

## TEACHING THE TENSIONS

ANGELA P. HARRIS\*

*Aporia: "a logical contradiction beyond rational resolution."*<sup>1</sup>

### 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.

I have been walking into classrooms for twenty-one years now. In this Essay, rather than discussing the technical work of teaching—exercises, reading materials, grading methods—I want to reflect on some of the things that happen below the surface of classroom conversations. And I want to try to tease out some of the unarticulated (and not fully articulable) commitments that allow me to find a place for myself in a law school classroom.

Trying to think and feel these things through took me to the epigraph to, and the title of, this Essay. An *aporia*, Derrida and his followers tell us, is an unresolvable internal contradiction in a text, the place where x and not-x attempt to share the same space.<sup>2</sup> It is possible to read legal doctrine, like other kinds of texts, for its *aporias*. But unlike the Critical Legal Studies scholars,

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\* University of California–Berkeley School of Law; Baldy Distinguished Scholar, University at Buffalo, State University of New York. Portions of this Essay were first presented at Washington University School of Law. This Essay is dedicated to Luke W. Cole.

1. Graham Allen, *Aporia*, in THE LITERARY ENCYCLOPEDIA (2005), <http://www.litencyc.com/php/stopsics.php?rec=true&UID=1578>.

2. *Id.* See also Jacques Derrida, *Force of Law: The "Mystical Foundation of Authority,"* 11 CARDOZO L. REV. 919, 947 (1990).

who uncovered their “fundamental contradictions” as a kind of “gotcha” strategy to prove the indeterminacy of legal reasoning and the primacy of politics,<sup>3</sup> I accept the existence of irresolvable contradictions. Perhaps paradoxically (I love paradoxes, too), the play of internal contradictions, like matter meeting antimatter, provides a blast of energy that makes an argument, an ideology, or a legal doctrine move. Tension and contradiction also make sense of my life as an essential anti-essentialist, a person whose presence in any given social scene is likely to be visibly incongruous, and who has come to be happiest in the margins.

I have slowly come to see that staging the tensions and contradictions is also what I do as a teacher—not via the Socratic method, but via the conversations beneath the conversation. In this Essay, I attempt to identify some of the tensions and contradictions that I try to set before students, not in order to resolve them, but as frames within which to situate ourselves. These frames all have to do with a fundamental tension: how does a person committed to social change live within the law, a set of institutions and ideologies committed to preserving the status quo?

In Part I of this Essay, I offer a brief autobiography, attempting to diagnose my love of tension and paradox. In Part II, I discuss the *aporia* I see at the heart of social justice lawyering and the impossibility of doing justice through law. In Part III, I discuss the ethical and professional issues this impossibility raises for social-justice-minded law students. In Part IV, I offer not a resolution of the tension, but a pragmatic way of living with it.

### I. TENSION AND PARADOX: A DIAGNOSIS

I found myself in front of law students quite by accident. When I was growing up, I was an intensely shy, intensely unworldly, and bookish kid whose internal life was governed by a series of tensions and contradictions about identity, on many, many levels. The village in which I grew up, Yellow Springs, Ohio, was itself a place with many sub-surface tensions: a progressive enclave of 1960s counterculture, racial integration, and commitments to the humanities and the liberal arts (this was the home of Antioch College, which pioneered work-study programs and credits for life experience) in a region of southwest Ohio dominated by farming, racial segregation, the small-town culture of the upper South, and the military-industrial complex (Wright-Patterson Air Force Base was one of the biggest local employers and employed my dad). I was a black kid in a series of predominantly white environments, a black kid who liked science fiction and sensitive singer-songwriters, a black kid intensely uncomfortable with performing blackness for either black or

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3. For an overview of the philosophical bases of Critical Legal Studies, see ISAAK I. DORE, *THE EPISTEMOLOGICAL FOUNDATIONS OF LAW* 857–90 (2007).

white audiences. And I was a girl uninterested in performing girliness, drawn instead to fabulous, ironic, and self-critical artistic and cultural works and personal displays that, I would later discover, all fell under the description “gay.”

My aspiration for myself was to write fiction, and it was not a commitment to defending the disempowered or a longing to make stirring closing arguments that took me to law school, but rather a chain of disappointments, frustrations, and, finally, a desire for more “options.” Law school found me—a vaguely leftish, vaguely queer, black feminist—at one of the most ideologically right-wing institutions in the nation, the University of Chicago Law School, without really understanding how I’d gotten there. I didn’t really know much about law school or lawyers. I’d loved the rarefied life of the mind as a U of C graduate student, reading Freud and Marx and being introduced to post-colonial theory, and I assumed law school there would be more of the same. I knew how to write beautiful, free-form, evocative essays on the high and popular cultures of modernity. I had no idea how to write a brief.

A few years later at the ripe old age of twenty-six, I was suddenly an Acting Professor of Law (and the title was so apropos—I was clearly acting) at the University of California-Berkeley, the slightly stunned product of many converging forces: hand-to-hand combat by Boalt Hall’s student Coalition for a Diversified Faculty; the genteel patronage system of hiring developed by the national old boys’ network of white-guy law professors; federal and state affirmative action policies; and a bewildered and anxious faculty reluctantly convinced to “diversify” by threats, lawsuits, and demonstrations.

I had to find a way to bring myself into the classroom, yet nothing of me felt the tiniest bit suitable. Even though I could now organize my thoughts like a lawyer rather than a poet, I’d never been a doctrine jockey; to be honest, case analysis kind of bored me. I was drawn to the slow, subtle currents of modern and post-modern culture moving below the surface of legal reasoning and the eddies they stirred on the surface. More pragmatically, there was also the problem that I didn’t look anything like a law professor. I was the first black woman to hold my position at Boalt, although Rachel Moran, thankfully, had already taken the position of “First Woman of Color.” And I was way too young—the same age or younger than most of my students. Photos of me at the time show me looking panicked in flowered dresses, law-firm skirted suits, and a bubble of 80s hair—an Acting Professor, without a doubt.

The 1980s American academy saw conservative moralists like William Bennett and Dinesh D’Souza decrying the destruction of “the canon” and attacking the “tenured radicals” they saw making rules against “hate speech” and filling up students’ minds with politically-correct poetry and impenetrable,

pretentious, post-modernist theory.<sup>4</sup> Many of the new faculty targeted by these attacks had, in fact, tried to open up the canon. They taught from a critical perspective that saw the university not as the keeper of timeless knowledge to be preserved for the ages, but as a site of debate over the historical record to be left by social and political struggle. History is written by winners. But faculty inspired—even propelled into teaching—by radical movements like Third World feminism were trying to make the traces of the “losers” visible. The resulting “culture wars” were intense, and one solution offered by educational theorists to professors whirling around in this vortex of academic controversy was to simply “teach the conflicts.”<sup>5</sup> Without really articulating it that way to myself, I found myself personally drawn to theories of tension and contradiction.

This was certainly true in my research, and given that “theory is therapy,” tension and contradiction rang true as a theme in both my life and my work. For example, in 1990 and 1991, Duke University Law School held a conference series called “Frontiers of Legal Thought,” attended by a mix of feminist, critical race, and queer scholars and activists.<sup>6</sup> My notes from those conferences are now lost (electromagnetically trapped in some archaic computer storage medium), but I remember clearly a panel at which Joan Williams and I spoke about the link between autobiography and theory, and both of us confessed that for us anti-essentialism was not only a theoretical commitment but a character trait. Stanley Fish was in the audience and was upset to hear this. He chastised us: “One cannot be essentially anti-essentialist!”

I granted the absurdity. But there was something true about our claim, all the same. And it found its way into my teaching as well as my writing.

## 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

4. See, e.g., DANIEL A. FARBER & SUZANNA SHERRY, *BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW* 5 (1997) (describing the progress of the “culture wars” from university humanities departments to the law schools); DINESH D’SOUZA, *ILLIBERAL EDUCATION: THE POLITICS OF RACE AND SEX ON CAMPUS* 5–9 (1991) (describing the steady elimination of the canon from America’s elite universities).

5. See Gerald Graff, *Teach the Conflicts*, in *THE POLITICS OF LIBERAL EDUCATION* 57 (Darryl J. Gless & Barbara Herrnstein Smith eds., 1992).

6. Symposium, *Frontiers of Legal Thought*, 1990 DUKE L.J. 193 (1990); Symposium, *Frontiers of Legal Thought II*, 1991 DUKE L.J. 271 (1991); *Frontiers of Legal Thought III*, 1992 DUKE L.J. 625 (1992) (Editor’s note—this symposium was published in three separate issues).

always self-compelled, coerced by forces—beliefs, convictions, reasons, desires—from which we cannot move one inch away.<sup>7</sup>

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.<sup>8</sup> Violence is the opposite of law, in the sense that it causes pain and thereby destroys language, on which law depends.<sup>9</sup> Violence also shatters the social world on which law depends.<sup>10</sup> Elaine Scarry argues that torture erases any bond of mutuality between the victim and the torturer.<sup>11</sup> The torturer says, “Your consent is irrelevant; you exist only at my whim.”<sup>12</sup> 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.<sup>13</sup> 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.<sup>14</sup>

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

7. STANLEY FISH, *DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES* 520 (1989).

8. See Derrida, *supra* note 2, at 927.

9. ELAINE SCARRY, *THE BODY IN PAIN: THE MAKING AND UNMAKING OF THE WORLD* 35 (1985).

10. *Id.* at 32–33 (describing a diminishing sphere of perception).

11. *Id.* at 36–37.

12. See *id.* at 27–59.

13. *Id.* at 41–42.

14. GIORGIO AGAMBEN, *HOMO SACER: SOVEREIGN POWER AND BARE LIFE* 15 (Daniel Heller-Roazen trans., 1995).

call “founding violence.”<sup>15</sup> 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.<sup>16</sup> When these revolutionary moments happen, the law of the new regime follows along. Consider, for example, *Johnson v. M’Intosh*.<sup>17</sup> 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.<sup>18</sup>

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.<sup>19</sup> But he also very clearly asserts that as a justice of the U.S. Supreme Court, he cannot rule any differently.<sup>20</sup> As he puts it, “Conquest gives a title which the Courts of the conqueror cannot deny.”<sup>21</sup>

In addition to “founding violence,” there is another kind of violence necessary to law—the everyday violence present in the idea of “enforcement.”<sup>22</sup> 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.”<sup>23</sup> The unrelenting 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.<sup>24</sup>

15. See Derrida, *supra* note 2, at 943. See also Michèle Lowrie, *Virgil and Founding Violence*, 27 CARDOZO L. REV. 945, 947 (2005).

16. See Derrida, *supra* note 2, at 943.

17. *Johnson v. M’Intosh*, 21 U.S. (1 Wheat.) 543 (1823).

18. *Id.* at 573.

19. *Id.* at 588.

20. *Id.* at 589.

21. *Id.* at 588.

22. See Derrida, *supra* note 2, at 925 (explaining that enforcement is essential to justice) (emphasis added); Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1619 (1986) (equating violence with enforcement).

23. Cover, *supra* note 22, at 1601.

24. See Robert Gordon, *Some Critical Theories of Law and Their Critics*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 641 (David Kairys ed., 3d ed. 1998).

Third, and most subtly, “discursive violence” is necessary to the law.<sup>25</sup> 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.<sup>26</sup> 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.<sup>27</sup>

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.<sup>28</sup> 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.<sup>29</sup> 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.<sup>30</sup> 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.<sup>31</sup> 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

25. See, e.g., RICK PARRISH, *VIOLENCE INEVITABLE: THE PLAY AND FORCE AND RESPECT IN DERRIDA, NIETZSCHE, HOBBS, AND BERLIN* 103 (2006).

26. Cover, *supra* note 22, at 1610.

27. See, e.g., IAN HANEY LOPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 91 (2006).

28. See Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 *STAN. L. REV.* 581, 586 (1990).

29. Cover, *supra* note 22, at 1610.

30. Derrida, *supra* note 2, at 982–83.

31. See, e.g., DORE, *supra* note 3, at 863.

practices are legalized, folded into order by lawyers, and torture becomes an “increased pressure phase.”<sup>32</sup> 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.<sup>33</sup> 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.<sup>34</sup> 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 antiracialization efforts. The city of Rio was then in the throes of litigation challenging affirmative-action policies in higher education as contrary to

32. Chief Justice Marshall does this in *Johnson v. M’Intosh* with a sense of irony. With no such irony, John Yoo and Jay Bybee, authors of the “torture memos” written to justify the Bush Administration’s violations of the Geneva Convention, did the same thing. See, e.g., Memorandum from Steven G. Bradbury, Principal Deputy Assistant Attorney General, to John Rizzo, Acting General Counsel of the Central Intelligence Agency (August 1, 2002), available at <http://documents.nytimes.com/justice-department-memos-on-interrogation-techniques#p=1> (describing the “increased pressure phase”). For a study of the cognitive dissonance that arose for antislavery judges who nonetheless upheld the legality of slavery and the various rhetorical strategies they resorted to in order to convince others—or themselves—that they had no choice in doing so, see ROBERT COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* (1984).

33. Gerald B. Wetlaufer, *Rhetoric and Its Denial in Legal Discourse*, 76 VA. L. REV. 1545, 1596 (1990).

34. See, e.g., WILLIAM M. SULLIVAN ET AL., *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* (2007) (discussing shortcomings of legal education when limited to formal knowledge).



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.<sup>35</sup> 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,"<sup>36</sup> 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?<sup>37</sup>

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35. MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S*, at 1–5 (2d ed. 1994).

36. *Id.* at 56.

37. The same question arises for Puerto Rico and the island nations taken through imperial action by the United States. See, e.g., Pedro A. Malavet, *Puerto Rico: Cultural Nation, American*

What happens to political sovereignty itself in a world swallowed by global capitalism? Conquest, Justice Marshall wrote, grants a title that courts cannot deny.<sup>38</sup> 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.<sup>39</sup> 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.<sup>40</sup>

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*Colony*, 6 MICH. J. RACE & L. 1, 23 (2000); Ángel R. Oquendo, *Liking to Be in America: Puerto Rico's Quest for Difference in the United States*, 14 DUKE J. COMP. & INT'L L. 249, 250–52 (2004); Rose Cuison Villazor, Presentation at the University of Durham, England, Property, Citizenship and Social Entrepreneurship Conference: Indigenous-Only Land Ownership Laws in the U.S., France and Fiji: A Comparative Analysis (July 14, 2007).

38. *Johnson v. M'Intosh*, 21 U.S. (1 Wheat) 543, 588 (1823).

39. See *In re African-American Slave Descendants Litig.*, 471 F.3d 754, 762 (7th Cir. 2006).

40. See *The Black Panther Party: 1966–1980*, <http://www.blackpanther.org/TenPoint.htm> (last visited March 15, 2010).

In a recent article, Ariela Gross asks, “When is the time of slavery?”<sup>41</sup> 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.”<sup>42</sup> 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.<sup>43</sup> 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<sup>44</sup>—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.<sup>45</sup> In the end, as Stanley Fish warns, law becomes indistinguishable from the forces it would

41. Ariela Gross, *When Is The Time of Slavery? The History of Slavery in Contemporary Legal and Political Argument*, 96 CAL. L. REV. 283 (2008).

42. *Id.* at 303. See also Amy Kapczynski, *Historicism, Progress, and the Redemptive Constitution*, 26 CARDOZO L. REV. 1041, 1043 (2005).

43. See, e.g., Anthony V. Alfieri, *Gideon in White/Gideon in Black: Race and Identity in Lawyering*, 114 YALE L.J. 1459, 1461–63 (2005); Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1, 32–33 (1990).

44. Jeremy Waldron, *Homelessness and the Issue of Freedom*, 39 UCLA L. REV. 295, 299 (1991).

45. On the prison abolition movement, see ANGELA Y. DAVIS, *ABOLITION DEMOCRACY: BEYOND EMPIRE, PRISONS, AND TORTURE: INTERVIEWS WITH ANGELA Y. DAVIS* (2005).

oppose.<sup>46</sup> Law merges into violence, violence stands for security, and security is not only the law, but our law.

#### IV. TEACHING THE TENSIONS

The project of deconstruction . . . is not to reverse binary oppositions but to problematize the very idea of opposition and the notion of identity upon which it depends.<sup>47</sup>

I was . . . a pessimist in my intelligence and an optimist in my will.<sup>48</sup>

What does one do with the burden of this “hermeneutics of suspicion”?<sup>49</sup> Should social-justice-minded law students drop out and become political organizers instead? Critical legal theorists have repeatedly been accused of being “nihilists”—against law, against truth, against hope, against the Enlightenment, against America, against everything good.<sup>50</sup> Is it possible to “trash” liberalism and still be a lawyer? In my view, this tension cannot be resolved, only lived in, taking inspiration from Derrick Bell’s assertion that racial justice is impossible, yet we all have a moral obligation to struggle for it every day.<sup>51</sup> I want finally to show my students that the *aporia* contained within the term “social justice lawyer” should be not the cause of a paralyzing guilt or self-loathing, but the engine of their professional and personal commitments. To make this possible, in turn, we must go beyond the intellectual practices taught in law school and bring something else into the room.

46. FISH, *supra* note 7, at 520.

47. Mary Poovey, *Feminism and Deconstruction*, 14 FEMINIST STUD. 51, 52 (1988).

48. ANTONIO GRAMSCI, 2 LETTERS FROM PRISON 299 (Frank Rosengarten ed., Raymond Rosenthal trans. 1994).

49. See generally PAUL RICOEUR, FREUD & PHILOSOPHY: AN ESSAY ON INTERPRETATION (Dennis Savage trans., 1970).

50. See, e.g., Paul D. Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222, 227 (1984) (accusing Critical Legal Studies scholars of being “nihilists” and asking them to leave the academy); see also Maurice J. Holland, *Hurried Perspective on the Critical Legal Studies Movement: The Marx Brothers Assault the Citadel*, 8 HARV. J.L. & PUB. POL’Y 239, 243–44 (1985) (describing CLS scholars as “anti-American” and claiming they insist that American law is “fraudulent methodological sleight of hand”); Editorial, *Berkeley’s School of Criminology, 1950–1976*, 6 CRIME & SOC. JUST. 1, 1–2 (1976) (describing the history of Berkeley’s School of Criminology, which was dismantled and had its faculty fired for being too political); Eric Ilhyung Lee, *Nomination of Derrick A. Bell, Jr. to Be an Associate Justice of the Supreme Court of the United States: The Chronicles of a Civil Rights Activist*, 22 OHIO N.U. L. REV. 363, 422–25 (1995) (relating other academics’ views on Bell with statements that his work “does not qualify as scholarship,” “brims with patriarchy and sexism,” and is “Marxist,” and that Bell “preaches race hatred and irresponsibility”); FARBER & SHERRY, *supra* note 4, at 138–43 (1997) (accusing Critical Race Theory of being “beyond all reason”).

51. See DERRICK BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM 12 (1992).

If, as one of the epigraphs to this Essay suggests, an aporia has no rational resolution, taking an aporia seriously requires the extra-rational. In the case of social justice, the extra-rational begins with the awareness of suffering and the commitment to do something about it. Erica Elliott argues that justice itself is a feeling:

Justice is a sensation. We do not merely rationalize that justice has or has not been served in a particular situation. No, we *feel* the wrongness or the rightness of the events that have occurred, and the manner in which they have been dealt with by the law. . . . The commitment to grasp out our hands towards justice is so profound and enduring because it is an answer to a question posed to our very depths. . . . Where the other is the victim of injustice, I am especially enlivened to a sense of my own privilege, and jolted into the knowledge that privilege must carry with it an accountability and a responsibility to use whatever benefits I have gained to secure the others' best advantage. . . .

I will never learn anything more important than that which I learn from my brother's tears.<sup>52</sup>

Elliott is right to point at the emotional and psychological roots of the desire for justice. But she is wrong to call justice itself a sensation. In the Western intellectual tradition, we are so used to dividing “reason” from “emotion” that a call for one is usually understood as a renunciation of the other. But emotion uneducated by reason is as dangerous as reason unguided by emotion. For lawyers, especially those who work for the disempowered, unleashing the passions without regard to reason can mean unremitting rage against “the man,” a childish macho delight in one’s own toughness, or an unexamined “sympathy” for one’s clients that is inextricable from pity and narcissism.<sup>53</sup> What entitles Elliott, for example, to call someone who suffers her brother? Is it a mindful understanding of the “faces of oppression” that divide us from one another?<sup>54</sup> Or is it the sentimental belief that feeling bad

52. E. B. Elliott, *Beautiful Day: Awakening to Responsibility*, 13 LAW & CRITIQUE 173, 188–89 (2002).

53. For an examination of how one community lawyer renounced her rage against her legal adversary and adopted a more nuanced emotional stance that allowed her to better represent her clients' interests in the long run, see Angela Harris et al., *From “The Art of War” to “Being Peace”: Mindfulness and Community Lawyering in the Neoliberal Age*, 95 CAL. L. REV. 2073, 2121–22 (2007). For a perceptive and disturbing analysis of how actors in the criminal justice system, including defense attorneys and prosecutors, sometimes imagine themselves as colonial men shouldering the White Man’s Burden in the urban jungle, see James M. Doyle, *“It’s the Third World Down There!”: The Colonialist Vocation and American Criminal Justice*, 27 HARV. C.R.-C.L. L. REV. 71, 74 (1992). For a discussion of how pity for one’s client can subtly become narcissism, see GERALD LÓPEZ, *REBELLIOUS LAWYERING: ONE CHICANO’S VIEW OF PROGRESSIVE LAW PRACTICE* 123–26 (1992).

54. See IRIS MARION YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* 39–65 (1990).

for another person is, by itself, a moral act? Is it the aristocratic pleasure of shedding tears on behalf of an inferior?<sup>55</sup>

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.<sup>56</sup> 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.<sup>57</sup> 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":

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55. For a discussion of the connection between sentimentalism and imperialism, see Angela P. Harris, *Should People of Color Support Animal Rights?*, 5 J. ANIMAL L. 15, 22–27 (2009).

56. Ann E. Freedman, *Fact-Finding in Civil Domestic Violence Cases: Secondary Traumatic Stress and the Need for Compassionate Witnesses*, 11 AM. U.J. GENDER SOC. POL'Y & L. 567, 614–24 (2003).

57. Luke W. Cole, 1962–2009, was killed in a car crash in Uganda. He was the executive director and founder (with Ralph Abascal) of the Center on Race, Poverty & the Environment; the co-founder and editor emeritus of the journal *Race, Poverty & the Environment*; and a prolific scholar and teacher in the areas of environmental law and social justice. Stanford Law School Appoints Deborah Sivas as the Inaugural Luke W. Cole Professor of Environmental Law and Director of the Environmental Law Clinic, <http://www.law.stanford.edu/news/> (listed under "Press Releases") (last visited February 26, 2010).

1. The truth will set us free.
2. The government is on our side.
3. We need a lawyer.<sup>58</sup>

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.<sup>59</sup> 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."<sup>60</sup> 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.

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58. Luke W. Cole, *The Struggle of Kettleman City: Lessons for the Movement*, 5 MD. J. CONTEMP. LEGAL ISSUES 67, 68 n.4 (1994).

59. SHARON SALZBERG, *LOVINGKINDNESS: THE REVOLUTIONARY ART OF HAPPINESS* 1 (1995); see also PHILLIP MOFFITT, *DANCING WITH LIFE: BUDDHIST INSIGHTS FOR FINDING MEANING AND JOY IN THE FACE OF SUFFERING* (2008). Compassion, in this context, means the ability to feel with another who is suffering, and is therefore narrower than the meaning I have given compassion in my Essay.

60. Gramsci, *supra* note 48, at 299.

## 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.<sup>61</sup>

I don't talk much about these things with my students. It's only recently that I've even connected my desire to instill in students a deep awareness of the *aporia* of social justice lawyering with my own biography: my own convictions that all stable and knowable things, like identity, are in fact unstable and unknowable, that it's possible to be essentially an anti-essentialist and to identify with lack of identity. What I hope I do instead is to model this engagement in contradiction and tension by bringing into the room the things—like emotions and the awareness of legal violence—that law tries to keep hidden, and setting them beside our commitments to justice through law. In this I've always been aided by my students' own courage, honesty, and compassion. Every teacher knows that one doesn't really "teach" anything, though one can hope to educate in the etymological sense of "lead forth."

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?<sup>62</sup> 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.

61. JANE TOMPKINS, *A LIFE IN SCHOOL: WHAT THE TEACHER LEARNED*, at xvi (1996).

62. The East Bay Community Law Center (EBCLC), affiliated with Berkeley Law, has begun to incorporate mindfulness training, on a voluntary basis, into its work. Tirien Steinbach, Executive Director, EBCLC, personal communication with author.