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Is Law and Liberation an oxymoron?

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LAW AND LIBERATION asked members of its advisory board to respond to the question:
Is Law and Liberation an oxymoron?

The following are some of the answers we received . . .

Owen Fiss

Which law? Whose Liberation?

Mari Matsuda

A great American poet once wrote:

*LIBERTY!
FREEDOM!
DEMOCRACY!*

True anyhow no matter how many liars use those words.

In his poem, "In Explanation of Our Times,"¹ Langston Hughes warned gleefully of the world's subordinated people, addressed only as "George," "Sallie," "Coolie," or "Boy," ready to hear those words of freedom "and shout them back at the Mist'ers, Lords, Generals, Viceroy's, Governors of South Carolina." What joy it would give our brother Langston to see the children of George and Sallie, grown up and gone to Yale, launching a Journal to shout back those freedom words.

The word magician knew that the language of democracy in the hands of the oppressed was a revolutionary thing. Another Hughes poem quotes Thomas Jefferson on equality, and remembers the slaves who silently presumed "what he said was also meant for them." In that poem, "Freedom's Plow,"² the writer tells the reader we own those words of freedom, and his broad inclusive "we," as his poems make clear, really means *we*.

The ideals of Equality, Rights, Democratic Process, and Constitutionalism, are not enough alone. They are good ideals, some of the best that human beings have derived for living peaceful lives. In combination with a heart and hand tied to communities of the subordinated, those ideals take on liberating power.

The law that is so often manipulated to advance the privileges of a few is not a necessary result of commitment to the rule of law. It is, however, the result when rule-of-law conversations go on divorced from the experience and the participation of poor and working people, women, gays and lesbians, native peoples, and people of color. The question is not can law promote liberation. Rather, the question is *whose* law. When legal doctrine and legal institutions are in the hands of Langston's children, the "black brown yellow bent down working"³ folk, law and liberation will be one. May the words in this Journal bring us closer to the day.

1. L. Hughes, "In Explanation of Our Times," Selected Poems of Langston Hughes, at 281 (1974).

2. L. Hughes, "Freedom's Plow," Selected Poems of Langston Hughes, at 291 (1974).

3. *Id.*

Lucinda Finley

My first instinct is to answer a facile "yes" to your question. After all, the juxtaposition of the words "law" and "liberation" seems jarringly incongruous. Resort to law means resort to the power and definitions of the state, yet it is this power and these categorizations that people seeking liberation most often wish to resist or overcome. "Law" is synonymous with "rule," "order," "consistency," "continuity." "Liberation" implies overturning or breaking out from existing rules, confounding the existing order, smashing consistency and disrupting authority.

But this does not mean that people seeking liberation can ignore or dispense with law. Law is going to affect liberation struggles whether those seeking liberation engage with it or not. So, to me, a far more difficult and interesting question, implied by the one you pose, is "Can law ever be used as a positive tool for liberation?" Certainly civil rights activists, who looked to courts to support their rights to march and sit in, and to vindicate Black peoples' claims to equal human dignity and citizenship, thought that law could be a positive partner of progressive political action. And women's rights activists, who have been even more legalistic in their activities, apparently are committed to a positive role for law in their struggle for liberation.

But these groups have had to confront the fact that law in this country has been shaped and given meaning largely by white men — men who were also economically privileged. So, law's doctrines and categories and ways of understanding social problems are too often deaf and blind to the experiences, values, and needs of disempowered, marginalized people. In order to make the law a useful ally in struggles for liberation, we must work not only to diversify its practitioners, but also to diversify its definitions and ways of reasoning and understanding society. We must work to make the law not "color-blind" (definition: that which sees only white) or "gender-neutral" (definition: the more like a man you are the more neutral you are), but instead wide-eyed in its comprehension of the historical and social and economic significance of race, class, gender, sexual orientation, power, and domination in this society. The perspectives of those previously excluded from the powered side of the law must be incorporated into the way the law defines problems. In the process, the range of solutions the law can envision will be enlarged. When those seeking liberation can look at the law and say it is not just a system that respects whatever is closest to white men's standards, but is the law(s) of many people, then law can be a more positive tool for liberation. But if that day ever comes, we might not call it law, and we might find that we've already been liberated.

Guido Calabresi

Law can oppress; law can liberate. Reactionaries, rulers, reformers, radicals, and revolutionaries: some of the most famous of each have been trained in law and have used law to further their ends. Lincoln, Ghandi, Lenin, and Jesus Christ all studied law and knew full well the value of a powerful legal argument.

In a dictatorship the most formal and legalistic of arguments can help conserve the freedoms of an earlier age that the present tyranny seeks to destroy. During fascism in Italy, those scholars, lawyers, and judges who sought to protect 19th century "liberal" rights from totalitarian oppression found their strongest refuge (and considerable success) through a narrow parsing of the Codes. In a progressive society a functional use of law can be an extraordinarily powerful weapon in achieving freedom for the people. But law can work the other way, too.

Those who hail law or decry it in itself, mistake the tool for the artisan. The artisans of the JOURNAL OF LAW AND LIBERATION have a powerful tool in their hands. I wish them well in their use of it.

Pat Williams

I. LAW

I sit with my sister at my parent's kitchen table. Grown now, she and I are at home for Christmas holiday. We are chatting, catching up on each other's lives. My sister is telling me about how her house is haunted by rabbits. I am telling her about how I'm trying to write a book on law and liberation.

"The previous owner had hundreds of them," she says. "You can hear them dancing in the dining room after midnight."

"Mine will be a book about the jurisprudence of rights," I respond. "I will attempt to apply so-called critical thought to legal studies. I believe that critical theory has vital insights to contribute to debates about the ethics of law and the meaning of rights; yet many of those insights have been buried heretofore in relatively arcane vocabulary and abstraction. I will try to write in a way, therefore, that will bridge the traditional gap between theory and practice. It is not my goal merely to simplify; I hope that the result is a text that is multi-layered — that encompasses the straightforwardness of real life *and* that reveals complexity of meaning."

"But what's the book *about*," my sister asks at this point, thumping her leg against the chair impatiently.

"Howard Beach, polar bears and food stamps," I snap back. "I am interested in the way in which legal language flattens and confines in absolutes the complexity of meaning inherent in any given problem; thus I will try to challenge the usual limits of commercial discourse by using an intentionally double-voiced and relational, rather than a traditionally legal black-letter vocabulary. For example, I have been a commercial lawyer and a teacher of contract and property law. I am also black and female, a status which one of my former employers described as being 'at oxymoronic odds' with that of

commercial lawyer. While I certainly took issue with that particular characterization, it is true that my attempts to write in my own voice have placed me in the center of a snarl of social tensions and crossed boundaries. On the one hand, my writing has been staked out as the exclusive interdisciplinary property of constitutional law, contract, black history, jurisprudence, political science and rhetoric. At the same time, my work has been described, at various points, as a 'sophisticated frontal assault' on *laissez faire's* most sacred sanctums, as 'new age performance art,' and as 'anecdotal individualism.' In other words, to speak as black, female *and* commercial lawyer has rendered me simultaneously universal, trendy and marginal. I think, moreover, that there is a paradigm at work, in the persistent perceptions of me as inherent contradiction: a paradigm of larger social perceptions that divide public from private, black from white, dispossessed from legitimate. This realization, while extremely personal, inevitably informs my writing on a professional level."

"What's so new," asks my sister, losing interest rapidly, "about a schizophrenic black lady pouring her heart out about food stamps and polar bears?" I lean closer to her: "Floating signifiers," I whisper.

I continue: "Legal writing presumes a methodology that is highly stylized, precedential, and based on deductive reasoning. Most scholarship in law is rather like the "old math:" static, stable, formal — rationalism walled against chaos. My writing is an intentional departure from that. I have tried to employ a model of inductive empiricism, borrowed from systems analysis, in order to enliven thought about complex, dynamic social problems. My goal is to look at legal issues within a framework described not just by the four corners of a document — be it contract or the Constitution — but by the disciplines of psychology, sociology, history, criticism and philosophy. The advantage of this approach is that it highlights factors that otherwise would go unremarked. For example, *stare decisis*, rather than remaining a silent, unquestioned "given," can be analyzed as a filter to certain types of systematic input. Another advantage is that this sort of analytic technique can serve to describe a community of context for those social actors whose traditional legal status has been the isolation of oxymoron, of oddity, or of outsider. I am trying to create a genre of legal writing to fill the gaps of traditional legal scholarship. I would like to write in a way that reveals the intersubjectivity of legal constructions, that forces the reader both to participate in the construction of meaning and to be conscious of that process. Thus, in attempting to fill the gaps in the discourse of commercial exchange, I hope that the gaps in my own writing will be self-consciously filled by the reader, as an act of forced mirroring of meaning-invention. To this end, I exploit all sorts of literary devices, including parody, parable, and poetry."

"... as in polar bears?" my sister asks eagerly, alert now, ears pricked, nose quivering, hair bristling. "My what big teeth you have!" I exclaim, just before the darkness closes over me . . .

II. LIBERATION

It is my deep belief that law and liberation are not oxymoronic. It is, I think, the goal and political aspiration of this journal to fill in the gaps between those apostatized ends that the sensation of oxymoron marks. What I hope will be filled in, in this collective enterprise, is connection; connection between our psyche and our readers, between lived experience and social perception, and between an encompassing theory of history and a jurisprudence of generosity.

