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Being a Teacher, of Lawyers: Discerning the Theory of My Practice

by

HOWARD LESNICK*

When I first expressed interest in participating in this symposium, I described the Essay I wanted to write as one speaking to the question, what can teachers contribute to practitioners that will be responsive to the reality of their work lives in engaging with issues of professional responsibility and professional identity in practice on behalf of subordinated people. Having on that basis ensnared the interest of the symposium’s organizers, I find that to address the question I need to be more explicit than I have heretofore been about what it means (to me) to “teach,” in particular, to teach people who are or are becoming lawyers.

I have long been dissatisfied with the prevalent notion of teaching. That notion, I believe, is that what we are doing is transmitting some of our acquired knowledge and skills, which will be useful to our students in their careers. We have the knowledge (provided that we keep up our scholarship), our students need it, and in teaching we “impart” what we have to them. In describing this concept, Robert Bellah has used a metaphor that I, and many of the students with whom I have shared it over the years, find distressingly familiar: “The pervasive emphasis on [this] instrumental use of knowledge has tended to make of the university a kind of universal filling station where students tank up on knowledge they will ‘need’ later.”

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I am grateful to Carolyn Schodt for (once again) helping me to develop my perception of the teaching and practice of law by sharing with me her profound understanding and insight about the teaching and practice of nursing.

I find this approach woefully deficient. It trivializes both knowledge and the utility of knowledge, first by overvaluing its utilitarian over its intrinsic worth, then by focusing on narrowly instrumental measures of utility while losing sight of the deeper value of knowledge (whether it be knowledge of legal doctrine, skills, history, or theory) as a means to greater understanding of the world and of oneself. By seeking to justify present choices in terms of the future, it excessively dichotomizes the present and the future, thereby gravely diserving students’ capacity to learn to live integrated lives. \(^2\) It both inflates and cabins, in troubling ways, the work of the teacher: by exaggerating the value of expertise and authority, it denigrates and inhibits the self-teaching capacities of students; at the same time, it tends to render “off limits” a teacher’s motivation to engage more than the analytic or argumentative powers of his or her students. It delegitimates the authentic experience and motivation of many teachers by fostering a view of research and scholarship as augmenting, and of teaching and other student-oriented work as depleting, a teacher’s “human capital,” thereby helping to erect a destructive conflict of interest between teacher and student. It gives students an implicit model of the professional relation that encourages them to adopt a comparably crippling view of the attorney-client relation, and an implicit model of political life that is profoundly antidemocratic and justificatory of inequality. Most fundamentally, it reifies both teacher and student, in that it abstracts their roles as teachers and students from their individual identities; it uses people to teach things, not recognizing (as a wise friend long ago said to me) that teaching is using things to teach people.

A central prop of the prevailing approach is the fear that its rejection must entail the illegitimate indoctrination or coercion of students, or a repellent and self-defeating preaching to (or at) them. I agree that this polar consequence is both illegitimate and self-defeating. I acknowledge, too, that these concerns need to be taken seriously. Students can easily accept (or reject) a teacher’s values or world view more as a result of the traditional teacher-student role dynamic than out of any sense of the student’s emergent sense of self.

But I cannot accept as axiomatic the implicit assertion that we must choose between polar vices. I regard submission to such a limit on choice as what, in an analogous context, I have termed “an act of cosmic despair.” I repeat those words here because I think it important to recognize that the effort to which I want to give voice in this Essay is an act

\(^2\) Howard Lesnick, Comment, \textit{in Dworkin et al., supra note 1}, at 88, 88-89.

of hope, a refusal to surrender to despair. This effort rests in part on the perception that the traditional view contains an element of despair, seldom acknowledged and almost never confronted squarely, that accounts for a significant portion of the weariness and cynicism that too often afflicts our profession.

Curiously enough, the theory of teaching that I want to articulate is embedded in one aspect of the etymology of the word, *educate*: it is derived from the Latin word, *educere*, to draw out something latent. To me, it revolutionizes the idea of teaching to think of it as bringing out something that is in a student, rather than putting something in that the student lacks. When Socrates demonstrated in the *Meno* that the slave-boy “knew” that “the square on the diagonal of a square is double its area,” to me he was demonstrating, not the latency of some forgotten prenatal knowledge, nor his own ability to ask leading questions, but the latent ability to transform oneself that is constitutive of being human. There is somewhere a magnificent line of Albert Schweitzer’s, which (as best I can remember it) says, there is a physician within each of us, and the practice of medicine is the art of bringing out the physician in the sick person.

To draw out of students what is latent inside them, teachers must, I believe, put more of ourselves into our engagement with the subject matter of our teaching. At the same time, we must struggle to do this in a way that encourages our students to look for more of themselves in their responses to us and to the subject matter. I want to say something about each branch of this teacher-student dyad.

That I do not find the path wholly unmarked is in large measure due to Roger Cramton. Consider these thoughts of his:

> Since my thesis is that ultimate questions need to be discussed in law school, it is only fair that I reveal my tentative and halting views...

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5. To Socrates, the fact that the boy, ignorant of geometry, could be led to understand the relation between the length of a side of a square and its area proved that “learning” was the recalling to awareness of knowledge that the immortal soul had acquired in earlier lives. See *id.* at 370-71. What this reasoning (taken literally) demonstrates to me is the prenatal existence of Newtonian thinking.

6. For example, for most of my teaching career my primary interest has been labor law. That was so, I believe, not merely because it was an interesting, ever-changing field or a “hot” subject in 1960, when I began to teach law. My attraction to the subject is embedded in my belief in the centrality of work to the meaningfulness of human life and the viability of democratic values. Yet any manifestation of this belief in my classes was probably wholly implicit. For a late and partial acknowledgment of the connection, see Howard Lesnick, *The Consciousness of Work and the Values of American Labor Law*, 32 Buff. L. Rev. 833 (1983) (reviewing *James G. Atkinson, Values and Assumption in American Labor Law* (1983)).
on some of the vital questions: Who am I? What am I doing here? What should I do with my life? There is a risk in opening oneself in this manner, but one encouraging belief of mine is that trust in others and acceptance of oneself is a crucial predicate of meaningful moral discourse. Hence I believe—a belief itself worthy of analysis and criticism—that the effort to be self-consciously critical about our operating assumptions requires us to reveal our most deeply held beliefs.

What do I profess? Here I am, a struggling pilgrim, beset by doubts and anxieties, painfully aware of my own limitations and failures. Even Moses, when God called to him out of the burning bush, replied that he was not adequate to the task of bringing the Jewish people out of bondage. "But who am I," Moses said, "that I should [do these great deeds]. . . . I am [unworthy] and slow and hesitant in speech." And God replied: "Who is it that gives man speech? Is it not I? . . . Go now; I will help your speech." Well, God has not spoken to me, so I cannot rely on a vivid and overpowering personal experience. I have had to figure things out for myself as best I could, evaluating those parts of my cultural and religious traditions that seemed most relevant, consistent, and truthful.

My own tentative formulation builds on traditional Judeo-Christian ideas of "faith, hope and charity" as well as the idea of justice. My basic faith is in the goodness of creation and the sacredness of many things but especially the human spirit. These ideas, consistent with my experience and reflection, lead me to believe that human life has meaning and purpose.

Love and justice . . . are two faces of the same ultimate reality. Love is a special problem in today's law school.

"Love" carries connotations of both sexual love and a shallow, other-oriented do-goodism . . . . We have no word that embodies a committed concern for commonweal, whether the social unit is the family or a neighborhood or the workplace or the nation or the world.

There is something more to being a fully developed human being than atomistic selfishness—when each seeks to advance oneself, one's tribe, or one's genes at the expense of others, of society, or of nature. Even though we may experience it only rarely, love is a reality that, like truth, can build communities that are fully human. In an ultimate sense, both love and justice come from a source beyond us—a transforming, ennobling source that some call God. Love and justice are gifts that come to us by grace; they are not things given by government or institutional arrangements, although fully human people can help by giving them to each other. Law, the efforts of lawyers, and the character of our social and legal arrangements can further them or frustrate them. In this view, love and justice are related: justice must
always be informed by love if it is to be just; and love must always meet
the demands of justice if it is to be loving.7

What I take Cramton to be saying, and what I want to say, is that
our teaching should be informed by our own ongoing engagement with
the questions: “Who am I? What am I doing here? What should I do
with my life?” That Cramton’s response to these questions may not be
yours, or mine, does not undermine his thesis that the questions need to
be asked.8 Nor does Cramton (or I) present this response as a proposed
set of lecture notes; he was speaking, not to a class, but to members of a
student religious organization. Finding ways in which our emergent re-
sponses to these questions can be manifested in our classrooms is a com-
plex and challenging task. What is clear to me is that neither our
engagement with the questions nor our responses should be suppressed as
an irrelevant or an intrinsically illegitimate input to our teaching.

It is not easy—it has not been easy for me—to engage with these
questions. I have had to bear in mind that responses are not quickly
packageable, in the classic classroom or courtroom manner. I also have
had to come to understand that the process of asking fundamental ques-
tions need not be unavoidably bound up with authoritarian religion or
totalitarian politics. Cramton carefully prefaced his thoughts with the
acknowledgment that they derive from his own “religion and cultural
traditions” and that “the argument from authority is the weakest of all
arguments—a good starting point, perhaps, but only that. Every belief
must be tested by one’s experience, evaluated for consistency with other
beliefs that one has found useful and reliable, and compared with con-
trasting views.”9 Certainly, we must continually monitor our tendency
to confuse deeply held values and beliefs with the truth. At the same
time, we can acknowledge that our beliefs are contestable without
thereby surrendering our bases for holding them and shaping our lives by
them. We can reject the idea of unquestionable authority; we can steer
clear of the hazard of presenting ourselves as such an authority; and we
can yet retain and acknowledge the wellsprings of our identity.10 In that

7. Roger C. Cramton, Beyond the Ordinary Religion, 37 J. LEGAL EDUC. 509, 516-18
8. I do not want to allow the importance of recognizing the truth of the statement in the
text to distance myself from Roger Cramton’s answer. I find it a constant source of inspiration,
wisdom, and beauty. If God did not help his speech, he does remarkable work on his
own.
9. Cramton, supra note 7, at 515.
10. In addition to Cramton’s discussion, id. at 514-15, I have found the work of Katha-
rine Bartlett and Emily Fowler Hartigan especially helpful to this effort. See Katharine Bart-
lett, Feminist Legal Methods, 103 HARV. L. REV. 829, 880-84 (1990); Emily Fowler Hartigan,
regard, I (and some of my students) have benefited from this classic ad-
monition of George Fox:

You will say, Christ saith this, and the apostles say this; but what
canst thou say?11

These words remind me that the difficulty of freeing one’s mind from the
objectionable coercion of authority (of the merely powerful as well as the
divine) is in part a product of internalized, and not merely external,
constraints.

Recall too that, although Cramton does not shrink from speaking of
love, and of God, his subject is teaching law. He refuses, as I want to
refuse, to cabin the role of “lawyer” or “teacher” narrowly off from his
personhood, recognizing the ways in which our deepest identities inform
our professional identity. We need to discern the existence of a link be-
tween our responses to questions of professional choice and our most
fundamental world views. Kenneth Penegar, in articulating the “pillars of
professionalism” that shaped the Model Code of Professional Responsi-
bility, gave voice as well to what he termed a “competing visionary ideal”
faintly observable in some aspects of the Model Code. Although he did
not avow it as his vision, he articulated it in words of extraordinary sensi-
tivity and discernment, words to which I would happily subscribe:

In the society of the competing visionary ideal, there is a shared
consciousness wide enough to maintain the individual as primary
moral agent and at the same time hold to a concrete sense of commu-
nity . . . . Human cooperation is facilitated in a variety of ways and not
predominantly through bargained exchange. The definition and place
of roles, especially vocational and professional ones, are tentative and
less influential than within the dominant vision. The individual’s
moral autonomy is prominent and not obscured by role and status.
The democratic ideal is prominent in discourse about the complete
range of associations and not limited to merely governmental issues.
The possibilities of social experiment are consciously encouraged, and
the forms of society needed to shape the good are recognized as unfin-
ished and immanent, still to be expressed, fully discovered and
attempted.12

Penegar recognized that this “competing ideal,” expressed as it is in
the borderland of professional and “personal” or “political” value sys-
tems, rests on still more fundamental beliefs. Hear his quotation of some

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11. Testimony of Margaret Fox, in The Works of George Fox 1:50 (AMS Press 1975)
    (1831). Fox was the founder of the Religious Society of Friends (Quakers).
concluding passages from Robert Bellah and his associates’ recent study of contemporary America, *Habits of the Heart*:

Perhaps life is not a race whose only goal is being foremost. . . . Perhaps . . . there are practices of life, good in themselves, that are inherently fulfilling. Perhaps work that is intrinsically rewarding is better for human beings than work that is only extrinsically rewarded. Perhaps enduring commitment to those we love and civic friendship toward our fellow citizens are preferable to restless competition and anxious self-defense. Perhaps common worship, in which we express our gratitude and wonder in the face of the mystery of being itself, is the most important thing of all. If so, we will have to change our lives and begin to remember what we have been happier to forget.

We will need to remember that we did not create ourselves, that we owe what we are to the communities that formed us . . . .

What I aspire, then, to present more fully to my students is myself as a teacher and a lawyer, to share some of the aspirations for the teacher-student and attorney-client relations that have made them (at times) seem a fit context in which to live my life. My goal is in part an instrumental one. It is to invite my students to ask themselves what being a lawyer means, or can come to mean, to them. So, in teaching Professional Responsibility, I use the “law of lawyering”—both doctrinal development and theoretical critiques—to evoke in students their own responses to questions much like Cramton’s, questions about themselves as emergent lawyers. My goal is to teach students to ask themselves:

Who am I?
In my work as a lawyer, what will I be doing in the world?
What do I want to be doing in the world?

My aim is not to avow a particular set of answers as the truth, nor to lead students to reach answers like mine, nor even to teach them the relevant arguments in support of differing answers. It is rather to *avoid* the appropriateness of asking the questions, and to engage with whatever answers the questions call forth. *Teaching, to me, is evoking that engagement*. Imparting information, whether about these questions or my or anyone else’s answers to them, a fortiori about the law of Professional Responsibility, is a valuable part of teaching insofar as it tends to aid that process, as it often can; it is a positive interference with teaching when it tends to shut that process down, as it often does.

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14. It should be clear, therefore, that I am not denying my responsibility to assure students the means of learning “the law of lawyering” (or of any other subject I might teach). My goal is that knowledge of the law be “imparted” as a *by-product* of the central enterprise described in the text, not for its own sake. My view is close to that articulated by Erwin Chemerinsky, *Training the Ethical Lawyer: A Rejoinder to Schneier*. 1986 AM. B. FOUND. RES. J.
What I have said is not meant to privilege responses that focus on love or on God. I think of two colleagues, past and present, both rigor­ously secular in their avowals: one, a litigator and mentor of litigators, who sees in lawyering a combative and potentially effective vehicle for acting on feelings of outrage at the perpetrators, defenders, and beneficiaries of injustice; one, a student and critic of the contours of the substantive law, who sees in law a means of holding individuals responsible for their antisocial acts, in the name of their own personhood as well as of the protection of a concededly flawed social order. Through engagement with such teachers, students (and fellow teachers as well) can derive intellectual challenge, spiritual sustenance, and insight into their own nascent visions of law as a vocation. There need not be any special congruence between a student’s vision and a teacher’s. All that is needed is for teachers to present their ideas as responses to fundamental questions of identity and purpose, as aspects of themselves, and not only as “legal” positions; and to do so not primarily to espouse or test the correctness of their responses or the ability of students to contend over their correctness, but to draw out—to elicit—a similar process of self-definition in their students.15

I have drawn a contrast between the process of “engagement” and the exchange of expositions or arguments in support of teachers’ and students’ presentations. That process of engagement is a relational, and not merely an instrumental, interaction. Although it may contain, it is not dominated by, a desire to affect another’s world view. In its noninstrumental aspect, it seeks simply to present oneself authentically to the other, and to the world;16 in its instrumental aspect, it seeks to “impart” to students an enhanced capacity to realize their own selfhood. The delivery of that “tank of gas” is what teaching is to me.17

959. I have attempted to make my goal explicit, and to articulate its premises, in the Introduction to my coursebook, BEING A LAWYER: INDIVIDUAL CHOICE AND RESPONSIBILITY IN THE PRACTICE OF LAW (forthcoming 1992). (Some of what is written in that Introduction, and in this paper, is a revision of portions of an earlier unpublished paper, excerpts of which were quoted or paraphrased by Cramton, supra note 7, at 510-13. I hope that my hospitality to his words has not been influenced unduly by his earlier hospitality to mine).

15. See the discussion, and accompanying references, regarding the idea of “invitation,” in Howard Lesnick, The Wellsprings of Legal Responses to Inequality: A Perspective on Perspectives, 1991 DUKE L.J. 413, 443, 452-54.

16. See the discussion in id. at 453-54.

17. Jack Sammons finds the thought expressed in the text too accepting of “the opinions, aspirations, [and] judgment” that students bring to us as teachers. In felicitous terms, he asserts, “the truth stands in judgment of both the student and the teacher,” and (attributing the words to Stanley Hauerwas) observes: “Kindness is not treating the other as he is, but treating him as if he is capable of a good that he does not now possess, but is capable of possessing.” Letter from Jack L. Sammons, Jr., Professor of Law, Mercer University, to Howard Lesnick.
What are the implications of this theory of teaching18 for the teacher-practitioner relation, that is, for the work of a teacher as it is oriented toward practicing lawyers, rather than law students (or fellow teachers)? The short answer may be that most of us are happy to abjure that undertaking; academics tend to regard practitioners as providing a terrain in which to “teach” that is as unwelcoming as it is infertile. I have no dispositive response to that answer, other than to note that the “happiness” of many teachers, particularly those interested in the legal representation of poor or otherwise disadvantaged people, with this state of affairs is more than a little alloyed. Indeed, this symposium is one (but not the only) manifestation of a desire to find ways in which academics can be more helpful as academics (that is, other than as participants in litigation planning or brief-writing) to those who are actually “doing it.” Recalling again that I am here attempting to articulate a theory of teaching practitioners, I will say no more about the existence, present or potential, of a market for our talents.

Many academic lawyers share a desire to be of assistance to lawyers for disempowered people in ways that go beyond the limitations of doctrinally or strategically oriented presentations, perceiving that such activities, although an undeniably worthy and useful contribution of a teacher’s knowledge and skill, nonetheless fall seriously short of contributing all that teachers have to offer. At its best, theoretical scholarship addressed to the practice of law can be saliently powerful: Stephen Wexler’s landmark effort to reconceptualize “Practicing Law for Poor People,”19 and Peter Gabel and Paul Harris’ attempt to bring the insights of critical legal theory to bear on the practice of law,20 are classic examples


18. I take refuge in the fact that I am writing about “the theory of my practice,” and not the practice of my theory, to justify saying no more than I have about the very real difficulties, risks, and pitfalls involved in attempting to implement the theory. I have chosen to limit my topic in this way in order to overcome the tendency to express objections to a theory in terms of its practicality rather than to engage directly with its espousal as an aspiration. Proceeding immediately to engage with a theory at the level of implementation, congenial as it is to problem-solving lawyers, can lead to a “shadow” discussion, silently shaped by an unacknowledged difference over the appeal of the theory itself.

of what can be done. It is a truly heartening moment in a grievously disheartening world to see in the participants in this symposium a rising generation of academic lawyers with insight, energy, and devotion. By calling, in the name of the “teaching” of practitioners, for something different from that genre, I am in no way denying its strengths and importance. I am not seeking to supplant what emergent theoretical scholarship is doing, but only to suggest that there may also be a place for the conception of the teacher-student relation that I have attempted to articulate here in the domain of practice as well as school.

The hazard of theoretically oriented presentations, inherent in their very power, is that they have a tendency to be experienced by their addressees—especially by practitioners—as critical of who they are, rather than of what at times they do or the ways in which they are accustomed to think. Like most legal writing, such presentations tend to be prescriptive in their tone—what James Boyd White has felicitously termed, “structurally coercive”21—rather than sharing or disclosing the person of the speaker, and inviting one’s hearers to “try on” a somewhat different understanding of their work.

If we are to “invite” rather than “prescribe,” it is necessary not only to present ourselves authentically, but also to meet others on their own terrain. To do this requires that we be willing to engage with rather than judge or dismiss the existential realities of practice. We should not presume that the inhospitality of many practitioners to “academic” ideas is simply a product of their unreflective or anti-intellectual mindset. Consider some of the characteristics that many practitioners manifest: an impatience with “theoretical” notions lacking immediate payoff for the job at hand; a reluctance to question established norms of practice; a tendency to blame shortfalls on governmental and taxpayer hostility; a frustrating mix of inferiority and superiority about the choice (theirs and ours) between teaching and practice; an amalgam of feelings of pride and self-denigration in representing disvalued people and causes for egregiously inadequate pay and other forms of recognition from the profession; and a righteous refusal to question their own reliance on traditional norms of adversariness, so widely used by the “other side” to intensify the oppression of their clients.

To “teach” practitioners would, in my conception, be to make this array of responses a central part of the agenda rather than an unspoken barrier to proceeding with it. It would, for example, entail acknowledg-

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ing and engaging directly with the fact that questioning the socialization of the law office can undermine one’s ability to present oneself as prepared and knowledgeable. It would seek at the same time to enhance lawyers’ awareness of the loss, as well as the gain, in allowing that exigency to control one’s responses. In making that effort, this teaching would be seeking to displace reflexive action with conscious choice, neither dismissing barriers to change nor accepting without reflection the dispositive character of those barriers.

As with the teacher-student and lawyer-client relations, the task, as I see it, is to keep the responsibility of teacher and practitioner shared. The teacher’s task is to strengthen the practitioner’s experience of choice in his or her work, while genuinely leaving the practitioner space to exercise that choice. Teacher and practitioner need one another, even though each often experiences the other negatively. Practitioners, like all of us, need teachers (as well as academic lecturers, co-counsel, and critics), if they are to continue to grow, to keep striving to realize themselves in their work, to hold at bay the experience of meaninglessness and burn out that laps at our feet in all that we do. But teachers need practitioners as well, to ground their thinking in the concrete settings in which it is played out. Practitioners have the experience and the confidence to provide a source of feedback that goes beyond what students can usually give us. And there is learning for the teacher even in the negative or inhospitable responses of practitioners, for just as practitioners can learn from teachers to open themselves to unacknowledged choice and responsibility, so can teachers benefit from what practitioners have to say about the limitations on choice.

I hope that this glimpse of some ways in which “the theory of my practice” as a teacher might be applicable to work that I would like to do with practitioners will strike a responsive chord among some teachers, and some practitioners. Even as theory, it stands in substantial need of further thought and articulation; and the challenges of implementation are formidable. Some will surely think the enterprise misguided conceptually, or the difficulties of implementation so self-evidently dispositive as to justify disdaining the project. If, however, there are some who find what I have written resonant with their deepest aspirations for their work as a teacher, I would welcome the opportunity to explore with them the tasks of articulation and implementation. For in undertaking these tasks, I need colleagues. More than that, I need teachers.