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### **LEGAL EDUCATION AS TRAINING FOR HIERARCHY**

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LAW schools are intensely political places despite the fact that they seem intellectually unpretentious, barren of theoretical ambition or practical vision of what social life might be. The trade-school mentality, the endless attention to trees at the expense of forests, the alternating grimness and chumminess of focus on the limited task at hand – all these are only a part of what is going on. The other part is the ideological training for willing service in the hierarchies of the corporate welfare state.

To say that law school is ideological is to say that what teachers teach along with basic skills is wrong, is nonsense about what law is and how it works is wrong, is nonsense about what law is and how it works; that the message about the nature of legal competence, and its distribution among students, is wrong, is nonsense; that the ideas about the possibilities of life as a lawyer that students pick up from legal education are wrong, are nonsense. But it is all nonsense with a tilt; it is biased and motivated nonsense rather than random error. What it says is that it is natural, efficient, and fair for law firms, the bar as a whole, and the society the bar services to be organized in their actual patterns of hierarchy and domination.

Because students believe what they are told, explicitly and implicitly, about the world they are entering, they behave in ways that fulfill the prophecies the system makes about them and about that world. This is the linkback that completes the system: students do more than accept the way things are, and ideology does more than damp opposition. Students act affirmatively within the channels cut for them, cutting them deeper, giving the whole a patina of consent and weaving complicity into everyone's life story.

In this chapter, I take up in turn the initial first-year experience, the ideological content of the law school curriculum, and the noncurricular

practices of law schools that train students to accept and participate in the hierarchical structure of life in the law.

## THE FIRST-YEAR EXPERIENCE

A surprisingly large number of law students go to law school secretly wishing that being a lawyer could turn out to be something more, something more socially constructive than just doing a highly respectable job. There is the fantasy of playing the role an earlier generation associated with Brandeis: the role of service through law, carried out with superb technical competence and also with a deep belief that in its essence law is a progressive force, however much it may be distorted by the actual arrangements of capitalism. For a few, there is a contrasting, more radical notion that law is a tool of established interests, that it is in essence superstructural, but that it is a tool that a coldly effective professional can sometimes turn against the dominators. Whereas in the first notion the student aspires to help the oppressed and transform society by bringing out the latent content of a valid ideal, in the second the student imagines herself as part technician, part judo expert, able to turn the tables exactly because she never lets herself be mystified by the rhetoric that is so important to other students.

Then there are the conflicting motives, which are equally real for both types. People think of law school as extremely competitive, as a place where a tough, hardworking, smart style is cultivated and rewarded. Students enter law school with a sense that they will develop that side of themselves. Even if they disapprove, on principle, on that side of themselves, they have had other experiences in which it turned out that they wanted and liked aspects of themselves that on principle they disapproved of. How is one to know that one is not “really” looking to develop oneself in this way as much as one is motivated by the vocation of social transformation?

There is also the issue of social mobility. Almost everyone whose parents were not members of the professional/technical intelligentsia seems to feel that going to law school is an advantage in terms of the family history. This is true even for children of high-level business managers, so long as their parents’ positions were due to hard work and struggle rather than to birth into the upper echelons. It is rare for parents to actively *disapprove* of their children going to law school, whatever their origins. So taking this particular step has a social meaning, however much the student may reject it, and that social meaning is success. The

success is bittersweet if one feels one should have gotten into a better school, but both the bitter and the sweet suggest that one's motives are impure.

The initial classroom experience sustains rather than dissipates ambivalence. The teachers are overwhelmingly white, male and死板ly straight and middle class in manner. The classroom is hierarchical with a vengeance, the teacher receiving a degree of deference and arousing fears that remind one of high school rather than college. The sense of autonomy one has in a lecture, with the rule that you must let teacher drone on without interruption balanced by the rule that teacher can't *do* anything to you, is gone. In its place is a demand for pseudoparticipation in which one struggles desperately, in front of a large audience, to read a mind determined to elude you. It is almost never anything as bad as *The Paper Chase* or *One-L*, but it is still humiliating to be frightened and unsure of oneself, especially when what renders one unsure is a classroom arrangement that suggests at once the patriarchal family and a Kafka-like riddle state. The law school classroom at the beginning of the first year is culturally reactionary.

But it is also engaging. You are learning a new language, and it is possible to learn it. Pseudoparticipation makes one intensely aware of how everyone else is doing, providing endless bases for comparison. Information is coming on all sides, and aspects of the grown-up world that you knew were out there but didn't understand are becoming intelligible. The teacher offers subtle encouragements as well as not-so-subtle reasons for alarm. Performance is on one's mind, adrenaline flows, success has a nightly and daily meaning in terms of the material assigned. After all, this is the next segment: one is moving from the vaguely sentimental world of college, or the frustrating world of office work or housework, into something that promises a dose of "reality", even if it's cold and scary reality.

It quickly emerges that neither the students nor the faculty are as homogeneous as they at first appeared. Some teachers are more authoritarian than others; some students other than oneself reacted with horror to the infantilization of the first days or weeks. There even seems to be a connection between classroom manners and substantive views, with the "softer" teachers also seeming to be more "liberal", perhaps more sympathetic to plaintiffs in the torts course, more willing to hear what are called policy arguments, as well as less intimidating in class discussion. But there is a disturbing aspect to this process of differentiation: in most law schools, it turns out that the tougher, less policy-oriented teachers are the more popular. The softies seem to get less matter across, they let

things wander, and one begins to worry that their niceness is at the expense of a metaphysical quality called rigor, thought to be essential to success on bar exams and in the adult world of practice. Ambivalence reasserts itself. As between the conservatives and the mushy centrists, enemies who scare you but subtly reassure you may seem more attractive than allies no better anchored than yourself.

There is an intellectual experience that somewhat corresponds to the emotional one: the gradual revelation that there is no purchase for committed liberal (let alone radical) thinking on any part of the smooth surface of legal education. The issue in the classroom is not left against right, but pedagogical conservatism against moderate, disintegrated liberalism. All your teachers are likely to deny or at least deemphasize the political character of the classroom and of their various subject matters, though some *are* likely to be obviously sympathetic to progressive causes, and some may be even moonlighting as left lawyers. Students are struggling for cognitive mastery and against the sneaking depression of the pre-professional. The intellectual content of the law seems to consist of learning rules - what they are and why they have to be the way they are - while rooting for the occasional judge who seems willing to make them marginally more humane. The basic experience is of double surrender: to a passivizing classroom experience and to a passive attitude toward the content of the legal system.

The first step toward this sense of the irrelevance of liberal or left thinking is the opposition in the first-year curriculum between the technical, boring, difficult, obscure legal case and the occasional case with outrageous facts and a piggish judicial opinion endorsing or tolerating the outrage. The first kind of case – call it a cold case – is a challenge to interest, understanding, even to wakefulness. It can be on any subject, so long as it is of no political or moral or emotional significance. Just to understand what happened and what's being said about it, you have to learn a lot of new terms, a little potted legal history, and lots of rules, none of which is carefully explained by the casebook or the teacher. It is difficult to figure out why the case is there in the first place, difficult to figure out whether you have grasped it, and difficult to anticipate what the teacher will ask and how you should respond.

The other kind of case - call it a hot case – usually involves a sympathetic plaintiff –say, and Appalachian farm family- and an unsympathetic defendant –say, a coal company-. On first reading, it appears that the coal company has screwed the farm family by renting their land for strip mining, with a promise to restore it to its original condition once

the coal has been extracted, and then reneging on the promise. And the case should include a judicial opinion that does something like award a meaningless couple of hundred dollars to the farm family rather than making the coal company perform the restoration work. The point of the class discussion will be that your initial reaction of outrage is naive, non-legal, irrelevant to what you're supposed to be learning, and maybe substantively wrong into the bargain. There are "good reasons" for the awful result, when you take a legal and logical "large" view, as opposed to the knee-jerk passionate view; and if you can't muster those reasons, maybe you aren't cut out to be a lawyer.

Most students can't fight this combination of a cold case and a hot case. The cold case is boring, but you have to do it if you want to become a lawyer. The hot case cries out for response, seems to say that if you can't respond you've already sold out; but the system tells you to put away childish things, and your reaction to the hot case is one of them. Without any intellectual resources in the way of knowledge of the legal system and of the character of legal reasoning, it will appear that emoting will only isolate and incapacitate you. The choice is to develop some calluses and hit the books, or admit failure almost before you've begun.

## THE IDEOLOGICAL CONTENT OF HEGAL EDUCATION

One can distinguish in a rough way between two aspects of legal education as a reproducer of hierarchy. A lot of what happens is the inculcation through a formal curriculum and the classroom experience of a set of political attitudes towards the economy and society in general, toward law, and toward the possibilities of life in the profession. These have a general ideological significance, and they have an impact on the lives even of law students who never practice law. Then there is a complicated set of institutional practices that orient students to willing participation in the specialized hierarchical roles of lawyers. Students begin to absorb the more general ideological message before they have much in the way of a conception of life after law school, so I will describe the formal aspect of the educational process before describing the ways in which the institutional practice of law schools bear on those realities.

Law students sometimes speak as though they learned *nothing* in law school. In fact, they learn the skills, to do a number of simple but important things. They learn to retain large numbers of rules organized into categorical systems (requisites for a contract, rules about breach, etc.). They learn "issue spotting", which means identifying the ways in which the rules are ambiguous, in conflict,

or have a gap when applied to particular fact situations. They learn elementary case analysis, meaning the art of generating broad holdings for cases so they will apply beyond their intuitive scope, and narrow holdings for cases so that they won't apply where it at first seemed they would. And they learn a list of balanced, formulaic, pro/con policy arguments that lawyers use in arguing that a given rule should apply to a situation despite a gap, conflict or ambiguity, or that a given case should be extended or narrowed. These are arguments like "the need for certainty" and "the need for flexibility", "the need to promote competition" and "the need to encourage production by letting producers keep the rewards of their labor".

One should neither exalt these skills nor denigrate them. By comparison with the first-year students' tendency to flip-flop between formalism and mere equitable intuition, they represent a real intellectual advance. Lawyers actually do use them in practice; and when properly, consciously mastered, they have "critical" bite. They are a help in thinking about politics, public policy, ethical discourse in general, because they show the indeterminacy and manipulability of ideas and institutions that are central to liberalism.

On the other hand, law schools teach these rather rudimentary, essentially instrumental skills in a way that almost completely mystifies them for most law students. The mystification has three parts. First, the schools teach skills through class discussions of cases in which it is asserted that law emerges from a rigorous analytical procedure called legal reasoning, which is unintelligible to the layperson but somehow both explains and validates the great majority of the rules in force in our system. At the same time, the class context and the materials present every legal issue as distinct from every other - as a tub on its own bottom, so to speak - with no hope or even any reason to hope that from law study one might derive an integrating vision of what law is, how it works, or how it might change (other than in an incremental, case-by-case, reformist way).

Second, the teaching of skills in the mystified context of legal reasoning about utterly unconnected legal problems means that skills are taught badly, unself-consciously to be absorbed by osmosis as one picks up the knack of "thinking like a lawyer". Bad or only randomly good teaching generates and then accentuates real differences and imagined differences in student capabilities. But it does so in such a way that students don't know when they are learning and when they aren't, and have no way of improving or even understanding their own learning process.

They experience skills training as the gradual emergence of differences among themselves, as a process of ranking that reflects something that is just “there” inside them.

Third, the schools teach skills in isolation from actual lawyering experience. “Legal reasoning” is sharply distinguished from law practice, and one learns nothing about practice. This procedure disables students from any future role but that of an apprentice in a law firm organized in the same manner as a law school, with older lawyers controlling the content and pace of depoliticized craft-training in a setting of intense competition and no feedback.

### **THE FORMAL CURRICULUM: LEGAL RULES AND LEGAL REASONING**

The intellectual core of the ideology is the distinction between law and policy. Teachers convince students that legal reasoning exists, and is different from policy analysis, by bullying them into accepting as valid in particular cases arguments about legal correctness that are circular, question-begging, incoherent, or so vague as to be meaningless. Sometimes these are just arguments from authority, with the validity of the authoritative premise put outside discussion by professorial fiat. Sometimes they are policy arguments (e. g., security of transaction, business certainty) that are treated in a particular situation as though they were rules that everyone accepts, but that will be ignored in the next case when they would suggest that the decision was wrong. Sometimes they are exercises in doctrinal logic that wouldn't stand up for a minute in a discussion between equals (e. g., the small print in a form contract represents the “will of the parties”).

Within a given subfield, the teacher is likely to treat cases in three different ways. There are the cases that present and justify the basic rules and basic ideas of the field. These are treated as cursory exercises in legal logic. Then there are cases which are anomalous –“outdated” or “wrongly decided”- because they don't follow the supposed inner logic of the area. There won't be many of these, but they are important because their treatment persuades students that the technique of legal reasoning is at least minimally independent of the results reached by particular judges and is therefore capable of criticizing as well as legitimating. Finally, there will be an equally small number of peripheral or “cutting-edge” cases the teacher sees as raising policy issues about growth or change in the law. Whereas in discussing the first two kinds of case the teacher behaves in an authoritarian way supposedly based on his or her objective knowledge of the technique of legal reasoning, here everything is different. Because we are dealing

with “value judgments”, that have “political” overtones, the discussion will be much more freewheeling. Rather than every student comment being right or wrong, all student comments get pluralistic acceptance, and the teacher will reveal himself or herself to be either a liberal or a conservative rather than merely a legal technician.

The curriculum as a whole has a rather similar structure. It is not really a random assortment of tubs on their own bottoms, a forest of tubs. First, there are contracts, torts, property, criminal law, and civil procedure. The rules in these courses are the ground rules of late-nineteenth-century *laissez-faire* capitalism. Teachers teach them as though they had an inner logic, as an exercise in legal reasoning, with policy (e. g., commercial certainty in the contracts course) playing a relatively minor role. Then there are the second- and third-year courses that expound the moderate reformist program of the New Deal and the administrative structure of the modern regulatory state (with passing reference to the racial egalitarianism of the Warren Court). These courses are more policy-oriented than first-year courses, and also much more ad hoc.

Liberal teachers teach students that limited interference with the market makes sense and is as authoritatively grounded in statutes as the rules of *laissez-faire* are grounded in natural law. But each problem is discrete, enormously complicated, and understood in a way that guarantees the practical impotence of the reform program. Conservative teachers teach that much of the reform program is irrational or counterproductive or both, and would have been rolled back long ago were it not for “politics”. Finally, there are peripheral subjects, like legal philosophy or legal history, legal process, clinical legal education. These are presented as not truly relevant to the “hard” objective, serious, rigorous analytic core of law; they are a kind of playground or finishing school for learning the social art of self-presentation as a lawyer.

It would be an extraordinary first-year student who could, on his own, develop a theoretically critical attitude towards this system. Entering students just don't know enough to figure out where the teacher is fudging, misrepresenting, or otherwise distorting legal thinking and legal reality. To make matters worse, the most common kind of liberal thinking the student is likely to bring with her is likely to hinder rather than assist in the struggle to maintain some intellectual autonomy from the experience. Most liberal students believe that the liberal program can be reduced to guaranteeing people their rights and to bringing about the triumph of human rights over mere property rights. In this picture, the trouble with the legal system is that it fails to put the state behind the

rights of the oppressed, or that the system fails to enforce the rights formally recognized. If one thinks about law this way, one is inescapably dependent on the very techniques of legal reasoning that are being marshaled in defense of the status quo.

This wouldn't be so bad if the problem with legal education were that the teachers *misused* rights reasoning to restrict the range of the rights of the oppressed. But the problem is much deeper than that. Rights discourse is internally inconsistent, vacuous or circular. Legal thought can generate equally plausible rights justifications for almost any result. Moreover, the discourse of rights imposes constraints on those who use it that make difficult for it to function effectively as a tool of radical transformation. Rights are by their nature "formal", meaning that they secure to individuals legal protection for, as well as from, arbitrariness - to speak of rights is precisely *not* to speak of justice between social classes, races or sexes. Rights discourse, moreover, presupposes or takes for granted that the world is and should be divided between a state sector that enforces rights and a private world of "civil society" in which individuals pursue their diverse goals. This framework is, in itself, a part of the problem rather than of the solution. It makes it difficult even to conceptualize radical proposals such as, for example, decentralized democratic worker control of factories.

Because it is incoherent and manipulable, traditionally individualist, and willfully blind to the realities of *substantive* inequality, rights discourse is a trap. As long as one stays within it, one can produce good pieces of argument about the occasional case on the periphery where everyone recognizes value judgments have to be made. But one is without guidance in deciding what to do about fundamental questions and fated to the gradual loss of confidence in the convincingness of what one has to say in favor of the very results one believes in most passionately.

Left liberal rights analysis submerges the student in legal rhetoric but, because of its inherent vacuousness, can provide no more than an emotional stance against the legal order. It fails liberal students because it offers no base for the mastery of ambivalence. What is needed is to think about law in a way that will allow one to enter into it, to criticize it without utterly rejecting it, and to manipulate it without self-abandonment to *their* system of thinking and doing.

## STUDENT EVALUATION

Law schools teach a small number of useful skills. But they teach them only obliquely. It would threaten the professional ideology and the academic

pretensions of teachers to make their students as good as they can be at the relatively simple tasks that they will have to perform in practice. But it would also upset the process by which a hierarchical arrangement analogous to that of law school applicants, law schools and law firms is established within a given student body.

To teach the repetitive skills of legal analysis effectively, one would have to isolate the general procedures that make them up, and then devise large numbers of factual and doctrinal hypotheticals where students could practice those skills, knowing what they were doing and learning in every single case whether their performance was good or bad. As legal education now works, on the other hand, students do exercises designed to discover what the “correct solution” to a legal problem might be, those exercises are treated as unrelated to one another, and students receive no feedback at all except a grade on a single examination at the end of the course. Students generally experience these grades as almost totally arbitrary –unrelated to how much you worked, how much you liked the subject, how much you understood going into the exam, and what you thought about the class and the teacher.

This is silly, looked at as pedagogy. But it is more than silly when looked at as ideology. The system generates a rank ordering of students based on grades, and students learn that there is little or nothing they can do to change their place in that ordering, or to change the way the school generates it. Grading as practiced teaches the inevitability and also the justice of hierarchy, a hierarchy that is at once false and unnecessary.

It is unnecessary because it is largely irrelevant to what students will do as lawyers. Most of the process of differentiating students into bad, better and good could simply be dispensed with without the slightest detriment to the quality of legal services. It is false, first, because insomuch as it does involve the measuring of the real and useful skills of potential lawyers, the differences between students could be “leveled up” at minimal cost, whereas the actual practice of legal education systematically accentuates differences in real capacities. If law schools invested some of the time and money they now put into Socratic classes in developing systematic skills training, and committed themselves to giving constant, detailed feedback on student progress in learning those skills, they could graduate the vast majority of all the law students in the country at the level of technical proficiency now achieved by a small minority in each institution.

Law schools convey their factual message to each student about his or her place in the ranking of students along with the implicit corollary that

place is individually earned, and therefore deserved. The system tells you that you learned as much as you were capable of learning, and that if you feel incompetent or that you could have become better at what you do, it is your own fault. Opposition is sour grapes. Students internalize this message about themselves and about the world, and so prepare themselves for all the hierarchies to follow.

## INCAPACITATION FOR ALTERNATIVE PRACTICE

Law schools channel their students into jobs in the hierarchy of the bar according to their own standing in the hierarchy of schools. Students confronted with the choice of what to do after they graduate experience themselves as largely helpless: they have no “real” alternative to taking a job in one of the firms that customarily hire from their school. Partly, faculties generate this sense of student helplessness by propagating myths about the character of the different kinds of practice. They extol the forms that are accessible to their students; they subtly denigrate or express envy about the jobs that will be beyond their students’ reach; they dismiss as ethically and socially suspect the jobs their students won’t have to take.

As for any form of work outside the established system –for example, legal services for the poor and neighborhood law practice- they convey to students that, although morally exalted, the work is hopelessly dull and unchallenging, and that the possibilities of reaching a standard of living appropriate to a lawyer are slim or nonexistent. There messages are just nonsense –the rationalizations of law teachers who long upward, fear status degradation, and above all hate the idea of risk. Legal services practice, for example, is far more intellectually stimulating and demanding, even with a high caseload, than most of what corporate lawyers do. It is also more fun.

Beyond this dimension of professional mythology, law schools act in more concrete ways to guarantee that their students will fit themselves into their appropriate niches in the existing system of practice. First, the actual content of what is taught in a given school will incapacitate students from any other form of practice than that allotted to graduates of that institution. This looks superficially like a rational adaptation to the needs of the market, but it is in fact almost entirely unnecessary. Law schools teach so little, and that so incompetently, that they cannot, as not constituted, prepare students for more than one career at the bar. But the reason for this is that they embed skills training in mystificatory nonsense and devote most of their teaching time to transmitting masses of

ill-digested rules. A more rational system would emphasize the way to learn law rather than rules, and skills rather than answers. Student capacities would be more equal as a result, but students would also be radically more flexible in what they could do in practice.

A second incapacitating device is the teaching of doctrine in isolation from practice skills. Students who have no practice skills tend to exaggerate how difficult it is to acquire them. There is a distinct lawyers' mystique of the irrelevance of the "theoretical" material learned in school, and of the crucial importance of abilities that cannot be known or developed until one is out in the "real world" and "in the trenches". Students have little alternative to getting training in this dimension of things after law school. It therefore seems hopelessly impractical to think about setting up your own law firm, and only a little less impractical to go to a small or political or unconventional firm rather than to one of those that offer the standard package of postgraduate education. Law schools are wholly responsible for this situation, They could quite easily revamp their curricula so that any student who wanted it would have a meaningful choice between independence and servility.

A third form of incapacitation is more subtle. Law school, as an extension of the educational system as a whole, teaches students that they are weak, lazy, incompetent and insecure. And it also teaches them that if they are willing to accept extreme dependency and vulnerability for a probationary term, large institutions will (probably) take care of them almost no matter what. The terms of the bargain are relatively clear. The institution will set limited, defined tasks that specify minimum requirements in their performance. The student/associate has no other responsibilities than performance of those tasks. The institution takes care of all the contingencies of life, both within the law (supervision and backup from other firm members; firm resources and prestige to bail you out if you make a mistake) and in private life (firms offer money but also long-term job security and delicious benefits packages aimed to reduce risks of disaster). In exchange, you renounce any claim to control your work setting or the actual content of what you do, and agree to show the appropriate form of deference to those above and condescension to those below.

By comparison, the alternatives are risky. Law school does not train you to run a small law business, to realistically assess the outcome of a complex process involving many different actors, or to enjoy the feeling of independence and moral integrity that comes of creating your own job to serve your own goals. It tries to persuade you that you are barely

competent to perform the much more limited roles it allows you, and strongly suggests that it is more prudent to kiss the lash than to strike out on your own.

### **THE MODELING OF HIERARCHICAL RELATIONSHIPS**

Law teachers model for students how they are supposed to think, feel and act in their future professional roles. Some of this is a matter of teaching by example, some of it a matter of more active learning from interactions that are a kind of clinical education for lawyerlike behaviour. This training is a major factor in the hierarchical life of the bar. It encodes the message of the legitimacy of the whole system into the smallest details of personal style, daily routine, gesture, tone of voice, facial expression - a plethora of little p's and q's for everyone to mind. Partly, these will serve as a language - a way for the young lawyer to convey that she knows what the rules of the game are and intends to play them. What's going on is partly a matter of ritual oaths and affirmations - by adopting the mannerisms, one pledges one's troth to inequality. And partly it is a substantive matter of value. Hierarchical behavior will come to express and realize the hierarchical selves of people who were initially only wearers of masks.

Law teachers enlist on the side of hierarchy all the vulnerabilities students feel as they begin to understand what lies ahead of them. In law school, students have to come to grips with implications of their social class and sex and race in a way that is different from (but not necessarily less important than) the experience of school. People discover that preserving their class status is extremely important to them, so important that no alternative to the best law job they can get seems possible to them. Or they discover that they want to rise, or that they are trapped by student loans in a way they hadn't anticipated. People change the way they dress and talk; they change their opinions and even their emotions. None of this is easy for anyone, but liberal students have the special set of humiliations involved in discovering the limits of their commitment and often the instability of attitudes they thought were basic to themselves.

Another kind of vulnerability has to do with one's own competence. Law school wields frightening instruments of judgment, including not only the grading system but also the more subtle systems of teacher approval in class, reputation among fellow students, and out-of-class faculty contact and respect. Liberal students sometimes begin law school with an apparently unshakable confidence in their own competence and

with a related confidence in their own left analysis. But even these apparently self-assured students quickly find that adverse judgments -even judgments that are only imagined or projected of to others- count and hurt. They have to decide whether this responsiveness in themselves is something to accept, whether the judgments in question have validity and refer to things they care about, or whether they should reject them. They have to wonder whether they have embarked on a subtle course of accommodating themselves intellectually in order to be in the ball park where people win and lose teacher and peer approval. And they have, in most or at least many cases, to deal with actual failure to live up to their highest hopes of accomplishment within the conventional system of rewards.

A first lesson is that professors are intensely preoccupied with the status ranking of their schools, and show themselves willing to sacrifice to improve their status in the rankings and to prevent downward drift. They approach the appointment of colleagues in the spirit of trying to get people who are as high up as possible in a conventionally defined hierarchy of teaching applicants, and they are notoriously hostile to affirmative action in faculty hiring, even when they are quite willing to practice it for student admissions and in filling administrative posts. Assistant professors begin their careers as the little darlings of their older colleagues. They end up in tense competition for the prize of tenure, trying to accommodate themselves to standards and expectations that are, typically, too vague to master except by a commitment to please at any cost. In these respects, law schools are a good preview of what law firms will be like.

Law professors, like lawyers, have secretaries. Students deal with them off and on through law school, watch how their bosses treat them, how they treat their bosses, and how “a secretary” relates to “a professor” even when one does not work for the other. Students learn that it is acceptable, even if it’s not always and everywhere the norm, for faculty to treat their secretaries petulantly, condescendingly, with a perfectionism that is a matter of the bosses’ face rather than of the demands of the job itself, as though they were personal body servants, utterly impersonally, or as objects of sexual harassment. They learn that “a secretary” treats “a professor” with elaborate deference, as though her time and her dignity meant nothing and his everything, even when he is not her boss. In general, they learn that humane relations in the workplace are a matter of the superior’s grace rather than of human need and social justice.

These lessons are repeated in the relationships of professors and secretaries with administrators and with maintenance and support staff. Teachers convey a sense of their own superiority and practice a social segregation sufficiently extreme so that there are no occasions on which the reality of that superiority might be tested. As a group, they accept and willingly support the division of labor that consigns everyone in the institution but them to boredom and passivity. Friendly but deferential social relations reinforce everyone's sense that all's for the best, making hierarchy seem to disappear in the midst of cordiality when in fact any serious challenge to the regime would be met with outrage and retaliation.

All of this is teaching by example. In their relations with students, and in the student culture they foster, teachers get the message across more directly and more powerfully. The teacher/student relationship is the model for relations between junior associates and senior partners, and also for the relationship between lawyers and judges. The student/student relationship is the model for relations among lawyers as peers, for the age cohort within a law firm, and for the "fraternity" of the court-house crowd.

In the classroom and out of it, students learn a particular style of deference. They learn to suffer with positive cheerfulness interruption in mid-sentence, mockery, ad hominem assault, inconsequential asides, questions that are so vague as to be unanswerable but can somehow be answered wrong all the same, abrupt dismissal, and stinginess of praise (even if these things are not always and everywhere the norm). They learn, if they have talent, that submission is most effective flavored with a pinch of rebellion, to bridle a little before they bend. They learn to savor crumbs, while picking from the air the indications of the master's mood that can mean the difference between a good day and misery. They learn to take it all in good sort, that there is often shyness, good intentions, some real commitment to your learning something behind the authoritarian façade. So it will be with many a robed curmudgeon in years to come.

Then there is affiliation. From among many possibilities, each student gets to choose a mentor, or several, to admire and depend on, to become sort of friends with if the mentor is a liberal, to sit at the feet of if the mentor is more "traditional". You learn how he or she is different from other teachers, and to be supportive of those differences, as the mentor learns something of your particular strengths and weaknesses, both of you trying to prevent the inevitability of letters of recommendation from corrupting the whole experience. This can be fruitful and satisfying, or degrading, or both at once. So it will be a few years later with your "father in the law".

There is a third, more subtle, and less conscious message conveyed in student/teacher relations. Teachers are overwhelmingly white, male, and middle class; and most (by no means all) black and women law teachers give the impression of thorough assimilation to that style, or of insecurity and unhappiness. Students who are women or black or working class find out something important about the professional universe from the first day of class: that it is not even nominally pluralist in cultural terms. The teacher sets the tone – a white, male, middle-class tone. Students adapt. They do so partly out of fear, partly out of hope of gain, partly out of genuine admiration for their role models. But the line between adaptation to the intellectual and skills content of legal education and adaptation to the white, male, middle-class cultural style is a fine one, easily lost sight of.

While students quickly understand that there is diversity among their fellow students and that the faculty is not really homogeneous in terms of character, background, or opinions, the classroom itself becomes more rather than less uniform as legal education progresses. You'll find Fred Astaire and Howard Cosell over and over again, but never Richard Pryor or Betty Friedan. It's not that the teacher punishes you if you use slang or wear clothes or give examples or voice opinions that identify you as different, though that might happen. You are likely to be sanctioned, mildly or severely, only if you refuse to adopt the highly cognitive, dominating mode of discourse that everyone identifies as lawyerlike. Nonetheless, the indirect pressure for conformity is intense.

If you, alone in your seat, feel alienated in this atmosphere, it is unlikely that you will do anything about it in the classroom setting itself, however much you gripe about it with friends. It is more than likely that you'll find a way, in class, to respond as the teacher seems to want you to respond –to be a lot like him, as far as one could tell if one knew you only in class, even though your imitation is flawed by the need to suppress anger. And when some teacher, at least once in some class, makes a remark that seems sexist or racist, or seems unwilling to treat black or women students in quite as “challenging” a way as white students, or treats them in a more challenging way, or cuts off discussion when a woman student gets mad at a male student's joke about the tort of “offensive touching”, it is unlikely that you'll do anything then either.

It is easy enough to see this situation of enforced cultural uniformity as oppressive, but somewhat more difficult to see it as training, especially if you are aware of it and hate it. But it is training nonetheless. You will pick up mannerisms, ways of speaking, gestures, that would be “neutral”

if they were not emblematic of membership in the universe of the bar. You will come to expect that as a lawyer you will live in a world in which essential parts of you are not represented, or are misrepresented, and in which things you don't like will be accepted to the point that it doesn't occur to people that they are even controversial. And you will come to expect that there is nothing you can do about it. One develops ways of coping with these expectations –turning off attention or involvement when the conversation strays in certain directions, participating actively while ignoring the offensive elements of the interchange, even reinterpreting as inoffensive things that would otherwise make you boil. These are skills that incapacitate rather than empower, skills that will help you imprison yourself in practice.

Relations among students get a lot of their color from relations with the faculty. There is the sense of blood brotherhood, with or without sisters, in endless speculation about the Olympians. The speculation is colored with rage, expressed sometimes in student theatricals or the “humor” column of the school paper. (“Put Professor X’s talents to the best possible use: Turn him into hamburger.” Ha, ha.) There is likely to be a surface norm of non-competitiveness and cooperation. (“Gee, I thought this would be like *The Paper Chase*, but it isn’t at all.”) But a basic thing to learn is the limits of that cooperativeness. Very few people can combine rivalry for grades, law review, clerkships, good summer jobs, with helping another member of their study group so effectively that he might actually pose a danger to them. You learn camaraderie and distrust at the same time. So it will be in the law-firm age cohort.

And there is more to it than that. Through the reactions of fellow students – diffuse, disembodied events that just “happen”, in class or out of class- women learn how important it is not to appear to be “hysterical females”, and that when your moot court partner gets a crush on you, and doesn’t know it, and is married, there is a danger he will hate you when he discovers what he has been feeling. Lower-middle-class students learn not to wear an undershirt that shows, and that certain patterns and fabrics in clothes will stigmatize them no matter what their grades. Black students learn without surprise that the bar will have its own peculiar forms of racism, and that their very presence means affirmative action, unless it means “he would have made it even without affirmative action.” They worry about forms of bias so diabolical even they can’t see them; and wonder whether legal reasoning is intrinsically white. Meanwhile, dozens of small changes through which they become more and more like other middle- or upper-middle-class Americans engender rhetoric about

how the black community is not divided along class lines. On one level, all of this is just high school replayed; on another, it's about how to make partner.

The final touch that completes the picture of law school as training for professional hierarchy is the placement process. As each firm, with the tacit or enthusiastically overt participation of the schools, puts on a conspicuous display of its relative status within the bar, the bar as a whole affirms and celebrates its hierarchical values and the rewards they bring. This process is most powerful for students who go through the elaborate procedures of firms in about the top half of the profession. There include, nowadays, first-year summer jobs, dozens of interviews, fly-outs, second-year summer jobs, more interviews, and more fly-outs.

This system allows law firms to get a *social* sense of applicants, a sense of how they will contribute to the non-legal image of the firm and to the internal system of deference and affiliation. It allows firms to convey to students the extraordinary opulence of the life they offer, adding the allure of free travel, expense-account meals, fancy hotel suites, and parties at country clubs to the simple message of big bucks in a paycheck. And it teaches students at fancy law schools, students who have had continuous experience of academic and careerist success, that they are not as "safe" as they thought they were.

When students at Columbia or Yale paper dorm corridors with rejection letters, or award prizes for the most rejection letters and for the most unpleasant single letter, they show their sense of the meaning of the ritual. There are many ways in which the boss can persuade you to brush his teeth and comb his hair. One of them is to arrange things so that almost all students get good jobs, but most students get their good jobs through twenty interviews yielding only two offers.

By dangling the bait, making clear the rules of the game, and then subjecting almost everyone to intense anxiety about their acceptability, firms structure entry into the profession so as to maximize acceptance of hierarchy. If you feel you've succeeded, you're forever grateful, and you have a vested interest. If you feel you've failed, you blame yourself, when you aren't busy feeling envy. When you get to be the hiring partner, you'll have a visceral understanding of what's at stake, but by then it will be hard to even imagine why someone might want to change it.

Inasmuch as these hierarchies are generational, they are easier to take than those baldly reflective of race, sex or class. You, too, will one day be a senior partner and, who knows, maybe even a judge; you will have mentees and be the object of the rage and longing of those coming up

behind you. Training for subservience is learning for domination as well. Nothing could be more natural and, if you've served your time, more fair than that you as a group should do as you have been done to, for better and for worse. But it doesn't have to be that way, and remember, you saw it first in law school.

I have been arguing that legal education is one of the causes of legal hierarchy. Legal education supports it by analogy, provides it with a general legitimating ideology by justifying the rules that underlie it, and provides it with a particular ideology by mystifying legal reasoning. Legal education structures the pool of prospective lawyers so that their hierarchical organization seems inevitable, and trains them in detail to look and think and act just like all the other lawyers in the system. Up to this point I have presented this causal analysis as though legal education were a machine feeding particular inputs into another machine. But machines have no consciousness of one another; inasmuch as they are coordinated, it is by some external intelligence. Law teachers, on the other hand, have a vivid sense of what the profession looks like and what it expects them to do. Since actors in the two systems consciously adjust to one another and also consciously attempt to influence one another, legal education is as much a product of legal hierarchy as a cause of it. To my mind, this means that law teachers must take personal responsibility for legal hierarchy in general, including hierarchy within legal education. If it is there, it is there because they put it there and reproduce it generation after generation, just as lawyers do.

## THE STUDENT RESPONSE TO HIERARCHY

Students respond in different ways to their slowly emerging consciousness of the hierarchical realities of life in the law. Looking around me, I see students who enter wholeheartedly into the system –for whom the training “takes” in a quite straightforward way. Others appear, at least, to manage something more complex. They accept the system’s presentation of itself as largely neutral, as apolitical, meritocratic, instrumental, a matter of craft. And they also accept the system’s promise that if they do their work, “serve their time”, and “put in their hours”, they are free to think and do and feel anything they want in their “private lives”.

This mode of response is complex because the promise, though sincerely proffered, is only sometimes realized. People who accept the messages at face value are surprisingly often disappointed, at least to hear them tell it twenty years later. And since the law is neither apolitical nor

meritocratic nor instrumental nor a matter of craft (at least not exclusively these things), and since training for hierarchy cannot be a matter merely of public as opposed to private life, it is inevitable that they do in fact give and take something different than what is suggested by the overt terms of the bargain. Sometimes people enact a kind of parody: they behave in a particularly tough, cognitive, lawyerlike mode in their professional selves, and construct a private self that seems on the surface to deliberately exaggerate opposing qualities of warmth, sensitivity, easygoingness, or cultural radicalism.

Sometimes one senses an opposite version: the person never fully enters into “legal reasoning”, remaining always a slightly disoriented, not-quite-in-good-faith role player in professional life, and feels a parallel inability ever to fully “be” their private self. For example, they may talk “shop” and obsess about the day at work, while hating themselves for being unable to “relax”, but then find that at work they are unable to make the tasks assigned them fully their own, and that each new task seems at first an unpleasant threat to their fragile feelings of confidence.

For committed liberal students, there is another possibility, which might be called the denunciatory mode. Once can take law school work seriously as time serving and do it coldly in that spirit, hate one’s fellow students for their surrenders, and focus one’s hopes on “not being a lawyer” or on a fantasy of an unproblematically leftist legal job on graduation. This response is hard from the very beginning. If you reject what teachers and the student culture tell you about what the first-year curriculum means and how to enter into learning it, you are adrift as to how to go about becoming minimally competent. You are to develop a theory of your own of what is valid skills training and what is merely indoctrination, and your ambivalent desire to be successful in spite of all is likely to sabotage your independence. As graduation approaches, it becomes clearer that there are precious few unambiguously virtuous law jobs even to apply for, and your situation begins to look more like everyone else’s, though perhaps more extreme. Most (by no means all) students who begin with denunciation end by settling for some version of the bargain of public against private life.

I am a good deal more confident about the patterns that I have just described than about the attitudes toward hierarchy that go along with them. My own position in the system of class, sex and race (as an upper-middle class white male) and my rank in the professional hierarchy (as a Harvard professor) give me an interest in the perception that hierarchy is both omnipresent and enormously important, even while I am busy

condemning it. And there is a problem of imagination that goes beyond that of interest. It is hard for me to know whether I even understand the attitudes toward hierarchy of women and blacks, for example, or of children of working-class parents, or of solo practitioners eking out a living from residential real-estate closings. Members of those groups sometimes suggest that the particularity of their experience of oppression simply cannot be grasped by outsiders, but sometimes that they failure to grasp it is a personal responsibility rather than inevitable. Often it seems to me that all people have at least analogous experiences of the oppressive reality of hierarchy, even those who seems most favored by the system –that the collar feels the same when you get to the end of the rope, whether the rope is ten feet long or fifty. On the other hand, it seems clear that hierarchy creates distances that are never bridged.

It is not uncommon for a person to answer a description of the hierarchy of law firms with a flat denial that the bar is really ranked. Lawyers of lower-middle class background tend to have far more direct political power in the state governments than “elite” lawyers, even under Republican administrations. Furthermore, every lawyer knows of instances of real friendship, seemingly outside and beyond the distinctions that are supposed to be so important, and can cite examples of lower-middle-class lawyers in upper-middle-class law firms, and vice versa. There are many lawyers who seem to defy hierarchical classification, and law firms and law schools that do likewise, so that one can argue that the hierarchy claim that everyone and everything is ranked breaks down the minute you try to give concrete examples. I have been told often enough that I *may* be right about the pervasiveness of ranking, but that the speaker has never notices it himself, himself treats all lawyers in the same way, regardless of their class or professional standing, and has never, except in an occasional very bizarre case, found lawyers violating an egalitarian norm.

When the person making these claims is a rich corporate lawyer who was my prep school classmate, I tend to interpret them as willful denial of the way he is treated and treats others. When the person speaking is someone I perceive as less favored by the system (say, a woman of lower-middle-class origin who went to Brooklyn Law School and now works for a small, struggling downtown law firm), it is harder to know how to react. Maybe I’m just wrong about what it’s like out there. Maybe my preoccupation with the horrors of hierarchy is just a way to wring the last ironic drop of pleasure from my own hierarchical superiority. But I don’t interpret it that way. The denial of hierarchy is false consciousness.

The problem is not whether hierarchy is there, but how to understand it, and what its implications are for political action.

An enlarged version of this chapter entitled *Legal Education and the Reproduction of Hierarchy* is available in pamphlet form from the author.