

My Life in the Law

It's not my fault I was a lawyer. I was not called to the bar. No one in my family was a lawyer except an uncle by marriage, whom no one except perhaps his wife could stand. I drifted into the law, like a small boat that sets out upon a great sea, only to drift into an inlet and be drawn into a canal too narrow to turn back.

My earliest memory of law was a sense of moral revulsion that lawyers would assert claims which they did not believe for money. As a teenager I was in a neighborhood bar listening to the band with some friends and bemoaning we were not old enough to drink 3.2 beer. Someone's father, a stockbroker and pretty far gone himself, expostulated on the finer points of underage drinking. This was my first exposure to the well-known legal maxim that people who talk most about law know the least about it. A surprising corollary is that no one is more dangerous in legal matters than a non-practicing attorney.

I went to Kenyon College, a place not much known for temperance. There I became an English major, imagining that some familiarity with literature and the seduction sonnets of the nineteen

thirties, then still remembered and perhaps even practiced by my professors, would propel me into a life of sophistication and satiation. In what field I had no idea, except for the vague hope that I would write a best seller in my twenties and escape the job market altogether.

In an ominous foreboding, however, I found myself my senior year on the student court, where we endured a series of complaints of ungentlemanlike conduct against the more entrepreneurial students. This was a euphemism for having a woman in the offender's room after hours. Before one hearing, I talked with our campus cop, a retired Mt. Vernon policeman about the basis for the complaint. Knowing what he would say, I asked at the hearing why he chose to knock on this particular door.

“May it please the court,” he solemnly intoned, “I heard bed springs.”

Despite an impassioned plea from the student's advocate, a pre-law major this was enough to convict the defendant. For the first time I knew the answer to the key question before it was asked and had the thrill of winning a case.

I question taking the time to prosecute cases of ungentlemanlike conduct, when a case of attempted murder was ignored. Perhaps in retaliation for his damning testimony, perhaps in an excess of youthful exuberance, a fraternity threw a keg out their fourth-story dormitory window as the campus cop was passing beneath. It missed but did not help the target's heart condition. Hence another legal maxim: the motivating force of all law, at least American law, is not a quest for justice but a delight in titillation.

With no prospects or desire to do much of anything, I joined the Navy and graduated from Officer Candidate School in Newport, Rhode Island in December 1965. No, this assessment is too cynical: I had enough sense to know that although I loved literature, I was not meant to be an academic. To be a real teacher, a person must place his students before himself. I was more interested in my own conceptions than those of others, so I did not apply for graduate school. In retrospect this was a wise decision.

After another six months at the Navy Supply Corps School in Athens, Georgia, I found myself aboard USS Henrico (APA-45), a fast

attack transport that could make 15 knots with fair winds and a following sea. The Henrico had a crew of 340 officers and men, a commodore's staff of about 60, and could carry a battalion of 1,000 troops. I will not regale you here with sea stories about being disbursing officer and running the ship's store and barber shop and laundry. I did, however, serve on one court martial.

A sailor had gone AWOL for a few days. Although a good friend of mine who was thinking of going to law school defended him, the panel convicted the sailor. We let the First Lieutenant, an officer who had come up through the ranks to become head of our deck department, convince us that the defendant had betrayed his shipmates and deserved the brig. My friend was devastated by this loss, gave up all thoughts of law school, and became an FBI agent instead. I should have learned then not to take every case and every loss so personally, but I didn't.

After the Henrico was decommissioned – she had been hit by a Kamikaze at Okinawa and was a miracle to be afloat 20 years later – I became supply officer aboard a repair barge anchored in the middle of a

river in the Mekong Delta as the headquarters for two ten boat patrol boat squadrons.

Regrettably for this paper, no legal affairs of any note transpired during my year aboard. Nevertheless, my three and a half years in the Navy were coming to an end, and I had to find something else to do. Although offered a commission in the regular Navy, I knew that agonizing over inventories and budgets in the Supply Corps was not my calling.

On a beautiful San Diego Saturday morning while I was going through training at the Amphibious Base for Vietnam, I drove up Point Loma to Nazarene University to take the Law School Admission Test. I still remember the blazing white amphitheater set in a hillside overlooking the Pacific Ocean with a mock-up of the Parthenon standing above it. Much like the College Boards, the LSAT tested for what passed in certain East Coast circles for cleverness and in others for mendacity. Both these traits are essential for the successful lawyer.

Aboard the barge with nothing better to do in the evenings, I applied to law school. I was delighted to be accepted at Harvard. One

night in the wardroom, we watched *The Thomas Crown Affair*, a Steve McQueen movie set in Boston that made the women and life there appear dazzling.

The GI Bill paid \$145 a month, enough for rent, and tuition was \$750 a semester, easy to handle with my savings from a year aboard the barge. How the Law School raised tuition to over \$100,000 a year without any perceived improvement in quality or output is still studied in the Business School as a model for brand management.

Harvard prided itself on teaching by the case study method, developed in the late Nineteenth Century to counter teaching by rote. For example, in the first year property course, instead of propounding the maxim, “he who owns the land owns up to the sky,” the professor would present a judicial opinion from a text book he had put together years or decades earlier. The class would then revisit how a developer had bought up all the land around a homeowner, built towering skyscrapers on every side, and left holdout to wilt in the shadows without any means of egress. Enthralled by the developer’s audacity and the professor’s ability to recycle the same old story year after year,

students would come up with myriad theories to rationalize the developer's actions and vindicate the court that had found in his favor.

Case studies were presented through the so-called Socratic Method, a dialogue between professor and students supposed to ascertain truth. To speak of a Socratic Method sounds liberating, and many students found it enthralling. The problem was that it is particularly unsuited to law.

Harvard Law School, the Supreme Court of the United States, and all the lawyers selling their services to the contrary, law is not rational in its origins or development or practice. It proceeds from a problem being brought to the attention of someone who can't ignore it any longer, such as a judge or a tyrant or a first sergeant, and the deeply held bias of the human race to only think a problem through once. The answer, whether it is a statute, a curse, a decree, a judgment, a treaty, or a beheading must be followed to avoid reconsidering the problem and perhaps having to admit that the initial decision was wrong. This is called *stare decisis*, or following precedent.

Now here is another legal maxim that no one else will tell you: few judges are first-rate intellectuals. In fact the reason most of them are on the bench is that they cannot earn a living practicing law or, for that matter, doing anything else. State elected judges attain their position by misleading the public about their qualifications and character. How many times during an election year do you see someone campaigning on the slogan, “Fair but Firm,” while their opponent campaigns on the slogan, “Firm but Fair?” The slogan is code-speak for, “I will take good care of you because you gave to my campaign, and I will throw the book at everyone else.”

Federal judges don’t have to campaign, although many spend years or decades or fortunes softening up a Senator or a President. They ascend the bench by accepting a political pay-off. Once there they have life-time tenure. Their every utterance is parsed for deep meanings, and their every joke is hilariously funny. Is it any wonder that so many slip into megalomania as they impose their fantasies upon generations unborn when they were appointed?

Given our judiciary, many cases that could be decided by precedent in fact distort or overrule the precedent so that the opposite conclusion is reached. This leads to further litigation to re-establish the original precedent that only produces further distortions, so that every case that reaches an appellate court scrambles every other case on the same subject.

Here we reach the great flaw of our legal system. The common law, if you can call it that, is articulated through litigated cases that eventually reach a court of appeals or supreme court. What no one says is that lawyers who understand the system never subject themselves or their clients to it. Nationwide only a tiny percentage of all civil and criminal cases are actually tried; the rest are disposed of by settlements or plea bargains. The real process of the law is not to litigate but to negotiate.

It is only when this process fails that anyone goes to trial and ends up in the law books. These cases are outliers, random events where one or possibly both parties were so poorly advised or so desperate they had to hazard a final judgment. Therefore every reported case represents a

failure of the legal system. Would you go to a physician who used treatment failures as the standard of care? Herein lies the self-contradiction that converts a supposedly rational system into a parody of itself.

Therefore, it is impossible for law to develop rationally or to be studied as a liberal art. Opinions are driven by the need to say something or anything to get rid of the case, or to rationalize prejudice, promote political ideology, or much, much worse. The American bias favoring judicial opinions over statutes means that no statute, however simple, is considered law until courts in all 50 states have construed and misconstrued it so many times that the mess has to be untangled by the Supreme Court. Thus teaching law by the Socratic Method produces the same results as teaching the periodic table of the elements by the Socratic Method: confusion, ignorance, and arrogance.

We must now confront the last obstacle to becoming a lawyer: “thinking like a lawyer.” Although this may sound like a term of condemnation, it is in fact the highest praise one practitioner can offer to another. It took me several years after graduation to understand what it

really means. Many lawyers never learn it, but I will share it with you here.

Legal reasoning is like Zeno's paradox. Achilles can never catch up to the tortoise, because he must first cover half the distance to the tortoise, and as he covers that distance, the tortoise goes a little farther, and Achilles must cover half that distance, and so on until eternity. The paradox is an argument against the infinite divisibility of matter, but this has not stopped the lawyers.

In every case the lawyer breaks down the facts and the law until he or she can apply some fact to some law that makes their client win. And there the process stops. The lawyer on the other side does exactly the same thing. Every law suit, every brief, every legal argument, every decided case embodies this principle. If it were correct, we could construct the perfect society out of Lego blocks. And now you know it, too.

So why did I stay with it? In the beginning, it was a challenge, and I liked to win. Then it became something I thought I was good at. Finally I succumbed to the fear it was the only thing I could do. No

longer. The world is wider and more wonderful than lawyers and judges can imagine. There is still time to enjoy it. With a little help, the boat can be hauled out of the canal, turned around and paddled back to the sea.