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MAKDISI AND JUNE MARY ZEKAN MAKDISI*

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THE MORAL IMPERATIVE TO CHANGE UNJUST LAWS AND THE NEW HAVEN SCHOOL

CAROL CASTLEBERRY*

The theme of this issue of the *Intercultural Human Rights Law Review* involves profound issues of law and morality. Professors John and June Mary Makdisi chose this theme as one close to their hearts. Throughout their professional and personal lives, both Professors Makdisi have been teachers, mentors, and examples of how law and morality fit together. This essay is dedicated to them.

What is the relationship between law and morality? The answer depends on our definitions of law and morality. Law is all about definitions. The answer to a legal question can turn on the meaning of a single word. When we think of “law,” we likely think of it as formal, legislated rules, such as constitutions, statutes, treaties, codes, ordinances, and adjudicated rules decided by courts, all put in writing. This concept of law comports with the second definition of “law” in BLACK’S LAW DICTIONARY, describing it as “[t]he aggregate of legislation, judicial precedents, and accepted legal principles; the body of authoritative grounds of judicial and administrative action; esp., the body of rules, standards, and principles that the courts of a particular jurisdiction apply in deciding controversies brought before them.” Various parts of our government make these laws and have the power to enforce them. “Lawful” behavior is “[n]ot contrary to law; permitted or recognized by law.”¹ We must obey the law by *doing* certain things or *refraining* from doing certain things as prescribed. If we disobey, we can be fined, arrested, jailed, or sued. This is legal positivism—the idea that laws are only what the government officially decides. Positivism’s original legal theorist, John Austin, defined law as a command of the sovereign, enforced by sanctions.²

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¹ *Lawful*, BLACK’S LAW DICTIONARY (10th ed. 2014) [hereinafter Black’s].

² JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 285 (Wilfrid Rumble ed., Cambridge 1995) (1832). Positivism’s original theorist, John Austin,

It may be surprising—especially to lawyers—that BLACK’S first definition of “law” is “[t]he regime that orders human activities and relations through systematic application of the force of politically organized society, or through social pressure, backed by force, in such a society.” This conception of law can include rules that may *not* be official, written law, but that we feel obligated to follow for social, cultural, or moral reasons nonetheless.

“Obligation” means a “legal or moral duty to do or not do something. The word has many wide and varied meanings. It may refer to anything that a person is bound to do or forbear from doing, whether the duty is imposed by law, contract, promise, social relations, courtesy, kindness, or morality.”³ “Morality” means: “1. The doctrine of right and wrong in human conduct; ethics; moral philosophy. — Also termed *moral law*. 2. Conformity with recognized rules of correct conduct; behavior that accords with what is true and honorable.”⁴ Disobeying laws of a social, cultural, or moral character may also have unwanted consequences. An oft-cited example is the “law” of standing in line: we must go to the end of the line to wait for our turn.⁵ We disobey by cutting in line at the risk of objection, anger, ostracism, or even physical altercation from other line-standers. The social, cultural, or moral reasons for obeying are our “norms”—what we consider normal, that is, what we believe to be right, good, or just.

Formal, written law is generally not legislated, decided, adopted, or enforced until its content is the norm⁶ for the constituency it will control—or at least for the decision-makers. What do we do when our own morality—our sense of right and wrong, good and bad, and just and unjust—tells us that the written law is wrong, bad, or unjust? Justice is defined as, “1. The fair treatment of people. 2. The

did not recognize international law as positive law or “law strictly so called,” but rather regarded it as “positive moral rules,” because he found that it was not ordained by a sovereign. *Id.* at 123.

³ BLACK’S, *supra* note 1, *Obligation*.

⁴ *Id.*, *Morality*.

⁵ W. MICHAEL REISMAN, LAW IN BRIEF ENCOUNTERS 51-96 (1999) (calling such everyday rules “[m]icrolegal systems”).

⁶ “Norm” means “[a] standard, model, or pattern regarded as typical for a specific group.” *Id.* at 848.

quality of being fair or reasonable.”⁷ I believe it is a moral imperative to work to change unjust laws,⁸ especially if that law harms human beings who cannot fight back. If we can change what people consider norms, then written law and enforcement mechanisms should follow. Laws ratify changes in norms—shared understandings of justice—accomplished by social and historical changes. A plethora of examples illustrate the “tipping point” mechanism of changes in norms reaching a critical point that “tips” the scale and results in formally changed law. Among them are the abolition of slavery, the vote for women, the U.S. Civil Rights Act of 1964, and recently the legalization of same-sex marriage.

Rapid changes or traumatic events—crises that put critical values at stake—often precede tipping points and social change. A profound and inspiring example is World War II. Common moral outrage and revulsion to the Holocaust led to the 1948 United Nations Universal Declaration of Human Rights. At that time, fifty-six countries were members of the United Nations. Eleanor Roosevelt chaired the Commission that, with hundreds of proposals by member states and private persons, drafted the Declaration.⁹ Although the Declaration was an aspirational declaration with no legal force at that time, it articulated normative commitments for the future.¹⁰ Today it mostly reflects customary international law.¹¹

⁷ BLACK’S, *supra* note 1, *Justice*. See generally JOHN RAWLS, A THEORY OF JUSTICE (1971) (advocating for fairness as the very essence of justice).

⁸ Gustav Radbruch, a legal positivist and moral relativist writing before World War II, came to believe after the war that law and morality are connected, and therefore intolerably unjust laws are flawed and must yield to justice. Torben Spaak, *Meta-Ethics & Legal Theory: The Case of Gustav Radbruch*, 28 LAW & PHIL. 261, 262 (2008).

⁹ See JOHANNES MORSINK, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ORIGINS, DRAFTING, AND INTENT 5-10 (2000).

¹⁰ See Mary Elsbernd, *Vision, Context and Transformative Praxis: Reading the Universal Declaration of Human Rights Forty Years Later*, in *NORMATIVITY OF THE FUTURE: READING BIBLICAL AND OTHER AUTHORITATIVE TEXTS IN AN ESCHATOLOGICAL PERSPECTIVE* 328 (Reimund Bieringer & Mary Elsbernd eds., 2010).

¹¹ RICHARD B. LILICH, THE HUMAN RIGHTS OF ALIENS IN CONTEMPORARY INTERNATIONAL LAW 44 (Gillian M. White ed., 1984).

The Declaration's Preamble sets forth reasons for proclaiming the list of rights. Its first words are, "Whereas the recognition of the *inherent dignity* and of the equal and inalienable rights of *all members of the human family* is the foundation of freedom, justice and peace in the world . . ." ¹² The drafters believed that recognizing this fact and treating people accordingly would help to bring about world freedom, justice, and peace. ¹³ The Declaration states:

The General Assembly [p]roclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction. ¹⁴

Upon this seminal Declaration today rest not only legally binding treaties, conventions, and human rights protocols across nations and cultures around the globe, but also a standard of human rights norms that people feel obligated to follow, enforce, promote, and fulfill.

My own understanding of and commitment to this inherent dignity of all persons has been part of me from early childhood. It underlies my belief in the moral imperative to fight injustice and to change norms and laws that do not prevent injustice, stop it when it happens, or ameliorate the harms in its wake. It was not until after I studied cultural anthropology in college, finished law school, and practiced appellate law for several years that I concluded that written

¹² G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) (emphasis added) [hereinafter Universal Declaration]. Article 1 proclaims: "All human beings are born free and equal in dignity and rights."

¹³ MORSINK, *supra* note 9, at 313.

¹⁴ Universal Declaration, *supra* note 12.

law is not enough to change the world and make it more just. I felt straight-jacketed by written law imposed from above which, while amenable to latitude in interpretation, was too inflexible to bring about significant social change. I wanted to know how to change the *law* itself. My search led me to study Social Justice at Loyola University Chicago, where I began to find what I was looking for. I learned that social change is a multi-faceted process and that effective advocates employ practical skills, tools, and steps to engage in the process and strategically foster change at the local, national, and international levels, in order to bring about that tipping point at which the law is changed.

The sequence of steps I learned in the context of social justice advocacy¹⁵ begins with a case study describing the social problem in detail and a vision statement of preferred outcomes. Next is a multidisciplinary, social-science-based analysis of the underlying structural and institutional causes of the problem. This includes both quantitative and qualitative analysis, looking for relationships, patterns, trends, and contradictions at interpersonal, local, national, and international levels. After describing and analyzing the problem and root causes comes research to discover solutions both existing and untried that might fix the underlying causes by changes in law, policy or behavior. The advocate must also identify what processes and procedures are involved in accomplishing various solutions, identify the stakeholders, decision-makers, and pressure-makers who have the power to make solutions happen, and seek out potential allies to collaborate with. The advocate formulates the core message and tailors it to each prospective audience, considering what framing will appeal to each audience. The advocate also considers the best medium—such as lobbying or mass media, as well as the best strategy for reaching each audience, crafting and executing long and short-term action plans with periodic evaluation and adjustments.¹⁶

I began to practice these steps and to teach them. When I went on to study intercultural human rights at St. Thomas University School

¹⁵ See DAVID COHEN, ROSA DE LA VEGA & GABRIELLE WATSON, *ADVOCACY FOR SOCIAL JUSTICE: A GLOBAL ACTION AND REFLECTION GUIDE* (2001).

¹⁶ See *id.*

of Law,¹⁷ I discovered a similar sequence of steps for change, this time arising from jurisprudence itself, while simultaneously displaying interdisciplinary features. According to it, the lawyer's role is that of societal leader and problem-solver, a "[d]octor of the social order."¹⁸ This new, creative discipline opened my eyes to the concepts of law described in the first paragraphs of this essay. I had never heard of the New Haven School of Jurisprudence,¹⁹ but I immediately felt at home.

The New Haven School's guiding light is the principle of a global public order of human dignity. A public order of human dignity is "[o]ne which approximates the optimum access by all human beings to all things they cherish: power, wealth, enlightenment, skill, well-being, affection, respect, and rectitude."²⁰ Harold Lasswell's eight values identify the things to which human beings aspire.²¹

The New Haven School's goal is to solve pressing social problems rationally and comprehensively, using a series of five practical steps, or "intellectual tasks" adapted from cultural anthropology's systematic description of social process. The first task is to "delimit" the problem. This includes not only a description of the facts and why they constitute a problem—a situation that fails to

¹⁷ As a graduate of the LL.M. program in Intercultural Human Rights and a J.S.D. candidate, I am particularly grateful to Professors John and June Mary Makdisi. Professor John Makdisi was Dean of the law school when the LL.M. in Intercultural Human Rights program began, and has guided and supported it from its inception. Both Professors Makdisi have generously helped our students with scholarships, in the classroom, and as mentors and advisers.

¹⁸ Siegfried Wiessner, *Doctors of the Social Order: Introduction to New Haven Methodology*, in HANDBOOK ON HUMAN TRAFFICKING, PUBLIC HEALTH AND THE LAW 8 (Wilhelm Kirch, Siegfried Wiessner & Roza Pati eds., 2014)

¹⁹ Also known as "Policy-Oriented Jurisprudence" or "Law, Science, and Policy." Siegfried Wiessner, *Law as a Means to a Public Order of Human Dignity: The Jurisprudence of Michael Reisman*, 34 YALE J. INT'L L. 525, 526 (n. 10) (2009); W. Michael Reisman, Siegfried Wiessner & Andrew R. Willard, *The New Haven School: A Brief Introduction*, 32 YALE J. INT'L L. 575 (2007); Siegfried Wiessner & Andrew Willard, *Policy-Oriented Jurisprudence*, 44 GERMAN Y.B. INT'L L. 96 (2001).

²⁰ Reisman, Wiessner & Willard, *supra* note 19, at 576.

²¹ Myres S. McDougal, Harold D. Lasswell & Lung-chu Chen, *The Social Setting of Human Rights: The Process of Deprivation and Non-Fulfillment of Values*, 49 REV. JUR. U.P.R. 477 (1977).

maximize human dignity, but also the root and structural causes that underlie the problem. The second task is to analyze the conflicting claims, who the claimants are, and their identifications, perspectives, and bases of power. Third is “[t]he identification of past trends in decision in light of their predispositional and environmental conditioning factors.”²²

There is an enlightening common thread in investigating and describing the root/structural causes of a pressing social problem in task one; the claimants’ identifications, perspectives, and bases of power in task two; and the predispositional and environmental conditioning factors underlying past decisions in task three. That thread is the understanding that much about pressing social problems does lie hidden behind, beneath, and even within the society’s culture—the “norms” discussed above—that determine the rules we feel obligated to follow. People and families, groups, and whole societies are predisposed to act and react in certain ways, conditioned by genetics and environmental factors including early childhood experiences, cultures, peers, schooling, media, and more to perceive the world through a certain lens.²³ Lasswell’s eight values stated above—Power, Enlightenment, Skills, Wealth, Well-being, Affection, Respect, and Rectitude—provide another tool in the New Haven School’s toolbox because they are not only human desires and goals, but they unconsciously motivate behavior and provide insight into predispositions. These values are also resources upon which actors draw.

The fourth task in the New Haven School’s approach is to forecast possible future decisions, in light of changed and changing trends, including the most pessimistic and optimistic scenarios. If the possible futures do not meet the preferred goals, the fifth task is to develop and recommend solutions, drawing from existing ideas or inventing new solutions that hold promise toward achieving a world order of human dignity.

²² Wiessner, *supra* note 19, at 528.

²³ See generally, WILLIAM ASCHER & BARBARA HIRSCHFELDER-ASCHER, REVITALIZING POLITICAL PSYCHOLOGY: THE LEGACY OF HAROLD D. LASSWELL (2005).

Like the Social Justice Advocacy steps described above, the New Haven School provides a way to organize action following presentment of solutions. It identifies seven decision functions of every decision process: intelligence, promotion, prescription, invocation, application, termination, and appraisal.²⁴ Intelligence and prescription are key parts of the sequence of decision-making. Promotion is the persuasive communication of proposed solutions to decision-makers, pressure-makers,²⁵ and to society at large where values are shaped and norms are re-formed. Invoking and applying are identifying a set of circumstances to which a prescription applies and executing the prescription.

Appraisal compares goals and performance. This can apply not only to the execution of the prescription, but also to the processes of performing the tasks and decision functions, as described in the Social Justice advocacy steps above. Appraisal need not be limited to evaluation of past decisions. In fact, each New Haven School task and function is subject to appraisal and New Haven School analysis, even during performance of the task or function. For example, if delimitation of the social problem is not going well, the scholar can investigate the causes of the functional problem(s) he or she is experiencing in delimiting the social problem, prescribe solutions, and

²⁴ The seven decision functions include:

Intelligence: Obtaining information about the past, making estimates of the future, planning.

Promoting: Urging proposals.

Prescribing: Laying down general norms.

Invoking: Confronting concrete situations with provisional characterization in terms of a prescription to concrete circumstances.

Applying: Final characterization and execution of a prescription in a concrete situation.

Terminating: Ending a prescription or arrangement within the scope of a prescription.

Appraising: Comparison between goals and performance.

Harold D. Lasswell & Myres S. McDougal, *Jurisprudence in Policy-Oriented Perspective* 19 U. FLA. L. REV. 486, 505 (1967) (emphasis added).

²⁵ "Pressure-makers" are those people who influence public opinion, directly influence decision-makers, or who may be so influential that they are informal or de facto decision-makers. COHEN, DE LA VEGA, & WATSON, *supra* note 15, at 65.

apply them.

The strength of the New Haven School's approach lies in its interdisciplinarity; it does not limit itself in the sources upon which it draws. Its interdisciplinarity reflects the interconnection and interdependence of cause and effect that requires inclusion of a myriad of perspectives that can shape and share values and shed light on problems and integrative solutions. This is essential because the goal is a public order of human dignity where all humans have optimum access to all things they cherish.

Not only is the approach interdisciplinary, but so are its practitioners. The Policy Sciences are not restricted to lawyers. Policy scientists work in a myriad of disciplines, some of which are environment, energy, anthropology, nutrition, health care, education, government and politics, international affairs, criminology, information systems and data analysis, and banking. Individual scholars can play meaningful roles in effecting change, from the local to the international. Their roles may lie in the tasks of researching facts and root causes, exploring potentially relevant policies, formulating specific prescriptions, or communicating prescriptions to appropriate audiences.²⁶ Moreover, anyone trying to solve a problem

²⁶ St. Thomas University School of Law's own Siegfried Wiessner applied the New Haven approach to the problem of potential exclusion of developing countries from access to the geostationary satellite orbit—the one orbit 20,000 miles above the equator where a satellite moves at the same speed as the earth and thus stays at the same point in relation to the earth, required for critical global communication services. He prescribed an equitable access solution that aided a compromise. Siegfried Wiessner, *The Public Order of the Geostationary Orbit: Blueprints for the Future*, 9 YALE J. WORLD PUB. ORD. 217 (1983); Siegfried Wiessner, *Communications in the Earth-Space Arena: Translating Equity into Hertz and Degrees from the Greenwich Meridian*, 52 ITU TELECOMM. J. 304 (1985); Siegfried Wiessner, *The Art of the Possible: A Review of Space-WARC* 85-86, 32 PROC. ON L. OUTER SPACE 266 (1989) (on the legal status of the geostationary orbit in the light of the recent activities of the International Telecommunications Union).

As Chair of an International Law Association global expert committee, Prof. Wiessner paved the way to change regarding the problem of marginalization and dispossession of indigenous peoples in international law, resulting in ILA Resolution No. 5/2012, finding that certain rights of indigenous peoples are now rules of customary international law. Final Report and ILA Resolution No. 5/2012, International Law Association Committee on the Rights of Indigenous Peoples, 75th

can use the New Haven School's intellectual tools.

The job of a lawyer is to solve problems. In law schools, we teach the doctrinal, written law, because we need to do that. We also teach many skills that we typically and traditionally associate with practicing law and achieving justice. For instance, we offer classes for students to learn skills, including legal research and writing, trial advocacy, appellate argument, counseling and negotiation, alternative dispute resolution, and law office management. As I mentioned above, in law school I never heard of the New Haven School or Policy-Oriented Jurisprudence. Why not? To me it is indispensable, if for no other reason than to provide the big picture of how the world works and where law—however one defines it—fits in problem-solving. I am fortunate to have studied in a law school that teaches New Haven.²⁷ In a world that too often feels frustrating and hopeless—even for lawyers trained to advocate, resolve problems, and fight injustice, the New Haven School approach is empowering and brings us the light of hope and purpose.

ILA Biennial Meeting, Sofia, Bulgaria, August 26-30, 2012, <http://www.ila-hq.org/index.php/committees>. See also Catherine J. Iorns Magallanes, *ILA Interim Report on a Commentary on the Declaration of the Rights of Indigenous Peoples*, VICTORIA U. WELLINGTON LEGAL RES. PAPERS 50 (2012), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2175897.

²⁷ The *Intercultural Human Rights Law Review* is the only law review dedicated to the New Haven approach. Founded in 2005, it now ranks Number 6 among all 44 human rights law reviews in the world in academic impact. It requires member-candidates to submit a paper in the mode of New Haven. See Lauren M. Smith, *The New Haven School of Thought - A Focused Foundation in Article Analysis*, 30 T. M. COOLEY L. REV. 143 (2013).