

WHY NOT A JUSTICE SCHOOL?

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Today, I would like to make the modest proposal that – instead of killing all the lawyers – we simply stop them from reproducing. No, not by neutering them, but by simply closing down all the law schools. And we should replace them with Schools of Justice.

Law is the instrument, the handmaiden of justice; justice is the goal, law merely the means to achieve it. As James Madison wrote in Federalist #51:

Justice is the end of government. It is the end of civil society. It ever has been, and ever will be pursued, until it be obtained, or until liberty be lost in the pursuit.

But all our schools that turn out practicing lawyers in this country are schools of law. Indeed, it is, to me, astonishing that, of the 194 schools accredited by the American Bar Association to produce practicing lawyers, not one has the word “justice” in its name!

So today, I want to make a plea for “justice schools.” As Anthony D’Amato has written,

Perhaps the first thing that went wrong with law schools was the fact that they were given the name “law school.” (Things might have turned out differently had they been called colleges of justice.) The name “law school” gave rise to the expectation that this was a school to which a person could go to “learn the law.”

Let’s examine Law schools for a moment – of necessity, quickly and superficially: What do we teach now? We teach “thinking like a lawyer” -- even though it has always been a bit unclear exactly what

that means. We also teach black letter law or doctrine – but the information explosion makes that something of a Sisyphean task; it is impossible to learn all that stuff, even harder to retain it. And, besides, when I was a lawyer, I looked everything up; didn't you?

And, intellectually, how does one characterize that task? Compared to deciding whether laws are fair and just, it is simply not all that difficult to merely memorize extant law. Perhaps that is why the economist Thorsten Veblen opined that a school of law no more belonged in a university than a school of dancing.

What are the results of our system of legal education? Martha Minow of Harvard has written

After students in my law school courses have finished about a month of law school, I ask them why none of them ever mentions the “j” word. When I relieve their perplexity by divulging it means justice, they laugh nervously, but still don't mention it. Somehow, law school quickly gives the message that law is not about justice. Justice is for the sentimental, the immature, or, in any case, not for lawyers.

At Touro Law School, where I teach a course entitled “Justice,” one of my best students described how law school had affected her:

In thinking about the [effect] which legal education has been found to have upon students' attitudes concerning justice, I was most [distressed] by the realization that I too had virtually discarded my natural inclination to question right or wrong when it came to the law. Somehow, in an endeavor to teach me to “think like a lawyer,” law school has taught me to segregate, in my own mind, the law from notions of justice. I can remember questioning the rightness or wrongness of much of what I read my first semester, a little less the second and even less thereafter... I have to a great extent learned to read the law, analyze it, synthesize it and apply it – no questions asked.

This effect can be quantified. Stover and Erlanger found that the number of students interested in doing public interest work declined by 50 % over the 3 years of law school. And sociologist Robert Granfield, who studied Harvard law school students, observed:

A lot of people who go into law school have a strong sense of right and wrong and a belief in moral truths. Those values are destroyed in law school, where students are taught there is no right and no wrong and where such idealistic, big-picture concepts get usurped. The way the majority of students deal with this is to become cynical. They actually come to disdain right-versus-wrong thinking as unprofessional and naive.

Unfortunately, our law school pedagogy contributes to the production of passive lawyers, default defenders of the status quo -- turning out lawyers who are passive, unquestioning, and apathetic toward social change. Law school teaches the mainstream American values that underlie our legal system. Law school teaches primarily what the law is; it makes no judgment about the fairness and morality of most of our law. (Individual teachers – most of them at this conference! – may express such judgments, but, by and large, the institution of law school does not.)

And, having done what they have learned we expect of them – having learned the black letter law – students shut down, because anything else, including a discussion of justice or fairness, is surplusage: it will not be on the test or the bar exam.

Consequently, there isn't much consideration of the justness or morality of our legal system. Most law passes without much critique, particularly the larger principles underlying our law. Law is not like a dish at a restaurant which one sends back as insufficiently tasty. Students don't send back Law; no matter how unjust it may be, they write it down in their notes and – unfortunately, continuing the food metaphor -- regurgitate it on the exam.

When we do critique, the critique is usually hypertechnical and “lawyerly,” attacking the court's logic -- not the morality of its decision. And the vast majority of the American legal canon goes completely

unquestioned. Consequently, students think that, since the teacher did not critique it, it must be okay. Students think that when we do not criticize a holding, we are giving our full approval – including moral approval of the result. But of course we are not.

And how would justice schools be different?

The crucial change would not be in the curriculum but in the pedagogy. Instead of top-down law, black letter law dictated by the professor, the Sage on the Stage, we would use inductive law, constructivist law, law from the ground up. (According to some learning theorists, such a methodology is much more conducive to real learning. See Alison King's wonderful article, From Sage on the Stage to Guide on the Side, at 41 College Teaching 30 (1993).)

Instead of simply being given the law, students would have to construct it for themselves – and then critique extant law. Imagine a Trusts and Estates class (I purposely pick an example not from my own field); and take the issue of inheritance. The teacher would explain that the issue was whether, and under what conditions, a person should be allowed to transfer her property to another human being at death. The teacher would raise the question of the justness of inheritance in maintaining, even increasing, radical inequalities of wealth.

The assignment would be for each individual student to draft a fair and just inheritance statute. To solve this problem, students would not be “given” the applicable cases and statutes in their jurisdiction. Instead, they would be given a coursebook, which would contain 4 types of materials: [1] pertinent readings from philosophy and policy analysis, to help students think about the fundamental principles at stake; [2] relevant fiction, which frees students' imaginations and exposes them to a different mode of argument, frequently expressed in the most powerful of words and images (for instance, where economic and social equality are an issue, a short story like Vonnegut's Harrison Bergeron is remarkably powerful stuff); [3] empirical research and social science data, documenting the problem, the ramifications of the problem, and the results of competing solutions to the problem; and [4] foreign law (how other jurisdictions – sovereign nations or even other American states –

have dealt with the issue, because radically different approaches from other jurisdictions open up student minds and give them permission to think beyond the orthodox and the traditional).

The one thing students would not be given is precisely what we do give them now – the actual prevailing law in this country, if not their state.

Then, each student would draft a statute she thinks would represent a fair and just solution to the problem; and those student solutions would then be discussed in class. Only after that class discussion would the professor distribute the actual, black letter law. The class would then compare the black letter law to their own solutions, seeing in what way the black letter law is just or unjust.

If engaged learning is good learning, then there are some additional advantages of this pedagogy: [1] students would be more likely to remember the law, precisely because their own moral position coincided with that of extant law – or, to the contrary, because current law offended their moral view; [2] students should remember the law for a greater time period for exactly the same reason; [3] having themselves agonized over these issues, the students will understand these issues in a far deeper way than if the law had simply been given to them; and, finally, [4] the lawyers we produce would be more sensitive to the injustices inherent in current law, less willing to simply passively accept them, and more willing to work to change the law when they feel it needs changing.

So, let's not kill all the lawyers; let's simply shutter and lock up their enabling institutions, the law schools -- and replace them with schools of justice.