The Decline and Fall of Law Teaching in the Age of Student Consumerism, by Anthony D'Amato*, 37 Journal of Legal Education 461 (1987) Code A87c

In this paper I want to suggest what I think good law school teaching is all about, primarily relying upon a recent work on the brain and artificial intelligence by Marvin Minsky. FN1 My thesis is that the pressure of student consumerism is not only changing for the worse how law is taught, but that good teaching may be on an accelerating decline toward extinction. The consequences for the quality of our profession could be severe.

I. Teaching vs. Learning

Little support is needed for my initial proposition that we have reached the golden age of student consumerism in law schools. Student evaluation forms now provided officially by the law school administration "grade" the professors, and many deans take these evaluations most seriously. Annual prizes are given to the professor who gets the most votes from the student body. Elective curricula mean that the popular professors are supported by student attendance, putting pressure upon the unpopular professors to learn how to become popular. Even faculty appointments committees routinely inquire into the "teaching ability" of non-entry-level candidates, the evidence usually being the most egregious sort of student-sample hearsay. FN2 Student bar associations increasingly complain that there is no pay-off for them when a faculty member engages in research or writing, [page 462] and that performance in front of a classroom should be the exclusive test for hiring, FN3 promotion, tenure, and all the less obvious forms of reward. FN4

Also, little needs to be said about what consumerism is. Madison Avenue discovered four or five decades ago that a company can go broke attempting to change public desires or wants. Instead, effective advertising feeds into "strokes"—consumer preferences no matter how arbitrary or ridiculous ("dazzling white laundry") those preferences might be. The advertising message refrains from interference with public whims while at the same time engaging in compellingly powerful exhortations to the consumer that the advertiser's own product satisfies these whims better than any competing product ("less calories than our regular beer"). Advertising apotheosizes consumer sovereignty.

Teaching is the exact opposite. Teaching is an attempt to change the student's mind. As I will argue below, the best teaching challenges and alters the mental pathways, connections, and "censors" within the student's brain. But there is no doubt that teaching, totally unlike advertising, is a deliberate form of interference with how the student thinks. The student is likely to resist.

Parental teaching, the most important teaching there is, has to find many ways to overcome the child's natural resistance. The parent will get nowhere unless she earns the child's confidence and trust, because after all the child is vulnerable to the parent's intrusions into the child's mind. The parent then must use complex combinations of cajolery, flattery, good example, disappointment, anger, rewards and promises of rewards, and other more subtle tactics hard to describe but well known to every good and successful parent. More importantly, the good parent will leave the child with problems to solve (building blocks, sand pail and shovel, etc.) and refrain from
showing the child how to solve them but offering a helpful hint if the child gets stuck. As a result of good parental teaching, a child's mind changes and grows, enabling it eventually to survive in an indifferent and dangerous universe.

The changes in the child's mind that I am talking about are not simply, nor even importantly, increases in the sum of knowledge. The mind grows, becomes more intelligent, and more able to deal with the outside world, as it develops new problem-solving pathways. To use a computer analogy, the mind forms and develops its own "software" as it learns to solve more problems of increasing complexity, whereas the "hardware"—the mind we were born with—is comparatively less important, since with minor variations most people have the same hardware. Mental growth and creativity thus depend upon the proliferation of pathways and circuits within the brain that enable us to string thoughts and recognition-units together to understand and solve the problems of our environment. A key point of Minsky's thesis is the following:

Whenever you "get a good idea," solve a problem, or have a memorable experience, you activate a K-line [knowledge-line] to "represent" it. A K-line is a wirelike structure that attaches itself to whichever mental agents are active when you solve a problem or have a good idea.

When you activate that K-line later, the agents attached to it are aroused, putting you into a "mental state" much like the one you were in when you solved that problem or got that idea. This should make it relatively easy for you to solve new, similar problems! FN5

We get smarter as our brains become better wired. "Intelligence," in Minsky's view, has a core meaning—the ability to solve problems. FN6 The better our minds get at solving problems of increasing difficulty and complexity, the more "intelligent" we become.

Why were we not born with our brains prewired with all the information we need to survive? The human body is not as powerful, strong, nor protected (as with a carapace) as many other animals, and yet, by virtue of our mental flexibility to adapt ourselves, we have survived and flourished under a great diversity of natural conditions. Yet in order for our brains to have been prewired with sufficient substantive information for us to survive under the variable conditions of our planet, they would have been far too large for our bodies to support. A much more economical brain is one that is programmed to learn to learn. "Much less information" is needed, Minsky says, "to specify the construction of a learning machine." FN7 The brains we were born with are marvelous learning machines.

Even after birth, our brains are too small—and our memory banks too low in capacity—to accumulate and store all the trillions of bits of information we need in order to survive. Instead, we utilize selective memorization of critical facts that can be wired to other mental receptors so that we can reconceptualize the problems of our environment and solve them by analogy to problems we have already solved. Hence, it is absurd to think that someone becomes smarter by amassing more information. The champion player of the parlor game of "trivia" is not the smartest person in the world. The smartest law student is not the one who can recall the name of every case assigned in every course. But a smart attorney—one who can solve a client's legal problem—is one whose K-lines are efficiently plugged into many mental agencies so that new problems are instantly recognized as "similar" to previously solved problems, activating K-lines that are already in place and ready to shift and compare present possible solutions with previous acceptable solutions.
Learning requires mental struggle. To change and multiply the rudimentary pathways and K-lines we were born with, we have to accept an antipleasure experience. We have to deal with obstacles and overcome them, cope with problems and solve them, find new ways of approaching old and new challenges, even use humor and absurdity to challenge what Minsky, and Freud before him, call “censors” in the mind. These censors inhibit or suppress the operations of other mental agencies that otherwise would lead to mistakes, absurdities, or socially prohibited thoughts. Censors enable us to engage in "lazy" thinking, whereas learning to make exceptions to censors is hard and not always pleasurable. The censors our minds contain are indeed efficient for routine everyday tasks. But while censors prevent us from overthinking simple problems or getting stymied by thinking of too many alternatives to ordinary situations that confront us, they also inhibit creativity. Lawyers especially are confronted with the intricate problems generated by other lives in strange contexts; legal minds therefore have to be freed from the overuse of censors that would suppress possible K-lines of thought that could help those other people. Thus, censors in the mind must continually be challenged and refined, redefined and exploited, utilized when they are helpful and overcome when they inhibit needed creativity.

To some extent, grade-school teachers, especially in schools fortunate to have small classes, utilize the parental-type strategies to work further changes in the students' minds. They have the advantage of reaching the student while still a child and still subject to an avalanche of parental teaching at home. Mental censors are broken down by the need to develop new strategies in the school playground or the need to figure out academic problems in the classroom. By the time of high school, however, both teachers and parents are beginning to lose influence, and students are growing mentally lazy as they become passive recipients in an environment increasingly dominated by attractive but mostly spoon-fed television and music entertainment. Their mental censors multiply and start to take over their minds; they begin getting set in their ways, especially the ways they deal with the problems in their environment. High school is a transitional stage; the educational strategy is ill-defined, and more and more high school teachers are taking their clues from the wrong place—from universities.

University teaching is an almost total disaster. FN8 It is characterized by the [page 465] lecture, a device that had some justification in the early universities prior to the time of Gutenberg's invention of the printing press. Most lectures, like advertising messages, simply feed into the mental pathways the students already have. Like calories, the lectures increase the girth of the students' memory banks but do little or nothing to change or increase the brain's K-lines. University classes are too large, or the lecturers lack the ability, to be of the Socratic dialogue type. College students receive and store the lecture material, regurgitate it on exams, and sign up for the next "popular" lecture course. Lecturers compete with each other on the tastiness of their product, sugar-coating the material to attract the passive student. Most of them do not grade their students' papers or exams, depriving themselves of student feedback and thus of the ability to know whether they are communicating effectively with the students. To be sure, not all university courses consist of lectures, and many good colleges have small classes in which actual learning has an opportunity to take place. But even these—though this is not the present topic—are in decline, due in part to financial pressures upon institutions of higher learning to admit more students into more "efficient" larger classes, and in part to the same student consumerist pressures that are the subject of this essay.
Law schools used to be the last bastion of good teaching. When I went to law school almost thirty years ago, I was shocked into an experience of actual learning. Professors such as William McCurdy in contracts (always chuckling under his breath at the "logic" of the classroom dialogue), John Mansfield in torts (with one unforgettable guest appearance by Emeritus Professor Warren Seavey, the grandmaster of ping-pong classroom technique), Lon Fuller in jurisprudence (with his unfathomable jokes the point of which occurred to us weeks later), and others were engaged in manipulating and changing my mind, creating wholly new pathways for thought and legal analysis. The experience was alienating and refreshing, frustrating and challenging, upsetting and liberating. FN9

It is not that these fine teachers simply used the "Socratic method," because that overworked cliche encompasses both good and bad methods. The Bad Socratic method is the one found where it got its name—in Platonic dialogues, where Socrates' question sets up, indeed compels, the answer. This is just a literary technique, not good Socratic teaching (although Plato, Socrates' student, for all we know may have failed to recollect accurately the way his teacher really did it). In contrast, in the Good Socratic method the answer is not implicit in, or deductively derivable from, the question. Instead, the professor "plugs in" to the student's mental wavelength, making sure, by question-and-answer, that the student's mind is precisely at the point where the existing mental pathways will lead to the wrong answer. The professor's challenge is to the pathways, not to the "bottom line" conclusion; the point is not to instill in the student a new bit of substantive memory but rather to force the student to shake up existing mental K-lines so as to learn how to arrive at a better solution to the professor's question-puzzle. This technique actually leads to mental growth by the multiplication of pathways of thinking. New K-lines are formed in the students' minds as a consequence of the students' realizing that they have broken down a problem into solvable components and then solved it. The networks of pathways in the mind, when well-connected, allow a person "to consider alternatives and envision things from many perspectives" until one is found that works. "And that's what we mean by thinking!" Minsky adds. FN10 The student in fact becomes smarter—smarter in general and certainly smarter in the use of law to effectuate the desirable goals of society and the client. FN11 The astounding ability actually to improve someone else's intelligence by showing that person how to learn to learn is a unique and priceless reward that goes to all good parents and all good teachers. FN12

To obtain new mental pathways requires sharp challenges to the conclusions that existing pathways compel. One effective way to do this is through humor (satire, irony, exaggeration, the coupling of absurd propositions). As Minsky has shown, laughter is an emotional reaction to challenges to our mental censors. We laugh, somewhat uncomfortably, when existing mental pathways are bypassed by catastrophic humor. Freud argued that we laugh when our culturally formed taboos are challenged thus accounting for the prevalence of "dirty" and "gross" jokes. Yet Freud was troubled that his theory did not account for "nonsense" jokes. Minsky's emendation of Freud's insight is simply that we laugh when mental taboos are challenged:

Once we recognize that ordinary thinking, too, requires censors to suppress ineffectual mental processes, then all the different-seeming forms of jokes will seem more similar. Absurd results of reasoning must be tabooed as thoroughly as social mistakes and insanities! FN13

Similarly, when a statement seems absurd, our reaction is to laugh. But our laughter signifies a process of mental challenge and mental growth. We will later question the assumptions that led
to our laughter. We might of course decide that what we thought was absurd really was absurd, and then dismiss it. But we might also decide that what seemed absurd was a clue to something profound.

II. An Imaginary Example of Classroom Teaching

I want to give a concrete illustration of what I mean by the teaching process. Here is an imaginary dialogue of a first-year contracts class (purely imaginary, I might add, since I have never taught contracts). The subject is mutual mistake, and the case at hand concerns the cow "Rose 2d of Aberlone." FN14 According to the seller, Hiram Walker, both he and the buyer believed that Rose 2d could not breed and therefore the price was fixed at $80, about one tenth of what the cow would otherwise have been worth. When Walker discovered that Rose 2d was in fact with calf, he attempted to avoid the contract and refused to deliver the cow to the buyer. The court held that the contract could be avoided if both parties believed the cow to be barren and useless for the purposes of breeding, on the ground that although the parties named the same cow, "a barren cow is substantially a different creature than a breeding one." Imagine the following classroom dialogue:

PROFESSOR SMITH: Would the result have been any different if the seller's name had been Gary Grace instead of Hiram Walker, all other facts being the same?
MR. GREEN: No,
PROFESSOR SMITH: Would the result have been any different if the cow's name were "Peaches 3d of the Panhandle" all other facts remaining the same?
MS. BLUE: No.
PROFESSOR SMITH (coyly): How about "Jack the 4th of Jerrico"?
MR. BLACK: No.
PROFESSOR SMITH: What do you think, Ms. Brown?
[page 468] MS. BROWN: Can I ask you a question, sir?
PROFESSOR SMITH: Certainly, if it's relevant.
MS. BROWN: Is Jack the 4th a bull or a cow?
PROFESSOR SMITH: With a name like that, he's a bull. What difference does that make?
MS. BROWN: Then he couldn't be pregnant. The fact that the cow was pregnant is, in my opinion, the reason the court decided the case that way.
PROFESSOR SMITH: You mean there's one rule for pregnant animals and another rule for all other animals? Isn't that sexist?
MS. BROWN: No, I don't mean that. What I mean is the fact that Rose 2d of Aberlone was with calf was the most important thing in the contract, and since both parties were mistaken about it, there was a mutual mistake.
PROFESSOR SMITH: But both seller and buyer named the same cow. Who cares if they thought the cow was barren? I don't know their reason; maybe the cow looked thin and scrawny. Maybe it was a purple cow. Or maybe Rose 2d was really a bull that only looked like a cow.
CLASS: (uncomfortable laughter)
MS. BROWN: But even a thin and scrawny cow would be capable of becoming pregnant, but a bull isn't.
PROFESSOR SMITH: Ah, Ms. Brown, but I said "all other facts remaining the same." So if all other facts were the same except that Jack the 4th was a bull instead of a cow, then we could have had a pregnant bull.

CLASS: (uncomfortable laughter and some expressions of annoyance; note-taking ostentatiously ceases as the students plunk their pens and pencils on their desks)

MS. BROWN: I'm sorry to disagree with you, sir, but it's impossible for a bull named Jack the 4th of Jerroco to get pregnant.

PROFESSOR SMITH: Why not? It's *my* hypothetical FN15

CLASS: (uncomfortable laughter)

This is the kind of dialogue that frustrates many first-year law students. Here are some of the kinder comments that students might make in the hall after class: "You can't tell what the law is in his class." "Smith tries to torture your mind." "He hides the ball." "I knew more about mutual mistake going into the class than I know now." "Everything I've learned about contracts in Smith's course I've had to teach myself." FN16 "I never come out of that class with good notes."
"What the hell are we supposed to give him on the final [page 469] exam?" "He didn't give Wendy Brown proper credit for her answers." "He always tries to outdo the students." "No matter how you nail him, he's got a comeback. His ego's so big he just can't concede any argument." "It was either some bullshit about a cow or some cowshit about a bull—I forget which." "He thinks he's a stand-up comic, but I wouldn't even buy a drink in a bar that featured his act." "My notes in contracts are disorganized. It stands to reason: the prof's disorganized." "He obviously doesn't know what the law is; he keeps asking us." "He doesn't have his act together." "In my considered judgment, Smith is professionally incompetent." "Who hired him to teach here?"

We now look at what Professor Jones would have done. In order to make the contrast meaningful, let us assume that the dialogue runs exactly the same way, substituting "Professor Jones" for "Professor Smith," all the way up through Ms. Brown's lines about mutual mistake, and only then changes course:

MS. BROWN: No, I don't mean that. What I mean is the fact that Rose 2d of Aberlone was with calf was the most important thing in the contract, and since both parties were mistaken about it, there was a mutual mistake.

PROFESSOR JONES: Excellent answer, Ms. Brown! I hope everyone in the class heard Ms. Brown. The contract could be avoided not because one party made a mistake, as Ms. Brown has pointed out, but because both parties made the same mistake. Indeed, you might even say that since a pregnant Rose 2d of Aberlone was not the subject of the so-called contract that Walker and Sherwood thought they made, there was no contract at all!

CLASS: (signs of admiration, murmurs of approval, and furious notetaking.)

What do we hear in the hallways after Professor Jones' class? "Another A+ class." "Great teacher." "Nice guy." "Gives students credit where credit is due." "Not an ego-tripper." "I like Jones because he doesn't hide the ball. He tells you what the law is." "He gives good notes." "He's super bright. Wasn't that a terrific point that there was no contract at all? Shows you how deep the law is."
Are you ready for my verdict in this imaginary exercise in classroom teaching? Over 99% of the learning occurred in Professor Smith's class, and less than 1% of the learning took place in Professor Jones' class!

III. Analysis

Many people use the term "learning" simply to mean the acquisition of information and the storage of that information in their memories. I am trying to use a more accurate meaning here. Consider, for example, two students in grade school: one learns how to multiply two numbers such as 348 x 603, and the other amazingly "learns" the answers to all multiplications up to 1,000 x 1,000. The second student can give you the answer to 348 x 603 faster than the first student can, but if you ask him to multiply 39,807 x 4,617 he cannot do so whereas the first student can. The second student has memorized a lot but has learned nothing, no more than a law student who commits to memory the entire Internal Revenue Code.

Moreover, there is reason to believe—especially in law study—that excess memorization is not merely harmless, but that it is in fact counter-productive. Minsky writes: "Beyond a certain level of detail, increasingly complete memories of previous situations are increasingly difficult to match to new situations." FN17 If we remember too much about the facts of a case, it becomes sharply different from all other cases and hence the entire notion of precedent and common-law development gets lost. Minsky notes, "Past a certain level of detail, the more one sees, the less one can tell what one is seeing!" FN18

Real learning—the acquisition of new K-lines, the overcoming of censors, and the application of networks of K-lines to the problem at hand—occurred in Professor Smith's class after student Brown offered her conclusion about mutual mistake. Prior to that moment, Smith as well as Jones were simply communicating through pathways that were already present in their students' minds. The professors were simply dispensers of information, and the students were receiving it and storing it in their mental storage units. To be sure, the information was imparted in a colorful question-and-answer form, but not one that challenged the students' thought processes. But after that moment of Brown's conclusion about mutual mistake, Professor Smith, and not Jones, tried to interfere with existing pathways and create new ones. Suddenly, teaching was going on.

Professor Smith tried to interfere with the students' minds because, after all, students coming to law school cannot be expected to have the subtle and intricate mental pathways in their minds that are necessary to deal with the complex legal task of interpreting and articulating real-world facts in light of shifting and often ambiguous and problematic legal norms, principles, rules, theories, and litigative strategies. FN19 Hence, a good law school teacher has to begin by assuming that the minds of her students have to be changed, a notion encapsulated in the cliche that law school is supposed to teach a student to think like a lawyer. Lawyering is preeminently problem-solving: thinking like a lawyer is having the ability to look at some facts, decide what is missing and what could be added, and relating those facts to "the law" in such a way as to solve the client's problem. It is preposterous to assume that students come into law school already equipped with this ability, or that all they need is "more" information. Rather, students need to have their minds challenged, changed, and expanded; they have to learn how to solve the problem of relating facts to law and law to facts in diverse and representative contexts;
and this need opens up an exciting possibility for real teaching. A law school teacher can actually affect the most important thing in the universe—the mind of another human being. A good teacher effects a change in the structure of the minds of her students, whereas a classroom dispenser of information only adds facts to the students' minds in the same way that *Time* magazine adds facts.

Smith's "jokes" were terrible because they were not really jokes at all. They resulted in uncomfortable laughter because the students were reacting to challenges to their mental censors, and their reaction took the form of nervous laughter. Minsky theorizes that "the function of laughing is to disrupt another person's reasoning!" FN20 Censors in our minds inhibit any thoughts that run up against pathways blocked by the censors. Thus, challenging a censor results in the nervous condition we call laughter. As Minsky pointedly observes: "To see why humor is so often concerned with prohibition, consider that our most productive forms of thought are just the ones most subject to mistakes. We can make fewer errors by confining ourselves to cautious, 'logical' reasoning, but we'll also discover fewer new ideas." FN21 We might well recall, in this connection, the advice to law students by one of the greatest lawyers of all time, Louis Brandeis: above all, think boldly.

The students felt insecure after Professor Smith's class. The insecurity is not simply apprehension about the final exam. Rather, it is mental insecurity, a feeling of having lost one's intellectual moorings. But clearly such insecurity is the direct result of having one's mental censors challenged. Censors in the mind allow us to proceed without much thinking; they channel our thoughts to the humdrum and in the process give us emotional security. Take away the censors and you get psychological insecurity; but you also get creativity, imagination, and ability to deal with new and unexpected problems. The vaunted lawyer's ability to "think on one's feet" symbolizes a mind relatively free from law censors.

Unlike a later courtroom setting where a lawyer is penalized for making a mistake (of course, the law's way of doing this is actually to penalize the lawyer's *client*), the classroom is an ideal setting to make all kinds of mistakes. We learn when we make mistakes, just as science advances on null-experimental results. Not only do we learn the "right" way to attack a problem, but we also learn a whole range of wrong ways. The discovery of new kinds of mental mistakes in the classroom prepares us for knowing the kinds of mistakes that are possible in the courtroom, for recognizing them when the opposing attorney makes them, and for avoiding them when we are about to make them ourselves. Many of Professor Smith's students turn off their minds as they wait impatiently until someone gets the "right" answer, and then they scribble that answer into their notes. In doing so, they miss a major point of the teaching process, which is to learn the range of possible mistakes that can be made with respect to the problem at hand, why they are mistakes, and how they can be avoided.

Professor Jones, in contrast, conceives his role as imparting information to the students. He imparts the information in an attractive way that will help them to store it in their memory banks. Thus, he uses the case as an *illustration* for the rule about mutual mistake; the function of the case is a memory-aid. He uses the Socratic method to get students involved in the case. If a student gives the correct answer, he praises her. If a student gives an incorrect answer, he patiently gets other viewpoints, giving more and more hints by his questions until some student
gets it right, whereupon he praises the student. He is pleased that the students will go away with
the Doctrine of Mutual Mistake tucked into their memory banks, to be accessed again when it
comes up, if it ever does so, FN22 in their professional lives as practicing attorneys.

Professor Jones is adept at accommodating the thought processes that students already have:
their isonomes (brain-signals that have similar effects on several brain-agencies), polynemes
(brain-signals that arouse different activities at the same time in different mental agencies), FN23
and K-lines. He feeds their memory banks through these existing mental trajectories, and their
responsibility is simply to regurgitate the information on the final exam. As a result, they feel
comfortable and secure with Professor Jones. They will vote him the outstanding teacher of the
year and present him with a trophy.

But not Professor Smith, who conceives his role as training new lawyers to solve problems and
situations that are different from the ones in the casebooks. The casebooks, after all, contain
problems that others have already solved. To some extent, then, learning the content of the
casebooks is counterproductive. But actually solving past problems is not at all
counterproductive; if the cases in the casebook are treated as problems to be solved (rather than
as rules to be learned), then the mental pathways created to solve past problems can be
effectively utilized by the brain whenever new situations are encountered that seem similar to
ones that have been solved in class. FN24 Since the cases in the casebooks represent past [page
473] solved problems, the best way to train the student to re-solve those problems is to offer
variations on the facts, which a professor can do by the method of hypotheticals.

To teach the students new mental pathways to cope with new legal problems, Smith has to
enlarge their minds and make them more receptive to creativity of analysis. He has to change the
way they learn to learn, adding new pathways and encouraging them to override mental censors.
He knows that students came to law school with sloppy ways of thinking, and he has to do his
best to shake up those lazy mental attitudes. Law-thinking is a new kind of thinking, or at least
relatively new, requiring a rewiring of mental K-lines. Any case to Smith may be good for this
purpose; he does not really care too much about the specific doctrine of mutual mistake, although
it has inherent interest and may arise in protean disguises in cases that ostensibly have nothing to
do with cows or contracts. But he can exploit the mutual mistake case to teach students to teach
themselves how to define and attack a problem. He is relentless; the better the student's answer,
the more he is personally challenged to find something wrong with it. He is not out to prove that
there is something wrong with every student's answer; rather, he wants to prove to the students
that they should never be complacently satisfied with any answer, however pat it may appear.
Since Ms. Brown is particularly bright, he feels he "owes" her continued confrontation; good
minds can be improved too. In fact, he is paying her his highest compliment: he is debating with
her. Debate is the most direct, adversarial, one-on-one mind-improving process we know. FN25
Ms. Brown may not realize that she has received Smith's highest compliment until she looks
back on it ten years later.

In a nutshell, to use that favorite hornbook expression, what Professor Smith is trying to do is to
teach his students how to teach themselves the law. Once the students learn how to learn, they
can spend the rest of their professional lives in the learning process. They will understand that
mental exercise is as stimulating to the mind as physical exercise is to the body. They will get better and better as lawyers and enjoy it more and more.

Professor Smith to some extent dislikes the mutual-mistake case, because that case can lead to a very attractive and "pat", answer that discourages further thinking—namely, that there was no contract in the first place. But to believe and absorb that is to give up the game. FN26 So he hopes that students [page 474] will see through the tinsel covering of that case and learn how to unravel "solutions" that appeared to be secure. Unfortunately, to strip away the security of the solutions, Smith must leave the students with a certain amount of psychological insecurity. He has to deny them the "comfort" that they would have in concluding that after all there was no "contract" regarding Rose 2d of Aberlone and thus that case can safely be pigeonholed away in their memory banks under a heading like "illusory contracts."

Do the students understand what Professor Smith is doing? His approach leaves them mentally insecure; this insecurity is what they need if they are to sweep out cobwebbed censor-driven pathways in their minds and formulate new avenues of thought. But in the brave, new, laid-back age of the consumer, students find insecurity to be an evil, just like anything else that makes them uncomfortable. We live in the Age of Feel-Good. Students find debate to be confrontational. They will say that Smith is a chauvinist aggressor, taking advantage of his age, position in front of the classroom, authority over the grading process, maleness, and superior knowledge. The students feel that they are in a classroom situation neither of their own invention nor choice, but rather as another hurdle erected by the establishment to impede their right to go out and practice law. The teacher-student environment—the classroom, the textbooks, the homework, the recitation in front of one's peers, the humiliation in not knowing the answer—is analogized to the real world of huge law firms representing insurance companies that delay and frustrate accident victims or landlords who use legal mechanisms to evict tenants who miss a couple of rent payments. While many professors of law may dispute the analogy, I suspect they will be sympathetic, as I am, to these larger political concerns that students have and ought to have.

The psychological insecurity that Smith instills is less a reflection of legal browbeating in the real world than simply a natural artifact of the learning process. It is part of human nature for minds initially to resist growth because growth involves effort, risk, and insecurity. Students in Professor Smith's class are forced to learn. But they do not know that they are learning. They think that learning law is a matter of memorization, recall, and regurgitation—that is what college learning was, and how they got their good grades in college, so why should law school be any different? So they come to believe that Professor Smith is not teaching them law, perhaps—they say to themselves in a mode of self-consolation—because Professor Smith himself does not know what the law is. ("He's always questioning everything, even himself! Doesn't he know any law?") FN27 Hence they are [page 475] hostile to his method. FN28 The irony is that Smith indeed is not teaching them "the law"; he is teaching them how to teach themselves legal problem-solving.

Every learner goes through the same insecurity with every teacher. When we were very small, we believed that our parents were trying to help us; we trusted them; and so we opened up our minds to them. Later, at some point, we began to doubt that they knew everything there was to
know. They may have given us occasional reason to doubt that they were really "on our side." FN29 And so we began to distrust them, and with distrust came resistance to their teaching. They called us "stubborn." But we left them and entered institutions of higher learning to absorb the mental processes of people who were more qualified at improving our minds.

When students come to law school, the only chance they have to learn anything is to begin by trusting their professors. But trust is largely a thing of the past. Students today do not trust, they evaluate. When they are hostile to learning, they have a mental block against learning that makes it next to impossible for Professor Smith to reach them. Smith is, after all, trying to operate on their minds. If they do not open their minds to him, his thinking processes will not be able to get in.

Students now define what it is to learn, and their standards are increasingly accepted by faculty and administration. We have reached the ultimate point of perversity in the history of American legal education: the standards of good teaching are defined by those who are being taught years before they have had any opportunity to compare the efficacy of the teaching they receive to their ability to solve legal problems in the real world. And this retrogressive standard-setting shows no sign of abating; rather, it is gathering momentum. If you tell a student he should be more receptive to, and less critical of, Professor Smith, he will immediately fear that you are preparing him to accept the abolition of the "teacher evaluation forms" students fill out after every course. And since teacher evaluation is what students are—by definition—good at, how could you possibly take away his right to evaluate Professor Smith? The fact that he is entitled to evaluate Professor Smith is proof that he alone is capable of judging whether to be receptive or hostile to Smith. Only students can recognize good teaching when they see it.

No matter how hard Professor Smith tries to teach, these days his effectiveness is largely undermined by the environment in which he teaches. His approach sticks out like a sore thumb because in many of their other classes the students are exposed to variants of Professor Jones. They [page 476] "learn" that law-school teaching is the sort of thing that the Joneses do. And then they draw the conclusion that the Smiths, who are out-of-step with or cannot keep up with the Joneses, do not know how to teach. FN30

Still, are the students not justified in criticizing Professor Smith's hypothetical as being unrealistic? Is law not something that is careful, sober, systematic and dull, something that has no room for pregnant bulls? Does such an impossible hypothetical not really "torture" the students’ minds? Why should they trust Smith?

Let us consider the case a bit further. The bottom line is that Hiram Walker's attorney managed to convince the court not just that Walker made a mistake in selling Rose 2d (because the court would simply say "too bad for you"), but that the buyer of the cow made a mistake. Now, if the buyer really made the same mistake the seller made, there would have been no need for a lawsuit. The case got to court because the buyer insisted that he had not made a mistake. Nevertheless, Walker's attorney managed to put over the perfectly outrageous argument that the buyer made a mistake—he made too good a deal. It's not that the buyer knew something the seller did not know, because the cow was in the seller's possession up to the sale and after the sale; Hiram Walker refused to deliver the cow to the buyer. The buyer made his "mistake" when
he agreed to the seller's price, which turned out to be a bargain. Professor Smith is implying to the class: if you can believe that the buyer made a mistake, you can believe that a bull can become pregnant. Both notions are equally outrageous.

Why? Why is a pregnant cow different from a nonpregnant cow? Why is a purple cow different from a brown one? Why is a cow with a bad temper different from one with a good temper? How about a really bad temper?

This is a case not about cows but about sameness. When is the same thing a different thing? When is a pregnant animal not the same as the same animal when not pregnant? When is something the same "all other things being equal"? Are other things ever equal? Which inequalities should we notice and which ones should we ignore? We might note here Nelson Goodman's important demonstration about counterfactuals; in 1947, Goodman proved that if we assume something occurred which in fact did not occur (such as, "I could have struck that match but I didn't"), everything else could not possibly have remained the same! FN31

But maybe Smith has pushed the argument too far against the possibility [page 477] of there ever being a mutual mistake. Just for fun, let us carry on the dialogue a bit further:

PROFESSOR SMITH: If the contract said "Rose 2d" but the seller delivered, and the buyer accepted, Peaches 3d, could either side avoid the contract?
MR. GOLD: Yes.
PROFESSOR SMITH: But what if both buyer and seller meant the cow called Peaches 3d yet both mistakenly called her Rose 2d in the contract? Mr. Gold?
MR. GOLD: I'm sorry, would you please repeat the question?
PROFESSOR SMITH: I didn't ask you, I asked Mr. Gold.
MR. GOLD: But I am Mr. Gold.
PROFESSOR SMITH: Can you prove it? (uncomfortable laughter)
MR. GOLD: It's right here on my driver's license. (laughter) All my friends call me Ed Gold (laughter). Actually, I have the best evidence in the world—my mother. (laughter)
PROFESSOR SMITH: No, no, I don't mean any of that. I mean, can you prove that you are the Mr. Gold I have in mind?

What Smith wants to accomplish above all is to send the students out of his classroom with burning questions creating new pathways in their minds, questions that they should wrestle with at home in the evening as they pore over their casebooks in Lincolnesque candlelight. Questions such as: How can anyone prove what is in someone else's mind? Can there be objective evidence of subjective intent? If not, can there ever be any such thing as a "mistake"? Since we know that mistakes are sometimes made, what would count as proof of a mistake? Does proof of a certain kind of mistake consist in showing that what someone thought was the same thing turned out to be a different thing? But if it turned out to be different, could everything else have remained the same? What does it mean to say that "all other things remain the same"? Don't we need a concept of similarity if we are ever to say that something is like something else? When is one case similar to another case? Something about "all fours"—like a cow? Is one case analogous to another only when it fits with our concept of analogy? If so, isn't that circular? How can one case be "on all fours" with another case if everything other than the rule the case stands for isn't the same? But
what is everything else? How do we know what rule the case stands for if we can't figure out what everything else is? By what standard do we separate out the rule and say that it remains the same while everything else changes? What things stay the same and what things are different? What right does Smith have to say it's "his" hypothetical? How can he dictate what is possible and what is impossible? Is he trying to say that any hypothetical can be arbitrary? If a judge someday asks me a hypothetical question, can I challenge the foundation and relevance of the hypothetical itself? What is a hypothetical, after all? Is it a possible new case from which we can abstract the features we want to change without affecting all the other features in the case? Is that just a way of fooling ourselves into pouring the facts of the present case into a bottle with a different label? I should have raised my hand in class and said to Professor Smith that it may be his hypothetical, but if he's using [page 478] it to persuade us about law, then it's our hypothetical too—and we can object to it.

Of course, not all of the foregoing questions result just from the one example of the case on mutual mistake, although they could. Indeed, and almost crucially, variants of these questions tend to be stimulated by the way Professor Smith handles other cases. It is part of his teaching strategy ultimately to free the students' minds from any notion that particular questions about legal problem-solving are relevant solely to the particular subject-matter of the day. To be sure, new mental K-lines have to be tied to specific subject-matters; neither the mind nor the common law itself totally distinguishes between a rule and the facts that gave rise to the rule. FN32 But you can later solve new problems, if they are at all similar to the old ones, by activating the previous K-lines. FN33 Pretty soon the students will not only have had their minds opened to new pathways suggested by Professor Smith's probings, but also they will have learned how to ask questions the way Professor Smith used to ask them. They will find to their amazement later in life—even though they will forget where they learned it—that asking those questions helps them in every single case that they are called upon to deal with! FN34

But students will only learn to ask themselves such questions, and their minds will only form new and creative pathways for solving them, if they start out trusting Professor Smith. They have to trust his ability to teach, trust his credentials, trust him to know exactly what he is doing, and trust him to be genuinely interested in, and considerate about, their mental development. Only with that trust will their minds be receptive to his probing; only that way will they take his questions seriously. Only with trust will they stay tuned when he gives them an "unrealistic" hypothetical. But we know, as my imagined hall conversations indicate, that the students will in fact be turned off by Professor Smith's assault on their minds. Their minds will not be filled with the questions asked in Lincolnesque candlelight, but instead will be filled with plans of revenge. At the end of the semester, they will get back at Smith when they hand in their teacher evaluation forms. Maybe then the dean will cut Professor Smith's salary or shift him out of teaching a required course and into some seminar that no one will take. Or if Smith does not have tenure, then maybe the school will get rid of him.

Smith, and his style of teaching, are going the way of the dinosaur.

[page 479] IV. Less Extreme Cases
So far I have taken extreme cases. The real world is not so dichotomous. Smith and Jones are not quite as different as I have made them out to be. FN35 And there are things about teaching that each could learn from the other.

For instance, teachers like Smith tend to be overly combative in class. From their viewpoint, they are wholly engaged in attempting to change the thought processes of their students' minds, and as a result tend to forget the human factor. A fanciful example might be the following, picking up the dialogue with Ms. Brown's statement:

MS. BROWN: No, I don't mean that. What I mean is the fact that Rose 2d of Aberlone was with calf was the most important thing in the contract, and since both parties were mistaken about it, there was a mutual mistake.

PROFESSOR SMITH: Which is exactly what the court said. Congratulations, Ms. Brown, you've learned how to read!

This sort of put-down helped get a bad name for old-guard professors like Smith. It is the kind of thing satirized in *The Paper Chase*. Professor Smith's motivation may not have been to be sarcastic for the sake of sarcasm, but what he said came out sounding that way. And many students in his class will resolve that, if they ever become teachers, they will never emulate Professor Smith's teaching style. Turned off by his excesses, they will reject his entire approach. In defense of Smith, what he was really trying to say was that a student should not feel proud of her answer if her answer is simply a paraphrase of what she read the night before in the case that was assigned. Legal analysis does not end with reading a case; rather, that is where the analysis should begin. FN36 For someday the student will be counsel for a client on the wrong side of the a precedent, and then it will do little good simply to restate what the court said. Instead, one has to see through what the court said. And that is what Professor Smith is attempting to teach his class. By the use of sarcasm and ridicule, he wants them to feel uncomfortable with any answer that is simply a restatement of what somebody else (a court, a textbook, a restatement, or even Professor Smith himself) has said. But because Professor Smith is so immersed in the process of teaching, he forgets the [page 480] negative psychological impact of sarcasm upon his students.

Smith has something to learn about the efficacy of teaching from his less combative colleagues—that if you provoke students into shutting their minds off to you, then you cannot reach their minds at all.

Both Jones and Smith would agree on the importance of developing issue-spotting ability in the students. Jones may have a tendency, however, to reify the issues, treating them as yes-no questions:

PROFESSOR JONES: Would the buyer of the cow be helped by the concept of implied condition precedent? How about promissory estoppel?

Smith, on the other hand, might be afraid that, for every "relevant" issue spotted, the lawyer is likely to spot one that leads to a blind alley. In fact, that is what happens when a memory approach is used. It is like a student taking an exam looking down the index to the casebook on contracts too see how many items in the index might be "worked in" to the exam answer. FN37 Thus, Smith would instead prefer to work from hypotheticals:
PROFESSOR SMITH: We've seen that Rose 2nd was sold for $80, but that with calf she was worth $800. Suppose you could come up with evidence that Walker typically sold cows that he was absolutely certain were barren for $50, but the price he charged for Rose 2d of Aberlone was $80. Would that change the result, Ms. Brown?

STUDENT BROWN: Maybe there's promissory estoppel here.

PROFESSOR SMITH: Well, if you're going to drag that old horse in, you've got to tell us why.

A problem that many young professors of law may have with Smith's style can be summarized in a phrase that Minsky would certainly endorse: what you teach is largely a function of how you teach. Professor Kingsfield of The Paper Chase and my imaginary Professor Smith tend to be associated with a sort of ivory-tower view that the law has a magisterial equality, and that in the parsing of particular cases one touches upon issues of fairness and justice. The more one analyzes a case of "mutual mistake," for example, the more one is implicitly saying that bargaining power between buyer and seller is equal, or that "contracts" can be fair despite the fact that some parties have overwhelming political power and others are nearly destitute. Yet a critical legal studies scholar might counter that devoting supposedly "neutral" or "rational" analysis to Rose 2d of Aberlone merely perpetuates a dominant political myth in our society that judicial enforcement of contracts is a good thing; in fact any judicial enforcement of contracts irrespective of whether the buyer or seller of Rose 2d wins—seduces the losing party into falsely thinking that an oppressively unequal political system has nevertheless given consideration to his side of the story. In addition to the critical-legal-studies objection, a relationist might say that the answer depends on facts we do not know about concerning previous dealings between this buyer and this seller. Or a literary interpretivist might say that focussing on the text of the contract of sale vastly distorts its meaning, a meaning which can only make sense in the much broader context of the preparation and dissemination of form contracts and form bills of sale in a capitalist society. And maybe a few years from now, if not already in some circles, a new-wave scholar might claim that Rose 2d also has legitimate interests in the matter, and where she and her calf end up should depend more on a comparison of the living conditions offered by buyer and seller than upon any agreement in which Rose 2nd and the future Rose 3rd (through their legal guardian) did not participate.

I would accept these criticisms and plead that the problem arose when we linked Smith and Kingsfield. There is no necessary connection between the two. We think there is a connection because Smith reminds us of the values that law professors held through the 1950s, which for the most part were values different from those produced by the revolution in consciousness that has occurred since then. The feminist movement, which I regard as the most significant cultural event in human history, is only one of the vast differences in consciousness that separate us from the Professor Kingsfields of the Eisenhower era. We should not make the mistake of discarding Smith's method because of the historical coincidence that his style of teaching peaked prior to the 1960s. FN38

The fundamental questions raised by present-day concerns about political power (including power based on race, sex, and class) are, in my opinion, exactly what Professor Smith today would be raising in the classroom. All of the positions I mentioned two paragraphs above are eminently suited to Socratic dialogue between professor and law student. For example, is it "fair"
to use the word "fairness" in analyzing a contract between a poor rancher who is selling a cow to a prosperous buyer? Partially fair? Misleading? Even if, like Hiram Walker, he manages to engage a super-attorney? How can we bring "larger" or "political" considerations of fairness into our specific discussion of fairness in relation to the given contract? And if we figure out how to do it, how can we then frame the issue of relevance in such a way as to convince a judge that argument about these larger issues should not be excluded from the adversary process? Or, reanalyzing the case, do we make a category mistake in thinking that the sale of Rose 2d is a contract case? Might it not better be analogized to a child custody dispute, so that Rose 2d's and Rose 3rd's interests can affect the outcome?

It is a somewhat unfair rap to criticize the old Professor Smiths for assuming that law is equal and fair and for being blind to the larger political realities. What Smith was really doing in class was to assume that the equities between plaintiff and defendant are rather equally divided in order to enhance the argumentative difficulty for the students of solving their problems. You may get a good game of chess between grandmaster and [page 482] grandmaster, but are not likely to find anything of interest or value in a game between grandmaster and novice. Similarly, Professor Smith might say that it is too easy always to be on the side of the tenant against the landlord because of your vision of political oppression; if you consistently take that position, you might brush aside the "legal" arguments in the case and look upon anything said for the landlord as rationalization and upon anything said for the tenant as a political weapon. But this tends to downplay the need for your creative legal argument for both sides. Ultimately it will make you a poorer lawyer even for tenants.

Professor Smith could even have a bit of fun pitting economic analysis against what I have called "new wave":

PROFESSOR SMITH: Some economists have proposed that we have a market in babies, a sort of infant commodities exchange. Suppose we did; should a new baby go at the highest bid price?
CLASS: (silence)
PROFESSOR SMITH: I'll rephrase the question. If anyone has studied economics in college, would you say it is fair to give the baby to the highest bidder? FN39
MS. SILVER: I think an economist would say that the person who pays the highest price values the baby the most. So I suppose the answer is yes.
PROFESSOR SMITH: Is that true from the baby's point of view?
MISS SILVER: Yes, I would imagine that the baby would be better off in the hands of the parents who value the baby the most.
PROFESSOR SMITH: Would the same be true of Rose 2d of Aberlone—that Rose 2d should go to the highest bidder—that is, from Rose's point of view?
MS. SILVER: I think so.
PROFESSOR SMITH: But wouldn't the buyer who could pay the highest price for Rose 2d be the person who could most efficiently exploit the cow?
MS. SILVER: Yes, I think that's right in economic theory.
PROFESSOR SMITH: Then, from Rose's point of view, she'd be worst off in the hands of the person who will most efficiently exploit her, right?
MS. SILVER: Are you saying that Rose 2d of Aberlone should go to the lowest bidder?
PROFESSOR SMITH: Don't you agree—just from Rose's point of view?
MS. SILVER: Yes.
PROFESSOR SMITH: Cows go to the lowest bidder, and kiddies to the highest?

MS. SILVER: Maybe that ought to be the rule. They're quite different.
PROFESSOR SMITH: Well, good for economic analysis! Maybe it should yield quite opposite rules depending on whether the subject is a cow or a kiddie. But then what are we supposed to do about goldfish and mynah birds?

While at this point I can no longer conceal my thinly-concealed preference in teaching styles, I have not meant to claim that Jones is incapable of teaching the way Smith does. Maybe Jones is perfectly capable of teaching students new ways to learn, and maybe when he started teaching he did so. But then, in his early days as a teacher, when he tried to teach the students new mental pathways, the students complained to the dean about his classroom teaching. So he figured out what was wrong, adjusted his style, and gave the students what they wanted. FN40 He decided that it was far less of a hassle to teach students what to think than to teach them how to think. That was, after all, what his colleagues were doing, and they received rave notices from the students. And now the dean likes him because he has Satisfied Students, not the kind who are upset and want to see him in his office because they are "lost" in class. His life is easier and pleasanter, he enjoys the glow of popularity, and he has more time for recreation outside of law school.

My real concern is not for the Joneses of this world, but for the students of the Joneses. Some of those students will become law professors. And they will never know what law teaching is all about, because they were never exposed to it as students.

V. Casebooks

If we look at how casebooks have evolved over the past twenty or thirty years, we see a clear parallel to what has happened to the art of teaching. Indeed, it would be surprising if there were not such a parallel.

The old casebooks were pretty hard on the students' minds. The books consisted primarily of cases, with very little additional explanatory material. Students had to figure out why the case was there. Once in a while there was an essay by the author or an excerpt from a published article, but strangely enough those essays and excerpts did not explain the cases in the book; rather, they caused new problems for the student, raising issues that the cases did not reach. Indeed, from the author's point of view, the only reason to include any essay material in the old-style casebooks was precisely that no case could be found that raised the problem that the author was looking for. If he could find such a case, then he would include the case and dispense with the essay.

It is a myth to say that the Langdellian approach succeeded because it was easier to distill law out of appellate court cases than it was from the old texts that were used in the nineteenth century prior to the Langdellian revolution. The success of Langdell's case method had nothing to do with efficiency; the old texts were actually more efficient in "covering" the law than was Langdell. The reason for the success of the case method, which reached its golden age
in the first half of the twentieth century and then, began its precipitous decline, had to do with problem-solving. FN41 Students were taught through the cases the way the common law faced up to, and I solved, new problems. Recall Lon Fuller's first prescription for reform of law teaching: "We must retain the problem method implicit in the case method." FN42

The common law itself is a sort of vast mind, absorbing and processing the real-world problems of litigants through the intensive adversarial debates of opposing counsel. A single case is like the records of a war, and a line of cases like the history of a civilizing process. The intricate pathways created by the common law need to be reproduced in the mind of the well-trained attorney. These pathways cannot be reproduced by memorizing what courts held, for that would be like memorizing multiplication tables. Rather, the mind reproduces the common law by working through the problems the same way the courts worked through the problems, and even outdoing the courts—with the help of stimulating questions presented by a master teacher—in criticizing existing cases and preparing the mind to grapple with new ones that may come up when the student goes into practice. FN43

But casebooks have evolved along the lines of becoming easier and easier for the students to read and digest. The old casebooks challenged the student to think, to figure out why the cases were placed in that order, and what the relationships were, if any, among a case and the ones preceding and following it. The new casebooks tell the student these things.

Just from a quantitative point of view, the amount of space devoted to cases is steadily decreasing, while the space devoted to explaining what the cases stand for is increasing. Cases are whittled down into snippets of cases in order to make more room for authors' "notes" and "comments." While some authors retain a vestige of the old "questions" sections, they actually proceed to answer their own questions, saving the students the mental strain. Why present unsolved problems for the students in a casebook?—that would only cause the students anxiety and hurt sales.

By the late 1950s, casebooks had shifted in this "modern" direction. The way to get a feel for what the really old turn-of-the-century casebooks were like is to look them up in a law library that has not discarded them. One's first impression is that they seem extraordinarily primitive. They hardly have any notes at all. Cases are not excerpted very much; there is little sign that the editors have done their work or earned their keep. More than that, the cases do not seem quite to fit the chapter headings and subheadings! It appears that the compilers of those casebooks were rather lazy, not taking the care that editors take these days to select cases precisely and then hack them down so that the language remaining supports the exact proposition of law that the editor has in mind.

A second look is needed. The "old" casebooks resemble the research that an attorney does in practice. A practicing attorney, looking up cases in a general area, will never find a nicely edited group of cases illustrating a precise rule; rather, some cases will be on point and others off point, either confirming a rule or disconfirming it, distinguishing each other or failing to recognize contrary precedent. The practicing attorney must then do a tremendous mental job of filing and sorting those cases not just according to their decisional rules but also according to their facts, to what the parties were trying to achieve, and to their procedural history. The modern
casebook editor does all of this work in preparing the casebook, leaving none of it for the student to do. By doing more and more editorial work, modern casebook compilers are in fact doing less and less for the teaching process. In retrospect, the "old" casebook editors were pretty subtle; their editorial work showed up not in notes and comments, but in the perceptive selection and ordering of cases that could efficiently be used as vehicles for creative problem solving. FN44

Minsky discusses the elemental mental operations of uniframing and accumulating. We unframe when we observe commonalities in a number of separate instances or cases; we accumulate when we collect and store in our memories incompatible descriptions of instances or cases. FN45 Uniframers are sometimes "reckless," Minsky says, "because they have to reject some evidence in order to make their uniframes." FN46 Accumulators, on the other hand, are less extreme and hence less prone to make mistakes. "But then they're also slower to make discoveries." FN47 Our legal intelligence is enhanced when we develop the ability to shift back and forth between uniframing and accumulating in light of the particular problems we are called upon to solve for the client, so that we reject (i.e., do not "store" in our memories) irrelevant cases but accumulate those cases (or portions thereof) that extend, expand upon, or qualify the rules that we have uniframed. Minsky says that "on the surface, it might seem easier to make accumulations than to make uniframes—but choosing what to accumulate may require deeper insight." FN48

What a good casebook should do is provide the student with the opportunity to learn to shift between uniframing and accumulating—to remember those aspects of the cases the student selects and to relate those aspects to uniframed rules and the solution of legal problems. This can only be done by presenting diverse and not drastically edited cases. Most casebooks today, however, do all the uniframing and accumulating in advance. FN49 In telling the students exactly what to learn, the casebooks fail to teach the students how to learn.

Worse than that, the modern casebooks have a goal that is at variance with teaching the students how to think about law. Let us consider in this connection what Minsky has to say about choosing between uniframing and accumulating: "When should you accumulate, and when should you make uniframes? The choice depends upon your purposes. Sometimes it is useful to regard things as similar because they have similar forms, but sometimes it makes more sense to group together things with similar uses." FN50

The editor's purpose in compiling the modern casebook is, apparently, to cover the subject matter. Cases are "fitted in" when they economically cover an aspect of the law, supplemented by notes to cover all points and issues the cases did not raise. Thus the editor chooses between uniframing and accumulating according to the principle of comprehensive coverage. In total contrast, the student who is learning the law ought to be uniframing and accumulating according to the purpose of solving problems. With such a divergence of purpose between editor and student, it is no wonder that the modern casebook fails to provide tools for instruction in legal thinking.

The old idea that a course in torts or contracts is only a course in legal thinking has utterly changed; today they are actually courses in Contracts and courses in Torts. The casebooks now are so comprehensive that when the student is finished, she knows more than any first-year student ever knew about the content of (but not how to be mentally creative about) the law of
contracts. Her challenge is to retain it in her memory bank up to and including the final exam.

Sometimes a modern casebook is praised in because "it practically teaches itself." (This is the equivalent of the high praise accorded to some recent hardboiled detective and spy novels—"a real page-turner.") There is indeed little use for the classroom teacher of the new modern casebook, except as a sort of master of ceremonies. Is it surprising that students cut classes more than ever before? They can "get it out of the casebook" in the comfort of their own apartments and watch TV at the same time. And they are largely right; the classroom instructor is replaceable by the casebook, [page 488] because neither what goes on in the classroom nor the casebook is teaching. The classroom becomes an oral version of the extensive "notes" and "comments" that are in the casebook.

IV. Doctrinalism

Since the 1950s the study of law has witnessed explosive growth in interdisciplinary methods. To some observers, Professor Smith is associated with an outmoded form of doctrinalism, an insular approach emphasizing the theoretical autonomy of the discipline of law. Thus, the decline in his style of teaching might be viewed as a triumph of new approaches to legal analysis. As Judge Posner writes, "advances in medical science, space and weapons technology, computers, mathematics and statistics, cosmology, biology, economics, linguistics, and many other areas of scientific and technological endeavor are making traditional legal doctrinal analysis—the heart of legal thinking when law is conceived as an autonomous discipline—seem to many younger scholars old-fashioned, passé, tired." Students have to be taught these new insights, and instruction in them is not likely to be efficient if the old style of Socratic doctrinalism is allowed breathing room.

On the contrary, I contend that the decline of Smith's style and the rise of interdisciplinary studies is another example of a mere historical coincidence. There is no necessary relation between the two. Even so, the interdisciplinary mode exercises something of a chilling effect upon the kind of training necessary to produce lawyers with good legal minds. The effect is subtle and needs to be spelled out.

Let us distinguish two characters, or at least two hats that attorneys wear: the law reformer and the lawyer. Law schools, without making this distinction, seem to address both at once. For example, Judge Posner cites some of the current goals of law reform: revising the Federal Rules of Civil Procedure, federal sentencing, the Bankruptcy Code, the Internal Revenue Code, and tort law. Many law professors are engaged in these and similar, endeavors. Judge Posner encourages them to enlist the services of economists, statisticians, and other social scientists; and clearly, law professors who have competence in these interdisciplinary approaches should employ that competence. But, inevitably, much of the thinking that goes into law reform spills over into the classroom. Professors naturally want to share [page 489] with their students their sense of the inadequacies of current law and their ideas for a more rational, just system of law.

In my view, however, teaching the techniques and attitudes of law reform is not the same thing as training students to become lawyers. Personally I am in favor of a considerable amount
of law-reform teaching. But it should not be viewed as a replacement for a core educational program in how to be a lawyer. Interdisciplinary analysis has a tremendous role to play in law reform, a role that has been obvious for decades. (My biggest gripe about interdisciplinary analysis is when someone calls it "new"). But if we put law-reform considerations to one side, what is the role of interdisciplinary studies in the training of lawyers?

Lon Fuller, considered by many to be a doctrinalist, said once in class that any theory that explains judicial decisions is relevant for law school analysis. The theory could be expressed in terms of a mathematical formula, or a picture-graph, or any combination of words; the only real question was its correlation with judicial opinions and its helpfulness in terms of explanation. It did not matter, I recall Professor Fuller adding, whether or not judges were aware of any of these formulae or theories. If the theories explained results, then that fact was far more significant than the question of judicial awareness. I do not think that our imaginary Professor Smith would disagree with Fuller (Smith had better not, or I will disinvent him!). Law is not just a bunch of words, and the study of law is not just an "autonomous discipline" consisting of the kind of analysis associated with Williston and Wigmore. Thus, if part or all of Judge Posner's "economic analysis of law," for example, actually explains how a number of cases were really decided, then Smith certainly will make sure that economic analysis is part of his classroom dialogue. In general, to the extent that interdisciplinary analysis actually illuminates existing patterns of law, lawyers need to know about it in order more effectively to argue new cases.

Thus, there is no barrier in Smith's style of teaching to the accommodation of new interdisciplinary approaches. There is to be sure a certain conservatism: the latest interdisciplinary fad is not going to find its way into Smith's classroom unless it has established its credentials in actually making an impact either upon real-world advocacy or classroom interpretation of real-world cases. Here is perhaps the greatest difference between law reformer and lawyer. To the professor of law studying law reform, the latest fad is the most interesting, because it might be the "cutting edge" that enables the professor to make a name for herself in the academic world. But to the professor preparing for a class, the latest fad can be the least useful.

The "chilling effect" I alluded to earlier results from thinking that interdisciplinary techniques are all that law is about, and that pure-law study is old-fashioned and will become extinct just as soon as enough interdisciplinary approaches come along to occupy the entire legal field. This view sells short the discipline of law. In my view, pure-law includes all the relevant (in Fuller's sense) interdisciplinary approaches and has lots of discipline left over. (If not, we would not need law schools; we would only need good interdisciplinary training at the undergraduate level.) Training people to become lawyers is training them to reformulate the world of fact into legal discourse in such a way as to promote the interests of client and society. By "legal discourse" I include words, formulae, graphs. But it is still a matter of increasing the power of the mind to conceptualize facts and find relationships among facts that can be cast in terms of "law" creatively interpreted. If we were to subtract all the interdisciplinary approaches, there would still be enough law as an autonomous discipline to make it a fit object of study. FN56

In this regard, interdisciplinary approaches can be equally stultifying as common-law metaphors. A student can learn a mathematical formula for solving a negligence case, only to find himself
stuck with a memorized formula that is impervious to modification or change. Sometimes, when fads from other disciplines are introduced into a given discipline, they carry too much credibility with them. What in the outside discipline is viewed as a highly problematic theory becomes reified into an eternal truth upon its importation into one's own discipline, in which less is known about its intellectual heritage and shortcomings than in the discipline that invented it. Hence we might become overcommitted to theories or mathematical formulae that themselves are much more problematic than they appear or than we can unravel. On the other hand, of course, students must have some familiarity with these extradisciplinary formulae and theories to the extent that they are utilized in legal argument and judicial decisions. As in all things, a professor must weigh the amount of classroom time devoted to extradisciplinary approaches against their projected utility in the students' future careers.

As much as we should be open to new theoretical approaches, we have to recognize the chilling effect that they may (inadvertently) inflict upon our main mission—to expand the minds of our students to enable them to relate legal formulae to the real world of behavior so that they may someday help channel that behavior into socially desirable endeavors in the course of helping a client solve her immediate problems.

V. In Mitigation

There are mitigating factors in legal education that make the picture I have painted less bleak. Seminars can be intense learning experiences if the number of students is small and the professor is not overly concerned with "coverage." Writing papers and getting feedback from professors is certainly a means of improving the mind. In particular, seminars that ask students to write on topics that cross different domains of law (for example, a paper on a topic in tort law that compares moral analysis with economic analysis) have a special place in the law school curriculum: they enable students to synthesize areas of legal knowledge that had previously been shattered by the overly analytic approach of the Professor Smiths. Further, simulated trials can be excellent learning experiences, and new problem-oriented coursebooks FN57 may be opening a window on a way to get back to real learning in law schools. Nevertheless, the bulk of law school teaching is in the large class now characterized by the Bad Socratic method or the lecture.

To be sure, teaching—whether good or bad—does not have the importance it once had in law schools a couple of decades ago. Today, tenure decisions in the best law schools are based on scholarship, not teaching. To the extent that law school values are changing, one might conclude that poor teaching is not so serious a problem. I take no stand on the value question of teaching vs. scholarship in law schools (though I am skeptical about the dichotomy, for in my observation good teaching and good scholarship tend to go together). But I believe that we share a commitment to good teaching that is an important part of our mission as professors of law. Even if our evaluators do not care whether we are truly effective in the classroom, I'd like to think that the fact that you are reading this article means that you and I care-irrespective of the question of the best teaching method.

There are some flanking movements that faculties might engage in to help slow down the acceleration toward the extinction of good teaching in the large classes. Young professors can be
encouraged not to give in to the "easy" style in the classroom; the faculty can attempt to resist student if pressures for better classroom performers; the curriculum can be changed to discourage the proliferation of courses that are added simply to increase subject-matter "coverage." Also, students have to be "sold" on good law teaching and its purpose; they cannot simply be expected to recognize it when they see it. Smith ought to spend part of his time explaining what he, is trying to do as a teacher. Yet just saying these things suggests how hard most of them are to achieve. The most popular professors will be the most [page 492] resistant, and they will feel—with some justification—that the unpopular ones are simply jealous of their success. And curricula these days are, in most schools, not curricula at all, but simply lists of courses that have emerged out of a highly intensive political process that has little to do with teaching and a lot to do with tradeoffs and satisfying the political preferences of the students and certain faculty members. FN58 As for ending the faculty evaluation forms that students fill out, FN59 or reducing student input into faculty appointments and curricular decisions, do you want the students to barricade the building?

It must also be acknowledged that a great deal of learning, for some students, occurs after law school. The learning experience can take place in a clerkship and/or a job in a large "teaching-type" law firm. FN60 Young associate lawyers can learn to expand their minds in their contacts with [page 493] senior partners in the day-to-day work in a large firm: on-the-job training at the client's expense. Yet, how sad it is that three years of law school, where mind-expansion ought to be taking place, has to be "saved" by some of these post-law school experiences. And many graduates do not even get these experiences.

VI. Conclusion

The Moment of Truth for a practicing attorney occurs whenever a prospective client tells a story that seems morally compelling but legally hopeless. That is where the attorney's legal research should begin, not where it should end. Too much injustice persists in the world because tired legal thinking has accepted unjust patterns as inevitable.

Any law professor will agree with me that there is a huge amount of shoddy law practice going on in the real world. (Were every one of these practitioners once our students???) Putting aside sheer incompetence, there is far too much evidence that most attorneys proceed on fixed mental tracks like express trains, oblivious of side-considerations which, if explored, might win for them. They think in categories or in fixed concepts, rather than facing up to the reality and ambiguity of facts in the real world. They may have been creative students in grade school; they may have been mentally alert in high school; but law school has resulted, to use Thorstein Veblen's phrase, in their "trained incapacity." Their post-law school minds are set in granite blocks with labels such as Estoppel, Waiver, Laches, Collateral, Hearsay, Unconscionability, and the like. Stimulate one of these issue-blocks and out comes a memorized set of doctrinal considerations, impressive perhaps to a client when she hears them and maybe still comforting to her when her attorney loses her case.

Real-world facts are so incredibly complicated and rich, at least in comparison with unidimensional rules of law FN61 that the pathways in lawyers' minds should not be isomorphic with legal rules. For that would reduce lawyers to the level of computer retrieval systems. As
legal rules proliferate—indeed, as computer retrieval systems proliferate—there is an increasing need for lawyers to be creative, to see connections that are latent in the legal rules, to articulate and present facts as they really are and not as they might appear through law-colored glasses, and then to examine the law with a fresh eye to see whether it indeed fits those facts. But this need is not being met by law school teaching, which is turning out students bearing an uncanny mental resemblance to WESTLAW and LEXIS.

Students start out in law school with the best of intentions: they want to become good attorneys. Many of them want to help in a small way to promote the cause of justice. They are certainly paying good money for a legal education. In the very best sense of the term "consumerism," law schools owe to these consumers of legal education a program of instruction that gives them the mental ability to cope with legal problems. A student's mind can only improve if he learns new pathways to conceptualize, analyze, and solve problems. His mind will not improve if it becomes a warehouse for the storage of legal rules. We owe him a lot more than he can read in a hornbook or nutshell, because he has paid us tuition for using our judgment to give him what he really needs—even if he then kicks and screams through three years of the learning process.

But the consumer movement simply will not have it. And student resistance is effective because we professors collectively are pushovers; we really want to please the students. Our collegiate behavioral response includes calming our students' insecurities, playing to their interests, praising them when they do their homework, laying out the law, giving predictable final exams, never putting any of them "on the spot," covering the whole casebook, tucking all the law into a well-organized syllabus (omitting what does not fit), using cases as illustrated rules, and above all accommodating the secure censor-laden mental pathways the students brought with them when they entered law school. After all, if the students are happy, who is hurt?

Only the poor future client who discovers too late that her lawyer is part of her problem and not part of her solution.

Because she makes no present demands upon us and is not an immediately visible consumer of our services (though ultimately she pays the entire educational bill), we may tend to lose sight of the fact that she is the reason we are in the ed biz.

Footnotes

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FN2. Sometimes "evidence" of student reactions to a professor's teaching may be used negatively in a tenure decision as a surrogate for other political reasons for denying tenure. Ironically, this
misuse of student evaluations lends even greater importance to the idea that student evaluations should play a significant role in tenure decisions.

FN3. I favor students' interviewing of prospective faculty members, but sometimes it is hard to evaluate the students' evaluations. Some years ago our students reported total opposition to an entry-level candidate. It turns out that when he met with the students, he was asked why he wanted to go into teaching, and he replied, "Maybe I don't want to go into teaching." When I heard this I thought it was a polished Socratic response designed to provoke the student interviewers, even though they concluded that it showed the candidate to be unfit for teaching. After a protracted fight with the students, we appointed the candidate.

FN4. A college professor of philosophy writes that the real evil comes from faculty members' thinking that they will get better student evaluations if they reduce course content or lower the intellectual level of their lectures. Kenton Machina, Evaluating Student Evaluations, 73 Academe 19 (May-June 1987). The result is that the faculty will live out that belief by lowering standards. Nevertheless, Professor Machina opposes the elimination of student evaluations for pay and promotion purposes and instead proposes that the faculty be educated "as to the complexities of the relationship between evaluations, course standards, and student achievement." Id. at 21. Rather, I take the position in this article that whatever benefit might accrue from using student evaluations for pay and promotion purposes is vastly outweighed by the psychological damage inflicted upon the learning process that results from setting students up to be evaluators of their teachers—especially when the students know that their evaluations will have some input into the pay and promotion process.

FN5. Minsky, supra note 1, at 82.
FN6. Id. at 71.
FN7. Id. at 115.
FN8. The teaching of mathematics is an exception and provides a good model. Math is mostly self-taught; students teach the subject to themselves by doing homework consisting of solving mathematics problems. Good class teaching is devoted largely to going over those homework "exercises." As a result (in my opinion) mathematics, of all the academic disciplines, has progressed the farthest within its own subject matter (matrix algebra, for instance, was invented in the mid-nineteenth century as a mathematical curiosity having no real-world application, only to be "discovered" by the quantum physicists in the mid-1920s as the best description of the behavior of subatomic particles; mathematical exploration has nearly always preceeded theoretical physics, an exception being Isaac Newton who was simultaneously a mathematician-physicist). Contrast history, which (in my opinion) is the most retarded of the academic disciplines. Homework in history consists largely of reading, and tests are based on memory recall; unlike mathematics, there is little or no problem-solving demanded of the students. Studying mathematics by problem-solving is, I submit, the very best model for studying law.

FN9. A watershed experience for me after the first three weeks of school was when I looked up what Prosser had to say about assault. In torts class, Professor Mansfield had assaulted our minds so much that no one had the vaguest idea what assault was. "Assault" either had something to do with, or absolutely nothing to do with, somebody gesturing at somebody else with an axe. My classmates advised me to follow their lead and look up Prosser on Torts. I did not know that such books existed but I duly looked it up in the library, and was astounded at what I read. Every single thing that Prosser said with such authority was vague, ambiguous, and conclusory! Every point he made we had already demolished in class. Prosser read, to me, like an absolutely stupid view of what had gone on in the classroom, written from the standpoint of someone who had
missed every single nuance, every single argument and refutation, and was saying just the sort of mindless generalities that we had exposed in class discussion. At that point I realized that if I did not know what assault was, at least I was better off than Prosser who thought he knew. I put the book down and avoided all texts and hornbooks for the rest of my student days, and mentally chalked one up for Professor Mansfield. Today, Prosser looks pretty good to me compared to the things that the students are actually reading outside of class—such as outlines by Gilbert and nutshells by Smith.

FN10. Minsky, supra note 1, at 64.

FN11. The notion that nature and not nurture accounts for "intelligence" is quite incorrect. Nature gives some children a little more raw brain material than others, so that starting points are not precisely the same. But from then on, how much the child is engaged in solving problems—problems relating to the child's relation to its own environment and needs—is what expands the mind. Good teaching, at any stage of life, can multiply and improve the pathways in the mind that enable people to meet creatively the demands of their environment. Motivation, of course, is also vital. But motivation can be taught!

FN12. Even more astounding is the fact that the student can end up smarter than the teacher. Minsky proves this proposition indirectly, by showing that the fact that our minds can improve—that we can become smarter over time—means that the "learner" units in the brain must be smarter than the "teacher" units in the brain that developed them. The mechanism for making this possible is problem-solving. The "teacher" units can present a problem to the "learner" units even though the "teacher" units themselves cannot solve the problem. But the "learner" units can recognize a solution when they come up with it. Hence, the "learner" units can end up with better problem-solving ability than the "teacher" units, which is another way of saying that we can become more intelligent. See Minsky, supra note 1, at 174; see also note 24 infra.

FN13. Minsky, supra note 1, at 278.


FN15. Compare Willard Van Orman Quine, From a Logical Point of View 4, 2d rev. ed. (Cambridge, Mass., 1964): "Take, for instance, the possible fat man in that doorway; and again, the possible bald man in that doorway. Are they the same possible man, or two possible men? How do we decide? How many possible men are there in that doorway? Are there more possible thin ones than fat ones?" When I was a law student, Professor Paul Freund remarked that Quine's book, "From a Logical Point of View" ought to be required reading for all law students.

FN16. This is Professor Monroe Freedman's all-time favorite "negative" faculty evaluation.

FN17. Minsky, supra note 1, at 88.

FN18. Id.

FN19. Indeed, the prelaw ways of thought have a strong advantage. Minksy calls it the "investment principle": "Our oldest ideas have unfair advantages over those that come later. The earlier we learn a skill, the more methods we can acquire for using it. Each new idea must then compete against the larger mass of skills the old ideas have accumulated." Id. at 146. It may be hard to teach old dogs new tricks, but in law school, when we are confronted with a group of old students (old in terms of having gone through sixteen years of education already!) we have to teach them new mental pathways. This is hard on the teacher and hard on the student. It is much easier for the student to "lay back" and absorb bits of content from the class discussion that comport with his already existing mental pathways, for that is the strategy of least resistance and greatest mental security. One sometimes observes in students the same hardheadedness exhibited by some older successful attorneys, who in conversation reject any idea that is new to them and
play back to you, as if from a recording, their own ideas on whatever subject is being discussed. But even if one forgives an older person who refuses to learn, it would be contradictory to allow a "student" to do so.

FN20. Id. at 280. Minsky adds that laughter prevents you from "taking seriously" your present thought, thus giving you time to "build a censor against that state of mind." Id. However, I am here taking the contrapositive of Minsky's thesis; I am suggesting—and I am sure Minsky would agree—that when new learning is going on that challenges existing mental pathways, laughter results as an indicator of that new learning process.

FN21. Id. at 279.

FN22. The real trouble with storing a "mutual mistake" example in our memory banks is that the only sure-fire way to "access" it is to have someone articulate the question, "Is this a problem involving mutual mistake?" When we hear those mental trigger-words, we access and call up Rose 2d of Aberlone. In this fashion, we are exactly like WESTLAW and LEXIS, with our minds becoming data-retrieval mechanisms.


FN24. In fact, the problem here is extremely profound: how is learning possible? If we simply apply the past on the theory that the future will exactly resemble the past, we are heading for catastrophe. Yet our minds are, in a sense, "the past"—how do we change our minds to make mental growth possible? Minsky’s answer is that when we solve a problem, we learn how we solved it, and that becomes new information that expands our minds. While the problem existed in the "past," its solution is in the "future." Hence, even though the solution to the problem is not present in our minds when we attack the problem, when we solve it our minds grow by virtue of having solved it. Thus mental expansion—"learning"—is possible. See id. at 174; see also note 12, supra.

FN25. That is, when one of the debaters is trying to improve the mind of the other, or at least when both debaters are trying to reach the truth. In contrast, what is called "debate" between political candidates is not an attempt to sharpen minds, but if anything, to deaden the minds of the listeners.

FN26. Compare Judge Gardozo’s admonition: "Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it." Berkey v. Third Ave. Ry. Co., 244 N.Y. 84, 94, 155 N.E. 58, 61 (1926).

FN27. When Langdell introduced the Socratic method in 1870, at a time when all the other professors at Harvard lectured to the students, student attendance in his course rapidly declined and there was great discontent with his teaching method. "Again it was asked why Langdell did not give his own opinion, as the others [other professors] did. It is true that he failed to express himself, although in the early stages of his teaching many questions were put to him in order to draw out an expression of his views. On these occasions he became absorbed in thought and seemed to falter. Usually he asked questions in reply. This occasioned harshest criticism. It was said that he did not answer because he did not know, that Professors __and__ knew, and therefore they replied." Franklin G. Fessenden, The Rebirth of the Harvard Law School, 33 Harv. L. Rev. 493,501 (1920).

FN28. Judge Hans Linde suggests, quite plausibly, that Smith ought to spend a little time telling students that he is in fact demonstrating to them the indeterminacy of legal propositions. Letter to the author, June 10, 1987. But that is not Smith's main purpose; if it were, it could be accomplished in the first week or two. Rather, he is attempting to do something harder to articulate and infinitely more valuable to the students: he is attempting to create new pathways in
their minds, to increase their general powers of legal thinking. (P.S. Are all legal propositions indeterminate? If so, what about that one?)

FN29. Children are quite perspicacious in ascertaining the difference, when there is one, between what parents say and what parents do.

FN30. To be sure, when Langdell introduced the problem-solving method, he was able to survive in an environment when everyone else was lecturing. See Fessenden, *supra* note 27. Without intending in any way to detract from his brilliant innovation, I suggest that he benefited from the extreme contrast between his method and that of the rest of the faculty. Today, both Smith and Jones engage in dialogue with the class, with the result that the difference between them—though just as real—is harder to discern. Students may vote Jones the best teacher and Smith the worst, and yet the reasons they might give for their vote might be as conclusory or self-contradictory as the "hallway" reasons I suggested earlier in this essay. My bottom line is that students cannot know, nor be expected to know, what good law school teaching is, and therefore we should not be surprised that they cannot articulate the real differences between Smith and Jones.


FN32. Ultimately, this is why we need, and have, a variety of different subject-matter courses.

FN33. Minsky, *supra* note 1, at 82: "We keep each thing we learn close to the [mental] agents that learn it in the first place."

FN34. "Some of our most persistent memories are about certain teachers, but not about what was taught," Minsky says. *Id.* at 184. What we have absorbed from our best teachers is a certain way they thought about things and a certain attitude or point of view. We find that we can recall their style when we are confronted with new puzzles. Even Isaac Newton, who obviously surpassed all of his teachers, complimented them by saying (I do not have the exact quote): "If I've been able to see farther into the distance than others, it's because I've stood on the shoulders of giants."

FN35. Ironically, this fact may help accelerate the demise of Smithian teaching methods. When Langdell introduced the problem-solving method (see Fessenden, *supra* note 27), his teaching was in noticeably stark contrast to the lecturing of his colleagues. This contrast may have helped his method to survive and flourish. But if the students fail to perceive the reasons Smith and Jones are different, that failure of perception may help extinguish the Smithian style, since Smith will not be so much perceived as "different" from the others but simply as "worse."

FN36. I agree, however, with Professor Kent Greenawalt, in his comment on a draft of this article, that reading a case accurately and fairly is an important achievement for a student. Reading a case is not easy, nor is "stating" the case a trivial job because it involves many judgments on relevancy. Without changing my text on this point, I think it is fair to add that an ideal reaction to Ms. Brown would fall somewhere between Smith's and Jones's. She did get the main point of what the court said, and should be positively reinforced by the professor. At the same time—and especially because she is a bright student—she should not be left feeling smug about it.

FN37. This is the mind-as-computer-retrieval approach.

FN38. I have noticed some male law professors progressively tone down the acerbity and sharpness of their questions over the years as more women are admitted to law school. This has always struck me as sympathetically motivated yet fundamentally sexist. (One former colleague, notorious for a sharply combative approach, never called on a woman, as many students ruefully reported.)
FN39. See Richard A. Posner, Economic Analysis of Law 141, 3d ed. (Boston, 1986) ("[T]he parents who value a child the most are likely to give it the most care, and at the very least the sacrifice of a substantial sum of money to obtain a child attests to the seriousness of the purchaser's desire to have the child").

FN40. A law teacher who will remain nameless once confided to me, "Over the last year I have consciously changed my teaching in the direction of spoon feeding and allaying insecurities in order to get good student evaluations. I have a tenure decision coming up."

FN41. Langdell's first class at Harvard was as revolutionary for the discipline of law as Galileo's experimental method was for the discipline of physics. The excitement is recounted by Fessenden: "There was great curiosity as to what he would do. It was generally believed that his was to be a new method. But no one had any conception what it would be until the students were given, in advance of the lecture, sheets which contained reprints of cases, the headnotes omitted, selected from various reports. ...On the appearance of the cases and forms the proposed system was condemned in advance by practically all. ...The subject was Contracts. While it was a beginner's course, most of those who had been over the subject during the preceding year felt drawn to the lecture. The attendance was unusually large. It filled the room. Langdell began....by questioning students about the case of Payne v. Cave. After the preliminary inquiries as to the facts, arguments, and opinions had been made, further questions were put to draw out the views of the students as to the arguments and opinions. At first it was almost impossible to get much expression; for it was evident that very few had studied the case critically, and had had no thought of forming any judgment of their own. And so as question after question was put, all presupposing a careful examination into various aspects of the case, the answerers for the most part said that they were not prepared. The new men generally had not studied law at all. It seemed to them the height of presumption to have, and much more to express, an opinion. It was to learn rules of law that they had come to the School. When they had accomplished this they might have some right to state their views. They thought it absurd to undertake to give their thoughts about a subject of which they knew nothing. Those were courageous indeed who ventured to participate. Langdell asked more and more questions. As it now comes to the memory of one who was present, there was a series of admirable, analytical inquiries. At the time, the general judgment of the students was that it was a childish performance; for nearly all, if not all, failed to see at the beginning that the method was to analyze the case closely and to extract the essential elements, and in this way to grasp the real legal principles involved. But the hour passed with amazing rapidity. When it ended there was a great deal of comment by those who had been present. Interest had plainly been excited, but principally in the method of teaching. By far the greater number openly condemned the new way. They said there was no instruction or imparting of rules, that really nothing had been learned. Older students said they theretofore had received something, even though in a preliminary way, from professors and lecturers, but here was an entire absence of anything but a seeking of expressions of opinion from youths who were ignorant of what they talked about; that no rule or suggestion of any rule of law had been hinted at; that certainly it was no way to learn law, for the law was not in the idle talk of these young boys; that the performance was foolish; that Langdell acted as if he did not know any law; that it would be more profitable to attend other lectures where something could be learned. Yet there were a few who felt a quickening of their zeal, who were certain that they had received an impulse, who insisted that they got 'something which somehow lasted,' as one of them, since famous at the bar, expressed it." Fessenden, supra note 27, at 498-500.
FN43. As law teachers know, sometimes the classroom itself turns into a large mind. This exhilarating development happens, if at all, usually past the midpoint of a course, where enough of the individual minds are sufficiently tracking one another, and where there is an accumulation of case-law experience so that new cases can be evaluated against that backdrop. The professor then, in a way, becomes just one more input into the classroom mind, which takes over. Very few people who have neither taught a law class nor been a student in one that was well taught can know the quality of excitement that I am talking about.

FN44. One factor in the evolution of the "modern" casebook is the reaction of the publishing market. If an author comes out with a "difficult" but successful casebook, there soon will appear published "guides" and "outlines" to the casebook, prepared by other professors who take something of a free ride on the original casebook. Students then purchase these "study aids" in order to avoid thinking for themselves. One can hardly blame the original author, then, for starting to incorporate some of these external materials into her own casebook in the form of Notes and Comments. A better way to deal with the proliferation of external study aids would be to substitute entirely new cases in the casebook at every new edition. (The organization could remain the same, and the book would sell on the strength of the author's reputation.) But just to mention this alternative is to show how difficult it would be to achieve, given the conservatism of publishers, the profits generated by the peripheral market in study aids, and the enormous resistance that law professors would have to such wholesale changes in reading material. I am told that at Oxford University the reading materials for law students consist of mimeographed cases that are changed each semester. I know nothing about the teaching methods there, but if what I am told about the mimeographed cases is true, Smithism is possibly flourishing at Oxford.

FN45. Minsky, supra note 1, at 120.

FN46. Id. at 125.

FN47. Id.

FN48. Id.

FN49. And editors of casebooks are often encouraged to engage in heavy editing by book reviewers, who seem to assess casebooks according to whether the cases seem to be comprehensively selected, heavily edited, and supplemented by copious authors' notes. Of course, it would be enormously difficult for a reviewer to evaluate a new casebook that did not have all of this paraphernalia; the reviewer actually might have to use the book in a course in order to evaluate whether the cases were well chosen. Thus, the institution of reviewing casebooks in legal periodicals tends to be a contributing factor in the success of the "modern" casebook.

FN50. Minsky, supra note 1, at 126.

FN51. Still, some anecdotal evidence suggests that employers are quite happy with our best graduating students. Does this mean we have done a good teaching job after all? It might simply mean that we have selected bright students in the first place—as population increases and more of the best students decide to go to law school. And there is some anecdotal evidence that has come my way from senior partners in major law firms to the effect that, below the top echelon, law school graduates seem to be getting less sharp each year. This accords with my own limited experience in seeing the work-product of some junior associates. We could use a rigorous statistical survey that addresses these questions.
FN52. When Langdell gave his first final exam, many of the students who had cut his classes flunked the exam. They were "deeply disappointed, some openly indignant. They had passed the other examinations [in the courses which, unlike Langdell's, were lecture courses]. It was discovered that a few who had not attended some of the other courses but had read the textbooks used, had passed the examinations in those courses, receiving excellent marks." Fessenden, supra note 27, at 506. Remarkably, the learning experience in Langdell's course could not be replicated in any fashion other than by attending and participating in the course. This fact is indeed the very first sign that we can have about the true efficacy of any teacher.


FN54. Id. at 778.

FN55. Judge Hans Linde suggests that the dialectic teaching of adversary analysis of disputed cases tends to disable students from dealing effectively with questions of law, justice, and policy that come up in the professional life of attorneys when they are not just representing a client. Letter to the author, June 10, 1987. There is certainly merit in his criticism; we often encounter attorneys who can take "the other side" of any argument but appear to have no fixed positions—or perhaps no moral foundations—of their own. I should think, however; that the expansion of the mind that comes from the kind of legal thinking I am talking about in this article should help, rather than hinder, study of the broader philosophical issues of justice and policy. We have some experience of law graduates who go on to get their Ph.D.'s and do extremely well in fields such as philosophy or political theory; many of them report back that "legal thinking" is what made the difference for them. As for Judge Linde's concern, perhaps the best training is the third-year seminar in which students write papers on topics of justice and policy, other members of the seminar criticize the ideas in their formative stage, and the professor meets with the writers and comments on their draft papers.

FN56. I have suggested ten unsolved, fundamental pure-law questions, or "anomalies," in D'Amato, Whither Jurisprudence? 6 Cardozo L. Rev. 971, 983-85 (1985). It is not apparent, at least to me, that these are currently solvable by the present arsenal of interdisciplinary methods.

FN57. One of the things my coauthors and I attempt in our problem-oriented coursebook in international law is to give the students a wide range of unedited international-law materials (cases, U.N. reports, treaties, excerpts from articles, archival material) coupled with large and comprehensive hypothetical problems, leaving it to the students to make comparative evaluations of the authoritativeness of the materials as well as to construct legal arguments on the basis of those materials. See Burns H. Weston, Richard A. Falk & Anthony D'Amato, International Law and World Order: A Problem-Oriented Coursebook (St. Paul, Minn., 1980).

FN58. Having made this indictment, it is only fair that I go out on a limb with a suggestion for curricular planning in light of the principles I have stated in the text: The FIRST YEAR should stress the analytic method, contain nothing but common-law courses (omitting "public law" courses), and in civil procedure stress the old common-law forms of pleading—not for any present-day practical purpose, but to illuminate centuries of developmental insight into the structure of adversary proceedings and the way procedure interacts with, and is eventually transformed into, substance. Common law does not necessarily have to be taught according to subject matter; the course breakdown could possibly be functional if someday someone invents a way to do it: common law, equity, legislation, justice, forms of action, interests, entitlements, etc. The SECOND YEAR ought to emphasize "practice" courses—moot court, trial advocacy, and negotiation, all using simulated exercises with full-time faculty staffing the courses. These are
tremendous mind-expansion devices if guided by professors who use them as vehicles for teaching the students how to teach themselves. In addition, some "foundation" courses are perhaps necessary in the second year, in areas such as business, international, comparative, tax, accounting, economics, and jurisprudence. The THIRD YEAR should stress the synthetic method: public law courses (constitutional, antitrust, trade), and seminars. Overall, it is important to give students both a sense of progression and of something new each year, which is why I think it is a mistake to "mix up" too many different kinds of offerings in the first year (I would leave moot court out of the first year, for instance). But most importantly, we have three years in which to train young minds; the curriculum should be rationally planned to accomplish this goal in a progressive way, and not to accommodate particular subject-matter preferences of students or faculty. I concede that just saying this shows how impossible it would be to achieve.

FN59. Professor Willard Pedrick suggests that the evaluation questionnaires be devised carefully by the faculty and administration. Letter to the author, June 9, 1987. My problem, however, is not with the content of the questionnaires but with the idea that student evaluations are taken seriously by the school; Professor Pedrick’s suggestion might serve to amplify student perceptions that the evaluations are important and that, accordingly, the students know best how to evaluate teaching. In his letter, Professor Pedrick suggests an alternative which I find very interesting: that evaluation questionnaires be sent to alums who have been out of school five or ten years. Surely if we are going to have student evaluations at all, I would prefer those that measure what a teacher did against real-world practice; after all, the point of good law teaching is to prepare students for real-world practice.

FN60. Many smaller law firms have very little time to train young associates; they consider that to be too much of a luxury. And the larger firms are increasingly becoming cost-conscious. Instead of looking upon a new associate as a person to be trained, today they are moving toward the approach of hiring many more new associates than ever before on the calculation that one out of ten will somehow train herself and be selected for partnership whereas the others (the untrained ones) will be dropped so they can go practice law elsewhere. It is interesting that even as the best law schools are moving toward almost routine tenure appointments of junior faculty, the best law firms are moving in the opposite direction in deciding upon new partners.