

URGENT TIMES[©]

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Each generation must discover its mission, fulfill it or betray it in relative opacity.

—Frantz Fanon¹

PROLOGUE

These are Urgent Times. The times are urgent with the Iraqi War—with the enormous suffering it bestows upon the Iraqi population and the poor of the American population, whose children, bearing the marks of “otherness,” have been taken to fight this War. These are Urgent Times with the ever-expanding prison-industrial complex and the acute distress it causes our communities—according to Human Rights Watch, if present trends of imprisonment continue uninterrupted, one person in every twenty of our generation will serve time in prison.² These are Urgent Times with global warming, the melting of the polar ice-cap, the resulting shortage of fresh water, and the inevitable suffering of Water Wars and poverty. These times are urgent with the plundering of the federal budget, and with the hardships an ever increasing and escalating budget deficit causes through its effects upon social welfare programs, education, health care, and jobs. These are Urgent Times for the Nation and for the World; but also it is *the* Urgent Time of our generation. These are the struggles that will define our generation, whether we address them as a group or not. Whether we accept it as our mission or not, these times are ours in which to live.

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1. FRANTZ FANON, *WRETCHED OF THE EARTH* (Richard Philcox trans., 2004) (1961).

2. HUMAN RIGHTS WATCH, *PUNISHMENT AND PREJUDICE: RACIAL DISPARITIES IN THE WAR ON DRUGS* 7 (2000).

It is time for the establishment to speak out against the atrocities of this Administration.

I will suggest the formation of a People's Movement. I will begin by proposing a more optimistic and proactive response to the domination of the right wing than the navel gazing that we on the Left have been doing (myself included) for the last years. There are, of course, exceptions, but the exceptions are most often not to be found within our academic institutions, but rather within grassroots organizations operating outside of the establishment; and if we have found these groups within the academic setting it has been among undergraduates, as if being upset about the current politics in the United States would be outside of the realm of "grown ups."

On an editorial note, *I want to include the comments made by editor-in-chief Emily Malandra openly in the text.* Her comments have been more than editorial in their character and a part of a contribution to a larger project of forming a dialogue of the Left in legal academia. I appreciate very much her comments and her willingness to engage in this dialogue.

I.

A NEW CLASS—THE SUBJUGATED

Emily points out that the November 2007 election could be read as an indicator that the winds are shifting, that the establishment has entered the fray speaking up against the administration. I hope that this is so; however to me it seems as if it was the people in its broader sense that spoke up, not necessarily including the establishment. Consequently, the November election at best shows that there should be more of an outrage from the establishment because the people are living in a state of outrage. Indeed this question illuminates my central point: the administration has so co-opted the language of politics, that even the voting-middle-class-America has been disenfranchised in that they do not really have a party any longer. Thus, whatever change the November election signifies will be minimal: the military surge will still happen; the budget deficit will keep growing, and very little will be done about Global Warming in the face of these impending wars.

All our contemporary Wars—against Iraqis, against the poor, against blacks, against women, and against children—are the battles of a larger War. They are the battles in a War that has lost its name because the Left has been silent and has abstained from naming it. This War is not a war fought against someone; rather, it is a war fought on behalf of a two-fold imperative: *total domination* and *right-wing ideology*. It is a War that has imploded the distinction between means and ends: a right-wing ideology is the means toward total domination, and total domination is the means towards a right-wing ideology. It is a War in which white supremacy, sexism, and imperialism are both the means and the

ends in and of themselves. This is the Postmodern War, with which the post-modern presidency finally has subjugated all of us.

To have one's identity produced out of subjugation instead of belongingness used to be the position reserved for the minority. With "minority" I refer to the underrepresented, traditionally women and black people. One example of underrepresentation is when there is a law against your group's right to vote. Another example would be when your opinion does not count even when you have the right to vote. The group that is becoming larger under this administration is the group whose opinion does not count. *Emily points out the interchangeability in this essay between the minority and the subjugated.* The line between the minority, the formerly formally underrepresented, and the non-minority, is now blurred; there is now a larger group of subjugated, whose opinions do not count, even though they never formally held a minority status.

Now even the privileged require a liberation politics that can bring them out from the position of the subjugated. This Administration has been brutally successful in creating a language of its own at the expense of a general language, so that we all come together as a mass of people whose language has come undone. This language of the right wing is both the means and its end, both ideology and tool.

In this language, domination itself is glorified. Violence is glorified as domination. What is hidden is the resistance against this domination—this is why the pictures from Abu Ghraib have not fatally harmed the Administration. Torture is at the core of this ideology and at the same time torture constitutes its tools. This is why we get to see the torture pictures but not the mass-demonstrations or uprisings against this War. This is how electric shocks against a person's genitals do not become torture but security. This is how an invasion and occupation of a country becomes liberation and an expression of freedom and sovereignty. This is how the control of women's bodies and reproduction becomes a celebration of life. This is how black poverty becomes a celebration of freedom that is expressed as a choice. The way that everyone is being silenced has not been hidden. What has been hidden is speech itself and its role in resistance.

A. *The Language of the Subjugated*

I believe that the silence of the Left is due, correspondingly, to the fact that our language has come undone in this postmodern world. We lack the words to describe what is happening to us, to the nation, and to the World. This lack, in combination with our knowledge that liberation lies in every direction and yet is nowhere to be found, then, becomes the mark of subjugation, a subjugation that connects never-before connected people and groups across race, gender and class.

For Baudrillard the postmodern is a new theoretical era:

It is all of metaphysics that is lost. No more mirror of being and appearances, of the real and its concept. . . . It [the real] no longer needs to be rational because it no longer measures itself against either an ideal or negative instance. It is no longer anything but operational. In fact, it is no longer really the real, because no imaginary envelops it anymore. It is a hyperreal, produced from a radiating synthesis of combinatory models in a hyperspace without atmosphere.³

So understood, two interrelated sets of arguments make up the postmodern era. First, there is no separation between the object and its concepts anymore. Language has come undone. Second, life—in the form of the real—exists outside of the imaginary. Life has also come undone, or at least our understanding of the possibilities of life. Life outside of the politically possible is lived in the disconnect between real objects and their concepts; in this way, the implosion of the metaphysics is simultaneously a disconnect. It is the tension inherent in this juxtaposition of these two strands that characterizes the postmodern era. In the next Part, I will address how the disconnect between the object and its concept also produces a disconnect between life and what makes life possible. Here, I explore the postmodern implosion of concept and object in language.

In postmodernity, the object comes into being through its concept at the moment when the concept becomes its object, thereby disconnecting the relationship between the reality, so to speak, of an object and its concept. Similarly, when experience and the tools of language are mutually exclusive, the only explanation is that the linguistically identified object is nothing more than the concept. For example, only then could slavery exist simultaneously with the concept of the “Land of the Free”; only then could not having enough money to pay for gasoline to escape the devastation of Hurricane Katrina become a “choice” to stay in New Orleans. Thus, the divorce between language and reality is always clear to the subjugated, and a primary building block of their language. And now the logic of the current administration brings us all within the experience of postmodernity: Iraq is liberated even when it is occupied, and one can be both liberated and occupied only if there is a separation between what liberation is and how it expresses itself. *Emily asks for whom it is a contradiction that the United States of America could be both a slave nation and “the Land of the Free” simultaneously. If it is from the slave’s position or from the master’s position the contradiction appears.* I think that the contradiction is not based on the position but on the relationship to freedom. If with master one thinks of a person only existing as free in relationship to not being a slave when the only other alternative to being free would be to be a slave, then the “Land of the Free” only means the land of the non-slaves and therefore this is not a contradiction for anyone. It would just mean that the land belongs to the masters and not to the slaves. If, however, we think of the “Land of the Free” as a place

3. JEAN BAUDRILLARD, *SIMULACRA AND SIMULATION 2* (Sheila Faria Glaser trans., 1995) (1981).

where people seek refuge from oppression instead of a place where people are getting enslaved, then it is a contradiction to be a slave nation and the “Land of the Free” at the same time. The contradiction between slavery and the notion of a “free country” is so strong that one claim has to completely suppress the other claim for the remaining claim to hold any meaning.

In a similar manner within the legal academy, it took a Wesley Hohfeld to coin the expression “a bundle of rights”⁴ for the owning class to understand that rights are a mysticism. For one who has never had a right to property, but has instead been property, *property* has always been “operational.” For the privileged, it took Critical Legal Studies to see that law was full of gaps, conflicts, and ambiguities. For the subjugated, the gaps, conflicts, and ambiguities were not news: first, they were made into objects of property; later, the subjugated objects of property were made into formally disenfranchised subjects; still later, the subjugated, formally disenfranchised subjects were made into substantively disempowered subjects. Law has always revealed itself as gaps, conflicts, and ambiguities to the subjugated.

Emily asks if we might be speaking of two (mis)understandings of one general and imperfect language, and not two separate languages, one of the administration and one of the subjugated, each perfect for its purposes. I am hoping that we, by insisting on connecting the object with its concept, can reclaim a critical language or better be part of establishing a new one that includes a broader group of people. That we, for example, by continuing to insist that Iraq is not liberated by the U.S. forces at the same time as it is being occupied by the same forces, can change the relationship between what is seen as connected and disconnected.

B. The Life of the Subjugated: How Can Life Exist Outside of the Possible and Still It Does

A second way of viewing postmodern times is that all bets are off. For Baudrillard, life now exists outside of the air we need to breathe. Viewed this way, the real *overcomes* the disconnect by the fact that life is being lived in the impossible. What you describe as the real has no correlation to life. What was real yesterday was only real because so it was said. What was said to be real yesterday has no bearing on what is said to be real today, or tomorrow. What is said to be real cannot be challenged by the real and the real cannot be challenged by what is said. This is why the reasons for going to war against Iraq could keep changing without ever challenging the real or being challenged by the real.

But what Baudrillard describes as new times, I am suggesting are better thought of as the eternal times of the life of the minority, the subjugated. In other words, the postmodern *is* the life of the slave, the woman, the child, or the colonized. For it to have been possible to have a system of slavery in the same

4. WESLEY N. HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS* 23, 65 (1923).

country that calls itself the land of the free, there had to be a complete disconnect between life and its concept. When looking at the conditions of slavery and life in chains, life itself is impossible where life requires freedom. Surviving slavery thus lives outside of the imaginary possible; it is only through the irrefutable presence of their descendents that we can reach beyond the limitations of our imaginations to know that it was possible to survive slavery. Still today, the very existence of an African diaspora is the real proof of the impossible survival in spite of the conditions of a maximum-security prison. Similarly, people survive on minimum wage and women survive abortion bans and male control over their bodies. Life, the “really real,” always implodes the possible: what happens is that the cost and the harm of living your life under circumstances where the object and its concepts have been disconnected becomes invisible and without a language. This is why liberation can be found in any direction at the same time as nowhere. For the slave, the woman, and the child, the very meaning of their existence is itself the sign of the implosion or the rejection of the metaphysical distinction between object and concept.

For the subjugated, the official language has always been not of one’s own, it has always been a language of the never real. For the subjugated, the relationship between the object and the concept, as expressed in the official language, has always been one of disconnect outside of the metaphysical, outside of what makes life possible. For the subjugated, if life is anything at all, it must be produced outside of any environment that our rationality can imagine as being able to sustain life.

All that is new is that this postmodern presidency has democratized the need for a liberation politics to now also include the privileged. Before, the subjugated also had the other marks of disadvantage (i.e., race, class, gender); but now even those without these marks are in the position of subjugation in relationship to this administration. We all now experience postmodernity, where the real only comes into being because someone above you tells you “because I say so.” For the slave, it was the speech of the master, for the woman the speech of the man, for the colonized the speech of the colonizer; and now for most of the world (inside and outside of the United States) it is the speech of this Administration.

Thus, contrary to Baudrillard, transcendence need not be “lost” with the ubiquitous postmodernity of the privileged. Just as for the subjugated, the real is positioned outside of existence, even though, in an environment of subjugation, existence is not rationally possible to imagine. So there is a way in which disconnect, together with life in the impossible, can provide a chance for resistance to take place through life. If there are no longer any rules for what goes with what, then the confines of identity politics might be broken, and broader bonds of solidarity may be formed in a movements based on antisubjugation in favor of democracy and representation.

II.
THE POLITICS OF BEING WRONG

I want to connect anticolonialism to two things: first, a politics of description, and, second, a politics of liberation. The politics of description is about how to make language, how to not let objects and their concepts be disconnected by showing the politics of disconnects and connects. The politics of liberation is about how to ask and answer the question that will always turn out to be wrong, to live life in the impossible. Postmodern theory taught us that as soon as we leave the space of description to enter the times of change we necessarily will be wrong, with the relationship between a question and its answer constrained by the limitations of our imaginary. Thus, a politics of liberation—by definition produced in reference to a position outside of what is possible to logically imagine—will itself be wrong, it will not lead to the form of liberation as envisioned. Since life under domination is itself an object without a concept and an existence outside of the imaginary, any articulation that makes sense as a politics of description must be, and is, generated by the politics of liberation through life in the condition of the impossible.

Thus, to be descriptively and directionally wrong, in the sense that the description will not match the direction of liberation, is the lesson that the Left has to learn. Without the ability to be wrong, the Left can be neither supportive nor involved in a politics of anticolonialism. To be involved in a politics of anticolonialism is to simultaneously ask and answer the question, *which way to freedom*; but, whatever direction we take, we will have known all along that any answer or question will not be the correct formula. In retrospect, we know that it is not enough to find the route to Canada to abolish slavery and be liberated; it is not enough to extend the right to vote to women and to black people to find liberation from sexism and white supremacy; it is not enough to have access to formal education to find liberation for the working class. At the same time we also know that these were all struggles that had to be lived to bring about a possibility for life to not have to take place in the impossible any longer. These were struggles that had to take place for even the possibility of life within the possible and within the logics of survival. To struggle against subjugation teaches us how to survive being wrong and how to reorient towards new and expanded goals en route to freedom.

The Left is participating in hiding the resistance, and this must stop. While looking for the relationship between domination and subjugation, the Left hid resistance under the concept of free agency; but it was a free agency in its literal meaning—an agency and agent detached from any politics of liberation. The Left abandoned altogether the questioning and answering that could provide any direction away from domination when we learned that we would always be wrong.

A. Urgency and Representation

This being right and being wrong is a question of whom you choose to empower in their wrongness because no one will ever be right in the eyes of everybody. Sometimes, the only way for the dominated to speak is by questioning its representation. When the Left stopped speaking it not only silenced itself but it also took away one of the greatest powers that groups whose language has come undone possess—namely the power to question and delegitimize their own representation.

The Left has been confused on this issue of representation. The lesson from postmodernism, that representation is not an expression of an unquestionable essence but an always-questionable construction, paralyzed the Left. Representation, in this postmodern view, is a construction made of political choices instead of nature. The Left did not appreciate the possibilities opened up by this lesson; they did not see that the social constructedness of representations promise the ability to create broad solidarities across groups and self-interests. This is how the disconnect of postmodernity can become a resource instead of a burden carried by the subjugated whose identities were constructed out of their location as minorities. It might be possible to build broader forms of solidarity that go beyond the limitations of identity politics in the spaces of the disconnect.

Rather than seizing the opportunities of the postmodern lesson, instead, the Left began to universalize “being wrong” as a counter to the fragmentation of “being right.”

However, we forgot that it is only in relation to a politics that the connection between object and concept becomes meaningful for a wider community. We forgot that it is only in relation to a politics that the gaps, conflicts, and ambiguities can become indicators that have meaning for a wider community. Without a politics, these revelations will be just proof of the inadequacy of the craftsmanship, and not a critique of the discipline’s overall project. If one takes away a politics of liberation, then what is left is only the standard of being right versus being wrong, and being right is better than being wrong.

The Legal Left began to behave like the law school that they had always written against by believing in the “right” answer and in the danger of being “wrong”; and, finally, concluded that it is better to not ask a question to which an answer cannot be given, that it is better to not give an answer than to be wrong, all in a good student and lawyerly manner. And so, the Left’s resolution of the challenges of postmodernism and poststructuralism skirted the complexities of representation. Instead of staying within the complexities of representation, the Left abstained altogether from making any speech. This is how “identity politics” developed in its most conservative manner.

The Left’s resolution became a politics of “not speaking,” a discipline of not speaking for anything wider than the self and its personal experiences. The silence of the Left grew because any speech that was wider than the idiosyncratic individual connection between the object and its concept was an always-

questionable representation.

Instead of believing that representation is never true and always constructed, the Left believed that representation was not possible. The Left could have interpreted the always-open question of representation as a possibility and opportunity for mass solidarity. My point is this: because representation is a choice and not an essence, there are always possibilities for solidarity of the masses.

This state of confusion within the Left is often expressed as a search for the “authentic leader,” a community leader. We search without realizing that once representation has been made impossible, the authentic community leader has also been made impossible. Waiting for the essential leader who can speak without being questioned, the Left has been incapable of addressing and stopping the different Wars waged against defenseless populations at home and abroad. Instead of leading a discussion about politics and taking a position on behalf of those without institutional access, the Left felt that its role was in the space of policy, to serve as a communication facilitator between the War-wagers and the defenseless. This at a time when the power relationship between the ones waging the wars and those who are the targets of the wars is so overwhelming, so unbalanced, that the War analogy itself is questionable and needs to be re-examined.

The resulting feeling is one of urgency. We are once again living in Urgent Times. The sensation of time running out, of time fading away as we speak, as we numbly go about our everyday lives, is a feeling that we have not had since the end of the Cold War.

But unlike the feeling of urgency during the Cold War, we are not screaming from the rooftops; and, even when we sometimes begin to scream, no one is listening, so we stop. During the Cold War we were articulate in expressing the urgency, the uneasiness, and our refusal to live with the fear that time might end because of what someone in the White House or the Kremlin might do. We were declaring from pulpits, from classroom floors, from street corners, our refusal to accept the appropriation of the right to end time.

What we need now is a people’s movement.

B. *A People’s Movement*

“What is a people’s movement?” you might ask.⁵ It is more than a protest march, fueled by the moment. A People’s Movement has sustainability; it banks on the spirit expressed in protest marches but remains after the adrenaline has left our system. A People’s Movement draws on two main sources. The first

5. Save the Children, Sweden, was my formative “People’s Movement.” People’s Movement is a literal translation of *Folk Rorelse* (people in movement), what we in Sweden call the largest groups that are organizing almost every Swedish person. The true political power lies in these People’s Movements. No law or reform can be legislated without the say of the People’s Movements having approved them.

source is its big numbers (thus the name *People's Movement*). It is the opposite of being ONE. A People's Movement is where there is difference. Analogizing a movement to an individual is entirely inapt. A Movement is different from the concept of the nation-state where the state becomes personified as an individual body. Instead of being "one body," a People's Movement is the joining together of several bodies into an association of several. A People's Movement happens when there are enough people for the Movement to contain its own internal political spectrum; only then can a Movement can maintain its movement and not become still. It is the internal tensions, rather than the external pressures, that give a People's Movement its dynamic.

The second source is its status as a thorough research institution, able to generate its own material and respected in its areas. To be respected is, of course, different than to be approved of. It is important to be able to generate one's own research material so that whenever you are questioned or doubted you know every step of the way—you know and own the process by which the material came about, and, more importantly, you trust the work. This is why it is important for a People's Movement to NOT create a hierarchy between "high theory" and the politics of description. Without scholars focusing on the specifics, we cannot have a People's Movement because then we do not own the facts upon which we base our theories, and without theory we cannot give our facts a meaning that has importance beyond the personal narrative.

The building of a legal language where gaps, conflicts and ambiguities are points of departure instead of proof of disciplinary shortcomings and seen as a threat to legal academia or an unbridgeable gulf of identity politics is a project still to come. The Critical Legal Studies (CLS) movements of the United Kingdom and of the United States were successful in drawing from a conflicted society outside of the law schools in order to break down the complete homogeneity then existing within the institutions. Both movements drew energy from the dualistic world order of the Cold War. Our situation today is quite the reverse: as a result of the "Culture Wars" of the 1980's and 1990's, in which the CLS movement was a force on the Left. Our law schools have room for conflicting factions, while the world outside of the law schools is a world of only one single ideology, in which only a very narrow scope of facts are available for building a social analysis. In the same way that the conflicted "outside"—with the help of CLS and, later, other factions from the Left, such as Fem-crits, and Critical Race Theory—penetrated the law schools walls, so now is the one single mentality from outside seeping back in through the walls of our academic institutions. The faculties and student bodies are once again becoming homogenous. This is why the time within our law schools is also a time of urgency. I believe that if CLS was able to "break into" the inner sanctity of law schools, it will also be able to draw the map of how to "break out." It will also show us the way to use what is left of the diversity of faculty and student bodies inside the law schools to create a space of conflicting ideologies and interests outside our walls.

I want theory and politics, rather than policy. *Emily wonders if it is just that the Left did not understand its role in the policy production.* The difference between theory and politics, on one hand, and policy, on the other hand, is that in theory and politics one presents a conclusion before it has been negotiated between different factions in society, before it has been met by the *it is impossible to get through* in the public space. In theory and politics the negotiation with the possible takes place afterwards, in the public space.

Policy is when we have internalized the conflicting strands of society and brought them into our way of thinking in such a way that we can only write for the possible. This is also how the negotiation between different social groups takes place in the closed spaces, in the secret spaces—either of your mind or of the conference rooms. The problem with policy is a problem of accountability because policy is symbolic of the will of conflicting interests without any possible accounting of how these interests were negotiated. This is why the responsibility of the academic Left should be to engage in politics and produce theory rather than policy.

PART I:
LEGAL EDUCATION

