Answering Harvard:
Work-In-Progress Suggestions for Reform

By Harvey E. Harrison

I. Introduction

This article will propose that law school education requires extensive reform. It will build upon recent articles suggesting reform, and it will do so by widening focus on the conditions and cause necessitating reform.

I have never served as a professional legal educator.[1] To the extent this lack of service may undermine my qualifications, I ask the reader to examine the content of the section immediately following. I hope the reader will conclude that section contains a sufficient invitation to me to address the issues discussed in this article.

II. The Letter From Harvard

My mother recently located and provided me with a copy of a letter addressed to me on the letterhead of the "Law School of Harvard University, Cambridge, Mass. 02138", specifically its "Admissions Office", dated July 31, 1973. The letter is signed by a person who identifies herself as "Assistant Director of Admissions." That letter reads as follows:

[1] After just short of three years' practice at an outstanding, small firm in Los Angeles, I became involved directly in the entertainment industry as a businessperson, in such roles as agent, producer, president of a Japanese animation company, business affairs executive at Columbia/TriStar, but most of all as an agent, specializing in the digital entertainment and animation media. While I deal daily with lawyers (a group which abounds in Hollywood!) and remain an active member of the Bar, I do not practice, except for one case in twenty years. Information about the client and press coverage of that case is at http://www.mishalov.com/Liteky.html. I have also savored recently a taste of academia, as a lecturer in the department of Psychiatry and Biobehavioral Sciences at UCLA. Currently, I am concentrating in the new, interdisciplinary field of knowledge management; indeed, this article is the result of a proposed "module" for further study in my curriculum material described at www.liquidknowledge.info.

Dear Mr. Harrison:

This will acknowledge your mother's phone call informing us that you will not be accepting the place offered you in the class entering Harvard Law School this Fall. We regret very much that you will not be with us.

In order to improve our various admissions policies and procedures, we are very much interested in the reasons you might have for not accepting a place here and, if you would not mind taking the time, we would appreciate hearing from you.

With best wishes for the future.
Sincerely,
[Signature]
Assistant Director of Admissions

To the best of my recollection I did not reply. I did not reply because I did not know how to respond helpfully. Now, nearly thirty years later, I feel prepared to do so (I would "not mind taking the time"), and I hope that my reply, contained in this article , will be helpful.

III. The Dysfunction of Law School Education and Law Practice

It is the main thesis of this article that legal education and law practice are seriously dysfunctional. In this thesis, I support but need not duplicate Professor Iijima's article which "examines the role of law schools in creating emotional dysfunction and the possibility that they might produce healthier law students and lawyers and, perhaps, a more functional legal system."[2] I also support and again need not duplicate Professor Watson's article and the proposed reforms it contains.[3] I find his introduction to reforms he suggests captivating and one that demands attention. He relates that, with respect to a class essay, a student asked if the following topic could be included as a choice on which

[2] Ann L. Iijima, "Lessons Learned: Legal Education and Law Student Dysfunction", 48 J. Legal Educ. 524 at 524 (1998).

[3] Alan Watson, "Legal Education Reform: Modest Suggestions", 51 J. Legal Educ. 91 (2001).

to write: "American Legal Education Is Rubbish". [4] As Watson reveals, "More students chose to write on that topic than on any other. As they also did when I set a similar essay topic the following year."[5] Watson has more to say: "I was horrified that none of the students had anything good—not one thing—to say about legal education (though they did recognize that some professors were good teachers)."[6]

I had hoped that, in the decades since I completed my law school education, conditions in legal education, if not in law practice, had improved. Iijima's and Watson's recent articles suggest that conditions have not improved as I had hoped. In the following sections, I will try to widen the focus on certain dysfunctional conditions in legal education and seek to uncover a specific cause of these dysfunctional conditions in legal education (a behavioral pattern described in social psychology discussed below), all in an effort to complement the discussion by Iijima and Watson.

It is central to my views that reform of the causes of dysfunction in legal education is an enterprise of gigantic dimensions. These dimensions are, in turn, greatly expanded and complicated by the vast vested interest in maintenance of the status quo both in education and practice. Still, I submit it is better to have a clear map of the conditions irrespective of the difficulty of the objective. Hence, I understand Watson fully when he describes his suggestions for improvement as "modest"[7]. I offer mine with humility and the awareness that they are very much a work-in-progress.

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[4] *Id*., at 91.

[5] *Id.*

[6] *Id.*

[7] *Id.*

IV. The Covert Style In Legal Education

To conceal from the participant the process and especially the values underlying any intensive training, in this case legal education, is perhaps the most harmful characteristic of legal education. At best, to do so is inattentive and unaware, and, at worst, it is blatant deception. The process and values underlying legal education are often ignored or addressed in phrases largely empty of meaning to the student, such as "We are teaching you to think like a lawyer." This is effectively covert. Because the student presumably does not know what it is to "think like a lawyer" (indeed that is precisely what is supposed to be learned); accordingly, he or she is in no position to evaluate whether the educational process and values achieve that goal.[8]

An especially harmful covertness in legal education is the description that "Socratic dialogue dominates law teaching and methodology."[9] The intellectual dishonesty of this characterization, I believe, contains important clues to how and why the dysfunction of legal education continues.

The techniques used in law teaching called "Socratic" are precisely the opposite of "Socratic/Platonic" thought and practice. Indeed, the accurate Classical term for law school educational method is "eristic" (from the Greek "eristikos" meaning "fond of wrangling"), and, as practiced by the Sophists, was a method which Socrates/Plato harshly condemned. As Frederick Copleston describes in his classic history of philosophy:

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[8] I recall a favorite whimsical comment which conveys this concept. The first year students in my class were given their list of courses and teachers. Regarding the course in "Civil Procedure", one of my classmates exclaimed, "What is that? It sounds like training in etiquette for a formal dinner."

[9] Steven I. Friedland, "How We Teach: A Survey of Teaching Techniques in American Law Schools, 20 Seattle U. L. Rev. 1, 28 (1996), quoted in Iijima, *supra*, at 528

> This [adversarial technique] was particularly the case with regard to their [the Sophists'] teaching of Eristic. If a man wanted to make money in the Greek democracy, it had to be done mainly by lawsuits, and the Sophists professed to teach the right way of winning these lawsuits. But, clearly that might easily mean in practice the art of teaching men how to make the unjust appear the just cause. Such a procedure was obviously very different from the procedure of the old truth-seeking attitude of the philosopher, and helps to explain the treatment meted out to the Sophists at the hands of Plato.[10]

Copleston then describes a common law school classroom experience as follows:

> [T]he idea became current that they [the Sophists] gathered together the young men from their homes and then pulled to pieces before them the traditional ethical code and religious beliefs.[11]

Has any law student ***not*** been required to argue in the most compelling terms a position that is morally repugnant in the advancement of "thinking like a lawyer"?

V. What Covertness Conceals: Adversarialism

I submit that what legal education conceals is an enculturation process into certain ethical values. I do not use the term "enculturation" in an anthropological sense, but in an informal way. "Enculturation", here, describes a process in which a group of inductees undergoes an extended period during which diverse life activities are scrutinized, regulated, and adjusted, all within the context of a prevailing set of values.

An example of "enculturation" in the sense in which I use the term here is the process of basic military training. My sense is that military enculturation is scrutinized, regulated, and adjusted, and, like law school education, is rigorous. Yet, I believe that the values of basic military training are overt not covert: I believe trainers express repeatedly

[10] Frederick Copleston, S.J., A History of Philosophy Volume 1 Greece and Rome: Part 1, new rev.ed. (Garden City, New York; Image Books, A Division of Doubleday & Co, 1962), at 104.

[11] *Id.*

the values they want their trainees to absorb: skill in technical military activities, respect for authority, cohesion, and mutual reliance.[12]

What principal values, then, does legal education seek covertly to inculcate or enculturate? I believe the lawyer or the alert law student will affirm that central to legal educational experience is commitment to the an ***adversarial*** outlook or set of values. There are endless ways to express adversarialism, as it is scarcely confined to our legal education and system. From the American love of professional and non-professional team sports to the "I win/You lose" of the poker table, adversarialism is pervasive.

Adversarialism is in our art and our heart. I recall talking with Mark Kasdan, the co-writer of the motion picture Silverado,[13] around the time of the film's release. He said that, while he and his director/co-writer brother Lawrence Kasdan, tried to innovate and refresh the Western genre, one critical aspect of that genre's tradition was honored: it ended with a solitary man with a gun facing another armed man in an empty street in a windy Western town. Our legal system and the legal educational system inherits and preserves much of this gunslinger ethos.

The supreme covert message in the adversarial enculturation of legal education is that law practice is a zero sum game, and through the cultivation of legal expertise, the student/lawyer wins the game. In short, I measure my win in the law by your defeat, and vice versa. The concept (which I believe underlies the law of contracts, for example) that I can agree to invest effort and you can agree to invest effort, and our clients both can

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[12] Johnathan Shay, M.D., Ph.d., author of Achilles In Vietnam: Combat Trauma and the Undoing of Character (New York; Touchstone Books, 1994) and many other works has collaborated magnificently with the military to elevate these values not only for their effectiveness but also as preventative practices with respect to post traumatic stress disorder from possible future combat experiences.

[13] Personal conversation with author, circa 1985.

emerge better off than in the absence of these dealings exists in legal education, but is de-emphasized as a value in favor of the collision of adversaries. (Consider the prominence of moot court and the absence, to my knowledge, of moot "deal making" exercises.)

I acknowledge that there are real, adversarial showdowns in human life, especially American life.[14] However, to enculturate covertly a profession which is at the center of our society, the source of most legislators, some presidents, and all judges, into the adversarial worldview lies, I believe, at the heart of the dysfunction of legal education and of the professional practice. Before concluding, I would like to take this work-in-progress one, additional major step: to describe a pattern in social psychology that is the foundation for the covert adversarialism challenged here.

VI. Beneath Adversarialism: The Fundamental Attribution Error

Even in a society that is rich in adversarial experience, there must be balance. The work of the doctor is to maintain and restore health. That of the teacher is to awaken understanding in students. The taxi driver transports the customer from one place to another. These are not adversarial.

What I submit underlies our adversarialism especially as reflected in legal education and our law system is a pattern recognized in social psychology called the fundamental attribution error.[15] In my informal way of describing the error, I say that we

[14] During my career, I had the opportunity to work in a senior position at a Japanese animation company. Based on that experience, I found what many others have reported: Japanese interpersonal and business relations highly disfavor adversarial behavior and solutions to issues of controversy. Indeed, much work is currently underway among social psychologists contrasting American impulses to commit the fundamental attribution error (discussed *infra* in section V.) with Asian cultural patterns to refrain from that error.

[15] I am greatly indebted to and thank Professor Susanne Lohmann, Professor of Political Science, UCLA, who introduced me to these resources, was the catalyst for my thinking, and thus the catalyst for this article.

tend to identify a person or persons as responsible for conditions and events that we do not like. In serious situations, we resort to lawyers for guidance, and their enculturation and training (as described above) prompts them to make someone else an adversary.

We do so in preference to looking at the situation and the conditions generally involved in our discontent, and focusing upon such situational or conditional factors rather than personal sources of discontent. In short, when we are aggrieved we tend to attribute the cause to persons rather than situations and conditions.

Lee Ross and Richard Nisbett have led the discussion of the fundamental attribution error:

> The [fundamental attribution] … error concerns causal attributions for behavior. People fail to recognize the extent to which observed actions and outcomes, especially surprising or atypical ones, may prove to be diagnostic not of the actor's unique personal dispositions but rather of the objective situational factors facing the actor and of the actor's subjective construals of those factors. In effect, people are too quick to "recompute" the person (that is, to infer that he or she is somehow different from other ordinary people) and too slow to recompute or reconstrue the situation (that is, to infer that one's original construal of the situation was incomplete, or erroneous, or at least significantly different from that of the actor).[16]

Ross and Nisbett summarize the fundamental attribution error succinctly as follows:

> [P]eople (1) infer dispositions from behavior that is manifestly situationally produced, (2) overlook situational context factors of substantial importance, and (3) make overly confident predictions when given a small amount of trait-relevant information.[17]

In concluding this article, I would invite examination of the impact that attribution to situation instead of person could have in the enculturation process of legal education and practice. I suspect that most legal matters can be resolved more effectively by

[16] Lee Ross and Richard E. Nisbett, The Person and the Situation: Perspectives Of Social Psychology, (Philadelphia; Temple University Press, 1991), at 13.

[17] *Id*., at 126. See also detailed discussion of the topic at 125-139.

educating our law students to look first and foremost at analyses and adjustments of situations and conditions. Only in the failure of such solutions should resort to adversarial processes be considered. Some fine lawyers with whom I have worked often do this intuitively: they avoid polarizing individuals and frame, if accurate and constructive, the issues to be addressed in the context of situation and conditions.

I subtitle this article "work-in-progress" because I am keenly aware that, if the reader considers what I present here favorably, the implications require a full paradigm redesign by legal educators of what they do and how they do it. For those who may have responded favorably to what I present here, perhaps we may refer to the "work-in-progress" in this sense: this article could be considered the "work-in-commencement" and the reader's efforts to reflect, extend, improve, and realize ideas suggested here could be considered the true "work-in-progress".