

Western New England Law Review

Volume 19 19 (1997)

Issue 1 *FIRST ANNUAL NORTHEASTERN
PEOPLE OF COLOR LEGAL SCHOLARSHIP
CONFERENCE*

Article 10

1-1-1997

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Recommended Citation

Verna C. Sánchez, *LAW AND THE POSSIBILITY OF JUSTICE*, 19 W. New Eng. L. Rev. 183 (1997),
<http://digitalcommons.law.wne.edu/lawreview/vol19/iss1/10>

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LAW AND THE POSSIBILITY OF JUSTICE

VERNA C. SÁNCHEZ*

In a commencement speech last year, one of our graduates explained that a friend had asked what she had learned during three years in law school. When the graduate mentioned torts, contracts, and criminal law, her friend responded, "But where is the class about justice?"¹

As individuals and as lawyers, we have all considered the issue of what is justice. For those of us who are academics, we are obligated to not only reconsider this question, but to add another. That is, our concern must not simply be focused on what justice is and what is its relationship to the law and legal system of this country. Rather, we must also ask, and try to answer, the question: What do we *teach* about justice and the legal system? To a limited extent, I think it is less important *what* we think about justice, than that we *do think* about it. I say this because it is most often the case that the legal academy, like Justicia herself, wears a blindfold. That is, the focus of the legal academy is on teaching the law and the *rule of law*. This is not, in and of itself, wrong. What is difficult to explain, as the conversation cited above exemplifies, is how, when, and *why* the issue of justice got separated out from the law. How is it that one may study three years in law school, read hundreds of cases and learn, articulate, and apply an equal number of rules of law without ever considering or even hearing mention of justice? "In an earlier day, speaking about law and justice was not so vexing or difficult. Justice (*jus* meaning 'law') was a *legal term*, pure and simple."² Thus, expanding my idea that what we, as law professors, think about justice may not be as important as the obligation that we do think about it.

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1. Stephanie M. Wildman, *The Quest for Justice: The Rule of Law and Invisible Systems of Privilege*, in PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA 139, 139-40 (Stephanie M. Wildman et al. eds., 1996).

2. Thomas R. Kearns & Austin Sarat, *Legal Justice and Injustice: Toward a Situated Perspective*, in JUSTICE AND INJUSTICE IN LAW AND LEGAL THEORY 1, 2 (Austin Sarat & Thomas R. Kearns eds., 1996) (emphasis added).

What is even more critical is that we get our *students* to think about it, at least as often as they are thinking about rules of law. I would venture to say that the word “justice” is not often heard (or at least not often enough) in law schools, except to refer to Supreme Court judges. Too often students are only taught the formalistic requirements of legal thought and analysis: brief the case, learn the facts, find the issue, find the holding, isolate the rationale for the decision, apply it to a hypothetical set of facts. How often do they get taught that each case they read is about real people and real lives? Do we remind them that beyond the issue and the rule in the case, there is a profound impact on one or more people every time a court rules? I once used the two Jehovah’s Witness flag salute cases, decided three years apart, in a course for first year students.³ But in addition to discussing the facts, issue, and rule of law, we also talked about the people involved in the case. We discussed and read material about the plaintiffs in *Minersville School District v. Gobitis*,⁴ and we also read about what happened in the three years between the two cases. As has been well documented, following *Gobitis*, Jehovah’s Witnesses all over the country were brutally attacked by mobs.⁵ Many of the students told me they thought it was the most meaningful experience they had yet had in law school; the recognition that the law is about something beyond formalistic and abstract principles to be learned and mastered. Discussion of the law and legal analysis ought to include a different kind of “hide and seek” than the type usually encouraged in the academy. That is, let’s also look for and try to find what is *not* there and see if it has had any influence on the outcome.

Coming back to *Gobitis* and *West Virginia State Board of Education v. Barnette*⁶ as examples, it was difficult to explain or justify why the Court, in ruling on two cases with virtually identical facts and issues, could reach absolutely opposite results,⁷ if we ignored everything beyond the “four corners of the pages” on which the

3. See *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940).

4. 310 U.S. 586 (1940).

5. See BARBARA GRIZZUTI HARRISON, *VISIONS OF GLORY: A HISTORY AND A MEMORY OF JEHOVAH’S WITNESSES 190-91* (1978).

6. 319 U.S. 624 (1943).

7. In *Gobitis*, the Court upheld the public school expulsion of two children, Jehovah’s Witnesses, who had refused to stand and pledge allegiance to the flag, because of their religious beliefs. See *Gobitis*, 310 U.S. at 600. Three years later, on almost the exact same facts, the Court reversed itself, on a vote of six to three. See *Barnette*, 319 U.S. at 642.

opinions were written. Once, however, we read about the repercussions that occurred after *Gobitis*, of which the Court was aware, we could begin to better understand the dynamics of the decision in *Barnette*. The mythology of the “traditionalists” in the academy is that the “legal realists” or “critical legal theorists” are seeking, inappropriately, to further a political agenda, in a world where, instead, the law is actually decided and taught in a neutral, value-free fashion.⁸ If one operates from the latter perspective, it is then quite easy to think about and teach the law without ever considering the idea of justice. What is more difficult, however, is to try and make meaning out of much that we read and teach. The idea of justice can, in the “traditionalist” context, be seen to be absolutely irrelevant to the teaching of law.

It is quite natural that those of us who have historically been disenfranchised in so many different ways, as well as those others who may have a more inclusive and fuller sense of history than has been traditionally taught and discussed, will see things in a way different from the “mainstream” of thought (i.e., through our own particular filters or prisms). How do we *not* think about racial discrimination, for example, in a way that does not include a fundamental “in the soul” type of understanding that the next time it could be me, or that in the past, in fact, it has been? I would suggest that we need to go even further than simply recognizing the effect of one’s personal prism on how one views the world. To limit ourselves, collectively, to the notion that the “other” will never see, or know, or really understand, is to let all of us off too lightly. To say, for example, that as a man you can never quite appreciate the emotional burden that each woman bears of knowing that *simply because she is a woman*, she is never completely safe from that very particular act of violence (i.e., rape) does not and should not preclude the idea that, you, as a man, must join forces in every possible way to eliminate such threats—*for the collective good*. That is, not because you may have a sister, daughter, mother, lover, friend, or wife who may be affected, but because it should be a societal demand that such a state of constant danger and threat harms us all, *as a society*.

People of color, women, and gay people are distinct targets of

8. Jonathan Stubbs has briefly described some “legal realist” views, including those of Professor John Gray, who, as Stubbs notes, has asserted that “the real meaning of law is what the judges say it is.” Jonathan K. Stubbs, *Perceptual Prisms and Racial Realism: The Good News About a Bad Situation*, 45 *MERCER L. REV.* 773, 782 (1994) (citing JOHN CHIPMAN GRAY, *THE NATURE AND SOURCES OF THE LAW* (2d ed. 1921)).

the burgeoning threat of hate groups. Numerous scholars have laid out the extent of this threat.⁹ But what must also be understood is how such groups represent a threat to us all, *as a society*, not simply to some of us within society. There is little chance of genuine justice being achieved in a climate of fear. The perception problem, of course, goes back to the idea of the prism, derived from Professor Jonathan Stubbs's article.¹⁰ If it is not in my personal "reality," the thinking often goes, then I need not make an effort to try and look at it from another's perspective and understand what is so threatening and harmful to that other person. Or worse yet, there is often not even a consciousness or awareness that "I" am operating from a particular perspective derived exclusively from my own life experience. How often have you heard a woman say: "I don't consider myself a feminist, because I've never been discriminated against; I don't understand why these women are complaining; they need to just pull themselves up by their own bootstraps"? There is an unquestioned assumption that "my" reality is everyone else's reality (or at least should be).

Why don't all Americans feel strongly about the threat posed by hate groups? Perhaps it is because when one does not feel *individually* threatened, then one need not be concerned that others may be. Further, there is a failure to see that such a threat to others is, in and of itself, a threat to all.¹¹ It is the same type of thinking that leads to the complaints about procedural and other legal protections given to criminal defendants. The notion is that "this will never affect me, and so the protection offered to someone else, here a criminal, has no value for me and never will. *I receive no benefit* from such protection, and therefore, it is wrong for society to extend such a benefit to others, particularly to such unworthy people." This thinking is founded on an idea of the absolute primacy of the individual over the community, which goes hand in hand (although it is not clear which came first) with the "sanctity" of private property. Beyond this, of course, are those people who, while not willing to join such groups as the Order or the Klan, in fact condone or endorse (although in practice this may be a distinction

9. See, e.g., Robin Barnes, *Standing Guard for the P.C. Militia, or, Fighting Hatred and Indifference: Some Thoughts on Expressive Hate-Conduct and Political Correctness*, 1992 U. ILL. L. REV. 979; Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989).

10. See Stubbs, *supra* note 8.

11. "Injustice anywhere is a threat to justice everywhere." MARTIN LUTHER KING, JR., *WHY WE CAN'T WAIT* 79 (1963).

without a difference) the ideas articulated by these groups. How can it be that not everyone sees what to many of us is quite clear: that these groups represent a clear and present danger?

It is an interesting exercise to read the papers and listen to the news reporting the racial violence occurring in Germany (even the European papers seem to happily lick their lips with an "I told you so" smirk almost seeping out of each new report of violence). There are indisputably sound historical reasons for being concerned about the rise of Neo-Nazis and racist skinhead groups in that country, but that is not my point in raising this issue. There is probably little disagreement in this country as to whether or not it was right and proper for the German government to have banned Nazi symbols, such as the swastika, as it has done. It would seem that people have agreed that this should be so—the swastika, for example, because of its appropriation by the Nazis, has become a symbol of a terrible and violent past,¹² and to ban it is quite proper for that reason. And, of course, the German government should and must "go after" these groups, as quickly and emphatically as possible. Ban them, punish them, and make sure they never again have the power to put their ideas into practice.

But now let us look at our own country for a moment. Why does this government accept the public display of the Confederate flag? It is a symbol of sedition and racial violence, with a profound and bloody history attached to it. How is it that this symbol has defenders, and what is the basis of such a defense? Given the history surrounding the Confederacy, not only as a breakaway government, but also the bloody legacy attached to the maintenance of slavery or slave-like conditions post-Civil War, why is it that not everyone can see the offensive and oppressive nature represented by this flag? Don't we, in this country, also have a bloody history of genocide and oppression, and therefore a historically sound basis for doing something comparable to what the German government has done? It has to do, again, with perceptions and "prisms." What we see in others goes unnoticed in ourselves. I raise these questions less as a means of suggesting one absolute correct answer, but rather to suggest that, as a society, we ought to be talking about them. I believe there is a connection between these ideas of the

12. The swastika is a very ancient symbol which has been used by various peoples and cultures throughout the world. See, e.g., MIRANDA BRUCE-MITFORD, *THE ILLUSTRATED BOOK OF SIGNS & SYMBOLS* 21, 105 (1996); 18 *ACADEMIC AMERICAN ENCYCLOPEDIA* 379 (1995); 26 *ENCYCLOPEDIA AMERICANA* 91 (Int'l ed. 1996).

need for genuine self-reflection and inclusive dialogues, and those of justice—defining it and trying to achieve it.

I suggest that the problem here is not of the loss of an American ethos, but instead, the absence of one.¹³ Because of the supremacy of the individual (how often have you heard expressed the idea that it is precisely the individualism of this nation that makes it great?), there cannot be a complete and true ethos. At least part of the problem would appear to be that this society too often seems to embrace an ahistorical and incomplete view of the world. In doing so, we never have to consider the possibility that what is true for us as individuals may not be true for others, whether that means others in our own country, or elsewhere in the world. The individual prism does not have to expand to include the idea that there are other experiences, cultures, and values that must be accounted for. But as Gabriel García Márquez said when he accepted the Nobel Prize for Literature: “The interpretation of our reality through patterns not our own serves only to make us ever more unknown, ever less free, ever more solitary.”¹⁴ The hostility which has greeted recent works of “revisionist” history, which have simply attempted to set forth a more complete and *inclusive* retelling of what happened and when, is consistent with a myopic view of the world and one’s place in it, as a person or as a nation. Indeed, referring to this country as “America” is also an example of this narrowness of vision. The United States of America is only one part of *one* of the Americas—there are, we should remember, a North, South, and Central America.

There are so many words that we come across each day which have become loaded with negative implications. The words we use, and the tone with which we speak them, send very clear signals about what is valuable, respected, and worthy, and conversely, what is not. The words “idealism” or “idealist,” for example, whether written or spoken, are often used in a way that seems to carry with them an implicit sneer. But what we say in this context, and how we say it, may of course reflect what we think about justice and the law and the relationship between the two. As lawyers, we are accustomed to seeing the standard, once-a-year article in the *ABA Journal* (or comparable professional publication) about those law-

13. See Reginald L. Robinson, *The Impact of Hobbes's Empirical Natural Law on Title VII's Effectiveness: A Hegelian Critique*, 25 CONN. L. REV. 607 (1993).

14. Gabriel García Márquez, *The Solitude of Latin America*, in GABRIEL GARCÍA MÁRQUEZ AND THE POWERS OF FICTION 87, 89 (Julio Ortega ed. & Marina Castañeda trans., 1988).

yers who practice public interest law. The article is usually written in a way that makes it apparent that, overall, these people are aberrant but interesting "specimens." The "idealist" of course, is always juxtaposed against the "pragmatist." In fact, the pragmatist is usually meant to be what an idealist becomes when he or she "grows up." That is, work that carries with it a goal of attaining a common good or betterment of society is a sign of immaturity—a stage, perhaps, to be gotten through until one achieves "good sense" and moves on. But it is the idealist, I contend, who worries most about questions of justice: do we have it, does the law consider it or offer it, can we get it, and if so, how?

It seems clear that there is no real consensus about what justice means.¹⁵ Some have argued that justice is an elusive, philosophical idea. Even if this is so, society can only benefit by continued debate and discussion about it. We are harmed, within the academy and without, by turning away from, or benignly neglecting the topic. But ours is a society that seems to have moved further and further away from respecting ideas or the life of the mind. Instead, we are fed "sound bites," a meager substitute for genuine intellectual exchange within and among the polity. Abstract concepts and the realm of ideas have been almost completely superseded by "things." The extension of this perspective is that anything can be bought and sold. And we all remember that our own history includes a time when some peoples were indeed treated only as commodities. How can we attempt to achieve justice when there may be so little interest in discussing or thinking about it?

When you have a society that has connected up the idea of freedom or liberty with ownership and the pursuit of "things," then the right of the individual emerges as paramount to the right of the community. It becomes ever more difficult to try and persuade people of the intrinsic value of a just society when you may not be able to offer tangible proof of the benefits, especially for each individual person. This explains why we have seen such a distortion of the constitutional right to bear arms. This "right," taken totally out of any historical or constitutional context, has ended up being translated into the idea that society has absolutely no right to try to limit the number or type of guns one can purchase each month, or assert

15. See generally JUSTICE AND INJUSTICE IN LAW AND LEGAL THEORY, *supra* note 2. Is justice simply the absence of injustice? Or is it, as Justinian stated it, "the set and constant purpose which gives to every man his due?" CAESAR FLAVIUS JUSTINIAN, THE INSTITUTES OF JUSTINIAN 3 (J.B. Moyle trans., 5th ed. 1913).

that there might be a legitimate reason to ban certain types of weapons, such as assault rifles. We hear the refrain, chanted like a mantra that, "It's my right as an American to . . ." What is really meant is that it is my absolute right as an *individual* to be free from any restraint, irrespective of the impact of that idea on society as a whole.

It is quite easy, then, to see why law professors and law students can spend three years together, discussing hundreds of rules of law and cases, and never once utter the word "justice" except as a reference to a judge. Or why one can spend an entire career practicing law and litigating without ever trying to consciously achieve, attain, or define justice. I am not arguing that justice requires that the individual should always, and at all costs, be subverted by the community. We all know, through the lessons of world history, the dangers implicit in that conclusion. And for those of us whose histories include having been subjected to slavery, or disenfranchisement, or a legacy of poverty and colonialism, there is an understandable reluctance to urge the adoption of an absolute preference for the community over the individual. We know that, more often than not, "we" are not included in the definition of "community," but rather, are left to be affected by what the community decides. What I suggest here, instead, is that the problems of fairness and equality, for example, cannot be resolved without at least an acknowledgement of the need for a meaningful ethos that tries to balance the needs of both the individual and the community in a way that benefits both and advances the cause of justice. I am reminded of an excerpt of a speech given by another Nobel Prize winner. Albert Camus was speaking of the artist, but I believe that we may take his words and substitute ourselves, as lawyers, law students, or law professors, but also, and above all, as members of a larger community:

At the same time, after having outlined the nobility of the writer's craft, I should have put him in his proper place. He has no other claims but those which he shares with his comrades in arms: vulnerable but obstinate, unjust but impassioned for justice, doing his work without shame or pride in view of everybody, not ceasing to be divided between sorrow and beauty, and devoted finally to drawing from his double existence the creations that he obstinately tries to erect in the destructive movement of

history.¹⁶

I believe it is our obligation, as professors, lawyers, and law students, to seek justice when and how we can. We must teach justice, talk about it, write about it, and work for it, so that all of us may come to desire it, recognize the need for it and the benefit derived from it, and therefore possibly make it real, always.

16. Albert Camus, *Acceptance Speech*, in NOBEL PRIZE LIBRARY: ALBERT CAMUS, WINSTON CHURCHILL 7, 9-10 (1971).