

Why – and how – law schools need to teach entrepreneurship

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For the past ten years, entrepreneurship has been taking higher education by storm. There are now over 200 entrepreneurship centers in the United States alone.¹ Although most are in business schools, a significant number are housed elsewhere, such as in engineering², or in schools with an emphasis on music, art, or design.³ Entrepreneurship is expanding its influence to the fine arts, humanities and social sciences, shaping curricular reform,⁴ influencing research collaborations,⁵ and prompting “intrapreneurial” overhauls of the hidebound administrative bureaucracy.⁶

However, even on campuses with imaginative and visionary entrepreneurship education programs, law schools have been slow to get into the game. According to a recent study conducted by the Kauffman Foundation, perhaps 30 (of 200 ABA-accredited⁷) law schools are *integrally* involved with their campus’ entrepreneurship education programs.⁸ This is unfortunate, as it is probably the easiest way to facilitate educational experience in entrepreneurship for law students, since it does not require the establishment of new programs, clinics, or institutes.

¹ Source: Global Consortium of Entrepreneurship Centers, www.nationalconsortium.org. The GCEC has expanded at an astounding rate since its creation (as the National Consortium of Entrepreneurship Centers, or NCEC) in 1997 with just a handful of member schools to over 200 members this year, including some from Europe, the Middle East, South America, and Australia.

² See, for example, the Technology Entrepreneur Center in the College of Engineering at the University of Illinois at Urbana-Champaign (www.tec.illinois.edu) or the Center for Entrepreneurship and Technology in the College of Engineering at the University of California, Berkeley (www.cet.berkeley.edu).

³ See, e.g., Oberlin College (<http://new.oberlin.edu/office/creativity/>), Belmont University (http://www.belmont.edu/business/undergrad_soba/soba_programs/entrepreneurship.html) or the School of Visual Arts (<http://design.sva.edu/site/home>).

⁴ See, e.g., <http://www.aaup.org/AAUP/pubsres/academe/2009/JF/Feat/godw.htm>.

⁵ The University of Illinois’ Entrepreneurship Faculty Fellows program has been groundbreaking in this regard. <http://business.illinois.edu/ael/faculty/>.

⁶ See, e.g., <http://www.oecd.org/dataoecd/35/41/35327298.pdf> and <http://www.stevens.edu/entrepreneurship/>.

⁷ <http://www.abanet.org/legaled/approvedlawschools/approved.html>.

⁸ <http://www.entrepreneurship.org/en/entrepreneurship-law/interdisciplinary-programs-with-significant-law-school-involvement.aspx>

That said, a larger number of law schools have actually established small business and/or entrepreneurship clinics.⁹ This is a good start, and the numbers are growing. But the impact of these clinics on law students – and thus future lawyers – is limited to those relative few who participate in the clinics.¹⁰

There are certainly courses that cover selected aspects of entrepreneurship in the curricula of dozens of law schools. Most of these focus on some element of business planning, transactional work, valuation, entrepreneurial finance (especially venture capital), and/or intellectual property. A few delve into some of the unique problems of not-for-profit. Many are part of the clinics described above.¹¹

We can do more.

A good next step for law schools would be to integrate the teaching of entrepreneurship *into* the traditional law school curriculum, as a separate course, or as a unique and distinctive perspective on the content of other well-established courses that have tended to ignore entrepreneurship.

While it is true that every law school features courses in corporate law or business associations, the content of these courses is not coterminous with teaching about entrepreneurship. The standard business law courses tends to focus on the mechanics of entity formation, the rights and duties of corporate (and other entity) actors vis-à-vis each other, responsibilities for management decisions, the liability of the entity and its owners to outside creditors, methods of dispute resolution (like shareholder derivative suits, etc.), and the regulatory climate. The study of entrepreneurship, on the other hand, provides insight into the sources of opportunities and methodologies for exploiting those opportunities, the backgrounds, mindsets and skill sets of entrepreneurs, the (typically market, but sometimes legal) challenges faced by entrepreneurs, the options available for product development, funding and growth, and

⁹ Anthony J. Luppino, *Minding More Than Our Own Business: Educating Entrepreneurial Lawyers Through Law School-Business School Collaborations*, 30 W. New Eng. L. Rev. 151 (2007)(hereinafter, Luppino, *Entrepreneurial Lawyers*). According to Professor Luppino, nearly 25% of all ABA-accredited law schools now have a clinic devoted to small business, entrepreneurship, non-profit organizations, transactional work, or some combination of all four.

¹⁰ Clinical directors are becoming vocal about the need to take entrepreneurship education beyond the clinics. Northwestern University Law School has one of the best-known small business and entrepreneurship clinics. Its director, Thomas Morsch, JD, provides his perspective in an article for the Kauffman Foundation entitled, “*Crossing the Divide: Entrepreneurial Law*.” <http://www.kauffman.org/research-and-policy/crossing-the-divide.aspx>.

¹¹ Anthony J. Luppino, “*Can Do: Training Lawyers to be Effective Counselors to Entrepreneurs*,” REPORT TO THE KAUFFMAN FOUNDATION (January 30, 2008), Appendix 5. Available at <http://ssrn.com/abstract+1157065>.

mechanisms for staying ahead of the competition. When viewed in this light, the issues with which so many business associations courses occupy themselves are relatively low on a typical entrepreneur's list of concerns – something which often comes as a shock to the practicing attorney advising an entrepreneur for the first time.

Entrepreneurship has the potential to bring vital and distinctive perspectives not only to business law, but to any number of other courses which are standard fare at every law school in the country.

For example, there is a close correlation between corporate law and family law which becomes much clearer when both courses are viewed through the lens of entrepreneurship. By frequently-cited reports of the U.S. Small Business Administration, nearly 90% of all businesses in the United States are closely-held, and the vast majority of these are *family-owned*.¹² While much of the public discourse and a good deal of the curricular emphasis on corporations focus on large, publicly-traded entities, these represent a surprisingly small percentage of the American economic system. Furthermore, even the largest corporations were entrepreneurial ventures at one point (which presents interesting possibilities for discussions about growth and expansion). And family law courses tend to focus on divorce, custody, and child support. But a family is as likely – if not more likely – to be involved in a family business as it is to be embroiled in a divorce.

Tort law is another opportunity to offer students an entrepreneurial perspective. Negligence, strict liability and *respondeat superior* are major concerns for larger enterprises; what does the small start-up do to insulate itself from liability?

Bankruptcy, too, is a stand-alone course which takes on new pedagogical dimensions when entrepreneurship is considered. If, as many entrepreneurship scholars note, the vast majority of new businesses end in failure within the first few years,¹³ then insolvency is quite likely a part of many entrepreneurs' experience. But it is also true that many successful entrepreneurs have come back from earlier failed businesses to launch spectacularly successful ones. Do bankruptcy courses in law school address the

¹² See., e.g., <http://www.amserv.com/familystatistics.html>; <http://definitions.uslegal.com/c/closely-held-corporations/>; Jim Lee, "Family Firm Performance: Further Evidence," Vol. 19, Issue 2 FAM.BUS.REV., 103 (Blackwell Publishing, June 2006), <http://www.moyak.com/papers/small-business-statistics.html>; <http://sbinformation.about.com/od/buyingorselling/a/succession.htm>;

¹³ Scott Shane, THE ILLUSIONS OF ENTREPRENEURSHIP: THE COSTLY MYTHS THAT ENTREPRENEURS, INVESTORS, AND POLICY MAKERS LIVE BY, p.37, Yale University Press (2008)(citing statistics from the U.S Small Business Administration on start-up failure rates).

role that business failure plays in subsequent entrepreneurial success, or balance the societal costs and benefits?

Property law is also essential to the entrepreneurial impulse. Not only intellectual property (patents, trademarks, trade secrets, copyrights) which is commonly understood to be among the necessary barriers to entry for an entrepreneurial venture, but also traditional property, and the right of private ownership thereof, which forms the basis for creating – and investing in – a venture in the first place.

Government regulations and shifting market demands are rich sources of entrepreneurial opportunity. In that vein, courses like environmental law, water law, land use planning, and other “green” courses could explore the opportunities for entrepreneurially-minded individuals, not to mention the legal support for those efforts. Courses that teach students about regulatory and administrative demands that affect some businesses (such as pharmaceuticals and medical devices) more than others can create dynamic in-class discussions on the comparative merits of such regulation, and the ways that it tends to favor existing enterprises versus start-ups who face often insurmountable financial hurdles to new product introduction.

And then there is taxation: individual taxation, corporate and other entity taxation, and (drawn from recent headlines) estate taxation.

How do entrepreneurs factor all of these laws affecting their enterprises into their decision to start a venture, and into its operation?

These are just a few ways that entrepreneurship could be better integrated into the law school curriculum. And there are compelling reasons why it should be.

First, since passage of the Bayh-Dole Act in 1980,¹⁴ universities have been able to capitalize on inventions developed on their campuses by faculty and student researchers. This has resulted in huge outlays for technology commercialization, and the need to understand all aspects of intellectual property, licensing arrangements, and spin-out companies.¹⁵ While licensing revenues have yet to become a significant

¹⁴ See Association of University Technology Managers: http://www.autm.net/Bayh_Dole_Act.htm

¹⁵ According to the *Licensing Activity Survey* published by the Association of University Technology Managers, in fiscal year 2009, there were \$53.9 billion in total research expenditures alone. This does not include the costs associated with the establishment and maintenance of technology management offices at research universities across the country. AUTM boasts over 300 members, including representatives from universities, research institutes and hospitals, and governmental organizations.

percentage of even the most successful institutions' operating budgets,¹⁶ the impact has been substantial, and, given the continued emphasis on entrepreneurship and innovation, promises to grow.¹⁷

Law schools with courses in technology transfer and licensing (and these are beginning to crop up) can contribute much here. Universities have traditionally been forced to seek outside legal advice, as neither university general counsel nor law school faculties have had the practical experience or scholarly expertise to advise their campus administration on the legal or economic mechanics of tech transfer.

Second, the meteoric rise of social entrepreneurship as a sort of "sub-discipline" within entrepreneurship more generally¹⁸ is producing huge demands for legal advice given to non-profit organizations. Faculty, staff and students involved in many small business legal clinics acknowledge that they have insufficient experience for giving that advice.¹⁹

But none of the above curricular suggestions address what I view to be the most glaring intellectual gap. The vast majority of courses in entrepreneurship in law schools – as is the case in business schools, as well, incidentally – examine what I have characterized as the "internal context" of entrepreneurship: the idea, the technology, the founder, and the business plan.²⁰ At most, one sees some discussion of the *market* or the *industry*. But

¹⁶ *Id.* AUTM reports \$2.3 billion in licensing income *in toto* for FY2009.

¹⁷ By way of comparison, prior to passage of the Bayh-Dole Act, fewer than 250 patents had been issued to American universities each year, and these resulted in minimal commercialization. <http://www.autm.net/FAQs/2186.htm>. In fiscal year 2009, there were over 20,000 disclosures nationwide, over 12,000 *new* patent applications, nearly 3500 new patents issued, 596 new companies formed, and 658 new products introduced into the marketplace. <http://www.autm.net/AM/Template.cfm?Section=Documents&Template=/CM/ContentDisplay.cfm&ContentID=5237>.

¹⁸ See, e.g., <http://www.independent.co.uk/student/postgraduate/mbas-guide/students-seek-a-responsible-angle-to-their-studies-2099741.html>; Diane Middleton, "MBAs seek social change," WALL STREET JOURNAL ONLINE, October 15, 2009, available at <http://online.wsj.com/article/SB10001424052748704107204574469602649140462.html>; <http://davidbornstein.wordpress.com/faq/>; Sujata Srinivasan, "Rise of the Other Multinational," THE INDIAN EXPRESS (North American edition), <http://www.tgfworld.org/IE-SocialEntrepreneurship.pdf>; "Rise of the social entrepreneur," THE ECONOMIST (February 23, 2006), <http://www.economist.com/node/5517666>.

¹⁹ Among those clinics listed in Professor Luppino's article, footnote 9, *infra*, only five expressly list "non-profit" in their titles (though more, obviously, serve not-for-profit entities). Additionally, the members of Kauffman's ELAW listserv include a significant number of directors of clinics. The need for more education and information to advise the growing number of non-profit requests has been a common discussion thread.

²⁰ Laura L. Hollis, "Entrepreneurial Policy Design: Grassroots Governance from Human Nature and Rational Self-Interest," (forthcoming, 2011).

there is virtually nothing about the “external context” of entrepreneurship: the social, cultural, economic, legal and political climate in which entrepreneurship thrives, as well as where it founders.

In other words, what are needed are courses which examine the law as it *affects* entrepreneurship.

Why should we care? Because of the nexus between entrepreneurship and economic growth, and the impact that entrepreneurial activity has on widespread prosperity, improvement in the quality of human life, including the alleviation of poverty, and even transformation of political systems.

Some data are instructive here. How do entrepreneurship and small business impact the U.S. economy?

According to the most recently available updated U.S. Census data,²¹ of the more than 25 million U.S. firms, 75.5% (or around 19.5 million) are small “nonemployer firms,” (in that they report no payroll), and consist largely of sole proprietorships, general partnerships, or other unincorporated businesses. While these firms account for only 3.4% of business receipts, since 1997, they have been growing faster than “employer firms.”²²

And while millions of Americans do work for large companies, of the remaining 5.9 million firms which actually have a payroll (“employer firms”), approximately 5.1 million (or 86 %) *employ fewer than 20 people*.²³

This is significant when one considers U.S. Small Business Administration studies showing that approximately *half* of the net new jobs have been tended in recent years to be created in the smallest firms – firms with fewer than 20 employees.²⁴

²¹ 2000 Census data updated as of 2004; the 2010 Census data is not yet available.

²² <http://www.census.gov/epcd/www/smallbus.html#Nonemployers>. But more recent information suggests that entrepreneurial activity is just as important now, in the midst of the economic downturn. See, e.g., Kristie Arslan, “Self-employment keeps the unemployment rolls low,” THE HUFFINGTON POST (January 10, 2011). <http://www.huffingtonpost.com/kristie-arslan/self-employment-keeps-the-b-806641.html>. In this article, Ms. Arslan, the Executive Director of the National Association for the Self-Employed (NASE) explains that 23 million people are self-employed business owners, and that 77% of “small businesses” are entrepreneurial enterprises.

²³ <http://www.census.gov/epcd/www/smallbus.html#Nonemployers>.

²⁴ Robert A. Bednarzik, “The role of entrepreneurship is U.S. and European job growth,” MONTHLY LABOR REVIEW, p. 6 (July 2000)(citing *Small Business Growth by Major Industry, 1988 – 1995*, (Small Business

Perhaps more surprising is the average annual *income* of the vast majority of American small businesses. Of the 5.7 million employer firms listed in U.S. government data from 2002, 4.5 million (or around 80%) made less than \$1 million/year; 3.7 million of those made less than \$500,000/year.²⁵ Only a very small percentage of corporations made millions, tens of millions, or over a billion dollars each year.

These data are not well-known to many. And while ignorance about entrepreneurship is unfortunate in the general population, it is potentially catastrophic when policymakers have little to no understanding of how public policy can affect entrepreneurship, for good or for ill.

Consider the sheer volume of laws affecting entrepreneurs, innovators, and small business owners which are passed every year by Congress and state legislatures, and the proportion of those elected representatives which are lawyers.

By way of example, in the outgoing 111th Congress, 54 of 100 United States Senators were attorneys. 161 of the 441 members (or 36%) of the U.S. House of Representatives were attorneys. Lawyers represented nearly 40% of the 111th Congress.²⁶

Nor is it just the legislative branch of government. President Barack Obama has a law degree, as do Vice President Joseph Biden and a significant number of cabinet members, including Secretary of State Hillary Clinton, Secretary of the Interior Kenneth Salazar, Secretary of Agriculture Thomas Vilsack, Commerce Secretary Gary Locke, Homeland Security Secretary Janet Napolitano, and United States Trade Representative Ronald Kirk.

And this is without aggregating the number of attorneys among U.S. governors and in state legislatures, or the countless numbers in regulatory and administrative positions in federal and state governments.

As recent events have demonstrated, economic downturns in particular produce calls for government policies that foster the creation and growth of businesses, with a corresponding addition of new jobs. And yet the people in whom we repose trust and confidence for drafting, enacting, and implementing these policies probably never had

Administration, Office of Advocacy, Washington, 1998) and *Mergers and Acquisitions in the United States, 1990-1994*, (Small Business Administration, Office of Advocacy, Washington, 1998)).

²⁵ Id.

²⁶ <http://www.dailypaul.com/node/94514>.

the opportunity to take a single course in entrepreneurship and public policy while in law school. A Google search can produce instance after instance of befuddlement that policies espoused by the President or enacted by Congress have not produced economic growth or perceptions of economic opportunity.²⁷ But, given the minimal exposure of most lawyers to entrepreneurship, it should come as no surprise that the many of the policies espoused and enacted by our political leadership not only do *not* encourage entrepreneurship; they actively thwart the creation and growth of successful businesses.

This ignorance is pernicious and destructive. A good example is the recent debate over the increase in the federal estate tax. Lawmakers were quoted making demonstrably false assertions about the lack of generational involvement in family business,²⁸ as justifications for reestablishing the so-called “death tax,” – confiscatory levels of taxation at a founder’s death, which many argue could result in the family’s loss of the business.²⁹

Of the huge number of family-owned businesses in this country, only 30% make it to the second generation, and less than 15% to the third.³⁰ Given the contributions of family business to the United States economy, federal and state policies should *help* with complex succession planning, rather than implementing policies which make it *more* difficult for businesses to be continued by the families which started them.

It bears stating once again that neither “business” nor “entrepreneurship” is synonymous with “big business.” The interests of large national and multinational corporations often conflict with those of entrepreneurs. This becomes even clearer when one considers that some of the best ideas for new businesses are those which *compete* with established enterprises.³¹ The relationship between big business and big government is well-established; the largest enterprises can afford to lobby for policies which protect their own interests, close out potential competitors and disruptive innovations, or carve out exceptions for themselves to laws which otherwise bind (and thus competitively hamper) smaller businesses and start-ups.³² When policymakers,

²⁷ See, e.g., http://money.cnn.com/2010/07/14/news/economy/obama_jobs/index.htm; Lori Montgomery, *Business leaders say Obama’s economic policies stifle growth*, WASHINGTON POST ONLINE (June 23, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/06/22/AR2010062205279.html>.

²⁸ See, e.g., <http://www.breitbart.tv/barney-frank-death-tax-not-punishment-heirs-didnt-do-anything-to-deserve-inheritance/>.

²⁹ http://www.nodeathtax.org/uploads/view/2325/cost_of_compromise.pdf.

³⁰ As cited in <http://www.familybusinessbattleground.com/2010/03/family-business-succession-planning-and-the-family/>.

³¹ Clayton Christenson, *THE INNOVATOR’S DILEMMA*, Harper Business Essentials (1997).

³² See, e.g., <http://blogs.ajc.com/jamie-dupree-washington-insider/2010/12/07/more-health-waivers/>.

ignorant of or oblivious to the role of entrepreneurs, pass legislation which unduly favors big business in this way, society faces a downward spiral of increasing prices, decreasing quality, and diminished accountability. This is completely antithetical to entrepreneurship.

The benefits of educating future lawyers about entrepreneurship do not just inure to businesses; importing some of the *entrepreneur's* experiences to the lawmakers allows the benefit to flow both ways.

Law creates powerful incentives and disincentives. Indeed, promoting or discouraging conduct is often the primary purpose behind proposed legislation. Among the risks, however, are the unintended consequences, and many of these are directly attributable to lawyers' blindness to or unfamiliarity with the very human behavior that they are attempting to govern.³³

So, too, are entrepreneurs often wrong about what the public wants. But they must ultimately adapt in response to public behavior, or risk failure. An understanding of entrepreneurial motivations, skills and best practices can therefore not only enhance policymakers' ability to draft laws which promote venture creation and growth, but also strengthen the efficacy of *all* laws, and mitigate so much of the fiscal profligacy and waste that is attributable to poorly drafted legislation. Lawmakers, like entrepreneurs, would like to be judged by their intentions, but the public insists that they be judged on their *results*.

Finally, in a global economy, it is also important to understand that it is not just the United States or developed nations generally which benefit from political encouragement of entrepreneurial activity. Respected writers and scholars like Scott Shane,³⁴ David Bornstein,³⁵ Paul Polak,³⁶ Alvaro Vargas Llosa,³⁷ and 2006 Nobel Peace

³³ Hawaii's recent efforts to implement universal health care for all children is illustrative: "Gov. Linda Lingle's administration cited budget shortfalls and other available health care options for eliminating funding for the program. A state official said families were dropping private coverage so their children would be eligible for the subsidized plan. 'People who were already able to afford health care began to stop paying for it so they could get it for free,' said Dr. Kenny Fink, the administrator for Med-QUEST at the Department of Human Services. 'I don't believe that was the intent of the program.'" http://www.breitbart.com/article.php?id=D93SBEUG0&show_article=1. The story is remarkable for at least two reasons. First, some very rudimentary market sampling or focus groups would have revealed this result before the program was implemented. Second, the state of Hawaii demonstrated uncharacteristic fiscal responsibility by acknowledging that the program was bankrupt not long after it was launched.

³⁴ See n. 13, *infra*.

³⁵ David Bornstein, *HOW TO CHANGE THE WORLD: SOCIAL ENTREPRENEURSHIP AND THE POWER OF NEW IDEAS* (Oxford University Press, 2004).

Prize winner and Grameen Bank founder Muhammad Yunus³⁸ speak frequently about the need for developing nations to adopt a more entrepreneurial spirit, and for the governments of those nations to eliminate the bureaucracies and regulations that thwart entrepreneurship, foster corruption and bribery, drive legitimate enterprise underground, and entrench poverty. As passionate as many law students are about “making the world a better place,” vast numbers of them are utterly unaware of the role that entrepreneurial activity can play in such efforts, or the role that they themselves can play as attorneys in making our society – and others’ – *more* entrepreneurial. We are not doing enough to make sure that our own legal system remains hospitable to entrepreneurship by educating future leaders about the vital interplay between public policy and venture creation and growth.³⁹

Infusing the law school curriculum with entrepreneurship content would go a long way toward addressing the gaps identified in this article. Law schools have tolerated a gaping hole in their curricula by ignoring entrepreneurship, or marginalizing it into the basic business associations or intellectual property courses, or the clinical setting. This shortsightedness has been shared by our colleagues in business schools, which for years insisted that they did not need to teach entrepreneurship as a subject separate from management or strategy. Happily, this view is changing, as business schools have begun creating doctoral programs in entrepreneurship.⁴⁰ So, too, should law schools recognize that entrepreneurship deserves its own place in the law curriculum, distinct from corporate law, and even beyond experience in clinics.

The economic future of the United States – and the rest of the world – depends not only upon business leadership, but also upon *legal and political* leadership that understands

³⁶ Paul Polak, *OUT OF POVERTY: WHAT WORKS WHEN TRADITIONAL APPROACHES FAIL* (Berrett-Koehler Publishers, 2008).

³⁷ Alvaro Vargas Llosa, *LESSONS FROM THE POOR: TRIUMPH OF THE ENTREPRENEURIAL SPIRIT* (Independent Institute, 2008).

³⁸ Muhammad Yunus, *CREATING A WORLD WITHOUT POVERTY: SOCIAL BUSINESS AND THE FUTURE OF CAPITALISM* (Public Affairs, 2009).

³⁹ It is worth mentioning here, in passing, that it is not just the ability to *start* companies which contributes to economic growth. Some of the poorest nations on earth, with very low per capita income, have higher rates of entrepreneurship (defined in this context as “self-employment”) than the United States. What is essential is that start-ups must have a legal, political and economic climate in which they can *grow*. See, e.g., Zoltan Acs, “How is entrepreneurship good for economic growth?” *INNOVATIONS* (Winter 2006), p. 99.

⁴⁰ Among the schools which now offer Ph.D. programs in entrepreneurship, are Indiana University, Syracuse University, MIT, the University of Missouri at Kansas City, and the University of Washington. See <http://www.slu.edu/x17968.xml> for a list published by St. Louis University, as originally aggregated by Harold Welsch of DePaul University. More programs are being added each year, as demand for professors in entrepreneurship grows.

the motivations of entrepreneurs, the sources of ideas, the proper climate for innovation, venture creation, growth (and yes, failure), the relationship between entrepreneurship and prosperity, as well as the ways in which the legal system can protect the structural underpinnings which make entrepreneurship possible. The law schools which seize these curricular opportunities – like the entrepreneurs they emulate and educate about – will be the ones producing tomorrow's public policy leadership.