

# ARTICLES

## TO STAND FOR THE WHOLE: PLURALISM AND THE LAW SCHOOL'S PROFESSIONAL RESPONSIBILITY

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Only within that interdependency of different strengths, acknowledged and equal, can the power to seek new ways of being in the world generate, as well as the courage and sustenance to act where there are no charters.<sup>1</sup>

### HISTORY

On April 9, 1866, Congress passed the first Civil Rights Act<sup>2</sup> which made citizenship and the rights to make contracts, to hold and enjoy prop-

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1. AUDRE LORDE, *THE MASTER'S TOOLS WILL NEVER DISMANTLE THE MASTER'S HOUSE*, FEMINIST FRONTIERS III 10 (Laurel Richardson & Verta Taylor eds., 1993).

2. 14 Stat. 27 (1866).

erty, to serve as witnesses and to enjoy the equal benefit of all laws available to African-Americans. Two years later, on July 21, 1868, Congress ratified the Fourteenth Amendment, which explicitly reversed the Dred Scott<sup>3</sup> decision and attempted to answer the question put forward by Justice Taney:

Can a Negro whose ancestors were imported into this country, and sold as slaves become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights and privileges and immunities guaranteed by that instrument to the citizens?<sup>4</sup>

In a further attempt to stem continuing abuses heaped upon the heads of freed African-Americans, Congress adopted, and submitted to the states, the Fifteenth Amendment which was ratified on March 30, 1870. However, as if proceeding to the beat of an insistent drummer, abuse and violence continued their relentless march over the privileges and immunities of citizenship granted to African-Americans. The need for more African-American lawyers to assist in the struggle for political, social and economic justice was enormous.

Concurrent with the ratification of the Fifteenth Amendment, Christopher Langdell introduced the case method at Harvard Law School,<sup>5</sup> a development which would transform the complexion of legal education. He enthusiastically announced that his new method constituted "much of the shortest and best, if not the only way of mastering . . . legal doctrine."<sup>6</sup> Although initial reaction to the introduction of the case method was negative,<sup>7</sup> it has, in many modern variants,<sup>8</sup> grown to be the predominant mode of law teaching.

Introduction of the case method and Langdell's later appointment of James Barr Ames to a professorship, ushered in a new era for legal education.<sup>9</sup> Although Ames had never practiced law, Langdell viewed as the perfect choice to take on the duties and fulfill his conception of a law professor. Langdell maintained that "what qualifies a person, therefore to teach law, is not experience in the work of a lawyer's office, not experience in dealing with men, not experience in the trial or argument of cases not experienced in short, in using law, but experience in learning law."<sup>10</sup>

3. *Scott v. Sanford*, 61 U.S. 393 (1857).

4. *Id.* at 403.

5. ROBERT STEVENS, *LAW SCHOOL, LEGAL EDUCATION IN AMERICA FROM THE 1850'S TO THE 1980'S* 205 (Chapel Hill, North Carolina, 1983).

6. *Id.* at 52 (quoting CHRISTOPHER LANGDELL, *A SELECTION OF CASES ON THE LAW OF CONTRACT*, vii).

7. *Id.* at 52. Initial reactions varied in scope and intensity. For a sampling of criticisms see Jacob H. Landmann, *Arise the Case Method of Studying Law*, 4 N.Y.U. L. REV. 139, 151 (1927) (Induction. . . it is here that Langdell and his followers fail most wretchedly); Karl N. Llewellyn, *The Current Crisis in Legal Education* 1 J. LEGAL EDUC. 211, 215 (1948) (It is obvious that man could not devise a more wasteful method of imparting information about subject matter than the case - class. Certainly, man never has); See also Andrew Watson, *The Quest for Professional Competence: Psychological Aspects of Legal Education*, 37 U. CIN. L. REV. 91 (1968); Jon Richardson, *Does Anyone Care for More Hemlock?*, 25 J. LEGAL EDUC. 427 (1973).

8. STEVENS, *supra* note 5 at 38. See also DONNA FOSSUM, *Law Professors: A Profile on the Teaching Branch of the Legal Profession*, 1980 AM. B. FOUND. RES. J.501.

9. *Id.*

10. *Id.* at 38-39 (quoting JOEL SELIGMAN, *THE HIGH CITADEL: THE INFLUENCE OF HARVARD LAW SCHOOL* (Boston: Houghton Mifflin Co., 1978)].

Ames' appointment signaled the beginning of a dichotomy in legal education between "academics" and "practitioners."<sup>11</sup> This division eventually led to the creation of the Association of American Law Schools which institutionalized the dichotomy between "academicians" and "practitioners." Charles Elliott, President of Harvard University during Langdell's tenure, viewed the appointment of Ames as a success for the profession. Elliot predicted the appointment would have far reaching implications for the profession:

"There will be produced in this country a body of men learned in the law, who have never been on the bench or at the bar, but who nevertheless hold positions of great weight and influence as teachers of the law, as expounders, systematizers and historians. This I venture to predict, is one of the most far-reaching changes in the organization of the profession that has ever been made in our country."<sup>12</sup>

Prior to this change, legal education for African-Americans and for whites began under the apprenticeship of an established lawyer.<sup>13</sup> In the next stage of its development, law schools (primarily private) were recognized as a viable alternative to apprenticeship.<sup>14</sup> As the evolution continued throughout the 20th century, law school replaced the apprenticeship model and became the dominant mode of legal education. By the 1970's, attendance and graduation from an ABA approved law school was nearly the exclusive mode of obtaining legal education.<sup>15</sup>

During the Langdell period, formal legal education for African-Americans began when Howard University opened its law department in 1868.<sup>16</sup> In addition, the first exclusively white part-time evening proprietary schools were opened during that decade. Both these schools and the African-American law schools afforded ethnic minorities interested in law an opportunity to obtain a legal education. The low tuition of freestanding law schools significantly facilitated African-Americans and other ethnic minorities acquiring a legal education.<sup>17</sup>

In 1878, the American Bar Association was founded with the goal of improving the professionalism of practicing attorneys.<sup>18</sup> As part of its call for higher standards in the profession the ABA's charge for more formal requirements in legal education<sup>19</sup> led to the establishment of the Association of American Law Schools (AALS) in 1900.<sup>20</sup> That law schools could only obtain membership in the AALS if they met stated minimum standards<sup>21</sup> demonstrates a clear intent to standardize and raise legal education requirements so high that the proprietary schools could not possibly meet them. The reasons for elevating the standards for admission to law

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11. *Id.* at 38 (quoting LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 615, (New York, NY 1973).

12. *Id.* at 38 (quoting ARTHUR F. SUTHERLAND, THE LAW at Harvard, 194).

13. *Id.* at 3.

14. See generally STEVENS, *supra* note 1. Stevens discusses stages in the development of legal education throughout text. Also see FRIEDMAN *supra* note 11, at 606-613.

15. FOSSUM, *supra* note 9, at 503.

16. J. CLAY SMITH, EMANCIPATION 41 (Philadelphia, 1993).

17. *Id.*

18. STEVENS, *supra* note 5, at 27.

19. FRIEDMAN, *supra* note 11, at 650-651.

20. *Id.* at 674.

21. STEVENS, *supra* note 5, at 97.

school were numerous. However, Fleming and Bailyn stated that Jerold S. Auerbach's<sup>22</sup> study left little doubt that much of the hostility on the part of the leading legal academics and practitioners toward proprietary and night schools was ethnic. The night law school became an integral part of the melting pot of America.<sup>23</sup>

"It is true that the leaders of the bar shared the then current assumptions about the ethnic superiority of native white Americans . . . . Legal periodical articles from the end of the century resound with praises of the glories of the legal profession . . . . Often these articles detailed or presumed an idealistic, but attainable vision of a lawyer, which could be achieved through high standards . . . . The image of the poor [African-American], Jewish or immigrant law school student was far from this ideal . . . . The only way to retain the ideal of the perfect lawyer was to get rid of schools that did not follow Orthodox methods or that admitted [students who had not followed a conventional educational pattern]. The [ABA and AALS] hoped to accomplish this by urging state legislatures to raise prelaw and law school structural requirements so high that these law schools could be deprived of their natural markets, the lower socioeconomic groups."<sup>24</sup>

During this period, due to a general exclusion from membership, African-American attorneys and African-American law professors were absent from the policy debate on legal education which preceded and followed the formation of the ABA and the AALS.<sup>25</sup> With no advocacy forum, African-American attorneys and professors were rendered powerless to argue the adverse impact of this new policy and reverse this negative tide. "The exclusion of [African-Americans] from the ABA and AALS is offered as one reason that [African-American] lawyers were not hired as professors by white law schools for a period which extended into the 1900's."<sup>26</sup>

In the midst of this regressive policy process there were a number of attempts to establish African-American law schools. These attempts substantiated the definitive desire and interest on the part of ethnic minorities in entering the legal profession. Though many of these schools existed for a relatively short duration the commitment to expand the number of African-American lawyers through formal legal education was strikingly apparent. Howard University Law School, which was founded first, adopted a non-discriminatory policy which allowed admission irrespective of race or gender.<sup>27</sup> This inclusive admission policy gave Howard the distinction of being one of the first to admit women.

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22. JEROLD L. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA*, (New York, 1976).

23. D. FLEMING AND B. BAILYN, *LAW IN AMERICAN HISTORY ENMITY AND AMITY: LAW TEACHERS AND PRACTITIONERS 1900-1922* (Boston 1971).

24. STEVENS, *supra* note 5, at 100-102.

25. ALFRED Z. REED, *TRAINING FOR THE PUBLIC PROFESSION OF THE LAW* 208 (1921).

26. SMITH, *supra* note 16. Outside of the [African-American] schools, however, the administration and faculty of the AALS member schools remained predominantly white until after the mid 1940's.

27. KELLIS E. PARKER AND BETTY STEBMAN, *Legal Education for Blacks*, 407 *ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE*, 145 (May 1973).

## LISTING OF AFRICAN-AMERICAN LAW SCHOOLS (1869-1932)

Law School	Date Opened	Date Closed
Howard University	1869	
Straight University	1870	1887
Lincoln University	1870	1873
Wilberforce University	1872	1885
Harper Law School	1875	1890
Shaw University	1878	1880
Central Tennessee College	1879	1921
Shaw University	1888	1916
Simmons University	1890	1931
Morris Brown College	1896	1907
Lane College of Law	1900	1903
John Mercer Langston School of Law	1915	1927
Virginia Union University	1922	1931
Robert H. Terrell Law School	1931	1945
Kent College of Law	1932	1941
Keystone College of Technology School of Law	1932	1933

Source: J. Clay Smith, *Emancipation* (Philadelphia, 1993)

Women shared with African-Americans the status of outsiders.<sup>28</sup> Women were not allowed to practice law before the 1870's.<sup>29</sup> Myra Bradwell's struggle to gain admission to the Illinois bar epitomizes the resistance women faced in their efforts to enter the legal profession. Mr. Justice Joseph Bradley, in his much cited opinion, stated that "the natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life . . . the paramount destiny and mission of women are to fulfill the noble and benign offices of wife and mother. This is the law of the creator. And the rules of civil society must be adapted to the general contribution of things, and cannot be based on exceptional cases."<sup>30</sup> The so-called "exceptional case" became more common as talented and committed women attempted to attain equal standing in American society and gain entry into the legal profession.

In the late 1860's, Union College of Law admitted women. The University of Iowa, Michigan, Boston University and Hastings Law School were among the next group of law schools to open the doors to women.<sup>31</sup> The elite law schools, however, remained resistant.<sup>32</sup> It was not until 1918 women were admitted to membership in the ABA and also to the law schools at Fordham and Yale.<sup>33</sup> Harvard did not admit women until the 1950's.<sup>34</sup> It took approximately twenty more years for women to finally gain access to all ABA accredited schools.<sup>35</sup>

Even though the effort to raise the standards of legal education met with some opposition and did not start to firmly take hold in many states

28. LAWRENCE FRIEDMAN, *A HISTORY OF AMERICAN LAW* (New York, 1973).

29. *Id.* at 639.

30. *Bradwell v State*, 83 U.S. 130, 131 (1873).

31. STEVENS, *supra* note 5, at 82.

32. Donna Fossum, *Law and the Sexual Integration of Institutions: The Case of American Law Schools*, 7 AM. LEGAL STUD. ASS'N 222 (1983).

33. STEVENS, *supra* note 5, at 84.

34. STEVENS, *supra* note 5, at 84.

35. FOSSUM, *supra* note 32, at 222.

until the 1950's, by 1975 law schools had a virtual monopoly on legal education.<sup>36</sup> As a result, law schools are currently nearly the only means of entry into the legal profession. This "guardian" function is a privilege which places law schools in a unique and exceptional position of influence and authority. With this privilege comes an immense professional responsibility to society at large. In essence, the law is so profoundly intertwined with our economic, social and political status<sup>37</sup> that its accessibility by all segments of society must be guaranteed in order to protect and extend democratic rights to all. In addition, law provides a framework in which discourse takes place. It is also a means to non-violently redress social conditions, to legislate new laws and to both initiate lawsuits and to defend oneself from accusations of criminal and civil misconduct. Adequate representation is crucial to the successful navigation of the legal system. Consequently, law school, with its virtual monopoly on determining who will and will not enter the profession, has an undeniable responsibility for seeking out and insuring the education of a diverse group of highly qualified individuals. Pluralism in the legal profession is an indispensable resource for helping to insure accessibility to legal redress for all segments of the American population on a broad range of issues.

### *Enhancing Pluralism in Student Admissions*

"When the . . . graduates removed the multicolored ribbons from the sleeves of their robes . . . many of us, most in fact, envisioned a faculty as diverse in gender, ethnicity and perspective as the ribbons were in color. Some of us imagined learning the law through courses and materials that would address the interests and needs of women, people of color, and other social outsiders and would encourage us to value and express our points of view. Many of us had wished time and again . . . for an understanding ear, with the firm belief that acknowledgment and respect from the faculty (and indeed the institution) for the differences in culture, consciousness and perspective among us would ultimately make a difference in the way we would be able to practice law and possibly in the nature of law itself."<sup>38</sup>

Enhanced pluralism in the law school student body and faculty populations has the potential for enriching the educational and overall professional development experience. In the last decade, law schools have experienced unprecedented growth and student bodies have moved toward expanded gender, cultural and racial inclusiveness.<sup>39</sup>

Pressures toward establishing more equity and inclusiveness for African-Americans, women and other outsider groups resulted in these admissions policy changes. (Hereafter, the term "outsider" will be used to speak

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36. See generally AUERBACH, *supra* note 22.

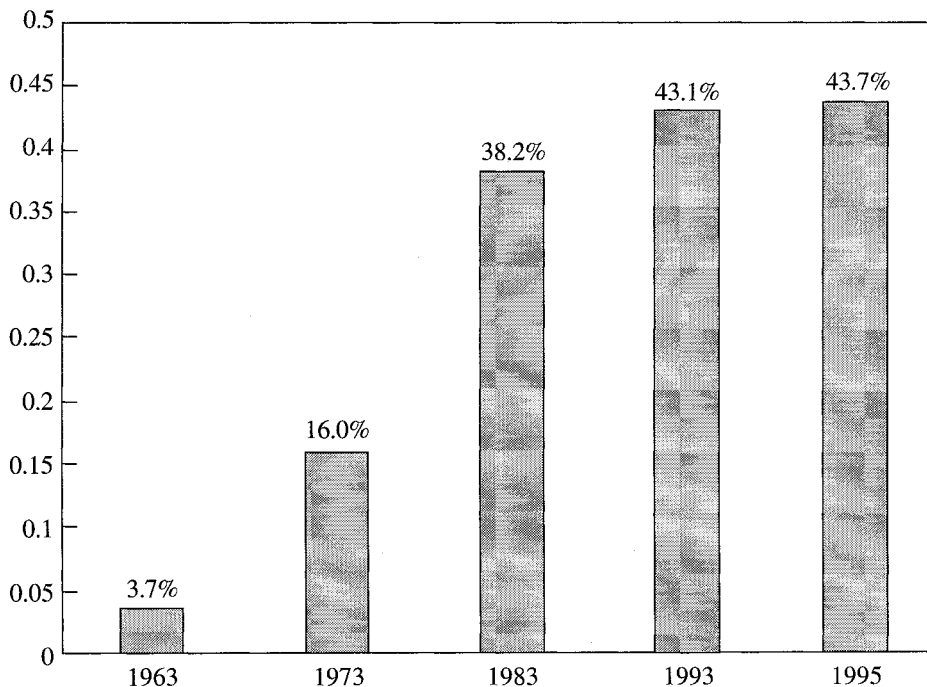
37. See ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT*, (New Haven, 1975); ROBERT A. DAHL, *DILEMMAS OF PLURALIST DEMOCRACY* (New Haven, 1982); MARTIN S. SKLAR, *THE CORPORATE RESTRUCTURING OF AMERICAN CAPITALISM 1890-1916* (Cambridge University Press, 1988) and MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870-1960* (New York 1992).

38. Suzanne Home & Lois Schwartz, *Admitted but Not Accepted: Outsiders Take an Inside Look at Law School*, 5 BERKELEY WOMEN'S L. J. 1, 47.

39. 1993 REVIEW OF LEGAL EDUCATION IN THE UNITED STATES; See also STEVENS, *supra* note 5, at 234.

inclusively about groups of color, women, persons with disabling conditions and other historically underrepresented groups. The most focused attention will be directed toward women and person of color.) Consequently, the proportion of women and minorities enrolled in law school has risen.<sup>40</sup> In 1963, women comprised 3.5% of law school enrollment.<sup>41</sup> In 1973, the number increased to 15.3% and in 1983 to 35.6%.<sup>42</sup> By 1995, women represented over 43% of the total students enrolled in law school.<sup>43</sup> Minority enrollment, however, did not climb at the same rate, though the number has increased significantly. In 1967, minorities comprised 2.6% of the law school enrollment.<sup>44</sup> By 1973, the number had risen to 7.48%. The percentage rose to 9.8% in 1983,<sup>45</sup> though not without some challenges. By 1995, minorities represented nearly 19% of law school enrollment.<sup>46</sup> African-American students comprised the largest portion of this number with 7.2% total enrollment.<sup>47</sup>

CHART #1  
Growth in the Percentage of Women Attending Law Schools  
1963-1995



Sources: (1) Review of Legal Education in the United States, 1973. (2) A Review of Legal Education in the U.S., 1995.

40. STEVENS, *supra* note 5, at 246.

41. 1993 REVIEW OF LEGAL EDUCATION IN THE UNITED STATES, at 67.

42. *Id.* at 67.

43. 1995 REVIEW OF LEGAL EDUCATION IN THE UNITED STATES at 67.

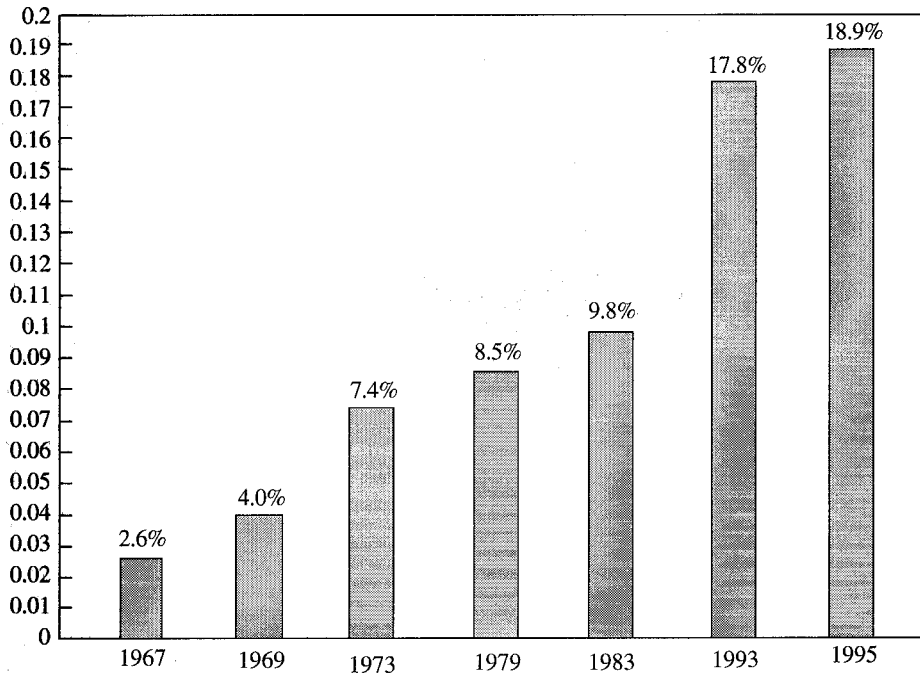
44. Assoc. of American Law School Newsletter, 68-3 p. 2.

45. Parker and Stebman, *supra* note 27, at 146.

46. 1995 REVIEW OF LEGAL EDUCATION IN THE UNITED STATES at 68.

47. *Id.*

CHART #2  
GROWTH IN THE PERCENTAGE OF MINORITIES IN LAW SCHOOL:  
1967-1995



Source: A Review of Legal Education in the United States, 1995.

Clearly, the number of women and minorities admitted to law school has risen significantly. But surveys analyzing their law school experience indicate that the entrance has been characterized by difficult and traumatic experiences.<sup>48</sup> There is a large body of literature examining the overall law school experience.<sup>49</sup> A study of University of Michigan law students revealed that almost one half of the student body expressed some level of dissatisfaction with their law school experience.<sup>50</sup> A correlation between ethnicity and the level of dissatisfaction was also cited. Jewish students expressed more dissatisfaction than other Protestant or Catholic students. African-American and Hispanics students were "markedly more dissatisfied than any of the white groups," and the female students expressed more

48. Randall L. Kennedy, *Racial Crises of Legal Academia*, 102 HARV. L. REV. 1745 (1989); Suzanne Homer and Lois Schwarz, *Admitted but Not Accepted: Outsiders Take an Inside Look at Law School*, 5 BERKELEY'S WOMEN'S L. J. 1 (1989-90); Catherine Weiss and Louise Melling, *The Legal Education of Twenty Women*, 40 STAN. L. REV. 1299 (1988); Kimberle Crenshaw, *Foreword: Toward a Race-Conscious Pedagogy in Legal Education*, 11 NAT'L BLACK L. J. 1 (1989); Taunya L. Banks, *Gender Bias in the Classroom*, 38 J. LEGAL EDUC. 137 (1989) and also see generally, Volume 38 of the Journal of Legal Education for a thoughtful and insightful array of articles on women in law school covering issues ranging from curriculum and teaching method to feminist legal theory.

49. See, for example, Scott Turow, *One L* (Penguin, 1978); Ralph Warner & Toni Ihara, 29 Reasons Not to Go to Law School (NOLO, 1988); Ronald M. Pipkin, *Legal Education: The Consumer's Perspective*, 1976 AM. B. FOUND. RES. J. 1161; Stephen B. Shanfield and G. Andrew H. Benjamin, *Psychiatric Distress in Law Students*, 35 J. LEGAL EDUC. 65 (1985); and Paul Carrington and James J. Conley, *The Alienation of Law Students*, 75 MICH. L. REV. 887 (1977).

50. Carrington and Conley, *supra* note 48, at 887.

dissatisfaction than males.<sup>51</sup> In reading accounts of how law school affects students, there is a consistent finding that for a large number of students, law school can be a very painful experience filled with anxiety, sadness, confusion, disillusionment and dejection. Up to 40% of law students may even suffer depression as a result of experiences in school.<sup>52</sup>

Many have focused on the experience of the "outsider"<sup>53</sup> in law school settings, and a most recent study at the University of Pennsylvania provides an enormous amount of insight into this phenomenon. The study supports the premise that there are considerable academic differences between the graduation credentials of male and female students at the end of law school. "Despite identical entry-level credentials, this performance differential between men and women is created in the first-year of law school and maintained over the next three years."<sup>54</sup> By the end of their first year in law school men are three times more likely than women to be in the top 10% of their law school class.<sup>55</sup> This confirms the emergence of an early configuration in which women performed at a lower level<sup>56</sup> and received lower grades and lower class rank which resulted in lower achievement of academic honors.<sup>57</sup> The study also indicated strong attitudinal differences between the male and female students.<sup>58</sup> More specifically, "women were alienated by the way the Socratic method [was] used in large class instruction"<sup>59</sup> . . . For these women, learning to think like a lawyer [meant] learning to think and act like a man."<sup>60</sup>

The study also tracked race data to determine if similar or contrasting patterns existed for persons of color.<sup>61</sup> The students of color were found to have shared a experience similar to those reported for the women students, in terms of their academic performance. "Even when [holding] constant, LSAT and undergraduate GPA, race alone continued to be a highly significant predictor of law school performance across first, second and third years."<sup>62</sup> As a consequence of disproportionately low class ranking, women and students of color are underrepresented in the law school's formal recognition of outstanding students, including participation in law reviews and moot court boards.<sup>63</sup> First year grades largely determine the distribu-

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51. *Id.* 894.

52. Benjamin, Andrew H., et. al, *The Role of Legal Education in Producing Psychological Distress Among Law Students and Lawyers*, 1986 AM. B. FOUND. RES. J. 225.

53. See Homer and Schwartz *supra* note 48; Weiss and Melling, *supra* note 48; Mari Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 WOMEN'S RTS. L. REP 7 (1989).

54. The University of Pennsylvania survey of views on gender and the law school experience utilized an anonymous listing of 981 students. It included data on gender, race, undergraduate grade point average, Law School Admissions Test score, undergraduate institution and law school grade point average. Lani Guinier, Michelle Fine, and Jane Balin with Ann Bartlow and Deborah Lee Stachel, *Becoming Gentlemen: Women's Experiences at One Ivy League Law School*, 143 U. PENN L. REV. 1 (1994).

55. *Id.* at 3.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 5.

61. *Id.* at 27 see Table V, Effects of College Statistics and Race on Law School GPA's.

62. *Id.* at 27 (See note 74).

63. *Id.* at 27.

tion of such as "honors, law review, job placement and because of the importance placed on these matters by the law school culture, even the student's sense of self worth."<sup>64</sup>

A study at Boalt Hall School of Law<sup>65</sup> indicated that women and persons of color suffer "substantially diminished self-esteem during the law school experience."<sup>66</sup> "A majority (51%) of all women agreed with the statement that although they felt intelligent and articulate prior to law school, they did not feel that way at Boalt . . . Nearly 40% of all women said they lost confidence when they were in class."<sup>67</sup> Again, a consistent pattern emerged among reactions of women and people of color. "This pattern is repeated in so many findings, it supported the theory that white men were having a vastly different experience in law school."<sup>68</sup>

Numerous studies have documented differences between the experiences of male and female graduate students.<sup>69</sup> Most of the studies indicate "there is evidence that women are less confident than men and this is likely to influence their career plans as well as their perseverance in carrying them out. Women are more likely to attribute the lack of ability as a barrier to success and are viewed as less dedicated and less promising by faculty. One may well speculate whether there is a causal relationship between this perception of the faculty and the low self-confidence of women students."<sup>70</sup>

Other writers eloquently have painted a picture of how conflicting the outsider experience can be. Mari Matsuda has described a phenomenon of multiple consciousness which requires a bifurcated way of thinking - a shifting back and forth between an "outsider consciousness and the white consciousness required for survival in elite educational institutions . . . This constant shifting of consciousness produces sometimes madness, sometimes genius, sometimes both."<sup>71</sup>

Matsuda expanded upon her experience noting "a professor once remarked that the mediocre law students are the ones who are still trying to make it all make sense. That is, the students who are trying to understand law as necessary, logical, and co-extensive with reality. The students who excel in law schools - and the lawyers - are the one who are able to detach

64. *The Current State of the Law Curriculum*, 32 J. LEGAL EDUC. 321, 329 (1982).

65. Homer & Schwartz *supra* note 48 at 24. The study at Boalt Hall Law School utilized a 19 page questionnaire which included quantitative data on "class work, number of high honors grades, etc." The questionnaire was divided into six parts: "(1) career plans and goals; (2) academic experience at Boalt; (3) psychological and emotional reaction to the academic experience. . . ; (4) academic performance; (5) demographic information. . . and (6) the section for openminded comments."

66. *Id.* at 33.

67. *Id.* at 33.

68. *Id.* at 33.

69. See *eg.*, Rosalyn Arlin Mickelson, *Why Does Jane Read and Write So Well? The anomaly of Women's Achievement*, 62 SOCIOLOGY OF EDUC. 47 (1989); Helen M. Berg and Marianne A. Ferber, *Men and Women Graduate Students: Who Succeeds and Why?* 54 J. OF HIGHER EDUC. 629 (1983); Sarah H. Stenglanz and Shirley Lyberger Ficek, *Sex Differences in Student Teacher Interactions in the College Classroom*, 3 SEX ROLES 345 (1977).

70. Berg and Ferber *supra* note 69, at 639.

71. Matsuda *supra* note 66 at 638. These observations stimulated memories of my observing puzzled expressions and questions.

law and to see it as a system that makes sense only from a particular viewpoint."<sup>72</sup>

Matsuda reasoned that this abstraction and detachment are ways out of the discomfort of direct confrontation with the ugliness of oppression. "Abstraction criticized by both feminist and scholars of color, is the method that allows theorists to discuss liberalism with no connection to what those concepts mean in real people's lives."<sup>73</sup> Outsiders then have a dual status with accompanying contradictions which they must reconcile daily. For outsider group members, this is analogous to their efforts at reconciling their bank records each month—in a vacuum devoid of any consideration for pressing and seemingly overwhelming life expenses and overall indebtedness. This type of detachment ignores the struggle and pain outsiders may experience in attempting to reconcile their own identities within institutions which place little or no value on how their identity impacts how they see the law.<sup>74</sup>

It is this process of continuous reconciliation which Patricia Williams experienced as a youth. She associated her dreamy, many-sided feelings of the world with fears that she was schizophrenic. With age she saw there was sanity in that many-sided world view.

"If indeed we are mirrors of each other in this society, if we have a sense of self-concept that is in any way whatsoever dependent upon the regard of others, upon the looks that we sometimes get in other people's eyes as judgment of ourselves - if these others indeed supply some part of our self, then it makes a certain amount of social sense to be in touch with, rather than unconscious of that doubleness of ourselves, that me that stares back in the eyes of others."<sup>75</sup>

Studies conducted outside of the law school arena have also examined the causes and effects of academic success for persons of color.<sup>76</sup> At the University of California at Berkeley, Professor Victor Reisman conducted a study to determine how students actually learn. Initial data gathered from especially successful and unsuccessful students indicated that the students of color comprised a large portion of the unsuccessful category.<sup>77</sup> An

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72. Patricia Williams, *Response to Mari Matsuda*, (1988 *Women of Color and the Law Conference at Yale University*) 11 *WOMEN'S RTS L.J.* 11 (1989).

73. Terence J. Tracey and William E. Sedlacek, *A Comparison of White and Black Students' Academic Success Using Non-Cognitive Variable*, 27 *RES. HIGHER EDUC* 333 (1987) (Attributed Black student success in college to non-academic factors e.g. a positive self-concept and leadership experience); Uri Treisman, *Studying Students Studying Calculus: A Look at the Lives of Minority Mathematics Students in College*, 23 *COLLEGE MATHEMATICS J.* 362 No. 5 (1992).

74. Treisman, *supra* note 73, at 364.

75. *Id.* at 365. (The first assumption was that based on the existence of a motivational gap between different ethnic groups, African-American and Latino students were considered motivated "but. . .not as motivated as other certain groups." The second assumption was poor academic preparation. The African-American and Latino students entered the course with less background courses and "substantially lower SAT scores." The third was lack of family support. "The idea was roughly, that since the families of these kids did not have educational backgrounds, how could they pass onto their kids the survival skills they would need in college?" "The fourth. . .is a corollary of the great liberal dream: "It has nothing to do with race or ethnicity at all. Income is the dominant variable. If you control for income all the differences disappear.").

76. Treisman, *supra* note 73 at 366. Treisman identified a very significant difference in the study habits of the different groups. In the Black students, especially, he observed a "debilitating pattern of isolation. Other students studied together, quizzing each other." The Black students, on the other hand, didn't have a clue what other students in the class were doing.

77. *Id.* at 369.

initial hypothesis was developed based upon survey results of professors from different universities across the country. The survey sought to identify faculty beliefs about the causes of success rates for students of color in their program. It revealed several interesting points. Essentially, the faculty members attributed the failure to "low income, low motivation, poor academic preparation and lack of family support, all factors . . . over which the institution had no control."<sup>78</sup>

A comparison of the study habits and backgrounds of students from different ethnic groups contradicted the original hypothesis. Treisman developed a tutorial program which addressed the differences in study patterns which had been observed in the different groups. Treisman found that during the program over half of the participants substantially outperformed not only their minority classmates but also outperformed their white and Asian classmates.<sup>79</sup> This survey underscores the danger of accepting factors outside an institution's control as the cause of recurring problems faced by students in an academic program of study. The most credible insights and conclusions are derived from a comprehensive analysis of factors which influence the performance of students in outsider groups. In undertaking a viable strategic analysis, there should be input and involvement from a diverse group. Such an approach would facilitate a more valid and reliable identification of the requisite elements for establishing an intellectually challenging, yet emotionally supportive, environment that is beneficial for all students.

Society is becoming increasingly more diverse each day. Persons from different groups seek and deserve qualified and concerned representatives to champion their respective interests and issues. Nonetheless, some may draw the conclusion that women and persons of color cannot succeed in law schools or that the faculty energy and resources required to create a supportive environment are too costly over the long haul. Thus, as the reasoning goes, the law schools need only to change its admission criteria to admit those with the characteristics consistent with or similar to the individuals who have succeeded under existing law programs in the past.<sup>79</sup> If this approach was to be adopted it would lead to a predominant emphasis on conformity and a potentially unhealthy suppression of one's unique diversity. Hopefully, more law schools will assume an innovative and transformational leadership posture. Law schools need to be proactive and create an environment which is supportive and conducive to genuinely acknowledging, respecting and valuing pluralism. This would be accomplished by facilitating the successful academic performance and professional development of a diverse student body. Creating and maintaining the pluralism of the learning community would be a priority, and students as well as faculty members would be encouraged in broadening the educational process by bringing the particularities that make up their pluralism into the law school classroom.

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78. Guinier, *supra* note 54, at 81.

79. *Id.* at 28.

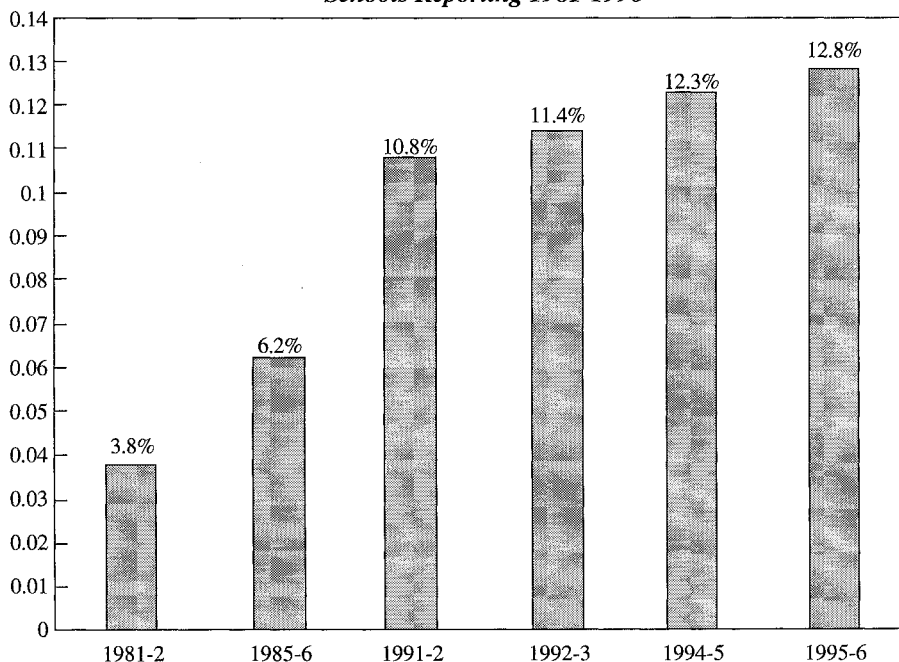
### *Progress Towards Faculty Pluralism*

“People have (with the help of conventions) oriented all their solutions toward the easy and toward the easiest side of the easy; but it is clear that we must hold to what is difficult; everything in nature grows and defends itself in its own way and is characteristically and spontaneously itself, seeks at all costs to be so and against all opposition.”<sup>80</sup>

### *The Numbers*

The proportion of women and persons of color on law school faculties has followed a pattern of gradual increase in recent years.<sup>81</sup> However, changes in the composition of faculties have not mirrored changes in the composition of law school student bodies. Still, compared to the early 1970's when women comprised less than 7 percent of faculties and minorities comprised an even smaller percentage, substantial gains have been made in hiring.<sup>82</sup>

CHART #3  
Growth in the % of Full Time Minority Faculty at ABA Approved  
Schools Reporting 1981-1996



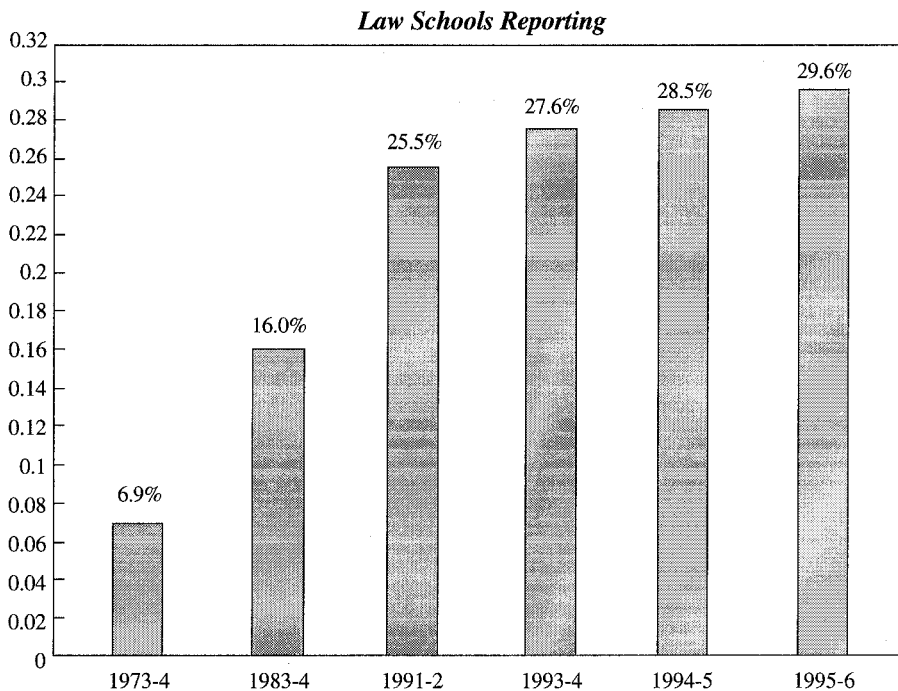
Sources: (1) *The Hiring and Retention of Minorities and Women on American Law School Faculties*: Richard H. Chused, *University of Pennsylvania Law Review* vol. 137:431 (1988). (2) *AALS Newsletter* #95-1 Feb. 1995. (3) *A Review of the Legal Education in the U.S.* 1991. (4) *AALS All Full Time Faculty DLT* 1994-95. (5) *AALS Statistical Report on Law School Faculty - 1996-96*, pgs. 4-5.

80. Rainer Maria Rilke, *Letters to a Young Poet*.

81. Richard A. White, *The Gender and Minority Composition of New Law Teachers and AALS Faculty Appointments Register Candidates* 44 *J. LEGAL EDUC.* 424 (1994).

82. Richard A. White, *The Gender and Minority Composition of Law School Faculty*, *THE AALS THE NEWSLETTER* no. 95-1 Feb. 1995.

CHART #4  
Growth in the % of Women as Full Time Faculty in ABA Approved



Sources: (1) AALS Newsletter #95-1 Feb. 95. (2) AALS All Full Time Faculty DLT 1994-95 (3) AALS Statistical Report on Law School Faculty - 1995-96.

The 1981-82 Society of American Law Teachers' survey of legal education confirmed that few law schools "had made significant progress in the integration of its law faculty."<sup>83</sup> Though the details are difficult to obtain, reports indicate that the first African-American full-time law faculty member was appointed at a predominately white law school in 1946.<sup>84</sup> By 1963 four (4) African-American had obtained full time status.<sup>85</sup> The SALT survey also indicated that in 1981-82 a total of 5.7 percent of all full-time law faculty were minorities.<sup>86</sup> Over the next four years this number had increased to 6.2%.<sup>87</sup> Utilizing data available in 1986-87, an updated SALT survey of legal education showed African-Americans comprised 3.7% of majority operated law schools, Hispanics represented 0.7% and other minorities ranged between 0.5- to 1%.<sup>88</sup> As of 1995-96 the total percentage of

83. Charles A. Lawrence III, *Minority Writing in AALS Law Schools: The Need for Voluntary Quotas*, 20 U. S. F. L. REV. 429 (1986).

84. Parker and Stebman *supra* note 27 at 152. The first full-time black law school faculty member to serve at a predominantly white law school was William R. Ming who taught at the University of Chicago.

85. *Id.*

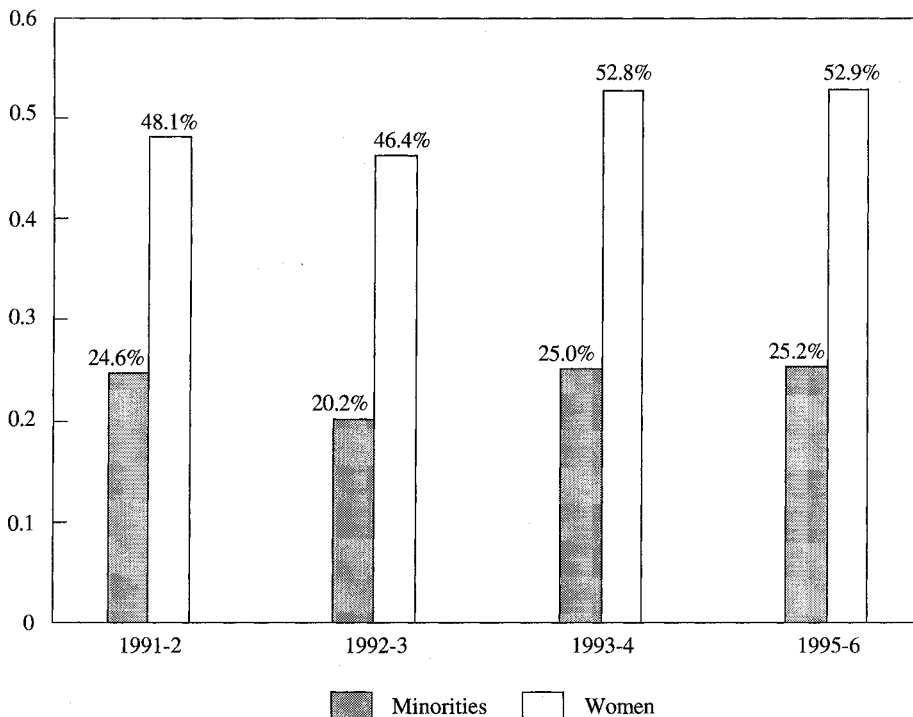
86. Lawrence, *supra* note 83 at 439-441.

87. Richard H. Chused, *The Hiring and Retention of Minorities and Women on American Law School Faculties*, 137 U. PENN L. REV. 537, 538 (1988).

88. *Id.* at 538.

minority faculty had risen to 12.8%.<sup>89</sup> The number of minority full professors had increased to 8.4% by 1995.<sup>90</sup>

CHART #5  
Growth in the Percentage of Minorities and Women of New  
Faculty Hirings (Total) 1991-2 - 1995-6



Source: 1) The Gender and Minority Composition of New Law 1993. Teachers and AALS Faculty Appointments Register Candidates, 2) Richard A. White, 48 Journal of Legal Ed. number 5 (Sept. 1994), 3) AALS, All Full-Time Faculty - DLT 1995.

During the 1980s and continuing into the 1990s, the percentage of female law professors faculties gradually increased. In 1983, women represented 16% of all law professors.<sup>91</sup> By 1987, 20% of all law faculties were comprised of women.<sup>92</sup> In 1991, the total proportion had increased to 26.2%.<sup>93</sup> For the rank of full professor, 13.1% were women in 1990, 17.03% in 1994-95, and 18.1% in 1995-96.<sup>94</sup> A significantly higher number of women have been hired in lower ranked positions. Of the new assistant professorships in 1995, 41.8% were comprised by women and 24.4% minorities. Associate professor positions in 1995 were comprised by 41.8% women and 24.4% minorities.<sup>95</sup> This fact, combined with the high level of hires in the lecturer and instructor category, raises special concern over the

89. AALS, STATISTICAL REPORT ON LAW SCHOOL FACULTY 1995-96.

90. AALS, STATISTICAL REPORT ON LAW SCHOOL FACULTY 1995-96, at 4-5.

91. White, *supra* note 83.

92. *Id.* at 2.

93. AALS, All Full Time Faculty - DLT 1991-1992, Table of Gender By Titles.

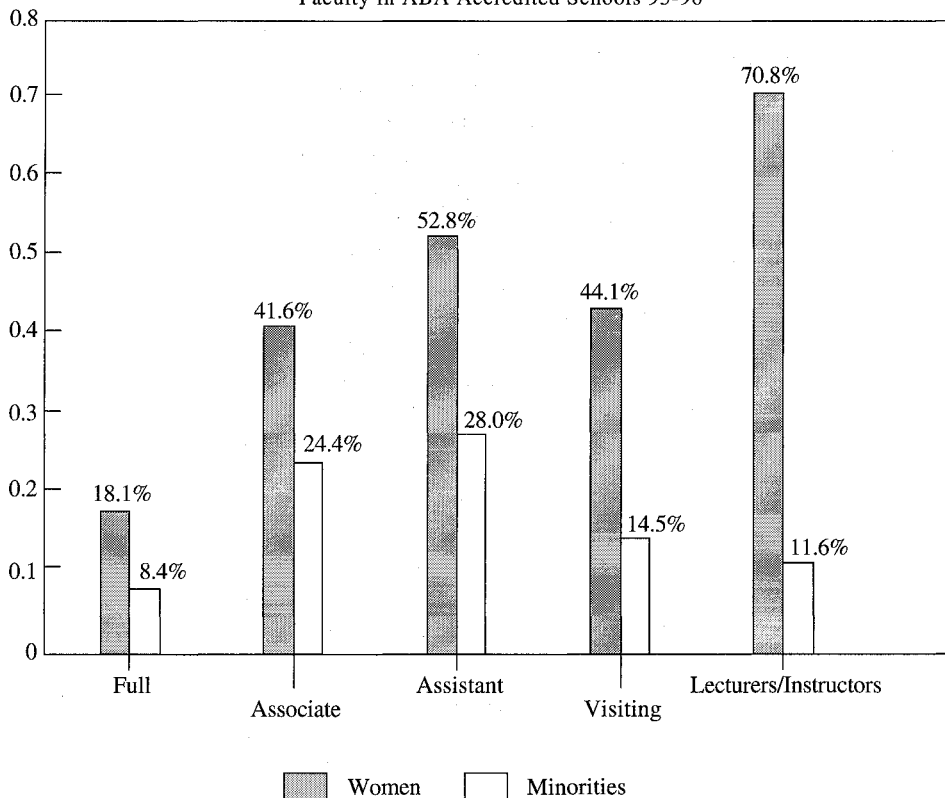
94. White, *supra* note 82. AALS, STATISTICAL REPORT ON LAW SCHOOL FACULTY 1995-96, at 4-5.

95. AALS, *supra* note 82; AALS Full-Time Faculty DLT 1994-95 Table of Gender By Titles.

concentration of women and minorities in lower ranking positions. In 1995-96, nearly 75% of all lecturers and instructors were women and minorities.<sup>96</sup> As of 1995-96 (though both groups are concentrated in the lower ranks of law school faculties) women represent 29.6% and minorities represent 12.8% of full time faculty.<sup>97</sup>

CHART #6

**Percentage of Minority and Women**  
Faculty in ABA Accredited Schools 95-96



Source: AALS Study of All Full Time Faculty 1994-95.

In comparative time frames, even these low numbers are a significant improvement over the days when outsiders were so few on the faculties of majority institutions that they could be individually named. These figures included head librarians and assistant and associate deans. Presently, neither the AALS nor the ABA provide a racial breakdown for tenured faculty members though Carl Monk has stated that the numbers are very low.<sup>98</sup>

96. AALS, STATISTICAL REPORT ON LAW SCHOOL FACULTY 1995-96, at 4-5.

97. AALS, STATISTICAL REPORT ON LAW SCHOOL FACULTY 1995-96, pgs. 4-5. (All statistics quoted include faculty at historically black institutions and schools in Puerto Rico listed in AALS Directory of Law Teachers).

98. Carl C. Monk, *Battle to Keep a Black Professor Leaves Bruised Egos and Reputations*, N.Y. Times, Mar.8, 1995 at B8.

Law schools show a great propensity for joining the ranks of those institutions with a "hidden professorate."<sup>99</sup> This classification includes individuals who have been denied tenure, those never on a tenure track and those just entering the academic labor market. The phenomenon has been described as a "dramatic but relatively unnoticed structural transformation of higher education: the emergence of a quasi closed elite at the top end and a permanent underprivileged stratum of untouchables at the bottom."<sup>100</sup> The appearance of a dual academic labor market was even more strongly suggested when I explored the time frame it would take to bring women and minority faculty members in line with minority and women enrollment data for 1995-96.

The total number of full-time positions are weighted heavily in the most senior positions (over 49.1% of the full time faculty positions in all the law schools are full professorships), and there are a low number of positions that open up each year. For example, during the period 1991-95 the average number of new full-time professors being reported was only 16 a year. Given the low number of minorities and women in the senior positions, a striking paradox appears when one projects faculty patterns into the future based on the recent promotion rates of both groups. Chart number 7 highlights this paradox. If we hold the current new faculty numbers for minorities and women constant at the five year average for the period 1991-95 (for women 51.6% and 23.7% for minorities) and hold constant the percentage of women and minorities enrolled in law schools at the 1995-96 levels (43.7% women and 18.9% minorities) as well as the average number of new positions reported each year (based on the 5 year average for 1991-95 of approximately 405/yr.), then the following projections will result:

1. Law schools will reach an equality between the percent of minority enrollees and minority faculty by roughly the year 2001.
2. Law schools will reach gender equality between enrollees and faculty by roughly the year 2002.

However, when the same assumptions are applied to professorship positions, the time frame for race and gender equality dramatically changes:

1. Law schools would reach racial equality between enrollees and full professors roughly by the year 2131. (over 100 years)
2. Law schools would reach gender equality by the year 2278.

This projection exercise, based on "optimistic" assumptions, dramatically shows the dual professorship market that exists in law schools. White males dominate the most senior tenure positions, while women and minorities dominate the lower levels.

Chart 7 illustrates how difficult it will be to overcome the cumulative impact from generations of exclusionary hiring policies and to achieve improved representations in the most senior faculty positions in the foreseeable future. Because women and minority faculty are over-represented in the lower ranks and thus have low seniority, they remain particularly vulnerable to retrenchment. In part, the concentration at the lower levels re-

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99. See. A.S. Wilke, *The Hidden Professorate: Credentialism, Professionalism and the Tenure Crisis*, (1979).

100. *Id.* at xii.

flects the more recent arrival of women and minorities on faculties.<sup>101</sup> It also reflects the fact that minority and women faculty are more likely to be hired to fill positions in the library, in legal writing departments, and in an array of student support positions which sometimes carry titles of assistant or associate deans.<sup>102</sup> It is often difficult to move from any of these posts into full-time tenure track positions.<sup>103</sup> This could be a partial explanation for the very high turnover rates on clinical and legal writing contract positions. Between 1980 and 1987, 58.8% of clinical contract positions and 76% of legal writing contract positions had turned over.<sup>104</sup>

Another area of concern is an increase in tenure standards. The 1981-892 SALT survey revealed that "at about a third of the schools responding tenure standards had been generally toughened or that standards of quality or quantity of scholarship had been tightened."<sup>105</sup> There is a disturbing concurrence between the increased tenure standards and the expansion in the number of women and people of color entering law faculties. The issue deserves a full analysis even if it has not resulted in high levels of tenure denials. One can only speculate whether the increased tenure standards also could be connected to a higher level of movement noted among minority faculty members.

An additional concern is the diminished quality of professional life of so many work within a structure with severely restrict opportunities for meaningful participation in the discussion and decision-making on crucial issues. The practical effect of the exclusion from decision-making is to send a resounding devaluing message to the segment of untouchables at the bottom which reinforces their second class citizenship. This results in and contributes to a sense of not belonging among members of recently hired outsider groups. This counterproductive outcome is compounded further when one considers the likely impact on the women and people of color in the student population who see a mirror image of themselves in the persons relegated into second class status on the faculty. What messages are communicated to these students?

### *Symbols, Messages and Images*

Pluralizing faculty hiring has been fraught with many difficulties. One major hurdle proved to be suitable qualifications.<sup>106</sup> In her extensive research on the background and educational experience of law professors, Donna Fossum conclusively identified the existence of a pattern of characteristics that the vast majority of law professors shared.<sup>107</sup> Remarkably, the entry into a career as a law professor has historically been quite narrow. Law schools which ranked in the top twenty produced nearly 60% of all

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101. White, *supra* note 83.

102. Deborah Rhode, *Once More With Feeling*, THE AALS NEWSLETTER No. 95-1.

103. Chused, *supra* note 88, at 553.

104. *Id.* at 544.

105. Lawrence, *supra* note 84, at 443.

106. *Id.* at 544.

107. Donna Fossum, *Law Professors: A Profile of the Teaching Branch of the Legal Profession*, 1980 AM. B. FOUND. RES. J. 501.

law professors.<sup>108</sup> Nearly all of the faculty at the top twenty schools are graduates of the same group of schools.<sup>109</sup> In 1990, an estimated 87% of law professors teaching at a top twenty ranked schools graduated from a top twenty law school.<sup>110</sup> Generally, law schools sought to hire graduates from schools with a higher rank or more prestige than their own.<sup>111</sup>

In addition to graduation from a high ranking school, other criteria significant to securing a teaching position include high rank in law school class, a judicial clerkship, practice experience with a prestigious firm, and a law review editorship.<sup>112</sup> With the considerable amount of emphasis placed on hiring graduates of a small number of schools, the acceptance of these criteria as the prerequisites for success in law teaching has been passed down from generation to generation of law school faculties and graduates. It begins to take on the classic characteristic of inbreeding:

“If we were biologists studying inbreeding, we might predict that successive generation of imbeciles would be produced by such a system. . . . It seem clear that the inbreeding there is likely to contribute to a form of legal education that services large firms and their corporate clients better than it does the lawyers who handle the personal legal problems of average people.”<sup>113</sup> This inbreeding filters out or relegated to an inferior position experiences, values, and traditions that were not consistent with “the criteria.”<sup>114</sup>

The virtual absence of minorities in law teaching was most often explained by reference to the small pool of qualified candidates. Every law school appointment committee maintained “it would gladly hire a minority if it could only find a qualified minority candidate.”<sup>115</sup> The criteria became an autonomous, self-fulfilling framework for selection. For many institutions, it rose to the level of an unalterable mantra that could not be superseded or supplanted by any other qualifications. Therefore, selecting anyone not meeting “the criteria” could be viewed as constituting a lowering of the standards.

At a time when the pool of talented law school teachers prospects was steadily increasing, “the criteria” still remained an impediment to diversifying teaching faculties. The 1981-82 SALT statement on minority hiring in AALS member school concluded: “The continued segregated status of law faculties is not caused by intentional or conscious racially discriminatory choices. It is the result of policies, practices and values, that are an integral part of the ‘normal’ criteria which have inevitable exclusionary impact.”<sup>116</sup>

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108. Robert J. Bothwick and Jordan R. Schau, *Gatekeepers of the Profession: An Empirical Profile of the Nation's Law Professor*, 25 U. MICH. J. L. REF. 191, 198 (1991); Fossum, *supra* note 102, at 528.

109. Fossum, *supra* note 109, at 509.

110. Bothwick and Schau, *supra* note 110, at 231.

111. *Id.* at 230.

112. Lawrence, *supra* note 84, at 433-434.

113. Law Schools and Professional Education: Report and Recommendations of the Special Committee for a study of Legal Education of American Bar Association (1980).

114. The term “the criteria” is used from this point on in the paper to summarize the special qualifications used by law schools in hiring—graduation from a high ranking law school, law review editorship, high rank in law school class and a judicial clerkship.

115. Lawrence, *supra* note 84, at 432.

116. Lawrence, *supra* note 84, at 438.

The relevancy of the qualifications to success in the profession was sometimes challenged by respected colleagues.<sup>117</sup> Some contend that law schools decide who is qualified to teach in them without any attempt to demonstrate the relevance between the desired qualifications and the law school's mission.

"Many bemoan the low numbers of minority professors, but with established qualifications set without proof of validity, the search for what they know is going to be . . . nearly impossible, continues with little changing . . . . With perfectly straight faces, schools with few women and no minority faculty assure one and all that they have been giving the search for 'qualified' minorities special attention for quite some time. The implication is that these people simply cannot be found and that they likely do not exist . . . . Whatever good-faith fears of twenty years ago that outstanding grades and law review editorship earned at a major law school were absolute prerequisites for effective teaching and scholarship. Such concerns have been answered by the performance of dozens of minority law teachers since that time. Yet critics claim diversity reflects no more than the desire to hire less competent persons of color over intellectually gifted white."<sup>118</sup>

Rigid adherence to "the criteria" became symbolic of the struggle to diversify. Use of only top law school academic records, graduation from a top rank law school, law review membership and even use of "the good old boy network" was questioned.<sup>119</sup> Appointment committees rely heavily upon personal evaluations to make their final choices. "It seems eminently reasonable to choose from among a number of outstanding candidates by seeking the personal evaluation of those we know and trust, but this heavy reliance on mutual friends and colleagues operates to exclude even those few minorities who have managed to surmount the more easily quantifiable barriers to access."<sup>120</sup>

Statistical data cited herein denotes an increase in the ranks of women and minorities who have joined law school faculties. Those institutions which have paved the difficult highway of diversity in hiring should be commended. However, despite the notable increase in representation of these groups, the studies indicate that much more remains to be done to create an inclusive and supportive environment for all.<sup>121</sup>

One possible explanation for the qualifiable difference in the law school experience of white males and all other groups could be grounded in very basic and real differences which exist between the outsider groups and the majority of their professors. "Students who are women or black or working class find out something important about the professional universe from the first day of class: that it is not even nominally pluralistic in cultural terms. The teacher sets the tone - a white, male, middle class tone. Students adapt."<sup>122</sup> In some instances the different cultural backgrounds,

117. See Derrick Bell, Jr., *Application of the Tipping Point Principle to Law Faculty Hiring Process* 24, 10 NOVA L. J. 319 (1986).

118. *Id.* at 321.

119. Lawrence, *supra* note 84, at 435.

120. *Id.*

121. See *supra* notes 48, 52 and accompanying text.

122. Duncan Kennedy, *Legal Education as Training for Hierarchy, The Politics of Law* p. 40 (Pantheon, 1982).

perspectives and experiences of the teachers and students may lead to a breakdown or difficulty in communication. Students who fit the mold receive positive feedback, while the students who do not fit are assumed to be incapable of doing well. This low expectation may be communicated in many different ways creating anxiety and loss of confidence in very able students.

The successful study of law requires engagement. Students must put themselves into the cases, look beyond the apparent, bring out the real story and make their experience count.

Crucial to the engagement process is a supportive atmosphere filled with challenges and high expectations, and where the contributions of each person are encouraged and engagement processes, particularly students from different socioeconomic, cultural and ethnic backgrounds, are encouraged. The majority of students will feel self-assured, or derive a sense of identity from the presence of professors from similar backgrounds. Others will be left questioning what they or others like them can contribute to the profession. This questioning process may lead to a loss of confidence. At any level, energy devoted to this type of thought process is a time consuming distraction that interferes with the concentration needed for successful study.

Less than desirable academic records in first-year students reinforce feelings of self-doubt and alienation. In large part, academic performance determines the distribution of honors and commendations.<sup>123</sup> Within the law school culture, obtaining these honors is of great importance to most students and experiencing academic difficulty rather than the expected success understandably affects students' self perception.<sup>124</sup> The impact of this process on outsider groups can be devastating, though often difficult to quantify. Without able and caring mentors, inevitably students who need the guidance and assistance of supportive professors withdraw and refuse to seek help for fear of disclosing a further lack of ability. Recognizing the need for hard work, the students bury themselves underneath cases, suffocating as they attempt to commit to memory every minute detail of each case covered in every class. In utilizing this strategy, they fail to see the forest and become lost in the trees. Similarly, primary use of the case method combined with the common practice of not telling students why they are studying a particular case or what they are expected to learn from a case provides little hope of escape for students lost in the trees.<sup>125</sup>

Anxiety and fear may paralyze the engagement process. A dejected and unmotivated student is incapable of giving attention to the tedious detail required to grasp the fundamentals of legal reasoning and analysis. In their second and third year, some students resort to taking classes which may improve their performance on the bar exam or may allow them to raise their grade point average. They realize that in many instances employers use grades as the principal criterion for interviewing and hiring in which leads them to choose courses without considering the professor's ability to stimulate their thinking process or even their own interest.

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123. Guinier, Fine and Balin, *supra* note 54, at 28.

124. *Supra* note 61 at 329.

125. C. Berman, *The Crisis of Legal Education in America*, 24 B.C.L. REV 347 (1985).

As students find their new intensified efforts producing the same or marginal improvements, concerns regarding institutional discrimination surface. For example, the students often have only a few ambiguous clues about how to do case analysis or how to apply legal theory to fact. Unclear about what is required in an analysis, students resort to tactics which include attempting to figure out how a particular professor thinks and then mimic the perceived approach on the exam. Students may also grow passive and rely on canned or black market summaries to supply the needed information. The result all too often is a severe disillusionment with the law school experience; a disillusionment which we find is being documented far too often to be ignored.

It is clear that students and faculty of similar backgrounds interact most comfortably with one another.<sup>126</sup> A study of graduate students found both men and women faculty tend to be more supportive of students of their own sex.<sup>127</sup> This was noted to be an even more important factor where faculties are predominantly male<sup>128</sup> in that female students are at an inescapable disadvantage in finding mentors. It would appear to be a reasonable deduction that minority students would face similar disadvantage where faculties are predominantly white. This disadvantage can be a decided impediment to the law school which values pluralism. To avoid that dilemma and its regressive impact, law schools must progress to a new paradigm. The new paradigm which stresses a facilitation of and catalytic dimension to the guardian responsibilities by proactively supporting and promoting excellence throughout the entire diverse student body and faculty.

### CONCLUSION

“A gardening handbook warns us to remove the seed heads of phlox every spring and plant anew the hybrid seed. Left alone to reseed, the phlox will soon revert to the old muddy-purple, disappointing gardener who first planted a rainbow of lemon, white, garnet lavender and apricot. We must tend our garden lovingly, lest we revert to the boring world of one color, one idea. . . We cannot afford to exclude the strengths of any of us in the difficult days ahead.”<sup>129</sup>

Law schools must continue to seek new mechanisms to improve the experience of all students. Until the major civil rights bills of the 1960's, Jim Crow laws and other policies, practices and customs created a sophisticated and elaborate preference system for the white male. No change in law alone would prove forceful enough to eradicate the barriers faced by women and minorities as they attempted to enter what had been all-white male professional bastions for more than a century. Changes in laws and subsequent cases have, in many instances, opened access to the game by allowing women and minorities onto the playing field. However, the rules, practices and customs which have become institutionalized can prove to be even more resistant to change. Therefore, a visionary process of transfor-

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126. Berg and Ferber, *supra* note 69, at 639.

127. *Id.* at 631.

128. *Id.* at 631.

129. Mari Matsuda, *Affirmative Action and Legal Knowledge: Planting Seeds in Plowed-Up Ground*, II. HARV. WOMEN'S L.J. 16.

mation is necessary to level the playing field and establish new rules which insure a fair game, a genuine fulfillment of valuing pluralism.

Determining which rules need to be changed in order to level the playing field is a complex process. It requires continuous open and trusting dialogue, strategic analysis, formulation of deliberate action plans and implementation. There is no one step or easy formula which will work for every institution. Constant assessment of resources for and impediments to creating pluralized faculty and student population must be undertaken. This type of assessment must take into consideration hiring practices, curriculum, course offerings, teaching methods, allocation of resources and decision-making, etc. Hopefully, ongoing assessment will help to reveal whether law schools are communicating less than positive messages to outsider groups regarding their value and place within the institution.

Using the Treisman study as a model, we may find that there are more factors within the law school's control that can be changed to create a supportive and challenging environment for outsiders than there are factors outside of the institution's control.<sup>130</sup> Changes may include the eradication of real life images which communicate messages of less than equal standing and still life images which hang on the wall serving as a constant reminder of the historic exclusion of outsider groups.<sup>131</sup>

We do not have enough experience to comprehend the full scope of benefits which can be derived from effectively valuing pluralism. It has the potential to change the very fabric and nature of legal education in an advantageous fashion.<sup>132</sup> As a critical first step, it will produce an environment which stresses and encourages respect for pluralism. Furthermore, inclusivity and proactively sharing input and knowledge from each person's unique life experiences will be the hallmark to values and principles for the entire learning community. "We will live and work in a different kind of academic life, one more invigorating and surprising than that which we live in now."<sup>133</sup> Everyone will manifest his/her commitment to valuing pluralism with supportive actions in the classroom, as well as other formal and informal learning community interactions. No one study or set of findings can be held to be conclusive regarding the general environment or overall experience of women and minorities in all institutions. However, there are definite patterns and themes concerning the current difficulties, challenges, and concerns of women, people of color and other outsider group members in law school faculties and student populations which deserve careful attention and responsive action.

Progress and increases in the numbers of women and minorities on law school faculties should be seen as symbolic of and a rallying cry for what

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130. Treisman, *supra* note 73, at 368.

131. While teaching at another post, I like many faculty members found myself inundated with students. A mentor recommended that I try a space reserved for the faculty in the library as a possible quiet retreat for reading and writing. Once in the room, I was greeted by a portrait of Justice Taney. Immediately, I was struck by such an avalanche of emotions - shock, anger, resentment, uneasiness, resignation, defiance, victory etc. I left with most of my feelings unresolved. Was my presence there a salute to how much things had changed or was the portrait an unabashed reminder of struggles yet to come?

132. Matsuda, *supra* note 132, at 8.

133. *Id.* at 9.

can be done. The presence of minorities and women alone will not remedy difficulties which are deeply rooted in over a century of exclusive practices. Progress reflected in statistical data should not allow the law school community to be lulled into lethargy. With each dawn, strong action must be taken to determine not only the general problems but the problems specific to that institution. Visionary leadership, astute assessment, creative identification of strategic changes, collaborative teamwork, as well as proactive and productive implementation have to be our distinguishing characteristics.

Today's law school graduates will face many new challenges. For members of outsider groups, that test probably will prove the most formidable. A distinct portion of our national population still is struggling to throw off the devastating effects of racial and economic injustice. They are in desperate need of skilled and determined legal representatives to address the potentially devastating avalanche of limits on benefit programs. In addition, on the state level, balanced budget amendments and anti-affirmative action legislation threaten to undo many of the gains made during the last 30 years. Issues and disputes over domestic violence, environmental protection, lending and housing discrimination, hate crimes, and public education become increasingly prevalent and ever more pressing each day.

A historical cornerstone of our democratic governmental structure has been accessibility to the judicial system for a peaceful resolution of these type of concerns. This requires a diverse community of legal advocates who are capable of providing expert representation to an equally diverse clientele.

"The road to freedom is now a highway because lawyers throughout the land yesterday and today have helped clear the obstructions, have helped eliminate roadblocks by their selfless, courageous espousal of difficult and unpopular causes.<sup>134</sup>

Lawyers who have had the benefit of an educational experience founded on pluralism and democratic principles will be best equipped to meet this continuing challenge.

Law schools remain entrusted with the privilege of being the guardians of the temple — the gatekeepers to the profession.<sup>135</sup> We choose and educate the women and men who will be empowered to join our profession. Inextricably intertwined within this privileged position is extraordinary responsibility and accountability. Our nation is witnessing a daily expansion in the rich diversity of our population. In addition, it is becoming increasingly apparent that we will have an increasing number of interactions with other countries. Therefore, we need lawyers who can function within this emerging global community context.

Our nation has perhaps the best opportunities to demonstrate how to truly value pluralism and capitalize most fully upon its far reaching potential as a national resource. As guardians of the temple, law schools are well-positioned to play a pivotal role in this process. It will necessitate some creative assessment and experimentation as we enlarge our paradigm. In the new paradigm, law schools with diverse faculties will serve as cata-

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134. ALEX AYERS, *THE WISDOM OF DR. MARTIN LUTHER KING* 133 (New York: 1993).

135. Bothwick and Schau, *supra* note 110; and Fossum, *supra* note 109.

lysts for seeking out and insuring the education of a diverse group of advocates to represent all segments of society on an ever expanding range of issues.

The 1960's Civil Rights Movement had a transformational impact on our nation and laid the foundation for continuing efforts to peacefully address racial, economic and other inequities. The movement offered insightful lessons in leadership and proactive behavior which can be instructive for law schools in shifting the prevailing paradigm to emphasize how to effectively value pluralism in the student population and the faculty. The movement sought to establish an environment where diversity would be recognized and creativity utilized for the community's gain. Through the proactive and constructive acknowledgement and use of pluralism, the movement sought to create within itself a mini-scale of the type of values and behaviors we would advocate on a national level.

To fulfill their change-directed and role-modeling leadership function, law schools must consider all segments of their community as equal, valuable, respected, and included. There is no preset or established route for achieving this goal. Although attempting the unknown may initially foster feelings of discomfort or frustration, the difficulty of the task does not eliminate its necessity. Law schools must have "the courage and sustenance to act where there are no charters."<sup>136</sup>

## CHART #7

## COMPARISON OF PROJECTED TIME FRAMES FOR MINORITY AND WOMEN TOTAL FULL TIME FACULTY AND FULL PROFESSORSHIP POSITIONS TO EQUAL STUDENT ENROLLMENT PERCENTAGES OF 1995.

	Minority Enrollment (1995)					18.9%
	Women's Enrollment (1995)					43.7%
	Percentage Full Time Faculty 1995-1996	Average Number of New Faculty Reported 1991-1995	Five Year Average Percent of All New Faculty Reported 1991-1995	Average of New Full Professorships Reported 1991-1995	Average Percent of new Full Professorships Per Year Reported 1991-1995	Approx. Projected Year of Equality
TOTAL (All Categories)	100%	405	100%	16	100%	
Minority (All Positions)	12.8%	96.5	23.7%			2001
Minority (Full Professorship)	8.4%	3.2		3.2	19.7%	2131
Women (All Positions)	29.6%	2.09	51.6%			2002
Women (Full Professorship)	18.1%	3.76		3.76	23.5%	2278

136. Lorde, *supra* note 1, at 110.