



1992

The Justice Mission of the Law Schools

Linda Greene
University of Wisconsin

Follow this and additional works at: <https://engagedscholarship.csuohio.edu/clevstrev>

 Part of the [Legal Education Commons](#)

How does access to this work benefit you? Let us know!

Recommended Citation

Linda Greene, *The Justice Mission of the Law Schools*, 40 Clev. St. L. Rev. 353 (1992)
available at <https://engagedscholarship.csuohio.edu/clevstrev/vol40/iss3/9>

This Article is brought to you for free and open access by the Law Journals at EngagedScholarship@CSU. It has been accepted for inclusion in Cleveland State Law Review by an authorized editor of EngagedScholarship@CSU. For more information, please contact library.es@csuohio.edu.

THE JUSTICE MISSION OF THE LAW SCHOOLS

LINDA GREENE¹

I want to begin by giving thanks to the spiritual forces that have combined to make a conference on a Justice Mission possible and to the spiritual forces which have moved us to come together without financial incentives to discuss that which I believe ought to be above a price-justice.

Someone said, where there is no vision, a people perish. When I look at the list of participants in this conference, I dream "What if we could create several law faculties from the participants here?" We would have not only professors of law but prophets, people who would continue to give the call to justice even if their voices might sound like cries in the wilderness.

I offer several passages from *Isaiah 59*:

None calleth for justice, nor any pleadeth for truth: they trust in vanity, and speak lies; they conceive mischief, and bring forth iniquity.

Their feet run to evil, and they make haste to shed innocent blood: their thoughts are thoughts of iniquity; wasting and destruction are in their paths.

The way of peace they know not; and there is no judgment in their goings: They have made them crooked paths: whosoever goeth therein shall not know peace.

Therefore is judgment far from us, neither doth justice overtake us; we wait for light, but behold obscurity; for brightness, but we walk in darkness.

We grope for the wall like the blind, and we grope as if we had no eyes: we stumble at noonday as in the night; we are in desolate places as dead men For judgment but there is none; for salvation, but it is far off from us; and as for our iniquities, we know them.

And judgment is turned away backward, and justice standeth afar off: for truth is fallen in the street, and equity cannot enter.²

What is the justice mission of the law schools? What are several preliminary questions we might seek to answer? They include:

How should we define both injustice and justice?

How do we identify the places and institutions where injustice is done and the places where justice might be achieved?

¹ Professor of Law, University of Wisconsin.

² Isaiah 59:4-14 (King James).

What conditions are necessary for the achievement of justice, and how can conditions conducive to justice be created?

What are the roles of the law schools as institutions in this process? To lead and exhort all institutions which affect justice—law schools, courts, law firms both public and private, legislatures—to identify and eliminate injustice!

What, then, is our obligation? It has been eloquently framed by our conference organizer David Barnhizer, "To speak truth to power" and as an obligation of prophetic confrontation. Our task is to explore what prophetic confrontation would mean in the context of the law schools.

I suggest that the idea of the role of law schools in the delivery of justice is not a new idea. Some of those here, and some who are not present, have explored it in their work. The work of Houston and Hastie at Howard, Jean and Edgar Cahn at Antioch, of Lesnick and Burns and others at CUNY Law School are examples of the possibility of a law school's institutional responsibility for justice.

While these institutions and their successors and inheritors continue the work to institutionalize a law school role in the achievement of justice, most of the efforts are still viewed as interesting but experiments or as alternatives not worthy of wholesale and enthusiastic emulation. But the meaning of these programs and the efforts of these prophets is clear. The prophecy is given. If we are to frame the mission of the law school in terms of justice, our efforts must not be isolated, occasional, sporadic, temporary programs. They must be systematic, pervasive, enduring and integrating related to our law school operations.

As scholars, we are often tentative, but I want to be more insistent about my message. The task of prophetic confrontation is to take the message of justice and its vital importance throughout the legal community and beyond that community to every place where justice is implicated, to every place where justice is openly--or secretly denied.

This is not necessarily an easy task. Those familiar with the Bible know the problems associated with being a prophet. The way of the prophet is not an easy one. The prophet is often called to spread an unpopular message or warn of bad days to come. John the Baptist will never be forgotten, but he lost his head in the process of prophesying the advent of a heavenly king and kingdom. Daniel was called in by Belshazzar to interpret the meaning of the handwriting on the wall. Though his interpretation predicted the downfall of Belshazzar, he was hailed as a wise man and decorated with gold. Soon thereafter he became the object of scorn and scrutiny, and found himself in a lion's den facing certain death.

A second difficulty is that the prophet is often rejected by his peers and his community. Thus is it said, "[a] prophet is not without honor, *but* in his own country, among his own kin, and in his own house."

The lot of the prophet may be both adulation and rejection. Nonetheless, the ideal of the prophet as a truthsayer is a redeeming ideal. While prophets are not held strictly accountable for achieving change, they *are* held strictly to the standard of truth-telling even under difficult and troubling circumstances. Truth-telling about justice is our obligation.

We must think about how to define both justice and injustice as our first commitment. We might begin by identifying the work on justice which already exists. During our time together, we will intensify and expand on a discussion of justice which has already been achieved. For some time legal scholars have been talking about injustice, constricted choice, about the masking of oppression in formal and elegant doctrine, about the dangers which lurk in procedures untested for the way in which they perpetuate powerfulness and weakness, and about legal formulations far-removed from the economic and social context in which they will operate. We also hear about the importance of listening to the perspectives of reality increasingly voiced by previously silenced, powerless and marginalized groups. We have a rich start in forming a jurisprudence of justice and empowerment and inclusive humanity, a jurisprudence informed by history as well as the actual conditions which give rise to and shape human knowledge.

Our developing jurisprudence of justice and injustice would keep the question of power and authority squarely in focus despite words or phrases or formulations which might obscure it. And, a jurisprudence of empowerment could well encompass several formulations of justice, including compensatory and commutative justice, but also would provide an affirmative vision as well.

Such a jurisprudence would go farther than a mere critique. It would inform a vision about the future. It would be a jurisprudence of hope, a vision about the circumstances under which the boundaries between existing law and our aspirations for a just society might be eliminated. We could incorporate in this idea of justice the knowledge of both male and female visions of justice, not essentialized but evaluated for the richness they might give to an inclusive vision of justice. We need to understand how justice is perceived, manipulated, made to appear apparent or irrelevant, and how the blatant absence of justice reinforces a coercive ideal which may be tolerable only because the weak and the powerless suffer its effects. For example, our laws include shoot-to-kill policies and fleeing felon laws which approve the use of deadly force without accusation, trial, or conviction. We understand the possibilities of this power and may recoil from its possibilities, but we also understand that it is not a policy which will be uniformly-horizontally and vertically applied across the board. It is a policy which is targeted toward the black, the black male, the easily identified in our society-those who would have no voice and few advocates in the event the full range of the coercive possibilities allowed by the law in question is made manifest. Justice or injustice here can only be understood against a background of use and enforcement, a world shaped by ideals of respect for law and protection of the community. But *whose* community?

A similar situation is the prosecution of pregnant drug addicted mothers who are accused of abusing their fetuses or "delivering drugs" to their babies. Roberts has written eloquently on the social and historical significance of such a policy and its implications as much for privacy as for equality. There are justice concerns here too. But we can only see their full implications if we understand the nature of a social context in which the most vulnerable and the most exposed person with no personal resources may be the suffering addict herself. In such a context justice must include compassion, feeling, mercy, forgiveness, and love and anger. These, however, are the elements excluded from so much of what we call jurisprudence.

In addition, we should consider the need for compassion, the harm produced by irrationality, the sensitivity for human concerns which is lost in the technocratization of equality as well as in the rationalization which minimize the obligation to compensate those who have been grievously wronged. We would seek to define justice as more than mere obedience to the extant rules of society and instead understand justice as a process of reformulation and reinterpretation of society's rules in pursuit of a comprehensive jurisprudence of empowerment.

It will be difficult to form a single phrase or sentence which will embody our framework for justice, but we can begin by thinking about what we must take into account. We should explore a variety of ideas concerning the meaning of justice which have profound implications for the reshaping of power relations among people who seek justice and those who dispense justice. David Barnhizer has challenged us to take up the prophetic responsibility of speaking the truth to those in power. More fundamentally, we should join those who ask what is the truth and who is excluded from its formulation?

We must also begin to identify the places and institutions where injustice is done and where justice might be achieved. One of those places is in the classroom. The idea of incorporating justice in our teaching milieu is also not innovative. A perusal of the curricula of law schools reveals many courses which squarely address the issues of justice. There are, too, isolated attempts to infuse the concern with justice into the curricula as a whole, to make its consideration a routine part of legal education. CUNY, Antioch, Washington, D.C., and the University of Maryland have programs that seek to integrate justice concerns throughout their curriculum. University of Wisconsin Law School professors have developed contracts case materials which address the practice of contract law and raise questions of fairness and justice in contractual relationships. However, it is also possible that the classroom *per se* is an inadequate venue for the exploration of justice issues and that these issues may only be fully understood after exposure to the concrete experiences which give rise to legal claims.

Justice must also be a concern in our writing. Here, too, theory and abstract may obscure rather than reveal justice concerns.

Justice must be exemplified in our work in the community and in our public service.

Justice must be exemplified in our own administration of the law schools. The questions of justice in our own law school behavior have not been resolved. On the whole, we have made important change in the improvement of *access* to the legal profession. Just twenty years ago the law schools of America were overwhelmingly white and male. Many of our student bodies now have almost equal numbers of males and females. Black law students were just one percent of all law students in 1965, 4.3% in 1972, and 6.3% in 1991. Minority law student

enrollment was 6000 in 1971 and triple that number—19,410—in 1991.³ There is now a consensus that students of color ought also to be admitted but even after twenty years there is still much to be accomplished. Discussions of student diversity and access to the legal profession still stir feelings of resentment and hostility. This resistance began as soon as policies and commitments on the part of the law schools seeking the greater inclusion of students of color were pursued.

This great progress in enrollment may tempt us to forget the historical and current controversy over inclusion of minorities in the legal profession. We must remember that in 1971, the same year in which there were barely 4% black law students, the controversy over that inclusion crystallized in the *Defunis* case debate. Just several years later, in *Bakke*, the Supreme Court barely sustained the constitutionality of infant programs of inclusion. In just two decades the discourse of inclusion as a matter of right has been obscured by a discourse of white innocence and entitlement. The concern about the legitimacy of a justice system which bars large numbers of people on grounds associated with class and race has been replaced with a meritocracy alarm. The argument that the justice system and related legal institutions must reflect society and include all groups is often rejected in favor of a diluted diversity claim. All too often the new diversity rhetoric implicitly denies claims of entitlement and reparation. And while we tiptoe carefully through a thicket of these thorny inclusion issues, we also hesitate to firmly address the unresolved question whether access to legal services should continue to depend upon an individual's financial resources. Perhaps legal education institutions were ill-suited to address larger justice concerns by virtue of their historical exclusionary nature. Perhaps our tentativeness on larger questions of justice is traceable to this recent past.

The history of exclusion has been costly, forgotten, and suppressed. It is not taught, nor mentioned; perhaps it is not even fully understood by those who lived it.

In any event, the history is buried beneath the rubbish of two decades in which our discourse about equality has shifted like sand in the political and judicial tides. The ground of justice has been lost in the shuffle. In its place is an easy accommodation of the status quo. As more students of all backgrounds desire to enter the study of law, the questions of class, money and access to legal training become more contentious. Nonetheless, there remains unresolved questions about our commitment to provide access to legal training for a truly representative portion of our population.

The justice mission must implicate all of our assumptions about merit. These professional-related justice questions concern the sharing of power and the role and influence of the lawyer. They concern the opportunity of people to raise

³ AMERICAN BAR ASSOCIATION, TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT - AN EDUCATIONAL CONTINUUM 24 (1992).

issues of status in a legitimate voice. They concern the opportunity to share power in a profession which virtually monopolizes peaceful dispute resolution. A discussion of justice in this context involves a discussion of power.

Is there justice in the distribution of minorities and persons of color on our law school faculties? The following statistics from a 1987 Society of American Law Teachers' survey present the reality of the situation:

- 3.7% were black;
- .7% Latino (seven-tenths);
- 1.0% minorities (one percent);
- 20% females⁴ (twenty percent).

Here, too, the history of inclusion has only been recent. It is improving yet still dismal in outlook and mood. The revised report outlined the findings from a 1986-87 study done by the Society of American Law Teachers. The SALT study found:

- 26.4% of American law school faculties had no minority faculty members;
- 25.7% had just one minority teacher;
- 23.6% had more than three minorities on their staff;⁵
- 48 schools had no black faculty member.⁶

Hispanic figures collected by Professor J. Olivas are also troubling.⁷ Fifty-one (51) of 5,700 law faculty members are Hispanic. This is in a nation expected to grow to 30-40% Hispanic population in the next twenty-five years.

The battle here is not to frame the debate about inclusion. Even the framing of the debate as one of merit begs the question on the substance of merit. It certainly obscures the process through which the standards now used to determine merit were formulated. We must speak frankly about the questions of power and authority imbedded in the characteristics of the existing professoriate and the characteristics of our recent law graduates who seek to become professors. The role model argument, enrollment diversity rationales, and token systems of inclusion do not begin to address the concerns of justice and fairness implicated in the monopolization of authority and the transmission of knowledge. Of all the issues of justice we must address, this one is the most sensitive because it requires that we implicate our own exercise of power and its possible illegitimacy and our own responsibility and risks.

⁴ Richard Chused, *The Hiring and Retention of Minorities and Women on American Law School Faculties*, 137 U. PA. L. REV. 537, 538 (1988).

⁵ *Id.* at 558.

⁶ *Id.*

⁷ Paper delivered at Association of American Law Schools (AALS) Conference, "The Role of the Minority Law Professor," September 1992.

The Pursuit of Justice in Relationships

An issue of justice is present in career placement, our relationships to law firms, both public and private.

In our relationship to the courts and other institutions which purport to do justice, is there justice in the assignment of judges, prosecutors, public defenders, and case bargaining? We can call for changes in these behaviors and institutions, but we cannot achieve it through our ideas alone. Courts, political campaigns, financing, and allocations are all involved. Who will represent us in the legislature, in the city councils, in the state houses and legislatures, the primary venues in which the politics of justice are shaped and folded?

Where the politics of justice are addressed, the question of who speaks for those interests which would shape justice is part of its very definition. Critical issues include the failure to explore the role of policymaking institutions in the creation of conditions of justice and injustice and the need to evaluate how those institutions, their structure, their responsiveness to money and other forms of influence impede both access to justice as well as the substantive content of policy. What are the politics of justice? How are policymaking institutions responsive to justice concerns and how are these concerns raised and explored? Are policymaking institutions too remote to be responsive to justice concerns?

At What Junctures and With What Intensity?

We have exhibited our concern for justice in our clinical programs. Some of our students may choose to represent the poor, or work with prosecutors, defense attorneys, in prisons and in housing courts. We want our students to have an opportunity to work with the poor and in the institutions which dispense public "justice" such as prosecutors, defenders, Attorneys General, etc. Should we mandate these experiences, though?

The opportunity to experience justice first hand is still just an option for most law students. Except at a very few law schools, working in the places where the real conditions of justice and injustice are made plain—where people are processed and sorted impersonally, where they get, as my colleague Stuart Macaulay said, "not due process, but a deal" is an optional experience. We use words like choice or option to describe the process in which students are exposed to justice concerns. But we should know that the very idea of choice in the context we have created is problematic.

Our students know we are ourselves ambivalent about the value of our clinical programs that would expose them to real justice. We house these programs in old buildings away from the law school and keep "clients" out of our main corridors. We pay the clinical teachers less money, sometimes only half as much as we pay other professors, and we do not allow them to participate in our political deliberations or governance decisions. Most often, we do not even know their names. We speak of two types of teachers, those with promise and those who might make good clinical instructors. In short, we devalue the latter group in publicly palpable ways. Moreover, we do not participate in their work or lend our assistance to their advocacy. We have, in short, created a structure of hierarchy with barriers which devalue the choices we have created.

Moreover, to the extent that what we call "the traditional law firms" do not require that students demonstrate a concern for problems of justice and may even be skeptical about students who have had such exposure, law students incur professional risks when they take seriously the idea of participation in existing programs. As things now stand, American law schools both actively and passively limit such exposure. Students who do clinical work understand the consequences of these choices in the job market. They are met with skeptical stares from hiring associates who wonder aloud whether their exposure to clinical work might make the interviewee uncomfortable with some of "our clients." It is true that there are law firms which tout to students the pro bono opportunities which exist at their firms and who offer meaningful opportunities for associates to work on cases in which the concerns of justice are clear. Yet other realities make the full-time pursuit of these programs unpalatable and professionally costly.

Does the skepticism felt by some law faculty members about these programs make our aspiration to do justice an opportunity for derision? I hope not. No, we must still aspire to the pursuit of justice and recoil when we see extraordinary evidence that it is not being done. We know that the killing of death row inmates who have no counsel or have only suffered the ineffective efforts of incompetent lawyers is not justice. But we also know we are still unwilling to restructure the system of our "preferences" and "choices" to insure a more just system.

During this conference we will be talking about what we would want to have said about us 50 years from now, or perhaps one hundred years later, after we are gone. What would we want said about the legal profession, about legal education, about our students, about our professors, about our courts, about our judges, about our legal system as a whole? Would we be satisfied if they talked about our student selectivity ratings, about student LSAT's, about the number of placement call-backs our students received, or how many dinners at \$100 per person students enjoyed during a summer associateship? Would we be satisfied if our students said, "we have fine buildings for our courts, beautiful wool gabardine robes for our justices, and finely carved mottoes with alabaster angels and marble lady justices all around?" Look at our 500 person law firms with personal elevators for the partners and limousines for rides across town.

Would we be satisfied if anthropologists described the pecking order of our law schools and their rituals—law reviews, clerkships, personal blessings and symbolic trappings—which lead to priesthoods in our law schools?

Would we be satisfied if they talked about our footnotes, the number of articles published, the pay raises we receive, and the scant hours spent in teaching?

Would it be enough if they knew that the University of California-Berkeley Law Library, my alma mater, contains a half-million volumes, or that in 1991 Yale had almost 700,000, or that in Harvard Law School the library has accumulated close to one and one half million books? Would we be satisfied if they pondered the number of students in our law schools and the salaries they obtained upon graduation? I hope that your answer is a resounding "no!" In the long run, the enduring legacy in your legal system will be the ideas of justice we leave behind.

Conclusion

At the end of a sermon, Martin Luther King, Jr. asked his followers to remember him for his commitment to justice. His words are haunting because his last campaign on behalf of sanitation workers in Memphis underscored his commitment to salvage the humanity of essential yet unvalued people. His prescient anticipation of death seemed to sharpen his acute judgment that justice—not worldly fame or prestige—must be our priority.

And if you get somebody to deliver the eulogy, tell them not to talk too long. Tell them not to mention that I have a Nobel Peace Prize, that isn't important. Tell them not to mention that I have three or four hundred other awards Tell them not to mention where I went to school I'd like somebody to mention that day, that Martin Luther King, Jr. tried to give his life serving others. I'd like for somebody to say that day, that Martin Luther King, Jr. tried to love somebody I want you to be able to say that day, that I did try to feed the hungry. And I want you to be able to say that day, that I did try, in my life, to clothe those who were naked. I want you to say, on that day, that I did try, in my life, to visit those who were in prison. I want you to say that I tried to love and serve humanity. Yes, . . . say that I was a drum major for justice.⁸

A Conference on the Justice Mission of the Law Schools is timely, and King's words offer to us a vision of that mission. They demand that we reexamine the role of the law school to determine whether we have taken into account the question of justice while ordering our institutional priorities. The title of this conference implicitly asks whether we can continue to reproduce legal culture without evaluating the impact of that culture on both the powerful as well as the powerless. Legal educational institutions cannot right all historical wrongs or solve the problems of our nation which have been caused by a particular conception of the role of law in society. But we can play a catalytic role as prophets of justice who raise disturbing yet direct questions about the relationship, if any, between the mission of legal education institutions and the problem of justice.

⁸ Martin Luther King, Jr., *The Drum Major Instinct*, in *A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING* 259, 267 (James Washington ed., 1986).

