

2007

# The Paradox of Hierarchy - or Why We Always Choose the Tools of the Master's House

Zanita E. Fenton

*University of Miami School of Law*, [zfenton@law.miami.edu](mailto:zfenton@law.miami.edu)

Follow this and additional works at: [https://repository.law.miami.edu/fac\\_articles](https://repository.law.miami.edu/fac_articles)



Part of the [Legal Education Commons](#), and the [Legal Profession Commons](#)

---

## Recommended Citation

Zanita E. Fenton, *The Paradox of Hierarchy - or Why We Always Choose the Tools of the Master's House*, 31 *NYU. Rev. L. & Soc. Change* 627 (2007).

This Article is brought to you for free and open access by the Faculty and Deans at University of Miami School of Law Institutional Repository. It has been accepted for inclusion in Articles by an authorized administrator of University of Miami School of Law Institutional Repository. For more information, please contact [library@law.miami.edu](mailto:library@law.miami.edu).

# THE PARADOX OF HIERARCHY—OR WHY WE ALWAYS CHOOSE THE TOOLS OF THE MASTER’S HOUSE

ZANITA E. FENTON\*

*It is learning how to take our differences and make them strengths. For the master’s tools will never dismantle the master’s house. They may allow us temporarily to beat him at his own game, but they will never enable us to bring about genuine change.*<sup>1</sup>

Many of our students come to law school believing law is the vehicle through which they can accomplish beneficial social change. By the end of law school, many of these same students are completely disenchanting and disengaged, or entirely resigned to and submerged within the status quo. As Professor Pierre Schlag has observed, law students’ disenchantment is due in great measure to the way that law professors teach legal doctrine.<sup>2</sup> In my interpretation of Schlag’s description, teachers of law reaffirm hierarchy through reverence for the case method and the homogenizing/centralizing forms of thought it inspires<sup>3</sup> and, in a performative manner, entice students to enact a doctrinal world view.<sup>4</sup> Though this centralizing effect occurs through law teaching and legal doctrine, it is also reflected in general social norms.<sup>5</sup>

---

\* Professor of Law, University of Miami School of Law; A.B. Princeton University; J.D. Harvard Law School. I thank Ken Casebeer, Mary Coombs, Patrick Gudridge, Martha Mahoney, and Stephen Vladeck for their thoughtful comments and assistance on an early draft of this essay. I also thank Maria Grahn-Farley for organizing the Teaching from the Left conference and inviting me to participate alongside amazing teachers, scholars, and students of law.

1. AUDRE LORDE, *The Master’s Tools Will Never Dismantle the Master’s House*, in *SISTER OUTSIDER* 110, 112 (1984).

2. See generally Pierre Schlag, *The Anxiety of the Law Student at the Socratic Impasse—An Essay on Reductionism in Legal Education*, 31 N.Y.U. REV. L. & SOC. CHANGE 575 (2007) [hereinafter Schlag, *Anxiety*] (arguing that law professors indoctrinate students by corraling analysis and criticism within the boundaries of prevailing doctrinal frameworks).

3. *Id.* Schlag argues that legal education’s focus on case law inherently reaffirms hierarchy because “[in judicial opinions,] the moment of openness and imagination is in service of the moment of closure, not the other way around.” *Id.* at 576. This focus also implicates the hierarchy between formalism and anti-formalism and the other means of canon confirmation. *Id.* at 576–77.

4. Marinos Diamantides discusses Schlag’s assessment that the function of teaching law is “to produce a politics of centre.” Marinos Diamantides, *Hesitant Left*, 31 N.Y.U. REV. L. & SOC. CHANGE 605, 605 (2007). Diamantides examines Schlag’s focus on the *function* of the law, and contrasts Schlag’s approach with Adam Gearey’s acknowledgement of an existing *tradition* of the law and Gearey’s subsequent focus on confrontation with this tradition. *Id.* at 606–10, 614; Adam Gearey, *Anxiety and Affirmation: Critical Legal Studies and the Critical “Tradition(s)”*, 31 N.Y.U. REV. L. & SOC. CHANGE 585, 586–602 (2007).

5. One might ask, “Which came first?” This is, of course, the classic chicken-and-egg problem, which I have neither the time nor the desire to explore fully. We can easily concede that each is integral to the other.

Once law teachers have taught students the rules of the game and are reasonably comfortable that the students understand the rules, the next step ought to address how to get past the status quo in the quest for change. This next step represents an important goal for those of us who choose to teach from “the left.”<sup>6</sup> A standard question I hear from my students is, “What can be done?” I must provide answers, both from within the canon and through the use of examples from outside. In other words, for ourselves and as examples for our students, we need to think outside the box. Sometimes this means using the tools of legal analysis and the structure of doctrine to make change from within.<sup>7</sup> This may effect glacial reforms in the larger body of law generally, and, more significantly, it may effect change in social norms.<sup>8</sup> In some instances, however, it may produce no real change at all.<sup>9</sup> Sometimes, these challenges require us to find ways to alter the justice system from without. As a teacher of law, then, I find myself encouraging legal *and* social activism.<sup>10</sup>

I like to think of myself as an activist, but I am able to acknowledge that this characterization is not wholly accurate. After all, I primarily sit on my keister and use the podium and my pen.<sup>11</sup> But at the same time, I *do* encourage and direct my students to move beyond the status quo. Some of these students go out into the world to make an impact through active means; some find less direct but no less creative ways to fulfill their dreams of changing the world in big and small ways.

---

6. Putting “the left” in quotes acknowledges the task before us at this conference, but also refers to Schlag’s playful musings on the nature of such labels. See, e.g., Pierre Schlag, *A Reply—The Missing Portion*, 57 U. MIAMI L. REV. 1029 (2003) (flaunting legal academia’s labels). See generally Pierre Schlag, *Politics and Denial*, 22 CARDOZO L. REV. 1135 (2001) [hereinafter Schlag, *Politics*] (celebrating Duncan Kennedy’s ability to undermine traditional theoretical approaches). Joanne Conaghan addresses “the left” and the quotes that threaten to subsume it more explicitly in this volume. See Joanne Conaghan, *The Left: In Memoriam?*, 31 N.Y.U. REV. L. & SOC. CHANGE 455 (2007).

7. This brings to mind an old joke: “How many psychiatrists does it take to change a light bulb? Just one, but the light bulb has to want to change.” Though we are not explicitly discussing psychiatry, the general proposition concerning the light bulb still applies.

Seriously, though, see Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 648–65 (1983) (discussing the program and practice of deviationist doctrine).

8. See *infra* notes 40–41 and accompanying text.

9. See *id.*

10. There are myriad historic examples of activism, protest, conflict, and revolt that have precipitated major changes. Such examples include activities for civil rights and suffrage or even the American Revolution or other wars embarked upon for change within the United States.

11. See Zanita E. Fenton, *To Do Is to Be*, 9 CARDOZO WOMEN’S L.J. 431, 431–32 (2003). Writing is a form of activism. One of my personal “sheroes,” Ida B. Wells, exemplified this type of activism through her amazing courage and writings, despite threats to her personal safety and arson to her printing press. See IDA B. WELLS, *A RED RECORD* (1894), reprinted in *ON LYNCHINGS* 51 (William Loren Katz ed., 1991); IDA B. WELLS, *SOUTHERN HORRORS: LYNCH LAW IN ALL ITS PHASES* (1892), reprinted in *ON LYNCHINGS*, *supra*, at 7. For an account of Wells’s journalism, the attendant dangers, the threats to her life, and the mob attack that destroyed her printing press, see PATRICIA A. SCHECHTER, *IDA B. WELLS-BARNETT AND AMERICAN REFORM, 1880–1930*, at 23, 35, 78–79, 106 (2001).

Perhaps implicit in my support for the activist is an unending faith in the law as a vehicle for social change. I too have been raised in this system, and I am as susceptible to the seduction of hierarchy as anybody. Yet I recognize how the structures of power, which the law cultivates and nurtures, will support the status quo. This inertial force is the paradox of hierarchy.<sup>12</sup>

The paradox of hierarchy is that it strives to reaffirm itself, whether through law<sup>13</sup> or through other social structures of which the law is inevitably a part. The indicia of success (or the markers for equality, as the case may be) are established through the structures of power.<sup>14</sup> Someone not at the top of a relevant hierarchy has incentives to achieve or acquire the badges of success within that system. Even the quest, though much less than the achievement of the goal, reaffirms the power structures and hence the status quo. Thus, the elimination of hierarchy is nearly impossible.<sup>15</sup> Only those who have achieved (or embody)

12. In one adolescent mode of personal resistance to hierarchy, I had (and continue to have) the debate with myself as to whether and how I should cite Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy: A Polemic Against the System*, in *LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM, A CRITICAL EDITION 9* (N.Y. Univ. Press 2004) (1983). Duncan was one of my law professors, after all, and thus guided my quest to achieve an indicia of success in at least one hierarchical structure, legal scholarship. Some kind of “Antigone complex” interjects itself when I try to decide whether or not to cite his work. See generally CECILIA SJÖHOLM, *THE ANTIGONE COMPLEX: ETHICS AND THE INVENTION OF FEMININE DESIRE* (2004). In all Greek tragedies, however, especially those concerning the nature of hierarchy, such resistance is futile. And so is mine: his influence in my work presents itself, but it does so in subconscious ways. So I guess this means that I don’t have to cite this work . . .

13. Violence within the law’s text can reaffirm these hierarchies: “[L]aw erases its own doubts, negates its own inadequacies, denies its own internal instability. This is accomplished through acts of violence that destroy the various potentialities of law and transform it into an objective, stable, univocal, monistic self-representation.” PIERRE SCHLAG, *LAYING DOWN THE LAW: MYSTICISM, FETISHISM, AND THE AMERICAN LEGAL MIND* 12 (1996). See also Robert M. Cover, *Violence and the Word*, 95 *YALE L.J.* 1601, 1608–09 (1986) (discussing the threat of violence, via jail time or even death, that permeates the texts of court opinions); Zanita E. Fenton, *Mirrored Silence: Reflection on Judicial Complicity in Private Violence*, 78 *OR. L. REV.* 995 (1999) [hereinafter Fenton, *Mirrored Silence*] (discussing acts of violence, and even conditions of violence, that the law permits).

The structure of the law is invested in its own affirmation and continuation. However, the effort to reaffirm itself also suggests that the hierarchy’s self-reinforcing nature is precarious. That is, hierarchy is not a thing, but a dynamic.

14. See Anthony Paul Farley, *The Station*, in *AFTER THE STORM: BLACK INTELLECTUALS EXPLORE THE MEANING OF HURRICANE KATRINA* 147, 148 (David Dante Troutt ed., 2006)

Hierarchy based on racial marking expressed itself as rape and then as the reproductive undoing of the already-fictional biology of racial difference that kept white over black. Hierarchy expressed itself as rape and forced reproduction, and forced reproduction meant whites who were not so white and blacks who were not so black.

*Id.*

15. Marxism notwithstanding. The intent of Marxist ideology is the elimination of hierarchy; at least as Marx saw it, Marxism aimed to eliminate both capitalism and the exploitation of workers. See generally Karl Marx, *MANIFESTO OF THE COMMUNIST PARTY* (1848), reprinted in HAROLD J. LASKI, *KARL MARX: AN ESSAY* (1933). Societies that have attempted to follow Marxist ideals have most often replaced gaping economic and class disparities with other sorts of privileges, such as political privileges. See generally MILOVAN DJILAS, *THE NEW CLASS: AN ANALYSIS OF THE COMMUNIST SYSTEM* (1957). Marx himself worried about this in his question,

hierarchical success have the power to change its contours, but these are the individuals with the greatest interest in maintaining the structures that ensure their success. This structure is “the Master’s house.”

With the nature of hierarchy being what it is, teachers on the left have two options: burn the house down (revolution) or remodel the house from within (activism).<sup>16</sup> In the following pages, I will first demonstrate how this paradox is reaffirmed through law teaching, and then I will show how the law itself reaffirms hierarchy in the example of education doctrine.

#### TEACHING LAW

The law and law teaching are both replete with hierarchy. This paradox is especially poignant for our students on the margins—and I don’t mean marginal students. Anyone who has struggled to fit into normative expectations, who has attempted to be part of traditional hierarchies, is on the edge of at least one hierarchy.<sup>17</sup>

In addition, teaching from the left as someone from the margins can be complex. To be specific, my identity as a Black woman law professor<sup>18</sup> affects my students’ perceptions of what and how I teach. My own social location demonstrates the complexity of competing hierarchies. All of us, based on our situational turns, choose to use certain means of stratification and to denounce others. It follows that, depending on the situation and perception of the teacher and her students, law classroom participants may accord more or less credence to the discussion of doctrine, insofar as doctrine is a representation of the normative and the traditional. Certain individuals, but not others, may be *expected* to teach outside of doctrine and to take on the challenges of activism.

When we take on that obligatory yet important task of imparting doctrine, we must not allow ourselves or our students to lose sight of the greater picture.<sup>19</sup> In the academic realm of jurisprudence, we cannot forget the lives of *real* people. Our students, who yearn for our guidance, want to have a *real* effect, don’t they? To change the world? To become lawyers who *help* people?<sup>20</sup> Or

---

“Who will educate the educators?” Karl Marx, *Theses on Feurbach* (1845), reprinted in THE MARX-ENGELS READER 143, 143–45 (Robert C. Tucker ed., 2d ed. 1978).

16. These two options are my suggested remedies for the “reductionist and homogenizing effect” of the law. Schlag, *Anxiety*, *supra* note 2, at 581.

17. As Rhonda Magee, Professor of Law at the University of San Francisco, points out: “Unless and until law schools change significantly, nontraditional students’ lived experiences in these institutions will be marred especially by heightened feelings of alienation and identity dissonance.” Rhonda V. Magee, *Legal Education and the Formation of Professional Identity: A Critical Spirituo-Humanistic—“Humanity Consciousness”—Perspective*, 31 N.Y.U. REV. L. & SOC. CHANGE 467, 475 (2007).

18. Or is it my identity as a law professor—one who happens to be a Black woman?

19. Losing sight of the big picture is easy to do when we rely on casebook abridgements of judicial opinions that focus only on doctrinal points and often omit references to background facts and social context.

20. Tatiana Flessas tells us that “it is necessary to emphasize the importance of insisting upon

have we succumbed to the need to be included, to be considered the norm—or, even better (or worse), the norm creator? Are we doomed to succumb to the seductions of hierarchy?<sup>21</sup>

When Professor Schlag discusses language and the aesthetics of law, I read it as a discussion of how legal norms and hierarchies are created. I agree with his description of this process. However, we all should strive to take the next step—to use language, and the meanings we ascribe to language, for their value and import to the lives of real people.<sup>22</sup> I challenge Schlag, and jurists from all schools of thought, to make experience<sup>23</sup> the indicator of truth and beauty.<sup>24</sup>

We must seek to defend more than just ideology. We must seek the perspective of the Other, from wherever our own social stance might be. We must support real autonomy and choice by accepting that others may know what is best for themselves. We must understand that choices which appear irrational from one's own perspective may in fact have rational underpinnings.<sup>25</sup>

As an example, consider the choices we make and the questions we pose<sup>26</sup>

the *capacity* to be human—to be civilized—in order to contemplate any capacity for political understanding.” Tatiana Flessas, *The Future Will Not Stop Escaping Us*, 31 N.Y.U. REV. L. & SOC. CHANGE 661, 667 (2007).

21. Schlag discusses the seduction of the process inherent to the structure of law and its self-affirmation. “There is a certain pleasure that many of us experience in working within the grids. It is the pleasure of making arguments that are either right or wrong, and if right, unassailable.” Pierre Schlag, *The Aesthetics of American Law*, 115 HARV. L. REV. 1047, 1059–60 (2002) [hereinafter Schlag, *Aesthetics*]. This is, of course, the same process and structure to which I refer in this Article.

That the law is sometimes fair and the activists occasionally win also contributes to the seductiveness of law. See, e.g., E. P. THOMPSON, *WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT* 258–69 (1975) (discussing the rule of law). We continue to use the law as a tool for social change because of the appearance or occasional reality of fairness.

22. So, while many of us live in resistance to the law through our teaching and writing, see Schlag, *Aesthetics*, *supra* note 21, at 1061, those who live in the realities of oppression also talk and live in resistance, however circumscribed.

23. See generally Fenton, *Mirrored Silence*, *supra* note 13. Schlag, however, writes: “I simply do not *experience* law as a coherent enterprise, though an important aspect of the enterprise is the representation of law as coherent.” Schlag, *Politics*, *supra* note 6, at 1144 (emphasis added). It may be unfair for me to use Schlag’s words in this manner, as I doubt his intention was to exclude *real* experience. Nonetheless, it is appropriate and exemplifies the manipulability of language.

24. Within my intended point is a playful potshot at Schlag’s *Aesthetics of American Law*. See Schlag, *Aesthetics*, *supra* note 21. However, Schlag does not mean aesthetics and beauty in the simplistic manner I put forth. He seeks more intellectual significance for these qualities. See generally Schlag, *Anxiety*, *supra* note 2 (examining the creation and identity of law for law’s own sake).

25. Take, for example, an abuse victim’s choice to stay in an abusive relationship. See SUSAN SCHECHTER, *WOMEN AND MALE VIOLENCE: THE VISIONS AND STRUGGLES OF THE BATTERED WOMEN’S MOVEMENT* 79 (1982) (“Don’t ask why she stayed; ask why he beat her.” (internal citations omitted)).

26. See Schlag, *Anxiety*, *supra* note 2, at 583–84 (pointing out the narrow questions we ask in teaching doctrine). In addition to revering the Supreme Court in our “indoctrinations,” we also use excerpted cases in the “case” method, which allows us to focus on dogma while ignoring the background story. *Id.* at 576–78.

when we teach *Roe v. Wade*<sup>27</sup> and *Planned Parenthood of Southeastern Pennsylvania v. Casey*.<sup>28</sup> What was the social history prior to *Roe* that precipitated the structure of the decision? In addition to discussions of the philosophical disagreements about when human life begins, are we also discussing wire hangers for the desperate or trips to Paris and therapeutic D&Cs<sup>29</sup> for wealthy women? What was the balance of equities underlying this structure? When we discuss *Casey*, do we only discuss the doctrinal turn to “undue burden,”<sup>30</sup> or do we also discuss how the permissible state strictures on abortion have the gravest effects for impoverished women,<sup>31</sup> most often women of color?<sup>32</sup> In addition to discussing state prerogatives for dictating restrictions, do we also discuss the individual woman’s burden of finding transportation or risking time away from work? Do we discuss emergency room abortions to obtain Medicare coverage?

---

27. 410 U.S. 113 (1973).

28. 505 U.S. 833 (1992). In *Casey*, Justices O’Connor, Kennedy, and Souter address comparisons between *Roe* and the overruling of *Plessy v. Ferguson*, 163 U.S. 537 (1896), in the first *Brown v. Board of Education* decision, 347 U.S. 483 (1954) [hereinafter *Brown I*]. 505 U.S. at 860–64. Justice O’Connor, as the opinion’s author, states that a terrible price would have been paid if *Plessy* had been upheld, but a terrible price would be paid if *Roe* were overruled. See *id.* at 863–64. She also makes the bold statement, in affirming *Roe*, that “[l]iberty finds no refuge in a jurisprudence of doubt.” *Casey*, 505 U.S. at 844. However, a jurisprudence of doubt was precisely the result of the *Casey* decision, and *Casey* demonstrates the precariousness of hierarchy in at least two ways. First, by accepting the various state restrictions placed on a woman’s right to terminate her pregnancy and curtailing the judicial review of such restrictions, the *Casey* Court effectively returns the realities of access to abortion to pre-*Roe* status for many women. See *infra* notes 29–31 and accompanying text. Second, the *Casey* Court’s comparisons to the repudiation of *Plessy* have been effectively belied in subsequent decisions concerning segregation in educational opportunity. See *infra* notes 41–49 and accompanying text.

29. “Dilation and curettage,” commonly called D&C, is a surgical procedure that removes tissue from the uterus. UNIV. OF MICH. HEALTH SYS., WOMEN’S HEALTH ADVISORY 2005.4: DILATION AND CURETTAGE (D&C) (2005), [http://www.med.umich.edu/1libr/wha/wha\\_therdc\\_crs.htm](http://www.med.umich.edu/1libr/wha/wha_therdc_crs.htm) (last visited Apr. 20, 2007). While it is used to perform abortions, D&C is also an elective procedure for diagnosing cancer, treating abnormal uterine bleeding, and removing excess tissue after miscarriage. *Id.*

30. *Casey*, 505 U.S. at 874.

31. Parental consent, informed consent, and twenty-four hour waiting periods are constitutionally valid regulations under *Casey*. See 505 U.S. at 881–901. Though the Court deemed these regulations to have no “undue burden” on a woman’s choice, *id.* at 883, 885, 886–87, the corollary impediments (requesting additional time away from work, or obtaining transportation to faraway locations) may be undue burdens. In addition, it may be impossible for impoverished individuals to find funds for a safe procedure. One legislative barrier is the Hyde Amendment, which prohibits the use of federal funds, through Medicaid or otherwise, for non-emergency abortion procedures. 42 U.S.C. § 1397ee(c)(1) (2006). Given the relevant limitations on access to safe abortions, there is a class of individuals who continue to deal with pre-*Roe* realities—specifically, back-alley wire-hanger abortions.

32. Rates of poverty in 2001 were approximately 23.1% for Blacks, 24.9% for Hispanics, and 7.9% for whites. URBAN INSTITUTE, FAST FACTS ON WELFARE POLICY, <http://www.urban.org/UploadedPDF/900703.pdf> (last visited Apr. 20, 2007). Current minority populations each represent less than thirteen percent of the population. See U.S. CENSUS BUREAU, PROFILE OF GENERAL DEMOGRAPHIC CHARACTERISTICS: 2000, at 1 (2001), available at <http://www.census.gov/prod/cen2000/dp1/2khus.pdf> (showing population breakdown by race, sex, and age).

Are we as consistent in discussing social context, history, and consequences in these cases as we are in *Marbury v. Madison*<sup>33</sup> and the like?<sup>34</sup>

Constitutional law is supposed to have continuing relevance. Context assists in understanding its relevance and is that much more important when the issue is one of immediate controversy. For example, in March 2006, the Governor of South Dakota, Mike Rounds, signed a bill criminalizing practically all abortions.<sup>35</sup> The South Dakota ban rejected the “health of the mother” language that had long been used to limit access to second- and third-trimester abortions without running afoul of *Stenberg v. Carhart*,<sup>36</sup> much less *Casey* and *Roe*; the only exception in the South Dakota statute was “to prevent the death of a pregnant mother.”<sup>37</sup> It did not even include exceptions for rape or incest. Ultimately, voters rejected the proposed bill in the November elections.<sup>38</sup> Despite the ban’s electoral defeat, its mere presence provokes serious questions. If the ban had gone into effect, who would have reported crimes of rape and incest? For a woman unfortunate enough to be a victim of a sex crime, there would have been a counter-incentive for her to report the crime perpetrated against her.<sup>39</sup> Activists must worry.

Activists have always used test cases to alter the law using the law’s own logic. The state government of South Dakota, instead of following established law, promoted its challenge through the test-case method. This brings us back to the original proposition: the master’s tools will not give us a new place to live.<sup>40</sup>

33. 5 U.S. 137 (1803).

34. Though it is not a complete representation of how Constitutional Law courses are taught, nor do I wish to hold casebook editors solely responsible for the content of these courses, a sampling of some of the most frequently assigned texts is telling. For example, in ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW* 39–46 (2d ed. 2005), there is plenty of social and political backdrop for *Marbury v. Madison*; there is no social background or historical context for *Roe v. Wade*, *id.* at 117, 788–94. The same can be said for the text of KATHLEEN M. SULLIVAN & GERALD GUNTHER, *CONSTITUTIONAL LAW* 11–12, 15–18 (*Marbury*), 564–68 (*Roe*) (15th ed. 2004). I feel fortunate that the text from which I choose to teach my Con Law course, GEOFFREY R. STONE, LOUIS M. SEIDMAN, CASS R. SUNSTEIN, MARK V. TUSHNET & PAMELA S. KARLAN, *CONSTITUTIONAL LAW* (5th ed. 2005), has a short paragraph mentioning the public health consequences of illegal abortions and comparing rates of abortions before and after *Roe*. *Id.* at 867 (quoting LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 931 (1978)). Unfortunately, even this mention is minimal, especially in comparison to the treatment of *Marbury*. *Id.* at 36–42.

35. S.D. CODIFIED LAWS §§ 22-17-7 to -12 (2006) (repealed by referendum 2006). See Monica Davey, *South Dakota Bans Abortion, Setting Up a Battle*, N.Y. TIMES, Mar. 7, 2006, at A1.

36. 530 U.S. 914 (2000) (limiting permissible state restrictions on third-trimester abortions).

37. S.D. CODIFIED LAWS § 22-17-10 (2006) (repealed by referendum 2006).

38. Monica Davey, *South Dakotans Reject Sweeping Abortion Ban*, N.Y. TIMES, Mar. 8, 2006, at P8.

39. Rape is already a difficult crime for victims to report. The decision of whether to report a rape is certainly no less difficult than the decision of whether or not to terminate one’s pregnancy. Laws concerning the termination of pregnancy should not make the choice to report the rape or incest more difficult.

40. The biggest drawback of fighting within the law is that the methods activists create to change the law can become transparent and may be used by others to revert the law and society to



## AN EDUCATION ABOUT EDUCATION

Education is one of the best examples of how hierarchy reifies itself. I always find discussions of education or the education system in the United States fascinating. If you listen to politicians, pundits, and academics in almost every field, their rhetoric and associated platitudes are extraordinary. Everyone articulates the correct egalitarian ideal for all of “the nation’s children,” with the understanding that equality in educational opportunity would benefit society as a whole, whether it be in social progress or the gross national product. These same people, however, will do whatever is necessary to maintain hierarchies in education so that they and their own children will have the advantages necessary to be at the top of the food chain—and thereby gain entry into other forms of hierarchy. Make no mistake: no hierarchical structure exists on its own; each contributes to and reaffirms the others.<sup>41</sup>

We cannot speak of education without discussing *Brown v. Board of Education*.<sup>42</sup> *Brown* is an example of a situation where the law appeared to promote profound change, yet it simultaneously enabled a migration back to the original state of affairs.<sup>43</sup> Yes, I fully acknowledge the strides that have been made since de jure segregation; I am quite pleased that I do not have to sit at the back of the bus<sup>44</sup> and will be served at any lunch counter of my choice.<sup>45</sup> But I am also keenly aware of continued residential segregation<sup>46</sup> and of segregation

the status quo ex ante. Indeed, the precariousness of hierarchy, exemplified by the political battles over the legal landscape of abortion, is embodied in the tenuousness of both *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

41. Lefties, also vulnerable to the seductive nature of hierarchy, tend to have their pet position or cause, sometimes to the detriment of other leftist causes; this promotes a structure that allows for in-fighting. With the understanding that hierarchies reaffirm each other, such positions are counter-productive.

42. *Brown I*, 347 U.S. 483 (1954).

43. See CHARLES J. OGLETREE, JR., ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF CENTURY OF *BROWN V. BOARD OF EDUCATION* (2004), for a discussion of the delays in implementing the remedies for educational segregation and of the current state of continued segregation in education and difference in opportunity.

Once we have a case, indeed a Supreme Court decision, that abolishes legal segregation, we see the emergence of a “we took care of that” attitude—a belief that all is fixed. And even if everything is *not* fixed, the pervasive attitude tells us that the continuing problems are not legal problems, that these problems were not created by the law or legal systems, and that the problems may not even be the kind that can or should be fixed. See generally DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* (1992).

44. See *Browder v. Gayle*, 142 F. Supp. 707 (M.D. Ala. 1956) (holding that segregation on public buses violates the Equal Protection Clause of the Fourteenth Amendment), *aff’d*, 352 U.S. 903 (1956) (per curiam).

45. For accounts of the 1960s student protests against de jure segregation, see CLAYBORNE CARSON, IN *STRUGGLE: SNCC AND THE BLACK AWAKENING OF THE 1960S*, at 9–18 (1995); WILLIAM H. CHAFE, *CIVILITIES AND CIVIL RIGHTS: GREENSBORO, NORTH CAROLINA, AND THE BLACK STRUGGLE FOR FREEDOM* 82–119 (1980).

46. While there have been declines in residential segregation since 1980, “residential segregation was still higher for African Americans than for the other groups across all [segregation] measures. Hispanics or Latinos were generally the next most highly segregated,

in educational opportunity.<sup>47</sup> Overall levels of education that an individual may attain are predicated on relative wealth more than any other factor.<sup>48</sup> The strong association of poverty with race, in addition to the ills of classism and racism, makes the continuation of racial segregation a reality.<sup>49</sup>

*Grutter v. Bollinger*<sup>50</sup> and *Gratz v. Bollinger*,<sup>51</sup> celebrated cases in the area of higher education, address the extent to which affirmative action might continue in higher education. These cases, read together, present a contradiction: *Grutter* treats the skill of working within diverse settings as an essential value for leadership in graduate education,<sup>52</sup> yet *Gratz* appears to find diversity less

followed by Asian and Pacific Islanders, and then American Indians and Alaska Natives, across a majority of the measures.” JOHN ICELAND, DANIEL H. WEINBERG & ERIKA STEINMETZ, U.S. CENSUS BUREAU, RACIAL AND ETHNIC SEGREGATION IN THE UNITED STATES: 1980–2000, at 4 (2002), available at <http://www.census.gov/hhes/www/housing/resseseg/pdf/censr-3.pdf>.

47. See generally GARY ORFIELD & CHUNGMEI LEI, THE CIVIL RIGHTS PROJECT, WHY SEGREGATION MATTERS: POVERTY AND EDUCATIONAL INEQUALITY (2005), available at [http://www.civilrightsproject.harvard.edu/research/deseg/Why\\_Segreg\\_Matters.pdf](http://www.civilrightsproject.harvard.edu/research/deseg/Why_Segreg_Matters.pdf) (detailing the multi-dimensionality of segregation in education and its severe consequences).

48. See, e.g., Anthony P. Carnevale & Stephen J. Rose, *Socioeconomic Status, Race/Ethnicity, and Selective College Admissions*, in AMERICA'S UNTAPPED RESOURCE: LOW-INCOME STUDENTS IN HIGHER EDUCATION 101, 106 (Richard D. Kahlenberg ed., 2004). See also R. Richard Banks, *Meritocratic Values and Racial Outcomes: Defending Class-Based College Admissions*, 79 N.C. L. REV. 1029, 1068 (2001) (“[M]iddle class blacks hold dramatically less wealth than whites with comparable education and income,” and “[l]ow socioeconomic status whites, as measured by education and income, have a wealth-holding comparable to many middle class blacks.”); Deborah C. Malamud, *Affirmative Action, Diversity, and the Black Middle Class*, 68 U. COLO. L. REV. 939, 978 (1997) (“Black middle-class children do worse in school than (seemingly) similarly situated white middle-class children—which means that middle-class socioeconomic status is not as strong a predictor of educational success for blacks as it is for whites.”).

49. The remedies promised by the second *Brown v. Board of Education* decision run up against ongoing residential segregation and overwhelming class stratification. See *Brown v. Board of Education*, 349 U.S. 294, 300–01 (1955) [hereinafter *Brown II*] (directing lower courts to fashion and effectuate decrees that enforce *Brown I*'s “fundamental principle that racial discrimination in public education is unconstitutional”). The Supreme Court has since cut off potential paths to addressing these causes of continuing public school segregation. See *Milliken v. Bradley*, 418 U.S. 717 (1974) (refusing cross-district desegregation); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (holding that a system of local public school financing that produces school disparities is not unconstitutional). The doctrine established in *Milliken* and *Rodriguez* ensures the status quo of both educational racial segregation and class stratification.

The interaction of educational and residential segregation at play in *Milliken* and *Rodriguez* and the Court's reluctance to remedy ongoing disparities demonstrate the precariousness of hierarchy. See *supra* note 13. The *Brown* decisions' attempt to reverse or mitigate hierarchy became subject to societal factors and legal developments that limited their reach. See also DERRICK BELL, *SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM* (2004) (positing that had the focus of *Brown* been on requiring equality amongst schools regardless of racial composition, the overall quality of public school education would be better for all children).

50. 539 U.S. 306 (2003).

51. 539 U.S. 244 (2003).

52. See *Grutter*, 539 U.S. at 327–33 (deferring to the University of Michigan Law School's assessment that diversity will yield educational benefits); *id.* at 328 (holding that the law school “has a compelling interest in attaining a diverse student body”).

important in undergraduate educational settings, where greater numbers of people are educated.<sup>53</sup> In addition, *Grutter* supports the hierarchical status quo by according the greatest deference to important power structures in American society: corporate America and the United States military.<sup>54</sup> *Grutter* also diverts our attention from the continued segregation and barriers to opportunity that create the need for affirmative action in the first instance.<sup>55</sup> The Court's narrow focus allows us to ignore the need for affirmative action in the workplace;<sup>56</sup> instead, the presumption is that affirmative action in higher education will lead to opportunity in the workplace. The irony of the Court's reliance on this corollary is that workplace equality continues to lag.<sup>57</sup>

There are many examples I could discuss to demonstrate the role of law in perpetuating hierarchy and the status quo. I could talk about *United States v. Lopez*<sup>58</sup> and *United States v. Morrison*<sup>59</sup> as doctrinal turns which allow continuation of two different forms of domestic violence,<sup>60</sup> or how deference to

---

53. See *Gratz*, 539 U.S. at 270–71 (holding that the University of Michigan's undergraduate admissions program was not narrowly tailored to the state's interest in educational diversity).

Sheer numbers make undergraduate admissions a more involved process. More importantly, successful diversity in undergraduate education—as well as in high school, primary, and kindergarten educational settings—is essential for meaningful diversity in graduate education, and, more importantly, within other social arenas.

54. *Grutter*, 539 U.S. at 330–31 (citing Brief for 3M et al. as Amici Curiae 5, Brief for General Motors Corp. as Amicus Curiae 3–4, and Brief for Julius W. Becton, Jr., et al. as Amici Curiae 5).

Did the Supreme Court justices finally embrace the right method when they read and cited some of the amicus briefs (which numbered over one hundred)? One could suggest that, through these efforts, the Court gained a sense of its decisions' potential impact on real people.

55. See *supra* notes 47–49 and accompanying text.

56. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995), was cited multiple times in the opinions of *Grutter* for the proposition that strict scrutiny is required for racial classifications and for the proposition that affirmative action is only permissible to remedy previous discrimination. See *Grutter*, 539 U.S. at 326, 327, 334 (majority opinion); *id.* at 371 (Thomas, J., concurring in part, dissenting in part); *id.* at 379 (Rehnquist, J., dissenting); *id.* at 391 (Kennedy, J., dissenting). Despite this significant reliance on *Adarand*, however, the *Grutter* opinions did not comment on the continued viability of affirmative action in employment contexts. This is quite odd, considering that *Grutter*'s holding relied upon the development of leaders through education for the purpose of good business. See *supra* note 54 and accompanying text. In these opinions, it appears that diversity is only “relevant” for those with access to leadership positions in the workforce gained by higher education. So, once again, hierarchy is reaffirmed.

57. “White men are 98% of the CEOs and 95% of the top earners in the Fortune 500.” Press Release, Center for Work-Life Policy, Minority Professionals Sidelined by Hidden Bias (Oct. 27, 2005), <http://www.worklifepolicy.org/documents/Hidden%20Bias%20Press%20Release.pdf> (last visited Mar. 21, 2007). The overall earnings of Black men are only 76.8% of those of white men, while white women earn 74.1% and Black women earn only 66.0% of the overall earnings of white men. See BRUCE H. WEBSTER, JR. & ALEMAYEHU BISHAW, U.S. CENSUS BUREAU, INCOME, EARNINGS, AND POVERTY DATA FROM THE 2005 AMERICAN COMMUNITY SURVEY 10–11 & tbl.5 (2006), available at <http://www.census.gov/prod/2006pubs/acs-02.pdf>.

58. 514 U.S. 549 (1995).

59. 529 U.S. 598 (2000).

60. In *Morrison*, the Supreme Court could have given deference to the extensive Congressional record detailing the potential impact of the Violence Against Women Act on real

discretion in the case of police and state (in)action allows value judgments about the methods and identity of protected societal groups, most poignantly embodied by *Castle Rock v. Gonzalez*<sup>61</sup> and *DeShaney v. Winnebago County Department of Social Services*,<sup>62</sup> among others.<sup>63</sup> Ultimately, I wish to promote awareness and vigilance. Law might be the vehicle for meaningful change, but only if we are insistent.

I have two suggestions for breaking the paradox, for ourselves and for how we guide our students. First, always look beyond what you are handed and the expectable. Read between the lines. Be clear on the consequences for all. Second, when you find yourself at the top of the pyramid, when you have the power in a given situation, this is the most important time to challenge structures of hierarchy. While we need to look to the bottom to understand what needs to be done,<sup>64</sup> enduring change to hierarchy must be addressed from the top as well.

---

people who are powerless and in vulnerable positions. This extensive record was clearly created in response to the rhetoric of *Lopez*, an earlier decision dealing with a federal effort meant to address a different form of violence through gun control. Instead, the *Morrison* Court chose to continue down the path of limiting Congress's power under the Commerce Clause, by most accounts a doctrinal sea change.

61. 545 U.S. 748 (2005) (holding that the failure to enforce a domestic restraining order that resulted in the death of three minor children did not violate the Due Process Clause).

62. 489 U.S. 189 (1989) (holding that the failure of the state to protect a child from continued abuse of which the state had knowledge did not violate the Due Process Clause).

63. *DeShaney* and the more recent case of *Castle Rock* exemplify deference to police/executive discretion that allows differential protection. The case of *Whren v. United States*, 517 U.S. 806 (1996) (holding that pretextual traffic stops that disproportionately affect African-American drivers do not violate the Fourth Amendment), demonstrates how such discretion allows for value-laden differential enforcement.

Also see Phyllis Goldfarb's discussion of the history of death penalty cases: "The outline is clear. Throughout American history, from slavery to lynching to the death penalty, state violence has been most frequently and most harshly used for blacks believed to have harmed whites." Phyllis Goldfarb, *Pedagogy of the Suppressed: A Class on Race and the Death Penalty*, 31 N.Y.U. REV. L. & SOC. CHANGE 549, 556 (2007).

64. See generally Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987) (suggesting that we need to look to the bottom of existing power hierarchies to understand most clearly how such hierarchies need to change).