Modern Disparities in Legal Education: Emancipation from Racial Neutrality

David Mears, Vermont Law School
Modern Disparities in Legal Education: Emancipation From Racial Neutrality

By
David Mears
South Royalton, Vermont, U.S.A.

May, 2008

Professor: Shirley Jefferson, Esq.
Justice Oliver Wendell Holmes:

“The aim of a law school should be……not to make men smart but to make them wise in their calling –to start them on a road which will lead them to the abode of masters. A law school should be at once the workshop and the nursery of specialist.”
Abstract

Wealth, leadership and political power within any democratic society requires the highest
caliber of a quality legal education. The Black experience is not necessarily a unique one within
legal education but rather an excellent example of either poor to substandard quality disseminated
unequally among racial and socioeconomic stereotypes based upon expected outcomes of probable
success or failure. It is often said, “Speak and so it will happen” – many within the halls of
academia work hard to openly predict failure yet seemingly do very little to foster success internally
within the academic procedures and processes based on the customer service model and a pursuit of
quality. Some reject this model while others totally ignore it to begin with. This seems to feed into
the aristocracy of legal education and its brutal acceptance or rejection of individuals based upon
historical bias and prejudice rampant through out its legacy. Who we are as a nation, a people, an
ideal and a common belief in the basic freedoms of liberty and justice for all requires an
introspection into this academic past as a postscript for what may or may not be realized for so
many Americans who still dare to dream the American Dream.

Rev. Martin Luther King, Jr. declared he’d seen the “promise land,” yet today that promise
land of equality still eludes Blacks based upon this double-standard system of “Entitlement.” Being
socioeconomically advantaged allows one to aggressively pursue and defend one’s right to all levels
of educational matriculation, especially when pursuing higher education, while being Black,
particularly poor and minority still requires permission and acceptance as a tolerable entity into the
“dining” room of opportunity. Like in Langston Hughes poem - “I, too, sing America,” the over
looked forgotten masses within our society seemingly desire the power of the elite, unwilling to
accept anything less than the American Dream enshrined in our Declaration of Independence.
America’s struggle for racial equality continues to evolve as Sen. Barack Obama, (D-IL.), 2008
Presidential candidate, capitalizes on his unique multiracial American “identity” as a leader. The
question remains whether his ascendancy into political leadership began as Harvard Law Review’s
first black president in the 102 year history of this prestigious law journal? Can access to legal
education transcend racial polarization and if so, does that mean that equal access to legal education
is a conduit to various forms of leadership and wealth, therefore, bridging the numerous racial and
socioeconomic gaps within our society. At least one component of this answer requires a deep
understanding of the historical significance of blacks in legal education and the mitigating factors
for both success and failure. As the United Negro College Fund, suggests – “A mind is a terrible
thing to waste” so everyone should have the Right to the highest echelons of higher education,
particularly quality legal education. The law student today will likely be the CEO, Governor,
President and Chairman of the Board, etc. tomorrow. To fulfill the ideals of a democracy the United
States of America must improve upon legal education because tomorrows leaders are today’s law
students.
# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>INTRODUCTION</td>
<td>1</td>
</tr>
<tr>
<td>I.  New England: The Genesis of the Black Lawyer</td>
<td>2</td>
</tr>
<tr>
<td>A. Black Man’s History of Legal Education</td>
<td>2</td>
</tr>
<tr>
<td>B. Maine</td>
<td>7</td>
</tr>
<tr>
<td>C. Massachusetts</td>
<td>8</td>
</tr>
<tr>
<td>II. Educational Landscape</td>
<td>10</td>
</tr>
<tr>
<td>A. Brown v. Board of Education</td>
<td>10</td>
</tr>
<tr>
<td>B. Blacks in Law School</td>
<td>12</td>
</tr>
<tr>
<td>C. Harvard Law School – It’s African-American Legacy</td>
<td>15</td>
</tr>
<tr>
<td>D. Debate Among Academics and Administrators</td>
<td>20</td>
</tr>
<tr>
<td>III. Black Students in White Schools</td>
<td>25</td>
</tr>
<tr>
<td>IV.  Black Students in Black Schools</td>
<td>28</td>
</tr>
<tr>
<td>V. 21st Century Racism &amp; Discrimination</td>
<td>30</td>
</tr>
<tr>
<td>A. Culture of Legal Academia</td>
<td>30</td>
</tr>
<tr>
<td>B. Customer Service and Quality</td>
<td>32</td>
</tr>
<tr>
<td>C. Racism On Campus</td>
<td>37</td>
</tr>
<tr>
<td>D. Work Life Balance</td>
<td>41</td>
</tr>
<tr>
<td>VI. No Longer Separate But Very Unequal</td>
<td>45</td>
</tr>
<tr>
<td>A. Fewer Blacks Enter Law School</td>
<td>45</td>
</tr>
<tr>
<td>1. Affirmative Action</td>
<td>48</td>
</tr>
<tr>
<td>2. LSAT FUD: Fear, Uncertainty, and Doubt</td>
<td>50</td>
</tr>
<tr>
<td>B. Wealth Disparity and Legal Education</td>
<td>53</td>
</tr>
<tr>
<td>C. Cost of Legal Education</td>
<td>57</td>
</tr>
<tr>
<td>CONCLUSION</td>
<td>61</td>
</tr>
<tr>
<td>APPENDIX</td>
<td>63</td>
</tr>
<tr>
<td>BIBLIOGRAPHY</td>
<td>67</td>
</tr>
</tbody>
</table>
Introduction

To become a black lawyer in America requires an extraordinary measure of courage, determination, and vision. Today, despite the seemingly many advances of the Civil Rights Movement, which included Affirmative Action – to most blacks, the goal of becoming a lawyer seems to defy social and economic realities. At the turn of the twentieth century, W.E.B. Du Bois found that physicians and lawyers together comprised only 1.5 percent of the black population.¹ According to the 1910 U.S. census, there were at that time only 798 black lawyers in the country and by 1940 there were a mere 1,925 total. This translates into one black lawyer for every 13,000 blacks in America.²

During this period, the few blacks who did manage to become lawyers found themselves in a profession that was intolerant with racism and fundamentally segregated. The first black federal judge in the United States was appointed in 1937 in the U.S. Virgin Islands; until 1949, there were no blacks on the United States Circuit Court; and until 1961, none on a United States District Court; and not until the appointment of Thurgood Marshall in 1967, none were on the United States Supreme Court. Blacks were not admitted to “white” law schools. Until 1943 color had to be stated on the applications to the American Bar Association and until 1946 there was no black teacher on the faculty of predominantly white law schools.³ Over the past fifty plus years, since Brown v. Board of Education,⁴ legal education and society has done more to discourage than encourage black hopefuls. Black role models in the profession have been few, and the disincentives to blacks have predominantly been too great to overcome. Even today, many see the legal education and its various maneuvers regarding “Affirmative Action” as disingenuous in origin because the outcome seeks to integrate based on diversity and a

² Id., at 1.
³ Id., at 1.
compelling state interest without any foundation or steps in place to accelerate black law school matriculation and bar passage. Education has always been seen as pathway to socioeconomic and political freedom for African-Americans (blacks); therefore, a historical perspective of modern disparities in legal education may enlighten us toward true racial equality. Oliver Wendell Holmes stated, that “the life of the law has not been logic: it has been experience ...we must consult history because the substance of the law …depends very much on the study of history.”

I. New England: The Genesis of the Black Lawyer

A. Black Man’s History of Legal Education

The principle discouragement for many blacks seeking to become lawyers has been the difficulty of obtaining a legal education. This was especially true during the period of 1900 to 1930 when states individually began to require a law degree for the practice of law. The racial and economic barriers to legal education remain a continuing problem for blacks. Blacks began to establish their own law schools to counterbalance the restrictive requirements of white law schools – which were used to limit their entrance into the profession. Unfortunately, eighteen of the nineteen black law schools established prior to 1900 did not prosper and had to be discontinued, leaving only Howard University Law School in Washington, D.C., which was founded and chartered by the federal government in 1869, as the only surviving law school. Between 1877 and 1935 Howard Law School was the only substantial source of legal education for blacks in an approved law school anywhere.

Subsequently, over the next twelve years, three other currently functioning accredited black law schools in the South came into existence. First was North Carolina Central University Law School in Durham, North Carolina, founded in 1939.\(^5\) The next two law schools were Texas Southern University

\(^5\) Id., at 2.
Law School in Houston, Texas and Southern University Law School in Baton Rouge, Louisiana. The majority of black lawyers in the United States – were trained at these four Historically Black Colleges & University (HBCU) Law Schools.

This limiting of blacks to black law schools was a perpetuation of racism – based on the social and academic stereotype for separation of the races. Under the leadership of Charles H. Houston, and later Thurgood Marshall, of the NAACP Legal Defense and Educational Fund, a series of lawsuits were filed to obtain the right for blacks to attend predominantly white southern law school. Through persistence, effective advocacy and the resulting court orders mandating legal educational integration, slowly the legal barriers restricting admission of blacks to white law schools began to fall. There is no doubt that the 1954 decision of the United States Supreme Court in *Brown v. Board of Education* had some significant impact upon the thinking of white law schools. *Brown* overruled the “separate but equal” doctrine approved by the Supreme Court in 1896 in *Plessy v. Ferguson*, which had been the legal foundation supporting segregated school systems for fifty-eight years. However, it was not until 1964, some 147 years after formal legal education in the United States began, that the Association of American Law Schools’ (AALS) Committee on Racial Discrimination could state for the first time that no member school reported denying admission to any applicant on grounds of race or color. There is no doubt from those informed on the subject during this period that the denial of admission to black students continued in 1964 and afterwards in a substantial number of AALS law schools, the consolidation is that by 1964 no such institution was willing to admit that they engaged in such discriminatory conduct.

---

6 *Id.*, at 2.
7 *Id.*, at 2.
10 *Id.*, at 3.
The overt policies of racial discrimination in admissions were not the only barriers that potential law students had to overcome. Many blacks were deprived of the early educational opportunities that would allow them to compete in higher education. Furthermore, few families or friends offered strong encouragement to the black would-be lawyer. The clergy (preachers), school teacher, and physician were occupations which were seen by blacks as superior to one of a lawyer. Parents deliberately discouraged their children from entering into the legal profession. They were skeptical of the black lawyer’s ability to obtain justice in the courts; because they realized that a large portion of the black community chose white lawyers to represent them; and they knew that black lawyers had to frequently associate themselves with white lawyers and split fees if they wanted clients.

Discouragement – comes in many forms and contexts. The discouragement of Blacks from pursuing the legal profession was and remains a common experience among those motivated toward the study of law. This dramatic form of discouragement appears in the advice given Malcolm X when he discussed his career plans with his high-school teacher and adviser:

“…. Malcolm, you ought to be thinking about a career. Have you been giving it thought?”

“…. I’ve been thinking I’d like to be a lawyer.” – (Malcolm X)

“… Malcolm, one of life’s first needs is for us to be realistic …. You’ve got to be realistic about being a nigger. A lawyer-that’s no realistic goal for a nigger.”

– (Teacher)

In this manner the budding seed of motivation, interest and possible passion for a discipline of legal learning is ripped out of the consciousness of a young black man who dreams and desires are tainted by the seemingly social and economic limitation of his race. It’s not young Malcolm’s intellect and

---


cognitive abilities that are being challenged with regard to his career selection but the manifestation that his educational and therefore career options are not limitless and therefore his freedom is also constrained. In addition to family opposition, educational handicaps, and humiliating conditions diverting blacks from a career in the law, there was the problem of the high costs of both undergraduate and law school education. Blacks entering law school had the least financial support from their families – based on the median income of black parents being lower than that of any other group. As stated before many black parents did not see a future in the legal profession, so they hesitated.

In 1968, the Council on Legal Education Opportunity (CLEO) was sponsored by the Association of American Law Schools, American Bar Association, the National Bar Association, and the Law School Admission Council. Its purpose was to help remedy the underrepresentation of disadvantaged groups in the legal profession by expanding their opportunities to study and practice law. CLEO’s goal was to double black enrollment in law schools within five years through its summer institutes and inspirational approach13 – it generally eased the transition to law school. The increased financial and remedial programs detailed above were so successful that every year since 1970 seven have been conducted in law schools every year – totaling about two hundred students. Professor Ralph Smith, of the University of Pennsylvania Law School, comments, “At a time when so few things work, the CLEO model stands out as one which deserves continued support, expansion and replication.”14 Despite these positive gains – both Bush administrations – cut the federal budget for such programs like CLEO –which helped racial minorities, as well as economically disadvantaged white students. It seems aristocracy rears its ugly head again in legal academia based on policy decisions affecting access to legal education. In this manner – two paradigms come to realization: (1) the dichotomy between

13 Geraldine R. Segal, Blacks in the Law, p.5.
14 Id. at 6.
“rights” and “privileges” within the academic landscape and its impact on blacks, and (2) the remediation of an intellectually inferior class of people based on a filtering process setup, designed and implemented by white legal scholars and academics.

Educational institutions, especially law schools, seem reactionary post Bakke\textsuperscript{15} and Grutter v. Bollinger\textsuperscript{16} and not proactive in lobbying and implementing supportive affirmative – action programs. Justice Powell’s controlling opinion in the 1978 Bakke decision, upheld race-conscious admissions policies on the grounds that they support the important goal of producing a diverse student body representing many kinds of experiences and points of view which enriches the discussions and the learning experiences.\textsuperscript{17} Affirmative action in selective universities and professional schools is generally voluntary rather than required by a court order or administrative directive. Law is an area of study in which effective analysis and advocacy obviously require as deep an understanding as possible of various points of view on key legal issues and of the social and economic realities in which they arise. The Bakke opinion relied heavily upon Harvard College’s admission procedures-…..”the race of an applicant may tip the balance in his favor…..” and “…Similarly, a black student can usually bring something that a white person cannot offer.” In this manner the fundamental requirement of professional legal education is that students confront different ideas on campus and learn how to relate to other students who reflect the diversity in society. The best way for law schools to make this happen is to consciously select and matriculate students likely to contribute to diversity. This openness to diversity can be observed in parts of New England as the birthplace of our democracy and the originator of the American black lawyer.

\textsuperscript{17} Gary Orfield & Dean Whitla, Diversity and Legal Education: Student Experiences in Leading Law Schools, Diversity Challenged, at 147 (August 1999) http://www.civilrightsproject.ucla.edu/research/lawmichigan/DiversityandLegalEducation.pdf
B. Maine

Maine was the first state to admit a Black American to the bar. Through the efforts of General Samuel Fessenden, a white liberal, Macon Bolling Allen was sponsored for admission to the courts of Maine in 1844.\textsuperscript{18} During this time any citizen, who produced a certificate of good moral character, was eligible to be admitted to the bar in Maine. All others were required to pass a written examination. Initially, it was determined that Allen was not a citizen of Maine and therefore was ineligible to qualify for admission, so he applied for admission by examination and he passed successfully. Mr. Allen left for Boston, MA within a year of his admission to the Maine bar.\textsuperscript{19} He had hopes of being admitted to the Massachusetts bar. Allen admission to the bar in Maine was greeted with mixed feelings, so it subsequently took thirty-five years before Maine admitted John H. Hill as its second black lawyer.\textsuperscript{20} Hill who studied under a white lawyer was admitted to the bar of the Supreme Judicial Court of Sagadahoc County on April 11, 1978, by Judge Charles J. Faulkner, Jr. Similarly, like his predecessor – Macon Bolling Allen, Hill did not remain in Maine; because he returned to his native state of West Virginia, where he was also admitted to the bar. The paradox between these two black legal pioneers and black students like myself remains the persistent ability and need to step beyond what is familiar and seek an educational opportunity elsewhere, and then returning to “home” or where blacks feel a likelihood of success is available. In essence going through the “fires of purgatory” to discover the nirvana of heavenly opportunity elsewhere.

Milton Roscoe Geary was the first black student admitted to the University of Maine School of Law in 1911, after previously studying law in a law office in Marlboro, Massachusetts. Geary remained in

\textsuperscript{18} J. Clay Smith, Jr., \textit{Emancipation}, p. 93.
\textsuperscript{19} \textit{Id.} at 93.
\textsuperscript{20} \textit{Id.} at 93
Maine and opened a law office in the city of Bangor.\textsuperscript{21} Geary was the first black member of the Penobscot Bar Association, and he remained the only black lawyer in the state of Maine through the 1940’s. In this manner, the unique legal perspective provided by Geary, couple with his community outreach – engaging in various civic, religious, and cultural community projects and organizations, provided a distinctly diverse advantage as a black lawyer. This diversity at bar provides a greater advantage for black lawyers among the various members of the community and society at large; in essence, diversity in legal education is good business sense. The American black lawyer originated in the New England states of Maine and Massachusetts. By following the historical journey of Macon Bolling Allen, the first black lawyer in the nation, one can gain insight into the educational and professional plight that black lawyers still face today.

\textbf{C. Massachusetts}

The first black lawyer in the nation, Macon Bolling Allen, arrived in Boston in 1845 and subsequently admitted to the Suffolk County Bar in Massachusetts. He held the distinction of being the first black lawyer admitted to practice in Maine and in the Commonwealth of Massachusetts.\textsuperscript{22} On April 21, 1847, Governor George N. Briggs, of the Whig Party, appointed Allen justice of the peace. In 1854 this appointment was renewed by Governor Emory Washburn, also a Whig, making Allen the first black lawyer in the history of the nation to be appointed a judicial post.

Robert Morris, Sr., was America’s second black lawyer.\textsuperscript{23} He studied under the tutelage of Ellis Gray Loring, a white man connected with the anti-slavery movement and Harvard University Law graduate, who hired Morris as house servant in 1837. He got a chance to help out “doing copying” in

\begin{itemize}
  \item \textsuperscript{21} \textit{Id.} at 94.
  \item \textsuperscript{22} \textit{Id.} at 94.
  \item \textsuperscript{23} \textit{Id.} at 96.
\end{itemize}
Loring’s law office. Pleased with the intellect of young Morris, Loring encouraged him to study law. Robert Morris Sr. was admitted to the Superior Civil Court of Suffolk County on February 2, 1847.\textsuperscript{24}

Attorney Morris was known as an aggressive lawyer whose technical skills were recognized by many in the community and by the members of the local bar. In 1847, in what is known to be the first lawsuit filed by a black lawyer on behalf of a client in the history of the nation, a Boston jury ruled in favor of Morris’s client.\textsuperscript{25} Morris popularity soared because a black man had prevailed against a white lawyer. A few months later, Robert Morris filed and personally tried, the first civil rights case challenging a segregated public school system in Boston, known as \textit{Robert v. City of Boston}\textsuperscript{26}. Roberts failed to prove successfully that a resolution passed by the local school board was illegal because it required “colored children” to attend “colored schools.”\textsuperscript{27} The local court ruled in favor of the local school board and Morris immediately appealed the ruling to the highest court in the commonwealth. Upon doing so he won the support of Charles Sumner, an abolitionist Boston lawyer who in 1851 would be elected to the United States Senate. Later, as Senator Charles Sumner, he would be instrumental in assisting Dr. John Swett Rock to become the first black admitted to practice before the United States Supreme Court.\textsuperscript{28} Morris and Sumner filed the first civil rights appellate brief ever co-signed by a black lawyer and a white lawyer in any case in America. The Supreme Judicial Council of Massachusetts refused to overturn the lower court’s decision, holding that it was reasonable and “practical” to require black children in Boston to travel further distances to attend “colored schools.”\textsuperscript{29} Although Morris and Sumner lost this case, their efforts set the foundation in jurisprudence for the opposition to segregated public education that would culminate one hundred and five years later in

\textsuperscript{24} \textit{Id.} at 96.
\textsuperscript{25} \textit{Id.} at 96.
\textsuperscript{26} Roberts v. City of Boston, Case No. 976, Court of Commons Pleas, Suffolk County, Boston, MA, Oct. 1848.
\textsuperscript{27} J. Clay Smith, Jr., \textit{Emancipation}, p.97.
\textsuperscript{28} \textit{Id.} at 102.
\textsuperscript{29} \textit{Id.} at 97.
Brown v. Board of Education, which held that state imposed segregation in public school systems was unconstitutional. 30

II. Educational Landscape

A. Brown v. Board of Education

Brown v. Board of Education’s promise of inclusive, integrated, high-quality schools for all of our nation's children has never been more important. Yet in the 54 years since Brown, the nation has struggled to realize that promise. After a period of massive resistance and foot dragging, our country made real progress toward more integrated and equitable education. Over the last two decades, however, the nation has witnessed disturbing levels of resegregation across the country. Indeed, America's public schools, universities, colleges and graduate / professional programs are now more segregated than they were in 1970. Certain school districts, colleges and universities have voluntarily tried to fight this trend, and to bring students together across lines of difference.

Educators, including African-American (Black) educators, have struggled with the concepts of “Rights” versus “Privileges” when implementing policies and procedures educationally. A “Right” is defined in jurisprudence and the law as a legal entitlement to do or refrain from doing something. Despite the many educational advances post Brown v. Board of Education, including those of the Civil Rights Era; many African-Americans continue to struggle for these inherent rights of entitlement. One aspect for this reasoning seems indistinguishable from a belief that these rights can be earned or acquired through acts of citizenship, based on the American ideal of hard work being the universal equalizer for access and opportunity. This earning one’s place is entrenched within the American educational perspective and seems indistinguishable from the privilege or opportunity to participate in the American ideology of a new form of citizenship. A privilege is defined as a “private law” or law

30 Id. at 97.
relating to a specific individual; also known as a special entitlement. A privilege can be revoked in some cases. It is conditional and granted only after birth. In comparison, a right is inherent, irrevocable entitlement held by all citizens or all human beings from birth. The Supreme Court has struggled with defining racial integration as a Constitutional Right, versus a Privilege which can be revoked.\(^{31}\) There seems to be two reasons for this paradigmatic debate: (1) that our developing systems of democracy and jurisprudence also struggle with these concepts. Pre-Brown era, of Plessy v. Ferguson help qualify this struggle. (2) Also, the culture of academia – especially within higher education contains seemingly misplaced antiquated notions of who belongs and who doesn’t, based on inadequate quantifiable measurements of performance used to select and rank individuals into a caste system. Ironically, this caste or social ranking is exactly what a quality education is supposed to at best eliminate and at worst minimize with regard to its legal and social impact.

Affirmative action in selective universities and professional schools is generally voluntary rather than required by a court order or administrative directive. The basic legal requirements for defending race-conscious policies in this period of legal development are that the policy responds to a “compelling interest” of the institution that cannot be achieved by another method and that it is “narrowly tailored” to achieve that interest. In Sweatt v. Painter\(^{32}\), the Court’s 1950 opinion, by Chief Justice Fred M. Vinson, he comments about the University of Texas Law School, saying,\(^{33}\)….. The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts. Few students and no one who has practice law would choose to study in an academic vacuum, removed from the interplay of ideas and


\(^{33}\) Id. at 147.
the exchange of views with which the law is concerned." Law is an area in which effective analysis and advocacy obviously require as deep an understanding as possible of various points of view on key legal issues and of the social and economic realities in which they arise. Both the Sweatt decision in 1950 and Bakke decision almost thirty years later relied on the proposition that a fundamental requirement of professional education is that students confront different ideas on campus and learn how to relate to other students who reflect diversity of society. This argument supporting diversity was rejected, in the 1996 Texas Hopwood case, which denies that diversity has an impact on universities. In this case the Fifth Circuit Court of Appeals held that race was not associated with any relevant educational diversity. In Hopwood the court held that, “The use of race, in and of itself, to choose students, simply achieves a student body that looks different” – seemingly the court embraces the proposition that race and ethnicity are not linked to either different experiences or perspectives that would be relevant to the educational experience. This Texas Appellate court’s perspective remains a mere assertion about the effects of educational diversity, because there are only two reliable sources for feedback and data: the students and faculty. The experiences of students, particularly Black students attending law school result in varying educational outcomes.

B. Blacks in Law School

Despite the admission and matriculation of more blacks to predominantly white law schools, the problem of social integration still inhibits many blacks. The desegregation of law schools, like the desegregation of colleges and public schools, raises complex issues of stereotypes and discrimination.

34 Id. at 147.
36 Gary Orfield & Dean Whitla, Diversity and Legal Education: Student Experiences in Leading Law Schools, Diversity Challenged, at 148 (August 1999).
These disparities of integration include students who are isolated on campus and had to make difficult transitions, the lack of customer service – or the double standard treatment given blacks versus their counterparts, consistent and constant agitation for either physical and/or mental altercation, blatantly rude and disrespectful interpersonal interaction – causing intimidation, fear and despair among many blacks attending law school. This exacerbates the inherent institutional racism of academia making it a difficult process to develop successful interracial communities on campuses with very few minority professors and administrators.  

Law schools are particularly a target in the battle over affirmative action because of the intensely competitive nature of their admissions processes. Several surveys report positively on the interracial contact between law students. The data from a Gallop Poll at Harvard Law School and the University of Michigan Law School etc. indicates that it is rare for minority students to obtain access to elite law schools without substantial integration experiences in their earlier life. This suggests that whites may receive some the largest benefits from policies that desegregate elite colleges and professional schools. If adults with fully developed racial concepts and stereotypes are brought together in an unfavorable setting, the result can be reinforcement of their stereotypes, unless the situation is handled well. Neighborhood racial transition often produces this kind of experience. Many white Americans have stereotypes about black and Latino communities and culture in which elements of class are mixed with elements of varying socialization, habits, and preferences, etc. Some forms of interracial contact experiences may reinforce these stereotypes rather than change them. Many minorities have stereotypes and fears about contact in their family background –memories, for

40 Gary Orfield & Dean Whitla, Diversity and Legal Education: Student Experiences in Leading Law Schools, Diversity Challenged, at 147 (August 1999) http://www.civilrightsproject.ucla.edu/research/lawmichigan/DiversityandLegalEducation.pdf
example, about forms of discrimination, especially those memories of police brutality or negative interactions with legal authority. Several researchers describe the conditions for “Successful Contact” as depending on “equal status interaction” settings in which people are treated equally and interact as peers. Avoiding conflict, of course, is not a basic goal of higher education.

Legal education requires that students understand all sides of conflicts and how to argue difficult issues in contentious, high stakes settings. In a research study done at both Harvard and Michigan – students were asked whether or not conflicts arising from racial differences led them to reexamine their own ideas, many replied –yes. One student added a comment noting the impact on his beliefs and values: “I guess I would say that due to my discussions with minorities I’ve completely changed my viewpoint on affirmative action. And I work closely with a professor who happens to be black and I think that’s changed my perception as well.” Other students see this interracial conflict as negative. Racial identity shapes ones view on legal and social issues, in law school students tend to perceive issues of racial diversity differently. Racial polarization based on this identity is reflected among various groups of Americans, such as the deep differences in the way the criminal justice system is viewed. Understanding the nature of the law requires understanding the social and economic conditions in which law is applied. Although rights are often discussed in absolute terms, much of the law and politics in the United States is about the conflict of rights-one person’s right to safety v. another person’s right to have a gun etc. Often these issues are not addressed substantively in teaching the law, which tends to be much more about the principles and precedents or deductive models concerning points of law than about the underlying social realities. Inextricably, many minorities cognitive reasoning is based on survival – this conditioned ability to determine a social threat and assesses its potential becomes a completely different reasoning ability for rational analysis when

---

41 *Id.* at 147.
42 *Id.* at 147.
contrasted racially with a theoretical abstract legal concept. Post slavery – blacks were under a constant state of violence and fear – Lynching’s, Jim Crow and racial hostility was the normal existence for blacks. Time has changed yet – this conditioning has been reinforced from one generation to the next as a mechanism of survival. In a standardized learning environment, such as pre-law school and a theoretical abstract one during law school – black student’s interpretative approach and analysis of the facts can be distinctly different from their peers and those reviewing their work.

The United States has entered a period in which civil rights issues will take on extraordinary importance. There are rapidly changing demographics and deep inequalities and regional differences among racial and ethnic groups. Today, in five states, including the nation’s two largest states, whites have become a rapidly shrinking statewide minority in the school population. U.S. Census Bureau projects that whites will be only about 40% of the school aged population. Blacks, who are already the third largest minority in California and the second largest in three New England states, will like their white counterparts have too adapt to huge racial changes. In a country whose population is being driven by immigration, mostly non-Europeans who do not speak English – many issues of immigration and language must be resolved. The complexity of these issues is enormous, and law students tend to have varying viewpoints on these issues, depending on their own race or ethnicity.

C. **Harvard Law School – Its African-American Legacy**

The history of Harvard Law School is a reflection of American Black history because of the numerous and significant contributions of blacks. "You cannot separate out the black history of this school from the soul of the school," Boston College Law School professor and Harvard alumnus

---

43 Id. at 147.
44 Id. at 166.
45 Id. at 147.
46 Id. at 147.
Daniel Coquillette ('71) told the gathering. "It flows through the arteries and the veins and to the very heart of this institution. From the beginning of the school's life to this day, it's at the very heart of everything that this school was and this school will become." A significant component to Harvard Law School’s origin was “slavery.”

African slave labor intersected with the founding of nearly every early American institution including Harvard Law School. No single institution’s prestige or reputation can suppress this reality. Harvard’s legacy started on the Caribbean island of “Antigua” named after the Seville Church of Santa Maria de la Antigua, known for its sugar-cane-production using African slaves as the primary labor source. One of these sugar-cane plantation owners was Isaac Royall Jr., whose wealth would later establish Harvard Law School.

Royall a wealthy sugar-cane plantation and slave owner added a codicil to his will two years before his death in 1871. In his will he left 200 acres of land (worth $2.5 million today) for the "endowing of a Professor of Laws at said college, or a Professor of Physics and Anatomy." School administrators sold the land to create a trust to fund and Harvard's first chair in law, traditionally occupied by the dean. The Royall family's coat-of-arms was adopted as the Harvard Law School's crest. It shows three stacked wheat sheaves and incorporates the motto, "From the Old Fields Must Spring the New Corn." It is a motto that reveals an entire institution's history in just a few simple words and images. Those "old fields" were located in Antigua, and the "new corn" would symbolically

---

48 Id. at 2.
49 Id. at 2.
50 Id. at 2.
51 Id. at 2.
become, apparently not by design, the first African American students to graduate from Harvard Law School.  

Only predominantly black Howard University Law School has produced more black lawyers than Harvard Law School. More than two-thirds of the 1,600-plus black lawyers who graduated from Harvard Law School completed their studies between the 1970s and 1990s. Many of those graduates today are distinguished by the names they have made for themselves and the institutions they represent. Harvard law graduates have not limited themselves to careers in law. They can be found influencing the fields of business, finance, politics and even literature.  

Among Harvard Law's distinguished black alumni are Pulitzer Prize winner James Alan McPherson ('68); American Express CEO Kenneth I. Chenault ('76); Congressman William J. Jefferson ('72); BET Holdings President and COO Debra L. Lee ('80); Fannie Mae CEO and former Office of Management and Budget Director Franklin D. Raines ('76); and TransAfrica President Randall M. Robinson ('70). American Express CEO Kenneth I. Chenault ('76) said in his keynote remarks the following, "As leaders of our generation, we-both alumni and students-are accountable to those who have come before us to continue the legacy of Harvard Law School;" Indeed, this legacy stretches back to 1869, when George Lewis Ruffin became the first African American to graduate from Harvard Law School. Ruffin graduated only four years after Abraham Lincoln signed the Emancipation Proclamation, and 79 years before Jackie Robinson broke baseball's color barrier. Many significant milestones of American legal history and the implementation of black diversity were

\[^{52} \text{Id. at 2.}\]
\[^{53} \text{Id. at 2.}\]
\[^{54} \text{Id. at 2.}\]
\[^{55} \text{Id. at 2.}\]
\[^{56} \text{Id. at 2.}\]
\[^{57} \text{Id. at 2.}\]
made at Harvard Law School, particularly the admission and matriculation of black students from historically black colleges and universities (HBCU).

Archibald Grimke was Harvard's second black law graduate and in 1894, Grimke was named consul to Santa Domingo by President Grover Cleveland.\(^{58}\) Upon his return to the United States in 1898, Grimke became closely allied with W.E.B. Du Bois and later became vice president of the NAACP. As vice president of the NAACP, Grimke often challenged the views of another prominent leader during this time, Booker T. Washington. One of Grimke's major disagreements with Washington was on the importance of voting.\(^{59}\) The right to vote was, for Grimke, essential to the social and economic aspiration of blacks, whereas Washington saw it as being less important. Yet despite their disagreements over strategy, the two men over the years developed a cordial relationship. Grimke entered Harvard Law School after graduating from a predominantly black college, Lincoln University.

Recently, the torch of diversity has been passed from one generation to the next at Harvard Law School. Pickens Patterson, a 1968 Harvard Law School graduate, represented the school's efforts to diversify its student body during the late 1960s.\(^ {60}\) Patterson never dreamed of attending Harvard Law School, but a series of unforeseen events led him to the most prestigious law school in the nation. "I thought I had no chance to get in, very frankly, because at the time a large number of blacks weren't being admitted to Harvard," Patterson says.\(^ {61}\) As Patterson saw it, he had two strikes against him: he was educated in the segregated public schools of Savannah, Ga., and he had graduated in 1965 from a predominantly black college; Fisk University in Nashville, Tenn.\(^ {62}\) Patterson wasn't being pessimistic,
just facing the reality of 1960s America. Even Patterson's home state of Georgia was adverse to the prospects of having blacks attend the state's graduate and professional schools. During the 1960s, segregationist Georgia legislators allocated taxpayer money to pay black students to attend college out of state.\textsuperscript{63} Georgia offered Pickens and other black residents the difference in the cost of tuition at the University of Georgia Law School and tuition of an out-of-state law school. Patterson was fortunate. He had already been offered a full scholarship to Howard University Law School. But considering the deal Georgia officials were offering, his father urged him to at least apply to Harvard Law School. Patterson was accepted at Harvard, and along with a check from the state of Georgia, loans and other financial aid, he was able to pay his tuition.\textsuperscript{64}

"With my background from a segregated public school system, segregated society, and having been confined to the South basically in terms of my experiences," Patterson says, "Harvard was like another planet, just foreign to me. I'd never considered the possibility that I might go there."\textsuperscript{65}

In 1967 Patterson was one of the founding members of Harvard's Black Law Student Association (BLSA): "We wanted to serve as mentors to new black law students coming in, to give them the benefit of what we had learned about what it took to pass."\textsuperscript{66} Patterson practices real estate and municipal-bond law in Atlanta. His daughter, Staci, will be graduating from Harvard Law School next year, and is currently president of the BLSA.\textsuperscript{67} She feels a responsibility to take advantage of the opportunities that her father and other black Harvard graduates have created for her generation. Staci says,

"I'm definitely looking forward to taking the opportunities of larger firms and doing all the things I think he wishes he could

\textsuperscript{63} Id. at 3.
\textsuperscript{64} Id. at 3.
\textsuperscript{65} Id. at 4.
\textsuperscript{66} Id. at 4.
\textsuperscript{67} Id. at 4.
have done during his time.... His fight would be in vain if I didn't. That's what the struggle was all about, to have equal opportunities."  

In recent years Harvard University has expanded the concept of diversity to include students from disadvantaged economic, racial and ethnic groups. When the Committee on Admissions reviews the large middle group of applicants who are deemed capable of doing good work in their courses, the race of an applicant may tip the balance in his favor just as geographic origin or a life spent farming may tip the balance in other candidates’ cases. A farm boy from Idaho can bring something to Harvard University that a Bostonian cannot offer. Similarly, a black student can usually bring something that a white person cannot offer. In this manner, Harvard has consistently implemented the philosophy that diversity was a fundamental requirement in constructing the best possible educational experience. As such, this academic institution remains convinced that it knows much more about choosing the best class for a great university than could be discerned from the numbers on tests such as the LSAT and transcripts.

D. Debate Among Academics and Administrators

Much of the debate concerning Affirmative Action depends on whether or not diversity really does make a difference to educational experiences. Proponents of diversity, who defend its use, assert that it makes a substantial difference to educational experiences. Opponents claim a lack of empirical evidence supports this assertion, and that only traditional values and philosophical premises are relied upon. Clearly, this difference is based more on the reality of divergent social perspectives.

This debate among academics is exemplified by Richard H. Sander, a law professor at UCLA, in the November 2004 issue of the Stanford Law Review. Prof. Sanders argues that affirmative action

68 Id. at 4.
“mismatches” black students at law schools where their lower entering LSAT scores and undergraduate grades place them at an academic disadvantage, therefore, resulting in their poor academic performance - lower grades, no graduation, and low bar passage rates among African-American law students.\textsuperscript{70} Harvard and Yale Law Schools have in effect skimmed off a lot of applicants with LSAT scores that would be at the median of less selective law schools.\textsuperscript{71} Here Sanders makes his controversial assertion, that if affirmative action ended, African Americans would overwhelmingly enter lower-ranked law schools where they would perform dramatically better, thus causing an increase of 8 percent in the number of new black lawyers. This “mismatch” theory was advanced previously by Stephan and Abigail Thernstrom, Ward Connerly, Walter Williams, Gail Heriot and Thomas Sowell-with respect to affirmative action and college graduation rates.\textsuperscript{72} The basic premise of these claims has been refuted time and time again.

The Thernstroms’ predicted that among the benefits of California’s Proposition 209 was the “redistribution” of African Americans from UCLA and UC Berkley to less selective campuses like UC Riverside that will, in the end, increase the number of blacks graduating from the UC system overall.\textsuperscript{73} There was no indication that this presumptive benefit would have materialized or ever will. However, what is clear is that black enrollment decreased at the University of California’s most selective campuses, the educational pipeline to law school will show the racial divide produced by “cascading.” Last year UCLA and Berkley produced the most and third-most applicants to law school in the country. The University of California at Riverside, the 114\textsuperscript{th}-ranked feeder institution, sent only one

\textsuperscript{70} \textit{Id.} at 1.
\textsuperscript{71} \textit{Id.} at 1.
\textsuperscript{72} \textit{Id.} at 1.
\textsuperscript{73} \textit{Id.} at 1.
seventh as many applicants to law school as UCLA. Based on this analysis, it would seem that the assertions of Prof. Sanders are pure fallacy from a self-described liberal. He significantly underestimates the harms of ending affirmative action, and seriously overestimates the benefits of ending affirmative action.

There are several unrealistic assumptions in Sanders model; he assumes that applications from African Americans would not decline if Affirmative Action were to end. Applications from black students consistently dropped when the public law schools in California, Texas, and Washington banned affirmative action in the late 1990’s. If without affirmative action all the highly competitive law schools had only 1 to 2 percent African Americans (a point Sanders concedes), it is unrealistic to assume that all of the accomplished African Americans now at law schools like Michigan and Northwestern would go to law school at all if their best option would be to attend a lower-ranked law school like Arizona State, Marquette or Vermont Law School, and to do so more likely than not, in an environment of social isolation. It is far more likely that African Americans at elite law schools like Penn, USC, and Georgetown, comprising a little over 10 percent of the student body would select the job market or alternative graduate education if law schools suddenly ended affirmative action. There is also the assumption that all law schools are the same in terms of attractiveness (locale, community / people, cost, job placement, quality of education and customer service etc.) to black applicants, this is simply not true or reasonable. It assumes that any law school would be acceptable for black applicants - regardless of personal choice and/or desires - here Prof. Sanders forgets that legal education is a business and as such the market forces of this business require customer service driven model not the cultural heritage of academia based on benevolence through the admission process and beyond in the classroom as well. This cultural attitude of privilege and hierarchy by many in legal academia is not an

---

74 Id. at 1.
75 Id. at 2.
attractive feature to black applicants. Black students like their white peers, prefer schools where they will make contacts with peers and alums in the area they intend to practice. So there is no reason to believe an African-American candidate from Houston, Texas (4th largest city in the nation) would attend law school in rural Vermont. While the most competitive schools generate a nationally recognized credential, this is simply not true of lower ranked law schools.

Another perpetuation among law school admissions advisors is the belief that performance on the LSAT exam represents one destiny to be successful as a law student and potential to pass the bar. This is simply not true, based on published reports of Bar Passage Study, which indicate that LSAT and GPA only explain about a tenth of the variation in bar pass/fail status. Many academic’s, including Sanders rely on the unsound assumption that eliminating affirmative action will erase all LSAT and college grade differences between blacks and whites attending the same law schools. Yet a significant black-white LSAT gap will inevitably carry over from the applicant pool to the entering class under “race-neutral” admission practices given the distribution in scores. Bowen and Bok state in The Shape of the River, “The only way to create a class in which black and white students had the same average [test] scores would be to discriminate against black candidates.” 76 This ironically refutes Prof. Sanders claim, because the more seriously one takes his claim about the importance of the LSAT, the more skeptical one must regard his optimistic estimates of the number of African Americans who would become lawyers without affirmative action.

The institutional environment has a critical impact on law students and their relative performance in law school. A article recently published in Law & Social Inquiry (the American Bar Foundation’s faculty-refereed journal) utilizing the same Bar Passage Study as Prof. Sanders, demonstrates that the educational process at American law schools exacerbates the entering

76 Id. at 3.
educational gaps of minority and other atypical law students, including African Americans, Latino students, Asian American students, and those who begin law school at 30 or older.\textsuperscript{77} These students get lower grades than their entry numbers would predict. The negativity of the law school culture alienates and increases the likelihood for failure rather than success. Hostile institutional climates, student’s sense of belonging or isolation, as well as teachers’ expectations have a significant effect on academic performance. Evidence of these experiences have been documented upon complaints by black law students, to faculty and administration concerning, constant over emphasis of poor grades or performance in accessing possible academic programs like joint exchange programs, early graduation, experiential programs - like Judicial Externship and Semester-in-Practice etc. all reemphasize the stereotype that grades reflect success at the bar and therefore competence, not too mention this mentally dramatizes the anguish felt by many blacks of a destiny to fail. In addition hostility from faculty, staff, work-study students, and the administration all cascade into a kaleidoscope of law school dysfunction. These examples are not surprising among many black students, especially those students of color at UCLA, Boalt, Davis, and Hastings who filed a brief in \textit{Grutter} describing the tremendous academic pressures and social stigmatization they encountered after Proposition 209.\textsuperscript{78} Despite, these documented experiences-many academic’s see minority, especially black law school academic failure as acceptable failure ratios of human intellectual capital! This means the greatest challenge to diversity and increased black minority representation at bar and in legal practice remains legal educator’s antidotal paradigm of thinking.

\textsuperscript{77} Id. at 3.  
\textsuperscript{78} Id. at 4.
III. Black Students in White Law Schools

There has been a distorted perception that blacks played no significant role in the evolution of legal education.\textsuperscript{79} This viewpoint fails to consider the impact that the nation's racial policies had on the opportunities for black men and women to pursue a law career. Beginning in the colonial period of American history, legal education for blacks and whites began under apprenticeship of an established lawyer or preceptorship of a judge.\textsuperscript{80} Prior to 1868, there is no evidence that any black lawyer was trained in a university. Racial prejudice was always present in the apprentice and preceptor systems. An apprentice was charged a fee for legal instruction. The period of instruction varied as necessary to prepare for the state examination. This curriculum included the following texts: Coke’s \textit{Institute}, French’s \textit{Law}, and Blackstone’s \textit{Commentaries}.\textsuperscript{81}

In 1850 John Mercer Langston became the first known Black applicant to an American law school as Ballston Spa, New York, operated by J.W. Fowler.\textsuperscript{82} Mr. Langston was invited for a “look-see” but politics had prevented Langston from being admitted. Fowler feared that enrollment of a black student would offend, Senator Calhoun of South Carolina, who had promised he would encourage young men from his state to attend. Clearly, economics was one part of the driving principle behind Mr. Fowler’s request that Langston agree to \textit{pass}, sit apart from the rest of the class; and ask no questions while behaving quietly. Langston refused to accept this condition of admission because it required him to “yield his American birthright.” Langston was also denied admission to another law school, located in Cincinnati, OH, operated by Judge Timothy Walker.

\textsuperscript{79} J. Clay Smith, Jr., \textit{Emancipation}, p. 33.
\textsuperscript{80} \textit{Id.} at 33.
\textsuperscript{81} \textit{Id.} at 33.
\textsuperscript{82} \textit{Id.} at 34.
Langston was the first black lawyer to be trained under apprenticeship in 1853, under a liberal white probate judge, Philemon Bliss, of Ohio.\textsuperscript{83} The usual period of apprenticeship was a minimum of two years or less, if the applicant could demonstrate the mastery of the legal principles to the satisfaction of the local judges. Langston was admitted to the Ohio bar in 1854 after a year’s study under Judge Bliss. Times may have changed but there seems to be many similarities between black students today seek a legal education and those of 1853 during John Mercer Langston century. Law schools are first and foremost businesses – run based on the principles of supply and demand. Students, especially black students provide the demand and financial capital to acquire this educational opportunity. Like Langston, too often black students must overcome persistent rejection – based on racism, which equalizes capability to ones ethnicity and gender. Eager and determined to acquire the right opportunity, once provided, they work extra-diligently to become masters of the law. Langston opportunity to study law prior to the Civil War was unique.

During the Reconstruction and post-reconstruction eras, the education of a few blacks was financed by liberal whites. Mark Twain, also know as “Samuel Clemmons,” paid for Warner T. McGuinn’s board at Yale’s law school in 1887.\textsuperscript{84} The tuition at New England law schools was not cheap, a factor that most likely discouraged many blacks from applying. Today, this factor is still present as law schools, such as Vermont Law School, continue to raise annual tuition to an astronomical level, substantively pricing law schools out of a potential market, just like many law programs are over priced today. During the nineteenth century most law schools taught few or no blacks.

In 1868 Harvard admitted George Lewis Ruffin; he faced hostility from students who sought to exclude him from the student assembly.\textsuperscript{85} Racism at Harvard Law School touched many black law

\begin{footnotes}
\item Id. at 34.
\item Id. at 35.
\item Id. at 36.
\end{footnotes}
students in the city of Cambridge. Often black law students were denied common services, and there was “no social life between the white student body and the blacks.” White students from the south never spoke to black students, even the pleasant and courteous Northern and Western students merely said a quiet ‘hello’ and nothing more. Despite the horrific conditions, blacks excelled academically, such as their election to the law review. Between 1922 and 1943, at least a dozen black students made law review and some were elected to the Order of Coif, the most prestigious academic society for graduating law students. Jasper Alston Atkins, a 1922 graduate of Yale University’s law school was elected to both the Order of Coif and the first black elected to Yale Law Review. Yale was the first law school to have two black students, John Francis Williams and Jasper Alston Atkins, on law review at the same time.

In 1991 Georgetown Law Center came under fire concerning its admissions requirements for blacks and whites. In an article published in “The Georgetown Law Weekly,” headlined “Admissions Apartheid” a white student and former employee in admissions asserted that Georgetown law school used a separate less demanding standard when considering black students for admissions. In the article, Mr. Maguire sharply criticized educators for promoting the concept of “diversity” on campus while not honestly revealing information which explains minority underrepresentation for more convincingly than the vague ‘racism’ incessantly decried. This article prompted, Dean Areen, to release a statement, calling the article a “misleading mix of opinion and data” that has caused “considerable pain and anger to this community.” Controversies, like this reveal the negative and often hostile landscape

86 Id. at 36.
87 Id. at 36.
88 Id. at 39.
89 Id. at 39.
91 Id. at 1.
of blacks attending “white” law schools. This purview that some special “affirmative action” process has permitted the academically inferior “black-race” to gain admittance to a particular law school, especially one with national prominence, like Georgetown Law Center fosters the fallacy of racial intellectual superiority.

As affirmative action becomes ever more an increasing hot-topic, more and more black students become the object of hostility due to a seemingly unfair law school admissions process - as though no historical social or legal basis can substantiate the need for diversity.

IV. Black Students in Black Law Schools

Nine years after the founding of Howard University School of Law, the nation’s first black law school, the American Bar Association was formed. The ABA established the Committee on Legal Education and Admission to the Bar in 1878, with the purpose of reforming legal education in the United States. The ABA’s first report declared that “education is the parent of public and private virtue, even though educational institutions, particularly those in the South, excluded blacks. In 1900 Association of American Law Schools (AALS) was founded, as an auxiliary organization of the ABA. Until 1925, no black lawyers were hired as professors by white law schools because of the exclusion of blacks from the ABA and AALS.

By 1920, there were a significant number of “freestanding” law schools opened. At this time there were, twenty-one day-and-night schools with 5,164 students and forty-three night schools with 5,570 students. Black and white night laws schools began to increase as more blacks and ethnic minorities showed a greater interest in law in urban areas. This is significant because even today – the demand among the poorest urban areas for law schools is extremely high, so access to this education,

---

92 J. Clay Smith, Jr., Emancipation, p. 41.
93 Id. at 42.
94 Id. at 41.
particularly in an evening / night program would greatly enhance the professions accessibility. Several key factors – made the freestanding institutions desirable: (1) low tuition cost, (2) evening hours of flexible - study and (3) availability of academic institution – making them extremely accessible and convenient. Many black lawyers attending freestanding night law schools became as successful as their counterparts educated in law schools associated with universities.

Charles Hamilton Houston, in his capacity as Dean of Howard Law School, sought the accreditation from American Bar Association and Association of American Law Schools. To meet both the ABA and AALS requirements, Dean Hamilton closed the evening program and discontinued the special and unclassified admissions categories. This meant the end of the Howard part-time evening program. Howard University School of Law became the 69th school admitted to the Association of American Law Schools.95 Once accreditation was no longer an issue, Dean Houston wanted an emphasis placed on the methodology hidden in jurisprudence so that Howard University law graduates could render service to “the race as an interpreter” of the law and thereby help gain their full citizenship by whatever means necessary. He sought more concentration on the subjects having direct application to the economics, political and social problems of the Negro.96 Despite his short tenure at Howard University Law School, Dean Houston transformed Howard from part-time to a full-time law school. This raises two questions: (1) Did this truly serve blacks based on their needs of access to a legal education? And, who really benefited from the accreditation process, over the long term?

The experiences of black Americans in white law schools remain a very difficult and challenging process more often than not. Black law students faced racism and still fight against it, often with the support of key faculty members and deans. In some cases, white professors have tested the racism of the white legal establishment by recommending black students to major law firms, most who were

95 Id. at 49.
96 Id. at 50.
rejected because of their race. In general, Black law students broke new ground in white law schools and excelled academically, as shown by their admittance to the Order of Coif honor society and various prestigious law reviews.

Black law schools, such as Howard University Law School became the primary and largest source of black law graduates in the nation between 1871 and 1944.\textsuperscript{97} Howard law school as an educational institution was a pioneer, becoming the first law school to open its doors to an integrated faculty, to admit women of all races, and to graduate a black woman, and it was one of the first law schools to confer a master of laws degree on a white a woman graduate.\textsuperscript{98} This single institution has produced some of the brightest legal scholars in the history of jurisprudence.

V. \textit{21st Century Racism & Discrimination}

A. Culture of Legal Academia

Unlike other professional disciplines such as medicine, business and accounting there seems to be an apparent disconnect between what the marketplace desires from an educated professional law school graduate and the foundation desired by academia. Culturally, these two paradigms could not be further apart. Today, professional communication globally is simply expected within the normal course of business yet communication is almost de-emphasized in many law school environments. Many within academia are simply poor communicators, especially verbally. While writing and research are the hallmarks of legal scholarship, they cannot and do not super cede the necessity of good verbal communication. This can be especially important when teaching a complex legal doctrine or explaining the rationale behind an appellate courts decision. Some would argue that law schools have kept pace with technology and its varied uses both academically and within the professional world.

\textsuperscript{97} \textit{Id.} at 54.
\textsuperscript{98} \textit{Id.} at 54.
Rapid communication requires efficient use of email, web-blogs, online networks, and chat sites for collaboration and efficiency.

In many cases students are discourage from using the devices simply because the law school administration is either unfamiliar with them, unable to police their use, and unwilling to look beyond “the business as usual approach” which retards growth, innovation, and creativity within the incubator of law school. This retardation impairs the student, faculty and law school community as a whole. Students whose undergraduate institutions have more advanced and innovative teaching mechanism are perplexed and frustrated with this seemingly backward approach to education. This is especially true when one factors in the cost of a law degree and the demands post graduation of the marketplace. In many cases students are poorly equipped for entry level positions.

Law schools pride themselves of on their historical achievements within academia and the legacy of their graduates yet very little is done to internally self critique the institutions current policies and procedures for diversity, quality of education and the overall student experience on campus. This is not withstanding the caste like role law students must give way too in relation to the administration, faculty and general academic community. It’s somewhat like a medieval feudal system where the Dean of the law school is master and lord, with everyone else his or her subjects.99 In this manner law students are “castrated” to lowly peasant status - whose mere existence is based on the tolerance of the Dean and administration. Clearly, the traditional roles of business based on excellence in customer service as a driver of quality are nonexistent. Also, the business model of professional quality assurance is not employed - because quality is not driven based on the customer demands but rather proficiency is administratively determined by the accrediting agency whose connection to the student is distant if even present. The austere environment of aristocracy exacerbates already apparent class,

99 Id. at 54.
socioeconomic and racial differences - making those in the minority even more alienated than their counterparts. This alienation breeds emotional dysfunction and poor academic performance, while it severely reduces the potential for substantive educational collaboration and debate among students and faculty, therefore, truly impairing exploration of the benefits of diversity. Customer service is the primary vehicle for successful academic performance and matriculation through law school. Black law students suffer disproportionately from extremely poor and debilitating customer service because of the constant pressures of institutional racism which intensifies their isolation and alienation on both black and white law school campuses.

**B. Customer Service and Quality**

Customer service is a transactional experience of communication designed to enhance the level of customer satisfaction, which is a feeling that a product or service has met the customer’s expectation. Customer service is an integral part of any servicing organization (company, college or university etc.) customer value proposition based upon quality.\(^\text{100}\) In recent years the quality and level of customer service has decreased in all business sectors especially higher education. Often this is attributed to a lack of support or understanding at the executive and middle management levels of a corporation, academic institutions and business organizations. Law schools suffer from both poor quality assurance mechanisms and therefore extremely poor customer service. This impairs academic performance and learning while creating an undue burden upon the individual law student.

Several reasons are attributed to this legal academic problem of poor customer service, but the most apparent include a lack of feedback at the point of experience. Feedback loops are vital, law schools as businesses must adopt and better utilize these feedback loops to improve quality and

minimize defects. William Edwards Deming Ph.D.,\textsuperscript{101} an American pioneer in Total Quality Management (TQM), developed the “transformation” theory for management which employs feedback loops as a crucial component to TQM.\textsuperscript{102}

Transformation is discontinuous, requiring a view from outside inwardly - it comes from the understanding of profound knowledge where the individual will perceive new meaning to his life, to events, to numbers, and to interactions between people. Deming advocated four parts to the System of Profound Knowledge;\textsuperscript{103} they are applicable in the law school context as:

1. Appreciation of a system - which means understanding the overall process involving faculty, adjunct scholars, student-customers, staff and administrators based on the educational services provided and needed;

2. Knowledge of variation - refers to the dissection and understanding of the range and causes of variation in legal educational quality, particularly customer service within campus daily life and the use of statistical sampling (\textit{Six Sigma}) among a variety of students in measuring this variation;

3. Theory of knowledge - meaning the concepts explaining knowledge and the limits of what can be known, this means determining, what data or information concerning student academic life is knowledge? How is this information collected or gathered? And what do people within academia and outside actually know? In essence the usefulness of the knowledge gained is as important as the information itself.

4. Knowledge of psychology - meaning the concept of human nature.

Quality in customer service involves recognizing the differences in variations of experience in order to eliminate the “special causes” that create defects. Understanding variation includes the mathematical certainty that variation will normally occur within six standard deviations (\textit{Six Sigma}) of the mean.\textsuperscript{104} A Six Sigma defect is defined as anything outside of customer specifications. “\textit{Six Sigma}”

\textsuperscript{104} Wikipedia, \url{http://en.wikipedia.org/wiki/Six_Sigma} (last visited May 21, 2008).
is a discipline that strives for perfection.\textsuperscript{105} Deming’s famous fourteen Points of Management are crucial elements in exploring academic management’s effectiveness toward perfection in customer service, products, and services offered to customer.\textsuperscript{106} Law students are the customers (primary constituents) of law schools, academics, administrators, regulators such as the U.S. Department of Education and accrediting boards such as the American Bar Association (ABA) and American Association of Law Schools (AALS). As such quality in legal education must be measured based on a data driven methodology for eliminating defects (disparities), known also as disparities with the law school educational process. The first step along this path of quality service, particularly customer service is defining variation for overall process improvement. The best way to define such disparity is to examine this variation through the “eyes” of the black law student.

An anonymous letter, written by a “\textit{Young Black Man}” to a law school Board of Trustees complains of poor customer service.\textsuperscript{107} More recent events have yielded additional letters to the Board of Trustees, which like the Board of Directors in a corporation has a fiduciary obligation to the law school itself, as well as the shareholder students whose tuition buys a legacy of participation and interest in the longevity and financial success of the institution. Speaking up (feedback) is the only way to improve poor service and facilitate changed, it’s the primary element to defining variation and disparity. Cressie Thigpen, Chairman of North Carolina Central University, speaking to the Board of Trustees, said: “\textit{Every time we get a letter like that we have lost a potential contributor to the university};” and Board Secretary George Miller said some employees need reminding that, “\textit{We are here to provide a service and an education, NOT TO KEEP SOMEONE IN THEIR PLACE}.”\textsuperscript{108}

Ironically, N.C. Central University Law School is predominantly African-American, an HBCU. This

\textsuperscript{105} Id. at 1.
\textsuperscript{107} Gregory Phillips, \textit{HBCU to focus on customer service}, The Hearld-Sun, Nov. 5, 2006, at1.
\textsuperscript{108} Id. at 1.
emphasizes the inherent widespread disparity within all of academia, particularly within law schools.\textsuperscript{109}

The letter reads, “While I have attended law school, there has not been a year where the main campus staff and employees have been anything more than rude, disrespectful, and completely unhelpful.” “….administratively, one of the worst institutions a person could attend.” The letter focuses on three crucial areas of a law student’s daily academic life: (1) Financial Aid, (2) Parking and (3) Cafeteria and other services.\textsuperscript{110} The student claims the financial aid department is an unorganized group; it’s typical to wait for hours on the phone in an attempt to talk with someone. Employees are known to chastise and rush people off the phone before disseminating any useful information. Workers treat law students like children; the interaction is not one of courtesy or respect, the letter states that students are not valued.\textsuperscript{111} Poor to non-existent communication continues to be an issue, like a banking institution, the financial aid office must service students in a professional manner, understanding that without the students there would be no institution and therefore no need for a financial aid department.\textsuperscript{112} Like a lending institution, the financial aid department handles the monetary resources of individual’s primary and sometimes only source of income - this can become an exhaustive and debilitating process when money is either withheld, eliminated, or delayed temporarily at the student’s expense. It becomes a liability academically, and an additional unnecessary stressor for black law students.

At this HBCU parking is limited, especially on weekends, leaving no where to park to do school work. Sporting events become the priority over academics and eliminate the limited parking. The letter states, “When students feel that it is too much of a hassle to study at their own institution, do

\textsuperscript{109} Id. at 1.
\textsuperscript{110} Id. at 1.
\textsuperscript{111} Id. at 1.
\textsuperscript{112} Id. at 1.
you think they will become an alumni dedicated to giving contributions to improve the university? I hope not, because most students I talk to feel it was a mistake to come here, mainly because of the issues dealing with administration."  

The letter concludes that overall the staff at the law school is disrespectful and rude. Many law students feel that being on campus leads to hassle. It’s is unsafe to be on campus, and there is the potential for confrontation-leading to expulsion and removal. “Is that the embarrassing reputation you want for this university?” The letter is signed -Young Black Man, Class of 2007.

Chairman Thigpen said changing the customer service culture at an HBCU has to come from the top. A complaints office, while necessary, amounts to a Band-Aid approach when what’s required is a change in the way law schools hire, train and promote employees. Thigpen say’s, “We’re not going to tolerate people treating other people badly.” His listed recommendations included - customer service training for all employees, especially for new employees and work-study students whose daily interaction with peers can cloud professionalism and objectivity. A mandatory annual seminar for all workers and continuous monitoring (evaluation) of law school departments with a rewards program for Excellent Customer Service was initiated. The Board of Trustees must be invested in the longevity and financial success of the academic institution mission and goal to provide excellence in legal education; therefore, Thigpen also recommended that the Trustees make a minimum contribution to the University’s capital fundraising campaign. Like the Ivy, money donated can be directly reinvested into capital infrastructure for all within the law school community to benefit for generations to come.

---

113 Id. at 1.  
114 Id. at 1.  
115 Id. at 1.  
116 Id. at 1.  
117 Id. at 2.  
118 Id. at 1.  
119 Id. at 2.
As tuition increases annually, many schools like Vermont Law School keeps raising it by a minimum of $2,000 per academic year, to currently $38,908.00 for entering students.\textsuperscript{120} Yet, customer service continues to decline, facilities are in disrepair and even state inspections of elevators remain unlawfully expired.\textsuperscript{121} Here the institution resents feedback and discourages students from acknowledgment of these disparities impacting black and non-black students alike. Clearly, Deming, a graduate of Yale University would be highly perplexed and disappointed at such a disgrace among New England’s finest legal institutions of higher learning.

C. Racism On Campus

The Supreme Court’s race jurisprudence, as seen in \textit{Grutter}, should not be based on colorblind constitutionalism and rhetorical neutrality. The Court’s neutral approach privileges white interests through a shift in Fourteenth Amendment analysis away from the anti-	extit{caste} principle into the anti-differentiation principle. In \textit{Brown},\textsuperscript{122} the Supreme Court avoided making education a constitutional fundamental right. (Constitutionalizing)\textsuperscript{123} While \textit{Brown} removed the remnants of Jim Crow-based on the doctrine of “separate, but equal,” it did not substantively define the right of equal access as it pertains to education. Justice Marshall stated:

“It is unnecessary in 20\textsuperscript{Th} Century America to have individual Negroes demonstrate that they have been victims of racial discrimination; the racism is our society has been so pervasive that none, regardless of wealth or position, has managed to escape its impact. The experience of the Negro has been different in kind, not just in degree, from that of other ethnic groups. It is not merely the history of slavery alone but also that a whole people were marked as inferior by the law. And that mark endured. The dream of America as the great melting pot has not been realized for the Negro; because of his

\textsuperscript{120} Vermont Law School, \url{http://www.vermontlaw.edu/admissions/index.cfm?doc_id=57} (last visited on May 21, 2008).
\textsuperscript{121} Interview with David Mears, 2L, Vermont Law School. (May 21, 2008).
\textsuperscript{122} \textit{Brown}, 347 U.S. 483 (1954).
\textsuperscript{123} Cedric M. Powell, \textit{Rhetorical Neutrality: Colorblindness, Frederick Douglass, and Inverted Critical Race Theory}, \url{http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=cedric_powell} (last visited May 21, 2008).
skin color he never even made it into the pot.” (Justice Thurgood Marshall).124

The historical racial exclusion and subordination experienced by many black Americans remains a component of legal education today. This is contrasted by the seemingly preferential admission of African-American women over African-American men into graduate and professional schools while 62 percent of today’s top black lawyers attended the most elite U.S. law schools. So how does one define and recognize racism? What are its modern characteristics, and how does this impact legal education?

The best answer to the questions lies in testimonials from people who are in the trenches of legal education-faculty and students. At the University of Florida, Levin College of Law, a letter by Professor Jonathan Cohen detailed some of these experiences during his seven year tenure as he encountered campus racism. In the letter addressed to law students - Professor Cohen writes that some of his colleagues say things such as: “I don’t mean this to sound like a racist question but do you think Blacks don’t hear as well as whites?” as an African-American driver had stopped his car alongside theirs at a traffic light with the volume of music “blasting” loudly. These acts extend to bigotry imposed by one student upon another such as student Judges in Moot court competition. Here even the witnessing of the word “Nigger” written as part of a hostile comment on a classroom wall. This hostility is too often the normality of everyday life for some black students - as law schools become incubators of racism seemingly covered up and unmasked under the guise of “free speech.” Yet, there remains no Constitutional protection for verbal insult and defamation.

Experiences at Vermont Law School such as racist and inflammatory campus-wide emails, a student’s email being ignored by faculty when inquiring about a course, forcibly being removed from financial aid when simply inquiring about fee’s or a increase charge in tuition and being yelled  

124 Id. at 69.
verbally assaulted) at by academic support advisors when seeking resources such as bar text’s or supplemental books are just a few examples of racist hostility employed to either remove a black law student through intimidation and fear or intensify the negative environment imposed upon the student to facilitate academic failure or even a possible emotional melt down. In this regard the Civil Rights movement has unfinished business when it comes to reforming historical racist misconceptions of inferiority based on these critical hostile acts of stereotype and discrimination. In essence creating two simultaneous environments, (1) one which facilitates and encourages racism through ambivalence of law school faculty and administration and (2) another which imposes hostility toward a select group based on their ethnicity and racial heritage. Collectively these individual acts of racism form the greatest barrier to increased diversity, resulting in widespread institutional racism.

Professor Jonathan Cohen’s letter goes onto explain the racial disparity among the faculty and administration - predominantly white males. “To my knowledge the University of Florida has never had a president who was not a white man. Is it surprising that students of color often feel less comfortable than white students?” This also describes the legacy of academic racism by former University of Florida president Stephen C. O’Connell who was a leading segregationist. As one of the Florida Supreme Court justices who blocked the United States Supreme Court’s order to admit Virgil Hawkins to the Levin School of Law. Hawkins v. Board of Control, 93 So.2d 354 (1957). Afterwards O’Connell as president of the University of Florida ordered the arrest and suspension of roughly sixty African-American students who were protesting to improve recruitment and status of blacks at the university. Despite this negative and hostile racist history, the library reading room

---

125 Interview with David Mears, 2L, Vermont Law School. (May 21, 2008).
127 Id. at 1.
honors O’Connell with a kiosk, which presents the “good” while omitting the “bad” including the story behind Virgil Hawkins. 128 The reading room that bears O’Connell name is an insult and “slap” in the face to everyone who worked tirelessly to help fully integrate the University of Florida, Levin School of Law. As with the many occurrences of racism on law school campuses, ignoring these difficult subjects does not make them go away, no matter how hard the law school administration and faculty attempt to do so. Often racist incidents are largely hushed over or “whitewashed” rather than being actively and openly repudiated. 129 In any case, the professional irony is that lawyers as advocates and social engineers must perform exactly this task of problem solving, a lawyer must tackle difficult issues head-on until resolved or an agreement can be reached. As any good leader should, a legal advocate has the responsibility to look presently and forwardly into the future for a solution with permanency for all concerned. Unfortunately, many administrators, faculty and others in legal academia either are poorly equipped for this leadership role or they choose alternative paths of self-interests. 130

Many potential black and minority candidates find that law schools are unwelcoming regressive environments yet many students seek law school for what they perceive or assume is a progressive positive experience only to be disappointed and left feeling somewhat “con or cheated” for their tuition dollar. 131 Minority students see this “con game” as even more exploitable upon those unaware of the business tactics of law school marketing to gain tuition dollars while maintaining accreditation and rank. 132 Various recruitment and advertisement efforts (e.g., featuring a person of color on a law school brochure’s cover) draw these unsuspecting individuals to apply, and if admitted attend despite the

---

128 Id. at 1.
129 Id. at 1.
130 Interview with David Mears, 2L, Vermont Law School. (May 21, 2008).
131 Id. at 1.
132 Id. at 1.
industry known limitations of diversity, racial hostility and unsupportive administrative and academic leadership, resulting in a high drop out rate, poor to failing grades, and an inability to pass the bar. All while reinforcing negative stereotypes in both the African-American community, that law school is truly not a good academic career choice, and among those educated whites, that blacks are intellectually inferior and not astute enough to handle the rigors of law school or a legal career. Both are intolerable fallacies based on FUD: fear, uncertainty, and doubt which are exacerbated by a lack of sound leadership and these various racial educational disparities. The lack of a work life balance intensifies racial disparities because often black students and other minorities, especially U.S. immigrants feel compelled to work harder than their white counterparts so that they will be perceived as competent legal scholars and worthy of the opportunity to enter the legal profession.  

D. Work Life Balance

The culture of the legal profession suffers broadly from many serious problems. Lawyers and law students are much more likely than the general population to experience emotional distress, depression, anxiety, addictions, and other related mental, physical, and social problems. Lawyers as a group tend to be stressed and unpleasant people.

Many clinical therapists and commentators have called upon law schools to address this problem. Much of the discomfort associated within the law school environment is a by product of assumptions and attitudes commonly shared within the law school communities. As law students prepare for their careers, they must be equally encouraged to balance their drive for honors and recognition, either with respect for personal well-being or with trust that life will actually be fine for

---

134 Lawrence S. Krieger, What we are not telling Law Students-and Lawyers that they really need to Know, 13 Journal Law and Health 1 (1998-99) at 2.  
135 Id. at 3.
many who don’t place at “the top.” It has been often said that the law is a “selfish mistress” alluding to the overwhelming dedication and perseverance required to accomplish legal endeavors. However, this must be balanced with good mental and physical health and comfort while resisting temptations of excess which can lead to dysfunction such as the -isms: workaholism, alcoholism, and perfectionism.  

Many law students continue to walk and push their way, into abusive work environments, and stay there long enough to feel trapped by the life style. Legal educators must do more culturally and academically within the law school environment toward keeping a work-life balanced of personal health, happiness and priorities. Otherwise the tendency in law school is to forfeit these things - and once they’re gone, this could become lifetime mistake.

Many law students sense that, to deal effectively with legal issues, they are expected to silence their personal ethics in favor of analysis and “objectivity.” Analytical skills and substantive knowledge are, important, but they should not be used to replace the remainder of one’s personal qualities. “Only a whole person can be a whole lawyer.” Students need to hear this sentiment often and regularly from professors as a replacement to the ego driven emphasis on GPA and class rank. Law students really need to know that they can not have good lives as lawyers if they do not act according to their conscience, deep personal values, and ideas. These values are derived from a sense of self independence and reliance, law school trains folks to think according to a systematic methodology, a formal approach to all problem-solving, which can result in a habitual condition that crosses over from law school into personal life - simply because under stressful conditions it’s familiar.

136 Id. at 3, 6.
137 Id. at 10.
138 Id. at 3, 6.
139 Id. at 7.
140 Id. at 7.
Law students really need to know that they do not have to be at the top of the class, or on law review, to become successful, satisfied lawyers. The desire to be at the top of the class is seen as a need instead of as a want, and then clearly those students who emphasize this sentiment will see themselves as failures.\textsuperscript{141} A law-of-the-jungle mentality is often encouraged among legal academia which fosters this prevailing “need” misconception, creating a need to defeat, rather than a need to support, classmates, and peers.\textsuperscript{142} Many students resent these institutional requirements that they compete against each other for limited recognition and opportunities. The problem is not the competition; but rather the individual’s disposition to experience distress around competition.

Law students really need to know that, as attorneys, their personal attributes are more important than their best skills or performances.\textsuperscript{143} Law school emphasizes to students that it is how you do, rather than who you are, that really matters—many black students find this both depressing and debilitating.\textsuperscript{144} This encourages a fear of mistakes, anxiety over grades (etc.) and singular devotion to competition. The result can be hectic, even frantic lifestyles. Students who bring this approach with them to the practice of law are obvious candidates for high stress, low self esteem, and burnout. Law students, lawyers, legal academics and teachers need to realize that good, valuable people make mistakes as a normal part of human life, and that mistakes reflect (transitory) imperfections in what one is doing, rather than (fundamental) flaws in what one intrinsically is.\textsuperscript{145}

Many law students exhibit extreme concern over how they may appear to or compare with others (including how their performance reflects on them). The psychological scales reported in the Beck/Sales study reveal the highest incidence of dysfunction in the area of interpersonal sensitivity - a

\textsuperscript{141} Id. at 10.  
\textsuperscript{142} Id. at 10.  
\textsuperscript{143} Id. at 15, 16.  
\textsuperscript{144} Id. at 11, 13.  
\textsuperscript{145} Id. at 12.
measure of insecurity specifically focused on the need to compare one’s self with others.\textsuperscript{146} In this study, one manifestation was the self-inflating posturing (super ego), among law students and attorneys. This egotism results from the sense that one needs to be better than others which is clinically unhealthy in comparison to genuine self-esteem, which involves no comparison with or reference to others. Law faculty must articulate consistently the importance of character over competition in the quest for professionalism.

Gen. George S. Patton said, “\textit{America loves a winner and will settle for nothing else,}” which taken in context means we as a society celebrate the victor, but second and third best has become meaningless. The \textit{desire} to prevail is natural; but the \textit{need} to prevail is destructive. Like students overstressing themselves to make top grades or put on flawless performances, those lawyers who based their esteem and satisfaction on positive case outcomes are likely to become compulsive as they struggle to avoid reality. Law students and lawyers (faculty and administration) must find a stable basis for sense of professional satisfaction and personal value in their strong preparation, clear presentation, respectful actions and worthy motives rather than in (unpredictable) outcomes. This approach to professional life needs to be encouraged among the entire legal community often, so the need to prevail does not become confused with professionalism.

Psychological studies suggest that emotional maturity, personal satisfaction and the expression of the qualities of professionalism tend encourage positive interactions and encourage individuals.\textsuperscript{147} Law students, faculty and administration need to know that a respectful, caring attitude and consistent enjoyment of life are signs of a mature, healthy person. Maturity cannot be defined chronologically, however, the obstacles and challenges of life - are excellent preparation for the acquisition of wisdom - with which mature coping mechanisms are established. Inherently, as each law school entering 1L

\begin{flushleft}
\textsuperscript{146} \textit{Id.} at 3.
\end{flushleft}
\begin{flushleft}
\textsuperscript{147} \textit{Id.} at 20.
\end{flushleft}
class becomes more youthful, the faculty, administration and staff must set the example of good work life balance and professional courtesy and respect for others.

VI. No Longer Separate But Very Unequal

A. Fewer Black Enter Law School

The increasing enrollment among our nation’s law schools is a reflection of a growing demand based on various socioeconomic factors such as the need for job stability and professional skill development, global competition for skilled and professional labor, and a shrinking dollar resulting in less money for longer hours and harder work. As general enrollment has increased, thus more people are applying and gaining admission into law school, yet black enrollment has declined.148 This is truly alarming because the American Bar Association (ABA), Law School Admission Council (LSAC) and others have invested time, money and resources toward increasing minority enrollment. During the period of 1995 - 2005 the enrollment among white law students gained by 6 percent, the number of black law students decreased by about 2 percent according to the ABA.149 The number of black students applying to law school during the 2006 - 2007 admissions season has dropped 8 percent after a 6 percent decline the previous year.150 “It’s harder now for Blacks to get into the profession,” says Leonard Baynes, a professor at St. John’s University School of Law in New York.151 In response to this dramatic decline, the American Bar Association’s legal education committee, which accredits law schools, voted to monitor law school admissions of minorities more closely.

149 Id. at 1.
150 Id. at 1.
151 Id. at 1.
The 2003 decision, by the Supreme Court in *Grutter v. Bollinger*\(^{152}\), endorsed affirmative action in law school admissions through diversity initiatives.\(^{153}\) One explanation for this decline in black law school enrollment is based on a magazine: U.S. News & World Report©. This publication’s annual law school rankings are based in part on a law schools’ median LSAT scores. As law schools attempt to improve their rankings, they are admitting fewer black students because blacks score, on average, significantly lower than whites on the LSAT, according to the St. John’s study.\(^{154}\)

Some legal academics say they believe that the racial disparity in LSAT scores occurs because blacks and other minorities are less willing or capable to take pricey LSAT preparatory courses or, perhaps, to realize the test’s importance for getting admitted to law school. There is very little to no evidence to support this perspective, actually upon speaking with many black law school applicants the rejection rate is either extremely high or about even among those who’ve taken these pricey LSAT review courses in comparison to those students who simply could not afford such review courses. It seems that only a small percentage of black students would benefit from such commercial review courses, still leaving the problem of black disparity in law school admissions unresolved. John Nussbaumer, author of the St. John’s study says, “*The emphasis on test scores is about old-fashion race discrimination.*”\(^{155}\)

Once the apparent disparity among blacks has been documented and quantified, various business interests within legal education find ways to justify their particular policy and role. U.S. News and World Report© - seeks to increase publication sales, and drive revenues from advertisers. These constituents all financially feed off the rankings process from the educational lenders, academic

---


\(^{154}\) *Id.* at 1.

\(^{155}\) *Id.* at 1.
institutions including graduate and professional schools, as well commercial companies involved in the industry etc., each plays a role in supporting racial stereotypes through market driven forces of economics. Robert Morse says, “*U.S. News did not make the LSAT a requirement for admission to law schools,*” while the Law School Admissions Council which administers the LSAT, claims it takes extraordinary steps to make sure there is no racial insensitivity in the content of the exam according to Phillip Shelton, president of LSAC.\(^{156}\) However, this does resolve whether a standardized exam can be racial sensitive but have metrics academically which do not adequately measure cognitive, analytical and verbal abilities.

Diversity seems to be a moving target, depending upon the definition utilized. The legal interpretation is confusing because it implies race consciousness yet attempts to minimize race as the only quantifiable factor for diversity under the guise of affirmative action. The definition itself is illusive depending upon the audience - whether academic, legal, administrative or political. Since there has been no clear consensus among these experts - their attempt to administer policies which would either increase diversity or facilitate a diverse environment seem, “like putting the cart before horse.” This inherent confusions allows for alienation, misperception and even discrimination among a variety of special interests groups who all seek a fair opportunity to legal education. The American Bar Association’s legal-education committee didn’t address schools’ reliance on the LSAT when it voted to strengthen its long-standing requirement that law schools show a “commitment” to diversity.\(^ {157}\) The ABA had previously measured a school’s commitment by its efforts to recruit a diverse student body. Now, based on new rules, the ABA also will measure schools’ diversity commitment by the law schools success in admitting minority students. This diversity standard has been applauded by many lawyers and judges, who hope that the new rules will encourage schools to enroll more minorities.

\(^{156}\) *Id.* at 1.  
\(^{157}\) *Id.* at 1.
More companies in our global marketplace today insist on being represented by a diverse group of lawyers so racial diversity has become an economic necessity and business driver especially for legal employers such as multinational law firms. The continuation of affirmative action is an economic necessity because it benefits a broad range of people and communities that continue to face discrimination while ensuring diversity.

1. Affirmative Action

Affirmative action removes barriers that unfairly exclude women and people of color. This promotes equal opportunity for its beneficiaries. Critics say that affirmative action should be eliminated because it gives those beneficiaries an unfair head start in an otherwise fair race. A more appropriate analogy would be to consider the lanes of opportunity obstructed and their path blocked by racial and gender discrimination, poverty, social isolation and hostility. This reality explains performance differences in law school, which are a product of various complex factors. In the May 2005 issue of the *Stanford Law Review*, a comparison was made of African-American law students who attended various tiers of schools but whose LSAT scores and college grades were identical, it revealed that in 11 of 13 studied, attending law schools in the higher-ranked tier was associated with higher African-American graduation rates. Also, eight of the thirteen comparisons, attending higher ranked law schools were associated with higher African-American bar passage rates. Clearly, racially defined academic performance in law school is connected to ranking and the law school environment makes all the difference when measuring outcomes.

The substantive issue becomes whether race conscious policies by definition are unconstitutional. The concept of “colorblindness” derived in Justice Harlan’s dissent in, *Plessy v.*

---

Ferguson\textsuperscript{159}, suggests that affirmative action and other race conscious policies are unconstitutional. Here, race is seen as an irrelevant characteristic and discrimination as a thing of the past. This perspective turns the meaning of the Fourteenth Amendment inside out, and calls for the elimination of race conscious programs such as affirmative action. Yet, the history of the Fourteenth Amendment supports the use of state sponsored race conscious initiatives, which served as a foundation for the historic \textit{Brown v. Board of Education}\textsuperscript{160} decision.

One’s race and ethnicity matters, the notion of colorblindness implies that “race” is no more significant than eye color in modern day America. Many supporters of race neutrality and/or colorblindness - insist that to treat people equally they must be all treated the same. The rationale of this belief is based on the misconception that America has transcended the racism of its past and that now we (everyone who is a U.S. citizen) are all similarly situated across racial lines. This perspective obscures the divisiveness intrinsically intertwined within our American identity and heritage. As we attempt to emerge from the cloud racial inequality, the notion of colorblindness cleverly “coins” the language of the Civil Right Movement, yet empties it of its original meaning, and promotes a social vision that masks the experience of racial subordination.

Despite Justice O’Connor words in \textit{Grutter}\textsuperscript{161}, colorblindness is not an aspiration of the Constitution; it was never a foundational principle of the Constitution. This concept remains an ideological perspective developed by the judiciary which masks the social reality of the many forms of racial inequality that are embedded within the structures of our society. The U.S. Constitution aspires to racial equity, not colorblindness. Therefore, affirmative action is consistent with our democratic principles and values because it is designed to facilitate the creation of a more equitable society. Colorblindness serves as a

\textsuperscript{159} Plessy v. Ferguson, 163 U.S. 537, 11 (1896) (Harlan, J., dissenting).
\textsuperscript{160} Brown, 347 U.S. 483 (1954).
Constitutional shield for white privilege while embracing the language of racial justice. Unpacking colorblindness and revealing it to be mere fantasy is a key step in promoting educational equality in the United States. Many academics and educators etc., assume that standardized tests such as the LSAT are fair and balanced indicators of one’s academic ability and therefore, colorblind but the reality is that standardized exams are neither colorblind nor are they objective.

2. **LSAT FUD: Fear, Uncertainty, and Doubt**

   Prof. Richard Sander’s mismatch theory argues that law school entering credentials – Law School Admissions Test (LSAT) scores and college grades are powerful determinants of bar passage. Sanders believes that LSAT and GPA explain “well over 35 percent” of the variation in the bar performance. This claim however, is not based on the Law School Admission Council’s Bar Passage Study, of 27,000 students in 163 law schools; rather he relies on data from the California bar exam. This study is unreliable because California has the most difficult bar exam in the country, and California also allows graduates of unaccredited law schools to sit for the exam. The published reports of the Bar Passage Study indicate that LSAT and GPA only explain about one tenth of the variation in bar pass/fail status. The assertion that there is a strong correlation between entry credentials and bar passage rates is erroneous and not supported by the data.

   The Society of American Law Teachers (SALT) published a report in 2003, which stated that the popularization of using the LSAT as a predictor of success throughout law school and on the bar exam is based on neither contemplated nor advocated information from the test-makers themselves. This means that the test was neither designed nor developed for any predictive value of success in

---

163 *Id.* at 104.  
either arena, yet disturbingly there is an over-reliance on the LSAT which serves as a significant barrier to achieving excellence and diversity in our law schools and in the legal profession.

SALT has urged law schools, the Law School Admission Council (LSAC), the Association of American Law Schools (AALS), and the American Bar Association (ABA), among others to abandon the improper use of this test. The LSAT is a standardized, three-hour, multiple choice exam which is intended to measure aptitude, not achievement—a much more contested intention itself. Its developers merely sought to design a test that accurately measures limited skills, not a competence. The test score is claimed to predict whether an applicant will successfully complete the first year of law school, yet one study finds that the test explains only 16% of the variance in grades among students enrolled as ABA accredited law schools (while the LSAT combined with the undergraduate GPA explains 25% of the variance). This problem becomes even more pronounced when the correlation between first year grades and LSAT varies from school to school. Race and gender also continue to be negatively correlated with these test scores.

Despite these known problems with the LSAT, many deans, faculties, and law school admission officers continue to treat the test as a nearly definitive measure of aptitude and merit. This occurs in spite of the claims of personalized, holistic review processes for admission. Studies show that 70-80 percent of all admissions are determined strictly on the numbers. Clearly, the improper use and implementation of the LSAT in law school admissions has greatly assisted in the dramatic decline of minority (specifically Black American) enrollment in law school. Law schools and even some prospective employers tend to over rely on the LSAT. In doing so, they fail to give consideration to other attributes and skills that are important, such as motivation, perseverance, character, 

---

165 Id. at 2.
166 Id. at 2.
167 Id. at 2.
interpersonal skills, problem-solving skills, oral communication, empathy for clients, and commitment
to public service. In their neglect of these important attributes, law schools continuously do a
disservice to the legal profession and its clients, thereby limiting the legal profession’s ability to
provide meaningful access to legal services to all segments of society. The “fairness” of the LSAT is a
contested debated issue. LSAC has maintained that the test is fair to all test takers regardless of racial,
ethnic, gender, regional, or national background;” however, test results vary significantly along race,
gender, and class lines. There are many theories but no definitive explanations for these differences in
performance, an examination of the history of standardized tests may provide some valuable insights.

Since their origination, standardized tests were used to “prove” the superiority of Northern
European whites, the inferiority of African Americans, Jews, and Southern European immigrants and
as evidence of the need to impose restrictions on immigration.168 Carl Bingham, who devised the first
standardized test for use in college entrance exams and who subsequently headed the Educational
Testing Service (ETS), had once been a major proponent of immigration restrictions and eugenics (the
use of selective breeding [genetics] to produce healthier and more intelligent people).169 The pioneers
of ability testing developed their tests as a call for “standards” in the profession, often this was a
synonym for racial, ethnic and income-status exclusion.

In the early twentieth century, elite law schools began using aptitude tests. By 1947 the first
LSAT-type test was used, its was based on the original IQ test and data collected by the Army to test
recruits in World War I.170 The data used for this test was also offered as proof of the viewpoint that
Eastern European immigrants and African Americans were less intelligent than Northern and Western
Europeans. Thus, the original LSAT had racist roots. It was used in an effort to substantiate racial

168 Id. at 5.
169 Id. at 5.
170 Id. at 5.
inequality. Despite this history, conservative legal scholars among others, who are opposed to affirmative action, insist that test scores correlate with intelligence and merit which is best measured by LSAT and undergraduate GPA. This fallacy supports the notion that racial and ethnic minorities are, as a group, less meritorious - that is less qualified than whites. The widespread appeal of these standardized tests seem to be based on the prevailing racially based attitudes in American society and our strong belief in the ability of science to devise some standard by which human capabilities can be measured. Tests such as the LSAT are potent symbols for opponents of affirmative action, who wish to prove that the quality of higher education has been impaired by the admission of “unqualified” minorities based upon aggregate differences between whites and certain minority groups.\textsuperscript{171} This perpetuates the ideal that Western civilization is at risk unless those who do not belong, those who are perceived inferior, are kept at bay. The Supreme Court, in \textit{Grutter v. Bollinger}\textsuperscript{172}, recognized that law schools can legitimately seeks to devise a race-conscious admission process designated to create a challenging and diverse learning environment. Which ultimately is designed to graduate better qualified legal professionals but the over-reliance in the LSAT undermines this goal and impedes attainment of these objectives of professional competency. The LSAT continues to be the “door-way-entrance” to legal education, while legal education remains the primary avenue to wealth and leadership within our democracy.

\textbf{B. Wealth Disparity and Legal Education}

A perplexing component within our American democracy remains wealth and the many racial implications it posses based upon social inequality. Clearly, in an economic driven “caste” like state, such as ours, one segment must be at the bottom – socially, educationally and economically for another segment or segments to be one top. The paradox between this reality and our hallowed beliefs based

\textsuperscript{171} Id. at 6.

upon the vision within the Declaration of Independence and the U.S. Constitution – confuses true understanding, and impairs the capacity of bridging the impact those wealth disparities still present today. Much of the attention recently given to this subject focuses upon the gender pay gap between men and women, as well the variations based on skill, education and income between the sexes; however as “Middle-Class America” continues to stretch into suburbia and immigration expands our national identity – few within our society rationally understand this disparity from the racial and legal context.

There remains a debate as to whether the law plays some role in the creation and maintenance of wealth disparities based on race. The aspiration (vision) of our legal system directly conflicts with the social realities of life for varying communities and demographics of American people. Many within our legal system – including educators, judges and lawyers do not view law and the legal system, including law schools, as a process which polices race and wealth disparities. Some see American law removed from race and wealth concerns and many legal workers see no place for such considerations in their education or practice.

Despite this prevailing view, that American law and legal institutions are class and color blind, there are many examples of how legal institutions sometimes do create and maintain racialized wealth disparities. Louis Brandies once warned that: “We can have democracy, in this country; or we can have great wealth concentrated in the hands of a few, but we can’t have both.”¹⁷³ Race and wealth are so intertwined that even today the wealthy few are almost invariably white. If Brandeis is correct, a democracy cannot exist alongside concentrated wealth, and therefore wealth concentrated by race presents an even greater threat than wealth that is concentrated through more random means. The

examples of seemingly neutral roles which have race and wealth effects include, but not limited to: (1) the law school classroom, and (2) its replication of silence on matters of class.

Many first year law students study subjects that raise wealth and race issues, however, legal educators rarely teach those subjects in ways that raise wealth and race concerns. Legal education insists on adopting a mode of “perspectivelessness”, which reinenforces the ideal that legal discourse is objective and analytical.\textsuperscript{174} This lack of perspective supports the myth of legal neutrality. Many legal scholars, like Robert Hale have been very explicit about the role of wealth in American law, and the exploration of critical race theory has been equally explicit about the role race plays in American legal institutions.\textsuperscript{175} Unfortunately, both topics remain boutique seminar courses. Equally as alarming and unfortunate is the fact that many students study the law for three years without ever considering either wealth or race as legitimate topics of study.

This omission of race and wealth disparities from the core law school curriculum, either intentionally and/or mistakenly, within legal education reinforces its invisibility in other parts of the profession, thereby supporting judicial decisions and statutes which exacerbate the race-wealth division within America. Thus the lack of study or comment on class, race and wealth in the law school classroom perpetuates fallacy and misconception, as legal educator’s train the next generation of lawyers to also ignore these fundamental issues of fairness and their implications for justice and democracy. The silence on wealth and class in the law school classroom is not limited to one specific institution. This silence is so widespread that it impacts student career choices, and reduces the number of law students who aspire to work for social justice. Several studies indicate that students enter law school with a desire to work in area of public interest, yet by the time these same students graduate, they have changed their vision of success toward a corporate practice devoid of social justice issues.

\textsuperscript{174} \textit{Id.} at 6.

\textsuperscript{175} \textit{Id.} at 6.
The dysfunction inherently within the law school environment perpetuates stereotypes and double-standards among students. The invisibility of wealth in legal education permits and encourages this dysfunction, and magnifies the existence of “class.”\textsuperscript{176} When “class” just happens, the failure to pay attention replicates and reinforces existing academic structures.\textsuperscript{177} Faculty and Administrative leadership within the law school environment must be diligent and proactive toward responding to these educational dysfunctions and limitations – curriculum should reflect value-added (anonymous) student driven feedback, for qualitative educational improvement. Class reflects social relationships and the divergence of power, social statistics may quantify a snapshot of class and wealth but these statistics fail to convey how people experience class, identify themselves and others and how power structures become replicated.\textsuperscript{178} The replication and reinforcement of these existing structures influences the development of the law, legal theory, and the next generation of legal professionals.

The law is causation for income and wealth disparities; as such it is not a trivial or minor reason. Legal rules especially those rules that claim to support equality and neutrality can mask the means for supporting wealth and power differentials of all sorts. Today, legal education disserves the very people who need to understand both how law supports and undercuts equality and neutrality. Legal education ignores issues of race, class, and inequality through silence on these issues that extends into many law school classrooms and examinations, impeding the student’s ability to truly take advantage of diversity among peers in an academic sense. This results in future leaders (lawyers) lacking the training that they need to even imagine how law supports or undercuts true equality, much less how to address those issues in any serious context.

\textsuperscript{176} Id. at 6.
\textsuperscript{177} Id. at 7.
\textsuperscript{178} Id. at 7.
No discussion of wealth and race would be complete without at least mentioning the different historical definitions of wealth and their meaning today. Human beings held as slaves provided a form of wealth to their owners. Access to legal education, as well as education in general develops human capital and is another form of unevenly distributed wealth in this nation. In connection to legal education, there is a growing need for legal services, which continuously remains out of reach and denied to the poorest Americans. The key here is ‘accountability’ which is both personally acquired and institutionally maintain within legal academia. Richard Delgado has urged many in legal academia to learn from other disciplines in their efforts to promote a well balanced, socially conscious academic environment. 179 He describes, for example, that post colonial literature, searching for ways to oppose imperial forces in Africa, Asia, and Latin America, developed chronologically parallel to the civil rights tradition in the United States, but, “without much interchange between the two.” 180 The law and legal institutions must “look at themselves in the mirror” and then respond accordingly to the deficiencies and inconsistencies revealed, to ultimately hold our legal system accountable. Accountability is the hallmark of an experienced and competent lawyer and is a continual work-in-progress for all law schools to acquire and maintain for professionalism.

C. Cost of Legal Education

The rising cost of law school tuition remains a barrier to accessing a legal education, and consequently the entire legal profession. Public and private law schools are increasing tuition at rates that exceed inflation. Law school graduates are more heavily burdened by debt, and more than sixty percent say it has affected their employment choices. 181

179 Id. at 8.
180 Id. at 9.
The Top American Law 100 firms (largest U.S. and International law firms) are paying up to $160,000 annually for new associates yet these salaries are for a very select group of graduates and many more will suffer the stifling effects of runaway costs for a legal education.\(^\text{182}\) These figures do not take into account the decreased earning power due to inflation. Beginning lawyers—especially those in midsize and small firms are shouldering proportionately much more debt at graduation than did their predecessors, a situation that some observers fear will lead to more loan defaults, attrition and job dissatisfaction.

Tuition and costs at public and private law schools have skyrocketed since 1990. For in-state residents at public law schools, students are paying 267 percent more than in 1990, according to a study compiled by John Sebert, consultant on legal education to the American Bar Association.\(^\text{183}\) For nonresidents, public law school costs have soared by 197 percent. Private tuition since 1990 has risen by 130 percent.\(^\text{184}\) Tuition in 2004 at public law schools for in-state residents averaged $11,860 and $21,905 for nonresidents, and at private schools, tuition was $26,952.\(^\text{185}\) About 80 percent of law school students obtain loans to pay for law school, and the average loan debt is $76,763 for private law school graduates and $48,910 for public school graduates.\(^\text{186}\)

According to the National Association of Law Placement (NALP), the median salary for first-year associates in private practice in 2004 was $80,000, the last year that figures for comparison were available.\(^\text{187}\) Inflation totaled 45 percent between 1990 and 2004, which means that in 2004 an associate would have needed a salary of $72,400 to have the same earning power of $50,000 in 1990,

\(^{182}\) Id. at 1.
\(^{184}\) Id. at 1.
\(^{185}\) Id. at 1.
\(^{186}\) Id. at 1.
\(^{187}\) Id. at 1.
regardless of the much greater law school costs.\textsuperscript{188} In comparison, the price of a legal education for an in-state resident at a state law school, accounting for only inflation increases, should have increased from $3,236 to $4,700, a sharp contrast to the $11,860 average cost at the same type of school in 2004.\textsuperscript{189}

Many factors have contributed to the explosion in law school costs and student loan debt. These factors include smaller appropriations for public law schools from state legislatures, pressure to boost rankings and the call for law schools to provide more practical skills training. The primary reason for the escalation apparently stems from the inability of law schools to increase revenues in ways other than by increasing tuition and by fund raising. Stephen Friedman, dean of Pace University School of Law in White Plains, N.Y., points to the “\textit{basic economics}” of law schools, which, unlike corporations, cannot “\textit{sell more stuff or operate more efficiently}.”\textsuperscript{190} His point is debatable from a management perspective because some economies of scale between parent universities and the attached law schools would help lower costs, also better and more effective collaboration between law schools within a geographical region could help avoid duplication in various specialty fields of study. Many critics of law schools cost, attribute some the escalating costs to poor and ineffective cost accounting and management skills, especially with some law school deans earning more than $300,000 annually in salary plus perks.\textsuperscript{191} Law schools counter, by claiming that in order to increase faculty pay and cover rising costs, they are restricted from adding more students because of the size of their facilities, the number of faculty members, and what the legal market will bear.

\textsuperscript{188} \textit{Id.} at 1.
\textsuperscript{189} \textit{Id.} at 1.
\textsuperscript{190} \textit{Id.} at 1.
The U.S. Department of Education reported in September that default rates for all federal student loans hit an all-time low at 4.5 percent in 2003, the latest year for which the information is available. Access Group, one the nation’s largest higher education lenders, tracks the default rate for private loans. Students generally obtain these private loans after they have borrowed the maximum amount through federal loan process. The default rate for private loans that pay for professional and graduate degrees runs higher than federal loans.

The ramifications of this high cost and high debt norm for students in the nation’s law schools are not difficult to identify. Higher tuition means greater institutional investment in student financial aid, particularly in an increasing competitive marketplace for students, and this in turns drives costs even higher. These high debt loads not only heighten students’ stress associated with the finding good employment after law school, while increasing the burden on career services, but it also limits the graduates’ ability to pursue lower paying careers in the public sector. The ABA recognizes that the access to legal education and the quality of the education itself will become at risk at a significant number of law schools if this escalation in tuition costs and debt is not altered.

The Congressional Black Caucus in Washington, D.C., at its recent annual meeting addressed minority access to legal education and the issue of rising law school tuition. In a forum, The Decline in African-American Enrollment in Law School, panelist discussed concerns over statistics that indicate the number of African Americans enrolled in law school declined from 1995-96 to 2005-06 even though 19 new law schools were accredited during that time and overall enrollment increased. After several years of aggressive lobbying by the ABA and the Law Student Division, Congress passed the College Cost Reduction and Access Act of 2007 (CCRAA), which allows law school graduates to pay

off their qualified federal loans at a reduced rate. CCRAA further encourages new lawyers to enter public service by forgiving the balance of qualified federal loans after 10 years of payments while employed in a public interest position. The College Opportunity and Affordability Act was approved by the House of Representatives Committee on Education and Labor late last year for undergraduate institutions. It asks schools for more transparency regarding tuition hikes and increases reporting requirements overall. Should Congress require the same for law schools?

**Conclusion**

Race – and all the complexities of its interpersonal dynamics within society intersect with access to a quality Education. Throughout American history, the power of an education has been seen as both an emancipator for freedom and a mechanism to uplift those denied access. In this manner access to education has equaled freedom – under the Constitutional context of “liberty and justice for all.” This bridging of the racial divide –makes access to a quality education even more pronounced because in many respects it tears away the social caste structure born out of American slavery. In doing so, this redefines American identity from a truly heterogeneous unequal social structure to a more homogeneous identity, based on equality of quality access for all. Today, the question remains, “What is a quality (legal) education and does quality in education require racial inclusion at all levels of academia?” Maybe the answer lies in the struggle and pursuit for excellence through inclusion and racial-wealth equality.

Even among historic titans of African-American academia – Booker T. Washington and W.E.B. Dubois there was no clear cut answer. The seminal debate between Booker T. Washington and Du Bois played out in the pages of the “Crisis” with Washington advocating a philosophy of self-help and vocational training for Southern blacks while Du Bois pressed for full educational opportunities.

---

194 *Id.* at 22.
195 *Id.* at 22.
Du Bois believed blacks should challenge and question whites on all grounds, but Washington believed assimilating and fitting into the "American" culture is the best way for Blacks to move up in society. Booker T. Washington felt that teaching was a duty but Du Bois felt it was a calling.

Educational freedom requires a consciousness of racial and economic disparity. Affirmative Action and the struggle for equality are consistent with American principles because it is designed to facilitate the creation of a more equitable society. In this manner, by uncovering colorblindness and revealing it to be a mere fantasy, all Americans can benefit from the promotion of equality, particularly in legal education. Only those racially-conscious individuals uniquely trained and skilled in the law (lawyers) can facilitate this fight for-liberty and justice for all. In the words of Frederick Douglass, “If there is no struggle, there is no progress. Those who profess to favor freedom, and deprecate agitation, are men who want crops without plowing up the ground, they want rain without thunder and lightning.”
APPENDIX

A. A LETTER TO STUDENTS CONCERNING DIVERSITY AND RACISM AT THE LEVIN COLLEGE OF LAW

January 30, 2006

Dear Levin College of Law Students:

Last Thursday, I attended an open discussion led by Dean Jerry in response to the student petition regarding increasing student diversity here at our law school. At the time, I had a number of thoughts I wanted to share, but refrained from so doing, principally because time was limited and I wanted to hear what students had to say. For those who might be interested, I share my thoughts below. Before doing so, however, I want to thank the students who prompted that meeting and spoke at that meeting. I often feel privileged to teach here, but rarely do I feel so privileged as when I witness students so sincerely and skillfully tackling one of the most difficult and painful areas for our law school, indeed, for our society. You truly are the leaders here, and I thank you.

My main thought as I attended the meeting was that the root issues our school must ultimately address if we wish to make progress concern not simply diversity, but racism, including both individual acts of racism and institutional racism. Let me provide a few examples to impart a sense of the cultural context.

In my seven years teaching here, I have witnessed and been told of numerous individual incidents with a racist flavor. I’ll mention a few. Some are small. I recall in my first semester driving to lunch with a group of white colleagues. We were stopped at a traffic light and could hear loud music coming from the car next to us driven by an African American male. One colleague then said quite seriously to the rest of us, “I don’t mean this to sound like a racist question, but do you think Blacks don’t hear as well as Whites?” Some examples are more serious, influencing for example the faculty hiring process, as when a professor announced in “jest” to two of his classes several years ago that (I paraphrase), “Today we are interviewing a gay Jew to replace the gay Buddhist Black who left.” Sometimes acts are not definitively racist, but raise serious questions of possible racism, as when this year the threat was made that a group of faculty might “boycott” (i.e., refuse to meet with the candidate) if a particular African American candidate were brought in for a job interview. Other examples relate to actions by students, such as the bigotry demonstrated by student “judges” in the Moot court process a few years back. At the meeting last Thursday, one student reported her painful experience of reading the racial epithet “nigger” written as part of a hostile comment on a classroom wall. I do not mean to suggest that such instances are daily events here. Most students and faculty abhor such things. However, when such events do occur, the sting felt by those who experience them is quite real. Rather than a low-grade-tolerance approach, we should have a zero-tolerance approach to such events.

Yet it may well be that it is not such individual acts that form the greatest barrier to increased diversity here, but rather what one might call institutional racism.
Sometimes this institutional racism is reflected in how we respond - or don’t respond - to instances of racism. Consider by way of illustration an example from “outside” the law school, though it touches too upon the law school. In recent years, the Alligator has run a number of highly offensive cartoons (e.g., anti-African American, anti-Semitic, anti-Native American, etc.) by Andy Marlette, including the recent one labeling Secretary of State Condoleezza Rice and rapper Kayne West as “nigga”s. Though Marlette is certainly free to draw what he wants, and the Alligator is certainly free to publish what it wants, what to me is more stunning than the animus Marlette’s work exhibits is the Alligator’s decision to continue to run such hateful cartoons. In my view, a similar practice often applies here. Often racist incidents are largely hushed over or “whitewashed” rather than being actively and openly repudiated.

In addition, there is what one might call the institutional racism woven into the very fabric of our institution, and the very fabric of society too. Does our law school have difficulty hiring African Americans? Well, no, not for janitorial and other service positions. To my knowledge, the University of Florida has never had a president who was not a white man, and our law school has never had a dean who was not a white man. Our faculty is overwhelmingly white, far more so than the general population (and largely male too). Is it surprising that students of color often feel less comfortable than white students? Further, our alumni - a main feeder of new students to our school - are, of course, overwhelmingly white. Are there ways to address that challenge when thinking about the recruitment process?

Connected to this is the complexity of how we now relate to our law school’s segregationist past. Last year, for example, the marquis reading room in the new library was named after former Florida Supreme Court Justice and then UF president Stephen C. O’Connell. Yet O’Connell was in many ways a leading segregationist. Indeed, he was one of the Florida Supreme Court Justices who blocked the United States Supreme Court’s order to admit Hawkins to this very law school without delay. See State ex rel. Hawkins v. Board of Control, 93 So.2d 354 (1957). (And to think he was later appointed as president of this university!) As university president, on “Black Thursday” of 1971, he responded to a sit-in by roughly sixty African American students to improve the recruitment and status of American Americans at this university by ordering that the students be arrested and suspended. O’Connell’s decision effectively ended most of those students’ educational careers, and led to the resignation of a large proportion of the university’s African American faculty. (See, e.g., http://www.dso.ufl.edu/multicultural/ibe/history.php.) Later, O’Connell did take some pro-African American steps. For example, he dedicated a Black Culture Center at the university. Yet what is most noteworthy to me is the display about O’Connell in the library’s reading room. That display presents the “good” but omits the “bad”. (To its credit, the kiosk in the hallway outside of the reading room does contain within it information on both O’Connell and Virgil Hawkins; however, there too the information on O’Connell is all “good”.) Naming the room after a man who was instrumental in blocking admissions of African Americans to our school is problematic enough. The manner in which it has been done further complicates the situation. When I go to the library, I personally feel uncomfortable using that reading room as it now exists. While I doubt the reading room will ever be renamed, I hope that someday the O’Connell display
will be “re-curated”. As with current incidents of racism, ignoring difficult subjects does not make them go away. Some may ask, “Is it really necessary to talk of racism? Might we not instead simply discuss diversity and focus upon recruiting a more diverse student body?” I applaud efforts to achieve a more diverse student body, but, in my view, unless racial issues here are addressed squarely efforts toward greater diversity will be deeply constrained. Our state has sizable minority communities, our law school is prestigious, and the cost of tuition here is extremely low when compared with other law schools. Yet despite that, the “buzz” often reported in the minority communities is that our school is not a welcoming place. In my view, all the expanded minority recruitment efforts (which I applaud) and advertising efforts (e.g., featuring a person of color on a brochure’s cover) will be of limited efficacy in the long run until we truly address the racial issues here.

Sincerely,
Jonathan R. Cohen
Professor of Law

B. HBCU to focus on customer service
November 5, 2006 BY GREGORY PHILLIPS, The Herald-Sun

My letter to the board of trustees.

I have attended HBCU School of Law for two years. I have enjoyed my experience here at the law school. The staff is educated, respectful, and the facilities are exceptional. However, that is where my love for this institution ends. While I have attended the law school, there has not been a year where the main campus staff and employees have been anything more than rude, disrespectful, and completely unhelpful. Unlike many who attend the Law School, my undergraduate degree is from a historically black college/university. I understand the struggles which face our HBCUs. However, HBCU ranks, in my mind, as administratively, one of the worst institutions a person could attend. Some of the reasons why include:

Financial Aid I have never seen such an unorganized group of individuals like what I have seen in the financial aid building. It is typical to wait for hours on the phone in an attempt to talk with someone. Once someone is on the phone, students are greeted with an unpleasant employee who chides students and rushes people off the phone before disseminating any useful information. In person, financial aid workers are often on cell phones while lines wrap around the room. Like over the phone, workers treat students like children and chastise them about problems. Students are there for information about their money. Such lines would not be necessary if financial aid did their job throughout the year explaining the processes and procedures. In financial aid, students are not treated as if they are respected and valued, but as a burden in the day of the workers. You may make undergraduate students believe it is like this everywhere, but the graduate students know better, and we know you do as well.

Now, financial aid tells the law students we will not receive our refund checks until October of this year. What is equally as frustrating is that the financial aid office is placing the blame on the students! What did we do wrong other than fill out the same forms and financial aid with came in September last year? If a change occurred in procedure, I would assume it would be financial aid’s job to inform students about it. However, that would require people to do their job, and at HBCU, that is always asking for too much.

Parking

Why are the law school parking lots VIP parking for football games? There is no where to park on Saturday’s to do school work. Students cannot study our rigorous course work because of these events. Indeed, there is no parking for students to use the undergraduate library during games. So, attending the athletic events is the focus on HBCU. Funny, at most schools, getting an education comes first. What do you think your serious students do instead? They travel to UNC-CH, Duke, or NC State to have a place to study. When students feel that it is too much of a hassle to study at their own institution, do you think they will become an alumni dedicated to giving contributions to
improve the university? I hope not, because most students I talk to feel it was a mistake to come here, mainly because of the issues dealing with administration.

In regards to the daily parking problems revolving around the school, what attempts have been made to increase parking areas? All many students see is increased enrollment with no new lots. The law school itself has enough students to fill all the lots surrounding it. Because your administration is slow to act on anything non-athletic, the law school pays a local church to rent parking spaces for its students. At least the law school takes swift, affirmative steps to show its students it is working with and for them.

Cafeteria and other services

At HBCU, I have witnessed, on multiple occasions, employees of this institution using profanity at students for asking questions like: ‘what is that for dinner?; ‘is there anywhere to park?’; and ‘why can’t I wear my undergraduate school paraphernalia in the gym?’ Overall, the staff at your institution is disrespectful and rude. Most graduate students feel being on campus only leads to hassle, and head-ache and prefer to stay here only for class. Is that the reputation you want for this university?

Before the Law School MPRE exam, a white individual said, “I was told to not take the exam at HBCU. Hopefully nothing will go wrong.” Not surprisingly, a fire alarm went off during the test. Many students are appealing the scores and want to invalidate the results. This is embarrassing to the institution. The students who took the exam are not just HBCU students, but students from across the world taking the NC Bar examination. The widely known reputation of HBCU as being ghetto, inefficient, unprofessional, unorganized, and dangerously susceptible to crime continues to grow with each instance where outsiders come on campus. Most students at the law school leave immediately after class because they do not feel safe here. In addition, many students here illuminate their undergraduate institutions in interviews because HBCU is thought to be a stain on any resume. After internships, many employers remark that they are impressed with our work despite coming from HBCU. All of this combines to make this institution the worst collegiate experience most of us here at the law school have ever experienced.

HBCU is a business and the students are its customers. The customers are dissatisfied. Most of my classmates agree that our children will never attend this institution. Further, we have no sense of pride for anything here outside the law school. This letter could be longer, but you have heard all I have to say before. The question is, will you do anything about it or continue to hide behind the fake guise that this is a great institution with no problems?

Young Black Man

School of Law, Class of 2007
BIBLIOGRAPHY

**Books**


**Journals and Law School Publications**


Krieger, Lawrence S. “What we are not telling Law Students-and Lawyers that they really need to Know.” *Journal Law and Health* 1999, 13(1), 2-20.


**Newspapers and Magazine Publications**


**Web and Blog Sites**


**Cases**


Roberts v. City of Boston, Case No. 976, Court of Commons Pleas, Suffolk County, Boston, M.A. (October 1848).


**Interviews**