Erasing Race from Legal Education

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In this Article, Professor Greenberg argues that law schools claim to treat African American students as if their race is irrelevant, yet law school curricula have a hidden message that African American students are in fact inferior and dangerous to white students. When African American students do not perform as well as white students, they are assumed to have deficient skills and are placed in remedial programs to improve those skills. Professor Greenberg argues that the cause of African American students' poor performance in law school is not necessarily deficient skills, but rather a bias inherent in the structure of legal education that rewards cultural traits that do not match those often identified with African American culture. Thus, despite their claims to be color-blind, law schools provide inherent preferences for students who can act, think, and write white.

INTRODUCTION

It is no secret that African American1 law students tend to do less well academically than their white counterparts. Many attribute this discrepancy to a lack of skills. Law schools often seek to remedy the situation through academic support programs which, in turn, result in only marginal success. Despite their lack of efficacy, academic support programs are popular with the faculty and administrations of predominantly white

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1. A note on usage is appropriate here. I am using the term "African American" to refer to those Americans whose identities derive, in part, from the forced importation and enslavement of Africans in the United States. I am specifically using this term "African American" because it leaves room for the separate recognition of dark skinned Americans with other cultural backgrounds, including recent immigrants from the West Indies or Haiti. Cf. Adrien K. Wing, Brief Reflections Toward a Multiplicative Theory and Praxis of Being, 6 BERKELEY WOMEN'S L.J. 181, 181 n.3 (1990–1991) (identifying herself as "Black" because she believes it is a more inclusive term than "African American"). For a general discussion of how a particular minority group's history and culture affects its relationship to education, see JOHN U. OGBU, MINORITY EDUCATION AND CASTE: THE AMERICAN SYSTEM IN CROSS-CULTURAL PERSPECTIVE (1978).
law schools. If these programs are only marginally successful, why are they so popular? This Article suggests new ways to answer this question.

African American law students' comparatively poor performances in law school are not surprising. This poor performance was noted as early as the 1960s. Whether we measure academic success in terms of attrition rates, ranking within the class, or bar pass rates, African American law students perform dramatically worse than white law students. The attrition rate for minority law students in the 1970s exceeded the attrition rate for all law students by fifty to one hundred percent. A study by the Law School Admission Council (LSAC) in 1986 showed that the situation for African American law students had not improved much over the intervening ten years: their attrition rate was twenty-five percent while the rate for non-minority students was only fourteen percent.

2. Although the historically African American law schools also have academic support programs, see Paul L. Diggs, Communication Skills in Legal Materials: The Howard Law School Program, 1970 U. Tol. L. Rev. 763, their programs are set in a radically different social context and may have very different meanings than similar programs at other law schools. This Article is addressed to the education of African American students at predominantly white law schools.

3. See, e.g., LAW SCH. ADMISSION TEST COUNCIL, LAW SCHOOL ADMISSION TEST: ANNUAL COUNCIL REPORT 155 (1969) (finding that polled schools' major attempts to provide special tutorial programs were uniformly unsatisfactory); Ernest Gellhorn, The Law Schools and the Negro, 1968 DUKK L.J. 1069, 1083 (describing low success levels of African Americans in Emory's pre-law school summer programs).

4. Portia Y.T. Hamlar, Minority Tokenism in American Law Schools, 26 HOW. L.J. 443, 532 (1983). Much of the literature in this area discusses minority students in general without focusing on African American students specifically. I use this literature, but I indicate when it discusses all minority students instead of only African American students. This literature is helpful because what is true of minority students in general is probably true of African American students in particular.

5. Developments: Minority Attrition in Law School, 37 J. LEGAL EDUC. 144, 145 (1987). Data on class rank and bar pass rates also illustrate the difficulties that African American law students are having with law school. One study of students from two large California state law schools showed that over 75% of the African American students who applied for admission to the California bar were in the bottom quarter of their classes. Stephen P. Klein, Disparities in Bar Exam Passing Rates Among Racial/Ethnic Groups: Their Size, Source, and Implications, 16 T. MARSHALL L. REV. 517, 525 (1991). On average, these students ranked in the bottom 15% of their law school classes. Id. Similarly, bar pass rates for African American law students have been comparatively low. Oregon and Florida report that African American applicants pass the bar examination at approximately two-thirds the rate of white applicants, while in California and Colorado their pass rate is about half that of white applicants. Dannye Holley & Thomas Kleven, The Bar Examination and Other Barriers to African and Hispanic American Fair Representation among American Lawyers: A 1990 Update—Perspectives and Recommendations, 16 T. MARSHALL L. REV. 477, 488-90 (1991) (listing bar exam pass rates for California, Oregon, and Colorado from 1985 to 1990); Ken Meyers, Studies Suggest That Minorities Still Lag in Admissions, Tests,
Law schools, for their part, have tried to remedy the problem through a variety of academic support programs which focus on improving African American students' analytical, writing, and doctrinal skills. These programs have had some limited success in reducing African American students' attrition rates in law school, but those rates remain disproportionately high.

For example, approximately twenty percent of those who participated in the early days of the pre-law school program run by the Council on Legal Education Opportunity (CLEO), a well-known and long-established program, left law school without completing their degrees. Over a three year span in the Mellon program at the University of Pittsburgh Law School, approximately thirteen percent of the African American first year students were unable to advance to the second year.

NAT'L L.J., Feb. 24, 1992, at 4 (discussing a study which showed that 76% of whites but only 46% of Blacks passed the Florida bar examination); see also Daniel O. Bernstine, Minority Law Students and the Bar Examination: Are Law Schools Doing Enough?, B. EXAMINER, Aug. 1989, at 10 (describing low bar passage rates of minority graduates of three of the "better" law schools). These dismal statistics have prompted several state bars and the LSAC to conduct studies to attempt to ascertain the cause. See, e.g., MASSACHUSETTS BAR ASS'N COMM. ON BAR ADMISSIONS, THE BAR EXAMINATION: IS IT FAIR? (describing concerns about minority law school graduates' low bar pass rates and making recommendations to improve those rates); Henry Ramsey, Jr., Law Graduates, Law Schools and Bar Passage Rates, B. EXAMINER, Feb. 1991, at 21 (describing a LSAC bar passage study). The disparities in bar passage rates, however, may be less severe than they appear if large percentages of African Americans who initially fail the bar exam pass it on subsequent attempts. See id. at 26 (noting that the bar passage study would provide data on this phenomenon at a national level).

6. See infra Part III.

7. Assessments of the success of academic support programs are difficult, however, because control groups rarely are available. Paul T. Wangerin, Law School Academic Support Programs, 40 HASTINGS L.J. 771, 776 (1989) (decrying the methodological and interpretive problems of evaluating academic support programs).

8. Hamlar, supra note 4, at 543; Ralph R. Smith, The CLEO Experience: A Success by Any Measure, 22 HOW. L.J. 399, 400 (1979). These figures should not be taken as a criticism of CLEO in particular. Almost 45% of those who participate in CLEO ultimately do graduate from law school, a significant accomplishment given that without CLEO many of these students would never have been admitted to law school in the first place. Hamlar, supra note 4, at 543; see also Leo M. Romero, An Assessment of Affirmative Action in Law School Admissions after Fifteen Years: A Need for Recommitment, 34 J. LEGAL EDUC. 430, 434–35 (1984) (noting that over 70% of CLEO graduates who were admitted to law school completed it successfully).

9. Kevin Deasy, Enabling Black Students to Realize Their Potential in Law School: A Psycho-Social Assessment of an Academic Support Program, 16 T. MARSHALL L. REV. 547, 558 (1991); see also Daniel O. Bernstine, An Empirical Study of the University of Wisconsin Law School Special Admissions Program: A Progress Report, 7 BLACK L.J. 146, 151 n.20 (1991) (reporting that the Legal Education Opportunities Program at the University of Wisconsin Law School, which enrolled primarily African American students, was able to assist 78% of participating students to pass their first year); Graham Hughes et al., The Disadvantaged Student and Preparation for Legal
In general, despite the fact that at least 109 American Bar Association accredited law schools reported having some type of academic support program,\(^{10}\) attrition rates for minority students from 1981 to 1988 ranged from a high of 30.2% in 1985 to a low of 24.7% in 1986, with a rate of 26.9% in 1988.\(^{11}\) In contrast, attrition rates for majority students during the same period ranged from 10.8% to 13.4%, with a rate of 11.3% in 1988.\(^{12}\)

Furthermore, even if programs have successfully reduced attrition levels,\(^{13}\) they have not had much success in moving African American students' grade point averages (GPAs) to a distribution that resembles that of the majority students. For example, at the University of Oregon Law School almost three-quarters of the students who participated in the Academic Support Program from 1984 to 1987 had GPAs in the bottom half of their first year class.\(^{14}\) Similarly, in the Mellon program over a three year period, only eighteen percent of the African American students achieved grade averages of "B-" or better.\(^{15}\) The result is that, although African American law students may not be flunking out of school at the extraordinarily high rates that existed prior to the institution of support programs, their GPAs remain unacceptably low.

The various efforts to provide academic support to African American students do not appear to have generated solutions to their low GPAs. Perhaps this absence of significant success

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\(^{10}\) MINORITY AFFAIRS COMMITTEE REPORT, SUMMARY REPORT ON THE LSAC QUESTIONNAIRE ON SPECIAL LAW SCHOOL PROGRAMS FOR MINORITY STUDENTS 73, 97, 125 (1988) [hereinafter MINORITY AFFAIRS COMMITTEE REPORT].

\(^{11}\) Holley & Kleven, supra note 5, at 485.

\(^{12}\) Id.

\(^{13}\) For example, the Mellon Program at the University of Pittsburgh Law School reduced attrition rates of African American students from over 50% to approximately 13%. Deasy, supra note 9, at 557–58.

\(^{14}\) In the 1984–1985 school year, 71.5% of the academic support program students were in the bottom half of their first year class. In the 1985–1986 school year, 69.6% were so placed, and in the 1986–1987 school year, the percentage rose to 78.6%. Charles L. Finke, Affirmative Action in Law School Academic Support Programs, 39 J. LEGAL EDUC. 55, 67–69 (1989). The Oregon program served generally "disadvantaged" law students, not just African Americans. See id. at 61. The majority of participating students were minority students. See id. at 62 n.21.

\(^{15}\) Deasy, supra note 9, at 558.
should be taken as an indication that our current understanding of the problem—that African American students lack skills—is incomplete. Thus, it is appropriate to revisit the question that has haunted legal educators for more than a decade: Why do African American law students perform so poorly in law school?

This Article offers a different way of thinking about this question. Instead of focusing on the “deficiencies” of African American law students, I investigate the structure of legal education and its construction of those students. Part I briefly describes the social ideal of a color-blind legal system. This ideal is premised on the assertion that race is irrelevant to individual identity. Since legal education does not exist in a vacuum, this norm can be expected to have a significant effect on the treatment of racial issues within law school.

Part II turns to the law school context and examines the claim of color blindness in this setting. The curriculum, the teaching materials, and the common pedagogical techniques all are structured around a norm of whiteness that is rendered color-blind by the unstated assumption that African American students are fundamentally the same as white students. Race is addressed only through widespread silence. Deeply submerged and in opposition to this assertion of color blindness is the hidden message of the curriculum, materials, and techniques that African American students are inferior and dangerous to the white students. These two messages exist simultaneously in the curriculum, in tension with each other.

Part III looks at two issues that overtly raise the question of race: affirmative action and academic support programs. This Part explores the two distinct discourses of these programs. One discourse primarily denies differences, but, to the extent that differences are perceived, it redefines them as superficial and remediable deficiencies. As with the legal system in general, the counterpoint is a second discourse in which the differences are recognized, found to demonstrate inferiority in the particular context, and claimed to be dangerous to the white students.¹⁶

Part IV argues that some African American law students may perceive themselves as different from white students in

ways that are fundamental and not superficial. Drawing on postmodern cultural and linguistic criticism, this Part describes the roles that African American communities, a distinct oral linguistic tradition, and an oppositional stance toward white culture play in the development of some African Americans' identities. For students who understand themselves in this way, law school may require not just new skills, but a new self.

My claim in this Article is that African American students' relatively poor performance need not be attributed to the students' deficient skills, as traditionally has been the case. Instead, that poor performance reflects a bias inherent in the structure of legal education that rewards cultural traits which do not match those of African American culture.\(^\text{17}\) In particular, oral skills often are identified as especially well-developed and appreciated within African American communities. Yet, legal education rewards excellence in writing over excellence in oral performance, even though oral skills are clearly relevant to a lawyer's effectiveness.

Thus, my goal is not to propose new programs that could supplement the current structure of legal education and therefore improve African American students' performances. Rather, it is to suggest that under the current structure, students whose identities are culturally African American necessarily will experience considerably more difficulty in law school than students whose identities are more consistent with the dominant white culture. In other words, law school, despite its claims to be color-blind, is not culturally neutral; it provides inherent preferences for students who can act, think, and write white.

I. COLOR-BLIND IDEOLOGY AND THE LEGAL SYSTEM

One way to answer the persistent question about why African American law students perform less well than their white counterparts is to consider the context within which legal education occurs. The legal system, in general, claims to be

\(^{17}\) I am not claiming that all African Americans share a single culture or that all African Americans share the traits that I describe. I only claim that these are traits that many African Americans have identified as fundamental to their identities as African Americans. See infra Part IV.
color-blind18—a claim which supports mainstream American culture and practices.19 Exploring the law’s assertion of color-blindness provides a framework within which to discuss similar assertions of racial neutrality in the discourse of legal education.

The color-blind stance was stated almost a hundred years ago by Justice Harlan in his dissent in Plessy v. Ferguson,20 in which he wrote: “Our Constitution is color-blind.”21 Although he was unable to convince the Court to adopt his position in Plessy, his powerful metaphor resurfaced with the Civil Rights movement of the 1960s.22 By then, Andrew Kull reports, “some members of the Supreme Court appeared to regard the color blindness of the Constitution as a settled thing.”23 This assumption of color blindness is reflected in judicial statements such as: “[R]acial classifications are obviously irrelevant and invidious.”24

The ideology of color blindness asserts that decision making without attributing value to skin color is both desirable and practicable.25 According to color-blind ideology, race implies no more about an individual than does that person’s hair or eye color, height, weight, or nose length. A person’s “important” traits—such as intelligence, perseverance, and curiosity—are determined by who the person is, not by that person’s race.26

18. The blindfolded woman who symbolizes justice is an example of this—she supposedly does not see the particular characteristics of the claimants who stand before her. Dennis E. Curtis & Judith Resnik, Images of Justice, 96 YALE L.J. 1727, 1758 (1987). These unseen characteristics include race. But see Neil Gotanda, A Critique of “Our Constitution Is Color-Blind”, 44 STAN. L. REV. 1, 6 n.20 (1991) (arguing that, while a blind test may theoretically avoid noticing race, “in the real world very few judgments about people are made without a moment of racial identification”).


20. 163 U.S. 537 (1896).

21. Id. at 559 (Harlan, J., dissenting).

22. For a detailed history of claims that the Constitution should be interpreted as “color-blind,” see ANDREW KULL, THE COLOR-BLIND CONSTITUTION (1992).

23. Id. at 164.


25. Gotanda, supra note 18, at 16; see also Kimberlé W. Crenshaw & Gary Peller, Reel Time/Real Justice, in READING RODNEY KING/READING URBAN UPRISING 56, 60 (Robert Gooding-Williams ed., 1993) (maintaining that the “embrace of ‘color blindness’ as the norm of equal protection” in Richmond v. Croson, 488 U.S. 469 (1989), means that “racism consists of the failure to treat people on an individual basis according to terms that are neutral to race”).

Advocates of a color-blind approach to decision making argue that "to treat race ... as a proxy criterion for a particular viewpoint or perspective [or set of abilities] is to engage in illegitimate stereotyping—racism ... —of the most pernicious form." This argument is based on the belief that "[p]eople are not intellectual captives of their skin color."28

According to this understanding of the world, individuals stand alone. Who they are is not determined in any predictable way by their histories; their character traits and positions cannot be determined by consideration of the communities with which they affiliate. To think of individuals in terms of their communities would be to stereotype them in just the manner that color-blind decision making is intended to prevent.29 Thus, decisions about public policy must be race neutral.

A color-blind stance claims not only that race is irrelevant to decisions about people, but that individuals' own life choices are unaffected by their race. As Dwight Greene illustrated in his discussion of Florida v. Bostwick,30 the Court analyzes cases on the assumption that race does not affect how people act.31 Bostick involved a request by Florida police to search an African American bus passenger's luggage for drugs. The police

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on the basis of race is to miss the individual"; Gotanda, supra note 18, at 40 (describing "formal-race").


28. Paulsen, supra note 27, at 1000.

29. In 1964, Louis Lusky wrote that a stereotype is:

[A] conception of a group of people as possessing, each of them, certain characteristics that are believed to inhere in the group; a conception that is factually erroneous; and a conception that is impervious to rational refutation because it is rooted in the emotions rather than the intellect.

... The stereotype ... involves a sort of hysterical paralysis ...

Louis Lusky, The Stereotype: Hard Core of Racism, 13 BUFF. L. REV. 450, 450–51 (1964). He continued by noting that the important point about stereotypes is that "any stereotype results in a partial blindness to the actual qualities of individuals, and consequently is a persistent and prolific breeding ground for irrational treatment of them." Id. at 451.


31. Dwight L. Greene, Justice Scalia and Tonto, Judicial Pluralistic Ignorance, and the Myth of Colorless Individualism in Bostick v. Florida, 67 TUL. L. REV. 1979, 2022–43 (1993); see also Gotanda, supra note 18, at 36–52 (arguing that the Court typically approaches race as a formal classification that is disconnected to historical and social background).
admitted that they did not have any "articulable suspicion" for choosing to search this particular passenger’s luggage.\(^{32}\) The legality of the search, and the admissibility of the cocaine that was found in the luggage, turned on whether the passenger had given consent voluntarily.\(^{33}\) Greene pointed out that the Court’s opinion never mentioned that the defendant was an African American.\(^{34}\) This color-blind Court wrote as if the history of police relations with African American communities in America’s urban areas was irrelevant to an African American bus passenger in south Florida faced with a request from the sheriff’s department officers to search his luggage.\(^{35}\)

Once race is rejected as an irrelevant and irrational basis for decision making, something else must be substituted. For many who subscribe to color-blind decision making, this other criterion is merit.\(^{36}\) Merit can be defined as the ability to perform a particular task or the possession of qualities considered valuable.\(^{37}\) Ideas of merit are consistent with a focus on the individual instead of the group.\(^{38}\)

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33. Id. at 432.
34. Greene, supra note 31, at 2028.
35. For additional discussions of the relevance of African Americans’ relations with the police to their reactions to the police, see CHARLES J. OGLETREE, JR., ET AL., NAACP, BEYOND THE RODNEY KING STORY: AN INVESTIGATION OF POLICE CONDUCT IN MINORITY COMMUNITIES (1995); David Rudovsky, Police Abuse: Can the Violence Be Contained?, 27 HARV. C.R.-C.L. L. REV. 465, 488–90 (1992); Robert V. Ward, Consenting to a Search and Seizure in Poor and Minority Neighborhoods: No Place for a "Reasonable Person", 36 HOW. L.J. 239, 248–53 (1993). See generally NATIONAL ADVISORY COMM’N ON CIVIL DISORDERS, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 157–68 (1968) (describing the causes of ghetto inhabitants’ hostility toward the police and proposing reforms to help alleviate that hostility).
36. See, e.g., Duncan Kennedy, A Cultural Pluralist Case for Affirmative Action in Legal Academia, 1990 DUKE L.J. 705 (refuting the idea that decisions based on merit are color-blind by arguing that judgments of merit are not culturally neutral).
37. Richard H. Fallon, Jr., To Each According to His Ability, From None According to His Race: The Concept of Merit in the Law of Antidiscrimination, 60 B.U. L. REV. 815, 826–27 (1980); see also Detroit Police Officers Ass’n v. Young, 446 F. Supp. 979, 1014 n.87 (E.D. Mich. 1978) (“[I]f ‘affirmative action’ is a term mandating equality of result then this country is not far from rejection of the concepts of individual merit and achievement . . . .”); Stephen L. Carter, Academic Tenure and “White Male” Standards: Some Lessons from the Patent Law, 100 YALE L.J. 2065, 2068 (1991) (arguing that the merit of scholarship should be evaluated objectively in terms of its overall contribution to human knowledge, regardless of the scholar’s perspective or subject matter); Kennedy, supra note 36, at 709–10 (noting that one of the "tenets of colorblindness" is that "[m]erit is a matter of individual traits or products, " not group-based status).
38. Fallon, supra note 37, at 822. But note that race may sometimes be an acceptable component of determining merit. For example, in Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978), Justice Powell wrote that an acceptable kind of racial
The combination of merit-based standards and ideas of individual autonomy also permits an understanding of choice that places the decision not to be meritorious squarely on the individual instead of on society or the social structure. For example, in *EEOC v. Sears*, the United States Court of Appeals for the Seventh Circuit held that Sears' failure to employ women as salespeople for items sold at a large commission did not violate Title VII because Sears produced survey evidence indicating that women chose less competitive and less demanding positions.

Thus, three tenets of the ideology of color blindness are particularly relevant to this discussion. First, decisions about the structure of society should be made without reference to the race of the people affected. Second, individuals' decisions are made independently of race. Finally, it is possible to create race-neutral criteria for determining who should receive rewards and who should not.

Each of these tenets can be illustrated by analyzing the Supreme Court's decision in *City of Richmond v. Croson*. In *Croson*, the Court held unconstitutional an ordinance that required contractors who were awarded city construction contracts to subcontract at least thirty percent of the work to qualifying minority businesses. The Court rejected the appellant's claim that the ordinance could be justified as remedying injuries caused by past racial discrimination.
According to the Court, the identification of such injuries would be “sheer speculation” based on “statistical generalizations” that were not “tied to any injury suffered by anyone.” In other words, the Court found the ordinance unconstitutional because, in the absence of findings of actual injury suffered by African Americans in the construction industry, “there [was] a danger that a racial classification [was] merely the product of unthinking stereotypes or a form of racial politics.” This was not an acceptable basis for making social decisions. The city, therefore, was unable to demonstrate the compelling interest necessary to uphold a racially based set-aside program.

The Court’s decision relied on its determination that the traditional bidding process had provided a neutral means of allocating the public contracting opportunities. Although the bidding process itself was not challenged, the Court noted repeatedly that there was no evidence of prior discrimination in the Richmond construction industry. As a result, the new bidding process, with its requirement of awarding a percentage of bids to minority contractors, could be seen as a race-based mechanism for awarding contracts.

Also consistent with the tenets of color-blind ideology, the Court in Croson did not believe that the selection of bids and the ability to bid were affected by the bidder’s race. In fact, the Court relied on testimony indicating an absence of racial discrimination. For example, at the public hearing at which the ordinance was originally heard, one witness noted that minority contractors, if available to bid, would have the same opportunities to do so as anyone else. The Court also noted that representatives of the local contractors’ organizations indicated that they did not discriminate on the basis of race and were in fact actively seeking minority members. Thus, the Court assumed, based on this testimony, that no minority contractor’s decision on whether to bid on a particular project should have been affected by her race.

44. Id. at 499.
45. Id. at 510.
46. Id. at 505.
47. Id. at 500, 503, 505.
48. Id. at 480 (“There was no direct evidence of race discrimination on the part of the city in letting contracts or any evidence that the city’s prime contractors had discriminated against minority-owned subcontractors.”).
49. Id. (citing Councilperson Kemp).
50. Id. at 481.
In its description of the minority subcontractors' choices, the Court missed the same type of evidence of how race affects individual choices that it missed in *Bostick*. The opinion in *Croson* describes circumstances which in effect limited the minority subcontractor’s opportunities to bid on the construction project. There were only two manufacturers whose products met the bid specifications. In its effort to prepare a bid, the minority subcontractor, Continental, contacted two suppliers of the approved products. The first already had submitted a quotation directly to the general contractor, *Croson*, and refused to provide a quote to Continental, while the second was not familiar with Continental and therefore required thirty days to complete a credit check. Finally, Continental contacted an agent of the second approved manufacturer. The quotation that this agent made to Continental was not only “subject to credit approval,” but was also “substantially higher than any other quotation *Croson* had received.” *Croson*, instead of asking the city to keep the bids open long enough to allow the credit check to be completed, and instead of asking the first manufacturer to deal with Continental, requested that the city waive the set-aside requirement.

The Court did not see Continental’s difficulties in participating in the bidding process as deficiencies in the supposedly neutral bidding process’s ability to identify meritorious contractors. Rather, it treated them as deficiencies in Continental. Just as it understood the women in *Sears* as “choosing” not to seek major commission sales jobs, and just as it understood the African American defendant in *Bostick* as freely choosing to cooperate with the police in the aisle of the bus, the Court’s emphasis on past discrimination implies that Continental’s difficulties are not attributable to current discrimination in the bidding process but to Continental’s poor choices. The Court’s

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52. *Croson*, 488 U.S. at 481.
53. Id. at 482.
54. Id. It is entirely possible that the first agent’s refusal to deal with Continental and the second agent’s credit requirement were related to Continental’s minority status. The Court never considers this possibility. Minority-owned businesses in Richmond rarely belonged to local trade associations. Id. at 529 (Marshall, J., dissenting).
55. Id.
56. Id. at 483.
57. Id. at 482.
language in discussing Continental's inability to submit a bid before the date when the waiver request was submitted is significant: "By October 19, 1983, Croson had still not received a bid from Continental."\(^ {58} \) The use of the word "still" implies that the Court believed that Continental should have submitted its bid earlier, despite the fact that it had been told less than a week before that a credit check would take thirty days, and despite the fact that Continental had promptly informed Croson of the credit problems. The Court did not consider whether Croson could have waited to submit the waiver request until after the credit check was completed.\(^ {59} \)

Failure to consider the facts leading up to Continental's late bid allowed the Court to act as if Continental was able to do business in the same way as majority businesses, unhampered by subtle, unconscious forms of racial discrimination.\(^ {60} \) The Court also implied that it was somehow Continental's fault that its bid could not come in on time; perhaps Continental was an inefficient, poorly run, or otherwise undeserving business. Thus, the Court treated Continental as if it had chosen not to perform adequately. In short, reliance on so-called objective measures allowed the Court to ignore both the social context in which decisions about bidding are made and the effect that race has on individual choices and options.

In Croson, the Court assumed that Croson merited the award because of its bid and that Continental did not because Continental chose to bid late. Claims of merit-based decisions and of individual choice allow Americans to believe that race is irrelevant to decisions in modern America. Despite this belief, race matters.\(^ {61} \) This should be clear to anyone who reads stories of police or security guard conduct,\(^ {62} \) anyone who has

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58. Id.
59. As it turned out, Croson's request for a waiver was denied on November 2 and sometime after December 9 the city informed Croson that it had decided to rebid the project. Id. at 483. The results of the credit check should have been in long before that, so Croson might not have needed to move so rapidly in asking for a waiver.
60. See generally Charles R. Lawrence III, The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism, 39 STAN. L. REV. 317 (1987) (describing unconscious racism and arguing that it should be considered in applying and interpreting the Equal Protection clause).
61. This phrase is the title of Cornel West's new book, CORNEL WEST, RACE MATTERS (1993). For a similar use of the phrase, see RUTH FRANKENBERG, WHITE WOMEN, RACE MATTERS (1993) (describing the ways in which the experience of being white is constructed by race).
ever pressed a doorbell for entrance into an urban boutique, or anyone who has ever looked at pornography—to name just a few of the areas in which race matters.

In addition, because actions that are prohibited in the public sphere often are protected in the private sphere, the public/private dichotomy functions to permit the continuance of differential and inferior treatment of African Americans. An individual's social decisions are understood as private and therefore not subject to an investigation as to whether they are racially motivated. This allows whites to exclude African Americans from their private lives. It also allows the courts to accept the "choices" that African Americans make—choices like permitting police to open baggage on a bus or to run a business inefficiently—as if they were made freely and were unaffected

professor at Duke Law School, described being stopped and questioned by traffic police after having retrieved something from his office late at night:

As I turned near the law school I noticed that a campus police car was following me. This police car sped up and followed as closely as it could as I approached the next light. . . . [T]he policeman turned on his overhead police lights and pulled me over. . . . I asked him why he had pulled me over, and I showed him my driver's license. He stopped me, he said, because I had crossed the double lines at the intersection. I pointed out to him that that argument was just silly because the nature of the interchange made it virtually impossible to cross the yellow lines. He glanced at my driver's license and simply got back into his car and drove off. I never knew if he noticed that my driver's license lists me as a white male which, despite what his eyes told him, may have immunized me, or whether—as I have always contended—the campus police are required to remember the faces of all 35 black faculty members. I have no doubt, however, why I was stopped. It was the interaction of the color of my skin, my apparent age . . . and my gender . . .

Id. at 203; see also OGLETREE ET AL., supra note 35 (describing the influence of race on policing); Deborah W. Post, Race, Riots and the Rule of Law, 70 DENV. U. L. REV. 237, 257–59 (1993) (describing being shadowed by a security guard while shepherding her black son and young cousins through a museum).

63. See PATRICIA WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 44–46 (1991) (describing her experience of being denied access to Benetton by a white employee even though other (white) customers were in the store).


by race. Since these choices are understood as freely made, they function to legitimate African Americans' subordinate positions in society. According to the ideology of color blindness, African Americans chose these inferior positions.

Characterizing African American subordination as a product of choice, as in cases like Bostick and Croson, is not the only way in which legal doctrine perpetuates that subordination. Kimberlé Crenshaw's study of race discrimination law describes the ways in which racial subordination remains despite the existence of civil rights laws. She notes that the stereotyped characteristics once attributed to African Americans as a result of biology are now ascribed to culture. Furthermore, the presence of "white" traits like industriousness and intelligence are understood to account for white success. In order for civil rights laws to create true equality of whites and African Americans, whites would have to "confront myths about equality of opportunity that justify for them whatever measure of economic success they may have attained."

Legal doctrine also perpetuates subordination through the way in which the courts have interpreted the First Amendment. Charles Lawrence argues that the First Amendment has been interpreted to protect certain constitutional values but not others, thereby reinforcing the subordination of racial minorities. Although the First Amendment's exception for "fighting words" usually is interpreted as excluding racial insults, Lawrence shows that racial insults have the same emotional impact as fighting words and the same "preemptive nature"—they are unanswerable. Unlike racial epithets, however, the danger of "fighting words" to the public peace is


67. Crenshaw, supra note 66, at 1379.

68. Id. at 1373.

69. Id. at 1381.

70. U.S. CONST. amend. I.

71. Charles R. Lawrence III, If He Hollers Let Him Go: Regulating Racist Speech on Campus, 1990 DUKE L.J. 431.

72. Id. at 452–53.
easily understood from a white male perspective.\textsuperscript{73} In contrast, regulation of racial hate speech is seen as an incursion on the protections accorded by the First Amendment to all Americans.\textsuperscript{74} Hate speech and its subordinating message are thereby protected as speech. The fact that people of color must pay a particular and unique price for protecting free speech is overlooked.\textsuperscript{75}

The Supreme Court also perpetuates the subordination of African Americans by its language, which Neil Gotanda argues reinforces ideas of white supremacy.\textsuperscript{76} He looks at cases dealing with voting rights, affirmative action, and jury selection and finds that the Court often considers race to be a characteristic unconnected to a social context or a particular history.\textsuperscript{77} Thus, decision making based on race is irrational and racism becomes an irrational prejudice.\textsuperscript{78} As a result, the types of remedies that plausibly can combat racial subordination are limited.\textsuperscript{79} Gotanda concludes:

This disaggregated treatment [of race] veils the continuing oppression of institutional racism. It whittles racism down to the point where racism can be understood as an attitude problem amenable to formal-race solutions. . . . [This] hinders this country's ability to address the clear correlation between racial minority populations and the concentrations of these various, supposedly distinct problems. Even if one admits that large numbers of the unemployed and undereducated youth in the inner cities are Black, unconnectedness hinders the government's ability to use that correlation as a basis for attacking social ills.\textsuperscript{80}

Law becomes part of the system that supports racial subordination instead of being part of the cure.

Thus, the ideology of color blindness declares both the irrelevance of race \textit{and} the inferiority of African Americans. Overtly, it asserts that African Americans should be treated

\begin{itemize}
\item 73. Id. at 454.
\item 74. Id. at 473–75.
\item 75. Id. at 475.
\item 76. See Gotanda, supra note 18.
\item 77. Id. at 40–42.
\item 78. Id. at 43–44.
\item 79. Id. at 44.
\item 80. Id. at 45.
\end{itemize}
the same as whites. Covertly, however, it continues to accept doctrines like those allowing private racism and thereby permits the subordination of African Americans. It is in this context that we must consider the construction of African American law students' identities in legal education.

II. THE DISCOURSES OF LEGAL EDUCATION: CURRICULUM AND PEDAGOGY

A. Claims of Color Blindness

Like the larger legal culture, legal education also makes claims to color blindness. As with the legal system in general, these claims support and legitimate the status quo in legal education. These claims assert that it is not necessary to consider race in making policy decisions, such as curricular decisions, about the structure of legal education. They also assert that people's responses to that structure will not be affected by their race. This is a claim that legal education is race neutral.

Most of the time, the claim to be color-blind is made through silence. Discussions of legal education rarely mention race as a factor relevant to a student's success. For example, Robert Granfield's recent study of the culture of law school, Making Elite Lawyers, 81 does not treat race as an organizing principle, although it does include chapters on women and working-class students. 82 The major liberal critiques of the 1970s that identified legal education as inhumane 83 or impractical 84 barely

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81. Robert Granfield, Making Elite Lawyers (1992). Granfield does not omit African American law students entirely. He includes one quotation from an African American law student in making the point that while most law students enter law school for career reasons, some enter for altruistic reasons. Id. at 39. This, however, simply demonstrates my point that the race of the student is not important to Granfield. Rather, the student is quoted to prove a statement about all law students' motives in entering law school. Meaning is attributed to the student's intentions, but not to his race. In fact, Granfield does not include index entries for "Black" students, "African American" students, or "students of color." See id. at 244-48.

82. Id. at 94-122.

83. See, e.g., Jack Himmelstein, Reassessing Law Schooling: An Inquiry into the Application of Humanistic Educational Psychology to the Teaching of Law, 53 N.Y.U. L. Rev. 514 (1978) (emphasizing the importance of individual and social development in the process of obtaining a legal education).

84. See, e.g., Michael Meltsner & Philip G. Schrag, Scenes From a Clinic, 127 U. Pa. L. Rev. 1 (1978) (contrasting the role of a clinic faculty advisor with that of a law school professor).
touched on issues of race. The more leftist-oriented critique by
people associated with the Critical Legal Studies movement
focused on the ways in which legal education worked to repro-
duce hierarchy in general, but not, until recently, on racial
hierarchies in particular. Similarly, much of the important
feminist legal literature of the late 1970s and early 1980s
ignored the significance of race.

The message of color blindness also is implicit in many of the
common practices of legal education. Law schools' goal of
teaching each student to "think like a lawyer" resonates with
color blindness, since skin color is not considered relevant in
determining whether one is thinking like a lawyer. The phrase
"thinking like a lawyer" has meant discovering the underlying
scientific principles of the law—principles that are equally
available to and supposedly have equal meaning for all stu-
dents, regardless of race. The result, as Kimberlé Crenshaw
notes, is that "when the discussion involves racial minorities,
minority students are expected to stand apart from their
history, their identity, and sometimes their own immediate
circumstances and discuss issues without making reference to
the reality that the 'they' or 'them' being discussed is from [the
minority students'] perspective 'we' or 'us.'"

85. See, e.g., Duncan Kennedy, Legal Education and the Reproduction of Hierar-
chy, 32 J. LEGAL EDUC. 591 (1982) (describing the hierarchies resulting from students'
competitiveness in class, grading and ranking, career placement, and the professors' interests in preserving school rankings).
86. Crenshaw, supra note 66, at 1356.
87. See, e.g., Ann E. Freedman, Sex Equality, Sex Differences, and the Supreme Court, 92 YALE L.J. 913 (1983) (discussing the Supreme Court's application of the Equal Protection Clause and Title VII in the context of sex discrimination); Sylvia A. Law, Rethinking Sex and the Constitution, 132 U. PA. L. REV. 955, 963–66 (1984) (discussing the "analogies between race- and sex-based discrimination" and arguing that, although there are real sex-based differences in terms of reproductive capacity, "[t]here is no reason to believe that black and white people are inherently different in any way that should ever be allowed to matter in the law"); Wendy W. Williams, Equality's Riddle: Pregnancy and the Equal Treatment / Special Treatment Debate, 13 N.Y.U. REV. L. & SOC. CHANGE 325 (1984–1985) (highlighting the feminist debate over whether a woman's ability to reproduce demands special litigative attention to equalize the sexes in the workplace).
88. See OLIVER WENDELL HOLMES, THE COMMON LAW 41–43 (Mark DeWolfe Howey ed., 1963) (2d ed. 1881) (noting the impossibility of taking individual characteristics into account in determining if one is acting reasonably); Jerome M. Culp, Jr., Autobiography and Legal Scholarship and Teaching: Finding the Me in the Legal Academy, 77 VA. L. REV. 539, 546 (1991) (noting that the personal usually is considered irrelevant to law because "[l]aw has to treat rich and poor, pretty and ugly, black and white alike"); Margaret E. Montoya, Mascaras, Trenzas, Y Greñas: Un Masking the Self While Un/Braiding Latina Stories and Legal Discourse, 16 CHICANO-LATINO L. REV. 1, 20–21 (1994) (explaining the legal discourse assertion that there is only one relevant reality).
Consistent with the claim of color blindness, most law schools require students to identify themselves on their examinations by number instead of by name. Instead of interpreting the exam in light of the student's comments and positions in class, faculty are expected to grade according to objective, merit-based standards commonly identified by the anagram "IRAC." According to Paul Carrington, this practice of blind grading was instituted as a means of ensuring against favoritism for specially admitted minority students. Blind grading was seen as a way of guaranteeing that race did not impact on the meritocratic evaluative process. By holding the African American students to the same standards as the white students, legal education reiterated its claim of race blindness.

As noted above, one of the central tenets of a color-blind approach to decision making is that race is an illegitimate criterion upon which to base a policy decision. In terms of legal education, this means that African American students are not seen as differing from white students in the various traits that might matter such as intelligence, industriousness, and alacrity. Law schools construe African American students to be the same as white students underneath their skin. They view their students’ differences as superficial—the color of their skin.

90. Students are told to identify the issue, state the relevant rule(s), analyze the problem, and come to a conclusion. For discussions of law school exams, see Philip C. Kissam, Law School Examinations, 42 VAND. L. REV. 433 (1989); Janet Motley, A Foolish Consistency: The Law School Exam, 10 NOVA L.J. 723 (1986); Steven H. Nickles, Examining and Grading in American Law Schools, 30 ARK. L. REV. 411 (1977); see also Norman Redlich & Steve Friedland, Challenging Tradition: Using Objective Questions in Law School Examinations, 41 DEPAUL L. REV. 143 (1991) (recommending the use of multiple choice examinations in lieu of or in addition to traditional essay exams).


92. See supra Part I.

93. Jerome M. Culp points out that there is a long history of assuming that "Negroes are, after all, only white men with Black skins, nothing more, nothing less." Jerome M. Culp, Jr., Posner on Duncan Kennedy and Racial Difference: White Authority in the Legal Academy, 41 DUKE L.J. 1095, 1107 n.42 (1992) (quoting KENNETH M. STAMPP, THE PECULIAR INSTITUTION vii (1956)). One Georgetown law student expressed a similar sentiment when he said: "[E]very white male here thinks that if he was black or a woman or some other minority, they'd be at Harvard or Yale . . . . That's not true, but that's the impression." Saundra Torry, Racial Tension Scars Georgetown's Veneer, WASH. POST, Apr. 21, 1991, at A1, A9. The implication is that difference is only skin deep. The color-blind approach to race does not allow for the possibility that there may be cultural differences between African American and white law students and that these differences may be significant in the context of legal education. See infra Part IV.
The message of color blindness and the claim that African American students are the same as white students also is visible in the structure of the curriculum. The core of the curriculum in most law schools revolves around traditional common law subjects and statutory courses on corporate, commercial, and tax law. Race rarely is discussed in these courses. For example, a review of the indexes of three prominent torts casebooks reveals that none of them contains an entry for "African American," "Black," "Negro," or "Race." Although this does not necessarily mean that African Americans are not mentioned at all in these casebooks, it does mean that the casebooks' editors did not consider the subject of African Americans to be one with sufficient relevance to a torts class that students might want to search for material according to that category. In fact, all three of these casebooks do make some references to race, for example, in their discussions of the tort of intentional infliction of emotional distress. Even here, however, race is treated as an incidental, rather than an analyzing principle.

94. DAN B. DOBBS, TORTS AND COMPENSATION (2d ed. 1993); MARC A. FRANKLIN & ROBERT L. RABIN, CASES AND MATERIALS ON TORT LAW AND ALTERNATIVES (5th ed. 1992); WILLIAM L. PROSSER ET AL., CASES AND MATERIALS ON TORTS (8th ed. 1988). Dobbs does have an index entry under "Racial Discrimination," which sends the reader to "Discrimination," under which there are six sub-entries. One of these is "Ethnic indignities or racial slurs, mental distress." DOBBS, supra at 1075, 1062. DOBBS, supra note 94, at 58; FRANKLIN & RABIN, supra note 94, at 818–19; PROSSER ET AL., supra note 94, at 62.

95. DOBBS, supra note 94, at 58; FRANKLIN & RABIN, supra note 94, at 818–19; PROSSER ET AL., supra note 94, at 62.

96. Prosser, Wade, and Schwartz, in their casebook, address race and intentional infliction of mental distress in a note following a case in which the plaintiff was particularly sensitive because of a speech impediment. PROSSER ET AL., supra note 94, at 57–60, 62. The implication is that, if one suffers mental distress due to racially discriminatory treatment, it is somehow similar to the mental distress suffered in the case of the plaintiff with the speech impediment. Although the commonalities and differences between racial discrimination and discrimination based on other characteristics would make an interesting classroom discussion, Prosser, Wade, and Schwartz have buried the subject in a two and one-half page section of notes in which only two of the 28 cases involve race. Id. at 62. Furthermore, because the authors describe each of the cases relating to race only briefly, the editors encourage discussion of the "plaintiff's sensitivity for race" in terms of the lead case (on the speech impediment) instead of in terms of race. They thereby imply that racial characteristics are not unique, but rather are the same as other "superficial" differences like age, religion, pregnancy, and hypertension.

Dobbs, in his casebook, also uses only the notes to treat racial discrimination as the subject of intentional infliction of emotional distress. DOBBS, supra note 94, at 56. In a series of questions, Dobbs covertly asks whether the power relationship between the plaintiff and the defendant might not be important to the tort. Id. at 58. Certainly, anyone focusing on this tort in a racial context would find this a relevant question. He asks the questions so discretely, however, that a student is likely to miss their importance unless the professor expressly refers to them in class. Dobbs's note asks:
Similarly, the required upperclass courses tend to treat race as if it were irrelevant to their subject matters. This is because race, in fact, has been made irrelevant to those courses as they are usually taught; most of the areas in those subjects that a significant number of African Americans might find interesting have been excised from the basic course.

For example, corporations courses usually exclude issues relating to the availability of public funding for small businesses. The traditional course will cover private funding

What pattern is suggested by these cases? Can it be stated in a way broad enough to encompass LaBrier? Does the pattern here suggest that Mrs. LaBrier might have been liable if it had been she who made accusations? Or that Mr. Gomez might have been liable if his scatological vocabulary had been fired at Mr. Hug?

Finally, Franklin and Rabin provide the longest treatment of racial insults of the three casebooks: over a page of textual notes, which include a note on the Civil Rights Acts and Title VII. FRANKLIN & RABIN, supra note 94, at 818–20. They treat the issue, however, with as little affect as the other authors. Although they note that some courts have found causes of action for intentional infliction of mental distress but others have not, id. at 818–19, they fail to explain the differences in results. They do cite some important current scholarly work on the subject, but again they do not provide the student with any insight into what the works say. Id. at 819.

Certainly none of these treatments would encourage a student interested in the relationship between race and law to believe that the tort of intentional infliction of mental distress, or tort law in general, had or could have much to say about that relationship. These casebook authors treat race as any other difference among individuals. In this way, they reinforce the idea that African Americans differ from whites in the same way that whites differ among themselves in hair color, height, or weight. Cf. Mark Tushnet, Spite Fences and Scholars: Why Race Is and Is Not Different, 26 CONN. L. REV. 285, 286–88 (1993) (arguing that racial discrimination is different from other forms of discrimination).

97. By “required” I mean the courses that students tend to think of as required to pass the bar or to be literate in the law. I would include among these commercial law, corporate law, evidence, tax, and trusts and estates. Agreement as to exactly which courses fit this category is unnecessary because I contend that issues relating to race will not be a focus of discussion regardless of the course. If it is understood as a required course, race will be deferred to another course that is considered an elective.

98. For a similar analysis of contract law and women, see Mary Joe Frug, Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook, 34 AM. U. L. REV. 1065, 1089–93 (1985) (noting the absence of materials on reproductive technology and marital contracts from the first year contracts course casebooks).

This excising of subjects of relevance to African Americans occurs despite the ways in which the question of race has influenced doctrinal developments in a number of subject areas. See Roy L. Brooks, Anti-Minority Mindset in the Law School Personnel Process: Toward an Understanding of Racial Mindsets, 5 LAW & INEQ. J. 1, 14 n.41 (1987) (discussing the influence of race in civil procedure, constitutional torts, property, criminal procedure, labor relations, trusts and estates, and employment discrimination).
through the sale of securities—an option not available to many small businesses. Public corporations may touch more on the lives of African Americans through their pensions or their labor relations than through the type of governance issues discussed in most corporations courses. Pensions and labor relations, and even plant closings, however, are saved for other courses—ones that generally are considered highly elective. Furthermore, while most corporations courses include a segment on corporate responsibility and the composition of the corporate board, only the exceptional course is likely to make reference to the way in which board selection procedures exclude African Americans. Many not-for-profit corporations are active in African American communities, yet their formation and governance usually are not included in courses on corporations.

Race is likely to be a central feature only in courses that students and faculty alike consider to be the highly elective courses, designated and denigrated as not central to the curriculum. In 1970, the Association of American Law Schools suggested that a "course in race relations law or in race, racism and justice could be supplemental to courses in constitutional and civil rights law."\(^9\) Such courses remain supplemental today. While many schools now have seminars in subjects like race discrimination law or law and racism, few give race a central place within the law school curriculum.\(^1\) Furthermore, African American law professors working toward tenure often


[T]hey failed to recognize that the study of law has no immediate relevance to the black community. It is almost pure study. The real relevance comes only after the period of training, when the individual student has to decide for himself what role he wants to play with the tools he has acquired. At this point, it seems to me, the law becomes most relevant.

Id. at 96.

\(^1\) Northeastern Law School is one of the few to put racism in a central place. It requires all first-year law students to take the course, "Law, Culture and Difference." Northeastern University Law School, Teaching Materials for Law, Culture and Difference, Fall/Winter/Spring 1992–1993 (on file with the University of Michigan Journal of Law Reform); see also Frances L. Ansley, *Race and the Core Curriculum in Legal Education*, 79 CAL. L. REV. 1511 (1991) (arguing that race should be given a central place in the law school curriculum because of its central place in constitutional history).
are urged by their colleagues not to concentrate on issues like race and law or civil rights. African American faculty have been advised not to produce civil rights scholarship, or, after writing about race, to pull back and write on something else. If African American faculty followed this advice, the result would be a dearth of research on these subjects or teaching in these areas.

The vast majority of courses are taught from texts that focus on appellate cases. These cases rarely state the race of the parties or the judge. But, in this society, if race is not indicated, the assumption is that the people involved are white. Of course, this assumption will be true in most cases: the majority of litigants are white as well as the majority of judges. In addition to the appellate cases, some casebooks include textual materials. These additional casebook materials, however, tend not to excerpt from articles written by African American legal academics.


102. The case method of teaching was first introduced in 1870 by Christopher Langdell, then Dean of Harvard Law School. GRANT GILMORE, THE AGES OF AMERICAN LAW 42-43 (1977). This method remains widely used in law schools today. For a detailed discussion and critique of the case method, see Russell L. Weaver, Langdell's Legacy: Living with the Case Method, 36 VILL. L. REV. 517 (1991).


104. I recognize that many people supplement casebooks with their own sets of materials, but I have no way of analyzing these. Ever since Basic Books v. Kinko's Graphics, 758 F. Supp. 1522 (S.D.N.Y. 1991), in which publishers successfully sued the duplication business for copying book excerpts and compiling them in university coursepacks without authorization, I suspect fewer people are using supplements and those that are used are likely to be smaller than those previously used.

105. For example, neither a well-known torts casebook, DOBBS, supra note 94, nor two torts anthologies, A TORTS ANTHOLOGY (Lawrence C. Levine et al. eds., 1993), and ROBERT L. RABIN, PERSPECTIVES ON TORT LAW (3d ed. 1990), include excerpts from African American legal scholars' work. Furthermore, neither Dobbs' casebook nor PROSSER ET AL., supra note 94 (which does not include excerpts of academic material), include citations to the work of African American legal scholars. Many African American legal scholars have written in the field of torts or on closely connected subjects. Works by these scholars include Anita L. Allen & Erin Mack, How Privacy Got its Gender, 10 N. ILL. U. L. REV. 441 (1990); Regina Austin, Employer Abuse, Worker Resistance, and
The result is that legal educators only rarely refer to race. The uniformity of silence on race should alert us to its non-accidental nature. This silence can be understood within the norm of color blindness as saying that discussions of topics that allude to race are unnecessary because there are no relevant differences between African Americans and whites. Given the ideology of color blindness, the silence works to construct African American students as white. Legal educators, who are themselves predominantly white, teach the subjects that are important to them and to the predominantly white bar. In organizing their courses and their curricula around these subjects, legal educators implicitly make the claim that African American law students are, or ought to be, the same as white students, and that they are, or ought to be, animated by the same concerns that animate white students.

In short, the dual assumptions of color blindness—that race is irrelevant to decisions about people and to decisions that people make in their own lives—affect the structure of the curriculum. The curriculum can be as silent on race as it is because race is not considered a characteristic that is relevant to the study of law. It is not relevant to the study of law, in part, because decisions about people, and their courses of study, should not be made based on race. In addition, according

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106. LAW SCH. ADMISSION SERVICES, MINORITY PARTICIPATION IN LEGAL EDUCATION AND THE PROFESSION: A COMPENDIUM OF DATA tbl. VIII-1 (1990) [hereinafter MINORITY PARTICIPATION DATA] (reporting that minority faculty in 1989-1990 made up 8.7% of all faculty, including faculty at the historically Black law schools).

107. In 1986–1987, three percent of the legal profession was African American. Judy Rothotz, Are Hiring Practices a Factor? Percentage of Blacks in the Profession Lags, N.J. L.J., Dec. 3, 1987, at 1, 30. In 1988, less than two percent of the attorneys employed by the nation's 250 largest law firms were Black, while fewer than one percent of the partners in these firms were Black. Deasy, supra note 9, at 551–52 (citing Doreen Weisenhaus, Still a Long Way to Go for Women, Minorities; White Males Dominate Firms, NAT'L L.J., Feb. 8, 1988, at 1, 1, 48). In fact, more than 10% of the 250 largest firms reported employing no African American attorneys and more than half had no African American partners. Id. For a study of the disproportionately low number of Hispanic attorneys employed in large law firms, see Linda E. Dávila, The Underrepresentation of Hispanic Attorneys in Corporate Law Firms, 39 STAN. L. REV. 1403 (1987).
to the ideology of color blindness, an individual's own decisions about what to study are not affected by her race.

B. Claims of African American Inferiority

Although law schools claim to have color-blind curricula, these curricula also can be seen to oppose the ideology of color blindness. Just as legal doctrines governing discrimination law, First Amendment law, and constitutional interpretation make overt claims to color blindness that can be reinterpreted as assertions of white supremacy, the institutional practices of legal education can be reread. The failure to refer to African Americans or African American authors in casebooks can be understood as a statement of their inferiority when compared with whites. The message conveyed is that African American work is not sufficiently valuable to be the subject of litigation or to be reproduced in legal texts. Similarly, the silence about African Americans in the subject matter of courses can be understood as a mark of inferiority. According to this interpretation of the curriculum, African Americans are not simply colored whites, they are different and inferior.

Law schools' implicit treatment of African American law students as inferior is reinforced by the strong, negative student reaction to the inclusion of materials on race in core courses. Most law faculty are familiar with the way in which students put down their pens the moment the subject of race arises in a core course. A notorious example of this is the demeaning response of students and faculty to Visiting Professor Derrick Bell's Constitutional Law class at Stanford Law School in 1986. At the time of this incident, Professor Bell was a well-known African American with more than seventeen years of law school teaching experience at Oregon, Harvard, Emory, Illinois, the University of Washington, and Florida

109. See Knight v. Alabama, 14 F.3d 1534, 1553 (11th Cir. 1994) (remanding for a determination as to whether state college curricula that marginalize the study of African American thought, culture, and history are traceable to earlier de jure segregation).
State. He also had served as the Dean of the University of Oregon School of Law. Professor Bell taught his Constitutional Law class from the same casebook that other Constitutional Law professors used at Stanford but, unlike the other professors, Professor Bell taught the material in the order in which the casebook presented it: before the students encountered doctrinal materials, they were faced with a discussion of the importance of slavery and property rights in the thinking of the authors of the Constitution. According to Professor Bell: 

"[W]ithout this background, the later chapters devoted to contemporary racial issues are not coherent. They seem on the periphery of the constitutional pattern of which they may be the most important part."

When some of the students in the class expressed dissatisfaction, apparently believing that issues of race were not of particular importance to the study of constitutional law, some faculty members established a lecture series to supplement Professor Bell's course without telling him the purpose of the lectures. Ultimately, after protests by the Stanford Black Law Students Association, the lecture series was cancelled and the two dozen students who had been attending other constitutional law classes slowly drifted back to Professor Bell's class.

The students' rejection of race as an appropriate topic of discussion could be understood as a claim that African Americans are the same as whites and that therefore the study of the history and context in which the Constitution was created is irrelevant. Professor Bell, however, saw the way in which the lecture series was created as saying something different. According to Professor Bell: "The fact of my exclusion from the dialogues that must have taken place before so radical a remedy for student upset was adopted was a denial of my status as a faculty member and my worth as a person...." He termed the event "stigmatizing" and "demeaning." Even weeks later, he experienced "abject humiliation" and "absolute outrage" as a result of these events.

111. Bell, supra note 110, at 5.
112. Id.
113. Id.
114. Id.
115. Id.
116. See supra Part II.A.
117. Bell, supra note 110, at 5.
118. Id.
119. Id.
Others also understood the episode as carrying a message of African American inferiority. Faculty members were embarrassed by the event and referred to it as "outrageous."\textsuperscript{120} They offered their apologies to Professor Bell, as did the Dean and a number of white students. This incident serves as a reminder to African American faculty and students of the ease with which the message of African American inferiority surfaces.\textsuperscript{121}

Law students also might understand the overwhelmingly white character of student bodies\textsuperscript{122} and faculties\textsuperscript{123} as a further indication of the inferior status of African Americans. It would be easy to interpret the predominant color of these bodies as implying that African Americans were not smart enough to get into law school, to stay in law school, or to be appointed to law school faculties.\textsuperscript{124}

Furthermore, norms of privacy work within the law school environment, as they do within the larger legal system, to make possible the exclusion of African American students. African American students often find it difficult to join

\textsuperscript{120.} \textit{Id.}

\textsuperscript{121.} Although the fact that Professor Bell is African American may have made it easier for the white students to go forward with their extraordinary plan, white faculty who have tried to discuss issues of race in the classroom have also experienced resistance. See, e.g., Frances L. Ansley, \textit{Race and the Core Curriculum in Legal Education}, 79 CAL. L. REV. 1512, 1559–60 (1991) (recounting comments from students who saw her curricular emphasis on race as an indication of impermissible bias).

\textsuperscript{122.} In the 1991–1992 academic year, Blacks comprised only 6.3% of those attending ABA-approved law schools, despite the fact that Blacks make up approximately 12% of the United States population. The 6.3% figure appears to include students at historically Black law schools. Ken Myers, \textit{Studies Suggest That Minorities Still Lag in Admissions, Tests}, NAT'L L.J., Feb. 24, 1992, at 4.

\textsuperscript{123.} In 1986–1987, Black faculty members constituted only 3.7% of the faculty at non-historically Black schools. Richard H. Chused, \textit{The Hiring and Retention of Minorities and Women on American Law School Faculties}, 137 U. PA. L. REV. 537, 538 (1988) (defining "faculty" to include non-tenure track teaching staff, such as clinical staff); see also MINORITY PARTICIPATION DATA, supra note 106, at tbl. VIII-1 (showing minority faculty in 1989–1990 to be 8.7% of all full-time professors, including all minority—not just Black—faculty and including the historically Black law schools); Delgado,\textsuperscript{101} supra note 101, at 351 (finding that momentum to hire minorities stalled in the mid-1980s). Furthermore, Black faculty tend to be tokens at the majority-run law schools. In 1991, over half of the ABA-approved law schools reported only two or fewer full-time minority (Black, Hispanic, Native American, or Asian) faculty members, while almost 10% of the schools continued to report no full-time minority faculty members at all. ABA SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR,\textit{ A Review of Legal Education in the United States} 14–63 (1991).

predominantly white study groups. Yet, much of the learning and self-testing of law school takes place in these settings. Similarly, white faculty members often serve as mentors to white students, again leaving African American students out of many of the informal settings in which learning takes place. Finally, but just as importantly, African American students tend not to be invited to participate in white students' small, informal social gatherings. These include eating meals and just relaxing. Although these settings usually are not conceived of as educational, law school classes and law school survival techniques frequently are discussed. By not participating in these exchanges, African American students lose out on the lore and knowledge about the institution and its participants. Their exclusion from these important settings marks them as different. It also may mark them as inferior in that no one thought their ideas or company sufficiently desirable to invite them.

The dominant message of sameness, with its underlying message of difference and inferiority, also is reinforced through the subject matter of the few core courses in which race is likely to be considered frequently. In constitutional law, race usually will be discussed in order to understand the development of the Equal Protection Clause. This doctrine serves as the paradigm of the assertion that African Americans are the same as whites. Beginning with the pronouncement in *Dred Scott v. Sanford* that African Americans are neither "citizens" nor "people of the United States" within the meaning of the Constitution, and moving through the modern equal protection cases, the cases usually are taught to show the appropriateness of the norm of race-blind, equal treatment.

In contrast, in classes on criminal law and procedure, African Americans ordinarily are portrayed as dangerous to white

125. The information in this paragraph is based on informal conversations with students at New England Law School and with students and faculty from several other law schools. It is anecdotal in character. See also Leslie G. Espinoza, *Empowerment and Achievement in Minority Law Student Support Programs: Constructing Affirmative Action*, 22 U. Mich. J.L. Ref. 281, 291 (1989) (emphasizing the isolation of students of color from both white students and faculty); see also Lawrence, supra note 60 (describing the unconscious racism in many white-Black interactions).

126. "[N]or shall any state . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

127. 60 U.S. (19 How.) 393 (1856).

128. *Id.* at 404.

129. Cf. Gotanda, supra note 18, at 62 (arguing that the ideology of race-blind constitutionalism actually promotes white supremacy).
America. Here, African Americans are the criminals—people who inflict or try to inflict injury on white law-abiding citizens.\textsuperscript{130} Consistent with notions of race blindness, most criminal cases do not identify the race of either the defendant or the victim, but, those that do often identify the defendant as African American and occasionally identify the victim as white.\textsuperscript{131} Despite the fact that a disproportionate number of crimes in the United States are committed against Black victims,\textsuperscript{132} the identifications in these cases reinforce the popular construction of African Americans, and in particular, African American males, as dangerous to whites.

Both the construction of African Americans as the same as whites and the competing construction of them as different and inferior have the effect of reinforcing the status quo in legal education. If African American students are indeed the same as white students, then there is no need to adjust legal education to accommodate the presence of slowly increasing numbers of African American students. These new students should fit right in, simply replacing or adding to the white students who traditionally have been present. Similarly, if African American students are different from and inferior to white students, there is no reason to change legal education to take their needs into account. To do so would diminish the quality of legal education, downgrading it from the high standard previously provided to white students to a lower quality of education that African Americans could survive.\textsuperscript{133} Thus, construction of African American law students as either the same or different

\footnotesize{\begin{itemize}
  \item \textsuperscript{130} Crenshaw, \textit{supra} note 89, at 4 (noting that "[i]t is not unusual for [criminal law] professors to base a hypothetical on the presence of a Black person in a white neighborhood"); Williams, \textit{supra} note 63, at 80–90 (discussing the use of racial classifications in law school exam questions).
  \item \textsuperscript{131} A review of the first 35 Supreme Court cases excerpted in James B. Haddad \textit{et al.}, \textit{Cases and Comments on Criminal Procedure} (4th ed. 1992), reveals that the race of the defendant or the victim is disclosed in only four cases. In one, the defendant is identified as being Black and the victim as white. \textit{Id.} at 13 (excerpting Brown \textit{v. Mississippi}, 297 U.S. 278 (1936)). In the second, the defendant is Black and is noted to have sold drugs to a Black undercover cop; there is no victim. \textit{Id.} at 266 (excerpting Mason \textit{v. Brathwaite}, 432 U.S. 98 (1977)). In the third, the victim is described as white, but the defendant's race is not given, \textit{id.} at 160 (excerpting Brewer \textit{v. Williams}, 430 U.S. 387 (1977)), while in the fourth the Court implies that the defendant is Black. \textit{Id.} at 388 (excerpting Terry \textit{v. Ohio}, 392 U.S. 1 (1968)).
  \item \textsuperscript{132} Irene Sege, \textit{Race, Violence Make Complex Picture}, \textit{Boston Globe}, Jan. 31, 1990, at 1. The vast majority of victims of violent crime are the victims of someone of their own race. \textit{Id.} African Americans, however, are overrepresented both among the victims of crime and those who commit crimes. \textit{Id.}
  \item \textsuperscript{133} \textit{See infra} text accompanying notes 193–200.
\end{itemize}}
and inferior to whites serves to legitimate the continuation of the status quo in legal education.

III. THE DISCOURSE OF COLOR BLINDNESS AND LEGAL EDUCATION: AFFIRMATIVE ACTION AND ACADEMIC SUPPORT PROGRAMS

There are two areas of legal discourse in which silence on the issue of race is particularly difficult: affirmative action and academic support programs. Both of these programs are associated primarily with students of color, even if they also serve some white students. In both of these areas, the dominant discourse constructs African American students as white. Sometimes this is clear from the language used; other times it is implicit. As with the rest of legal education, however, there is also a discourse that constructs African American students as different and inferior.

One way that academic support programs construct African American students as white is through their emphasis on enhancing students’ skills. There are many different types of academic support programs—summer programs, tutorial programs, special legal writing programs—but most of them are aimed primarily at improving the students’ abilities to write and to spot issues. The implication is that the participating African American students’ skills can be made indistinguishable from the non-participating white students’ skills.

For example, the CLEO program, one of the earliest and best known academic support programs, traditionally devoted approximately fifty percent of its curriculum to the development of legal writing skills. The emphasis on improving analytical and writing skills continues today. The current Mellon Program at the University of Pittsburgh focuses on these skills: “Writing and analytical skills are emphasized

134. See infra note 164 and accompanying text.
135. As of 1988, at least 62 law schools had academic support programs. MINORITY AFFAIRS COMMITTEE REPORT, supra note 10, at 73, 97, 125 (listing the law schools with summer orientation, tutorial, and legal writing programs).
136. Espinoza, supra note 125, at 291.
137. Alfred A. Slocum, CLEO: Anatomy of Success, 22 HOW. L.J. 335, 357 (1979); see also Leo M. Romero et al., The Legal Education of Chicano Students: A Study in Mutual Accommodation and Cultural Conflict, 5 N.M. L. REV. 177, 219 (1975) (noting that each regional CLEO summer institute was required to have a writing program).

Other programs emphasize substantive knowledge.\footnote{It would be inaccurate to imply, and therefore I do not mean to do so, that most programs fail to attack writing skills, substantive deficits, and learning methodologies simultaneously.} The assumption behind these programs is that African American students do not perform as well on their examinations and papers as white students because they have less knowledge of the material. Recent examples of substantive programs include the Academic Support Program of the University of Oregon,\footnote{This program is described in Finke, supra note 14, at 61–70.} the Charles Hamilton Houston Enrichment Program at the New England School of Law, and the support program recommended by the LSAC.\footnote{The LSAC proposal has four components in an academic year: seminars, small group sessions, individual sessions, and examination writing sessions. The seminars are intended to clarify, expand upon, and assist in the synthesis of the information presented in the large classes, while the small group sessions provide more intensive analysis of the information conveyed by the professor. In the individual sessions,} All three programs involve both substantive seminars and individualized tutorials.\footnote{This program is described in Finke, supra note 14, at 61–70.}
Still other programs focus on learning skills instead of either writing ability or substantive knowledge. For example, Paul Wangerin recommends that students be taught to learn independently. 144 He believes that those students who “experience academic difficulty” are dependent learners. This would explain why students in undergraduate academic support programs show only short term grade improvement. 145 The case method, according to Wangerin, is a useful vehicle for teaching independent learning because it “force[s] students to formulate their own solutions to their academic problems.”146

Regardless of the specific emphasis of a particular academic support program, they are all premised on the assumption that African American students would do better in law school if only they could bring their skill level up to that of white students. Furthermore, these programs would not exist if it were not assumed that such skill improvement was possible. Katherine Vaughns, for example, notes that law students with “high predictors”—the students admitted through the “regular” admissions process—undoubtedly have mastered the skills required in order to “think like lawyers.” 147 The challenge for law faculty, according to Vaughns, is to teach the specially admitted—minority—students to think like these regularly admitted—white—students. 148 Similarly, a description of a model academic support program, prepared for the Law School Admission Council/Law School Admission Services, asserts:

students can focus on legal issues that are posing particular difficulty for them. ACADEMIC ASSISTANCE PROGRAMS, supra note 142, at 27–31.

The Oregon School of Law program also includes support seminars, small-group or individual sessions, and review sessions. The seminars are intended to provide a second opportunity for the student to become familiar with the material from the large classes; the small-group or individual sessions are occasions for synthesizing the material periodically; the review sessions allow for summations at the end of the semester. Finke, supra note 14, at 63–64.

The New England School of Law program offers a six-week seminar in the spring semester that involves substantive faculty lectures and student-run tutorial reviews of written answers to problems developed by the faculty. See supra note 139 and accompanying text.


145. Wangerin, supra note 7, at 786.

146. Id. at 797–801.

147. Vaughns, supra note 144, at 470.

148. Id.
"The primary goal of an academic support program should be to help students develop the abilities that are necessary to independently proceed with their legal education."\footnote{149} In short, the goal of support programs is to give the students in the academic support program the skills that the white students who are not in the program presumptively already possess.

This fundamental assumption of African American students’ sameness in relation to white students is signalled by the terms used to describe students who participate in the programs. Students rarely are described in racial terms. Instead, they are referred to as “nontraditional students” or students “with special needs.”\footnote{150} These terms presumably are intended to indicate the inclusive nature of the programs, since both white and African American, as well as Hispanic and Native American, students fit within these categories. In other programs, eligibility is based on predictors of academic success, such as Law School Achievement Tests (LSATs) and undergraduate grade point averages (GPAs).\footnote{151} Again, this language implies that eligibility to participate in the programs is based on neutral, non-racial criteria. Once more, the implication is that there is no difference between white students and African American students.

Thus, the entire existence of academic support programs is based on the premise that African American and other minority students are fundamentally the same as white students and that whatever superficial differences may exist can be corrected through education. Academic support programs do not deny the uncontroverted fact that African American students often do not perform as well in law school as their white counterparts. Instead of attributing these differences in performance to fundamental differences between African American and white students’ identities or to possible pro-white biases in legal

\footnote{149. ACADEMIC ASSISTANCE PROGRAMS, supra note 142, at 13.}

\footnote{150. See, e.g., id. at 1, 2 (using the term “nontraditional” to apply to students who might participate in an academic support program); Deasy, supra note 9, at 564 (describing the placement of Black students with other “nontraditional” students as a way of reducing stigma); see also Finke, supra note 14, at 62 (noting that the Oregon Law School academic assistance program includes older students returning to school, students with large differences between their Law School Achievement Test (LSAT) scores and their undergraduate grade point averages (GPAs), and disabled students in an academic support program).}

\footnote{151. Espinoza, supra note 125, at 285–86 (showing how the use of predictors to identify students for support programs allows schools to ignore their role in perpetuating minority students’ failures).}
education, the substance of those programs reasserts the superficiality of any differences. Because skill deficiencies can be remedied, such deficiencies do not challenge the perceived sameness of African American and white law students.

Because law schools treat African American students the same as white ones, continued inadequate or disappointing performances by African American students, even after completing support programs, is likely to be understood as a result of the choices made by those students. Poor performance often is seen as the result of decisions by the student not to study enough, not to seek out peer or professorial assistance, or to engage in extracurricular activities at the expense of academic ones.152 Consistent with color-blind ideology,153 law schools treat these choices as unrelated to the individual's racial identity. The result is that African American law students who do not perform well are seen as similar to white students who simply have made bad choices about their use of time.

Discussions of affirmative action also focus on the superficiality of the differences between African American and white applicants for student or faculty positions, as well as on their basic similarity to each other. Proponents and opponents both endorse the position that race is not a relevant factor in determining a student's success in law school. Advocates of affirmative action admissions programs often admit that African American law school applicants may not perform as well as white applicants on standardized tests like the LSAT and that their undergraduate GPAs may be lower, but these lapses can be explained by a whole host of skills-related factors.154 Once African American applicants matriculate in law school, however, the advocates of affirmative action programs often reject special treatment for the newly registered students. Instead, these advocates claim that African American students

152. See Cheryl E. Amana, Recruitment and Retention of the African American Law Student, 19 N.C. CENT. L.J. 207, 214–16 (1991) (emphasizing the need for environmental as well as skill-related support services); Deasy, supra note 9, at 568 n.95 (recognizing the dangers to Black law students from extracurricular overload); see also Melinda Henneberger, Escaping Mean Streets, a Student Still Struggles, N.Y. TIMES, Mar. 18, 1994, at B1 (describing choices made by an African American college student).

153. See supra notes 30–35, 41–60 and accompanying text (discussing the failure to consider the effects of race on choice in Bostick and Croson).

154. See, e.g., Carrington, supra note 91, at 569 (citing poor urban schools and poor health care as reasons for poor African American academic performance in general).
should be treated the same as white law students. In doing so, they are asserting that there are no differences between African American and white law students that are significant enough to require rethinking traditional legal education.

While proponents support affirmative action based on norms of equality, opponents, including African American opponents, often oppose it as violating the norms of color blindness. Opponents argue that all things being equal, it is not fair to prefer African American applicants over white applicants. As William Rasberry argues: "A black graduate of a black college . . . who scores 36 on the LSAT may strike the admissions officer of a top-ranked law school as a diamond in the rough. But what of the black applicant whose undergraduate school was Yale?" The implication here is that if Yale is an applicant's undergraduate institution, then that applicant should be considered the same as a white student, regardless of the color of the applicant's skin.

Opponents of affirmative action also argue against it by calling it "reverse discrimination." For example, Lino Graglia asserts that "[t]he only point of contention" in considering affirmative action programs is "whether it is appropriate and desirable to grant preference to some applicants and, therefore, to exclude others solely on the basis of race." He concludes, not surprisingly, that granting such a preference is not appropriate because the consideration of race constitutes "racial discrimination." By redescribing affirmative action as discrimination, Graglia implies that African Americans and whites are similarly situated, and that institutions that practice affirmative action are choosing people based on superficial differences rather than merit. This assumption of underlying,


158. Id. at 102.

159. See RANDOM HOUSE COLLEGE DICTIONARY 379 (rev. ed. 1975) (defining "discrimination" as "treatment or distinction not based on individual merit in favor of or against a person, group, etc.").
fundamental "sameness" fits with the ideology of color blindness in legal education and in the legal system.

Judge Posner argues for a similar view of affirmative action, which he refers to "more bluntly, [as] reverse discrimination." He argues for this view of affirmative action, which he refers to "more bluntly, [as] reverse discrimination," like Graglia's "racial discrimination," implies that the subjects under consideration are fundamentally the same. But here, the term undoubtedly receives part of its power because the word "reverse" makes the reader wonder what "non-reverse" discrimination is. "Discrimination," unmodified, reminds us of the claims of differential and inferior treatment of African Americans made by civil rights advocates during the 1950s and 1960s. In this historical context, the word "discrimination" was used to imply a claim of sameness—that African Americans were essentially the same as whites and entitled to the same rights. Posner's use of "reverse discrimination" draws on this historical claim of equality from the Civil Rights era.

Judge Posner then argues against the use of affirmative action in faculty hiring because faculty members hired under such programs ultimately can be expected to receive unfavorable tenure decisions. According to him:

Not every competent untenured faculty member is expected to get tenure. . . . What then are the tenure standards for the affirmative action hires to be? If they are the same tenure standards as for white males, then probably a disproportionate number of blacks will not make tenure, and this will be more than awkward. What is to be done? Are there to be two tenure tracks? If so, will voting on tenure in the affirmative action track be limited to blacks? Instead of attempting to answer any of the questions he poses, Judge Posner changes the subject, moving to a discussion of the problem of hiring entry level African American faculty.

160. Posner, supra note 124, at 1157 (responding to Kennedy, supra note 36); but see Culp, supra note 93 (interpreting Judge Posner's argument as part of a continuing effort of white scholars to dominate the legal academy).

161. For a discussion of the longstanding debate within the African American community as to whether African Americans should assert a claim to equal inclusion in white society or whether they should claim difference, see Peller, supra note 19.


163. Id. at 1160.
Thus, he moves rapidly from “firing” to “hiring” African American faculty, playing perhaps on the similarity between the two words and what he sees as the natural relationship between the two processes: those African American who are hired for faculty positions eventually will have to be fired.

By leaving the question of tenure standards for African American faculty unanswered, Judge Posner appears to believe that the question is rhetorical. He expects the readers to endorse the proposition that a standard that treats African Americans as identical with whites is the right one, and implies that hiring faculty pursuant to an affirmative action plan will create awkward situations because African American faculty will be unable to meet merit-based tenure standards. Yet, Posner fails to consider the possibility of rethinking the tenure standards themselves. In short, Judge Posner follows a strategy of asserting that African Americans and whites should be judged by the same standards for tenure, while recognizing that African Americans perform poorly when judged by those standards.

The dominant discourse for proponents and opponents of both affirmative action and academic support programs may be one that asserts that African American students and faculty are the same as their white counterparts. There is, however, a competing refrain that constructs African Americans as different, inferior, and dangerous. This construction of inferiority derives from the claim of equality. Although academic support programs use racially neutral language to describe eligible students, most academic support programs have a disproportionately low percentage of white students when compared to the law school’s population. As a result, even those programs that do not formally define themselves in terms of the students’ race will serve vastly disproportionate numbers of African American and other non-white students. This means that while the programs may not be defined explicitly in terms of race, they will be understood as being race-based. Furthermore, academic support programs may not be able to provide the flexible hours that nontraditional students might need or the facilities and assistance that students with different abilities might require for success. In fact, students often conclude that

164. For example, the Charles Hamilton Houston Program at the New England School of Law routinely has an enrollment that is over 70% minority while the school itself has a minority enrollment of under 10%. Conversation with Professor Robert V. Ward, Administrator, Charles Hamilton Houston Program (Apr. 3, 1995).
programs for "nontraditional" or "special needs" students are race-based and thus complain of racial discrimination in being disproportionately excluded from such programs.\textsuperscript{165} The mere existence of academic support programs that disproportionately involve students of color emphasizes the present difference between African American and white students while holding out the hope for future sameness.

Racially neutral eligibility criteria for participation in academic support programs also serve to emphasize the African American students' difference from other, predominantly white, students. Labeling academic support program students as being "nontraditional" or as having "special needs" simultaneously defines the non-academic support students as the "traditional," "normal" students. These "traditional" students become the model against which other students are measured.\textsuperscript{166} In this way, the language makes a claim that the African American students are no different from others—simply nontraditional, but so, perhaps, are some whites—and simultaneously asserts the African American students' difference by setting them up against the model of the traditional white student.

Like the discourse of affirmative action programs, their pedagogy emphasizes African American students' difference. Guidelines for support programs often encourage instructors to use hypotheticals drawn from fact situations that are thought to be of particular relevance to African American communities. For example, one model program states: "[H]ypothetical examples [in the support program] should, to the extent possible, reflect the students' diverse life experiences and cultural backgrounds."\textsuperscript{167} This is undoubtedly correct; hypotheticals in a support program should show the students how law can be meaningful to them. Stressing hypotheticals of particular relevance to African American communities in support programs, however, implies that these same hypotheticals would be of less relevance outside of academic support classes—in regular classes dominated by white students.


\textsuperscript{166} See Martha Minow, Foreword: Justice Engendered, 101 \textit{HARV. L. REV.} 10, 14 (1989) (arguing that differences are only constructed in reference to a norm).

\textsuperscript{167} ACADEMIC ASSISTANCE PROGRAMS, supra note 142, at 28. The lives of the students involved in the academic support program are described as "diverse," thus indicating their difference from the "non-diverse," presumably white, students. \textit{See supra} text accompanying note 150.
Another way in which the pedagogy of academic support programs undermines its prime statement about color blindness is through an emphasis on the need to provide role models for African American students. Academic support programs often claim that one of their goals is "[f]ostering a sense of competence and belonging" among the students involved.\footnote{168} As one description of a model program notes, this is a "particularly challenging [objective] in academic institutions where few role models exist."\footnote{169} If African American law students were fundamentally the same as white law students and if the only difference were the superficial difference in skill levels upon entering law school, then the role model issue should not be a problem. After all, there is no reason to think that all members of current law faculty had high skill levels upon entering law school.\footnote{170} Those faculty whose skill levels were once relatively low may need to be encouraged to serve as mentors, but they should already be there. White faculty who had low skill levels as entering law students, or even as undergraduates, could serve as role models.

The goal of making academic support students feel as if they belong is challenging because the low skills category serves as a substitute for race. The role models that these programs are looking for are not those who received an award for "most improved" while in law school, but rather those who are African American. In fact, faculty members' skill levels upon entering law school probably are irrelevant to their utility as role models.\footnote{171} Thus, we deny African American students' difference from white students by claiming that whatever differences there may be are superficial and remediable; and yet, we reinstate those differences and recognize their centrality by noting the need for African American role models.

The language of academic support programs not only serves to identify the programs with race, setting their students apart from others, but also serves to deny the importance of race. The role models that these programs are looking for must be African American. If African American law students were fundamentally the same as white law students, then the role model issue would not be a problem. However, if the only difference were the superficial difference in skill levels upon entering law school, then the role model issue would not be a problem. After all, there is no reason to think that all members of current law faculty had high skill levels upon entering law school. Those faculty whose skill levels were once relatively low may need to be encouraged to serve as mentors, but they should already be there. White faculty who had low skill levels as entering law students, or even as undergraduates, could serve as role models.

\footnote{168} ACADEMIC ASSISTANCE PROGRAMS, supra note 142, at 2.
\footnote{169} Id.
\footnote{171} See Anita L. Allen, On Being a Role Model, 6 BERKELEY WOMEN'S L.J. 22, 25, 30-31 (1990-1991) (arguing that Black women teachers can serve as role models for Black female students because they have experienced racism and because they can show students that Black women can succeed as intellectuals); Richard Delgado, Affirmative Action as a Majoritarian Device: Or, Do You Really Want to be a Role Model? 89 MIch. L. REV. 1222 (1991) (describing a role model's function as co-opting students into the system).
from the white students, it also marks the students as inferior. This is done through the discussion of the students' skill deficiencies. Support programs, having diagnosed the African American students' problems as ones of skill, seek to teach students to read complex materials, to analyze or synthesize these materials, to write or think like a lawyer, or to learn independently. In doing so, they imply that only the students in the programs are lacking in these skills. One program description, for example, says, "summer academic assistance programs offer a valuable opportunity for [nontraditional] students to prepare for the academic challenges presented in law school." This suggests that only "nontraditional" law students—African Americans or other students of color—will need a whole summer of assistance to prepare for law school's "challenges." Similarly, most academic year support programs involve skills review, which assumes that the students in the program are especially in need of this review. Finally, failure to perform adequately, after completion of an academic support program, may simply reinforce the message of inferiority.

Affirmative action programs function in the same way. African American law students are marked as inferior to white students simply by virtue of their inability to meet the normal admissions standards that are based on the supposedly neutral results of objective testing. Stephen Carter argues that affirmative action programs are undesirable for African Americans precisely because they cause African Americans to be labeled as inferior. According to Carter, such programs choose among Blacks to locate the "best [B]lack"—a person understood as unable to compete with the best person overall for the job or class seat. This reinforces "the durable and demeaning stereotype of [B]lack people as unable to compete with white ones."

172. Espinoza, supra note 125, at 286-90 (recognizing the dual message of support programs as simultaneously one of support and stigma).
173. See supra notes 135-49 and accompanying text.
174. ACADEMIC ASSISTANCE PROGRAMS, supra note 142, at 27.
176. CARTER, supra note 27, at 47-69.
177. Id.
178. Id. at 50; see also Torry, supra note 93, at A1, A9 (asserting that "minority students who gain entrance to the [law] school strictly on merit tend to be viewed as if they had received preference").
Not only do affirmative action and academic support programs portray African American students as inferior, they depict African American students as dangerous to the white students. African Americans often have been characterized as threatening to whites. Throughout American history, African Americans have been portrayed as violent toward the person and property of whites.179 Furthermore, the stereotype of the highly sexually charged African American male and of the lascivious African American female play prominent roles in the white American imagination.180 These stereotypes of violence and sexuality evoke intertwined fears in whites for their security and identities. The very presence of African Americans

179. For examples from literature, see Loyle Hairston, William Styron’s Nat Turner—Rogue-Nigger, in William Styron’s Nat Turner: Ten Black Writers Respond 70 (John Henrik Clarke ed., 1968) (hereinafter RESPONSE TO NAT TURNER] (accusing Styron of portraying the Turner revolt against slavery as “mere wanton savagery” against whites); Charles V. Hamilton, Our Nat Turner and William Styron’s Creation, in RESPONSE TO NAT TURNER, supra, at 77 (describing Styron’s Nat Turner as confirming white America’s racist beliefs that kindness to African Americans will simply be repaid by murder). For examples from current news stories, see Crenshaw & Peller, supra note 25, at 61 (emphasizing that the defense in the Rodney King case described King’s African American body, even while on the ground with baton blows raining down on him, as “cocked” and “in a trigger position”); Patricia Williams, Spirit-Murdering the Messenger: The Discourse of Fingerprinting as the Law’s Response to Racism, 42 U. MIAMI L. REV. 127, 137 (1987) (noting that local residents of Howard Beach felt that the attack on three African Americans who had left their stalled car in an effort to seek help was justified because the African Americans were in a white neighborhood and it is better to be safe than sorry); Michael Grunwald, For Boston, Harsh Reminder: 5 Years Ago, Stuart’s Racist Hoax Was Hatched—And Believed, BOSTON GLOBE, Nov. 4, 1994, at 17 (quoting Ozell Hudson of the Lawyers Committee for Civil Rights Under Law who said, in relation to the Charles Stuart and Susan Smith cases, “black people have always been stereotyped as criminals in this country, and it’s clear that people are still willing to believe those stereotypes”); Charles M. Sennott, Case Confirms Some Fears of Racism in S.C. Town, BOSTON GLOBE, Nov. 6, 1994, at 22 (noting that Susan Smith’s and Charles Stuart’s allegations that African American men were responsible for violent crimes against whites, coupled with white America’s willingness to think of African American men as potentially criminal, resulted in the detention or suspicion of large numbers of innocent African Americans in Union County, South Carolina; and the Mission Hill area of Boston); see also Jody D. Armour, Race Iota Loquitur, 46 STAN. L. REV. 781, 787 (1994) (indicating that over 56% of Americans believe African Americans to be violence prone).

in law schools may prove dangerous for whites. The danger derives from two sources. First, African Americans may wrest from whites property to which whites are entitled. Second, the mere existence of African American students in a predominantly white law school may imperil white identity by threatening the purity of the school's standards and the quality of the education that it provides.

Affirmative action programs routinely are understood as depriving white applicants of seats in a class—seats to which whites feel they are entitled.\textsuperscript{181} This idea of white entitlement underlies the recent controversy over the Georgetown University Law Center's admissions policy. On April 8, 1991, Timothy Maguire, a third year student at Georgetown, wrote an opinion piece for the school's newspaper claiming that African American law students' LSAT scores and undergraduate GPAs were significantly lower than whites.\textsuperscript{182} The practice of preferential admissions for African Americans, he asserted, "almost certainly creat[es] more serious problems than it . . . solv[es]."\textsuperscript{183}

Maguire's article focused on LSAT scores, assuming that those scores are neutral entrance criteria.\textsuperscript{184} He devoted at least half of his two-column article to a discussion of the LSAT scores of Georgetown's African American and white applicants and accepted students, and to the scores of students at the historically Black schools of Howard, Morehouse, Hampton, Jackson State, and Grambling. In the midst of this discussion of scores, Maguire states that "[t]he biggest problem is that in every area and at every level of postsecondary education black

\textsuperscript{181} For a full description this phenomenon, see Cheryl I. Harris, \textit{Whiteness as Property}, 106 \textit{HARV. L. REV.} 1707, 1777-84 (1993); see also \textit{Ellis Cosse, The Rage of a Privileged Class} 111-13 (1993); (analyzing the percentage of Blacks and Hispanics who have been unfairly promoted over white males, as reported by a 1993 \textit{Newsweek} Magazine poll of white males, and asking why, if that poll is accurate, Blacks and Hispanics on average earn less and hold lower positions than whites); Carl A. Auerbach, \textit{The Silent Opposition of Professors and Graduate Students to Preferential Affirmative Action Programs: 1969 and 1975}, 72 \textit{MINN. L. REV.} 1233, 1253 (1988) (citing a 1975 survey which indicated that large numbers of white faculty and students believed their own opportunities would be diminished by affirmative action programs).

\textsuperscript{182} Timothy Maguire, \textit{Admissions Apartheid}, \textit{GEO. L. WKLY.}, Apr. 8, 1991, at 5.

\textsuperscript{183} \textit{Id.}

\textsuperscript{184} \textit{Id. But see} Espinoza, \textit{supra} note 175, at 127-38 (describing gender and cultural bias of LSAT questions).
achievements are far inferior to those of whites.” 185 How he has measured this inferiority is unclear. Presumably he believes that it is indicated, at least in part, by the scores. 186

Maguire’s argument against Georgetown’s affirmative action program is that it forces Georgetown to lower its admission standards for African American applicants, not because they have been harmed by a “lack of black role models” or a “hostile environment” in their undergraduate educations, but because African American applicants have lower grades and scores. 187 The implication is that whites are injured by affirmative action programs like Georgetown’s because such programs create “artificial” preferences, rather than remedying past harms to African Americans. 188 Maguire’s use of the term “artificial” implies that LSAT scores, in contrast, are “natural” sifting criteria. A number of authors, however, have argued that the LSAT is culturally biased toward white, upper middle class students. 189

The claim of injury to whites was echoed by others who commented on Maguire’s article. One columnist worried about the frustration and anger of white students who “wonder what they did to have been denied . . . admittance . . . on account of race.” 190 A Georgetown law student remarked: “[E]very white male here thinks that if he was black or a woman or some other minority, they’d be at Harvard or Yale or some other university . . . . That’s not true, but that’s the impression.” 191 Another Georgetown law student noted that he believed Maguire’s objection to the affirmative action program was that

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185. Maguire, supra note 182, at 5.

186. LSAT scores, however, do not measure educational achievement. The Law School Admissions Service claims that the test “is designed to perform . . . the task of predicting academic success in the first year of law school.” LAW SCH. ADMISSION SERVICES, THE LAW SCHOOL ADMISSION TEST: SOURCES, CONTENTS, USES 5 (1991).

187. Maguire, supra note 182, at 5.

188. See id.

189. See, e.g., Espinoza, supra note 175, at 134–38 (describing cultural bias of LSAT questions); David M. White, Culturally Biased Testing and Predictive Invalidity: Putting Them on the Record, 14 HARV. C.R.-C.L. L. Rev. 89, 108-14 (1979) (arguing that both the content of the questions and the mannering of administering the LSAT are culturally biased against African Americans); see also Katherine Connor & Ellen J. Vargyas, The Legal Implications of Gender Bias in Standardized Testing, 7 BERKELEY WOMEN’S L.J. 13, 25 (1992) (recognizing that what might be seen as gender differences in SAT performance may really be attributable to racial differences).


191. Torry, supra note 93, at A9.
it causes "white people [to] have a tougher road to hoe." The implication is that affirmative action programs do injury to whites by depriving them of the class seats that, by right, ought to be theirs.

Affirmative action programs also are portrayed as dangerous to white students because they may cause a reduction in intellectual standards. An article written by Clyde Summers in 1970 provides an example of this position. Summers claimed that it was a mistake to admit into law school minority students with lower GPAs and LSAT scores than white students. According to him, preferential admissions programs served only to move minority students from law schools at which their scores would make them competitive, to law schools whose expectations they simply could not meet. As a result, the very students who are to be helped by the admissions policies are in fact injured. Instead of competing equally with their classmates, they are at an immediate disadvantage.

192. Reid Prouty, Letter to the Editor: In Support of Affirmative Action, GEO. L. WKLY., Apr. 16, 1991, at 3. Prouty responds by arguing that "in the big scheme of things, the unfairness that whites suffer here is trivial compared to what blacks do across the board." Id. Another Georgetown law student noted that affirmative action has its price but said that he, "as a white male, [was] willing to pay that price." Saundra Torry, Affirmative Action a Flash Point at GU, WASH. POST, Apr. 17, 1991, at D1, D6; cf. Paul D. Carrington, Diversity! 1992 UTAH L. REV. 1105, 1106 (arguing that the affirmative action movement seeks "a payment made by educational institutions, at the expense of individuals seeking admission or employment, to compensate members of groups said to be disadvantaged").

193. See Carrington, supra note 192, at 1134 (noting that a program to encourage faculty to "invest[ ] more effort in mentoring [minority] students," along with the admission of less qualified students, could result in declines in the quality of teaching and research); see also CARTER, supra note 27, at 26 (acknowledging the fear that affirmative action programs cause a lowering of academic standards).

194. Clyde W. Summers, Preferential Admissions: An Unreal Solution to a Real Problem, 1970 U. TOL. L. REV. 377. It is not my argument that Professor Summers was, in 1970, in any way more racist than any of the white law school faculty who supported affirmative action admissions programs. Summers describes his own pain at raising questions about the value of the programs:

To raise questions about this program in which so many so deeply believe almost inevitably leads to misunderstanding, no matter how hard one tries to make himself understood. More troublesome, what one writes may be seized upon and used by those who seek excuses for doing nothing and thus preserving the present pattern of deprivation.

Id. at 380.
195. Id. at 394–95.
196. Id. at 381–85.
Even assuming that lower grades and LSAT scores actually reflect a lower level of skills, there are two possible responses to Summers' argument. The first is that teaching could be aimed at the capabilities of the less competent group of students. This would ensure that they are able to learn; the more able students presumably would have no trouble learning. The second possibility—the one that Summers simply assumed is the correct practice—is to aim the class at the more advanced level, leaving the other students scrambling to keep up. Summers saw this as damaging to the egos of the less advanced students who would always feel inferior.

The question is, if the second option has this negative effect, why did Summers reject the first possibility without even considering it? It is here that the possibility of "taint" emerges. Summers assumed that the law schools that are most selective in their admissions are also the most demanding in their educational standards and are "better" law schools. Following his analysis, the presence of minority law students at these schools is "dangerous" to white law students—the "better" students—because their presence pressures the institution to work at what Summers perceives to be the lower level of the minority students. Responses to this pressure will result in an inferior education for the more able students. Consequently, the presence of African American students is dangerous to white students who presumably are able to perform at the higher level.

Special admission programs justify their existence in part on the grounds that high institutional standards will not be affected. Instead, students admitted according to the "special" criteria are cabined off. One educational process is used for them; another for students admitted in the "regular" manner. Thus, in schools with affirmative action programs, academic support programs function to reassure white law school constituencies that the school's standards and norms will remain

197. Id. at 395–96.
198. The students in these "better" schools will, he says, have a greater "verbal facility and much more highly developed skills in manipulating ideas." Id. at 395. Since the class will move at the level of these students, the student who was admitted with lower scores will be left behind. Id.
199. Cf. Amana, supra note 152, at 216 ("Under no circumstances should a school consider lowering overall academic standards . . . "); Carrington, supra note 192, at 1134–35 (noting that some programs to encourage diversity may, because of the admission of less qualified students, result in declines in the quality of teaching and research).
unpolluted. Although seeming to be a means of integrating law school classes, these programs ultimately function as a means of containing the dangers African Americans may pose, thereby maintaining white purity and segregation.\textsuperscript{200}

These multiple discourses about African American law students both exist within and reinforce the present structure of legal education. They do this in two ways. First, the discourse of color blindness supports a belief in law school as a meritocracy, while the discourse of deviance and danger leaves legal academics unsurprised when African American students fail. Second, the ideology of color blindness claims that decisions, including curricular decisions, should be made without reference to race. If African Americans are assumed to be the same as whites, then it is sufficient to discuss only whites in the classroom. Nothing would be added by discussing African Americans. The result is that legal education has needed to change very little to accommodate the presence of African Americans.\textsuperscript{201} The ideology of race-blind equality supports the maintenance of the status quo, as does the possibility of African American difference and inferiority. Neither of these discourses admits the possibility of difference without inferiority. That possibility, discussed in the next Part, would require a reassessment of whether legal education is biased against African Americans.

\textbf{IV. AFRICAN AMERICAN LAW STUDENTS AND DIFFERENCE}

A system of legal education structured around the assumption that African American students are either the same as whites or inferior to whites is likely to place any African American students who understand themselves as different, but not inferior, at a serious disadvantage. For these students,

\textsuperscript{200} This is very similar to the role that tracking has played in integrated public schools. \textit{See}, e.g., Jeannie Oakes, \textit{Tracking in Mathematics and Science Education: A Structural Contribution to Unequal Schooling, in CLASS, RACE, GENDER IN AMERICAN EDUCATION} 106, 112–19 (Lois Weis ed., 1988) (noting that poor and minority students often are placed in remedial classes at an early age, which may result in a limitation of those students' opportunities and may contribute to their lower academic outcomes).

\textsuperscript{201} \textit{See} Anthony J. Scanlon, \textit{The History and Culture of Affirmative Action}, 1988 B.Y.U. L. REV. 343, 351 (stating that summer support programs of the mid-1960s were popular in part because they did not require curricular change).
their identities as African Americans\textsuperscript{202} may conflict with the white or inferior identities imposed on them by law schools. They may understand that while law and legal education make claims to be blind to race, law students—African American and white—are taught that race counts in a variety of ways.

I consider here three characteristics described frequently in studies of African American cultures and identity: (1) the organic nature of African American communities; (2) a distinct oral linguistic tradition; and (3) a sense of alienation from and opposition to the dominant white culture. I am not claiming that these characteristics have a definitional priority over others,\textsuperscript{203} but only that these are important to some African Americans' sense of self. This Part will show that the structure of legal education particularly disadvantages African American law students whose identities are defined in relation to these characteristics.\textsuperscript{204} For these students, legal education presents distinct obstacles that are not present for white students with different understandings of their own identities.\textsuperscript{205} In short, it

\textsuperscript{202} The culture of law school also may make legal education more difficult for others who do not identify themselves with its traditional norms. These may include Hispanics, Asian Americans, white women, and poor men and women regardless of race. A discussion of the problems faced by these groups, however, is outside of the scope of this Article.


\textsuperscript{204} This methodology draws on that used by Mary Joe Frug. Frug, supra note 98, at 1070–74 (imagining multiple "readers" and their responses to a casebook).

\textsuperscript{205} Similarly, Sheila Foster notes that the melting pot ideal requires only some people to give up their racially-related identities. Sheila Foster, Difference and Equality: A Critical Assessment of the Concept of "Diversity", 1993 WIS. L. REV. 105, 151.
is the goal of this Part to show that legal education is not culturally neutral.

A. Organic Communities

Understanding African American communities as organic means picturing them, as Regina Austin does, as places where “everyone would be a resource, especially those whom the dominant society would write off as having little or nothing to contribute.”206 According to this admittedly idealized vision, African American communities draw an important portion of their strength and meaning from all of their members; the members in turn draw their identity from the community.207

Many aspects of African American culture contribute to its organic nature. Anthony Cook described religious conversion in African American communities as providing “a process in which personalities disintegrated by the social chaos of oppression found meaning and commonality by fusing with others in a collective act of self-affirmation and even defiance.”208 Similarly, the call and response form, often used in African American religion and music, “embodies an interlocking and synergistic dimension, in which members of the group participate by adding their own voice to those of others, to serve both as counterpoint and counterforce . . . until collective spiritual release and regeneration is achieved.”209 The close, organic

207. Id. at 1775.
208. Anthony E. Cook, Beyond Critical Legal Studies: The Reconstructive Theology of Dr. Martin Luther King, Jr., 103 HARV. L. REV. 985, 1022 (1990) (citation omitted); see also CHARLES P. HENRY, CULTURE AND AFRICAN AMERICAN POLITICS 61–75 (1990) (noting that many African American faiths believe that Blacks are a chosen people).
209. THOMAS KOCHMAN, BLACK AND WHITE STYLES IN CONFLICT 109 (1981). For discussions of the call and response form in African American music, see ROGER D. ABRAHAMS, TALKING BLACK 83 (1976); HENRY, supra note 208, at 34 (rap); LAWRENCE W. LEVINE, BLACK CULTURE AND BLACK CONSCIOUSNESS 232 (1977) (blues).

The community's response to a performance often is crucial to African American performers, who use it as a way of assessing what their performance has meant to the audience. GENEVA SMITHERMAN, TALKIN AND TESTIFYIN: THE LANGUAGE OF BLACK AMERICA 110–18 (1977). Reportedly Ethel Waters, who was used to performing before African American audiences, thought she had failed before a white audience because: "Nobody stomped as they always do in colored theaters when I finish my act. Nobody screamed or jumped up and down. Nobody howled with joy." LEVINE, supra, at 233 (quoting Ethel Waters).
nature of many African American communities also is reinforced by the frequent use of "brother" and "sister" to refer to members of the community.210

Students whose identities are formed, at least partially, through their connection to the African American community may feel that law school challenges their very selves. They may feel excluded from participating in African American community activities, and thus from being African American, by the time demands and competitiveness of law school culture. Lois Weis notes that academic success for African American students, at least in the community college setting which she studied, generally means rejecting the community's immediate demands for assistance.211 The students she studied understood that success in school meant letting go of the street community.212 These community college students found this bearable because they intended to use their educations as a means of moving away from their communities.213


Carol B. Stack's discussion of the support that Black women on welfare provide to one another is yet another example of the organic nature of the Black women's community. Carol B. Stack, All Our Kin 34-40 (1974); see also Haney-Lopez, supra note 124, at 50-53 (discussing the effects of community ties on world perspectives). African American communities of course also may have individualistic aspects. See S. Rhett Jones, Rugged Black Individualism: Eighteenth Century Causes—Twentieth Century Consequences, 1 J. Pan Afr. Stud. 1, 1, 3-7 (1990) (arguing against the common perception "that black Americans are a communalistic folk" and asserting that black Americans are in fact individualistic and self-reliant as a result of their experiences as slaves); see also Jay MacLeod, Ain't No Makin' It 141 (1987) (noting that African American students and parents often accept the achievement ideology of the educational system). Students whose African American identities are tied to the norm of achievement may feel less like they are under attack in law school. Nevertheless, law schools' structural biases against African American law students—very little classroom discussion of African Americans, choice of written work as the major evaluative criteria—are likely to work against these students as well.

211. Lois Weis, Between Two Worlds 126 (1985). Weis's study shows how the community college's attendance policy, for example, was at odds with the fluid understanding of time on the street; compliance with the attendance policy would prevent meaningful participation in the collective life and obligations of the street. Id. at 77-82. Yet not all students were required to reject their underclass community in order to succeed. Older women who earned associate degrees in secretarial science or child care could participate in college while remaining outside of the student culture and maintaining their community ties. Furthermore, upon completing their Associate of Arts degrees, their wages would be low enough to require them to remain within the community. Income from employment in one of those fields would simply supplement the resources otherwise available in the kin networks. Id. at 126.

212. Id. at 17-21.

213. Id. at 20.
In contrast to the students that Weis studied, some African American law students may have chosen law school because they wish to use their legal skills to assist their communities. While in law school, they are likely to be physically separated from these communities. Students whose identities are closely tied to helping their communities may turn to the subject matter of their courses for support for their identities. These students' reasons for coming to law school likely will be undermined by the significant lack of information available in most law school curricula on issues that would be important to African American communities.

James McPherson's description of his class at Harvard Law School in the late 1960s illustrates this response:

It has always bothered me that three very bright black students, two from excellent Ivy League colleges and the third from one of the best black colleges, flunked out after our first year at Harvard. . . . One of the men obviously preferred to read literature much more than to read law. The other two had a very keen sense of obligation to what was called in those days "the civil rights movement." Both had been highly active in civil rights affairs before coming to law school—in fact, one man came to Harvard directly from a Mississippi jail—and both worked in civil liberties organizations at the law school during that first year. . . . Were these two men looking for some immediate relationship between subjects which required most of their time and the social situations which they had agreed to leave for a while? If one assumes that they sincerely sought relevance, it is possible to see, or at least speculate on, why they did not succeed during that first year. The answer seems simple: they failed to recognize that the study of law

214. See, e.g., GRANFIELD, supra note 81, at 39 (quoting the son of an African American minister, who went to law school so that he could provide legal counsel to his father's church); see also David B. Wilkins, Two Paths to the Mountaintop?, 45 STAN. L. REV. 1981 (1993)(arguing that African American law students and lawyers owe moral obligations to African American communities). The question of the relation of African American intellectuals to African American communities is a long-standing issue. For discussions of this issue, see HAROLD CRUSE, THE CRISIS OF THE NEGRO INTELLECTUAL (1967); see also Deborah W. Post, Reflections on Identity, Diversity and Morality, 6 BERKELEY WOMEN'S L.J. 136, 158-64 (1990-1991)(discussing the morality of Black assimilation into the white culture); Forum: On the Responsibility of Intellectuals, BOSTON REV., Jan./Feb. 1993, at 22 (reporting on a transcript from part of a forum on the future of the urban poor).

has no immediate relevance to the black community. It is almost pure study. The real relevance comes only after the period of training. . . . 216

The current substance of legal education does not provide much more sustenance for an African American law student looking for discussions of issues of relevance to the African American communities than it did in the 1960s. An African American law student looking for this type of information will find it only in the most hidden nooks and crannies of the core courses.217 A white, middle class student, by contrast, will find that most courses, most of the time, deal with the communities from which he comes and with the business or personal issues of relevance to those communities.

Furthermore, African American students may even experience difficulty visualizing themselves in the settings or transactions described in class.

Consider discussions of probable cause where the reasonableness of an officer's suspicion requires students to view the situation through the eyes of the arresting officer. It is not unusual for professors to base a hypothetical on the presence of a Black person in a white neighborhood. . . . [T]he minority student is essentially required to look back at herself to determine whether her own presence in a white neighborhood would be sufficient cause for her to arrest herself.218

African American students may find it easier to see themselves on the subordinate side, rather than on the dominant side, of a transaction between police and suspect, seller and purchaser, landlord and tenant, bureaucrat and benefits

216. McPherson, supra note 99, at 96. Arguing, as McPherson does, that African American law students should see law school simply as an interruption in their connection to the community—that they will be able to return to it with renewed vigor upon graduation—is a recognition of their difference from white students. First, it may turn out that law school cannot be merely an "interruption." The amount of time African American students spend in law school on white subjects and under the assumption that they themselves are just like white law students may affect their very identities. African American students who see this as a possibility and wish to prevent it will have to work simply to maintain their identities. Second, even if it were true that law school is simply an interruption in African American students' lives, white students have no similar period in which their sense of self must be put on hold.

217. See supra text accompanying notes 94–99.

218. Crenshaw, supra note 89, at 4 (citations omitted).
recipient, corporate tortfeasor and victim. These subordinate positions are likely to evoke strong emotions on the part of the students. White students, like "objective" white scholars, may be able to "remain cool and distant in the face of suffering or anger because it is not their liberation, their humanity, which is at stake." To ask many of the African American students to do the same may be to ask them to deny their identities as they have been formed in relation to their conceptions of African American communities.

Not only are some African American students prevented from studying the very subjects that are crucial to their sense of who they are, but they are forced to study, as if they were white, subjects that assume their whiteness. As a result, it seems likely that at least some of those African American students whose identities are formed in relation to their communities will try to maintain or create ties with African American communities, either within or outside of the law school. This is a way of resisting the law school's effort to make them white. African American students often participate in the Black American Law Students Association (BALSA) or community organizations near the law school, tutor other law students or students in the local schools, or become leaders in their church.

Although it is hard to obtain information about African American students' activities on behalf of the community, African American faculty have not been shy about describing the frequent conflicts that they experience in trying

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220. It is important to recognize that the African American communities with which students identify may have mythic as well as real components to them. Regina Austin describes the communities' legendary aspects:

There exists out there, somewhere, "the black community." . . . [I]t is more of an idea, or an ideal, than a reality. . . . "The black community" of which I write is partly the manifestation of a nostalgic longing for a time when . . . concern about the welfare of the poor was more natural than our hairdos.

Austin, supra note 206, at 1769.

221. This, of course, is not a characteristic that is limited to African American students. Others have argued that women's identities are often derived from their sense of caring for and responsibility to others. See, e.g., CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982); Suzanna Sherry, Civic Virtue and the Feminine Voice in Constitutional Adjudication, 72 VA. L. REV. 543, 584-90 (1986).

222. See Espinoza, supra note 125, at 291.
to serve the local African American communities while at the same time meeting the demands of the law school.  

Participation in community activities may help African American students recover their sense of communal identity and self-worth; these endeavors, however, often require precious hours that otherwise could be spent studying. When African American students are cautioned not to undertake too many extracurricular obligations, they may respond by arguing that law school should be kept in perspective—there are "real world" problems that require immediate attention. In structuring their lives around these problems, and in downplaying the importance of academics, the students establish the fundamentals of a culture of resistance. This culture may simultaneously make it possible for them to survive law school and make such survival more difficult.

The effort to recreate community where there is none also may cause some African American law students to identify with their African American law school peers in situations in which such identification can be dangerous to their own academic success. An African American student whose own identity is structured by a sense of belonging to a community may feel personally injured, discouraged, or angry if another African American student does not perform as well as hoped in law school. The student may experience personal failure for not having done more to prevent the friend's troubles.

223. See, e.g., Derrick Bell, *Strangers in Academic Paradise: Law Teachers of Color in Still White Schools*, 20 U.S.F. L. Rev. 385, 394 (1986) (describing some minority law teachers who give up all other duties in favor of working with minority law students); Roy L. Brooks, *Life After Tenure: Can Minority Law Professors Avoid the Clyde Ferguson Syndrome?*, 20 U.S.F. L. Rev. 419, 420–24 (1986) (recognizing the various demands made on minority faculty members' time by law students and community leaders); Delgado, supra note 101, at 355–56 (noting that a survey found that nearly two-thirds of minority law faculty reported feeling acute time pressure, often as a result of demands placed on them to counsel minority students, to participate in law school committees, or to speak to minority groups).

224. See *Deasy*, supra note 9, at 553 n.36 (describing the fears of an African American law professor who, after studying the poor performance of African American law students, was concerned that these students may be rejecting the goal of developing necessary legal skills "in favor of directing their energies toward achieving popularity and social success").

225. This is an experience that we noted frequently at New England School of Law during a period in the 1980s in which a substantial percentage of our African American students were academically dismissed each year. The remaining African American students, even those who had performed quite well, would be fearful, angry, and discouraged, as if they themselves were the ones who had performed poorly.
Conversely, African American law students may believe that others’ success rides on theirs and be overwhelmed by this responsibility in a setting in which teachers invariably push students to the point where they must admit that they do not know the answer. James McPherson poignantly described these feelings of shared identity among Black law students, drawing from his own experiences in the late 1960s:

The silence, the heavy sense of expectation, fell on all of the blacks in a classroom whenever one of us was called upon for an answer. We waited, with the class, for the chosen man to justify the right of all of us to be there. And the busy silence between the time a black student was called on and the time he began to make an answer was alive with all our answers being pushed, by sad attempts at some kind of empathy, from all sections of the huge room to the mind of the man who, for the moment, represented all of us. . . . And when an answer came, however poor it was, there would be relief . . . audible in the renewed breathing of the rest of the black students. 226

For African American law students who feel the weight of the community on their shoulders every time they speak, the stakes are higher than they are for students who do not feel this way.

It is not surprising that these students venture fewer voluntary answers and generally participate less frequently in order to reduce the risks of failing their communities. It also is not surprising that they venture fewer answers and participate less because the information provided makes less sense to them than it does to their white counterparts. If the African American students can neither visualize themselves in the transactions described nor see the value of the information provided for their communities, it will be harder for them to learn than for the white students who are familiar with the people and events described and with the communities that

226. McPherson, supra note 99, at 99; see also Margalynne Armstrong, Meditations on Being Good, 6 BERKELEY WOMEN'S L.J. 43, 43 (1990-1991) (recounting a Black woman student's comment to the author, a Black woman, during her first week as a law professor: "Girl, you'd better be good"); Emma C. Jordan, Images of Black Women in the Legal Academy, 6 BERKELEY WOMEN'S L.J. 1, 5 (1990-1991) (portraying Black women faculty's sense of shared identity with one of their number who had been publicly criticized).
value them. Similarly, students who feel the need to divide their time between their communities and the law school are not likely to do as well because law school makes heavy demands on student time and provides relatively few opportunities for part-time study.

B. Oral Linguistic Tradition

Legal education's emphasis on written work in a heavily analytic style also may place some African American students at a distinct disadvantage. Recent studies have claimed that African American communities often have a strong and distinctive tradition of oral language that emphasizes narratives and poetics. Thus, asking African American students to transform their use of language from its primarily oral, playful style to the written, analytical style of legal education is essentially asking these students to change their identities.

Henry Louis Gates, in his pathbreaking work, *The Signifying Monkey*, asserts that it is the African American rhetorical tradition that distinguishes African American culture from white culture. This tradition includes the telling and retelling of numerous folktales, the language of song, the strategic use of emotional force, and the practice of signifying. The emphasis and skill in signifying is on style—the use


228. *Gates*, supra note 227, at 45; see also *Lorenz*, supra note 227, at 628–29 (discussing the need for African Americans to learn a new language in order to “come to terms’ with the dominant culture”).


230. See, e.g., *Levine*, supra note 209, at 158–297 (discussing the importance of song to Black slave and free communities).

231. See *Kochman*, supra note 209, at 108–16.

of words and phrases with dexterity. As Gates says, "one does not signify something; one signifies in some way."  

The power and elegance of signifying come from the reuse of familiar words that carry with them their past meanings. The power of the words comes from their sound—for example, rhyming is important—as well as from the multiple meanings that the words carry. In this way it is diametrically opposed to the analytic style of legal writing in which meaning is circumscribed and limited. According to Gates, the African American tradition of signifying orally thus marks "its sense of difference from the rest of the English community of speakers." For those African Americans who are in this tradition, the oral heritage and the practice of signifying define their identities: "The mastery of Signifyin[g] creates homo rhetoricus Africanus."  

Students whose linguistic patterns and identities have been formed by this African American oral tradition may find themselves at a particular disadvantage in law school. To the student who is schooled in the oral tradition, law school's emphasis on a particular form of written work may appear hostile. Legal writing puts a premium on the concise, analytical use of words. Extraneous words are discouraged, in part...
because they have the potential for conveying multiple, unexplored meanings. Students rarely are encouraged to develop their own style. In fact, style is relatively unimportant; it can come later. Instead, students are expected to parse their cases to identify the legal facts and rules that relate to the particular narrow issue before them.

The African American oral tradition, in contrast, glories in exactly those aspects of language that the legal style excludes: emotion, exaggeration, double entendre, and a whole range of tropes. For a student who has found her voice within the oral tradition, the requirements of legal writing will be tantamount to writing in a different voice. This is consistent with Gates's claim that the African American oral tradition is a signifying mark of difference between African American and white communities.

The importance of this mark cannot be overstated. If some African American students begin law school with a specific style of communicating that for them is tied to their identities as African Americans, and if law school requires a drastically different style of communication that is identical to the style already possessed by some white students, it should not be surprising that law faculties often find that these African American students have trouble with legal writing. Furthermore, if the student's style of communication is an integral part of the student's identity as an African American, then changing that student's writing style will require a change in the student's self. The student may perceive the process of learning to write like a lawyer as simultaneously forcing the student to become white.

239. See Charles R. Calleros, Legal Method and Writing 71-72 (1990); Gertrude Block, Effective Legal Writing 29-31 (3d ed. 1986).
240. See Gates, supra note 227, at 44-51.
241. Id. at 46-47.
242. It may, for example, help to explain the plagiarism of which Martin Luther King, Jr. has been accused. For discussions of this, see Keith D. Miller, Voice of Deliverance: The Language of Martin L. King, Jr. and Its Sources (1992); Clayborne Carson et al., Martin Luther King, Jr., as Scholar: A Reexamination of His Theological Writings, 78 J. Am. Hist. 93 (1991); David J. Garrow, King's Plagiarism: Imitation, Insecurity, and Transformation, 78 J. Am. Hist. 86 (1991); Martin Luther King, Jr., Papers Project, The Student Papers of Martin Luther King, Jr.: A Summary Statement on Research, 78 J. Am. Hist. 23 (1991); Keith D. Miller, Martin Luther King, Jr., and the Black Folk Pulpit, 78 J. Am. Hist. 120 (1991).
243. Carter, supra note 27, at 26 (noting a student complaint that in order to be invited to join the law review, African American students must learn to write like white males); see also Signithia Fordham, Racelessness as a Factor in Black Students' School Success: Pragmatic Strategy or Pyrrhic Victory?, 58 Harv. Educ. Rev. 54 (1988)
Under these circumstances, it is not surprising that learning to write like a lawyer may be a particularly complicated and painful process for some African American students. For these students, legal education and legal writing are not simply a matter of acquiring new skills, they are a matter of acquiring a new racial identity. Law school faculties' failure to acknowledge the particular obstacles placed in front of African American students whose identities are formed by an oral culture makes it more difficult for them to teach these African American students to write successfully. In this setting, the claim that African American and white law students are essentially the same is not only wrong, but also may contribute to the creation of writing standards that place significant burdens on African American students while easing white students' way.

Similarly, the choice to evaluate students almost entirely through their written work may operate to the benefit of white students and to the disadvantage of African American students. Not only do some African American writing styles differ significantly from the acceptable legal style, but skill areas in which these same students might have an advantage over white students are not examined. The African American oral style described above, because of the multiplicity of meanings that a listener can take from a statement, can be persuasive in both African American and white communities. For example, by using portions from texts that make up white America's history—patriotic songs, philosophical tracts, or religious pieces—Martin Luther King, Jr., was able to present a "pastiche" that moved African Americans and simultaneously sounded familiar and powerful, but not threatening, to many white Americans. Certainly, it is useful for lawyers of any race to have this ability to persuade in their repertoire. The

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(244) Gates, supra note 227, at xxvi–xxvii (using the term "pastiche" to describe a form of signifying that is a "joyous proclamation of antecedent...texts").

(245) See Miller, supra note 242, at 11–12 (attributing King's success at mobilizing middle America in part to his use of the idiom of white preachers); Carson et al., supra note 242, at 102–03 (recognizing the role that King's appropriation of others' words may have played in mobilizing white Americans); Miller, supra note 242, at 121–23 (describing the multiple meanings of King's speeches).
exclusion of this dynamic oral style biases legal education against students whose senses of self are tied to this particular oral tradition and in favor of those who identify with and are skilled in the white, middle class tradition of the analytic written word.

C. Alienation

A third cultural characteristic that distinguishes some African Americans from white Americans is the former's alienation from the dominant American culture. More than seventy years ago, W.E.B. Du Bois recognized the role this feeling of alienation played in the formation of African American identities:

[T]he Negro is a sort of seventh son, born with a veil, and gifted with second-sight in this American world,—a world which yields him no true self-consciousness, but only lets him see himself through the revelation of the other world. It is a peculiar sensation, this double-consciousness, this sense of always looking at one's self through the eyes of others, of measuring one's soul by the tape of a world that looks on in amused contempt and pity. One ever feels his two-ness,—an American, a Negro; two souls, two thoughts, two unreconciled strivings; two warring ideals in one dark body, whose dogged strength alone keeps it from being torn asunder.

Studies show that the theme of alienation from white society and resulting mistrust of that society resonates in many


247. W.E.B. DU BOIS, THE SOULS OF BLACK FOLK 8–9 (Vintage Books 1986) (1903); see also Lawrence, supra note 219, at 2239, 2270–77 (describing the importance of this feeling of alienation in African American writers' work).
aspects of African American culture. Martin Luther King, Jr., exhibited a feeling of alienation in accusing white America of having “given the Negro a bad check; it has come back marked ‘insufficient funds.’” African-American folklore always has exalted tricksters like Brer Rabbit, while a major theme of blues music is that others are not to be trusted. This sense of alienation also affects African Americans’ perceptions of the educational process. John Ogbu has characterized the relationship between minorities and the public schools as one of “conflict and distrust.” Similarly, Lois Weis interviewed African American community college students who believed that they were being intentionally cheated out of a first-rate education.

248. See, e.g., BROOKS, supra note 246, at 40–41 (describing the sense of alienation among the African-American middle class); SMITH & SELTZER, supra note 203, at 121–22 (describing anthropological studies suggesting that African-American interpersonal alienation may be more than a class phenomenon, and speculating that it is a cultural phenomenon); Hill, supra note 246, at 580 (“Black people, consciously and unconsciously, are forced by political tradition to live in terror of possible sanctions that can be exercised against them collectively should the Nation decide not to honor its commitment to racial coexistence.”).

249. SMITH & SELTZER, supra note 203, at 121.

250. Id.

251. Id. (citing as an example B.B. King’s 1970s song entitled “Nobody Loves Me But My Mother (And She Could Be Jivin’ Too)”). African-American alienation is usually described as aimed at white society, but this need not be the case. Smith and Seltzer observe that in everyday African-American conversation the poor position of many African Americans is often explained by phrases like “Blacks don’t stick together” or “Niggers don’t trust each other.” Id. at 122. Note that this type of alienation from African-American culture as well as from white would undermine the idealized conception of a true African-American community.


253. WEIS, supra note 211, at 139. Weis quotes a student:

I figure that what they did was put the school right in our community—they said “we’ll give them this and this may satisfy them.” . . . [W]e were shortchanged as far as the education itself was concerned.

. . . We’re definitely cheated. I think what they’re doing is “let’s give the blacks a place in their own neighborhood, then we can give them as little as possible and maybe they’ll be satisfied with it. . . . We’ll give them as much as we can and they’ll keep their mouths shut.”

Id. Similarly, at the New England School of Law in the late 1980s, African American students charged that they were being cheated out of exam grades owed to them. They believed that faculty were breaking the blind grading codes on exams and singling out African American students for low grades. The students believed this although they had no evidence other than the low grades. Their complaints expressed the high level of alienation they were experiencing.
African American law students whose identities are formed in opposition to white culture are also at a disadvantage in law school. African American law students who experience feelings of alienation are likely to be estranged from and distrustful of their predominantly white faculty and colleagues.\textsuperscript{254} They may not be able to participate in class without constantly looking for the hidden ways in which faculty and other students are manipulating them. For example, some African American students may perceive that having once made a particular point in reference to relations between Blacks and whites, they are now repeatedly called upon to restate the same theme.\textsuperscript{255} As a result, they may feel maneuvered into expressing a point over and over again which they believed was true in the setting in which they first articulated it, but which is not unambiguously the case in settings in which they are later called upon to reproduce it.

In addition, being called upon repeatedly to restate the same point about race may be alienating to an African American student who may understand such a procedure as emphasizing that she is the only one, or one of very few who, because of race, holds a particular substantive position. The student may feel reduced to a caricatured racial position for the benefit of the surrounding whites. A student who is alienated and perceives the world as described above may well decide to be silent in the future—that is, to venture no more views that would allow a complex identity to be whittled down to a white teacher's view of race.

\textsuperscript{254} Although most law students, regardless of their race, feel a certain level of alienation from law school, this is likely to be more acute and have clear racial overtones for African American students, perhaps particularly for African American women, who are already distrustful of the dominant white culture. \textit{See} Armstrong, \textit{supra} note 226, at 44 n.2 (stating that women of color at predominantly white law schools claim never to volunteer in class at higher rates than white women); \textit{see also} Montoya, \textit{supra} note 88, at 9–17 (describing the Anglo “mask” she wore in law school to guard against the disclosure of her Latina self). For a study of women’s alienation, see Lani Guinier et al., \textit{Becoming Gentlemen: Women’s Experiences at One Ivy League Law School}, 143 U. Pa. L. Rev. 1, 67–71 (1994) (describing the connection between women’s feelings of alienation in law school and their comparatively poorer performances), and Catherine Weiss & Louise Melling, \textit{The Legal Education of Twenty Women}, 40 STAN L. REV. 1299 (1988) (claiming alienation as a salient characteristic of women’s relation to law school).

African American students who feel alienated from the white culture around them may believe themselves to be slighted when they are not called upon to participate in classroom discussions. They may assume the professor considers them to be unprepared for class or, worse yet, incapable of doing the work. Their feelings of alienation may make them suspect the worst of their professors.

These African American students also may be less willing to seek out white faculty informally for assistance or discussions because they may fear the extreme inequality that often results from Black-white informal relations. The color-blind assumption that permeates legal education may mean that legal educators do not even notice their lack of academic interchange with some African American students. Generally it is thought to be up to the students to initiate contact with the faculty; usually it is assumed that there is no structural barrier to any particular group of students taking advantage of the faculty's presence. African American law students, however, may choose not to engage with faculty because such interactions may have different meanings for those students than they would for white students.

It also is possible that for some African American students, alienation affects not only how they interact in class, but also how they understand the doctrines that they are taught. Donald Hill has claimed, for example, that some African American law students resist the fact that oral contracts are enforceable because of their distrust of the law as a white institution.

Black students resist the notion of oral contracts. They are overly dependent on the sanctity of its written form. . . . Black students equally resist the full acceptance of other

256. Ansley, supra note 255, at 1584 (describing an African American student taking offense at not being called on more frequently).
257. Id.
258. Of course, it is also entirely possible that the professor was worried about the students' ability to perform and thought that the best way not to "embarrass" them was simply not to call on them. See Lawrence, supra note 60, at 328-44 (describing white liberal unconscious racism).
260. But see Guinier et al., supra note 254, at 71-75 (describing barriers to female student interaction with faculty outside of class despite "equal" faculty treatment of male and female students).
contractual doctrines which are heavily weighted toward such interpersonal dependencies, as good faith, reliance, estoppel, custom and usage, course of dealing, etc. . . . [They also are inclined] to seek extreme safe guards, . . . to cover every contingency in the negotiating and drafting stages where reliance upon the verbal expressions of intent are involved. 261

This is consistent with Patricia Williams’s story about her approach to renting an apartment. She and a white male friend, Peter Gabel, went apartment hunting in New York City at the same time. When Gabel found an apartment, he gave the lessor a cash deposit without signing a lease or obtaining keys or receipt in exchange. Williams, in contrast, upon finding an apartment in a building owned by a friend, signed a lease that was first negotiated in detail. She noted that both she and Gabel were seeking to establish relationships of trust with their landlords, but that their senses of how to establish trust were very different:

Peter, for example, appeared to be extremely self-conscious of his power potential (either real or imagistic) as a white or male or lawyer authority figure. . . .

On the other hand, I was raised to be acutely conscious of the likelihood that no matter what degree of professional I am, people will greet and dismiss my black femaleness as unreliable, untrustworthy, hostile, angry, powerless, irrational, and probably destitute. . . . As black, I have been given by this society a strong sense of myself as already too familiar, personal, subordinate to white people. I am still evolving from being treated as three-fifths of a human, a subpart of the white estate. I grew up in a neighborhood where landlords would not sign leases with their poor black tenants, and demanded that rent be paid in cash; . . . such informality in most white-on-black situations signals distrust, not trust. Unlike Peter, I am still engaged in a struggle to set up transactions at arm’s length, as legitimately commercial, and to portray myself

261. Hill, supra note 246, at 585–86; see Guinier et al., supra note 254, at 72–77 (noting social science findings that members of minority groups often perceive informality as contrary to their interests).
as a bargainer of separate worth, distinct power, sufficient \textit{rights} to manipulate commerce.

\ldots For me, stranger-stranger relations are better than stranger-chattel.\textsuperscript{262}

Law school does not take into account how an African American student's sense of estrangement from white society may affect her understanding of some legal subjects. Many legal doctrines are premised on the idea that informally made commitments should be enforceable.\textsuperscript{263} Legal education assumes that this will be an equally acceptable concept to all students. The possibility that some students may be culturally positioned against believing in the enforceability of specific types of commitments is simply not considered. Nor does legal education take into account that these students may have repeatedly experienced the unenforceability in practice of informal commitments or that to African American students such informal commitments may signal inequality instead of equality. The cultural stance stems from and is reinforced by the events of daily life. It should not be surprising that, under such circumstances, it will be harder for these African American law students to believe what they are being taught than for white students whose experiences reinforce the plausibility and naturalness of the topics they are learning.

My point here is not to set out exhaustively all the relevant ways in which African American law students may differ from white ones. Rather, it is to show that for at least some students, such cultural differences do exist and undoubtedly will be important in structuring the student's identity. These students will not understand themselves to be the same as white students, nor will they understand themselves as inferior. The process and content of legal education, however, are premised on the truth of one or the other of these two assumptions. For at least some African American law students, legal education presents challenges to who they are and how they know things that it never poses to many of the white students.

\textsuperscript{262} WILLIAMS, supra note 259, at 147-48.

\textsuperscript{263} An example is the constellation of estoppel and reliance-based concepts that permeate tort, contracts, and property law where one party is considered to be entitled to rely on the other even in the absence of a written contract. See Ronald Chester & Scott E. Alumbaugh, Functionalizing First-Year Legal Education: Toward a New Pedagogical Jurisprudence, 25 U.C. DAVIS L. REV. 21, 65-70 (1991).
Legal education describes African American law students as the same as whites, while simultaneously portraying them as different from and inferior to whites. What it does not recognize is the possibility of difference without subordination. As shown in Part IV, some African Americans will understand themselves as being different in ways that are important to their identities but are not marks of inferiority. For these students, legal education's promise to treat white and African American students the same is an empty shell: legal education actually places obstacles in the way of some African Americans, obstacles that are absent for whites.

How can it be, in a legal environment permeated with the ideology of color blindness, that legal education is blind to its own white structure? One answer is that the ideology of racial neutrality contains within it the seeds of its own preferences. The ideology of racial neutrality emphasizes that decisions about the course of a person's life are not predetermined by that person's race. Instead, individual choices set the direction for one's life. The result is that African American students' failures to excel are recast as the result of particular choices that they have made, not as the result of structural obstacles in front of them as African Americans.  

African American students are blamed for their own failures in ways that are very clear. The skills-based discourse of academic support programs accuses them of not having developed sufficiently the necessary faculties of legal analysis and legal writing. This accusation is consistent with a race-neutral approach to these students because it presumes that they have the same opportunities as white students to develop these talents. This may be the case for some African American law students, but for others who have distinct and different African American identities, it will not be. Their attachment to African American communities, their oral tradition of signifying, and their alienation from the white society of the faculty and their fellow students will affect their ability to master particular skills.

264. This understanding is consistent with the legal system's emphasis on individual choice within the ideology of color blindness. See supra text accompanying notes 41–59 (discussing City of Richmond v. Croson, 488 U.S. 469 (1989)).
Within the color-blind world of legal education, however, their failings are not seen as due to the interaction between their racial identities and a white-oriented system of legal education. Instead, their failings are understood as being the African American students' faults. Thus, they are seen as choosing to engage in community activities instead of spending the time studying, choosing inept study groups composed of other African American students, choosing to complain and to be alienated instead of focusing on academic work, and choosing to write in an insufficiently analytical fashion.

I do not want to argue that these are not choices. They are, of course, but "choice" is a slippery word. Part of what is implied by the use of the word "choice" is that the meaning of the choices is the same for these African American students as it would be for white students. White students' racial identities, however, are not likely to be challenged when they make the systemically desired decisions. Their identity as whites is much less likely to be implicated in their connections to specific communities inside and outside of the law school, to the level of their involvement in the activities—in class and extracurricular—of the law school, or to their particular style of communicating with others.

The decisions that African American law students must make are understood within the culture of legal education as foregone in favor of study time, not community time, acquiescence as opposed to opposition, and a willingness to write in the required style. When some African American students make the opposite choices because of their own racial identities, legal educators do not understand what is at stake for them. This is because the connection between the choices and racial identities is not understood. Instead, race is seen as irrelevant to how one organizes oneself in relation to law school. What may be major issues of identity for some African American law students are seen as frivolous, lazy, or inept decisions by the color-blind culture of legal education. The result is that the message of racial irrelevance can be maintained despite disproportionately low performances by African American students.

This stance—that the individual African American student is at fault—makes it unnecessary to challenge the status quo of legal education. If an African American's failure to perform as well as white students is due to the African American student's individual choices, then that failure cannot be laid
at the door of legal education. Law faculty need not reexamine the content of their own individual courses nor, as a group, need they restructure the curriculum.

For example, they need not reconsider the decision to evaluate student progress almost entirely through written work. Although writing is undoubtedly an important part of what any lawyer does, it is by no means the only way in which lawyers communicate. One recent study of lawyering skills repeatedly ranks oral communication as the most important skill, placing it above written communication regardless of practice setting. In a world in which oral communication is so important to lawyers, it is anomalous that it is given such short shift in law school. One might argue that this is because it is difficult to evaluate a person's oral skills in a large class. But it is not clear that evaluating short oral exams would take any longer than reading the multi-hour written exams that are common today. Furthermore, many schools have established writing requirements for graduation that involve individualized faculty supervision of long written projects. The resources used to evaluate these long written projects could have been devoted to evaluation of oral skills.

The assertion that African American law students are the same as white students places the fault on African American students when they do not succeed. It also makes it unnecessary to review the structure and content of legal education. Finally, it reinforces the concept of a unitary legal profession. Paul Carrington argues that for the legal profession to be one single profession, "there needs to be an acknowledged common core of shared public values informing the professional work

265. The overwhelming majority of a student's credit hours are evaluated through written projects. Occasionally these will be research papers or take-home exams, but most commonly they will be traditional blue book exams. Kissam, supra note 90, at 437-38; Nickles, supra note 90, at 431-31; see Motley, supra note 90, at 753 (stating that much of law students' work product consists of exams).

266. Bryant G. Garth & Joanne Martin, Law Schools and the Construction of Competence, 43 J. LEGAL EDUC. 469 (1993). This study indicates that young Chicago lawyers, lawyers from rural and medium sized cities in Missouri, and Chicago hiring partners all ranked oral communication as more important than written communication, although in some cases the rankings were quite close. Id. at 473, 477. Similarly, lawyers practicing for the government or a corporation gave priority to oral communication, while lawyers in private practice voted for written communication over oral by only the slimmest of margins (written communication received a ranking of 1.19 on an "importance" scale and oral communication received a 1.20, with one being the highest rating available and five being the lowest). Id. at 475.
of its members.\textsuperscript{267} Recognizing that African American law students are not necessarily the same as white students, that they may differ in important ways, would jeopardize the ideal of a unified profession. Lawyers, according to Carrington, must be able to make "professional judgments that would coincide with those of other [legal] professionals."\textsuperscript{268} Recognition of African Americans' differences might require us to rework our conception of law as a profession.

Thus, the construction of African American law students as the same as white ones does not exist in a vacuum. It is supported by, and supports, our current system of legal education and our larger ideas about the nature of the legal profession. Until we are willing to question seriously the subject matter and evaluative techniques of legal education and its relationship to larger communities—ethnic or professional—we should not be surprised that a significant and disproportionate number of African American law students perform unsatisfactorily in law schools.

\textsuperscript{267} Carrington, \textit{supra} note 91, at 505.
\textsuperscript{268} \textit{Id.} at 506.