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Why Not a Justice School? On the Role of Justice in Legal Education and The Construction of a Pedagogy of Justice

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WHY NOT A JUSTICE SCHOOL? ON THE ROLE OF JUSTICE IN LEGAL EDUCATION AND THE CONSTRUCTION OF A PEDAGOGY OF JUSTICE

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WHY NOT A JUSTICE SCHOOL? ON THE ROLE OF JUSTICE IN LEGAL EDUCATION AND THE CONSTRUCTION OF A PEDAGOGY OF JUSTICE

Peter L. Davis[1]

I. INTRODUCTION

Law is supposed to be the instrument, the handmaiden, of justice; justice is the ultimate goal. As James Madison limned it in *The Federalist Papers*, "[j]ustice 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."[2] Dean Roscoe Pound said similarly that justice is "the end of law."[3] More recently, one commentator has observed that "[j]ustice is the purpose and goal of law. It is the reason that law exists. It animates and breathes life into the law."[4]

That is why it is so astonishing that, of the one hundred and ninety-four schools accredited by the American Bar Association to produce practicing lawyers in the United States, every single one is named for the instrument (law), instead of the goal (justice).[5] Not one A.B.A.-approved law school has the word "justice" in its name. There are schools in this

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[1] Associate Professor of Law, Touro Law Center. J.D., New York University School of Law, 1972. I want to acknowledge the enormous support for this project I received from Dean Lawrence Raful and Dean Emeritus Howard Glickstein of Touro Law School. I also want to thank all my colleagues on the Touro Law School faculty, no matter their ideological positions, who participated in an intense and long-running internal debate on the role of justice in legal education. I want to particularly acknowledge the aid and support of Professors Marianne Artusio and Eileen Kaufman in the development of my thinking on this subject, as well as the assistance of Professors Richard Klein, Jeffrey Morris, and Peter Zablotsky in the writing of this article. I also want to thank my students, who taught me the real world application of pedagogical theories; Alice H. Henkin, the director of the Justice and Society Program of the Aspen Institute; and Cosim John Sayid, my research assistant, whose help went well beyond the aid normally offered by a research assistant. Thanks also to Judge Jerome Frank, whose article title I have brazenly adapted here. *See* Jerome Frank, *Why Not a Clinical Lawyer School?*, 81 U. PA. L. REV. 907 (1933).

[2] THE FEDERALIST NO. 51, at 352 (JACOB E. COOKE ed., 1961).

[3] Roscoe Pound, *The Causes of Popular Dissatisfaction With the Administration of Justice*, 8 BAYLOR L. REV. 1, 9 (1956). He also wrote, "Justinian's Digest says of the lawyers: We worship justice and profess knowledge of what is right and just. Daniel Webster tells that justice is the greatest interest of man on earth. . . . For our purpose it is the ideal relation among men." *Id.* at 1.

[4] Anthony D'Amato, *Rethinking Legal Education*, 74 MARQ. L. REV. 1, 35 (1990). Even if it may fairly be argued that another goal of law is social control – the establishment and maintenance of civil order – surely there are few societies in which the designers of the legal structure did not have in mind the attainment of justice, however differently and idiosyncratically they may have defined that term. Indeed, it is difficult to conceive of a plan for civil order unaccompanied by a vision of what constitutes justice.

[5] *2005-2006 Annual Report*, 2007 A.B.A. SEC. OF LEGAL EDUC. & ADMISSIONS TO THE BAR 54-57.

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country which have the word "justice" in their name; but, ironically, they are not schools that prepare students to be lawyers.[6]

Why are law schools not named schools of justice, or, at least, schools of law and justice?[7] Of course, virtually every law school will reply that this is nit-picking; all claim to be devoted to the study of justice. But our concern is not so easily dismissed. The names of institutions carry great significance; they deliver a political, social, or economic message. At the very least, they indicate what the institution regards as important.[8] If law

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[6] For instance, the John Jay College of Criminal Justice in New York City does not train students to be lawyers.

[7] Professor D'Amato has addressed this issue succinctly:

> 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."

D'Amato, *supra* note 3, at 8.

[8] Names of colleges and universities are certainly of significant import when the schools are interested in increasing their market share of potential student applicants. Alan Finder, *To Woo Students, Colleges Choose Names That Sell*, N.Y. TIMES, Aug. 11, 2005, at A1. One branding expert for universities and other nonprofits claimed that "every college and university is trying to articulate what makes it uniquely valuable;" and one university president asserted that the purpose of a name change is to "clarify its mission and project to potential students and donors what makes the place unusual." *Id.*

Name changes can produce remarkable results. In the four years after Beaver College morphed into Arcadia University, its applications doubled, and the average SAT score of its students rose sixty points. *Id.* Similarly, since Trenton State became the College of New Jersey, the average combined SAT score rose one hundred and sixty points, and the average percentage rank in high school class went from the top twenty percent to the top eight percent. *Id.*

Schools are normally quite concerned with the names of their institutions, whether it is Princeton University, which reacted vehemently when Merrill Lynch & Company, the brokerage firm, announced that it was taking its own name off its money-management business and would operate under the name Princeton Portfolio Research and Management, Patrick McGeehan, *How to Get to Princeton? Just Try Using Its Name*, N.Y. TIMES, Feb. 2, 2006 at B1, or the University of Rochester, which spent a great deal of time and money considering whether or not to change its name, Michael Winerip, *Our Towns: Change of Image in 'Cold and Distant Outpost,'* N.Y. TIMES, Feb. 25, 1986 at B2.

The United States Military Academy has registered a trademark on the words "West Point," "United States Military Academy," and "U.S.M.A." Since then, it has told local merchants that they needed permission to use the words "West Point" in their businesses; and, most recently, West Point told an anti-war organization called "West Point Graduates Against the War" that the group could not use the words "West Point" on its website or as part of the name of the organization. Peter Applebome, *And Now A Few Words On West Point*, N.Y. TIMES, May 21, 2006 at 33. And, indeed, the precise wording of the name of a university on a diploma has caused rioting among discontented students in China. Joseph Kahn, *Rioting in China Over Label on College Diplomas*, N.Y.TIMES, June 22, 2006, at 1.

Walt Whitman understood clearly the importance of names. "The goal that was named cannot be countermanded." Walt Whitman, *Song of the Open Road, in* LEAVES OF GRASS 13 (Doubleday, Doran & Company, Inc. 1940) (1855).

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schools feel so strongly about justice, how come not one of them feels strongly enough to put the word "justice" in its name?[9]

For many years, there has been a controversy brewing at Touro Law School over the role of justice in legal education, leading to a recent decision by the faculty that every Touro student must take a course in justice. Part II of this article contends that not only do law schools virtually ignore justice - a concept that is supposed to be the goal of all legal systems - they go so far as to denigrate it and turn students away from a concern with justice.[10]

Part III(A) argues that justice-based advocacy is superior to that traditionally taught in law school; and Part III(B) asserts that lawyers, because of their disproportionate influence in society, have a particular need and responsibility to understand and confront fundamental issues of social justice.[11] Part III(C) shows how our pedagogy – through our law-giving method of instruction, combined with an emphasis on a false neutrality – leads law schools to produce mainly staunch defenders of the status quo.[12]

Part IV discusses what a proposed school of justice would look like.[13] A justice school's curriculum would embrace a justice-perspective, include special "justice" courses, and focus on the three levels of justice: pure justice, positive justice, and applied justice. Concentrating on the study of how justice is administered in the real world, the school would emphasize student understanding of sociology of law and of empirical research.

Part IV(B) then proposes a new pedagogy, one that takes the emphasis off the lawgiver-professor, "the sage on the stage," and puts it onto the student, who must do her work by continually confronting her own concept of what is just.[14] Finally, Part IV(B)(2) acknowledges that a concern with justice will be time-consuming and suggests that, because of the inefficiency and confusion inherent in the case method, reduction in the use of that method would give law professors the necessary time to turn their attention to matters of justice.[15]

II. DRIFTING AWAY FROM JUSTICE

An examination of current legal education reveals that law schools have drifted far from our proper concern, justice, into a deadened and

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[9] Actually, a *non*-A.B.A.-approved, for-profit law school opened in 2005 in Paducah, Kentucky, with the unwieldy name of American Justice School of Law. Despite its name (and the additional fact that its "official newsletter" is named "Justice Quest"), there is absolutely nothing on the school's ample website or in the press coverage of the school that indicates that the school has anything but the traditional law school attitude toward law and justice. *See* American Justice School of Law, http://www.ajsl.us/ (last visited Apr. 6, 2007).

[10] *Infra* notes 16-29 and accompanying text

[11] *Infra* notes 30-47 and accompanying text.

[12] *Infra* notes 47-76 and accompanying text.

[13] *Infra* notes 78-115 and accompanying text.

[14] *Infra* notes 115-133 and accompanying text.

[15] *Infra* notes 134-140 and accompanying text.

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uninspired pragmatism, the only concern of which is law.[16] Certainly, there is some talk of justice in every law school; many professors will ask their students from time to time whether a judicial decision is fair or just. By and large, however, students learn very early in their legal education that law is compartmentalized into courses like torts or tax or trusts and estates. They learn also that only those answers which fit quite pragmatically into our statutory or common law system are worth anything; cries of injustice and the consequent exploration of moral values are not the currency of the American law school. The result of learning these lessons so very early in law school is that our students never confront in any coherent way the great moral issues inherent in law and legal systems. As a result, law schools turn out graduates who practice, function, and even *think* within very narrow parameters. A focus on the great moral and philosophical issues would go a long way toward remedying those problems.

Members of other professions find the proposition that law school should be about justice self-evident (even if other professional schools may miss the main point of what *they* are supposed to be teaching as well). In his book *Home*, architect Witold Rybczynski discussed the lack of concern with "comfort" when he was a student in architecture school:

> During the six years of my architectural education, the subject of comfort was mentioned only once. It was by a mechanical engineer whose job it was to initiate my classmates and me into the mysteries of air conditioning and heating. He described something called the "comfort zone," which, as far as I can remember, was a kidney-shaped, crosshatched area on a graph that showed the relationship between temperature and humidity. Comfort was inside the kidney, discomfort was everywhere else. This, apparently, was all that we needed to know about the subject.[17]

Rybczynski concluded, "[i]t was a curious omission from an otherwise rigorous curriculum; one would have thought that comfort was a crucial issue in preparing for the architectural profession, *like justice in law*, or health in medicine."[18] As one law professor has phrased it, "[j]ust as medicine is all about health and architecture is all about aesthetically acceptable buildings that do not fall down, ultimately everyone should perceive that *law is all about justice.*"[19]

These comments show that justice is actually the unwanted stepchild of legal education – or, perhaps more accurately, that embarrassing relative

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[16] Anthony D'Amato has observed that legal education "lacks a soul." D'Amato, *supra* note 4, at 3.

[17] Witold Rybcynski, HOME: A SHORT HISTORY OF AN IDEA vii (1987).

[18] *Id.* (emphasis added).

[19] D'Amato, *supra* note 4, at 55.

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who never quite fits in at family gatherings and whose presence makes the other relations just a little uncomfortable. Perhaps we are uncomfortable with justice, as opposed to law, because, while we have done a reasonably effective job of using the law to keep order in our exercise of self-government, we are all cognizant that our society has done markedly worse in achieving justice. Hence, justice is the spectre in law school, much like the unquiet victims Susan Jacoby has so eloquently described:

> We prefer to avert our eyes from those who persist in reminding us of the wrongs they have suffered – the mother whose child disappeared three years ago on a New York street and who, instead of mourning in silence, continues to appear on television and appeal for information about her missing son; the young Sicilian woman who, instead of marrying her rapist as ancient local custom dictates, scandalizes the town by bringing criminal charges; the concentration-camp survivors who, instead of putting the past behind them, persist in pointing their fingers at ex-Nazis living comfortable lives on quiet streets. Such people are disturbers of the peace; we wish they would take their memories away to a church, a cemetery, a psychotherapist's office . . . .[20]

Just like the call of the unvindicated victim, the call of justice is powerful. It weighs on the mind and claws at the soul. Law, on the other hand, is a creature of rationality; it rarely calls out to our deepest emotions. At the profoundest emotional levels, law, unlike injustice, chafes few of us. Injustice, however, haunts many of us.

Indeed, law school has long favored the realm of the mind – the difficult, cognitive work of parsing the law – over the emotional work of wrestling with justice and injustice.

> Legal education has been primarily concerned with instilling lawyering skills, with training students to think like lawyers. This endeavor required emphasis on process over substance - on internalizing certain modes of reasoning rather than on the consequences of reasoning by these modes. [21]

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[20] SUSAN JACOBY, WILD JUSTICE: THE EVOLUTION OF REVENGE 1-2 (1983). In the real world, justice is, quite rightly, a perennial disturber of the peace; in legal academia, justice ought to drive the engine of critical analysis of social institutions, most particularly laws and legal arrangements.

[21] Jerold S. Auerbach, *What Has the Teaching of Law to Do with Justice?*, 53 N.Y.U. L. REV. 457, 458 (1978); *see also* Talbot D'Alemberte, *Teaching About Justice and Social Contributions,* 40 CLEV. ST. L. REV. 363, 365 (1992) ("When do we decide that we have taught our students enough of tough-minded analytical skills and begin to allow them to think about values, consequences?").

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The "consequences," of course, are the eviction of the widow, the denial of a remedy to the family of a deceased tort victim, and the conviction and subsequent incarceration of a man who did not receive a fair trial. It is not that law professors are a particularly heartless breed, genuinely untouched by the plight of such unfortunates; indeed, many are distinguished by their compassion. However, under the gun of having limited class time in which to complete "coverage" of an already overstuffed course, in order to prepare our students to pass the bar exam and practice law competently, we feel that we simply cannot afford to spend much class time on the consequences, only on the applicable black letter law and the proper application of that law (in the sense of "correct" legal analysis). That is what we were told was the role of the law professor when we were students; and that is, after all, why the case is in the casebook – to teach students the law, not to explore the injustice of the court's holding.

Indeed, law school has made almost a fetish of discouraging exploration of morality, fairness, and justice. Emotional responses of virtually all kinds are discouraged.[22] Currently, our emphasis on process in our teaching constitutes a form of reductionism. This reductionism sorts out such values as fairness and justice, which are rejected as "soft" and "fuzzy," unbefitting law school classroom discussion. It has been noted that law students who ask questions about fairness and justice are frequently told by their teachers that they "would find a happier home in the graduate school of theology."[23] One professor has written of her own experience teaching law school:

> 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.[24]

One of the best students in my justice course described how law school had affected her:

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[22] "The feeling shared by many students was that law schools are places where old men in their twenties go to die." Paul N. Savoy, *Toward a New Politics of Legal Education*, 79 YALE L.J. 444, 462 (1970).

[23] Auerbach, *supra* note 21, at 471.

[24] Martha Minow, *Introduction: Seeking Justice*, *in* OUTSIDE THE LAW: NARRATIVES ON JUSTICE IN AMERICA 1, 1 (Susan Richards Shreve & Porter Shreve eds., 1998). Professor Lynne Henderson's teaching experience corroborates that of Minow. Henderson observed that "rather than nurturing the devlopment of a sense of justice in our students in law school we kill it off and we kill it off in fairly short order." Lynne Henderson, *Nurturing The Impulse For Justice*, 40 CLEV. ST. L. REV. 455, 455 (1992).

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> 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. While I am not hardened to the point where I have been taught to disdain this mode of thinking like some of my peers before me, I have to a great extent learned to read the law, analyze it, synthesize it and apply it – no questions asked. If that is not an injustice I don't know what is.[25]

Legalistic concern with "coverage" of black letter law and "thinking like a lawyer" crowd out concerns about fairness and justice from the normal law school curriculum and discourse. Certainly, in the first year, when extracting doctrine from cases, grasping principles of statutory interpretation, and applying legal rules to hypothetical fact patterns are seen as the central tasks, any effort to examine issues of justice in the classroom seems peripheral and distracting to most students and most faculty, as well. The students must have gotten this message from *some* place. Usually, under pressure to provide complete "coverage" of the assigned subject, the law

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[25] Student Journal for Justice Course, Touro Law School (September 6, 2006) (on file with the author). Students' increasing disconnection from the concept of justice is, no doubt, related to their abandoment of an ethic of *pro bono* work and lawyering in the public interest. William Hines, when he was President of the Association of American Law Schools, adverted to "a widely shared observation that many of our students come to law school with impressive records of volunteer service and commitments to social justice causes, but seem to lose their passion to help others somewhere during their three years with us." N. William Hines, *Empirical Scholarship: What Should We Study and How Should We Study It?*, AALS NEWSLETTER 3 (Feb. 2005). This premise was certainly well-documented in ROBERT V. STOVER, MAKING IT AND BREAKING IT: THE FATE OF PUBLIC INTEREST COMMITMENT DURING LAW SCHOOL (Howard S. Erlanger ed., 1989). Stover and Erlanger found that the number of students interested in pursuing public interest work decreased by fifty percent during the three years of law school, and, while many students abandoned their public interest aspirations during law school, very few students who had entered law school without such ambitions developed them during their law school careers. *Id.* at 3, 12-13. They also found that the factors responsible for this change of student attitude included the faculty's lack of classroom emphasis on this responsibility and a concurrent faculty emphasis on making money. *Id.* at 53-53. As a result, "[t]he phenomenon of students entering law school wanting to do good and leaving wanting to do well is perpetuated." Henry Rose, *Law Schools Should Be About Justice Too*, 40 CLEV. ST. L. REV. 443, 445 (1992).

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professor is at least complicit in this rejection and, ultimately, denigration of the question of the fairness, morality, and justice of American law.[26]

This premise has been clearly documented. Sociologist Robert Granfield, writing about the moral transition of students from the time they were accepted to Harvard Law School until the time they graduated, concluded that legal education frequently turns realists into amoral pragmatists:

> 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.[27]

According to Anthony D'Amato, "[t]he students, in short, absorb the lesson of moral relativism, and it stays with many of them throughout their career as practitioners."[28] And, as Karl Llewellyn noted, "[i]deals without technique are a mess. But technique without ideals is a menace."[29]

III. WHY LAW SCHOOLS NEED A JUSTICE ORIENTATION

Today, the public's view of the legal profession is abysmal. Lay people believe that lawyers care only about money, winning, and self-promotion. To the untutored eye, it appears that lawyers have become totally unmoored from their underlying and guiding principle, justice.

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[26] *See* Leslie Bender, *Hidden Messages in the Required First-Year Law School Curriculum*, 40 CLEV. ST. L. REV. 387, 394 (1992).

> [L]aw students receive no messages from the required curriculum that law is about a search for justice. They are never required to question the relationships among law and justice and truth... Students may or may not get these messages from individual professors, but even if they do, they also figure out that come exam time, they will be asked about contracts, not justice; about torts, not truths . . . .

Id.

[27] RALPH NADER & WESLEY J. SMITH, NO CONTEST: CORPORATE LAWYERS AND THE PERVERSION OF JUSTICE IN AMERICA 334 (1996) (quoting from interview with Robert Granfield, author, MAKING ELITE LAWYERS: VISIONS OF LAW AT HARVARD AND BEYOND (1992) (Dec. 12, 1993)).

[28] D'Amato, *supra* note 4, at 1.

[29] Karl Llewellyn, *On What is Wrong with So-Called Legal Education*, 35 COLUM. L. REV. 651, 662 (1935). For a critique of the dominant paradigm that disdains justice, *see* Russell G. Pearce, *The Legal Profession as a Blue State: Reflections on Public Philosophy, Jurisprudence, and Legal Ethics*, 73 FORD. L. REV. 1339, 1358-1365 (2006).

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We know that the situation is far more complicated than that. People believe lawyers to be unethical because, in part, they do not understand constitutional and ethical requirements. There are, in fact, many ethical lawyers. Nevertheless, there may be some justification for the public's view. We lawyers and legal academics have not made the concern for justice as central to our profession and the education for that profession as we could have. There are a lot of lawyers out there who do nothing to embody the noblest ideals of our profession; many lawyers appear simply soulless. As Yeats put it, "the best lack all conviction, while the worst are full of passionate intensity."[30]

A. In the Real World, Justice-Based Advocacy is Superior Advocacy

Anthony D'Amato has already advanced the claim that justice-based advocacy is superior to the advocacy based on distinguishing precedents that we now teach in law school.[31] His thesis is summed up this way:

> The skill of an advocate is the ability to convince a judge that his client's cause is a just one and his client should win the lawsuit. The role of a judge is to decide cases justly. Since the judge is presented with plausible legal arguments from both sides, the judge will usually pick the side that she believes *ought* to win. This "ought" is a *moral* imperative and is part of her sense of justice. It is not a *legal* imperative except to the extent that the judge feels that one side's interpretation of the law is coincident with the dictates of justice.[32]

His claim is based upon the belief that neither statutes nor case law actually constrain judges to decide cases in a particular way. Even with an obviously applicable and plainly unambiguous statute, D'Amato argues, a judge can find a way to find it inapplicable or unclear in its meaning. "The judge can always 'find' a meaning in the words that will favor whichever party to whom the judge wishes to grant the decision."[33]

D'Amato's claim of the "indeterminacy"[34] of the law is far from unique. It is completely congruent with the teachings of Legal Realists and

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[30] W.B. Yeats, *The Second Coming, in* THE COLLECTED POEMS OF W.B. YEATS 184-185 (Macmillan Publishing Co., Inc. 1956) (1933).

[31] D'Amato, *supra* note 4 (emphasis in original).

[32] *Id.* at 35.

[33] *Id.* at 13. "What those of us who teach law have to disabuse ourselves of is the notion that the law determines the way a judge will rule in a given case. The law may help us predict the way a judge will probably rule, but it cannot determine the way a judge must rule." *Id.* at 16 n.30. Indeed, "[i]t is a massive, yet societally well-entrenched illusion, to think that the content of the law actually constrains any judge in any particular case." *Id.* at 26.

[34] *Id.* at 13.

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Critical Legal Studies scholars.[35] Forty years earlier, Karl Llewellyn explained how judges do and do not make decisions. Acknowledging from the beginning that statutes, rules, and canons of construction do not constrain judges to make a particular decision, Llewellyn wrote that ". . . there is no single right and accurate way of reading one case, or of reading a bunch of cases."[36] Writing of our system of precedent, Llewellyn said:

> The major defect in that system is a mistaken idea which many lawyers have about it – to wit, the idea that the cases themselves and in themselves, plus the correct rules on how to handle cases, provide one single correct answer to a disputed issue of law. In fact, the available correct answers are two, three, or ten. The question is: *Which* of the available correct answers will the court *select* – and *why?* For since there is always more than one available correct answer, the court always has to select.[37]

So how does a court decide which of the available correct answers to select? Llewellyn emphasized three criteria: (1) the "*current tradition* of the court," (2) the "*current temper* of the court," and (3) "*the sense of the situation as seen by the court.*"[38] The "current tradition" of the court refers to whether the court stresses fidelity to past decisions (*stare decisis)* or a concern for the outcome of any given case (result-orientation).[39] The "current temper" of the court refers to the personalities of the judges on the court at that particular moment. Are they adventurous, risk-taking, and result-oriented? Or are they sober, conservative, and tradition-oriented?[40] More significant than the other two criteria, according to Llewellyn, is "the sense of the situation as seen by the court."[41] Here, the court is looking for the most just result – and how to get there.[42]

Since, according to D'Amato, the judge will decide which party to rule for based on her sense of justice, the lawyer who makes her cause appear to be the one more consistent with justice will triumph. Hence, knowing

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[35] For an example of a critique from a Critical Legal Studies scholar, *see* David Kairys, *Legal Reasoning*, *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 11 (David Kairys ed., 1st ed. 1982).

[36] Karl Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed*, 3 VAND. L. REV. 395 (1950).

[37] *Id.* at 396 (emphasis in original). Indeed, Llewellyn opined that there are at least thirty-eight ways to interpret precedent, *all of them correct. Id.*

[38] *Id.* (emphasis in original).

[39] *Id.* at 396.

[40] *Id.* at 396-97.

[41] *Id.* at 397.

[42] *Id.* at 397-399. Kairys' critique is far more blistering, but he too would argue that judges are not constrained by statutes and case law, and that they make their judicial decisions based on the judges' own values or sense of what is right and just. *See* Kairys, *supra* note 35.

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how to make the "justice arguments" is vital to successful advocacy, much more so than knowing and arguing all the precedents. "Successful advocacy," D'Amato wrote, "will entail, in my view, ferreting out the factual basis in justice for their client's claims, and organizing and presenting those facts so as to elicit resonance with the decision-maker's sense of justice."[43] Ultimately, D'Amato's argument for teaching justice, not law, is that it will make students into more effective and better lawyers. Since the currency of judicial decisionmaking is actually justice, not law, teaching students to argue justice concerns, rather than just statutory interpretation and exegesis of precedent, will produce superior lawyers.[44]

B. Lawyers Need Experience Wrestling with the Justice Questions

In our society, as well as many others, lawyers are disproportionately powerful and influential, whether they hold public office or represent the interests of (frequently powerful) clients.[45] They are confronted by moral issues and issues of justice, such as which clients they should represent, what advice they give their clients, and the moral limits to advocacy. They are frequently faced with issues of the broadest social policy – of what is, or would be, morally right or morally wrong in a just society.[46]

Because of the disproportionate power and influence they wield in our society, lawyers, more than other people, must be constantly reminded of society's social problems and moral shortcomings. Is it fair and just that some people are born with Paris Hilton's money while others are born to families mired in debt? Or, to use Warren Buffet's delicious phrase, is it fair that some win "the ovarian lottery?"[47] If it is not fair, then what kind of fiscal policies should a society pursue to mitigate this unfairness? This issue implicates virtually every area of law. It is not required that students regard the operation of fate to be unfair or that they believe it necessary to "correct" the market distribution of wealth. It should be required, however, that

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[43] D'Amato, *supra* note 4, at 37. *See also id.* at 25-26 ("I only claim that we should be teaching students how to marshal and structure the facts of cases in order to get through to the judge's sense of justice.").

[44] This is not to say that judges, in their decisionmaking, are not influenced by such factors as politics, fear, promotion, playing it safe, and concern for the media. However, students should learn about this aspect of the judicial mind from their study of "applied justice" and the sociology of law. *See infra* Section II(A)(4).

[45] D'Amato, *supra* note 4, at 38 ("Through our hands as professors of law pass some of future society's most important people . . . . they will leave us and take up 'the law,' whether in politics, in business, in private practice, or on the bench. They will influence and, in some cases, judge or govern our society.").

[46] Here I speak not of professional ethics – the rules promulgated by our profession and governing the conduct of lawyers – but of personal and individual morality.

[47] Georgina Russell, *Oracle of Omaha Offers Words of Wisdom*, THE WHARTON J. (April 17, 2006), *available at* http://www.whartonjournal.com/home/index.cfm (the difference between being born into rich families and being born into poverty).

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lawyers be sensitized to this issue of basic fairness and reflect upon it in a serious way.[48]

Graduating from law school, students enter practice, which is usually a sufficiently frenetic experience that practitioners hardly have time to sit around and discuss, or even think about, the big moral or "justice" issues of the day. Busy legal practitioners - juggling clients, cases, and court appearances – rarely have the time to reflect on these matters. Therefore, if a systematic examination of these problems does not occur in law school, there will probably never be another opportunity for such organized, shared, and guided reflection.

It is not enough, then, that lawyers be well-trained in the legal and professional skills of "thinking like a lawyer," parsing statutes and cases, counseling a client, examining witnesses, and picking a jury. Because of the enormous power and influence they wield, they must be well-schooled in recognizing and resolving moral issues. In order to fulfill their roles their roles as lawyers, citizens, and morally autonomous individuals, lawyers must also be trained in the issues of justice and inequity facing our society: individual rights and the limits of governmental power, economic justice, issues of gender and race, criminal justice issues, and issues of international justice.

Many of our students come to law school without a good liberal education and without much experience in thinking deeply, broadly, rationally, and systematically about the big issues of justice that face our world today. While these issues arise sporadically in law school, traditional law school education focuses on comparatively small "professional" issues, such as the proper interpretation of a phrase in the Uniform Commercial Code, the proper reading of a line of cases, and how to cross-examine a hostile witness. During these three years, law students largely lose sight of the "big picture" issues.

Law schools bear a major responsibility for the adverse changes that occur in students while they are under our tutelage. Students' natural concern with justice and fairness must not only be encouraged; it must be prodded, taunted, and regularly poked with a stick.

C. Law School Pedagogy Contributes to the Production of Passive Lawyers, Default Defenders of the Status Quo

I do not argue that law school, as a social institution, has a moral responsibility to turn out future generations of Ralph Naders and Thurgood Marshalls, those lawyers who will fight for institutional change in our legal system and our nation.[49] I would, however, contend that law school has a

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[48] Of course, if students do find fundamental unfairness here, then they are likely to be motivated, on a long-term basis, to attempt to remedy the situation.

[49] That law school may not have the moral duty to foster the development of such individuals does not, however, mean that it would not be socially useful if it chose to do so.

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duty, at the very least, not to knowingly employ a curriculum and a pedagogy that will effectively discourage students, particularly those who entered law school already concerned with justice, from continuing on the paths they have previously chosen for themselves. Law schools should not turn out class after class of corporate drones, who will snap, Lego-tight, into our corporate environment and never challenge any part of the system. Yet, American law schools do turn out by and large remarkably passive and accepting graduates. These lawyers generally support the legal status quo, rather than embrace change of a legal system in which unfairness, inequity, and injustice cry out for change. As Robert Granfield has shown, even students who enter law school with a strong interest in working for justice often end up abandoning their individual morality and adopting law school's precisely amoral character.[50] In short, it is our pedagogy that forges this result.[51]

We need to call off our pedagogy and adopt an educational methodology that allows students to adopt more diverse views toward our legal system and social problems. This is another reason why law schools should reduce their emphasis on law and focus more on justice. If we want to allow budding Naders and Marshalls to emerge, then we will have to alter our pedagogy. Hence, our law schools must reconsider curriculum and methodology in order to produce graduates who are willing to think more in terms of achieving justice than in terms of simply accepting the status quo.

While claiming to teach law neutrally, law school turns out defenders of the status quo by actually teaching American mainstream values that underlie our legal system. Law school also blunts any attempt by students to unearth these hidden values and dissect them. While individual law professors do stray from time to time, generally law school teaches primarily what the law is. It makes no judgment about the fairness and morality of most of our law.[52] Indeed, law school prides itself on its claimed

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[50] ROBERT GRANFIELD, MAKING ELITE LAWYERS: VISIONS OF LAW AT HARVARD AND BEYOND (Routledge 1992).

[51] The pedagogy works hand in hand with other aspects of the law school, like the placement office, that indicate to students what is *really* important in the world.

[52] As Anthony D'Amato has written,

> The only way we can criticize the court's final judgment – that is, the only way that makes any sense and is worthy of our time and effort – is to criticize it from the normative standpoint of justice. Fortunately, it remains open to us to say whether a given decision is fair or unfair.

D'Amato, *supra* note 4, at 29. It seems to me that teaching what the law is actually constitutes the easy part; it is judging the justness of laws and their alternatives that is difficult. The feeling this evokes in me reminds me of a story about Steve Brodie, the man who jumped off the Brooklyn Bridge and lived:

> In 1886, in order to win a $200 bet, Steve Brodie jumped from the Brooklyn Bridge into the East River, 135 feet below. Years later the father of heavyweight boxer Jim Corbett met Brodie and asked him about his remarkable feat: "So you're the fellow who jumped over the Brooklyn Bridge?" "I jumped *off* it," Brodie corrected. "I thought you jumped over

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neutrality. But that neutrality is actually false. I maintain that there simply is no such thing as neutrality or neutral teaching.[53] Neutrality ends up being an endorsement of the status quo, a clearly partisan position. As sociologist Robert Granfield has written, "[l]aw schooling, thus, represents a moral transformation through which students dissociate themselves from previously held notions about justice and replace them with new views consistent with the status quo."[54]

In the name of a false neutrality, then, law students are discouraged from taking a position. The unsubtle message of all this is that taking a position is a bad thing – even while nearly all of law school perpetuates a position (declared to be a *neutral non*-position) that recapitulates and reproduces the status quo. A desire for the appearance (though not the reality) of neutrality and even-handedness has led to some absurd results in other arenas. "National Geographic" magazine has long had a policy of not saying anything negative about countries and people:

> 'Only what is of a kindly nature,' wrote the editor in 1915, 'is printed about any country or people.' . . . This is still the magazine's policy. One photographer described it like this: 'In a story about volcanoes, you should balance the devastation with something good about volcanoes.'[55]

One wonders what the magazine would write about tsunamis today.

Sister Helen Prejean, author of *Dead Man Walking*, whose instinct was to try to "remain neutral," has written of the pain of taking sides, and the result of appearing not to:

> it," Corbett replied with apparent disappointment. "Any damn fool could jump off it!"

DAVID WALLECHINSKY & IRVING WALLACE, THE PEOPLE'S ALMANAC PRESENTS THE TWENTIETH CENTURY: HISTORY WITH THE BORING BITS LEFT OUT (Overlook 1999) (emphasis in original), *available at* http://www.anecdotage.com/index.php?aid=10565. A similar tone of disenchantment is struck in the story of a two women who meet at a party. The first woman explains that she is a dance therapist and inquires as to the second's line of work. Informed that the second is a psychotherapist, the dance therapist asks, "Just words?" If law school's function is merely to tell students what the law is – not consider the justness of law(s) – then perhaps the song lyric "Is that all there is?" best sums up the aspirations of current legal education. Peggy Lee, *Is That All There Is?*, on NATURAL WOMAN/ IS THAT ALL THERE IS? *(EMI Gold (UK) 2003)* . Perhaps it was this lack of intellectual aspiration that caused Thorstein Veblen to observe that "a school of law no more belongs in a university than a school of ... dancing." THORSTEIN VEBLEN, HIGHER LEARNING IN AMERICA, *cited in* ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S 51, 64 (Univ. of. N.C. Press 1983).

[53] Russell G. Pearce, *White Lawyering: Rethinking Race, Lawyer Identity, and Rule of Law*, 73 FORD. L. REV. 2081, 2097-2098 (2005)(opining that neutrality does not exist).

[54] GRANFIELD, *supra* note 50, at 73.

[55] Marina Warner, *High-Minded Pursuit of the Exotic*, N.Y. TIMES, Sept. 19, 1993, at 13 (book review). Even acknowledging their natural beauty, what good things could one write about volcanoes that could possibly balance the death and devastation they cause?

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> In 1980 my religious community, the Sisters of St. Joseph of Medaille, had made a commitment to 'stand on the side of the poor,' and I had assented, but reluctantly. I resisted this recasting of the faith of my childhood, where what counted was a personal relationship with God, inner peace, kindness to others, and heaven when this life was done. I didn't want to struggle with politics and economics. We were nuns, after all, not social workers, and some realities in life were, for better or worse, rather fixed -- like the gap between rich and poor. Even Jesus Christ himself had said, 'The poor you will always have with you.' Besides, it was all so complex and confusing -- the mess the world was in --with one social problem meshed with other problems . . .
>
> Enlightenment had come in June 1980. I can remember the moment because it changed my life. My community had assembled at Terre Haute, Indiana, to grapple with directions of our ministries for the 1980s, and the chief speaker was Sister Marie Augusta Neal, S.N.D. deN. A sociologist, she described glaring inequities in the world: two thirds of the peoples of the world live at or below subsistence level while one third live in affluence. Did we know, she asked, that the United States, which comprises about 6 percent of the world's population, consumed 48 percent of the world's goods? What were we to do about such glaring injustices? She knew her facts and I found myself mentally pitting my arguments against her challenge -- *we were nuns, not social workers, not political.* But it's as if she knew what I was thinking. She pointed out that <u>to claim to be apolitical or neutral in the face of such injustices would be, in actuality, to uphold the status quo -- a very political position to take, and on the side of the oppressors</u>.[56]

If neutrality is impossible, then what requirements of fairness are placed upon a communicator – a law professor or, say, a reporter – from whom most listeners expect a certain modicum of evenhandedness? Perhaps it is as simple as telling both sides of the story – perhaps not treating them the same, but telling both sides anyway. Of Christiane Amanpour, the noted foreign correspondent, it has been written:

> Ms. Amanpour's passion for the Bosnia story has led some people to question her objectivity, a criticism she rejects.

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[56] HELEN PREJEAN, DEAD MAN WALKING: AN EYEWITNESS ACCOUNT OF THE DEATH PENALTY IN THE UNITED STATES 5-6 (Random House 1993) (italics in original) (underlining added).

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> 'There are some situations one simply cannot be neutral about, because when you are neutral you are an accomplice,' said Ms. Amanpour. 'Objectivity doesn't mean treating all sides equally. It means giving each side a hearing.'[57]

One can understand, and even sympathize with, the desire to avoid complete moral relativism. But a belief in a fictional neutrality can be equally dangerous, not least because it is usually the viewpoint of the proponent of this neutrality that is magically anointed as the officially neutral position. For instance, in 2006, the State of Florida enacted the Florida Education Omnibus Bill,[58] which mandated, *inter alia,* how American history should be taught:

> American history shall be viewed as factual, not as constructed, shall be viewed as knowable, teachable, and testable, and shall be defined as the creation of a new nation based largely on the universal principles stated in the Declaration of Independence.[59]

This law also singles out the Constitution for special attention by mandating that teachers convey "[t]he history, meaning, significance, and effect of the provisions of the Constitution of the United States [and] the amendments thereto . . ."[60] But *whose* "meaning?" No one knows better than law professors that there simply is no single, neutral, and authoritative interpretation of most of the significant provisions of the Constitution. Indeed, that is what law professors (and judges) do – they argue over the correct interpretation of the Constitution.

This statute shows very well that "neutrality" is just one group's vision of what it believes *ought* to be accepted as neutral. Under this law, for instance, the history curriculum must stress "[f]lag education, including proper flag display and flag salute,"[61] "[t]he nature and importance of free enterprise to the United States economy,"[62] and "the benefits of sexual

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[57] Eric Schmitt, *Five Years Later, The Gulf War Story Is Still Being Told,* N.Y. TIMES, May 12, 1996 at B41.

[58] FLA. STAT. ANN. § 1003.42 (West 2006).

[59] *Id.* at subd. (2)(f). The original bill was even more emphatic, requiring that American history ". . . shall be taught as genuine history and shall not follow the revisionist or postmodernist viewpoints of relative truth." *See* S.B. 28 and H.B. 7087(e)(3), 108th Reg. Sess. (Fla. 2006). *See also* Jonathan Zimmerman, *All History is "Revisionist,"* LOS ANGELES TIMES, June 7, 2006, *available at* http://www.latimes.com/news/opinion/commentary/la-oe-zimmerman7jun07,0,5940045.story?coll=la-news-comment-opinions; Bruce Craig, New Florida Law Tightens Control over History in Schools, http://hnn.us/roundup/entries/26016.html (last visited March 25, 2007) (citing newsletter of the National Coalition for History).

[60] FLA. STAT. ANN. § 1003.42(2)(b) (West 2006).

[61] *Id.* at § 1003.42(2)(d).

[62] *Id.* at § 1003.42(2)(r).

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abstinence as the expected standard."[63] The law requires that teachers instruct their students on the Holocaust[64] and the special contributions to American history of African-Americans,[65] Hispanics,[66] and women;[67] yet, no mention is made of the achievements or contributions of gays or Native Americans. The bill purports to focus students' attention on historical "facts," which are regarded as identifiable, fixed, and immutable. But, as one state legislator asked pointedly, "whose facts would they be, Christopher Columbus's or the Indians *[sic]*?"[68]

For a long time, historians have told us that historical facts are not fixed and immutable. In his 1931 inaugural address as President of the American Historical Association, distinguished Cornell University historian Carl Becker remarked on how "malleable" such hard, cold facts are and "how easy it is to coax and cajole them."[69] Since all facts must be interpreted, the history written by historians, Becker said, is a mixture of "truth" (facts) and "fancy" (interpretation). Becker elaborated:

> It must then be obvious that living history, the ideal series of events that we affirm and hold in memory, since it is so intimately associated with what we are doing and with what we can hope to do, can not be precisely the same for all at any given time, or the same for one generation as for another. History in this sense cannot be reduced to a verifiable set of statistics or formulated in terms of universally valid mathematical formulas. It is rather an imaginative creation, a personal possession which each one of us . . . fashions out of his individual experience, adapts to his practical or emotional needs, and adorns as well as may be to suit his aesthetic tastes.[70]

Historian Jonathan Zimmerman has explained how this works in very down-to-earth detail:

> For instance, try to recount everything you did yesterday. Not just a few things, like going to work or eating dinner or reading the newspaper, but *everything*. You can't. Even if

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[63] *Id.* at § 1003.42(2)(n).

[64] *Id.* at § 1003.42(2)(g).

[65] *Id.* at § 1003.42(2)(h).

[66] FLA. STAT. ANN. § 1003.42(2)(p) (West 2006).

[67] *Id.* at § 1003.42(2)(q).

[68] Craig, *supra* note 59. It may not have been a coincidence that State Representative Shelley Vana, who made this observation, was also president of the West Palm Beach teachers union. *Id.*

[69] Carl Becker, *Everyman His Own Historian*, 37 AM. HIST. REV. 221, 230 (1932).

[70] *Id.* at 227-28.

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> you kept a diary and recorded what you did each minute, you would inevitably omit some detail: a sound in your ear, a twitch in your nose, a passing glance of your eyes. A 24-hour video camera might pick up these physical actions, but it could never record your thoughts.
>
> So when somebody asks what you did yesterday, you select a certain few facts about your day and spin a story around them.
>
> As do professional historians. They may draw on a wider array of facts and theories but . . . they choose certain data points and omit others, as well they must.[71]

All narrative, all recounting – indeed, all communication – is selective and, therefore, not neutral.

How do law schools exercise their selectivity? In what ways are they not neutral? First, law schools have selected the body of knowledge they choose to emphasize in their teaching. While the law school curriculum is not entirely homogeneous, and other topics are touched upon, it normally emphasizes the teaching of doctrinal law. It has been decided to stress instruction on doctrine rather than empirical and sociological studies of how law and legal institutions actually function, lawyering skills, or values and justice issues. Second, the very choice of courses to offer (and to require) is itself a non-neutral indication of what the institution thinks is most important.[72]

Cloaked in the protection of academic freedom, individual law professors exercise vast discretion and selectivity in several ways as well. First of all, the professors choose what casebook or other teaching materials to use, presumably based on the book's "coverage" of the topic (*what* is covered) and the nature of that coverage (*how* it is covered). Second, the professor makes her own decisions about coverage - which topics, parts, and pages of the casebook should be covered and which should not be covered? In what depth? And with which cases and what other materials? This process further refines the coverage decisions initially made by the casebook editors. These decisions on how much of the semester to spend on specific topics are usually enshrined in a syllabus, which the professor may or may not ultimately follow, depending on her own value choices. Indeed, frequently on a day-by-day basis, the professor decides how much class time should be spent on what subject matter (to the exclusion of other topics) and

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[71] Zimmerman, *supra* note 59.

[72] While bar examiners play a substantial role in this process by basing the bar exam on what they think is important, it still falls to the individual law school to decide to what degree it will fall in line with the value judgments made by the bar examiners.

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even on which students to call on in class (since professors can often tell where a student is going to take the discussion).

Third, there is what the professor chooses to actually say to her classes – putting forward certain positions and interpretations rather than others. Fourth, the grading mechanism – whether it is an exam, the assignment for a term paper, or some other device for quantifying student performance -- must be compiled. That process involves making decisions based on spoken or unspoken values. Finally, grading is strongly influenced by the value judgments of the professor that have shaped the course the entire semester.

Hence, there can be little doubt that we do not teach "Torts" (or any other subject). Instead, Professor K teaches her understanding and view of torts, Professor Z teaches his understanding and view of torts. But there is no neutral, authoritative version of "Torts" (or any other subject) – not in law school anyway.

Currently, in most American law schools, we "give" students the law. We give it as case law,[73] statutory law, administrative regulations, etc. Admittedly, different teachers give it in different pedagogical styles: it may be given in lectures, through the Socratic Method, through casebooks or hornbooks, or by the problem method. But all these methods have one thing in common; the student is *given* "the law."[74] There are several results of this handing down of the law. First, while the professor is looked upon as the source of law, more importantly, the student - the future lawyer and policymaker - is in a completely passive role as the receiver of this "prefab" law.[75] Policy and habits of passive acceptance are both set and reinforced.[76]

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[73] It might be argued, particularly when discussing the use of the case method, that what some see as that method's greatest vice, its opacity, is really its greatest virtue. The law is not just there for the taking; it must be teased out of judicial opinions. However, while that lamentable opacity undoubtably makes it harder to grab the right dress right off the hanger, the fact remains that the law is still coming off the rack. The student plays no role in making the law, customizing it, or creating it. Indeed, in the case method, the law must be found in the sense that we find Waldo; but Waldo, once found, is the same for all students and contains nothing of the student in it. MARTIN HANDFORD, WHERE'S WALDO? (1997).

[74] One of the advantages of clinical legal education is that, at its best, it does not just give the law or the skill; it draws it out of the student.

[75] In one of the lesser-known Mel Brooks movies, Brooks, playing Moses, begins descending the mountain as he announces to the people that God has given them fifteen commandments. While descending the mountain, one of the three tablets falls from his arms and is broken. Without missing a beat, Moses carries on gamely to present to the world the Ten Commandments. HISTORY OF THE WORLD, PART 1 (Twentieth Century Fox 1981). While the film focuses on the lawgiver, notice that the passive receivers of the law will accept and embrace two tablets or three, fifteen commandments or ten, whatever they are "given."

[76] The style of law school teaching has been described as "highly authoritarian." Anthony Amsterdam, *Teaching About Justice Through Creative Strategies,* 40 CLEV. ST. L. REV. 413, 418-19 (1992). One does not want to overstate the case; however, we already know the mischief caused by passive acceptance. STANLEY MILGRAM, OBEDIENCE TO AUTHORITY (Harper & Row 1974).

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Second, the professor has, in effect, set down the parameters of the discussion. My experience with law students is that once they "receive" the law they regard all divergent opinions as "soft" and shut down to any discussion beyond what the black letter law is. Such is the pedagogy of the overly easily impressed.

Third, whatever law is not expressly critiqued by the professor is assumed by the student to be reasonably sound and not worth scrutinizing or evaluating (in this category, of course, most current American law will be included). Fourth, whatever criticism of the law *is* offered is most likely to be of the "this-decision-was-not-well-reasoned" variety, a lawyerly (in some instances, hypertechnical) objection without any consideration of the underlying fairness and justice of either that decision or the entire area of law into which it fits. Consequently, students are unknowingly trained to accept without question the justice and fairness of the vast majority of the corpus of American law.

What is the message and relevance of all this? First of all, we must recognize that our "giving" of the law – combined with criticism of the law normally limited to a narrow and legalistic critique of judicial reasoning – leads directly to the passive acceptance of the morality of the legal status quo. Our false claim of neutrality reinforces students' passive acceptance. If we want to do more than simply produce lawyers who are preprogrammed to support, and enter into, the status quo, we must jettison this false pose of neutrality. Indeed, ridding ourselves of this insidious cloak of neutrality is the least we can do for our students. As Paul Savoy has explained:

> I have no objection to *propaganda* in the classroom - students experience it every day in our schools except that we do not like to apply such a pejorative term to teaching American middle-class values; we generally reserve it for teaching values we do not like. What is important is that teachers make *explicit* their own value judgments instead of dressing them up in the guise of "rational" and "objective" standards - a bit of semantic sleight-of-hand that makes it so much more difficult for students to reject the teacher's vision of the world and make up their own minds about how the law should deal with social problems.[77]

If neutrality is, indeed, just an illusion, then, instead of bemoaning its loss, we need to celebrate the diversity of truths and the richness of nuance available to us as we consider what a curriculum and a pedagogy of justice would look like, a pedagogy that would give law students a chance to reject orthodoxy and choose their own individualized belief system.

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[77] Savoy, *supra* note 22, at 471 (emphasis added).

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IV. DESIGNING A SCHOOL OF JUSTICE

A. Curriculum

1. The Role of the Justice Theme

A "school of justice" would train its students to sit for the bar exam and become lawyers. However, the curriculum would focus on justice and the nature of law in a just society, rather than, as the law school curriculum currently does, focus on black letter law with only occasional and interstitial glances at the equity or inequity of our law. Justice would become central to the discussion, and the consideration of fairness and justice issues would be explicit.[78] Indeed, a student would no longer have to be embarrassed when protesting the unfairness of a judicial decision; instead, such a protest would be a normal and respected part of the classroom discussion. As Robert Hutchins argued, "the lawyer's task is ultimately concerned with justice and . . . any legal teaching that ignores justice has missed most of its point."[79] The issue of justice must be central to both the curriculum and the classroom discussion, pervading, among other things, the first year and core curricula.

A school of justice would attempt to recapture the traditional role of the university, taking a critical posture toward social institutions.[80] Students should know, and know viscerally, that law is fluid and changeable, and that they can be agents of change.[81]

But what do we mean by "justice" when we talk about "teaching justice?" We do not pretend to be able to authoritatively identify what is and what is not justice. Surely, no law faculty could ever agree on what is just and what is unjust; and no law school student body could either. Justice is so elusive of definition that Martha Minow has pointed out that "[p]erhaps it is easier to know what injustice is."[82] "It seems easier to see departures from a seldom or never achieved goal than to define the goal itself,"[83] she wrote. And Aviam Soifer has observed that "[s]eeking justice is like going east. You can go east and go east as much as you would like – but you never get east."[84] We cannot be said to teach justice in the sense we teach torts or contracts (no matter how subjectively those courses are taught) because we

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[78] *See* Rose, *supra* note 25, at 451 ("It should not be sufficient in any course to simply teach legal doctrine or analysis; discussion of normative principles – what the law ought to be – should also occur.").

[79] Max Radin, *The Education of a Lawyer*, 25 CALIF. L. REV. 676, 688 (1937) (characterizing Hutchins's position and citing Robert Maynard Hutchins, *Legal Education*, 4 U. CHI. L. REV. 357, 357-68 (1937)).

[80] *See* PAUL GOODMAN, COMPULSORY MIS-EDUCATION AND THE COMMUNITY OF SCHOLARS (Vintage 1964).

[81] I am indebted to my colleague Marianne Artusio for her views on this point.

[82] *See* Minow, *supra* note 24, at 4.

[83] *Id.* at 6.

[84] *Id.* at 6 (quoting AVIAM SOIFER, WHO TOOK THE AWE OUT OF LAW? 3 (Graven Images 1996)).

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do not subscribe to, or even claim to possess, a single definition of justice.[85] And since there is no claim of exclusivity of understanding of justice, the chance of students being numbly indoctrinated into the professor's conception of justice is very small.

However, we are no moral relativists, and the concept of justice does have meaning in our society. As conceded above, while few people can agree on the precise parameters of justice, some fundamental principles exist that the vast majority of our population would recognize as just or unjust. For instance, most people attached to American law schools would probably agree that it would be unjust: (1) to sentence a person to life imprisonment for a crime without granting him a trial first; (2) to execute a man with no prior criminal record who has been duly found guilty of petty larceny; or (3) upon a father's intestate death, give twins two markedly different shares of their father's estate when the father never indicated that he wanted his children treated disparately. There is, at the very least, a small core of moral agreement that we can recognize as justice. Beyond that core - however large or small it may be in any given community - is where classroom discussion and debate rage.

When teaching justice, the professor is not teaching that something is just or unjust; on the contrary, she is teaching a *concern* for justice. She is teaching students philosophical approaches that will help each student decide for herself what is just or unjust.

In the current law school environment, with all the emphasis on black letter law, it is morally necessary that students remember to care about the outcome, about the fate of people, and about justice. While the strongest pressures in law school appear to steer students towards self-serving economic goals, one of the purposes of a justice-oriented curriculum and pedagogy would be to focus students' attention on the justice and fairness aspects of important sociolegal issues. A justice school would give students the tools to evaluate problems and issues in a different way; and if it "took," this justice perspective would continue to inform their legal analysis for the rest of their careers.

2. The Justice Course

"How odd it may seem that law school does not begin with, or perhaps consist of, a course on the subject of justice: what it is and how it can be achieved."[86] As the requirement of a course in Professional Responsibility was legal academia's response to the public's reaction to the lawyer-infested Watergate scandal,[87] a course (or courses) in justice may well be an appropriate response to the public's view that lawyers no longer

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[85] *See supra* notes 49-77.

[86] James Boyd White, The Legal Imagination 631 (1973).

[87] David S. Logan, *Upping the Ante: Curricular and Bar Exam Reform in Professional Responsibility*, 56 WASH. & LEE L. REV. 1023, 1025 (1999).

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engage in the pursuit of justice. In their eyes, attorneys don't care about justice; they care about winning (at all costs) and billable hours. The public's disrespect for lawyers is pervasive, deep, and palpable.

But more than just reassuring the public of the righteous intentions of the legal profession, a course in justice should help slow the process by which law schools are turning morally autonomous individuals into lawyers who regard morality and doing the right thing as less important than the production of billable hours. This transformation into Babbitts of the bar may have been facilitated by the fact that many students entering law school today lack a strong liberal arts education in which they have explored the most significant moral issues in the context of the humanities and the social sciences. My law school, Touro Law School, is not the first law school to teach a course in Justice. At least two law schools, Chicago-Kent College of Law and Benjamin N. Cardozo Law School, offered a justice course before Touro; Suffolk University Law School followed after Touro. Touro currently offers the justice course as a first-year elective and an upper-class elective, both carrying three credits. It has also offered the course as a one-credit elective for first-year students during intersession.[88] Beginning with the 2007-2008 academic year, Touro will *require* a one-credit justice course for all students,[89] making it, I believe, the first and only law school in the country to require a justice course of all its students.

What are the specific objectives of a justice course? The course is designed to give students from very different academic, social, and geographical backgrounds a shared intellectual armamentarium of data, language, and techniques of philosophical analysis which they can employ during law school and beyond. So, for instance, very early in my justice course, the students do two simulations in which they learn the analytic method of several schools of philosophical thought by arguing controversial moral conundrums in assigned roles as act utilitarians,[90] rule utilitarians,[91] duty-based deontologists,[92] and rights-based deontologists.[93]

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[88] One of the reasons that Touro has offered the justice course in so many formats is that we are quite self-consciously searching for the most effective format. One of the most interesting issues, for instance, is whether the course will be most effective toward the end of law school when students are more sophisticated in their understanding – or whether, on the other hand, the course will be more effective if students take the course early in their law school careers, before law school has had a chance to totally "corrupt" them (by teaching them that, among other things, nothing beyond black letter law actually matters).

[89] Touro Law Center, Central Islip, http://www.tourolaw.edu/ci/dream/curriculum.asp (last visited Apr. 5, 2007).

[90] Act utilitarianism is the school of thought which says that, when faced with a choice between two acts, the actor should choose the 'behavior [which] will lead to more happiness or well-being in a particular situation." THOMAS MORGAN & RONALD ROTUNDA, PROFESSIONAL RESPONSIBILITY: PROBLEMS & MATERIALS 21 (West 2006). *See also* DONALD PALMER, DOES THE CENTER HOLD? AN INTRODUCTION TO WESTERN PHILOSOPHY 263 (Mayfield 1996); ROBERT AUDI, THE CAMBRIDGE DICTIONARY OF PHILOSOPHY 943 (Cambridge Univ. Press 1995).

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There are many formats a justice course can take; and there are various sets of reading materials available, including books written specifically for law school justice courses.[94] However, these texts can be surprisingly legalistic. Wanting to draw student attention to the broadest moral issues, ones by no means restricted to lawyers, I selected the materials (and methodology) created for the Aspen Institute's Justice and Society Program, "Seminar Readings on Justice and Society."[95] These readings, which are not particularly legalistic, treat with great sophistication the foremost issues of moral, political, and legal philosophy. The topics of the readings (and discussions, as well) include (in addition to introductory, background materials): (1) Law, Morality, and Justice; (2) Autonomy and Justice; (3) The Economy and Justice; (4) Gender and Justice; (5) Race and Justice; (6) Criminal Justice: The Scope and the Sanction; and (7) International Justice.[96]

The pedagogy is quite simple, yet effective. The goal is to explore what a more just and fair society would look like. Rather than "operate" within current American society, we create a fictional society. The theory is

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[91] Rule utilitarianism is the school of thought that "takes the view that there is value in establishing appropriate standards of behavior for particular classes of cases. Thus, one would not ask how best to produce maximum welfare in a unique case, but what principle or course of conduct is most appropriate for a class of similar cases." MORGAN & ROTUNDA, *supra* note 90, at 21. *See also* PALMER, *supra* note 90, at 263, and AUDI, *supra* note 90, at 943.

[92] Duty-based deontology "says that there are particular general principles of moral responsibility that can be derived logically and applied universally... A moral person acting from this perspective would say that behavior is right or wrong, without regard to particular effects produced by the behavior in a given situation." MORGAN & ROTUNDA, *supra* note 90, at 21. *See also* AUDI, *supra* note 90, at 248-49.

[93] Rights-based deontology holds that "individuals have certain human rights that [one] should help preserve and protect. This position sees particular behavior ... as appropriate quite without regard to what the effect would be on the general happiness or well being of the rest of society produced by asserting the rights." MORGAN & ROTUNDA, *supra* note 90, at 21. *See also* Kurt M. Saunders, *The Law and Ethics of Trade Secrets: A Case Study*, 49 CAL. W. L. REV. 209, 231 (2005-06).

[94] *See* ANTHONY D'AMATO & ARTHUR J. JACOBSON, JUSTICE AND THE LEGAL SYSTEM: A COURSEBOOK (1992); MARTHA R. MAHONEY, JOHN O. CALMORE & STEPHANIE M. WILDMAN, SOCIAL JUSTICE: PROFESSIONALS, COMMUNITIES, AND LAW (2003); DALE A. NANCE, LAW AND JUSTICE: CASES AND READINGS ON THE AMERICAN LEGAL SYSTEM (1994).

[95] I selected these materials after having used them one summer as a "student" participant in the seminars. (Fortunately, the Aspen Institute graciously consented to let us use its materials.) I cannot overstate how remarkable an experience it was to participate in these seminars; certainly my own views on many topics, including the role of justice in legal education, were profoundly affected by my time there. (For that I am deeply grateful to Alice Henkin and the staff of the Institute, as well as my co-participants and our facilitators.) I should also note that several other Touro Law School faculty members have attended the seminars; and virtually all have returned with a significantly greater openness toward a larger place for "justice issues" in the law school curriculum.

[96] *See* Aspen Institute, Justice and Society Seminars, http://www.aspeninstitute.org/site/c.huLWJeMRKpH/b.612085/k.ACA2/Justice_and_Society_Seminars.htm (last visited Apr. 5, 2007).

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that the students sitting around the seminar table have just emerged from their caves, desirous of entering into a social contract to set up a new society, a society that will be more just and fair than any that has gone before. However, it is very difficult to be fair, when designing a new society, to put aside one's own social status in life and not consider how one will fare under the new, proposed rules, given one's pre-existing wealth, tangibles, and personality traits. Our own selfish interests get in the way of planning an objectively fairer society.

To transcend this problem, we use the fictional construct of the philosopher John Rawls, the "veil of ignorance."[97] Rawls' hypothetical "veil of ignorance" provides that, when the new society begins, all the participants will have substantially changed from who they were before the start of the new society. Whatever the amount of money one had coming into the new society, randomness decrees that one may now end up with any amount of money, ranging from abundant riches to dirt-floor poverty. And it is not just the amount of individuals' wealth that changes; when the new society dawns, each participant will likely be different in race, gender, mental and physical abilities, personality traits, etc., from the person she was before. The theory is that, when planning a just society, if one does not know who he or she is going to be in the new society, one loses the incentive to protect what he or she is now and will decide the structure of a new and fairer society on disinterested principles of basic fairness.[98]

Each day, as if from behind Rawls' "veil of ignorance," the class attempts to construct the "just society," at least in terms of whatever topic is under discussion that day - without, of course, violating the decisions made in the name of justice and fairness on the previous days. To put it another way, the class's goal is to consider and promulgate laws to govern the Utopia they are designing.

It is not the purpose of this course to indoctrinate students in the instructor's view of justice. Indeed, the aim is to give each student the tools - the philosophical background and the permission to think about these larger issues - to develop his or her own sense of justice and to apply that sense of justice to the rest of law school and beyond.[99] The course is intended to have impact on how students conduct themselves in other courses as well. Having been given "permission" by one professor in one law school classroom to consider the broadest issues of justice on an ongoing basis, students who have taken a justice course will, one hopes, raise these issues in other courses and other classrooms as well. And having been taught how to analyze and

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[97] *See* JOHN RAWLS, A THEORY OF JUSTICE 11 (Belknap Press 1999) (1971).

[98] *Id.* ("Since all are similarly situated [behind the veil of ignorance] and no one is able to design principles to favor his particular condition, the principles of justice are the result of a fair agreement or bargain.")

[99] In this sense, the course may be analogous not to the teaching of religious doctrine but, instead, to a course in Comparative Religion, in which the student is exposed to concepts of great importance in many religions and allowed to come to her own conclusions about ultimate questions of religious faith.

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think about moral issues, these students should be able to make salient points in support of their value-explicit assertions. It is my fervent hope that students who take a justice course will, like seeds, carry the concern for justice and the methodology to other parts of the law school, including more traditional courses.

Potentially, there should be many different kinds of justice courses available in a law school curriculum. In addition to the justice course I teach based on the Aspen Institute materials, there are numerous other justice-based courses that could be offered as part of the law school curriculum. Indeed, every topic in the Aspen materials could support a separate course: obedience and disobedience to law; privacy and individual autonomy; economics and distributive justice; gender and race; punishment and the criminal law; and issues of international law. And one can easily imagine justice-based courses on animal rights, philanthropy, informed consent, etc.

Then, there are the more legalistic approaches to the idea of a justice course, which have spawned their own texts,[100] as well as the more social-activist approach, which, likewise, has already generated a casebook.[101] Indeed, it is probably axiomatic that most law professors can easily envision many topics they would love to teach in a justice-based format; with a reasonable amount of effort, they could put together their own materials.[102]

3. Emphasis on the Morality of the Lawyer: Professional Responsibility

In any school of justice, there presumably would be a greater emphasis on professional responsibility as an area of study. A professional responsibility course in a school of justice should go well beyond a study of the professional rules that bind lawyers; the course should include very serious consideration of the lawyer's role in the search for justice. While questioning the status quo and the common wisdom should be the hallmark of a justice school, nowhere should that be truer than in the study of ourselves – lawyers, in all of the diverse roles we play in society. A justice-based professional responsibility course would examine the role of lawyers in the social system -- lawyers as public resources, and the socioeconomic standing of lawyers. Impolite questions should be asked: if lawyers are essential resources for many people, should not the profession be organized in a different fashion? Should not lawyers be paid by a different method? How much should lawyers earn? Why?

The course should also have to explore lawyers' choices. And, of course, as with any course in this subject, a justice-based professional

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[100] D'AMATO & JACOBSON, *supra* note 94; NANCE, *supra* note 94.

[101] MAHONEY, CALMORE, & WILDMAN, *supra* note 94.

[102] Over a few years of teaching a justice course, I have begun to accumulate relevant materials myself. In my experience, one good source of these materials is my students themselves, who are often eager to bring relevant books, articles, films, etc., to my attention.

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responsibility course should examine the cases in which lawyers simply broke the rules. However, it should also look more closely at less obvious lawyer-caused injustices. For instance, while bar associations and judges are obsessed with lawyer incivility and overzealousness, a genuine problem, this course should look more closely at the harm caused when lawyers are *insufficiently* zealous[103] and fail to render "effective assistance of counsel."[104] This is a problem that disproportionately affects poor people and appears to have become institutionalized in our legal system.

The course should emphasize that, while an attorney can easily run into trouble by violating the ethical rules of our profession, a lawyer can also run afoul of *moral* mandates by being part of a legal system that itself perverts the law. Regimes that violate their own laws may put attorneys – even those attorneys who have chosen to fight those regimes as, for instance, criminal defense or civil rights lawyers – in morally untenable positions, inadvertently giving legitimacy to a lawless system by participating in it, though fighting against it from the inside.[105] And students need to explore the fact that in times of crisis and civil disorders, even the most democratic regimes and governments can engage in such perversions of law.[106] These issues all require extensive exploration.[107]

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[103] MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. 1 (1983) ("A lawyer should pursue a matter on behalf of a client despite opposition, obstruction, or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf...."). For an earlier, and more poetic, version of the same ideal, *see also* CANONS OF PROF'L ETHICS Canon 15 (1986) ("The lawyer owes 'entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability,' to the end that nothing be taken or be withheld from him save by the rules of law, legally applied. No fear of judicial disfavor or public unpopularity should restrain him from the full discharge of his duty. In the judicial forum the client is entitled to the benefit of any and every remedy and defense that is authorized by the law of the land, and he may expect his lawyer to assert every such remedy and defense.").

[104] *See generally* Strickland v. Washington, 466 U.S. 668 (1984).

[105] *See generally* Kenneth C.H. Willig, *The Bar in the Third Reich*, 20 AM. J. LEG. HIST. 1 (1976) (Nazi Germany); Sydney Kentridge, *The Pathology of a Legal System: Criminal Justice in South Africa*, 128 U. PA. L. REV. 603 (1980) (apartheid South Africa); Mike Kendall, *Law Without Justice,* HARV. MAG., November-December 1985 at 33 (apartheid South Africa); and David Margolick, *Breaking One of South Africa's Barriers,* N.Y. TIMES, Sept. 16, 1989, at 29 (apartheid South Africa).

[106] *See* Constantin Costa-Gavras, SECTION SPÉCIALE (Goriz Films 1975)(presenting an excellent visual portrayal of the perversion of the French legal system under the Vichy regime in World War II). For accounts of the perversion of the American legal system, *see* Comment, *The Administration of Justice in the Wake of the Detroit Civil Disorder of July 1967,* 66 MICH. L. REV. 1544 (1968); Craig Wolff, *Judges Describe Justice's Efforts As Intimidation,* N.Y. TIMES, June 7, 1991, at B2; Ronald Sullivan, *Critics Fault Selection of Judge in Jogger Case,* N.Y. TIMES, August 7, 1989, at B4; Ronald Sullivan, *Rules Skirted to Give Tourist Slaying Case to Judge Known as Tough*, N.Y. TIMES, Sept. 25, 1990, at B3; and William M. Kunstler, Op-Ed., *How Are New York Judges Assigned?,* N.Y. TIMES, Sept. 8, 1990, at 123. The legal response of the United States government to the events of September 11, 2001 raises all sorts of issues that might be plumbed in a justice-based

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This course should be taught not by law-giving, but by the inductive method used for other courses.[108] Furthermore, this course lends itself remarkably well to simulation, a teaching method that, in my experience, has its greatest effectiveness precisely when it is motivated by students' anxieties over moral choices.

4. A Focus on the Three Levels of Justice

The curriculum of a school of justice ought to focus on the three levels on which justice operates: (1) pure justice, or justice as an ideal; (2) positive justice, or the law as written; and (3) applied justice, or the law as administered in the real world.

a. Sociology of Law and the Dynamics of Legal Institutions

In order to understand "applied justice," schools of justice must teach an understanding of the dynamics of legal systems and institutions. In other words, the questions here are: How do legal systems and institutions actually function? On what factors does the disposition of cases actually turn?

Traditionally, law schools have taught that legal cases turn on precedent and the weight of the evidence. However, sociologists of law (and members of the Law and Society movement) have made empirically-based claims that, in the real world, the resolution of cases is, in actuality, determined by factors quite apart from precedent and the weight of the evidence.[109]

Take just one example: sociologist of law Donald Black claims that there is a universal "behavior of law" which is dictated not by the variables we teach about in law school but by social factors concerning the parties, witnesses, judges, and juries.[110] If it is true, as Black maintains, that the disposition of legal controversies may depend on sociological factors as well

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professional responsibility course, particularly the issue of what a lawyer is to do when she believes that her government has violated, or is violating, the law.

[107] One may properly ask whether there is a connection between the passivity we breed into lawyers in law school and underzealous lawyers who provide ineffective assistance of counsel or lawyers who continue to "cooperate" with corrupt legal systems, rather than directly challenging them or, at least, opting out. *See supra* notes 44-77.

[108] *See infra* notes 125-134.

[109] My own personal experience, starting with eight years as a criminal trial attorney for The Legal Aid Society of New York City (much like a public defender), was that cases were often determined by factors that were never mentioned in law school.

[110] DONALD BLACK, THE BEHAVIOR OF LAW (1976). Black may well offer one of the most holistic analyses, but he is certainly not alone among legal sociologists in offering theories about how our legal system actually functions (as opposed to how we teach in law school that it functions). For another good example, *see* Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974).

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as legal ones, then an understanding of whether our justice system is, in fact, fair and just requires that students first appreciate precisely how these sociological factors influence the outcome of legal controversies. As Black notes:

> Lawyers who cannot distinguish cases sociologically as well as technically have a serious handicap. They must forever work in darkness, never understanding why some precedents are upheld while others are ignored. Many decry the unpredictability of the courts, unaware that the behavior of judges and juries is not nearly as mysterious as it first appears. Court decisions are the greatest mystery to those who would understand them with legal doctrine alone. *The incomprehensibility of law results from legal education in its present form.* But the day may come when law professors will ask their students to distinguish one case from another – the heart of legal education in America – and the answer will be sociological as well as legal.[111]

He further explains:

> [T]he strength of the case is a sociological as well as a legal question. *Variation in the social structure of cases explains many differentials in legal life that the written law alone cannot explain.* Hence, anyone who ventures into the legal world without knowing how to assess the sociological strengths and weaknesses of a case has a disadvantage. Any law school that does not offer a course on this subject is denying its students valuable knowledge about how law actually works.
>
> Many lawyers already know from years of experience that the social characteristics of a case can be important. Legal educators commonly ignore this subject . . . [112]

However, sociological insights into legal matters should not be confused with the kind of insights that many lawyers develop after years of practicing law. Indeed, as Black hastens to point out, "[a] folk sociology of law has thus evolved among members of the legal profession even if, like folk medicine, *it is sometimes inconsistent and contrary to factual evidence.*"[113] For example, lawyers commonly believe that it is better to sue

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[111] DONALD BLACK, SOCIOLOGICAL JUSTICE 31 (1989) (emphasis added).

[112] *Id.* at 24 (emphasis added); *see also id.* at 39 (stating "[u]nsociological litigation might even come to be considered a form of malpractice.").

[113] *Id.* at 25 (emphasis added).

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wealthy defendants, those with so-called "deep pockets." They also commonly believe that the best plaintiffs are those who will elicit sympathy; they are "pathetic" because they are the jobless, the widowed, and the very poor. As Black notes, the empirical research indicates that these theories of "pathetic plaintiff[s]" suing "deep pocket" defendants are "largely wrong. They are not merely useless, but are the opposite of what a sociologically trained lawyer would do."[114]

A school of justice needs to teach what really happens in our justice system; and that certainly includes an understanding of the sociological factors at play and how they affect legal outcomes. If we are to understand whether or not our legal system is actually delivering justice, then we must first grasp how cases are decided and why. To this end, a school of justice must require that students learn the lessons of sociology of law.

b. Empirical Research

Schools of justice should not merely scrutinize sociological studies; they should do them. A school particularly concerned with justice would make studying the fairness of American law as applied a significant part of its curriculum. Does the law of bail, as administered, discriminate against the poor? Do class actions really even the playing field? Do federal sentencing guidelines work as they were intended? Do various tort doctrines function in the real world as they were designed to function? If law school is actually going to be concerned with justice, as opposed to mere law, it must examine whether our current legal system actually delivers justice and, if not, why and how it might be improved.

We have to get serious about knowing how to perform empirical research on the legal system and actually doing it. A school of justice would *require* a course on Law and the Social Sciences, so that all students learn how to do research on the fairness of the law and work with faculty members on such research projects.[115] Research might be driven by the following: Is

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[114] *Id.* at 27-28.

[115] *See* Minow, *supra* note 24, at 3 (acknowledging that understanding justice requires more than just philosophical discourse). Since it would be extremely helpful if faculty members knew how to do empirical research, becoming a school of justice might require some tinkering with the faculty. Any study of justice should not be left wholly to those trained exclusively as lawyers and law professors; the faculty of a justice school, deeply engaged in interdisciplinary work, ought to include those, whether lawyers or not, trained as statisticians, psychologists, sociologists, philosophers –social scientists and humanists of many stripes. Countless law faculties already have many members with advanced degrees in fields other than law. The study of justice is far too important to be left to lawyers.

Most law professors are sufficiently well-educated and intellectually versatile that they should be able to adapt and teach courses from a justice perspective. While perhaps not entirely necessary, it would improve matters if they would hone their skills in empirical research, the social sciences, and/or philosophy – and the schools could help by offering classes to their faculty in these subjects or financially supporting individual faculty members' attempts to get advanced degrees in these areas.

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the law congruent with what it is supposed to be? Does it represent good social policy? What social and economic policies does it serve and disserve? Does the law function efficiently? But the main question to be asked here is: Is the law as applied *fair and just*?

Gathering this kind of information completes the tripartite study of justice. Having determined what is just, and having decided whether the law as written is fair on its face, the study of the actual operation of the law to determine its fairness completes the cycle.

B. The Pedagogy of Justice

The difference between a traditional law school and a justice-oriented law school may be reflected as much in the pedagogy as in the curriculum. By and large, law professors, like their brethren who teach at the undergraduate level, employ the "transmittal model" of teaching.[116] This model presumes that the professor - the lawgiver or "sage on the stage"[117] - will primarily lecture to students, who come to class with a *tabula rasa,* a blank slate onto which the professor may inscribe any knowledge he cares to convey in his lectures. The students passively receive that knowledge, taking it down in note form, committing it to memory, and subsequently spitting it back on the exam.[118]

Unfortunately, students commonly write their exam responses in a more or less rote manner, often without having considered the material in any significant way and without having mentally "made it their own" by processing it through their own prior experience and previously-obtained knowledge.[119] The "constructivist" theory of learning, on the other hand, holds that what is actually transmitted from teacher to student is not knowledge, but mere bits of information, raw data. It does not become usable knowledge when it is transmitted to the student by the professor; it is not actually "learned" – converted to useful knowledge – until the learner processes that information by re-conceptualizing or re-constructing it. The learner re-constructs the information and integrates it into his own reality by discerning relationships and connections between this new data and the information and experience he already possesses. This type of learning is "active learning."[120]

In addition, particularly if the school's justice course were based, like mine, on the Aspen model, it would be a prudent expenditure for the school to send any professor who was going to teach the course to take the course herself at Aspen's Justice and Society Program.

[116] Alison King, *From Sage on the Stage to Guide on the Side,* 41 COLLEGE TEACHING 30-35 (1993).

[117] *Id.*

[118] *Id.*

[119] *Id.*

[120] *Id.*

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> Active learning simply means getting involved with the information presented – really thinking about it (analyzing, synthesizing, evaluating) rather than just passively receiving it and memorizing it. Active learning usually results in the generation of something new, such as a cause-effect relationship between two ideas, an inference, or an elaboration, and it always leads to deeper understanding.[121]

Active learning, because it involves the attainment of a significance or meaning personal to the learner, is also more likely to lead to longer retention of the knowledge.[122]

The constructivist theory of active learning is student-centered, putting the burden of learning – personal processing - on the individual student. The professor, on the other hand, relinquishes his role as "a sage on the stage" in order to become "a guide on the side,"[123] whose major responsibility is to facilitate the student's active learning by choreographing such processing opportunities through sundry, specific learning techniques conducive to students learning from each other and each individual student actively re-constructing the information into a structure of knowledge personally meaningful to him.[124]

1. Teaching Inductively

As discussed above,[125] in traditional law school pedagogy, professors "give" students the law. In a justice-oriented law school, that would not be the case. Instead of "giving" the law and then analyzing or critiquing it, consistent with constructivist learning theory's emphasis on "active learning," the justice-oriented law school would emphasize teaching inductively. Rather than spooning out the law to the students, the teacher would assign the students the issue or problem and direct each student to draft a law responsive to the problem. The instructor would provide students with readings – from philosophy, fiction, empirical research, and the law of foreign jurisdictions – explicating and discussing the problem, offering different solutions.

Philosophical readings are extremely helpful in getting students to think about the fundamental principles at stake. Fiction frees the students' imaginations and exposes them to a different kind of "argument," frequently expressed in the most powerful of words and images.[126] Empirical research

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[121] *Id.*

[122] King, *supra* note 116, at 30-35.

[123] *Id.*

[124] *Id.* (discussing several examples of these techniques in detail – including guided reciprocal peer questioning, jigsaw, and co-op co-op).

[125] *See supra* notes 49-77 and accompanying text.

[126] For instance, in my justice course, when we discuss "handicapping down" as a way of achieving equality, the students read Kurt Vonnegut's short story "Harrison

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explains the precise nature of the problem in reality and, when available, may indicate some results of competing solutions. Foreign law that differs substantially from American law on the most fundamental issues is particularly useful; laws of other nations that take a completely different approach to the issue than does the United States or the particular state jurisdiction at issue help students broaden their views of the possible – and, unlike fiction or philosophical reflections, they come with the imprimatur of another sovereign nation, probably giving them significantly more persuasive authority with students.[127]

In sum, students would be given a great deal of information on varying approaches to the problem at hand, except for the actual prevailing law of the United States or the pertinent state jurisdiction.[128] Only after each student had drafted her own statute, comporting with her own individual sense of justice, would each student be "given" - by whatever method the professor chooses - the controlling statutes and case law. Individual students would then be in a position to judge the fairness of the extant law against the "just" legislation they had drafted. Class discussion would focus on the justness and fairness of current law, comparing prevailing law with the student-generated solutions in terms of fairness and justice.[129]

Bergeron," a wickedly acid critique of the lengths we are willing to go to achieve equality. The story is so powerful that it almost "blows away" any intellectual counterargument, a vivid testament to the compelling power of fiction. *See* KURT VONNEGUT, JR., *Harrison Bergeron*, *in* WELCOME TO THE MONKEY HOUSE 7 (1968); *see also* PGA Tour, Inc. v. Martin, 532 U.S. 661, 705 (2001) (Scalia, J., dissenting).

[127] It may, at first glance, seem contradictory to use the black letter law of sovereign nations when one's pedagogical goal is to get away from arguments based on authority; however, in this situation, the power and authority of a nation's controlling law is substantially offset by the fact that students are exposed simultaneously to several distinct examples of conflicting laws from different jurisdictions.

[128] My preference would be to provide the American "solution" as well, so that students have all significant approaches in front of them, including the one that they will eventually be called upon to critique and study. However, my experience with law students is that, once they are told what the law in the jurisdiction is, even if that information is accompanied by many other approaches, they are transfixed – unable or unwilling to seriously consider those alternatives. Instead, students focus almost exclusively on the controlling law. We have been so successful in training them that the point of law school is to teach them the law, not what is fair and just, that critical thought seems to cease when the black letter law is introduced.

My colleague Jeffrey Morris has pointed out that there is nothing to stop students from looking up the controlling American law themselves and being "transfixed" by that. Surely, he is correct. However, if, at the beginning of the semester, the pedagogy is carefully explained to the class, students are required to agree that they will not seek out the controlling law, and, at the same time, they are assured that they will eventually learn the controlling law, I believe most students will cooperate.

[129] This pedagogy can be used in virtually every area of law and every course. However, some of my colleagues have suggested that it should not be used in the second and third years of law school. Their argument against using it then - that it is so difficult to get second and third year students to think in terms of justice and fairness - seems to me to be precisely why it *should* be used in those years.

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In a course on trusts and estates, for example, the teacher would withhold all texts and statutes at the beginning of the course. The teacher would then explain to the class that the issue they were to be concerned with 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. Put more dramatically, the teacher might open the course with the following problem I use in the economic justice section of my justice course:

> In April of 2008, Robert Miller of Millersville, Virginia, died of natural causes. Miller had started several companies, invested in the stock market with extraordinary success, and became one of the five richest men in the world. His will left his entire estate to his son, Robert Jr., and his daughter, Marianne, both of whom the father absolutely adored. Robert Jr. and Marianne, both in their thirties, were upstanding members of the community and regarded by all who dealt with them as genuinely lovely people.
>
> In 2008, the town of Millersville, Virginia, was on the verge of bankruptcy, and virtually all industry and commerce had ground to a halt. In addition, hordes of homeless people roamed the streets – with no place to go, no chance of getting work, and no hope for the future.
>
> Actually, Millersville was far from unique in 2008. All of Chatham County, where Millersville was located, suffered from the same economic conditions. Indeed, the rest of Virginia, and the other 49 states, were not much better off. The United States was still the reigning economic superpower in the world – only by virtue of the fact that that other nations were in even worse economic straits. These other countries were rapidly disintegrating, suffering not only from severe economic problems, illiteracy, crop failure, an epidemic of aids, and a new disease even worse than AIDS.
>
> Robert, Jr. and Marianne have announced their intention to maintain the family's extraordinarily lavish and opulent lifestyle; they have also announced that any money the family donated to charity would be given to the Foundation to Save the Snail Darter, a species of fish possibly facing extinction.
>
> Given the pitiful state of Robert and Marianne's town, county, state, country, and world, should Robert Sr.'s

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> estate be allowed to go where he intended – to his beloved children – or does justice require some other result?[130]

The students would then be provided with reading materials that discuss whether or not there should be inheritance and, if so, what form it should take. As noted above, these materials would include philosophical ruminations and social science research on the topic, as well as fiction and radically different legal approaches from other jurisdictions. For instance, one might include a discussion of the British approach, by which a citizenship inheritance is bestowed on every child born in the United Kingdom when the child reaches his majority. When the child is born, the government puts $900 in the child's account, repeating this act when the child turns seven years old. It has been calculated that, if these funds grow at a rate of seven percent, ultimately, at age eighteen, the recipient will have close to $4,000.[131] In my experience, this kind of radically different approach opens up student minds and gives them permission to think beyond the orthodox and the traditional.

After students read this material (everything but the governing law in the pertinent jurisdiction),[132] these different approaches would be thoroughly discussed and debated in class. Next, the students would individually draft their own legislation, providing for the most just system of transfer they could devise.

Only after each student has completed the drafting exercise would the students be provided by the instructor with the applicable law of the jurisdiction. Then, each student could usefully compare the "just statute" she has drafted with the black letter law of the jurisdiction under consideration. This should lead to a much more sophisticated analysis of the black letter law, one achieved in the emotional crucible of the individual student's reconstruction of aggregated data into actual knowledge.

If engaged learning is good learning, then this methodology should carry additional benefits: (1) Students would be more likely to remember the law, precisely because their own moral position coincides with that of extant law, or, to the contrary, because the position codified in current law offends their moral view.[133] (2) For the same reasons, students should remember the law for a longer period of time.[134] (3) Having themselves agonized over the

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[130] This, of course, is an extreme example, the most extreme example I could come up with that had even a patina of credibility. But, as every teacher knows, sometimes it takes extreme examples to get the discussion started. Then, one can "walk it back" to more normal, subtle, and nuanced fact-patterns.

[131] Child Trust Fund, http://www.childtrustfund.gov.uk/ (last visited March 23, 2007); *see* Bruce Ackerman & Anne Alstott, *Letter to the Editor*, N.Y.TIMES, April 4, 2006, at A22.

[132] Of course, if this methodology were to become common, it would open up a market for a whole new type of "casebook."

[133] *See supra* note 122 and accompanying text.

[134] *Id.*

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issues, the students will understand these issues in a way far better than they would if the law had simply been handed to them. In an analogy to psychotherapy, one might say that the analysand (student) will truly gain insight if the therapist (instructor) draws it out of the patient (student) rather than simply presenting the answer to the analysand (student) in final form. (4) The lawyers we produce should 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. These lawyers should approach the law from a more critical perspective. The result might well be a society in which there are more lawyers actively striving for a better and fairer social structure.

2. Making Time for Justice Concerns: Backwards Learning and the Inefficiency of the Case Method

Many well-meaning law professors will not directly oppose the curricular reforms and pedagogy I have suggested. They will, instead, express their sincere concerns that spending time on justice issues will take classroom time they simply do not have. *I already have a tough enough time trying to cram into forty-two class hours everything I absolutely have to teach in this course.*[135]

Our pedagogy needs to change. I would argue that, to conserve time and avoid student confusion, the case method should be used more sparingly in law school. While the case method has the advantage of presenting a rich tapestry of law, it is, nonetheless, inefficient and perplexing to students.

First year law students are frequently confused and bewildered. They have this experience for many reasons, but two of these reasons are pedagogical and direct products of the case method: (1) students learn backwards, in an unnatural and unhelpful way, first studying minor details of cases and only later trying to understand the big picture and the major, overarching, doctrinal rules; (2) the relationship between the cases in most of our casebooks is almost inexplicable to the average law student.

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[135] The objection will still be raised that all this attention to justice issues will leave us far less time to teach students substantive and procedural law that they will need to pass the bar exam (upon which our *U.S. News and World Report* ratings substantially depend) and practice law.

Part of the answer to this objection is simply the realization – to which the legal academy seems painfully slow in arriving – that we live in an age of information explosion and overflow. For quite some time now, it has been impossible for any human being to learn all that there is to learn – even if limited to the discipline of law. At some point, the increasingly frenetic attempt to pump more and more data into hapless law students appears ill-considered and fruitless. In an information-intensive age in which information is expanding faster than any human mind can grasp it, do we not delude ourselves in some kind of intellectual hubris by believing we can "cover" more than the basics? Perhaps we should simply concentrate on teaching students the basics -- and the skills necessary to learn on their own when they are out in practice. Then we will have time left over to focus on the issue of justice.

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An analogy may be useful in understanding these two problems. If, hypothetically, because of the perceived threat of nuclear weapons, the United States decided to invade the country of Law, and you were in charge of planning the invasion, what maps would you look at first? Surely, you would *not* look first at a detailed map of one small street in the small, backwater, run-of-the-mill town of Obscure Precedent; on the contrary, you would first look at a globe to see where the country of Law was located. Then you would look at a more detailed map of the entire country. Understanding the overview, you would move progressively to the more detailed maps. Of course, you would need to know precisely how the maps fit together and related to each other. Which map is a blow-up of which other map? Which map represents an area north of another map? And so forth. But you would certainly not begin your study of the subject with the most detailed map of the smallest area available. Nor would you use maps whose relationship to each other you did not understand. Yet, that is exactly what we do with cases in the first year of law school.[136]

Students are taught "backwards" throughout the first year of law school. During most of the semester, we focus on the details and nuances of rules as expressed in individual cases, whose relationship to each other is entirely unclear. As a result, many students have experienced the same feelings about the first year of law school as former U.S. Attorney General Janet Reno did: "She talked about how, in the first year of law school, she read all the cases and didn't see how they fit together. She couldn't seem to make sense of the law from the individual cases she had read from her first year."[137]

Currently, as the semester begins to wind down, with exams staring them in the face, students realize they do not understand the subject matter and, quite understandably, panic. They then run to the law school bookstore to buy a commercial outline of the subject. The commercial outline "puts it all together" for the students, who, frequently for the first time, get an overview of the subject matter, including the relationship of the cases.[138]

It is simply counterintuitive to teach a subject with parts (cases) whose relationship to each other is virtually unfathomable - at least to the first year law student. It is equally counterintuitive to teach detail and nuance before one teaches the broad overview of a subject -- any subject. Anyone would get far more out of the nuances and intricacies of a rule or a case if they were not in a state of panic simply trying to identify the "big

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[136] *See* John Makdisi, *Problems with the Structure of Casebooks and Instruction*, 40 CLEV. ST. L. REV. 437, 437 (1992) ("Casebooks 'hide the ball.' Students . . . are asked to piece together a disorganized jumble of rules strewn throughout these cases and construct a coherent outline of rules and rationales. The big picture is hidden.")

[137] James Barron, *Public Lives*, N.Y. TIMES, Apr. 23, 1998, at B2.

[138] Makdisi, *supra* note 136, at 437 ("Commerical outlines and hornbooks do help explain and categorize information where casebooks do not and professors may not. Students need to understand the big picture so that they can explain and categorize the cases properly and move on quickly to an intelligent discussion of unsolved problems.").

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rule" and figure out the relationship of the cases to each other. Many students eventually understand this. In an article ranking the "best study aids" in law school, one student said of a particular outline series, "[u]se it all semester long - read it *before* you read the assigned cases, and you'll get a lot more out of the cases."[139] This suggestion is useful precisely because the outline gives the student the "big rule" right up front; now in possession of the rule, without any panic about missing it, the student can pay much closer attention to a more nuanced and sophisticated analysis of the rule and the pertinent cases.

The case method is also extraordinarily inefficient as a means of transferring information, conveying to students the meaning of a rule or an exception to a rule; yet it is frequently justified - for virtually every course - because of the lawyerly skills the parsing of cases teaches.

> Lawrence M. Friedman, who teaches legal history at Stanford, illustrates his point with a Kafkaesque parable: A visitor tours an elementary school whose classes are labeled "English," "arithmetic," and "geography," but in each the children are finger painting -- because, the visitor is told, it encourages creativity and self-expression. That, Professor Friedman says, is "a complete description of classical legal education."
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> "Every course justifies itself by the case method and the skills training it affords," he says. "Maybe you can justify this for first-year torts and property, but by the time you get to third year it's pretty threadbare. Could there be a more backward slow inefficient way for providing knowledge?"[140]

Given its inefficiency and the confusion it causes law students, the case method ought to be employed with decreasing frequency. This can be done in different ways. One might simply seek to minimize its use; why use

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[139] Tom Stabile, *Best Study Aids*, THE NATIONAL JURIST 28 (Sept. 1998) (emphasis added).

[140] David Margolick, *The Trouble with America's Law Schools*, N.Y. TIMES, May 22, 1983, § 6 (emphasis added). Robert Hutchins made a similar point:

> When the teacher's object is merely to transmit a simple but important piece of information, when the class is large and of very uneven abilities, or when the subject under discussion is chiefly of historical interest, the case system leads to an inordinate waste of time.
>
> Law students must learn to read cases, but three years seems a little protracted for the process. A student who cannot read them after six months will probably never learn to do so.

Hutchins, *supra* note 79, at 357-58.

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ten cases on unconscionability when you can use two? Or teach them collectively.[141]

Any professor who seriously decreases the use of the case method will gain a tremendous amount of time which can be used to do more interesting, creative things – using alternative teaching methods which may produce deeper, more long-lasting learning, teaching skills, or increasing the student's knowledge of how the legal system actually works. Such a change would also free up a great deal of time to spend on justice issues.

V. CONCLUSION

Law schools – whatever they choose to call themselves – should be about justice. What is suggested here is that law schools drop their spurious neutrality shields, those armaments they have used to fend off student questions about fairness and justice. Students should not feel embarrassed when they question the fairness or morality of statutes or judicial rulings. On the contrary, the historical role of the academy has been, in addition to education, to critique our social institutions.[142] We need to get back to that role, but we cannot do so as long as students feel that law school is inhospitable to their complaints about unjust decisions.

It is time to make it a regular part of our practice to take on the difficult cognitive and emotional work of assessing which laws and rulings are fair, which unfair, and how we can make them more just. Even if, as is certainly likely, we cannot reach agreement on these issues, at the very least we will start to re-engage our students in matters of justice. In so doing, we will stop sending them the message that justice does not matter, that law is a profession for cynical gamers. In so doing, we can help them develop their own individual senses of moral responsibility and their own individual concerns about results, people, and justice.

If law professors refuse to play the role of law-givers, and instead choose to be guides on the side; they will force students to take upon themselves responsibility for their own intellectual and moral development. Legal education will progress toward fulfilling its social, intellectual, and moral potential. If we want to turn out better lawyers, then we had better

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[141] Despite its serious shortcomings, the case method does teach some things lawyers need to know. Another approach that would make sure that students learn what they need to learn from the case method, but are not subjected unnecessarily to its detriments, would be to create a first year course, given a large credit allocation, in the interpretation of cases and statutes. (Or, if found to be more workable, it could be split into two courses, one covering case law and the other covering statutory law.) If this were done correctly, students would learn in this course (or these two courses) the lawyering skills one learns from the case method. Then, there would be no reason to rely nearly as heavily on the case method in the other first (and second and third) year courses. Therefore, those courses could concentrate more on exploring justice issues.

[142] *See* GOODMAN, *supra* note 80.

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rethink our pedagogy and begin giving more than lip service to the concept of justice.

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