

# SEPARATING SUPPORT FROM BETRAYAL: EXAMINING THE INTERSECTIONS OF RACIALIZED LEGAL PEDAGOGY, ACADEMIC SUPPORT, AND SUBORDINATION

CHRIS K. IJIMA\*

*If we have learned anything at all, it has to be that power and politics are not separate or different from teaching. They are at the heart of it.<sup>1</sup>*

## PROLOGUE

When I was a beginning instructor in the New York University School of Law's Lawyering Program, its renowned Director, Professor Anthony Amsterdam, periodically gave teaching workshops to the entire Lawyering faculty. In one of the first workshops, as I was still struggling to decipher the volume of materials I was expected to digest (the detailed outlines of the exercises, the requirements of the various assignments, the comprehensive teaching notes, and the intricacies of the NYU personnel forms), he said something almost as an aside that nevertheless struck me as a revelation (Tony

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\* Assistant Professor of Law and Director of the Pre-Admission Program, William S. Richardson School of Law, University of Hawai'i-Manoa. I would like to thank the students in my spring 1998 Critical Race Theory course at Western New England College School of Law who gave me permission to use their reflection papers in this piece, my students in my Second Year Seminar class at the William S. Richardson School of Law, and my students who are with me in the Pre-Admission Program—all of whom allowed me the opportunity to talk about and explore issues that too often get paid little or no attention in law school, and from whom I learned a great deal.

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Finally, I want to acknowledge someone with whom I have never spoken, never corresponded, and never met—the late Professor Judy Weightman, the Director of the Pre-Admission Program at the William S. Richardson School of Law from 1988 until her untimely death in 1998. Professor Weightman left a rich legacy for me and the rest of the Pre-Admission students with her societal vision and always compassionate approach to the issues that face legal education. Because she was so busy with many important projects both inside and outside of the law school, she never systematically recorded her approach to the Pre-Admission Program. However, parts of her vision were recorded on various pieces of paper found in her office and files, and most importantly, the results of her vision are found in the lives, successes, and memories of the many Pre-Admission students and alumni who had the great fortune of studying with her. The Pre-Admission Program and the law school miss her greatly, and her work at the law school has provided the inspiration for this piece.

1. LOUISE HARMON & DEBORAH POST, *CULTIVATING INTELLIGENCE: POWER, LAW, AND THE POLITICS OF TEACHING* 202 (1996).

used to refer to these epiphanies as “the shock of recognition”). As he was explaining the pedagogic focus of the first fall writing assignment, he contended that ideally no case should be taught to a student without the student first asking him or herself the question, “Who am I?” He asserted that it was only from the perspective of the lawyer’s context—i.e., the particular interest of the client, the stage of the litigation, the jurisdiction of the court, etc.—that a student could appreciate the real meaning of the authority. It dawned on me then, that I had certainly never learned the “who” of legal analysis in my first critical year of law school when I was supposed to learn how to “think like a lawyer.”

Later, after I had left the NYU Lawyering Program to teach at Western New England College School of Law, I was given the opportunity to teach a course on Critical Race Theory. I asked my students periodically to write “reflection papers”—essays expressing their personal thoughts about what we had been discussing or reading in the previous class.<sup>2</sup> One of my students wrote in her first paper:

When I told my favorite undergraduate professor that I intended to pursue a law degree, I could not understand the look of concern that clouded his expression. During [Critical Race] class on Friday, I finally realized his concern. Professor Engel was concerned that I would lose my spark and would quietly accept every “neutral, legally correct” principle that passed my way. He did not believe that . . . law school would hone my analytic abilities so that I could continue to challenge; he assumed that I would get lost in the “neutral” principles.

Professor Engel was one of my favorite political science professors because he always challenged viewpoints. . . . This necessarily involved delving into where we obtain our beliefs and values and why we hold them dear.

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Ultimately, Professor Engel taught me a great deal about myself. In the end, I realized the personal is political. Law is not immune to this fact. The law is what the majority (in every sense of the word) says it is, and it carries with it the assumptions of the majority. Thanks to Professor Engel, however, I am usually able to see the assumptions behind the so-called neutral principles. Many times during the first year I found myself questioning the reasoning of the opinions I read. Yes, I admit that I acquiesced to these principles in order to do well on exams,

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2. This was an assignment to which I had been introduced by Professor Paulette Caldwell who graciously allowed me to audit her class at New York University School of Law when I was an instructor in the Lawyering Program there. Although Professor Caldwell’s class was the first time I had experienced the technique, the methodology has been first attributed to others such as Professors Patricia Cain, Derrick Bell, and Charles Lawrence. See Frances Ansley, *Starting with the Students: Lessons from Popular Education*, 4 S. CAL. REV. L. & WOMEN’S STUD. 7, 19 n.26 (1994).

but I have not lost my ability to question the assumptions from which they flow. I enrolled in Critical Race Theory hoping that I would finally be in a class where these assumptions could and would be challenged. Our first class left me with this thought, "I can't wait to tell Professor Engel."

#### INTRODUCTION

Professor Mari Matsuda once observed that it was the mediocre law students who tried to make law co-extensive with reality, and it was the law students who were able to detach themselves and see it "as a system that makes sense only from a particular viewpoint," that excelled.<sup>3</sup> It follows, then, that in order for students to observe from a particular vantage point, they must first acknowledge and value where they are presently standing. Thus, as I mature as a law teacher, engaged in my own existential, personal, and professional searches for who I am, part of that journey has also become a search in the pedagogy of my profession for some indication that we collectively are concerned about where each of our student's "who" is.<sup>4</sup>

The need for recognizing the importance of teaching within a larger societal and professional context is multileveled. It is an analytic and methodological concern (Tony Amsterdam's reference to the advocate's context). Further, perhaps more importantly, we have a responsibility to teach legal analysis with reference to the larger societal context. That is, we should try to give students a better understanding of what law is, and whose interests and what values it may serve. If we would put what we teach in a better context, we would teach better. If we could teach better, we could ultimately train more competent and compassionate lawyers.<sup>5</sup>

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3. Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 14 *WOMEN'S RTS. L. REP.* 297, 299 (1992). Law school promotes an internalization of "detached cynicism" as a value in which legal issues are depersonalized and detached from questions of justice. Catharine Pierce Wells, *American Association of Law Schools Symposium: Bringing Values and Perspectives Back into the Law School Classroom: Practical Ideas for Teachers*, 4 *S. CAL. REV. L. & WOMEN'S STUD.* 1, 2 (1994) (quoting Robert Granfield, *Constructing Professional Boundaries in Law School: Reactions of Students and Implications for Teachers*, *S. CAL. REV. L. & WOMEN'S STUD.* 53, 68-69 (1994)). On the other hand, "who we are and what we care about is inextricably intertwined with where we come from, what we know and how we are educated." *Id.* at 6. The experience of legal education is too often "disheartening and disempowering," and the belief that lawyers can lead lives that are "socially useful and personally fulfilling" too often gets lost while acquiring a law school education. *Id.*

4. "Between law teacher and law student there is a silent conspiracy to preserve . . . 'the taboo against knowing who you are.'" Paul N. Savoy, *Toward a New Politics of Legal Education*, 79 *YALE L. J.* 444, 456 (1970) (quoting ALAN WATTS, *THE BOOK* (1967)).

5. This is not only a question for American legal educators. As Professor Mark Levin observes in his essay discussing legal education in Japan, the responsibility of all educators is to "consider our students' futures" and assess what "knowledge skills, and abilities" they must have

Moreover, for those engaged in providing academic support for those students “at risk,” traditional law school pedagogy, particularly as it manifests in most first year curricula, presents an educational and professional dilemma. The mission to help students excel in the narrow confines of law school may be fundamentally at odds with helping students truly understand and appreciate their potential as students of the law, as future lawyers, as members of their communities of color, and ultimately as citizens of the nation and world. Indeed, if the goal of legal academic support programs is simply to “retool” students so that they “fit” within the confines of what traditional legal academia deems to be important and valid, it may exacerbate the very exclusion that many people of color and other marginalized groups feel from law school and the law itself.<sup>6</sup>

It is critical to emphasize at the outset that I do not equate the populations of the academically “at risk” with law students of color or any other subordinated population, or that each individual student of color reacts to law school in the same way that all others do. Indeed, part of the problem for many law students of color is the stereotype that confronts them about their lack of “belonging” in both the academic as well as the social setting of law school. Rather, my purpose is to explore how legal academic support programs (“ASPs”) might help address the pedagogical premises and problems that affect all students—male and female, white and nonwhite, straight and gay—such that the disadvantages under which

to not only become professionally competent, but also to “help . . . society blossom as we move in and through the twenty-first century.” Mark Levin, *Legal Education for the Next Generation: Ideas from America*, Hokkaido University Faculty of Law 50th Anniversary Essay Compendium (March 1999) (English translation on file with the author) at 17.

6. Sarah Berger et al., *Hey! There's Ladies Here!!!*, 73 N.Y.U. L. REV. 1022, 1029 (1998). The authors describe the phenomenon of “Quantitative Diversity” in which “inclusion is meant to be quantitative only; diversification is imagined as occurring without making a *qualitative* difference in the newly diversified whole.” *Id.* at 1028 (emphasis added). The authors continue:

In a setting in which Quantitative Diversity holds sway, people typically begin to recognize cultural difference—often as a result of tension or conflict. When this happens, majority group members in positions of authority cite difference as a cause for concern, and respond with efforts to “retool” newcomers so that they can be assimilated or “fit in.” The aim is to make Quantitative Diversity work smoothly and comfortably. The newly admitted group is the object of the retooling effort. Its members are seen as either assimilating to majority norms or resisting dominant ethos.

*Id.* at 1029.

Professor Kathryn Stanchi observes that while “outsiders” (i.e., she defines as “those traditionally excluded from the creation and practice of law”) can certainly succeed in the field of law and become fluent in its language, “to do so, they must assimilate.” Kathryn M. Stanchi, *Resistance Is Futile: How Legal Writing Pedagogy Contributes to the Law's Marginalization of Outsider Voices*, 103 DICK. L. REV. 7, 9 n.14, 21 n.83 (1998). For example, she notes that in a study of Temple University Law School students, after the first year women law students tended to “suppress their relational orientation and engage much more frequently in hierarchical, rights-based reasoning.” *Id.* (citing Sandra Janoff, *The Influence of Legal Education on Moral Reasoning*, 76 MINN. L. REV. 193, 238 (1991)).

some in the law school population work might be better understood and resolved. Moreover, I also want to make absolutely clear that I have known and continue to know many colleagues who teach brilliantly and humanely within the traditional style and canon, and from whom I have learned much about the law and about teaching. I do not advocate here discarding anything except the narrow views that (1) there is only one way to teach or understand law, and that (2) our society's dominant perspectives are privileged over others.

This Article will contend that it is the responsibility of ASPs and its professionals to do more than solely work with students to improve academic performance within the traditional parameters of law school education, or even to work as advocates to change how law is taught. The responsibility of ASPs is also, and most importantly, to be self-conscious critics of the normalized presumptions and biases that underlie much of the way law is taught and of the law itself.<sup>7</sup> In essence, the task of ASPs is to engage in an exploration and exposition about how the ideological and political intersect and influence the pedagogical. It is through this kind of project that the students whom we serve will be given both the tools to understand and excel within "the system," and to enable them to question and change the legal system itself which has historically helped subordinate and devalue the communities and people from which they come.<sup>8</sup> By engaging in this critical project, the ironic result will be that students' performance within the traditional pedagogy will be enhanced because they will have a clearer perspective about how to approach the material and clearer expectations and thus, be more engaged. Of course, this approach proceeds from the threshold understanding and belief that there are students who "are gripping the table in pain, as the racism, sexism, and homophobia of our world resonates through the classrooms in which they are trying to learn"<sup>9</sup>—and more

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7. I do not advocate this without a realization that those taking such positions within law academia may be exposed to some risk because ASPs and those who work in them are often marginalized or treated as afterthoughts in most law schools. See Kathy L. Cerminara, *Remembering Arthur: Some Suggestions for Law School Academic Support Programs*, 21 T. MARSHALL L. REV. 249, 250 (1996) (noting how ASPs are marginalized). However, failure to address, at least in some way, what I believe are the larger issues confronting many of our students may elevate professional self-preservation over our professional duty.

8. Natsu Saito Jenga, *Finding Our Voices, Teaching Our Truth: Reflections on Legal Pedagogy and Asian American Identity*, 3 ASIAN PAC. AM. L. J. 81 (1995):

Since the beginning moments of our nation, racism has been interwoven into our history and our institutions. This means that racism will not be eliminated without fundamental social restructuring and, conversely, that fundamental social change will not occur unless racism is addressed. The legal system is simultaneously an institution permeated by this racial stratification, a critical part of its perpetuation, and an avenue for social reconstruction. In teaching law, we do not simply convey a roadmap of the legal system; by training those who will be the system, we participate in and shape it as well.

*Id.* at 82-83 (footnotes omitted).

9. Stephanie M. Wildman, *Privilege and Liberalism in Legal Education: Teaching and Learning in a Diverse Environment*, 10 BERKELEY WOMEN'S L.J. 88, 97 (1995). In an effective

importantly, that we value them.

Part I will review the range of criticisms leveled at traditional legal education. I will focus primarily on those critiques that explore how the lack of a contextualized analysis of the law, the normalized assumptions inherent in the teaching of the law, and the social and political environment within law schools affect the academic performance of students of color and women. Part II will examine the evolving scholarship related to academic support for indications of whether ASPs in law schools reflect and/or address these concerns. In Part III, I will conclude with a few modest proposals about how ASPs could confront the issue of how traditional legal pedagogy contributes to the marginalization of certain law student populations without sacrificing—but rather enhancing—the success of our students within the confines of the traditional curriculum.

### I. THE BASIC CRITIQUES OF TRADITIONAL LEGAL PEDAGOGY

The traditional first year law curriculum has remained unchanged for decades. One commentator has characterized the core curriculum as standing “astoundingly unchanged and unexamined.”<sup>10</sup> It is essentially an exploration of

piece, Brian Owsley wrote about his experiences as an African-American law student at Columbia University School of Law. See Brian Owsley, *Black Ivy: An African-American Perspective on Law School*, 28 COLUM. HUM. RTS. L. REV. 501 (1997). He recounts that he and most of his fellow African American classmates, “never felt as if it was our law school”:

We were made to feel as interlopers in this precious experience who should be eternally grateful. Despite our credentials and academic records, some students still viewed us as thieves stealing a more qualified and talented white student’s rightful place. These views became apparent through passing comments and classroom discussions.

*Id.* at 515.

10. Frances Lee Ansley, *Race and the Core Curriculum in Legal Education*, 79 CAL. L. REV. 1511, 1515 (1991). Professor Ansley observes:

[L]egal education appears to have been isolated from trends in the rest of the academy in that the core curriculum remains unchanged in all its monumental splendor, its feet firmly planted in the first year curriculum. Despite profound changes in constitutional, statutory, and common law, staggering centralization and elaboration of the state and economy, the development of a new demographic profile in our student body and faculty, and radical alterations in the nature and practice of American lawyering, the basic core curriculum endures.

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[L]egal education is startling in its preservationism. Though occasional serious attempts to restructure law school requirements have been mounted in the past and although some provocative and interesting alternatives are presently being tried, the central courses have continued with remarkable similarity and remarkably little serious challenge.

*Id.* at 1515-16 (footnotes omitted).

For a brief overview of the scholarship that critiques traditional legal pedagogy, see Paula Lustbader, *Construction Sites, Building Types, and Bridging Gaps: A Cognitive Theory of the*

some or all of the following subjects in large survey courses: civil procedure, contracts, torts, criminal law, and property.<sup>11</sup> It is usually taught in the so-called “Socratic dialogue style” which has come to mean law professors calling upon individual students to articulate some aspect of an appellate opinion assigned for the day’s class. As the student discusses the case, the law professor gently, or not so gently, guides them through specific issues and analyses within the opinion that illuminate an aspect of applicable substantive legal doctrine.<sup>12</sup> There is generally no individualized feedback except at the end of the semester or year in which one final exam determines the students’ final grade for the course.<sup>13</sup> It

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*Learning Progression of Law Students*, 33 WILLAMETTE L. REV. 315, 315-22 (1997). Lustbader lists factors that may contribute to a student’s difficulties in law school such as isolation, alienation, cultural barriers, lack of gender and racial diversity, and a lack of concern for students’ learning processes. *See id.* While she makes incisive points about how academic support teachers must critique traditional legal pedagogy (*see infra* notes 159-61 and accompanying text), the bulk of this particular article discusses the “Learning Progression: a cognitive theory that explains the evolutionary learning process of law students” and its use as a tool in working with law students. *Id.* at 321.

11. *See* Mary Brigid McManamon, *The History of the Civil Procedure Course: A Study in Evolving Pedagogy*, 30 ARIZ. ST. L.J. 397, 399 (1998) (observing that the basic first year curriculum—civil procedure, torts, criminal law, contracts and property has been virtually unchanged since it was “heralded as Harvard’s new curriculum—in 1938”).

12. The traditional law school pedagogical model is from the approach pioneered by Christopher Columbus Langdell at Harvard Law School in the 1870s. *See, e.g.*, ALBERT J. HARNO, LEGAL EDUCATION IN THE UNITED STATES 53-60 (1953); *see also* David S. Clark, *Tracing the Roots of American Legal Education*, 51 RABELS ZEITSCHRIFT 313 (1987), *reprinted in* 1 THE HISTORY OF LEGAL EDUCATION IN THE UNITED STATES 495, 501 (Steve Sheppard ed. 1999). The Langdellian model consists generally of the case method (a concentration on the reading and analysis of case law), the so-called “Socratic” teaching style, and an end of the semester final exam. Cathaleen A. Roach, *A River Runs Through It: Tapping into the Informational Stream to Move Students from Isolation to Autonomy*, 36 ARIZ. L. REV. 667, 670 (1994); *see also* Ann L. Iijima, *Lessons Learned: Legal Education and Law Student Dysfunction*, 48 J. LEGAL EDUC. 524, 528 (1998) (noting that in the first year curriculum, “Socratic dialogue dominates law teaching methodology” (quoting Steven I. Friedland, *How We Teach: A Survey of Teaching Techniques in American Law Schools*, 20 SEATTLE U. L. REV. 1, 28 (1996))); Steve Sheppard, *An Introductory History of Law in the Lecture Hall*, 82 IOWA L. REV. 547 (1997), *reprinted in* 1 THE HISTORY OF LEGAL EDUCATION IN THE UNITED STATES, *supra*, at 7, 37 (stating that the casebook and the Socratic dialogue “are overwhelmingly the most popular devices” used in modern American law schools).

Professor Paul Savoy describes the Socratic method utilized today in law school classes as essentially a “set of games.” He describes them as: “Corner” (the professor drives the student into an intellectual corner); “One Up” (the professor is always able to “win” the “dialogue” by evasion or changing contexts); “The Chamber of Horror Gambit” (reducing the student’s argument to an absurd conclusion). Savoy, *supra* note 4, at 457-60.

13. In a tongue-in-cheek essay on the law school experience, Professor James D. Gordon, III, described the law school exam as follows:

Studies have shown that the best way to learn is to have frequent exams on small

is these first year grades that will have a disproportionately powerful impact on the students' eventual law careers for they will determine in profound ways the success of a student's law school career.<sup>14</sup>

### A. *The Critique of Inadequacy*

The immense importance of these grades would be justified if there was assurance that they reflected the acquisition of skills and values that were needed for the successful practice of law.<sup>15</sup> However, legal academia, as well as the practicing bar, has become increasingly uncomfortable about the fact that a student's successful performance within the traditional curriculum may not be a true marker for his or her legal competence or even preparation for professional success in the world outside of law school.<sup>16</sup> So profound was the general sense in the legal community that there was a disjunction between law practice and legal education that in 1989, the American Bar Association formed a task force composed of legal educators, practitioners, and members of the judiciary to study the state of legal education and to recommend improvements.<sup>17</sup>

However, the American Bar Association was certainly not the first to raise concerns about the state of legal education. Indeed, the Legal Realists of the 1930s—Jerome Frank, Karl Llewellyn, Leon Green—attacked “the heart of the Langdellian assumption that the case method was both practical and in the

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amounts of material and to receive lots of feedback from the teacher. Consequently, law school does none of this. Anyone can learn under ideal conditions; law school is supposed to be an intellectual challenge. Therefore, law professors give only one exam, the FINAL EXAM OF THE LIVING DEAD, and they give absolutely no feedback before then.

James D. Gordon, III, *How Not to Succeed in Law School*, 100 YALE L.J. 1679, 1692 (1991).

14. See Lani Guinier et al., *Becoming Gentlemen: Women's Experiences at One Ivy League Law School*, 143 U. PA. L. REV. 1, 89 n.243 (1994) (observing that law school examinations and grades determine major law school credentials such as dean's list, law review, honor fraternities, enrollment in specialized programs or classes, prestigious clerkships, and offers from elite firms (citing Steve H. Nickles, *Examining and Grading in American Law Schools*, 30 ARK. L. REV. 411, 411-12 (1977))).

15. See Deborah L. Rhode, *Missing Questions: Feminist Perspectives On Legal Education*, 45 STAN. L. REV. 1547, 1557 (1993) (noting that grading practices are calculated to rank students rather than instruct them). Moreover, law schools do not test what they teach. Roach, *supra* note 12, at 669. Professor Roach observed that often professors teach by the case method, but test by the problem method. See *id.* at 673.

16. See, e.g., Savoy, *supra* note 4, at 446 (describing the “unforgivable irrelevance of my legal education to what was happening in my head, in the courtroom, and in the streets of our cities”).

17. THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM (1992) (commonly known as the “MacCrate Report” after the task force's chairperson, Robert MacCrate, Esq.).



intellectual tradition of German scientism.”<sup>18</sup>

Contemporary critiques of legal education have been made from a number of different perspectives. Some commentators assert that the traditional law school curriculum does not address adequately or comprehensively the range of legal practice.<sup>19</sup> Indeed, they contend that the study of private law is emphasized to the exclusion of other areas of law.<sup>20</sup> Others have expressed concern with the lack of lawyering context in traditional legal education. As one commentator has articulated it:

What law schools actually concentrate on teaching for three years is, first, how to analyze legal doctrine by defining, contrasting, and systematizing the rules from appellate opinions and, second, how to construct policy arguments for opposing sides of cases. . . . Rather than enabling students to exercise these analytical skills in ways that replicate how lawyers actually use them in practice, they are generally taught as abstract casebook exercises devoid of any contextual reality.<sup>21</sup>

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18. ROBERT STEVENS, *LAW SCHOOL, LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S* 156 (1983). Stevens also states:

The major contribution of the Realist movement was to kill the Langdellian notion of law as an exact science, based upon the objectivity of black-letter rules. When it became acceptable to write about the law as it actually operated, legal rules could no longer be assumed to be value-free. This change inevitably caused the predictive value of doctrine to be seriously questioned. The vantage point of American legal scholarship was finally established as being process rather than substance.

*Id.*

19. See, e.g., Bob Gordon et al., *Legal Education Then and Now: Changing Patterns in Legal Training and the Relationship of Law Schools to the World Around Them*, 47 AM. U. L. REV. 747 (1998).

Put bluntly, at best, the contemporary law school looks at a ridiculously narrow range of legal practice, and even within that range presents almost no explicit theory about how those practices are accomplished. It acts as if law were a normative discipline that could be understood best from an internal perspective.

*Id.* at 755 (remarks of Professor John Henry Schlegel).

Of course, the Realists had similar criticisms decades before. Jerome Frank called upon law schools to become more practical and “repudiate the false dogmas of Langdell.” STEVENS, *supra* note 18, at 156-57 (quoting Jerome Frank).

20. See, e.g., Gordon et al., *supra* note 19, at 758 (“[T]here’s a kind of magnetic north that the needle keeps swinging back to; that is, of all the things that we could be teaching in legal education, why is it that so uniformly and continuously throughout the country, the curriculum centers so heavily . . . on the teaching of private law doctrine?”) (remarks of Professor Robert Gordon).

21. John S. Elson, *Why and How the Practicing Bar Must Rescue American Legal Education from the Misguided Priorities of American Legal Academia*, 64 TENN. L. REV. 1135, 1136 (1997). Even law schools’ priority on legal scholarship is misplaced because the social utility of “normative” legal scholarship (“scholarship that prescribes courses of action to resolve

Because the world of lawyering demands that lawyers be able to think in role, use cases and doctrine for specific ends in the service of their clients' interests, and be familiar with a repertoire of different problem solving approaches besides doctrinal analysis.<sup>22</sup> The law schools' three year emphasis on case analysis within discrete casebook defined courses poorly prepares students for the eventual world of practice.<sup>23</sup>

Professor Leslie Bender has articulated the hidden and fictitious messages of first year curriculum as follows:<sup>24</sup>

- (1) legal problems may be divided into seemingly fixed doctrinal categories;
- (2) particularized substantive content is to be emphasized over processes of reasoning, argumentation and law-making, classifications of legal thought more worthy of study than the values contained within it and abstraction more valuable than practical lawyering skills;
- (3) law focuses on "private disputes and litigation";<sup>25</sup>
- (4) since there is a "devotion to appellate cases"<sup>26</sup> in the traditional curriculum, the message given to new students is that attention to specific facts, contexts, and the people involved is nearly irrelevant, and that law is basically

controversial socio-legal issues") is small given that "the vast majority of law review articles are written for and read by legal academics." *Id.* at 1139-40. Indeed, given the criteria of how legal scholarship is evaluated for purposes of hiring, promotion, and tenure, it is clear that "actual social benefit [is irrelevant] to the enterprise of normative legal scholarship." *Id.* at 1141.

22. See *id.*; see also Ian Weinstein, *Lawyering in the State of Nature: Instinct and Automaticity in Legal Problem Solving*, 23 VT. L. REV. 1, 52 (1998) (asserting that lawyering is "a bundle of expertises each defined by their goals"). Weinstein observes that contrary to more traditional viewpoints, the focus on case book learning may be less rigorous than other approaches: "The traditional conception of thinking like a lawyer corresponds to an identifiable expertise—appellate lawyering . . . [but] the excessive focus on that expertise may be explained by the fact that as hard as doctrinal analysis is to learn, it is easier than manipulating both doctrine and facts at the same time." *Id.*

Lani Guinier suggests that if law schools fail to support alternative perspectives and approaches to learning, the legal profession may be denied "the advantages of creative tension, of innovative ideas, and of solving problems by merging information from diverse sources." Lani Guinier, *Lessons and Challenges of Becoming Gentlemen*, 24 N.Y.U. REV. L. & SOC. CHANGE 1, 13 (1998). Guinier theorizes that legal problem solving requires diverse perspectives and skills, "including the ability to listen as well as speak, to synthesize as well as categorize, and to think hard about nuance and context even when that slows down the decision-making process; insight, especially in team contexts, benefits from the integration of mainstream and marginal viewpoints." *Id.*

23. Elson, *supra* note 21, at 1141.

24. See Leslie Bender, *Hidden Messages in the Required First-Year Law School Curriculum*, 40 CLEV. ST. L. REV. 387 (1992).

25. *Id.* at 392.

26. *Id.*

“the search for abstract rules of law and governing principles”;<sup>27</sup>

(5) intellectual priority should be given “to doctrinal categories over processes of law, of change, and over practical skills. . . and that the core of what all lawyers should learn is mostly private common law regulating economic relationships”;<sup>28</sup>

(6) The reality of law is more about doctrine and less about “interactions among individuals in families, in neighborhoods, workplaces, schools, and communities; between groups of people, and between people and institutions. . . .”;<sup>29</sup> and finally,

(7) students “figure out come exam time, they will be asked about contracts, not justice; about torts, not truths; about constitutional doctrine, not substantive equality.”<sup>30</sup>

What law school training, therefore, neglects is in great part, “the dynamics of inevitably working *with* people.”<sup>31</sup> This dynamic happens in the context of “conflicting, uncertain, and unique situations,” the interaction of lay and professional, the influence of cultural and other forces on problem solving, as well as the impact of income and other power disparities.<sup>32</sup> In this way, law is better conceptualized as a multilayered activity, rather than a purely analytical

27. *Id.* at 393. As Professor Rhode puts it, “[t]hinking like a lawyer” is typically presented as the “functional equivalent of thinking like a law professor.” Rhode, *supra* note 15, at 1559. All legal thinking must be rational, distanced, and detached. *See id.*

28. Bender, *supra* note 24, at 393.

29. “What is troubling in the structure of law school pedagogy has much to do with what is troubling in lawyer-client relationships.” Rhode, *supra* note 15, at 1554. The authoritarian structure of law school and the dynamics of classroom settings offer a “disturbing paradigm” that is replicated in other legal relationships such as those between partner and associate, lawyer and client, professional and support staff. *Id.* at 1556. Law schools’ culture which focuses on analytic reasoning and competition over skills such as respect or empathy also ill prepares students for dealing with clients who may evaluate their satisfaction as much over how they were treated as how much they “won.” Martha M. Peters, *Bridging Troubled Waters: Academic Support’s Role in Teaching and Modeling “Helping” in Legal Education*, 31 U.S.F. L. REV. 861, 863-65 (1997).

30. Bender, *supra* note 24, at 394. The “individualist ethos of legal education is also in tension with the needs of legal practice,” which often requires cooperative process. Rhode, *supra* note 15, at 1557. As Professor Gerald Lopez points out:

Does anyone really expect legal education to seem any different. . . when the very appellate cases that it so regularly attends to are themselves so schematic, ungrounded, and bloodless? . . . In the legal culture the appellate court’s distance from the heat of conflict and from the pathology of failed ventures is hailed as a distinctive virtue—indeed as a principal source of a judge’s authority and the legal system’s legitimacy.

Gerald P. Lopez, *Training Future Lawyers to Work with the Politically and Socially Subordinated: Anti-Generic Legal Education*, 91 W. VA. L. REV. 305, 336 (1989).

31. Lopez, *supra* note 30, at 322.

32. *Id.*

endeavor.<sup>33</sup>

The lack of conceptualization of law practice as a multileveled activity affects the culture of the classroom as well. As Professor Deborah Post points out, the prevalent emotion of first year law students is fear:

[F]ear of arbitrariness, the fear of failure, the fear that ensures failure. They are angry and frustrated. They know that success means a splintering of self, a division into the professional and the personal to mirror the dichotomies that dominate the first-year curriculum—theoretical and practical, procedural and substantive, public and private law.<sup>34</sup>

Part of the indoctrination process that occurs during the first year of law school is an infantilization that begins immediately: attendance is taken, official excuses are necessary for absences, students are “called upon” rather than volunteer, leaving the room during class is discouraged. Even within the presentation of the subject matter itself, “hiding the ball” is an accepted teaching technique in which students are kept purposefully in the dark about substantive information. As one student puts it, the experience of law school “was like coming into a movie when it was half over.”<sup>35</sup> This is because, in reality, legal education “does not attempt to educate as much as it attempts to weed out students and to rank the students who remain.”<sup>36</sup> In sum, the law school environment and culture “encourages emotional dysfunction.”<sup>37</sup> According to a

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33. See Weinstein, *supra* note 22, at 7 (noting that clinical legal thought “analyzes law as an activity and attends closely to perspective (role) and context”) (footnotes omitted).

34. HARMON & POST, *supra* note 1, at 194.

35. *Id.* at 160. Professor Vernellia Randall describes the approach of traditional legal pedagogy as the equivalent of spending a semester teaching a student to play the piano by focusing most of the student’s attention on the analysis of sheet music, and at the end of the term having a piano rolled in to have student play a piece of music as the final exam. See Vernellia R. Randall, *The Myers-Briggs Type Indicator, First Year Law Students and Performance*, 26 CUMB. L. REV. 63, 65 n.3 (1995).

36. Randall, *supra* note 35, at 66.

37. Iijima, *supra* note 12, at 530. Law students are considerably more dysfunctional in almost all categories of psychiatric distress than the general public, become disproportionately dysfunctional soon after starting law school even if they were within normal psychological ranges upon entering, and experience increasing dysfunction as they progress through their legal education. See *id.* at 525-26; see also Roach, *supra* note 12, at 669 (stating that the Langdellian method promotes psychological and academic distress). Indeed, it is the “nontraditional students” who suffer disproportionately. *Id.* at 670.

In a moving and provocative article, Professor Calvin Pang points out that “the [legal] profession, at its core, faces a spiritual crisis that at least partly explains the unhappiness that marks a significant part of the profession.” Calvin G.C. Pang, *Eyeing the Circle: Finding a Place for Spirituality in a Law School Clinic*, 35 WILLAMETTE L. REV. 241, 248 (1999) (citations omitted). He urges that “[as] law students approach their entry into the profession, they should become aware not only of this crisis but receive guidance on how to survive it and even how to assist in its

study reviewing data on law school student levels of anxiety and depression:

law students almost always reported higher levels of anxiety than comparison groups, including medical students. In some cases, they report mean scores on anxiety measures that are comparable to psychiatric populations.<sup>38</sup>

When the data on law students' levels of depression are analyzed, the results are similar to that of anxiety.<sup>39</sup> There is some speculation that both the selection criteria for law school (certain qualities associated with depression and anxiety such as the need to "achieve"), as well as the socialization process at the law school (the law school environment) may interact to produce heightened psychological distress.<sup>40</sup>

Indeed, there is even evidence that the distress suffered by law students while in school foreshadows what lawyers experience after law school.<sup>41</sup> Indications that young lawyers are increasingly unhappy are mounting. One in four associates quit their first firm after two years and over two out of five are gone by the end of their third year.<sup>42</sup> Almost forty percent of 1988 graduates left after three years and more than forty-five percent of 1994 graduates quit.<sup>43</sup> Attrition at New York City firms averages twenty-five percent, with some firms having a firm-wide forty-one percent attrition rate.<sup>44</sup> This is despite surging starting salaries in New York and California near or above the six-figure mark.<sup>45</sup> Some critics blame this skyrocketing rate on law firm hierarchy's "antiquated thinking."<sup>46</sup> Thus, the lawyer's lack of training in dealing with people may not only affect the relationship with clients and adversaries, but with each other as well.<sup>47</sup> Incapable or unwilling to deal effectively with the problem, the response of many law firms is to deny the morale problems or simply throw more money

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dissipation." *Id.* Pang defines "spirituality" not as a particular religious orientation, but in the inclusive sense of it being the "better' or 'higher' part of us. It is the part of us that sets us searching for meaning and purpose of life, strives for transcending values, meaning, and experiences, and motivates the pursuit of virtues such as love, truth, and wisdom." *Id.* at 256-57.

38. Matthew M. Dammeyer & Narina Nunez, *Anxiety and Depression Among Law Students: Current Knowledge and Future Directions*, 23 *LAW & HUM. BEHAV.* 55, 63 (1999).

39. *See id.* at 67.

40. *See id.* at 70-71. The authors suggest that exploring the levels of psychological distress among law students is warranted due to the large number of lawyers and the powerful influence that they exert upon American society. *See id.* at 56.

41. *See id.*

42. *See* Debra Baker, *Cash-and-Carry Associates*, A.B.A. J., May 1999, at 40, 41 (quoting a National Association for Law Placement survey of associates hired between 1988 and 1996).

43. *See id.*

44. *See id.* (citing a *New York Law Journal* survey).

45. *See id.*

46. *Id.* at 42.

47. *See id.* at 43 (comparing the law firm understanding of people management to the treatment of "Dickensian factory workers").

at the problem by creating financial incentives for staying.<sup>48</sup>

### B. *The Critique of Subordination*

Perhaps most troubling is the fact that the narrow scope of legal pedagogy's focus works to the particular detriment of certain segments of the law school population.<sup>49</sup> As a result of the lack of fit between legal education and practice "a substantial proportion of law students—many, but by no means all of them, women students—experience frustration, or alienation, or both, because of law schools' failure to engage and develop the full range of intellectual capacities necessary to successful and responsible practice."<sup>50</sup> Thus, law schools often fail to develop "the multiple kinds of intelligence" that a diverse population brings to legal education because the hierarchical and competitive design "inhibits the academic and professional flowering of a large proportion of its students, [and] also reflects a counterproductive and all too narrow vision of what lawyers do."<sup>51</sup> This is so for at least two major reasons.

First, law schools are generally not diverse communities. Certainly, the population of law schools is notable for its lack of racial diversity. In 1995, only 13.1 % of full-time law teachers were racial minorities, and minority women suffered a "pervasive disadvantage" in the market for law faculty.<sup>52</sup> While 19.6% of law students were from racial minorities, this is still an overall underrepresentation because much of the growth reflects an increased enrollment of Asian Americans of 235%.<sup>53</sup> Thus, it should come as no surprise that the figures for racial composition in other sectors of the legal community reflect these statistics.<sup>54</sup>

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48. *See id.* at 43, 44.

49. *See, e.g.,* Berger et al., *supra* note 6.

50. *Id.* at 1025.

51. *Id.* at 1040 (citing and quoting LANI GUINIER ET AL., *BECOMING GENTLEMEN: WOMEN, LAW SCHOOL, AND INSTITUTIONAL CHANGE* 13 (1997)).

52. AMERICAN BAR ASSOCIATION COMMISSION ON OPPORTUNITIES FOR MINORITIES IN THE PROFESSION, *MILES TO GO: PROGRESS OF MINORITIES IN THE LEGAL PROFESSION* 11 (1998) [hereinafter ABA, *MILES TO GO*].

53. *See id.* at 1-2. However, given that statistic it is also interesting to note that despite the relative surge in Asian American law school admittees, "recent evidence suggests that law schools hire Asian Americans at a lower rate than other minority groups." *Id.* at 11. Moreover, since recent anti-affirmative action court decisions in the 5th Circuit, *Hopwood v. Texas*, 78 F.3d 932 (5th Cir.), *cert. denied*, 116 S. Ct. 2581 (1996)), and California's Board of Regents policy and a later ballot initiative, Proposition 209, all of which effectively banned any racial considerations in admission decisions, the law student admissions of African Americans for the major law public schools of California and Texas dropped by 80%, and 50% for Latinos applicants. *See* ABA, *MILES TO GO*, *supra* note 52, at 16-17.

54. In 1995, African Americans and Hispanics, for example, represented only 2% and 1.2%, respectively, of the lawyers at the largest firms. *See* Jacquelyn H. Slotkin, *An Institutional Commitment to Minorities and Diversity: The Evolution of a Law School Academic Support*

Second, traditional curriculum does not engage the full range of diverse intelligences because it fails to emphasize, and in some instances fails even to recognize, the fact that legal work is interactive “requiring narrative, interpersonal, intrapersonal, and strategic intelligences in equal measure with categorizing and deductive reasoning.”<sup>55</sup> Attention to developing these kinds of intelligences would lead to stressing fact sensitivity as much as rule sensitivity. Indeed, disregarding the policy implications of rule interpretations misses “an important means of influencing decisionmakers’ discretion,” and also yields “the responsibility for constructing legal culture that makes practice socially useful and morally fulfilling.”<sup>56</sup> Thus, real world lawyering involves much more intellectual capacity than the traditional law school classroom encompasses.<sup>57</sup>

With all the criticism of law school’s curriculum, the most damning are not those which criticize the distance between what is taught and what must be learned to practice competently and ethically; the most damning are those criticisms about how law teaching obfuscates what law “is” and how that obfuscation exacerbates the alienation of students of color and women from the study of law itself.<sup>58</sup> It is this dynamic that ultimately duplicates and perpetuates the same subordination these law school populations experience in the larger

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*Program*, 12 T.M. COOLEY L. REV. 559, 560 n.6 (1995) (citing Claudia MacLauchlan & Rita Henley Jensen, *Progress Glacial for Women, Minorities*, NAT’L L.J., Jan. 27, 1992, at 1, 31). Moreover, as of 1995, only about 1% of the more than 25,000 partners in the largest 251 firms in the nation were African American; 44 of them having no partners of color, and 61 of them having only one. *See id.* Racial minorities as a whole make up only 3% of partners at the 250 largest firms. *See* ABA, MILES TO GO, *supra* note 52, at 5. Among the 40,000 federal, state, and local judges only 3.3% are African-American, and 1% are Hispanic. *See id.* at 10.

55. Berger et al., *supra* note 6, at 1061.

56. *Id.*

57. *See id.* at 1061 (citing HARMON & POST, *supra* note 1). The authors point out that certain kinds of intelligence, i.e., logical and mathematical, are stereotypically associated with men while others such as inter and intrapersonal intelligences are associated with women. The latter intelligences are the ones neglected in law school pedagogy. Thus, the authors point out that it is important to balance and integrate different kinds of intelligence so that all can utilize different approaches to legal problems. While it is possible to learn to work comfortably nourished only within the intellectual domains of traditional law school pedagogy, the authors assert that it is preferable “to clear the air of intellectual bias and nourish all of the capacities that matter to well-rounded professional growth.” *Id.* at 1062-63.

58. It has been noted, for example, that even within the curriculum, women’s contributions to the growth of legal jurisprudence have been ignored. *See, e.g.*, Karin Mika, *Self-Reflection Within the Academy: The Absence of Women in Constitutional Jurisprudence*, 9 HASTINGS WOMEN’S L.J. 273, 303-04 (1998) (cataloguing the central role women have played in constitutional jurisprudence and noting how those contributions are often marginalized as worth studying only in courses separated from “mainstream legal study”). Owsley noted in his experience as a Columbia law student that blatantly racist comments written in judicial opinions were often considered irrelevant for classroom discussion, although they clearly were relevant to policy issues. *See* Owsley, *supra* note 9, at 522.

society.<sup>59</sup> In fact, the dynamic is reflected in the almost polar opposite views about law and its practice between white lawyers and lawyers of color.

A recent American Bar Association poll found that ninety-two percent of black lawyers believed that the justice system was equally or more racially biased than other segments of society.<sup>60</sup> Yet, more than forty-five percent of white lawyers thought there was less.<sup>61</sup> A minute percentage of black lawyers—less than three percent—either believed that there was very little racial bias in the justice system or had no opinion as compared to almost forty percent of white lawyers.<sup>62</sup>

In a seminal piece on legal pedagogy, Professors Lani Guinier, Michelle Fine, and Jane Balin observed:

The hierarchy within the large first-year Socratic class also includes a hierarchy of perspectives. Those who most identify with the institution, its faculty, its texts, and its individualistic perspectives experience little dissonance in the first year. On the other hand are students who import an ambivalent identification with the institution, who resist competitive, adversarial relationships, who do not see themselves in the faculty, who vacillate on the emotionally detached, “objective” perspectives inscribed as “law,” and who identify with the lives of persons who suffer from existing political arrangements. These students experience much dissonance.<sup>63</sup>

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59. Other segments of the student population experience alienation as well. See Scott N. Ihrig, *Sexual Orientation in Law School: Experiences of Gay, Lesbian, and Bisexual Law Students*, 14 *LAW & INEQ.* 555, 561-62 (1996) (“The absence of a GLB [Gay, Lesbian, or Bisexual] presence in classrooms and throughout law school injures the GLB community. It reinforces our societal invisibility and denies us the privilege of community.”); see also Jennifer Gerada Brown, “To Give Them Countenance”: *The Case for a Women’s Law School*, 22 *HARV. WOMEN’S L.J.* 1, 3 (1999) (proposing a law school for women “where they perceive themselves not as a foreign element” but as “full members of an institution dedicated to them”); Judith Fischer, *Portia Unbound: The Effects of a Supportive Law School Environment on Women and Minority Students*, 7 *U.C.L.A. WOMEN’S L.J.* 81 (1996) (discussing four law school studies at Yale, University of Pennsylvania Law School, Boalt Hall-University of California-Berkeley, and Ohio indicating women experienced great alienation in law school).

60. See Terry Carter, *Divided Justice*, *ABA J.*, Feb. 1999, at 42, 43.

61. See *id.* at 42.

62. See *id.*

63. Guinier et al., *supra* note 14, at 47. The authors note that law school creates the categories that the school then presumes to be sifting. We call this the process of “legitimation.” Those who identify with the norms and goals of the institution and perform accordingly are legitimated through institutional rewards. In turn, the institution is legitimated in its selection criteria by the very fact that these are always those who meet these criteria.

The legitimating process affects students in two ways. First, the institution attempts to legitimate its structural organization and values by formally presenting them to the



Gerald Lopez has observed that the values which the culture of law schools and legal pedagogy assume as a baseline are, in essence, narrow expressions of specific racial, gender, and class experience.<sup>64</sup> These values are ingrained and become self-referential due to the lack of inclusivity and diversity among law school faculties.<sup>65</sup> Thus, many students of color and women are forced to

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student as intrinsic components of “thinking like a lawyer.” Thus, the law school transmits the formal structure of the institution by preparing the student for hierarchical relationships (teacher-student is equated with partner-associate, judge-counsel, and lawyer-client) as well as by telling the student that acceptance of these relationships is necessary for effective lawyering.

Second, the student reciprocates in the process of legitimation by accepting the law school on its terms, including accepting as legitimate the system by which the law school evaluates and ranks its students. Implicitly, then, the student recognizes that the law school has the right to rank students, that the ranking must be correct, and that the ranking represents the student’s true ability to be a lawyer (at least in relation to the others in his class).

*Id.* at 69-70 (footnotes omitted). See also Duncan Kennedy, *Legal Education as Training for Hierarchy*, in *THE POLITICS OF LAW, A PROGRESSIVE CRITIQUE* 38 (David Kairys ed., 2d ed. 1990). Professor Kennedy asserts that students respond to the hidden messages of law school in different ways. See *id.* at 56. “They accept the system’s presentation of itself as largely neutral, as apolitical, meritocratic, instrumental, [and] a matter of craft,” and carve out a separate private life in which their own values become more central. *Id.* at 56-57.

According to Kennedy, legal education supports legal hierarchy by providing it with a legitimating ideology, and structures prospective lawyers into believing that legal hierarchy is inevitable. See *id.* at 56. Moreover, “[t]eachers teach nonsense when they persuade students that legal reasoning is distinct, *as a method for reaching correct results*, from ethical and political discourse in general” (i.e., from policy analysis). *Id.* “Put another way, everything taught, except the formal rules themselves and the argumentative techniques for manipulating them, is policy and nothing more.” *Id.* at 45.

64. Lopez states:

Indeed, in terms of what counts as knowledge, in terms of what’s valued as success, in terms of how to behave and advance, and in terms of what’s comfortable and familiar along the dimensions of race, gender and class, one could hardly find a better socializing experience for future business lawyers than law schools in this country.

Lopez, *supra* note 30, at 348.

65. Lopez observes:

Whatever else law schools may be, they remain intensely mainstream in terms of race, gender, and class; in terms of how authority is exercised; and in terms of what counts as wisdom and insight. Whatever else law schools may be, they are not where you go to learn about how the poor live, about how elderly cope, about how the disabled struggle, and about how single women of color raise their children in the midst of mediocre schools and inadequate social support. Most of those people never get near making it into law schools, let alone on to faculties. . . . [I]t has not been my experience that law school cultures or law students themselves value what subordinated people may

“retool” themselves to conform to the culture in order to attain the values and cultural outlook that law school and legal practice demand of its members.<sup>66</sup> Accordingly, there is agreement among many legal educators that law schools have failed in any attempt “to engage and educate diverse students democratically and critically about the practices and possibilities of law for all people.”<sup>67</sup>

The substantive dynamics of the classroom also have a severe impact on law students of color because the norm of objectivity creates a fiction that the dominant racial perspective is neutral.<sup>68</sup> Students of color are often forced to “stand apart from their history, their identity, and sometimes their own immediate circumstances and discuss issues without making reference to the reality that the ‘they’ or ‘them’ being discussed is from their perspective ‘we’ or ‘us.’”<sup>69</sup>

Students of color experience two contradictory phenomenon simultaneously. They experience “objectification,” the expectation that they adopt dominant white racial perspectives when discussing minority issues, and “subjectification,” the result when students of color express themselves referencing a different racial experience and it is assumed by their professors and classmates that these

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have to teach about the world from which they came or in which they now live. If anything, subordinated people feel pressures in and around law schools to act white, straight, upper-class, and male.

*Id.* at 353.

66. Guinier et al., *supra* note 14, at 59-60 (noting that many female students at the University of Pennsylvania School of Law where Professor Guinier was once a professor “become gentlemen” to the extent that they “aspire to ascend the status hierarchy without necessarily confronting its normative condition along the way” (quoting ROBERT GRANFIELD, *MAKING ELITE LAWYERS: VISIONS OF LAW AT HARVARD AND BEYOND* 108 (1992))).

Most of this paper is about a group of women at the Law School who cannot or do not want to “become gentlemen.” . . . The first group of women fails academically as well as personally. The second group of women succeeds academically. These are women who do “become gentlemen.” Within this category of successful women, there is also a subset who do well but feel alienated. This subset of women resents the sacrifices of self that law school requires them to make. These women perceive that law school is a “game.” These women learn the rules in order to play the game, but are acutely aware of the price they are paying.

*Id.* at 82.

67. *Id.* at 99 n.273 (quoting Michelle Fine) (stating further “[i]n the meantime, the price borne by women across colors is far too high and their critique far too powerful to dismiss. The question is not about women; it is about the political project of law schools, and the price women have to pay to become gentlemen.”); *see also* Taunya Lovell Banks, *Gender Bias in the Classroom*, 38 J. LEGAL EDUC. 137, 138 (1988) (observing that law schools expect women “to become more like men” in order to succeed).

68. *See* Kimberlé Williams Crenshaw, *Foreword: Toward a Race-Conscious Pedagogy in Legal Education*, 11 NAT’L BLACK L.J. 1, 2-3 (1989).

69. *Id.* at 3.

observations are not objective, but biased and self-interested opinions.<sup>70</sup> The only escape from these twin problems is when their experiences are deemed completely irrelevant to the discussion at which point there is a welcomed invisibility, but an invisibility that often leads to intense alienation.<sup>71</sup> As such, law students of color must often “unlearn patterns of disengagement and alienation.”<sup>72</sup> Furthermore, it is more than isolation in the classroom, it is

70. *Id.* at 3-9. Owsley describes his reaction as a Columbia law student as follows:

These discussions of race and diversity were occurring quite frequently, and I was somehow always involved in one. In all fairness, I would have to admit that it was a topic that interested and concerned me, so I was open to them on a certain level. Nonetheless, such discussions often caused me a lot of pain and anxiety. . . .

At times, I got so caught up in it all that I became overwhelmed.

Owsley, *supra* note 9, at 523.

71. See Crenshaw, *supra* note 68, at 3.

72. *Id.* at 13; see also Paula Gaber, “Just Trying to Be Human in This Place”: *The Legal Education of Twenty Women*, 10 YALE J.L. & FEMINISM 165 (1998). Gaber, inspired by an earlier piece written about the experiences of women at Yale Law School (Catherine Weiss & Louise Melling, *The Legal Education of Twenty Women*, 40 STAN. L. REV. 1299 (1988)), followed up the article ten years later. Sadly, she found that the alienation felt by women law students as originally documented by Weiss and Melling, had not changed in ten years. See Gaber, *supra*, at 249. They reported that women’s negative experiences in law school included disrespect from fellow students, feelings of isolation, unequal classroom participation, differential grading patterns, open sexual harassment of women students, and ethnic and racial stereotyping. See *id.* at 170 (citing the AMERICAN BAR ASSOCIATION COMMISSION ON WOMEN IN THE PROFESSION, *ELUSIVE EQUALITY: THE EXPERIENCES OF WOMEN IN LEGAL EDUCATION* (1996)).

It is worth noting that James Barr Ames, an early appointee of Langdell’s at Harvard Law School criticized what he saw as a lack of “virility” in the teaching of law before the Langdellian case method. STEVENS, *supra* note 18, at 54-55 (quoting HARVARD LAW SCHOOL ASSOCIATION, *CENTENNIAL HISTORY OF THE HARVARD LAW SCHOOL, 1817-1917*, at 130 (1918)). Stevens characterizes the Langdellian “scientific approach” toward legal analysis as a “Darwinian,” survival of the fittest and “machismo” pedagogical approach. *Id.* at 54. Ames is credited, along with Langdell and Charles Eliot the president of Harvard University during Langdell’s deanship, with creating Harvard’s influence among contemporary law schools:

Eliot provided the inspiration and “power in action,” Langdell was its first practitioner and therefore its symbol, and, finally, the talent and perhaps youthful enthusiasm of Ames helped to perfect and perpetuate the system. The case method fulfilled the latest requirements in modern education: it was “scientific,” practical, and somewhat Darwinian. It was based on the assumption of a unitary, principled system of objective doctrines that seemed or were made to seem to provide consistent responses. In theory, the case method was to produce mechanistic answers to legal questions; yet it managed to create an aura of the survival of the fittest.

*Id.* at 55 (footnotes omitted); see also Gaber, *supra*, at 165 n.3 (noting that an “underlying premise” in Victorian America’s legal consciousness was that law was a “masculine domain” (quoting Michael Grossberg, *Institutionalizing Masculinity: The Law as a Masculine Profession*, in *MEANINGS FOR MANHOOD: CONSTRUCTIONS OF MASCULINITY IN VICTORIAN AMERICA* 133, 134

also isolation from access to “pivotal survival information” such as outlines, study groups, mentoring from upperclass students that has severe academic consequences for many law students of color.<sup>73</sup>

However, the successful study of law requires a student’s engagement in his or her study.<sup>74</sup> For students to be engaged, a supportive atmosphere and the contributions of students from different socioeconomic and cultural backgrounds must be encouraged.<sup>75</sup> Often certain law students are not in the presence of professors from similar backgrounds, and thus they may question whether they can contribute to the profession. This may lead to a loss of confidence which, in turn, consumes energy and time and interferes with the concentration necessary for successful study.<sup>76</sup>

(Mark C. Carnes & Clyde Griffen eds. 1990))).

Not only was there a distinctly male cast to the 19th century approach to law, but a European one as well. Both Eliot and Ames were influenced by contemporary German educational practices and theories. See Clark, *supra* note 12, at 498-503. Under their influence, Harvard Law School “attempted to embrace a kind of Germanic ‘scientism’ while retaining an Anglophilic and Anglophonic facade.” *Id.* at 503 (quoting STEVENS, *supra* note 18, at 134).

73. Roach, *supra* note 12, at 674-76.

74. See Phyliss Craig-Taylor, *To Stand for the Whole: Pluralism and the Law School’s Professional Responsibility*, 15 NAT’L BLACK L.J. 1, 21 (1997). Isolation of students from the larger institution has profound academic, institutional, and psychological ramifications. See Roach, *supra* note 12, at 669. For example, studies have shown that women law students tend to receive grades below those which would be expected, given their entering credentials. See Brown, *supra* note 59, at 2 (citing LINDA F. WIGHTMAN, *WOMEN IN LEGAL EDUCATION: A COMPARISON OF THE LAW SCHOOL PERFORMANCE AND LAW SCHOOL EXPERIENCE OF WOMEN AND MEN* 16-27 (1996)).

75. See Craig-Taylor, *supra* note 74, at 21.

76. See *id.*; see also Elizabeth Mertz et al., *What Difference Does Difference Make? The Challenge for Legal Education*, 48 J. LEGAL EDUC. 1, 3-4, 74 (1998) (reporting on classroom dynamics in terms of race, gender, and school status in an observational study of eight law schools and finding that there was a correlation between the presence of a teacher of color and greater participation by students of color).

Professor Craig-Taylor also recommends that:

Determining which rules need to be changed in order to level the playing field is a complex process. . . . Constant assessment of resources for and impediments to creating pluralized faculty and student population must be undertaken. This type of assessment must take into consideration hiring practices, curriculum, course offerings, teaching methods, allocation of resources and decision-making, etc. Hopefully, ongoing assessment will help to reveal whether law schools are communicating less than positive messages to outsider groups regarding their value and place within the institution.

Craig-Taylor, *supra* note 74, at 23.

Professor Mertz suggests that “examination of the ways in which class size, teacher and student discourse styles, gender, race, and other factors interacted might yield some insight into how to create an encouraging and inclusive classroom environment.” Mertz, *supra*, at 76-77. There is some opinion that it is the use of the Socratic method which contributes to the silencing of women in law school. See Brown, *supra* note 59, at 12-14.

The marginalization of groups within the legal academy is not solely a function of interpersonal or classroom dynamics, but also exists explicitly and implicitly within the substantive curriculum. Professor Judith Greenberg argues that the prevalent, but fictitious and ultimately destructive, assumption that there is a colorblind legal system is replicated in traditional legal pedagogy:<sup>77</sup>

The curriculum, the teaching materials, and the common pedagogical techniques are all structured around the norm of whiteness that is rendered color-blind by the unstated assumption that African American students are fundamentally the same as white students. Race is addressed only through widespread silence. Deeply submerged and in opposition to this assertion of color blindness is the hidden message of the curriculum, materials, and techniques that African American students are inferior and dangerous to white students. These two messages exist simultaneously in the curriculum, in tension with each other.<sup>78</sup>

Thus, the goal of teaching students to “think like a lawyer” has implicit colorblind implications because the expectation is that race is irrelevant in terms of determining whether one is “thinking like a lawyer.” “The phrase ‘thinking like a lawyer’ has meant discovering the underlying scientific principles of the law—principles that are equally available to and supposedly have equal meaning for all students, regardless of race.”<sup>79</sup>

The message that race is irrelevant affects the structure and content of the law school curriculum. Just as colorblind legal jurisprudence contains hidden messages of white supremacy, so too does colorblind legal pedagogy, as has been pointed out by many legal scholars.<sup>80</sup> In a larger sense, the absence of a

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77. See Judith G. Greenberg, *Erasing Race from Legal Education*, 28 U. MICH. J.L. REFORM 51, 55 (1994) (“[The colorblind] ideal is premised on the assertion that race is irrelevant to individual identity. . . . [and] this norm can be expected to have a significant effect on the treatment of racial issues within law school.”); see also Wells, *supra* note 3, at 3 (“Too often, class discussions assume a white perspective and when this unstated assumption is combined with the equally unstated assumption of perspectivelessness, it does much to reinforce societal patterns of racial subordination.”).

78. Greenberg, *supra* note 77, at 55.

79. *Id.* at 68.

80. See *id.* at 75. Professor Greenberg points out:

[T]he discourse of color blindness supports a belief in law school as a meritocracy, while the discourse of deviance and danger leaves legal academics unsurprised when African American students fail. Second, the ideology of color blindness claims that decisions, including curricular decisions, should be made without reference to race. If African Americans are assumed to be the same as whites, then it is sufficient to discuss only whites in the classroom. Nothing would be added by discussing African Americans. The result is that legal education has needed to change very little to accommodate the presence of African Americans. The ideology of race-blind equality supports the maintenance of the status quo, as does the possibility of African American difference and inferiority. Neither of these discourses admits the possibility of

contextualized vision of how status intersects with the law and how the normalized racial and gender assumptions inherent in neutrality in actuality privileges some students over others.<sup>81</sup>

On the level of content and approach to the substantive material itself, Professor Frances Lee Ansley, among others, has described how substantive law areas, even within the core curriculum, are rich in racial implications but those overtones are rarely addressed or discussed in the traditional law classroom.<sup>82</sup> Moreover, the mere inclusion of racial, gender, or sexual orientation issues into the curriculum is not enough, but rather what is also necessary is the understanding and the acknowledgment of how these issues play out within the law, the society, and the classroom.<sup>83</sup>

It is against this context that ASPs must be considered. Indeed, to the extent that ASPs must deal with subordinated populations among law students, it is critical to address the more difficult gender and racial issues or risk exacerbating the very subordination that disadvantages many in the first instance.<sup>84</sup> While

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difference without inferiority.

*Id.* at 96. See also Neil Gotanda, *A Critique of "Our Constitution Is Colorblind,"* 44 STAN. L. REV. 1, 16 (stating that the nonrecognition of race fosters the "systematic denial of racial subordination" which ultimately perpetuates the subordination).

Professor Wildman observes, "The reality is that if we say race plays no part, then the invisible system of white privilege will inevitably continue." Wildman, *supra* note 9, at 91.

81. Professor Wildman observes legal liberalism's construction that all individuals are similarly situated and that absent unfair treatment, the notion of systemic privilege is left unacknowledged. See *id.* She notes that seeing privilege takes effort for those privileged since it is the norm. See *id.* Moreover, since "each of us lives at the juncture of privilege and subordination" analysis of it is a complex undertaking. *Id.* However, she concludes that teaching and learning in a diverse environment "requires awareness and honesty about systems of privilege." *Id.* at 92.

82. See Ansley, *supra* note 10, at 1521-37; see also Charles R. Calleros, *Training a Diverse Student Body for a Multicultural Society*, 8 LA RAZA L. J. 140, 147-55 (1995) (discussing ways to incorporate issues of diversity into the classroom).

83. See Wildman, *supra* note 9, at 89 ("We seek more than mere inclusion of race, gender, and sexual orientation in the law school curriculum. We seek understanding as well."). Even in the first year legal writing courses, the pedagogical emphasis on legal discourse "both reflects and perpetuates the biases in legal language and reasoning." Stanchi, *supra* note 6, at 20.

84. See Greenberg, *supra* note 77, at 51-55 (discussing the participation of minority law students in academic support programs). It has been suggested that one of the goals of ASPs is "to provide a supportive environment for, to enhance the sense of community among, to increase the information flow to, and thus improve the performance of, a group of students who have traditionally been at risk for underperformance." Cerminara, *supra* note 7, at 251. Indeed, the original impetus for academic support programs may have arisen "from the desire to improve the environment surrounding and performance of minority students." *Id.* at 252. Law students of color "have not achieved, in numbers proportionate to their percentage of law students, the traditional indicators of academic success" despite their diligent study habits. Pamela Edwards, *The Culture of Success: Improving the Academic Success Opportunities for Multicultural Students in Law*

ASPs have a potentially significant and positive role to play for students of color, the role has potential negative implications as well. It has been observed by Paulo Freire that:

All domination involves invasion—at times physical and overt, at times camouflaged, with the invader assuming the role of a helping friend. . . .

Cultural conquest leads to the cultural inauthenticity of those who are invaded; they begin to respond to the values, the standards, and the goals of the invaders. In their passion to dominate, to mold others to their patterns and their way of life, the invaders desire to know how those they have invaded apprehend reality—but only so they can dominate the latter more effectively. In cultural invasion it is essential that those who are invaded come to see their own reality with the outlook of the invaders rather than their own; for the more they mimic the invaders, the more stable the position of the latter becomes.<sup>85</sup>

Whether ASFs play the role of true “helping friends” or of “cultural conquerors in disguise” depends upon the articulation and implementation of our mission.<sup>86</sup>

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*School*, 31 NEW ENG. L. REV. 739, 739-40 (1997) (discussing a study by the Law School Admission Council, conducted by Linda F. Wightman, *Women in Legal Education: A Comparison of the Law School Performance and Law School Experiences of Women and Men*, LSAC RESEARCH REPORT SERIES (1996)).

85. PAULO FREIRE, *PEDAGOGY OF THE OPPRESSED* 150-51 (1970) [hereinafter FREIRE, *PEDAGOGY*]. Professor Kathryn Stanchi also sees the connection between the teaching of legal writing in the first year to the muting of “outsider” voices:

Indeed, because of the degree of cultural and ideological bias contained in the language of law, legal writing’s effectiveness in teaching that language is directly proportional to its effectiveness in muting outsider voices: the better legal writing is at teaching the language of law, the more effective it is at muting those individuals whose voices are not included in the language of law, and the more effective legal writing is at ensuring that those voices will continue not to be heard in the legal context.

Stanchi, *supra* note 6, at 20.

86. There is much historical precedent for the attempt to retool populations to conform to the dominant norm. The Indian boarding school system established by the federal government in the 1880s attempted to remove all traces of Native American culture. See Robert J. Miller & Maril Hazlett, *The “Drunken Indian”: Myth Distilled into Reality Through Federal Indian Alcohol Policy*, 28 ARIZ. ST. L.J. 223, 232 n.38 (1996). Children as young as five years old were taken from their parents, dressed in western style clothes, taught English and beaten if they spoke their own language. See *id.* Captain Richard H. Pratt, the superintendent of the Carlisle Indian Boarding School, is remembered for saying, “[A]ll the Indian there is in the race should be dead. Kill the Indian in him and save the man.” Carl G. Hakansson, *Allotment at Pine Ridge Reservation: Its Consequences and Alternative Remedies*, 73 N.D. L. REV. 231, 239 (1997) (quoting Richard H. Pratt, *The Advantages of Mingling Indians with Non-Indians*, in AMERICANIZING THE AMERICAN INDIANS 260-61 (Francis Paul Prucha ed., 1973)).

## II. THE RESPONSES OF PROPONENTS OF LEGAL ACADEMIC SUPPORT TO THE CRITIQUES

There is a growing presence within the legal academy of ASP services. In a recent conference held in 1997 at Pace University School of Law and hosted by the Law School Admissions Council, the official attendee list had over eighty law schools and educators represented from across the United States and Canada.<sup>87</sup> However, the recognition of the role of ASPs in both helping students simply achieve higher law school grades and helping them understand the nature and effect of law school pedagogy and culture upon them is not entirely clear from either the relevant literature or the orientation of these professional gatherings.<sup>88</sup> The lack of a clear distinction between the two orientations is more than just the acknowledgment of a casual disjunction. If one accepts the pervasive critique that traditional law school pedagogy is fundamentally flawed, then whatever role ASPs play in exacerbating that effect, particularly upon students from marginalized and subordinated populations, is troubling.

Generally speaking, there are two worldviews that have informed the practice of ASP professionals. There are those in the field who candidly and solely advocate that ASPs focus only on the academic performance of students.<sup>89</sup> According to this view, the point of ASPs is essentially to attempt to improve the learning skills of students in order to help them "cope" with law school.<sup>90</sup> The other general outlook is to look to learning theory to create techniques and approaches that either will (1) enhance the learning environment for students participating in ASPs themselves, and/or will (2) change the way that traditional

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87. See 1997 LSAC ACADEMIC ASSISTANCE TRAINING WORKSHOP MANUAL, Attendee List (on file with author).

88. In the interest of disclosure, I should point out here that I did not attend the 1997 LSAC Conference; therefore, it is highly conceivable, even probable, that issues of racial and gender subordination were discussed in many of the workshops. However, I noted that of the twenty-seven workshop topics listed in the manual for the conference, only three might be settings in which a consideration of the intersection of pedagogy and subordination might be explored in a substantive way ("Creating a Culture of Inclusion," "Strategies and Considerations for Empowering Students for the Classroom," and "ASP and the Legal Academy: Where Does ASP Fit Within the Institution?").

This is also not to say that these issues have not been discussed at other gatherings. See Paula Lustbader, *From Dreams to Reality: The Emerging Role of Law School Academic Support Programs*, 31 U.S.F. L. REV. 839, 844-46 (1997) (describing the emergence of ASP influence on numerous issues from 1992-97).

89. See, e.g., Kristine S. Knaplund & Richard H. Sander, *The Art and Science of Academic Support*, 45 J. LEGAL EDUC. 157, 159 (1995) (asserting that while some ASPs may be geared toward "the general well-being of minority students," the main goals are academic ones which "are supposed to help participating students catch up with their classmates and to equip them for success").

90. *Id.* at 161.



law school courses are taught. However, although both approaches deal with immediate issues confronting "at-risk" students, neither completely confronts other issues faced by many students of color both in the classroom and in the institution which can have devastating effects upon their academic performance.

### A. *The Assimilationist Approach*

Consistent with the former perspective is some acknowledgment of positive nonacademic effects of ASPs (more cohesive environment, congruence of academic achievement, greater retention and participation). However, the overall success of ASPs is to be evaluated by focusing on grades because "better grade performance is the single most important purpose of academic support . . . ."<sup>91</sup> In effect, under this approach, the successful ASP is the one which most effectively and efficiently "retools" law students to "cope" with traditional law school culture and its demands.<sup>92</sup>

Professor Ruta Stropus asserts that the point of ASPs is to "target 'at risk' students to help them to understand and master the Langdellian [casebook/Socratic] method."<sup>93</sup> Indeed, the purpose of ASPs' is to "empower students to succeed without disrupting the benefits bestowed by the Langdellian method. . . . The key lies not in abandoning the system, but in learning how to deal with it, understand it, and work within it."<sup>94</sup> According to Stropus, students must understand that "[a]lthough it is true that the Langdellian method derives its origins from white men, it is not true that only white males master the technique."<sup>95</sup> Thus, there is an express advocacy of an acceptance of the traditional pedagogy. Indeed, there is a celebration of it.

There is an obvious appeal to this approach. Good grades mean good jobs. The reason that there are academic support programs in the first instance is because some students are not able to achieve the level of expected performance necessary to excel or even to graduate. Indeed, one might argue that the point of law school is not to feel good about one's self, and perhaps unfortunately, few if any law students would forego the possibility of good grades for a chance at improved self-esteem. In essence, this approach is an acceptance of and a capitulation to the reality that it is a white, male-dominated world and to win one must play the game within the given rules. Nevertheless, there is little hard evidence that ASPs accomplish the limited goal of improving grades even within the confines of the traditional pedagogy.<sup>96</sup>

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91. *Id.* at 196.

92. *See, e.g.,* Ruta K. Stropus, *Mend It, Bend It, and Extend It: The Fate of Traditional Law School Methodology in the 21st Century*, 27 *LOY. U. CHI. L.J.* 449, 485-88 (1996).

93. *Id.* at 485 (footnotes omitted).

94. *Id.* at 488.

95. *Id.* at 484. Professor Stropus suggests that professors might ease the stress of the Langdellian method by giving it an historical context and explaining its pedagogical goals. *Id.* at 477.

96. *See* Knaplund & Sander, *supra* note 89, at 163 (asserting that "a clear showing of

### B. *The Learning Theory Approach*

Other academic support professionals, while seeing the need to address legal pedagogy as a whole and its particular effect upon students of color, nevertheless still focus their energy on creating and teaching learning techniques to help students improve their academic performance.<sup>97</sup> They seek to incorporate within ASPs the visions of legal education reformers who advocate changing the ways in which students learn the law by changing the way that law professors teach it. Their authority for evaluating and changing legal pedagogy is rooted in the literature and research on general adult learning.<sup>98</sup> According to this view, by implementing techniques of adult education in law school, the academy will be able to improve its teaching and consequently, improve the performance of its students.<sup>99</sup> As a result, attention is placed primarily on solutions which utilize learning theory for students to “learn how to learn,”<sup>100</sup> by developing effective

academic benefits flowing from academic support has never been made.”). Not surprisingly, there have been criticisms of academic support programs that reflect similar criticisms of traditional law school pedagogy. *See, e.g.*, Leslie G. Espinoza, *Empowerment and Achievement in Minority Law Student Support Programs: Constructing Affirmative Action*, 22 U. MICH. J.L. REFORM 281, 282 (1989). Professor Espinoza states that the “mere existence” of academic support programs is not positive if the message support programs relay is not encouragement and empowerment, but incompetence and the “predictive certainty of failure.” If that is the message, then academic support programs are “destined to fail.” *Id.*

97. *See, e.g.*, Pamela Edwards, *The Culture of Success: Improving the Academic Success Opportunities for Multicultural Students in Law School*, 31 NEW ENG. L. REV. 739, 746 (1997) (stating that the factors that interfere with academic success are: poor writing skills, concerns about finances, overwork, discrimination, and cultural factors). Social isolation is another factor that has a negative impact on law students of color. *See id.* at 757-59.

98. *See, e.g.*, Robin A. Boyle & Rita Dunn, *Teaching Law Students Through Individual Learning Styles*, 62 ALB. L. REV. 213 (1998); Gerald F. Hess, *Listening to Our Students: Obstructing and Enhancing Learning in Law School*, 31 U.S.F. L. REV. 941, 941-42 (1997).

99. *See Hess, supra* note 98, at 941-42. Professor Hess enumerates six principles of adult teaching and learning:

1. Voluntariness (understanding that adults are highly motivated learners and will engage in such activities as discussion, simulation, and small group activities);
2. Respect (fostering mutual respect between students and teachers);
3. Collaboration (engaging students by utilizing cooperative effort);
4. Context (recognizing that adults learn by evaluating information through the context of experience);
5. Activity (acknowledging that the learning process must involve more than passive listening);
6. Evaluation (recognizing the need for effective evaluation of students' learning).

*Id.* at 942-44.

100. Edwards, *supra* note 97, at 760 (citing Paul T. Wangerin, *Learning Strategies for Law Students*, 52 ALB. L. REV. 471 (1988)).

study skills, constructing efficient schedules, improving critical thinking skills, and improving writing skills.<sup>101</sup> Since there is evidence that academic counseling provides only short term grade improvement which disappears after the counseling ends, some scholars have urged that academic support programs utilize an “independent learning theory,” which emphasizes ways in which the student learns to self-direct his or her own learning.<sup>102</sup>

However, while both approaches necessarily address the problems some individual students may have coping with traditional pedagogy, they leave unaddressed other fundamental issues that confront legal pedagogy with respect to the *total* learning environment of law students and the educational content they receive from their substantive law school courses. If one were to compare these approaches within the context of the miner’s canary metaphor, the latter is concerned about finding ways which will help the canary breathe, while the former wants to actually breed canaries that will thrive in mines while the levels of toxicity in the atmosphere rise.<sup>103</sup> Neither focuses on how to change the toxic

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101. See *id.* at 764-66; see also Cerminara, *supra* note 7, at 256 (“[ASPs] must concentrate on teaching students how they best learn, providing different learning and studying techniques than the students might otherwise have adopted so that those students are strengthened in future, independent learning efforts.”).

102. E.g., Paul T. Wangerin, *Law School Academic Support Programs*, 40 HASTINGS L.J. 771, 786 (1989). Ironically, Wangerin concludes that the Langdellian “Classic Case Method” of instruction, including the use of the hypotheticals method, or reconciling conflicting cases with similar facts, is the most effective way to have students develop independent learning skills. *Id.* at 798-801. Indeed, it is his contention that most modern professors do not engage in the case method style of instruction *enough*. See *id.* at 796. Thus, this approach seems curious and even illogical, and somewhat circular. Wangerin even admits that students will resist the “Classic Case Method” and this resistance will “duplicate the resistance shown by generations of law students” before them but that academic counselors should persevere because as “generations of law teachers can attest . . . students’ initial resistance to use of these techniques begins to break down.” *Id.* at 801. One might characterize this proposed “cure” as giving the patient a stronger dose of the disease.

103. The miner’s canary metaphor is perhaps best associated with Professor Lani Guinier. See, e.g., Lani Guinier, *Reframing the Affirmative Action Debate*, 86 KY. L.J. 505, 505-07 (1998). The miner’s canary was a canary that was brought into the mines to alert miners when the atmosphere was becoming toxic. Because the canary was more sensitive to the toxicity, its condition provided a warning to the miners when the air was becoming dangerous. Guinier is concerned that our attempt to deal with the problems of inequality in society is akin to miners trying to revive the expired canary rather than trying to fix the poisonous atmosphere that caused the canary’s death in the first instance.

Of course, the miner’s canary metaphor assumes certain premises. The major premise is that the atmosphere is toxic to all if the canary dies. There may be some who might contend that there is nothing wrong with the atmosphere of law schools, and if the “canaries” die it is a natural phenomenon, or some weakness on a particular canary’s part. Thus, some might argue that the idea of law schools is to breed canaries that will be able to breath and survive in a toxic atmosphere. Indeed, it could even be assumed that the atmosphere that kills some canaries is actually the best atmosphere of all because it kills inferior canaries and allows hardier, more deserving entities to

atmosphere in the first instance particularly with respect to negative effects of normative perspective on marginalized student populations.<sup>104</sup> In fact, the desire to change the *way* in which law is taught, logically implies that there are corresponding values about what law is or by whom and how it should be practiced that are not being sufficiently communicated through the traditional pedagogy.<sup>105</sup>

Even those legal scholars who believe that the underlying purpose of ASPs is to diversify the legal profession as a whole tend to focus inward on the students in ASPs rather than on those aspects of the institution which drove them there in the first place.<sup>106</sup> With respect to working with students themselves,

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live. Perhaps this is what the “survival of the fittest” allusion to Langdellian pedagogy is about. *See generally* STEVENS, *supra* note 18.

104. *See* Banu Ramachandran, Note, *Re-reading Difference: Feminist Critiques of the Law School Classroom and the Problem with Speaking from Experience*, 98 COLUM. L. REV. 1757 (1998). Ramachandran asserts that the way to improve women’s law school experience is “not primarily by attacking the *forms* of legal education (for instance, a nonabusive Socratic teaching method), but by imbuing the *content* of legal education with the critical stance that feminist, antiracist, and antihomophobic work typifies.” *Id.* at 1793 (emphasis added).

105. *See* Cynthia V. Ward, *A Response to Professor Vernellia R. Randall’s the Myers-Briggs Indicator, First Year Law Students and Performance*, 26 CUMB. L. REV. 111, 115 (1995) (observing that “proposals to reform law school education via more skills training are necessarily based upon some fundamental claim about the nature of law practice.”). Professor Ward observes that Professor Randall’s arguments for an educational reform that would take into account different learning styles must imply a larger critique of law and legal practice. *See id.* at 114. She implicitly criticizes Professor Randall for not expressly linking her pedagogical approach to a larger critique. *See id.* at 120. However, while not a central aspect of her article, Professor Randall does expressly link her perspective to a critique about the racial and class bias of legal education. Randall asserts that the present pedagogical orientation of law schools is positioned from an historical law school population that had “essentially the same background—white, upper-middle class, male—and when the legal system was tailored for the practice of persons from that background.” Randall, *supra* note 35, at 66 n.4. She concludes that the legal system should reflect the larger society and its practitioners “must come from diverse cultural, ethnic, and educational backgrounds . . . [such that law schools] must develop a pedagogy that allows those who are not white, upper-middle class males to succeed with the same frequency as those who are.” *Id.* Professor Pamela Edwards recognizes the social and ideological difficulties faced by law students of color within the pedagogy and environment of law school, although her primary focus is on solutions to help students study more effectively. *See* Edwards, *supra* note 97. I should reiterate here that my purpose with this piece is not to advocate an abandonment of incorporating more learning theory into academic support. My only point is that learning theory may be necessary but, by itself, is not sufficient. *See infra* Part III.

106. *See, e.g.,* Lustbader, *supra* note 88. Professor Lustbader notes:

[Law school promotes] exclusivity over inclusivity, individuality over community, economic efficiency over moral or humanistic efficiency, and rights over care-orientation. Many people have argued that the legal system will continue to inadequately respond to a culturally diverse society until a critical mass of diverse

some commentators focus on the development of cognitive structural frameworks to help students organize and retain the information they receive.<sup>107</sup> According to this approach, a major part of the task of academic support faculty is to recognize, acknowledge, and teach to different learning styles through the use of different teaching strategies. In the process students then understand that their learning problems are less personal than institutional.<sup>108</sup> As Professor Paula Lustbader articulates it: "ASP's pedagogical approach is simple: it creates a safe and effective learning environment; is student oriented; reinforces students' logic and values; provides challenges and ways to help them achieve those challenges; responds to student voices; and, as a result of the above, empowers students."<sup>109</sup>

However, as important as concentrating on the creation of an empowered learner is—and it certainly is a necessity—concentrating on the learning environment solely *within* academic support programs can only be a partial solution. ASPs are usually marginalized operations, often not considered a vital or even valuable aspect of the law school's offerings.<sup>110</sup> As such, the exclusive use and identification of alternative pedagogical approaches within ASPs may even serve to stigmatize such approaches within the larger law school population, student and faculty alike, as not "real" or "rigorous" law school education.

Thus, finding ways to empower marginalized populations of students is not solely a pedagogical undertaking, for it has profound ideological and political connotations as well. If the root of some students' alienation lies embedded in the ideological and political underpinnings of the way law is seen by those who

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lawyers and legal academicians enter the system and influence it. The underlying purpose of most Academic Support Programs ("ASPs") is to diversify the legal profession by helping more diverse students gain admission into, remain and excel in, and graduate from law schools, so they can pass a bar examination and gain entry into the legal profession.

*Id.* at 840 (footnotes omitted). See also Slotkin, *supra* note 54, at 569 (focusing on the metacognition learning theory to address the "isolation, language and writing difficulties and socioeconomic disadvantage" of minority students).

107. Professor Lustbader refers to these frameworks as substantive and syntactical schemata. Thus, ASP teachers will have students take relevant information in their lives to help them develop schemata. See Lustbader, *supra* note 88, at 848-51.

108. See *id.* at 856; see also Roach, *supra* note 12, at 682-83, 696 (stressing the importance of teaching through the application of learning theory so that students learn "how to learn," become independent learners, and utilize self-directed learning strategies).

109. Lustbader, *supra* note 88, at 847; see also Paula Lustbader, *Teach in Context: In Response to Diverse Student Voices to Enhance Learning for All Students*, contained in Materials of the 1997 Annual Conference of the Institute for Law School Teaching, TEACH TO THE WHOLE CLASS, EFFECTIVE TEACHING METHODS FOR A DIVERSE STUDENT BODY. Professor Lustbader explores ways to create a more inclusive community through pedagogical approaches such as contextualized learning and teaching strategies such as experiential, writing, or collaborative exercises. For an interesting discussion of her approach to learning theory, see her explanation of the "Learning Progression" in Lustbader, *supra* note 10, at 322-23.

110. See Cerminara, *supra* note 7, at 250 (noting the marginalization of ASPs).

teach and practice it, then the markers by which one evaluates a student's "adjustment" to this alienating and often hostile environment will determine the ultimate effectiveness of the "support" the student receives. Indeed, if one believes that something important may be lost if a student completely adjusts to this environment, then a disjunction between the ideological effect of ASPs on its students and the pedagogical one is, for many students of color, a potentially dangerous one. The solutions to both concerns must be informed by the other to truly empower those whom ASPs purport to serve—particularly those who are law students of color.

ASPs have been seen as performing a variety of roles within the larger institution such as: influencing admissions decisions; providing resources for the larger faculty; building a community which improves the general atmosphere of the institution and profession; influencing pedagogy; and helping students to "adjust to a culture where the students' differences based upon factors such as race, class, disability, gender, and/or sexual orientation, can lead to feelings of stigma, disenfranchisement, and alienation."<sup>111</sup> ASP professionals concentrate much of their energy on the last role because they are well aware of the connection between academic success and "students' feelings of self-worth."<sup>112</sup> Indeed, the alienation from law school culture and values that many students of color experience has a profound effect upon their academic performance.<sup>113</sup> Yet, there is relatively little attention paid to the ways in which ASPs can conceptualize their activity in the other areas of the institution—influencing the pedagogical atmosphere and curricular content of the law school itself.

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111. Lustbader, *supra* note 88, at 842-43 (footnotes omitted).

112. *Id.* at 842 ("ASPs share a common mission: to provide diverse persons access to legal education, help create community, help diverse students succeed and excel academically, and most importantly, preserve students' feelings of self-worth and value.").

113. Lustbader observes that many diverse students express the concern that "in order to succeed they must lose their voices and give up their values." *Id.* at 858. Therefore, she suggests that it is necessary to find ways to allow students "to keep their own voices, so they can become bi-cultural." *Id.* Moreover, because many of them expend energy "just keeping themselves intact and holding their place," there is correspondingly less energy to devote to academics. *Id.* (footnotes omitted). See also Mertz et al., *supra* note 76, at 85:

If all of us possess multiple senses of identity, if all of us at times must translate across diverse "worlds" (perhaps in ways of which we are only dimly aware), then perhaps those for whom these processes are a continuing, urgent necessity can be our best teachers about the way context and identity shape human interactions. . . . One aspect of this perspective that emerges from expertise at crossing contexts is a keen understanding of a kind of multilingualism—that the same person can and often does speak differently in different contexts, so that if we observe her in only one context and imagine that we have a complete picture, we will be mistaken.

*Id.*

### C. *Transformative Process Is Both Individual and Environmental*

The tendency to separate the task of giving support to law students of color and the critique and reformation of traditional law school pedagogy and of the law itself is striking in several ways. In the Preface to its publication about Academic Assistance Program, the Law School Admission Council ("LSAC") cites the work of three educators—Paulo Freire, Ivan Illich, and Arthur Pearl—as providing the "principal pedagogical foundation" for its discussion of academic support.<sup>114</sup> The Preface acknowledges Freire's focus on the importance of teachers "meet[ing] students on equal ground"; Illich's admonition to "demystify" the educational experience; and Pearl's emphasis on the necessity to develop a student's "sense of competence and belonging."<sup>115</sup>

The basic content of the LSAC publication is an overview of the issues faced by ASPs, as well as concrete suggestions for how to implement or improve a program.<sup>116</sup> However, the substantive pedagogical focus of the piece is contained in a number of sections. In the chapter dealing with educational theory, the authors emphasize that, to the extent ASP program staff understands cognitive process theory, the programs "will be better able to provide academic assistance services."<sup>117</sup> The rest of the discussion of education theory consists of short descriptions of specific learning skills that the LSAC sees as the areas in which ASPs should focus: reading comprehension, concept analysis, mapping, and metacognition.<sup>118</sup> The section concludes with the admonition that the "primary

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114. LAW SCHOOL ADMISSION COUNCIL, AN INTRODUCTION TO ACADEMIC ASSISTANCE PROGRAMS 1-2 (1992) (a report from the Minority Affairs Committee of the Law School Admission Council) [hereinafter LSAC Publication].

115. *Id.*

116. The publication is divided into six chapters and a preface. The chapters are entitled Introduction; Program Implementation; Education Theories and Teaching Techniques; Summer Program; School-Year Program; and Program Evaluation.

117. LSAC Publication, *supra* note 114, at 11. Cognitive process theory is defined by the LSAC as the recognition of two types of mental processes: cognition and metacognition:

Cognitive mental processes are called upon to address the daily problem-solving requirements of life, while metacognitive processes are used to manage, plan, and evaluate cognitive applications. Cognition may be seen as involving at least five separate mental processes: *encoding, inference, mapping, application, and response.*

Further it appears that three types of mentation are critical to the type of advanced learning that is required of law students: data choice (selective encoding), data organization (selective combination), and data relationships (selective comparison).

*Id.* (citations omitted).

118. The LSAC encourages the use of the "ConStruct technique" of teaching reading comprehension in which there are three stages of instruction along with constructions of schematic illustrative diagrams: the first, which asks students to identify relationships between the principal topic and major subtopics (called "superordinate concepts"); the second, in which students are asked to understand the relationship between subordinate concepts and the superordinate concepts; the third stage involving identification of specific material to assist in understanding the concepts

goal of an academic assistance program should be to help students develop the abilities that are necessary to independently proceed with their legal education."<sup>119</sup> Intrinsic to this is the understanding of students' "metacognitive skill levels and the development of strategies to address their learning deficiencies."<sup>120</sup>

It is without question that the major point of providing academic assistance is to enable students to survive and excel in the law school environment. Thus, giving students the tools to achieve this specific goal is and should be paramount. Anything less would be irresponsible.

Yet, intrinsic to and underlying the pedagogical vision of all three of the educators cited by the LSAC is their insistence that the goal of education is to empower students through education to begin the project of *transforming* the larger institutions and society. The notion that academic support and innovation is to transform only students and their learning deficiencies, while leaving the institutions which have contributed to those deficiencies fundamentally untouched, unobserved, and unchanged is antithetical to their work. In fact, part of the process to help students navigate and improve within their environment is the recognition that their participation will help to improve/change the environment itself.

It would be ironic if the interpretation of their writings was to lead to a project whose end result was trying to transform students to adapt, conform, and thereby "succeed" in institutions whose atmosphere may be hostile to them. Pearl, in fact, takes dead-aim at programs and educators who focus solely on "improving" students without questioning the values and approaches of the institution in which they learn: "Throughout this book [*The Atrocity of Education*] we encounter in various guises the educational engineer who would have us upgrade education by doing what we are doing now—only better. . . . This type of innovator tells you *how* to do things, but he doesn't question whether they should be done at all."<sup>121</sup>

Pearl critiques the Upward Bound Program, a program similar in many respects to some ASPs in which high school inner city youth, often of color, are brought to a college campus for a summer to undergo academic stimulation, individual tutoring, and remedial work in preparation for college.<sup>122</sup> Yet, Pearl points out that the need for such programs "can [only] be understood only as a candid admission that traditional educational establishments and approaches have

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identified. *Id.* at 11-12.

Concept analysis is described as comprising "data comprehension, analysis, and retention." *Id.* at 12. Mapping is presented as "a learning strategy that rests on the premise that all text can be structured in a hierarchical fashion." *Id.* (citations omitted). Metacognition is "the examination and understanding of one's own cognitive process." *Id.* at 13.

119. *Id.*

120. *Id.*

121. ARTHUR PEARL, *THE ATROCITY OF EDUCATION* 15 (1972).

122. *See id.* at 21.



failed.”<sup>123</sup> Indeed, according to Pearl, such programs “recapitulated the evils that have befallen the disadvantaged throughout their school career.”<sup>124</sup> His focus on a student’s sense of belonging is, in fact, an express call to action to use education to transform a society and an educational system that “overwhelms, depersonalizes, and renders useless.”<sup>125</sup> Thus, Pearl’s pedagogical premise proceeds from his conviction that those support programs which legitimize the circumstances that cause academic failure in the first instance must be dismantled.

The context of Illich’s admonition to demystify the educational experience is even more radical than Pearl’s and certainly pertinent to the direction and purpose of ASPs. His is a withering criticism of the very notion of curriculum itself.<sup>126</sup> If there is anything within the traditional law school canon that would horrify Illich, it would be the reliance and perpetuation of the universal sacred cow of the first year curriculum of law school.<sup>127</sup> He states:

School sells curriculum—a bundle of goods made according to the same process and having the same structure as other merchandise. . . . The result of the curriculum production process looks like any other modern staple. It is a bundle of planned meanings, a package of values, a commodity whose “balanced appeal” makes it marketable to a sufficiently large number to justify the cost of production. Consumer-pupils are taught to make their desires conform to marketable values.<sup>128</sup>

In Illich’s view the insistence on a rigid curriculum is another mechanism by which societal norms are promulgated to control individual creativity. His vision of the end result of “prefabricated curriculum” echoes much of the contemporary

123. *Id.*

124. *Id.*

125. *Id.* at 44.

126. See IVAN ILLICH, DESCHOOLING SOCIETY 12 (1971). He states:

Curriculum has always been used to assign social rank. At times it could be prenatal: karma ascribes you to a caste and lineage to the aristocracy. Curriculum could take the form of a ritual, of sequential sacred ordinations, or it could consist of a succession of feats in war or hunting, or further advancement could be made to depend on a series of previously princely favors. Universal schooling was meant to detach role assignment from personal life history: it was meant to give everybody an equal chance to any office. Even now many people wrongly believe that school ensures the dependence of public trust on relevant learning achievements. However, instead of equalizing chances, the school system has monopolized their distribution.

*Id.*

127. Illich’s view is that curriculum is essentially an abstraction disassociated from both learning and competence: “School is inefficient in skill instruction especially because it is curricular. In most schools a program which is meant to improve one skill is chained always to another irrelevant task. History is tied to advancement in math, and class attendance to the right to use the playground.” *Id.* at 17.

128. *Id.* at 41.

criticism of traditional law school curriculum: “[Students] no longer have to be put in their place, but put themselves into their assigned slots, squeeze themselves into the niche which they have been taught to seek, and, in the very process, put their fellows into their places, too, until everybody and everything fits.”<sup>129</sup>

But, perhaps it is Freire who most explicitly admonishes those of us who teach to put our teaching into a larger societal context. According to Freire, while the “teaching task” demands qualities such as intellectual rigor, epistemological curiosity, love, creativity, and scientific competence, it also requires “the capacity to fight for freedom, without which the teaching task becomes meaningless.”<sup>130</sup> This is the context of Freire’s emphasis on “meeting students on equal ground.”<sup>131</sup> He posits a dialectic movement between teachers and students in which teaching and learning become “knowing and reknowing”—learners learning what they do not know, teachers relearning what they knew previously.<sup>132</sup> Understanding this process of teaching demands “political discipline” because democratic education “cannot be realized apart from an education of and for citizenship” which is a political construction demanding “commitment, political clarity, coherence, decision.”<sup>133</sup> Freire observes—echoing the sentiments articulated by Arthur Pearl—that oftentimes dedicated professionals do not perceive that they become agents of “oppressive cultural action” when they emphasize a “*focalized* view of problems rather than [on] seeing them as dimensions of a *totality*.”<sup>134</sup> That is, educators do more harm than good when their attention is directed only at the smaller community which is viewed as a totality in itself rather than seeing it as part of a larger entity.<sup>135</sup> His criticism is directed at “those who do not realize that the development of the local community cannot occur except in the total context of which it is a part, in interaction with other parts.”<sup>136</sup> Deborah Post puts it another way:

129. *Id.* at 40.

130. PAULO FREIRE, TEACHERS AS CULTURAL WORKERS: LETTERS TO THOSE WHO DARE TEACH 4 (1998). Freire states:

To the extent that I become clearer about my choices and my dreams, which are substantively political and attributively pedagogical, and to the extent that I recognize that though an educator I am also a political agent, I can better understand . . . and realize how far we still have to go to improve our democracy. I also understand that as we put into practice an education that critically provokes the learner’s consciousness, we are necessarily working against myths that deform us. As we confront such myths, we also face the dominant power because those myths are nothing but the expression of this power, of its ideology.

*Id.* at 41.

131. LSAC Publication, *supra* note 114, at 1.

132. FREIRE, *supra* note 130, at 63-68.

133. *Id.* at 90.

134. FREIRE, PEDAGOGY, *supra* note 85, at 137-38.

135. *See id.* at 138 n.17.

136. *Id.* It is quite predictable that the reliance on the theories of these three educators has

I hope I am teaching a different skill. I want [my students] to think about the relevance of their own values and beliefs to practice; I want them to understand that practice necessarily includes political *and* moral choices. I want them to consider what justice means and to understand the imperatives of justice. We don't talk about justice often enough in law school anymore; we refer to it euphemistically as public policy. . . . Many of my colleagues who some call "outsiders". . . consider the revelation of unstated but powerful assumptions underlying doctrine and theory an important educational objective. And we are accused of teaching something other than law because we do.<sup>137</sup>

The pedagogical lessons, then, of these educators are clear. Merely to groom students—particularly students of color or those at academic risk—to participate “successfully” within the larger environment, particularly when that environment itself may cause a significant portion of the dysfunction is ultimately counterproductive and actually perpetuates and exacerbates the conditions of failure. There is a critical and ongoing necessity to create support environments where alienated or struggling students may experience individualized relief and learn better ways to cope with the peculiar and particular methodology of traditional law school curriculum. However, without concurrently attempting to change the totality of the law school context and atmosphere, the endeavor is naive and maybe even self-defeating. In addition, perhaps ironically, an accommodationist approach will also do no more to improve the perception, as well as the reality, of ASPs' marginalization from the larger institutions, since it will reinforce the perception that all ASPs really do is to try make the work “easier” for academically struggling students.

### III. ASP PEDAGOGY SHOULD INCLUDE CREATING COMMUNITIES OF COLOR AND TEACHING STUDENTS TO HAVE AND UTILIZE A “MULTIPLE CONSCIOUSNESS”

While much has been written and suggested about improving law schools'

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drawn fire from some in the academic support community. Paul Wangerin criticizes the citation of Freire's work by the Law School Admission Council because, according to Wangerin, Freire and his followers suggest “students fail principally because of the weaknesses or the wickedness of teachers or the educational establishment itself.” Paul T. Wangerin, *A Little Assistance Regarding Academic Assistance Programs: An Introduction to Academic Assistance Programs*, 21 J. CONTEMP. L. 169, 171 (1995). While Wangerin concedes that “some teachers” within the legal education community may accept Freire's premises, he concludes, tautologically, that “[i]t probably is safe, however, to say that most teachers in the legal education community disagree on a fundamental level with what clearly is the driving premise of this book.” *Id.* Of course, one would assume that the legal education “establishment”—one which has been criticized for its lack of innovation, sensitivity, and perspective—would not look kindly upon the work of an author whose entire point is to empower students to change entrenched institutions.

137. HARMON & POST, *supra* note 1, at 19-20 (citations omitted).

curricula, the prospect of dramatic and immediate change is probably not realistic, and the struggle to change law schools and, ultimately, how the law is viewed, created, and implemented will be a protracted one.<sup>138</sup> Indeed, only the most optimistic of educational visionaries would believe that the project of influencing the legal academy to alter its viewpoint, perspective, composition, and pedagogy will be easy. Thus, it is important to find areas in which ASPs will be able to influence the larger institution in a more immediate sense while simultaneously participating in the longer range goal of influencing the entrenched pedagogy. There are distinct but related areas in which such attempts may be made without undue institutional structural upheaval.

The first task for ASPs is to advocate that law schools as institutions find systemic ways to build communities which can withstand the pressures of the stigma that attaches to ASP participants, particularly those of color. Second, and perhaps most important, there should be an introduction of a critical analysis of the law and legal institutions—including a critique of law school pedagogy itself—into the substance of support curriculum and the tutorial process itself.

#### A. *Building Communities as Pedagogic Method*

With respect to the building of community, one of the major issues that confront students who are connected to ASPs is that of the stigma—real and perceived—placed upon its participants and collaterally, upon all students of color whether in ASPs or not.<sup>139</sup> Stigma associated with participation in ASPs

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138. The critique of law school pedagogy has not gone unaddressed by those invested in maintaining the traditional approach and worldview. See, e.g., ARTHUR AUSTIN, *THE EMPIRE STRIKES BACK: OUTSIDERS AND THE STRUGGLE OVER LEGAL EDUCATION* (1998). Professor Austin dismisses critical critiques of law and pedagogy as a “pop culture vision of scholarship and law” or “PC Newspeak.” *Id.* at xvi. According to Austin this state of affairs is brought about by “race separatists” spouting “propaganda,” trivial “Tenured Radicals” or “the feminist movement” that wishes to “[b]alkanize legal education.” *Id.* at 186, 192, 200. This is, of course, in contradiction to the “analytical evaluation, rationality, and objectivity” so valued by Professor Austin (and, one presumes, of which he considers himself to be a model) that he articulates as the “core values” of traditional legal education. *Id.* at xvi. The imminent future would be, according to Austin’s illuminating view, a situation where economic exigencies would allow the “Empire” given its present superior power and influence within the legal academy an unfettered opportunity to close completely the hiring doors to legal academia to these kinds of “Outsiders,” deny tenure to those writing scholarship that does not meet with the “Empire’s” approval, and revoke the notion of tenure itself to discourage those who would do so after receiving tenure and expose them to dismissal for such transgressions. *Id.* at 197-98.

I also note here without further comment: Deborah Post’s cogent observation that “much of what is expressed by white males . . . these days is not reasoning at all but expressions of belief—blind faith, maintained in spite of all evidence to the contrary. Defiance of reason is the response of most white males to any challenge to their power, to their sense of entitlement.” HARMON & POST, *supra* note 1, at 127-28.

139. See, e.g., Cerminara, *supra* note 7, at 255-56 (noting that the label of academic support

is one of the “most frequently discussed issues faced by schools interested in establishing or maintaining an academic assistance program.”<sup>140</sup> However, given the social attitude toward affirmative action in general, attitudes toward certain ethnic communities in particular, and given the structure and racial makeup of many ASPs, it is perhaps inevitable that some stigma will attach to students who participate in these programs.<sup>141</sup> Indeed, even the terms of the present dialogue of affirmative action which differentiates and counterpoises “diversity” from “merit” may contribute to the stigma.

Thus, since it may be impossible to eliminate or even minimize stigma entirely, at least for the foreseeable future, it is important to create ways to minimize its effect on the students themselves. While some might argue that the obvious solution to combat stigma is academic success in the traditional sense, it has been noted that “academic assistance programs, which arguably bring greater balance to law school playing fields, are often characterized as ‘remedial’ if they are marginally successful, or are challenged for providing an ‘unfair advantage’ if they are very successful.”<sup>142</sup> Moreover, the issue of how best to succeed in accomplishing that goal, because perceptions of stigma—both real and imagined—have an effect upon academic performance, is still left unaddressed by identification of the end goal of “success” within the institution.

It would be logical to assume that a sense of group solidarity would function as a protection against the effects of stigma. However, it is important to keep in mind that while participation in community activities may restore a sense of communal identity and self-worth, it may come at the cost of study time. The “culture of resistance” to law school aculturalization “may simultaneously make it possible . . . to survive law school and make such survival more difficult.”<sup>143</sup> In fact, some point out that an attempt to recreate community may also have other dangers such as identifying with others so much that a student may feel personally injured, angry, or discouraged if another does not perform well, or may feel overwhelming responsibility about the fact that others’ success may ride on their own.<sup>144</sup> In addition, like professors of color, students of color are often doubly burdened with the roles that tokens must often play, and the expectations that are placed upon them that are not placed upon other students.<sup>145</sup>

Despite these dangers, it is important to create and maintain a separate

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itself may be stigmatizing and “[t]hose who participate in academic support programs are often stigmatized.”).

140. LSAC Publication, *supra* note 114, at 5.

141. See, e.g., Darlene C. Goring, *Silent Beneficiaries: Affirmative Action and Gender in Law School Academic Support Programs*, 84 KY. L.J. 941, 981 (1996) (finding that stigmatization is not a by-product of academic support, but a “systemic component of legal education” that is only exacerbated by participation in such programs).

142. LSAC Publication, *supra* note 114, at 5.

143. Greenberg, *supra* note 77, at 103.

144. See, e.g., *id.* at 103-04.

145. See Espinoza, *supra* note 96, at 291-92 (describing the ways in which people of color are perceived as “symbols for their race” and the pressure that come along with that label).

character between tutorial programs designed to improve law school exam results, and programs designed to make underrepresented populations in the law school community succeed in the environment. Students who are admitted under “diversity rationales” must be viewed as a group of students who are not defined automatically nor primarily as students who are “at risk academically,” but as a particular and unique community of students who bring something important and unique to the law school. By lumping diversity students and Academic Support together under one rubric, the cure for stigma may be worse than the disease. Academic support may be important for students of color not because they have less “merit,” or because they are more deficient academically, but because the social, pedagogical, cultural, and political environment of law school is more difficult for them.<sup>146</sup>

Peter Alexander has discussed the importance of creating a community among law professors of color within the legal academy.<sup>147</sup> He catalogued the ways in which law professors of color were marginalized, silenced, devalued, and frustrated within their larger institutions through the context of a semi-fictionalized recounting of a conference of legal scholars of color.<sup>148</sup> The conference was entitled “Celebrating Community.”<sup>149</sup> He explained how important the notion of having a safe and familial space is for those operating outside the mainstream of the our institutions:

We were a collection of teacher/scholars—most, but not all, of whom were people of color—who came together to celebrate our sameness as well as our diversity. Many, like me, arrived at the conference planning to learn more about . . . scholarship. . . . Others attended the conference because of a fierce need for community and for the opportunity to connect with people who looked like them, thought like them, traveled a professional path that was similar to theirs, and understood them. Everyone at the conference connected with one another, and we celebrated the recognition of our “family” within the legal academy. It was a memorable weekend, filled with shared experiences and a true sense of solidarity.<sup>150</sup>

Yet, as important as it is for teachers and legal scholars of color to experience a sense of belonging in order to function most effectively, the same

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146. “Support programs must focus less on the remedial and more on acculturation.” *Id.* at 292.

147. See Peter C. Alexander, *Silent Screams from Within the Academy: Let My People Grow*, 59 OHIO ST. L.J. 1311 (1998).

148. See *id.* at 1312 n.3. It should be noted that “over 30 percent of minorities on the tenure track in 1981 left law teaching by 1987, compared to 17.1 percent of whites.” ABA, MILES TO GO, *supra* note 52, at 11.

149. Alexander, *supra* note 147, at 1312.

150. *Id.* at 1327. Law teachers of color, particularly women of color, are often singled out for criticisms that are not leveled against other professors. See, e.g., Owsley, *supra* note 9, at 516-21.

longing must be even more intense for law students of color who are certainly without any of the benefits and privileges of professor status. Moreover, the strength that comes with this particular sense of shared community is not one based solely upon a commonality of racial experience. It is also derived from the sense that it is the structure, dynamic, vocabulary, and values of the *institution* itself that lies at the root of one's professional and personal alienation. An institutional awareness of its own biases cannot be communicated effectively by student-run organizations such as an Asian Pacific Law Students Association, or a Women's Law Student Association. While important as sources of support, these student groups cannot be a proxy for an institutional recognition of inherent contradictions that may exist for some in the student population. Indeed, there has been a proposal to create a separate law school solely for women.<sup>151</sup> In the alternative, there have been proposals to create, within co-ed institutions, separate programs for women or summer programs open solely to women students.<sup>152</sup>

These kinds of proposals suggest that there must be an institutionally-supported mechanism that acknowledges the particular anomalies that law school education contains, as long as traditional legal pedagogy and the racial and gender makeup of law school faculties remain essentially unchanged in the majority of law schools.<sup>153</sup> Indeed, it is the remedial structure and focus of many support programs that may send a particularly negative message.<sup>154</sup> As Professor Cecil J. Hunt, II, observes,

[t]he bitter irony is that an academic support program does not have to be remedial in focus and, therefore, stigmatizing in result. It is quite possible to design, structure, and implement an academic support program that is empowering and challenging in both tone and content. Such programs tend to build minority students up, rather than weigh them down.<sup>155</sup>

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151. See Brown, *supra* note 59, at 1.

152. See *id.* at 35.

153. This does not necessarily mean solely creating a cadre of student tutors who form personal bonds with their charges, although the Pre-Admission Program does use student tutors. See Slotkin, *supra* note 54, at 573-75. If tutors are part of the support system, it is necessary that "role modeling" be on different levels—academic success, personal integrity, community involvement. The point of building community and "role modeling" among students of color should be to create a positive counternarrative.

In 1986, minorities were 3.5% of all tenured law faculty and 11.1% of tenure-track faculty, but as of 1995, only 13.1% of full time law teachers were minorities. See *supra* notes 52-54 and accompanying text.

154. See Cecil J. Hunt, II, *Guests in Another's House: An Analysis of Racially Disparate Bar Performance*, 23 FLA. ST. U. L. REV. 721, 782 (1996).

155. *Id.* at 783. Professor Hunt describes the academic support program at Touro Law School which was created for all minority law students without regard to statistical indicators, involving participation by minority law professors and minority upper-class students as tutors, where "the

For example, the Pre-Admission Program of the William S. Richardson School of Law at the University of Hawai'i has had a remarkable history in its twenty-four years of operation.<sup>156</sup> It was designed to increase the diversity of the law school's student population such that it reflected the diversity of Hawai'i's population as well to increase the number of lawyers who had a connection to and practiced in Hawai'i's communities that were underserved.<sup>157</sup>

Under the late Professor Judy Weightman, the Pre-Admission Program Director from 1988 to 1998, there was a great emphasis placed upon building a sense of community among the Pre-Admission students, as well as an emphasis placed upon the social responsibility that was implicit in the Program's existence. This is reflected in the connection that many of the Program's alumni and upper level students maintain with those who newly enter the program. Professor Weightman's approach was to combine a tutoring curriculum with a consistent advocacy for the interests of the Pre-Admission students within and graduated from the law school. She also focused on a conscious effort to instill pride, community and identification of Program participants with one another, the communities from which they came, and the graduates of the Program.<sup>158</sup>

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sense of stigma is significantly reduced and the sense of empowerment is greatly enhanced." *Id.* at 783 n.346.

156. As I have only been the Director of the Pre-Admission Program for a short time, it is with a great sense of humility that I describe its past successes as I made no contribution to them.

157. As of 1973, the year before the Pre-Admission Program began, persons of Hawaiian descent represented only 2 percent of the Hawaiian bar, and those of Filipino ancestry less than 1 per cent. As of 1997, Hawaiians or part Hawaiians represented 9 percent of the bar and Filipinos 2 percent of the bar. Despite the still significant underrepresentation of these two groups, much of the increase in the percentages is related to the Pre-Admission Program. Indeed, the matriculation/graduation rate for Program students has ranged from 75% to 100% and is generally comparable to the graduation rates of the law school's other students.

Candidates for the Pre-Admission Program are not eligible to matriculate into the law school under the law school's traditional criteria, but are nevertheless rigorously selected from criteria including among other considerations: LSAT and undergraduate GPA scores, personal motivation, public leadership, social commitment, maturity, history of overcoming disadvantage, exceptional personal talents, work or service experience particularly in providing service to Hawai'i's poor, as well as ethnic background. There is no single factor that overrides any other except that admission must conform to the goals and purposes of the program. Pre-Admission students are selected separately after the bulk of the "regular" admission decisions are made. As such, they do not "take the place" of an applicant who would otherwise have been admitted under the traditional criteria.

158. When I took over the program in 1998 after Professor Weightman's passing, I was immediately struck by the sense of *ohana* (family) within the program, and the students' commitment to it and to each other. I was also struck by how supportive of the program and its students the law school's faculty and administration were. I attribute much of the success of the program to that environment created by the administration and faculty of the law school, to Professor Weightman's vision and energy, and, of course, to the commitment, sacrifice, and ability of the Pre-Admission students themselves.



Although there are students from various ethnic communities among the entire student body of the law school—the William S. Richardson School of Law has the distinction of being one of the few law schools where students of color outnumber white students—it is the students from the Pre-Admission Program who often take the lead in bringing awareness of issues such as those concerning Native Hawaiian rights and the larger social issues to the law school community. Perhaps most significantly, there is a culture and tradition within the Program that emphasized the ultimate goal was not solely for Pre-Admission students simply to “do well” or even to graduate, but for Pre-Admission students to *lead* the law school and to work for societal change as lawyers *after* graduation.<sup>159</sup> In 1999 alone, among other noteworthy achievements, a different individual Pre-Admission or former Pre-Admission student:

- \*was the President of the Student Bar Association;
- \*was the Secretary of the Student Bar Association;
- \*published a Note in the University of Hawai`i Law Review;
- \*was a member of a Regional Championship moot court team;
- \*was selected by the graduates to be the Class Speaker at graduation;
- \*achieved the highest grade in the first year Civil Procedure course;
- \*helped form the first Hispanic/Black Students organization at the law school;
- \*was elected by the entire student body to be the voting student representative on the Faculty Admissions Committee.

In addition, Pre-Admission and former Pre-Admission students were active in Native Hawaiian issues such as the struggle over tuition waivers for Native Hawaiians at the university, and took on active roles in cultural activities such as the law school’s hula halau (which performs at the law school’s official functions including graduation) and organizing trips to the island of Kaho`olawe, a symbol of Hawaiian sovereignty. Pre-Admission and former Pre-Admission students also volunteered to translate for newly arrived immigrants at the local legal services organization dealing with immigration issues. Finally, Pre-Admission alumni have gone on to become state legislators, judges, as well as successful public and private attorneys.

There is a recently formed Pre-Admission Association consisting primarily of law school alumni who were Pre-Admission students.<sup>160</sup> Their first public function in the spring of 1999, was a memorial commemoration of the contributions of Professor Weightman to their lives and to the legacy of the law school.

This is the kind of function that ASPs can play—to be not only a means of tutorial support, but that part of the institution which sees as its function the performance of a critique of the institution itself. Ironically, it can and should play a counter-narrative role within the law school to help achieve a stronger and

159. Pre-Admission students after one year in the Program matriculate into the “regular” full-time program.

160. The acronym for the Pre-Admission Association and part of its official name is “PA’A” which in Hawaiian means “firm” and “solid.”

more capable student body even in the terms that the law school itself values. Indeed, ASPs can, and must, simultaneously enable students to function in the traditional environment, and yet stand apart from the institution to engage in a critical analysis of what law and law school is about. This will help law students understand that it is “not them” alone who must “own” the problems of legal pedagogy, but that their law school and its professors must at least share the responsibility.<sup>161</sup>

*B. “Multiple Consciousness” as an Aspect of Academic Support*

This should not only be in the context of creating and supporting “safe” spaces within the institution for students of color, but it should be reflected in the substantive curriculum of an ASP program itself. That is, the ASP curriculum should have some critical analysis of legal institutions and legal pedagogy.<sup>162</sup> It is this component that may be even more important than fostering a sense of community because it is a recognition of the necessity for law students to engage in what Mari Matsuda terms a “shifting of consciousness,” one that “produces sometimes madness, sometimes genius, sometimes both.”<sup>163</sup> In her brilliant piece on multiple consciousness as jurisprudential method, Professor Matsuda articulates how consciousness operating on different levels—as legal formalist, as person of color, as woman, etc.—can aid not only the practitioner, but the law student herself in understanding how the law operates and how it can be utilized.<sup>164</sup> Multiple consciousness is the kind of consciousness that understands the place, function and skills of traditional legal analysis while simultaneously valuing and recognizing experience, emotion, and oppression. It may allow the student of color to do more easily what Matsuda observes law students who excel do—“detach” themselves and approach law from the particular viewpoint demanded by traditional law school pedagogy without sacrificing and placing in

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161. Put another way, “[w]hat I’m proposing is to attack the problem of the perspectivelessness or the apparent neutrality or the abstraction of legal studies by making the classroom into a place where students learn doctrine and legal argument in the process of defining themselves as political actors in their professional lives.” Wells, *supra* note 3, at 4.

162. It is interesting to note that there is scholarly opinion advocating that a component of critical theory be incorporated as a requirement into the first-year curriculum, and most particularly in legal writing courses. Professor Karyn Stanchi writes:

Students must learn to use critical legal thinking in the context of lawyering—to use critical thinking in predictive writing, persuasive writing, legal analysis, oral advocacy, negotiation, and client representation. And, students must be exposed to some critical theory at the same time that they are learning conventional legal analysis and language. At a minimum, this would teach students to recognize bias in legal language and would validate students who feel uncomfortable with legal language. It would also educate “insider” students about the limitations and biases of the law and legal language.

Stanchi, *supra* note 6, at 55.

163. Matsuda, *supra* note 3, at 298.

164. *See id.*

conflict the sense of themselves, their community, their lives.<sup>165</sup> As Matsuda puts it, “[h]olding on to a multiple consciousness will allow us [and students] to operate both within the abstractions of standard jurisprudential discourse, and within the details of our own special knowledge.”<sup>166</sup> This metacognitive process of ordering and contextualizing traditional legal doctrine will not only be helpful with respect to helping students understand material but also to understand their relationship to the material in a more meaningful way.

Professor Paula Lustbader conceptualizes this disjunction in a similar way:

Often, to get the right answer, students must argue that mainstream values are correct. . . . Mainstream values [for example] presuppose that all consumers can shop around and bargain for the best deal because of competition in the marketplace. Unfortunately, that is not reality in a highly class-divided society. Many law students have lived under powerless conditions or are at least more willing to recognize them. However, in order to get the “right” answer, the student must argue to the professor (who statistically most likely has lived in a position of power all his life) that the contract terms are not unconscionable, when the student’s own conscience is telling him or her that the social conditions that force the consumer to sign the contract are patently unfair.<sup>167</sup>

She continues by stating that in teaching students how to “argue for . . . mainstream values, we are not condemning them to a position of having sold out their own value system.”<sup>168</sup> Thus, it is necessary “to be explicit” about how law schools represent reality from a particular perspective and that one of the tasks of future lawyers is to change the system to recognize new and different perspectives and values.<sup>169</sup>

However, “being explicit” and developing “multiple consciousnesses” means more than teachers simply telling their students about the narrowness of the world of traditional legal analysis. It also demands that teachers introduce their students to some of the literature and scholarship that explains how and, more importantly, why that world is so narrow. Legal academic support should

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165. Professor Pamela Edwards describes her law school strategy as follows:

During my first year of law school, not only was I presented with new concepts, but I was also faced with values that conflicted with the strategies and values that had worked well for me prior to entering law school. I knew that it was important to understand how to “think like a lawyer,” however, I did not want to abandon those previously successful strategies and values that seemed to conflict with that learning. I consciously developed what I considered to be a split personality. I would use my “new” knowledge in law school, while continuing to use my old strategies in “real” life.

Edwards, *supra* note 97, at 758.

166. Matsuda, *supra* note 3, at 299.

167. Lustbader, *supra* note 10, at 344 n.73.

168. *Id.* at 346 n.75.

169. *Id.*

include the creation of substantive course material that utilizes the emerging critical scholarship on legal pedagogy. It means convincing students (and perhaps, someday, brethren legal academicians) that understanding the critical approach to pedagogy will help many of them function more effectively and consequently do better academically within the traditional atmosphere of law schools.

Creating community, combatting stigma, and learning better analytical tools are not separate tasks. They cannot be seen or addressed separately for students of color and those who identify with subordinated communities in our society. ASP curriculum and structure should be a critical project that (1) acknowledges the necessity that doing well within the present law school environment, particularly for students from subordinated communities, requires a detachment from a sense of self; (2) has the focus of creating alternative and supportive communities in which students not only feel "safe" but also have a base from which they may seek to affect changes in the institution, (3) offers within the substantive content of the tutorial curriculum itself some critical overview of the law and law pedagogy, and (4) sees the academic support field itself as a critical project for advocating change within the legal academy and the society as a whole.

By recognizing and utilizing the interconnections between these phenomenon in an ASP curriculum and structure, ASPs will better serve their constituency as law students and emotionally healthier human beings. Indeed, our academic support community has an almost fiduciary duty to our students to make sure that in the process of enabling them to swim successfully in the law school institutional current we also teach them that the narrow banks of that particular river do not define and constrain the infinite possibilities of the sea.

#### EPILOGUE

As I was writing this Article and looking through old papers from former students, I happened upon one that, to me, illustrated how so many of the most telling thoughts about our status as people of color are triggered by the everyday and the seemingly mundane. These thoughts we often articulate only to ourselves or to those close to us because we are afraid that these notions may seem irrelevant or even petty. We keep these indelible and powerful reactions quiet because they are unnoticed and unacknowledged by those for whom privilege has become an entitlement, and they are often devalued as the product of an oversensitive disposition if they are ever acknowledged.<sup>170</sup>

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170. Professor Angela Harris describes a faculty cocktail party where after someone had mentioned she could sing, a colleague "happily rambles on about all the 'colored gals' he has known throughout his life who are musical . . . [and another colleague] asks me if I have a good recipe for barbeque sauce." Angela P. Harris, *On Doing the Right Thing: Education Work in the Academy*, 15 VT. L. REV. 125, 128 (1990). Harris describes the relationship between power and knowledge:

People who are members of minority groups have access to at least two perspectives and

One of my former students wrote pieces about being Latina. I remember how incisive she was about the subtleties of racial and gender subordination as she related to us how differently some people would react to her when they saw her in person as opposed to when they knew her only by her married name on the telephone (she usually used her husband's "Anglo" name to identify herself on the telephone).

She wrote one reflection paper in which she began by writing, "When I say 'Viva La Raza' (live the race) or Brown Power, some people, okay, maybe most people would see me as a radical . . . [but it] is a statement used to show pride and can be used as a rally cry for all Hispanics to join together and make a difference." She went on to observe that some think that this kind of sentiment is foolish, and still others "can't stand the way Puerto Ricans display their flag in the window of their cars," particularly on the day of the Puerto Rican Day Parade in New York City. She remembers non-Latino people yelling hostile phrases on that day such as, "If you love Puerto Rico so much, go back where you came from," even though many who celebrated that day were born in New York.

That year, she attended the annual St. Patrick's Day parade in Holyoke, Massachusetts. She saw the Irish flags strewn about the town and noticed the Gaelic signs hung across the balconies of the buildings. Yet, she heard no complaints, no anger, no comments about radicalism. Her friend explained to her that, "everyone is Irish in Holyoke on St. Patrick's Day." And she wondered to herself if there would ever come a time when "on the day Puerto Ricans celebrate their day of pride in their culture and traditions," everyone would want to be Puerto Rican.

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ways of being—the public world of the dominant group and the more private world of the minority subculture. . . . In this sense, political subordination creates an unexpected asymmetry of knowledge. People who are multicultural, happily or not, find themselves with multiple ways of knowing. People who belong to the dominant culture only gain access to these different worlds with difficulty.

*Id.* at 131 (explaining the W.E.B. Dubois concept of "double-consciousness") (citations omitted).

