A PRE-MEMORIAL MESSAGE ON LAW SCHOOL TEACHING

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Booker T. Washington was fond of conveying his philosophy of Negro self-sufficiency in a parable. A lost ship had sailed for weeks before finally sighting another vessel. Frantically, the lost ship's crew signaled their need for water, for they were dying of thirst. The rescue boat signaled back: "Lower your buckets where you are." The crew did so and found them filled with the fresh water of a vast river into which they had unknowingly sailed.

Whatever the wisdom of Washington's advice to a people whose dire physical plight was the result, not of storms abroad, but an overwhelming racial hostility at home, the admonition: "Lower your buckets where you are" can be the salvation for those working to reform and revitalize legal education. Law students are the academic equivalent of the fresh water in Washington's parable. To benefit from this resource in our midst, we must replace the hierarchical structures in law school classrooms with innovative forms of teacher-student collaboration that enable students to share in the teaching enterprise and thereby make real the pedagogical principle that students learn best by doing.

Students provide the key to the needed transition. Through their extracurricular, academic activities (i.e., law journals, moot court competitions, legal aid, negotiation projects, and similar enterprises), law students devote countless hours of hard work without credit, pay, faculty supervision, or much chance of individual recognition. Law graduates almost always count such activities as the most rewarding learning experiences of their law school careers. Clinical programs at NYU and other progressive law schools also offer students a level of supervised learning by providing opportunities unmatched in most traditional classroom courses. Paradoxically, voluntary student projects and clinical courses define the challenge for law school reform. It is to restructure traditional course work to include those components that make extracurricular work and clinical training so appealing and educationally effective.

For much of my teaching career, I have been making a conscious effort to re-structure my courses in accordance with these principles of collaborative learning. I want both to be a better teacher and to try and effect a merger between classroom teaching and scholarship. The key to this effort is found in Paulo Freire's admonition in *Pedagogy of the Oppressed* that the

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education process "must begin with the solution of the teacher-student contradiction, by reconciling the poles of the contradiction so that both are simultaneously teachers *and* students."[1]

Students' involvement is enhanced when they are actively engaged in the learning and teaching process. An analogy to driving a car, or riding a bicycle, may not be exact, but as with skills requiring coordination of many faculties, understanding, much less advocacy of legal issues, is facilitated greatly by practice. Student understanding of the precedents and, more importantly, the economic and political pressures that underlie the ebb and flow of doctrine increases when they utilize these precedents to support arguments they are making as advocates in front of their peers, or when, as justices, they seek to find flaws in those arguments. While the cases they argue and decide are hypothetical, they provide effective training for those who will become advocates tomorrow.

This philosophy, I think, explains the longevity of my text, *Race, Racism, and American Law*, published initially in 1973, and now in its third edition, published in 1992. A fourth edition is planned for 1998. The text, in addition to eschewing a neutral position on racism, encourages the briefing and oral argument of simulated cases with rather involved fact patterns. Students, I've learned, pay more attention and are far more ready to disagree with one of their peers at the podium than they are when I am holding forth. Discussion is more animated and the contradictions within most legal principles become more readily apparent in the vigorous give-and-take of classroom advocacy. It also serves to spur the weekly writings that provide students the chance to offer their views and insights to the crucial issues we are discussing. I try to respond in writing to each of these essays.

A published example of my classroom/scholarship effort is the UCLA article, *Racial Reflections: Dialogues in the Direction of Liberation.*[2] I edited the student work that is the main body of the article together with two students in my 1988 "Civil Rights at the Crossroads" seminar, Tracy Higgins[3] and Sung-Hee Suh.[4] I owe a major debt to Professor Charles Lawrence of the Georgetown Law School for the idea of having students respond each week to reading assignments with two-page reflections containing their views about those readings.

While several years old, the student perspectives on civil rights issues published in this article remain relevant, offering valuable insights and enlightenment, a goal not always achieved in more traditional law review writing. For example, I often quote a statement by Radhika Rao, one of the

1. PAULO FREIRE, PEDAGOGY OF THE OPPRESSED 58-59 (1994).

2. Derrick Bell, Tracy Higgins, and Sung-Hee Suh, *Racial Reflections: Dialogues in the Direction of Liberation*, 37 U.C.L.A. L. REV. 1037 (1990) [hereinafter *Racial Reflections*].

3. J.D. 1990, Harvard Law School. Tracy Higgins is now a professor of law at Fordham Law School.

4. J.D. 1990, Harvard Law School. Sung-Hee Suh is now an assistant United States Attorney in the Southern District of New York.

contributors, who beautifully described the significance of the Supreme Court's action in finding a Richmond, Virginia, set-aside ordinance unconstitutional:

> In *City of Richmond v. Croson*, a majority of the Supreme Court chose for the first time to subject an affirmative action plan enacted by the former capital of the Confederacy to the stringent review it applies to the most repugnant forms of racism. The Court's decision to treat all racial classifications identically possesses the same superficial symmetry of the "separate but equal" analysis in *Plessy v. Ferguson*, and it suffers from the same flaw. The Court denies the reality of racism when it isolates race-conscious actions from their context and concludes that benign racial classifications warrant the same standard of review as invidious acts.[5]

Ms. Rao's comment reflects students' efforts to come to grips in writing with the disparities between the law they learn and the justice they seek. At the least, the essays provide relief from footnote-laden doctrinal analysis that seeks to convey an objectivity that may exist in theory but is impossible in the real world. My hope is that it has encouraged more experiential writing, based on the work of students as well as teachers. As all of this should show, I believe it is valuable to have a class product come out of a course. That is, "learning by doing" ideally should mean doing something real and tangible. Even if it is not published in a law review, today's computer facilities make feasible a course publication that is distributed to each student and perhaps to everyone in the school.

Of course, with so much paper flowing back and forth, student teaching assistants are both a necessity and, as I have discovered, a satisfying dividend to this form of teaching. While their duties vary with the course, students get a teacher's view, and benefit from the course and the learning process by helping with the participatory course process in a variety of ways that aid both students and myself. Usually, these students can earn credit by writing a paper about their efforts or the course subject matter, or a combination of the two.

Participatory teaching lifts the veil of drudgery that characterizes so much of legal education. Let me cite one dramatic illustration of its potential. In the Fall of 1990, during the first year of my leave-without-pay protest against the Harvard Law School's failure to hire and tenure women of color for its faculty, I offered my civil rights seminar to students willing to do the rather considerable amount of work without either grades or credit. About 25 students enrolled in this rather unique enterprise. Each week, as the seminar met, I was impressed with the feeling that comes when a group

5. *Racial Reflections*, *supra* note 2, at 1040 (citing Radhika Rao, who is now a professor at the University of California at Hastings Law School).

has gathered to learn, not for pay, not for credit, but for the simple satisfaction of sharing in the learning process. This, of course, is the law journal/moot court model, transformed to the classroom. It was for me and, I think, for the students, a most memorable experience.

This is my 28th year as a full-time law professor. I have received over my teaching career far more positive recognition than I deserve, and thus feel secure enough to confess that I came to teaching deeply concerned that my failure to obtain the traditional criteria—graduation from a major school with top grades, a law review editorship, and a Supreme Court clerkship—would doom me to failure or mediocrity as a teacher and writer. In fact, that fear was well-founded. Many law teachers have never been able to see beyond what they would consider my unimpressive credentials. For them, true worth is measured for life by one's law school transcript. The law faculty members of whom I speak are found in every law school. They view themselves as Keepers of the Traditional Way—a view of law school teaching whose major vice is its universality. What I have learned over the years, though, is that one's law school accomplishments, while not irrelevant, have precious little to do with the essence of teaching.

Swimming against the academic tide, of course, is risky and has surely brought to a quick end the academic careers of many teachers whose innovative teaching pleased their students while posing a threat to their senior colleagues. For me, the challenge was to adopt my participatory teaching methods to constitutional law, one of the prestige courses at most law schools. Years ago, contemplating the possibility of teaching constitutional law, I decided to audit the course as taught by Professor Laurence Tribe. In addition to his monumental accomplishments as a scholar and litigator, Tribe is also an extremely popular teacher. Although his class size hovers around the 200 figure, his courses are always oversubscribed.

Sitting in his class day after day convinced me that Tribe's reputation as a titan among constitutional scholars is well-deserved. He not only knows the cases but is able to spin out elaborate theories to explain how the law developed as it did, the flaws in its present state, and where it should be going. These theories were taken in by the students who sat down front as a kind of post-lactate mother's milk. As I gazed over the class, I noted that students about mid-way back in the large room, duly took notes, but were less enthralled with the classroom discussion than the front-benchers. The students who took seats in the back rows (seating was not assigned) looked more confused than enriched by Tribe's theories. They took few notes, grumbled among themselves, and started looking at their watches long before the hour ended.

At lunch one day, I told Larry how much I was enjoying the course. I suggested, though, that there seem to be various levels of class comprehension and involvement, the result I thought of his teaching at the highest level of generality. I thought it might be well if he pegged his lectures a

little more to those toward the back who were a bit lost. Larry looked surprised. "But, I have about 26 levels in which I can approach the material. I seldom go above 12 or 13." I said no more.

I honestly did gain a great deal from Tribe's course, but I wondered whether by using my "participatory learning" model it might be possible to hold the attention of the eager students down front while reaching out to those further back in the classroom. It would not be easy to convert techniques that work in a relatively small seminar to a basic constitutional law course with 60 or 80 or even more students. There is, moreover, a special obligation on constitutional law teachers. Students entering the classroom on the first day of constitutional law, and sensing that constitutional law is in some way unique, often feel a strong sense of anticipation. This course is likely to be, they have been told, the high point of their legal educations, where they will study and wrestle with the cases defining the legal conceptual foundations of our nation. My educated guess is that, as constitutional law is traditionally taught, that anticipation is disappointed. For many, the traditional exercise has been dusty dry, and none but the most resolute law students see the possibility of testing today's unresolved dilemmas on the battlefield of constitutional law as a project in which they themselves would wish to engage.

The challenge is no less great because this is a course with so little settled doctrine. Even within the four decades of my legal career, I have witnessed changes in constitutional law that defy even the most skilled efforts to explain or harmonize as neutral, objective interpretations of the constitutional text. For example, as a law student in the mid-1950s, I learned that the equal protection clause of the Fourteenth Amendment was adopted to provide the former slaves with all the indicia of citizenship as a means of protecting them from invidious discrimination from the vanquished but still vengeful whites in the Southern states. I learned, as well, that after the Reconstruction period, the nation's interest turned to growth and away from the earlier commitment to the now free, but still vulnerable black people. The protective potential of the clause was diluted by restrictive decisions, and for the better part of the next century it was utilized to "nurture railroads, utility companies, banks, employers of child labor, chain stores, money lenders, aliens, and a host of other groups and institutions . . . leaving so little room for the Negro that he seemed to be the Fourteenth Amendment's forgotten man."[6]

In the wake of economic reforms required by the Great Depression, and a more egalitarian outlook prompted by the nation's victory in World War II, the Supreme Court's view of the Fourteenth Amendment refocused on its original purpose. The "strict scrutiny" standard in equal protection analysis became the great safeguard of "discrete and insular minorities"

6. Boris Bittker, *The Case of the Checkerboard Ordinance: An Experiment in Race Relations,* 71 YALE L. REV. 1387, 1393 (1962).

against majoritarian hostility. But as Radhika Rao explained so vividly, the Court has again weakened the Fourteenth Amendment's shield by applying the strictures of strict scrutiny to the most modest efforts to remedy generations of racial discrimination, much of it continuing in more subtle but no less pernicious forms.

Then, there is the right of individuals to enjoy privacy in the areas of sex and family life free from state interference, a long struggle that culminated with the Supreme Court's recognition of a limited right to abortion. That right continues to exist despite a generation of attacks, but in very diluted form. The First Amendment's Free Exercise Clause, so often in tension with the Establishment Clause, has produced a series of conflicting decisions that can charitably be described as a series of *ad hoc* decisions, adhering closely to the facts of each case, and providing little of precedential value for even experts attempting to explain or predict the law in this muddled field.

Nor is the confusion limited to the individual rights area. The Tenth Amendment, only recently laid to rest as an impossible measure of what, if any, limits the Constitution imposes on the federal government's policies that interfere with basic state functioning, has evidently been given a new life. And, on their part, it is far from clear to what extent the states in this modern, complex and increasingly interrelated age, can legitimately engage in functions that interfere with the policies or interests of other states without running afoul of the Commerce Clause. And finally, must we await a modern-day Solomon to distinguish the ever-more complicated relationships between the Executive, Legislative, and Judicial branches of the federal government?

These questions, only a sampling of those that assert themselves after even a cursory survey of current constitutional precedent, raise a more troubling question for the law school course. How does one teach materials that seem to fit so comfortably into the Critical Legal Studies critique of law? As interpreted by Professor Stanley Fish, judicial decision-making is not "a formal mechanism for determining outcomes in a neutral fashion—as traditional legal scholars maintain—but is rather a ramshackle, ad hoc affair whose ill-fitting joints are soldered together by suspect rhetorical gestures, leaps of illogic, and special pleading tricked up as general rules, all in the service of a decidedly partisan agenda that wants to wrap itself in the mantle and majesty of law."[7]

But the challenge of law, and the particular challenge of teaching constitutional law, is less to harmonize the inherently dissonant, than to convey to students an understanding of the wide-ranging economic, social, and political influences that play a mostly unacknowledged but substantial role in constitutional decision-making. We know that the framers who gathered

7. STANLEY FISH, THERE'S NO SUCH THING AS FREE SPEECH . . . AND IT'S A GOOD THING TOO 21 (1994).

in Philadelphia were moved by the political theories of John Locke and Montesquieu, but their presence was mandated by concern that their property as well as their liberty, threatened under the unworkable Articles of Confederation, might be placed at even greater risk under a strong, central government.

They were, as Charles Beard reminds us in his classic study, *An Economic Interpretation of the Constitution*,[8] men of wealth with investments in land, slaves, manufacturing, and shipping. The Constitution they adopted served their primary interests. It created a strong federal government that balanced authority with the states. By recognizing specific rights in the individual, the Constitution enabled the wealthy a measure of protection against both government and uprisings by dissident groups of citizens as had happened the year before in Shay's Rebellion. The wealthy continue to enjoy influence in government policy-making based on their wealth rather than on either their numbers or the wisdom and worth of the policies they support. And yet, precisely because they lack wealth and influence, the poor and working classes, minorities and those with unpopular views, beliefs, or causes look to the Constitution as the primary source of protection, fairness, and reform. Whether such efforts bring about substantive improvement for the disadvantaged and a measure of equality for long-time victims of discrimination is a question that can be raised again and again throughout the course.

More than in other areas of the law, constitutional law requires that provisions and precedents be used as aids in decisionmaking, not directives. Understanding in this area is furthered by actually working with the materials, rather than simply discussing them in the abstract or examining how the Court has used them over time. To this end, I tried to organize my constitutional law course so as to involve maximum feasible student participation. To support a participatory approach, I tried to strip away impediments to the immediacy that should characterize students' encounters with the Supreme Court's decisions, adding sufficient reminders of the historical contexts in which the decisions were written to orient the student to the social and political fabric behind the specific controversy.

The starting point for the teaching of any law course is, I believe, to identify the pedagogical goal: what should each student who enters a particular course of study retain long after completing the course? What should that student understand, have accomplished, be able to do, and have made his or her "own" from that class? Long after completing their legal education, today's students, who will be tomorrow's lawyers, should of course retain key concepts of constitutional law as they inform every lawyer's practice, and an understanding of the framework of the structure of government. More importantly, each student should understand that

8. CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION (1941).

Supreme Court decisions are particular to specific periods, with broad factual settings that really include all of society.

Then, there was the matter of a text. The traditional constitutional law casebooks open typically with Marbury v. Madison[9] introducing judicial review in greater or lesser detail. These proceed to examine national powers, commencing with the commerce power and continuing with the enumerated powers of Congress. This start leads fairly naturally to the powers of the other branches of government, separation of powers, and so forth. Newer efforts begin the text with recent and controversial cases, seeking to stimulate students' attention early in the course, which is then presumed to continue at a high level thereafter. The existing texts, which differ considerably in the number of major cases covered, order of presentation, note materials on lesser cases and the secondary literature, and so forth, are all quite similar variations on a theme. They share certain conventions of the genre and assumptions about the conduct of the courses in which they are used. I have used three or four of them with some degree of success and likely no more frustration than most law teachers not using teaching materials specifically designed for their courses.

After several years, I prepared a set of materials that I used with an existing casebook. Finally, and with the very valuable work of a former student, Deborah Creane, and any number of student researchers and case editors, I completed a text designed for teaching the course on a participatory basis. The book is titled *Constitutional Conflicts.* The text's substantial departure from the norm in constitutional law casebooks supports participatory "learning by doing" simulations. The book comes in two parts. Part I, in hardback, contains thirty-odd hypotheticals whose detailed factual situations cover the main areas of the course. Set out after each hypothetical is a list of case citations and an approximately 10 page summary covering the applicable law. Part II, available on computer diskettes or in hardback, contains edited versions of the major Supreme Court opinions.

The book's structure assumes—though it does not require—that students will prepare and present oral arguments of these cases to the class serving as the court. The student advocates, who are unfailingly well-prepared for their presentations, are actually mimicking the kind of process that an attorney, researching an unfamiliar area of law, might utilize to investigate prior decisions. In practice, lawyers are called upon to research and to write; to comprehend legal arguments; to guess at the probable effect of and interaction between judicial, statutory, legal and policy arguments in court; to argue, persuade and debate; to work cooperatively with colleagues; and for some, to judge those arguments and decide cases and issues of law. This is as true in the practice of constitutional law as in any other. Once their research skills are in place, most students are aware that

9. 5 U.S. (1 Cranch) 137 (1803).

they have the capacity to learn, relatively quickly, whatever they need or want to know regarding any legal question.

This course procedure deviates rather severely from a number of law school teaching norms. It does not assume that the teacher is all-knowing and thus should occupy center stage in the classroom. Rather, by decoupling several traditional aspects of legal instruction, it frees the student to learn to analyze and perform independently. The instability and malleability of constitutional law doctrine renders certainty a myth and stare decisis a fiction. The teacher can guide students through the precedential confusion, but primarily must impart, through experience, the knowledge that each student is competent to do so. I find that this guidance is most effective as students seek to find their own way through the thicket of conflicting rules and multi-opinioned decisions. While students must grasp the concepts key to the making of a constitutional argument, it is quite clear that because Supreme Court decisions defy even the most skilled efforts to explain or harmonize as neutral, or objective, interpretations of the constitutional text—in itself a dubious exercise—the important point, the one each student should retain long after the case names fade from memory, is that rather than a revered relic bequeathed by the Founding Fathers, to be kept under glass and occasionally dusted, the Constitution is a living document, one locus of battle over the shape of our society, where differing prescriptive and proscriptive visions compete over what is, what should be, and what will be.

The participatory teaching approach is the antithesis of the traditional inculcation of "passivity as the norm" so common in legal education. In my experience—and as my students frequently have told me—students do vastly more work, and learn more from an engaged teaching methodology, one which requires that they perform very much like the lawyers they will soon become. The demands on individual students mimic, in many ways, the world of practice, and require that they assume substantial personal responsibility for their professional education. Law students gracefully rise to the challenge and meet it with a competence that might surprise some educators.

For many students, alas not all, this task-oriented process brings back some of the involvement-based excitement of first-year moot court. My Con Law students spend long hours haggling over the facts in cases they are writing and practicing the arguments that they must present before their peers. The quality of case presentation varies, but my classes are far more exciting when students are involved in this way than when I stand before them and try to "convey the word." In fact, students are far more ready to listen to my views after they have struggled with their own cases. Certainly, whether they adopt or reject my views, they are deeply engaged:

they have experienced the Constitution as a living document, one with contested meaning, greatly influenced by historical context, a vehicle capable of conveying and sustaining a moral vision.

As to final exams, I have always believed that much of the learning potential in law school final exams is wasted on the teacher who writes them. The real learning comes in writing the exam questions. Indeed, it is impossible to write a decent question without a fairly good knowledge of the material. Students studying to take exams written by the teacher certainly hone their knowledge of the subject, but it tends to be a passive-defensive process (what is the S.O.B. going to hit us with). When, on the other hand, the student, working with others, writes an exam question, he or she is actively involved in shaping the facts and the issues. They are motivated to do their best in formulating a question that some of their classmates must answer. They realize that while they will grade the answers, their classmates will be judging them as well. Taking responsibility for a job well-done can take precedence over grades when we provide a structure that makes this possible.

Students grading other students is seldom done at the law school level. Competition for good grades, it is assumed, will over-power honesty and integrity. That has not been my experience. Student groups usually spend long hours discussing the relative merits of the answers they are grading. Their comments are usually right on target and far more detailed than students usually receive from even the most conscientious teacher. In my overall grading, I usually comment on the comments, but I seldom have to correct statements that are either wrong or wrong-headed. They are also a bit astounded to find that they cannot bring themselves to recommend an undeserved "A" for an exam paper: they prepared the question, have an idea of what would comprise an excellent response, and differentiate between better and worse with sudden understanding that grading, while no science, is also not entirely random.

Grading is a problem where school policy requires that large classes be graded either on a curve or in line with grading guidelines. My Con Law courses, while often large, are taught far more like seminars where students usually receive more individual attention and do better work on papers than they might on a traditional final exam. I provide each student with a multi-page memorandum summarizing performance on each course component. My grades are usually higher than the guidelines recommend, but I have copies of my memos to explain the reason for those grades.

For most students (alas, again, not all), grades become a secondary consideration to the benefits they gain from learning constitutional law on a participatory basis. It is said of a great teacher that "he taught as a learner, led as a follower, and so set the feet of many in the way of life." That is quite a model. It moves me to close with the admission that, more

important than teaching structure or technique or writing style or jurisprudential philosophy, is the effort of all successful teachers who succeed in communicating not only subject, but self.

We all know that the memorable teachers in our lives hold that status even though we do not recall a single thing they taught us. Rather, we remember them as enviable individuals who spurred us to learn on our own, both the subject matter and ourselves. In the law school curriculum, there are few courses that are better suited than Constitutional Law as vehicles for the accomplishment of this transference. Teaching methods and textbooks are simply vehicles that enable a teacher to establish a pre-memorial presence among students. It is a marvelous gift both for those able to receive and the teacher fortunate enough to be able to give.