THE WORSHIP OF THE DISEMBODIED BRAIN

THE RESULT IS A LEGAL EDUCATION THAT SANCTIFIES THINKING OVER FEELING, TECHNIQUE OVER TENDERNESS

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Lingering odors from Washington confirm what Tocqueville noticed about lawyers in America—that they are an aristocratic, non-sectarian ruling priesthood. Lawyers make their fellow citizens uncomfortable because lawyer power derives from special consecration as governors of conduct and manipulators of reason. They seem neither to feel nor to care. They seem to serve a power which marks the soul and survives dishonor.

Lawyers earn their power and appear to gain their sacerdotal character in American university law schools. Hart's girl friend in *The Paper Chase* tells him he acts like a student in a seminary. Law teachers and their students recognize the simile, although some wisely doubt it. Law school is an intense intellectual experience, but it is not a seminary. The fact is that the novitiate for lawyers sharpens the mind and never reaches humane aspects of experience. Law school is not a source of character, except, maybe, for those who lack character. For most purposes, law school doesn't matter.

Hart, *The Paper Chase* law student, feels, as beginning law students often do, that he is being retooled. Hart says Professor Kingsfield, his contracts teacher, is "like the air or the wind. He's everywhere. You can say you don't care, but he's there anyway, pounding his mind into mine. He screws around with my life."

The retooling is of some importance. American law schools are the most efficient and pervasive system of legal education in the world; and they are one of the few segments of American university education which enjoy prosperity in the seventies. There are now three times as many students in schools accredited by the American Bar Association as there were in 1961. There is one person studying law in America today for every three lawyers in practice, an incredible ratio for a profession which continues to refuse to limit entrance to its privileges.

This phenomenal increase in numbers of lawyers will soon unsettle a society which has given lawyers the keys to the kingdom. (That is not a casual metaphor. Tocqueville noticed both that lawyers run America and that they are antidemocratic.) Americans, even when there were far fewer lawyers, have expressed discomfort and distrust over lawyer power and lawyer morals; we tend to notice, as Sandburg said, that the hearse horse snickers when they carry a lawyer away.

Law students are uneasy about the law-school process because they feel manipulated and because the priesthood does not seem to be benign. The sacerdotal stain does not preclude Ehrlichmans and Kalmbachs and Nixons. It is an ominous portent and students feel it. "If you want to hit a bird on the wing, you must have all your will in a focus," Justice Holmes once told the Boston Bar Association. "You must not be thinking about your neighbor." Americans, beginning law students among them, may sense that they are the birds in a lawyer's drama.

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Hart, an earnest middle American from Minnesota, fears that he is losing himself in law school, and that this will happen even if he fails his courses. Kingsfield's daughter Susan tells Hart to worry about his soul, but not about his courses. "You're the kind the law school wants," she says. "You've got class. The law school wants to suck out your Midwestern class."

We have looked in some depth at beginning and senior law students, and in some faculty and alumni, at three Midwestern law schools (Notre Dame, Valparaiso, Indianapolis). Some 225 respondents answered our questions and engaged in exercises aimed at finding out something about the *character* of legal education and the professionalization of lawyers.

We looked at responses ranging from those beginning their legal education to those who are professionally experienced in law. We observed how our respondents would solve client problems and what emphasis they chose. We particularly observed how many would choose the "human alternative," as distinguished from rational, mechanical or doctrinal solutions in solving client problems. We noted what our respondents chose as important to observe or analyze in client situations, and what they overlooked or chose to neglect.

We sampled opinion, from freshman through practitioner and from school to school, to determine if minds and feelings changed about what perceptions and skills were important to law practice. We delved a bit into personal backgrounds, examined character attributes, and analyzed classroom practices.

SACERDOTAL MARK: THE CULT OF REASON

We conclude that Susan is both right and wrong in admonishing Hart that worrisome things would happen to his soul in law school. Hart is closest to the reality of legal education when, at the end of his story, he throws his grade report away without reading it. He had survived the ordeal; his *being* remained a thing apart from his *calling*. Law school had not touched him as much as Susan thought.

If lawyers have a sacerdotal mark, it comes from the cult of reason, and is conferred by a culture which has need of a priesthood. It is borne by students who show a proficiency of mind alone and a cool, stable endurance of personality. Legal education holds character stable, so that character is affected in law school by an absence of concern—an absence which is even more noticeable in law school than in the practice of law.

Our beginning law students, notably in family relations cases, showed concern for the personal experience and the well-being of their clients. As the students go through school, their focus shifts to how to formulate and attack problems in legal terms. Their sensitivity toward human experience recovers slightly as they go into professional practice.

The process of leaving law school seems to undo some of the effect of law school. But the overwhelming disposition of law students, law faculty and practicing lawyers was to seek legal answers with little reference to the personal feelings of their clients, and little demonstrated concern for what legal solutions do to concern for what legal solutions do to people.

The nation need not fear that its booming law schools will turn out Torquemadas. The tragedy may be that they don't turn out saviors and heroes either. Law students trudge in and trudge around, and lawyers trudge out; and through it all, as Auden said a generation ago, they are trudging on time to a tidy fortune. And little more.

Students come to law school with clear aspirations to be humanely influential, but they find that law in its ministrations is indifferent to human problems. Lawyering is insensitive. Young lawyers leave law school with aspirations unmet. Students, faculty and alumni alike, in responding to a survey of humanistic concerns in the law, tend to agree that ministrations in law lack human concern; that there ought to be more of this concern in legal education; they would prefer it that way. These lawyers seem to agree that there are few experiences in law school, and no tools to be found there, to help a lawyer close the gap between the "is" and the "ought" in the world he is going out to administer. Lawyers cope by ignoring facts and emotions which do not fit lawyer's tools.

Some students leave law school with the hope they brought to it—that, as lawyers, they may be able to help people—but they leave believing that law is inert. Most of them leave without any clear interest to make the law an instrument for making people better. "I will do good things for my clients," these students seem to say, "and, if the law helps, which it probably won't, I will use the law."

Others, having been stuffed like sausages, as John Gardner would say, with reason unclouded by human reaction, see the logic of their power. "I will win for my clients," they seem to say, "and in winning, I will share in the perquisites of my hard-won priesthood."

Law students—even the superbright students who can survive the admissions pressures law schools have now—tend to find an awesome intellectual challenge. Hart, for example, is in a discordant study group of first-year Harvard law students. They bicker and insult one another until one member says, "We've got to stick together. That's the whole point of this group." And their wordly-wise organizer looks down his nose, as Holmes might have, and says, "The point of this group is to learn law."

AVOIDING STICKY HUMAN ENCOUNTER

And they learn it, as Francis Bacon did, from books and lectures. They are reluctant to learn skills which might ferret out social trust, or which might bring them into interpersonal contact with their clients. Knowing the cold procedural steps to take and knowing how to formulate a client's problems in legal terms are considered more important than the equally precise ability to determine client feelings, or the difficult skill needed in investigating events and experience. Lawyers prefer an impersonal coolness. They avoid sticky human encounter. They seize opportunities to put distances between themselves and people who need them.

When they do examine a law-office problem in

perspective)—and they do this rarely—they tend more to seek clarification from the client than to offer him either acceptance or support. Problems are approached (by students, faculty and alumni) in impersonal terms—as opportunities for investigation, defense, abstract persuasion, argument—rather than as opportunities for involvement. Even when the problem calls for moralism, as legal problems often do, the moralism selected is the lawyer's moralism; lawyers ignore the moral impulses of their clients.

The process keeps clear even of the lawyer's own self-awareness. In a part of our research protocol, we presented respondents with hypothetical problems involving broken marriages, care for children and the aftermath of a death in the family. These problems were pregnant with the possibility for creative, personal concern. They cried for some sort of personal relationship between lawyer and client; they were occasions for compassion in the way problems are approached and understood. Our respondents were asked to indicate what they regarded as important to their understanding or service in the problem situation; how they would go about solving the problem; and what solution they hoped to reach.

With dramatic infrequency, few lawyers at any level of maturation were interested in how their clients felt. They found no professional usefulness in how *they themselves* felt. They saw themselves as mechanics.

When propriety became an issue, it was only in terms of professional union rules. Some respondents showed concern, for instance, over the suggestion that they talk to another lawyer's client without the intervention of the other lawyer.

Almost no one showed concern for the emotional turmoil of a divorce client who demonstrated instability and even hinted at suicide.

Law teachers are seen—and see themselves—as dominating figures whose principal skill (and principal training) is persuasion rather than healing. Lawyers therefore learn (by default perhaps) to deal with abstracted, selected facts, rather than real facts, because they never learn anything about *finding* facts. They tend to deal with human feelings by ignoring them when possible, and battering them away when they will not be ignored. They prefer faith in words to faith in people.

Persuasion can be used to leave dilemmas untouched. This is apparent in lawyer responses to the case of a family which is falling apart. The mother is told by her lawyer to stop drinking, or she is told that her lawyer will abandon her if she does not seek psychotherapy. There was, here, a rare difference, and a slight one, between our clinical sampling of students and practicing lawyers.

The lawyers showed somewhat more disposition to encounter the client and get to the bottom of her conduct, as opposed to the students' (and, especially, the faculty's) disposition to avoid her as a person, to talk her into change, or, if she refused to change, into leaving the office. Students tended to treat the alcoholism as a legal dilemma (an obstacle, in this problem, to the mother's claim for child custody),

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LAWYERS PREFER AN IMPERSONAL COOLNESS. THEY AVOID STICKY HUMAN ENCOUNTER

rather than a human problem; few showed interest in learning more about the alcoholism, and almost no one showed interest in learning more about the client.

DOCTRINE AND DISPOSITION OF PEOPLE

The lawyer's ordinary human knack to deal with other people is blocked, or, likely, never touched at all. Lawyers have little interest in the array of professional skills available for solving other than the strictly doctrinal dimensions of family problems.

Doctrine is a way—a useful way—to dispose rather than deal with people. Doctrine is a way for the lawyer to say to himself that he doesn't understand. New students, more so than more experienced students and practitioners, tended in these cases to refer clients to marriage counselors or mental health practitioners. The experienced student, and the practitioner, with greater legal skill, is more inclined to think of only the intellectual tools lawyers come to law school expecting to find. They prefer non-solutions, pastimes (as Eric Berne might have called them) which minimize personal involvement. When pastimes fail, lawyers choose to fight; they choose a traditional adversary identification.

Analysis and advocacy, even when useless, appear to be a way to get something done. An occasional student realizes this and is frustrated by it. "I have not been trained to provide counseling," one student said. "I also think people deserve competence, and the least expensive source of competence. . . . I owe it to a client to tell him the limits and consequences of seeking a legal solution to the problem. . . . I am a 'hired gun'—period."

Lawyers are thought to be exceptional tolerators of ambiguity. This is attributed to their legal education, especially to the insight that advocates fashion solutions rather than find them. A lawyer's answer to "What is the law?" is "Why do you ask?" We found,

though, that lawyers *avoid* ambiguity.

One of our hypothetical examples involved three siblings in middle age who were disputing over their late mother's estate. The ambiguity was that the client (one of the three children) could not decide whether to bring a lawsuit against her brother. We wanted to know what tools and objectives our respondents would choose. Our lawyers—students, faculty and alumni—chose further investigation (which promised to turn up nothing), distrust of the client, bargaining with another lawyer, and limitation of risks, more often than attempts at family reconciliation (which would involve skills of interpersonal understanding), or counseling.

Many professionals who deal with interpersonal problems of this sort would elect a supportive role with this client—would, in other words, confirm her reluctance to take her brother to court—and others would choose a non-directive counseling stance; these latter would seek to help her make up her mind. The lawyer's reaction tended more to be investigation. In other words, they sought to force her to decide what the lawyer was to do. A few lawyers attempted to mediate among members of the family without first finding out what the client wanted.

WHEN IN DOUBT, ORGANIZE

Most commentators on law student psychology find a significant need for order among them. We found that, too, expressed in terms of organizing what is known and avoiding what is difficult to understand. (Hart's principal frustration with his free-spirited girl friend was that she refused to "organize" their relationship.)

Our respondents prefer closed systems; they are uninterested in information from other fields (social science, for instance, or psychology) except as this immediately and clearly affects legal operations. Lawyers are uninterested in the observations and findings of sociology—even when sociology studies lawyers—or in studies of human behavior and society. Law professors show a kind of arrogance in their faith that their intellectual influences (intellectual because they avoid any other kind) will stay with students. Since law professors dominate their own game, they are of course mostly correct.

What the legal system cannot answer, it organizes without answers. It provides solutions which are clear *enough* (that is, they do not lead to armed rebellion) in the face of inevitability. They are like physicians who are reconciled to the fact that every person dies, or theology reconciling itself to the fact that evil is intractable. They show distrust toward the social sciences and social scientists who, after all, contribute most when they ask questions and cannot provide irrefutable answers.

Most law professors would probably take pride in the fact that our character findings show that law students are more "tough-minded," and less "tender-minded," than non-lawyer groups. What might give even a law teacher pause for reflection is that our respondents are also, characteristically, more "thing-oriented" than "people-oriented."

Most law students lose their sense of personal competence as law school goes along, but pick it up again before they finish. (This probably explains why people—and there are many—who attend law school for a year or so and then leave, are peculiarly insecure about law and the legal profession.) The ordeal—and to many law school is an ordeal—is like a poker game; one leaves it a little poorer (or a little richer), having enjoyed or sweated out the experience and not been touched by it; having liked it or found it boring. The difference between law school and a poker game is that most law students would decline an opportunity to return.

The lawyer mentality—to "think like a lawyer" as elders in the profession call it—is in part the product of a limited approach to the way people are. Lawyer thinking is also the product of methods of education in law schools. Lawyers learn behavior, attitudes and intentions from the games which are played in law classes. The subject has a myth about it, a tradition—and what Hubert Humphrey would have called a past that never was.

The classical first-year law class is an exercise in intimidation—apparently serving the same purpose as the rule that novices scrub the floor of the monastery chapel. Law teachers have traditionally called this method of intimidation Socratic—although Socrates would undoubtedly decline the honor of being identified with it. It traces to the introduction of appellate court reports (casebooks) rather than texts, and discussion instead of lecture, at the Harvard Law School soon after the Civil War. It is often defended as a way to make large classes seem smaller than they are. (One secret to law school success in American universities is that it does not carry the burden of expense that is generally connected with either graduate or professional education.)

Lawyers are sentimental about the case method—as monks are about the novitiate or Marines about boot camp—and the profession is fond of hair-raising stories about the inhumane exercise of "logic" by law teachers and the humiliation of law students in first-year courses. There is a whetting of aggressive and even destructive appetites in the "search and destroy" missions that are euphemistically referred to as "learning the law." It is an obscene myth, and is today little more than a memory. Some law teachers still attempt to exercise aggressive needs in their "Socratic" classrooms, but they tend to fail at it. Patterns of classroom conduct are now merely impersonal.

DESICCATED SOCRATES

We recorded and analyzed classroom sessions in a variety of subjects in four law schools. We observed, with remarkable consistency, a revival of what Harvard's post-Civil War Dean, Langdell, was supposed to have abolished—lectures. Sixty to 90 percent of a typical large law class (and most are large) is lecture. There are some discussion-oriented classrooms, but they are not what the Harvard innovators—or Socrates, for that matter—had in mind.

One variant reverses the intimidation from students

to professor. Here (from one of our classroom recordings) is a discussion of the perennial black beast of property law, the rule against perpetuities (the rule against perpetuities is a deceptively simply legal formula governing rights of inheritance):

Professor: . . . the gift is "then to his issue, per stirpes, then living." Is this valid or void? Mr. Thompson.
Thompson: Uh. (*Pause*) That's valid.
Professor: That's valid.
Thompson: Right.
Professor: Everybody agree?
(*Silence*)
Thompson: Oh. (*Pause*) It's invalid.
Professor: "Then living." Everybody agree?
(*Silence*)
Professor: Now, it's just as if the testator said, "When the big tree falls, to Joe." Now, you would agree, that's void. Right?
(*Silence*)
Professor: When the big tree falls, to Joe.
(*Silence*)
Professor: This is the same as the last class. Except it's to Joe; you've got a gift to a class. (*Explains at length.*)
Thompson: I'm not sure I understand. (*Asks question about a problem which was discussed ten minutes earlier.*)
Professor: (*Explains.*) Now, when will the class close?
Thompson: When she can't have any more children. When she's dead?
Professor: (*Ignores T.*) When will the class close?
(*Silence*)
Professor: Let's go on to the next problem then. Mr. Morgan . . . (*Explains.*)

There are other possibilities. In one the student asks all of the questions after the professor gives a mind-boggling exposition of skill and argument. In another, the professor hides the ball (from a labor law class which is considering employment of replacements during a strike):

Professor: Hawkins, would you lay out that case?
Hawkins: The workers went out on strike . . . . Apparently negotiations came to an impasse. The company offered non-strikers—
Professor: How would you view non-strikers?
Hawkins: Ones not engaged in the strike.
Professor: Are they replacements? (*Pause*) Or former employees? (*Long pause*) Or both?
Hawkins: Looks like both.
Professor: Okay (*with inflection meaning "I hear" and not meaning "That's right."*).
Professor: How would you, then, frame the issue in this case? What is the question to be answered?
Hawkins: Does the super-seniority system interfere with the workers rights. . . ?
Professor: (*Ignores Hawkins and asks same question of another student.*)

This is a question game. The teacher always wins it because he asks all the questions; it is therefore essentially a system of training people how to persuade. Not only does he confine himself to questions, he controls the time, the place, the gavel and the pace—and he keeps his own agenda hidden. This may seem to resemble Kingsfield but it produces boredom more than either analysis or fear. It also produces students who insist on spoken text (lecture), and teachers who, usually, comply. The result is, in practice, an unrealistic example of persuasion. It produces not training, but information.

We do not regard the respondents in our study as anthropoidal throwbacks to an earlier generation of law. They are probably fairly representative in important particulars of men and women in law and law schools today. They come from the wrenching educational, political and cultural climate of the early 1970s. Most are young and male—and nearly all are white. They are split between being single and married, though few students among the marrieds have children. Most of them are protestants or Catholics, with a variety of religious practices and levels of involvement. Most come from unbroken homes; some come from large families. In the main, they are midwesterners from communities under 50,000, and in this they may differ from their counterparts, especially in eastern law schools. Their parents generally have at least a high school education, some a little more. Their fathers are blue collar workers or businessmen, their mothers work as housewives.

Among students we personally interviewed, most began law school with idealized but essentially unclear expectations of what they were going to do with their legal education. Students about to graduate want to join an established group law practice. Though some graduates retained altruism, most wanted to reap the benefits of power, position and money.

Chesterton put it well: "The horrible thing about all legal officials, even the best, about all judges, magistrates, barristers, detectives and policemen, is not that they are wicked (some of them are good), not that they are stupid (some of them are quite intelligent), it is simply that they have got used to it."

They engage in, to use Keniston's phrase, the *institutionalization of hypocrisy.* Lawyers point with pride to their defense of justice, and cite epochal legal battles in history to prove it, but they do not care to recognize the neglect or failure that results from treating justice as a cause rather than an experience.

The perpetuation of power is the first law of those who have it. Bar admission committees, the Praetorian Guard of the legal sanctum, insist—even more than law professors—that law schools continue forms of learning that insure against change. Bar examiners continue to test for legal analysis and leave professional competence to chance. Law teachers have as their special pride and exultation a conceptualistic brilliance that boggles the mind. The teacher's intellect serves the power of the law, and that is what

learning the law seems to be about. An interlocking and self-perpetuating network is created between the lawyer, the institutional forms of law, the teacher and the student who inherits the system and carries it on. or, at best useless—which is not moral and emotional

KISSING v. A TREATISE ON OSCULATION

One cannot object to a system of legal education that values intelligence, but an intelligence is dangerous—or at best useless—which is not moral and emotional as well as intellectual. Chesterton said that a madman has not lost his mind; his trouble is that he has lost everything but his mind. The nurture and development of complex, humane intelligence needs more than the study of the "tail end" of cases (cases in appellate courts that stipulate a few facts in order to dwell on the complexities of the law), or the causativity over principles or propositions, so that, in effect, "kissing a girl and reading a treatise on osculation" are made to seem one and the same thing.

These felicitous thoughts and phrases are a reminder of a bright and sensitive spirit, an erstwhile and unorthodox "footnote to the Yale law faculty," Judge Jerome Frank, who more than a generation ago titled an article in the form of a query "Why Not a Clinical-Lawyer School?" Frank wished to "repudiate Langdell's morbid repudiation of actual legal practice." He wanted to depart from "library-law schools, book-law schools" and infuse the learning of law with some of the sensitivity and character that comes from experience, the experience of the lawyer in his office and in the courts.

The peripheries of American legal education—of some of them—have been turned in this direction. Clinical legal education, in the very narrow sense of participating in and learning what lawyers do, is now a small part of the average law student's experience—small enough not to threaten the hegemony of vested law school interests.

Clinical legal education, as a way of generating in lawyers care and concern for the human experience, has not become the virtue that it ought to be, because the average American lawyer's behavior is not the best demonstration of how to deal with people. More skill and preparation is required than lawyers and judges have received. The perfectibility of lawyers, for one instance, extends beyond the cultivation of the mind. The arts of client counseling, for example, provide consciousness of human experience and skill in dealing with it.

Moral and psychological dilemmas admit of study as much as the legal and economic. Client problems are prospective as well as retrospective; the skills of planning and prevention are usually more important than the skills of litigation. A dependent other person—a client—invokes moral feelings and affection or disaffection in the lawyer that cry for self-understanding; they are part of his professional person.

Counseling is a transactional experience which is neglected in law school; it ought to be the cornerstone of legal education. Learning facts in interviews, learning to bargain, and negotiation are other transactions which involve moral and emotional, as well as intellectual, aspects of experience—and all of these things, all of their implications, are studiable.

Human regimens of study begin and end in experience. They emphasize a well-being that goes beyond rights, powers and duties. Fact finding and fact evaluation are matters for complex inquiry more than hypothesis. Holmes noticed that—he in fact learned it from John Dewey—legal education heeds its Langdells more than its Holmeses, Brandeises, and Franks. The jurisprudence of a fact, the system by which it is identified and governed in the real life and lives of human beings, is a matter that was discovered in our courts before 1920, but it has yet to be discovered in the laboratories of legal education.

The fabric of law is more than the texture of the weave. The materials of law are the experiences of human beings, and these experiences have to be measured in terms that go beyond winning or losing law suits. Litigants, and clients whose problems do not go to litigation, experience much more than a decree that changes a particular account in terms of the past or the future. Law cases ought to be formed so that the lawyer is witness to (1) how and why a client's problem occurs or may occur, (2) the different possibilities for solution and the means to bring these about, and (3) outcomes and ramifications that are the immediate or indirect result of what the lawyer and client do together. It is not enough to know how to argue.

The lawyer's consumers have a perspective which is broader and deeper and better than the perspective of the state and more important than the history of law. It is this essential human component which is neglected in legal education. It is not enough to argue as law students do, endlessly, whether law is just. If law is not humane, it is not just. Recent history has again instructed us that lawyers who perform without humanity perpetrate injustice. These limited years of prosperity in legal education are a time of opportunity for citizens who care to insist that law schools be a place where people matter.

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