



1992

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James Douglas
Texas Southern University

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Recommended Citation

James Douglas, *The Distinction between Lawyers as Advocates and as Activists; And the Role of the Law School Dean in Facilitating the Justice Mission*, 40 Clev. St. L. Rev. 405 (1992)
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THE DISTINCTION BETWEEN LAWYERS AS ADVOCATES AND AS ACTIVISTS; AND THE ROLE OF THE LAW SCHOOL DEAN IN FACILITATING THE JUSTICE MISSION

JAMES DOUGLAS¹

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I. INTRODUCTION

When David Barnhizer invited me to be involved in the Justice Mission conference I jumped at the opportunity; because justice is an issue that is extremely important to me, especially being a person of color in America. In presenting my ideas about the justice mission, I will be talking about two distinct concerns. One is the role of the law school dean in facilitating the justice mission in the law schools. The second is related but applies even more broadly since it draws upon the experiences of lawyers both in their roles as practitioners and as social activists. The point I will be making is that the two roles are very different and this is often not well understood by activist lawyers or law professors.

II. THE DISTINCTION BETWEEN ADVOCACY AND ACTIVISM

A friend of mine who was doing historical research about the civil rights movement in the 1960's, once hypothesized that Martin Luther King, Jr. could have been more effective and could have accomplished more had he been a lawyer. I disagree with this position. I think Martin Luther King, Jr. would have been *less* effective if he had been a "true lawyer" because the law and the role of a lawyer require you to consider every aspect of an issue, not just the particular one you advocate. A good lawyer learns to understand both sides of every issue. To do so causes one to appreciate the good and bad of both sides. The real social activist, instead, acts out of emotion, not out of logic. Thus, the social activist is less likely to have respect for the other side, or even for people who don't fully ally themselves with the activist's cause. I am, therefore, doubtful whether Martin Luther King, Jr. would have accomplished as much if he had been a lawyer because, as a lawyer, he would have considered to a greater degree the rule of law and would have been less likely to breach the rule. Social activists are not concerned with the rule of law; they are, instead, concerned with changing society and the way members of society interrelate

¹ Dean, Texas Southern University.

with each other. The social activist is therefore, more likely to breach the rule if to do so might result in the accomplishment of the desired goal, a change in society.

Yesterday in his presentation, Haywood Burns mentioned that one of his friends had made the statement that lawyers were not activists for social change, and that this disturbed him. I am that friend. What I said to Haywood Burns is caused by a mistake I believe we, as legal educators, tend to make in our law school teaching when we discuss our ability as lawyers to bring about social change. I came to this conclusion in part because of the frustration experienced by many of my long-time colleagues, many of whom went to law school with me. These are people of the 1960's who had looked at law as the profession to pursue if one wanted to make a strong social statement. Many people went to law school in the late 1960's and early 1970's because they wanted to make a positive change in American society and they saw law as the means that would allow them to help make those changes.

It was my belief then, and it is a belief that has stayed with me, and the reason I am less frustrated with my legal career than most of my lawyer friends, that law is "only" a set of rules that govern the interrelationship between members of a given society. I repeat: Law is "only" a set of rules that govern the interrelationship between members of a given society. Lawyers are the people who *describe* those rules and the people who try to *implement* those relationships. But I do not see lawyers as the *definers* of those rules. It is the belief that lawyers are the definers of the relationship between the members of a society that causes frustration for many of my colleagues.

My colleagues become frustrated because they think they can, as lawyers, define the rules of the game when in fact society itself defines changes in the rules of relationships, and lawyers then describe these new sets of rules necessitated by the changes in relationships. If one wants to change the definitions of the rules that govern the interrelationships of members of the society, one cannot change the definitions while operating as a lawyer. One can only seek to change the definition of a rule by functioning as a social activist. The dilemma is that a lawyer's role in society is not to change the rules of the game, but to assist in maintaining the rules and to help resolve conflicts under the established rules.

I do agree, however, with Haywood Burns on the point that some lawyers have also been social activists and as social activists have worked to change fundamental social relationships. And so, for example, while I agree that a revolutionary social activist such as Fidel Castro is a lawyer, he is a lawyer only in a technical sense. He did not achieve profound social change and did not redefine the terms of Cuban society and the relations among nations in the Western Hemisphere while acting in the role of a lawyer. Castro did not lead the revolution in Cuba by going into a court of law. Castro led the revolution in Cuba as a social activist, by acting outside the legal system and using tools unavailable to lawyers functioning in their professional context. I also agree with Haywood Burns that Abraham Lincoln was a lawyer and an activist. But again, Abraham Lincoln did not make a name for himself primarily as a lawyer except in a small area of Illinois and he did not redefine relationships in this country by functioning as a lawyer. He changed the definition of social relationships as a political and social activist.

When I talk to my students about their roles as lawyers, I say to them that those people who want to change society have to step outside of their role as a lawyer and become social activists. This is not to say that lawyers cannot contribute to the changes in society. It is intended to say, however, that lawyers are limited in what they can do by virtue of the nature of their basic roles. As lawyers, they cannot *move* the description of the societal relationships they dislike nor change the direction of society too far from the center of belief of those in power. For when one attempts to change the rule in a manner that moves the new rule too far from the center of societal belief, the change results in an ineffective legal rule that members of the society honor more in the breach than apply it as a standard for governing their behavior.

In order to make major changes in critical societal relationships that you consider unjust or unfair you must not only change "the law", you must also change the way people think about the values and assumptions that underlie the rule that allows the injustice. Social activists change the way people think; lawyers do not. Lawyers, instead, describe the changes in the rules caused by changes in the way people think and this new thought process was caused by the social activist.

I have not yet heard at this conference the question I hope we are going to address: namely how are we to bring about change in the relationship of the members of a society and how are we to change the rules that govern the resolution of conflicts between the members of the society. I have always liked the fact about Socrates that he was not satisfied to simply talk about change but developed disciples who carried forth his teachings. I have not yet heard us talking about the necessity for law faculty who believe in the justice mission to develop disciples among our law students. This is an important step. If we believe in a justice mission for law schools, we must begin to talk about how to impart our ideas and our sense of "justice" to a larger group of disciples, i.e., our students who will then go out into society and become social activists. These people will redefine the ways people interrelate with the law rather than just describe a world that needs to be changed.

III. THE ROLE OF THE LAW DEAN

The role of the law dean in promoting the "justice mission" is to be a leader by example. First, I am going to discuss the dean's leadership role. Then, I want to describe the *real way* to approach the "justice" issue in law school.

In terms of justice, people have often said that it is better for the faculty to set an example for the students. But I believe that the best way to teach law students about justice is to first help students understand what the concept of justice means. "Justice" can best be described as doing what is right. Doing what is right, however, frequently depends on the type of relationship that exists between the people involved. People are more likely to do what is right when the relationship is one of respect, and they are more likely not to do what is right when there is a lack of respect. In order to have a just society, members of the society must have a relationship with each other that is based on respect of other persons and of self. In order to promote and facilitate the ability of those within the law school to understand and "do" justice, the dean must develop a healthy relationship with the faculty, the staff, and the students. Thus, the way

in which the dean manages the law school environment, and its functions, sets an example for the students.

In order to promote justice, the dean must strive to involve the students in all aspects of the law school's operations, especially its governance. The dean should request that students serve on the important committees, i.e., the hiring committee and the rank and tenure committee. With this as an example, the students will better understand that the dean believes that they, the students, are a part of the total law school environment.

I also believe that the dean sets a good example by being actively involved in various professional associations. If the dean says that service in professional organizations is important, then the dean must set an example by his or her service and involvement with professional organizations. If the dean says that it is important to represent indigent clients, then the dean must in some way set an example by assisting indigent clients, either by taking cases, giving advice, or serving on boards of legal service organizations that represent the poor and the needy.

Probably the most important thing that a dean can do is to help students understand the relationship between "law" and "justice." One of the responsibilities of a prophet is to tell the truth. I am not a prophet, but I always try to tell the truth. We require that all incoming first-year law students arrive a week prior to the beginning of classes for a period of orientation. During this orientation week, we introduce the students to the law school experience. We do so because we discovered that few entering first-year students have any idea as to what will happen to them during the first year of law school. Even more unfortunate is that most students go through three years and then graduate from law school and still do not understand what has happened to them. Therefore, what I try to do during this week of orientation is to get them to understand what their responsibilities are likely to be as lawyers.

One of the things we as legal educators can do for our students is to be truthful about the role of the lawyer in our society. I already discussed the distinction between lawyers functioning as lawyers and people who happen to be lawyers engaging in social activism. Each role is important but distinct and we must better explain the differences between the two roles to our students. I am not talking about the role of the lawyer as an individual member of society but the role of the "lawyer" as a professional member of society. Think back to the example of Fidel Castro. He was a lawyer who became the leader of Cuba. Yet, Castro became the leader of Cuba not because he was a lawyer but because he was a revolutionary who seized power through military force. An individual does not need to be a lawyer to be a revolutionary but an individual does need to be a lawyer to represent others in court. Castro could have become the leader of Cuba even if he had not been a lawyer.

The other example was Abraham Lincoln who brought about fundamental change because he was a great politician, not because he was a lawyer. As deans, we must make students understand this distinction. We must constantly remind law students that they each have a role as an individual member of society and as a member of the legal profession. It is of utmost importance they not confuse the two roles.

When I began working in law school admissions, I came to better understand this vital distinction. In 1971, almost everyone who applied to law school

applied because he or she had a "mission"; each wanted to drastically change society for the better. After years in law practice, most revealed an extreme level of frustration with their jobs as lawyers because they had been unable to make any societal changes even though they had worked hard as good lawyers. They were frustrated because they did not understand that the role of a lawyer is not to change society. They did not understand that it is the social activist, instead, who brings about change in society.

The primary role of the lawyer, we must remember, is to help resolve conflicts that occur between members of a given society. The society lives under the rule of law and functions within the established system. If one wants to change the system, one must change the rule of law. We must also remember that the best way to create an effective rule is to be certain it is "in synch" with the beliefs and values of a majority of the members of society. The best example of this theory is our society's response to murder. Nearly every member of this society believes it is wrong to take the life of another member of this society. Therefore, when the law enacts a rule that said it is wrong for one member of society to take the life of another member of society, the rule is followed, at least most of the time, because the rule grew out of the culture and beliefs of the society.

People do not respect institutions that advocate beliefs too distant from their dominant beliefs. Therefore, rules enacted by the institutions of law generally tend to reflect the beliefs of most members of society. If, however, a legal rule does not emanate directly from the culture and beliefs of the society then the rule is likely to be followed only if the members of the society respect (or fear greatly) the institution from which the rule emanates, be it the administration, the legislature or the courts. The members of society are more likely to follow a rule out of respect for these branches of our government, "the institution", than out of respect for the rule. When the members of society follow the rule because they respect the institution whether local or national, it is generally because the newly enacted rule is not too far from the center of accepted belief held by members of the society. Thus, if one wants to drastically change the law, one must change the society's belief in what the rule ought to be. And lawyers don't change the views and beliefs of the society—social activists do.

When we, as law school deans, talk about justice, too many of us try to "intellectualize" about what justice is and what it should mean to our students. Justice is what society *believes* justice is. Thus, if you want to change justice, you must first change the views and beliefs of society. Take the United States Supreme Court for example. One hundred years from now people will probably look back at us and think our notions of justice were primitive. Not because they will be better people than us but because society's view of justice will have changed over time.

Lawyers can only change law and society at the edges, not at the center. Lawyers who want to accomplish more must do so not as lawyers, but as social activists. And everyone can be a social activist. The failure of legal educators to draw this critical distinction between one's role as a lawyer and one's role as a social activist will leave many future lawyers frustrated.

IV. THE LIMITS OF THE LAWYER'S ROLE

The one thing we must do as deans is to make students aware of and sensitive to the legal needs of the social activists. Because when the social activists are trying to change the laws, the lawyers must be their advocates and make the legal arguments on their behalf. And most important, when a change is acceptable to the society, the lawyers must be ready to describe this new social relationship in legal terms. It is in this way that a lawyer can help change society.

Thurgood Marshall and his work with the NAACP is a great example of the role a lawyer plays in social change. When this country was ready to move towards more inclusion of African-Americans as members of the society, a lawyer was ready to help in the description of this new resolution, and he did. Had Thurgood Marshall or some other lawyer raised the same arguments fifty years earlier rather than in *Brown v. Board of Education*,² the outcome would have been totally different, because his arguments would have fallen upon deaf ears operating according to very different cultural beliefs. That is why the same institution, the United States Supreme Court, could at one point in American history hold that African-Americans were something less than human; at another point in American history hold that separate but equal was legal, and yet, at still another point in American history, hold that separate but equal is not legal. The reason these conflicts in opinion by the United States Supreme Court can occur is because society changes. The fact that society does not accept a given rule of law today does not mean that society will not accept the same rule tomorrow. So if you really want to affect the justice mission, you must change the way society thinks. Therefore, if we, as legal educators, do not want our students to leave the legal profession in frustration, we must understand and teach the difference between working within the rule of law and *truly* changing the rule of law. Lawyers work within the rules of law, social activists work to change the rules of law.

You should always remember that lawyers are problem solvers; they solve human problems. They solve the problems that arise between members of society and in solving these problems, they use a set of rules we call laws. When I first started teaching, I taught commercial law. One day, a student came up to me and said: "Professor Douglas, I really want to take your course, but I want to practice poverty law and, therefore, I have no reason to take commercial transactions." I quickly replied: "What type of problems do you think poor people have? In fact, not only must you take my class but you must also excel in it." That is why I like to use Christopher Langdell's case method of teaching. I told the student, "By using the Socratic method of teaching you learn to solve problems and develop analytical skills. If you want to represent unpopular causes, and when you represent poor people you represent unpopular causes, you, as a lawyer, have to be much better than the lawyers who oppose you. And that can only be accomplished by developing better analytical skills. In a

²347 U.S. 483 (1954).

real sense, the lawyer is like a carpenter; when a problem arises, the lawyer must find the right tool to fix the problem and the tools of the lawyer is the set of rules we call laws." Just as a master carpenter is called on to solve great problems of building and construction, the master lawyer is called on to solve great societal problems. Each, however, is limited by the tools he or she has in the tool box.

Thus, if a lawyer understands his or her role as a lawyer and his or her role as a member of society, which includes one's role as a social activist, he or she is not likely to one day decide to leave the profession in frustration. What we must do as deans is to provide the tools and lead the way to an understanding of this crucial distinction between the role a lawyer plays in changing societal relationships and the role a social activist plays in changing societal relationships.

What is justice? It really depends on whose interest is being served. It is hard to define justice but, at the bottom of any definition, justice involves inclusion. Thus, the manner in which the deans include and treat the students as part of the law school society will set an example for the way in which students will strive to achieve justice for others in society.

