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EDUCATING CITIZENS

Peter L. Strauss†

There is a vague popular belief that lawyers are necessarily dishonest. I say vague, because when we consider to what extent confidence and honors are reposed in and conferred upon lawyers by the people, it appears improbable that their impression of dishonesty is very distinct and vivid. Yet the impression is common, almost universal. Let no young man choosing the law for a calling for a moment yield to the popular belief—resolve to be honest at all events; and if in your own judgment you cannot be an honest lawyer, resolve to be honest without being a lawyer. Choose some other occupation, rather than one in the choosing of which you do, in advance, consent to be a knave.

—Abraham Lincoln¹

Socrates and his followers, the Cynics among them, put great store in educating the youths who would become the leaders of the Athenian republic. The Athenians agreed that education of their youth was of the utmost importance for their state, and executed Socrates for corrupting them. As I thought about how these concluding remarks could do more than cast a pale reflection of the extraordinary learning and thought that have preceded them, talking about education leapt to mind.

Partly this came in response to my discomfort with a Symposium whose papers, for all their attention to psychology, seem to be fixed on theorizing human institutions strictly from the perspective of atomistic beings whose governmental arrangements are, as it were, external to their natures. Such creatures do exist in our world—the lonely leopard, the great white shark. Even in fairly well-developed orders, rearing and educating the young may be an individual not a community matter. What we can know from simple observation is that we are not one of those orders. We may not be leaf-cutter ants, whose complex communities of millions of individuals of several different specialized castes are meaningfully viewed as one organism. But neither do we flourish as solitary eremites. Our existence, like the rearing of our young, is inherently social. Daily it grows more so; we have come a long way from the first social groups formed by Lucy and her mates. In the debates between nature and nurture, the unavoidable reality is that social nurture is a part of our nature. It is true that, like any particular leaf-cutter ant, we live and die, we suffer pain or hunger, we

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¹ 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN 82 (Roy P. Basler ed., 1953).

enjoy satisfaction as individuals. But prosperity, success, failure, our general well-being are inevitably tied up with our communities. The very nature of our markets—that they are markets for 747s and Airbus 300s, for Intel Pentium IV chips, and not for wood and salt—bespeaks the extraordinary levels of our interdependence. So we might think of our theories of government in that perspective. A theory whose premises do not take into account our society is inherently flawed.

The market for wood and salt I have in mind is the great Bati market of Ethiopia, which I visited thirty-five years ago, virtually to the day. An empty field six days a week, it is home to perhaps ten thousand on Tuesdays, who come down from the highlands on foot or by mule, carrying wood and agricultural produce, and up from the desert lowlands in the same way, carrying blocks of salt and the like. Transactions are immediate; goods are simple. As in Professor Rubin's evocative market for artichokes,² one need not worry significantly about the social formation of the participants, who do not expect continuing dealings with one another in any but the most abstract sense. Few of the participants have had direct social, as distinct from familial, enculturation; any such social enculturation is more likely to have come from their religions—different ones, highland and lowland—than from a shared civil society; most likely, any particular transaction is between individuals who share only attendance at the Tuesday market, a common humanity, and, unimportantly to their consciousness, Ethiopian citizenship. Even so, a gallows stands in the very middle of the market. A reminder of the contribution of law, conveying an assurance that, by and large, what occurs will be voluntary exchange and not brigandage, it permits the weekly gathering.

We are well beyond markets for artichokes, or wood and salt. In our extraordinarily interdependent world, we count on a specialization of function that regularly demands about two decades of formal education to create a productive individual. That person's productivity, in turn, is possible only if there simultaneously exist *both* other equally well-trained individuals practicing an unimaginable number of other specialties *and* a social framework capable of sustaining the extraordinarily complex network of exchanges and interchanges that result. We could say, with the phenomenologists, that each of these individuals has an acquired world-view from within which she meets and understands the world. For all the reasons Professor Rubin's evocative paper suggests, that picture is a considerable improvement over one that simply ignores the fact of this education, with its accompanying acquisitions of tastes, expectations, and motivations. Yet I was

² See Edward L. Rubin, *Public Choice, Phenomenology, and the Meaning of the Modern State: Keep the Bathwater, but Throw Out That Baby*, 87 CORNELL L. REV. 309, 324–25 (2002).

struck by his remark that phenomenology's preservation of the principles of instrumental rationality and methodological individualism is an asset because these are both "highly attractive premises." What is it that makes them highly attractive premises, I wonder? The thought that springs to mind—echoing the problem of original sin that Professors Farina and Rachlinski's Article evoked for me³—is that they come down on the satisfying side of the problem of "free will." We are, as we experience ourselves, individuals, responsible, free, the masters of our own destinies, within whatever lifeworld we happen to have. We are not just one of those specialist ants within a leaf-cutter colony. This is, of course, a normative preference, which hardly assures that it is the most accurate possible account of the world as it is—that place where if you hit your foot hard enough on a rock, you will break a toe.

As professors, we are in the business of helping young lawyers acquire their lifeworlds. These people we rather proudly claim as the future architects of the success or failure of our particular, extraordinarily complex and interdependent society. In this secular state of ours, especially, law is a crucial constituent of our social glue, the material with which we build the successful, reliable interdependence from which markets for 747s can emerge. Gallows in the marketplace do not suffice as its symbol or its teaching. Creating its architects is what we law professors do—directly, in our classrooms and, to the extent any read and are influenced by our words, also in our writings. This feedback loop, of which I could find only hints in Professor Rubin's presentation, is the central characteristic of our own social value, as it might be observed from outside. Of course we, too, can act out of self-interest narrowly understood—isn't tenure a wonderful thing? Or we can commit errors of judgment, with or without the help of usually appropriate but occasionally unhelpful heuristics. Inevitably, each of us exemplifies his or her personal lifeworld, whatever it may be. But still, here are the questions that strike me as warranting a moment's examination in the terms this Symposium has opened up: How is our own conveying of the world of administrative law to our students to be assessed? What in it might contribute to their success as individuals, or to the success of the larger communities of which we and they are a part? When ought we to earn laurels and when, our own cups of hemlock?

Nice guy that he is, and knowing that particular students might well think a crown of laurels appropriate, I would like to give Professor Macey a cup of hemlock. My reasons take us straight back to Socrates and the Cynics—perhaps even more particularly the Sophists. Is education simply about acquiring manipulative skills, or is it about

³ See Jeffrey J. Rachlinski & Cynthia R. Farina, *Cognitive Psychology and Optimal Government Design*, 87 CORNELL L. REV. 549 (2002).

virtue? If we present ourselves as teaching normatively neutral manipulation, in a world naturally—unremarkably—characterized by manipulators, how if at all will our impact differ from what it would be if we presented ourselves as exploring the necessary conditions of a successful social order—conditions which I imagine to include strenuous and enforced disapproval of many acts and even attitudes that in a strictly atomistic and self-interested society one would expect to prevail.

There is an imperfect experiment out there, chilling in its implications. Recall Professor Macey's account of the ultimatum game, and its somewhat reassuring results: people rejected "unfair" results even when the result was to preclude their own lesser gain in welfare.⁴ If the proposed distribution was too skewed, it became more important for the offeree to punish the greedy offeror than to benefit from the pittance proposed as her own share. In a society committed to monetizing utility functions, one could take the average twenty-percent tipping point he reports as a measure of the utility value of justice. It is what citizens were prepared to give up to achieve justice. One could understand in a similar way the "interesting . . . fact that [the first parties] often anticipate[] this result and generally make[] rather generous offer[s] in order to protect [their] claim to at least some of the money."⁵ Now, is twenty percent too high or too low for the kind of society we aspire to—and might possibly build towards, if we get the creation of our students' lifeworlds right?

What Professor Macey did not mention is that these results appear to depend on the education one has received. When the same game is played in the same way with students of economics or public choice, rather than students of astronomy, history, or sociology, the result is different. What is an insultingly low offer falls, and the propensity of offerors to make surprisingly generous offers drops right along with it. These players understand and accept, as he put it, that as a matter of "economic theory . . . the second party should accept any amount offered by the first party that is greater than zero,"⁶ and with that expectation about the understandings of their second parties, economically trained first parties maximize their own self-interest and offer accordingly.⁷

On the surface, one can say that the experiment demonstrates that students can be taught to approach problems with social implica-

⁴ See Jonathan R. Macey, *Cynicism and Trust in Politics and Constitutional Theory*, 87 CORNELL L. REV. 280, 302 (2002).

⁵ *Id.*

⁶ *Id.* at 301.

⁷ See Robert H. Frank et al., *Does Studying Economics Inhibit Cooperation?*, J. ECON. PERSP., Spring 1993, at 159.

tions differently from how they were initially socialized, and that training in economics produces an approach that matches well that discipline's underlying premises, which we have heard so well described. It is tempting also to say that this is a demonstration of how low is the utility function of distributive justice for economists—though I know that they make perfectly good neighbors and that they understand, as we all do, that this is a one-time game. If it were a repeated game in which they were as likely in future iterations to be offeree as offeror, their behavior would “rationally” change. Yet life is a one-time game, into which some of us fortunately are born into situations that permit us to act most often as offerors and most of us, less luckily, as offerees. Certain lifeworlds—those that teach about reincarnation cycles notably, but most religions—give their holders an incentive to make generous offers; that may help account for the neighborliness of my economist friends. But I teach about the law, not religion, and wonder if my own teaching does not need to find some contribution. What I see about me at this moment in this lifeworld of mine, of ours, is that over the same decades as this country has moved toward accepting the economists' world-view as the norm, we have witnessed radical changes in the distribution of social wealth—changes suggested much more strongly by the prevailing lines of economic analysis than by any of these softer points of view. Is this mere coincidence? Will it matter if I point my students in this or some other direction?

Fostering justice, however we may understand that, is often our motivator for forgoing the princely compensation we law professors habitually assert we could have earned had we chosen commercial practice rather than the academic rostrum. Professor Macey argues, if I understand him correctly, that we are more likely to succeed in just that ambition if we imbue our charges with cynicism about government, and if researchers “adopt the most cynical explanation [for governmental conduct] when confronted with multiple explanations,”⁸ than if we set our course, as his colleagues Professors Farina and Rachlinski would, to build the capacity of government actors to avoid the types of error that they are likely to make in actual pursuit of the public good.⁹ Professor Macey is not always so clear about what he means by cynicism, but he appears to mean that one should opt for that explanation most consistent with individualistic greed and self-service—a position rather far from the original Cynics' ideas about virtue.

For me, teaching cynicism is more a hazard than an obligation of office. Why would I wish simply to teach my students to acquire personal wealth in an amoral, each-for-herself world, at the sacrifice of my

⁸ Macey, *supra* note 4, at 308.

⁹ See Rachlinski & Farina, *supra* note 3, at 591–92.

own capacity to do so? It is a commonplace about legal education that our students enter law school much more idealistic, much more committed to ideas of public service and achieving justice in some self-defined sense than they leave it. Perhaps I am wrong, then, about our motivations; or perhaps we just do poorly in achieving our ends; or, as it is sometimes comforting to think, we so succeed in conveying the complexity of the social order as to drive our students to the perverse haven of a simple, if demeaning explanation. Watching the lure of "it's all politics" or "common law judges basically just do what they want" in the face of their encounters with the agonizing complexities of and stunning changes in, say, the law of products liability across time, I find it extraordinarily challenging to plant the seeds of a lawyer's lifeworld in which law is other than just another expression of self-interest and will.

Professor Macey appears to be imagining his task in some similar way: what scholarship and teaching, he wants to know, is most likely to contribute to the extent to which government works, and to control its excesses? He has asked such questions before to stunning effect, as in his advice that judges stress the public-regarding surface aspects of legislation as a means of making it less likely that rent-seekers will prevail with hidden private agendas, and in any event more costly for them to do so.¹⁰ In his Symposium Article here, it seems to me, he mistakes cynicism (assuming the worst about human conduct as a suitable theoretic base for understanding all of it), for skepticism, which permits if it does not entail personal commitment to a system of values, but recognizes that not all people will hold those values. James Madison taught the importance of being aware that men were not angels;¹¹ in this way he was a skeptic about human nature. Yet one could hardly describe Madison as a cynic. He had ends in view that were other than self-aggrandizement, and a faith that with proper attention to the construction of a just social order they might be achieved.

Madison's hopeful yet skeptical faith cannot be vindicated, in my judgment, without an education that attends to virtue. Professor Macey, if I rightly understand him, claims that our lives will be better if we teach our students not to expect virtue, but to order their and their clients' lives as if it will be absent. I imagine we might succeed in conveying the idea, but dread the society toward which it slouches. In that teaching lies the permission to offer one percent or five, not twenty—or even, in a more perfect world, thirty-five.¹² Members of

¹⁰ Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 250–54 (1986).

¹¹ See THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961).

¹² See *supra* notes 4–6 and accompanying text.

Congress who understand that attending to their reelection is their most natural motivator, and maximizing self-interest is the general character of human affairs, will be drawn the more strongly to behave exactly in that way. So too for Presidents, judges, even academics like ourselves. It is an invitation to a grim world—not for nothing is economics called the dark science—threatening self-fulfillment, and the more tragic for its falseness to our character. Shall we contribute by our teaching to creating the lifeworlds that, even marginally, will make that grim world's realization the more likely?

Let me close with a story of virtue or foolishness, you will take your pick. A cousin of mine by marriage was a Vermont senator until last fall, when he was swept out of office by reaction to the civil-union statute there. He had managed to secure election a few times as a Democrat in a district that had most often voted Republican. When the bill reached the Senate floor it was already clear that supporting it would likely bring about his defeat. The Governor and the party leadership released him from voting; they did not need his vote, they said. It is a part-time job to be a Vermont senator, and in his private life my cousin is a teacher. "I'm going to have to explain my vote to my students," he said. And to himself, he might have added. In my judgment, we do not gain by teaching such people that they haven't thought well enough about their situation—even if occasionally, as happened last fall, they see correctly what their integrity might cost them.