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BAD NEWS, GOOD NEWS: THE JUSTICE MISSION OF U.S. LAW SCHOOLS

HAYWOOD BURNS[1]

In the late 1960's, a group of students at NYU Law School agitated for change in the curriculum of the school. The students accused NYU of being deficient in many ways including the way in which it addressed questions of race. The outcome of that agitation was an agreement on the part of the faculty to introduce a course on "Racism and American Law." The problem that they suddenly discovered after having made this decision was they had no one to teach it. Bob McKay, at that point, gave me a call and talked to me about coming into legal education. That might not, from the vantage point of 1991, seem like such a momentous act, but Bob McKay, along with his many other achievements and accomplishments, was someone who was very conscious of the issue of the color line in legal education. He was responsible for bringing me and others into that aspect of our profession. Along with Leroy Clark, I became one of the first African-Americans to teach as a regular member of the full-time NYU law faculty.

I saw Bob McKay at many points in my life after our first meeting. I was the chief counsel for the Attica Brothers Legal Defense Fund. Some of you may recall the Attica prison rebellion twenty years ago. At the time, Attica was the bloodiest one day conflict between Americans since the native American wars of the 19th century. Bob stepped into this maelstrom and through his leadership produced an eminently fair report which will always be a monument to the kind of work Bob did, scrupulously fair, meticulous and complete.

We in New York were proud to see one of our own law professors, a law dean, become president of the Association of the Bar in the City of New York. All of us have seen Bob work through the ABA Section on Legal Education and Admission to the Bar. He was also an excellent litigator, arguing before the Supreme Court of the United States, including a landmark case in the area of one-person one-vote. Bob was on public interest boards, the Aspen Institute and wherever the cause of justice was at stake. When I first came to NYU the students told me how impressed they were with him and how calm he was when they took him hostage. He was tireless. He was kind. He was generous. He believed in excellence and not just excellence for its own sake but excellence in the service of change. CUNY Law School gained much from Bob McKay in terms of our shared ideals and the explicit support he gave during his lifetime. We are very pleased to be a co-sponsor at this Justice Mission conference. We feel that in honoring Bob here, we honor the best in ourselves. No finer example can be found.

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Seeking justice. Several months ago I had a conversation with a very good friend about the issue of justice in legal education. We must talk more about what we mean by "justice." Are we talking about access to lawyers? Are we talking about actual substantive justice? Are we talking about a more just social order? Whatever we are talking about, this colleague and I got into an exchange on the issue of justice and law. He is a respected legal educator but the point of view that he expressed was something like this: "Law schools are supposed to educate lawyers, they are not agents of change. Lawyers are not responsible for social change and do not perform this function."

I said, "What about a lawyer named Jefferson? Or one named Lenin or one named Castro? What about a lawyer named Ghandi? What about a lawyer named Nelson Mandela?" He replied "They didn't do what they did through law. They did what they did through other means." The debate went on and others chimed in, "But what about a lawyer like Abraham Lincoln or Thurgood Marshall or Bob McKay?" The debate continues.

At a recent National Association for Public Interest Law Conference I was asked to respond to the topic: "Law Schools, Help or Hindrance in the Struggle for Social Justice?" To fashion my response I told a story. It is a baseball story.

> There were two men and during their lifetimes they loved baseball. They would go to games all the time and sit in the stands and just enjoy the games. One thing that bothered them though was what happens when it is all over? The question they asked was, "is there baseball in heaven?" They decided to make a pact. Whichever one died first, that person would come back and tell the other one the answer to the question. As time would have it, one of them went off to his eternal reward and several months later his buddy was lying in bed when he saw the curtains wafting a little bit in the breeze and he had this kind of eerie feeling. So he sat up in bed and he said, "John, John, is that you John?" And the voice from beyond said, "Yes, Bill, it's me." "Well, tell me the answer, what's happening, is there baseball in heaven?" He said, "Well, I've got some good news and I've got some bad news." "Well, what's the good news?" "The good news," the reply came, "Yes, there's baseball in heaven, great games, well kept infields, terrific players, great hot dogs and beer, wonderful games." "Well then, what's the bad news?" "The bad news is that you are pitching next Thursday."

I also have some good news and I have some bad news. The good news is that there is much positive going on in legal education. Because there is so much good news we must resist the easy temptation to engage in law school bashing. Some great changes are being made in our law schools' fine contributions to legal learning. The bad news, however, is that in the main, these changes are not representative of legal education. Most of legal education has been and remains focused on producing lawyers to serve private, commercial and corporate interests that perpetuate the status quo.

Legal education is not the value-neutral production of educated, trained lawyers. It reflects the self-aggrandizement and material acquisition that have long been the driving engines in our society. Law schools, however, like most institutions in any society, tend to reflect rather than transcend that society. They produce "goods" that respond to the market and the demands of centers

of power. Until there are major changes in the society of which they are a part, major changes within American law schools will be difficult to achieve. But every effort must still be made to speak "truth to power," to recognize that law schools themselves are centers of power and can be made to use that power for the public good. David Barnhizer and I went back and forth a bit on the title of my talk with various incarnations. One of them was "Why Law Schools Fail?" I rejected that title out of hand because I do not believe entirely that they have failed. As Sandy D'Alemberte, president of the ABA, has indicated, there are many things we can catalog that are positive achievements of law schools. Finally we agreed upon that no matter the specific title, I would attempt to address what is wrong with law schools and how to fix it.

It was clear that I was to draw upon the CUNY critique and our experience since opening in 1983 to provide concrete grounding for what can easily become an overly abstract and hypothetical discussion of justice. At the outset, let me assure you that this is not an exercise in vainglory. There are few things more humbling than attempting to create a new kind of institution of legal education built on the pursuit of social justice through law and having it recognized by established legal education. We have many bumps and bruises to prove it. I have no fantasies or magic formulas to offer. I do, however, have a prism through which to look at the issues and want to share the view.

First, three cautionary notes. We are no longer an experiment, we have been operating for eight years. We have had six graduating classes with over eight hundred graduates doing the work that we sent them out to do. We are still a model in process, however, a model in progress. Anything I say is not offered as an example of a finished product. Secondly, we stand on the shoulders of others. There are many other individuals and institutions who went before us and from whom we have borrowed, some of whom are present. Thirdly, as a new institution we have a kind of latitude and clean slate that most places do not have. To that extent we are advantaged in trying to set in place another model of legal education. With these disclaimers let me then add my sense of what is wrong and how to fix it.

First of all, with respect to the issue of the justice mission, one of the things that is wrong is that most law schools do not even recognize they have a mission. Certainly, they do not realize that justice is part of that mission. A noted commentator once said that, "in the halls of justice, justice is in the halls." The same thing may very well be said of American law schools. As we examine our law schools we will find very little in their stated reasons for existing that has anything to do with justice. So I would suggest as a first step that law schools must set forth a goal that includes, at least in part, the mission of justice. We have tried to do that at CUNY. We have tried to do that in making justice the center of our discourse. We have set "law in the service of human needs" as our watchword and tried to build a program around that. Even if a given law school cannot make justice its central focus, it can be and should be at least part of its stated mission.

Secondly, there is the issue of what gets taught in the curriculum. This has an impact not just on students who are going into public interest and public service work, but on all students. We must go back and look at what we are doing in our curriculum. It was Jefferson who brought the chair in law to the University of Virginia. Justice Story helped develop the law school at Harvard

as part of the university. Christopher Columbus Langdell in the 1870's and early 1880's brought the case method of legal instruction. Since these major watersheds there has not been very much that is all that new, certainly little that is radically new, in the way we approach what we teach. We should look at our curricula and explore ways to achieve the ends we profess to seek.

Critique of the curricula found in U.S. law schools today would find most law schools' curricula too segmented and too unexamined. In life and in the life of the law, situations do not come to us in neatly arranged packages. I am sure that anyone who teaches torts will admit a tort problem does not walk into the office and say, "Hey, I'm a tort problem." It is far more subtle and complex. What happens is that the whole constellation of problems is laid before the lawyer and it is our responsibility to identify, set priorities, integrate, estimate and discover value among the pieces of this complex array. This reality has important implications for the ways in which we ought to structure our curriculum. One way to get at the problem of excessive segmentation and compartmentalization is an integrated curriculum, one which does not necessarily accept our historic categories as valid and give them the dominant status they have been awarded for over a century.

We have attempted to develop an integrated curriculum at CUNY. We have sought to think about what we teach in larger, more integrated terms. We have courses with very strange names but which are designed to reflect this idea of a more integrated curriculum. We have courses like "Responsibility for Injurious Conduct" in which the problem the client brings into your law office may have aspects grounded both in tort and criminal law. This means that two of the major perspectives by which one is liable for the injuries flowing from their conduct, criminal and tort law, can be discussed in one class. We have a course on "Law and the Market Economy" which looks at the functions, rules, abuses, consequences and relationships operating in relation to law in our economic system. We have a course in the first year on "Liberty, Equality and Due Process," which deals with various issues of civil rights and remedies in constitutional law.

If we go farther we will see that too much of our general law curricula in American law schools today is *noncontextual*, removed from the real world. I find that my students suddenly perk up when we start talking about real world examples. Many law teachers have the same experience when they bring the real world into the classroom. The reason students react this way is that much of our legal education is designed and presented in a way that is abstracted from philosophy, from economics, from history, politics—abstracted from life. For that reason we have tried at CUNY to approach our curriculum in a more interdisciplinary way so that these subjects are taught in the context of life. A further aspect of the critique involves looking for ways to enrich the curriculum both in terms of adding elements to existing courses that are important but are not being taught, aspects that might otherwise be overlooked, and adding new courses. For example, there is much room in our criminal law courses to be talking about such things as the demographics of race in sentencing. In our tax courses we might consider the consequences to public interest organizations of engaging in advocacy activities as a possible violation of its 501(C)(3) status.

At CUNY we also feel that the examples used in our curriculum, the messages that are sent, depend too much upon the adversarial model of dispute

resolution. Although we devote considerable attention to the adversarial model, we have added to our curriculum a substantial component that speaks to issues of alternative dispute resolution: arbitration, mediation and the like.

Finally on the issue of curriculum, there seems to me to be too little attention in law schools to fostering concerns based on moral and ethical visions. Even though almost all law schools now have a specific course in professional responsibility, I think a better approach, a healthier approach for training people to pursue the justice mission, is to raise issues of ethical responsibility across the curriculum. This would mean that we approach professional responsibility not as a course for two credits at one point in your life but something to be raised throughout the curriculum, throughout the three years of law school whenever relevant.

Beyond the question of *what* do we teach is that of *whom* do we teach? The justice mission calls for us to reexamine the way in which we approach the question of admissions. Sandy D'Alemberte stated that we have to go back to square one to look at how we make those decisions. Too often we have been guilty in our profession of being too closed, too narrow, too test-reliant in producing over our history a profession that, as Cathy Douglas says, is "too male and too pale." There should be no conflict between our pursuit of excellence and our desire for access. One of the ways to develop a more open approach to admissions is to examine whom we teach and who is teaching. Bringing more lawyers into the profession who are committed to pursuing the justice mission requires that we look at the extent to which we rely far too much upon standardized tests in our admissions decisions. It is not that such indicators are unimportant, but that the extreme weight that we give to them and the way we use them bears intense scrutiny. Bob McKay used to tell me a story about a law professor to illustrate that point.

> There was a law professor who ordered a lawn mower that was delivered to him. He sat down and read the instructions and tinkered with it, worked with the mower but couldn't get it to work for him. After an hour perspiring in the summer sun, he went back upon his porch, made a martini and sat down. About ten minutes later, the professor's illiterate gardener came by and started the mower without any trouble. The law professor looked at him and said, "John, how could you do that. I have been working on that for an hour. I read the instructions. You are my illiterate gardener. How did you do that?" The gardener looked at him and said, "Sir. Those of us who can't read have to think."

Of course law students have to both read and think and do a lot more. But Bob's point was that we must have broader concepts about how it is that we approach qualifications and quality when selecting law school applicants. The message is that the intellectual ability to manipulate abstract symbols has limited utility in making a decision about who is competent and who is not competent to study law. There are inherent problems in overreliance on standardized tests even though they must be a part of our admission decisions. We all know they are flawed. We all know that even at their best they do not test certain kinds of nonquantifiable skills and intellectual qualities. We also know that other values are to be served in the decision about who should be

given access to the legal profession than who scores highest on the Law School Admission Test. At CUNY the idea of a public service prerequisite to admissions is something that we take seriously. It is not only an abstract idea, for us public service is one of the aspects we look at in making our admissions decisions.

Other considerations at CUNY involve issues of how we recruit, how we have put in place an academic and financial support system for our students, and how we approach loan forgiveness. All these factors are related to the special character of our students and how we are going to pursue the justice mission. They help to answer the question of whom do we teach. Through this process we have produced a student body that averages one third African-American, Hispanic and Asian.

The question not only *whom do we teach* but *who teaches* is also of great concern to us. I believe that if we are going to put energy and purpose into the pursuit of the justice mission, we should be recruiting law faculty differently than the traditional way used by law schools. This should not necessarily be instead of the more traditional standards, but in addition to them, because our problem has been one of being too narrow. This has resulted in a self-perpetuating, self-replicating process where too often the faculty in American law schools, who have traditionally come out of the mold of law review big firm experience, hire people who look just like them. I am not saying those standards are illegitimate. I hope that some law faculty continue to come from these areas. But they should also come from persons who in their law practice have demonstrated a level of professional excellence of the kind we want to communicate to our students. A recent study indicates that one third of our law schools have only one African-American faculty member. Another third have no African-American faculty. Even in this period, long after my conversation with Bob McKay in the late 1960's, two-thirds of American law schools have either one or no African-Americans on their faculty. We might even ask ourselves, as much as those in this room today represent the cutting edge of reform in law schools, why are there so few people of color here? Is this something we can do anything about? Can we take affirmative and aggressive action to engage others in addressing this topic?

How we teach has something to do with what we produce at the end of that teaching process. In this critique that looks at who the students are and who the faculty happens to be, we also need to ask ourselves questions about our methodology and our materials. A Kingsfield type professor such as that found in *Paper Chase* has long begun to disappear from our landscape, but many of us are still relying far too much on old methods of teaching and materials, including far too much on the casebook method. We need to engage in inquiry that looks at the "medium" and the "message" issues and to develop other approaches to how we transmit knowledge. We have tried at CUNY to use from even the first year, simulations to assist the transmission of knowledge about the law and lawyers. We have tried to break down the rigid division found in law schools between theory and practice. We have tried to break down the wall between the practical and the doctrinal and make our pedagogy one that is more accessible and that is intended to produce good lawyers with a commitment to justice.

The final question is where do your graduates go? This involves placement of law graduates. The reason law schools have such a high proportion of their graduates not considering in any way the possibility of going into public interest work is not only the financial question of lower salaries and the need to repay loans, but also the way in which our placement offices are organized. This includes their priorities, their networks and contacts, the values of placement officers and their allocation of resources. We need to reexamine all these factors as important in the placement of our graduates. At CUNY, because we place an emphasis at the beginning on public service and public interest, we have turned placement on its head. On the average 60 percent of our graduates go into public service and public interest work. I am hoping this is a model that can be shared with other law schools.

Let me just close by saying that there are some larger issues here—issues that perhaps we can address in some of the workshops that involve the question of the legitimacy of producing lawyers at the rate we are currently producing them, the society for which we are producing them, and the current economic crisis. At the present rate we will have 1,000,000 lawyers in this country by the year 2000. Some find this an awesome thought, others an awful thought. But the criticism about overproduction of lawyers is misplaced. There is not a problem of a plethora of lawyers. It is *not* a problem of overproduction. It is a problem of *maldistribution*. We do not have too many lawyers, we have too many lawyers serving too few interests. It is the responsibility of the law schools to see what we can do to redistribute the availability of lawyers. The ABA studies on legal needs show that only about 20 percent of the legal needs represented by traditionally unrepresented constituencies are being addressed.

We need to go beyond the production of more lawyers because the answer is not just more lawyers. We need to be creative in how it is that we approach the issue of delivery mechanisms, including how it is the law schools themselves can use their resources to help make systemic and structural changes in the way in which law is practiced. Edgar Cahn has recently been writing and talking on this issue using some examples from his Antioch experience. He has talked about the way in which law schools can have an impact upon the practice of law in the community. We should commit ourselves to working for justice and change through the power of the law school, to bring law and justice closer together and ultimately make the law school and all of us more of a part of the good news.