Legends of the Legal Academy

The Pedagogy of the Old Case Method: A Tribute to "Bull" Warren

Paul D. Carrington

Editors' Note: *With publication of "The Pedagogy of the Old Case Method: A Tribute to 'Bull' Warren," the Journal of Legal Education inaugurates a new occasional feature, "Legends of the Legal Academy," focused on law teachers whose lessons and teaching style left an enduring imprint on their students, their institutions, and the profession. The Editors welcome submissions profiling professors whose teaching and scholarship made a similarly strong and lasting impact.*

In my youth almost a half-century ago, I attended a school dedicated to the subordination of its students. The teachers made incessant demands on their students. Inadequacies in their performances were publicly observed without pity and often in the most insulting terms.

We students at that school were almost randomly selected. We did not choose to go there and, indeed, most of us did not want to go to school at all. Certainly none of us relished the incessant demands and insults. We were forced to do what had to be done when it had to be done, and we gradually acquired the habit of prompt obedience.

But we acquired other traits as well. The teachers' seeming inhumanity had at least three redemptive consequences. The most obvious was that it demonstrated their conviction that their work, and hence the work they demanded of their students, was important and possible. They could not have all been that grouchy had they been taking their tasks lightly or had they expected that we would fail if we tried hard enough.

Secondly, their gruffness conferred on most of us a valuable sense of survivorship. Most of us succeeded at least marginally at the seemingly important feats required, and they were not easy. Especially for those of us who were not very good students in that school, minimal success was a considerable

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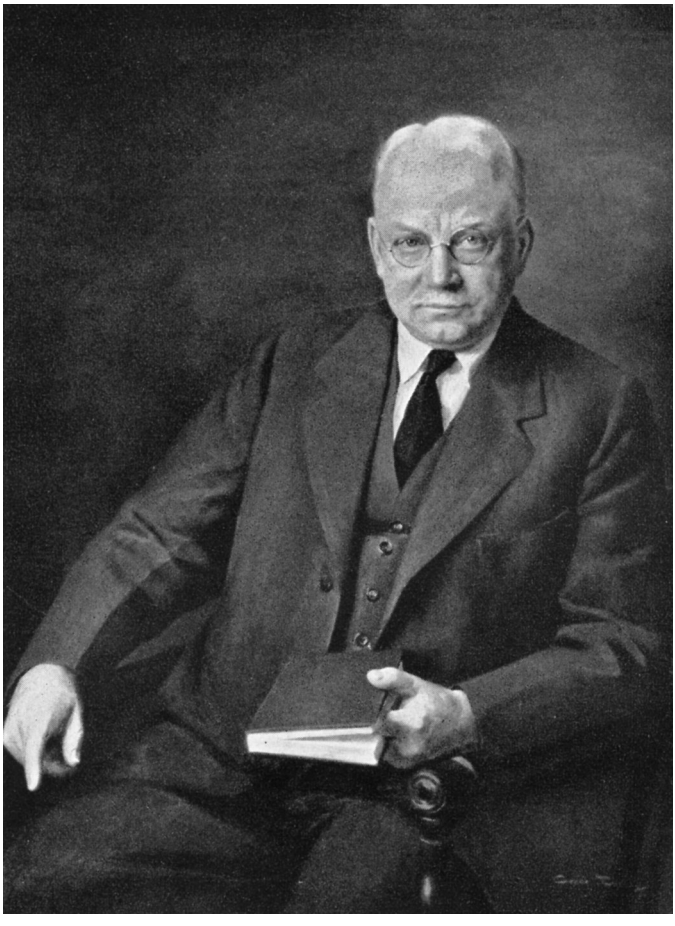

Edward "Bull" Warren

gratification. To use a term not then known, most of us acquired a new measure of self-esteem derived not from praise by others but from achievement permitting self-praise. In part, this was because failure was obviously possible; a few students who could not achieve minimum standards were sent home.

Finally, the teachers' hateful conduct created among the students a sense of interdependency—they provided their students with a common adversary against whom we could and did respond together. We formed bonds of mutual trust. We became artificial siblings. This was extraordinary, given that our backgrounds of race and class were as different as can be imagined, and that the school had only very recently been racially desegregated.

I was twenty-four years old when I attended that school, and I was a lawyer. Most of my fellow students in 1955 were nineteen or twenty. My special brothers included a black operator of a shoe shine stand at the Corpus Christi railroad station, a Hispanic grocery clerk from San Antonio, a black warehouse guard from Oakland, and a Japanese-American from Redding who had lived for four years in an internment camp in Utah. My immediate circle also included a butcher from Las Vegas and a guy who aspired to be a professional golfer. One of them may well have been gay; we did not ask and he did not tell. It was my buddy from Corpus Christi who pushed me over the training barricade that I was not strong enough to climb. He saved me from additional humiliation and stress, a kind deed I could never have repaid. The school was, of course, basic infantry training, and almost all of us had been selected by our local draft boards.

From my present perspective, I would have to say that basic infantry training was the most effective educational institution I ever had the opportunity to observe. The Phillips Exeter Academy (from which I was quite appropriately expelled) and the Harvard Law School (from which I was not expelled) made strong impressions on me, and the other schools I attended were also pretty good. But neither Exeter nor Harvard achieved in years what the United States Army did in weeks to make adults out of almost all of us involuntary selectees. I have, alas, not kept up with my military brothers, but I am as certain as one can be about such matters that they met the chances of life with measurably greater competence and composure than they would have absent what the Army did to and for them in eight short weeks. Happily, I know almost for certain that none of them was ever in military combat.

My respect for what the Army did is not linked to any militaristic impulses on my part. I was grateful that the Army thought me unpromising as an infantryman, and later trained me to type and fill out forms. I was never happier than the day I left active duty as a soldier. But passage of more than a half-century has not erased my affection for my military buddies, nor has my distaste for the military enterprise prevented me from continuing to admire the drill sergeants (perhaps especially the brutal black female corporal) who did their work with such spirit and effect.

In varying degrees, hierarchy is indispensable to all human endeavors entailing organized collaboration. Most that are worthwhile require it. One can draw a picture without hierarchy, but one cannot play in an orchestra. An infantry unit without hierarchy is a mob, and one organized by students passionately resistant to hierarchy[1] would, in military combat, have been a suicide pact. Could there be a ballet troupe, a basketball team, a hospital, or an industrial organization of whatever kind in a leftist heaven that excluded hierarchy? Many of our most valued freedoms depend on restraints imposed by hierarchs of one kind or another, and there is, therefore, nothing inherently wrong with reproducing it in a classroom devoted to professional training. Everything depends on the purpose of a hierarchy and the fitness of its methods to that purpose.

No mid-20th century law school such as the one I attended was reproducing hierarchy for its own sake. Law schools were then striving to fit their students for professional work in a world filled will all kinds of hierarchies, many bad but many good.[2] They were, among other objectives, trying to fit their students with the moral and intellectual strength and self-confidence to exercise prudent professional judgment in distinguishing good from bad and to withstand the sometimes horrific stress they would experience in vigorously contested circumstances of whatever sort. Most law teachers then supposed, whether correctly or not, that treating adult students as immature persons needing emotional nurture and intellectual succor was not the way to prepare them for the moral and intellectual combat that pervades the work of American lawyers.

My most stressful moment came about six weeks into the first year. Professor Austin Scott called on me to inform the class of 125 students about the next case. I froze, and said that I was not prepared. His response was: "Well, Mr. Carrington, what have you read? We will talk about that." It helped that he had a twinkle in his eye, and I did survive to find something to say.

But if some students found the stress of managing their own professional development too stressful and left the school to pursue a different career, that was not a cause for regret but an indication that the schools were serving their students (perhaps especially the former students who left) and the public well.

The war in Vietnam and the reactions it engendered among students tended to infect law student anxiety with mistrust of teachers as persons engaged merely in self-gratification. The mistrust was compounded by the arrival in law schools in numbers, first of students of color, and then of women, many of whom were quick to suppose that teachers were motivated by an ambition to humiliate them. It is possible that many of the women were "hard-wired" to need and thus demand mentoring relationships that law teachers of that time were not equipped to supply. As a consequence of the efforts by law teachers to

1. *E.g.*, Duncan Kennedy, Legal Education and the Reproduction of Hierarchy: A Polemic Against the System (New York Univ. Press 2003).

2. For an account of the Yale Law School of that era, see Laura Kalman, Yale Law School and The Sixties: Revolt and Reverberations (Univ. of North Carolina Press 2005).

respond to student mistrust and their demands for nurture, law school became almost everywhere less stressful, and students were less frequently required to participate actively and competitively in their own instruction.

If law teachers of that and earlier times were right in their assumptions that they were not merely instructing students in law but were preparing them for professional work as lawyers, and that professional work is in almost all its forms competitive and stressful, and often laden with moral ambiguities, the reforms effected in response to the mistrust of their students may have been counterproductive. Law school graduates may have been less well prepared than they might have been for the professional work they sought to perform. And they may have had less moral autonomy of the sort that enabled them to withstand the corruption and moral squalor that is the stuff of human conflict with which lawyers must deal.

For example, would the lawyers who later helped the accountants shred Enron documents have performed more admirably had they been better educated in law school? Would the lawyers advising the reckless bankers of the 21st century have given better advice had they been better educated? I reject the arrogant utterance of Professor Felix Frankfurter that "lawyers are what the law schools make them."[3] The opposite would be far more accurate. Steven Pinker has thoroughly refuted the widely shared premise that our children, or even our law students, are blank slates on which we can write a message of our choosing.[4] Mostly, students, even law students, get their morals from their peers. If Enron's or the bankers' lawyers grew up among neighbors and attended schools and universities with fellow students who measure one another by such superficialities as their annual earnings, without regard for their professional integrity or the worthiness of the services they perform, no professional school can do very much to change that. Nevertheless, mid-20th century law teachers may not have been wrong to suppose that moral education is possible. And moral education may be the most important and enduring consequence of good professional training in law.

If law teachers today sought to prepare their students to withstand the moral squalor they are certain to encounter in performing legal services, how might they pursue that goal? They might seek to foster in their students the gratification that comes from earned self-respect derived from surviving rigorous demands with little help from intellectual and moral nursemaids, in the hope that the moral and intellectual autonomy thus developed might be put, at least sometimes, to good public use. Would a law school guided by such aims resemble basic infantry training? Maybe a little.

3. Letter to R. Rosenwald, May 13, 1927, quoted in Rand Jack & Dana Crowley Jack, Moral Vision and Professional Decisions: The Changing Values of Women and Men Lawyers 156 (Cambridge Univ. Press 1989).

4. Steven Pinker, The Blank Slate: The Modern Denial of Human Nature (Penguin Books 2002).

Or maybe it would bear more resemblance to the law school that featured the teaching of Edward "Bull" Warren, whose legendary antics recorded in the lore of the Harvard Law School provided the anecdotes in *Paper Chase*.[5] The school in which he taught took form in the late 19th century in response to the idea of Charles Eliot, Harvard's president, who predicted that if law school were made long and hard, the most promising professional students would be attracted by the challenge and opportunity to elevate themselves within the social and professional hierarchy.[6]

In the academic marketplace of the 19th century, Eliot's idea was a resounding success. Accordingly, The Bull's students were attracted by his sometimes brutal manners that supplied the basis for his fame among several generations of Harvard Law students. A native of Worcester, his transformative experience was a leadership role on the *Harvard Crimson*, where he learned that rejection by President Eliot was a first step to triumph.[7] He experienced legal education with four memorable professors. The teacher he most admired was James Barr Ames who conducted classes "chiefly by means of Socratic dialogues between himself and fifteen or twenty of the best students who formed, so to speak, a Greek chorus."[8] But he also observed that Judge Jeremiah Smith was a man "overflowing with the milk of human kindness."[9] In 1899, while Warren was a third year student, he was identified by Dean Ames as a promising teacher who would employ the rigorous Ames style. But he practiced with a large firm in New York before returning to the law school in 1904 to become a legendary teacher on the Ames model.

It was no part of Warren's objective as a Socratic teacher to train students to be weak subordinates in morally corrupt hierarchies, as some students in later generations may have supposed that their teachers were doing.[10] Students who survived The Bull's teaching were more likely, The Bull thought, to insist

5. All the stories in that celebrated novel were circulating at the Harvard Law School in 1952 when I was a first year student. It is not unlikely that many of them had gained color from frequent repetition. The novelist used all but one of the stories I heard about "Bull" Warren. The one that the novelist did not use was my favorite. It was reported that a student was so agitated after reading the Property examination questions that he drank his ink. He was taken to a convenient nursing station in Ames Hall where the ink could be pumped out of his stomach. As he was returning to consciousness, The Bull entered the nursing station and asked him how he was feeling. "OK, I guess, Professor Warren." "That's good," The Bull was alleged to have said, "because you have only forty-five minutes to finish the exam."

6. On Eliot's selection of Dean Langdell, see Bruce A. Kimball, The Inception of Modern Professional Education: C.C. Langdell, 1826–1906 86 (Univ. of North Carolina Press 2009); on his influence on the school, *see id. passim*.

7. Edward H. Warren, Spartan Education 3 (Houghton Mifflin 1942).

8. *Id.* at 7. Kimball, *supra* note 6, at 262, describes Ames as often insulting and dismissive in class.

9. *Id.* at 6.

10. For an account of Harvard Law School in Kennedy's time as a student at Yale, see Joel Seligman, The High Citadel: The Influence of Harvard Law School 93–201 (Houghton Mifflin 1978).

on thinking for themselves. In his retrospection, he observed that the most important attribute a lawyer can have is "the confidence of other people that he can be trusted always to do the decent thing."[11] It is not obvious that this trait is acquired by the Socratic method. But his students were likely to have shared a sense that what they had achieved was important, and perhaps not merely to themselves. They might also have gained self-respect by surviving an emotional as well as an intellectual challenge. And they might have tended to bond with their classmates as members of a profession making moral demands. The key to professional virtue in Warren's mind was discipline:

> I believe in discipline. From boyhood days on, I have sought to discipline my own mind, pen and tongue. (As a teacher) I have sought to discipline the minds, pen, and tongues of my students. I have never suffered fools gladly, and regard such sufferances as mischievous.[12]

In his way, The Bull plainly strove to "teach law in the grand manner," as Holmes had designated the method.[13] The larger aim was, as Holmes had it, to enable the student to become "reasonable, and see things in their proportion":

> Nay, more, that he should be passionate as well as reasonable—that he should be able not only to explain, but to feel, that the ardors of intellectual pursuit should be relieved by the charms of art, should be succeeded by the joy of life, become an end in itself.[14]

One may be skeptical that the Socratic method as practiced by "Bull" Warren could have achieved the intended outcome. Yet, I have actually known quite a few of "Bull" Warren's students because my father was one of them, and over the years I met many of his Harvard Law 1917 contemporaries, and more than a few manifested the traits The Bull sought to "nurture."

I never had occasion to discuss with any of them their reactions to The Bull. I wonder how he might have scored on 21st century student evaluations of his teaching. All his students whom I met except my father were in their seniority when I met them. Some were rather pompous, self-seeking persons who might, as best I could tell, have been the sort of lawyers who would have shredded Enron documents without a blink, and papered over the misdeeds of 21st century bankers, at least if well paid to do so. But others I knew were morally formidable and autonomous persons who would have participated

11. Warren, *supra* note 7, at 28.

12. *Id.* at ix.

13. Oliver Wendell Holmes, Jr., The Use of Law Schools, in Speeches 265 (Little, Brown and Co. 1913). For that and many other contemporaneous comments on the teaching method, see The History of Legal Education in the United States: Commentaries and Primary Sources 495–583 (Steve Sheppard ed., Salem Press 1999). A bibliography on the subject is provided in The Centennial History of the Harvard Law School 1817–1917, 365–376 (Harvard Law School Association 1918).

14. *Id.*

in such a desperate act only after exercising independent and critical moral judgment and reaching the unlikely conclusion that the world would be a better place if the documents were shredded or the loans repackaged.

This assessment is not based merely on my intuitive reading of their characters. Dean Acheson,[15] for one member of the class, had the moral starch in 1937 to resign as Undersecretary of the Treasury because of his belief that President Franklin D. Roosevelt's monetary policy was morally reprehensible. In 1948, he (with Secretary of State George Marshall) gave President Truman the very unwelcome advice that recognition of a Zionist state would result in a permanent state of undeclared war between the United States and the Muslim world. In 1949, he improvidently stood up for Alger Hiss. In 1951, he stood up to Joseph McCarthy.

My father's roommate, a fellow Missourian, Claude Cross, practiced in Boston for many years, and exhibited his moral toughness when he undertook the defense of Alger Hiss. One may question Cross's judgment if he lied on his client's behalf, but one cannot question his moral toughness and independence.[16] Raeburn Green, another Missourian, practiced in Saint Louis, advising business clients, and in 1950, pro bono publico, he defended members of the Communist Party against diverse criminal charges.

Kenneth Royall practiced in Raleigh representing business interests until he was activated as a colonel in the JAG Corps. A few months thereafter, in 1942, he was assigned to defend German saboteurs, and he took their case to civil courts and to the Supreme Court of the United States in direct defiance of his commander-in-chief.[17] He lost the case but cherished the admiring note he received from a client shortly before the client's execution. Royall also took a stand against Senator McCarthy.[18]

And the end of that Senator's vicious tirade came when Joe Welch, a farm boy from Iowa who had spent a career trying cases in Boston, stood up to him on behalf of clients he was serving pro bono publico. What Acheson, Cross, Green, Royall, and Welch did in these events was to put their careers at risk to do what they perceived to be "the decent thing." Other members of that Class of 1917 (including my father) performed other less noted acts, public services sometimes rendered at substantial cost to themselves.

No one can say that any of these courageous public acts were a consequence of the teaching of The Bull. But it is possible that they learned in law school to look out for their own moral standards without close guidance from mentors,

15. Acheson wrote four volumes of autobiography and he is the subject of five biographies.

16. He argued that lawyers sometimes have a duty to lie in Charles P. Curtis, The Ethics of Advocacy, 4 Stan. L. Rev. 3 (1951). A response is Henry S. Drinker, Some Remarks on Mr. Curtis' "The Ethics of Advocacy," 4 Stan. L. Rev. 349 (1952).

17. Ex parte Quirin, 317 U.S. 1 (1942); for an account, see Paul D. Carrington, A Military Salute, 12 Green Bag 2d 19 (2008).

18. See his essay, American Freedom and the Law: Fighting the Communist Menace, 40 A.B.A. J. 559 (1953).

and gained confidence in their ability to do so. I am sure that many of them practiced law with moral courage, and we can say that The Bull's teaching, so despicable to many students of a later generation, had that result as its aim. Maybe it even had some of that effect. I doubt that teachers who would have provided more gratification and comfort to students of Duncan Kennedy's generation would have been likely to have done better in training students to stand on their own moral and intellectual feet.

I wonder how The Bull would teach law students in the 21st century. He would have to deal with the troubling change in law firms advising large corporate enterprises such as Enron as well as those attorneys more recently revealed to share responsibility for the economic chaos of 2008. Lawyers in such organizations are increasingly subordinates in hierarchies that are sometimes uncaring.[19] While members of the Class of 1917 were often called by their clients for broad advice, today's large firm partners less frequently have the kind of stable relationship with their clients that results in that kind of consultation. It may well be, for example, that no independent lawyer (i.e., one who had not been subordinated by his or her corporate managers) was ever invited to give advice about the antics of many of the corporate executives who have recently been disgraced. What legal advice could and should have been given to Lehman Brothers or AIG? Even The Bull could not hope to do much about their irresponsible behavior.

Moreover, even The Bull would need to confront the destructive force of law school rankings, which have a paralyzing effect on the freedom of most law schools to do anything that might diminish their relative standings. Virtually every measurement of law schools employed in rankings counts expenditures, and virtually all available funds must be spent to protect schools rankings. Also, their shared preoccupation with such matters must tend to reinforce in students a sense that it is affect and not substance that matters. Law students are now consumers. Maybe today's basic infantry trainees are, too.

A few years ago, I proposed my own Utopian law school for the 21st century.[20] My proposal requires an elite university with an endowment that its trustees might be willing to invest in the creation of a morally independent legal profession of lawyers unwilling to surrender their autonomy to mindless or greedy hierarchs. My Utopian law school would simply foreswear tuition, proclaiming that it would conduct the best three-year program it could without charging students for it. Classes would be large, and services other than classroom teaching would be minimal. In order to assure their moral independence in shaping their careers, students would be enjoined to borrow no money and to live within their current means, however modest those might be. But the university might proclaim that its law school is a contribution to the Republic, much in the tradition envisioned by the 18th century founders

19. For comment on that change, see Paul Haskell, Why Lawyers Behave as They Do (Westview Press 1998).

20. Paul D. Carrington, On Ranking: A Response to Mitchell Berger, 53 J. Legal Educ. 301 (2003).

of American university legal education,[21] and maintained by the University of Michigan in the time of Thomas Cooley.[22] Their graduates would be instructed to repay any indebtedness they felt they owed to the university by serving the public interest as they might best identify that interest.

My Utopian law school would not do well in the rankings provided by *US News & World Report* because it could not compete in the expenditure of money. Imaginably, it might nevertheless attract adult students who were seriously committed to their own moral values and were willing and able to manage their own intellectual affairs. Their commitments and moral standards might even be reinforced by the moral ambience created by their classmates. Its graduates might actually prove to have special value to the causes they chose to serve. My reading of "Bull" Warren's memoir led me to believe that he would join in this proposal.

21. For a brief account, see Paul D. Carrington, The Revolutionary Idea of University Legal Education, 31 Wm. & Mary L. Rev. 527 (1990).

22. Paul D. Carrington, Stewards of Democracy: Law as a Public Profession 25-34 (Westview Press 1999).