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Barbara L. Bernier

BETWEEN A ROCK AND A HARD PLACE

CENSORSHIP
Are my words too much for you?
Are they too dark, too sharp,
too colored with experiences
you will never be expert in?
Have I said too much?
Am I too plain,
putting out what I have to say
as it comes to me,
not shading sex with fruit
or hiding pain with flowers.
Do I have too few sunrises,
insufficient levels of illusion,
or is it too obvious that I have a point of view
which is unexpected?
Should I not talk about racism
because it is old hat,
poverty because it is passé?
Should I go back to my European roots
that were planted in my educational garden, and
pull out sonnets
and other controlled modes of expression?
Am I too wild,
unstructured
nonlinear
mosaic
indefinable
to be read by your erudite constituency?
Am I too Black?

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My insatiable love for learning and the excitement of connecting with students brought me to the teaching profession. Although my college major was steeped in anthropology and history, my graduate school travels took me through a masters in social work in which I tried to understand the psychosocial aspects of human beings. Thereafter, I pursued two law degrees, one of which specifically emphasized the foundations of the art of teaching. The opportunity to discuss the nuances of teaching with senior professors who served as mentors and with whom I co-taught various classes excited me. I explored concepts of teaching from the pedagogical, intellectual, and practical experience in group settings and also with individual professors. However, I soon learned that race was a definite issue in law school classrooms and remains very much an issue today. While at Temple University studying for my LL.M., only one professor, a black male, ever discussed the concept of race in the classroom. Moreover, only one of my colleagues ever raised the idea of gender. My colleague told me that she thoroughly appreciated the challenges of being a woman but could not understand the duality of being a black woman in front of a class of largely white students. I tried to meld the two aspects of my being from my discussions with these two professors, but somehow my experience was different from either of their experiences.

Throughout my teaching career, I moved through various types of law schools from private to public, from large to small, and clearly understood the concept of race in the classroom and in the politics of the Academy. I have finally achieved the coveted mantle of tenure, but somehow it is a hollow victory. Although I have managed to come to a place of comfort in the classroom and my student evaluations indicate that I am a great teacher, I am ever-mindful that I remain a black woman teaching law to people who, for the most part, have never had a black teacher. I consistently receive high approval ratings on my teacher evaluations, and some of my classes have waiting lists; however, I am always cautious of the undercurrent of being the ‘token.’

That said, I am constantly amazed by the over-thirty group whom I cautiously call colleagues. I have taught at my present institution since 1993 and remain the only person of color on the faculty. The politics of a “society of one” continue to concern me as I watch the dearth of hiring not only

2. See American Bar Ass’n, Multicultural Women Attorneys Network, The Burdens of Both, The Privilege of Neither, 17 (1994) (“Although certain assumptions of incompetence or weakness are leveled at women generally, or at minority males, neither group has both sets of stereotypes the way multicultural women do.”).

3. See Rachel F. Moran, Commentary: The Implications of Being a Society of One, 20 U.S.F. L. Rev. 503, 512 (1986) (“Moreover, because of the small number of minority and women faculty members, those who opt for pluralism will often constitute a ‘Society of One.’ A recent SALT position paper on minority hiring indicates most law professors are ‘isolated token presences on their campuses.’”). See also Racial Integration of Legal Education: Making Progress and Redoubling Efforts, American Ass’n Of
people of color but women as well. I am convinced that, although the American Association of Law Schools (AALS) and the American Bar Association (ABA) continue to have conference and workshop themes claiming diversity to be the number one priority in the new millennium, this mantra must be believed by those professors on hiring teams in order to effectuate movement in the recruitment efforts in law schools throughout this country. Efforts to increase the number of minority faculty must not wane.

Some argue that the retrenchment in law school applications throughout the past decade has placed an additional burden on the Academy to reduce available faculty slots. All too often, the reduction in slots adversely affects the hiring of additional professors of color. Moreover, many institutions continue to hire women and minorities for clinical and writing programs that carry job security and second-class status. The Academy expects that hiring one minority will accomplish the work of integration.

Professors of color face an additional burden of sitting on university and law school committees. This burden is a double-edged sword that undercuts time needed for scholarship and teaching. When the professor of color chooses not to participate on every committee assigned, he/she faces allegations of failing to be a team player. If one does participate, tenure committees often give little or no credit for additional institutional pressures placed on the minority faculty member. Thus, the ‘token syndrome’ makes inordinate made on the time of the professor of color that are never demanded of majority faculty.

There is an expectation, essentially a requirement, that

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7. See Richard Delgado and Derrick Bell, Minority Law Professors’ Lives: The Bell-Delgado Survey, 24 HARV. C.R.-C.L. L. REV. 349, 355-59 (1989) (noting that, according to Bell-Delgado study, factors that contribute to higher attrition rate include competing demands on time of professors of color due to increased committee work and student counseling, inability of white faculty to recognize impact of these increased demands, difficulties discussing work with white colleagues, resistance from faculty regarding hiring and tenure decisions, and that minority professors should be expert on issues of race even though there are negative messages sent to minority professors regarding their scholarship interest in civil rights concerns). See also Retaining Faculty of Color, AMERICAN ASS’N OF LAW SCHS. NEWSL. (AALS, Washington, D.C.) August 1996, at 7 (stating that although number of new minority faculty increased for
appears invisibly in the professor of color's job description. The professor of color must bring a minority viewpoint to the table when the majority desires. Further, that viewpoint is embraced so long as it is neither controversial nor uncomfortable to the majority. These requirements insinuate that the professor of color can speak the universal language of all people of color because all marginalized groups are monolithic. The 'one size fits all' mentality frustrates the effectiveness and the voice of the faculty member of color.

All professors should be concerned about the additional burdens and responsibilities of professors of color. These concerns should not be relegated to minority faculty alone. The mere employment of a professor of color does not remove the professional obligation of all professors to deal with students, to participate on committees at both the university and law school levels and to be members of the entire community, not discrete parts of it.

The professor of color counsels many students regardless of race or gender. Those students come to the professor of color because there are few professors they feel they can go to in time of need. Perhaps students identify with professors of color because the professor seems as powerless as the students feel. It seems that the hiring of a person of color eliminates the perceived guilt of not having any persons of color and removes the burden of having to deal with students of color and to provide the minority perspective. The hiring of one professor of color is a good deal for the institution that gets multiple personalities from one job description! It is no wonder that professors of color leave or simply disengage because of the unhealthy burdens presented by tokenism.

I write this essay after discussion and reflection about the ramifications of this action. Other professors of color have raised similar thoughts only to

1995-96 academic year by sixty-two, thirty-one minority faculty members also left faculties. Forty-six members of racial minorities became law professors, but twenty-two minority professors left during 1994-95 academic year.

8. Many people of color and white women in the Academy are fearful of writing articles dealing with race or gender or both. Some people feel it is safe once they are tenured to have a voice. For example, a female colleague wrote a gender-based article that was accepted as a lead piece in a nationally recognized law review was told by a tenured professor that she should confine her writing to more "mainstream" topics. When she asked him what he meant, he simply told her he had to think about it. I suppose women are not considered a mainstream topic deserving respect or recognition. A female faculty member at another institution who is a tax expert wrote an article dealing with issues of the adverse impact of the tax code on women. She was cautioned by a colleague that her article would be viewed negatively by the tenure committee. However, she had already written twice as many articles as anyone else on her faculty. Similarly, when I showed the first draft of this article to the Dean at my institution, he advised me that personal issues should not be discussed in law review articles. I am so thankful that Rosa Parks did not receive that kind of advice when she decided not to sit in the back of the bus.

9. Several people have told me that this article will prevent my promotion to full professor. So be it! I will not sell my voice for status.
be met with raised brows or outright hostility. The perception is that the "affirmative action" hire is a thief, stealing the rightful position of the privileged white male. Whatever I write or comment upon is viewed as less than and never equal to that of the privileged white male. I am free within my own power to discuss injustice in the continual struggle of minority faculty to establish and maintain voice in the Academy. I have heard young white male colleagues state that all law school positions have been taken by white women and professors of color. I found that astonishing since I was then and remain the only person of color on a faculty of twenty-four people. The rationalization of rhetoric as truth is a result of the dominant culture's system of values.

The commitment to inclusion must be a central theme, not an afterthought, in everyday discourse in national legal institutions and law schools. In addition to the overall discussion, the concept of critical mass needs to be a substantive component in the dialogue. If this goal is achieved, then the majority will have to listen to the multiplicity of voices, thus giving voice to the heretofore voiceless. The political power of coalition building will produce voting blocks to effect change in the curriculum, policy considerations, and overall general demeanor of the institution, but it is very difficult to generate coalition building with only one voice. For until there is critical mass there is no real advancement; for until there is critical mass the

10. See ELLIS COSE, THE RAGE OF A PRIVILEGED CLASS 111 (1993) ("When the talk turns to affirmative action, I often recall a conversation from years ago. A young white man, a Harvard student and the brother of a close friend, happened to be in Washington when the Supreme Court ruled on an affirmative action question. I have long since forgotten the question and the Court's decision, but I remember the young man's reaction. He was not only troubled but choleric at the very notion that "unqualified minorities" would dare to demand preferential treatment. Why, he wanted to know, couldn't they compete like everyone else? Why should hardworking whites like himself be pushed aside for second-rate affirmative action hires. . . . When the young man paused to catch his breath, I took the occasion to observe that it seemed more than a bit hypocritical of him to rage about preferential treatment. A person of modest intellect, he had gotten into Harvard largely on the basis of family connections. His first summer internship, with the White House, had been arranged by a family member. His second, with the World Bank, had been similarly arranged. Thanks to his nice internships and Harvard degree, he had been promised a coveted slot in a major company's executive training program. In short, he was already well on his way to a distinguished career—a career made possible by preferential treatment.").

11. I attended a luncheon with a faculty member whose son had a high LSAT score but a 2.2 college GPA. She was dismayed that he had not been accepted to a top ten law school. She had networked with everyone she knew in legal education and finally he landed in a respectable top tier school. The ability to move barriers through well placed phone calls still permits certain people to see that as using contacts but not affirmative action. This young male's prophylactic whiteness permitted him to neglect his educational obligations in college and still attain a law school seat.

12. See Okianer Christian Dark, Just My "Magination, 10 HARV. BLACK LETTER J. 21, 35-36 (stating that "if a faculty member is a person from a group that has traditionally been viewed as Outsider and acquires authority solely by virtue of his or her faculty position, then students interact with that faculty member with that knowledge and experience in mind. If the faculty member is from the dominant culture in the larger society, then his holding a faculty position within the law school is no surprise and viewed as quite natural").
inclusion discussion pays lip service to the reality that one is tolerated, not respected and, more often than not, rendered invisible. 13

The political reality of increasing the minority pool too successfully can also pose problems for the institution's image and public relations. Perhaps increasing the minority pool by acceptance of genuine inclusion threatens a status quo that finds it acceptable to have one or two, or possibly three faces of color in the faculty section of the view book. 14 There seems to be a concerted effort to maintain the minimum numbers in order to prevent the public relations fallout that may ensue if the faculty and student bodies begin to reflect more of what America looks like today rather than what it looked like a century ago. 15 There is a reluctance to commit to attract both faculty and students of color to the Academy. Moreover, if the thrust to get additional minority members proves too successful, then the institution is perceived as a minority haven where white faculty and students become more uncomfortable by the change in the complexion of the environment. The mere presence of a critical mass of different people not only changes the complexion but the balance and perception of power. True equality has more

13. See Kevin M. Fong, Comment, Cultural Pluralism, 13 Harv. C.R.-C.L. L. Rev. 133,136-37 (1978) (stating that "[a]ssimilation envisions a unified society permeated by a single culture, a society in which conflict among groups is reduced by eliminating their differences"). Minority faculty can integrate into the law school environment through assimilation, which disregards their differences and renders them invisible. Since structural assimilation has not occurred, the practice of ethnic and racial organizations continues. When minority faculty are burdened with additional organizational duties, they are unable to acculturate to the institution. Thus, the comment regarding the minority as the political rather than the academic appointment becomes the rhetoric. The internal indifference to the minority faculty member ensures the continuance of second class status in the Academy for people of color. The response to assimilation has historically failed the minority professor. Pluralism encourages respect for difference and tolerance of different groups. I am concerned about tolerance because the implication that the minority faculty is merely a sustainable irritant connotes the majority's permissive character in allowing the presence of one unlike themselves. That being the case, the origins of pluralism give force and authority to the minority professors' position of celebrating difference rather than assimilating.

14. The concept of "tipping point" is borrowed from housing discrimination law. It is the phenomenon of whites leaving a neighborhood when the percentage of black families reaches a certain point. See also Derrick Bell, and WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE 140-60 (1987) (detailing ramifications of tipping point when major law schools hire too many minority professors).

15. When I travel on behalf of my institution to law school fairs, I am always asked about the demographics of the institution and the community by students of color. I do not gloss over the reality because it is difficult enough for students of color to make the decision to attend law school without being concerned about the comfort level of the institution, the town in which the school is located, or the state in which it sits. With so many other choices and financial and emotional commitments to the endeavor, a student would be foolhardy to attend a school with a low comfort threshold. All too often, an institution that is resistant to inclusion loses out by not attracting diverse students who choose to go elsewhere. When prospective students raise the diversity question, the administrative response is that it is difficult to recruit students because of the locale. If the problem was truly the locale, then the University of Iowa School of Law would not be as successful as it has been in attracting and maintaining a talented minority student pool in a state that statistically has very low percentages of minority communities. This circular reasoning begs the question as to the real commitment of the institution to ensure that both minority faculty and students are welcome.
to do with the sharing of power than the perception of inclusion. The Academy majority must come to terms with power sharing and relinquish the paradigm that most white Americans feel that blacks have done just fine since the civil rights movement. There is a difficulty in understanding why blacks, especially educated blacks, are complaining. After all, everything appears to be better because desegregation cured all the Jim Crow ailments that defeated blacks' progress into the mainstream. After all, every white person in America has a black friend since civil rights laws were passed. So when questions come up as to the paucity of minorities in legal education, the majority responds with the rhetoric of inclusion while claiming that it is impossible to find any 'good, qualified' minorities. The traditional power construct maintained as white power with negligible attempts at inclusion has become a worn and outdated concept.

Critical race scholars maintain that whites permit progress for minorities only when white self-interest is promoted.

16. See Jane Lazarre, Beyond the Whiteness of Whiteness 34 (1996) (indicating that although large numbers of whites support interracial friendships, study conducted in New York found that ninety percent of parents would not be comfortable with interracial dating among their children; when results were announced, parents were amazed at existence of bigotry in their group).

17. The multicultural student association met with the Dean of my school to discuss the paucity of minorities at the school. The Dean responded that it was impossible to locate a credible pool of applicants because of the small number of students of color and the tendency for attorneys of color to practice. He went on to encourage them to consider a teaching career, knowing full well that this institution would never hire one of its own graduates.

18. See Paul Brest & Miranda Oshige, Affirmative Power for Whom?, 47 STAN. L. REV. 855, 856 (1995) ("The viable presence and success of minority professionals can help secure compensatory or distributive justice for other members of their racial and ethnic groups"). See generally Duncan Kennedy, A Cultural Pluralist Case for Affirmative Action in Legal Academia, 1990 DUKE L.J. 705 (arguing that there are political reasons for increasing number of minorities in legal education).

19. See Derrick Bell, Faces in the Bottom of the Well 139 (1992) ("The Harvard administration would deem deeply insulting any suggestion that white superiority was a current barrier to hiring blacks. But the fact that is that for more than two hundred years before DuBois' years at Harvard—and likely for three quarters of this century—the scriptures of law and widely held prejudices about the superiority of whites and the inferiority of blacks barred all blacks—including any with DuBois' academic qualifications—from any teaching or administrative positions. The inertia sustained during this long exclusion period was not eliminated by antidiscrimination laws. Standards of qualification now subtly play the role once performed overtly by policies of racial exclusion."). Having served on faculty recruitment committees for several years, I can attest to the discussions revolving around qualifications. In some instances, the qualifications of Ivy League black candidates are met with disparaging remarks as to how the degrees were attained. The most insulting aspect of all of this is that the people who do the evaluating have themselves lackluster credentials. They simply raise the bar and disqualify candidates with sometimes nothing more than a peremptory dismissal without further discussion. Given the democratic process involved, candidates are asked to come to campus by a majority vote of the hiring committee. Thus, it is impossible for the lone minority voice in the room to effectuate change if there is no collective consciousness on the part of the majority to do so. I submit that it is often a sham to have minority faculty on these committees when very little effort is made to further integrate the staff. The minority person serves to pacify the conscious of the committee and further aids in the justification and acceptance of the rhetoric that there are few qualified minority persons available.
I wrote this essay for the following reasons: first, to raise yet another voice in the discussion regarding inclusion in the Academy by pointing out some of my experiences, particularly those during my tenure process as a woman and a person of color. I think this is very important because too many of us suffer in silence. Second, I wrote this essay to discuss the need to maintain the stance as a legal nihilist in order keep the light of difference alive regardless of the "spirit-murdering" experience of being a society of one. When and if we are allowed into the tenure foyer (because we are never really permitted into the inner sanctum), we attempt to bury the pain by retreating and often disengaging. It is imperative that the topic regarding race in the Academy remain open and fluid because the Academy represents the embodiment of race relations at the very core of the American experience—the applicability of the Constitution and the Bill of Rights to all Americans. What better place to have that ideal realized than in the legal Academy.

REFLECTIONS

In race relations in the United States, the concept of racial definition is controlled by social construction. The dominant culture defines and sets the legal and social parameters for the other cultures. In fact, the early history of this country clearly established the other as subhuman, chattel without intellect, spirit or emotions. Thus, the prevailing attitude has survived through the present. The marginalized group continues to face obstacles to enter the mainstream. In fact, a recent AALS study continues to show that the lack of minority professors in law schools indicates the reticence of the majority to address the issue of critical mass. Thus, when professors of color experience frustration and eventually withdraw from the Academy, the majority is

20. See Patricia Williams, Spirit Murdering the Messenger: The Discourse of Fingerpointing at Law's Reaction to Racism, in CRITICAL RACE FEMINISM, 229-30 (Adrien K. Wing, ed., 1997) (stating purpose to examine "racism as crime, an offense so deeply painful and assaultive as to constitute something I call 'spirit-murder.' Society is only beginning to realize that racism is as devastating, as costly, and as psychically obliterating as robbery or assault, indeed, they are often the same. It can be as difficult to prove as child abuse. . .").

21. See LEONARD STEINHORN & BARBARA DIGGS-BROWN, BY THE COLOR OF OUR SKIN—THE ILLUSION OF INTEGRATION AND THE REALITY OF RACE 200 (1999) ("Though disguised as racial solicitude, rhetorical integration is yet another form of racial denial, and insofar as it sustains the integration illusion, it is, powerful as any code word in keeping real integration a distant and unreachable dream.").

22. See Richard White, AALS Statistical Report on Law School Faculty and Candidates for Law School Positions, 1998-99 (visited Feb. 24, 2000) <http://www.aals.org/statistics/rpt9899w.html> (indicating that of 8,719 full time faculty in 179 law schools, 61.3% are white males, 25.4% are white females, 7.7% are minority males, 5.6% are minority females; in administrative offices, 81.5% are white males, 9.6% are white females, 7.9% are minority males, 1.1% are minority females). Though the number of law professors has increased by 294 people in the last five years the percentage of minority faculty has diminished.
flabbergasted and wonders what happened. The numbers of minority faculty currently in the Academy continue to underscore their token status.\(^2\)

I served on a hiring committee for three years during which no minority candidate ever advanced from the "B" list. Indeed, all of the minorities and women were on the "B" list. It appeared that the criteria for placement on the "A" was white male status. Though this was never officially stated, it seemed to be the rule. When I raised this point to the committee, I was told that I could cast my vote for whoever I wanted. However, one of the candidates that we interviewed at the AALS conference was rejected by our institution but was hired by a higher tier school. I have read resumes from minority candidates who were graduates of Harvard, Yale, Columbia, and other top tier schools, but were summarily rejected in favor of less credentialed majority members.

Ellis Cose interviewed minority professionals from all walks of life who echoed the same story.\(^2\)\(^4\) No matter the quantity or quality of the degrees or the nature of the experience, the roadblocks to success are more frequent and more serious for the minority professional. The trivialization of minority persons' experiences underscore the racial gap.\(^2\)\(^5\) While affirmative action always seems to be the buzzword for the criteria to evaluate minority candidates, few whites are willing to acknowledge the strides made by white women in the Academy under the affirmative action umbrella as tenured law professors and Deans.\(^6\) When I have raised questions of inclusion or fairness, I am dismissed by stark silence. The unchanging position of the minority relative to that of the majority negates the basis for self-actualization.

Personhood and worth in this society have always been and continue to be defined by the dominant group. In this society, there is only one standard

\(^{23}\) See id.

\(^{24}\) See Cose, supra note 10, at 1 (1993) ("I heard the same plaintive declaration--always followed by various versions of an unchanging and urgently put question. 'I have done everything I was supposed to do. I have stayed out of trouble with the law, gone to the eight schools, and worked myself nearly to death. What more do they want? Why in God's name won't they accept me as a full human being? Why am I pigeonholed in a "black job"? Why am I constantly being treated as if I were a drug addict, a thief, or a thug? Why am I still not allowed to aspire to the same things every white person in America takes as a birthright? Why, when I most want to be seen, am I suddenly rendered invisible?'"). See also RANDALL ROBINSON, THE DEBT: WHAT AMERICA OWES TO BLACKS 145 (2000) (stating that "African Americans have never been allowed to own the idea of America. Had never been allowed to glimpse in its mirror the complex whole of the ancient self they had presented to it. Had never known a moment's grant of respite at home from the mean burden of race. Had danced in shadows to tunes never strummed for them.").

\(^{25}\) See Cose, supra note 10, at 192 ("The racial gap, . . . can only be closed by recognizing it, and by recognizing why it exists. That will not come to pass as long as we insist on dividing people into different camps and then swearing that differences don't count or that repeated blows to the soul shouldn't be taken seriously. For the truth is that the often hurtful and seemingly trivial encounters of daily existence are in the end what most of life is.").

\(^{26}\) See White, supra note 22 (indicating that white women compose over a quarter of faculty, while minority men and women make up only 13%).
one lens through which people are viewed. Thus, the single focus is all that matters. This myopic view shapes a simplistic analysis in a complex world. The dominant and the ‘other’ lose the opportunity to learn and gain perspective that invariably will bring a different dimension and texture to the discourse.

In the American agenda on race, there is the continuous struggle to have the dominant prevail. There is no modality in American history in which there is a true acceptance of ‘other’ or a bridge of understanding giving not only credence but also value to the ‘other’. Recently, a white male faculty member made a comment regarding ‘subordinate’ journals—specifically those journals that have specialty foci—as not being acceptable places to publish scholarship. The article he referred to was accepted for publication by the Harvard Women’s Law Journal. The canonization of what are considered acceptable places to publish further supports the beliefs that the only acceptable venue is the main journal and that specialty journals are not as good. The not-so-subtle message is the white male standard is the only standard. As Audre Lord said so eloquently,

Institutionalized rejection of difference is an absolute necessity in a profit economy which needs outsiders as surplus people. As members of such an economy, we have all been programmed to respond to the human differences between us with fear and loathing and to handle that difference in one of three ways: ignore it, and if that is not possible, copy it if we think it is dominant, or destroy it if we think it is subordinate. But we have no patterns for relating across our human differences as equals. As a result, those differences have been misnamed and misused in the service of separation and confusion.27

When faculty have little opportunity to hear different voices, the academic experience becomes jaded. When black faculty have no control over their self-concepts, self-doubt emerges. The ‘other’ is never truly included in the majority group. In these circumstances, minorities continue to lose, and the game continues to be played by the same rules. No matter what minority faculty members do, they are merely tolerated. The issue of critical mass becomes an illusion that one minority faculty member is certainly enough to satisfy the requirements of diversity.28

28. See Adrien Katharine Wing, Brief Reflections Towards a Multiplicative Theory and Praxis of Being, in CRITICAL RACE FEMINISM: A READER 27 (Adrien K. Wing, ed., 1997) ("The purpose of this reflection is to put forth the proposition that the experiences of black women whether it be in legal academia or elsewhere, might reflect the basic mathematical equation that one times one truly does equal one.").
The historical underpinnings of the legal Academy thus force the token minority faculty to choose either to remain silent or to voice concerns about the absurdity of the concept of inclusion.29 Continuing to admit one token faculty member at a time further underscores the Academy’s reluctance to come to grips with its desire to continue the one-sided dialogue of what and who is an acceptable member of the legal Academy. When the token faculty member leaves, remaining faculty comment that no one knew or understood why the person was unhappy. The majority faculty’s denial of the minority faculty members’ experience further highlights the fact that marginalization is the norm. The emotional turmoil associated with coming into the hallowed halls of privilege makes the reality all too stark for the token. Professor Linda Greene explains the perceptual tendencies in Rosabeth Moss Kanter’s definition of tokenism:

The visibility phenomenon is self-explanatory—tokens are highly visible because their physical features set them apart from the dominants. Contrast, the second perceptual tendency, results when dominant group members exaggerate the differences between themselves and the token as a defensive measure to maintain and guarantee their commonalities. Assimilation is the increased use, by the dominant group, of generalizations with respect to the token individual. In effect, the dominant group distorts its perception of the token individual in order to maintain the stereotypical generalizations it holds as to the token group. The assimilation phenomenon insures that the token’s “true characteristics” are dominated—and overshadowed—by those stereotypes which are believed to identify the group to which the token belongs.30

Thus, tokenism becomes the acceptable norm, causing minority faculty to become bitter and silently enraged.31 The psychological toll of racism on people of color, no matter what their status, continues unabated in America today. Studies have addressed the stress caused by discrimination.32

29. See Linda S. Greene, Tokens, Role Models, and Pedagogical Politics: Lamentations of an African American Law Professor, in CRITICAL RACE FEMINISM: A READER, 88, 93 (Adrien K. Wing, ed. 1997) (“The presence—and absence—of African American females symbolized by tokenism speaks volumes in a modernized whispering anthology of racism and sexism. If we remain silent about the equality sham of tokenism, we remain complicit in tokenism’s assertion that we should not teach law. On the other hand, if we decide to speak out against the sham of tokenism and to work toward ending it—we take an important step in affirming our group consciousness and political consciousness. Such a decision would reflect our increasing sophistication and our understanding of the relationship between tokenism and the politics of intellectual authority.”).
32. See C.A. Amistad, et al., Relationship of Racial Stressors to Blood Pressure Responses and Anger Expressions in Black College Students, 8 HEALTH PSYCH. 541 (1989) (discussing experiment in which discrimination caused high rates of hypertension).
Psychological anomie becomes the norm and the effort to reduce it is key.\textsuperscript{33} If medical and psychological evidence supports the depth of racism, why is it so difficult for the majority of Americans to acknowledge this as truth?\textsuperscript{34}

The psychological remnants of slavery are reinforced through the cultural gene that is passed from one generation to another in America. I remember one of the most poignant comments made by a white indentured servant in the television blockbuster Roots. Though he was an indentured servant, he reminded the slave that although, he could pay his debt off and move into the mainstream, the slave would never be seen for more than a slave.\textsuperscript{35} This attitude is still pervasive in American society, where the most downtrodden white person is valued more than an educated middle class black person. Although slavery was formally abolished in the late nineteenth century, the remnants of slavery articulated in Jim Crow laws were an effective means to continue privilege based simply on skin color. The bridge from slave to free men and women took an interesting twist because the community had to sustain itself. Thus, the enterprising souls in the black community established businesses that served the needs of the community. Although the promise of integration led many to believe greater gains would follow, the reality is that these gains have not been forthcoming. The concept of race has never left center stage in American politics. Race continues to serve a useful purpose to maintain the status quo in which white people are privileged solely for being white.

The definition and recognition of racism are political policy choices.\textsuperscript{36} Blacks often view an event one way, while whites view the same event from the opposite direction. White society’s tendency to define an action as non-racist and dismiss the black person’s allegations merely as a hypersensitive overreaction is evident in news about racial profiling by police all across the

\textsuperscript{33} See JAMES H. HUMPHREY, HUMAN STRESS, 63 (1986) (noting that “an ethnic group’s perception of another ethnic group’s effect on the distortion of the rules of distributive justice will predict a sense of anomie among its members and consequently disturb their emotional homeostasis”).

\textsuperscript{34} See ROSABETH MOSS KANTER, MEN AND WOMEN OF THE CORPORATION, 211-40 (1977). In an institutional culture, changes profoundly affect the condition under which tokens live and work. Tokens and tokenism are prevalent in ‘skewed groups’—groups that are dominated by one type of individual. These groups control the institutions’ culture. Those outside the dominant group are ‘tokens.’ See also Kellis Parker, Ideas, Affirmative Action and the Ideal University, 10 NOVA L. REV. 761, 763 (1986) (noting that hiring a few token black faculty and administrators does not automatically lead to change because these tokens lack sufficient numbers and power to effect change).

\textsuperscript{35} Roots, (ABC television broadcast, Jan. 23-30, 1977).

\textsuperscript{36} See MICHAEL OMI & HAROLD WINANT, RACIAL FORMATION IN THE UNITED STATES 62-64 (2d ed. 1994) (“This seemingly obvious, ‘natural’ and ‘common sense’ qualities which the existing racial order exhibits themselves testify to the effectiveness of the racial formation process in constructing racial meanings and racial identities. . . . Racial ideology is constructed from preexisting conceptual . . . elements and emerges from the struggles of competing political projects and the ideas seeking to articulate similar elements differently.”).
Another example of how racism is passed from generation to
generation is evident through the notion of acceptable speech on university
campuses. Though blacks attend majority institutions, they remain isolated
and are often victims of racist acts. They remain tokens who are tolerated so
long as they are silent. This qualified toleration legitimizes the liberals’
notion of inclusion but does nothing to improve the black person’s experience.

The legal Academy is no more interested in true integration than any other
segment of American society. Law schools are not the only culprits in this
vicious game. When the New York bar conducted a gender bias study, the
numbers of minorities in firms, especially minority women, were statistically
insignificant.

Given the paucity of minorities at all levels of legal life, I believe
Americans should admit that the illusion of integration prevents recognition
that, though the races may work together for a particular goal, they will not
view the methods to reach that goal in the same fashion. People of color
should understand that it is a waste of time to continue attempts at reaching
true integration. Perhaps it is better to understand that the ideal of integration

37. See Sunday Morning Show: Driving While Black; Debate is Heated around the Contention by
Some that Police Departments Practice Racial Profiling, (CBS television broadcast, Feb. 13, 2000)
(discussing general police harassment of black people for falsified traffic violations and specific Diallo case
in New York City and Cornel Young case in Providence, Rhode Island). Blacks see such cases as racial
profiling while whites view it as good police work.

38. See Magner, Blacks and Whites on Campuses: Behind the Ugly Racist Incidents, Student
Isolation and Insensitivity, CHRON. OF HIGHER EDUC., April 26, 1989. I participated in a Council of Legal
Education Opportunity (CLEO) in 1997 at the University of Richmond. CLEO now has a truly multi-
cultural group of students. One of the white women in the program indicated that, while sitting in the
library, she heard negative comments about the CLEO students from the white University of Richmond
students. She said she felt “like a fly on the wall” regarding the comments because, although she was a
CLEO student, the other white students assumed she wasn’t because, after all, only minorities needed a
summer program. This incident highlights the questions of legitimacy of a program in which some minority
students participated.

39. See Cynthia Fuchs Epstein, et al., Glass Ceilings and Open Doors: Women’s Advancement in
the Legal Profession, 64 FORDHAM L. REV. 291, 324 (1995) (“We had hoped to analyze the experiences
of minority lawyers in the study of glass ceilings in large law firms. However, there were so few African-
American, Latino, or Asian-American senior associates and partners at these firms that no analysis could
be reasonably executed.”).

<table>
<thead>
<tr>
<th>RACE</th>
<th>MALE PARTNER</th>
<th>FEMALE PARTNER</th>
<th>MALE ASSOCIATE</th>
<th>FEMALE ASSOCIATE</th>
<th>TOTAL MALES</th>
<th>TOTAL FEMALES</th>
</tr>
</thead>
<tbody>
<tr>
<td>White</td>
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<td>482 (90%)</td>
<td>281 (84%)</td>
<td>972 (94%)</td>
<td>339 (86%)</td>
</tr>
<tr>
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<td>1 (0%)</td>
<td>1 (2%)</td>
<td>25 (5%)</td>
<td>24 (7%)</td>
<td>26 (7%)</td>
<td>25 (3%)</td>
</tr>
<tr>
<td>Latin</td>
<td>3 (1%)</td>
<td>0 (%)</td>
<td>12 (2%)</td>
<td>9 (3%)</td>
<td>15 (1%)</td>
<td>9 (2%)</td>
</tr>
<tr>
<td>Asian</td>
<td>3 (1%)</td>
<td>1 (2%)</td>
<td>15 (3%)</td>
<td>13 (4%)</td>
<td>18 (2%)</td>
<td>14 (4%)</td>
</tr>
<tr>
<td>Other</td>
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<td>3 (1%)</td>
<td>6 (2%)</td>
<td>5 (0%)</td>
<td>6 (1%)</td>
</tr>
<tr>
<td>Total</td>
<td>490 (100%)</td>
<td>60 (100%)</td>
<td>537 (100%)</td>
<td>333 (100%)</td>
<td>1036 (100%)</td>
<td>393 (100%)</td>
</tr>
</tbody>
</table>

New York Offices only. Source: Firm-supplied data.
is an elusive dream at best. In other words, human beings need to have hope to go on, but false hope leads to dysfunction. However, since very little change accompanies each generation, perhaps it is time to devise new strategies that will not disappoint future generations. When a few people of color trickle into professional schools and business and are held up as viable examples of the growth of the minority middle class, in essence, these exemplars mask the reality of race in America.

Black and whites hold differing concepts of integration and desegregation. Many black people would contend that, although America has desegregated, it has yet to move toward integration on any meaningful level. White people would view that statement differently. True integration would allow minority people "to define themselves and to calculate their lives non-racially." The idea that a person of color is first described by skin color reinforces the reality that race does matter. White people rarely describe someone who is white by race. The dominant group takes the issue for granted and only describes an individual who is different than the accepted norm of whiteness. The futile attempt to describe this society as color-blind is dishonest and fails to address the reality of the experience of people of color in American society. The idea that people of color should gain education, good jobs, adequate housing, and other basic necessities of life is acceptable to the majority so long as not too many people of color are getting too much at the expense of white people.

Perhaps the legal Academy is not the venue we should expect to find true integration because the Academy stands, at best, for the status quo and remains the true architect in maintaining power in America. Although it appears that the Academy as an institution of higher learning would encourage intellectual debate of relevant social issues, the recognition of the need to have more than a few tokens would require a true sharing of power. All too often, when minorities do raise questions, the Academy’s response focuses upon the sensitivity of the minority speaker, rather than confronting the issue at hand. Again, the concept of ‘other’ is marginalized within the Academy and results in no productive discussions regarding race.41

White America’s removal of “Colored Only” signs in restrooms, schools and in other public areas simply made racist actions more difficult to prove. The difficulty in proving racist intent places an unreasonable burden on the minority person to prove intent. However, if intent could be established historically, then perhaps the minority person could prove that, more often

41. I was recently on a campus hate speech panel at my institution. One of the panelists, a former attorney general of the state, indicated that speech that may be offensive to the minority community, in fact presents an occasion to open dialogue about racial issues. An attack on the essence of an individual’s being does not provide the framework or the emotional environment to have an intellectual discourse about race.
than not, employment, housing, medical care, and education are inextricably connected to the privilege of race. Since most white people have no idea of the status that their whiteness imparts, they lack awareness of how "blackness" feels.\textsuperscript{42}

It is unfortunate that integration with its promise of better education, better housing, and genuine opportunity to participate fully in the American dream, has been an illusion at best for most black Americans. Although, slavery technically ceased to exist, in reality the culture of slavery continues.\textsuperscript{43} American culture has not accepted its role in the enslavement of millions of people. Instead, it has made the victim the center of ridicule. The few people of color who have been allowed to rise above the fray are viewed as "honorary" whites who are "different." In recent years the ability of African-Americans to move into the mainstream through higher education has been hampered, and gains through education continue to be illusive and tenuous.\textsuperscript{44}

\textsuperscript{42} See LESLIE BENDER & DAAN BRAVEMAN, POWER, PRIVILEGE AND THE LAW: A CIVIL RIGHTS READER 22-33 (1995) (listing forty-six items of white privilege). Race, unlike homosexuality, is not a political option. People are judged by the color of their skin and little more.

\textsuperscript{43} When my Contemporary Legal Theories class discussed white privilege, a white lesbian student told me the list was too conservative. Several students confronted her lesbianism and its relationship to racism, to which she responded, "There is a big difference. No one sees my choice. I can take advantage of my position in society. No one 'sees' me." A gay friend feels that being gay and/or minority carries the same kinds of discrimination. Because society sees through colored lenses, one's blackness or other minority of color status comes before one's sexuality gets into the discussion of whose oppression is greater. However, in the area of race there are no options. People are judged by the color of their skins first and foremost. See also IRA BERLIN, MANY THOUSANDS GONE: THE FIRST TWO CENTURIES OF SLAVERY IN NORTH AMERICA 364-65 (1998) ("Whether viewed from the perspective of the past or the future, the transformation of black society in the years that followed the Age of Revolution underscored the dynamic nature of slavery and its reciprocal relations to notions of race. Looking forward from the beginning of the nineteenth century to the era of the Civil War, slavery's changing character reveals how much of the antebellum experience was presaged in the first two centuries. The renegotiation of slavery would continue as black people marched across the blackbelt, learned the mysteries of cotton, and remade Christianity from remembered African cosmologies. However, looking backward from this same perspective, slavery's changing character suggests that the first two centuries of African-American captivity were no prolegomenon to an antebellum quintessence. Instead, the first two hundred years of African-American life embraced a distinctive experience which gave master and slave, black and white, unique definitions. Slavery's changing reality continually transformed race through the half-century prior to emancipation. The fresh representations of black and white that emerged in the blackbelt reflected the new circumstances, but they were also inescapably anchored in a past that reached back across the Atlantic. The history of the many thousands gone would guide slavery's last generation and would inform African-American life to the present day.").

\textsuperscript{44} See Amy Wallace, UC Law School Class May Have Only 1 Black, L.A. TIMES, June 27, 1997, at A1 ("Not one of the [fourteen] black students admitted this year to UC Berkeley's Boalt Hall School of Law has decided to enroll, officials said Thursday, prompting the school's dean to call the numbers 'a total wipeout.' The tally confirms some critics' worst fears about the ripple effect of UC's ban on affirmative action. Come August, when classes begin at Boalt, this jewel among California's public professional schools will probably have the same number of blacks in its 270-member, first-year class as the University of Mississippi had in 1962: one, a student who was admitted last year but deferred enrolling. . . Richard Russell, one of the three Blacks on the 26-member UC Board of Regents, put it another way: "[I]t is obvious that the resegregation of higher education has begun." "). See also JAMES & FARMER, supra note 1, at 200. ("Educational canon and power structure reflect a belief in the supremacy of Whites and males
Although America came face to face with the ravages of racism in the 1960s and '70s, few white Americans acknowledged the perpetual neglect of the 'other.' Whites paid lip service to the betterment of race relations; however, the legal Academy remains one of the most segregated institutions in both student enrollment and faculty hiring. The cultural denigration of the 'other' continues to be prevalent throughout American society. It is incredible that issues of race create so many contradictions in the American psyche.

The recent discussion of an apology for slavery demonstrates America's inability to recognize a tenet that is the very core of its moral and legal philosophy. An article in the Washington Post questioned whether the federal government should issue a formal apology to black Americans for slavery. Thirteen members of Congress have suggested that this might be a good idea. However, criticism from both the right and the left questioned the reason for an apology. According to the criticism, the Fourteenth Amendment supposedly took care of the "slavery problem." Yet America continues to have a "perplexing connection between slavery and race and the relation of both to our intractable problems of race and class. Nothing more enrages black and white than the race-based policies that aggravate class inequities and the class-based policies that expose deep-seated racism."

**PEDAGOGY AND DIFFERENCE**

If pedagogy explores the art and science of teaching, then the concept of difference should be inculcated into the discussion. The failure to recognize learning theory and the rigid application of the Socratic method as the ultimate teaching technique merely reflects a continued effort to circle the wagons whenever a different viewpoint surfaces. It is an educational experience in

and, for this reason, the majority of those who direct educational institutions (Whites and males) find absolutely nothing amiss with things as they are."); NOEL IGNATIEV, HOW THE IRISH BECAME WHITE (1995) (examining how race is used to place distance between whites and blacks, ensuring whites a higher rung on social ladder). Although the Irish staunchly opposed slavery in Ireland, Irish immigrants never participated in the abolitionist movement and became virulent racists. Their ability to maintain a sharp division between blacks and whites is premised on the concept that white identity meant the privilege of not being black. The construct of building identity from a negative stance gives further credence to the concept of 'other.'

45. When I asked my Contemporary Legal Theories class, "What are civil rights?", a third year student responded that the Constitutional Law professor had not covered the civil rights aspects of the course. Instead she stated, "Those were the rights they gave to the slaves." I then asked her where she would find the rights that white people have and she responded, "In the rest of the Constitution."


47. See id.

48. Id.

49. See AMERICAN BAR ASS'N, COMMISSION ON WOMEN IN THE PROFESSION, ELUSIVE EQUALITY: THE EXPERIENCES OF WOMEN IN LEGAL EDUCATION, 4, 5 (1996) ("This deterioration in civility is
which people are reduced to cookie-cutter replicas, conformity is the goal, and individuality is viewed as renegade behavior to be silenced and brought into line. The Academy desperately needs to embrace the concept that teaching, rather than breaking, students is the law teaching profession’s primary responsibility. The dissonance between what schools teach and what students need to know to earn a living upon graduation is mind boggling; for example, experiential learning is frowned upon in a profession, ironically, that is focused on practice. Students no longer have the luxury to learn the practice of law after graduation, safely tucked under the wings of senior partners in law firms. More and more students are seeking alternative career paths and solo practices that necessitate a more diverse curriculum to address twenty-first century options. I identify with students who question curricula, fairness, and justice issues that are non-existent when one is learning the law.50 The fear of difference closes avenues for discussion because of the fear that the traditional way may not be the best way, given the changes and advancements made in law school admissions since the 1970s. The inclusion of different voices brings a fresh perspective to the way things are and raises possibilities of what may become.

I recently listened to a radio talk show in which a jazz musician was conducting a master class. The teacher’s supportive and nurturing enthusiasm struck a chord in me regarding the way we train students to become lawyers. Listening to the master teacher made me wonder what is it about legal education that attempts to teach students to think like lawyers, while asking them to give up their creativity in the process. Can the Kingsfield51 ‘model’ of teaching really be characterized as teaching? Can humiliation and intimidation stimulate the learning environment? Is the goal of teaching to teach or to control the class through fear? What is the pedagogical reason for teaching a class in a certain fashion? The legal teaching profession needs to seriously consider these kinds of questions. Good lawyers are not necessarily good teachers. The most elementary understanding of human nature acknowledges that human beings learn best in supportive, yet firm and nurturing environments. A very important part of my job is to help students ‘see’ and understand legal concepts. However, I do not achieve positive

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50. See id. at 5-6 (noting that “[i]n response to the testimony pertaining to student experiences, the Commission developed recommendations that focus on equalizing the classroom setting; eliminating stereotypes in teaching methods, language usage, and grading processes, improving career services and widening opportunities for women students to join in extracurricular and co-curricular activities.”).

51. See THE PAPER CHASE (Panavision 1973). Professor Kingsfield is a professor at a major eastern law school who berates and intimidates his first-year students allegedly teaching them through the Socratic method.
responses in a class in which the intimidating environment is not conducive to learning.

If the goal is to teach students to think like lawyers, what does that concept really mean? For many students the "hide the ball" theory of legal education means little more than confusion and frustration. They read canned briefs and outlines to the utter dismay and disgust of their professors. However, where else can students get the information they need to succeed on the final examination?52 In the sphere of the old-time gentleman's way of learning, the discipline of law is again circumvented and defeated. The classroom experience becomes outmoded and boring and law professors continue to lament about the good old days. Students, on the other hand, come out of the experience feeling battered and having lower self-esteem than when they entered law school. For many students with prior business experience, law school leaves them wondering whether they made the right decision when enrolling.53

The hazing methods many law professors employ in their classrooms come from their own experience as students. The model of the stodgy, white male law professor has been upheld as the only appropriate model. All others methods are deviant and underscore a difference from the norm. Because the majority of law schools have identifiably different groups such as women, older students, and minorities, this model has outlived its usefulness.54

52. See Derrick Bell, Strangers in Academic Paradise: Law Teachers of Color in Still White Schools, 20 U.S.F. L. Rev. 385, 387 (1986) ("In addition to living the life of the mind, these lofty beings perform the magical feat of training and credentialing all who practice law in the land. This is a truly marvelous accomplishment because, with few exceptions, the academicians have little or no experience in law practice. . . . The academies refuse to assist in preparing their students for this examination, deeming such labor neither worthy of their highly tuned intellects nor a justifiable use of their valuable time. . . . Actually, if the truth be known, the Academy is not well structured to teach any but the very best students, those so gifted with intelligence and compulsive work habits that could as well learn on their own what is taught at the Academy; this is precisely how many students, bright and average, prepare themselves for their chosen profession.").

53. One of my students, a forty-nine year old former teacher sat in my office most of last semester wondering whether she could cope with several professors' educational styles. She had serious reservations about whether to return the following semester although she clearly understood the material well enough to maintain a B average. The work was not the problem; rather she disliked the methodology used in an overwhelming number of classes. Another student who came to the law school experience was disillusioned with the testing scenario, and test anxiety caused her to rethink the physical toll on her body as she went through the experience. She had been very successful in graduate school and was unaccustomed to the anxiety caused by this experience. Another student went to the administration to complain about an encounter he had in class and was told that the insult was to 'toughen' him up for the real world. The student was an executive prior to attending law school and fully understood the demands of the 'real world'. These are but a few of the stories I have heard. Surely there are many more in the annals of the Academy.

54. See Trina Grillo, Anti-Essentialism and Intersectionality: Tools to Dismantle the Master's House, 10 BERKELEY WOMEN'S L.J. 16, 28 (1995) (noting importance of ensuring that non-mainstream legal scholarship is not marginalized); Mari J. Matsuda, When the First Quail Calls: Multiple Consciousness as Jurisprudential Method, 11 WOMEN'S RTS. L. REP. 7 (1989). See also Milner S. Ball, The Legal Academy and Minority Scholars, 103 HARV. L. REV. 1855, 1858. ("But Matsuda is expanding
The goal should be to incorporate learning theory, computer skills, advocacy training, and diversity training into the curriculum so students emerge from the experience empowered and not demoralized. The true mark of a good legal education experience should be professors and students working in tandem for the success of the student in the learning process, not the submersion of ego and morale for a piece of paper called a law degree.\textsuperscript{55}

The hundred year old pedagogical model in legal education that breaks down individuals and reshapes them to think 'like lawyers' is outdated and outmoded, given the introduction of people of color and women into the Academy.\textsuperscript{56} The opportunities presented by computer and media technology should bring the teaching of law into the present century rather than keeping it squarely in the nineteenth. Adherence to tradition without acknowledging advances made in educational practice defies logic. Interdisciplinary study throughout the law school curriculum requires additional time and effort in preparation for class; however, it affords the opportunity for holistic learning. Since law concerns every aspect of society, it is important to integrate other disciplines into the discourse of law. Thus, the introduction psychology in family law or political science in property law enables students to understand the interconnectedness of various disciplines. Rejecting the traditional white male model of yesteryear represents the obligation of the institutions to move away from the teaching modalities that are no longer effective.\textsuperscript{57}

Some are hesitant to admit that the law does not operate in a vacuum but is a system that must judge social exchange. The failure of the law and the legal teaching profession to discuss the interrelatedness of various divisions in society creates the appearance of disconnection from the populace that law

\textsuperscript{55} See Judith Glazer-Raymo, Shattering the Myths: Women in Academy 122-23 (1999) (noting that "feminist jurisprudence... seeks to move away from the normative model of legal education in which Socratic pedagogy in the analysis of relevant facts and issues in legal cases has traditionally been the sole resource materials for developing students' understanding of various areas of the law and the skills of legal reasoning").

\textsuperscript{56} See American Bar Ass'n, Commission on Women in the Profession, Unfinished Business: Overcoming the Sisyphus Factor, 1 (1995) (explaining that "There is compelling reason for attorneys to create a profession that conducts itself without bias. Lawyers are the gatekeepers of our nation's justice system; lawyers should be the trailblazers in promoting equality. Fundamental fairness requires a justice system that reflects the community it serves").

\textsuperscript{57} See Glazer-Raymo, supra note 55, at 123 (noting that movements of feminist jurisprudence, critical legal studies, critical race, and latest critical race feminism bring ideology and pedagogy squarely into realities of modern society).
governs. The lawyer jokes in American society shed light on cultural attitudes about lawyers. Perhaps these attitudes come from the legal profession's reluctance to view people as individuals rather than commodities. As more and more people utilize the legal profession, the capitalist underpinnings of the law are pushed forward when corporations win lawsuits at the expense of common men and women, when judges and lawyers become celebrities more interested in their public persona than in justice, and when lawsuits are won by the party that spends the most. The public's perception of justice is disconnected from the reality of the politics of the law. Better media communication of the unjust and sometimes unfair application of the law allows greater numbers of Americans to become more knowledgeable about the law's shortcomings. Thus, the greed and deception which currently characterize many Americans' attitudes about the law and lawyers, form a rather dismal description of what was once regarded as a noble profession. A more comprehensive and holistic approach to the study of law should become the linchpin of legal educational pedagogy, despite the disdain expressed by some in the Academy who glibly cite such topics as gender, race, family issues as too 'touchy-feely' or rather weak and thus, unimportant.

The reluctance to acknowledge that genuine feelings or passion about particular issues influence law professors, lawyers and judges belies logic, psychology and common sense. This kind of thinking is arrogant and completely denies history and its residual emotional impact on the legal issues of the day. Preaching that law is truly objective and that those who judge and teach leave their prejudices and biases behind is arrogant. However, it also provides a comfortable reason for the majority to devalue difference, rendering any discussion of difference as unworthy and inconsequential. In essence, to acknowledge difference provides an admission that there is a value

58. See id. at 125-26 ("The study of women at the University of Pennsylvania Law School stirred my memories of advising women students on the criteria for graduate school admissions. Young women who had been 'A' students throughout college did well on their LSAT's, gaining admission into good law schools. They were intimidated and somewhat repelled by the competition between men and women students for grades, status, and recognition. . . . As Guinier, Fine and Balin observe, preparing students to think like lawyers conditions them for hierarchical relationships in which male-female is equated with teacher-student, as preparation for the partner-associate, judge-counsel, and lawyer-client roles that women law students soon learn are basic to 'effective lawyering.' The concept of legal education expects that women will assimilate and transform their thinking as lawyers. Traditionally, the norm is the white male lawyer. If this is the goal then we are asking women, minorities and women of color to undergo the ultimate metamorphic transformation in order to be accepted, all the while changing the rules for acceptance.").

59. See Bender & Braveman, supra note 42, at 138-95 (noting use of rhetoric in making legal decisions, including Dred Scott and Brown). The authors show that legal decisions do not come from on high without understanding the role history plays in decision-making. The authors also discuss the use of rhetoric in judicial analysis, which squarely challenges the 'objectivity' standard often spouted in the classroom and legal decisions.
associated with difference. I would maintain that failure to acknowledge difference is a confirmation that law is devoid of the connection of the psyche to the attitudes of the lawmakers, interpreters, teachers, and enforcers of law, especially in regard to racial issues. Legal doctrine is not conceived and germinated in a petri dish in a sterile lab. Legal doctrine is shaped by history, cultural norms, privilege, and other characteristics of the majority.

Even though hard fought civil rights battles of the sixties and seventies offered hope of opportunity for previously disenfranchised Americans, the recent attacks on affirmative action in higher education seek to undermine the minute gains. In fact, a study conducted by the ABA revealed that from 1980 to 1998 the percentage of minority lawyers in this country rose from 5.0% to 7.0%, certainly not a significant increase by any standard. Although minimal strides were made in the profession, students of color continue to face difficulties in admission to law school, remaining in law school, the bar examination, employment, partnership and tenure. Perhaps those who preserve the power and status quo, namely lawyers, are required by the power elite to have the same credentials of white skin privilege in order to be accepted into the club.

60. See Charles R. Lawrence III, The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism, 39 STAN. L. REV. 317, 322 (1987) (stating that "Americans share a common historical and cultural heritage in which racism has played and still plays a dominant role. Because of this shared experience, we also inevitably share many ideas, attitudes, and beliefs that attach significance to an individual's race and induce negative feelings and opinions about nonwhites... We do not recognize the ways in which our cultural experience has influenced our beliefs about race or the occasions on which those beliefs affect our actions"). See generally JOE R. FEAGIN & MELVIN P. SIKES, LIVING WITH RACISM: THE BLACK MIDDLE-CLASS EXPERIENCE (1994), MARI J. MATSUDA, ET AL., WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT (1993) (discussing continued existence of racism in America).

61. When Atlanta Braves baseball player John Rocker was confronted with the negative racial and gender based comments he made, he responded that he had not intended to offend anyone. The even more ridiculous response of the team's front office was that he would be evaluated for some psychological infirmity. However, when asked his opinion of the incident, one man responded that "[h]e only said what most Americans think." Chris Young, Sounding Off on John Rocker, <http://www.espn.go.com/mlb/2000/0113/271181.html> (visited February 25, 2000). This episode reinforces the notion that Americans feel that so long as they make racial comments within their own group they are safe from scrutiny. However, when comments are made publicly, or as in this case privately to a journalist who later published the comments, then there is public outcry to such outlandish behavior.

62. See Wallace, supra note 44.

63. See Tony Mauro, Report: Minorities Not Reaching Top Legal Levels, USA TODAY, Aug. 5, 1998, at 3A (noting that even though there has been a twenty percent increase in minority students in past dozen years, this increase is not reflected in two percent increase in minority lawyers).

64. See James & Farmer, supra note 1, at 200 ("Educational canon and power structure reflect a belief in the supremacy of whites and males, and, for this reason, the majority of those who direct educational institutions (whites and males) find nothing amiss with things the way they are.").
The following stories are samples of some of my experiences in my tenure year. Shedding light on my experiences may help those going through similar experiences at other institutions. For others, I want to share these accounts to identify and name the demons for psychic and emotional well-being. Our encounters are not figments of imagination or hypersensitive reactions to racism in America.65

I spent the summer of 1995 in Innsbruck, Austria. I taught, traveled, and tried to ready myself for the tenure journey that I would take in the fall. I returned to the United States full of energy and hope for the upcoming year. I thought my tenure year would be relatively smooth because at the end of the prior spring, I had already collected all of the material to include in my tenure binder. All I had to do was write the cover letter and assemble the “package.” Two days after I submitted my application, I was approached by a member of the administration who indicated that he sensed that I was unhappy and was willing to help me move. Of course I should not have inferred that I was not wanted; it was merely a case of friendly paternalism. I found it hard to believe that the issue of leaving would arise since I had recently submitted my application for tenure. I had taught there for three years, and the concept of leaving had never been articulated to me. In hindsight, I am sure that other professors felt the same way about me. I made clear my commitment to remain at the institution should tenure be granted to me.

THE EXAM STORIES

I taught Real Estate Transactions in the fall of my tenure year. Because it was a transactions course, I included a title search in the final assignment. I was astonished when a local title searcher informed me that students had approached him to purchase title searches. I informed the class that this was unacceptable and unethical behavior. As it was a week before the final class, it was too late in the semester to conduct a thorough investigation. I informed the students that the final assignment would be an in-class final exam. Some students marched into the administrative office to complain that I had changed my initial plan and that they were being treated unfairly. When confronted with this accusation, I explained the events that forced me to change my initial offering of a take-home exam. I found the administration’s reaction amazing. The administration adopted the students’ position before even discussing with

65. See Dark, supra note 12, at 22-33 (detailing experience of minority professor).
me the reason for changing the assignment. I found unprofessional and insulting the fact that a faculty member’s decision would be questioned without an inquiry into the facts.

At the end of the fall semester, I had to fail several students in my Trusts and Estates class. I went to the administration and expressed my concern that graduating seniors might fail. I was told to fail them. I believed that my professional decision would be supported. I submitted my grades and spoke to another faculty member who also had similar results from his class. However, when he approached the administration with similar concerns, he was told to merely give “Ds” rather than fail anyone. At this point, my grades had been released and all hell broke loose.

THE THREATS

I taught a night class the following spring semester. Upon leaving after class, I would constantly see another car in my rear view mirror. For weeks the same car would pull out of the lot as I did. I kept telling myself that it must have been someone who lived in my neighborhood, but I was getting paranoid. One day I went down a different street and the car turned down the street as well. I later found out from one of my students that I was being followed by students who failed my class the previous semester.

Later that semester, I received a phone call from my research assistant, who informed me that one of my disgruntled students was a gun dealer with an arsenal in his apartment. My research assistant told me that the student had made threats against me. The piece de resistance was a phone call I received on my unpublished number at six o’clock in the morning. The caller told me that he knew where my daughter went to school. This was the straw that broke the camel’s back! I went to school that morning, marched into the administrative office, and told the administration about the threatening phone call. The reaction astonished me. With a smile, the administration informed me that nothing had happened yet and thus, there was no compelling reason to do anything. I was stunned and scared. Later that week I received a phone call from the President of the university. He was concerned about my safety because several students had told him of the various incidents. He informed me that the campus police would conduct an investigation. The police found little to prosecute.

Given this assault and the lack of information regarding my tenure decision, I felt frazzled, alone, and isolated. I relied on my friendships with other kindred souls outside my institution to help me cope. The majority of my colleagues at the law school were silent regarding the incidents. In
addition to all of the mental anguish, I couldn’t sleep at night. I experienced anxiety to the point that my doctor prescribed one type of medication to help me sleep and another kind of medication to help me cope with my workday. In a word, I was a complete mess! I know that the tenure process can be a grueling experience, but most people do not experience what I went through that year. Although I did receive tenure, I sometimes wonder if it was really worth the pain. I left the law school that summer and spent the next year healing and garnering strength to return.

Much to the chagrin of many of my colleagues I did return. I imagine that many of my colleagues would have preferred that I retreat. I am still trying to find a way to fully participate, but I find these experiences very difficult to work through. So I go along in measured steps, not allowing the institution to sap me and destroy me as I try to accomplish the things I came here to do: teach, write, and pursue the intellectual experience that this type of employment affords.

LEGAL NIHILISM

When I was a Visiting Scholar at the Harvard School of Divinity last year, I studied the impact of law and religion in the de(volution) of women’s religions. When I told my friends and colleagues of my studies, some were taken aback by my aim to connect law and religion to a woman-centered discussion. My perspective was one of interconnectedness. When one thinks about the nexus between law and religion, it is not difficult to understand that law and religion follow the same procedures of indoctrination in a belief system. In order to achieve optimal membership, the priests of the organization must be well versed in doctrine and loyal to prescribed precepts. Those who fail to fully accept the beliefs are seen as heretics and are denied membership if they have not yet been ordained or are denounced in the community if they have attained membership. The process of teaching law is also a period of indoctrination and examination by the community. The novice is scrutinized and constantly tested on issues regarding loyalty and total acquiescence to the faith. The religious novitiate’s testing period is akin to the legal Academy’s six years tenure time frame. In both scenarios, the time frame gives credence in seeking and casting out the unfaithful. The culture of both the legal profession and the church attempt to mold individuals to represent what society considers an acceptable citizen. The dilemma for law professors is to play the game and get tenure and then write, teach, and politic what is important, or to be honest from the outset. Honesty, however requires taking the chance that a liberal faculty will accept diversity of thought.
or will brand the renegade as an outsider and not renew the law professor’s employment contract.

Several years ago, Paul Carrington, then Dean of Duke University law school, expressed his disappointment in those in the legal Academy whom he termed “legal nihilists.” See Sanford Levinson, Constitutional Faith 157 (1988) (detailing Carrington’s views). He even suggested that it may be a better idea for those persons to secure employment outside the Academy. See Paul D. Carrington, Of Law and the River, 3 J. LEGAL EDUC. 222, 227 (discussing proper role of law professor). His comments were directed at those in the Critical Legal Studies movement (again another branch of primarily white males) who questioned the possibility of justice in a system that was flawed. See id. Suggesting that the nihilist position is simply wrong reinforces the notions that there is only one correct perspective and that other perspectives are inferior to the established norms and must be silenced. This position furthers the belief that differences in ideology are unacceptable in the Academy. Everyone must beat the same drum, and there is no interest in hearing the other voice, much less validating it. It is again the tyranny of the majority. If difference is silenced in the halls of academia, will there be a space for open and honest debate of differing views?

Inclusion in the Academy becomes a litmus test of how well one can submerge one’s beliefs and render the classroom, the writing, and the politics as closely aligned to the majority as possible. The minority is asked to submerge and assimilate their voice in order to gain acceptance into the group, even if only at the margin. Thus, individuality is sacrificed for the good of the whole. The breaking down of the newly minted law professor is characterized by Dean Carrington through the religious metaphor. Philosophical difficulties sometimes arise for the minority law professor to accept some of the tenets of exclusion in the legal Academy. The test balances the submersion of ideology and expression of independent thought or maintain the status quo. Those in the forefront of the civil rights movement took great personal and professional risks to move the law toward a more humane space for all citizens. It is difficult to imagine in the area of civil rights, for instance, that white propertied men would simply decide to share their wealth with the very people who created wealth for them. However, it is precisely this type of mindset that stifles debate by both students and professors who are...

67. See Paul D. Carrington, Of Law and the River, 3 J. LEGAL EDUC. 222, 227 (discussing proper role of law professor).
68. See id.
69. See Levinson, supra note 66. 157-58 (“Carrington’s own prose is strikingly evocative of religious discourse. He is, let there be no doubt about it, writing about faith and belief. . . . For those university teachers able to keep the faith of the secular religion, let there be no shame in the romantic innocence with which they approach the ultimate issue of their profession. ‘Nihilists,’ however, are alleged to have none of this innocence or the requisite faith to be a commendable professor of law.” (citing Paul D. Carrington, Of Law and the River, 3 J. LEGAL EDUC. 227, 228 (1984))).
considered 'other.' This perspective presumes that those who teach the law must have the fervor of the religiously ordained. The professor must uphold the sanctity and honor of the law notwithstanding historically failed concepts of justice and fairness. The 'acceptable' professor is one who, after a period of indoctrination, must prove allegiance by exhibiting the mandated behavior of the community. When the 'heretical' professor questions the social order, it is viewed as a direct threat to the status quo and is duly noted. Outspoken behavior calling for changes in perspective and sensitivity is dismissed as unimportant and too touchy-feely. Other notable explanations that dismiss the 'other's' comments as unimportant or lacking the stiff upper-lip syndrome are supported by the majority. The underlying import of the word 'touchy-feely' means that women and often minorities are too emotional and non-rational. On the other hand, the rhetoric utilized by judges in the pre-Civil War cases to maintain slavery was directly linked to the slave ownership of judges across the country, including those on the Supreme Court. Such rationalization through the use of rhetoric is never viewed as the economic or emotional interests of judges but merely good decision-making. The same rhetorical discussion was also utilized in anti-miscegenation cases, denial of admission of women to the bar, and the lack of tax-based funding to poorer school districts. The judges in these cases were passionate about their position of maintaining the status quo.

When the minority or woman expresses passion, it is considered to be an unacceptable characteristic for inclusion in the legal Academic priesthood, in which strength and detachment are the cornerstones in the discussion of acceptability. Consequently, the nascent faculty member must always be aware of statements or ill-perceived positions that will be remembered by those on the tenure committee.

70. See id. at 159 ("Some of Carrington's critics have pointed out that he is notably unclear in defining the nihilism that he is so quick to denounce. It is not clear, for example, if he is angry at those who deny the efficacy of legal rules because of omnipresent indeterminacy in their interpretations, a view that I have defended elsewhere, or at those who state that law quite clearly safeguards only the interests of the powerful and does not in fact serve to discipline their power. I do not in fact share his optimism that the language of legal 'command' will necessarily serve to restrain 'the lash of power,' rather than simply to justify that power.").

71. See THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 851-58 (Kermit L. Hall, et al. eds., 1992) (noting that Judge Taney wrote for majority in Dred Scott case, but was slave owner who felt that federal government should not interfere with slave laws of various states).

72. See Bender & Braveman, supra note 42, at 138-95 (1995) (discussing Bradwell v. Illinois (denying woman right to be admitted to bar), Scott v. Sanford (separate but equal facilities), Loving v. Virginia (denial of interracial marriage), Brown v. Board (desegregation of school), and Rodriguez v. Texas (denial of funding for poorer school district)). The use of rhetoric in these cases and other similar cases point out deep personal involvement of judges. Thus, the conversation about objectivity in judicial decision-making is truly an illusion.
Thus, the newly minted novitiate must accept the rules of the Academy and dutifully abide until tenure is conferred. There are political ramifications for the truth coming out prior to tenure. An early disclosure raises questions about the novitiate’s true commitment to the faith. This process emulates the position of the Church as it grinds away at the individual, reforming him to the cloned priest who parrots the proper responses at the proper times. The tenure committee serves as the gatekeeper sworn to silence and speaking with one voice. This is very similar to the Church:

It is for the director and assistants to discern and test the vocation of the novices and to form them gradually to lead correctly the life of perfection proper to the institute. The director of novices and the assistants gradually form the novices in a life of perfection suitable to the nature and the spirit of the institute. While engaged in this task, formation personnel are obliged to study and to test the vocation of the novices. These responsibilities are important, as recommendations based on objective criteria should be made to the major superior who admits to first profession according to proper law.\(^7\)

It is often foolhardy and political suicide to expose particular interests in either race or gender issues. For people of color and women, in order to be an acceptable novice, one must show no compassion for either issue. The ‘other’ must give counsel when asked for expert testimony on such issues, but any substantial interest in these areas is considered fringed-based. Those who teach or write in such a way that their gender or race is invisible are elevated to the ranks of the ordained, while those who teach or write with gender and race being central are dismissed as contenders for the tenure prize. However, those who play the game and succeed at the tenure prize and then show their political hand are known as untrustworthy. They are untrustworthy for not permitting the Academy to use their political position for their eventual annihilation.\(^7\) Concepts of academic freedom are chilled by the senior academic priests.

Ideology regarding women’s issues, race and sexual orientation are viewed as radical concepts at some institutions. The difficulty of professors who write in the area of race, for instance, is reflected not only in the material


they write but also in where the article is published. It is no secret in the Academy that minority professors are told to be careful not to write about race, and women professors are told not to write about gender. In writing about these topics, professors must fear that their scholarship will not be considered mainstream enough to satisfy the whims of the predominantly white male faculty members who make the ultimate decision as to who gets into and remains in the Academy. Essentially, the power remains firmly entrenched in the hands of older white male professors.

Once the Academy claims efforts at inclusion, these so-called controversial topics are no longer swept under the rug or merely relegated to the margins of unimportance. For those who continue to allow in non-majority professors, there should be an implicit understanding that the novice may not necessarily accept the creed that has subordinated and denigrated him/her. Alas, the game is fraught with indecision regardless which path is taken. There are countless stories of those who played the game and were denied permanent acceptance into the Academy. Thus, there is a dire need to come to terms with the multiplicity of our experiences and to value individuality rather than sameness as the criteria for acceptance. If individuality is not valued, then society falls into the abyss of sameness as the acceptable norm.

Preaching the faith according to prescribed norms obligates the legal priest to internalize the conviction of blind faith in a faulty system. This kind of homage suggests that only the faithful need apply to the Academy. To demand that the acceptance of 'other' necessitates transmutation into the being and mentality of the dominant ruler requires not only intellectual but behavioral adherence to the established norm. For example, one of my colleagues co-authored a piece in the Journal of Legal Education regarding pedagogy and another piece on ethics and sexuality and was told that her writing was not mainstream and would threaten her chances for tenure. This sort of criticism raises two points: first, the total disregard for academic freedom and, second, the disregard of half the population as non-valuable in the area of legal discourse. The message indicates that the person behind this scholarship is diminished and devalued. Thus, the 'other' in this case becomes a footnote in the discussion because the legal Academy has sought legitimization by the university as a place of higher learning than a vocational school. However this sort of thinking clearly places the law school in a vocational setting where all the widgets look the same. Upon careful scrutiny, the imposition of majoritarian concepts is out-dated to those who present themselves to the Academy as living in parallel worlds as outsiders on the inside. The existence of people of color and women in both the white world
of the Academy and in their own world creates a dual consciousness that undergirds the constant mental corrections necessary in each milieu. This consciousness collides as one navigates the halls of academia with the call to take up the mission with less than religious zeal. The senior legal priests continue their practice of religious doctrine with no space or tolerance for the unfaithful. Admission into the inner sanctum requires the incorporation of the holy rules of law. These rules pose an alarming connection to the underlying concepts of church and state in the indoctrination of the next generation of ‘priests.’ In fact the intersections of church and state are present in the political arena when a sexually fallen president consults with religious leaders; prayer is invoked in public schools; and government vouchers are offered for parochial schools. This religious-like mantle is manifested in the legal Academy with the same fervor by those who would uphold the tenets of the church and the law.

As a professor of property law and one who is intensely interested in legal history, I understand full well the need for the officiates to continue the rhetoric of social control over the masses through the rubric of the historical legal construct. However, I am a stranger in a strange land because my status has allowed the priests to say they are fair and diverse by anointing me as an honorary priest. Although I fully understand that the nature of my membership will never accord me full rights in the Academy, I also understand that I serve the purpose as a visual acceptance of difference. Thus, the cumulative message is to be the good girl or the good black or both, and to be thankful that you were chosen over all the rest. True acceptance and respect for difference is an illusion. The psychic damage from this expectation to mold oneself to the same system that has and continues to minimize the ‘others’ experiences can render one dysfunctional and effectively crazy.

CONCLUSION

The second half of the twentieth century seemed to give hope that full participation was within reach. Participation has been granted but the

75. See Linda Greenhouse, Court Proposes to Weigh Issues of Church, State, N.Y. TIMES, Sept. 19, 1999, at A5 (“With struggles over student-led prayer at high school football games and legal brinksmanship over taxpayer-paid vouchers for parochial school tuition, the line separating church and state appears as contested as it has been in years... The Supreme Court, the ultimate arbiter of constitutional boundaries, has stood by as a largely silent witness to these escalating debates...”).

76. See Bell, supra note 19, at 141 (1992) (“Finally, there’s the barrier of tokenism. While the lack of an adequate pool of blacks with traditional qualifications serves as the major excuse for little or no progress, the drop in interest in minority recruitment after one or two blacks are hired demonstrates that there is an unconscious but no less real ceiling on the number of blacks who will be hired in a given department—regardless of qualifications.”).
numbers are negligible—merely tokenism. The obvious creation of these 'societies of one' possibly assuaged some guilt regarding the payment of the debt for building this country on 'others' backs. Many are complacent that the debt of slavery has been paid and there is no longer a need to make additional attempts at inclusion of the 'other' into the conversation of the legal profession, especially in places of power such as law firms and the Academy. It appears that it is tolerable to have a few guests of color at the table but never enough to cause the balance of power to shift. In order to preserve majoritarian beliefs and reinforce the negative stereotype of the 'other,' it is imperative that the exposure of the 'other,' in the legal academic environment be both minimal and minimized. The 'society of one' is the order of the day and the unspoken policy. The concept of critical mass is never part of the discussion, only tokenism is acceptable.

The difficulty in moving the Academy to value difference is based on the additional effort it takes to accept and squarely face the imposition of racism as a foundational construct in the legacy of America. The discussion of difference as being unimportant characterizes difference as inferior. The majority has a comfortable reason to devalue difference, thus rendering any discussion of it as unworthy. The effort needed to fully comprehend the possible positive attributes is never addressed or taken into account. The rejection of difference as a viable subject for discussion places difference in the continuous position of subordination and minimized value. For to understand difference would mean to understand and acknowledge that there is value associated with it. This would obligate the dominant group to acknowledge difference and on some level to accept it. The concept of diversity imposes an obligation upon the majority to appreciate and understand its historical role in maintaining difference for the status quo. In order to maintain power and control and to continue the regeneration of difference, it is vital to the basic foundation of the hierarchal structure to place difference in opposition to the stated norm. Therefore, the dominant voice is the only acceptable voice because it is the only valid voice that can distinguish the acceptable from the unacceptable. And so I go on, writing this type of article to heal my spirit all the while fully understanding that the struggles will not end, but the hope for fairness and equality and appreciation of difference must endure.

77. See Paul M. Barnett, Legal Superman: Prestigious Law Firm Courts Black Lawyers but Diversity is Elusive, WALL ST. J., July 8, 1997, at A1 (“The prestigious law firm [Shearman and Sterling] routinely engineers complex international mergers but can't manage to keep black attorneys from walking out the door. That isn't unusual among top 250 law firms. Only 2.4% of lawyers in the country's biggest firms are black, up from 1.5% in 1985 . . .”).