In Search of Skeptics

By Lawrence Lessig

In this article, reprinted with permission from The Standard, Stanford law professor Lawrence Lessig lauds the Law School's historic "discipline of skepticism," which he says is evident in the creation of the new required first-year course, "Technology, Innovation, and Society."

There's a famous movement in the legal world called "law and economics." Originally a conservative cause (famously associated with Judge Richard Posner of the Seventh Circuit Court of Appeals) but quickly attracting advocates of all stripes (including the decidedly unconservative Judge Guido Calabresi of the Second Circuit), the movement presses law to justify itself in terms of its consequences. What good does a particular regulation do? Does it achieve what it promises? Is there anything more to its authority than its pompous invocation of time immemorial?

Law and economics was born at the University of Chicago Law School. In the early 1950s, Dean Edward Levi (later President Ford's attorney general) invited Chicago economist Aaron Director to sit in on his antitrust class. The story goes that for four days a week, Levi would teach antitrust law. On the fifth day, Director would show why everything Levi had said—from the perspective of economics—was bunk. By the end of the course, the legend goes, the dean was convinced, and a movement was born.

The movement remade antitrust law. A student of the time, Robert Bork, later carried its message into the courts. The first edition of Bork's important book, The Antitrust Paradox—long delayed because of Bork's own service in the government—declared the failure of U.S. antitrust law to understand the most basic facts about economics. Bork's warnings struck a cord: His second edition had to confess, somewhat sheepishly, that the Supreme Court's view had changed markedly over time. The high court had reversed many of the doctrines Bork and others had attacked; it had embraced the core tenets of "the Chicago School." And while battles in antitrust law continue to this day, and though "the Chicago School" has yet to reign supreme, there is no doubt that the field has been remade by the requirement that the law confront and justify itself in terms of the consequences.

We may be seeing the beginning of a similar revolution. Once more, its home is the law school of the University of Chicago.

Beginning this fall, the school's first-year law students will be required to take a course called "Technology, Innovation and Society." The course will examine how law and extralegal systems affect the development of new businesses and rapidly evolving technology. It will give incoming students an introduction to intellectual property and antitrust law. And it will force them to consider how the law impacts innovation. Its aim, like the course Levi and Director taught, is to be critical of the law. The question it will ask is how the law affects innovation—and how bad law can stifle it.

It may surprise you that this is something new in legal education. There are not many businesses where divisions don't regularly have to justify themselves. In law, this isn't the case. Every once in a while, reform movements are born, but these are rare. The norm is that divisions in the legal bureaucracy, once born, survive. Worse, they specialize so that only the practitioners know enough to know about the division, and outsiders are afraid to even peer in.

This was the fate of intellectual property law for most of the last few hundred years. Copyright law was a fairly contained practice. Until the birth of Xerox machines, it was a law that regulated primarily publishers. The law affected companies with printing presses, not ordinary people. The same isolation was true with patent law—an even more specialized and more arcane field. Patent law at least had the virtue of remaining relatively stable over the past 200 years. (While the term for copyright law has increased from an initial term of 14 years to a current term that can last more than 140 years, the patent term has remained fairly close to the initial grant of 14 years.) But patent law too has remained incestuous. Its current commissioner sees his job as serving the patent office's "customers." Who are they? You might ask? Well, patent holders, of course—though the burden of bad patents is felt by the economy as a whole, not just patent office "customers."

The Internet has flushed these two law divisions into the open. Now that everyone on the Net is a "publisher," copyright lobbyists have pushed Congress to radically increase the regulation of copyright on the Net. But now the control is exercised over ordinary people. Put up a Simpsons site for your fan club, get a letter from the copyright and
trademark police. Store an MP3 file of a favorite song from your CD collection on your college Web server, get a letter threatening expulsion unless you remove it fast.

Ditto with patent law. The recent explosion of concern about the effect of patents in cyberspace is a reaction to legal imperialism. Software coders had not lived in a world where their right to write software was regulated by bureaucrats in Washington. The founders of the Internet had not experienced life where every innovation had to be passed by the lawyers’ committee. An unregulated—and extraordinarily creative and innovative—space has begun to balk at the idea that business here will be lawyers’ business as usual.

In many of these columns, I have written about this conflict. I’ve been skeptical about what my profession will do to cyberspace. I’ve been anxious about its ability to be self-critical about its role. We in law are not very good at stepping outside of our mandarin practice. We don’t have the tools and ordinarily don’t have the attitude. We get comfortable in our approach and greedy at the idea of a burgeoning market of new legal billables.

Thus the need for more from the University of Chicago. For the great virtue of Chicago is not the triumph of economics over law, or the end of law in the face of economics. The virtue is a discipline of skepticism about the pronouncements of self-aggrandizing lawyers, who have no method for understanding whether their practice does any good. It is a demand that the law justify itself, not in self-defined terms, but in terms external to the law. Does it promote innovation? Does it preserve creativity? Does it enable change?

We need this skepticism now, especially regarding regulation of the Internet. We need this willingness to think about the effects of regulation on the process of innovation. We come from a past that was extremely skeptical about state-granted monopolies. What we call “the intellectual property clause” of the Constitution, our framers would have called the “monopolies clause.” The framers established—in the face of strong skepticism by Jefferson—a narrow class of cases in which the state might grant a legal monopoly to an idea or an expression to inventors when they had a novel idea, to authors when they expressed something original. But we live in a time when everyone feels entitled to a state-backed monopoly, when every idea wants a patent, and every copyright wants to be perpetual. We have allowed this limited power to grow beyond recognition, and lawyers have been the stewards of this growth.

This may be a good thing. It may be that the massive increase in patents induces greater innovation. It may be that facilitating greater control over online speech will produce better and more speech.

Maybe. But one can’t know this in the abstract. One knows it only by studying it. And one is open to studying it only when one is trained in a context where the question is being asked. This is the virtue of the education of the Chicago School. It will force the question generally—not just among the specialists, but also among every University of Chicago law student.

It’s about time. And so too is the danger of this legal imperialism also about time. If the imperialists are wrong, then we will have lost something important by the time the Internet’s Robert Bork graduates from Chicago.

We don’t have 30 years to get this one right.

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