

HOW DOES CHANGE HAPPEN?

Remarks at the Inaugural Symposium

on Experiential Education in Law

Boston, Massachusetts

October 27, 2012

Gara LaMarche

As Luke Bierman and Martha Davis will tell you, it was not easy to get me to agree to speak to you today. Not because I am so high and mighty that I had to play hard to get, weighing the invitation among competing offers. Not because I don't like spending an autumn weekend in Boston. But because I was not convinced, as a non-lawyer, as a somewhat under-educated person, and as someone a bit rusty on law reform issues, that I had much to contribute to a symposium on legal education.

To be sure, I am a non-lawyer who, as they say, "played one on TV." In my formative professional years with the American Civil Liberties Union and Human Rights Watch, I became fond of citing the retort of Roger Baldwin, the ACLU's founder -- and also, like four of the ACLU's six national executive directors in 92 years, a non-attorney -- to someone who asked where he got his law degree. "Son," he said, "I hire the lawyers!" One of his successors, Ira Glasser, was more inclined to use the language of civilian control. I'm a non-academic, whose Columbia B.A. is the limit of his formal education, but who is now based in a graduate school, teaching courses on philanthropy and public policy, institutional culture in non-profit organizations, and the history of social movements. And while it's been over a year since I left the last foundation that employed me, Atlantic Philanthropies, in my years at the Open Society Foundations we were perhaps the leading funder of efforts to reform the legal profession and legal education to place a much stronger emphasis on public service and social mission. So it's possible Luke and Martha were right that I might have a few things to say. The particular charge I have been given, before this audience of people who wish to transform legal education, is to share some reflections on how change takes place. That is a huge topic, and even to attempt it is to engage in a giant act of hubris. I can't be comprehensive, but I will try to play a series of riffs on this theme about paths to social change.

In the last few weeks, I've tried to come up to speed on the issues I think you are trying to deal with this weekend, or at least which affect the climate in which you meet. Let me attempt to list some of them at the outset. Legal education is too expensive, the cost serving either as a barrier to entry for low and moderate income

students or saddling them with crippling debt when they emerge from three years of law school. Which is too long, misdirected in its curriculum, or both. The U.S. News and World Report rankings distort the policies and practices of law schools enormously, measure some things that are not important and ignore some things, like public service careers, that are. Few students graduate ready to go to work as a lawyer. Rather, for the most part, they have made it through a series of tests and credentializing exercises, ending with the ordeal of the bar exam, that have earned them the right to be hired, only after which they are actually trained. Except that there are fewer jobs, and an oversupply of law school graduates, at least with respect to the private firm jobs many seek.

The firms themselves are changing rapidly, the longstanding business model no longer viable. Big firms are merging or dying – or merging and dying – and the traditional, somewhat genteel model of lifelong employment is (as in some other sectors) becoming a quaint relic, as lawyers move around for the best offer, figuring that if firms are not committed to them, they have no obligation to be loyal. Firm culture stagnates as the pyramid shape morphs into a diamond, with most lawyers languishing in its thick middle. The businesses that employ law firms increasingly balk at the cost of their services, and more and more take their legal work in-house. A new industry of service vendors and brokers has come into this breach. As fewer ordinary people can afford legal services, clients of all kinds, in law as in medicine, find e-law and other more democratized forms of access to knowledge more and more appealing.

How am I doing here? And don't get me started on globalization! I will make some reference to these developments again here and there in the course of these remarks. However, I think my best value to you is not as a fellow practitioner, which in any event I am not, but as an observer – a sympathetic observer whose career has been focused on supporting those working to achieve social change with whatever tools I had available to me at the time, from organizing and publicizing to providing representation or funds.

Most of what I would like to share with you today I will draw from the most recent part of my career, leading two large and progressive philanthropies, the U.S. Programs of what was then called the Open Society Institute, now the Open Society Foundations, and Atlantic, a global foundation working in human rights, youth, health and ageing. I'll draw primarily on my OSF days, which I have more distance from and a better vantage point on.

A number of the campaigns we pursued in both places aimed at large-scale change. Some of it was aimed at the broader culture, such as how we care for the dying, and how we look at and deal with drugs. Some of it was aimed at more specific policy change, like ending the death penalty or reforming health care. And some was aimed at fields and professions, from criminal justice to medicine to law. Before I talk about all those, I want to go back about a hundred years.

You all seem to be familiar with the 2007 Carnegie report that underscores the lack of preparation of law students for actual practice. But in thinking boldly about how to transform the professional education of lawyers in 2012, it's worth a look back at some of the earliest initiatives of established philanthropy, the progressive era efforts by the Carnegie Corporation to reform medical and legal education and by the Russell Sage Foundation to create a social work profession.

The best known Carnegie effort in professional education was its sponsorship of the landmark *Flexner Report* on medical schools in 1906, supported by its Foundation for the Advancement of Teaching. As Joel Fleishman notes in *The Foundation: A Great American Secret*, “the proprietary character of medical education instilled in Carnegie a distaste for the field.” Around the time of the Flexner Report, Johns Hopkins, under its new president, D. C. Gilman, was quickly becoming a model of academic medical education, rejecting the prevalent model of education by practitioners in favor of “professors fully dedicated to academic pursuits and centralized governing hierarchy.”

Flexner had no expertise in medical education, but visited more than 150 North American medical schools, harshly criticizing many of them. Yale and Washington University quickly took his recommendations to heart, the latter even forcing the resignation of its entire medical faculty and replacing them with academically-trained faculty. What Flexner gave us, in effect, is the still-dominant system of medical faculty who are devoted to full-time clinical work at the university and affiliated teaching hospitals, rather than splitting their time with private practices.

I start with Flexner because it is the paradigmatic story of early philanthropic impact, said to have played a transformative role in raising the bar of standards. (Incidentally, it also had the effect, for a while, of reversing the few gains that women had made in gaining access to the profession.) It was medicine, of course, not law. But looking at its history again in preparing to speak with you today, it would seem to stand for the opposite of the proposition that animates many in this room: that practitioners and the real world of problems they are associated with, the problems that people have attaining justice, should be closer to the core of legal education, not more remote.

Carnegie moved on to the law in 1921, concerned with raising the bar of professional standards. Ostensibly this was motivated by an explosion in the sheer volume of case law, and the need to foster expertise in it and also some degree of standardization. Somewhat more disturbingly, particularly given the contemporary Carnegie Corporation’s stalwart support for immigrants and immigration reform, it was also sparked by the recent influx of immigrants and concern over their educational backgrounds. The publication resulting from Carnegie’s support, Alfred Reed’s “Training for the Public Profession of the Law,” did not, according to Steven Schindler, share the desire of some to restrict access to the profession, but favored a greater emphasis on practical training, and was committed to

maintaining access for “poor boys” to the profession. A Carnegie grant also launched the American Law Institute, which over the years has become the authoritative body, developing, for instance, the Uniform Commercial code now in use in 49 states and D of C.

While there is an excellent paper by Benjamin Spencer in your packet that discusses the Reed report, and while few people read or speak about Reed and his impact today, its concern with diversity, inclusion and relevance strikes me as much closer than Flexner to your purpose here.

While Carnegie was trying to change the nature of training for the leading professions, law and medicine, the Russell Sage Foundation was trying to create a profession of social work where none had existed. Margaret Olivia Sage set about to spend her late husband’s fortune on “social betterment – improvement of the hard conditions of our working classes, making their homes and surroundings more healthful and comfortable and their lives happier; giving more of opportunity to them and their children.” Her foundation, David C. Hammack writes, “established a national center for the study of social welfare policy and for the promotion of cooperation among charity organization societies and related organizations – the kind of organization that in recent years has come to be called a ‘think tank.’”

Sage was focused on what in later years we came to call “root causes” of poverty. As one of the caseworkers she supported, Lawrence Veiller, reported to Mrs. Sage, 68% of the families in his district were poor due “not to moral failings or mistakes of their own, but to causes beyond their control like the death of the breadwinner, injury, illness or age.” The foundation concluded that a key route to the alleviation of poverty was the professionalization of social workers like Veiller. Sage supported the Pittsburgh Survey of social conditions, credited by Jane Addams with sparking a “zeal for reform.” It backed a Charities Publications Committee that consolidated newsletters in New York and Chicago to create a new national journal, *Charities and the Commons*, which undertook an investigation of substandard housing and family conditions in D.C. that strongly influenced President Theodore Roosevelt and Congress to establish a juvenile court and introduce sanitary and housing regulations. Sage also established the New York School of Social Work and others in Boston, Chicago, and St. Louis, and drew on its research collections for two editions of *American Foundations for Social Welfare*, the first foundation directories. Finally, the foundation supported the development of professional associations, like the National Conference of Social Work, the American Association of Social Workers, and the National Social Work Council, even providing space in its building.

I didn’t know much about the Russell Sage Foundation’s early history when I started my career in philanthropy in 1996, founding the Open Society Institute’s U.S. Programs. So I was condemned to repeat it. We undertook a lot of field-building that, now that I understand the history better, drew on many of the strategies pioneered by Russell Sage.

George Soros started his U.S. Programs, having worked for some years in Eastern Europe and some parts of Africa and the Americas, with several notions about what were the greatest challenges in the United States to what he called, as a disciple of the philosopher Karl Popper, open society. At that time, Soros believed that the U.S. did not have many urgent problems of civil liberty, as in the former Soviet world on which most of his philanthropy had previously centered. (He revised that view during the Bush years.) But he did believe it had growing equality problems and, in the wake of the 1994 election of the Gingrich Congress, a burgeoning and disturbing ideology that touted an untrammelled free market as a solution to all problems. (I'm told some people still take this view.) Among the places where Soros saw pernicious consequences of this philosophy were the law and medicine – professions he believed were increasingly dominated by marketplace values, to the detriment of professional ethics and standards. Put more bluntly, the professions were becoming like businesses.

We set about to work on this beginning with the law. What could we do to change the culture of law firms, more and more bottom-line focused, where public service and pro bono work – producing the great civic-minded lawyers, the Arthur Limans, Cy Vances, Helene Kaplans, Fritz Schwarzes, Rita Hausers and others – was increasingly undervalued and undersupported? Could we do anything to influence the business model of the corporate law firm?

We pulled together an advisory committee for what we called our Law and Society Program, and some of the best people in the profession, inside and outside the academy, served on it – Bob Gordon of Yale, Deborah Rhode of Stanford, Peter Edelman of Georgetown, Lani Guinier and David Wilkins of Harvard, the late Bob Joffee of Cravath, Swaine and Moore, and others, working with a top-notch staff, with Catherine Samuels as Program Director and John Kowal and Raquiba LaBrie – all of them, unusually for a private foundation, with significant private firm experience. We concluded there was little a foundation could do to affect the law as a business. As John Kowal put it in remarks to a professionalism symposium in Savannah, Georgia, “Those of us outside the profession can only do so much in terms of dealing with the entrenched self-interest of those in the profession.” He went on to say: “The profession has historically not been accountable to those outside,” and noted another big obstacle: “With regard to the legal profession, there are surprisingly few institutes and organizations” – surprisingly few partners – “that have the credibility to serve a watch dog function, that could help educate the public, that could deal with the very important policy issues involving the public’s interest in the profession.”

We never gave up trying to influence the profession, but determined that if we widened our frame, in light of these realities, to the larger system of justice, there was a lot we could do. We learned about the public interest law fellowships run by Equal Justice Works, then called NAPIL, and issued a challenge grant to match law firms, corporations, foundations and other donors in creating new

opportunities for talented recent law graduates to work for non-profits dealing with human rights, women's rights, housing, employment, the environment and other causes. At its peak, there were 140 new fellowships funded by the Soros match – a virtual army of public interest lawyers, many of whom would stay in the field and go on to leadership positions, and all of whom would continue to influence the law in a positive way, in firms, or government or whatever they did.

We looked at the landscape and saw that the historic and vital independence of the courts were under attack, from politicization of the federal judiciary in confirmation battles to efforts to limit courts' jurisdiction in many key areas of civil rights law, to the appalling infusion of money in state judicial elections. We launched the Justice at Stake campaign to create an ongoing organization – backed by almost sixty national and local partners – to work on these issues.

And we looked at the state of legal services for the poor and found it woefully underfunded and hampered by restrictions on the kinds of cases legal services lawyers could take and the kinds of clients they could represent, with the most marginalized – prisoners, immigrants, welfare recipients – increasingly cut off from access to justice. We supported a variety of responses to this, from expanding the technological capacity of legal assistance providers and pro bono coordinators, to backing public education campaigns on the value of publicly-financed legal services, to supporting litigation to challenge courtstripping.

The most poignant section, to me, in Brian Tamanaha's recent and influential Failing Law Schools, is this: "Perversely, the United States has an oversupply of law graduates at the same time that a significant proportion of the populace – the poor and lower middle class – go without legal assistance. This is reaching crisis proportions: A recent LSC study found that nearly a million cases – one out of every two seeking legal assistance – were rejected by legal aid programs owing to insufficient resources." That's people, as Tamahana notes, who have evictions, divorces, child custody, foreclosures, workplace problems, and disputed insurance claims. There is a tremendous mismatch, it seems, in 2012 as in 1996 when OSF launched its Law and Society Program, between the need for lawyers and what most lawyers are educated for and encouraged to do.

I'm very proud of the work we did in the Law and Society Program, and I don't have the space or time here to touch on other things like our early support for more innovative and holistic approaches to public interest law like the Advancement Project and Make the Road by Walking, or to strengthen the progressive legal infrastructure, like the American Constitution Society.

In my Open Society days, we faced some similar challenges in efforts to deal with medicine as a profession: what could a foundation do in the wake of powerful economic forces reshaping health care and the role of physicians? And here, in contrast to the law, where the American Bar Association has in recent years been a largely progressive prod on access to justice issues, the AMA and similar trade and

professional associations have usually functioned as a conservative force. In medicine, perhaps the most significant thing we did was establish a fellowship to support advocacy by doctors, acknowledging the reality that, in sharp contrast to lawyers, those wearing the white coat are viewed as authoritative and less self-interested. Unlike in the law, where there is a long tradition of pro bono work and engagement in public policy, most doctors – with a few well-known exceptions like Paul Farmer or Irwin Redlener – steer clear of the public realm.

We had the idea for a fellowship to pair physicians with advocacy organizations in particular campaigns. The doctor would sharpen his or her knowledge of the tools and systems of advocacy, and the cause would acquire an unusual advocate. So it was that a pediatrician worked with a children's organization promoting increased insurance coverage for kids, and a military doctor worked with a human rights organization opposing torture. Our hope was not simply to strengthen the advocacy campaigns -- most of which related to OSF's other program concerns – but to make a point to the profession that physicians should be socially engaged. In recognizing such work with money and publicity, we wanted to affect the incentive system.

Indeed, that was at the heart of the Project on Death in America, the first initiative George Soros undertook in the United States. Never a man to think small, Soros was influenced by the deaths of his parents – his father had died alone in a hospital room, his pain unattended to, but his mother died at home, with palliative care and family all around – to aim for changing the culture of dying in the U.S. The death and dying project, led by Dr. Kathleen Foley, a leading palliative care expert at Memorial Sloan-Kettering, tried a number of approaches, including small grants to non-profits and arts and culture organizations. But it soon concluded that the most effective route to change was through physicians (and later, some nurses and social workers) on the front lines of the system. A Faculty Scholars program made grants of \$70,000 each to seven or eight physicians a year affiliated with major teaching hospitals across the United States. Kathy Foley acknowledged that “from the beginning, there was a very elite perspective on our model of social change, and the elite perspective was that we were not going to be a grassroots organization.” Instead, she recounts, in the forthcoming Oxford Press history of the Project on Death in America by David Clark: “[O]ne of the major problems identified was in medicine itself and that .. hospitals were places where most people died...we wanted to create change. We didn’t want to understand stuff like social scientists do; that was good but that was not what the aim was. The aim was to create change, and in that sense, we thought doctors had the most power to do that.”

As the largest single investment of the PDIA, the Faculty Scholars Program identified faculty and clinicians committed to working in end-of-life care and supported them in developing new approaches for care of the dying. As Clark notes, the program promoted “the visibility and prestige of clinicians committed to this

area and sought to enhance their effectiveness as academic leaders, role models, and mentors,” developing “an intellectually vibrant, mutually supportive, and cross-fertilizing network of colleagues involved in multiple facets of work with dying and bereaved people.”

A leading forum for Soros’s equality concerns was the criminal justice system. We came to believe, like Michelle Alexander, author of The New Jim Crow, that the system in its totality operated as a successor to the racist institutions of the past, from slavery to segregation to Jim Crow. We employed a variety of approaches in taking this on, in 1996, at a time when few major funders – or even minor ones – focused on criminal justice, and almost none did so on the basis of the same critique of the structural flaws in the system.

We found effective but underfunded organizations, like the DC-based Sentencing Project, and gave them sufficient resources to strengthen and expand their work. We found arenas not specifically focused on criminal justice, like the Council of State Governments, and provided funds to help draw them into the issue and work with our other grantees. We examined where gaps in the research could be found, in many cases because of ideological bias in governmental funding agencies, long in the grip of “war on drugs” hysteria, and provided support – so that, for instance, Harry Levine of Queens College could document the extraordinary racial disparities in low-level marijuana arrests in New York, a key piece of data fuelling the campaign against stop-and-frisk laws. We created a Soros Justice Fellowship for scholars – like, in fact, Michelle Alexander, whose New Jim Crow is this generation’s Silent Spring, a book that names a phenomenon, lifts it up for public understanding, and spurs action – but also for advocates and social entrepreneurs. Perhaps most importantly, we tried to find, or help launch, organizations working for change that were led by the people most affected – by drug users, formerly incarcerated persons, and their families.

It would probably be helpful to you all, and make these reflections and recollections at least slightly more memorable, if I ended them with a few lessons or recommendations that I have taken from the various campaigns and initiatives in which I have been involved. I’ve thought about that, and come up with a few, and want to offer them before taking your questions.

The first is: start with the ultimate goal you are seeking, and work back from there. Judge all the steps along the way by whether and how they advance that goal. That’s a lesson I learned from widening the frame of OSF’s “legal profession work.” What I mean most by this is that the goal should be big, and that you shouldn’t confuse the means with the end.

Why do you want to change the way law schools are organized, and law students are educated? Because you want different kinds of lawyers, with different kinds of priorities. You want that not because the profession or craft is an end in itself – though of course that is important, and that is the part of the ecosystem of

change you have the most influence over and competence in – but because you want to better serve the ends of justice. Particularly if you want to widen the circle of allies working with you for change, you have to keep your eye on the biggest prize, which is a more just and equitable world in which the legal system is a means to that end, not an impediment to it.

Second – and all these lessons relate in one way or another to the first – you should consider who are the principal stakeholders in the change you are seeking, and make sure you involve those with the most significant stakes. That's what I learned from Atlantic's health care work and OSF's and Atlantic's death penalty work. (Stakeholder, by the way, is one of those buzzwords I try to avoid – as a general matter, any word that appears often in foundation strategy documents or proposals is a good word to avoid – and in considering using it here, I looked it up I discovered that its origin lies in the world of gambling, not ranching, as I had imagined.) Looked at that way, those with most at stake are not law professors, or even the coffers of law schools and their universities. Students have a bigger stake, to be sure, but the biggest stake is held by those who need justice in an increasingly unjust world. That argues to me for greater connection and alignment with civil society organizations outside the law school's walls – with civil rights agencies, community groups and organizing networks.

At the same time, I'd urge you to think about unusual allies and even strange bedfellows. Just as the anti-death penalty movement made effective use of cops and wardens and district attorneys who think the death penalty is inhumane or a waste of money, just as the anti-torture movement made alliances with retired generals who could testify that, in addition to its immorality, torture doesn't work, there may be people or groups out there, consumer or business groups perhaps, who you wouldn't think to involve, but with whom you may be able to make some common cause.

To draw a wider range of groups into your efforts will require a third thing, which is greater attention to language, and for that matter, as I've suggested above, story and narrative. Law professors are engaged in an intellectual enterprise, and I am not trying to dumb it down. But experiential education, though it may be a term of art in a certain world, is sometimes hard for people outside that world to figure out. It can sound a little new-agey.

We realized in our work on the criminal justice system that the way we talked about these issues among ourselves, among advocates and academics, had little resonance with the wider public. Rattling off statistics about the disproportionate number of African-Americans on death row – or more to the point, people of any race who had murdered white people – was not very effective, however passionately we believed they communicated injustice. Telling stories of innocent people on death row was, and made a critical difference in reversing decades of negative momentum. It turned out that those not immersed in the criminal justice system were not as shocked as we were by the fact that the U.S. had an

incarceration rate ten times as high as Japan or Norway. They did perk up and listen when the cost and waste of mass incarceration was documented, or when we framed the debate in terms of whether the right people were in prison, with consequences for public safety.

Fourth, you will have picked up from my discussions of OSF's work in law, medicine and criminal justice, that I believe leadership, supported by investments in people, is essential to any movement for social change. The civil rights movement had the Highlander Institute; many of today's civil rights, environmental and economic justice leaders go through the Rockwood Institute's well-regarded program. The conferring of recognition on disciplines and sectors that haven't received much of it – doctors as concerned with easing the end of life, when inevitable, as with heroic rescues; drug policy researchers formerly starved of federal grants; civic-minded law graduates – is a powerful statement in itself, and building a cadre of such people to cohere and press forward together, is probably the most valuable thing we did at both of the foundations I have been privileged to lead. I wonder how that insight could be applied to the work in which you are engaged.

The fifth thing I'd recommend, and you are making a great start of it here, is that all successful movements need to create a community, and refresh and renew it regularly. People working for significant change against considerable odds – whether those odds are weighted by inertia, entrenched culture or powerful adversaries – need to come together regularly, to buck one another up, to learn from one another, to experience and nurture solidarity. This is particularly true for those of you who do their work in institutions without too many like-minded colleagues – and though this often, but not always correlates – in cities and states whose dominant politics and culture may feel unwelcoming or alienating. Overcoming isolation, and enriching connection, whether through gatherings like this or more virtual communities online, is important in movement-building and sometimes insufficiently attended to.

Sixth, let me stress the importance of time. Important change feels urgent, and a sense of urgency is a powerful fuel for social movements. At the same time, everything we know about social change tells us that it takes time, and a kind of patience -- or in any case, tenacity and resilience. Teaching a course on social movements to 22 incarcerated men in the Bard College Prison Initiative last fall reminded me, in reacquainting myself with the abolition, prohibition and civil rights movements, that the arc of justice is indeed long, an undertaking over generations where victories often lead to new challenges. Even movements that have seemed to make rapid gains in just a few years, like the ones for marriage equality or universal health care, have in fact taken a century or half of one, and having been won, or partially won, instantly require vigorous defense against the forces of reaction.

Finally, and more specifically to what you are all trying to do to advance experiential education, I come away from my readings, from the discussion so far,

and from talking with some of you with a strong sense that you are trying to communicate the value of your approach in a dominant academic paradigm that, however fragile, prides itself on rigor and may see some of your innovations and experiments as challenging that. I think it goes without saying, then, that whatever you do must accept the deep investment the legal academy has in rigor, but define it in a much broader way, a way that re-articulates timeless values to establish the value of the change you are working so hard to bring about.