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The Pedagogy of "Yes We Can": Teaching Reformative Legal Justice in the Age of Obama

LeRoy Pernell
leroy.pernell@famu.edu

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The following reflects comments delivered as part of the 5th Annual Fred Gray Sr. Civil Rights Symposium, Faulkner University, Thomas Goode Jones School of Law October 21, 2009.

The American Bar Association's Standards and Rules of Procedure for Approval of Law Schools states, as to the purpose of legal education, that a "law school shall maintain an educational program that prepares its students for admission to the bar, and effective and responsible participation in the legal profession."[1] In order to achieve this goal legal education has, for a long time, relied on the so-called "Langdellian" case method – one that is heavily reliant on Socratic teaching technique.[2]

One commentator has described the Langdellian approach as one designed to "isolate and analyze the relatively few principles of the common law that the Harvard system postulated and to show how some . . . judges had deviated from them."[3] Traditionally the analysis has been accomplished by the "case method" that is highly reliant on teaching consisting of "massing barely edited cases."[4] More often than not, this case method analysis is devoid of personalization. We seldom know the human emotion, fears, or social-political ramifications surrounding how the conflict arose or the impact of the law's solution. When we do know such things they are often afterthoughts or relegated to policy considera-

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[*] Dean & Professor, Fla A&M Univ. Coll. of Law.

[1] AM. BAR ASS'N, STANDARDS & RULES OF PROCEDURE FOR APPROVAL OF LAW SCH'S, Standard 301 (a) (2009-2010).

[2] ROBERT BOCKING STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1890S 53 (Univ. of N.C. Press 2001) (1983).

[3] *Id.*

[4] David E. Engdahl, *Reviews, Casebooks & Constitutional Competency*, 21 SEATTLE U. L. REV.741, 748 (1998). *See also* James M. Dente, *A Century of the Case Method: An Apologia*, 50 WASH. L. REV. 93, 96 (1974).

tions that may have influenced, but seldom controlled the legal outcome.

For example, John T. Noonan Jr., in his classic *Persons and Masks of the Law: Cardozo, Holmes, Jefferson and Wythe as Makers of the Masks*,[5] interestingly points out that in the seminal case of *Palsgraf v. Long Island Railroad*[6] we are not even privileged to know the first name of Ms. Palsgraf or that two of her children were with her when the scales fell; surely of great emotional trauma and concern to the children.

With the human dynamic removed, legal education focuses more on the balance of the analytic and the logical and its conformity to the *status quo*. Langdellian education makes the case for acceptance of legal conflict resolution while social/political conflict resolution is seen as being only tangentially related[7].

Most law teaching, particularly in the first year, treats political conflict resolution as an interesting "extra," relevant only as an add-on to the core values of legal understanding. Note, for example, that the first year student's old reliable saw, IRAC[8], does not give any recognition of, let alone a minor role for social or political change.

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[5] JOHN T. NOONAN JR. PERSONS & THE MASKS OF LAW: CARDOZO, HOLMES, JEFFERSON & WYTHE AS MAKERS OF THE MASKS (Univ. of Cal. Press 2002) (1976).

[6] Palsgraf v. Long Island R.R. Co., 162 N.E. 99 (N.Y. 1928).

[7] David B. Owens in his philosophical analysis of Langdellian approach to legal education, as opposed to Llewellyn, looks at the conflict between traditional legal analysis and social/political conflict and states that:

> Another way to conceive of the rights essentialist and remedial equilibration views is to compare Langdellian formalism to Llewellyn's realism in regards to what the "law" is. In the formalist paradigm, legal rules can be abstracted from broad principles, which are thereby self-executing and apolitical. The realist perspective, however, is hostile of this conception of law, because it ignores the practicalities of daily life. *Cf*, Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting) ("General propositions do not decide concrete cases."). Taken a step further, the essentialist approach has analytical similarity to attempts to draw a bright-line distinction between "law" and "policy"--the former being superior, and the latter subservient to true law. Meanwhile, the remedial equilibration approach shares some similarity with critics of the policy-law distinction who argue that all law is inherently political.

David B. Owens, *Comment: Fourth Amendment Remedial Equilibration: A Comment on Herring v. United States and Pearson v. Callahan*, 62 STAN. L. REV. 563 (2010).

[8] "IRAC" is a gnomonic that stands for the parts of legal analysis normally expected of students on law school essay exams. The letters stand for: Issue, Rule, Analysis, and Conclusion.

The impact of the traditional approach to legal education reinforces the protection of the *status quo*. Traditional legal education says that change is appropriate only if it is both absolutely necessary and that change can somehow be reconciled with the existing legal system by way of analogy. The law student quickly learns that the protection of the *status quo* is richly rewarded not only in academic recognition through grades, but also through examples of those who have achieved the most success financially.

Admittedly, Standard 301 does speak about an obligation to instruct students concerning responsible participation in the legal profession; however, aside from periodic references to *pro bono* responsibilities and general encouragements to do good works, there is little that is done in the standards (or in the applicable standards of professional behavior that all members of the bar are eventually subjected to) that excites, inspires, or moves the student beyond ennui – like recognition of duty. Indeed, law school teaches students that professionalism involves emotional detachment from the non-legal woes of society and that professionalism focuses instead on zealously stretching existing principles to meet a distilled legal objective of the client.[9] Wealth collection is recognized as an implicit value although the ethical canons and principles of professionalism give formal recognition to law serving a vaguely defined public good.

These brief comments do not challenge whether law schools and the profession sufficiently make the case for public service and commitment to societal good; admittedly most existing standards and curricula do. Rather, these comments address the opportunity for legal education to tap, and expand on, a heightened psychological and emotional commitment that might be engendered in law students following the election of Barack Obama as President of the United States.

Of particular importance in placing traditional legal education in the context of reaction to the Obama election is the recogni-

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[9] *See* Jack Himmelstein, *Reassessing Law Schooling: An Inquiry into the Application of Humanistic Educational Psychology to the Teaching of Law*, 53 N.Y.U. L. Rev. 514 (1978). Professor Himmelstein states: "Another premise is that much in legal education fails to foster, and may even demean, a professional vision sensitive and responsive to the human dimensions of "legal" reality. *See also* THE WORLDS CAUSE LAWYERS MAKE: STRUCTURE AND AGENCY IN LEGAL PRACTICE (Austin Sarat and Stuart A. Scheingold eds., Stanford University Press 2005).

tion that the value of *status quo* protection, traditional values of personal gain, and success has a particularly profound impact on society. This impact is particularly visible in young adults who over the past thirty years have developed a scrupulous cynicism borne of perceived powerlessness of individuals to make profound political/social change. A distressing aftermath of Vietnam, Watergate, intractable and sensationalized crime increase, among other things, has produced an "atomized"[10] individual, suspicious in the wake of a failed "Great Society" of their parents.[11] Disbelief in the law as capable of (or even properly concerned with) widespread reformative change is understandable. The *status quo* oriented legal educational system nurtures that lack of conviction.

What does the election of Barack Obama have to do with all this? First, the capturing of youthful energy and focus on change may offer a window of opportunity for a different paradigm that can be recognized by the revolutionary fact that a black man was elected president of the United States less than 150 years after the end of slavery. Secondly, it is possible that his election represents a coalition re-alignment in the classic James McGregor Burn's sense.[12] Time will tell if the re-alignment responsible for

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[10] The concept of "atomization" refers to the postulate of the sociologist C. Wright Mills who theorized that the traditional notion of American society, that power rests and originates with the "people" is severely corrupted in a society where actual decision making is usurped by a "power elite" (comprised of what became referred to as the industrial/military complex.) CHARLES WRIGHT MILLS, THE POWER ELITE (Oxford Univ. Press 1956). In such a society, the general public becomes alienated and perceives themselves as "atomized" – separated from decision making and each other, and thus disinterested in effecting transformative change. Though sometimes discredited as "Marxist" theory, atomization does speak to a modern day phenomena of depressed socio-political involvement of younger Americans in particular that may now be on the brink of change in the post-Obama election era.

[11] Candidate Barack Obama stated: "For good reason, the rest of us have become cynical about what politics can achieve in this country, and as we've turned away in frustration" Barrack Obama, Address to California State Democratic Convention. BARACK OBAMA, INSPIRE A NATION: BARACK OBAMA'S MOST ELECTRIFYING SPEECHES FROM DAY ONE OF HIS CAMPAIGN THROUGH HIS INAUGURATION 22 (Jaclyn Easton ed., Publishing 180) (2009).

[12] *See generally* JAMES MCGREGOR BURNS, THE DEADLOCK OF DEMOCRACY (Englewood Cliffs, Prentice-Hall; 1963). Realigning elections represent, in political science, a dramatic change in coalitions forming support for political positions, actions or candidates. Usually involving the replacement of old coalitions with a new one, the term can be traced back to V.O. Key Jr. *A Theory of Critical Elections* 17 The Journal of Politics 3 (1955), but obtained particular popular use in reference to James MacGregor Burns' analysis of presidential elections.

Obama's election will be maintained or squandered. Thirdly, and of particular significance, the campaign for coalition rebuilding was based on a "Yes We Can" response to *status quo* inertia. In announcing his candidacy for President, delivered February 10, 2007, Barack Obama spoke to the disillusionment of many over the inability to engage in reformative change:

> We all made this journey for a reason. It's humbling, but in my heart I know you didn't come here just for me, you came here because you believe in what this country can be. In the face of war, you believe there can be peace. In the face of despair, you believe there can be hope. In the face of a politics that's shut you out, that's told you to settle, that's divided us for too long, you believe we can be one people, reaching for what's possible, building that more perfect union.[13]

Obama's election also challenges basic legal concepts, found particularly in the first year of law school, of gradualism. Many people did not expect a presidential election that transcended racism (if not transcending race) to occur so soon. Likewise, traditional notions of equal protection and due process often speak to gradual reform and growth of doctrine in response to social need.[14]

Obama's election also challenges *sotto voce* notions embedded and taught in legal education, constitutional law in particular, that race recognition is an insurmountable barrier to change no matter how gradual. Some legal decisions have pretended that race was not the motivating or substantial reason for change. Note for example, the curious growth of constitutional based procedural rights in Criminal Procedure, an area that I teach.

The procedural rights revolution of the 60s and 70s, as evidenced by a series of landmark decisions from the United States Supreme Court, produced growth and redefinition of individual rights while seemingly devoid of response to or recognition of race as a major issue of contention. In fact, virtually every major United States Supreme Court case of that era purportedly recognizing

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[13] INSPIRE A NATION, *supra* note 11, at 10.

[14] *See, e.g.*, Beth Van Schaack, *With All Deliberate Speed: Civil Human Rights Litigation as a Tool for Social Change*, 57 VAND. L. REV. 2305, 2322 (2004) (footnote omitted).

and expanding individual rights under the Fourth, Fifth, and Sixth Amendments were in fact based on a significant racial component.[15] For example, in *Mapp v. Ohio*, law enforcement invaded the home of an African American woman.[16] Both *Escobedo v. Illinois*[17] and *Miranda v. Arizona*[18] involved law enforcement improperly obtaining confessions from Latinos. Moreover, while *Gideon v. Wainwright*[19] may have featured a white defendant in Florida, the decision was a Sixth Amendment extension of the Due Process principles of *Powell v. Alabama*,[20] a Supreme Court case stemming from the "Scottsboro Boys" trials, one of the most famous (or infamous) racial prosecutions in United States history. Such cases were conceived in racial conflict, but the decisions were born as racial eunuchs. Although the NAACP often argued and wrote amicus briefs for these cases, the opinions pretend that race was never the issue.[21]

The slide into self-centered cynicism, mentioned earlier as a result of post-60s and 70s disillusionment, may have endured a course correction as a result of the Obama election. The attraction to law school as a positive agent of change was advertised in the 60s by prominent legal activism and media images such as television shows like "The Defenders." Yet this was soon replaced in subsequent years by the more nihilistic images of "L.A. Law," "Boston Legal," and even "Law and Order." Such shows suggest that the practice of law is only good for wealth accumulation, sexual conquest, or "greasing the path" for low-life criminal confessions (without trial) abetted by semi-competent, but morally corrupt, criminal defense counselors in the public sector.

Legal education may now have the opportunity to radically change this concept of law and to re-invigorate a sense of purpose and commitment to social change with honor. The Obama elec-

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[15] *See, e.g.*, Terry v. Ohio, 392 U.S. (1968); Miranda v. Arizona, 384 U.S. 436 (1966); Escobedo v. Illinois, 378 U.S. 478 (1964); Gideon v. Wainwright, 372 U.S. 335 (1963); Mapp v. Ohio, 367 U.S. 643 (1961).

[16] *See* CAROL N. LONG, MAPP V. OHIO: GUARDING AGAINST UNREASONABLE SEARCH AND SEIZURES (University Press of Kansas, 2006)

[17] Escobedo v. Ill., 378 U.S. 478 (1964).

[18] Miranda v. Ariz., 384 U.S. 436 (1966).

[19] Gideon v. Wainright, 372 U.S. 335 (1963).

[20] Powell v. Ala., 287 U.S. 45 (1932).

[21] *See, e. g.*, Bell v. Wolfish, 441 U.S. 520 (1979); Johnson v. Avery, 393 U.S. 483 (1969); Sibron v. New York, 392 U.S. 40 (1968); Terry v. Ohio, 392 U.S. 1 (1968).

tion era may be a catalyst to this change in legal education, but only if our institutions stoke the flames of "Yes We Can" motivation by altering what and how professors teach. This can occur in several ways:

Curriculum Reform

At the height of social reform activism, law school curricula featured courses that focused on exploration of the various political, social, and economic challenges. These curricula also sought to inspire the law student with solid examples of how the basic legal principles taught throughout law school can have practical application to bring about transformative change. Featured courses were drawn from a strong tradition of civil rights litigation and expanded legal services to the poor, which stemmed from the initial support for an expansive Legal Services Corporation. However, these courses have in recent decades dropped from the catalog of many, if not most, law schools. Law schools can re-introduce a few of these courses into its curriculum that, in turn, will support the growth of a transformative consciousness. These courses include: Legal Problems of the Poor, Tenants' Rights, Correction Reform, Welfare/ Income Maintenance, Environmental Law, and Consumer Rights.

Embrace a Greater International Perspective

One additional impact area of Obama's election and opportunity for legal education change comes from recognizing the extraordinary and broad-based world appeal of Barack Obama. This appeal was born not only of his ethnic heritage but also of his stated commitment to world citizenship and responsibility of the United States. In many ways, Obama may be the first world president. He personifies the importance of globalization in legal education.

Globalization refers to the "denationalization of markets, laws and politics in the sense of interlacing peoples and individuals for the sake of the common good."[22] This kind of globalization brings the "world of transnational law to the door of the country lawyer."[23] One need look no further than the emergence of the

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[22] Gloria M. Sanchez, *A Paradigm Shift In Legal Education: Preparing Law Students for the Major U.S. American Trading Partners,* 34 SAN DIEGO L. REV. 635, 635-636 (1997).
[23] *Id.* at 636.

European Common Market with its adoption of the "euro" as a multi-national currency to see how quickly and dramatically globalization can impact our view of the world. During the Obama era, globalization may bring about at least the following changes in United States legal education, as that system seeks to prepare practitioners to function in this new arena:

> 1. Law schools may need to change first year curriculums to encompass building block perspectives beyond the common law, constitutional law, and statutory sources. Law schools should design a standardized and compulsory first year curriculum largely to introduce standard principles that the American law student will need for developing analytical skills to be applied *inter alia* in upper class elective courses. The failure to include the principles of "transnational law"[24] in the basic curriculum creates the risk of marginalization of globalization at a time when expanded preparation is greatly needed.[25]
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> 2. The cultural values long assumed in Anglo European perspectives may need to change to accommodate other policy values including cultures influenced by tradition, religion, and other legal approaches to problem solving.
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> 3. Foreign language training may need to be encouraged and included with attention paid to the skills of faculty as well as students.[26]

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[24] Transnational law has been defined as "The law applicable to the complex interrelated world community which may be described as beginning with the individual and reaching up to the so called 'family of nations' or 'society of states'. It include[s] all law which regulates actions or events that transcend national frontiers." PHILIP C. JESSUP, TRANSNATIONAL Law (Yale Univ. Press (1956).

[25] *See* Gunter Frankenberg, *Critical Comparisons: Rethinking Comparative Law*, 26 HARV. INT'L L. J. 411, 419-420 (1985).

[26] Sanchez notes that only one American law school offered a course in foreign law in the language native to the subject. St. Mary's University of San Antonio, Texas, offered a course in Mexican law in Spanish. Sanchez, *supra* note 22, at 638. (referring to a telephone interview with Professor Roberto Rosas, visiting Professor from the Universidad Nacional Autónoma de México, Guadalajara (Oct. 20, 1995)); Vivian Curran, *Developing*

4. International law and comparative law courses should be moved to the first year or encouraged and included as prospective second year courses.

5. Specific courses on the domestic laws of other countries will need to be developed and added. While most American law schools offer, at the very least, survey courses in International Law and/or Comparative Law, very few offer courses in the domestic laws of specific countries. This limits the ability of the American law school graduates to practice within a foreign country without additional training.[27]

6. Law schools need to re-examine the commitment to the Langdellian method.

7. Globalization will result in redefining who "the good law student" is. Changes in an expanded concept of undergraduate experience and relevant practical exposure will open new vistas.

8. Globalization will need to work hand-in-hand with an emphasis on diversity in both the student body and faculty. The ethnic and cultural diversity of law schools within the United States is not just an imperative brought about to remedy decades of unequal treatment and opportunity, but is also a force fueled by the rapidly changing and globalized nature of the new law student. In the 21st century the United States will be a country in which the majority of Americans will be non-caucasian.[28]

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and Teaching a Foreign-Language Course for Law Students, 43 J. LEGAL EDUC. 598 (1993) (discussing the need for and the encouragement of foreign language instruction in law school).

[27] Sanchez, *supra* note 22, at 638.

[28] Thomas Penny, *U.S. White Population Will Be Minority by 2042, Government Says*, Bloomberg.com, August 14, 2008 (available at http://www.bloomberg.com/apps/news?pid=20601087&sid=afLRFXgzpFoY&refer=home) (last visited on March 23, 2010).

Possible Pitfalls for the Obama Effect on Legal Education

There is a risk and a danger inherent in development of a social change agenda that may be occasioned by President Obama's election as well. The biggest danger to the chance for a reformative change agenda for legal education is the very real possibility that his "Yes We Can" election will mean promotion of a "Yes We Did" notion that most of the battle against socio-political wrongs and racial injustice is over and that such exists now only as a possible historical lens through which to view race neutral principles.

Professor Sumi Cho does an excellent job of laying out the danger in her new article *Honoring Our Past, Charting Our Future Post Racialism.*[29] Professor Cho posits that the ideology of post-racialism in the 21st century defines the role of race as an active part of reformative justice as one relegated to historical analysis only and that race-based conscious remedy is inappropriate in a civil society that has met and conquered its race demon.[30] There is, of course, no greater example of this victory than the election of Barack Obama. Some will say that proponents of race consciousness in legal remedies (more than just affirmative action) are "out of step" old schoolers who fail to recognize the demise of purposeful or systematic racism as an active principle in continuation of the legal *status quo.*[31]

A similar impact may be felt in understanding and eliminating the underrepresentation of students of color in our law schools.[32] President Obama's success is a false mirror of the suc-

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[29] Sumi Cho, *Honoring Our Past, Charting Our Future Post Racialism*, 94 IOWA L. REV. 1589 (2009).

[30] *Id.* at 1600.

[31] *Cf. id.* at 1611-14.

[32] Based on the latest available statistics from the American Bar Association/Law School Admission Council, as of 2008-2009, African Americans comprised only 6% of the matriculating law students in the United States. Hispanic students (Mexican American, Puerto Rican and other Hispanic Americans combined) accounted for only 5.9 % of the matriculating law students. *See* ABA/LSAC OFFICIAL GUIDE TO ABA-APPROVED LAW SCHOOLS, app. A at 870-73 (2010). The ABA Commission on Racial and Ethnic Diversity in its 2009 report indicated the following chart demonstrating underrepresentation:

cess of the African American male in particular and students of color in general. The impetus for inclusion of people of color in our legal education system becomes less about restorative justice and more about diversity, a consumer oriented, guilt-free justification for hydrogenising the law school.

But finally, the most galling danger will be that occasioned by President Obama *himself* if he fails to inspire approaches that have a profound impact on motivating legal education to promote change and instead adapt *status quo* policies. We have already witnessed President Obama's execution of policies that undercut individual liberty change opportunities such as abolishing the Patriot Act,[33] accepting military tribunals for civilians and accepting the concept of "mini-Gitmos."[34]

Legal education is about creating change agents. Such inspiration has never been isolated from the political milieu outside the classroom walls. The historic, ground-breaking event of President Obama's election must create a historic, ground-breaking change in legal education.

	General Population	Lawyers	Lawyers and Judges
African American	12.90%	3.90%	4.20%
Asian American	4.20%	2.80%	2.29%
Hispanic	12.50%	3.30%	3.70%
Native American	1.50%	0.20%	0.24%

ABA COMM'N ON RACIAL & ETHNIC DIVERSITY, GOAL III REP.: THE STATE OF RACIAL & ETHNIC DIVERSITY IN THE AM. BAR ASS'N (2009) 3, *available at* http://www.abanet.org/minorities/pdfs/full_report.pdf.

[33] USA Patriot Act (Patriot Act), Pub. L. No. 107-56, 115 Stat. 272 (2001) (codified as amended in scattered sections of U.S.C.).

[34] *Cf.* Benjamin J. Priester, *Terrorist Detention: Directions For Reform*, 43 U. RICH. L. REV. 1021, 1066 (2009) (citing Dan Eggen & Josh White, *Debate over Guantanamo's Fate Intensifies*, WASH. POST, July 4, 2008, at A1, stating that President Obama announced before his election that he would move detainees to Fort Leavenworth in Kansas and other civilian and military facilities, and that he would close Guantanamo).