

**BECOMING A LAWYER: A
HUMANISTIC PERSPECTIVE ON
LEGAL EDUCATION AND
PROFESSIONALISM**

by Elizabeth Dvorkin, Jack Himmelstein, and
Howard Lesnick. Minneapolis, MN:
West Publishing Co., 1981, \$8.50 paper.

*reviewed by James R. Elkins**

Where are the books on humanistic law, legal education and legal studies?¹ Try to name one. There are books on humanistic psychology,² humanistic sociology,³ and humanistic anthropology.⁴ There are even books on humanistic geography.⁵ The grand old profession of medicine has been invaded by humanists.⁶ We find humanists in nursing,⁷ engineering,⁸ and business. I think it safe to say that in every discipline and profession there are practitioners and scholars who work to promote a humanistic perspective in their academic and professional work.⁹ In some areas, most notably psychology, sociology, and anthropology, there are academic associations devoted to the humanistic perspective which produce scholarly journals and hold annual conventions.

I do not mean to suggest that the humanistic perspective is rampant in the academy or the professions. In fact, it is for the most part overlooked or ignored by establishment academicians. The "best and the brightest" of the disciplines still plead ignorance of the humanistic perspective.

If you are wondering what the humanistic perspective is all about, you are part of the problem. It is ironic to contemplate that the readers of this essay will in fact have no idea what I mean by a humanistic orientation, perspective, or frame of reference. Telling someone what you mean by the

humanistic perspective can be done, but the effort is often futile. I have little faith that anyone will ever be won over to a humanistic orientation by having it described and defined for them. We adopt a humanistic perspective when we lose faith in what our academic fathers taught us. We find out what the humanistic perspective means when we become disillusioned and disaffected with our own teaching. When we admit that the law (read psychology, anthropology, sociology, political science, medicine) we were taught doesn't work, perpetuates social injustice, and makes us feel bad about ourselves in the process, then we are ready for the humanistic orientation. It is futile and demeaning to try to convince a typical academic that the humanistic perspective has anything to offer. Why bother with a different perspective when the institutional rewards support establishment views. (As you may have guessed, my vision of the humanistic perspective has a distinctly critical bent.)

There is no single authoritative view of the perspective humanistic. The humanism which "breaks out" in the academic disciplines and in professions like law and medicine differs depending on the intellectual biography of the humanist. For example, in medical education the humanistic perspective has its roots in theology and applied medical ethics. (It is interesting to note that medical ethics is itself rooted in theology and philosophy, in contrast to legal ethics which eschews any and all connections to philosophy, much less theology.) Humanistic educators are likely to have been influenced by psychologists and psychotherapists like Carl Rogers, Abraham Maslow, and Rollo May. In sociology, the humanistic perspective has a decidedly political flavor and sometimes, but not always, embraces a Marxist orientation. Some humanists in the academic disciplines and in professional education pay primary allegiance to the humanities. So we have law and literature courses, literature and medicine courses, philosophy of medicine courses, and courses in the history of the legal profession and the medical profession. And finally on the very margin, there are those who would argue that the humanities and perhaps even the social sciences are in and of themselves humanistic. This group would have us believe that all education is a humanistic endeavor. I would draw the line somewhere before embracing the later group as humanists. I realize the danger in drawing lines and creating two groups -- those within and those without the humanist circle -- but there are limits and a healthy, robust, vigorous, loving debate about

what is and what is not humanistic is the kind of confrontation we need to keep ourselves honest. If the humanistic perspective is inherently critical, as I believe it is, then that critical awareness should be directed inward on itself as well as outward toward establishment scholarship.

II

The purpose in writing this essay is to review a recent book which the authors have subtitled "A Humanistic Perspective on Legal Education and Professionalism." One of the questions I want to address is what kind of humanistic perspective is presented? What does such a book offer the humanistic scholar outside legal education, the teacher of legal studies courses or the law school teacher? If one does not know anything about the humanistic perspective, is this the place to begin? Does the book take on the burdensome task of defining and describing the humanistic perspective? Why was this book written and to whom is it directed?

A biographical note: I make no pretense of being an impartial objective reader (as if there could be such a thing) of Becoming A Lawyer. I have been a part of the community of legal educators who participated in the Project for the Study and Application of Humanistic Education in Law, directed by Jack Himmelstein, one of the authors of the book.¹⁰

I attended the first two-week summer workshop in which Himmelstein and his co-workers (one of whom was Elizabeth Dvorkin, another of the authors) made an effort to teach us (and show us how to teach ourselves) to be humanistic law teachers. Howard Lesnick, the third author, was also a participant in this first workshop sponsored by what we now refer to as "the Project."

The authors acknowledge that Becoming A Lawyer emanated from the source materials developed for Himmelstein's residential workshops. One problem with Becoming A Lawyer is that the "materials" -- the book consists of excerpts from other books and articles, with comments on the excerpts by a group of law students and law teachers, including the authors -- may make a lot more sense to the participants in the residential workshops than to the uninitiated reader.

The excerpts in Becoming A Lawyer are eclectic, drawn from a variety of sources. Most prominent are the works of humanistic psychologists, Carl Rogers, Abraham Maslow,

Viktor Frankl, and Rollo May. The authors have also included excerpts from authors who are not associated with humanistic psychology. For example, the book includes excerpts from Robert Bolt's play, A Man For All Seasons, Tolstoy, John Steinbeck, E.F. Schumacher (of "Small is Beautiful" fame), and Mark Twain. A few excerpts from legal writers (including, I might add, the author of this review) are intermingled with more notable writers that the authors wisely prefer.

The excerpts are used as the bases for short reflective essays by the dozen commentators who are law teachers or law students. The authors of the book also contribute as commentators. By skillful weaving of the excerpts, reflective essays, and comments the authors help us see that our identities and roles as lawyers are a problem with psychological, social, and moral implications. We learn from the comments following the excerpts from humanistic literature that sensitive students and teachers are troubled by what takes place in legal education.

It is hard to evaluate exactly what this eclectic gathering of humanistic fragments and personal reflections might say to a particular reader. My guess is that it will be easy to dismiss by traditional law school teachers as incomprehensible, anti-intellectual, and narcissistic ("romantic tender-minded nonsense"). While Becoming A Lawyer may not be the book to convince traditional teachers that they are misguided and should change their orientation, it is hard to imagine any book that would accomplish such a monumental task. The book is probably going to be of little use to the law teacher looking for humanism as a "quick-fix." It is too amorphous, some might say ephemeral, for that. More problematic is that law teachers who have a long-standing love affair with the humanities and who make strong claims to humanistic credentials may also find little use for Becoming A Lawyer. The reason is not that the authors lay unfair claim to the humanistic perspective, but that it is a humanistic perspective that has its intellectual roots in humanistic psychology and humanistic education. Himmelstein has indicated elsewhere that his perspective grows out of humanistic psychology, a humanistic orientation that entails its own world-view, body of literature (the most extensive of the humanistic social sciences), language, and modes of practice. Himmelstein and Becoming A Lawyer are, however, far from being prisoners of humanistic psychology. To the contrary, the book is a

wonderful collection of materials which embrace an array of writers beyond psychology.

The humanistic perspective of Becoming A Lawyer helps us remember a fundamental fact of obvious significance -- that it is a human being, a person, a self, an individual, who becomes a lawyer. The authors are interested in "examining the process that transforms a lay person into a lawyer." (p. 1). It is this "subtle process of professionalization" (p. 1) that is taken for granted in law school. Taken for granted -- forgotten -- it becomes both the source and carrier of significant values that are out of awareness -- values which flow in an antinomian underground stream. At times, these values bubble to the surface, at other times they break through in the form of eruptions, and in still other times, as humorous incidents, enlightening and revealing student-teacher or student-student dialogue. The point is that these values run beneath the surface, unattended and ignored, forgotten and suppressed. In some cases they are condemned. These values are simply not a part of the everyday world that we come to identify with the reality of professional schooling.

The authors of Becoming A Lawyer believe that we need to pay more attention to the person, the personal, the subjective -- or what I have called here the underground stream. The reason we cannot afford to ignore the personal humanistic perspective is that it affects the way that law is learned and the professional identity is formed during law school. Ultimately, the lawyer's role in society is at stake. By ignoring this underground stream of personal values, emotions, feelings, fears, hopes, beliefs and dreams, we compartmentalize our lives into personal and professional, shutting ourselves off from our highest ideals. "When that separation occurs, the profession easily becomes experienced as only a job or role, and human problems as only legal issues. Care and responsibility yield to exigencies and strategems; and legal education, instead of reflecting the aspiration and searching that embody law and lawyering, can all too easily become an exercise in attempted mastery and growing cynicism" (p. 3).

The difficulty in expressing our most human values in professional education and legal practice reflects the more universal problem of the loss of meaning in our lives. It becomes clear in reading Becoming A Lawyer that the authors' experience of life in the larger culture has significantly influenced and enriched their perspectives on legal education.

As the authors note in their introduction, "[a] humanistic perspective on teaching and learning law builds upon our experience -- on the way we actually live our lives, on our inner reality ..." (p. 4). By focusing on "experience" the authors have shown us the first step in revisioning legal education. It is only a first step and should become the foundation for a social critique and criticism of legal ideology.

After calling attention to our problem with "identity and role," Chapter 1 outlines the need for "personal awareness in professional development." The problem of this chapter as of so much of the book is that it touches on profound and significant problems but moves all too quickly from one problem to the next. The authors have elected to provide hints and elusive suggestions rather than a sustained and comprehensive examination of selected problems. Some readers will be put off by this cursory overview of problems at the cost of a more analytic and in-depth approach. For example, in the first chapter on "identity and role" the authors point to the problem but do not attempt to provide the historical, philosophical, social, or psychological roots of our "limiting view of professionalism" (p. 5).

Although they note in the introduction that they are aware of "strong economic, cultural and psychological forces at work within the profession and the larger society that influence both the experience of the practicing attorney, and the direction of legal education" these forces are not reflected in the excerpts or the commentary. Consequently the book tends to be ahistorical and cut off from the socio-political world in which the subjective sense of human experience is shaped and channeled.¹¹ The temptation is to ask too much of such an innovative and delightful book. The authors recognize that the book is "tentative, more open-minded than definitive," (p. 4) a point that reviewers and readers are prone to overlook.

Those of us who view ourselves as humanists should provide insight into what the humanistic perspective hides as it illuminates the present ideology of legal education. In Becoming A Lawyer the critical dimensions of the humanistic perspective are largely implicit although never entirely hidden from view. It should be obvious to any but the most superficial reader that the humanistic perspective suggested in Becoming A Lawyer would, if adopted, result in radical changes in legal education. Legal education could not continue turning out legal clones if we took into account personal experience -- "the way

we actually live our lives" and "our inner-reality" (p. 4). Taken as a whole, Becoming A Lawyer is a form of critique, a response to traditional education which ignores the psychological (and the social, political, and ethical) dimensions of lawyering. Even though there is no effort "to articulate the concrete changes that would be necessary to bring this [humanistic] perspective into the classroom" (p. 3)¹². Becoming A Lawyer suggests that learner and teacher have a lot to learn from how we are affected as persons by and through the existing pedagogy and institutional arrangements. It suggests that we pay more attention to ourselves as we learn and teach, that we broaden legal education so that we are "bringing together mastery with aspiration, intellect with experience, rigor with value, pragmatism with idealism, competence and skill with caring and a sense of meaning" (p. 3). Becoming A Lawyer might be seen as a first effect of what could be called a holistic humanistic approach to professional education.

Arguably, legal education reflects political and social currents within the larger society. Legal education mirrors contemporary philosophical, political, and social schools of thought. The timing, nature, and effort of these "outside" influences and how they coalesce in an ideology of legal education has not been fully explored. Criticism of legal education tends to focus on particular deficiencies in the academic program (the absence of "something"): e.g., training, practical skills, office management, interviewing and counseling, ethical training, mediation, or course coverage in particular areas -- public law, international law, jurisprudence, public policy. The implicit message in such criticism is that the fundamental values embodied in legal education are sound if buttressed with more of "the something" that the critic is pushing. This "add-on" approach to criticism takes the political/social ideology of legal education as a given. We come to accept the stability and effectiveness of law school as a function of the existing program. A criticism which argues for more skills-training, a more practical approach, a more jurisprudential approach, leaves unexamined the underlying values which are promoted by present day legal education. The ideology of legal education sets us up to believe something as true and at the same time forget the basis for our belief. Ideology perpetrates itself through forgetfulness. Becoming A Lawyer: A Humanistic Perspective On Legal Education and Professionalism suggests that we need to

penetrate this ideological crust which has formed over and around legal education.

Becoming A Lawyer is by no means a comprehensive ideological analysis of legal education. The authors make no effort to describe the existing ideology of legal education, in fact, they do not use ideology as an explicit frame of reference. The stated purpose of the book is to "explore a humanistic perspective on teaching and learning law" (p. 1). Since the "humanistic perspective" is not a recognized and traditional approach to professional education, the reader may need more in the way of background description than the authors provide. The reader who wants answers and is unwilling to accept a book designed to provoke questions has come to the wrong source. It is possible to find fault with this book, especially for those who have looked forward to its arrival for so long and realize that it may not result in a flood of new humanistic-oriented literature on legal education. Yet, it may well be asking too much to expect that a single book provide a definitive exposition of humanistic concerns in legal education. It would be hard to pinpoint a book that accomplishes a similar task for humanistic psychology even though the body of humanistic-oriented literature in psychology is a "third force" in psychology. (The other two are psychoanalytic and behavioral approaches.)

We have been in the dark in legal education for so long that we are prone to grab whatever source of light, trying to make use of it in situations far beyond its illuminative power. And that is certainly what one is tempted to do with Becoming A Lawyer. I wanted this book to show the world (especially the world of legal education) what it is possible to do in the name of the humanistic perspective. I wanted a book which honors the critics of legal education -- Paul Savoy,¹³ Duncan Kennedy,¹⁴ Thomas Shaffer.¹⁵ I wanted a book that took account of and built on the efforts of Andrew Watson¹⁶ and Alan Stone¹⁷, who have provided us with a sophisticated psychoanalytic perspective on legal education. I wanted a book which roots the humanistic perspective in the work of legal educators who have argued that legal education should focus more attention on "human relations skills training," jurisprudence, the legal imagination,¹⁸ law and literature, law and the social sciences (sociology, psychology, anthropology). And if this wasn't too much to ask, I wanted all of this to be formulated and constructed with an awareness that the humanistic perspective is a mode of discourse with

distinct social/political dimensions. Becoming A Lawyer disappoints in each of the areas that I have outlined here. The book isn't what I wanted, but it says far too much, hinting broadly of values that I believe in and is not to be dismissed simply because it disappoints those of us who need and want so much more.

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FOOTNOTES

1 The literature on the humanistic perspective in legal education consists essentially of a small, but growing number of law review articles, none of which provide a comprehensive overview of the humanistic perspective. Himmelstein, Reassessing Law Schooling: An Inquiry into the Application of Humanistic Educational Psychology to the Teaching of Law, 53 N.Y.U.L. Rev. 561 (1978); Himmelstein, et al., Reassessing Law Schooling: The Sterling Forest Group, 53 N.Y.U.L. Rev. 561 (1978); Redmount, Humanistic Law Through Legal Education, 1 Conn. L. Rev. 201 (1968); Reich, Toward the Humanistic Study of Law, 74 Yale L.J. 1402 (1965); d'Errico, The Law is Terror Put Into Words, 2 Learning & the Law 39 (Fall 1975); Redmount & Shaffer, Learning the Law -- Thoughts Toward a Human Perspective, 51 Notre Dame Law 956 (1976); Savoy, Toward a New Politics of Legal Education, 79 Yale L.J. 444 (1970); d'Errico, Arons & Rifkin, Humanistic Legal Studies at the University of Massachusetts, 28 J. Legal Ed. 18 (1976); Abramson, Law Humanities and the Hinterlands, 30 J. Legal Ed. 27 (1979); Kershen, Humanization of Lawyers at Harvard, 61 A.B.A.J. 223 (1975); Botein, Reflections on the New Humanism in Law, 22 Way. L. Rev. 1295 (1976); Bellow, The Limits of Humanistic Law Teaching, 53 N.Y.U.L. Rev. 644 (1978); Meltsner & Schrag, Report from a CLEPR Colony, 76 Colum.

L. Rev. 581 (1976); _____, Scenes from a Clinic, 127 U. Penn. L. Rev. 1 (1978).

The humanistic perspective is reflected in the following: The Politics of Law: A Progressive Critique (D. Kairys ed. 1982); T. Shaffer, On Being a Christian and a Lawyer (1981) (See Jones, Book Review, 32 J. Leg. Educ. 649 (1982)); and the book under review, E. Dvorkin, J. Himmelstein & H. Lesnick, Becoming a Lawyer: A Humanistic Perspective on Legal Education and Professionalism (1981).

² I know of no single book which provides an adequate introduction to the substantial body of literature on the humanistic perspective in psychology. The works of Carl Rogers, Abraham Maslow, Viktor Frankl and Rollo May are associated with the humanistic perspective in psychology, but have reputations beyond psychology. See also A. Mahrer, Experiencing: A Humanistic Theory of Psychology and Psychiatry (1978); F. Goble, The Third Force: The Psychology of Abraham Maslow (1970); M. Brewster Smith, Humanizing Social Psychology (1974); C. Wilson, New Pathway in Psychology: Maslow & the Post-Freudian Revolution (1972).

³ Alfred McClung Lee, one of the founders of the Association for Humanist Sociology and a primary figure in contemporary humanistic sociology has noted that humanistic sociology "takes these questions to be central: What has society done to me and to other people? What purposes and whose purposes are thus served? Should I try to play along with or to counteract these influences in my own life and in that of others? If so, how can I do it? Is so much human misery as exists in my community and in the world necessary? How can I learn how to lead a humane and constructive life?" Lee, Sociology for People, 3 Humanity and Society 81,83 (1979). See also, A. Lee, Sociology for Whom? (1978). "In short, humanist sociologists are concerned with asking questions and exploring answers about social conditions which encourage or limit human choice, responsibility and cooperation ..." Rader. Teaching Sociology Humanistically, 3 Humanity & Society 92, 93 (1979).

Peter Berger notes that "sociology comes time and again on the fundamental questions of what it means to be a man and what it means to be a man in a particular situation." P. Berger, Invitation to Sociology, 167 (Anchor Books ed. 1963). One mark of a humanistic orientation is an "ironical

skepticism" concerning the undertakings of the discipline. Id. at 165.

C. Wright Mills, another early figure in humanistic sociology suggested that the sociological imagination explores the sociological relationship between individual experience and social issues, between private troubles and social problems, in short, the relationship between biography and history. C.W. Mills, The Sociological Imagination, (1959). See Krisberg, "The Sociological Imagination Revisited," in The Sociology of Law: A Conflict Perspective 455-70 (C. Reans and R. Rich eds. 1978).

The following works present various strains of the humanistic perspective in sociology: R. Nisbet, Sociology as an Art Form (1976); J. O'Neill, Sociology as a Skin Trade: Essays Towards a Reflective Sociology (1972); J. O'Neill, Making Sense Together: An Introduction to Wild Sociology (1974); P. Berger, An Invitation to Sociology: A Humanistic Perspective (Anchor Books ed. 1963).

⁴ Humanistic anthropology is an anthropology which has a close "relationship to the existential reality of human lives." Berreman, "'Bringing It All Back Home:' Malaise in Anthropology," in Reinventing Anthropology 83, 92 (D. Hymes ed. 1972) "An anthropology which does not reflect and convey or illuminate the human experience is no anthropology at all." Id. at 93. See Wilk, Castaneda, Coming of Age in Sonora, 79 Amer. Anthropologist 84, 89 (1977); Wilk, Therapeutic Anthropology and Culture Consciousness, 2 Anthropology & Humanism Quart. 12 (1978); Benedict, Anthropology and the Humanities, 50 Amer. Anthropologist 585 (1948); R. Johnson, In Quest of a New Psychology: Toward a Redefinition of Humanism 268-78 (1975).

⁵ "Humanistic geography reflects upon geographical phenomena with the ultimate purpose of achieving a better understanding of man and his condition. ***It belongs with the humanities and the social sciences to the extent that they all share the hope of providing an accurate picture of the human world. ***Humanistic geography achieves an understanding of the human world by studying people's relations with nature, their geographical behavior as well as their feelings and ideas in regard to space and place." Yi-fu Tuan, Humanistic Geography, 66(2) Annals of the Association of American Geographers 266-276 (June 1976). "Humanistic geography ...

tries to understand how geographical activities and phenomena reveal the quality of human awareness." Id. at 267 "Generally speaking, the humanist's competence lies in interpreting human experience in its ambiguity, ambivalence, and complexity. His main function as a geographer is to clarify the meaning of concepts, symbols, and aspirations as they pertain to space and place. Here is a specific hint of how he can serve. People's response to physical setting is mediated by culture, which is so much a part of day-to-day living that it can rarely be seen by the inhabitants themselves. One of the humanist's functions is to make the virtues and defects of a culture explicit. He should be able to suggest to the planner that in some cultures togetherness, however desirable, is achieved at the cost of certain other human values. The humanist will show how place is a shared feeling and a concept as much as a location and a physical environment. He can suggest means by which a sense of place may be enhanced." Id. at 275.

Yi-fu Tuan is one of the most fruitful of the humanistic geographers. His works include Landscapes of Fear (1979); Space and Place: The Perspectives of Experience (See Alanen, Book Review, 6(3) Human Ecology 355-57 (1978); Topophilia: A Study of Environmental Perception, Attitudes, and Values (1974).

"Geography is the study of the earth as the dwelling place of man. It seeks to understand a person's life in relation to the places, spaces and environments which in sum comprise his or her geographical world." D. Seaman, A Geography of the Life World 15 (1979). The book focuses on "people's day-to-day experiences and behaviors associated with places, spaces and environments in which they live and move." Id.

See generally, Humanist Geography: Prospects and Problems (D. Ley & M. Samuels eds. 1978) See also E. Ralph, Place and Placelessness (1976).

⁶ E. Pellegrino, Humanism and the Physician (1978); E. Cassell, The Healer's Art: A New Approach to the Doctor/Patient Relationship (1976); Miller, A New Humanism in Medicine, 1 Synthesis 63 (1974); Churchill, "A Study of the Value Dimensions of Medical Education and Practice," in Institute on Human Values in Medicine, Reports of the Institute Fellows, 1973-74 (May 73-73); Davis, "How Can We Train Doctors to be More Humanistic?" in Ethics, Humanism and Medicine 61-68 (M. Basson ed. 1980); Pellegrino, "Humanistic

Base for Professional Ethics in Medicine," 77 N.Y. State J. Med. 1456 (1977); Humanistic Perspectives in Medical Ethics (M.B. Visscher ed. 1973); Bates, Humanism in Undergraduate Medical Education, 105 Canadian Med. Assoc. J. 258 (1971); Gadow, "Nursing and the Humanities: An Approach to Humanistic Issues in Health Care," In Bioethics and Human Rights 305-312 (E. Bandman and B. Bandman eds. 1978); Bergen, Lindenthal and Thomas, "Alienation and Medicine," in Bioethics and Human Rights (293-198 (E. Bandman and E. Bandman eds. 1978); M. Belknap, R. Blau, R. GROSSMAN, Case Studies and Methods in Humanistic Medical Care (1975). My perusal of the literature on humanistic medicine was made possible by the Health Law Institute at Houston, Texas which extended me the honor of a Visiting Fellowship to work at the University of Texas Health Science Center at Houston and the University of Houston College of Law.

⁷ See Nursing: Images and Ideals (S. Spicker & S. Gadow eds. 1980).

⁸ S. Floroan, The Existential Pleasures of Engineering (1976).

⁹ Paul Kurtz, in introducing a book on humanistic education in 1971, proclaimed that "we are in the midst of a humanist revolution in education ..." Humanistic Frontiers in American Education xi (R. Fairfield ed. 1971). Kurtz notes the following ideas associated with humanistic education: relevance to students and society; emphasis on creative learning; democratic participation of students; overcoming the dehumanizing aspects of educational institutions; fulfillment of human potential.

¹⁰ The background for the Project is briefly described in Himmelstein, et al., Reassessing Law Schooling: The Sterling Forest Group, 53 N.Y.U. L. Rev. 561-591(1981). Himmelstein has written a comprehensive account of the theoretical basis for the humanistic legal education workshops. See, Himmelstein, Reassessing Law Schooling: An Inquiry Into the Application of Humanistic Educational Psychology to the Teaching of Law, 53 N.Y.U. L. Rev. 514 (1978). For a critique of Himmelstein's work, see Elkins, "All My Friends are Becoming Strangers;" The Psychological Perspective in Legal Education, 84 W. Va. L. Rev. 161 (1981).

11 One problem with humanistic psychology is that it does not have a very sophisticated understanding of social change. The general theory of humanistic psychology is that if we get our personal house in order, society will change. Walt Andersen for example says, "To talk of political revolution as we have known it becomes irrelevant to our times. Nobody will have to overthrow the state; we will simply outgrow our need for many of its functions." W. Andersen, Politics and the New Humanism 53 (1973). The experiential focus of humanistic psychology is both its promise and its problem. The central theme of humanistic psychology, the here and now of feelings and emotions, tends to ignore the social determination of feeling. In humanistic psychology the aim is "not at the institutional superstructure but at the person-to-person foundation of society." See generally, Simon, Homo Psychologus, Notes on a New Legal Formalism, 32 Stan. L. Rev. 487 (1980); E. Schur, The Awareness Trap (1976); Nord, A Marxist Critique of Humanistic Psychology, 17 J. Humanistic Psychology 75 (1977); Marin, "The New Narcissism," Harpers Mag. (Oct. 1975).

12 If the humanists are right, legal education will need to be totally restructured. The relegation of humanistic concerns to particular courses like Jurisprudence, Professional Responsibility, and the Legal Profession are doomed to failure. The failure flows from the implicit message which follows from assigning "higher values" to particular courses. Students come to realize that these courses are not "lawcourses" and are peripheral to the primary goal of learning lawyer skills. Moreover, the courses are taught differently, often apologetically.

The creation of value courses suggests the false dichotomization of value and value-free areas of study. It is true that value courses are an implicit recognition of the value dimension of lawyering; but they also serve as a reminder of the way the traditional law curriculum crowds out other perspectives, particularly the value dimension. Giving Professional Responsibility and Jurisprudence a place in the curriculum is a result of the compartmentalization endemic in the academic world. Whenever we recognize a problem in education we add a course to cover it, and the recent recognition of Professional Responsibility as a required course is a perfect example. The cooption of values by the design of

curriculum change insures that the fundamental goals and purposes of legal education will not be threatened.

Equally problematic is the message that we send students by offering value courses well after they have been indoctrinated by traditional pedagogical practices. The implicit message here parallels and reinforces the effect of segregating and channeling the values associated with lawyering and the legal profession into a separate course. Here again we suggest that values are not an integral part of legal education and are not coterminous with the substantive strata of legal education.

When we look at how values are presently dealt with in what are commonly viewed as values courses, there is further cause for alarm. Jurisprudence is more often associated with various philosophical schools of legal thought than it is the personal, social, and ethical values and ideals associated with being a lawyer. In fact, jurisprudence itself is a "repression" of higher human concerns. "Like the scientists," my friend John Batt argues that "the jurisprudes have been historically obsessed with order, rationality, logic, and predictability." If Batt is correct, it is unlikely that jurisprudence offers an appropriate forum for our highest ideals.

Professional Responsibility is an obvious place to carry on a dialogue with students concerning the values associated with lawyering and the legal profession. How do students respond to this kind of effort? A recent study of law school instruction in Professional Responsibility confirms that courses in Professional Responsibility have the lowest status in the curriculum among students. In the study, Pipkin found that students did not specifically reject learning about values, rather the status of the course was linked to the relatively "soft" intellectual content and the discussion method of teaching (often of poor quality). The Pipkin study of student disenchantment with Professional Responsibility provides some interesting insights into the relationship of pedagogical style, course content, and student evaluations of the significance of a particular course. Pipkin, *Law School Instruction in Professional Responsibility: A Curricular Paradox*, 1979 Amer. B. F. Res. J. 247. See also, Elkins, *Moral Discourse and Legalism in Legal Education*, 32 J. Leg. Educ. 11 (1982).

¹³ Toward a New Politics of Legal Education, 79 Yale L. J. 444 (1970).

14 How the Law School Fails: A Polemic, 1 Yale L. Rev. & Soc. Action 71 (1971).

15 Advocacy as Moral Discourse, 57 N.C.L. Rev. 647 (1979); Serving the Guilty, 26 Loyola L. Rev. 71 (1980); The Practice of Law as Moral Discourse, 55 Notre Dame Lawyer 231 (1979); Collaboration in Studying Law, 25 J. Leg. Educ. 239 (1973).

16 Some Psychological Aspects of Teaching Professional Responsibility, 16 J. Legal Educ. 1 (1963); The Quest for Professional Competence: Psychological Aspects of Legal Education, 37 U. Cin. L. Rev. 93 (1968); Professionalizing the Lawyer's Role as Counselor: Risk-Taking for Rewards, 1969 Ariz. St. L. J. 17; Know Thyself Know Thy Client, 1 Learning & the Law 45 (Spring 1974); The Watergate Syndrome: An Education Disease 26 J. Leg. Educ. 441 (1974); Legal Education Plays Some Strange Psychological Tricks on You, 3 Student Lawyer 23 (Sept. 1974); Lawyers and Professionalism: A Further Psychiatric Perspective on Legal Education, 8 U. Mich. J. Law Ref. 248 (1975); The Psychology of the Professional Self-Image, 38 Chemical & Eng. News 84 (1960).

17 Legal Education on the Couch, 85 Harv. L. Rev. 392 (1971).

18 J. White, The Legal Imagination (1973).

DEATH PENALTIES: THE SUPREME COURT'S OBSTACLE COURSE

**by Raoul Berger. Cambridge, MA:
Harvard University Press, 1982, pp 242,**

reviewed by Lee S. Weinberg and Richard E. Vatz***

To those familiar with the work of Raoul Berger, the thesis, argument, and meticulous documentation of Death Penalties comes as no surprise. Readers (according to their predilections) will find in this latest in a series of attacks on the "imperial judiciary" either a compelling case against unprincipled and undemocratic decision-making by the Supreme Court, or a narrow, legalistic, over-restrictive, and ultimately destructive view of the role of the Court in American political life. Regardless, Berger clearly emerges as the most articulate and persuasive spokesman for the view that Constitutional provisions should be interpreted primarily in light of the intentions of their authors.

In this analysis of the cases and reasoning of the Court in the death penalty cases, Berger argues powerfully for the proposition that "there is a wide gap between what the Justices say the 'cruel and unusual punishments' clause 'requires' and the limited purpose the Framers meant it to serve..." and concludes bluntly the "Nothing in the Constitution, in my judgment, authorizes the Court to abolish the death penalty." Using careful historical analysis combined with damaging admissions of the weaknesses of this claim by death penalty opponents (both on and off the Court), Berger builds an almost airtight case against the suggestion that the Eighth Amendment was ever intended to prevent the states from providing for a death penalty. Thus, the book must be seen generally as an argument supporting the interpretivist philosophy of constitutional adjudication and specifically as an application of that philosophy to the Eighth Amendment cases on the death penalty. As to the first argument, Berger's position will predictably impress its adherents and leave the faith of its opponents unshaken. But regarding the second, one would be hard-pressed to refute the logic of the avalanche

of arguments and legal citations offered in this volume.

The two crucial starting points in Death Penalties are the arguments which are more assumed than explicitly stated — (1) that the Supreme Court has strayed from its proper role by reading its own values and/or purely speculative ideas about our values into Constitutional provisions and (2) that it is possible and desirable for the Court to do otherwise. A brief examination of these points reveals the obvious complexities and subtleties of this eternal dilemma confronting American political philosophy. This may be somewhat unfair in light of Berger's expressed purposes, but must be discussed if the book's thesis is to be properly understood. If his premises are granted, however, the rest of Berger's case, as surveyed below, becomes almost invincible.

Berger's belief that the only legitimate way to apply the Constitution is to identify the intentions of the framers rests on largely unarticulated assumptions. One can grant his claim that the "Court cannot derive power outside the Constitution..." without conceding that the only way to determine what those powers might be is to refer to the written record of the authors along with their actions from which one might infer their intentions. To be sure, he uses his historical analysis of the Federalist papers, the speeches and letters of Hamilton, and the early Court opinions to demonstrate that the intention of the framers was that the intention of the framers should circumscribe the Court in the future. But the unaddressed question of why their "intentions" about the role of "intentions" in Constitutional adjudication should be accepted remains largely unexplored. At one point Berger suggests a possible reason — that the "authority of a decision is a function of its reasoning..." Thus, a Court which openly acknowledges that it is superceding the judgments of elected legislators rather than reasoning from the Constitution to the result will ultimately lose its authority or its legitimacy. This is, of course, a political and empirical argument in favor of interpretivism. In other words, if the Court ultimately comes to be seen as denying the people the ability to work their will through their elected officials, in Berger's words, "they will not be at a loss for corrective measures." But, a moment's reflection on the nature of popular thinking about the Court suggests that most people in America support or oppose the Court almost exclusively on the basis of agreement or disagreement with the Court decisions. Those who oppose capital punishment are not (perhaps unfortunately) heard complaining about judicial activism when the Court applies the Eighth Amendment to limit the state's discretion in this area. And if

Raoul Berger himself had had the opportunity to write what undoubtedly would have been an impressive opinion documenting that those who wrote the "cruel and unusual punishments" clause not only did not intend it to limit the sentencing discretion of state legislatures, but almost certainly intended the opposite, the legitimacy of the Court would still have declined in the eyes of the staunch abolitionists who would simply not be able to understand how deliberate executions can be seen as anything but cruel and unusual. Thus, if a reason for strictly seeking out the intentions of the framers is to maintain legitimacy, it is a fragile argument. One need not praise, but only recognize this political reality. Were the masses all as committed and consistent as Raoul Berger, then legitimacy of the Supreme Court would, indeed, be threatened by the decisions of the Warren and Burger Courts.

As to the practicality of following the intentions of the framers generally rather than the political desires of the incumbents, Berger's position raises some difficulties. Apart from the often obvious problem of determining the intentions of legislative bodies qua bodies, the fact that political compromises often lead to deliberate ambiguities, and the fact that the intentions of the framers may differ significantly from the purposes of the framers, there remains yet another problematic thought. Berger seems to raise it himself in criticizing Justice Frankfurter (whom he generally regards very highly) because Frankfurter "slipped from grace where his own predilections were involved, as in the desegregation case." The problem appears to be that on certain issues, seen by a judge as of singular paramount importance for personal, political, or moral reasons, even the strongest supporters of Berger's position flounder (at least in the eyes of some). One wonders for example, on what issue Berger, himself, might "sell out." To his credit, and unlike the less authentic millions among us (lay and lawyer-folk alike) Berger appears to be more willing than most to leave his policy preferences totally independent from his view of what is constitutionally permissible or impermissible.

Leaving these conundrums aside, Berger's evidence on the following propositions is convincing: 1) the selective incorporation theory of the Fourteenth Amendment cannot be historically defended; 2) jury sentencing discretion was an accepted process in England and in the states long before the Fourteenth Amendment was adopted; 3) constitutional historical analysis precludes a conclusion that the death penalty is cruel and unusual; 4) proportionality, a concept employed in the death penalty cases, is not grounded in the Constitution.

Arguing with Berger on his own ground is not easy. Even those with an activist view of the proper role of the Court and those who staunchly oppose the death penalty (sometimes the same people) are shown to concede his basic point over and over again. Abolitionist Bedau is quoted as saying that abolition of the death penalty on the basis of the Fourteenth and Eighth Amendments cannot be "supported by historical research into the original intention of the Congress or the states in proposing and ratifying these amendments." Justice Blackmun admits that "Although I personally may rejoice at the Court's result, I find it difficult to accept or justify as a matter of history, or law, or of constitutional pronouncement..." and Michael Perry finally concludes that "noninterpretive review...cannot be justified by reference either to the text or to the intention of the Framers of the Constitution."

Berger surely makes his case in a purely logical sense. But in doing so, he (like his opponents in their own way) may be arguing for a perhaps unattainable and even undesirable degree of consistency in the conduct of public affairs. Without a substantial degree of consistency, of course, the Court will lose its legitimacy; but, ironically, if the strict consistency advocated by Berger (or his opponents) were somehow achieved, practicality would be sacrificed to a new form of ideological rigidity, losing perhaps in the process the delicate balancing of interests necessary even in constitutional decision-making.

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