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# An Agenda for Social Justice through Law

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# AN AGENDA FOR SOCIAL JUSTICE THROUGH LAW

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I was asked to speak on "an agenda for social justice through law." As I began to think of what to say, I realized it was not going to be easy to come to grips with such a broad topic. But linking the subject to Bob McKay is not very difficult. When Bob McKay became dean in early 1967, it was a new beginning for the modern NYU law school. It was a time of political and social turbulence that affected the lives of everyone at the school. The civil rights movement, the women's movement, the Viet Nam war, the sexual revolution, and the gay rights movement, were all on the ground or in the air during those years.

Bob was not always an intellectual leader of the faculty. Moreover, he was sometimes indecisive, not surprisingly given the strong and conflicting pressures operating during this period. And most of Bob's writings on legal education were produced in the years after his deanship. Yet Bob encouraged and valued scholarship while he was dean. Perhaps most important, he was the moral leader of the faculty. He lent rectitude and stability at a stormy time when these qualities were badly needed. He also promoted a more democratic governance system at the law school. His extraordinary performance as chairman of the Commission studying the riots and deaths at Attica prison brought him and the law school to national attention. He demonstrated uncommon courage by daring to challenge, both legally and morally, the most powerful political leader in New York and the person who appointed the Commission, Governor Nelson Rockefeller.

It will not surprise many of you that, in defining social justice, I start from the policies of the ACLU. These value free expression, religious liberty, separation of church and state, due process, privacy, and the fair treatment of those that need special protection such as people with disabilities, poor people, gay people, nonwhite people, and women. In general, that is what I have in mind when I think about social justice. But the topic today is the *agenda* for social justice through law. We are not talking about theory or doctrine, but action. The title of this conference, "The Justice Mission of American Law Schools," also implies effectiveness in the real world.

Before proceeding, I would like to comment on the context in which we meet. Throughout the country, there is great malaise, frustration, and anger. It is of two sorts. *We* are upset by the reactionary Supreme Court, the civil liberties machinations of the Bush administration, shocking political developments such as the emergence of David Duke, and the Clarence Thomas confirmation hearings. On the other hand, another type of citizen is also beset by malaise, frustration and anger. These Americans are upset by the public interest model,

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by the ACLU, and by our agenda for justice, which they regard as antireligious, pro-pornographic, soft on crime, antifamily, and bigoted (through reverse discrimination). These intersections of anger, as it were, form the background of this conference.

The key question is what we can and should do from our positions as law professors, as lawyers, and as public interest personalities. One approach involves our activities outside our respective law schools. We tend to focus on the federal courts, but there are many other influential institutions, including state courts, legislatures, commissions, and boards. We should become active in the building blocks of our society. Some of these are in the private sector, such as groups advocating civil rights, consumer rights and a cleaner environment. Others are public institutions, such as zoning commissions, school boards, and human rights commissions. We can act as litigators, lobbyists, board members, committee members, and as financial supporters.

The object is not only to influence public events but to educate the people with whom we come in contact. It often is not easy to do this. It especially is not easy to do on a large scale, but it is being done right now by the religious right. There was an extraordinary change in the way the country thought in the 1960's compared to the 1950's. There was another extraordinary change in the way people thought in the 1980's from the way they did in the 1970's. These changes were not accidental. People worked hard to alter the flow. Another such change is unfolding now. The question is whether the emerging consciousness will more resemble the religious right or the public interest model. This consciousness—how people come to think—in the long run will determine the kind of government we have and the kind of social justice we have. External activities by law professors also will have a short-term impact on governmental and private institutions that determine legal reality. The decisions of these institutions will be better and fairer to the degree that people with a sense of justice participate. Every decision has one or more consumers for whom that decision is the most important in the world. Closer to home, those activities will also affect the teaching and scholarship of academics because being part of the decision-making process on the Wetlands Commission or the school board, for example, will provide new insights almost by osmosis.

The ACLU has been a central part of my life. What I did at the ACLU had an important impact on how I related to my students, what I taught in class, what I wrote about, and what I thought about. There is no one way to do it . . . no one model that will make a person a better agent for justice. This is a second part of the agenda—to bring the public interest world into the law school. A phrase I heard this morning was "linking one's life and one's work." An excellent example of that grand concept is Tom Emerson, who taught for many years at Yale Law School. Having worked closely with him, I was moved to write a tribute in the Yale Law Journal when he died.[2] But now I want to read

[2] Norman Dorsen, *In Memory of Tom Emerson*, 101 YALE L. J. 317 (1971).

from another tribute to him, by Dean Guido Calabresi, which discusses the integration of life and work.

> Tom has always lived—both completely and calmly—the ideals that others only preach. For some, craftsmanship and scholarly excellence are all too readily abandoned when they get in the way of the goals to be served. For others, a commitment to freedom, to the poor, to outcasts, to *justice*, lasts only so long as it does not get in the way of scholarly or political advancement, and only so long as it doesn't threaten one's own comfortable life. Even worse, for many, if the scholarly model leads to a result that does violence to justice, then "justice" must be wrong. For Tom, however, craftsmanship and scholarly excellence can *never* conflict with justice and decency. If scholarship seems to lead to unfairness, it must mean that the scholar has not worked hard enough or has not been sophisticated enough. Where the self-indulgent (most of us) would be inclined to abandon either scholarliness or fairness, Tom would say "dig more deeply, be less lazy, be intellectually more daring, and you will see that the conflict disappears." He would not only *say* it, he would demonstrate it; for that is the way he has lived his whole scholarly life![3]

It is not only scholarship that is vital for the justice mission: Teaching is at least as important. I had a good friend, now deceased, named Oscar Davis. Long the First Assistant to the Solicitor General of the United States, he eventually became a judge of the U.S. Court of Claims. I got to know him when I was still a law student. He told me then that law professors who think their scholarship changes the world are wrong. He believed, from the point of view of a constitutional litigator and judge, that the impact we have on our students as teachers is more important than the impact of scholarship. Personally, I am not sure that is true; it is a big question. But I was struck by the fact that a wise and experienced person felt that way. Whether or not Oscar Davis was right, our teaching cannot be underestimated as a way of affecting justice. This includes the teaching we do through mentoring and through personal relationships with students as well as in the large classrooms. Not everyone has the luxury of working in clinics and seminars, where one can relate to a small number of students and penetrate their consciousness as they penetrate yours. But even in a larger class there is an effect.

Who are the students within one's orbit? There is a natural tendency, if one is a public interest law professor, to concentrate on those students. They are the ones with whom you feel kinship, the people who share your ideas and ideals. I have done that in the Arthur Garfield Hays Civil Liberties Program, at N.Y.U. Law School, where Liz Schneider (who speaks next) was a Hays Fellow and so were people like Sylvia Law and David Rudovsky and many others who are

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[3] Guido Calabresi, *Tom Emerson: Law in the Service of Justice*, 38 CASE W. RES. L. REV. 477, 477-78 (1987-88).

now public interest lawyers and professors. My bond with them is deeper than with other students.

But I do not believe that the only virtuous student or professor is one who goes into full-time public interest law. Of course we want to encourage that type of work. But it is not the only way. Let me illustrate with a recent experience.

Toward the end of a SALT conference last year at N.Y.U. Law School, a prominent liberal law professor said that he was interested only in students who were going to work for organizations such as Legal Aid, the NAACP and NOW. He added that the person who goes to Covington and Burling or to a small firm in Alabama or Minnesota and spends only five percent of his or her time on public interest law is less worthy.

I was shocked and chagrined to hear that. It is both unjust and shortsighted. Initially, many students who would sincerely like to be public interest lawyers cannot afford to do so given the low salaries for that sort of work and the crushing debts many students carry after law school. Others who can afford it cannot land a job. Full-time public interest positions, especially with established organizations, are rare and prized, and many able and committed men and women simply do not attract offers. Beyond these considerations, to place everyone outside the pale who is not destined for a public interest job ignores the fact that a huge percentage of public interest work is performed, without fee, by lawyers in private practice. Many organizations—the ACLU for one—would be far less effective, even crippled, without the help of such "cooperating attorneys." These lawyers in private practice are public interest sympathizers who take on a free speech, discrimination, or death penalty case, work hard on it, and often suffer with it, in the midst of their normal work. These lawyers should be praised and nurtured—starting in law school, where many of them can be spotted—and should not be made to feel less virtuous than lawyers working on the staff of a public interest organization.

Finally, there is more than a whiff of self-congratulation, of holier-than-thou about such attitudes that is unseemly, especially since they would drive a wedge between full-time public interest lawyers and those who merely help out, often from the same motives. That approach would sever the public interest community. So reach out to the decent young man and young woman who is not going into fulltime public interest practice but who really cares about abortion rights or due process, or abhors the death penalty. Get those people involved. Show them they can make a contribution.

James Douglas mentioned the term "disciples" in his remarks. I will put it another way. We can be role models within our law schools. Not just role models in terms of the blockbuster article or the famous case, although these are important, but also by working with students and alumni, by treating people courteously and fairly—from the dean to the most junior administrator. There is a signal there, a message. If you are a public interest person, everyone knows it. They can go back and say "another liberal brute, another phony." Or they can praise and admire those who live close to their principles, who convey day-by-day, minute-by-minute a sense of fairness, integrity and rectitude. Incidentally, I have committed my share of insensitive acts and I hope nobody thinks that I am throwing the first stone.

Law professors are a privileged class. Once we receive tenure we pretty much do what we want. We can concentrate exclusively on our own careers and lives, or we can spend the time and energy to reach out and help people.

This is probably the last group of law professors who need such advice or exhortation. But more and more of our colleagues now concentrate solely on their scholarship. And the work is getting more and more theoretical, increasingly extrapolated from real life. I am not an opponent of theoretical scholarship. It serves an important function. But for it to be the principal product of law schools would be most unfortunate. We must resist or at least be a counterweight to a narrow conception of the law professor model. This does not mean there is only one way to live. What is appropriate in 1991 is not necessarily what was appropriate in 1965 or 1980 or will be appropriate in 2000. Flexibility and a sense of context are important.

In concluding, I want to return to my title, which is "An Agenda for Social Justice Through Law," and to the title of the conference, which is "The Justice Mission of American Law Schools." In a recent article on N.Y.U. Law School, I described my ideal institution. The discussion seems applicable here:

> For me there have been three ideas, that for thirty years, have epitomized a place I can be proud of: quality, variety, and heart. About quality I have said enough: whether it is the faculty or student body or administration, whether in teaching or scholarship, whether in one program or another, we must aim high and prize intelligence, imagination, rigor, and wit.
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> Variety is a coat of many colors. In the individual background and philosophy of faculty members and students, in the areas of scholarly interests, in analytic and intellectual styles, in these and more, it is essential to encourage differences, even revel in them. This will assure continuation of a healthy balance in our educational program.
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> Heart is likewise not a single concept. At bottom it relates to a moral conception of the law, an approach that takes into account the human consequences of legal rules and structures. To be sure, heart must be tempered by good judgment. And, of course, there is more than one morality; individuals will hold different values. But there are common denominators. They are reflected in what people are thinking about in addition to grades and jobs, if they are students, or financial success or prestige, if they are out in the world.
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> Is a person concerned about the community? About the profession and the society? About the fate of others? Everyone knows very well the terrible problems New York City faces, that other cities face, that this country faces. There are great difficulties with the environment, the economy, crime, poverty. The Law School as an institution and as a community of individuals should respond to these problems as best it can with "heart."
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> The concepts of quality, variety, and heart are not merely complex; there is potential conflict among them. Sometimes a desire for quality and variety runs counter to hiring somebody for whom your heart feels as a person. And sometimes a desire for quality is not consistent with maintaining variety . . . . It is not easy to accommodate these values when there are different perceptions of how to teach, how to write,

> indeed how to live. What is important? What kinds of students should we have? What kind of faculty should we have? What are the ultimate goals? These questions recur and should recur because it will not be possible ever to freeze time or conditions inside or outside the school.
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> For this reason we must recognize that the Law School's immense gains are reversible. To prevent this we must be alert to ensure perpetuation of high quality and the other elements that distinguish the school. Variety, in particular, can dissipate quickly because academics, like other people, tend to reproduce themselves, discounting intellectual or professional traditions not their own. Heart is also constantly at risk because intense preoccupation with our individual scholarly pursuits may drive out concern for public values and the socially vulnerable.[4]

Whatever the frustration and obstacles, the effort to create law schools of this kind will be repaid many times in personal satisfaction. The task is part of the broader agenda for justice for public interest law professors.

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[4] Norman Dorsen, *How N.Y.U. Became a Major Law School*, N.Y.U.: LAW SCH. MAG. 42, 48-49 (Fall 1991).