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TEACHING THE TENSIONS

By Angela P. Harris

Aporia: "a logical contradiction beyond rational resolution."

Introduction

Teaching, like any other human interaction, is only partly articulable in language.

In every course there is the official curriculum, and then there is the unofficial curriculum. I don't mean the game of "hiding the ball" that so many law professors are accused of playing. I mean that when people sit down with one another to talk about rights, justice, and the state, other things are happening among them that cannot be formalized or articulated in language. This is true in every classroom and in every conversation. To be a good teacher you have to know the context as well as the text. More importantly, you have to be mindful about your own contributions to that secret conversation, as far as is possible (and I'm not sure that is very far). But most importantly, you have to find a way to bring yourself into the classroom.

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II. The Aporia of Social Justice Lawyering

> [T]he force of the law is . . . indistinguishable from the forces it would oppose. Or to put [it] another way: there is always a gun at your head . . . . [T]he interests that seek to compel you are appealing and therefore pressuring only to the extent they already live within you, and indeed are you. In the end we are always self-compelled, coerced by forces--beliefs, convictions, reasons, desires--from which we cannot move one inch away.[7]

The fundamental tension in my teaching is this: Justice is the reason why many of my students have come to law school. But justice is not what the law provides.

"Justice" is a word that shows up with some frequency in the titles of my seminars: "Law and Social Justice;" "Environmental Justice;" "Restorative Justice;" "Economic Justice." Even when "justice" is not in my title, justice and fairness are always on the table in my classes. I am one of those teachers who doesn't flinch (well, only a little) when a student says, "It isn't fair!" Yet the first thing I want my students to understand, whatever I'm teaching, is that the project of getting law to do, or reflect, "justice" is always already (as the postmodernists say) a failed project. Making things fair is not the law's aim. Though as an institution, a set of practices and ideologies, law is designed to constantly point at justice, it is also designed to actually do something quite different, which is to preserve order and, even more importantly, cultivate the desire for order. To see this, students have to recognize law's complicated and intimate relationship with violence.

Law is, at the same time, the opposite of violence and absolutely dependent on violence, or at least the possibility of violence.[8] Violence is the opposite of law, in the sense that it causes pain and thereby destroys language, on which law depends.[9] Violence also shatters the social world on which law depends.[10] Elaine Scarry argues that torture erases any bond of mutuality between the victim and the torturer.[11] The torturer says, "Your consent is irrelevant; you exist only at my whim."[12] Under those conditions there is no law, because law is based on the assumption of something called society, a relationship based on consent and shared norms.[13] To the extent that torture coexists with law, it does so, as Giorgio Agamben writes, by creating "state[s] of exception," places where, by law, the rule of law has been indefinitely suspended.[14]

Yet at the same time that violence is the opposite of law, certain kinds of violence are also intimately entwined with law. An example is what we might call "founding violence."[15] As a matter of history, every nation-state, including our own, has begun in some extralegal act or acts of violence, in which the previous order is destroyed and a new order begins.[16] When these revolutionary moments happen, the law of the new regime follows along. Consider, for example, Johnson v. M'Intosh.[17] In that case, Chief Justice John Marshall of the U.S. Supreme Court announces the so-called doctrine of discovery, under which Indians do not hold original title to the territory of the New World themselves. Only Europeans can establish original title as against each other, first by "discovering" the land, and then by perfecting their title through conquest of or treaty with the natives.[18]

Although my students are usually outraged and offended by the substance of Marshall's opinion, I admire its craft, the way he dryly lays bare both the facts and the pretensions of colonialism. Chief Justice Marshall grants that the doctrine of discovery may well violate customary international law, not to mention its being suspiciously convenient for the invading Europeans.[19] But he also very clearly asserts that as a justice of the U.S. Supreme Court, he cannot rule any differently.[20] As he puts it, "Conquest gives a title which the Courts of the conqueror cannot deny."[21]

In addition to "founding violence," there is another kind of violence necessary to law--the everyday violence present in the idea of "enforcement."[22] Lack of enforcement is why international law and international human rights are in a constant identity crisis. As a corollary, Robert Cover observed long ago, "Legal interpretation takes place in a field of pain and death."[23] The unremitting violence of the criminal justice system is the most obvious example of this phenomenon, but as Robert Gordon has pointed out, violence is a constant presence in private law as well: it is state violence that guarantees private property, and the intricate relationships of contract and commercial law for which private property serves as a foundation.[24]

Third, and most subtly, "discursive violence" is necessary to the law.[25] As the Critical Legal Studies scholars and the Legal Realists before them, pointed out, legal language is performative--it does not just describe the world, it makes the world.[26] Once you have an offer and acceptance, there is a thing in the world called a contract that was not there before. The whole point of legal language is to do this work of creating new cultural entities: contracts, treaties, marriages, and the rest. But in making these pronouncements, the law does violence to the world as we understand it in reality. To use the CLS terminology, legal language "reifies;" it makes a fluid, dynamic set of relationships appear to be a static thing.[27]

The law works discursive violence in other ways as well. Of course, language at some deep level, even in its most poetic uses, is always "violent" in the sense that it fails to do justice to lived experience. To generalize at all, to put things into categories, is always immediately to destroy the fullness of whatever you are describing.[28] But the law also deliberately seeks to subordinate or incorporate other social orders and practices into itself. Robert Cover wrote that state law is "jurispathic"--it seeks to destroy all other normative orders.[29] For instance, Cherokee customs relating to land became meaningless once Chief Justice Marshall had made clear that the Cherokee had no property rights that the white man was bound to respect. Indeed, the very idea on which Western law is founded--that people can "own" things, that a human being can put the earth itself and all the living things on it under his dominion--does violence, symbolic and material, to the lives of peoples who find the world sacred, and the lives of all nonhuman beings. But this violence is what Anglo-American law is all about.

These three kinds of violence--founding violence, enforcement violence, and discursive violence--are easy to forget about, even though they are the preconditions for law.[30] This forgettability is no accident. The law works hard to make its own violence disappear, or even seem desirable-- necessary, normal, and natural, as the critical scholars say.[31] Lawyers, the heirs of Chief Justice Marshall, work hard to fold founding violence, and its cousin, the violence that the law tolerates when the state itself is perceived to be at risk, into "security." Thus internment camps, detention centers, and rendition practices are legalized, folded into order by lawyers, and torture becomes an "increased pressure phase."[32] Enforcement violence becomes simply "enforcement," or even "justice." As for discursive violence, the first year of law school is devoted to teaching students not to see it at all, or to give it another name. Call it "interpretation."

III. Impossibility & Social-Justice-Minded Law Students

If we take to heart the lesson that law and justice are not the same, we end by staring a big question in the face: To what extent are we as lawyers inevitably complicit with injustice? As Gerald Wetlaufer has written, the law's most important client is always itself.[33] If the law is committed at some level to making violence and injustice disappear, is "social justice lawyer" a contradiction in terms?

In their first-year classes, law students begin learning the long lesson that justice is out of order. Legal institutions and practices have their own imperatives that we teach students to recite--"institutional competence," "federalism," and "separation of powers," for instance. "Doing justice" is not on the list.[34] But it gets worse than that, because putting "justice" and "fairness" back on the table and patting ourselves on the back is not enough.

In the spring of 2009, Denise Ferreira da Silva and I taught a short course called "Social Equality and the Law" in Rio de Janeiro, Brazil, as part of a summer law program sponsored by Georgia State University and Seattle University. Our course compared racialization in Brazil and the United States and examined the law's participation in both racial subordination and antisubordination efforts. The city of Rio was then in the throes of litigation challenging affirmative-action policies in higher education as contrary to Brazil's revised constitution, and we had many lively exchanges with local lawyers and activists over the wisdom of racial quotas.

Our students were ready and willing to talk about affirmative action policies and their pitfalls. At the beginning of the twenty-first century in the contemporary United States, a policy goal once described as "integration," then "desegregation," then "anti-discrimination," is now "diversity," a politics of

representation in which each individual is both pressed to claim a racial-ethnic identity and to seek inclusion and affirmation within the greater confederation.[35] Our students, the children of food-group politics, were well familiar with its traps: inclusion that is only illusory (because it comes with continued stigma and the persistence of norms of privilege); the problem of assigning each person to a group and keeping those designations stable; the reification of group identity that comes with the constant call to say who you "are." We had great discussions with our Brazilian students and guest speakers about these problems.

But Denise and I ultimately wanted our students to see outside the affirmative action box entirely. The problem, as we framed it for our students, was not "racial discrimination" but rather historical "dispossession." Using Michael Omi and Howard Winant's concept of a "racial project,"[36] we suggested that racial ideologies had originally functioned in both Brazil and the United States as projects designed to facilitate, and normalize, the dispossession of African labor and indigenous land. That master project was an extraordinarily productive and powerful one, and was to be the starting point for many other racial projects over time. In the present day, the dilemma we posed was: Is any legal concept adequate to the task of fully remedying that original dispossession? "Equality," we suggested, is a slippery word, liable to be qualified heavily with modifiers like "formal" or "legal." Moreover, even a broad concept like "social equality" is inadequate to address the taking of indigenous land and the economic, political, and social destruction associated with that taking. Indigenous peoples, we suggested, seek not to be equal but to be free.

Even if one could theoretically specify the task of remedying dispossession, the problem of implementing that task is both historical and political. Even if the political will were somehow found to return Hawaii to the native Hawaiians, what is the relationship of the Hawaii taken in the illegal overthrow of the Kingdom in 1893 to the Hawaii of 2010, and what becomes of the people who claim Hawaii as home who are not native Hawaiians?[37] What happens to political sovereignty itself in a world swallowed by global capitalism? Conquest, Justice Marshall wrote, grants a title that courts cannot deny.[38] We might add that markets impose a servitude that legislation cannot deny.

And so we can make sense of the painstaking efforts by judges faced with litigation seeking reparations for slavery to close off every possible avenue of recovery.[39] We can predict that even in Brazil, where aggressive affirmative action policies on behalf of black people and poor people have broader support, political and economic redistribution is likely to happen only on the margins, and not on the grand scale hoped for by the dispossessed. And we can predict that even full legal sovereignty, were it to come to Hawaii, Puerto Rico, or Guam, would mean economic impoverishment and continued client status with respect to the United States.

For our final exam, we gave the students the text of the Black Panther Party's Ten-Point Plan, a plan that ends by deliberately calling out the presence of founding violence:

> We hold these truths to be self-evident, that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness. That to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed; that, whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it, and to institute a new government, laying its foundation on such principles, and organizing its powers in such form as to them shall seem most likely to effect their safety and happiness.

> Prudence, indeed, will dictate that governments long established should not be changed for light and transient causes; and, accordingly, all experience hath shown that mankind are most disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But, when a long train of abuses and usurpation, pursuing invariably the same object, evinces a design to reduce them under absolute despotism, it is their right, it is their duty, to throw off such government, and to provide new guards for their future security.[40] In a recent article, Ariela Gross asks, "When is the time of slavery?"[41] Denise and I asked the students, "When is the time of freedom?" We tried to make them see that the law's terms-- discrimination and equality--are smaller than history's terms--dispossession and freedom.

We tried to make them feel, moreover, the gap between the Black Panthers' aspirations and the law's solutions, and to feel their own anxiety about talk of revolution, which reflects the investment we all have in current political and economic distributions. We tried to make them recognize that even the most radical of us are closet liberals to the extent that we are lawyers. Intellectually, as Gross notes, social-legal liberalism encourages us to believe that the time of slavery is over, that we are always marching into a future that is more just than the past and that "the system works."[42] Psychologically and emotionally, social-legal liberalism converges with the psychological desire for a just world. This complicity cannot be erased by a professional commitment to social justice. As a generation of literature on progressive lawyering has pointed out, lawyers are inevitably enmeshed in reproducing hierarchy even when they publicly commit themselves to undermining hierarchy.[43] Denise and I pushed our students to feel the fear that arises when we contemplate full reparations for American slavery, or the return of occupied lands to their original owners, and thus to feel the sense of relief that comes along with being "realistic" and "reasonable" about the impossibility of fulfilling these claims to freedom.

In trying to get students to see their investment in order, I have no interest in trying to make them feel guilty. There are very few people who are so far beyond the law's domain--maybe some homeless persons, whose very existence is illegal[44]--that they have no stake in it at all. But I do want students not only to see, but to feel, the difference between their liberal commitments and a genuinely radical stance. The difference between equality and sovereignty, between nondiscrimination and freedom, between criminal justice and prison abolition, between reform and revolution.[45] In the end, as Stanley Fish warns, law becomes indistinguishable from the forces it would oppose.[46] Law merges into violence, violence stands for security, and security is not only the law, but our law.

IV. Teaching the Tensions

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What is needed is an ethical, emotional, and psychological stance that tempers the emotional, visceral desire to help another who is suffering with the discernment a rigorous intellectual understanding of justice and the limits of law brings. This stance is what I want to call compassion, and it is not a thing you have or you don't, but is rather the ever-unfinished practice of trying to enlarge one's sympathies, trying to understand the history and prognosis of the varieties of suffering, and setting one's emotional and

intellectual knowledges side by side so that each can educate the other. Even this compassion, however, is not enough. What is also needed is the humility brought by full awareness of the aporia in which social justice lawyers live. We want justice; we work for justice; we cannot fully achieve justice, at least not on our own, and not through law.

If this stance takes its clear-sighted awareness of the ethics of impossibility from Derrick Bell, it also owes much to others who have written about the practice of lawyering for social justice. Ann Freedman has written perceptively about the "compassionate witnessing" role lawyers can play when representing clients who have been traumatized by domestic violence, and the psychological and ethical implications of that work.[56] In my own life, though, it was Luke Cole who taught me the most, in casual conversation as well as writing, about what letting go of one's professional and personal self-importance makes possible.[57] Luke had a lot of demons, and he got a great deal of personal pleasure from using his private rage and his social privilege on behalf of his clients. But he also understood clearly that these narcissistic side benefits were only that; that the goal of the environmental justice movement with which he identified was community political empowerment and the institutional changes that empowerment could bring about.

Luke understood, moreover, the power of liberal beliefs to confound and obstruct justice. In speeches and in writing, he often cited the "Three Great Myths of White Americana":

1. The truth will set us free.

2. The government is on our side.

3. We need a lawyer.[58]

Luke understood that setting your ego to one side enables you to do your best work, despite the temptations that professional status creates to put yourself, as the lawyer, front and center. He also understood, though, that one's ego is not the enemy.

The last thing that I want to inculcate in my social justice students is the hardest to talk about but fortunately something that they already have within them, which is the energy to be hopeful and courageous that love brings. As critical thinkers and as lawyers, we are perhaps most used to articulating negative emotions like outrage and anger. Yet, as all the great spiritual teachers and leaders know, love is a stronger emotion than anger or hate, and love is a sustaining force that can keep the struggle for justice joyful even when the odds are very long. The Buddhists recognize four virtues that compose the loving life: loving kindness, compassion, sympathetic joy, and equanimity.[59] Practicing these virtues daily, whether one is Buddhist or not, helps build the resilience that makes long and arduous struggle possible, and even enjoyable. This is a message especially crucial for lawyers, many of whom suffer from "burn-out" and other afflictions that affect people whose professional lives expose them to high and constant levels of stress and hostility. The hope of someday bringing about the Revolution is not enough to be sustaining. We must love the journey every day.

The compassion and humility necessary to be a good social justice lawyer, I am suggesting, come from recognizing the impossible relationship between law and justice, yet acting anyway, with a full knowledge of the possibilities and limitations of one's actions. As Gramsci wrote, "pessimism in my intelligence and optimism in my will."[60] For if being a social justice lawyer is an impossibility, so is a social justice

anything; we are human and therefore always fall short of justice. Law, with its social and cultural power to do good and evil, is as good a place to act as any other.

Conclusion

> A holistic approach to education would recognize that a person must learn how to be with other people, how to love, how to take criticism, how to grieve, how to have fun, as well as how to add and subtract, multiply and divide. It would not leave out of account that people are begotten, born, and die. It would address the need for purpose and for connectedness to ourselves and one another; it would not leave us alone to wander the world armed with plenty of knowledge but lacking the skills to handle the things that are coming up in our lives.[61]

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The work that remains undone, therefore, is the work of bringing this subtextual conversation into the text, and doing so institutionally. What would it mean for "professional ethics" education to mean more than enough familiarity with the ABA Model Rules of Professional Conduct to pass a multiple-choice test? What if professional ethics education included emotional education, psychological counseling, and spiritual instruction--I don't mean religious instruction, for some law schools do make room for this, but instruction on how to meditate, how to sit quietly and deal with what comes up when you really reflect on yourself? What if clinical legal education included mindfulness practice?[62] These questions are only now rising to the top of my pedagogical reflections, but I have a feeling they will stay.

If I have a pedagogical slogan, it is the one taken from journalism: the injunction to comfort the afflicted and afflict the comfortable. That includes self-affliction as well as self-comfort. I have learned to feel at home in the law by not feeling at home in it. What my work in the classroom leaves undone is the greater institutional work of making the unspoken curriculum manifest.