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The Current Status of Lawyer Professionals: Some Implications for Legal Education

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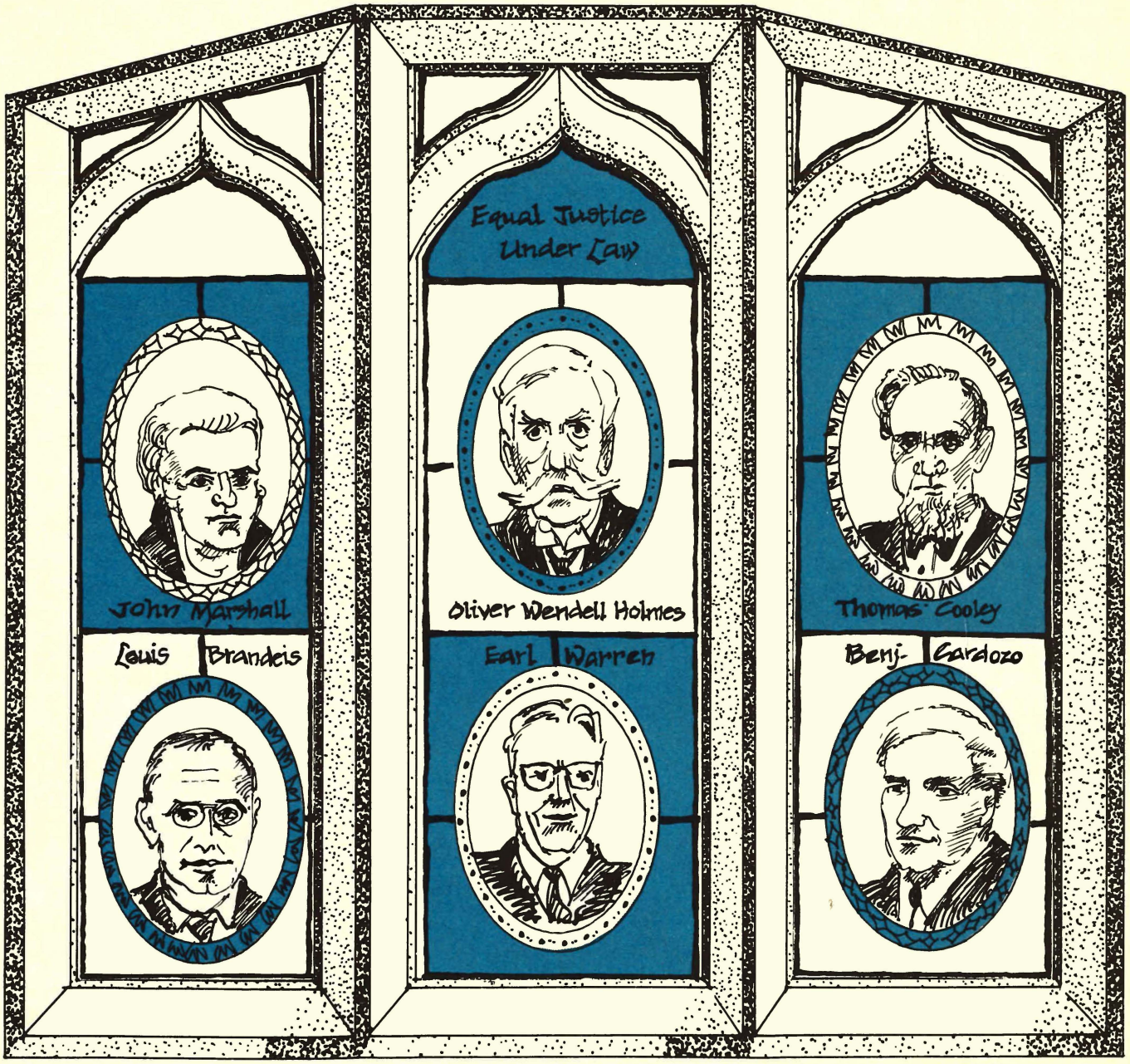

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The Current Status of Lawyer Professionals: Some Implications for Legal Education

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[Based on the third lecture of Prof. Watson's three-part Isaac Ray Awards Lectures, "Some Psychological Forces in the Ebb and Flow of Professional Status: Implications for Training and Regulation," delivered at Boalt Hall, the University of California (Berkeley), February 13-15, 1979.]

In this lecture I will take some of the problems and processes of legal education and law practice which were described earlier and explore some suggestions for change. I have organized my comments in relation to the locale where the issues arise, although in fact many of them may occur in several sectors. My friends will recognize some of the proposals to be reiterative and others will be new. Hopefully all of them will engage your consideration or your re-consideration as the case may be.

The Law School Situation Regarding Professionalism

Student Motivation Issues

In discussing legal education and the processes for selecting law students, the part which is most difficult to ascertain, complex to deal with, and most frequently overlooked in discussions of the subject, are the motivational and emotional issues that are so important to the shaping of professional behavior. Since this is the area of my principal interest and expertise, I will focus my attention on this aspect of the educational process.

Any training or education program, whether it wishes to or not, must cope with the motivational factors which brought the person to the program in the first place. A medieval knight among other things, took arms to demonstrate bravery and any mission he undertook would be bent to demonstrate that fact, whether it was militarily wise or not. With law students, if their psychological motivations are not dealt with, they, like all frustrated beings, will have to develop some kind of psychological armorplate if they are to remain in the field and function. I mention in my first lecture the special concerns which law students have about orderliness, aggression, and social altruism, and how these relate to career selection.

Because professional and ethical issues involving these emotional motivations are so painful to deal with, it is crucial that students be confronted with the necessity of considering them in their learning processes consistently and persistently. They should infrequently or never encounter situations in which these matters are ignored. Students who express unethical views or behaviors should draw criticism and not be permitted to go forward with the notion that ethical standards are purely a matter of personal preference. If the latter course is followed, it removes one of the primary sources of motivation for

professionally responsible and ethical behavior; that of group standard setting and group reinforcement. This is to say, that the intention to behave ethically is a highly personal matter, and to note that the standards of ethical performance always come from the group, and must not be ignored. A well-integrated and psychologically effective training institution will challenge deviants and apply great pressure for them to conform. Such a group should feel a duty to withhold certification of those who do not.

Law School Curriculum Issues

Here again, I shall limit my observations to matters relating to professional responsibility and ethical behavior. In regard to these, each student needs a personal "terrain map" that accurately reflects his own psychological territory, that he can recognize fully, and through which he can move freely with the comfort that comes with familiarity. Psychological territories like others can only be clearly marked and labeled after all landmarks have been thoroughly reconnoitered and recognized. Although lawyers do this skillfully in relation to substitutive law and procedure, they are substantially deficient when it comes to emotional matters. By the time a law student completes his professional education, he should have a well evolved and well articulated "moral sense" about law practice. This should be invested with considerable passion which can allow him as a working lawyer to press vigorously for appropriate performance in the difficult circumstances of his life. Frankfurter once stated, "It is not, I hope, professional vain glory that makes me regard duly equipped lawyers as experts in relevance" (Kurland/Reflections on Ames). It is unlikely that he was speaking of emotional matters, but in fact psychological knowledge is so relevant to lawyer work, that I would move this kind of learning into a place of high curricular importance and make it a duty for lawyers to possess such knowledge.

There have been many discussions in the past about where and how material about professional responsibility should be introduced. Its relevance has been reluctantly conceded but now the issue is where can we put it in our busy schedule? For many reasons, the only fully logical strategy is what has been called "the pervasive approach." Failing to deal with these matters wherever and whenever they arise, models the image that they are not important. A special course tacked onto the third year, seems to express precisely what faculties think of the subject.

Very obviously, not all teachers are well equipped to deal with matters involving professional responsibility and ethics. Many have little or no personal experience at the bar and so may deal with these subjects only abstractly at best.

Because this kind of proposal nearly always stirs discomfort and challenge, the question must be, "How do you deal with a reluctant faculty?" Fortunately, on most law school faculties there are several usually younger members who, with a little support from their colleagues and the dean, would be willing to develop a faculty seminar to explore the problems of teaching this kind of material. It is probably desirable to have some external consultant for the behavioral aspects of this kind of teaching, since their "magical authority" can help carry the burden of persuasion during the early phases and before the product can stand on its own merits. It is an ideal place for an interdisciplinary team, and I will speak more of this matter later.

Issues of Teaching Technique

Most law schools have at least a great teacher or two who leave indelible traces in their students' memories, and many lawyers will allude to the inspirational experiences with them. Among other things, these men seem to have had native qualities which made students want to emulate them in their lawyerliness. Sadly however, there are not nearly enough of these models to generate the personal investment in professionalism, needed to develop a highly ethical bar. This means that one of our pedagogic concerns must be to remedy this deficiency and find new ways to help law students have some guided experience in coping with the stresses of professional life. This kind of learning must be "experiential" if it is to be effective. By this I mean that students must encounter intellectual concepts like "professionalism" in a context that will stimulate the emotional reactions and conflicts that are the real concomitants of that activity in practice. This learning can take place in actual practice, or to varying degrees, in simulated situations. I have long believed that the law school Socratic classroom is a perfect place to carry out professional simulations, in fact, simulation may not even be the correct word since the emotions generated there are real enough and are closely analogous to those stirred up in law practice. For example, the relationship between teacher and student has a precise parallel to the relationship between a lawyer and his client. In the classroom, the student seeks help with the mysteries of the law from his teacher and the way the help is offered generates feelings of fear, doubt, and awe, as well as a multitude of other sensations. In the law office, the client comes mostly in ignorance to obtain the technical assistance of the lawyer in solving his problems, and the atmosphere of the office, whatever its style, raises many complicated questions and feelings. If the student can be helped to understand some of the substantive knowledge needed to understand and deal with the sense of helplessness and vulnerability that clients will bring to him later. There are many other classroom examples of professional tensions such as, competitive conflicts, concerns over "How do I look?" "Do I care enough about clients?" or "Am I a fool for caring?"

When a student has difficulty reciting in the Socratic classroom, most teachers tend to start with the assumption that he is unprepared and his behavior is a reflection of that fact. A more likely probability is that they are having some internal conflict which inhibits their ability to respond. It might even be a very creative thought, not yet fully formed which they are fearful to express! Law schools like this one, have students with very high intellectual capability, and no answer they come up with should be taken as intellectually ridiculous even if it seems so at first glance. More often than not, the responses reflect some highly complex thought processes, possibly accompanied by some conflicted feeling or attitude which has momentarily inhibited their expressiveness. This kind of response difficulty has high relevance to law practice since only rarely does a client come in and say explicitly what he wants to say. When teachers deal with answers as if they are foolish, intellectually inadequate, or the function of ill preparation, this models a kind of intellectual arrogance which if carried over into practice, will certainly do the practitioner little good and may well contribute to his inadequate performance there. In other words, there is a great tendency for law teachers to dismiss classroom communications too swiftly if they do not come straight down onto the target. To do that loses an important opportunity to teach students about the nature of human

communications something of great professional importance and concern.

Alternatively, one can press the student socratically for how he is relating his answer to the original question: "That's interesting Mr. Jones, but I'm not sure how you got there from my question. Could you tell me more about the connection *you* see?" Of course if inflected sarcastically, it defeats the purpose and is best left undone. However, when the question is seriously put, the answers illicited are sometimes quite creative and usually are at least interesting demonstrations of the way the human communication process works.

Many teachers will instantly argue that they do not know how to do this kind of teaching. I would argue that the only new tools needed to carry out this method are a few intellectual concepts about how the mind works. Then most law teachers would have at hand all they need to proceed.

Most law professors have at least as many capabilities for learning how to teach this way as they do for dealing with the more conventional law teacher's approach. Both modalities require practice and learning.

Young Teachers Workshop

Of course being taught how to teach is virtually an unknown process at the university level. We make the interesting presumption that a person who has demonstrated capacity in research and who has himself excelled academically, will just naturally know how to teach. Experience in Academe (outside of the law school of course) suggests quite the contrary. About twelve years ago, under the leadership of Professor Frank Strong, one-time dean of the Ohio State Law School, a most unusual project was initiated. He had long been concerned with teaching methods and got a substantial grant from the Federal Department of Education to set up a "Young Law Teachers Workshop." The first of these workshops was held in Chapel Hill, North Carolina and the central focus of its curriculum was to sensitize young teachers to the emotional factors which operate in the classroom. Although there were many problems that first year, it went well enough to be repeated. Plans were immediately instituted for the second workshop which was held at Madison, Wisconsin. This was very successful and there have been two more workshops since then, with about eighty "students" in each.

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The program of those workshops consisted of plenary sessions which dealt with a demonstration of Socratic classroom tensions, demonstrations of a variety of other teaching methods, discussions of examination techniques, law school administrative problems, and other subjects germaine to a new law teacher.

Of central importance to the workshop were the small group sessions in which 12-15 participants met regularly and intensively with a leader, chosen for their skill in dealing with the emotional processes of teaching. In the context of these groups, each student did a demonstration class-session which was critiqued by the group and the leader. These were also video-taped so they could be studied intensively, by the students alone and/or with behavior experts. Most of the workshop participants were enthusiastic about their experience and many wished to find means for taking this technique back to their home campus for further exploration. Plans are progressing to continue this project under the aegis of the Association of American Law Schools, although the details of its management are not yet settled.

Another activity which must take place in law schools if they are to teach professional responsibility with effectiveness (in my opinion), is the development of interdisciplinary teams. This should be possible in nearly any university setting. The first impulse of many when confronting a need like this, is to figure out some way to get a financial grant to develop such a program. Although such a grant is fine, it is not easy to bring off in these days of limited resources. Fortunately, there are other ways to start these programs simply using the *quid pro quo* which flows from such interlocking teaching efforts. For example, I work in a child psychiatry hospital, where there is enormous advantage in involving lawyers in our work. We have many cases involving decisions about child custody, civil commitment, juvenile court activities, criminal law matters, and the now ubiquitous problems of child abuse and child neglect. These are all intertwined with a multitude of technical problems, involving privacy, confidentiality, and privileged communication. Most of us are woefully ignorant about the legal processes involved in these kinds of cases and we may easily waste years of our time and the patients', as we helplessly flop around. We *need* legal consultation.

On the law school side, the utilization of psychiatric or psychological input could be extremely fruitful in such courses as criminal law, family law, negotiation, clinical law, wills and trusts, some aspects of tort law, evidence and no doubt others. Those who teach in these areas of law could all use expert information of the kind that good psychiatrists and good clinical psychologists can provide. In the best of all possible worlds, there would be cross-departmental appointments.

In setting up these interdisciplinary teams, the inevitable tensions should be dealt with before hand, as members of both professions learn to work together. Whenever the psychiatrist is present, there is the presumption that he is busy psychoanalyzing his lawyer colleague and discovering all of the terrible things hidden within. Similarly for us, we know that lawyers are going to use their Machiavellian skills to see to it that we are prevented from carrying out our professional purposes effectively. By definition, both of us come very close to being paranoid. It is only as these fantasies are cleared away that effective interdisciplinary teaching can take place.

In many law school situations, the tendency is to bring behavioral scientists in merely to present substitutive information. This is to make less than the best use of them. If the person is well chosen whether he be psychiatrist, psychologist, or social worker, he can offer extremely valuable commentary upon the educational processes themselves. In fact, this may be the most valuable way for a law school to use their skills and it is shortsighted not to do so.

The Need for Professional Heroes

Now I would like to deal more explicitly with the need young professionals have for heroes from whom to model themselves. Let me begin by describing what a hero is. The original one was the mythological figure hero, a priestess of Aphrodite who drowned herself after her lover, Leander, foundered while trying to swim the Hellespont to visit her. The dictionary states that a hero is "a man of distinguished

courage or ability, admired for his brave deeds and noble qualities." Or, "is a man who is regarded as having heroic qualities and is considered a model or ideal." (We may note in passing, that the original model for a hero was female, but that quality has been pre-empted by males in what seems to be clear sexism! Heroes *can* be either female or male.)

Complex and difficult behaviors like "being professional" or "acting ethical" are mostly learned by modeling. Regrettably, as I have described elsewhere, a substantial impact of law school education is to cut down the attractiveness of many hero models. For example, when the classroom analysis of a Holmes opinion is opened with a derisive comment like "This is lovely poetry, but just what exactly does it mean?", the struggling and anxious neophyte may easily believe that the teacher thinks the Holmes' arguments are not very good ones. Similarly, if Brandeis is characterized as being "idealistic," it implies that there is something wrong with that! Since nearly any student can readily discern that he would have great difficulty in doing even as well as either of these stellar figures, he begins to wonder just what will become of him here in law school.

It seems clear to me that one alteration in legal education that could be made readily would be for law teachers to be open and vigorous in their support for concepts of ethicalness. Even while they rigorously analyze what it means to be ethical and to turn that into a rational concept, they should consciously avoid creating even the slightest intimation that they think it a meaningless concept. (As I remarked in my last lecture, the British in teaching their bar neophytes, do not hesitate at all to exhort them actively toward becoming professional.) Thus if a heroic figure like Holmes is intellectually challenged as to his concepts, his zeal and concern about law and society must always be noted and perhaps, even admired by the teacher. In fact, some teaching materials might well be devoted to the question of where his passion came from. When one reads some of his letters to his parents while he was an army officer during the Civil War, his concerns become much more comprehensible. He clearly came out of that experience with deep inner resolve about the importance of certain values and one can feel them in his judicial opinions. Regardless of how one seels Holmes' position, he had the moral courage to carry out his professional role regularly, even from his sometimes lonely position as "The Great Dissenter."

Since most contemporary law students avoid the few offerings in "jurisprudence" like the plague, perhaps each teacher should usher into their own courses the highly visible presence of at least one hero. For example, in Commercial Law the dedication of Karl Llewellyn would do much to demonstrate what professional integrity looks like there. Criminal Law could profit from the presence of a Clarence Darrow or an Edward Bennet Williams. Constitutional Law could have a vignette of the passionate Holmes while Antitrust could show the background and the modus operandi of Louis Brandeis. Some understanding of why these men functioned as they did might help students figure out how they might develop in similar directions.

To underscore the importance of developing a professional self-image, each student in some first year course would be required to write a paper on their favorite lawyer hero, describing why they admired that person. No opportunity should be lost to emphasize the importance the faculty feels about having each student think hard about what they want to look like in their lawyer future.

This brings me to another unused and omnipresent resource of law schools: the personality of the professor himself. Personally, I have never met a more dedicated group of teachers than are law professors. They are constantly in the vanguard with their concerns about a multitude of social issues, and conversations in the faculty lounge, vividly demonstrate their dedication to these matters. Regrettably, this rarely gets into the classroom, which is to lose an enormous modelling potential. I would like to urge that after the vigor of the Socratic analysis has been completed in class, that any time an element involving professionalism is present in the material (like every day!), that the teacher should reveal his own position on the matter in a way that makes it very clear he cares about it. Then more students than the Harts in the class would be able to appreciate Kingsfield's professional passion. I have often suggested this to my colleagues and others. After their initial argument that they "don't want to influence the students" has been dealt with, we get down to their self-conscious concern that students already know all about them or in fact they aren't even very interesting. And we talk about student shyness!

"Clinical" Legal Education

In the best of all possible worlds, clinical education would be closely integrated with other curricular presentation. This of course, is the perfect place to engage the complex tensions generated by professional work. When I first joined a law faculty in 1955, this kind of opportunity was very rare indeed. This demonstrated virtues of the Langdellian case method had swept out nearly all "practical" training from the law school setting, and unfortunately, accompanied by an ambiance of "well done." Hopefully, this attitude will now be rigorously and even objectively re-examined.

I have already commented about what a true dedication to clinical education would do to a law school faculty. It would force the recruitment of some different kinds of persons with different kinds of skills than those now favored in faculty choices. It would require the recognition that there is more to practicing law than merely to have a powerful intellect. Many law school graduates hold the belief that law faculties simply do not care about their needs and concerns for practicing law, and while I do not think this is totally true, I certainly agree with them that on the surface it looks as it if is. I have the impression that this grievance may be at its highest intensity in the great law schools. I have encountered literally scores of highly competent and very successful graduates of The Harvards in the land who, twenty years later, still feel almost vitriolic in their anger about this matter. It is obvious that their self-evaluation is not precisely accurate, because in fact they clearly demonstrate success: they have either shipped up their skill out of whole cloth, or else they learned many things which they either do not know about or do not care to acknowledge. At least we must see these feelings as symptomatic and a reflection of the fact that they did not *feel* prepared to practice law when they graduated.

Of course I can hear all of the law school deans raising the chorus that, "Yes, if we had an enormous amount of money available we might then be able to remedy the situation." It is certainly true that developing good clinical programs increases the financial burden on a law school. However, I am not aware that there has been any zealous request for funds to meet this purpose and it is hard for me to believe that with the advocacy skills of law professors have, they could not carry this argument with at least some success if they wished to do so. Neither can I fail to note that good law schools have a plethora of small seminars which explore a multitude of esoteric subjects which have at least as an important function, the satisfaction of some intellectual curiosity of the teacher. I know full well that this is the birthing place of many new and important ideas

for the law teacher and the law. But in terms of value to students, it is highly unlikely that they can hold a candle to the importance of developing professional skills and the appropriate professional images that will be needed by the vast majority of graduates.

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I also believe that vigorous institutional financial support for clinical law programs would inevitably generate the kind of powerful intellectual investment in exploring practice problems and practice issues, which characterized the pre-judicial work of Brandeis. I have never heard anyone demean his pragmatic explorations and without doubt, many of the issues of practice, if examined with the intellectual zeal that law professors can mobilize, would produce similar results in clinical work. When wedded with interdisciplinary knowledge from sociology, psychology, psychiatry, economics, and no doubt many other collateral fields, there would be a gold mine of material that could simultaneously help law students better understand and develop their self images as working professionals.

One of the most important aspects of incorporating this kind of material into effective utilization by legal educators, relates to the status of the clinical faculty. In many law schools they are assigned the status of second-class citizen and are not even on the tenure track. In fact they are hardly known by their colleagues on the "regular" faculty, and they do not have any of the kinds of security needed to plunge freely into the hectic chores of teaching law students how to be lawyers. It takes a very stalwart individual to persist under these circumstances, and I have seen superb clinical teachers slip away from academic settings because of these deep personal frustrations.

Now that much of the seed money which came from CLEPR is beginning to disappear, we will swiftly see what kind of dedication law schools have to this deep student concern. I hope that this struggling new sector of the law school curriculum will not die of malnutrition and then have to reincarnated later. If that were to happen, of course, it would be nothing new on the historical scene. It is a pity however, that once in awhile we can not learn from the past and avoid such waste.

On Ameliorating the Impact of Law School and Lawyer Professionalism

First of all let me reiterate that I am under no illusion about the enormous contribution that contemporary legal education makes to lawyers' skills. Much of this is a product of the intellectual honing effected by the Socratic method. *But* I suspect that few would argue that there are not some glaring and serious deficiencies in an enormous number of practicing members of the bar. It seems to me that Frankfurter captured one of these deficiencies in noting in the way lawyers advise their clients about, "a wise course of action." When they follow only the law, their advice is inadequate, "because legal right and legal wrong, after all, on the whole, are the minima of morality, and minima of social duties, and not the maxima of wisdom." Because we wish law students first of all to care strongly about helping their clients wisely, we must do something about the apparent loss of access to their motivation for social altruism from which they suffer. I believe it is possible to perform a kind of psychological innoculation on students at the beginning of their law school experience so that they do not feel quite so much need for developing a defensive armor of callousness. If they can be helped to recognize that the powerful feelings they experience are not strange, aberrant, nor even signals of forthcoming doom, they can probably resist some of the common-place changes which seem to happen in law school. This kind of process-intervention can either be in lieu of, or in addition to, the pervasive approach. It relates simply to the concept that prevention is more effective and less costly than remedy. Also it could help students avoid a great deal of the human discomfort and misery which befalls so many of them now.

It would seem to me that we can no longer greatly doubt that our elegant teaching procedure causes marked student distress. We should use every means possible to correct this source of personal difficulty and professional incapacitation.

The Professional Roles of Lawyer: Some Types of Tensions

The word *role*, which comes from sociology, defines the things a person does which are imposed upon him from without. For example, a physician may carry out a treatment process on a patient because the patient permits as well as expects it. Such role activities of course, may be reinforced by law as well as expectation. Some of them will be by implicit expectation such as the lawyer as counselore. Whether or not a lawyer wished to become concerned with the personal problems his client believes are related to law, they will be imposed upon him because the client expects it and Counsel will have to deal with that anticipation one way or another.

In this section I will take a few of the many role expectations which impinge upon lawyers at the present time, and look at some of the ways in which they may produce performance conflict. In all of them, if counsel is to function effectively, he must "know himself." This self-knowledge is a crucial part of the diagnostic process of understanding and knowing what clients are doing and wanting as they relate to counsel.

The Tension Between Being an Ethical Member of the Bar Vs. Functioning as The Zealous Advocate of a Client

Whatever lawyers do within the legal system, they must be viewed as "trustworthy" if the system is to work. Much of the effectiveness of a legal system, and much of society's willingness to accept the legal system, depends on whether or not they can perceive a true rule of law, administered and implemented by lawyers who can be trusted to adhere to the system. This concept is of course contained in canon I of the code of professional responsibility. Although lawyers will zealously press their clients' interests (canon 7), they must do so within the limitations imposed by law and ethical practices.

This may generate problems between client and counsel. Clients will start off with the anticipation that their lawyer will do the things they want to have done on their behalf and they do not readily comprehend why certain wishes are refused. In British litigation, there is a buffer between the advocate-barrister and the office-work solicitor which

functions to protect barristers from pressures by clients, as well as to provide the client with an interpreter for the system.

When a lawyer appears to be or is too zealous on behalf of his client, he raises questions in the minds of many members of society in regard to the trustworthiness of the system. The recently published article in *Esquire* about Roy Cohn demonstrates this point dramatically: Cohn makes no bones about the fact that he's going to do anything he can to win the case for his client (whatever that means). Lieberman suggests that a lawyer like Cohn is only doing what he has been taught to do by the system. He also suggests that the way this difficult matter should be handled is to have counsel articulate vigorously to his client, all of the pros and cons of a particular course of action including the conflicts between their wishes, the law, and the canons of ethics. Then he should urge his client to behave lawfully! He views this as a means for counsel to deal with these two contradictory principles.

Another serious problem for a lawyer arises when he encounters an opponent who, by disregarding the canons, gains an advantage. What should he do? Should he behave the same way in order to even the balance? Do you report the other lawyer's behavior to the bar grievance committee and seek redress that way? What does this do for your client? These are terribly difficult questions but to beg them is to ignore the realities of professional responsibility and ethical behavior. No wonder a lawyer's life is difficult.

Hired Gun Vs. Wise Advisor

One of the easiest ways a lawyer "escapes" some of the difficult and painful decisions he makes about what to do for his client, is simply to state that he is a hired gun who does what his client asks. This would be easier to accept as an explanation if one saw its uniform practice in all areas of legal work, but obviously this is not the case. Often in business law practice, if counsel sees his client embarking on an unwise course of action, he will vigorously try to dissuade him. In family and criminal law areas, however, counsel seems more willing to posture himself as hired gun. I interpret this to reflect the intrinsic difficulties of family law practice that relate to its highly emotional ambiance. It is a taxing area of practice especially if one has no technical tools with which to cope. No wonder a lawyer would be drawn to the solution of doing "what my client wants me to do." Unfortunately, this strategy fosters unwise behavior of precisely the kind Justice Frankfurter talks about. He says, "Again and again during my twenty-one years or so on the court, I have been appalled at the lack of wisdom of lawyers giving advice, on which they might get vindication in the highest courts in the land, but the upshot of which would be, and often is, great damage to their clients." If a lawyer is to be a wise advisor and avoid being merely a hired gun, it is necessary for him to develop emotional and intellectual freedom in order that he can perceive wise choices. This relates back to some of my earlier comments about how lawyers need to be educated.

Independent Counsel Vs. Those Permanently Retained ("Kept")

I noted earlier that a lawyer's work carries a built-in conflict of interest stemming from the fact that the help he gives his client is also the source of his livelihood. The simple fact that lawyer income may bear some relationship not only to "billable hours" but also to "pleasing the client," may greatly influence the decisions lawyers make in the office as well as in private life. (Abel-Stevens) Even when counsel works at poverty law (a decision surely motivated by powerful emotional as well as intellectual concerns), there is a temptation to use the case to gain personal goals (like making new law with a class action) rather than merely to solve the client's problem in the easiest way possible. This conflict of interest cannot be eliminated but it requires a lawyer to invest a great deal of conscious concern in order to minimize this ubiquitous risk.

Louis Brandeis planned a deliberate life strategy to enable himself to keep as free as possible from the kind of attachments that would limit his decision making, and be sure that his identification with a particular legal position did not become fixed. He provides us with the interesting demonstration that he could serve brilliantly on the union side in one case, and then in the next, argue for a corporation. Because of this freedom, he was extraordinarily important in the early shaping of labor law, and several other legal areas vital to our national interests. Justice Jackson's father apparently pressed this same point home to his son. It is described as follows: "It was a man's *spirit* or independence that was important. To make his point clear, he often put it this way to his growing boy: 'Keep always in the position where you have a right to, and can tell any man to go to hell.' "

It is this sense of independence which is so vital to the decisional freedom of professionals. Without it they cannot possibly fulfill their role which is so difficult even under the best of circumstances.

Adequacy of Counsel (Specialization) Vs. Lawyer Incompetence/Malpractice ("I can do anything")

Recently the legal profession has been experiencing a great deal of pressure to become specialized. One source of this has been the ongoing commentary by Chief Justice Burger and others about the adequacy of trial counsel. They have urged that trial advocacy become a specialty, and that there should be sufficient training for certification to insure adequate representation of clients in the courtroom. While it can be argued easily that the same end could be met without formalized specialization, such a position requires that every lawyer have at least enough self-awareness that he would refer his clients to other counsel when their needs exceeded his own professional capacities. Such emotionally-laden questions as, "What do *I* need help with?"; "Does asking for help blight my self-esteem?" and many other such emotionally-laden questions inevitably arise. It seems to me that present methods of legal education do not develop this skill and in fact may even blunt it.

Any competence standards for lawyers must surely include the development of interpersonal skills. If a lawyer does not know how to conduct a skillful interview, there is certainly no way that he can routinely elicit from his clients the information he needs to carry out his legal tasks. It is not even possible any longer for the bar to argue that this is a skill which can not be measured. As an example, Professor Louis Brown at the University of Southern California has developed several quite objective ways to ascertain a lawyer's interviewing skill, which could be used easily in any kind of specialty examination.

The three examples I have described of conflict and tension relating to a lawyer's work, are but a sampling of the kinds of things that must be mastered if one is to be an effective and responsible professional. Most lawyers have no trouble at all in seeing these problems in others. This suggests to me that they have the perceptual capacity to learn to recognize them in themselves if they would wish to do so. To make this kind of self-awareness a goal of professional training does stir up all sorts of personal and group discomfort, and such learning will not come easily. If

we try, however, we may not only improve the level of professionalism, we may also slowly develop the means to greatly increase the personal satisfactions of being a lawyer.

Postgraduate Education of The Bar in Relation to Professional Behavior

Conscientious professionals have always engaged in a kind of continuing education process. Their work stimulates it, their sense of concern requires it, and in a multitude of formal and informal ways, their professional associations foster it. However, in recent years there has been a large development of more formalized continuing education programs. Many states have Institutes to carry it out, usually formed by a consortium of law schools and bar organizations, and they offer a multitude of different offerings. When planning such programs, there are many complicated matters to take into consideration.

Issues of Timing

We can assume that lawyers who have just graduated from law school are so close to their training that they do not need refresher courses on substantive law. On the other hand, they feel desperately ignorant about law practice and are highly motivated to learn about its myriad problems. They evaluate postgraduate courses strictly according to whether or not they will have practice utility and if they do, registration will be high. Also, at the beginning of practice, although young lawyers will be eagerly seeking work, in fact they will have more free time available than at any subsequent time. They may also be quite open-minded about how to practice law, and this can facilitate learning. One of the crucial challenges to program planners is how to engage the interest of young practitioners in issues about professionalism. What will make a young lawyer want to learn how to "argue" with clients to behave lawfully, as Lieberman suggests they should, even as they desperately seek to obtain such clients? How can a young lawyer make visible professional integrity into a saleable service skill? Can the consumer of legal services be taught to value the evidences of professional integrity?

One of the things I believe young lawyers must be taught is that their self-survival concerns must also embrace the development of what Sir William Osler, one of the great medical teachers of the last century, called *Aequinimitas*. (Osler was one of the founders of the modern form of clinical teaching in medicine at Johns Hopkins University in 1888.) In other words, in addition to serving the client and his interests, it is vital that a lawyer realize that he must also satisfy *himself* about the way he conducts his work. Even if unprofessional behavior escapes notice by peers, there is no fooling one's inner self. I should modify this by saying that there is no fooling of self without invoking drastic interpsychic processes which cause serious disequilibrium, such as alcoholism or a multitude of other psychological difficulties. These personal disabilities are as much a part of practice economics as failure to get clients in the first place. These are tough problems and a real challenge to postgraduate educators.

The Third Year of Law School

If professional education were to be organized along completely logical lines, it might well constitute grounds for altering the third year law school following such suggestions as those of Deans Carrington and Cramton. In their suggested curricula, the third year of law school would be heavily involved with professional skills training and would utilize a kind of teacher who is capable of bringing these matters before the young student in solid, "practical" forms. One of the things which academic teachers often critize about the educational efforts of practitioners is their proclivity for telling war stories. However, if these practitioners were to join forces with traditional law teachers (i.e., team teach), together they could evolve materials and techniques which would readily embrace the skills of both. Needless to say, this would require some substantial psychological harmonizing for them to move toward mutual respect. We are all familiar with the aggressively derisive remarks that go back and forth between the academic and the practice sides of the bar.

Matters For the Organized Bar

In the years since Watergate, there has been much discussion about the question of what, if anything, can be done by the bar to foster improved professionalism and ethical behavior. Some clearly feel that in the first place there is little that needs remedy, or second, there will always be scalawags among us so there is no changing that. However, there are some things that could be done that might bring improvement.

Size of Bar Organizations

Justice Brandeis made a great issue of the fact that when an organization becomes so large that its head can no longer personally encompass its activities, it begins to function in ways which are self-defeating. Presumably, the same thing might be said about the bar. You recall, that one of the factors which seems to make the British bar function so well is its small size. In that bar, it is possible to know a large percentage of one's colleagues. One sees them in the dining room, at the Inns of Court, and in the highly centralized courtrooms. This is made possible partially through the division of the bar into the solicitor and barrister branches.

Lawyers who practice in small communities enjoy similar advantages. They know each other well, seem to care about what their colleagues think about them, and can hide very little about the way they practice. This substantially reinforces their ethical attitudes about lawyering and fosters the solidification of group standards. When we look at the huge bars in our major metropolitan centers, all of these intrinsic advantages of smallness disappear. Could anything be done about this? Might it be possible to subdivide the large metropolitan bars into relatively small groups so that more collegial relationships could evolve? What might motivate such smaller bars to develop a group identity? Perhaps such a bar could take on the task of providing some apprenticeship experience to law students. Could they find ways to have a student trail them about during vacation time? Could they gain some personal pride and satisfaction over knowing that they were helping young law students learn about the ways of a professional? Could such a process be the vehicle for renewed exploration by students, lawyers, and law faculty of some of the very difficult problems of being a professional? These kinds of experiments might be carried out by bar groups that were small enough so they could be involved as committees of the whole to deal with this kind of project.

I have described earlier the social power of the dynamics of "shaming." Is there any way this force could be utilized effectively by a bar? Could this be linked in some way to economic advantage? Conversely, when an individual functions in a way that is professionally desirable, is there some way it could lead to social or economic advantage?

What Can the ABA Do to Promote Professionalism?

For some time the American Bar Foundation has carried out a substantial amount of excellent research on behalf of the ABA. Perhaps they might devote some of their interest and economic resources to studying the forces related to professionalism, such as the effects of various kinds of law firm organization on professional behavior. For example, how do large firms manage their extensive orientation programs with their young firm associates and what are their effects? Do they make the right value choices so far as the bar is concerned? Is there anything in those training programs that could be organized in relation to the solo practitioners of the bar? Perhaps some of this information would be seen to relate to "trade secrets," but if that should be the case, it would tell us something about the relative values of profesional behavior versus lawyer advantage.

Would it be possible for the ABA to help put together "road shows" made up of some of the great lawyers of the day to speak to law students and young lawyers?

I have emphasized the importance of models in shaping behavior. Would it be possible for the ABA to help put together "road shows" made up of some of the great lawyers of the day to speak to law students and young lawyers? The late Mr. Justice Clark in the latter years of his life, spent a great deal of time visiting different law schools and bar groups, talking about matters of law practice. Presumably one might argue about what it was he was modeling, but having heard him do this several times, it seemed to me that at least he showed law students and young lawyers something of the excitement he felt in being a good lawyer and being dedicated to issues of public importance. There have also been a few lawyers recently like Archibald Cox, who stood conspicuously against authority as a matter of principle. Of course it is easy to imagine all of the fears about politicizing this kind of activity; who will choose the representative for what value? One can readily concede such a risk, but in my opinion, it is not nearly so serious a danger as that of failing to present *any* models of the values and behaviors that we seek to foster.

Another project which the ABA is in an ideal position to carry out is to see that good video tapes of the great lawyers and judges of the day are archived. Would it not be wonderful is we had some well conducted interviews with Justices Holmes, Cardozo, Brandeis, and Frankfurter? Would it not be exciting for law students to listen and watch the judicial thought processes of the brothers Hand, or better still, to see them at work? If we cannot decide now who is great because of our fears of political implications, we could easily overcollect for these archives, letting our successors make the historical choices. At least we should be sure that we capture this kind of information for subsequent generations of law students and lawyers.

The Effects of Judicial Behavior

Perhaps one of the more powerful pressures that can be brought to bear against the professional behavior of lawyers lies in the hands of the judiciary. At least they are in a position to deal vigorously with the public professional behavior of lawyers as it relates to the trial process. It is my impression that American trial judges are rather loathe to control aggressively the unethical behavior of counsel before them. For example, when trial counsel asks questions which have the instrumental function of bringing inadmissable information before the jury, while they will be objected to and the jury will be told to ignore the question, everyone knows that they will have succeeded in their intentionally unethical and unlawful communication. Although admonitions are pro forma, disciplinary action seems to be extremely rare.

The judges' role is a very difficult one, filled with many of the same kind of emotional conflicts which lie at the heart of effective professional behavior both on and off the bench. The British judiciary, seem to be much more active and effective in dealing with the courtroom behavior of counsel. There is little question that if counsel oversteps the bounds of ethical propriety, they are stopped cold, and they will suffer some penalty for having done so. This probability is so clear that counsel themselves seem to have thoroughly adopted the attitude of constraint and propriety, and this is as it should be.

Because of the central importance of judges, they are an important group upon whom to focus training of professionalism. There is no question that they could be given a kind of training to enable them to perform this function more effectively and with more personal comfort, but neither is there any doubt that such a presentation would be initially unpopular. Only as they came to grasp its ultimate utility would the purpose and value of such experience become apparent. Some few judicial training programs have made tentative steps in this direction.

Issues About the Canons of Ethics

For any canon of ethics or code or professional behavior to work, practitioners must first of all accept the standards and then they must adopt the full intention to try to implement them. Therefore, the teaching/training approach to professionalism must focus heavily upon how to instill and reinforce such an ethical intention. Although there will be some breaches which are the product of total ignorance, hopefully these will be rare. The vast majority will come from either deliberate, conscious decisions to breach or more commonly, in my opinion, actions in which the lawyer has succumbed to internal psychological conflicts about which he is not fully cognizant. This suggests then that for a lawyer to perform ethically he must be willing to engage in some very intensive self-scrutiny in order to gain a substantial knowledge about his own motivational patterns as they relate to professional behavior and the code of ethics.

With this process in mind, the form and content of the "preamble" to a code of professional behavior which is admonitory and aspirational becomes very important. Its purpose is hopefully to potentiate lawyers' awareness and willingness to deal with these complex and conflictual issues. It is not remiss or inappropriate to note there, that the practitioner's own satisfaction with his work might have a close relationship to his wish or even his "need" to be ethical. This obviously turns on the assumption that there will be strong group reinforcement of the standards which in turn will foster the psychological desire to be a

part of the group. The preamble might also describe and concede the painful dilemmas and temptations which exist for counsel, that lead him to behave in a self-serving way. This acknowledges where the psychological pressure will be coming from and it alerts him to the fact that to behave ethically requires constant attention.

I have already commented on the central importance of lawyers being willing to report the ethical breach of another, and the current inclination to nullify this requirement.

Because the actual implementation of a code of professional responsibility is so fraught with pain and trepidation, it would seem to me that a bar might develop a kind of stepped procedure which it could teach to its members about how to handle breaches. A first step might be that the observing lawyer would communicate directly and solely to the one who seemed to offend the code. If this communication were effective, the "offender" would evidence that fact by making some kind of response of acknowledgement and be appreciative of the fact that he had received a private warning (although no doubt he would have and should have some inner turmoil).

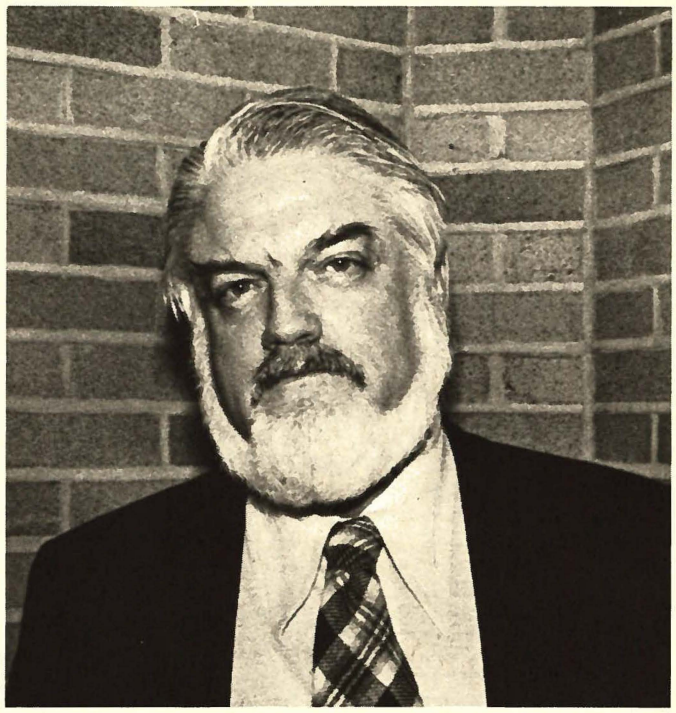
The second stage of intervention might be additionally to report the observed behavior to a member of the lawyer's firm if the first step was thought to have been ineffective. A letter to the senior partner or associate would no doubt mobilize a certain amount of anxiety in the firm about its public image and probably bring internal pressure against the individual who committed the questionable act. It would put them all on notice that this behavior will have to be stopped or obviously there might be some future difficulty.

Finally, if there is no alteration of behavior and another similar occurrence is seen, then the observer would report the matter to the bar's grievance committee. They already appear to have a stepped intervention process. I would merely repeat what I described earlier, that it is important in process terms, to make sure that the person who reported the grievance knows that his report was fairly evaluated and something of why the matter was dismissed. Otherwise, there would be strong inclinations to avoid making these psychologically discomforting moves in the future.

The final thing I would like to say about the code is that it seems mostly to stay on the book shelf. A very large challenge to the bar is to find ways to raise each lawyer's concern about its implementation. I suspect that a few bar meetings with titles like, "Lawyers' Unethical Behavior: Should We Be Licensed By the State?" would not only draw a crowd, but would stimulate a lively and useful discussion. Much attention to self help is needed here.

In these lectures I have attempted to describe some of the social and psychological factors that appear to impinge presently upon the effective functioning of professionals. Although many of them were invoked to improve and protect society, some of their effect has been to gnaw away at the very core of the professional identity, without which no physician nor lawyer can effectively fulfill his difficult functions. I hope I have persuaded you to the belief that it is only a well trained, deeply conscientious professional concern which can ultimately protect people from the risks attendant upon receiving help from a doctor or a lawyer. That kind of ethical concern can only be developed by a very special kind of educational experience joined to continuing professional group reinforcement. I have also tried to set forth some of the problems I see in contemporary professional education as well as to lay out some suggestions for re-tuning this training so that it may better fulfill its purposes.

Because most of these questions involve ethical issues and because we lack the luxury of having much hard, scientific data on the subject, I suspect I have sounded somewhat like a preacher with all of my shoulds and shouldn'ts. If that be true, I can then only say something like *Pax Vobiscum.*



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