

# To Beginning Law Students

*Patrick McKinley Brennan*

**R**egardless of what each of you has come to law school to do, allow me to suggest a complementary or perhaps an alternative aspiration: take these three years to learn how to do law well; even more, learn that the point of doing law well is to do good; still more, learn that doing good through law is about using power

to achieve love's ends. "The central problem of the legal enterprise," Judge John Noonan has suggested, "is the relation of love to power." Rather than of love, we could talk today about this or that, just as we can use the power of law for this or that, for good or for evil, for life or for death. Let us, rather, talk and think about what place law has in love and love has in law.

The typical method by which American law schools invite their students to begin (as we say) "thinking like lawyers" is the reading of appellate court opinions. You will read dozens, perhaps hundreds, of appellate decisions during your first year, and one of the questions you will be asked of them is: What is the law? What is the law of this case? Another is: Does the court claim to base its decision, its holding, in discernible legal materials, or was this, in the court's eyes, a case of "first impression" in which there was, in effect, no law at all?

Law, it seems, is not always there when you look for it. Sometimes, even in the judicial opinions of self-styled conservative jurists, law must be made. The result is that you will soon find yourself admitting under professorial cross-examination that the court based its decision not on law (because there was none "on point") but instead on something else. That something is called "policy grounds." The habit of mind of a large segment of the modern legal academy is, I regret to report, to treat the apex of your education in law as the realization that what looks like "law" is instead "law and policy." It is against this tendency that I would like to inoculate you. I doubt I shall succeed, but there is too much at stake to allow the possibility of failure to dissuade me.

What legislatures and courts proffer in the name of the law is so plentiful today that we easily forget that the quantity of law has nothing to do with its quality. However clever a statute or "policy," the mere fact that a law has been enacted is no guarantee that it will make any contribution to our leading good lives. Law almost by definition succeeds in ordering our living, but order is not all there is and may not be for the good. As the late Yale Professor Grant Gilmore put it: "In hell there will be nothing but law and due process will be meticulously observed."

But if law is not just a system of ordering indifferent to what goods we pursue in life, then, as lawyers, we need to determine what is truly good. There is, of course, a long history of disagreement on the issue. So much disagreement, in fact, that in the name of avoiding discord we have been asked, or rather ordered, by much of modern political and legal theory to leave our aspirations for the good at the threshold of law and politics. In its place, we are instructed to let policy, that trusty tool of the objective experts, get the job done uncomplicatedly and uncontroversially.

Yet when a person is denied a seat at the front of the bus based on the color of her skin, when a pregnant

woman is deported without consideration to where she is being returned, when an executioner puts an innocent person to death in the name of justice and the people—we know that this is the antithesis of the good, and we know this because with our pre-theoretical intelligence we grasp what is good.

Now you will not hear much about the good in your law school classes, and to some extent this is as it should be. But you will hear a lot about the importance of doing work *pro bono publico*—that is, "for the public good." This is something the American Bar Association (ABA) tells every American lawyer he should perform, and this law school is committed, as it should be, to encouraging such work as well.

Now the ABA defines *pro bono* work broadly as any free legal service toward any public good, or, more narrowly, as free legal services for those in need of them. Without telling us why, the ABA favors the latter, narrower definition. Work *pro bono publico* then turns out to mean free legal services for poor people, something to which, according to the ABA, every lawyer should dedicate at least fifty hours annually. The rest of the lawyer's professional life should then be guided by the ABA's ideal of the lawyer as "zealous advocate," with, apparently, no concern for the good at all.

Zeal is not, I suppose, an unmitigated evil. But like order, I suspect there is plenty of it in hell (a point not lost on Dante). Nor, of course, am I knocking free legal services for the poor; I entertain no doubt that well-chosen legal services provided to the needy would make the world a better place. But I do have grave reservations about a legal profession that believes it can sustain itself while advocating that lawyers spend a mere fifty hours a year working for the public good—while acting as little more than hired guns the rest of the time. In a particularly pernicious and seductive sleight of hand, the ABA presupposes that paid work cannot be *pro bona*. This would have come as a great and dispiriting shock to this country's great lawyers of earlier generations, who considered all of their work to serve a higher good.

But there is no reason to despair. If only they would learn again to think of law as a reflection or expression of the public good, then lawyers could act once again as civil leaders.

Of course there will always be disagreement about the content of the good. Even the American founders disagreed among themselves. But they bothered to disagree because they *cared* enough to seek the good. Law school will be for you, I hope, a focused opportunity to discover or rediscover how people in community go about figuring out what is good. As theologian James Tunstead Burtchaell explains, "Our judgments of good and evil focus on whether a certain course of action will make a human being grow, and mature, and flourish, or

whether it will make a person withered, estranged, and indifferent. In making our evaluations, we have little to draw on except our own and our forebears' experience, and whatever wisdom we can wring from our debate with others."

The effort required will be great. It is not easy to pay attention to experience, to be intelligent in interpreting what you experience, to be reasonable in the judgments you reach, to be responsible about acting only in ways consistent with what you know. Throughout the process, do not lose sight of the fact that, although law is a specialized dialect, a technical language in which you are to become expert, at the end of the day law governs the domain of common sense, the quotidian issues about what is worth doing, what risks should be permitted, what harms must be avoided. Pay attention to your common sense, but let it be tested through dialogue. Genuine engagement in the process of learning from and with others will require you to be ready to change. Be ready to change for the good.

**W**e have spoken of law and of the good, which brings us finally to love. What is done in the name of the law is done with great power behind it—the army or a firing squad if necessary. Law that would give effect to the good as understood by a diverse population would be very good indeed, or so I have been suggesting. But things are perhaps not so simple. Might it not be the case that law, even law that aims at the good, is itself an evil? While the Jewish people live under God's law, and their possession of it is their boast and pride, indeed their salvation, the Christian people, by contrast, "died to the law through the body of Christ" (Romans 7:4). To the Galatians Paul wrote, "All who rely on works of law are under a curse" (Galatians 3:10).

Yet it is important to keep in mind that Christ considered himself to be fulfilling the law, not supplanting it. People who would love one another still need law, at least in this life. But while love may lie beyond law, law worth living under does some of love's bidding. As Michigan professor Joseph Vining has noted, law that is worth living under, like the love that informs it, "leaves nothing out" in its effort to make sense of our experience: "not person, nor present, nor freedom, nor will, nor madness, nor the individual, nor the delight of a child, nor the eyes of a fellow human being, nor our sense of the ultimate."

Welcome to law school. And if intellectually and morally you would make the most of your experience here, remember along the way to leave nothing out.

*PATRICK MCKINLEY BRENNAN is Associate Dean and Professor of Law at Arizona State University. This essay is adapted from an address delivered last fall to first-year students in the university's College of Law.*