

Of Law and the River

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Mark Twain's *Life on the Mississippi* is the best book in English about professional training. For those not familiar with the work, it records the author's own training as a cub pilot of steamboats. He comments on many of the ethical issues associated with the training of professionals.

Learning to be a steamboat pilot is more like learning to be a lawyer than you may suppose. One significant similarity is that persons attracted to the role of pilot are attracted, at least in part, by the aroma of power. As Twain compared:

My father was a justice of the peace and I supposed that he had power of life and death over all men, and could hang anybody that offended him. That was distinction enough for me as a general thing, but the desire to be a [pilot] kept intruding, nevertheless.¹

"Kings," he noted

are but the hampered servants of parliament and the people, and parliaments sit in chains forged by their constituency; . . . in truth, every man and woman and child has a master . . . but in the day I write of, the Mississippi pilot had none. . . . His movements were entirely free, he consulted no one, he received comments from nobody. . . . So here was the novelty of a king without a keeper, an absolute monarch who was absolute in sober truth and not by a fiction of words.²

Few would mistake a lawyer for a king without a keeper, but in a discussion of the power and responsibility of the law professoriate, it seems wise to acknowledge that most and perhaps all of us share a fascination with power. A law teacher who does not know that he or she enjoys power needs closer self-acquaintance.

As there are similarities between pilots and lawyers in their aspirations to power, there is also similarity in the politics of the two professions. Mark Twain was denied admission on his first application to be a pilot; training was a scarce good. Providers had the power of gatekeeping. Twain reports that because they found it profitable to train cubs, a glut of pilots was created.³ The cubs were not immediately troubled by this because they paid tuition out of future earnings, a system redolent of guaranteed student loans.

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1. The book is available in numerous publications. Page citations here are to the Harpers edition of 1902.

2. *Id.* at 105-06.

3. *Id.* at 113-25.

When professional incomes fell, however, the pilots organized to control entry and unauthorized practice. Twain intimates conflicting responsibilities of persons having the power of gatekeeping: to the users of professional services on the one hand, and to the unknowing prospective cubs on the other. Twain gives no evidence of comprehending how very complex a task it is to reconcile these often conflicting duties.

The power of pilots, like the power of lawyers, derives in part from the esoteric nature of the data that informs their professionalism. Pilots, like lawyers, dramatized their technocracy by cloaking work in a professional and mystic language that excluded laymen from understanding. Twain understood that language became for pilots, as for lawyers, a source of power.

By way of illustration, Twain the cub overhears a conversation among pilots discussing the passage of Plum Point, using familiar words but in technical senses rendering their meaning almost impenetrable. "I stood in the corner," Twain said, "and the talk I listened to took the hope all out of me. . . . I wish the piloting business was in Jericho and I had never thought of it."⁴

In addition to this affectation of language, there was another difference between professionals and laymen which Twain early discovered. The technocratic interest of the professional pilots changed their capacity to perceive ordinary events which took on a significance special to them. In a passage familiar even to many who have not read the book, Twain described how his training as a pilot deprived him of the capacity to appreciate the river for what it is to laymen: "I had lost something," he complained, "that could never be restored to me while I lived. All the grace, the beauty, the poetry, had gone out of the majestic river!"⁵ He could remember appreciating a beautiful sunset on the river, but after training he could no longer enjoy rapture, but would comment on a sunset thus:

This sun means that we are going to have wind tomorrow; that floating log means that the river is rising, small thanks to it; that slanting mark on the water refers to a bluff reef which is going to kill somebody's steamboat one of these nights, if it keeps on stretching out like that; those tumbling boils show a dissolving bar and a changing channel there; the lines and circles in the slick water over yonder are a warning that that troublesome place is shoaling up dangerously; that silver streak in the shadow of the forest is the break of a new snag, and he has located himself in the very place he could have found to fish for steamboats; that tall dead tree, with a single living branch, is not going to last long, and then how is a body ever going to get through this blind place at night without the friendly old landmark?

No, the romance and beauty were all gone from the river. All the value any feature of it had for me now was the amount of usefulness it could furnish toward compassing the safe piloting of a steamboat. Since those days, I have pitied doctors from my heart. What does the lovely flush in a beauty's cheek mean to a doctor but the 'break' that ripples above some deadly disease? Are not all her visible charms sown thick with what are to him the signs and symbols of hidden decay? Does he ever see her beauty at all, or doesn't he simply view her professionally, and comment upon her unwholesome condition all to himself? And doesn't he sometimes wonder whether he has gained most or lost most by learning his trade?⁶

4. *Id.* at 51.

5. *Id.* at 70.

6. *Id.* at 71-72.

Law students, like cub pilots, are exposed to such risks. Law teachers have the power to influence the process by which law students can numb themselves to many of their more desirable human impulses. As technocrats, we can lose feelings for the human tragedies in which we participate; we can also permanently anaesthetize our capacity for indignation at injustice or mendacity. Teachers, it would seem, do have an ethical responsibility to do what can be done to help students resist this dehumanizing effect of technocratic learning.

One cause of this effect may be the intensiveness of the demands to master all one needs to know. There is, indeed, daunting intricacy in both the law and the river. Bear in mind that Twain was on the Mississippi before the Corps of Engineers and there was not so much as a buoy between New Orleans and St. Louis.⁷

Going upstream, the pilot on schedule had to steer for the slack water, staying close first to one bank and then the other. To find the slack water, the pilot needed to know of a hundred landmarks for each of the twelve hundred miles of the journey.⁸ Every point, stump, limb, ridge, rock, or snag had navigational use. Going upstream at night, the pilot had to know the shape of the river so well that he did not actually need to see the landmarks.⁹

For safety, it was necessary to know the depth of the river in all places. To some extent, it is possible to read the surface of the water; a knowledgeable pilot can detect a submerged reef from the appearance of the water above, but a pilot can easily mistake a "wind reef" which is false for a "bluff reef" which is real.¹⁰ Reading the water is assisted by accurate memory of the depth at each place when last measured by the pilot's leadsmen who constantly monitor the amount of water under the bow and under the stern of the boat.¹¹ Reading is also assisted by the feel of the helm, for, as Twain tells us, steamboats do not like shoal water.¹²

All these bits of technical data and skill of the pilot, like that of the lawyer, are subject to constant change. The water ebbs and rises; a course that can be followed when the water is at one elevation is perilous when the water is lower; for the knowing pilot, high water makes a short trip.¹³ Also, erosion was then a very rapid process; points, reefs, snags, and channels moved from one week to the next,¹⁴ like laws repealed or decisions distinguished.

Thus, Twain, the cub pilot, attempted what generations of law students have attempted, to assimilate an enormous mass of detailed information. And, like law students, he came only gradually to the full realization that his subject was elusive as well as complex, that no amount of sheer memorization of information would ever be enough to make him a good pilot.

7. *Id.* at 73.

8. *Id.* at 45-46.

9. *Id.* at 58-60.

10. *Id.* at 65-69.

11. *Id.* at 62-64.

12. *Id.* at 65.

13. *Id.* at 74-77.

14. *Id.* at 49-51.

And of course one proper response to such a condition is to perpetuate the enterprise of study, to try to keep learning the fugitive subject. So Twain describes how the bigger boats' often carried supernumerary unpaid pilots whose own boats were being refitted or repaired; they traveled "to look at the river,"¹⁵ to refresh knowledge of transient marks and channels. Their training had at least provided them with a framework of understanding that enabled them to relearn the river as it changed. Indeed, Twain noted, a well-trained pilot could even assimilate entirely new data quite rapidly; he tells of Horace Bixby mastering the intricacy of the Missouri River with a single preparatory trip.¹⁶ We doubtless share responsibility for providing similar framework adequate to permit our students to become their own teachers.

Perhaps because of similarities in their aspirations and in the intricacy and inconstancy of the material with which they work, the teaching methods used to train pilots are not unlike those familiar in the training of lawyers. Horace Bixby, Twain's teacher, could be described as a devotee of the Socratic method. He asked Twain a lot of questions and commented forcefully when his responses were inadequate. When Twain missed his first question, Bixby denounced him as the "stupidest dunderhead I ever saw or heard of."¹⁷ On another occasion, Bixby summed up his appraisal of Twain: "taking you by and large, you do seem to be more kinds of an ass than any creature I ever saw before."¹⁸ Twain reciprocated these hard lessons and harsh comments with unspoken hostility and often when discouraged he would withdraw, manifesting the familiar traits of alienation. Yet beneath the veneer of authoritarian abuse and cringing enmity, there was between master and cub a bond of shared purpose which most law teachers would envy. Twain at times recognized that Bixby's harshness reflected high standards and high hopes for Twain.

Twain, more than most professional students, read the subtext to the pedagogical dialogue. He recognized Bixby not merely as a hard taskmaster, but also as an example of what a pilot is and can be. Twain knew that it was the character and values of Bixby that he had learned first and that he would forget last. It was Bixby's example, not his preachments or his manners, that operated most powerfully. Bixby seemed unaware of this effect and, indeed, it is a force so powerful that teachers can seldom control it.

Twain knew that the technical knowledge and skill drilled into him by Bixby was not the durable substance he received. Twain tells us that what he really learned from Bixby was not marks and channels, but judgment and courage¹⁹—judgment in the evaluation of his own technical knowledge and skill, courage to apply them despite the ubiquitous risk of professional error. Bixby taught both hard-eyed realism and tight mastery of self-doubt. He did teach these traits by example, but also by deliberately putting Twain in

15. *Id.* at 49.

16. *Id.* at 97-98.

17. *Id.* at 45.

18. *Id.* at 61.

19. *Id.* at 100.

spots,²⁰ and making adverse comment when Twain overconfidently exceeded his competence or timidly failed to exercise it. If Bixby used the carrot of praise, we are not told.

Lawyers need judgment as much as pilots. Somewhat different judgment, to be sure: our medium is words not water, and the forces that influence the meaning of language are social and political, not natural. But our work, like that of pilots, requires effective use of intuition going beyond technical knowledge; those who use intuition need to know its limits. Thus lawyers like pilots must be always distrustful of themselves, on guard against the risk of mistaking their own political or social preferences for those of the law.

For lawyers as for pilots, the balance to professional judgment is courage, intellectual courage, the courage to risk error when the odds are right. Legal judgment, like navigational judgment, can be, and often is, neutralized by timidity. As the lawyer exercises self-distrust, he needs also to overcome self-doubt.

Law teachers, like Bixby, have the power to teach both judgment and courage to at least some of their students. Courage to at least some of their students—most effectively by example, but also importantly by putting their students on the spot and requiring them to exercise both judgment and courage. The law school classroom affords an arena in which these traits can develop. Fortunately for us, our students' errors and failures do not have the same potential for disaster as do the errors and failures of cub pilots; we can develop the professionalism of students with hazard only to the temporary condition of their sensitive vanities.

Seen in this light, students seeking to escape classroom dialogue harm themselves as professionals. Those claiming a right to "no-hassle pass" effectively seek to avoid important learning. Teachers have a duty to dispute any such claim of right.

Maintaining intellectual courage in law presents one difficulty that has no analogue in the professionalism of steamboat pilots. One cannot believe in the worth of one's professional skill and judgment as a lawyer unless one also has some minimal belief in the idea of law and the institutions that enforce it. The river is complex and changing, but it is tangible, a wet experience to refresh the pilot's conviction that his knowledge pertains to reality in nature. The law, in contrast, is a mere hope that people who apply the lash of power will seek to obey the law's command. Let us not be modest: it is an act of considerable courage to maintain belief in such a hope.

There are many familiar reasons why lawyers may disbelieve in their own professionalism. Lawyers everywhere and always must have known that the law cannot deliver all that is promised in its behalf. For the law to be applied, facts must be known, and facts can be very elusive. The law is itself obscure in many of its specific applications; its meaning must be found if at all in the conduct of officials. But officials are people and that means they are vulnerable to the attractions of self-aggrandizement, and to other influences. Even if they are altruistic, they may use power to pursue social and political agendas not embodied in the law. So law will reflect the tastes

20. *Id.* at 101-02.

of that class of persons from whom the officials are drawn. And, if this be so, then perhaps as some of our colleagues may be heard to say, law is a mere deception by which the powerful weaken the resistance of the powerless. Thus, enforcement and even obedience may be morally degenerate.²¹ Faced with such impediments to belief in law, who can fail to have doubts about the validity of their professionalism as lawyers?

Such disbelief threatens competence. More than a few lawyers lack competence because they have lost, or never acquired, the needed confidence that law matters. Lawyers lacking confidence that legal principles actually influence the exercise of power have no professional tools with which to do their work. In due course they must abandon whatever professionalism they have, to choose between simple neglect of their work or the application of common cunning, such techniques as bribery and intimidation in all their many forms.

Moreover, there is dread in disbelief. A lawyer who succumbs to legal nihilism faces a far greater danger than mere professional incompetence. He must contemplate the dreadful reality of government by cunning and a society in which the only right is might. Such a fright can sustain belief in many that law is at least possible and must matter.

The professionalism and intellectual courage of lawyers does not require rejection of Legal Realism and its lesson that who decides also matters. What it cannot abide is the embrace of nihilism and its lesson that who decides is everything, and principle nothing but cosmetic. Persons espousing the latter view, however honestly held, have a substantial ethical problem as teachers of professional law students. The nihilist teacher threatens to rob his or her students of the courage to act on such professional judgment as they may have acquired. Teaching cynicism may, and perhaps probably does, result in the learning of the skills of corruption: bribery and intimidation. In an honest effort to proclaim a need for revolution, nihilist teachers are more likely to train crooks than radicals. If this risk is correctly appraised, the nihilist who must profess that legal principle does not matter has an ethical duty to depart the law school, perhaps to seek a place elsewhere in the academy.

This is a hard dictum within a university, whose traditions favor the inclusion in house of all honestly held ideas, beliefs, and values. When, however, the university accepted responsibility for training professionals, it also accepted a duty to constrain teaching that knowingly dispirits students or disables them from doing the work for which they are trained. And even the nihilist must eventually recognize that professional law students are infertile ground for the seed of anarchy; within institutions such as professional law schools, nihilism is a doomed testament. Elsewhere, such teaching may find an audience, but not among those who have set their hands to perform the world's work.

For those university law teachers able to keep the faith of the secular religion, let there be no shame in the romantic innocence with which they

21. E.g., Roberto Unger, *The Critical Legal Studies Movement*, 96 *Harv. L. Rev.* 563, passim (1983). Indeed, one is tempted to cite the whole of volume 96 passim.

approach the ultimate issue of their profession. Twain, it seems, would approve our romance; he concluded that the one essential ingredient in the professionalism of the pilot was love of the river. "Your true pilot," he said, "cares nothing about anything on earth but the river, and his pride in his occupation surpasses the pride of Kings."²² For safe rivers, the public needs loving pilots. To limit might, the public needs lawyers who acclaim the hope and expectation that rights will be enforced. Seeing her blemishes (they are many) and knowing her perfidies (which are not few), true lawyers can love the law just as true pilots love the river. We love law not because reason requires it, but because our commitment to our discipline serves the needs of the public to whom, and for whom, we are responsible. Sharing that commitment may be our most important power and responsibility.

22. Twain, *supra* note 1, at 50. Cf. Konstantin Stanislavsky, *My Life in Art* 21 (1935): "One must love art, not one's self in art."