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Legal Advocacy, Performance, and Affection

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LEGAL ADVOCACY, PERFORMANCE, AND AFFECTION

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Professor Geoffrey Hazard's lecture addresses appellate advocacy. That advocate's brief is best, he says, that, short of surrender, concedes most to the opposing party.

En route to this conclusion, Professor Hazard tells us that appellate briefs generally are poor in quality and that prospects for improvement are bleak. Such impoverishment of advocacy arises, he says, from failure to reckon with adverse authority. This failure, in turn, springs from fear: fear of confronting the weakness of one's position and fear of displaying weakness in the contest.

Professor Hazard proposes to wean advocates from this fear and to entice them into better brief writing through promises of more success by other means. Arguments will be stronger and likelier to triumph, he suggests, if they frankly take account of the other side's strengths. Hence he derives the formula: "The chance of prevailing is *greatest* if the decision point involves the greatest concession with respect to the client's position that is consistent with victory for the client."[1]

We assume that Professor Hazard would scarcely have ventured out of New Haven to participate in the distinguished Sibley Lectureship merely to commend to the consideration of his audience an interesting but minor rhetorical ploy. Therefore we read his comments as surely implying more. We interpret his lecture as an invitation to rethink the nature of the courtroom event.

The textual openings to our examination of fundamentals are found in various of Professor Hazard's comments—for instance,

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[1] Hazard, *Arguing the Law: The Advocate's Duty and Opportunity*, 16 GA. L. REV. 821, 830 (1982); *cf.* R. NEELY, HOW COURTS GOVERN AMERICA 148 (1981) ("since on all momentous issues some activist minority of any given court will always have their mind made up in advance based on the result to be achieved, it is to the ideological middle that all rational argument must be addressed.").

his diagnosis of "a larger fear of weakness in the contest as a whole,"[2] and his recognition of advocates' arguments as "derivative from the court's function."[3] Consideration of these and other comments has led us through a hermeneutical adventure to imagine a restatement of Professor Hazard's conclusion: That argument is best that is most performative of affection.

A. The Metaphor of Battle

According to the general supposition, the courtroom is the setting for a battle. Attorneys at law are seen as successors to attorneys at battle. This possibility is offered as a sign of the advancement of civilization because, although there is a fight, it is a war of words—a verbal contest waged in substitute for the less enlightened options of trial by combat, vendetta, or war.[4] Those who support the ideology of judicial process as strife defend it on the ground that the struggle between parties to a suit is heroic: a powerful contest between opposing sides leads to a holy grail of truth. Accordingly, many constitutional trial safeguards are explained as conducive to the antagonistic character of adjudication. If a court's jurisdiction extends to cases and controversies, then the emphasis is upon controversies; indeed, absent a showing of adversity, there may be thought constitutional or prudential grounds for not allowing the parties to enter the lists.

Even outside the courtroom we normally think about argument in martial terms. Lakoff and Johnson note that our everyday language reflects an underlying conception of argument as war.[5] They give as examples such statements as "His criticisms were *right on target*"; "I *demolished* his argument"; "He *shot down* all of my arguments."[6]

It is to be observed in this regard that Professor Hazard's idea about conceding strength to the other side is cast in the terminology of armed conflict. Reducing "the boundaries of a position," he avers, renders it the "strongest position strategically."[7] (This ad-

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[2] Hazard, *supra* note 1, at 829.

[3] *Id.*

[4] *See, e.g.*, Chambers v. Baltimore & O.R.R., 207 U.S. 142, 148 (1907) ("The right to sue and defend in the courts is the alternative of force.").

[5] *See* G. LAKOFF & M. JOHNSON, METAPHORS WE LIVE BY (1980).

[6] *Id.* at 4.

[7] Hazard, *supra* note 1, at 831.

vice may be challenged even within the battle frame of reference. For example, confusion of the enemy, bluff, and sham may prove equally valuable techniques.)

In spite of all his (and our) war talk, good soldier Hazard's ideas hint at an altogether different conceptual construct—the courtroom event as something other than battle. After advising that "verbal assault . . . does not intimidate judges,"[8] he invites advocates to consider an alternative. He asks them to consider demonstrating to a court how its legal problem can be resolved and, anticipating the court's task, "to help in its performance."[9]

We think that the image of the court as engaged in a performance is well worth seizing upon and exploring.[10]

B. Theater

Lakoff and Johnson suggest that a person arguing with you could be understood as giving you her time in a joint effort at mutual understanding.[11] They ask us to think of argument as cooperation, without reference to attack or defense, gain or loss of ground. "Imagine a culture," they say, "where an argument is viewed as a dance, the participants are seen as performers, and the goal is to perform in a balanced and aesthetically pleasing way."[12] Imagine appellate advocacy, we say, to be a performance where legal argument is devoted to achievement of an affecting, just performance.[13]

In a performing, theatrical—as opposed to martial—setting, the advocate will find it as inapt to assault the other side as to assault the judge.[14] If appellate advocates are actors representing (taking the parts of) their clients and the judge or panel of judges is the audience, then an attorney may view herself as engaged in a joint enterprise with the other advocate with whom she is pursuing a common cause, i.e., a performance (which is played also to the public at large as well as to the judges). The action then becomes

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[8] *Id.*

[9] *Id.* at 830.

[10] Perhaps we do violence to Professor Hazard's casual remark about performance. He has been thinking, however, about the theatrical nature of the courtroom event and the roles played within it for over a decade. *See* Hazard, Book Review, 80 YALE L.J. 433 (1970).

[11] *See* G. LAKOFF & M. JOHNSON, *supra* note 5, at 10.

[12] *Id.* at 4-5.

[13] *See* note 17 and accompanying text *infra*.

[14] *See* note 16 and accompanying text *infra*.

dialogue rather than diapolemics, and the kinds of arguments offered will be drawn from a wholly different environment than that of battle and verbal warfare. We may identify this environment as one of cooperation and professional mutuality.

Theater lends itself to a sense of collegiality. One recent essay, for example, observes that theater elicits the reality of offering and receiving among the actors and between the actors and the audience.[15] This reality of connectedness may also be imagined as animating successful courtroom performances.[16] Within the context of such a reality, a brief that seeks to destroy the other side will fail—not for weakness, but for irrelevance. It is wholly out of place and not in keeping with the task at hand.

We hasten to point out that, if the brief is not a salvo, neither is it an abject surrender. There is need for strong individual performance in the joint effort of an appellate argument. A weak or stupid brief does not invite a good response and will have as depressing an effect as a poor, lifeless performance by an actor in an ensemble.

We are also constrained to note that one of the advantages to the conception of appeals as theatrical performances is that it frees legal argument from the constricting limitations of warfare and

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[15] The essay proposes that, although a city is "ambition and hubbub, buying and selling, greed and haste," it remains the case that "the real stuff of the city, that which makes it alive rather than dead, civilized rather than barbarous, a place of nourishment rather than of deprivation, is . . . the reality that comes of offering and receiving." *The Talk of the Town: Notes and Comments*, NEW YORKER, Mar. 15, 1982, at 33. This reality, the essay notes, is most vividly called forth through musical or theatrical performances "that take place in a room of some sort." *Id.*

[16] The success of the performance of a play or piece of music can be measured, it has been suggested, "by its ability to elicit connectedness." *Id.* A performance elicits the nexus of offering and receiving "by being, first, true and second, articulately true, so that people present not only recognize the truth of whatever is expressed . . . but also share it." *Id.* This standard for theater (being true and articulately true) is translated into the standard for judicial theater that it do justice and be seen to do justice.

Another word for connectedness is love. The love that it is the particular responsibility of judicial theater to evoke is civic affection. As this country's only state-supported theater that is at the same time a branch of government, the courts have a distinctly political assignment unlike both private theater and the state-supported theater of other countries.

It may be more traditional and acceptable, but less accurate we think, to talk about "according dignity," instead of "having affection," and about the court as "forum of principle," instead of the court as "theater of affection." Ronald Dworkin, for example, finds citizens' dignity to be vindicated by the forum of adjudication as a matter of principle. *See* R. DWORKIN, TAKING RIGHTS SERIOUSLY 216-17 (1977); Dworkin, *Seven Critics*, 11 GA. L. REV. 1201, 1249-50 (1977).

frees it for experimentation. Professor Hazard's offering was too frugal in this respect. For example, an argument need not gain its strength from concession. There are times when a successful bit of stagecraft calls for actors to affect a battle.[17] Actors in judicial theater may make arguments that advance deliberately immoderate positions and concede nothing at all for any of several different reasons: to serve a client who wants more to be heard than to win, to bring attention to a cause, to highlight the discrepancy between the legal weakness and ethical strength of a position, to fit the form of the argument to the felt outrage of the substantive grievance, and so forth.

Moreover, theatrically informed argument may employ irony or hyperbole or any of a great variety of devices of the stage. In addition, a brief may make use of clever illustration, humor, and indignation, as well as the cool, rational concession favored by Professor Hazard.

Arguments and briefs are freed for experimentation because the play is the thing, and in the play the other party is a partner, a fellow actor with whom the advocate makes a performance.[18] How the attorney goes about this performance—which may include a battle scene—will be determined by something far more like aesthetics than combat readiness and far more like ethics than military science.

The point is that battle-weary advocates suffering shell shock need not be forever consigned to the barren torments of warlike strategems. Briefs do not have to be wadding, arguments do not have to be ordnance, and the theory of a case does not have to calculate the tightest perimeter of defense. Instead, advocates may be thought of as having the far richer vocation of writing scripts, creating performances, and imagining how connectedness may be made real.

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[17] If cases do not always feature Punch and Judy, neither do they always star Alphonse and Gaston. A strong argument vigorously made can be, and generally is, an acknowledgement of another's dignity. For example, law teachers do not *assault* students with arguments; to argue with a student is to affirm that the ideas, statements, and person are worth taking seriously enough to be argued with, and we emphasize the *with*.

It should also be noted that when advocates do affect a battle, the motive and outcome are never the demolition of the other side. The purpose is theatrical and expressive rather than destructive or martial.

[18] There is the danger that advocates will play to and for each other and fail to serve and represent their clients. Our proposal is risky as well as utopian.

C. *The Litigation of Affection*

The judicial process as a collegial performance is not a new idea but the return to an old one.[19] In his book *The Great War and Modern Memory,* Paul Fussell has a chapter entitled "Adversary Proceedings," in which he argues that the imaginative habit of gross dichotomizing ("we" are here; the "enemy" is over there) is traceable to World War I with its two lines of trenches and a no-man's-land in between.[20] Gross dichotomizing, he proposes, eventually encouraged the modern habit of perceiving sides diametrically opposed to each other, without the possibility of synthesis or negotiation, so that the total submission of one side is called for.[21]

It may be that this "versus habit"[22] and the correspondent perception of court as battleground are legacies of the Great War. (There are still lawyers who refer to cases by the style "Doe *and* Roe" rather than "Doe *against* Roe." Is this a prewar holdover?) In any event, it is clear that gross dichotomizing was not the mode of the founders. To be sure, they favored divided powers and a diverse citizenry. The Republic, however, was not to be a great conflict embracing innumerable little ones; rather it was to be a body or well-balanced, smooth-working machine composed of harmonious parts. The courts were to be an integral member of the body or element of the machinery.[23]

To reach further back than the founders, we may return to that

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[19] The general assumption seems to be that litigation has succeeded vengeance and trial by combat. It is possible and plausible that courts were derived from earlier forms of theater or religious ritual. In any event, when one hears lawyers in the outlying districts still referred to as "Colonel," the reference is not to a military rank but to a familiar, even comic, part, as in "Colonel Sanders' Kentucky Fried Chicken."

[20] P. FUSSELL, THE GREAT WAR AND MODERN MEMORY 75 (1975).

> Prolonged trench warfare, with its collective isolation, its "defensiveness," and its nervous obsession with what "the other side" is up to, establishes a model of modern political, social, artistic, and psychological polarization. Prolonged trench warfare, whether enacted or remembered, fosters paranoid melodrama, which I take to be a primary mode in modern writing. Mailer, Joseph Heller, Thomas Pynchon are examples of what I mean. The most indispensable concept underlying the energies of modern writing is that of "the enemy."

Id. at 76. To say nothing of the indirect, the direct impact of the Great War upon modern thought and imagination continues, as is witnessed in the references in, and interpretative framework for, the recent film *Chariots of Fire.*

[21] *Id.* at 76, 79, 105.

[22] *Id.* at 79.

[23] *See* Ball, *Don't Die Don Quixote: A Response and Alternative to Bobbitt, Tushnet, and the Revised Texas Version of Constitutional Law,* 59 TEX. L. REV. 787 (1981).

sometime lawyer John Calvin, who went so far as to identify litigation as a good and pure gift of God.[24] He was not deterred from this extraordinary affirmation by the fact that there were no examples at hand of undefiled lawsuits.[25]

According to Calvin, it is animosity and adversity that corrupt the judicial process.[26] Enmity, in his estimation, should disqualify a party, notwithstanding the justice of the cause, for "no lawsuit can ever be carried on in a proper manner by any man, who does not feel as much benevolence and affection towards his adversary, as if the business in dispute had already been settled and terminated by an amicable adjustment."[27] Calvin begins from total concession and would only proceed with litigation counselled by charity, "for whatever litigations are undertaken without charity, or are carried to a degree inconsistent with it, we conclude them, beyond all controversy, to be unjust and wicked."[28]

There is a vast difference between Calvin's notion about the litigation of affection and Hazard's suggestion for improving one's strategic position. This is so even with regard to the point about concession, where the two seem closest. Professor Hazard counsels that it is pragmatically sound—in fact a winning tactic—for an advocate candidly to address the strengths of the other party's position. For warriors, however, this may be advising the impossible. How can the other's strengths be genuinely addressed unless they are fully acknowledged? How can they be acknowledged unless the advocate is prepared freely to concede not unwanted territory, but the merits of the other party and his case? And what is this concession or how is it made possible unless one begins from something very like Calvin's premise of affection instead of the premise of animosity?

Professor Hazard begins his lecture with sharp criticism of the quality of appellate briefs and with pessimism about the prospects

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[24] 2 J. CALVIN, INSTITUTES OF THE CHRISTIAN RELIGION bk. IV, ch. XX, at paras. 17-21 (J. Allen trans. 1949).

[25] Some, perhaps, will object, that such moderation in lawsuits is far from being ever practised, and that if one instance of it were to be found, it would be regarded as a prodigy. I confess, indeed, that, in the corruption of these times, the example of [an] upright litigator is very rare; but the thing itself ceases not to be good and pure . . . . *Id.* at para. 18.

[26] *Id.*

[27] *Id.*

[28] *Id.* at para. 21.

for improvement. We remain unconvinced that briefs are as bad as he says. Even if we concede that he is right, the sad state of appellate argument would deserve an answer other than his. The clue to a Calvin-inspired answer may be discovered in the document from which Professor Hazard draws his example of the duty to disclose. The Model Rules of Professional Conduct, like the Model Code of Professional Responsibility, persists in mixing metaphors of battle and theater.[29] To the extent that advocacy is seen as combat, criticism of the duty to disclose is well grounded. Such disclosure is incompatible with loyal, effective military service. On the other hand, if advocacy is understood as the performance of affection, the duty to disclose fits the action very well.

Because only those parties may litigate who are first prepared to yield, as if the business to be litigated had already been amicably settled, the conduct of lawsuits cannot be a function of adversity or a generic substitute for less acceptable forms of violence or verbal, procedural battles. They can only be expressions—performances—of the affection citizens have for each other.

The real questions, though we can only identify without answering them here, are: First, how should we conform briefs and arguments to fit the demands of the performance? Second, how do we encourage litigants to state claims "without any desire of injury or revenge, without any asperity or hatred, without any ardour for contention, but rather prepared to waive [their] right, and to sustain some disadvantage, than to cherish enmity against [an] adversary"?[30] And third, how does it come about that citizens can love each other?

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[29] We refer here to the tension between a lawyer's duty to his client, vigorous representation of his client's position, and a lawyer's systemic duties as an officer of the court. It might be observed that the appellate lawyers whose work Professor Hazard commends, the lawyers in the Office of the Solicitor General, are among those least accountable to the wishes of a client. Their "client" is both a government and a nation, and the Solicitor General has much discretion in deciding for himself what "interests" this client has in a given lawsuit.

[30] 2 J. CALVIN, *supra* note 24, bk. IV, ch. XX, at para. 18.