

A FEMINIST PERSPECTIVE ON EXPERIENCE-BASED LEARNING AND CURRICULUM CHANGE

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Despite significant innovations, especially in relation to course content and substantive materials, a rationalist approach to knowledge and learning continues to dominate at law school. The increasing diversity of the student body in many law schools – their richness of experience and their educational, social and ethnic backgrounds – is rarely if ever reflected in the epistemological assumptions of the curriculum, which continues to sustain an apparently homogeneous and highly propositional model of “real” knowledge. This is exemplified in choices of teaching and assessment models which stress the transmission of information and its recitation in examinations, a rational-logical approach to analysis, and the self-conscious cultivation of an adversarial style in argument. Real transformation in law school requires a rethinking of our assumptions over knowledge and pedagogy and close attention to the process of classroom teaching and assessment. Feminist descriptions of knowledge as partial and personally situated suggest new experience-based approaches to planning and valuing learning; for example, problem-based learning, and clinical and skills education using groupwork, role-play and simulation. Experience-based methods can reshape and revitalize the relationship between knowledge and personal experience; challenge our understanding of what we mean by “expertise”; and explicitly encourage the emotional and moral dimensions of cognitive development.

Malgré d'importantes innovations, qui touchent en particulier le contenu des cours et les matières fondamentales, une approche rationaliste du savoir et de l'apprentissage continue de dominer dans les facultés de droit. La diversité croissante des membres du corps étudiant de bien des facultés – la richesse de leur expérience, leurs antécédents scolaires, leurs origines ethniques et leur milieu social – est rarement, ou jamais, reflétée dans les présupposés épistémologiques du programme d'études, qui continue d'alimenter un modèle du « vrai » savoir qui est en apparence homogène et fortement propositionnel. Ce fait est démontré par des choix de modèles d'enseignement et d'évaluation qui mettent l'accent sur la transmission de renseignements et leur récitation pendant un examen, sur une approche rationnelle et logique de l'analyse et sur l'acquisition d'un style d'argumentation accusatoire non naturel. Pour opérer de vrais changements dans les facultés de droit, il faut repenser nos présupposés du savoir et de la pédagogie et prêter une attention toute particulière au processus d'enseignement et d'évaluation en classe. Les descriptions féministes du savoir, en ce qu'elles ont de partiel et de personnel, proposent de nouvelles approches de la planification et de la valorisation de l'apprentissage qui sont fondées sur l'expérience, telles que l'apprentissage par résolution de problèmes, les formations pratiques et le perfectionnement faisant appel au travail d'équipe, les jeux de rôle et la simulation. Les méthodes fondées sur l'expérience peuvent reformuler et revitaliser la relation entre le savoir et l'expérience personnelle, remettre en question notre compréhension de ce que nous appelons « les connaissances spécialisées » et favoriser explicitement les dimensions émotionnelles et morales du développement cognitif.

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I. INTRODUCTION: STRATEGIES FOR CHANGE

Classroom teaching methods, assessment processes, and the shape and substance of the law school curriculum are crucially shaped by how we understand the nature of "knowledge" and "learning". Law school pedagogies are still heavily influenced (in their emphasis on the transmission of substantive knowledge and the testing of outcomes) by a rationalist model of knowledge which assumes that knowledge can be objective, certain and universal, and which measures achievement against those standards. In this paper I shall argue that the continued dominance in legal education of a rationalist model of knowledge which reflects a narrow view of what is "real" knowledge inevitably fails to reflect or respond to the radically changing conditions of a pluralist society. In making this argument I shall draw on critiques made of the rationalist model of knowledge by feminist theory and in particular on alternative, feminist epistemologies.

This paper describes and considers the use of experiential methods of teaching and learning as an alternative to the didactic, lecture-style teaching methods predominant in law school. Experiential methods of teaching imply a very different set of epistemological consequences (about the process of learning and what is learned as a result) from the transmission/outcome paradigm characteristic of law school pedagogy. I shall attempt to identify what I understand as the critical components of knowledge derived experientially, and evaluate the ways in which experiential learning can, in practical terms, challenge the rationalist epistemological assumptions which still prevail in the teaching and assessment methods commonly employed in law school. The central thesis of this paper is that the character and elements of "knowledge" developed through the use of experience-based methods of teaching and learning has the potential to transform the way we understand the nature of knowledge in legal education, and in so doing, to challenge the rationalist status quo. In its implicit challenge to the dominant paradigm of knowledge, experiential methods of teaching and learning reflect a critique of rationalist epistemology similar to that articulated by many feminist scholars. As a feminist and a law teacher, finding what I believe to be some significant shared interests between feminism and the development of an alternative pedagogical approach is an exciting discovery.¹

Some progress has already been made in law schools away from a rationalist model of knowledge which elevates a single, normative paradigm. Many law teachers now recognize that the imposition of a singular knowledge (claiming to be "truth" and legitimated by this claim)² which either devalues, or excludes altogether, the perspectives and experiences of women and visible minorities, raises critical equity issues. Not only

¹ Throughout this paper, I shall draw on feminist critiques of the rationalist paradigm of knowledge. Note, however, the critiques of rationalism made by critical legal theorists and by critical race theorists. On critical legal theory and a critical epistemology see e.g. M. Tushnet, "Critical Legal Studies: An Introduction to its Origins and Underpinnings" (1986) 36 J. Legal Educ. 505 especially at 512-13, and D. Kennedy, "Legal Education as Training for Hierarchy" in D. Kairys, ed., *The Politics of Law* (New York: Pantheon Books, 1982) at 40. On critical race theory and "outsider jurisprudence" see e.g. M. Matsuda, "Public Response to Racist Speech: Considering the Victim's Story" (1989) 87 Mich. L. Rev. 2320 and in the same volume see R. Delgado, "Storytelling for Oppositionists and Others: A Plea for Narrative" at 2411, especially 2416-18.

² C. Smart, *Feminism and the Power of Law* (New York: Routledge, 1989) at 6-14.

is this vision of knowledge exclusionary and inequitable in its effect but it is also incomplete and deficient, excluding as it does persons and alternate views of the world and suppressing a spirit of critique.³ This vision of knowledge is challenged by increasingly diverse student and faculty bodies in law schools. Acknowledgement of the mismatch between aspirations towards pluralism in law school, and a dominant culture of knowledge resting on a largely homogeneous white male experience, has had a visible impact (at least in North America) on procedures for the recruitment of law school faculty (and in some smaller number of cases on the procedure for evaluating them for the purposes of tenure and promotion). At the same time there is an increasing recognition that traditional criteria for admission to law school have historically excluded large numbers of students who did not conform to the model of the "standard entrant". There are growing numbers of access programmes to encourage entrants from under-represented groups, including those without "standard" academic qualifications.⁴

As vitally important as these strategies are, they are fragments of an overall approach which, in order to effect real change in the law school culture, must challenge the central epistemological assumptions of legal education. These assumptions about the nature of "real" knowledge are implicit in course objectives, teaching methods, curriculum content and assessment criteria, at all levels and in all contexts. It is not enough to encourage plurality in law school, if that plurality of persons is simply assimilated into the dominant rationalist ethos, epitomized by transmission/outcome centred teaching and assessment methods, once they get there. Feminist legal scholars have long pointed to the particular tendency of traditional legal method to perpetuate rationalist "truth-seeking" paradigms of thought and legitimacy.⁵ I will argue below that the rationalist epistemology is also sustained in law school by the predominant methods of teaching and assessment: a reliance on the use of lectures to transmit information and the continued widespread use of 100% final assessments which are primarily concerned with the demonstration of "given" content.

Efforts to challenge the dominant models of knowledge in law school and respond to the new climate of diversity have, for the most part, focused on the development and introduction of new teaching materials into the law school curriculum which describe and sometimes advocate new and/or marginalized perspectives, and which sometimes include contributions from other disciplines. These materials are introduced in a variety of ways: in orientation programmes, in "equity" days and in "satellite" courses such as "Women and the Law" or "Critical Race Theory and the Law". These are important

³ See e.g. A. Stone, "Legal Education on the Couch" (1971) 85 Harv. L. Rev. 392 and Kennedy, *supra* note 1.

⁴ In an effort to diversify the student body, recognition is now increasingly being paid to "non-academic" criteria in the selection of students for admission (e.g. evidence of community involvement). This approach was first adopted by the Faculty of Law at the University of Windsor. There is also an effort being made to attract and recruit into law school programs a group more representative of the racial and ethnic diversity of Canada, including First Nations Peoples (see e.g. the work of the Indigenous, Black and MicMac Program at Dalhousie law school and the Native Law program at the University of Saskatchewan). Note also in this context the work of the cross-Canada "Access and Support Group".

⁵ Smart, *supra* note 2 at 21, and M.J. Mossman, "Feminism and Legal Method: The Difference it Makes" (1986) 3 Austral. J.L. & S. 30.

developments which reflect the growing impact of the many critiques being made of an objectified, decontextualized approach to knowledge by scholars from a wide range of different perspectives. However, where substantial revisions have been made to course content we often continue to rely on teaching methods in our classrooms that are based on rationalist assumptions about the nature of knowledge and learning (for example, that knowledge is “given” rather than personally or socially constructed through shared experiences). In addition, we continue to use rationalist frameworks for determining the “validity” and “relevance” of knowledge (for example, in discussing answers to traditional law school hypotheticals which assume a certain standardization of answer). Moreover, we continue to assume the traditional authority of the teacher whose approval is set as the benchmark for student learning.⁶ Consequently, our students continue to arrive at law school with the expectation that they will be provided with objectivity, certainty and universality; and, to a large extent, unwittingly perhaps, we continue to try to give them what they want.

My principal concern in this paper is not with the revision of course content or with the development of new and inclusive hiring and admission policies, although it is certainly not my intention to diminish the importance of this work. Instead my focus is on how classroom teaching methods, and the development of complementary assessment practices, can be made more responsive to pluralism and changing visions of what we count as knowledge. I am interested in moving beyond revising the content of our courses into the development of new methods of teaching and assessment for effectively sharing this new content with our students and encouraging the kinds of learning (for example, active engagement with materials and topics, informed critique, and an exploration of the relationship between theory and practice) that a new diversity of materials implies.

My assumption throughout this paper is that there is a clear connection between pedagogy and epistemology; between the implicit valuing or devaluing of different types of learning and knowledge which is manifest in the teaching and assessment methods we choose to use, and our personal approaches to both the content and the process of legal education. Reflecting on our own assumptions as teachers of law about appropriate content and process involves examining the central significance of epistemology to education from a personal standpoint.⁷ It is not always easy to recognize the reflection of our personal conceptions of knowledge and truth in our teaching practice or the assumptions we make about the subjects we teach. In part, this is because we are all (or almost all) the products of a highly formalistic legal education which leaves its mark on our own values and ideas about knowledge and truth. It is also true that at least some of what we do we do out of habit. In order to reassess our teaching and assessment methods, it is necessary for us as teachers to question many, if not all, of our assumptions about legal education and the form it should take. This includes not only the assumptions we make about what it is that law school should teach (in contracts, in

⁶ See E. Ellsworth, “Why Doesn’t This Feel Empowering? Working Through the Repressive Mists of Critical Pedagogy” (1989) 59 Harv. Ed. Rev. 297.

⁷ “...teachers who wish to teach well must themselves understand that a fundamental dispute about the objective or relative nature of truth exists and that the dispute undoubtedly affects their own teaching in subtle, but important, ways”, from P. Wangerin, “Objective, Multiplistic, and Relative Truth in Developmental Psychology and Legal Education” (1988) 62 Tul. L. Rev. 1237 at 1240.

family law, in criminal law) but also what choices we make about structural frameworks and their implications for an epistemology. We must consider what core of "essential" knowledge we nominate, and what choices we make over methods of teaching and learning, and formal and informal methods of assessments. How much of what we do is done because we assume that this is with law teaching? Do we have difficulty conceiving of our course without a final examination? Do we continue to set assessments which inevitably favour those students emotionally and intellectually prepared, via traditional academic routes, for three hour examinations or to write essays presented in a particular (traditional) stylistic format? Do we assume, without thinking twice, that our syllabus must include this or that topic (thus obligating all students to study it)? How clearly do we recognize the limitations of our own approach to what we understand as "knowledge" or "truth"?⁸

The following section describes and evaluates the impact of the dominant rationalist epistemology on education, and outlines the feminist critique. Some more detailed examples of what I argue is evidence of the continuing rationalist orientation of legal education are developed in section III below. In the remaining sections of the paper, I shall look at experience-based methods of teaching and learning as an alternative to law school pedagogies, while attempting to develop an epistemological basis for experiential learning which can be contrasted with the rationalist paradigm. I hope to show that the understanding of "knowledge" upon which experiential learning rests meets many of the concerns, and realizes many of the goals, articulated by feminists and others who have critiqued the rationalist paradigm.

II. RATIONALIST EPISTEMOLOGY AND THE FEMINIST CRITIQUE

The rationalist status quo is epitomized by a vision of knowledge which is based on the experience of a single, dominant group. This model of knowledge has historically been sustained by its self-serving assertions of objectivity, certainty and universality. It has been attacked by feminists, critical legal theorists and critical race theorists, among others.⁹ "Classical" rationalism has survived in philosophical and educational thought in many modified forms, and I shall set out the paradigm usually associated with rationalism as an "ideal type". In looking for evidence of the continued influence of rationalism on the culture of law school and legal practice, it is probably more appropriate and more helpful to think of it as an orientation, rather than an ideal type or paradigm.

In its pure form, rationalist epistemology is characterized by a conception of knowledge as fixed, certain and detached from social context. It focuses on what is sometimes described by educationists as "propositional knowledge" or "knowledge that". Propositional or formal knowledge (in law, the rules of the legal system and the substance of its procedures, doctrines and decisions) is regarded as superior to any other form of "knowledge", including that acquired or generated through personal experience,

⁸ This point can be made in relation to both "content" and "process" which depart from the expected law school classroom experience. See e.g. P. Williams, *The Alchemy of Race and Rights* (Cambridge: Harvard University Press, 1991) c. 2.

⁹ See *supra* note 1.

or the experience of the senses.¹⁰ In the hierarchy of learning created by the rationalist approach, the acquisition of propositional knowledge comes first, while other forms of learning, including the personal development of the individual, are seen as separate and generally inferior.¹¹ Similarly, "knowledge that" is seen as separate from and superior to "knowledge how", with process purely instrumental to achieve given ends, rather than dynamic and responsive to changing contexts. Irrespective of context or relevance, theoretical or formal knowledge is seen as intrinsically worthwhile in and of itself.¹²

This special status afforded to formal or propositional knowledge derives in part from the process of reasoning, which necessarily precedes the identification of those universally valid (and hence, totally decontextualized) propositions which characterize the rationalist paradigm of knowledge. In this paradigm, what is "knowable" is the consequence of a linear chain of reasoning, each step of which is validated according to the standards of internal logic and universality. In this way, the process of reasoning is stable and consistent, and the process of education equally so. The overriding concern of an educational system becomes the transmission of knowledge which has already passed this test of "knowability", rather than the determination of knowledge itself, or a debate over establishing its validity. Thus, education in the rationalist tradition is sometimes described as being concerned only with "knowledge-getting" and never with "developing new knowledge and...generating new systems of values".¹³ In this way, learning is limited to the received wisdom of what one educationalist has described as "the myth of the given".¹⁴

The rationalist paradigm is legitimated by the quest by the knower for "truth" (where "truth" is conceived of as an objective certainty, universal regardless of context, and determined and validated according to a "neutral" standard).¹⁵ The knower in rationalist or objectivist epistemologies is always, either implicitly or by assumption, male. Many important historical figures in the development of philosophical thought have not only attributed the defining feature of knowledge in the rationalist model (*i.e.* objectivity) specifically to men, but also have clearly stated that objectivity is not characteristic of women.¹⁶ Needless to say, those individuals whose contributions have been regarded as milestones in the history of epistemological inquiry are almost without exception men,

¹⁰ The philosopher Gilbert Ryle in his seminal work, *The Concept of Mind*, trans. S. Stern-Gillet (Paris: Payot, 1978) presents a dichotomy between "knowledge how" and "knowledge that" which is sometimes described as "propositional knowledge". For a thesis of knowledge experienced through the senses see J. Dewey, *Experience and Education* (New York: Collier, 1963), and see section V below.

¹¹ See also the discussion in section VII below.

¹² R.S. Peters, *Ethics and Education* (London: George Allen & Unwin, 1966).

¹³ A.V. Kelly, *Knowledge and Curriculum Planning* (New York: Harper and Row, 1987) at 75.

¹⁴ T. Burgess, *Education After School* (London: Victor Gollanz, 1977) at 46.

¹⁵ L. Code, *What Can She Know? Feminist Theory and the Construction of Knowledge* (London: Cornell University Press, 1991) c. 1.

¹⁶ See the many examples given by Code, *ibid.* For example, at 10, Code quotes the following remark by the linguist Wilhelm von Humboldt: "[women's] nature also contains a lack or a failing of analytic capacity which draws a line of strict demarcation between ego and world; therefore, they will not come as close to the ultimate investigation of truth as man."

and without any exceptions, white.¹⁷ The significance attached throughout the history of philosophy to the contributions of individual scholars itself belies the assertion that in the rationalist model the knower is featureless and sexless. Mary O'Brien argues that the rationalist epistemology suppresses or ignores any knowledge or experience which she describes as falling outside the "malestream".¹⁸

A number of common themes are apparent in the work of feminist scholars from many different disciplines as they critique the way in which rationalist knowledge is framed and legitimated. Most point to the existence of a male model against which new ideas and hypotheses are routinely tested.¹⁹ The so-called objectivity (of both the natural sciences²⁰ and the social sciences²¹) is questioned as subject to a range of ideological influences, foremost amongst which is often to be found the imposition of paternalistic goals in the development of research agendas, and paternalistic values in the evaluation of research findings. Feminist legal scholars have applied the same forms of critique to mainstream legal scholarship and reached similar conclusions about the pre-emptive nature of objectivism which is historically associated with predominantly male exponents. Mary Jane Mossman argues that the structure of legal method and reasoning is rendered "impervious to feminist perspective" by the reliance of the judiciary on the "myth of neutrality" to sustain and legitimate decisions, and by an internal definition of "relevance", which excludes some ideas while admitting others on allegedly "objective" and "reasonable" grounds. This allows the judiciary to "prefer" the ideas of the mainstream and exclude those of the margins, typically those of women.²² Through these processes, the judges decide what is "knowledge" for the purposes of legal method, and determine it to be "objective".

Feminists have pointed out that it is the inevitable tendency of the rationalist ethos to understand the world as a series of hierarchies and bifurcations (for example, theory-practice, male-female, intellectual-emotional) as an effort to characterize one phenomenon in relation to, or as different from, another. This is one consequence of the tendency of rationalist analysis to simplify and categorise. Bifurcation entrenches unquestioned assumptions about the nature of the phenomenon itself,²³ while dichotomies implicitly favour one side of the bifurcation over the other. Such dichotomies "afford conceptual

¹⁷ The same argument about the oppressive nature of the "universality" of rationalist thought has been made by men and women of colour; and see e.g. Matsuda and Delgado, *supra* note 1, amongst many others.

¹⁸ M. O'Brien, *The Politics of Reproduction* (Boston: Routledge and Kegan Paul, 1981).

¹⁹ J. Shotter & J. Logan, "The Pervasiveness of Patriarchy: On Finding a Different Voice" in M. Gergen, ed., *Feminist Thought and the Structure of Knowledge* (New York: New York University Press, 1988) at 69.

²⁰ R. Hubbard, "Some Thoughts about the Masculinity of the Natural Sciences" in Gergen, ed., *ibid.* at 1.

²¹ M. Gergen, "Toward a Feminist Metatheory and Methodology in the Social Sciences" in Gergen, ed., *supra* note 19 at 87.

²² See Mossman, *supra* note 5 at 44-45.

²³ In addition, some feminists have argued that dichotomies are themselves peculiarly characteristic of male thought. Other feminists challenge this approach as giving credence to the notion of essentialist "male" characteristics; characteristics which, as MacKinnon argues, are defined and socially constructed by men and not by women: see C. MacKinnon, *Feminism Unmodified* (Cambridge: Harvard University Press, 1987).

support for social and ideological structures that preserve the privileged places occupied by an elite group of men in the social order and designate the disadvantaged places reserved for women and other less privileged people".²⁴ This approach to the characterization of the actors and subjects of knowledge has perpetuated sexist and paternalistic descriptions of natural and social phenomena.²⁵ Feminist epistemologies attempt to dislodge the pervasiveness of dichotomies and hierarchies and question the assumptions we fall into making about subject-matter. As a result, feminist analysis prefers to represent knowledge as a continuum which can be characterized as "the product of an intermingling of subjective and objective elements".²⁶ In feminist epistemologies "truth" is never fixed and static, but fluid and responsive and highly contextualized. Unlike the "claim for truth" made by traditional legal method,²⁷ in a feminist research method the researcher's own experience is recognized as an integral part of the picture she paints; her "fingerprints" can never be erased.²⁸ This is not only a methodological feature of a feminist research method but also an epistemological one because it implies "theories of knowledge different from the traditional ones".²⁹ Katherine Bartlett argues that knowledge and truth are the results of individual and highly personalized interaction with the world; hence, knowledge and truth are not only defined by, but are also limited by, individual experience. Knowledge is "situated and provisional rather than absolute or final". Since, therefore, "the key to increasing knowledge lies in the effort to extend one's limited perspective",³⁰ it is the responsibility of each of us as individuals (teachers or students) to be open to the possibility of different "truths" to be found in the different perspectives of others.³¹

III. RATIONALISM, TECHNO-RATIONALISM AND ITS LEGACY IN LEGAL EDUCATION

There is no shortage of both formal evaluative and anecdotal material pointing to the predominance of the rationalist paradigm in most areas of professional practice and

²⁴ Code, *supra* note 15 at 28.

²⁵ There are many well-known historical examples of blatant sexist bias in the so-called objective process of scientific inquiry: for example, the claim of 19th century biologists that women's ovaries and uteruses needed rest away from school once menstruation had begun if they were to be able to reproduce; or the assertion that women's brains were smaller than men's. We are still surrounded by more subtle but equally insidious examples of dichotomous reasoning, bias in reasoning, and bias in research and scholarship (e.g. the characterization of sexuality as an individualized medical condition rather than socially constructed and related to interpersonal relationships).

²⁶ Code, *supra* note 15 at 30; and see P. Freire, *The Politics of Education* (South Hadley, Mass.: Bergin & Garvey, 1985) for a similar view.

²⁷ Smart, *supra* note 2 at 20-25.

²⁸ S. Harding, ed., *Feminism and Methodology* (Bloomington: Indiana University Press, 1987).

²⁹ *Ibid.* at 9-10.

³⁰ K. Bartlett, "Feminist Legal Methods" (1990) Harv. L. Rev. 829 at 881.

³¹ There are of course many debates within feminism over the development of epistemologies which are beyond the scope of this paper.

preparation over the past 150 years.³² The rationalist paradigm has been described by some education theorists and sociologists as “techno-rationalism”, where it is applied to the learning of professional, practical skills and knowledge.³³ When a rationalist paradigm is adopted and applied in the context of professional education and training, practice takes on an inferior, almost incidental, status compared with learning the “rules” or core knowledge itself. “Practice is conceived solely as activity and practice-derived knowledge is seen, where it exists, as specific, intuitive and unsystematic, thus failing the test of ‘true’ knowledge”.³⁴ In the techno-rationalist paradigm, practice is regarded as simply the application of theory to problems; “knowledge how” becomes no more than instrumental to the achievement of a given end. “Propositional” knowledge (“knowledge that”) in the rationalist model characterizes the problems of practice as predictable, controllable and standardized. By understanding problems in this way, rationalism suppresses their impact and their potency for effecting change. Problem-solving in the techno-rationalist model becomes a mechanistic activity in which knowledge (without choices) is directly applied to apparently predictable ends. Problems are made manageable on the assumption that each is susceptible to reasoned analysis irrespective of context, history or individual standpoint. Self-interest and contradictory interests are reduced to a formula. In this way, through a process of generalization and standardization, techno-rationalism obliterates context (the client whose needs are not clear at the first reading of the file, the client who changes his mind halfway through an action, the lawyer who finds that her personal feelings on a matter make it difficult or impossible to handle that case, the client whose problem which we cannot fully comprehend because it involves experiences – wife beating, sexual assault, racism – outside our own). By excluding context from the analysis and resolving of problems, techno-rationalism deftly re-packages our personal reality (applied to our own particular set of experiences and circumstances) as “objectivity”.

Few practitioners would understand their everyday approach to solving problems in these terms. Presumably this is one of the reasons that we hear from those in practice that their legal education now feels largely irrelevant to what they do. However, these comments mask the complexity of the relationship between law school and the formation of professional identity. The profession continues to be driven by a law school culture of learning and knowledge. The ethos of objectivity and neutrality (some describe it as a “discipline” of objectivity) fostered by a rationalist or techno-rationalist approach to knowledge and learning is an important sustaining feature of professional identity. This attitude is prevalent amongst both lawyers and judges who, however they may act in relation to individual clients and cases, maintain an espoused theory which is committed to “objectivity” and a neutral appraisal of context.³⁵ Any challenge to the

³² See e.g. D.A. Schon, *The Reflective Practitioner* (New York: Basic Books, 1983) and R.S. Usher, “Locating Adult Education in the Practical”, in B.P. Bright, ed., *Theory and Practice in the Study of Adult Education: The Epistemological Debate* (New York: Routledge, 1989) at 65.

³³ See Schon, *ibid.*, and D.A. Schon & C. Argyris, *Theory in Practice: Increasing Professional Effectiveness* (San Francisco: Jossey-Bass, 1980).

³⁴ Usher, in Bright, ed., *supra* note 32 at 73.

³⁵ For a discussion of the contrast between espoused theory and “theory-in-action”, see Schon & Argyris, *supra* note 33 and the discussion in section VII below.

dominant paradigm of knowledge thus challenges both academic and professional standards; what Smart describes as “double suicide”.³⁶

The type of largely propositional “core” knowledge which is generally associated with the so-called major professions (law and medicine) falls clearly within a rationalist paradigm and lends itself to the development of a techno-rationalist model of preparation for professional practice. According to Schon, the dominant expectations of professional knowledge are that it is highly specialized, firmly bounded, scientific or quasi-scientific in nature, and standardized.³⁷ The notion of “standardization” rests on the assumption that future practitioners can be effective as problem-solvers by learning a range of standardized responses which enable them to apply principles to practice. Sustaining the “bounded” parameters of highly specialized knowledge in this paradigm are the multiple hierarchies and dichotomies created and sustained by the ethos of techno-rationalism (for example, theory/practice, propositional/empirical knowledge, expert/lay person, and so on). Since it is the inevitable tendency of dichotomies to entrench assumptions and constrain debate, these and other dichotomies are clearly self-serving in sustaining professional legitimacy. Nathan Glazer describes the legal profession as lending itself particularly well to the model of techno-rationalism as it is “disciplined by an unambiguous end-success in litigation, profit – which settles men’s minds” and operating in a “stable institutional context”.³⁸ Echoing Glazer’s observations, other work has described the overall organizational ethos of the legal profession as subscribing to a “command/compliance” model, dominated by systems of internal and external rules (“command”), and the determination of breach and subsequent sanctions (“compliance”).³⁹ The use of such a methodological/epistemological framework for analysing and understanding problems and problematic situations may further encourage and sustain a tendency to reduce problems to a technical application of rules to facts.

How far is techno-rationalism implicit in the culture of law school and in the process of professional preparation? Few law teachers today would defend the classical rationalist model of knowledge (although some would). Many of us argue constantly against this unitary and constraining model of knowledge. I believe that the extent of the continuing influence exerted by the legacy of rationalism on the process of legal education, in particular in relation to the dominant teaching methods used in law school, often goes unrecognized in our unself-conscious and unstated assumptions about the kinds of learning that should go on in law school and how that learning should be evaluated, both formally and informally. The legacy of rationalism grows out of 150 years of legal education, during most of which law schools have systematically excluded both persons and understandings of the world that fell outside the confines of a narrow set of norms and values.⁴⁰ These controlling norms and values were inevitably those of

³⁶ Smart, *supra* note 2 at 21.

³⁷ Schon, *supra* note 32 at c. 1.

³⁸ N. Glazer, quoted in Schon, *supra* note 32 at 23.

³⁹ For a discussion of the “command/compliance” paradigm in relation to police training see University of East Anglia (UK), “Final Report of the Stage 2 Review of Police Probationer Training” (1987) HMSO at 19.

⁴⁰ See e.g. J.F. Dovidio & S.L. Gaertner, “Prejudice, Discrimination and Racism: Historical Trends and Contemporary Approaches” in J.F. Dovidio & S.C. Gaertner, eds., *Prejudice, Discrimination and Racism* (Orlando: Academic Press Inc., 1986) at 1; C. Boyle, “Teaching Law As If Women Really Mattered, or, What About the Washrooms?” (1986) 2 C.J.W.L. 96. For a

that group (self-identified "experts" in the university tradition)⁴¹ which has dominated law teaching and study in the universities for the past 150 years. University law students and teachers in Britain and North America have, until recently, represented a fairly homogeneous group. They have been predominantly male, predominantly drawn from the middle or upper classes whose sons have had access to university education, and almost without exception white. This group has either promoted, or largely accepted without serious challenge, a highly exclusive and excluding approach to knowledge which is, of course, largely self-serving. The norms and values of this group have been developed around an objectivist conception of knowledge which has determined the content (for example, what passes for "core" knowledge) of law school curricula. The same homogeneous and largely male group has also generated the theoretical orthodoxies of legal analysis. Elevated to the level of theory, the techno-rationalist model of legal knowledge has appeared in various guises throughout the history of the university law school. Examples include legal positivism, the case law method,⁴² the economic analysis of law and even the Lasswell-McDougal Plan.⁴³

Even if these examples of rationalism at the level of theory are regarded, as they may be by some, as no more than historical footnotes, there are many contemporary examples of the continued impact of the rationalist model on the values which dominate curriculum design and planning decisions in law school. The legacy of rationalism is a dominant set of outcome-orientated values, reflecting a preoccupation with the transmission of propositional knowledge. It is evident in the many rigid dichotomies of favour and disfavour, achievement and success, created and sustained by the law school environment, many of which are carried forward into professional practice. It is epitomized in the predominance of the lecture/examination format⁴⁴ (reflecting a transmission/outcome paradigm) as the accepted, even unquestioned, method of covering the curriculum. In this way, pedagogy in legal education has become driven, like other professional disciplines, by its substantive content; course objectives generally relate exclusively or almost exclusively to the acquisition of propositional knowledge. A rationalist approach is also evident in the dominant modes of inquiry and analysis of so-called "legal method". It is ultimately translated into criteria for achievement through the almost exclusive use of summative assessments, which emphasize detail and

general historical survey see R. Stevens, *Law School: Legal Education in America from the 1850s to the 1980s* (Chapel Hill: University of North Carolina Press, 1983).

⁴¹ Burgess, *supra* note 14. See also the discussion in section VI below.

⁴² Developed by Christopher Langdell, Dean of Harvard Law School from 1869 to 1894 who could also lay claim to being one of the first legal positivists. See e.g. "Record of the Commemoration of the 250th Anniversary of the Founding of Harvard College", 1987.

⁴³ See H.D. Lasswell & M.S. McDougal, "Legal Education and Public Policy: Professional Training in the Public Interest" (1943) 52 Yale L.J. 203, where "public policy" was clearly prescribed according to their highly partisan political ideals.

⁴⁴ That is, lectures and tutor-dominated tutorials or seminars. This has been documented in one extensive study in British law schools in J. Bailey, *Law Teaching Methodologies* (Ph.D. Thesis, Council for Academic Awards, UK, 1985). These methods do of course serve an important, albeit limited, purpose. My attention is not to characterize them as always inappropriate or without use; but exclusive or even predominant use of these methods seriously limits the kinds of learning likely to take place.

quantity of "given" information, about the form and style of learning as it should take place in law school. I shall look more closely at each of these examples below.

Law school culture presents us with many examples of tendency towards hierarchies and dichotomies which are created and sustained by the rationalist ethos. Obvious examples include professor/student, theory/practice, analysis/intuition, rational/emotional, neutral rules/political context, "A" grade/fail; all of which are mirrored in the hierarchies recognizable in the organization of the legal profession and the legal system itself.⁴⁵ The multiple hierarchies and dichotomies of rationalist epistemology are also reflected in the way the legal curriculum is formed and presented, from the planning stages up, and in the separation between the values of the formal and the informal (or "hidden") curriculum, which Giroux describes as working "in a subtly discriminating way to discredit the dreams, experiences, and knowledges associated with students from specific class, racial, and gender groupings".⁴⁶ The fixed "core" content of syllabuses, those elements of a subject deemed indispensable that a future practitioner of law "must know", reflect the rationalist conviction that it is possible to distinguish between essential and (presumably) non-essential knowledge, independent of context.

Having adopted the traditional "core" syllabus, most North American and British law schools follow a linear approach to learning, signposted for students by their teachers with "given" characterizations of relative complexity, which has a structurally pre-determined beginning, middle and end. Transmission methods are perfectly suited to this approach since the teacher completely controls the sequence, complexity and structure of materials. Similar assumptions are implicit in pre-determined conceptual frameworks (for example, the development of a family law syllabus around a model of a heterosexual couple who are birth parents to their children) which then provides a rationale for course structure as it looks at marriage, divorce and so on. The established traditions of content-based curricula, hierarchies of complexity and key conceptual frameworks generally assume a unitary vision of what "real" knowledge is and rarely reflect the ideas and experiences of individuals (women, minorities, men and women from working class backgrounds) who historically have not participated in law school and its "modeling" of professional practice.

Dominant modes of inquiry and analysis in law school also reflect a rationalist paradigm. The process of inquiry is characterized by a polarization of views, the adopting of extreme positions and the effort to prove the other side "wrong". In many ways this is not inquiry at all but is better characterized as combat. Janice Moulton describes an "adversary method" rooted in the rationalist approach and still evident in methods of philosophical inquiry.⁴⁷ Mooting, offered in almost all law schools from the first year upwards, is an obvious example of this. We school law students to accept an adversarial model as not only somehow inevitable to the practice of law, but furthermore as a legitimate and honourable mode of inquiry. The nervous anxiety generated by mooting and its tendency to reduce the human elements of the lawyering process to a

⁴⁵ Kennedy, *supra* note 1.

⁴⁶ H. Giroux, *Schooling and the Struggle for Public Life* (Minneapolis: University of Minnesota Press, 1988) at 182. On the distinction between the formal and the informal or "hidden" curriculum, see I. Illich, *Deschooling Society* (New York: Harper & Row, 1971).

⁴⁷ See J. Moulton, "A Paradigm of Philosophy: The Adversary Method" in S. Harding & M.B. Hintikka, eds., *Discovering Reality* (Dordrecht, Holland: D. Reidel, 1983) at 149.

series of win/lose arguments is well-known to teachers who have been involved with law student moots, even if they continue to assert that mooting has "other benefits". An alternative, feminist position is to question the assumption of adversarial argument and consider instead that "[t]he adversary is not someone who is to be destroyed but someone who is to be accommodated".⁴⁸ This sends a different message from the one sent by mooting; that the "good" or "successful" lawyer of the future might not "win" a case but rather manage to resolve it to the satisfaction of both parties. Menkel-Meadow has described a feminist methodology as one which attempts to find "a more open and flexible understanding of the many ways problems can be solved".⁴⁹

At the level of analysis, students are sometimes invited to devise and apply criteria, which must be objective and universal rather than differently reasoned, in order to determine the validity of argument or select between competing alternatives. Otherwise they are presented with a limited list of criteria, or at worst a *fait accompli*. Some writers point to the assimilation by law students of this dominant culture of analysis, exemplified by the process of extracting the rule or rules applied by an appellate court in reaching a decision.⁵⁰ This is described as the case method of legal reasoning and we teach it in law school because it is held out as the way in which judges search out precedent and render decisions. The element of objectivity rests on a rationalist assumption that the process of selection (of what is and is not deemed "relevant" in previous caselaw) is a scientific one. Smart and Mossman, among others, have suggested that this process is, in reality, less than logical and its ends less than inevitable.⁵¹ An uncritical approach to the teaching of "legal reasoning" entrenches the assumptions of logic and inevitability, and sustains the techno-rationalist approach to problem-solving. This approach elevates and separates the analytical framework of lawyers from others, thus ignoring the interrelation of all analytical frameworks. It also explicitly encourages students to reach conclusions which claim to be universally valid, and to measure the quality of their analysis against a singular standard of logic and consistency.

The legacy of rationalism is also apparent in the predominance of assessment models which continue to require students to cram, memorize and then regurgitate information in a highly stylistic manner often unrelated to any subsequent intellectual or professional demands (other than the taking of further examinations or tests), reflecting a preoccupation with the intrinsic value of knowledge in and of itself. Examinations and the mystery which often surrounds the grading process send the message that there is a clear bright line separating a "B" paper from a "C+" paper (without actually revealing what that is) and sustains the hierarchy of "B" student and "C+" student. The traditional assessment process can only reflect the values and

⁴⁸ J. Brockman, D. Evans & K. Reid, "Feminist Perspectives for the Study of Gender Bias in the Legal Profession" (1992) 5 C.J.W.L. 37 at 56.

⁴⁹ C. Menkel-Meadow, "Feminist Legal Theory, Critical Legal Studies, and Legal Education or 'The Fem-Crits Go To Law School'" (1988) 38 J. Leg. Education 61 at 81.

⁵⁰ See e.g. M.J. Matsuda, "When the First Quail Calls: Multiple Consciousness as Jurisprudential Method" (1989) 11 Women's Rights L. Rep. 7; B. Balos, "Learning to Teach Gender, Race, Class, and Heterosexism: Challenge in the Classroom and Clinic" (1992) 3 Hastings Women's L.J. 161.

⁵¹ See Smart, *supra* note 2 and Mossman, *supra* note 5.

assumptions of one person, that is, the person doing the grading.⁵² Opposition to other forms of assessment (continuous assessment, performance-based assessment, oral examinations, group assessments, self-assessment and "contract" grading)⁵³ reveals a deep-seated antagonism towards considering alternatives, and makes some surprising assumptions about the so-called "objectivity" of traditional forms of written assessment.

The totality of this approach to knowledge and learning has obvious political and specifically exclusionary consequences. Together the law schools and the profession collude to perpetuate a myth of "special" knowledge, unattainable to those "outside" (the lay person seeking legal advice or qualification, especially someone from a minority or traditionally excluded group), which is practised by a rational, emotionally detached legal technician. As one writer puts it, "the law's structure not only claims neutrality but also celebrates abstraction and objectivity."⁵⁴ It is in law school that the prospective profession is "armed" with these credentials. It is little wonder then that the first few months of law school can be so disorienting and create real dissonance for some students who describe themselves as completely "changed" by the process.⁵⁵ Many students experience these first few months as not only a time when they must learn a new vocabulary, new systems, and new modes of working but also a time of accepting and conforming to new models of learning and standards of "success". In the recorded difficulties experienced by first year law students (of both sexes and of all classes and races) in relating their past experience and perceptions of the world to the image of knowledge they are confronted with in law school, we are provided with many vivid pictures of what happens when Jake/Amy goes to law school and meets the technorationalist paradigm.⁵⁶

IV. AN EPISTEMOLOGY FOR EXPERIENCE-BASED LEARNING

Since learning by and through experience results in knowledge which is personal, contextualized and constantly responding to change, experiential teaching and learning methods implicitly challenge the rationalist epistemology still dominant in the pedagogies and curricula of legal education. "Experience" in the sense that it is used here means a focus on personal experience in the present, active sense (through the incorporation of structured learning activities emphasizing action and "trying-out" for the individual

⁵² See J. Feinman & M. Feldman, "Achieving Excellence: Mastery Learning in Legal Education" (1985) *J. Leg. Education* 528; for a British view, see M. Zander, "Examinations in Law" (1968) 10 *J. Soc. Pub. Teachers of L.* 24.

⁵³ See M. Torrey, J. Casey & K. Olson, "Teaching Law in a Feminist Manner: A Commentary from Experience" (1990) 13 *Harv. Women's L.J.* 87 at 96 for a description of this latter approach.

⁵⁴ Balos, *supra* note 50 at 162.

⁵⁵ From many discussions with students.

⁵⁶ See e.g. Boyle, *supra* note 40; P.A. Monture, "Ka-Nin-Geh-Heh-Gah-E-Sa-Nonh-Yah-Gah" (1986) 2 *C.J.W.L.* 159. There are a number of interesting US studies on the apparent drop-off in student idealism after the first year of law school. See e.g. J.M. Hedegard, "The Impact of Legal Education: An In-Depth Examination of Career-Relevant Interests, Attitudes, and Personality Traits Among First-Year Law Students" (1979) *Amer. Bar. Found. Res. J.* 791. On a more personal note, see also J.R. Elkins, "Rites de Passage: Law Students 'Telling Their Lives'" (1985) 35 *J. Leg. Education* 27.

learner) followed by the evaluation and processing of that (pedagogically planned) experience. While experiential models of learning also implicitly value the individual learner's past experiences, they focus on learning through structured current and on-going experiences, whether simulated or real-life. Evaluation in this context is not an afterthought or available only to those students who seek out their teacher outside class times, but an explicit pedagogical commitment requiring scheduled class time and teaching resources. Subsequent processing of experience is a critical feature of an experiential pedagogy since it is at this point that individual learning can be maximized in reflection, in self, peer and teacher evaluation and feedback, and in relating the lessons of the experience both forward and backward in time.

Experience-based education has potential applications throughout every topic of the current law school curriculum because it represents an educational method, a focus on the process of learning, rather than any set content or body of knowledge.⁵⁷ When in this paper I refer to "experience-based learning" or experiential models of teaching and learning, I am using these terms to refer specifically to three types of experiential pedagogy with which I am familiar. These are legal skills education, clinical legal education and problem-based learning. I do not, however, intend to exclude other forms of experience-based pedagogy with which I am less familiar. Examples of structured experiential learning activities characteristic of these methods include role-play, simulation, game-playing, teamwork on simulated files or problems, work on live files or with live clients, and any other practical "hands-on" exercises which allow for independent student analysis, decision-making, and evaluation.

A. Skills Education

Definitions of skills education are not monolithic, nor is it in the nature of skills education that they should be. Different programmes use different methods to cover different agendas. Some emphasize client service, others rely exclusively on classroom simulation; some concentrate on client relations skills, others on advocacy; and so on. Education in skills is basically concerned with learning about how to do things; for example, how to counsel an angry client, how to advocate on behalf of a client seeking bail, how to write an advice letter or draft a document according to client instructions, how to negotiate a settlement on the client's behalf in order to avoid lengthy and expensive litigation, and so on. In law school, skills education is also increasingly concerned with learning about personal management strategies, dealing with stress, work planning and prioritizing, management of cases, working effectively with colleagues and other staff members, and so on.⁵⁸

⁵⁷ G. Bellow, "On Teaching the Teachers: Reflections on Clinical Legal Education as Methodology" in *Clinical Education for the Law Student* (Working Paper prepared for the 1973 CLEPR Conference) at 374.

⁵⁸ For a useful discussion of the educational principles underlying skills education and the types of practical pedagogy it implies, see K. Mackie, "Lawyer's Skills: Educational Skills" in N. Gold, K. Mackie & W. Twining, eds., *Learning Lawyers' Skills* (London: Butterworths, 1989) at 8.

B. Clinical Legal Education

The most widely understood meaning of the term "clinical legal education" is still the live client clinic model.⁵⁹ Live client clinics operate in law schools throughout North America, many as part of credit programmes.⁶⁰ Partly in response to reduced funding, and partly as a natural pedagogical development, clinical programmes have increasingly come to make use of classroom simulation either as a substitute for or as a supplement to live client work. Where this is the case, there is often little practical difference between skills education and clinical programmes.

C. Problem-Based Learning

In problem-based learning, used widely in medical education, students work co-operatively in small groups of six or seven. Their work focus is a simulated file, in legal education typically a client file, which requires students to determine and then actually take a number of analytic and practical steps. The group will work for the most part independently of the teacher, working at its own pace, delegating and sharing tasks among group members and in some cases determining its own learning objectives for any one exercise.⁶¹ At the conclusion of any one exercise, which may take several hours or several weeks depending on how it is structured and organized, the group presents and discusses its conclusions in an interactive forum. The final stage of the exercise is for the group with the tutor to evaluate the process of learning which has brought them to this point.⁶²

Each of these three pedagogies can of course be practised in a rationalist, prescriptive manner. This is a critique often made of skills education and it is certainly true that the teaching of skills can become a mechanistic and uncritical teaching of technique and that "emphasis on learning 'how' can, and often does, result in producing efficient, uncritical servants of the *status quo*".⁶³ This tendency was most prevalent in skills programmes

⁵⁹ See D. Barnhizer, "The Theory and Practice of Clinical Legal Instruction" (1974) 29 Cleveland L.R. at 67.

⁶⁰ For a complete listing of clinical programmes in US law schools, see the Directory of Clinical Programs published by the American Association of Law Schools (AALS), 1993.

⁶¹ See e.g. J.E. Des Marchais & B. Dumas, "Issues in Implementing a Problem-Based Learning Curriculum at the University of Sherbrooke" (1990) 3 Annals of Community-Oriented Education 9; V.R. Neufeld & H.S. Barrows, "The 'McMaster Philosophy': An Approach to Medical Education" (1974) 49 J. Medical Education 1040; S. Kurtz, M. Wylie & N. Gold, "Problem Based Learning: An Alternative Approach To Legal Education" (1990) 13 Dalhousie L.J. 797; J. Macfarlane & P. Boyle, "Instructional Design and Student Learning in Professional Legal Education" (1993) 4 Leg. Education Rev. 63.

⁶² This stage of the exercise is sometimes referred to as "loop back reiterative learning", where students are encouraged to reflect on and evaluate the process dimensions (as opposed to the substantive results) of the exercise they have just completed and to make explicit similarities and differences between the process they adopted in this exercise and in other, earlier exercises. See Kurtz, Wylie & Gold, *supra* note 61 at 799-800; D. Boud, "Problem-Based Learning in Perspective" in D. Boud, ed., *Problem-Based Learning for the Professions* (Sydney, Australia: Herdsa, 1989).

⁶³ W. Twining, "Legal Skills and Legal Education" (1988) 22 L. Teacher 4 at 10.

developed during the 1980s which utilized an instructional strategy known as "systematic instructional design". This strategy, in prescribing detailed behavioural objectives, reinforced the tendency to favour certain kinds of knowledge, that is, the propositional (or formal) knowledge characteristic of rationalist epistemology rather than tacit knowledge (related to understandings and awarenesses), and reinforced the characterization of skills as mechanistic rather than largely context-dependent. What this critique of skills education suggests is that regardless of focus, whether skills or substantive law, it is equally possible for any programme or pedagogy to be employed in an uncritical and formalist manner. This goes to the important question of *how* experiential methods are used in the classroom. The threshold question, which is my focus in this paper, is the remainder of what is the potential of experience-based methods of teaching and learning in legal education, and whether they should be seriously considered as an important part of the effort to transform the rationalist-dominated curriculum.

What follows below is an effort to further articulate the special nature of knowledge in experiential learning, described in relation to three key elements of experiential methods: personal experience, the development of expertise, and affective or moral development. In each case, I shall attempt to make explicit some connections with feminist critiques of rationalism and feminist epistemologies, which I believe offer insight into the transformative potential of experiential teaching and learning methods. My aim is to clarify and to illustrate the ways in which experiential methods can challenge rationalism as the dominant pedagogical model in law school.

V. KNOWLEDGE AND PERSONAL EXPERIENCE

The role of individual learners in the predominantly didactic, transmission-outcome model of teaching and learning used in law school is limited to that of "theoretical spectators".⁶⁴ Most kinds of prior experience (of work, of relationships, of discrimination or other perspectives personally experienced), are excluded as irrelevant. In the rationalist paradigm, there is little or no interest in the meaning of experiences (past or present) for the individuals who experience them. Nevertheless, whether we sit in a lecture theatre as spectators or participate in a practical exercise, it is self-evident that our personal experience is the medium through which all our learning is filtered, regardless of our actual level of engagement. This is equally the case whether we are learning as spectators (in didactic instruction) or as participants (in experiential learning). What distinguishes the former from the latter is the value placed on that experience as it occurs personally and its particular meaning for the individual, including the way in which the individual perceives, responds to and learns from personal experience.

Curriculum planning in an experiential learning environment is primarily concerned with the planning of current learning experiences, and with the subsequent examination

⁶⁴ J. Dewey, *Democracy and Education*, first published 1916, excerpted as "Experience and Thinking" in J. McDermott, ed., *The Philosophy of John Dewey*, vol. 2 (New York: G.P. Putnam's Sons, 1973) at 496. John Dewey, a teacher and social philosopher, worked with his partner Alice Chipman in establishing a laboratory school at the University of Chicago, between 1904 and 1908, which provided the basis for much of his later writing on experience, development and pedagogy.

and processing of these experiences. The meaning of what it is to learn is transformed; the learner moves from being a spectator or a recipient of given knowledge to individual "meaning-making", through and from personal experience, supported by subsequent reflection. Experiential pedagogies draw direct relationships between learning and personal experiences. It is how we relate to and learn from our direct personal experiences in the active sense⁶⁵ (rather than what we are told) which constitutes the most significant learning we do as adults.⁶⁶ This relationship between personal experience and learning is central to skills education, clinical education and problem-based learning. Each of these three methods structures participation and personal experience directly into the learning process. Types of experience include short role-play activities, or games, or other interactions such as discussion groups on task, more extended simulations, or live case study work undertaken either individually or in groups. Students' on-going work on tasks involves them with problems and exercises which are deliberately designed and structured in order to be dynamic, heavily context-dependent and unpredictable in outcome (as in real life). Furthermore, it is an essential characteristic of the experiential methods described in this paper that students are required to assume responsibility for outcome.⁶⁷ Students are encouraged and supported in making judgments, based on their personal experiences, and to follow through and take responsibility for the consequences.

Critical to the learning which takes place through experience is what happens next. "When we experience something, we act upon it, we do something with it: then we suffer or undergo the consequences."⁶⁸ In this lies the educative nature of the experience itself: learning *from* experience. The effective processing of experience implies a supervisory and facilitative role for faculty which demands both great care and skill.⁶⁹ Processing of experience can and should occur at many different stages and on many different levels within any one learning experience. A programme may state learning goals and assumptions at the outset (such as, "by the end of this course, you will be able to identify from your own experience both the strengths and the weaknesses of a competitive approach to negotiation...") which may be used as a benchmark for processing a structured experience or set of experiences. In addition, through working with students in a facilitative role, faculty can encourage students to develop and prioritize personal learning objectives. For each individual the experience is uniquely personal, where the individual resolves and understands what she learns, in relation to both this new experience and to her past experiences, in a personal way and also in a way which can

⁶⁵ John Dewey's notion of "experience" in his philosophical and educational writings is something which is directly acted on, *i.e.*, it is essentially active. See *e.g.* the collection of Dewey's writings on education in McDermott, *supra* note 64. See especially "Experience and Thinking", *ibid.* and *My Pedagogic Creed*, first published 1897, at 442.

⁶⁶ See the work of Jerome Bruner, an adult educator and psychologist in the developmental tradition. J. Bruner, *Acts of Meaning* (Cambridge, Mass.: Harvard University Press, 1990) at c. 3, "Entry into Meaning".

⁶⁷ A. Boon, M. Jeeves & J. Macfarlane, "Clinical Anatomy: Towards a Working Definition of Clinical Legal Education" (1987) 21 L. Teacher 61 at 67.

⁶⁸ Dewey in McDermott, *supra* note 64 at 495.

⁶⁹ K. Kreiling, "Clinical Education and Lawyering Competency: The Process of Learning to Learn from Experience through Properly Structured Clinical Supervision" (1981) 40 Maryland L. Rev. 284.

be informed and shaped by the collective experience of those with whom she is working. Teachers working with students in this way to value, reflect on and facilitate their learning from their personal experiences can begin to transform the parameters of what is "valued knowledge". In the process, the tutor may also begin to define a new role for herself, in which she too is often the learner.

Based on this understanding of learning, John Dewey describes education as "the continuing reconstruction of experience";⁷⁰ as we continually experience, evaluate, re-experience and so on. Characterizations of the process of learning through experience make the dialectic between theory and practice (experience followed by evaluation, experimentation and re-evaluation) explicit.⁷¹ This process is described as "constant" learning, in which we evaluate and re-evaluate at any one stage in the learning process based on what we presently know and have experienced.⁷² In his seminal article on the methodology of clinical legal education, Gary Bellow describes the pedagogy of the clinic as "the continual reconstruction of knowledge in the light of new experience".⁷³ It is this dialectic between theory and practice, experience and evaluation, that some clinical teachers (including feminist clinicians)⁷⁴ have written of aspiring to develop in their use of experiential teaching and learning methods.

As a feminist, an approach which conceives of knowledge as developing out of direct personal experience and epistemologies as necessarily personal and partial immediately resonates with my own understanding of the process of learning and the development of knowledge. The central significance of personal experience in understanding the world is an important basis for the feminist critique of rationalist knowledge. Knowledge is contextual and intersubjective and contingent on personal experience. Knowledge and truth are the results of individual and highly personalized interaction with the world, members of our own communities and others; hence knowledge and truth are not only defined by but are also limited by individual experience. Significantly, feminist theory itself arises out of experience—often explored and expressed through consciousness-raising, the sharing of experiences with others, narratives or the keeping of a journal, all of which emphasize the significance and value of personal experience in the development of "knowledge". As one group of feminist scholars expressed this idea, "the epistemological implication of feminist perspectives is that no human knowledge is absolute. It is always filtered through the preconceptions, biases, and socialization of the knower."⁷⁵

⁷⁰ Dewey in *My Pedagogic Creed* in McDermott, *supra* note 64.

⁷¹ D. Kolb, *Experiential Learning: Experience as the Source of Learning and Development* (Englewood Cliffs, N.J.: Prentice-Hall, 1984). Phyllis Goldfarb describes this dialectic as the "theory-practice spiral". See P. Goldfarb, "A Theory-Practice Spiral: The Ethics of Feminism and Clinical Education" (1991) 75 Minnesota L. Rev. 1599 [hereinafter "The Theory-Practice Spiral"].

⁷² This has echoes of Lorraine Code's epistemological paradigm of "knowing other people", in which final conclusions or answers are less important than a maturing of judgment and a learning to know other people. See Code, *supra* note 15 at 37.

⁷³ Bellow, *supra* note 57 at 400.

⁷⁴ See e.g. "The Theory-Practice Spiral", *supra* note 71 and by the same author, "Beyond Cut Flowers: Developing a Clinical Perspective on Critical Legal Theory" (1992) 43 Hastings L.J. 717.

⁷⁵ Brockman, Evans & Reid, *supra* note 48 at 42.

The significance and value attached to personal experience by experiential learning methods, and the structuring of on-going experiences into the learning process, is a practical step towards the development of models of knowledge and learning in law school which rest on a fundamental conception of knowledge as personal and dynamic. Experiential methods of teaching and learning contain the potential for the development of new epistemologies in legal education and would allow feminists, among others, to explore the transformative effects of pedagogies which explicitly validate and nurture the development of epistemologies derived from experience.

VI. KNOWLEDGE AND EXPERTISE

The techno-rationalist epistemology assumes the ascendancy of the "expert" who can both set and meet "objective" standards for mastery in her field. Hence it sustains the status of the university itself, the home of most law schools in Europe and North America, as the citadel of knowledge and expertise. Techno-rationalism assumes that those who generate knowledge will be different from those who practice it;⁷⁶ and that it is the former rather than the latter, who, viewing the world from the uniquely impartial perspective of the "ivory tower", will be accorded the status of "expert".

A transformation of what we understand by knowledge also requires a reconception of what we mean by "expertise". For feminists in law schools these arguments are currently being waged over highly practical, political issues including what characterizes "scholarship" for the purposes of tenure; the importance of teaching and interaction with students and colleagues compared with other aspects of academic life; the development of differently gendered criteria for hiring faculty members; and the development of criteria to admit women students. There are clear tensions between the standard "malestream" definition of "expertise" which is generally characterized by objectivity and rationality, qualities which traditionally have been ascribed to men and not to women, and arguments for a more differentiated and complex understanding of the nature of expertise. These same tensions are reflected in the contrast between the model of expertise implicit in education in the techno-rationalist tradition, and the re-making of the concept of expertise in the context of experiential approaches to learning.

In an experience-based epistemology, growth is not generally conceptualized in linear terms or as steps in a hierarchy. Learning is more often characterized as dialectical or cyclic, moving from experience to reflection and back again, and centring on the process of learning to learn through experience. The sorts of abilities indicative of personal growth and development in an experiential model include reflection and insight into one's own experiences, the ability to process new information arising from experience, and the transferring of knowledge and experience between different situations and contexts.⁷⁷

Rationalism associates expertise with the acquisition of information or data, in its purest form. A premium is placed on the accumulation of information. This information

⁷⁶ R.S. Usher, "Locating Adult Education in the Practical" in Bright, ed., *supra* note 32 at 71.

⁷⁷ This last is generally accepted by cognitive theorists as a longer-term goal in experiential learning; see e.g. J. Bruner, *Toward a Theory of Instruction* (Cambridge, Mass.: Harvard University Press, 1966).

is generally measured in terms of quantity or volume (over as wide and as detailed a field as possible) rather than relevance or practical application. As the volume of available information, driven by technological advances and the proliferation of specialism,⁷⁸ grows, we are required to access increasing quantities of knowledge in order to become "expert". The exclusivity of the rationalist tradition is sustained to a large extent by institutional and other structural constraints on access to knowledge, whether access to a particular educational programme, or intellectual access to specialized vocabulary, concepts and perspectives.⁷⁹ In re-evaluating the concept of "expertise" from the perspective of experiential approaches to learning and knowledge, the ability to do (to accurately identify a problem or issue, to make sensitive and appropriate judgments about data and persons, to strategize, to make and carry through effective decisions) becomes at least as significant as the ability to simply know. Knowing itself is broadened to include awareness, caring and sensitivity to context, recurrent themes in feminist moral theory.⁸⁰ The relationship between theory and action, played out in personal experience, is central to this notion of expertise.

This difference in approach to what it is to be an "expert" can be vividly illustrated by reference to the role played by the teacher in problem-based learning.⁸¹ The rationalist ethos in education assumes that the teacher is always the subject-matter expert. In problem-based learning, teachers are rarely subject experts in each and every one of the many and varied areas of their discipline in which the small groups for whom they act as tutor will work. Instead, the primary task of tutors is to contribute their expertise by guiding and advising students as they make a way for themselves through the process of work on any one file, which might include problem analysis and subsequent research, fact-finding and eventual decision-making. Unsurprisingly, some student participants in problem-based learning find it difficult at first to accept the tutor playing a role so far away from their learned role-model for a teacher; which is as a specialist in substance (as in the rationalist paradigm) rather than process (as in problem-based learning). However, experience with one problem-based learning programme has demonstrated that students, after some initial resistance, can and do adapt their expectations of the tutor. What is probably most significant about this is that in the process, students come to challenge their own preconceptions about what it might mean to be "expert", and how

⁷⁸ The National Register of Scientific and Technical Personnel in the US now lists more than 1,000 specialisms whereas 30 years ago the list contained less than 50. See R. Beard & J. Hartley, *Teaching and Learning in Higher Education* (London: Harper Row, 1984) at 3-4.

⁷⁹ Intellectual and institutional "gatekeeping" by legal academics and by the profession is a familiar phenomenon to anyone who has worked in public legal education or public legal services. In simple terms these programs and services operate on the assumption that individual and community "empowerment" require the provision of basic information about the operation of the legal system and about personal legal rights. See e.g. J. Macfarlane & M. Jeeves, "Rethinking Legal Education" in J. Cooper & R. Dhavan, eds., *Public Interest Law* (Oxford: Basil Blackwell, 1986) 394 especially 407-09.

⁸⁰ See e.g. C. Gilligan, *In a Different Voice* (Cambridge, Mass.: Harvard University Press, 1982) and the discussion in section VII below.

⁸¹ Neufeld & Barrows, *supra* note 61 at 1044-45.

the interplay of theory and practice affects their understanding of the notion of expertise both for themselves and for their teachers.⁸²

It is interesting to note that much of the recent research on what distinguishes an "expert" from a novice has focused on the ability of the experts to develop effective schemata and structures for understanding the information they have about the world.⁸³ As a consequence, the expert tends to have "...a richer repertory of strategies, and appropriate mechanisms for accessing and applying these strategies."⁸⁴ The novice, on the other hand, tends to have developed fewer structures or groupings for learned information. Clearly what makes this process effective (or not) is the ability of the learner to relate her past experiences to a current experience in which similar ideas, problems or data are being re-evaluated and reconsidered; in other words, the integration of knowledge with skill or practical application. While much of the information required to establish effective schemata is domain-specific and certainly includes "propositional knowledge", achieving expertise through the development of sophisticated schemata is as much a product of the accumulation of experience as it is the accumulation of propositional knowledge.⁸⁵ This requires the thorough processing of experience and explicit encouragement and space for the development of personalized schema with which to understand and relate to the world of experience and practice.⁸⁶ The expert, in this model, is the person who learns most and best from her personal experiences. This requires the self-conscious identification of the various understandings—of knowledge, of technical skill, of other people—that are implicit in action; and their constant re-evaluation for future action.⁸⁷

VII. KNOWLEDGE AND FEELINGS

What law school does for you is this: it tells you that to become a lawyer means to forget your feelings, forget your community, most of all, if you are a woman, forget your experience.⁸⁸

Feminists have long criticized the separation of knowledge from feelings, logic from intuition, and rational (called objective) from emotional responses which are

⁸² See results of the evaluation study conducted in Macfarlane & Boyle, *supra* note 61. The reconceptualization of the teacher as process facilitator has many echoes in feminist pedagogies. See e.g. Torrey, Casey & Olson, *supra* note 53.

⁸³ See e.g. M.T.H. Chi, R. Glaser & M.J. Farr, *The Nature of Expertise* (Hillsdale, NJ: Lawrence Erlbaum Associates, 1988). This study compared "novice" with "expert" performance in a number of fields including chess, physics, typewriting and magistrates decision-making.

⁸⁴ E. Johnson, "Expertise and Decision under Uncertainty: Performance and Process" in Chi, Glaser & Farr, *ibid.* at 209-10.

⁸⁵ See e.g. J. Mitchell, "Current Theories on Expert and Novice Thinking: a Full Faculty considers the Implications for Legal Education" (1989) 39 J. Leg. Education 277.

⁸⁶ A tendency towards rationalism can equally creep into our preconceptions of what useful "schemata" should look like. The emphasis should instead be on the development of personally accessible and meaningful frameworks rather than the repetition of models of "legal reasoning" in the rationalist mold.

⁸⁷ Schon, *supra* note 32 at 50.

⁸⁸ C. MacKinnon, "On Collaboration" in *Feminism Unmodified*, *supra* note 23 at 205.

clearly signalled in both the open and the hidden curriculum in law school. In contrast, an experiential model of teaching and learning regards personal, moral and emotional responses as integral to the process of learning, and considers affective development to be equally significant in the process of learning as cognitive and other aspects of individual development. The cognitive-developmental tradition, exemplified in the work of Jean Piaget,⁸⁹ conceives of emotional and intellectual development as inseparable. Cognitive-developmental and moral development theory⁹⁰ assume that in order for a learner to grow intellectually, she must grow in the affective domain also. As she learns, she will not only develop cognitive and processing skills in relation to data, new and old, but will also question the moral basis of what she is learning and ask herself how it relates to her present value system.⁹¹ This is often a difficult and distressing process for law students, especially where there is a perceived or actual dissonance between what is being learned and his or her current value system. Experiential methods of teaching and learning acknowledge this process and explicitly recognize its significance for learning and personal development. This has many implications for the role of the tutor in both opening up a dialogue on this process, and supporting those students who find it to be an especially difficult one.

In a rationalist approach, little or no attention is paid to this process of intellectual and moral integration. Whilst it may occur unconsciously, it is never reflected upon in a self-conscious or validating way. This is extremely alienating for many law students. Experiential approaches to learning value and encourage the development of personal moral frameworks based on experience, with which to evaluate current and future learning. This can include explicitly encouraging (not coercing) students to integrate the personal perspectives they bring with them to law school with what they are learning about in law school, and to react and respond accordingly. By explicitly valuing personal responses, including intuitive ones, to questions of justice, an experiential approach to learning can encourage the exploration of individual reactions to and reflections on both issues and materials in a respectful, validating climate. Such a climate values and

⁸⁹ See J. Piaget, *The Origins of Intelligence in Children*, trans. M. Cook (New York: International Universities Press, 1952); Jerome Bruner, *The Process of Education* (Cambridge, Mass.: Harvard University Press, 1960) and *Toward a Theory of Instruction*, *supra* note 79. For a brief review of the significance of cognitive theory in relation to experiential learning, see J. Macfarlane, "Look Before You Leap: Knowledge and Learning in Legal Skills Education" (1992) 19 J.L. & S. 293 at 304-05.

⁹⁰ See e.g. the two-volume work of Lawrence Kohlberg, *Essays on Moral Development*, vol. 1 *The Philosophy of Moral Development* (San Francisco: Harper & Row, 1981) and vol. 2 *The Psychology of Moral Development* (San Francisco: Harper & Row, 1984). See Macfarlane *supra* note 89 at 304-05 for a brief review of the significance of moral development theory for experiential models of teaching and learning. Several clinicians have experimented with some of Kohlberg's ideas on moral development in a clinical setting.

⁹¹ Moral development and cognitive development theorists have drawn a direct relationship between the personal maturity displayed by the individual, e.g. in relation to the toleration and accommodation of differences and diversity, and her or his intellectual maturity in analysing and synthesizing information and ideas. See also W. Perry, *Forms of Intellectual and Ethical Development in the College Years* (New York: Holt, Rinehart and Winston, 1970), and for a feminist perspective see M.F. Beleuky et al., *Womens Ways of Knowing: The Development of Self, Voice and Mind* (New York: Basic Books, 1986).

validates personal reactions because moral and affective growth are seen as important and not as "fringe" to the "real" business of law school. Experiential learning methods can be structured to emphasize the integration of both personal and professional ethical questions into the curriculum. This may take the form of a professional ethical issue, contained within a problem or simulation or file, which students should first recognize as a concern and then decide on a method for dealing with it. Most important of all, students should be able to explain *why* they approached an ethical issue in the way in which they did. This may mean that their initial "on-the-spot" response is modified after reflection, so time spent after the exercise in reflection and evaluation becomes especially important. The emphasis in experiential learning is thus on the development of personal "theories-in-use" based on actual experiences rather than merely the espoused theories which we might offer in response to a hypothetical, and which tend to reflect learned rules of professional conduct rather than actual behaviour when confronted with an ethical dilemma.⁹²

The process of knowledge development in this model implies both a cognitive and an affective response. For personal epistemologies developed through experiential learning, this has a number of significant implications. Conclusions reached one day as the result of one experience or set of experiences may change the next. No conclusion is immune from the challenge continually presented by the next experience. This is development towards a target which is personal and changeable rather than universal and fixed. It might be described as an activist approach⁹³ to moral reasoning, based on actual events as they are experienced rather than abstract theorizing.⁹⁴ This strikes a chord with feminist theories of moral reasoning which emphasize the development of a moral judgment which is highly contextualized and which delays conclusions until it has fully considered, and attempted to understand, all possible details and perspectives. One feminist scholar describes this as a feminist social activist "descriptive epistemology". Descriptive epistemology would seek to transform moral argument by diverting our attention away from the development of normative positions and towards improving our understanding of the different "social worlds" (as a result of different experiences and giving rise to different views) inhabited by participants on any one public issue.⁹⁵ Striking a similar note, Martha Minow and Elizabeth Spelman write of the "epistemological humility" of a feminist ethic which prefers to suspend judgment until it has comprehended sufficient complexity and detail; and which judgment may itself prove to be less than final as new details and complexities evolve.⁹⁶ All this is in stark contrast to the classic rationalist ideal of the autonomous, self-conscious moral agent who could make dispassionate decisions based solely on reason and untouched by emotion and "never permitting inclination (affection, friendship, love) to interfere with the performance of his duty".⁹⁷

⁹² See Schon & Argyris, *supra* note 33.

⁹³ "The Theory-Practice Spiral", *supra* note 71.

⁹⁴ See Schon & Argyris, *supra* note 33.

⁹⁵ K. Addelson, "Knowers/Doers and Their Moral Problems" in L. Alcoff & E. Potter, eds., *Feminist Epistemologies* (New York: Routledge, 1993).

⁹⁶ M. Minow & E. Spelman, "In Context" (1990) 63 S. Cal. L. Rev. 1597.

⁹⁷ Code, *supra* note 15 at 75 and generally c. 3 on ethics.

In this model, educational institutions carry some responsibility for fostering a climate in which moral and affective development is valued, and not, as often happens at law school, derided or ignored. The integration of personal affective and intellectual development in these ways is a direct challenge to the techno-rationalist tradition, which either tacitly or sometimes overtly encourages the "boxing off" of personal, moral and emotional responses from both intellectual and professional life. Experiential learning, by explicitly arguing for the integration of the intellectual and the affective, allows us to explore terrain and to validate responses shut out by the techno-rationalist paradigm. This I believe provides an epistemological and pedagogical framework for actualizing the goals of feminist theories of ethics and moral development in the classroom.

VIII. CONCLUSION

The feminist concern with challenging and changing issues of process, whether that process is the classroom pedagogy, research methodology or another type of strategy or inquiry, implies a focus on learning to learn, rather than on outcomes driven by "given" conceptions of knowledge. The experiential methods of teaching and learning described in this paper share this focus. I have attempted to describe how a different type of knowledge is implied by a focus on process rather than product. In this model, knowledge becomes "a dynamic social process, not...a product to be justified".⁹⁸ It challenges us to think beyond our conventional preoccupation with subject-matter. It also challenges the traditional bifurcation of knowledge and experience.⁹⁹ The valuing of personal experience and context makes it conceptually and practically impossible, as well as pedagogically undesirable, to separate the substance of what is learned from how it is learned, or theory from practice.

The significance attached by experiential learning to the process of learning to learn further implies a relationship between teacher and student which challenges the dominant tradition of classroom relationships based on hierarchy and authoritarianism. In experiential learning, whether in problem-based learning, in the clinic or in a classroom-based simulation programme, the tutor's role is to facilitate and support learning, respecting and encouraging the experiences, goals and personal development of the individual learner. This is in clear contrast to the traditional role of the teacher in setting up a model which requires, or at least implies (through the further choice of assessment models which demand "modelling" by the student), the need for compliance. These same themes (recognizing the contradiction of the feminist teacher imposing her personal and cultural assumptions and values on the class, and the desirability of movement towards the development of a collaborative classroom environment in which leadership can be shared) are increasingly evident in feminist writing about pedagogy.

⁹⁸ Addelson, *supra* note 95.

⁹⁹ This dichotomy is characterized by Dewey as the fundamental flaw in contemporary thinking about education when he writes: "Abandon the notion of subject-matter as something fixed and ready-made in itself, outside the child's experience; cease thinking of the child's experience as also something hard and fast;...and we realise that the child and the curriculum are simply two points which define a single process" (J. Dewey, *The Child and the Curriculum*, first published 1902, in McDermott, *supra* note 64 at 472).

Much of this literature is now stressing the need to transform the basis of the relationship between teacher and student in the classroom.¹⁰⁰

Challenging the continuing existence of the dominant epistemology of rationalism entails more than a simple recognition of the reality of the increasingly diverse range of approaches to learning, values and understandings of the world represented by the students in our classrooms. Challenging the dominant epistemology also means recognizing how our own unquestioned assumptions about the substance and method of the law school curriculum serve to sustain an ideology of exclusion and elitism. We are already acting to challenge this exclusion ideology in relation to other aspects of legal education, such as law school admission and hiring practices. We need to find the same energy to create an impetus for curriculum change.

In relation to the law school curriculum, no less than in relation to any other matter, challenging assumptions does not afford us the comfort of being able to predict the answers. The more we question, the more we suffer "experiences of doubt", as one feminist has described them.¹⁰¹ No assumptions are safe from the process of re-imagining. We cannot assume that some things are exempt, or that some things may never change (for example, the criteria for "excellence" in law school achievement). In the context of law teaching, these experiences of doubt almost always imply not only re-thinking but also consequent re-structuring of our teaching methods, methods of assessment and supporting materials. Instinctively, we tend to hang on to what is known, tried and familiar to us (and to our students, who come with their own expectations). Many curriculum changes necessarily imply further changes beyond law school, for example, the evaluation criteria applied by the profession to law school graduates and the criteria for advancement in the profession itself,¹⁰² to be truly efficacious. However, that fact does not reduce our responsibility as law teachers to develop and advocate for new approaches to curriculum change which challenge the rationalist status quo.

¹⁰⁰ See the discussion in M. Torrey *et al.*, *supra* note 53 and also T. Pickard, "Experience As Teacher: Discovering the Politics of Law Teaching" (1983) 33 U.T.L.J. 279.

¹⁰¹ M. Minow, "Feminist Reason: Getting It and Losing It" (1988) 38 J. Leg. Education 47.

¹⁰² See the far-reaching proposals of the Wilson Task Force Report on Gender Equality in the Legal Profession, *Touchstones for Change: Equality, Diversity and Accountability* (Ottawa: Can. Bar Assoc., 1993).

