

2015

Towards a Pedagogy of Diversity in Legal Education

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Citation Information

Bhabha, Faisal. "Towards a Pedagogy of Diversity in Legal Education." *Osgoode Hall Law Journal* 52.1 (2015) : 59-108.

DOI: <https://doi.org/10.60082/2817-5069.2792>

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Towards a Pedagogy of Diversity in Legal Education

Abstract

There is resounding consensus that diversity in legal education is a priority. Yet, North American law schools continue to be criticized for failing to reflect the diversity of the society that they are training lawyers to serve. This article is a project of conceptual reorientation against a backdrop of critical scholarship and empirical evidence. Parts I and II examine the past twenty years of diversity promotion in legal education, concluding that, while several advances have been made, especially in increasing numerical representation of diverse groups in law schools, the promise of meaningful diversity remains unfulfilled. Part III suggests that reforms in legal education, though well-intentioned, have continued to focus on the production of a model of professional identity that is out of reach and out of touch for many minority students. In Parts IV and V, the author outlines a program for transforming the norm of lawyering taught in law school. Grounded in a normative framework of access to justice and equality, the author argues that experiential/clinical learning practices offer a useful method to achieve a more engaged pedagogical commitment to diversity in legal education.

Keywords

Law--Study and teaching; Discrimination in higher education; Law schools; Law students; Canada

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Towards a Pedagogy of Diversity in Legal Education

FAISAL BHABHA*

There is resounding consensus that diversity in legal education is a priority. Yet, North American law schools continue to be criticized for failing to reflect the diversity of the society that they are training lawyers to serve. This article is a project of conceptual reorientation against a backdrop of critical scholarship and empirical evidence. Parts I and II examine the past twenty years of diversity promotion in legal education, concluding that, while several advances have been made, especially in increasing numerical representation of diverse groups in law schools, the promise of meaningful diversity remains unfulfilled. Part III suggests that reforms in legal education, though well-intentioned, have continued to focus on the production of a model of professional identity that is out of reach and out of touch for many minority students. In Parts IV and V, the author outlines a program for transforming the norm of lawyering taught in law school. Grounded in a normative framework of access to justice and equality, the author argues that experiential/clinical learning practices offer a useful method to achieve a more engaged pedagogical commitment to diversity in legal education.

Personne ne réfute que la diversité devrait constituer une priorité dans la formation juridique. Pourtant, les écoles de droit d'Amérique du Nord continuent d'être critiquées pour ne pas refléter la diversité de la société au service de laquelle œuvreront les avocats qu'elles forment. Cet article constitue le projet d'une réorientation conceptuelle sur fond d'érudition critique et de témoignage empirique. Ses première et deuxième parties passent en revue les vingt dernières années de promotion de la diversité dans la formation juridique, pour conclure que, même si plusieurs progrès ont été réalisés, particulièrement grâce à une plus forte représentation numérique des groupes de la diversité dans les écoles de droit, la

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promesse d'une diversité digne de ce nom demeure non remplie. La troisième partie établit que les réformes de la formation juridique, quoique bien intentionnées, continuent de cibler la création d'un modèle d'identité professionnelle hors d'atteinte et déconnecté pour beaucoup d'étudiants minoritaires. Dans les quatrième et cinquième parties, l'auteur propose un programme destiné à transformer l'image de la profession d'avocat qu'enseignent les écoles de droit. S'appuyant sur un cadre normatif de l'accès à la justice et de l'égalité, l'auteur prétend qu'un enseignement expérientiel et clinique constitue un moyen utile d'atteindre un engagement pédagogique plus intense envers la diversité dans la formation juridique.

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LEGAL EDUCATION IN NORTH AMERICA IS CHANGING. These changes are occurring at a time when law schools are under intense pressures from a variety of forces, many of which are beyond anyone's control.¹ One important push, both in legal education and in the profession,² is to better implement formal commitments to diversity. This push for diversity occurs at the nexus of at least three related developments in law schools across North America.³ First, there is a consensus that diversity is both a social fact and a public good, deserving of efforts to foster and promote it institutionally. Secondly, well-known reform initiatives have aimed to diversify the demographic composition of the law school by admitting students and appointing faculty members from historically under-represented communities. Finally, law teachers are approaching legal education more critically than ever and are embracing innovative teaching practices, most notably experiential education. Although questions about how to educate and train lawyers are not novel—the core model has persisted despite incessant

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1. Harry Arthurs, "The Future of Law School: Three Visions and a Prediction" (2014) 51:4 *Alb L Rev* 705 [Arthurs, "Three Visions"] (arguing that the "future of law school depends on ... developments in political economy, technology, demography and society that are reconfiguring the legal system, the market for professional services and the structure of higher education" at 705).
 2. For definitional purposes, when speaking of "legal education," I refer to the provision of training and educational services to students who will subsequently be eligible for membership in a bar. This education occurs in faculties housed within institutions of higher learning, known colloquially as "law schools," and is carried out by a high proportion of tenured, full-time law professors, with a smaller number of part-time or adjunct faculty, many of whom maintain active professional lives. When speaking of the "legal profession," I refer to the professionally constituted corps of licensed lawyers in the relevant jurisdiction. Although every jurisdiction has a professional corps of lawyers, there is sufficient variation in the modes of organizing and regulating lawyers—and in the business, cultural, political, and interpersonal relations among lawyers—that my reference here is specific to the legal profession in the province of Ontario, Canada. I suggest that the relevance of one sizable English-speaking, North American jurisdiction (population: twelve million) with a largely urban, middle-class, and multicultural population is a good general reference point from which many analogues may be drawn to jurisdictions with similar demographic features.
 3. I use the province of Ontario in Canada as a case study, but generalize many observations to North American law school experience broadly. Legal education and the legal profession across North American jurisdictions share many similar features and exist amid relatively comparable legal cultures, socio-political conditions, and institutional structures.

critique⁴—the call for a more substantial and structural review of the modes of legal education has reached fever pitch.⁵

Issues about access to and delivery of legal education relate, both causally and contextually, to issues about access to and delivery of legal *services*. The interconnection of legal education and the provision of legal services in a profit-driven market has meant that market collapse tethers the future of law schools to economic interests. One effect of this interconnection, evident in recent developments in law school accreditation and lawyer licensing, is that law schools are expected to produce “practice-ready” graduates.⁶ Whether this will lead to radical

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4. See Benjamin A Spencer, “The Law School Critique in Historical Perspective” (2012) 69:4 Wash & Lee L Rev 1949 (summarizing the history of legal education in the United States, and noting that “when one canvases the various assessments of formal legal education over the past 130 years, it is remarkable how consistent the criticisms are and how persistent the Langdellian model has been in the face of these critiques” at 1982). Modern American legal education, developed by Christopher Columbus Langdell, Dean of Harvard Law School beginning in 1870, also became the dominant model in Canada. See Ian Holloway, “Future of Law Conference: The Evolved Context of Legal Education” (2013) 76:1 Sask L Rev 133 at 134. Holloway argues:

The system of legal education as we know it in Canada today is a creature of the American industrial revolution. It is not, despite what we might instinctively assume, grounded in the antiquity of the common law system. Rather, it stemmed from a move in the aftermath of the US Civil War to make the education of lawyers both more “scientific” and more rigorous. And it endures to this day.

5. See Alfred Zantinger Reed, *Training for the Public Profession of the Law: Historical Development and Principal Contemporary Problems of Legal Education in the United States with Some Account of Conditions in England and Canada* (New York: The Carnegie Foundation for the Advancement of Teaching, 1921); American Bar Association Section of Legal Education and Admission to the Bar, *Report of the Task Force on Law Schools and the Profession: Narrowing the Gap* (Chicago: American Bar Association, July 1992); William M Sullivan et al, *Educating Lawyers: Preparation for the Profession of Law* (San Francisco: Jossey-Bass for the Carnegie Foundation for the Advancement of Teaching, 2007) [*Carnegie Report*]; Richard Susskind, *The End of Lawyers? Rethinking the Nature of Legal Services* (New York: Oxford University Press, 2008).
6. This is especially true in the United States where, since the late 2000s, the American Bar Association Accreditation Committee has moved towards requiring law schools to produce “practice-ready” graduates. See generally Margaret Martin Barry, “Practice Ready: Are We There Yet?” (2012) 32:2 Boston College J L & Soc Just 247. In Canada, the shift to practice readiness occurs in a different historical and socioeconomic context. Critics in both countries doubt whether practice readiness is useful as an accreditation standard. See Robert J Condlin, “‘Practice Ready Graduates’: A Millennialist Fantasy” (University of Maryland Legal Studies Research Paper No 2013-48), online: <<http://ssrn.com/abstract=2316093>> (describing law graduates’ job prospects as “a function of a school’s academic reputation, not its curriculum” and arguing that “the legal labor market will rebound only after the market

reform in professional norms or a pandering to established interests remains to be seen.⁷ Much will depend on the values and ambitions identified by law teachers and the strategies adopted to advance them.⁸ For these reasons, legal education is inextricably tied to issues of professional regulation and access to justice, which makes it both timely and appropriate to consider the implications of specific commitments to diversity within the context of these broader factors.

Building on these observations, I begin this article with two descriptive claims. The first, discussed in Parts I and II, is that diversity promotion is a universally recognized normative goal that has been the subject of institutional initiatives within legal education and the legal profession. Law schools are influenced by the values of the professional world of lawyers, especially as directed by the self-governing bodies of the profession as well as by diversity promotion commitments within the academy and in university policy. Yet, while the normative case for diversity has been embraced widely and at all levels, these declarations and promises tend to lack articulation of what diversity means as a substantive concept. In this sense, diversity pedagogy in North American law schools to date can be described as “thin.”

The second descriptive claim, which I outline in Part III, is that the current state of affairs with respect to diversity issues in the law school reveals that institutional initiatives to promote diversity have brought some advancement, but incomplete results. This claim will be developed with reference to a variety

as a whole has rebounded (and perhaps not then)” at 4). See also Holloway, *supra* note 4 at 137 (arguing that “to define the goals of legal education by reference to what a young lawyer needs to begin private legal practice is short-sighted,” given the changes occurring within the profession and the varied types of legal careers that young lawyers can expect to have over the course of their careers).

7. See Larry E Ribstein, “Practicing Theory: Legal Education for the Twenty-First Century” (2011) 96:5 Iowa L Rev 1649; Carrie Hempel & Carroll Seron, “An Innovative Approach to Legal Education: The Founding of the University of California, Irvine School of Law” in Scott L Cummings, ed, *The Paradox of Professionalism: Lawyers and the Possibility of Justice* (New York: Cambridge University Press, 2011) 169.
8. See Arthurs, “Three Visions”, *supra* note 1. Arthurs argues that the values and ambitions of law schools are beyond the reach of regulators, but are “very much within the control of [the] law school” (*ibid* at 705). Arthurs states that:

the values [that law schools] embrace and [the] way they define their ambitions... will determine whom they hire as faculty members and admit as students, what and how they teach, the standards they use to measure achievements, and the way they allocate their scarce resources. And crucially, it will determine how, if at all, law schools exploit their strategic location as producers and distributors, as conservators and critics, of legal and social knowledge (*Ibid* at 705-706).

of scholarship, including empirical, theoretical, and experiential accounts. These accounts indicate, for example, that despite efforts to make legal education and the profession more representative, minorities continue to be statistically under-represented⁹ and often recount experiences of marginalization in law school.¹⁰

Moving from the descriptive to the prescriptive, in Part IV of this article I outline the parameters for a pedagogical program of diversity in legal education. I redefine the theoretical and normative underpinnings of a diversity pedagogy that I describe as “thick,” and argue that the confluence of diversity intensification and curriculum reform provides a unique opportunity to implement novel, and more inclusive, approaches to legal education. On this basis, Part V highlights how the embrace of experiential education, with its blended use of hands-on experience and structured critical reflection, can help law schools deliver on their commitment to diversity in substantive ways that both produce competent lawyers and reduce barriers in education and the profession.

I. WHY DIVERSITY?

There is wide agreement that diversity in North American legal education is a priority. The promotion of diversity is desirable for various reasons. The Canadian Bar Association spearheaded research and policy work on sex and racial equality, publishing two key reports in 1993 and 1999 that called for greater

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9. See Michael Ornstein, *Racialization and Gender of Lawyers in Ontario: A Report for the Law Society of Upper Canada* (Toronto: LSUC, April 2010), online: <http://www.lsuc.on.ca/media/convapril10_ornstein.pdf>. See also Wendy Cukier et al, *DiverseCity Counts 3: A Snapshot of Diverse Leadership in the GTA* (Toronto: Diversity Institute, Ted Rogers School of Management at Ryerson University, 2011), online: <<http://diversecitytoronto.ca/wp-content/uploads/CountsReport3-full.pdf>>. Cukier et al examine racial representation in positions of leadership within the various institutions of the legal community of the Greater Toronto region. The trends identified in their report are likely representative of many North American cities with similar diversity patterns. In the United States, while 70 per cent of the general population is white, about 90 per cent of lawyers are white. The American legal profession is less racially diverse than most other professions—racial diversity in the legal profession has actually slowed considerably since 1995. See ABA Presidential Initiative Commission on Diversity, *Diversity in the Legal Profession: The Next Steps* (Chicago: American Bar Association, 2011) at 11-13, online: <http://www.americanbar.org/content/dam/aba/administrative/diversity/next_steps_2011.authcheckdam.pdf> [ABA, *Next Steps*].
 10. See Brenna Bhandar, “Always on the Defence: The Myth of Universality and the Persistence of Privilege in Legal Education” (2002) 14:2 CJWL 341; Diana Younes, “Teaching White: Constructing Lawyer Identity in Canadian Law Schools” in RJ Gilmour et al, ed, “*Too Asian?*” *Racism, Privilege, and Post-Secondary Education* (Toronto: Between the Lines, 2012).

attention to diversity in the Canadian legal profession.¹¹ A survey of Canadian law society websites reveals that all of the provincial and territorial regulatory bodies have adopted some form of diversity policy, linking the core values of the legal profession with the practical goals of increasing representation, equality, and access in legal practice and services.¹² For example, the Law Society of Upper Canada (LSUC), which regulates the practice of law in Ontario, maintains a rich array of programs and initiatives designed to promote “equity and diversity.” This includes a Discrimination and Harassment Counsel and a membership-based Equity Advisory Group attached to a committee of benchers (elected governors). In 2012, the LSUC created the Challenges Faced by Racialized Licensees

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11. Task Force on Gender Equality in the Legal Profession, *Touchstones for Change: Equality, Diversity and Accountability* (Ottawa: Canadian Bar Association, 1993) (Chair: The Hon Bertha Wilson), online: <<http://www.cba.org/CBA/equity/pdf/touchstonesforchange.pdf>> [CBA, *Touchstones*]; Working Group on Racial Equality in the Legal Profession, *Racial Equality in the Legal Profession* (Ottawa: Canadian Bar Association, 1999) (Co-Chairs: Joanne St Louis & Benjamin Trevino, QC), online: <<http://www.cba.org/cba/pubs/pdf/racialequality.pdf>>.
 12. Survey conducted by the author (May 2013) [on file with author]. See e.g. Law Society of British Columbia, *Equity and Diversity*, online: <<http://www.lawsociety.bc.ca/page.cfm?cid=5&t=Equity-and-Diversity>>; Law Society of British Columbia, *Code of Professional Conduct for British Columbia* (2013) ch 2, 6.3; The Law Society of Alberta, *Rules of the Law Society of Alberta* (2013) at 1-15; The Law Society of Alberta, *Strategic Plan 2010-2013* (November 2010) at 3-4, 8, online: <http://www.lawsociety.ab.ca/files/management/strategic_plan.pdf>; Law Society of Saskatchewan, *Equity Office* (2011), online: <<http://www.lawsociety.sk.ca/for-lawyers-and-students/equity-office.aspx>>; Law Society of Saskatchewan, *Code of Professional Conduct* (2012) at 104; Law Society of Manitoba, *About Equity* (2008-2014), online: <<http://www.lawsociety.mb.ca/equity/about-equity>>; Law Society of Manitoba, *Code of Professional Conduct* (2011) rr 5.03(4)-(5); Law Society of Upper Canada, *Equity and Diversity in the Legal Profession* (2014), online: <<http://www.lsuc.on.ca/with.aspx?id=2147487011>>; Law Society of Upper Canada, *Rules of Professional Conduct* (2000) rr 6.3.1 [LSUC, *Rules*]; Law Society of New Brunswick, *Code of Professional Conduct* (2009) at 93; Law Society of New Brunswick, *History* at b, online: <<http://lawsociety-barreau.nb.ca/en/about/history>>; Nova Scotia Barristers' Society, *The Equity Program* (2014), online: <http://www.nsbns.org/improving_justice/the_equity_program>; *Legal Profession Act*, SNS 2004, c 28, s 4(2)(d)(i); Nova Scotia Barristers' Society *Code of Professional Conduct* (2012) at 89; Nova Scotia Barristers' Society, *Annual Report 2012*, online: <<http://nsbs.org/sites/default/files/cms/publications/annual-reports/nsbsannrpt2012.pdf>>; Canadian Bar Association, *Code of Professional Conduct* (1974), ch XX, no 6, adopted by the Law Society of Prince Edward Island, online: <http://www.lspei.pe.ca/pdf/code_of_professional_conduct_CBA1987.pdf>; Law Society of Newfoundland and Labrador, *Code of Professional Conduct* (2013) at 91, 101; Law Society of Yukon, *Toward a New Legal Profession Act: Policy Paper* (18 November 2011) at 4; Law Society of the Northwest Territories, *Policy Manual* (1980) at 16; Law Society of Nunavut, *Legal Ethics and Practice Committee*, online: <<http://lawsociety.nu.ca/legal-ethics-and-practice-committee>>.

Working Group with a mandate to investigate obstacles to minorities in the profession and consider strategies for enhanced inclusion at all career stages.¹³ The LSUC also maintains a Disability Resource Centre, a Career Coaching for Women Lawyers program, a Retention of Women in Private Practice working group, and a Human Rights Monitoring Group. The American Bar Association's report, *Next Steps*, suggests that a similar embrace of diversity and equity has occurred across the American legal profession.¹⁴

In addition to the institutional and professional recognition of the priority of diversity, law faculties have also noted the diversity gaps in legal education, and have taken clear steps to redress historical exclusion.¹⁵ A survey of seventeen Canadian law faculty websites finds that diversity is explicitly mentioned in the governing policies of eleven schools.¹⁶ Of the faculties that do not have an explicit

13. Equity and Aboriginal Issues Committee, *Report to Convocation* (Toronto: Law Society of Upper Canada, 2012).

14. *Supra* note 9.

15. See Kevin R Johnson, "The Importance of Student and Faculty Diversity in Law Schools: One Dean's Perspective" (2011) 96:5 Iowa L Rev 1549 (outlining the arguments, from a Dean's perspective, for improving diversity of both the student body and faculty in legal education).

16. There are seventeen Canadian law faculties outside of Quebec. I did not include the five Quebec law schools in this study. Survey conducted by the author (May 2013) [on file with author]. Several law faculties explicitly refer to diversity in website materials. See e.g. University of British Columbia Faculty of Law, *Equity Resources* (2014), online: <<http://www.law.ubc.ca/equity-resources>> ("The Faculty celebrates, supports and promotes the importance of diversity, and equality to a vibrant law school"); *University of Victoria Faculty of Law Equity Policy* (2008), online: <<http://www.uvic.ca/law/assets/docs/studentandacademicmatterspagedocs/universityofvictoriafacultyoflawequitypolicy.pdf>> ("Diversity, equity, fairness and respect are paramount values at the Faculty of Law and central to this policy" at 2); Philip Bryden, "Dean's Welcome," *University of Alberta Faculty of Law*, online: <<http://lawschool.ualberta.ca/about/welcome>> ("Our students are a diverse group"); University of Manitoba, "Support," *Robson Hall, Faculty of Law* (2014), online: <<http://law.robsonhall.ca/support>> ("Robson Hall promotes diversity."); University of Toronto Faculty of Law, *Admissions Policies* (2014), online: <<http://www.law.utoronto.ca/admissions/jd-admissions/admissions-policies>> ("The Faculty seeks a diverse . . . student body."); Queen's University Faculty of Law, *Admission Philosophy and Criteria* (2011-2012), online: <http://www.queensu.ca/calendars/law/Admission_Philosophy_and_Criteria.html> (declaring that the "diversity of the Canadian population should be reflected in the ranks of those granted access to legal education"); Queen's University, *JD Admissions* (2014), online: <<http://law.queensu.ca/jd-admissions/admission-information/first-year>> (access category describing commitment to enhancing diversity in legal education and the legal profession); Osgoode Hall Law School, *Our Holistic Review Process* (2014), online: <<http://www.osgoode.yorku.ca/prospective-students/jd-program/jd-admissions/review-process/holistic-admission-policy>> ("Our admission policy recognizes, fosters and celebrates excellence and

diversity policy, the goals of diversity are reflected in institutional practices. Examples include targeted equitable admissions policies, especially for Aboriginal applicants, and “equity” policies for increasing the participation of “racial and cultural minorities, Aboriginal peoples, lesbians, gay men and bisexuals, persons with disabilities, and economically disadvantaged persons.”¹⁷ These initiatives ascribe value to the experiences of “difference” carried by members of marginalized groups and minorities. Through policies and practices rooted in equality

equity... . We place a priority on opening doors to communities that traditionally have been under-represented in the legal profession”); Western Law, *First-Year Applications* (2014), online: <https://www.law.uwo.ca/admissions/first_year_admissions.html> (“The Faculty of Law is strongly committed to excellence and diversity”); Windsor Law, *Our Admissions Criteria*, online: <<http://www.uwindsor.ca/law/343/our-admissions-criteria>> (seeking “those who have traditionally been barred from higher law study to ensure that Canada’s many communities will have access to legal professionals, as that [*sic*] Canada’s diverse and varied society can be served from a variety of perspectives”); McGill Faculty of Law, Event, “Law school and diversity: Admission information session for students of colour and students from marginalized backgrounds” (12 October 2012), online: <<http://www.mcgill.ca/law/channels/event/law-school-and-diversity-admission-information-session-students-colour-and-students-m>>; University of New Brunswick Faculty of Law, *Law Admissions Handbook 2014-2015* at 4, 5, 6, 16-17. See also University of Ottawa Faculty of Law, Common Law Section, “Education Equity,” *Prospective Students*, online: <<http://www.commonlaw.uottawa.ca/en>>; Schulich School of Law at Dalhousie University, *Indigenous Blacks & Mi’kmaq Initiative*, online: <<http://www.dal.ca/faculty/law/about/indigenous-blacks-mi-kmaq-initiative.html>>; Lee Stuesser, “Dean’s Message,” *Lakehead University Faculty of Law*, online: <<https://www.lakeheadu.ca/academics/departments/law/deans-message>>; Université de Moncton, *Objectifs*, online: <<http://www.umoncton.ca/umcm-droit/node/3>>; University of Calgary Faculty of Law, *Aboriginal Applicants to the JD Program*, online: <<http://www.law.ucalgary.ca/prospectivestudents/admission/aboriginalapplicants>>; University of Saskatchewan College of Law, *Special Applicants*, online: <<http://law.usask.ca/programs/law-degree/special-applicants.php>>; Thompson Rivers University Faculty of Law, *Academic Accommodation Policy*, online: <https://www.tru.ca/_shared/assets/Law_Academic_Accommodation_Policy25672.pdf>.

17. University of Ottawa, *Education Equity Office* (15 December 2009), online: <<http://www.commonlaw.uottawa.ca>>.

commitments, law schools across North America have universally pledged to make the promotion of diversity in legal education a priority.¹⁸

The rationale for embracing diversity has not always been articulated in terms of equality. The most common rationales for diversity come from three distinct approaches. First, individual, group, corporate, and institutional forces drive the impetus for diversity within the legal profession.¹⁹ This impetus reflects clients' increasing expectation for their lawyers and law firms to demonstrate diversity competence. This expectation arises as a result of factors of globalization, particularly transnational trade and migration. Lawyers with cultural and linguistic proficiencies, and firms with diverse staff, are better able to meet diverse client needs.²⁰ The professional push towards diversity also recognizes the fact that lawyers are leaders in many fields and have a broad mandate to promote the interests of justice. The profession takes seriously its monopoly over the provision of legal services and recognizes that this privilege comes with concomitant duties. The profession claims to hold its members to a high standard of professional responsibility and integrity. This standard requires lawyers to be attentive to shifting social and demographic forces that are bound to impact their professional lives and their provision of legal services to the public.

Second, a political imperative recognizes that diversity is a priority in public policy, is modelled within the public service sector, and is promoted in the broader society through a host of initiatives designed to enhance communications and interactions across differences. Lawyers bear considerable responsibility for sustaining a democratic, rule-of-law legal order that represents the society it serves. For much of the general public, lawyers are both the guardians and the

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18. Of the seventeen Canadian law school websites surveyed, eleven explicitly reference "diversity" as an institutional priority; the remaining six faculties have policies and priorities that do not contain the word diversity, but instead emphasize "equity" or "access." See e.g. Lorne Sossin, "Transparency and Accountability Reflected in Tracking of Osgoode's Student Body" (29 May 2013), online: <<http://www.osgoode.yorku.ca/prospective-students/jd-program/life-osgoode/transparency-accountability-reflected-tracking-osgoodes-student-body>> (summarizing statistics that show the 2015 class of JD students is "the most diverse in Osgoode's history" and linking these data to the school's goals of "accessibility and inclusion"); University of British Columbia Faculty of Law, *Equity Resources*, online: <<http://www.law.ubc.ca/equity-resources>> ("The Faculty celebrates, supports and promotes the importance of diversity [and] equity"); University of Toronto Faculty of Law, *Public Interest and Diversity*, online: <<http://www.law.utoronto.ca/focus-area/public-interest-and-diversity>> (noting the "school's ... commitment to diversity").
19. See e.g. Ryerson General Counsel's Office, *Legal Leaders for Diversity: A Statement of Support for Diversity and Inclusion by General Counsel in Canada* (June 2011), online: <<http://www.computershop.ryerson.ca/about/generalcounsel>>.
20. See ABA, *Next Steps*, *supra* note 9 at 5.

gatekeepers of the legal system, instrumental in the vindication of citizens' legal rights and entitlements. As leaders in both politics and society, members of the legal profession should ensure broad and representative access to the profession as a gateway to positions of influence in politics and society.²¹

Finally, the growing importance of ethics regulation has led the diversity imperative to be linked with legal professionalism and access to justice. Emerging scholarship on Canadian legal ethics highlights the importance of diversity to the legitimacy of the legal profession and the administration of justice.²² This view holds that a legal profession that is not appropriately representative of the society in which it operates will be hindered in carrying out its core mandate and will lose the confidence of the public it is bound to serve. The ethics push has also been linked to more substantive notions of justice, and to the suggestion that lawyers have a professional duty to promote justice and equality.²³ While such language is articulated in formal policy, there is little elaboration or enforcement.

Indeed, constitutional and legislative developments in recent decades have focused more clearly on the public role of lawyers in remedying historical disadvantage and promoting equality as a social goal.²⁴ In turn, this focus has produced a normative imperative to promote diversity in the legal profession and, by necessity, in legal education. In Ontario, the *Rules of Professional Conduct* ("Rules") require lawyers to fulfil a "special responsibility to respect the requirements of human rights laws in force in Ontario and, specifically, to honour the obligation not to discriminate"²⁵ on the grounds listed in the *Human Rights Code* ("Code").²⁶ Ontario is the only jurisdiction that makes this human rights responsibility an explicit rule of practice. Five other provincial codes of conduct

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21. See Cukier et al, *supra* note 9 (concluding that "the generally low rates of visible minority representation among legal sector leaders suggest that the legal profession and its institutions need to continue to promote the advancement of visible minorities in leadership roles" at 34-35).
 22. See Adam M Dodek, "Canadian Legal Ethics: Ready for the Twenty-First Century at Last" (2008) 10:7 Osgoode Hall LJ 1 [Dodek, "Ready for the Twenty-First Century"].
 23. See David M Tanovich "Law's Ambition and the Reconstruction of Role Morality in Canada" (2005) 28:2 Dal LJ 267 [Tanovich, "Law's Ambition"] (arguing for a professional code of conduct that incorporates moral concepts of justice and equality, and presumably including diversity).
 24. In Canada, these developments include the adoption of statutory human rights, the *Canadian Bill of Rights*, and, in 1982, the incorporation into the constitution of the *Canadian Charter of Rights and Freedoms*. See Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].
 25. LSUC, *Rules*, *supra* note 12, r 6.3.1
 26. *Human Rights Code*, RSO 1990, c H.19 [*Code*].

include—in commentary—reference to a “special responsibility” to either “comply with,” “respect,” or “honour” the obligations in human rights law,²⁷ while all three territories and two provinces include simply a “responsibility” to do so.²⁸ Only the professional codes of Quebec and New Brunswick make no mention of human rights law.

Tethering the lawyer’s duty to promote equality to the individual right to non-discrimination limits the aspiration of an equality promotion ethic. It also raises the obvious question, why include the rule at all if it requires nothing more than what statutory human rights already require of lawyers? In the absence of articulated applications, whether as rules or standards, it is difficult to see how a broader equality goal is to become manifest. It is more likely that the existing professional culture reproduces itself—a professionalism absorbed in privilege and driven by profit. Whether law teachers can (and should) seek, through progressive destabilizing pedagogy, to effect systemic change, economic justice, or the dismantling of hierarchy, remains unclear. It is no wonder, then, that in the absence of a coherent theory of equality to define the goal of promoting diversity, that goal ends up appearing either thin or coopted by vested interests.

Despite the prevalence of factors beyond the control of law teachers and academic administrators, if the goal is to promote diversity in the legal profession, there are good reasons to focus efforts on the law school. The law school is the first point of admission to the legal community. It is the site of immersion and instruction in legal reasoning, and the gateway to the profession. It is where one assimilates legal theory and doctrine, acquires aptitude, learns and engages in the production of legal knowledge, develops an idea about what a lawyer is, identifies professional options, and pursues job opportunities or prepares for solo practice. In fact, a great deal happens in law school that is both reflective of the world in which lawyers work, and determinative of how that world will look in the future. The first women and minority law professors wrote of their experiences

27. These are: British Columbia, Alberta, Saskatchewan, Manitoba, and Newfoundland & Labrador. See *supra* note 12.

28. These are: Nunavut, Northwest Territories, Yukon, Prince Edward Island, and Nova Scotia. See *supra* note 12.

of alienation in the classroom, on faculty councils, and in the law books.²⁹ They wrote about the differential impact of law and legal education on individuals and groups in ways that speak more deeply to underlying systemic inequality than do formal anti-discrimination laws. Their subjective experiences of legal education and professional initiation exposed realities that created an imperative for reform. For at least the past thirty years, North American law faculties have articulated a commitment to making law schools more representative of the societies they serve; but their efforts have failed to extinguish the diversity deficit, and student accounts of alienation in the classroom and in student life suggest that the work of diversity is far from complete. As I have suggested, a significant contributor to the problem of strategizing the promotion of diversity and evaluating its success is that the concept itself has not been adequately defined. And, more importantly, the implications of how diversity is defined have not been seriously considered.

II. DIVERSITY AS EQUALITY

As a descriptive concept, diversity is a statement of demographic data. Framed most broadly, it refers to the wide range of individuals and groups that constitute a society. It may refer to all sorts of grounds of difference, including not only the types of grounds protected by anti-discrimination legislation, but *any* basis of difference. The potential for definitional indeterminacy has led to some concern about a concept of diversity devoid of substance.³⁰ For some, “diversity” can be understood simply as a synonym for “variety.”³¹ But what is the value of celebrating difference for its own sake? No doubt, there may be aesthetic or other reasons to value difference, but this is not how diversity is conceptualized in public discourse, at least with respect to the legal profession. Rather, the diversity imperative emerged as a purposeful response to institutionalized historical exclusion.

29. See Kimberlé Williams Crenshaw, “Toward a Race-Conscious Pedagogy in Legal Education” (1989-1990) 11:1 *Nat’l Black LJ* 1 [Crenshaw, “Race-Conscious Pedagogy”]; Patricia J. Williams, *The Alchemy of Race and Rights: Diary of a Law Professor* (Cambridge, Mass: Harvard University Press, 1991) at 5, 10, 56; Mari Matsuda, “Affirmative Action and Legal Knowledge: Planting Seeds in PlowedUp Ground” (Spring 1988) 11:1 *Harv Women’s LJ* 1 [Matsuda, “Affirmative Action and Legal Knowledge”]. See also Tina Grillo, “Tenure and Minority Women Law Professors: Separating the Strands” (1996-1997) 31:4 *USF L Rev* 747 (noting the patterns of exclusion within law school faculty composition at 747-48).

30. Sheila Foster, “Difference and Equality: A Critical Assessment of the Concept of Diversity” (1993) *Wis L Rev* 105 at 133.

31. *Ibid* at 126.

A diversity program aimed at remedying historical exclusion would strip back layers of historical understandings of the law and lawyering in order to expose the foundations of exclusion. This normative transformation, if undertaken in legal education, would have necessary implications. It would demand a critical assessment of what it means to “think like a lawyer,” because it would challenge the inherited professional model and, necessarily, the skills and traits that characterize the “good” lawyer.³² Recognizing that lawyers have a privilege that requires them to embed responsibility in their professional culture is one reason legal regulators enforce rules of professional conduct. However, embedding the culture of professional responsibility begins not with admission to the bar and to professional regulation, but with education. Law teachers are in a primary position to initiate students into legal culture, identity, analysis, and action well before the regulator takes on the role of governing professional responsibility. The question remains whether legal educators will challenge and reform inherited approaches to legal professionalism or simply replicate them. A diversity pedagogy requires the former if it is to meaningfully deliver on the stated normative commitments.

The premises on which legal reasoning is based present the key challenge for teaching law from a diversity-as-equality perspective. Principal among these premises is the posture of neutrality or objectivity in law. Writing as a black woman teaching in an American law faculty in the 1990s, Kimberlé Crenshaw identified a governing myth in traditional legal education, “perspectivelessness,”³³ which is described as a myopic posture that obscures or ignores patterns of inequality and the complicity of the law, legal institutions, and the legal academy in perpetuating structural racial inequality.³⁴ The harm of perspectivelessness is that it speaks a ‘truth’ about law’s neutrality that is plainly untrue for members of disadvantaged communities. The ways in which perspectivelessness masks law’s

32. See Tanovich, “Law’s Ambition,” *supra* note 23; Trevor CW Farrow, “The Good, the Right, and the Lawyer” (Osgoode Hall Law School Comparative Research in Law & Political Economy Research Paper No 8/2013), online: <<http://digitalcommons.osgoode.yorku.ca/clpe/257>>; David Luban, *Lawyers and Justice: An Ethical Study* (Princeton, NJ: Princeton University Press, 1988) (arguing that, for all intents and purposes, lawyers are “the law” for the vast majority of the public and for this reason, being a good lawyer and an ethical lawyer is important for the entire justice system).

33. “Race-Conscious Pedagogy,” *supra* note 29 at 2-3, 6, 10, 12. See also Brenna Bhandar, *supra* note 10.

34. There is a sufficient body of work now to accept as sound and persuasive the notion of a broadly shared experience of racial antagonism and exclusion stemming from the conventional ways in which the law is created, reproduced, interpreted, applied, and taught. See generally, Richard Delgado & Jean Stefancic, *Critical Race Theory: An Introduction*, 2d ed (New York: NYU Press, 2012); Crenshaw, “Race-Conscious Pedagogy,” *supra* note 29.

complicity in reproducing racial exclusion are muted by the law's embrace of formal equality.³⁵ Indeed, the very idea of a perspectiveless, 'neutral' law is born of the concept of formal equality. Colour-blindness is a classic example of a formal equality mindset.³⁶ Under such models, equal treatment is ensured through 'objective' decision-making and by treating everybody the same.

Formal equality accepts the moral view that all persons are, at least theoretically, equally capable of realizing or fulfilling any goal reasonably available to any other person. However, it fails to appreciate historical factors that frustrate the possibility of actual equality of opportunity. Formal equality fails to account for the underlying conditions that create exclusion in the first place. It is not useful to teach law from an internal, false-neutral perspective. Rather, law teachers are increasingly realizing that effective legal education must be self-revealing about the different narratives supporting law's meaning and impact.

The embrace of legal pluralism as a tool for understanding overlapping and sometimes conflicting normative systems helps confront the pressures of diversity. A pluralist understanding of law seeks to achieve

detachment from legal centralism revolving around state law, criticism of the exclusiveness of state law, decentralization of court-centered judicial studies, exploration of non-state legal orders, unveiling of informal socio-legal practices, and an understanding of law as a multi-centered field that deals with the convergence of a multiplicity of norms, localities, states, global sites, and practices.³⁷

Because society is increasingly differentiated and the application of universal norms is practically fraught, social-fact pluralism (*i.e.*, descriptive pluralism) describes the realities of the multicultural, globalizing societies in which North American law schools are operating.³⁸ However, even normative pluralism (*i.e.*, pluralism as a normative goal) "will [not] on its own provide ... direct guidance on normative questions."³⁹ For this reason, if diversity is a manifestation of

35. The concept of substantive equality is favoured by many who take a broader view of the original causes and enabling constructs that lead to the persistence of systemic discrimination. Formal equality remains a dominant, and even resurgent, model of conceiving of equality. See Mario L Barnes, Erwin Chemerinsky & Trina Jones, "A Post-Race Equal Protection?" (2010) 98:4 *Geo LJ* 967 (warning against the perils of a "post-race" or race-neutral analysis of American legal history or contemporary realities, given statistical evidence showing parallels between race and social and economic disadvantage at 968).

36. Judith G Greenberg, "Erasing Race from Legal Education" (1994) 28:1 *U Mich JL Ref* 51.

37. Gad Barzilai, "Beyond Relativism: Where Is Political Power in Legal Pluralism?" (2008) 9:2 *Theor Inq L* 395 at 396.

38. See William Twining, "Normative and Legal Pluralism: A Global Perspective" (2010) 20:3 *Duke J Comp & Int'l L* 473.

39. *Ibid* at 517.

social-fact pluralism, it still requires a normative corollary. This article asserts that, within the diversity pedagogy model, substantive equality is the value that provides the normative content.

Equality as a diversity norm in legal education must do two things. First, it must embrace normative pluralism. That is, it must accept that no one perspective or system of positive law has dominion over 'truth.' And, for this reason, the second thing equality as a diversity norm must do is to reject the idea of "perspectivelessness" as a normative frame or default position in legal instruction. False notions of 'neutral' or disinvested legal analysis rest on an internalized, constructed, and self-referential concept of 'objectivity' that distorts reality by employing established perspectives to the exclusion of others. The privileging of tradition occurs by holding to the idea that legal analysis can be taught as a fixed, objective 'science' without directly engaging with changes or conflicts of individual values, experiences, and world views. Thus, subverting the notion of objectivity or neutrality in legal analysis is a necessary precondition to promoting diversity-as-equality in education and creating space for the law to embody the full panoply of human experience.

Speaking about diversity in terms of inclusion and exclusion helps emphasize important historical connections between power, privilege, and professionalism. It also acknowledges gendered and racialized patterns of exclusion. When viewed in this full light, the distinction between grounds of difference (what I call the "variety approach") and patterns of exclusion (the "diversity approach") becomes critically important. The promotion of diversity without a willingness to investigate and expose the sources of exclusion and to commit to change would be meaningless and even counter-productive, given the social fact of inequality. Thus, a variety approach, which pursues the goal of representation, only goes part way. Diversity from an equality frame of reference moves beyond representation and pursues the more meaningful goal of inclusion. In Part II(A-B), below, I outline how the dual components of representation and inclusion are integral to a substantively meaningful concept of diversity.

A. REPRESENTATION

Although there is no universal definition of diversity, it is widely accepted that the legal profession should be representative of the significant personal and group differences that constitute the broader society. This norm of "representation" looks to the social makeup of a particular jurisdiction and asks whether there is a rough correlation between the demographic composition of society and that of the constituent members of the legal profession. So, for example,

if Aboriginal peoples constitute 2 per cent of Ontario's population but only 1 per cent of lawyers in that province,⁴⁰ then we have a representation deficit of Aboriginal lawyers in Ontario. The reason why a representation gap is viewed as a problem is because the foundational arrangements of liberal democracy provide assurances, at minimum, that all citizens have equal access to the same opportunities as everyone else. Equal opportunity is the baseline of the representation rationale. A representation gap is evidence that this basic assurance of equality is malfunctioning.⁴¹ Within this logic, the onus rests with the legal academy and profession, if they fail to draw broadly from different sectors of the society, to remedy the sources of exclusion and mitigate their effects.

The equality interest in promoting diversity has gained relevance as a result of demographic changes in recent decades that have radically altered the North American population. In Ontario, for example, by the mid-2000s "visible minorities"⁴² constituted more than 20 per cent of the population and growing; in the city of Toronto, they were nearly half the population.⁴³ In a report prepared for the LSUC, Michael Ornstein finds that between 2001 and 2006, the proportion of non-white lawyers rose from 9 per cent to 11.5 per cent—well below their demographic representation in Ontario.⁴⁴ Among younger lawyers (aged 25–34), the proportion of non-white lawyers (20 per cent) in 2006 was on a par with their provincial population figure.⁴⁵ On the whole, the legal profession appears to be on track to be statistically representative in the near

40. These figures are current to 2006. See Ornstein, *supra* note 9 at 2–4.

41. It is beyond the scope of this article to trace, empirically, the sources of under-representation. However, law schools committed to promoting diversity can be said, even on a crude reading of the evidence, to inherit and reproduce exclusionary patterns of race and class privileging, despite promises of inclusion.

42. Statistics Canada adopts the Employment Equity definition of "visible minority," as "persons, other than Aboriginal peoples, who are non-Caucasian in race or non-white in colour." The following groups are listed as primary examples of visible minority communities in Canada: "Chinese, South Asian, Black, Arab, West Asian, Filipino, Southeast Asian, Latin American, Japanese, and Korean." See Statistics Canada, Visible Minority Person (18 December 2012), online: <<http://www.statcan.gc.ca/tables-tableaux/sum-som/l01/cst01/demo53c-eng.htm>>.

43. According to the 2006 Canadian Census, Ontario, a province of roughly 12 million residents, had a population of 2.7 million "visible minorities," constituting 22.5% of the population. In Toronto, a city of 5 million, visible minorities numbered 2.1 million, or 42% of the city's population. See Statistics Canada, *Visible minority population, by census metropolitan areas (2006 Census): (Kingston, Peterborough, Oshawa, Toronto, Hamilton)* (6 November 2009), online: <<http://www.statcan.gc.ca/tables-tableaux/sum-som/l01/cst01/demo53c-eng.htm>>.

44. Ornstein, *supra* note 9 at i.

45. *Ibid.*

future. Nonetheless, there remain significant representation gaps when the data are examined more closely. For example, Ornstein found that when looking at minority groups in Ontario, there were ratios of around 1 lawyer in 627, 750, and 755 for members of the South Asian, Black, and Chinese communities, respectively.⁴⁶ In contrast, Ornstein found “just one Filipino lawyer for every 2,730 members of that community, one for every 1,649 Latin Americans, and one for every 994 Southeast Asians.”⁴⁷ Apparently, as old representation deficits are narrowed, new ones form and widen.

It is worth observing that the legal profession has always had a representation deficit.⁴⁸ Explicit exclusionary norms operated for generations. Such norms became untenable in the face of rapid demographic changes, globalization, and large-scale transnational migration. These and other factors motivated social and legal changes beginning in the 1960s,⁴⁹ as part of the global “rights revolution.”⁵⁰ The 1960s saw Canada’s first attempts at incorporating a national rights instrument, the *Canadian Bill of Rights*,⁵¹ as well as provincial civil rights statutes.⁵² The adoption of the *Canadian Charter of Rights and Freedoms*⁵³ in 1982 created a clear constitutional mandate to promote a vision of the country based on the goal of social inclusion. This was reflected in the *Charter’s* commitment to the “preservation and enhancement of the multicultural heritage of Canadians”⁵⁴

46. *Ibid.*

47. *Ibid.* at ii.

48. Constance Backhouse, “Gender and Race in the Construction of ‘Legal Professionalism’: Historical Perspectives” (Paper delivered at the First Colloquium on the Legal Profession, October 2003), online: <http://www.lsuc.on.ca/media/constance_backhouse_gender_and_race.pdf>; Fiona Kay, “Crossroads to Innovation and Diversity: The Careers of Women Lawyers in Quebec” (2001-2002) 47:4 McGill LJ 699.

49. The American civil rights movement of the 1960s dovetailed with the global movement to give life to universal human rights. See *Universal Declaration of Human Rights*, GA Res 217(III), UNGAOR, 3d Sess, Supp No 13, UN Doc A/810, (1948) 71.

50. See Charles Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* (Chicago: University of Chicago Press, 1998) (examining the growth of civil rights and human rights across the world, and noting a democratization of access to the courts through social activism).

51. SC 1960, c 44.

52. See e.g. *Code*, *supra* note 26 (first enacted in June 1962). See also Ontario Human Rights Commission, *Human Rights: The Next Generation* (Annual Report of the Ontario Human Rights Commission, 2011-2012).

53. *Supra* note 24.

54. *Ibid.*, s 27. See also Joseph Eliot Magnet, “Multiculturalism and Collective Rights” (2005) 27:1 Sup Ct L Rev 431 at 441.

and its entrenchment of an individual right to equality, paired with a shield for government-initiated affirmative action for disadvantaged groups.⁵⁵

The Supreme Court of Canada's first judgment interpreting section 15 equality rights involved a claim by a white South African corporate lawyer seeking access to the profession in British Columbia.⁵⁶ In rejecting the citizenship requirement for admission to the bar, the Court affirmed that principles of equality would govern the legal profession. Describing the public importance of lawyers and the power wielded through the licence to practice, Justice McIntyre stated:

While it may be arguable whether the lawyer exercises a judicial, *quasi-judicial*, or governmental role, it is clear that at his own discretion he can invoke the full force and authority of the State in procuring and enforcing judgments or other remedial measures which may be obtained. It is equally true that in defending an action he has the burden of protecting his client from the imposition of such state authority and power. By any standard, these powers and duties are vital to the maintenance of order in our society and the due administration of the law in the interest of the whole community.⁵⁷

Understanding the essential role of the lawyer in the administration of justice in the public interest in the *Charter* era makes the diversity imperative more than a matter of lawyer regulation and professional competence. It is now a function of constitutional commitments to equality.

B. INCLUSION

Closing the representation gap is just one component of promoting a conception of diversity that is grounded in equality. Demographics alone are not what generated the history of exclusion. In Canada, for example, the history of exclusion has been traced to an elitist conception of the legal profession.⁵⁸ One hundred years ago, it was widely accepted that common law lawyers should be white, male, Protestant, and English.⁵⁹ The concept of legal professionalism, modelled on the English 'gentleman,' was the standard used to define the behaviours and habits of a good lawyer. In its effect, this standard operated to exclude non-English, non-elites, and women from the legal profession.

55. *Charter*, *supra* note 24, ss 15(1)-(2), 27.

56. *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143, 27 DLR (4th) 600.

57. *Ibid* at 188.

58. Annie Rochette & Wesley Pue, "Back to Basics?: University Legal Education and 21st Century Professionalism" (2001) 20:1 Windsor YB Access Just 167. See also Backhouse, *supra* note 48.

59. *Ibid* at 3.

With time, the profession evolved, barriers lowered, and diversity inroads gradually brought colour and gender representation to the profession.⁶⁰ Evolving public attitudes about equality and discrimination helped to lower barriers and narrow the representation gap, as more women and minorities gained access to the profession.⁶¹ However, rapidly changing demographics would have an even stronger widening effect on the representation gap. In other words, as elitist, racist, and sexist ideas that had perpetuated exclusion receded, thereby generating openness to increasing racial and gender representation in the profession, the demographic diversification of the general population far outpaced the entry of minorities into law school and the profession.⁶² The problem of exclusion—historically linked to systemic and institutional bigotry and prejudice—was heightened by rapid demographic changes.⁶³ What measures were adopted to remedy historical exclusion were not sufficient to keep up with the pace of social diversification.⁶⁴

A flurry of critical race and feminist scholarship beginning in the 1980s illustrated the link between exclusion and inequality,⁶⁵ highlighting the experiences

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60. See Ornstein, *supra* note 9 at i (observing ethnic diversity among younger lawyers (aged 25-34) to be on a par with their provincial population figures). However, compared to other professions, the legal profession has been notably slow at diversifying and remains significantly outpaced by virtually every other regulated profession in that respect (*ibid* at ii).
61. *Ibid* at 6-7, 18-20.
62. *Ibid* at 8 (noting that, as of 2006, “11.5 percent of Ontario lawyers were members of a visible minority group, compared to ... 23.0 percent of the Ontario population”).
63. By the 1990s, the Canadian legal profession acknowledged the need to address the problem of ethnic under-representation. See The Law Society of Upper Canada, *Canadian Bar Association Report and Recommendations on 'Racial Equality in the Legal Profession'* (Toronto: Law Society of Upper Canada), online: <<http://www.lsuc.on.ca/media/cbaresponse.pdf>> (“A detailing of challenges, barriers and opportunities for change, the report provides a unique look into the issues of racial discrimination in terms of entry to and activity within the practice of law, and various models promoting racial equality within the legal profession” at 1).
64. See Ornstein, *supra* note 9.
65. Critical scholarship emerged out of the law and society movement of the late 1960s. Critical race and feminist scholarship blossomed in the 1980s. For a survey of the origins of the law and society movement, see Bryant Garth & Joyce Sterling, “From Legal Realism to Law and Society: Reshaping Law for the Last Stages of the Social Activist State” (1998) 32:2 *Law & Soc’y Rev* 409.

of women and people of colour in legal education.⁶⁶ According to these critics, exclusionary historical forces did not evaporate, notwithstanding the narrowing of the representation gap brought about by diversity-inspired admissions policies.⁶⁷ For the critics, historical exclusionary practices are embedded in the content, modes, and forms of contemporary legal education. Although student and faculty composition have evolved, law schools continue to teach according to a standard of “whiteness” that, for many, perpetuates a generalized experience of alienation from law.⁶⁸

Although law teachers may not necessarily intend to perpetuate exclusion,⁶⁹ and often aspire to laudable goals,⁷⁰ critics argue that inherited pedagogical methods and expectations, norms of legal reasoning, and standards for evaluating “merit”⁷¹ have the effect of perpetuating a tradition and practice of

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66. Kimberlé Crenshaw et al, eds, *Critical Race Theory: The Key Writings that Informed the Movement* (New York: The New Press, 1995); Derrick Bell, “The Final Report: Harvard’s Affirmative Action Allegory” (1989) 87:8 Mich L Rev 2382; Williams, *supra* note 29 at 1; Kimberlé Crenshaw, “Race, Reform, and Retrenchment: Transformation and Legitimation in Anti-Discrimination Law” (1988) 101:7 Harv L Rev 1331; Mari J Matsuda, “Looking to the Bottom: Critical Legal Studies and Reparations” (1987) 22:2 Harv CR-CLL Rev 323.
67. See e.g. Jennifer Gerarda Brown, “‘To Give Them Countenance’: The Case for a Women’s Law School” (1999) 22:1 Harv Women’s LJ 1; Valerie Fontaine, “Progress Report: Women and People of Color in Legal Education and the Legal Profession” (1995) 6:1 Hastings Women’s LJ 27.
68. Margalynne J Armstrong & Stephanie M Wildman, “Teaching Race/Teaching Whiteness: Transforming Colorblindness to Color Insight” (2008) 86:3 NCL Rev 635. See also Younes, *supra* note 10; Bhandar, *supra* note 10.
69. Matsuda, “Affirmative Action and Legal Knowledge,” *supra* note 29 at 11 (arguing that legal knowledge is constructed in an exclusionary way to ensure that outsider voices are perpetually marginalized).
70. Jonathan Feingold & Doug Souza, “Measuring the Racial Unevenness of Law School” (2013) 15:1 Afr-Am L & Pol’y 71 (stating that “race-dependent burdens can arise in institutions and communities that expressly promote racial diversity and condemn overt racial discrimination; good intentions are no panacea to racial unevenness” at 73).
71. Matsuda, “Affirmative Action and Legal Knowledge,” *supra* note 29. See also Daria Roithmayr, “Deconstructing the Distinction between Bias and Merit” (1997) 85:5 Cal L Rev 1449 (critiquing merit on the basis that law school admission standards necessarily embody race-conscious social preferences that existed at the time the standards were developed, and which “disproportionately exclude people of color and women because the standards historically have been developed by members of dominant groups in ways that end up favoring them” at 1452); Kimberly West-Faulcon, “More Intelligent Design: Testing Measures of Merit” (2011) 13:5 U Pa J Const L 1235 (referring to social science evidence to argue that common law school admissions tests are not good predictors of future academic performance and lead to racial distortions based on an unsound theory of human intelligence).

racial exclusion.⁷² Critics suggest that traditional law school evaluation is hardly merit-based and neutral. They argue that ranking methods privilege a white male normativity, have differential impacts on non-white, non-male students, and perpetuate disadvantage and bias.⁷³ They warn that the postures of ‘neutrality’ or ‘objectivity’ in the dominant modes of legal analysis and methods of evaluation operate to mask the reproduction of racial hierarchy.⁷⁴

Law faculties have not been oblivious to these concerns and critiques. However, past and existing efforts at diversity promotion within law faculties are best described as a thin approach to diversity. Law school administrators have directed energies at closing the representation gap through equitable admissions policies. In so doing, they have failed to undertake the kind of curriculum reform needed to make the form and content of legal education a more inclusive experience, one that is more directly relevant to the experiences of the diverse society that law schools are now expected, and claim, to represent.

III. THE FIRST WAVE OF DIVERSITY IN LEGAL EDUCATION

The first wave of diversity promotion in legal education was characterized by two main sites of administrative action: admissions and curricular offerings. After surveying each of these sites, I will posit that these measures have served an important purpose but offer only partial remedies, providing incomplete mitigation of the history of exclusion in legal education.

A. TARGETED ADMISSIONS: AFFIRMATIVE ACTION IN ACTION

Affirmative action in legal education was designed to increase the ranks of minority lawyers in the profession by admitting members of identifiable, historically disadvantaged groups.⁷⁵ Access to an affirmative action program was

72. See *e.g.* Crenshaw et al, *supra* note 66.

73. Richard Delgado, “Rodrigo’s Tenth Chronicle: Merit and Affirmative Action” (1995) 83:4 *Geo LJ* 1711 [Delgado, “Rodrigo’s Tenth Chronicle”]. See also Roithmayr, *supra* note 71; West-Faulcon, *supra* note 71.

74. Younes, *supra* note 10; Rob Trousdale, “White Privilege and the Case-Dialogue Method” (2010) 1:1 *Wm Mitchell L Rev* 28 (describing the result of formal race neutrality as “a classroom environment that actively encourages the silencing of minority students. Forced to stand apart from their own self, minorities are generally more reluctant than their white counterparts to speak in the classroom” at 41).

75. Dolores J Blonde et al, “The Impact of Law School Admission Criteria: Evaluating the Broad-Based Admission Policy at the University of Windsor Faculty of Law” (1998) 61:2 *Sask L Rev* 529 at 533.

conditioned on membership (usually through self-identification) in a targeted group. Targeted admission would typically consist of altering the 'objective' criteria in admissions standards, while allotting weight to other factors designed to ameliorate the strength of minority applicants' comparative profiles. Although individual merit is conventionally the sole overriding criterion for law school admission, any unearned advantage conferred by affirmative action to the individual by virtue of group membership would be justified on the basis that it redresses historical wrongs (whose effects are systemic and ongoing) that affect individuals by virtue of their membership in that group.

When diverse life experiences or perspectives are seen as strengths sufficient to bolster or complement more conventional criteria (like undergraduate marks and LSAT scores), affirmative action can provide access to law school for individuals who might never have successfully applied. More importantly, affirmative action programs provide a concrete response to the history of formal and informal exclusion. Law schools benefit by being able to demonstrate better representation, at least formally, which boosts their image and legitimacy. Reversing the discrimination allows for more rapid systemic change than would otherwise occur in a more 'neutral' arrangement over time, and this strategy is more manageable than cruder alternatives.

There was a sense of urgency when the American legal academy began to seriously consider race-targeted admissions as the solution to the representation deficit, which, at the height of the 1960s American civil rights movement, could no longer be ignored. In 1964, black Americans accounted for only about 1 per cent of law students and the same proportion of the legal profession. By 2001, blacks constituted 7.7 per cent of American first-year law students at American Bar Association-accredited schools.⁷⁶ Though not the only factor, targeted admissions were key to increasing black access to law school (especially at elite institutions) and, in turn, to jobs in the profession. Later, affirmative action would drive an even more dramatic demographic shift to broader diversity by including other minority groups, in particular Hispanics, Asian-Americans, and Native Americans.⁷⁷

The assumption behind affirmative action was that, although representation from minority groups would likely increase naturally over time, patience was

76. Richard H Sander, "A Systematic Analysis of Affirmative Action in American Law Schools" (2004) 57:2 Stan L Rev 367 at 374.

77. In 1971, blacks accounted for more than two-thirds of all minorities enrolled in American law schools; by 2001, their proportion had dropped to just over one-third of the racialized student body. See *ibid* at 386.

not an option, both for functional and principled reasons. In the United States, with the civil rights struggle directly engaging issues of law and justice, the liberal establishment at the helm of legal education had to demonstrate commitment to the values of the legal profession at a time of significant political reorientation: “Gradualism as a philosophy of racial justice seemed discredited; many of those running both private and public institutions felt they had to do something rapid and dramatic to demonstrate progress in black access.”⁷⁸

Affirmative action was always controversial in the United States, and the issue has made its way to the US Supreme Court five times in thirty-five years.⁷⁹ In its 1978 decision in *Bakke*,⁸⁰ the US Court very cautiously ruled on the constitutionality of race as a university admissions factor, outlining permissible parameters. Ever since, perhaps out of lawyerly prudence, American law schools have observed a “code of silence” on their affirmative action policies: “The relatively vibrant research and discussion about affirmative action that characterized the late 1960s and 1970s almost totally disappeared in the 1980s and 1990s.”⁸¹ As a result, it became difficult to track empirically results of specific affirmative action programs. In Canada, by contrast, affirmative action received an explicit constitutional shield in section 15 of the 1982 *Charter*. It is therefore surprising how little data has been reported by Canadian law schools operating affirmative action programs. A 1999 study of law school admissions across Canada revealed that the majority of Canadian law schools “had not conducted any empirical studies or reviewed the efficacy of their admissions criteria and policies in any systematic way,”⁸² including “affirmative action, special access, or discretionary admissions policies.”⁸³ It appears that little has changed over the last fifteen years, though further investigations are certainly warranted.

Notwithstanding the urgency of the rights revolution and a powerful consequentialist justification to reverse decades of discrimination, affirmative

78. *Ibid* at 378.

79. See *Regents of the University of California v Bakke*, 438 US 265, 98 S Ct 2733 (1978) [*Bakke*]; *Gratz v Bollinger*, 539 US 244, 123 S Ct 2411 (2003) [*Gratz*]; *Grutter v Bollinger*, 539 US 306, 342 (2003) [*Grutter*]; *Fisher v University of Texas at Austin*, 133 S Ct 2411 (2013). A further case to defend affirmative action was heard at the US Supreme Court in October 2013. At the time of writing, judgement was on reserve. See *Schuetz v Coalition to Defend Affirmative Action*, 134 S Ct 1623, 188 L Ed 2d 613 (2014) [*Schuetz*].

80. *Supra* note 79. The US Court established limits to the kind of affirmative action that may be employed.

81. Sander, *supra* note 76 at 385.

82. Dawna Tong & W Wesley Pue, “Best and Brightest? Canadian Law School Admissions” (1999) 37:4 Osgoode Hall LJ 843 at 855.

83. *Ibid* at 854.

action has always been seen as a temporary measure, necessary in the short term to close the representation gap and level the playing field.⁸⁴ However, changing ethnic representation in law school was only one step in implementing an effective program for meaningful diversity promotion.⁸⁵ Because affirmative admissions policies do not directly address the underlying social forces that create exclusion in the first place, diversity factors in law school admissions have been found to offer only band-aid solutions.⁸⁶ The rising cost of law school tuition, the continued use of the LSAT (despite credible evidence that the test is itself discriminatory),⁸⁷ law school assessment methods (namely, grading and ranking),⁸⁸ and the tepid implementation of affirmative action at some American schools have “combined to depress the number of minorities that are accepted and that ultimately graduate from law school and sit for the bar exam.”⁸⁹ In Canada, a qualitative review of the University of Windsor’s Faculty of Law admissions conducted in the late 1990s found that the school’s access policy constituted “one tool for increased racial diversity,” but that “[a]dditional measures (over and above the passage of time) may be needed to achieve further racial diversity among members of the legal profession, including changes during law school and beyond.”⁹⁰

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84. See *Grutter*, *supra* note 79 at 343 (O’Connor J stating, “We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the [diversity] interest approved today”).
85. See Johanna KP Dennis, “Ensuring a Multicultural Educational Experience in Legal Education: Start with The Legal Writing Classroom” (2010) 16:4 *Tex Wesleyan L Rev* 613 (“Admitting more students of color does not necessarily correlate into more competent attorneys of color being admitted to the bar” at 631-32).
86. Okechukwu Oko, “Laboring in the Vineyards of Equality: Promoting Diversity in Legal Education Through Affirmative Action” (1996) 23:2 *SUL Rev* 189 at 212.
87. William C Kidder, “Does the LSAT Mirror or Magnify Racial and Ethnic Differences in Educational Attainment? A Study of Equally Achieving ‘Elite’ College Students” (2001) 89:4 *Cal L Rev* 1055 (arguing that the LSAT is culturally biased in the sense that it creates an artificial barrier to entering the legal profession). See also Phoebe A Haddon & Deborah W Post, “Misuse and Abuse of the LSAT: Making the Case for Alternative Evaluative Efforts and a Redefinition of Merit” (2006) 80:1 *St John’s L Rev* 41.
88. Delgado, “Rodrigo’s Tenth Chronicle,” *supra* note 73 (arguing that students admitted under affirmative action are evaluated based on constructions of “merit” that are rooted in historical patterns of exclusion at 1712-14).
89. Patricia A Wilson, “Recreating the Law School to Increase Minority Participation: The Conceptual Law School” (2010) 16:4 *Tex Wesleyan L Rev* 577 at 578.
90. Blonde et al, *supra* note 75.

As much as affirmative action admissions programs can be justified under theories of equality,⁹¹ their practical value remains empirically contested.⁹² Many indicators suggest that the experience of racial minorities, once they are admitted to law school, is shaped by continued patterns of social and professional exclusion and academic underperformance. For example, a study of a number of American law school affirmative action programs revealed high rates of attrition of students admitted through such programs.⁹³ There remain ongoing problems of retention and completion of law school by minority students.⁹⁴ Evidence also suggests that minority students are “more at-risk, are more in need of academic support, are more likely to leave law school for financial reasons, and are more prone to failing the bar exam.”⁹⁵ Among elite American law schools, minorities are most often concentrated in the bottom half of their classes.⁹⁶ Poor performance in law school makes it harder to graduate and more onerous to launch a career in legal practice. While these difficulties cannot be traced causally to law school admissions policies alone, it is clear that well after the introduction of affirmative action, the minority experience in law school continued, to a surprising extent,

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91. See *Gratz*, *supra* note 79. The US Supreme Court held that a “minority quota” system of affirmative action violated the equal protection rights of white applicants. In the sister case, *Grutter*, the US Court held that using race as one among many factors in university admission decision-making was not unconstitutional. See *Grutter*, *supra* note 79. In Canada, s 15(2) of the *Charter* provides that the equality guarantee “does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.” See *supra* note 24.
92. See *e.g.* Sander, *supra* note 76 at 370 (suggesting that minority students would be better off attending lower-ranked law schools to which they can be admitted without the need for affirmative action). *Contra* David L Chambers et al, “The Real Impact of Affirmative Action in American Law Schools: An Empirical Critique of Richard Sander’s Study” (2005) 57:6 *Stan L Rev* 1855.
93. Sander, *supra* note 76.
94. Carole J Buckner, “Realizing *Grutter v. Bollinger*’s ‘Compelling Educational Benefits of Diversity’ – Transforming Aspirational Rhetoric Into Experience (2004) 72:4 *UMKC L Rev* 877 (linking lack of engagement with minority issues in class with feelings of alienation by minority law students at 888).
95. Dennis, *supra* note 85 at 630 (also citing the fact that the ABA has identified students of colour as “at-risk” with respect to passing the bar examination). See also Anupama Ramlackhan, “Leveling the Playing Field in Law School: A Look at Academic Assistance Programs for Minority Law Students” (2006) 1:1 *J Race, Gender & Ethnicity* 27 at 31; Sander, *supra* note 76 at 426-67.
96. Wilson, *supra* note 89 at 581.

to be shaped by the same patterns of exclusion and obstruction that members of those communities experience outside legal education.⁹⁷

Affirmative action admissions programs have been found to work best when paired with robust academic support throughout law school.⁹⁸ This approach helps to alleviate the ingrained tendency of legal education to exclude members of historically disadvantaged or outsider communities.⁹⁹ But it also highlights that, notwithstanding the positive goals of affirmative action, structural obstacles to many minority students do not disappear simply because they are admitted to law school. Indeed, academic support may help to mitigate exclusion by enabling outsider students to navigate the extra hurdles they face in a structurally adverse environment. It does not, however, on its own, remedy the underlying causes of exclusion.

No doubt, affirmative action has removed some barriers and created new opportunities that did not exist before. Increasing access to legal education for members of historically excluded groups has enabled certain minorities to move from ‘outsider’ to ‘insider’ status and to achieve professional success. But it has also created new challenges in a social landscape shaped by underlying systemic inequalities. For these reasons, it is helpful to remember that affirmative action has always been understood by its primary defenders and by the courts as a tool, not a goal. In terms of diversity, affirmative action can help create the conditions for achieving meaningful diversity in the law school by constituting a statistically diverse student body.¹⁰⁰ This is, however, a precondition to the more important

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97. See *e.g.* Rachel F Moran, “Diversity and its Discontents: The End of Affirmative Action at Boalt Hall” (2000) 88:6 Cal L Rev 2241 at 2283-2285 (finding issues of race and gender “largely ignored” within the law school curriculum at 2269); Walter A Allen & Daniel G Solorzano, “Affirmative Action, Educational Equity and Campus Racial Climate: A Case Study of the University of Michigan Law School” (2001) 12:2 Berkeley La Raza LJ 237 (describing a sample law school environment as replete with segregation and racial conflict). For recent findings, see Feingold & Souza, *supra* note 70 (concluding in a 2013 study at UCLA Law School that “[r]acial unevenness and its concomitant burdens are a reality for Students of Color at UCLA Law ... [which is] likely far from unique in this regard” at 114).
98. See Ramlackhan, *supra* note 95. See also Richard Cabrera & Stephanie Zeman, “Law School Academic Support Programs—A Survey of Available Academic Support Programs for the New Century” (2000) 26:1 Wm Mitchell L Rev 205.
99. See Adam G Todd, “Academic Support Programs: Effective Support Through a Systemic Approach” (2002-2003) 38:1 Gonz L Rev 187 at 189 (noting the contributions that academic support programs have made to law schools generally).
100. Similarly, diversity in faculty is a related, though distinct, issue. See generally Kellye Y Testy, “Best Practices for Hiring and Retaining a Diverse Law Faculty” (2011) 96:5 Iowa L Rev 1707.

task of incorporating diversity into the way we understand legal knowledge, skills, reasoning, rules, and authority, and how these things are conveyed pedagogically.

B. CURRICULUM AND TEACHING REFORM: MAKING OUTSIDERS INSIDERS

The second area of first-wave diversity promotion in the law school came in modest curriculum reform that led to the diversification of course offerings. This area has been well studied in Canada. Scholars refer to seminars that focus on experiential and theoretical perspectives of members of marginalized communities as “outsider” courses.¹⁰¹ Like affirmative action in admissions, reform that incorporates outsider courses into the curriculum is justified on equitable grounds for providing a space to pay special attention to the relationship between law and marginalized groups: “Outsider courses offer the very real possibility of creating environments in which otherwise silent voices have not only space, but credibility and perhaps even power.”¹⁰²

Indeed, framing cases in terms of a particular perspective can give voice to questions and commentary about issues of identification for law students who may not otherwise find opportunities in core curriculum courses to explore such issues. One of the first “outsider” courses taught in Canada was “Women and the Law,” offered in 1972-73 at Osgoode Hall Law School.¹⁰³ At the time, Osgoode’s upper-year student population of 518 included 69 women.¹⁰⁴ With time, the relative enrolment in feminist courses declined as the variety and volume of outsider offerings multiplied, especially by the 1990s.¹⁰⁵ Yet, while critical and outsider perspectives could be found on the periphery, little was altered in the core of legal education. Most North American law schools persisted in a failure to integrate critical, counter-dominant discourses and social commentary about the

101. Natasha Bakht et al, “Continuing Outsiders: A Critical Exploration of Outsider Course Enrollment in Canadian Legal Education” (2007) 45:4 Osgoode Hall LJ 667.

102. *Ibid* at 674.

103. *Ibid* at 694.

104. Osgoode Hall Law School historical class records. These figures are derived from the graduating class lists of 1973 and 1974, the members of which would have comprised the 2L and 3L classes in the 1972-1973 academic year [on file with author].

105. Todd, *supra* note 99 at 696-98; Bakht, *supra* note 101 at 669-70.

law adequately into the core curriculum.¹⁰⁶ Even as law schools have moved away from “legal fundamentalism” and embraced socio-legal approaches, this has been matched by a curious persistence of the narrow, doctrinal pedagogical tradition.

Despite the resilience of its traditions, the content, form, and methods of legal education have always been subject to critique: “For a century or more, legal scholars (and some thoughtful practitioners and judges) have one way or another insisted upon the indeterminacy of legal decisions, the historical contingency of legal institutions and processes, and the cultural variability of what people understand ‘law’ to be.”¹⁰⁷ The American Legal Realists of the early twentieth century highlighted the gap between doctrinal study and the lived experience of law, focusing on the disjuncture between appellate decision-making (the focus of law school instruction) on the one hand, and the reality of legal practice on the other.¹⁰⁸ Decades later, critical race and feminist scholars brought their experiences with the law to their scholarly interpretations. They developed compelling critiques of traditional case-method instruction for its tendency to express the law in abstractions and marginalize lived experiences of the law, especially those of members of disadvantaged groups.¹⁰⁹

The critical race and feminist perspectives on law created a discourse linking the general observations of the legal realists and the critical legal studies movement with a race- and gender-conscious exposition of law in all its manifestations: doctrine, legal reasoning, institutions, professional responsibility and ethics, and, of course, legal education. Perspectives grounded in subjective experiences of minorities, such as queer, disabled, Indigenous, and Latino, among others, gave rise to numerous offshoot branches of critical scholarships. Literature in

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106. See Richard Delgado, “The Imperial Scholar: Reflections on a Review of Civil Rights Literature” (1984) 132:3 U Pa L Rev 561 at 563 (critiquing the closed “inner-circle” of academic legal commentary, particularly in prestigious publications). See also Matsuda, “Affirmative Action and Legal Knowledge,” *supra* note 29 (describing the “segregation” or “apartheid in legal knowledge” between established scholarly authority and “outsider” women and people of colour at 2-5); Duncan Kennedy, “Legal Education and the Reproduction of Hierarchy” (1982) 32:4 J Legal Educ 591.
107. Harry Arthurs, “‘Valour Rather Than Prudence’: Hard Times and Hard Choices for Canada’s Legal Academy” (2013) 76 Sask L Rev 73 at 83 [Arthurs, “Valour Rather Than Prudence”] (referring to the Canadian academy). For the American experience, see Spencer, *supra* note 4 (tracing 130 years of American critique of doctrinal legal education).
108. See Brian Leiter, “American Legal Realism” (University Texas Public Law Research Paper No 042, 2002) at 8, online: <<http://ssrn.com/abstract=339562>>.
109. See *e.g.* Crenshaw et al, *supra* note 66; Richard Delgado & Jean Stefancic, eds, *Critical Race Theory: the Cutting Edge* (New York: The New Press, 1995); Derrick Bell & Erin Edmonds, “Students as Teachers, Teachers as Learners” (1993) 91:8 Mich L Rev 2025.

law reviews, especially from the 1990s onwards, began to capture the perspective of racialized faculty and reflect critical discourses. Many such faculty members meditated on issues in the law school, including facing hostility from students for raising racial justice issues in doctrinal or “core” courses.¹¹⁰

The critique of law as complicit in historical and ongoing systemic racial oppression, which was a core claim of the critical race school, is linked to a critique of the practices and assumptions of legal education. Curricula tied to appellate doctrine rather than contextual understandings of law-in-action diminish the realities of minorities’ lives under the law. Unengaged and outmoded methods of instruction, such as the case method and Socratic dialogue, heighten existing power imbalances in the classroom, reward entitlement, and make outsiders feel even more alien. Evaluation methods that reflect a biased ordering of lawyering knowledge and skill—placing, as these do, abstract analytical reasoning at the top and experienced subjective realities at the bottom—again arbitrarily magnify perspectives of privileged law students while minimizing those of minority students. And a faculty composition that remains largely ethnically homogeneous causes minority students to doubt the credibility of law schools’ commitments to diversity.¹¹¹

110. Robert S Chang & Adrienne D Davis, “Making Up Is Hard to Do: Race/Gender/Sexual Orientation in the Law School Classroom” (2010) 3:1 Harv J L & Gender 1; Peter Goodrich & Linda G Mills, “The Law of White Spaces: Race, Culture, and Legal Education” (2001) 51:1 J Legal Educ 15; Armstrong & Wildman, *supra* note 68.

111. See Larry Chartrand et al, “Law Students, Law Schools, and their Graduates” (2001) 20 Windsor YB Access to Just 211. Citing gender and ethnic representation figures at a number of Canadian law school faculties in 1992, the authors conclude:

From even this limited amount of data, we can identify systematic patterns across the schools. There was a clear lack of diversity in faculty composition. Although women made up approximately 50% or more of the student population in each of the five schools, they held only a minority of faculty positions. Aboriginals and visible minority faculty members were even less common. We note that faculty composition may have changed since our study was completed (*ibid* at 216-17).

Even as most faculties now have strong female representation, and there are many examples of female law school deans, the pace of racial representation has been markedly slower. See Ornstein, *supra* note 9 at 14 (observing that, in 2006, 17.6 per cent of all university professors in Ontario were visible minorities—the percentage is likely much lower within law faculties—while they constituted more than 20 per cent of the total population).

Little is done to educate students of colour uniquely about what it means to be a lawyer of colour.¹¹² Meanwhile, white students who do not actively seek out racialized perspectives on the law are likely to spend negligible time reflecting on the differential impact of law on non-majority sectors of society. This has led some to call for a program of multicultural “hypereducation,”¹¹³ whereby all students are instructed about the linkages between the reality of diversity and the norms of equality. This would be successful only if embedded in core legal instruction, not shunted to the periphery of the curriculum. The justification for such a proactive approach to diversity can be traced back to the public function of the lawyer and the unique power and influence that attach to legal professionalism. The goal of an explicit commitment to multicultural education is to produce the “Atticus Finches of tomorrow today.”¹¹⁴ Both white and non-white students stand to benefit and learn from a diversity pedagogy that is rooted in a commitment to substantive equality. A student’s personal experience as a racialized person, for example, does not predetermine his competency to meet the needs of the culturally diverse, minority client. Nor does a student’s whiteness necessarily prevent her from empathizing with the condition of a racial minority. In a “multicultural hypereducation” curriculum, instructors actively subvert stereotypes and biases and help students to see how the law operates to reinforce social, cultural, and economic status markers, and show how the law can be deployed to challenge existing hierarchy and power imbalances.

Outsider courses keep outsider perspectives on the periphery of legal education and do little to transform the core. Students who do not initiate contact with outsider perspectives are unlikely to encounter such perspectives, and if they do, it is likely to pass as a missed opportunity.¹¹⁵ If the goal is to draw attention to perspectives on law that are analytically important, then the question is whether doing so by way of optional, specialized, segregated courses will generate the kind of change needed to make marginal voices more relevant to mainstream legal analysis. If calls for legal education reform include more focus on practical knowledge and applied skills, the relevance of outsider course material will become significant. No serious conception of “practice readiness”

112. A 2013 empirical study at UCLA Law School measuring racial “unevenness” found that “Students of Color experienced far greater levels of stigma consciousness than their White colleagues.” Meanwhile, “White UCLA Law students overwhelmingly proceed through law school without ever consciously thinking about their own whiteness.” See Feingold & Souza, *supra* note 70 at 112-13.

113. Dennis, *supra* note 85 at 632.

114. *Ibid.*

115. Feingold & Souza, *supra* note 70 at 112-13.

can neglect the importance of cultural competencies and an appreciation for the interplay of law, power, and privilege. Shifts in accreditation and standard-setting offer an opportunity to reorient legal pedagogy towards integrating the understanding of subjective experiences of law with skills, theory, and doctrine.

What the above suggests is that without significant curriculum reform, first-wave efforts over-promise with respect to diversity. Though not universally true, a segment of the minority student community that tends to strongly identify as racialized and that pervasively manifests that identity can expect to experience law school as alienation in many, if not most, respects. Targeted admission can come at a high personal cost for minority students, forced to carry burdens that members of dominant social groups do not have to shoulder.¹¹⁶ In finding refuge in outsider courses, students risk permanently labelling themselves outsiders to the legal mainstream, setting an even steeper uphill path to professional success. All of this can have the effect not only of perpetuating historical patterns of racial disadvantage, but also of creating new patterns of insider-outsider exclusion.¹¹⁷ This effect contributes to the perpetuation of historical patterns of exclusion in the law school and in the legal profession, even as some members of historically excluded groups excel and succeed in conventional career paths that may previously not have been available to members of their communities.

C. DIVERSITY AND ACCESS TO THE PROFESSION

Nowadays, it is not only morally desirable for law schools to showcase diversity, it also can benefit a law faculty's profile. The law school can attract the brightest stars from racialized communities by offering a diverse and welcoming environment, a sampling of perspective courses with attractive titles, and a system of professional counselling and supported access to the competitive job market. However, while the law school is the forum in which students are typically first introduced to law firms, it is the firms and members of the profession, not the school, that determine the students' access to professional training, entry to professional culture, and opportunities for employment. The schools deliver graduates to the profession but have no authority over student job placement or firm hiring decisions.

In a very meaningful sense, then, law firms hold the key to professional access for many students. In Ontario, as in all Canadian provinces, every law graduate

116. *Ibid* (arguing that "racial unevenness arises from environmental factors and institutional culture independent from any identifiable perpetrator" at 73).

117. See Sander, *supra* note 76 (describing the "cascade effect" caused by an over-representation of blacks in elite law schools, leaving an ever wider divide between black and non-black students at lower-tier law schools at 410-11).

must secure a training position under the stewardship of a senior member of the profession.¹¹⁸ This makes student trainees¹¹⁹ literally beholden to the members of the profession—and, increasingly, to the law firms—to admit them to professional membership. Despite the dominance of law firm involvement in formal law graduate training through articling programs, law firms fall outside the regulatory purview of law societies and bar associations.¹²⁰ With the gradual move away from articling requirements and a decreased reliance on law firms for training, the responsibility for training “practice-ready” graduates now more than ever falls on the law schools.¹²¹ Thus, if students experience exclusion and underperformance in law school, they are more likely to encounter systemic obstacles in their career.

Indeed, the numbers in Ornstein’s research suggest only modest and slow change in the diversity direction at all levels of legal practice.¹²² There is plenty of cause for concern upon closer analysis of the data.¹²³ At the general level, the places where diversity inadequacies remain virtually unchanged are in the highest levels of influence and authority. Whether in the law firms, the law schools, or the judiciary, racial and ethnic minorities are not only underrepresented, they are

118. In Ontario, a supervising lawyer must have three years’ experience at the bar. This was lowered from ten years in response to a growing “articling crisis” in the province, whereby estimates reach 15 per cent as the number of law graduates unable to qualify for the bar due to lack of articles. On 22 November 2012, the Pathways pilot project was launched, allowing lawyer licensing candidates to complete a Law Practice Program (LPP) as an alternative to articles, starting in the 2014-15 licensing year. See The Law Society of Upper Canada, *Pathways to the Profession: A Roadmap for the Reform of Lawyer Licensing in Ontario* (Final Report of the LSUC Articling Task Force, 25 October 2012) at 13, online: <<http://www.lsuc.on.ca/WorkArea/DownloadAsset.aspx?id=2147489848>>. A concern is that the LPP alternative will stigmatize underprivileged and under-represented minorities, who are less likely to secure traditional articles. See Jean Ko Din, “Ryerson law practice program nets praise, skepticism” *The Ryersonian* (26 November 2013), online: <<http://www.ryersonian.ca/ryerson-law-practice-program-nets-praise-skepticism>>.

119. “Student” is the designation for graduates of accredited law programs in Ontario who are receiving training through articling or the law practice program prior to their admission to the bar. “Law student” refers to a student enrolled in an accredited law degree program in Canada. See Law Society of Upper Canada, By-law 4, *Licensing*, ss 33, 34, online: <<http://www.lsuc.on.ca/WorkArea/DownloadAsset.aspx?id=2147485805>>.

120. See Adam M Dodek, “Regulating Law Firms in Canada” (2012) 90:2 *Can Bar Rev* 383.

121. See *supra* note 6 and accompanying discussion (concerning practice readiness as a core competency for the purpose of law school accreditation).

122. *Supra* note 9 at i-ii, 5, 7, 9, 18.

123. For example, the data illustrate for the first time clear evidence of massive disparities between different social groups, such that some minorities are statistically over-represented in law school, while others are under-represented. See *ibid.*

virtually absent, especially from upper echelons.¹²⁴ Law school commitments to diversity offer the promise of a self-fulfilling career in the law, in a legal culture that celebrates difference and accommodates a multitude of perspectives. However, when students enter the profession, they encounter a world that is slow to change and is rooted in a culture that will appear foreign and inhospitable to many. For the minority student who has already experienced alienation in legal education, it may be an unsurprising realization to be out of place in the profession. Given the pattern of female attrition from the large law firms following the rapid entry of women into the profession,¹²⁵ racial diversity statistics suggest that a similar pattern might already be underway among racial and ethnic minorities.¹²⁶

124. Diversity Institute, *Improving Representation in the Judiciary: A Diversity Strategy* (Toronto: Ryerson University, 2012) at 14; Diversity Institute, "Research from Ryerson University Finds Increased Representation of Women in Canada's Judiciary, but Visible Minorities Left Behind" (27 June 2012), online: <<http://www.ryerson.ca/diversity/news/2012-06-27.html>> (noting that "[v]isible minorities are all but absent among Federal appointments to the courts and the selection process"). Ornstein observes that:

In Ontario in 2006, members of a visible minority accounted for 30.7 percent of all physicians, 31.7 percent of engineers, 17.6 percent of academics and 11.8 percent of high-level managers, compared to 11.5 percent of lawyers. This suggests that potential immigrants who are already lawyers in countries with dissimilar legal structures believe they will be unable to translate their skills in Canada as easily as other professionals. Even immigrants who come to Canada when they are young children are disadvantaged in pursuing a legal career.

See *supra* note 9 at ii. See also *Carasco v University of Windsor*, 2012 HRTO 195 (CanLII) (application filed with the Human Rights Tribunal of Ontario (HRTO) alleging systemic racial discrimination in a law school decanal appointment process and highlighting a history of white privilege in law school governance).

125. See *e.g.* The Law Society of Upper Canada, *Consultation Report: Retention of Women in Private Practice Working Group* (Toronto: LSUC, 2008) at 114, online: <<http://www.lsuc.on.ca/media/retentionofwomen.pdf>>; Law Society of Upper Canada, *Change of Status Research, 2010-2012: Report of the Key Findings Submitted to the Law Society of Upper Canada* (Toronto: LSUC, May 2013) at 36, online: <<http://lsuc.on.ca/ChangeofStatus2013>>.

126. Elizabeth H Gorman & Fiona M Kay, "Racial and ethnic minority representation in large U.S. law firms" (2010) 52 *Studies in Law, Politics & Soc'y* 211 at 213. Gorman and Kay argue:

[I]t is likely that minority underrepresentation in law firms is largely shaped by their disproportionately elevated rates of attrition, which have been described as 'devastatingly high' and a mass 'exodus', rather than by low rates of entry. Associates are more likely to exit when they perceive their future prospects in a firm as unattractive. In the case of minorities, such perceptions are often realistic.

IV. TOWARDS DIVERSITY PEDAGOGY

The law school is a site of production not only of lawyers, but also of law itself. Through decisions about faculty composition, student admissions, research, and curriculum, law faculties determine the knowledge, skills, and priorities that define and constitute the law to a greater extent than they have tended to acknowledge.¹²⁷ The law school also transmits and assimilates the norms, behaviours, and ethics that shape the professional identity. There are implications to the claim that the law school establishes—or plays a significant role in establishing—the normative approach to law and lawyering.

Diversity pedagogy offers an account of legal education that weaves diversity into the forms and practices of law. To achieve this, diversity pedagogy seeks to move beyond thinking about how to make the dominant legal establishment more accessible to “outsiders,” to a more concentrated focus on revising and reorienting the definitions and functions of lawyering. This involves a reorientation of law school pedagogy and administration to produce an institutional and professional culture, reflected in curriculum, that is expressly and comprehensively built on equality-positive assumptions.

Diversity pedagogy is both a theoretical and practical program.¹²⁸ While I do not seek to prescribe a specific set of pedagogical instruments, exercises, or experiments to implement the general prescriptions offered here, we can recognize that law teachers perform two sets of functions: they choose and define the scope and content of legal knowledge; and they transmit that knowledge through doctrinal instruction, practical and skills training, and ethical framing.

127. Law schools never have absolute discretion to determine curricular content and educational programming. In the United States, the American Bar Association (ABA) accredits law schools and most state bar associations only permit graduates of ABA-accredited institutions to be admitted to practice. In Canada, the Federation of Law Societies and provincial law societies play a similar role. Since about 1960, an informal agreement between the Canadian legal academy and the professional regulators allowed the law schools to determine with virtually no oversight the content of legal education. It has been noted that “this mutually beneficial *détente* ended abruptly in 2009” when, “[f]or the first time in the recent history of Canadian legal education, the profession’s governing bodies were formally asserting their claim to be entitled to tell law schools what they must teach, to whom, and to some extent, how.” See Arthurs, “Valour Rather Than Prudence,” *supra* note 107 at 81.

128. This is a description of the theoretical basis on which a pedagogy of promoting meaningful and impactful diversity norms could and, in my view, should be pursued. The task of experimenting with implementing theory is another project altogether. As a teacher who attempts to implement ideas of diversity pedagogy, my theoretical frame is certainly informed and shaped by classroom experience.

By harmonizing the core functions with a properly theorized diversity commitment and by implementing them alongside targeted, diversity-enhancing institutional initiatives, these pedagogical methods can and should be applied creatively and flexibly across different law school settings according to local diversity needs and goals.

A. BEYOND CELEBRATING DIFFERENCE: MEANINGFUL REPRESENTATION

To overcome the insufficiency of first-wave measures, and to promote a more robust conception of diversity, law schools will no doubt have to continue to work to diversify law school classrooms, in terms of both admitting minority students and appointing minority faculty members. But it has become clear that the benefits of diversity do not flow automatically upon adjusting representation. Evidence suggests that minorities typically either assimilate intellectually and culturally in order to succeed in law school and in practice or do not assimilate and experience law school and professional life as alienation. While representation is, normatively, a defensible and necessary condition, it is but a partial and preliminary measure. What is needed is the development of a more thorough program of diversity/equality, both in legal education and in the profession.

Enhanced academic support and the introduction of “outsider courses” have been important for meeting minority students’ needs and affirming their place inside the law school. However, these types of measures offer false comfort; while they may ease the student’s entry to and passage through law school, they do not provide a vehicle for meaningful engagement with diversity issues, nor do they resolve for the minority student the homogenizing pull within conventional legal pedagogy. What is required is an approach to teaching and training that integrates critical voices within legal education and scholarship, and embraces the pedagogical centrality of pluralist narratives in legal history, doctrine, analysis, and reasoning. Far too little scholarship has been devoted to developing the connections between pluralist and counter-dominant approaches to law and the qualities of good lawyering.¹²⁹ This seems to be where the most important work for diversity pedagogy lies: in creating space for different ways to think and behave as a lawyer, not only as a matter of competent service delivery, but also as a matter of individual self-fulfilment.

Indeed, if diversity demands the celebration of difference as a way of promoting equality, there must be some content to the kinds of differences

129. Trevor CW Farrow, “Ethical Lawyering in a Global Community” (Osgoode Hall Law School Comparative Research in Law & Political Economy Research Paper No 9/2013) at 13, online: <<http://digitalcommons.osgoode.yorku.ca/clpe/258>>.

that are celebrated within the diversity paradigm. Diversity also demands a re-evaluation of the kinds of norms that shape the professional model, or range of models, to which students aspire. Normative writers have focused on infusing the reconstructed lawyer model with a commitment to advance justice, promote equality, and “do no harm.”¹³⁰ How this infusion is achieved involves tailoring legal education both to reorient the prevailing model of lawyering and change the characteristics of professional self-image.

The goal for a reformed legal education should be to present the possibility of a lawyer identity to which any student can ascribe or aspire not because it is neutral but because it is inclusive. This can assist in combatting some of the adverse effects of diversity’s vulnerability, such as the attrition of women and minorities from the profession.¹³¹ By reorienting all aspects of legal reasoning, analysis, doctrine, and practice to align with the practical, moral, and political commitments implied in a diversity ethic, the law school can lead a reform agenda that can be expected to have long-term, lasting impact not only on legal education, but also on the entire legal profession.

B. TEACHING TRANSFORMATION: IMPLEMENTING INCLUSION

The primary theoretical challenge of implementing diversity in legal education is to determine how best to subvert the dominance of the inherited models, critically assess what is valuable (and what is not), and then work on improving approaches to legal education to reflect the professional norms of a reconstituted idea of what legal analysis and practice are. Transforming professional norms, practices, and behaviours is no modest task in a profession that is generally resistant to change:

Employing only modest poetical licence, it could be said that nothing *fundamental* distinguishes present educational practices from those of Toronto in 1968 or Vancouver in 1945, Winnipeg in 1925, Halifax in 1900 or Oxford in 1885. Contemporary common law legal education takes its form from schemes launched by elite Anglo-Canadian lawyers a century ago.¹³²

130. See *e.g.* David Tanovich, “Law’s Ambition,” *supra* note 23 (articulating an approach to ethical responsibility rooted in the promotion of justice). See also Rosemary Cairns Way, “Reconceptualizing Professional Responsibility: Incorporating Equality” (2002) 25:1 Dal LJ 27 (proposing an equality-seeking ethic as a core professional responsibility); Duncan Kennedy, “The Responsibility of Lawyers for the Justice of Their Causes” (1987) 18:4 Texas Tech L Rev 1157 (urging a “do no harm” ethic, stating, “Try your best, oh graduating students..., to avoid doing harm with your lawyer skills” at 1158).

131. See Ornstein, *supra* note 9; CBA, *Touchstones*, *supra* note 9; ABA, *Next Steps*, *supra* note 9.

132. Rochette & Pue, *supra* note 58 at 169 [emphasis in original].

The traditional form of legal education has helped reinforce the dominant culture of the profession, described through most of its history as “xenophobic, elitist and generally aligned with capital interests against ordinary citizens.”¹³³ Responding to this legacy with repudiation, scholars in the legal ethics field have used history as moral justification for fundamentally reconceptualizing the role of the lawyer in the legal system and in society.¹³⁴ The project of linking ethics and professionalism to mainstream legal education is as much aligned with the diversity imperative as it is a further example of outward pressures on the scope of what is considered “relevant” and “central” to understanding the law.¹³⁵ Legal ethics necessarily speaks to theoretical and practical questions about legal education.¹³⁶ As ethics becomes a more directed focus of attention in the profession, the teaching of legal ethics and modelling of professional conduct will reach even greater importance. With this confluence, normative ethics and diversity pedagogy overlap considerably.

There is also, as always, constant reciprocal influence between the law schools and the legal profession. The firms rely on law faculties to supply their existing service systems with competent graduates. As law firms have played a decreasing role in lawyer training over the past several decades, they have come to rely increasingly on the law schools to produce “practice-ready” graduates. But the profession also looks to the academy to explain the law, and to describe the legal imagination and scope of possibility. With the focus on law firm hiring processes, the extent of influence that the legal academy has over the *future* of the profession is often underestimated in the face of the perceived dominance of the profession (large firms in particular) over *present* job prospects for students.

All of this is to emphasize that law schools are natural leaders in shaping the law and should boldly embrace diversity pedagogy with a view to transforming

133. W Wesley Pue, “In Pursuit of Better Myth: Lawyers’ Histories and Histories of Lawyers” (1995) 33 *Alta L Rev* 730 at 762-63.

134. The emerging field of Canadian legal ethics demonstrates a strong push towards incorporating diversity values and justice principles into the model lawyer. See *e.g.* Adam M Dodek, “Canadian Legal Ethics: A Subject in Search of Scholarship” (2000) 50:1 *UTLJ* 115; Dodek, “Ready for the Twenty-First Century,” *supra* note 22; HW Arthurs, “Why Canadian Law Schools Do Not Teach Legal Ethics” in Kim Economides, ed, *Ethical Challenges to Legal Education & Conduct* (Oxford, UK: Hart Publishing, 1998) 151; Allan Hutchinson, “Calgary and Everything After: a Postmodern Re-vision of Lawyering” (1998) 33:4 *Alb L Rev* 768.

135. See W Wesley Pue, “Becoming ‘Ethical’: Lawyers’ Professional Ethics in Early Twentieth Century Canada” (1991) 20:1 *Man LJ* 227.

136. See *e.g.* David Tanovich, “Learning to Act Like a Lawyer: A Model Code of Professional Responsibility for Law Students” (2009) 27:1 *Windsor YB Access Just* 75.

classrooms and curricula, as well as norms that constitute the core values and priorities of the profession.

V. THEORY + PRACTICE + REFLECTION

*Give the pupils something to do, not something to learn; and the doing is of such a nature as to demand thinking, or the intentional noting of connections; learning naturally results.*¹³⁷

If diversity in legal education is the goal, this article has thus far suggested that institutional strategies have failed to promote a meaningful conception of that goal. Diversity pedagogy calls for a reconceptualization of the normative model of lawyering that is produced in law school. Part V(A), below, provides a general proposal of how that can be achieved. I argue, first, for disrupting the “science of law” approach that has dominated the core of legal education for more than a century. This is not to turn the study of law into an anti-intellectual exercise, but rather to enhance and make more meaningful student engagement with the study of law. There is little intellectual value in a method that mutes lived experiences and emphasizes abstractions over realities. Next, I argue that the concept of “practice readiness” is the wrong focus of skills training, but is not necessarily a wrong-headed approach. With sufficient and appropriate theoretical grounding, critical tools, and structured reflection, “skills training” can provide an environment where, to quote John Dewey, “learning naturally results.” To this end, I connect the diversity imperative to the theory, forms, and specific outcomes of experiential education.

A. THE DOMINION OF DOCTRINE

Traditional legal pedagogy relies heavily on the “case method” of instruction. Despite curriculum modifications, the case method remains the dominant mode of doctrinal instruction in the first-year curriculum and in much of the upper-year offerings at law schools across Canada and the United States.¹³⁸ The case method is rooted in an understanding of legal analysis as a science. It seeks to organize the law into a system of knowable, predictable, and neutral rules and

137. John Dewey, *Democracy and Education: An Introduction to the Philosophy of Education* (New York: MacMillan, 1916) at 181.

138. Spencer, *supra* note 4.

principles that can be applied generally in any fact situation.¹³⁹ In teaching the law from this perspective—with a focus on the abstract rules—law comes to be understood as a coherent system of conclusions, reached through a process of objective analytical reasoning.

It is widely understood that the case method as a sole mode of legal instruction is unduly narrow. The American Legal Realists of the early twentieth century took aim at its excessive reliance on formalistic application of principles under a pretense of neutrality and predictability, oblivious to context. They argued that legal education must do more than teach cases in order to prepare future lawyers adequately for the contextual contingencies of real-world lawyering.¹⁴⁰ Because the case method mutes or excludes factors that are arguably relevant in any given case, this can have an objectifying impact on members of minority groups who identify with the “other” side of a rule in the face of a dominant frame that treats rules as inherently objective, legitimate, and fair.¹⁴¹

The case method is also criticized for failing to account for arbitrary factors, such as the personal characteristics and political preferences of judges exercising decision-making power.¹⁴² It inadequately considers social-fact variables and leaves no room for serious self-critique within the discourses of legal analysis and reasoning. The case method assumes that legal language is rational and effective, that precedents deserve respect, that the Constitution is legitimate, that formal justice is just, that litigants are generally equal, and that the rule of law is the best bulwark against tyranny. Yet, the case method’s attachment to assumptions that only make sense when presented in the abstract can create actual alienation for students who have experienced or witnessed the law in ways that challenge these underlying assumptions. Objectivity and neutrality in legal analysis, presented without critique or caution in traditional case-method reasoning, can have exclusionary effects in legal education when it discounts as irrelevant non-conformist and diverse perspectives:

[B]ecause of the dominant view in academe that legal analysis can be taught without directly addressing conflicts of individual values, experiences, and world views, these conflicts seldom, if ever, reach the surface of the classroom discussion. Dominant beliefs in the objectivity of legal discourse serve to suppress the conflict by discount-

139. For a classic articulation of the science of law approach, see Oliver Wendell Holmes, “The Path of the Law” (1897) 10:8 Harv L Rev 457 (describing the “body of dogma or systematized prediction which we call the law” at 458).

140. See Jerome Frank, “A Plea for Lawyer-Schools” (1947) 56:8 Yale LJ 1303 at 1315.

141. Crenshaw, “Race-Conscious Pedagogy,” *supra* note 29 at 6.

142. See Leiter, *supra* note 108 at 8 (outlining the various strands of this critique within Realist writings).

ing the relevance of any particular perspective in legal analysis and by positing an analytical stance that has no specific cultural, political, or class characteristics.¹⁴³

Thus, the depersonalization and decontextualization of the law in traditional case-method analysis tends to accentuate the exclusionary impact of law on some minority students. The challenge is that this depersonalization of the law is part of what the case method claims as foundational to its posture of neutrality. Many law professors do highlight the false pretensions of neutrality and colour-blindness in judicial interpretations. But this is no easy task: faculty who attempt to integrate perspectives (critical, racial, feminist, et cetera) into legal analysis risk being accused of lacking objectivity, propagandizing, or failing to teach relevant material.¹⁴⁴ This is a direct by-product of the case method, which devalues social context and critical theoretical approaches. If students are taught that doctrine is all that matters, they will resist attempts at diversifying the content of core courses. Student responses are a reflection of the values and priorities set by the law school. Individual instructors, despite assurances of academic freedom, have little incentive to be creative or experimental in the delivery of “core” subjects.¹⁴⁵ Stated commitments to diversity and transformation do little to change student expectations when the curriculum and classroom reproduce traditional priorities and privilege established perspectives.

B. LEARNING LAW BY DOING LAW: BROADENING SKILLS

One of the primary functions of North American law schools is to prepare JD graduates for the legal job market and to begin the students’ socialization into professional culture. Teaching students how to read a case and to understand its logic and principles imparts an important competency, but is just one of many

143. Crenshaw, “Race-Conscious Pedagogy,” *supra* 29 at 2.

144. Chang & Davis, *supra* note 110.

145. The reasons for this are many, including formal and informal pressures to cover huge amounts of material, market-consumer pressures to conform to dominant forms of instruction, and institutional pressures for teaching to be more “efficient.” See Herbert N. Ramo, “Moving Students from Hearing and Forgetting to Doing and Understanding: A Manual for Assessment in Law School” (2013) 41:4 *Capital UL Rev* 837 at 885. Ramo argues that:

[C]hange [in teaching and evaluation methods] will not come easily because it must take place at every level of the law school. Administrators must reward faculty who engage in innovative teaching practices, not just those who publish most frequently. Teachers must be willing to spend the time needed to modify their current teaching practices to incorporate the more frequent assessments of their students. Finally, students must become willing participants in their own education so that they can become independent lifetime learners (at 885).

skills a new lawyer needs and may not be the most important one. According to an emerging consensus amongst law teachers, law schools must do more than teach doctrine, especially as technology makes access to legal information and knowledge much easier:

Lawyers need to know how to investigate legal issues they have not studied before, and how to keep abreast of changes in the law over the years. They also must recognize that in a world of many legally-trained people and multiple sources of legal information, knowing 'the law' alone will be insufficient to set them apart and cause a client to seek out their services.¹⁴⁶

The law school experience needs to provide some added value. As such, law teachers now realize they must focus not only on cognitive knowledge, but also on identity and skills-based knowledge.¹⁴⁷

The task of achieving a generally well-trained and practice-ready law graduate will be the challenge for the future of legal education. Recent reports suggest even more dramatic declines in law school applications in the United States than previously known,¹⁴⁸ with less dramatic though similar patterns in Canada.¹⁴⁹ The value of expensive legal education in a struggling economy is in question. This fact presents further obstacles to diversity and access. How "practice readiness" is defined will lie at the centre of the struggle between regulators and law schools over how best to make legal education relevant to professional preparedness. The outcome of this project will determine whether the future role of law schools is to shape, or be shaped by, the legal profession. For reasons based on sound evidence and pedagogical theory, and in decisions taken without regulatory pressure, many law schools have undertaken to make experiential education a centrepiece

146. Thomas D Morgan, "The Changing Face of Legal Education: Its Impact on What it Means to Be a Lawyer" (2012) 45:4 Akron L Rev 811 at 832.

147. *Carnegie Report*, *supra* note 5 (listing six tasks that law schools must perform: (1) teach basic knowledge and research; (2) build students' capacity to engage in complex practice; (3) develop students' professional judgment in conditions of uncertainty; (4) teach how to learn from experience; (5) introduce students to a professional role and identity; and (6) encourage contributions to the public service at 22).

148. See Law School Admission Council, *End of Year Summary: ABA Applicants, Applicants, Applications, Admissions, Enrollments, LSATs, CAS* (2014), online: <<http://www.lsac.org/lscresources/data/lsc-volume-summary>>.

149. See *e.g.* Ontario Universities' Application Centre, *Law School Application Statistics* (2013), online: <<http://www.ouac.on.ca/statistics/law-school-application-statistics>>.

of their reform agenda.¹⁵⁰ Linking diversity goals to the framework of experiential education cannot only bridge theory and practice, it can also bring diverse perspectives and experiences to the core of the study of law. This latter possibility has received very little attention.

C. IN FROM THE MARGINS: MAINSTREAMING EXPERIENTIAL EDUCATION

The basic formula for experiential pedagogy (theory+practice+reflection) is not completely new to legal education, though it has attracted revitalized interest in recent years.¹⁵¹ Practical training in law through apprenticeship was, up until the late nineteenth century, the primary method of legal education throughout the common law world.¹⁵² The “science of law” approach, pioneered at Harvard Law School in the 1870s, quickly replaced apprenticeship and became the new norm.¹⁵³ This transition to university-based legal education came about as legal practice became both more complex and the bar became more organized. The law school model was defined by characteristics that directly suppressed and delegitimized the practice-based approach to learning law: It relied on the case method and Socratic teaching, which prioritized the “mastery of principles and doctrines” as opposed to skills and habits; it appointed professors with no prior practice experience and cloistered them in ivory tower faculties; and it required a significant lengthening of the academic program to three years to accommodate the growing amount of material deemed essential to the study of law.¹⁵⁴

The Langdellian model was never impervious to criticism. The American Legal Realists first raised the idea of “clinical” legal education as a complement to

150. For example, in 2010, a university-wide mandate to promote experiential education was adopted after much deliberation at York University in Toronto, where Osgoode Hall Law School is housed. Beginning with the 1L cohort of 2012-2013, the law school implemented a requirement to complete a designated amount of experiential credit hours in order to graduate from the JD program. See Patrick Monahan, “Building an Engaged University: Strategic Directions for York University 2010-2020” (April 2010), online: York University <http://vpap.info.yorku.ca/files/2012/09/White_Paper_Overview_April_15.pdf> (stating that “there will be a significant increase in opportunities for students to participate in an experiential education activity, both domestically and internationally, as a component of their degree program” at 12). See also *Carnegie Report*, *supra* note 5.

151. Roy Stuckey et al, *Best Practices for Legal Education: A Vision and a Road Map* (Columbia, SC: Clinical Legal Education Association, 2007); *Carnegie Report*, *supra* note 5.

152. Spencer, *supra* note 4 at 1956-58.

153. *Ibid* at 1974-75.

154. *Ibid* at 1975-76.

classroom-centred, case-focused studies.¹⁵⁵ The emergence of the Law and Society movement,¹⁵⁶ and the influence of radical left politics on university campuses in the 1960s, generated a normative foundation from which modern clinical legal education was born.¹⁵⁷ Legal clinics departed from the “doctrines and principles” focus to develop an activist pedagogy that aspired to link lawyering practices to a reform social agenda.¹⁵⁸ The clinic was an incubator of “rebellious” lawyering and helped pave the way to transforming the conceptual understanding of the lawyer, from stylized technician to dynamic social actor and lawmaker.¹⁵⁹ This approach was motivated by an opposition to the conventions that persisted in most law schools, along with a desire to increase access to justice for the poor and vulnerable. The role of the lawyer in the clinic was not simply to apply and explicate formal rules. Clinical students learned how to challenge and reinterpret rules, problem-solve and set norms in a fact-based, client specific, socially contingent context. To do this, it became apparent that the law student would need much more than grounding in abstract principles and doctrine.

Thus, the clinic provided a venue for student creativity and energy, while also highlighting the importance of skills training and “learning by doing.” Writing in 1974, just three years after the first clinical programs were established at Osgoode Hall Law School, professor W.H. Angus observed that “we can no longer justify the narrowness of our teaching vehicles... . Law schools have only begun to scratch the surface in clinical training.”¹⁶⁰ Indeed, in addition to teaching skills and providing access to justice to the poor, clinics helped students understand the law through the eyes of the people affected by it. This enabled the development of

155. See *e.g.* Jerome Frank, “Why Not a Clinical Lawyer-School” (1933) 81:8 U Pa L Rev 907 at 910 (critiquing the use of case books and the focus on judicial opinion, to the exclusion of other relevant factors in teaching the law); Karl N Llewellyn, “The Current Crisis in Legal Education” (1948-1949) 1:2 J Legal Educ 211 (critiquing the case study method and urging a curricular shift in law school towards the acquisition of “craft skills,” an early call for clinical legal education at 213).

156. See Garth & Sterling, *supra* note 65.

157. See Jeff Giddings et al, “The First Wave of Modern Clinical Legal Education: The United States, Britain, Canada, and Australia” in Frank S Bloch ed, *The Global Clinical Movement: Educating Lawyers for Social Justice* (Oxford: Oxford University Press, 2011) at 3-8.

158. Julie Macfarlane, “Bringing the Clinic into the 21st Century” (2009) 27:1 Windsor YB Access Just 35 at 36.

159. Gerald Lopez, *Rebellious Lawyering: One Chicano’s Vision of Progressive Law Practice* (Boulder, CO: Westview Press, 1992).

160. WH Angus, “The Individual and the Bureaucracy: Judicial Review – Do We Need It?” (1974) 20:2 McGill LJ 177 at 211-12. Nearly thirty years later, the promise of clinical legal education in Canada was still largely unrealized. See Rose Voyvodic, “Considerable Promise and Troublesome Aspects” (2001) 20:1 Windsor YB Access Just 111 at 112.

a vision of pedagogy and practice that would be responsive to the lived impact of law and the structural reality of power differentiation. Clinical educators saw legal education as an instrument of social transformation, wherein a commitment to justice could be promoted through the dual methods of client-centred lawyering and student-centred learning.¹⁶¹

Over the years, clinical programs have evolved to incorporate experiential pedagogical theories and to reflect the established best practice formula, consisting of theoretical framing, practical instruction, and structured personal reflection.¹⁶² Clinical legal education began on the periphery of the law school curriculum. Today, clinical programs exist at a majority of law schools and have overcome early antipathy to earn credence as a valuable and enriching way of teaching and learning. Not all current clinics are tied to a progressive or leftist political orientation, though many still are.¹⁶³ Some law faculties have clinics focusing on business law, intellectual property law, appellate advocacy, or in-house representation of government and corporations. Despite the embrace of clinical methods across subject areas and fields, clinical legal education remains conceptually distinct from mainstream legal education. Clinical programs, siloed and often physically removed or disconnected from the law school, are viewed as an alternative or complement to the all-important doctrinal instruction that occurs in the lecture hall. Students are aware of the value of a clinical program but also of the stigma that may arise from having “too much” clinical experience on a transcript. Such students may be seen as lacking the intellectual mitre to endure traditional instruction, assumed to be weak in doctrine or unable to engage in high-level legal analysis, or viewed simply as too caring or too political.

The historical marginalization of clinics has already been mitigated by the gradual mainstreaming of experiential education. The value of learning law in the clinics is, at minimum, threefold. First, it escapes the pedagogical focus on abstracting doctrine from facts and context, substantially widening what is relevant to learning and practising law. Second, clinical legal education offers real-life settings in which to apply diverse forms of legal knowledge and abilities

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161. See Janet E Mosher, “Legal Education: Nemesis or Ally of Social Movements?” (1997) 35:3-4 *Osgoode Hall LJ* 613; Lucie E White, “The Transformative Potential of Clinical Legal Education” (1997) 35:3-4 *Osgoode Hall LJ* 603 at 605.
162. See Nigel Duncan, “Ethical Practice and Clinical Legal Education” (2005) 7:1 *Int’l J Clinical Legal Educ* 7 at 18 (arguing that the ideal clinical instructor is steeped in education theory and has practice experience).
163. See Sameer M Ashar, “Law Clinics and Collective Mobilization” (2008) 14:2 *Clinical L Rev* 355 (noting that clinical legal education has, from its inception, eluded clear definition, subject to debates about its purpose, meaning, and potential).

to actual case studies, rewarding different student competencies and skillsets.¹⁶⁴ Third, it employs critical reflection to nurture professional and personal growth, self-healing, and socially responsible and ethical behaviour through the appreciation of the lived impact of law and legal practice. Thus, the mainstreaming of clinical legal education offers possibilities beyond promoting access to justice for members of disadvantaged communities through on-campus and community clinics, fostering students' political consciousness, and appealing to student desire for hands-on experience and skills acquisition. The lessons learned from clinical education offer unique opportunities to further mainstream experiential learning by incorporating it into the core of legal education as a vehicle for advancing diversity pedagogy.

D. EMPLOYING EXPERIENTIAL EDUCATION TO PROMOTE DIVERSITY

There are many ways in which experiential education can integrate and promote diversity pedagogy. First, it can break away from the subject-area dominance of traditional legal education and seek understandings of legal problems through the eyes of differently affected individuals or groups. Such a socio-legal approach can remedy the depersonalizing, abstracting tendency in traditional legal analysis. It helps reorient the focus of study from the rule to the process. Finally, and perhaps most importantly, it teaches legal principles as contextualized by facts. This is in contrast to the case-method approach of extricating the ratio, and then rationalizing the facts according to pre-set analytical frames. Such a shift allows for destabilizing epistemological assumptions, and widens the scope for diverse contributions to the production of legally relevant knowledge.¹⁶⁵

Second, experiential learning promotes diversity because it generally employs more diverse evaluation methods than does traditional legal education.¹⁶⁶ It is well known that end-of-term, high-stakes examinations reward particular cognitive skills that only narrowly capture the skillsets required to be a good lawyer.¹⁶⁷ Evaluation in an experiential learning setting tends to gauge a student's progress over time and with an assortment of evaluative tools. This allows students both to demonstrate their talents in various ways and to develop at their own pace. Experi-

164. Voyvodic, *supra* note at 160 at 117.

165. See Crenshaw, "Race-Conscious Pedagogy," *supra* note 29.

166. See Antoinette Sedillo Lopez, "Leading Change in Legal Education—Educating Lawyers and Best Practices: Good News for Diversity" (2008) 31:4 Seattle UL Rev 775 at 777-79.

167. Ian Weinstein, "Testing Multiple Intelligences: Comparing Evaluation by Simulation and Written Exam" (2001-2002) 8:1 Clinical L Rev 247 (observing that law school grades are not a useful measure or predictor of success as a lawyer at 248-49).

ential learning provides an educational setting where different kinds of students will perform well. It upsets the grades hierarchy that takes hold so quickly in law school and may help doctrinally strong students identify other skills that need development prior to encountering difficulties in real-world practice.

Third, experiential pedagogy is more collaborative, both horizontally and vertically. The experiential teacher is fundamentally different from the traditional lecturer in style, approach, and method. The lecture style is detached, didactic, and impersonal. To the extent that it is dialectical, it thrives on confrontation and is burdened by a tradition of classroom authoritarianism that has unproven pedagogical value (*e.g.*, the Socratic method).¹⁶⁸ Experiential education follows a model of student-centred education, whereby the instructor is a mentor or guide, facilitating the student's self-learning. The student discovers and produces the knowledge herself, making connections through the act of doing. As Dewey put it, "learning naturally results" from being placed in a setting with "something to do,"¹⁶⁹ rather than in the role of passive recipient of the instructor's knowledge, as in lecture-based learning. Similarly, because experiential methods encourage cooperation with fellow students and make the interests of clients (live or simulated) paramount, students are more likely to work as collaborators and allies in problem-solving and knowledge production, rather than as competitors pursuing narrow personal interests (*i.e.*, scarce high grades).

The ways in which experiential education promotes diversity also align with traits commonly attributed to members of the "millennial generation," who now constitute the majority of the North American law student body.¹⁷⁰ Such characteristics include the desire to work collaboratively, a wish to be mentored and nurtured, a drive to do good in the world, and an easy comfort with diversity

168. Todd E Pettys, "The Analytic Classroom" (2012) 60:5 Buff L Rev 1255 at 1268-74 (noting that pure Socratic teaching has disappeared from US law schools for a variety of reasons, including inefficiency and alienation produced by it).

169. *Supra* note 137.

170. Emily A Benfer & Colleen F Shanahan, "Educating the Invincibles: Strategies for Teaching the Millennial Generation in Law School" (2013) 20:1 Clinical L Rev 1 (summarizing research about millennials). The authors make the case for generational generalizations while acknowledging that characteristics cannot be presumptively attributed to all members of the generation.

and difference.¹⁷¹ While experiential education helps mitigate the deficiencies in traditional education by showing legal rules and practices in action, an experiential approach to legal education need not be predicated on an outright rejection of classroom or lecture-based learning. What is clear is that each style or pedagogical mode rewards different skillsets, delivers distinct educational outputs, and may naturally cater to different types of students. What is also true is that, in the appropriate conditions and with competent instruction, any law student should be able to learn under either mode. The ideal legal education would include elements of both doctrinal and experiential learning.¹⁷² Indeed, an important task for scholarship on legal education in the coming years will be to analyze and prescribe methods for integrating and harmonizing doctrinal and experiential learning.

The strongest accounts of experiential education champion it as the “most effective pedagogic device for forcing students to address a full agenda of intellectual and social issues.”¹⁷³ The live-client experience gives students the opportunity to deal with “unstructured situations,” learn how to think through actual professional issues, and study and strategize the law in complex social contexts. Applying the law in the complexities of context and as part of actual legal process could make experiential learning a superior method of understanding doctrine, as compared with extracting abstract principles from appellate dicta. This, of course, depends on the availability of sufficient theoretical grounding through competent supervision and faculty support throughout the learning process. Such a foundation is essential to ensure that the value of hands-on experience is not reduced to mere skills acquisition.

It is also important to note that not all experiential education occurs in a live-client clinic, and not all of the benefits of experiential learning will necessarily accrue to the student in each and every one of these settings. Experiential education provides general benefits simply from learning by doing, with reflection. This formula can be delivered in a rather diverse array of formats

171. *Ibid* at 7-9. Benfer and Shanahan describe members of this generation as people who

[are] comfortable in both virtual and physical space ... appreciate and expect diversity and are collaborative ... [are] trusting of people over 30 and eager to learn from and work with older mentors ... [are] confident, team oriented, conventional, achieving, and ambitious ... are service and cause-oriented and want to contribute to the greater good ... are forward looking, opportunity driven, ready to contribute ... know what they want and believe they can achieve it ... [and have] a greater awareness of and comfort level with diversity of all kinds than previous generations.

172. This is a claim that is echoed in policy documents, such as the *Carnegie Report*. See *supra* note 5.

173. Voyvodic, *supra* note at 160 at 111.

that is broader than what is traditionally understood as clinical legal education. It might include, for example, simulated experiences, such as role-play and mootings. What makes it experiential is fundamentally not whether there is a real client or an actual issue, but rather whether the form of instruction is problem-based. That is, whether it includes the application of theory and doctrine to a practical situation, the opportunity to engage in the act of doing, and a structure for reflection about performance and the process afterwards.

If experiential education is delivered in a manner that conforms to the best practices, as they evolve, diversity pedagogy can be expected to contribute positively to legal education in at least four ways:

1. *Subverting the myth of universality.* Legal education excels when it ensures space for different voices and distinct or overlapping perspectives on, and experiences with, the law and when it encourages students to craft their own professional identity, rather than try to fit into a predetermined role.
2. *Deconstructing power relationships.* Law schools can realign power and can empower students not just with the credential of a law degree, but also with a consciousness of diversity involving professional responsibility, ethics, empathy, and competence. This portrays the lawyer as an agent of change.
3. *Stimulating culture shift in the profession* organically by training students to develop a socially responsible professional self-image, to be contributors to the profession, and to realize the transformative potential of their role as lawyers in the broader society. As opposed to reading law as a body of fixed and determinate text, this kind of diversity invites students to view law as both normatively pluralistic and strategically positivist.
4. *Making lawyers better communicators,* who are able to explain and translate the law to clients across various sources of difference. In this sense, diversity necessarily incorporates aspects of transnational fluency, inter-cultural sensitivity, and global awareness.

VI. CONCLUSION

The implications of embracing a pedagogy of diversity as a governing feature of contemporary legal education would be significant. Fully implemented, diversity pedagogy would enable the promotion not only of basic principles of access and representation, but also of a thicker conception of diversity as a normative goal,

shaped by values of equality and pluralistic understandings of law and lawyering. Diversity pedagogy can, and should, touch on all aspects of law school life, from the doctrinal classroom to clinical placements to career counselling. The kinds of outcomes that will emerge depend on the particular context and circumstances in any given setting. For this reason, educators should focus on diversity-enhancing processes rather than on achieving specific outcomes. With time, best practices will emerge.

The tools for implementing the goals of diversity pedagogy are to be found in innovative teaching methods. The embrace of experiential education offers a timely opportunity to harmonize different strands of law school reform to meet mutually reinforcing ends. What emerges from the aspiration of diversity pedagogy is a model of professional competence and skill that includes a series of attractive and admirable professional qualities, which can be contrasted with outmoded and discredited approaches to legal professionalism. The diversity-trained law student will be emotionally intelligent, as opposed to dispassionate or suppressed; experientially informed, as opposed to abstracted and artificially 'neutral'; empathetic and personally invested, as opposed to detached and indifferent; and critical and creative, not just within established doctrinal boundaries but also in theoretical inquiry and practice techniques. As such, rather than being doctrinaire or merely strategic about ethical rules, the diversity-trained law student will engage in critical self-reflection and nurture a professional culture rooted in ethical conduct.