

THINKING LIKE A LAWYER, THINKING LIKE A LEGAL SYSTEM

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A dissertation submitted to the faculty of the University of North Carolina at Chapel Hill in partial fulfillment of the requirements for the degree of Doctor of Philosophy in the Department of Anthropology.

Chapel Hill
2013

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Abstract

RICHARD CLAY STUART: Thinking Like A Lawyer, Thinking Like A Legal System
(Under the direction of Carole L. Crumley and Robert E. Daniels)

The legal system is the product of lawyers. Lawyers are the product of a specific educational system. Therefore, to understand the legal system, we must first explore how lawyers are trained and conditioned to think. What does it mean to “Think Like a Lawyer?”

This dissertation makes use of autoethnography to explore the experience and effects of law school. It recreates the daily ritual of law students and law professors. It explores the Socratic nature of legal education. Finally, it links these processes to complex systems in general and the practice of law in particular.

This dissertation concludes that lawyers and the legal system are the product of a specific, initiation-like ritual process that occurs during and within the specific sociocultural context of law school.

For Mad Dog

Acknowledgments

First, thanks go to my parents, Dick and Susan Stuart, for all of their support down through the years. I could never have done any of this without your help.

Thanks are also due to my many friends from law school who have stood by me over the years with advice and friendship. Ed Ergenzinger, Jen Karrmann Granai, Alex MacClenahan, Eric Trosch, Elizabeth Trosch, Emma Lloyd, Rachel Goldstein Zetouni, Nathan Zaleski, and Jacob Wellman. I would also like to thank Joe Wiltberger for his constant friendship and feedback through grad school, Meg Kassabaum and my cousin, Lauren Pierce, for letting me crash in their apartments that first year, Will Meyer for unstintingly sharing information regarding the graduate program, Jamie Clark for dissertation advice, and Kristina Kilgrove for providing the \LaTeX template that was necessary to format this dissertation.

Thanks are, of course, owed to my dissertation committee. I would especially like to single out Carole Crumley and Bob Daniels. It was Carole who inspired me to major in anthropology during undergrad, wrote my recommendation to law school, generously answered my questions about anthropology while I was practicing law, and then coached me back into UNC's graduate program. Bob has been a wonderful mentor, friend, and coach through the dissertation process.

Finally, thank you to my wonderful wife and best friend, Carol, and our two beautiful children, Chloe and Ethan, who understood and cheered me on through countless nights and weekends as I wrote my dissertation.

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Chapter 1

BOHICA

The room was freezing cold, or at least it felt that way. It was hard to tell since my nerves were playing tricks on me. For literally months, I had been dreading this day, dreading this exam. I was scared. The subject was civil procedure, what lay-people might describe as the rules of the game for non-criminal lawsuits. It establishes the protocols for suing and defending someone, the proper court in which to file lawsuits, who can be a party to the lawsuit, and so forth. But the operation of those rules in the real world, meant very little to us. Civil procedure, or “CivPro” as its known inside the building, was the weed-out course at Wake Forest University School of Law, and today was the final.

Just about the first thing you realize in law school is that everything is different in law school. In high school and college, students get lots of opportunities to score points and fix mistakes. Messing up an assignment typically is not fatal. Homework assignments, papers, quizzes, midterms, miscellaneous assignments: these things come at you in a blizzard, providing plenty of chances for improving your grade and figuring out how to test better for a given professor.

In law school, you usually only get one bite at the apple: the final exam. That was it. Your grade on the final is your grade for the course, and since first year, or “1L” in law school speak, also serves as the weed-out year in law school, it is no exaggeration to say that your entire future as a lawyer quite literally rests on just a handful of exams. Thus my concern, and looking around the large courtroom that doubled as the law school’s auditorium, it was obvious that I was not alone. The room crackled with tension.

We were all trying our best, but for the first time in our lives, we found ourselves surrounded by people just as smart and hard-working as ourselves. Up to now, our best had always been enough to propel us to the top of our classes, but today, against this group of similarly talented individuals, we had to grapple with the fact that our best might not even be enough to pass. For students who have only their academic track record to point to, that is a terrifying realization. Nor was it unrealistic.

Back then, Wake required that every 1L class be held to an 81 average. We had all done the math, and it was brutal. Our reality was that for every point above 81 awarded to one person by the professor, points would have to be taken from someone else. The arrangement was a classic zero-sum game. There would be winners and losers, and the only way to succeed was by taking from one of your classmates. Some of us would go home triumphant, secure in the knowledge that they had what it took to survive law school and become an attorney. Others would be getting academic probation for Christmas, along with the promise that if they failed to outperform their classmates during the spring semester, they would be going home forever.

The room hushed then as our CivPro instructor, Professor George Walker, entered the courtroom and strode commandingly down to the front. Reaching the bottom, he turned and swept the room with his eyes, surveying us while wearing the wry smile on his face that I had come to know so well. Few professors have nicknames at Wake, but Professor Walker does. His nickname is Mad Dog, a moniker he obviously takes pride in and even fosters to some extent.

Of all the teachers in law school, Professor Walker's class was the one I—along with probably many of my classmates—feared the most since he routinely dismantled students with his questions, but not in a cruel way, just relentless. The routine was always the same. If Walker called your name, you were required to stand at your desk and verbally fence with him over the content and meaning of the assignment, though fencing fails to capture the essence of this exchange since he was a past master of the material and we were mostly clueless. Class after class, week after week, we marched into CivPro, praying that Walker would call on some other person.

Paradoxically, Professor Walker was also one of my favorite professors. Witty as hell and a natural comedian, Mad Dog managed to generate both terror and humor during each class—a quality worth its weight in gold under the crushing stress of 1L classes. I would later take one elective with him, and by graduation regretted that I had not taken more, but that seemed unimaginable during my first semester in his CivPro class, which had, quite simply, been brutal for me. And now, classes were over. It was time to see if I had learned anything.

I closed my notebook and waited. So did others until the room quieted on its own. A blackboard stood to the side, and after capturing our attention, Mad Dog walked over to the device and chalked onto its surface a single word: BOHICA.

My mind instantly began rifling through all the cases we had covered during the past semester. BOHICA? I could feel sweat gathering. Was it a legal principle? The name of a lawsuit? What? I had no idea. We were only one word in and I was already clueless. “Please God,” I prayed. “Don’t let this be the exam.”

“In years past,” Professor Walker began, “men injured during war and recuperating in a hospital would have their injuries treated by medical staff. Much like everything else in the military, their medications would be administered on a schedule. So every once in a while, a medical staffer would walk up to the chalkboard and write on its surface the word that I’ve just written for you. BOHICA: Bend Over—Here It Comes Again.”

And as the room erupted in laughter, Mad Dog handed out our exams.

Chapter 2

Autoethnography

I'm writing this dissertation to get my doctorate in anthropology, but anthropology is not my first doctorate degree. I earned a doctorate in law first. Confession time: I am an attorney. I don't practice much law these days, but I do still maintain my law licenses, having taken and passed both the North Carolina bar exam and the South Carolina bar exam. I still talk for a living, but in the classroom instead of the courtroom. I teach anthropology.

To most people, lawyers are, by definition, people who practice law, and since I don't take cases anymore, that must mean that I'm no longer an attorney. But it's a funny thing, being a lawyer. It gets into your bones. It lives in your car and whispers to you about auto accidents while you drive around town. It scans your legal documents, searching for loopholes. It audits people's behavior, smiling with sharp fangs at all the legal business they seem so desperate to generate. It laughs a lot, and not always kindly. And whatever else it does, the lawyer inside me jealously guards my identity.

I am a lawyer. The people I most closely associate with are lawyers. Virtually every friend I've made since law school is a lawyer. My lens is one of legal reasoning, and this will never change.

It was only after practicing law for a few years that I found myself back in school, but one very different from law school. My experience in law school mostly centered around playing a game called *finding precedent*. Finding precedent involves seeking out little tidbits of law written by a legislator or a legal opinion written by a judge that happens to support the argument I need to make in order to win my case. Right and wrong, in this context, is measured by convincing the deciding authority to rule your way. If they do, you were right; if they don't, you were wrong. The same goes for "rights" in general. If the court agrees that you have a given right, then the "right" exists; if the court disagrees, then you are out of luck. I'm not saying that lawyers don't know right from wrong, or that they don't get upset at injustice, but you don't win cases by complaining when something isn't fair. You win them by finding law that's on

your side.

So you can imagine my surprise upon entering graduate school for anthropology at hearing people discussing right and wrong again. It was shocking! People suddenly had natural rights—rights of the kind quoted in the Declaration of Independence, and to hear some of these people tell it, such rights trumped statutes and legal precedent. Slowly but surely, the values of anthropology seeped into my veins, reawakening perspectives which my legal education had blasted into remission. One could talk honestly, rather than naively, about right and wrong on the basis of the concepts themselves. Precedent wasn't required to prove a point. In fact, quite often it was the prevailing precedent that was being attacked.

The interesting thing about both law school and grad school—at least, as I experienced them—is that neither was particularly concerned with what I'll call vocational training. This stands in contrast to programs like medical school or physical therapy: institutions where the emphasis is centered around teaching medical technique. Law school and grad school were far more about inculcating values. Both schools enculturate. Both proselytize a belief system. What was sometimes confusing for me is that the two appear to be polar opposites.

When I sat down to write this dissertation, I found—much to my dismay—that two separate and irreconcilable value systems colored my analysis. I found myself simultaneously trying to criticize while also trying to defend, scoffing at myself for having gone soft. It made writing this dissertation challenging as I tried to be fair to both sides.

Let me say up front that some of what I've written may look like criticism of legal education, but that isn't what I'm trying to say. Law school is hard. It hurts. For some, it probably damages. But practicing law is even harder. Your decisions affect people's lives, many of whom have put their trust in you. So the three years I spent at Wake Forest were not necessarily pleasant, but that was never the deal. I was there to become a lawyer, and in that sense, the faculty overwhelmingly succeeded in what they had promised to do.

Anthropologically speaking, law school most resembles a rite of passage, and rites of passage aren't supposed to be easy. To be meaningful, they have to be hard. Law school was hard, but it provided me with the most empowering education that I've ever gotten. It gave me the tools to understand the mechanisms which govern our society. Moreover, it qualified me to take part in the process myself. This is real power. Consider this: the United States is currently the most powerful country in the world with a conventional military second to none and a nuclear arsenal capable of destroying every civilization on earth, but a single

lawyer can go into a courthouse and compel the country to change. Think about that.

Moreover, law school, in conditioning people to *think like a lawyer* truly delivers a valuable skill. What looks like arbitrary, legal hair-splitting to the uninitiated reveals itself as nuanced analysis to an attorney. Lawyers think differently from most non-lawyers. We are practiced at spotting subtle distinctions and trained to be dispassionate—or at least less passionate—about the subject matter. This discipline makes us very effective analysts. One of the questions taken up by this dissertation is how such a transformation is possible.

I shall also explore the impact of lawyerly analysis on the practice of law. We often discuss the legal system as if it exists apart from mankind in some natural, Platonic state. From this perspective, “The Law” becomes a separate entity: discoverable, deterministic, and finite. Laymen always want to know what the law is or what the outcome of their case will be. The position of this dissertation is that the legal system is not fully knowable; instead, it is an emergent phenomenon that only materializes when the individuals involved in each lawsuit, the lawyers, judges, jurors, witnesses, clerks, and of course, the clients, negotiate the reach and rules of the law as they muddle through the lawsuit itself. Only then, and really only at the conclusion of the lawsuit, do we know what the law will be.

Few legal matters of any kind are clear cut or blessed with straightforward answers. Moreover, few legal precedents are guaranteed to be applicable between cases for the simple reason that every lawsuit is factually different. The best you can say is that if the facts of one case resemble the facts of another then the law will probably follow, but that isn’t a guarantee. Are the lawyers the same? Are the judges? Are the jurors? Are the witnesses? Are the clients? Such differences matter. Simply put, the outcome of a lawsuit is never predictable, no matter how black-and-white the governing statutes or case law may appear.

What does this say about the legal system then? How should we analyze such a system? How do we conceptualize it, manage it, or attempt to govern it? How should law schools prepare for it? Exploring these questions will be the goal of this dissertation.

This then will be the road map for this dissertation: First, to explore the genesis of legal practice, which is found in the way we train lawyers in law school. Second, to define a framework of analysis that can be used, anthropologically, as a method for explaining the operation of the legal system.

The anthropological method employed in this dissertation is known as autoethnography. Autoethnography is a method of anthropological research and description that seeks “to concentrate on ways of producing meaningful, accessible, and evocative research grounded in personal experience, research that would

sensitize readers to issues of identity politics, to experiences shrouded in silence, and to forms of representation that deepen our capacity to empathize with people who are different from us or occupy different roles” (Ellis et al. 2013:274). I am attempting to combine an ethnographic analysis of law school and legal practice while simultaneously trying to generate a real “feel” for what these experiences are like. “As a method, autoethnography combines characteristics of autobiography and ethnography” together (Ellis et al. 2013:275).

To achieve this goal, I have attempted to blend experience, research, and simulation together. One of the key aspects of my legal training—and still for most attorneys—is the experience of Socratic recitation during class. Ask any attorney what they remember from law school and this experience will be at the forefront of their description. I have therefore tried to simulate a few Socratic lectures—distinguished by being in italics—along with simulated Socratic discussions of those cases as they might occur in class between a law student and law professor. The cryptographic struggle of reading cases, followed by the stress, and occasionally public humiliation, of being Socratically grilled by your professors on what you failed to understand pretty much summarizes the formative aspects of the law school experience as I observed it. To that end, it must be tackled in its own context. Again, this is exactly the kind of methodology supported by autoethnography.

When researchers write autoethnographies, they seek to produce aesthetic and evocative thick description of personal and interpersonal experiences. They accomplish this by . . . describing these patterns using facets of storytelling (e.g. character and plot development, showing and telling, and alterations of authorial voice. Thus, the autoethnographer not only tries to make personal experience meaningful and cultural experience engaging, but also, by producing accessible texts, she or he may be able to reach wider and more diverse mass audiences that traditional research usually disregards, a move that can make personal and social change possible for more people. (Ellis et al. 2013:277)

I have also included some simulated examples of court and court proceedings. These are drawn from composite experiences, but do not directly reflect any specific case or fact pattern.

Finally, this is a work of legal anthropology. Anthropologists have long studied the law in various forms. A recent work by Elizabeth Mertz, past editor of *PoLAR: Political and Legal Anthropology Review*, analyzed select American law schools by means of linguistic anthropology. Her theory is that law students learn to think like lawyers because of the language: “Learning to think like a lawyer, I suggest, is in large part a function of learning to read, talk, and write like a lawyer” (Mertz 2007:3)

I don’t want to minimize the importance of language in law school, but I must disagree that language is

the key ingredient when it comes to creating lawyers. Such an analysis tends to minimize the importance of such generating and regenerating cultural institutions of the habitus, exemplified by law schools in which only the totality of law school can explain the operation and reproduction of law school. No single element, by itself, is sufficient.

The formative process generated in law school is a ritualistic, initiation-like environment that law school creates akin to a conversion process. Language plays a role in that process, just as language plays a role in all initiations, but while language is necessary, by itself it is insufficient to explain what happens during law school. Initiations, in other words, are more than language. For example, consider these two passages by Duncan Kennedy—a Harvard law professor and leading academic in what anthropologists would recognize as post-modernism in the legal profession—exploring the student-teacher relationship in law school:

The interesting thing about the students' relationship with the faculty member with whom he does come into contact is its positively dizzying warmth. The classroom manner disappears almost altogether, and is replaced by a total openness, a universal solicitude and receptivity, which is its mirror image. The professor will often patiently bind up the lacerations inflicted in public ten minutes or an hour before, and add a word of encouragement which is like a laying on of hands. The reaction of the student is likely to be profoundly filial. (Kennedy 1970-1971:73)

We are dealing with a particular kind of terror: that of a person who knows himself defenseless before a person who has a demonstrated desire to hurt him....the fear is the fear of the victim. (Kennedy 1970-1971:75)

Terror? Lacerations? Those didn't come from reading the homework assignments. The forty-four percent of law students potentially suffering from "clinically significant levels of psychological distress" are not suffering because they spoke the words *promissory estoppel* or *the rule against perpetuities* (Peterson and Peterson 2009:359). In fact, "law students have significantly higher levels of stress, stress symptoms, and alcohol abuse" than medical students (Peterson and Peterson 2009:359). The study that reached that conclusion found that law students suffered greater stress than medical students due to the following eleven criteria: "lack of positive feedback, competition with peers for grades, exams given too infrequently, the fear of getting behind and not being able to catch up, difficulty in understanding the material, being called on in class, inconsistency of feedback from instructors, goofing off, worry about money, future career, and getting poor grades" (Heins et al. 1983:519). Linguistics was never mentioned.

My purpose here is not to attack Professor Mertz. She is interested in questions of race, gender,

and capitalist epistemology. I won't deny that certain modes of speech and language might disadvantage particular ethnic groups or preference one gender over another. What I will say is that Professor Mertz asks different questions than I do, and, unsurprisingly, arrives at different answers. Nor should it be surprising that with different perspectives—linguistic anthropology versus cultural anthropology—we reach different conclusions and preference different explanations.

What I want to emphasize is that the legal anthropological study of law schools is relevant, current, and called for. Indeed, Professor Mertz identifies the need for “more fine-grained and contextual attention to the ways that school status and culture, as well as aspects of professorial style and classroom dynamics, may affect equality of opportunity in law training and subsequent practice” after graduation (Mertz 2007:6).

This is exactly the kind of research that my dissertation is designed to produce. I am interested in culture, in the connection between legal education and legal practice, and in conveying my research in a way that is accessible to individuals in a visceral way. By writing this dissertation auto-ethnographically, I hope to present it in a way that makes the subject “come alive” in a way that will render it accessible to readers who have never gone to law school or practiced law.

Chapter 3

Your First Case: Capron v. Van Noorden

CAPRON V. VAN NOORDEN

6 U.S. 126 (1804)

Error to the circuit court of North Carolina. The proceedings stated Van Noorden to be late of Pitt county, but did not allege Capron, the plaintiff, to be an alien, nor a citizen of any state, nor the place of his residence.

Upon the general issue, in an action of trespass on the case, a verdict was found for the defendant, Van Noorden, upon which judgment was rendered.

The writ of error was sued out by Capron, the plaintiff below, who assigned for error, among other things, first, "that the circuit court aforesaid is a court of limited jurisdiction, and that by the record aforesaid it doth not appear, as it ought to have done, that either the said George Capron, or the said Hadrianus Van Noorden, was an alien at the time of the commencement of said suit, or at any other time, or that one of the said parties was at that or any other time a citizen of the state of North Carolina where the suit was brought, and the other a citizen of another state; or that they the said George and Hadrianus were, for any cause whatever, persons within the jurisdiction of the said court, and capable of suing and being sued there." And, secondly, "that by the record aforesaid it manifestly appeareth that the said circuit court had not any jurisdiction of the cause aforesaid, nor ought to have held plea thereof or given judgment therein, but ought to have dismissed the same, whereas the said court hath proceeded to final judgment there."

*Harper, for the plaintiff in error, stated the only question to be whether the plaintiff had a right to assign for error the want of jurisdiction in that court to which he had chosen to resort. ****

*Here it was the duty of the Court to see that they had jurisdiction, for the consent of the parties could not give it. ****

The defendant in error did not appear, but the citation having been duly served, the judgment was reversed. (Friedenthal et al. 2009:26-27)

Chapter 4

Discussion: Capron v. Van Noorden

This is called a legal opinion. Did you know that? This is exactly how it looks in the case book, along with the thousands of other opinions that will follow in this and other case books that law students trudge through every year. The first thing you do for every opinion is figure out who wrote it so that you can decide how much authority it carries. In this case, the opinion came down from the Supreme Court of the United States. That sounds important.

Alright, next question: what is the Supreme Court talking about? What are the facts of this case? Who wrote this opinion? What did they decide? Take a moment to really consider these questions. Unless you are already an attorney—or at least a second year law student—a legal opinion will probably appear very strange. Parts may appear completely incomprehensible. The terminology is unknown, and that is just a minor problem. You can at least try and look up the words you don't recognize. They are the known unknowns. The larger problem in law school and later when practicing law are all the unknown unknowns: the problems you not only could not explain but in fact never even identified. For exactly this reason, much of your first year in law school is concerned with practicing a skill known as “issue spotting” where the law student tries to hone his or her instincts for issues that were not—on the surface at least—apparent.

So here you are. It is the first day of your first year in law school. The class is Civil Procedure and you have been assigned the case of Capron v. Van Noorden. Your task is simple: decipher the various sentences within this opinion that you do not understand while spotting the issues floating beneath the surface that you do not even suspect. In other words, figure out what you do not know and spot issues that are invisible. If that sounds impossible or unfair, then you begin to comprehend why law school is so stressful.

Capron v. Van Noorden holds a special—and perhaps mildly traumatic—place in my heart and in the memory of my classmates. It was the first real assignment in Civil Procedure. It was also the first time

we ever saw our CivPro professor, Mad Dog, in action. On that day, he did his nickname proud. With unmistakable anticipation, Professor Walker called out the name of the first student. The student answered and then stood, unaware of what was about to happen. During orientation, we had been warned that this sort of recitation would be required, but I don't think anyone anticipated the severity of the experience. Until that day, I had never been in a class where a professor destroyed a student, cross-examining them as only a skilled litigator can do while also enjoying the unassailable position of judge and jury over each and every answer. It was brutal.

There is no pedagogical technique quite like the Socratic method in full swing. A single student is typically required to answer an increasingly difficult barrage of questions, though at least they tend to escalate in a fairly predictable pattern. The questions start off simple: identify the parties involved, the state where the lawsuit was filed, the basic facts of the case, and the holding of the appellate court that wrote the opinion being explored. This is all fairly straightforward and, usually, not too difficult provided you understood anything at all about the case.

If the student manages to survive the first round of softball questions—or not, some professors don't care either way—the next salvo typically requires the student to explore the court's reasoning in a series of hypotheticals limited only by what the professor feels like dreaming up. As time goes by, the good students become adept at verbal fencing, dodging the hard questions, and trying their best to avoid getting cornered.

At its best, this dialogic method works brilliantly as a teaching method because it forces students to really engage the subject material and make it their own. At its worst, Socratic grilling amounts to little more than an academic mugging. No law student can withstand the carpet bombing that professors are capable of if they feel so inclined. They control all the rules, and in a game with no right answers, controlling the rules means everything. The pressure is incredible, especially in those, thankfully rare, classes where the professor requires you to stand for recitation.

It is impossible to describe standing for recitation. The intensity of being singled out before your peers for long stretches of time changes you. It drives you to the material at night in an effort to learn it for the sake of your education, but also your pride. When you stand before the class, your identity is put into play.

This is where the contrast between law school and college becomes pronounced. Undergraduate textbooks go out of their way to explain everything in painstaking detail—often using more than one approach—so that any student who bothers to read the assignment should have a pretty good grasp of the

subject matter. Law school, by contrast, involves reading assignments concerning highly abstract ideas packaged in arcane language. Imagine a Shakespearean play explaining Euclidean geometry, but with the first scene missing, and you come fairly close. One of the many demoralizing surprises from 1L is the fact that you have to learn an entirely new language. Legalese is no longer a joke. It actually takes a special legal dictionary the size of most collegiate dictionaries just to make sense of the new terminology, and you cannot opt out. Law school is an immersion program; achieving fluency is required.

Fortunately, most professors exercise some mercy and move on—their concern being to cover the lesson of the day more than hammer their audience. Unfortunately, on that first day of Civil Procedure, the day's lesson appeared to be the hammer itself, and Mad Dog was relentless. Again and again, he asked about *Capron v. Van Noorden*. The answers were almost always wrong, but he never let up. He showed no mercy. Even now, a dozen years later, ask anyone who was there about that first CivPro class and they will recall how terrible it was even as a witness.

Pretend you are a first year law student at Wake Forest. What do you see? First off, the classrooms look nothing like traditional undergraduate lecture halls. For one thing, there is no natural light since, by design at the Worrell Professional Center where the law school is housed, almost none of the classrooms have windows. For another, the geometries of the room feel wrong. Instead of a rectangle, the room is arranged more like a semi-circle with each row higher than the one before it. In fact, upon reflection, this is not a classroom at all; it is a theater, and the professor is the star. At that moment, the professor walks in and heads down to the podium. This is a powerful moment. It tells you what you are up against.

Past experience is worth very little here. In high school and college, lecturers often walk into class looking bored or tired. They go slow. Many carry outlines of what they want to say. It is not unusual for professors to read their outlines verbatim. If the professor uses Power Point, it is just as likely to serve as a crutch for the lecturer rather than as an aid for the student since it takes real effort to make a good Power Point presentation and none at all to make a bad one. Good lecturers rise above these limitations of course, but then, they were good lecturers anyway. As for the bad ones, we have all endured the private hell that is a bad Power Point presentation: boring, non-interactive, and largely superficial.

Throw out everything I just said with 1L. Professors at Wake were highly educated and highly motivated. The ones I saw never trudged down to the podium with their state-supplied cheat sheets and teacher's editions; they strolled down carrying the assigned textbook in their arms—a textbook they always seemed to know inside and out, sometimes quite literally as the textbook was their creation. They

rarely used notes, read their lectures, or employed Power Point. In fact, they almost never looked down at all. Instead, they stand there watching you. Their eyes rove constantly over the classroom, hunting for eye contact, searching for any hint of confusion, which law students quickly learn to conceal. Meeting a professor's gaze is risky, just a small step from volunteering and sometimes not even that. The point I want to make is that law professors, with very few exceptions, owned their classrooms. Many appeared to positively enjoy being down there, stationed right at the focal point of the classroom: the eye of the storm. It was work, but it was also their stage.

Class begins and so does the stress. Law students face the prospect of an oral examination in front of their peers every time they walk into class. Day in and day out, they worry about public humiliation seasoned with the promise of academic failure, and students definitely appeared to fail out or, at least, leave in large numbers. The fear is almost tangible many days, especially in CivPro, and especially for cases that are particularly inscrutable.

The saying in law school is that the first year they scare you to death; the second year they work you to death; and the third year they bore you to death. That saying is true. 1L is emotional, like a final exam that goes on day after day for two semesters with everyone privy to your failures. It sounds strange now to describe the stress that such ungraded, daily exercises elicited, but the stress was real, even though, in actuality, you rarely get called in.

The professor announces a name, and you realize with horror that the name called out was yours. You reluctantly stand, feeling the gaze of your classmates upon you, their eyes filled with relief at having dodged the bullet this time, tinged perhaps with a hint of amused pity if they happen to be your friend. You take some solace in the fact that everyone goes through this. You are not especially cursed or hated. At lunch, you will all get together and laugh about what is about to happen. Over their sandwiches and salads, people will happily admit that they too were clueless on certain questions. Their confessions help lessen the sting, as does the entire debrief, but that comes after class. Right now, you have to go through it.

Your book and notes are still right there on your desk, but now that you are standing up, they suddenly feel far away, too far to read comfortably. Your answers are going to have to come mostly from what you can remember, or make up on the spot. If you happen to be sitting next to some good friends, they may try to help you out by surreptitiously pointing to a relevant passage during a moment of professorial distraction, but their assistance is risky. Accomplices may find themselves transformed into impromptu

volunteers if they are observed, so the pack will mostly just sit there and try to maintain their ninja mind trick of invisibility, sorry for your plight but nevertheless hopeful that the professor will stick with you rather than moving down the row.

You take one last Hail Mary glance through the fact portion of the assigned case and then the Professor begins:

Professor: Turn to Capron V. Van Noorden. Would you please tell the class what the facts of the case were.

Student: Um, this guy Capron sued this other person named Van Noorden.

Professor: OK. What do we call that guy Capron?

Student: The plaintiff.

Professor: Why do you say that?

Student: Because that's what the case called it.

Professor: Did you verify that in your Black's Law Dictionary.

Student: Um, no.

Professor: And that other guy. Does he have a title?

Student: The defendant.

Professor: Is that also from the case?

Student: [Nods yes]

Professor: OK. Why did the plaintiff sue the defendant?

Student: Trespass. In paragraph two it says the Plaintiff sued for trespass.

Professor: Just trespass?

Student (checking notes): Actually trespass on the case.

Professor: And what is trespass on the case?

Student: Going onto somebody's property without permission?

Professor: Did you look this up?

Student (looking extremely embarrassed): No.

Professor: Did you take the time to learn the elements of the plaintiff's cause of action?

Student (looking even more embarrassed): No.

Professor: I see. Tell me, where was this action filed?

Student: The circuit court of North Carolina

Professor: And does North Carolina still have circuit courts?

Student: I don't know.

Professor: Well what document allows for the creation of courts?

Student: The Constitution.

Professor: Does the Constitution specify for the creation of circuit courts?

Student: I don't know.

Professor: Have you read Article III Section 1 of the Constitution?

Student: No.

Professor: I see. Let's go back to the case. What is a writ of error?

Student: I'm not sure. A statement of what went wrong at trial.

Professor: So the Plaintiff issues it?

Student: Yes. It says Capron sued it out.

Professor: So 'sued out' means issues?

Student: I think so.

Professor: Is that right? What did the Supreme Court hold on appeal?

Student: They reversed the judgment of the lower court.

Professor: Why?

Student: They held that the circuit court didn't have jurisdiction to judge the lawsuit.

Professor: And what does that mean?

Student: It means they didn't have the right to hear the case.

Professor: Why not? What gives a court the right to hear a case?

Student: The Constitution?

Professor: The Constitution gives courts that right?

Student: I think so.

Professor: Have you read Article III Section 2 of the Constitution?

Student: No.

Professor: Well what does the Supreme Court mean when it says that circuit courts are courts of limited jurisdiction?

Student: That they can only hear certain types of cases.

Professor: And those certain types are?

Student: I'm not sure.

Professor: Alright, well what are the different types of jurisdiction then?

Student: I don't know.

Professor: Well then what is an alien?

Student: A person who isn't a citizen?

Professor: A citizen of what? The State? The United States? What?

Student: I don't know.

Professor: Well why does the Supreme Court make such a big deal about being an alien?

Student: I don't know.

Professor: OK. Why does the Supreme Court make such a big deal about whether the parties to this case were citizens of North Carolina or not?

Student: The court is trying to determine if the court has jurisdiction over the parties.

Professor: Good. So what does that have to do with citizenship?

Student: Because of jurisdiction.

Professor: Yes but why?

Student: Because that determines jurisdiction?

Professor: Good. How does that determine jurisdiction?

Student: I guess there are rules somewhere that depend on being an alien, citizen, or place of residence.

Professor: And how can we track down those rules.

Student: Probably start with the Constitution. Article III section 1.

Professor: Section 2. So was this a state or federal trial court?

Student: A federal trial court.

Professor: And who won?

Student: Well, Van Noorden did at trial. That's why Capron appealed.

Professor: OK. And what did the Supreme Court do?

Student: They reversed the trial court.

Professor: For lack of jurisdiction. Then what happened?

Student: I'm not sure.

Professor: Well did you notice who brought this appeal?

Student: The plaintiff.

Professor: And why again?

Student: For lack of jurisdiction.

Professor: That's right. Notice anything odd about that?

Student: I'm not sure.

Professor: Well who filed this lawsuit?

Student: The plaintiff.

Professor: Do you think the plaintiff should have ensured that the circuit court had jurisdiction before he filed his lawsuit there?

Student: Probably.

Professor: What happens if the court does not have jurisdiction?

Student: The lawsuit doesn't count.

Professor: OK. So the plaintiff filed in the wrong court, lost the lawsuit, and then what?

Student: Appealed because of his own mistake.

Professor: That's right. The plaintiff is appealing the judgment of the lower court on the grounds of the plaintiff's own mistake. And the court held what again?

Student: The court held that the plaintiff could appeal his own mistake. I guess it worked too. He managed to get his loss at the lower court reversed.

Professor: Could the parties have consented to jurisdiction?

Student: The opinion says no.

Professor: What does it actually say?

Student [reading]: It says 'it was the duty of the Court to see that they had jurisdiction, for the consent of the parties could not give it.'

Professor: So jurisdiction, whatever it is and wherever it comes from, is not up to the parties to determine. Is that right?

Student: Right.

Professor: In all cases?

Student: I don't know.

Professor: So what is the narrow issue of the case?

Student: The what?

Professor: What is the narrow issue of the case?

Student: Um, can a court hear a lawsuit without jurisdiction?

Professor: Hear a lawsuit?

Student: Can a court judge a lawsuit without jurisdiction?

Professor: What kind of court?

Student: Can a circuit court of limited jurisdiction judge a lawsuit without proper jurisdiction?

Professor: But what about all that writ of error business?

Student: Can a plaintiff sue out a writ of error from a circuit court of limited jurisdiction without proper jurisdiction?

Professor: On what grounds?

Student: OK. Can a plaintiff sue out a writ of error from a circuit court of limited jurisdiction on the grounds that the circuit court did not have proper jurisdiction over the lawsuit?

Professor: What about the plaintiff's own mistakes?

Student: Alright. Can a plaintiff sue out a writ of error from a circuit court of limited jurisdiction on the grounds that the circuit court did not have proper jurisdiction over the lawsuit despite the fact that it was filed in that circuit court by the plaintiff himself?

Professor: And what about the right of the parties to submit to jurisdiction.

Student: Can a plaintiff sue out a writ of error from a circuit court of limited jurisdiction on the grounds that the circuit court did not have proper jurisdiction over the lawsuit despite the fact that it was filed in that circuit court by the plaintiff himself and therefore submitted to the jurisdiction of the trial court?

Professor: Thank you. You can sit down now.

Chapter 5

Reading Capron Like A Lawyer

Go back and review *Capron v. Van Noorden* again. Did you anticipate all those questions about jurisdiction? Alright, now let me try to explain what just happened with the benefit of law school behind me. A gentleman named George Capron brought a civil lawsuit against another man named Hadrianus Van Noorden for trespass on the case, an action at common law. George Capron was complaining that Van Noorden did something that indirectly injured the other man in some way. At this point, we will simply refer to Capron as plaintiff and Van Noorden as defendant.

Plaintiff filed his action in a federal circuit court. Where do those come from? Well, Article III of the Constitution creates the Judiciary, but it does not mention the establish of circuit courts; it only specifically establishes a Supreme Court. However, Article III also authorizes the creation of “such inferior Courts as the Congress may from time to time ordain and establish” (Constitution of the United States). Congress exercised this grant of power to create inferior courts almost immediately by passing The Judiciary Act of 1789 which not only set the number of Justices on the Supreme Court to six, but also created thirteen federal district courts plus three circuit courts. So now we have it.

The district courts were given exclusive jurisdiction over admiralty cases, which means that they and they alone could hear such cases. They could also hear “minor criminal cases” (Wright 1994:4). The Judiciary Act makes clear that these “minor” offenses included crimes where the punishment was whipping “not exceeding thirty stripes” (Judiciary Act of 1789, Section 9). I guess times have changed.

The circuit courts were also courts of original jurisdiction—a court where lawsuits could be filed—for all cases with damages worth more than five hundred dollars where “the United States are plaintiffs, or petitioners; or an alien is a party, or the suit is between a citizen of the State where the suit is brought, and a citizen of another State” (Judiciary Act of 1789 Sec 11). Finally! Now we understand why the Supreme Court kept going on about aliens and state citizenship. The circuit court could only hear the case if one of

the parties was an alien or Capron and Van Noorden were citizens of different states. This is called subject matter jurisdiction, and it refers to the subjects which a given court is empowered to adjudicate.

So let's go back to the lawsuit. Plaintiff files his case in one of these federal trial courts. There is a trial and he loses; however, rather than accepting his loss, Plaintiff then does something very clever: he appeals on the grounds that his own lawsuit was invalid because the pleadings did not allege that the jurisdictional requirements of the Judiciary Act of 1789 had been met and the court itself never inquired. The Supreme Court agrees with the Plaintiff, holding that the trial court must determine that it has subject matter jurisdiction before allowing a lawsuit to proceed. The Supreme Court also holds that the parties cannot consent to the court's jurisdiction. We therefore learn some important lessons about the limits and requirements of subject matter jurisdiction: classic civil procedure.

As for the case itself, I have never been able to decide if Plaintiff enjoyed good lawyering or bad lawyering, but whichever the case, it worked. My bet is that Defendant did not have an attorney and never realized that he could have gotten the whole case thrown out on a technicality from deficiencies in the pleadings. But Plaintiff knew, and when things went South, he decided to try for a second bite at the apple, and he got it.

Now let's consider what happened in the classroom. A student is asked a series of questions that would have been difficult for almost anyone to answer on their first day of class. To this day, I have no idea how anyone could have prepared for that first class. How many non-lawyers have ever read The Judiciary Act of 1789? How many have even heard of it? Of course, the notes around the case hinted at these possibilities, but since most law students on their first day are still laboring under the college model of school—the one where professors deliver information to their students instead of trying to extract it from them—it has always struck me as highly unlikely that many students would have been able to answer these questions. The upshot is that the student was humiliated and the class as a whole was suitably cowed, but in a larger sense, something else is going on. It was a performance, designed and executed to impress upon all of us that we weren't in Kansas anymore, that this was professional school, and that the old rules no longer applied. The message was received loud and clear. It changed us.

To this day, whenever I run into somebody from my section in 1L, they almost never fail to reminisce about how excruciating that first class in CivPro was as they were forced to watch a fellow classmate get taken apart by one of the toughest Socratic professors in law school. The constant questions, the lack of explanations, the repeated queries about how far the student had explored the material. In fact, the grilling

actually spilled over into a second class period.

The lesson was clear: if we expected to survive law school, we would need to research deeply, cover the course materials broadly, and learn fast. Of course, that day holds a special place in my heart. I was that student of which Mad Dog made an example.

Chapter 6

Exploring Legal Anthropology

Legal Anthropology, like the law itself, is not governed by any single definition; however, I define it as the anthropological study of dispute resolution practices. What does this mean? Humans have conflicts. They fight with one another, constantly, and over everything: land, children, wealth, honor. It should come as no surprise to hear that the subject matter of such disputes varies widely. What people often forget—or perhaps never consider—is that the manner of dispute resolution can vary greatly as well. Trial by combat. Trial by poison. Trial by ordeal. Trial by jury. Perhaps not even trial at all, but rather mediation where the parties resolve their differences through negotiation. All of these are practices of dispute resolution. They resolve conflicts within their societies. The term for such a system is a legal system. Exploring the operation of legal systems is valuable for two reasons. Let us look at each of these in turn.

The first reason for examining dispute resolution systems is that they provide yet another window into society itself. Legal systems reflect the cultural values of the societies in which they exist. What does it say about North Carolina that we have jury trials where lawyers argue their case before twelve strangers who share little in common beyond geographic location and ignorance of the case? What can we deduce from the fact that such lawsuits have definite winners and losers without concern for the parties feelings at the end of the trial? Contrast this with a different system where judges decide the outcome of the case. Or still another where healing social rifts between parties appears at least as important as producing a definitive winner and loser. The practice reflects the people. Studying one tells you about the other.

The other reason for examining dispute resolution systems is entirely practical: these are the social processes that get things done. Legal systems accomplish things. They change things. Formally or informally, they represent power. Understanding how the system works means understanding how to get things done. Of course, this is not the only way to bring about change within a society. Political authority, kinship ties, economic influence, religious authority, military force: there are several methods for gaining

power within a society, but operating within the legal system is certainly one method, and sometimes a very elegant one at that.

The best way to understand legal anthropology is through an example, so let's look at one of the most famous, and in my opinion one of the best, works of legal anthropology: *The Kpelle Moot: A Therapeutic Model For The Informal Settlement Of Disputes* by James L. Gibbs, Jr (Gibbs 1963). This article describes a system of dispute resolution practiced by the Kpelle of Liberia. In this system, the parties appear before their family members and neighbors and publicly air their grievances. No rules of evidence exist to limit what can be said. Afterwards, the mediator announces the feelings of the group as to who was more in the wrong and suggests a light fine. Significantly, the mediator lacks the police power of our formal courts. He cannot compel; instead of force, it is mostly peer pressure that gains the cooperation of the participants.

The most interesting aspect of the Moot is that both parties also exchange gifts. The losing party gives more, but neither offers much. In fact, the gifts are largely symbolic. The goal of this system is not to punish one party or to reward the other, but to restore harmony to the community as a whole and heal the bad feelings between the parties. The author even goes so far as to describe the Moot as a method of performing social therapy (Gibbs 1963:6).

What does *The Kpelle Moot* tell us about the Kpelle of Liberia. First, it suggests that this is a society that places a high value on social harmony. People are dependent upon one another to the point that they have developed a system to resolve differences in a way that hopefully avoids creating permanent enmity. They also respect age. Before the Moot begins, it must be blessed by an elder who is one of the oldest men of the group (Gibbs 1963:3). Moreover, the Kpelle have a different social organization than we do. We learn that the mediator is also the chief or another important elder, but that is not why he is the mediator. He was chosen by the plaintiff and is related by blood to the plaintiff (Gibbs 1963:3). Kinship plays a large role in their social organization. Finally, the chief, the mediator, the elder who delivers the blessing and the other oldest men who attend are all men. This is probably a patriarchal society.

Contrast the Moot to our own system. We have no informal court to hear family law matters. In our system, you should not appear before a judge who is related to the parties. A judge would be expected to recuse himself or herself from the proceedings if they were related to the parties. Furthermore, the plaintiff does not get to select the judge. Judges may also be women in our society, and age is not a factor that qualifies judges under our system of law. Finally, the outcome of the case is probably not designed to restore harmony between the parties and to society as a whole. The court will probably be more concerned

with establishing a clear resolution than worrying about people's feelings. What might this suggest? We live in a society large enough and disconnected enough that we can afford to send people home dissatisfied with the outcome of their law suit and filled with hatred for the other party. It happens all the time.

North Carolina does have mandatory mediation for cases filed in the highest trial court. It is useful to contrast our system of mediation with that of the Kpelle. Mediations under our system are not distinct events, but happen as part of the lawsuit process. You must have a mediation before you can have a trial. However, in this context, a successful mediation serves to head off the expense of trial by ending the lawsuit rather than restoring good feelings between the parties. This is a significant difference. The mediator must be certified by North Carolina to serve in that role and is chosen by both sides rather than by the plaintiff alone, as is the case in the Moot.

More importantly, the mediation itself is not at all like the Moot. In North Carolina, parties rarely argue their own grievances. In fact, the actual parties rarely speak at all under our system. Instead, their lawyers speak for them. All this occurs behind closed doors. There are no neighbors, witnesses, family members, or friends to lend social support to your side or peer pressure to the outcome. The outcome itself is determined not by the mediator, but by the parties. The mediator does not actually determine anything; instead, he or she acts as a go-between, delivering messages, offers, and tactical threats between the various parties until either one side caves to the others demands, they both cave, or an impasse is reached and everyone goes home. In all cases, mediation is about the parties reaching a compromise rather than society healing a wound.

I do not think I have ever left a mediation where the parties were happy. In fact, one mediator I knew used to say that "a good mediation is one where both parties go home unhappy." I know what the mediator meant: the mediation was successful because both sides gave enough to get the matter settled. But even so, this is a far cry from the goals—stated or otherwise—of the moot where society seeks to heal a rift between plaintiff and defendant.

Finally, mediations under the Kpelle Moot result in only token or symbolic exchanges. How different this is from our own system. I have never seen the plaintiff pay anything as the result of a successful mediation, except perhaps part of the mediator's fee. I have seen defendants agree to pay large sums of money far in excess of token gift giving.

In every way, the Kpelle Moot differs from our own system of mediation or trial. Perhaps the closest thing to the Moot that we have is arbitration. But in that sense, we would not use the term "mediator" as

does Gibbs; we would say arbitrator. An arbitrator, under our system, may get to decide the outcome of the case once and for all, if the parties are in arbitration because they signed a binding agreement to do so. Even in arbitration, there is never, in my experience, the goal of restoring harmony between the parties. The matter is still conducted behind closed doors by disinterested arbitrators. Peer pressure is not part of the process, and in fact, society may never learn the outcome of the proceedings due to confidentiality agreements. The goals are totally different.

Here then we see legal anthropology at work. We examine one culture's practice and learn about it. Then we can contrast it to another culture's practice to gain greater insight into both. In the end, we gain perspective about both cultures in terms of conflict resolution and cultural ideals.

We can also examine these practices for practical reasons. Knowledge of the Moot is practical knowledge if you are a member of this society or have dealings with such members. For example, when dealing with the Kpelle, at least when Gibbs was doing his research, it was probably beneficial to make the acquaintance of male elders. They would have been the influential members of their society; of course, you could have discovered this knowledge in any number of ways, but the Moot gives you a concrete example of why gaining the favor of the elders would have been a smart strategy.

This is just one example of how legal anthropology is useful, and illustrates the continuing tradition of exploring legal systems within anthropology, of which *The Kpelle Moot* is merely one example of many. Many ethnographies touch on matters related to legal institutions. Indeed, describing a culture without reference to any sort of controlling mechanism, custom, crime, or taboo would prove exceedingly difficult unless the desire is simply to map out a specific cultural practice.

One of the earliest explorations of legal anthropology is probably still Bronislaw Malinowski's *Crime and Custom in Savage Society* (Malinowski 1926). In this work, Malinowski connects so-called "primitive law" to modern law by pointing out that "there is a number of laws, taboos and obligations in every human culture which weigh heavily on every citizen, demand great self-sacrifice, and are obeyed for moral, sentimental or matter-of-fact reasons, but without any 'spontaneity' " (Malinowski 1926:13-14). In this work, Malinowski is simultaneously challenging the older view that traditional cultures slavishly adhere to customs while at the same time articulating a theory of law in which legal systems need not resemble European jurisprudence in order to be considered legitimate sources of law for anthropological research. Not that custom ceases to exist. Habit, tradition, and social pressure encourage conformity too, but not anymore than they do for people in our own society. "Love of tradition, conformism and the sway

of custom account but to a very partial extent for obedience to rules among dons, savages, peasants, or Junkers” (Malinowski 1926:52).

At the same time, Malinowski concluded that “the social behavior of the natives is based on a well-assessed give-and-take, always mentally ticked off and in the long run balanced” (Malinowski 1926:26). Reciprocity, rather than threat, induced cooperation. But there were other forces too. He makes it clear that payment and repayment, in a world devoid of currency, take the form of social activities in which following through earns respect while failing to do so loses it: “every one tries to fulfill his obligations, for he is impelled to do so partly through enlightened self-interest, partly in obedience to his social ambitions and sentiments” (Malinowski 1926:30).

When I read *Crime and Custom*, I think back to the way my own community—the legal community—operates. Lawyers who cheat and play dishonestly will gain a reputation for doing so within their local legal community. Even in a society as large as our own, reputations are tremendously important. Most lawyers do the right thing and conform to the expectations of their peers and comply with the informal agreements they construct; those who do not find themselves mistrusted and isolated. Cooperation yields leniency; failure to get along brings only trouble. Even so, there are lawyers who choose to go it alone. There are exceptions to every rule. Or as Malinowski puts it, “the true problem is not to study how human life submits to rules—it simply does not; the real problem is how the rules become adapted to life” (Malinowski 1926:127).

The next major work in legal anthropology is *The Cheyenne Way* by Karl Llewellyn and E. Adamson Hoebel (Llewellyn and Hoebel 1941). The primary feature of this work is the application of the American case method of legal research to the Cheyenne. By adopting the case-method used in law schools, the authors demonstrate how modern legal methods can be utilized in anthropological research to inductively explore another culture’s legal system. This proves useful for exploring a system where rules are not written down; however, even when “rules are known and clear in words, one still does not know the legal system save as he studies case after case in which the rules have come into question, or have been challenged or broken” (Llewellyn and Hoebel 1941:26). In other words, the law can only be understood by studying it in operation.

The most interesting feature of *The Cheyenne Way* is the way it unpacks the Cheyenne culture through case after case. Procedurally, it offers a useful method of using law cases to study culture. Ethnographically, it is fascinating. On the other hand, the book is a total muddle. As Malinowski himself put in

in reviewing the book, it would have been a lot better if “the writers had given, after their racy and inspired phrasing of a brilliant idea, a sober translation into ordinary and accepted language” (Malinowski 1942:1251). What it needs is an English-to-English translation. As another set of reviewers put it, “*The Cheyenne Way* makes a poor case for the case method: its ‘cases’ are hardly that and the analysis is sparse and unpersuasive” (Conley and O’Barr 2004:181).

At the same time, *The Cheyenne Way* serves as a vehicle for Karl Llewellyn to develop a philosophy of law known as legal realism in which the law is what it is through practice. As Llewellyn and Hoebel write, “by its fruits is it to be known; indeed, if it fails to bear fruit on proper occasion, its very existence is drawn into question” (Llewellyn and Hoebel 1941:20). Before legal realism, the predominant view was that of legal formalism, in which the law existed in the universe all on its own, waiting only to be discovered (Vandeveldt 1960:242-243). Legal realism argued that judges “decide cases not by formal deduction from rules but by reference to policy considerations” (Vandeveldt 1960:250). Or as Justice Holmes famously wrote, “The life of the law has not been logic: it has been experience. . . The law embodies the story of a nation’s development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics” (Holmes 1963:5).

Interestingly, some authors argue that Llewellyn’s experience with *The Cheyenne Way* influenced his development of one of the most influential legal codes at work today: The Uniform Commercial Code (Conley and O’Barr 2004:204-207). As a funny aside, Conley and O’Barr provide an amusing back story to Karl Llewellyn. Llewellyn was in Paris at the outbreak of World War I. Swept up in the moment, he decided to join in the fight and managed to do so . . . on the German side, earning the rank of sergeant and the award of the Iron Cross, perhaps the only American to ever do so (Conley and O’Barr 2004:204-207). Injured, he returned to America where he later tried to enlist on the American side to fight against Germany this time (Conley and O’Barr 2004:204-207). His application was denied and he went to Yale Law school instead.

In the end, *The Cheyenne Way* failed as useful ethnography. However, it still proved useful to legal anthropology by importing the case method from the field of law. Llewellyn and Hoebel would fail in their efforts at actually doing anthropology, but their ethnographic strategy would live on, eventually being taken up and employed effectively by Paul Bohannan and Max Gluckman. Both of these individuals recorded cases and then tried to make sense of them. Gluckman, having received legal training, claimed in the course of his study to have discovered the ‘reasonable man’ standard employed by the Barotse in

his ethnography: *The Judicial Process among the Barotse of Northern Rhodesia*. His research is notable for three things: first, he used the case method to explore a foreign legal system; second, he claimed to have found a western legal standard at work in a supposedly primitive society; and third, he created an ongoing debate about whether his claims were correct or just the result of his legal training muddying up his perspective. In this regard, being a lawyer actually works against him by creating the appearance of bias.

“SHOULD this book fall into the hands of lawyers, I hope they will realize that it is a book of social anthropology, not a book of law” (Bohannan 1957:v). So begins *Justice And Judgment Among The Tiv* by Paul Bohannan who rushes to tell us in the second sentence that he has never received any sort of legal training. Superficially, this is about his background, but hovering behind the scenes is his constant critique of Gluckman’s efforts among the Barotse. Bohannan goes on to explain that he has devised a strategy for avoiding the confusion which arises when anthropologists use anthropology to describe things: the exact sort of problem that Gluckman encountered. Bohannan intends a dual description using the Tiv’s conceptualization—which he calls the “folk system”—to describe their perspectives while simultaneously employing an “analytical system” of description to describe what is going on using anthropological techniques (Bohannan 1957:4-5). Bohannan effectively accomplishes his goal, juxtaposing brief case descriptions with anthropological analysis. His folk method of description dodges the semantic problems encountered by Gluckman by simply using the Tiv’s own language. Reading *Justice And Judgment Among The Tiv* becomes something like a foreign language puzzle, but it works. In the end, the reader learns about the Tiv through their cases, and along the way, sees an effective demonstration of legal anthropology in action.

Legal anthropology has not ignored law here in the United States. In *Rules Versus Relationships: The Ethnography of Legal Discourse*, John M. Conley and William M. O’Barr explore the relationship of non-lawyers within the American legal system. They watched litigants representing themselves in Small Claims Court, ultimately concluding that they could divide these individuals into two categories: individuals who think in terms of rules and a second category focused on social experience, which the authors deem relations (Conley and O’Barr 1990:58-59). The upshot of this research is that the authors claim a clear, and not surprising, advantage for individuals capable of fashioning their claims into the form taken by the law—a rule oriented approach. This sort of speech is more likely to be the product of education, which creates an advantage for those who have it, while leaving those without such an

education at a disadvantage. At a higher level, this research suggests the way language, education, and wealth involves itself in the process of litigation. *Rules Versus Relationships* represents an interesting experiment in using legal anthropology to study American law.

Anthropology has a long history of exploring legal systems. Sometimes this exploration has been specifically and deliberately focused on the culture's legal system. More often, a discussion of rules and norms has simply found its way into the larger discussion. Either way, the study of law has a long history.

Two significant features of legal anthropology leap out to me as I read through the literature. The first is the sheer number of anthropological explorations into foreign legal systems, of which I have only listed the "classics" that everyone mentions. There are many more discussions of foreign law out there—indeed, an impossibly huge selection—but these appear to only be read, if they are read at all, by specialists interested in that particular culture.

The other significant feature of the literature concerning legal anthropology is the relative scarcity of materials concerning the American legal system, especially ways in which the American legal system operates at the more formal levels between judges and attorneys. This is quite surprising given the influence and wealth involved. My personal feeling is that this is the result of there being few anthropologists trained in law and what appears to be a preference among cultural anthropologists for going abroad. What I would like to see—and help create—is a legal anthropology of the American legal system at the level of the higher trial courts where lawyers participate. These are the courts of law which resolve all legal disputes involving any serious civil or criminal matters. These are the lawsuits that change America. This is an area of research that deserves to be studied. I hope to spend part of my career doing so.

Chapter 7

Law Students

Wake Forest University School of Law is a private law school located on the main campus of Wake Forest University in Winston-Salem, North Carolina. It is housed in a fairly isolated corner of campus in what was, at least when I was there, the still fairly new Worrell Professional Center. In appearance, the Worrell Professional Center resembles a Greek Pi symbol that has toppled over onto its side, producing two legs with a courtyard in the middle. The law school has claimed one of the legs. The MBA program claimed the other. They split the middle portion, which also houses the Professional Center Library.

I never went into the Business School side, but with one minor exception, the law school classrooms are windowless, undecorated, cold, and sloped like a movie theater. Stepping into them is like entering a space station. In contrast, the hallways enjoy large windows and interesting art, which would be nice, except that the halls were far too narrow for so many students, resulting in grinding, cacophonous, processional class changes as we squeezed past one another to get to our next class.

Each class is subdivided into four sections of approximately forty students each, capping the total number of students for each “grade” at around one hundred sixty men and women, though that fluctuated as students failed out or quit. Classes were organized by section, which meant that we spent the entirety of 1L sharing the same classes with the same forty people.

I never heard a clear explanation for why classes were organized that way. My assumption is that it simplified scheduling. It also helped students bond with one another. To this day, some of my best friends came out of those classes. On the downside, it produced cliques reminiscent of high school. Nor was that the only feature from high school that seemed to have been resurrected. Each year, the law school held a function known as Barrister’s Ball, which is as close to law school prom as one could get, though at least we were old enough to make the drinking legal. Having no control over our schedules was another issue that felt like a real step backwards after the freedom of college. Wake even gave us lockers.

The saving grace in all this is that none of the things I just listed really matter. They are all purely superficial. The things that matter in law school were top notch. Study areas were plentiful, the support staff treated me like it was Cheers, the professors were experts in their fields, and Worrell has the best parking on campus: just right outside the building. True, the hallways were crowded, but the courtyard right outside was easily accessible and lovely. In addition, the Professional Center Library is first rate. Besides, I enjoyed Barrister's Ball. I even used my locker.

As for the student body, my section appeared mostly from the East Coast, mostly educated in big universities, and mostly in our early to mid twenties; those who were not seemed to stand out, and then often dropped out. Law school is a jealous mistress. It leaves little time for other pursuits or interests. It also requires a great deal of mental flexibility. Some of the people who quit seemed unable or unwilling to make the sacrifices law school appeared to require.

One of the most striking facts about law students is one that rarely gets mentioned: the relative scarcity of science and math majors. The number of law students with a background in math and science is less than ten percent (Faigman 1999:53-54). At Wake, the few I knew also had different rationales for attending. You rarely heard a science major say "it was either go to law school or become a teacher." Not only that, but they were usually coming back to school. This was going to be their second career. They had real jobs, the kind that did not involve folding clothes, serving food, or sitting on a lifeguard stand; in other words, not the kind that I was facing should law school not work out.

Sadly, I never got to see the scientists put their skills to work. Law school is like a math free zone. Science and math were barely even part of the curriculum, typically only coming up during tax, family law, or estate planning courses, and even then, only tangentially. I still remember almost panicking during my final exam in Decedents, Estates, and Trusts because none of my inheritance solutions appeared on the exam. It was only after I calmed down that I realized the professor had reduced all the fractional answers to their lowest terms. Reducing fractions! My God, I thought, what is this? NASA?

In a wonderful book discussing students like myself, the author, a law professor, says the following about his students:

Nothing puts a class of law students to sleep faster than putting numbers on the chalkboard. It is a phenomenon you can actually observe. A bell curve makes their eyes glaze over. A minor equation or two or calculating a standard deviation renders law students unconscious; and a more complicated regression analysis induces a deep coma. The average law student's attitude toward mathematics is the same as Huckleberry Finn's: "I had been to school most all the time, and could spell, and read,

and write just a little, and could say the multiplication table up to six times seven is thirty-five, and I don't reckon I could ever get any further than that if I was to live forever. I don't take no stock in mathematics, anyway." (Faigman 1999:xi-xii)

The problem, of course, is that lawyers daily litigate matters which turn on principles of engineering, statistical chance, scientific research, forensics, and medical studies, just to name a few. Mathematical competency is required to understand these issues. Forensic evidence, real or not, convicts people. Medical evidence, real or not, provides the basis for suing doctors. Toxic substances, real or not, provide the basis for suing corporations on which countless individuals depend for their employment. Theoretically, attorneys should probably understand the science involved in each case in order to defend their clients, prosecute their cases, and select and cross-examine expert witnesses, which means learning math since the language of science is math. Meanwhile, judges—who are lawyers too, after all—bear the responsibility for determining the admissibility of scientific evidence. They are literally the gatekeepers of the legal process (*Daubert v Merrell Dow Pharmaceuticals, Inc.* 509 U.S. 579 [1993]).

Putting aside math and science, the other truly striking fact about most incoming law school students is how clueless they are about the field to which they have chosen to dedicate themselves. Generally speaking, they know nothing about either their upcoming education or their chosen profession. That is truly remarkable, especially when one considers that they often pay tens of thousands of dollars per year to take part in this experience. Virtually no other profession can make that claim.

Consider many incoming first year law students. For twenty-two years, they have progressed steadily up the educational food chain with barely a hiccup. Each new grade presented fresh challenges, but the coursework, in general, mapped very closely to the subjects and requirements of the year preceding it. Beginning in elementary school, going through middle school, and finally arriving in high school, the differences between the grades are based on elaboration rather than revolution. English, math, history, science: students know to expect these subjects every year and develop their own methods for learning the course material. The lesson plans necessarily vary by subject—algebra this year and geometry next—but the overall pattern remains fixed until the student graduates from high school.

Pedagogically, very little differentiates high school from college. This is especially true with the advent of Advanced Placement or “AP” classes and programs like “Early College” where the last few years of high school school are spent working on the first few years of college. Freshman enter college with more than a semester of credit already under their belt. Nor should this be a surprise. College coursework

largely follows the same trends as high school and did so even before AP programs became popular. New disciplines exist in college curricula that are not typically present in high school, but few college freshman would label these fields as unrecognizable; they look more like specializations. More importantly, the teaching style has barely changed. Teachers still stand at the front of the class and deliver information to their students who serve as passive recipients rather than active participants.

Of course, large differences do exist between high school and college, but these dissimilarities arise more in the areas of personal freedom than academic requirements. For the first time in many of their lives, college freshmen are on their own, forced to sink or swim on the basis of their own personal work ethic and provided with all the rope one could ask for on which to hang themselves. Except for athletes and individuals with special needs, few schools routinely check on their students to ensure that they are attending class, reading their homework, turning in their assignments, and taking their exams. In good schools, the difficulty of the coursework may also increase, though that too is far from guaranteed.

A large percentage of freshmen in college gain new freedom over scheduling as well. They learn to game the registration process through professor shopping and careful course management, but again, this is nothing new. High school has already taught them the value of finding the right teachers and courses. College registration merely opens up these principles to a larger and more dynamic context, promising even greater rewards for those who play the game.

The terrible irony of this process is that virtually everything accomplished in high school is revealed to be essentially worthless the minute Fall semester begins in college, but even though past efforts lose their value, the experience gained in achieving them remains. The overall strategy for excelling in school never really changes from the first day of kindergarten through the last day of college: go to class, memorize what the teacher tells you, regurgitate it back. There are exceptions of course, and the more academically competitive the school, the greater the number of exceptions, but in general the above mentioned procedure is the 'A' student's secret of success because of two factors that such students can virtually always depend on: 1) teachers serve up the information and 2) success means parroting it back.

By the time I graduated from college, I felt like I understood the system pretty well. Like most people, I made some mistakes along the way, but maturity and better registration times remedied most of them as I figured out how to play to my strengths. Like many seniors, I thought I had it all figured out. I had school wired for sound. All that changed on my first day of law school.

Your first day of law school is much like your first day of preschool. You are intimidated and totally

clueless about what is supposed to be happening. Everything looks strange. Everyone looks nervous. Most people are strangers, though if you go to law school where you attended undergrad, you may recognize some familiar faces. I did not, however. Everybody and everything looked brand new to me.

Then you get your schedule and life takes a turn for the bizarre when you realize that you don't even know what some of your classes are about. Contracts was the only obvious one for me.

We knew what Criminal Law meant too, though few people had any real experience with criminal court. Law school seemed to shy away from admitting convicted criminals. Few of us had visited a courthouse. Some of us had received speeding tickets, but those are typically handled by traffic attorneys retained on the basis of their stationary. Generally speaking, what we knew about criminal law consisted of little more than reruns from past seasons of Law and Order.

Property looked a little more mysterious. How can property even be a course? I took a quick glance through the book. That accomplished very little. Our textbook was mostly concerned with something called real property. What did that mean? Was there some sort of fake property—like antimatter—just lying around that nobody ever told me about? In any case, property means little to college graduates who have never owned any. The only portion that caught my eye was a minuscule section discussing the law of Treasure Trove. Treasure Trove! That sounded promising.

Civil Procedure meant nothing at all. Nor did the book offer much help. CivPro, as we already quite knowingly referred to it, having heard it from an upperclassman somewhere, would have to be one of those wait-and-see kind of things. Which brings me to the total mystery course: Torts. What in the world is a Torts? Or is it a tort? No one seemed sure about that. The general consensus was that Torts was definitely a noun. Probably. Beyond that, I had no clue, which proved unfortunate since I got called on first in that class too, right after leaving Mad Dog's first class.

A small minority of students had parents who were lawyers, so they probably knew more, but most of us were first timers: the first in our family to go to law school, which was why we had no way to forecast our future. There was really no way to prepare. Of course, that did not stop us from trying. We bought the "how to succeed at law school in ten easy steps" manuals and gave them valiant skims, but there are few magic formulas in life for success, and legal education is no exception.

The final great paradox of law school is that the institution is only secondarily concerned with teaching the law. It always comes as a great shock to new law students that their professors largely ignore the practice of law. When I was at Wake, I believe a student could finish at the top of their class without

ever drafting a will, writing a contract, filing a lawsuit, selecting a jury, trying a case, or even visiting a courthouse. And I don't think Wake was unusual in this.

This often strikes outsiders as virtually impossible to believe. They imagine that law school is probably a lot like an apprenticeship with lectures on will drafting and shouting "objection" with the proper amount of outrage in one's voice—a place where law students practice lawyering before graduating and doing it for real. Logically, this makes sense. After all, doctors learn to doctor in medical school. Accountants learn to account. It stands to reason that practicing how to lawyer would be the primary thrust of law school, but that wasn't my experience—not primarily. My law school experience was not one of apprenticeship, and while I complained about that at the time, in retrospect, I am profoundly grateful that it was not.

Chapter 8

Socratic Education

Step into any law library in the United States and you will instantly be confronted by one overwhelming realization: there is far more “law” than the human intellect can comprehend. Walk the stacks. Row after row after row of statutes and cases will surround you. You can’t hope to memorize it all. There is simply too much. I doubt you could even read through it all, and even if you could, the sheer volume of new laws being created and new appellate decisions getting handed down probably outpaces even the fastest reader. In short, “the law” is effectively infinite. So how can a law school hope to teach it?

Law students are quick to criticize their law school experiences. These complaints primarily fall into three separate categories. First, they complain about the confusion caused by the professors, themselves, who often appeared either incapable or unwilling to provide simple lectures about the law; instead, they spent most of the class asking us about it. Second, they complain about the stress of law school—and stressful it is. Finally, they take issue with the lack of practical education incorporated into the curriculum.

When I was in law school, it seemed like someone was always complaining about the lack of practical education in the curriculum, but that only begs the question of what “practical” education should be hard-wired into the required curriculum. They can’t teach it all. Should students learn criminal defense? What about estate planning? How about aviation law? Even if the schools could determine which practice areas to teach, they would still have to contend with the incompatibilities of legal codes from fifty different states plus the Federal government. To put it bluntly, law students would probably lose more from a curriculum that mandated extensive practical training than they would gain.

“Give a man a fish and feed him for a day. Teach a man to fish and feed him for a lifetime.”

Many have argued that law schools should be more practical. They should require students to draft wills, research land titles, argue cases, review contracts, and basically try to experience “all the things lawyers actually do” before graduation. Law school, in other words, should be transformed into a kind of

trade school. At a certain level, this sounds reasonable, but the flaw with this line of argument is that it assumes that we can actually pin down “what lawyers do” with enough precision to teach it effectively. But travel back for a moment to that infinite law library described above and really consider what the existence of so much law must imply.

No two cases are ever the same. Their facts differ, which means the laws that govern them and the application of such laws must differ too. Much as you can never step in the same river twice, you also can never work on the same legal matter twice.

Of course, in the real world, many aspects of legal practice become routinized and get handled with form letters, standardized legal pleadings, and the like, and some areas of law might lend themselves to a fill-in-the-blank manner of practice more than others, but not in every case and not if one party decides to really contest a particular point. Every legal matter can be transformed from routine practice into heavily contested—and perhaps even uncharted—territory if a lawyer is so inclined. If you are willing to pay the billable rate, even the most run-of-the-mill lawsuit can be fought like the trial of the century. It’s just a question of money and desire. This, by the way, is also why most lawyers do not endorse the do-it-yourself legal strategy where people download a form off the Internet and try to handle their own divorce. Do your own divorce? How about do your own brain surgery while you’re at it?

Law schools, therefore, must accommodate two harsh truths: there is too much law to cover it all and there are no formulas that can be relied upon one hundred percent of the time. In short, there are no silver bullets in the law. Many people, at this point, might conclude that providing an effective legal education is an impossibility. But law schools have adopted a novel approach to counter this problem. Instead of producing lawyers in the specialized sense, they produce legal scholars in the general sense.

Lawyers are not trained as mechanics who must rely upon a fixed set of preexisting tools and materials; rather, lawyers are like engineers who must stand ready to craft new tools as novel problems arise. As the great Karl Llewellyn said about law school, “students are to get not courses, but an education” (Llewellyn 1960:109). In theory, law students should exit law school equipped with the necessary skills to bootstrap themselves into practitioners of whatever legal problem they encounter.

The primary teaching technique that I experienced in law school is known as the Socratic Method. I have given a taste of this method earlier, and will elaborate on it later in this dissertation. For those who have never experienced it—who have been taught primarily through lecture—Socratic classrooms appear counter-productive. Like mystery novels without a resolution, students spend most of the class searching

for the lesson they are to learn because the professor either never tells them or waits until the end to summarize what it was all about, at which point, it's a little late to go back and appreciate what was said. The Socratic process can appear bewilderingly inefficient; after all, far more information can be delivered by lecture in the same class period. This criticism came up a lot, and I was a guilty as anyone else of raising it, but it misses the point.

The goal—paradoxically—is not to teach law to law students, but to teach them to think, reason, and research like lawyers. Law students learn to dissect appellate opinions for the arguments they need to support their side while nullifying the other side's arguments. They learn to find useful law so that when a client walks in with a novel problem the lawyer can still craft a possible solution. Law students don't necessarily need to learn will drafting—after all, they may never need to draft a will—but they do learn how to find the resources necessary to draft a valid will for a given jurisdiction should the need arise.

I've come to believe that the Socratic method—especially in its hybrid form—is invaluable in the preparation of lawyers when carried out by a skilled Socratic teacher. Nor am I alone:

A Socratic discussion, properly guided, can demonstrate the importance of all relevant sources of law that a student needs to perform the analysis: the basic rule (as articulated in statutes, regulations, or even cases), any interpretation of the rule (for example, if a court interprets something into a rule beyond what exists on the rule's face), and how the rule works in different factual scenarios. (Dye 2010:362)

I understand all of this now, but I did not when I was a first year law student, and it would not surprise me to learn that many lawyers still do not understand the process they went through during law school. It wasn't until I started teaching that I realized just how useful the Socratic method really is for student development. I was not always a believer, but I am now.

At the same time, there has been a growing trend amongst law schools to implement clinical training programs. Law students taking clinic get to work as lawyers in exchange for credit hours much like an extremely abbreviated apprenticeship. When I took clinic, I spent several days practicing criminal law through the District Attorney's office in misdemeanor court and several more days working in a civil law firm performing legal research. My experience was probably typical. Law students usually enjoy clinic because it gets them out of the law school and provides a taste—perhaps their first—of what “real lawyering” feels like.

Clinical programs are probably a good thing. They allow future lawyers to get some experience before graduation. Some clinics are also geared to provide free legal services to members of the public who would

otherwise be unable to afford an attorney. These are both good things. At the same time, I have grown more skeptical about the utility of clinic in its current incarnation because it fails to showcase the benefits of legal education.

Law students necessarily spend a relatively short time in the clinical setting, which in turn requires that they work on problems that can be completed or nearly completed within the short time available. The natural result is that clinics, by their nature, for the most part, must work on problems that are relatively simple, much simpler than many of the problems that students will face when they actually begin practicing. (McGregor 2010:345)

Clinic students typically work on only low level legal matters by themselves; otherwise, they occupy the position of assistant to a senior attorney. I can't imagine any clinic program in the world entrusting a capital murder defense to a clinic student, or a law firm turning over the lead position in a major products liability or medical malpractice case to a law student. There is simply too much at stake, and yet, these are the areas where thinking like a lawyer can really pay off, and in a variety of ways.

Law suits are like cold war conflicts: expensive, prolonged, and potentially catastrophic. They usually involve a great deal of procedural maneuvering, intelligence gathering, and diplomacy. The political capital of lawyers derives from two sources: the strength of their case, and their perceived willingness and capability to try that case in a courtroom. Like poker, each side tries to read their opponent's hand and assess the other's resources. For most lawsuits, the goal is not to win at trial, but to push the other side into giving you a favorable settlement.

In this context, the will to go all the way coupled with the legal acumen to actually get there is everything. Forget about the facts of the case for a moment. Lawyers who appear afraid to try their case, parties unwilling to suffer through the lawsuit, complexities related to witness preparation or availability, and a thousand other logistical details all impact the lawyer's negotiating position. Inside every lawsuit there are many battles: battles of pleadings and discovery, battles of research and motions, battles of sanctions and settlement conferences, and of course, battles of trial. Like deterrence, the stronger your case, the less likely you will need to actually prove it. Quality lawyering, as I have observed it, is the art of brinkmanship backed by the art of war.

Paint-by-number lawyering may be cheap and easy, but it is creativity and strategy, rooted in sound legal analysis, that convinces the other side to hammer out a favorable deal before trial, or if not, gives you an edge during trial. Even though most law suits ultimately settle out of court, the ability to think like a lawyer is everything.

Having praised the Socratic method, it must still be noted that lawyers graduate from law school without the requisite skills to hang out a shingle. No amount of short term clinics or practical skills courses can cover the ocean of legal matters that regularly confront general practice attorneys. Even if they could, successful lawyering revolves around more than solving a client's problem; it also means fostering relationships with other lawyers and accumulating clients. No amount of coursework can replace that. The assumption is that newly minted attorneys will find jobs within existing law firms where they can expand and refine their skills while building the relationships necessary for establishing their own independence. A law student's first job after graduation becomes, in effect, the equivalent of a medical residency program.

The tacit understanding under the current model of legal education is that law firms will provide enough jobs to meet the demand of new graduates. Three years of law school can be prohibitively expensive given the cost of tuition, living expenses, books, and then a summer spent preparing for the bar examination. There is also the opportunity cost of three more years spent hitting the books instead of working up the corporate ladder somewhere. Law students rationalizing this expenditure of time and money as an investment, but that investment only makes sense so long as there are jobs—and good paying jobs at that—waiting for them on the other side. If the jobs disappear, the economics of the arrangement no longer make sense.

Many new lawyers are simply not prepared to go it alone, either because they lack the necessary training or simply due to the fact that their student loans after law school are so immense that they need a big paycheck, which only the big firms can provide, just to meet expenses. Notice how fragile this system is structured. Anything that causes a noticeable decline in job availability could disrupt the entire process: an economic downturn, an overabundance of lawyers competing for jobs, an overabundance of law firms competing for clients by cutting billing rates, sophisticated clients who are no longer willing to underwrite the postgraduate training of new lawyers, insisting instead that only experienced attorneys work on their cases.

The roots of the current method of legal education can be traced back to Christopher Columbus Langdell, the dean of Harvard Law School from 1870 to 1895 (Stevens 1983:36). Langdell had a vision: promote a method of legal education that focused on studying appellate cases while also enhancing the legitimacy of law school by transforming it from an undergraduate course of study into a postgraduate program (Stevens 1983:36-37). Law was to be a science, and its library was the laboratory (Vandeveld

1960:242). Finally, it was supposed, the true governing dynamics of society could now be arrived at, allowing for the mechanical application of these laws to society in just the same way that the physical laws were being applied in the chemistry department.

Langdell's perspective is known today as legal formalism. While his two-pronged strategy succeeded, becoming in time the standard model that all other schools sought to emulate, the promise of formalism was never fully realized. In time, it would be replaced by legal realism, which posited that judicial decisions could not and should not be the result of the mechanical application of rules, but were instead the reflections of the parties and the judges involved (Vandeveldel 1960:250-253).

Even so, the echo of Langdell still rings loudly within the halls of legal education. Law school is still a three year graduate degree and the case method is still the primary means of teaching law. A few schools are experimenting with moving beyond the Harvard model. For example, CUNY law school has organized its facilities into a set of simulated law offices (Sullivan et al. 2007:36). The CUNY model is to move the residency back into the law school. "In the first year, students concentrate on simulation exercises, including writing and speaking, built around legal issues that arise from their doctrinal courses" (Sullivan et al. 2007:36). The approach at CUNY sounds intriguing, but I wonder if they go too far in the other direction, at least in the first year when mastering the basics are so important.

Drafting contracts can be learned at any time, but what good is a contract if you cannot reason about the law that controls its enforceability. Learning to read law takes time and effort. It is a skill, perhaps an art, definitely not a science. It is a perspective, which is what makes mastering it so time consuming. You can lecture about history, but you cannot teach perspective, you can only guide people to it. Insight is not delivered through PowerPoint. Critical thinking is a skill only arrived at through practice. What matters most is learning to think like a lawyer, and the Socratic method is the best tool for teaching others to do that. Here again is Karl Llewellyn dispensing advice to incoming law students:

Immerse yourself for all your hours in the law. Eat law, talk law, think law, drink law, babble of law and judgments in your sleep. Pickle yourselves in law—it is your only hope. And to do this you need more than your classes and your case-books, and yourselves. You need your fellows. You need your neighbor on the right. Grapple him to thy soul with hooks of steel—with boarding hooks, if needs must: the devil drives, indeed. In group work lies the deepening of thought. In group work lie ideas, cross-lights; dispute, and practice in dispute; cooperative thinking and practice in consultation; spur for the weary, pleasure for the strong. A threefold cord is not quickly broken: in group-work lies salvation. (Llewellyn 1960:110)

Chapter 9

Legal Research And Writing

Open up a dictionary and find to the word “flamingo.” How did you do it? Chances are good, that you searched first for the 'F' section, then the 'l' subsection, and finally the 'a' sub-subsection. After that, you found it pretty quickly. What makes this process so easy is that the dictionary's entries are sorted in alphabetical order.

Now consider what you would need to do if the words were not sorted. Searching becomes much more difficult. To find a definition, you need to perform what is called a linear search: you start at the beginning of the book and laboriously work your way through until you either find the word you need or reach the end. Take a moment to consider how much less efficient linear searches are when compared to sorted searches.

After an appeal is heard, the judges decide what they think and then one of their members writes down their conclusions and legal rationales of the majority of the court in a document known as an opinion. That opinion, along with any concurrences or dissents that other judges on the panel may choose to write, is then recorded into books known as reporters. This is where the discussion about dictionaries and sorting becomes relevant to the problem of legal research. Reporters are not sorted. Judicial opinions are recorded in chronological order. The first one written is the first one entered, then the second, then the third, and so on. There are hundreds of these reporters, dictionary sized, crammed full of cases, and completely unsorted.

One might suppose that the legal community would simply choose to ignore judicial opinions, but that is not a possibility. These opinions establish law—known as case law—for all the other courts within their jurisdiction. Judicial opinions are law in their own right. These are the cases that law students spend their lives reading and the particular rules of law that lawyers spend their lives fighting over. Finding good case law can mean winning your case.

Legal research is not merely important; it is a critical skill that law students hone over several semesters through a series of increasingly difficult exercises. The first thing you learn is how to look up a case in the reporters. This is akin to using someone's home address to locate their house. The hard part is finding their address in the first place. Remember, the reporters are no help. They are unsorted. So some other means must exist for finding particular points of law.

The traditional solution were the indexes, which provided cross-references between specific points of law and the cases discussing them. To use these indexes, which look like encyclopedia sets, the researcher first figures out what point of law they wish to explore. Then they turn to that section in the index. The indexes should include excerpts from every case that mentions this point of law. The researcher reads these excerpts to see if any of them sound like the court is arguing that point of law the way you want for your own case.

After scanning the index, the lawyer then goes and pulls the actual cases to compare the fact patterns of the cases in the reporters to the facts of the lawyer's case. The goal is to find a case with similar fact patterns where the judge interpreted the law in a way that supports the lawyer's case. Such cases are known as being "on point." The lawyer will then go into court, armed with this research, and argue that because the facts of the researched case match the facts of the case currently being litigated, the legal holdings from the researched case ought to apply as precedent. The other side, of course, tries to distinguish the facts of the researched case from those of the one at bar in order to convince the judge that the legal determinations from before should not be applied to the present case. Of course, the other side has found some case law as well that they believe is more applicable, and, no surprise, seems to require the opposite outcome.

However, even finding a case with facts that are on point and a rule of law that is favorable still is not enough. After all, cases overrule one another from time to time. Thus, the researcher must then take their case and perform a second round of research using a second set of indexes to see if the case they have found is still good law. Sometimes it is, sometimes it is not, and sometimes only certain portions of the case were overruled by subsequent decisions. Not only that, but the situation sometimes occurs where the case law is still good on the books, but the judges have changed, and now there is some concern over whether they will follow the law. Particularly divided Supreme Court decisions are especially problematic in this regard; rather than settling the law, all they do is open the door to speculation and further litigation.

In short, the whole process is complicated and messy. More recently, much of the grunt work of going to the law library, flipping through indexes, noting down promising cases, pulling reporter after reporter,

and then manually checking each case's status has been automated by computers. Anymore, lawyers typically skim the research online from their desks, printing anything that looks interesting. Search engine technology has provided an alternative research method. Using key words, attorney's can skip the indexes altogether, which may not only provide better results, but also reduces operating costs. Computing power is cheap; whereas, law libraries and the indexing services to make use of them are expensive.

Legal research is the art of finding needles in haystacks. However, finding on point cases is only half the battle. The other is putting it together in a way that is easily digestible by the judges who must read and decide. Therefore, law students also spend a great deal of time learning to write in a very formulaic way. The standard method we were taught is known as the IRAC method.

Under the IRAC method, students practice stating the legal Issue under specific examination, the Rule governing this issue, then Analogizing the facts of the researched case to the facts of the case at bar to show how the two cases match factually, and finally Concluding that because the facts match, the rule stated above ought to be applied. The IRAC method provides a very clean, very powerful way of structuring legal analysis. It is a writing formula for winning arguments.

Armed with these two tools—legal research and writing—law students develop the critical ability to find winning law and employ it effectively. These skills are central to many law jobs. They also dovetail nicely with the curriculum of law school, which preferences reading cases and arguing in front of mock appellate courts over reading statutes and arguing to mock juries. While still a law student, it is easy to forget that lawyering involves more than arguing case law. IRACing becomes more than a writing style; it becomes a philosophy.

In a wonderful book entitled *Structure and Relationship in Constitutional Law*, the author argues that the emphasis placed on textual analysis over practical necessity results in legal opinions that are sometimes justified on legal fictions (Charles L. Black 1969). His point is that this is a weak basis for making law. The judges should simply say that their holding is necessary for the American system to function, but they feel constrained by the need to ground their reasoning in case law. The result is that they still probably decide based on structural necessity, but then invent, after-the-fact, a basis that appears supported by some legal document or precedent.

Arguing before judges is supposed to be about arguing points of law, which will then effect the case. But there is definitely a school of thought that holds it is better to argue the case, and then supply some law so that the judge can justify their decision. Karl Llewellyn recounts the anecdote of Chief Justice John

Marshall stating “Judgment for the plaintiff... Mr. Justice Story will furnish the authorities” (Llewellyn 1960:33). Of course, this debate can never be fully reconciled. Did the Supreme Court order desegregation in *Brown v. Board of Education* (347 U.S. 483 [1954]) because separate but equal would always violate the equal protection clause of the 14th Amendment, or was segregation something that the Court could no longer stomach? Does the due process clause of the 14th Amendment really guarantee a woman’s privacy rights to the extent that the government cannot make abortion illegal, or did the majority of the Court feel that a woman should have the right to abortion and used judicial legislation to accomplish what the elected legislators would not. Either way, the focus on case law arises in law school through the casebook method of legal instruction.

Chapter 10

Thinking Like a Lawyer

The first year, I have already stated, aims to drill into you the more essential techniques of handling cases. It lays a foundation simultaneously for law school and law practice. It aims, in the old phrase, to get you to “thinking like a lawyer”. 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. . . . it is an almost impossible process to achieve the technique without sacrificing some humanity first. (Llewellyn 1960:116)

The primary goal of law school, as law students are reminded again and again, is to learn to think like a lawyer. At the time, I felt only excited by this message of transformation. We all did. We were going to become lawyers! But what does “thinking like a lawyer” really mean? Look again Karl Llewellyn’s quote. There is no ambiguity in his statement, no question over what he is trying to say. According to Llewellyn, law school is supposed to strip each law student of their moral compass, leaving them demoralized in the original sense of the word. Law students are supposed to come out seeing the world differently, and most of them do.

The first time I ever heard the Dean speak was during the welcoming speech to all incoming law students. We were gathered together in the big courtroom where large assemblies were always held. The law students sat in the seats. The professors assembled behind the panel where judges ordinarily would sit. The Dean rose and told a story about his own first day of law school at Harvard. On that day, he and his colleagues were instructed to look first to their left and then to their right. After the students did so, they were informed that one of the people they had just laid on eyes would no longer be there by the end of the year.

I remember thinking this was not much of a pep talk. In fact, it served to heighten my tension. There were other speeches that day. None of them were really encouraging. However, one thing did stick out—a warning that at some point we might enter a fog as if our minds were asleep, but not to worry, for we

would emerge again and suddenly things click.

As strange as it sounds, that experience happened to me. I entered and exited the fog at some point during my first semester. I know this not because I remember it. It only came to my attention as I was preparing to study for my criminal law exam with a friend. As we reviewed our material, I happened to mention how glad I was that we did not need to learn defenses for the exam. Looking puzzled, my friend asked me why I thought that. My answer was simple: we had not covered them. My friend then gave me a funny look and told me to check the syllabus, which I did. The syllabus said we covered defenses. Then I checked my notes.

My mouth literally fell open in disbelief. There, right where they should be, were page after page of notes on criminal defenses. I have no memory of reading those assignments. I have no memory of writing those notes. But I had obviously been to class. The notes were there, silent proof of my attendance, written by somebody else in my handwriting.

Isolation is the first key to understanding law school. The Worrell Professional Center is its own little universe of academia. It is situated far from the undergraduate buildings and quads. It has its own classrooms, library, parking lot, and dining hall. For all the interaction we had with outsiders, our facilities might as well have been located on a totally different campus. We went to class to with law students, studied with law students, ate meals with law students, researched in the law school library with law students, spent much of our free time with law students, partied with law students, lived with law students, and dated law students. Sometimes it felt like a totally different world: planet law school.

Anthropologically, this practically screams initiation. To trace Arnold van Gennep's three stages, entering law school separated us from our previous life and thrust us into the liminal stage where our status was "neither here nor there ...betwixt and between the positions assigned and arrayed by law, custom, convention, and ceremonial" (Turner 1969:95). We were not yet lawyers, but we were more than non-lawyers since many of us were practicing law in law firms, even if under a full lawyer's supervision.

We also were no longer ordinary citizens. People treat you differently when they find out you are a law student. They start emailing you jokes where the punch line is: you die. They ascribe your abilities to law school. If you out argue them, that suddenly becomes law school's victory. If you out work them, that becomes the product of discipline gained in law school. Basically, you are perceived to be the creature of the law, and yet, while in law school, not yet a lawyer. A gulf opens up between you and your non-lawyer friends that never existed before.

Victor Turner also states that those in the liminal state are “normally passive or humble; they must obey their instructors implicitly, and accept arbitrary punishment without complaint. It is as though they are being reduced or ground down to a uniform condition to be fashioned anew and endowed with additional powers to enable them to cope with their new station in life” (Turner 1969:95). That is an almost perfect summary of first year. Of course, none of what I experienced involved physical or verbal abuse; instead, it was the pressure of being made to look like a fool in front of my peers combined with the looming possibility of actually failing out of law school that acted as the grindstone. That was, quite literally, the price of admission to the bar.

Being isolated permitted the messages circulated within the school to go largely unchallenged. Law school permeated the air. Your social group is largely law students. So even when not in class or preparing for class, class nevertheless becomes the topic of discussion. You discuss cases. You discuss points of law. You discuss the failures and triumphs of people during class. You discuss which students are dating each other. There are few reality checks. You live in a world of law.

This process is guided, reinforced, and accelerated by the authority of the professors. They exist on a different plane—literally. Their offices are high up where law students are rarely encouraged to go. They spend much of their time researching and writing. They come to work dressed in suit and tie, a silent reminder that this is professional school, not a picnic.

The law professors determine the rules of the game and the winners. You have to learn what they say. Pretty soon it even makes sense. Few students really challenge their teachers. Why would you? You are paying them a young fortune for this experience so what would even be the point? You can quit anytime you want. Then there are the cases and the questions. Question after question after question. But rarely without purpose.

Socratic questions guide; they require consideration; they force comprehension. First year recitation is a lot like a journey. Follow the correct path and you are rewarded with a short trip. Step off the way, and the professor guides you back. Rules from case law are your signposts. Similar facts make for fair weather. From stumbling first steps, you slowly learn to negotiate the terrain until finally you can navigate by yourself.

The other side of this equation is that successful navigation requires learning to talk the talk, setting aside prior beliefs, and rearranging old priorities so that they map to the new rules of the game. Right and wrong are almost never winning arguments. Fair and unfair are almost never enough. You get to the point

where arguing that a particular outcome serves the ends of justice becomes a signal of a weak case. No one bothers with squishy arguments like justice when the law is on their side.

And still the cases come. Mind numbing, boring, confusing, rarely explained. I've included four in this dissertation. Did you read them? Were you able to force yourself to read them?

We were left largely on our own to figure out what the cases meant, where they fit into the course, and what the course was really about. Feedback is minimal and, when delivered, likely to appear different from what you expected. I once took a paper to one of my professors to get his opinion on it. The paper contained the word "certainly" in it, as in, the law on this matter was certain. The professor's comment was very simple: "what the fuck is ever certain about the law?" Then my paper was tossed back. That was enough constructive criticism for one day. But he was right, and his lesson was never forgotten.

Slowly, ever so slowly, patterns began to emerge as we plowed through our casebooks. Each case represented some hidden point of law or point of view, chosen for inclusion by the casebook's editor because it captured some aspect of legal reasoning deemed significant. Days and then weeks and then months were spent grinding through these things, dissecting them in preparation for class and ultimately the final exam.

Over time, students learn to read in a brand new way. They learn to recognize what is important and what is not. They learn to use legal jargon. People become parties, parties become plaintiffs and defendants, and the plaintiffs and defendants becomes abstract concepts until you forget that these were ever really people in the first place, that behind the words there were human beings who sweated blood over some of these outcomes, whose very lives depended on them. Arguments based on right and wrong become juvenile, replaced by causes of action. Facts lose their independence. Now they matter only in the context of "staking a legal claim on the basis of precedent" (Sullivan et al. 2007:53). If fact x and legal point y then outcome z, but nothing is set in stone.

The cases come in waves that accomplish different things. The first type are extremely dry: endurance tests that challenge one's fortitude just to make it through them. Duncan Kennedy, a Harvard law professor, labels these "cold cases" for their lack of emotional triggers (Kennedy 1982:494). Such cases are useful. They expose law students to important terms and vocabulary, and to basic legal concepts. Like riding a bike with training wheels, they represent baby steps.

They also typically show the development of a certain legal premise over time. This is especially true in Constitutional Law where cases long overruled are nevertheless included so that students will have

enough context to understand the present ruling. Or at least that is the idea. All too often, tracing through the past with these little cases produces so much noise that the signal of current precedent is difficult to recognize. I never once heard a student express appreciation at being force-marched through the overruled cases of yesteryear. The background is interesting to me now, but back then, we all seemed so busy just trying to keep our heads above water that anything extra only added confusion rather than clarity. The professors know this of course.

The other category of case law is what Duncan Kennedy labels the hot cases. His explanation is worth repeating in its entirety:

The first kind of case—call it a cold case—is a challenge to interest, understanding, even to wakefulness. It can be on any subject, so long as it is of no political or moral or emotional significance. Just to understand what happened and what’s being said about it, you have to learn a lot of new terms, a little potted legal history, and lots of rules, none of which is carefully explained by the casebook or the teacher. It is difficult to figure out why the case is there in the first place, difficult to figure out whether you have grasped it, and difficult to anticipate what the teacher will ask and how you should respond.

The other kind of case—call it a hot case—usually involves a sympathetic plaintiff—say, an Appalachian farm family—and an unsympathetic defendant—say, a coal company. On first reading, it appears that the coal company has screwed the farm family by renting their land for strip mining, with a promise to restore it to its original condition once the coal has been extracted, and then renegeing on the promise. And the case should include a judicial opinion that does something like award a meaningless couple of hundred dollars to the farm family rather than making the coal company perform the restoration work. The point of the class discussion will be that your initial reaction of outrage is naive, non-legal, irrelevant to what you’re supposed to be learning, and maybe substantively wrong in the bargain. There are “good reasons” for the awful result, when you take a legal and logical ‘large’ view, as opposed to the knee-jerk passionate view; and if you can’t muster those reasons, maybe you aren’t cut out to be a lawyer.

Most students can’t fight this combination of a cold case and a hot case. The cold case is boring, but you have to do it if you want to become a lawyer. The hot case cries out for response, seems to say that if you can’t respond you’ve already sold out; but the system tells you to put away childish things, and your reaction to the hot case is one of them. Without any intellectual resources in the way of knowledge of the legal system and of the character of legal reasoning, it will appear that emoting will only isolate and incapacitate you. The choice is to develop some calluses and hit the books, or admit failure almost before you’ve begun. (Kennedy 1982:594-595)

The cases thus become the academic equivalent of good cop, bad cop. You get hit with a challenge to your intellect and then a challenge to your conscience. Over and over.

Finally, there is the relentless pressure of school. It is impossible to describe the level of stress and fear that many law students experience day in and day out during their first year of law school, which

sounds odd until one realizes that from the student's perspective, not only their present identity, but also their entire future depends on becoming an attorney. Many of us were liberal arts majors, qualified to do nothing. Idealistically, law school was about changing the world. Realistically, law school was about making a living.

The stress is emphasized by the lack of control. In college, making low grades is unlikely with a little hard work, steady class attendance, and the right registration. Smart undergrads select majors and classes with grade points in mind. Gaming the system increases success; it also gives back some control. Wake stripped us of that control. First year schedules are generated by the administration. Our lives were determined for us.

The competition also increased considerably. Virtually everyone was an overachiever. You almost have to be to get accepted. Even if we did not know each other, we recognized each other, and almost at once, set about quietly—and sometimes not so quietly—competing with one another. Law school magnified this effect by mandating an 81 class average for all first year classes.

This mandatory curve trapped each of us inside a zero-sum game. For every point above an 81 that a professor wishes to give, they must take a point away from someone else. Recall what a small world law school provides, made all the smaller by the fact that all 1L classes are taken with the same forty people. Earning a 90, means robbing your fellow students of 8 points. Those points must come from somewhere. These are your colleagues, your friends, and quite possibly your significant other. You only succeed at someone else's expense.

Moreover, for most classes, there is only one graded exercise: the final. Your whole grade comes down to one test on one day on everything. Do well, and your standing goes up. Perhaps you will qualify for a scholarship. Perhaps you will get some sort of special recognition that will help you get a high paying summer job and a higher paying permanent job after graduation. Just boosting your class rank will give you advantages. Conversely, doing poorly reduces your chances of getting a high paying summer job and a high paying permanent job after graduation. It might cost you your scholarship. Score badly enough, and your seat will be empty next semester: all from a single exam.

This is the classic prisoner's dilemma. The curve is a reflection of the class. In theory, if everyone was shooting for mediocrity, we could all score an 81 without differentiation. The problem is that employment after graduation is largely determined by only two factors: your individual rank in your law school and your law school's rank amongst all other law schools. The incentive to defect is overwhelming, and in

fact, that is exactly what happened. Moreover, many law students are given scholarships that depend on them outperforming the class average. They cannot afford to be a team player, but then, neither could the non-scholarship students. Everyone wanted to succeed; everyone worked hard; everyone tried to get the best grades they could. We all defected.

Our cooperation with the system should not imply our ignorance. Everyone understood the way the grading scheme operated, and what it meant. We even had a term for overachievers; we called them gunners. Though to be honest, I never heard anyone call someone else that except as a joke or a backhanded compliment. To label someone a gunner is to admit that they are outworking you, and in an environment where effort—or at least perceived effort—earns respect, that’s almost like an admission of failure.

The interesting thing about this intense competition is that the experience of law school also served to draw people together. That should not be interpreted to mean that everyone loved everyone else; of course not. We were still human, but many of us worked together. Some of my closest friendships were formed with classmates from law school; we bonded even as we competed with one another. The competition may have been personal to some people, but my crowd managed to keep it at arms length. The competition was also indirect. Many of us lived together, ate together, studied together, partied together, dated one another, and then tried to marry one another. For a while there, it felt like everyone in law school was getting engaged to each other. I’m no exception.

In this, law school reflects the practice of law where friends can represent opposing clients today, settle that case, and then represent the same client tomorrow, all the while meeting up for lunch and calling each other up for free advice—on other cases—and giving some back in turn. Legal cases may be adversarial, but lawyers, at least where I have practiced, are usually very friendly. Not everyone of course, but word quickly gets around about those who are not. The same goes for law school. You learn to compete professionally, without taking it personally and without holding grudges. Even so, it is still high stakes competition. Nothing changes that.

The totality of first year felt like distilled pressure and fear, and then there was the work. Case after case after case in an unrelenting barrage that never ended, culminating each day in the fear of being called on to recite, the fear of looking like a fool, the fear of failure. There were students who seemed immune to this effect, but they usually had an advantage: a spouse, a family in the legal practice, a prior career to fall back on, a psychological immunity to peer pressure. Whatever the reason, a small minority honestly treated the whole thing like a joke, which is not to say that they performed poorly; if anything, resistance

probably provided them with an advantage.

In 1947, the United States Army realized that it had a big problem. It had just emerged triumphant from World War II and was planning for the next war. As part of its preparation for the future, it analyzed the performance of its men in the past and discovered, much to its dismay, that at best only 25 percent of its men would fire on the enemy (Marshall 1947:50). A study from the European Theater that the “fear of killing, rather than the fear of being killed, was the most common cause of battle failure” only buttressed the Army’s concern (Marshall 1947:78). Ordinarily, such restraint would be interpreted as a positive development, a sign of hope for an end to killing, but the military is not engaged in ordinary pursuits; its business is killing. The sudden discovery that fully 75 percent of its men would essentially become conscientious objectors at the moment of truth left it with quite a problem: how to convince well adjusted, peaceable citizens to voluntarily kill their fellow man.

Subsequent research has uncovered similar patterns of restraint in prior wars. During the Civil War, regiments of as many as a thousand men could line up across from one another at ranges of about thirty yards and still only kill “one or two men per minute” despite the storm of bullets being fired by each side (Grossman 1995:10). Firing experiments demonstrated that it should have been around 600 kills per minute (Grossman 1995:10). The problem was not technological. The men simply were not firing at one another.

Perhaps the most interesting finding is that “after the Battle of Gettysburg, 27,574 muskets were recovered from the battlefield. Of these, nearly 90 percent (twenty-four thousand) were loaded. Twelve thousand of these loaded muskets were found to be loaded more than once, and six thousand of the multiply loaded weapons had from three to ten rounds” inside (Grossman 1995:21-22). One musket had been loaded 23 times! (Grossman 1995:22). Again, the only explanation is that the men were standing on the line, loading their weapons, getting shot at, but not shooting back.

So what was the military to do? Charged with defending America, it had to produce soldiers who would use their weapons. The men had to fire. They had to shoot to kill, and not just the 20 percent reported in World War II. The situation had to change, and it did.

By Vietnam, the firing rate had climbed to 95 percent (Grossman 1995:35). The difference largely came from different methods for preparing soldiers for combat. Training became something akin to operant conditioning. Interestingly, Major David S. Pierson, US Army has also recommended that the military seek out and employ psychopaths in key battle positions since they tend to increase overall combat effectiveness

(Pierson 1999:60). Major Pierson even provides a recipe for identifying the kind of individuals that he is describing (Pierson 1999:62).

What the various numbers from World War II and Vietnam illustrate is an intriguing proof of concept that morality can be programmed, and reprogrammed. The question is how. How do you take someone and demoralize them in the original sense of the word?

One possible solution lies in conditioning. In 1957, a fascinating book titled *Battle For The Mind* was published. Motivated by fear of communist brainwashing techniques, it explores the process of conversion in the sense of religious conversion, but from the standpoint that these individuals are not choosing to convert so much as be reprogrammed to convert.

The author of *Battle For The Mind* was a psychiatrist treating men and women suffering from shell shock and other forms of stress during World War II. What he and his colleagues realized was that the conditions they were observing in men coming back from the front closely mimicked the conditions Pavlov described in his experiments of dogs pushed beyond the breaking point. Essentially, that it is possible to stress someone beyond the point of normal functioning, resulting in a variety of symptoms including loss of memory and normal inhibitions (Sargant 1957:57-59). People under extreme stress exhibit signs of “anxiety hysteria” which manifest in all sorts of odd behaviors, but one of the most interesting side effects of this condition is an increased state of suggestibility in certain personality types (Sargant 1957:59).

Sargant and his colleagues used this insights to treat patients suffering from mental breakdowns due to battle pressure. Calling their method abreaction, they would use ether to lower their patients inhibitions and then persuade the patient to relive their terror until they actually collapsed from exhaustion (Sargant 1957:67). Afterwards, they would report full recovery. The key though was to push them past the breaking point or else the treatment would not work. Nor was it necessary for the relived experience to actually be real. In one instance, Sargant describes a soldier who could only be brought to collapse by the use of ether and then forcing him to experience being trapped in a burning tank while struggling desperately to escape (Sargant 1957:72). It was the emotional collapse, however achieved, that probably mattered most; not the specific event.

Significantly, suggestions delivered to people in this state are far more powerful. Indeed, Sargant describes people reaching a phase of inhibition labeled the “ultraparadoxical” in which their conditioned

responses would flip flop (Sargant 1957:73). Not only that, but repeated exposure to abreactions—therapeutic events bringing about emotional collapse—would leave the patients in increasingly more sensitive states so that the more a patient was exposed to this treatment the easier they were to condition. Sargant’s own description deserves to be quoted here in full:

Patients who have been subjected to repeated abreactions during a period of months and even years, on the psychotherapeutic couch, are known to become increasingly sensitive to the therapist’s suggestions. He may then be able to change their previous behavior patterns without too much difficulty; they respond more willingly when he attempts to implant new ideas in them, or new interpretations of old ideas, which they would have rejected without hesitation before they developed a ‘transference’ to him. (Sargant 1957:73)

Sargant explicitly identifies this same process at work in “the behavior of ordinary people subjected to fear-provoking sermons by a powerful preacher; and lastly, the behavior of political suspects in police stations and prisons where confessions are elicited and habits of ‘right thinking’ implanted” (Sargant 1957:73). He goes on to make clear that one does not need access to ether and a “psychotherapeutic couch” to accomplish this process. Alcohol and other drugs can be replaced for ether, and are often used in social contexts for these very reasons. Dancing, drumming, and clapping work as well. Any stress will likely do. Put simply, certain individuals have breaking points. Push them hard enough, and some will “reverse their previous patterns of behaviors” while others “are likely to become more suggestible, accepting whatever they are told, however nonsensical, as the inescapable truth” (Sargant 1957:76).

Lastly, the question is which individuals are most susceptible? One might suppose it to be the members of society least adjusted to the norms the majority takes for granted, but just the opposite appears to be the case: “the ordinary person, in general, is much more easily indoctrinated than the abnormal” (Sargant 1957:80). The explanation Sargant offers is that ordinary members of society are only considered ordinary because they readily accepted the social conditioning of their society; outcasts are the ones who reject it. The normal, the well-adjusted, the ones who play by the rules, these are the ones who give in: “the readiest victims of brainwashing or religious conversion may be the simple, healthy extrovert” (Sargant 1957:81). This is the key point that Sargant comes back to again and again—that otherwise ordinary, well adjusted individuals become programmable when pushed too hard.

Beyond isolation and authority, I believe it was the stress that converted so many to thinking like a lawyer. In his book, *Battle For The Mind*, Sargant moves from treating psychological casualties during

World War II to the process of religious conversion in the early Methodist Church. As a Methodist himself, Sargant concludes that the emotional excitement from John Wesley's sermons in which people are described as shrieking and falling to the floor before rousing again parallels the emotional excitement, collapse, and renewal cycle of successful abreactions. Wesley, of course, did not use ether or shock therapy. He used words, but to his congregations, oriented as they were by a particular mindset and cultural setting, Wesley's terrifying sermons were enough to push them over the edge.

I believe that the same mechanism which produces religious conversions and psychological conversions also produces lawyer conversions. This is what commentators on law school often miss. They focus on the goal of law school: learning to think like a lawyer. In doing so, they ignore the mechanism. What I want to point out is both very simple and very profound: lawyers are converted in law school to a new paradigm. They are taught to believe in case law, to believe in the system, and to believe in the practice of law as a quest for better precedent than for morality.

Upon completion of all this, we were reintegrated back into society under our new identities. We had learned a lot, but we had also changed. Those who made it through were now lawyers from Wake Forest. To this day, that last part means something to me. I prefer dealing with someone from Wake. I know what they went through. I may understand them better. At a recent Continuing Legal Education class, I listened to a speaker give an update on a particular area of the law. The update was very good, but there was also something familiar about the way they structured their analysis. During a break, I found the speaker and asked if they had also had Mad Dog for civil procedure. The speaker laughed and confirmed my suspicion. We had never met before, but our initiation was the same, and that means something.

As a lawyer, it is actually very difficult for me to conceptualize any other possibility for how law school might be structured. I want to scoff at simplistic arguments over right and wrong. I also value my status as a graduate of Wake Forest. My initiation was successful. It changed me forever, and in ways that I do not want to give up. It is only when I speak to my colleagues in the social sciences that I am reminded that there are people who view right and wrong as the starting point for decision making, not an afterthought when legal research uncovers little precedent of value. It is difficult to remember a time when legal arguments appeared technical only for the sake of being technical, when legalese was still a joke rather than a vocabulary that framed my thoughts, when tort reform seemed like a good idea because there were too many lawsuits, and when the entire process of legal research looked like a shell game to convince non-lawyers that there really was a "there" there. In fact, even now, even as I write these words,

deep down I don't quite believe the critique they imply. I think like a lawyer and I think that my thought process is sound. But then I think with my other value system, the one resurrected during grad school and nurtured by the example of my non-lawyer wife, the one that believes right and wrong should occupy the center of the argument and rather than legal precedent, and I have to wonder, what if I'm wrong?

Chapter 11

Leaving Law School

Graduating from law school felt anticlimactic. Of course, we were all grateful to have made it through, as well as grateful to be finished with the endless series of cases and exams, but the looming bar examination helped dampen any real sense of escape. We might be lawyers now, but we were not admitted to practice anywhere, and the biggest exam of our lives still awaited us at the end of the summer: a multi-day extravaganza of short essays and multiple choice questions.

So not long after graduating from Wake Forest, I found myself once again back in the big courtroom of the Worrell Professional Center where law school had begun many years before, sitting in the same seats, and studying with the same people.

The classes were different though. This time they were more practical and focused, as one might imagine, on the specifics of North Carolina law since that was the bar we were taking. Several of the lecturers were even our old professors, which confirmed our suspicions from the prior three years that classes could have been far more practical if the professors had so desired.

It is impossible to describe the emotion one gets listening to crystal clear lectures explaining the same subjects that had seemed nearly impenetrable over the last three years. Or at least, they had been taught that way. Nor did it escape our attention that we had paid a young fortune for that inscrutability, and were now paying at least a few of those same individuals once again for the explanations we never received the first time around.

Bar review courses cost a lot, but everybody I knew signed up for at least one, and often more than one. I did two. It was hard to justify not doing so. After all, failure was still not really an option. For those who had a job, failing the bar exam could mean getting fired. It also might require returning the hiring advance that many students had obviously received, judging by the overnight transformation of the parking lot. Gone were many of the clunkers and old reliables that had served my fellow law students so

faithfully—or not—over the past three years. New cars now sat in many parking places. No one had even passed the exam yet, but many were already transitioning into the lifestyle of a lawyer instead of a law student. That seemed risky to me. Wake graduates enjoyed a really high bar pass rate, but not everyone passed.

The amount of information covered by the bar is more than anybody can learn. Not surprisingly, this creates some tension. However, the bar prep people really knew their business. Their outlines were worth the money. In fact, I wish that I'd had them during law school. My grades would have been higher. The lectures were worth the money too. They gave you the materials, the explanations, and the game plan.

Their plan worked for me. By the end of the summer, I had reviewed the material so thoroughly that I could picture entire pages in my head. I could even read the text in my mind. It was spooky how well I learned the law.

Most lawyers say that you are never smarter than right after the bar exam, and I think they are correct. It is amazing how much information a motivated student can cram into their heads over a summer treated like a finals week. The downside is that all that knowledge begins to vanish almost as soon as you leave the examination room.

In the end, most of us passed. Most of us found jobs. We were lawyers and members of a bar. We had spent almost three years and tens of thousands of dollars—much of them borrowed—to reach that point. Even though many still could not lawyer, we could think like lawyers. The combination of isolation, authority, and pressure had forever changed the way we saw the world and analyzed its problems.

After the bar, I drove back home and met my study partner and his wife at a restaurant for dinner. He and I played a game, reciting the most esoteric points of law from our review materials and then describing the layout of the page on which the information was found. We left that night to go home and relax. We were relieved to have it behind us, but we also knew that this was not the end. The work was not over; it was just beginning, only this time for real.

Chapter 12

Your Second Case: Buck v. Bell

BUCK v. BELL,

274 U.S. 200 (1927)

Mr. Justice HOLMES delivered the opinion of the Court.

This is a writ of error to review a judgment of the Supreme Court of Appeals of the State of Virginia, affirming a judgment of the Circuit Court of Amherst County, by which the defendant in error, the superintendent of the State Colony for Epileptics and Feeble Minded, was ordered to perform the operation of salpingectomy upon Carrie Buck, the plaintiff in error, for the purpose of making her sterile. 143 Va. 310, 130 S. E. 516. The case comes here upon the contention that the statute authorizing the judgment is void under the Fourteenth Amendment as denying to the plaintiff in error due process of law and the equal protection of the laws.

Carrie Buck is a feeble-minded white woman who was committed to the State Colony above mentioned in due form. She is the daughter of a feeble-minded mother in the same institution, and the mother of an illegitimate feeble-minded child. She was eighteen years old at the time of the trial of her case in the Circuit Court in the latter part of 1924. An Act of Virginia approved March 20, 1924 (Laws 1924, c. 394) recites that the health of the patient and the welfare of society may be promoted in certain cases by the sterilization of mental defectives, under careful safeguard, etc.; that the sterilization may be effected in males by vasectomy and in females by salpingectomy, without serious pain or substantial danger to life; that the Commonwealth is supporting in various institutions many defective persons who if now discharged would become[274 U.S. 200, 206] a menace but if incapable of procreating might be discharged with safety and become self-supporting with benefit to themselves and to society; and that experience has shown that heredity plays an important part in the transmission of insanity, imbecility, etc. The statute

then enacts that whenever the superintendent of certain institutions including the abovenamed State Colony shall be of opinion that it is for the best interest of the patients and of society that an inmate under his care should be sexually sterilized, he may have the operation performed upon any patient afflicted with hereditary forms of insanity, imbecility, etc., on complying with the very careful provisions by which the act protects the patients from possible abuse.

The superintendent first presents a petition to the special board of directors of his hospital or colony, stating the facts and the grounds for his opinion, verified by affidavit. Notice of the petition and of the time and place of the hearing in the institution is to be served upon the inmate, and also upon his guardian, and if there is no guardian the superintendent is to apply to the Circuit Court of the County to appoint one. If the inmate is a minor notice also is to be given to his parents, if any, with a copy of the petition. The board is to see to it that the inmate may attend the hearings if desired by him or his guardian. The evidence is all to be reduced to writing, and after the board has made its order for or against the operation, the superintendent, or the inmate, or his guardian, may appeal to the Circuit Court of the County. The Circuit Court may consider the record of the board and the evidence before it and such other admissible evidence as may be offered, and may affirm, revise, or reverse the order of the board and enter such order as it deems just. Finally any party may apply to the Supreme Court of Appeals, which, if it grants the appeal, is to hear the case upon the record of the trial [274 U.S. 200, 207 in the Circuit Court and may enter such order as it thinks the Circuit Court should have entered. There can be no doubt that so far as procedure is concerned the rights of the patient are most carefully considered, and as every step in this case was taken in scrupulous compliance with the statute and after months of observation, there is no doubt that in that respect the plaintiff in error has had due process at law.

The attack is not upon the procedure but upon the substantive law. It seems to be contended that in no circumstances could such an order be justified. It certainly is contended that the order cannot be justified upon the existing grounds. The judgment finds the facts that have been recited and that Carrie Buck 'is the probable potential parent of socially inadequate offspring, likewise afflicted, that she may be sexually sterilized without detriment to her general health and that her welfare and that of society will be promoted by her sterilization,' and thereupon makes the order. In view of the general declarations of the Legislature and the specific findings of the

Court obviously we cannot say as matter of law that the grounds do not exist, and if they exist they justify the result. We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. Jacobson v. Massachusetts, 197 U.S. 11, 25 S. Ct. 358, 3 Ann. Cas. 765. Three generations of imbeciles are enough. [274 U.S. 200, 208] But, it is said, however it might be if this reasoning were applied generally, it fails when it is confined to the small number who are in the institutions named and is not applied to the multitudes outside. It is the usual last resort of constitutional arguments to point out shortcomings of this sort. But the answer is that the law does all that is needed when it does all that it can, indicates a policy, applies it to all within the lines, and seeks to bring within the lines all similarly situated so far and so fast as its means allow. Of course so far as the operations enable those who otherwise must be kept confined to be returned to the world, and thus open the asylum to others, the equality aimed at will be more nearly reached.

Judgment affirmed.

Mr. Justice BUTLER dissents.

Chapter 13

Discussion: Buck v. Bell

Professor: Mr Stuart. Could you please state the facts of the case.

Student: Carrie Buck was an 18 year old described as feeble-minded. Virginia passed a law in 1924 authorizing the sterilization of individuals with hereditary forms of insanity, imbecility, and the like. Ms. Buck had been committed to the State Colony for Epileptics and Feeble Minded. The superintendent of the State Colony was ordered to sterilize Ms. Buck. This case was to decide whether or not that operation was legally permissible.

Professor: What method was used for sterilization?

Student: Vasectomy for males and salpingectomy for females.

Professor: Which means what? What is a salpingectomy?

Student: It's the removal of the Fallopian tubes.

Professor: OK. So what were the legal grounds for this lawsuit?

Student: The due process of law and equal protection clauses of the Fourteenth Amendment.

Professor: And who brought it?

Student: Ms. Buck. Or someone acting on her behalf. The case lists her as the Plaintiff in error.

Professor: And what did the court hold?

Student: The Supreme Court first stated that Ms. Buck did have due process of law.

Professor: Please describe the process.

Student: First the superintendent where the inmate is located applies to his Board of Directors for an order of sterilization and a hearing is held. All interested parties are notified. The inmate's guardian is notified, and if the inmate doesn't have a guardian, one is appointed. If the inmate is a minor, their parents are notified. The inmate can also attend. The Board then hears evidence and issues an order. Afterwards, if a party disagrees, they can appeal to the Circuit Court of the County. They can then appeal from the

Circuit Court to the Virginia's Supreme Court of Appeals. From there, they can appeal to the United States Supreme Court, which is where this opinion came from.

Professor: Alright, and Justice Holmes, writing for the court, states that there is "no doubt" that due process was satisfied. What about equal protection?

Student: Holmes compares sterilization to calling on soldiers to give their lives. He basically says that if we can ask healthy members of society to make the ultimate sacrifice, we can ask [student refers to book] "those who already sap the strength of the state for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence." Basically, if due process protections are in place and we apply it equally to those who qualify, then the law is valid.

Professor: Did Carrie Buck qualify.

Student: Yes. Holmes states that "three generations of imbeciles are enough."

Professor: Do either the due process clause or the equal rights clause have formal definitions in the Constitution?

Student: No. They essentially mean whatever the Court says they mean.

Professor: And what did the Court say they mean this time?

Student: That Carrie Buck was adequately protected.

Professor: Alright. What was the Court's holding.

Student: They affirmed the judgment of the lower court.

Professor: And Carrie Buck?

Student: They sterilized her.

Chapter 14

Your Third Case: Marbury v. Madison

MARBURY v. MADISON,

5 U.S. 137 (1803)

AT the December term 1801, William Marbury, Dennis Ramsay, Robert Townsend Hooe, and William Harper, by their counsel [5 U.S. 137, 138] severally moved the court for a rule to James Madison, secretary of state of the United States, to show cause why a mandamus should not issue commanding him to cause to be delivered to them respectively their several commissions as justices of the peace in the district of Columbia.

This motion was supported by affidavits of the following facts: that notice of this motion had been given to Mr. Madison; that Mr. Adams, the late president of the United States, nominated the applicants to the senate for their advice and consent to be appointed justices of the peace of the district of Columbia; that the senate advised and consented to the appointments; that commissions in due form were signed by the said president appointing them justices, &c. and that the seal of the United States was in due form affixed to the said commissions by the secretary of state; that the applicants have requested Mr. Madison to deliver them their said commissions, who has not complied with that request; and that their said commissions are withheld from them; that the applicants have made application to Mr. Madison as secretary of state of the United States at his office, for information whether the commissions were signed and sealed as aforesaid; that explicit and satisfactory information has not been given in answer to that inquiry, either by the secretary of state, or any officer in the department of state; that application has been made to the secretary of the senate for a certificate of the nomination of the applicants, and of the advice and consent of the senate, who has declined giving such a certificate; whereupon a rule was made to show cause on the fourth day of this term. This rule having been duly served,

[5 U.S. 137, 139] Mr. Jacob Wagner and Mr. Daniel Brent, who had been summoned to attend the court, and were required to give evidence, objected to be sworn, alleging that they were clerks in the department of state, and not bound to disclose any facts relating to the business or transactions of the office.

The court ordered the witnesses to be sworn, and their answers taken in writing; but informed them that when the questions were asked they might state their objections to answering each particular question, if they had any.

Mr. Lincoln, who had been the acting secretary of state, when the circumstances stated in the affidavits occurred, was called upon to give testimony. He objected to answering. The questions were put in writing.

The court said there was nothing confidential required to be disclosed. If there had been, he was not obliged to answer it, and if he thought any thing was communicated to him confidentially he was not bound to disclose, nor was he obliged to state any thing which would criminate himself.

The questions argued by the counsel for the relators were, 1. Whether the supreme court can award the writ of mandamus in any case. 2. Whether it will lie to a secretary of state, in any case whatever. 3. Whether in the present case the court may award a mandamus to James Madison, secretary of state.

[5 U.S. 137, 153]

Mr. Chief Justice MARSHALL delivered the opinion of the court.

At the last term, on the affidavits then read and filed with the clerk, a rule was granted in this case, requiring the secretary of state to show cause why a mandamus [5 U.S. 137, 154] should not issue, directing him to deliver to William Marbury his commission as a justice of the peace for the county of Washington, in the district of Columbia.

No cause has been shown, and the present motion is for a mandamus. The peculiar delicacy of this case, the novelty of some of its circumstances, and the real difficulty attending the points which occur in it, require a complete exposition of the principles on which the opinion to be given by the court is founded.

These principles have been, on the side of the applicant, very ably argued at the bar. In rendering the opinion of the court, there will be some departure in form, though not in substance,

from the points stated in that argument.

In the order in which the court has viewed this subject, the following questions have been considered and decided.

1. Has the applicant a right to the commission he demands?

2. If he has a right, and that right has been violated, do the laws of his country afford him a remedy?

3. If they do afford him a remedy, is it a mandamus issuing from this court?

The first object of inquiry is,

1. Has the applicant a right to the commission he demands?

His right originates in an act of congress passed in February 1801, concerning the district of Columbia.

After dividing the district into two counties, the eleventh section of this law enacts, "that there shall be appointed in and for each of the said counties, such number of discreet persons to be justices of the peace as the president of the United States shall, from time to time, think expedient, to continue in office for five years. [5 U.S. 137, 155] It appears from the affidavits, that in compliance with this law, a commission for William Marbury as a justice of peace for the county of Washington was signed by John Adams, then president of the United States; after which the seal of the United States was affixed to it; but the commission has never reached the person for whom it was made out.

In order to determine whether he is entitled to this commission, it becomes necessary to inquire whether he has been appointed to the office. For if he has been appointed, the law continues him in office for five years, and he is entitled to the possession of those evidences of office, which, being completed, became his property.

The second section of the second article of the constitution declares, "the president shall nominate, and, by and with the advice and consent of the senate, shall appoint ambassadors, other public ministers and consuls, and all other officers of the United States, whose appointments are not otherwise provided for."

The third section declares, that "he shall commission all the officers of the United States."

An act of congress directs the secretary of state to keep the seal of the United States, "to make out and record, and affix the said seal to all civil commissions to officers of the United

States to be appointed by the president, by and with the consent of the senate, or by the president alone; provided that the said seal shall not be affixed to any commission before the same shall have been signed by the president of the United States.”

These are the clauses of the constitution and laws of the United States, which affect this part of the case. They seem to contemplate three distinct operations:

- 1. The nomination. This is the sole act of the president, and is completely voluntary.*
- 2. The appointment. This is also the act of the president, and is also a voluntary act, though it can only be performed by and with the advice and consent of the senate. [5 U.S. 137, 156]*
- 3. The commission. To grant a commission to a person appointed, might perhaps be deemed a duty enjoined by the constitution. “He shall,” says that instrument, “commission all the officers of the United States.”*

The acts of appointing to office, and commissioning the person appointed, can scarcely be considered as one and the same; since the power to perform them is given in two separate and distinct sections of the constitution. The distinction between the appointment and the commission will be rendered more apparent by adverting to that provision in the second section of the second article of the constitution, which authorises congress “to vest by law the appointment of such inferior officers as they think proper, in the president alone, in the courts of law, or in the heads of departments; thus contemplating cases where the law may direct the president to commission an officer appointed by the courts or by the heads of departments. In such a case, to issue a commission would be apparently a duty distinct from the appointment, the performance of which perhaps, could not legally be refused.

Although that clause of the constitution which requires the president to commission all the officers of the United States, may never have been applied to officers appointed otherwise than by himself, yet it would be difficult to deny the legislative power to apply it to such cases. Of consequence the constitutional distinction between the appointment to an office and the commission of an officer who has been appointed, remains the same as if in practice the president had commissioned officers appointed by an authority other than his own.

It follows too, from the existence of this distinction, that, if an appointment was to be evidenced by any public act other than the commission, the performance of such public act would create the officer; and if he was not removable at the will of the president, would either give him a right

to his commission, or enable him to perform the duties without it.

These observations are premised solely for the purpose of rendering more intelligible those which apply more directly to the particular case under consideration. [5 U.S. 137, 157] This is an appointment made by the president, by and with the advice and consent of the senate, and is evidenced by no act but the commission itself. In such a case therefore the commission and the appointment seem inseparable; it being almost impossible to show an appointment otherwise than by proving the existence of a commission: still the commission is not necessarily the appointment; though conclusive evidence of it.

But at what stage does it amount to this conclusive evidence?

The answer to this question seems an obvious one. The appointment being the sole act of the president, must be completely evidenced, when it is shown that he has done every thing to be performed by him.

Should the commission, instead of being evidence of an appointment, even be considered as constituting the appointment itself; still it would be made when the last act to be done by the president was performed, or, at furthest, when the commission was complete.

The last act to be done by the president, is the signature of the commission. He has then acted on the advice and consent of the senate to his own nomination. The time for deliberation has then passed. He has decided. His judgment, on the advice and consent of the senate concurring with his nomination, has been made, and the officer is appointed. This appointment is evidenced by an open, unequivocal act; and being the last act required from the person making it, necessarily excludes the idea of its being, so far as it respects the appointment, an inchoate and incomplete transaction.

Some point of time must be taken when the power of the executive over an officer, not removable at his will, must cease. That point of time must be when the constitutional power of appointment has been exercised. And this power has been exercised when the last act, required from the person possessing the power, has been performed. This last act is the signature of the commission. This idea seems to have prevailed with the legislature, when the act passed converting the department [5 U.S. 137, 158] of foreign affairs into the department of state. By that act it is enacted, that the secretary of state shall keep the seal of the United States, "and shall make out and record, and shall affix the said seal to all civil commissions to officers of the United

States, to be appointed by the president: "provided that the said seal shall not be affixed to any commission, before the same shall have been signed by the president of the United States; nor to any other instrument or act, without the special warrant of the president therefor."

The signature is a warrant for affixing the great seal to the commission; and the great seal is only to be affixed to an instrument which is complete. It attests, by an act supposed to be of public notoriety, the verity of the presidential signature.

It is never to be affixed till the commission is signed, because the signature, which gives force and effect to the commission, is conclusive evidence that the appointment is made.

The commission being signed, the subsequent duty of the secretary of state is prescribed by law, and not to be guided by the will of the president. He is to affix the seal of the United States to the commission, and is to record it.

This is not a proceeding which may be varied, if the judgment of the executive shall suggest one more eligible, but is a precise course accurately marked out by law, and is to be strictly pursued. It is the duty of the secretary of state to conform to the law, and in this he is an officer of the United States, bound to obey the laws. He acts, in this respect, as has been very properly stated at the bar, under the authority of law, and not by the instructions of the president. It is a ministerial act which the law enjoins on a particular officer for a particular purpose.

If it should be supposed, that the solemnity of affixing the seal, is necessary not only to the validity of the commission, but even to the completion of an appointment, still when the seal is affixed the appointment is made, and [5 U.S. 137, 159] the commission is valid. No other solemnity is required by law; no other act is to be performed on the part of government. All that the executive can do to invest the person with his office, is done; and unless the appointment be then made, the executive cannot make one without the co- operation of others.

After searching anxiously for the principles on which a contrary opinion may be supported, none have been found which appear of sufficient force to maintain the opposite doctrine.

Such as the imagination of the court could suggest, have been very deliberately examined, and after allowing them all the weight which it appears possible to give them, they do not shake the opinion which has been formed.

In considering this question, it has been conjectured that the commission may have been assimilated to a deed, to the validity of which, delivery is essential.

This idea is founded on the supposition that the commission is not merely evidence of an appointment, but is itself the actual appointment; a supposition by no means unquestionable. But for the purpose of examining this objection fairly, let it be conceded, that the principle, claimed for its support, is established.

The appointment being, under the constitution, to be made by the president personally, the delivery of the deed of appointment, if necessary to its completion, must be made by the president also. It is not necessary that the livery should be made personally to the grantee of the office: it never is so made. The law would seem to contemplate that it should be made to the secretary of state, since it directs the secretary to affix the seal to the commission after it shall have been signed by the president. If then the act of livery be necessary to give validity to the commission, it has been delivered when executed and given to the secretary for the purpose of being sealed, recorded, and transmitted to the party.

But in all cases of letters patent, certain solemnities are required by law, which solemnities are the evidences [5 U.S. 137, 160] of the validity of the instrument. A formal delivery to the person is not among them. In cases of commissions, the sign manual of the president, and the seal of the United States, are those solemnities. This objection therefore does not touch the case.

It has also occurred as possible, and barely possible, that the transmission of the commission, and the acceptance thereof, might be deemed necessary to complete the right of the plaintiff.

The transmission of the commission is a practice directed by convenience, but not by law. It cannot therefore be necessary to constitute the appointment which must precede it, and which is the mere act of the president. If the executive required that every person appointed to an office, should himself take means to procure his commission, the appointment would not be the less valid on that account. The appointment is the sole act of the president; the transmission of the commission is the sole act of the officer to whom that duty is assigned, and may be accelerated or retarded by circumstances which can have no influence on the appointment. A commission is transmitted to a person already appointed; not to a person to be appointed or not, as the letter enclosing the commission should happen to get into the post-office and reach him in safety, or to miscarry.

It may have some tendency to elucidate this point, to inquire, whether the possession of the

original commission be indispensably necessary to authorize a person, appointed to any office, to perform the duties of that office. If it was necessary, then a loss of the commission would lose the office. Not only negligence, but accident or fraud, fire or theft, might deprive an individual of his office. In such a case, I presume it could not be doubted, but that a copy from the record of the office of the secretary of state, would be, to every intent and purpose, equal to the original. The act of congress has expressly made it so. To give that copy validity, it would not be necessary to prove that the original had been transmitted and afterwards lost. The copy would be complete evidence that the original had existed, and that the appointment had been made, but not that the original had been transmitted. If indeed it should appear that [5 U.S. 137, 161] the original had been mislaid in the office of state, that circumstance would not affect the operation of the copy. When all the requisites have been performed which authorize a recording officer to record any instrument whatever, and the order for that purpose has been given, the instrument is in law considered as recorded, although the manual labour of inserting it in a book kept for that purpose may not have been performed.

In the case of commissions, the law orders the secretary of state to record them. When therefore they are signed and sealed, the order for their being recorded is given; and whether inserted in the book or not, they are in law recorded.

A copy of this record is declared equal to the original, and the fees to be paid by a person requiring a copy are ascertained by law. Can a keeper of a public record erase therefrom a commission which has been recorded? Or can he refuse a copy thereof to a person demanding it on the terms prescribed by law?

Such a copy would, equally with the original, authorize the justice of peace to proceed in the performance of his duty, because it would, equally with the original, attest his appointment.

If the transmission of a commission be not considered as necessary to give validity to an appointment; still less is its acceptance. The appointment is the sole act of the president; the acceptance is the sole act of the officer, and is, in plain common sense, posterior to the appointment. As he may resign, so may he refuse to accept: but neither the one nor the other is capable of rendering the appointment a nonentity.

That this is the understanding of the government, is apparent from the whole tenor of its conduct.

A commission bears date, and the salary of the officer commences from his appointment; not from the transmission or acceptance of his commission. When a person, appointed to any office, refuses to accept that office, the successor is nominated in the place of the person who [5 U.S. 137, 162] has declined to accept, and not in the place of the person who had been previously in office and had created the original vacancy.

It is therefore decidedly the opinion of the court, that when a commission has been signed by the president, the appointment is made; and that the commission is complete when the seal of the United States has been affixed to it by the secretary of state.

Where an officer is removable at the will of the executive, the circumstance which completes his appointment is of no concern; because the act is at any time revocable; and the commission may be arrested, if still in the office. But when the officer is not removable at the will of the executive, the appointment is not revocable and cannot be annulled. It has conferred legal rights which cannot be resumed.

The discretion of the executive is to be exercised until the appointment has been made. But having once made the appointment, his power over the office is terminated in all cases, where by law the officer is not removable by him. The right to the office is then in the person appointed, and he has the absolute, unconditional power of accepting or rejecting it.

Mr. Marbury, then, since his commission was signed by the president and sealed by the secretary of state, was appointed; and as the law creating the office gave the officer a right to hold for five years independent of the executive, the appointment was not revocable; but vested in the officer legal rights which are protected by the laws of his country.

To withhold the commission, therefore, is an act deemed by the court not warranted by law, but violative of a vested legal right.

This brings us to the second inquiry; which is,

2. If he has a right, and that right has been violated, do the laws of his country afford him a remedy? [5 U.S. 137, 163] The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection. In Great Britain the king himself is sued in the respectful form of a petition, and he never fails to comply with the judgment of his court.

In the third volume of his Commentaries, page 23, Blackstone states two cases in which a

remedy is afforded by mere operation of law.

“In all other cases,” he says, “it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law whenever that right is invaded.”

And afterwards, page 109 of the same volume, he says, “I am next to consider such injuries as are cognizable by the courts of common law. And herein I shall for the present only remark, that all possible injuries whatsoever, that did not fall within the exclusive cognizance of either the ecclesiastical, military, or maritime tribunals, are, for that very reason, within the cognizance of the common law courts of justice; for it is a settled and invariable principle in the laws of England, that every right, when withheld, must have a remedy, and every injury its proper redress.”

The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.

If this obloquy is to be cast on the jurisprudence of our country, it must arise from the peculiar character of the case.

*It behoves us then to inquire whether there be in its composition any ingredient which shall exempt from legal investigation, or exclude the injured party from legal redress. In pursuing this inquiry the first question which presents itself, is, whether this can be arranged [5 U.S. 137, 164] with that class of cases which come under the description of *damnum absque injuria*-a loss without an injury.*

This description of cases never has been considered, and it is believed never can be considered as comprehending offices of trust, of honour or of profit. The office of justice of peace in the district of Columbia is such an office; it is therefore worthy of the attention and guardianship of the laws. It has received that attention and guardianship. It has been created by special act of congress, and has been secured, so far as the laws can give security to the person appointed to fill it, for five years. It is not then on account of the worthlessness of the thing pursued, that the injured party can be alleged to be without remedy.

Is it in the nature of the transaction? Is the act of delivering or withholding a commission to be considered as a mere political act belonging to the executive department alone, for the performance of which entire confidence is placed by our constitution in the supreme executive; and for any misconduct respecting which, the injured individual has no remedy.

That there may be such cases is not to be questioned; but that every act of duty to be performed in any of the great departments of government constitutes such a case, is not to be admitted.

By the act concerning invalids, passed in June 1794, the secretary at war is ordered to place on the pension list all persons whose names are contained in a report previously made by him to congress. If he should refuse to do so, would the wounded veteran be without remedy? Is it to be contended that where the law in precise terms directs the performance of an act in which an individual is interested, the law is incapable of securing obedience to its mandate? Is it on account of the character of the person against whom the complaint is made? Is it to be contended that the heads of departments are not amenable to the laws of their country?

Whatever the practice on particular occasions may be, the theory of this principle will certainly never be maintained. [5 U.S. 137, 165] No act of the legislature confers so extraordinary a privilege, nor can it derive countenance from the doctrines of the common law. After stating that personal injury from the king to a subject is presumed to be impossible, Blackstone, Vol. III. p. 255, says, "but injuries to the rights of property can scarcely be committed by the crown without the intervention of its officers: for whom, the law, in matters of right, entertains no respect or delicacy; but furnishes various methods of detecting the errors and misconduct of those agents by whom the king has been deceived and induced to do a temporary injustice."

By the act passed in 1796, authorizing the sale of the lands above the mouth of Kentucky river, the purchaser, on paying his purchase money, becomes completely entitled to the property purchased; and on producing to the secretary of state the receipt of the treasurer upon a certificate required by the law, the president of the United States is authorized to grant him a patent. It is further enacted that all patents shall be countersigned by the secretary of state, and recorded in his office. If the secretary of state should choose to withhold this patent; or the patent being lost, should refuse a copy of it; can it be imagined that the law furnishes to the injured person no remedy?

It is not believed that any person whatever would attempt to maintain such a proposition.

It follows then that the question, whether the legality of an act of the head of a department be examinable in a court of justice or not, must always depend on the nature of that act.

If some acts be examinable, and others not, there must be some rule of law to guide the court

in the exercise of its jurisdiction.

In some instances there may be difficulty in applying the rule to particular cases; but there cannot, it is believed, be much difficulty in laying down the rule.

By the constitution of the United States, the president is invested with certain important political powers, in the [5 U.S. 137, 166] exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority and in conformity with his orders.

In such cases, their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political. They respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive. The application of this remark will be perceived by adverting to the act of congress for establishing the department of foreign affairs. This officer, as his duties were prescribed by that act, is to conform precisely to the will of the president. He is the mere organ by whom that will is communicated. The acts of such an officer, as an officer, can never be examinable by the courts.

But when the legislature proceeds to impose on that officer other duties; when he is directed peremptorily to perform certain acts; when the rights of individuals are dependent on the performance of those acts; he is so far the officer of the law; is amenable to the laws for his conduct; and cannot at his discretion sport away the vested rights of others.

The conclusion from this reasoning is, that where the heads of departments are the political or confidential agents of the executive, merely to execute the will of the president, or rather to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable. But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured has a right to resort to the laws of his country for a remedy.

If this be the rule, let us inquire how it applies to the case under the consideration of the court. [5 U.S. 137, 167] The power of nominating to the senate, and the power of appointing the person nominated, are political powers, to be exercised by the president according to his

own discretion. When he has made an appointment, he has exercised his whole power, and his discretion has been completely applied to the case. If, by law, the officer be removable at the will of the president, then a new appointment may be immediately made, and the rights of the officer are terminated. But as a fact which has existed cannot be made never to have existed, the appointment cannot be annihilated; and consequently if the officer is by law not removable at the will of the president, the rights he has acquired are protected by the law, and are not resumable by the president. They cannot be extinguished by executive authority, and he has the privilege of asserting them in like manner as if they had been derived from any other source.

The question whether a right has vested or not, is, in its nature, judicial, and must be tried by the judicial authority, If, for example, Mr. Marbury had taken the oaths of a magistrate, and proceeded to act as one; in consequence of which a suit had been instituted against him, in which his defence had depended on his being a magistrate; the validity of his appointment must have been determined by judicial authority.

So, if he conceives that by virtue of his appointment he has a legal right either to the commission which has been made out for him or to a copy of that commission, it is equally a question examinable in a court, and the decision of the court upon it must depend on the opinion entertained of his appointment.

That question has been discussed, and the opinion is, that the latest point of time which can be taken as that at which the appointment was complete, and evidenced, was when, after the signature of the president, the seal of the United States was affixed to the commission.

It is then the opinion of the court,

1. That by signing the commission of Mr. Marbury, the president of the United States appointed him a justice [5 U.S. 137, 168] of peace for the county of Washington in the district of Columbia; and that the seal of the United States, affixed thereto by the secretary of state, is conclusive testimony of the verity of the signature, and of the completion of the appointment; and that the appointment conferred on him a legal right to the office for the space of five years.

2. That, having this legal title to the office, he has a consequent right to the commission; a refusal to deliver which is a plain violation of that right, for which the laws of his country afford him a remedy.

It remains to be inquired whether,

3. He is entitled to the remedy for which he applies. This depends on,

1. The nature of the writ applied for. And,

2. The power of this court.

1. The nature of the writ.

Blackstone, in the third volume of his Commentaries, page 110, defines a mandamus to be, "a command issuing in the king's name from the court of king's bench, and directed to any person, corporation, or inferior court of judicature within the king's dominions, requiring them to do some particular thing therein specified which appertains to their office and duty, and which the court of king's bench has previously determined, or at least supposes, to be consonant to right and justice."

Lord Mansfield, in 3 Burrows, 1266, in the case of The King v. Baker et al. states with much precision and explicitness the cases in which this writ may be used.

"Whenever," says that very able judge, "there is a right to execute an office, perform a service, or exercise a franchise (more especially if it be in a matter of public concern or attended with profit), and a person is kept out of possession, or dispossessed of such right, and [5 U.S. 137, 169] has no other specific legal remedy, this court ought to assist by mandamus, upon reasons of justice, as the writ expresses, and upon reasons of public policy, to preserve peace, order and good government." In the same case he says, "this writ ought to be used upon all occasions where the law has established no specific remedy, and where in justice and good government there ought to be one."

In addition to the authorities now particularly cited, many others were relied on at the bar, which show how far the practice has conformed to the general doctrines that have been just quoted.

This writ, if awarded, would be directed to an officer of government, and its mandate to him would be, to use the words of Blackstone, "to do a particular thing therein specified, which appertains to his office and duty, and which the court has previously determined or at least supposes to be consonant to right and justice." Or, in the words of Lord Mansfield, the applicant, in this case, has a right to execute an office of public concern, and is kept out of possession of that right.

These circumstances certainly concur in this case.

Still, to render the mandamus a proper remedy, the officer to whom it is to be directed, must be one to whom, on legal principles, such writ may be directed; and the person applying for it must be without any other specific and legal remedy.

1. With respect to the officer to whom it would be directed. The intimate political relation, subsisting between the president of the United States and the heads of departments, necessarily renders any legal investigation of the acts of one of those high officers peculiarly irksome, as well as delicate; and excites some hesitation with respect to the propriety of entering into such investigation. Impressions are often received without much reflection or examination; and it is not wonderful that in such a case as this, the assertion, by an individual, of his legal claims in a court of justice, to which claims it is the duty of that court to attend, should at first view be considered [5 U.S. 137, 170] by some, as an attempt to intrude into the cabinet, and to intermeddle with the prerogatives of the executive.

It is scarcely necessary for the court to disclaim all pretensions to such a jurisdiction. An extravagance, so absurd and excessive, could not have been entertained for a moment. The province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion. Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.

But, if this be not such a question; if so far from being an intrusion into the secrets of the cabinet, it respects a paper, which, according to law, is upon record, and to a copy of which the law gives a right, on the payment of ten cents; if it be no intermeddling with a subject, over which the executive can be considered as having exercised any control; what is there in the exalted station of the officer, which shall bar a citizen from asserting, in a court of justice, his legal rights, or shall forbid a court to listen to the claim; or to issue a mandamus, directing the performance of a duty, not depending on executive discretion, but on particular acts of congress and the general principles of law?

If one of the heads of departments commits any illegal act, under colour of his office, by which an individual sustains an injury, it cannot be pretended that his office alone exempts him from being sued in the ordinary mode of proceeding, and being compelled to obey the judgment of the law. How then can his office exempt him from this particular mode of deciding on the legality of

his conduct, if the case be such a case as would, were any other individual the party complained of, authorize the process?

It is not by the office of the person to whom the writ is directed, but the nature of the thing to be done, that the propriety or impropriety of issuing a mandamus is to be determined. Where the head of a department acts in a case in which executive discretion is to be exercised; in which he is the mere organ of executive will; it is [5 U.S. 137, 171] again repeated, that any application to a court to control, in any respect, his conduct, would be rejected without hesitation.

But where he is directed by law to do a certain act affecting the absolute rights of individuals, in the performance of which he is not placed under the particular direction of the president, and the performance of which the president cannot lawfully forbid, and therefore is never presumed to have forbidden; as for example, to record a commission, or a patent for land, which has received all the legal solemnities; or to give a copy of such record; in such cases, it is not perceived on what ground the courts of the country are further excused from the duty of giving judgment, that right to be done to an injured individual, than if the same services were to be performed by a person not the head of a department.

This opinion seems not now for the first time to be taken up in this country.

It must be well recollected that in 1792 an act passed, directing the secretary at war to place on the pension list such disabled officers and soldiers as should be reported to him by the circuit courts, which act, so far as the duty was imposed on the courts, was deemed unconstitutional; but some of the judges, thinking that the law might be executed by them in the character of commissioners, proceeded to act and to report in that character.

This law being deemed unconstitutional at the circuits, was repealed, and a different system was established; but the question whether those persons, who had been reported by the judges, as commissioners, were entitled, in consequence of that report, to be placed on the pension list, was a legal question, properly determinable in the courts, although the act of placing such persons on the list was to be performed by the head of a department.

That this question might be properly settled, congress passed an act in February 1793, making it the duty of the secretary of war, in conjunction with the attorney general, to take such measures as might be necessary to obtain an adjudication of the supreme court of the United [5 U.S. 137, 172] States on the validity of any such rights, claimed under the act aforesaid.

After the passage of this act, a mandamus was moved for, to be directed to the secretary at war, commanding him to place on the pension list a person stating himself to be on the report of the judges.

There is, therefore, much reason to believe, that this mode of trying the legal right of the complainant, was deemed by the head of a department, and by the highest law officer of the United States, the most proper which could be selected for the purpose.

When the subject was brought before the court the decision was, not, that a mandamus would not lie to the head of a department, directing him to perform an act, enjoined by law, in the performance of which an individual had a vested interest; but that a mandamus ought not to issue in that case-the decision necessarily to be made if the report of the commissioners did not confer on the applicant a legal right.

The judgment in that case is understood to have decided the merits of all claims of that description; and the persons, on the report of the commissioners, found it necessary to pursue the mode prescribed by the law subsequent to that which had been deemed unconstitutional, in order to place themselves on the pension list.

The doctrine, therefore, now advanced is by no means a novel one.

It is true that the mandamus, now moved for, is not for the performance of an act expressly enjoined by statute.

It is to deliver a commission; on which subjects the acts of congress are silent. This difference is not considered as affecting the case. It has already been stated that the applicant has, to that commission, a vested legal right, of which the executive cannot deprive him. He has been appointed to an office, from which he is not removable at the will of the executive; and being so [5 U.S. 137, 173] appointed, he has a right to the commission which the secretary has received from the president for his use. The act of congress does not indeed order the secretary of state to send it to him, but it is placed in his hands for the person entitled to it; and cannot be more lawfully withheld by him, than by another person.

It was at first doubted whether the action of detinue was not a specific legal remedy for the commission which has been withheld from Mr. Marbury; in which case a mandamus would be improper. But this doubt has yielded to the consideration that the judgment in detinue is for the thing itself, or its value. The value of a public office not to be sold, is incapable of being

ascertained; and the applicant has a right to the office itself, or to nothing. He will obtain the office by obtaining the commission, or a copy of it from the record.

This, then, is a plain case of a mandamus, either to deliver the commission, or a copy of it from the record; and it only remains to be inquired,

Whether it can issue from this court.

The act to establish the judicial courts of the United States authorizes the supreme court “to issue writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States.”

The secretary of state, being a person, holding an office under the authority of the United States, is precisely within the letter of the description; and if this court is not authorized to issue a writ of mandamus to such an officer, it must be because the law is unconstitutional, and therefore absolutely incapable of conferring the authority, and assigning the duties which its words purport to confer and assign.

The constitution vests the whole judicial power of the United States in one supreme court, and such inferior courts as congress shall, from time to time, ordain and establish. This power is expressly extended to all cases arising under the laws of the United States; and consequently, in some form, may be exercised over the present [5 U.S. 137, 174] case; because the right claimed is given by a law of the United States.

In the distribution of this power it is declared that “the supreme court shall have original jurisdiction in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party. In all other cases, the supreme court shall have appellate jurisdiction.”

It has been insisted at the bar, that as the original grant of jurisdiction to the supreme and inferior courts is general, and the clause, assigning original jurisdiction to the supreme court, contains no negative or restrictive words; the power remains to the legislature to assign original jurisdiction to that court in other cases than those specified in the article which has been recited; provided those cases belong to the judicial power of the United States.

If it had been intended to leave it in the discretion of the legislature to apportion the judicial power between the supreme and inferior courts according to the will of that body, it would certainly have been useless to have proceeded further than to have defined the judicial power, and

the tribunals in which it should be vested. The subsequent part of the section is mere surplusage, is entirely without meaning, if such is to be the construction. If congress remains at liberty to give this court appellate jurisdiction, where the constitution has declared their jurisdiction shall be original; and original jurisdiction where the constitution has declared it shall be appellate; the distribution of jurisdiction made in the constitution, is form without substance.

Affirmative words are often, in their operation, negative of other objects than those affirmed; and in this case, a negative or exclusive sense must be given to them or they have no operation at all.

It cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such construction is inadmissible, unless the words require it. [5 U.S. 137, 175] If the solicitude of the convention, respecting our peace with foreign powers, induced a provision that the supreme court should take original jurisdiction in cases which might be supposed to affect them; yet the clause would have proceeded no further than to provide for such cases, if no further restriction on the powers of congress had been intended. That they should have appellate jurisdiction in all other cases, with such exceptions as congress might make, is no restriction; unless the words be deemed exclusive of original jurisdiction.

When an instrument organizing fundamentally a judicial system, divides it into one supreme, and so many inferior courts as the legislature may ordain and establish; then enumerates its powers, and proceeds so far to distribute them, as to define the jurisdiction of the supreme court by declaring the cases in which it shall take original jurisdiction, and that in others it shall take appellate jurisdiction, the plain import of the words seems to be, that in one class of cases its jurisdiction is original, and not appellate; in the other it is appellate, and not original. If any other construction would render the clause inoperative, that is an additional reason for rejecting such other construction, and for adhering to the obvious meaning.

To enable this court then to issue a mandamus, it must be shown to be an exercise of appellate jurisdiction, or to be necessary to enable them to exercise appellate jurisdiction.

It has been stated at the bar that the appellate jurisdiction may be exercised in a variety of forms, and that if it be the will of the legislature that a mandamus should be used for that purpose, that will must be obeyed. This is true; yet the jurisdiction must be appellate, not original.

It is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings

in a cause already instituted, and does not create that case. Although, therefore, a mandamus may be directed to courts, yet to issue such a writ to an officer for the delivery of a paper, is in effect the same as to sustain an original action for that paper, and therefore seems not to belong to [5 U.S. 137, 176] appellate, but to original jurisdiction. Neither is it necessary in such a case as this, to enable the court to exercise its appellate jurisdiction.

The authority, therefore, given to the supreme court, by the act establishing the judicial courts of the United States, to issue writs of mandamus to public officers, appears not to be warranted by the constitution; and it becomes necessary to inquire whether a jurisdiction, so conferred, can be exercised.

The question, whether an act, repugnant to the constitution, can become the law of the land, is a question deeply interesting to the United States; but, happily, not of an intricacy proportioned to its interest. It seems only necessary to recognise certain principles, supposed to have been long and well established, to decide it.

That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it nor ought it to be frequently repeated. The principles, therefore, so established are deemed fundamental. And as the authority, from which they proceed, is supreme, and can seldom act, they are designed to be permanent.

This original and supreme will organizes the government, and assigns to different departments their respective powers. It may either stop here; or establish certain limits not to be transcended by those departments.

The government of the United States is of the latter description. The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing; if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited [5 U.S. 137, 177] and acts allowed are of equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the

constitution by an ordinary act.

Between these alternatives there is no middle ground. The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it.

If the former part of the alternative be true, then a legislative act contrary to the constitution is not law: if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable.

Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature repugnant to the constitution is void.

This theory is essentially attached to a written constitution, and is consequently to be considered by this court as one of the fundamental principles of our society. It is not therefore to be lost sight of in the further consideration of this subject.

If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration.

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. [5 U.S. 137, 178] So if a law be in opposition to the constitution: if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law: the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply.

Those then who controvert the principle that the constitution is to be considered, in court, as

a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law.

This doctrine would subvert the very foundation of all written constitutions. It would declare that an act, which, according to the principles and theory of our government, is entirely void, is yet, in practice, completely obligatory. It would declare, that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure.

That it thus reduces to nothing what we have deemed the greatest improvement on political institutions—a written constitution, would of itself be sufficient, in America where written constitutions have been viewed with so much reverence, for rejecting the construction. But the peculiar expressions of the constitution of the United States furnish additional arguments in favour of its rejection.

The judicial power of the United States is extended to all cases arising under the constitution. [5 U.S. 137, 179] Could it be the intention of those who gave this power, to say that, in using it, the constitution should not be looked into? That a case arising under the constitution should be decided without examining the instrument under which it arises?

This is too extravagant to be maintained.

In some cases then, the constitution must be looked into by the judges. And if they can open it at all, what part of it are they forbidden to read, or to obey?

There are many other parts of the constitution which serve to illustrate this subject.

It is declared that “no tax or duty shall be laid on articles exported from any state.” Suppose a duty on the export of cotton, of tobacco, or of flour; and a suit instituted to recover it. Ought judgment to be rendered in such a case? ought the judges to close their eyes on the constitution, and only see the law.

The constitution declares that “no bill of attainder or ex post facto law shall be passed.”

If, however, such a bill should be passed and a person should be prosecuted under it, must the court condemn to death those victims whom the constitution endeavours to preserve?

“No person,” says the constitution, “shall be convicted of treason unless on the testimony of

two witnesses to the same overt act, or on confession in open court.”

Here the language of the constitution is addressed especially to the courts. It prescribes, directly for them, a rule of evidence not to be departed from. If the legislature should change that rule, and declare one witness, or a confession out of court, sufficient for conviction, must the constitutional principle yield to the legislative act?

From these and many other selections which might be made, it is apparent, that the framers of the constitution [5 U.S. 137, 180] contemplated that instrument as a rule for the government of courts, as well as of the legislature.

Why otherwise does it direct the judges to take an oath to support it? This oath certainly applies, in an especial manner, to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support!

The oath of office, too, imposed by the legislature, is completely demonstrative of the legislative opinion on this subject. It is in these words: “I do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich; and that I will faithfully and impartially discharge all the duties incumbent on me as according to the best of my abilities and understanding, agreeably to the constitution and laws of the United States.”

Why does a judge swear to discharge his duties agreeably to the constitution of the United States, if that constitution forms no rule for his government? if it is closed upon him and cannot be inspected by him.

If such be the real state of things, this is worse than solemn mockery. To prescribe, or to take this oath, becomes equally a crime.

It is also not entirely unworthy of observation, that in declaring what shall be the supreme law of the land, the constitution itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in pursuance of the constitution, have that rank.

Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void, and that courts, as well as other departments, are bound by that instrument.

The rule must be discharged.

Chapter 15

Discussion: Marbury v. Madison

Professor: Mr Stuart. Could you please state the facts of the case.

Student: When John Adams was President, he made several last minute judicial appointments. One of them was to William Marbury to serve as a justice of the peace for the county of Washington. The appointment was signed by President Adams and then sealed by his Secretary of State. However, the commission was never delivered. Marbury moved for a show cause order to show why a writ of mandamus should not be issued to James Madison, the new Secretary of State, commanding him to deliver the appointment.

Professor: What is a writ of mandamus?

Student: An order from the court to do something.

Professor: And who was the Secretary of State under Adams?

Student: John Marshal.

Professor: And who is now the Chief Justice of the Supreme Court deciding this case?

Student: John Marshall.

Professor: One and the same. So the man who didn't get the commission delivered on time is now left to decide if it can lawfully be withheld by his successor. Isn't that convenient. Please continue.

Student: Marshall lists three points to be considered. One, does Marbury still have a commission? Two, if so, does he have a remedy? And three, if he has a remedy, is it a writ of mandamus.

Professor: And what does the Chief Justice have to say?

Student: That Marbury's appointment is valid. The Constitution says that the President gets to appoint and commission people.

Professor: Where does it say this?

Student: Article II, Section II gives the President the power of appointment. Article II, Section III gives him the power to commission all the officers of the United States."

Professor: Very good. Then what?

Student: Marshall says that the appointment is valid at the time of signature and that after that the President cannot remove him from office unless the officer is removable at his will.”

Professor: Why does Marshall make this point?

Student: He is laying a foundation that locks in Adam’s appointment while denying Jefferson the power to revoke it.

Professor: Keep going.

Student: Marshall then says that the Secretary of State has a duty to deliver the appointment arising out of the law and not the President’s instructions. He goes on to say that problems with delivery cannot invalidate the appointment once the President signs it and the Secretary of State seals it.

Professor: Good. So Marbury has a right. Does he have a remedy?

Student: Yes. He has a legal right to his commission and therefore a legal remedy if the commission is denied to him.

Professor: Does the Court distinguish between different types of acts.

Student: It does. There are two types of acts: political and acts at law. Political acts are those entirely within the discretion of the President. They cannot be reviewed by the courts. However, acts that are not solely within the President’s authority can be examined.

Professor: Which type of act is the one involving Marbury?

Student: It’s an act at law. If the President had the power to revoke an appointment it would be solely within the President’s discretion and therefore only a political act, but since the President cannot revoke, it becomes an act at law once the appointment is complete.

Professor: Good. So Marbury has a valid appointment of the sort that can be reviewed by the courts. He has the right to a remedy. When does he get his writ of mandamus?

Student: He doesn’t.

Professor: Why not?

Student: Issuing a writ of mandamus to an officer of the government is an act of original jurisdiction. The Supreme Court was given original jurisdiction to issue writs of mandamus by the Judiciary Act; however, that jurisdiction conflicts with the limits of the Supreme Court specified by the Constitution. These limits were written into the Constitution to act as checks on each branch of government, but limits don’t work if the branches can violate them. The Court’s job is to decide what the law is and to resolve

conflicts between various laws. Here, the conflict is between the Congress and the Constitution.

Professor: Who does the Court side with?

Student: It sides with the Constitution. That part of the Judiciary Act is unconstitutional and unenforceable.

Professor: What do we now call this process of review by the court.

Student: Judicial Review.

Professor: Correct. And Marbury—what happens to him?

Student: He doesn't get his commission.

Chapter 16

Your Fourth Case: Korematsu v. United States

TOYOSABURO KOREMATSU v. UNITED STATES

323 U.S. 214 (1944)

[Footnotes Deleted for abridgment]

Mr. Justice BLACK delivered the opinion of the Court.

The petitioner, an American citizen of Japanese descent, was convicted in a federal district court for remaining in San Leandro, California, a 'Military Area', contrary to Civilian Exclusion Order No. 34 of the Commanding General [323 U.S. 214, 216] of the Western Command, U.S. Army, which directed that after May 9, 1942, all persons of Japanese ancestry should be excluded from that area. No question was raised as to petitioner's loyalty to the United States. The Circuit Court of Appeals affirmed, and the importance of the constitutional question involved caused us to grant certiorari.

It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.

In the instant case prosecution of the petitioner was begun by information charging violation of an Act of Congress, of March 21, 1942, 56 Stat. 173, 18 U.S.C.A. 97a, which provides that

... whoever shall enter, remain in, leave, or commit any act in any military area or military zone prescribed, under the authority of an Executive order of the President, by the Secretary of War, or by any military commander designated by the Secretary of War, contrary to the restrictions applicable to any such area or zone or contrary to the order of the Secretary of War or any such military commander, shall, if it appears that he knew or should

have known of the existence and extent of the restrictions or order and that his act was in violation thereof, be guilty of a misdemeanor and upon conviction shall be liable to a fine of not to exceed \$ 5,000 or to imprisonment for not more than one year, or both, for each offense.

Exclusion Order No. 34, which the petitioner knowingly and admittedly violated was one of a number of military orders and proclamations, all of which were substantially [323 U.S. 214, 217] based upon Executive Order No. 9066, 7 Fed.Reg. 1407. That order, issued after we were at war with Japan, declared that 'the successful prosecution of the war requires every possible protection against espionage and against sabotage to national-defense material, national-defense premises, and national-defense utilities. . . .'

One of the series of orders and proclamations, a curfew order, which like the exclusion order here was promulgated pursuant to Executive Order 9066, subjected all persons of Japanese ancestry in prescribed West Coast military areas to remain in their residences from 8 p.m. to 6 a.m. As is the case with the exclusion order here, that prior curfew order was designed as a 'protection against espionage and against sabotage.' In Kiyoshi Hirabayashi v. United States, 320 U.S. 81, 63 S.Ct. 1375, we sustained a conviction obtained for violation of the curfew order. The Hirabayashi conviction and this one thus rest on the same 1942 Congressional Act and the same basic executive and military orders, all of which orders were aimed at the twin dangers of espionage and sabotage.

The 1942 Act was attacked in the Hirabayashi case as an unconstitutional delegation of power; it was contended that the curfew order and other orders on which it rested were beyond the war powers of the Congress, the military authorities and of the President, as Commander in Chief of the Army; and finally that to apply the curfew order against none but citizens of Japanese ancestry amounted to a constitutionally prohibited discrimination solely on account of race. To these questions, we gave the serious consideration which their importance justified. We upheld the curfew order as an exercise of the power of the government to take steps necessary to prevent espionage and sabotage in an area threatened by Japanese attack.

In the light of the principles we announced in the Hirabayashi case, we are unable to conclude that it was beyond the war power of Congress and the Executive to exclude [323 U.S. 214, 218] those of Japanese ancestry from the West Coast war area at the time they did. True,

exclusion from the area in which one's home is located is a far greater deprivation than constant confinement to the home from 8 p.m. to 6 a.m. Nothing short of apprehension by the proper military authorities of the gravest imminent danger to the public safety can constitutionally justify either. But exclusion from a threatened area, no less than curfew, has a definite and close relationship to the prevention of espionage and sabotage. The military authorities, charged with the primary responsibility of defending our shores, concluded that curfew provided inadequate protection and ordered exclusion. They did so, as pointed out in our Hirabayashi opinion, in accordance with Congressional authority to the military to say who should, and who should not, remain in the threatened areas.

In this case the petitioner challenges the assumptions upon which we rested our conclusions in the Hirabayashi case. He also urges that by May 1942, when Order No. 34 was promulgated, all danger of Japanese invasion of the West Coast had disappeared. After careful consideration of these contentions we are compelled to reject them.

Here, as in the Hirabayashi case, supra, 320 U.S. at page 99, 63 S.Ct. at page 1385, '... we cannot reject as unfounded the judgment of the military authorities and of Congress that there were disloyal members of that population, whose number and strength could not be precisely and quickly ascertained. We cannot say that the war-making branches of the Government did not have ground for believing that in a critical hour such persons could not readily be isolated and separately dealt with, and constituted a menace to the national defense and safety, which demanded that prompt and adequate measures be taken to guard against it.'

Like curfew, exclusion of those of Japanese origin was deemed necessary because of the presence of an unascertained number of disloyal members of the group, most of [323 U.S. 214, 219] whom we have no doubt were loyal to this country. It was because we could not reject the finding of the military authorities that it was impossible to bring about an immediate segregation of the disloyal from the loyal that we sustained the validity of the curfew order as applying to the whole group. In the instant case, temporary exclusion of the entire group was rested by the military on the same ground. The judgment that exclusion of the whole group was for the same reason a military imperative answers the contention that the exclusion was in the nature of group punishment based on antagonism to those of Japanese origin. That there were members of the group who retained loyalties to Japan has been confirmed by investigations made subsequent

to the exclusion. Approximately five thousand American citizens of Japanese ancestry refused to swear unqualified allegiance to the United States and to renounce allegiance to the Japanese Emperor, and several thousand evacuees requested repatriation to Japan.

We uphold the exclusion order as of the time it was made and when the petitioner violated it. Cf. Chastleton Corporation v. Sinclair, 264 U.S. 543, 547, 44 S.Ct. 405, 406; Block v. Hirsh, 256 U.S. 135, 154, 155 S., 41 S.Ct. 458, 459, 16 A.L.R. 165. In doing so, we are not unmindful of the hardships imposed by it upon a large group of American citizens. Cf. Ex parte Kumezo Kawato, 317 U.S. 69, 73, 63 S.Ct. 115, 117. But hardships are part of war, and war is an aggregation of hardships. All citizens alike, both in and out of uniform, feel the impact of war in greater or lesser measure. Citizenship has its responsibilities as well as its privileges, and in time of war the burden is always heavier. Compulsory [323 U.S. 214, 220] exclusion of large groups of citizens from their homes, except under circumstances of direst emergency and peril, is inconsistent with our basic governmental institutions. But when under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger.

It is argued that on May 30, 1942, the date the petitioner was charged with remaining in the prohibited area, there were conflicting orders outstanding, forbidding him both to leave the area and to remain there. Of course, a person cannot be convicted for doing the very thing which it is a crime to fail to do. But the outstanding orders here contained no such contradictory commands.

There was an order issued March 27, 1942, which prohibited petitioner and others of Japanese ancestry from leaving the area, but its effect was specifically limited in time 'until and to the extent that a future proclamation or order should so permit or direct.' 7 Fed.Reg. 2601. That 'future order', the one for violation of which petitioner was convicted, was issued May 3, 1942, and it did 'direct' exclusion from the area of all persons of Japanese ancestry, before 12 o'clock noon, May 9; furthermore it contained a warning that all such persons found in the prohibited area would be liable to punishment under the March 21, 1942 Act of Congress. Consequently, the only order in effect touching the petitioner's being in the area on May 30, 1942, the date specified in the information against him, was the May 3 order which prohibited his remaining there, and it was that same order, which he stipulated in his trial that he had violated, knowing of its existence. There is therefore no basis for the argument that on May 30, 1942, he was subject to punishment, under

the March 27 and May 3rd orders, whether he remained in or left the area.

It does appear, however, that on May 9, the effective date of the exclusion order, the military authorities had [323 U.S. 214, 221]already determined that the evacuation should be effected by assembling together and placing under guard all those of Japanese ancestry, at central points, designated as 'assembly centers', in order 'to insure the orderly evacuation and resettlement of Japanese voluntarily migrating from military area No. 1 to restrict and regulate such migration.' Public Proclamation No. 4, 7 Fed.Reg. 2601. And on May 19, 1942, eleven days before the time petitioner was charged with unlawfully remaining in the area, Civilian Restrictive Order No. 1, 8 Fed.Reg. 982, provided for detention of those of Japanese ancestry in assembly or relocation centers. It is now argued that the validity of the exclusion order cannot be considered apart from the orders requiring him, after departure from the area, to report and to remain in an assembly or relocation center. The contention is that we must treat these separate orders as one and inseparable; that, for this reason, if detention in the assembly or relocation center would have illegally deprived the petitioner of his liberty, the exclusion order and his conviction under it cannot stand.

We are thus being asked to pass at this time upon the whole subsequent detention program in both assembly and relocation centers, although the only issues framed at the trial related to petitioner's remaining in the prohibited area in violation of the exclusion order. Had petitioner here left the prohibited area and gone to an assembly center we cannot say either as a matter of fact or law, that his presence in that center would have resulted in his detention in a relocation center. Some who did report to the assembly center were not sent to relocation centers, but were released upon condition that they remain outside the prohibited zone until the military orders were modified or lifted. This illustrates that they pose different problems and may be governed by different principles. The lawfulness of one does not necessarily determine the lawfulness of the others. This is made clear [323 U.S. 214, 222] when we analyze the requirements of the separate provisions of the separate orders. These separate requirements were that those of Japanese ancestry (1) depart from the area; (2) report to and temporarily remain in an assembly center; (3) go under military control to a relocation center there to remain for an indeterminate period until released conditionally or unconditionally by the military authorities. Each of these requirements, it will be noted, imposed distinct duties in connection with the separate steps in

a complete evacuation program. Had Congress directly incorporated into one Act the language of these separate orders, and provided sanctions for their violations, disobedience of any one would have constituted a separate offense. Cf. Blockburger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180, 182. There is no reason why violations of these orders, insofar as they were promulgated pursuant to congressional enactment, should not be treated as separate offenses.

The Endo case (Ex parte Mitsuye Endo) 323 U.S. 283, 65 S.Ct. 208, graphically illustrates the difference between the validity of an order to exclude and the validity of a detention order after exclusion has been effected.

Since the petitioner has not been convicted of failing to report or to remain in an assembly or relocation center, we cannot in this case determine the validity of those separate provisions of the order. It is sufficient here for us to pass upon the order which petitioner violated. To do more would be to go beyond the issues raised, and to decide momentous questions not contained within the framework of the pleadings or the evidence in this case. It will be time enough to decide the serious constitutional issues which petitioner seeks to raise when an assembly or relocation order is applied or is certain to be applied to him, and we have its terms before us.

Some of the members of the Court are of the view that evacuation and detention in an Assembly Center were inseparable. After May 3, 1942, the date of Exclusion [323 U.S. 214, 223] Order No. 34, Korematsu was under compulsion to leave the area not as he would choose but via an Assembly Center. The Assembly Center was conceived as a part of the machinery for group evacuation. The power to exclude includes the power to do it by force if necessary. And any forcible measure must necessarily entail some degree of detention or restraint whatever method of removal is selected. But whichever view is taken, it results in holding that the order under which petitioner was convicted was valid.

It is said that we are dealing here with the case of imprisonment of a citizen in a concentration camp solely because of his ancestry, without evidence or inquiry concerning his loyalty and good disposition towards the United States. Our task would be simple, our duty clear, were this a case involving the imprisonment of a loyal citizen in a concentration camp because of racial prejudice. Regardless of the true nature of the assembly and relocation centers-and we deem it unjustifiable to call them concentration camps with all the ugly connotations that term implies-we are dealing specifically with nothing but an exclusion order. To cast this case into outlines

of racial prejudice, without reference to the real military dangers which were presented, merely confuses the issue. Korematsu was not excluded from the Military Area because of hostility to him or his race. He was excluded because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures, because they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily, and finally, because Congress, reposing its confidence in this time of war in our military leaders—as inevitably it must—determined that they should have the power to do just this. There was evidence of disloyalty on the part of some, the military authorities considered that the need for [323 U.S. 214, 224] action was great, and time was short. We cannot—by availing ourselves of the calm perspective of hindsight—now say that at that time these actions were unjustified.

AFFIRMED.

Mr. Justice FRANKFURTER, concurring.

*According to my reading of Civilian Exclusion Order No. 34, it was an offense for Korematsu to be found in Military Area No. 1, the territory wherein he was previously living, except within the bounds of the established Assembly Center of that area. Even though the various orders issued by General DeWitt be deemed a comprehensive code of instructions, their tenor is clear and not contradictory. They put upon Korematsu the obligation to leave Military Area No. 1, but only by the method prescribed in the instructions, i.e., by reporting to the Assembly Center. I am unable to see how the legal considerations that led to the decision in *Kiyoshi Hirabayashi v. United States*, 320 U.S. 81, 63 S.Ct. 1375, fail to sustain the military order which made the conduct now in controversy a crime. And so I join in the opinion of the Court, but should like to add a few words of my own.*

*The provisions of the Constitution which confer on the Congress and the President powers to enable this country to wage war are as much part of the Constitution as provisions looking to a nation at peace. And we have had recent occasion to quote approvingly the statement of former Chief Justice Hughes that the war power of the Government is 'the power to wage war successfully.' *Hirabayashi v. United States*, supra, 320 U.S. at page 93, 63 S.Ct. at page 1382 and see *Home Bldg. & L. Ass'n v. Blaisdell*, 290 U.S. 398, 426, 54 S.Ct. 231, 235, 88 A.L.R. 1481. Therefore, the validity of action under the war power must be judged wholly in the context of*

war. That action is not to be stigmatized as lawless because like action in times of peace would be lawless. To talk about a military order that expresses an allowable judgment of war needs by those entrusted with the duty of conducting war as 'an [323 U.S. 214, 225] unconstitutional order' is to suffuse a part of the Constitution with an atmosphere of unconstitutionality. The respective spheres of action of military authorities and of judges are of course very different. But within their sphere, military authorities are no more outside the bounds of obedience to the Constitution than are judges within theirs. 'The war power of the United States, like its other powers . . . is subject to applicable constitutional limitations', Hamilton v. Kentucky Distilleries, Co., 251 U.S. 146, 156, 40 S.Ct. 106, 108. To recognize that military orders are 'reasonably expedient military precautions' in time of war and yet to deny them constitutional legitimacy makes of the Constitution an instrument for dialectic subtleties not reasonably to be attributed to the hard-headed Framers, of whom a majority had had actual participation in war. If a military order such as that under review does not transcend the means appropriate for conducting war, such action by the military is as constitutional as would be any authorized action by the Interstate Commerce Commission within the limits of the constitutional power to regulate commerce. And being an exercise of the war power explicitly granted by the Constitution for safeguarding the national life by prosecuting war effectively, I find nothing in the Constitution which denies to Congress the power to enforce such a valid military order by making its violation an offense triable in the civil courts. Compare Interstate Commerce Commission v. Brimson, 154 U.S. 447, 14 S.Ct. 1125; Id., 155 U.S. 3, 15 S.Ct. 19, and Monongahela Bridge Co. v. United States, 216 U.S. 177, 30 S.Ct. 356. To find that the Constitution does not forbid the military measures now complained of does not carry with it approval of that which Congress and the Executive did. That is their business, not ours.

Mr. Justice ROBERTS.

I dissent, because I think the indisputable facts exhibit a clear violation of Constitutional rights.

This is not a case of keeping people off the streets at night as was Kiyoshi Hirabayashi v. United States, 320 U.S. 81, 63 S.Ct. 1375, [323 U.S. 214, 226] nor a case of temporary exclusion of a citizen from an area for his own safety or that of the community, nor a case of offering him an opportunity to go temporarily out of an area where his presence might cause danger to himself or to his fellows. On the contrary, it is the case of convicting a citizen as a punishment for not

submitting to imprisonment in a concentration camp, based on his ancestry, and solely because of his ancestry, without evidence or inquiry concerning his loyalty and good disposition towards the United States. If this be a correct statement of the facts disclosed by this record, and facts of which we take judicial notice, I need hardly labor the conclusion that Constitutional rights have been violated.

The Government's argument, and the opinion of the court, in my judgment, erroneously divide that which is single and indivisible and thus make the case appear as if the petitioner violated a Military Order, sanctioned by Act of Congress, which excluded him from his home, by refusing voluntarily to leave and, so, knowingly and intentionally, defying the order and the Act of Congress.

The petitioner, a resident of San Leandro, Alameda County, California, is a native of the United States of Japanese ancestry who, according to the uncontradicted evidence, is a loyal citizen of the nation.

A chronological recitation of events will make it plain that the petitioner's supposed offense did not, in truth, consist in his refusal voluntarily to leave the area which included his home in obedience to the order excluding him therefrom. Critical attention must be given to the dates and sequence of events.

December 8, 1941, the United States declared war on Japan.

February 19, 1942, the President issued Executive Order No. 9066, which, after stating the reason for issuing the [323 U.S. 214, 227] order as 'protection against espionage and against sabotage to national- defense material, national-defense premises, and national-defense utilities', provided that certain Military Commanders might, in their discretion, 'prescribe military areas' and define their extent, 'from which any or all persons may be excluded, and with respect to which, the right of any person to enter, remain in, or leave shall be subject to whatever restrictions' the 'Military Commander may impose in his discretion.'

February 20, 1942, Lieutenant General DeWitt was designated Military Commander of the Western Defense Command embracing the westernmost states of the Union,-about one-fourth of the total area of the nation.

March 2, 1942, General DeWitt promulgated Public Proclamation No. 1, which recites that the entire Pacific Coast is 'particularly subject to attack, to attempted invasion . . . and, in connection

therewith, is subject to espionage and acts of sabotage'. It states that 'as a matter of military necessity' certain military areas and zones are established known as Military Areas Nos. 1 and 2. It adds that 'Such persons or classes of persons as the situation may require' will, by subsequent orders, 'be excluded from all of Military Area No. 1' and from certain zones in Military Area No. 2. Subsequent proclamations were made which, together with Proclamation No. 1, included in such areas and zones all of California, Washington, Oregon, Idaho, Montana, Nevada and Utah, and the southern portion of Arizona. The orders required that if any person of Japanese, German or Italian ancestry residing in Area No. 1 desired to change his habitual residence he must execute and deliver to the authorities a Change of Residence Notice.

San Leandro, the city of petitioner's residence, lies in Military Area No. 1. [323 U.S. 214, 228] On March 2, 1942, the petitioner, therefore, had notice that, by Executive Order, the President, to prevent espionage and sabotage, had authorized the Military to exclude him from certain areas and to prevent his entering or leaving certain areas without permission. He was on notice that his home city had been included, by Military Order, in Area No. 1, and he was on notice further that, at sometime in the future, the Military Commander would make an order for the exclusion of certain persons, not described or classified, from various zones including that in which he lived.

March 21, 1942, Congress enacted that anyone who knowingly 'shall enter, remain in, leave, or commit any act in any military area or military zone prescribed . . . by any military commander . . . contrary to the restrictions applicable to any such area or zone or contrary to the order of . . . any such military commander' shall be guilty of a misdemeanor. This is the Act under which the petitioner was charged.

*March 24, 1942, General DeWitt instituted the curfew for certain areas within his command, by an order the validity of which was sustained in *Hirabayashi v. United States*, supra.*

March 24, 1942, General DeWitt began to issue a series of exclusion orders relating to specified areas.

March 27, 1942, by Proclamation No. 4, the General recited that 'it is necessary, in order to provide for the welfare and to insure the orderly evacuation and resettlement of Japanese voluntarily migrating from Military Area No. 1 to restrict and regulate such migration'; and ordered that, as of March 29, 1942, 'all alien Japanese and persons of Japanese ancestry who are within the limits of Military Area No. 1, be and they are hereby [323 U.S. 214, 229] prohibited from

leaving that area for any purpose until and to the extent that a future proclamation or order of this headquarters shall so permit or direct.'

No order had been made excluding the petitioner from the area in which he lived. By Proclamation No. 4 he was, after March 29, 1942, confined to the limits of Area No. 1. If the Executive Order No. 9066 and the Act of Congress meant what they said, to leave that area, in the face of Proclamation No. 4, would be to commit a misdemeanor.

May 3, 1942, General DeWitt issued Civilian Exclusion Order No. 34 providing that, after 12 o'clock May 8, 1942, all persons of Japanese ancestry, both alien and non-alien, were to be excluded from a described portion of Military Area No. 1, which included the County of Alameda, California. The order required a responsible member of each family and each individual living alone to report, at a time set, at a Civil Control Station for instructions to go to an Assembly Center, and added that any person failing to comply with the provisions of the order who was found in the described area after the date set would be liable to prosecution under the Act of March 21, 1942, supra. It is important to note that the order, by its express terms, had no application to persons within the bounds 'of an established Assembly Center pursuant to instructions from this Headquarters' The obvious purpose of the orders made, taken together, was to drive all citizens of Japanese ancestry into Assembly Centers within the zones of their residence, under pain of criminal prosecution. [323 U.S. 214, 230] The predicament in which the petitioner thus found himself was this: He was forbidden, by Military Order, to leave the zone in which he lived; he was forbidden, by Military Order, after a date fixed, to be found within that zone unless he were in an Assembly Center located in that zone. General DeWitt's report to the Secretary of War concerning the programme of evacuation and relocation of Japanese makes it entirely clear, if it were necessary to refer to that document,-and, in the light of the above recitation, I think it is not,-that an Assembly Center was a euphemism for a prison. No person within such a center was permitted to leave except by Military Order.

In the dilemma that he dare not remain in his home, or voluntarily leave the area, without incurring criminal penalties, and that the only way he could avoid punishment was to go to an Assembly Center and submit himself to military imprisonment, the petitioner did nothing.

June 12, 1942, an Information was filed in the District Court for Northern California charging a violation of the Act of March 21, 1942, in that petitioner had knowingly remained within the

area covered by Exclusion Order No. 34. A demurrer to the information having been overruled, the petitioner was tried under a plea of not guilty and convicted. Sentence was suspended and he was placed on probation for five years. We know, however, in the light of the foregoing recitation, that he was at once taken into military custody and lodged in an Assembly Center. We further know that, on March 18, 1942, the President had promulgated Executive Order No. 9102 establishing the War Relocation Authority under which so-called Relocation Centers, a euphemism for concentration camps, were established pursuant to cooperation between the military authorities of the Western Defense Command and the Relocation Authority, and that the petitioner has [323 U.S. 214, 231] been confined either in an Assembly Center, within the zone in which he had lived or has been removed to a Relocation Center where, as the facts disclosed in *Ex parte Mitsuye Endo*, 323 U.S. 283, 65 S.Ct. 208, demonstrate, he was illegally held in custody.

The Government has argued this case as if the only order outstanding at the time the petitioner was arrested and informed against was Exclusion Order No. 34 ordering him to leave the area in which he resided, which was the basis of the information against him. That argument has evidently been effective. The opinion refers to the *Hirabayashi* case, *supra*, to show that this court has sustained the validity of a curfew order in an emergency. The argument then is that exclusion from a given area of danger, while somewhat more sweeping than a curfew regulation, is of the same nature, -a temporary expedient made necessary by a sudden emergency. This, I think, is a substitution of an hypothetical case for the case actually before the court. I might agree with the court's disposition of the hypothetical case. The liberty of every American citizen freely to come and to go must frequently, in the face of sudden danger, be temporarily limited or suspended. The civil authorities must often resort to the expedient of excluding citizens temporarily from a locality. The drawing of fire lines in the case of a conflagration, the removal of persons from the area where a pestilence has broken out, are familiar examples. If the exclusion worked by Exclusion Order No. 34 were of that nature the *Hirabayashi* case would be authority for sustaining it. [323 U.S. 214, 232] But the facts above recited, and those set forth in *Ex parte Mitsuye Endo*, *supra*, show that the exclusion was but a part of an over-all plan for forceable detention. This case cannot, therefore, be decided on any such narrow ground as the possible

validity of a Temporary Exclusion Order under which the residents of an area are given an opportunity to leave and go elsewhere in their native land outside the boundaries of a military area. To make the case turn on any such assumption is to shut our eyes to reality.

As I have said above, the petitioner, prior to his arrest, was faced with two diametrically contradictory orders given sanction by the Act of Congress of March 21, 1942. The earlier of those orders made him a criminal if he left the zone in which he resided; the later made him a criminal if he did not leave.

I had supposed that if a citizen was constrained by two laws, or two orders having the force of law, and obedience to one would violate the other, to punish him for violation of either would deny him due process of law. And I had supposed that under these circumstances a conviction for violating one of the orders could not stand.

We cannot shut our eyes to the fact that had the petitioner attempted to violate Proclamation No. 4 and leave the military area in which he lived he would have been arrested and tried and convicted for violation of Proclamation No. 4. The two conflicting orders, one which commanded him to stay and the other which commanded him to go, were nothing but a cleverly devised trap to accomplish the real purpose of the military authority, which was to lock him up in a concentration camp. The only course by which the petitioner could avoid arrest and prosecution was to go to that camp according to instructions to be given him when he reported at a Civil Control Center. We know that is the fact. Why should we set up a figmentary and artificial situation instead of addressing ourselves to the actualities of the case? [323 U.S. 214, 233] These stark realities are met by the suggestion that it is lawful to compel an American citizen to submit to illegal imprisonment on the assumption that he might, after going to the Assembly Center, apply for his discharge by suing out a writ of habeas corpus, as was done in the Endo case, supra. The answer, of course, is that where he was subject to two conflicting laws he was not bound, in order to escape violation of one of the other, to surrender his liberty for any period. Nor will it do to say that the detention was a necessary part of the process of evacuation, and so we are here concerned only with the validity of the latter.

Again it is a new doctrine of constitutional law that one indicted for disobedience to an unconstitutional statute may not defend on the ground of the invalidity of the statute but must obey it though he knows it is no law and, after he has suffered the disgrace of conviction and lost his

liberty by sentence, then, and not before, seek, from within prison walls, to test the validity of the law.

Moreover, it is beside the point to rest decision in part on the fact that the petitioner, for his own reasons, wished to remain in his home. If, as is the fact he was constrained so to do, it is indeed a narrow application of constitutional rights to ignore the order which constrained him, in order to sustain his conviction for violation of another contradictory order.

I would reverse the judgment of conviction.

Mr. Justice MURPHY, dissenting.

This exclusion of 'all persons of Japanese ancestry, both alien and non-alien,' from the Pacific Coast area on a plea of military necessity in the absence of martial law ought not to be approved. Such exclusion goes over 'the very brink of constitutional power' and falls into the ugly abyss of racism.

In dealing with matters relating to the prosecution and progress of a war, we must accord great respect and consideration [323 U.S. 214, 234] to the judgments of the military authorities who are on the scene and who have full knowledge of the military facts. The scope of their discretion must, as a matter of necessity and common sense, be wide. And their judgments ought not to be overruled lightly by those whose training and duties ill-equip them to deal intelligently with matters so vital to the physical security of the nation.

*At the same time, however, it is essential that there be definite limits to military discretion, especially where martial law has not been declared. Individuals must not be left impoverished of their constitutional rights on a plea of military necessity that has neither substance nor support. Thus, like other claims conflicting with the asserted constitutional rights of the individual, the military claim must subject itself to the judicial process of having its reasonableness determined and its conflicts with other interests reconciled. 'What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions.' *Sterling v. Constantin*, 287 U.S. 328, 401, 53 S.Ct. 190, 196.*

The judicial test of whether the Government, on a plea of military necessity, can validly deprive an individual of any of his constitutional rights is whether the deprivation is reasonably related to a public danger that is so 'immediate, imminent, and impending' as not to admit of

delay and not to permit the intervention of ordinary constitutional processes to alleviate the danger. United States v. Russell, 13 Wall. 623, 627, 628; Mitchell v. Harmony, 13 How. 115, 134, 135; Raymond v. Thomas, 91 U.S. 712, 716. Civilian Exclusion Order No. 34, banishing from a prescribed area of the Pacific Coast 'all persons of Japanese ancestry, both alien and non-alien,' clearly does not meet that test. Being an obvious racial discrimination, the [323 U.S. 214, 235] order deprives all those within its scope of the equal protection of the laws as guaranteed by the Fifth Amendment. It further deprives these individuals of their constitutional rights to live and work where they will, to establish a home where they choose and to move about freely. In excommunicating them without benefit of hearings, this order also deprives them of all their constitutional rights to procedural due process. Yet no reasonable relation to an 'immediate, imminent, and impending' public danger is evident to support this racial restriction which is one of the most sweeping and complete deprivations of constitutional rights in the history of this nation in the absence of martial law.

It must be conceded that the military and naval situation in the spring of 1942 was such as to generate a very real fear of invasion of the Pacific Coast, accompanied by fears of sabotage and espionage in that area. The military command was therefore justified in adopting all reasonable means necessary to combat these dangers. In adjudging the military action taken in light of the then apparent dangers, we must not erect too high or too meticulous standards; it is necessary only that the action have some reasonable relation to the removal of the dangers of invasion, sabotage and espionage. But the exclusion, either temporarily or permanently, of all persons with Japanese blood in their veins has no such reasonable relation. And that relation is lacking because the exclusion order necessarily must rely for its reasonableness upon the assumption that all persons of Japanese ancestry may have a dangerous tendency to commit sabotage and espionage and to aid our Japanese enemy in other ways. It is difficult to believe that reason, logic or experience could be marshaled in support of such an assumption.

That this forced exclusion was the result in good measure of this erroneous assumption of racial guilt rather than [323 U.S. 214, 236] bona fide military necessity is evidenced by the Commanding General's Final Report on the evacuation from the Pacific Coast area. In it he refers to all individuals of Japanese descent as 'subversive,' as belonging to 'an enemy race' whose 'racial strains are undiluted,' and as constituting 'over 112,000 potential enemies ... at

large today' along the Pacific Coast. In support of this blanket condemnation of all persons of Japanese descent, however, no reliable evidence is cited to show that such individuals were generally disloyal, or had generally so conducted themselves in this area as to constitute a special menace to defense installations or war industries, or had otherwise by their behavior furnished reasonable ground for their exclusion as a group.

Justification for the exclusion is sought, instead, mainly upon questionable racial and sociological grounds not [323 U.S. 214, 237] ordinarily within the realm of expert military judgment, supplemented by certain semi-military conclusions drawn from an unwarranted use of circumstantial evidence. Individuals of Japanese ancestry are condemned because they are said to be 'a large, unassimilated, tightly knit racial group, bound to an enemy nation by strong ties of race, culture, custom and religion.' They are claimed to be given to 'emperor worshipping ceremonies' and to 'dual citizenship.' Japanese language schools and allegedly pro-Japanese organizations are cited as evidence of possible group disloyalty, together with facts as to [323 U.S. 214, 238] certain persons being educated and residing at length in Japan. It is intimated that many of these individuals deliberately resided 'adjacent to strategic points,' thus enabling them 'to carry into execution a tremendous program of sabotage on a mass scale should any considerable number of them have been inclined to do so.' The need for protective custody is also asserted. The report refers without identity to 'numerous incidents of violence' as well as to other admittedly unverified or cumulative incidents. From this, plus certain other events not shown to have been connected with the Japanese Americans, it is concluded that the 'situation was fraught with danger to the Japanese population itself' and that the general public 'was ready to take matters into its own hands.' Finally, it is intimated, though not directly [323 U.S. 214, 239] charged or proved, that persons of Japanese ancestry were responsible for three minor isolated shellings and bombings of the Pacific Coast area, as well as for unidentified radio transmissions and night signaling.

The main reasons relied upon by those responsible for the forced evacuation, therefore, do not prove a reasonable relation between the group characteristics of Japanese Americans and the dangers of invasion, sabotage and espionage. The reasons appear, instead, to be largely an accumulation of much of the misinformation, half-truths and insinuations that for years have been directed against Japanese Americans by people with racial and economic prejudices-the same people who have been among the foremost advocates of the evacuation. A military judgment

[323 U.S. 214, 240] based upon such racial and sociological considerations is not entitled to the great weight ordinarily given the judgments based upon strictly military considerations. Especially is this so when every charge relative to race, religion, culture, geographical location, and legal and economic status has been substantially discredited by independent studies made by experts in these matters.

The military necessity which is essential to the validity of the evacuation order thus resolves itself into a few intimations that certain individuals actively aided the enemy, from which it is inferred that the entire group of Japanese Americans could not be trusted to be or remain loyal to the United States. No one denies, of course, that there were some disloyal persons of Japanese descent on the Pacific Coast who did all in their power to aid their ancestral land. Similar disloyal activities have been engaged in by many persons of German, Italian and even more pioneer stock in our country. But to infer that examples of individual disloyalty prove group disloyalty and justify discriminatory action against the entire group is to deny that under our system of law individual guilt is the sole basis for deprivation of rights. Moreover, this inference, which is at the very heart of the evacuation orders, has been used in support of the abhorrent and despicable treatment of minority groups by the dictatorial tyrannies which this nation is now pledged to destroy. To give constitutional sanction to that inference in this case, however well-intentioned may have been the military command on the Pacific Coast, is to adopt one of the cruelest of the rationales used by our enemies to destroy the dignity of the individual and to encourage and open the door to discriminatory actions against other minority groups in the passions of tomorrow. [323 U.S. 214, 241] No adequate reason is given for the failure to treat these Japanese Americans on an individual basis by holding investigations and hearings to separate the loyal from the disloyal, as was done in the case of persons of German and Italian ancestry. See House Report No. 2124 (77th Cong., 2d Sess.) 247-52. It is asserted merely that the loyalties of this group 'were unknown and time was of the essence.' Yet nearly four months elapsed after Pearl Harbor before the first exclusion order was issued; nearly eight months went by until the last order was issued; and the last of these 'subversive' persons was not actually removed until almost eleven months had elapsed. Leisure and deliberation seem to have been more of the essence than speed. And the fact that conditions were not such as to warrant a declaration of martial law adds strength to the belief that the factors of time and military necessity were not as urgent as they have been

represented to be.

Moreover, there was no adequate proof that the Federal Bureau of Investigation and the military and naval intelligence services did not have the espionage and sabotage situation well in hand during this long period. Nor is there any denial of the fact that not one person of Japanese ancestry was accused or convicted of espionage or sabotage after Pearl Harbor while they were still free, a fact which is some evidence of the loyalty of the vast majority of these individuals and of the effectiveness of the established methods of combating these evils. It [323 U.S. 214, 242] seems incredible that under these circumstances it would have been impossible to hold loyalty hearings for the mere 112,000 persons involved- or at least for the 70,000 American citizens- especially when a large part of this number represented children and elderly men and women. Any inconvenience that may have accompanied an attempt to conform to procedural due process cannot be said to justify violations of constitutional rights of individuals.

I dissent, therefore, from this legalization of racism. Racial discrimination in any form and in any degree has no justifiable part whatever in our democratic way of life. It is unattractive in any setting but it is utterly revolting among a free people who have embraced the principles set forth in the Constitution of the United States. All residents of this nation are kin in some way by blood or culture to a foreign land. Yet they are primarily and necessarily a part of the new and distinct civilization of the United States. They must accordingly be treated at all times as the heirs of the American experiment and as entitled to all the rights and freedoms guaranteed by the Constitution.

Mr. Justice JACKSON, dissenting.

Korematsu was born on our soil, of parents born in Japan. The Constitution makes him a citizen of the United States by nativity and a citizen of California by [323 U.S. 214, 243] residence. No claim is made that he is not loyal to this country. There is no suggestion that apart from the matter involved here he is not law-abiding and well disposed. Korematsu, however, has been convicted of an act not commonly a crime. It consists merely of being present in the state whereof he is a citizen, near the place where he was born, and where all his life he has lived.

Even more unusual is the series of military orders which made this conduct a crime. They forbid such a one to remain, and they also forbid him to leave. They were so drawn that the only way Korematsu could avoid violation was to give himself up to the military authority. This

meant submission to custody, examination, and transportation out of the territory, to be followed by indeterminate confinement in detention camps.

A citizen's presence in the locality, however, was made a crime only if his parents were of Japanese birth. Had Korematsu been one of four-the others being, say, a German alien enemy, an Italian alien enemy, and a citizen of American-born ancestors, convicted of treason but out on parole- only Korematsu's presence would have violated the order. The difference between their innocence and his crime would result, not from anything he did, said, or thought, different than they, but only in that he was born of different racial stock.

Now, if any fundamental assumption underlies our system, it is that guilt is personal and not inheritable. Even if all of one's antecedents had been convicted of treason, the Constitution forbids its penalties to be visited upon him, for it provides that 'no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attained.' Article 3, 3, cl. 2. But here is an attempt to make an otherwise innocent act a crime merely because this prisoner is the son of parents as to whom he had no choice, and belongs to a race from which there is no way to resign. If Congress in peace-time legislation should [323 U.S. 214, 244] enact such a criminal law, I should suppose this Court would refuse to enforce it.

But the 'law' which this prisoner is convicted of disregarding is not found in an act of Congress, but in a military order. Neither the Act of Congress nor the Executive Order of the President, nor both together, would afford a basis for this conviction. It rests on the orders of General DeWitt. And it is said that if the military commander had reasonable military grounds for promulgating the orders, they are constitutional and become law, and the Court is required to enforce them. There are several reasons why I cannot subscribe to this doctrine.

It would be impracticable and dangerous idealism to expect or insist that each specific military command in an area of probable operations will conform to conventional tests of constitutionality. When an area is so beset that it must be put under military control at all, the paramount consideration is that its measures be successful, rather than legal. The armed services must protect a society, not merely its Constitution. The very essence of the military job is to marshal physical force, to remove every obstacle to its effectiveness, to give it every strategic advantage. Defense measures will not, and often should not, be held within the limits that bind civil authority in peace. No court can require such a commander in such circumstances to act as a reasonable

man; he may be unreasonably cautious and exacting. Perhaps he should be. But a commander in temporarily focusing the life of a community on defense is carrying out a military program; he is not making law in the sense the courts know the term. He issues orders, and they may have a certain authority as military commands, although they may be very bad as constitutional law.

But if we cannot confine military expedients by the Constitution, neither would I distort the Constitution to approve all that the military may deem expedient. This is [323 U.S. 214, 245] what the Court appears to be doing, whether consciously or not. I cannot say, from any evidence before me, that the orders of General DeWitt were not reasonably expedient military precautions, nor could I say that they were. But even if they were permissible military procedures, I deny that it follows that they are constitutional. If, as the Court holds, it does follow, then we may as well say that any military order will be constitutional and have done with it.

The limitation under which courts always will labor in examining the necessity for a military order are illustrated by this case. How does the Court know that these orders have a reasonable basis in necessity? No evidence whatever on that subject has been taken by this or any other court. There is sharp controversy as to the credibility of the DeWitt report. So the Court, having no real evidence before it, has no choice but to accept General DeWitt's own unsworn, self-serving statement, untested by any cross-examination, that what he did was reasonable. And thus it will always be when courts try to look into the reasonableness of a military order.

In the very nature of things military decisions are not susceptible of intelligent judicial appraisal. They do not pretend to rest on evidence, but are made on information that often would not be admissible and on assumptions that could not be proved. Information in support of an order could not be disclosed to courts without danger that it would reach the enemy. Neither can courts act on communications made in confidence. Hence courts can never have any real alternative to accepting the mere declaration of the authority that issued the order that it was reasonably necessary from a military viewpoint.

Much is said of the danger to liberty from the Army program for deporting and detaining these citizens of Japanese extraction. But a judicial construction of the due process clause that will sustain this order is a far more [323 U.S. 214, 246] subtle blow to liberty than the promulgation of the order itself. A military order, however unconstitutional, is not apt to last longer than the military emergency. Even during that period a succeeding commander may revoke it all. But

once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need. Every repetition embeds that principle more deeply in our law and thinking and expands it to new purposes. All who observe the work of courts are familiar with what Judge Cardozo described as 'the tendency of a principle to expand itself to the limit of its logic.' A military commander may overstep the bounds of constitutionality, and it is an incident. But if we review and approve, that passing incident becomes the doctrine of the Constitution. There it has a generative power of its own, and all that it creates will be in its own image. Nothing better illustrates this danger than does the Court's opinion in this case.

*It argues that we are bound to uphold the conviction of Korematsu because we upheld one in *Kiyshi Hirabayashi v. United States*, 320 U.S. 81, 63 S.Ct. 1375, when we sustained these orders in so far as they applied a curfew requirement to a citizen of Japanese ancestry. I think we should learn something from that experience.*

In that case we were urged to consider only that curfew feature, that being all that technically was involved, because it was the only count necessary to sustain Hirabayashi's conviction and sentence. We yielded, and the Chief Justice guarded the opinion as carefully as language [323 U.S. 214, 247] will do. He said: 'Our investigation here does not go beyond the inquiry whether, in the light of all the relevant circumstances preceding and attending their promulgation, the challenged orders and statute afforded a reasonable basis for the action taken in imposing the curfew.' 320 U.S. at page 101, 63 S.Ct. at page 1386. 'We decide only the issue as we have defined it—we decide only that the curfew order as applied, and at the time it was applied, was within the boundaries of the war power.' 320 U.S. at page 102, 63 S.Ct. at page 1386. And again: 'It is unnecessary to consider whether or to what extent such findings would support orders differing from the curfew order.' 320 U.S. at page 105, 63 S.Ct. at page 1387. (Italics supplied.) However, in spite of our limiting words we did validate a discrimination of the basis of ancestry for mild and temporary deprivation of liberty. Now the principle of racial discrimination is pushed from support of mild measures to very harsh ones, and from temporary deprivations

to indeterminate ones. And the precedent which it is said requires us to do so is Hirabayashi. The Court is now saying that in Hirabayashi we did decide the very things we there said we were not deciding. Because we said that these citizens could be made to stay in their homes during the hours of dark, it is said we must require them to leave home entirely; and if that, we are told they may also be taken into custody for deportation; and if that, it is argued they may also be held for some undetermined time in detention camps. How far the principle of this case would be extended before plausible reasons would play out, I do not know.

I should hold that a civil court cannot be made to enforce an order which violates constitutional limitations even if it is a reasonable exercise of military authority. The courts can exercise only the judicial power, can apply only law, and must abide by the Constitution, or they cease to be civil courts and become instruments of military policy. [323 U.S. 214, 248] Of course the existence of a military power resting on force, so vagrant, so centralized, so necessarily heedless of the individual, is an inherent threat to liberty. But I would not lead people to rely on this Court for a review that seems to me wholly delusive. The military reasonableness of these orders can only be determined by military superiors. If the people ever let command of the war power fall into irresponsible and unscrupulous hands, the courts wield no power equal to its restraint. The chief restraint upon those who command the physical forces of the country, in the future as in the past, must be their responsibility to the political judgments of their contemporaries and to the moral judgments of history.

My duties as a justice as I see them do not require me to make a military judgment as to whether General DeWitt's evacuation and detention program was a reasonable military necessity. I do not suggest that the courts should have attempted to interfere with the Army in carrying out its task. But I do not think they may be asked to execute a military expedient that has no place in law under the Constitution. I would reverse the judgment and discharge the prisoner.

Chapter 17

Discussion: Korematsu v. United States

Professor: Mr Stuart. Could you please state the facts of the case.

Student: On March 21, 1942, Congress passed an Act that allowed for the lawful exclusion of individuals from designated military zones. One such zone was designated for all individuals of Japanese ancestry. Mr. Korematsu violated this provision and was prosecuted in Federal District Court for the violation.

Professor: What was Mr. Korematsu's nationality.

Student: He was an American citizen.

Professor: Why did Congress pass this act?

Student: To protect against possible sabotage.

Professor: Was Mr. Korematsu suspected of sabotage?

Student: No. His loyalty was never questioned. That was made part of the record.

Professor: So an American citizen who was never suspected of sabotage was nevertheless convicted for being Japanese at the wrong place and time on the basis of an anti-sabotage law. What happened after Mr. Korematsu was convicted?

Student: He appealed his conviction to the Circuit Court of Appeals. They confirmed his conviction. He appealed that decision to the Supreme Court.

Professor: What was his basic argument?

Student: That the combined orders being issued amounted to imprisoning an American citizen in a concentration camp on the basis of race alone without an investigation ever being made.

Professor: What was the Court's disposition regarding singling out a specific race for special legal restrictions?

Student: They said it was immediately suspect?

Professor: Does that make it impossible?

Student: No. It can still be justified on the basis of pressing public necessity.

Professor: Was this one of those times?

Student: The military felt that it was and the Court sided with the military.

Professor: Was this the first time such necessity was recognized?

Student: No. They had used the same reasoning in a previous case to justify mandatory curfews for Japanese people. They extended that reasoning here to justify exclusion.

Professor: And where were these Japanese individuals excluded from?

Student: Parts of the West Coast.

Professor: That's right. Not just a military base or a shipyard but whole geographic areas. Now we know where these individuals were excluded from, please tell the class where they were excluded to?

Student: They were to relocate to designated assembly areas.

Professor: What did the Court call this relocation?

Student: An evacuation.

Professor: Evacuated to detention centers. Not your standard evacuation is it? What did the Court call the evacuation camps?

Student: They called them relocation centers. They objected to the term concentration camp. Apparently concentration camp was too ugly since it suggest racial prejudice.

Professor: Does the Court say what would have happened if Mr. Korematsu had reported to a concentration camp and then escaped?

Student: No. They specifically say they are not going to discuss that.

Professor: So what does the Court want this case to be about?

Student: They would like it to be a case about military necessity. The military felt there were disloyal Japanese and they needed to be excluded from the West Coast.

Professor: So what did the Court do?

Student: They affirmed the conviction.

Professor: Let's move on to the dissent by Justice Roberts. What was his argument?

Student: He claimed the entire measure was unconstitutional on the basis of the facts. That it was the illegal imprisonment of an American never suspected of espionage or sabotage done purely on the basis of race. Korematsu was placed in a predicament by a series of orders that forced him to either report for imprisonment or stay illegally in his home. Korematsu stayed home.

Professor: What happened then?

Student: They discovered him and convicted him for violating the exclusion order.

Professor: What was his sentence?

Student: He was placed on probation, but then he was taken by the military to an assembly center and then concentration camp.

Professor: What is the effect of convicting him, giving him probation, and then taking him away anyway.

Student: It is an illegal imprisonment.

Professor: What distinction does Robert draw that the Court seems to have overlooked?

Student: Roberts points out that while the curfew and even the exclusion order may have been constitutional by themselves due to necessity, the other part that the Court overlooks is that a second order prohibited people of Japanese ancestry from moving away. They can't just move to a non-restricted area because there is another order in place trapping them within the zone. The only place they can legally go to is an assembly area from which they are not allowed to leave. The whole thing was a setup to put people in concentration camps.

Professor: What about the dissent by Justice Murphy?

Student: He flat out calls it racism. He also argues that while the military should get a lot of deference, that doesn't give them the right to rob people of their constitutional rights for reasons without any basis.

Professor: What rights specifically?

Student: Focusing just on persons of Japanese ancestry violates their rights to Equal Protection under the Fifth Amendment, and doing so without a hearing violates their Due Process rights.

Professor: Finally someone says it. Isn't it interesting that it took this long for someone sitting on the Supreme Court to mention the terms 'Equal Protection' and 'Due Process.' Go on.

Student: Murphy also references a specific test for when it is permissible to deprive someone of constitutional rights on the basis of military necessity.

Professor: What is that test?

Student: 'Whether the deprivation is reasonably related to a public danger that is so 'immediate, imminent, and impending' as not to admit of delay and not to permit the intervention of ordinary constitutional processes to alleviate the danger.' From *United States v Russell*.

Professor: So now we have constitutional rights and a test to determine when they can be violated.

And according to Murphy, does this situation meet the test?

Student: No. It's just blanket racism.

Professor: What about Justice Jackson's dissent? What does he have to say?

Student: He points out that if Korematsu had been born Italian, German, or of an American traitor, he would not have been covered by this order. It was just his ancestry that mattered. Guilt by ancestry is illegal and would not be enforceable in peace-time. Moreover, the law being enforced was created by a General, not by an Act of Congress or an Executive Order and that if this military order is enforceable on the basis of military expedient, then the Court might as well say that any military order is. Basically, he worries that giving such an order constitutional support is far more worrisome than the order itself.

Professor: Which means what?

Student: It validates racial discrimination and creates a precedent that subsequent Court decisions are more likely to expand. Jackson points out that this has already happened. That the Court is using a prior case, which allowed the curfew of Japanese on the basis of military necessity, to be expanded into a ruling allowing wholesale removal of Japanese individuals for military necessity. It's a slippery slope argument.

Professor: And Mr. Korematsu—what happened to him?

Student: His conviction stood, as did his imprisonment.

Chapter 18

A Fictional Court Day

Note: This chapter is a fictional composite based on my years of practicing law.

Today is court day. Your court day to be exact. You need to be inside, but instead you find yourself standing in a long line of shuffling humanity slowly making its way forward through the courthouse's metal detectors.

You hadn't counted on there being metal detectors, but in retrospect, they make perfect sense. You are surrounded by people who are probably criminals. A small percentage are almost certainly violent offenders: the sort of individual that employs violence the way you utilize your word processor—as a tool of their trade. This is your first time in a courthouse, any courthouse, and you suddenly realize just how unprepared you are for this experience.

What do you do? How should act? You gaze around at the other people in line and immediately notice their clothes. Only a few are dressed like you: clean cut, carefully groomed, and wearing suit. A few more would qualify for business casual, but not many. More than a few look like they are going to ride an inner tube down a river next to a floating cooler of beer. Many are flat out scary looking, conforming to virtually every stereotype you've tried to repress. They look like criminals.

You look back at your clothes and realize suddenly how much you stand out wearing a suit. Several confident looking people also wearing suits stroll past the line and breeze around security like VIP's, flashing badges as they go. Lawyers obviously. Apparently, waiting in line is for other people. This is your first taste of the double world you are about to enter: one for citizens and another reserved for courthouse personnel.

As the line crawls forward, you wonder if one of those suits is your attorney. The two of you have never met. In fact, you have never even spoken to her. A small part of you worries about how she will even find you in the mix of the crowd, but her secretary promised it would all be handled. That promise

had sounded reasonable enough a few days ago, back when today was still far enough away that all you wanted to do was avoid thinking about it. But things look different now. You never thought it would be this crowded. How could two strangers possible find another amidst all these people. This thought is still on your mind as you empty your pockets and pass through the metal detectors, only to realize that you have an even bigger problem on your hands: you have no idea where to go.

Lost from the start, you plunge forward following the crowd. You know no one. You recognize nothing. Everything looks cold and slightly authoritarian. All around you, people are checking numbers above doorways and jostling one another to get a look at printouts someone has attached to the walls. Sometimes they go inside the room after checking the paper; other times, the person shrugs and moves on. Clueless, you copy their actions, becoming a consumer of other peoples' behavior.

The paper is an alphabetical list of names. Each name has a criminal charge listed next to it. Some names are repeated several times with a different charge each time. It's an attendance sheet. Now you understand. You must find the attendance sheet with your name on it. You find the page where your name ought to be, but you aren't on it. You check again, but then realize that all the charges seem to involve driving. You aren't here for a driving offense. Your courtroom must be somewhere else.

Stepping aside, you wander further down the hallway, oblivious to the fact that other, equally clueless, people who passed through security behind you have just witnessed your actions and are now copying you. They check the papers on the wall, following your lead, just as you followed someone else's. Without even realizing it, you have become a producer of behavior too.

Loud and chaotic, the hallways take you back to the chaos of high school. Tight and crowded, it feels the way changing classes used to feel back then, right down to the unimaginative, utilitarian architecture. Forget feeding the soul; this place was designed for longevity. Your search also gives you a moment to remember all those conversations you had with friends about the unnecessary loopholes in the legal system and the lamentable trend within society to forget about justice and coddle criminals instead. That had always made you angry in the past, but today a new feeling washes over you. Gone are your concerns for punishing wrongdoers and extracting justice. In fact, the more you walk down that hallway, the colder and more inhumane justice appears. Justice should be for other people. You want mercy.

That thought is still reverberating in your head as you reach a new courtroom and flip through another set of papers. This time you find your name, and there beside it is the offense you were charged with. This must be the place. Pushing through the heavy wooden doors of the courtroom, you enter to find the room

still mostly empty.

Your first impression is that the courtroom looks like a Church. It funnels all attention to the front and center where something that looks a lot like a throne dominates the surrounding furniture. A lifetime of watching television leaves no doubt that this is where the judge sits. The two rows of the jury box are obvious too. There are cushions in the jury box, but none in the pews where you have to sit. Those are made of wood and hard.

You walk forward as far as you can until someone who looks like a police officer orders you to go back. You try to ask a question, but he ignores you, and then repeats his order, his voice growing less tolerant by the syllable. Turning, you trudge back and find a seat. Your rear-end begins to hurt almost immediately.

Minutes pass as the courtroom fills up. Just like in Church, you are repeatedly forced to shrink into your pew as strangers stumble over in their quest for a place to sit down. People talk. Some seem to know each other. Others are making friends. A constant murmur fills the room, punctuated now and again by the sound of babies crying. You didn't expect that either. It seems wrong to bring a baby into this place.

Up at the front of the room, beyond where the bailiff made you stop, those confident looking, fast-walking people in business suits walk, chatting with one another and occasionally laughing. Some carry manila folders. Others seem to have brief cases. Several are women, and you wonder if one of them is your lawyer.

Police officers also begin to file in until they fill up the jury box, doing their best to look relaxed, or at least, as relaxed as someone can look encased in body armor and a batman utility belt. They make their own space, away from the lawyers. Occasionally, a lawyer will break away from the pack long enough to go ask a police officer some questions, but they look too formal for the conversation to be social. Whatever they happen to be saying, it's just business. Lawyers and police: two separate tribes forced into close proximity, and nothing more.

After a moment, another lawyer walks in and introduces himself to the crowd as the assistant district attorney for your courtroom. Up to then, you didn't realize the district attorney even had assistants, though in retrospect, there must be a lot of them—at least one for every courtroom handling criminal matters. The ADA announces that he will begin reading off the docket of names. He instructs the audience to “answer up” with special responses so he will know how to handle each individual's case.

He then races through the list of answers at auctioneer speeds: state whether you have an attorney or

wish to have one appointed, are requesting a continuance, are a victim or witness, intend to plead guilty or intend to plead not guilty. The DA rattles this list off so quickly that you lose track of what some of the options are. Nor do you understand all of them. What is a continuance? How do you qualify to have a court appointed attorney, assuming you want one. One thing is for sure, the ADA isn't there to answer questions.

“Christine Adams,” he calls out.

“Not guilty,” a woman shouts from the back of the room. The DA makes a quick note in the docket and continues on.

“Steven Adams.”

“Continuance,” a man says from nearby. Again, the DA writes something down. More names follow in alphabetical order, and you realize that his list is just like the ones outside the courtroom. It all proceeds very smoothly. Then he calls out a name and no one answers. You hold your breath the first time, curious to see what the DA will do, but his reaction is just the same: a quick mark on the docket and on to the next name.

The whole affair strikes you as bizarre: the oddly cooperative audience doing its best to aid the man sent there to prosecute them. It happens very fast, partly because the prosecutor obviously knows what he is doing, but also because a great many of your peers in the audience have just as obviously been through this process before.

Then something weird happens. Someone answers up with a reply the prosecutor never supplied. Instead of saying “guilty” as instructed, he says “guilty with an explanation” instead. The prosecutor corrects him, but then another person does it, and then another, and this time it is the prosecutor who goes along. He gives in to the crowd and stops correcting people. Suddenly, every guilty plea becomes “guilty with an explanation” as the audience collectively changes the procedure.

When your time comes, you answer up by saying that you have an attorney. The DA asks who and you shout her name. He nods in recognition and makes a note. He knows her. You wish you could say the same.

The DA finishes a few minutes later and everyone goes back to chatting, although now you notice more movement at the front of the room. The lawyers have begun queuing up to talk with the DA who has taken up residence at one of the two tables before the judge's bench. Some of the attorneys must know the DA well—there are smiles all around.

Others look uneasy. After a bit of this, a bailiff suddenly commands “All rise” and then burns through the call to court. You can’t catch all of it, but it sounds something like “Oyez, Oyez, Oyez. This honorable court is now open and sitting for the dispatch of its business. God save the state and this honorable court.” Nobody sits.

Again, just like Church, a man in black robes comes in. He sits down at the main chair and gives permission for everyone to sit. Almost at once, the DA begins calling out people’s names and the thought comes to you: this is court. Court is in session. You wait to hear the Adams name from earlier in the morning, but apparently alphabetical ordering is optional now. The first name starts with an ‘S,’ which seems strange until you see the lawyer closest to the DA gesture for the person to come forward.

The person never speaks. Only the lawyer speaks. He says something about a continuance. The DA gives a date, the judge nods, and the DA calls out another name. This name too appears to be represented by the next lawyer in line. Name after name gets called and all correspond to the lawyers’ clients, providing a small, but powerful display of the difference lawyers make in court. They get to go first.

Periodically, a lawyer will walk down one side of the courtroom and call out someone’s name. The person then stumbles out of their row and marches out of the room with their attorney, coming back later. After a while, a woman appears with a bunch of manila folders and calls out your name. You look around to make sure no one else stands up and then raise your hand.

“Meet me in the hallway,” she calls out and strides commandingly towards the rear of the courtroom without a backward glance, leaving you alone to climb over the people in your row. You follow her out into the hallway. Once there, she introduces herself as your lawyer and starts asking things. She fires through a quick list of questions about what happened and you answer as best you can, realizing as you do that the speed you keep witnessing is probably the product of repetition. These aren’t fresh questions coming your way. She has done this many times before and will do this many times again.

“Alright,” she says after grilling you for another few minutes. “I’ve got some things I need to take care of in another courtroom, but I’ll be back soon. Sit tight.”

Then she’s gone. Shrugging, you wander back into the courtroom and start wondering about the option to get a court appointed attorney, but they seem to be doing the same thing with their clients. Call a name. Have a pow wow. Go do something else. In fact, most of the attorneys are doing pretty much the same. So you decide to keep yours. Besides, you had to pay in advance for these services. No refunds.

She’s back half an hour later. You watch as she wanders over to the DA and they chat while the another

defense attorney speaks to the judge. The DA says something and your attorney shows him some papers from one of her folders. They continue whispering as the judge says something back. Then your attorney walks over to the jury box and speaks to the officer who raided your poker game and charged you with a misdemeanor. You tense as they speak, but they look like two strangers discussing the weather. Then your lawyer walks back towards you and points towards the hallway again.

You sigh and began stumbling over people. Once outside, she asks you some more questions. How did you act when you were charged? What were the cops like? Did you do this? Did you do that? She verifies again that you've never been convicted of a crime. "OK," she says. "Go back in and sit down. I'll be back."

You nod as she walks off to another courtroom and go back inside. At this point, you have no idea if things look good or bad, or if your attorney is even doing anything to help you. The question of why she keeps leaving has grown in importance. You do know that you paid her good money for these services. For a thousand dollars, you are not impressed.

She's back again twenty minutes later. This time she goes to the cop first. Then to the DA. Then back to the cop. They smile and she smiles and then heads towards you. By this time, you already know what to expect and are already tripping over people to reach her.

Out in the hallway, she turns and smiles. "All charges dismissed," she says as you do a double-take in surprise. "You can go home."

"That's it?" you ask, hoping for some kind of explanation, but detailed explanations apparently weren't part of the bargain. Besides, she has those other clients she needs to get back to, but do keep her in mind if you or someone you know ever needs a lawyer. Then she's off again.

Dazed, you walk out of the courthouse, and smile as a great sense of relief washes over you. Could it really be over? Just like that? You laugh a little. Your worries from this morning already seem like something from long ago—a relic of childhood, a distant memory. Obviously, they did the right thing. Whatever that was. You just hope the prosecutor will do his job when it comes to all those bad people still inside—people completely unlike yourself. Justice must still be done.

But still, even as you mentally congratulate yourself on doing such a great job finding that attorney, you can't help but wonder what happened.

Chapter 19

Lawyering As Relationships

It was summer and already hot as I passed through the metal detectors of the large courthouse. I was sweating, partially from the heat trapped in my suit, but also from tension. This was only the second time that I had ever entered such a building, and the first since entering law school. I had no idea where I was going. I had no clue what I was doing. I was totally incompetent, and I had come to practice to law.

Sort of.

North Carolina allows law students to “practice law” under the guidance of a bar certified mentor. The mentor holds the student’s hand, explains what is happening, and takes responsibility for their actions. So I wasn’t alone. I had a mentor who was going to chaperon me through the process of actually learning how to lawyer, since practicing law isn’t one of those things covered by the \$100,000 price tag of law school. Wake’s estimated total cost for 2012-2013 is just under \$60,000 per year the last time I checked their website.

I was an apprentice in practicing criminal law. I was going to spend every day in the courtroom, and my hope was that after the summer ended, I could claim to have progressed somewhere near journeyman status, which seemed like a reasonable goal. Back then. In any case, I was young, enthusiastic, and after two years trapped in a classroom, chomping at the bit to actually do something like what lawyers really do. My mind was full of shouted objections, brilliant arguments made to the judge, blistered witnesses breaking on the stand under cross-examination, and juries forking over vast sums of money. (The fact that criminal juries don’t hand out monetary damages was something of a letdown.) It makes me laugh to put such thoughts down on paper now, but I swear that’s what I thought lawyering was mostly about: courtroom gun fighting.

The truth was far different. First, I would get my cases for the day—I handled only misdemeanors. I would review my files, review what my clients had been charged with, and then head off to my courtroom

where I would chat with the other defense lawyers while we waited for the Assistant District Attorney to get there. He or she would arrive and call out the Docket. When one of my clients' names was called out, I would inform the DA that the individual was one of mine, meaning they were represented. The DA would nod, write down my name, and move on.

Now I could have let my clients call out their own names, but I answered up for them instead. I did this for two reasons. First, I answered up as a courtesy to the DA. Second, I answered up for my clients in order to protect them. You see, it happens from time to time that people are late getting to court, just as people are late getting to all sorts of things. The problem is that failing to appear for your court date is a bad thing. In most aspects of American society, people facing criticism will often challenge their critics with the hackneyed, and always rhetorical, response, "who are you to judge me?" The fascinating detail about court that often escapes most individuals until it's too late is that the courtroom actually has an answer to that question. In court, judges are entrusted with extraordinary power, which includes measuring the quality of someone's behavior. Failing to appear for one's court date is the kind of behavior that judges tend to frown upon, and having frowned, they next issue a warrant for the person's arrest.

However, if a lawyer is present, they can answer up for their client, and in doing so, buy their client more time to get to court. The lawyer can also try to contact their client in case the client has forgotten all about their court date. In some courthouses, it is even possible to continue the case to a later date without producing your client, but that only works if the prosecutor isn't on notice that your client is missing. So for a number of reasons, it makes good tactical sense to answer up for your clients if you can. Of course, this isn't always possible; after all, you may have cases in multiple courtrooms, and maybe even multiple courthouses, in which case, you obviously cannot be present for the calling of every docket.

This is exactly the kind of lesson that I learned every day while working that summer. Who would have thought that there could even be a legal strategy connected to the calling of the docket? I never did before then. But there is and I have used it to great advantage on several occasions.

This situation highlights a major facet of practicing law, which is the effort lawyers exert to control the flow of information to the opposite side. Good lawyers—in my opinion—do everything they can to control the flow of information. In a lawsuit, information is power. Information is defense. Information is offense. Information, while not everything, is of extraordinary importance.

Information—at least as I observed it in the criminal misdemeanor setting—is secondary to relationships. Remember, how I said that I answered up first as a courtesy to the prosecutor. I meant that. Because

the very next thing that happens in most criminal courtrooms after the prosecutor finishes calling the docket is that he or she gets mobbed by defense attorneys looking for deals.

The factual circumstances for many people who stand accused of a crime make it extremely difficult for them to prove their innocence at trial. So instead of seeking a trial, they look for a plea bargain. A plea bargain is a deal worked out between the defense attorney and the district attorney where the accused pleads guilty to a lesser charge or a reduced number of charges in exchange for having other charges dropped. DA's will also sometimes recommend a reduced sentence to the judge or stand silent when the defense attorney requests a reduced sentence.

None of this falls out of the sky into the defense attorney's lap. Plea bargains are just that: bargains. They are the result of attorneys working out compromises. What is most interesting is that both sides have an interest in striking a bargain. Many defendants have cases that they do not want to take to trial. At the same time, district attorneys have too many cases to take them all to trial.

There were 23,001 misdemeanor criminal trials in North Carolina district courts from July 1, 2010 to June 30, 2011 (20102011 Annual Report — North Carolina Courts: 7). That sounds like a lot, but compare that paltry 23,000 to the 200,384 guilty pleas made during the same time period, or the 330,360 cases dismissed outright by district attorneys and you begin to realize just how few misdemeanors are ever brought to trial (NCAOC 2010:7).

What about felonies? The same report published by North Carolina reveals that there were only 2,690 trials compared to 78,123 pleas plus another 50,140 dismissals in Superior Court (NCAOC 2010:8). Looking at the numbers, only about 2% of felony charges go to trial.

Even accounting for defendants charged with multiple crimes, the numbers reveal an indisputable preference for negotiating settlements over going to trial. Something profound is taking place here, something beyond the involvement of judge and jury: the supposed cornerstones of our legal system. Put simply, lawyers are informally running the show.

Of course, any criminal lawyer could tell you that. Maybe not the numbers, but the trend become obvious almost immediately once you step into a courtroom. Deals are being made constantly, and they all revolve around relationships. Getting a good deal has—in my experience—more to do with who you know and how well you know them than the facts of your case. As an attorney, you get to know which district attorney has a soft spot for the charges of your client. You also get to know which ones offer harsher deals. This is the benefit of going to court every day. You learn who to deal with and when to do it. At the same

time, familiarity helps. I'm not saying that unknown attorneys get cheated, but they don't have a history. They don't have a relationship.

Nor is this only about plea bargains. Defense attorneys quickly learn how to use continuances as well to further their clients interests. For example, let's say your client is on probation and must do a certain amount of community service, but their probation officer has decided that they have violated the terms of their probation. (This kind of thing seems to happen all the time) Now your client is back in court for that violation. In such circumstances, a good strategy is to get the case continued in the hopes that your client will get out there and get their community service done. That way, they can come back in and prove that they are no longer in violation, which is a pretty good defense. Continuances are used for all sorts of reasons: to research the case, to find witnesses, to move the case to another day because a necessary witness failed to show up, and to give your client time to get themselves out of trouble.

Court documents are typically kept by the clerk of court with each case enclosed in an envelope known as a shuck. The outside of the envelope contained a number of lines where the next court date was typically written. In many courts, lawyers are not allowed to personally handle the shuck; only the judge and clerk may alter them. This slows down the processing of cases since every continuance must be personally approved by the judge; however, in the courthouse where I first apprenticed, DA's routinely wrote continuances on the shuck themselves. Even better, once a defense attorney gained the DA's trust, he or she could determine the date of the continuance and write it on the shuck themselves. You just had to be sure to let any witnesses for the prosecution know and then inform the DA.

By streamlining matters in this way, district attorneys could burn through an hour's worth of work for any other court in about ten minutes of freewheeling negotiations. This is convenient when you have cases being heard in multiple courts, so lawyers always appreciated it, but this process also benefited the clients and witnesses too. After all, a large number of cases get continued every day—often several months in a row while the lawyer works out different strategies to help the client. But you never know when the last appearance will be, so everyone involved in the case—the client, the police officer, all the witnesses—must keep coming back to court. That's a large burden to place on people. Ordinarily, those people just have to sit there all morning and wait until their case gets heard only to find out that they showed up for nothing. By handling continuances quickly, clients and witnesses could get back to work.

I personally loved this part of each morning. It was always so fast and furious. You don't often hear lawyers talk about the practice of law being fun, but that was fun: plain and simple. I'd answer up for my

clients at the calling of the docket, then meet with them in rapid succession to make sure I knew what we needed to do, determine which of them would benefit from a continuance and who was ready to try for a plea bargain, and then ask everyone to sit back down while I went up to see what I could accomplish.

I've participated in plea bargains from both sides of the table. I've worked some as a defense attorney asking for deals, and I've handed them out during a few days spent working for the district attorney's office. I found both sides interesting. As a defense attorney, all I could ever see was an individual standing in my way. I wanted to send my people home without any more hassle, and for some reason, the DA would never give me all that I wanted. However, as a DA, you suddenly feel responsible for upholding the law. Police officers have charged these people with crimes; the accused—through their attorneys—rarely even claim innocence; but instead they just want a free ride home. What to do?

On a personal level, most defense attorneys have tons of cases. They are getting paid to do their best for their clients, but the truth is that they are not miracle workers and no one expects them to be. In district court where I worked—where the cases are misdemeanors and the penalties relatively low—many clients simply want the hassle of court to go away. Amazingly, some actually prefer jail time to probation. For them, probation requires self-discipline that they either do not possess or aren't inclined to exercise. Either way, they seem to regard jail more as a necessary evil that one must face periodically, than as an experience to be avoided at all costs. Unsurprisingly, their record for prior convictions is typically fairly long. This can sometimes even be the cause of some courtroom humor. During sentencing, district attorneys typically read off the prior record of someone being sentenced. Usually, this isn't too difficult, but every once in a while it can become a real marathon of reading out loud.

At the same time, there is a real problem of what to do with such individuals. They are true recidivists. Breaking the law is quite obviously something they do repeatedly and with ease. Jail is an ineffective deterrent for many of these people. Again, probation is often an option, but they prefer to go to jail for a few days or weeks or even months just to avoid the hassle of complying with all the various terms and conditions imposed during probation. I will not discuss any of my cases in particular, but I will say that this is not a homogeneous population of offenders. Their motives for committing criminal acts are as various as the misdemeanors enumerated within the legal codes, but the appearance of many of these people is striking. To me, their clothing and general demeanor appears disrespectful.

Prosecutors are rarely sympathetic in these cases. They've probably convicted your client before on some previous charge, and they have the sense that your client is routinely in court. This doesn't mean

that they have it in for such people; they probably don't feel much either way. Realistically, they know that whatever happens today, your client will probably be back, and then they will have to listen to another attorney ask for another plea bargain. And so the cycle goes. Still, this is when it pays to understanding the the dynamics of interpersonal relationships. DA's are human. They can develop grudges, and it pays to know if the prosecutor in court has an ax to grind. Sometimes they do, which means today is not the day to go looking for a plea. Or maybe they don't have anything against your client, but have a real problem with the particular type of crime that your client stands accused of committing. Again, you need to know these things.

This is when your fellow attorneys can help you out. Ask them questions? Find out who tolerates what? Lawyers—at least where I practiced—are extremely friendly and generous with their time when it comes to helping junior members of the bar. At least, that was always my experience. One day in court, I managed to do something to really infuriate the DA. At the time, I didn't even realize that what I was doing might have the effect. I was just zealously practicing law. Despite my innocent intentions, this individual wound up yelling at me in open court, which was unusual enough, but it also left me really worried about the future. What was my relationship with that person going to be the next time I came looking for a plea bargain?

Out in the hall, I spotted a more senior lawyer who I happened to know and asked that person for help. They gave me some good advice and then went back in to vouch for me—leveraging their own relationship in order to rehabilitate mine. As a result, my ability to practice law in that courtroom was preserved. I've never forgotten that, and to this day, whenever someone asks me for a recommendation for a criminal attorney, I go out of my way to get them the contact information of the lawyer who helped me that day.

A definite culture of mutual cooperation circulates among the members of the criminal defense bar. Lawyers are explicitly encouraged to help one another. In doing so, they actively work to produce a climate where pitching in is not only acceptable, but desirable. You also see this in the day-to-day behavior of lawyers in court. Their conduct informs the newcomers—educating them on how to act until this becomes a cultural value. You don't treat people with respect just because you want something from them; you treat them that way because that is how one acts, and also because those people become your friends. Having worked in both the criminal and civil settings, I can easily say that the criminal bar feels more like a brotherhood—not because the civil attorneys aren't just as friendly, but because members of the criminal bar interact with each other so often. This is just law school extended into legal practice.

Civil lawyers spend most of their time in the office. Criminal lawyers spend most of their time in the courtroom. They see each other every day, which makes building relationships easy and maintaining them important. This is helped by the fact that lawyers practicing criminal law also seem to switch sides periodically. More than a few defense attorneys have sent people to jail in the past. I know I have. As a result, the feeling at the misdemeanor level where all my experience comes from, is one of general collegiality.

I'm not sure this is the case at the felony levels, where punishments are much more severe and the stakes all around are higher, but in district court, I was equally comfortable going out to lunch with attorneys on both sides. Of course, there are always a few who fail to get along, but I could never understand why. There was no gain in being disagreeable, only personal and professional loss. Why go to a prosecutor who offers bad bargains? On the flip side, if you're the DA, why offer a good plea to someone who acts like a jerk?

The lawyers are not the only players in court. First, there are the arresting officers who are present in case they need to testify. The police officers always sit by themselves, in the jury box if there is one, off to the side if there isn't. For obvious reasons, they don't mix with the crowd of people they've arrested. Lawyers from both sides use this opportunity to interrogate—nicely—the officers involved. DA's will often offer better pleas to people who cooperated during their arrest. On the other hand, some people seem to go out of their way to aggravate the arresting officer. Perhaps they have a legitimate grievance against law enforcement that colors their actions, but a cop with a grudge rarely helps your case. I always approached police officers with candor. They know I'm a defense attorney. They know I'm there to try to undo their work. Impressively, most are very cooperative. Again, I'm not sure how they act for the bigger crimes, but for routine misdemeanors, they typically have very little invested unless the client managed to make an impression on them.

Probation officers pop in every once in a while. These individuals are employed to monitor the progress—or lack thereof—of people fulfilling the terms of their probation. Probation violations are not popular cases to handle. There just isn't much to do. The person has already pled guilty—thus the probation—and is now trying to avoid going to jail. Except lots of people don't try very hard. So now they are back in court and it's your job to see what you can do for them. I always tried to meet with the probation officer first to see what they had to say. Most times, they don't want to see your client go to jail any more than you do. So you ask the DA to call your case, and then you and the probation officer both

argue that the client's probation shouldn't be revoked. This usually works the first time around. After that, it gets tougher. It also matters which judge you get to hear your case.

It goes without saying that the focal point of court is the judge. In district criminal court, this individual is not only judge, but also jury. There are no misdemeanor jury trials. All trials are held before the bench who does double duty as both judge—deciding matters of law—and jury—deciding matters of fact. Constitutional right to a jury trial is preserved by giving defendants the right to appeal to Superior Court where they can get a retrial in front of a jury. However, the exercise of this option is extremely rare.

District court judges also determine probation violations, review plea bargains—and occasionally reject them—and determine continuances in those courts where the DA's don't monitor them. Of course, judges do far more than what I've described, which includes presiding over civil lawsuits and matters, but I'm only concerned with their usual involvement during sessions of criminal court.

In the courtroom, judges are the law. Before they speak, the law is uncertain. After they speak, the law has become a tangible reality. This is something most people do not understand. There is no such thing as "the law" as it applies to everyone because in every case, the application of law is dependent upon the decision of a judge. The law for you is not the same as the law for me, even if we happen to appear before the same judge. My facts are not your facts. My history is not your history. My case is not your case. My law is not your law.

Of course, you may appeal a judge's decisions to a higher power, but for the moment, the entire state of North Carolina stands behind them. This sometimes takes people by surprise. I was in court one day listening to a trial. The defendant disagreed with what the witness was saying, and expressed that disagreement by shaking her head no. The judge saw this, and in the kindest voice imaginable, informed the defendant that they would hold their head still or they would go to jail for contempt. That's the kind of power they hold.

Some lawyers act very informally towards the bench. They address the judge as 'Judge' instead of 'Your Honor' as they are formally supposed to do. I've never agreed with that practice. I think it detracts from the ceremony of the court. Whenever I appear in court, I also take a moment to ask the judge for permission to approach the bench. You don't just walk up. You ask for permission. Once there, I introduce myself if this is my first time appearing before this particular judge, or exchange a greeting if we are already acquainted. This is the judge's court. It seems to me that the polite thing to do is for the attorney to introduce themselves if they are going to take up the judge's time.

As with everything else in the courtroom, relationships count with judges too. In North Carolina, judges are also elected officials, though once elected, they tend to stay elected, so I'm not sure how much that really counts for things. In any case, I've never seen a judge do something I considered improper, though I have heard of a judge telling a lawyer never to appear before them again when the lawyer was caught lying to the bench. I remember thinking then what I still think now: why did that individual ruin their relationship with one of only a handful of judges? This is their career. No case is worth a career—certainly not a district court case.

Judges also work to set the tone of a courtroom. They add weight to the courtroom. Everyone stands when a judge enters or exits the courtroom. After the judge arrives, people speak softer. Of course, the judges elevated seat and formal robes help set the stage, but many judges also look and act the part. They command, and when need be, they can be tough, sometimes when you least expect it.

I mentioned earlier that you do not see many well-dressed, prosperous-looking individuals awaiting their turn in district court, but there are a few who fit that description. These individuals are typically first timers to court who often appear genuinely ashamed of getting into trouble and scared of the consequences. Such people are easy to spot. For one thing, they have private attorneys instead of public defenders. For another, they are usually formally attired, early to court, and present in the front most rows. Finally, their parents are often there with them. Unlike most of the crowd, these people look like they are taking this very seriously indeed. Paradoxically, these people are also the ones who quite often get chewed out by the judges. People shake. Tears can flow.

At first glance, it seems odd that a judge will grill a first offender only to resume their business-as-usual voice with a courtroom regular, but this highlights one of the unspoken duties that many judges assume: they want that young person to never come back. I always feel sorry for someone getting grilled by the court, but I'm also impressed when they take the time to do so—impressed because it would be very easy to just give up on people after seeing so many apparently hopeless cases return through the courthouse doors again and again. Being a judge is a lonely job. It takes a certain kind of person to do it well. For those who fit that description, it is always a pleasure to show them the respect I feel they've earned.

In the end, what we find is a courtroom composed of several distinct social groups defined largely by occupation and presided over by a member of the lawyer class. In North Carolina, only attorneys can be judges. These groups communicate between themselves, sharing knowledge and transmitting culture,

while acknowledging the presence of the other groups as little as possible. The dividing lines are pronounced and strictly maintained by everyone. Nevertheless, communication does occur and must occur between the various groups in order to resolve the court's business. How this occurs is largely informal. Rules exist for filing lawsuits and trying lawsuits, but the world of plea bargaining—which resolves the vast majority of criminal lawsuits—is almost totally barren in terms of procedure. In my opinion, the free-wheeling, misdemeanor trader's pit approach to practicing criminal law not only makes that that kind of lawyering more fun, it also makes it more efficient; this is never more obvious than when you compare criminal litigation to its civil counterpart.

Chapter 20

Cold War Litigation

Civil lawsuits are like little cold wars. They are fought indirectly, from law offices through post offices rather than in the courtroom, proper. The lawyers involved spend most of their time pushing paper, drafting letters, and applying subtle degrees of pressure. Both sides prefer rattling their sabers and collecting intelligence over actually fighting it out. The result is that rather than being resolved in a morning like their misdemeanor counterparts, civil lawsuits—even those over relatively small monetary amounts—can drag out for months and even years without showing much if any progress.

Civil matters begin with the plaintiff filing a complaint against the defendant. The complaint is then served on the defendant, who must then, after a period of requested extensions, file an answer. During this process and following it, both sides routinely serve one another with written questions called interrogatories, requests for productions of documents such as financial records, medical records, and the like, and sets of canned admissions that must be formally denied by the other side or else they will be deemed admitted. This investigation stage is known as discovery. Both plaintiffs and defendants compete to discover as much data as possible while limiting what they turn over. The parties then typically schedule a battery of depositions—formal examinations taken before a court reporter and often videotaped as well, which are admissible in court as if actually given during trial—upon one another's clients and witnesses before finally scheduling a mandatory mediation. Here, both sides bring all of their accumulated data, including some of the data they've managed to withhold and try to pressure the other side into settling. A mediator is paid to go back and forth between the parties and try to help them reach a compromise.

In theory, all of this pretrial maneuvering is supposed to make the civil legal system more equitable by providing both sides with the information they need to fairly evaluate their case. The hope is that, having acquired all the relevant data that might be produced at trial, they can skip the trial altogether by reaching a settlement of their own making. In practice, this process slows everything down to a crawl—sometimes

a brutally expensive crawl. I have yet to hear a client praise the glacier pace of civil litigation or the bills they receive for such legal services.

What's interesting is that few non-lawyers approve of either the criminal or the civil methods of practicing law. The civil side appears too slow and too expensive for too little gain. While most civil cases end in settlement, those settlements end in disappointment. I have yet to see anyone—even when “victorious” at mediation—celebrate after a settlement. They are usually tired, bitter, and heartsick over the whole affair. One of the strongest arguments I've seen during mediation to get a plaintiff to settle is the simple observation that settling will put an end to their lawsuit and let them get on with their lives. More than one has caved just to escape their own lawsuit.

On the criminal side, it might be asked what exactly is the wisdom of encouraging plea bargains? This is, after all, the mechanism people complain about when they deplore the “revolving door” legal system. Pleas help ensure that criminals face fewer convictions with reduced sentences. From a policy standpoint, plea bargaining effectively undercuts the validity of having all those laws on the books and police officers on the payroll.

Of course, the public's distrust and even dislike for the legal profession is open and obvious. *What do you call a thousand lawyers at the bottom of the ocean? A good start. What do lawyers and sperm have in common? A one-in-a-billion chance of becoming a human being. Oh so funny. . . .*

Most lawyers despise lawyer jokes—I know I do. And I don't care how many “only kidding” winks you add to your email or back slaps you hand out around the water cooler, when the punchline of your joke is that I die or lack humanity, it says something. Lawyers recognize this. What I think the profession fails or chooses not to recognize is that these nasty little jokes are also social commentaries by society-at-large. They highlight the profound gulf that exists between those who are a product of law school and those who are not. Few lawyers I know accept this reality. It's safer to condemn the tellers than to address the message. Moreover, treating the jokes as commentary elevates them to the level of legitimate criticisms of the profession, and that is scary. It runs counter to the revised value system that law students are conditioned to substitute for their own. It also threatens their pocket book.

Justice, as I interpret its existence under the present system, is the subjective grade we give the legal process after a case is concluded. Justice is what happens when the system works in our eyes. When the system works, bad people are punished. When the system works, good people are exonerated or, in the civil setting, paid money. But justice is not a concept that one appeals to during dealings with attorneys.

To stand before a court and cry out, “this isn’t justice” or to complain during a negotiation, “that isn’t fair” is to earn the scorn of your fellows. Lawsuits are won by producing some form of law creating an abstract right and then some form of facts which convinces the finder of fact that the law applies to your case.

Here’s a common piece of lawyer wisdom: When the facts are against you, argue the law. When the law is against you, argue the facts. When both are against you, then and only then do you hear lawyers talk about “right and wrong.”

Given a choice between arguing “right and wrong” or arguing that their facts are right on point with the law, lawyers will choose facts and the law every time. To a lawyer, or at least the lawyers I know, the second strategy is obviously superior. But to non-lawyers, that isn’t always the case. To many people, being “in the right” should trump. To them, clever legal hairsplitting is not what makes the system strong; it is the essence of how the system is broken.

My response to them is always the same: this is how lawyers are trained and how law is practiced.

Three questions then logically follow:

1. Must the criminal legal system continue to operate in this fashion?
2. Must the civil legal system continue to operate in this fashion?
3. If change is desired, how might it be accomplished?

I’ve tried to quickly illustrate the differences between the practice of civil litigation and the practice of misdemeanor criminal litigation. At the present time, the criminal law method of dealing with lawsuits is far more efficient. District court prosecutors probably settle more cases in a morning than many law firms settle in a year.

What is fascinating is that these cases are resolved without much in the way of hierarchical command and control. Instead, the solutions just sort of produce themselves as a byproduct of the networks of relationships interacting with one another in the courtroom. This phenomenon is known as emergence. In the next chapter, we will explore how emergence operates.

Chapter 21

Mindful Networks

We propose to consider first the single elements of our subject, then each branch or part, and, last of all, the whole, in all its relations—therefore to advance from the simple to the complex. But it is necessary for us to commence with a glance at the nature of the whole, because it is particularly necessary that in the consideration of any of the parts their relation to the whole should be kept constantly in view. (Clausewitz 2004:1)

How does one describe a legal system? For that matter, what does a “system” even mean? Ecosystems, economic systems, medical systems, political systems, computer systems, and legal systems: these terms serve as abstractions for collectives too complex to easily enumerate or describe. The problem with such abstractions is that they also beguile us into forgetting the true complexities of the world around us. Papering over something by calling it a system might be convenient, but it also runs the risk of confusing singularity with multiplicity, stasis for process, and isolation when in actuality there is networked interaction. In other words, when we speak of the system instead of the many actors comprising that system, we run the risk of mistaking the forest for the trees.

Let’s talk about networks of human interaction instead. These are not static and inflexible. Rather, they are dynamic webs of interaction formed between autonomous agents communicating with one another through case-specific communication protocols in chains of feedback loops. Networks, in this sense are both creations and creators. The people who form them are also formed by them.

Networks are not a new idea. Here, for example, is Emile Durkheim describing one such network:

The very act of congregating is an exceptionally powerful stimulant. Once the individuals are gathered together, a sort of electricity is generated from their closeness and quickly launches them to an extraordinary height of exaltation. Every emotion expressed resonates without interference in consciousnesses that are wide open to external impressions, each one echoing the others. The initial impulse is thereby amplified each time it is echoed, like an avalanche that grows as it goes along. And since passions so heated and so free from all control cannot help but spill over, from every side there are nothing but wild movements, shouts, downright howls, and deafening noises of all kinds

that further intensify the state they are expressing. Probably because a collective emotion cannot be expressed collectively without some order that permits harmony and unison of movement, these gestures and cries tend to fall into rhythm and regularity, and from there into songs and dances. But in taking on a more regular form, they lose none of their natural fury. A regulated commotion is still a commotion. The human voice is inadequate to the task and is given artificial reinforcement: Boomerangs are knocked against one another; bull roarers are whirled. The original function of these instruments, used widely in the religious ceremonies of Australia, probably was to give more satisfying expression to the excitement felt. And by expressing this excitement, they also reinforce it. The effervescence often becomes so intense that it leads to outlandish behavior; the passions unleashed are so torrential that nothing can hold them. People are so far outside the ordinary conditions of life, and so conscious of the fact, that they feel a certain need to set themselves above and beyond ordinary morality. (Durkheim 1995:217-218)

The wonderful thing about Durkheim's description is that it captures the way that the people form the network, but are then transformed by it. Somehow it takes on a life of its own, and they react to it. Anyone who has ever experienced the social power of a sporting event or a concert, who has ever felt themselves drawn into the consciousness of the group mind, who has ever experienced a change within themselves and found themselves acting differently and in so doing influencing others to act different in turn understands perfectly the nebulous, quintessentially human mechanism that is so natural to our species yet so alien to our language. It is truly an anthropological marvel that perfect strangers can congregate together, and from their interactions, something new can emerge. I choose to call this thing a network, and not just any network either; in coming together as individuals, we form neural networks as a group—adaptive networks exhibiting problem solving behavior, which we call intelligence. To really understand human systems, one must think of them not in terms of mobs of people, but as problem solving entities. The interesting question then becomes “what problem is the entity in question solving.”

By explicitly calling this organization intelligence, I hope to remove some of the cloud of mystique that hangs over the way social networks operate. Enough with all the “wisdom of the crowds” mumbo jumbo. Enough with all the metaphors.

Adam Smith poetically coined the term “invisible hand” to explain the behavior of capitalism in action, but let's consider what he was really describing: the people. Adam Smith was two hundred years ahead of his time. He just lacked the proper metaphor to describe what he was seeing. Like Durkheim, he's talking about neural networks.

Agents form the primary building blocks of neural networks. They are the actors that make up the system. They make decisions—though not always sophisticated ones. They do things—though their

accomplishments are not always earth shattering. Agents are autonomous, but they do not exist in vacuums. Sometimes their autonomy is obvious, as in the case of human beings, neurons, or ants. However, other forms of agency may appear far more subtle. Overheated power lines and falling trees can also display agency under the right conditions.

People tend to limit the boundaries of agency by reserving it for only organic systems. They argue that rain forests are fundamentally different from car engines because car engines are constructed of inorganic components operating within fixed and predictable patterns, but such logic is critically flawed as anyone who has ever visited an auto-mechanic knows full well. Car engines behave unpredictably. The counter-argument is then offered that mechanical breakdowns are merely accidents, and that mechanical engines lack the creative spark—the self-awareness—that autonomy possesses in their mind. Implicit in such arguments is the chauvinistic prerequisite that agency is somehow the exclusive domain of intelligent decision-making, but this mischaracterizes the very nature of intelligence. Intelligence—even human intelligence—is merely the byproduct of agents interacting with one another. To put that more concretely, an individual human neuron knows nothing while one hundred billion neurons wired together are writing this dissertation.

The key is to escape our natural preferences for human intelligence and dichotomies of thought that attempt to distinguish between organic and inorganic phenomena. Such paradigms might prove useful for dividing up chemistry curricula, but the real world recognizes no such distinctions. If something can switch states, and in switching states effect other things with similar abilities, then the thing is an agent. Its composition is irrelevant.

Another fundamental misconception that arises when discussing neural networks is the tendency to overlook many forms of communication linking agents together. Put simply, we have a huge bias for communication that falls within narrow bandwidth of sound and light and occurs inside a specific time scale. Messages that happen too slow or too fast, or which transmit through mediums that we don't pay attention to or cannot perceive get downgraded to "noise." Such messages can take the form of chemical transmissions between ants, emailed contracts between humans, whale songs, or something else entirely. The possibilities are practically endless. The form doesn't matter. Communication is the input and output of information, regardless of type. If the message makes a difference to the agents receiving it, then it has meaning to the network.

At the same time, channels of communication are also subject to limitations which I shall call restraints.

Restraints refer to the limited possible “course of events” that an agent’s message may follow. For example, the pieces in a jigsaw puzzle are restrained by shape and picture to only one, unique position in relation to the rest of the pieces (Bateson 1972:406). In this case, the pieces’ edges serve as their channels of communication with one another. By limiting the possible avenues that a specific message can travel, the specific restraints present in each individual circumstance play a vital role in determining the arrangement of the neural network as it emerges as well as being the reason that all complex systems—even ones composed of essentially identical agents—emerge with unique characteristics.

At first glance, the negative rather than positive operation of restraints on determining outcome appears paradoxical, or at least slightly unintuitive, but the real world provides ample evidence for its significance. I am often reminded of the power of restraints whenever I drive to Boone from Winston-Salem along Highway 421. Several years ago, the state of North Carolina rerouted a small section of road. To drivers, it made very little difference, but the impact on the local businesses was profound since the highway no longer ran right by their stores. Cut off from the immediate highway, what were once thriving gas stations are now grass covered ruins. Restraints are a powerful force in the world.

The dependence of the agents on one another through their channels of communication is another factor that needs to be addressed before moving on. Drawing from the terminology of Charles Perrow, I adopt the term “coupling” to describe the level of influence exerted by one agent over other agents in the system. The power of coupling exists along a continuum ranging from very loose to very tight. Loosely coupled systems are constructed of agents whose actions are fairly independent; the act or failure to act by one agent does not effect the others very much. Such a system would include swimmers racing in separate lanes. If the swimmer in lane six stops, the other five swimmers remain unaffected. They are loosely coupled and can continue racing; however, contrast the case of individual swimmers to what happens in the case of a relay where each swimmer on the team must wait until the swimmer ahead of them reaches the wall before they can enter the water. Now the team members are tightly coupled: their actions are dependent upon the actions of their teammates. In the case of competitive swimming, the effects of such coupling is not given much importance, but nuclear power plants, where failsafe devices and backup systems are often dependent upon one another for proper operation—despite the engineers best efforts at decoupling them—are another example of a tightly coupled system—one of much greater significance (Perrow 1984). Even when devices are designed to operate in isolation, systems have a way of finding connections beyond the anticipation of their original designers. The physical world is a surprisingly connected place. One of

my favorite examples involves the computer chip company Intel, which has to take into account the effects of cosmic rays striking their computer chips and interfering with the processor's calculations. We don't often think of cosmic rays as being connected to our daily lives, but if cosmic rays can cause a computer to return an erroneous result, and humans depend on their computers—then cosmic rays and humans are connected.

The final building block for neural networks is feedback. Feedback is the process whereby agents are linked together by circuits of transmission in such a way that messages sent by a particular agent not only possess the power to impact the original recipients of the communication, but may also loop back around to effect the sending agent too. In this way, the chains of communication are circular. This is an unusual property—one that runs counter to our intuitive sense of the way things ought to flow. We are accustomed to watching rivers run from their source to their destination. It feels odd to imagine water running in a circle like something out of an M.C. Escher drawing, but that paradoxical circularity is how feedback actually flows.

Moreover, feedback loops come in two forms: positive feedback and negative feedback. Positive feedback is the name given to circuits that reinforce the current message each time it cycles. An example is the tiny fire from a match. At first, the fire is barely strong enough to burn even the smallest piece of kindling, but as the kindling catches light, the growing fire generates more heat, which burns more fuel, and then spreads further. With each iteration, the size of the fire increases. The fire burns more fuel, the burning fuel gives off more heat, the heat generates a larger flame, and the fire expands even more. If provided enough fuel of the right type, such as a dry woods, a match flame extinguishable between your fingers can grow into a raging forest fire capable of burning thousands of acres to the ground. For this reason, such loops are sometimes known as regenerative feedback—regenerative in the sense that they continuously contribute to their own growth, at least for a time (Bateson 1972:109).

The Achilles Heel of positive feedback is that if the feedback loop goes unchecked, it will inevitably cause its own destruction by exceeding its carrying capacity or power source. This is always the fate of unchecked positive feedback loops. In the case of fire, the unchecked flame will burn hotter and faster until it burns through its supply of available fuel, at which point the loop will stop cycling.

The contrast to positive feedback is negative feedback. Negative feedback loops are interactions that tend to reduce or reverse the current cycle. For example, a reduction in oxygen might serve to inhibit the combustion process and thereby limit the fire. Or a firebreak may be constructed to cut the flames off from

unburned fuel.

The balance of positive and negative feedback determines the stability of the feedback system. Positive feedback must occur for the cycle to continue, but positive feedback self-destructs if left unchecked by negative feedback. At the same time, overly powerful negative feedback may interrupt the cycle, preventing its continuation. System stability is only achieved when the forces of positive and negative feedback reach an equilibrium of checks and balances offsetting one another.

We have identified three elements for constructing neural networks: agents, channels of communication, and feedback loops. These three elements can combine under the right circumstances to create mindful networks capable of producing decisions. Again, the mind is not contained within any of the agents; rather, it is a byproduct of their communications which only becomes apparent as the agents interact with one another. It is a process.

A simple example might be my neighborhood on the night before trash day. Recently, my home town implemented a recycling scheme where they handed out enormous trash bins to use for recycling. These bins have yellow lids instead of green ones. Every once in a while, the town comes around and picks up recycling, but not every week. There is a posted schedule of course, but I never check it. Instead, every night before trash pickup, we simply check to see what the neighborhood is doing. Have they put out both trash cans or just the solid green one? We watch our neighbors, and based on what they do, follow suit. In doing so, we also repeat the message so that other neighbors may likewise figure out how to act. The wonderful aspect of this arrangement is that it solves the problem of trash day without anyone formally organizing the neighborhood or even sending a communication.

These kinds of arrangements happen all the time in human societies. Without even quite realizing it, we self-organize all the time to solve big problems that would require a great deal of supervision if handled hierarchically, but require almost no effort at all if the network successfully incorporates. We witness such displays all the time, paying them little if any attention. They are ordinary, and thus deemed uninteresting, but the truth is that this kind of organization is anything but uninteresting. This kind of organic, complex adaptive network of cooperation illustrates, in a microcosm, how most of the functioning elements of our society operate. It is efficient and flexible, and anyone who has ever been forced to deal with a non-neural network, such as those automated programs over the telephone replacing live operators, quickly comes to appreciate the seemingly effortless adaptability that neural networks provide.

Chapter 22

A Hypothetical Hospital Stay

Let us put these three building blocks—agents, channels of communication, and feedback loops— together into a hypothetical analysis of a neural network. We could choose from any number of examples, but I prefer something that we are all probably familiar with: the hospital. Again, let me stress that this example is not a reflection of any specific hospital.

A hypothetical patient gets admitted to the hospital for the purpose of having performed some sort of minor surgery. The patient is not in any immediate danger upon admission. He walks in under his own power, gets admitted by his doctor, and then settles into a room to await treatment. Stop for a moment to consider who he sees, what he says, and what he does. He is in an alien environment. He is probably experiencing a curious mixture of anxiety and boredom. The hospital buzzes with activity, but he feels strangely isolated. From time to time, strangers come to check on him—and from their attire—he guesses that they are probably nurses or at least hospital employees, but their communications are always superficial, brief, and perhaps even obviously hurried. One or two stand out by telling jokes—though he wonders how spur-of-the-moment they really are—and a few others distinguish themselves by being easily, and almost immediately disliked. The vast majority fall somewhere else in the forgotten middle ground.

The patient goes through something called pre-op where he gets checked for things—though what he isn't exactly sure. He feels thirsty since they asked him not to drink anything. The fear is taking care of any hunger pains. His surgeon comes in to check on things, but not for long and not for the patient's sake. No explanations or words of comfort are offered. He leaves again very quickly. Drugs are administered by a nurse. Or was it the anesthesiologist? Thinks get woozy. Someone wheels him somewhere where more drugs are administered, and then it's over.

At this point, if the patient is lucky, he goes home to recover. If he is less fortunate, he stays in the hospital for a while. What happens if he stays? What does that look like? Continuing our hypothetical,

almost from the start, the patient's weight begins to decline. This is partially due to a decreased appetite because hospital patients are typically sick and thus have diminished appetites, but it may also reflect the quality of food that the hospital provides.

If the food is bad, or cold, or tasteless, some people voluntarily reduce their eating and quite literally begin to starve. When this happens, the nurses' notes typically begin to track a daily drop in the patient's body weight that can quickly become worrisome. Hospital patients need energy to heal and keep their immune systems working in order to ward off secondary infections such as pneumonia. They also need nutrition to resist the twin forces of deconditioning, which is the process of muscles atrophying from immobilization, and the development of bed sores—decubitus ulcers—that result when constant pressure is applied to body parts for extended periods of time so that open wounds develop.

Any one of these problems is potentially lethal, though none need be. Nurses can track the amount of food that patient eat in documents known as “feeding charts” to guard against starvation. Many hospitals also employ nutritionists. In theory, this should solve the nutrition problem; in practice, nurses have few options if patients refuse to eat their “healthy meals” and may not have enough time to ensure that everyone is eating. Perfect attention is impossible. Nor do feeding charts always accurately reflect meals eaten. They record what the hospital staff choose to record.

Does three bites equal twenty-five percent of the meal eaten? Fifty percent? Is there an appeal process if you disagree with the amount reported? Patient's medical records can report dramatic weight loss alongside charts reporting regular meal consumption, and who is to say otherwise. In any case, not all patients are fortunate enough to have family members who are willing and able to regularly bring food in from the outside. For our hypothetical patient, it becomes a choice: choke down the hospital food or starve. He tries his best, but the food tastes awful. Despite being immobile, his weight goes down.

Lack of food leads to lack of energy. As the patient weakens from hunger, physical therapists get involved. Their job it is to help the patient ward off the deconditioning mentioned above by leading them through a series of exercises. They too chart on their patient's progress, and may report a decline in cooperation as the patient's energy levels decline.

Our patient may also be diagnosed at some point as mildly depressed as his stay becomes protracted. This isn't that hard to understand; after all, being stuck in the hospital is depressing. Fortunately, the hospital has people for this too and psychiatric medications will be administered which may or may not leave our hypothetical individual even less responsive than he was before, further impeding his appetite

and hastening his physical decline as what little motivation he once possessed gets narcotized away from him.

In the meantime, an army of doctors performing rounds march through his room and records, which are growing with every visit, so much so that it becomes difficult for the doctors to read the full account. For details, they may choose to rely instead on the hospital staff who are also pressed for time. Doctors may also work in partnerships that trade off performing rounds so that the doctor who sees you today is not necessarily the doctor who will see you tomorrow. Contractual bonuses may also be offered based on the number of patients “seen” during the year. “Seen” is such an interesting word. The hospital staff, nurses, specialists, nutritionists, physical therapists create a whirlwind of constant coming and going, which is punctuated now and again by the all-too-often unfamiliar face of our patient’s doctor—or at least his doctor for today.

As the days turn to weeks and the combination of poor nutrition, depression, deconditioning, and exposure to novel pathogens works its magic, new problems emerge, which require new specialists to be consulted and new drugs to be administered. The records grow and fragment. Weight loss, complications, and secondary illnesses open the door to further weight loss, complications, and secondary illnesses: a classic example of positive feedback building momentum in a vicious cycle.

Think about the hypothetical neural network that is emerging. What are the building blocks? Let’s begin with the agents.

The most obvious agents are the nurses and doctors, but they are only the beginning. Below them are the support staff they rely upon. Above them is the hospital administration, which may be setting rules and quotas driving the system in a way that the doctors themselves do not approve of but feel powerless to control. Then there is the patient, himself. He is an agent in this system, along with any friends or family who choose to visit and help him. Such individuals are all too often forgotten, but may make the difference in a bad situation.

Humans are not the only agents in this system. Biological agents are a constant menace in hospitals. Though too small to see, their input is immediately apparent. Pathogens may be microscopic, but human efforts to keep them at bay certainly are not. Mechanical agents also play a role in the medical network. Modern medicine is built—in part—on trust. Who services the diagnostic equipment? Who reviews the programming of machines that deliver treatment to ensure that they are bug free? What about the drugs being taken? What are the possible interactions between the patient and the drugs? How do the drugs

combine in effect? What happens if the power goes off? Is there backup power? Do transplant patients get the new organ, or will it get delivered to some other hospital where the lights are still on?

The agents communicate through a variety of channels. The most apparent involve verbal interactions. Less obvious, but just as important, are the written documents being generated. Medical records are intended to facilitate communication between medical personnel by recording prior findings and decisions for later review; however, such records can also become so voluminous that important details are lost amidst the oceans of reports everyone is generated. In other words, the signal-to-noise ratio degrades until the noise is deafening. Given the time constraints of many hospital settings, the channels of communication are constrained in terms of bandwidth to the point that vital information gets lost along the way.

This can present a real problem. The nurses' chart, though perhaps they do not react. The doctors are given the notes, though perhaps they do not have sufficient mastery of the big picture to make the best decision. Monetary constraints prevent doctors and nurses from repeating prior tests. In most cases, they have to assume the tests were performed correctly unless some evidence indicates otherwise, just as they must assume that prior medical treatments were performed correctly unless they have some reason to believe differently, just as they must assume that the pharmacists will do their jobs correctly, the lab technicians do their jobs correctly, and the service technicians their job correctly.

Hospitals are giant webs of interconnected trust; as such, they are tightly coupled. Such coupling produces two potential problems. First, tight coupling masks the inevitable errors of treatment that must occur, and second, mistakes can produce multiplier effects on future errors as mistaken diagnoses lead to treatments that further complicate the patient's condition. Such problems distract the care team from effectively treating the patient and often provide the primary problem time to progress unimpeded.

Positive feedback loops emerge in the form of nutritional deficiencies coupled to complications and increased referrals designed to address them, but which has the side effect of increasing the document load. All of this leads to decreased overall understanding of the patient's condition by the care team, making it that much harder to adequately treat them.

Hospitals are not unaware of these feedback loops. Indeed, members of most medical teams experience considerable frustration over just these sorts of complexity problems, though they have no real solutions for them. Nor has the legal system helped reduce this problem—quite the contrary. Lawsuits have increased trends of practicing “defensive medicine” in which additional tests are ordered just in case a lawsuit is ever filed and someone asks why something was not done, even though the extra tests are almost certainly

unnecessary. At the same time, new documentation is always being created by hospital administrators for monitoring patients, supposedly to provide additional checks on the system. In reality, the effect may be just the opposite as critical time and energy get wasted by health care professionals filling out new forms rather than treating their patients. The overall effect is that the fixes designed to solve the problems within the health care system have probably only exacerbated them instead, while the original flaws within the system remain unsolved.

In the end, the individual agents within the hospital self-organize to heal their patient. Sometimes they fail. Mostly they succeed. But the important thing, it seems to me, is to recognize that they are rarely successful or not as individuals. They often call themselves a team, but from a slightly different perspective, they are a neural net, collectively solving a problem.

The value in reconceptualizing their arrangement as I have done is that it explains the frustration individuals often experience in such organizations. They want to get things done. They want to get things right, but it often seems as if the “system” or the “bureaucracy” or whatever they chose to call it is working against them. In a team mindset, the conclusion in such situations is that the team failed. But from the perspective of a neural network, it may be that the individual agents misunderstand the problem that the network is really trying to solve.

To the network, the business of the hospital may not be to make individual patients well. Rather, it may be to process people through billable events as often as possible while rendering as little care as it can. In so doing, it optimizes its resources for maximizing billable events. From this perspective, a patient that demands a lot of attention with minimal billable events looks like just another part of the problem that requires solving. And solving problems are what neural networks are all about.

Chapter 23

Heterarchy

There is a legal concept that everyone, even non-lawyers, are intimately familiar with: the corporation. Everyone has heard of companies and corporations, but few have considered what a corporation actually is. Corporations do not actually exist in the sense that individuals do. Instead, they are legal fictions. No one has ever seen a corporation. They have talked to the officers of a corporation, or worked with a corporation's employees. They have walked on corporate property and purchased corporate products, but the corporation itself has never interacted directly with anyone. This is because corporations are owned and operated by individuals. Individual humans make the decisions for the corporation, carry out its business, and represent it to the world. And when they make mistakes, it is the corporation that pays the price.

In fact, corporations are popular exactly because they allow investors to purchase shares of a given company without being concerned that if the company gets sued, the investors will be sued too; the theory being that the corporation, for all its fictitious existence, is still a separate entity that acts independently of these individuals and thus they should not be held accountable for the corporations tortious conduct. As a result, investors enjoy limited liability: only their ownership stake in the corporation is ever at risk for the corporation's legal liabilities. Or at least, that is how things usually work. Every once in a while though, the owners of a corporation will engage in a certain set of practices that transform the corporation's status from that of an autonomous entity to one that is, for all intents and purposes, the mere instrumentality of the owners of the business. When this happens, the limited liability protection ordinarily granted these owners is removed so that plaintiffs are allowed to sue the owners for all their assets, rather than just for the owners' shares of stock in the company. This act of looking past the imaginary, legal entity of the company to the very real people behind it is called piercing the corporate veil.

One of the goals of my dissertation is to "pierce the veil" of abstraction that obscures our understanding of true social interactions within the legal system. The key to understanding all such interactions is to

recognize that they are complex systems—not singular constructions. Complex systems gain significance only when properly viewed as a synergistic whole—as emergent patterns of interacting agents. Thus, the body is never a body, but rather a pattern of interacting cells. The city is never a city, but really the result of interacting human beings. Humans only think in terms of cities and bodies because we lack the processing power to keep track of all the variables—the cells and people. Our brains cannot hold all the information together. As a result of our limits, we employ a cognitive trick; we group things into classes of artificial, and somewhat arbitrary, distinction: a process rightfully called classification. The beauty of this system is that we can then link all sorts of rough conceptualizations together to create rich understandings of what such classes mean. And yet, just as with all frameworks and analytical simplifications, classifications are, at some level, fictitious too. This is why explicit classification schemes always fail at some point; they are doomed to failure because they seek the specific in the arbitrary. However, human beings are so used to thinking in this way—indeed must think in this way if they are to make sense of the world in any kind of practical time frame that allows them to survive—that we often forget that these classifications are reductive fictions.

Regarding social systems as neural networks runs absolutely counter to the process of reductionism. While agents may be the atomic units that make up networks, it is critical to remember that such agents only become relevant when they are interacting with one another. Again, we must never forget the whole. Networks only gain importance as a collective. The cells of the body would all die within a few minutes of being separated from one another, but when working together, the body's cells can endure remarkable changes in environment for long periods of time. This is the power of synergy—the power of networking, and just as it would be both ridiculous and illogical to ask someone to remove the cell from their body that embodies them, so too is it illogical to consider any element of a network in isolation. Impotent in isolation, agents can accomplish amazing things once linked together. Processing information is a collective effort that emerges interstitially, from the flow of interactions between the agents.

One of the fundamental aspects concerning agent interaction is the difference between heterarchy and hierarchy. In the everyday world, people are accustomed to thinking in terms of hierarchy. There is, seemingly, a pecking order for every institution and action in society. Government, corporate, and military institutions are explicitly designed to operate as hierarchies because they are thought to be more efficient and easier to administer, and to that end, the concept of hierarchy is useful as a method of analysis and organization. But the truth is that hierarchy is probably just a fiction.

There are actually two forms of hierarchy. The first, known as a scalar hierarchy, is one where every level of the hierarchy can affect every other (Crumley 1995). An example of a scalar hierarchy is the global climate system in which microclimates created within a single cubic meter of air can eventually affect the entire planet's weather patterns, just as large scale weather fronts can drastically affect each single cubic meter of air within them (Crumley 1995). The second form of hierarchy is known as a control hierarchy (Crumley 1995). Control hierarchies include classic military and corporate hierarchical structures where the lower levels are subordinated to the command and control of the higher levels of authority.

However, there is an alternative form of organization to hierarchy known as heterarchy (Crumley 1995). Heterarchy has been defined as "the relation of elements to one another when they are unranked or when they possess the potential for being ranked in a number of different ways" (Crumley 1995:3). Although fewer people have heard the term heterarchy than hierarchy, everyone is implicitly familiar with this concept from everyday life. In the context of human beings, heterarchy is how people self-organize themselves whenever they meet. In meetings between equals, it is everyone discussing what they are good at and bad at, and ranking each other on the spot according to their strengths. In nature, it is each individual drop of water sorting itself out amongst all the other drops as they come together to form a river, or the flocking of birds or the coordination of worker ants as they take care of the nest and then forage for food. It is many things, but the important thing to remember is that all of this is performed without any explicit coordinator ordering agents about. The agents do it themselves. There is no control hierarchy within heterarchy, only self-organization.

Warren McCulloch, the originator of the term heterarchy, was one of the first cyberneticians and researchers of neural networks (Crumley 1995). He was concerned with how systems of neurons network to become minded. The power of networking is that it can very efficiently connect extremely large numbers of objects or agents together. For example, it has been shown that "in a network of 300 points, there are nearly 50,000 possible links that could run between them. But if no more than about 2 percent of these are in place, every agent in the network will be connected to every other agent either directly or indirectly. For 1,000 points, the crucial fraction is less than 1 percent. For 10 million points, it is only 0.0000016" (Buchanan 1984:37). Networks allow information to diffuse across a system very quickly and efficiently. Paradoxically, the larger the network, the more efficient it becomes at transmitting information.

McCulloch's model of neural networks remains the primary model for system mindedness. The brain is composed of approximately fifty billion neurons (Holland 1999:83). For the purpose of our discussion,

these neurons are essentially composed of three features: the cell body, which acts as a regulator, the axon, which connects the neurons together—though a gap does exist across which the neurotransmitter must travel, and the synapse, which is the receiving point of the axon’s signal (Holland 1999:83-85). The fifty billion or so neurons then network together by chaining their axons to other neurons’ synapses in incredibly intricate patterns through which electric signals are passed. These neurons then begin to operate as the regulators introduced in chapter two. They receive energy pulses that get transmitted to them from other neurons’ axons; if enough energy gets passed to a neuron within a given period of time, it reaches its firing threshold, and it too will generate a pulse that will in turn travel down its axons to the neurons waiting to be triggered at the other end, where the process will begin anew.

Neural networks are tied to outside stimuli for both input and output (Holland 1999:88-90). The stimulus to fire ultimately comes from outside input—though the energy to fire is internal—and the output of firing ultimately leads back to the outside world through a chain of linkages and transforms. Thus, if I see something, the light that hits my eyes will cause a pattern to begin firing in my brain as my neural network maps the input and processes it. This transference is known as a transform. When my network finishes processing this information, it will also have a pathway of neural linkages that will lead back out again to the outside world, this time in the form of a transform that emerges as my reaction to the stimulus of some sort as I control my body to move in response to the pattern of light that my eyes previously detected. Of course, the next question is how do the feedback loops of neural networks know what to do? And the answer is, they do not, at least, not in a way that involves self-awareness. The agents within the network are not aware of the greater whole that they are producing, but the beauty of the network is that they do not need to be. The mind operates regardless.

Neural networks are chains of neurons—of whatever composition—waiting to fire, but they are also maps of the outside world. To return to my example above, the neurons in my brain are connected to my eyes, which fire in response to a certain image. In the beginning, all the neurons in the network fire without much order, which leaves my response muddled. If this were the end of the process, then not much would happen; however, the system extends beyond just my eyes. It is my neurons, my body, and the world in which I interact that matter—everything together. As Bateson said, “the mind is immanent in the larger system—man plus environment, by which he means—to use his own example—that a man cutting down a tree has a mind that can only be understood in the context of the system in which (a) the mind processes each cut as (b) the body wields the axe for each cut as (c) the axe cuts each cut in the (d) tree being cut, and

then (e) back to the mind again through the eyes (Bateson 1972:372). It is a system, and it learns. Over time, my brain will use feedback to strengthen my neural network pathways that accurately target the axe while weakening my neural pathways that do not accurately target the axe (Holland 1999:90-91). In short, the network will learn.

There are at least three profound implications of the neural network model just discussed. First, the networks are capable of processing information and making de facto decisions without any cognitive awareness or strategy on the part of the agents that comprise such networks of what they are accomplishing. The agents need not even know that they form a network—as in the case of neurons. Secondly, if feedback is present, the networks can preference the neural circuits that most effectively respond to the given stimulus over the circuits that fire incorrectly—a process known as learning. And third, there is no reason why complex systems composed of agents other than neurons cannot create the same phenomenon of emergent system mindedness that neural networks create within the brain. If the agents can cause each other to fire, the neural network is present.

Robert Daniels has utilized neural network activation in explaining Kipsigis age-set transitions (Daniels 1982). In that case, the question was how many hundreds of local community decisions to declare an age-set transition was occurring. His answer was that small, social groups were networked together into larger, neural networks. When a strong enough activation signal was created by a local community deciding to transition, this message propagated throughout the remainder of the much larger social network, triggering a cascade of similar transitions as it spread until everyone collectively transitioned, though without ever explicitly coordinating such a transition.

This demonstrates a very interesting principle of neural networks, which is their ability to allow localized firings to create system-wide effects. This same principle provides a likely model for the propagation of synchronized cheering at sporting events, decentralized revolution, the emergence of riots, and accounts for the ability of revitalization movements to transform the social systems of far flung groups of people in extremely short periods of time and from extremely limited beginnings—either just a prophet or the prophet and a few disciples (Wallace 1956). Analyzing social systems as neural networks provides a model for explaining how extraordinary social changes can emerge out of very localized beginnings.

In the case of the hospital system, the complex exchange networks of doctors and nurses pass medical information between themselves as problems arise. The teams that handle given problems most accurately and efficiently get promoted by the system; the ones with high error rates are eventually removed. In

effect, the system adapts to become a more efficient health care provider. Interestingly, most agents inside a typical hospital system possess very limited information about any particular patient. This has the effect of increasing system efficiency by reducing the processing time that each agent needs before it can decide whether or not to act; however, it also means that the networks of health care providers may be inadequate to solve atypical medical problems because they have optimized to handle the standard health care issues that are most frequently seen. In the medical field, this is the classic problem of internal medicine doctors blindly handing out antibiotics for every problem, and the system supporting them in this strategy. It is no accident that Infectious Disease experts have gained prominence in recent years. Their training and job descriptions remove them from the standard circuits, in effect creating an alternative pathway for medical treatment with greater diagnostic flexibility.

There is at least one other model for system mindedness that is often discussed. This is the phenomenon of emergence, wherein agents act together in concert because of the operation of specific restraints governing their behavior. Emergence runs counter to our teleological instincts, and for that reason, often feels paradoxical. How, we ask, can there be outcome without design? How can pattern result unless it was crafted by some form of intelligence?

Do such questions sound familiar?

Examples of emergence include birds flocking, cars driving, and ant colonies foraging for food and maintaining the hive. Ants exhibit a fascinating display of organization on the basis of an extremely limited interaction system. Besides the behavioral set they are born with, ants coordinate with one another through pheromones (Johnson 2002). When an ant locates food, it releases pheromones to that effect, which other ants in the hive can detect (Resnick 1994). As they wander around, other ants come across this trail and follow it to the food source. On their return trip, they too release pheromones. Over time, the pheromone trail becomes the most powerful food indicating trail so that the vast majority of the ants will follow it to the food and add their own scent on the way back. Thus, classic positive feedback is induced and the ants continue to mine the food source until it is gone, at which point the ants stop dropping pheromones on the return trip to the nest and the scent trail evaporates. At the same time, the wandering of the ants also finds the optimal route to the food.

Based on a few hard wired rules, ants can coordinate together in ways that lead to very sophisticated patterns of emergent behavior. In fact, the harvesting patterns of ants have been electronically duplicated to find optimal solutions to complex problems such as the Traveling Salesman Problem, where the goal is

to find the most efficient route to numerous destinations and back (Johnson 2002). This sort of emergent behavior is often referred to as hive mind or swarm logic (Johnson 2002). Such mindedness emerges whenever agents interact within complex systems in ways that solve problems. Once again, such mindedness does not require self-awareness. This concept is incredibly important because it highlights the problem solving power of complex systems. To ignore this capacity on the part of such systems is to ignore a powerful tool within complexity that can be harnessed and promoted to increase a particular emergent property.

The other key implication of heterarchy is that it challenges the very concept of hierarchy. Complex systems are composed of interacting agents that achieve collective behavior giving rise to emergent phenomena. Such organizations are always heterarchical in that, at some level, agents must always self-organize in keeping with the restraints implicit in their own system. For very simple agents—atoms forming molecules—these restraints are decided by the laws of chemistry and physics. For more complex agents—such as biological organisms ranging from the “simple” neuron to the more “complex” human being—these decisions are the acts of processing units within the entity. In either case, the core idea is that the agents must negotiate their place and roles within the system. They must heterarchically organize themselves.

However, the presence of heterarchy does not necessarily obviate hierarchy. Simply because agents in a heterarchical situation approach each other from the outset without ranking, it does not have to follow that these agents will not generate hierarchical rankings themselves based on each agent’s particular strength. To draw from social experience, we have all been members of organizations containing members of varying capabilities; indeed, one of the primary reasons for forming teams in the first place—besides simply adding members to gain strength from numbers—is to take advantage of each member’s strengths in order to offset for our own weaknesses. By playing to everyone’s strengths, the team synergizes to become more effective than if each member worked individually. By itself, this might not mean very much, but complex systems do not exist in vacuums. In the real world, systems self-organize to compete or cooperate with other complex systems. This process results in the emergence of ever larger and more intricately connected complex systems. It is likely that this process bootstrapped the simple one-celled organisms of a few billion years ago into the unimaginably complex systems that multicellular organisms and ecosystems form today. The process of optimizing within these heterarchical networks also allows preferred pathways of interaction within such complex systems to arise.

The result of repeated heterarchical organization for optimal efficiency creates the emergent phenomena of hierarchy. As hierarchies emerge, individual agents orient themselves and their networks of information exchange in relation to the emerging hierarchies in an accelerating trend so that the centers of the hierarchies begin to resemble hubs in a network. Topographically, the arrangements of information leading to these hubs resemble elevation, which conceptually lead us to think of high-low rankings, but this is illusion. Piercing the veil of such hierarchies, we can easily remind ourselves that in fact the role of individual human beings is always dynamic and insecure. How many divine kings and absolute dictators down through history have been overthrown by those over whom they ruled? Hierarchy is quickly revealed to be heterarchy in disguise every time power structures are ignored and rewritten by the “lower” individuals on the totem pole. Thus, hierarchy is really emergent heterarchy.

Finally, for the purposes of practical application, it seems very likely that the existence of a particular hierarchy within a complex system represents a necessary competitive advantage that has developed over time and in response to external influences. Removing such a power structure, even if its operation appears objectionable, can quite possibly result in the demise of the system, or at the very least, lead to chaos as the agents and lesser social systems are forced to restructure themselves. The mere fact that the system survived with the hierarchy does not guarantee that it can survive without it. In some cases, it logically follows that destruction of one part will result in the destruction of the whole, just as the loss of the heart will kill every cell in the body. Examples of just these kinds of problems are easy to procure from examples of current international relations between the United States and less powerful nations. As shall be discussed in the next chapter, creating capitalisms and democracies is more difficult than simply declaring martial law. Unless the foundational systems and cultural understandings of the people themselves are similar in nature to western economic and governmental systems, any effort to inject western practices into these societies is likely doomed.

Put simply, the system will view the effort as a problem that needs to be solved.

Chapter 24

Thinking Like A Legal System

I have already argued that system mindedness is the emergent result of agents interacting with each other within networks. As we have seen, some of these networks are wired in such a way that they exhibit positive and negative feedback, and if the nodes within these networks also make decisions based on the signals they are receiving then the system as a whole can exhibit learning and adaptive behavior associated with neural networks. It is my argument that complexity theory provides a useful model for examining social systems. Again, societies are made up of agents that negotiate with one another to determine their role and relationship within that society. At the same time, individual human beings within complex systems, while organizing themselves heterarchically, also always have the choice to either cooperate with the system or resist it. Of course, these choices sometimes involve the difference between complying with the weight of the system or being killed, but there is still a choice. Hierarchies always depend upon cooperation.

The analysis of any social system constructed out of human agents should involve an analysis of feedback. Individuals do not operate in isolation. Their actions create effects that ripple outward even as they react to the input of their environments. Human beings respond to what other human beings are doing. We respond to patterns of culture generated by others in our social system, and by modifying part of the pattern before communicating passing it on, we add our social weight to its acceptability and even social desirability. The more people that cheer, the more people that want to cheer: classic positive feedback. But of course, this cannot last forever. Inevitably some change in the game will introduce negative feedback, and even faster than it began, a chant involving thousands will be extinguished as surely as if someone had pressed some kind of cosmic mute button. This is the kind of effect that can emerge from complex systems. They are intrinsically non-linear. The shot to the heart does not end at the heart; it kills the entire system. Small changes can quickly lead to massive changes and back again in patterns that defy predictive

certainty.

However, I do not believe that this makes understanding such systems impossible. We can identify the systems in place in a given society to understand the cultural patterns of positive and negative feedback loops that drive the system, and while I do not believe it is possible to create entire cultural patterns out of whole cloth—this is the problem with efforts to establish democracy and capitalism in places that have never known them that I discussed above—I do believe that new patterns can be promoted within a system to eventually become dominant. Revitalization movements are just one example of creating new systems from modest beginnings. It should also be possible to radically change a system through the introduction and promotion of cultural patterns of positive and negative feedback.

An example can be found in an ethnography by Nancy Scheper-Hughes' book, *Saints, Scholars, and Schizophrenics*, in which she identifies a feedback loop grounded in the foundering economics of rural western Ireland (Scheper-Hughes 2001). Essentially, the economic system within the area of Ireland that she studied was traditionally supported by agriculture; however, due to the effects of a modernizing market system, the viability of local agriculture collapsed. As a result, families began to encourage their oldest sons and their daughters to emigrate to America rather than remain at home. Of course, as people left, this only worsened the economic conditions in the area under study. Fewer people meant that there would be fewer to participate in the local economy, which only hastened the society's decline and encouraged even harsher Catholic discouragement of male-female relationships that might have counteracted the pattern of decline. At the same time, families began to reinforce a pattern of child rearing that socialized the youngest son into total dejection in order to force them to remain at home and maintain the family lands. This negative socialization plus the absence of marriage possibilities created a pressure cooker that pushed many men into some form of emotional dysfunction—though whether it was schizophrenia is debatable. The result of this socialization of the youngest men also decreased their likelihood of finding wives, which further encouraged the pattern of population decline and economic collapse within the area. Ultimately, the problem with the system—from a systems analysis point of view—was that the system had all positive feedback and no negative feedback. There was no system in place to counteract the trend of negative socialization, population decline, and economic collapse.

However, the book *Saints, Scholars, and Schizophrenics*, itself, may have had the effect of acting as negative feedback by highlighting deleterious positive feedback loops and shaming people into changing their ways. The ethical implications of publishing such a book are the subject for a different paper, but the

point for the purpose of complex systems analysis is that it does seem possible to analyze a society and then bring about changes by identifying and modifying specific, cultural feedback patterns. For the purpose of medical malpractice reform, I find the idea of correcting certain complex systems to be extremely exciting and entirely realistic.

The same principles discussed for rural Ireland should hold true for any functioning social system. All complex systems emerge from the exchange of information between agents. As such, I see this as one of the great possibilities that we need to explore in the coming century. We need to recognize that complex systems are emergent, embodied through their constituent agents, and mindful. I know for a fact that most individual health care works want to provide their patients with high quality health care, just as the operators of nuclear power plants want to avoid meltdowns. The agents within these systems want their respective systems to work, but for reasons beyond the actions or control of the individual agents, failures nevertheless occur.

These are the kinds of problems that infect the legal system as well. Consider again the case I mentioned earlier in the “hypothetical day in court” where the individuals are being trained by the various messages passing through the hallways about how to act. No one set out to start the process of educating everyone on how to find their courtroom by checking various dockets, and yet, that is exactly what happened. Likewise, no DA instructs people to answer up at the call of the docket with “guilty with an explanation.” In fact, the DA usually tells people to stop saying it, but the audience learns. The message circulates from the few who have heard it before to those who have not, but the whole repeats it. In time, those who learned it today will find their way back into court at some later date and repeat the process of instructing new people in this unsanctioned option.

At the same time, the DA is a product of the system too. He feels the weight of the audience and typically gives in, adapting his own procedure to that of the groups. It is a powerful process. One person could not have done it, but the group can.

Then there are the defense attorneys. They learn how to act by watching each other and repeating what they see. They approach the DA and ask for pleas, but they also collectively bring pressure on the DA as well to hand out good pleas; otherwise, they may demand a trial instead. That would be a disaster. The courts do not possess the processing capacity to handle so many trials—even at the district court level where trials are conducted before a judge, thus eliminating the significant delay of jury selection, which would prove an even greater bottleneck than lack of prosecutors and judges.

Instead of gridlock, the system exerts pressures upon its agents to conform to the needs of the criminal process. In doing so, the system elegantly solves the problem of how to deal with many times its total processing capacity. Nor is it clear where the boundaries of this system really lie. Does it reach end at the courthouse, or would it go all the way into North Carolina's legislature if a major county suddenly found itself without a functioning criminal legal system? Politically, this would be unacceptable, but what does that really mean? When we consider it, we might envision legislators outraged over the situation, and individual voters going to the polls to vote for a new DA, or perhaps a change in the laws, but is that the correct scale to focus on. After all, those individuals are really processing information filtered and delivered by their society to them. They are getting messages, and if the message is powerful enough, they are reacting by sending along their own messages. If the total gets loud enough, change occurs. But that is nothing more than a description of a neural network in action.

The implications are huge. First, these networks of feedback gestalt into something greater than the sum of their parts. This suggests that when we consider social movements we should not fix upon any one measure of scale. Second, it suggests that changing such systems is not something susceptible to an easy fix. There may not be any silver bullets for achieving social reform in the form of passing new ethical guidelines for prosecutors or sentencing guidelines for judges.

For example, some counties employ no-drop policies for certain kinds of crimes like domestic violence. Superficially, this sounds like a good thing. After all, we don't want to go easy on domestic violence. However, these charges are usually handed out by police officers who do not actually witness a crime. Instead, they merely show up after the fact in response to a telephone call, listen to the husband and wife, and then hand out charges. That's good enough to get someone in court; however, it's not enough to convict them. Instead, the prosecuting witness is the spouse. But what if the spouse regrets calling the cops, as can happen for a number of reasons? In most instances, the spouse would explain to the prosecutor that things got out of control and they want the charges dropped—except this is a no-drop county. The prosecutor does not have the discretion to drop the case.

So what happens? First, the number of domestic violence trials skyrocket, which requires the creation of special courts. Second, prosecutors must decide what to do in those cases where they truly feel the case isn't warranted. Is it even ethical to go forward with a case that the prosecutor feels is unwarranted. There is a dilemma with two countervailing messages competing for the prosecutors attention. The result—hypothetically speaking—is that prosecutors might throw the trial. At trial, the prosecuting witness—the

victim—might refuse to testify against their spouse, or say instead that there was no abuse, for a variety of possible reasons ranging from fear to dependence to a legitimate belief that the charges are unfounded. The point is that such workarounds exist and are available in virtually all aspects of legal practice.

You also find lawyers making decisions, perhaps to the detriment of their case, in order to preserve their relationships with other lawyers. Opposing counsel will sometimes warn the other side about a procedural mistake they are making which could cost them the case. In theory, they should not do this since it potentially goes against the interest of their own client, but it happens. In the criminal setting, opposing sides will often agree to a continuance that the other side needs in order to avoid getting their case dismissed—say because the prosecuting witness could not be in court that day. In theory, they should move for a motion to a dismiss instead and win their case, but this almost never happens.

At one level, lawyers justify this as an admirable trend within the profession, or because they want to preserve their relationships in order to remain personally successful. At another level, one must ask where such trends originate and why they remain. From a systems perspective, cooperation among opposing attorneys maintains the network. Cases come and go, but the system remains. This is a functionalist interpretation, but I think, also a correct one. Dysfunctional systems do not endure. They certainly don't allow a handful of people to process hundreds of thousands of criminal cases each year. At a personal level, lawyers that refuse to play the game quickly find themselves swimming upstream at every turn until one day they aren't there anymore while those who manage to get along get rewarded.

The question then becomes, if change is desired, how could it be carried out.

Chapter 25

A Theoretical Analysis of Law School

Law school, as a system, is a perfect representation of Bourdieu's concept of the habitus: a system of "durable, transposable *dispositions*, structured structures predisposed to function as structuring structures" in a never ending cycle (Bourdieu 1977:72). Importantly, law school is neither a mechanical, deterministic outcome, nor a subjectively deliberate product, architected by planners with a specific blueprint (Bourdieu and Wacquant 1992:121). In many ways, the habitus resembles the shared mazeway of Anthony Wallace or the Charter of Bronislaw Malinowski.

In keeping with the idea of habitus, law school is self-perpetuating. It takes in non-lawyers, trains them in the law school way of thinking, knowing, and evaluating based on its own internal structure and methods, and later, draws from this pool of law students a select few to become the law professors for the next generation. And of course, the previous generation of law professors were lawyers too. In this way, law school makes and remakes itself in its own image, each time passing down the rules of the game to the next generation with each generation free to make small changes in keeping with their historical situation while nevertheless retaining much of the original form.

And law schools have conserved their form to a great degree. Law students from the 1930's might be shocked at the inclusion of women or minorities in law school, but the case books would feel familiar. So would class. In fact, the more shocking fact might be how little has really changed from a pedagogical standpoint.

I don't mean to argue that law school or legal practice are static. Both have changed, but its important to note that these changes largely reflect larger social changes. The habitus does reflect its current historical moment, and as such, radical shifts do arise within the legal framework as they arise within the larger cultural setting. (Bourdieu and Wacquant 1992:135) Again, far more women and minorities practice law today than back in the 1930's in response to changing social values, but also as a consequence of legal

changes made during the past century. Desegregation and women's suffrage were legal movements arising out of changes in social values that resulted in further changes. In this way, we see the feedback process at work: the structuring structures at play, representative of their historical moment, formed by historical processes but activated by the actors within them, and in turn giving birth to the next generation, allowing both possibility for change while simultaneously rewarding conservation of tendency

A good example of Supreme Court politics changing due to the times would be the reversal during the 1930's of the Supreme Court's position on economic regulation. The Court during the start of the Great Depression rejected governmental interference in the marketplace, rejecting time and again New Deal measures passed to protect workers and, hopefully, restore the economy. This, of course, was the impetus behind Roosevelt's Court Packing Plan. Roosevelt figured that if he could not convince the old Supreme Court of the merits of the New Deal, he would outvote them by putting younger Justices on the court who agreed with New Deal economic theories. Ultimately, Roosevelt's court reform bill proved unnecessary and was defeated after Justice Roberts began supporting New Deal legislation and Justice Van Devanter—an opponent of New Deal legislation—retired.

In each instance, the legal system is a reflection of its particular time and place intersecting with the choices made by the actors inhabiting it. As Bordieu states: "The habitus, the durably installed generative principle of regulated improvisations, produces practices which tend to reproduce the regularities immanent in the object conditions of the production of their generative principle, while adjusting to the demands inscribed as objective potentialities in the situation, as defined by the cognitive and motivating structures making up the habitus" (Bourdieu 1977:78). I read that to mean that the environment of the actors causes them to act in a certain way, which encourages them to pressure others to act that way while also allowing a certain amount of freedom for improvisation. If this isn't a description for practicing law, then I've never heard one.

The legal system is a creation of its society's making—spearheaded by its lawyers—but also shaping these individuals in turn, while encouraging each individual to seek out his or her own particular, idiosyncratic outcome.

Meta-analytically, the autoethnographic position of this dissertation provides a solution of sorts to one of Bordieu's problems with anthropology: our "theoretical distortion" of what we study due to being only observers (Bourdieu 1977:1). My research also complies with the habitus in the sense that it recognizes outright that it is neither fundamentally objective nor naturally original, in the sense that it bootstraps

itself out of nothing. Thinking about law is certainly not new, but most of that thinking accepts the law as a fundamental basis without ever really considering the forces that construct it. If my research does anything, it tries through a variety of strategies to highlight the regulated, self-constructing, forces of the habitus in order to bring it into sharp relief for those who have either lost sight of it, having been enculturated into its processes so deeply that they cannot remember how they saw the world before law school, or to give those who have never experienced law school first hand the opportunity to do so, at least in a limited sense.

For example, I have tried to demonstrate that law school, as habitus, is the result of history. This alone is both news and not news to most lawyers who are rarely informed about the history of law school or changes in legal practice. Older lawyers may remember the changes that occurred during their practice, but they were not educated on practice before their arrival, just as new lawyers treat the situation present at their own arrival as Year 1.

Not that this distinguishes law school, particularly. I never received a single day of lecture on the history of elementary, middle, high school, or undergraduate education either. In fact, it wasn't until graduate school, that I learned about the intellectual roots of the education process that I was currently enrolled in. Even then, we studied the contributions of particular individuals while ignoring the various social trends in higher education that brought such educational practices about.

In keeping with this argument, I have not tried to “map” out law school and its relation to the practice of law. Instead, I have tried to perform it. Moreover, I have tried to enlist the aid of other insiders by drawing on law reviews written by other lawyers.

Of course, my writing this is, according to Bordieu, the result of the particular habitus that I occupy at this very moment as a result of education priorities set at UNC. Anthropologists from a different school of thought—or habitus—might frame research like mine not through Bordieu, but rather by means of functionalism.

Most lawyers would recognize neither of these approaches, unless they encountered them elsewhere. Anthropological and sociological theory was never mentioned once during my law school or legal practice.

If there is one argument to make about theory, it is this: gaining an awareness of oneself within the process is helpful. While they have never heard of Bordieu, I have heard lawyers attempting to describe the relationship of lawyer to legal system, and failing at it. How to describe a system that both shapes and is shaped by legal practitioners? How to describe an educational system that both shapes and is shaped by its own educational methods? There is a place for history and reflexive awareness in legal education and

practice that currently sits largely empty. Bringing that to the surface would prove a real challenge to effect within legal education. But for now, I am content to try to describe the habitus as it connects education to practice in a way that everyone might try to understand.

Chapter 26

Conclusion

My hope is that this dissertation has established a link between the process of legal education and legal practice. I believe that the latter is the product of the former. It seems to me that if we are to understand the practice of the legal system, or any system for that matter, we must recognize that all such systems are comprised of individuals operating within a specific habitus. This dissertation has attempted to explore, autoethnographically, what one such habitus—Law School— looks like and how it operates. In the end, the law school experience seems to act very much like an extended ritual of initiation and conversion, whose initiates—lawyers—having learned to “think like a lawyer” then mold the legal system to reflect their training and experience. The Socratic method is probably a necessary component of bringing about such a conversion.

I have also argued that the legal system is complicated, and that its complexity is also a source of resilience. We read much in the news about passing new laws and seeking to reform “the law” as a whole; however, without understanding the forces at work in such a system and the way they interact, all such reforms are probably doomed to failure, either because they do not address the true problems or because the actors within the system find ways to route around the proposed reforms. In other words, direct attacks are likely to fail. What is much more likely to succeed are indirect, asynchronous efforts that do not push and pull, but rather side-step and redirect: a form of anthropological judo that leverages a deeper understanding of the problem to allow wide ranging solutions to emerge rather than be brute forced into being.

Personally, I don’t believe in the efficacy of brute force as a tool of cultural reformation. Historical examples of failed brute force efforts such as Vietnam and our current military efforts in places like Afghanistan only serve to buttress my concerns. There are solutions for such places, but they are probably not military solutions—at least, not the kind using unfocused force alone.

Our goal, as anthropologists, should be to understand the system and the habitus within it, identify the problem that it seeks to solve, evaluate the desirability of that solution, and then decide whether reform is warranted or not. If so, such reform will probably only be obtained through education. The agents of the resulting network must work to solve a different problem; otherwise, there will be no change. After all, change is not something you make; it's something that emerges.

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