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ON BRINGING THE JUSTICE MISSION CONFERENCE BACK HOME

MARJORIE A. SILVER¹

The Justice Mission Conference had a special resonance for me. This is my ninth year in law teaching and my first year as a member of the faculty of the Touro Law Center in Huntington, Long Island. The Conference was an affirmation of the values that have led me to Touro, as well as a springboard for changes in my own teaching. From conversations with my three Touro colleagues who also attended the Conference, as well as with others from Touro who were eager to hear about the Conference upon our return, I believe the Conference will have lasting importance for our school as well. Many Touro faculty and administrators are committed to furthering social justice through our teaching, our scholarship, and the way we relate to our students, to each other and to the world at large. The Conference nurtured those inclinations and aspirations.

The papers in this symposium memorialize the Conference's richness of insight and experience. The purpose of this essay is to reflect on the immediate and potential ongoing impact the Conference had on me and my colleagues from Touro. I am sure we are not unique in the nature or the variety of ideas that the Conference generated for us. Nonetheless, what follows is a tribute to the Conference presenters who gave so much to the rest of us, as well as a possible inspiration to those looking for simple possibilities for furthering social justice in their own academic experience.

BEING THERE

It has always felt good, right, to join for a few days with fellow-travelling academics who continue to fight the good fight. It was exhilarating for me to be at the Conference with three other colleagues from my new academic home. Had this been a few years earlier, I likely would have been fretting over how I might sell some of the Conference's inspirations to my former colleagues at a law school committed to social justice only incidentally. Instead, here I was with three others from Touro: Acting Dean Hal Abramson, Acting Associate Dean for Academic Affairs, Beverly McQueary Smith, and Director of Clinical Programs, Marianne Artusio, each of us eager to learn and grow. My new colleagues probably could not understand how special this was for me. I am

¹ Associate Professor of Law, Touro Law Center, B.A. 1970, Brandeis University; J.D. 1973, University of Pennsylvania Law School. This essay was written shortly after returning from the Justice Mission Conference, during the winter of 1991-92. I thank my colleagues Hal Abramson, Marianne Artusio and Beverly McQueary Smith for their helpful comments and contributions.

not sure that how I felt can be fully understood by anyone who has not spent years beating her progressive head and heart against the proverbial ivy-covered wall. Wednesday evening, Thursday, most of Friday—a relatively short period of time compared to many conferences, yet it was a feast of ideas and inspirations. I loved being there yet I could not wait to get home and back to work.

THE PLANE RIDE HOME

Hal Abramson and I sat next to each other on the plane home. Hal, Touro's Associate Dean for Academic Affairs, was Acting Dean for the Fall semester while Howard Glickstein was on sabbatical. In that capacity, he was to give a speech two days later at Touro's Family Day, an annual event honoring students' accomplishments, as well as their spouses, parents, children and significant others who help keep the faith during the long trek of law school. Hal and I shared with each other our experiences at the Conference, and talked about workshops one or the other had attended. We discussed ideas for how he might convey some of his concerns about justice to his Family Day audience. As the plane flew toward New York City, we began to develop a written outline for Hal's remarks.²

² Hal has since shared with me a copy of that talk. He spoke of the plethora of lawyer jokes and explored some of the reasons for this. He talked about what our society would look like without lawyers, how our legal system serves as an alternative to violent self-help and other confrontations. And he spoke of the possible tension between the lawyer's obligation to represent her client zealously and the quest for justice:

Given that lawyers and courts perform such important functions in our communities, why this disillusionment? Why this dissatisfaction with lawyers? Why the lawyer jokes?

This past week, I had the opportunity to think about this at a conference held on the lofty topic of The Justice Mission of American Law Schools. I wonder, are lawyers perceived as simply hired guns blindly advocating for a client without any regard to whether the result is just or fair?

This is indeed a complicated issue because lawyers do have the obligation to zealously represent clients. This is an important obligation that must be fulfilled in order for our adversarial system to succeed. Furthermore, what is just or fair in a particular case may depend on one's point of view.

But have lawyers gone too far in their zealousness? At the Justice Conference, I was told of a case brought by one law student on behalf of an indigent client. The response of the other attorney was described as a scorch the earth strategy. The law student had to call on the assistance of eleven more students and two full-time clinical professors to work together to represent this single client as a result of the opposing attorney's strategy.

Recently, I organized a panel on the use of mediation in family law. I was warned not to invite a particular attorney because he was known as a "bomber". I was not familiar with the label. It was explained to me that a bomber is an attorney that other attorneys cannot talk to. The bomber is

I told Hal about thoughts I had been having over the previous two days about the Civil Procedure class I would be teaching that following Monday. I was thick in the middle of teaching personal jurisdiction. At some point during the Conference I realized that I had been discussing this subject, and had used the phrase "traditional notions of *fair* play and substantial *justice*"³ from *International Shoe* dozens of times over the previous few weeks, without really pausing to *think* about what the Court—or I—mean by it. It was like playing the children's game of saying a word aloud over and over and over until it becomes mere gibberish. I was eager to go home and prepare my notes to teach *Burger King*.⁴

HOME AGAIN

Burger King involves a Michigan franchisee whose principals were sued in Florida by the Florida-based Burger King Corporation for, among other things, breaking the franchise agreement. The bald issue is whether the Florida court had jurisdiction over them based on their contractual arrangement with the Florida corporation. It is a story of the Big Corporation against the little guys—except in this case the little guys were two relatively sophisticated businessmen who defied the Big Corporation by continuing to operate as a Burger King even after the corporation had terminated the franchise agreement. The Supreme Court sustained the exercise of jurisdiction over Rudzewicz.

After discussing the case and its background, I asked the class the following series of questions:

- * Do you feel differently about *Burger King* because the merits seem to suggest that Burger King had a strong case against Rudzewicz?

- * What if, instead, Rudzewicz' only failure was that hard economic times had hit him, and he could not meet his franchise payments each month?

- * What if, instead of being an experienced and sophisticated businessman, Rudzewicz was a single mother of three young

driven to win at all costs. He does not respond to reasoned discussion or even merit. He wants to win for the sake of winning.

Bombers and scorch the earth strategies do not contribute to just and fair resolution of disputes. They contribute to more lawyer jokes.

Hal then went on to describe some of the programs and courses at Touro designed "to prepare our graduates to excel in the practice of law and to promote justice in our communities." See *infra* note 9. A copy of the speech is on file with the author.

³ *International Shoe Co. v. State of Washington*, 326 U.S. 310, 316, (1945) (citing *Milliken v. Meyer*, 311 U.S. 457, 463 (1941)) (emphasis added).

⁴ *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985).

children—a former welfare recipient—who obtained a loan from the Small Business Administration to purchase the Burger King franchise?

* How fact specific should the personal jurisdiction inquiry be?

* We have spoken over and over again about notions of "fair play and substantial justice." But I don't know that we've spent much time—at least together here in class—reflecting on what that *means*. What do you think it means? What is "fairness"? What is "justice"? Is there a difference?

My goal was to get them to examine the differences between procedural and substantive justice, as well as—perhaps—compensatory and distributive justice. I wanted to get them talking about power imbalances among litigants, and how that either does or should affect the inquiry about personal jurisdiction.

Did I succeed? To some degree, yes. There was not enough time to do the discussion justice (pun intended). An animated discussion ensued about whether the courts should differentiate among differently situated litigants for purposes of asserting personal jurisdiction over them. Some students had difficulty dealing with the hypothetical involving the former welfare recipient ("No one would give her a business loan, really"). Others felt that if she wanted to operate a franchise, then she shouldn't expect to be treated differently than any other business person. Yet others felt it would definitely not be fair (and therefore not just) to require her to litigate in Florida. While no consensus of what justice or fairness required emerged—nor did I expect it to—the occurrence of the discussion left an impression on many students. This was valuable for its own sake. S., an older, somewhat disaffected, gay, demonstrably progressive student came up to me after class. "What happened to you in Cleveland?" he smiled, clearly delighted with the change in focus of the class discussion. By moving the discourse from the doctrinal to the jurisprudential, I had succeeded in sparking excitement in a student who could have cared less whether the outcome in *World-Wide Volkswagen*⁵ would be different if the suit had been brought in Pennsylvania rather than Oklahoma.

Might I do more? Obviously. But this was a start. In subsequent classes, we would return to notions of justice in our discussion of judicial exercises of power over litigants. Often, after the *Burger King* class, it was a student who would test an approach in terms of whether it furthered justice. The Conference served as a catalyst for me to refocus. Now it is easier for me to avoid intellectual abstractions and to infuse class discussions with explorations of core values served or frustrated by procedural principles. So we spend more time talking about what is important to me, and I hope to many of my students as well.

BEYOND BURGER KING

This is the first time I have had the pleasure of teaching Civil Procedure as a two-term six credit, rather than a one-term four credit course. I had long

⁵ *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980).

wanted to do more with lawyering skills in the course, but four credits had handicapped efforts to do anything truly ambitious. Now with two extra credit hours with which to work, I could. Into this void leapt Phil Schrag's wonderful year-long simulation materials about Lucy Lockett and her unfortunate snake bite.⁶ Having just completed the first semester of the course, I can attest that it not only made Civil Procedure more real and more fun, it actually succeeded in teaching the vast majority of the class *to think like lawyers!* By that I *don't* mean merely the ability to argue any side of a case. Rather, in terms of planning and strategizing, most students could put themselves in the shoes of a real lawyer with a real client who had a real problem (or set of problems), consider alternative approaches, evaluate them, and make recommendations. The simulations themselves—involving interviewing the client, case planning, complaint drafting, and presenting evidence and argument on a motion to dismiss for lack of personal jurisdiction—were a highlight of the semester for students and teacher alike. I had been impressed with the quality of the written submissions from these neophyte law students. I designed the exam to test the special skills I had been teaching. The ninety-four exams I got back were the best set of exams I have ever received.⁷

Despite this outstanding success, I remain partially dissatisfied with the Lockett simulation, and I only recognized this dissatisfaction during a workshop session of the Conference. Phil Schrag has put so much time, energy and skill into creating this simulation. I only wish the case involved more compelling moral and social issues than this young woman's undoubtedly traumatic personal experience with a snake. Nor do I feel I have the time or the experience now to replicate what Phil has done with a problem that meets my concerns.⁸

⁶PHILIP G. SCHRAG, CIVIL PROCEDURE: A SIMULATION SUPPLEMENT (1990).

⁷I say this not because their ability to relate or to manipulate doctrine was markedly different from that of previous classes, but for other reasons. For example, I always include a component in the grade regarding "point of view" to assess the students' ability to put themselves in the role the exam creates for them. This is frequently a problem for many students. This time around it was a problem for only a small minority. Also, their technical ability to recreate the appropriate form for an answer filed in federal court was surprisingly good, despite the fact that they themselves had not yet been asked to draft one for the course. They knew how to find a model form, and adapt it to fit their particular case. This exam, like all of my exams, was completely open book, so the students had available to them whatever resources they thought to bring.

Although I have omitted more detail as beyond the scope of this essay, I would be happy to share with anyone interested my experience with the Lockett simulation or the particulars of how I tested for the skills taught.

⁸I beseech anyone who knows of such a simulation to please let me know!

NEW COURSE, NEW CHALLENGE

The Conference precipitated another important teaching decision. Several weeks before participating, in response to Dean Beverly McQueary Smith's solicitation of our teaching desires for next year, I said I hoped to teach a seminar. My first choice was a seminar on Education Law which I had taught happily several times before. A tried and true, beloved course. My second choice was a seminar on Civil Disobedience and the Rule of Law, which I had never taught. For quite some time, I have been doing research on Civil Disobedience and the Anti-abortion movement. I thought it would be useful both to utilize the vast amount of research I had done, and perhaps to quicken the birth of an article, to teach a seminar on the subject. Yet inertia and comfort with the familiar (not to mention already extant course materials) kept Education Law my priority. But for the influence of the Conference, the seminar on Civil Disobedience might have remained only aspirational.

On a stroll back to our hotel during the Conference, Beverly and I discussed what I would teach next year. There were institutional reasons why the Education Law seminar might present a problem: another member of the faculty taught a survey course on Education Law and there was concern my seminar would be redundant. While willing and able to distinguish and reconcile his course and mine, I (uncharacteristically) decided not to push the matter. I was getting excited about the possibilities of an *entire* course focused on *justice* issues, something I had never taught before. After the Conference, I sketched out a syllabus for the Civil Disobedience and the Rule of Law seminar and presented it to the Curriculum Committee. I will teach both a day and an evening section of the seminar in the Fall.

KEEPING THE FLAME BURNING

It was relatively easy within days of the Conference to prepare notes or make decisions fueled by the enthusiasm and excitement that the Conference generated. The challenge is in keeping that focus constant. As I teach Professional Responsibility for this Spring, I hope to remember and convey the insights gained in the workshop on Justice and the Legal Profession co-facilitated by David Luban and Steven Ellman. I plan to add a simulation based on the problem of individual versus mass justice created by sealing of court records as conditions of settlement agreements. Also during that workshop, Fran Ansley perceptively observed that many ethical dilemmas faced by attorneys are a function of one of two types of power imbalances in the lawyer-client relationship. In one case, lawyers represent clients who are more powerful than they: for example, house counsel for a large corporation. In the other, lawyers represent clients who are less powerful than they: to wit, the legal services lawyer. In making decisions of who my students want to be when they become attorneys, this realization—which before the Conference I had never had consciously—seems critical.

Another critical realization I had concerns the impact of the change in the composition of the Supreme Court on how we teach law from now on. The years when we might count on the Supreme Court to bring issues of justice and fairness to the forefront of our students' minds are over, at least for our professional lifetimes. We can not even count on vigorous dissenting opinions

to raise such concerns. Thus we have a transformed obligation to teach *against* Supreme Court decisions, the bread-and-butter of our casebooks. I am not yet sure how this will or should play out in curriculum changes, but I am sure that it demands hard, intensive, creative thought.

One post-Conference goal, then, is the personal one of keeping the flame alive in my individual work. Another is the challenge of keeping it alive institutionally. Upon returning from Cleveland, I organized a brown-bag lunch for Touro faculty who wanted to hear more about what had gone on at the Conference. As I said earlier, many of my Touro colleagues have concerned themselves with social justice issues in their work before and since coming to law teaching.⁹ Apart from occasional faculty colloquia on social justice issues, and our annual Public Interest Lawyer in Residence program, we do not gather regularly as a group to talk about these issues. We plan to hold these informal

⁹ In the November-December, 1991 issue of the Touro student newspaper, *The Restatement* (Vol. 13, No. 3), Hal Abramson used the "Dean's Column" to discuss the public service work being performed by members of the faculty. Hal wrote:

During the past two years, there has been much debate about whether or not a mandatory pro bono obligation should be imposed on lawyers and how broadly or narrowly pro bono work should be defined. When Touro Law Center was first established in 1980, the Faculty considered these issues . . . [and] decided to impose upon itself an obligation to engage in public service work. The Faculty reaffirmed this obligation when our rules of governance were revised in 1987.

[They] state that faculty members will be evaluated for reappointment, promotion in rank and tenure in accordance with several criteria including their actual and potential contribution to professional service to consist "of an activity in which the faculty member has functioned as an attorney or legal expert in affecting community or public policy or in providing community or public service." It is clear that performing public service is part of the culture of the Touro Faculty.

Hal then went on to list examples of public service work of about a quarter of the members of our faculty, ranging from Peter Davis' work as Chair of the Board of Directors of the Andrew Glover Youth Program, an organization dedicated to providing alternative sentencing options for youth offenders, to Eileen Kaufman's membership on the President's Committee on Access to Justice of the state bar association, to Bruce Morton's service on the Executive Board of the state chapter of the American Lung Association, to Doug Scherer's position as President of the Board of Directors of the county's Child Care Council, to Barbara Swartz' work as a consultant on public health issues for the World Health Organization. His list did not pretend to be exhaustive, and did not even mention the scholarship the faculty has produced on social justice issues.

lunches periodically to continue the discussion of changes we might make beyond our individual classrooms.¹⁰

In addition to talking to each other, we must continue to talk about these issues with our students, their families, and the larger community. Hal's Family Day speech was significant not merely for its content, but because what we talk about at events such as these conveys an important message about our priorities.¹¹ And that message must be conveyed by the deans of our law schools, the presidents of our universities, and the leaders of the bars.¹²

FRIENDS AND HEROES

A special fringe benefit of the Conference for me was rooming with Marianne Artusio. It was an opportunity to get to know a new colleague, who I already liked enormously, much more intensively than would otherwise have been possible in such a short period of time. Marianne has a deep, abiding commitment to social justice. She and I make a strange, yet complementary pair in several ways that became apparent in Cleveland. What was most telling, however, was how we each responded to the Conference. As I have described, the Conference energized me and fueled my diehard optimism. Marianne had a profoundly different reaction. While she thought the Conference was wonderful, she found it emotionally and intellectually unsettling. Why? Because she felt completely inadequate for not having already thought of, and

¹⁰Touro has already taken important institutional steps in recent years. It is among the few law schools in the country to have implemented a mandatory public interest perspective requirement. Ours is perhaps unique in that a student can satisfy the requirement either by representing clients through our clinical programs or externships, or by taking one of two courses, Racism in American Law or Poverty Law. In 1983, Touro established a Public Interest Summer Fellowship program that regularly supports public interest internships for at least five students each summer. Last summer (1991), with the help of some outside funding, the school was able to provide fifteen such fellowships.

Our Admissions Committee and LEAP program endeavor to attract, admit, and retain qualified applicants from disadvantaged backgrounds. Our Appointments Committee has made significant strides in increasing the racial and ethnic diversity of our faculty. Our clinical programs continue to serve otherwise underrepresented client populations such as social security disability recipients facing cut-off of benefits, mental health patients facing discrimination, and aliens facing deportation.

¹¹Leslie Bender made this point so well in her presentation at the Conference on the hidden messages of the traditional first-year curriculum. See *infra* this symposium.

¹²It was heartening to see the large number of deans participating in the Conference. And the presentation—even the mere presence!—of Sandy D'Alemberte, President of the ABA, lent the establishment's imprimatur of legitimacy to the Conference's goals.

accomplished, *all* of the incredible things being done by all the Conference presenters to further social and legal justice.

Although I endeavored—in vain—to get her to see her own significant accomplishments, part of me is pleased that Marianne will not stop fretting until the world is perfect. Marianne wants to be John Healey.¹³ I do not. But I am ever so grateful that there are John Healeys and Marianne Artusios in the world. They, like the other remarkable people at the Justice Mission Conference, guard us from complacency.

¹³ John Healey is the Executive Director of Amnesty International USA who delivered an indescribably passionate speech about torture he had witnessed in South America at Thursday night's dinner.

