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A LEGACY OF TEACHING

R.A. LENHARDT*

INTRODUCTION

“Who will build my grave?” These are words that my great-grandfather, Alexander Hartman, a gravedigger from Des Ark, Arkansas, regularly spoke. As I have written elsewhere, there was a practical dimension to this inquiry.¹ He naturally wanted to know whether, at the time of his passing, anyone would be there to dig his grave, as he had done for so many others.² But, as I gleaned from the way my grandmother told this story about her beloved father, there was much more lurking behind Alexander’s inquiry. In asking, “Who will build *my* grave?,” he also wanted to know who would remember him, who would carry on his work after he was gone, and what his lasting legacy would be.³

Upon being asked to participate on a panel about Derrick Bell and his legacy of teaching, I thought a lot about my great-grandfather and his life in the segregated South. Initially, my worry was that I would have very little to contribute to such a discussion. While Derrick had offered me kind and invaluable advice as I entered the legal academy in 2004, I had never had the pleasure of having him as a teacher. When I stepped foot on Harvard Law School’s campus in the fall of 1991, Derrick had already started his teaching leave to protest the faculty’s refusal to hire a woman of color. In many ways, though, I learned a lot from his absence. I realized that, unlike others asked to participate on the panel, I could not talk from experience about Derrick’s innovative teaching strategies or gentle classroom demeanor. But I could talk about the overall legacy of his teaching, of the lasting life and educational lessons he left for students who were lucky enough to have him in class, but also for the scores of others—black or white; male or female; gay or straight; lawyer or non-lawyer alike—who, like myself, were not. Derrick Bell advocated an approach to legal education that emphasized not just legal doctrine or the attainment of lawyering skills, but the need to promote a sense of “conscience” and social justice in students.⁴

I. ETHICAL TEACHING AND PURPOSE

In a short essay entitled “Humanity in Legal Education,” Professor Bell took the opportunity presented by his selection as the Dean of Oregon Law School to opine on the purpose of legal education and teaching.⁵ He expressed the view that teaching legal skills should not “be the sole justification for a law school.”⁶ Rather, he argued, a law school’s “highest responsibility is to change lay people into professionals. The process by which we accomplish such a change must also strengthen character, increase sensitivity to humanitarian concerns, and deepen moral values.”⁷ For Professor Bell, a law

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¹ See R.A. Lenhardt, *Grave Building: A Tribute to Charles J. Ogletree, Jr., and His Evolving Legacy*, 22 HARV. BLACKLETTER L.J. 153 (2006).

² *Id.* at 154.

³ *Id.*

⁴ Derrick A. Bell, Jr., *Humanity in Legal Education*, 59 OR. L. REV. 243, 244 (1980) [hereinafter *Humanity in Legal Education*].

⁵ *Id.*

⁶ *Id.* at 244.

⁷ *Id.*

professor's role was as much about serving as an ethical guide and conscience as it was about providing doctrinal authority.⁸

At a time of declining legal jobs and concerns about the cost and utility of legal education in the twenty-first century,⁹ Professor Bell's words take on deep meaning. To be clear, the short intervention Professor Bell made in "Humanity in Legal Education" was critical of certain elements of legal education at the time. In particular, he concluded that the charge that law schools had "done just the opposite"¹⁰ of providing legal instruction that "strengthen[ed] character, increase[d] sensitivity to humanitarian concerns, and deepen[ed] moral values"¹¹ was "too often . . . true."¹²

The essay does not, however, challenge the whole of the traditional law school curriculum. As a constitutional law professor, Bell was no stranger to legal doctrine and, in his essay, makes clear the need to support and fund the "[t]eaching [of] legal skills."¹³ Instead, what Bell presciently advocated was the integration of a kind of "conscience" or social justice instruction that focuses students on matters of justice and the need for personal sacrifice, not merely questions of tort law or how to avoid breaking attorney-client privilege.¹⁴ The kind of innovation in legal education he envisioned then, interestingly, was very much in line with observations that the Carnegie Foundation later made in its 2007 report, "Educating Lawyers: Preparation for the Practice of Law," which recommended changes to the traditional law school curriculum.¹⁵ In criticizing the continued reliance on the Socratic method in legal education, the report's drafters lamented that, while "[i]ssues such as the social needs or matters of justice involved in cases do get attention in some case-dialogue classrooms, . . . these issues [of justice] are almost always treated as addenda."¹⁶

Professor Bell took the position that "[l]awyers need conscience as well as craft."¹⁷ He did not take lightly the task of instilling such conscience. Indeed, he acknowledged that accomplishing this kind of social justice instruction would be challenging. And yet he maintained that "law school faculty and administrators cannot be exempted from their most vital obligation, to instill ethical values in students, through coursework and by example."¹⁸ For Derrick Bell, the responsibility of law schools extends beyond merely teaching "craft;" it goes to the imperative of nurturing "conscience."¹⁹ As he explained, good "[l]awyers must have the courage to apply conscience, as well as competence in each situation they

⁸ *Id.*

⁹ See, e.g., David Segal, *Is Law School a Losing Game?*, N.Y. TIMES, Jan. 9, 2011, at BU1 (describing, *inter alia*, the poor job market and high debt facing some law school graduates).

¹⁰ *Id.*

¹¹ Bell, *Humanity in Legal Education*, *supra* note 4, at 244.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ WILLIAM M. SULLIVAN ET AL., CARNEGIE FOUND. FOR THE ADVANCEMENT OF TEACHING, EDUCATING LAWYERS: PREPARATION FOR THE PRACTICE OF LAW: SUMMARY (2007), available at http://www.carnegiefoundation.org/sites/default/files/publications/elibrary_pdf_632.

¹⁶ *Id.* at 6.

¹⁷ Bell, *Humanity in Legal Education*, *supra* note 4, at 244.

¹⁸ *Id.*

¹⁹ *Id.*

face. This courage must be taught and nurtured. It must be practiced on a daily basis if it is to be relied upon in times of crisis.”²⁰

I did not appreciate it at the time. But my arrival at Harvard in 1991 offered me a valuable introduction to Bell’s approach to legal education. I learned a great deal, of course, from his personal example. His decision to leave a post at Harvard Law School, one of the most prestigious in legal academia, was a way of communicating the injustice of excluding women of color from the Harvard faculty that had ripple effects far beyond. But, in many ways, I learned even more from the Harvard students he left behind, many of whom, like me, knew Derrick Bell only through his public protest and scholarship. Influential articles like “The Interest Convergence Dilemma,” published in the *Harvard Law Review* in 1980,²¹ and groundbreaking books like *And We Are Not Saved: The Elusive Quest for Racial Justice*,²² *Faces at the Bottom of the Well: The Permanence of Racism*,²³ or *Confronting Authority: Reflections of an Ardent Protester*,²⁴ which detailed his leave from Harvard and his commitment to protest, inspired and guided so many of us.

II. A LASTING LEGACY

The Harvard Law School of the 1990’s could not have been more different from that institution today, one shaped in innumerable ways by the innovative leadership of current dean Martha Minnow and former dean and now United States Supreme Court justice Elena Kagan. Dubbed “Beirut on the Charles,” the Harvard of the 1990’s was a place of infighting and strife, where great hostility to the ideas about race and the goal of diversity espoused by Professor Bell existed.²⁵ In such a climate, efforts to challenge the law school administration’s hiring choices and to support Professor Bell’s call for diversity were not without risk. Indeed, recent efforts to tar President Barack Obama in the media for his mere association with Professor Bell makes plain that, even today, attempts to talk openly about race remain controversial.²⁶

Yet the campus I found in the fall of 1991 was one in which students of all backgrounds—white, black, Latino, Asian, gay and straight—were actively involved in such protest. Students sat in administration offices, protested on the school’s manicured lawns, signed petitions, debated professors, and challenged classmates. They also formed organizations such as the Coalition for Civil Rights, of which I was once co-chair, that were focused on change. We took seriously Professor Bell’s challenge to us and the example of earlier generations of students, like those who, in the 1980’s, responded to Professor Bell’s departure for the Oregon deanship by organizing their own race course, rather than acquiescing in the administration’s continued refusal to diversify its faculty and decision to have Jack

²⁰ *Id.*

²¹ Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

²² DERRICK A. BELL, JR., *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* (1987).

²³ DERRICK A. BELL, JR., *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* (1992).

²⁴ DERRICK A. BELL, JR., *CONFRONTING AUTHORITY: REFLECTIONS OF AN ARDENT PROTESTER* (1995).

²⁵ See, e.g., David Fontana, *The Postradical Legal Generation*, CHRON. REV. (May 19, 2010), available at <http://chronicle.com/article/The-Postradical-Legal/65623/>.

²⁶ Tom Cohen, *Obama’s Harvard Law Professor Challenges U.S. Racism*, CNN (Mar. 9, 2012), available at <http://www.cnn.com/2012/03/09/election/2012/derrick-bell-profile/index.html> (discussing conservatives who characterize Bell as a “radical academic with an anti-white message” and Obama’s association with him proves that Obama supports racism).

Greenberg, a white civil rights attorney and former head of the NAACP Legal Defense and Educational Fund, teach the course in Bell's absence.²⁷

In the essay mentioned above, Bell turned to the U.S. Supreme Court's landmark 1954 decision in *Brown v. Board of Education*.²⁸ He pointed to the victory secured in that case in underscoring the need for lawyers to "have the courage to apply conscience":²⁹

That case served as a signal to all Americans that the ideals of equality and educational opportunity must not be simply preached on the Fourth of July, but should be practiced throughout the year. It was a great decision because it was right. But, more importantly because the Court, one of our major institutions, placed itself at substantial risk to proclaim that truth. The Court's decision has not eliminated injustice, racial or otherwise, but the signal conveyed by that historic decision has moved this nation closer to that goal than many thought would ever be possible.³⁰

Perhaps without even realizing that, the scores of students who, in ways big and small, helped to support Professor Bell's protest leave and push for greater diversity on the faculty had thoroughly internalized this insight. We understood the power of practicing conscience and of Professor Bell's legacy of teaching.³¹ Consequently, Bell's protest was more than the one-day news story many arguably thought it would be. It continued long after he left, ensuring that open discourse about race and the need for diversity in institutions of higher education would be ongoing.

III. TEACHING JUSTICE

In my view, it is no accident that so many of the students involved in campus activism in the 1980's and 1990's, went on to become law professors themselves. From my generation of students, those who have been involved in legal and, in many cases, writing about issues of race and equality, include: Michelle Adams, Muneer Ahmad, Sameer Ashar, Rick Banks, Elise Boddie, Christopher Bracey, Carmia Caesar, Devon Carbado, Jeremi Duru, Roger and Lisa Fairfax, Zanita Fenton, Jennifer Gordon, Mitu Gulati, Renee Jones, Njeri Mathis, Spencer Overton, Kimberly Robinson, Russell Robinson, Leticia Saucedo, Brad Sears, Peggie Smith, Chantal Thomas, and Ronald Sullivan. For those of us now on law school faculties or who have otherwise been involved in teaching in some way, the challenge is to find ways to motivate our students to be "practitioners of conscience" in the same way that Professor Bell inspired us to take up this role.³² We do this through our scholarship, which often builds on the foundation created by Bell's work: by mentoring students, through service in community groups or in law school administrative positions that place us, somewhat ironically, in the position of decision-makers, and, of course, through our teaching.

Since 2005, I have taught the first-year Civil Procedure course at my institution, Fordham Law School. The course provides an opportunity to introduce students to the rules and legal doctrines that help shape our federal system of civil litigation. As Professor Bell no doubt also appreciated, however, the course presents a unique chance to teach students just beginning their legal careers about much more

²⁷ See Richard Delgado, *Liberal McCarthyism and the Origins of Critical Race Theory*, 94 IOWA L. REV. 1505, 1511–13 (2009); Kimberlé Williams Crenshaw, *The First Decade: Critical Reflections, or "A Foot in the Closing Door,"* 49 UCLA L. REV. 1343, 1344–55 (2002).

²⁸ 347 U.S. 483 (1954).

²⁹ Bell, *Humanity in Legal Education*, *supra* note 4, at 244.

³⁰ *Id.* at 247.

³¹ *Id.* at 244.

³² *Id.* at 244.

than the Federal Rules of Civil Procedure or doctrines such as *res judicata* or collateral estoppel. The course is one that lends itself quite readily to discussions about justice and conscience.

Before entering legal academia, I had the opportunity to work with another legal giant and civil rights advocate who recently passed, my dear friend and mentor John Payton, who, at the time of his death a few weeks ago, served as President and Director-Counsel of the NAACP Legal Defense and Educational Fund (“LDF”).³³ I worked closely with John on the litigation team that resulted in the United States Supreme Court’s 2003 decision in *Grutter v. Bollinger*,³⁴ which upheld the constitutionality of the University of Michigan Law School’s admission policy seeking to achieve broad diversity—including racial and ethnic diversity—in its student body.³⁵ Each year, I begin my Civil Procedure course by asking students to review the initial pleadings in that case. I want them to understand that, while the procedural rules to be covered over the semester might seem abstract at times, they have real, concrete effects on people, whether you talk about the particular litigants in the cases that we spend time discussing in class or, more generally, about the countless others affected by the judgments rendered in those cases.

Taking my inspiration from Professor Bell, I endeavor to engender deep knowledge of the rules and practical skills required for effective lawyering in my students, but also a sense of justice and, if you will, conscience. Consequently, in teaching a case such as *World-Wide Volkswagen Corp. v. Woodson*,³⁶ which helps to establish the limits under the Constitution’s Due Process Clause for exercising personal jurisdiction over a defendant, I focus on more than just the notion of purposeful availment that it articulates or the questions of fairness that it addresses.³⁷ I engage my class in a discussion about what these concepts meant for the Robinson family who first brought suit in that case. Mrs. Kay Robinson and her two children were badly burned when the gas tank of a car in which they were riding during a cross-country trip exploded.³⁸ For the Robinsons, the procedural rule adopted by the *World-Wide Volkswagen* Court has a very substantive effect; it essentially meant that they never received the kind of justice for which they had hoped.³⁹

In urging this focus on “the bottom,” on the people and narratives underlying judicial decisions, I do not suggest to my students that the result in *World-Wide Volkswagen* should necessarily have been different.⁴⁰ I hope to leave them with something more than the sense that just one case could have been decided differently. Instead, I want them to be aware that every case involves the Robinsons or someone like them, and that every situation is one in which questions about how best to do justice arises. So, I urge a focus on *Grutter* and on the Robinsons, and I take the time to discuss relevant legal scholarship, such as Professor Bell’s important 1976 Yale Law Journal article, *Serving Two Masters*, which discusses the ethical challenges facing civil rights lawyers representing clients in class action cases.⁴¹ In that article,

³³ See Dennis Hevesi, *John Payton, Lawyer Who Fought for Civil Rights, Dies at 65*, N.Y. TIMES (Mar. 25, 2012), A26.

³⁴ 539 U.S. 306 (2003).

³⁵ *Id.*

³⁶ 444 U.S. 286 (1980).

³⁷ *Id.* at 297–99.

³⁸ *Id.* at 288.

³⁹ See JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE: CASES AND MATERIALS 114 n. 2 (10th ed. 2009) (citing Charles W. Adams, *World-Wide Volkswagen v. Woodson—The Rest of the Story*, 72 NEB. L. REV. 1122 (1993)).

⁴⁰ See Mari Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987).

⁴¹ Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976).

Professor Bell, an LDF veteran, argued that attorneys working for organizations such as LDF, which emphasized the goal of racial integration, faced an ethical challenge when representing black parents who might generally agree with such a goal, but who might prioritize better educational resources and outcomes for their children above the realization of that ideal.⁴² As Bell watched the fallout in Boston from white backlash to desegregation orders—along with black Harvard Law students who, like John Payton, had volunteered to help during this time—he realized that desegregation efforts arguably reflected two, sometimes competing, visions of justice.⁴³ Staying true to justice and one’s role as a lawyer, Bell teaches us, necessarily requires persistent acts of conscience, often in times of deep despair, personal sacrifice, and seeming defeat.

CONCLUSION

Last fall, I went to LDF’s yearly Airlie Conference and civil rights training to give a lecture on class actions and the ethical challenges that they present for civil rights attorneys. And I talked a great deal about Professor Derrick Bell’s legacy and the lessons that he delivered about justice and conscience. The colleague and I who jointly conducted the session had prepared it weeks in advance. We had no idea that, on the morning that we would actually deliver our presentation, we would learn that Derrick Bell had passed only hours before. The sadness about this news could be felt throughout the room, as we all reflected on what the loss of one more leader would mean. But one also had the sense that there was reason for hope, despite the terrible loss. Derrick’s legacy would continue. For in that room and around the country were generations of lawyers who had taken his lesson about conscience and justice to heart. To use my great-grandfather’s words, Derrick’s grave had been built long before that moment, and was being tended by scores of those he had taught, in person and through his example and scholarship.

⁴² *Id.* at 492–93.

⁴³ *Id.* at 512-16.