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How the Law School Fails: A Polemic

by Duncan Kennedy

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The following two articles are the initial installment in a continuing symposium on legal education.

**“You tell me it’s the institution”
Lennon/McCartney**

To the committed empiricist, the pages which follow will seem no more credible than a child’s tortured dream. Yet even the committed empiricist must recognize that for the time being at least there are areas inaccessible to him, areas where what passes for knowledge must be no more than a network of intuitions and theories dimly grasped. The current “malaise” at the Law School is a subject which lies in such an area. Faculty and student body seem equally affected, but neither seems able to express its feelings in any way except indirectly, in moments of bitterness or disillusionment, in lethargy or a febrile verbalism. It is perhaps because of this elusive quality of the subject that I find myself unable to approach it in any other tone than that of moral exhortation.

Let me begin with a brief statement of the values to which I appeal. First, I am very glad to be a member of the community of the Law School; my motives in writing are anything but destructive. I would like to do something to improve our lives as people living together; if the

critique is at times bitter, it is with that hope. It would not have occurred to me to write this paper if I did not think I could appeal to the sense of moral obligation which underlies the concepts of “teacher” and “lawyer,” and to the urge for craftsmanlike “effectiveness” combined with social responsibility which brings most students here.

Finally, it should be clear that I am not a “trained observer” in any of the disciplines upon which this paper draws. Nor is this an attempt at an “Anthropology of the Legal Profession,” based on some kind of “research.”¹ My purpose is to add depth to what thus far has been a disappointingly shallow debate about legal education.

I. The Teachers

The faculty, as a group, make much of their own atomization. They refer with pride to the fact that in any faculty discussion there are “43 different points of view.” Nonetheless, to the student body they are very much the “Faculty,” a group of “individuals” without doubt, but very much a group. They are unified in the eyes of students by far more than the fact that they all teach at the same institution. There is “the manner.”

One of the first and most lasting impressions that many students have of the Law School is that the teachers are either astoundingly intellectually self-confident or just plain *smug*. Many of them seem to their students to be preening themselves before their classes. In most cases, each gesture seems to say: “I am brilliant. I am famous in the only community that matters. I am doing the most difficult and most desirable thing in the world, and doing it well; I am being a Law Professor.”

As might be expected, the feeling of being in the presence of a truly extraordinary narcissistic phenomenon diminishes somewhat with time. But it is still shocking to hear professors dismiss all disciplines but the law as intellectually shoddy and practitioners in other fields as a class of dolts. It is hard for the student not to wince at the air of magisterial self-satisfaction with which professors tend to approach questions they know little about. No amount of actual brilliance (and I will get to that point later) justifies the pose.

“Smugness” is a minor vice. There is another quality which is very generally perceived in the faculty which is much more important: *hostility*. I am now speaking only of the students’ perceptions of the professors’ manner. It is of course possible (but I think in fact not true) that everything I describe is a collective hallucination of the student body. What I am asserting—as a fact—is that if you ask the more sensitive students what they feel is the dominant tone of the classroom of this

or that professor, and then probe the answer even a little bit, you will discover the *perception* of hostility.²

There are as many variants to the perception of hostility as there are to the expression of it. For some students, the teachers are “condescending,” or insufferably paternal. Others speak in terms of an underlying contempt. The formulation may be almost pathetically indirect: “He is so brilliant; there is no reason why he should care about me.” “He’s very nasty, but I suppose I need it.” “It’s understandable that he should hate teaching first year students year after year.” Other teachers evoke a more direct response: everyone in class is quite conscious of being disliked.

This perception is strongest among first year students, and is weaker in seminars than in large classes, but these differences are only quantitative. Hostility is sometimes seen as embodied in a teacher’s actual words. A great many students, of all levels of academic competence and of many varieties of personality, feel the

socratic method (the basic question and answer, suggestion and criticism, approach, rather than the stricter version once popular and now practiced by only a few teachers) is an assault. The observation³ that students often respond physically and emotionally to questioning as though they were in the presence of a profound danger is simply *true*. A participant or observer not blinded by his own fear or by his involvement in practicing the technique notices the student response almost immediately. Few will deny that the atmosphere of the first year classroom is as heavy with fear as it is tense with intellectual excitement. The point here is more than that: students see professors as people who want to hurt them; professors' actions often do hurt them, deeply.

It is not only open verbal attack or the socratic method which is seen as hostile. Each of us interprets the emotions of his interlocutor by far more than the content of his language. Tones of voice, physical mannerisms; facial expression, cast of eye—all these are as important in the classroom as they are anywhere else in life. What is conveyed—for whatever reason—is extraordinarily often contempt, or disgust, or what one student described as “ice-cold indifference.” A professor who lectures can get this across as effectively as a professor who proceeds by question and answer.

Teachers who are hostile are not generally dull, although they are sometimes insufferably so. They may be greatly loved by their students; they may provoke an admirable response, from both the human and the intellectual point of view. They may be—but very often are not—unusually effective pedagogues.

It is perfectly clear that most professors are largely unconscious of the effect they are producing. Yet in fact, more open displays of anger—such as a walkout when no one in the class is prepared—are often perceived as less deeply hostile than the vague aura given off by a teacher who seems perfectly content in the classroom situation.

I hope that what has been said thus far will not be dismissed as simply outrageous. I might muster in support

of my description the testimony of a large number of outside observers—formal and informal—but that seems unnecessary. I have dealt only with the students' perception. That is a matter of fact, however little susceptible to legal methods of proof, and may be investigated “in the field” by any faculty member.

The picture would be incomplete without a brief description of the students' view of the faculty member out of class. Before that perception occurs, a hurdle must be jumped. Some faculty members are accessible; others are not. Simply because it is a part of a more general emotional atmosphere, inaccessibility is interpreted to some limited extent as an expression of indifference or contempt. (I hope no one will draw the inference that I favor the abolition of either legal research or the professors' right to privacy.)

The interesting thing about the students' relationship with the faculty member with whom he does come into contact is its positively dizzying warmth. The classroom manner disappears almost altogether, and is replaced by a total openness, a universal solicitude and receptivity, which is its mirror image. The professor will often patiently bind up the lacerations inflicted in public ten minutes or an hour before, and add a word of encouragement which is like a laying on of hands.⁴ The reaction of the student is likely to be profoundly filial. My own feeling is that the relationship of master and disciple that tends to develop from such encounters often (but by no means always) has an element at least of the degrading: the student is too vulnerable, too passive, to be able to deal with the professor as a man. But even this limited kind of solace is available to only a small minority of students, generally those who are academically successful. For the vast majority, the experience of the law which dominates all others is that of the classroom.

Supposing that the situation exists as I describe it, what is to be said of it? At a bare minimum it seems to me that the faculty as a group is guilty of an astounding lack of awareness of what they are doing. They have neglected a professional responsibility of the first order, and in so doing have

inflicted emotional harm on their students. They are as much the losers as the students. A person who is unable to come to grips with his own impact on the world around him is an impoverished person.

This strikes me as a weak way of putting the point, as will appear. First, however, I would like to deal with some of the arguments which will be put forward “in mitigation” by those who do not reject my thesis out of hand.

It is asserted that the members of the faculty treat each other in the same “straightforward” manner (sometimes conceived by faculty members as that of the “hard-headed seeker after truth”) that they treat the students. Two observations are in order. First, it is clear that most faculty members make distinctions among students in their conduct. Some are treated in ways which give rise to far stronger perceptions of hostility than are others. The student who has established some tenuous claim to intellectual ability, either in the classroom or in his exams, is accorded a measure of apparent respect in his dealings with teachers in class. The teacher's attack may be no less fierce, but the gleeful thrust for the jugular is less apparent. This suggests at least that faculty members are not constitutionally incapable of acting as human beings outside their offices.

Secondly, it is the most elementary sort of moral principle that a person with power to affect the lives of others should be aware of the meaning of his conduct in the eyes of those others. A given set of mannerisms means one thing when an established law professor attacks another established law professor who is also his friend or long time associate. The same conduct is likely to mean something altogether different when indulged in from the podium against a terrified student. Law students often call each others' arguments idiotic and heap ridicule on each other in debate. Surely no one would argue that this behavior would have the same social meaning if engaged in in class against professors?

Another argument in mitigation is that if the students now see the faculty as hostile, a profound change has occurred. In the old days (the early sixties) students simply did not respond that way; in fact, they enjoyed the "give and take" and were able to profit from it without emotional problems. The faculty's difficulties in handling the new situation are therefore understandable. I am willing to admit that the faculty's perception of the students' response has changed radically in the last two years. I am also willing to admit that several years ago, few, if any, students formulated their response in the way a growing number of students now do. I do not admit, however, that the problem of hostility was any less great then than it is now.

The faculty's perception of the student response to law school has altered in two ways: as they see it, there has been a spate of "radical" student criticism of the Law School, emotional attacks on the institution, and dark rumors of student rebellion; there appears to a number of professors to have been a decline in student interest in the law as taught, a sort of spreading indifference to the whole enterprise, a deadness in every classroom discussion. None of this indicates to me that students of other years did not feel a current of hostility from their teachers. I think a far more plausible hypothesis is a change in student response to the perception of faculty hostility.

Is the problem simply one of perception? It seems abundantly clear to me that what the students see is more than a mirage, that a vast amount of destructive energy does in fact go into the teaching of law as presently practiced. I should say at the beginning, however, that the student response to that hostile current is so much more extreme than what one would expect that it too requires considerable investigation. The atmosphere of the Law School, which often strikes me as an alternation between a peculiar intensity and an even more peculiar frozen deadness, is certainly as much a product of students as of teachers.

Only a few of the faculty are open to the idea that certain of their colleagues are hostile to students. Far fewer will be able to accept that this quality is an important element in their own teaching. How to persuade that there is at least some underlying reality to the student perception? Many faculty members recognize, sometimes with a rather unashful pride, that they are aggressive people, and no less so in the classroom than out of it. It should not be so very difficult to admit that a substantial part of the pleasure of being aggressive in class consists of being able to demolish students. And that another substantial part consists of being able to impose on them, by "main force" of reason, a concept or a conclusion they might not have reached alone. Teachers must realize, if only indistinctly, that their students are aware of the pleasure that is taken in their subjection.

I do not mean, at this stage of the argument, either to reject or to accept aggressiveness as a useful pedagogic tool. Even less do I mean to imply that all law professors, all the time, are unrestrained sadists. In fact, professors often seem, in their most aggressive moments, to be struggling manfully to restrain an inward rage which baffles them. Sometimes, a gesture meant to hurt is followed instantly by a sort of apology. I am convinced that most teachers at the Law School love their students, and in a way which is admirable. And yet in the long run there must be something deeply corrupting about the daily exercise of a license to inflict pain.

Inflicting pain is a part of life, it will be said, and must be accepted as an essential element of many processes by which people attain objectives which are enormously valuable to others as well as to themselves. I think that quite true. But it is equally true, and more important, that a person who has not come to terms with his own pleasure in inflicting pain is an incomplete and often a dangerous person. What is most striking about many members of the faculty is their obliviousness to what must be one of the most important elements in their lives. That obliviousness is a dereliction, not because self-knowledge is a good in itself, but because it is

Before turning to the role of the students in the Law School community, I have a few tentative suggestions for an explanation of the phenomenon I have been describing. Law professors were once law students, and like most law students tend to be unusually aggressive people. After their academic successes, many of them came early to teaching and have stayed long. It is interesting to think about some of the elements of the equilibrium that keeps these unusually intelligent men at this particular remove from "real life."

Most aggressive people, myself included, find themselves confronted with a difficult problem: how to channel their energy in basically constructive rather than destructive directions. The problem is both moral and social. Teaching law is an attractive solution. A great deal of aggression can be let off in the classroom, and whatever destruction occurs may be not only justified in the name of "effectiveness" but also rewarded with admiration and respect. The mastery and sometimes the transformation of the law itself offers a parallel satisfaction. The live and undocile client represents a kind of threat to a cherished self-control, and is to be kept at a distance. It is not the real world itself, but the possible violence of one's response to it which is frightening.

Students are frightening too, in a variety of ways, and this explains some of the violence of the response to them. Some teachers seem to feel that they must be "tough" in order to "control" their classes, not in the sense of preventing pandemonium but in that of restraining the students' desire to disintegrate discussions into irrelevance. Others respond instantly to the slightest suggestion that a student is becoming "uppity," whether by humor or by a manifest unwillingness to give himself to the socratic game. The powerful artillery of ridicule is often rolled out with an abruptness which suggests something close to panic.

All this is “curbstone psychoanalysis” run wild, I freely admit. There are of course numerous other characteristics of law professors which might be singled out, and there are a multiplicity of individual responses to this particular problem. And no one element “explains” the atmosphere of the Law School. Nonetheless I find it helpful in trying to understand what I see around me. A rather grim conclusion is suggested: the element of destructive aggression, of terrorism, in teaching law is a real “psychic good” for the teacher. A critique which challenges the morality of that good is therefore unlikely to get a sympathetic response.⁵

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II. The Students

At the threshold, it seems well to address the argument that the Law School has *no* effect on the personalities of its students. It seems incredible that anyone—and especially a teacher—should put this view forward, but it happens quite often among those who find inquiries of the sort attempted here particularly distasteful. The answer is that it is at best naive for the faculty to suppose, with evident self-satisfaction, that the School brilliantly transforms the unwashed first year student into an elegant whiz-kid or sturdy craftsman, but that the process is somehow purely “intellectual.” If nothing more than the capacity of one’s “mind” (whatever that means) is changed by the Law School, then surely the institution is a failure. This is not to suggest that the students can legitimately shift responsibility for all the ills of the lawyer-infested “real world” onto the backs of the poor teachers. I mean only that to deny that teachers affect students is self-delusion of a rather shoddy sort.

A. Some General Observations

One of the most striking characteristics of the first year at the Law School is that a very great deal of social interaction goes on among students in class, even though the situation would appear to an outsider to be completely dominated by the relationship between the teacher and

the individual he is interrogating. To a large extent, students get to know the group to which they belong before they make large numbers of individual friends; the character of the group is thus very important in their feeling about the Law School in general.

The atmosphere of collective terror has already been mentioned. It is important that we are dealing with a particular kind of terror: that of a person who knows himself defenseless before a person who has a demonstrated desire to hurt him. The salutary feeling of tension before going into battle is notably absent during the ten minutes between classes. The fear is the fear of the victim.⁶

First year students when acting as a group in class are as cruel if not crueller than the teachers.⁷ They howl with glee when one of their number is dismembered. Many times during the first year I felt ashamed that my own laughter was uncontrollable, that the slight hysteria in the room infected me too. But the teacher who provokes, orchestrates and then openly revels in these displays should be far more ashamed. This is not to say by any means that all the humor is cruel, nor that it is only humor which can be cruel. There is something more degrading still about the professorial tone which invites the whole class to join in contempt for a student’s point. Even those who do not succumb to laughter must sometimes accept this other sort of invitation, no matter how well they know that the contempt will eventually be turned on them as well.

But most impressive of all is the group’s submission. Students in first year classes at the Law School are rapt as no other students I have ever seen. They are so emotionally enthralled by the process going on around them that they miss obvious points they would catch instantly outside class, and fall into traps or deliberately confusing trains of thought when their basic understanding is perfectly sound. They accept the importance of what they are about largely without question, and lay themselves bare to the tender mercies of the teacher with an astonishing humility.

The contradictory emotions which underlie the “normal” classroom response are suggested by a number of remarks which are repeated over and over again—often with a slightly ridiculous conviction—outside of class: “Anyone who can get into this school has to be very, very smart to start with.” “I just didn’t understand a *single word* of what he was saying today.” Or: “He’s brilliant. He was number one in his class and editor of the Law Review at _____.” “I hate that guy.” Or: “I couldn’t care less about grades or all this competition.” “I know I won’t do very well. I just *know* it. You can tell.”

While the characteristic of the student body which is most in the minds of everyone at the Law School is that they all did superbly well before coming here, there are a number of other widespread qualities which are important in understanding the students’ response to the way they are taught. Students arriving in the last few years have been through what amounts to a prolonged nation-wide competition of intimidating rigor. When they say they are not competitive, they must mean something very strange, or be deluding themselves. Law students as a group are more aggressive than students in other professional disciplines,⁸ although many of them are clearly much less aggressive than their teachers. Nonetheless, they vary greatly in their real ability—or perhaps only preparation—to handle the law as an academic subject. They are almost all over twenty-one, but very few of them have had any experience of the real world beyond that acquired during summers and perhaps in a year or two in the especially unreal world of an English university. Their self-confidence is likely to be dependent to some significant degree on their past academic successes, or on their prestige at other educational institutions. They are moving toward a time of life when crucial decisions about one’s role in life must be made, a time when many talented young men find themselves afflicted with an unaccustomed indecision and self-doubt.⁹

A basic question which most students ask themselves more or less repeatedly throughout the first year is: *Why am I taking this shit from them?* It is not the work load which is being challenged. It is the underlying relationship of teacher to student. Is it acceptable at 22 or 23 or 24 to let oneself be publicly insulted, day after day, by another man no matter how brilliant? Is it acceptable to submerge oneself in a group which responds with Pavlovian consistency to suggestions you find degrading? Is it acceptable, after years spent dealing with the complicated emotions inevitably involved in the relations of intelligent and aggressive young men with their fathers, to plunge oneself into an essentially paternalistic community where the route to success is to establish yourself firmly in the affections of powerful older men?

On the most obvious level, this question is answered in one or both of the following ways: "It's intellectually stimulating." "I want to be a good lawyer." The validity of these justifications will be examined later. On a deeper level, I have a strong intuition, surprisingly often confirmed indirectly in talking to people, that the answer is: "Because I *deserve* to take this shit. I am wrong and stupid. There is no reason why I should be treated by this great man with even the most minimal human respect."

To go beyond these very general observations, it is necessary to begin dividing the students into different groups. There are many classifications one could choose. I have chosen three: according to academic success; according to the pleasure taken in the "intellectual" side of the law; according to degree of political "radicalism."

B. Two Student Types

I will proceed here by the construction of two "types," one meant to be representative of many aspects of students in the bottom half of the class; the other representing many students in the top quarter. Of course there is an infinity of responses to the Law School, and no description of a "type" can even begin to attain the complexity which is needed to understand an actual person.

Nonetheless, the exercise may be

It seems best to state explicitly that I do not think the qualities I ascribe to my "types" are morally neutral. I think there is something quite clearly wrong with people who resemble the two "typical students" described: they fail in "integration," they compartmentalize their lives and fail to apply the same standards of self-knowledge and responsibility across the board; they lack wholeness; when one speaks with them, there is a sense that what they say about themselves is unreliable, sometimes "inauthentic," as though they had been unable to bring together in their own minds all the emotions, as well as all the arguments, which are relevant to how one feels about a given point. I am speaking in terms of the vaguest sort of moral standard, but a difficult one which I only very rarely have the courage to apply to myself.

My first type comes to the Law School largely because he wants to be a lawyer—a good lawyer but not necessarily a famous one—and has heard that this is one of the best schools in the country. He is likely to have been very successful at academic competition, but he has not developed an overwhelmingly aggressive manner. When he first arrives he is eager to learn, and more than ready to contribute his bit in class, but he is somewhat uncertain about how well he will come out in comparison with the "brilliant" student body he has heard so much about.

Throughout the first year this type is torn between a strong conviction that he will not "make it" and a blind faith in the power of hard work to bring him through. The combined impact of the classroom and the aggressive bull session is overwhelming to his self-confidence. When he gets distinctly mediocre grades, he is not really surprised; the formal seal has been put on a gradual process of changing his self-image, and behavior patterns which were fluid become set in a new mode.¹⁰

This type continues to go fairly regularly to class, and does a solid minimum of studying. His work does not improve; in fact it loses something in underlying seriousness as it gains in polish. What changes is his attitude. He

adopts a pose of total indifference to the Law School and to the law, or better yet a quiet contempt tinged with cynicism for the whole business. He avoids teachers like the plague, except for occasional School social events where he is embarrassed, deferential, and somehow gives the impression that things are less than perfectly all right. In class he is often unprepared, but that is the least of the problem. When forced to recite there is an odd incoherence about what he says, apparently at least a total refusal to enter into the Socratic dialogue in a meaningful way. This may be perceived as sullen hostility or as stupidity by the teacher, who is surprised to discover that this same student is quite capable of behaving rather like a law professor in other circumstances. The almost comatose passivity of the student before even the most outrageous, or fascinating, statement made in class seems incomprehensible.

This student learns a good deal of law, though much of it is understood in a particularly narrow way. The great unifying threads—philosophic, moral, intellectual—which draw apparently disparate areas together and give the law much of its fascination and much of its power are only indistinctly perceived, if at all. He also absorbs a quantum of Yale Law School rhetoric, and accepts, whether he knows it or not, a mass of legal knowledge which is riddled with the unexplored moral and philosophical biases of his teachers. The law is imposed on him, in a sense against his will.

From a superficial point of view, this typical student might be said to have "beaten the system." He gets his Yale LL.B., a good job, and a certain polish in the use of legal concepts. Some of his type, of course, do extraordinarily well outside. While at the Law School, he seems to avoid the frustrations inevitable for people who are deeply involved in community life, and he also obtains a sort of revenge on the whole place by withholding a crucial part of himself. Afterwards, he will argue that the trouble with law school is that it teaches you nothing which is of any use in the "real world," meaning the world of corporate law practice.

What are the costs to the individual? First, it is simply not true that this type “learns the law” without being influenced by his professors. In fact, he is “brainwashed” in a quite real sense: his head is filled with notions he barely understands but which he will use every day of his life as a lawyer, often with enormous effect, for good or evil, on the lives of totally dependent people. The nature of his response to the teaching of law denies him a chance to understand the concepts by which he will live, and I am convinced that he will be a worse person for having participated so willingly in the denial.

A second cost is harder to state: we lose something when we allow our fears, and the hostile pressure of the world around us, to drive us into passivity and cynicism. For an intelligent student eager to participate in the life going on around him to submit to becoming an apparently idiotic lump on a seat in a class is essentially degrading.

The costs for the institution are much clearer: classes are boring and dead. But if this is true, how to explain the apparent increase in boringness and deadness which a number of faculty members claim has occurred in the last few years? I will deal with this question in some detail later on. For the moment it is enough to point out that one suggested solution will have no practical effect. It is sometimes said that the problem is that the Law School has acquired an exaggerated reputation as a fascinating place for non-lawyers, and that the result has been the admission of many intelligent students who have no bent for the law, or interest in practicing it. The consequence is supposed to be a student body which rapidly becomes disillusioned with what they are doing (hence sullen and apathetic) and would be better off elsewhere. If my description of the apathetic student is correct, however, a change in “image” and admissions policy will have no effect on the “deadness” problem (although it might, of course, reduce the level of open, vocal protest against the “system”). Most of the students whose unwillingness to participate is so alarming tend to be both relatively

sure of their vocation as lawyers and relatively little attracted by the more “sexy” aspects of the Law School’s reputation.

My second typical student is apparently worlds away from my first. He is in the top quarter of the class (therefore likely to be on the Law Journal) and quite openly very much involved in learning the law, participating in the community, and so forth. He is a success, and his existence is felt (both by himself and by the faculty) to justify whatever one may find unpleasant about the way the Law School operates. He sees a fair amount of the faculty, and gets in general an extremely friendly response. He participates in class as much as he sees fit: his silence is not mis-interpreted as stupidity, and what he does say is treated with some respect.

What is interesting about this student is that he operates on two distinctly different levels, and is rather proud of it. There is a public self—most fully developed in relations with the faculty or with potential employers but also dominant in relations with the run of Law School acquaintances—which is characterized above all by control, an exact modulation of what is said to what is appropriate in the situation, an unusual preoccupation with getting directly to the point, getting the issue simplified down to manageable dimensions, avoiding “time wasting.”

All of these are of course attributes highly prized in successful lawyers. Nonetheless it is worthwhile to examine them further. The key element is control: my typical law student is impressed with his own intellectual mastery, but what is really unusual about him is the extent to which he is willing to banish fluid emotional response from his face-to-face relations with a large part of the people he knows. He accepts the “context,” whatever it may be, and achieves above all a sort of “respectability.” Getting directly to the point often means above all avoiding areas of ambiguity, “subjectivism,” issues too large for him to understand or which may provoke fundamental disagreement. “Time wasting” may in many circumstances be a synonym for “thought provoking.” This approach is not limited to legal problems. Often,

you will discover that my typical law student has adopted a series of simplifying “presumptions” for use in talking about love, death, power or anything else, although of course in his public role he is rarely willing to address these “time wasting” subjects at all.

The pose is one of disciplined enthusiasm, aggressiveness toward “the problem to be solved” and passive respect for the poser of the problem and his definition of it. The student conveys “hungriness” with no suggestion of a threat; intelligence with no implication that underlying premises will be challenged.

“But everything you describe is highly functional/operational/-effective!” (Yes, Virginia, there is a Santa Claus.) Perhaps this is so. The subject will be taken up later. However it may be, this type is unlikely to accept this aspect of himself, no matter how “operational” it may be, as exhausting his potentialities as a human being. Instead, he builds a “private self” as a counter-model to the “public self.”

He thinks of himself as having a talent for creative writing, or perhaps an unprecedentedly warm and emotional family, or an intuitive feel for music which would be incomprehensible to his classmates. Or perhaps he idealizes some moment of the past, and escapes into a haze of nostalgia whenever he is alone and not studying. Another pattern which would merit a paper in itself is that of the student who conceives of his relationships with women as being somehow a preserve wherein he is the diametric opposite of a “lawyer,” as though it were really possible to turn selves on and off like faucets.

Of course it is perfectly true that even successful law students do have private lives, and that these are often as rich in fact as they are felt to be. The point is that it is thought desirable to act in directly opposite ways in the two areas. As this type’s public life becomes more and more controlled and aggressive, often more and more dishonest and in any case less and less emotionally satisfying, his private life is invested with vast quantities of intense feeling, sentimentality,

idealism and exaggerated protectiveness. There is something truly pathetic about his terror of talking about these "private matters" in any context which, no matter how appropriate in other ways, has even a whiff of the "legal" about it.

This type is likely to be quite aware that he has feelings of this kind. On those very rare occasions when he will discuss the matter with another person, he usually explains it in one of two ways: although he looks, talks, smells, and appears to think like a lawyer, *in fact* he is altogether different from his colleagues—he is a "real person"; alternatively, he has been forced to "compartmentalize" because The Law, and therefore all human relations connected with it, is "inhuman" or "cold." The first of these explanations would be more convincing if it were not for the fact that an astonishingly large number of successful law students share the idea that they are somehow "different," and that they all seem to be "different" in similar ways. Whom are they "different" from?

The second explanation implies an anthropomorphism of the law as misleading as the view of the law as a "brooding omnipresence." What is really meant is that as lawyers we behave in ways so destructive and so frightening that we must deny that behavior altogether in other parts of our lives. The existence of the adversary system does not "explain" why law students and law professors behave toward each other with hostility (nor does it explain the same traits among practicing lawyers). The guiding principles of the law, and the insights of its individual geniuses, are no more and often less "cold" than those of psychology or history. The behavior of our "public selves" which so alarms us is a social fact like any other, rooted in the way we live and understand ourselves. It is not in any sense "determined" by the abstract nature of what we study. If English literature were taught as law is, and by professors with the same complex of emotions toward their students and their work, I do not doubt for a minute that it too would be seen by students as "inhuman."

An evaluation of the "effectiveness" of such students is incomplete unless it includes some estimates of the psychological cost of their particular resolution of the problem of aggression (of course there are other problems involved as well). One cost seems to me to be that the division of life into hermetically sealed "private" (emotional) and "public" (effectiveness) compartments must lead to deformations in both areas. There is more to the law than effectiveness. The values and emotions evoked in family life, for example, are highly relevant to many practical legal problems, and when they can be imported only implicitly, disguised in various kinds of "rational" dress, their impact cannot be fairly assessed. In the same way, the underlying values and approaches of the law do not exist in a vacuum; lawyers import them willy nilly into private life. When this is done unconsciously, the result is likely to be a group of insufferable tics and mannerisms rather than an enrichment.

There is another aspect to the same problem: the creation of a model of private life in direct opposition to public life as a lawyer may make it possible to accept conduct in the public area which would otherwise be intolerable. Because I write short stories it is easier for me to accept the hostile atmosphere of the Law School—and of course less alarming to me when I myself become hostile in dealing with Law School acquaintances. Solutions of this kind are attractive because they seem both "practical" and constructive. But is it really acceptable that all day long one should never even *try* to be one's whole self at any given moment? There is something irresponsible about a profession which organizes itself to utilize so much of a person's public energies without accepting the controls implied in his private emotions.

The attainment of self-mastery in order to be able to serve others in the most effective possible way is an ideal which contains an ambiguity. In one sense it means learning to restrain one's impulses to greed and self-indulgence so that one can do good to other people and the community, and in this sense it is a moral ambition of a high order. In another, but closely related sense, it means learning to suppress any emotion that might offend one's master—whether individual or institutional—so as to be a more perfect tool to his ends, and in this sense it is anything but a moral ambition. I doubt that any law student can be really clear in his own mind as to what this ambiguity means to him; to pretend that it does not exist, or can be "resolved," is to court disaster.

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C. The Changing "Intellectual Response" at Law School

The argument has been put forward that the reason for the growth of apathy and boredom at the Law School, and for some part of the criticism which has arisen in the last two years, is that we are going through a "trough" in interest in things intellectual. It is supposed that the domestic social crisis and the war in Vietnam have diverted the energy and interest of a whole generation of students away from the "aesthetic experience" of the law. Students are struck by the impotence of the law they learn to change what they see as overwhelming evils in the society they live in, and they feel that what are offered as "interesting problems" are in fact irrelevant.

It is easy to see the attraction of this view: it implies that the crisis is temporary. Sympathy for the students who must go through Law School at a particularly difficult time for the country can be combined with the hope that in a year or two New Haven will return to the atmosphere of the early Kennedy or late Eisenhower years. At the same time, the argument appeals to vast social forces altogether beyond the control of the individual professor; this both makes it difficult to refute and suggests that no one can do much about the phenomenon.

I think there is a kernel of truth and a bushel of obscurantism to this argument. A key to the whole proposition is the distinction between "intellectual" response and other kinds of response. It is certainly true that in a rough way one can distinguish intellectuals at the Law School from those who see the law more as a means than as an end in itself. Oddly enough, however, it seems to me that the real intellectuals are spread out among apathetic, successful and other kinds of students. A good number of people whose approach to non-legal matters is highly "intellectual" do not respond to Law School at all after the first year (or semester), and their indifference has nothing to do with the war in Vietnam. They have been "turned off," by the extraordinary atmosphere of hostility, by what they see as their own failure, or by something else peculiar to themselves.

But there is a more fundamental criticism. I have a strong feeling that when a professor speaks about "intellectual response" in a classroom at the Law School, what he really means is an enthusiastic, eager, involved response to the particular question he has identified for the class as "interesting." Few teachers anywhere show an enormous amount of interest in exactly what it is that makes their students enthusiastic and excited until it becomes apparent to them that for some reason or another they have lost the capacity to evoke that response. One suspects that the emphasis on "intellect" is a way of shifting the onus onto the students.

But forgetting about intellect, why the decline in enthusiasm and involvement? There are two aspects of the enthusiastic response that I think have been somewhat overlooked. To a very large extent, student behavior in the classroom is determined by group norms. Often, when the group has apparently made a decision that participation is appropriate, almost everyone participates, and enthusiastically. When the group has decided that participation is inappropriate, often no one at all participates. Of course the interest of the class for individual students is important, and is a significant factor in the group decision. But it is crucial to recognize

that much more than a simple series of individual decisions is going on.

This approach suggests some questions: Have students as a group changed their idea of what is an appropriate response to *all* classroom situations? Are there particular classroom characteristics which have become less likely to evoke a favorable group response? Of course to answer these questions one must appeal to broad social factors, and to that extent the Vietnam-intellectual response theory has validity.

It is quite clear that students as a group condemn certain kinds of behavior, and always have: brown-nosing is frowned upon; so are attempts to monopolize the discussion, digressions thought to be stupid or irrelevant, responses which show a lack of "cool," and so forth. To be aggressively "wrong" is very much frowned on, but to be totally passive and uncooperative is *not*. Being unprepared is not a sign of ignorance, nor is failure to pay attention a sin, however embarrassing it may be to everyone. A solid minimum of respect for the teacher is desirable; emotional outbursts of all kinds are not.

For a number of reasons enthusiasm is on its way out as a socially acceptable response for most people in large classes as currently taught. The academic tensions of law school are not in any sense something new to this generation of students: they have simply entered the last segment of a pipeline all of whose parts are neatly fitted together. Professors can no longer rely on their own much touted brilliance to make law school so much more interesting than college that the prolongation of helot status is acceptable.

An increase in competitiveness has now brought into sharp relief a characteristic of pre-legal education which was always latent: a terrific emphasis on convergent reasoning (what is *the* right answer to this question?) as opposed to divergent reasoning (*how many* right answers or valid approaches can you think of for this question?)¹¹ The decline of rote learning is of ambiguous value. When memorization is replaced by the investment of staggering amounts of energy in the quest for *the correct solution* which will satisfy the teacher,

and in avoidance of *the wrong answer* which will provoke anger or "ice cold indifference," the change may be on balance for the worse.

The increase in competition and the emphasis on relatively sterile modes of understanding have been accompanied by a gradual change in the social meaning of the various stages of the growing-up process. "Successful" teenage boys are expected to behave in most ways exactly like grown men, to exhibit restraint and reasonableness, to do top grade work (to get Advanced Placement) and to accept the sort of "responsibility" which means obeying adult rules. On the other hand, they are allowed a "youth culture", from which adults are altogether excluded, in a setting in which it is not necessary to come to terms in any meaningful way with the demands of productive life in the "real world."

College is not a change, especially at large universities. Adults continue to demand a very high level of performance, and continue to deny even a modicum of self-determination. Students live in a world made up of classmates where it is possible to play the "system" of success without ever fully accepting that one day one will be one of *them*. A protraction of adolescence of this kind may be enormously productive from an academic point of view, it may be useful for society as currently organized, but it has costs as well. No student intelligent enough to get into this Law School can avoid feeling an odd ambivalence about going through three more years as a peculiar kind of half-man. Yet there are not many students who are really prepared for anything else. "Success," which has consumed their energies for years, is their only real connection with adulthood.

There are many possible responses to this situation, including giving oneself enthusiastically to the new process, or "radical" rejection of the whole "system". But the first of these responses is becoming gradually more difficult over time. Already when I was in prep school our generation of students was thought to be radically different from that which preceded it.

We were excoriated for being “cynical” and “negative” (this in the last years of the famous “silent generation”). We had begun tentatively, but as a group, to reject the idea that it is acceptable to enter wholeheartedly into a system which made overwhelming demands on our emotions and our capacities without offering in return either any real cultural sustenance or any sense of autonomy.

The Law School *is* intellectually stimulating. But when you have been competing in deadly earnest since the age of ten, submitting constantly to your own fear of the teacher’s disapproval, accepting your own status as a non-person, there is a point at which *no* amount of intellectual interest will overcome your fear and revulsion at the spectacle of the professor smiling quietly to himself as he prepares to lay your guts out on the floor yet once again, paternally. Withdrawal, no matter how painful for one’s carefully nurtured sense that one is “a success,” is less difficult than to submit another time.

What I am describing is only a tendency: many people submit; others avoid the experience altogether; others go through some half unconscious variant. But it is a tendency which has been growing steadily for years, and sooner or later even the Yale Law School will have to recognize it.

And what of Vietnam and the social crisis? It seems to me that their main importance has been to provide the impetus for the beginning of a group rejection of much that is bad (and much that is good) in our academic culture. Students refuse to be enthusiastic not because they are “preoccupied” with “non-intellectual” issues, but because Vietnam, like most other wars, has made young people self-conscious, and therefore more reluctant than in the past to commit a part of themselves which they know to be fragile to a process which they know to be brutal.

A social norm is emerging; the refusal of enthusiasm is now promoted by a large number of indirect social pressures. It is unlikely that it will disappear with the end of the war or some miraculous transformation of the urban slums. Active involvement in enterprises like the Law School will be

<https://digitalcommons.law.yale.edu/yrlsa/vol1/iss1/7>

achieved only by a change in the atmosphere of the place itself, by a fundamental alteration of the social meaning of the behavior of students and teachers.

It should be obvious that the expedient of making the Law School seem dull to prospective students and then picking the less talented over the more talented could only delay the process of change. The problem is not that students do not know whether they want to be lawyers. They are not sure what kind of *people* they want to be.

D. Radicalism and Apathy

The number of students at the Law School who would describe themselves as “radicals” is small, yet their impact over the last two years has been great. I would suggest that the reason for this is that they are practically the only people in the school who have brought into some kind of conscious focus the conflicts and currents of change described in the previous pages. Law School radicals in general belong to the “activist” rather than the “hippie” strain in the youth cultural revolution, and as a result they tend to identify themselves in terms of their commitment to political and institutional change rather than in terms of their distinct approach to life. Nonetheless they have probably done more to expose the underlying problem of *being* at the Law School than to improve its institutional structure.

The radicals denounce “competition” in general; they have a preoccupation bordering on obsession with the problem of “selling out”; they criticize the content and organization of study at the Law School as irrelevant, meaning both that the school fails to play a responsible role as a catalyst of change in the community around it and that it reinforces rather than challenges tendencies in the students toward opportunism and social irresponsibility.¹² Of course there is nothing particularly novel about any of this. What makes the radicals important is that they have an explanation—albeit a simplistic one—and are committed to

action to bring about change. They believe that it is the structure of the institution, and especially the distribution of power within it, which is to blame. A whole life style has been built on this promise.

My objections to the basic analysis are altogether conventional (worse: they are “liberal”), and therefore not worth repeating at length here. I simply do not believe that either institutional structure, or the distribution of power, or for that matter the shiboleth of “participation” are particularly important in giving the Law School its peculiar atmosphere. The school is too much a part of the society around it—both as a part of the pipeline by which an elite is selected and as a reflection of the values of that elite—to be susceptible of significant change by “reorganization”. I think the Law School is on the whole a well governed place, responsive to what are seen as the needs of the students, and that if it were possible to formulate a program for concrete changes to improve the atmosphere, they would be accepted. I think the basic problem is a human one and endemic to the American upper middle class elite as a whole. Tinkering with structure is useful in a number of ways—to reduce the tension, to minimize some of the more glaring competitive deformations, to open the way for more communication between students and faculty—but in no way a substitute for an attack on the underlying forms of human relations which give the structure its meaning.

But whatever the value of their occasional substantive proposals, the fact that the radicals have had the courage to challenge the Law School openly has been of enormous benefit to everyone here. What they have done is to demonstrate both to faculty and students that the manifold deficiencies of the institution need not be accepted as in some way “inevitable”; and even the limited success of their efforts at organizing have shown that the discontent is far more generalized and more serious than had been supposed. The combination of their activities with what is perceived as a growing incapacity of the institution to get students excited about the law has led

to a general recognition that "something is happening," even if not as yet to any serious attempts on anyone's part to respond.

The faculty response to the radicals has thus far been ambivalent. On the one hand, their "representativeness" is constantly challenged, and it is implied that they are a mere handful of students intoxicated with utopian concepts who probably should not have been here in the first place.

On the other, there is a tendency to make frequent embarrassed jokes about the likelihood of confrontations, an end to "rational discourse," mobs, demagoguery, and so forth. The constant jokes about revolution suggest to me that a number of faculty members sense intuitively that under the passivity of the classroom there must be something more than pure boredom, and I think that intuition is correct. The radicals are highly representative in the sense that their active protest expresses feelings which almost all students share in one complicated variant or another.

The radicals are representative in another way as well. Like the other students they have had to come to terms with the internal and external pressures generated by an educational system of which the Law School is only a part. They are often as humble, earnest and submissive in class as the most abandoned of their conventionally successful comrades. They differ in that instead of constructing elaborate "private lives" or "identifying with the aggressor" they have begun to construct a sort of "counter-community" within the Law School, a more and more elaborate pattern of social, political and even academic activities which make the place more bearable. The Law School as a whole may eventually be a rather different place than it has been as a result.

The radicals have often been accused of wanting to abolish original sin, of yearning for a "perfect institution" which would somehow alter the very nature of man. This objection seems to me to miss the point, and when put in the supercilious tone of a bored and sophisticated adult to an idealistic child it is offensive. No matter how true it is that all of us "make do" and always will, it is also true that some ways of

making do are preferred over others. There are a vast number of things wrong with the solutions which most of us at the Law School (including the faculty) find ourselves forced to adopt. The radicals want to improve the situation. Rather than simply putting them down as utopian, it might be a good idea for those who find their analysis unacceptable to make their own inquiry into the problem. The problem is *there*.

The danger for the radicals seems to me to lie in fixating on the "system". It seems to me that it is as much a mistake to make a social construction like the Law School (or the United States Government) into a *bête noire* on which one can vent hostility as it is to turn the practice of corporate law into a "successful career" and so justify one's own submission. It is true that institutions are more than people acting autonomously, but it is not true that they are themselves animate. It seems to me that one gives up something quite real when one allows one's emotions to be diverted from the work of relating to, influencing, and if necessary confronting the people whose conduct *is* the institution. It is often true that the "rules" must be changed, but the rules are just "things", like money or status; there is something unhealthy about making them do service for the real human objects of aggression and love. (It has been suggested that this is "legal hippieism." If so, I am a legal hippie.)

However this may be, and even if the radicals on the whole are no more successful than the other students in bringing together in their own minds the various emotions and impulses provoked by a given situation, there is something important to be said for them which cannot be said for the others. They are aware of a fundamental problem and committed to using all of their faculties to solve it as best they can. They tend to accept their own psychic reality, and the burden of defining themselves in a world made up of other psychically real people. For this reason, they are likely to be more perceptive than their fellow students, both about themselves and about the people around them.

III.

Academic and Professional Values

Any criticism of the Law School which suggests that change is desirable is likely to be met by two objections: the capacity to turn out highly successful professionals must not be endangered; and the current organization of the School maximizes the intellectual quality of the work done here. These two arguments would not be so formidable if they were not used in a sort of "heads I win, tails you lose" combination by proponents of the status quo. A proposal put in terms of improving the lawyerly virtues of the student is met by the argument that academic standards are all-important. An argument which attacks the intellectual shallowness of much that is taught here is met by appeals to the value of technical competence and the "trade school" responsibility of the institution.

I should say at the outset that I think the dilemma presented by this revolving-door approach is very nearly completely illusory. The neat debater's point obscures the fact that we know very little about what actually produces either professional success or academic excellence. Moreover, both terms are broad enough to encompass a large number of experiments. The Law School has neither an academic nor a professional "temperature" which can be exactly measured and must be kept from falling by so much as a single point. All discussions of the kind now joined at the school operate implicitly on the assumption that there exists a rather wide leeway within which changes can be made without raising the spectre of "debasement" of the education offered here.

A. The Professional Model

At the outset, it seems best to meet the argument occasionally put forward that the Law School has no business turning out "successful" professionals if what is meant by this is that it should help staff corporate law firms and government agencies which are essentially reactionary. The argument is that professional success

as currently conceived means holding a prominent position as a supporter of the *status quo*, giving one's life to maintaining the efficiency and stability of a corrupt social order. Even those graduates who become innovative policy makers are seen as devoted mainly to preserving the existing structure of power and values while "accommodating" as much as may be necessary.

For me, the short answer to this is that I am not a revolutionary. On a more practical level, I do not think a revolutionary situation exists in the United States today, nor do I think such a situation likely in the near future. Someone must provide the system as it now operates with "successful professionals," and whoever performs that function has enormous power and enormous responsibility. What is important to me is that that power be exercised as well as possible, that it be used to improve the human quality of the society. I think it desirable for the Yale Law School to have a large share of this power and this responsibility because I think that the institution is capable of exercising it well—much better than it exercises it now. I therefore take as a premise for the discussion that the Law School should continue to turn out successful professionals, in all the conventional meanings of the term.¹³ I accept this as a limitation on what changes can be made in the School. It remains to examine the nature of the limitation.

What do we mean when we say that the Law School has the capacity to turn out highly successful professionals? For students, the basic meaning is that they are courted by the best law firms, who manage to give the impression that there really is something special about the Yale LL.B. For teachers, there are reports from graduates praising the education they got, news of the progression of graduates from one job to another, each better than the last; there is the evidence of spectacular success outside the legal world, the cumulation of honors and places of influence for older men, the wielding of real power in "staff" and like capacities by the young. Finally, there is the strong intuitive sense that graduates are *different* when they leave. The

"bright" ones are honed to a fine edge of productivity and flashiness; the others have an air of trusty competence.

It seems fairly clear that there are two kinds of success which are thought to justify the school from a professional point of view. First, there are the "whiz kids", the contribution of Yale to top policy formulation (whether as clerks and professors, legislative counsels, heads of innovative government programs, Under-Secretaries of State, business innovators). These people are conceived of (and I think rightly) as an important part of the dynamic segment of the American managerial elite; they are people who get things done, both for themselves and for vast numbers of other people. Second, there is the "profession" in a more limited sense, the body of practitioners who may also exercise great power and achieve great prestige, but who are primarily solid lawyer types, contributing to the community through legal and business skills. They are in a sense the "human infra-structure" essential for the smooth operation and orderly progress of a great industrial nation-state.

Why is Yale so successful in feeding people into these two related elites? First, a goodly number of students are destined for success by the combination of social position, connections, intelligence, and vocational bent long before they come to Yale. To have gone to Yale is important to them in terms of success only because it is one of the best last items one can have on an educational resume. The Law School contributes only its name to their progress. For others, exposure to the actual experience of Law School is very important; they grow intellectually and emotionally and begin to see what they are about in a way which eluded them in college. But for many of these people, *any* respectable law school would have the same effect. As far as their success is concerned, having gone to Yale is good for their confidence and adds prestige, but if they could have gone somewhere else and called it Yale, they would be just as well off.

I think a considerably larger group benefits from Yale in ways not available at most other schools. But for many of them, what is crucial is being a member of a student body of very high calibre, taught by a faculty of higher than normal intelligence. For them, it is possible that the School could be organized in any one of a thousand ways, and so long as there was a substantial amount of interchange among talented people, the result in terms of success would be the same.

My point is not that everything but admissions and hiring policy are irrelevant. It is that a faculty member should think twice before arguing that the particular emotional atmosphere which dominates the classroom here is in some sense essential to the production of successful graduates. It seems clear to me that the emotional tone of the Law School does have an influence on professional careers, but equally clear that to argue for a direct positive relationship between it and "success" is simplistic.

Why is it desirable that graduates be professionally successful? The primary reason is certainly not so that they will be rich or happy; nor is it that success is what they want. Surely the two basic reasons are that on the one hand we associate success with a quality of work which we find desirable for its own sake, and that on the other we see that people who are conventionally successful at the law often have great power to do good or evil. It seems to me, anyway, that the Law School is justified in emphasizing professional success only to the extent that that success is beneficial to the community. I do not mean by this that only the success of "liberals" or people of a progressive bent is tolerable—in fact I am not talking about politics at all. I am talking about the underlying qualities of self-awareness and empathy without which the exercise of power is likely to be arbitrary and destructive, no matter how "rational".

However much I might like to make the argument that a change in the atmosphere of the Law School would have uniquely positive results from a professional point of view, it

seems clear to me that in one respect the emotions generated are “functional”. The typical “successful” law student develops qualities of personality which are very useful to him in climbing to the top of bureaucratic organizations: he is highly aggressive and competitive in relation to his peers and extremely submissive toward the authority which decrees the structure of his life. I do not doubt for a minute that the decision, made early in his school experience, to handle the problem of aggression by accepting all questions posed as valid and then trying desperately to be first to find the “right” answer is of great importance throughout his career.

I am therefore willing to admit that the Yale Law School might turn out a marginally smaller number of Under-Secretaries of State if the professors were less hostile and the students less passive. But there are still two questions to be answered before concluding that such a marginal change would be for the worse. Would the Under-Secretaries who took their place be any different? And would the Yale graduates who still made it to the top of the greasy pole be any better than their predecessors? The world is full of whiz kid law students lusting to be Richard Goodwin. It seems inherently unlikely that a more human atmosphere at the Yale Law School would deprive the Nation in any significant way.

The second question is harder to answer. Nonetheless it seems clear to me that the personal costs of turning oneself into a successful law student type are professional costs as well. Of course it is impossible to be “successful” within the system without accepting it to some extent. Yet there are a large variety of ways to accept, and submission, passivity anchored by a faith in one’s “private life” to keep one somehow uncorrupted, seems to me a poor way. If there is anything at all to be said (and I think there is) for the institutions within which law students are successful, it seems to me to be that they admit of creative manipulation and change. If one is to approach them divided within oneself, it seems to me best that the division should be openly over their value,

their future, their quality as places for people to act, and not over whether one can tolerate “selling out” to them if one has enough private sustenance. The profession (here meaning the whole gamut of activities dominated by lawyers) and the national constituency it serves would be better off if approached with less fear, less distortion of the self, by those who are supposed to be its life blood.

So far, the discussion has been in terms of the whiz kids. The case that the profession suffers as a result of the atmosphere of law school is easier to make when we turn to those students who the faculty conceives as cut out for more conventional kinds of professional success. First, it seems abundantly clear that the reaction of complete withdrawal and cynicism about the law which characterizes a very substantial number of students can hardly be professionally productive. What they learn of the law while refusing to admit that it has any interest for them could certainly be as well conveyed by a far inferior faculty. It is hard to imagine that a decision to abate the terror in the first year classroom could have anything but good effects on their purely technical competence.

But the professional problem goes much deeper. Students who are not in any way excited by the Law School can learn the techniques of the particular branch of the law they choose after they enter practice, and the only bad result will be that they will reproach the school with failure to give them a sufficiently “practical” education. It is much harder for anyone actually engaged in practice to take the time to make the far more difficult and frustrating investigations into “abstract” or even “philosophical” aspects of the law which make it more than a set of “neutral” techniques. Yet these investigations are much more than a “luxury” for the professional. While it is true that it takes little reflection to be able to find out how many directors are needed to form a corporation in Connecticut, it is equally true that conventionally successful lawyers perform professional functions that go far beyond the technicalities of their practice. Law professors spend a great deal of time thinking about the larger questions

those functions involve. It is too bad that their approach to teaching and to community life in general makes it almost impossible for them to get their thoughts across to the great majority of their students.

The irony of this is that many professors defend courses which they admit are not stimulating intellectually on the ground that they are necessary to give a minimum of professional competence. In fact, most of those courses are not of a “nuts and bolts” type at all: they are a compromise between the theoretical interests of the teacher and a vague catalogue of areas of expertise. The result is that the student who is unable to face up to the professor’s theoretical assault—often as incoherent as it is aggressive—has to fall back on a very meagre residue of “practically useful” content, almost all of which he will have to relearn anyway if he is ever confronted with a similar case in practice.

And what of the famous “development of analytical skills”? Does it take place? More than would take place for the same people in another kind of school? Taught by a different method? I must admit I find the evidence for this virtue of a legal education too sparse for serious discussion. The one thing that is clear is that the analytical capacity of many students is far, far greater outside class than it is in. If our minds are really being “honed” it seems clear to me that it is happening in the library, or in conversations with other students, or very occasionally with teachers out of class, and always under the terrific handicap created by an oppressive emotional atmosphere.

B. The Academic Model

While most people at the Law School would place about equal emphasis on the professional and strictly academic functions of the school, there are a few professors and a few students who clearly give priority to the “intellectual” side. I am one of them. It seems to me that the academic virtues largely although not entirely subsume the professional or “training” ones, so that students are best served by keeping the nuts and bolts work to a minimum. There are, however, a number of conclusions not uncommonly drawn from this academic model with which I strongly disagree.

There is a tendency to justify almost everything about the institution as required for the maintenance of its very high academic standards. Before examining the conclusions drawn from this vaunted excellence, it seems well to briefly explore its reality.

It seems to me that when looked at as a whole the Yale Law School fails miserably to live up to its academic and intellectual pretensions. Some courses are superb; others are really terrible. The great majority represent an honest effort ending in mediocrity or intellectual shallowness. Students who love the law can always salvage something; if nothing else, they can derive nourishment from the problems presented by teachers who fail to follow up or even fully understand what they are saying. But most students do not particularly love the law; after the first semester they get little more from class than they could from a good horn book.

I do not think the problem derives either from lack of intelligence among teachers or from lack of application on their part. I think law professors as a group are going through a “trough”, largely as a result of the failure of a number of intellectual and political experiments of the last three decades, and find it difficult to respond creatively to the law as an academic subject. What is altogether absent from the Law School is the feeling of intellectual tension which comes of the confrontation of ideas in the

process of growth. Yale notoriously had this quality in the 1930’s. Harvard College had it in the early sixties.

An interest in applying the concepts of a variety of fields to poverty law or land law is no substitute for creativity. Nor is even the most monumental expertise in an aspect of the law as it exists. What is needed is a feeling of the existence of problems unexplored not because no one has bothered to think of them but because the light of a new theory has only recently been turned on them. What is needed is a feeling that for once a piece of doctrine will be challenged from a *new* direction rather than confronted for the thousandth time with some well known counter-vailing principle. The law school classroom is strewn with the corpses of ideas that did not succeed, of new approaches that no one took up. The teacher seems to be saying at each moment “I *know* there is nowhere to go along this line. I haven’t much to say, but it’s all there is.”

The conclusion drawn by even the most talented students is terribly depressing: work interstitially, unearth something, apply simple logic where no one has thought to before. It is extraordinarily simple to be “brilliant” once you get the hang of it: look for the “dilemmas”, “key value choices”, and the areas where institutional competency is in question. All the rest is memorization.¹⁴ “This cuts against that.” “When you unpack this concept . . .” are the key phrases. The teacher who asks for more is simply a tough grader. After a certain amount of this, the impression grows that the law is without what could properly be called theoretical or philosophical problems. There are only “conflicting principles”, factors to be “balanced”, and problems to be “left” to this, that or the other institution, and the process by which that institution reaches its decision is somehow irrelevant to an understanding of the law.

It has come to be recognized that “political economy” is now extinct. What was once the most exciting of the behavioral sciences is now the territory of technicians executing the practical decisions of “policy makers”, for which read “politicians”. The law as an academic subject *could* have as much vitality as economics ever did. I am an optimist: it seems to me that at Yale this could be achieved by asking “Why” over and over again rather than stopping as soon as the piece of legal behavior being studied has been “unpacked” into a neat little pile of “values” to be “balanced”. What makes me so sure of this is that some teachers do it, although even they tend to disguise the process, as though they were afraid they would lose the students’ interest the minute it became clear that something more than a particularly confusing exposition of “the law” was going on.

In the classroom all of this manifests itself in a pervading vice: the unstated assumption. It is assumed that all students share those assumptions, or that students are not worth arguing with about assumptions, or perhaps there is an unawareness of how important the assumptions actually are. There is virtually never a conscious effort to build two models based on different principles, or even to see how one set of principles will run through a large body of law to create a series of results quite different from those arrived at either piecemeal or by a different approach.

Students rapidly get used to this approach. They are passive to start with; they want to please. After a while they tend to be deeply apologetic, to their fellow students as well as to the teacher, whenever they appear to be raising a really fundamental question about what is going on. Since nothing of any great interest is offered, students become eager to “get on with it”; the objective is to accumulate as many nuggets of pseudo-concrete “knowledge”, or rather as much knowledge of the teacher’s “views” as is possible in the hour. It is no wonder that years of this eventually produce a feeling of both sullenness and hostility in teachers and students.

85 One response has been the student demand for "relevance". In one sense this is no more than a plea by a particular group of students for work in particular fields of the law which interest them. On this level it is very much like any other request for a change in the curriculum. But the request has another meaning as well, it represents a demand for *stimulation* which is shared by many students who have no overwhelming interest in urban law as a discrete field. It would seem to me to be desirable that the debate about "relevance" carried on between the radicals and the faculty should go beyond the question of whether or not the radicals will get faculty time and money devoted to the projects which interest them. Unless a broader challenge is made, the courses in urban law or whatever will be no more interesting than the courses currently taught in similarly practical fields (e.g. various aspects of commercial law).

What of the argument that things must be as they are at the Law School because that is necessary to maintain its high academic standards? The argument has two branches. The first is that the Law School simply admits the "brightest" students, hires the most "brilliant" teachers, and then lets the teachers teach "exactly what they want." Ergo, the Law School has the highest possible academic standards, and anyone who might want to change any of the three policies in any way would, practically by definition, be betraying the ideal of intellectual excellence.

This is sophistic even for a law professor. Both "bright" and "brilliant" are terms defined in practice through a complicated set of criteria, all of which shift over time, and each one of which represents a set of judgments about "relevance" of exactly the sort discussed above. "Brilliant" professors, for example, are very young men who have gotten smashing grades in law school, clerked, written a few law review articles, and perhaps practiced for a year or two. They may indeed be the best people one could possibly find for the job; it may be true that any other way of hiring teachers is hopeless; but it is ridiculous to suggest that they are selected by some simple standard of brilliance.

The idea that teachers teach "exactly what they want to" at the Law School is equally vacuous. This is supposed to mean that no one is "coerced" into teaching a course. The chairman of the Curriculum Committee has explained with admirable ambiguity that its function is to "make sure" that the basic courses which all agree ought to be taught are taught. This is achieved, without "coercion", by, guess what, "persuasion"! It is perfectly clear that the faculty accepts a large responsibility, both individually and as a group, to make sure that the curriculum meets some standard of depth, diversity, etc. I have not the slightest doubt that if the students and faculty come to feel that serious reform in course offerings and teaching techniques is needed, there will be a gradual response to the new consensus without it being necessary to keel-haul anyone.

The second branch of the academic model argument can be summarized as "A teacher has to break some eggs to make an academic omelette." The idea is that teachers at the Law School treat students as their exact intellectual equals, this being the most efficient way toward truth, and that if some students are not up to the challenge, that is an unfortunate sacrifice to be made in the name of intellectual progress. If the teachers pampered the students, standards would be lowered (bad points might sneak by unnoticed in class).

The simple answer here is that teachers virtually *never* treat students as their intellectual equals in class. The Law School is a "community of scholars" only in the sense that students on the Law Review are treated as promising junior versions of faculty members; for the rest of the students the roles of professor and student are carefully defined in every encounter, and there is not even a suggestion that they might be transcended at the intellectual level. I do not think this is bad, although the extent of the discrimination in favor of success (= good grades) is rather sickening. The idea that the basic problem will be solved by "unstructuring" student/faculty contact strikes me as utopian. A far more important objective is to see to it that within their respective roles students and faculty treat each other decently.

There is no question in my mind that the Yale Law School is one of the best in the country. There is also no question that as an academic institution it greatly lessens its own effectiveness by perpetuating an atmosphere which makes it difficult for its students to be academically creative. Great stores of academic talent are wasted when students respond to that atmosphere by withdrawal; other talents are turned toward relatively sterile approaches and are impoverished by the demands of a particularly emotionally depleting kind of "success".¹⁵

IV. Conclusion

If there is "revolution" in the air, it is not primarily institutional, but psychic territory which is at stake, or the whole thing is a waste of time.

November 17, 1968

Postscript

Since I wrote the paper reproduced above, students at just about every "national" law school in the country have begun to agitate—often successfully—for various kinds of changes in school structure. I have no more faith now than a year ago in the substantive efficacy of "tinkering", but I have been persuaded that by the very act of organization the activists are bringing beneficial psychological changes. Most important, students and faculty in the elite schools have begun to express their emotions at least a little, and while this may be disturbing, indeed sometimes terrifying, to all concerned, I think it is a step in the right direction. As for the analysis above, I think it still holds, but would like to add, without attempting to integrate, two observations.

Ambivalence and Projection: HLA, HLSN, HLSU, SHLSU.

There are a large number of students at the Law School (perhaps as much as 30 or 40 per cent of the student body) who feel a strong and unpleasant ambivalence about practicing law for a conventional law firm. This combination of attraction and repulsion toward the traditional notion of professional "success" is matched by a similar and symmetrical ambivalence felt toward such alternatives as a life devoted to poverty law, radical activism, or what is vaguely conceived as "being creative." A number of students who feel these conflicts resolve them superficially by a characteristic Hip Law Student's Neurosis which leads to a characteristic Hip Law Student's Unhappiness.

Hip Law Student's Neurosis (HLSN) consists in projecting one's feelings of attraction to conventional private practice and one's feelings of repulsion toward a life of insecure self-sacrifice onto one's fellow students. Once this has been effected, the HLS is—as far as he can tell—left only with feelings of attraction to activist or aesthetic self-sacrifice and feelings of repulsion toward conventional practice. The characteristic form of expression of a person suffering from HLSN is denunciation of the careerism, opportunism, sterile legalism, and devotion to mindless studying of his classmates combined with assertion of his determination to follow his own feelings in the direction of "some other kind of life."

HLSN produces a variety of ironic misperceptions of the Law School, two of which are particularly worthy of note. The first is Library Syndrome. The HLS is firmly, indeed categorically and dogmatically, convinced that the library is at all times filled with a mass of students devoting themselves virtually without rest to academic success. This mass of careerist students is conceived as truly phenomenal in its passion for all that is most sterile, technical, abstruse, and boring about the law. The HLS will argue that exactly because of this devotion to the pedantic, the careerist majority is learning a great deal of law which he

himself is constitutionally incapable of learning, and is therefore destined to a conventional legal success which—he is proud to say—he could not have if he wanted it. Library Syndrome is exposed if one stops to think that all the HLS's spend some time in the library, which is too small to hold more than a fraction of the student body at any given time. Enough students, from all groups within the student body, pass enough fractions of their time there to constantly keep it full. But the mass of industrious students simply does not exist: if the HLS spent several consecutive days in the library he would realize that its fullness is the result of constant turnover.

A similar misperception applies to classes. The HLS will assert that the industrious mass is composed of people who go to class and make sterile, legalistic interventions in search of teacher approval. Yet the HLS himself will admit to going to class occasionally, and to raising his hand to make a sterile, legalistic statement. After all, since that's what people who go to class do and appreciate, there would be no point in his trying to behave any differently. As with the library, the mass of industrious careerist students is an illusion created by a mass of HLS's all behaving as they think they must—or might as well—given the hopeless corruption of their peers.

HLSN produces a particular kind of unhappiness (HLSU): a combination of loneliness, distrust of other students, and anxiety about the future. Loneliness is the immediate result of projection, since the projection defines virtually all other students as tainted with the selfishness, blindness, opportunism, etc. which the projector has escaped. The fact that the HLS lives characteristically in small groups of other HLS's, and that these groups spend most of their time expressing their feelings of alienation from the illusory mass of careerists does not lessen loneliness. Some HLS's will simply emphasize how tiny their group is, what a forsaken island in the sea of three-piece-suited potential Wall Streeters. Others put forward an argument which

illustrates perfectly the deep distrust which HLSN produces, a distrust which in turn reenforces the neurosis.

A sophisticated HLS will point out that in spite of the fact that a very large number of his fellow students go around *sounding* like HLS's, denouncing the careerism of the vast mass of the student body, it is nonetheless true that after graduation a large proportion of these pseudo-HLS's actually renounce their alienation and integrate themselves in the most abandoned fashion into conventional practice. The sophisticated HLS will adduce from this incontestable fact that in any group of avowed HLSs there are a large number of traitors, masqueraders, men of little faith and shoddy fibre who will desert the cause at the first opportunity. The sophisticated HLS therefore suffers from a particularly acute form of unhappiness (SHLSU): he is surrounded not only by careerism but also by hypocrisy.

Anxiety about the future caused by deep and multiple ambivalence is at the root of HLSN, and the projection which causes loneliness and distrust does not eliminate that anxiety. This is the true misfortune, and one to be taken seriously, of the HLS. HLSN has in a sense taken the place of the passionate assertions of cynicism and detachment which ambitious students in the 1950's often put forward when confronted by situations which evoked guilt about "selling out." The HLS does not even succeed in buying time before confronting the inevitable choices; he is likely to be too anxious and too distracted by the Law School to engage in serious creative work or in serious political activism outside the academic community. HLSU is usually paralyzing.

Is there a solution? Of course not. But it does seem to me that the Law School would be more interesting and more healthy if students took to public discussion of their own conflicts over what is a morally acceptable way of life, rather than exhorting their friends to an imaginary virtue while denouncing everyone else for an equally imaginary Pact with the Devil.

Faculty Time and the Consumer Revolt

When students and professors talk about the crisis in legal education, or about a particular crisis in the Law School, they are likely to concentrate on what they see as the substantive issues: e.g. reform of the grading system, student participation in school government, curricular reform, and so forth. There are groups within the law school for whom these are issues of intense concern in and of themselves, but one of the ironies of situation after situation is that people who would say it was beneath them to be passionate about such trivialities find themselves taking passionate positions about them. I would suggest that the reason for this is that such issues mask a deeper issue which is indeed of passionate concern: the distribution of faculty time among different pursuits, with everything that entails for the distribution of emotional satisfactions among the groups which make up the law school community.

From the point of view of the faculty, the most important fact about their time is that they must limit the amount of it they supply to students. Many faculty members would agree with this on the simple ground that they are so few and the students so many, but there is more to it than that. A number of factors make it important to limit the supply to an amount considerably below that it could be given the existing faculty/student ratio. A first point is that many faculty members apparently feel that they have "bought" a certain amount of "free" time by becoming professors and thereby sacrificing the large incomes they might have made in private practice. This "free" time is seen as a sort of "contractual" right, and its quantity determined by "expectations" on joining the faculty. This is pretty silly, but there you are.

A second reason for limiting time devoted to students is that professors tend to conceive of themselves as far more than teachers—they feel themselves to be eminently qualified by their intelligence and savvy as generalist contributors to a wide variety of policy-making processes.

Such an allocation may or may not be an efficient one. It is unfortunate that it seems to arise at least in part from two kinds of calculation. First, the professor who owes his position to demonstration of his own superiority to the run-of-the-mill law students who were his classmates is unlikely to think that the run of the mill of students have anything at all to offer him. It is a characteristic vice of law review editors that they think of most other law students as "mini-minds."¹⁶ Second, the prestige derived from consulting and dilettantish policy-making is one of the commodities professors "buy" by sacrificing Wall Street income. The issue of the scholarly output of the faculty will be considered after examining student demand.

The student demand for faculty time, given the existing structure of the law school, is practically unlimited—professors could spend all their waking hours with students and still leave them unsatisfied. The main reason for this is probably the extraordinary sterility of current teaching techniques. Offered the chance, students as individuals naturally attempt to obtain from professors the emotional and intellectual nutriment—approval, encouragement, and also ideas—which they are denied in class. The situation would be less desperate if students at the Law School were not products of sterile techniques at lower levels in the educational system, but in the current state of things it is simply unreal to expect any large number of students to be either intellectually or emotionally self-sufficient. And the situation is aggravated by the rationing system about to be described, since the very short supply of faculty time makes it a particularly desirable item.

Given the limited supply and the unlimited demand for time, a *rationing system is inevitable*. What was peculiar about the Law School's system in the past was that it functioned so perfectly that all parties were able to deny that it existed. The elements are implicit in the psychological phenomena described in the earlier parts of this paper: the vast majority of students were persuaded that because of their academic inadequacy they had no valid claim on *any* faculty time outside

of the classroom. Conversely, members of the Law Journal and a few others were persuaded that they were virtually peers of the faculty and therefore could draw at will. The result was a balance so neat that many faculty were able to maintain an "open door" policy: they could afford to talk to any student who dropped by secure in the knowledge that they would never be swamped.

It is worth dwelling for a moment on the neatness of this institutional solution. Everyone's conception of himself is reenforced, and therefore there is a tendency toward stability. The classroom experience of most students convinces them that any relationship with a faculty member is hopeless, and that it is necessary to seek sustenance altogether outside the Law School. There is no interference with these students' tendency to "turn off" the law altogether. Elite students on the other hand improve their competitive position through faculty contact and become even more elite. They tend more and more to identify with the faculty and with the system, which appears to follow what amount to laws of nature. The faculty member is able to conceive of himself as fulfilling his teaching responsibilities—after all, his door *is* open to any student at almost any time—while in fact having contact only with a student elite not numerous enough to disrupt his schedule. Academic life is truly beautiful as long as most students will accept something less than what *they* pay for.

The faculty's impression that they were not really rationing their time devoted to students—or doing so only to a very limited extent—reenforced the tendency of professors to think of their free time as a contractual right, something inherent in their positions. In such a situation, a number of other developments take on special significance. It seems perfectly permissible that numerous professors should serve only part time, devoting themselves mainly to affairs in the "real world". The fact that faculty members never eat in the student dining hall can also be accepted as perfectly natural. In the absence of a

perceived rationing problem it has no significance at all. Finally, the limited scholarly output of the faculty as a group is a matter only for gentle irony at the expense of colleagues. That the average professor's life work consists of perhaps two hundred printed pages, a couple of Reports to Commissions to Study the Causes of Almost Anything, and a handful of appellate briefs is a matter of little moment if alternative uses of faculty time are not apparent.

But the rationing system is disintegrating and a "Consumer Revolt" has begun. First, there is the general disintegrating of "competitiveness", the partial but nonetheless important impact on the Law School of long range changes in the culture of young people. There is the diffusion of interests resulting from the politicization of life in the school, and the consequent decline of the Law Journal from its position of dominance as the *ne plus ultra* in prestige among students. Most important, a series of "crises" have permitted students to voice the demand for time outside of the established academic structures. In the jargon of the moment, the old system of entitlements to time has lost its "legitimacy".

This began to be apparent in the movement for grade reform. It seems to me that one of the more important, although one of the least expressed reasons for demanding the elimination of letter grades was that they symbolized the denial of time to the mass of students. It was said over and over again that the grades were "meaningless", that they expressed nothing which could be useful to the student except in his role as competitor with other students, that they were the basis for an elitist system. In short, grades symbolized the absolutely minimal extent of the involvement which the faculty was willing to suffer for the average student, and at the same time the faculty's determination to select a group of favorites on whom involvement would be lavished.

The application of this notion to the demand for student participation in decision-making is obvious, and helps to explain the chronic lack of "substantive" proposals for change to accompany the demand for "power".

But a more interesting phenomenon is the perpetual cry for more "communication" between students and faculty. It is important that it is students who raise this cry, and particularly students who find themselves, somewhat to their surprise, supporting activist initiatives which express an antagonism toward the faculty that they barely knew they felt. In fact, "communication" seems to be constant, and productive. The rapidity with which different points of view are disseminated is one of the great strengths of the Law School, and one reason for its at least relative success in adjusting itself to changing student demands. But no amount of political communication will substitute for the communication which is really desired—that of student and teacher in a setting undistorted by the fear and anger of the law school classroom.

That it is time that is at stake, and the involvement which time symbolizes, also helps to explain the surprising intensity of the anxiety each successive "crisis" evokes in the faculty. The passionate arguments from "principle", dire predictions of

institutional decline, threats of departure, result in part from a vaguely sensed threat to a central part of the Yale Law professor's status: his extraordinarily limited teaching responsibilities. This threat is reinforced in a curious way by the very institution of crisis: all the hours spent making those appeals to "principle", all the cleverness expended in transforming vested interests into "contractual rights"; is perforce subtracted from the very free time that was to be protected. Because the issue of professional responsibility, the issue of time, is never raised directly, the inherent self-contradiction in the faculty's approach to consumer revolt is never confronted. The result is a pervasive frustration; often faculty members seem as annoyed with each other for wasting each other's time as they are with the students.

The professorial fantasy of a life devoted entirely to faculty meetings called to deal with student demands is no more than a fantasy. But until someone begins to evolve a new set of rules governing the supply of faculty time and its distribution, it seems likely that recurrent crises will keep that fantasy constantly at the back of the mind.

1. After I began writing this paper, I ran across the following, which neatly sums up my approach:

Dilettantism

"Though I lack a philosophical, sociological, historical and political education, I do not cease to meditate upon philosophy, sociology, history and politics. Consequently, it must be admitted that whatever I turn over in my mind may bear the mark of incorrectness. Besides, my afterthoughts are consistently inconsistent with these disciplines as disciplines . . . Yet, assuming that both my premises and my conclusions are hazy and precarious, I nevertheless write them down, and fill them out with simple human experience. For it has never been proved that a dilettante has nothing to say."

L. Tyrmand, "Reflections," *The New Yorker*, Nov. 9, 1968.

2. The following is quoted from *A Tribute to Henry E. Springmeyer (1901-1968)*, 42 *So. Cal. L. Rev.* 2 (1969):

"Professor Springmeyer was devoted to the cause of legal education. His tough minded approach to law, and especially to torts, which he taught for over twenty years, commanded a special kind of respect. Veterans who had faced the enemy under fire during two wars trembled before his outrage at fuzzy thinking. The experience of being called on to recite a case is etched indelibly in the memory of every student. There was the scraping of the chair as one rose to his feet; the struggle to stand at his desk yet still read the carefully prepared brief. The fear of a less than perfect performance led more than one first year student to feel that, had William Pitt been taught by Professor Springmeyer, Pitt's famed expression might well have read 'where law begins tyranny begins.'

"After the long uneasiness of the first year, students could reflect upon Professor Springmeyer's integrity, his energy, his tough-mindedness, his devotion to the law, and his sense of responsibility to the embryo lawyers he faced. Those of us who had called him our teacher began later to appreciate in full how his dedication cost him and how it enriched us.

"Those of us who called him also colleague and friend were impressed by other attributes . . ."

It might appear that even on the most superficial reading it is apparent that Professor Springmeyer belonged to a generation of law teachers now almost wholly disappeared. References to standing in class, "carefully prepared briefs," and student "reflections" upon their professors' god-like virtues clearly mark the time-period described as The Past Utopian. Professors to whom I have shown the passage are quick to point this out, perhaps with a nostalgic chuckle and an intimation that students these days have life easy. Oddly enough, students seem to react quite differently: they tend to miss the element of anachronism altogether and to focus on the accuracy of the description of their own emotional experience.

3. Watson, "The Quest for Professional Competence: Psychological Aspects of Legal Education," 37 *Cinc. L. Rev.* 91 (1968).

4. See R. Lifton, *Thought Reform and the Psychology of Totalism* (1963).

5. After reading this far, a friend wrote the following marginal comment: "Compare with (talk about) fantastic passivity of teaching profession—the effete English professor. The *unconstructiveness* of what law teachers do, i.e. *criticism*. Criticism = the law professor's nihilism. Also, law teachers are not great men. They are not Dean Rusk or even Sol Linowitz, though they might have been."

6. The elements of fear: (a) the teacher will ridicule you; (b) the teacher will disapprove of you; (c) fellow students will ridicule you; (d) fellow students will disapprove; (e) the teacher will not deal with material in a comprehensible way; (f) the teacher will demonstrate to you that you didn't understand the material when you studied it; (g) the teacher will raise issues which will frighten you because you haven't dealt with them before; (h) the teacher will discover you have not studied the material assigned. I will consider below the reaction which this kind of experience evokes in different kinds of students.

7. "When my little patient assumed the active role, roaring like a lion and laying about him with the rod and the knife, he was dramatizing and forestalling the punishment which he feared." A. Freud, *The Ego and the Mechanisms of Defense* 124 (1946).

8. Nachman, "Childhood Experience and Vocational Choice in Law, Dentistry and Social Work," 7 *J. Counsel Psychology* 243 (1960).

9. E. Erikson, *Childhood and Society* (1963); *Young Man Luther* (1962).

10. Since this was written, the Law School has changed its grading system. Grades at the end of the first semester are now on a pass-fail basis.

11. E. Friedenberg, *Coming of Age in America: The Vanishing Adolescent* (1963).

12. Radical criticisms of the Law School on this score seem to have been almost universally misunderstood by the Faculty. (I think largely as a result of an extreme defensiveness combined with pride in a professional ability to disintegrate an "adversary's" point into something unattractive.) It is *not* being suggested that the Law School should adopt a policy of Orwellian indoctrination aimed at turning the students into political activists committed to the SDS line. The point is simply that *any* law school spends much of its time trying to interest students in particular legal issues, and that the choice of which issues to emphasize has social consequences. In a Business Units course, for example, a teacher may choose to emphasize the problems of social justice involved in the doctrine of fiduciary relations, and no one (almost no one) will accuse him of attempts to impose a particular political point of view. The radicals are suggesting that in the mass of the curriculum too little attention is focused on the myriad problems of social justice involved in the body of American law. This is hardly reason for paranoia on the part of the Faculty.

13. It is equally necessary that someone turn out radical challengers of all the underpinnings of the system. I think this is a function of the Law School as well. I don't think there need be a serious conflict.

14. The banality and shallowness of the standard "intellectually excellent" technique of analysis practiced in law schools is wonderfully illustrated by an article entitled "Ten Precepts for Law Book and Law Review Writing" which appeared in the *Journal of Legal Education* over fifteen years ago. As summarized by the author, the first eight precepts are: 1. Do a little every day. 2. Finish provisionally a section or chapter at a time. 3. Use short words and short sentences. 4. Work directly with the legal raw material itself. 5. Arrange the subject matter in systematic order. 6. Aim to inform the court. 7. Express your own ideas. 8. Master the pertinent facts. The legal writer who has grasped all this is ready to move on to two final rules, worth quoting at length:

"9. Grasp the functional perspective to point the way.

"In my own experience, I have found it very helpful in trying to analyze and organize material for presentation in law books to ask this question: What is the function served by the branch of the law with which I am dealing? . . .

"What the conduct was, what harm it caused, and to whom; these are factual questions. Whether the actor or the victim should, in the given type of case, take the chances and bear the burden of harm involves matters of policy. In other words, it involves a weighing or balancing of various conflicting interests. On these matters of policy relating to balancing of conflicting interests, there are often sharp and deep-seated differences of opinion . . .

"Decision either way in these matters of policy actually does involve, wittingly or unwittingly, decision upon the relative weight or importance of the underlying conflicting interests involved. For intelligent decision one way or the other (sic) these policy matters, in doubtful cases, the court needs to be informed by counsel not only what these underlying conflicting interests are, but also what are their relative weights in the scale of social values that it is proper to apply.

"10. Find the ultimate guides to policy decisions in weighing of conflicting interests in scales of recognizable criteria of justice.

"Individual interests often conflict with each other. Individual interests can also conflict with social interests, under whatever label of public policy or general welfare the social interests may be expressed. What interests, individual or social, are in the instance involved? Which of these interests, in the instance, outweigh other conflicting interests in the scale of social values that is to be applied? In the process of appraisal, what scale of social values is properly to be applied?

"Solution of these policy questions thus involves much more than mere scrutiny of detailed physical facts. In this regard, it is not even enough merely to inform the court what the conflicting interests are. The relative importance, in the instance of these conflicting interests, is involved in what the court must determine in reaching its decision. For that purpose, the court must be adequately informed regarding what standard of right and wrong, what criterion of justice or injustice, it is proper in the instance to apply.

"Here is involved a vital portion of the age-old question, "What is Justice?" This question involves the ends or objectives to be achieved in the legal ordering of human relations. The basic problem of what ends or objectives are to be achieved can be illustrated, but not for any particular occasion settled, by a variety of familiar contrasting terms. Among these terms are truth or falsehood, stability or change, rule or discretion, plenty or scarcity, production or restriction, competition or regulation, free enterprise or regimentation, liberty or security, war or peace, freedom or slavery.

"Adequately to inform the court what bearing such underlying basic problems have upon proper decision of a case currently before the court may tax the talent and resourcefulness of any lawyer. Whether or not the court is in the instance adequately informed, however, the ends or objectives of law often are to greater or less extent involved in current decisions. The court's choice between available alternatives is normally governed by what it believes to be right. It is the lawyer's job so to inform the court that the court can see what is right."

Vold, "Ten Precepts for Law Book and Law Review Writing," 6 *J. Leg. Ed.* 373 (1954). (Footnotes in the original have been omitted.)

Got it? Well, you don't have to actually *get* it. It is self-contradictory or at least obscure. But just learn to *sound* as though you've got it and everything will be fine.

15. I include here a quotation from a review of a book called *Education and Ecstasy* (1):

"In calling Leonard's picture of future education sentimental, I am not, of course, putting down his conception that education is concerned as much with emotional as with intellectual development, or that the two are and should be inextricably linked. This, I agree, should be the heart of any reform in schooling, for the schools of today are as profoundly alienating as Leonard says they are. What is sentimental is his depiction of the necessary improvements as changes in the techniques and attitudes of educators rather than in the society that supports them and its goals. How will students as appropriately lachrymose as those in Leonard's dream manage to take their place in the military-industrial complex? It will certainly not tolerate schools which render the young unfit for its service; so that if the schools are to educate feeling people, the system itself must be changed—and not by T-groups and the Esalen Institute . . . but by basic changes in the allocation of power and the functioning of the economy."

E. Friedenberg, "Sentimental Education," *The New York Review of Books*, Nov. 21, 1968.

16. I owe this phrase to a fellow member of the Editorial Board of the *Yale Law Journal*.

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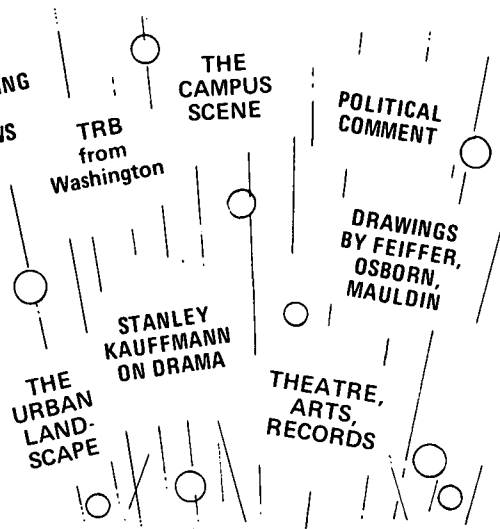
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