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Legal Education's Concern with Justice: A Conversation with a Critic

Howard Lesnick

The following is a written version of a talk given at the 1984 Conference of the Society of American Law Teachers, "Looking at the Law School Classroom," held at New York University School of Law on December 14, 1984. It retains the informality of its origins. I ask the reader to bear in mind too that the talk was given very shortly after the Bhopal disaster.

I dedicate this article, in solidarity, to my colleague Professor Dinesh Khosla.

The charge is by now a familiar one: The study of law as practiced in most American law schools lacks a concern with justice.¹ The response may seem less familiar, but only because it tends to be implicit in expressions of dismay or bewilderment at the evident misunderstanding inherent in the charge: Justice is precisely what legal education has for the past half-century been principally about. Can any new growth be engendered by another effort to plow such well-worked ground? The planners of the 1984 SALT Conference evidently thought so, and asked me to focus my thoughts less on the merits of the charge and response than on the difficulties that arise for a teacher or school motivated to accept the truth and gravity of the charge and to articulate an alternative approach as a response. Since I have been working for the past two and one-half years at a new school that is making just such an effort,² I view the issue as anything but stale.

I want, however, neither to catalogue the joys and pitfalls of our work at CUNY nor to attempt to "prove" the merit of the charge or the infirmity of the traditional response. Focusing on the difficulties in expressing an alternative response can be of aid to both attackers and defenders—the former because unless they acknowledge and engage with those difficulties they will remain forever marginal, and the latter because the implicit belief that the difficulties are fundamental and irremediable is, in my judgment, at

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1. See my Introduction to the first SALT Conference on Legal Education, Preface to Symposium, 53 N.Y.U. L. Rev. 293, 294 (1978); Jerold Auerbach, What Has the Teaching of Law To Do with Justice, *id.* at 457.
2. The City University Law School, which admitted its first class in September 1983, has adopted as its motto, "Law in the Service of Human Needs," and its educational program is explicitly designed to take central account of the societal impact of the practice of law, and the relation of students' goals and values to the choices that they make in their work as lawyers.

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the heart of the tenacity with which the traditional faith is defended. I believe that the difficulties *are* fundamental, and are *not* irremediable.

I can develop what I want to say in the concrete context of a recent event, the disaster occasioned by the accidental release of methyl isocyanate gas at the Union Carbide plant in Bhopal, India. Let me hypothesize a colloquy several days afterward between two personified abstractions, Legal Education and a Critic, both of whom see in that colloquy a relevant manifestation of the problem each has with the other:

Critic: Well, what is your reaction to what happened at Bhopal?

Legal Education: First, I have sympathy, distress, and concern for the victims of a massive tragedy. The immediate need is for medical attention, and the mobilization of supplies and personnel in the area. Second, Union Carbide, other chemical companies and government agencies in this country and elsewhere need to review relevant safety standards and procedures, both corporate and governmental.

Third, I want the established mechanisms of our adjudicatory system to be available and effective. The victims should have access to legal representation—necessarily on a contingent-fee basis—and as prompt and full and remedy as the law can allow in so complex a matter. At the same time, we should not condemn the company without full knowledge of the relevant facts, and their sober assessment by an impartial tribunal.

Fourth, I am concerned about the continued economic viability of Union Carbide. The bankruptcy of the company, or a substantial threat of bankruptcy, would be a major blow to the public interest, injuring as it would thousands of employees, customers and suppliers, shareholders, communities. Even a serious persisting decline in the market for Union Carbide products would be a cause for real concern. Fifth, I am conscious of the dangers to continued economic progress, in the Third World and domestically, that would attend a long-term inhibiting effect on development.

In sum, I seek a balanced appraisal of all relevant factors, aware of the complexity and elusiveness of many of them and of the great stakes involved. In a word, my critical friend, I seek Justice, exactly what you fail or refuse to see in my value system; for what is justice but the result of all of the momentous inputs I have so briefly sketched, and how else can I or anyone purport to defend or question the appropriateness of particular processes or outcomes than by reference to their justice? Of course, we all have differing ideas about particular outcomes or processes, and widely varying ideas of what is just, but my recognition of the subjectivity of those ideas in no way detracts from my acknowledgement of their centrality.

But what about you, what is your reaction to Bhopal?

Critic: OK, fair enough, but first I want to say that if *that* is what you mean by justice, no wonder we have trouble making ourselves understood to one another! I find your notion of what justice is a grotesque caricature, an unbearably repellent caricature. I want to say more about that, but first let me try to answer your question. You asked for my reaction to the event. I do not find it easy to sort out my reactions, let alone to say them out loud. I think it is important to make the attempt.

My first reaction is to *cry*. Over 2,000 people suddenly killed in their beds, perhaps a quarter million in pain, choking and blinded, disfigured, maimed. Children, the aged, the malnourished—the more vulnerable, the more attacked. I imagine myself carrying my two-year-old daughter, stumbling to find someone safe and expert enough to treat her, or hurrying to deliver her body to an improvised communal pyre before she becomes a source, not of pleasure and pride, but of cholera. She is beautiful, precious, and innocent: except to me and to a few others, no more so than hundreds of others whose fathers were awakened to an uneradicable reality.

My second reaction is to *pray*. A silent lethal vapor, that does not exist in nature—its very function is to kill—engulfing an entire valley in minutes, leaving a slight white powder behind. Is this to be the Black Death of the Twenty-First Century? The Angel of Death, in purposeful measured coercion in the cause of human freedom, destroyed one child in each family of the Egyptian slave masters. What world lies ahead of us, and of our children? I find within me ancient words:

Holy Mary, Mother of God
Pray for us now
And at the hour of our death.
Amen.

My third reaction is to *scream*—I do not have a better word for the angry mixture of condemnation and exhortation that I want to describe:

-At the company, I want to scream, “Accept responsibility.” Don’t point with pride, view with alarm, cut your losses. Move, both in public and in reality, to establish (probably in collaboration with the government in India) mechanisms for prompt and real compensation to individuals, families, communities.

-At the United States, my country, I want to scream: “Is this what we have become in the world?” Over the past two centuries the principal export of the United States has been the Declaration of Independence—always of course an alloyed product, and grievously so since the end of World War II; but now, beyond the shabby record of repeated armed support of repressive elements in Third World countries, are we to come to experience the American gift to the world as an array of latter-day Trojan horses of development?

-To all of us—First, Second, and Third Worlds, whether selling or buying the ideology of the inevitability of endlessly escalating technological development—I want to scream: “Stop!” Are we really unable to consider seriously the notion that, if adequate safety measures cannot prevent what happened at Bhopal, methyl isocyanate should not exist in the world? Are our thinking and our resources so impoverished that we are indeed forced to choose between suppressing such questions by ridicule and leaving large parts of the world unable to feed itself?

-Finally, I want to scream at the racism of it all. I simply will not presume that it was just ill luck for India that the Bhopal plant malfunctioned, that Union Carbide’s West Virginia plant (for example) was as much at risk. With all of the imponderables and variables of an operation like the production of methyl isocyanate, it would take more than a few words of

pompous reassurance in a corporate press release or newspaper editorial to dispel my concern that Third World countries are being subjected to, and through their leaders are subjecting themselves to, greater hazards than would be deemed tolerable in the West (and probably in Eastern Europe as well).

My fourth reaction is want to *do something*. Law is especially oriented to solving problems, and the reactions that I have thought it important not to suppress fuel the desire to influence future events. What options are open to me? Shall I stop buying Prestone, Glad, or Eveready batteries? Shall I seek to organize others to do so? Shall I support (in one of a number of ways) litigation on behalf of the victims, or seeking changes in marketing or regulatory patterns? Shall I draft a statute? Shall I write an article, or a Letter to the Editor? These are not disreputable courses of action, but they foster rather than ward off my fifth reaction.

My last reaction is to *despair*. We will go on as before, convinced we have no choice. There will probably be minor regulatory changes. Years of litigation are in prospect, which will probably produce the transfer of a large sum of money from Union Carbide (and the United States Treasury) to American and Indian professionals and organizational systems, and another sum, perhaps half as large, to the victims and their families. Union Carbide might “go under” in some manner, the specific contours of the change being orchestrated most by those most responsible for what has happened and least by those—employees, customers and suppliers, communities dependent on the company’s presence—who will bear the major burden of what will happen. The facility at Bhopal will stand with Three Mile Island as components of a grotesque, twentieth-century Stonehenge, to be joined inevitably by what we cannot know.

Legal Education (having listened with alternating flashes of irritated impatience and benign indulgence, now smiling broadly): *Q.E.D.* If you ever wondered why your criticism has not gotten me to change in ways responsive to it, you have provided the answer yourself, more eloquently than I ever could!

You are, first of all, completely ineffectual. Tears, prayers, screams, and despair are no one’s model of effective lawyering, for any end, and when you finally seem to be gearing up to “do something,” you cannot even work up any interest in the task, except to dismiss all responses as just too depressing to get involved in.

But, worse than that, you are intolerably divisive and coercive. Divisive, in more ways than I can catalogue: For one, many do not want the terms of public debate to be infused with religious thoughts, especially sectarian ones, and the fact that the sect whose words you have chosen is not your own only complicates one’s reactions; for another, many will regard your indictment of half the world of racism, and of the whole world of mindless pursuit of development, as gratuitous, insulting, and half-baked. Coercive, because your tone appears to preempt the ground of moral sensibility, and does not allow others simply to disagree. You tell those who do not share your reactions that their notions of justice are—what were your words?—grotesque and repellent. Because Legal Education won’t adopt your answers

to the question of justice you accuse it of devaluing the question. Were it not for your incapacity to make your concerns the ground of effective action, you would be a menace; as it is, you can safely be ignored. You certainly deserve no more.

Critic: If there is one thing that Legal Education has always been able to do, it is to move in hard at the soft spots in an argument! But before you decide to ignore me or to disarm me, let me try to take what both of us have said, and relate it to where Legal Education is and can be.

First, I want to go back to what you said when you spoke initially, because even if everything you said just now about me is right, none of it makes *me* any less right about *you*. I am not Legal Education, but a Critic; if my prescription is defective, my diagnosis may be nonetheless right. And if it is right, it is your responsibility, at least as much as mine, to seek an appropriate prescription. Any failure of mine at the remedial task is not a defense to you.

Why do I call your conception of justice grotesque and repellent? It purports to espouse a nonformalist, normative view of law, and at the same time to leave each of us free, whether in academic thought or political interaction, to discern and pursue our own answers. In fact, however, it does nothing of the sort. It begs all of the crucial questions, the parameters-setting questions, asserting loudly (if implicitly) that they have only one answer. It glories in the asserted subjectivity of the idea of justice, only to legitimate a market-oriented approach by which all human needs, impulses, and values are viewed simply as commodities. It characterizes as “freedom” the exercise of choice within the constraints imposed by the power of others, and as “coercion” societal attempts to ease any of those constraints. It can hardly be an accident then that your conception of justice, for all your espousal of the subjectivity of the concept, necessarily renders existing social relations presumptively just. What is needed turns out to be no more than what is possible in any event, some fine tuning—important, difficult, intellectually challenging, but nothing more disturbing. It is of course precisely to ward off more disturbing questions that your concept of justice can and must leave out entirely such human reactions as tears, prayers, screams, and despair. *These feelings are going on around us in the world of law all the time; yet they must be suppressed, lest they prove destabilizing.*³

3. Karl Klare has written, with characteristic insight and eloquence, of an approach to scholarship that, in my view, is an application of the conception of justice described in the text:

[It] substitutes stereotyped argumentation within the accepted repertoire of legal analysis for an open-ended search for truth. It has great difficulty acknowledging the component of political and moral choice implicit in all legal decisions and arguments. It judges research not in terms of its quality or imagination but its conformity to orthodox assumptions. And it is hostile to any effort at fundamental reexamination or questioning of accepted views. . . . [It] adheres to an unstated but pervasive belief in the inevitability of the status quo. It has difficulty imagining that history could have turned out differently but for the choices people made and the actions they took. It treats established arrangements as natural and just, and it copes poorly with evidence that prevailing arrangements may not fully serve the needs of those they are intended to serve.

Your approach, then, has exactly the flaws of divisiveness and coercion that you attribute to me—except that, coming from an institution in power and not merely a Critic, the coercion is tangible and effective and the divisiveness hidden, for those who would differ are cast out, channeled out, or delegitimated.⁴

I fully acknowledge, however, in my turn that nothing I have said about you makes you wrong about me. The concerns that you smugly throw in my face as axiomatically unanswerable are real concerns, and present grave hazards in carrying out an alternative approach. To grapple with them is to take on the most fundamental questions of professionalism and of political theory.

First, can we respond to legal problems—that is, to human problems with legal aspects—in a way that does not deny our human reactions, without losing our ability to be effective and constructive as problem solvers? Put the other way—and it is important, if we are not to beg the question, to put it both ways—can we actualize our desire to be effective and constructive as problem solvers without suppressing our humanity?⁵

Second, notwithstanding the teaching that has been so pervasive in the last three centuries of our heritage, can we act on the belief that there *are* values that are authentically constitutive of being a human, that values are not inherently pervasively personal and subjective, that values can be treated as something other than a subject of exchanges, without legitimating the tyranny of whoever has control of government (or of a law school)? Put the other way, again, can we avoid coercing one another without having to surrender our desire to act out of our values?

Your answer to these momentous questions is a quick and final “no.” This is *your* creed. I do not subscribe to it. I shall come to subscribe to it only as a final act of surrender, an act of cosmic despair. The questions for me all begin, “*How* can we . . .?” My answer is that the answer cannot be reasoned through in advance. It can be found only through a developmental process involving the interaction of thought and action. Indeed, the idea of “finding” an “answer” is too static to capture the meaning of the task. The finding is in the search, in a continually deepening unfolding of understanding.

Karl Klare, Traditional Labor Law Scholarship and the Crisis of Collective Bargaining Law: A Reply to Professor Finkin, 44 Md. L. Rev. 737, 845 (1985).

4. For a recent, crudely explicit call for such an exercise of coercive power, see Paul D. Carrington, Of Law and the River, 34 J. Legal Educ. 222, 227-28 (1984).

5. My colleague Barbara Bezdek has written about her experience of this question as a law student:

I learned that it is possible and essential to me to care, and that caring is not sentimentality that should be separate from my professional life. . . . The feelings I was experiencing [in law school clinical work] do not have an adverse effect on my lawyering; in fact, they motivate me to better lawyering all around. They need not and do not interfere with my legal craftsmanship; they do allow me to feel that it is me being a lawyer, not a stranger or a mask.

Barbara Bezdek, Comment, in Elizabeth Dvorkin et al., *Becoming a Lawyer: A Humanistic Perspective on Legal Education and Professionalism* 40 (St. Paul, Minn., 1981).

In my view, the search for answers to the “how” is exactly what Legal Education *should be* about, indeed what the practice of law should be about. In the carrying out of that search, two conditioning thoughts seem to me to be most important to bear in mind. First, neither the question that I have called one of professionalism—the integration of human emotional responses with responsible lawyering—nor that which I have termed one of political theory—the possibility of a values-based approach that is not imposed on us—can be successfully pursued in isolation from the other. Some are naturally drawn to one of these more than the other, but I am convinced that prolonged inattention to either is a barrier to successful grappling with the other. Second, the presence in the law schools of tears, prayers, anger, despair, division, and feelings of oppression, while perhaps not symptoms of success in constructing a quality legal education, are symptoms of struggle over exactly the subjects that it is essential to struggle over. And, whether the search is for understanding or for modes of interaction, the fact that it may often seem to take place in the dark, with many stubbed toes and bumped noses, with many fingers burned trying to strike matches, is not a sign that it is misguided. Only that it is hard.