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# The Hired Gun or the Social Engineer

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# THE HIRED GUN OR THE SOCIAL ENGINEER

THESE ARE THE  
CLASSIC MODELS.  
IT IS TIME  
FOR LAW SCHOOLS  
TO MAKE USE OF  
AVAILABLE  
ALTERNATIVES

An intelligent observer stationed in a university classroom could identify certain fundamental assumptions that are presupposed by most of the student and faculty participants in the educational process. The value system that is implied by this intellectual framework is rarely articulated in a direct and unitary fashion, but it lurks behind much of what is said and done. As Alfred North Whitehead said, fundamental assumptions "appear so obvious that people do not

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NINETEEN

know what they are assuming because no other way of putting things has ever occurred to them."

Unexamined premises are always dangerous. The neglect of values in the university context is particularly dangerous since it invites a narrow specialization and focus of concern that is destructive of the balanced wholeness of the good life. Academics need to be more open, more critical, and more creative about the value aspects of the educational process.

Professional training in a law school provides a good example of the need and the problem. The unarticulated (and usually unexamined) value system of legal education in the United States today involves the following ingredients: a skeptical attitude toward generalizations; an instrumental approach to knowledge (i.e., knowledge aimed at immediate practical results); an emphasis on tough-minded analysis; and a faith that man, by the application of his reason and the use of democratic processes, can make the world a better place.

There is much to be said for the utility of this intellectual framework for the practicing lawyer. It is part of the powerful forces of secularism that, starting with an emphasis on cognitive rationality and utilizing the methods of science and applied technology, have routed superstition and fixed status, and resulted in a more open society in which individual choice and a more abundant life are possible.

A skeptical attitude toward generalizations, principles, and rules is a desirable attribute of a competent lawyer. But skepticism that deepens to a belief in the meaninglessness of principles, the relativism of values, or the nonexistence of an ultimate reality is crippling and dangerous. One example is the now-commonplace (but erroneous) notion that there is an unbridgeable chasm between facts, which are "real" or "hard" or "tangible," and values, which are "subjective" or "soft" or "intangible." This notion leads to a neglect of values, which are viewed either as personal preferences ("you can't argue about values") or as the product of social conditioning ("the real determinant is childhood sexual experiences"—or "class interests" or whatnot). Tendencies toward moral relativism and value nihilism are pervasive in the modern university, leaving students troubled and anxious about the self-centered *Playboy* philosophy that dominates much of student culture.

One of the consequences of a skeptical age is that all the heroes are killed off one by one. Law is no exception. The great men of American law in recent times—Holmes, Brandeis, Cardozo, and the like—come off poorly in the critical atmosphere of the law classroom. Their wisdom is seen as partial, their decisions frequently short-sighted or wrong, and their greatness is blurred.

Yet the young professional hungers for mature professionals on which he can model his conduct. In certain aspects of thinking and feeling—such as careful use of language, cognitive rationality, and a skeptical attitude—law teachers may serve as models. But they

have forsaken the profession that the law student plans to enter, and their attitude toward practitioners is often touched with an air of superiority and disdain. Inevitably there is a "do as I say not as I do" problem for a law student viewing a law teacher as a model.

### CONFRONTED WITH TWO EXTREMES

Law school tends to present two abstract models of professional conduct to law students: the hired gun and the social engineer. Both are consistent with the instrumental approach to law, and both are specialists in persuasion and manipulation.

The role of the hired gun forces the potential lawyer to visualize himself as an intellectual prostitute. In law school he is asked to argue both sides of many issues. It is common for a student to respond to the question "How do you come out on this case?" with the revealing reply "It depends on what side I'm on." If the lawyer is going to live with himself, the system seems to say, he can't worry too much about right and wrong. Many sensitive students are deeply troubled by the moral implications of this role, and law school generally provides little help in resolving the problem.

The social engineer is a technician who deals with issues and interests rather than individuals. This role implies a somewhat lifeless concern with the details of a technical and bureaucratic world and a givenness of the values that the social engineer is attempting to implement. But it also implies a tunnel vision that filters out a large portion of human experience. As Robert Bellah has said, "Modern secularism, while releasing human beings from one kind of tyranny, often imposed a new, more terrible tyranny, however—the tyranny of the pragmatic world of every day, of the givenness of immediate reality with all its constraints. It has resulted in the rise of the bureaucratic, technological, and manipulative man, who rejects all transcendence, who has what Blake called 'single vision.' There is something deeply demonic in the single vision of modern secular consciousness with the vast range of human experience that it tends to shut out."

The sharing, helping and serving aspects of human endeavor, especially important to future professionals, are left largely untouched by the law school experience. Some observers comment that law students become more isolated, suspicious, and verbally aggressive as they progress through law school; their aptitude for verbal articulation increases, but they rarely stop to listen to others. If so, will they be good counselors? Will they need to unlearn a number of things in order to operate successfully as professionals?

There was a time when the deficiencies of legal education could be compensated for by the breadth and depth of liberal education. I fear, however, that the deficiencies of legal education are now increasingly characteristic of university education generally: enormous emphasis on cognitive rationality, inculcation of skeptical attitudes, an instrumental approach toward knowledge and an avoidance of value questions. Greater attention to the value questions implicit in the professional role was always desirable; it is even more so in an era in which higher education is pervaded by a narrow emphasis on knowledge and rationality as

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tools for the control or manipulation of people.

### FLAWS IN A LEGAL EDUCATION

Legal education in a university setting is a relatively new phenomenon in the United States. The three-year law program was first developed at Harvard at the end of the nineteenth century, whence it spread to other schools. A college degree as a requirement for admission to law school was a development of the first half of this century. It was not until after World War II that the number of American lawyers trained in law schools finally passed the number trained by the apprenticeship route that has now virtually passed out of existence.

This historical evolution, and especially the success of large-class, case method teaching, has left its stamp on contemporary legal education. First, although a baccalaureate degree is required for admission, legal education has a closer resemblance in many important respects (large average class size, standardized curriculum, competitive atmosphere, emphasis on development of basic analytical skills, etc.) to undergraduate than to graduate education. A relatively small group of faculty teach a fairly large number of students in a manner that is reasonably efficient but contains only limited provision for individual work, specialized programs, or practical experience. Despite the best efforts of law deans and faculties, legal education continues to be graduate education on the cheap.

Second, the tension between the university environment, with its emphasis on the development of new knowledge through research and scholarship, and the legal profession, with its desire for a stream of highly qualified professionals, has been resolved for the most part in favor of a strong professional orientation. Only a handful of law schools in the United States make a substantial contribution to the creation of new knowledge about law and legal institutions. Law students tend to view the scholarly interests of law teachers as a diversion from or obstacle to their efforts to prepare themselves—frequently in a too-short-sighted way—for professional practice.

Third, although American law schools do a magnificent job in fostering a related group of cognitive skills (“thinking like a lawyer”) and in conveying basic information about the legal system, they do not produce a graduate fully qualified to practice law. The assumption has been that the law graduate will round out his legal and interpersonal skills during a period of apprenticeship in a law office. Only limited attention is given in law school to the integration of skills, knowledge and attitudes that are necessary to operate as a professional in handling the sensitive and difficult problems of an actual client.

The major directions of movement in legal education in recent years flow directly from the shortcomings implicit in this brief analysis of the general characteristics of legal education. First, efforts have been made to infuse many of the virtues of graduate education into legal education. Expansion of faculty size at many schools has permitted a vast increase in the total number of upper-class elective courses, intro-

duction of problem courses or seminars that provide more intensive research and writing experiences to law students and some development of specialized programs, such as programs in international legal studies, law and economics, and the like.

The results have been beneficial, but the proliferation of the curriculum has been ungainly. The law curriculum tends to grow by accretion and fragmentation, which provide additional choice to students without interfering with entrenched faculty interests. The resulting curriculum is not unified by a coherent theory but is held together, if at all, by the unwillingness to depart from a common set of first-year courses, traditional ever since established by Langdell at Harvard in the 1890s, and by student persistence in electing courses that are either tested on state bar examinations or viewed as bread-and-butter courses.

Second, law schools have attempted to justify their presence in the university setting by encouraging scholarship by faculty members, by building bridges to disciplines, such as economics, history, government and philosophy, that share some common interests and by introducing policy science and perspective courses into the law school.

The research product of law schools has taken a quantum leap, but the effects on law students and the law curriculum have been more limited. Empirical research generally has proved too costly for the limited resources of the law schools. Heavy teaching loads and the pull of the profession, which offers attractive consulting, speaking and law reform activities, leave faculty little time for research and scholarship. And law students have not seized the opportunities available to them for more intellectual fare, as distinct from courses that appeared to have greater short-run utility to the practitioner. Thus no law school has been willing to require law students to acquire a basic understanding of the modern decision-making techniques of economics and the policy sciences even though there is a general recognition that nearly all sophisticated lawyers will have to deal with these techniques in the years ahead.

Third, a widespread recognition that legal education has concentrated in too single-minded a fashion on certain cognitive skills and neglected other aspects of professional competence (skill in negotiating, conciliating, interviewing, litigating, etc., as well as the ability to handle the emotional aspects of various professional roles) has led law schools to focus increased attention on the competencies required of the “complete” lawyer.

Many law graduates are not exposed to good apprenticeship experiences, and even the portion that receive high-quality supervision in the initial years of practice benefit from an earlier introduction to a clinical model of high-quality lawyer behavior (the analogy to clinical training in medicine is apparent). A clinical experience, involving actual or simulated client representation, advances professional competence, sets standards for future professional performance and energizes the student’s interest in law study.

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stop, a unit incapable of moral choice and thus of meaning.

This is not, by the way, the same thing as saying that man is trivial, with an almost infinitesimal life span in an almost infinite universe. Trivial is something; to be totally caused is to be nothing. This idea does not get full expression till well past the midpoint of the piece but it colors everything. It explains the beginning sections about the curse of consciousness—how can you take out after someone who injures you, when you *understand* both the attack and your counterattack to mean nothing. You're a couple of puppets set bumping into each other by the accidents of stage design. Man cannot injure and insult you if you understand nature's ultimate insult: that your behavior is nothing more than a fact.

His idea of the meaninglessness of factual man is also closely connected with his recurring references to man's wildness. Man is conscious of the possibility that he means nothing, and strikes out wildly, in purposefully irrational behavior, destructive of self or others, raging around in his prison of fact trying to persuade himself that he means something. To quote our hero, "whipping yourself may be very reactionary,

but it's better than nothing."

This raging is one of the things that destroys utopias, assuming that we can stay interested in their trivial materialistic advantages when confronted with our nothingness. But the raging is more important than that. Because it is, after all, in a determined world, pointless, and so, far from freeing man from his servitude, may simply be one of the bars. Yet it reflects man's ultimate refusal to accept the fact of his nothingness.

The ultimate acceptance of life is the *Notes* themselves. Why is he writing at all, he asks himself, and for whom? He knows that he's sending out bleak messages of pain, evil, irrationality and the total pointlessness of communication. But he also knows that he's sending out the message in a form that is brilliant, vital, often wildly funny and wonderfully exuberant. How can he justify writing that his writing is not justified—and with so much gusto? "Well," he says, "why not? There's something more impressive about it . . . it will be in better style."

So now I'll give my answer about what the humanities can bring to law. As I said before, "only style"; but that may be all there is. L

## LIBERATING

(Continued from page 7)

These are some of the benefits jurisprudence has for the student. I should like to conclude with a word or two about the benefits that jurisprudence has for the law faculty itself. Law teaching is of course subject to the same pressures of specialization, the same division of intellectual labor, which in this century has transformed higher education and produced the modern university, with its atomized faculties and factory-like atmosphere. Although the process of specialization in law teaching has been slowed somewhat by the fact that most law teachers share a common educational background, and by the resistance to substantive curricular change in American law schools, the proliferation of complex statutes and the emergence of entirely new branches of legal scholarship (such as law and economics) have made it increasingly difficult to appreciate, or even to assess, the value of work being done in a field other than one's own.

At Chicago this difficulty has so far proved not to be a serious one. The relatively small size of the faculty and the rather remarkable eagerness of its members to keep abreast of one another's accomplishments have preserved a wholeness of spirit and understanding that is striking.

And yet, even here, the risks of specialization can-

not be eliminated altogether. Foremost among these risks is the danger that one may lose sight of the basic assumptions and value-preferences on which work in his specialty depends. Just as the fertility of a field requires that it be turned over regularly, the vitality of a discipline demands that its philosophical underpinnings occasionally be exposed to view so that they may be critically scrutinized. This is necessary if others are to understand what the specialist is doing and what his aims are. It is also necessary if the specialist himself is to retain the breadth of vision he needs to appreciate his place in the larger enterprise of which he is a part.

Jurisprudence—and now I am talking not so much about a course as about a mode of inquiry—provides a forum in which many of these basic methodological questions may be raised. It offers the specialist an opportunity to reflect on the foundations of his specialty and to compare his premises and values with those of his colleagues. In this way it helps him to combat the terrible tendency of every specialized organization to turn its members into the cogs of a machine. The simple questions that jurisprudence poses help us to remain masters of our own work rather than being mastered by it. In this sense, jurisprudence has a liberating influence. L

## HIRED GUN

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Most law schools have been reluctant to commit themselves to any of these paths. The traditional model has remained the dominant emphasis, but each of the modern trends has been incorporated to some degree without special emphasis on any one of them.

Here as elsewhere, the cumulation of people and resources in specific directions may provide uniqueness and special distinction.

Spreading resources over too many approaches may diminish the quality of each. Now is the time for law faculties to face the issue of the direction of their

schools' future. Can we obtain the resources to support each of the directions of growth along with the traditional model? Which model or combination of models, given our strengths and institutional setting, offers the best vision for the future?

#### FACED WITH THE NEED TO CHANGE

These three trends—an emphasis on specialization and research, an attempt to integrate other disciplines and perspectives into the law curriculum and to connect the law school with the university and the introduction of clinical legal education—are the directions of movement in modern legal education. The traditional Langdellian approach, however, with its emphasis on cognitive skills and case analysis, continues to dominate student culture and course selections. The modern trends have added to the interest and cost of legal education, but the results have been limited nearly everywhere by inadequate resources, student apathy, faculty inertia and disagreement, and the strong pull from the profession. The principal failure of legal education is the inability to accomplish all of these changes simultaneously.

### BAKKE

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enriched by the opening up of a vast new spectrum of job opportunities for large, previously excluded segments of the population. In this sense, the black who is preferred as a teacher or a doctor or a pipefitter is not being favored as an individual. It merely so happens that, at this moment in history, minorities are endowed with qualities that must be distributed throughout a wide range of positions in industry and the professions if we are to solve one of our most pressing social problems. Such an approach may be profoundly at odds with our traditions of individual merit and race neutrality, but I believe it accords with the realities of the seventies.

Ultimately, the legitimacy of preferential treatment for minorities should turn on a judicious appraisal of the gains and losses for our society, and not on abstract concepts like "color-blindness." Deliberate race-based preferences are dangerous medicine,

### SABBATICALS

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than 15 and to take a case that I had tried to conclude so that I had all of the pleadings, fact memoranda, research memos and deposition transcripts. I could prepare a fact sheet for each witness and have faculty members act as witnesses. The students in each seminar could be divided into two groups, representing a plaintiff's firm and a defendant's firm.

Each "firm" would work on the case, beginning with the first client interview and concluding with the (non-jury) trial. The students would not see my papers; they would do their own factual investigation, research, memos, pleadings and discovery as though they were handling an actual case for their respective "law firms." Essentially, the students would be treated as though they were associates in my own firm.

Only a few schools have dared either to stick with the traditional model in its undiluted form or to place an emphasis on one or another of the three modern trends: Antioch in clinical legal education and Chicago in legal research are two uncharacteristic examples that come to mind. Most law schools have followed the Harvard pattern of maintaining the traditional framework while pursuing all three modern trends simultaneously. It is doubtful whether any schools, except perhaps Harvard, have resources that are sufficient to support adequate programs on all fronts.

The cautious approach to the future is to spread resources over each of the alternative strategies rather than to commit an institution to a single one. For a prestige institution, this approach probably involves less risk on the down side; but it also involves a reduced likelihood of really outstanding performance in the years ahead.

If that is the goal, some product differentiation is probably necessary, whether it be along the traditional model, the graduate and research institution model, or the clinical legal education model. L

justified only by the gravest circumstances, and they must not be allowed to become habit-forming. There is the obvious risk of estranging white ethnics, and indeed all groups who have good historical grounds for abhorring any practice that smacks of racial quotas. There is the further risk of perpetuating racial stereotypes that must be purged even from our subconscious. Balanced against these risks is the certainty that an absolutist approach to color-blindness will call a halt to the past decade's promising, if often fumbling, efforts at integration in education and employment.

*Bakke* presents the Supreme Court with a cruel practical choice. It also presents the court with an opportunity to find a new dimension in the Fourteenth Amendment, and to see that "equal protection" is not a mathematician's table of equivalents, but a realist's injunction to treat alike those who are, in this remarkably diverse world, truly alike. L

I would supervise their work, but they would have to develop their own methods of research, writing and interviewing.

My next step was to find a school. I wanted to teach either in the southwest or the Pacific northwest, so I searched through the AALS directory and wrote to 15 schools, setting forth my professional qualifications and proposal for the course. Nearly all of the schools responded, and most were interested in the course I had outlined. A few were interested in having me teach a conventional law school course. I eliminated these from consideration.

After visiting several schools, and talking at length with a number of others, I finally accepted an appointment as visiting professor from the University of New Mexico Law School in Albuquerque. Albuquerque