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Harry Pratter's Wisdom

JONATHAN PRATTER *

From 1950 to 1994 Harry Pratter taught law at Indiana University-Bloomington.¹ One of his favorite sayings (he had many of these) was Maitland's "[T]aught law is tough law,"² a phrase that a forty-four year teaching career entitles you to utter with some frequency. In response to Sartre's notorious challenge, "Do you have anything to say?" Pratter could certainly answer yes.³ He took Sartre literally. Pratter preferred to speak—that is to teach, and not to write. The source of Pratter's strong preference for speech over writing must remain a mystery. The consequence is that a good deal of what he thought and said has not been preserved.

That's a shame because Harry Pratter had something to say that was well worth hearing. The hope is that this essay will be able to convey something of the flavor and tenor of Harry Pratter's thought.

A. PARADOX AND LAW

Pratter was fond of paradox because he believed that an internally contradictory statement that provoked productive thought could generate true insight, if not absolute truth. And he much preferred the former over the latter because it is more human. If Pratter was about anything, it was the human, especially young people like law students.

Does paradox grant insight into the law? One example suggests an affirmative answer; could it ever be permissible, even required, for an attorney to advise her client to violate the law? Now, the question itself doesn't harbor an internal contradiction, but the conduct it speaks of certainly does. Attorneys are people of the law. They are bound to it and this carries with it the ineluctable duty to follow the law themselves and to advise their clients to do the same.

In the summer of 1979, Bob Knight, the coach of the Hoosiers basketball team, was coaching the United States men's team at the Pan-American Games in San Juan, Puerto Rico.⁴ Knight and the team arrived at a gym for a scheduled practice.⁵

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¹ Indiana University's law school was renamed the Michael Maurer School of Law in 2008. *About Us*, MAURER SCHOOL OF LAW, <http://law.indiana.edu/about/history.shtml>.

² FREDERIC W. MAITLAND, *ENGLISH LAW AND THE RENAISSANCE: THE REDE LECTURE OF 1901* 18 (1901).

³ JEAN-PAUL SARTRE, *QU'EST-CE QUE LA LITTÉRATURE?* 28 (1948). Of course, what Sartre actually said was, "Avez-vous quelque chose à dire?"

⁴ Readers who believe that their ethical assessment of Bob Knight's character and conduct must diminish the cogency of the example should stop reading now.

⁵ The facts are taken from a telephone interview with Bob Hammel, former reporter and columnist with the Bloomington (Ind.) Herald-Telephone (Feb. 27, 2015). (*The Herald-Telephone* newspaper is now the *Herald-Times*.) The episode was chronicled in national

The Brazilian women's team was still on the floor and didn't leave.⁶ Knight started onto the floor and was stopped by a police officer.⁷ An argument ensued during which the officer, perhaps not intentionally, jabbed Knight in the eye, leading Knight, perhaps in a defensive gesture, to shove the police officer with an open hand.⁸ Of course, Knight was six feet five inches tall and weighed about 220 pounds.⁹ Knight was arrested for assault on a police officer.¹⁰ On the morning of the championship game, Knight made a first appearance in court and was granted bail.¹¹

On returning to Bloomington, Knight consulted with his attorney and with Pratter, his friend and informal legal advisor.. Knight asked the elemental question: "What should I do?" Their considered advice to Knight? "Do not go back to Puerto Rico."¹²

Now, of course there were good instrumental reasons for giving Knight the advice to jump bail. The charge, while certainly not petty, was a misdemeanor, and extradition for misdemeanors is rare. And the attorneys calculated that even if Puerto Rico attempted to extradite, Indiana governor Otis Bowen would probably refuse to accede. As it turned out, Puerto Rico did try to extradite Knight and Bowen did indeed refuse to agree to it.¹³ But, as Pratter liked to say, will instrumental reasons standing alone cut the mustard? He didn't think so. Before advising a client to break the law, the attorney needs principled reasons for asserting that a client has a *duty*, and a compelling one, to act as counseled.

Here enter extra-legal, or perhaps better, meta-legal considerations. This is not a cop-out, as Pratter would say. But can or ought such reasons be taught in law school? Now we see the value of a liberal education, something in which Pratter believed strongly, just as he believed in the humane value of a strictly legal education. It was always a point of pride with him that law school welcomes students with degrees even in French, or Art History, or Uralic-Altaic Studies, or musicology.

The reasons applicable to our case will not be hard to seek for anyone who has worked in history, literature, or philosophy. Pratter preferred to illustrate this tension through reference to Franz Kafka. Should Josef K., the protagonist of Kafka's *Der Process*, have permitted himself to be subjected to the interminably soul-destroying process at law that he suffered without complaint? Should he docilely have allowed himself to be conducted by his strangely attired executioners down into the stone quarry to have a long knife jammed into his chest, the blade twisted there, while his neighbors looked on impassively from their apartment windows? Pratter thought not. On the contrary, he thought that Josef K. had a duty

sports media of the day. See, e.g., *Knight Apologizes for San Juan Incident*, L.A. TIMES (July 23, 1987), available at http://articles.latimes.com/1987-07-23/sports/sp-5750_1_san-juan.

⁶ Interview, *supra* note 5.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

to himself to resist, even if it meant failing to appear for one of the horrifyingly absurd hearings that dotted his progress toward annihilation. Josef K. failed tragically in this duty to himself. The reasons are imponderable and certainly won't be explicated here. Pratter read the book, learned the lesson, and was tough enough to apply it in his own life when the occasion arose.

Is the juxtaposition of Josef K.'s fate with that of Bob Knight before Puerto Rican justice an invidious one? That is essentially an empirical question. Pratter considered the facts as he saw them, knew the law as he understood it, and gave the advice he thought it right to give. In other words, he acted as a good lawyer.

B. "TOO RICH!"

Are there objects of inquiry that end up exceeding our capacity to comprehend them in their fullness because they present so many facets to our attention and generate so many knock-on implications in all directions? Pratter certainly thought so. For instance, we can contemplate the infinite, but it would be sheer hubris to claim it was intelligible. Not even the most original and creative cosmologist, at least one with any modesty, would dare to assert that he could understand and explain the origins of the universe and its workings.

Pratter reveled in this phenomenon, that all our efforts could encounter a limit, set perhaps paradoxically by the protean nature of the object itself. When, so to speak, he hit his head on the ceiling, he thought it told him a good deal both about the contents of the room in which he found himself, and about what might be lurking in the attic. When this happened, and his former colleagues probably would report it happened a lot, he would exclaim, "It's too rich for the human mind to comprehend!" This was not just a way of ending a conversation. Rather, he meant to indicate that the conversation had reached both a productive and natural stopping point.

Is this phenomenon true of that very human activity, the law? It is no insult to human intelligence or to the legal species to affirm that it is. In exploring this, we *ab initio* rule out the seminar on law and religion, as otherwise we would be cheating. Jurisprudence should probably be disqualified as well, because it would be unfair to make things too easy.

Pratter plied his trade in the field of commercial law, and in there his favorite acreage was the Uniform Commercial Code. On more than one occasion he asked, "Have you ever looked at Article 1?" without elaborating. Article 1 is not substantive in the sense that it does not create primary rights and duties.¹⁴ Not all of it is of equal interest, but several sections stand out. One of these is 1-303(d):

(d) A course of performance or course of dealing between the parties or usage of trade in the vocation or trade in which they are engaged or of which they are or should be aware is relevant in ascertaining the meaning of the parties' agreement, and may

¹⁴ U.C.C. Art. 1 (2001).

supplement or qualify the terms of the agreement.¹⁵

It is worth noting that 1-303(d) refers directly to extra-legal sources of norms in the sense that these are neither a statute, case, administrative regulation, nor constitution. Rather, the source of the norm is the non-normative practices of the parties to the agreement, their trade usages or course of dealing.

But how do we get from the facts of their practices to a legal rule governing their agreement? Section 1-303(d) doesn't speak to that. Maybe we should only adopt the parties' practices as normative if they understood that was what they were doing, but that may well not always be the case.

We may have found ourselves in a puzzling place—practices become the rule even though the practitioners don't recognize they are generating rules through their actions. It is almost as if the classic is/ought distinction has collapsed before our eyes. This is not much of an example. Would we be justified in exclaiming "Too rich!" at this point? Probably not. But as previously explained, the hope is to give the *flavor* of Pratter's thought, nothing more.

C. ATHLETIC GRACE AND THE POSSIBILITY OF PERFECTION

Harry Pratter was a sports fan; he made no apologies for that. What do sports have to do with law? Perhaps very little, but that is exactly the point. Of course, this could be easily contradicted. The NCAA, for example, is a legal behemoth. Pratter showed on more than one occasion that he was capable of taking on the NCAA. He didn't have much choice; he was both a member of the Athletic Committee and a friend of Knight.

Pratter was a sports fan, but not himself an athlete. He tried to assure that his three sons learned to run, catch, throw, and swim. He could not swim himself. He did grow up playing stickball and handball in the streets and parks of Buffalo, New York, so he knew the meaning of tough competition.

For him sports was the best terre-à-terre instance he could find of grace under pressure. To him, American football was akin to ballet. If the comparison is deemed invidious, consider what ballet can do to a dancer after about five years, the span allotted to the typical pro running back. Back damage, shin splints, stress fractures, knee injuries, harm to feet, arthritis, even anorexia. Those can be the costs of grace in many sports.

This wasn't the case for swimmers. Pratter was friends with James "Doc" Councilman, the coach of the Indiana University men's swim team in its glory years. Councilman taught Pratter a lot about swimming, from stroke mechanics to innovative weight-training techniques that worked muscles not reached in most standard repertoires of lifts. It is impossible to forget the look of stunned amazement on Pratter's face as he watched Janet Evans digging and digging her way to the gold medal in the 400 meter freestyle at the 1988 Summer Olympics in Seoul. Evans faced huge odds. First, there was the existential fact that she gave away six inches in height and almost as much in reach. As in boxing, these are critical factors in swimming. Furthermore, there was the disturbing contingent fact

¹⁵ U.C.C. § 1-303(d) (2001).

that steroid use by the East German team infected the women's swimming competition at the Seoul Olympics. None of that seemed to matter to Evans. Perhaps she was too young to know what she was up against.

Despite her unorthodox freestyle stroke, Harry knew he had witnessed a perfect swim. But it wasn't perfection for the sake of perfection that interested him. What he wanted was a perfect instance of human striving to swim as hard and well as humanly possible. He found it, and that was as close to perfection as he needed to get.

For other reflections on former professor Harry Pratter please see:

Terry A. Bethel, Douglass Boshkoff, and Maurice J. Holland, *Special Feature: A Tribute to Harry Pratter*, 78 IND. L.J. 1 (2003), available at <http://www.repository.law.indiana.edu/ilj/vol78/iss1/1>.

George P. Smith II, *Special Feature: The Harry Pratter Professorship Lecture: A Tribute To Harry Pratter*, 76 IND. L.J. 937 (2001), available at <http://www.repository.law.indiana.edu/ilj/vol76/iss4/4/>.