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## Reworking the Latent Agenda of Legal Education

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## Reworking the Latent Agenda of Legal Education

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Today, as critical attention has turned to the ideological underpinnings of the law and its structure, it is also useful to consider legal education in this light. I ended my own brief law school education in the late 1950's as a result of personally experiencing the alienating mode of teaching, the competitive atmosphere, and most important to me, my intellectual disdain for what seemed to be a context-free analysis of legal subject matter. The explanation for the mode of teaching and for the atmosphere was the development of adversary skills. The same explanation was given for the inattention to historical context, an insistence on the autonomy of the law, separate from other scholarly disciplines and from other professions and institutions of society.

Although my school, the University of Chicago, was known to be different from other great law schools of the time for possessing a somewhat more "liberal" perspective on such matters, and was even the site of a famous study of the jury system, as a first year student I was only exposed to the standard required curriculum of property, civil procedure, torts, contracts, and criminal law. I found it grueling, not only because of the workload, but because I felt intellectually and morally adrift. The rule of reason used in the legal precedents seemed arbitrary and far from reality, and the precedents themselves appeared mired in particular social circumstances no longer relevant.

I have since learned more about the dynamics of legal change and have gained a certain respect for the use of precedent, but having become a social scientist, I am no less appalled by the implicit (and sometimes explicit) notions about human nature in the law and the role of law in setting parameters for our thinking about the human condition. Further, I have become more sensitive to the ways in which law not only reflects common misunderstandings about human character and social behavior, but also leads the way in characterizing perspectives on

such issues as normality and deviance, reifies stereotypes about sex and age, and is the instrument used to generate and maintain inequality (as well as the instrument used to achieve equality). Examples abound in legal literature about the ways in which the courts have used the measure of the "rational man" or the mentally functional or ill person in their judgments about civil or criminal responsibility which have not been consonant with the informed contemporary views of psychologists and sociologists. A dramatic illustration is the way nineteenth century law has defined women as not falling under the category of persons allowed to practice law (*In re Lockwood*, 1894), and later, in defining them as in special need of protection (*Muller v. Oregon*, 1908). Not until recently has there been an attempt to go beyond judgments based on stereotypical assessments of women's and men's "human" nature to a more rigorous assessment of all people's capacities. Furthermore, as Hunt (1985) points out, law also transforms human subjects into legal subjects so that "law influences the way in which participants experience and perceive their relations with others." For example, the law defines a minor and thus restricts people of certain ages from making choices while it permits others to control their own lives. Another illustration of this point would be when the law defines some groups of people as corporations or partnerships, exempting them from obligations which for individuals or other social groups would be considered questionable.

In the legal distinctions between private and public areas, the law has allowed the possibility for such problems as unrestrained violence in the family by defining the family as a sphere governed by different laws and standards from other groups (or individuals) engaging in the same activities, such as assault, outside the home (Taub and Schneider, 1982). The extent to which the law reflects social organization and hierarchies, or determines social relations, is a topic of some interest today. However, although legal scholars (Hunt, 1985 & Kairys, 1982) and practicing lawyers and judges wrestle with these issues, the debates in which they engage are not evident in the initiation of law students to the law. Only some students are ever exposed to the analysis of legal doctrine, and for those who are, it comes late in the process. Rather, law school initiates most typically face a set of legal givens, are afforded little time to reflect on the meaning, virtues and costs to justice and humanity of the legal process, and are even discouraged from asking the kinds of searching questions about the profession that might later move them to challenge the *status quo*. Like recruits in the army whose hair is cut short and to whom uniforms are assigned, law school

recruits are shorn of their prior opinions and sentiments, to be indoctrinated in a mode of thought regarded as the *sine qua non* of legal thinking. The first year of law school is oriented to ridding the fledgling student of prior ideological commitments — a process which is itself profoundly ideological in character.

Of course, the designers of any curriculum must always deal with the tension between the need to convey the received knowledge in a field and the need to address the challenges to it. Professors in any discipline must teach the basics which set the agenda for subsequent debates, but there is disagreement as to what the basics ought to be. In law, unlike science, there are no sets of relationships between various factors that are predictable and explanatory. In short, there are no objectively determined facts. Basics in law refer to the practices and attitudes of former law makers. Students need to know them to learn their craft but, unlike scientists, cannot objectively determine whether they are wrong or right. The realm of the legal is the realm of values. Each generation is encouraged to bring its values into line with the values of the generations that have gone before, and then to reinterpret them in such a way as to make them resonate with the contemporary scene, or rather, a particular segment of the contemporary scene. Legal educators are faced with a perplexing problem: how to create a useful sense of objectivity in the pursuit of craft.



Teaching in a narrow sense

The particular relationship between the crafting of law and interpretation of law, and the social context in which they are accomplished,

is rarely focused upon in legal education. Thus, attention to the consequences is minimized not only for individuals, but for social groups as well. In my view, this creates a professional class which tends toward ethically and politically sterilized concerns which ultimately lean toward the preferences and interests of the most powerful in the system. As is well known, a good proportion of legal talent goes to the large firms which defend the interests of the rich and powerful, while relatively few law graduates are attracted to spheres of law which serve the public interest (or the interests of the less-endowed). Some of the "blame" for this must be placed on the law schools, which better prepare students for the corporate world than for alternatives in law. Thus, the legal structure, as it is linked to the structure of society, can embody a value structure determined not by referendum, but by the manipulation and coercion of those with entrenched interests.

Up until the past few years, law school also served the profession and its powerful client group by carefully selecting recruits through both direct and subtle modes of gatekeeping. Those most blatantly excluded were blacks and women. For the few who succeeded in penetrating the barriers, their experience in law school was unpleasant and alienating. (My own research on women lawyers (Epstein, 1981) uncovered institutionalized practices of humiliation such as "ladies' days" when only women were called upon, or separate sections for women.) After a period of activity outside the profession, and by small pressure groups within, the profession has become more hospitable to women and minorities. Their inclusion has had real consequences for the legal profession beyond merely diminishing the injustice of keeping out people who were not regarded as like-minded. It has made legal educators more aware of the sexist and racist content in legal casebooks, as well as changing the interviewing procedures for jobs, the assumptions regarding competence, and many other latent policies and behavior which reinforced prejudice far beyond the walls of the law schools.

Furthermore, men and women as law professors and students who were drawn to law in the 1970's, because they saw it as a tool for social change, helped loosen the hierarchical and oppressive atmosphere in law schools, and encouraged the kind of thinking that explored the underlying ideologies implicit in law and legal education.

But there has not been a significant change in the profile of legal educators. The number of blacks and women who have become law professors, for example, has remained small and is not well distributed across the profession. Of all full time tenure-track professors, only 6.65 percent are minorities (of any kind). Of all full-time law teachers, 4.7

percent are black, but in addition to tenure-track professors, this figure also includes those who have one or two year appointments, or are instructors in clinical or legal writing programs.<sup>1</sup> Although an attempt was made to bring women and blacks onto law school faculties in the late 1960's and 1970's because of the pressure of law students and minority caucuses within the profession, the momentum has slowed considerably. Law school efforts to hire women for tenure-track positions began to lag significantly in the legal profession according to a study by Donna Fossum (*cited* in LAUTER, 1984) who also predicted that the trend may well worsen over the next several years. The research showed that the gap between the proportion of women in the profession and the proportion on law school faculties began to widen in the late 1970's and has increased steadily since then.<sup>2</sup>

Furthermore, law schools remain insular. For example, although the courts use social science data more and more as a source of evidence, there is little attempt to bring in experts from the social sciences

1. The following are the most recently available statistics (1984) on the composition of law professors (as reported by Kathleen Grove, American Bar Association, Office of the Consultant on Legal Education). The total number of full-time, tenure-track law professors is 4,461. Of this total, 754 (or 16.9 percent) are women; 297 (6.65 percent) are minorities of both sexes. The total number of full-time law teachers (which includes clinical instructors, legal writing instructors, and those teaching on one and two-year appointments) is 4,783. Of this total, 224 (or 4.68 percent) are black men and women.

In addition, information obtained from the AMERICAN ASSOCIATION OF LAW SCHOOLS 1984-85 STATISTICAL ANALYSIS OF LAW TEACHERS shows for the year 1984 a breakdown by race of newly-hired full-time law teaching faculty. For males these figures are: Puerto Rican, 3; Other Hispanic American, 2; Asian American, 4; Black, 15; White, 374 (or 93.9 percent). For women, the figures are: Puerto Rican, 2; Other Hispanic American, 1; Asian American, 1; Chicano, 2; American Indian, 2; Black, 12; White, 228 (or 91.2 percent). The AALS states that the total number of minority law professors nationally is 381; however, they offer no total of all law professors nationally.

2. Of course, the proportion has improved steadily from 1970 when 65 percent of all law schools had no women on their faculty. By 1983, only two percent had no women on their faculties and 17 percent had as many as six. Although women and men law teachers have virtually similar backgrounds, most women faculty members are untenured and most men are tenured. The slowdown in promotion of women is attributed by some to budget cuts. Higher percentages of women also resigned from law schools, partially because they went on to the judiciary and executive branch appointments during the Carter administration. But complacency is given as another reason; the heat is simply off the law schools and they are not as actively recruiting women. And there remains the problem of law schools, like law firms, being small cultures which seek to perpetuate themselves with the entry of people who are most similar to themselves, both in looks and perspective.

to inform law students about the use (and abuse) of social science findings. Lawyers are consumers of social research even if they are not producers and they need to be capable of using empirical means in conjunction with legal skills as an intellectual tool for analyzing issues of legal policy. The call for this kind of knowledge harkens back to Justice Holmes, who in 1897 wrote "For the rational study of the law, the black-letterman may be the man of the present, but the man of the future is the man of statistics and the master of economics" — these disciplines being the "social sciences of the day" as Wallace D. Loh (1984) pointed out in his reference to Justice Holmes' remarks. There is agreement among some contemporary legal scholars, such as Priest (1983), who has pointed out that the "law student of the future will be . . . out-of-place without an education of increasingly greater sophistication in social science."

Some years ago, Bruce Ackerman of the Columbia Law School, in his Storrs Lectures at Harvard (1984), spoke of the need to educate lawyers in economic analysis and in the use of computer sciences to understand the data and the consequences of legal interventions. Ackerman did not emphasize the need for education in the social sciences with the aim of educating lawyers to evaluate sociological and psychological studies. However, not only statistics, but also the findings of studies — the interpretations of which are disputed in the social sciences — find their way into court cases and can thus be a problematic source of evidence.

Legal decisions could be so much better informed by understanding that goes beyond the use of expert witnesses. Outstanding advances in civil rights have been made in our society because of the use of social science data in Supreme Court cases — *Brown v. Board of Education* is the most obvious, but one might also include the important cases on sex discrimination arising out of the passage of the Civil Rights Act of 1964, such as the 1973 *American Telephone and Telegraph Company (AT&T)* consent decree. We can only reflect on how other important cases could have been decided if lawyers and judges had been sophisticated in the use of social science data.

Insularity would also be diminished if there were more exposure of students (and faculty) to the creators of law — legislators and other policy makers. Although there is merit in separating the executive, legislative and judicial branches of government on some levels, there is no merit in limiting knowledge about the context in which decisions are made and about the political forces working on them. Law students ought to become familiar with the political process that creates the

laws which they must administer, as they will also be required to ascertain the intent of those laws and the interests that are represented in them. It is too much to ask students to educate themselves about the political process in this age of specialization, particularly in light of the grueling work load to which students must submit in law school and in their first jobs. If law students were exposed to policy makers in schools and had an opportunity to interact with them, their understanding of the legislative process would have greater dimension. In short, law students should get a dose of political science in their education, and beyond that, exposure to legislators would also provide the opportunity for discourse about the responsibilities of each sector of the law community.

Legal educators aim to create practitioners of craft and they do well at the task. That these practitioners also become conveyers of values is incidental. The process should be reversed. Craft should follow and be an instrument for the larger concerns of social values and policy. A more reflexive view ought to be part of a new agenda of legal education.



DOONESBURY  
by Garry Trudeau

