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Notes and Comments

A. Wayne MacKay*

The Social Costs of
Incompetence: An Educator's
View¹

After I had cut off my hands and grown new ones, something my former hands had longed for came and asked to be rocked. After my plucked out eyes had withered and new ones grown, something my former eyes had wept for came asking to be pitied.²

The above quotation has been applied to lawyers and in particular the process of legal education. It is a distressing thought for anyone who cares about the law and considers it a worthy profession. Must people sever hands that can rock and pluck out eyes that can pity in order to become a lawyer? Surely not, but there is more severing and plucking that takes place in our law schools and law offices than lawyers would care to admit.

Although most students enter law schools with a liberal-arts education, legal educators do not properly build upon this foundation. Indeed, we often feel it necessary to uproot the foundation and replace it with one designed to promote legal reasoning. After-dinner homilies about the well-rounded Renaissance lawyer aside, lawyers and law students are not encouraged to read broadly in the arts and the humanities. In fact, law students and young lawyers are inundated with legal reading which consumes not only their time, but also their desire and energy to read anything else.

In fairness, becoming expert or learned in any field entails a certain narrowing of perspective and loss of innocence. This loss of the sense of mystery is eloquently described in Mark Twain's famous account of the pilot learning to navigate the Mississippi River.³ Mark Twain's own analogy is to the physician who views

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1. This paper was prepared for presentation at the Conference on Professional Competence and the Law, Dalhousie Law School, May 30, 1981.

2. Excerpt from a poem by Denise Levertov entitled "Intrusion" quoted by Professor Caleb Foote of the School of Law, Boalt Hall, University of California Berkeley in his address given at the Commencement Exercises of the Class of 1978 on May 20, 1978.

3. M. Twain, *Life on the Mississippi* (New York: Harper, 1883) ch. 8.

the flush in a woman's cheek not as a sign of physical beauty, but rather as a mask of some dreadful disease. James B. White in *The Legal Imagination* casts Mark Twain's words in a legal setting but asks rhetorically what is the loss.⁴ Does a person lose the poet's sense of beauty and wonder or does one simply lose the view of the sentimentalist by learning to think in less childish ways?

What is the relevance of the above comments to the social costs of incompetence? Other speakers at this conference have emphasized the difficulty in defining legal incompetence. This panel must also grapple with the meaning of social costs and hence fall victim to a kind of semantic double jeopardy. There is no claim to really define either of these elusive concepts. Instead, the aims of this venture are rather modest. It is to a narrower slice of the topic that the introductory comments relate.

This paper will focus upon two major facets of lawyer's incompetence — the loss of humanism and the growth of anti-intellectualism. There will also be some consideration of the impact of these inadequacies upon the consumer of legal services.

The Importance of Humanism

It is not fashionable in legal circles to be identified as a humanist if indeed there is such a distinctive category. Humanism is one of those umbrella concepts which admits as much rain as it repels. There may be no satisfactory definition of the term. I argue for a broader awareness of human values outside the discipline of law as well as within it. Hopefully, this would produce a greater sensitivity to the human problems that people bring to law offices.

To even speak in these terms could be viewed as a regression to the naive optimism of the 1960's. I think not. Furthermore, there is no contradiction in promoting both a more humanistic approach to law and an intellectually more rigorous one.⁵ The development of the intellect should enhance humanity and not the reverse.

Implicit in my selection of problems is the need to focus not upon substantive knowledge and practical skills but rather on attitudes. Professor Frankel before doning his judicial robes, argued

4. J. B. White, *The Legal Imagination* (Boston: Little, Brown and Company, 1973) at 10-13.

5. This view appears to be shared by Professor Francis Allen in "New Anti-Intellectualism in American Legal Education" (1976), 28 *Mercer L. Rev.* at 447-62.

persuasively that the real problems of lawyer incompetence are attitudinal.⁶ Lawyers are very rarely sued for lack of knowledge or technical proficiency. They are most frequently sued on matters of ethics or neglect such as missing limitation periods, failing to interview witnesses, poor research or fraud. Professor Frankel as he then was, reaches the alarming conclusion that in the United States, there are frequent assertions that the "lawyer as tradesman has been cheating the customer."⁷ These are problems of ethics and attitudes not skill deficiency. These same problems of procrastination, disorganization and irresponsible professional behavior are reflected in less dramatic form in the Canadian negligence cases.⁸

Professor Neil Gold of the University of Victoria sees attitudes as an important part of professional competence.⁹ He makes the following comment:

A competent professional must be responsible, diligent, open-minded, considerate of others, committed to quality services and interested in the social, economic and human implications of his work. The well-rounded professional realizes that law operates within a complex social system. The competent and concerned legal professional is a person who sees law as connected with learning in the social sciences and the humanities. The narrow technician should give way to the sentient whole person, whose world views are dynamic.¹⁰

This appears to be a call for humanism in the best sense of that term. The competent lawyer must be sensitive to the human tragedy which lies behind the distilled legal issues. Such sensitivity is much more likely if the lawyer approaches the problem with consideration, responsibility and open-mindedness. These are attitudes which should be fostered and nourished by the law schools, the Bar and the Bench.

On basic matters of ethics and integrity, one should be modest

6. Frankel, "Curbing Lawyer's Incompetence — Primus Non Nocere" (1977), 10 *Creighton, L. Rev.* 613, at p. 614-15. The same conclusion is reached in the First and Second Annual Reports of the *Lay Observer* under Section 45 of the Solicitor's Act (U.K.), 1971.

7. *Id.* at pp. 618-619.

8. L. Klar, "Recent Development in The Law Relating to Solicitors Negligence". (Paper prepared for the 1978 Mid-Winter Meeting of the Canadian Bar Association, Alberta Branch).

9. N. Gold, "Competence and Continuing Legal Education" (A paper presented to the Second Conference on The Quality of Legal Services held in Toronto during October 1980).

10. *Id.*, at 16-17.

about the role of education. Professor Frankel again expresses this well.

Let us by all means stress ethics and seek to uplift ourselves. But let us not build our hopes for the system on a breed of lawyers much better or much worse than mere human beings. If we limit our fantasies in this respect, we will not expect that better rules of warfare are apt to produce peace and co-operative crusades for justice.¹¹

The concern about incompetent advocacy is typified by the remarks of Chief Justice Warren Burger of the American Supreme Court, in which he suggested that one third to one half of American trial lawyers are incompetent.¹² Not only do more recent studies indicate that the problems of incompetent advocacy have been over-stated;¹³ but more importantly, basic attitudes and not lack of technical skills, are the genesis of incompetence. Teaching the arts of advocacy or negotiation may make lawyers more adept at playing the legal game, but it will not necessarily promote either professionalism or justice. The concern about advocacy skills is misguided and incomplete. Better technicians will not necessarily fashion a more humane and just legal machine.

The Need for Intellectual Rigour

No teacher of law, judge or lawyer should apologize for demanding high academic performance from law students and young lawyers. Indeed, apologies are owed when lower standards are accepted or encouraged. Being perfectly normal human beings, law students and young lawyers seek to avoid work, minimize intellectual pain and find the certainty of fixed rules. Learning anything involves both pain and pleasure and this should be demonstrated by word and example.

A lawyer need not attain the highest standards in order to be competent. However, given the status of the legal profession and the economic benefits of joining it, we have a duty to insist upon minimum standards of intellectual performance. More importantly, law schools and the practicing profession should encourage and

11. Frankel, "The Search for Truth — An Umpireal View" (1975), 123 *U. Pa. L. Rev.* 1031.

12. W. Burger, "The Special Skills of Advocacy" (1973-74), 42 *Fordham L. Rev.* at 227-43.

13. Cramton and Jensen, "The State of Trial Advocacy and Legal Education — Three New Studies" (1979), 30 *J. Leg. Ed.*, at pp. 253-69.

promote self-motivated learning, continuing legal education and dedication to quality legal service. Such professionalism is a pre-requisite to long term lawyer competence.

The broader evils of anti-intellectualism in the law schools have been well chronicled.¹⁴ Furthermore, delay, poor work habits, inadequate preparation and insufficient effort are at the heart of most cases of lawyer negligence. Dispensing justice in a complex society demands increasing moral and intellectual rigour on the part of lawyers. If lawyers are unwilling to enforce high standards of performance, then they should be willing to surrender some of the privileges and benefits of a learned profession.

The Social Costs

There are readily apparent social costs to anti-intellectualism. Law schools may degenerate into trade schools where students are denied the academic challenge of mastering the discipline of law. Consumers of legal services may be confronted with a legal system that is more concerned with procedures and technicalities than a careful balancing of the scales of justice. Members of Bench and Bar will be bored by the routine of law rather than challenged by its intricacies and capacity for change.

However, the greatest social cost of anti-intellectualism is that it decreases the likelihood that the basic assumptions of our legal system will be questioned. To be effective law must be vital and changing. Stagnation born of lazy thinking will poison not only the legal profession but the broader society as well.

The social costs of underplaying human values are less apparent but equally devastating. Returning to the questions posed by Mark Twain and James White, what is lost in the process of legal education? If lawyers can only view problems in legal terms devoid of human dimensions, a great deal is lost. If a lawyer's first reaction to a murder is a strategy of legal defences, he or she has lost a sense of priority. However, such losses are not inevitable. Nor does Mark Twain convince me that a doctor sees a woman's body in terms of potential disease.

The human side of lawyering is clearly underplayed by law teachers and practicing lawyers. There are few opportunities for law students to interview clients or improve their skills in relating to

14. Allen, *supra*, note 4.

non-lawyers. Speaking to a distressed client in complex legal terms demonstrates a lack of sensitivity and consideration. Establishing good human relations with your client also pays immediate dividends in terms of information flow and client trust. Sensitivity and effective communication are a vital part of the competent lawyer's repertoire.

Lawyers need not have arms incapable of rocking and eyes incapable of pity, but in too many cases they do. Whether this is a problem of admission standards, legal education or the practice of law is far from clear. Most likely all segments of the legal profession are implicated. The important point is that the loss of human perspective be recognized as an element of incompetence and that steps be taken to combat it. A blending of humanity and intellect will not in itself guarantee competent lawyers; however, it can provide the foundation for true professional service. Such service would minimize the social costs to the legal consumer and enhance the stature of the legal profession as well.