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HOW DERRICK BELL HELPED ME DECIDE TO BECOME AN EDUCATOR, NOT JUST A FACULTY MEMBER

VANESSA MERTON*

It is a great honor and an incredible pleasure to celebrate International Human Rights Day today by hearing and recounting these wonderful stories of how our lives and work have been shaped and enriched by Derrick's teachings, example, and guidance. As Penny Andrews observed at the start of this session, Derrick Bell epitomizes the teacher as transformer, whose legacy includes a boatload of lawyers, activists, and academics who attribute to him their changed perspectives and philosophies. For me, it was not merely focus, but actual locus: the concrete direction of my professional life took a 180°, not through direct contact with Derrick—whom I knew, and once lured to Pace to deliver a major lecture, but never had the joy of teaching or studying with—but by reading something he wrote. And perhaps the most remarkable aspect of this profoundly subversive work—a little-known, rarely-cited, and essentially non-scholarly piece published in *The Student Lawyer*—is its date.¹

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¹ From *The Law Student as Slave: One Dean's Perspective*, 11 STUDENT LAWYER 18 (1982), partially reprinted in THE DERRICK BELL READER 278–83 (Richard Delgado & Jean Stefancic eds., 2005) [hereinafter *Law Student as Slave*].

Here and now I call on law students to lead a revolution that is much overdue and sorely needed. . . . The time has come to stop ignoring your subjugated state, to stop rationalizing the pain and suffering you are experiencing, and to recognize that law school need not be a degrading and educationally inefficient three-year period of travail. . . .

Why should you want to revolt against law school? Let me count the ways:

1. Law students are not getting their money's worth. With its reliance on large classes, instructed by relatively small faculties via the casebook and Socratic teaching methods, with student achievement measured by the sudden-death final exam, a law school is the most cost-effective and profitable enterprise in a university. . . .
2. Law school teaching is inadequate. Law schools are the only professional training institutions I know of in which many of the teachers have little or no actual experience in doing what they are supposed to be teaching their students to do: practice law. . . .
3. Law school tenure is a barrier to effective education. . . .
4. Law school endangers human values. . . .

It is not enough that law school is not as bad as it used to be. . . . The law schools in America will not provide their students with the quality of education they need and deserve if they are not forced to do so. . . . Your time in the purgatory of law school is brief, the difficulty in bringing about real change is great, and the risks of too vigorously pushing to alter the status quo are quite real. But the damage you and all other law students suffer by not challenging the current system 'generates a feeling of inferiority . . . that may affect their hearts and minds in a way unlikely ever to be undone.' The insertion of Chief Justice Earl Warren's famous lines from *Brown v. Board of Education* is both intentional and appropriate. Law students are understandably concerned that all of their work, sacrifice, and trauma will provide no more than the barrier of a bar exam and no job opportunities. The gruesome statistics are well known. In legal education, as in most other aspects of our society, the principles of the free market simply do not work. . . .

No law student strikes that I know of have demanded that teachers reserve a reasonable number of
Bell Merton for EIC.doc

It was published in 1982, a decade before the professional consensus embodied in the MacCrate Report posited an imperative to bring lawyering skills and lawyers' values into the law school curriculum,² and a full generation before the even more urgent exhortations of Carnegie³ and Best Practices.⁴ Derrick's essay escalated the struggle over what law students needed and deserved, well beyond the trenchant but comparatively decorous proposals of pioneers like Mike Meltsner and Phil Schrag⁵ or Gary Bellow and Bea Moulton.⁶ When I came across Derrick's piece, it hit me in the stomach. This was no conference paper about curriculum reform, or inclusion of alternative perspectives, or tinkering with the first year. It was a gauntlet flung at the basic premises of legal education, in a general circulation magazine for law students – by a law school dean, no less.

But first, let me explain the context in which I read *Law Student as Slave*. That winter of 1982, when I had been teaching in the clinical program at NYU Law for five years, I was facing what would turn out to be the most difficult decision of my professional life: NYU or CUNY?

Should I stay at NYU, with all that it offered in the way of prestige, opportunity and resources, including the chance to continue working directly with the phenomenal, legendary Tony Amsterdam,⁷ who had arrived at NYU a year earlier? I already realized a) that Tony was the smartest, hardest-working man I'd ever meet; and b) that, as the greatest law teacher of his time, Tony would surely overcome the NYU faculty's conservatism on matters of pedagogy, not only to build an unparalleled clinical program, but to smuggle significant experiential and lawyering elements into the required curriculum, with probable transformative impact across the legal academy.

OR...

Should I accept the coveted offer to join the tiny founding faculty of the brand-new City University of New York Law School, just starting to take shape in a run-down elementary school in Bayside, Queens, with its progressive mission and motto "Law in the Service of Human Needs," where I would be able to work with the incomparable, extraordinary trio of Howard Lesnick,⁸ John Farago,⁹ and

hours per week for out-of-class student contact, or that they base final grades on more than one long final exam. Women petition for more women teachers with growing success, while blacks continue urging that more black teachers be hired with steadily diminishing success, but few insist that all teachers be hired on the basis of standards that include a keen interest in students and a commitment to teach based on both a knowledge of the subject matter and actual and impressive experience in practicing what he or she intends to teach.

² See AMERICAN BAR ASSOCIATION SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM: REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (MacCrate Report) (1992).

³ WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007).

⁴ ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION (2007).

⁵ Michael Meltsner & Phillip G. Schrag, *Report from a CLEPR Colony*, 76 COLUM. L. REV. 581 (1976).

⁶ GARY BELLOW & BEA MOULTON, THE LAWYERING PROCESS (1978); see also Gary Bellow, *On Teaching the Teachers: Some Preliminary Reflections on Clinical Education as a Methodology*, in CLINICAL EDUCATION FOR THE LAW STUDENT 374 (1973).

⁷ He remains at NYU and has been named a University Professor. See ANTHONY G. AMSTERDAM, <https://its.law.nyu.edu/facultyprofiles/profile.cfm?personID=19743> (last visited Apr. 29, 2012).

⁸ He is now at the University of Pennsylvania School of Law. See PENN LAW FACULTY: HOWARD LESNICK, <http://www.law.upenn.edu/cf/faculty/hlesnick/> (last visited Apr. 29, 2012).

⁹ He is now Professor Emeritus at CUNY Law School. See JOHN FARAGO, <http://www.law.cuny.edu/faculty-staff/JFarago.html> (last visited Apr. 29, 2012).

Charlie Halpern¹⁰ to build the first and only law school to simultaneously combine: 1) an unprecedented curriculum, designed to recruit and prepare students primarily for public service and public interest practice that would entail far more than the occasional pro bono case; 2) a genuine commitment to educating and empowering an unconventional student body that would be the antithesis of that of NYU: not merely diverse, but composed principally of those who had overcome or were overcoming adversity and disadvantage, often without the benefit of conventional pre-law preparation;¹¹ and 3) a fierce determination to accomplish both those challenges through a pedagogy of the oppressed¹² or rather an andragogy¹³ of the liberated, a teaching philosophy and praxis so radically egalitarian, experiential, theoretical, trans-disciplinary, collaborative, pragmatic, evidence-based, and student-centered that it was fundamentally different from even the clinical teaching model that had standardized in the decade or so since I had been a student lawyer in the very first NYU clinic.¹⁴

Sometimes decisions, although perplexing in the moment, seem in retrospect inevitable. This was not such a decision. Bluntly, most people who cared for me—in fact, almost everyone I knew—told me I was nuts even to consider leaving NYU. I was a litigation teacher with instant access to resources most lawyers could only dream of: if a case required an expert witness from, say, Timbuktu, that could be arranged. The NYU students, of course, were superb: as Derrick noted,¹⁵ they could teach themselves; more often than not, they were teaching me. My colleagues were the best, including my dearest friends. And (New Yorkers will appreciate the magnitude of this) how could I give up the cozy university-provided apartment on Washington Square, around the corner from the (alas now-defunct) Bottom Line, blocks from the Public Theater and the Strand, a five-minute walk to work?

But then I came across that copy of *The Student Lawyer* and Derrick's amazing piece, which caustically (though characteristically mingling love and concern with his distress and disappointment) excoriated law schools through the medium of speaking directly to law students. Derrick was never more prescient than when delivering this message:

Law students cannot look to those of us in the teaching profession for salvation. We are like the slave masters of an earlier time, part of the problem. For just as slave-owners prior to the Civil War could claim that such property in people was an economic necessity, so law teachers and administrators today can state . . . that budgetary realities and educational traditions determine how today's legal education is organized. . . . The

¹⁰ He is now a Scholar in Residence at Boalt Hall School of Law at the University of California at Berkeley. See BERKELEY LAW: CHARLES HALPERN, <http://www.law.berkeley.edu/2483.htm> (last visited Apr. 29, 2012).

¹¹ When I think of the difference between the two law schools in this regard, I am reminded of Derrick's acerbic comment on the near-irrelevance of law school instructional deficiencies, given their deliberate student selection practices:

[The Academicians] perform the magical feat of training and credentialing all who practice law in the land. This is a truly marvelous accomplishment because, with few exceptions, they have little or no experience in law practice. . . . Actually if the truth be known, the Academy is not well structured to teach any but the very best students, those so gifted with intelligence and compulsive work habits that they could as well learn on their own what the Academy teaches; this is precisely how many students, bright and average, prepare themselves for their chosen profession.

Derrick A. Bell, *Strangers in Academic Paradise: Law Teachers of Color in Still White Law Schools*, 20 U.S.F. L. REV. 385, 387 (1986) [hereinafter *Strangers in Academic Paradise*].

¹² Paulo Freire, *PEDAGOGY OF THE OPPRESSED* (1970). Derrick frequently cited Freire as an inspiration.

¹³ See Frank S. Bloch, *The Andragogical Basis of Clinical Education*, 35 VAND. L. REV. 321 (1982).

¹⁴ See generally Vanessa Merton, *CUNY Law School: An Insider's Report*, 12 NOVA L. REV. 45 (1987).

¹⁵ See Bell, *Strangers in Academic Paradise*, *supra* note 11.

law schools in America will not provide their students with the quality of education they need and deserve if they are not forced to do so.¹⁶

From the provocative title—*The Law Student as Slave*, a phrase that no one I knew would have dared use—to his admonition, “I call on law students to lead a revolution that is much overdue and sorely needed. . . . The time has come to stop ignoring your subjugated state, to stop rationalizing your pain,” Derrick’s article captured a reality that was then almost wholly unacknowledged. [I urge the reader to return to Footnote 1 and reread the entire excerpted text.] Law students weren’t perceived as “subjugated” or “in pain;”¹⁷ no one in legal education, certainly not law faculty, ever mentioned “gruesome” statistics about job placement.¹⁸ Nor did respected members of the legal academy flatly state, out loud at least, that “[l]aw school teaching is inadequate. Law schools are the only professional training institutions I know of in which many of the teachers have little or no actual experience in doing what they are supposed to be teaching their students to do: practice law.”¹⁹ And most assuredly, law professors did not discuss the ways that tenure obstructs quality education or call for student strikes demanding, as a required criterion for hiring new faculty, “a keen interest in students and a commitment to teach based on *both* a knowledge of the subject matter and actual and impressive experience in practicing what he or she intends to teach.”²⁰

But Derrick was not merely pointing out that in most law schools, law students don’t get what they pay for. He also was arguing that law school pedagogics insidiously operate to produce lawyers who are not really inclined to grapple with larger issues of human values, human dignity, and policy. This linkage was by no means a major preoccupation of Derrick’s, but it was a theme that he revisited over the years.²¹ The difference between Derrick and many subsequent catalogers of the failings of legal education is that he didn’t just talk about it, he took action. He made the effort to set up his large, traditional classroom courses so as to generate a much higher level of dynamic participation.

The key is to replace a basically passive procedure, consisting of assigned reading and lecture listening, with one requiring active engagement For all the pressures of the

¹⁶ Bell, *Law Student as Slave*, *supra* note 1, at 281. This conclusion is reminiscent of his famous principle of “interest-convergence.” See Derrick Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

¹⁷ Harvard law professor and critical legal studies scholar Duncan Kennedy began his project of critiquing legal education a decade earlier with *How the Law School Fails: A Polemic*, 1 YALE REV. OF L. & SOC. ACTION 71 (1970), available at http://duncankennedy.net/documents/How%20the%20Law%20School%20Fails_A%20Polemic.pdf, which contains strong rhetoric comparable to Derrick’s *Law Student as Slave*, but was easier to dismiss as a student’s screed. Professor Kennedy’s first major publication on the topic as an academic came more or less contemporaneously with Derrick’s, in the various versions of *Legal Education and the Reproduction of Hierarchy*, 32 J. LEG. ED. 591 (1982). Arguably, however, Professor Kennedy focused more on the harm to society than on the unfairness to law students of law school curriculum, ideology, and institutional structure.

¹⁸ For examples of the now ubiquitous denunciation of legal education along these lines, see the following series: David Segal, *Ask David Segal About Law School*, N.Y. TIMES ECONOMIX (Dec. 17, 2011, 2:58 PM), <http://economix.blogs.nytimes.com/2011/12/17/ask-david-segal-about-law-school/?scp=9&sq=%22law%20school%22%20%22legal%20education%22&st=cse> (including *What They Don’t Teach Law Students: Lawyering* (Nov. 20, 2011); *Law School Economics: Ka-Ching!* (July 17, 2011); *Law Students Lose the Grant Game as Schools Win* (May 1, 2011); and *Is Law School a Losing Game?* (Jan. 9, 2011)).

¹⁹ Bell, *Law Student as Slave*, *supra* note 1, at 280.

²⁰ *Id.* at 282 (emphasis added).

²¹ See also Derrick Bell, *Defying the Norms: Teaching Large Law School Classes in Accordance with Good Pedagogy*, in ENGAGING LARGE CLASSES 235 (Christine A. Stanley & M. Erin Porter eds., 2002); Derrick Bell, *A Pre-Memorial Message on Law School Teaching*, 23 N.Y.U. REV. L. & SOC. CHANGE 205 (1997); Derrick Bell, *Students as Teachers, Teachers as Learners* (Symposium: Legal Education), 91 MICH. L. REV. 2025 (1993) (with Erin Edmonds).

legal curriculum, students give every indication of welcoming responsibility, opportunity, and challenge. For myself I find that I learn from my students[] Potentially such a procedure allows us to approach the Paulo Freire ideal: that students become teachers and teachers become learners.²²

As early as his classic *Race, Racism, and American Law*, published in 1973 (the year I graduated from law school), and re-issued in a new edition as recently as 2008, Derrick insisted on incorporating complex and labor-intensive simulated argument and brief-writing exercises into his syllabus, at a time when this was virtually unheard of.²³ In that most theoretical of all law school courses, Constitutional Law—not a clinic, not an externship, but squarely in the “core”—Derrick required students to draft exam questions and grade each other’s exams, and assessed their performance of both tasks.²⁴ In a real sense, all that has come since—Carnegie, Best Practices, the Institute for Law School Teaching,²⁵ the Center for Excellence in Law Teaching,²⁶ and so much more—not to mention the law students who benefit from these developments and their future clients—are in substantial debt to Derrick Bell, a leader of the vanguard of legal education reform as of so many other vanguards.²⁷

Obviously, I did join the founding faculty of CUNY and survived the agony and the ecstasy of creating a “lawyer-school.”²⁸ This is not the place for reflection on that choice.²⁹ But for a legal educator, it was an experience not to have missed, and had I not encountered Derrick’s words of power and felt their truth, almost surely I would have. I can say, too, that the colossal, collective effort of students, faculty and staff to realize the unique CUNY experiment led me much closer to a “life of meaning and worth.”³⁰ That, I will always owe to Derrick.

²² Derrick Bell, *Constitutional Conflicts: The Perils and Rewards of Pioneering in the Law School Classroom*, 21 SEATTLE U. L. REV. 1039, 1049–50 (1998) [hereinafter *Constitutional Conflicts*].

²³ DERRICK BELL, *RACE, RACISM, AND AMERICAN LAW*, at xxii–xxiii (6th ed. 2008).

²⁴ Bell, *Constitutional Conflicts*, *supra* note 22.

²⁵ See, e.g., MICHAEL HUNTER SCHWARTZ, SOPHIE SPARROW & GERALD HESS, *TEACHING LAW BY DESIGN: ENGAGING STUDENTS FROM THE SYLLABUS TO THE FINAL EXAM* (2009); STEVEN FRIEDLAND & GERALD F. HESS, *TEACHING THE LAW SCHOOL CURRICULUM* (2004); GERALD F. HESS & STEVEN FRIEDLAND, *TECHNIQUES FOR TEACHING LAW* (1999).

²⁶ CTR. FOR EXCELLENCE IN LAW TEACHING, http://www.albanylaw.edu/sub.php?navigation_id=1709 (last visited Apr. 29, 2012).

²⁷ Derrick paid a tremendous price for leading this as other revolutions. Space precludes more than allusion to the appalling travesty of the subversion of his constitutional law course at Stanford. See THE DERRICK BELL READER, *supra* note 1, at 11.

²⁸ Jerome Frank, *Why Not a Clinical Lawyer-School?*, 81 U. PENN. L. REV. 907 (1933).

²⁹ See generally Merton, *supra* note 14.

³⁰ DERRICK BELL, *ETHICAL AMBITION: LIVING A LIFE OF MEANING AND WORTH* (2002).