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Faith, Hope, and the Law Teacher: A Reaction to Professor Levinson

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FAITH, HOPE, AND THE LAW TEACHER: A REACTION TO PROFESSOR LEVINSON

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I. INTRODUCTION

In this symposium, the editors have assigned the commentators a difficult task by requesting a response to Professor Levinson's speech. Law professors, being a contentious lot, find provocation in the simplest of statements. In this case, though, I disagree with little, if any, of what Professor Levinson has written. Still, he does evoke a reaction, if not a pointed response.

Professor Levinson's article of faith stands poised between modernist and postmodernist sentiments about law and contains a degree of skepticism that I understand, share, and find uncomfortable. The modernism in Levinson's remarks, as I see it, is contained in his recognition (and partial acceptance) of paradox and contradiction in law, and his consequent rejection of, or agnosticism toward, legal dogma as the Way to Truth and Justice. As I read him, Levinson's bow to postmodernism is his desire for comfort in the existential quality of law through belief in law's power to order political institutions. Institutions so ordered reject dogma and allow decisions to be made in the presence of paradox and contradiction, resulting in an array of diverse and competing truth(s) and justice(s). This faith in law's ability to accommodate and mediate competing claims is a faith in the liberal tradition.

My discomfort stems from what I perceive to be a notable degree of skepticism. As a writer and as a teacher, I feel an obligation to make positive, authoritative statements about law, or at least to take recognizable positions. At the same time, skepticism, not humility, pulls me in another direction. I do not trust dogmatic assertions about law or legal education. I am torn between the need for explicit articulation of my beliefs and a simultaneous fear or distrust of them. This distressing ambivalence seems pandemic to our age, as Levinson's discussion of Metzger and Rorty makes clear. I believe that those of us afflicted with this ambivalence cope by making a series of temporary resolutions that serve as resting places in our personal intellectual journeys. In the course of this essay, I want to uncover what attracts me to the liberal, intellectual pluralism Professor Levinson describes, and I want to ex-

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plore why I cannot stay content resting within the interstices of indeterminacy surrounding this position.

II. THE LAW AS JUSTICE

I am a product of pre- and post-Vatican II Catholic education. My primary grades were spent under the tutelage of nuns. The atmosphere was not far removed from the tragicomical worlds of Christopher Durang and Mary Gordon. I regard those times fondly. Whenever asked to recall influential teachers, I always remember Sister Angela Bulla for challenging me and making me think. After grade school, I attended Christian Brothers Academy, a Catholic high school. The clear message the Brothers gave us from the beginning was: "Remember all the stuff the nuns taught you? Well, forget it." Implicit in that command was a directive to question what they the Brothers would teach us as well. They made us question dogma and assumptions, invited us to rely on our consciences for moral decisionmaking, and encouraged us to forage freely in all intellectual fields. I recall teachers like Brother Richard, who opened up the world of drama, and Brother John, who drove a group of us to Manhattan to attend a Fellini film festival. Brother John also tutored us in advanced calculus. I also remember Brother Bernadine, who told us to read Sartre after haranguing us for not knowing who Sartre was or why Sartre turned down the Nobel Prize. Clearly, this was not the stuff of the Baltimore Catechism. It was the foundation for a lifelong intellectual challenge. At the time, I was not fully aware that the journey was continuous. Instead, I assumed that at some point the fields of inquiry would narrow, and that the narrowing would start in college.

I spent four wonderful years at the University of Notre Dame where I must say, to my embarrassment, that formal education was wasted on my youth. During my first two years, I found the courses slightly less demanding than my advanced high school courses, which naturally led me to pursuits other than my studies. When I did study, I concentrated on anything but the assigned texts. Although I would give the assigned readings the once over, when examination time came I read related subjects, or subjects in a related field. When I went to the library, I told myself that I was constitutionally incapable of sitting in a carrel doing assigned work; instead, I wandered the stacks. That wandering through the library paid off in my last two years, when I began choosing interesting courses instead of required ones. One of those interesting undergraduate courses, called The Common Law, was taught by my mentor and fellow commentator, Thomas Shaffer.

Even though I found that law school required more discipline than had Notre Dame, I carried on in my tradition of intellectual wandering, and occasionally found myself comfortably ensconced in some cubicle reading jurisprudence or the autobiographical war stories of trial

lawyers. I also supplemented and complemented my law school courses with clerkships. These part-time work experiences were valuable ways of integrating theory and practice.

There was no hidden method to my learning madness. Rather, I suffered (or enjoyed) an undisciplined, roving mind. That love of inquiry may be the most important characteristic that impelled me to teach law. I often felt, and still feel, the schizophrenia of being too theoretical to be a practicing attorney and too practical to be a scholar. As Professor Levinson notes, how could I turn down a job that paid me to read, write, and talk about the things I like? I look back on my Catholic (and catholic) education with great fondness. The memories are funny and sad and their recollection evokes the bittersweet feeling of lost innocence. I do not intend this essay to take an overly confessional or apologetic tone (a noble, Catholic tradition); my remarks are limited instead to my intellectual loss of innocence.

My formal education, from grade school through law school, is best described as a period of roving among library stacks, searching through bookstores, and attending diverse lectures. I felt more like an intellectual guerrilla than a trained soldier. This feeling was something of an anomaly for a kid with a scholastic education. If I did not come away from this education with a disciplined mind, I did come away with a sense of inquiry. That sense of inquiry had two dimensions. One dimension was its intellectual pluralism: everything from particle physics to zen looked like fun. The other dimension was a healthy skepticism that made me realize nothing contained the answer, and that the search was the thing.

Healthy skepticism was about as far away from both cynicism and true belief as I thought I could get. My intellectual or philosophical mindset consisted of the following precepts: (1) question dogma; (2) invest in the intellectual search; (3) beware of false intellectual idols; (4) judge modestly; (5) give allegiance to no single principle; (6) avoid despair; (7) be generous of spirit; and (8) maintain hope.

Those intellectual beatitudes are both ideals and aspirations. Hopefully, I will not be faulted too severely for not attaining them. I should, however, be faulted for not striving towards them. Read together, the beatitudes make a curious statement about Truth. The healthy skeptic does not deny the possibility of competing versions of Truth, nor does the healthy skeptic regard Truth with a relativism so expansive as to render Truth meaningless and judgment or action impossible. Instead, the healthy skeptic admits that he or she does not know Truth to a certainty, and is willing, if not compelled, to entertain other interpretations.

This view of Truth has a direct application to law. Borrowing from John Rawls, the American philospher and political theorist, if truth is the end of thought, then justice is the end of social institutions like law. Justice then, like Truth, may not come neatly packaged in one unalter-

able variety, desirable as that might be. Instead, different versions of Justice exist. There are historical and cultural, as well as epistemological and intellectual, reasons for the variations. Law does not necessarily lead to Justice. Law, however, has the capacity to aid us in attaining Justice, if we let it.

The healthy skeptic has faith that law can serve Justice. That faith is buttressed by hope that law will do so. Faith and hope in law are tempered by reason and the realization that law is not by itself the *summum bonum*. Manmade law, as Thomas Aquinas recognized, is either just or unjust. Law can have a noble end. Attaining (striving for) Justice is our responsibility if we choose it.

A crucial shift was made in the last sentence. Justice through law comes about if those of us engaged in law teaching and lawyering choose to see Justice as the end of law. Law is not an autonomous construct dispensing Justice. Choosing Justice as the goal of law does not eliminate the possibility that Justice can also be the object of those who criticize law's role as a social institution. There is no logical or compelling reason that says we must all believe in the same conception of Justice. Everything in my training leads me to reject such a rigid interpretation.

As applied to law teaching, this attitude means that intellectual inquiry about law, with Justice as its object, allows the freedom to read, write, and talk about ways of using law to make society more just. Those were my views of law when I began teaching, and I had a specific self-education project in mind. I set out to master a substantive area or two of law, to attain a certain technical competence, and then to elaborate on the socio-political consequences of this conception. I thus hoped to develop a theory of law that would provide a background for examining substantive topics. For a few years, the project worked. As a teacher, I grew in confidence in the classroom; as a thinker, I began to feel comfortable with my subjects and arrogant enough to publish my thoughts about law, lawyering, and legal education.

III. Something Happened: The Indeterminacy of Law

With due acknowledgement to Joseph Heller, something happened. My faith and hope in intellectual inquiry and my healthy skepticism gave way to the dark night of the soul that Levinson refers to in his essay. Again, let me use a personal example.

A colleague, a Jesuit priest also trained as a lawyer, taught law school for many years until one day he decided he could not go into the classroom. Here was a teacher who could parse an opinion with Occam's razor sharpened to its finest edge. His breadth and depth of knowledge was typical of someone with his scholastic education and training. He also had the Jesuit hubris that makes teaching an easy chore. Yet something happened. He began to fear the classroom. When

I asked him why, he answered that he could not face the students' questions. He felt silenced. He had nothing to say. He had nothing to teach. His only recourse was to depart the academy, which he did. The silence was deafening. He had devoted much of his life to this branch of his vocation, only to cut it off in one courageous act.

I cannot say I share that experience to the depth my late colleague did. But I can say I have peered into the intellectual abyss of the law, and have been standing for some time looking over its edge, unsure whether to walk away or take a leap of faith into the void.

The precise experience is harmless enough. It is, however, symbolic of a state of intellectual doubt, discomfort, and potential despair. One semester not long ago I was teaching what I thought was the best contracts course of my career. Almost everyday the class proceeded smoothly, the discussion was continuous and wide-ranging. We explored legal method, doctrinal analysis, economics, feminism, Critical Legal Studies, and liberal politics, all in appropriately modest doses. Almost every class ended with a question that set up a discussion for the next day. At no point did I feel unsure of the course's direction. Then one day, during the discussion of a case, the students analyzed a rule with frightening predictability. One student stated the decisional rule, another gave a counter-argument, the next presented a brief economic analysis, and another contributed a political overlay covering the rule and the policy behind it. After that tour of the case, we fell silent and moved on to the next topic.

I left class disturbed by the predictability of it all. I had heard the arguments before, because I had taught them. I was also disturbed by the silence. There was no resolution to our discussion. Was I to enjoy this indeterminacy and take Kingsfieldian pride in exploring the contours of an issue without hinting at a correct answer? Was I to rejoice in the brilliant training I had accomplished? My students could dissect a case at several levels. Did this not accomplish what I had set out to do, namely, explore legal method rather than doctrine? Was I not one of the teachers who refused to "lay it all out for the students"? I must confess that those were my goals, and they were also my conception of good law teaching. Yet, I felt uncomfortable. There was no apparent end to it all.

The training or, pejoratively, the indoctrination I just described consists of exposing students to "thinking like a lawyer." This thinking consists of inculcating in students a capacity to play with law. To be sure, there is play within the rules of law. At some point, however, there is a hard edge to this game when play becomes manipulation. We, through our teaching, show students how to manipulate facts and rules. From there, students learn to manipulate policy arguments and jurisprudential schools of thought. I also suspect that, with the popularity of the Alternative Dispute Resolution movement, students will soon become adept at manipulating decisionmaking processes. To what end

do we manipulate? Is law so susceptible to manipulation that anything we say about the ends of law is meaningless or capable of being contradicted? Moreover, if law is so indeterminate, are teachers even capable of teaching students discernment? Do we develop their capacity to make judgements? Put another way, do we teach students how to use law, or how to live a life in law?

The answer to the last question is that teachers cannot help but influence students. More often than not, we do this by example instead of explicit articulation. I wonder, though, how conscious we are of the silent symbols and subtle messages we send our students about the right and wrong, good and bad ways of practicing law. I wonder how reflective we are of the way our values infuse the learning process and how our faith in, and doubt about, law affects our students. If we abandon our faith and hope in law, and if we fail to confront our doubts about law's capacity for Justice, what kind of training are we giving to our students? It is important to me that any faith we have in law must not be reduced to simple catechisms. Instead, our teaching must confront our doubt.

As teachers in a professional school, we must realize that we are involved in training students to make choices in an imperfect and some times evil world. Law can be used to do bad things. South African apartheid, Third Reich genocide, and American racism and sexism are testaments to the evils and injustices perpetrated under law. The civil rights movement, the women's movement, even the anti-war movement are countervailing examples of the struggle for Justice under law. Clearly, law has the capacity for good and evil. But what are we to make of this?

When I admit my doubt about law's ability to serve Justice, the intellectual beatitudes of my formal education and my healthy skepticism give way to modernist thinking. Faith and hope in the search for Truth and Justice confront the realization that law is not coextensive with either virtue. Indeterminacy, paradox, and contradiction replace dogmatic assertions of belief in the virtues of law.

These attributes of modern thought claim respectability because of their associations with recognizable philosophical schools. I like Duncan Kennedy's tongue-in-cheek label "fancy theory," by which he refers to phenomenology, structuralism, deconstruction, Marxism, neo-Marxism, and the Frankfurt School. Yet, all is not fun and games. Even when these fashionable schools are not engaged in the intellectual trench warfare known as "trashing," modernist learning has an uncomfortable edge of cynicism and despair. Modernism exposes the myths and meanings behind law and reveals the illusion that law is Truth and Justice. But where are we left on our journey? The modernist vision of the indeterminacy of law leaves little ground to stand upon in the search for Justice.

IV. RECONCILIATION

The personal anecdotes recounted earlier describe my loss of innocence as the beatitudes of my formal education gave way to modernist tenets. Can the beatitudes be recaptured in a way that celebrates rather than denigrates modernist learning? Can they be recaptured in a way that accepts the inconclusiveness surrounding the edge of the abyss? I believe that the healthy skepticism of my early education can be reconciled with modernist learning. The near cynicism of modernism is tempered by a liberal tolerance of our existential world, allowing faith and hope to exist alongside truth(s) and justice(s). My ambiguous use of the plural and singular forms and use of the lower case are intended as a recognition of the fact that law does not have a life autonomous from the people involved in its administration. Additionally, people and their values vary. As lawyers and law teachers, we invigorate law with truth and justice to the extent we wish. The responsibility is ours to give law the conditions necessary to do good and avoid evil. We can adopt Unger's Christian-romantic vision or Dworkin's view of law as integrity just as easily as we can adopt some Marxian notion of law as a tool of the oppressive classes.

Where, then, does this journey to the edge of intellectual inquiry leave me? If more than one conception of the good (Truth and Justice) exists, then how do we choose, and train our students to choose, among them? How can I know the true and the good? Are all versions equally acceptable? The quick, and not altogether irrelevant or objectionable, response to the question of how to choose among numerous alternatives is the answer the instrumentalist gives. Lawyers need only represent their clients. They need not reconstruct the whole of Justice. After all, the instrumentalist continues, the lawyer cannot act as judge and jury as well as advocate and counsellor. If lawyers assume all of these roles, then their advice and representation of clients will be distorted. Rather, the lawyer is one cog in the machine of Justice, and with zealous representation what emerges from that machine will be just.

This instrumentalist and positivist response is neither as relativistic nor as neutral as it may appear. Furthermore, it does not necessarily follow that the lawyer is nothing more than a hired gun and that law is lethal, if neutral, ammunition. First, lawyers have responsibilities when choosing clients and providing legal representation. Law is not self-executing; it must be administered by people. Lawyers give law its shape in the first instance by choosing clients and careers. Second, lawyers have professional and ethical obligations to the system to make sure that it runs fairly. The criteria lawyers use in choosing clients, conducting representation, and maintaining the integrity of the technology of justice do not require a commitment to a single, unalterable vision of the just state. Instead, lawyers can disagree on the best possible world view. I believe, however, that lawyers should not disagree about

whether the end of law should be Justice. Lawyers should take responsibility for achieving that end even when law fails.

In this regard, lawyers inject ethical and moral content into the decisions they make when choosing and representing clients. Not all choices, Charles Fried notwithstanding, are morally praiseworthy. It is wrong to represent a guilty client by asserting an alibi defense. It is wrong to churn fees. It is wrong to help clients harass others. It is absurd to say that lawyers can choose clients and conduct representation for any reason whatsoever. Representing someone only because they pay is morally indefensible. There must be something more and there almost always is. Civil clients need help understanding and working through an impersonal bureaucracy. Criminal clients need help responding to the accusations of a state that has the power to use coercive force against them. Lawyers in both instances have the training to render the necessary help. The law, even with its open-endedness, exists as a tool for the lawyer rendering assistance. The abstract set of rules and procedures we call law do not dispense Justice; people do. As law teachers who influence those under our charge, we must be sensitive to our role as models. We can at least teach students the importance of making sound, intelligent, and caring choices in the imperfect, complex world of law.

My loss of innocence was a maturation process and a recognition that I will not develop, or see the development of, the answer to the problem of the one and the many. Protecting individual rights while improving the quality of life in a democratic society is no easy task, but Justice requires it. The struggle to honor the one while helping the many is an evolving challenge. The Grand Unified Theory (GUT) of law is no closer than the GUT of particle physics. Still, the failure to find either Truth or Justice in law does not mean the search is either irrelevant or absurd. It simply means the vision must be reinspired.

Once the reconstructed imagination entertains intellectual beatitudes in light of modernist learning, a picture emerges. Law is not completely autonomous. Consequently, what law does is not necessarily Just. Although it is not wholly determined by the political programs of the ruling class, neither does law exist apart from ideology. Law is not Truth. Indeed, law can be used to excuse bad things. Law, then, is political in the same way that society is political. Politics change, changing laws until they reflect the political structure of the state. In turn, law executes the political programs that emerge from the structure. Specifically, majoritarian political programs in the United States are the result of pluralism. Our society relies on the structure of our Constitution for the protection of individual rights. Most importantly, there is an inevitable tension between the two pulls of majoritarianism and individualism. Law may be incapable of ultimately resolving the tension, but the tension is embraced as much as it is tolerated. Unlike immovable restraints, paradox and contradiction present opportunities

for social and individual growth and development.

The role of lawyers, and trainers of lawyers, is to recognize and be capable of acting within a range of indeterminacy with the full realization that paradox and contradiction exist but do not preclude action. Teaching can take place with a sense of wonder, excitement, and challenge once the teacher abandons the uncritical posture. As teachers, we can reject the demands of our students for rules and suppress our desire for mastery, while we profess our faith in law's capability to serve Justice. That law is not always just does not negate its potential for Justice.

The existential quality of intellectual inquiry requires constant motion and exploration through fields, topics, and issues. Modernism stares us in the face: we can perceive it as a threat instead of a challenge, or as a continuing part of the promise of a scholarly vocation. We can move past modernism and reconstruct the legal landscape, even reimagine our vision of teaching if we wish. Law need not be the theater of the absurd. As teachers, we must hold two deep contradictions in our careers. We must appear to our students as mistresses and masters of law. We must appear as having a philosophy of education and law. Simultaneously, we must appear uncommitted to particular philosophies of law and education, not because by showing no commitment we are "objective" and value neutral, but because the lack of permanent commitment helps preclude us from stagnating, promotes flexibility of mind and craft, and allows us to continue the intellectual journey without betraying the search.