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Lynne Henderson

University of Nevada, Las Vegas – William S. Boyd School of Law

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NURTURING THE IMPULSE FOR JUSTICE

LYNNE HENDERSON¹

What does "Nurturing the Impulse for Justice" mean? This afternoon I have a story, some justifications, an example, and an appeal.

I want to start with the story. Last year while teaching Criminal Law, I happily posed "the baby is drowning in the lake" hypothetical. The baby didn't make it. It didn't matter whether the person who was in position to rescue the baby was a stranger who could swim, a stranger who only had to wade into the water to rescue the baby, a cousin, or an off duty baby-sitter. No one twitched, the baby died. Finally, the students admitted that the lifeguard might have a contractual duty to rescue the baby, in which case the grieving parents would have a cause of action for breach of contract. Notions of moral responsibility or moral culpability were completely absent in the classroom discussion.

I was thinking, "what moral cretins were admitted to the Indiana law school class of 1993?" Despite my exhortations no one wanted to play my pedagogical game nor—and this was a greater concern to me—did they even seem morally troubled. I was finally relieved in a way when a tiny student voice said, "we were told in torts that morals has nothing to do with it."

The statement gnawed at me: This was roughly the third week of law school and already the students were taking an authoritarian-obedience stance to law when only a few weeks before the situation might have troubled them. They might have found it immoral or unjust to let a baby drown in a lake, although I am not certain that is the case. Obviously they could have decided in torts that the issue was about autonomy or efficient allocation of resources or the difficulty of policing altruistic behavior or some such thing. But comfortably accepting that a baby should drown without any sense of moral outrage troubles me.

The discussion stayed with me. It suggested that rather than nurturing the development of a sense of justice in our students in law school we kill it off and we kill it off in fairly short order. Bob Gordon of Stanford Law School has observed that

"[i]n law schools much of the training we give, even that provided by teachers who are, relatively speaking, on the left, is deliberately, brutally, antisentimental. This is useful. As . . . Mark Kelman says, it is always useful for . . . conservatives to point out that you cannot get habitable housing by having a judge declare that landlords have to warrant habitability. But at the same time, . . . we have been allowed for too long to get away with creating a sense of hopelessness that

¹Professor of Law, Indiana University.

works against needed change out of a sense of false legitimization and false necessity.²

By dwelling on doctrine and appellate case analysis we too often lose sight of the underlying assumptions behind the law and the social consequences of the law. By doing so we fail to give students even a glimmer of understanding as to what they need to know to fight injustice effectively. We spend much classroom time rationalizing the real and evading difficult questions of social justice. We do almost nothing to help our students develop any sense of justice or injustice or ways of identifying how the law produces justice and injustice.

The more I have thought about it the more morally irresponsible I think I have been--many of us have been--in failing in this task. David Luban has suggested in some of his work that there are two virtues associated with law, a *virtue of order* and a *virtue of justice*. I believe we do an extremely good job of teaching the virtue of order at the expense of the virtue of justice. Everything from mandatory attendance policies to calling on students who do not volunteer, to celebrating the Is at the expense of the Ought, domesticates and encourages students to be obedient and encourages the view of law as order. But if, as I firmly believe, *justice* is the virtue associated with law in the legal profession, we need to work on helping our students develop that virtue. At a minimum, our students should leave law school with some notion of the contested meanings of justice and I would submit that it is probably invariably true that most law students leave law school knowing no more about various theories of justice than when they walked in the door.

If justice does have a contested meaning, if the meanings of justice are not rationally commensurable as Alasdair MacIntyre argues, we should not use this as an excuse to ignore issues of justice and injustice. We are not relieved of our responsibility to further the search for justice, nor can we responsibly ignore injustice and law's role in it. Law itself can be unjust, as with Jim Crow laws, or good laws can be unjust because they are not respected or because of resistance, as in the case of many antidiscrimination laws. Injustice, as Judith Shklar noted, does not only cover acts that "law and customs are meant to eliminate" but also covers "all those occasions that make us cry out in anger and resentment, that is not right and that is not fair."³ The reactions may be culturally determined but the principle is valid. Even if we disagree on the particular theory of justice we can agree there is much to be done to eliminate injustice. Various people have spoken at this Justice Mission conference about the injustices of poverty, the injustices of racism and a few illusions to the injustice of misogyny, and these still plague laws in our society.

It is my belief that many students do come to us with at least a sense of injustice, not perfectly formed perhaps. I might have entitled this presentation "nurturing the impulse against injustice" rather than "nurturing the impulse

²Robert W. Gordon, *Unfreezing Legal Reality: Critical Approaches to Law*, 15 FLA. ST. U. L. REV. 195, 220 (1987).

³Judith Shklar, *Giving Injustice Its Due*, 98 YALE L.J. 1135, 1138 (1989).

for justice," because like Lawrence Friedman I do not believe there is any such thing as a genetic urge for justice. I want to claim that students do come to law school wanting to do good things. They of course have other motives as well, but there are studies that show that many students come to law school wanting to help people, wanting to serve people. Glib statements to the effect, "our cynical students just do not care about justice anymore," can not relieve us of our responsibility to encourage them to develop their capacities to fight for justice.

Furthermore, students do respond positively to opportunities to work on issues of justice and injustice. The Indiana Protective Order Project, which I will discuss in more detail later, attracts fifteen to twenty students every semester who participate in assisting lawyers in getting protective orders for battered women. The project involves a considerable time commitment, and there is no class credit, but the work itself and the Project continue to have the enthusiastic support of our students. Another example comes from the University of Colorado this fall semester. Professor Hiroshi Motomura posted a notice requesting student volunteers to aid immigration attorneys in political asylum cases. He was flooded with applications. He had forty-six students volunteer the first day and only six to eight lawyers available to work with them. A number of students indicated they had no idea there could be such opportunities available to them. Stanford students started the East Palo Alto Community Law Clinic, which provides legal services to a disadvantaged population of the San Francisco Bay area. It appears, then, that students do have an interest in preventing injustice and furthering justice.

According to Aristotelian notions, in paying attention to this activity we ourselves learn virtues and become virtuous both by observing examples and by doing that which is virtuous. If law schools and law professors are to encourage development of the virtue of justice, therefore, we need to provide good examples of that virtue in our everyday work. We can treat each other with respect, courtesy, and justice; we can treat students and staff well; and we can provide opportunities to practice working for justice and fighting injustice in a far richer way than we do now. Finally, we can legitimate the practice of law as involving commitment to fighting injustice and promoting justice.

Let me work through an example of how legal educators can alert students to injustice and give them an opportunity to do something about it in a specific context. We have not come close to achieving gender justice in the world or the United States. Violence against and abuse of women in the United States is a serious problem. A few years ago Dr. C. Everett Koop called it the number one health problem for women in the United States. A specific kind of injustice is battered women, women battered in intimate relationships primarily by men, although not exclusively. Unless we are willing to tolerate the continued abuse of women by taking a resigned or hopeless stance toward the problem or by denying its existence, we should seek to make ourselves aware of the problems of battering including where the law helps and where the law hurts.

The first step is to understand the issue as one of justice. Historically it was considered just to discipline one's wife; there are still many people who hold the belief that if a wife is beaten, she somehow "deserved" it in a kind of crude retributive or corrective justice sense. Feminists and social scientists have shown us that wife-beating is *not* about desert or anything like it--battering is

an issue of power and control, as Martha Mahoney's recent piece in the *Michigan Law Review* so eloquently documents.⁴ Hence, the many ways that law disadvantages women who are battered provides a reason to cry out against the injustice of law. As a result of what we have learned about battering, it is not right and it is not fair.

The next step is to know what areas of law this analysis of injustice applies to. Injustices I have identified that relate to battering range across a wide variety of subjects including criminal law, tort law, constitutional law, family law, civil procedure, remedies, juvenile law, poverty law, homelessness and employment law to name only some areas of law. The injustices take two forms. Either there is the injustice of omission or the injustice of failure of commitment to implementing good, existing law. This connects to our teaching.

How we treat the issues of battering in these many subject areas determines whether students are made aware of the problem of the injustices involved in battering and whether they recognize substantial injustice. The issue of whether it is just to punish battered women who kill is of course familiar to most people by now. It is standard in many criminal law classes to teach the traditional law of self defense and then point out certain gender biases and so forth. But the failure of criminal law historically to take battering seriously raises another series of issues of injustice by omission. For example, a gender bias exists in voluntary manslaughter cases as many voluntary manslaughter cases involve purportedly enraged husbands killing their wives; the manslaughter doctrine itself is built around supporting male prerogatives over females. Indeed, many homicide cases, including *Godfrey v. Georgia*,⁵ holding that the death penalty does not apply to "garden variety murders," involve battered women who are ultimately killed by their husbands or male companions. We also have the marital rape exception that is still in force in approximately twenty-five states. This is another example of injustice by omission. Gender bias exists in all kinds of homicide cases. For example, Georgia struck down the death penalty in a "garden variety murder case" that involved an attack by a husband on his wife who was trying to separate from him. Many victims in homicide cases are battered women who were ultimately killed. To overlook these issues in teaching these cases is to give implicit endorsement to a vision of male/female relations that perpetuates the injustice of violence against women.

In remedies, how the teacher approaches the question of restraining orders can affect whether students are alerted to potential injustices to women. You do not, for example, help students to become aware of the injustices of the situation by remarking that "the fellow was only trying to get a date." Here, good law can be undermined by resistance as well. I believe the *Denver Post*

⁴ Martha Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1 (1991).

⁵ 446 U.S. 420 (1980).

recently reported a story about a judge in Colorado who said it would be "unfair" to take a woman's word alone as a reason to issue a restraining order.

In family law, the manipulation of the battered woman's dependency and fear in order to disadvantage her economically and in child custody matters raises issues of justice and injustice. So does the awarding of joint custody to fathers who batter. In tort and constitutional law, issues of governmental tort liability for failure to protect battered women arise. Finally, women fleeing abusive situations are unlikely to have financial resources, raising issues in poverty law and the laws affecting the homeless.

It is very easy for the law teacher to raise these issues. Doing something about the problems is another matter. A relatively cost free way to do something about it is to acquaint students with the kind of work that Liz Schneider did in listening to women's voices and formulating issues of self-defense from a woman's perspective in *Washington v. Wanrow*.⁶ Letting students know the approach taken by Schneider is a way to illustrate effective legal work against gender bias and is relatively easy to teach. Giving students more concrete experiences, on the other hand, takes more time, commitment, and energy, but can be quite rewarding. A number of law schools have begun projects for assisting battered women, but I do not know specifically how they work. I do know about Indiana's Protective Order Project, however, and I want briefly to describe it as a concrete and creative example of how you can put the practice of fighting injustice into place. I wish I could claim I had something to do with creating what has become a valuable community resource in Bloomington, but all the credit goes to our now Associate Dean Lauren Robel. The state of Indiana has a "model protective order" statute designed to protect victims of battering and abuse, but no one in Bloomington or in the county was willing to assist battered women seeking to obtain protective orders. No one told them about the legal process, appointed counsel for them with the courts, or anything of this nature. Many were intimidated and found the legal system too complex to go *pro per*. When Professor Robel learned of the problem, she, on her own time, learned the law, contacted attorneys, recruited volunteer attorneys to handle restraining order cases, worked with prosecutors and police to encourage their cooperation on enforcing restraining orders and convinced the prosecutor's office, which had had a "no-drop" policy, that these orders were important empowering tools for women. She is still working very hard in an effort to educate judges. While doing all this she created training materials and recruited and trained students to work as volunteers with the volunteer attorneys.

The project requires students to make a commitment that includes being "on call" one day a month and being a back up one day a month for new cases, TRO's and emergencies. Robel has stated:

[The project] gives the students a sense of accomplishment and the experience of using their developing legal skills in helpful ways. . . . working with abuse victims (also) has special benefits. It sensitizes

⁶559 P.2d 548 (Wash. 1977).

students to the prevalence of violence against women. It shatters their preconceptions about 'battered women'; it teaches them to respect their client's own understandings of their situations, and it has given them opportunities to think about ways in which the effectiveness of these orders might be increased.⁷

The students also learn that the civil law system provides a useful alternative to the criminal system and that at times it is better, because it empowers victims rather than taking over decisions for them as is the case in a county with a prosecutorial "no drop" policy.

The program has been an important resource for abused women throughout the county; referrals come from the prosecutor's office as well as shelters, independent contacts, and so forth. The Protective Order Project has legitimated concern for and working with battered women as a service to justice.

It is sad for me to admit that the law school has done very little to financially support the project. The faculty do support the project and consider it a legitimate, worthwhile, and positive force at the school. The attorneys who volunteer their time are also providing a legitimating function in the sense that they are telling students, "this is one of the things you can do as an attorney. You do not just make money, you serve justice."

It seems to me that the Protective Order Project is a perfect example of how to nurture the impulse for justice by working through every level of the mission both by example and by creating the opportunity for students to fight injustice. Lauren Robel has made a wonderful contribution and is very special; we do not have to be particularly special to nurture the impulse for justice. We can, for example, refuse to sneer at students' cries when they say "that is unfair or that is unjust!" We can begin to take those cries seriously. In conjunction with fighting the injustices of poverty, racism, and misogyny, we can support concerned students who are interested in exploring other options besides large law firm practice. When I was at Stanford Law School I wanted to be a public defender. Virtually every professor I discussed this with said, "why would you want to do that?" Or, as one professor said, "why would you want to do that? It's a sewer down there." Now Stanford has a second person in the placement office to advise students on public interest opportunities.

Thus, we can do more to help place our students in public interest jobs by ensuring that our placement offices take seriously the work of finding jobs in public interest, as was mentioned this morning by Haywood Burns. It is very easy for placement offices to be coopted by large law firms. It is very easy for students to be coopted. It is a little more work to get somebody in place for public interest work. Many schools have loan forgiveness and low interest loan programs for students who pursue public interest jobs. If we are fortunate enough to have the funds, we should have loan forgiveness programs for

⁷Lauren Robel, *The Protective Order Project* (unpublished manuscript on file with author).

students who go into public interest work. Earning \$24,000 a year in a public interest job when you owe \$40,000 or more of educational debt gives you a good reason not to go into a public interest career. Student bar associations have begun such programs. Although this is really waxing optimistic, we can encourage students who take jobs with large law firm to remember their commitment to pro bono work and—this is almost irrational on my part—to work to encourage those firms and their clients to resist injustice. Some of the work that Bob Gordon and William Simon have done on that subject makes it seem almost possible.

I hope these suggestions and these concrete examples help illustrate how you might nurture an impulse for justice. There are many other ways to go about it. For too long we have allowed ourselves to create a sense of hopelessness and resignation about what we can do. The political climate of the last ten years has not been hospitable to being progressive. I want to leave you with Hillel's words, "If not me, who? If not now, when?"