

# ARTICLES

## PAINT BY NUMBER? HOW THE RACE AND GENDER OF LAW SCHOOL FACULTY AFFECT THE FIRST-YEAR CURRICULUM

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## ABSTRACT

While there is a relatively standard first-year curriculum at all ABA-accredited law schools in the U.S., no two classrooms are identical. This article examines how the race and gender of law school faculty affect both *what* is taught in the first year and *how* that material is taught. Using focus group data from a national, longitudinal, multi-method study of American law schools, this article reveals that faculty of color and female faculty are more likely to engage in “diversity discussions” – discussions involving race and gender – than their white male counterparts. While many students appreciate these discussions and mention numerous ways in which these conversations enhance their legal education, some prefer their exclusion. Additionally, a few professors are so insensitive to diversity issues that they may be creating a hostile learning environment for some students. The Conclusion offers implications and policy suggestions to improve learning outcomes for students, retention rates for both students and faculty, and faculty diversity generally.

## INTRODUCTION

While students have varying experiences in their first year of law school, the majority who attend American Bar Association (ABA)-accredited law schools have a relatively standard first-year curriculum. For example, most schools require first-year law students to enroll in Torts, Criminal Law, Contracts, Property, and Civil Procedure.<sup>1</sup> While these five subjects are considered standard first-year requirements, some schools also allow or require Constitutional Law and still others allow students to choose an elective.<sup>2</sup> At schools where the same five standard classes are taught, one wonders whether students are learning the same material. Many of these classes cover particular landmark cases to illustrate fundamental concepts in each substantive area. Even within one law school, where subject materials and case books may be standard, there is a question of whether students extract the same lessons from identical cases. Racial and gender prisms can color a student’s educational experience and consequently affect the lessons a student extracts from a particular case or set of facts. Life experiences and salient background

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1. See, e.g., Celestial S.D. Cassman and Lisa R. Pruitt, *A Kinder, Gentler Law School? Race, Ethnicity, Gender, and Legal Education at King Hall*, 38 U.C. DAVIS L. REV. 1209, at 1229 (2005).

2. Rachel F. Moran, *Diversity and its Discontents: The End of Affirmative Action at Boalt Hall*, 88 CAL. L. REV. 2241 (2000); Jonathan L. Entin, *Symposium on the Relation Between Scholarship and Teaching: Scholarship About Teaching*, 73 CHI.-KENT L. REV. 847 (1998); Kim Forde-Mazrui, *Learning Law Through the Lens of Race*, 21(2) J. L. & POL. 1 (2005).

characteristics may also influence how particular faculty members teach certain classes or cases.

This article investigates how the race and gender of law school professors may affect their teaching of first-year material. Specifically, the article inquires whether law school courses adhere to a “paint-by-number” formula, where faculty follow a rigidly prescribed curriculum, or whether professors employ greater independence and flexibility by drawing on their own background and experiences. The specific inquiry is whether one method results in more vibrant discussions and inclusion of a broader context within which to understand the law. The article refers to discussions that address issues of race and gender as “diversity discussions,” and asks whether and how these discussions are included in the classroom, examining the character and quality of those discussions when they occur.

Gender and race are not the only defining characteristics of diversity. Diversity can refer to a number of social, political, and cultural variations in individuals/groups, including those related to class, national origin, sexual orientation, geographic region, political affiliation, religion, ability/disability and age.<sup>3</sup> Encompassed within the notion of diversity is the broad understanding that all types of background experiences (from playing the tuba to living in a small, rural town) bring different perspectives and added complexity to human diversity.<sup>4</sup> However, some dimensions of diversity, such as race and gender, have a distinct, significant and foundational role in shaping experiences in the U.S.<sup>5</sup> For example, the structured inequalities premised on racist and sexist ideology have continued significance today as expressed through subtleties in the language of the law<sup>6</sup> or more vulgar so-

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3. WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER* (1998); GARY ORFIELD & MICHAEL KURLAENDER, *DIVERSITY CHALLENGED: EVIDENCE ON THE IMPACT OF AFFIRMATIVE ACTION* (2001).

4. *Id.*

5. For a discussion on the salience of race in American life, see Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993) (examining how race distributes power and property in America); See also MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960s TO THE 1990s* 56-79 (2d ed.) (1994) (presenting a theory of racial formation, which advances that race is “linked. . . to the evolution of hegemony” and that “the major institutions and social relationships of U.S. society – law, political organization, economic relationships, religion, cultural life, residential patterns etc. – have been structured from the beginning by the racial order”). See also Catharine A. MacKinnon, *Reflections on Sex Equality under Law*, 100 YALE L.J. 1281, at 1281 (1991) (considering the unique role of gender include stating, “No woman had a voice in the design of the legal institutions that rule the social order under which women, as well as men, live. Nor was the condition of women taken into account or the interest of women as a sex represented”).

6. This refers to language and ideology in legal doctrine, which presumes to be neutral, for example “man,” now “person” in some cases, as referring to white and male. See Shirley Sagawa, *A Hard case for Feminists: People v Geotz*, 10 HARV.

cial phenomena exhibited in the glass ceilings of workplaces and the socioeconomic disparities between whites and our nation's people of color. As such, while the article appreciates dimensionality of diversity, the focus on race and gender is a purposeful recognition of how other dimensions of diversity (various background experiences as well as aspects such as class, religion, and nationality) are often expressed through their intersections with and between race and gender.<sup>7</sup> Therefore, given that race and gender issues have been at the forefront of the diversity debate, the scope is largely limited to those issues.<sup>8</sup>

Some limitations in this research study also suggest topics for future research. Data for this study refer to all classes that research subjects attended in the first year of law school; during that time, most students are exposed to at least 10 professors and 10 courses which meet at least weekly for 16 weeks per semester. Thus, each student attended well over a thousand classes and may have observed multiple discussions in every one; each of these conversations serves as a data point during which students could experience and report on diversity discussions. Still, the sample size of 164 students at eight schools limits the ability to make sweeping generalizations about all law students in the U.S.<sup>9</sup>

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WOMEN'S L.J. 253 (1987); *See also* MacKinnon, *supra* note 5, at 1282-1283 (the only reason for counting both white women and Black women was "to divide power among white men, who kept the vote, that primitive exercise of citizenship, to themselves," thus the author notes the exclusiveness of "we the people"). For more discussion on the problem of colorblind jurisprudence, see Kimberle Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988).

7. See Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991) (The intersectional relationship of gender and race, as well as sometimes class and citizenship, marginalizes women of color from feminist and antidiscrimination movements); Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (1989); EVELYN NAKANO GLENN, *UNEQUAL FREEDOM: HOW RACE AND GENDER SHAPED AMERICAN CITIZENSHIP AND LABOR* (2002); PATRICIA HILL COLLINS, *BLACK FEMINIST THEORY: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT* (2000).

8. ORFIELD & KURLAENDER, *supra* note 3.

9. Future work can expand on this initial offering by collecting qualitative data not only from a greater number of students, but also from faculty members. Additional research drawing on data from law school professors could supplement what we have learned through the student viewpoint to present a multidimensional picture of the first-year curriculum. Future research may also include historically Black law schools to see if the context of the institution (i.e., a historical mission of providing access to the Black community) has any bearing on the first-year curriculum and the race and gender of faculty. This is worth investigating given that the historical legacy of exclusion of students of color at primarily white institutions may continue to determine the institutional climate and influence current practices that lead to their marginalization. See Sylvia Hurtado, Jeffrey F. Milem, Alma R. Clayton-Pedersen, & Walter R. Allen, *Enacting Diverse Learning Environments: Improving the Climate for Racial/Ethnic Diversity in Higher Education*, in 26 ASHE-ERIC HIGHER EDUC. REP. SERIES 8 (1999).

This study does not propose one objective perspective on the first year law school curriculum. Instead, the article presents the student voices that highlight the high points and challenges they face during their first year, especially with regard to classroom conversations.

In addition, for purposes of confidentiality, the research does not include specifications about individual schools or particular regions of the country.<sup>10</sup> With respect to variance among faculty members, existing data indicate that newer and younger faculty members, not just Assistant or Associate Professors, but even Full Professors who are relatively new to their position and/or at the younger end of the age spectrum, may be more adept at facilitating diversity discussions in their classrooms than those who have held their positions longer and/or are older. This may be because newer and younger faculty members themselves are the products of increasingly multicultural educational institutions, a consequence that may have made these professors more able to navigate issues of diversity and interact with students from diverse backgrounds.<sup>11</sup> In other words, contemporary experiences with diversity both within and outside of academia may have instilled in these newer and younger law professors the requisite skills to engage diversity issues in the classroom.<sup>12</sup> Future research can further investigate these observations.

Moreover, this study focuses exclusively on student perspectives because the focus is on student learning.<sup>13</sup> Since faculty of color and female faculty may be more likely to teach lower-status courses, including some first-year classes, there may be even fewer of these individuals available to teach upper-division core courses and certain electives.<sup>14</sup> Thus, students may have access

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10. For example, because there is a paucity of Black female faculty and only a handful of them teach each course, we are unable to identify findings as specific to particular regions or particular schools – i.e., a student speaking about her Black female Torts professor at School X in Region Y – because readers could potentially determine the subject of the quote. Perhaps with a larger sample size or by including more schools within a region (i.e., a study that included all of the law schools in the New York City region), this could be possible.

11. BOWEN & BOK, *supra* note 3.

12. Future research could also consider how the age of law school professors affects teaching style, methods, and inclusion of diversity discussions.

13. While there is currently insufficient data from the law school professor's viewpoint to elaborate on the points made here, additional studies using law faculty as research subjects would only add to this discussion. In addition to the ways in which their voice may supplement this study, information regarding the age of faculty members could be useful; it would also be interesting to determine the proportion of faculty of color and female faculty who teach first-year coursework as opposed to classes taught to second- and third-year students.

14. While some core courses, such as Constitutional Law, are high-prestige courses, most are low-status and more likely to be taught therefore by faculty members with lower status than their peers – i.e., Assistant Professors, male professors of color, female professors. See, e.g., Marjorie E. Kornhauser, *Rooms Of Their Own:*

to even fewer professors of color and female professors as they continue along their law school careers. In short, the minimal level of faculty diversity that students experience in the first year and the potential resultant consequences could worsen for students later in law school.

Part I of this article situates the overarching themes regarding diversity discussions within the existing reality of faculty teaching first-year courses. Notably, some studies discuss diversity in more general terms, such as discrimination on college campuses<sup>15</sup> and broad challenges facing students of color in predominantly white institutions.<sup>16</sup> Other studies on undergraduate experiences reveal the race of a faculty member impacts classroom curriculum. Specifically, some research suggests Black professors may be more likely than their white and Asian American counterparts to include reading materials focused on race and gender as a part of their curricula.<sup>17</sup> This research takes a slightly different approach in that it asks whether there are any appreciable differences between the manner that professors of color, female professors, and white male professors teach first-year law school courses.

Part II of the Article sets forth three main conclusions. In addition, it provides details regarding the underlying data and methodology. This section also includes a broad overview of the results of data analysis which are covered more specifically in the following sections.

Part III presents the data that reveal patterns indicating a correlation between faculty race and gender and the likelihood of engaging in diversity discussions in class. This section of the Article first examines white male engagement with diversity discussions and then moves on to consider how faculty of color and

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*An Empirical Study Of Occupational Segregation By Gender Among Law Professors*, 73 UMKC L. REV. 293, at 305, 313-14 (2004) (stating "generally, female law professors disproportionately teach courses that can be described as more 'feminine,' softer, less hard core, and-often perceived as less prestigious").

15. Joe R. Feagin & Melvin P. Sikes, *Seeking a Good Education*, in *LIVING WITH RACISM* (1994); JOE R. FEAGIN, HERNAN VERA, & NIKITAH IMANI, *THE AGONY OF EDUCATION: BLACK STUDENTS AT WHITE COLLEGES AND UNIVERSITIES* (1996).

16. FELIX M. PADILLA, *THE STRUGGLE OF LATINO/A UNIVERSITY STUDENTS: IN SEARCH OF A LIBERATING EDUCATION* (1997); ALEXANDER JUN, *FROM HERE TO UNIVERSITY: ACCESS, MOBILITY, AND RESILIENCE AMONG URBAN LATINO YOUTH* (2001); RUTH SIDEL, *BATTLING BIAS: THE STRUGGLE FOR IDENTITY AND COMMUNITY ON COLLEGE CAMPUSES* (1994).

17. Jeffrey F. Milem, *The Importance of Faculty Diversity to Student Learning and to the Mission of Higher Education*, 21 (3) *THE REV. OF HIGHER EDUC.* 279 (1998); Jeffrey F. Milem, *Increasing Diversity Benefits: How Campus Climate and Teaching Methods Affect Student Outcomes*, in *DIVERSITY CHALLENGED: EVIDENCE ON THE IMPACT OF AFFIRMATIVE ACTION* (Gary Orfield & Michael Kurlaender eds., 2001).

female faculty facilitate these conversations in the classroom. It also narrates some student responses to these varying approaches to law instruction.

Part IV presents what may be outlier data, information that was gathered during data collection but not necessarily reflecting widespread challenges or occurrences. Nevertheless, it is included here as a part of the dialogue on diversity discussions generally. First, this section considers how and why some law school faculty and students are sanctioned for engaging in diversity discussions; next are a few “horror stories” of situations that may create a hostile environment for some law students.

The Article concludes that a meaningful presence of faculty of color, female faculty, and students of color in the classroom is critical not only for students who find diversity discussions personally significant, but also for every student who wishes to understand how the law develops in a society that is becoming progressively multicultural.

#### I. EXISTING DATA SUGGEST APPRECIABLE DIFFERENCES BETWEEN LAW SCHOOL PROFESSORS’ TEACHING METHODS

Because statistical data indicate that the majority of professors at ABA-accredited law schools are white men, this research may be especially useful in understanding if and how female faculty and faculty of color bring rare but unique benefits to the classroom.<sup>18</sup> For example, faculty members who are committed to diversity and who take the time and effort to teach their students about related issues are vital to creating diverse learning environments.<sup>19</sup> Without these individuals, conversations about race, gender, sexual orientation, and other diversity topics would rarely come up. Since the *Grutter* case, it has been recognized that “the educational benefits that flow from a diverse student body”<sup>20</sup> are a compelling interest, not only by virtue of students sitting next to one another in the classroom, but through various types of interaction, including classroom discussions.<sup>21</sup>

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18. In other words, the majority of students learn from white male faculty; if these individuals do not include diversity discussions in their classrooms then the majority of students are missing these conversations. By focusing on female faculty and faculty of color, individuals who do tend to include diversity discussions which benefit students, we can learn how these issues are discussed and perhaps apply these lessons to other classes as well.

19. Hurtado et al., *supra* note 9.

20. *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).

21. The term “diversity” can mean many things. In this instance we draw on three interrelated concepts of diversity: structural diversity – numerical representation of individuals with diverse backgrounds (*see* Hurtado et al., *supra* note 9); interactional diversity – the frequency and quality of interaction with diverse peers; and

Each year, the Association of American Law Schools (AALS) creates a Statistical Report on Law School Faculty (“the Report” or “the AALS study”).<sup>22</sup> The Report indicates that most students have almost exclusively white male professors during the first year, with a few females and perhaps one professor of color. According to the Report covering the 2004-05 academic year, the period of time during which data collection for this article took place, 17.5% of all ranks of legal academia were occupied by faculty of color and 31% of law professors of varying rank were female.<sup>23</sup>

Table 1 provides the relevant statistical composition of female faculty and faculty of color relevant to the analyses and conclusions of this study. The AALS study includes information regarding 4,304 individuals at the Full Professor rank for whom ethnic identifying characteristics are available. Of these, 3,198 (74%) are men and 1,106 (26%) are women. Among the Full Professor rank are very limited numbers of faculty of color. Indeed, only 0.6% are Native American, 2% are Asian American, 6.5% are Black, 3.2% are Hispanic, and 1.1% are Other Minority. In addition, 21% (906 individuals out of a total of 4304 faculty) are white women and a full two-thirds or 66% of American law school professors (2825 individuals out of a total of 4304 faculty) are white men.

Some argue that the overrepresentation of white males in legal academia represents a “pipeline problem”: historically as well as currently, there have been relatively few women and people of color joining the legal profession, producing even fewer eligible and qualified candidates prepared to enter the legal

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classroom diversity – “learning about diverse people (content knowledge) and gaining experience with diverse peers in the classroom.” See Patricia Gurin, Eric L. Dey, Sylvia Hurtado & Gerald Gurin, *Diversity and Higher Education: Theory and Impact on Educational Outcomes*, 72(3) HARV. EDUC. REV. 333 (2002). Gurin et al. examine the effects of formal classroom diversity and informal interactional diversity experiences on 1) learning outcomes (i.e., active thinking, intellectual engagement and motivation, and academic skills) and 2) democracy outcomes (i.e., citizen engagement, compatibility of difference, racial/cultural engagement, perspective taking); finding that the two diversity experiences significantly related to both types of outcomes for students of color and white students, Gurin et al.’s research supports the notion that the diversity of a campus operates through students’ experiences. As such, the authors argue for structural diversity and using it as a resource for structuring student engagement in higher education. See also Uma Madure Jayakumar, *Can Higher Education Meet the Needs of an Increasingly Diverse and Global Society? Campus Diversity and Cross-Cultural Workforce Competencies*, 78(4) HARV. EDUC. REV. 615 (2008); Maureen T. Hallinan, *Diversity Effects on Student Outcomes: Social Science Evidence*, 59 OHIO ST. L.J. 733 (1998).

22. ASSOCIATION OF AMERICAN LAW SCHOOLS (AALS), STATISTICAL REPORT ON LAW SCHOOL FACULTY (2005), available at [http://www.aals.org/re-sources\\_statistical.php](http://www.aals.org/re-sources_statistical.php) and on file with the first author.

23. See Table 1.

academy.<sup>24</sup> Yet, the shortage of women faculty and faculty of color at the law school level, as compared to the high percentages of white male faculty, does not appear to be due to a lack of qualified candidates in the pool or any personal constraints that hamper these individuals' success on the academic job market.<sup>25</sup> While there are more faculty of color and female faculty now than ever before, annual statistics indicate slow progress. Those at the Associate Professor rank, who are generally younger, more recent law school graduates than those who are Full Professors, are still overwhelmingly white (71%) and the majority are male (55%), with a full 40% of Associate Professors being white males. The data indicate some improvement along racial and ethnic lines, with 5% of all Associate Professors being Asian American, 15% Black, and 5.5% Hispanic. Yet, people of color are not better represented at the Assistant Professor level, which generally consists of the youngest and most recent law school graduates among tenure-track professors of all ranks; only 6% are Asian American, 12% are Black, and 6% are Hispanic. A full 72% of all of the most recent hires in legal academia are white and 54% are men; white male Assistant Professors make up 40% of the total.

TABLE 1. RACE/ETHNICITY OF PROFESSORS  
BY RANK AND GENDER

| Rank                |     | Total<br>N | Native American |     | Asian American |     | Black |      | Hispanic |     | Other Minority |     | White |      |
|---------------------|-----|------------|-----------------|-----|----------------|-----|-------|------|----------|-----|----------------|-----|-------|------|
|                     |     |            | n               | %   | n              | %   | n     | %    | n        | %   | n              | %   | n     | %    |
| Full Professor      | F   | 1106       | 7               | 0.6 | 24             | 2.2 | 122   | 11.0 | 41       | 3.7 | 6              | 0.5 | 906   | 81.9 |
|                     | M   | 3198       | 17              | 0.5 | 63             | 2.0 | 156   | 4.9  | 95       | 3.0 | 42             | 1.3 | 2825  | 88.3 |
|                     | ALL | 4304       | 24              | 0.6 | 87             | 2.0 | 278   | 6.5  | 136      | 3.2 | 48             | 1.1 | 3731  | 86.7 |
| Associate Professor | F   | 463        | 6               | 1.3 | 14             | 3.0 | 85    | 18.4 | 27       | 5.8 | 13             | 2.8 | 318   | 68.7 |
|                     | M   | 560        | 10              | 1.8 | 35             | 6.3 | 68    | 12.1 | 29       | 5.2 | 14             | 2.5 | 404   | 72.1 |
|                     | ALL | 1023       | 16              | 1.6 | 49             | 4.8 | 153   | 15.0 | 56       | 5.5 | 27             | 2.6 | 722   | 70.6 |
| Assistant Professor | F   | 251        | 1               | 0.4 | 15             | 6.0 | 43    | 17.1 | 12       | 4.8 | 8              | 3.2 | 172   | 68.5 |
|                     | M   | 298        | 4               | 1.3 | 18             | 6.0 | 25    | 8.4  | 21       | 7.0 | 8              | 2.7 | 222   | 74.5 |
|                     | ALL | 549        | 5               | 0.9 | 33             | 6.0 | 68    | 12.4 | 33       | 6.0 | 16             | 2.9 | 394   | 71.8 |

A lack of faculty diversity, as measured by low percentages of female faculty and faculty of color, connects to challenges facing particular students as well. A growing number of studies doc-

24. See, e.g., Andrew Buck & Andrew Canter, *Supply, Demand and the Changing Economics of Large Law Firms*, 60 STAN. L. REV. 2087, 2104 (2008).

25. See, e.g., Deborah J. Merritt & Barbara F. Reskin *The Double Minority: Empirical Evidence Of A Double Standard In Law School Hiring Of Minority Women*, 65 S. CAL. L. REV. 2299, 2356-57 (1992) ("Minority women suffer a pervasive disadvantage in the job market that cannot be explained by differences in their credentials or personal constraints").

ument the persistence of hostile law school campus climates for students of color and female students.<sup>26</sup> This lack of diversity among the faculty may exacerbate the already challenging campus climate, especially for female students and students of color. There are few role models and few professors with whom students of color and female students can personally relate, factors that may contribute to feelings of discomfort for many and intimidation for some.<sup>27</sup>

Some of this study's findings confirm and extend results from a case study by Moran (2000) of one particular law school that examined issues of campus climate, faculty diversity, curriculum, and student interactions.<sup>28</sup> That research found that "[t]he absence of women of color in the student body and on the faculty created conditions of isolation" for some students, especially students of color and women.<sup>29</sup> In addition, Moran (2000) found both that the law school curriculum as a whole "largely ignored" discussions regarding race and gender, and that those who made efforts to include these topics were often informally sanctioned.<sup>30</sup> Moreover, students who initiated or engaged in diversity discussions tended to be labeled as "activists" as opposed to "intellectuals" (with their accusers mistakenly assuming that these terms are mutually exclusive), while female professors who included issues of gender were sometimes accused of turning their law school classes into Women's Studies classes.<sup>31</sup>

This article refers to conversations that touch on issues of race or gender as "diversity discussions." These conversations, which may be sensitive for many law students as well as faculty, could naturally arise in any number of classroom conversations, especially those that concern the "reasonable person," the death

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26. Walter R. Allen & Daniel Solórzano, *Affirmative Action, Educational Equity, and Campus Racial Climate: A Case Study of the University of Michigan Law School*, 12 LA RAZA L.J. 237 (2001); LANI GUINIER, MICHELLE FINE, & JANE BALIN, *BECOMING GENTLEMEN: WOMEN, LAW SCHOOL, AND INSTITUTIONAL CHANGE* (1997); CYNTHIA FUCHS EPSTEIN, *WOMEN IN LAW* (1983); Portia Y.T. Hamlar, *Minority Tokenism in American Law Schools*, 26 HOW. L.J. 443 (1983); Nancy E. Dowd, Kenneth Nunn & Jane Pendergrast, *Diversity Matters: Race, Gender, and Ethnicity in Legal Education*, 15 FLA. J. L. & PUB. POL'Y 11 (2003); Janet Taber, *Gender, Legal Education, and the Legal Profession*, 40 STAN. L. REV. 1209 (1998); Cassman & Pruitt, *supra* note 1; JAMES EDWARD BLACKWELL, *MAINSTREAMING OUTSIDERS: THE PRODUCTION OF BLACK PROFESSIONALS* (1987); Carole J. Buckner, *Realizing Grutter v. Bollinger's 'Compelling Educational Benefits of Diversity' - Transforming Aspirational Rhetoric into Experience*, 72 UMKC L. REV. 877 (2004).

27. Morrison Torres, Jennifer Ries & Elaine Spiliopoulos, *What Every First-Year Female Law Student Should Know*, 7 COLUM. J. GENDER & L. 267 (1998).

28. Moran, *supra* note 2.

29. *Id.* at 2269.

30. *Id.*

31. *Id.* at 2268-69; 2287.

penalty, rape, and civil rights. In fact, many of the most marginalized students – students of color and women – find these topics especially relevant to their own lives.<sup>32</sup> Thus, when professors ignore these subjects, gloss over them, or discredit discussions in these areas, professors may make law school that much more removed from the lived realities of students of color and women students. The idea of racial exceptionalism, whereby being “objective” means being “race-neutral” or “color-blind,”<sup>33</sup> may further alienate students of color and female students from the learning process because many of these students see these issues as central to their own lives rather than excessively race- or gender-focused. As a consequence, an exclusion of diversity issues in discussions can create acute tensions for students of color and women students: inappropriate inclusion of diversity issues may lead to essentialist expectations, while exclusion of diversity issues may mean that pertinent background and life experiences are disregarded in the classroom.<sup>34</sup>

## II. DIVERSITY DISCUSSIONS: AN OVERVIEW OF CONCLUSIONS, DATA, METHODS AND RESULTS

This article focuses on three conclusions regarding the ways in which the race and gender of faculty members affect diversity discussions in the classroom. While these are drawn directly from the data discussed below, the hypotheses originate in numerous earlier studies regarding the intersection of race, gender, legal academia, and diversity generally.

First, the Article suggests that many white male faculty typically are reluctant to approach diversity discussions in the classroom. One legal scholar noted recently that “some law faculty members . . . avoid addressing certain topics in class” based on a misconception of the need for “political correctness” over inclusion of important conversations relevant to the law; the result is

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32. *Id.* at 2283, 2285 (students of color who believe their perspectives should be included in classroom discussions see themselves in an uphill battle and describe being silenced by approaches that ignore discussion of racial discrimination leading to court decisions); see also ELIZABETH J. TISDELL, CTR. ON EDUC. & TRAINING FOR EMP., CREATING INCLUSIVE ADULT LEARNING ENVIRONMENTS: INSIGHTS FROM MULTICULTURAL EDUCATION AND FEMINIST PEDAGOGY, 3 (1995) (describing inclusive learning environments as content and pedagogy that reflects a diversity of student experiences); Mari J. Matsuda, *Looking to the Bottom: Critical Legal Students and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987) (arguing for including the experiences and perspectives of those of the bottom in order to effectively achieve legal justice for people of color).

33. Forde-Mazrui, *supra* note 2.

34. See, e.g., Moran, *supra* note 2, at 2283, 2285.

that these professors “stifle discussions of such topics.”<sup>35</sup> In other words, professors uncomfortable discussing diversity issues may avoid them altogether. While this seems a reasonable assertion, it is one not yet tested to date based on the race or gender of law faculty; this article examines the actions of white male faculty at law schools, from the perspective of the students attending their classes, and concludes that some faculty do avoid these sensitive topics.

The second conclusion is that faculty of color and female faculty make significant efforts to engage the classroom in diversity discussions. There has been some research on this topic at the collegiate level, as well as a few law school studies that suggest this may be true.<sup>36</sup> This article seeks to confirm and expand on those studies with a focus on empirical qualitative data.

Third, women students and students of color may be especially drawn toward diversity discussions because they make the law come alive in a way that is particularly relevant to their own lives and experiences. Female law students and students of color often report that they are alienated from the “content of legal education.”<sup>37</sup> This may be especially true when classroom discussions focus exclusively on “black letter law” to the exclusion of context. As one scholar notes:

When the issues avoided always seem to involve gender, race, or socio-economic class, a subtle message and subtext is conveyed that these voices and forms of diversity lack value. Students who come from the unrecognized race, gender, or socio-economic class will feel less engaged and less able to participate in the conversation. As a result, these students will self-silence from the conversation, which further degrades the learning opportunity in that topic area and denies the benefit of diversity in that context.<sup>38</sup>

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35. Chris Chambers Goodman, *Retaining Diversity in the Classroom: Strategies for Maximizing the Benefits that Flow from a Diverse Student Body*, 35 PEPP. L. REV. 663, 692 (2008).

36. For example, a lengthy study of diversity on eight law school campuses found that students of color participate more frequently in classes taught by professors of color; this may be because faculty of color seek and support their contributions regarding diversity and other life experience. See Elizabeth Mertz, *Inside the Law School Classroom: Toward a New Legal Realist Pedagogy*, 60 VAND. L. REV. 483, 510 (2007). See also Dowd, *supra* note 26, at 111 (maintaining that students of color were more likely to speak in classes with faculty of color); Suzanne E. Eckes, *Diversity In Higher Education: The Consideration Of Race In Hiring University Faculty*, 2005 BYU EDUC. & L.J. 33, 49 (“the presence of minority faculty tends to make students of color feel that they are welcome in the institution.”).

37. See, e.g., Catherine Weiss & Louise Melling, *The Legal Education of Twenty Women*, 40 STAN. L. REV. 1299, 1299 (1988).

38. Goodman, *supra* note 35, at 693.

Research documents that students from all walks of life place great value in law school diversity;<sup>39</sup> our third conclusion narrows the focus specifically to women students and students of color who may see these discussions as particularly relevant to their legal education and their lives, such that excluding these conversations is especially problematic.<sup>40</sup>

### A. *Data & Methodology*

This article utilizes qualitative data analysis to explain first-year law school student experiences with the American law school curriculum. The data come from the Educational Diversity Project (EDP), a collaborative three-year study conducted by researchers at the University of North Carolina and the University of California, Los Angeles, which examines diversity in U.S. law schools through surveys and focus groups. This project first collected over 8,000 surveys from first-year law student respondents attending orientation activities at a clustered sample of accredited American law schools in Fall 2004. Second, researchers conducted focus groups with a sub-sample of over 200 law students at eleven schools in four regions throughout the U.S. during each Spring semester of their law school careers – in 2005, 2006, and 2007.<sup>41</sup> Thus, researchers tracked one group of law students throughout their time in law school, gathering data on occurrences specific to each year (i.e., curriculum in the first year; job search in the second year; career plans in the third year) as well as their observations on law school generally. As indicated in Table 2, participants include both students of color and white students; the sample is 59% female.

In the first year of focus group meetings, the protocol<sup>42</sup> focused heavily on the first-year curriculum, with the majority of questions asking students to characterize discussions around

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39. Meera E. Deo, Walter R. Allen, A.T. Panter, Charles Daye & Linda Wightman, *Struggles & Support: Diversity in U.S. Law Schools*, NAT'L BLACK L. J. (2010).

40. The goal of the article is not to suggest that diversity issues should be of exclusive value to faculty of color/female faculty or students of color/women. Rather, the emphasis is on the correlation between a faculty member's identity and the issues that are discussed in the classroom, and as a consequence what students learn.

41. Spring was selected in order for students to have had enough law school experience to share their perspectives on the year (as opposed to Fall when students would have only a few months worth of time on which to base their opinions).

42. A "protocol" is a guide of set questions to ask research participants as well as suggested prompts or follow ups for elaboration. Facilitators use the protocol as a starting point, with freedom to pursue additional relevant topics and themes at their discretion. This ensures responses to a standard set of questions but also provides the flexibility to include additional data. See, e.g., ROBERT M. EMERSON, CONTEMPORARY FIELD RESEARCH (2001); ROBERT WEISS, LEARNING FROM STRANGERS: THE ART AND METHOD OF QUALITATIVE INTERVIEW STUDIES (1995).

TABLE 2. RACIAL DISTRIBUTION OF FOCUS GROUP SAMPLE

|          | N   | %    |
|----------|-----|------|
| Black    | 56  | 28   |
| Latino   | 16  | 8    |
| Asian/PI | 25  | 12   |
| White    | 102 | 50   |
| Other    | 4   | 2    |
| Total    | 203 | 100% |

cases that have a high potential to result in diversity discussions.<sup>43</sup> In addition to focus group participation, law student subjects also completed a brief pre-focus group survey. Answers to a question on this survey regarding campus climate serve as the basis for Table 3.<sup>44</sup>

This article centers on the focus group data obtained from discussions with students in the Spring of their first year, with an emphasis on the curriculum, cases, and classroom discussions that potentially addressed race and gender issues. This article includes data from 164 individuals at eight law schools. These are generally representative of law schools and law students nationwide, in terms of geographic location, race and gender diversity, faculty diversity, and curriculum. Data from three Historically-Black law schools in the sample have been excluded from the analysis because this article seeks to represent the experiences of the majority of law students, most of whom attend predominantly white institutions.

Focus group sessions were audio taped and professionally transcribed into Word documents.<sup>45</sup> Next, all transcripts were systematically analyzed using ATLAS.ti software. Researchers used ATLAS.ti to code the transcripts according to the following categories:<sup>46</sup>

#### White professors discussing race

43. To determine which cases to include, researchers polled a number of first-year law professors around the country for cases that often yielded interesting discussions of race, gender, and/or sexual orientation. In addition to cases that were specifically about these topics (*see, e.g.,* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (discussing racial equality in education)), researchers also included cases wherein issues of race and/or gender could be brought into the discussion although they were not necessarily directly discussed in the text of the case (*see, e.g.,* *Harper v. Va. Bd. of Elections*, 383 U.S. 663 (1966) (case about poll taxes)). The focus group protocol is attached as Appendix A.

44. *See infra* Section II.B.

45. These documents were then cleaned: checked for content against the audio files themselves, and reviewed for error.

46. These categories were chosen because the article seeks to measure diversity along gender and racial proxies; organizing the transcripts in this manner helps to test the hypotheses.

White professors discussing gender  
Non-white professors discussing race  
Non-white professors discussing gender  
Male professors discussing race  
Male professors discussing gender  
Female professors discussing race  
Female professors discussing gender

Once all 2005 transcripts were coded according to the above schema, all output was printed and reviewed according to accepted sociological standards using emerging theme analysis, which categorizes data in order to identify broad representative patterns.<sup>47</sup> Thus, the quotes presented in this article are representative of a broader category of students who share similar views on the topic at hand. This article follows accepted and standard sociological practice, coding and categorizing all of the data and selecting particular quotes that most and best represent the whole; no data are excluded from the analysis; no data are preferred. Quotes from actual law students are utilized to give full voice to the law student experience; all names are pseudonyms. In addition, none of the individual law schools are identified to ensure the confidentiality of the student participants as well as the professors they mention.<sup>48</sup>

While the first year of law school may be daunting for many students, studies suggest that students of color and female students face unique challenges navigating what are often unwelcoming campus environments.<sup>49</sup> Our data confirm that law students from different racial or ethnic backgrounds have different perspectives on their racial climate at their law school. Table 3 presents data on students' level of agreement with the statement, "The campus climate at my law school is one that supports diversity."<sup>50</sup> This table includes responses from EDP law student participants attending the same eight predominantly white law schools mentioned above. It was created using SPSS to run cross-tabs evaluating responses to the above statement according to a 5-point scale, with 1 equaling "Strongly Disagree" to 5 equaling "Strongly Agree." As indicated by Table 3, the majority of students from all racial backgrounds believe that their campus is generally supportive of diversity. However, a careful examination reveals some racial variation. For instance, while over 1/3

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47. WEISS, *supra* note 42.

48. *See supra* note 10 for more on confidentiality.

49. *See supra* note 26.

50. While this is primarily a qualitative study, we include this quantitative analysis here to introduce the findings that follow. Just before commencing each focus group session, student participants completed a short survey which sought data regarding their law school experience. Table 3 presents findings from that data in 2004, the same year the focus group data for this article were collected.

(35%) of white students strongly agree that their law school supports diversity, only 16% of Black students do so, as compared to 20% of Asian Pacific Islander students and 31% of Latinos.<sup>51</sup> Support from faculty and other sources may make under-represented and/or marginalized students more comfortable on campus and in the classroom.<sup>52</sup> Perhaps inclusion of diversity discussions as part of their core courses could also play a role.

TABLE 3. RACE &amp; CAMPUS CLIMATE

|          |   | Positive Racial Climate on Campus |           |           |           |                |            |
|----------|---|-----------------------------------|-----------|-----------|-----------|----------------|------------|
|          |   | Strongly Disagree                 | Disagree  | Neither   | Agree     | Strongly Agree | Total      |
| Black    | N | 1                                 | 0         | 4         | 11        | 3              | 19         |
|          | % | <b>5</b>                          | <b>0</b>  | <b>21</b> | <b>58</b> | <b>16</b>      | <b>100</b> |
| Asian/PI | N | 0                                 | 2         | 6         | 8         | 4              | 20         |
|          | % | <b>0</b>                          | <b>10</b> | <b>30</b> | <b>40</b> | <b>20</b>      | <b>100</b> |
| Latina/o | N | 1                                 | 1         | 2         | 5         | 4              | 13         |
|          | % | <b>8</b>                          | <b>8</b>  | <b>15</b> | <b>39</b> | <b>31</b>      | <b>100</b> |
| White    | N | 0                                 | 8         | 11        | 40        | 32             | 91         |
|          | % | <b>0</b>                          | <b>9</b>  | <b>12</b> | <b>44</b> | <b>35</b>      | <b>100</b> |
| Other    | N | 0                                 | 1         | 1         | 2         | 2              | 6          |
|          | % | <b>0</b>                          | <b>17</b> | <b>17</b> | <b>33</b> | <b>33</b>      | <b>100</b> |
| Total N  |   | 2                                 | 12        | 24        | 66        | 45             | 149        |
| Total %  |   | <b>1</b>                          | <b>8</b>  | <b>16</b> | <b>44</b> | <b>30</b>      | <b>100</b> |

### B. Qualitative Findings

Results from qualitative data analyses demonstrate the cases and conversations inherent in the first-year law school curriculum are not standard, but rather vary greatly between classes and faculty members. One similarity among most first-year classrooms is that most faculty utilize the Socratic Method, whereby professors call on students to answer specific questions, rather than a general format of students volunteering answers or discussing viewpoints.<sup>53</sup> This design is not naturally conducive to

51. Note that while our small sample size does not allow us to make sweeping generalizations regarding perceptions of campus climate and diversity, the quantitative findings from this table can be used to frame the qualitative data presented below.

52. See Deo et al., *supra* note 39. For more on the comfort of students of color in classes taught by faculty of color, see *supra* note 36.

53. Other research substantiates this finding regarding the Socratic Method. See, e.g., Susan H. Williams, *Legal Education, Feminist Epistemology, and the Socratic Method*, 45 STAN. L.REV. 1571, 1573-74 (1993); GARY ORFIELD & DEAN WHITLA, DIVERSITY AND LEGAL EDUCATION: STUDENT EXPERIENCES IN LEADING LAW SCHOOLS 160 (1999).

much classroom discussion, let alone sensitive diversity discussions.

Yet, even with this structure in place, classes do not follow a rigid formula – such as in a paint-by-number diagram, where the artist simply adds in the prescribed color to each numbered area. Rather, the considerable leeway afforded professors allows them the opportunity to include colorful discussions of race and other diversity issues – or ignore them altogether. Data reveal a pattern based on race and gender such that female faculty and faculty of color are more likely to engage in these discussions, while white male faculty not only are more likely to disregard the racial/gender context of the law but may even be insensitive to diversity issues, contributing to a more challenging environment for some students of color and female students.

Most of the student respondents indicate course instruction by almost exclusively white male professors during their first year. These findings are consistent with our knowledge about the proportion of white male faculty members at law schools from national data, which indicate that a full 59% (or 3,451 out of 5,876 total) of law school faculty are white men.<sup>54</sup> Out of a total of eight to ten faculty members during the course of the first-year, most students in the sample report that they have perhaps one or two females and at most one person of color, usually an African American, and the rest white male faculty. Thus, the experience of Matt, a white male student, is representative: “I actually have . . . had all white males, except for one [white] female.” Or consider Brittany, a white female student, speaking for herself and another woman in her section in saying, “We’ve had all Anglo white professors.”

If all professors taught their classes in the same way, this finding would be unremarkable with regard to curriculum –though the lack of faculty diversity would nevertheless bring up issues of representativeness and race and gender exclusion from the ranks of legal academe.<sup>55</sup> However, our data indicate that the race and gender of faculty do make a difference in legal pedagogy and that students, regardless of race or gender, tend to prefer the approach most often used by female faculty and faculty of color, who actively involve diversity discussions in their law teaching.<sup>56</sup> As student preferences may affect academic out-

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54. AALS, *supra* note 22.

55. *See, e.g.*, Merritt & Reskin, *supra* note 25.

56. This study confirms research done by other scholars noting that students of color tend to feel more comfortable speaking up in class in courses taught by faculty of color (*see, e.g.*, Mertz, *supra* note 36; Dowd, *supra* note 26; Eckes, *supra* note 36).

comes and legal practice,<sup>57</sup> it is especially important that faculty members recognize the importance of creating an engaging classroom that speaks to students' lived experiences. Specific findings are discussed in detail below. This article follows accepted sociological standards of qualitative research, where the words of the students themselves explain their experiences and serve as findings.

### III. RACE AND GENDER DIFFERENCES AMONG LAW FACULTY AFFECT LEGAL PEDAGOGY

#### A. *White Male Faculty*

Students reveal that law professors approach cases very differently depending on the professor's identity as well as related professional and life experiences. Considering that white males account for 59% of all law faculty,<sup>58</sup> data that speak to this cohort will be our point of departure.

##### 1. *Avoiding Diversity Discussions*

One identifiable trend in the data is that white male professors use a variety of techniques to sidestep diversity discussions. First, the data reveal that white male professors are less likely than professors of color and female professors to include diversity discussions in class, in effect excluding issues of race and gender from the classroom. Harriet, a Black woman with mostly white male professors during her first year (she reports that out of ten first year classes, eight were taught by white males, one by a white female, and one by a Black male), says, "Well, for me, I don't think we really entered in any racial discussions in most of my classes."

As a case study of missed opportunities for inclusion of diversity discussions, the article begins by focusing on teaching approaches to a standard first-year Criminal Law case, *People v. Goetz*.<sup>59</sup> In this case, a white man shot four Black youth who approached him for money on a New York City subway. The white man was exonerated of all charges, save a concealed weapons charge. Many Criminal Law classes use this case as an opportunity to discuss the "reasonable person" standard, examining a number of possibilities for what is "reasonable" and for

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57. Vincent Tinto, *Colleges as Communities: Exploring the Educational Character of Student Persistence*, 68(6) J. OF HIGHER EDUC. (1997); Vincent Tinto, *Stages of Student Departure: Reflections on the Longitudinal Character of Student Leaving*, 59(4) J. OF HIGHER EDUC. 438 (1988).

58. AALS, *supra* note 22.

59. 68 N.Y.2d. 96 (1986).

whom.<sup>60</sup> The facts of the case arguably inject racial tension into the heart of the case, including what would be “reasonable” for any man vs. a white man, and even whether the law should take race into account when deciding what is “reasonable.”<sup>61</sup> The data show that white male professors are often unwilling or unable to effectively facilitate diversity discussions regarding the *Goetz* case. Although the vast majority of research subjects in the sample specifically remember their class covering *People v. Goetz*, one way that white male professors avoid racial discussions regarding the case is to omit it altogether. Kirsten, a Black female student, says, “I don’t even remember [discussing] that case, but I remember hearing about it in the news. I don’t remember us reading it in Crim.”

Another method whereby professors avoid diversity discussions in the classroom is by talking about the case, but ignoring the racial component. While this may seem difficult to do in a case such as *Goetz*, some white male professors do manage to adopt this contrary method for studying it, changing enough of the facts to create a hypothetical example that avoids the more complicated subject of race. For example, a white female student named Jerry reports that her Criminal Law class avoided reading the *Goetz* case itself, though her white male professor instead created a similar hypothetical that completely excluded race. In that scenario, the class discussed whether a “frail woman” would be threatened by “someone” asking her for money. Jerry emphasizes, “race did not ever come up. . . . I thought that was ironic that race never came up.”

Students provide a number of reasons for why they believe their white male professors may exclude diversity discussions from the classroom. Some students believe their professors prefer to circumvent difficult topics to avoid controversial racial and gender discussions. Take, for example, an Asian American student named Justine, who says:

I feel like all the discussions and the opportunities to really talk about race, and class, and gender, sexual orientation, any type of diversity, I think, has really been sort of like this add-on thing that I feel like the administration has just tacked on to other things. It’s not really given its due. In the sense that I don’t think professors really talk about it. I feel like these are the cases that get cut off. Like when we have to cut something from the syllabus, those are the cases. Recently we just got our whole section on rape and sexual assault cut out of our Criminal Law syllabus. Because we didn’t, we don’t have time

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60. Moran, *supra* note 2, at 2289.

61. Moran, *supra* note 2, at 2289-2291; *see also* Sagawa, *supra* note 6 (discussing the “reasonable person” standard for women and minorities).

to go through every case. And it's like, "Okay, well, what are we going to take out? Let's take out that." And the same with [race]. I felt like he [the white male professor] cut out a lot of the cases that talked about race. In Property we never even talked about the fair housing cases. I feel like those are just really incidental to people. It's kind of being like, "Oh well, it's too hard to talk about. Let's just not talk about it," kind of thing.

## 2. *Poor Facilitation of Diversity Discussions*

In addition to faculty who avoid these controversial topics are those who make attempts to mention issues of race or gender, but lack the skills or training to facilitate what are often sensitive discussions. As Mick, a white male student notes, "Sometimes the white professors have tried to bring in those perspectives and maybe haven't done it as effectively and it backfires." A Latina student named Maya recounts such an instance as one of the worst days of her first year of law school:

I feel very strongly about this case [*People v. Goetz*]. That was one of the worst days of my law school experience ever, ever, hands down. I mean there were kids saying, "Oh, it makes perfect sense if you want to kill people because you're scared of Black people." I mean, kids actually [said] that, and the professor kind of just plays it up, "Should this be a legal theory? Should this?" Not even talking about like socially should that be acceptable. A Black woman [student] actually said, "Should I be able to kill white men then because they scare me because they have all the power?" And it was just ridiculous. I think every student of color in that class was up in arms and it was not handled in a way that made us feel like we were being represented, that we were being heard. There was no point made about whether or not experience should interact with the justice system, which was my big complaint with Criminal Law class in general, because we had an entire class where we never talked about race, except for the *Goetz* case. And then we never talked about whether or not it should be involved. Like how we should deal with it in our criminal justice system. And I'm still pretty upset about it.

Karen and Lucy, white females, express equal frustration with a white male professor who focused only on the Law and Economics perspective in Contracts and ignored diversity issues, except for in one instance, which turned out to be a "big disaster":

*Karen*: Well I remember in Contracts we only talked about race once, and it was in the *Williams [v. Walker-Thomas Furniture Co.]*<sup>62</sup> case. And it was kind of a horrible discussion in

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62. 350 F.2d 445 (D.C. Cir. 1965).

my opinion. It was the only time our Contracts class tried to talk about social inequality, and it was a big disaster. The professor was like, "You're wrong." He didn't say that, but it was very clear like what his opinion was. And he thought it was nonsense to talk about the unfairness to a Black woman in a contract.

*Lucy:* That was actually a class where it was all about Law and Economics, and so everything was about the efficiency, and so if you can't hack it in this efficient system, then don't even bother. Then we'll just throw you to the side. I feel like that was a situation where there was a lot of discussion that could have happened, and a lot of discussion happened, but the discussion was all about like, "Well if you have rent to own places in poor neighborhoods, then obviously that is because that is the way that they make money, and so that is how they should be allowed to be."

*Karen:* I was trying really hard to make some social justice arguments in efficiency terms but it was really hard.

*Facilitator:* Why was it hard?

*Karen:* Because I'm not an economist.

### 3. *Placing the Burden on the Students*

A white female student named Marla reveals another tactic, suggesting that some white male professors prefer to avoid bringing up diversity issues with the hope that students will raise them instead:

I definitely got the sense, again the professor, who is white, and male, and not very well-liked, that he was afraid to bring [race] up himself. And I don't know why he was but maybe he thought it wasn't his place to do it. I don't know, but he was definitely avoiding being the one to initiate sort of the . . . race conversation.

Marla's point brings up something that many marginalized students echo: they often bear the burden of raising diversity issues in class, and educating their classmates by representing particular perspectives.<sup>63</sup> Keenan, a Black male student, perhaps summarizes it best:

I specifically have had a [white male] professor tell me and . . . a few other students that there are certain topics that he wants *us* to bring up and these topics in terms of being diversity would be racial issues. I guess from his perspective perhaps [he's] being wary as a faculty member and not wanting to make other students feel uncomfortable or maybe think that

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63. For more on the burden facing students of color who have to educate classmates while pursuing their own education, see, e.g., Feagin et al., *supra* note 15, at 91; SIDEL, *supra* note 16, at 165.

he wants to bring up some issues that they would disagree with on a cultural level. He kind of wanted . . . expected us to bring forth any racial issue that we thought might have been undermined perhaps in the holding or the rationale of a judicial opinion.

This expectation from faculty members adds significant pressure to already marginalized students, requiring them to educate others while trying to get an education themselves. In addition, they are forced to carry the burden of representing their race or gender, rather than simply expressing themselves. This often leads or contributes to campus alienation or even less enthusiasm for learning.<sup>64</sup> For example, Dakota is a transgender male student who often feels the pressure to bring up points during class that the professor would otherwise ignore. Dakota says about one particular instance, “I wanted other people to bring that up. I didn’t want to do double and triple time for other cross-minority type things. I wanted other voices to be in there, and I felt uncomfortable taking that up, but it had to be said.” Similarly, a Black male student named Jake mentions one example from his experience of being one of very few Black male students at his school:

Then I remember, this is like three days ago [in Constitutional Law when we covered affirmative action], and, of course, I get called on, and I’m like, “Sure, yeah. I’m going to be the angry Black guy. That’s what I’m talking about this day.” It’s not like [the white male professor will] call on you, and you say something, and then he’ll move on. He’ll move on and then he’ll come back to your point. So I’m defending my viewpoint the whole day, and I’m like, “Come on, can somebody else join this side here?” But everybody else is like, “Oh, I don’t know.”

Jake then recounts a conversation he had with law school friends outside of class about his forced participation in these classroom discussions:

We were having a discussion the other day, just like six of us. We were talking about, because my classmate asked me after that day in my affirmative action class, and she said, “Do you feel like you’re the spokesperson for your race?” And I said, “You know, technically no, I don’t. But the farther I move along, the more I do because there are fewer Black people around me. So like when you guys ask me a question, you’re making me make a statement for African Americans, you know?”

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64. Allen & Solórzano, *supra* note 26, at 287; Feagin et al., *supra* note 15, at 91; SIDEL, *supra* note 16, at 165.

Much of the pressure on students of color and others appreciating diversity discussions comes from the past experience that if they do not initiate diversity discussions, the issues will likely be excluded altogether. As Bonnie, a white female student, notes, “[M]ost the stuff, if you don’t bring it up yourself or don’t pursue it yourself, it’s not going to get introduced in class.” However, students rarely have an opportunity to share their views during class time, in part because of the structure of classroom discussions.

As mentioned earlier, the Socratic Method used by many faculty members teaching first-year courses is not particularly conducive to classroom discussions generally, let alone diversity discussions which may be more challenging to facilitate since the faculty member controls the unidirectional exchange. Furthermore, many faculty members believe that “diversity is more relevant to some parts of the law school curriculum than to others;” the majority of first-year classes, including “Contracts, Property, Civil Procedure, and others . . . may have little direct relationship to race,” unless the professor specifically injects this perspective.<sup>65</sup> Both Melissa and Lori, white female students, illustrate this point:

*Melissa:* And so the format, the Socratic Method, that has been established and proven for decades, ages and ages, is not given to allowing spontaneity, allowing discourse on different avenues or elements outside of the legal issues. Very often the conversation is isolated down into points ignoring the cultural significance.

*Lori:* I totally agree: the Socratic Method is designed, if anything, to stifle discussion rather than invigorate it in any kind of way.

Even when there is an opening that allows for students to bring up their viewpoints, some white male professors steer the class away from what they see as difficult and subjective topics, just as they avoid bringing up these topics themselves. For instance, when covering *Johnson v. M’Intosh*,<sup>66</sup> a case involving the U.S. government taking Native American land, two white male students named Jason and Henry had different white male professors who tried their best to avoid diversity discussions regarding this case. Jason’s Property class tended to avoid diversity discussions altogether:

I have to say, we in our Property class did not touch upon any sort of like Manifest Destiny, or Native American property rights, or anything like that at all. *At all.* Our professor did

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65. Williams, *supra* note 53; ORFIELD & WHITLA, *supra* note 53.

66. 21 U.S. (8 Wheat.) 543 (1823).

touch on, he tried to sort of say, I think he tried to keep class somewhat neutral in terms of values . . . . But we pretty much steered clear of things like that. Not a whole lot of discussion about that.

Henry's professor found a way to move the class away from diversity discussions even when students initiated them:

Everyone, not everyone, but I'd say that many people were quite outraged over the way the Court was handling Native Americans. The conversation just guided that way, I mean, it initially did. But then our teacher kind of steered it to a different direction of, "This [case] is talking about the concept really of first in time, first in right." That's what he wanted to get out of the case, not any political discussion about Native American rights. I mean, the class wanted to go there. We wanted to go down that route but he, that was not why he chose that case. It was for that particular issue and I'd say it's one of the first cases we had in Property.

The avoidance of diversity discussions often causes marginalized students, who can only do so much to include issues that are pertinent to their lives in class discussions, to become frustrated and exhausted. For example, Lauren, an African American female student, says this about how her white male Constitutional Law professor handled *Plessy v. Ferguson*,<sup>67</sup> *Dred Scott v. Sanford*,<sup>68</sup> and later civil rights cases:

I'm annoyed because the teacher keeps stressing, "This is a case about freedom of association. Black people want to associate with white people, but the white people don't want to associate with the Black people." And it made me so mad! I have to keep reminding him, "This is not freedom of association." At one point I even said, "Look, if you want to be separate, fine. Then let the white people go to the bad schools and let the Black people go to the great schools." I said, "Then will you still want to be separate?" I said, "It's not about being together. It's about equality. That's what it is." And he didn't seem to get that. That makes me mad, and I was going to bring it up [again] today but I decided not to.

#### 4. *Effective Facilitation*

Notably, a number of white male law professors effectively initiate and facilitate diversity discussions in their classes. Students quickly point out that these professors generally possess unique experiences that may make these issues important to them personally, which perhaps lead them to include these discussions in the classroom. For instance, some students mention

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67. 163 U.S. 537 (1896).

68. 60 U.S. (19 How.) 393 (1857).

that their white male professors who in the past had worked at organizations focused on protecting and promoting civil rights and civil liberties seem to be especially adept at navigating diversity discussions in class. Kieran, an Asian American male student, references his white male Civil Procedure professor in this regard:

*Kieran:* Well, in Civ Pro our professor used to head the ACLU. And I think race and diversity issues are very close to his heart or whatever. So he talked about cases that he litigated on behalf of this minority in a civil rights case. We talked about poor people and how hard it is to take away their welfare without proper Due Process and he got into that.

*Facilitator:* How did the class respond?

*Kieran:* Oh, I think we liked it a lot. He's very prestigious in the civil rights legal world and it was, Civ Pro is just so, sometimes so dry and unapproachable [so] any kind of personalization of experience is really helpful. Yeah, and I could tell that he fostered a good atmosphere for diversity in the classroom.

Similarly, a white woman named Leah recounts her experience as a student in a white male professor's Criminal Law class when they covered *Goetz*:

But when he brought it up, he presented the case, and then he discussed the issue of race. He asked for some comment, some discussion. It was one of the most interactive classes that we actually had in that class. But he is also a scholar of Native American land rights. So he is, even though he's an older white male, he's still very much focused on kind of a different aspect, not mainstream. So, for him, race was always something he was interested in bringing up.

In addition, the personal identity of some white men may be a factor in their interest in bringing up diversity issues. For instance, students occasionally mention that their gay white male professors may be more effective at facilitating these sensitive discussions than other white male professors. For instance, a Latina named Lilly mentions, "[O]ur gay white male professor . . . brought up . . . everything you can possibly imagine about [diversity] issues."

In sum, the data strongly suggest that white male professors are generally reluctant to include issues of race and gender in classroom discussions. Some professors expect students to raise these issues and educate their peers, which effectively recuses professors from including relevant gender and racial context in discussions on case law. Still others refuse to introduce diversity discussions altogether and discourage students from initiating these topics. Conversely, those few white males who are adept at initiating and facilitating these discussions often have personal

connections to the issues themselves that students respond to and appreciate.

### B. *Faculty of Color and Female Faculty*

As indicated earlier in this article, white male faculty make up the majority of current law professors, with national data indicating that a full 59% of all law professors are white men.<sup>69</sup> This may be especially troubling because some students specifically note how the few faculty of color and female faculty they have seem more likely to include and effectively facilitate diversity discussions in their classrooms.<sup>70</sup> White students and students of color, male and female students alike note the contrast between professors.

#### 1. *Initiating Diversity Discussions*

The data indicate that faculty of color and female faculty are generally more proactive in discussing issues of race and gender in the classroom. Hank, a white male student, states that his female Criminal Law professor encourages students to think critically about “the death penalty and how race plays a part in it,” adding that “our professor pushed us very hard for a discussion on that end.” When these professors do not introduce the issues themselves, they tend to be more amenable to students who raise these subjects in class. As Maggie, an Asian American female student, comments, “I feel like women teachers are much more open about hearing alternative views, trying to bring up minority views. Male teachers don’t do that as much, generally.” Unfortunately, since only 31% of all law professors are female and only 17.5% are people of color, many law students never experience much classroom leadership by anyone other than white men.<sup>71</sup> In fact, female professors and professors of color may be more likely to stray from the Socratic Method and include all types of discussion in the classroom. Annette, a white female student notes:

I would say the female professors also go more towards discussion. Where you can share your own experience or your feelings about something and not get shot down because it’s “wrong.” Where the male teachers are just looking for like

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69. AALS, *supra* note 22.

70. *Id.* For example, Michi, a Latina student, indicates how having a Black female professor facilitate class discussion leads her to expect that the professor’s “race necessarily informs the tenor of the class.” Sadly, Michi’s experience with a Black female professor is rare among law students as Black female faculty account for only 4% of all law professors nationwide.

71. AALS, *supra* note 22.

“the right answer” and they’ll go with analysis or whatever, and that’s it.

While “the law” may apply equally to all, it is dynamic and touches people’s lives on varying matrices. Moreover, one’s gender and race/ethnicity, as well as how those identities intersect, inform one’s perspective, which in turns affects how one reads facts in any particular scenario and ultimately understands the law.<sup>72</sup> Unsurprisingly, therefore, sometimes professors of color and female professors rely on and relate their own personal experiences to the law so that the class gains a perspective that white male professors would be hard pressed to provide. For example, a white female student named Libby comments on the ways in which the only Black professor she has her first year includes his personal experiences to elucidate the law in ways she does not normally consider:

We had talked about a few cases where one of the people was from some kind of a poor neighborhood. And he would kind of draw on his own experiences of growing up in a poor area or, you know, predominantly Black area or whatever, and kind of just throw in how that might affect the plaintiff or the defendant or whoever it was. And it seemed relevant to me as a perspective that I didn’t have.

Not only can professors of color and women faculty relate their own experiences vis-à-vis their gender and racial identities to the law, they also appear more open to include diversity discussions generally. Ken, an Asian American male student, notices a significant difference based on the race and gender of faculty members, emphasizing:

In terms of the approach, I think one of the strengths the female professors have is that, and particularly with the people of color professors we’ve had, is that there’s been discussion of things like feminine jurisprudence and critical race theory which I don’t know how much emphasis that would have been given in another law school.

Bobby, an African American male student, also sees an obvious difference in the way that white male faculty teach their classes as compared to faculty of color and female faculty. He says:

[W]here it’s white professors, like in Torts, we had a case about an African American woman, and the bus didn’t go to her area. We read the case, but we just skipped it in class. About Property, when we talk about things about race we just skip ‘em, you know what I mean? We never really talk about the substance of why this was. So I feel like the white professors skip a lot of the things about race whereas the African American professors, they don’t always bring it up because it

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72. For additional research on intersectionality and law, see *supra* note 7.

it's not always popular but they try. And as far as gender, the same thing. The male professors never bring up gender things, whereas my Contracts professor's a female, she brought up something about gender, how this case might be because of sexual discrimination and whatnot. So you definitely see that.

Ashley, who is an Asian American female student, relates a specific instance in which her Black male Contracts professor brought in his own experience with racial discrimination to make the issue of gender discrimination come alive to the class:

And one of the students in my class said something like, "Well if someone doesn't want to work with a female director, you can't blame Time-Warner for that. You can't blame Time-Warner for saying, 'OK we can't hire you because no one will work with you. We're really sorry.' You can't blame Time-Warner for that." And our professor said, "Being a Black male, that comment is really distressing because there was a lot of that sentiment when I was coming out of law school," saying, "A lot of companies, law firms said, 'We don't want to hire Black males because our clients don't want to work with them,' and that's a really distressing comment," and you could tell [the student who made the comment] felt really small after that.<sup>73</sup>

Sometimes, students cannot establish a clear connection between the race or gender of their faculty and professor's willingness to discuss diversity issues, especially as most law students have limited opportunities to learn from female faculty and faculty of color. A white male student named Cameron notes that overall, his first-year faculty is "a pretty small sample set," which makes it hard for him to generalize about the ways in which race and gender influence teaching styles. Because of these small numbers, some students attribute teaching styles to individual preferences rather than race or gender. For instance, a white female student named Adriana states, "[E]very professor approaches the classroom differently, and I don't think I have noticed any commonalities that seem to correlate to race." However, an examination of the EDP data as a whole, with information from all 164 students at eight schools, reveals a distinct pattern showing that faculty of color and women faculty are more likely to include diversity issues in class than their white male counterparts. Indeed, in trying to compare faculty members by race/gender, Eric who is a white male student states:

I mean it's hard to say. . . . We have a sort of limited [number] of faculty. . . . The only professor that I've had who seems to encourage [diversity discussions is] my Immigration professor,

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73. *Id.* Again, Ashley's experience is shared by few other students, as Black male law professors account for only 4% of faculty in legal academia.

who is Black. He's the only one that actually seems to let the conversation go where it needs to. And he does bring up issues of race through immigration and issues of race and gender. I have no idea once again what that has to do with his race or ethnicity.

Students of color and women are more likely to notice differences among faculty members and attribute them to race and/or gender. For example, a white female student named Marla recognizes the way that her women of color professors have added something unique to her law school experience:

[O]n the whole the women of color have been hugely more likely to talk about issues of not just race and gender but class, and difference, and sort of bringing in sort of more social ideas about law and not just sort of the law as it functions sort of in the court and our casebooks. And certainly the other professors have brought that in as well but not nearly to the extent that the women of color have.

Similarly, a white female student named Nora notes that the Black male professor she had her first semester in law school brought real life to many abstract theories of law:

[H]e was one of the only professors last semester who actually brought some of the Torts situations into like real-life situations. Like he really applied what was going on in the world and how people would actually feel, as opposed to being in a glass or in a bubble and thinking about legal issues just in theory.

## 2. *Effectively Facilitating Diversity Discussions*

Faculty of color and female faculty not only include diversity discussions in their classrooms, but also effectively facilitate those conversations among students. To start, data indicate that faculty of color and women professors generally remind students to be respectful and sensitive to the other students in the class while discussing delicate subjects.<sup>74</sup> For example, an Asian American female student named Aretha recounts how her African American Criminal Law professor set the stage for what are often difficult discussions about rape:

I mean our professor said this at the beginning of our whole rape discussion, "Statistically in a room of 80 people, there's going to be someone who probably either has been accused of rape, or someone who has been assaulted. So keep that in mind in the discussion." Which I think kept things a little bit calmer than they would have been otherwise.

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74. While this may not be a phenomenon exclusive to female faculty and faculty of color, the student research subjects indicate that these individuals perhaps emphasize the importance of this sensitivity to a greater degree.

Andy, a Latino, says his female Property professor did something similar to ensure students respected each other during diversity discussions: “She started out with like a disclaimer like, ‘This is going to be a case that is going to be hard for some people,’ and stuff like that.”

Students also recount how certain professors of color and women professors cautiously emphasize diversity issues in class discussions. For example, Kirsten, a Black female student, reports that one of her Black professors waited to see if any students would bring up race as relevant to the case they were covering. When no student voluntarily discussed race, the professor raised the issue himself, much to the relief and encouragement of the students of color in the class; she remembers:

Now, mind you, this is the Black professor in Contracts. Now, he seemed to tip-toe around the whole race issue. And then when none of the students of color brought it up and no one else in the class brought it up, he said, “Well, do you think that it made a difference that the plaintiff was a Black female and the fact that she’s on welfare and she’s got all these kids and got all this furniture?” And that’s when the whole atmosphere in the room changed entirely, and that’s when the ten students of color – five of whom were sitting in a row because I sat with them – we all were raising our hands.<sup>75</sup>

Thus, faculty of color and female faculty tend to initiate diversity discussions on their own as well as encourage students to share their relevant lived experience with the class. Students also view these particular faculty as capable facilitators for these conversations, even from the starting point of recognizing that they may be sensitive for some people in the class.

### C. *Student Reactions*

The data suggest that oftentimes diversity discussions are neither conducted as frequently nor handled as effectively as they could be. In fact, some students are fine with keeping these conversations out of legal education. Some are afraid that an “extra” emphasis on diversity discussions will detract from their learning about subjects that will be tested on the Bar Examination. Austin, a white male student, mentions an assigned book that was more about social and historical context than “black letter law,” and then states: “Considering that law school is kind of like the path to go to take the Bar and pass the Bar, is that book

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75. Notice here how inclusion of this racial context leads to active learning on the part of the students of color in the class, which is to be expected as research documents how ignoring this context often leads to disengagement. See, e.g., Allen & Solórzano, *supra* note 26, at 287; Feagin et al., *supra* note 15, at 91; SIDEL, *supra* note 16, at 165.

going to help you do that at all? No.” Another white male student, named Matt, echoes this sentiment, saying, “[F]rankly I appreciate other perspectives but I also want to just learn the basic foundational stuff that we’re learning here. And so sometimes this effort at diverse perspectives is actually at the expense of learning the major things.”

Yet, most students of all racial backgrounds not only appreciate diversity discussions, but also wish that they were included more often as a standard part of the first-year curriculum. Benefits of educational diversity are well-documented and include well-developed critical thinking skills, cognitive development, and an ability to interact with other members of our increasingly diverse society.<sup>76</sup> Students interacting with others from diverse backgrounds show greater relative gains in critical and active thinking.<sup>77</sup> Diversity enhances development in the cognitive, affective, and interpersonal domains.<sup>78</sup> Additionally, increased minority enrollment results in better preparation for students entering a diverse society upon graduation.<sup>79</sup> Students in the EDP sample also note a number of ways in which diversity discussions are beneficial to their legal education, a few of which are discussed below.

First, diversity discussions tend to bring out different perspectives, which help students recognize and appreciate the context of legal material. The words of Ken, an Asian American student at a school that prides itself on its social justice orientation, perhaps explains most clearly how he expects the inclusion of race and gender will help him become a better attorney:

It’s important to sort of look at this and be like, “Wait, the law has traditionally affected women this way. The law has traditionally affected people of color this way.” And these things matter, when you talk about the death penalty, when you talk about abortion rights, when you talk about any of the gamut of things that a public interest law school has an emphasis on.

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76. Elizabeth J. Whitt, Marcia I. Edison, Ernest T. Pascarella, Patrick T. Terenzini & Amaury Nora, *Influences on Students’ Openness to Diversity and Challenge in the Second and Third Years of College*, 72(2) J. OF HIGHER EDUC. 172, 172-204 (2001); Jeffrey F. Milem, *The Educational Benefits of Diversity: Evidence from Multiple Sectors*, in COMPELLING INTEREST: EXAMINING THE EVIDENCE ON RACIAL DYNAMICS IN COLLEGES AND UNIVERSITIES 126, 126-169 (2003); BOWEN & BOK, *supra* note 3.

77. Whitt et al., *supra* note 76; Elizabeth T. Pascarella, Marcia I. Edison, Amaury Nora, Linda S. Hagedorn & Patrick T. Terenzini, *Attitudes Toward Campus Diversity: Participation in a Racial or Cultural Awareness Workshop*, 67(2) J. OF HIGHER EDUC., 53 (1996).

78. Milem, *supra* note 76, at 142-43.

79. Gary R. Pike & George D. Kuh, *Relationships Among Structural Diversity, Informal Peer Interaction, and Perception of the Campus Environment*, 29(4) THE REV. OF HIGHER EDUC. 425, 425-450 (2006); BOWEN & BOK, *supra* note 3.

Cameron, a white male, similarly notes how historical context helps him better understand the law:

I think that it's important to understand that a lot of these [issues] are still very current and . . . while we're studying the history and while things have changed . . . there's still a lot of things that are either changing with society or have yet to catch up. So that it is very good to have a lot of different people bring up different things that affect them and expose the rest of the class to them.

A second but related point suggests inclusion of race and gender issues into classroom discussions also makes it easier for students to relate to and understand often abstract legal theories. The words of Bianca, a Latina student, are illustrative: "I only have one African American professor but she does a really good job of always kind of bringing the law back to real life." Robin, a white female student, says her Black Property professor relates the law to reality, which helps her learn better: "I'm really enjoying Property Law right now. It's a wonderful class because we're able to have more discussions, more group discussions. We talk about real application [of the law]." She also notes that though some other white students may think these discussions detract from their legal education, she sees it as helpful.

Adele, a white female student with two female faculty teaching her first year classes, also notices a gender difference among teaching styles, stating:

Definitely [women faculty are] more about discussion and less about exactly verbatim from what the book says, [laughing] which makes learning a lot more fun. And so I think they take it more from almost like behavioral learning style. They know that people learn in different ways, and so both of them have kind of switched up their teaching styles during class, to either do something that's more visual or [auditory].

Two white male students, Hardy and Gary, bring up the following interesting point: excluding diversity issues from the law unfortunately removes morality from the law as well. Specifically, Hardy mentions:

I would also say that in the classes that we do focus more on points of law, that sometimes I almost feel like that's a disadvantage for me because I've wondered a couple times over the last year if I've been losing my moral compass and I'm just starting to filter things through points of law. And so, whether or not I think something is right is whether or not I think something was correctly decided are two different things. And so I think that it might be beneficial to have a discussion of whether or not we think some of these things are right.

Gary agrees: "[I]t does seem sometimes like there's a risk that you lose the moral foundation for this stuff."

One final and extremely important point is that marginalized students tend to be more comfortable participating in classes taught by faculty of color and female professors, who often include diversity discussions in class.<sup>80</sup> As Latinos account for less than 4% of all American law professors,<sup>81</sup> it is clear that few Latino students learn from professors who share their racial or ethnic background. Nevertheless, some students of color and female students indicate an increase in their comfort level whenever they are in classes taught by faculty of color or female faculty, even if the professor does not share the same identity as the student. For example, a Latino named Andy explains how faculty who bring up these issues make him feel comfortable contributing to class discussions: “[Professors of color] tend to raise [diversity issues] a lot more, so I feel a lot more comfortable in those classes, and I feel a lot more comfortable speaking up [considering that] a lot of cases we read are [based on] real-life experience[s].” Thus, while some students prefer to focus exclusively on “black letter law,” many others appreciate the context that diversity discussions bring to the cases and rules they learn in class.

#### IV. SANCTIONS AND HORROR STORIES

Both formal and informal sanctions operate against some professors who make efforts to integrate issues of race and gender into legal pedagogy. Harmony, a white female student, relays how a white male student made an inappropriate joke regarding a female professor who included gender in discussions of the “reasonable person” standard:

In Torts we spent at least a couple days talking exclusively about the “reasonable person” standard in terms of gender but also in terms of race [and] in terms of class background. And, towards the end of the class some white male said something like, “Oh! Now you’re thinking like a reasonable woman.” It was a joke but only sort of; like, he really meant it.

Some professors run a career risk when they bring up diversity issues to the discontent of their students. Annette, a white female student, describes how a white female visiting professor was unlikely to get a permanent offer because some administrators disliked her style, and one student had accused her of being a “femi-Nazi” for including a feminist perspective in her class:

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80. For additional research studies that reach similar conclusions, finding that students of color and women students are more comfortable in classes taught by faculty of color and female faculty, see *supra* note 36.

81. AALS, *supra* note 22.

She was saying that she is trying to stay at this school. But that she's been getting some critique from . . . the school or other teachers about her teaching style. She was saying in her [evaluations she has] . . . been getting negative comments from students about like her feminist views and stuff she's been covering in class. Like someone said she was a "femi-Nazi" in her reviews, and so I don't know if because she's trying to do things differently and teach different stuff if that will impact her career negatively. And I hope it doesn't because she is obviously the only teacher we have that's going over this type of stuff.

The data also indicate that white female professors, who account for 24% of all law faculty,<sup>82</sup> are sometimes directly challenged in class, especially by white male students.<sup>83</sup> Andy, a Latino, relays the following comparison between his male and female professors:

I was thinking about . . . the way students interact with . . . different types of professors. So last semester we had three female professors and one male professor, who was African American, and [the students] seemed a lot more respectful of the male professor. And, I don't know if it was the topic or whatever, it just seemed like they were more willing to talk and actually confront a female professor.

Ophelia, a Native American student, recounts how students would actually walk out of a class taught by a Black female professor, something she thinks students would never do in a class taught by a white male:

Our Torts professor, she's African American and, well, her specialty is also family law and race relations and gender. And so she brought that into the course. I think perhaps she didn't do a very good job of monitoring the conversation or guiding it to a specific point, because there were instances where students would actually walk out because they didn't feel that they were getting anything from the class.

While not all professors are particularly adept at facilitating diversity discussions in the classroom, conversations about race and gender are especially problematic for students of color and female students who are targeted during unpleasant discussions.

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82. AALS, *supra* note 22.

83. While there seem to be isolated incidents which showcase student resistance to male faculty and women of color, there is a discernable pattern in the data indicating that white female faculty are challenged by their students. Perhaps we would expect that the intersectionality of marginalized or devalued identity characteristics would lead female faculty of color to be challenged even more than white female faculty. See, e.g., Patricia Zavella, *The Problematic Relationship of Feminism and Chicana Studies*, 17 WOMEN'S STUDIES 25, 29 (1989). However, this is not borne out in this study's data. Perhaps this pattern is too obscure to identify, because of the dearth of female faculty of color who make up only 7.2% of law faculty. See AALS, *supra* note 22.

Unfortunately, a few students have endured horrendous experiences in their dealings with faculty. All of the findings below report experiences of students of color and female students who have been belittled, humiliated, or made uncomfortable by white male professors.<sup>84</sup> It is important to note that not only are white male professors less likely to discuss diversity issues, but they are also the only ones in the sample who express occasional insensitivity to these issues in personal interactions with students. For example, Audrey, a Latina, notes the inappropriate interactions of her white male Constitutional Law professor with some female students:

For example, when he first introduced our [teaching assistant] to us, he called her “babe.” Which maybe they’re just really close, that’s fine. I mean, that’s their thing. But it was just kind of alarming. And when – my friend was just telling me this the other day – she went up to him after class and he was very touchy . . . [in that] he put his hand on her shoulder and he said, “What can I do for you?” And then [later], he did the same thing and said, “That was a very good question. I’m glad you brought that up.” Of course, he didn’t do that to any of the men that were up there talking to him.

Some of the most problematic encounters involve an older white male Criminal Law professor. Christina and Edna, white female law students in his class, recount how the professor would single out females in the classroom to involve as survivors in different rape hypotheticals. Edna states, “Specifically, in the beginning of the year we used rape as kind of the standard, typical sexual crime. He would go up to a student in the front, always a female, and [call] them by their first names, and use them as the victim in the crime.” Even more horrific, he often cast himself as the rapist. Christina notes her own attempts to reconcile this hostile classroom environment:

He’s very aggressive and that, coupled with coming up saying, “OK, say I raped Christina,” and he’s standing right in front of you and it gets intimidating and it’s not really what you expect when you come to school. But I can kind of sit back and go “OK this isn’t the real world, this is just a class, he’s just using it as an example, he doesn’t really mean me,” and kind of push it away a little bit. But it gets unnerving after while.

Perhaps unsurprisingly, this same professor was just as insensitive to students of color in his class. Edna states he also singled

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84. The article does not claim that no female faculty or faculty of color make similarly insensitive comments or create classroom environments that may be just as challenging for students; however, the individual case studies provided in this section are the sum total of outrageous vignettes shared by student research subjects regarding their classroom experiences. In each of these, the faculty member leading the class was a white male.

out a Black male student in his class to represent the criminal in various hypotheticals:

He actually used a male one time, as an example . . . but this particular other law student said that he was a little bit upset by the fact that he used a Black male. And he would refer to him by name and say, "Well what do you think?" And there is more than one Black male in our class, but he would always refer to the one that was sitting in the middle kind of like by himself. . . . You're not really supposed to answer [these rhetorical questions] but you kind of feel that you have to. So I think that he said that it goes both ways as far as the stereotypical victim or criminal in each crime he used.

In fact, that same Black student Edna mentions participated in the EDP focus groups and recounts those classroom discussions as "tense" and "uncomfortable." Specifically, Aaron indicates, "[M]y Crim Law professor, he would always, like, point at me, you know when something happened regarding a racial issue. He would say, 'What do you think about it?'" Even more shocking, in the private confines of his office, this white male professor verbally abused Aaron: "he . . . called me 'nigger' one time in his office." Aaron insists that he is not offended by these words and actions, although he feels the professor "went overboard" with his comments. Interestingly, within a year Aaron transferred to another law school and continued participating in the EDP study. Of course, while this is not the norm for white male professors, the only instances of such offensive behavior involved white men. While this incident did not occur within the classroom, it demonstrates how a professor's actions and behaviors with students outside of class can create a climate that is either conducive or hostile towards diversity discussions specifically and the study of the law generally.

## V. CONCLUSION

While the first-year curriculum may be somewhat standard across law schools, professors' teaching methods vary substantially. After a detailed examination of the sample of U.S. law students participating in the EDP longitudinal survey and focus group study, it seems that professors of color and female professors engage deeply with the issues they teach. These professors generally include the historical and societal context vis-à-vis racial and gender issues surrounding cases, in spite of the potential disincentives for including this type of material. While a number of white male professors may also tolerate these discussions when initiated by students, other white male professors generally are less likely to lead or initiate them. Finally, the data indicate

that a few professors, generally older white males, exhibit especially problematic behavior with respect to diversity issues.

These findings have a number of interesting and significant implications. First, with regard to the law school classroom, students make clear that law professors do not all teach alike. Rather, white males tend to exclude and avoid discussions regarding race and gender, while female faculty and faculty of color tended to engage in diversity discussions. As a whole, students prefer classroom discussions that include race and gender issues as means of illuminating how the law affects people differently. Because students also indicate that they learn better in environments that include diversity discussions, it can be inferred that students better understand the law in classes taught by faculty of color and female faculty. Yet, this question requires further research.<sup>85</sup> Given that 59% of law professors in the U.S. are white men, only 8% of faculty are African American, 4% Latino, 3% Asian American, and 31% white females,<sup>86</sup> this may be especially relevant. We may be selling our students short by engaging in legal pedagogy that does not lead to optimal educational outcomes. To that end, it may be useful to train faculty how to effectively include diversity issues in their classroom discussions. If faculty feel more prepared to handle these sensitive topics, predictably they would feel more comfortable discussing them in class, which again may lead to better learning outcomes for students.

Currently, some faculty who engage in diversity discussions in the classroom are punished for this behavior, despite the fact that a vast majority of students find it rewarding, interesting, and an integral part of their legal education. Practically, this calls for institutions to be supportive and encourage diverse pedagogical approaches offered by traditionally marginalized faculty groups, both female faculty and faculty of color, through conscious artic-

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85. For example a future study examining whether student outcomes (as measured by Bar passage, self-reported understanding of law courses, law school grades, retention rates, etc.) are improved through inclusion of diversity discussions in the classroom would help to illustrate any potential effects of diversity discussions on learning outcomes. Future quantitative studies could examine archival data (including teacher evaluations, grades, and Bar passage rates) to confirm or challenge the implication that students may prefer and perform better in classes where diversity discussions are included. It would also be interesting to look specifically at the ways in which students of color and female students engage in the learning process with professors of different races and genders. If, for example, students of color have lower law school completion rates overall, but are doing well in classes taught by faculty of color and female faculty, an evaluation and modification of the methods used in particular classes may go a long way in retaining students of color. Similarly, grades and participation rates—again, often considered lower than expected for law students of color—may improve with a shift in legal pedagogy towards the methods already utilized by female faculty and faculty of color.

86. AALS, *supra* note 22.

ulation of diversity goals. Moreover, those professors who receive positive feedback from students should be emulated to improve legal academia.

A final implication of the study is that we must do more to recruit and retain not just students of color, but also faculty of color and female faculty who may be especially adept at teaching students. While this article does not measure objective student outcomes, the students themselves voice their preference for discussions facilitated by faculty of color and female faculty. If faculty diversity is as important as not only the students in this study seem to indicate but also as evidenced by other independent research,<sup>87</sup> law schools owe to their students and to the legal profession to hire and promote professors from groups that are underrepresented. There are some recent studies examining the racial and gender dynamics of law teaching;<sup>88</sup> these should be continued and expanded upon in order to better understand the unique challenges facing these individuals. Only after understanding the barriers can we hope to improve the situation, and increase their representation among the law faculty ranks.

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87. See RICHARD WHITE, *LAW SCHOOL FACULTY VIEWS ON DIVERSITY IN THE CLASSROOM AND THE LAW SCHOOL COMMUNITY* (2000).

88. See Kornhauser, *supra* note 14, at 305; Merritt & Reskin, *supra* note 14, at 2299.

## APPENDIX A

EDUCATIONAL DIVERSITY PROJECT  
2005 LAW STUDENT FOCUS GROUP PROTOCOL

The purpose of today's focus group is to better understand your experience with diversity in law school. Please be assured that your responses will be held in the strictest professional confidence. Please also maintain the confidentiality of others in the group. Thank you in advance for your assistance.

First, we have an introductory question.

1. Please tell us your assigned name, race/ethnicity, hometown, and the undergraduate institution you attended.

Now let's talk about diversity and the law school experience.

2. Do you feel this law school campus is a diverse environment to learn about the law? If so, what are the advantages and disadvantages to having a racially diverse student body on your law school campus?
3. Do you think there are enough students like you at this law school to feel comfortable here? Being "like you" refers to people with a similar background and experiences.
4. Since starting law school, have you had contact or interaction with others who are from a different background than yourself? What type of contact? Is it more or less than when you were in college? Is it more or less than when you were in high school?
5. How, if at all, has diversity in the faculty affected your study of the law? How are professors of color different from white professors? How are female professors different from male professors?
6. Are any of you members of law student organizations, institutional programs, journals, or clinics specifically focused on race/ethnicity or gender? If so, please tell us why you joined and what your experience has been like.

I also have some questions about cases you may have covered in your classes.

7. In discussions of *Johnson v. M'Intosh* or other cases in your Property class, did students or the professor explicitly raise the issue of how case law may have affected Native American property rights? Can you tell us how those discussions went?

8. In discussions of *People v. Goetz*, where a man is charged with shooting four youth who approached him for money on a NY subway, or other cases in your Criminal Law class, did students or the professor explicitly raise the issue of how race and class may be implicated in the criminal justice system? How was the case discussed?
9. If your Criminal Law class covered the “reasonable person” standard (in *State v. Norman* considering the defendant’s subjective view, or *State v. Kelly* which relies on “Battered Women’s Syndrome” as an affirmative defense) or if it was covered in Torts, did students or the professor raise issues of race, class, or gender? How?
10. When discussing *Katzenbach v. McClung* (Ollie’s BBQ case), *Heart of Atlanta Motel*, or other Commerce Clause cases in Constitutional Law, did students or the professor explicitly include race? How were those discussions?
11. Which cases did you cover in Constitutional Law to explain fundamental rights? Did you read *Roe v. Wade* or any cases dealing with contraception or abortion rights? If so, did students or the professor explicitly include class or gender in the discussion of *Rust v. Sullivan*, *Harris v. McRae*, or *Maher v. Roe*? Tell us about the discussion.
12. If you covered voting rights in Constitutional Law (i.e., *Lassiter v. Northampton County Board of Elections* about literacy tests or *Harper v. Virginia Board of Elections* about poll taxes) did you focus on literacy requirements or poll taxes as applicable to all potential voters or was there a focus on how these were Southern efforts to disenfranchise African Americans? How was the discussion?
13. How were discussions you may have had about *Dred Scott* or *Plessy v. Ferguson*?
14. In discussions of *Brown v. Board of Education*, *Bakke v. UC Regents*, *Grutter v. Bollinger*, or other desegregation or affirmative action cases in Constitutional Law, did students or the professor explicitly raise issues of racial integration, legacy admits, or how women benefit from affirmative action? How were those discussions?
15. In discussions of *Loving v. Virginia* or other cases regarding right to marriage, did students or the professor explicitly raise issues of same-sex marriage? Did your class discuss *Romer v. Evans*, *Bowers v. Hardwick*, or *Lawrence v. Texas*, all cases involving gay and lesbian rights? If so, please describe those discussions.

16. In your Civil Procedure class, did you cover *Batson v. Kentucky* or *JEB v. Alabama* –prohibiting peremptory strikes in jury selection based on race and gender? How were those discussions?
17. Are there any other cases you can think of where you had a particularly noteworthy discussion of the topics we've covered today OR where you thought your class missed a unique opportunity to discuss race, gender, and/or sexual orientation?

**Probes:**

- Can you give an example?
- Did you talk about it with law school friends outside of class?
- Would you explain further?
- Would you say more?
- Is there anything else?
- Please describe what you mean.
- I don't understand.
- Did you ever walk out of class saying, "I can't believe he just said that!"

