

## ESSAY

### To Dress for Dinner: Teaching Law in a Bureaucratic Age

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#### I

“It’s late, . . . we must go and dress for dinner. For a few hours I have to act the part of a civilized man.”<sup>1</sup> Thus did Fabrizio Corbèra, Prince of Salina, a Sicilian aristocrat and so a part of the court of the recently deposed Spanish Bourbon ruler of the Kingdom of the Two Sicilies, dismiss an emissary of Victor Emmanuel of Savoy, ruler of the Kingdom of Sardinia, soon to be the first king of a mostly united Italy. This emissary had asked Don Fabrizio to accept royal appointment as a member of the Senate of the new country, a constitutional monarchy. Don Fabrizio had declined.

Of course, Don Fabrizio, the Leopard, so called because that animal dominated the family crest, is a largely fictional character, modeled after the great-grandfather of the author, Giuseppe di Lampedusa, himself a Sicilian aristocrat. The time depicted in *The Leopard* is, however, real—the few

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† U.B. Distinguished Professor of Law at the University at Buffalo, State University of New York. Jim Gardner’s effort in helping me think out this problem has been invaluable. A faculty seminar at the University at Buffalo School of Law was both helpful and enlightening. Conversations with Guyora, Michael, Joe, Tony, Matt and Bert were separately useful. Mark Fenster provided the Simpsons reference.

1. GUISEPPI DI LAMPEDUSA, *THE LEOPARD* 213 (Archibald Colquhoun trans., Pantheon Books Inc. 1960) (1958). The book was later made into one of Luchino Visconti’s arguably best movies, starring Bert Lancaster, Claudia Cardinale and Alan Delon. *IL GATOPARDO* (Twentieth Century Fox 1963).

years of the Risorgimento following Garibaldi's invasion of first Sicily, and thereafter the mainland around Naples. The novel is thus a portrait of an aristocracy in decline as the expanding *bourgeois* middle class begins its ascendancy.

Among the many reasons the Prince gave for his unwillingness to serve in the new Senate, two stand out. The first is about Sicily.

You talked to me about a young Sicily facing the marvels of the modern world; for my part I see instead a centenarian being dragged in a Bath chair around the Great Exhibition in London, understanding nothing and caring about nothing, whether it's the steel factories of Sheffield or the cotton spinners of Manchester . . .<sup>2</sup>

The second is about himself.

I am a member of the old ruling class, inevitably compromised with the Bourbon regime, and tied to it by chains of decency, if not of affection. I belong to an unfortunate generation, swung between the old world and the new, and I find myself ill at ease in both. And what is more . . . I am without illusions; what would the Senate do with me, an inexperienced legislator who lacks the faculty of self-deception, essential requisite for wanting to guide others? We of our generation must draw aside and watch the capers and somersaults of the young around this ornate catafalque. Now you need young men, bright young men, with minds asking 'how' rather than 'why' and who are good at masking, at blending . . . their personal interests with vague public ideals.<sup>3</sup>

And yet, despite Don Fabrizio's obvious distaste for the concerns and values of the rising middle class and his sense of representing the values of a time past, he almost immediately suggests that the emissary consider a different appointee. That candidate is the quite unpolished, perhaps better seen as uncouth, but nonetheless wealthy. He is soon to be the father-in-law of the Don's favorite, but

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2. DI LAMPEDUSA, *supra* note 1, at 205–06.

3. *Id.* at 209.

impoverished nephew, Tancredi. This young man had defended his choice to join Garibaldi's troops, by saying to his disapproving uncle, "Unless we ourselves take a hand now, they'll foist a republic on us; if we want things to stay as they are, things must change."<sup>4</sup>

What is to be made of Don Fabrizio, a man who finds the future so much more than unappetizing that he is unwilling to participate in it, but yet is willing to attempt to advance the potential interests of his headstrong nephew, a young man who has already broken the heart of the Don's eldest daughter? How should one respond to an unappetizing future, one whose job is "to guide others?" Should one play the part of a "civilized man," and so "dress for dinner," or instead "take a hand now," lest the future be even worse?

This question is a serious one for me. My students face a future that undermines the values that have grounded my teaching since I began this strange activity. However, before facing up to these questions, it seems useful to review a contrasting version of the Leopard's story, this time in a film set about seventy years later. Change is coming, not to Sicily, but to somewhere along the Tennessee River, the *Wild River* of the film's title, in the form of the Tennessee Valley Authority's (TVA) attempt to tame that river by building a series of dams that would also provide plentiful electric power to the area.<sup>5</sup> The story is not told from the point of

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4. *Id.* at 40.

5. *WILD RIVER* (Twentieth Century Fox 1960) is an Elia Kazan movie starring Montgomery Clift, Lee Remick and Jo van Fleet. The screenplay of *Wild River* was written by Paul Osborne, known for writing the screenplays of *South Pacific*, *East of Eden*, *The Yearling*, *The World of Suzie Wong* and *Sayonara*. He fashioned the story from two books. *Mud on the Stars* provided the location, including the river island farm, and the character of Ella Garth. See generally WILLIAM BRADFORD HUIE, *MUD ON THE STARS* (1942). *Dunbar's Cove* provided the young TVA bureaucrat who falls in love with a relative of a property owner, though in this novel the country farmer who is central to the story is the father of the girl, not the grandmother. See generally BORDEN DEAL, *DUNBAR'S COVE* (1957). Neither novel provided significant dialog, though the last paragraph of the second

view of the Leopard, but from that of Tancredi, of the younger generation, represented by Chuck Glover, an earnest, idealistic, naïve young man sent out from TVA headquarters in Washington to handle a problem.

The problem is Ella Garth, matriarch to a rather unsavory clan of hardscrabble farmers, and an even larger collection of negroes, probably sharecroppers, working a soon to be flooded island in the middle of the Tennessee River. Chuck's task is to convince Ella to sell her land and move to better housing higher up in the valley—a task that several others have undertaken, only to fail. Washington is afraid that there will be political repercussions if Ella is either forced off her land or left there and stubbornly drowns. Chuck is their go-to guy.

After Chuck's first attempt to meet Ella results in his being thrown in the river by her "boys," the old woman sends them to apologize for the rough treatment. Assuming that the apology is an invitation of sorts, Chuck returns only to be told by Ella that she will not sell

the land I've poured my heart's blood in. You don't love the land. You love your land. 'Electricity,' I expect that's what you call progress. Taking away people's souls, putting electricity in place of them, ain't progress. Not the way I see it.<sup>6</sup>

Still, Ella tells the negroes that they may leave the island and makes no effort to dissuade her granddaughter, Carol, who is falling in love with Chuck, from doing so as well.

Two more trips back to the island, the first drunk and the second to apologize for having been drunk, do nothing to change Ella's mind, and indeed leave Chuck crying out, "Mrs. Garth, what are you trying to prove?" to a resolutely closed door. In the end, it takes an order of eviction, signed by a federal judge and served by a U.S. marshal to force Ella,

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provided the movie's title.

<sup>6</sup> WILD RIVER (Twentieth Century Fox 1960).

wearing her good cloth coat, to leave. When her granddaughter offers to carry a small, obviously cardboard suitcase, Ella refuses and, as she walks past Chuck, commands, “Well, what you waiting for.” Though she settles into the new house that Chuck has had specially constructed for her, complete with a porch for her rocker, Ella dies as soon as her land is inundated. Chuck and Carol leave for a new life in Washington.

The structural similarities between *The Leopard* and *Wild River* are obvious, though less interesting than their differences. Ella, like Don Fabrizio, sees an abhorrent future and draws back from it. Though less willing than he to compromise with that future, she makes it clear, as does the Don, that she will not interfere with the choice of the younger generation, with Carol’s new found love or with the desire of the negroes to secure better housing and well-paying, if temporary, jobs off the island. But, *Wild River* is a movie focused on the young people. Like Tancredi, Chuck has enlisted as an agent of the future order. However, unlike Tancredi, Chuck comes to doubt the value of that order when, as a result of his interaction with Ella in her stubbornness, he realizes that the progress that the TVA brings to the valley—electricity and housing and industry—will destroy a way of life that, if not attractive to him, is at least meaningful to those living in that valley. He tries to temporize on behalf of the new order, but only after the old one shows its ugly underside—two sound thrashings delivered by the town bully, a defender of the old ways, especially white supremacy—can Chuck act decisively in favor of the newer one that brought him to the valley in the first place. And so his indecision adds another question to our initial ones. Is it plausible to temporize between past, present and future?

## II

Let me start to answer these questions by first acquiring an understanding of the past and a glimpse of the future. Born, raised, and educated in the Midwest, I attended the

University of Chicago Law School at a time when law and economics was anything but central to an overwhelmingly politically conservative curriculum, and left understanding that law, at least when well-practiced, was a matter of handicraft. My guess is that most of my classmates came out with a similar understanding. Whether the matter at hand was a complex financial transaction or a piece of litigation, the lawyer's job was the same—to fashion the judicial and legislative materials of law and the conventional ways of its practice into a form that would accomplish a given client's purpose as well as could be done, and hopefully that would manage to transform these materials at hand into a “better,” “more just”—most of us thought we knew what those words meant—species of law.

Though Robert Hutchins, patron saint of the University, if not its Law School, may have derided “the how to do it” law school,<sup>7</sup> I did not experience legal education as an example of the teaching of low level practice, but as *technê*, as knowledge gained from doing, much as knowledge of legal theory is gained from doing the critical analysis of judicial and legislative materials. Indeed, it was the experience of low-level practice, of the preparation of the summons and complaint or the notice of motion together with the proof of service, which was the surprise. Working out the theory that informed the complaint or the proper way of presenting the argument in a brief and then preparing these documents met our expectations of what it was to be a lawyer. If I had complained about law school's failure to prepare me for practice, it would have been about a failure to sufficiently stress the theory that informed practice—for example the theoretical understanding of how to translate a rule of law into a set of allegations in a complaint sufficient to withstand a motion to dismiss.

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7. See Robert M. Hutchins, *The University Law School*, in *THE LAW SCHOOL OF TOMORROW: THE PROJECTION OF AN IDEAL* 5, 5–6 (David Haber & Julius Cohen eds., 1968).

My experience of practice was of a hard, but honest living in a legal services office. I was professionally offended when an opponent too openly or too un-self-consciously turned the practice of law into a routine activity, whether it was by filing what was obviously the same motion to dismiss with the same brief, or the same set of boilerplate discovery requests in every case without regard to the narrow case-specific considerations that made cases distinguishable, indeed separately interesting. Such actions turned into a matter of vulgar, bureaucratic regularity something that I understood as anything but.

All of which was not to say that I did not experience from time to time the desultory routinization of law; I practiced in the Municipal Court of Chicago where, if papers were not ordered so that the check covering fees was on top of the summons which was on top of the complaint, the clerk would discipline the offender by throwing the pile back at the attorney filing the case in such a way that these papers would land on the dirty floor. Nevertheless, such experiences were to be counted as deviations, and unwelcome ones, from what was legal practice properly understood.

When I entered teaching, I experienced a difference between the law school I had been graduated from and the one at which I taught. At Chicago, only the insane worried about passing the bar exam. At Buffalo, where I began and remain teaching, a significant portion of the students were concerned about bar passage and rightly so, given the high degree of correlation between LSAT score and bar passage. This was not an elite school. Yet, a significant portion of my students saw law pretty much as I had. It was a handicraft and an absorbing one. These students were hungry to learn what this handicraft was all about, what needed to be known in order to be good at it. Of course, questions of earning a living were never suppressed; most nascent producers of handcrafted products recognize the need to earn a living. Still, it was not then implausible for a dean to wish his graduates that they should experience law as a matter of

“doing well, by doing good,” in Ben Franklin’s words. In line with such a vision of what it was to be a lawyer, many students understood, or at least acted as if they understood, that learning was significantly a matter of grasping the “why” of law—the theories, and so, the reasons that informed both bodies of doctrine and the various practices of lawyers. So, for them, critique of such theories was a crucial part of learning the law, a part of becoming a lawyer.

Today, I most often experience a very different understanding of law and lawyering on the largest part of my students. They are anything but hungry to learn. Perhaps they are sated even from too much learning. Pride in craft is noticeably lacking except for a few students taking courses that seem to them to be narrowly relevant to a future practice clearly envisioned.<sup>8</sup> Indeed, the transformation of “relevance” from being central to a sixties plea for more courses related to contemporary social problems, to being central to a demand for courses of ever more narrowly conceived short-term usefulness, is a source of sadness.<sup>9</sup>

In this world of law study, critique, a central part of my

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8. A good example are the students taking my colleagues’ courses, Isabel Marcus’ class on domestic violence or Judith Olin’s similar clinic.

9. I experienced the late sixties cry for “relevance” as a category mistake, a failure to understand the theoretical centrality of the verbs “to get” and “to spend” to the law’s understanding of itself. Some people will be surprised at this statement, coming as it does from a still self-identifying member of the Conference on Critical Legal Studies (CLS). While there is reason to question that affiliation, as some members of the group have done, because I found the critique part of CLS more to my liking than some of the politics which I found anything but capable of surviving the application of that critique, what I shared then with most of the CLS crew, and still hold now, is a dislike of liberal politics/policy/political theory. The endless balancing of this against that has always offended me because it avoids the obligation of anyone purporting to represent another or to judge on behalf of a polity to recognize the positional obligation to exercise judgment, to choose, and so, to accept that obligation as a personal one, as putting one’s being on the line, as it were. The endless wringing of one’s hands at the tragedy of choice has long struck me as the best evidence that liberals are psychologically unfit to govern, in any of the senses of that polysemous word, for accompanying their every choice is always an attempt to deflect criticism with a prepared apology. Fitness to govern is better evidenced by the willingness to accept criticism of choice and act upon it when appropriate.

experience of legal education, is an unwelcome intrusion into the job of becoming a lawyer. Indeed, at times, it seems that almost everything other than the thinnest, narrowest, most quickly comprehended material, delivered much as the classic heroin addict's plea, "straight in the arm," is an imposition on the life of the law student, a life conceived as moving on, getting this over with, as an endless series of occasions to hit the "page down" button on the computer program that is learning. Maybe even on the computer program that is life.

There seems to be no time patiently to learn a handicraft either, and if there were time, no inclination to use such time in this way. Any decrease in the breadth of materials covered in any class is no longer an occasion for exploring the remaining material in more detail in the name of gaining a better sense of how law works, but is taken as a contribution toward an ever-expanding pile of unnamed, possibly unnamable, other things to do. Training in legal research and writing seems to be a hurdle to be jumped over, a hurdle seen in terms of the minutiae of citation form and routine, idiomatic legal usage, but not as an occasion to work on the primary task of producing argument in readable, effective English prose. And both seem to be completely divorced from the activity of keeping a job once that elusive goal, on which all student attention seems to be focused, is attained.

### III

In struggling to understand why and how this change took place, I can offer two accounts. One emphasizes interrelated alterations in the structure of the American university and of the economy in which the legal practice for which our students understand themselves to be preparing, takes place. The other emphasizes changes in the cultural practices and outlooks that our students bring with them to law school. These accounts are not mutually exclusive, though they may be mutually reinforcing and likely reflect similar underlying social tectonics. For present purposes,

these possible interactions are not particularly important.

Start by revisiting the history of the social formation that is the American university. The contemporary university is not the descendant of the small denominational college of the late eighteenth and early nineteenth centuries, though some prominent universities have such a lineage. Rather, it is the descendant of the German university, specifically von Humboldt's University of Berlin. Von Humboldt conceived of an institution combining the faculty's practice of *Wissenschaft*, the acquisition of objective, scholarly knowledge about the worlds of nature and of human affairs designed to disclose the truth, *seen as a philosophical unity*, and its transmission of this knowledge to students who independently were attempting to develop their own *wissenschaftlich* understanding of the world. Both faculty and students were thus participating in the lifelong process of *Bildung*, the development of an individual's intellectual and moral, that is, human potential—a potential encompassing the ideal of the cultivated man embedded in a fully social and political context. This cultural unity was expected to create, and so to embody, the core of an ethnic German nation-state.

The students that von Humboldt envisioned for his ethnic German university were of the minor nobility and the various parts of the non-noble upper classes. He understood that the male children of the narrow middle class were to be remitted to the *Technische Hochschulen* or *Instituten*. When, in the 1870s, von Humboldt's ideas were transferred to the United States, two problems needed to be faced: cultural unity and social relations. The nation lacked von Humboldt's idealist understanding of a cultural identity that might serve as the philosophical unity for the American state. And the lack of a nobility meant that the American social structure was far different from the German.<sup>10</sup>

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10. John Henry Schlegel, *From High in the Paper Tower, An Essay on Von Humboldt's University*, 52 BUFF. L. REV. 865, 867–68 (2004).

When it came to establishing a cultural identity, the best the American university could do was to produce a student well-versed in American letters and, even here, there were problems. As a result of the Morrill Act of 1862, which provided for the support of “agriculture and the mechanic arts,” technical training was to be had within the university, not outside of it.<sup>11</sup> American letters was hardly a central part of such a technical education. Still, letters had the advantage that it was vaguely continuous with the curriculum of the denominational college that had long provided some students with a pre-professional education for the study of law, medicine, and theology. Such a traditional curriculum had included a modicum of science and political economy. So, when in the late nineteenth and early twentieth centuries, the sciences professionalized and the social sciences hived off into their own, separate professional orders, letters came to stand as central to a broader range of studies—the “liberal arts” (and sciences). Still, identifying a unity that might hold together the American university of professionally fragmented arts and sciences departments, various technical fields, such as engineering, and professional schools, such as medicine and law, was anything but easy.

A changing social structure presented equally difficult problems. The denominational college had long served the slender upper and upper-middle classes. That relationship continued in the growing American university. However, the change from an agricultural and commercial economy to one that was centered in mass manufacturing and transportation networks brought the appearance of a new piece of the middle class: middle management. This group, variously found in both the upper-middle and the once-largely artisanal, middle-middle classes, now had choices of where and how to educate its children and exercised them. Some invested in social class and so sent their children away

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11. Land-Grant Agricultural and Mechanical College Act of 1862, Pub. L. No. 37-130, 12 Stat. 503, 503 (1862) (codified as amended at 7 U.S.C. §§ 301–349 (2012)).

for the liberal arts education that supposedly fit them for the professions. Others, perhaps less economically secure, or maybe only less delusional, sent theirs away with the hope that they would receive a more technical education, which came to include the business school. By the 1930s, social fragmentation had thus reinforced educational fragmentation.

Interestingly, the Cold War that followed the much hotter World War II initially led to an increased emphasis on letters, renamed literary studies. Such studies were briefly seen as the core of Western values, and so Western higher education, understood as in opposition to the more science- and technology-centered Communist values, and so, Eastern higher education. But soon, the prestige of science derived from wartime engineering and the “Sputnik crisis” brought a sense that the worlds of science and letters were so different that, in C.P. Snow’s words, they comprised “two cultures.”<sup>12</sup> Any further pretense that the university represented a cultural unity became impossible.

Within the university, the response to this impossibility was the substitute of a superficial, but at least substantive, cultural unity that was literary studies, with an artificial one—a culture of excellence, sometime derided as the University of Excellence.<sup>13</sup> Excellence was a classic post-

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12. See generally C.P. SNOW, *THE TWO CULTURES AND A SECOND LOOK* (1963).

13. The University of Excellence is brutally, but wonderfully explored in BILL READINGS, *THE UNIVERSITY IN RUINS* (1996), a book that would be required reading for every university leader were it not written in the obscure language of Eighties and Nineties LitCrit.

Friends have objected to my endorsement of Readings’ excoriation of the term “excellence” as utterly lacking substance. They argue that much of Readings’ attack is leveled against a straw man as no one really believes that “excellence” is something that can be recommended or pursued without an underlying conception of in what it consists. Instead, excellence can only exist in relation to role-specific behavior, and can only be measured by the standards applicable to some particular role and so what Readings really objects to is the watered-down conception of excellence that in his view the modern university not only pursues, but also inculcates. This is a well-meant observation, but dubious to anyone who has listened carefully to a half hour of presidential rhetoric and chooses to

modern absence, a space without quality that thus could be filled with any metric. Internally, it quite quickly became the University of Administration, as non-teaching professionals multiplied like coat hangers in a dark closet. As part of a society obsessed with the ever-changing language of management, as well as its definition of value as output per unit cost, the University's metrics were both financial and resource utilization—tuition dollars and full-time equivalents (FTEs). Externally, the absence was quickly and quite arbitrarily filled with assessments, rankings or what-have-yous that measured nothing in the world at all, but instead reflected back the measurer's preferences, generally understood as an ordinal array; although the objects measured, whether universities as a whole or schools or programs within them, quite likely were close to normally distributed. The culture of excellence became the culture of the treadmill—endless striving to catch up with the ever-advancing leaders in a race for distinct advantage, but with indistinct purpose.

Meanwhile, major changes were taking place in the American social structure. At the end of World War II, the economy of high wages and high prices that was legislated, though not experienced, during the Depression created a

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substitute an irrelevant word, say “kale,” every time that “excellence” appears. The meaning changes not one wit, but it quickly becomes obvious that it is particularly inappropriate for an institution of higher education to play this fast and loose with signifiers.

Even more disreputable is the obvious meaning that is the University of Excellence. The University's excellence is that of a discipline and its norms and of peer review. Ironically, this is the revenge of the professionalization process that created the American university. By making knowing possible, the disciplines now act through their credentialing function to limit the knowable as well. Taken together, the university's bureaucratic personnel process and its disciplinary base thus have created a species of tyranny designed to avoid the difficult judgment of the individual value of a scholar's, a department's or even a university's scholarship, by means of the endless deferral of judgment to others who similarly defer their judgment to others, who similarly defer their judgment, *ad infinitum*, *ad nauseum*. Real excellence is personal to the actor. The judgmental buck stops there and so humility on the part of humans is required, in contrast to the arrogance of disciplinary self-assurance, and so self-satisfaction.

twenty-five-year boom. Accompanying this boom was both a population explosion, the Baby Boom, and a great downward expansion of the middle class as unionized workers, primarily in mass manufacturing industries, experienced middle class earnings for the first time. The existence of a mass middle class made aspirations for social advancement easier to envision and at the same time made delineations of the subtle substrata of that class more difficult, as the color of the worker's collar lost salience. Given the purportedly meritocratic bias that distinguishes our relatively democratic, but hardly egalitarian society, the expansion of college education that followed with the adolescence of the children who comprised the Baby Boom generation meant that college graduation changed from a clean marker of upper-middle class status to no more than a secure grip on middle-middle class status.

These boom years were followed by the Great Inflation of the seventies, which was in turn followed by another boom in the eighties and nineties. Inflation followed by boom partially hid the hollowing out of the unionized mass manufacturing sector, turned one wage earner families into two wage earner families, and stripped out many middle management jobs from newly leaner corporate entities. It also brought a great expansion of low-wage service employment and an increase in the cubicle warrior jobs that required a college degree, neither of which offered a clear route to middle management. These changes squeezed the newly expanded middle class and stressed families generally.

Increasingly, it seemed that the only sure route to a well-paying job, and so a weak, necessary, but hardly sufficient, grip on upper-middle class status, was either a technical degree, often including a master's degree, or a post-graduate professional degree. Thus, protecting one's high school GPA began to take on inordinate importance as a strong transcript, together with strong standardized admission test scores and endless participation in

“activities,” seemed to be the only way to secure a place in one of the “better” colleges or universities.

Once in college, the same concerns—transcript, test scores and activities—dominated student life, for college had turned from an objective to a stop, but not necessarily a rest, along the achievement highway. As a result, the broad, cultural education offered in the traditional liberal arts declined in attractiveness, then fell by the wayside. In technical fields, the same thing happened to those undergraduate and graduate courses that were deemed irrelevant to burnishing credentials for any necessary certification test or future employment. In sum, for students, von Humboldt’s university had turned into either an overly administered, but not very effective, employment service or several tune up laps around the track before the next big challenge—getting a place in one of the “better” graduate or professional schools.

Given these changes in the social understanding of undergraduate education, it is hardly surprising that law students, already inhabitants of the world that von Humboldt’s university has become, might easily slide, if not jump, into disconnecting the substance of professional education from the goal of getting and keeping employment. For them, getting the job might come to be understood as the important part, the affirmation of a desirable and so desired social status, the paper prerequisite for entering the upper-middle class. In contrast, keeping that job, doing law, might just as easily be understood primarily as participation in a bureaucratic enterprise of the kind that students regularly had passed through, successfully they might add, for close to twenty years. And in a very real sense, such students would not be wrong.

Consider social status first—always a good idea in a status-conscious, status-denying county. As is the case with any marker of status, its achievement is easily separated from its content. It is precisely this separation that the U.S. News & World Report rankings of everything play into. A

question about *what* one might have learned became easily subsumed into the question of *where* one might have learned. A top-twenty school offered more cachet than a top-forty school and a top-five, more than a top-twenty, though a degree from none of these schools offered but insignificant evidence that anything at all had been learned, especially given the obvious correlation between parent social status, standardized test scores, and institutional rank. In such a world, it is far more important to get to the finish line with an unscarred academic record than to learn anything.

Indeed, learning may be irrelevant. Again, given the modestly democratic ethos of our society, an ethos that pushes for the production of more, similarly credentialed individuals, rather than fewer, better-trained ones, most employers make their initial cut of whom to interview wholly on the basis of the status of the school and the relative place in the graduating class of the student. Only after exercising this easy rule of thumb is there any good reason for such employers to begin to cull among the similarly qualified by relying on personality, dress, handshake, eye contact, quickness, and other obvious, but irrelevant surrogates for having learned something useful. After all, if the first hire doesn't work out because the degree and the smile accompanying it hides the absence of, rather than evidences the acquisition of, useful knowledge, there always will be many more candidates in line to fill the job. In a world where employers act in this way, spending time building a resume and improving networking skills may indeed be a better use of a law student's time than learning the refinements of any body of doctrine or marginally improving the ability to craft an argument in an already wholly clichéd English language or even acquiring a better understanding of the institutions with which clients regularly interact.

Second, consider the nature of legal practice that young lawyers experience today. However plausible it once was to understand legal practice as a species of handicraft when I was in law school—after all, the modern form of plea

bargaining dates no later than the twenties prosecutions for Prohibition violations and the routinization of tort cases dates from a similar time when the automobile became a ubiquitous part of the urban landscape—it is wholly bizarre to see most contemporary legal practice as other than a species of bureaucratic administration, or at least as an enterprise of mass production. Handcrafting personalized legal solutions to client problems still survives in the representation of the wealthiest families and the most prosperous businesses, in small subspecies of governmental representation and in the more exotic corners of public interest practice, but it has largely disappeared everywhere else. A mass society brings bureaucratic solutions to its problems. Forms are so ubiquitous in our society that we seldom even notice them.

The best evidence of the bureaucratic nature of contemporary legal practice is the wild proliferation of paraprofessionals in even the fanciest of law firms. The faithful secretary who “ran” the office for small practitioners with concentrated practices—for example, real estate, divorce, worker’s compensation, probate, or personal bankruptcy—is both long storied and evidence of the routinization of many practices during the mid-twentieth century. But the expansion of such routine work into areas of finance and litigation in the largest firms, well enough known that it has become fodder for novels and movies, says mountains about the nature of such practice, as well as about the difficulty of creating a model for the delivery of legal services that can support partner salaries in such firms at their immodest level, a level initially driven by investment banker envy, but eventually by reported per partner earnings of competitors—a level way above lifestyle needs. Here again can be seen, but on the law firm side, the unthinking adoption of the ever-changing language of management, as well as its definition of value as output per unit cost.

If examples of serious and sustained handcrafted

production of legal work are seldom to be experienced, it is not surprising that students should act as if knowledge of how to do such things is largely irrelevant to their education. The ability carefully to craft a complaint or brief is of little importance if most of the jobs that students can conceive of consist primarily of moving paper from the right side of the desk to the left. And much the same is the case where the dollar amount of a transaction severely constrains the dollar amount of fees that can be justified by, and so the hours that can reasonably be devoted to, generating the perfect set of transactional documents. How students can come to understand such things before having experienced practice has long escaped me, but then, deep cultural understandings are often quite mysterious. Indeed, since entering law school, I have been bewildered by how it is that students come to law school believing that learning law is learning doctrine when they have never been there before—not that this is their only misconception.

#### IV

Here, then, is where the historical account should be supplemented by an account that acknowledges the cultural aspects of what as a law teacher I find myself experiencing—the raw phenomenology of attempting to teach today's students. On a daily basis, the dominant feature of the landscape I inhabit as teacher is, after all, the behavior of students in the classroom, and, in particular, the aspects of character that appear to guide their behavior in ways that are, if not impossible to comprehend, at least deeply dismaying to behold. Much has changed over forty years.

First and foremost—and here the historical-economic account is most directly relevant—many of our students, perhaps most, don't really want to be lawyers. Or, to put this more accurately, they don't really want to be lawyers in the sense that I understand what it means to want to be a lawyer. I speak here not of motivations to enter the practice of law—to right wrongs, to help the helpless, to make good

money, to get into politics, to wait out a bad economy, to satisfy one's parents; students have always entered law schools with some mix of these motivations and still do. Rather, students do not appear to equate wanting to be a lawyer with wanting to be a *good* lawyer—a skillful lawyer, a successful lawyer, a winning lawyer, a decent and ethical lawyer, a lawyer who knows the craft—a lawyer, in short, who is admired by other lawyers and by judges who are in a position to recognize the difference between a good lawyer, worthy of emulation, and a mediocre or poor one, worthy of at best silent pity, and at worst contempt.

In nearly every large course I have taught for significantly more than the past few years, a time comes in the semester when I have the urge to deliver a message: “Unless you plan to live a life as a river pirate standing aside the routine legal transactions of daily life with your hand out to collect a toll, you misunderstand what it is to be a good lawyer. Good lawyers are not paid for delivering certain answers to routine questions. Good lawyers earn the big bucks you all hope to make by putting their butt on the line, by exercising the best possible judgment in circumstances where answers are unlikely and advice only possible in terms of better or worse alternatives.” Forty years ago, this message might have secured many students' attention. They might have looked up as knowing smiles crept across their faces. “That's right,” they might have said to themselves silently, “I am here to become good lawyer; help me to learn to exercise good legal judgment.” Twenty years ago not as many would have sat up and taken notice. Lately, should I choose to deliver that message, it distressingly comes out sounding more like a plea and elicits from my students not a jolt of self-recognition, but an equally palpable sensation of distanced curiosity. How strange, they think to themselves; what can any of this law possibly have to do with the exercise of judgment?

Here, historical and economic explanations of this phenomenon do not suffice. Those who undertake to train for

a profession, and invest considerable time and money in the enterprise, yet do not aspire to provide their clients with the best possible judgment available to the profession for which they train, suffer from something more than a set of poor incentives; they suffer from a defect of character.

Even if it is true that the practice of law in the world our students will inhabit is desultory and bureaucratic, it is one thing to recognize that one's professional life rarely will afford opportunities to practice law creatively and satisfyingly, and quite another to reject as irrelevant the acquisition of the craft necessary to do so should the opportunity arise. In truth, the only thing that has distinguished practicing law from flipping burgers, in any era, has been, not the daily absence of tedium, but the fact that perhaps once a month, a lawyer may face a problem that cannot be handled by resort to the formulaic responses and the boilerplate that lawyer has deployed a hundred times before. Judgment, craft, creativity, and even wit occasionally may be found highly useful, even if not strictly required. The cubicle-warrior, in contrast, may pass an entire career without ever facing a problem that demands or even invites the exercise of any interesting kind of occupational judgment.

If law students were in a position to understand what skills they need to acquire and to what degree of proficiency in order to have a chance of practicing law well in those moments, rare or otherwise, that permit or invite the exercise of satisfying agency—those moments that confirm one's very humanity—their lack of interest in what a good legal education would require of them might be understood merely as a lack of understanding. But students are, of course, by definition, in no position to understand such questions and so their impulses must arise from other sources. Two factors suggest themselves.

First, it seems that students no longer believe in the value, or even the instrumental utility, of hard work. Or perhaps, it is that their conception of hard work is different

from mine. To today's students, work appears to mean the willingness to sit at a computer clicking around the internet until the answer to some question is located. It follows for such students that *hard* work consists of clicking around the internet *for as long as it takes* to find the answer. The idea that hard work might consist of exploring the contents of one's own head seemingly occurs to a few of them or, if it does occur to them, they evidently discard it as implausible on the ground that cultivating the skill of independent, critical thinking is nothing a teacher could possibly have reason to demand.<sup>14</sup> In any event, they do not very often exhibit the kinds of behavior that I think of as hard work: close, laborious, critical reading of texts; careful and self-critical reflection; and, repeated practice in basic analytic thinking. Instead, they are intellectually passive and dependent; everything must be provided to them, pointed out to them, explained to them. Nothing is for them to discover, and in so doing, to learn the art of discovery. They must not only be told what to do, but also reminded repeatedly to do it. To provide them with information in, say, a syllabus in the

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14. Some of my interlocutors have asked me to explain what I mean by "critical thinking." I have hesitated to do so because of the way that this seemingly ordinary activity from my youth has been debased in the high school and college of today, as well as highjacked as an indication of merit (or demerit) in various political debates of academic topicality. The use of "critical" in Critical Theory, Critical Marxism, and Critical Legal Studies has not been helpful either. But out of deference to good friends, here goes.

Critical thinking is the activity of reading against (and sometimes across) the grain, whether the grain is that of written materials, understandings of human behavior, or of human institutions in an attempt to gain a different perspective (sometimes erroneously described as a deeper or truer perspective) as to how, why, or wherefore these objects act or are intended to act. Critical thinking is often seen as inherently derived from particular, assumedly totalizing social theories—such as structuralism, Freudianism, various Marxisms, economisms or political preferences, but such a stereotypical identification is unnecessary and perhaps inimical to critical thought. Rather, critical thinking is simply skeptical (but hopefully not corrosively so) thinking that refuses to take surface understandings for granted, but instead requires that they, as well as alternative understandings, be supported only after being put under serious intellectual pressure designed to identify possible weaknesses or errors before putting those understandings into use.

expectation that it will stay provided is, in their view, a kind of magical thinking. The entire burden of their progress depends on their teachers who are in charge of their education, and thus, of their success. If they fail, it is because their teachers have failed.

Sadly, evidence of the value of old-fashioned, self-motivated hard work is, at least for the moment, all around students, if only they could perceive it. There are always some students, often older, usually with prior work experience, who understand that they are capable of affecting their futures through the exercise of personal agency, and that doing so requires exertion, initiative, and some degree of enterprise. These are the students who impress their professors and, if they work during law school, their employers. They collect a disproportionate share of available opportunities, not because they are smarter or luckier, but because they demonstrate to people in a position to know that they have the makings of truly good practitioners. Much comes to them because they deserve it.

Even among students who have some vague appreciation of the value of self-motivation and enterprise, the concept is sometimes bizarrely mistranslated. Students increasingly seem to believe that the kind of enterprise they should exhibit consists in pounding the pavement endlessly to scrounge up work of any kind, no matter how worthless, or even inimical, to their development as professionals. They call this "building a resume." In reality—or at least what I would like to believe is reality—the kind of enterprise in which they should invest their time consists instead in finding opportunities to hone a degree of professional craft that will, in the end, make them desirable for what they can actually do, as opposed to what they can say they have done.

Second, it seems that students no longer see a connection between what teachers do, in or out of the classroom, and what they do, or can imagine themselves doing in or out of the classroom. Perhaps they are no longer capable of perceiving who we are, or the relationship between our

characteristics as persons and as professionals, or between our characteristics as persons and professionals and our behavior. The notion that in their daily life teachers are learners and that what we do best is to help students learn, as they will have to do pretty much on their own for the rest of their life, seems to be impossible for students to comprehend. Instead, they seem to think of us as simply “professors,” members of a class of artificial entities, like video game avatars, that have been designed by young people a lot like themselves to help them check off the requirements for a license to practice law—itsself evidently a strange relic of a bygone era about as comprehensible as a shiny black monolith on the lunar surface. Teachers are incarnate Wikipedias—sources of information, at least when behaving themselves; things to be clicked on periodically should a question require an answer. The perverse insistence that our students acquire professional skills and knowledge through their own hard, independent, though not unassisted, work, and our puzzling refusal to buy the ingredients, cook the meal, set the table, *and* wash the dishes makes us, perhaps, like some kind of bad hyperlinks, annoying malfunctions, the proper response to which is to browse elsewhere for better and more responsive sources.

## V

With this understanding of law students and legal practice established, at least to my satisfaction, it should be obvious that living in such a world might create problems for a teacher. In order to help other teachers address these problems, I offer first an Aristotelian approach to them that, while not congenial to me, is congenial to other teachers I know.<sup>15</sup> I follow with my own approach.

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15. My Aristotelian teacher is not a straw man to bat at, but rather my synthesis of conversations with several teachers whom I have respected over many years. I know that there are many possible frameworks for approaching the problems identified in this piece, but I would be unable to present most of them empathetically and so I have simply limited myself to this one and my own.

An individual who thinks about teaching through an Aristotelian lens<sup>16</sup> sees the professional world as populated by roles, and believes that success is to a significant degree properly understood as a matter of how ably an individual performs the role inhabited. The most obvious role for a teacher of lawyers is that of a successful, high-performing lawyer. Central to that role is the idea of precisely what the best work of such a lawyer would comprise. A teacher who subscribes to this image of the highest quality of lawyering believes she is obliged to attempt to lead her students to embrace it. It prominently centers upon the kind of mastery of handicraft described earlier, but it also includes something more. She does not confine her teaching to what she thinks will be useful to her students as practitioners, but also feels obliged to teach them what will be useful to them as citizens, and particularly citizens of a democracy, and even more particularly as lawyer-citizens, who occupy a somewhat unusual socio-political niche. What law students therefore most need to be taught is the discipline and practice of critical thinking, and indeed of critique itself, the model of good teaching she inherited from her best teachers in high school, college, and law school, and from her best mentors in the working world.

The difficulty for an Aristotelian teacher, however, consists of this. Students, she has come to suspect, *au fond* no longer genuinely respect such an objective, and in consequence discount the value of such teaching. Because they do not respect such a teacher, they do not admire her, and because they do not admire her, they do not seek to

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I invite my readers, should there be any at this point, who are not comfortable with the alternatives I present, to address these problems through their own favored frameworks. It is the problems that are important. I offer my observations on them as a starting point, not a self-evidently correct solution.

16. For me, this individual has no gender. However, the genderless pronoun "it," while in some ways attractive, is surely inappropriate. In the interest of clarity, because I am male, I have chosen to use the female. My choice should not be taken to imply anything about with which Aristotelian teachers I have spoken, or to imply that female teachers are by nature Aristotelian.

emulate her. Yet by failing to emulate her, they cut themselves off from a good deal of what she has to offer as a teacher: everything she models, everything she embodies—that is to say, the most valuable things she possesses and is capable of sharing. For such a teacher, success depends fundamentally upon her students' willingness to say to themselves one thing, and one thing only: "Here is a good lawyer. I want to be like her." Everything else follows from that, and nothing is possible without it.

Proceeding from this premise, the Aristotelian teacher affirms that in order to teach a student critical thinking, that student, to accept the lesson, must first accept that the teacher is capable of thinking critically in a way that is worth emulating—that the teacher is not, for example, just a liberal, or a Democrat, or un-American, or self-important or a complete jerk, and so that what that teacher is teaching *really is* critical thinking—the genuine concept—and not merely some whiny rant that can be written off and ignored. Thus, for such a teacher, her character is her most valuable asset. She cannot teach the lessons she really wants to teach unless she can be perceived as someone authentically capable of delivering it.

Questions of purpose aside, assuming that they can ever be set aside, the phenomenology of the Aristotelian teacher's ideal teaching involves being "in the zone"—attaining a level of contextual awareness and in-the-moment mastery that allows the teacher to direct things wherever she wants them to go, even if she is in some trivial sense extemporizing (at least that is how it feels, even if it's an illusion). "In the zone," teaching is one of the great liberating pleasures. When, from time to time, the pleasure is absent, when in her lowest moments, such a teacher feels unsuited to the task at hand.

The Aristotelian teacher, consistent with the understanding of the American university offered above, knows that once there were plenty of students who believed in the value of critical thinking, who had internalized it as a way of life, who aspired to improve the quality and

persuasiveness of their critical thinking, and who recognized her services as valuable. However, such a teacher sometimes believes that we no longer inhabit a society in which critical thinking is valued and so there is a stark difference between her generation and the current one. Her generation did not reject conformity *tout court* (though they said they did), but they did reject as illegitimate a life lived in slavery to a certain kind of corporate consumerism. That we have choices, that we have the freedom to refuse to do what we are told—these were their insights.

In contrast, the generation now sitting in law school classrooms has different instincts. They do not reject slavery, but on the contrary seek enthusiastically to enslave themselves as quickly and completely as possible. They do not wish even the illusion of freedom of choice in fashion, music, gadgets, politics, ideology, or anything else; they want precisely what they are told (in every waking moment, alas) to want. The idea that not wanting these things is even a choice on the conceptual map is beyond not only their experience, but also their comprehension. Capitalism has indeed finally consumed itself: those who mindfully built the pillars of consumerism have succeeded in creating a species of individual who lives, and can live, only to consume, no longer to build.

The sense of the difficulty, if not impossibility, of establishing the Aristotelian relationship between teacher and student makes it difficult for a teacher who accepts, indeed embraces, such a relationship to experience the concomitant Aristotelian sense of life in which, for the virtuous person, desire is in harmony with practical reason. And, it is this sense of harmony of desire and reason that is essential to a life well lived. Thus, if the point of teaching is the demonstration, and so transmission, of the skill of critical reasoning and the student is incapable of acquiring this skill, or somehow sees it as irrelevant, then the teacher cannot properly teach. The activity is literally pointless and so might well be abandoned as unworthy of either party. Each

might better pursue some other objective.

In contrast, I am not an Aristotelian. I believe in neither nature nor essence, though have always a bit jealous of those who do. A true child of the Sixties, though not a chronological one, I have never seen a role that I wholeheartedly wished to occupy, much less to inspire others to occupy, at least in any conventional way. Indeed, for me the point of critical thinking is challenging, if not destroying, such roles, such understandings of appropriate behavior. And, I have never known a harmonious existence and long ago gave up on even its possibility. A fragmented, conflicted life is all I can envision. The notion of being taken as a master, someone whose attributes a student might wish to emulate, frightens me. At most, I wish to be seen as a learner just a bit farther down the road toward understanding and so at times something as simple as being called “Professor” can bring the filing of a stern demurrer with the observation, “I profess nothing and the notion that I do would deeply offend anyone who actually did.”

Instead, I teach, first, because doing so is fun—it brings me joy, or at least still does from time to time. Second, I teach because teaching is also a contribution to the civilization that tolerates me, an activity undertaken in exchange for the time to write. I am not therefore unserious. For me, learning has always been fun, but serious, often hard fun. Indeed, knowing how hard learning is, I find it difficult to understand how or why, after some point in school, possibly somewhere between tenth and twelfth grade, anyone might continue to study a subject beyond a desultory introduction, unless it was at least interesting, even if not fun.

As it is interesting to learn, to come to understand, how people do things in the world, it was for just this reason that I was attracted to law as a practice. Law is fun because on the surface it is a very complicated, multifarious practice, and yet underneath, it can be reduced to a rather simple set of concerns, “a powerful theory” as I like to say. For my entire teaching career, I have more, but often less, successfully

tried to identify that theory and communicate it to my students.

As I indicated earlier, my image as a teacher is of someone who comes to class, not to teach, and especially not to convey information, but to help students learn. Thus, I am most comfortable in a large classroom answering questions, not asking them, in an attempt to help students come to understand what they might have learned from the material assigned for the day. The underlying theory is simple. If bewilderment can be removed, learning may more likely take place. Of course, such an understanding of the law professor's role depends on the willingness of law students, many of whom are twenty-two years old, to take charge of their education, to be available to learning, a phrase that I have derived from David Matza's work.<sup>17</sup>

Matza speaks of adolescents as available to delinquency, as individuals for whom delinquency is one of a range of life options that might plausibly be explored.<sup>18</sup> During all of my years as an academic, I have experienced students who were clearly, even passionately available to learning. These students were, and still are, a joy to have in class. They have, however, never been the majority in any large class. The majority has never been available to learning. It still is unwilling to take charge of its education. Unfortunately, while in the seventies the minority of students who were available to learning was respectably large and so established the tone of the classroom experience, as the eighties passed slowly into the 2010s, that minority slowly declined in numbers. Now it is seldom sufficient to set the tone in any classroom where helping students to learn is the dominant objective.

The decline in the percentage of students available to learning that an Aristotelian teacher might experience is just as big an obstacle for what I choose to do in the classroom

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17. DAVID MATZA, DELINQUENCY AND DRIFT 69 (1964).

18. *Id.*

as it is for her, though in a different way. This is because the object of my teaching is different from the Aristotelian's. I respect her understanding of the importance of character for teaching law and learning what it is to be a lawyer, as well as her objective of teaching critical thinking. However, for me, character implies a role dependence that I have a difficulty accepting, much less exhibiting for others, and though I try to help students improve their limited skills in critical thinking, such an activity is a mediate objective. For me, the ultimate objective of critical thinking is to help students to begin to exercise judgment, an attitude toward law that is different from, but related to, the Aristotelian's emphasis on coming to understand the character required to be a good lawyer. It is judgment that distinguishes the office of a lawyer from that of a tollgate operator. And so, the point of the practice of law may best be seen as the use critical thinking about first, the vast background of institutions, understood historically, structurally, culturally, and philosophically, that pervade human activity, next, about the foreground of client desires, and finally about the available scraps and pieces of rule systems, as a basis from which to fashion an effective arrangement that harmonizes, as best as can be done, all three. This is what judgment does and its exercise equips a practitioner with the ability to distinguish that course of action that "will work" from that course of action which "isn't likely to work" and especially to identify the third, fourth, or fifth alternative course of action that at first might be rejected, but in the end may seem to be "just the thing."

The subject of judgment can be various: a merger, a regulatory filing, a financing package, a property settlement, a plea agreement, a complaint, a brief, a trial strategy, the structure of a financial instrument, or a business plan. All require judgment, a matter of more or less, a matter of taking ownership of a problem and so accepting responsibility for the quality of the solution proffered, rather than merely deferring to "the law." More crudely put, it is the act of

putting one's butt on the line. A lawyer who exercises judgment accepts the risk that the advice given will be less than optimum, even wrong, and so accepts the blame that follows from poor judgment. Thus, for the exercise of judgment—as distinguished from “just” filing routine papers—a lawyer is entitled to be paid well, even when no question of malpractice could possibly arise.

Unfortunately, most of my students seem not only uninterested in exercising judgment, they are absolutely adverse to it. Somehow instinctively understanding that they are likely to be fodder for someone else's war, they just want to put in their hours and get paid. Their preference is for what my one-time colleague Tom Disare called “the risk-free practice of law,” even though they also somehow know that it is only by taking responsibility for their work that they have the chance to secure the semi-permanent employment that has been the object they have been seeking for all the years on the treadmill that is K–16 education.

Trying to convince these students to accept the obligation of exercising judgment is very hard, often futile work. This work has been made harder by their palpable longing to continue to do what they have been taught to do for so many years by an educational system that has done a rather wonderful job of socializing students into American life, but has done a truly awful job of providing them with the tools necessary for critical thinking, all the while regularly grading and sorting them on the basis of the ability to do what they are told for intentionally predictable rewards.

Why this is so is relatively easy to understand. For years of education, nothing has been asked of those who become my students. Of course, in this statement, I use “asked” in a particular way. Nothing open-ended has been asked of them. I readily acknowledge that in fact much has been asked, but only in a peculiar, routinized form. For most of my students, for most of their education up until they reach my classroom, they are regularly asked to do the following task. The teacher

tells the student exactly what is to be taught, preferably in clear outline form, so that the student knows exactly what needs to be mastered, and how mastery, defined as the receipt and retention of information, will be tested, most often in a way that makes easy the transfer of the information from an outline to the test. This is a popular art form in that it makes it easy to grade students and provides a handy defense to objections directed toward the accuracy of that grading on the part of those helicopter parents who believe that their Dick or Jane is destined to be great because they are already “perfect,” or would be were they adequately taught.<sup>19</sup>

Most students are also asked to master the skill that is the response paper, of saying something “smart” in response to a carefully chosen, generally bland and so inoffensive, “prompt.” Such exercises are justified as allowing for creativity and self-expression and so not graded, or if graded, generally graded in terms of the relevance of the response to the prompt, the intellectual equivalent of learning to color within the lines.

Both of these skills are moderately useful, but emphasis on such varieties of learning entails a rather unfortunate consequence. Students find that doing what they are told and so eschewing the exercise of individual judgment is not their second nature, but their only nature. Never having been allowed to set their own goals except in trivial matters—I really want to go to this or that movie—they find it all but impossible to figure out how one might engage in critical thinking as way of exercising judgment.

In some ways, I am not surprised by this pattern to K–16 education; my education was much the same until

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19. Given this understanding of learning, it is not surprising that when asked to do a research project, that project is defined as the collection and ordering of material assembled for the purpose—you must have six, eight, ten, . . . pick a number, sources, properly cited in your bibliography—thus reducing a possible exercise of judgment to a glorified scavenger hunt.

towards the end of high school.<sup>20</sup> However, by then, the importance of critical thinking, of looking at accepted understandings of things in the world from the outside/in the third person/critically, though we never used any of those locutions, was increasingly stressed. And in college, after completing the introductory courses in most any field other than math or science, critical thinking was the point of most courses offered by most instructors.

However, if I am to judge on the basis of my experience of most of my students, emphasis on critical thinking as an educational objective seems no longer to be experienced by many students in many majors at many colleges, regardless of whatever an individual department or the university as a whole may say in its advertising brochures. When asked to respond to any material or faced with an open-ended task—be it doctrinal, where it would take years of work to master it all, were that even possible, or worse, processual—work to become a good lawyer or to exercise judgment—students, and not just first year students, seem to think that the task identified is to repeat what the material said and so are bewildered when they discover that this is not the case. At best, they are indignant that that they should not have been told or cannot quickly find the answer before any question is asked. Very often, and not wholly surprisingly, such students freak. All they have to damp down the panic are their old, tried and true skills, and they complain bitterly when it becomes apparent that such skills are simply not up to the task placed before them. Rationalization often follows: “I just need to work harder with my existing skills; this teacher is just hiding the important secrets from me.” Or overt denial: “This can’t be what the practice of law is about; this teacher is simply out of it.”

Those who do not freak often attempt to reinterpret the task as requiring the oral equivalent of a response paper, as perhaps an occasion for law school “policy” analysis. If

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20. Thankfully, the response paper did not then exist.

deprived of this possibility, students have a hard time understanding that there might be anything else they could do. If it finally dawns on them that they are required to exercise independent judgment based on critical thought, they mostly recoil in horror as if some *sanctum sanctorum* had been invaded, as if the task was far harder than even asking someone of another gender to dance at the first middle school party. Even worse, some students confuse critical thought with the contemporary version of critique, a version that Kant could not have possibly identified with, that offers stereotypical understandings of why interpersonal, social, or economic life is radically deficient with respect to some aspect of an assumedly “natural” order.

I have a certain amount of sympathy for these responses from the majority of my students and for three reasons. First, I would be dumbfounded were it to turn out to be the case that so many of my students were congenitally incapable of critical thought. It is far more likely that they suffer from a college education that failed to stress the importance of such open-ended thought. Whether the reason for this marginalization of such thought is the diminution of the size of college faculties as administration takes over the campuses, the obsession of faculty with the necessity of time for research, a fear of faculty and administrators alike of exercising judgment themselves and so of offering judgments about their student’s thought, the preference of one and all to avoid the trouble of individualizing education that an emphasis on critical thinking necessarily implies, the social reduction of the college and the college degree to a credential, or even all of these quite obviously related aspects of higher education today, I surely cannot establish. However, I am sure that this marginalization is what daily I face in my teaching and it makes me sad.

Second, the great social and economic shift that has turned the acquisition of a professional degree from the mark of membership in the upper-middle class to but a ticket to the possibility of such class membership has meant that

protecting one's GPA, long a staple of an undergraduate life spent managing the college experience,<sup>21</sup> is now just an ordinary part of a life spent managing the law school experience, at least at all but maybe the most elite few law schools. The time required to begin to be able to learn with but minimal help, to make oneself available to learn, to start working on being a good lawyer who is capable of exercising sound judgment founded in critical thinking skills, quite obviously detracts from time spent worrying about grades, fattening one's resume with activities and employment experiences, as well as having fun, mating, and even dating. Learning is thus easily tossed overboard, yet again postponed until . . . until some other dimly perceived future when there will be time for such things.

Third, to be caught on an educational treadmill for at least the nineteen years from kindergarten through the bar exam is surely an exhausting educational marathon. And, "please keep it simple" is a plausible prayer as the finish line approaches. However, most lawyers will spend some portion of the rest of their lives confronting open-ended tasks that require the exercise of critical thinking skills, among them learning on their own. Surely, by the time a student enters law school, it is necessary to begin to engage in such activities, lest the necessary effort at learning, and hopefully mastery, take place at a client's expense.

Sympathy might ever be my dominant response to my students were it not for one other crucial detail. Just when is such learning going to start? When will judgment be acquired? And, at whose expense? These are important questions for a law teacher. We attempt to prepare students for the practice of law, not for practicing doing law on paying, much less nonpaying, clients.

How does one who is without an Aristotelian teacher's grounding, evaluate the plausibility of the teacher's task in

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21. REBEKAH NATHAN, *MY FRESHMAN YEAR* (2005) is excellent on the topic of students "managing college."

such circumstances? The question for me is not whether one can be a teacher in any given set of circumstances, but whether being a teacher in a given set of circumstances is a tolerable task rather than a pure sinecure of the “I pretend to teach and they pretend to learn” variety, something unworthy of even an ill-ordered life tolerably lived—something so devoid of joy that one is no longer capable of honestly believing that one is making a contribution to the civilization that tolerates one in exchange for the time to write.

In answering this question, I know that I cannot just consider the exchange made—teaching for writing. I must also consider the situation of the individuals not placed, but thrust into my care. They did not create the world in which they find themselves and it is highly doubtful that they would have chosen it had they been given a choice. It is ugly to find oneself in a world where social advance, or even maintenance of social position, requires twenty years of an education that is not intrinsically attractive leading to not very secure employment opportunities doing work that is not all that interesting. And so, I believe that it is important to recognize a possible obligation derived from the fact that I benefited from experiencing a world of both study and practice that presented a far less demoralizing prospect than the one my students today experience. It helps that, in a real sense, I like my students and would be more than willing to express such affection were they open to it. But it is not clear that that liking is enough. Understanding, even when combined with affection, does not equate with psychic reward. From the front of the room, the decline in the size of the group of students available to learning is as dispiriting to me as is the increasing difficulty of establishing the proper relationship between teacher and student for the Aristotelian figment of my imagination. So, it is time to return to Sicily and Tennessee and see whether these fictional places can help illuminate the real problems that a law teacher may face today.

## VI

Though my Aristotelian figment and I start from very different understandings of what it is to teach, at this point we find ourselves arguably lamenting the passing of an understanding of what a life in the law should be that each experienced to some extent, but should have then understood was waning, not waxing. Both worry that the idea of the law school that we know and love is “the centenarian being dragged in a Bath chair” around a new world—human, economic, and educational—“understanding nothing,” and sad, if not embarrassed, to be so close to channeling Ortega y Gasset<sup>22</sup> in order to avoid the usual cliché about dead languages and Oxbridge.

Still, it is a position that cannot be escaped. Nor should it be. It is impossible to get as angry at the present world of law teaching as we are without having deeply embraced the job it implies. As such, I, and my Aristotelian figment, still love the task of “guiding others” and note no change in the intellectual quality of our students over the years of teaching beyond that attributable to the sometimes random, lately less so, variation around the norm. So, we are not in that sense unhappy with our students. Rather, the change that we do note over the years, the change that both angers and saddens, is the significant change in students’ attitude toward learning. And thus, we feel obliged to deal with the changing circumstances under which we undertake to teach. In seeking to explore the implied alternatives, we return to Don Fabrizio and Ella, Tancredi and Chuck.

The choices that Tancredi and Chuck make are for me and my Aristotelian figment impossible, but they need to be addressed for just that reason. Tancredi chose to embrace the abhorrent future because it was the lesser of two evils; “If we

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22. JOSÉ ORTEGA Y GASSET, *THE REVOLT OF THE MASSES* 15, 65 (Anonymous Trans., 1932) (1930).

want things to stay as they are, things must change.”<sup>23</sup> Chuck faced a more ambiguous choice. While he came to understand that the destruction of Ella’s way of life was unfortunate, whether he came to agree with her that the changes the TVA was bringing to the valley were the greater evil or whether the white supremacist, good ole country boys who had tried to run him off represented that evil is not at all clear. And so, the meaning of Chuck’s high-tailing it back to Washington with his new wife in tow is not clear either. But, run he did, and on a fancy new airplane—a detail that suggests that, for him, the past was the greater evil, in which case he, like Tancredi, chose to embrace the future.

The deep perspectivalist view of life inherent in the actions of these young men provides a helpful check on facile theorizing. What is so wrong with the bureaucratization of the practice of law? What is the evil to which it might be the lesser alternative? It seems doubtful that the greater evil is the abandonment of law. There seems to be no culture without norms and some mechanism for enforcing them. The norms may be abhorrent. The mechanism may be more or less effective. But law there will be.

Instead, it seems more likely that the greater evil is the possibility that a fully bureaucratic law would be a system without play, without the space for tailoring the rules of law to people and circumstances, a place where no one might be able to build Ella a house on the hill above the river with a porch for her rocking chair. This would be the hell where, in Grant Gilmore’s words, “there will be nothing but law, and due process will be meticulously observed,”<sup>24</sup> a truly totalitarian alternative, a system where categories determine everything and all persons and their behavior are already categorized.

In contrast, at some level, legal incompleteness allows the hope that a system in which lawyers may do their work,

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23. DI LAMPEDUSA, *supra* note 1, at 40.

24. GRANT GILMORE, *THE AGES OF AMERICAN LAW* 111 (1977).

one that possibly may be manipulated, one in which in Leonard Cohen's words, "There's a crack, a crack in everything. That's how the light gets in,"<sup>25</sup> might indicate the possibility of the individualized "better," "more just" outcomes I worked for in practice. Many Aristotelians did too. It is a place where a really good lawyer might make a really good argument, a place where judgment might be exercised. And, it is in consequence a place where self-conscious, critical reflection might lead to the belief that character matters, and thus that individual agency may play some role, however slight, in remaking the world.

If this is so, if a fully bureaucratic law is the greater evil to be feared, then neither my Aristotelian figment nor I can imitate Tancredi and Chuck. We cannot run toward the future that, as Don Fabrizio knew, needed "bright young men, with minds asking 'how' rather than 'why' and who are good at masking, at blending . . . their personal interests with vague public ideals."<sup>26</sup> No longer is the optimism that sought the growth of modestly democratic government, as well as modestly benign regulatory guidance, available to us. To paraphrase Pogo, "we have seen the future and it is us."<sup>27</sup> And so we must face the differing postures of Don Fabrizio and Ella Garth toward an unpalatable future.

Of the two, it is Ella's actions that are the more surprising. The Don allows aristocratic privilege to do the tough work of opposition for him; he may affect aged tiredness or aged wisdom as he wishes—"being dragged in a Bath Chair around the Great Exhibition."<sup>28</sup> He allows rank to set aside discomfiting questions, secure in the knowledge that while his patrimony will continue to decline, for the present, his position will not be questioned. He may in this

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25. LEONARD COHEN, *ANTHEM* (Columbia Records 1992).

26. DI LAMPEDUSA, *supra* note 1, at 209.

27. See Walt Kelly, *Pogo Earth Day Poster* (Apr. 22 1970) (originally, Pogo said, "We have met the enemy and he is us.").

28. DI LAMPEDUSA, *supra* note 1, at 205.

sense continue to “dress for dinner.” In contrast, Ella has nothing but her person to hold the world at bay. Implacable, stubborn, used to being obeyed and in her own way respected, she has nothing to fall back on. When the Don retreats to his country estate, he can retreat in style, a caravan of coaches and a retinue of servants to pack bags and lead the way. Ella has only a small suitcase. She relies on no one, unwilling even to allow her granddaughter to carry her bag. Like the Don, used to being obeyed, she orders Chuck to get moving when he, perhaps ruefully, lags behind.

There is, of course, no federal marshal ordering either my Aristotelian figment or me to get out of the way of progress, as the marshal did by evicting Ella from her island.<sup>29</sup> Tenure means one may teach until the drool becomes too apparent, if not beyond. Still, it is important to highlight the attitudinal difference between Don Fabrizio and Ella Garth. The Don, lacking “the faculty of self-deception, essential requisite for wanting to guide others,” asks only to be left alone to do that small bit of education that he feels he is required to do.<sup>30</sup> The world may easily make a path around him. Ella stands squarely across the world’s path and will step aside for no one and nothing, except in the face of superior force. However, her attitude is made easier by the fact that she has no more education she can do. Her boys, actually nephews, clearly never learned anything except to be afraid of her and the negroes have learned what she could teach and await only her leave to depart.

And so there remains the irreducible nub of the problem that faces my Aristotelian figment and I—whether it is more

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29. At about this point, my readers will surely have begun to ask why I am keeping up with the awful locution “my Aristotelian figment and I.” Why not say “law teachers” and be done with it? The reason is simple. As I suggested earlier, there are all sorts of ways to deal with the problem I am attempting to address. In addition to embracing the future, others that come to mind are burying one’s head in the sand, burying one’s head in scholarship, self-deception and political activism. I could not write a proper apologia for any of these alternatives. And so, I stick to the two positions I can modestly defend.

30. DI LAMPEDUSA, *supra* note 1, at 209.

honorable to assume that the world will be content to make a path around those who find themselves in its course, around us, or to stand in the way recognizing that superior force will eventually move us out of that course? Is it best to dress for dinner, as did Don Fabrizio, or to close the door and ignore the shouting outside, as did Ella?

Initially, this question can be avoided briefly by remembering that routine activity is less costly than its alternative. Interchangeable parts for the manufacture of rifles and the assembly line for the manufacture of cars reduced the cost of both items substantially. The cost of legal services is an outrage. The cost of a middle class lifestyle grows apace; an upper-middle class lifestyle is rapidly becoming out of reach, even for professionals. The further bureaucratization of legal practice will at least put off the day when legal services can only be delivered to persons or institutions that comprise the economic royalty or to those that a government chooses to favor with a subsidy. Any such putting off is probably a good thing. In this way, our students' desire for the risk-free practice of law, their wish to avoid confronting what it is to be a really good lawyer and their hope to eschew judgment by embracing bureaucratic legal practice is probably good for the social welfare of the community concerned.

Whether it is an honorable thing for a teacher to tolerate such behavior is another matter. An Aristotelian law teacher would address three possible alternatives as follows. First, one might simply abandon the field—that is, leave law teaching altogether to pursue some other occupation. When the population of students neither values nor desires what the teacher believes to be the greatest gift she has to offer, the teacher is obsolete in the most complete sense of the term, so what else is there to do but step aside? The main feasible alternative would be to return to the practice of law, an endeavor that perhaps continues to offer some occasional and scattered opportunities for honorable living, at least to

the truly skilled. And for some, this is a live option—for they are still very good lawyers, and the market for very good lawyering has not yet entirely disappeared (if it ever will). Reverting to one's roots in practice might allow such individuals to follow a path more like Don Fabrizio's, producing beautifully crafted work for an ever-shrinking number of connoisseurs who will pay good money for it. After a period of lucrative practice, one might be able to acquire some moderately comfortable retirement home someplace warm.

As part of this alternative, there might even be the nasty, yet delicious fantasy of belatedly teaching students who did not come to law school to learn how to be good lawyers, and succeeded. An Aristotelian teacher could envision meeting some of these derelicts in litigation and instantiating good lawyering for them in a different way: by wiping the courthouse floor with them. Still, such a lawyer might wonder whether this activity might actually provide much pleasure. It is not obvious that such ill-prepared law school graduates are even capable of recognizing when they are getting their asses kicked, an experience that demands the recipient have at least some vague ability to recognize artistry, even when it is inflicted on this no longer student's own sorry, ill-constructed, poorly supported case.

A second option is to bend so as not to break. This is the kind of response, well known in today's academy, which demands that teachers "engage" their students by any means necessary. If the students expect technology, give it to them. If they want answers rather than questions, provide answers and stifle the questions. If they think one should be available around the clock, make one's self available. If they think it is reasonable to ask one to repeat a 45-minute lecture in one's office for their own private consumption, then it is reasonable, and one should cheerfully do so. Ask of students only what they are willing to give. Treat them like

consumers, and the customer is always right.<sup>31</sup> This is a response, in other words, that allocates the burden of behavior modification entirely onto the teacher; students are fine—no, not merely fine; complete—just the way they walk in the door.

Surely an Aristotelian teacher would find this alternative abhorrent. Knowing the kind of behavior that is required of good lawyers, and how to inculcate that behavior in other human beings, such a teacher thinks she has a better plan for transmitting mastery of his subject than her students have for receiving it. This confidence is justified by experience, knowledge, and results. Pandering is the definition of dishonorable behavior in such a teacher; she will not do it.

That seems to leave only one option: fighting the world in place, while courting the risk of being broken. This was Ella's strategy, and an Aristotelian teacher might well develop a pattern of action such as the following. Ban laptops in classes. Count professionalism for twenty percent of the grade in first-year courses. Use technology only when it makes achievement of teaching goals easier, which is only sometimes. Refuse to post things on the web merely because students ask, but do so only for perceived pedagogical benefit. Distribute a carefully thought out syllabus stuffed full of information and hold students accountable for its contents. Be direct and even blunt when providing evaluations of performance. Maintain no presence on Facebook at the knowing risk that for a certain kind of student (and even for a certain kind of colleague) one therefore does not fully exist. In doing these things, such a teacher would fulfill the role of law professor, that is to say, would act in accordance with her own understanding of what

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31. Never mind that this idea flows from a kind of sad Boomer ahistoricism. In fact, people under twenty-five treat you with the same degree of self-involvement regardless of which side of the counter they happen to occupy. The idea that the customer is always right—and should therefore receive good and responsive service—is one that is held mostly by people middle-aged and older.

constitutes an excellent performance, judged solely by her and based on her own conviction that on that subject, if even on none other, she still knows what she is talking about. And, on the day on which she ceases to feel that way, hope she will have the courage to pursue the first option described above—walking out the door.

In contrast, I can only see two choices. The idea of taking up the practice of law again is ludicrous, and I am quite sure that such is not a reasonable alternative for most other law professors—the overly inbred show dogs that almost all are. Nor have I any willingness to pander to my students' asserted needs. Such an alternative demeans student and teacher alike. So I am left with the stark choice between Ella and the Don. Though I respect the Aristotelian urge to channel Ella Garth, I cannot do it. Such an alternative is unavailable to one who is not Aristotelian, though possibly an Existentialist.<sup>32</sup> So I am left to imitate—to channel is impossible—Don Fabrizio.

To do the best one can is all that one can be asked to do as a teacher, “to struggle to ignore parts of the given structure of life,” as a colleague once put it. Pushing water up hill is not something that most humans are able to do. I know that I am not good at it. I can never hide disappointment at a given student's performance in class and long ago stopped trying. Thus, the bureaucratization of law, together with the tendency of law students to treat a law degree as a credential and only secondarily as a learning experience, just might be a gift to those teachers like me who still see the practice of law as a species of handicraft. I teach as if law were a species of handicraft, and for those who might possibly so understand it. The trick then—Don Fabrizio's trick—is at the same time to harbor no illusions about what is being learned, as well as no regrets that other

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32. Errol Meidinger made this suggestion, which is not wrong, though it may not be right.

things are not being learned. Teach for the handcrafters, those who are willing, however hesitantly, to take the risk of exercising judgment, but grade for the credentialists, since the handcrafters will need the credential too.

But is such a lesson to be learned from Don Fabrizio, if it is the lesson he teaches, an honorable practice? Can temporizing between the past and the future ever be honorable? I believe that it can. The choice to be a teacher is not a choice to give up one's soul, something Ella Garth in her different way knew. At the same time, it does carry with it an obligation to treat students with a certain amount of respect, knowing that there will often be a difference between the respect that students believe that their views are entitled to receive and the teacher's understanding of the question of dueeness. In this circumstance, when that difference cannot be bridged, it is at least possible to accord each a certain space—for the teacher to accord students the ability to move on and for the students to indulge the teacher's wish to dress for dinner, as it were, with such students who wish to dress for dinner as well.

I recognize that from my first semester of teaching I have faced this problem of differing perceptions about what needed to be known in order to become a lawyer—in my place, the rudiments of pre-trial practice; in theirs, personal jurisdiction and *Erie Railroad Co. v. Tompkins*. I taught what I thought important and lectured what they thought important. Neither party was very happy, but I graded generously, and so my students just grumbled rather than started looking for tar and feathers. In most of my classes for most of the many years since that experience, I have made similar choices. Indeed, it is a choice emphasized by two posters that graced my office for years: one was in Russian from the years of the New Economic Program that, loosely translated, exhorted the peasants to “[p]ull out weeds” and, in the other, Snoopy noted, “I did not take this job just to rap with the birds.”

For this reason, of course, I would not be surprised if

others greeted my claim of honorable conduct with a certain amount of suspicion. No one would ever say that I am a popular teacher and almost all of the compliments about my teaching have been delivered by former students, then practicing lawyers, five or ten or even forty years after the horrible experience. “I hated the course, but in time came to understand and use what you were trying to teach us,” is a not uncommon refrain. Thus, I see—understanding is a far, far different matter—that the bureaucratic history of the university and the economic embeddedness of the experience of my students create limits to what I may accomplish when working with them. And yet, they do not determine what, as a teacher, I must do. For me, teaching is another example of the Sisyphean struggle with the rock. A life well lived is not the struggle to collect the most toys, but to keep pushing the rock up the hill until gravity gets not just the rock, but also the pusher. That is enough, for the Existentialist in me at least.

Neither the Aristotelian figment of my imagination nor I would argue with the other’s evaluation of these alternatives. Both would, however, continue to ask, “shall we dress for dinner or simply close the door until we are forced to leave our island?” That is a good question for law professors to face up to as U.S. News & World Report, the Association of American Law Schools, the United States Department of Education, the American Bar Association, our own universities, and sometimes our own schools are busy further diminishing the possible breadth of the activity of teaching law.