BECOMING A LAWYER

*Edward A. Hartnett**

"The first thing we do, let's kill all the lawyers."[1]

You've heard it before; you'll hear it again. Perhaps you've even seen it on t-shirts and coffee mugs. It's Shakespeare's most famous line about lawyers and one that lawyers and law students should contemplate and remember — and I will discuss it further this morning. But there is another, less-famous, line from Shakespeare that we also should contemplate and remember:

> O, it is excellent
> To have a giant's strength; but it is tyrannous
> To use it like a giant.[2]

The law is a giant; it has a giant's strength. At its most base level, the law is the will of the sovereign, the will of whoever controls the badges and the guns. Indeed, a contemporary of Shakespeare's, Thomas Hobbes, the first democratic theorist, called the sovereign "that great Leviathan," and argued that the creation of such a giant monster was necessary in order for people to live together in peace.[3] In Hobbes's view, anything the sovereign did to a subject, for whatever reason, including ordering the death of an innocent subject, could not properly be called an injustice because it violated no law except God's.[4]

Karl Llewellyn, the great realist from Columbia Law School, seemed to make a similar (but less extreme) point in his famous

---

* Edward A. Hartnett is an Assistant Professor of Law at Seton Hall University School of Law. This address was delivered at the orientation for new students at Seton Hall on August 30, 1994. The name of the article is taken from ELIZABETH DVORKIN ET AL., BECOMING A LAWYER: A HUMANISTIC PERSPECTIVE ON LEGAL EDUCATION AND PROFESSIONALISM (1981), which is a collection of readings and reflections on the nature of law school and lawyering that the author has returned to again and again for insight. The author thanks Michael Ambrosio and Charles Sullivan for their support and encouragement of this project.

1 WILLIAM SHAKESPEARE, THE SECOND PART OF KING HENRY THE SIXTH, act 4, sc.2, line 78 (Folger, 1966).

2 WILLIAM SHAKESPEARE, MEASURE FOR MEASURE, act 2, sc. 2, lines 109-11 (Clarendon Press 1988). *See* DANIEL KORNSTEIN, KILL ALL THE LAWYERS? 55 (1994) ("These cautionary lines, with their simple but clear message, should be carved into every courtroom, right next to 'In God We Trust.' Every judge, every powerful government official, every business executive, every military officer — everyone who exercises power — should recite those lines before going to sleep each night.").

3 THOMAS HOBBES, LEVIATHAN 227 (C.B. McPherson ed., Penguin Books 1968) (1651).

4 *Id.* at 264-65.

introductory lectures to law students. After observing that the business of law is doing something about disputes, and that those people in charge of doing something about disputes — including judges, cops, jailers — are officials of the law, he stated, "What these officials do about disputes is, to my mind, the law itself."[5]

While we must never lose sight of the fact that legal decisions are ultimately backed by the enforcement power of people with badges and guns, there would be little need for lawyers — and even less for law schools — if there were no more to law than the will of the sovereign, the Leviathan, the giant. For a giant can be erratic, impulsive, and irrational. Subjects could do little more than guess the giant's next lurch and try to stay out of the way.[6]

At the very minimum, law is only law if it has at least some coherence, some regularity, some rationality. As Llewellyn himself pointed out, these features of law make possible predictions — not wholly certain predictions, but reasonable predictions nonetheless — about how officials (most significantly judges) are likely to deal with certain disputes.[7]

These features of law give lawyers a lot to do: to determine how judges have responded to similar disputes in order to predict what they will do in the future, and therefore advise a client both how to avoid being forced to do something the client does not want to do and how to get others to be forced to do what the client wants them to do.

What does this mean for you now, as a beginning law student? You must carefully study what judges have done. Particularly in your first year, you will read — not some scholar's interpretation, analysis, and synthesis of what judges have done — but the judges' own work. Why? Because you must learn to do the interpretation, analysis, and synthesis yourself. At first, this may feel like you are putting together a jigsaw puzzle without looking at the top of the box. But with active reading, time, and hard work — and with the help of your teachers *and your classmates* — you will learn how to do it.

---

[5] KARL LLEWELLYN, THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY 3 (Oceana 1960); *see also* Oliver W. Holmes, *The Path of the Law, reprinted in* COLLECTED LEGAL PAPERS at 173 (1920) ("The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.").

[6] *Cf.* Holmes, *supra* note 5, at 179 ("Even if every decision required the sanction of an emperor with despotic power and a whimsical turn of mind, we should be interested none the less, still with a view to prediction, in discovering some order, some rational explanation, and some principle of growth for the rules he laid down. In every system there are such explanations and principles to be found.").

[7] LLEWELLYN, *supra* note 5, at 4.

If you want to get a feel for the kind of active reading you need to do in law school, but in a context that has nothing to do with the law, pick up and explore a book that I love to read with my children: David Macaulay's *Black and White.* It comes with a warning, that perhaps should also accompany legal education:

> Warning: This book appears to contain a number of stories that do not necessarily occur at the same time. But it may contain only one story. Then again, there may be four stories. Or four parts of a story. Careful inspection . . . is recommended.[8]

Some coherence, some regularity, some rationality. By constraining those who exercise power, these go a long way toward preventing law from using its giant strength like a giant and becoming tyranny. This is particularly true where, as in the United States, the overarching political theory is not the Hobbesian notion that people are so afraid of violence from their neighbors that they give the government absolute power, but rather the Jeffersonian notion that people are endowed by their Creator with certain unalienable rights, that governments are instituted to secure those rights, and that the people's delegation of power to the government is both limited and revokable.[9]

But the law is far from fully coherent, fully regular, and fully rational. There is the constant risk of the arbitrary exercise of raw power. A major role of lawyers, then, is to push for coherence, for regularity, for rationality, and thereby to protect against the arbitrary exercise of power. Such striving to ensure that those who exercise power themselves obey the law is, to my mind, one of the greatest joys of being a lawyer. Certainly, in my own life, I've had the most fun in those kinds of cases, whether as a public defender seeking to compel prosecutors and law enforcement officials to obey the law or as an attorney in a law firm suing the Chief Justice of the New Jersey Supreme Court, claiming that he violated the First Amendment.[10]

What does this mean for you now, as a beginning law student? It is not enough to simply learn what the judges have done in order

---

8 DAVID MACAULAY, BLACK AND WHITE (1990).

9 THE DECLARATION OF INDEPENDENCE, para. 2 (U.S. 1776).

10 *See, e.g.*, United States v. Gallagher, 870 F.2d 652 (3d Cir. 1989) (table), *cert. granted and judgment vacated,* 495 U.S. 926 (1990), *on remand,* 909 F.2d 1478 (3d Cir. 1990) (table), *on remand,* 751 F. Supp. 481 (D.N.J. 1990), *vacated,* 969 F.2d 1480 (3d Cir. 1992) (challenging the admissibility of electronic surveillance evidence); Amato v. Wilentz, 753 F. Supp. 543 (D.N.J. 1990), *vacated,* 952 F.2d 742 (3d Cir. 1991) (claiming First Amendment violation against the Chief Justice of the New Jersey Supreme Court for barring the filming of scenes from "Bonfire of the Vanities" in a New Jersey courtroom).

to predict what they will do in the future. You must also analyze what they have done, and criticize it when it is not coherent, not regular, and not rational. You must, as one of the many buttons I used to wear in college said, "question authority."

But even coherence, regularity, and rationality are not enough. As Justice Cardozo explained in describing how a good judge goes about deciding a hard case:

> We go forward with our logic, with our analogies, with our philosophies, till we reach a certain point. At first, we have no trouble with the paths; they follow the same lines. Then they begin to diverge, and we must make a choice between them. History or custom or social utility or some compelling sentiment of justice or sometimes perhaps a semi-intuitive apprehension of the pervading spirit of our law must come to the rescue of the anxious judge, and tell him where to go.[11]

Building on Justice Cardozo's philosophy, Justice Brennan — who was born and raised and practiced law in this city — has stated that a judge must act with passion as well as reason, with the heart as well as the head.[12] Justice Brennan explained that by "passion," he meant "the range of emotional and intuitive responses . . . which often speed into our consciousness far ahead of the lumbering syllogisms of reason."[13] He argued, "Sensitivity to one's intuitive and passionate responses, and awareness of the range of human experience, is therefore not only an inevitable but a desirable part of the judicial process, an aspect more to be nurtured than feared."[14]

Thus law is more than the will of the sovereign, even as channelled by the requirements of some coherence, some regularity, and some rationality. For law must be rooted in human experience, in morality, and must always strive for justice. As Justice Cardozo reminded his readers:

> "Ethical considerations can no more be excluded from the administration of justice which is the end and purpose of all civil laws than one can exclude the vital air from his room and live." Logic and history and custom have their place. We will shape the law to conform to them when we may; but only within bounds. . . . There is an old legend that on one occasion God

---

11 BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 43 (1921).

12 William J. Brennan, Jr., *Reason, Passion, and "The Progress of the Law,"* 42 THE RECORD OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 948, 958-59, 963 (1987). Justice Brennan delivered the annual Benjamin Cardozo Lecture before the Association of the Bar of the City of New York on September 17, 1987, the two hundredth anniversary of the United States Constitution.

13 *Id.* at 958.

14 *Id.* at 959.

> prayed, and his prayer was "Be it my will that my justice be ruled by my mercy." That is a prayer which we all need to utter at times when the demon of formalism tempts the intellect with the lure of scientific order.[15]

Even Karl Llewellyn, whose famous sentence, "What these officials do about disputes is, to my mind, the law itself," I quoted earlier, reported that he found it "painful" that people seized on these words "to characterize a whole man and his whole position."[16] He wrote that this sentence is:

> plainly at best a very partial statement of the whole truth. For it is clear that one office of law is to control officials in some part .... Moreover, no man sees law whole who ever forgets that one inherent drive which is a living part of even the most wrong-headed and arbitrary legal system is a drive — patent or latent, throbbing or faint-pulsed, impatient or sluggish, but always present — to make the system, its detail and its officials more closely realize an ideal of justice.[17]

Thus a lawyer must care about humanity, morality, and justice — if not for their own sake than at least to be able to win. And what is true for judges is certainly true for jurors as well: if you can convince a jury that justice is on your side, you have made a major step toward victory.[18]

The lawyer's role in insisting on some coherence, some regularity, and some rationality — and in directing attention to the requirements of humanity, morality, and justice — goes a long way to explain why Dick the Butcher in Shakespeare's Henry VI, Part 2, exclaims "The first thing we do, let's kill all the lawyers." Dick the Butcher and his leader Jack Cade are part of a mob seeking to overthrow the government in a fit of irrational ferocity and, indeed, a few lines later in the play, Cade orders a clerk to be executed simply because he is able to read and write.[19] Dick the Butcher and Cade are hardly alone in this regard. As John W. Davis — widely known as the lawyer's lawyer — once said, "[E]very would-be despot has found it necessary to silence the tongues of his country's lawyers."[20]

---

15 CARDOZO, *supra* note 11, at 66 (citations omitted).

16 LLEWELLYN, *supra* note 5, at xi.

17 *Id.* at x.

18 *See* JAMES W. MCELHANEY, TRIAL NOTEBOOK 71 (3d ed. 1994) (poll of potential jurors found that 60% view the "trial as a 'moral arena,' in which it is more important to do the right thing than the legally correct thing").

19 SHAKESPEARE, *supra* note 1, at 100-05.

20 JOHN W. DAVIS, 1 THE RECORD OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 101, 103 (1946).

While in this country it is more common for lawyers to become the butt of jokes or the objects of criticism for representing unpopular clients, lawyers who try to insist that those with power obey the law — that they act with some coherence, some regularity, and some rationality — and who try to insist on justice, can meet far worse fates, particularly in other parts of the world. To take but one recent example, Mohammed Nejob Hosni, a Tunisian human rights lawyer who has been honored internationally for his representation of clients from all types of backgrounds in political cases, had his office and house put under police surveillance, his family denied passports, the backyard of his home bulldozed, and was ultimately arrested and imprisoned on apparently trumped up charges.[21] Perhaps, then, it is not surprising that Robert Kennedy said "courage is the most important attribute of a lawyer."[22]

What does *this* mean for you now, as a beginning law student? It is not enough to simply learn what the judges have done in order to predict what they will do in the future, not enough to analyze what they have done, not enough to criticize it when it is incoherent, irregular, and irrational. You must also critique it when it is unjust. That is why your first reading assignment in law school was a brief summary of the traditions of moral reasoning. In order to be able to persuasively criticize legal decisions as unjust, you need to be familiar with the distinction between utilitarianism and rights-based approaches to moral questions, and need to be aware that both the Charybdis of intolerance and the Scylla of relativism are dangerous.

Here is where I — and I believe most, if not all, of this school's faculty — part company with Llewellyn. He told new law students:

> The hardest job of the first year is to lop off your common sense, to knock your ethics into temporary anesthesia. Your view of social policy, your sense of justice — to knock these out of you along with woozy thinking, along with ideas all fuzzed along their edges. You are to acquire ability to think precisely, to analyze coldly, to work within a body of materials that is given, to see, and see only, and manipulate, the machinery of the law. It is not easy thus to turn human beings into lawyers.[23]

Maybe the kinds of students who were sufficiently privileged to attend Columbia Law School during the Great Depression needed that kind of a kick in the teeth, but I don't think that you do. Un-

---

21 *See* Lawyers Committee for Human Rights, *Lawyer-to-Lawyer Network* (June 1994).

22 FRED R. SHAPIRO, THE OXFORD DICTIONARY OF AMERICAN LEGAL QUOTATIONS 270 (1993).

23 LLEWELLYN, *supra* note 5, at 116.

happily, while I do not think that your teachers will actually set out to try to do it, you may nevertheless find yourself at times cut loose from common sense, adrift from human experience, and numb to ethics. Part of this may be caused by what Dean Cramton of Cornell called the "steady diet of borderline cases" we will feed you.[24] That is, what we focus on in law school are the hard cases, the ones where reasonable arguments can be made either way, rather than the easy cases. This can sometimes mislead you into thinking that there are no easy cases. In addition, by focussing on hard cases, by showing you how law changes over time, and by insisting that you think critically about what you read, you may be misled into thinking that everything is unsettled. There is, in short, a real danger of cynicism.

Llewellyn himself recognized this. After noting that "It is not easy thus to turn human beings into lawyers," he continued — in a passage that is unfortunately less well-known:

> Neither is it safe. For a mere legal machine is a social danger. Indeed, a mere legal machine is not even a good lawyer. It lacks insight and judgment. It lacks the power to draw into hunching that body of intangibles that lie in social experience.[25]

Llewellyn nevertheless believed that it was "almost impossible" to do anything but "sacrific[e] some humanity first" and then "hope" to regain it.[26]

I believe that it is far too risky to sacrifice one's humanity in the hope of regaining it later. You need it for all of the other parts of your life: to be a good friend, a good neighbor, a good citizen, a good spouse, and a good parent. Indeed, as Llewellyn recognized, you need it to be a good lawyer.

For a lawyer has a grip on the levers of the machinery of the state. A lawyer holds the keys to the system of justice.

> O, it is excellent
> To have a giant's strength; but it is tyrannous
> To use it like a giant.[27]

The idea may be as old as Shakespeare, but it is as new as The Crash Test Dummies, who sing in praise of Superman:

> Even though he could have smashed through any bank

---

[24] Roger C. Cramton, *The Ordinary Religion of the Law School Classroom*, 29 J. LEGAL ED. 247, 254 (1978).

[25] LLEWELLYN, *supra* note 5, at 116.

[26] *Id.* at 116-17.

[27] SHAKESPEARE, *supra* note 2, at lines 109-11.

In the United States, he had the strength, but he would not.[28]

A lawyer has a giant's strength, but must not use it like a giant, but rather must use it with an eye toward justice. Indeed, in advising a client, the Rules of Professional Conduct are plain that "a lawyer may refer not only to law but to other considerations, such as moral, economic, social and political facts, that may be relevant to the client's situation."[29] This does not mean that a lawyer has to be a Superman, who, again in the words of the Crash Test Dummies:

> [Superman] never made any money
> For saving the world from Solomon Grundy . . . .
> [But] stayed in the city, and kept changing clothes
> In dirty old phonebooths till his work was through
> And nothing to do but go on home.[30]

It is a great mistake to think that unless you are willing to do it all, you can do nothing; that unless you are a saint, you can do no good. The person who made that point most clearly to me was Bob Hayes, who became a bit of a folk hero a few years back when he left a high-paying Wall Street law firm to found the Coalition for the Homeless and advocate on behalf of the homeless. Resisting suggestions of sainthood, Hayes pointed out that he still had a comfortable life and a good home.[31] You need not be willing to be a Superman and give it all to the pursuit of justice in order to give something of value in the pursuit of justice.

When lawyers pay no attention to justice, the result is tyranny. Perhaps, then, there is another sense in which to understand Dick the Butcher's cry, "The first thing we do, let's kill all the lawyers."[32] His cry — and the whole mob uprising — only occur after Good Duke Humphrey, who had fairly administered the law, is falsely accused of illegal conduct and killed. So understood, Daniel Kornstein argues in his new book on Shakespeare and the law, the

---

28 Crash Test Dummies, *Superman's Song, on* THE GHOSTS THAT HAUNT ME (Arista 1991).

29 N.J. RULES OF PROFESSIONAL CONDUCT Rule 2.1 (1994).

30 Crash Test Dummies, *Superman's Song, supra* note 28.

31 *See* Steven Brill, *Attorney for the Defenseless,* ESQUIRE. Dec. 1984, at 245, 246 (quoting Robert Hayes as stating, "I live decently and hypocritically . . . . I eat more than I need to, while some people starve. But what I think I have accomplished is . . . that I've taken the work away from being exclusively for the saints and the Mother Theresa types and shown that it is something average people can care about and do something about."); *see also id.* at 248 (Hayes tells lawyers that "you achieve a balance in life that is morally tenable by knowing that you have limitations — that you like nice clothing or good food or a nice place to live, that you don't have to become Mother Theresa, but that you can decide to make $50,000 or $60,000 and live well instead of $150,000, and have the freedom to help people, and to make a difference.").

32 SHAKESPEARE, *supra* note 1, at line 78.

people are not uprising against all law, but rather only against "perverted, false law, such as accused and killed the good duke."[33] Seen in this light, even the killing of the clerk because he could read and write is less an illustration of the brutality of the mob, and more a stark indictment of a gross injustice in the legal system at the time, which exempted from execution those offenders who could read Latin.[34]

What does *this* mean for you now, as a beginning law student? You must hold on to your common sense, your sense of ethics, your sense of justice, your humanity. Remember that you, your classmates, your teachers, and your future clients, bosses, colleagues, subordinates, adversaries, and judges all share in that humanity — that all are children of God.

Resist the temptation of cynicism. As Vice President Al Gore said at this June's Harvard Commencement, "the brokenness that separates the cynic from others is the outward sign of an inner division between the head and the heart."[35] Notice that Vice President Gore's prescription for avoiding cynicism is precisely Justice Brennan's prescription for progress in the law — keeping the head and the heart in constant dialogue.

Keep your head and your heart in constant dialogue as you read, analyze, and critique the work of judges, and remember the words of Professor Henry Hart:

> [T]he judges who sit for the time being on the court . . . . are only the custodians of the law and not the owners of it. The law belongs to the people of the country, and to the hundreds of thousands of lawyers and judges who through the years have struggled, in their behalf, to make it coherent and intelligible and responsive to the people's sense of justice.[36]

You are now taking the first steps to be among those who must carry on that struggle.

---

[33] KORNSTEIN, *supra* note 2, at 33.

[34] *Id.* at 30 (discussing "benefit of clergy").

[35] Al Gore, *The Cynics Are Wrong*, 96 HARV. MAG. July-Aug. 1994, at 32.

[36] Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of the Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1396 (1953).