

## Reviews

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# Dionysian Education

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BRUSH WITH THE LAW: THE TRUE STORY OF LAW SCHOOL TODAY AT HARVARD AND STANFORD  
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Joseph P. Tomain

*As for morality, . . . could it be anything but a will to deny life, a secret instinct of destruction, a principle of calumny, a reductive agent – the beginning of the end? – and, for that reason, the Supreme Danger? . . . But it still wanted a name. Being a philologist, that is to say a man of words, I christened it rather arbitrarily – for who can tell the real name of the Antichrist? – with the name of a Greek god, Dionysos.*

Friedrich Nietzsche, *The Birth of Tragedy*

**I**N *THE BIRTH OF TRAGEDY*, two deities – Apollo and Dionysus – are necessary for successful drama. Apollo, the more thoughtful and reasonable of the two, works through dream experiences while Dionysus is more rapturous and intoxicated. Drama with Apollo and without Dionysus would be flat and stale; drama with Dionysus and without Apollo would be chaotic and incoherent. Both gods are necessary to engage life and let creativity flourish. Drama is certainly a form of education and legal education has its counterparts to Nietzsche's two gods.

When Edward Warren enrolled in Harvard College in 1891, students were divided into Sports and Grinds. Being a Sport was preferred. As Warren remembered, "It was

definitely *not* fashionable to study." Rather, "The desire of social recognition was more controlling among most of the students in Harvard in my time than any other desire."<sup>1</sup> He later enrolled in Harvard Law School, graduating in 1900, then joining the law faculty in 1904. As a member of the law faculty, Edward Warren transmuted into "Bull" Warren, the Kingsfield prototype.

At seventy years of age, Bull Warren had occasion to look back on his life in law in a memoir published in a limited edition of 1000. *Spartan Education* was dedicated to "The Harvard Law School" and the reader is told that:

As I review my life, I find the source of greatest satisfaction in my belief that there are today ten thousand men who are leading more useful

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1 Edward H. Warren, *Spartan Education* 2 (1942).

and successful lives than they would be leading if my Spartan training had not played a substantial part in the moulding of their minds; and that most, if not all, of them now recognize that to be the fact, and are grateful.

The book's epigram contains a further insight into the author:

Your work has been unique and your fame as a great teacher and master of the science of law has extended throughout the English-speaking world.

President Conant to the author.

Warren's Spartan education, for which ten thousand men were grateful, involved the discipline of the "minds, pens, and tongues of the students" (p. ix); the "beneficial, purging qualities of artistic sarcasm" (p. 10); and enabling students to become "accurate, clear, and terse in their statements of facts and issues, and sensible in their exercise of judgment" (p. 20).

The world was more certain then, the rules of life, at least life in law school, clearer. All male, all white, all middle class +, all suits and ties, all connected – all the rules understood. After all, what is law other than rules? "Learn to dance, get dressed, get blessed, try to be a success" then "twenty years of schoolin' and they put you on the day shift."<sup>2</sup> The fit between behavior in law school and success at the bar was as understandable as a country club tee time. Not so today. Today's world and today's law schools are more democratized, more competitive, and less predictable. Indeed, at no time since Warren's Harvard has the predictability of law been so severely tested by a society and culture as diverse and pluralistic as our own. The law of the country club, its exclusion and

fixity, no longer exists and today we have yet to understand how law should interact with a more complex society.

On the one hand, law is a deeply and inherently conservative social institution. On the other hand, law opened our society to classes, races, religions, sexual orientations, and points of view that do not fit neatly into old categories. This more liberal, open culture cannot but avoid crashing directly into law's conservatism – a 1960s collision from which we are yet to emerge. Not that we haven't tried, but while it may be time to put away Crit-think, we are not sure about what takes its place. All of this is preface to saying that *Brush with the Law* is the first post-Crit account of the law school experience. As memoir, it tells us more about the authors than about how law, or about how legal education for that matter, relates to larger social phenomena. Still, the book points us in that direction.

*Brush with the Law* paints a picture of legal education at today's Harvard and Stanford law schools decidedly different than Warren's era. It is much too simplistic to say that *Brush* provides an antidote to Langdell's legacy. Grant Gilmore demolished Langdell in *The Ages of American Law*.<sup>3</sup> Instead, *Brush with the Law* is a buddy movie of a book which calls to mind other famous outlaw pairs. One pair fits better than most. Tom and Huck? No. Thelma and Louise? Closer. Cassidy and Kerouac? Too ambitious. Ren and Stimpy? Warmer. But there is a better fit than all of these for Byrnes and Marquart – Amory Blaine and Tom D'Invilliers. You remember Amory and Tom, F. Scott Fitzgerald's two crazy pre-Jazz Age Princetonians with their own brand of disdain for the Ivy League.<sup>4</sup>

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2 Thank you Bob Dylan for *Subterranean Homesick Blues* (1965).

3 Grant Gilmore, *The Ages of American Law* 41-48 (1977). Professor Gilmore did not spare the great Holmes either, see 48-56.

4 F. Scott Fitzgerald, *This Side of Paradise* (Modern Library ed. 2001).

Amory and Tom looked down their noses at Princeton and their classmates with the self-absorption of the young. Their idea of undermining elite tradition consisted of dumping exams, taking road trips to such exotic places as Deal and Asbury Park, New Jersey where they played cards, drank illegal hooch, and sought woman companionship. Amory and Tom's road trips are no match for Byrnes and Marquart's, but the parallel is there. Marquart prefers Foxwoods Resort & Casino to Deal, Byrnes crack to alcohol, and both seek true love along the way, with the occasional detour for orgies and onanism.

Overall, the book left me scratching my head. Here are two talented guys awarded an opportunity that many covet and they proceed to blow it off – perhaps in grand style.

There are points in this book when you think that one or both of the authors are cycling around and through the various circles of hell chasing their own demons with an occasional insight into their own vulnerable lives. Skipping classes, smoking dope before exams, tanking a moot court competition, living in Los Angeles the third year while attending Stanford Law School a few hundred miles away, gambling with financial aid checks, and trying to trade a Harvard Kennedy School diploma for crack certainly amount to an odd counter curriculum. This approach to law school would surely test Nietzsche's patience and Dionysian spirit. Not surprisingly, Nietzsche is about the only author quoted in the book. The *Brush with the Law* stories range from the childish to the needlessly risky to the professionally irresponsible to the outright criminal.

*Brush with the Law* is a juvenile docudrama that can be read as a slacker manual for law students. Classes are irrelevant. The first few days of legal research are all you need for a successful law practice. Take as many pass/fail courses as possible. Enroll in courses with

a long period for take home exams. Get your hands on the best outlines possible. Bluff your way through summer clerkships and the hiring process. And know that for the elite, a scandalously lucrative job offer is yours for the taking no matter how much you screw up. Along the way, Byrnes and Marquart introduce us to a range of characters, from the petty and banal, to the drudge and deceptive, to the sexy and nearly mystical. And many passages of the book provide a good read. Yet there is a nagging discomfort throughout.

Perhaps the discomfort is from envy and guilt. Who wouldn't like to pull off some of those stunts with such élan. If, indeed, élan is what it was. That's the envy. The guilt is that we all have some slacker outlaw in us. We probably have our own tales to tell. At the same time, one wonders whether what passes for cool cockiness isn't really fear and dread on the path to adulthood. At bottom, one wonders why Byrnes and Marquart hadn't gotten this stuff out of their system in college or before, just like Amory and Tom.

In *This Side of Paradise*, Fitzgerald writes about Amory's "Philosophy of the Slicker," portions of which seem to have been adopted by *Brush with the Law*. For example: "From the scoffing superiority of sixth-form year and success, Amory looked back with cynical wonder on his status of the year before" (p. 36). Of Amory's qualities, Fitzgerald writes about his "moodiness, his tendency to pose, his laziness, and his love of playing the fool" (id.) and "the slicker seemed distributed through school, always a little wiser and shrewder than his contemporaries" (p. 39), with a "bizarre streak" (p. 40). Amory and Tom differ with Byrnes and Marquart in that Amory's Philosophy of the Slicker was developed in prep school on his way to Princeton, which seems exactly right for a teenage boy, though not so appropriate for privileged about-to-be lawyers.

*Brush with the Law* is more a story about self-indulgence than about legal education, and the debunking of law school pretension has been done before and before.<sup>5</sup> Yet the book does make one wonder. One wonders, for example, what Deans Kathleen Sullivan and Robert Clark might think of their graduates. I suspect that neither Byrnes nor Marquart will be joining the Stanford or Harvard Law School Boards of Visitors anytime soon. One wonders about slacker stories untold, those little bandit acts of rebellion engaged in by all students. One wonders whether or not the secrets to success in law school are available only to the privileged or talented few rather than to the many. One wonders whether or not Byrnes and Marquart will write a sequel. Perhaps they will join a law faculty. Then they could write about what really happens at faculty retreats. Will *Brush with the Law* the TV series replace *Ally McBeal*?

Absurdist and smug at once, *Brush with the Law* bears the same resemblance to a law school critique as *The Daily Show* does to news. Even so it does raise concerns not only about legal education but also about the legal profession and the society of which both are parts. While many of us in the academy (okay, only me) thought that the post-Critical world would involve a move toward a practical pragmatism and away from “fancy theory,” *Brush with the Law* suggests that legal education is not exactly connecting with the world and raises serious questions. For what are we in legal education preparing our students? The Agon? Impossible hours? Duller than watching paint peel legal assignments? Decreasing loyalty? Increasing competition?

A profession loaded with mixed signals, such as (a) be more entrepreneurial because your jobs will change because multidisciplinary practice is around the corner and (b) don't be entrepreneurial as Enron and Arthur Andersen warn? Can one, as Holmes promised, still live greatly in the law?<sup>6</sup>

There is no question that law practice isn't what it used to be. That dissatisfaction among lawyers appears to be more widespread. That students entering practice do so knowing that job security is not to be had and that they are likely to have several different jobs or even careers. That law firms have yet to figure out how to manage themselves let alone newly hired lawyers. For employers, the game is called Fish-or-Cut-Bait as lawyers are dismissed whenever the bottom line signals that the time is right. For elite law school graduates, the game is called Eat-and-Run as students pay down their student loans in the first year or two with fat salaries. The great disconnect seems to be between the reality of practice and life in law school.

Which brings us back to Bull Warren's *Spartan Education*, a story that seems as quaint and nostalgic as it does anachronistic. Warren's “training” took because students and teachers and employers pretty much held the same set of expectations – a modicum of intelligence, diligence, integrity, and a first job offer meant a lawyer was set for life. (Of course, “social recognition” never hurt.) The same cannot be said for expectations today. Worse still, there is less assurance of even professional satisfaction. The disjunction between legal education and law practice so often complained of has less to do with Judge

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5 With *Brush With the Law* we now have a Pentateuch of law school memoirs. The others are: Chris Goodrich, *Anarchy and Elegance: Confessions of a Journalist at Yale Law School* (1991); Richard D. Kahlenberg, *Broken Contract: A Memoir of Harvard Law School* (1992); John J. Osborne, Jr., *The Paper Chase* (1983 ed.); and Scott Turow, *One L: The Turbulent True Story of a First Year at Harvard Law School* (1997 ed.).

6 Oliver Wendell Holmes, *The Profession of the Law* (February 17, 1886).

Edwards<sup>7</sup> critique of the gap between theory and practice in law school than it does with the fact that the profession has changed dramatically but the law schools have not, and that neither the profession nor the law schools are at all clear about what counts as law or law practice.

*Brush with the Law* could have been more than a diary of the pathology of two slacker law students. It could have been the diary of the pathology of the profession including legal education. As bright new lawyers, recounting

their law school experiences, was it too much to hope for some reflection by Byrnes and Marquart? Apparently so because the book has so little to do with law. What could have engaged deeper reflection from our authors? Clearly Byrnes and Marquart have drunken deeply from the well of Dionysius, too deeply it seems. If they had the addition of some Apollonine spirit, or better yet, some Spartan education, then they may have had something reflective to say about law, its practice, and its education. *GB*

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7 Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 Mich. L. Rev. 34 (1992). Judge Edwards' article and the following books constitute another Pentateuch of sorts – of critiques of the profession by lawyers and law professors. See, Anthony Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession*, (1993); Mary Ann Glendon, *A Nation Under Lawyers: How the Crisis in the Legal Profession is Transforming American Society* (1994); Sol Linowitz, *The Betrayed Profession: Lawyering at the End of the 20th Century* (1994); Deborah L. Rhode, *In the Interests of Justice: Reforming the Legal Profession* (2000).