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# FOREWORD: TOWARD A RACE-CONSCIOUS PEDAGOGY IN LEGAL EDUCATION

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It is both an honor and a pleasure to write the Foreword for this issue of the NATIONAL BLACK LAW JOURNAL. This project represents the culmination of a joint effort involving the NBLJ, Dean Susan Westerberg Prager and me. The project grew out of discussions that began in the Spring of 1987 in which we explored various ways that the law school could support the production of publishable student material for the *Journal*. I initially considered sponsoring interested students in independent research projects; however, a high level of student interest, an obvious overlap between proposed student topics, and my own interest in developing alternative pedagogical strategies combined to make a seminar the most attractive option.

After receiving suggested themes for the proposed issue from *Journal* members, I attempted to develop a seminar that would reflect our substantive interests and that would also be responsive to some of the problems that I believe confront minority students in traditional classrooms. The seminar that resulted—"Minority Voting Rights and Majoritarian Domination"—reflected an effort to further three interrelated objectives: 1) to explore the successes and failures of the legal strategies developed to address political disenfranchisement on the basis of race; 2) to create an environment that presented an alternative to the traditional classroom experiences of minority students in majority-centered law schools; and 3) to provide a support structure specifically designed to produce publishable student material. In this Foreword, I will sketch my own view of some of the difficulties confronting minorities in the classroom and explain how the seminar was developed to address them. These views are impressions based on recollections and experiences that I have gathered from observing classroom dynamics from both sides of the law school podium. Although none of these ideas are based on empirical research, I hope nonetheless that they provide a basis for interpreting the seminar and that they may perhaps offer some ideas for further discussion.

## RACE IN THE LAW SCHOOL CLASSROOM

Minority students across the country have waged a series of protests to draw attention to problems of diversity in the nation's law schools.<sup>1</sup> Although

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I am grateful to several friends and colleagues who offered helpful comments on earlier drafts of this Foreword. I would like especially to thank Richard Yarborough, Duncan Kennedy, Neil Gotanda and the Editors of the NATIONAL BLACK LAW JOURNAL all of whom have been most generous in providing me with their time, insights, patience, and support.

1. See, e.g., *Law Students Protest*, N.Y. Times, Mar. 24, 1988, at A24, col. 4 (Boalt Hall student protest over the lack of women and minority group members among tenured faculty); *Stanford Rights Class Dropped After Black Protest*, N.Y. Times, Mar. 20, 1983, § 1, at 27, col. 1; (protest in support of Harvard Black law students January 1983 protest); *Students Picket Law Course in Rights*

the students' bottom line demand is often for the recruitment of more minority faculty and students, the anger and frustration apparent in these protests indicate that the disappointment is not simply over the lack of "color" in the hallways.<sup>2</sup> The dissatisfaction goes much deeper—to the substantive dynamics of the classroom and their particular impact on minority students.<sup>3</sup> In many instances, minority students' values, beliefs, and experiences clash not only with those of their classmates but also with those of their professors.<sup>4</sup> Yet because of the dominant view in academe that legal analysis can be taught without directly addressing conflicts of individual values, experiences, and world views, these conflicts seldom, if ever, reach the surface of the classroom discussion. Dominant beliefs in the objectivity of legal discourse serve to suppress the conflict by discounting the relevance of any particular perspective in legal analysis and by positing an analytical stance that has no specific cultural, political, or class characteristics. I call this dominant mode "perspectivelessness."

This norm of perspectivelessness is problematic in general, and particularly burdensome on minority students. While it seems relatively straightforward that objects, issues, and other phenomena are interpreted from the vantage point of the observer, many law classes are conducted as though it is possible to create, weigh, and evaluate rules and arguments in ways that neither reflect nor privilege any particular perspective or world view. Thus,

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*Protest at Harvard*, N.Y. Times, Jan. 6, 1983, at A16, col. 1 (protest over school's record in recruiting Black teachers); *Goal of Boycott at Harvard Law*, N.Y. Times, Aug. 20, 1982, at A26, col. 6 (student-written editorial on law student protest at Harvard Law School).

Some students have protested against changes in diversity programs that they feared would weaken the programs' effectiveness. See Roark, *UCLA Stiffens Requirements for Law School*, L.A. Times, May 3, 1987, § 2, at 1, col. 5 (UCLA law faculty votes to toughen admission standards); L.A. Times, Apr. 29, 1987, § 1, at 2, col. 1 (UCLA student protest over changing admissions standards at the law school).

2. A recent study suggest that diversity is a major problem in the nations law schools. See Chused, *The Hiring and Retention of Minorities and Women on American Law School Faculties*, 137 U. PA. L. REV. 537 (1988). Chused's statistics indicate that two-thirds of the nations law schools have one or no minorities on their faculties. Only a third have more than one minority faculty member.

3. See e.g., Letter from Benita Ramsey to the Dean of the University of Miami Law School (July 1, 1987)(chronicling how "law as an institution perpetuates disillusionment and discontent from its students of color.") (on file with author).

4. In order to sketch the contours of this conflict I offer some generalizations about contrasting Black and white perspectives that I think are relevant. I rely on no empirical data to support the generalizations. I realize that any conclusions drawn from such generalizations are tentative at best and are compelling only to the extent that the underlying generalizations seem plausible. Nonetheless I think it is important to put these perceptions forward for discussion. Also, I have limited these particular generalizations to white and Black students, although they may be more broadly applicable to differences between white and other minority students as well.

Black students are likely to have encountered more racist treatment and attitudes than white students. Moreover, Black students are more likely to view American society as racist, characterized by systematic differences in power, wealth and status. Blacks are likely to be somewhat aware that law has played a role in maintaining racial privilege. Whites, although aware that racial subordination is a problem, are unlikely to view racism as a constant or central feature of American life. As a consequence of these conflicting views, while Black students are likely to be concerned with the impact of laws on the Black community, white students are unlikely to think about the impact of laws upon the Black community unless and until the question is raised by Black students. Even when the potential impact is raised, white students are likely to balance these concerns with other interests and values. Moreover, they probably view the Black students' concerns as racial and specially interested, while the other values or world views that are routinely invoked are not viewed as racial or self-interested, but as general—or even universal—values.

law school discourse proceeds with the expectation that students will learn to perform the standard mode of legal reasoning and embrace its presumption of perspectivelessness. When this expectation is combined with the fact that what is understood as objective or neutral is often the embodiment of a white middle-class world view, minority students are placed in a difficult situation. To assume the air of perspectivelessness that is expected in the classroom, minority students must participate in the discussion as though they were not African-American or Latino, but colorless legal analysts.<sup>5</sup> The consequence of adopting this colorless mode is that when the discussion involves racial minorities, minority students are expected to stand apart from their history, their identity, and sometimes their own immediate circumstances and discuss issues without making reference to the reality that the "they" or "them" being discussed is from their perspective "we" or "us." Conversely, on the few occasions when minority students are invited to incorporate their racial identity and experiences into their comments, they often feel as though they have been put on the spot. Moreover, their comments are frequently disregarded by other students who believe that since race figures prominently in such comments, the minority students—unlike themselves—are expressing biased, self-interested, or subjective opinions. The result is that minority students can seldom ground their analysis in their own racial experiences without risking some kind of formal or informal sanction. Minority students escape the twin problems of objectification and subjectification in discussions when minority experiences are deemed to be completely irrelevant, or are obscured by the centering of the discussion elsewhere. The price of this sometimes welcomed invisibility, however, can be intense alienation. I will elaborate on these dilemmas below.

### *The Problem of Objectification*

Instructors create the conditions that lead to the objectification of minority students by narrowly framing classroom discussions as simple exercises in rule application and by not giving students permission to step outside the doctrinal boundaries to comment on or critique the rules. If the subject involves some issue, rule, or case that is implicated in the subordination of the students' racial group, minority students confront unattractive options. To illustrate, consider a discussion in Property where the class is instructed to identify and apply a rule involving a lessee's responsibility for damage suffered by the lessor's property during the term of the lease. The professor has asked the class to discuss the application of the rule in a suit for damages by the owner of a deceased slave against a lessee who was responsible for supervising the slave when he was killed. The ambiguity that the students are asked to resolve is whether the slave should be treated as mere chattel, in which case the slave owner will recover, or whether the slave should be treated as a human agent, in which case the lessee's responsibility will probably be mitigated.<sup>6</sup> If the

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5. For an argument that colorblindness is a series of complex and contradictory norms and beliefs that legitimizes white supremacy see N. Gotanda, *Toward A Critique of Colorblind* (1989) (unpublished manuscript) (on file with author).

6. Several cases confronted the courts and apologists for slavery with the complex task of resolving the contradiction between the fact of the slaves' humanity and the legal fiction of the slaves' being mere chattel. Compare the discussion of *State v. Mann*, 13 N.C. 263 (1829) (contradiction resolved by claiming that the slave was property and that the power of the master over the slave was

instructor does not open the door for students to question the very legitimacy of this doctrinal framework, the African-American student is faced with a difficult choice. To participate correctly in the discussion, she must abstract herself from her identity as an African-American, a descendent of the very people who were enslaved under the fiction of human chattel. She must ignore her personal perceptions and judgments about the illegitimacy of the doctrine under consideration and become a colorless student attempting to demonstrate her legal talents by manipulating the legal abstraction within the narrow boundaries already established.

Alternatively, she could choose to explode the abstraction by stepping outside the doctrinal bounds to discuss how the very question that she is asked to address holds constant the legal fiction of human chattel. She could refuse to participate in the objectification of her ancestors, and instead, reveal how this very framework perpetuates the devaluation of African-American perspectives. She would thus challenge her classmates' beliefs in the perspectivelessness of law and reveal how discussing slavery within such narrowly constructed boundaries immunizes the law from serious criticism. Yet no matter how eloquent her performance, offering such a response would be costly for the student. Should she choose to step outside the boundaries of classroom decorum, she would risk being regarded as an emotional—perhaps even an hysterical—Black person railing against the law in an obviously biased, unlawful manner.

I acknowledge that this particular scenario may be rare. Indeed, it is unlikely that many Property instructors discuss the law of slavery, and it is even more unlikely to find anyone attempting to resolve slavery's legal contradictions today. Yet other examples can be easily generated that raise similar, if not identical, dilemmas for minorities in the classroom. Consider discussions of probable cause where the reasonableness of an officer's suspicion requires students to view the situation through the eyes of the arresting officer.<sup>7</sup> It is not unusual for professors to base a hypothetical on the presence of a Black person in a white neighborhood. When the instructor has not opened the dialogue to allow students to question the potentially discriminatory effects of determining reasonableness from the perspective of the arresting officer, the minority student is essentially required to look back at herself to determine whether her own presence in a white neighborhood would be sufficient cause for her to arrest herself.<sup>8</sup> Similar dilemmas are confronted when the discus-

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absolute, thus permitting a hirer to maim the slave without legal liability) with *Gorman v. Campbell*, 14 Ga. 137 (1853) (slave owner can recover monetary damages if slave is regarded as property but if slave is classified as a human with agency then the hirer's responsibility for injury suffered by the slave is mitigated by slave's own actions) in M. TUSHNET, *THE AMERICAN LAW OF SLAVERY, 1810-1860: CONSIDERATIONS OF HUMANITY AND INTEREST* 3-6, 51-65 (1981). For another discussion of the legal structure of slavery see also A. HIGGINBOTTHAM, JR., *IN THE MATTER OF COLOR: RACE AND THE AMERICAN LEGAL PROCESS, THE COLONIAL PERIOD* (1978).

7. See e.g. *Kolender v. Lawson*, 461 U.S. 352 (1983) (discussing whether there was probable cause to arrest a Black man walking at night in an all-white neighborhood), *rev'd on other grounds*.

8. The expectation that minorities can and should objectify themselves even in discussions of race can sometimes reach absurd proportions. Professor Pat Williams' account of her racially-motivated exclusion from a New York boutique offers an example of such an expectation. In recounting white store owners' response to the controversy over their racially discriminatory use of buzzers to refuse entry to "undesirables," Professor Williams noted that the "repeated public urgings that blacks put themselves in the shoes of white store owners" in effect expected blacks to "look into the mirror of frightened whites faces to the reality of their undesirability; and that then blacks would 'just as

sion turns to the reasonableness of an Immigration and Naturalization Service agent's detention of a car containing Latino passengers. The tension created by the expectation of objectivity and the reality that a Chicana student might herself be in that situation essentially places her in the awkward position of considering whether from the perspective of the agent, it would be reasonable to detain herself and a car of her friends as suspected undocumented workers.<sup>9</sup> A Japanese-American student considering the reasonableness of the government's World War II internment of Japanese-Americans confronts a similar dilemma. Unless given leave to discuss the internment from a Japanese-American perspective, she has to consider whether from the point of view of some government decision-makers, her parents represented a threat to the national security such that their internment satisfied a compelling state interest.<sup>10</sup>

In each of these cases minority students confront difficult choices. To play the game right, they have to assume a stance that denies their own identity and requires them to adopt an apparently objective stance as the given starting point of analysis. Should they step outside the doctrinal constraints, not only have they failed in their efforts to "think like a lawyer," they have committed an even more stigmatizing *faux pas*: they have taken the discussion far afield by revealing their emotional preoccupation with their racial identity.

Given the infrequency with which most law teachers create the space for and legitimize responses that acknowledge the significance of a racially-informed perspective, it is not surprising that minority students often choose the role of "good student" rather than run the risk of appearing to be incapable of exercising the proper decorum and engagement in legal analysis. Such experiences teach minority students that in law school discourse, their cultural and experiential knowledge is not important or relevant. Indeed, they learn that any failure to observe the constructed dichotomy between the rational—read non-racial and non-personal—and the emotional—read racial and experiential—may elicit derision or disregard. To expect minority students to feel

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surely conclude that [they] would not let [themselves] in under similar circumstances.' " Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerprinting as the Law's Response to Racism*, 42 *MIAMI L. REV.* 127, 129 (1987) (quoting Letter to the Editor from Michael Levin and Marguerita Levin, *N.Y. Times*, Jan. 11, 1987, at E32, col. 3).

Another manifestation of the presumption that analysis can and should stand apart from the racial identity of the speaker is revealed in Professor Williams' subsequent account of her struggles with law review editors to include reference to her racial identity in writing about her exclusion from the New York boutique. Williams, "And We Are Not Married: A Journal of Musings, Legal Language and the Ideology of Style in CONSEQUENCES OF THEORY (B. Johnson and J. Arce eds. (forthcoming)). According to Professor Williams, the editors initially deleted all references to her racial identity informing her that references to "physiognomy" were irrelevant. Yet the absence of an explicit "physiognomy" does not constitute racial neutrality but simply permits the reader to assume whiteness. The presence of this assumption—however unconscious it may be—is revealed when the story is told without referring to Professor Williams' race. As Professor Williams points out, if the racial identity of the speaker is not included, the point of the story is unintelligible.

9. See, e.g., *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) (no constitutional violation for INS officials at a fixed border checkpoint to selectively detain persons on the basis of apparent Mexican ancestry).

10. See *Korematsu v. United States*, 323 U.S. 214 (1944) (Court finding the potential national security threat presented by persons of Japanese ancestry warranted the internment of West Coast Japanese-Americans). Even though retrospective reviews of the opinion have been generally critical, Japanese-American students whose families were affected by the decision may still feel compelled to adopt the posture of the decisionmaker even in arguing against the reasonableness of the decision.

comfortable or to be creative in such a classroom is the equivalent of asking someone to perform a two-handed task with one hand tied behind her back.

This dichotomy between rational, objective commentary and mere emotional denunciation is often a false one, maintained by the belief that when minority students step outside the bounds of rote rule application to express their criticisms or concerns, they are violating classroom norms by being racially biased. Many of these problems could be averted if professors framed discussions so that the boundaries of acceptable responses were not so narrowly constructed. This would give students permission to drop the air of perspectivelessness, to stand within their own identity, and to critique the doctrine or rule directly. Yet instructors often fail to broaden the parameters of the discussion, perhaps believing that to do so would legitimize the inclusion of racial perspectives where none had existed before. Some may assert that since white students do not feel the need to fall back on personal, racialized views of the world, neither should minorities. This belief, however, is predicated on an erroneous view that white students—and indeed the instructors themselves—are not also reflecting racialized views when they frame and discuss issues. They accept the absence of an explicitly racial referent as evidence that the doctrinal or substantive framework being discussed is objective and race-neutral. However, majority as well as minority students view the world through a consciousness constructed in part through race. The appearance of perspectivelessness is simply the illusion by which the dominant perspective is made to appear neutral, ordinary, and beyond question. As a result, while the perspectives of minority students are often identified as racial, the perspectives of their majority classmates are not. Moreover, when the instructor presents as a “given” the perspectivelessness of a particular rule or value, then many decisions that effectively burden minority group members will appear to both the instructor and most students to be the result of an unbiased, objective legal analysis. As long as other perspectives are obscured by the illusion of objectivity, the fact that courts are making choices that privilege the perspectives and interests of some groups over others will go unrecognized.

### *Subjectivity and the Problem of Minority “Testifying”*

An equally stressful, but conceptually more obscure experience is what I call subjectification. This is experienced by minority students when, after learning to leave their race at the door, their racial identities are unexpectedly dragged into the classroom by their instructor to illustrate a point or to provide the basis for a command performance of “show and tell.” The eyes of the class are suddenly fixed upon the minority student who is then expected to offer some sort of minority “testimony.” For example, in a discussion concerning whether racial epithets should be regarded as sufficient provocation to warrant a heat-of-passion homicide defense, the professor might attempt to ground the discussion by questioning how it feels to be called a “nigger.” Once a minority student “testifies,” the class goes on to debate whether the law can afford to recognize a manslaughter defense in such cases. Usually, the effort to illicit the minority perspective is a cue that the discussion is a policy—as opposed to a doctrinal—discussion. The racial conflict, if any, is seen as occurring outside of the classroom while the objective of the discussion is apparently to determine how best to address the problem. To the extent that

the minority student can participate in this debate, she is viewed as a biased or specially interested party and thus, her perspectives are probably regarded as being too subjective to have a significant bearing on the ultimate solution.

This pattern of pigeon-holing minority student responses into a "special testimony" category occurs when their comments are essentially limited to providing information on how it feels to live in a ghetto, to go to segregated schools, to be harassed by police, or to risk being stigmatized by affirmative action. Instructors who until that startling moment have made no effort to create space for discussing how race shapes experiences or the role of law in maintaining racial subordination are sometimes surprised that minority students resent this episodic expression of interest. Instructors may believe that they have made a good faith attempt to include minority students in classroom discussions by offering them an opportunity to speak about something within their area of expertise. Yet to raise race in this way imposes multiple burdens upon minority students. First, it reinforces the view that racial differences and minority students' distinct racial experiences are essentially peripheral to the main course of law. Such efforts to compartmentalize racial experiences present racism as a series of individualized anomalous occurrences rather than systematically connected to larger institutional practices and values which are reflected in and reinforced by law. Presenting minority viewpoints in such narrowly-framed and marginalized discussions ignores the possibility that these insights might have some bearing on larger issues involving the role of law in constructing societal relationships and on the appropriateness of discussing those relationships in law school classrooms.

Second, when instructors attempt to include minority experiences while failing to call into question the objectivity of the dominant perspective, they fail to challenge majority students' beliefs that the minority perspective is self-interested and biased while the doctrinal framework and their own perspectives are not. Thus, if the instructor has not given the impression that a particular perspective or an entire doctrinal framework is subject to criticism, minority students' perspectives will still be viewed as expressions of subjective personal experiences.

Third, unless the instructor clearly establishes antiracism as a norm, occasional uses of racial hypotheticals may anger and deeply offend most minority students. For example, it is understandably annoying when an instructor persists in using racial epithets or racist stereotypes while never uttering a word about the undesirability of racism. Instructors may assume that both minority as well as majority students are aware that the epithets or the stereotypes are not meant to cause offense. They may assume that their good faith is obvious, that no one accepts the legitimacy of racism anymore, or, most disturbingly, that to make explicit antiracist statements would compromise the appearance of objectivity that they seek to maintain. Whatever reason that instructors give to justify their use of racial stereotypes or epithets without explicitly condemning racism, the result is that minority students are given little indication that the hostility that such statements would otherwise convey is, in this context, not intended.<sup>11</sup> Without clear indication that the stereo-

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11. Minority students at one of the elite law schools documented a conflict with their Criminal Law instructor over his repeated use of racial epithets and stereotypes and his refusal to challenge white students who made comments supporting racial stereotypes. While the students welcomed the



types or epithets are not being introduced to reinforce racism but instead, to counter it, there is little reason to expect minority students to feel comfortable while their colleagues freely invoke those racial stereotypes and epithets.

Finally, unless the instructor sends a clear normative message that racial subordination should be condemned and that racism itself is not being condoned, it is quite possible that majority students will disregard or rationalize minority experiences as the necessary costs of broader societal interests. The entire episode can be extremely stressful for minority students; their experiences are solicited only to be ultimately dismissed as examples of hard issues, or of compromises that are rationally mandated by mainstream societal values.

Some of these dilemmas can be addressed by altering the way racial issues are framed, by presenting racism as a serious societal problem, and by explicitly depriving dominant perspectives. Instructors wishing to explore racial issues without contributing to the anxiety of minority students should resist framing minority experiences in ways that make such experiences appear to be disconnected to broader issues and that can be easily forgotten as soon as the policy discussion is over. Instead, the frame should be shifted so as to illuminate the connection between racial subordination and the values and interests that appear to be race-neutral or that are simply taken for granted. This would provide space for minority students to contribute to discussions in ways that value their perspectives and do not put them on the spot. Thus, rather than asking how it feels to live in the ghetto, instructors wishing to explore, for example, the legal aspects of segregation might shift the frame to discuss how landlord-tenant law or banking practices perpetuate the maintenance of substandard dwellings in minority communities. As an alternative to asking how it feels to go to a segregated school, it might be more illuminating to start the discussion with how property laws and the judiciary's interpretation of the fourteenth amendment protect the current distribution of wealth and thus perpetuate substandard schools. In Criminal Law, rather than asking whether being called a "nigger" or "spic" should be sufficient provocation to warrant a manslaughter instruction, one might start by asking whether a defendant's right to a fair trial in such cases requires that the jury be made up of the defendant's racial peers. Instead of asking how it feels to be harassed by police, or how it feels to be stigmatized by affirmative action, it might make more sense to question whether the virtual unreviewability of police discretion perpetuates mistreatment of racial minorities, or how current conceptions of meritocracy privilege characteristics that are valued by the dominant group.

When the instructor places an entire legal framework at issue, minority perspectives can be included in ways that illuminate better the racial consequences of dominant values, concepts, and rules. More importantly, shifting the frame revalues distinct minority experiences; no longer are they cultural handicaps that either must be overcome or made the subject of occasional observation. Such experiences are instead, sources of knowledge that can be legitimately and powerfully utilized in legal analysis. Minority students can

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discussion of race, they felt that the discussion merely confirmed rather than challenged racist beliefs. The students then met with the professor, but to no avail. The students then wrote an open letter recounting several incidents of race bias in their classroom. Letter Regarding Criminal Law Class (on file with author).

gain the advantage that their majority colleagues share: *their* vision of the world, *their* experiences and values and the things that *they* take for granted can be legitimately included.

### *Alienation of Minorities in the Classroom*

In addition to objectification and subjectification, a third category of minority classroom experience involves the alienation that is engendered by discussions that focus on problems, interests and values that either minorities do not share or that obscure or overlook issues that are particularly relevant to minorities. This may be the most difficult of the classroom experiences to address because most students experience some degree of alienation during law school and because much of what is discussed does not engage students' personal experiences or interests. Thus, race is one of many reasons why students do not have an experiential connection with the material. Yet, there are a few observations that can be made about the racial aspects of alienation despite its relatively narrower role.

Although it is clear that many discussions do not involve race, it is also true that race is often implicated in a range of ways even when it is not directly at issue and when racial perspectives are not explicitly identified. Yet, even though race may be implicated in some way, often, it never explicitly becomes part of the discussion. For example, sometimes race is implicated when racial images that lie just below the surface of the discussion inform the views of the speakers. Perhaps the most common example is found in discussions of rape where in many minds the image of the typical assailant is Black. Alternatively, race may also be implicated when race is not even a subtext, but the specific inclusion of minorities in the discussion would probably reveal that it was largely, if not exclusively premised upon white, middle-class experiences and problems. For example, problems involving capital gains taxes, or gifts and inheritances are apparently race neutral, but experientially, tend to be more race specific. Taxation, property, or estate problems that typically confront minorities are probably different. Tax problems that might be more commonly experienced by minorities might involve the taxability of pensions, general relief, Social Security and other benefits. In Property, fraudulent conveyances and other real estate practices such as those used to deprive Southern Blacks of real property interests represent legal issues that are more likely experienced by minorities.

In addition to having different kinds of problems, minorities may be more concerned about the racial implications of the topics. For example, questions over the tax-exempt status of institutions that discriminate on the basis of race are likely to be of interest to minority students. The racial dimensions of traditional law school subject areas are seldom discussed. On the few occasions when racial dimensions are considered the issues raised are either summarily addressed or mentioned only in passing.

Racial perspectives may be implicated in other discussions where the presence or absence of certain experiences which are themselves related to race lead to different descriptive and normative perspectives on issues unrelated to race. For instance, in discussions about the tension between federal and state powers, students' whose history suggests that for them the most significant threat to their personal autonomy has been state inaction rather than federal

action are likely to be more sympathetic to federal intervention than students who cannot readily imagine having to rely on the federal government for protection against local authority.

In these and other discussions where the framework established by the professor precludes the acknowledgement of the racial dimensions of certain topics, minority students may be disinclined to actively participate. When the racial issues that do come up are dismissed out-of-hand, the sense of distance minority students feel between themselves and the rest of the class is probably exacerbated. Consequently, they have little if any personal connection to the subject matter that would contribute to their understanding of the issues. Students are thus bound to master facts, values, and problems that arise out of circumstances that are often quite unfamiliar.

Minority student alienation is in no small part attributable to a sense of total irrelevance in the classroom. Instructors need not infer, however, that in order to address this alienation, it is necessary to uncover the racial dimensions of every issue in every discussion. Not only would instructors feel that they are teaching a completely different course, it would probably make minority students feel uncomfortable as well. A promising start could be made if instructors were more conscious of the particular ways that their comments or attitudes contribute to the alienation of minority students and if on occasion, they included cases or discussions that might involve facts that are more familiar to minority students. This might at least neutralize the aspects of alienation that derive from feeling that the entire discussion is irrelevant to the minority student's racial community.

#### THE PROBLEM OF PERSPECTIVELESSNESS IN ANTIDISCRIMINATION LAW

These special problems that minorities face when they confront the expectations of perspectivelessness extend beyond the classroom. Minority perspectives are devalued not simply in the discussion of doctrine, but in the construction of doctrine as well. Attempts to bring minority perspectives to bear in legal analysis must confront several interrelated problems. First, the legal framework under which many cases arise often determines whose perspectives are relevant and whose are not. For a number of reasons discussed above, minority perspectives are often excluded and dominant perspectives are privileged in the legal inquiry. Moreover, dominant perspectives are not identified or associated with any characteristics; the perspective is nameless. Most debilitating for minorities, however, is that while dominant perspectives are granted the protection of apparent objectivity, minority perspectives are identified as such and viewed as subjective and biased. As a result, legal concepts, claims, and categories that value minority perspectives are sometimes viewed as suspect or biased.

These observations can be illustrated with a brief review of the tension between competing frameworks for defining and remedying racial discrimination.<sup>12</sup> Perspectives are important in determining the scope of antidiscrimination law. Yet minority perspectives are rendered irrelevant by some of the

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12. See Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of the Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978) (characterization of the tension within antidiscrimination law as one between a perpetrator perspective and a victim perspective).

United States Supreme Court's approaches in which the significance of the victim's experience of domination is minimized by the search for an actor who intentionally and irrationally discriminated against certain victims. The result of this search is that protection afforded to minorities is limited.

Discriminatory intent is increasingly the *sine qua non* of a successful claim. The United States Supreme Court has adopted the view that the injury is found in the intentional deprivation of rights on the basis of race.<sup>13</sup> Thus, the inquiry focuses on the beliefs, actions, and experiences of perpetrators. This effort to ground antidiscrimination protection in the identification of a particular discriminating actor might appear to be rational and noncontroversial in the absence of a competing view. Yet, when we contrast this view—which seminar participants labeled the “discrimination approach”—with what we called the “domination approach,” another equally plausible view is revealed. In the domination model the search for a particular perpetrator is not as important as seeking to remedy the conditions which render the community in question subordinate to whites.<sup>14</sup> Such an approach relies on the reintroduction of historical details and the inclusion of the victims' personal experiences and aspirations which initially gave rise to the case. This domination model values the perspectives of the victims and when those perspectives are introduced, the conclusions drawn from the discrimination model make less sense. Unlike the discrimination approach, the domination model privileges the perspective of the victim. Her views, her experiences and her condition become the focal point of the analysis. Under the domination model, intentionality—which is the determinative factor under the discrimination model—is but an additional insult to an already established injury.<sup>15</sup>

Thus, the doctrinal framing of an issue can determine which perspectives

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13. See *Washington v. Davis*, 426 U.S. 229 (1976) (upholding a police recruitment test, despite the test's disproportionate impact on minority applicants because there was no showing of racially discriminatory intent); *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 265-66 (1977) (unless a party can prove “that a racially discriminatory purpose has been a motivating factor in the decision,” the court will uphold the law).

14. Here I do not mean to argue that there is a causal or determinative relationship between the adoption of the discrimination approach and the devaluing of the victim's perspective. Indeed, it is unclear whether it is the adoption of the discrimination approach that renders irrelevant the perspective of the victim, or whether conversely, the casting of the victim's perspective as race based and therefore biased leads to the adoption of the apparently more neutral discrimination approach. The latter possibility is premised on beliefs in the racial neutrality of the dominant perspective and the subsequent casting of minority perspectives as political. The popular analogue to this is the casting of civil rights as a “special interest.”

15. The difference between the way these two approaches frame the issues and thus, determine the relevance of minority perspectives is best illustrated in the several opinions issued in *City of Mobile v. Bolden*, 446 U.S. 55 (1980). *Mobile* held that an at-large voting system in which no Black had ever been elected violated neither the fourteenth and fifteenth amendments, nor the 1965 Voting Rights Act.

Justice Stewart in his plurality opinion wrote, “[The plaintiffs introduced] mechanics of the at-large electoral system itself as proof that the votes of Negroes were being invidiously canceled out. But those features of that electoral system, . . . are far from proof that the at-large electoral scheme represents purposeful discrimination against Negro voters.” *Id.* at 74. Justice Marshall, in dissent, charged, “The plurality's requirement of proof of *intentional discrimination*, so inappropriate in today's cases, may represent an attempt to bury the legitimate concerns of the minority beneath the soil of a doctrine almost as impermeable as it is specious.” *Id.* at 141 (emphasis in original).

The holding with respect to the Voting Rights Act was congressionally overruled by the 1982 amendments to the Voting Rights Act, which imposed a “totality of circumstances” test. 42 U.S.C. § 1973(b) (amending 42 U.S.C. § 1973(b) (1965)).

are central and which are irrelevant in legal analysis. Moreover, the reasonableness of a particular legal framework or resolution depends, in turn, on whether the perspective it empowers happens to be a perspective that is familiar to or shared by the analyst. When the analyst shares the perspective that is privileged, the process seems to be reasonable, rational and objective. Because the subjectivity of the perspective that is empowered by the doctrinal framework is rarely perceived, the results that follow from privileging that perspective are seldom regarded as being arbitrary, irrational or biased.

If it is true that the objectivity of legal analysis is grounded in the apparent perspectivelessness of the dominant discourse, then the introduction of competing perspectives can destabilize this apparent objectivity. More importantly, creating space for competing perspectives can loosen the constraints upon those who have been forced to adopt a perspective which is often at odds with their reality. By contrasting alternative points of view with the dominant perspective, the subjectivity of legal analysis is revealed.

As I have argued above, legal analysis—like other modes of analysis—is grounded in a perspective. Since perspectives are informed in part by experiential characteristics such as race, then race often does figure into legal analysis. It is not necessary that race be explicitly referred to in order to be salient. Formal neutrality that is often mistaken for objectivity merely masks the particular characteristics of the empowered perspective; it does not erase them. For minorities, and particularly for minority students, the myth of perspectivelessness is often analytically and emotionally disempowering. When such a significant part of their consciousness and life experiences is forced outside the discourses they are left to ground their analyses on unfamiliar and alienating turf. The law school experiences of minorities parallels their experiences before courts as often they must subordinate their interests in alleviating the actual circumstances of racial domination to an endless search for a “smoking rope.”<sup>16</sup>

Students as well as other minority thinkers should be encouraged to include their personal, experiential knowledge in legal analysis. The personal is especially important in engaging in the normative debate within civil rights law, and in the debate over the role of law in general. Consequently, as a teacher I believe that my role is to open up possibilities for students to reconnect with their personal, experiential knowledge and to develop a critique that reflects rather than conflicts with their experiences and characteristics.

#### THE CONSTRUCTION OF A CRITICAL AND COLLECTIVE PEDAGOGY

In developing this seminar, I consciously attempted to create an atmosphere in which students were not objectified, subjectified, or alienated and where significant reserves of knowledge were not left untapped. To a certain extent the structure of the class (small seminar), its make-up (all-minority), and my identity (African-American female) constituted such a significant departure from the standard fare that the experience probably would have been distinct without any conscious effort. Yet, as I have discussed above, much of the silencing that is experienced in larger classrooms is not simply a matter of

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16. UCLA Law Professor Henry W. McGee, Jr. coined this phrase, an allusion to the “smoking gun” metaphor and the historic tyranny of “lynch law.”

the constitution of the class, but of the nature and norms of the classroom discourse. My aim was to alter those norms, to broaden the notion of what insight is relevant, and to empower students to feel as comfortable standing within their own consciousness as their classmates who are unburdened with the knowledge that theirs is not the universal view. It was important that minority students were not the objects of an already engaged discourse, but rather subjects in their own discourse.

Consequently, my objective was to create the conditions for students to participate in the construction of a dialogue that was, to a certain extent, theirs. To claim ownership of the dialogue meant that they would have to carry responsibility for the classroom discussions; for a few, it required that they unlearn patterns of disengagement and alienation. As the instructor, I had to unlearn conventional ways of presenting material and conducting classes as though the ultimate voice of authority comes from behind the podium. To accomplish these objectives I felt it necessary to embrace both critical and constructive methodologies; we would practice critical analysis and collective production.

In order to empower students to critique the texts in their own voices, it was important to develop a means of discussing judicial opinions in ways that met the logic of the decisions and that were responsive to the arguments and views expressed therein. The objective was to learn how to analyze an opinion that carries the air of authority but which may nevertheless deny a reality that its readers feel they know. Traditionally, too many students are rendered silent because they cannot respond directly to the premises and rhetorical mechanics of judicial opinions. To hone this skill, we read and criticized several texts representing views with which the majority of the students disagreed. They were asked to identify the implicit premises of the arguments and to discuss both the descriptive and normative views that informed the pieces. Through this process their arguments became more complex. More importantly, the relevance of their perspective was not only affirmed, but given a role in their descriptive or normative analyses. Thus, the simplistic phrase "I think this is wrong," was replaced with specific arguments ranging from empirically- or experientially-based critiques of the accuracy of the claims being made, to criticism of the normative world view implicitly or explicitly adopted by the texts. While normative questions often drew heated and passionate discussions, I believe that all the participants left with a sense that positions were clarified, and that alternative possibilities had been seriously debated, rather than presumed or overlooked.

The class was organized to encourage collective production and support.<sup>17</sup> As members of a collective, students were jointly responsible for the success of the seminar, and would determine whether or not the time was well spent. Students were responsible for conducting their own segment of the

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17. Several students identified this concept as "Ujima," a Swahili word adopted by Dr. Maulana Karenga as one of the seven principles of African-American unity. Ujima represents the principal of collective work and group responsibility. M. KARENGA, *KAWAIDA THEORY: AN INTRODUCTORY OUTLINE* 45 (1980). Collective inquiry has been central in the development of legal strategies to address discrimination and segregation. For a discussion of how the team which argued the landmark civil rights cases worked closed with faculty and students at Howard Law School see R. KLUGER, *SIMPLE JUSTICE* (1976); G. MCNEIL, *GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS* (1983).

seminar, which included producing the reading material and preparing an oral presentation. Additionally, each participant gave written feed-back to each presenter, including a critique of the presentation, the readings, and the overall project. Each student was also encouraged to consider the connections between the presentations and her own work in order to take advantage of the opportunity for cross-germination and mutual support.

A second objective pursued through the organization of the class was to create an environment which was most conducive to producing publishable work. Many students complete their formal legal education without having produced a substantive piece of written work. Fewer still have produced publishable work. Given some of the problems identified above, I assumed that minority students were unlikely to be inspired to engage in legal scholarship. My approach in creating such opportunities was premised upon an assumption that students would write if they were confident and if they found a topic and a voice with which they felt comfortable.

My effort to maximize the opportunity for the students to produce a written piece began with encouraging them to submit topic ideas by the second class. After reviewing them I made suggestions, and asked for a revised topic summary due two weeks later. At the fourth week, bibliographies were due, and after the sixth week, detailed outlines were expected. After the end of six weeks, classes were suspended for three weeks during which I met individually with the students each week as they conducted their research and wrote first drafts. When classes reconvened in the ninth week, the participants began conducting the seminar and the feed-back process began. Papers were received during the fourteenth week of the semester.

The collective and critical nature of the project did not lead students to adopt a uniform position on the political and normative issues discussed, nor were they led to adopt a uniform analytical approach. To the contrary, as the Comments which follow illustrate, the seminar produced a multiplicity of approaches to thinking and writing about voting rights issues within the larger context of race, racism, and democratic domination. While some students see value in fine-tuning dominant approaches that define and protect voting rights, others conclude that it would be better to jettison traditional strategies altogether and to adopt other methods to assure political participation of people of color. Moreover, while some adopt a conventional view of the standard by which antidiscrimination opinions should be evaluated, others adopt normative positions outside conventional expectations.

The Comments that follow do not reflect an agreement on all issues relating to voting rights and to antidiscrimination law. They do, however, represent the commitment of each student to think and write about a serious community issue, and to contribute to the production of a collective effort to produce a timely and interesting volume of legal scholarship.. I enthusiastically applaud their efforts, and I commend the seminar participants and the NATIONAL BLACK LAW JOURNAL for seeing the project through to completion.