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Critical Thoughts About Race, Exclusion, Oppression, and Tenure

Deborah W. Post*

I. Introduction¹

I have written about tenure before, about the manipulability of the "standards," including evaluations of teaching, which

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1. The reader should be warned. This article contains numerous footnotes.

A friend once asked me why my footnotes are so long. We concluded that it had something to do with my perception of the function of footnotes. Footnotes are a place where I can be discursive on subjects which might digress from the main text. Footnotes are a source of information about ideas which are tangential to the paper, but still very interesting. Footnotes are the place where I am allowed to explore the connections which I see among different issues and ideas, connections which are not immediately obvious to the reader.

I write two articles at a time. If I were writing fiction or some other literary genre, this might be viewed as an artistic judgment the reader need not argue with. But law reviews are neither art nor literature. They are a forum for scholarship. And scholarship must be supported by Authority. So I offer up Authority as an explanation of footnotes as well. Let us say I prefer to give you, the reader, as much information as I can about the subject I am discussing, as thorough and complete a description of the work in the field, or a place to find such a list, as I can manage.

There are those who claim that this obsession with footnotes has gone too far and that the use of footnotes is either mechanistic and meaningless, or manipulative and unethical. They complain that authors take liberties with footnotes and put things below the line that could not be said above the line precisely because they have no authority to support certain assertions. See, e.g., Edgar A. Hahn, *Footnote Skulduggery and Other Bad Habits*, 44 U. MIAMI L. REV. 1009, 1020-24 (1990).

we apply when we tenure faculty.² In that earlier piece I attacked the pretense of objectivity which disguises the role aesthetics and cultural preferences play in our definition of good scholarship.³ This essay can be considered a further elaboration on the subject; a variation on a theme. The theme is oppression, one form of which is exclusion; the variation a discussion of the relationship between tenure, teaching and oppression.

My objective in this essay is to persuade the reader that our goal, in whatever institution we inhabit—law firm, law school or court—should not be just inclusion, but transformation. I will explain why it is worth the risk to abandon traditions like tenure which replicate hierarchy, and to imagine other ways in which we can encourage and reward excellence.

II. A Critical Race Perspective on Tenure

A few years ago, I raised the issue of tenure at a meeting of the Northeast Corridor Black Women's Law Collective.⁴ Tenure was much on my mind because we had just been through a struggle to revise the faculty rules of governance at my institution, Touro Law School.⁵ When it was founded, of necessity, Touro had a system which provided for a full faculty vote on all tenure applications.⁶ But the faculty rules of governance also provided for a vote by only tenured faculty once the number of

2. Deborah W. Post, *Reflections on Identity, Diversity and Morality*, 6 BERKELEY WOMEN'S L.J. 136, 147 (1990-1991).

3. *Id.* at 147-48.

4. From time to time, one or another of the women who show up for meetings which rotate between New York, Philadelphia and Washington D.C. suggests that we adopt some kind of name for the group or that we use the group to mobilize around one or more issues of interest to black women. Efforts such as these to give greater definition to what is an extremely amorphous group usually fail. However, Emma Coleman Jordan did successfully coordinate an effort to collect essays by women from the collective, ultimately published in volume six of the *Berkeley Women's Law Journal*.

5. Although we refer to it as Touro Law School, the name of the school actually is Touro College, Jacob D. Fuchsberg School of Law. The college is named after Judah Touro, the founder of the first synagogue in the United States, in Providence, Rhode Island. The law school is named after a prominent lawyer and jurist, Jacob D. Fuchsberg, who served on the New York Court of Appeals.

6. Under the rules, there was a Promotion and Tenure Committee which made recommendations to the faculty. This committee included tenured and non-tenured faculty.

tenured faculty was sufficient to constitute a promotion and tenure committee.⁷

I had only been at Touro a year or so when the magic number was reached and the power to decide tenure was shifted from a larger and more diverse body of decision-makers to one which was small and relatively homogeneous. To put it bluntly, I was appalled at the prospect of turning over tenure decisions to a body made up of seven white men and one white woman.⁸ I did not suspect bad faith on the part of my colleagues, or a hid-

The Committee on Promotion and Tenure shall consist of all tenured members of the Faculty, including the Dean if the Dean is a tenured member of the Faculty. In the event that the tenured members of the Faculty are fewer than eight in number, the remaining members shall be chosen by an election by the Faculty of non-tenured members of the Faculty. This method of election shall be specified in the By-laws.

Faculty Rules of Governance, Touro College, Jacob D. Fuchsberg School of Law, Article 7, § 7.1 [hereinafter Faculty Rules].

The Promotion and Tenure Committee then made "recommendations" on retention, promotion and tenure which were submitted to the faculty. These "recommendations" could be "reversed or altered" by the full faculty. *Id.* § 7.6.

There is ambiguity in the language of the Faculty Rules which describes the tenure process. If a vote is merely a recommendation, it doesn't have to be reversed or altered. Generally, if you are the decision maker, you are free to reject recommendations. But, of course, if all you are doing is replacing the recommendation of the committee with your own recommendation, then you are reversing or altering the recommendation. If you read our Faculty Rules closely you discover that no one at Touro actually decides whether someone is fired or tenured. Everyone makes "recommendations." Even when it gets to the level of the Central Administration and the Board of Trustees, what the Faculty Rules look for is "Action" by these bodies "in response" to recommendations. *Id.* § 7.7.

7. The Faculty Rules state:

Until such time as the Committee on Promotion and Tenure is composed entirely of tenured members of the Faculty, promotion, tenure, and non-reappointment recommendations of the Committee on Promotion and Tenure shall be reported to the faculty for review. . . . When the Committee is composed entirely of tenured members of the Faculty, the Faculty review process discussed above shall end.

Id. § 7.6.

8. I was caught off guard by the switch because I had become accustomed to a full faculty vote at the University of Houston Law School. At the time I was at Houston, there were about forty full-time faculty members but only six untenured faculty. I suppose these numbers may explain why the requirement of a full faculty vote was not particularly controversial. I think the contrast between the two institutions suggests that rules should be written in a way which can accommodate the changing demographics of an institution. Obviously, the more tenured faculty you have, the harder it is to justify the designation of the decision-making body a "Committee."

den desire or intent to discriminate against women or people of color. I knew they would find such a practice abhorrent. As a group they are so opposed to discrimination that they cannot contemplate the possibility of bias. They wouldn't even see it when it happened.⁹

The solution which we devised, because there was resistance to continuing the practice of a full faculty vote, was to add untenured women and people of color to the committee.¹⁰ This

9. The best discussion yet of the relationship between the way racism affects (and infects) us all and the psychology of denial is contained in a critique of the Supreme Court's decision to require "discriminatory purpose" rather than disparate impact to prove discrimination. Charles R. Lawrence III, *The Id, the Ego and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987). In this article Lawrence explains why racism (as well as other forms of prejudice) may be invisible to those who discriminate:

There are two explanations for the unconscious nature of our racially discriminatory beliefs and ideas. First, Freudian theory states that the human mind defends itself against the discomfort of guilt by denying or refusing to recognize those ideas, wishes, and beliefs that conflict with what the individual has learned is good or right. While our historical experience has made racism an integral part of our culture, our society has more recently embraced an ideal that rejects racism as immoral. When an individual experiences conflict between racist ideas and the societal ethic that condemns those ideas, the mind excludes his racism from consciousness.

Second, the theory of cognitive psychology states that the culture—including, for example, the media and an individual's parents, peers, and authority figures—transmits certain beliefs and preferences. Because these beliefs are so much a part of the culture, they are not experienced as explicit lessons. Instead, they seem part of the individual's rational ordering of her perceptions of the world. The individual is unaware, for example, that the ubiquitous presence of a cultural stereotype has influenced her perception that blacks are lazy or unintelligent. Because racism is so deeply ingrained in our culture, it is likely to be transmitted by tacit understandings: Even if a child is not told that blacks are inferior, he learns that lesson by observing the behavior of others. These tacit understandings, because they have never been articulated, are less likely to be experienced at a conscious level.

Id. at 322-23 (footnotes omitted).

In the case of Touro, at least where race is concerned, I think the first theory has more explanatory power than the second. The role of individual psychology and culture (although both perception and guilt are culturally determined and both involve cognitive processes, so this distinction is somewhat problematic) may vary in the particular case. For instance, although sexism is considered bad, there is less moral outrage around gender bias than there is about racism, at least on my faculty. Guilt probably plays a more significant role in blinding faculty to racist remarks while perception (they just don't get it) is at work where gender bias is involved.

10. Specifically, the test set out in the Faculty Rules asks us to look at the composition of the Promotion and Tenure Committee "[i]f at any time the Promo-

process probably strikes many academics as bizarre and initially it caused some consternation among accrediting institutions.¹¹ But new institutions sometimes take liberties with traditions and Touro had already tinkered with tradition by eliminating the "up or out" rule¹² and providing for periodic

tion and Tenure Committee does not consist of a significant number of minority members as defined by the Annual Questionnaire of the American Bar Association . . ." or "[i]f at any time the Promotion and Tenure Committee does not consist of a significant number of women members . . ." Faculty Rules, *supra* note 6, § 7.1. The finding that women or minorities are under-represented on the Committee results in the election of two untenured women and two people of color or people who are deemed "best able to reflect the concerns of minorities and women." *Id.*

11. The American Bar Association (ABA) and the Association of American Law Schools (AALS) are the principal accrediting agencies. As I understand it, the ABA's imprimatur is essential to the operation of a law school, while AALS membership is not required for operation but is required if an institution wishes to be recognized as the equal of other law schools within the community. See Carl C. Monk, *The AALS Role as an Accrediting Body: Notes from the Executive Director*, AALS NEWSLETTER, Aug. 1993, at 3. According to Mr. Monk, "[a]lthough both the ABA and the AALS are concerned with all facets of legal education, the ABA structure reflects its membership and focus on the profession while the AALS structure reflects its focus on the academy and the role of law professors as members of an academic institution." *Id.*

As I recollect the dean's report to the faculty after each one of approximately six accreditation reviews by the ABA and the AALS, the opposition to our method of deciding tenure diminished with time. Perhaps the concerns of the accrediting bodies were alleviated when they saw the way the rules operated in actual practice. Of course, we did make compromises which were designed to obviate the worst case scenario—untenured faculty making a difference in the outcome of a tenure vote. This baffles me a little. Although we pretty much reach consensus on tenure cases, so there is no such conflict, the reason for putting minorities and women on the committee would be to prevent a discriminatory outcome. If bias were playing a role in the decision-making process, you would want the untenured women and minorities to make a difference. That is why we made them full voting members of the committee.

In the end, despite the unusual practices and policies, Touro was accredited by the ABA and admitted as a member of the AALS.

12. The "up or out" rule refers to the seven-year probationary period for law professors contained in the ABA Standards for Tenure:

(2) Beginning with appointment to the rank of full time instructor or a higher rank, the probationary period should not exceed seven years, including within this period of full time service in all institutions of higher education; but subject to the proviso that when, after a term of probationary service of more than three years in one or more institutions, a teacher is called to [an] institution it may be agreed in writing that his new appointment is for a probationary period of not more than four years, even though thereby the person's total probationary period in the academic profession is extended beyond the normal maximum of seven years. Notice should be given at least one year prior to the expiration of the probationary period if

reviews of tenured faculty.¹³

All in all, I am pretty proud of the changes we made at Touro. Flush with my success advocating reform at Touro, I proposed a discussion of these changes at the Northeast Corridor meeting. I brought the issue up because I think tenure rules hurt women and people of color; that they are an instrument of exclusion.¹⁴ My suggestion that we discuss tenure or reform of the tenure process met with deafening silence.

the teacher is not to be continued in service after the expiration of that period.

1940 Statement of Principles on Academic Freedom and Tenure, in AMERICAN BAR ASSOCIATION, STANDARDS FOR THE APPROVAL OF LAW SCHOOLS ann. I (Oct. 1993) [hereinafter ABA STANDARDS]. The 1940 Statement is from the AAUP's 1940 Statement on Academic Freedom and Tenure as amended by the Interpretive Comments adopted in 1970. AALS HANDBOOK, EXECUTIVE COMMITTEE REGULATION § 6.16, at 37-38 (1992); AAUP, *1940 Statement of Principles on Academic Freedom and Tenure with 1970 Interpretive Comments*, 76 ACADEME: BULL. OF THE AAUP 37 (May-June 1990), reprinted in AAUP POLICY DOCUMENTS AND REP'TS 1 (7th ed. 1990).

Both law firms and law schools have lengthened the time spent on "track." Law schools have lengthened the time from three or four years to five or six. *Report of the AALS Special Committee on Tenure and the Tenuring Process*, 42 J. LEGAL EDUC. 477, 489 (1992) [hereinafter *Tenure Report*]. Law firms have gone from five- or six-year to eight- or nine-year tracks for partnership and, in some cases they have created alternatives to partnership. See *infra* note 37.

I imagine the seven-year limit was a protection for faculty who worried that the tenure process would be delayed or deferred by the faculty in a way which was arbitrary or capricious. Today, however, it operates to the disadvantage of almost everyone. Tenure requirements with respect to scholarship have increased from a single "tenure" piece to two or three articles and, as a consequence, the seven-year limit serves as a real disincentive to true scholarship.

13. Faculty Rules, *supra* note 6, Art. 12.

14. Although I have a preference for storytelling in my scholarship, I like to have "facts" at my disposal to prove my points. I would like to have some evidence, studies, surveys or something of the sort, to demonstrate that women continue to produce scholarship after tenure at a rate which is higher than that of men. I could not find statistical proof that women faculty are more productive in their later years, only general anecdotal evidence about the relationship between age and productivity of women in the work force. As a consequence, I have to rely on my own experience on three different faculties as the basis for my generalization.

In over ten years of teaching, I have never heard anyone complain that a woman was "deadwood" and so the problem of tenure seems to me to be one which has a gendered dimension to it. It has been my experience that even after tenure, women continue to be productive. They head committees and do public service and community service and many continue to write as well. But there are often men on faculties who simply shut down. They do minimal committee work and that which they do is done with a lack of enthusiasm and a lack of thoroughness. They don't write and they rarely prepare for class.

The tenure "problem" is another way of saying that men are ambitious and driven in achieving career goals and once they get there, there are no challenges left. While some people are intellectual sprinters, others are long distance writers. An "up or out" policy is made for the former but not for the latter. This can have a negative impact on the success rate of both women and people of color. There is literature, for example, on relative rates of productivity of men and women, which suggests that men are most productive during the early part of their careers while women peak later, usually after their childbearing and child-rearing has ended, and last longer. In other words, men write during their thirties and women write during their forties.

Until the world and the roles of men and women change, women will continue to be responsible for both careers and for household and child care. Joyce Carol Oates has outlined an interesting division of labor between her and her husband. She does work inside (cooking, cleaning, etc.) and he does work outside (yardwork, etc.) but the division of labor works for her because it is "part of" her writing. "Sometimes my brain is like a computer screen and I can do my revisions and copyediting of the day's work while I'm preparing a meal. When I'm done I'll go to my desk and make those corrections, then the whole thing's erased in my head." Lawrence Grobel, *Playboy Interview: Joyce Carol Oates*, PLAYBOY, Nov. 1993, at 63, 73.

The issues are different and more difficult when writing involves research and when a woman tries to balance scholarship with the demands of child-rearing. See, e.g., William H. Honan, *Wary of Entrenchment in the Ranks, Colleges Offer Alternatives to Tenure*, N.Y. TIMES, Apr. 20, 1994, at B13 (citing to study by Dr. Judith Gappa, author of *The Invisible Faculty*, who claims to have interviewed women faculty who feel that "the system forces them to prove themselves professionally during the child-bearing and most important child-rearing years"). The American Association of University Women acknowledges that "many women have to balance work and family, which gives them less time to devote to scholarship," but most women who are scholars would disagree with the male faculty member who suggested that because women publish "half as much as men" they don't "publish books or conduct research nearly enough." Monte Williams, *Tenure Furor: Supreme Court Ruling Helps Close the Gap*, CHI. TRIB., July 22, 1990, at C3. Is quantity being measured pre- or post-tenure?

The proof that women are or continue to be productive after their childbearing years is supported by the evidence collected over the years about women who return to the work force. In my mother's generation and in my own, according to one report, over three million women between the ages of 35-54 returned to the work force from 1970-1980. See Emily Greenspan, *Work Begins at 35*, N.Y. TIMES, July 6, 1980, § 6 (Magazine), at 21. Only 20% of those re-entering the workplace were in "high status" jobs. *Id.* But there are success stories about those who were, to which we should or could pay heed in thinking about the "up or out" policy. For instance, there is Beatrice Bain, the founder of the Math/Science Network, which encourages women and girls to achieve their goals in "non-traditional" fields. Bain returned to work in 1957 after 17 years as a homemaker. See Janice Mall, *About Women*, L.A. TIMES, July 6, 1980, § 7, at 14. There is the amazing story of the fabulously successful writers of popular fiction, P.D. James, Jackie Collins, and Janet Daily, all of whom started writing relatively late in life. See, e.g., Carol Eissen Rinzier, *The Superwriters: The Story Behind the Best Sellers, Women in the 1980's*, LADIES HOME J., May 1985, at 92; Connie Lauerma, *P.D. James: Until I was 59, I Did a Full Time Job as Well as Write*, CHI. TRIB., Nov. 16, 1986, § 18, at 3.

When I thought about it later, the lack of enthusiasm for this idea among a group of black women fighting for equality in academia should not have been surprising. Tenure provides security, but more importantly for "outsiders," it provides status. It is an acknowledgement that we have achieved a measure of professional competence, that we black women are the "equal" of other members of our communities who have achieved this recognition. As long as there are "standards" for tenure, and selection and exclusion based on "merit," even though we fight over the meaning and the aesthetics of the "objective" standards which are applied, tenure has currency.¹⁵ And for people of color, the acknowledgement of our worth as intellectuals has additional significance. The continued discussion of biologically based theories of intelligence which purport to affirm the innate superiority of whites makes it even harder to reject an "objective" standard which blacks can claim they have met.¹⁶

Today many young women entering the professions and academia defer childbearing and sometimes even mating until they have achieved a career goal like partnership or tenure. The lengthening of the partnership track has made such deferral more difficult and so we have had heated discussions about "mommy track" and its effect on the careers of women. In the academy, deferral of childbearing is still possible, but the result is merely the circumvention of the real issue—should we recognize explicitly the fact that productivity varies during the life span of all scholars?

The exception carved out in the "up or out" rule for teachers who negotiate a fresh start at a new school provides a way to circumvent the rule. As a result, people who really want to teach and do scholarship may end up migrating from school to school in order to survive. If tenure is not obtained at the institution at which someone begins teaching within seven years, he or she can move laterally. Generally, if a faculty member has a record of scholarship and is at all socially adept, a move may be difficult but not impossible.

This might not be a satisfactory arrangement for faculty or schools. The institution and the human beings at a school may have invested financially and emotionally in a person who is a slow producer and that investment then benefits the next school at which the faculty member receives an appointment. In fact, some schools have advertised their interest in hiring entry level people with "substantial scholarship." I can not imagine any practitioner with substantial scholarship so the practice must represent a decision to exploit the opportunity to obtain experienced teachers and scholars at the bargain rates made possible by the "up or out" rule and the glut of law teachers on the market.

15. Post, *supra* note 2, at 147-48.

16. The science editors for the New York Times recently reviewed three books which resurrect discussions of the genetic basis for intelligence. Malcolm W. Browne, *What is Intelligence, and Who Has It?*, N.Y. TIMES, Oct. 16, 1994, at 3 (book review) (reviewing RICHARD J. HERRNSTEIN & CHARLES MURRAY, *THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE* (1994); J. PHILIPPE

The Northeast Corridor Collective does not take positions on political issues, but all individuals who are members of the group, including those who write as members of "critical race theory," do. Another way to approach the problem of tenure would be to look at this body of literature to determine whether or what position would be consistent with the theory.

The term "theory" is misleading, of course. There is no single theory. This is merely the name or label given to the work of scholars who critique the law from a slightly different place or perspective than other critical scholars. Critical race theorists¹⁷ have offered a critique of liberalism, including the ideals of color blindness, neutrality and merit.¹⁸ Having said that, I am not

RUSHTON, RACE, EVOLUTION, AND BEHAVIOR (1995); and SEYMOUR W. ITZKOFF, *THE DECLINE OF INTELLIGENCE IN AMERICA* (1994)). The week before, the *New York Times* featured a story on Charles Murray and the theory espoused by him and Herrnstein that our society will end up being divided along "cognitive" lines—those who can think and those who cannot. See generally Jason DeParle, *Daring Research or 'Social Science Pornography'?*, N.Y. TIMES, Oct. 9, 1994, § 6 (Magazine), at 48. See also Tom Morganthau, *IQ: Is It Destiny?*, NEWSWEEK, Oct. 24, 1994, at 52. There are several other stories, including one which does not live up to the promise of its title. Geoffrey Cowley, *Testing the Science of Intelligence*, NEWSWEEK, Oct. 24, 1994, at 56.

17. Several years ago, Richard Delgado wrote a critique of civil rights scholarship, which noted that white male scholars ignored the work of people of color in the same field. See Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561 (1984); Richard Delgado, *The Imperial Scholar Revisited: How to Marginalize Outsider Writing, Ten Years Later*, 140 U. PA. L. REV. 1349 (1992). Several institutions have since published bibliographies of the work of "outsiders" in the legal academy. See, e.g., *Women of Color in Legal Academia: A Biographic and Bibliographic Guide*, 16 HARV. WOMEN'S L.J. 1 (1993). There is even a bibliography prepared by Richard Delgado himself. Richard Delgado & Jean Stefancic, *Critical Race Theory: An Annotated Bibliography*, 79 VA. L. REV. 461 (1993) [hereinafter *Bibliography*].

I am confronted with an embarrassment of riches. How do I decide what to include or exclude from my footnotes? I cite to the articles I have read and enjoyed; I cite to the articles which are acknowledged to be "seminal." I could, if I chose, acknowledge the work of people who are prominent because they teach at institutions which are high up in the hierarchy of law schools. Obviously, some of these reasons are better than others. My solution is to cite to the bibliography prepared by Delgado and Stefancic adding a caveat that this bibliography, which is dated 1993, is already in need of an update. There are three "critical race" readers or anthologies in preparation, but none are currently available. I will not cite to the Delgado and Stefancic Bibliography on the occasions when I want to discuss in greater detail an idea that someone else developed in an article I have read.

18. See *Bibliography*, supra note 17, at 462.

sure what a critical race analysis of tenure should be.¹⁹ One strand or theme in critical race theory is a reaction to or critique of critical legal studies, and an affirmation of rights discourse as part of the tradition of activism by people of color. A suggestion that we abandon tenure might not be well received by those who care about rights.²⁰ Tenure is, after all, a system of privileges which includes certain rights. Theoretically, tenure means we cannot be fired without "adequate cause" or "financial exigencies" which are "demonstrably bona fide."²¹

But the structures of domination and subordination in law school and in life are complicated. Critical race theorists could be expected to sympathize with students of color and students who are members of other subordinated communities when they protest racist, sexist or homophobic behavior, including speech, in and outside of class, by tenured members of the

19. But see Michael A. Olivas, *Reflections on Professorial Academic Freedom: Second Thoughts on the Third Essential Freedom*, 45 STAN. L. REV. 1835, 1854-55 (1993) [hereinafter *Academic Freedom*] (discussing the effect of racist comments on students). In particular, he refers to his discussion with a Puerto Rican student and an African-American student on the effect of out-of-class racist comments on the atmosphere within the classroom. *Id.* Olivas concludes that there should be some "feedback mechanism" to compliment the principle of "professorial authority" embedded in the idea of academic freedom. *Id.* at 1857.

20. See, e.g., Harlon Dalton, *The Clouded Prism*, 22 HARV. C.R.-C.L. L. REV. 435, 435-36 (1987) (discussing the divide that grew up between the "theorists" and the "practitioners" or, as Dalton describes them, the "people of color" in the Critical Legal Studies movement); Patricia Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 408-16 (1987) (offering a critique of the rights critique). Dalton also discusses the issue of status and intellectual ability. He begins with a discussion of the difference created by the experience of racism, the preoccupation with program or praxis on the part of people of color and the attraction of the "life of the mind" for white males who live in a community which

was a self-consciously intellectual one in which intellectual machismo is encouraged and revered. [People of color] have circled around CLS' door in fluctuating numbers . . . always invited in for tea, but rarely invited to stay for supper, lest we use the wrong intellectual fork. No matter how smart or bookish we were, we could not retreat from the sights, sounds, and smells of the communities from which we came. . . . Part of the reality of that community, at least in our time and space, was that "the life of the mind" as an overriding and singular commitment was not possible.

Id. at 439-40 (footnote omitted). For an opposing view of "rights rhetoric" by an African American scholar, see Christopher Edley, Jr., *Affirmative Action and the Rights Rhetoric Trap*, 3 HARV. BLACKLETTER J. 9, 20 (1986) (arguing that rights rhetoric is "necessarily an unreliable strategy of persuasion . . .").

21. ABA STANDARDS, *supra* note 12, ann. I, at 2-3.

faculty.²² But when young white men or women, for instance, in the subordinate position of students, assert the entitlements which come with the dominant position they occupy in the wider society, our reaction to the attempts they make to undermine our authority complicates any discussion of hierarchy.

One of Pat Williams' stories about law school teaching immediately springs to mind. Pat was called in to speak to a dean and asked to justify the way she treated a student.²³ In Pat's case, the student didn't appreciate having her own logic turned against her, having the inconsistency in the standards she applied to slumlord uncles and homeless people pointed out to her. I was immediately sympathetic to Pat's plight; to the humiliation of being called on the carpet for "trumping" a student. I have been guilty of the same sin, although I have not been called to task for it by anyone except my friend and fellow adventurer in cognitive theory, Louise Harmon.²⁴ Louise accused me of being a "closet natural law theorist" and a rationalist concerned with consistency (or the lack of it).²⁵

22. See *Academic Freedom*, *supra* note 19, at 1854.

23. PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 21 (1991). The story is contained in Chapter 2 of the book, *Gilded Lilies and Liberal Guilt* (A Reflection on Law School Pedagogy). The power that white students have to mobilize the administration with accusations of incompetence where black or women faculty are concerned is well demonstrated. See, e.g., *Academic Freedom*, *supra* note 19, at 1842-43 (discussing the experience of Derrick Bell at Stanford). See also Michelle S. Jacobs, *Legitimacy and the Power Game*, 1 CLINICAL L. REV. 187, 194 (1994) (discussing her reservations about the "wholesale rejection of hierarchy" in the classroom because authority, or a "power relationship," is critical to the teaching process).

Faculty can be involved in protesting the treatment of students as well. At Touro, we have a Diversity Committee that handled a complaint filed against a student because of his attack on women and gay and lesbian students. There are no sanctions in such a case, but the student does have to speak with members of the Committee. After a meeting with one of the students involved in which he found himself arguing that his commitment to the First Amendment was such that he did not care about the rules with respect to defamation or libel, a colleague submitted a written request that the entire committee recuse itself. He felt that a committee composed of two white women, a black woman and a gay man could not be "objective" since we were all members of the communities which were being attacked.

24. I am rather proud of my place above the line in Louise's last article and so I have returned the favor. See Louise Harmon, *Law, Art, and the Killing Jar*, 79 IOWA L. REV. 367, 406-11 (1994).

25. *Id.* at 409.

Louise used my impatience with the inaccessible writing of the Critical Legal Studies scholars (affectionately known as "Crits") as an example of what could be described as a preoccupation with consistency that rises to the level of inflexibility on my part.²⁶ Even Louise had to admit that my concern was with "fundamental inconsistencies," which I hope rules out obsession with foolish inconsistencies.²⁷ I prefer to think that the inconsistency which offends me usually signals bad faith or hypocrisy. An example might be my anger when I see the way faculties manipulate rules with respect to tenure.²⁸ Preoccupation with inconsistency may be an epistemic device favored by skeptics and outsiders because it pierces through the pretense of neutrality and objectivity to the very heart of the matter, to the unprincipled ways in which privilege is justified.

This is not to say that I am sure that some or all critical race theorists object to hierarchy.²⁹ Even among critical theorists there are class issues and ideological differences which affect our reaction to hierarchy. There are some, I am sure, who truly believe that if racism could be eradicated, if all vestiges of that peculiar state of mind disappeared, what we would have left is the chance to compete for the privileges and the power that inheres in status and class.

For others, like me, racism is a horrible manifestation of a deeper problem, an example of a belief system structured to justify the disparities in wealth and power that we see in our society.³⁰ In school, the ones we teach in and the ones our children

26. *Id.* at 408.

27. *Id.* The reference to foolish consistencies is, of course, from a book I never read. "A foolish consistency is the hobgoblin of little minds . . ." MACMILLAN DICTIONARY OF QUOTATIONS 126 (1987) (quoting RALPH WALDO EMERSON, *Essays, Self Reliance*).

28. See generally Post, *supra* note 2.

29. For instance, the work of Randall Kennedy is included among that of other Critical Race Theorists. The critique which Kennedy offers, however, seems to be limited to "illicit hierarchies." Illicit hierarchies are those which are constructed on the basis of race, class or gender. See Randall Kennedy, *The Political Correctness Scare*, 37 LOY. L. REV. 231, 232 (1991).

30. The discussion of injustice based on race is inextricably linked in critical race theory with issues of class. See, e.g., WILLIAMS, *supra* note 23, at 21-29. Williams discusses in Chapter 2 the relationship of race and class to privilege and entitlements of privacy, intimacy, family, and political power. *Id.* Regina Austin's recent work deals explicitly with the right of an "oppressed people" to break the law "where economics are concerned." In particular, she refers to the

attend, students learn little enough about discrimination and racism, but often they are taught virtually nothing (explicitly) about other forms of oppression. I forget that sometimes until my son, Christopher, says something to remind me that it is my responsibility to compensate for the inadequacies of his formal education—which is what he did recently.

We were watching a nightly news report on the cease-fire in Northern Ireland. The report was illustrated with archival film of snipers firing at the mourners at the funeral of a member of the IRA and a current interview with one of the mothers of the many children who died in this long war. As we watched the woman offer up tears of gratitude at the prospect of peace, Chris offered up his commentary "I can't believe Catholics and Protestants are killing each other."³¹

Even though we know there are prejudices which operate to the disadvantage of other groups in our society, we are accustomed to thinking of race as the principal dividing line between those who are entitled and those who are not; between those who are considered better, prettier, smarter, cleaner, thriftier,

growing realization among blacks that the problems of those on the bottom of the socioeconomic ladder do not result totally from disparities in income and impediments to consumption that can be solved by allowing workers to recapture more of the surplus produced by their labor. The maldistribution and free mobility of capital and wealth threaten those whose economic security is tied to their status as wage earners.

Regina Austin, "An Honest Living": *Street Vendors, Municipal Regulation, and the Black Public Sphere*, 103 YALE L.J. 2119, 2120 (1994).

31. I know that Chris has been studying more recent U.S. history in social studies. He and two classmates recently did a project in social studies on the Vietnam War and the antiwar movement. Their project was on the killings at Kent State. I don't know whether he knows now or ever knew that the religion of John F. Kennedy was an issue when he ran for President. I suspect he would find it hard to believe that people were concerned that electing a Catholic president would be tantamount to turning control of the United States over to the Pope. See, e.g., William L. O'Neill, Book Review, *Patrick Allitt, Catholic Intellectuals and Conservative Politics in America 1950-1985*, SOCIETY, July-Aug. 1994, at 87, 87-88 (discussing the marginalization of the Catholic Church in America). One writer has asserted that "the Pope was routinely conjured up as Evil Incarnate, ready to board the next steamer for America, whenever Roman Catholicism arose in a campaign, including John F. Kennedy's in 1960." Joe Sharkey, *The Decline of Old Time Dirty Politics*, NEWSDAY, Sept. 3, 1992, at 62 (review of KATHLEEN H. JAMIESON, *DECEPTION, DISTRACTION AND DEMOCRACY* (1993)). The election of John F. Kennedy is also supposed to be a kind of watershed event for Catholics, the moment in American history when they moved into the "mainstream." O'Neill, *supra*, at 87.

harder working, etc., and those who are not. Race so dominates our system of social classifications that we are surprised when we see people fight about things that we think do not matter. We are surprised that structures of domination and subordination, oppression and exclusion are constructed from something other than the idea of race as a source of difference.³² I remind Chris, and myself, that the boundary lines may be race or skin

32. See, e.g., Thomas B. Edsall & Mary D. Edsall, *When the Official Subject is Presidential Politics*, ATLANTIC MONTHLY, May 1991, at 53. The authors argue that liberals and blacks have reacted to the "conflation by the political right of values with attempts to resist racial integration, to exclude women from public life, and to discredit the extension of constitutional rights to minorities . . .", and this confusion of issues in turn alienated the white working or middle class. *Id.* at 61. According to the authors:

This stigmatization as "racist" or as "in bad faith" of open discussion of values charged matters—ranging from crime to sexual responsibility to welfare dependency to drug abuse to standards of social obligation—has for more than two decades created a *values barrier* between Democratic liberals and much of the electorate.

Id. Patricia Williams offers a different perspective. She has suggested that "[t]he gulf between blacks and whites reflects the degree to which color in the United States has been used to categorize people, overshadowing class, religion, history, ethnicity and gender." Patricia J. Williams, *Inside the Black Middle Class*, CIVILIZATION, Nov.-Dec. 1994, at 72, 75.

The primacy of race is also perpetuated by our legal system which now uses "race" to cover a variety of prejudices. See, e.g., *Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 613 (1987) (interpreting the term "race" in 42 U.S.C. § 1981 to include all persons suffering intentional discrimination); *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615, 617-18 (1987) (interpreting the term "race" in 42 U.S.C. §§ 1981-1982 to include ethnicity and national origin). The court in *Al-Khazraji* relied on an interpretation which referred back to the use of race at the time the statute was written, something which may prove to be problematic since historically nationality and race were sometimes blurred. *Al-Khazraji*, 481 U.S. at 610-13. There are many critics of the term "race" who see this as a purely social construct, not one which is grounded in any way in biology. KWAME ANTHONY APPIAH, *IN MY FATHER'S HOUSE: AFRICA IN THE PHILOSOPHY OF CULTURE* 28-46 (1992). But for sources fueling the current controversy about genetic—that is, racial—theories of intelligence, see *supra* note 16. If we acknowledge that "race" is socially constructed, it is also fair, I think, to focus on the characteristics which used to identify a different race within a particular culture. In the United States, skin color is the most commonly used marker but religion, where it is visible, is another.

I am less certain than the historians and the sociologists about the complete acceptance of Catholicism. It may depend on whether Catholics are associated with "radical" political causes and recent immigrants, e.g., the Sanctuary Movement (providing safety and an underground railroad for those fleeing the death squads in El Salvador) or as the proponents of ideals which are shared by many conservatives, e.g., its opposition to abortion and homosexuals. For a conservative (free market economist) discussion of the inconsistencies in the papal views, see William McGurn, *The Population Problem: The Pope Undermines the Case Against*

color or religion, but the politics are the same; some indicia of difference is chosen as a social marker and then used to construct a theory of inferiority, a justification for exclusion and oppression. Only the extent of the deprivation varies.

Racism is evil, but so too are the structures within our society that deprive some people of the basic requirements of human dignity while others have so much more than dignity requires.³³ I suspect that in many cases, the privileges of posi-

Population Control by Accepting Leftist Economic Assumptions, NAT'L REV., Sept. 12, 1994, at 64.

33. Materialism is a sin of the flesh. But of course Americans like to think that the only legitimate social taboos in our society are those which involve human sexuality and even there, the only things which are truly off-limits are snuff films and child pornography. The advocates of free speech for pornographers use the confusion of capitalism with consumption (or as one critic put it, capitalism and materialism) effectively. Metaphors (like the marketplace of ideas) make the argument that one should be able to buy pornographic materials easier. Once consumption has been lifted to the pinnacle of democratic ideals, we all experience issues involving exploitation as a restriction of the "freedom" of those who have the money to buy what they want. See, e.g., RICHARD POSNER, *SEX AND REASON* 428 (1992) (arguing that the critics of surrogacy are proponents of the "jurisprudence of envy").

The complexity of our feelings about conspicuous consumption approaches that of the Europeans in the fourteenth century whose sumptuary laws have been described in BARBARA W. TUCHMAN, *A DISTANT MIRROR, THE CALAMITOUS 14TH CENTURY* 18-19 (1978). Nobility wished to preserve the prerogatives of status so that "exact gradations of fabric, color, fur trimming, ornaments, and jewels were laid down for every rank and income level." *Id.* at 19. But, according to Tuchman, concern about consumption also reflected competition and rivalry among noble and merchant classes, economic concerns of the state and moral concerns of the Church. *Id.* at 20. How could we expect our own attitudes towards consumption to be any less complex?

For an interesting example of the contemporary economic debate, including a discussion of hedonism, theories of marginal utility, revealed preference theory, Post Keynesian theory and the idea of "keeping up with the Joneses" in analyzing consumer choices, see Marc Lavoie, *A Post Keynesian Approach to Consumer Choice*, J. POST KEYNESIAN ECON., June 22, 1994, at 539.

I have often remarked that excessive compulsion is obscene. The connection with sex is not unintentional but it may certainly seem Victorian, or even worse, Puritanical, to others. I like to believe that I am not a Puritan when it comes to "earthly" pleasures. But I do find the juxtaposition of excessive consumption and extreme deprivation shocking. The juxtaposition of the two extremes also marks the boundary between spending and waste; between compulsive spending and innocuous self-indulgence. I am discouraged by the confusion of social status with material goods (the difference between class defined by income and the perception of social class) and by the thought that some sense of the injustice at the relationship between waste and deprivation cannot be gained through education or discourse but only through experience. After the decade or more of "restructuring" in the U.S. economy, those who thought they were solidly middle class are not talking

tion or high status are "unearned" and the presumptions of inferiority and exclusion which are the corollaries of low status are undeserved.³⁴ More than that, I hate what hierarchy does to people—the way that concern with external indicia of success (movement up the hierarchy) breeds pettiness and meanness and subverts honesty and integrity.³⁵ And so, hierarchy and oppression are linked in my mind.

about "downward mobility." See generally Bruce Nussbaum et al., *Downward Mobility: Corporate Castoffs Are Struggling to Just to Stay in the Middle Class*, BUS. WEEK, Mar. 23, 1992, at 56, 57-60. I wonder how long it will take before those who are downwardly mobile begin to feel deprived and what the effect that sense of deprivation might have on their tolerance for conspicuous consumption.

Elsewhere I have commented on the extent to which "profit" has become a moral imperative in our society. See generally Deborah W. Post, *Profit, Progress and Moral Imperatives, A Review of Meir Tamari, In the Marketplace: Jewish Business Ethics*, 9 Touro L. REV. 487 (1993). Consumption of goods has become a virtue and the patriotic thing to do. We are urged to "spend" our way out of recession. Democracy and capitalism share an identity in our society. In fact, the term democratic socialism seems an oxymoron to most Americans.

34. For an interesting discussion of the relationship between class perception, conceptions of entitlement and unfair exchange, see generally Jeffrey L. Harrison, *Class, Personality, Contract, and Unconscionability*, 35 WM. & MARY L. REV. 445 (1994).

35. My negative characterization of hierarchy is also a criticism of competition. Most lawyers encounter the ugliness of competition in law school and much has been written about the unpleasant side effects in that context. See generally David Culp, *Law School: A Mortuary for Poets and Moral Reason*, 16 CAMPBELL L. REV. 61, 71 (1994), and sources cited therein. In practice, one of the worst manifestations of competitiveness is the padding which occurs when attorneys are required to meet a minimum number of billable hours or when young associates feel that they are being measured and compared in terms of their billable hours. See the discussion of the problems of "fluffing," including the standard denial "I know everyone and they couldn't be doing it" and the "I've never actually caught anyone doing it" into which lawyers escape when confronted with an ethical dilemma. Roundtable, *The Seven-, Eight-, Nine- and 10 Year Goal, Making Partner Isn't that Easy Anymore*, ILL. LEG. TIMES, Sept. 1993, at 1. There is a recognition that some of the institutional practices, like forcing out associates who cannot meet "minimum" billing levels of 2200 hours, or basing bonuses on billable hours, create an environment which is both competitive and ripe for abuse. In a not unsurprising development (a consequence of the "pull" of hierarchy), large corporations are adopting the practices of large firms and establishing minimum billable hours for their attorneys. According to one account, 58% of all corporate law departments keep track of lawyer's hours. One of the advantages which managers have noticed is that the work load for attorneys can be increased. This is made possible by "increased competition and a weak market" for lawyers. Rather than hire more lawyers to handle expansions into new markets, companies now merely increase the amount of work handled by each attorney. One downside they recognize is the fact that this encourages attorneys to lie about the number of hours they work. This is dismissed as a problem by those who feel anyone who is "highly motivated"

Nowhere is hierarchy more entrenched than in the legal profession.³⁶ The most repressive aspects of hierarchy are reproduced in various legal institutions. We see it in the struggle for partnership within firms,³⁷ and in the struggle for power be-

would lie anyway. Nicholas Varchaver, *Quantity Counts: The Push to Bill More Hours*, AM. LAW., Jan.-Feb. 1992, at 50 (many of the statements referred to here are attributed to Michael Halloran, general counsel for BankAmerica). Both law firms and corporations seem to have adopted the view of legal work which is technical, an assembly line model promoted by early industrial theorists like the proponent of "scientific management" Frederick Winslow Taylor. Focusing on time and efficiency can subvert creativity, resulting in what one theorist calls "the degradation of work." Harry Braverman, *Labor and Monopoly Capital: The Degradation of Work in the Twentieth Century*, in TECHNOLOGY AND SOCIETY IN TWENTIETH CENTURY AMERICA 50, 52 (Randall E. Stross ed., 1989). When workers are asked to account for their time in increments of .1 of an hour and billable budgets which require you to work (bill) 8 1/2 hours a day (unless we assume a six day week), when is there time to let your mind work out a problem? Creativity cannot be mass produced, even if the products of a creative mind can be (which is why all law firms have "form files"). It is no wonder the dissatisfaction level of lawyers is so high.

36. For a classic discussion of hierarchy in legal institutions, see DUNCAN KENNEDY, *LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM* 33-44 (1983).

37. Much has been written of late about the problems which exist within the legal profession. Much of the blame has been laid at the feet of the large firms whose interest in profits has overwhelmed the more traditional ideals and values, the ethical standards to which lawyers, as professionals, adhered. For an interesting review of this literature, nonfiction and fiction, see generally Verlyn Klinkenborg, *Law's Labors Lost*, NEW REPUBLIC, Mar. 14, 1994, at 32 (reviewing ANTHONY T. KRONMAN, *THE LAST LAWYER: THE FAILING IDEALS OF THE LEGAL PROFESSION*; LINCOLN CAPLAN, *SKADDEN: POWER, MONEY AND THE RISE OF THE LEGAL EMPIRE*; JOHN GRISHAM, *THE FIRM* (1991); SCOTT TUROW, *PLEADING GUILTY* (1993); WILLIAM BERNHARDT, *BLIND JUSTICE* (1992)). In the reviewer's opinion, what ties together fiction and nonfiction is the focus on the culture of the law, not the law itself but the way that lawyers learn what their profession is about: overwork (exploitation) and corruption (greed). Even though the majority of books do not take place in large law firms, the lawyer protagonists "can hear the footsteps of money all around them, and none of it is walking their way." *Id.* at 37. Whether big firms have the pernicious effect that is ascribed to them by critiques of the legal profession or not, there is certainly reason to believe that lawyers are less happy with their lot in life than one would assume a group of professionals with a career (as opposed to a job) ought to be. See, e.g., Michael Orey, *Misery*, AM. LAW., Oct. 1993, at 5.

Most associates in law firms aspire to the status of partner, but the expectation of partnership based on some sort of "objective" measurement of merit has been undermined by practices which reveal the obvious desire on the part of law firms to keep the number of "owners" (partners) significantly smaller than the number of "producers" (associates). The problems created by large "classes" of associates was solved at first by the lengthening of the partnership track. See, e.g., Kenneth L. Lowe, *Changing Partnership Tracks*, TEXAS LAW., July 13, 1992, at 28

tween large and small firms.³⁸ I see it in the struggle for recognition and power between "national" and "regional" schools.³⁹

(track moved during 1980s from 4-7 years to 8-10 years). In recent years, law firms have started to discuss various forms of "restructuring" which minimize the cost associated with denying partnership to senior associates. Among the options are forms of "tiered equity" and the creation of positions for "permanent associates." See generally Gary A. Munneke, *Strategic Planning: Law Firm Restructuring: The Big Picture*, 19 LAW PRAC. MGMT. 34 (Apr. 1993).

38. One report sorts legal practitioners into two categories: solo practitioners and small firms and large and middle sized firms. The dividing line between the two is the nature of the practice or the identity of the clients. The former represent individual clients, the latter predominantly business clients. See generally LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM: REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP 29-102 (1992) [hereinafter McCRATE REPORT]. Small firms find it difficult to compete with large firms in the courtroom or in the area of recruitment. For a discussion of the "ripple effect of law firms," see *id.* at 82. Unless there is a structural accommodation (like rotation between small and large firms), tensions between small and large firms sometimes take the form of political struggles. See, e.g., Rosalind Resnick, *Being Bar President Sometimes Isn't Worth It*, NAT'L L.J., Sept. 24, 1990, at 1, 43; Laura Duncan, *State Bar Governors Consider Setting Campaign Spending Limits*, CHI. DAILY L. BULL., July 16, 1992, at 3; Robert Elder Jr., *Bar Limits Campaign Spending; New Rules Aimed at Attracting Candidates for Presidency*, TEXAS LAW., Sept. 20, 1993, at 5.

39. Our preoccupation with hierarchy is reflected in our obsession with rankings, the periodic publication of lists in the national press which rank law firms and law schools and the protests which are published in response. See, e.g., *Special Report: The Best Professional Schools*, U.S. NEWS AND WORLD REPORT, Nov. 2, 1987, at 72; *America's Best Graduate and Professional Schools: Law*, U.S. NEWS AND WORLD REPORT, Mar. 19, 1990, at 59. For a bibliography of rankings, see Lynn C. Hattendorf, *College and University Rankings, An Annotated Bibliography of Analysis, Criticism and Evaluation*, RES. Q., Mar. 22, 1989, at 340.

Even though we condemn rankings, see, e.g., Rennard Strickland, *Index Envy in the Adolescent Law School*, AALS NEWSLETTER, Aug. 1994, at 1 ("A statistical index cannot tell the tale."), ranking plays a very important role in law school teaching. It is used in evaluating those who wish to enter law school teaching. Top tier schools overvalue their own graduates, creating a kind of inbreeding, while mid- and lower-tier schools undervalue their own graduates. Scholarship has become the most important factor in deciding who gets tenure and often the quality of a publication is measured by the rank of the law review in which it is published. See Janet M. Gumm, *Survey: Chicago Kent Law Review Faculty Scholarship Survey*, 66 CHI.-KENT L. REV. 509 (1990). By the way, this is perfectly consistent with at least one theory of consumer preferences which says that if there is too much information or if we are unable to process a large amount of information, our lack of confidence in our own ability to make judgments will result in "procedural" or "bounded rationality." In short, we rely on a belief that others are "better informed" than we are. Lavoie, *supra* note 33, at 544. In the case of scholarships, we have put our faith in second and third year law students. Could this explain the greater reliance on outside evaluations of scholarship in law school tenure?

And it is present in one of its most virulent forms in the institution of tenure.

III. Discourse About Tenure: Some Thoughts on the Way We Think About Tenure

I have had occasion to think about tenure a lot since that Northeast Corridor meeting at which I raised the issue. I thought about it a lot when I applied for and received tenure at my own institution. And, if I hadn't been thinking about it when we began, tenure came to mind soon after I began research on the topic of cognitive theory with Louise Harmon.⁴⁰

As law teachers, our principle identification is as lawyers and we are concerned with teaching students how to be good lawyers. We have done this for years without benefit of instruction in the art or the science of teaching. No one taught me how to teach. Except for one workshop on law teaching in which experienced teachers performed both a "problem approach" and a "socratic method," a community of scholars and teachers con-

See Tenure Report, supra note 12, at 497-98 (discussing the reliance by many law schools on faculty evaluations made by the faculty at other law schools).

We also refer regularly to these rankings in making career choices. Law teachers, all teachers, perhaps, are pretty mobile. Itinerant status is forced on some because their work is valued, but they are unable to survive the politics of tenure. Catherine McKinnon usually is cited as an example of this particularly repugnant byproduct of the tenure process. *See, e.g.,* Ron Grossman, *Women Get High Marks, Low Tenure at Law Schools*, CHI. TRIB., June 23, 1989, at C20. The other side of the coin is the use of visitorships to "trade up" much the same way we trade up in our consideration of offers from law reviews.

There are people, of course, who make decisions on some other basis, but this is considered irrational. When I decided to move from the University of Houston to Touro, one of my male colleagues at Houston questioned my decision. He thought it imprudent of me to turn down an offer from another school which was ranked roughly in the same tier with Houston to accept an offer from Touro which was only provisionally accredited at the time. I thought it imprudent to accept an offer anywhere other than a place where I was confident that my values and my interests were shared by the institution and the people in it.

Those of us at mid- or lower-tier schools often attend conferences only to discover that the only representatives from the "top tier" schools present are the speakers. I think it is safe to say that there is a perception among those who teach in the "lower" tier schools that this limited form of participation is considered uncollegial and, well, in a word, snobbery. When no one from Harvard or Yale shows up as a member of the audience at the meetings of the professional association, you have to ask, have we all been "dissed"?

40. *See generally* DEBORAH W. POST & LOUISE HARMON, *CULTIVATING INTELLIGENCE, POWER, LAW AND THE POLITICS OF TEACHING* (forthcoming 1995).

spired to put me in a classroom with one hundred students and bade me teach them corporations law. Three years later, colleagues sat in on my classes to assess whether I was good at what I was doing, and my entire career was on the line. Fortunately, it was a hung jury. Half of them thought I was the best teacher they had ever seen. The other half thought I was the worst.

Now, many years later, Louise and I have both paused to think about the process of teaching and to explore the literature in the field of cognitive science. While we were toiling away teaching the doctrine of Consideration and the Rule Against Perpetuities, scholars in the fields of psychology and education were paying attention to the way students learn and talking about what that means for those of us who teach.

Cognitive theory is fascinating. It asks us to think about the way our minds work, about what we know and how we know it; what we perceive and how we recollect things. It is educational theory but it is also philosophy and it asks some of the same questions other legal scholars have been asking. As law professors we are forced, these days, to wade into the uncharted waters of interdisciplinary scholarship, to speculate about our own interpretive strategies, about the conventions that govern our own reading of a text, even a text like the debate over tenure.

The domain of metathought offers a change of view, a vacation from our ordinary habits of mind. It should not be advertised as some sort of miracle cure for the multiplicity of social problems that ail us, but it does suggest there may be an intellectual position from which we may catch sight of new trails across old terrain, alternative approaches to a particularly vexing problem. I, for one, would like some relief from this feeling that we are caught in a self-sustaining intellectual loop, the academic version of the Twilight Zone. From the domain of metathought can we at least identify the obstacles we confront in what has been a recurring debate in our society?⁴¹

41. For one discussion of the confines of the current debate about tenure, see, e.g., Irwin H. Polishook, *Academic Freedom and Academic Contexts*, 15 PACE L. REV. 141, 146-49 (1995). For a very cogent argument in favor of abolishing tenure first published in 1978, see James O'Toole, *Tenure: A Conscientious Objection*, CHANGE, May 1994, at 79, 80-85.

Jerome Bruner has suggested that "we know altogether too little about how we go about constructing and representing the rich and messy domain of human interaction."⁴² The law is concerned with nothing so much as the messiness of human interaction and with the organization of our experiences. Perhaps we should pay attention to Bruner's conclusion that narrative is the means we use to "organize our experience."⁴³

While the reader may disagree, dig in his or her heels, determined to resist the onslaught of refugees of other disciplines who bring all kinds of intellectual baggage with them to the field of law, there are others who have found the process invigorating. Asking a question about the relationship between law and poetry, for instance, is not as esoteric as it may seem. What is really being asked is whether lawyers think in a way which is different from poets and whether the poet's way of thinking might not produce a different or even better result.⁴⁴

The advocates of law and poetry or law as poetry reject the binary habits of mind which place law in the domain of the literal and poetry in the domain of the metaphor. They argue that metaphor is "part of the common, imaginative core of human rationality."⁴⁵ Metaphoric reasoning is among the "higher" forms of reasoning, even for those who concede the possibility of multiple intelligences.⁴⁶ It is a form of reasoning that most of us—practitioners, judges and law teachers—understand. Persuasion through the use of words is the art which we practice and it is extremely difficult to write in a way which does not employ metaphor, living or dead.⁴⁷

42. Jerome S. Bruner, *The Narrative Construction of Reality*, 18 CRITICAL INQUIRY 1, 4 (Autumn 1991).

43. *Id.*

44. See, e.g., Steven L. Winter, *Death is the Mother of Metaphor, A Review of Thomas C. Grey, The Wallace Stevens Case: Law and the Practice of Poetry*, 105 HARV. L. REV. 745 (1992) (discussing the controversy engendered by a discussion of the relationship between law and literature, specifically the usefulness of metaphor). I grant credence to Grey's concession that poetry has usefulness because "we lawyers should be able to learn something useful from poets, those ultimate specialists in language, about our own inescapably linguistic business." *Id.* at 746 (quoting Grey at 4).

45. *Id.* at 753.

46. HOWARD GARDNER, *FRAMES OF MIND: THE THEORY OF MULTIPLE INTELLIGENCES* 290-93 (1993).

47. "If language originates in figure and is essentially metaphorical, then what we call 'literal meaning' or 'literal language' is nothing but figurative lan-

But there are other literary devices besides metaphor. I am tempted to say that I have spent my whole life using the less privileged rhetorical form of metonymy: contiguity and opposition provide me with clues to meaning.⁴⁸ It is the process of comparison, the close scrutiny of the classes and categories and taxonomic structures of the dominant culture, which occupies scholars who claim the status of "outsider." Outside is a position from which you can sometimes see the cracks in the "logical (and ideological) armour" of those who are privileged and powerful.⁴⁹ This is how I "deconstruct" the arguments of others. I say this realizing that the use of the term "deconstruction," however inaccurately or inexpertly it is employed, means something to my readers.⁵⁰

guage whose figurality has been forgotten." JONATHAN D. CULLER, *THE PURSUIT OF SIGNS: SEMIOTICS, LITERATURE, DECONSTRUCTION* 203 (1981); see also Winter, *supra* note 44, at 754-57.

48. For a discussion of metonymy, see CULLER, *supra* note 47, at 192-209. Culler's exploration of the relationship between metaphor and metonymy fascinated me, particularly sentences like "Metaphor is the mode of poetry, particularly of Romanticism and Symbolism, whereas metonymy is the mode of realism." *Id.* at 192. See also *id.* at 189 (discussing the "metaphorical privileging of metaphor"). Unfortunately for me, Culler does not discuss antinomy, although he does spend a great deal of time on structuralism and the "fundamental principle of structural or semiotic analysis . . . that elements of a text do not have intrinsic meaning as autonomous entities but derive their significance from oppositions which are in turn related to other oppositions in a process of theoretically infinite semiosis." *Id.* at 29.

49. I borrow this phrase and this analysis from BRUCE LINCOLN, *DISCOURSE AND THE CONSTRUCTION OF SOCIETY: COMPARATIVE STUDIES OF MYTH, RITUAL, AND CLASSIFICATION* 164 (1989).

50. I am not the first scholar to issue such a disclaimer or to apologize in advance for contributing to the appropriation of a term of art in another discipline. See, e.g., Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797, 797 n.1 (1989). While some claim that deconstruction is dead, others are sure that its influence will continue for some time. See, e.g., Mitchell Stephens, *Jacques Derrida*, N.Y. TIMES, Jan. 23, 1994, § 6 (Magazine), at 22. What we all understand about deconstruction is that it involves some kind of comparison and that the examination of oppositional categories can end in the collapse of those categories. In this translation of deconstruction for general consumption by the public, the author of this article offers up Derrida's statements that deconstruction is the "experience of the impossible." "To deconstruct a 'text' (a term defined broadly enough to include the Declaration of Independence and a Van Gogh painting) means to pick it apart, in search of ways in which it fails to make the points it seems to be trying to make." *Id.* I suppose in my version of deconstruction, what I examine and scrutinize are the points people don't know or refuse to acknowledge they are making. My text is the dominant culture and the opposition I examine, I suppose, is the expression of intent and the outward manifestations of intent. I suppose this

I began with a discussion of cognitive theory. I return to it now as a way of resuming our discussion of the meaning of the debate over tenure. Like most theories, cognitive theory can be used progressively or repressively. References to cognition and to cognitive ability are being used right now to explain and justify the extremes of deprivation and privilege which exist in our society. We are told that there is a "cognitive elite" which has risen to the top in our society and a mass of uneducable, unintelligent people who have no way to learn.⁵¹ Is anyone really surprised that racial theories of inferiority and superiority have surfaced in this discussion? The controversy about cognition and the controversy over tenure have something in common. They both employ race metaphorically. It is a narrative strategy which invokes the mythology of race and national identity to create an emotional and intellectual rift.

As a black woman, I see and understand the threat to me and to others like me in the work of "scholars" who purport to write scientific treatises on intelligence. The new cognitive theorists claim the status of "truthtellers" who have been oppressed, silenced by our political system. One reviewer writes:

However much one may disagree . . . the possibility that the authors may be even partly right makes these three books worth plowing through and mulling over. The articulation of issues touching on group intelligence and ethnicity has been neither fashionable nor safe for the last three decades, but these scholars argue that the time has come to grasp the nettle of political heresy, to discard social myths and to come to grips with statistical evidence.⁵²

Charles Murray, one of the authors advancing the theory of racial inferiority, raises the spectre of bestiality, a group of subintellec[t]s reproducing at an alarming rate.⁵³ And though I may rail at the new credibility given ideas which have a long tradition in this society, the obviously mythic nature of our dis-

makes me more of a realist than a postmodernist. This may be deconstruction in the sense of an unraveling which demonstrates "how one term of an antithesis secretly inheres within the other. . . . how texts come to embarrass their own ruling systems of logic" TERRY EAGLETON, *LITERARY THEORY: AN INTRODUCTION* 133 (1983).

51. See *supra* text accompanying note 16.

52. Browne, *supra* note 16, at 3.

53. *Id.*

cussion of statistical “proof” which shows “correlations” which are then read as “causal” connections by the general public, I also know that my words will have little effect. These images, this narrative strategy, cannot be countered with facts, or reason or logic. Reason has nothing to do with race relations in the United States.

The proponents of theories of intellectual inferiority and superiority use race to make a case for the subordination of a much larger class of people—the cognitive elite may be predominately white, but the underclass is not limited to people of color. And these men, all white men who are members of a privileged class, use the language of freedom, the link between free speech and truth,⁵⁴ and they make claims as to their own courage laying claim to the status (and the privilege) of heroes. This is a narrative about our past and our future, about national identity and individual character.⁵⁵

Similarly, the discourse on tenure today begins as a discourse on race and freedom. There has been both political up-

54. I have been rereading and rediscovering Ralph Ellison. I especially like the speeches of the protagonist, the points in the novel when he resorts to metaphors like the description of the plight of blacks as

a couple of one-eyed men walking down opposite sides of the street. Someone starts throwing bricks and we start blaming each other and fighting among ourselves. But we're mistaken! Because there's a third party present. There's a smooth, oily scoundrel running down the *middle* of the wide gray street throwing stones—He's the one! He's doing the damage! He claims he needs the space—he calls it his *freedom*. . . . In fact, *his* freedom has got us damn-nigh blind!

RALPH ELLISON, *THE INVISIBLE MAN* 344 (1990).

55. In reading postmodernism, I have been struck by the way intellectual thought was transformed in Europe by the Holocaust. Perhaps it is the description of the way the Nazis came to power that is so frightening:

Nazism put the Aryan name in the place occupied by the idea of the citizen. Abandoning the modern horizon of cosmopolitanism, it grounded its legitimacy in the sagas of the Nordic peoples. The reason it could succeed was that it released in the “sovereign people,” “democratically” in Kant’s sense, a desire to “return to the source,” a desire only mythology could satisfy. Nazism provided the people with names and narratives that permitted them to identify exclusively with Germanic heroes and heal the wounds inflicted by the event of defeat and crisis. Xenophobia and chronophobia are necessarily implicated in the use of language as an apparatus of legitimation.

JEAN-FRANCOIS LYOTARD, *THE POSTMODERN EXPLAINED: CORRESPONDENCE 1982-1985*, at 47 (Julian Pefanis & Morgan Thomas eds., Don Barry et al. trans., 1992).

roar and litigation around the treatment of Michael Levin,⁵⁶ Leonard Jeffries,⁵⁷ Earnest Fred Dube, a professor at the State University of New York at Stony Brook,⁵⁸ and Tony Martin of Wellesley.⁵⁹ Of course, I realize these cases are not the same. The fact that I have grouped them together is not intended to suggest that they are.

What they have in common is the way race is used to raise questions about tenure in the academy and among members of the public. More specifically, these cases have led some to question whether tenure operates as a shield to protect academic freedom, or a license for irresponsible behavior and racist and anti-Semitic comments.⁶⁰ For others, these cases merely affirm

56. *Levin v. Harleston*, 752 F. Supp. 620 (S.D.N.Y. 1990); *Levin v. Harleston*, 770 F. Supp. 895 (S.D.N.Y. 1991), *aff'd in part and vacated in part*, 966 F.2d 85 (2d Cir. 1992). See also Daniel Seligman, *The Case of Michael Levin*, NAT'L REV., May 5, 1989, at 38.

57. *Jeffries v. Harleston*, 828 F. Supp. 1066 (S.D.N.Y. 1993), *modified*, 21 F.3d 1238 (2d Cir. 1994).

58. Ernest Fred Dube sued the State University of New York at Stony Brook after it denied him tenure. Mr. Dube, who is a black South African, studied at Cornell and taught Africana Studies at Stony Brook for ten years. He claims that he was denied tenure because of complaints stemming from a course he taught entitled "The Politics of Race." The source of the controversy was his criticism of "right wing zionism" which he characterized as "reactive racism." See Paul Vitello, *A Case That Simply Went Away*, NEWSDAY, June 8, 1993, at 8.

59. See *Wellesley Leader Rebukes Professor For Book on Jewish Conspiracy*, N.Y. TIMES, Feb. 1, 1994, at A18. The black Wellesley professor wrote and published a book, *The Jewish Onslaught: Despatches from the Wellesley Battlefront*, about the criticism he received when he assigned a book published by the Nation of Islam, *The Secret Relationship Between Blacks and Jews*, in his black studies course. *Id.*

60. See, e.g., *A Deafening Silence* (Editorial), NAT'L REV., Sept. 9, 1991, at 16, 16-17 (condemning the silence of black intellectuals and academics on the Jeffries case). Michael Levin was condemned by the faculty at City College of New York for the racist views he expressed about the intellectual inferiority of blacks. While he was the target of student protests, the uproar over his racist remarks did not result in demands in editorials for his firing or his removal. In fact, a very sympathetic portrait of Levin appears in the same magazine that condemned Jeffries. It begins with the statement "Michael Levin and academic freedom have both been in trouble at the City College of New York." Seligman, *supra* note 56, at 38. Seligman went on to write a book about the intellectual inferiority of blacks. For a review of Seligman's book *A Question of Intelligence: The IQ Debate in America*, see Richard A. Goldsby, *The Myth of Genetic Inferiority*, 1 J. BLACKS HIGHER EDUC. 98 (1993).

The district court opinion in *Levin* begins with a reference to the "national debate on what has come to be denominated as 'political correctness.'" *Levin*, 770 F. Supp. at 897. The court proceeds to reprint in full two of the offending pieces

the need for tenure.⁶¹

The racism in this debate is not limited to the remarks issuing from the mouths of the two most infamous offenders. There is racism in the differential treatment accorded the two men; in the condemnation of the theories of Jeffries as outrageous and insupportable while Levin is responded to as though his arguments were credible because, as one columnist put it, his remarks are an attempt at "argument by reason."⁶²

But I do not think this essay, or the debate about tenure for that matter, can be reduced to the racial theories of faculty who have gained notoriety of late. Nor is it a simple matter of identifying the way the discourse plays out the racist assumptions and preoccupations of our society. It is true we cannot talk about tenure today without talking about race, gender, class or sexual orientation, or about the politics or morality of exclusion. Unfortunately, often when we talk about each of these issues, the discourse is habit-driven, symbolic and empty, dangerous and misdirected.

The tenure debate is smoke and mirrors, the basic tools of a master of deception, the magician. There is no magician transforming academia (if there were, it might be a lot less painful for us all), but there are a lot of people with smoke in their eyes—and no wonder. More smoke than light is generated by the fires of indignation and outrage fueled by the incendiary comments of a few faculty. These conflicts symbolize, but do not represent, the real issues regarding tenure. The clue to the real meaning of this debate lies in the identity of the person or institution invoking the "liberty" interests.

Those who defend the tenure system, and not infrequently those who support the granting of tenure to a particular appli-

written by Levin but never condemns them, referring only to the opinions of college officials saying that Levin's views were odious and rightly denounced. *Id.* at 901-03. Jeffries's speech was described as "hateful, poisonous and reprehensible statements" and his classroom behavior as "bizarre, shallow, and incompetent pseudo-thinking and pseudo-teaching." *Jeffries*, 828 F. Supp. at 1071. Both opinions were written by Judge Kenneth Conboy.

61. See Polishook, *supra* note 41, at 146-47.

62. Murray Kempton, *Stupidity Does Not Discriminate*, *NEWSDAY*, Sept. 8, 1991, at 37.

cant, invoke the idea of academic freedom.⁶³ The cases of Levin, Jeffries and others invariably result in matter-of-fact statements that they are utterly protected by the Constitution and the principle of academic freedom, and emotional defenses of that threatened freedom rejecting any attempt to censure the two men.

In any battle over tenure, and frequently in tenure battles, therefore, proponents and opponents weave together political and moral arguments around the idea of freedom. In American culture, freedom is a moral precept and a sign. The litany with respect to tenure is as follows: Tenure is a bulwark of freedom not because it protects a particular individual whose ideas or scholarship are controversial, but because it protects our institutions. Academic institutions provide a safe place from which to offer a critique of government, challenging entropic tendencies in the dissemination of ideas and information. Academic freedom also promotes the full and free exchange of ideas, the development of new and controversial theories and these, in turn, hold out the possibility of innovation and progress. And finally, tenure can be justified because what amounts to a lifetime appointment is granted only after a faculty member has earned tenure.

Critics of tenure have answered by asserting that the dangers which once justified a tenure system no longer exist. The freedom protected by tenure is not at risk. One author opines that:

63. For a review of the literature in the area of academic freedom, see *Academic Freedom*, *supra* note 19. The theories and the classificatory schemes which have been used to "chart" academic freedom are also generally covered in MICHAEL A. OLIVAS, *THE LAW AND HIGHER EDUCATION, CASES AND MATERIALS ON COLLEGES IN COURT* (1989). Notwithstanding the laudable work of all of the scholars who have attempted to sort and organize the case law which deals with the issue of academic freedom and its relationship to the First Amendment of the Constitution, state Constitutional Law and Contract law, Professor Olivas has provided a concise statement of the beliefs which support this ideal. "It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation." *Academic Freedom*, *supra* note 19, at 1835 (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring)). Olivas continues by stating that "[t]he search for truth requires that scholars receive the protection of academic freedom in posing new, controversial, or unpopular ideas in their teaching and research." *Id.* at 1836.

Even the staunchest advocates of tenure concede that it is no longer necessary to protect professors' freedom to speak out politically. "If by academic freedom you mean that taking Marxist or fascist positions would be risky, that doesn't come up much any more" More of a problem . . . are professors who antagonize their schools or communities by, say, flunking a football player.⁶⁴

This writer is either disingenuous or suffering from information deprivation. Anyone who reads a newspaper or listens to the radio or watches television in this country knows that the political battles of earlier generations have been replaced by the political battles of a new generation. Instead of worrying about communists, some academics worry about postmodernists and nihilism.

Those who rightly conclude that this debate about tenure is related to the controversy over postmodernism and post-structuralism, postcolonialism and multiculturalism, might reach that conclusion for the wrong reasons. Because we are talking about a Black man and a Jewish man, if we use Jeffries and Levin, respectively, as our examples, we think the debate over tenure is a debate about the risk of bias in the system. Diversity and multiculturalism are implicated either because of the identity of the two men as members of subordinated communities, or because their attacks have been on subordinated groups—Jeffries is an anti-Semite and Levin is a racist.

Contrary to what most readers would assume, multiculturalism is not a shield or defense for either Levin or Jeffries. The debate over multiculturalism is about the Leonard Jeffries and the Michael Levins in this world, but it is not about tolerating their intolerance—exactly the opposite.

Neither case is really about race as much as it is about oppression, the kind of oppression which occurs when faculty use the power which inheres in a tenure system to harm students, the academic community and the wider communities of which we are all a part. It is the kind of oppression which occurs when we react to images and to ideas which are part of the mythos of our society. It is the kind of oppression which occurs when we fail to examine critically the oppositions which have been set up

64. David E. Rosenbaum, *Amid Joblessness, The Joys of Tenure*, N.Y. TIMES, Dec. 12, 1993, at E4 (quoting Earnest Benjamin, general secretary of the American Association of University Professors).

to see whether the supposed opposition collapses in on itself. If we thought critically about the narrative, who is telling the story and why, what would we see? Would we notice the fact that Jeffries used Levin's case as precedent in his own trial, or that Levin defended the rights of his colleague Jeffries?

IV. Critical Pedagogy and the Paradox of Postmodernism— Implications for Tenure

Two years ago Louise Harmon and I began our research with a grant from the Gonzaga University School of Law Center for Law School Teaching. People in legal education were beginning to talk about cognitive theory and pedagogy,⁶⁵ but only a few of those talking about cognition referred to the field of critical pedagogy.⁶⁶ Louise and I began our research with the more

65. Increasingly, discussions of cognitive development and cognitive theory can be found in law school literature. For an early example, see, e.g., Paul Wangerin, *Objective, Multiplistic, and Relative Truth in Developmental Psychology and Legal Education*, 62 TUL. L. REV. 1237 (1988). For a more recent study, see Brook K. Baker, *Beyond McCrate: The Role of Context, Experience, Theory and Reflection in Ecological Learning*, 36 ARIZ. L. REV. 287 (1994). Sometimes it even appears in law reviews which discuss the "substantive" areas of the law. See, e.g., Baker, *supra*, at 294 n.23 (citing sources which discuss cognitive theory in connection with substantive areas of law).

The Society of American Law Teachers (SALT) sponsored three conferences on teaching over the last two years. I participated in the last conference in Minnesota, September 23-24, where an entire day was devoted to discussion of learning theory. The people with the most expertise, oddly enough, are the "academic support" people, the people who put together programs to ensure the success of "high risk" students. What they discovered, of course, was a body of work which explores the differences in the way people think, differences which are sometimes, but not always, culturally specific. In fact, learning theory had much wider application. It explained the unexplainable, the "failure" of "smart" people (students with advanced degrees in other disciplines) or the differences in the modes of information acquisition (or lack of it) associated with a visual culture and the new technologies which support and maintain it. For a discussion of the "new illiteracy," see HENRY A. GIROUX, *TEACHERS AS INTELLECTUALS: TOWARD A CRITICAL PEDAGOGY OF LEARNING* 79-85 (1988).

66. See Charles R. Lawrence III, *The Word and the River: Pedagogy as Scholarship as Struggle*, 65 S. CAL. L. REV. 2231, 2238 (1992) (locating his pedagogy in the tradition of "teaching, preaching, and healing; an interdisciplinary tradition wherein healers are concerned with the soul and preachers with the pedagogy of the oppressed"); Kimberle Crenshaw, *Towards a Race Conscious Pedagogy*, 11 NAT'L BLACK L.J. 1 (1989-1990); Jay Feinman & Marc Feldman, *Pedagogy and Politics*, 73 GEO. L.J. 875 (1985). Feinman and Feldman used a consultant in educational psychology and concluded that we should employ a different philosophy of teaching, a "mastery" approach which "is so profoundly democratic in approach

mainstream or traditional theories of cognitive development and cognitive styles.

There are, of course, different branches of cognitive theory. Some researchers explore the idea that human intelligence and the capacity to learn are physiological properties and so a matter of science,⁶⁷ while for others learning and intelligence implicate the social anthropology of cognition,⁶⁸ the meaning

and result that it would dramatically change American legal education." *Id.* at 925 n.125.

67. Many social scientists aspire to the status of "scientist" in the sense that the word is used when we refer to the natural sciences. Perhaps we ought to listen to the philosophers who disapprove. See, e.g., Charles Taylor, *Understanding in Human Science*, 34 REV. METAPHYSICS 25, 26 (Sept. 1980). Taylor discusses the canonical split and the debate between those who believed in the unity of science and those who were proponents of hermeneutics as the basis of the human sciences. In science there are those who argue that there is no rational place for hermeneutics and so there can be no room for debate. The author criticizes those who have abandoned the distinctions which fueled this opposition, the demise of the "[o]ld guard Diltheyans, their shoulders hunched from years-long resistance against the encroaching pressure of positivist natural science" *Id.* Advocates of a scientific approach maintain that positivist science, with its use of a formalizable language, can sharply distinguish between the data of experience and their theoretical explanation. But, Taylor maintains, hard science is not what it purports to be; "logical empiricists sold us an extraordinary bill of goods about natural science. Once we awaken from our positivist slumbers we realize that none of these features hold of natural science either." *Id.* After I narrowly escaped a career as a social scientist—having begun but then abandoning a career as an anthropologist—I moved on to a new career, one which is or was just as deeply envious of the natural sciences. For a discussion of Christopher Columbus Langdell's preoccupation with the scientific method, see John Henry Schlegel, *Langdell's Legacy or, The Case of the Empty Envelope*, 36 STAN. L. REV. 1517, 1520 (1984); see also Pierre Schlag, *The Problem of the Subject*, 69 TEX. L. REV. 1627, 1632-56 (1991). Schlag states:

We must remember that the enterprise that we as legal thinkers have been engaged in from the very start has been to construct and reconstruct law in the image of a discipline worthy of the university—in other words, to legitimate and institutionalize our work and our selves. In a sense, then, from the very beginning we have tried to construct and to create the study of "law" as something that would be independent of the particular individuals who would study the law.

Id. at 1732 (footnote omitted).

68. JEAN LAVE, *COGNITION IN PRACTICE, MIND, MATHEMATICS AND CULTURE IN EVERY DAY LIFE* 1 (1988). The author describes cognition as "a complex social phenomenon" which is distributed among "mind, body, activity and culturally organized settings." *Id.* Cognition is an activity and the construction and distribution of knowledge is one dimension of social organization. The author tests the socially and culturally organized beliefs about cognition in something called the Adult Math Project. *Id.*

assigned to both teaching and learning, the perceptions of who can teach and who can be taught. If you fall into the latter category, and I think that is where Louise and I found ourselves, there is no way to talk about teaching without talking about race, gender, class or politics.

My convictions as a teacher are rooted in my own experience of formal education as something unrelated to meaningful knowledge. In my first year of law school, I learned the elements of proof for negligence, manslaughter and promissory estoppel. More than a decade earlier, in Earth Science, I learned all the parts of the internal combustion engine. Both have equal value in my life.

To this day, I remember the names and functions of the various parts of the car engine: the distributor cap, butterfly valves, piston and crank shaft. But even before electronic ignitions made my knowledge obsolete, it was irrelevant. The summer before eighth grade (and Earth Science) my father died and my mother did not know how to drive. We never owned a car after my father's death. In fact, I did not get my driver's license until I was twenty-six years old.

In stark contrast to my experience in Earth Science, Print Shop, the elective I chose instead of typing, provided me with a profound sense of satisfaction. It certainly wasn't because I envisioned a future for myself running an offset press. But I could make the press in Print Shop move. I could make it produce something of my own design, however crude the design or how inexpert the job. I don't remember discussing the history of printing or the theory behind the printing press in Print Shop. It would have been superfluous.

The engine I was forced to touch in Earth Science, taking it apart and giving those parts names, was still and cold. Something critical was missing from our discussion of the theory of the internal combustion engine. Maybe it was the idea of mobility or freedom. But what I already knew about freedom was reinforced. I knew an A on the examination which tested my knowledge of the parts was critical to my escape from poverty and the small town I lived in.

Years later, in college, I understood the idea offered up by Paolo Friere in *Pedagogy of the Oppressed*,⁶⁹ even though he was then focusing on Brazilian peasants. Brazil or Auburn, New York, or any law school in this nation, the impediments to learning are much the same. I had forgotten what I learned from Paolo Friere, but not what I had learned from life, when I started reading the literature on critical studies in education. I immediately felt a connection with those scholars whose moral vision is closer to my own. I reclaimed my conviction that the world is socially constructed, including our ideas about teaching and learning.

This idea that our social reality is “constructed” is a classic postmodern concept.⁷⁰ Not all critical theory, legal or educational, is postmodern, but it must be acknowledged that much of it is “located in the postmodern.” That is, while many critical scholars have not proceeded from, and are not grounded in, the work of particular European philosophers like Derrida, Foucault, Barthes, Lacan and Habermas, their work is classified as postmodern because of the characteristics which are used to identify the postmodern. As one author put it, education is located in the “postmodern moment,” when it issues “a challenge to existing concepts, structures and hierarchies of knowledge,”⁷¹ when “epistemological structures” and the notion of “foundational knowledge” are challenged.⁷² Postmodernism resists simplification or reduction precisely because it can be said that “[t]he possibility of a multiplicity of perspectives is perhaps what most characterizes a postmodern perspective.”⁷³

I don't label myself or my scholarship. I appreciate the arguments of postmodernity, however, even though I have to struggle to understand the vocabulary. In some sense, I feel postmodern scholars have created a space for me to do my work, a theory which is not hostile to the idea of multiculturalism. The automatic credibility granted European intellectuals has had an unintended effect—it legitimizes some forms of alterna-

69. PAULO FRIERE, *PEDAGOGY OF THE OPPRESSED* 185-86 (1970).

70. ROBIN USHER & RICHARD EDWARDS, *POSTMODERNISM AND EDUCATION* 28 (1994).

71. *Id.* at 25.

72. *Id.*

73. *Id.* at 26.

tive scholarship. Even so, I recognize that keeping company with postmodernists can be dangerous. I know I will be labeled a fellow traveler.

Scholarship which is labeled postmodern⁷⁴ is anathema to those who consider it immoral, the abandonment of virtue. Proponents of postmodernism and critical scholars are both considered by conservatives⁷⁵ and libertarians⁷⁶ to be as great a threat to the American way of life as yesterday's communists and socialists, respectively.⁷⁷

74. I have to admit here that I am new to the project of expressing complex ideas in a single name or a single phrase. My interest in postmodernism is that of the voyeur and scavenger, picking up bits and pieces that glitter and attract my attention and carting them away, certain that I will have use for them in the future. I am, in effect, following the suggestion of one critical scholar that we "appropriate key concepts in discourse theory, reception theory, post-structuralism, deconstructionist hermeneutics, and various other new schools of inquiry without becoming trapped in their often impenetrable language, arcane jargon and theoretical cul-de-sacs." GIROUX, *supra* note 65, at 166.

Whatever postmodernism is, and I do not pretend to know what it is, the themes which I have come to recognize, the rejection of universalism and grand narratives, the intense scrutiny of the internal contradictions in theories and in various texts, a concern with the relationship between subject and object, seem both principled and moral. For a discussion of "post modern paradigm shifting," see Robin West, *Murdering the Spirit: Racism, Rights, and Commerce*, 90 MICH. L. REV. 1771 (1992) (reviewing PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS: THE DIARY OF A LAW PROFESSOR* (1991)).

75. One religious publication has raised the issue of general alarm. "[P]ostmodernists . . . deny the existence of *any* universal truth or morality. Postmodernism holds that individuals are merely constructs of social forces—race, gender, and ethnic background. Every culture has its own 'truth.'" Charles Colson, *Postmodern Power Grab*, CHRISTIANITY TODAY, June 20, 1994, at 80, 80.

76. I associate the Libertarian position with the work of the American Civil Liberties Union (ACLU). For example, Nadine Strossen, the President of the ACLU, campaigns extensively in opposition to proponents of hate speech codes and anti-pornography legislation. She is particularly critical of Katherine McKinnon and of the practice of "elite law schools" which hire and promote those who take a "revisionist" approach to the First Amendment. See, e.g., Nadine Strossen, *Censuring the Censors of Free Speech*, CHI. TRIB., Sept. 2, 1993, at N27. Of course, it is hard sometimes to figure out who is classified as a postmodernist. See Steven Hill, *To Choose or Not to Choose: A Politics of Choice*, HUMANIST, May 1993, at 3 (distinguishing between two forms of postmodernism: one which stands for multiculturalism, and the other which "degenerates into a New Age naivete and shallowness . . . that promotes notions of "free choice" and "liberty").

77. People who know about such things apparently draw distinctions between several categories of thought, including current continental philosophy. For instance, one writer reviewing Frederic Jameson's work *Late Marxism* seems to draw distinctions between Marxists, post Marxists, and postmodernists and post-structuralists. Michael Ferber, *The Turn of the Screw*, NATION, Oct. 15, 1990, at

The immorality the critics of postmodernism condemn has its source in an alleged absence of standards, the abandonment of the ideals of Truth and Beauty in scholarship and art for what is disparagingly referred to as a form of intellectual narcissism.⁷⁸ Postmodernism, in whatever form it takes, is portrayed as sloppy, self-indulgent and empirically suspect.⁷⁹ After reading a critique of postmodernism, you are left with the impression that postmodernism is a form of social and intellectual anarchy, a capitulation to self-indulgence which results in standardlessness.⁸⁰

The critics of postmodernism, the standard bearers for standards, abandon any and all commitment to uniformity or individual achievement (we understand their use of "standards" to have something to do with both) with respect to behavior which they all acknowledge is immoral but which they label

425, 426 (reviewing FREDRIC JAMESON, *LATE MARXISM: ADORNO OR, THE PERSISTENCE OF THE DIALECTIC* (1990)). Critics of postmodernism reject such subtleties. All proponents of diversity are often labeled "neo-Marxists" by their critics. They are also accused of "attempted brainwashing," barbarism, dogmatism and other assorted sins. See, e.g., Dinesh D'Souza, *The Visigoths in Tweed*, FORBES, Apr. 1, 1991, at 81, 81. Critics on the art scene label postmodern artists "left-wing" and criticize them for being "looser, less stringent, and more avowedly hedonistic and opportunistic" Terry Teachout, *Mr. Pinfold's Revenge*, NAT'L REV., Mar. 28, 1986, at 58, 58 (quoting HILTON KRAMER, *THE REVENGE OF THE PHILISTINES: ART AND CULTURE 1972-1984* (1985)).

78. See, e.g., Chris Goodrich, *Mourning Liberalism: a Review of Gertrude Himmelfarb*, Looking into the Abyss: Untimely Thoughts on Culture and Society, L.A. TIMES, May 26, 1994, at E8. Even the debate among critical theorists reflects a similar view, but only with respect to the commitment to engagement, to "concrete human suffering . . . a discourse of the body" and the extent to which some theorists "appear to be suffocating in ideological narcissism, tied more closely to the self-serving tenets of vanguardism and despair than to anything else." GIROUX, *supra* note 65, at 206 (criticizing also "a meanness of spirit that abstracts and reifies the pain and suffering that take place in schools. . . the disappearance of a discourse of the body . . .").

79. See, e.g., Alan Wolfe, *The End of Essences*, NEW REPUBLIC, Aug. 8, 1994, at 34. In this review Wolfe condemns Diggins for his many "sins" not the least of which is his violation of the "carefully constructed rules of historical scholarship"; Diggins' "surrender[] to postmodern methods" is described as "shoddy workmanship" full of "intellectual inconsistencies" and "conceptual confusions." *Id.* at 38.

80. One writer characterizes the multiculturalist education and the postmodern philosophy as "codifications of the new experience of fragmentation." The result is that we are all at risk. "At stake . . . is the future of civilization itself. The struggle for civilization has always been a struggle for unity, universality, ecumenism." Patrick Glynn, *The Age of Balkanization*, COMMENTARY, July 1993, at 21, 23.

political. The alternative classification of the behavior as "political" means that democratic ideals, liberty notions, are at risk. In defense of liberty, academic freedom is invoked and critical theorists are labeled intolerant and repressive.⁸¹

The lines between politics and morality shift in the dominant discourse about academic freedom. Racist and anti-Semitic speech is condemned as immoral, but the right to speak it is affirmed as a political right, a separate—or should I say inseparable—moral notion. In contrast, this notion of a political morality which constrains is nowhere apparent in the debate about postmodernism and multiculturalism, even though morality or arguments about what is moral play a dominant role in the discourse.

I once had a meeting with a white male student who had written a "parody" which ridiculed and hurt virtually everyone (except white heterosexual males) in our community. As we talked I used various examples from his "parody" in an attempt to explain why they might be hurtful. Finally, as we reached the point where humor, "can't you take a joke," was offered as a defense, I described my reaction to a skit performed by law students depicting a black professor in blackface with a "ghetto blaster" on his shoulder doing the "tenure trot." To his credit, I must admit that he saw that the "humor defense" had its limits. But his response was to rebuke me. He claimed I had unfairly gained the upper hand in the debate by taking to a moral high ground. It was unfair to invoke morality in a political debate.

I am unsure just where the dividing line between morality and politics was for this student and for those who have reduced the splendidly complex discussions of multiculturalism or various critical theories to a single misleading label, "political cor-

81. With pride the founder of the Center for Individual Rights announced the creation of an Academic Freedom Defense Fund. Michael P. McDonald, *Defending Academic Freedom*, HERITAGE FOUND. REP., No. 371, Nov. 21, 1991, available in LEXIS, News Library, HFRPTS File. The author noted that the Center for Individual Rights had successfully defended Timothy Maguire, a law student from Georgetown University Law School who attacked affirmative action by publishing LSAT scores of black and white students and Professor Michael Levin. But the author gives away his real agenda when he discloses that in protecting the Levins and Maguire's of the world, he is in fact, working to subvert the cultural decadence promoted by those who would establish what he calls a "PC Dictatorship." Academic freedom, he admits, is a "partisan" affair. *Id.*

rectness." Morality has been reduced to a form of instrumentalism. I worry that once morality has been so reduced, it will be easily abandoned in the cause of political expediency.

There is both internal and external contradiction and consistency in the debate over standards and morality. Modernists and postmodernists both advocate and oppose standards but their positions relative to one another are usually, but not always, oppositional. Those who advocate the application of traditional standards also reject the idea of standards when this conflicts with their conception of liberty or the preservation of their own power. Those who reject traditional standards and the idea of merit embedded in them also embrace the idea of moral or ethical standards which are liberatory. In fact, for critical educators, at least, the moral and the political cannot be separated. Morality is political and politics are moral (or immoral). At the heart of the work of critical educators is the rejection on moral grounds of educational theories which perpetuate oppression and exclusion.⁸²

In some ways, there is a paradox to be found in postmodernism. Obviously, critical scholars are between a rock and a hard place. If the goal of education is liberatory, then we must confront oppression, but this confrontation is antithetical to the values which we espouse: the values of community, connection, generosity, and excellence.

I was deep into the literature of cognitive theory before I realized that I was caught between two seemingly inconsistent moral visions. Critical pedagogy is problematic.⁸³ If we don't have standards, what have we got? And if we do have stan-

82. Much of the tradition of critical pedagogy which I have read is explicitly connected with the "discourse of liberation theology." GIROUX, *supra* note 65, at 112. The practice of the teacher as intellectual is to "create an alternative and emancipatory politics of truth . . . grounded in forms of moral and ethical discourse and action that address the suffering and struggles of the oppressed." *Id.* at 219.

83. The hegemonic function of education can be found both in the content of the curriculum and in the "hidden curriculum" implicit in the teaching method. *Id.* at 201 (discussing Harold Entwistle's interpretation of Antonio Gramsci's pedagogy). The imposition of meanings and values distributed in schools is related to mechanisms of economic and political control, the political significance of power and culture. Mechanisms of domination can be found "in the material practices of classroom social relationships, in the ideological practices of teachers, in the attitudes and behavior of students, and the classroom materials themselves." *Id.* The

dards, what does it mean? What does it mean to reject on moral grounds the educational theories which perpetuate exclusion and oppression? An even more basic question, one which is linked to our survival in academia, is should advocates of critical pedagogy use standards to protect themselves from those who call them "barbarians" and "visigoths in tweed"?⁸⁴ Should they affirm the need for tenure, even as they condemn the existence of hierarchy? In other words, we are asked to choose between a more radical pedagogy and a liberal humanist approach, one which has an emancipatory intent, but also a "will to power."⁸⁵

Obviously critical scholars are between a rock and a hard place. If the goal of education is liberatory, then we must confront oppression, but this confrontation is antithetical to the values which we espouse: liberty, community, connection, generosity, and excellence.

V. Conclusion—Some Final Thoughts About Ethics, Excellence and the Abandonment of Hierarchy

Commitment to critical pedagogy is commitment to a political struggle, but the label "political" should not obscure the moral choices that have been made. Certainly those who oppose change often invoke morality in their defense of the status quo. Although I personally find some of that morality repugnant, that is not a reason for shrinking from the discussion of the morality of a critique.

Much of my critique of tenure implicates issues of professional ethics, but the reader may not know that the standards which currently apply to law professors state that compliance is voluntary rather than mandatory precisely because morality is implicated.⁸⁶ I do not understand the reasoning which says that we cannot, as institutions, enforce the moral standards which

goal of Gramsci's critical pedagogy is not transmission but opposition, understanding which permits criticism and a transformative process. *Id.* at 202.

84. D'Souza, *supra* note 77, at 81.

85. USHER & EDWARDS, *supra* note 70, at 27.

86. AALS HANDBOOK, *supra* note 12, at 59 ("Although the norms of conduct set forth in this Statement may be relevant when questions concerning propriety of conduct arise in a particular institutional context, the statement [sic] is not promulgated as a disciplinary code.").

we all share.⁸⁷ But within academia the morality which defines our responsibilities as teachers is qualified by a commitment to

87. In December of 1992, a report of the Special Committee on Tenure and the Tenuring Process was circulated to law schools and published. *Tenure Report*, *supra* note 12. The AALS has a standing committee on Academic Freedom and Tenure. AALS HANDBOOK, *supra* note 12, at 34. In the memorandum Herma Hill Kay, then President-elect of the AALS to the Executive Committee which created the special committee, listed various reasons for the committee. Among them were the concern that tenure decisions "continue to be made in a responsible fashion." *Tenure Report*, *supra* note 12, at 477. Of particular concern was that the "expanded claims concerning external peer review and by the University administration in academic personnel cases . . . create some tension around traditional concepts of law school autonomy" and finally the President-elect cited the litigation over the issue of tenure denial in which claims of discrimination were raised. She noted "Regardless of the merits of such claims, their existence signals a need for law schools to examine their own standards in order to satisfy themselves and their critics that both the tenure decision and the tenuring process deserve confidence." *Id.* at 477-78. For its part, the Committee was quite clear about the fact that it was not to make a judgment about the "concept of tenure itself" but "assumed the concept of tenure's continuing existence," focusing instead on "tenure's empirical status in legal education." *Id.* at 479.

The committee did make recommendations, however, and these are recommendations for reform which are intended to remedy the problems with tenure. It recommended, for example, that a school develop standards which "ensure that the candidate, at a minimum, has an opportunity to respond to any significant criticisms, by requiring full and timely disclosure of the substance of serious criticism in the tenure file without necessarily revealing the source" and "avoiding prejudice against any particular methodology or perspective used in teaching or scholarship" and finally "guarding against discrimination on the basis of political viewpoint, as well as on the basis of a candidate's race, gender, national origin, religion, sexual orientation, or physical handicap." *Id.* at 479-80. The data collected by this committee revealed alarming statistics for the period from 1979-1989 with respect to the tenure of people of color. Almost 40% of the "non-black minorities" resigned before consideration, while 29% of the black candidates resigned before they were considered for tenure. The recommendations for reform can be seen as an attempt to deal with these disturbing statistics. *Id.* at 486.

The committee uses a metaphor, the evaluation of a musician who is positioned behind a screen where the evaluators are unable to see the candidate. *Id.* at 494-95. You can almost hear a sigh in the written expression of regret and frustration, "Were it only so with tenure." *Id.* at 495. Of course, the identity of the player might also be revealed by the selection he chooses to play, or in the style of her playing. And the "evaluation" of music is not unrelated to preferences for classical over jazz, for instance, or folk over hard rock. If you don't like what someone is playing, you can define him out of the community of serious musicians. A fiddler is not a classical violinist, but who is the better musician? The solution offered by the committee is the following: "The school should commit itself to avoiding prejudice against any particular methodology or perspective used in teaching or scholarship. When evaluating any work embodying innovative or less widely pursued methodologies or perspectives, the standard should be neither higher nor lower than the standard used for evaluating more traditional work." *Id.* at 505.

a competing morality, a conception of liberty which is embodied in the term "academic freedom."

Tenure is a moral issue, but it is not about liberty in the sense that most critics and advocates assume. It is about the loss of freedom that comes with the discourse of freedom which is used in this debate. Michel Foucault has described a "particular sort of intellectual enterprise," an affirmation of liberty in which there is, in fact, a "deprivation of liberty." The archetype Foucault chooses is the "English merchant" who is at risk "of losing himself because he loses sight of his connections with nature and the world."⁸⁸ It is this risk of loss which we have failed to confront in our debate over tenure.

Foucault's use of the merchant resonates for those who teach today, for we recognize immediately the extent to which education has become a commodity. It is not hard for a society committed to the idea of self-improvement, which is defined in a variety of ways, most of them material, to sell education. We set up a system of mass production with larger and larger classes admitted, many of them children of the middle and working classes. The price of a dream comes high, and education is big business.⁸⁹

To be honest, I think what scares many academics is the prospect of unrestrained capitalism, a workplace in which the very idea of human dignity has lost all meaning. We are all afraid—and it is reasonable and rational fear—of the presumption in the law which confers unlimited power over our eco-

88. MICHEL FOUCAULT, *MADNESS AND CIVILIZATION* 214 (1965).

89. I was particularly struck by a discussion of competence and management in education and the relationship between that ethic and the way education has become a commodity.

We require "value for money" and "quality" of goods and services. If this is obtained through effective and efficient management, then all to the good. This is as true for institutions of education as it is for other organizations . . . in reconstituting the school, college or university as an organization to be managed, the discourse of teaching and learning is also displaced from its central organizing role in such institutions and reconstituted. . . . Teachers and lecturers . . . have their professional status and autonomy redefined . . . as technicians, deliverers of a curriculum.

USHER & EDWARDS, *supra* note 70, at 112-13. This reminded me of a discussion I had with a colleague who suggested that the market should determine teaching style. If students prefer a particular teaching style, and a law school is competing in the marketplace for students, it should be attentive to the preferences of these student consumers.

conomic and personal well-being in the hands of employers. No person in their right mind would choose at-will employment over tenure.

What I assume when I propose the abandonment of tenure is not a return to the equally oppressive form of employment which is characterized as at-will employment. My critique presupposes a commitment to a transformed workplace in which employers and employees recognize their interdependence. The idea that any employee could be fired arbitrarily without cause is one which is antithetical to any emancipatory project. If we have no other choice, that is, if courts cannot be persuaded that the at-will doctrine has outlived the economic circumstances which spawned it, then we would have to resort to some form of collective bargaining. Even though professors do not have the protection of the National Labor Relations Board, we should consider collective action.⁹⁰ We would negotiate for terms which define the ethical and moral dimensions of the employment relationship.

This brings us back, full circle, to the issues of morality. What is the content of the morality which would define our responsibility? What would be "good cause" for terminating employment? My argument would be that critical pedagogy, or postmodernism, does not propose an abandonment of standards so much as a change of focus; the selection of new standards or the application of old standards in new ways. We are being asked to reconsider the way we have valued human endeavor in the past and, in the process, we are being asked to reexamine the nature of our enterprise.

90. For a discussion of the controversy surrounding faculty unions, see generally David M. Rabban, *Can American Labor Accommodate Collective Bargaining by Professional Employees?*, 99 YALE L.J. 689 (1990) (discussing the possible conflict between labor law doctrines and professional values); David M. Rabban, *Distinguishing Excluded Managers from Covered Professionals under the NLRA*, 89 COLUM. L. REV. 1775 (1989) (discussing the impact of the United States Supreme Court's decision in *NLRB v. Yeshiva Univ.*, 444 U.S. 672 (1980), and subsequent decisions by the National Labor Relations Board and federal courts with respect to collective bargaining by faculties). The fact that a faculty is not covered by the NLRA or the protections afforded by that statute does not prevent bargaining; it is just that employees cannot be required to bargain. After the decision in *Yeshiva*, in fact, some universities continued to bargain with the faculty unions. *Id.* at 1824.

If we are really serious about teaching in a way that enhances learning; if we decide that we have a certain ethical responsibility as law teachers to assist those who want to learn, there are changes which will have to occur in the academy. We can no longer disregard or ignore the theories and the practical knowledge available to educators. We can no longer afford to be aloof and arrogant in our assurance that imitation and mimicry will be sufficient. If we eliminate tenure, we will have eliminated one source of the power and the arrogance—the imagined invulnerability created by tenure.

In some ways, the transformation of higher education into a commodity has had an effect on distribution. It has “democratized” higher education. Most faculty are committed to increasing the opportunities for higher education. Most faculty in law schools see a law degree as a gateway, a validation of the idea of upward mobility, fulfillment of the American Dream, as well as a safety valve providing access to the legal process for groups who were otherwise disenfranchised. And yet, there is no group of individuals more convinced of their own superiority than faculty, all faculty at all levels. After all, those of us who have been successful in academia generally do well in standardized tests. You can almost hear the unspoken comparison, “unlike the students we teach today.” The disdain for students is not limited to students of color, although they are singled out in debates over affirmative action.

I have always believed that all men and women are “intellectuals” and that the only thing that stands between them and the ability to learn is their active resistance to “forms of knowledge that pose a challenge to their world view.”⁹¹ It seems to me that we have discounted or disregarded the intellectual ability of students when we ignore their reaction to the practices of people like Michael Levin or Leonard Jeffries. In similar fashion, our preoccupation with protecting the prerogatives of tenure by constructing arguments to vindicate the freedom of people like Levin and Jeffries threatens to deprive us all of the freedom which comes from recognizing our connections with other members of the academic community and the wider communities in which we all reside.

91. GIROUX, *supra* note 65, at 115.

What I am proposing is a place in space and time where it might be possible to participate in the educational process in a collaborative way. New teachers, old teachers, students, administration—all have something to contribute and to learn. This may seem a utopian notion, a word which is much discredited today. I prefer to characterize my approach as hopeful, for I understand that hope is a “precondition for radical thought.”⁹² I have accepted the invitation of one critical scholar to explore the “language of possibility.”⁹³ I hope the reader will too.

92. *Id.* at 204.

93. *Id.*