

COMPETING WITH JERRY'S KIDS: THE MORAL CASE FOR LAW SCHOOL DEVELOPMENT

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SEVERAL years ago, I had lunch with a law school alumnus in Florida. Let's call him "Jim." He is a prominent and highly successful attorney who has fond memories of his law school years. It was apparent very early in our meeting that he was openly and genuinely appreciative of the education he had received in law school and that he was philanthropically involved in his community. But he had never supported the law school. Following some pleasant social banter, he said, "Look, I know what you're doing here and I don't resent it at all. However, I have to tell you that, with all the important causes out there, I just don't understand why anyone would give their money to *a law school*. Still, I like to think I have an open mind, so maybe you can enlighten me."

It was not the kind of question, at least in this context, that called for one of the pat answers about "giving back" so that "future generations of law students could enjoy the same educational advantages you did, etc." Rather, it was an earnest question springing from a thoughtful person's fundamental bafflement about the relative value and importance of educational philanthropy in general, and philanthropy for professional education in particular. It was not an easy question. I had to ask myself, if I had one or two million dollars to give away, would I truly choose to donate it to a law school rather than, say, world hunger, domestic violence, homelessness, the local symphony,¹ or Jerry's Kids?

Of course, posing the question in that fashion is somewhat unrealistic² inasmuch as people who are able and inclined to be philanthropic do not ordinarily choose a single recipient or purpose as the sole beneficiary of their largesse. Still, it is not too far off, as very few people are equipped financially to make major, or certainly transformational, gifts to more than one charity. So, why would I endow a chair for a reasonably comfortable faculty member or a merit scholarship for a prospective student likely to enjoy a remunerative career, rather than helping someone who is truly downtrodden through no fault of his or

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1. Well, yes, I would give to a law school before the symphony, but that's more reflective of my rather stunted cultural development than anything else, so the point remains that I think a majority of prospective donors might instinctively find the arts to be the more worthwhile cause.

2. As is the assumption that I would ever be in a position to have that kind of money to give away.

her own and unlikely to recover, or in some cases even to survive, without some external assistance?

One answer, to be sure, is vanity, in the most non-pejorative sense of the word. I want something with my name on it that will endure beyond my limited earthly existence.³ This is a natural urge to which we all subscribe to one degree or another as we come to grips with our own mortality. Or, perhaps less self-aggrandizing, I want to create something that will serve as a permanent legacy honoring a family member, an esteemed colleague, or an admired public figure. It was clear to me, however, that this explanation was not what stimulated or incited Jim's giving, nor was it really responsive to the perplexity that had prompted his question.

Another answer, and a perfectly satisfactory one to some people (including me), is indirect personal and professional advantage. To put a finer point on it, the stronger the external reputation of the institution from which you graduated becomes, the more prestige you enjoy as the holder of a degree from that institution. This is particularly true in the case of law schools, given the extent to which the legal profession is still very status conscious and driven.

The "value enhancement" rationale can produce both psychological benefits, along the lines of "my dad can beat up your dad," and economic benefits, to the extent the degree opens the door or tilts the balance in connection with a competitive professional opportunity. I realize these observations are open to criticism as being a little shallow and self-absorbed, but I do think they are very real, and not by any stretch, I might add, inappropriate. A little benevolent self-interest can be good for the soul. As I have sometimes expressed to alumni, "It doesn't matter what the school's reputation was when you graduated because, next year, if we are regarded as the twentieth best law school in the country, then, guess what, you just graduated from the twentieth best school in the country, but bear in mind, should we slip to 150, the converse is equally true."

This explanation, while undoubtedly a piece in the puzzle of educational philanthropy, was not calculated to reply meaningfully to the question Jim posed to me at this lunch meeting. This was an individual, already quite successful, who did not appear to be motivated by validation through external trappings, or at least not sufficiently motivated to share some of that success with his alma mater. I believed Jim genuinely cared about and had given considerable intellectual deliberation to the question of where his philanthropic resources would do the most good. To date, this introspection had left him hard pressed to apprehend how a law school, generally populated with relatively privileged

3. I imagine true believers, or those simply seeking to hedge their bet just in case, might decide this purpose would be served in a more personally satisfying fashion by tithing. The point here was probably best made by a University of Chicago donor who was quoted as saying: "I know it says in the Bible it is better to give, but I still enjoy having my name on the building." John D. Colombo, *The Marketing of Philanthropy and the Charitable Deduction: Integrating Theories for the Deduction and Tax Exemption*, 36 WAKE FOREST L. REV. 657, 657 n.1 (2001) (quoting Patricia M. Jones, *Gift Has Name for It*, CHI. TRIB., Jan. 10, 1999, at C1).

students and faculty, would promote good or improve human well-being.⁴ My not inconsiderable challenge was to alter that mindset.

In part, the answer to Jim rests in the fact that there are different definitions or understandings of what constitutes philanthropy, and the characterization to which a particular donor subscribes will drive his or her giving. For example, to oversimplify by a pinch or two, some associate philanthropy with support of benevolent organizations that provide charity for the poor or those underserved by the market, and even more particularly often in response to a disastrous event, such as war, famine, or the unchecked propagation of disease. Others take a broader view and categorize philanthropy as support for any altruistic activity that advances the human condition or aggregate social welfare.⁵

Giving along these latter lines tends to focus more on institutions that themselves represent valuable community assets rather than on the more prototypical charitable organizations that serve individuals in need. Surely, higher education institutions, particularly research universities, dedicated to the creation of new knowledge and the enlightenment of young (and sometimes not so young) minds, fall into this latter category.⁶ Finally, some define philanthropy in relation to the tax-advantaged nature of the contribution determined by the status of the recipient. Like the thorny issues surrounding corporate philanthropy,⁷ this interpretation is a tail-wagging-the-dog approach that advances the discussion very little, in spite of the importance that this form of indirect governmental subsidy plays in actual charitable giving.⁸

4. Certainly, he is not alone in this view. For example, in commenting on John W. Kluge's \$400 million pledge to Columbia University, Walter M. Kimbrough commented: "I am becoming less and less tolerant of people who pass wealth on to the privileged and masquerade it as philanthropy.... This simply extends the gross inequities that exist in our country—inequities that one day will come home to roost." Walter M. Kimbrough, *The Perpetuation of Privilege*, INSIDE HIGHER ED., June 12, 2007, <http://www.insidehighered.com/views/2007/06/12/kimbrough>. Mr. Kimbrough's point is a thoughtful one, although somehow I find myself wishing that Mr. Kluge was an alumnus of my institution rather than Columbia.

5. Obviously, there are other ways to categorize philanthropic giving, including religious, scientific, educational, political, social activism, etc. Likewise, philanthropy, in the broadest sense of the term, can encapsulate volunteerism as well as financial contribution. Thus, it should be clear that I use these two categories purely for convenience rather than as necessarily intending to represent for all purposes the most descriptive or useful system of classification.

6. This is not to over-glorify what we do in higher education. Surely, colleges and universities expend a great deal of resources on activities that neither produce any ground-breaking discoveries nor help students develop intellectually as whole persons. Examples abound, but desiring to stay away from discussion of intercollegiate athletics, I'll stick to administrative retreats as a prototype.

7. Corporations can, and do, make charitable contributions either in expectation of some business benefit to the corporation or without expectation of a benefit to the corporation. Corporations may make charitable gifts for general product advertising purposes or to improve the corporation's public image, aid recruitment efforts, or attract shareholders. There are times, however, when corporate charitable contributions cannot rationally be justified on the basis of tangible or intangible benefit to the corporation. See Faith Stevelman Kahn, *Pandora's Box: Managerial Discretion and the Problem of Corporate Philanthropy*, 44 UCLA L. REV. 579, 609-11 (1997).

8. See generally Johnny Rex Buckles, *The Case for the Taxpaying Good Samaritan: Deducting Earmarked Transfers under the Federal Income Tax Law, Theory and Policy*, 70

It was obvious to me that Jim had fully internalized philanthropy in the first sense, what I will call “crisis or needs” philanthropy, but less clearly in the latter sense, which might be termed “societal justice or welfare” philanthropy. Obviously, the two are not mutually inconsistent, but they do emanate from rather different philosophical perspectives in terms of the optimal and appropriate deployment of private, nongovernmental resources to benevolent and humanitarian causes.⁹ This is all well and good, but it does not provide a response to prospective donors like Jim, accepting, as I do, the proposition that law school development should neither be regarded as a “win at all costs” exercise nor as a competitive sport.¹⁰

On reflection, the answer, it occurred to me, was really a structural one that in a sense conflated both forms of philanthropy. To explain, let’s go back to Jerry’s Kids. Assume, after one particularly poignant, tear-jerking segment on the annual Muscular Dystrophy telethon involving a young victim, Donor *X* is moved to express support and solidarity in the form of a financial contribution. Does that mean Donor *X* should make an investment in finding a cure? Well, sure. But to be blunt, what really moved Donor *X* was the plight of that particularly sentimental victim featured in the vignette. In other words, she wants to help *that individual*. While a cure would certainly have that effect, the relationship between the victim’s suffering and supporting medical research directed toward finding a cure is a bit abstract and attenuated. Moreover, there is no assurance that the investment will produce results, or at least produce results in time to make a difference for the individual to whose aid Donor *X* wishes to rush.

This being the case, perhaps Donor *X* would receive more satisfaction by earmarking her contribution not to the Muscular Dystrophy Family Foundation (MDFF),¹¹ but rather directly to this child’s family, or, if tax considerations were

FORDHAM L. REV. 1243 (2002) (examining the normative question of whether, and to what extent, earmarked contributions to charity should be deductible). I say that it is a tail wagging the dog, because, except for certain esoteric estate-planning devices for extremely wealthy individuals, from a pure economics-based perspective, philanthropy is a losing proposition for most donors (e.g., I’ll be happy to spend all day trading fifty-cent pieces for dollars with you). Then again, there is also the extreme view, expressed by Nietzsche, opposing charity and altruism as contrary to individualism, serving only to further weaken the race. See H.L. MENCKEN, THE PHILOSOPHY OF FRIEDRICH NIETZSCHE 85 (rev. ed. 2003).

9. To the extent one credits this admittedly rough-hewn description at all, one might regard the former category as ameliorative in the sense of abating the plight of those facing adversity not of their own making, while the latter is aimed at effectuating positive social change at the organic level.

10. By this, I mean to suggest that I do not regard development as a zero-sum game where the object is to advance one’s own cause by diverting funds that otherwise would have gone to support another cause. Concededly, this view derives less from personal altruism than it does from personal insecurity—religious organizations are major beneficiaries of philanthropy and I really have no desire to tangle with God. In fact, however, while everyone has a finite proportion of income or assets that can be devoted to charitable giving, I suspect very few are truly at the limit, and many have not even started.

11. This assumes, solely for purposes of illustration, that the MDFF only supports medical research. In fact, that is not the case. The Foundation provides a wide variety of services, including home modification and repairs, and social activities for individuals with MD. Apologies

a factor, to the particular facility where this child receives treatment or even to a local tax-exempt organization that supports and comforts individual victims of the disease. In point of fact, Donor *X* might, on reflection, rationally conclude that maximum gratification would be obtained by supporting *both* the victim and research devoted to finding a cure, whether directly or through a charitable organization likely to have a more immediate impact on the victim's life. Donor *X* could split the gift, or perhaps even, not irrationally, split a larger total gift between the two applications.

If, for a particular donor, like Jim, crisis or needs philanthropy resonates but social justice or welfare philanthropy does not, the MDFF example arguably reveals the seeds of a response that is not just glib, but also quite sincere and genuine. Let us assume Jim is concerned about, and thus directs his philanthropic support to, the issues of hunger and homelessness. Accordingly, he gives generously to organizations that alleviate these conditions in individual cases, such as food banks and homeless shelters. Though laudable, this surely is not calculated to have a systemic impact on either societal issue. To put it another way, this is a classic example of treating the symptom rather than the disease. Treating the symptom is necessary once the patient is ill, but what will—or at least may—eliminate or at least diminish the extent of hunger and homelessness in Jim's community, or the nation, or even on a global scale?

Stated somewhat differently, how do we address these issues systemically? The answer, unequivocally, is policy. More specifically, the answer rests with policy that makes eradication of certain social ills a priority and devotes human and financial assets to that end. With the exception of perhaps a handful of enormous mega-foundations, charitable organizations do not and cannot make policy. Rather, political leaders make policy, and business and community leaders influence the manner in which the policy agenda is set. And, in the most basic and essential sense, is this not what we do in higher education by training tomorrow's leaders? Have I taken a fairly large leap of faith here? Yes. Is this just a little clichéd and perhaps even bromidic? Yes. But I am quite serious and, with a little indulgence, I believe I can explain why.

Stepping back from a law school to the academy at large—of which we are an integral part no matter how vociferously colleagues from other disciplines may challenge that assertion—among the core values of virtually every institution of higher education is a commitment to excellence in academic instruction and scholarship, and to the principles of community, integrity, leadership, and service.¹² We also widely acknowledge that a high-quality educational experience entails much more than the mere accumulation and

to the MDFF for taking the liberty of this mischaracterization; it was done solely for the purpose of making a point that has nothing to do with value and importance of the work undertaken by that organization.

12. As just one example, consider the following sentence from Tulane's mission statement revised and adopted shortly after Hurricane Katrina paid New Orleans a most unwelcome visit: "Tulane's purpose is to create, communicate, and conserve knowledge in order to enrich the capacity of individuals, organizations and communities to think, to learn, and to act and lead with integrity and wisdom." Tulane University Mission and Strategic Plan, http://www2.tulane.edu/administration_mission.cfm (last visited Jan. 16, 2009).

assimilation of data. A meaningful and effective instructional program is one that equips students with the capacity to acquire, process, and apply new knowledge throughout their lives, as well as to develop socially. It awakens students to the earmarks of responsible citizenry and inspires them to be positive agents for effecting change in the communities in which they live to improve the quality of life for all of its members.

In turn, it is essential to communicate what to many people outside the academy, and not raised in a familial culture of philanthropy,¹³ is at first blush counterintuitive; namely, that an institution that charges market rates for its services can truly be a “charitable organization” within the broadest sense of that term. In fact, however, higher education is one of those rare eleemosynary institutions that hinges equally on the twin pillars of (often not insubstantial) users’ fees *and* philanthropy. Historically, of course, this has been somewhat unique to, and certainly most pervasive in, higher education in the United States. This is why the subject of cultural differences in approaches to and attitudes toward educational philanthropy is such an interesting subject,¹⁴ but that is a story for another day.

Now allow me to drill down from the macro to the micro level by focusing on just law schools. Over the past two or more decades, an increasingly important component in American law schools’ curricular and co-curricular programs has been an emphasis on professionalism and public service. From mandatory pro bono service, to loan-repayment assistance programs for graduates taking public interest positions, to clinics, to institutes and centers, to public interest law foundations, to cause-based student organizations, to course content, every law school today perceives as a vital element of its mission the instilling in its students of a keen understanding and a sensitive awareness of the community service obligations that necessarily attend the privileges they will enjoy as the members of a profession. Doctrinal instruction, along with legal research and writing skills, no longer constitutes a sufficient legal education. We all recognize our role in acculturating students into seeing lawyering as a unique profession that gives back to the public, regardless of which branch of the practice the student decides to enter.

13. I can relate personally to this sentiment, as I never gave to my law school until, ironically, I moved from practice into academia and, in so doing, cut my income by more than half.

14. Studies have shown that private fundraising at even the most prestigious European universities is dwarfed by fundraising at American universities, including public universities. See SUTTON TRUST, UNIVERSITY ENDOWMENTS—A UK/US COMPARISON 2-5 (2003); SUTTON TRUST, UNIVERSITY FUNDING—AN UPDATE 2 (2006). In part, this can be explained by differences in tax laws, as well as by the relative absence of private universities on the Continent. This has also started to change. See Joanna Sugden, *Oxford University Launches Massive Bid for Funding*, TIMES ONLINE, May 28, 2008, <http://www.timesonline.co.uk/tol/news/uk/article4019099.ece> (describing Oxford University’s recently-announced £1.25 billion campaign “to keep it on a par with institutions like Harvard”). See also Editorial, *Show Me The Money*, 5 NATURE REVS: MICROBIOLOGY 84, 84 (2007) (“In the face of such enormous resources becoming available to their American counterparts, British and European higher education institutions must accept they can no longer rely on government and that the exploitation of philanthropy through professional fundraising has become an option that can no longer be ignored.”).

It is beyond cavil that much of our public service message's observable focus is on equal access to justice for all persons regardless of economic status as a basic tenet of our commitment to a rule of law. At the core level, however, the value I believe we are striving to imprint on our students is the imperative to act compassionately by expressing an ethic of service that is respectful of the differences among people and cultures and that promotes basic human dignity. Stated another way, we strive to train our students how to be leaders not only in their professions, but also in their communities. Certainly, with some graduates, the message never takes. Others may express it by providing services directly to otherwise underserved individuals or groups. But surely some will, and do, carry out this service mission by becoming policymakers who are in a position to effect positive social change on a systemic basis through legislation and programmatic initiatives. In short, it is leadership, informed by the ability to think critically, creatively, and independently, that will improve the quality of our communities by addressing at the root the cause of the social problems that currently plague those communities.

Providing safety for a domestic abuse victim does not stem the tide of domestic violence. Sheltering the homeless today does not eliminate the problem of homelessness. In each instance, the former is a moral necessity and not to be trivialized in importance. The latter, however, only occurs with wise leadership.

So, I told Jim that the reason he should give money to the law school was not simply to boost the value and perception of his own degree or even to enhance the quality of the educational experience for the next generation of law students, who we will after all doubtlessly charge dearly for the privilege. Rather, recognizing what had inspired Jim's philanthropy to date,¹⁵ I urged that the most important reason for him to give was to partner with us in producing tomorrow's leaders.

I was pleased with my answer. Not only did I feel it was effective, but, damn it, I really believed it. Did it overstate the case just a bit? Yes. We are not divinity schools. We principally produce practicing lawyers, most of whom represent clients for a fee and make a pretty good living doing so. But the value aspect of our mission, the message of personal integrity and compassion, and the capacity for leadership we try to inculcate in our students are not chimerical or ephemeral. As a society, our future does hinge on our leaders' capacity to act with wisdom, rectitude, and a general regard for the welfare and betterment of all the members of our communities, and no profession has produced more leaders over this nation's history than the law.¹⁶

15. I stress that the object was not to divert Jim's giving from these important causes, but rather convince him to expand his universe of philanthropic causes. *See supra* text accompanying note 10.

16. The number of lawyers in both houses of Congress generally fluctuates at about forty-five percent, *see* Time to Change Congress, Scholastic.com, <http://www2.scholastic.com/browse/article.jsp?id=4732> (last visited Jan. 16, 2009), and twenty-four of the forty-three American presidents have also been lawyers. *See* Janet Welch & Elizabeth K. Lyon, *Lawyers as Legislators: Lawyers, Law-Making, and Legislative Power*, MICH. BAR J., Mar. 2005, at 32. That number rose to twenty-four out of forty-four when Barack Obama was sworn in on January 20, 2009. *See* Meet the Candidate, BarackObama.com, <http://www.barackobama.com/about/> (last visited Jan. 16,

So, how much did I get from Jim? In truth, nothing (and I just checked again). But it did help me think more clearly about what we do in this industry generally and in my institution in particular. It also added a powerful and compelling arrow to my quiver in articulating the case for external support to alumni and other prospective donors. And of course it gave me something to write about. I suppose that is something.

2009). Concededly, these statistics are distressing to some, evidenced by a proliferation of websites. *See, e.g.*, A Modest Proposal: Separation of Lawyers and Politics, <http://www.friesian.com/lawyers.htm> (last visited Jan. 16, 2009). Moreover, the number of lawyers in the legislatures of the states and the nation is higher than most other countries. The predominance of lawyers in these positions, however, is reflective of the important leadership role that legally trained citizens have played since this country's inception upon the signing of the Declaration of Independence; twenty-five of the fifty-six signatories of which, including its draftsman, were lawyers. ROBERT A. FERGUSON, *LAW AND LETTERS IN AMERICAN CULTURE* 11 (1984).