

An Epilogue

The Next Reconstruction

There may be a story within the story here, and it will be the last story of this book. The law is blind, willfully or not, to the steady replication of advantages and biases because, perhaps, it too embraces them, and it is quite oblivious to its own self-perpetuating patterns of disadvantage and exclusion. Law is made by lawyers, and, importantly, lawyers are made by law. There's not a lot of room here for new perspectives.

Consider that law students are admitted into law school based on their aptitude for the study of law, an aptitude measured in substantial part by their performance on a standardized test, the LSAT. Admitted students are then trained to "think like a lawyer," and their success in that task is subsequently measured by examinations that have not much changed in several generations. Performance on those tests, as measured by student grades, are substantially correlated with performance on the LSAT, which, of course, is how the folks who create that standardized test stay in business. At the end of three years' training, graduating students receive one final test of their ability to "think like a lawyer" in the form of a mega-test, the bar examination, performance on which correlates with their law school grades and, hence, the LSAT. Thus students who are admitted into law school based on their measured aptitude for thinking like lawyers are trained to think like lawyers and admitted into the profession based on their success in learning to think like lawyers. When they become professionals, then, we should perhaps not be terribly surprised if, in the course of solving the problems presented to them, they tend to think like—well of course—lawyers.

Folks complain about this all the time. Lawyers, they say, are argumentative; lawyers are coldly deductive; lawyers make big issues

out of little words; lawyers talk in circles; lawyers look for loopholes; lawyers always obfuscate; lawyers are savagely competitive; lawyers don't care about people, about their real problems, about the real world. I've done some of this complaining myself, most recently, about fifteen pages' worth.

So here, perhaps, is an idea. It is admittedly quixotic and utopian and optimistic to a fault, but, to borrow a phrase, "you talk about a dream, you try to make it real." And in a few generations, or maybe a few generations more—well, who knows?

So here's the idea: Let's make lawyers out of some people who don't think like lawyers—at least, not in the conventional sense—and maybe out of people who never will. Let's make lawyers out of some people who are smart in different ways, people who are really good at practical problem-solving, and people who are extraordinarily kind and compassionate, and people with a heightened sense of situation and context, and people with a powerful commitment to their community, and people who are especially creative, and deeply spiritual, and moral and ethical and maybe even just. Some of them won't have done so great on the LSAT; some of them will have done just plain lousy. And they'll be the ones we recruit most heavily.

We will have, of course, certain assessment problems. Identifying people who are real kind or spiritual or committed to their community may not be an easy matter: there are, to date, no standardized tests of these qualities. But if we can create tests to determine somebody's aptitude for conventional legal analysis—if we can create, for that matter, tests for something as broad and organic as "general intelligence"—then I am quite certain that we could create tests for these other qualities, if we merely put our minds to it and our hearts into it. Maybe, for that matter, we would not be constrained by standardized tests at all: maybe we could gauge kindness, spirituality, or community commitment in more practical or experiential terms, by considering, for example, how our applicants actually live their lives.

It may take a while to work out the particulars, and it may take a while longer for us to transcend our long-held biases. Eventually, though, we'll get all kinds of different folks into our schools, with all kinds of different aptitudes. We'd get folks with some different perspectives too. Would that mean, for example, that we'd get more black Americans, do they have a unique, and uniquely valuable, perspective? Of course they do, and so do other minorities of "race,"

and so do poor folks, and so do folks with disabilities, and so do all the uniquely gifted people we'd be recruiting, and if we can get enough of them into law school, they just might be willing to share their perspective, and share their gifts, and help us rebuild the profession in ways that reflect their various strengths, instead of excluding folks because of their supposed weaknesses.

Some people won't much like this plan. They'd fuss and fume about merit, and inferiority, and qualifications and all that old tired nonsense they've been trotting out to exclude people for centuries. Ironically, many of the people who would throw a tantrum if we really tried to democratize the legal profession are the same ones who are always carping about the lawyers. Well, now we'd see where they really stand.

And when we were done, when we'd really democratized "lawyers," I'll bet you we then democratize the laws. Not just in letter, not just in theory, but in practice, in the way law is experienced. Our new lawyers would not tolerate empty formalisms, and neither would our reconstructed laws.

Some of the old hierarchies would be swept away quickly. "Race" would surely be one; it never had anything going for it anyway, except the inequities fashioned by law. Take away those inequities—really take them away—and there won't be much left to be "race"-ist about.

Some other hierarchies might take longer. Some parts of the order are so hard to escape; some changes would really require some faith. But maybe, at some point, perhaps several more generations down the line, we'd take a really bold chance. Some day, at some law school, we'd admit somebody who had a lousy LSAT and a low IQ to boot. He'd need some help: we'd have to modify our curriculum some, and the way we taught, and also our examinations. And when he became a lawyer, he'd still need our help: some things he couldn't do alone. But maybe that would be the beauty of it, maybe that's when we'd really learn about the law.

What insights would he offer? What clarifications would he demand? What would be his vision of the law as it is practiced, as it is lived? How would the law change, when it included—I mean really included—him? It's hard even to imagine; but then, we knew we had a long way to go.

Some things, we might suspect, would never make sense to him. The fuss over affirmative action might be one. It might not be easy

to explain why we got into this business of labeling people, or why we could not use those labels to get us out of the mess we created. It may be especially hard to convince him that laws designed to help people had to be treated the same as the laws that were designed to hurt them in the first place. He'd probably see things more like a fellow named Ed Murphy, a guy who knows something about labels, seeing as how he's lived with one of the toughest labels all his life:

It is very hard to go through life with a label. You have to fight constantly. Retarded is just a word. We have to separate individuals from the word. We use words like "retarded" because of habit—just like going shopping every week and getting up in the morning. The word "retarded" must be there if you are going to give people help, but what the hell is the sense of calling someone retarded and not giving them anything?

So our best efforts to explain might fail; it might never make sense to him. And then maybe it would stop making sense to the rest of us.

Some people would be skeptical, some scornful, some would mock us for what we were trying to do. "A mentally retarded lawyer," they'd scoff, "there's certain proof that you've gone off the deep end." We could tell them it was only a label, but they know that, and they don't care. So we'd say instead that "it's only law—it's not like it's nuclear physics." "And besides," we'd say, "we've seen what the 'smart' people have done with law, and frankly, we're not all that impressed."

Or maybe we wouldn't say that at all. Maybe the response would be different, different because it came from a voice that, until only recently, had not much been heard. Maybe it would sound like Ed Murphy: "I don't know. Maybe I used to be retarded. That's what they said anyhow. I wish they could see me now. I wonder what they'd say if they could see me holding down a regular job and doing all kinds of things. I bet they wouldn't believe it."¹