

The Importance of Teaching Transformative Justice in Law School

By:

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[These comments include excerpts from ideas expressed by the author recently in his article *The Pedagogy of “Yes We Can”: Teaching Reformatory Legal Justice in the Age of Obama*, 1 Faulkner Law Review 227, (2010)]

The American Bar Association standards for approval of law schools states as to the purpose of legal education that:

A law school shall maintain an educational program that prepares its students for admission to the bar, and effective and responsible participation in the legal profession.¹

In order to achieve this goal legal education has, for a long time, relied on the so-called “Langdellian” case method – one that is heavily reliant on Socratic teaching technique. One commentator has described the Langdellian approach as one designed to “isolate and analyze the relatively few principles of the common law that the Harvard system postulated and to show how some...judges deviated from them.”² This has traditionally been accomplished by a case method highly reliant on teaching consisting of “massing barely edited cases.”³ This case analysis is more often than not devoid of personalization⁴. We seldom know the human emotion, fears or social-political ramifications surrounding how the conflict arose or the impact of the law’s solution. When we do know such things it is often an afterthought or relegated to policy considerations that may influence but seldom control the legal outcome. John T. Noonan in his classic *PERSONS AND MASKS OF THE LAW*⁵ interestingly points out that in the seminal *Palsgraf*⁶ case we are not even privileged to know the first name of Mrs. Palsgraf or that her daughter was with her when the scales fell which surely was of great emotional trauma and concern to her as well.

With the human dynamic removed legal education focuses more on analytic logic balance and its conformity to the status quo. Langdellian education makes the case for acceptance of legal conflict resolution. Social/political conflict resolution is seen as being only tangentially related.

Most law teaching, particularly in the first year, treats political conflict resolution as an interesting “extra” relevant only as an add-on to the core values of legal understanding. Note, for example, that the that old reliable saw of the first year IRAC does not give any recognition of, let alone a minor core role for, social or political change.

The impact of the traditional approach to legal education is to reinforce protection of the status quo. Change is appropriate only if absolutely necessary and if in can somehow be reconciled with the existing legal system by way of analogization. The law student quickly learns that this protection of the status quo is richly rewarded not only in academic recognition through grades but through examples of those who have achieved the most success financially. We are often amused

¹ American Bar Association, 2009-2010 Standards and Rules of Procedure for Approval of Law Schools, Standard 301 (a)

² Robert Stevens, *Law School: Legal Education in America From the 1850s to the 1980s* at 53

³ 21 Seattle U. Law Rev. 741, 748 (1998). See Also, James M. Dente, *A Century of the Case Method: An Apologia* 50 Wash. L. Rev. 93,96 (1974)

⁴ “[Law students] may have a great deal of abstract knowledge, but no understanding of how to use those concepts to solve a client’s problem” *Note: Continuous Quality Improvement, Law and Legal Education*, 43 Emory Law Journal 393 at 462 (1994)

⁵ University of California Press, 2002

⁶ *Palsgraf v. Long Island R.R.*, 162 NE 99 (NY 1928).

by the fact that nothing major in the law of property, for example, has occurred in the last 75-100 years.

Standard 301 does speak about an obligation to instruct about responsible participation in the legal profession but aside from periodic references to *pro bono* responsibility, and a general encouragement to do good works, there is little that is done in the standards or in the applicable standards of professional behavior that all members of the bar are eventually subjected to, that excites, inspires or moves the student beyond an ennui – like recognition of duty.

Indeed, students are taught that professionalism involves emotional detachment from the non-legal woes of society and a focus instead on zealously stretching existing principles to meet a distilled legal objective of the client.

Wealth collection is recognized as implicit values although the ethical canons and principles of professionalism give formal recognition to law serving a vaguely defined public good.

Such dedication to status quo maintenance is at odds with the concept of transformative social change through restructured and more responsive legal systems once so fervently embraced in the American social revolution of the 1960's, which in turn were sparked by the demonstrated dichotomy between justice theory and justice reality with which the American conscious was confronted as a result of Civil Rights Movement. The resolution of egalitarian ideals and the stark reality of racism and injustice had the additional positive result of impressing on many concerned with transformative justice that such was possible through law.

In our law schools advanced courses and practical skills application courses (such as clinics) demonstrated how legal remedy might be had for profound social/political problems. Unfortunately two things occurred which ultimately caused our legal education system to lapse back into the social conscious malaise described above.

First, the very institutions which were the cauldrons for legal reform became the vehicles for oppressive backlash from reactionary interest determined to dismantle social change. The United States Supreme Court, once the altar for the justice denied to millions became the barrier for both growth and maintenance of the hard fought for gains of just 20 years earlier. Concepts such as "reverse discrimination" and "judicial activism" heralded a retrenchment against transformative justice. Legislative and executive resistance to continuing to completion social justice took what was a system of solution and made instead complex and confounding obstacles that destroyed not only the structures of transformation but for many the will to transform.

Second, the principles of transformative justice reflected in advanced legal education of the 60's and 70's never made itself manifest in the ethos of the basic building blocks of legal training presented during the first year of law study. Those building blocks which are both mandatory and uniform in most law school settings – Contracts, Civil Procedure, Property, Torts and even to some extent Constitutional Law, remained largely untouched by transformative change needs or gains reflected in such upper level courses as Legal Problems of the Poor, Corrections, Landlord Tenant and Civil Rights.

Thus for transformative change to really become ingrained in the intellectual fabric and social being of our law graduates, several things must happen. First our mandatory first year course content needs to be radically alters to cease its worship of maintaining the status quo. Success in the profession should be re-defined in the first year curriculum to reinforce the concept that positive transformative change is not only rewarding but rewarded. Second, Socratic teaching should cease

pretending to be morally neutral and instead commit to values development as part of basic legal education. Third, legal education should reinforce the importance of the potential for successful transformative change that isn't dependent on only massive majority consent/permission but is the realistic possibility of the actions of a dedicated few. Civil Rights victories in law were often the result of the vindication of small group individual rights and circumstances that helped shape and helped create subsequent consensus of will necessary for legislative and executive political change.

Legal education is about creating change agents. Such inspiration has never been isolated from the political milieu outside the classroom walls. However the conditions necessary for creating change agents can never be assumed but must be planned. It is time for legal education to plan.