

Who's Learning What?

Toward a participatory legal pedagogy

*E. Tammy Kim**

I had read all the studies and expected to replicate, but hoped to defy, them.¹ There was the danger of stereotype threat, so I left myself out of the subject group, although this would mean a substantial drop in the total numbers.² On a Monday in Torts, I started counting—comments made and questions asked by white men, the control group; and then, women speaking up, people of color volunteering answers, uses of “feminine” speech (à la Gilligan).³ The methodology was far from scientific, but my tallies confirmed what I had hypothesized and what previous literature already indicated: we were present but not declaring our presence; we were not making ourselves known and heard.

As my pen etched these too-few vertical markings, I tried to account for the striking absence of women and people of color from the classroom discussion.⁴ While women constituted fifty percent of the student body, our audible contributions during lecture were few. From people of color, a small fraction of the 100 people in our section, there was only silence. What would this mean for these non-participants, given the importance of professor recommendations and informal networking in law school? Moreover, this was not merely a demographic problem: did the apolitical nature of first-year curricula and pedagogy make it difficult for people with non-theoretical, i.e., real-life, encounters with legal injustices to meaningfully engage with the

* The author, who received her J.D. from NYU School of Law in 2006, works as a Staff Attorney for the Community Development Project of the Urban Justice Center.

¹ See, e.g., COMM. ON RACIAL DYNAMICS, YALE LAW SCH., REPORT ON RACIAL DYNAMICS AT YALE LAW SCHOOL (2003), <http://islandia.law.yale.edu/rd/>; Celestial S.D. Cassman & Lisa R. Pruitt, *A Kinder, Gentler Law School? Race, Ethnicity, Gender, and Legal Education at King Hall*, 38 U.C. DAVIS L. REV. 1209 (2005); Susan R. Farber & Monica Rickenberg, *Under-Confident Women and Over-Confident Men: Gender and Sense of Competence in a Simulated Negotiation*, 11 YALE J.L. & FEMINISM 271 (1999); Lani Guinier et al., *Becoming Gentlemen: Women's Experiences at One Ivy League Law School*, 143 U. PA. L. REV. 1 (1994); Catherine Weiss & Louise Melling, *The Legal Education of Twenty Women*, 40 STAN. L. REV. 1299 (1988).

² See, e.g., Claude M. Steele, *A Threat in the Air: How Stereotypes Shape Intellectual Identity and Performance*, 52 AMER. PSYCHOLOGIST 613, 616 (JUNE 1997).

³ See CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982).

⁴ I make this statement humbly, recognizing that private institutions like NYU are less vulnerable to the elimination of affirmative action-type programs threatening racial diversity at public law schools. See Rachel F. Moran, *Diversity and Its Discontents: The End of Affirmative Action at Boalt Hall*, 88 CAL. L. REV. 2241 (2000).

material?⁵ Perhaps, the imbalance in participation indicated deeper problems of substance and approach.

Mercifully, I found solace in *Lawyering*, the first-year legal research, writing, and simulations-based course developed by Peggy Cooper Davis, whose piece appears in this volume.⁶ I was assigned to Peggy's section my first semester, giving me the chance to thrive in an interdisciplinary, small-format (about 20 students), practice-oriented environment, and to be taught and mentored by a professor and teaching assistants who were women of color. Unfortunately, not all of us at NYU School of Law were so lucky, as many other 1Ls reported the same participatory and substantive problems in *Lawyering* as in their large lecture courses. Further, even in its best iteration, *Lawyering* received short shrift from students and faculty, both because it was graded on a pass/fail basis and because the academy regarded it as too practical and experimental to be sufficiently "legal" and "rigorous."

This chronically negative appraisal has also plagued NYU's clinical programs, the life raft of my legal education. Both in my time as a federal district court clerk and now as a public interest attorney, I have benefited much more from the doctrinal and practical lessons of my two clinics than from any traditional lecture course. Yet NYU, like other law schools, persists in using its clinics as a recruitment tool while simultaneously undervaluing and under-funding them.

The foregoing paints an admittedly bleak portrait of legal education, but it should also signal the need for continued engagement and student-driven change. One of the most profound aspects of my law school experience was participating in student organizing and activism. As soon as I arrived on campus, I plugged into a formal student coalition working on faculty diversity and joined an informal group of self-styled "radical" 1Ls of color. We encouraged one another to speak, speak out, stay true to our public-interest ambitions, and create change inside the law school. Looking back, we managed to do a lot and to get a lot of people talking about race, class, gender, sexuality, pedagogy, and social change: we started a student reading group and published an annual critical studies reader; we put on an "open mike" event to facilitate unheard speech; we met with and provided trainings to 1L professors on issues of difference and how to implement innovative teaching methods; we demonstrated and pushed (unsuccessfully) for a students-of-color space within the law school; we met regularly with faculty and administrators to discuss our concerns; we organized a critical studies lecture series; and we partnered with grassroots organizations in New York City to make an impact beyond our ivory walls. We invested innumerable hours, sweat, tears, and hope, sometimes to the detriment of our formal coursework

⁵ See Elizabeth Mertz, *Teaching Lawyers the Language of Law: Legal and Anthropological Translations*, 34 J. MARSHALL L. REV. 91 (2000).

⁶ For more on *Lawyering*, see Workways Forum, <http://www.law.nyu.edu/workways/index.html> (last visited Mar. 14, 2008).

and improperly in lieu of what the law school should have been providing us. And yet, as future lawyers committed to social change and aspiring to do public interest work, we learned how to weave activism into the fabric of our practice and our lives.

Given the limits of student activism and influence, who else must contribute to make diversity and cutting-edge pedagogy meaningful realities? The answer, of course, is everyone else: alumni, faculty, law school administrators, and the academy. I make prescriptions here, some dramatic, many relatively simple, which, when implemented by all of these acts, and the academy as part of a radical vision, can create substantial change.

I. STUDENTS

A critical mass of enthusiastic, committed students is a force to be reckoned with. Law students should fully engage in the law school community and attend to demographic, pedagogical, and curricular gaps, not merely because students are consumers of their education, but also because critical thinking is an important part of lawyering.

To effect change, students should mobilize existing student organizations (and form new groups as needed), drawing on the experiences of 3Ls and alumni to fight the greatest threat to student activism: loss of institutional memory. It is also important to work inside and outside of “the system.” In my experience, law school administrators were more than willing to support academic activities, like student-led reading groups, and concomitantly less keen on our campaign for a students-of-color space within the law school. Certain causes and issues will demand traditional means of protest: at NYU School of Law, LGBTQ students and their allies staged a demonstration when Justice Scalia was invited to speak in April 2005; and in April 1999, student leaders physically occupied the dean’s office to protest the lack of faculty diversity. More conciliatory, institutional approaches, including letter-writing and meetings with administrators, will be appropriate in other contexts, for other causes. Law student-activists—necessarily drawing on the arsenal of their target audience (administration and faculty are trained lawyers, after all)—must think strategically and tailor their messaging and approach to their end goals; this too is important legal training.

II. FACULTY

The nexus of faculty indifference, staid Socratic pedagogy, and over-emphasized reverence for precedent may defeat the potential for engagement and excitement in the law school lecture hall. Too often, professors seem more concerned with academic obligations than with learning their students’ names, staying attuned to classroom dynamics (e.g., whether students seem interested, which students participate, etc.), or making themselves available for office hours. Nonetheless, I believe that most professors care about their

students and are willing, when pushed, to adopt pedagogical and curricular innovations for their students' benefit. As mentioned above, a group of us at NYU led a training for 1L instructors on how to make their courses more responsive to students of color.⁷ We prescribed "best practices" for faculty to reach more students and teach them in a more comprehensive, well-rounded manner, and we led a lively discussion about how to implement these practices in the face of institutional pressures and demands.⁸ By involving students in thoughtful exchanges about pedagogy and curriculum, faculty can ensure that they are being effective, responsive teachers.

III. LAW SCHOOL ADMINISTRATORS

It goes without saying that the administration of education in a traditional profession will resist disruption of the status quo. In the face of student concerns about curricula, pedagogy, and the learning environment, however, administrators should be willing to partner with students to formulate solutions. Moreover, the administration should be held accountable to its promises: if legal writing and clinical courses are advertised widely and used in recruitment, they should be funded and supported accordingly.

IV. THE LEGAL ACADEMY⁹

"The academy" is not a faceless entity but rather inheres in all the above actors—students responsible for publishing journal articles, faculty

⁷ On behalf of CoLR (Coalition for Legal Recruiting), Rachel Germany, Navneet Grewal, Sarah Parady, John Smith, and I made this presentation in spring of 2006.

⁸ These best practices included: (1) state one's point of view (e.g., "In this Contracts class, I'll be teaching from a law-and-econ perspective, but there are equally important, competing approaches to the material."); (2) supplement the syllabus by assigning case commentary and literature from critical race theory and other critical bodies of scholarship; (3) vary methods of presentation, inquiry, and evaluation to meet all students' needs and cultivate well-rounded lawyers; (4) learn students' names and get to know them outside of the classroom (e.g., through lunches and office hours); (5) accept the challenge of tackling tough issues like race; (6) contextualize the learning by verbally acknowledging the difficulty of exploring certain topics (e.g., sexual violence in a Criminal Law course) and referencing pertinent current events; (7) distribute periodic evaluations so that change is possible during the semester; (8) communicate with other professors in order to troubleshoot concerns and share approaches; and (9) use a modified Socratic method (e.g., putting a row of students "on call") instead of orthodox Socraticism or pure volunteerism to maximize full participation. On multiple intelligences, see Ian Weinstein, *Testing Multiple Intelligences: Comparing Evaluation by Simulation and Written Exam*, 8 CLINICAL L. REV. 247 (2001) (drawing on the multiple intelligences theory set out in HOWARD GARDNER, *FRAMES OF MIND* (1993)); on innovative teaching methods, see Eric A. DeGroff & Kathleen A. McKee, *Learning Like Lawyers: Addressing the Differences in Law Student Learning Styles*, 2006 BYU EDUC. & L. J. 499 (2006); Stephanie M. Wildman, *The Question of Silence: Techniques to Ensure Full Class Participation*, 38 J. LEGAL EDUC. 147 (1988).

⁹ The challenges faced by women and faculty of color are well-documented. See, e.g., Martha Chamallas, *The Shadow of Professor Kingsfield: Contemporary Dilemmas Facing Women Law Professors*, 11 WM. & MARY J. WOMEN & L. 195 (2005); Christine Haight Farley, *Confronting Expectations: Women in the Legal Academy*, 8 YALE J.L. & FEMINISM 333 (1996); Deborah J. Merritt & Barbara F. Reskin, *The Double Minority: Empirical Evidence of*

producing scholarship, and administrators in charge of hiring and faculty development. While the legal teaching market is funneled through the Association of American Law Schools' process,¹⁰ there are many ways to encourage critical scholarship and the hiring and retention of diverse faculty: journals can prioritize publication of cutting-edge scholarship; veteran faculty can mentor new teachers; and law schools can offer incubatory teaching and writing fellowships for underrepresented minorities.

With all these stakeholders invested in creating a meaningfully diverse, participatory law school, we move one step closer to ensuring that the legal profession represents and responds to the needs of our entire citizenry. As lawyers, irrespective of identity or professional focus, our job is to advocate for our clients and seek the increase of justice in this world. Legal education must foreground this paradigm of advocacy and justice, adopting whatever innovations of substance, pedagogy, and approach are required to make this a reality.

a Double Standard in Law School Hiring of Minority Women, 65 S. CAL. L. REV. 2299 (1992); Kathryn Pourmand Nordick, *A Critical Look at Student Resistance to Non-Traditional Law School Professors*, 27 W. NEW ENG. L. REV. 173 (2005).

¹⁰ See Faculty Recruitment, The Association of American Law Schools, http://www.aals.org/services_recruitment.php (last visited Mar. 14, 2008).

