Excellence Lost

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It's the first day of class for the Spring 1998 semester, and despite having enjoyed teaching for many years, I realize that today I am uncomfortable. I've been talking for about ten minutes, beginning to set classroom norms and tone, meeting eyes long enough to make at least an initial connection, laying out expectations, addressing my intellectual and pedagogical approach to the subject. Because start-up is both hard and crucial, my energy is high and I'm a little wired. This group hasn't yet "jelled," isn't yet flowing and familiar, hasn't yet attained the focused but open, attentive, and engaged style I seek. This group's history has yet to be made; its personality has yet to emerge.

It takes a couple of minutes to diagnose the puzzled, inchoate feeling of strangeness that contributes to my fleeting frown. Then, awareness locks in. I've lived and worked in California long enough to feel literally uncomfortable in an all or predominately White group. As a female, I feel that way in a mostly male group—in faculty meetings, in the hospital or doctors' groups, at many University gatherings. I have been educated by Critical Race Theory and personal interaction to see (my) Whiteness, rather than "normalizing" it as invisible.

The faces in front of me in this first-year class reveal the bright, eager intelligence that I've been fortunate enough to become accustomed to as a professor teaching at this distinguished public law school. But as I survey my nearly 100 students, my unconscious color-comfort meter is blinking. Getting to know these students, I'll find variety of geographical origin, of family background, of political views, and of college and life experience. Thankfully, I see numerous Asian names and faces, Middle Eastern and Indian ones, a few Latinos, and a lot of mixed race individuals that I find (gratefully) difficult to classify. But I find no Black faces, and Latino names and faces are few. Such categorizations don't always provide even a crudely useful judgment about "race" (after all, that category

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exists not mainly in biology but mostly in social history, thought, and practice) or ethnicity (a term so loosely used it often confuses rather than clarifies meaning). But sadness registers as I realize that I’m not seeing the range of students I’m used to teaching in this very diverse state of California. California taxes have long been crucial to our institution’s financial support. Our school accords priority in admissions to California’s population. The California State Bar enrolls most of the lawyers we graduate. This first day’s look at my group feels odd, faintly distressing.

The racial composition of my class affects more than my comfort. Less diversity will deprive our group of crucial perspectives on the material we’ll be studying. Race is only one sort of diversity, and classifications are, at best, imprecise. But the more students of color that are present, the more likely it is that all students will engage with perspectives differing from those of middle class Whites. All students of color, no matter what their socio-economic background, have experienced Otherness in this country that is so conflicted by race and by perceived, attributed, or imposed race. Even the richest, most cultured, most highly placed persons of color are subject to abuses by White power. A few White students, but many students of color, personally, or through chosen group empathy, identity, and concern, articulate the perspectives of poverty, know about the pathologies of the criminal justice system, and distrust the “fairness” and “objectivity” of authority. Many minority students and some Whites as well see intense contradictions in the American Dream and its land-of-the-brave-and-the-free ideology. They hold greater-than-average skepticism about success being merit-based, earned through effort. Market economics is not so frequently their answer of choice.

Although students of color are in many ways similar to Whites, their margins of divergence matter (especially if they are present in realistic rather than “token” proportions). Different issues, persons, rules, and justifications spark their interest and empathy in the study of law. They tend to notice somewhat different things in classrooms, materials, and the lives they have lived to this point. They ask different (as well as similar) questions and challenge different claims. Those differences are subtle but critically important to the authenticity, depth, and breadth of what is learned and what is taught in law school classrooms.

My learning from my students of color began while I was a student myself. I was profoundly inspired by the passion and principle of a sister student, Eva Paterson, Boalt 1975, when she spoke at a student rally on diversity during my second year. I learned from the student-faculty strug-
gle over whether Asian subgroups should be dropped from Boalt's then “special” admissions process when the group’s number of “regular” admits reached a certain level. Looking back, I see in those clashes the early threads of later debates over multi-cultural admissions to Berkeley’s undergraduate program and of “model minority” labels for Asians.

In my years as a faculty member, a student taught me why many Latinos prefer that designation to “Hispanic.” He pointed out that abuse by Spanish conquistadors in the Americas makes many Latinos more receptive to the identifying term “Latin” than to the name of the conquerors. I learned from the critical theory journal of a Latina first-year student to question why criminal law accepts a defense of “necessity” for a druggist who alleviates suffering by dispensing a controlled drug without a prescription, or for a mountain climber who, caught in a storm, takes refuge in an empty house and appropriates provisions there, but does not allow such a defense to a “crowd in great want” who “helped themselves to groceries” during the Depression. I knew that courts more readily excuse an individual’s “atypical” deviation than they mitigate responsibility for numerous people faced with general problems. Arguments about limited institutional competence provide a partial explanation, but it took that Latina student (the daughter of farm workers) to press the issue before I, a child of the middle class, began thinking about those selective forms of “mercy” built into the very fabric of the law. Does the individual-group paradox also reflect a willingness to “understand” deviance by stressed-out middle class people but great reluctance to excuse those whose “choices” are continuously exercised in conditions of poverty or homelessness? To consider the latter requires analysis of the very structure of class and racial privilege in America; while the former can be carried out as a discrete, feel-good exercise of individual “mercy.”

Bob Gordon writes of “establishment” law’s receptivity to mercy in exceptional cases as a device to demonstrate the overall “fairness” of a system whose main function is actually to protect the property of the powerful. Could the same questions have been asked by a White student from middle or upper class backgrounds? Sure. But the odds of their being asked were greater if people like my Latina student were involved.

Students in a class I taught on legal ethics a couple of years ago provided a whole semester of vital learning experiences for me. A co-teacher and I had conducted several classes in which a main issue was race (one was on criminal justice ethics and one was on race and the legal profession). The class had the opportunity to feel each other out and develop a

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4. Examples are from MODEL PENAL CODE § 3.02, Commentary at 9–10 (1985).
little greater-than-usual willingness to speak to each other about this divisive issue. In the midst of a session, one of the Black students responded heatedly to a White student who had just said that he liked Boalt because of its diversity and the amicability of the student body, but maybe the situation at Boalt had lulled him into forgetting how serious America’s race problems are. The Black student asked why he thought that everything’s fine at Boalt, race-wise? She told of feeling isolated as a Black person within her small section (shared with him), of people avoiding sitting next to her, of not being invited to social gatherings, etc. White students were shocked.

Stirred by this exchange, another Black student explained with great intensity the discomfort she felt whenever her boyfriend (not a Boalt student) came to pick her up at the school. Entering the building recently, he had faced a veritable flood of mug shot-type flyers taped up on every door and available surface. The picture was a police sketch of a young, strong Black man who was being sought as a possible perpetrator in an incident the prior week. A maintenance services staff person had reported finding graffiti on a rest room wall inciting readers to “kill whites.” During routine cleaning in the evening on a nearly deserted floor of the building, the janitor arrived, interrupting a “large” and “threatening” young Black male with a knife who was spray-painting the message on the wall. The janitor was much relieved when the terrifying young man ran quickly from the small bathroom. Shortly after the janitor reported his experience to Boalt administrators and campus police, the flyers described by my student and her boyfriend had appeared all over the building. Outside doors previously left open were newly locked; security guards now monitored entry; the faculty were given a special briefing about this “threat.”

My student pointed out that her boyfriend was a stranger in the building. He was tall, young, and Black. Because many Whites fear any young Black male they don’t know, both she and her boyfriend felt that people in the building stared, avoided him, or in other ways made clear their dislike of his presence. Obviously, such people thought my student’s friend might be the person on the flyers. Other students of color joined the discussion saying that they, too, felt besieged and stigmatized by the flyers. They asked pointedly why no flyers were posted of non-Blacks involved in other threatening incidents on campus. They reported that hate messages like “kill the Chinks” (or Japs or lesbians or Jews) appeared many places on campus—in library carrels, between the tiles in bathrooms, on tables in campus dorms and cafeterias. Those messages didn’t seem to generate, as this did, special informational meetings for faculty, crime alert flyers, locked doors, and much alarm. A few White students

7. Located in a busy urban environment, the Berkeley campus has its share of crime, mostly of the property sort, but sometimes involving personal violence as well.
continued to argue that the need to warn people about potentially violent criminals overrode the minority students' concerns, but the mood in the room was radically different after these comments. The comments by the students of color had stunned me and many of the other Whites, forcing us to see through the eyes of others. Differences among various incidents could be noted, but the basic truth-power of the Black students' outrage was inescapable.

The following week, information began to circulate that the janitor had recanted his story; that there was no Black male, nor perhaps even the claimed graffiti. However, the mug-shot flyers remained on every door and hall. The next day, the old posters were joined by a few hand-drawn flyers showing a few newspaper lines acknowledging the janitor's "mistaken" report. I didn't know what to make of them. As a faculty member, I certainly hadn't received any notice of an error. Before I had a chance to inquire, students of color in my class confirmed that the new posters were correct. They asked angrily why the old "official" sketch flyers had not been taken down, why there had been no announcement that the original story was false.

I thought their questions were more than valid. After further class discussion, I told students that I would discuss the entire episode with the Dean, which I did later that day. The Dean didn't view the matter as being as eye-opening and instructive, as I did, but was partly responsive, promising the original flyers would be promptly taken down. I urged that this whole experience would make an excellent community learning experience regarding unconscious and institutionalized racism and that we could use it in a town hall meeting or in some written commentary. The Dean didn't comment further, but when I left, I was pretty sure there wouldn't be any town hall meeting. I went away unsatisfied. An announcement of the recanted story did appear later in the school's official announcement sheet, but the threatening-Black-male flyers remained up for several days longer. There was no attempt to gain institutional insight from the experience. But I, and the students in my class, learned important things that semester.

A Black student in that same class came to my office in tears one day. Her criminal law teacher said he wouldn't be covering death penalty issues in the course. This student had come to law school to focus on criminal law in general and death penalty law in particular. She saw death penalty law as critical to her race and her career. Her teacher's priorities obviously differed. Teachers have academic freedom to teach what they feel is best. But just as women students disagreed with earlier professorial choices to omit rape and domestic violence from basic criminal law courses, such judgments about the "importance" of particular crimes can institutionalize particular and debatable perspectives.
My student also commented that she wanted very much to come to the next ethics class in which "race and the legal profession" was the scheduled topic. But African-American students had planned a day-long teach-in about race and law that same day. She also wanted (and felt considerable pressure from fellow students of color) to be at the teach-in. She commented that White students could go either or neither place without much thought, whereas she had agonized for days and had not been sleeping well. Students of color often experience these "extra" conflicts. Even while surviving law school rigors, many members of any " Outsider" group understandably feel an obligation to represent other less fortunate members of their group. But my student's anguish transmitted to me the unequal playing field that her constant sense of being "embattled" and "different" created.

When we had more students of color, and I would teach Critical Race Theory materials in contracts, I would literally see light come up in the faces, a sigh of release and relief, sparks in the eyes of students of color when issues they cared about were seriously and substantively addressed. A few years ago, I taught a course on race as a perspective on legal ideas. Assigning lots of Critical Race Theory—Pat Williams, Cheryl Harris, Dorothy Roberts, Chuck Lawrence, Margaret Montoya, Angela Harris, Mari Matsuda—I saw the same excitement and renewal in the dozen or so students of color who constituted most of the group. That wonderful sight is less available now.

One of the students in the race seminar, knowing that this course permitted attention to race, told the class of his unsatisfying study of the Bostick case, dealing with permissible search and seizure. That case, he explained, involved two police officers who boarded a bus, questioned a young male of color about criminal activity, and requested permission to search his luggage. The Supreme Court held that consent to a search was valid so long as a reasonable person would feel free to "disregard the police and go about his business" without complying with the request. In times not far removed from the Rodney King episode, my student was

17. Id. at 434.
frustrated when he tried to discuss the issue in or after the class in which it was taught. In his paper on that and related cases, my student observed that:

[I]ndividuals from different backgrounds and with different experiences will have different opinions of what reasonable people do. . . . [T]he institution of slavery . . . [relied on] fear . . . as the foundation for keeping a race of people . . . oppressed. Whipping slaves for . . . looking a white man in the eyes, talking back to a white person, or just being obedient caused [trouble].

Was a fair standard being applied to Bostick? My student asked, did that young Black man really feel free to “disregard the police”? The ensuing argument about that problem has enriched my thinking about the application of “reasonableness” standards in legal doctrine.

Another student in that same course wrote what was to me such an eye-opening paper that I’ve urged him to publish it. His central theme was that in the development and teaching of American constitutional law, African Americans have been largely “erased”:

Eracism is the process whereby the experiences of African Americans . . . are systematically diminished in significance and often omitted completely from legal doctrine and course work . . . . It is glaring in constitutional law, where race is central to our historical foundations and constitutional development. Eracism is not an accident. It is a power play.

He notes that despite the near-erasure of slavery from the Constitution itself, compromises about slavery crucially shaped America’s fundamental governmental structure of federalism and separation of powers. Yet, almost nothing about slavery or race is taught in foundational courses on constitutional law. He further notes that although Dred Scott was the first case in which the Supreme Court held a federal law unconstitutional, the principle of judicial review is taught almost exclusively through the case Marbury v. Madison, whose content allowed its elaborate dicta to be celebrated as a triumph of wisdom, rationalism, and governmental planning.

I’ve always learned interesting things from my students of all colors and backgrounds, before and now. That’s a major reason I love teaching. I’ve also heard plenty of excellent, average, and typical analytic and doctrinal responses from students of color about consideration and mitigation, about damages and firm offers, about managed health care and reproductive rights. But I miss having the particular learning that comes

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21. 5 U.S. 137 (1803).
to an attentive White (student or teacher) who listens carefully to what people of color say. I value it because their learning matters—this is a nation riven by race.

A major aspect of lawyers' mandate is to play significant roles in articulating and implementing behavioral norms and in resolving interpersonal and intergroup conflict. If lawyers and educators are to perform their tasks well, they must understand the issues, the norms, the injuries, and the remedies from all relevant points of view, not from just a few. Whites dominate most conversation in most places, including Boalt. But at Boalt, the (previously) large number of students of color gave me unique and priceless opportunities to better understand my profession, my fields of expertise, and my pedagogical tasks. Once plentiful, that opportunity is now diminished. How ironic that in pursuit of so-called "merit," leaders have removed this vital source of excellence from this legal academy.