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The Practice - and Rule - of Law

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I. INTRODUCTION

Thank you to all of you. This Chair means a lot to me—and your presence even more. Thanks especially to Dean Anthony Crowell, who has supported the development of clinical and experiential learning so steadfastly—and me too. Thanks also to Jethro Lieberman for his gracious introduction. I would be proud to hold any Chair at New York Law School, and I am very glad to hold a Chair named for a man, Lester Martin, who was so much a part of the life of New York,¹ but I am honored to succeed two such scholars as Jethro Lieberman and Jim Simon in the Martin Chair.² Thanks above all to my family members who are here, to Maud, Dave, Frances, and to Teresa, who makes it possible for me to do everything.

I want to say a few more words of thanks to New York Law School. I have not been here for all of the school's 125 years, but it has been my academic home for twenty-three years now. I am grateful for: its students, who are so thirsty for understanding and knowledge; its faculty, clinicians, and classroom teachers alike, who welcomed me to their community and are my friends, and whose commitment to learning and teaching is evident every day; its administration and staff, who go the extra step, or mile, to make the school function successfully and who even respond to e-mails sent very late at night. And with you, I remember Mary Rose Mercieca.³ There are many more people I could thank—please let these brief thank-you's stand as a proxy for my gratitude to all of you.

And now let's get to work. The issues I discuss here are matters that many of us have thought and worried about, but that is as it should be. My goal, with T.S. Eliot, is that “We shall not cease from exploration/And the end of all our exploring”—many lectures and articles and years from now—“Will be to arrive where we started/And know the place for the first time.”⁴

My thesis can be stated straightforwardly, but I hope will soon grow more complicated. I argue that the reason law schools should teach students how to practice law is not to add to their list of skills, but to help prepare them for the crucial social role they play, namely the preservation and development of the rule of law.

II. THE “RULE OF LAW”

The “rule of law” is an elusive though critical idea. I want to describe its components, enough, I hope, to identify some of its crucial elements, though hardly enough to complete the task of understanding this complex institution. I define the

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1. For background on Lester Martin and his significance to New York Law School, see Press Release, N.Y. Law Sch., Stephen J. Ellmann Appointed Martin Professor of Law at New York Law School (Aug. 5, 2015), <http://www.nyls.edu/news-and-events/stephen-j-ellmann-appointed-martin-professor-of-law-at-new-york-law-school>.
 2. *Faculty Profiles: Emeriti*, N.Y.L. SCH., http://www.nyls.edu/faculty/faculty-profiles/emeriti_faculty (last visited Apr. 6, 2017).
 3. Mary Rose Mercieca was a beloved staff member of New York Law School's Human Resources department. She passed away suddenly on November 16, 2015.
 4. T.S. ELIOT, *Little Gidding*, in *FOUR QUARTETS* 39, 48 (Valerie Eliot ed., rev. ed. 1979).

rule of law simply as a system of reasonably predictable laws, enforced through reasonably just processes, as part of a system that protects human rights. That definition could be disputed; one might say that the rule of law is not directly connected to the protection of human rights, but South Africa, which spent the twentieth century demonstrating that societies could be ruled by law without rights, seems to me to make clear that the rule of law is of necessity rights-protective, and must be distinguished from what anti-apartheid observers of South Africa sometimes called “rule by law.”⁵

Lawyers and judges are not the only people responsible for preserving the rule of law, of course. Police officers are part of the rule of law; so are investment houses’ compliance officers; so are the people who formulate regulations and issue them for notice-and-comment rulemaking (whose work I have discussed with my students in *Legislation and Regulation*, otherwise known as *Leg/Reg*).

But lawyers and judges are important, in some ways that may seem mundane and others that are more dramatic. I begin a bit indirectly, with uncertainty in the law. In law school we tend to teach, at least in many of our classes, the tools for developing and manipulating uncertainty. Statutory text (*Leg/Reg* again) might be read according to a canon that says that if Congress left something out, it intended to do so; or it might be seen as ambiguous enough to be read in light of some overarching purpose Congress had that might have included the very word or idea left out of the explicit text. And so on. It is very hard to write language that cannot be pushed and pulled by interpretation into meanings that might surprise its authors. Doing that work must be part of the rule of law, for reasons I try to explain later.

Meanwhile, however, a great deal of what lawyers and law users do has very little to do with such sophisticated ventures into the world of doubt. Much of our legal world is routinized: driving this fast will get you this kind of a fine; providing these warranties will satisfy the buyer at the closing on your house; taking this deduction is reasonable while taking that one will look bad at an audit. All these are individual matters, but I take it the same is true in much of the legal world of business as well. And even in politics: As witness the recent resolution of a tied election for the Mississippi legislature by the faithful application of the prescribed statutory method, drawing straws, even though the result was that a Democrat was elected and the Republicans were denied a supermajority in the legislature.⁶ There are, in fact, large areas of reasonably predictable, reasonably stable rules by which people structure

5. See JOHN DUGARD, *HUMAN RIGHTS AND THE SOUTH AFRICAN LEGAL ORDER* 44 (1978) (illustrating the “equat[ing of] the Rule of Law with rule by law”); see also *id.* at 39–40 (quoting the “most valuable formulation,” *id.* at 39, of the rule of law, by the late South African professor Anthony Mathews, one that incorporates respect for human rights into the core of the rule of law itself).

6. See Richard Fausset, *Democrat Wins Mississippi House Race After Drawing Straw*, N.Y. TIMES (Nov. 20, 2015), <http://nyti.ms/1kK7VjU>. This was a more heart-warming “rule of law” story at the time I gave this talk than when the story concluded. Two months later, the Republican-dominated Mississippi House removed the Democrat from office “on the grounds that at least five of the votes in his favor [and counted in the original tie that the drawing of straws settled] should not have been counted” in light of Mississippi’s voter registration statute. Richard Fausset & Alan Blinder, *Republicans Unseat Mississippi Democrat Who Drew Winning Straw After Race Ended in Tie*, N.Y. TIMES (Jan. 20, 2016), <http://nyti.ms/1kK7VjU>.

their lives, and lawyers' role in guiding their clients' actions in light of these rules is an integral part of the rule of law. In that sense, and it is an important one, every honest lawyer's work for her clients, on any matter, is part of sustaining the rule of law. It is also, of course, part of enabling clients to exercise autonomy within the law, and morally valuable for that reason as well.⁷ The day-to-day business of law practice is moral work, in somewhat the same way that the day-to-day practice of medicine is moral work.

A world governed by the rule of law is not at all a world free of conflict, however, and another role of lawyers is to help resolve such conflicts. My colleague Becky Roiphe has explored the twentieth-century professional ideal of legal professionalism, in which the lawyer is a coordinator of society.⁸ In somewhat the same vein, lawyers are sometimes said to be excellent problem solvers because they are experts in process. So also Anthony Kronman has written, in his 1993 book *The Lost Lawyer*, about the lawyer-statesman, a lawyer of an earlier age who was distinguished by:

a broad familiarity with diverse and irreconcilable human goods coupled with an indefatigable willingness to enter the fray, hear the arguments, render judgment, and articulate the reasons that support it, even when all hope of moral certainty is gone. At war with itself, this complex set of attitudes nonetheless describes a recognizable moral ideal, an ideal closest, perhaps, to the public-spirited stoicism implied by the Roman term *gravitas* . . .⁹

I do not at all want to minimize the importance of this form of professionalism or statesmanship, but I think we must recognize that it is in a deep sense conservative. It maintains. It regulates. It does not provide the impetus for change, at least not so much as it handles change surging from elsewhere. Justice Harlan, about whom Nadine Strossen spoke so eloquently in her investiture speech, is perhaps an exemplar of this wise conservatism.¹⁰ It is to be admired, but it is not the whole of lawyers' role in change.

The impetus for change remains to be accounted for. I have learned about the importance of change in the rule of law from several sources. Ed Purcell's history, in particular his book *Brandeis and the Progressive Constitution*, convinced me that the rule of law rests on no absolute foundations at all.¹¹ There are vast areas of relative stability, but nothing lasts forever, neither the texts nor the meanings of texts, and in

ms/1V9JTe0. Whatever the best resolution of this matter, the rule of law gives force to both technicalities and rights, and so such conflicts are not surprising.

7. Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060, 1088 (1976).
8. Rebecca Roiphe, *The Decline of Professionalism*, 29 GEO. J. LEGAL ETHICS 649, 653–63 (2016).
9. ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 117–18 (1993).
10. Nadine Strossen, *Justice Harlan's Enduring Importance for Current Civil Liberties Issues, from Marriage Equality to Dagnet NSA Surveillance*, 61 N.Y.L. SCH. L. REV. 331 (2017).
11. EDWARD A. PURCELL, JR., *BRANDEIS AND THE PROGRESSIVE CONSTITUTION: ERIE, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA* (2000).

fact lawyers' (and judges') reasoning and advocacy skills are always being deployed in efforts to change the rules in one direction or another. Often, moreover, these efforts are not purely motivated, and not transparently conducted. This too is part of the actual nature of the rule of law. Similarly Frank Munger, in his ongoing work on Thailand's cause lawyers, seems to me to be demonstrating that the path to the rule of law doth not run straight, both because the moves that may make a positive difference in any society depend on the nature of that society, and because the ultimate outcome—that society's rule of law—may turn out to be quite different from ours.¹²

Struggle is integral to the rule of law, and by no means is all of it modulated by the august lawyer-statesmen of Kronman's vision.¹³ For me, that lesson came through most clearly in South Africa, which has been an important part of my academic work and my life since the mid-1980s. The critical lesson South Africa teaches on this score is that many of the greatest lawyer-statesmen—in South Africa, all of us know of Nelson Mandela, but Arthur Chaskalson, my friend and the first head of South Africa's new post-apartheid Constitutional Court, stands out as well—were not dispassionate.¹⁴ They had not lost all hope of moral certainty. They were deft, even masterful, in their use of the tools of legal argument available to them, but they were never infatuated by those tools. Instead, they were absolutely certain of the rightness of their cause, the fight against the inhuman blight of apartheid. Mahatma Gandhi, another lawyer, was no less convinced of the rightness of overthrowing British colonialism. When we stop to think about our own history, moreover, we see many similar examples: Thomas Jefferson, John Adams, Abraham Lincoln, Franklin Delano Roosevelt, Thurgood Marshall, Ruth Bader Ginsburg. These statesmen and stateswomen were not stoics but revolutionaries, either metaphorically or literally. Some, like their counterparts in South Africa, violated the law, sometimes extensively, in what I would call the cause of the rule of law. And this too is a role that the lawyers we are educating may come to take up.

III. CLINICAL AND EXPERIENTIAL EDUCATION AND THEIR EFFECTS ON LAW STUDENTS

So now we come to the question of how clinical and experiential education contribute to students' ability to play this range of roles in the ongoing creation of the rule of law. I begin in a sense paradoxically, with the impact of this kind of education on legal reasoning—paradoxically because legal reasoning is often thought to be the domain and the subject of classroom courses. Then I ask which clinics can best have this and related impacts for which students. Finally, I look at two overarching

12. See, e.g., Frank Munger, *The Cause Lawyer's Cause*, 28 LAW CONTEXT, no. 2, 2010, at 95.

13. KRONMAN, *supra* note 9, at 117–18.

14. I have made this point in the context of a fuller discussion of Nelson Mandela and Arthur Chaskalson's lives in Stephen Ellmann, *Two South African Men of the Law*, 28 TEMP. INT'L & COMP. L.J. 431 (2014). I discuss Arthur Chaskalson's remarkable and multilayered engagement with the rule of law in detail in a forthcoming biography, *For Justice: The Life of Arthur Chaskalson*.

contributions to the rule of law that legal education in the practice of law has provided: the liberatory effect of the idea of client-centeredness; and the profound clarification that this form of education offers into the moral nature, and moral ambiguity, of lawyers' contribution to the making of the rule of law.

Let me start with legal reasoning, acknowledged by all as absolutely integral to the lawyer's work. I do not at all suggest that clinical and experiential education is a substitute for classroom training in legal reasoning; but equally classroom training is often not a substitute for clinical and experiential education, even with respect to legal reasoning. After all, expertise theory indicates that expertise consists of mastery of a domain.¹⁵ Transferable expertise is limited, if it exists at all: an expert musician is not an expert conductor, an expert in moral philosophy is not an expert in literature. And an expert in legal reasoning from books is not an expert in legal reasoning that must begin from an encounter with a client, and the client's ambiguous facts and ambivalent desires, and work from there toward a legal approach that will achieve the client's objectives. If we trained our students only to be expert reasoners from books, we would have trained them in the wrong thing.

But to speak of legal reasoning by itself implies that this skill is something disembodied, distinct from the rest of the makeup of the individuals who employ it. If emotion shapes cognition, as much current research tells us,¹⁶ then emotion surely shapes learning as well. Few things give students so much reason to learn as the awareness that a client's wellbeing turns on what the student, acting as a lawyer, does. And few things give students so much of a sense of accomplishment as having successfully protected a client's interest. If we cannot give students these powerful experiences, we risk dampening their curiosity and limiting their engagement. We risk undercutting their learning not just of the values of client representation, but also of the elements of legal reasoning.

All this is quite general; let me now be more concrete about which clinics can have this impact for which students. Data collected in two NALP surveys, and discussed in a *Clinical Law Review* article by Meg Reuter and Joanne Ingham,¹⁷ strongly suggest that students who choose legal services litigation as a career find a home in skills courses and particularly value those skills courses—clinics and externships—in which they work on actual legal matters.¹⁸ Many of these students, I am sure, are also thrilled by the chance to work with like-minded faculty. Their clinic and externship experiences give them the chance to live, and develop, their ideals, and their experiences also help them to enter the job market with credentials and references that may make a crucial difference. I think we do a very good job

15. See STEPHEN ELLMANN, ROBERT D. DINERSTEIN, ISABELLE R. GUNNING, KATHERINE R. KRUSE & ANN C. SHALLECK, *LAWYERS AND CLIENTS: CRITICAL ISSUES IN INTERVIEWING AND COUNSELING* 350–51 (2009); *id.* at 377 nn.11–16.

16. See generally ANTONIO DAMASIO, *DESCARTES' ERROR: EMOTION, REASON, AND THE HUMAN BRAIN* (Penguin Books 2005) (1994) (analyzing the relationship between emotion and reason).

17. Margaret E. Reuter & Joanne Ingham, *The Practice Value of Experiential Legal Education: An Examination of Enrollment Patterns, Course Intensity, and Career Relevance*, 22 *CLINICAL L. REV.* 181 (2015).

18. See *id.* at 226–32.

launching these students into the world—and these are, I suspect, the students likeliest to play the rule of law role of demanding that the system change.

But what about the students who graduate and enter private practice? The NALP data, which focus in this respect on students who enter big-firm private practice and so are not necessarily applicable to students who go into other forms of private law,¹⁹ say that these future private practitioners took fewer clinical and experiential courses while they were in law school.²⁰ And though those who took the courses liked them, they liked them less than their future legal services counterparts did.²¹

What accounts for this? It seems to me that one likely answer is that the future private practitioners doubted that taking courses focused on public interest or public service practice—as most clinics and most externships probably are—would really help them prepare for the careers they envisioned. That surely reduced their motivation. And they were probably right, at least to a considerable extent. Again, expertise theory says that we become expert in domains. While the exact dimensions of a domain can be debated (as Ian Weinstein has reminded me), criminal defense is a long ways from patent law. It is easier to take what we learn in one area and apply it to another that is very similar than it is to transfer it to some field dramatically removed from the one in which we have been trained.²²

I think it follows from this that we clearly need clinical and experiential training that is set in or near the fields of private practice into which our students are likely to move. At New York Law School we already have several such clinics, and are discussing more. Needless to say, I also think our traditional, social-justice minded, clinical and experiential offerings are essential. Happily, at New York Law School, with the benefit of the wonderful gift from Joseph Plumeri that has given us the Plumeri Center for Social Justice and Economic Opportunity,²³ we have the opportunity to build on multiple fronts. But what I most want to say is that, if I am right that the roles our students will play in the private practice of law will be part of the maintenance of the rule of law—a rule of law that aims for justice and honors human rights—then creating such private-practice-oriented clinics is not a departure from a social justice mission. Instead, it is another way to contribute to social justice. And it is actually a special opportunity: to infuse into the teaching of the practice of law in these fields a sense of their social significance, so that we do not wind up essentially telling our graduates that their work is only socially meaningful if it falls in the cabin of what we call public interest law.

19. *See id.* at 181.

20. *Id.* at 231.

21. *Id.* This was especially true of the transactional lawyers among them. *Id.*

22. *See id.* at 236. Reuter and Ingham emphasize the difficulties of “far-transfer” of learning. *Id.*; *see also id.* at 207 (discussing near- and far-transfer as issues in pedagogy).

23. Press Release, N.Y. Law Sch., New York Law School Receives \$5 Million Gift to Establish the Plumeri Center for Social Justice and Economic Opportunity (Nov. 12, 2015), <http://www.nyls.edu/news-and-events/new-york-law-school-receives-5-million-gift-to-establish-the-plumeri-center-for-social-justice-and-economic-opportunity>.

As important as it is to offer clinical and experiential courses that speak to students' interests, these courses are much more than simply training for particular fields of future practice. There are two broader ways in which what clinical and experiential courses teach about the practice of law is specially important to students and graduates' contribution to the rule of law, regardless of the kind of law they will later practice. The first is the idea of client-centeredness, probably the single most important element of the past forty years' academic, that is to say clinical, reconceptualization of law practice.²⁴ Clinicians study law practice as doctrinal teachers study law doctrine, and the impact of that somewhat removed reflection is important. The idea of client-centeredness can be seen, as Becky Roiphe has thoughtfully argued, as a form of lawyers' drawing back from their professional role of managing social conflict.²⁵ That point has force, particularly if client-centeredness is understood as a form of self-enforced passivity on the part of the lawyer in her interactions with the client. But I do not see it that way; I think client-centeredness is or should be "engaged client-centeredness," in which the lawyer offers the client the full benefit of the lawyer's experience while trying hard to simultaneously assist the client to make her own choices.²⁶ In calling on lawyers to practice this way, and training their students to go out into the world to practice this way, clinicians have been adding to the foundation of the rule of law, by removing a form of lawless or arbitrary power—the lawyer's imposition of her will—from the processes of the law itself. And the work is not done: The lawyer-client relationship is, in many ways, an unequal one, and developing an understanding of what the lawyer committed to the rule of law should offer her client is a task that is not yet complete.

The second contribution to educating our students for the rule of law that I discuss is surely the most paradoxical: we teach them about moral values. That is not always a paradoxical enterprise: often we accomplish it by supporting the students' most idealistic impulses, which contribute so much to achieving zealous and caring representation. But we also do so in good part by teaching them about moral ambiguity. Lawyers are faithful to legal texts—except that what those texts mean is always subject to argument and reargument, and almost no one seems to think, really, that the answer to the question of what does a text mean is "what did its author say she intended?" Or to give a different, and important, example: My colleague Richard Sherwin has been exploring in depth the ways that today's media, such as film and video, affect how legal decisions are made. But once we know that these effects exist, we know that lawyers will—indeed, as zealous advocates, must—

24. Many people have contributed to this reconceptualization, but no account would be correct that omitted David Binder and Susan Price's path-breaking work. DAVID A. BINDER & SUSAN C. PRICE, *LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH* (1977). The latest successor volume is DAVID A. BINDER, PAUL BERGMAN, PAUL R. TREMBLAY & IAN S. WEINSTEIN, *LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH* (3d ed. 2012).

25. Roiphe, *supra* note 8, at 672–73.

26. Robert Dinerstein coined the phrase "engaged client-centeredness," and we used it in our book. ELLMANN, DINERSTEIN, GUNNING, KRUSE & SHALLECK, *supra* note 15.

make use of them. As Richard has argued, in principle this is no different from what advocates since Demosthenes have done with the techniques of rhetoric.²⁷

And the point can be generalized: As we learn about human beings' cognitive limitations, we also are learning about techniques that might manipulate those cognitive limitations. In recent years there has been a lot of attention devoted to the power of narrative as a way to convey to a decisionmaker the human essence of a situation. But we know that human beings' reasoning is limited by what is called the "heuristic of availability," which essentially says that people tend to decide things on the basis of the examples of such things that come most readily to mind.²⁸ The risk of shark bites is exaggerated because the stories stick in our minds; and narrative helps make things stick in our minds. So of course we should use narrative, but we should be clear about the extent to which we are engaged not in presenting "truth" but in conveying, within the rules to be sure, a story of what the truth might be. And as students learn these skills, they also encounter, often and perhaps inevitably, the reality that their clients—on whose behalf they engage in such careful presentation, and for whose wellbeing they care so much—may be lying.

IV. CONCLUSION

And this brings us back, emphatically, to the rule of law. Ed Purcell has wonderfully examined the maneuvers of judges, in particular, as they seek to shape and reshape the legal system.²⁹ But maneuver, manipulation, is part of the rule of law at every stage. I do not mean to suggest that this behavior is lawless or unprincipled. Quite the opposite: It is law-governed and should be principled, and this behavior is an integral part of our creation of a rule of law. Immanuel Kant tells us that from the crooked timber of humanity nothing completely straight can be made;³⁰ but from the lawyer's role in seeking, for flawed people and by means that may exploit other people's limitations, what the law provides, from that role can and does come a rule of law. We can arrive at this place, and because we and our students know it for the first time, make of it the best place that it can be.

27. See generally Richard K. Sherwin, *Law and the Poetic Imagination*, 61 N.Y.L. SCH. L. REV. 347 (2017).

28. On the "heuristic of availability," see Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, in *JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES* 3, 11–14 (Daniel Kahneman et al. eds., 1982).

29. See PURCELL, *supra* note 11.

30. IMMANUEL KANT, *Idea for a Universal History from a Cosmopolitan Point of View*, in *ON HISTORY* 11, 17–18 (Lewis White Beck ed., Lewis White Beck et al. trans., Macmillan Publ'g Co. 1963) (1957).

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