

PROMISES AND CHALLENGES OF ACHIEVING RACIAL EQUALITY IN LEGAL EDUCATION IN CANADA

Elizabeth Adjin-Tettey & Maneesha Deckha*

This paper considers the challenges law school actors (students, faculty, administrators) face in countering the hegemonic whiteness of Canadian law schools. In examining both admissions policies as well as current dominant law school cultures, the authors reveal how Canadian law schools can act as sites of institutional racism and provide suggestions on how to meaningfully diversify law schools in order to create a more egalitarian society. Part I of the paper focuses on admissions policies. The authors discuss the need for affirmative action and analyze different options for implementing racial balance in the admissions process. The paper also provides insights relating to the need for outreach and recruitment of racialized students as well as considers the way the racialization of poverty may impact attempts to achieve racial equality in legal education. Part II of the paper focuses on the cultural norms that permeate law schools and the difficulties they pose to racialized students and faculty. Specific problematic practices relating to academic support, curriculum content, classroom dynamics, pedagogy, evaluation and administration are identified and concrete steps that law schools can adopt in these areas to achieve greater racial balance are offered. The paper ends by highlighting the importance of racial equality in legal education to the broader goal of achieving a socially just society.

Le présent article porte sur les défis que doivent relever les différents acteurs des facultés de droit (les étudiants, le corps professoral, les administrateurs) en ce qui a trait à l'hégémonie des Blancs au sein des facultés de droit au Canada. À la lumière des règles d'admission et de la culture prédominante actuelle des facultés de droit, les auteurs montrent que les facultés de droit au Canada peuvent s'avérer un lieu de racisme institutionnel. Ils proposent également des façons de diversifier adéquatement les facultés de droit afin de favoriser une société plus égalitaire. La première partie de l'article met l'accent sur les règles d'admission. Les auteurs évaluent la nécessité de mettre sur pied une politique inclusive et analysent différentes avenues visant l'établissement d'un équilibre racial dans le processus d'admission. L'article traite aussi de l'approche et du recrutement d'étudiants de divers horizons culturels de même que l'incidence que peut avoir la pauvreté d'un groupe racial sur ses chances d'atteindre l'égalité raciale dans l'enseignement

* Faculty of Law, University of Victoria.

juridique. La deuxième partie de l'article présente les normes culturelles sur lesquelles se fondent les facultés de droit et les difficultés qu'elles présentent pour les étudiants de groupes raciaux différents et pour le corps professoral. Elle comprend également diverses pratiques problématiques liées au soutien à l'éducation, au contenu du programme d'études, à la dynamique dans les cours, à la pédagogie, à l'évaluation et à l'administration de même que les mesures concrètes que peuvent adopter les facultés de droit dans ces domaines afin d'offrir un meilleur équilibre racial. L'article conclut sur l'importance de l'égalité raciale dans l'enseignement juridique dans l'atteinte de l'objectif plus global de bâtir une société juste.

1. INTRODUCTION

Canada is a racially, ethnically and culturally diverse society. The percentage of racialized groups within Canadian society has been steadily increasing and is expected to reach approximately 30 percent by 2031.¹ In light of this, an important question to ask is whether the Canadian legal system reflects the changing demographics of contemporary Canadian society. A common critique of the Canadian legal system and its institutions has been their Eurocentric focus and the exclusion of the perspectives and experiences of Aboriginal people and other racialized groups notwithstanding commitments to diversity.² Indeed, the failure of the legal system and legal institutions to reflect the racial and cultural diversity in Canadian society has often led to feelings of alienation and second-class citizenship status among members of the excluded groups. For Aboriginal people in particular, this Eurocentrism acts as a constant reminder of their colonization and exacerbates its effects on present generations. Lack of diversity in the legal system and legal institutions has been attributable, at least in part, to the under-representation of persons from racialized groups in law schools and the legal profession and state institutions.³ Given that legal education is a gateway to the legal system and its institu-

¹ See Statistics Canada, "Projections of the Diversity of the Canadian Population, 2006 to 2031" (2010), catalogue no.: 91-551-X, online: Statistics Canada <<http://www.statcan.gc.ca/bsolc/olc-cel/olc-cel?catno=91-551-X&lang=eng>>.

² Many institutions, including universities generally, and law schools in particular, declare commitments to diversity in their mission statements and many have policies to that effect. Yet, commitments to diversity are not always reflected in structural and institutional practices. For example, see Patricia Monture, "Standing against Canadian Law: Naming Omissions of Race, Culture, and Gender" in Elizabeth Comack, ed., *Locating Law: Race/ Class/ Gender/ Sexuality Connections*, 2nd ed. (Halifax: Fernwood Publishing, 2006) at 73; Frances Henry & Carol Tator, "Introduction: Racism in the Canadian University" in Frances Henry & Carol Tator, eds., *Racism in the Canadian University: Demanding Social Justice, Inclusion, and Equality* (Toronto: University of Toronto Press, 2009) at 14–16; Audrey Kobayashi, "Now You See Them, How You See Them: Women of Colour in Canadian Academia" in Henry & Tator, eds., *ibid.*, at 69, 72–73. We emphasize our view that race is a social construction and use the terms "race," "racial" and related forms to describe socially constructed phenomena.

³ For example, see Alan J.C. King, Wendy K. Warren, & Sharon R. Miklas, *Study of Accessibility to Ontario Law Schools: A Report Submitted to Deans of Law at Osgoode Hall, University of Ottawa, Queen's University, University of Western Ontario & Uni-*

tions, including the actors within those systems, racial balance⁴ in law schools will be a step in the right direction to achieving an egalitarian society.⁵ Hence, some of the aims of achieving racial balance in legal education is to challenge the *status quo* and recognize the plurality of interests, values and perspectives in Canadian society and to have this diversity reflected in the legal system and other state institutions.⁶

The goal of this paper is to provide a snapshot of the current dominant practices that should stimulate anti-racist critique within Canadian law schools. We identify some ways in which racial balance in legal education can be achieved, as well as the challenges and promises of those initiatives, using our experiences at the University of Victoria as a model. We first make the case for racial balance in Canadian law schools and then proceed to discuss measures to achieve it. The paper draws from extensive American Critical Race Theory literature, much of it feminist and on legal education. The paper also provides a Canadian filter by discussing the Canadian constitutional jurisprudence that bypasses much of the current American debate regarding the legitimacy of racial balance as a goal for higher learning. We extrapolate from our own experiences as racialized female faculty at a racially imbalanced (and thus typical) Canadian law school, and provide examples from our home institution of promising initiatives in the area of achieving racial balance. The paper thus seeks to engage scholars interested in race-based social justice measures in Canada and elsewhere, especially as they relate to the amelioration of dominant law school cultures and enhanced access to the legal profession

versity of Windsor (Kingston: Social Policy Evaluation Group, Queen's University, 2004) at 89-90; Robert Todd, "LSUC Releases First-Ever Report on Aboriginal Lawyers" *Law Times* (9/16 February 2009) 2. The under-representation of individuals from racialized groups is also prevalent in higher education generally and has repercussions on the number of students from those communities who go on to law and other professional schools. See Anthony Stewart, *You Must be a Basketball Player: Rethinking Integration in the University* (Black Point, N.S.: Winnipeg: Fernwood Publishing, 2009) at 33-34.

⁴ We use the term "racial balance" to mean diversity in law schools to mirror the multi-racial and multicultural reality of Canadian society. We use the terms "racial balance," "racial diversity" and "racial equality" interchangeably.

⁵ We recognize the heterogeneity of racialized groups and also that even members of the same racial or cultural background have different perspectives and experiences based on factors such as gender, socio-economic location, religion, place of origin, etc. See Sonia Lawrence, "Feminism, Consequences, Accountability" (2004) 42 *Osgoode Hall L.J.* 583 at 592-94; Brenda Cossman, "Sexuality, Queer Theory, and Feminism after: Reading and Rereading the Sexual Subject" (2004) 49 *McGill L.J.* 847 at 875-876; Angela Onwuachi-Willig, "This Bridge Called Our Backs: An Introduction to 'The Future of Critical Race Feminism'" (2006) 39 *U.C. Davis L. Rev.* 733 at 735-376.

⁶ Having members of different racial and cultural backgrounds in law schools will not necessarily guarantee the recognition and integration of particular viewpoints in the curriculum or culture of the school and, the legal profession. This will depend on a number of factors, including having a critical and vocal mass, creating and supporting an inclusive environment to allow members of hitherto marginalized groups to thrive (intellectually and emotionally), and the willingness of individuals (faculty, staff and students) and the institution as a whole to create, encourage and be receptive to challenges to the *status quo*.

and societal institutions.

At the same time, the paper seeks to expand the Canadian conversation about racism and racialization within legal education, the legal profession and society generally. While this conversation is comparatively robust in the United States, it is lacking in Canada.⁷ The Canadian Bar Association's 1999 "Report on Racial Equality in the Legal Profession" laid a promising foundation for a more extensive inquiry.⁸ However, a large base of academic scholarship has not yet emerged.⁹ This seems, in part, to do with the low numbers of racialized faculty in Canadian law schools, scholars whose work focus on issues of marginalization other than by gender, class and sexual orientation, and reluctance to perceive such scholarship as legitimate.¹⁰ It is notable that feminist scholarship about legal education and the profession in Canada, while not firmly in the mainstream, is more pervasive.¹¹ The

⁷ Foster notes that the lack of conversation about racism in Canada notwithstanding official multiculturalism must be contrasted with the situation in the United States, which does not pretend to aspire to multiculturalism but rather "is still officially a nation-state based on assimilation and producing the quintessential American boy or girl." Cecil Foster, "Foreword" in Anthony Stewart, *You Must be a Basketball Player*, *supra* note 3, 11 at 17.

⁸ *Racial Equality in the Legal Profession* (Ottawa: Canadian Bar Association, 1999). See also Gerry Ferguson & Kuan Foo, *Addressing Discriminatory Barriers Facing Aboriginal Law Students and Lawyers* (Vancouver: Law Society of British Columbia, 2000); Michael Ornstein, *The Changing Face of the Ontario Legal Profession, 1971 to 2001* (Toronto: Law Society of Upper Canada, 2004); Fiona Kay, Cristi Masuch & Paula Curry, *Diversity and Change: The Contemporary Legal Profession in Ontario* (Toronto: Law Society of Upper Canada, 2004); Merrill Cooper, Joan Brockman & Irene Hoffart, *Final Report on Equity and Diversity in Alberta's Legal Profession* (Calgary: Law Society of Alberta, 2004).

⁹ Exceptions include Leighann Burns & Zara Suleman, "Justicia in your Face: How to Survive Law as an Anti-Colonial, Anti-Racist, Feminist Activist" in Elizabeth Sheehy & Sheila McIntyre, eds., *Calling for Change: Women, Law, and the Legal Profession* (Ottawa: University of Ottawa Press, 2006) 141; Monture, *supra* note 2; Patricia Monture-Okanee, "Ka-Nin-Geh-Heh-Gah-E-Sa-Nonh-Ya-Gah" (1993) 6 C.J.W.L. 119; Patricia A. Monture, "Now that the Door is Open: First Nations and the Law School Experience" (1990) 15 Queen's L.J. 179; Brenna Bhandar, "Always on the Defence: The Myth of Universality and the Persistence of Privilege in Legal Education" (2002) 14 C.J.W.L. 341; Shin Imai, "A Counter-Pedagogy for Social Justice: Core Skills for Community-Based Lawyering" (2002) 9 Clinical L. Rev. 195; Tracey Lindberg, "What Do You Call an Indian Woman with a Law Degree? Nine Aboriginal Women at the University of Saskatchewan College of Law Speak Out" (1997) 9 C.J.W.L. 301; Richelle Samuel, "Legal Ethics and Moral Dilemmas: Strategizing Around Race in the Provision of Client Service" (2001) 16 J.L. & Soc. Pol'y 63; Hugh MacAulay, "Improving Access to Legal Education for Native People in Canada: Dalhousie Law School's I.B.M. Program in Context" (1991) 14 Dal. L.J. 133; Donald J. Purich, "Affirmative Action in Canadian Law Schools: The Native Student in Law School" (1986) 51 Sask. L. Rev. 79.

¹⁰ Monture-Okanee, *ibid.*, at n. 2.

¹¹ See e.g., Jennie Abell, "Women, Violence, and the Criminal Law: 'It's the Fundamentals of Being a Lawyer that are at Stake Here'" (1992) 17 Queen's L.J. 147; Brian M.

greater number of white females compared to racialized faculty helps explain this disparity in critical legal theory. It is true that in recent years white Canadian feminist legal scholars have been more responsive to intersectional theory in their scholarship,¹² such as issues of race and other differences, and have collaborated with racialized female faculty to develop intersectional analysis of Canadian legal curriculum issues.¹³ Yet, analyses that target and explore racialization in an in-depth way remain underdeveloped. This paper is meant to further develop this type of analysis in the Canadian context.

Part 1 discusses some of the challenges with diversifying law schools in terms of admissions policies, focussing on the need for affirmative action and developing strategies to address potential backlash to affirmative action policies. It also addresses some steps that law schools, and society more generally, need to adopt even before the first day of class to respond to systemic barriers that impede access to legal education for persons from racialized and other marginalized communities. It makes clear the different tenor of the affirmative action debate in the Canadian constitutional landscape, where affirmative measures and race-based policies are

Mazer, "An Analysis of Gender in Admission to the Canadian Common Law Schools from 1985-86 to 1994-95" (1997) 20 Dal. L.J. 135; Joan Brockman, *Gender in the Legal Profession: Fitting or Breaking the Mould* (Vancouver: UBC Press, 2001); Janet E. Mosher, "Legal Education: Nemesis or Ally of Social Movements?" (1997) 35 Osgoode Hall L.J. 613; Rose Voyvodic, "'Considerable Promise and Troublesome Aspects': Theory and Methodology of Clinical Legal Education" (2001) 20 Windsor Y.B. Access Just. 111; Lucie E. White, "The Transformative Potential of Clinical Legal Education" (1997) 35 Osgoode Hall L.J. 603; Mary Jane Mossman, "Defining Moments for Women as Lawyers: Reflections on Numerical Gender Equality" (2005) 17 C.J.W.L. 15; Mary Jane Mossman, "'Otherness' and the Law School: A Comment on Teaching Gender Equality" (1985) 1 C.J.W.L. 213; Sheila McIntyre, "Gender Bias Within the Law School: 'The Memo' and its Impact" (1986-88) 2 C.J.W.L. 362; Christine Boyle, "Teaching Law as if Women Really Mattered, or, What About the Washrooms?" (1986-1988) 2 C.J.W.L. 96; The Chilly Collective, eds., *Breaking Anonymity The Chilly Climate for Women Faculty* (Waterloo: Wilfrid Laurier University Press, 1995). This elevated status among outsider curricula is also attributed to having more of a critical mass than other outsider communities: Natasha Bakht *et al.*, "Counting Outsiders: A Critical Exploration of Outsider Course Enrollment in Canadian Legal Education" (2007) 45 Osgoode Hall L.J. 667 at n. 40. We are grateful to Bakht *et al.*, *ibid.*, who identify and discuss many of these sources.

¹² See e.g., Gillian Calder, "We the People of Constitutional Law 100 Y01: Pedagogical Promise of a Classroom Constitution in First-Year Law" (2008) 2 Canadian Legal Education Annual Review 39; Rosemary Cairns Way & Daphne Gilbert, "Resisting the Hidden Curriculum: Teaching for Social Justice" (2008) 2 Canadian Legal Education Annual Review 1; Doris Buss, "Feminism, Racism, and Social Change in the Classroom" (2004) 16 C.J.W.L. 216. Of course, many Canadian white female scholars self-identify as disadvantaged on grounds other than race and have provided intersectional analyses of legal education with respect to gender and other axes of difference (although not focussing on race). See e.g., Kim Brooks & Debra Parkes, "Queering Legal Education: A Project of Theoretical Discovery" (2004) 27 Harv. Women's L.J. 89.

¹³ See Bakht *et al.*, *supra* note 11; Elizabeth Adjin-Tettey *et al.*, "Postcard from the Edge (of Empire)" (2008) 17 Soc. & Leg. Stud. 5.

not suspect, as in the United States, but welcome. In part 2, the challenges posed by cultural norms that permeate law schools for racialized students and faculty are discussed. Specific problematic practices related to academic support, classroom dynamics, pedagogy, curriculum, and administration are explored to reveal their cumulative effect in creating a hegemonic law school culture, unreceptive to anti-racist critique. Some concrete steps that law schools can adopt in these areas are offered.

Given the complex nature of racial inequality and the process of marginalization more broadly, multi-faceted solutions, both short and long-term, aimed at improving the life chances of racialized individuals from an early stage are required. Not all of these solutions may be within the mandate/power of law schools, especially those relating to pre-law and post-law school. However, there are still initiatives that can be pursued to minimize barriers to entering law schools and the legal profession for racialized individuals. This paper will focus on some of these initiatives, ones that law schools, the legal community, and society generally can realistically implement. Of course, successful implementation of particular racial equality programs will depend on a number of factors, including the size and location of the institution, and availability of resources. Thus, rather than providing a blueprint for legal education, this paper will highlight issues that law schools and, for that matter, all institutions of higher education may critically consider in adopting racial equality programs/initiatives and in creating an environment at those institutions in which racialized students and faculty can thrive. We provide illustrations from our own equity-oriented faculty as examples to consider.

Our focus on racial balance in this paper is neither meant to be exclusive nor essentialist. Following the insights of intersectionality theory, we fully embrace the position that experiences of racism and construction of racialized identity is a multilayered, interactive process, dependent on other force fields of socially constructed differences.¹⁴ Law schools need to achieve balance, not simply on racial grounds, but also on many other axes of difference possibly to an even greater extent. We have chosen here to focus on the experiences of racialized law school constituents partly due to our own social locations as racialized female faculty members teaching as “minorities” in a white law school. Furthermore, our perspective allows us to highlight some of the continuing concerns entrenched within the overwhelming whiteness of Canadian law schools and the legal profession, despite the volume of reports and studies since the 1990s that advocate the need to achieve racial diversity in the legal profession,¹⁵ and recent increases in the number of racialized individuals admitted to the bar.¹⁶ Indeed, as Charles Smith has very re-

¹⁴ See Kevin Gosine, “Essentialism versus Complexity: Conceptions of Racial Identity Construction in Educational Scholarship” (2002) 27 *Canadian Journal of Education* 81; Verna St. Denis, “Aboriginal Education and Anti-Racist Education: Building Alliances across Cultural and Racial Identity” (2007) 30 *Canadian Journal of Education* 1068.

¹⁵ Charles Smith, “Who is Afraid of the Big Bad Social Constructionists? Or Shedding Light on the Unpardonable Whiteness of the Canadian Legal Profession” (2008) 45 *Alta. L. Rev.* 55 at 70-71.

¹⁶ See Michael Ornstein, *Racialization and Gender of Lawyers in Ontario* (Toronto: Law Society of Upper Canada, 2010).

cently noted, in spite of this attention, the numbers of racialized students entering Canadian law schools has not increased in significant numbers, as compared to other professional schools.¹⁷

The recently launched Internationally Trained Lawyers Program (ITLP) in Ontario is intended to provide internationally trained lawyers the opportunity to obtain professional accreditation and a licence to practice law in Ontario.¹⁸ Given the fact that most beneficiaries of the program are racialized, it will also increase the number of members of racialized communities in the legal profession. While the program is a step in the right direction towards achieving racial balance in the legal profession, it is by no means a panacea for the current lack of racial diversity in legal education and the legal profession. Unless the ITLP is integrated into the mainstream law school program, the effect of the program in improving racial diversity in law schools and legal education may be minimal. As well, unless an anti-racist approach is adopted in the substance and delivery of legal education, students in the ITLP may face similar challenges as those experienced by racialized students in law schools, including those relating to curricula content, non-diversified faculty and the overall culture at these institutions. Hence, the ITLP can also benefit from some of the proposals outlined in this paper.¹⁹

Notwithstanding the catered focus that the issue of racial imbalance requires, many of the concerns outlined and recommendations identified are also plausibly transferable to the imbalances that other marginalized communities experience, due to sexuality, age, ability, socio-economic conditions, etc. In saying this, we do not suggest that all discrimination follows the same trajectory regardless of the grounds of difference, nor that parallels are easily made between what may appear, at first glance, to be similar issues of inequality.²⁰ Instead, we wish to note the presence of imbalance along other lines of difference within Canadian law schools and highlight our paper's relevance to addressing those imbalances as well.

2. ADMISSIONS

The importance of diversity in legal education is underscored by the fact that lawyers or, more generally, persons with legal education, have significant influence in society and access to its institutions and resources. Thus, diversity in law schools

¹⁷ Smith, *supra* note 15 at 71.

¹⁸ The ITLP was launched in 2009 with the support of the Ontario government, the Federal Ministry of Multiculturalism, Citizenship and Immigration and some law firms in Ontario. The first group of students in the ITLP commenced their program at the University of Toronto Faculty of Law in May 2010. The cohort of 50 students represent 20 different countries. For more on the ITLP, see <http://www.law.utoronto.ca/visitors_content.asp?itempath=5/5/0/0/0&specNews=808&cType=NewsEvents>

¹⁹ The eventual success of the program will depend not just on internationally trained lawyers successfully completing the program and being admitted to the Bar, but rather their integration into the legal profession, which is beyond the scope of this paper.

²⁰ Suzanne J. Lenon, "Marrying Citizens! Raced Subjects? Re-Thinking the Terrain of Equal Marriage Discourse" (2005) 17 C.J.W.L. 405 at 419-420; Kenneth Nunn, Nancy Dowd & Jane Pendergast, "Diversity Matters: Race, Gender, and Ethnicity in Legal Education" (2003) 15 U. Fla. J.L. & Pub. Pol'y 11 at 43.

and in the legal profession will not only assist in ensuring that the increasing ethnic, racial and cultural diversity of contemporary Canadian society is mirrored in the Canadian legal system and its institutions, but will also provide opportunities for integrating what critical race theorists have referred to as voices/perspectives of colour.²¹ Given the fact that only a small and privileged number of people receive higher education²² and an even smaller number receive legal education, it is important that admission to these institutions include members of historically marginalized groups as a way of promoting inclusivity in the crucial institutions of our society. As a result, admissions policies that promote diversity can assist in furthering the goals of social change and the creation of an egalitarian society.²³

Racial and ethnic diversity will also promote legitimacy for these public institutions among members of diverse communities. As the United States Supreme Court has noted:

In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity. All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training Access to legal education (and thus the legal profession) must be inclusive of talented and qualified individuals of every race and ethnicity, so that all members of our heterogeneous society may participate in the educational institutions that provide [such] . . . training and education . . .²⁴

Lived experiences and perspectives should also inform our understanding of law and its role in society in ways that resonate with the various constituents in society. Yet, laws and legal institutions have traditionally reflected only the lived experiences and perspectives of dominant groups. Meanwhile, the experiences and views of historical “Others” are often erased from knowledge production and the foundations of laws, legal systems and institutions.²⁵ This phenomenon has rightly

²¹ See Devon Carbado, “Race to the Bottom” (2002) 49 *UCLA L. Rev.* 1283; Kevin R. Johnson & Luis Fuentes-Rohwer, “A Principled Approach to the Quest for Racial Diversity on the Judiciary” (2004-2005) 10 *Mich. J. Race & L.* 5 at 11-12. There is no doubt that the presence of women in law schools and hence the legal profession in large numbers has opened up spaces for sensitivity to women’s issues and how legal principles and institutions affect women.

²² In 2007, while 87 per cent of Canadians aged 25–64 had completed secondary school, only 25 per cent of Canadians in the same age group had received a university degree or a university certificate above a bachelor’s degree. Statistics Canada, “Education indicators in Canada: An international perspective” (2009), online: Statistics Canada <<http://www.statcan.gc.ca/daily-quotidien/090908/dq090908b-eng.htm>>. For more detailed information, see also Statistics Canada, “Population 15 years and over by highest certificate, diploma or degree, by age groups (2006 Census)” (2006), online: Statistics Canada <<http://www40.statcan.gc.ca/l01/cst01/EDUC43A-eng.htm>>.

²³ See Mari Matsuda, “Affirmative Action and Legal Knowledge: Planting Seeds in Plowed-Up Ground” (1988) 11 *Harv. Women’s L.J.* 1 at 8.

²⁴ *Grutter v. Bollinger*, 539 US 306 at 332-33 (U.S. 2003) [*Bollinger*].

²⁵ See Burns & Suleman, *supra* note 9 at 142-3; D’Arcy Vermette, “Colonialism and the Process of Defining Aboriginal People” (2008) 31 *Dal. L.J.* 211 at 212-13.

been described as “apartheid in legal knowledge” and results in restrictive and stultified legal knowledge.²⁶

Given the correlation between the acquisition of educational capital and wealth and power in society, it is hoped that racial balance in legal education, and higher education more generally, will also become a vehicle for redistributing wealth and power. This will improve the material conditions of racialized people and also ensure their meaningful participation in society.²⁷

(a) Affirmative Action

The starting point for a discussion on diversity among students in law schools, and legal professionals/faculty, is affirmative action. Affirmative action is premised on a theory of rights and equality. It is aimed at achieving substantive equality by addressing structural inequalities inherent in the undifferentiated treatment of individuals that only yields formal equality. The goal of affirmative action is, therefore, to destabilize the current distribution of power and resources that mostly favour dominant groups to the detriment of racialized groups. In the context of legal education, affirmative action is intended to ensure racial balance in access to content and delivery of legal education and, ultimately in the legal profession, with a corresponding redistribution of power and resources in society more generally.

(i) Why We Need It

A frequent ground of commentary regarding the diversification of law school admissions in the past few decades has been the increase of women to almost equal or more than equal the number of men in the entering class.²⁸ However, while women may have achieved critical mass in many law schools, serious concerns persist regarding gender equality in the legal profession.²⁹ Their presence in large numbers also has not changed the male-stream orientation of law school culture³⁰

²⁶ Matsuda, “Affirmative Action and Legal Knowledge” *supra* note 23 at 2-3.

²⁷ This is not to suggest that educational capital will always translate into tangible benefits in terms of wealth and power. In fact, there is evidence to suggest that, in spite of being highly educated, racialized people, especially new immigrants, have a disproportionate unemployment or under-employment rate compared to the general population. See Ross Finnie & Ronald Meng, *Minorities, Cognitive Skills, and the Incomes of Canadians, Research Paper* (Ottawa: Statistics Canada), online: <[http://www.statcan.gc.ca/cgi-bin/af-fdr.cgi?l=eng&loc=http://www.statcan.gc.ca/pub/11f0019m/11f0019m2003196-eng.pdf&t=Minorities_per_cent20Cognitive_per_cent20Skills_per_cent20and_per_cent20the_per_cent20Incomes_per_cent20of_per_cent20Canadians_per_cent20\(Analytical_per_cent20Studies_per_cent20Branch_per_cent20Research_per_cent20Paper_per_cent20Series\)&k=298419/](http://www.statcan.gc.ca/cgi-bin/af-fdr.cgi?l=eng&loc=http://www.statcan.gc.ca/pub/11f0019m/11f0019m2003196-eng.pdf&t=Minorities_per_cent20Cognitive_per_cent20Skills_per_cent20and_per_cent20the_per_cent20Incomes_per_cent20of_per_cent20Canadians_per_cent20(Analytical_per_cent20Studies_per_cent20Branch_per_cent20Research_per_cent20Paper_per_cent20Series)&k=298419/)> (last accessed: January 24, 2009) at 7. In part 2 of this paper, we point out some of the difficulties that racialized graduates face and suggest some ways of addressing this problem.

²⁸ *Retention of Women in Private Practice Working Group, Final Report*, (Toronto: Law Society of Upper Canada, 2008).

²⁹ *Ibid.*

³⁰ Carol Smart, “Introduction” in Carol Smart, *Feminism and the Power of Law* (New York: Routledge, 1989) 4–14. See also Nunn *et al.*, *supra* note 20 at 23, (discussing the

nor altered the whiteness of this culture in Canada and elsewhere.³¹ As the expansive Law School Admission Council's Bar Passage Study, which followed a cohort of 27,478 American law school students who entered law school in 1991, reveals:

The typical (i.e., modal) first-year law student is a white male in his early twenties, who speaks English as his first language, attends law school full time, expresses high self-confidence, possesses no physical or learning disabilities, is neither married nor has children, plans 0–9 weekly hours of paid employment during the first year, and comes from an above-average socio-economic background.³²

There is no reason to expect that the situation in Canada, given its demographics, would be much different than this snapshot of American law schools revealing the white, young, able-bodied male embodiment of law schools. Indeed, Charles Smith's recent work on the whiteness of the legal profession confirms this observation for law schools in Canada.³³ Further, as Rosemary Cairns Way and Daphne Gilbert note, the Law Society of Upper Canada reported that only 19% of registrants in its Licensing Process self-identified as racialized.³⁴

(A) The Under-Representation of and Institutional Discrimination Against Racialized Individuals in Law Schools

The need for, and justification of racial balance in legal education does not necessarily stem from historical wrongs. Rather, it arises from the current underrepresentation of Aboriginal people and other racialized individuals in these institutions, which is, in part, a reflection of the continued effects of colonization and discrimination against racialized individuals in Canadian society and the resulting socio-economic deprivation.³⁵ It also reflects a collective responsibility for what are usually subtle manifestations of discrimination: for instance, conferring racial privileges on members of the dominant racial groups, not the least of which is the reliance of law schools on the LSAT for admission purposes.³⁶ Studies have shown that the performance of racialized students on standardized aptitude tests, such as the LSAT, is negatively affected by race-related anxiety, which has been referred to

lower levels of classroom participation by white women and racialized individuals when compared to white men).

³¹ Smith, *supra* note 15.

³² Timothy T. Clydesdale, "A Forked River Runs Through Law School: Toward Understanding Race, Gender, Age, and Related Gaps in Law School Performance and Bar Passage" (2004) 29 *Law & Soc. Inquiry* 711 at 724-725.

³³ Smith, *supra* note 15.

³⁴ The Law Society of Upper Canada, "The Changing Face of the Legal Profession," online: Law Society of Upper Canada: <<http://www.lsuc.on.ca/latest-news/b/fact/changing/>> cited in Cairns Way & Gilbert, *supra* note 12 at n. 38.

³⁵ Charles R. Lawrence III, "Two Views of The River: A Critique Of The Liberal Defense of Affirmative Action" (2001) 101 *Col. L. Rev.* 928. See also Smith, *supra* note 15 at 59. See also Stewart, *You Must be a Basketball Player*, *supra* note 3, at 38-39, who notes that focusing on redress for historical wrongs could undermine the diversification and responding to current conditions of inequities.

³⁶ Clydesdale, *supra* note 32 at 727.

as “stereotype threat.”³⁷ This complication is in addition to the pressures that the high cost of LSAT preparation can exert on students who perceive these courses as essential to a successful result. Students from a lower socio-economic bracket may have to assume paid employment during the tenure of these intensive courses, in addition to other commitments, and thereby compromise their test results.³⁸

Another example of the need for collective responsibility in remedying the effects of past and present discrimination against racialized groups is the fact that some of the barriers to entering law school stem from social attitudes towards racialized individuals that negatively impact their performance starting from elementary school, including poor funding for education in some racial minority neighbourhoods. The comparatively poorer socio-economic conditions of members of Aboriginal and other racial minority groups (racialization of poverty) expose them to unique life experiences that negatively impact their life chances³⁹ and often affect their academic performance.⁴⁰ For instance, consider the importance that

³⁷ “Stereotype Threat” refers to the phenomenon of how negative stereotypes about particular groups, for instance in relation to academic performance, can affect performance of members of that group on standardized test such that they tend to do more poorly. This occurs even when the contents of the tests and environment in which they are administered is the same for everyone. Thus, simply making racialized applicants write the same test and under the same conditions as non-racialized applicants only achieves formal equality. See William C. Kidder, “Does the LSAT Mirror or Magnify Racial and Ethnic Difference in Educational Attainment? A Study of Equally Achieving ‘Elite’ College” (2001) 89 Cal. L. Rev. 1057 at 1085–1089.

³⁸ We are grateful to our research assistant, Rashida Usman, for her insight on this point.

³⁹ A primary example is the disadvantage that attending school on an empty stomach can cause. As one of our racialized students put it: “When I was younger, rather than focusing on hunger (and the physical pains associated with lack of food), breakfast clubs (volunteer groups which provide free and full breakfasts for children) positively contributed to my ability to focus on my studies while at school. A healthy meal to start off the day is significant to a child’s performance and their ability to learn basic skills (analytical, critical and logical skills) for high school and postsecondary education. Breakfast clubs provide parents with assurance that their children will be fed well, and at little to no costs; and further, nutritious meals boost a child’s immune system so that they stay healthy and do not miss days of school.”

⁴⁰ Boris Palameta, “Low income among immigrants and visible minorities” (April 2004) Perspectives, Statistics Canada 12 at 16-17; Statistics Canada, *Earnings and Incomes of Canadians Over the Past Quarter Century, 2006 Census* (Ottawa: Minister of Industry, 2008), Catalogue no. 97-563-X, at 21–23, online: <<http://www12.statcan.ca/census-recensement/2006/as-sa/97-563/index-eng.cfm?CFID=3627605&CFTOKEN=95378288>> Ontario Council of Agencies Serving Immigrants (OCASI), “Racialization of Poverty,” online: <<http://www.ocasi.org/index.php?catid=114>>; OCASI, “Communities Concerned about Continuing Trend of Income Disparities in Canada,” May 2008, online: <http://www.cleonet.ca/instance_news.php?instance_id=651>; CLEO, “Understanding the Racialisation of Poverty in Ontario: An Introduction in 2007” and Fact Sheet # 6, online: <http://www.cleonet.ca/external.php?external_url=http://colourofpoverty.ca/>; *Colour of Poverty — Colour of Change is on Facebook*, online: <<http://www.facebook.com/group.php?gid=7376066367>>; Anver Saloojee, “Social In-

some law schools attach to extracurricular activities and community service in evaluating applications of potential law students. These seemingly objective criteria are intended to reflect how applicants might have lived their lives outside of their academic pursuits. However, these criteria fail to take into account the reasons why some people may have been more involved in their communities than others. Putting personal characteristics aside, given the socio-economically deprived backgrounds of many racialized students, many of them may be required to work full-time to financially maintain themselves through school and sometimes to contribute to the upkeep of their families. For such people, the time to engage in extra curricular activities and community services is a luxury that they can afford only at the expense of sustaining themselves or their families. This trend is likely to continue as the cost of higher education continues to rise.

An approach to affirmative action that focuses on compensating for these and other examples of current race privileges ensures that the focus on historical wrongs and their continuing effects on Aboriginal people do not preclude attention to newer forms of race privilege or the conditions of other racialized groups. The focus on racial marginality more generally recognizes the uniqueness of the past and current conditions of Aboriginal people but also avoids the difficulties associated with historical claims. Instead, the emphasis is placed on the present and continuing effects of those historical conditions that make remedial initiatives both a moral and legal imperative for the dominant society. Further, racial balance in legal education can increase the potential for clients to receive legal services from persons from their background. As a result, clients are more likely to identify with the service provider, with the attendant benefits of feelings of satisfaction and trust in the legal system.⁴¹ Feelings of satisfaction and trust are important societal interests in themselves and important objectives of diversity in legal education, legal institutions and society generally.⁴²

In summary, it is important for social and educational institutions to demonstrate that talent, brilliance and, for that matter, the lack thereof, are not the sole preserve of any particular “race.” Institutions should transcend the formal “equality of opportunity” framework and actively endeavour to create space for racialized

clusion, Anti-Racism and Democratic Citizenship” (2005) 14 Policy Matters 1, online: <<http://site.ebrary.com/lib/uvic/docDetail.action?docID=10215863>>; Grace-Edward Galabuzi, *Canada's Economic Apartheid: The Social Exclusion of Racialized Groups in the New Century* (Toronto: Canadian Scholars Press, 2006); Camille Hernandez-Ramdwar, “Caribbean Students in the Canadian Academy: We’ve Come a Long Way” in Henry & Tator eds., *supra* note 2 at 113.

⁴¹ It is shown that racialized lawyers represent a disproportionate share of racialized clients. Clydesdale, *supra* note 32 at 716. See also Law Society of Upper Canada, “The backbone of the profession mirrors clients’ diversity” (2010) 14 Ont. Law. Gaz. 5.

⁴² This is not to suggest that clients from racialized groups would always prefer to be serviced by lawyers, or more generally service providers, from their group or similar background. In some cases clients actually resist being served by persons from their background, among other things, for concerns about privacy. However, it is still important for clients to be able to exercise their choice of service providers, a choice that may be non-existent for many members of racialized groups because of an absence of persons of those groups in the legal profession.

persons in those institutions such that their presence and achievements can be celebrated on the same footing as that of members of dominant groups.⁴³ As has been pointed out, “[e]quity is an active, interventionist concept — demanding an in depth understanding of difference, a willingness to make space for it in institutions like schools, and a refusal to allow it to act as a barrier to any of life’s goods and pleasures.”⁴⁴ This should become part of the mandate of law schools and all educational institutions in order to achieve substantive equality.

(ii) *Replies to Friendly Critiques of Affirmative Action*

A recommendation that law schools apply affirmative action principles will encounter resistance. Indeed, the debate about affirmative action is a long-standing one, and one which we do not canvass here.⁴⁵ Many opponents do not share the social constructionist, anti-oppressive view of formal equality that we and other proponents do. Neither do they perceive present manifestations of racism, while covert, as permanent or even permeating all aspects of society.⁴⁶ These are first

⁴³ See Emily Carasco, “Reflections on Employment Equity (The Hiring Component) and Law Schools in Ontario” in Elizabeth Sheehy & Sheila McIntyre, eds., *Calling for Change*, *supra* note 9, 97 at 105.

⁴⁴ Judi Stevenson, “The Quality of Education and School Life” in *The A Cappella Papers* (Ottawa: Canadian Teachers Foundation, 1993) cited in Carasco, *ibid.*, at 100.

⁴⁵ For examples of sources in favour of affirmative action in higher education, see Bob Laird, *The Case for Affirmative Action in University Admissions* (Port Richmond, CA: Bay Tree Publishing, 2005). See also Lee C. Bollinger, “Why Diversity Matters” (2007) 53 *Chronicle of Higher Education* 39. For examples of authors who argue against affirmative action, see Dinesh D’Souza, *Illiberal Education: The Politics of Race and Sex on Campus* (New York: Free Press, 1991); Stephan Thernstrom & Abigail Thernstrom, “Racial Preferences: What We Now Know” Commentary, Manhattan Institute for Policy Research (February 1999) online: <www.manhattan-institute.org/html/_commentary-racial_prefs.htm>. Other authors include Carl Cohen, Lisa Newton, Ward Connerly and Thomas Sowell.

⁴⁶ The following criticism of affirmative action rests on the assumption that racism is not pervasive: David Sacks & Peter Thiel, “The Case against Affirmative Action” *Stanford Magazine* (1996) online: [Stanford Magazine](http://www.stanfordalumni.org/news/magazine/1996/sep/oct/articles/against.html), <<http://www.stanfordalumni.org/news/magazine/1996/sep/oct/articles/against.html>>. See also Lisa Newton, “Reverse Discrimination as Unjustified” (1973) 83 *Ethics* 308; Carl Cohen, *Naked Racial Preference* (Lanham, Maryland: Madison Books, 1995). A repeated concern here is the “reverse discrimination” argument, which advocates equality of treatment of all applicants. It does so without regard to historical and current patterns of distribution of power and resources that systematically privilege the dominant group. This only achieves formal equality and a sense of entitlement. As Duncan Kennedy points out, it is important to note that the winners within the current system are not necessarily the “best.” The current system is structured in such a way as to exclude many people based on their race and social class while, at the same time, privileging members of the dominant race and those from favourable socio-economic backgrounds. Thus, the supposed winners under the *status quo* have only a partial claim to entitlement. See Duncan Kennedy, “A Cultural Pluralist Case for Affirmative Action in Legal Academia” (1990) *Duke L.J.* 705 at 718. Although this comment was made in relation to hiring minority law professors, it is equally applicable to considera-

principles that we do not have the space to establish here and would direct readers to the cogent defences of affirmative action related to these grounds within the literature.⁴⁷ We find it more productive to focus on critiques that stem from those who share our view regarding first principles on the systemic nature and persistence of racism and racial inequality and the inadequacy of formal equality approaches, but nonetheless find affirmative action programs problematic. We take a very recent article by Kenneth Nunn as illustrative in this regard.⁴⁸

(B) Social Justice Not Promoted

In the provocatively titled work, “Diversity as a Dead End,” Nunn sets out six reasons why diversity as a rationale for affirmative action is not conducive to social justice ends.⁴⁹ The problems Nunn identifies with the diversity rationale are that it: 1) precludes race-based or ethnicity-based programming; these factors can only enter into a broader and vaguer mix; 2) fosters tokenism; 3) creates stigmatization of racialized peoples; 4) is non-responsive to injustice; 5) is non-responsive to racism; and 6) fosters white supremacy.⁵⁰

Much of Nunn’s critique emanates from the jurisprudence’s disappointing understanding of the benefits of affirmative action and the concept of diversity with respect to race reflected in American equal protection jurisprudence.⁵¹ As Nunn and others note, a fundamental flaw of this jurisprudence is its labelling of race or ethnicity-based affirmative action as “reverse racism” and its narrowing of the rationales in which race or ethnicity, when used “flexibly” and “non-mechanistically,” can factor into admissions analysis in public university decision-making.⁵² Equally distressing is the rationale given for diversity justification that it enhances the ability of white students to interact with people from diverse backgrounds and compete better in a diverse workplace.⁵³ With respect to stigmatization, Nunn’s use of that word is somewhat different from how it is typically harnessed in this debate. Here, he is not referring to the fact that people may be more likely to perceive racialized individuals as less capable by assuming they received entry solely due to affirmative action. Rather, Nunn’s stigma concern zeroes in on the one-sidedness of the United States Supreme Court’s recognition of the benefits of diversity. As he

tions of the effects of racialization in the admission process. See also Patricia Williams, *The Alchemy of Race and Rights* (Cambridge, Mass: Harvard Univ. Press, 1991) at 101. As well, characterizing affirmative action as “reverse discrimination” erases the past and present distribution of power and wealth that have created and reinforced systemic discrimination of many racialized individuals and groups, in favour of members of the dominant group. See Richard Delgado, “Affirmative Action as a Majoritarian Device: Or, Do You Really Want to Be a Role Model?” (1991) 89 Mich. L. Rev. 1222 at 1225.

⁴⁷ See *supra* notes 26 and 45.

⁴⁸ Kenneth Nunn, “Diversity as a Dead-End” (2008) 35 Pepp. L. Rev. 705.

⁴⁹ *Ibid.* at 720.

⁵⁰ *Ibid.*

⁵¹ *Ibid.* at 719-720.

⁵² *Ibid.*

⁵³ *Ibid.* at 723-24.

compellingly notes, nowhere in the jurisprudence are the benefits of diversity for racialized communities affirmed; instead, it is the benefit that white students will receive from their presence that is endorsed. This “one-way” relationship is what leads Nunn to state that racialized individuals are placed yet again in the service — and thus stigmatized as servile to — white individuals.⁵⁴

(C) Difference of the Canadian Context

The concerns Nunn sets out do not apply in Canada, where the situation is vastly different given our distinctive legal and political culture and, perhaps more to the point, the constitutional protection in section 15 of the *Canadian Charter of Rights and Freedoms* for affirmative action policies.⁵⁵ That the *Charter* does not characterize affirmative action as “reverse discrimination,” but instead places such programs in a positive light as ameliorative programs, was most recently affirmed by the Supreme Court of Canada in *R. v. Kapp*.⁵⁶ Here, the court emphasized the role of affirmative action as a remedy for the ills associated with systemic racism and historical wrongs. Diversity is not made to bear the weight of the rationale for affirmative policies nor is it conceptualized as a “horizon-broadening” benefit primarily to white individuals. Canadian equality jurisprudence is thus more amenable to a vibrant, anti-racist, anti-oppressive program of affirmative action aimed at promoting substantive equality.

Nunn’s remaining criticism is that diversity fosters tokenism. Nunn’s concern stems from the educational institution’s ability to define the quantity of individuals which would make the institution diverse or exhibit a critical mass in the student body. The lack of accountability to a standard set by racialized communities themselves leads to the conclusion that, while an institution may consider itself sufficiently diverse, it would not satisfy the critical mass sought by racialized communities. That law schools have control over the design of affirmative action policies they adopt (within applicable constitutional legal parameters) is a point of real concern. Yet, this concern is not addressed by avoiding affirmative action measures, but by better, more justice-oriented implementation.

(iii) Implementing Racial Balance in the Admissions Process

People cannot compete on an equal basis unless they have an even playing field. Affirmative action initiatives in the admission process are not intended to provide concessions, but rather to acknowledge and compensate for systemic inequalities that prevent racialized and other marginalized persons from achieving their optimum potential. One approach that has been adopted to achieve racial balance in higher education in the United States is that of using race-influenced criteria in the admissions process whereby race and/or socio-economic status is considered a factor for admissions. Another approach is to guarantee admission to top students from high schools throughout particular states. Both are worthy of consid-

⁵⁴ *Ibid.*

⁵⁵ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11.

⁵⁶ 2008 SCC 41, [2008] 2 S.C.R. 483.

eration in the Canadian context as a way to implement affirmative action. This seems especially the case given that the United States Supreme Court has held race-based affirmative action to be unconstitutional in recent equal protection jurisprudence.⁵⁷ In this section, we discuss the first strategy: adopting race-influenced admissions criteria.

(A) Adopting Race-Influenced Admissions Criteria

The first category of affirmative action programs specifically cater to race. Some Canadian institutions already have special access admission programs that set aside specified number of spaces for designated groups, such as Aboriginals.⁵⁸ We refer to these as race-primary programs, since race has a heightened importance in this stream. In addition to, or in lieu of race-specific criteria, some institutions have special access categories. These categories allow for the admission of applicants who can demonstrate how their unique circumstances have adversely affected their academic performance or opportunities for post-secondary education in the past.⁵⁹ Relevant factors that may warrant consideration include physical disabilities, learning disabilities, cultural and economic factors, and family responsibilities that have affected and/or continue to affect the applicant's ability to pursue post-secondary education. We refer to these as "programs with a broad focus on disadvantage." Furthermore, in recognition of the continuing nature of some adverse factors that inhibit full-time attendance at law school, a limited number of students are permitted to attend law school on a part-time basis.⁶⁰ We address the benefits and drawbacks of both types of initiative for implementing affirmative action below.

(B) Race-Primary Criteria

(B.1) Drawbacks of Using Race-Primary Criteria

Affirmative action can be a double-edged sword. On the one hand, it may

⁵⁷ See *Gratz v. Bollinger*, 539 U.S. 244 (2003) (*Bollinger 2*).

⁵⁸ The University of Victoria Faculty of Law has an Aboriginal category in its admission process. The stated goal of this category is to increase the number of persons of Aboriginal background in the legal profession. Up to ten students are admitted in the Aboriginal category each year out of a class of about 110. Online: <<http://law.uvic.ca/prospective/llb/aboriginal.php>>. Similarly, the purpose of the Indigenous Blacks and Mi'kmaq (IB&M) Initiative at Dalhousie University Law School is to reduce "structural and systemic discrimination by increasing the representation of Indigenous Blacks and Mi'kmaq in the legal profession," online: <<http://ibandm.law.dal.ca/index.htm>>. Up to twelve students are admitted through the IB&M program each year.

⁵⁹ In recognition of the significant barriers to obtaining post-secondary education, applicants who have not completed the minimum academic requirements for admission in the regular category are nevertheless considered for admission in the Special Access Category, provided they can demonstrate that it would be unreasonable to expect them to complete those requirements before attending law school.

⁶⁰ For example, see the criteria for the special access admissions category at the Faculty of Law, University of Victoria, online: <<http://law.uvic.ca/prospective/llb/special.php>>. Each year, up to 15 students are admitted in the Special Access Category.

open up opportunities for some individuals to attend institutions of higher learning and/or receive financial assistance that was previously unavailable to them. It can also promote cross-racial engagement and interaction, increased awareness and sensitivity towards the plight of members of racialized groups, and hopefully commitment to racial equality, anti-oppressive policies and equitable decision-making in society. On the other hand, there is also a possibility of backlash; racially and ethnically-diverse institutions can heighten rather than reduce prejudice against racial/ethnic individuals. Among other things, affirmative action could perpetuate a perception of racialized students as not being sufficiently qualified, and as being mere beneficiaries of race- or ethnicity-based concessions.⁶¹ Such perceptions could potentially generate feelings of hostility towards racialized students and the resulting alienation can affect their learning environment, which in turn undermines their ability to excel. The poor educational performance that may follow can reinforce stereotypes about Aboriginal students and other students of colour as intellectually inferior individuals, who would not have been able to obtain a legal education but for those “concessions.” These perceptions can follow racialized individuals into their working lives, and cause later challenges ranging from difficulties in obtaining employment, perceptions of incompetence in their work, and even prevent their upward mobility and/or being assigned tasks that command respect.⁶²

(B.2) Benefits of Using Race-Primary Criteria

Yet, anecdotal evidence from racialized students indicates that, whether they are admitted in the special access category or not, they are generally perceived as having been admitted through that program and consequently, less qualified academically. This in turn influences how some students interact with them, which tends to be demeaning, such that they find their presence and contributions in and out of the classroom often met with an attitude of dismissiveness. Thus, the “stigma” feared with race-primary affirmative action already exists to a certain extent. Rather than shy away from a more deliberate measure, race-primary affirmative action could be used to increase numbers. Hopefully, a critical mass of racial-

⁶¹ See Stephen L. Carter, “The Best Black and Other Tales” (1990) 1 *Reconstruction* 6; Kennedy, *supra* note 46; Delgado, *supra* note 46; Williams, *supra* note 46; Bhandar, *supra* note 9 at 351-352; Larry Chartrand *et al.*, “Law Students, Law Schools and Their Graduates” (2001) 20 *Windsor Y.B. Access Just.* 211 at 219. Stewart notes that there are many instances of preferential treatment of particular social groups in Canadian society and this is often not perceived as a problem or undermining merit. However, there appears to be a problem when the basis of the preferential treatment is or includes race. Stewart, *You Must be a Basketball Player*, *supra* note 3 at 24, 55–62. The potential for stigmatization partly arises from a particular view of affirmative action that stems from a place of privilege whereby the powerful bestows special treatment on the marginalized and those perceived to be different by allowing them to access previously excluded positions of power. See Christine M. Koggel, “A Feminist View of Equality and Its Implications for Affirmative Action” (1994) 7 *Can. J.L. & Jur.* 43 at 51.

⁶² For e.g., see Beverly Nelson Muldrow, “As a Woman of Colour” in Jean MacLean Snyder & Andra Barmash Greene, eds., *The Woman Advocate* (Chicago: American Bar Association, 1996) 81 at 84-85.

ized people at law school, institutions of higher learning more generally, and the workforce, will help eliminate or at least minimize hostile attitudes and perceptions about racialized people. However, it is not just about numbers. It is critically important that structural changes are instituted to make the law school environment conducive for racialized students, so as to make them feel welcomed and valued as equal citizens of these institutions. They should not feel they are symbols of tokenism.

(C) Admission Programs with a Broad Focus on Disadvantage

(C.1) Benefits of Admission Programs with a Broad Focus on Disadvantage

In light of the challenges of using Race-Primary criteria, we may also consider using criteria where race is only one of several factors. Will the same result be achieved with fewer drawbacks? Given the intersection between minority racial status and negative life experiences, such as low economic status,⁶³ which often detrimentally affect life chances and academic performance, it can reasonably be expected that racialized individuals can benefit from discretionary admission programs, even those not explicitly focused on race. An advantage of programs that focus more broadly on disadvantage is that they are anti-essentialist in nature. They acknowledge the intersecting and overlapping factors that construct individual identities. As well, they recognize that disadvantage and marginality transcend racial boundaries and, on the other hand, that not all members of minority racial groups may have experienced adversity in their lives.⁶⁴ Further, the conspicuous visibility of racialized students, the perception that all such students are less qualified than their peers because they benefited from race-based preferential treatment, and the resulting stigmatization of all students from visible minority backgrounds, can be avoided in a system not specifically tied to any particular status other than prior disadvantage.⁶⁵

⁶³ See Krishna Pendakur & Ravi Pendakur, "The Colour of Money: Earnings Differentials among Ethnic Groups" (1998) 31 Cdn. J. Econ. 518; M. Stelener & N. Kyriazis, "An Empirical Analysis of Earnings among Ethnic Groups in Canada" (1995) 32 Int'l J. Contemp. Sociology 41; CLEO, *Colour of Poverty*, 2007, online: <<http://colourofpoverty.ca/>>.

⁶⁴ For these reasons, some favour class-based affirmative action over race/ethnicity-based affirmative action.

⁶⁵ For example, see Maimon Schwarzschild, "A Class Act? Social Class Affirmative Action" Legal Studies Research Paper Series, Research Paper No. 07-6 (Sept. 2006) online: <<http://ssrn.com/abstract=929536>>. Class-based preferential treatment may also disregard the privileges that some members of that group enjoy in society on other and often more conspicuous grounds, such as skin colour. See Cheryl Harris, "Whiteness as Property" (1993) 106 Harv. L. Rev. 1709. Edited version reprinted in Kimberlé Crenshaw *et al.*, eds., *Critical Race Theory: Key Writings That Formed a Movement* (New York: New Press, 1995) 276. Derrick A. Bell, Jr., "Property Rights in Whiteness: Their Legal Legacy, Their Economic Costs" in Richard Delgado & Jean Stefancic, eds., *Critical Race Theory The Cutting Edge*, 2d ed. (Philadelphia: Temple Univ. Press, 2000) at 71; Thomas Ross, "The Unbearable Whiteness of Being" in Francisco Valdes, Jerome

(C.2) Drawbacks of Admission Programs with a Broad Focus on Disadvantage

Programs with a Broad Focus on Disadvantage are open to all applicants who have experienced adversity in their lives and not just members of racialized groups. As such, these programs may simply be aimed at acknowledging disadvantage or an individual's unique/unfavourable life experiences when determining merit or eligibility for admission rather than infusing the admission process with racial equality standards or achieving racial balance in key institutions. Thus, while race or ethnicity is one of the factors considered in determining eligibility under such admissions programs, such programs may fail to achieve or contribute to the goal of racial balance in legal education.⁶⁶

Second, a system focusing on socio-economic disadvantage, while commendable as being anti-essentialist, masks discrimination against racialized people who occupy more affluent socio-economic locations. Implicit in any such program is the assumption that socio-economic status can compensate for, or at least diminish the incidence and effects of racial/ethnic discrimination. Yet, racialized students, regardless of their socio-economic backgrounds are routinely marginalized in the educational system.⁶⁷ Further, racialized individuals often experience discrimination on a daily basis in social contexts, usually not based on the individual as such, but

McCristal Culp & Angela Harris, eds., *Crossroads, Directions, and a New Critical Race Theory* (Philadelphia: Temple Univ. Press, 2002) 251.

⁶⁶ See Frances Henry & Carol Tator, "Introduction: Racism in the Canadian University" in Henry & Tator, eds., *Racism in the Canadian University*, *supra* note 2 at 15.

⁶⁷ Discrimination also occurs in the educational system in elementary and high schools as well as at the university level, regardless of the socio-economic status of students. This often takes the form of racial devaluation that tends to play down the strengths of minority students, while highlighting their weaknesses to reflect stereotypes about racialized groups. This phenomenon often results in systemic alienation of racialized persons within educational and other institutions, and negatively impacts their performance. See generally, Anthony Stewart, "Penn and Teller Magic: Self, Racial Devaluation and the Canadian Academy" in Camille A. Nelson & Charmaine A. Nelson, eds., *Racism Eh?: A Critical Inter-Disciplinary Anthology of Race and Racism in Canada* (Concord, Ont.: Captus Press, 2004) 33 at 34–39. See also the discussion on Africentric learning environments as a means of addressing systemic barriers to academic success experienced by minority groups in conventional classrooms: Carmen Dragnea & Sally Erling, "The Effectiveness of Africentric (Black-Focused) Schools in Closing Student Success and Achievement Gaps: A Review of the Literature" (Toronto: Toronto District School Board, 2008), online: <http://www.tdsb.on.ca/wwwdocuments/about_us/external_research_application/docs/EffectivenessOfAfricentricSchoolsIn-ClosingStudentSuccessAchievementGaps.pdf>. In 2008, the Toronto School board voted in favour of a black-focused school: "Board okays black-focused school," *thestar.com* (January 2008), online: <<http://www.thestar.com/News/article/298714>>. The school opened in September, 2009: "Africentric school opens in Toronto," *CBC News* (September 2009), online: <<http://www.cbc.ca/canada/toronto/story/2009/09/08/africentric-alternative-school.html>>.

on the “depersonalized observation of skin colour,”⁶⁸ and regardless of socio-economic or other status.⁶⁹ As well, the phenomenon of race-related anxiety or “stereotype threat” that detrimentally affect the performance of racialized students on standardized tests affects racialized students regardless of socio-economic status.⁷⁰ Thus, an affirmative action program based on proof of socio-economic marginalization that continues to rely upon standardized test results will persist in disadvantaging racialized applicants from middle and upper-class backgrounds.⁷¹ This is not to diminish other bases of disadvantage in our society or to insist on an equal focus. Rather, it is simply an acknowledgement of how racial discrimination affects the very core and being of racialized people and hence their participation in society in ways not experienced by other groups.

A third concern with admission programs focusing more broadly on disadvantage is their proclivity to put an unreasonable burden on racial minority students, especially those from favourable socio-economic backgrounds, to prove how their racialized status has disadvantaged them. For example, individuals may have to provide personal statements outlining how their minority racial status has adversely affected them such that they should be admitted under this category. Individualized assessment may have the appeal of excluding members of racial minority groups who may not have ostensibly suffered obvious disadvantages or succumbed to the same, for example, based on their socio-economic status. This would also avoid the criticism that only the privileged members of racial minority groups, who ironically need no helping hand, actually benefit from affirmative action programs.

However, this is an onerous burden since, for the most part, students may not have concrete evidence of their marginalization. Such a process may also have the effect of reversing agency whereby victims of discrimination are expected to understand and be able to articulate the ways in which they have been marginalized. What is more, students may not necessarily make the connection between their racial status and the many forms of subtle discrimination that they have experienced. For example, it is one thing for individuals to see themselves as members of a group based on their physical characteristics or what has been socially constructed as race. However, not all members of the same racial group may identify with other members of that group and be willing or able to articulate discrimination on the basis of race. Some people may prefer to construct their identity and structure their social relations based on factors other than race, such as gender, sexual orientation, socio-economic status, etc. Yet, as discussed above, even such people cannot escape being perceived and treated as “Others” based on their racial background, or more appropriately, their physical characteristics, whether this is how they choose

⁶⁸ Anthony Stewart, *ibid.* at 34; Frances Henry & Carol Tator, “Theoretical Perspectives and Manifestations of Racism in the Academy” in Henry & Tator, eds., *Racism in the Canadian University*, *supra* note 2 at 25.

⁶⁹ See Williams, *supra* note 46 at 44–51; Anthony Stewart, *ibid.*

⁷⁰ Clydesdale, *supra* note 32 at 716. See also Sam Dillon, “Study Sees an Obama Effect as Lifting Black Test-Takers” *The New York Times* (23 January 2009), online: <[http://www.nytimes.com/2009/01/23/education/23gap.html?scp=1&sq=race per cent20education per cent20obama&st=cse](http://www.nytimes.com/2009/01/23/education/23gap.html?scp=1&sq=race%20education%20obama&st=cse)> (last accessed May 6, 2009).

⁷¹ Kidder, *supra* note 37 at 1089.

to identify themselves or not.⁷²

To the extent that racialized people share experiences of discrimination, sometimes based on other intersecting factors and often regardless of other characteristics, members of racialized groups should not be excluded from the benefits of affirmative action programs simply because of their other seemingly favourable characteristics. As Randall Kennedy has famously noted:

... even taking into account class, gender, and other divisions [there is still] an irreducible link of commonality in the experiences of people of color: rich or poor, male or female, learned or ignorant, all people of color are to some degree “outsiders” in a society that is intensely color-conscious and in which the hegemony of whites is overwhelming.⁷³

To insist on evidence of individualized effects of racial and ethnic discrimination amounts to abstracting applicants from their racial and ethnic context and viewing them as autonomous liberal subjects. In reality, their social identity and life experiences are constructed not on an individualized basis but on the social construction of their race or ethnicity.

Thus, so long as race continues to be relevant in constructing opportunities in society, there should be a presumption of disadvantage in favour of racialized students in programs with a broad focus. This will alleviate the concerns noted above as well as avoid the essentialism of race-primary programs. While this will undoubtedly benefit some students who may not have experienced as much adversity in their lives as others, this is a reasonable assumption given the overall discrimination that racialized people experience, often in spite of their socio-economic status. In any event, defining “disadvantage” involves discretion on the part of decision-makers and is apt to be influenced by their ideological preferences.⁷⁴ Ultimately, whatever system is selected should embody the anti-oppressive purpose of affirmative action. The anti-oppressive purpose should also inform all aspects of the operationalization of affirmative action initiatives. Otherwise, it risks becoming an ineffective and alienating “bureaucratic activity.”⁷⁵

(D) Steps to Change the Culture of Admissions Programs

In addition to adopting race-influenced criteria, of either variation above, admissions policies to higher education programs⁷⁶ must recognize how purported objective factors such as LSAT scores and extent of extracurricular involvement

⁷² Ashley M. Hibbett, “The Enigma of the Stigma: A Case Study on the Validity of the Stigma Arguments Made in Opposition to Affirmative Action Programs in Higher Education” (2005) 21 Harv. Blackletter L.J. 75; Stewart, *You Must be a Basketball Player*, *supra* note 3 at 65.

⁷³ Randall Kennedy, “Racial Critiques of Legal Academia” (1989) 102 Harv. L. Rev. 1745 at 1784.

⁷⁴ See generally, Schwarzschild, *supra* note 65.

⁷⁵ Adalberto Aguirre Jr., “Academic Storytelling: A Critical Race Theory Story of Affirmative Action” (2000) 43 Sociological Perspectives 319.

⁷⁶ It is important that all institutions of higher education consider such background factors in their admissions processes, among other things, because racial diversity in law schools is partly contingent upon racial balance in undergraduate education. Those una-

can mask systemic bias against racialized communities and devise ways to compensate for these disadvantages in the admissions process. To counter “racial stereotype” that affects performance of racialized individuals on the LSAT,⁷⁷ more weight can be allocated to an applicant’s GPA in the admissions process. In addition, other factors that may have adversely impacted an applicant’s academic performance, such as the need to maintain employment during post-secondary education, could be considered.⁷⁸ Moreover, instead of having two streams — regular and special — it is worth considering having one stream that is sensitive to issues of difference and marginalization. Rather than expecting racialized applicants to meet “objective criteria,” admission standards should take into account the lived experiences of racialized persons.

To avoid the criticism that such difference and race-sensitive admission standards undermine “merit,” schools should adopt a contextualized notion of “merit” and deflate the sense of entitlement fostered by reliance on seemingly “objective” standards, such as GPAs and LSAT scores. Within this context, it is important to emphasize that affirmative action is not aimed at eroding standards of academic excellence. Rather, it is about recognizing how the concept of academic excellence can be socially constructed to favour characteristics most common among particular segments of society, usually the dominant group.⁷⁹ Where standards and characteristics more prevalent among the dominant group, compared to racialized groups, are portrayed as normative standards of excellence, it gives rise to a culture of entitlement based on the supposed merits of candidates. It is this sense of entitlement that often leads to criticisms of “reverse discrimination.” These allegations commonly arise when allegedly “qualified” or “more qualified” applicants are passed over, and positions are instead offered to seemingly “less qualified” racialized applicants or, for that matter, members of any equality seeking group. Admissions offices and law faculties in general must be vigilant in countering this logic with institutional messaging.

(b) Outreach and Recruitment

Any serious commitment to removing barriers to legal education for persons from racialized and ethnic minority backgrounds must begin with outreach to these groups, especially those targeting youth as they contemplate their future careers.⁸⁰

ble to obtain tertiary level education are essentially shut out of the possibility of obtaining legal education.

⁷⁷ See Kidder, *supra* note 37.

⁷⁸ At the Faculty of Law, University of Victoria, the admissions process is based on an indexing system by which an applicant’s GPA is weighted 70 percent and the LSAT is weighted 30 percent. See Admission Requirements for Regular Applicants, online: <<http://law.uvic.ca/prospective/llb/regular.php>>.

⁷⁹ See Stewart, *You Must be a Basketball Player*, *supra* note 3 at 54-55.

⁸⁰ An example of such an outreach initiative is the Law for All Program run by students at the University of Victoria Faculty of Law. The program is aimed at getting youths who would otherwise not consider law school as a viable option to seriously think about obtaining legal education and hence a career in law. Organizers of the program target immigrant groups, marginalized and First Nations communities.

The effectiveness of outreach programs depends, in part, on the perception of the legal profession among racialized and ethnic minority groups. Many members of these communities find law schools and the legal profession alienating based on the current racial and ethnic composition of the profession and of legal institutions generally. A strong message about the desire and commitment to change the *status quo* by making law schools, the legal profession, and legal institutions reflect the diversity in Canadian society, is central to the success of outreach programs. As the Canadian Bar Association has noted, these initiatives and messages of change are critical to achieving true excellence not only in legal education but also in the legal profession and in society.⁸¹ Initiatives aimed at increasing diversity should not be limited to diversifying the undergraduate law program. They must extend to targeting graduate students from marginalized backgrounds to pave the way for diversified faculties.

(i) *The Importance of Role Models and Student Ambassadors*

Providing role models from the legal profession to inspire young people at an early stage will help challenge some of these perceptions.⁸² In addition, workshops at elementary and high schools about law as a viable career would be a particularly useful means of getting racialized youth to start thinking about and working toward obtaining legal education.⁸³ Toward this end, student ambassadors can be helpful. For example, students can organize workshops at elementary and high schools in their home communities, perhaps during law school vacations when school is still in session for younger students. Law schools should endeavour to provide funding for such programs and also to profile such initiatives in the law school community.

(ii) *Taking an Integrated Approach*

The credibility and success of recruitment initiatives will also partly depend on the experiences of members of marginalized groups in law school and in the legal profession. Thus, taking an integrated approach that both enhances diversity among students and undertakes other equality focused initiatives, such as diversity among faculty members, is crucial to achieving racial balance in law schools and in

⁸¹ Canadian Bar Association, *Touchstones for Change: Equality, Diversity and Accountability: The Report on Gender Equality in the Legal Profession* (Ottawa: Canadian Bar Association, 1993) at 24. See also Canadian Bar Association, *Ten Years into the Future: Where Are We Now After Touchstones?* (Ottawa: Canadian Bar Association, 2003) at 23 (where the Canadian Bar Association renewed its commitment to the 1993 report).

⁸² See Anita Indira Anand, "Visible Minorities in the Multi-Racial State: When are Preferential Policies Justifiable?" (1998) 21 Dal. L.J. 92 at 108-109; Koggel, *supra* note 61 at 54-8. See also Stewart, *You Must be a Basketball Player*, *supra* note 3 at 21, 23.

⁸³ The Law for All Program at the University of Victoria Faculty of Law organizes a number of outreach programs for elementary and high school students such as school visits to talk about possibilities for legal careers, a day-long workshop on exposure to the legal profession, hearing from current students about their journeys to law school and discussion of some current issues in law. The group also offers mentoring and tutoring for LSAT preparation.

the legal profession. This must also be accompanied by changes in the curricula, course content and manner of delivery in ways that reflect the lived experiences of racialized individuals.⁸⁴ Openness and receptivity to the physical presence of racialized people at these institutions, as well as their diverse experiences and perspectives, are key to achieving racial balance and diversity in legal education. It is important to acknowledge that challenges may arise for both historical “Others” and members of the dominant groups as each side tries to participate in the dialogue. For those from racialized backgrounds, this might stem from discomfort in challenging the supposed neutrality of the *status quo*. Also, students from dominant groups might feel a sense of uneasiness from having to step outside their comfort zones to consider and/or incorporate other views and experiences that seem at odds with everything they have known or believed in. However, these challenges are no reason to be discouraged. As Matsuda notes:

The voices bringing new knowledge are sometimes faint and self-effacing, other times brush and discordant. To the extent that our past complicity in academic segregation has contributed to these different tones, we should strive to understand their origin and listen carefully for the truth they may hide.⁸⁵

As well, a generally congenial environment at law schools, with support services for racialized students and feelings of inclusivity and equal citizenship, will enhance the participation of racialized students in the life of the institution.

(c) Financial Constraints

Given the racialization of poverty, perhaps the biggest barrier to accessing higher education for most members of racialized groups is financial — higher tuition, cost of books and paying for the cost of living, especially for those who have to attend law school away from home, creates significant hurdles.⁸⁶ For instance, some Aboriginal students have expressed concern that higher tuition will prevent many Aboriginal people from obtaining legal education. Although many Aboriginal students receive financial support from their Band Councils,⁸⁷ the Bands are not able to keep up with tuition increases and other costs associated with attending law school. Some Band Councils actively discourage their members from applying to law schools with higher tuition fees, or will not support them if they attend those institutions.⁸⁸ Further, members of other racialized groups, who do not have the

⁸⁴ Notwithstanding good intentions for racial diversity in legal academy and the legal profession, and “progressive” admissions criteria, these institutions will likely continue to be perceived as hostile environments in which the lived experiences and perspectives of racialized people are not valued. This will persist unless changes are made within those institutions to acknowledge and value the presence and contributions of such historical “Others” in the life of those institutions. These issues are explored in detail in part 2 of this paper.

⁸⁵ See Matsuda, “Affirmative Action and Legal Knowledge” *supra* note 23 at 7. See also Smith, *supra* note 15 at 63–66.

⁸⁶ See King *et al.*, *Study of Accessibility to Ontario Law Schools*, *supra* note 3 at 93–94.

⁸⁷ See “LSUC Releases First-Ever Report on Aboriginal Lawyers,” *supra* note 3.

⁸⁸ See King *et al.*, *Study of Accessibility to Ontario Law Schools*, *supra* note 3, at 78.

kind of financial support Aboriginal students may receive from their Bands, are less likely to pursue legal education. As such, higher tuition may undermine efforts to increase the number of racialized students in law schools.

Since tuition started increasing exponentially, some schools have also increased the number and amount of bursaries available to students. Although this has alleviated the financial burden for some racialized students who would otherwise not have been able to afford higher education, the reality is that these bursary funds are likely benefiting those who would have pursued higher education anyway, and who find these bursaries a welcome relief.⁸⁹ Further, bursaries might be “too little, too late” in encouraging some people to pursue higher education. As law schools consider how to achieve racial balance in their institutions, the financial implications must also be considered. Many students from lower socio-economic brackets already carry a substantial debt load from their undergraduate studies, making the prospect of taking on more for professional school training daunting. Also, given the likelihood that most minority students admitted pursuant to racial equality initiatives will be from poorer socio-economic backgrounds, there is likely to be an increase in the pool of students eligible for bursaries. Schools must carefully consider how to deal with the potential increase in demand for bursaries. Some United States institutions facing this possibility reacted by changing the eligibility criteria thereby limiting the number of students eligible for bursaries, or by reducing the amount of each bursary in attempt to reach a greater number of students. Unfortunately, this may have the unintended consequence of rendering the funds insufficient to make any meaningful difference in the financial situation of needy students. Changes in eligibility criteria, or in the amount of financial aid allocated to each individual, need to be carefully considered to ensure that they do not end up being detrimental to the intended beneficiaries of such assistance.

(d) Summary

Achieving racial balance in legal education does not necessarily mean mirroring the racial and ethnic composition of the general Canadian population. However, it is important to have a critical mass of people from racialized backgrounds sufficient to change not just the demographics, but also the culture and *modus operandi* at these institutions. In working towards this goal, it is important not to conflate identity with ideology — not all members of minority groups will necessarily be agents of social change and exclusive emphasis on numerical goals may only promote formal equality. Indeed, the realization of social change depends on identifying and removing systemic barriers that work against a racially and ethnically inclusive society in a substantive sense.

Hence, in addition to promoting the sociological fact of diversity in law schools and the legal community, we also need to continuously evaluate the extent to which these institutions reflect the lived experiences and interests of the various

⁸⁹ In the *Study of Accessibility to Ontario Law Schools*, *ibid.*, the authors of the report found that there has been an increase in the amount of money designated for bursaries since the deregulation of fees for professional schools in Ontario. However, this has resulted in increases in the amount of awards but not necessarily the number of recipients.

constituents in society. Emphasis should be on the substance or content of curriculum, pedagogy and the general environment at law schools to ensure that racialized students do not feel alienated. These changes must also be reflected in the legal system as a whole, as well as the culture of legal institutions. Addressing the multiple factors that affect who is admitted into law school is just one element of the legal education process in need of change. Altering the typical law school cultures that envelope law faculties across Canada is another integral dimension to creating an anti-racist habitus for legal education. Some of the steps involved in reaching this goal are identified in part 2.

3. CHANGING LAW SCHOOL CULTURES

Enabling racialized and other marginalized persons to gain admission to law schools without fundamental changes to the existing structures of hierarchy and power differentials in the law school environment, curriculum, and pedagogical approaches likely sets such persons up for failure and further stigmatization. The perception that affirmative action policies undermine rigorous academic standards by leading to the admission of less qualified students fails to recognize the alienation — academically and socially — that racialized students often experience in educational institutions once admitted. These experiences ultimately affect their academic performance and reinforce the perception of inferiority attributed to racialized individuals.⁹⁰ This is due to the unspoken, covert norms, values, and assumptions that characterize law school environments and universities generally, create dominant cultures that privilege the racial majority, and impair the impact of any racially inclusive admission programs and financial assistance that may be in place,⁹¹ a phenomenon referred to as “democratic racism.”⁹² This is not to suggest that these dominant practices are ideal for the paradigmatic white male student but rather that, as a group, they stand to benefit more and suffer less than non-dominant

⁹⁰ bell hooks, *Teaching Community: A Pedagogy of Hope* (New York: Routledge, 2003) at 88. See also Bhandar, *supra* note 9 at 351–53.

⁹¹ For a discussion of law schools as constituting cultures with their own set of codes, norms, symbol systems and ideologies, see Larissa Behrendt, “At the back of the class. At the front of the class: experiences as aboriginal student and aboriginal teacher” (1996) 52 *Feminist Review* 27; Fiona Lam, *Report on the Survey of Aboriginal Law Graduates in British Columbia* (Vancouver: Law Society of British Columbia, 1996); Philip C. Kissam, “The Ideology of the Case Method/Final Examination Law School” (2001) 70 *U. Cin. L. Rev.* 137; Gregory A. Kalscheur, “Law School as a Culture of Conversation: Re-imagining Legal Education as a Process of Conversion to the Demands of Authentic Conversation” (1996) 28 *Loy. U. Chicago L. J.* 333; David A. J. Richards, “Liberal Political Culture and the Marginalized Voice: Interpretive Responsibility and the American Law School” (1993) 45 *Stan. L. Rev.* 1955; Peter Goodrich & Linda G. Mills, “The Law of White Spaces: Race, Culture, and Legal Education” (2001) 51 *J. Legal Educ.* 15; Nunn *et al.*, *supra* note 20 at 36. Similar observations have been made in relation to universities generally. See Henry & Tator, “Introduction: Racism in the Canadian University”, *supra* note 2 at 8.

⁹² Henry & Tator, “Theoretical Perspectives and Manifestations of Racism in the Academy,” *supra* note 68 at 33.

groups in law school.⁹³ In this Part, we identify the elements of law school cultures that can contribute to making law schools sites of institutional racism, and suggest ways to recuperate these spaces. While exploring it briefly, we leave aside a full discussion of the critical issue of recruitment and retention of racialized faculty for reasons of space, but also because of excellent recent treatment of this aspect of law school cultures by Canadian feminists.⁹⁴

(a) Providing Support Systems

While students may choose to attend certain law schools because of their anti-racist philosophy and general climate of inclusiveness, the majority of students in all Canadian law schools are still white.⁹⁵ Thus, even if most of the non-racialized students are generally in favour of tackling institutional racism, long-standing norms and assumptions entrenched within cases, statutes and legal cultures, both professional and educational, will persist. Law schools may assist racialized students in feeling less alienated by the whiteness of the law by offering supportive academic and cultural counselling. The need for official cultural and social support systems will hopefully diminish when schools are able to attract and retain critical masses of racialized students from particular groups. Hence, we emphasize again the importance of inclusive admissions policies.

This point is underscored by the reality that first-year racialized students, once in law school, perform worse than their white counterparts in terms of their overall first-year GPA, even when their previous indicators of academic success (LSAT and undergraduate GPA) matched those of their white peers. Timothy Clydesdale's findings from an analysis of the 27,000 plus Bar Passage Study (BPS) study, led him to comment that "something intrinsic to the structure or process of legal education affects the grades of all minorities," particularly when those students report having experienced overt acts of racism within law school.⁹⁶ Interestingly, this finding is in sharp contrast to what Clydesdale noted for women in law school, who

⁹³ Nunn *et al.*, *supra* note 20 at 38.

⁹⁴ See Carasco, *supra* note 43; see Camille A. Nelson, "The Conflicting and Contradictory Dance: The Essential Management of Identity for Women of Colour in the Legal Academy" in Sheehy & McIntyre, eds., *Calling for Change*, *supra* note 9 at 117.

⁹⁵ The Akitsiraq Law School serves as an exception to the general whiteness of law schools in Canada. In 2001, the University of Victoria Faculty of Law collaborated with Nunavut Arctic College and the Akitsiraq Law School Society to create the Akitsiraq Law School — a one-time, full four year law school program. Students admitted to the program included Inuit, Non-Nunavummiut, and non-Inuit students with strong connections to Nunavut and Inuit communities. Law students who enrolled in the unique program and completed all of the requirements of an LL.B. earned a degree from the University of Victoria. For more information, see <<http://www.law.uvic.ca/akits/akits.html>>. Plans for a second Akitsiraq law program are currently underway. The University of Ottawa Faculty of Law and the Nunavut Arctic College will run Akitsiraq II jointly. It is expected that the student body will generally reflect the population of Nunavut. The planned commencement date of September 2010 has been delayed due to lack of "core funding." For details of the program, see: <<http://www.akitsiraq.ca/>>.

⁹⁶ Clydesdale, *supra* note 32 at 737.

earned equivalent first-year GPAs and higher overall GPAs than their male counterparts, when race and other differences were controlled.⁹⁷ Given the correlation between racialized status and depressed academic performance⁹⁸ due to systemic problems, the increased enrolment of racialized students could mean a corresponding increase in demand for academic support programs. However, since poor academic performance is not limited to racialized status, and perhaps to avoid stigmatization of racialized students, such programs should be open to all interested students.⁹⁹ At the same time, academic support programs should not replace other support programs that may uniquely benefit racialized students.

Another important point for administrators to consider is the fact that low academic performance in law schools may directly correspond to “outsider” status. This is not simply a product of systemic discrimination, but rather, is related to family structures that may create “life events” for “outsider” students that distract them from their studies,¹⁰⁰ deaths within the extended family system. Recognizing the relationship between life events and performance, as well as the heightened relevance of this relationship to racialized and other “outsider” students, is critical in developing centralized responses to requests for extensions, changes in exam dates, etc.

(b) Curriculum Change

As many critical legal scholars have noted, the law has an identity.¹⁰¹ Catharine Mackinnon, for example, has argued that the law is a social code that is fundamentally male, in that it has been designed and sustained by men as an instrument of oppression against women.¹⁰² Other feminists, more attentive to the intersectional dimensions of social identity, have argued that the law attends to the privi-

⁹⁷ *Ibid.* at 740. Notably, Clydesdale finds that women do not suffer the same effect with respect to their first-year grades even when they report being subject to overt sexist incidents in law school. Also, women do better in law school overall than men (when race and other factors are controlled), *ibid.* at 737, 752. The largest impediment identified for women is the reliance on LSAT scores over grades, since the LSAT is a standardized score that favours men, while women generally have better entering GPAs than men.

⁹⁸ Christopher Jencks & Meredith Philips, *The Black-White Test Score Gap* (Washington, DC: Brookings Institution Press, 1998). For a synopsis of the book see: <<http://books.google.com/books?id=zeaxHJwyHbcC&dq=african+americans+get+worse+grades+than+whites&psp=9>>.

⁹⁹ The Academic and Cultural Support Program at the University of Victoria Faculty of Law provides assistance to students admitted in the special access and Aboriginal category, online: <<http://www.law.uvic.ca/mmatilpi/programs.html>>. The Program Director also extends assistance to other students in need of academic accommodations.

¹⁰⁰ Clydesdale, *supra* note 32 at 726, 732.

¹⁰¹ Buss, *supra* note 12 at 217.

¹⁰² Catharine Mackinnon, *Toward a Feminist Theory of the State* (Cambridge, Mass: Harvard University Press, 1989).

leged sectors of our society not only in terms of gender, but also race and class.¹⁰³ Still others have underscored the harmful effects of liberal legalism — the dominant culture in the common law that masquerades as neutral — more generally. They have impugned law’s imagination of the “free” individual and (purportedly) paradigmatic legal actor, understood as the person who is able to actualize ideals of independence, autonomy and non-interference. This standard is problematic in that it actually reflects the worldviews of individuals who are not adversely gendered, racialized, classed, or otherwise marginalized and thus can imagine themselves as free of relationships (sustaining or oppressive) and their corresponding identities.¹⁰⁴ The concerns in all of these critiques relate to the way in which the law privileges some specific cultural viewpoints over others and its failure to live up to its reified image as a neutral, blank slate. In the process, students’ and instructors’ beliefs, experiences of privilege and discrimination that they carry with them are not validated. Indeed, failure to challenge the privileged and normative structures of the legal system has an assimilative effect on Aboriginal and other racialized students who do not see their experiences reflected in the law, and results in an impoverished legal education and legal system.

Students can discern this unsaid bias of the law and thus, become alienated from it, and from a classroom that seems to promote it. There are multiple levels of dissociation that may be encountered. One is the categorization itself of certain subjects — contracts, property, torts, etc., as “core” — and the case method approach to studying them as dissociated from normative critique.¹⁰⁵ Students may see themselves in these decisions and often, outside of them, either stigmatized as belonging to the racialized community that is often at the disciplinarian end of legal proceedings, or outside the realm of justice altogether in a given dispute.¹⁰⁶ Another moment of dissociation can come from what is said in the classroom, both by the instructor and the other students. When the discourse of the class is one which reinforces the image of the law as a neutral system, the student who is struggling with this perception is at risk of facing further dissociation from the class, especially when the instructor — often, the voice of authority — does not uncover or unpack the normative assumptions the law makes in this regard.¹⁰⁷

(i) *Mainstreaming Critical Perspectives*

To be sure, important changes in curriculum content and thus, arguably, classroom discussion regarding course content, have occurred in recent years in univer-

¹⁰³ The work of Critical Race Theorists is influential here. For a sampling of this theory directed to revealing legal assumptions see Delgado & Stefancic, eds., *Critical Race Theory: The Cutting Edge* 2d ed., *supra* note 65. See also Margaret Thornton, “Technocentrism in the Law School: Why the Gender and Colour of Law Remain the Same” (1998) 36 *Osgoode Hall L.J.* 369 at 378-79.

¹⁰⁴ Carol Smart, “The Woman of Legal Discourse” (1992) 1 *Soc. & Leg. Stud.* 29. See also Henry & Tator, “Theoretical Perspectives and Manifestations of Racism in the Academy,” *supra* note 68 at 37.

¹⁰⁵ Bhandar, *supra* note 9 at 347-348.

¹⁰⁶ Monture, *supra* note 2 at 93.

¹⁰⁷ Burns & Suleman, *supra* note 9; Bhandar, *supra* note 9 at 350.

sities, including law schools.¹⁰⁸ Law schools have increased their course offerings of “outsider” courses/jurisprudence, including those focussing on racialized issues.¹⁰⁹ “Outsider” courses may be understood as “those in which the outsider orientation is critical to the very nature of the course itself,”¹¹⁰ in that they challenge law’s claim to neutrality, objectivity, and universality. These courses highlight the contingencies, partialities, and erasures law creates with respect to multiple axes of difference (such as sexuality, age, ability, class, gender, race, etc.).¹¹¹ Given the tendency for these courses to be self-selecting, however, it should be mandatory for students to take a stated number of perspective courses across a broad range. Yet, this more common way of diversifying content, to include what critical race theorists call “outsider perspectives,”¹¹² is to add them in as, literally, colourful tokens to the “real” main content. As a result, these varied and skilful critiques of law are kept steadfastly on the outside.¹¹³ While “outsider courses” are highly valuable in and of themselves for rendering legal cultures more inclusive of marginalized students, staff and faculty, to the benefit of all law school members,¹¹⁴ there needs to be a greater effort to mainstream critical perspectives of the law, and to introduce these ideas to law students, thus expanding horizons, and resisting hegemonic understandings.

The success of such a curriculum change would depend on the importance

¹⁰⁸ hooks, *Teaching Community*, *supra* note 90 at 40; Bhandar, *ibid.*, at 348.

¹⁰⁹ Bakht *et al.*, *supra* note 11. As the authors of this cross-Canada examination of common law schools note, the influential 1983 Arthurs Report on Canadian legal education is credited as instigating the introduction of outsider courses in the curriculum. *Law & Learning: Report of the Consultative Group on Research and Education in Law* (Ottawa: Social Sciences and Humanities Research Council of Canada, 1983) cited in Bakht *et al.*, *supra* note 11 at 678. See also Bhandar, *supra* note 9 at 348.

¹¹⁰ Bakht *et al.*, *supra* note 11 at 672.

¹¹¹ *Ibid.* at 671-72 (drawing from the inspiration work of Mari Matsuda in developing the term “outsider jurisprudence”). See Mari J. Matsuda, “Public Response to Racist Speech: Considering the Victim’s Story” (1989) 87 Mich. L. Rev. 2320; see Mari J. Matsuda, “When the First Quail Calls: Multiple Consciousness as Jurisprudential Method” (1989) 11 Women’s Rts. L. Rep. 7.

¹¹² Richard Delgado “Coughlin’s Complaint: How to Disparage Outsider Writing, One Year Later” (1996) 82 Va. L. Rev. 95.

¹¹³ *Ibid.*; Sheila McIntyre, “Backlash Against Equality: The ‘Tyranny’ of the ‘Politically Correct’” (1993) 38 McGill L.J. 1. For manifestation of this pattern in liberal education in general, see Louis A. Castinell Jr. & William Pinar, *Understanding Curriculum as Racial Text: Representations of Identity and Difference in Education* (New York: SUNY Press, 1993).

¹¹⁴ The authors of the very recent research on outsider enrolment in Canadian law schools note six different benefits of having outsider courses in the curriculum, in that they: 1) give outsider groups importance; 2) augment their visibility and importance; 3) validate their presence; 4) promote diversity in other areas of law school cultures; 5) present important critiques of law’s claim to neutrality by placing it in context; and 6) validate non-dominant pedagogical styles (interactive and collaborative learning methods), which outsider students respond to more positively than traditional law students, Bakht *et al.*, *supra* note 11 at 674–691.

attached to equality issues, not just in perspectives courses or those taught by racialized and other marginalized faculty, but by the institution clearly making issues of (in)equality a central part of the entire curriculum. After all, the purpose of legal education and, for that matter, higher education is partly to prepare individuals for effective participation in society. Such preparation necessarily includes sensitivity to anti-oppressive policies and decision-making. It is, therefore, important that legal education incorporates experiences and perspectives of racialized individuals that can be learned from personal association with persons from marginalized groups, students and faculty alike, including the stories they tell about their conditions.¹¹⁵ As the Canadian Bar Association has recognized,

[effective] legal education must include a diversity of approaches to the law that reflect more than just one or two perspectives. . . . Law schools should ensure that curricula and methods of instruction enhance equality by eliminating biased material and including material on bias and discrimination. Courses should include components on all forms of discrimination and on equality rights of [marginalized groups].¹¹⁶

Recognizing the importance of such experiences in the educational process prepares students for the realities of Canadian society, validates the experiences of racialized groups, gives both racialized and non-racialized students opportunities to think about (in)equality issues and inspires these students to become the agents of social change.¹¹⁷

(ii) *Restoring Indigenous Law*

While this recognition is critical, any hope for complete integration of outsider material with hegemonic legal knowledge may be misguided due to the law's inability to shed its oppressive origins and norms and thereby domesticate critical discourses that it is amenable to absorbing.¹¹⁸ Consider, as a prime example, the type of degree that is awarded. The common law and civil law systems that have primacy in Canadian law schools are European and colonial in origin. An entrenched feature of law school cultures, then, is the colonial nature of the legal education we provide, which can be insurmountably alienating to indigenous students no matter how much outsider material permeates the core curriculum. One element of curriculum change, then, is to consider restoring indigenous law to an equal status with the common law and civil law, as one of several national legal orders. This, while not simple, can be achieved by offering a law degree in indige-

¹¹⁵ See Mitchell J. Chang *et al.*, "The Educational Benefits of Sustaining Cross-Racial Interaction among Undergraduates" (2006) 77 *Journal of Higher Education* 430. See also Jeffrey F. Milem, "Making Diversity Work on Campus: A Research-Based Perspective" (2005) online: Association of American Colleges and Universities <http://siher.stanford.edu/AntonioMilemChang_makingdiversitywork.pdf>; Bhandar, *supra* note 9 at 359-60. For a judicial discussion in the American context, see *Bollinger*, *supra* note 24 and *Bollinger 2*, *supra* note 57

¹¹⁶ Canadian Bar Association, *Touchstones for Change*, *supra* note 81 at 30-31.

¹¹⁷ See Kimberlé Crenshaw, "Foreword: Toward a Race-Conscious Pedagogy in Legal Education" (1989) 11 *Nat'l Black L.J.* 1. See also Bhandar, *supra* note 9 at 359-60.

¹¹⁸ Bhandar, *ibid.* at 349.

nous law (rather than merely common law and/or civil law). The University of Victoria is currently contemplating this option. Doing so highlights the need to have indigenous faculty who can lead and guide such an initiative, a point we discuss below. In addition, with respect to this suggestion for change, as with all matters, care must be taken to ensure that racialized students and faculty do not have to carry the burden and risk of adverse responses from educating non-racialized groups about racial discrimination and its effects on them.¹¹⁹ Indeed, the dynamics by which these critical discussions take place in classrooms are central to the success of radical anti-racist pedagogy.

(c) Classroom Environment

Whether it is explaining the colonial nature of our overarching legal order or the Eurocenteredness of long accepted legal terms and concepts, enabling instructors, especially racialized or otherwise marginalized ones, to teach these critical perspectives in class, is crucial. Students have an uncanny ability to absorb dominant norms early on about what constitutes the proper focus of study in law school. They are susceptible to forming misguided ideas of what constitutes “real” or “substantive” law and what is “just policy” or disparagingly termed “theory” or, even worse, “fluff.”¹²⁰ “Real” law is conceptualized as black letter, case method analysis, which is devoid of discussions of social issues or any normative critique of what law should be in an egalitarian and ideal society. Black letter analysis is perceived as objective and neutral.¹²¹

In contrast, discussions that integrate the force fields of gender, race, class, sexuality, ability, etc., may be viewed with scepticism and even resistance. What can then transpire are instances of backlash in the classroom.¹²² When students feel challenged by material that asks them to consider issues of race, gender, equality, and discrimination, and thus confront their own privileges, the teachers who introduce this material, and who are often from marginalized communities themselves, risk accusations of racism and sexism as a way of avoidance and deflection.¹²³ Racialized instructors, especially female ones, who offer a curriculum where gender and race issues are widely discussed, may have to contend with a student’s frustration arising from his sense of decentring in the class. This frustration may even incite the student to appropriate the language of equality and pervert its sub-

¹¹⁹ *Ibid.* at 350. This is not to say, however, that racialized faculty and students do not have any role to play in the education of their white peers.

¹²⁰ Thornton, *supra* note 103 at 373-74.

¹²¹ McIntyre, *supra* note 11.

¹²² Cheryl Harris, “Law Professors of Color and the Academy: Of Poets and Kings” (1992) 68 *Chicago-Kent L. Rev.* 331, reprinted in Adrien Wing, ed., *Critical Race Feminism* (New York: NYU Press, 1997); Edith Samuel & Njoki Wane, “‘Unsettling Relations’: Racism and Sexism Experienced by Faculty of Color in a Predominantly White Canadian University” (2005) 74 *Journal of Negro Education* 76 at 80–82.

¹²³ bell hooks, *Teaching to Transgress: Education as the Practice of Freedom* (New York: Routledge, 1994); Samuel & Wane, *ibid.* at 81.

stance by claiming “discrimination” as a white male in the instructor’s class.¹²⁴

(d) Pedagogy and Evaluation

(i) Participatory Instruction and Active Learning

Although the instructor cannot fully control what a student may say and how others respond, she or he can direct the class in a certain direction and thereby try to pre-empt such damaging expression. For example, using a more participatory mode of instruction may generate a more receptive audience for new and destabilizing critical perspectives. Through active learning techniques, by which students can process instruction through small group work, focused writing, role-play, movement, etc., those students resistant to equality ideals will have the opportunity to express their views to a few of their classmates or, at least, by active writing to themselves. This technique, which can be used in any size of class,¹²⁵ circumvents the need for the entire class to be subject to the resistive act of the student, while enabling the student to both hear from his classmates and be “heard” himself. Of course, students can also exhibit reluctance to venture into the relatively new pedagogical area of active learning, preferring instead the engaged lecture.¹²⁶ However, this makes the challenge of using active learning exercises to destabilize the *status quo* just that more acute.

Indeed, active learning is a more effective pedagogy for the majority of students and can be a vital part of anti-oppressive learning and teaching.¹²⁷ Leading scholars, including one of the founders of Critical Race Theory, Derrick Bell, and leading anti-racist feminists, such as bell hooks, have discussed its liberatory potential to supplant hierarchical models of top-down, instructor-centered education with a model that envisions “education as the practice of freedom.”¹²⁸ Studies of legal education document the positive role that participatory, interactive and collaborative styles of learning have for marginalized students, as well as privileged white male students who can also lose self-esteem and self-confidence from a hierarchi-

¹²⁴ See, generally, McIntyre, *supra* note 11; Beverly I. Moran, “Trapped by a Paradox: Speculations on Why Female Law Professors Find it Hard to Fit into Law School Cultures” (2002) 11 S. Cal. Rev. of L. & Women’s Stud. 283; Nelson, *supra* note 94; Samuel & Wane, *ibid.*, at 81.

¹²⁵ See, for example, John Hamlin & Susan Janssen, “Active Learning in Large Introductory Sociology Courses” (1987) 15 Teaching Sociology 45 at 46 in which the authors note that “active learning can function in both large and small classrooms . . . [and] class size makes little difference in the success or failure of active learning.”

¹²⁶ Richard Felder, “We Never Said It Would Be Easy” (1995) 29 Chemical Engineering Education 32; Maralee Mayberry, “Reproductive and resistant pedagogies: The comparative roles of collaborative learning and feminist pedagogy in science education” (1998) 35 Journal of Research in Science Teaching 443.

¹²⁷ Beverly D. Tatum, “Talking About Race, Learning About Racism: The Application of Racial Identity Development Theory in the Classroom” (1992) 62 Harvard Educational Review 1; See also Buss, *supra* note 12; Bhandar, *supra* note 9 at 359-60.

¹²⁸ hooks, *Teaching Community*, *supra* note 90; See Derrick Bell, “Enhancing Participatory Learning”, online: <<http://www.montclair.edu/academy/bellconnect.html>> (last accessed: May 6, 2009).

cal, top-down pedagogical and evaluation system that rewards only the top 10 percent and makes everyone else feel “average” and “mediocre.”¹²⁹

(ii) *Critical Perspectives and Space for “Outsider” Experiences*

While the work still to be done in traditional law school “core” courses is plenty, it is important not to overlook the fact that “(t)he phenomenon of white privilege that pervades the “core courses” tends to spill into the “safe spaces” as well.¹³⁰ As Brenna Bhandar notes in her reflections on her own experience as a racialized woman in a Critical Race and Gender course at a Canadian law school, this can occur, again, through classroom dynamics, the identity of the instructors and guest lecturers (who are perceived as the professorial “experts” and receive the position of instructors), or through reductive verbal or written feedback, etc.¹³¹ As many Critical Race Theorists, including Critical Race Feminists, and other non-dominant scholars have noted, having space in legal education for the telling of stories of racial marginalization and other outsider experiences is important.¹³² However, the benefit for racialized groups, the legal system and the overall community would amplify if the operation of privilege was rigorously attended to even in “outsider” courses. Furthermore, the importance of equality issues should be emphasized not only in perspectives courses or those taught by minority faculty, but by the institution clearly having racial balance as a stated goal and making issues of (in)equality a central part of the entire curriculum. An instructor’s efforts to reduce productive classroom moments and facilitate conversations on what can be difficult topics for students to engage with, because of entrenched and invisible privileges may only go so far. This brings the issue of backlash and administrative responses to the forefront. The next two subsections highlight this ingredient of a successful anti-racist law school.

(e) **Administrator Consciousness**

Until that future moment when racialized students are no longer a racialized minority at law school and race-based analysis and content is not occupying the peripheries of curriculum content, faculty and administrators must take further steps. Prime among these is to reduce reliance on the LSAT. Indeed, in Clydesdale’s detailed analysis of the Bar Passage Study, this is his primary recommenda-

¹²⁹ Nunn *et al.*, *supra* note 20 at 40-41; Calder, *supra* note 12; Cairns Way & Gilbert, *supra* note 12 at 19.

¹³⁰ Bhandar, *supra* note 9 at 353.

¹³¹ *Ibid.* at 353-358.

¹³² See e.g., the examples of leading works in this area by Derrick Bell, “Property Rights in Whiteness: Their Legal Legacy, Their Economic Costs” in Delgado & Stefancic, eds., *Critical Race Theory: The Cutting Edge*, *supra* note 65 at 71; Richard Delgado, “Storytelling for Oppositionists and Others: A Plea for Narrative” in Delgado & Stefancic, eds., *ibid.*, at 60; Patricia Williams, “Alchemical Notes: Reconstructing Ideals from Deconstructed Rights” in Delgado & Stefancic, eds., *ibid.*, at 80; Richard Delgado & Jean Stefancic, eds., *The Derrick Bell Reader* (New York: NYU Press, 2005); Williams, *supra* note 46.

tion, since it disadvantages all applicants, and primarily women.¹³³ This is, no doubt, a radical step for law schools wedded to tradition and reluctant to stray too far from the normative crowd within legal education. Yet, administrators must be willing to consider every cultural practice within a law school, especially ones so formative of the habitus of legal education and the composition of those who are selected to join.¹³⁴ In addition to revisiting the entrenched norms of law school, critical efforts to achieve racial balance lie in attracting and retaining not just students, but faculty as well.

(i) *Faculty Diversity*

Another recommendation Clydesdale makes from his detailed work, which we endorse, is to recruit more racialized faculty. As he notes, there is evidence that all students, including racialized students, perform better in law school when the faculty complement is diverse.¹³⁵ Although the overall effect of diverse faculty on law school performance for racialized students is minimal, Clydesdale nevertheless includes it as one of his five main recommendations.¹³⁶ This is because, despite the lack of solid correlation between the presence of a diverse faculty and racialized student performance, there is a correlation between having a diverse faculty and racialized students' sense of belonging, including having role models, and overall well-being in law school.¹³⁷ Further, any school that hopes for racial balance must think beyond its student body and address the faculty composition as well. A critical mass of racialized faculty can counteract perceptions of tokenism, potential for marginalization and backlash, and the burden of promoting and implementing diversity within the institution, which can sometimes be at a cost to racialized faculty.¹³⁸ Diversity of the faculty complement often starts with the current faculty itself valuing diversity in terms of the candidates it seeks and its conceptualization of the position's qualifications. Relying on problematic and static concepts of "objective merit" will simply reproduce affirmative action for candidates from dominant groups.¹³⁹ Institutions who still rely on this concept need to at least recognize that "merit" is not just the number of publications and positive student evaluations a candidate has, but also her ability to diversify the faculty and contribute to the overall law school in that regard.

¹³³ Clydesdale, *supra* note 32 at 762.

¹³⁴ Dawna Tong & Wesley Pue, "The Best and the Brightest?: Canadian Law School Admissions" (1999) 37 *Osgoode Hall L.J.* 843 at 866.

¹³⁵ *Ibid.*

¹³⁶ Clydesdale, *supra* note 32 at 755.

¹³⁷ Nunn *et al.*, *supra* note 20 at 34.

¹³⁸ See Patricia Monture, "'Doing Academia Differently': Confronting 'Whiteness' in the University" in Henry & Tator eds., *Racism in the Canadian University*, *supra* note 2 at 76; Carl James, "'It Will Happen without Putting in Place Special Measures': Racially Diversifying Universities" in Henry & Tator eds., *ibid.*, at 145–152.

¹³⁹ See Bhandar, *supra* note 9 at 360–61, for a discussion of how a lack of recognition of "accrued privilege" impacts hiring decisions.

(ii) Support for Racialized Innovation

Administrators can also improve the environment for racialized faculty and students by supporting those faculty members who face backlash when they integrate race and oppression issues in their classes. Again, it is important to note that teaching about race will not invariably lead to backlash. One notable example is when the paradigmatic voice of authority — a typical senior white male — leads a classroom discussion on racism. In these contexts, instead of being challenged, he may be praised for his “sensitivity” and “enlightened” state of mind when compared to his other white male colleagues. It is racialized and other marginalized faculty who disproportionately endure the risk of backlash in the classroom, are maligned for their “ideology” or “political correctness,”¹⁴⁰ and, as a result, have to respond to student complaints to the administration.¹⁴¹

A basic first step, when this occurs, is for the administration to understand the true nature of the problem. A critical component of this understanding is to appreciate the differentiated responses of students to white male faculty discussing gender, race and other equity issues in their classrooms, when compared to faculty members from equality seeking groups such as women and racialized people who bring up these same issues. Further, many faculties have equity and diversity polices in place, including forums to discuss problems of gender, race and diversity and how they affect faculty, students, and the classroom. An institution may not, however, sustain its response to the systemic nature of racism by relying on the institutional analysis of a student complaint against a teacher that arises from ideological differences, i.e., the instructor is mainstreaming anti-racist content and methodology and the student perceives this as irrelevant and biased. When allegations of bias do arise, they need to be positioned within a framework of systemic and institutionalized racism and sexism. It is problematic to think that power resides in the context of student complaints in only one form, and that the instructor always wields it. While the power a professor holds over her student is generally an important concern, in individual situations where understandings of equality and the meaning of oppression seem to be at the heart of a dispute, an appropriate understanding of the issue would advert to the instructor’s racialized or otherwise marginalized identity in a larger society which favours whiteness.

Hence, when classroom resistance to anti-racist teaching results in a student complaint, administrators must reject the traditional liberal and privatized model of dealing with these matters as implicating only two individuals. Instead, they should take a more nuanced approach that centers its focus on systemic and public dimensions. Investigations cannot proceed in a social vacuum, as if the complaint is not an example of systemic discrimination against female or racialized faculty. Rather, administrators should inquire into and identify whether equity disputes might be central to animating the complaint with the students at the onset. In the course of this initial discussion, administrators may wish to explain the problems with conventional understandings of “objectivity” and “impartiality,” and the importance of

¹⁴⁰ McIntyre, “Gender Bias Within the Law School,” *supra* note 11.

¹⁴¹ hooks, *Teaching to Transgress*, *supra* note 123; Harris, *supra* note 122; Samuel & Wane, *supra* note 122 at 80–82.

recognizing the impossibility of the “view from nowhere.”¹⁴² They may also wish to explain the difference between formal and substantive equality to students who complain that anti-oppressive perspectives receive more play in classrooms (difficult to believe for any law school classroom, given the cultural and social standpoints of judges and lawmakers whose cases and statutes we read!). Finally, administrators may wish to encourage a student to regard the teaching of marginalized perspectives positively, as an “enlargement of the mind,” rather than negatively, as “reverse discrimination” or “self-interest” on the part of a racialized instructor.¹⁴³

(iii) *Facilitating an Anti-Racist Faculty*

Administrators, themselves, obviously need to be equipped with an anti-racist consciousness in order to help facilitate this type of discussion. Given that administrators are often faculty members, this underscores the need to diversify the faculties of law schools generally, so that a critical mass of scholars and administrators familiar with theories based on equity and diversity principles exist. It also favours the adoption of faculty training initiatives for those faculty who are not racialized, and need to learn more about racialization to create a more inclusive law school culture. This will have the triple beneficial effect of increasing the likelihood that administrators will be capable of handling situations of backlash, making the racialized professor less of a standout on her faculty and, thus, less of a target for backlash in the first place, and providing all racialized instructors, students as well as their allies a network of support, thereby yielding more diversity in perspectives in instruction and learning.¹⁴⁴

(iv) *Support for Anti-Racist Projects*

A final measure that can contribute to creating a supportive environment for racialized faculty and students is for the administration to support anti-racist projects wherever possible. This would involve endorsing student-led projects (speakers, workshops, conferences, socials, etc.), supporting the formations of new student clubs related to anti-racism, and allocating or raising funds that can be devoted to such initiatives. Supporting anti-racist projects would also mean enabling research in critical race theory and practice, as well as related anti-oppressive research projects that faculty propose. Ingredients of support would include: providing internal research grants, authorizing teaching release when external grants are awarded to accommodate research endeavours, and promoting a research culture if one does not already exist. Without the time and funds to do the research, it will not be done and could potentially lead to feelings of demoralization. While this support is important for all faculty, it is heightened for faculty immersed in critical theory who will have important critiques of law to proffer, and can assist in altering liberal legalism’s *status quo*. Further, the absence of such support may impair retention

¹⁴² Donna Haraway, “Situated Knowledges: The Science Question in Feminism and the Privilege of Partial Perspective” (1988) 14 *Feminist Studies* 575.

¹⁴³ Jennifer Nedelsky, “Embodied Diversity and the Challenges to Law” (1997) 42 *McGill L.J.* 91, discussing the work of Hannah Arendt.

¹⁴⁴ Nunn *et al.*, *supra* note 20 at 44.

efforts of racialized and other marginalized faculty interested in doing this work, as well as foreclose employment and mentoring opportunities for interested students, many of whom will themselves be racialized.

4. CONCLUSION

The goal of racial equality in legal education is a noble and legitimate societal interest. It acknowledges the reality of racial inequalities in Canadian society and the legal system, as well as its detrimental effects not only on racialized and ethnic groups but society in general. Racially and ethnically diverse educational institutions enrich the social and learning environments at those institutions, resulting in significant benefits for individual members (from both non-mainstream and dominant groups), the institution and society.¹⁴⁵ Racial equality in higher education can, therefore, be a vehicle that promotes social welfare at large.¹⁴⁶ In the context of legal education and the legal system, there can be a direct correlation between diversity among those who obtain legal education, diversity of views represented in the educational process, and the nature and focus of the legal system and other state institutions more generally in terms of their attentiveness to issues of marginalization.¹⁴⁷ A diversity of perspectives in the legal academy, and the legal community, also serves to emphasize that dominant/traditional perspectives are not neutral, but rather social constructions that no longer deserve to be accorded the historical deference that such viewpoints have traditionally enjoyed.

While affirmative action is a vital initial measure, the successful attainment of racial equality in higher education, and legal education in particular, largely hinges on creating and sustaining conditions that can optimize the alleged benefits of a diverse institution, beyond the simple presence of diverse faces at the institution.¹⁴⁸ Such programs include peer and institutional initiatives that offer support in a congenial atmosphere and in ways that do not stigmatize racialized individuals. Sensitivity to curricula content that recognizes the historical and current realities of discrimination against Aboriginal and other racialized groups is also integral to an anti-racist culture. An inclusive curriculum not only validates the feelings and experiences of such students, but also helps them to identify with the course content and its relevance to their past, present and future,¹⁴⁹ and improve an overall sense of belonging. A greater culture of equity will also encourage faculty initiatives, as committed faculty will receive more support for their laudable, but often challenging, equity goals. This support will be especially valuable to racialized and other marginalized faculty members who are at risk of backlash. While these measures require resources and other commitments on the part of the institution, the benefits they will yield are themselves immeasurable, not the least of which will be an anti-

¹⁴⁵ For e.g., see Chang *et al.*, *supra* note 115 at 431-432, 448-451.

¹⁴⁶ See Anand, *supra* note 82 at 104-105; Schwarzschild, *supra* note 65 at 1.

¹⁴⁷ For example, see Brian Dickson, "Legal Education" (1986) 64 Can. Bar. Rev. 374 at 377. See also Canadian Bar Association, *Touchstones for Change*, *supra* note 81 at 24; Carasco, *supra* note 43 at 105-106; Kennedy, "A Cultural Pluralistic Case for Affirmative Action in Legal Academia," *supra* note 46; Bollinger, *supra* note 24.

¹⁴⁸ See Chang *et al.*, *supra* note 115 at 432-33.

¹⁴⁹ See Matsuda, "Affirmative Action and Legal Knowledge" *supra* note 23 at 9.

racist and anti-oppressive legal institution.

As the preceding discussion attests, similar to most cultures, law school cultures are complex and not easily altered. We have sought to highlight those elements that contribute to institutional racism and identify strategies that faculty, students, and administrators can adopt to facilitate the view of anti-racist critique as counter-critique, rather than “bias” or “subjective” and thus illegitimate. While not a guarantee of racial balance, these steps hold promise for creating more inclusive spaces within law schools where difference is recognized and celebrated.