DEMOCRACY REALIZED ONE CLASSROOM AT A TIME

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INTRODUCTION

It is unusual to publish the results of a student seminar. Occasionally, the prize essay or the winner of a writing competition finds its way as a note, comment or book review into a law review. The mode of such episodic recognition, however, is competitive and exclusionary. It mimics the process of litigation or *agon* of trial both by separating the victors from the context and collectivity in which their ideas developed, and by imposing a judgment that can neither be reviewed nor debated.[1] The process of legal publication – the law review – effortlessly reproduces the hierarchy of educational grading as well as the inaccessible and apodictic character of legal truth or academic excellence as enterprises that in the last instance only the judge, professor or editor can know. It is unusual to publish the results of a student seminar because the very idea of such a collective expression of learning – the very notion of sharing the insights of ambient discussion and the excitement and progress of ideas – transgresses the demarcations between student and teacher, pedagogy and scholarship, experience and outcome, upon which the texts of doctrine and law implicitly depend.

In this response to the symposium I will seek to address its most striking feature, namely the unusual character – very idea – of publishing what students collectively think, say or write in the course of a seminar. I will address it from the perspective of the process of theory rather than the mechanics of publishing, and attempt to elicit the politics of teaching and learning the law that this symposium addresses so unusually, directly, and radically. In brief, I want to say that something remarkable happens in these essays at the level of form: the legal concept of text is challenged and the "messy[] and contentious business" of theory is rendered for all to see.[2]

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[1] Although a judicial decision can be appealed, it is done before a different tribunal that is subject to highly restrictive procedural rules and is rapidly exhausted within a limited appellate structure.

[2] Anne Bottomley, *Theory is a Process and Not an End: A Feminist Approach to the Practice of Theory, in* FEMINIST PERSPECTIVES ON LAW & THEORY 42 (Janice Richardson & Ralph Sandland eds., 2000).

Equally striking, the process of theory – the collective nature of learning and knowing – is brought into the classroom. In a word, democracy takes hold of the teaching relation and, most radical of all, the classroom becomes a space in which the institutional possibilities of knowledge can be rethought, reimagined, and practiced differently.[3]

DIVERSIFICATION, OR THE STUDENTS TAKE OVER THE LAW REVIEW

The first issue, and in many ways the most complicated, is that of representation in the text of law. It is unusual to publish the results of a student seminar because they fall outside the norm of what is permissible or desirable to publish. Legal exceptionalism, to adapt a phrase used by Jacqueline Mertz,[4] confines the subject matter published in the law review to stylistic and doctrinal norms that are older, wearier, and considerably more homogeneous demographically and ethnically than the subjects of the classroom. Even where the substance of what is published is radical, it is produced in a style that allows it to join the indefinite murmur of weighty and unread law reviews. The abstract voice still dominates radical contributions to the law review. Leftist legal theory is in many respects even more drastically self-policed in terms of scholarship and style than more conformist doctrinal publications. The law must go on and this means that the text must remain familiar, bland, impersonal, and recognizable as "scholarship," doctrine, and law.

The diversity of voices and the variety of experience and scholarly style that the contributors to this symposium represent and express contradict many of the expectations of what is permissible under the aegis of the law review. Feminism and critical race theory may have challenged certain assumptions, especially the abstraction of juristic style, but that rhetorical color – Patricia Williams' anecdotes and narratives, Richard Delgado's conversational chronicles, Anthony Farley's liberationist poetics, feminist autobiographical enterprises – remains resolutely the exception rather than the rule and is more often derided than acknowledged or incorporated into the norm.[5] The challenging question that the diversity of voices poses – by virtue of their experiences, ethnicities, empowerment, and their unfinished character or student qualities of directness – is to what extent will the legal institution and its publishing arm accept these experiences and diversities as

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[3] I am borrowing here from the somewhat under-acknowledged later work of Roberto Unger. *See* ROBERTO MANGABEIRA UNGER, WHAT SHOULD LEGAL ANALYSIS BECOME? (Verso 1996) [hereinafter LEGAL ANALYSIS]; ROBERTO MANGABEIRA UNGER, DEMOCRACY REALIZED: THE PROGRESSIVE ALTERNATIVE (Verso 1998) [hereinafter DEMOCRACY].

[4] Jacqueline Mertz, *Women of Color – What Their Voices Teach Us*, 9 CARDOZO WOMEN'S L.J. 205 (2003).

[5] For an overview, see Peter Goodrich & Linda Mills, *The Law of White Spaces: Race, Culture and Legal Education*, 51 J. LEGAL EDUC. 15 (2000).

authentic knowledge.

The powerfully divergent realities of the contributors' experiences of law and law school are placed against the monolith of excellence and the power of editorial protocols. These are political in nature and this symposium is destined to expose those politics, bring them into our consciousness, and ideally subject them to scrutiny and institutional debate. In a sense this has already occurred, since disagreement over editorial protocols led to the Golden Gate Law Review's editorial board being relieved of the editing and publishing of this volume. There is already an intimate political history to the publication of this volume, which Professor Maria Grahn-Farley may or may not analyze in her introduction.[6] Whatever the details of the falling out, it allows for an initial and somewhat paradoxical comment about the idiosyncratic mode of reproduction of juristic stylistic norms.

A unique feature of the American law review is that students edit it. There is somewhat of a myth about the independence of the editors and their judgments that needs clarification. Students edit the law review but there are considerable, though varying, degrees of direct and indirect faculty control. In terms of direct control, there is usually a faculty "adviser" to the law review. At many law schools the submissions to the law review are circulated to faculty for comment, and at some schools, such as Harvard, no article is published without positive review from a member of the faculty. That is a fair amount of control. Add to this the indirect or symbolic controls exercised by the selection process – the exhibition of excellence according to traditional criteria, the desire to emulate faculty, and the goal of joining and excelling in the legal profession and occasionally the academy – and the control is fairly complete.

On the other hand, the student editors of the law review exercise an almost unblemished amount of self-policing. The self-imposed and highly disciplined criteria of place, norm, and hierarchy of knowing replace the democratic imperative of students actually dictating the content and form of the law review. The law reviews simply do not publish 'the unpublishable' or at least, that is, not until now. This symposium poses a direct challenge to the values and hierarchies that demarcate and oppose the publishable and the unpublishable. It raises the question of what would happen if the students actually took over the law review. What if the law review reflected the students' experiences and desires and not simply the wishes and

[6] What I can say, briefly, and derived from e-mails sent to all the respondents over the course of the summer, is that the broad stylistic demands made by the editors of the Golden Gate Law Review led to this symposium being withdrawn. For a wonderful and lively critique of the law review process, see Penelope Pether, *Discipline and Punish: Despatches from the Citation Manual Wars and Other (Literally) Unspeakable Stories*, 10 GRIFFITH L. REV. 101 (2001).

frequently turgid outpourings of their teachers? It would be a remarkable moment of democracy, of rethinking the institution, and of moving beyond what Unger coins as "the arrested development of legal thought."[7]

DECONSTRUCTION, OR THE TEACHER JOINS THE CLASS

Another way of posing the question raised by publishing the diversity of what students produce in a seminar is to posit the idea that it blurs the lines between teachers and students. Paradoxically, it is here we should acknowledge the extraordinary insight, courage, and talent that Grahn-Farley has displayed in convening this seminar and democratizing the experience of doing feminist legal theory. Later, I will address the various impasses faced by the legal left – broadly depicted as the "weary sons of the fathers." But initially I would like to address the conundrum of leftist law teaching, namely how it overwhelmingly reproduces the juristic status quo and the conventions of style and pedagogy that it seeks to attack.

The history of the legal left in the United States is both vocal and ephemeral in its engagements and effects.[8] From its inception, it has been marked most distinctively by pessimism of tone and alienation from both pedagogy and law. Where legal academics are fond of intoning somewhat portentously on the increasing separation of legal scholarship from judicial decision-making, the more striking disjunction is much closer to home – teaching practice and presentation of the self. The most marked disjunction on the left is that between legal scholarship – radical theory – and teaching the law, or the practice of scholarship within the academy. The tropes are relatively familiar. According to Unger, leftist law teachers constitute "a priesthood that ha[s] lost their faith and kept their jobs. They [stand] in tedious embarrassment before cold altars."[9] Pierre Schlag refers to the "weak nihilism" of the legal academy depicting a "group of thinkers and actors who no longer respect the grid, but who also have not the slightest idea what else to do."[10] Paul Campos refers both to the "solemn idiocy" of legal judgment and to the grinding boredom of doctrine.[11] Duncan Kennedy argues that most of what gets taught in law school is nonsense.[12]

Caught in the grip of a desire to change the outside rather than the

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[7] *See* LEGAL ANALYSIS, *supra* note 3, at 29.

[8] For a discussion of similar issues in relation to the English legal left, see Peter Goodrich, *The Critic's Love of the Law: Intimate Observations on an Insular Jurisdiction*, 10 LAW & CRITIQUE 344 (1999).

[9] ROBERTO MANGABEIRA UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT 119 (Harvard Univ. Press 1988).

[10] *See* PIERRE SCHLAG, THE ENCHANTMENT OF REASON (Duke Univ. Press 1998).

[11] *See* PAUL F. CAMPOS, JURISMANIA: THE MADNESS OF AMERICAN LAW (Oxford Univ. Press 1998).

[12] *See* DUNCAN KENNEDY, LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM (Afar 1983).

inside, the real rather than the personal, leftist law teachers have historically been a priesthood and have preached radicalism rather than being activists or practitioners of self-criticism. They have taken positions, expounded theories, criticized, and trashed; these acts, however, have been limited to exercises in writing – wars in the libraries and law reviews – and the discrete heterotopias of conferences and scholarly symposia, rather than presented to the classroom. This is a charged and contentious theme and I advert to it here simply to make the point that even on their own recognizance, radical scholars are most profoundly alienated not from the law that they write endlessly about, but from teaching the law. Ironically, that was how we were taught in the Marxist oriented days of the 1960's and 1970's.[13] Being middle class meant, amongst other things, that class struggle was invariantly external to the self and its immediate experiences. Exploitation was the experience of others, "the real" was the mode of production, and consciousness and law were shadows of the material world. All of this can be summarized in an anecdote. I first taught legal theory in the late 1970's to small tutorial groups in Edinburgh. The classes were held in rooms with high ceilings in the austere Old College in the center of the city. I would frequently lecture on Marxist epistemology and whenever I mentioned the concept of "the real," I would illustrate my argument by pointing out of the window. It was a simple and unconscious gesture but it accurately reflected the Marxist thesis that "the real" was external and that what was happening was "out there" in the domain of 'others' – the masses, the working classes – anywhere but here.

With the energy of youth and the insight of an outsider, Grahn-Farley poses a simple yet dangerous question: What would happen if our radical theories were applied to our classroom practices? Could it be that the depression of the radical is precisely a reflection of alienation from the self and the immediacy of the practice, the law school, the curriculum, and the classroom? To put it another way, the uniform scientific truths of the leftist generation, of the "rag tag of sixties radicals," have to cede to a novel diversity. The left has to relearn its radicalism, which means that besides teaching in the classical mode, it should learn to listen, attend to, and allow space for the myriad of voices, styles, and passions of a new and more plural generation of students. In this guise, the democratic classroom is built not in the image of Schlag's anti-normativo, Unger's prophet, Kennedy's gentle satirist, or for that matter my own disenchanted grammatologist, but rather in the multiple images of its students. As this symposium shows, the most radical teaching is neither the conveyance of a truth nor the inculcation of any other product or end. It is rather a question of creating a space for conversation, a site for thought, a middle ground that is democratically

[13] For a discussion of this theory, see Peter Goodrich, *Zenotypes*, 11 SOC. & LEGAL STUD. 45 (2002).

shared among students, as well as between students and their teachers.

INSTITUTIONAL IMAGINATION, OR A POSSIBLE TREATMENT FOR THE WEARY SONS OF THE FATHER

The best cure for the weary sons of the father (myself included) is the most immediate and radical. I am increasingly of the view that it is less important to criticize what others do or fail to do than simply to act differently oneself and see where that leads in its diverse modes of expression. There is a place, of course, for antagonism, criticism, exposure, and deconstruction. These are all predicated, however, upon the prior process of coming to theory. Thinking for oneself and embodying thought requires an initial openness to self, proximity, and possibility that is not available in any direct way within the strictures of traditional academic abstraction or law review style manuals. Nor is thinking for oneself constructively facilitated by the hierarchical logic and disposition of the traditional Socratic classroom. Whether radically or conservatively orientated in theory, the places, deference, and juristic images of knowledge or truth dictate a certain subordination of knower to knowledge and of student to teacher.

The principal aim of leftist legal theory has historically been that of escaping or undoing the law of the father. The object of criticism is the status quo, the anterior or antecedent law, and the reproduction of the same. Reproduction occurs at the level of structures: we profess something different, but we teach it in the same way. The reproduction of structures is largely invisible, but it is discernible in attributes of style, tone, and assumptions of place or prestige that do not need or do not bear uttering and so are left unsaid. To criticize or contest these aspects of the institution and its reproduction is in many ways the most radical and youthful gesture that a theorist can make.

For Grahn-Farley, the depression, boredom, and alienation of the radical law professor is an expression of a peculiarly deep-rooted inertia.[14] When it comes to the most immediate dimension of radicalism, the proximity of the law school, colleagues, teaching, and the interrelations of the classroom, professors suddenly cease to be radical. Instead, they become judges and lawyers – insiders that are absolutely in the know. Grahn-Farley suggests that the radical relinquishes that power, divests of that knowledge, and listens instead to what comes to be. Within her model, manifest in the papers that this seminar has produced, knowledge gives way to knowing, truth to becoming, and abstraction or rightness is displaced by experience

[14] *See* Maria Grahn-Farley, *An Open Letter to Pierre Schlag, in* CRITICAL RACE FEMINISM (Adrien Wing ed., 2d ed. forthcoming 2003).

and the various means by which these authors formulate their experiences of and against the institutional rigidities of law.

It is no easy task to act democratically in the classroom. It is hard to give up one's authority and to lay the justifications of institutional entitlement bare. It is much easier to bask in the safety of the past tense of knowledge and to act with the urgency of a project, syllabus, and style. The challenge that "to do feminist theory" imposes is that of acknowledging and addressing the limitations of the institution and the role of teaching in reproducing them. One could say, and the essays demonstrate this well, that it is inevitably the student who bears the more radical imagination of the institution. Without the experience of the tedium of doctrine or the sedimentation of Socratic method, they expect more and hope for change. Theirs, to borrow from Unger, is an intuition in which "practical experimentalism and individual emancipation require arrangements minimizing barriers to collective learning" and the re-imagination of institutional relations.[15] Historically, teaching the law has done anything but minimize those barriers.

Jessica Dayton begins her essay for this symposium with an epigraph from an unknown aboriginal woman: "If you are coming to help me, you are wasting your time. But if you have come because your liberation is bound up with mine, let us work together."[16] My intuition is that the essays in this symposium are precisely such a binding of causes and a working together. The students imagine the classroom as a democratic space and the law as a site of change. The collected papers are the work of friends, and in the mode of friendship their politics bear the immediacy and novelty of something shared. Borrowing from the tradition of discourses on friendship, rather than from those of scholarship, I will end by saying that it is important that this symposium be published and read. If pressed to say why, I would reply: "because of who they are, because of what they did."

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[15] *See* DEMOCRACY, *supra* note 3, at 7.

[16] Jessica Dayton, *The Silencing of a Woman's Choice: Mandatory Arrest and No Drop Prosecution Policies in Domestic Violence Cases*, 9 CARDOZO WOMEN'S L.J. 281, 281 (2003).