

12-19-2017

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Susan Grover
William & Mary Law School

Nikeshia Womack
William & Mary Law School

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Recommended Citation

Grover, Susan and Womack, Nikeshia (2017) "Stories at the Edge of Class-- Marginalization in the Law School Experience," *Seattle Journal for Social Justice*: Vol. 16 : Iss. 1 , Article 10.

Available at: <https://digitalcommons.law.seattleu.edu/sjsj/vol16/iss1/10>

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Stories at the Edge of Class—Marginalization in the Law School Experience

By Susan Grover¹ and Nikeshia Womack²

If you are not part of the solution, you are part of the problem.

I. INTRODUCTION

Students entering law school confront an academic setting unlike any they have encountered before. From the Socratic Method to fact-pattern exams,³ the system and the substance are entirely new for the typical student. The law school experience combines the excitement of intellectual discovery with the potential for distress and self-doubt resulting from heavy workloads, keen competition, and fear of the unknown.⁴ Tackling these challenges could put any student at risk of becoming isolated, becoming depressed, or experiencing other damaging reactions.

¹ Vice Provost for Academic & Faculty Affairs, University Professor for Teaching Excellence (2011-2014), William & Mary Law School.

² J.D., 2010, William & Mary Law School.

³ Although many schools, or courses within schools, no longer adhere to these practices, the practices remain the norm. See Roy Stuckey & Others, *Best Practices for Legal Education*, CLINICAL LEGAL EDUCATION ASSOCIATION, 1, 99–101 (2007), http://www.cleaweb.org/Resources/Documents/best_practices-full.pdf.

⁴ “All too often, the search for knowledge becomes a scramble for status in which participants vie with each other to impress rather than inform.” DEBORAH L. RHODE, IN *THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION* 197 (2001). Professor Rhode notes:

Although the psychological profile of entering law school students matches that of the public generally, an estimated 20 to 40 percent leave with some psychological dysfunction including depression, substance abuse, and various stress-related disorders. These problems are not inherent by-products of a demanding professional education; medical students do not experience similar difficulties.

Id.

For “outsider”⁵ students, law school presents additional challenges above and beyond those common to majority students.⁶ Outsiders report negative responses to the legal education experience that are more intense than those reported by the general law student population.⁷ Part of the explanation for this may lie in what some outsider students describe as feelings of alienation or marginalization resulting from comments and attitudes of the majority. In particular, they perceive majority faculty to be unaware of the differences in experience and point of view that outsiders bring to the

⁵ Throughout this article, the term, “outsider,” refers to all students whose status or experience renders them atypical. They include underrepresented racial groups, women, students with disabilities, students who are economically or educationally disadvantaged, students whose first language is not English or whose culture is not of the United States, older students, students who are parents, first-generation college graduates, and undocumented aliens. The essential aspects of the outsiders’ experience contemplated in this article are a sense of disenfranchisement or not belonging, lack of awareness of (thus access to) resources available to law students, and a sense that discussion in the institution contemplates an audience not containing the point of view possessed by the outsider. This article focuses on these aspects of the experience.

⁶ Morrison Torrey, *Yet Another Gender Study? A Critique Of The Harvard Study And A Proposal For Change*, 13 WM. & MARY J. WOMEN & L. 795, 796 & n.2 (2007) (citing Janice L. Austin, *Results From a Survey: Gay, Lesbian and Bisexual Students’ Attitudes About Law School*, 48 J. LEGAL EDUC. 157, 164–67 (1998)); Rhode, *supra* note 4, at 192–93 (women and minority men feel uncomfortable in law classrooms and report higher than average levels of dissatisfaction and disengagement with the law school experience). *But cf.* Walter T. Allen, Charles E. Daye, Meera E. Deo, Nisha C. Gottfredson, A. T. Panter, & Linda F. Wightman, *Identifying Predictors Of Law Student Life Satisfaction*, *supra* note 6, at 525 (African American students reported significantly less life satisfaction than all others; Asian American students reported significantly more life satisfaction relative to White students; older students were less satisfied than younger students; men were slightly less satisfied than women. “[The legal academy] must recognize that its own Langdellian methodolatry promotes psychological and academic distress, [and that] potentially all students suffer needlessly as a result, but that non-traditional students are likely to suffer much more acutely and as such, the institution may unwittingly promote continued discrimination and segregation even beyond its law school corridors.”). See 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 (1994).

⁷ *Id.*

classroom.⁸ One outsider student states, “I think that professors overlook the effect that law school can have on a student’s self-esteem. My law school experience has left me with almost insurmountable self-doubt about my ability and my overall intelligence and academic capacity.”⁹

This article discussed three categories of student experiences. One category involves faculty directly targeting individual students because of the students’ race or ethnicity (“Targeting Individuals”). Another involves faculty or administrators publicly making flagrantly biased statements with no apparent awareness of how deeply offensive listeners would find them

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A growing body of literature . . . describes and contextualizes the law school experience. Based on surveys of law students and alumni, narratives, and other data, this literature describes a law school experience that may be formally equal, but that is culturally unequal. According to these sources, a significant differential in experience, comfort, and challenge exists for those who are latecomers and outsiders to legal education, especially women and people of color. The law school, then, may be described as a complex cultural institution that presents different challenges for different people. In the cultural setting of legal education, race and gender differences operate differently and also sometimes interactively, providing examples of the multidimensional nature of self and the complex layers of prejudice.

Nancy E. Dowd, Kenneth B. Nunn & Jane E. Pendergast, *Diversity Matters: Race, Gender, and Ethnicity in Legal Education*, 15 U. FLA. J.L. & PUB. POL’Y 11, 16 (2003). In essence, the majority is unaware that “point-of-viewlessness” is not possible. According to Martha Minow:

[r]elationships of power are often so unequal as to allow the namers to altogether ignore the perspective of the less powerful. The social relations approach embraces the belief that knowledge is rooted in specific perspectives, and that ‘prevailing views’ or ‘consensus approaches’ express the perspectives of those in positions to enforce their points of view in the structure and governance of society.

Martha Minnow, *When Difference Has Its Home: Group Homes for The Mentally Retarded, Equal Protection and Legal Treatment of Difference*, 22 HARV. CIV. R. CIV. LIB. L. REV. 111, 128 (1987).

⁹ Anonymous law student, statement documented in author’s files.

(“Biased Public Statements”). A third category involves incidents in which faculty speak as if everyone in the room is white, even though students of color are present (“Invisible Students”).¹⁰

These alienating and marginalizing experiences in law school may underlie some of the disparities that occur subsequently in people’s legal careers. For example, the representation of women and minority group members in positions of power and influence continues to lag behind that of the majority. Despite parity between the numbers of women and men graduating from law schools,¹¹ women occupied only 18 percent of equity partnership positions in law firms nationwide in 2016,¹² and only 44 percent of law school faculty positions.¹³ Similarly, in the fall of 2013, 27 percent of

¹⁰ See *infra*, text accompanying notes 23-26.

¹¹ American Bar Association, *2016 JD Matriculants by Gender and Race/Ethnicity*, AMERICAN BAR ASSOCIATION (Fall 2016), http://www.americanbar.org/groups/legal_education/resources/statistics.html; see, e.g., Elizabeth Olson, *Women Make Up Majority of U.S. Law Students for First Time*, N.Y. TIMES (Dec. 16, 2016), https://www.nytimes.com/2016/12/16/business/dealbook/women-majority-of-us-law-students-first-time.html?_r=0.

¹² Lauren Rikleen, *Report of the Ninth Annual Survey on Retention and Promotion of Women in Law Firms*, NATL ASSOC. OF WOMEN LAW (Oct. 27, 2015), <http://www.nawl.org/p/cm/ld/fid=506>.

¹³ American Bar Association, *Section of Legal Education and Admissions to the Bar, Law School Faculty and Staff by Ethnicity and Gender*, AMERICAN BAR ASSOCIATION (Fall 2013), http://www.americanbar.org/groups/legal_education/resources/statistics.html; In *Reproducing Gender On Law School Faculties*, 2009 B.Y.U. L. REV. 99, 102–03, Professor Ann C. McGinley affirms:

Statistics collected by the Association of American Law Schools (AALS) confirm Professor Kornhauser’s results and demonstrate that while women have made continuous progress on law school faculties, they still occupy a disproportionate percentage of the lower-paying, lower-status jobs. From academic year 1998-99 to academic year 2007-08, the percentage of women law school deans rose from 10.4% to 19.8%. Their proportion of full professors grew from 20% to 29.3% of the population. Unfortunately, however, women represent 61.3% of lecturers and 65.4% of instructors. In contrast, men represent the vast majority of high-paying and high-prestige positions, 80.2% of deans, 70.7% of full professors, but a minority of low-paying and low-prestige positions, 38.7% of lecturers and 34.6% of instructors.

full-time JD students in accredited schools were minority students.¹⁴ According to the National Association for Law Placement (NALP), 8 percent of partners in United States law firms are minority.¹⁵

This article is the culmination of a nationwide project dedicated to gathering students' stories about marginalizing experiences at their law schools. Our primary purpose in collecting and reporting these stories is to convey to law faculty and administrators' information about a type of in-class occurrence that may be interfering with their students' learning.¹⁶ In positions of power and often members of racial and other majorities, faculty may be unaware of how drastically their own points of view diverge from the perspectives of the outsiders they teach, or how that divergence can cause students to feel marginalized.¹⁷

This marginalizing impact on the outsider student is of monumental importance. The alienation between teacher and student *interferes with the very learning process that the professor is meant to nurture*. Law school faculty rightly pride themselves on excellence in teaching, and will, we believe, be shocked to read of some specific occurrences that

¹⁴ AMERICAN BAR ASSOCIATION, *supra* note 13.

¹⁵ 2016 Report on Diversity in U.S. Law Firms, NAT'L ASSOC. L. PLACEMENT (2017), <http://www.nalp.org/uploads/Membership/2016NALPReportonDiversityinUSLawFirms.pdf>.

¹⁶ We do not attempt to explain or critique the student experiences, but just take them at face value. For our purposes, it does not matter whether the feelings students report are "justified" or "unwarranted." We seek only to let faculty know how some students experience the classroom. For a discussion of experiencing class from a minority perspective when perspectivelessness is presumed, see Jon Hanson & Michael McCann, *Situationist Torts*, 41 LOY. L.A. L. REV. 1345, 1440 (2008).

¹⁷ For a discussion of the ways in which classroom discourse effectuates marginalization and other harms, see Brook K. Baker, *Language Acculturation Processes and Resistance to in "Doctrine" action in the Legal Skills Curriculum and Beyond: A Commentary on Mertz's Critical Anthropology of the Socratic, Doctrinal Classroom*, 34 J. MARSHALL L. REV. 131-41 (2000).

unintentionally distract an entire segment of students from the educational mission at hand.¹⁸

Several years ago, the professorial half of our research team had an experience that exemplifies the problem. At the end of an Employment Discrimination class, a group of women students approached me to express a concern. This interaction took place during the second week of the semester. The students informed me that, in addressing students in the class, I had been calling women by their first names and men by “mister,” followed by their last names. Needless to say, I apologized profusely. Together, we discussed possible causes. One potential cause (a possibility that made this occurrence particularly distressing) was that I viewed men as worthy of more respect (thus the “mister” title) than the women warranted. Another possible cause was that I was unconsciously drawing this distinction because I knew many of the women students, and not the men students, as many of the women had taken a Women and the Law class with me the previous semester. For present purposes, though, the possible

¹⁸ Perspectives on privilege vary depending on who is looking, with outsiders evincing sensitivity to the possibility of privilege and insiders (the privileged) failing to notice. In a University of Florida law student survey, a majority of white respondents thought that race was irrelevant in the classroom. These students did not perceive themselves to be more likely to speak up in a class where the professor happened to share their racial group. They did not believe that race could affect grades, how a student is treated in class, or how comfortable a student feels in interacting with a professor outside of class. In contrast, the majority of African-Americans students reported feeling more comfortable speaking in a class taught by a professor of their own race; agreed that they were more comfortable with the teaching approach of a same-race professor; and agreed that the race/ethnicity of a student affects the way the student is treated in the classroom. They were concerned that race may consciously or unconsciously affect grading. They were more comfortable with professors of their own racial/ethnic group outside the classroom, and thought there were not enough professors of their own race to provide sufficient role models. As compared to whites regarding gender issues, African-Americans again saw gender as having more significance in the law school than did whites. They were more likely to agree that the gender of a student affects the way the student is treated in the classroom, that the gender of a student affects grading, and that many students come to the Levin College of Law expecting a competent law professor to be male.” Dowd et al., *supra* note 8, at 27.

reasons why I discriminated between the men and women in the class are immaterial.

The first lesson is that faculty may differentiate on the basis of a trait like race or gender without realizing they are doing it.¹⁹ That is what happened to me. I had no idea, and I do care a lot about treating students equally, so I would have expected to notice; but I was oblivious. The other lesson is this: the people who were distracted by the occurrence, as evidenced by their reporting it, were all members of the group being treated. No men came forward to complain. Whether conscious or unconscious, professors' biased statements in class disparately affect the outsider who is being marginalized. For this reason, our failure to curtail and correct our bias in the classroom disproportionately distracts outsider students and, cumulatively, may significantly interfere with their educational opportunities in a way that is not true of insiders. In effect, such disparate treatment of groups results in unequal access to educational opportunity for the outsider student.²⁰

A second purpose of this project is to provide students from law schools across the country an opportunity to share their experiences. A motive here is to create an opportunity for catharsis—in our call for stories, we explained to students that we would use their stories to help law schools create a more inclusive environment. We wanted students to feel that they could do something about the problem, and that people in the legal academy do care and want to understand how to do a better job of communicating

¹⁹ Stuckey, *supra* note 3, at 89 (expressing an expectation that “[a]s students progress through law school, they identify and analyze their conscious and subconscious biases regarding race, culture, social status, wealth, and poverty through discourse with their teachers and fellow students”).

²⁰ It could be, as is often argued, that outsider students benefit from these occurrences because such occurrences teach them to function in the face of marginalizing comments from authority figures. This may well be true, but in the course of this toughening up process, the outsider is subjected to a distraction that the insider does not experience. Thus, the outsider is building emotional callouses, but at the expense of remaining focused in class.

and supporting the education of all students equally.²¹ A number of students expressed relief that someone cared enough to ask them to share their experiences.

This article consists of four parts. The first part is a brief description of how we conducted our research. The second is an account of the stories themselves. In the third part, we explain why this is an issue for which law schools should assume responsibility. The fourth part discusses concrete recommendations to help faculty and administrators broaden their perspectives to serve the broad range of students who come to the legal academy today.

II. GATHERING STUDENT STORIES

Beginning in the spring semester of 2009, the authors began to contact law students at law schools across the United States and invited them to submit stories. The invitation went to ninety student groups with special interest focuses on race, sex, or other outsider traits. The law schools whose students were contacted span all levels of law school rankings and all geographical regions. Our initial correspondence consisted of three sets of emails: an initial invitation in March 2009, a follow-up reminder in May 2009, and a second invitation in October 2009. Copies of these communications appear in the appendix.²² We created a listserv address for students to respond to, giving access and distribution only to the researchers. In this way, we could protect the identity of all participants. Following that initial solicitation, we collected additional stories submitted by students who knew of the study. Below, we recount those stories we received from students, along with their explanations of the manner in

²¹ We received several messages from law students expressing gratitude, excitement and relief that this project was being conducted.

²² The researchers submitted a proposal and received approval from the William & Mary Human Subjects Committee to collect this information.

which the occurrences colored their perceptions and experiences. Copies of all correspondence with the participants are on file with the authors.

A. Stories of Marginalization

Student responses fell into three categories. Some students told of faculty directly targeting individual students because of the students' race or ethnicity ("Targeting Individuals"). Others reported faculty or administrators publicly making flagrantly biased statements with no apparent awareness of how deeply offensive listeners would find them ("Biased Public Statements"). A third group of students described incidents in which faculty spoke as if everyone in the room was white, even though students of color were present ("Invisible Students").

B. Targeting Individuals

Targeting a student's race or ethnicity seriously distracts the target, alienating them from their classmates and interfering with their legal education in ways not experienced by insider students.²³ In one class, the professor's "unusual" relationship with two Asian students involved both tokenism and ostracization. The professor called on the only Asian American student in the class to answer questions about the *Korematsu* case. Apparently, the professor believed the student to be Japanese, though classmates knew him to be Thai American. The same faculty member mocked a Chinese LLM student, who was still in the process of mastering English, by asking whether the student understood odd American words.²⁴ On one occasion, the professor's "words of the day" were "fouffy" and "mole" (meaning spy). The student's English speaking skills made it difficult for him to respond, and each time the professor made these

²³ Bystanders, of course, may experience distraction as well, but they are bystanders, not targets.

²⁴ The language in this report is that of our student respondents edited to achieve conciseness.

inquiries, the LLM student turned bright red in the face and appeared to be very upset.

Some faculty straightforwardly attack students on the basis of outsider traits. One student reported being told by her professor that the student was “too old” to be a law student and that the student should “just quit.”²⁵

Another student told of a professor questioning the student’s ethnicity:

I am a first generation born Mexican American and competed on my law school mock trial team for two years. The mock trial coach, who is also a professor at the law school, asked me one day during mock trial practice if I spoke Spanish. I told her that I do speak conversational Spanish, but am not as fluent as I would like to be. The professor, who is white, proceeded to tell me that I am “not a real Mexican.” Throughout my two years on the team, whenever I brought up my involvement in the law school’s La Raza organization in conversation between teammates, the professor would jump into the conversation making comments like, “I don’t know how they even let you in that group,” or “You’re not Mexican enough for that, you don’t even speak Spanish.” These comments continued throughout my membership on the team despite my telling her that those comments were rude and offensive.

As the story reflects, the student’s attempt to correct the problem by confronting the faculty member met with failure.

Another student shared a story of treatment at the hands of other students, rather than faculty.

I am a white female non-heterosexual 3rd-year-student, at least one generation older than most of my classmates. I’m in good physical condition. In my first month at a school that has received high ratings for diversity, I heard numerous comments expressing surprise that I was a law student. “Are you studying to be a paralegal?” “Are you a librarian?” But the two most hurtful and inappropriate comments that stuck with me and undermined my self-confidence: One younger student, on hearing that I was trying

²⁵ This student’s age at the time was 32.

to get back into my running program, said “just be careful you don’t fall over the first time you go out.” Another student replied, “luckily, I know CPR because there’s a lot of Baby Boomers in our office.” During law school, for the first time in my life, I have often felt like a minority and have really wanted some other student - anyone - who looks like me; now I understand why it’s so important for students of all ages to have people around who “look like them.”

The statements described by this student might seem to be nothing other than mild bantering in another context, and quite possibly the speakers intended exactly that. Where such comments target an isolated outsider in the competition-charged law school environment, however, they may exacerbate marginalization, as happened in this case. It is clear, moreover, that the student is also disappointed that faculty and staff witnesses failed to come to her aid, for she notes that the comments were made in the presence of faculty and staff who failed to challenge them. Faculty and administrators who witness student-on-student bias and hostility may be in a quandary. They are usually loath to interfere with students’ rights to express themselves, but, at the same time, want to protect students from unreasonable treatment that will interfere with their ability to focus on their studies. There may be a balancing process: weighing the hostile students’ right to free expression against the target’s right to pursue education unmolested. There is more, though, than just concern about whose rights are being violated: law schools are incubators. Students who create hostile climates for minority students present law schools with teachable moments on civility, collegiality, and diversity in the profession²⁶. As suggested above, the caliber of the diversity climate in the legal profession hinges in part on the lessons learned in law school.

²⁶ A colleague from one school appeals to students’ self-interest in their professional reputations when he shares with students the story of a fellow student from his own law school days who told a racist joke during study group and is not remembered today by other group members except as the teller of that joke.

C. Biased Public Statements

Several students reported statements by faculty or administrators exhibiting blatant racism or insensitivity on racial issues. One student's first day of law school opened her eyes to a mentality that she feels separates students from each other:

On our first day, the dean gave a speech about the history of our school. At one point, the dean said, "If it wasn't for the Indians fighting us, we would have been founded 50 years earlier." This comment was hostile and rude especially because the dean neglected to mention why the "Indians" were fighting "us," and I found this "us" and "them" mentality to be especially divisive.

In addition to the student's articulated concerns about the dean's statement, it is easy to imagine how the Native Americans in the audience experienced this.

Another student felt alienated by a professor who frequently told students that "diversity does not matter," and that ethnic studies classes, such as Critical Race Theory, "have no place in the law school curriculum." Of course, the professor is entitled to express her beliefs. The position of this article is not that faculty and administrators should refrain from expressing their views. Instead, it is that faculty and administrators should be conscious of the ways in which their words may affect outsider students who already feel marginalized in the legal academy.

A student from another school reported frustration with her law school administration's inability to understand student sentiment surrounding a faculty hiring decision:

Someone applied to be a law professor at my school. Though a brilliant . . . academic, a few years earlier the applicant had published his notes from law school, which contained racial slurs. He later removed the notes and apologized. The faculty and administration approved tenure for the applicant.

The diverse student organizations were outraged that our (all-white) faculty was not concerned that some law students would

most likely be uncomfortable in the classes of the professor, who would be teaching required first-year courses. There were e-mails, petitions, and law school newspaper articles voicing student outrage. Administrators failed to even attempt to discuss the matter with the outraged students until an embarrassing article was published in a national newspaper. At this point, administrators called a town meeting. But before the meeting occurred, the applicant withdrew his application. The students were upset that their concerns were never addressed.

In order to ensure a wholesome learning environment, every law school needs channels of communication that allow student concerns to reach the ears of thoughtful, responsible administrators. An ombudsperson, a dean of students, or a council of students with direct access to the law school's dean can communicate to the dean the full volatility of the situation . As a threshold matter, the students' voices must be heard in order to maintain even a modicum of peace in the school. Even if the faculty or administration ultimately make decisions that are counter to the diversity interests within the institution, the students' voices should play some role in the decision-making process. In a time when many law schools are competing for the strongest applicants, having a reputation as a school that hears what its students are saying could help weigh applicant decision making in a school's favor.

Students at another law school were disappointed when the administration distinguished Martin Luther King's birthday from other holidays:

Before the start of the second semester of my first year in law school, the Office of Registration emailed the school to inform us that the first day of classes had to be rearranged "to make up for the fact that we had to take off for the Martin Luther King Holiday." I was well aware of the ABA's required amount of hours for classes and knew that we also "made up" the day after Thanksgiving and Labor Day, so I was a little struck by the fact that the King holiday had been singled out for its effect on our schedules.

I mentioned the email in a BLSA meeting and found that other students were upset. The chapter president promised to say something to the Dean of Records and Registration and I figured the situation would be resolved.

The next year, however, we received ANOTHER email that said the EXACT same thing as the year before. It seemed to me that the administration was making an extra effort to tell students that they didn't really approve of having to make room for the King Holiday and, in my opinion, this diminished the meaning of the holiday. I decided to email the dean of the school, the dean of records and registration, and the dean of student life to inform them that I was upset with the tone and the contents of the email.

The Dean of Registration emailed me back to tell me that they were aware that some students were offended, but was not sure how to resolve the problem. I suggested saying nothing about the reason the classes were rescheduled - just like no explanation was given regarding the day after Thanksgiving or Labor Day - and simply emailing the revised schedule to the student body. My suggestion was well received and this year, no accompanying explanation was given for why the first day of spring classes was being rescheduled.

While the fact that I had to say anything at all frustrated me, I was very pleased with the administration's resulting willingness to be considerate of viewpoints of some of its students.

This story demonstrates the importance of hearing what students, particularly outsider students, are saying and shows what can be achieved by a student's persistence. Affected students concluded that the administration did not understand that their announcement could have a negative impact on a group of students, remaining oblivious even after a student complained. Students perceived the administrative action as "an extra effort to tell students that the administrators didn't really approve of having to make room for the King Holiday, thereby diminishing the meaning of the holiday."

D. Invisible Students

A third category of injurious professorial behavior entails apparent faculty blindness to the experiential differences of people in the room. Students complain of professors using examples in class or on exams that rely on presumed life experiences that some students do not share:

I took corporations my second year of law school. This course focused on the different types of business entities and my professor always attempted to use examples we could understand. Often, the professor made statements like, “if you look at your shareholder agreement, you will notice your rights listed as a shareholder” or “how many of you participate in votes open to shareholders?” I often wondered if I was the only person in the classroom who had never seen a shareholder agreement and who did not own stock in any company.

Another student reported an ‘invisibility’ incident that took place on the first day back from spring break:

Welcoming the students back, the professor stated, “I hope you all had a great time and got a good tan.” As a person with naturally dark skin, I looked at the other student of color in the class who was already looking at me. At that moment, I felt largely ignored and invisible to the professor and wondered exactly how, if at all, the professor sees me.²⁷

The students’ sense that they are not seen by the faculty, that they are not the expected audience for the faculty’s words, can exacerbate the sense of alienation and disenfranchisement. The suggestions are below.²⁸

III. WHY LAW SCHOOLS ARE RESPONSIBLE

Whose problem is this? If students are distracted in class by marginalizing events, that problem belongs both to the students and to the

²⁷ In response to this student comment, one person of color who reviewed this article commented, “Black people tan!”

²⁸ See text accompanying *infra* notes 32–49.

institution, but in very different ways. It is, as a practical matter, the outsider students' problem because students are the ones confronting cultural and discriminatory obstacles that traditional legal education places in their paths, frequently achieving monumental successes in the face of those challenges. Real responsibility, however, belongs to every institution committed to making education available equally to all admitted students. If schools are committed to admitting previously excluded groups, they must give real access. That means welcoming such outsiders as warmly as they welcome privileged, traditional law students.²⁹ To admit previously excluded groups in order to present favorable statistics on the U.S. News or similar surveys without concomitant efforts to give meaningful access to those admitted students would be unconscionable.

This is one reason why a diverse faculty is so important and why diversity is a proper consideration in faculty hiring. Diversity on the faculty makes access for diverse students meaningful. Diverse faculty may share their experiences and recognize the challenges faced by outsider students, thereby helping these students join a mainstream from which they previously have been excluded.

Although the problem belongs primarily to the institution, rather than the students, students who are marginalized often assume responsibility for educating their peers and faculty. That responsibility accrues to these students both by default and as a result of pressure from the establishment. Sometimes, for example, minority students speak up in class on behalf of a minority perspective that would otherwise go unrepresented. At other times, a professor literally calls upon a minority student to represent the views of a particular group the professor perceives the student to represent. The fact that, as a practical matter, this responsibility often defaults to the outsider student does not mean that responsibility properly belongs there. The onus

²⁹ Dowd et al., *supra* note 8, at 40; Judith D. Fischer, *Portia Unbound: The Effects of a Supportive Law School Environment on Women and Minority Students*, 7 UCLA WOMEN'S L.J. 81, 87 (1996).

of the task of integrating marginalized law students should be the institution's, not the students'. It is important that outsiders not be blamed for their outsider status; they do not have the power to become an integrated part of the institution without access being given by insiders at the institution.

One respondent argued that the authors of the present article should shift their focus from critiquing the academy, to helping students gain access to higher education. This student would urge students to toughen up and learn how to "deal" in a less-than-friendly environment, rather than write about how marginalized they feel. The authors of this article agree that thick skins help students thrive in the face of marginalizing experiences. It is the wise law student who equips herself to navigate a hostile, discriminatory classroom.

Although it is true that students whose professors marginalize them may be able to respond by refusing to be injured and by engaging the issues, this response does nothing to correct the root of the problem. Instead, faculty must be challenged to take affirmative steps to expand their world view and their consciousness to become mindful of the range of perspectives represented in their classrooms. Professors have a responsibility to educate themselves and consider their roles in the shaping of student experience. Students who are made to feel invisible by comments and actions of classmates and faculty cannot change themselves to become more visible. Instead, classmates and faculty must change their viewpoint and begin to see and understand the people in their environment. It is to the detriment of law schools not to meet the needs of all students who entrust their legal education to them.³⁰ There is room for improvement on all fronts. This project simply addresses the problem from one of many available approaches.

³⁰ If the law schools do not meet this challenge, then the legal profession and society as a whole are injured by the fact that lawyers, the most powerful group in our society, are incapable of working in a diverse reality.

IV. SUGGESTIONS³¹

In order for law schools and law students to realize their full potential, barriers to full participation must be identified and ultimately removed. Law schools are responsible for improving conditions so that legal education occurs in an environment that welcomes and supports diverse student populations. The array of methods available for ameliorating the marginalization of outsiders is broad. First, it is important to understand that achieving inclusion is not only about eliminating discrimination or even increasing the representation of previously excluded groups. It is about creating conditions that enable people of all groups to take advantage of educational opportunities and realize their capabilities.³² It is not enough for institutions to strive simply for numerical representation of women, students of color, and other outsider groups.³³ Equality, not just of access, but also of experience and engagement among all institutional citizens must be the goal.³⁴ All students (and other community members) should be able to realize their potential and participate fully in the life of the institution. To accomplish this, law school faculty and administrators must be willing to acknowledge and act on the concerns of outsiders, as well as those of

³¹ For best practices in creating and preserving a good climate for GLBT students, see Brietta R. Clark, Robin Ingle, Elizabeth Kransberger, Lawrence Levine, William Perez & Kelly Strader, *An Assessment Of The Law School Climate For GLBT Students*, 58 J. LEGAL EDUC. 214, 241 (2008).

³² Susan Sturm, *The Architecture of Inclusion*, 29 HARV. J.L. & GENDER 247 (2006).

³³ Despite the fact that law schools have achieved numerical equality between male and female students enrolled in law school, research indicates that some women and members of traditionally marginalized ethnic groups continue to experience law school differently than majority group members.

³⁴ See Christine Garton, *Still a Tough Market for Women*, LEGAL TIMES (Sept. 6, 2004), <http://www.law.com/jsp/printerfriendly.jsp?c=LawArticle&t=PrinterFriendlyArticle&cid=1095207119654>; see also G. Jeffrey MacDonald, *Law School Verdict's Still Out: Race vs. Ranking*, USA TODAY, at 5D (Apr. 25, 2006), http://www.usatoday.com/news/education/2006-04-24-law-school-race_x.htm (noting that numerical equality has not been achieved by blacks enrolled in law school).

traditional law students. Law schools must establish systems to ensure that administrators and faculty in positions of power hear the voices of students—both outsiders and insiders. The critiques these students offer will empower the institutions to reduce marginalization of the outsider and educate the insider on how to work effectively in a diverse world. The recommendations in this section are options for law schools to begin to identify and remove institutional barriers.

A. Gathering Information About Student Experiences

Law schools will benefit from soliciting information from students about the students' experience of the academic environment and the climate for diversity.³⁵ The same dichotomies in experience that allow faculty to unwittingly alienate their students can keep faculty and administrators from realizing how students experience the institution. Unacknowledged differences in perspective interfere with communication. This solicitation of student views should be done in a way that allows students to feel comfortable making comments, such as one that allows anonymous commenting. Constant solicitation of input from students allows ongoing assessment of the institutional climate. Equally important, the institution's sponsorship of such information-gathering tells students that their experience matters, and that the institution recognizes its responsibility for the environment in which they study. It shows that the institution cares.

B. Student Focus Groups

Student focus groups can elicit the identification of disparities between groups in their experiences of the institution. They can uncover the ways in which full citizenship is or is not being achieved and can also allow a

³⁵ A number of studies have been conducted to gather information on law student experiences, and there are arguments for continuing that effort. Ann Bartow, *Still Not Behaving Like Gentlemen*, 49 U. KAN. L. REV. 809, 814–15 (2001). We propose that schools can gauge their own success by tracking and responding to the student experience.

healthy exploration of reasons underlying such disparities.³⁶ A peer focus group meeting gives students the opportunity to brain-storm, compare notes, and work through issues face-to-face. It also provides information to the faculty and administration, fostering insight and sensitivity that will improve the classroom climate. Appendix B of this article contains a sample “game plan” for such a student focus group.

C. Surveys/Amplification of Course Evaluations

Law schools can add or modify existing student surveys and course evaluations to measure the students’ experience of inclusiveness or marginalization.³⁷ The advantage to such surveys or evaluations is that all students are given the same opportunity to explain their thoughts.³⁸ Students may share thoughts without fear of ridicule or embarrassment. Proposed questions to be included on course evaluations or on a diversity component of course evaluations are contained in Appendix C of this article. Surveys would give faculty and staff the benefit of knowing how students perceive the classroom and law school environment; that information would then be beneficial to improvements in individual courses and in the institution as a whole. Course evaluations should include an assessment of the classroom learning climate, including diversity and inclusion issues—both whether the teacher took the opportunity to discuss diversity questions presented by the material and whether students felt comfortable in the class, felt free to speak up, etc. The addition of “inclusiveness questions” to course evaluations would raise the

³⁶ Bonita London, Vanessa Anderson & Geraldine Downey, *Studying Institutional Engagement: Utilizing Social Psychology Research Methodologies to Study Law Student Engagement*, 30 HARV. WOMEN’S L.J. 389, 390 (2007).

³⁷ For the many law schools already engaged in ongoing student life assessment, adding an entirely new survey would risk survey fatigue. At the same time, questions about student marginalization will fit neatly into existing survey or course evaluation instruments. Proposed questions are set forth in appendix 2.

³⁸ Students who report marginalization also sometimes report reluctance to speak out on the subject.

consciousness of faculty on the issue of inclusiveness and would permit deans' evaluations of faculty to account for faculty effort and success on achieving a positive classroom climate of inclusiveness. Faculty salary increases should turn, in part, on faculty success at creating a good classroom climate.

V. CHANGING WHAT FACULTY DO

A. Faculty Training

To deal with differences in the classroom, law schools should implement teacher training for faculty.³⁹ Such training could include work on uncovering unconscious bias and techniques for creating an inclusive classroom climate. It could also include development of skills for including and teaching the issues of equity and inclusion that arise in the legal cases covered in class and that are presented by the class composition itself. Presently, faculty may avoid issues of equity and inclusion because of discomfort in dealing with such topics or because of the danger of tokenism in the law school classroom—such as calling on an ostensibly Asian-American student to discuss a case pertaining to the internment of the Japanese-American people during World War II. The academy should support faculty efforts to foster discussion of diversity issues, rather than avoid such issues. For example, most students, and probably all students of color, take note of the racial composition of their classes; it is a risk worth taking to find ways to discuss generally if and how the lack of racial diversity affects legal professional training without putting individual

³⁹ See generally Gerry Hess et al., *Teach to the Whole Class: Barriers and Pathways to Learning*, INST. FOR L. SCH. TEACHING, (1997) (instructional video and materials for faculty teaching diverse law student populations). This directness is also a way for law faculty to compensate for their own, and their students', unconscious bias. Law faculty generally do not, but should, receive training in teaching methods. See Stuckey, *supra* note 3, at 107. See also, Rhode, *supra* note 4, at 196–97. One portion of the needed training would teach law faculty to deal with their own and their students' unconscious bias.

students “on the spot” to defend their presence in the academy.⁴⁰ The conversation could be general, but would prepare students to acknowledge and discuss issues of inclusion as they enter the profession.⁴¹ In fact, perhaps the best way to educate faculty on issues of bias is to encourage faculty to educate their students on that topic.⁴²

B. Giving Students Equal Access to Faculty

Another obstacle to inclusion may be the difference in access to professors.⁴³ If a student feels invisible or less wanted than other students, it is understandable that the student will not feel comfortable with a professor on a one-on-one basis or as comfortable as a traditional student would feel. Students who feel at home in the legal academy, whose parents went to college, and who are educationally and economically advantaged feel more entitled to approach faculty members and administrators for assistance. Professors may wish to consider eliminating one-on-one examination preparation meetings with students. This avoids rewarding or preserving privilege to the extent that privileged students are more likely than outsiders to feel entitled or welcome to come to a professor’s office. Instead, faculty

⁴⁰ For example, in a November 2001 Fordham symposium discussion, Professor Rhode described an in-class exercise that they used in their seminar on “Ethics in the Public Interest.” In this exercise, each student was asked to draw a sketch of how s/he viewed himself or herself in the Fordham Law School community. Race emerged as a subtext in many students’ sketches in terms of where they located themselves in the community (insider, outsider) and how they felt about their position. The sketches in turn led to an illuminating discussion of the role of race and gender in the law school community and in legal education generally.

⁴¹ See Stuckey, *supra* note 3, at 89.

⁴² In the words of Roman philosopher Seneca the Younger, “we learn by teaching (Docendo discitur).” See ANNA LYDIA MOTTO, *GUIDE TO THE THOUGHT OF LUCIUS ANNAEUS SENECA, IN THE EXTANT PROSE WORKS: EPISTULAE MORALES, THE DIALOGI, DE BENEFICIIS, DE CLEMENTIA, AND QUAECTIONES NATURALIS* (1970).

⁴³ This comment spawned conversation among faculty readers of the article, who stress that their doors are open and that they are frequently visited by students who might be categorized as “outsiders.” Many faculty devote substantial hours to helping students, and especially this particular group of students. On the other hand, some outsider students state that there are some faculty whose offices they will not visit.

members might ask students to email questions, to which faculty can respond either on a website, such as Blackboard, or in an open session. As the exam approaches, faculty can level the playing field by limiting conversations about course material to conversations that are shared with the entire class. This is a revolutionary notion, as many faculty and students enjoy open door policies, and faculty perceive themselves to be welcoming to all students.⁴⁴

VI. INSTITUTIONAL REFORM

A. Use Clinical Opportunities to Expose Faculty and Students to Different Perspectives

Schools can increase the role that clinics play in exposing the law school community to differently situated people. Other than some discussions in constitutional law, law students and law faculty may pass their days without any focus at all on issues of inclusion, privilege, and bias. Both faculty and students would benefit from exposure through clinics to those who are not similarly situated. This is especially true for faculty whose teaching and scholarly focus tends toward the theoretical. Schools not presently offering such opportunities should consider adding a clinic that will provide legal help to the indigent, racial minorities, those whose first language is not English, or those whose first culture is not North American. Giving law students and law faculty an opportunity to work with the community outside

⁴⁴ See, e.g., *Faculty and Scholarship*, UNIVERSITY OF IOWA SCHOOL OF LAW. <https://law.uiowa.edu/faculty-and-scholarship> (University of Iowa description of faculty open-door policy). Several faculty confronted with the proposal in text have expressed dismay about the prospect of losing individual contact with students and also protested that they seek out and enjoy visits from a diverse group. While this is to be commended, we never know which students did actually hold back from seeking help because of a sense of not being entitled to burden the professor. Some would say that students too marginalized to seek help will not be very good at representing their clients. It is in law school, however, that the playing field hopefully is being leveled. In law school, with the right support, students heretofore excluded may become comfortable joining the mainstream.

the academy may expand their ability to empathize with people different from themselves. The lessons learned through these clinics will overflow into the classroom, providing additional learning opportunities and insight into how different groups function. Ultimately, this will make both faculty and students more valuable members of the legal profession.

B. Add Diversity-Focused Courses

Finally, more law schools should consider adding courses emphasizing diversity. The proposed courses might focus narrowly on the legal profession, or more broadly to some areas of law. Emphasizing diversity in the curriculum would allow for faculty and non-outsider students to have greater exposure to points of view and circumstances they are not currently exposed to.

One approach is to create a unit of materials about diversity in the legal profession as a required course. Many schools do not require an academic course devoted to analyzing the strengths and weaknesses of the legal profession with respect to equity, inclusion, and socialization. Law students, as well as law professors, would benefit from an intellectual structure within which to examine the history of inclusion in the legal profession, the present demographics of the legal profession, and how the lack of diversity in the profession affects not only their future as lawyers, but the future of their clients as well. Course topics could include: the history of women's and racial minorities' access to legal education; political, legal, and philosophical perspectives on affirmative action in the law; the role of the American Bar Association and other bar associations (particularly interest-based associations) in social justice initiatives; and other reforms that have created inclusion for non-traditional law students and lawyers. Just as marginalized students enjoy greater integration when they experience a person who "looks like them" at the podium, so marginalized students enjoy greater integration when the subject under study reflects a culture with which they are familiar.

Similarly, more schools might expand the offerings of diversity-related “law and ___” courses. For example, the William & Mary Law School currently offers an upper level seminar “Race and American Legal History,” which explores the intersection of the law and racial change in America.⁴⁵ Similar possibilities include women and law,⁴⁶ disability and law,⁴⁷ Native American law,⁴⁸ and so on.

Discussions about equity fit neatly within just about any legal course and yet often are entirely excluded.⁴⁹ Just as female students are the ones to notice a professor’s use of gender biased language, so too outsider students are likely to be the ones who notice that classroom discourse circumvents issues of race, bias, social justice, and so on. What are students who notice the conspicuous silence to make of it? One possibility is that students will come away with the sense that such discussions are not acceptable in legal circles. Another is that students may have the impression that diversity in legal education was an experiment that failed and must now give way to the

⁴⁵ *LAW 628 - Race & American Legal History* WILLIAM & MARY, http://catalog.wm.edu/preview_course_nopop.php?catoid=2&coid=3122 (last visited July 17th, 2017) (Archived Catalog).

⁴⁶ UNIVERSITY OF CALIFORNIA LAW SCHOOL COURSE DESCRIPTION PAGE, <http://www.law.ucla.edu/home/index.asp?page=205> (last visited March 23, 2010) (noting specifically, this course examines the legal and social status of women in modern American society, law and policy relating to that status, legal tools developed to address sexual inequality, and the possibility that law both challenges and supports women’s subordination).

⁴⁷ SYRACUSE UNIVERSITY COLLEGE OF LAW COURSE DESCRIPTION PAGE, [http://www.law.syr.edu/academics/centers/dlp/courses.aspx#dl course](http://www.law.syr.edu/academics/centers/dlp/courses.aspx#dl%20course) (last visited March 23, 2010).

⁴⁸ UNIVERSITY OF WASHINGTON SCHOOL OF LAW COURSE DESCRIPTION PAGE, <http://www.law.washington.edu/IndianLaw/Courses.aspx> (last visited March 23, 2010) (The University of Washington offers several courses and a clinic that focus on Native American law.).

⁴⁹ See Taifha Baker, *How Top Law Schools Can Resuscitate an Inclusive Climate for Minority and Low-Income Law Students*, 9 *GEO. J. L. & MOD. CRITICAL RACE PERSP.* 123, nn.133–140 and accompanying text (2017).

inevitable “normalcy” of black and brown tokenism, as one angry respondent to this survey suggested.⁵⁰

Discussing diversity, inclusion, and bias brings these issues to consciousness. When we are conscious of our biases, we become less likely to act and speak in accordance with them.⁵¹ With more discussion (and thus more consciousness) at law schools, both in and out of class, faculty and staff will likely make adjustments to create a more inclusive environment. Diversity issues that are ignored become like the elephant in the living room with everyone pretending it is not there. When the elephant’s presence is acknowledged, then real communication can begin. People will become free to express themselves. Such inclusive environments encourage and make routine the full participation of all of their members, and constantly monitor and ensure that all citizens are empowered to fully realize and develop their capabilities.⁵² An inclusive environment, then, becomes one in which all institutional members (particularly those who have historically been excluded and/or marginalized from the institution) are supported and expected to thrive both academically and socially, thereby contributing not only to their individual success, but to the success of the institution as a whole.

The need for reform in legal education remains. If the disparity between insiders and outsiders continues, real problems will remain unchallenged. The official stance will be that there are no problems. The blindness will permit the problems to spill over to the legal profession. Law schools must acknowledge that competent professional training of any student—insider or outsider—in the interests of justice cannot come without openly acknowledging the injustice within legal education and within the legal

⁵⁰ Margaret Russell, *McLaurin’s Seat: The Need for Racial Inclusion in Legal Education*, 70 *FORDHAM L. REV.* 1825, 1828 (2002).

⁵¹ See Debra Lyn Basset, *Deconstruct and Superstruct: Examining Bias Across the Legal System*, 46 *U.C. DAVIS L. REV.* 1563, 1571 (2013).

⁵² Sturm, *supra* note 32, at 250 (emphasis added).

profession itself. The atmosphere in the classroom should be one of mutual respect and collaborative learning.⁵³ Law professors must create and maintain student-friendly climates in their classrooms and other interactions with students. Students need to feel safe and free from fear of in-class humiliation. Only then will outsider students be willing to take academic risks. Only when outsider students are willing to take academic risks will law schools be worthy of being called “educational institutions.”

⁵³ See Stuckey, *supra* note 3, at 82.

APPENDIX

[Email sent to law students groups on May 16, 2009]

Friends:

Please circulate this message to your membership.

We write to ask your help with a project that will teach law faculty and administrators how to work more effectively (more inclusively) with diverse populations. We are gathering stories of current and former law students from law schools around the United States who have had marginalizing experiences during law school as a result of faculty, administrator or student insensitivity to their perspective or experience. We expect to publish these stories (without identifying the source of the stories) in an article that will educate faculty and administrators about the ways their actions may unwittingly injure students. By giving law school personnel insight into the kinds of things that marginalize students, the article will empower these personnel to meet their obligation to provide an environment that is inclusive and comfortable for ALL students.

Our focus is students whose race, sex, religion, economic background, ability status or other traits have resulted in marginalizing experiences, but we are glad to include your positive experiences as well. We also encourage law graduates to share their experiences from law school — or post-grad if you would like.

The identities of all those who provide stories will be protected. Stories will be edited to redact any identifying information such as names, location, time period and school. If, after submitting a story, you change your mind about sharing it, you need simply notify us prior to printing and we will pull it out.

We hope you will spend the few minutes it will take to send an email describing your story. By educating others about your experiences, you will improve legal education for the students who follow you.

Please email your story to stories@wm.edu. If you have any questions, please contact us at that email address as well.

Best wishes for the remainder of the semester and beyond,

Professor Susan Grover and Nikeshia Womack (2L)

If you have any ethical concerns regarding this project, please contact Chair of the Protection of Human Subjects Committee Michael Deschenes, PhD (E-mail: mrdesc@wm.edu, Tel:757-221-2778).

Stories of Marginalization—Last Call

Thanks to those who have shared classroom stories with us!

This is our last call. We are seeking stories about marginalizing experiences in the law classroom. Have you sat in the classroom with a professor or student who seemed completely unaware that there was racial diversity within the room or else clueless that the experiences and backgrounds of students are diverse?

Why are we collecting these stories? We want to share them (anonymously) to help faculty become more adept at working with diverse

groups. Faculty need (and often want) to learn about the experiences of different populations, and they will do a better job of teaching ALL students when they expand their understanding.

So please respond if you have not already done so: stories@wm.edu

Best wishes to each and every one of you for the summer and beyond.

Susan Grover
Nikeshia Womack