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Considering the Future of Legal Education: Law Schools and Social Justice

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CONSIDERING THE FUTURE OF LEGAL EDUCATION: LAW SCHOOLS AND SOCIAL JUSTICE

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I. BACKGROUND

The decade of the 1970's has thus far been a period of rather sustained criticism for legal education. From Chief Justice Burger¹ to Ralph Nader,² complaints about the quality of legal education have been raised. The American Bar Association, at least implicitly, laid part of the blame for lawyer participation in the crimes of the Watergate era upon the shoulders of legal education.³ The President of the Association of American Law Schools has been moved to discuss publicly, "The Causes of Popular Dissatisfaction with Legal Education."⁴ At least one state bar association has seen fit to attempt to exercise fairly extensive control over law school curricula.⁵ Judicial decisions have brought into question law school admissions⁶ and financial aid⁷ policies. It is as if, almost simultaneously, many different elements of society suddenly have recognized the pervasive influence of the law schools in determining the composition, skills, and attitudes of lawyers. Legal education is now viewed as having more than the relatively passive role of gatekeeper for the profession; rather, it is perceived by people with widely varying points of view as exercising a more active role: mold of the profession and its mores.

There can be no question that the law schools are strategically positioned to influence the composition, abilities, and attitudes of the members of the legal profession. Whereas only about 61 percent of practicing lawyers in 1943 had been graduated from a law school, by 1970 the figure was almost

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¹ Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?* 41 Fordham L.R. 228, 229-33 (1973).

² Nader, *Overview to Verdicts on Lawyers* at vii, xviii (R. Nader & M. Green, eds.) (1976); Nader, *Ralph Nader Asks Law Students to Change*, 24 Harv.L.Sch.Bull. No. 4, at 28 (1973).

³ See Janssen, "We'll Murder Them in August." *Who Decides How Ethics Should Be Taught?* 4 Juris Doctor No. 7 at 19 (1974); N.Y. Times, Sept. 22, 1974, at 69, col. 1; *id.*, Feb. 23, 1975, at 39, col. 1.

⁴ Allen, *The Causes of Popular Dissatisfaction with Legal Education*, 62 A.B.A.J. 447 (1976).

⁵ See Beytagh, *Prescribed Courses as Prerequisites for Taking Bar Examinations: Indiana's Experiment in Controlling Legal Education*, 26 J. Legal Educ. 449 (1974).

⁶ See, e. g., *Bakke v. Regents of Univ. of Calif.*, 18 Cal.3d 34, 553 P.2d 1152 (1976), cert. granted 97 S.Ct. 1098 (1977); *Cramer v. Va. Commonwealth Univ.*, 415 F.Supp. 673 (E.D.Va.1976).

⁷ E. g., *Flanagan v. Pres. and Dirs. of Georgetown College*, 417 F.Supp. 377 (D.D.C. 1976).

93%.⁸ In 1975, practically all of the 35,000 new members of the legal profession had been prepared for entry through the process of formal legal education.⁹ By 1980 virtually the entire profession will be composed of the products of law schools (and recent products at that: approximately half of the lawyers in America will have been admitted to practice for less than 10 years). This means that the people who refer to themselves as the "guardians of the law"¹⁰ will have been selected by law school administrators exercising criteria approved, explicitly or implicitly, by law school faculties, the members of which, in turn, have been selected by their predecessors on the law school faculties according to criteria which are largely unarticulated and unreviewed—at least as far as the outside world is concerned. The "guardians of the law" will have been exposed to substantive courses and teaching techniques which have been selected and designed by the same self-perpetuating and unaccountable law school faculties. Of greatest importance, however, is the fact that the professional norms, values, and attitudes of these "guardians of the law" will have been defined, structured, and internalized by the legal education process, a process which is intensely acculturating in nature.¹¹

It would be incorrect to leave the impression that review and criticism of legal education by outsiders to the law school community is a brand new phenomenon. As soon as formalized legal education emerged as a prevalent path to a career in law, in the latter part of the Nineteenth Century and the early Twentieth Century, the organized bar (which at that time was not so dominated by people who had been trained in law schools) began an evalua-

⁸ American Bar Foundation, *The 1971 Lawyer Statistical Report* 8 (1972).

⁹ *Bar Admissions Reach Record Total of 34,930 in 1975, According to N.C.B.E. Figures*, 62 A.B.A.J. 1536 (1976). Only Virginia, Mississippi, California, and Washington still accept law reading as an alternative to law school to qualify an applicant for entry to the bar. Hylton, *Law Reading Still an Option for Prospective Attorneys*, Virginia Law Weekly, Feb. 18, 1977, at 1, col. 2.

¹⁰ American Bar Association, Code of Professional Responsibility, Preamble [hereinafter cited as ABA CPR, followed by a numerical reference to Canons (e. g., ABA CPR Canon 1), Ethical Considerations (e. g., ABA CPR EC 1-1), or Disciplinary Rules (e. g., ABA CPR DR 1-101)]. (For an explanation of the significance of each category in the Code see ABA CPR Preliminary Statement). See also N.Y. Times, Jan. 14, 1974, at 39, col. 1.

¹¹ The socializing effects of legal education have received increasing attention in recent years. See, e. g., Auerbach, *A Plague of Lawyers*, Harpers (Oct. 1976), at 37, 40-43; J. Auerbach, *Unequal Justice* 275-77, 295-96 (1976); Diamond, *Psychic Pressure: What Happens to Your Head*, 6 Juris Doctor No. 11, at 40 (1976); Kubey, *Three Years of Adjustment: Where Your Ideals Go*, 6 Juris Doctor No. 11, at 34 (1976); Pipkin, *Legal Education: The Consumers' Perspective*, 1976 A.B.F.Res.J. 1161 (1976); Taylor, *Law School Stress and the "Deformation Professionnelle"*, 27 J. Legal Educ. 251 (1975); Cooper, *The Law School Way*, 27 J. Legal Educ. 268 (1975); Watson, *The Watergate Lawyer Syndrome: An Educational Deficiency Disease*, 26 J. Legal Educ. 441 (1974) [hereinafter cited as, Watson, *The Watergate Lawyer Syndrome*]; and Nader, *Law Schools and Law Firms, Case and Comment*, May-June 1970, at 30. As psychiatrist Andrew Watson cautions, of course "a very substantial part of every person's character and moral sense is tentatively molded well before he arrives at . . . school." Watson, *The Watergate Lawyer Syndrome*, supra, at 443. Although the student brings to law school a "framework" constructed by his or her pre-law school experiences, Watson nevertheless believes that one's personal values are significantly molded by the legal education process. *Id.*

tive process of which the current wave of criticism and inquiry¹² is only the latest chapter.¹³ Perhaps the chief distinction of the post-1970 round of this dialogue is the relatively greater public participation in discourse, as witnessed by the treatment of the issues in popular media.¹⁴

In view of this long history of scrutiny by "outsiders," it is difficult to say whether it has been a special sensitivity to issues of social responsibility or a keen sense of pragmatism—or both—which best explains the almost agonizing self-appraisal in which the legal education community itself has been engaged ever since its coming into being with the organization of the Association of American Law Schools (AALS) in 1900.¹⁵ This self-analysis has intensified with the recent round of criticism from those outside the law school world. Despite this long history of honest and serious inquiry, questions relating to the purposes and effects of legal education refuse to go away. Today, legal educators find themselves still searching for a consensus—or at least a self-satisfying understanding—as to what it is that we are supposed to be doing and how well we are doing it.

It is with this background in mind that the Society of American Law Teachers (SALT), with support from the Carnegie Foundation, sponsored a National Conference on the Future of Legal Education at New York University School of Law in December of 1976.¹⁶ SALT is a relatively new professional association of law professors who have joined together to work toward, *inter alia*, "the encouragement of developments in legal education that will make curriculum and forms of instruction more responsive to social needs, with particular attention to the public responsibilities of the

¹² See note 11, *supra*, and text accompanying notes 1 through 7, *supra*.

¹³ The concern of the bar which accompanied the early growth of formalized legal education is traced in J. Auerbach, *Unequal Justice* 94-101 (1976). Auerbach's history of the organized bar also documents the bar's continued interest in developments in legal education. *Id.*, at 108-113. It was the keen interest of the practicing bar that prompted the Carnegie Foundation to commission Alfred Z. Reed's landmark survey of legal education, *Training for the Public Profession of Law* (1921).

¹⁴ The works of historian Jerold Auerbach, cited in note 11, *supra*, have been directed at mass audiences, as was the popular movie "The Paper Chase," from J. Osborn's novel by the same name. See also Kasindorf, *Harvard Law Revisited*, 77 *Newsweek*, May 24, 1971, at 52; Goodman, *What are Tomorrow's Lawyers Thinking Today*, 136 *Redbook*, Feb. 1971, at 74; Edmiston, *Portia Faces Life: The Trials of Law School*, 2 *Ms.*, April 1974, at 74; Footlick, *Racism in Reverse: De Funis and the Quota System*, 83 *Newsweek*, Mar. 11, 1974, at 61; *N.Y. Times*, Sept. 23, 1973, at § 4, p. 11, col. 1; *id.*, Aug. 22, 1973, at 37, col. 2; *id.*, July 16, 1973, at 21, col. 1.

¹⁵ See, e. g., Boyer & Cramton, *American Legal Education: An Agenda for Research and Reform*, 59 *Cornell L.Rev.* 221 (1974); H. Packer & T. Ehrlich, *New Directions in Legal Education* (1972) [hereinafter cited as Packer & Ehrlich]; Stolz, *Training for the Public Profession of Law (1921): A Contemporary Review*, in Packer & Ehrlich, *supra*, at 227; Woodward, *The Limits of Legal Realism: An Historical Perspective*, in Packer & Ehrlich, *supra*, at 331; Lasswell & McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 *Yale L.J.* 203 (1943); Katz, *Human Nature and Training for Law Practice*, 1 *J. Legal Educ.* 205 (1948); Frank, *Why Not a Clinical Lawyer School?* 81 *U.Pa.L.Rev.* 907 (1933). The earliest deliberations of the Association of American Law Schools (AALS) are reviewed in J. Auerbach, *Unequal Justice* 87-89 (1976).

¹⁶ The Conference was duplicated in San Francisco in February, 1977.

profession.”¹⁷ The Conference provided a forum for the discussion of three basic questions which seem to be dominating the current public debate on the role of legal education:

- I. What has the teaching of law to do with justice?
- II. What can law school teach about the relation of law students as human beings to their identity as lawyers?
- III. How should legal education respond to developing changes in the legal profession?

The Code of Professional Responsibility¹⁸ encourages all lawyers, regardless of their remoteness from the nuts and bolts of law school administration, to take an interest in and contribute toward the development of legal education. There is a close connection between the quality of legal education—in its broadest sense—and the proficiency of the legal profession in serving society’s needs. EC 8-7 expresses the connection this way:

Since lawyers are a vital part of the legal system, they should be persons [1] of integrity, [2] of professional skill, and [3] of dedication to the improvement of the [legal] system . . .¹⁹

In view of their dual roles as gatekeepers *and* molders of the profession, the law schools are bound to affect the extent to which members of the bar measure up to all three of these numbered criteria. Thus, when EC 8-7 goes on to admonish *all* lawyers to aid in “insuring that those who practice law are qualified to do so,”²⁰ the Code is suggesting that one very important way the individual lawyer can fulfill Canon 8’s general obligation “to assist in improving the legal system”²¹ is to assist in improving legal education so that it will promote the development of all three of the traits identified in EC 8-7. EC 1-1 puts the point perhaps more forcefully:

. . . Maintaining the integrity and improving the competence of the bar to meet the highest standards is the ethical responsibility of *every lawyer*.²² (Emphasis added.)

If we define “competence” as including those professional traits enumerated in EC 8-7 (integrity, skill, and a sense of “social responsibility” for improving the legal system), and if we acknowledge the close connection between legal education and this broad concept of “competence,” then it becomes apparent that *every lawyer* has an ethical responsibility to follow and contribute to developments in legal education. Mindful of this aspect of the lawyer’s professional responsibility, this article is intended to call the SALT Conference to the attention of law teachers and law practitioners alike by exploring one of the questions discussed there. While the full proceedings of the conference are being published in Volume 52 of the New

¹⁷ Brief for Society of American Law Teachers, *amicus curiae*, *Bakke v. Regents of the Univ. of Calif.*, 18 Cal.3d 34; 553 P.2d 1152 (1976), cert. granted 97 S.Ct. 1098 (1977).

¹⁸ Note 10, *supra*.

¹⁹ ABA CPR EC 8-7.

²⁰ *Id.*

²¹ *Id.*, Canon 8.

²² *Id.*, EC 1-1 (emphasis added).

York University Law Review, this article will be confined to a commentary on the question: What has the teaching of law to do with justice?

It should be noted that the legal education community welcomes the interest and contributions of the practicing bar and non-lawyers regarding the development of the law schools. Francis Allen, President of the AALS and former Dean of the University of Michigan School of Law, has spoken approvingly of the "creative" tension between the law schools and the bar.²³ An indirect invitation for constructive criticism from the bar also was extended by Norman Redlich, Dean of the SALT Conference's host law school. In his prefatory remarks, Dean Redlich encouraged the participants to be open to outside criticism. If the SALT exercise in self-study was to be valuable, Redlich said, the professor-participants would have to adopt the kind of healthy "fact skepticism" that every law student is taught to employ in analyzing problems. The assembled law teachers were urged to be skeptical about their own abilities to understand the process of teaching law.²⁴ We were reminded that our personal views on the questions being discussed might well be colored by our own interests and motivations (such as a desire for peace and tranquility). Dean Redlich suggested that we in teaching should be aware of the fact that, by and large, our group is composed of people who have succeeded in law *school* but who have eschewed participation in law *practice*. He wondered if our success in law school, coupled with the fact that we self-selected ourselves out of the practice of law, might suggest that those of us in legal education could not be objective on issues such as the psychological effects of widely used educational techniques. He also wondered whether the self-selection process might make us less open than we ought to be to suggestions and criticisms from the profession which we seemingly have abjured.²⁵

Dean Redlich's comment may not have given adequate recognition to the many law teachers who have had distinguished careers in practice and the many other full-time teachers who contribute time, toil, and talent in professional service to the poor, the unpopular, the forces of law reform, as well as bar association and government enterprises. Likewise, he did not pause to note that many have chosen careers as legal educators by making the conscious decision that this would be the optimal way for them to participate in and contribute to the growth and development of the profession to which they were attracted when they chose to go to law school in the first place. Surely Dean Redlich, whose career has been marked by periods of government service and bar association leadership,²⁶ was not overlooking the prevalence of such career paths. He merely wished to caution the as-

²³ Allen, *supra* note 4, at 447.

²⁴ Similar reservations have been expressed by Boyer & Cramton, *supra* note 15, at 282-85.

²⁵ Sociologist David Riesman, himself a former law professor, has remarked on this point. Riesman, *Some Observations on Legal Education*, 1968 Wis.L.Rev. 63, 72-73.

²⁶ Dean Redlich has served as a member of the President's Commission on the Assassination of President Kennedy, a member of the New York City Board of Education, a member of the Executive Committee of the Association of the Bar of the City of New York and, for three years, as Corporation Counsel for New York City. Association of American Law Schools, *Directory of Law Teachers* 782 (1976).

sembled law teachers that they might comprise a group whose homogeneity could make total objectivity achievable only as the product of a conscious effort. His advice to law teachers is well worth considering. As for the lawyer-reader of this article, Dean Redlich's observation should serve as a reminder of one's professional responsibility to become involved in the development of legal education.²⁷

II. CONFERENCE PRESENTATION

In introducing the question of the relationship between the teaching of law and the quest for social justice, Howard Lesnick, Professor of Law at the University of Pennsylvania and President of SALT, noted that this topic poses a question that legal educators traditionally viewed as simply inappropriate for consideration. The reluctance to ask this question was based on the Holmesian²⁸ notion that interpreters of the law ought not to judge it.²⁹ This attitude began to break down in the mid-1960's as more and more young people, excited by the spirit of social activism then prevalent and encouraged by the judicial attitudes of the Warren era,³⁰ came to law schools.³¹ The question of the appropriate relationship between law school and justice seemed to have been forced upon law teachers by their students. A less pejorative way of stating the question would be to ask, "What *ought* the teaching of law have to do with justice?" Indeed, this was the question the SALT participants chose to address. It would be difficult to demonstrate that this more philosophical question was being asked belatedly. In fact, judging from the near anguish evinced by many of the Conference participants, it would appear that the question had not been forced upon them at all; it was clear that these people had been struggling with this question deeply within themselves for some time.

The focal point for the Conference's discussion of this question was a paper delivered by Jerold Auerbach,³² Professor of History at Wellesley College. Professor Auerbach is one of those outside critics of the legal profession whose writings have identified the law schools as being significantly responsible for many of the shortcomings of the legal profession and the legal system.³³ Auerbach criticizes legal education for emphasizing con-

²⁷ See text accompanying notes 18 through 22, *supra*.

²⁸ See, e. g., O. W. Holmes, *The Common Law* (1881).

²⁹ Address by Howard Lesnick, Society of American Law Teachers Conference on the Future of Legal Education (Dec. 3, 1976). These developments are traced in Woodward, *supra* note 15, at 373-77 and J. Auerbach, *Unequal Justice* 275-78 (1976).

³⁰ Lesnick, *supra* note 29. The developments of the 1960's resembled the "Legal Realist" movement of the 1920's and 1930's, noted in J. Auerbach, *Unequal Justice* 150-51 (1976).

³¹ See, e. g., Mohr & Rodgers, *Legal Education: Some Student Reflections*, 25 J. Legal Educ. 403, 405-09 (1973).

³² J. Auerbach, *What Has the Teaching of Law To Do with Justice?* (Dec. 3, 1976) (unpublished paper presented to Society of American Law Teachers Conference on the Future of Legal Education) [hereinafter cited as Auerbach paper]. A revised version of the paper will appear in the May 1978 issue of the *New York University Law Review*. Page citations here are to the draft of the paper which was presented to the SALT conference.

³³ See note 11, *supra*.

cepts of technique and process to the virtual exclusion of considerations of result. He sees law students being trained to elevate form over substance, becoming value-free craftsmen who are unconcerned with the morality of the position they are asked to advocate or the end they are asked to achieve.³⁴ This attitude of value neutrality which he sees purposely being inculcated causes Auerbach to conclude that legal education actually interferes with the capacity of our legal system to foster the achievement of a just society.³⁵ Even more disturbing for Auerbach is his observation that the legal profession, including its legal education component, has never paused to consider these implications of the traditional approach to legal education. His suggestion is that legal education (and lawyers) should not so readily accept the conventional definition of "Justice as process."³⁶

The process approach to justice, which has been taught to generations of law students through the well-known materials prepared (or influenced) by Hart and Sacks,³⁷ teaches that if a result has been achieved through the orderly functioning of the legal process, then the result is just.³⁸ What the law ought to be, or what the result ought to be, are questions which Professor Auerbach apparently did not hear as a freshman at Columbia University Law School in 1957. At least he did not hear them from his professors. Instead of questions of right and wrong, he heard questions such as, "How could Plaintiff have prevailed if you had been Plaintiff's lawyer?" or "What should Defendant have argued to avoid losing this case?" If a troubled freshman law student paused to raise the question of the justness of the result, the question might be dismissed as irrelevant to the *legal* issue at hand. Even worse, the questioner might be ridiculed by the professor for raising the social issue.

Carefully read, Auerbach's paper does not absolutely reject the appropriateness of the concept of "justice as process." His point is that there are non-neutral values underlying the concept of value neutrality implicit in the "justice as process" approach to law and legal education. His concern is that, as long as these underlying values are unarticulated in the classroom, the concepts of "justice as process" and value neutrality will be too easily accepted by law teachers, with the result that law *students*, in a period in which professional mores are being assimilated, will be given no incentive or opportunity to consider the implications which these concepts hold for the role lawyers play in society. Maybe questions of absolute justice *are*

³⁴ Auerbach paper, at 7.

³⁵ *Id.*, at 5.

³⁶ *Id.*, at 7.

³⁷ H. Hart & A. Sacks, *The Legal Process* (1958) (unpublished teaching materials).

³⁸ Auerbach paper, at 7. *But see* H. Hart & H. Wechsler, *The Federal Courts and the Federal System* xi-xii (1953):

"The book tries to suggest something of the variety of these questions and of their significance; it points to the importance of the postulates of federalism . . . ; it asks the question whether Congress cannot profitably give increased attention to these issues and attempts to show respects in which such conscious management of our federalism . . . might produce important gains. Without deprecating the importance of the problems facing courts, *we are concerned throughout with the issues of legislative policy that the nature of our system puts to Congress.*" (Emphasis added.)

inappropriate in the law school classroom. Maybe Civil Procedure I is the wrong place to discuss whether the Supreme Court's holding in *Eisen v. Carlisle & Jacquelin*,³⁹ construing Rule 23 of the Federal Rules of Civil Procedure in a manner which increases the costs of bringing large class actions, produced an "unjust" result. Maybe, it is the wrong place to consider the values underlying Rule 23, as drafted and construed, and the social consequences of the rule and its interpretation. But even if it is the law teacher's considered belief, grounded on moral principles, that Civil Procedure I is the wrong place to discuss these questions, to discourage a law student from asking them in class may have a lasting impact on that student's willingness to ask it again, even in a setting that the law professor considers more appropriate. Thus, the teacher who dismisses the student's question of abstract justice may be teaching a whole classroom full of impressionable law students a lesson in value neutrality. The students are being taught that lawyers do not care about the abstract justness of results.⁴⁰ Worst of all, from Auerbach's point of view, this lesson, received by students almost as dogma, may have been neither intended nor evaluated by the law teacher. If that is so, the teacher will not have considered the possible loss of personal humanism which may be associated with an individual's adoption of value neutrality. Nor will the teacher have critically evaluated the societal implications of elevating value neutrality (implicit in the concept of "justice as process") into the legal profession's definition of professional morality. And if the teacher has not considered this, we cannot expect many students to be encouraged to do so on their own. Because he perceives an inherent political bias in the assumption that justice is embodied in a fair process, Auerbach concludes that legal education's emphasis on value neutrality contributes, however unintentionally, to the perpetuation of a politically biased legal system.⁴¹

The "bias" that Auerbach sees in the "justice as process" concept stems from the maldistribution of legal services in America. All elements of society do not have equal access to the "fair process;" and the economics of representation and litigation leads to results that are skewed in favor of the status quo, the wealthy, and the financial and business community.⁴² The argument is not that these interests are inherently unjust; rather, the system is allegedly unjust because these interests are more likely to be advocated by lawyers (the most competent lawyers at that), and they are more likely to prevail than would be true if decisions were made strictly on the merits, or if there were equal access to legal counsel and advocacy. The reality of the allocation of legal services, governed by economic forces, thus "transforms law schools into politically aligned institutions,"⁴³ institutions which train generation after generation of legal technicians who, inexorably,

³⁹ 417 U.S. 156 (1974).

⁴⁰ See Watson, *The Watergate Lawyer Syndrome*, *supra* note 11, at 443-44; Auerbach, *A Plague of Lawyers*, Harpers, Oct. 1976, at 37, 40-41.

⁴¹ Auerbach paper, *supra* note 32, at 8.

⁴² *Id.*, at 11. See also Auerbach, *A Plague of Lawyers*, Harpers, Oct. 1976, at 37, 42-44; Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 Yale L.J. 1060, 1079-80 (1976) [hereinafter cited as Fried, *The Lawyer as Friend*].

⁴³ Auerbach paper, *supra* note 32, at 11.

and without considering the implications of doing so, fall into the pattern of disproportionately serving certain kinds of interests. Auerbach feels that, because they have ignored the way legal services are allocated, the law schools have failed to recognize that teaching "justice as process" does not in fact lead to professional attitudes that are neutral in effect.⁴⁴ Before we accept result neutrality as part and parcel of professional competence, law school teacher and student alike should become sensitive to the societal repercussions of instilling this prevailing attitude in the practicing bar.

This question ought to be confronted in law school, Auerbach believes, because every lawyer, at least every sensitive lawyer, eventually is going to have to come to grips with it. Sooner or later, every lawyer is going to wonder, "Can I be a good lawyer and a good person too?"⁴⁵ Encouraging the law student to address this question in law school would serve several purposes that legal educators ought to consider meritorious. First, it would assist the student who otherwise would never ask the question to see its relevancy to his or her own career and life; it might make these people conscious of issues of social justice which they otherwise might not have seen.⁴⁶ Second, for those who, in law school, would have perceived the importance of the question on their own, this new law school attitude would support their inquiry rather than crush their sensitivity and concern for social problems.⁴⁷ Third, for perhaps the majority of budding lawyers, those who would tend to confront this question for the first time in a real life situation in their early years of practice, we would be helping such persons avoid the personal trauma involved in having to face up to the question under those circumstances; we would also be enhancing the possibility that the answer discovered by such individuals would be grounded upon a recognition of the kind of social responsibility of lawyers reflected in Canon 8 of the Code of Professional Responsibility.⁴⁸

For Professor Auerbach, then, the teaching of law can have very little to do with justice so long as (1) there is a maldistribution of legal services in America and (2) the law schools continue to instill value neutrality in their students. Consequently, the sincerest of attempts to rationalize value neutrality on moral grounds⁴⁹ are flawed and unpersuasive, in Auerbach's view, since they regularly fail to come to grips with the practical social im-

⁴⁴ *Id.*

⁴⁵ *Id.*, at 12. Auerbach takes this phrasing of the question from Harvard's Charles Fried in *The Lawyer as Friend*, *supra* note 42, at 1060.

⁴⁶ The Code of Professional Responsibility attempts to induce lawyers (1) to ask questions about the efficacy of the legal system and (2) to take action to improve the system where it is discovered to be impairing just results. See ABA CPR EC 8-1, 8-2, 8-9. See discussion in text accompanying notes 85 through 92, *infra*.

⁴⁷ That law school does tend to do this has been argued in Silver, *Anxiety and the First Semester of Law School*, 1968 Wis.L.Rev. 1201; Mohr & Rodgers, *supra* note 31; Watson, *The Watergate Lawyer Syndrome*, *supra* note 11; Thaler, *What's Left of You After Law School*, 4 Student Lawyer 12 (1976). And see Pipkin, *supra* note 11, at 1163-65, 1191-92.

⁴⁸ "A Lawyer Should Assist in Improving the Legal System." ABA CPR Canon 8.

⁴⁹ Auerbach's example of such an attempt is Charles Fried's *The Lawyer as Friend*, *supra* note 42.

pact which this lawyers' attitude of value neutrality portends for the results achieved through the legal process:

The issue is not whether lawyering can be divorced from social consequence; it cannot. The issue is which social consequences, within the context of modern American society, lawyering shall promote.⁵⁰

III. CONFERENCE COMMENTARY

While Auerbach's statement of the crucial issue may be relevant to the question of what the teaching of law *does* have to do with justice, it appears to beg the more fundamental question of what law teaching *ought* to have to do with justice. Can law schools presume to instruct upon which social consequences ought to be furthered by their students upon graduation without involving themselves in value modification and attitudinal indoctrination? If law schools should decide to go down that path, who would define the "approved" values? Should we fail the student who is unable to assimilate our school's defined value system? Will the Association of American Law Schools or American Bar Association suspend the accreditation of those schools which have adopted a value system disapproved by one of those associations? Even those who, like Auerbach, perceive that the so-called value neutrality nurtured by legal education is itself a form of value modification and attitudinal indoctrination that has non-neutral, undesirable social consequences, fear the consequences of freeing legal education from its traditional role.⁵¹ Yet, they wonder if it should not be as legitimate purposely to select desired social consequences and gear legal education to foster their achievement as it is to foster value modification indirectly (or accidentally) in the direction of value neutrality.⁵² In view of his dissatisfaction with value neutrality as a professional value, it is not surprising that Professor Auerbach was attracted to this more openly naturalistic approach to legal education.⁵³ His concluding proposal was that law faculties should engage in "more explicit consideration of society itself, and the justness of its institutions and practices" ⁵⁴

⁵⁰ Auerbach, paper, *supra* note 32 at 22.

⁵¹ See Meltsner & Schrag, *Report from a CLEPR Colony*, 76 Colum.L.Rev. 581, 627-28 (1976).

⁵² So long as the accrediting institutions stay out of the process by which schools define their desired value goals, we might expect different goals to be adopted by different schools. Thus, value-conscious legal education would not forebode hegemony of any one point of view; on the contrary, because of its probable salutary effect on the distribution of legal services due to the greater student exposure to issues of social justice, value-conscious legal education in all likelihood would lead to a broader representation of differing interests than the neutrality system has produced. Cf. Nader, *Law Schools and Law Firms*, Case and Comment, May-June 1970, at 30 (law schools have failed to modify curricula to take into account the needs and strains of our increasingly complex society). But see C. Auerbach, *Some Comments on Mr. Nader's Views*, *id.*, at 39.

⁵³ It should be recognized that the concept of "justice as process," which is the rationale underlying legal education's traditional indoctrination in value neutrality, is itself based on fundamental naturalistic assumptions. These assumptions are rarely articulated or examined. See text accompanying notes 77 through 80 *supra*.

⁵⁴ Auerbach paper, *supra* note 32, at 21.

Others at the conference sought a middle ground, one from which law schools could attempt consciously to contribute to a just society without elevating the attitude of value neutrality or any other social attitude to a position of doctrinal infallibility. Commenting on Auerbach's presentation, Yale's Robert Cover suggested that law teachers could have a profound impact on students' sensitivity to questions of social justice as well as their commitment to contribute to the resolution of such questions—without redefining the mission of legal education to be the achievement of law reform rather than simply developing lawyering skills. How? By increasing both the quantity and quality of student-teacher interaction. Over the years, countless law teachers have, on their own time, devoted themselves to law reform and efforts for social justice. Since much of this work is done behind the scenes, and all of it is done outside of the classroom, most students may be unaware of these selfless efforts. If there were more interaction between students and professors, more students would see that their teachers, who very often become role models for the student, are not only concerned with justice but are willing to work for its achievement. The student would thus be at least as likely to assimilate this attitude of social involvement as the one of detached neutrality that often emerges in the classroom. Moreover, the students who might have been troubled by the question—Can a good lawyer be a good person?—might begin to see their way to an affirmative answer by seeing that loyalty to client in an employment context does not preclude zealous efforts in behalf of social change in the lawyer's personal life.⁵⁵

Because of the customary stratification between law review personnel and the rest of the student body, whatever faculty-student intellectual relationships that do exist at most schools tend to be reserved for a small proportion of the law school population. Cover believes law teachers should try to expand the number of meaningful contacts between all students and their instructors. Smaller class size would also foster greater interaction between student and teacher, for the closer the student-faculty ratio gets to one, the more likely it is that the student will get to see the teacher as a human being concerned with justice and society's ordering of priorities. This human relationship between student and teacher is one of the chief advantages of clinical legal education.⁵⁶ Cover fears that if law teachers do not actively seek to present themselves as positive role models, the tendency will be for students to be actuated primarily by economic forces, and their professional priorities will be allocated in an environment which he characterized as a "moral vacuum" created by the pervasive value neutrality described by Auerbach.⁵⁷ Thus, while agreeing with Auerbach that the teaching of law ought

⁵⁵ While not requiring personal involvement in law reform efforts, the Code of Professional Responsibility strongly encourages lawyers to consider it part of their professional responsibility to do so. See ABA CPR EC 8-1, 8-2, 8-3, 8-4, 8-9. *Of. id.*, EC 7-17 ("[a lawyer] may take positions on public issues and espouse legal reforms he favors without regard to the individual views of any client"). See text accompanying notes 85 through 92, *infra*.

⁵⁶ See Meltsner & Schrag, *supra* note 51, at 628.

⁵⁷ Meltsner & Schrag have noted the "incredibly few opportunities for practice in the 'public' sector, the lower wage scales [there], and the supposedly inferior training [there]," all of which tend to leave most law school graduates with little practical choice as to the career path to be followed. *Id.*, at 627.

to have a great deal to do with justice, and a great deal more than it presently does at that, Professor Cover proposes a course which is less direct, but more pervasive, than Auerbach seems to suggest. By broadening our definition of legal education and encouraging professors and students alike to take an active role in the non-classroom aspect of the education process (a part of the process that can have a great deal to do with character formation and value identification), Cover believes we can do all that we properly should do to interject a concern for social justice into the law school environment. However, to attempt to teach "justice" in the classroom along with substantive and procedural law is a task which Professor Cover as a lawyer, educator, or social activist, would have great difficulty (and reluctance) implementing.

Harris Wofford, another commentator on Auerbach's presentation, suggested that, rather than encouraging professors to present their view of justice as dogma (as he fears it would become), law schools should bring non-lawyers on to their faculties. Ethicists, moral philosophers, and social scientists could be added and asked to provoke student reflection by introducing a sense of radical skepticism about what students are learning to do in law school. He believes this stimulation would instill within students an intrinsic desire to search for answers to social problems. In reality, Wofford believes, the most we can hope to do is to encourage students to ask the right questions and care about their answers. This observer wondered whether even Auerbach would ask for more. The answer came in an exchange which followed shortly. A member of the audience, Norman Dorsen of New York University Law School (and newly-elected president of the American Civil Liberties Union) asked, "What more can we do than to get the student to appreciate the social and economic underpinnings and implications of legal doctrines and to encourage the student to consider these elements and form a personal judgment about them?"⁵⁸ Dorsen was making the point that he is not convinced that the teaching of technique and process, if done properly, has to be as unrelated to questions of social justice as Auerbach believes it is in practice. Dorsen used as an example the "assumption-of-risk" and "fellow-servant" doctrines in the law of torts. Should not the thorough teacher try to help the student to understand the historical origins, economic implications, and social consequences of the growth of those doctrines? Would not any lawyer representing a client whose interest required the expansion or limitation of these doctrines need to have this sort of broad understanding in order to do a competent job? If law teachers encourage their students to form a personal judgment about the wisdom or justness of these doctrines, having themselves helped the students to see grounds for attacking and defending the doctrines, would they not have done all they could reasonably do to foster within the student an attitude of caring which would negate the attitude of not caring which the process orientation of legal education is thought to engender? And having fostered an attitude of caring, would not the law teachers have done all they could reasonably be expected to do, short of attempting social indoctrination of law students, to educate lawyers in a manner that will contribute over time to the development of social justice? Professor Auerbach, conceding that he too believes it is dangerous for law schools to pronounce what they believe

⁵⁸ This quoted question is a paraphrase.

to be "truth and justice," stated that his concern would be eased considerably if more teachers approached their law school courses as Norman Dorsen suggested. In such an atmosphere the individual student not only would be free to define his or her own concept of justice, but he or she would be encouraged to do so.⁵⁹

The comments of a number of teachers in the audience seemed to establish a consensus which preferred Dorsen's approach. This approach would avoid the danger of value indoctrination or the teaching of dogma while at the same time encouraging law teachers, who seldom see eye to eye on substantive issues of social justice anyway, to raise the issues in the context of their courses—without being conclusory about them at all. The consensus seemed to be that it would not be inappropriate for the teacher to interject his or her own sense of how particular issues ought to be resolved but many felt uneasy about "requiring" teachers to expose their personal views. However, it was noted that such personal input would diminish the danger of unintentionally instilling value neutrality as a positive value in law students. One law teacher suggested that we were deluding ourselves if we thought merely talking about concepts of social justice would actually contribute to social change. But, in reality, no one had advocated using legal education as a *mechanism* to achieve social change. The expressed concern was whether legal education, as commonly approached today, unduly (and unwittingly) acts as an unnatural *barrier* to social change by training lawyers not to care about the personal ethics of either their clients or themselves. That legal education now stands as such a barrier was not disputed by any conference participant. The debate narrowed down to whether legal education ought to be concerned about this fact, and, if so, what could be done to improve the situation.

IV. ANALYSIS

On this review it appears that there are two distinct but related concerns regarding the effects of legal education. The main concern is that, because law school imbues students with an outlook of neutrality *vis-à-vis* client objectives, legal education fosters a situation in which some of the causes that *some* people believe to be the most necessary for the achievement of social justice go unrepresented or underrepresented. Auerbach and others believe that legal education neither prepares nor encourages lawyers to exercise discretion—upon the basis of social values—in deciding what sorts of clients to represent.⁶⁰ The second (and corollary) concern is that America's

⁵⁹ Auerbach's fear was that too few teachers undertake to provide this kind of encouragement, with students tending to discern from the resulting vacuum that the accepted role model for attorneys is value neutrality. The excerpt in note 38 *supra* from the preface to Hart and Wechsler's *The Federal Courts and the Federal System* suggests that Auerbach's fear may be unnecessary.

⁶⁰ The Code of Professional Responsibility does recognize that lawyers have this discretion. ABA CPR EC 2-30. *But see id.*, EC 2-29. However, the Code does not encourage the attorney to be judgmental of client motives, so long as the attorney is satisfied that the client is neither seeking *merely* to harass or maliciously injure a party nor asking the attorney to present a position that cannot be supported by existing law or a "good faith" argument for the extension, modification, or reversal of existing law. *Id.*, DR 2-109. Indeed, the EC's governing the acceptance and retention of employment tend to cut against the frequent exercise of attorney discre-

400,000 lawyers, having received their professional training without ever being encouraged to analyze social policy according to ethical principles, tend to pursue a policy of value neutrality in their private lives, where considerations of client loyalty should not operate.⁶¹ The effect of this tendency among lawyers, who are disproportionately represented in positions of policy-making authority in our society,⁶² is to impede the pace of social change. Those who voice these concerns conclude that, at best, the finished products of the law schools are no more socially aware or mindful than they were when they entered; at worst, the finished products are less concerned about the just resolution of social problems than they were when they began their legal studies. At best, the law schools mirror society's institutions and morality; at worst, the law schools demoralize the future leaders of the nation.⁶³

Law schools and lawyers ought to be troubled by these concerns. If they are based on what is really happening in law school, we surely would want to do something to resolve them. How could one argue that it is wise or just purposely to conduct the institution of legal education in a manner that fosters amorality among such an influential group as lawyers? But before we go off drastically reforming the law schools, we should inquire as to whether legal education is really responsible for the conditions that give rise to these concerns. In other words, can the critics' concerns ever be quieted merely by changing legal education? Let us separately examine the two principal concerns.

tion over the acceptance of employment; their thrust is that control of the availability of counsel should not be the mechanism by which society determines which views of social justice shall prevail. *See id.*, EC's 2-24 through 2-29 and 2-31 through 2-33 (neither the financial status of the prospective client nor the lawyer's disagreement with the prospective client's objective should lead the lawyer to decline representation). *But see* EC 2-30 (if the intensity of the lawyer's feelings concerning the client's motives would prevent truly zealous advocacy in the client's behalf, then the lawyer may decline).

Within the lawyer-client relationship, however, the Code does not compel value-neutrality. In that part of legal representation which involves the counseling function, lawyers are urged to advise their clients according to moral as well as legal considerations. *Id.*, EC 7-8, 7-9, 7-10. Thus, while the Code compels *result* neutrality during the advocacy stage of the representation, *id.*, DR 7-101(A), 7-106(C) (4), it neither compels nor supports *value* neutrality at any stage of the representation. Indeed, to be certain that one is living up to the duty of zealous advocacy imposed by DR 7-101(A), an attorney may be required almost continually to consider the client's motives and to evaluate them according to the lawyer's personal sense of right and wrong. How else could the lawyer be sure he or she was not subconsciously restricting his or her efforts in the client's behalf because of moral qualms? *Cf. id.*, EC 2-30 (intensity of personal feelings justifies declining or withdrawing from employment in non-court-appointed situation); DR 2-110(C)(1)(e) (it is permissible for attorney to withdraw when a client insists that the lawyer engage in conduct which is contrary to the judgment and advice of the lawyer). *See also id.*, EC 7-8, 7-9.

⁶¹ *See id.*, EC's 8-4, 7-16, 7-17.

⁶² *See, e. g.*, Eulau & Sprague, *Lawyers in Politics* 11 (1964).

⁶³ A recent survey of empirical studies leads to the conclusion that the voting behavior of lawyers in legislative bodies does not differ perceptibly from that of non-lawyers. V. Countryman, T. Finman & T. Schneyer, *The Lawyer in Modern Society* 61-70 (2d ed. 1976).

A. Law Schools and the Distribution of Legal Services

If there were abundant and affordable legal counsel for *all* interests in society, how much is left of the critics' concern about the underrepresentation of "just" causes? If all potential clients had the same access to advice and representation, the bias in the legal system that allegedly favors the status quo would be eliminated—at least that part of the bias that is sought to be attributed to the value neutrality of lawyers (nurtured in law school) whose employment is dictated by economic forces rather than sympathy with the client's cause. This part of the perceived problem, then, is not chiefly, or even largely, due to the value-inculcating characteristics of legal education. It arises most directly out of the maldistribution of legal services in America,⁶⁴ which in turn arises out of the maldistribution of wealth in America.⁶⁵ To suggest that a departure from traditional law school curricula and teaching methods might somehow transform legal education into a more positive force for social justice fails to take cognizance of the true nature and magnitude of the problem which gives rise to the critics' complaint: the maldistribution of wealth. It must be recognized that, as matters stand, even most of those idealists who are drawn to law school because of a desire to work for "social justice" will find it impossible to do so unless they are independently wealthy, so few are the positions which will pay a reasonably acceptable salary for such work.⁶⁶ As long as goods and services in our society are allocated primarily by economic forces rather than merit or egalitarian principles, the most successful indoctrination of a *pro bono* attitude into the heads of law students cannot be expected to eradicate the problem of the maldistribution of legal services, much less contribute to the realization of a particular goal of social justice.⁶⁷ But if the crisis in the delivery of legal services were resolved according to some democratically-defined concept of social justice, whether lawyers were "demoralized" by law school or not, their amorality in deciding which clients to represent could no longer be accused of impeding social justice—unless it be contended that some

⁶⁴ It is estimated that from 60 to 90% of the population does not now have meaningful access to legal services. See generally B. Christensen, *Lawyers for People of Moderate Means* (1970); *The Organized Bar: Self-Serving or Serving the Public? Hearings Before the Subcommittee on Representation of Citizen Interests of the Senate Com. on the Judiciary*, 93d Cong., 2d Sess. (1974); B. Curran & F. Spalding, *The Legal Needs of the Public* (1974); Cramton, *The Task Ahead in Legal Services*, 61 A.B.A.J. 1339 (1975).

⁶⁵ Cf. Cahn & Cahn, *The War on Poverty: A Civilian Perspective*, 73 Yale L.J. 1317 (1964) (lack of funds results in lack of legal representation; lack of legal representation affects decisions made by judicial, administrative, and legislative bodies).

⁶⁶ See note 57, *supra*. The shortage of paying jobs for lawyers who would like to devote at least part of their careers, on a full time basis, to serving the legal needs of the poor has resulted in a situation where about one-half of one percent of all lawyers are being employed to serve about one-sixth of the total population. Cramton, *supra* note 64, at 1343.

⁶⁷ Cf. Handler, Hollingsworth, Erlanger, Landinsky, *The Public Interest Activities of Private Practice Lawyers*, 61 A.B.A.J. 1388 (1975) (largely due to economic considerations, private practitioners do not devote significant time in behalf of "public interest" or "*pro bono*" efforts).

clients and some causes ought not to be represented by any lawyer, a position not advocated by even the most ardent critics of the legal profession.⁶⁸

To be sure, law schools as institutions can contribute to an improvement in the availability of legal services, e. g., by exercising admissions decisions with this end in mind.⁶⁹ Similarly, the people involved in legal education—as individual human beings and as members of an interdependent society—are in a position to make some personal contribution to filling what they perceive to be unmet legal needs.⁷⁰ Moreover, legal educators may indirectly foster constructive changes in the legal services delivery system by helping students to appreciate the relationship between the availability of legal services and many rules of law that may be discussed in a variety of traditional courses. But it is one thing to say that law schools and law teachers can contribute to an improvement in the distribution of legal services; it is something else to say that they have a responsibility to define the limits to the maldistribution problem and then solve it for society by selecting who should be admitted to law school and then instructing those deemed worthy (presumably on the basis of conformity with the school's formulation of the nature of social justice), on how to decide which causes are “just” and therefore worthy of representation—with or without a fee.⁷¹ It is one thing to say that the world of legal education ought to be concerned about improving the distribution of legal services in America, but do we really want to advocate that law schools have some special responsibility to resolve broad issues of social justice—issues such as the appropriate allocation and distribution mechanism for legal services? Let us not forget that these law school teachers and administrators have been neither trained (except fortuitously) nor nominated to resolve our society's questions of social justice.⁷² To whom are these people accountable? Who is to say when Harvard law professor Archibald Cox volunteers his services in behalf of Maine Indians⁷³ that he is contributing more to “social justice” than the Maine Attorney General who is defending that state against huge Indian claims? Do we want to establish legal scholars as an elite class charged with defining social justice and training an army of lawyers to go out and achieve it? Do we even want to bestow on this group the responsibility (with the implicit authority that accompanies it) to define the con-

⁶⁸ But see M. Green, *The Other Government* 268-89 (1975); ABA CPR, DR 7-102 (A)(1)-(2).

⁶⁹ By making a more affirmative effort to identify and offer admission to those applicants who indicate a propensity to represent elements of the population which are now underrepresented, law schools can at least assure that those paying positions now available or economically viable will not go unfilled.

⁷⁰ The lawyer's professional responsibility to assist in making legal counsel available to all who need it, see ABA CPR, Canon 2, applies to academic lawyers as well as practitioners. Cf. ABA Com. on Professional Ethics, Opinions, No. 336 (1974) (“[A] lawyer must comply at all times with the Code of Professional Responsibility whether or not he is acting in his professional capacity.”).

⁷¹ It is recognized that what has just been said questions the legitimacy of law schools' exercising the power described in note 69, *supra*.

⁷² See text accompanying note 10, *supra*. Cf. Lasswell & McDougal, *supra* note 15 (legal education is not designed adequately to prepare law students for the roles of public leadership they are so likely to assume after graduation).

⁷³ See Washington Post, Feb. 2, 1977, at A12, col. 1.

tours of the problem of the maldistribution of legal services? Or would we rather acknowledge that change in a democracy comes at the expense of time, but with the reward of freedom from tyranny—including a tyranny of the elite? To my mind, the latter is the more desirable course. The crisis in the maldistribution of legal services in our society⁷⁴ is certainly an issue of social justice, but as such it requires a political resolution. It is a crisis—one in which lawyers and law schools ought to be concerned, if only out of self-interest.⁷⁵ But neither the legal profession in general nor the law schools in particular can be expected to resolve it for society. Nor should they be. The problem is too big and the ramifications of potential solutions are too broad to entrust its solution to any interest group.⁷⁶

It may be said of this view that it is too positivistic, tending to absolve individuals who are in positions to materially improve the quality of social justice in our society of any responsibility to do so. And surely Professor Auerbach would protest that law schools simply cannot be neutral: by refusing to exercise discretion and consciously attempt to contribute to a solution to a perceived impediment to the achievement of social justice as one views it, a person contributes to the perpetuation of that problem. But I have not advocated that the law schools have no responsibility in this area, or that they should "do nothing". What I am saying is that it is both impractical and counterproductive to look upon the law schools as the most appropriate institutions for remedying what is at base a societal condition which is believed to be impeding the achievement of social justice.^{76-A} The impracticality stems from the distance between the root cause of the perceived problem and the proposed solution. The problem is largely one of economic origins; it cannot be resolved by changing attitudes of a group of the population (lawyers) which, like the rest of our society, is actuated by economic motives. Even "good" people have to make a living. The counterproductive effects of turning to the law schools for a solution to this problem are two-fold. First, to approach the problem this way creates an atmosphere in which other, more responsive solutions may not be pursued with appropriate vigor. Second, if implemented, the proposed solution would result in new, equally

⁷⁴ See note 64, *supra*.

⁷⁵ Cf. ABA CPR, Canon 8, note 2.

⁷⁶ One is tempted to analogize to the problems involved in providing for the distribution of medical services in America. Our society has chosen, through the representative process, not to rely strictly upon economic forces to allocate health care. Neither the medical schools nor the medical profession has been assigned the responsibility (or authority) to design the health care delivery system. This is done through the legislative process. Those who perceive imperfections in the health care delivery system propose legislative and administrative remedies rather than alterations to the Hippocratic Oath or American Medical Association Code of Ethics. See, e. g., Spivak, "Health Care: Ripe for Regulation," *Wall St. J.*, Jan. 19, 1977, at 16, col. 4.

^{76-A} Although the revised draft of Professor Auerbach's paper (see note 32, *supra*) is more moderate in tone than his original presentation to the SALT conference [e. g., he concedes the distribution of wealth rather than the distribution of legal services to be his primary concern, and he further concedes that this is a problem that may be beyond the "jurisdiction" of the legal profession (revised draft, p. 21)], he continues to view it as a lamentable fact of life that legal education is not likely to turn its attention more directly to questions of "the nature of just legal institutions." *Id.*, pp. 10, 21, 22.

serious barriers to the achievement of social justice that would offset any gains made in other areas. This point requires some elaboration.

The fundamental concept of the lawyer as an independent advocate for any client's (legal) interest⁷⁷ is founded upon some very fundamental moral principles. These include a recognition of the dignity of the individual (regardless of cause) and the concept of reasoned self-government based upon the rule of law.⁷⁸ This last principle embodies limitations on the power of the state and preserves an opportunity for individual citizens to resolve their disputes and assert their claims and defenses through an orderly, continuous, fair, and impartial legal system.⁷⁹ If there were equal access to counsel of equal competence, we would have a world in which every lawyer serving any client would surely be doing a moral act and contributing to the development of a just society by zealously seeking that client's every lawful objective through every legally available means. It would not detract from the intrinsic social value of such representation if the lawyer's devotion to client were so great that it blinded the lawyer from any consideration of the ultimate good or ill that might flow from the client's success. By serving the client well, the lawyer would be serving society well by assisting the system to function properly. But even now, in a world still afflicted by the maldistribution of legal services, it is appropriate to characterize a lawyer's representation of a client as an intrinsically moral act, even if the client has been accepted in a climate of value neutrality on the part of the lawyer.⁸⁰ As the distribution of legal services improves, we can expect that the legal system will begin to generate a legal order that would come closer to satisfying Professor Auerbach's notions of social justice than does the present one—but *only* if we continue to rely upon the model of zealous loyalty to the client and result neutrality now taught by the Code of Professional Responsibility and the law schools. The point is that there is an important aspect of social justice that is concerned with the way social decisions are made instead of the substance of those decisions. If Professor Auerbach can complain that "justice as process" is insufficient to secure absolute social justice, is it not as pertinent for someone else to complain that the imposition of "just" results by a tyranny of the state or a tyranny of the elite would sacrifice other values of social justice equally significant? In short, the benefits to be gained from having the law schools attempt to modify the concepts of client loyalty and value neutrality are uncertain at best, even accepting the goals of Professor Auerbach; and even if the benefits of such a modification were obvious and significant in the short run, to my mind they would be outweighed in the long run by the costs in terms of weakened democratic principles, the loss of respect for the dignity of the individual,

⁷⁷ "A basic tenet of the professional responsibility of lawyers is that every person in our society should have ready access to the independent professional services of a lawyer of integrity and competence." ABA CPR, EC 1-1. See also *id.*, DR 7-101 (A).

⁷⁸ *Id.*, Preamble.

⁷⁹ *Id.* See also D. Mellinkoff, *The Conscience of a Lawyer* 6-10 (1973).

⁸⁰ See generally Fried, *The Lawyer as Friend*, *supra* note 42. See also ABA CPR, EC 7-1 and 7-19: "The duty of a lawyer to his client and his duty to the legal system [society] are the same: to represent his client zealously within the bounds of the law."

and the tarnishing of the majesty of a continuous system of justice that resolves disputes and makes changes, if sometimes slowly, always with a minimal imposition of the power of the state or any single elite group. Hence, because it would require the implementation of a dangerous change in the definition of the lawyer's role in our society, relying on the law schools to lead the nation toward social justice through concentrated efforts toward reallocating legal services must be viewed as counterproductive.

B. Law Schools and Personal Morality

What about the other part of the critics' concern? What if law school tends to make lawyers behave amorally in their non-representative capacities? Should legal educators be concerned about that? Surely, yes. Fortunately, this is a problem that law schools can address effectively without the risk of becoming doctrinaire—simply by encouraging law teachers to care about social justice and to let their students know that they care.

We have just said that absolute client loyalty and value neutrality⁸¹ have moral foundations—in the context of client representation. Important systemic values underlying both the legal and political processes are furthered by the availability of a profession of trained attorneys capable of giving representation to any lawful cause. But lawyers' lives involve much more than client representation. All lawyers are citizens, constituents of many communities. That alone should make us hope that their professional training would not tend to make them irresponsible or uncaring. When we recognize the fact that lawyers are disproportionately represented in positions of leadership, responsibility, and influence, we can begin to appreciate the adverse societal impact that would be felt if the people populating these important positions have been desensitized to social problems or somehow "demoralized" by the legal education process. Society has little to gain from the value-free lawyer-school board member, lawyer-legislator, lawyer-director, lawyer-judge, or lawyer-citizen. There is no systemic rationalization for the proposition that it is good, or even acceptable, for people in these roles to be unconcerned about social justice. So if—for moral reasons—law schools should prepare their students to think in a value-free way with respect to client representation, then—also for moral reasons—the law schools should prepare their students to relate to their other roles in society in a value-oriented way. As an absolute minimum, legal education should not reduce the concern for social justice felt by people who are going to be lawyers.

There are two essential aspects of value orientation to which legal education is relevant. First, there is knowledge. Value identification and value ordering should be rational processes for each individual. By exposing students to the substantive law in its economic, social, and political contexts (both in terms of its origins and its implications), law schools can equip future lawyer-citizens with necessary insights for evaluating the adequacy of legal and social institutions for achieving abstract societal values (as each individual may define them). The student could be—and should be—forced to look behind the substantive and procedural rules and laws so as better to

⁸¹ "Value neutrality" might better be read as "result neutrality" in view of the discussion in note 60, *supra*.

understand their foundations and implications.⁸² This broader orientation of legal education would not only equip the lawyer to be a more value-oriented citizen in his or her non-representative roles, it would also equip the lawyer to be a better value-free advocate and counselor in the representative role.⁸³ If legal educators keep all of these possible future roles of their students in mind, and recognize that, intentionally or not, three years of law school may significantly affect the future attitudes with which their current students will approach these various roles, then legal education will have gone a long way toward avoiding value indifference among lawyers. In short, learning "black letter law" ill prepares the law student for any role, representative or private. To use an earlier illustration, simply to know the language of Rule 23 of the Federal Rules of Civil Procedure and the holding of the Supreme Court in *Eisen v. Carlisle & Jacquelin*⁸⁴ will not adequately equip a person either (1) to argue in a court for a client that *Eisen* ought to be strictly limited to its facts (or extended to further restrict the ability to support large consumer class actions), or (2) to argue in bar association meetings or in letters to Congress that—as a matter of social justice—there ought (or ought not) to be changes in the law that foster access to the legal process and meaningful remedies for the kinds of individuals who allegedly were injured in *Eisen* but unable to receive relief because of the Supreme Court's interpretation and application of Rule 23 in that case.

Besides knowledge, a value-oriented philosophy of life requires commitment. To be sure, the kind of knowledge just discussed is a prerequisite to social commitment. It provides both a foundation for a personal identification of values and a basis for evaluating where changes must occur if those values are to be actuated by society. But it is one thing to become sensitive to injustice; it is something else to see an injustice and devote *oneself* to seeing that society remedies it. Canon 8 of the Code of Professional Responsibility states that "Every lawyer should assist in improving the legal system."⁸⁵ This "axiomatic norm"⁸⁶ is not elaborated by any disciplinary rules which would make mandatory some specific individual activity on the part of every lawyer consistent with the norm.⁸⁷ But the

⁸² This is the point suggested at the SALT Conference by Professor Dorsen. See text accompanying note 58, *supra*.

⁸³ To the extent that thoroughly competent representation includes the counseling function, and to the extent that complete counseling involves advising the client as to the non-legal consequences of a proposed action, *see* ABA CPR EC 7-8, then this broader perspective on the part of the attorney should make for a better counselor in the representative context.

⁸⁴ See note 39, *supra*, and accompanying text.

⁸⁵ ABA CPR, Canon 8.

⁸⁶ The nine Canons in the Code of Professional Responsibility, stated as they are in broad generalities, are described in the Code's Preliminary Statement as "axiomatic norms."

⁸⁷ The three disciplinary rules that are found under Canon 8 are limited to proscribing the conduct of a lawyer holding public office so as to minimize (but not prohibit) conflicts of interest, *id.*, DR 8-101; proscribing false statements concerning judges, adjudicatory officers, or candidates for those positions, *id.*, DR 8-102; and proscribing certain kinds of (but not all) contributions to the campaigns of those running for judicial office, *id.*, DR 8-103.

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ethical considerations under Canon 8, though unenforceable,⁸⁸ do identify some aspirational objectives which encourage attorneys to be concerned with issues of social justice and to contribute to their just resolution. EC 8-1 states in part that, "By reason of education and experience, lawyers are especially qualified to recognize deficiencies in the legal system and to *initiate corrective* measures therein."⁸⁹ (Emphasis added.) EC 8-2 subsumes within the concept of "deficiencies in the legal system" social injustices, suggesting that lawyers—in their private capacities—"should endeavor . . . to obtain changes in the law" where they "believe the existence or absence of a rule of law, substantive or procedural, causes or contributes to an unjust result."⁹⁰ EC 8-3 singles out the maldistribution of legal services as one overriding "deficiency" in the legal system which contributes to unjust results and which every lawyer has a responsibility to help ameliorate.⁹¹ These provisions suggest the existence of a professional responsibility for the individual attorney to be on the lookout for, and to act affirmatively to correct, perceived "deficiencies in the legal system." EC 8-9 emphasizes the need for constant vigilance and affirmative action by relating Canon 8's concern for law reform to the very maintenance of the rule of law.⁹² Yet, the Preamble to the Code of Professional Responsibility sets a rather pessimistic tone regarding these aspirational objectives when it says, "Each lawyer must find within his own conscience the touchstone against which to test the extent to which his actions should rise above [the] minimum standards [set forth in the disciplinary rules]."⁹³ So, although Canon 8 instructs that it is part of every lawyer's professional responsibility to be concerned with issues of social justice and to contribute to their resolution, the inherently subjective nature of this requirement, coupled with the absence of any enforceable disciplinary rules in Canon 8 mandating activity toward this goal of involvement, leaves lawyer compliance with the precepts of Canon 8 essentially to the individual consciences of those who are selected (first, by themselves; second, by law school admissions officers; and, finally, by bar examiners) to be lawyers.

What can law schools do to instill a sense of commitment in law students to extend themselves beyond the minimum requirement stated in the disci-

⁸⁸ The Ethical Considerations appearing in the Code of Professional Responsibility are "aspirational in character;" only the Disciplinary Rules are "mandatory." *Id.*, Preliminary Statement.

⁸⁹ *Id.*, EC 8-1 (emphasis added).

⁹⁰ *Id.*, EC 8-2. The reference to *substantive* as well as procedural rules of law in EC 8-2 allows us to dismiss the argument that Canon 8 contemplates law reform activities only in areas dealing with "the functioning of legal institutions, such as the courts, Congress, and executive agencies." See, Rauch, *Public Interest Law: Should Lawyers Pick Up the Tab*, 61 A.B.A.J. 453, 454 (1975).

⁹¹ "The fair administration of justice requires the availability of competent lawyers. Members of the public should be educated to recognize the existence of legal problems and the resultant need for legal services, and should be provided methods for intelligent selection of counsel. Those persons unable to pay for legal services should be provided needed services. . . ." *Id.*, EC 8-3. This provision only serves to emphasize the ethical considerations appearing under Canon 2 concerning the individual lawyer's responsibility to assist in making legal counsel available to all who need it. See, e. g., ABA CPR, EC 2-25.

⁹² *Id.*, EC 8-9. See also, *id.*, Preamble and EC 8-4.

⁹³ *Id.*, Preamble.

plinary rules under Canon 8?⁹⁴ How can legal education motivate law students to strive toward the aspirational objectives articulated in the ethical considerations under Canon 8? I believe that thorough legal education can foster among law students the development of the kind of activist attitude contemplated by Canon 8. To do so requires that instruction be cognizant of and sympathetic to that aspect of the lawyer's professional responsibility covered under Canon 8 of the Code of Professional Responsibility—a responsibility to be an activist concerning what he or she perceives to be injustices and imperfections in our legal system.

One way to impart this kind of attitude is for law professors to ask questions in class such as, "Was the outcome in this case good, fair, or just?" "If in your opinion it was not, to what extent is your conclusion based upon what you perceive to be an imperfect, inefficient, or unjust rule of law, statute, procedural rule, or professional disciplinary standard?" "To what extent was the result in this case affected by the maldistribution of legal services?" "What needs to be done?" These questions can be asked with equal relevance (and probably greater force) in clinical teaching situations.⁹⁵ Questions such as these certainly can contribute to heightened sensitivity to questions of social justice on the part of law students. Such questions might do even more: the very fact that they are being asked offers support for those students who would be prone to action in the first place to *do* something.⁹⁶ For those individuals not so idealistically inclined to start with, the suggested educational approach may not motivate them to action, but neither will it support them in their tendency toward non-involvement and value indifference. For people in the middle ranges of motivation, this approach might contribute to a level of commitment greater than these people brought with them to law school; at least it would not push these individuals in a direction of less commitment. Thus, depending on the predisposition of the individual student, the thrust of this or a similar series of questions might actually provide a catalyst for individual motivation; at the very least, it would counteract the otherwise implicit attitude of value neutrality that the technical part of case analysis is thought to foster.⁹⁷ The student would be encouraged to see that the role of client representative is separate and distinct from the role of citizen, human being, or member of society.⁹⁸ The student would be encouraged to reflect upon the potential for leadership held by the organized bar and individual lawyers. Then, if the people being

⁹⁴ See notes 86 through 88, *supra*.

⁹⁵ See Meltsner & Schrag, *supra* note 51, at 627-28.

⁹⁶ *Cf.*, U. S. v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669 (1973) (in which a group of five law students, among other plaintiffs, sought to have a decision of the Interstate Commerce Commission overturned, succeeding, in the process, in convincing the Supreme Court to relax, to some extent (and temporarily), the barrier to access to the courts attributable to the "standing doctrine"). Of course, not every student should be expected to become a crusader for law reform while still in law school; the objective should be to support, rather than suppress, those who may be prone to involvement at some point in their career.

⁹⁷ This tendency was noted by Professor Auerbach. See note 34, *supra*, and accompanying text. See also Packer & Ehrlich, *supra* note 15, at 30.

⁹⁸ *Cf.* ABA CPR, EC 7-17 (interest of clients should not inhibit lawyer from seeking law reform).

attracted (and accepted) to law school are already people of good faith,⁹⁹ the heightened sensitivity fostered by this teaching approach should make those people favorably disposed toward contributing to social justice.

There is another way that legal education can fend off the tendency toward value indifference and contribute to an attitude of social activism. This can be done simply by setting a good example. Much of the criticism of legal education discussed above was based on the belief that students assimilate an attitude of value neutrality as a way of emulating what the students believe to be the attitudes of their professors, who are reluctant to express their personal views in class, and who, as far as the students know, are not personally involved in law reform or social activism. To some extent, the questioning approach just suggested can rebut this perception. But even more can be done. Law teachers can themselves engage in the sort of activities envisioned in Canon 8, thus setting positive examples for students to emulate instead of the neutral attitude which otherwise may be perceived. For example, when Professor Archibald Cox of Harvard Law School joined the legal team representing Maine Indians in a suit against the state of Maine—on a *pro bono* basis—¹⁰⁰ he did more to motivate those law students (present and former) who know him to treat seriously the attitude expressed in Canon 8 than any amount of formal instruction in a course on Professional Responsibility could ever achieve. The drafters of the Code seem to have recognized the importance of the good example as a means of encouraging conduct consistent with the unenforceable aspirational goals of Canon 8, when they stated, "[I]n the last analysis it is the desire for the respect and confidence of the members of his profession . . . that should provide to a lawyer the incentive for the highest possible degree of ethical conduct. The possible loss of that respect is the ultimate sanction."¹⁰¹ When a respected teacher expresses a social concern and acts upon it, the example set is easily perceived by the bright people who populate our law schools,¹⁰² just as indifference to injustice is perceived and emulated.¹⁰³ Professor Cox provides an illustration of how a respected teacher's personal example can foster an attitude of social involvement, while removing the aura of respectability that tends to adorn the value-free, non-interventionist attitude that so concerns Professor Auerbach and company.

There is one other way that law schools can, by example, contribute to an attitude of social awareness and involvement. That is the example of institutional responsibility. A school of law is an institution that is com-

⁹⁹ Monroe Freedman, Dean of Hofstra University School of Law, questioned this assumption when he commented on another paper delivered at the SALT Conference. He suggested that most law schools are not employing selection criteria designed to assure that those admitted to law schools possess the good faith, public service, or law reform-type of attitude for which Canon 8 suggests the admissions officers ought to be looking. Address by Monroe Freedman, Society of American Law Teachers Conference on the Future of Legal Education (Dec. 3, 1976).

¹⁰⁰ See note 73, *supra*.

¹⁰¹ ABA CPR, Preliminary Statement.

¹⁰² See generally D. Bok, *Can Ethics Be Taught?* Change, Oct. 1976, at 26.

¹⁰³ See Watson, *The Watergate Lawyer Syndrome*, *supra* note 11, at 443-44.

posed of people interrelating with other people. There are buildings¹⁰⁴ and books, water fountains and copying machines; but, from the student's perspective, the essential component of the law school is the collectivity of people who devise policies and procedures that affect them. The point is that law schools develop institutional personalities, and every policy, every decision, and every attitudinal nuance expressed by a law school affects the process through which law students formulate and redefine their professional and personal self-image.¹⁰⁵ To the extent that law school decision-makers (who are regular faculty members at many schools) are aware of the impact of institutional attitude or personality upon the students' value-formation process, then to that extent the school as an institution can attempt to contribute to the formation of positive rather than negative values. By its actions, a law school can signal its highly alert student body that the responsible professional attitude is one of sensitivity to social problems and commitment to their just resolution. Law schools should seek to be leaders rather than followers when it comes to recognizing and dealing with social issues affecting the law school community—issues such as race, sex, age, and handicap discrimination. Such an institutional attitude can go far toward minimizing the alleged tendency of legal education to foster attitudes of indifference to social problems and social justice. Derek Bok, President of Harvard College, recently articulated this point:

[I]f a university expects to overcome the sense of moral cynicism among its students, it must not merely offer courses; it will have to demonstrate its own commitment to principled behavior by making a serious effort to deal with ethical aspects of its investment policies, its employment practices, and the other moral dilemmas that inevitably confront every educational institution.¹⁰⁶

So, by individual and institutional example, the people involved with legal education can contribute to the formation of positive concepts of professional and social responsibility in the minds and hearts of future lawyers. Of course, for an individual professor's example to be influential, the teacher must be respected as a person by his or her students. This respect must be earned. And for the institution to exert a positive influence on the value-formation process, the collectivity of people who make up the faculty and administration of the school must consciously endeavor to shape the institutional personality in a constructive mold. This is the most meaningful way the law schools can refute the accusation that they influence law students to live their professional and personal lives unconcerned with our nation's quest for social justice. Those in legal education who are concerned about this accusation must "start at home" to create a personal attitude and institutional environment which will not only manifestly rebut the charge, but demonstrate as well that the institution of legal education exerts a positive force in the quest for justice.

¹⁰⁴ A building has a "personality" that can affect the attitudes of the human beings who are exposed to its environment. See generally Mealey, *Browsing Through Law Schools for Building Ideas*, 28 J. Legal Educ. 223 (1976).

¹⁰⁵ See generally Watson, *The Watergate Lawyer Syndrome*, *supra* note 11; Taylor, *Law School Stress and the "Deformation Professionnelle," supra* note 11; Pipkin, *Legal Education: The Consumer's Perspective*, *supra* note 11.

¹⁰⁶ D. Bok, *supra* note 102, at 29.