships, and (even when on the same side) are unpleasant to deal with, *see, e.g.,* T. SHAFFER & R. REDMOUNT, LAWYERS, LAW STUDENTS AND PEOPLE 107–35, 231–52 (1977) (and bibliography contained therein); Redmount, *Attorney Personalities and Some Psychological Aspects of Legal Consultation,* 109 U. PA. L. REV. 972 (1961); Watson, *supra* note 4; (2) superficiality — that they are unimaginative and shallow technicians who routinely simplify and process cases so that client interests go underdeveloped and inadequate outcomes are produced, *see, e.g.,* D. ROSENTHAL, LAWYER AND CLIENT: WHO'S IN CHARGE? 29–61 (1974); Bellow, *Turning Solutions Into Problems: The Legal Aid Experience,* NLADA BRIEFCASE, Aug. 1977, at 106; Hosticka, *We Don't Care About What Happened, We Only Care About What is Going to Happen: Lawyer-Client Negotiations of Reality,* 26 SOC. PROB. 599, 607–609 (1979); Spiegel, *supra* note 10, at 97–98 (and sources cited therein); (3) obsolescence — that they are trained in outmoded competencies, are bad innovators and planners, and have little ability to learn cumulatively from experience or to work with other professionals in solving problems or developing new systems and institutions, *see, e.g.,* C. ARGYRIS & D. SCHÖN, *supra* note 22, at 143–44; E. SCHEIN, PROFESSIONAL EDUCATION 34–36, 47–50 (1972); Ehrlich, *Future Roles for Lawyers:*

effect. For these reasons, the hypothesis that clinical practice instruction is persuasion mode in nature bears careful and scrupulous analysis. There is no reason to presume that clinical teachers will use learning mode behaviors,[129] and the behaviors which they do use must be determined empirically, not impressionistically.

Reflections on Crossing the Bar, 26 CLEV. ST. L. REV. 325, 326–28 (1977); Lasswell & McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest,* 52 YALE L.J. 203, 205, 212 (1943); Miller, *Public Law and the Obsolescence of the Lawyer,* 19 U. FLA. L. REV. 514, 521 (1966–67); Palmieri, *The Lawyer's Role: An Argument for Change,* HARV. BUS. REV., Nov.-Dec. 1978, at 30, 38; Wasserstrom, *Postscript: Lawyers and Revolution,* 30 U. PITT. L. REV. 125, 129 (1968); Wexler, *Practicing Law for Poor People,* 79 YALE L.J. 1049, 1053, 1056–57, 1060–61, 1065–66 (1970); and (4) amorality (or apoliticality) — that they systematically make all their skills and knowledge available without regard to objectively defined and idealistic standards of right and wrong, fair and just, *see, e.g.,* Frankel, *Can a Good Lawyer Be a Good Person,* NAT'L L.J., Nov. 27, 1978, at 19; Freedman, *Personal Responsibility in a Professional System,* 27 CATH. U.L. REV. 191, 193–96 (1978); Jones, *supra* note 61; Lehman, *supra* note 10, at 1084–96; Richards, Moral Theory, The Developmental Psychology of Ethical Autonomy, and Professionalism 1–5 (Jan. 20, 1979) (unpublished paper, delivered to N.Y.U. Colloquium on the Teaching of Ethics and Moral Values) (copy on file with R. Condlin) (and sources cited therein); Simon, *supra* note 3; Simon, *supra* note 22; Wasserstrom, *Lawyers as Professionals: Some Moral Issues,* 5 HUMAN RIGHTS 1, 5–6 (1975).

129. It may be difficult for clinical teachers to believe that they are reinforcing ineffective habits because the opposite is their conscious objective. If so, their mistake is to assume that their thoughts must be as fathers to their deeds. Persons, even clinical law teachers, often act inconsistently with their espoused views, sometimes on a massive scale. *See* C. ARGYRIS & D. SCHÖN, *supra* note 22, at 37–62; Bolman, *supra* note 22, at 111, 116. Good intentions are important (without them ineffective behavior would not create dilemmas, *see* note 32 *supra*) but they are far from enough. ARGYRIS, *supra* note 22, at x.