

# COMMENT

## Law and The Black Experience

### I. INTRODUCTION

The study of law is a crucial undertaking for Black Americans because the judicial process is a powerful weapon in the quest for racial equality.

That statement and a myriad of others like it form a major motivation for Black Americans to embark upon an intense three year period of study. Information on how the three years of exposure in such a well-entrenched bastion of White dominance effects Black Americans is negligible. What scarce literature is available is written about law school from non-minority perspectives, leaving the concerns and frustrations which are peculiar for Black law students to go largely undocumented. This Comment will attempt to convey the reality of legal training and practice for Black students as interpreted from observations, conversations with other students and practicing attorneys, from available literature and from my own singular viewpoint as a minority student.

#### A. *Minority Perceptions of Law School*

Entering law students hold many misconceptions about what the study of law entails. For most, their undergraduate experience leaves them ill-prepared for both the enormous workload and the inductive logic methodology.<sup>1</sup> For the Black student, the likelihood of having misconceptions is greatly enhanced due both to a deficient exposure to legal practice and to a near complete ignorance of underlying legal principles. While it is true that most law students have erroneous perceptions of legal practice before entering school, the divergence between the viewpoints of White or mainstream students and that of Black students is a determinative factor in their eventual academic success and their attitudes about the law school experience.

A useful description for the understanding of minority perceptions of law school may be obtained from literature regarding minority world views. Most scholars suggest that world views constitute the psychological or value orientation in life and can determine how we think, behave, make decisions, and define events.<sup>2</sup> Instead of viewing the world only from a majority perspective, cultural minorities have an additional viewpoint from which to interpret reality. Every act or event is filtered through both mainstream and minority cultural viewpoints, for each is equally valid and irreplaceable to the individual. It is this duality of vision which constitutes the single most important factor in Black students' perceptions of law school, for the legal training requires assim-

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1. Taylor, *Law School Stress and the "Déformation Professionnelle"*, 27 J. OF LEGAL ED. 251, 255 (1975).

2. Bibby, *Searching for Invisible Thread: Meaning Systems in Contemporary Canada*, in 22 J. FOR SCIENTIFIC STUDY OF RELIGION, 2, 101 (1983). See also KLUCKHOHN, F.R. & STRODTBECK, *VARIATIONS IN VALUE ORIENTATIONS* (1973); STAPLES, *INTRODUCTION TO BLACK SOCIOLOGY* (1976).

ilation of a professional world view, a goal which is complicated by the students' belief in their minority culture viewpoint.

Although the world view description is valid for all cultural minorities, it is even more extreme for Black students since racism is profoundly destructive to personal dignity, thus requiring constant defense through the minority culture viewpoint. The racism in this country is so pervasive that its presence serves as the background music to virtually every aspect of living. It is no longer manifested by blatant racist acts; rather, it is manifested by the inability of Whites to comprehend critical aspects of a situation which so affront dignity. For example, White law students who attempt to persuade Black law students to join their intramural basketball teams never realize it is the first invitation offered, or, that the racial diversity of various drinking groups or socializing groups does not extend itself to study groups or moot court competitions. As lawyers and future lawyers, Black law students are entitled to and do receive the respect and honor which the general public tenders to all lawyers; however, upon leaving the work or school environment the respect is replaced by undue familiarity, suspiciousness, disregard, or condensation. Thus it is not being for or against school integration, busing, and affirmative action which evidences racism, it is the myriad of unspoken racist attitudes such as: Blacks are inherently inferior; Black people must be (want to be), guided; to improve Black educational opportunities, it must be through enrollment in White institutions (as opposed to improving Black community schools). Because racism in all of its sophisticated, subtle, and indirect forms affects every Black student, no matter how bright or economically successful, total assimilation to the legal profession is impossible.

The explanation of this phenomenon contained in, *The Mark of Oppression*:<sup>3</sup> *Explorations in the Personality of the American Negro* is so lucid it justifies quotation at length:

It is a consistent feature of human personality that it tends to become organized about the main problems of adaptation, and this main problem tends to polarize all other aspects of adaptation toward itself. *This central problem of Negro adaptation is oriented toward the discrimination he suffers and the consequences of this discrimination* for the self-referential aspects of his social orientation. In simple words, it means that his self-esteem suffers (which is self-referential) because he is constantly receiving an unpleasant image of himself from the behavior of others to him. This is the subjective impact of social discrimination, and it sounds as though its effects ought to be localized and limited in influence. This is not the case. It seems to be an ever-present and unrelieved irritant. Its influence is not alone due to the fact that it is painful in its intensity, but also because the individual, in order to maintain internal balance and protect himself from being overwhelmed by it, must initiate restitutive maneuvers in order to keep functioning—all quite automatic and unconscious. In addition to maintaining an internal balance, the individual must continue to maintain a social facade and some kind of adaptation to the offending stimuli so that he can preserve some social effectiveness. *All of this requires a constant preoccupation, notwithstanding the fact that these adaptational process all take place on a low order of awareness.*

Thus the perceptions of Black Americans to the study of law encompasses two viewpoints. The mainstream view is a belief that the legal profes-

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3. A. KARDINER & L. OVESSEY, *THE MARK OF OPPRESSION: EXPLORATIONS IN THE PERSONALITY OF THE AMERICAN NEGRO* 302-33 (1972) (emphasis added).

sion is the best avenue to redress the system's insensitivity to minority problems. The minority view is that since the legal system has historically played a major role in racial discrimination, it is not to be trusted; however, access to legal training should be used for its merit in broadening one's awareness of where the system's weaknesses are.<sup>4</sup> Given the historical experience it is understandable that Blacks would give the minority view precedence. Black students must decide whether they will invest their time and energies developing competencies and skills which society may not allow them to utilize fully. They can see beyond tokenism and no amount of preaching about hard work, sacrifice and patience will convince them that equal opportunity is real as long as there are no concrete Black role models in the decision-making arena of economics, politics, and government. The decision to pursue a long range course of action such as legal training comes down to how much the student is willing to risk emotional well-being to the competitive, depersonalized atmosphere of law school.

## I

### A. *The Case Method Approach*

Legal study requires struggling through voluminous amounts of material. Students are expected to piece together a comprehensive understanding of legal principles and rules by connecting a series of legal holdings in a rational manner. This task is further complicated because it also requires learning to apply a legal method of analysis to case opinions. By applying rules and principles in the context of specific law suits, the student is introduced to the legal doctrine; more importantly, the legal methodology compels students to develop specific traits of character, i.e., to "think like a lawyer."<sup>5</sup>

To guide student learning and enhance their evolutions into lawyers, law school professors engage the class in critical case analysis using a Socratic dialogue. This dialogue consists of harassing students with aggressive questioning,<sup>6</sup> thereby leading them through the proper steps of legal reasoning. For every reasoned answer elicited, there is a further question until eventually the student cannot respond intelligibly.<sup>7</sup> Conclusions to the professor's hypotheticals are of relative unimportance as compared to the legal reasoning used to obtain the conclusion. It is the rational steps (inductive logic) which are the main focus of Socratic dialogue and the case method approach.

The emphasis on legal reasoning causes much emotional hardship for Black law students. The methodology is coldly impartial, and what appears determinative is often irrelevant. The process involves a weighing of interests according to a reasonable man's standard, easily interpreted by Black students as a reasonable White man's standard. For example, in 1985 a Travis County Texas jury acquitted a man of manslaughter who had traveled to his grown daughter's home, and while pistol-whipping his daughter's Black friend, "acci-

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4. Bell, *Black Students in White Law Schools: The Ordeal and the Opportunity*, 2 TOLEDO L. REV. 539, 547 (1970).

5. Patton, *The Student, The Situation, and Performance During the First Year of Law School*, 21 J. OF LEGAL ED. 10, 27 (1968).

6. Kennedy, *How the Law School Fails: A Polemic*, 1 YALE REV. OF LAW AND SOCIAL ACTION 71, 73 (1970).

7. *Id.*

dentially" shot him. The turning point in the case was whether there existed such "extreme provocation" (shocks the conscience), that the defendant's intent to do bodily harm to his daughter's Black friend was justified. The jury found that the defendant's expressed reason, that he disapproved of his daughter socializing with Blacks and that he had heard that the Black man had made a pass at his youngest daughter and wanted to prevent her involvement with Black men constituted extreme emotional provocation, justifying his actions. To Black law students, this case blatantly exemplified the law's inability to provide fair treatment to Black Americans. Not only was the defendant's racist attitude acceptable, the jury of his White peers agreed that were they in his shoes, they might have done the same. Even more tragic was the fact that the Black man killed was not the *intended* victim but another innocent Black man. The underlying message was that even I, a Black law student, could have been *justifiably* killed; ergo, there is no amount of education or improved social status which increases the value of my life beyond that of what is perceived as the lowest member of the Black race.

In the Black student perspective, legal reasoning is rampant with supposedly legitimate expressions of proper social relations which contradict the minority world view reality of relations. Reading the *Dred Scott*<sup>8</sup> decision with its psychologically damaging proclamation by Chief Justice Taney that the Black man has no rights that the "white man must respect,"<sup>9</sup> powerfully reinforces minority world views. Notwithstanding its intended value in legal scholarship, for Black students reading the extended reasoning which likened Mr. Scott to cattle and other possessions is another attack on self-esteem. At the very least, emotional energy will be spent considering what purpose a reading the entire case serves.

Listening to or participating in class discussions employing the Socratic method in the study of Civil Rights for Blacks creates a significant amount of emotional stress for two reasons. First, the principles involved in the reasoning tend to shock the sensibilities of students too young to experience segregation and civil disobedience firsthand. Secondly, the Socratic method ignores and obscures the more fundamental social and political questions of dominance and subordination by framing issues as questions of law, claims of right, precedent, and problems in constitutional interpretation. For example, it is absurd that the penalty for embezzlement or tax evasion, crimes which can involve millions of dollars, is often only a two or three year probated sentence, while the penalty for stealing a loaf of bread can be several years in the penitentiary. This is "establishment" justice, not "people's" justice.

Foremost in any consideration of legal principles is a recognition by Black students that the law is pervasive in that it influences mainstream America into believing in the rightness of existing social order.<sup>10</sup> For Black law students, the Supreme Court decision which found unconvincing or perhaps immaterial the statistical evidence that persons convicted of killing Whites are eleven times more likely to receive the death penalty than persons

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8. 60 U.S. (19 How.) 393 (1857).

9. *Id.* at 407.

10. Gabel & Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*, 11 N.Y.U. REV. OF L. & SOC. CHANGE 369, 372 (1983).

convicted of killing Blacks,<sup>11</sup> reinforces a belief that law can be a tool of oppression. The recent pronouncement that imposition of the death penalty is not influenced by racial bias by the highest court in the country carries enormous influence in Black attitudes about the legal profession. As explained by Peter Gabel and Paul Harris in their Article, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*:

The principle role of the legal system within [a capitalist] society is to create a political culture that can persuade people to accept both the legitimacy and the apparent inevitability of the existing hierarchical arrangement. The need for this legitimization arises because people will not accede to the subjugation of their souls through deployment of force alone. They must be persuaded . . . that the existing order is both just and fair, and that they themselves desire it.<sup>12</sup>

### B. *Testing*

In law school, examinations are taken at the end of nine month's exhaustive study. There are no four-week or six-week intermediate exams to test student comprehension prior to the final. After surviving a year of Socratic dialogue, briefing and outlining, participation in oral arguments, and writing research memoranda, the student's effort over the entire year's study is tested in one three- or four-hour exam. Thus, there is virtually no opportunity to receive feedback on how well one is learning — or even if one is learning the right material, until after the year is completed.<sup>13</sup>

This process poses a particular disadvantage for Black students. Their undergraduate success was achieved through the ability to vocalize problems, memorize and regurgitate information, and write papers — not the ability or skill to take exams. Furthermore, legal exams require learning to view the problem through lawyer's eyes — that is, through mainstream-lawyer's eyes. Consider an exam question involving landlord-tenant rights: The legal definition of "freedom" requires the protection of private property in a form enacted centuries ago,<sup>14</sup> before the advent of modern day urban ghettos. Thus, a student can "argue for increasing tenants' rights, but not to challenge the very existence of landlords and tenants."<sup>15</sup> A student who challenges this proposition on exams through extended reasoning based on the social realities of today (a majority of Americans are tenants in some form; tenants receive less protection than landlords. Therefore, the majority is receiving less protection of property than "elitist" landowners), will likely score lower than the student who does not address such "red herrings".

During first year orientation, school administrators recommend study groups to improve student performance; however, the truth is that study groups are necessary to effectively manage the workload. Yet, during my experience in law school I saw only one interracial study group. The result of this lack of sharing between races is that Black students do not receive the benefit of having sons or daughters of judges, lawyers, and professors in their

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11. *McCleskey v. Kemp*, 481 U.S. 279 (1987).

12. Gabel & Harris, *supra* note 10, at 372.

13. Shanfield & Benjamin, *Psychiatric Distress in Law Students*, 35 J. OF LEGAL ED. 65, 70 (1985).

14. Gabel & Harris, *supra* note 10, at 373.

15. *Id.*

study groups. Perhaps this is not surprising since the University of Texas accepted the first Blacks within their hallowed halls in 1976 coupled with the fact that most Black law students will be first generation lawyers. Black students are instead left with an underground communication network of other Black first years and upperclassmen who attempt to acquaint them with a successful method to achieve in law school. Like all first years, Black students must wait until first year grades are published (two and one-half semesters), to discover whether their method is successful. How is the student with little or no access to lawyer friends or family to learn not to expect answers to classroom hypotheticals, which outline is best or even if an outline, hornbook, or nutshell should be used at all, which professors will give straight answers to your questions, or which professors have blatantly racist attitudes and will derive sadistic pleasure from insulting you in front of the class? Is it possible without good advice to realize that the moot court brief-writing and oral competition is a red-herring (usually held within weeks of the final, graded on a pass-fail basis), or to learn how to write the exam answer the professor is looking for, or how to alter the study methods and exam preparations which were so successful in undergraduate school to methods more appropriate for law school?

With no feedback, how does a student whose world view encompasses an element of cooperation and emotion discover that the testing methodology in law school supports reasoning only from a dominant power orientation? Black students have a different language, psychology, and a different view of reality. Racial prejudice has caused these differences to suffuse and permeate their nature. How can law schools purport to fairly test the ability of Blacks and Whites equally when the tests are based on White world views only?

To illustrate and explain the differences in reasoning contingent upon an individual's world view, an example borrowed from the feminist perspective is helpful. In *Portia in a Different Voice: Speculations on a Woman's Lawyering Process*,<sup>16</sup> author Carrie Menkel-Meadow examines the difference between male reasoning and female reasoning. She states that what is considered "normal" was based on males, and that "normal" for women is quite different. In support of her argument, she quotes Carol Gilligan's work, *In a Different Voice: Psychological Theory and Women's Development*:

[w]hen one begins the study of women and derives developmental constructs of their lives, the outline of a moral conception different from that described by Freud, Piaget, or Kohlberg begins to emerge and informs a different description of development. In this conception, the moral problem arises from conflicting responsibilities rather than from competing rights and requires for its resolution a mode of thinking that is contextual and narrative rather than formal and abstract.<sup>17</sup>

Professor Menkel-Meadow states that in a women's world view, interdependence and cooperation takes precedence over separateness and individual rights. In an example borrowed from Gilligan's work, Menkel-Meadow illustrates male and female approaches to a hypothetical in which a man's wife is dying of cancer and needs a drug he cannot afford to purchase. The question

16. Menkel-Meadow, *Portia in a Different Voice: Speculations on a Woman's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39 (1985).

17. *Id.* at 45 (quoting GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT 19 (1982)).

was whether he should steal the drug. The male viewed the problem as a logical equation between competing rights: "Life is worth more than property, therefore, [he] should steal the drug." The female, on the other hand, does not attempt a balancing of rights but attempts to find a way to satisfy all of the parties by keeping ". . . the needs of the parties and their relationships constant, . . . rather than selecting a winner . . ." <sup>18</sup>

The female perspective is very similar to the Black American world view in that both endorse cooperation over competition, both have been subjected to mainstream "inferior" designations via institutional sexism and racism, and both have scored less well on law school exams than have their White male counterparts. For women, however, the legal reasoning required on examinations may be easier to fathom, due to the Protestant work ethic and other European values she shares with White males.

Efforts to improve Black student performance on examinations are misplaced.<sup>19</sup> I feel this is largely due to the approach used. When any type of remedial assistance is directed at Black law students, they are placed in the uncomfortable position of being singled out and labeled. Additionally, the proffered assistance might reinforce an already low self-regard, causing the student's performance to deteriorate even further.

The Council on Legal Education Opportunity (CLEO) programs of pre-law summer classes designed to ease the transition, have proven successful in improving the Black student attrition rate.<sup>20</sup> Unfortunately, CLEO can serve less than 200 of the more than 2,000 to 3,000 Black students entering law schools across the nation. Thus, the majority of Black students *must* comprehend legal methodology through their own efforts, which, given the conceptual problems associated with differing world views, often results in lower achievement than their undergraduate or LSAT potential would suggest.<sup>21</sup>

In *Larry P. v. Wilson Riles*,<sup>22</sup> the San Francisco Bay Area Black Psychology Association successfully challenged the practice of using intelligence test scores as a valid method for placing Black children in classes for the mentally retarded. Evidence proved that in 1971, Black students comprised 28.5% of the Bay Area school district, yet constituted 60% of the district's educable mentally retarded (EMR) classes. Statewide, the discrepancy was even larger. Black students were 9.1% of the total school population to 27.5% of the EMR population. The District Court ruled the school officials had violated the equal protection rights of plaintiffs by using IQ tests to place an inordinate number of students in the EMR classes. In a 131-page opinion the Court stated that because of cultural and racial bias, IQ tests could not be used as a valid measure of intellectual ability.

Although the court banned use of the IQ test in that context, testing remains a barrier to equal opportunity for Blacks, in all facets of life.

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18. *Id.* at 46.

19. Bell, *supra* note 4, at 539.

20. Smith, *The CLEO Experience: A Success by Any Measure*, 22 How. L.J. 399, 408 (1979).

21. *Id.* at 407.

22. *Larry P. v. Riles*, 343 F. Supp. 1306 (N.D. Cal. 1972), *aff'd*, 502 F. 2d 963 (9th Cir. 1974) *modified*, 495 F. Supp. 926 (N.D. Cal. 1979).

### C. *The Law School Atmosphere*

In law school, students are placed in large classrooms with 100 or more other intelligent and highly competitive students. Coupled with the enormous workload and its resulting isolation, the law school atmosphere serves to alienate and depersonalize its students.<sup>23</sup> This does little to modify the Black law student's perception of the legal profession as a hostile environment.

Experience has taught Black law students that White students are friendly while in school but will not "network" with them students once they have matriculated into the profession. The experience of social interaction between Black and White students, while no longer subject to overt racism, still contains elements of ignorance and distrust. Whereas undergraduate interaction between students was characterized as informal, socially oriented, and unlimited, the interaction between law students is formal, task-oriented, and narrowly focused.<sup>24</sup> The interaction between students is of vital importance, for classmates greatly influence Black law students' judgment regarding self-worth and acceptance by the group.<sup>25</sup>

The day-to-day conversations and interactions between law students accomplish two purposes: exchanging pleasantries and scoping out limits, serving both social and competitive motivations. Inquiries from classmates about whether you have read an assignment are not out of concern for how well you are doing, but out of concern over whether you are keeping up (enabling the inquirer to assess his or her own progress). An inquiry about where you attended undergraduate school carries with it the inference that you are good or not as good because your undergraduate school was better or worse than the inquirer's. For truly racist students, skin color is a viable measure of worth, and public discussions of the academic success rates of minorities is a favorite competitive weapon. An attitude that such exchanges between students are normal attributes of professional education, and that such social maneuvering is acceptable, will not salve the hurt dignity of Black students whose easily identified status is the subject of sophisticated racial slurs.

The social competition and the well-documented hostile classroom atmosphere resulting from use of the Socratic method<sup>26</sup> contributes to a sense of powerlessness among Black students, as unintended and unnoticed racial slurs abound. For instance, in one first-year class the students were discussing the legal duty of a landlord to inform tenants that part of the building was being used for an out-patient mental health clinic (one of the mental patients had raped a tenant in the building's elevator). One student, in support of his contention that tenants should be informed, drew an analogy between the desire not to have a Black person living next door with that of not having mental patients next door. The professor did not correct the student's erroneous assumption nor did the professor notice the racial implications. Here, the Black student is faced with the dilemma of speaking up and correcting the slur, which carries the possible consequences of further humiliation from being told that the remark was irrelevant to the discussion or, even worse, that the re-

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23. Patton, *supra* note 5, at 47-48.

24. *Id.* at 39.

25. *Id.* at 39-44.

26. Kennedy, *supra* note 6, at 73; Taylor, *supra* note 1, at 261-62.

mark was harmless or nonracist: "Aren't you being just a little over-sensitive, Ms. Student?"

## II. BEHAVIORAL RESPONSES TO LAW SCHOOL STRESS

A recent study on the stress of legal education revealed that law students experience higher rates of psychiatric distress than either the normal population or the medical school population.<sup>27</sup> Law school experiences contributing to this high level of stress included the Socratic method and student aggressiveness, the lack of certainty that the student is studying enough of the right material, and a lack of commitment to the law.<sup>28</sup>

The Socratic method is responsible for development of hostile relations between students and professors. Students learn very quickly that volunteering in class can result in ridicule, and the level of class participation decreases markedly after the first two weeks of first year classes. In undergraduate school, it is expected for students to use class for asking questions regarding anything they did not understand. In contrast, the hostile law class environment intimidates students into withholding their questions due to fear of being ridiculed. As a result, student comprehension of what is required of them may remain incomplete throughout the first year, leading to stress over whether they are on the right track.

Students who lack commitment to law school, either because they intend to use a legal education as a stepladder to another career,<sup>29</sup> or, as in the case of Black students, because of ambivalent feelings concerning the law,<sup>30</sup> find their experience in law school extremely stressful. No matter what event or situation is primarily responsible for their stressed condition, the behavioral responses to stress have received attention from the legal community.<sup>31</sup> No study to date has made a detailed study of law student behavioral responses attributable to Black students, with racism and its pernicious effects included in the description of stress producers. However, one paper reported that Black students who are very successful in law school may experience stress due to fears that the Black community may feel they have become tools of the system.<sup>32</sup>

Every Negro who is higher than lower class has a sense of guilt to other Negroes because he considers success a betrayal of his group and a piece of aggression against them. Hence, he has frequently what might be called 'success phobia' and occasionally cannot enjoy the fruits of his achievements.<sup>33</sup>

The sense of alienation from mainstream society and fears of separation from community peers may result in some Black students withdrawing academically, in order to maintain an average closer to their brothers. Apparently, a decision to make a commitment or to withdraw some of the commitment is a function of self-esteem. Researchers on the phenomenon associate withdrawal

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27. Shanefield & Benjamin, *supra* note 12.

28. *Id.* at 71.

29. *Id.*

30. Bell, *supra* note 4, at 547.

31. Taylor, *supra* note 1. Beck & Barns, *Anxiety and Depression in Law Students: Cognitive Intervention* 30 J. LEGAL ED. 270 (1979).

32. Bell, *supra* note 4, at 549.

33. *Id.* (quoting A. KARDINER & L. OVESSEY, *supra* note 3, at 316).

with lower achieving students,<sup>34</sup> and the Black student is no exception; the alienation felt in law school and the legal profession may increase the likelihood of a Black student losing commitment, and choosing to withdraw thus achieving low grades in their classes.

A study of the psychological problems associated with the law school experience, which results in dysfunctional behavior for some students, found that law school itself does not create dysfunctional behavior. Rather a combination of law school's potential stresses and specific attitudes which the student possesses upon entrance contribute to the dysfunctional behavior.<sup>35</sup> The study further stated that the law school experience can be damaging to an individual who equates academic success with self-esteem, and that students with outstanding academic achievement in prior schooling develop an attitude which equates self-worth with achievement.<sup>36</sup> Thus, law students are susceptible to behavioral disorders because they are high academic achievers.

### III. THE LEGAL PROFESSION

For many Black students, the legal profession loses much of its appeal after exposure to law school. Reasons for their disappointment center around their unfulfilled expectations of redressing discriminatory practices, not receiving employment comparable to their White peers, and increased awareness of unmentioned racism in the profession.

The National Association for Law Placement (NALP) class of 1983 Employment Survey demonstrated that minority law graduates were more likely than non-minority law graduates to obtain employment in public interest, government, military, or academic categories, and less likely to be employed in private practice, business concerns and judicial clerkships.<sup>37</sup>

The NALP survey also showed that Black Americans were *least* likely to have employment in private practice, no surprise to Black law students, who must overcome racism in private firms and culturally biased exams. First, firms interviewing at law schools typically state a preference for students in the top 10-25% of their class, a standard which excludes the majority of Black students. Secondly, private practice firms are not required, as government offices are, to implement affirmative action programs, and many firms are simply racist.

An informal survey of recent University of Texas School of Law graduates presents a frustrating and disparaging picture of the race and class obstacles facing Black lawyers. Experiences such as many monosyllabic interviews and shocked expressions have led some Black lawyers to place a picture on their resume, or other indicia of color. Litigators complain that their opponents often assume they are incompetent and use unethical maneuvers based on that assumption. Other more subtle forms of racism include lack of eye contact, unthinking assumptions and generalizations, "old boy" repartee between White judges, opposing attorneys, bailiffs, and ill-concealed animosity.

The legal profession for Black Americans can be described as higher pay,

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34. Taylor, *supra* note 1, at 263.

35. Patton, *supra* note 5.

36. *Id.* at 39-44.

37. NATIONAL ASSOCIATION FOR LAW PLACEMENT (NALP), Class of 1983 Employment Survey at 97, Table 29 (1985). *See* App. A.

more stress, less peace, and the same game as before. The lower achievement level and racism are preventing Black lawyers from gaining access to the power and structures of American society.

#### IV. SUGGESTIONS FOR IMPROVEMENT

Any hope for making the legal profession responsive to minorities requires that people recognize that there is a problem and that improvement is a worthwhile goal. "Institutional" racism includes an implicit denial or minimization of the persistence of serious racial discrimination and the concern for the unusually qualified Black American, at the expense of the group. Therefore, Black law students and lawyers must continue the struggle for both mainstream recognition and admission of the double standards being applied.

##### a. Grading Schemes

Law school educators defend the numbered grading system by stating it is the law firm's use of law GPA's to predict employee performance that prevents the adoption of a pass-fail scheme. To serve those law firms and remove some of the damage to law students, a compromise system whereby only status in the top 10% or 33% or bottom 50% is recognized. Alternatively, there is the use of some static gage to determine class ranking, such as the bar examination.

##### b. Teacher Feedback

The stress associated with genuine concern over whether a student is performing up to par can be decreased, if not eliminated, by giving mid-terms and critiquing the student's performance. This will also enable the school to aid minority development by providing a non-stigmatized avenue of remedial assistance.

##### c. Legal Responsiveness

Standards of behavior recognized by law should be more than the reasonable White man. Asking a middle-aged, suburban White female to assess a defendant's actions as "if she were in his/her shoes" is absurd when the defendant is from a cultural or racial minority. Likewise, neighborhood control of the petty offense courts will assure that a defendant is judged by the standards of that community.

##### d. Empowering Black Organizations

The social and fraternal support organizations for Black students should be subsidized by the university; however low minority enrollment coupled with a lack of financial resources have rendered these organizations powerless and ineffective.

#### A. *Teaching Legal Analysis*

I have argued for teaching legal analysis throughout this paper. Below is a brief description of how legal reasoning is taught.<sup>38</sup> Every first-year class

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38. Jaff, *Frame-Shifting: An Empowering Methodology for Teaching and Legal Reasoning*, 36 J. OF LEGAL ED. 249 (1986). See App. B.

must undergo some type of orientation before classes start, and information containing the steps involved in legal reasoning can be explained. Additionally, school administrations can form "required study groups" with a racially diverse mixture, thus militating against discrimination in forming study groups.

APPENDIX A  
Table  
Five-Year Comparison of Employment by Sex and  
Race  
In Full- or Part-Time Positions  
(Percentage of Employed Respondents Including  
Those With Job Not Identified)

Employment Categories	MEN (minority & non-minority)		WOMEN (minority & non-minority)		MINORITY (men & women)		TOTAL	
	1979	1983	1979	1983	1979	1983	1979	1983
Private Practice	56.1	58.5	45.0	56.0	33.2	45.7	53.3	58.9
Public Interest	4.3	2.3	9.3	4.3	19.2	9.0	5.4	3.0
Business Concerns	11.2	11.6	7.9	8.4	7.9	10.4	10.5	10.5
Governments	13.6	10.1	18.8	12.6	26.0	17.7	14.7	11.4
Judicial Clerkships	9.3	10.1	11.4	14.1	4.9	9.8	9.8	11.4
Military	2.0	2.2	0.8	0.8	1.4	2.5	1.7	1.7
Academic*	1.5	1.2	2.1	1.9	2.4	2.7	1.7	1.5

\* Academic category excludes Advanced Degree Program for both 1979 and 1988 for comparability.

## APPENDIX B

### FRAME-SHIFTING: AN EMPOWERING METHODOLOGY FOR TEACHING AND LEARNING LEGAL REASONING<sup>39</sup>

#### A. *Case Analogization: Only a Beginning*

In his seminal *Introduction to Legal Reasoning*, Edward H. Levi begins his explanation of the process of legal reasoning by suggesting a three-step approach to legal problem solving. First, one must establish the factual similarity between the relevant case precedents and the case to be decided. Second, one must extract the rule of law from those precedents as they have evolved. Finally, one must apply that rule of law to the case to be decided.

This progression of inquiry, commonly called "case analogization" is a good method with which to start in showing students how to gain access to the knowledge of the way cases are to be read and reasoned about in law school.

When formulating a progression of inquiry, legal reasoning should be presented not as a series of commands, but as a series of questions (a progression of inquiry).

And, the first question would be: has a relevant factually similar inquiry progressed before? This question involves the sub-inquiry of how to

39. The following is a near-verbatim reproduction of Jaff, *supra* note 36.

identify relevant past progressions. This sub-inquiry can be pursued by (2) looking at lines of cases that were deemed relevant or factually similar to each other in the past and asking what made someone think that those cases were mutually relevant.

The second question would be: How has that inquiry progressed and what is the conclusion (that) has been reached to date? Answering this question will help students see evolution of doctrine over time.

The final step in this progression of inquiry is to ask: If the case to be decided is the next step in the progression of the particular inquiry being pursued in a line of cases, then, based on how the inquiry has progressed to date, what should the result in the case to be decided be? In other words, what is the relevance of the past progression of the particular inquiry involved to the present and future progression of the same inquiry?

### B. *Frame-Shifting: the Rest of the Story*

The question that case analogization leads to, then, is: How can convincing rationales be formulated for different results in the same case or the same kinds of cases? In other words, how can there be two different yet equally "legally sound" results to a single factual situation? Yet another formulation of this question is: how do judges and lawyers know how an inquiry should and/or will progress, relying only on how it has progressed in the past? By asking this question, we advance the inquiry beyond case analogization to what I will call "frame-shifting."

Frame-shifting involves a progression of inquiry not unlike the earlier progression developed for case analogization. The students should be helped to develop a series attempting to construct arguments. Because the concepts of "broad" and "narrow" are relative ones. Frame-shifting begins with an identification of the argument to be responded to.

The first question in the frame-shifting progression of inquiry is: What is the argument to be refuted? Often this argument can be identified by looking for ambiguous words or phrases in the rule of law or the facts. The argument to be refuted will center on an interpretation of this word or phrase. Usually, ambiguous phrases include modifiers: reasonable person, compelling interest.

Second, students should ask: Is that argument based on a broad or narrow interpretation of the rule or the facts? If broad, the student should look for a broad interpretation on which to base a counterargument. That different interpretation can then be made the foundation for the student's or litigant's own argument, and the rationale for that argument can be constructed by continually asking "why?" until a self-evident or tautologous point is reached.

There are no mechanical rules for the application element of the reasoning process; thus, in the process of applying rules to facts, attorneys can find convincing rationales for various results.

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