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CHALLENGING INJUSTICE: A DEDICATION TO BOB MCKAY

NORMAN REDLICH¹

At first blush it would appear entirely appropriate that a conference entitled "The Justice Mission of American Law Schools" should be dedicated to the memory of Robert B. McKay, my good friend, colleague, and predecessor as dean at New York University Law School. Bob's name leaps to mind at the mere reading of the title. Bob rose above the traditional debates that seem to engross legal educators—the university versus the profession, skills versus scholarship, theoretical versus applied, simulation versus live client—we have heard it all. His was a voice that transcended these controversies and directed us to focus on broader issues such as—the pursuit of justice.

One would think, therefore, that Bob McKay would have been impelled to write about the meaning of justice, particularly since, as a constitutional law scholar, he taught in an area, and in an era, that gave rise to a veritable explosion of scholarship relating to moral and political philosophy. *Roe v. Wade*² unleashed a tidal wave of scholarship that, at times, has eschewed traditional doctrinal analysis. Constitutional theory, the role of courts in a democracy, attention to the so-called openended clauses of the constitution—these trends led to consideration of moral values and the meaning of justice. A whole generation of scholars followed this path. Bob did not. He did not have a booth at the constitutional theory bazaar. Although he actively recruited scholars like Ronald Dworkin, and supported the research efforts of legal philosophers on the NYU faculty, Bob McKay was not a major, or even minor, player in the world of jurisprudential scholars. He was an intellectual leader at NYU where he taught constitutional law, and in later years professional responsibility and alternative dispute resolution, in a highly competent, but traditional manner. His considerable body of scholarship focused, until the very end, on what courts did, the issues that courts were facing and likely to face, and problems of the profession.

It is, of course, self-evident that Bob McKay was primarily a legal educator, and, indeed, a preeminent leader in that aspect of the profession. But more than any other law school dean, Bob McKay always presented the image of someone who, with his feet firmly planted within the university, was looking outward toward the profession. He was more at home at ABA meetings than at AALS meetings. Thus, the organized bar and the profession generally, sensing the

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² 410 U.S. 113 (1973).

direction of Bob's internal gyroscope, reached out to him in ways too numerous to describe, to assume major positions of leadership in dealing with the most pressing problems of our profession—tort reform, pro bono responsibilities of lawyers, mandatory continuing legal education, the structure of lawyer discipline, revision of ethics codes—he was the unquestioned leading spokesperson for the legal academic community within the vast structure of the American Bar Association. And, while Bob received honorary degrees from eight universities, he was honored primarily for his contributions to legal education, and to the profession, and not as a student of justice in a jurisprudential sense.

Why, then, is it so appropriate that a conference on the "Justice Mission of American Law Schools" be dedicated to a person who, as far as I know, did not write about the meaning of justice. A partial answer lies in the title that Professor Barnhizer selected for the conference: "The Justice Mission of American Law Schools." The title suggests the concept of action, of doing something, a journey. A mission has a starting point and a goal; it connotes more of a state of action than of contemplation. But, our title still suggests that one can define something called "justice," otherwise, toward what end is our mission? Why do we start the journey? If so, what role does Bob McKay's career play in our work?

The real answer, I believe, lies in the words and wisdom of a great legal philosopher, Edmond Cahn, who taught at NYU from 1946 until his death in 1964 and who was a mentor to Bob McKay and to me. More than any single person, Edmond Cahn, I believe, influenced Bob McKay's thinking about the meaning of justice. They shared adjoining offices at NYU, were neighbors on Washington Square, and, in the less hectic days of Bob's earlier years at NYU, they had time to talk and to read. Edmond Cahn was a prolific and lucid writer, who willingly shared his thoughts with younger colleagues. Bob McKay was a superb listener. When Bob joined the NYU faculty in the early 1950's, Edmond Cahn had published his first book, *The Sense of Injustice*.³ In the following passage, Edmond Cahn explained the importance of the sense of injustice in the creation of a just legal order:

Why do we speak of the "sense of injustice" rather than the "sense of justice"? Because "justice" has been so beclouded by natural law writings that it almost inevitably brings to mind some ideal relation or static condition or set of perceptual standards, while we are concerned, on the contrary, with what is active, vital, and experiential in the reactions of human beings. Where justice is thought of in the customary manner as an ideal mode or condition, the human response will be merely contemplative, and contemplation bakes no loaves. But the response to a real or imagined instance of injustice is something quite different; it is alive with movement and warmth in the human organism. For this reason, the name "sense of injustice" seems much to

³ EDMOND CAHN, *THE SENSE OF INJUSTICE* (1949).

be preferred. What then would be meant by "justice" in the context of the approach adopted in this book? The answer would appear to be: not a state, but a process; not a condition, but an action. "Justice," as we shall use the term, means the *active process* of remedying or preventing what would arouse the sense of injustice.⁴

When viewed in these terms, Bob McKay was our profession's foremost chronicler of justice, because he possessed a refined sense of injustice and acted upon it. I don't believe that Bob McKay had any real interest in describing a "just" legal system. But he would have identified the injustices to be addressed.

His sense of injustice aroused him to anger when he led the commission investigating the Attica riots in 1970, and the result has left an indelible mark on prison administration ever since. A more just penal system emerged through the process of confronting, and correcting, injustice. In the process, Bob McKay, members of the commission, and the general public, drew closer to an understanding of the necessary components of a just correction system, and Bob, several years later, helped to move toward such a system when he was head of the Correction Commission of New York City. But his contribution to an improved penal system would not have been possible were it not for the fact that his interest was fueled by the sense of injustice and by the process of dealing with injustice in its most blatant form.

I believe that Bob McKay was deeply troubled, at the time of his death, by the dulling of the sense of injustice in American law schools. Like many of us, he found himself defending American legal education against attacks from those who spoke from ignorance, and occasionally it appeared as if he might be defending the status quo. He was an "establishment" figure, not a harping outsider. Armed with facts and figures, he could point out the increased commitment to skills training, affirmative action, the infusion of other disciplines into law school scholarship and curriculum, the vast improvements in libraries, law school administrations, the reductions in student/faculty ratios, the dramatic increases in financial aid, the superb quality of students and faculty, the list goes on and on.

But, despite the phenomenal advances in the quality of legal education during his lifetime, Bob McKay was troubled by what was happening in the entire profession, and in the law schools which, more often than we care to admit, march in tandem with the profession of which they are a part.

I don't believe that this conference would be faithful to the memory of Bob McKay if it concentrated too heavily on attempting to define the "justice content" of various courses or, by way of further example, the best approach to clinical education. Bob McKay never taught a clinical course, a fact he readily admitted when he received an award from the AALS Clinical Education Section. I believe that his own passionate dedication to clinical legal education came from a very personal reaction consistent with his sense of injustice. Bob's comparative inexperience in the actual practice of law created, in his mind, a

⁴*Id.* at 13-14.

gap between his own sense of injustice and his ability to correct unjust situations. It troubled him to contemplate the reality of idealistic young men and women leaving law school, intently anxious to deal with problems of poverty, discrimination, homelessness, or an inadequate education system, and not possess the widest possible range of tools to make one's legal education effective. I don't believe that Bob McKay had Tony Amsterdam's conceptual vision of a skills training curriculum. He and Tony did share, however, an abiding sense of injustice and a realization that traditional legal education was leaving too many students illequipped to engage in the corrective struggle.

Bob McKay also realized that the sense of injustice, like a sharply honed blade, becomes dull from disuse. The best of intentions will lead to frustration and cynicism if one does not possess the skills to help with the work of the hour. I think that Bob viewed legal education not as a conflict between the demands of the academy and the demands of the profession, but rather as an opportunity to harness the power of university-based education to deal with the problems of the profession and society. He found most debates within academia to be sterile and boring. The real question to him was whether law schools were instilling certain values and skills, whatever may have been the method of doing it, so that its graduates could be in the vanguard of correcting the inequities, abuses, and suffering of a democratic society.

In viewing the agenda for this conference, Bob McKay, as a chronicler of justice, might sound some words of caution. First, I know he would point out that the starting point for achieving the justice mission of American law schools is with the law professor. The journey starts at home. Nothing bothered Bob more than a law teacher who preached all the correct values but ignored them in relationships with colleagues, students, secretaries, administrators, or manual laborers at the school. Law professors should ignite the sense of injustice in their students so that that sense can be a guiding force in a student's later professional life. I know of no way to frustrate that mission more effectively than for students to feel a sense of outrage directed toward the person who is supposed to infuse them with a sense of injustice. This principle applies, of course, not only to law teachers, but to law schools themselves. Law schools are institutional teachers of professional responsibility, and if they fail in their mission of maintaining a high set of professional and moral values, all the talk about a "justice mission" for a law school will be viewed with complete cynicism by the students we are supposed to educate in that mission.

Second, while I note that one workshop is devoted to the topic, "The Justice Mission of the Legal Profession," I fail to observe a session devoted to a topic that was of deep concern to Bob McKay, namely, the justice mission of the law professor within the legal profession. Bob decried the growing gap between the academic community and the organized bar. He believed strongly that law professors cannot criticize the legal profession for its failings, its selfishness, its failure to address critical issues of the profession and the country, while playing no role whatsoever in the activities of the profession itself. Law professors, law schools, the institution of legal education, all are part of the profession and here, too, the justice mission of American law schools cannot be achieved solely within the academy.

Third, it is not sufficient for law schools to preach to students about confronting injustice. If law schools establish a value system that places almost

exclusive emphasis on scholarly achievement, lesser emphasis on teaching, and no emphasis whatsoever on a teacher's contribution to the profession and to the community, do not expect students to take seriously any talk about the justice mission in American law schools. They will be far more impressed with the practicing lawyers they see during their summer clerkships who are engaged in pro bono work (even if there aren't enough of them) than with law teachers who tell others what to do, but fail to do it themselves. And if we recruit as faculty members almost exclusively those who devote their careers to scholarship, and ignore those who have made a career out of doing what we tell students they should do, students will get the message in a hurry. Similarly, they will detect the double standard involved when law teachers write, and even litigate, on behalf of achieving racial diversity everywhere except on their own faculties.

In essence, we must look beyond the content of courses, our method of teaching, our relative emphasis on different aspects of legal education, and focus on the actual values we live by in terms of how we act, our reward system, whom we hire, how we treat each other, and ask, "Have we created a just society within the bounds of our own home?" The justice mission begins with the development of a sense of injustice, and the first place to address injustice is in the value systems of our own institution of legal education.

Most importantly, we must remember, and try to emulate, Bob McKay's unique ability to view legal education as an institution, rather than as a collection of individual schools, and to view that institution in terms of its relationship to the profession and to the broader society. His sense of injustice was not aroused by where a school, including his own, ranked in the *U.S. News and World Report* poll. He viewed schools as more similar than different. He chided all of us for tending to march in lock step, and he prodded us to face structural and institutional problems that aroused his sense of injustice. I think he might have looked at our agenda for this conference and asked whether we have addressed those concerns. He was deeply troubled that law schools, like the legal profession, had created an educational product based upon expectations that students would be able to spend more money, borrow more money, receive higher salaries, and continue an endless upward spiral that widened still further the gap between the have and havenot.

We face a legal education system that is reminiscent of the American auto industry of the 1950s that produced fins, heavy body frames, eight-cylinder gas guzzling engines, and opposed any mention of safety. True, the consumers did not need all of the components that we built into our cars, just as students and the profession don't need everything we have included in the legal education machine, but we don't seem to worry as long as there are enough people to buy our product, either by coming to our schools or hiring our graduates. True, our customers, the students, may have to go heavily in debt, but as long as someone is there to lend them money, and as long as they think they can earn the income to pay it back, we don't worry too much about whether there may be better things for them to borrow money for, or not borrow for, than to purchase our overloaded product. So, like the auto companies that found it easy to make a more expensive product because consumers thought that more was better, we continue to have more seminars, more substantive courses, spend more money on scholarly research that may be only tangentially related to the needs of our

customers or the profession, larger libraries, and more clinics to satisfy the social agenda of individual faculty members. All of this leads to higher rankings and prestige (as it did for the American auto makers) as long as students will borrow to the hilt to come to certain schools, and law firms continue to allow law schools to make their hiring decisions for them.

I suppose that, like the auto industry, we will not address these issues until the market forces us to do so. Someone in the 1950's must have told the auto executives that they had heard about some Japanese companies named Nissan, Toyota and a fledgling named Honda. The executives must have laughed, puffed on their cigars, and told stories about how the Japanese can only copy but never innovate. Well, we don't have to worry about the Honda University Law School. But we do have to worry about the state of the profession, the practice of law, and the integral role played by legal education in the industry that we call the legal profession. This is perhaps the most important part of our justice mission, and we cannot even address it unless our sense of injustice is aroused by the state of our industry.

Bob McKay had a favorite quotation from the writings of our mutual mentor and friend, Edmond Cahn. Please forgive the male pronoun, but Edmond Cahn wrote these words thirty years ago, and if he were writing them today he would have eliminated the male pronoun, but I do not wish to quote him inaccurately:

The condition of the democratic man is something new and young on the face of the earth, and his work of political creation is only beginning. In all the sad states of human history, his is the first that, by grace of intelligence, can actually will the elements of a just society into practical existence. Now that he has commenced to discover his capacities and flex his desires, the work is visibly accumulating power and momentum. I see a world where no nation is accounted strong except in justice, rich except in compassion, or secure except in freedom and peace.⁵

Edmond Cahn, writing in 1961, clearly saw that democratic societies were not in their decline but in their ascendancy. Bob McKay would call us to the challenge of educating young men and women to use their professional training to fulfill the promise that the democratic order makes possible. He would have prodded us to see a broader horizon for the justice mission of law schools and legal education. He would have loved to have been here. And he would have pointed the way.

⁵ EDMOND CAHN, *THE PREDICAMENT OF DEMOCRATIC MAN* 187 (1961).