The Spring

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My apologies to those who remember the 1980s, when business publications used the expression "paradigm shift" in every article, apparently identifying such shifts under every rock. Seeing "paradigm" again now must have given you a nasty shock, and my adding the term "hegemony" will have made the insult to your senses complete.

At this point I'd like to think I've attracted the interest not only of people who remember the expression "paradigm shift", but also people who lived through the '80s and can't remember it, and are troubled by that fact, as well as those interested in postmodernist thinking, and those who aren't sure they know what "hegemony" means, but think maybe they should...

Hegemony is the social, cultural, ideological, or economic influence exerted by a dominant group. In contemporary thinking, the term is generally used to mean undue influence. Generally speaking, such influence comes into being over time, shaped by a society's actions, beliefs and assumptions, and in some measure also` by the actions of those who seek power. Postmodern critics of our society say that our legal system reflects the hegemony of our Anglo-Saxon, propertied and largely male forebears, institutionalized (not to say calcified) through centuries.

The term "paradigm shift" also means change, specifically change to a model for thinking and action. It is generally used to refer to change that is relatively quick, and that may be considered and deliberate. By comparison, hegemonic change is glacial, occurring across eons, through myriad changes, small and large, many of which are unrecognized as they occur, the impact of which is collective. Over time, as the hegemonic influence grows and becomes dominant, people come to accept resulting structures, such as our legal system, as natural and necessary features of society, believing they represent the "right way" and consenting to them, in part, because no one remembers a time when there was any other way.

In this series I will be arguing for changes to our legal system. I will be looking at the existing structures of the system to understand the sorts of thinking that led to their development, and considering what sorts of thinking would generate desirable changes. Don't get me wrong, I believe our legal system is one of the triumphs of our civilization – it certainly beats the existing alternatives. But I believe we should consider more deeply the ways in which it is evolving, and other ways in which it could evolve, because change in our society is accelerating, and our existing legal system is premised on models that are badly out-of-date.

When I say that, what models do I have in mind? I am speaking of the oldest ideas that informed the hegemony of our legal system from the beginning, and I say that contemporary litigation continues to reflect two of the very oldest dynamic models, namely, combat and parenting.

We are taught in law school about the combat model. Part of the lore of law is that litigation descends from trial by combat, in which each of the principals is represented by a champion who fights as a proxy. This metaphor is still used to explain a dispute resolution system that is premised on the pitting of counsel against one another, in

a battle in which one "wins" and the other is vanquished. This model is plainly coercive, and that characteristic plays out in real litigation, where each party strives to impose his or her view on the other.

It may have worked for the proverbial knights on horses, but pitting the participants against one another creates some of the most problematic aspects of litigation, because it tends to trigger the aggression that resides in the ego, by which I mean the ego of both counsel and client. This competitive character can prompt all kinds of unconstructive behavior in the litigation, and can defeat any chance of settlement. Most importantly, distorting the facts into opposites -- black and white, fault vs. innocence – creates a mistaken view of the case that distorts client expectations, and yields results that lack credibility, in some measure, because they are based on a reconstructed narrative that is false.

The ego loves to squat on its version of the facts and bray about being right.

This polarizes the positions of the parties as well as the competing narratives, and it does not accord with the experience of what is true. In reality, there are few situations that are black and white. Human interactions are complex and changeable, and are more accurately described in a range of grays, each side bearing some of the wrong and some of the right. The combat model has no place for such nuances.

The role of the intermediary – the knight, or counsel, in litigation – is also problematic, particularly as to the ways in which the client is disempowered by it.

The disempowerment to which I am referring arises because representation by an agent necessarily separates the client from the handling of the dispute, preventing the client from forming a true, intimate understanding of the case and being directly involved in decision-making. Given the public's current preoccupation with information and empowerment, it is useful to ask how well the comparative distance and passivity of this role sit with today's client.

The second model to which I referred is parenting. Structurally, and dynamically, the justice system can be likened to dispute resolution in parenting: two combatants who cannot solve the problem between them take it to an arbiter who will decide it for them. The arbiter may literally be the exhausted parent of two squabbling offspring In other times, the arbiter might have been a king, or a chieftain, or a priestess. Today it may be one of our own judges. The defining characteristic of this model is that the third person makes the decision for the disputants; the disputants do not solve the problem for themselves.

I say parenting is outdated as one of the models embedded in our legal system for a variety of reasons. The model is hierarchical, an older form still in play at a time when hierarchies of power and privilege are under assault and are breaking down. The elevation of the arbiter makes the model implicitly, sometimes explicitly, elitist, in times that are increasingly populist. Most importantly, I say it is outdated because the parties are disempowered under this model, and I am moved to ask this: provided no party is unable to participate meaningfully by reason of youth, age, ailment or addiction, and provided the issue is not public, such as treason or crime, and thus inappropriate for a private disposition -- why shouldn't parties in modern society solve their problems for themselves?

As I thought about these defects in the combat and parenting models that are embedded in our legal system, I found myself thinking about "emotional intelligence". Psychologists in this field argue that a true adult in our society possesses not only necessary job and life skills, but also well-developed emotional skills. Thus an emotionally intelligent adult can remain rational and civil while involved in a dispute, and can work cooperatively with others towards resolving it. If a person is still solving issues through threats, bullying or violence, even though he or she is of adult years, it is said that he or she is arrested in a juvenile condition and not truly adult.

For the purposes of this paper, the important thing is that the emotionally intelligent adult seeks to be knowledgeable about and takes responsibility for his or her own affairs. Standing by while someone else decides those affairs does not appeal. This is at odds with the parenting model, in which the disputants participate from a lower position and the third party decides the outcome.

Note, also, that since the combat and parenting models are in play at the same time, the client is actually twice-disempowered – once, as discussed in the combat section, because he or she is distanced from the case through representation by an agent, and here, under the parenting model, because decision-making resides with the third party.

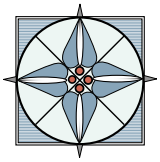
I am thinking of Albert Einstein's remark: "The world as we have created it is a process of our thinking. It cannot be changed without changing our thinking."

The idea that our world is a construct of our thinking is fairly well known today, but not enough thought is given to the corollary – that change to our world also arises through thinking – and application of that corollary in the world. I have decided to run with this set of ideas, so this is what I intend to pursue through The Spring series –

> What parts of the existing legal system could use a tune-up, and what kinds of thinking – explicit, implicit, historic, contemporary, empowering, disempowering – are revealed by those shortcomings?
>
> What ideas do we wish to see manifest in the developing legal system? What kinds of action and structures would actualize those ideas best?
>
> What thinking characterizes the lawyers of today, and what thinking -- in training, skills and values -- will shape the lawyers who practice in the legal system that is evolving?

I will be releasing articles exploring these issues through The Spring from time to time. I hope that you'll find them a fresh and provocative addition to your own thinking -- please watch for them.

Jane Demaray, February 4/19



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