ABOVE THE LAW

New ABA Law School Rules Have Bari Weiss Blog Drawing Some WILD Conclusions

The anti-wokeness movement is based on being just a little bit wrong at every turn until they end up with massively wrong conclusions.

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Presenting something of a "grand unified theory" of nonsense, Bari Weiss's ~~Roullete Wheel O'Grievances~~. Substack put up a story yesterday by Washington Free Beacon writer Aaron Sibarium, bemoaning how the ABA is going to spread critical race theory, forcing lawyers to betray the profession, and turn America into South Africa.

Does any of it make a lick of sense? No.

But it is a much more detailed treatment than most of the anti-wokeness crowd can cobble together, providing a fascinating window into how the whole movement rests on a compounding series of rickety faulty premises. If you misunderstand everything *just a little bit*, things can get wild.

So what's wrong with the new ABA rules? We've already chronicled the whole fields of straw soldiers involved in the conservative complaint that the ABA will require law schools to at least nod toward racial disparities in the law (it doesn't even have to be a class!). Despite the hype, the requirement is much more a bare minimum recognition that race still exerts influence on the American legal system.

But that's not stopping the whining. Yesterday, Walter Olson tweeted to bemoan that "ABA accreditation rules will soon push all law schools down the same road" where "the same road" means "admitting racial disparities exist." It's like the tale of the emperor wearing no clothes, except FedSoc gets really pissed off at the little kid pointing out what everyone is seeing.

Starting this Fall, Georgetown Law School will require all students to take a class "on the importance of questioning the law's neutrality" and assessing its "differential effects on subordinated groups," according to university documents obtained by Common Sense.

What happened to conservatives fanning the criticism of Joe Biden's egregious racially disparate drug sentencing laws? A good deal of effort went into using that to drive a wedge between Biden and more liberal corners of the Democratic Party. While Biden's backtracked on his disastrous former policy, one might have thought the whole affair would instill in conservatives at least a passing understanding of how the rule of law isn't racially neutral.

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Actually, can we just agree that schools fulfill the course by blaming Joe Biden for the crack-powder cocaine disparity? Would that put these people at ease? Because that seems like a fair trade.

The relatively straightforward ABA requirement has nothing to do with critical race theory — other than sharing the word "race" perhaps — but it seems that's enough of a hook to make the leap toward the more provocative theory. Or at least more provocative as conservatives imagine it to be.

What is this "critical race theory" according to this worldview?

The argument went like this: Since the United States was systemically racist—since racism was baked into the country's political, legal, economic and cultural institutions—neutrality, the conviction that the system should not seek to benefit any one group, camouflaged and even compounded that racism. The only way to undo it was to abandon all pretense of neutrality and to be unneutral. It was to tip the scales in favor of those who never had a fair shake to start with.

Sorta?

This starts out pretty close to accurate. But critical race theorists aren't likely to say the system should "be unneutral" as much as they'd acknowledge that some sort of Platonic neutrality is unlikely and that the law is better off recognizing that it's unachievable and engage the law in a state of deconstruction and simultaneous reconstruction.

To this end, it's not as much about tipping "in favor of those who never had a fair shake to start with" as much as unrigging a system fixed from the beginning. Slaveholders didn't construct a system "tainted by racism" as much as one *designed for the express purpose* of locking in their privileges as slaveholders. But the above description blows by this conclusion and bolts the white grievance rhetoric of affirmative action on an unrelated theory. And this just compounds from here.

And the big problem critical race theory invites, per the article, is a population of students willing to question lessons professors haven't thought critically about in years. Oh my! Questions? In a law school? Never!

Professors say it is harder to lecture about cases in which accused rapists are acquitted, or a police officer is found not guilty of abusing his authority. One criminal law professor at a top law school told me he's even stopped teaching theories of punishment because of how negatively students react to retributivism—the view that punishment is justified because criminals deserve to suffer.

"I got into this job because I liked to play devil's advocate," said the tenured professor, who identifies as a liberal. "I can't do that anymore. I have a family."

It's difficult to imagine a sentence that better translates to "I'm just an asshole" than "I liked to play devil's advocate." You play devil's advocate because you have to for the sake of honing an argument, not because you *like* it.

In any event, I've talked to the students who object to these sorts of lessons, and they don't object because they don't want to cover the material, they object for a couple reasons. One because professors deploy gratuitous hypos to purposely shock and offend students. Probably because they "like to play devil's advocate."

But more importantly, two, because professors can't get beyond "the rule" to engage in a discussion about why that's the rule, or how practitioners can engage the existing rule to get results better attuned to justice.

How does one protect, say, the exonerated Central Park 5 from rape allegations while recognizing that the system is historically stacked against women who've been attacked? There's an important discussion to be had there about challenging eye witness testimony and moving to toss coerced confessions. A practical education would engage how lawyers can get justice within a broken system. But the professors complaining about this don't want to have that conversation because it requires them to defend the rules they parrot and a lot of them are too intellectually calcified to do that.

Which is part of the reason almost every one of the "some people are saying" quotes in this piece belong to someone unwilling to publicly defend their premise.

Cue the sad, sad law students:

A Harvard Law professor told me that students face "social death" if they buck the consensus. Students at other law schools—including Yale, NYU, Boston College, Georgetown, and Northwestern—told me much the same thing. "You want to have friends, so you don't want to say anything controversial," one Georgetown Law student explained.

People finally decided to judge people not "by the color of their skin but by the content of their character" and now these folks are whining about that! Imagine the gall of believing that people are obliged to be your friend even if you're a jerk. The unspoken implication in these self-censorship discussions is always "I don't understand why people who *do* look like me aren't my friend just because I discriminate against people who *don't* look like me." To that end, critical race theory is the psychologist of The Simpsons, who Homer described as a profession that "turns wives against husbands, children against fathers, neighbors against me."

But they never really worried about not making friends with the people on the wrong end of their policy views before — they just don't like that the ranks of those folks keeps getting bigger.

And now comes the spillover to ruining the practice of law. Because this cluttered version of "critical race theory" is coming for the principle that everyone deserves the lawyer of their choice because John Adams something something.

The article begins by citing criticism David Boies faced for representing Harvey Weinstein — a representation that Boies has since said involved errors, so… the critic the article criticizes was kind of a canary in the mine, making this a curious example. Check out where it moves next:

When congressional Republicans attacked attorneys for representing Guantanamo detainees, for example, the entire profession rallied around them. The American Civil Liberties Union noted that John Adams took pride in representing British soldiers accused of taking part in the Boston Massacre, calling it "one of the best pieces of service I ever rendered to my country."

The difference, of course, is that these are instances of defending the accused against the awesome power of the state and not "billing yourself out $1000/hour to negotiate NDAs." And there is an argument for taking a stronger stance on the right to civil representation — a civil *Gideon* for people currently losing their homes because they can't afford a lawyer is an important justice issue — but that's not the same thing as representing a corporation in its latest civil spat with a rival corporation. John Adams representing the British is light years from the civil context, if for no other reason than the difference in the burden of proof.

But then we get to this quote from Andrew Koppelman, who despite his "liberal" tag was most recently seen sticking his head into the Emory Law Journal controversy to claim that the journal's editors were somehow obligated to publish an article they felt below the standards of the publication. Because how dare the *editors* question professors just because it's… actually their publication to run? Anyway, Koppelman gives a quote that's accurate as far as it goes:

"The idea that guilty people shouldn't get lawyers attacks the legal system at its root," Andrew Koppelman, a prominent liberal scholar of constitutional law at Northwestern University, said. "People will ask: 'How can you represent someone who's guilty?' The answer is that a society where accused people don't get a defense as a matter of course is a society you don't want to live in. It's a totalitarian nightmare."

Right. "Guilty" being the operative word because this is unique to the criminal justice system. Its square-peg-round-hole insertion into this discussion doesn't do much to advance the argument.

But the piece leans into this as it frets about woke Biglaw. Although it seems like the "problem" described actually has less to do with woke law students than woke business school graduates:

Law firms also worry about losing their corporate clients, which, like many American institutions, have grown more stridently ideological in recent years. "I knew of and heard of clients protesting cases we were taking," the recently retired lawyer said. "If you were going to do a gun rights case, you would incur the wrath of other clients."

This is how a free market economy works. Clients can choose to spend their money where they want and if they don't want to spend their money with your firm they really don't have to. Most

of these client defections are about transactional work anyway, which is as far from some principled Atticus Finch stance as you can get. And this all happens because clients — unlike the folks building an anti-woke infrastructure based on misconceptions — actually realize that representing a gun rights case is not a professional obligation like defending the accused, but rather a business choice to extract some profit and other clients don't have to be a part of it.

Ken Starr, the former solicitor general who led the 1998 investigation of Bill Clinton, agreed. "At a time when fundamental freedoms are under assault around the globe, it is all the more imperative that American lawyers boldly stand up for the rule of law," Starr said. "In our country, that includes—especially now—the representation of controversial causes and unpopular clients."

Guy who oversaw a culture of sexual assault coverups is… an interesting choice for an expert.

The whole thing wraps up with the biggest doozy of them all. As the FTC embraces the value of racial equity in the marketplace, the article muses that America is on course to repeat South Africa's experience with violent protests after the jailing of Jacob Zuma.

Because the source of South Africa's problems was the country's effort to address racial inequality through a questionably implemented policy — and not, say, the nearly half century of Apartheid that created that inequality in the first place.

So, to recap, they've got the ABA requirement wrong, the concept of critical race theory wrong, the reason students are pushing back on professors wrong, the principle of everyone deserving a right to criminal defense wrong, the whole concept of a free market for legal services wrong, and all this adds up to South Africa-style riots. Which is wrong. But every turn along the way there's *just enough* truthiness that it feels like the next logical leap almost makes sense.

One quoted lawyer — anonymously, of course — offered what may be the most unintentionally hilarious insight of the whole piece:

Once you depart from the idea that we're all people under the law, it really matters who is in power. That starts to feel like the rule of man, not the rule of law.

The United States Supreme Court is on the precipice of overruling a half century plus of established law and it's about to do it as an extension of the culture war rhetoric stirred up by the conservative legal movement. It's almost like respecting the law isn't the issue as much as ensuring that the "rule of man" stays in the hands of the "man" who had it first.

Which is about as good an argument in favor of what critical race theory really means as one could make.