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REBUILDING THE ETHICAL COMPASS OF LAW

*Purvi Shah**

“Each generation must out of relative obscurity discover its mission, fulfill it, or betray it.”

- Frantz Fanon¹

I. THE CURRENT MOMENT

We are in an incredibly challenging moment in U.S. history. Emboldened by the Trump presidency, a racist, anti-immigrant, anti-poor movement is gaining momentum. And while oppression is certainly nothing new, the scale and severity of the current crisis is staggering—millions impacted by: the Muslim Ban, a broken immigration system, the child migrant crisis, mass incarceration, and natural disasters of increasing frequency and intensity. These emergent issues play out on the backdrop of continued impunity for police killings of Black people, threats to reproductive rights for women, entrenched homophobia and transphobia, and insufficient housing, jobs, shelter, food, and healthcare

* Founder and Executive Director, Movement Law Lab; Co-Founder, Law for Black Lives. Prior to that, Purvi served as the founding Director of the Bertha Justice Institute at the Center for Constitutional Rights, the nation’s first movement lawyering institute. While there, Purvi trained thousands of emerging lawyers on movement lawyering and helped build a global network of movement lawyers in sixteen countries. Purvi also has significant experience as a civil rights lawyer and policy advocate. In 2006, Purvi co-founded the Community Justice Project of Florida Legal Services, Miami’s first movement lawyering shop. For six years, she represented taxi drivers, tenant unions, public housing residents, and immigrants’ rights groups. While there, Purvi was also an Adjunct Professor of Law at the University of Miami School of Law, teaching courses on Community Lawyering.

Purvi is best-known for being an effective multiplier and a skilled coach. From lecturing at law schools across the country to advertising dozens of legal organizations on movement lawyering Purvi has been building and training a new generation of movement lawyers. Purvi’s work over the last decade has been largely responsible for the reinvigoration of dialogue and momentum around movement lawyering across the United States. Prior to becoming a lawyer, Purvi worked as a community organizer with youth in Miami, students in India, and families of incarcerated youth in California.

1. FRANTZ FANON, *THE WRETCHED OF THE EARTH* 206 (Richard Philcox trans., Grove Press 2004) (1963).

for marginalized people and communities. We live in a country where human life and human labor have become increasingly disposable.

While popular culture has advanced a myth of lawyers as the noble guardians of justice and equality, the sordid truth is the vast majority of American lawyers are working to protect the interests of the rich and powerful. According to a recent American Bar Association study, less than three percent of America's 1.3 million lawyers work on issues of justice and poverty.² Another study found that low-income people seek lawyers for only twenty percent of their civil legal problems, and when they do, they are denied assistance eighty-six percent of the time.³ Millions of poor and marginalized Americans are enduring some of life's hardest challenges—discrimination, eviction, violence, deportation, and exploitation—without any assistance from our profession.

Some would argue that the gap between supply and demand is the result of sticky challenges including antiquated service delivery models, shrinking funding, and failure to use technology in creative ways. And while all of that is true, I think something more insidious is to blame for our profession's failure to meet the needs of the most vulnerable in our society.

The legal profession is in crisis of conscience

Our profession largely acts as the private army of corporations, the carceral state, and/or the elites who benefit from both.⁴ Sadly, more lawyers are working to preserve injustice rather than transform it. Lawyers serving in these roles—such as prosecutors and law firm partners—are exalted in law schools and elsewhere as the epitome of legal excellence without further critique of the systems they perpetuate. This has long been the case. Historically, lawyers have designed, justified, and advanced some of the most perverse and grotesque practices from slavery, Jim Crow segregation, torture, prolonged arbitrary detention, internment, and war. While every period in history

2. SOC'Y OF AM. LAW TEACHERS, CHOOSING THE RIGHT LAW SCHOOL FOR YOU: A CONSUMER GUIDE FOR THE SOCIAL JUSTICE-MINDED LAW STUDENT (The Soc'y of Am. Law Teachers, ed. 2015), <http://consumerguide.saltlaw.org/part-1-chapter-3-understanding-current-models-for-social-justice-lawyering-and-considering-alternatives> (finding that one percent of lawyers work in education, one percent in private nonprofits, and one percent work as public defenders or legal aid lawyers).

3. LEGAL SERV. CORP., THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS (2017).

4. Many attorneys work to promote and advance the carceral state as prosecutors, military lawyers, counsel for prisons, etc. See Marie Gottschalk, *Bring it On: The Future of Penal Reform, the Carceral State, and American Politics*, 12 OHIO ST. J. CRIM. L. 559, 569-70 (2015).

has always had a small minority of lawyers who are deeply committed to social justice, as a profession, lawyers have been silent in the face of some of the most egregious justice issues.

This silence continues to the modern day. I spent the last four years building legal support for communities resisting racialized police violence across the country with and through the broader Movement for Black Lives.⁵ I traveled to Ferguson just a week following the killing of Mike Brown, after watching the civil and human rights violations unfolding on live television between police and protesters. As a small group of us attempted to recruit lawyers to assist those arrested, what became immediately clear was that *hundreds* of lawyers in the greater St. Louis area *refused* to get involved in what was happening. We saw that phenomenon happen again in Baltimore, in Charlotte, and in Charlottesville. It took months of organizing and agitating lawyers, combined with a shift in the broader popular narrative around police violence to awaken a sluggish legal sector to respond. The response still falls woefully short of the compounding needs of poor and disenfranchised people.

So what is to blame for our profession's failure to acknowledge its responsibility to address the human suffering we are witnessing on a massive scale?

II. WE CAN'T REAP WHAT WE DON'T SOW

I believe we can attribute this failure to take moral responsibility in our field in part to how lawyers are trained, acculturated, and incentivized. Questions of justice rarely are the focus of required law school curriculums or classes, leaving lawyers with substantial analytical gaps in understanding the nature of oppression, what causes it, and what transforms it. It is hard to be motivated to tackle a problem you aren't aware of or don't understand. Law students interested in these topics have to actively seek out or be lucky enough to have some elective courses or professors with an interest in opening a discourse around justice.

Second, legal education promotes many false myths about law, which become etched into the minds of lawyers and prevent us from being compelled to take action. For example, we are taught "The Law" in the United States is the benevolent guarantor of a fair and just society. Few law school classrooms or lawyers poke holes in this myth. Lawyers are trained to see courts as self-actualizing engines of justice, leaving no

5. *About, THE MOVEMENT FOR BLACK LIVES*, <https://m4bl.net> (last visited Nov. 10, 2018).

reason for them to be concerned independently with the questions of structural injustice within the law and legal institutions. But history has shown us that law is neither objective nor neutral and that “The Law” has always trailed behind what was just. We must start being honest about the fact that the law is not ethical or moral on its own. We must push it to be so.

A growing sector of lawyers and legal organizations, deeply invested in the questions of justice, have sought to dispel these myths and are using their skills in more proactive and holistic ways. They see their role as that of conscious tacticians—not saviors or bystanders—in support of marginalized people seeking to transform the conditions of their own lives. These lawyers creatively use legal tools to build the power of, make space for, validate, bolster, defend, and protect social movements and the activists and communities within them. Premised on the idea that lawyers and the law are but one piece of social change, this style of lawyering has many names—community lawyering, political lawyering, empowerment lawyering, movement lawyering. Unfortunately, law students and lawyers are not being taught movement lawyering at school or at work. There are few institutions where one can learn how to do meaningful movement lawyering and make a living at it. There are no networks of “elders” or “mentors” lined up to coach budding lawyers to not make the same mistakes over and over again and shepherd a collective body of knowledge.

Finally, I think we can trace this crisis of conscience in the legal field to the failures of how lawyers are taught to think about ethics. The Rules of Professional Conduct, which all lawyers must swear to uphold, offer a baseline standard of legal ethics and professional responsibility for American lawyers.⁶ Yet these rules speak primarily about what we should *not* do as lawyers—don’t steal our clients’ money, don’t lie, don’t commit fraud, don’t disrespect the court. The rules are silent, however, on *what* the *affirmative* role for a lawyer is in society, *which* clients we should represent, *which* circumstances demand our ethical participation, and most importantly, *how* we should work for our clients.⁷ The rules say nothing about a larger social responsibility of lawyers. How can we expect lawyers to feel compelled to address the

6. MODEL RULES OF PROF’L CONDUCT pmb. & scope (AM. BAR ASS’N 2018).

7. *Id.* This is not to say that there are no affirmative duties whatsoever within the Model Rules. *See, e.g., Id.* r. 3.3(a)(1) (defining an affirmative duty to correct a false statement of material fact previously made to a tribunal by an attorney). However, these affirmative duties are limited and do not provide clarity about broader issues of social justice as noted above. It is also important to note that this Article is not proposing a rewrite of the Model Rules but instead advocating to view them as just one blueprint for how lawyers should ethically practice.

questions of injustice when we have created no incentives or responsibility for them to do so?

For the past fifteen years, a group of us,⁸ self-described movement lawyers, have worked to make interventions on all these fronts—by designing a robust suite of methodologies to train lawyers on social change, to popularize the concept of movement lawyering, and to build communities of practice where lawyers are encouraged to think deeply about our role in social change. We worked to change law school curriculums and create internship programs to develop a cadre of lawyers who have the skills and moral compass to be involved in the fight for human dignity. Our efforts have been successful, and we have developed a much broader interest in movement lawyering, but we still remain on the margins of the legal field.

In order to meet the demands of the current moment, I believe we must awaken the conscience of a much broader sector of the legal profession. We need thousands of lawyers to feel pulled by the questions of injustice. But how can we get there?

III. CREATING A NEW ETHICAL NORTH STAR

Moments of social unrest offer us an opportunity, if not an imperative, to examine business as usual—to excavate what is rotten, and rebuild something better. Law is no exception. This current moment has exposed so much of the hypocrisy and failure of law. But if we are courageous inside this vulnerable moment, there is an opportunity for transformation. Difficult moments, like the one we are in, can serve as opportunities to innovate, experiment, and shift culture.

8. These lawyers include myself, Bill Quigley, Charles Elsesser, Meena Jagannath, Alana Greer, Nikki Thanos, Amna Akbar, Marbre Stahly-Butts, Jeena Shah, Pam Spees, Vince Warren, Sameer Ashar, Dorcas Gilmore, Amanda Alexander, Sunita Patel, Jim Freeman, Jennifer Rosenbaum and many others. Our collaborative experiments have included co-designing a “Movement Lawyering 101” workshop that has been given to over 10,000 lawyers and law students across the world, organizing a six session online bootcamp on movement lawyering, creating new organizations and networks like Law for Black Lives, coordinating rapid response to crises when called upon by movement partners in Ferguson, Baltimore, Charlotte, Charlottesville, etc., organizing national conferences on movement lawyering, participating in lectures and conferences at law schools across the country, and running a collaborative, cross-cultural summer legal internship program called the Ella Baker Program through the Center for Constitutional Rights, among other things. To learn more about this work, see CTR. FOR CONST. RTS., <https://ccrjustice.org> (last visited Nov. 10, 2018); COMMUNITY JUST. PROJECT, <http://communityjusticeproject.com> (last visited Nov. 10, 2018); DETROIT JUST. CTR., <https://www.detroitjustice.org> (last visited Nov. 10, 2018); L. FOR BLACK LIVES, <http://www.law4blacklives.org> (last visited Nov. 10, 2018); MOVEMENT L. LAB, <https://movementlawlab.org> (last visited Nov. 10, 2018); NEW ORLEANS WORKERS CTR. FOR RACIAL JUST., <http://nowcrj.org> (last visited Nov. 10, 2018).

If a broader cross-section of lawyers must be activated to respond to the needs within our communities, then we will have to usher in a new era of leadership, activism, and morality among the legal profession. I have always found that the best way to change behavior is to inspire people. For that reason, I believe it is time to write a new code of ethics for lawyers. One that is aspirational and inspirational; an ethical north star versus a bare minimum. This code should be plain and easy to understand and should lay out ten to fifteen simple values to create a new ethical framework on the social responsibility of lawyers. This code should be used to supplement the Rules of Professional Conduct, designed to facilitate conversation, to encourage interrogation of the status quo, and to revive the heart and soul of our profession.

These values should be holistic and disrupt the normative paradigm of professional responsibility.⁹ For example, the code could include concepts like “Dignity: honoring the self-determination of our clients;” or “Integrity: an obligation to respond to moments of great injustice;” or “Collectivity: a commitment to use law to aggregate people with similar problems versus atomize them;” or “Collaboration: a commitment to working with other types of change-makers to address oppression.”

The code should be a living document that can be tailored to the current moment and incorporate historical lessons of how law and lawyers have advanced oppression. It can be revisited every few years. It should be drafted by the generation of lawyers, who are black and brown and who come from communities that are oppressed. More importantly, it should be drafted alongside our representatives from marginalized client communities, many of whom have the most intimate understanding of the failures of our profession.

This new code could be voluntarily adopted by individuals, organizations, law schools, and law firms. After it gains critical mass, it can create a common framework for analysis and reflection about our ethical successes and failures as a profession. But more than a written document, we have to ensure the code creates a new culture where questions of morality are discussed, wrestled with, and prioritized in the legal profession. To ensure more day-to-day application of these new standards, we will have to be intentional about operationalizing this code of ethics. For example, every law school and legal organization could have a secular ethics chaplain, a person with whom lawyers can discuss

9. Some organizations have adopted similar principles of additional accountability. *See, e.g., Our Mission*, COMMUNITY JUST. PROJECT, <https://communityjusticeproject.com/mission> (last visited Nov. 10, 2018) (discussing the organization’s “guiding principles and values”); *Values*, L. FOR BLACK LIVES, <http://www.law4blacklives.org/values> (last visited Nov. 10, 2018).

questions of morality and meaning in their work.¹⁰ Alternatively, case review and staff evaluations can incorporate this new code of ethics.¹¹ The possibilities are endless.

IV. WHY NOW?

The law is built on the concept of precedent. Legal education acculturates lawyers to look backwards, but fails to inspire and encourage us to look forward. Virtually every other field—science, technology, labor, art, journalism, media—has seen widespread innovation during the last fifty years. Yet, legal organizations have remained stagnant, undisturbed by the creative disruptions revolutionizing so many other industries.

We are in an interesting churning moment for numerous professions when it comes to questions of social justice. Over the past few years, social justice oriented professional associations and networks have been popping up such as Law for Black Lives,¹² Data for Black Lives,¹³ the Algorithmic Justice League,¹⁴ the Social Medicine Consortium,¹⁵ White Coats for Black Lives,¹⁶ Libraries for Black Lives,¹⁷ etc. The times are provoking people of conscience from many fields to re-examine how injustice is perpetuated and architected through their fields; to redefine what their collective role is in working to dismantle oppression.

10. For example, the Massachusetts Institute of Technology (“MIT”) has recently created a new “humanist chaplain” position for their students. See Isabel Fattal, *MIT Now Has a Humanist Chaplain to Help Students With the Ethics of Tech*, ATLANTIC (May 16, 2018), <https://www.theatlantic.com/education/archive/2018/05/mit-now-has-a-humanist-chaplain-to-help-students-with-the-ethics-of-tech/560504>.

11. It is also worth noting, that to really make it possible for more people to work on questions of justice, we have to bring tuition costs down or eliminate them completely. Melissa Korn, *NYU Makes Tuition Free for All Medical Students*, WALL ST. J. (Aug. 16, 2018, 12:10 PM), <https://www.wsj.com/articles/nyu-offers-full-tuition-scholarships-for-all-medical-students-1534433082>. Mounting student-debt is a huge barrier for many law students—especially students of color that do not come from any familial wealth. Recently, NYU Medical School eliminated all tuition fees for all students—an idea worth considering in the field of law. *Id.*

12. L. FOR BLACK LIVES, *supra* note 8.

13. DATA FOR BLACK LIVES, <http://d4bl.org> (last visited Nov. 10, 2018).

14. ALGORITHMIC JUST. LEAGUE, <https://www.ajlunited.org> (last visited Nov. 10, 2018).

15. SOC. MED. CONSORTIUM, <http://www.socialmedicineconsortium.org> (last visited Nov. 10, 2018).

16. WHITE COATS FOR BLACK LIVES, <http://whitecoats4blacklives.org> (last visited Nov. 10, 2018).

17. *Libraries4blacklives.org Launches on Movement for Black Lives’ National Day of Action*, BLACK CAUCUS AM. LIBRARY ASS’N, <https://www.bcala.org/2016/07/21/libraries4blacklives> (last visited Nov. 10, 2018). See generally BLACK CAUCUS AM. LIBRARY ASS’N, <https://www.bcala.org> (last visited Nov. 10, 2018).

We are in an exciting moment where we can think about the question of “What does it mean to have a shared north star of ethics that is *beyond* our profession?” What would it look like if lawyers of conscience, doctors of conscience, and the technologists of conscience worked together to develop an ethical North Star for *all* of our fields? The transformative power of an initiative like that could be astronomical. Not only would we redefine our work within our fields, but we would lay the groundwork for better collaborative problem-solving and solutions to the increasingly complex challenges of our day.

V. CONCLUSION

Shifting norms around legal ethics has the power to transform how lawyers orient themselves to injustice, but can also serve the purpose of transforming the broader, hegemonic understanding of law in society. Through shifting ourselves, we shift our profession. By shifting our profession, we can shift the broader culture of society. It has taken powerful, militant, beautiful movements to transform the law. It took movements to codify, reframe and reimagine what was “just” under the law. When wielded by people of conscience, law has always been a powerful tool for social justice. Lawyers throughout American history have used law as a sword and shield for advancing the causes of the most marginalized in our society. The work of all lawyers in this time is to walk the tightrope of doing our duty to engage valiantly and aggressively in the courts while simultaneously recognizing that law alone won’t solve our communities’ challenges. Understanding this contradiction and being able to take strategic action despite it, is what it means to be not only a movement lawyer—but an ethical lawyer in the twenty-first century.