Striving to Teach “Justice, Fairness, and Morality”

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4 Clinical L. Rev. 1-64 (1997)
Imagine the following discussion between a student and his supervisor:

Student: “Michael’s dying . . .”
Supervisor: “I know.”
Student: “And this is the last time that he and Josh will be able to be together. He told me when I interviewed him that all he wanted was to have Josh with him in the hospital room. They won’t let him in. His parents say that Josh was the cause of all of this and he is not to get anywhere near Michael.”
Supervisor: “Have you thought about what you can do to help Michael?”
Student: “Michael was fine last week. This bout of pneumonia came on so quickly, he didn’t get to sign the health care power of attorney.”
Supervisor: “Why is that necessary?”
Student: “The hospital’s policy says that only spouses and family and people with health care powers of attorney can get into intensive care. Josh doesn’t fit into any of those categories even though they have been together eleven years.”
Supervisor: “Why can’t he just go to the hospital and see him?”

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Student: “I thought that was exactly what would happen. I guess that's why I didn't finish the power of attorney faster. Michael had introduced Josh to all the nurses, and they know that Josh is who he wants with him when he dies. But the family has a lawyer now, and the hospital won't bend its rules. I can't believe it. It's so unfair. Michael's parents haven't even seen him since he left home thirteen years ago. Now they get to keep Josh out?”

A typical supervisor's response to this student might be to ask, “What are your options?” One might expect the student to reply: “Well I could call the hospital attorney and discuss with him the document that we prepared and try to get it enforced as Michael's intent.” The supervisor might then continue to inquire about the outcome of that strategy, what the law says about unsigned health care powers of attorney, and other legal ramifications.

Such an interchange between supervisor and student would certainly encourage the development of the student's skills of legal analysis and research. It would focus the student on the law as it is and move him away from feeling that the situation is unfair. Another approach to this scenario, however, is to try to use the student's own sense of frustration and injustice to teach him about his role as a lawyer in promoting the ideals of justice, fairness and morality.

What questions should a supervisor ask? What lessons about justice can be drawn here? Should the supervisor be content with the fact that the student now can see a clear contrast in how the law treats a gay person differently from a heterosexual person? How does the learner make the leap from that contrast to an insight about how the law incorporates a heterosexual point of view? What generalizations can the student make from the law's lack of neutrality that will assist him in using that insight? Is the supervisor overstepping the bounds if she urges the student to examine how his preconceptions resulted in his being unprepared for this possibility? How can the supervisor assist the student in this learning without prompting confusion and retreat? Clearly, mere exposure to the client's reality is not enough.

1 Teachers who take on a social justice agenda are often vulnerable to attack. We are accused of totalitarianism and “political correctness.” We are criticized for allegedly abusing our power as a professor by forcing our agenda on our students. I do not intend to argue with those accusations here. Others have done it far more eloquently than I. See, e.g., bell hooks, Teaching to Transgress: Education as the Practice of Freedom (1994) (hereinafter hooks, Teaching); Howard Lesnick, The Integration of Responsibility and Values: Legal Education in an Alternative Consciousness of Lawyering and Law, 10 NOVA. L. REV. 633 (1986). But see Robert Condlin, “Tastes Great, Less Filling”: The Law School Clinic and Political Critique, 36 J. LEGAL EDUC. 45 (1986) (arguing that law school clinics should not engage in “politicizing” students).
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own bias made him unable to anticipate his client’s needs, thus limiting his ability to serve the client. It demonstrates how his unawareness of his own heterosexuality affects his vision, reinforces the status quo, and can heighten his client’s pain. More importantly, this poignant moment in his relationship with his client can prompt him to anticipate the ways his various privileges may have affected him in other areas of his life. It is this understanding that will make transformational learning possible. It is through the practice of this understanding that the student can learn how to promote justice, fairness and morality.

Everything we do as law teachers suggests something about justice. Recent studies of law schools are urging that we be more explicit about justice in legal education. The Report of the Task Force on Law Schools and the Profession: Narrowing the Gap (the

2 By transformational learning, I mean the creation of opportunities for reflection and reorientation of a learner’s values. Such a project necessarily raises ethical issues. Jack Mezirow raises a few of these questions. He asks if it is ethical for an educator to:

- Intentionally precipitate transformative learning without making sure that the learner fully understands that such transformation may result.
- Facilitate a perspective transformation when its consequences may include dangerous or hopeless actions.
- Decide which among a learner’s beliefs should become questioned or problematized.
- Present his or her own perspective, which may be unduly influential with the learner.
- Refuse to help a learner plan to take an action because the educator’s personal convictions are in conflict with those of the learner.
- Make educational interventions when psychic distortions appear to impede the learner’s progress if the educator is not trained as a psychotherapist.

Jack Mezirow, Transformative Dimensions of Adult Learning 201 (1991). He concludes that all of these acts are ethical, and I agree. Indeed, I question whether our failure to address these issues in legal education is ethical. Every time we reinforce the idea that the law is neutral, we reinforce hierarchy and domination.


4 See American Bar Association Section of Legal Education and Admissions to the Bar, Legal Education and Professional Development — An Educational Continuum (Report of the Task Force on Law Schools and the Profession: Narrowing the Gap) (1992) (hereinafter MacCrate) and The American Bar Association, Section of Legal Education and Admissions to the Bar, Professionalism Committee, Teaching and Learning Professionalism (1996). The fact that these documents were produced by the ABA is significant because the ABA is the accrediting agency for law schools. Law schools must pay attention to criticism of how they conduct their education of law students because it could have ramifications for continuing accreditation. Since the publication of the MacCrate Report, the ABA has refined accreditation standards to reflect many of the concerns raised by MacCrate. Furthermore, because law schools are increasingly looking to the Bar for funding for law school programs, lawyers’ attitudes toward the effectiveness of legal education could have financial consequences. Law schools across the nation have created MacCrate task forces to begin the process of implementing its suggestions.
MacCrate Report) exhorts us to use opportunities like this moment with the student not just to teach the law of health care powers of attorney but to raise those questions of justice, fairness, and morality that lurk just below the surface.\(^5\) The MacCrate Report identifies four fundamental values of the profession:

1) provision of competent representation;
2) striving to promote justice, fairness and morality;
3) striving to improve the profession; and
4) professional self-development.

By far the most challenging value is the injunction to strive to promote justice, fairness, and morality. Arguably, the first value, the provision of competent representation, can be fostered by effective skills training. The third value, striving to improve the profession, can be fostered through active participation in the Bar. The fourth value, professional self-development, appears to be mainly concerned with effective Continuing Legal Education programs that enhance lawyers' ability to learn through experience. Yet methods of promoting the second value are not only less obvious than they are for the other three values, but also more difficult.\(^6\) The MacCrate Report, although

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\(^5\) MacCrate, supra note 4, at 213. The MacCrate report, released in July 1992, has been the subject of much debate both within the ABA and the Academy. See generally Michael Norwood, Legal Education: Past Developments, Present Status and Future Possibilities, Scenes from the Continuum: Sustaining the MacCrate Report's Vision of Law School Education into the Twenty-First Century, 30 Wake Forest L. REV. 293 (1995); Symposium on the MacCrate Report: Papers from the Midwest Clinical Teachers' Conference, 1 CLIN. L. REV. 349 (1994); John J. Costonis, The MacCrate Report: Of Loaves, Fishes, and the Future of American Legal Education, 43 J. LEGAL EDUC. 157 (1993). Since the MacCrate Report's release, law schools have grappled with meeting the goals articulated in the report. Although the report is not designed to be prescriptive, it does identify a list of skills and values new lawyers should seek to acquire. There has been much written about the skills portion of the Statement of Skills and Values (SSV). Legal educators feel fairly confident that they know how to teach skills such as problem-solving, negotiation, counseling, and legal research. The only debate in this area is whether and how much the skills should be taught. But how does one promote justice, fairness, and morality? How does the law school participate in that endeavor through teaching?

7 Educators have identified the questions that the issue of justice poses but have not outlined the ways in which those questions should be addressed in legal education. David Barnhizer identifies the following key questions that should be the focus of legal education:
1. What do we consider to be a just society?
2. What are the terms of such a society?
3. What kinds of behaviors tend toward facilitating the creation of such a society?
4. What behaviors undermine a society we consider just?
5. How do we or ought we organize our political institutions so that they behave in a manner we consider just?
6. How do we or ought we ensure that our institutions are generative, adaptive, self-evaluative and regenerative?
7. What ideals are integral to a workable vision of the individual and social human committed to living a just life?
eloquent in its articulation of this value, only spends three pages discussing it. In its section on justice, fairness and morality, the report suggests three areas in which attorneys can promote this value in their daily practice. They are: 1) when the lawyer is making decisions for a client; 2) when counseling clients about decisions the client must make; and 3) by treating others with dignity and respect. In addition, members of the profession can strive to promote justice by ensuring that adequate legal services are provided for those who cannot afford to pay and working toward the enhancement of the law's ability to do justice.\(^7\)

The MacCrate Report itself acknowledges that its inventory of skills and values is a “work in progress” and invites members of the legal community to expand and refine it.\(^8\) This article responds to that invitation by suggesting ways in which we can teach future lawyers about how to promote justice in their daily practice. First, I discuss the ways in which legal education is presently failing in this endeavor. Next, I outline a learning theory that offers a model for teaching about justice through the systematic study of incidences of injustice. I then describe a clinical experience in which the students encountered injustice in the course of representing clients and analyze how and perhaps why that experience affected the students' sense of justice.

8. What can a law faculty, law schools, lawyers, judges and legislators do that helps American society address the awesome challenges it faces? Barnhizer, supra note 3, at 322. These are questions rarely asked in a law school curriculum. Unmasking privilege is a prerequisite to being able to understand these questions and attempting to answer them. Otherwise, we are bound to reproduce power relations that undermine justice.

7 The MacCrate Report specifically states:

*Striving to Promote Justice, Fairness, and Morality*

As a member of a profession that bears “special responsibilities for the quality of justice,” a lawyer should be committed to the values of:

2.1 *Promoting Justice, Fairness, and Morality in One’s Own Daily Practice,* including:

(a) To the extent required or permitted by the ethical rules of the profession, acting in conformance with considerations of justice, fairness, and morality when making decisions or acting on behalf of a client . . . ;

(b) To the extent required or permitted by the ethical rules of the profession, counseling clients to take considerations of justice, fairness and morality into account when the client makes decisions or engages in conduct that may have an adverse effect on other individuals or on society . . . ;

(c) Treating other people (including clients, other attorneys, and support personnel) with dignity and respect;

2.2 *Contributing to the Profession’s Fulfillment of its Responsibilities to Ensure that Adequate legal Services Are Provided to Those Who Cannot Afford to Pay for Them;*

2.3 *Contributing to the Profession’s Fulfillment of its Responsibilities to Enhance the Capacity of Law and Legal Institutions to Do Justice.*

MacCrate, supra note 4, at 213.

8 MacCrate, supra note 4, at 123-24, 130-31.
Finally, I look at ways in which the learning theory and the insights gained from this clinical experience can be used in other clinical courses as well as in traditional law school courses. I offer examples of methods that may make the MacCrate aspiration operational.

I. Our Failure to Teach Justice

The MacCrate Report suggests that legal education could be doing a better job of instilling the value of promoting justice, fairness, and morality. Legal education is failing both directly and indirectly. First, educators often act as if lawyers play no role in the achievement of justice. Consequently, legal educators neglect to address issues of justice when the opportunity arises. Second, in those circumstances in which justice is discussed, too often the message that students receive is that justice is merely the product of the application of neutral rules. We ignore the fact that the exercise of judgment, perhaps the most fundamental of legal skills, is inherently value laden.

We communicate a great deal about the (un)importance of justice when we do not focus on it explicitly. The professor who responds to the student concerned about fairness with questions that are limited to what “the law says” is communicating ideas about justice and morality. The failure to address the student’s concerns may communicate that those concerns have no place in the practice of law. Legal education often ignores the significant role that lawyers play in shaping public policy. It includes little or no discussion of the social consequences of a lawyer’s acts and decisions not to act. Yet, practicing lawyers make legally significant decisions on a daily basis, perhaps as much or more so than do judges, legislators and administrators.

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9 See, generally Ian F. Hane Lopez, White By Law: The Legal Construction of Race (1996). It is not as if there were not a need for lawyers concerned with justice. In a national survey of people living at or below 125% of the poverty line, 80% of the legal problems were handled without the benefit of legal assistance. American Bar Association Consortium on Legal Services and the Public, Two Nationwide Surveys: 1989 Pilot Assessments of the Unmet Legal Needs of the Poor and of the Public Generally 37 (1989).

10 Jerold S. Auerbach, What Has The Teaching of Law To Do With Justice?, 53 N.Y.U. L. Rev. 457 (1978). If all I can do in law school is to teach students skills ungrounded in a sense of justice then at best there is no meaning to my work, and, at worst, I am contributing to the distress in the world. I am sending more people into the community armed with legal training but without a sense of responsibility for others or for the delivery of justice in our society.

11 The need to make future lawyers aware of their responsibility toward the poor in this country becomes more crucial every day. State and federal legislatures are actively engaged in attacks on the poor and poor people’s advocates. Congress has exacted deep cuts in funding and has created restrictions on the kinds of claims that can be brought by offices funded by the Legal Service Corporation. States are receiving waivers and are designing programs that significantly reduce public benefits and require the poor to jump over ever
Very few case books address issues of fairness, justice and morality. When they do, many professors, intentionally or subconsciously, skip the cases or footnotes that focus on sexual harassment, sexual orientation, race and class issues, and the intricacies that arise due to the overlap of these characteristics.

Focusing solely on “what the law says” also reinforces the idea that lawyers are legal technicians, that the practice of law is merely the exercise of applying fixed neutral rules to a given situation, that justice has no other content than the results that emanate from the application of these rules. The pedagogical assumption within law schools is that our subject matter is innately neutral. Law is merely a process and there is no common good, no common goals toward which everyone is collectively working. Many of us urge students to approach the law with a studied detachment to rid themselves of the emotion and personal experiences that may color their approach to a problem. Students learn quickly to search for the rule that will gov-

higher hurdles to maintain their meager benefits. Our students, however, are coming from backgrounds in which most are completely unaware of the needs of the poor. Income and wealth disparities in this country are greater than they have been in the last fifty years. See Inequality: For Richer, For Poorer, THE ECONOMIST, Nov. 5, 1994, at 19; see also KEVIN P. PHILLIPS, The Politics of Rich and Poor: Wealth and the American Electorate in the Reagan Aftermath (1990).


This view assumes that the prevailing allocations of wealth and power are based on neutral principles and are acquired through pure merit.

Even in our relationships with clients, the traditional image of the lawyer is that she can espouse any viewpoint of any client, that she is neutral as to political content. See Naomi R. Cahn, Styles of Lawyering, 43 HASTINGS L.J. 1039, 1063 (1992).

These ideas are hardly unique to law. Lester C. Thurow describes this phenomenon in economics when he describes both democracy and capitalism as processes divorced from values:

When anyone talks about societies being organic wholes, something more than the statistical summation of their individual members’ wants and achievements, both capitalists and democrats assert that there is no such thing. In both, individual freedom dominates community obligations. All political or economic transactions are voluntary. If an individual does not want to vote, or buy something, that is his or her right. If citizens want to be greedy and vote their narrow self-interest at the expense of others, that is their right. In the most vigorous expression of capitalistic ethics, crime is simply another economic activity that happens to have a high price (jail) if one is caught. There is no social obligation to obey the law. There is nothing that one “ought” not to do. Duties and obligations do not exist. Only market transactions exist.


ern a given situation and take the passion out of the problem. There is no room within this framework to examine how an individual learner's perspective affects his or her identification and assessment of the legal problem and choice of rule. I have talked with professors who pride themselves on exams that if answered on the basis of the student's innate sense of justice, would inevitably be answered "incorrectly." Only that student who has successfully learned to leave her sense of compassion at the door will master this type of exam. We are actively training students to divorce themselves from issues relating to justice, fairness and morality.

Law schools often ignore the skill of exercising judgment and the enormous power with which lawyers are vested in the attorney/client relationship. Lawyers' decisions, unlike those made by judges, legislators, and administrators, are not subject to any review by others. Making decisions for clients and counseling clients about the decisions they must make require lawyers to exercise judgment. MacCrate recognizes that this is where lawyers affect justice since these decisions

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19 Such a separation runs counter to the literature on adult learning and inhibits the learners' ability and openness to learning about justice and morality. See Carrie Menkel-Meadow, Narrowing the Gap by Narrowing the Field: What's Missing from the MacCrate Report — Of Skills, Legal Science and Being a Human Being, 69 WASH. L. REV. 621 (1994).

20 These exams assume that "thinking like a lawyer" means suppressing one's personal and political beliefs. For a thoughtful discussion of this attitude within the law school, see Angela P. Harris & Marjorie M. Shultz, A(nother) Critique of Pure Reason: Toward Civic Virtue in Legal Education, 45 STAN. L. REV. 1773 (1993).

21 This has demonstrable effects on women students' ability to succeed in the traditional ways in law school. See Lani Guinier, Michelle Fine & Jane Balin, Becoming Gentlemen: Women's Experience at One Ivy League Law School, 143 U. PA. L. REV. 1 (1994).

22 That separation from justice, reinforced daily in classes, only affirms privilege and perpetuates dominance. As an educator, I can only act ethically if I do not attempt to force my own perspective on the students but encourage learners to choose from a wide range of viewpoints. See Mezirow, supra note 2, at 225. Mezirow points out, however, that an educator is not bound to help a learner carry out actions that are in conflict with the educator's own code of ethics.

23 See Tom Clark, Teaching Professional Ethics, 12 SAN DIEGO L. REV. 249 (1975); James R. Elkins, The Pedagogy of Ethics, 10 J. LEGAL PROF. 37 (1985); Anthony T. Kronman, Living in the Law, 54 U. CHI. L. REV. 835 (1987). There are many skills that are essential to effective lawyering. Obviously, it is not enough to understand privilege if one does not have the skills to put that knowledge into operation. Clinical legal education is one place in the law school curriculum where those skills are learned. As Norman Redlich points out, "[I]dealistic young men and women [are] leaving law school, intently anxious to deal with problems of poverty, discrimination, homelessness, or an inadequate education system, and [do] not possess the widest possible range of tools to make one's legal education effective." Norman Redlich, Challenging Injustice: A Dedication to Bob McKay, 40 CLEV. ST. L. REV. 347, 350 (1992).

24 MACCRATE, supra note 4, at 213. The desire to promote justice is not a value that suddenly emerges upon admission to the Bar. See JACK BASS, UNLIKELY HEROES: THE
often reflect the value system of the lawyer. Rarely do our students have the opportunity to discuss what kind of lawyer they want to be, what norms should control their behavior, and how they should relate to clients, adversaries, judges, support personnel, and other third parties. Frequently the "values" portion of the law school curriculum is relegated to a two- or three-credit professional responsibility course. In some cases, even these courses utterly fail to address the issue of justice, reducing value choices within the profession to the mere application of professional rules. In those instances, there is frequently little or no discussion of the lawyer's responsibility to serve the public and to further the interests of justice, fairness, and morality.

Justice, fairness, and morality are teachable, provided we offer the kinds of experiences that make compassionate insight possible.

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25 The MacCrate Report identified the following fundamental skills: problem solving, legal analysis and reasoning, legal research, factual investigation, communication, counseling, negotiation, litigation and alternative dispute resolution procedures, organization and management of legal work, and recognizing and resolving ethical dilemmas. Statement of Fundamental Lawyering Skills and Professional Values, MacCrate, supra note 4, at 15-84.

The Report suggests that these skills are the foundation for effective, competent lawyering. The statement, however, also envisions the coexistence of fundamental professional values of justice, fairness, and morality. These qualities are hard to teach. Robert A. Solomon, Teaching Morality, 40 Clev. St. L. Rev. 507 (1992). However, they are the backbone of judgment, which is perhaps the fundamental legal skill. In this article, I argue that we can teach students to exercise judgment so as to promote justice. In doing so, I recognize that formidable scholars have concluded that judgment is not a skill that is teachable. Immanuel Kant said that "judgment is a peculiar talent which can be practiced only, and cannot be taught. It is the specific quality of so-called mother-wit; and its lack no school can make good." Immanuel Kant, Critique of Pure Reason *A133/B172 (Norman K. Smith trans., 1968). I am in agreement with David Luban and Michael Millemann, who specifically address this observation by Kant:

We are inclined to deny Kant's implicit distinction between things that can be taught and things that can (only) be practiced — For the disinction overlooks the possibility that judgment can be taught through practice.


27 See id.

28 See Luban & Millemann, supra note 25.


30 Many scholars have argued that we should use legal education to teach our students about injustice and use clinics to pursue the goal of law reform. See, e.g., Phyllis Goldfarb, Beyond Cut Flowers: Developing a Clinical Perspective on Critical Legal Theory, 43 Hastings L.J. 717 (1992); Carrie Menkel-Meadow, Two Contradictory Criticisms of Clinical Education: Dilemmas and Directions in Lawyering Education, 4 Antioch L.J. 287 (1986); Abbe Smith, Rosie O'Neill Goes to Law School: The Clinical Education of the Sensitive New Age Public Defender, 28 Harv. C.R.-C.L. L. Rev. 1 (1993); Stephen Wizner & Den-
Enhancing our students’ awareness about justice, fairness, and morality also requires that we discuss those values more fully throughout the curriculum. Discussion of justice is not sufficient. I suggest that the best way to teach about justice is to create opportunities for students to exercise judgment. Through the examination of their judgment, we can increase our students’ self-awareness and help them to develop a sense of justice.

II. Developing a Sense of Justice Through Deconstructing Power

Although the MacCrate Report identifies the need to do justice as a fundamental value of the profession, the report does not define what it means by the term “justice.” A jurisprudential treatment of the meaning of justice, fairness, and morality is well beyond this article, but justice — however one defines it — is about the exercise of power. In order to promote justice, one must be explicit about how power operates, particularly in its subtle and invisible manifestations.


32 For a discussion of this failure to teach our students to exercise judgment, see Teaching and Learning Professionalism, supra note 4. We must attempt to enlarge students’ thought so that they can recognize multiple points of view. This is hardly a new idea. Kant described it as erweiterer Denkkunstart. Immanuel Kant, Critique of Judgment Sec. 40, at 137 (J.H. Bernard trans., 1966). Of course, expanding one’s mind is not sufficient in the exercise of judgment. For a thoughtful analysis of the limitations of Kant’s view and an exploration of qualities necessary to teach in order to teach judgment, see Luban & Millemann, supra note 25.

33 I believe that when people confront and understand their complicity in others’ distress, they want to stop those acts that may contribute to that pain. Human beings do not want to feel morally responsible for the detrimental treatment of other human beings. This results in either a change in behavior or an attempt to distance themselves from responsibility and guilt. Our job as legal educators concerned about the public interest is to make the connections between the exercise of privilege and the reinforcement of hierarchy and to reduce our students’ ability to ignore the role that they play in upholding unearned dominance in our society.

34 MacCrate, supra note 4, at 140. See also Solomon, supra note 25.
One way to approach learning about justice, fairness, and morality is to teach our students the ability to deconstruct power, to identify privilege, and to take responsibility for the ways in which the law confers dominance. With that understanding, we can also learn to use our power and privilege in socially productive ways.

There is an old Chinese proverb that says, "We see what is behind our eyes." In order to learn about how to promote justice, the learner must understand how power affects vision and values. The legal educator's role is to help students see how their experience affects their values and how these values affect their assessment of the law. We are essentially teaching our students the "skill" of compassion. I define "compassion" as a sympathetic consciousness of others' distress with a desire to act to alleviate it. As this definition implies, compassion requires action; it is not merely empathy. It requires more than the knowing nod and sympathetic gesture. A feeling of compassion causes a person to act because of a desire to alleviate the condition. The desire to "alleviate" another's distress, or to act affirmatively, is the essence of the concept. In the social justice context, the skill of compassion is the ability to appreciate that we operate with only a partial perspective and to recognize that many of us, law students and practicing attorneys, have privileges —most of them not earned through any personal effort on our part — which color our perceptions both of the client and the legal claim.

We often treat our vision as if it were not partial at all. We are not the objective actors applying neutral rules that the legal system assumes. We can better promote justice if we understand how injustice depends on people's inability to examine how their own values

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36 This activity is not without costs. Often when people of privilege work to expose privilege and use it to assist others, they are discounted or treated with hostility. For example, white people who identify racism are often discounted as suffering from "terminal white guilt." Men who speak about sexism risk questions about their masculinity. These reactions only serve to expose the power and investment that those with privilege have in maintaining the status quo.

37 The idea that one can strive for justice impliedly assumes that the law is not neutral. Mari J. Matsuda describes a perspective that is akin to one aspect of compassion, that of multiple consciousness. It is not the ability to see all points of view but rather "to see the world from the standpoint of the oppressed." Mari J. Matsuda, When the First Quail Calls: Multiple Consciousness As Jurisprudential Method, 14 Women's Rs. L. Rep. 297 (1988).

38 Antonio Gramsci has described this phenomenon: "[T]he consciousness of what one really is [entails] 'knowing thyself' as a product of the historical process to date which has deposited in you an infinity of traces, without leaving an inventory." Antonio Gramsci, Selections from the Prison Notebooks 324 (Quintin Hoare & Geoffrey Nowell Smith eds. & trans., 1971).
may reinforce dominance.\textsuperscript{39} One way to explore this is through an understanding of privilege.\textsuperscript{40} The MacCrate Report suggests that this should be done on a personal level, uncovering privilege in our daily lives so that we can effectively participate in the process of social improvement.\textsuperscript{41}

I use the term "privilege" to describe that "invisible package of unearned assets that I can count on cashing in each day, but about which I was 'meant' to remain oblivious."\textsuperscript{42} It is conferred dominance.\textsuperscript{43} It is the vehicle by which systems of power operate. Too

\textsuperscript{39} Stephen Ellmann describes this sensitivity as an aspect of empathetic lawyering. He says:

Empathetic lawyering aspires to a vision of lawyers capable of overcoming their own limitations of perspective so as to see or feel the world as other persons do, despite the differences of race, gender, class, culture, or simply identity that divide us from each other. The experiences and perspectives of the powerful, however, are not the same as the powerless. To cross the gap—and to be perceived by one's client as having crossed it—the lawyer generally needs more than just intellectual curiosity. She needs some sympathetic identification with those with whom her experience might otherwise separate her.

Stephen Ellmann, \textit{Empathy and Approval}, 43 Hastings L.J. 991, 1003 (1992). I believe that "sympathetic identification" is not sufficient to enable us to overcome our limitations in perspective. It is only when that identity allows us to see how our own privilege is paid off through other's pain that true change will occur.

\textsuperscript{40} See generally \textit{Stephanie M. Wildman, Privilege Revealed: How Invisible Preference Undermines America} (1996). We must also appreciate the importance of constantly paying attention to context. As Jean Love points out:

In one situation, I may play the role of the oppressed woman among men, for example. In another situation, I may play the oppressor—a white woman in a predominately white society, for example. At some point in time in our lives, we all experience both the roles of oppressor and oppressed. We all practice both domination and resistance. Different though our individual experiences may be, we all learn something about the impact of oppression upon both its victims and its perpetrators. This creates a capacity for shared understanding of oppression. If we choose to talk with each other about our experiences of the phenomenon of oppression, we will eventually create a common language for devising solutions about the problem of oppression.

\textsuperscript{41} Section 2.1(c) of the MacCrate Report's Statement of Professional Values says that in order to achieve the value of striving to promote justice, fairness, and morality, a lawyer should treat "other people . . . with dignity and respect." \textit{MacCrate, supra} note 4, at 213.

The Commentary notes that:

[T]his necessarily includes refraining from sexual harassment and any form of discrimination on the basis of gender, race, religion, ethnic origin, sexual orientation, age or disability in one's professional interactions with clients, witnesses, support staff, and other individuals.

\textit{Id.} at 214.


\textsuperscript{43} The term "privilege" does not capture this concept fully. It is misleading because it implies something positive and always desired. I use it because I am unable to come up with a better word for the phenomenon. Peggy McIntosh is also troubled by the word. \textit{See
often we focus on disadvantage as the sole result of power disparities rather than recognizing that there is a subtle system of privilege that necessarily follows systems of subordination. We are taught to think of oppression as acts of cruelty by one group against another group or an individual. We look for intentional acts rather than “invisible id.

The literature in this area adopted the term and so it has become imbued with particular meaning within critical legal theory. The term has taken on an overly rhetorical quality that often gives rise to a charge of being “P.C.”; nevertheless, I believe that the term, if properly used, adds clarity to our understanding of how power functions in our society.

In this paper, I focus on race, sexuality, gender, and class privilege. One can easily identify other privileges (religion, ableness, etc.) and I would urge the reader to do so. I hope that my analysis is generalizable. I am concerned with conferred dominance in which the characteristics of the privileged group define the societal norm, allowing the privileged group to rely on its privilege and ignore oppression.


See Harlon L. Dalton, *Racial Healing: Confronting the Fear Between Blacks and Whites* (1995). Dalton points out that racism often focuses on race-based animosity or disdain, but that such a definition is flawed because it is indifferent to questions of hierarchy and social structure; it applies with equal force to the fox and the hound. He explains that a second flaw is that we do not reach the behavior of people who have no malice in their hearts, but who still create and reproduce racial hierarchy. He embraces Wellman’s idea that racism consists of “culturally acceptable beliefs that defend social advantages that are based on race.” David T. Wellman, *Portraits of White Racism* 4 (1993). A definition that focuses on the search for acceptable ways of justifying racial hierarchy has many advantages. It gets us away from focusing on malice or ill will. It makes the racism charge less personally accusatory. It eliminates a ready escape hatch of being pure of heart. Such a definition also mirrors how people of color actually experience racism. Dalton suggests that people with white sheets are not the only ones holding us down. Racism can exist even when there is no discrimination and no prejudice; all it requires is the desire to preserve what one has and the capacity to form supporting attitudes and beliefs. Dalton, supra at 92-95.

In fact, our jurisprudence has adopted this concept, as illustrated by the requirement that proof of a discriminatory intent is necessary to establish that a facially neutral law violates the Equal Protection Clause on the basis or race. Washington v. Davis, 426 U.S. 229 (1976). For criticisms of the intent requirement, see, e.g., Barbara J. Flagg, “Was Blind, But Now I See”: White Race Consciousness and the Requirement of Discriminatory Intent, 91 Mich. L. Rev. 953, 958 (1993) (whites fail to recognize that facially neutral norms are transparent white norms that actively participate in the maintenance of racism); Kenneth Karst, The Costs of Motive-Centered Inquiry, 15 San Diego L. Rev. 1163, 1165 (1978) (motive-centered doctrines place a practicably impossible burden on the wrong side because improper motives are easy to hide and result from the interaction of many motives and sometimes several decisionmakers); Charles R. Lawrence, III, *The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 Stan. L. Rev. 317, 323 (1987) (racial matters are influenced by factors that can be characterized as neither intentional nor unintentional, but unconscious racial motivations because of our cultural experiences); Donald Lively & Steven Plass, *Equal Protection: The Jurisprudence of Denial and Evasion*, 40 Am. U. L. Rev. 1307 (1991) (intent inquiry avoids unsettling race questions and is
Examples of "privilege" include a multitude of white skin privileges—for example, the ability to exist in the world without being labeled by race. Therefore, we seldom assume that a white person

the sophisticated grandchild of the separate but equal doctrine).

47 McIntosh, supra note 42. This view of the world distracts people's attention from the larger historical and contemporary context in which oppression is practiced. As one friend puts it, we can ask the question "Are you a racist?," answer "No," and pass the lie detector test. This does not mean that we are not racist. See RUTH FRANKENBERG, WHITE WOMEN, RACE MATTERS: THE SOCIAL CONSTRUCTION OF WHITENESS 242 (1993). Frankenberg describes this phenomenon as "power-evasion." Moreover, we point to individual triumphs or advantage and use them to argue that systematic oppression does not exist. Lawrence, supra note 46, at 321. Recent theorists have challenged the assimilationist approach to discrimination jurisprudence. See, e.g., Kevin M. Fong, Comment: Cultural Pluralism, 13 HARV. C.R.-C.L. L. REV. 133 (1978); Gerald Torres, Critical Race Theory: The Decline of the Universalist Ideal and the Hope of Plural Justice — Some Observations and Questions of an Emerging Phenomenon, 75 MINN. L. REV. 993 (1991); Patricia J. Williams, Metro Broadcasting, Inc. v. FCC: Regrouping in Singular Times, 104 HARV. L. REV. 525 (1990). As Adrienne Davis says:

Domination, subordination, and privilege are like three heads of a hydra. Attacking the most visible heads, domination and subordination, trying bravely to chop them up into little pieces, will not kill the third head, privilege. Like a mythic multi-headed hydra, which will inevitably grow another head, if not all heads are slain, discrimination cannot be ended by focusing only on . . . subordination and domination.

Wildman & Davis, supra note 44, at 895.

48 Barbara Flagg labels this the "transparency phenomenon," and defines it as "the fact that white people tend to be unconscious of whiteness as a distinct racial characteristic, and so tend to equate whiteness with racelessness." Barbara J. Flagg, On Selecting Black Women as Paradigms for Race Discrimination Analyses, 10 BERKELEY WOMEN'S L.J. 40, 40 (1995). She says: "White people externalize race. For most whites, most of the time, to think or speak about race is to speak about people of color, or perhaps, at times, to reflect on oneself (or other whites) in relation to people of color. But we do not tend to think of ourselves or our racial cohort as racially distinctive. Whites' 'consciousness' of whiteness is predominately unconsciousness of whiteness. We perceive and interact with other whites as individuals who have no significant racial characteristics. In the same vein, the white person is unlikely to see or describe himself in racial terms, perhaps in part because his white peers do not regard him as racially distinctive. Whiteness is an important quality when whites interact with whites in the absence of people of color. Whiteness attains opacity, becomes apparent to the white mind, only in relation to, and in contrast with, the 'color' of nonwhites." Flagg, supra note 46, at 970.

Sometimes the idea that only whites have no vested interest or no "race" has risen to the level of court challenges. Judge Constance Baker Motley of the United States District Court for the Southern District of New York was assigned to preside over a case in which the law firm of Sullivan and Cromwell was being sued by an applicant for an attorney position on the ground that she was discriminated against on the basis of her sex. Prior to trial, the lawyer representing the firm requested that Judge Motley disqualify herself from hearing the case because she was female and might not be able to deal with the sex discrimination claim in an unbiased manner. The attorney also noted that because Judge Motley was Black, she might have a heightened sensitivity to discrimination. Judge Motley denied the request, stating that "if [the] background or sex or race of each judge were, by definition, sufficient grounds for removal, no judge on this court could hear this case, or many others, by virtue of the fact that all of them were attorneys, of a sex, often with distinguished law firm or public service backgrounds." Blank v. Sullivan & Cromwell, 418
possesses the same characteristic observed in another white person.\textsuperscript{49} Male gender privilege allows men to work without any concern by employers that they may be limited by child care responsibilities.\textsuperscript{50}

49 As Mahoney says, “‘Race’ as a social construction is not only produced by the persistence of ‘old’ attitudes or ignorance, but by social processes that directly reproduce poverty and segregation and then identify poverty and unemployment as features of blackness and inner-city space and, therefore identify stability, employment, and employability as features of whiteness.” Martha R. Mahoney, \textit{Segregation, Whiteness, and Transformation}, 143 U. PA. L. REV. 1659, 1675 (1995). The concept of race is complicated, as recent debate on multiracial identity indicates. See Bill O. Hing, \textit{Beyond the Rhetoric of Assimilation and Cultural Pluralism: Addressing the Tension of Separatism and Conflict in an Immigration-Driven Multiracial Society}, 81 CAL. L. REV. 863 (1993).

Peggy McIntosh offers 46 examples of white skin privilege and notes that this is just the beginning of the list. Her list includes:

- I can, if I wish, arrange to be in the company of people of my race most of the time.
- I can avoid spending time with people whom I was trained to mistrust and who have learned to mistrust my kind or me.
- If I should need to move, I can be pretty sure of renting or purchasing a home in an area which I can afford and in which I would want to live.
- I can be reasonably sure that my neighbors in such a location will be neutral or pleasant to me.
- I can go shopping alone most of the time, fairly well assured that I will not be followed or harassed by store detectives.

McIntosh, supra note 42, at 34.

Too often we think of “discrimination” in broad terms, such as not being hired because of one’s race. McIntosh’s understanding of the daily effects of white privilege that have been granted merely by birth heightens white people’s awareness of this limited understanding of the effect of race. \textit{Id.}

50 Other examples of male privilege include the ability to deal with others with relative assurance that the other person will not be condescending; to walk to one’s car at night without fear of rape; never to think that a boss’s interest in you may be merely to get you in bed; and to have others assume achievements are due to worth and not due to sexual favors or flirtatiousness. Catherine MacKinnon describes male privilege as follows:

Men’s physiology defines most sports, their health needs largely define insurance coverage, their socially designed biographies define workplace expectations and successful career patterns, their perspectives and concerns define quality of scholarship, their experiences and obsessions define merit, their military service defines citizenship, their presence defines family, their inability to get along with each other — their wars and rulerships — defines history, their image defines god, and their genitals define sex.

\textsc{Catherine A. MacKinnon, Toward a Feminist Theory of the State} 224 (1989).

One can be denied some privilege, yet exercise others. Harlon Dalton describes his
Class privilege allows us to ignore others’ lack of health care, shelter and public transportation.\textsuperscript{51} Heterosexual privilege allows us to live without questions about why we live with our partner.\textsuperscript{52} For each cat-

\begin{quotation}
own experience of privilege:

White skin privilege is a birth right, a set of advantages one receives simply by being born with features that society values especially high. Although I can’t claim skin privilege, I have a sense of what it must be like to possess it. I am, after all a beneficiary of male privilege. I didn’t create it, I usually don’t seek it out, and I am often made uncomfortable by it.

Dalton, supra note 45, at 110-11.

For a comprehensive discussion of class privilege, see R. George Wright, \textit{Does the Law Morally Bind the Poor or What Good Is the Constitution When You Can’t Afford a Loaf of Bread?} (1996). bell hooks notes that our notions of class assume that it is merely a question of economic standing. In actuality, class determines values, standpoint and interests. Law schools assume that a student coming from a poor, working-class background is eager to shed that background and take on the dominant values. hooks notes that class status is never talked about in educational settings. She describes her own experience as a college student:

During my college years, it was tacitly assumed that we all agreed that class should not be talked about, that there would be no critique of the bourgeois class biases shaping and informing pedagogical process (as well as social etiquette) in the classroom. Although no one ever directly stated the rules that would govern our conduct, it was taught by example and reinforced by a system of rewards. As silence and obedience to authority were most rewarded, students learned that this was the appropriate demeanor in the classroom. Loudness, anger, emotional outbursts, and even something as seemingly innocent as unrestrained laughter were deemed unacceptable, vulgar disruptions of classroom order. These traits were also associated with being a member of the lower classes. If one was not from a privileged group, adopting a demeanor similar to that group could help one advance. It is still necessary for students to assimilate bourgeois values in order to be deemed acceptable.

hooks, Teaching, supra note 1, at 178.

52 Other examples of heterosexual privilege that McIntosh identifies include:

- I have no difficulty finding neighborhoods where people approve of our household.
- Our children are given texts and classes that implicitly support our kind of family unit and do not turn them against my choice of domestic partnership.
- Most people I meet will see my marital arrangements as an asset to my life or as a favorable comment on my likability, my competence, or my mental health.
- I can talk about the social events of a weekend without fearing most listeners' reactions.

McIntosh, supra note 42, at 36.

Other examples that occur to me include:

- I do not have to attend firm or business functions alone because of fear of repercussions.
- I will not be prevented from making decisions for my partner if he is faced with a serious illness or death.
- I can purchase a life insurance policy with my partner as the beneficiary without any questions or suspicions. I will not have to provide a family member as the beneficiary and then be required to add my partner through a change of beneficiary form months later. I am certain that he will receive the money in the event of my death.
- I can purchase gifts for my partner without having to dodge questions.
- If I am fired from my job because of a specific characteristic that defines me, I will have legal recourse.
There are many associated privileges for individuals who possess the favored characteristic. When taken together, these privileges create the construct of oppression for those who have no access to those privileges.

We do not experience the messages we receive culturally as explicit lessons. Instead we perceive them merely as the way things are.

As much as we need to learn from others who are "different" from us, there is always the risk that the focus on such difference will reinforce subordination. Brewer, supra note 40, at 1923. I am arguing for a two-sided analysis: First, we must try to learn from those we believe are "different" from us. Second, we must analyze why we perceive them as "different" and how that perception may reinforce existing power structures.

Marilyn Frye offers an analogy that captures this phenomenon. She says:

Consider a birdcage. If you look very closely at just one wire in the cage, you cannot see the other wires. If your conception of what is before you is determined in this myopic focus, you could look at that one wire, up and down the length of it, and be unable to see why a bird would not just fly around the wire at any time it wanted to go somewhere. Furthermore, even if, one day at a time, you myopically inspected each wire, you still could not see why a bird would have trouble going past the wires to get anywhere. There is no physical property of any one wire, nothing that the closest scrutiny could discover, that would reveal how a bird could be inhibited or harmed by it except in the most accidental way. It is only when you step back, stop looking at the wires one by one, microscopically, and take a macroscopic view of the whole cage, that you see why the bird does not go anywhere; and then you will see it in a moment. It will require no great subtlety of mental powers. It is perfectly obvious that the bird is surrounded by a network of systematically related barriers, no one of which would be the least hindrance to its flight, but which, by their relations to each other, are as confining as the solid walls of a dungeon.


An important aspect of privilege is that it defines what is desirable. Deviations from that "norm" are less desirable. This reinforces the existing power structure. Barbara J. Flagg, Fashioning a Title VII Remedy for Transparently White Subjective Decisionmaking, 104 YALE L.J. 2009 (1995). Flagg identifies cases that demonstrate white skin privilege's effect on assessment of worth: Lasson v. Woodmen of the World Life Ins. Co., 741 F.2d 1241, 1243 (10th Cir. 1984), cert. denied, 471 U.S. 1099 (1985) (reviewing trial court's finding that Hispanic male was passed over for state manager position because white male chosen "had more management experience and . . . his personality and leadership skills made him a more desirable choice than plaintiff"); Clay v. Hyatt Regency Hotel, 724 F.2d 721, 722 (8th Cir. 1984) (reviewing trial court's conclusion that assertive black male "would not fit into defendant's organization as well as other applicants would"); Leisner v. New York Tel. Co., 358 F. Supp. 359, 365 (S.D.N.Y. 1973) (approving employer's decision not to promote based on the question: "Is this person going to be successful in our business?"). See also Cheshire Calhoun, Sexuality Injustice, 9 NOTRE DAME J.L. ETHICS & PUB. POL'Y 241 (1995).

Jonathan Kozol describes the powerful messages that indigent children receive in school in Savage Inequalities: Children in America's Schools (1991). One compelling passage illustrates the point that these are not explicit lessons:

In a somewhat mechanical way, the teacher lifts a picture book of Mother Goose and flips the pages as the children sit before her on the rug. "Mary had a little lamb, its fleece was white as snow . . . Old Mother Hubbard went to the cupboard to fetch the poor dog a bone . . . Jack and Jill went up the hill . . . This little piggy went to market . . . " The children recite the verses with her as she turns the pages on the book. She is not very warm or animated as she does it, but the children are obedient and seem to like the fun of knowing the words. The book looks worn and old, as if the
are. These privileges operate to oppress others, but, generally, when privilege is exercised, the person is unaware of the role such privilege plays in perpetuating systematic oppression. Most people simply live their lives trying not to act as conscious agents of oppression.

Protection against seeing privilege is a necessary component and reinforcer of privilege itself. The invisibility of privilege allows us to reinforce dominance without any moral accountability for our actions. If we are to treat others with dignity and respect and to strive for justice and fairness within the legal system, we need to confront that unawareness.

It is the invisibility of privilege and its supposed inevitability that makes systemic change so difficult. Since the actors are unaware of their privilege, they fail to accept moral responsibility for their oppressive acts. As educators, we can help our students promote justice through unmasking privilege.

Unmasking privilege allows a person to challenge long-held assumptions and to develop a healthy skepticism about law's neutrality. Once we strip the facade of neutrality, helping our students to understand the ways in which privilege operates, then those students can never go back to innocent obliviousness. If we couple this with an understanding that one's exercise of privilege indirectly causes pain to others, then we can generalize the learning about privilege. This learning experience can be the catalyst for the student and teacher to continue to question the law's assumptions, to become more skilled at

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56 For a discussion of the ways in which cultural messages are internalized and justified, see Lawrence, supra note 46.

57 Flagg, supra note 46, at 958.


59 Mahoney, supra note 49, at 1665.


61 Frankenberg demonstrates how this can be transformative. She says:

Attention to the construction of white “experience” is important, both to transform the meaning of whiteness and to transforming the relations of race in general. This is crucial in a social context in which the racial order is normalized and rationalized rather than upheld by coercion alone. Analyzing the connections between white daily lives and discursive orders may help make visible the processes by which the stability of whiteness—as location of privilege, as culturally normative space, and as standpoint, is secured and reproduced. In this context, reconceptualizing histories and refiguring racialized landscapes are political acts in themselves.
identifying privilege, and to become more attuned to the power dynamics that infect the attorney/client relationship and the client’s claim. Revealing privilege is a “transformative project.” If we can identify how privilege operates and identify points in which we can share our privilege, we can actually begin to fulfill MacCrate’s injunction to “enhance the capacity of law and legal institutions to do justice.”

Power itself is not a negative. It is how power is used that determines its moral status. We are educating students to exercise power as lawyers. For those of us who choose to raise issues of justice and morality, one question that MacCrate invites us to ask is whether we are going to use this power to reinforce and maintain coercive hierarchies. It is through helping learners perceive “invisible” privilege that we can actually begin to fulfill MacCrate’s injunction to “enhance the capacity of law and legal institutions to do justice.”

62 This requires those of us who take on this agenda to struggle with those issues ourselves, acknowledging, among other things, the deep effects of racism on American culture. See Patricia H. Collins, Black Feminist Thought: Knowledge, Consciousness, and the Politics of Empowerment (1991); W.E.B. DuBois, The Souls of Black Folk (1961); Henry L. Gates & Cornel West, The Future of the Race (1996). We need to strive to confront the assumptions that poverty is the fault of the poor and that we are powerless to change the plight of poor people. See Christopher Jencks, Rethinking Social Policy: Race, Poverty, and the Underclass (1992). Our cultural experience necessarily colors our beliefs about those whom we perceive to be different from ourselves. See Bell hooks, Killing Rage: Ending Racism (1995). Those beliefs deeply affect our ideas about our own power to effect change and influence our exercise of judgment.

63 The concept of “Transformative Project” is developed by Martha Mahoney. Mahoney, supra note 49.

64 Section 2-3, Statement of Professional Values, MacCrate, supra note 4, at 213.

65 But see McIntosh, supra note 42, at 33.

66 The MacCrate Report urges us to “act in conformance with considerations of justice, fairness, and morality when making decisions or acting on behalf of a client.” MacCrate, supra note 4, at 213. See Hooks, Teaching, supra note 1, at 188. Harlon Dalton describes the Race Game. His description gives insight into how power is used to determine moral status. The object of the Race Game is to ascend to the top of the social pecking order. It is similar to the children’s game, King of the Hill, except that the Race Game is played in teams. Once one team makes it to the top, the goal is to keep the one below from climbing higher. Teams at the bottom have one goal — to climb higher and those in between are torn between maintaining their position with relation to those below and trying to climb higher still. Rules establish the racial pecking order and the way to prevail is to retain those rules. Usually the existing rules benefit the ones on top, who use the power of their position to keep them intact. Sometimes the rules cease to favor the status quo. When this happens it is in the interest of the King of the Hill to change the rules. Dalton provides an example in the admission to elite colleges. Admittance was once based on a broad range of aptitude so long as entrants came from the proper social stratum. People of color, Jews and White Christian commoners were excluded. Over time, various forces compelled elite colleges to become egalitarian and as they became academically (as opposed to socially) exclusive, they began to rely on standardized test scores even though tests tend to screen out a disproportionate number of African Americans, Latinos, and Native Americans. As the scores of Asian-Americans soared, many of the same schools suddenly began to look beyond numbers and to take into account activities that reflect creativity, leadership, well-roundedness, or other traits Asian-Americans were not thought to possess. Dalton, supra note 45, at 68-69.
that we can expect them to become accountable for their choices.67

Privilege is generally not something one can "give up." It comes with the characteristic. However, unearned, conferred power can be shared. If we assume that someone is more credible, for example, on the basis of the privilege associated with his or her skin color, then that person can exercise that privilege to benefit those disadvantaged in our society by skin color. This is difficult because it is easy to cross the line from sharing privilege to patronizing the person or at least being perceived as patronizing.68 Nevertheless, when the situation will not allow an oppressed person to participate or even to have access, an individual permitted access by virtue of some characteristic can step in. Without such sharing of privilege there will be no access to the knowledge or power.69 One example of this sharing often occurs in traditional law firms. A person of color enters a firm but is not told the unwritten rules that are needed to survive and succeed. A person in a privileged position shares those rules and provides the new arrival with the necessary knowledge. Without that "insider" information, there is a greater chance of failure.

When student attorneys represent poor clients, there are many opportunities for the students to witness the sharing of privilege. Because of their status as lawyer/representative and sometimes because of their skin and class privilege, they are given more credibility than their client, who may be saying the same thing but not be heard. These experiences offer teachers a chance to examine that phenome-

67 A necessary prerequisite to asking our students to take responsibility for conferred dominance is our willingness to do the same. Most law teachers have substantial privilege, be it race, gender, class, sexuality or professional. We must be aware of the ways in which our own privilege blinds us to injustice and may affect the ways we treat our clients and our students. Mahoney describes this project as it relates to racism:

Necessary steps toward change include attacking the power of whiteness as an invisible, dominant social norm; participating in the project (necessarily repeated) that reiterates the existence of subordination and privilege by revealing the ongoing reproduction of white privilege and power; disputing the legal and social preference for colorblind approaches that reproduce color and power evasion, protect privilege, and deny cultural autonomy; and seeking points of unity and transformative potential.

Mahoney, supra note 49, at 1677.

68 Sometimes when privileged individuals seek to "share privilege," we attempt to speak for someone as if she were not there. Stephanie Wildman and Adrienne Davis describe this phenomenon vividly in their essay. Wildman & Davis, supra note 44.

69 Not all privileges are created equal. Dalton distinguishes them by categorizing positive advantages as those which we can work to spread, and negative types of advantages as those which, unless rejected, will always reinforce our present hierarchies. The key word is hierarchies — we should not only be suspicious of advantages that reproduce the racial pecking order, but should also treat as candidates for redistribution those advantages that are acquired in part because of a person's favored position in the pecking order. No advance is possible until the existence of White skin privilege is acknowledged. Dalton, supra note 45, at 115-16.
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non with their students and focus on the role of privilege in how one is heard.

Sharing privilege includes a willingness not to be silent in the face of behavior that subordinates a group. Stephanie Wildman offers a powerful example of how privilege can be exercised by silence. She describes being called for jury service. During the voir dire, the jurors were asked to introduce themselves, and the attorneys were allowed to ask supplemental questions. The defense attorney asked the Asian-looking jurors if they spoke English. No one else was asked. The judge did nothing. Wildman describes her response to the questioning:

The Asian-American man sitting next to me smiled and flinched as he was asked the questions. I wondered how many times in his life he had been made to answer questions such as that one. I considered beginning my own questioning by saying, I'm Stephanie Wildman, I'm a professor of law, and yes, I speak English. I wanted to focus attention on the subordinating conduct of the attorney, but I did not. I exercised my white privilege by my silence. I exercised my privilege to opt out of engagement, even though this choice may not always be consciously made by someone with privilege.70

Striving to promote justice, fairness, and morality may require us to face the discomfort of not remaining silent.71 It is these circum-

70 Wildman & Davis, supra note 44, at 892.
71 We should not be satisfied with increasing our students' pro bono hours. We should strive for more. Thomas Shaffer and Robert Rhodes describe it vividly:
The burdens of poverty are fashioned in Wall Street offices faster and more effectively than legal services and public interest offices can lift them. If you spend the day on corporate takeovers and plant closings without thinking about the people you put out of work, you cannot make up for the harm that you do by giving a woman free legal advice in the evening when her unemployed husband takes out his frustration by beating her.


Whites must accept joint ownership of America's race problem. First, they must unlearn the many ways they commonly disown race which is done by: heightened rhetoric of Black responsibility (Blacks need to become more ambitious, take education seriously . . .); treating Blacks as if they were fully in control of their own fate (Why don't they just get a job . . .); and turning the tables (the notion that White men have suffered greatly at the hands of people of color and White women). Second, people disown the race problem by removing race from the picture (Black problems have to do more with class than race). This is flawed because it assumes that race and class are independent. The cause of many poor people's situation is not solely class but also the racial pecking order and race-related indifference, which play a role in our unwillingness to do what is necessary to improve the lot of the poor. Finally, rather than disown the race problem, many Whites make their participation conditional (I'd be willing to help if you would only . . . be less shrill, get your own house, meet me halfway . . .). White and Black aspirations are not necessarily inconsistent and if we take joint responsibility for cleaning up the racial mess, we could search for creative solutions to expand opportunities for everyone. DALTON, supra note 45, at 117-25.
stances that may offer those of us who have privilege an opportunity to act, using our privilege and credibility to identify the injustice. In the educational context, as teachers, we have the ability to share our own power and privilege in the classroom. We do this through our curricular choices and the comments we choose to ignore and those that we develop and examine in class. As members of an institution, we share our privilege through our willingness to encourage diversity among the faculty and the student body. We, like our students, can recognize that our choice not to speak may reinforce privilege and contribute to others’ pain.

As legal educators, our own privilege — be it skin, class, professional, heterosexual, or male privilege — imbues us with certain power that we can use to confront the privilege itself. One of my sad realizations when teaching about race as a white woman is that my opinion about race is given more credence by white people than opinions about race offered by fellow black teachers. This is due to skin privilege and the assumption that I do not have an ax to grind or the faulty assumption that I do not have a vested interest. Because I know this, I feel a responsibility to discuss race and racism as much as possible. At the same time, as a woman, my voice about women’s issues is characterized as shrill by many men because I am perceived to have a vested interest. A male’s critique of sexism, however, is likely to be more persuasive to those same men. This is unfortunate because the phenomenon of privilege undermines the voices that are most familiar with the ways in which oppression affects us. For those of us who are deeply concerned about problems of oppression in society even when we are not the direct victims, this phenomenon offers us a role to play and a responsibility to play it. In essence, as teachers, we are helping our students take off their blinders and recognize the unearned power conferred upon them. Once the blinders are off, they will necessarily assume responsibility for the perpetuation of privilege because they will no longer be able to exercise it unknowingly.

At the same time, because I have skin privilege, I am less likely to have a full understanding and sensitivity to the effects of white supremacy. Harlon Dalton notes the phenomenon of discounting black voices: “When it comes to race, too often the opinions and judgments of people of color are regarded by Whites as subjective and self-interested, and therefore of dubious value. We need look no further than the legal academy to see this dynamic in action.” DALTON, supra note 45, at 44. He cites some examples. In the legal academy people of color new to teaching are advised by concerned White colleagues to avoid dealing with issues of race in their scholarship so as to guard against problems with tenure, while White junior faculty can write about whatever they want. They are applauded for quality work that is supportive of the aspirations of people of color as well as for scholarship that is highly critical of positions associated with prominent scholars of color. Id.
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III. A Learning Theory to Promote Justice

Teaching to promote justice, fairness and morality in the way that is described here should be grounded in educational theory. Unfortunately, legal educators have little or no training in learning theory. Most of us rely on methods that we ourselves experienced in law school. These techniques are not grounded in the specialized needs of adult learners. Adult students come to law school already socialized with well-developed meaning schemes, that is, patterns of thought that control the way they interpret perception and construe experience. These sets of habitual expectations operate as codes to form, limit, and distort how adults think, believe, feel, and judge. Learning is essentially a process of appropriating a new or revised interpretation of the meaning of an experience. Adults naturally tend to integrate experiences that validate or fit their meaning schemes and discount those that do not. In order to learn, therefore, adults must break through preexisting patterns, allowing them to either validate or transform assumptions that they may bring to a given situation. Occasionally, adults are forced to assess basic premises that they have taken for granted and find them unjustified. This may result in a major transformation. That transformation occurs when learners must

73 MEZIROW, supra note 2, at 34. There is much evidence to support the assertion that we tend to accept and integrate experiences that comfortably fit our frame of reference and to discount those that do not. It appears that this process is not so much a matter of matching new information with stored information or reconstruing past events as a matter of referring to an existing frame of reference or an already established symbolic model with cognitive, affective, and connotative dimensions. Thus, our current frame of reference serves as the boundary condition for interpreting the meaning of an experience. MEZIROW, supra note 2, at 32.

74 Id.
75 Id. at 35.
76 Id.
77 Id.
78 Id. at 192. Mezirow identifies ten phases of transformation:
1. A disorienting dilemma;
2. Self-examination with feelings of guilt or shame;
3. A critical assessment of epistemic, sociocultural, or psychic assumptions;
4. Recognition that one’s discontent and the process of transformation are shared and that others have negotiated a similar change;
5. Exploration of options for new roles, relationships and actions;
6. Planning a course of action;
7. Acquisition of knowledge and skills for implementing one’s plan;
8. Provisional trying of new roles;
9. Building of competence and self-confidence in new roles and relationships;
10. A reintegration into one’s life on the basis of conditions dictated by one’s new perspective.

JACK MEZIROW ET AL., FOSTERING CRITICAL REFLECTION IN ADULTHOOD: A GUIDE TO TRANSFORMATIVE AND EMANCIPATORY LEARNING 168-69 (1990). These phases offer a great deal of guidance to the teacher about both what to expect and how to help our
engage in critical self-reflection, change their self-concept, and reinte-
grate the ensuing insights into life’s context on the basis of conditions
ddictated by a new perspective. They reinterpret an old experience
through a new lens. This gives the old experience new meaning.

Fran Quigley, a clinical law teacher, draws upon this learning the-
yory and calls this learning phenomenon the “disorienting moment”—
“when the learner confronts an experience that is disorienting or
even disturbing because the experience cannot be easily explained by
reference to the learner’s prior understanding—referred to in learning
theory as ‘meaning schemes’—of how the world works.” There are
three phases of adult learning when encountering “disorienting mo-
mments” can result in perspective transformation. First, there is the
“disorienting experience” in which a meaning scheme is placed in
jeopardy. Next, the learner engages in exploration of and reflection
on the content of the problem itself, or the premise upon which it is
predicated. Finally, the learner enters a “reorientation” stage. Here
the learner creates means for coping with the problem should it arise
again. Quigley suggests that clinical programs that place students in
students move through the process.

79 Mezirow, supra note 2, at 193. When this happens, the learner often feels uncom-
fortable and confused. This occasionally results in anger, tears, frustration or rejection,
making the learning process even more difficult.
80 Id. at 11. Not all learning is transformative. Sometimes we learn by adding knowl-
edge to our meaning schemes or learning entirely new meaning schemes. Id. at 223.
81 See notes 73-80 supra.
83 Quigley challenges the notion that the practice and application of law are “technical
matters of value-free representation” of a client’s best interests. Quigley recognizes the
crucial role that race, class, and gender play in effective client advocacy. Id.
84 Mezirow, supra note 2, at 117. According to Quigley, the proper role of the law
professor is to foster an environment in which these “disorienting moments” can occur.
Once guided through these three phases, learning results from the disorientation, rather
than the confusion and retreat. Quigley, supra note 82, at 52. As teachers, we have many
methods for encouraging students to reflect and increasing their openness to insights.
Teachers often accomplish this through the use of peer discussions, teacher-student discus-
sions, or journals. Each of these three techniques is detailed by Quigley. Although al-
lowing reflection on the disorienting moment, each technique can be problematic if not
carefully monitored by the teacher. While peer discussions are important in adult learning,
such discussions also pose the risk of becoming “confirming moments” as learners fall prey
to “groupthink,” overgeneralize their disorienting experiences, and attempt to frame them
within existing stereotypes. In supervisor-student discussions, the instructor risks dictating
the experience rather than guiding it. Finally, journals isolate learners from the pressures
inherent in group dynamics, but there exists a tendency for students to answer questions
with the peculiar knowledge that the instructor will read their answers. Id. at 55.
85 Id. at 51. Once adult learners reflect on the experience, they must “reorient.” This
means that each learner’s prior understanding of the world must be broadened to include
this new experience so that future acts will be based on this understanding. Quigley notes
that the main advantage of the clinical law setting is the age of the learners involved.
Rather than withdrawing from the challenge of reassessing their world view, adult learners
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contact with real clients from a poverty setting provide opportunities for a "disorienting experience." Law students typically come from backgrounds far more privileged than those of their clients. The students' abstract understanding of justice will almost always conflict with the reality of their clients' lives. Disorienting moments can occur anywhere, however, even in the traditional classroom. Once they occur, we educators can use them to teach about the personal role of the lawyer in advancing justice.

The disorienting moment provides a wealth of material for reflection and reorientation. We can ask our students to identify what they saw and felt about the experience. We can ask them to identify what assumptions about the law, the party, or the legal system were challenged by their recent experience. These teaching devices are familiar to teachers. They create opportunities to analyze what the insight means for each individual. However, reactive insight is not sufficient.

What does the student learn about the delivery of justice in
our society or about the general inapplicability of stereotypes? Mac-Crate seems to be asking for more. It is at this critical period in the learning process that I believe we can teach our students about how they can strive to promote justice.

Reflection and reorientation by themselves, will not have a lasting impact on a learner’s drive to champion justice. We must add a step in the reflection and reorientation phase. Not only should we help our students reflect carefully on the disorienting moments caused by the insights into “different” worlds, but we must help our students in reflecting on why the moments are “disorienting.” This requires students not only to analyze the world outside of them but also to turn inward and analyze themselves. They must seize the moment of their disorientation and deconstruct it. What is it about their own life experiences that allowed them to form their previous ideas about the law, the individual, the system? Why has their power and privilege allowed them to be oblivious to the realities of the lives of other people who do not share that privilege? How does their obliviousness reinforce their privilege and assist in maintaining a system which may have harmed their client?

If the students learn to identify the operation of privilege, they will have learned a skill that will enable them to question many of the critical assumptions that heretofore served as the underpinnings of their decision-making processes. The process of reorientation includes both an understanding of the injustice that initially caused the disorienting moment and a glimpse of our own role in that injustice. Our goal in the “reorientation phase” is not merely to create a learner with a clearer view of the world. Reorienting to an understanding of privilege will also allow the student to use his or her own privilege in a responsible way: to lend that privilege to those denied it.

Confronting the life situations of those who are less privileged may not always be “disorienting,” however. Adult learning theory suggests that we search for ways to confirm rather than challenge our own meaning schemes. This is particularly troubling when those

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92 To understand the complexities of what we mean by difference, see MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION AND AMERICAN LAW (1990).

93 Of course, we must also turn it back on ourselves. The value of promoting justice, fairness, and morality is not something static that one learns and thereafter incorporates in one's thinking and actions. We all are acculturated. We all live in the world of “invisible” privilege. We must always struggle with this ourselves. Being a supervisor does not make us the experts on privilege. Indeed, as often as not, this learning process will be joint: the learner and the supervisor simultaneously grappling with the question.

94 HOOKS, TEACHING, supra note 1, at 102.

95 MEZIROW, supra note 2, at 224.
meaning schemes are founded upon sexist, classist, or racist thinking. These schemes color the way law students view the facts and merits of a case as well as the students' attitudes about lawyering itself. When a student displays a lack of compassion, these opportunities to learn about privilege take on a riskier character. At these moments, I fear that my students are merely reinforcing their stereotyped views and that I will be sending them out as lawyers more sure of their incorrect assumptions about the poor, people of color, and women. I call these "confirming moments." In the clinic, we hear:

"He's malingering . . . ." "She's always late or misses the appointment. She must not think of this as important . . . ." "She doesn't know how to raise her children." "I told him to keep all of his records but he just doesn't listen." "She doesn't deserve . . . ." "I'm not sure if he did this, but he did other things. Prison would be good for him." "Those people just don't know how to take care of their homes."

In the traditional classroom we hear:

"Affirmative action doesn't make sense. I didn't cause these problems, I don't see why I have to suffer so that we can give them [women; people of color] a leg up. . . ." "The law shouldn't be in the business of redistributing wealth. . . ." "Law enforcement has to be realistic . . . blacks do commit more crimes. . . ." "Restrictions on abortion are consistent with the state's interest in curbing promiscuity. . . ."

The common denominator for these negative experiences is a detachment from the person or issue and an unwillingness to identify with the person and grapple with power dynamics. I find it extremely difficult to turn these negative experiences into positive learning opportunities. Students often are resistant to the process of examining privilege. They sometimes view my interventions as high-handed and "politically correct."

66 Psychologically, there is an impulse to avoid such transformation because it threatens basic meaning schemes. Psychiatrist Roger Gould has identified five implicit assumptions that get in the way of changing one's approach to problems. They are:

1. I may regret taking this action because it might not be the right act.
2. I may regret taking this action because it might disturb an important relationship in my life.
3. I may regret taking action because I may fail and feel worse about myself.
4. I may regret taking this action because I may succeed and it will change my life in a way that makes me feel uncomfortable.
5. If I take this action, it might disturb some inner balance and I might find out something about myself that I don't want to know.


As educators, we must help the learner identify the learning block that impedes transformation.

67 See Condlin, supra note 1 (raising questions about the social justice agenda of law
Experiences tend to reinforce stereotypes and cultural biases. I worry that they also function as "confirming" rather than "disorienting" moments. Providing my students with problems involving poor clients or issues relating to racism or gender domination may create an opportunity for a disorienting moment to happen, but I cannot be sure that the students will learn positive lessons. Therefore, I am not satisfied with merely placing my students in situations in which they will encounter such experiences; I want to guard against the "confirming moment."

In order to offset some of the situations that may act as "confirming moments" within a clinic, Professors Mary Zulack and Conrad Johnson of Columbia University School of Law devised an inventive simulation. At the beginning of the semester, one professor plays the role of a client who fails to show up for a pre-arranged meeting with the attorney. The students in the class speculate about why the client might miss the appointment. That exercise in speculation offers opportunities for students to air some of their preconceived notions that the client does not care, is lazy, or expects a handout. It also allows the students to hear other possible reasons like the lack of public transportation, the lack of child care, the inability to afford either child care or transportation to the office, ambivalence about pursuing the case, and ambivalence about the quality of the representation or the degree of respect the clinic will provide. Additionally, the discussion creates an opening for students to learn a bit about their fellow students who may approach the problem with differing perspectives and experience. Often the possibility of other explanations and the realization that others may see the experience differently can promote a conversion of the confirming moment into a disorienting one. The faculty member can ask the group members to examine how their own circumstances or experiences might affect their assessment of why the client was a "no-show." An added benefit of doing this is that it injects this kind of analysis into the accepted forms of feedback early school clinics and the problem of "political correctness").

98 See Mahoney, supra note 49.

99 Of course, the moment itself has no inherent character; it is how it is received that determines its type. Anyone who has done direct service work for poor people has had his or her share of "confirming moments." Ideally, we need a framework for dealing with these. One way we might identify how to cope with such moments is to examine our own experience. Despite these confirming moments, we still go on and do the work. Why do we remain devoted to the client and committed to the work? Professor Abbe Smith of Georgetown University Law Center suggests that perhaps progressive lawyers who continue to work despite these "confirming moments" do so because they are not motivated by the particular client but rather by a desire to change the world. Roundtable discussion at the Clinical Theory Workshop, New York Law School, Feb. 23, 1996.
and sets the tone for the course.\textsuperscript{100}

When students describe an experience that appears to confirm their stereotypes about people different from them, it is useful to expand the experience to generate many different perspectives to transform confirming moments into moments of insight.\textsuperscript{101} Professor Randy Hertz of New York University Law School, who supervises a juvenile justice clinic, describes an event that was an excellent teaching moment.\textsuperscript{102} During one semester, a student had the experience of having the mother of one of his clients go to the prosecutor and turn her child in for a violation of the conditions of his pretrial release order. The mother did this without discussing it with the clinic student who was acting as her child’s attorney. She was immediately demonized by the student.

Rather than focus on the student’s anger at the mother in an individual session, Professor Hertz brought the experience to the whole class. By opening the discussion up to the whole group, he allowed students to add to the analysis of why the mother might have acted that way. Initially, the students aired anger toward the mother. Then they looked at issues of the mother’s loss of control. They examined the possibility that the mother thought that the child’s attorney was not helping her child and that the prosecutor would assist. The students explored their own responses indicating that they would not turn in the child and the reasons why they would not have done what the mother did. The students compared their own responses to that of the mother; they also noted that they knew of support systems that might be able to help the child while the mother was unaware of those systems. The discussion allowed the students to root out the preconceptions that had led them astray in their analysis of the situation. It also allowed the students to understand the systems in which they were operating. It caused them to focus on their own privilege and their background of privilege that assumed access to systems and information. Finally, the discussion started them thinking about the ways to reform the system and themselves. Perhaps the best tactic to avoid confirming moments is to open the discussion to multiple points of view. Gaining insight through the insights of fellow learners and teachers is a key component of learning about justice.\textsuperscript{103} Of course, without a diverse student body and faculty, much of the advantage

\textsuperscript{100} Mary Zulack shared this idea at the Clinical Theory Workshop at New York Law School, Feb. 23, 1996.

\textsuperscript{101} For more discussion of this idea see notes 172-79 infra.

\textsuperscript{102} Roundtable discussion at the Clinical Theory Workshop, New York Law School, Feb. 23, 1996.

\textsuperscript{103} See notes 172-77 infra.
that could be gained from these perspectives is lost.

Because doing justice involves life-long learning, we can only begin the process. Practicing justice requires constant struggle; it requires being uncomfortable and is painful at times, and one never attains total mastery of the skill. It is like a revolving door: As some ideas get off, others get on. Even though some exit, they may return to circulate again. The door requires tension, or pressure, to move and keep moving. The disorienting moment supplies the tiny push or catalyst needed to start the door moving.

The learning theory of transformation leaves many questions unanswered. Are there ways to maximize these “disorienting moments” and minimize the moments of detachment and objectification? Even if we arm ourselves with the questions that will help our students in analyzing their own privilege, how can we create circumstances in which the learner can develop an enhanced critical consciousness from the experience? Are there things that we are doing in legal education that may be undercutting our ability to train our students to be aware of privilege? The following sections explore answers to those questions in both clinical and traditional settings.

IV. Teaching About Justice in the Clinic

Law students are generally remarkably unaware of what it means to be poor. I still am surprised when I see mouths drop open when we identify the total amount of benefits a person will get if we win a public benefit hearing. More than once, I have heard a student say, “You mean $312 a week, right? Not a month.” Or when a student attempts to find out about ties in the community to argue for low bail in a criminal case and cannot believe her client is homeless: “You mean you don’t have any address? There has to be some place.” Or in a landlord-tenant case: “The judge didn’t even allow her to speak . . .”; “All her belongings were out on the street . . . people were taking things and there was nothing she could do . . . .” Or in a neglect hearing: “I know the baby was sick but she didn’t have any money for a doctor and she was afraid the Department of Social Services would take her child away . . . .”

It is at these moments—when the student experiences first-hand the justice system’s effect on the poor—that students realize that assumptions they have taken for granted throughout their lives just do not hold true for all people. These experiences offer teachers and learners alike chances to examine their own assumptions about the

104 Judy Scales-Trent describes the struggle to achieve commonality through powerful vignettes in Commonalities: On Being Black and White, Different and the Same, 2 YALE J.L. & FEMINISM 305 (1990).
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world and engage in reality checks about how justice is delivered. Many argue that the most effective way to teach about justice is in a real-client clinical setting.\textsuperscript{105} It is in that setting that theory and practice merge.\textsuperscript{106} It is here where the law student encounters a different voice: the voice of the client.\textsuperscript{107}

I was fortunate enough to work in a clinic that serendipitously appeared to present more disorienting moments than other clinical or traditional teaching experiences.\textsuperscript{108} In 1989, the Arizona State Law School added an HIV component to its general clinic.\textsuperscript{109} We designed the program to provide free legal assistance to people with HIV, to identify appropriate policies for the State of Arizona in dealing with HIV, and to help community-based groups which provided support

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{105} See Auerbach, supra note 10; Barnhizer, supra note 3; Derrick Bell, \textit{Xerces and the Affirmative Action Mystique}, 57 GEO. WASH. L. REV. 1595 (1989); Barbara Bezdek, \textit{Reconstructing a Pedagogy of Responsibility}, 43 HASTINGS L.J. 1159 (1992); Anthony D'Amato, \textit{Rethinking Legal Education}, 74 MARQ. L. REV. 1 (1990); Cheryl I. Harris, \textit{Whiteness as Property}, 106 HARV. L. REV. 1709 (1993); Howard Lesnick, \textit{The Integration of Responsibility and Values: Legal Education in an Alternative Consciousness of Lawyering and Law}, 10 NOVA L. REV. 633 (1986). Clinical legal education has embraced the need to teach about social justice as a specific goal. See Robert Dinerstein, \textit{Report of the Committee on the Future of the In-House Clinic}, 42 J. LEGAL EDUC. 508 (1991). Stephanie Wildman writes about challenging privilege in non-clinical courses, using experiential exercises. See Wildman, supra note 40; Wildman, supra note 44. I have tried to do this myself in a course entitled “Gender, Race, Sexuality and the Law.” I have offered the course twice with approximately 50 students each time. The fact that this class drew so many is exciting, but makes it all the more difficult to use innovative teaching techniques that may enhance learning about privilege.

  \item \textsuperscript{106} Frank Bloch notes that clinical legal education uses methods that are best suited to adult learners and therefore most effective for teaching new skills. He writes:

  Andragogical methodology favors participatory, experiential learning techniques—for example, exercise, role playing, field work, seminars, and counseling—to reinforce the important role of experience in the lives and learning of adults. The assumption is that “the more active the learner’s role in the process, the more he is probably learning.”


  \item \textsuperscript{108} I first described what happened in this clinic in a presentation that I did for the Society of American Law Teachers in New York City in the Fall of 1990. I made some of these observations there, but have since done more reflection.

  \item \textsuperscript{109} ASU had an integrated legal clinic with five or six full-time faculty assigned to the clinic. The overall student population at ASU is remarkably diverse for a law school. In the later 1980’s and early 1990’s, approximately 20 percent or more of the students were people of color. The in-state tuition was low and attracted a larger number of lower-income students than other law schools of similar size and rank. The school had embarked on an Indian Law program and attracted several Native American students from tribes in the Southwest.
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for people with HIV. The HIV segment was part of a general clinic in which students had the opportunity to work on public benefits cases, criminal misdemeanors, a prisoners' rights class action, and at least one HIV case. The HIV cases typically involved seeking public benefits and drafting various documents such as traditional wills, living wills, and medical powers of attorney. We also occasionally handled a case of employment discrimination or health care or insurance discrimination. The goals for this HIV component were modest: to educate the students about the myriad legal issues that arise in the HIV context, both for persons with HIV and community-based organizations.

In 1989, the majority of people who had been identified as HIV positive in Arizona were white, gay men. As time passed, the demographics changed to include a large number of people of color and some children. As was true in most communities dealing with HIV, it was the white gay males who demanded and staffed community-based HIV support services. Since the Clinic provided legal

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111 The clinical faculty shared responsibility for supervising the students. We identified areas and cases of primary responsibility. When students were assigned cases, they were supervised by the faculty member who handled that case. I supervised the majority of the HIV cases.


113 HIV touches all areas of the law. While much of the scholarly literature concentrates on discrimination and privacy issues, HIV also affects such areas as family law, criminal law, immigration and tort liability. See AIDS Law Today (Scott Burris et al. eds., 1992).

114 At that time, Arizona Department of Health Services statistics indicated that whites accounted for 86% of all AIDS cases, a figure higher than their proportion in Arizona’s population, which was 75%.

115 Arizona’s demographics differed significantly from the national figures. According to the Centers for Disease Control, from June 1981 to September 1990, 152,126 cases of AIDS were reported. Although African Americans constitute 12% of the population, they accounted for 28% of AIDS cases and the rate is increasing. African Americans also account for 73% of the total AIDS cases in heterosexual men, 52% in women and 55% in children. Samuel Duh, Blacks and AIDS: Causes and Origins (1991). Among Latinos the rate of AIDS is almost three times that of the non-Latino population. Latinos accounted for 12.9% of the total number of cases nationally in 1981 and as of 1990 they constituted 15% of reported cases. AIDS Prevention and Services: Community Based Research (Johannes Van Vugt ed., 1994).

116 As Altman points out, AIDS volunteers “included a large number of people who were politically aware, and would demand a role in managing the epidemic very differently from that of the conventional health-care volunteer.” Dennis Altman, Power and Community: Organizational and Cultural Response to AIDS 20 (1994). See generally
services to the organization and served as the legal service provider for their clients, the students came into contact primarily with white, gay men, many of whom had formerly been relatively affluent.

The law students in the ASU clinic were varied in age, ethnicity, and gender and represented a wide spectrum of academic class rank. Each semester, I supervised approximately ten students, generally in their twenties. Approximately 20-25 percent were people of color: Latino, African American, and Native American. Eighty percent or greater were middle to upper-middle class. There were equal numbers of men and women. None of the students identified themselves as gay or bisexual.

Even though many of the students were attracted to the idea of helping those with HIV (such cases were more exciting than doing a typical public benefits case), some students expressed concern that they might be put at risk of contracting HIV and asked to be exempted from these cases. Therefore, our first goal was to educate the students about the fact that HIV cannot be contracted through casual contact. Very early in the semester, we offered “AIDS 101,” taught by a local physician who provided much of the care for people with HIV and the epidemiologist from the Arizona Department of Health Services.

I was not surprised that some students expressed fear for their health, but I was very surprised by the homophobia117 that a large number of students demonstrated. Most of the students in the clinic had never met an “out” gay person. They expressed astonishment that these people were remarkably similar to themselves. Many believed that all gay people were effeminate, sex-crazed or mentally ill.118 These students’ beliefs coincide with what Marc A. Fajer terms

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117 “Homophobia—the irrational fear and hatred of those who live and sexually desire those of the same sex.” Suzanne Pharr, Homophobia: A Weapon of Sexism 1 (1988). Pharr contends that “homophobia has been one of the major causes of the failure of the women’s movement to make deep and lasting change. We were fierce when we set out but when threatened with the loss of heterosexual privilege, we began putting on brakes.” Id. at 25. Pharr notes that “without the existence of sexism, there would be no homophobia.” See also Homophobia: How We All Pay the Price (Warren J. Blumenfeld ed., 1992); Anne E. Freeman, Feminist Legal Method in Action: Challenging Racism, Sexism and Homophobia in Law School, 24 Ga. L. Rev. 849 (1990).

118 It is not surprising that many of my students held these stereotypes. The media’s portrayal of gay people certainly supports these conclusions. For example, the movie Basic Instinct gave us not one, but three, psychopathic lesbian murderers. With few precious exceptions, Hollywood’s depiction of gay men runs the gambit from the flamboyant drag queen (Nathan Lane in The Birdcage), to the “everybody’s-gay-bestfriend-but-is-never-seen-in-an-intimate-relationship” character (George Carlin in The Prince of Tides), to the sex-crazed, deranged gay murderer (Al Pacino in the notorious Cruising). More often than not, when homosexuals are shown on screen, they are relegated to minor roles that
the "sex-as-lifestyle assumption." According to Fajer, a core element of non-gay pre-understanding of gay people is that homosexuals are defined by and obsessed with sexual activity. This sex-as-lifestyle assumption also encompasses the belief that gay people "choose" to be gay and are, therefore, not worthy of legal protection; that homosexuals are child molesters or actively recruit children; and that lesbians and gay men are promiscuous by nature and incapable of long-term monogamous relationships.

While most students are at least somewhat sensitive to being perceived as "racist," the students in our clinic generally lacked any self-consciousness about being perceived as homophobic. Their meaning schemes around homosexuality were well-developed along the lines Fajer discusses. Few had challenged these assumptions nor had they

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Id. at 537. Francisco Valdes who concurs with Fajer, states: "Sexual orientation denotes only the apparent or actual inclination(s) of sexual or affectional interests or desires among humans toward members of the same sex, the other sex, or both sexes. The term does not imply anything about the etiology of sexual orientation as a social construct or as an aspect of personhood. Likewise, the term does not extend to any behavioral manifestations of the desires it signifies." Francisco Valdes, Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society, 83 CALIF. L. REV. 1, 23 (1995).

In a strong indictment of this mindset, Fajer observes that "[t]he assumption that gay people's identities are reducible to sexual acts is peculiar and insulting, particularly in the context of a long-term relationship between two people who consider themselves married and are raising children together. Our society does not perceive heterosexual identity merely as sexual acts; we certainly do not view marriage as a formalized excuse to fuck."

Fajer, supra note 119, at 545.

There is substantial debate within the gay community about whether homosexuality is "genetic" or a product of choice. This may have jurisprudential implications but, at root, it should make no difference. Often the argument that gay people had no choice about their sexual orientation carries with it the negative implication that if they could choose, of course they would choose a heterosexual partner. That implication is merely a function of privilege and ignores the existence of the loving and positive relationships between persons of the same sex.

Fajer, supra note 119, at 540-42. Fajer notes that "[m]uch of the psychological literature examining homophobia has concluded that support for the traditional gender-role structure is a primary cause of homophobia." Id. at 617.
had the opportunity to do so. When establishing goals for this clinic, I had not planned on coping with homophobia.

Much of the legal work that the students did for their clients required them to confront the heterosexual assumptions built into the law. Without the medical power of attorney, for example, their client's partner of twelve years would be unable to see him in the hospital. Without a properly executed will, their client's treasured possessions would be carted off with the parents or siblings instead of remaining with his partner who had participated in their selection and purchase. The students learned that just because their client's partner was a successful, fully-insured business person did not mean that health insurance was available to the client. They saw the pain of a couple facing the inevitable death of one. They saw the desire for time off to care for an ill partner denied by employers who did not consider this an illness in the family. They saw young men with biological families nearby, struggling to identify a healthcare representative or an executor of their estate because their family had rejected them upon learning that they were gay and had HIV.

As these HIV cases progressed, the students also handled legal services cases involving poor people in need of public benefits. The vast majority of these students had as little experience with poor peo-


Many commentators link the deprivation of homosexual family rights with the judiciary's inherent homophobic mindset. See, e.g., Fred A. Bernstein, This Child Does Have Two Mothers . . . And a Sperm Donor with Visitation, 22 N.Y.U. Rev. L. & Soc. Change 1, 22 (1996) (noting that when families with homosexual members broke up, "the courts often deprived them of parental rights — a brand of homophobia that continues to surface in the 1990s"); Darren Rosenblum, Geographically Sexual?: Advancing Lesbian and Gay Interests through Proportional Representation, 31 Harv. C.R.-C.L. L. Rev. 119, 123 (1996) (observing that "[c]ourts reinforce homophobia by excluding lesbians and gay men from family rights such as marriage, adoption, and child custody").


125 See LESBIANS, GAY MEN, AND THE LAW, supra note 123, at 439-60.


127 These clients were disproportionately Latina and African American women. Of course, some of these clients may have been gay, as well, but that did not come up in our representation.
People and women of color as they had had with gay people. However, the students distanced themselves emotionally from their poor clients more than they had with their gay clients. The students never spoke of any identification with their legal services clients. I noticed, however, that the students formed strong relationships and identified with their HIV clients.

Most of the HIV clients railed at their treatment and demanded that the students use the law to stop the injustice. Why did they have to give up all of their privacy rights to receive public benefits? Why did they have to stand for hours in line just to talk with a caseworker? How were they supposed to pay for rent, food, medical care while they waited to see if they could get public benefits? How were they going to pay for those necessities even if awarded meager benefits? Why did they have to go to a special clinic for medical care instead of seeing a regular physician? Why were they subject to the whims of the health department and not entitled to anonymity about their health status? Why were they laid off from their jobs without any severance or notice? Why would it take so long to get a remedy for the employment discrimination that they knew was unlawful? The treatment the clients received often outraged the students. They worked harder on the cases. They tried to expand their clients' claims to provide legal remedies for these harms. They talked of class actions, legislative initiatives, and using the press to bring their clients' indignities to public attention.

Most of the questions raised by these HIV clients were questions that could have been raised by any of the poor clients in their legal services cases. I am sure that at least some of the legal services clients raised questions similar to these, but the issue of injustice did not color the majority of their conversations with students as it did with the HIV clients. Because these legal services clients all were poor, and the majority African American or Latina,¹²⁸ it is not surprising that they, unlike their gay male counterparts, did not raise questions about their treatment. Such treatment was not unusual and was sometimes even expected. Nevertheless, when these same students dealt with their poor clients, they did not express the same degree of outrage. A far more common feeling expressed was some form of "blame" of the clients themselves.¹²⁹ Some students contended that

¹²⁸ Some of the legal services clients may have been gay as well but given the restrictions of the Legal Services Corporation, we could not handle cases dealing with homosexuality and often were unaware of the clients' sexual orientation.

¹²⁹ For an excellent discussion of our tendency to blame the poor, see Thomas Ross, The Rhetoric of Poverty: Their Immorality, Our Helplessness, 79 Geo. L.J. 1499 (1991). Ross contends that there are a number of broad-based assumptions that cut across all treatment of the poor: A view of the poor as morally weak, the division of the poor into deserving
their clients' predicaments arose from bad personal choices rather than from any structural defect in the system.\textsuperscript{130}

The fact that many of the cases tended to arise as a result of the client's poverty created the risk of confirming some students' beliefs about poor women of color. While the students were quite able to see the injustice of an employer's unwillingness to hire a person with HIV as an explanation for their client's joblessness, they attributed a poor client's lack of employment to laziness or "malingering" despite compelling evidence of race and gender-based discrimination.\textsuperscript{131} A client with HIV must have missed an appointment due to his illness; the legal services client just "didn't care." Mere exposure to the client and her legal needs did not affect these students as such exposure had done in the HIV area.

As the semester continued, however, I noticed a change in many of those students who were handling both HIV and legal services cases.\textsuperscript{132} The students began to talk about injustice more often when describing their poor clients' claims. They spent more time with these clients than they had at the beginning of the semester. Their work product improved, and the time they spent investigating and developing claims increased. As an educator, the question then became: How can I replicate this experience? What is it about these cases that has made these lessons so clear and generalizable?

Clinical legal education increases the possibility for disorienting moments. One reason for such disorienting moments is the newness of the experience. The majority of these students had been shielded
from the reality of people they perceived as different. Experiencing
difference is often "disorienting." Real-client clinics are effective in
creating these moments in which the student attorney must "listen" to
the client in ways that perhaps have never happened before. There is
a subtle power shift that goes on in this unique setting. Frequently,
the client seeking free legal services is in a less powerful position in
relation to the lawyer. However, in a clinical setting, most students,
having never been in the role of lawyer with a client before, are un-
sure of themselves, eager to please, and likely to show more deference
to the client than they would once they become a practicing attor-
ney.133 This power shift creates a vulnerability, an opportunity to edu-
cate the student about many more things than how to handle a public
benefits case. It is a chance for the student to rethink assumptions
about poor people, gay people, women, and people of color. In that
rethinking, it also creates an opportunity to view these assumptions
within a broader context and to rethink the consequences of legal
actions.

Relying solely on a learner's inexperience to equalize power rela-
tions is not sufficient.134 Given the demographics of the student and
client populations, it is very likely that the client's voice will be from a
different perspective than the student's.135 Most clinical programs in
the United States focus on the legal needs of the poor.136 Students, as
well as the instructors themselves, tend to come from middle to upper-
middle class backgrounds.137 Many of the white students have never
had extended interaction with someone of another race.138 Most are
unfamiliar with the problems of the poor. Usually, the client's life is

133 Many clinicians have observed this phenomenon in a variety of settings. See, e.g.,
Smith, supra note 30.

134 Not to mention disempowering to the learner. The process of identifying unearned
power and the lack of neutrality in law should not be a process in which we undermine our
students' self-esteem.

135 In 1991, 85% of all law students were white. African Americans made up only 6.3%
of the law student population and other minorities an even smaller percentage. Michael A.
Olivas, Legal Norms in Law School Admissions: An Essay in Parallel Universes, 42 J.

136 Dinerstein, supra note 105, at 511.

137 See Lewis A. Kornhauser & Richard L. Revesz, Legal Education and Entry Into the
Legal Profession: The Role of Race, Gender and Educational Debt, 70 N.Y.U. L. REV. 829

138 Unfamiliarity with the client's issues presents itself in a multitude of ways. Students
comment on the hostility that they feel from some of their clients, particularly if the stu-
dent is white and the client is African American or Latino. Their descriptions do not ac-
knowledge the negative history that shapes the present interaction. See Hooks, supra note
62, at 102. They personalize this hostility as a function of the individual's personality,
which prevents honest, meaningful conversation. Many students enter these meetings
completely unaware of their "whiteness," but their client of color becomes emblematic of
their race.
so removed from the student's experience that the student inevitably feels detached and in control. The client seeks help from the student/attorney, but that help is often provided in a top-down manner. This risks the creation of a "confirming moment" in which cultural messages about our poor clients are reinforced rather than critically analyzed in light of structural oppression or the student's own power and privilege.

The students identified more easily with the HIV clients than with the poor clients of color because the students shared certain characteristics with the HIV clients, namely class, race, education and age. These characteristics facilitated an identification that prevented the students from remaining detached. Furthermore, the identification with the clients made it more difficult to rely upon stereotypes during interactions. These relationships flourished because these clients looked much like the students themselves. Most were white and fairly well-educated, and many had been successful professionals. Therefore, I was caught off guard as disorienting moments undermined their stereotypes. Much of the learning occurred with very little intervention on my part. Mere exposure to the clients caused the students to re-evaluate their assumptions. These clients looked, talked, and felt like their peers, their friends, and their family. I overheard a student telling another that her client reminded her a great deal of her uncle. The other student said, "So?" She countered, "But Joseph [the client] is a homosexual!"

These white, male clients had lived their lives with the attendant gender and skin privileges despite their lack of heterosexual privilege. Many of these men had not been identified as gay until their diagnosis with HIV. Their treatment, once they were identified as gay and infected with the HIV virus, was in stark contrast to the treatment they had received before the diagnosis. They were acutely aware of their loss of privilege and were quite articulate about it. They made it easy for students in the clinic to see their loss of privilege.

The antidote to this is training in client-centeredness. That is not without complexity, however. See Robert D. Dinerstein, Client-Centered Counseling: Reappraisal and Refinement, 32 ARIZ. L. REV. 501 (1990).

In some ways, this identification had the same effect as an unexpected "coming out" by a close friend. For example, an individual is certain that he has no contact with gay people when, to his surprise, a close friend reveals that he is gay. It is virtually impossible to maintain the stereotype in the face of such connection.

Fajer suggests that "[a] story that combines new perspective with an empathetic representation is a very powerful tool that can force the reconceptualization of a problem." Fajer, supra note 119, at 522. Fajer's reliance on empathy evoking storytelling closely resembles Quigley's "disorienting moment." Fajer admits that empathy is likely to fail when audiences do not share the basic premises of the excluded group. Id. This observation coincides with my conception of the "confirming moment."
This may explain the difficulty the students experienced in establishing similar relationships with their legal services clientele, who were primarily poor women of color. Because these clients differed from the students in a number of ways, and because poor women of color in the United States bear the burden of a complex and multi-layered host of stereotypes, the students may have felt overwhelmed by the many vectors of privilege that separated them from their clients. That sense of “difference” may have reinforced the need for distance and an unwillingness to re-examine multiple meaning schemes. But did this mean that in order to confront privilege, the adult learner should confront no more than one disorientation at any one time? Did the fact that the poor clients often differed from the students on more than one axis impede the students’ ability to engage in transformational learning?

Identification with the client was not the only phenomenon I observed in the HIV setting. I also noticed a lessening of the power imbalance between the student and client. This may have been partly due to the similarity between client and attorney but also it appeared to be connected to the degree of emotion that attended their dealings. The student’s proximity to the client’s pain increased the occurrence of “disorienting moments.” Basic assumptions about the world were in jeopardy. This allowed us the opportunity to explore the sense of disorientation, to identify those assumptions that appeared to be untrue, and, finally, to see why the students held those assumptions. These young clients had a disease that certainly would shorten their lives. In a few instances, they died while we were providing them with legal services. The students, young themselves, were challenged emotionally by the tragedy. This appeared to have the ef-

142 And, much the same as homophobia is affirmed judicially, the rhetoric of poverty is reinforced by a “special plea of judicial helplessness.” Ross, supra note 129, at 1511. In addition to these broad-based assumptions, case-specific assumptions arise depending on the public benefit sought: AFDC recipients are assumed to have no aspirations beyond maximizing their partakings from the public trough, disability benefits recipients are accused of fraud, and food stamps recipients are assumed to cheat the system. Id. at 1518-35.

143 Stephen Ellmann writes about the importance of respect in the attorney/client relationship. Respect implies an equalization of power. As Ellman states, “[T]he lawyer signals her common humanity with her client by responding to his views with views of her own, by engaging him rather than distancing him.” Ellmann, supra note 39, at 1000.

144 Professor Martin Guggenheim of New York University Law School notes that the difference between the clinic and the classroom is that in the class, we can experience how the rules might be unfair and in the clinic we study how it feels to be the recipient of those rules. He knows his students have experienced a “disorienting moment” when the student comes back from an encounter and says, “How could they have done that to us?” The event happens to the client but due to the identity between the student and the client, it is experienced as happening to both of them. Roundtable discussion at the Clinical Theory Workshop, New York Law School, Feb. 23, 1996.
ffect of correcting the power imbalance between lawyer and client. The students struggled with their own emotions and the sense of loss prompted by the imminence of the client's death. Such emotional turmoil also created a willingness to engage in self-reflection and an openness to learning about privilege.\textsuperscript{145}

The nature of the legal claims in the HIV setting frequently engendered “disorienting moments” because the claims presented opportunities to question the law's neutrality. Unlike poverty cases in which the law is well-settled and has deeply entrenched and unquestioned values, the law in the HIV area was developing and new.\textsuperscript{146} A large part of the work that the students did for these clients dealt with their relationships. Nearly all of the ways that the law handles non-blood relations presumes a heterosexual spouse.\textsuperscript{147} Matters of great importance to these clients, such as who would attend to them when they were hospitalized, who would make the decision to withdraw life support, who would care for their children and their pets upon their deaths, required the students to create legal documents to correct the law's default position. Students enhanced their understanding of the legal status of homosexuality as they realized that the law's default position denied their clients rights that most took as fundamental.\textsuperscript{148} Most of the students were deeply moved and troubled by the fact that the law made no room for the needs of their clients. They began to develop understanding and compassion for gay people.

The students were gaining insight about injustice from their HIV cases. The gay white male clients articulated the nature of the oppression they experienced. The students learned to understand how the law, which they had previously viewed as neutral, reinforced the oppression.\textsuperscript{149} They began to be more critical of the law and less ac-

\textsuperscript{145} Shauna Van Praagh describes the powerful effect of narrative on a student's ability to learn. She identifies three characteristics of narrative that make it a particularly powerful teaching device. Those characteristics appeared to be present in the students' relationships with their clients with HIV. First, their identity with the client allowed them to hear their stories. Second, because these stories were a necessary part of effective legal representation, they were a weave of emotion and reason. Finally, because the students were overwhelmingly heterosexual, they had to make room for multiple perspectives to construct legal documents designed to overcome the heterosexual bias in the law. Van Praagh, supra note 17, at 117.

\textsuperscript{146} Jane H. Aiken & Michael Musheno, Why Have-Not Win in the HIV Litigation Arena: Sociolegal Dynamics of Extreme Cases, 16 LAW & POL'Y REV. 3 (1994).


\textsuperscript{148} See THE LESBIAN AND GAY STUDIES READER (Henry Abelove et al. eds., 1993).

\textsuperscript{149} Phyllis Goldfarb writes about the power of narrative in enhancing the lawyer-client relationship. See Phyllis Goldfarb, A Clinic Runs Through It, 1 CLIN. L. REV. 65 (1994).
cepting of its purported neutrality. The students generalized this insight and became more critical of law’s presumed neutrality in other, more entrenched areas. They began to understand that their insistence that the law was value-free and neutral reinforced the marginalization of their clients. Once this window was opened to them, they could not go back to a faithful belief in law’s neutrality. All laws were now suspect.

I took the opportunity that this contrast gave me to teach about privilege. The students described lots of “disorienting moments” in which many of their basic assumptions about how the law functioned were challenged. We “reflected” on our experiences and “reoriented” our thinking. Together we strived to understand more thoroughly the injustices that infested the lives of both HIV clients and legal services clients. We spent class time and teacher-student meetings discussing how the lack of privilege had made the legal services clients expect the treatment and the structure that oppressed them. We discussed why the HIV clients had the ability to articulate loss of privilege while the poor clients did not discuss it in those terms. Most of the legal services clients had never had class privilege. Their legal problem was merely another in a long series of problems.

Another factor that may have contributed to the transferability of insights in the HIV context was that the students were not the sole determinants of what legal claims were available. They were not the “helpers,” with their clients relegated to a passive role of being the “helped.” There was a mutuality of effort that was not present in the students’ relationships with other clients. Their HIV clients articulated ways in which the legal system violated them and failed to meet their needs. Their loss of privilege was a new wound, their indignities fresh and oozing. They offered a critique of justice that the students understood through their identification with the clients. Their descriptions could be generalized. As a result, the students began to make connections. They thought about the criticisms so articulately expressed by the HIV clients and realized that the legal services clients were being subjected to the same injustices. They began to have

150 According to Valdes, “The legal permissibility of sexual orientation discrimination to facilitate sex and gender discrimination is at once an expression and an exploitation of heterosexism: it deploys legal heterosexism to absolve cultural heterosexism.” Valdes, supra note 120, at 124.


152 Much has been written about the importance of “client-centeredness.” See, e.g., ROBERT M. BASTRESS & JOSEPH D. HARBAUGH, INTERVIEWING, COUNSELING, NEGOTIATING: SKILLS FOR EFFECTIVE REPRESENTATION (1990); DAVID A. BINDER & SUSAN C. PRICE, LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH (1977); Ellmann, supra note 39.
more energy, more compassion for the poor clients. I heard fewer words of blame and more outrage. Instead of hearing me tell them about injustice, the people who were directly affected by the denial of privilege spoke to them. The authenticity of their observations made it much more difficult for the students to avoid the contradictions that such resistance posed for them.

Finally, the fact that their HIV clients had previously been safe from these injustices undermined the students' security that their own privilege was inviolate. They personalized the learning. The students realized that if people so similar to them could lose their privileges, so could they. Their newly recognized vulnerability fueled their desire to promote justice. They also began to realize that the exercise of their privilege resulted in pain for the client. Too many times their assumptions about how the world worked resulted in their being unprepared to cope with the needs of their clients.

Teaching about this is difficult, but it is key to teaching students to do justice. It is not enough to have the students understand the reality of their clients' lives and feel sympathy. The analysis must shift away from the client and the system and focus instead on the learner. We analyzed the surprise that the students expressed when encountering injustice. We talked about why they had previously been unaware. We analyzed who benefited from their lack of understanding. We focused on how our own privilege caused us to participate in those indignities.

I offer a simple example of this process:

Student: "I can't believe that he has to wait so long before he knows whether he will get those benefits. He's worried that the doctor may not be willing to continue his treatment unless he can be sure that he will qualify for Medicaid. He's spent down all that he has and is living in a trailer on the East side. He's got nothing to pay for the medicine while he waits. Without that drug, he could die. It just doesn't make sense."

Supervisor: "What doesn't make sense?"

Student: "That he could be treated that way. You know, I think this may be why my legal services client has so many health problems. She probably hasn't been able to afford a doctor all of her life."

Supervisor: "Why do you suppose that you were surprised by this? You have been dealing with Mrs. Winters (the legal services client) for almost a whole semester and you have never talked about her lack of access to health care."
Student: "I guess I just haven’t thought about it much. I’m covered by insurance. I never think about what medical care costs or even that it costs at all. That’s allowed me to be oblivious to the fact that a great number of people don’t have that access."

In hindsight, I could have been more proactive in my teaching by challenging the students to compare their experiences with their different clients. I should not rely on that comparison taking place spontaneously. When a student suddenly realizes that he has been oblivious to the fact that so many people lack access to health care, I should not be content with that awareness. The next question to ask should be: “How has your security in your own access to health care affected your client’s access?” What I am suggesting here is that we, as educators, should be forcing the inquiry. It is not enough to create the opportunity for a disorienting moment. Without greater intervention by the teacher, we risk creating a series of confirming moments. The educator’s natural inclination, reinforced by law school pedagogical techniques that avoid self-reflection, is to focus the student solely on the legal effect of privilege. Learners will not strive to promote justice unless they understand how their own privilege prevented them from seeing injustice as well as how their own privilege allows them to benefit indirectly.

I have suggested that we may, through pedagogical effort, be able to maximize the number of “disorienting moments” in the clinical setting. Yet the replication of that clinical experience poses serious challenges. Clearly this learning experience works best with a real client. Does the client have to be “formerly privileged but newly disempowered?” This suggests clinics that serve specific groups: people who have recently become chronically unemployed; women newly divorced from men who have provided them with wealth and derivative privilege; accident victims newly disabled. Certainly that is an unacceptably small sample of cases. The importance of identity in fostering a learning environment suggests that there may be some pedagogical virtue in having the students physically resemble their

153 But see Trina Grillo & Stephanie Wildman, Obscuring the Importance of Race: The Implications of Making Comparisons Between Racism and Sexism (or Other Isms), 1991 DUKE L.J. 397 (pointing out the risk of engaging in white privilege when using analogies to understand experience).

154 One might suggest that we need to include an HIV component in every clinic. However, the demographics of HIV have changed such that the majority of those affected are not the “newly disempowered.” Indeed, HIV disproportionately affects the poor, people of color and women. These are the populations that are in need of proactive legal services.
clients and share with them significant, privileged characteristics. Learning theory shows that such similarities do facilitate learning, a fact entirely consistent with our understanding of privilege. Our world view is shaped by seeking out others of our own race, class, and gender, and we assign difference a negative value. This raises some troubling problems in teaching about justice, fairness, and morality. Did my students merely unlearn homophobia by dealing with upper middle class, gay men, or were they simultaneously confirming their beliefs in white privilege? Does this mean that we should seek to match students with clients who are exactly like them except for a single attribute or characterisitic? A partial answer to these questions may have been provided by the students' apparent ability to generalize some of their learning about heterosexual privilege to issues of racism, gender, and class. For some students, at least, the recognition of flaws in their assumptions or beliefs in one area may make them more willing to question their stereotypes and judgments about other groups of people who are “different” from them. The risk remains, however, at least for some learners, that contact with clients who share many of their own privileges may confirm their preexisting beliefs about people whom they regard as “truly different.”

This ability to generalize one’s learning about privilege from one context to another is a key component in successful teaching about justice. Such generalization only occurred after the student demonstrated a willingness to engage in critical self-reflection. First they established identity with their client’s pain. Next they recognized how the limitations of their world view prevented them from predicting their client’s treatment. Finally, and perhaps most importantly, the students demonstrated a willingness to be self-critical of the world view that had failed them in responding to the needs of their clients. That willingness to evaluate long-held assumptions about the world, coupled with the desire to avoid having those

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155 Quigley notes that adult learning theory shows that adults learn especially well from their peers. Peer discussions provide valuable opportunities for the exchange of information and experiences. Quigley, supra note 82, at 57. Quigley's view appears to be consistent with this observation about the students and their HIV clients.


157 See MINOW, supra note 92. Minow identified five common unstated mis-assumptions regarding difference. They are:

1. Difference is Intrinsic, Not Comparison.
2. The Norm Need Not Be Stated.
3. The Observer Can See Without Perspective.
4. Other Perspectives Are Irrelevant.
5. The Status Quo Is Natural, Uncoerced, and Good.

Id. at 49-78.
presumptions harm another, appeared to expand the students' ability to perceive that heterosexual privilege was merely one of the privileges that shaped their lives.

An important aspect of the HIV legal clinic was that the student's relationship with the client allowed for more equal sharing of power. These were, for the most part, aggressive clients who wished to direct the action of the case. Their skin and class privilege contributed to that aggressiveness. The students perceived their clients as powerful and allowed the clients to frame the nature of the problem. Perhaps we can enhance the number of "disorienting moments" by ensuring that our students' clinical experiences include situations in which they perceive their clients as truly powerful and the directors of the action.158 In these situations, the legal work is no longer reactive, but jointly proactive.159

This does not mean that we should abandon the Legal Services model of providing direct service to poor clients who are often people of color. We must recognize, however, that the model requiring the client to come to the lawyer often disempowers the client and reinforces stereotypes that our students hold about people of color, women and poor people.160 "Confirming moments" occur with some regularity. Disorienting moments that arise in this model are fortuitous, often precipitated by the student's glimpse of the client's reality—in the client's home or in court. When providing direct service to poor clients, students should go to their clients' homes rather than requiring the client to come to the law school clinic office. Students should take all opportunities to be with their clients. Interview them in their homes; wait in lines with them; attend meetings with caseworkers, doctors, or court personnel; and, of course, attend appearances in court and administrative hearings. If it is true that students experience more disorienting moments when they are not on their own ground, then venturing into the client's world should increase the likelihood of developing a critical understanding of power and privilege.161

158 See Alfieri, supra note 107. One type of clinic that puts more power into the hands of the clients is the community economic development clinic. In these clinics, the client typically directs the lawyer's actions rather than playing the kind of passive role that is occasionally fostered by the direct service model.
159 Louise Trubek writes about creative ways to lawyer for poor people that appear to offer some of these advantages. See Louise G. Trubek, The Worst of Times . . . And the Best of Times: Lawyering for Poor Clients Today, 22 FORDHAM URB. L.J. 1123 (1995).
160 For a critical analysis of power relations in the clinical context, see Michelle S. Jacobs, Legitimacy and the Power Game, 1 CLIN. L. REV. 187 (1994).
161 Poverty law classes have had the effect of increasing the pro bono commitment of students. See Catherine L. LaFleur, Surveying Poverty Law: Addressing Poverty Law in a Required Course, 42 WASH. U. J. URB. & CONTEMP. L. 147 (1992).
V. Teaching About Justice in the Traditional Classroom

The insights from the clinic suggest that clinical legal education is the only setting in which this model of learning theory is effective. Although teaching about justice in the traditional classroom appears to pose seemingly insurmountable obstacles, there are, however, ways to create openings for students to examine their values and identify their role in promoting justice. In order to inspire a desire to promote justice, fairness, and morality effectively, we need to design opportunities for the students to experience a disorienting moment. When disorienting moments do occur, we need to create room within our classes for students to explore the moments, reflect on them, reorient with the new information, and open that window of critical consciousness that allows them to generalize their new understanding in the future. Self-reflection is key: the students must understand how others suffer when they ignore justice.

Traditional teaching methods inhibit both disorienting moments and reflection, whereas clinics offer many opportunities for such self-analysis. While the clinic thrusts the student into a world that is often unfamiliar, the classroom is usually an environment that operates by rote. Deviation from the traditional teaching model is difficult and often creates resistance among the students. Legal education is essentially passive, requiring very little of the flexibility and creativity from the students that client responsibility demands. Many students come to law school with the idea that professors should just “teach them the law so that they can get out and practice.” These students act as if the law is a body of information to be learned in law school and then used like a technical manual. This idea may be subtly and unintentionally reinforced in the classroom. From the outset, law students are socialized into a particular model of behaving that reduces their openness to self-analysis. The appellate decision, the staple of traditional teaching, reinforces the search for analytical “truth” and reinforces the idea that law involves a process of neutral inquiry.

162 Indeed, the doctrine of stare decisis appears to be consistent with the idea of reinforcing meaning schemes rather than reevaluating them. Once a decision about how facts should be interpreted has been made by a court, there is institutional need for that resolution to have predictive effect. If the same facts arise, there is no need to reevaluate the legal conclusions, they necessarily follow. That is essentially how meaning schemes function.

163 Luban & Millemann, supra note 25, at 62.

164 As Angela Harris and Marjorie Shultz have pointed out, “Existing legal rules and arrangements are not ‘neutral’; rather, every legal structure or decision creates ‘winners’ and ‘losers.’ ‘Winners’ can be comparatively dispassionate in discussing existing arrangements unless or until those arrangements are seriously threatened. ‘Losers,’ by contrast, are likely to be emotionally agitated by what they perceive as unjust disadvantage.” Harris & Shultz, supra note 20, at 1785.
The students are rarely exposed to the raw facts that the court sifted through to arrive at its statement of facts. Instead, they are treated to predigested morality plays that justify the conclusion. How, under these conditions, can we create a climate conducive to the insights necessary for learning about justice? The goals are to teach our students to be critical of their personal perspectives and to teach them to understand that unexamined perspective reinforces the status quo at the expense of many people. How do we bring home that message in as powerful a way as possible in the traditional classroom? How do we create a disorienting moment in an entirely familiar setting?

Legal educators can use a number of techniques to create disorienting moments in the classroom. First, the teacher must disabuse students of certain preconceived ideas about the law and establish a different kind of norm in the classroom.

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165 Luban and Millemann note the limitations of the case method in teaching students to exercise judgment:

Moreover, we doubt that the casebook people are very much like typical people, because selection bias populates casebooks with people whose disputes are among the small fraction that do not settle. We doubt as well that casebook people are very much like real people (a point to which we will return). Judges need to compose their fact statements as morality plays to underwrite their decisions, and in any event, judges and their clerks usually lack the art to write in three dimensions. Students who cultivate judgment based on casebook people are in for a surprise.

Luban & Millemann, supra note 25, at 61.


167 Angela Harris and Marjorie Shultz offer this insight into the disorienting moment: “[S]uppressed emotion injures the classroom experience indirectly — blocking learning, producing judgments that are based on little more than stereotypes, and creating intellectual and personal isolation. Emotion ruled off the official educational agenda remains unchallenged, unexamined, and undisciplined by reflection and analysis.” Harris & Shultz, supra note 20, at 1780.

168 As Frances Ansley states:

It is relatively easy to conclude that a teacher should offer students a variety of perspectives, but less so to define what role the teacher’s own values should play in the
rests with the teacher. In the first year, the purported agenda in most law schools is that we are teaching our students how to "think like a lawyer." That injunction carries with it the assumption that once one learns to "think like a lawyer," one has managed to achieve that state of neutrality common to all lawyers, regardless of their background and experience. This is the idea that a distinctly legal mode of analysis exists, and if applied to a given situation, it will assist one in arriving at just results in a particular case.

One way to undermine that forced neutrality is to demonstrate to students that there is difference among their peers. I tend to overlook and under-utilize perhaps the best teaching asset I have. It is the students themselves. Like the real clients that the students must work to understand, the students in the law classes sometimes come from very different backgrounds and perspectives. Wildman and Davis describe the importance of making friends across categories of difference as a powerful way to confront privilege:

A university is a special place, offering opportunity not only to make friends, but also to listen intently to many others who are not friends. This opportunity to hear differing views is particularly important in a law school, making a law school within a university an even more special place. Law and justice are symbolic of deeply held values in American culture. Law school is a place where we classroom. My aim is not to convert students to my own personal position on various issues. But I must confess to feeling certain that my own positions on some issues are right, and in some cases I do want to change my students. I am sure, for example, that more people in the United States need to learn the history of racism in America and the profound way it has shaped our legal institutions, our culture, and our daily lives.


169 Marjorie Shultz and Angela Harris concur with this assessment. Shultz observes, "To get a class deeply engaged, willing to expose preconceived notions, to question received wisdom, and to consider threatening new ideas, I have to get them to talk about what they really think and believe about whatever they are studying. I can only do that if I can be comfortable in the face of emotion, theirs and mine, and can help them to be likewise. Emotions are entwined with thought and judgment." Harris & Shultz, supra note 20, at 1789.

170 See WILDMAN, supra note 40, at 139.

171 For a compelling critique of this assumption, see Duncan Kennedy, Legal Education as Training for Hierarchy, in The Politics of Law: A Progressive Critique 40-61 (David Kairys ed., 1990). The first year of law school seems single-mindedly designed to reinforce this idea. First-year law students are particularly unwilling to break norms that are clearly established in their classes. Therefore, in order to teach about justice, I have found that I must undermine this premise of neutrality that is constantly reinforced in the other required courses that a first-year student is taking. Once "trained," they are resistant to different norms in upper-division courses. This is complicated by the fact that I am often the only female professor they have. The students tend to discount my approach as "touchy-feely" or "feminist," which diminishes my ability to challenge the neutrality premise in an effective manner.
should be able to think about systems of privilege and the role of law in maintaining or constraining power.\textsuperscript{172}

If we, as teachers, create circumstances in which the learner's perspective is valued in the class and is not merely a frolic in an otherwise detached analytical discussion, then we can create opportunities for disorienting moments. Although students are generally discouraged from sharing personal information about themselves and applying their own sense of justice to legal problems, teachers can encourage learners to do so by offering their own particular insights in class.\textsuperscript{173}

Peer pressure not to be personal may, however, be so strong that we cannot defeat the law school norm by merely encouraging students to reflect openly in the classroom. The key then is to create opportunities for learners to use their own sense of justice in analyzing legal problems and to make that a part of the "normal" discussion. This can be done in a number of ways: small group projects or simulations, small group discussions in which the learners offer their own perspectives on particular issues, and large class discussions in which the teacher asks questions that specifically solicit students' personal insights. Occasionally, the disorienting moment occurs. The students sometimes find themselves surprised at an insight and perspective offered by a peer because they did not realize that anyone in the class came from that background or because they had always assumed that everyone (at least in law school) shared their perspective on the particular issue. These experiences often leave the students disoriented and ripe for gaining insights about justice.

In a civil rights course, we were analyzing why class status would not be a suspect classification under the traditional equal protection clause. One of the primary reasons cited by the students from the case materials was the notion that class, unlike race and gender, is changeable. One student raised her hand and began to tell the story of her childhood. She was raised with four siblings in a very small home with no electricity or plumbing. She described studying by candlelight and going whole days without eating because there was no money for the family. Her mother raised the family alone, and, intermittently, she qualified for aid and food stamps. She could not afford any child care, and the children looked after each other when their mother was able to find work. The class was silent throughout this disclosure. I saw looks of surprise and embarrassment for her. Tears were evident on many faces. I believe that the moment was quite disorienting. Several students told me later that they had always assumed that everyone in the class was just like they were and had been

\textsuperscript{172} Wildman and Davis, supra note 44, at 884.

\textsuperscript{173} See Harris & Shultz, supra note 20.
raised in middle-class homes. They were taken aback that their assumptions about their peers had been untrue. They could no longer rely on those assumptions.

After the student concluded her description of the poverty in which she grew up, another student noted that her story proved the rule that class was a changeable characteristic because here she was in law school and breaking the cycle of poverty. Many people nodded and smiled. The student broke in and said, "You don't get it, do you? I'll never be able to get out of poverty. I still have three sisters and a mother at home. They still need me. They still live in the poverty I described. I guess I could abandon them, but I will not do that. So every cent I make over my living expenses goes to them to help them survive. No, I haven't escaped poverty . . . . I will always be poor."

That insight, offered so painfully and personally, did more than any readings or lecture could to expose the fallacy of the view that poverty is escapable by anyone willing to work hard.

The disorienting moment is not enough. This is an opportunity to have the learner reflect on how her own values affected her analysis of the problem and, consequently, the delivery of justice. This kind of reflection is often difficult to accomplish because there is discomfort in the classroom and tension not just for the students but also for me. Nevertheless, I have learned that you cannot let the moment fade. There are so few of them, and the learning does not occur later, once the students have had a chance to process the experience and succumb to cognitive dissonance. I ask the same questions that I would ask in the clinical setting. I name the experience in class: "Many of you appear moved and surprised by this story. Why were we surprised by what we learned? What structural realities of our lives encouraged us to believe the Horatio Alger myth?174 How are the law and society affected by the idea that poverty is escapable? Who benefits from that belief?" In addition to this kind of analysis, I attempt to lead the students into an even more self-reflective mode. I ask them: "How does believing that everyone is like you influence your ability to be effective lawyers? How do you benefit from the belief that your class

174 Harlon Dalton describes the influence of the Horatio Alger myth on race relations in our country. He notes that the Horatio Alger myth conveys three basic messages: 1) Each person is judged solely on their own merits; 2) We each have a fair opportunity to develop those merits; and 3) Ultimately, merit will out. There is a fundamental tension between the promise of opportunity enshrined in the Alger myth and the realities of a racial caste system. By rejecting the Alger myth we reveal the untruth that blacks can simply lift themselves up by the bootstraps and drive home the realization that hard work and individual merit do not necessarily produce success. Exposure of the fallacies of the myth also may cause white people to realize that their own achievements have been helped along by their preferred social position. *Dalton, supra* note 45, at 127-35.
status is earned? How does that belief affect current local and national policy initiatives? How are poor people harmed by that belief?"

Another classroom norm that gets in the way of discussions of justice is the limited opportunity for self-critique and reflection. Sometimes, students and I make comments that reveal our assumptions about the world and evidence our various biases. These kinds of comments, obviously, need to be handled delicately so as not to alienate the student and send a message to other learners that they might be attacked if they are candid in their comments. One of the ways I open the possibility of examining these comments is to use my own "slips of privilege" as fodder for class discussion. Once I show how it happens unintentionally (even to the teacher!), the learners become more willing to analyze their own experiences. What I have found is that the more subtle the example, the better. Comments that reflect overt racism or sexism are too easy to dismiss as idiosyncratic.

I offer an example of an analysis I did with my class of my own exercise of privilege. I testified before the South Carolina General Assembly in opposition to a bill that would prevent the acknowledgment of marriages between people of the same sex performed in other states. One of my strategies was to try to convince the legislature that they need not act on this law because gay marriages had not yet been recognized in any state and we were at least two years away from that event. I suggested that we could thereby avoid setting ourselves up for costly litigation, leaving those costs to other states to pay and acting later if necessary. When talking with my class about the constitutionality of such a bill, I told them about my testimony. I said, "It is not a problem yet, we don't need to fix it." At the moment I said that, I realized that I had engaged in heterosexual privilege. I had characterized same-sex marriage as a problem. I stopped the class and I pointed out my choice of words and asked the class: "If I had a committed relationship with someone of the same sex, would I have characterized same-sex marriage as a problem? Who benefits from that...

175 I copy portions of the Contract With America for the students and ask them to analyze the assumptions within the sections. Many of the students who have heard about the document but have never read any of it are stunned by its content.

176 Modeling is a key technique in demonstrating to students how they can incorporate critical self-consciousness of privilege. Norman Redlich says: "We teach best by example, and nothing which the law professor says in class with regard to professional standards can equal in impact the effect of the professor's own conduct." Norman Redlich, Professional Responsibility of Law Teachers, 29 CLEV. ST. L. REV. 623, 623-624 (1980). For a discussion of the importance of modeling in our teaching, see Jacobs, supra note 160, at 187.

177 Marjorie Shultz and Angela Harris offer terrific examples of circumstances in which they have examined their own and their students' comments for the power assumptions they embody. See Harris & Shultz, supra note 20, at 1788-92.
characterization? How does that characterization reinforce the marginalization of gay people?” I took pains to show them that my choice of words was not intended to have that effect, but that it was important for me to recognize the effect and work from there.

Once students go through an exercise in which I am the focal point, they appear less threatened by a similar analysis of their own comments. The O.J. Simpson case has been rich in many ways. Perhaps its greatest richness, however, is the degree to which unconscious privilege reveals itself in our very descriptions of the case. Before the case went to trial, it came up in my civil rights class, and we began a discussion of whether racism was involved in the case. One white student said, “O.J. has transcended race.” This comment set off a flurry of hands from the African American students. One African American student pointed out that O.J. Simpson had only transcended race as long as everyone knew who he was. If he were encountered on the street by someone unfamiliar with him, then he was just a big, black male who embodied all the stereotypes that go along with that description. That point was understood by the class. I did not want to leave it at that, however. The choice of words was too useful as a lesson in hidden privilege. I drew a horizontal line on the board and wrote black under the line and a vertical arrow pointing up and over the line. I asked the class, “What do we mean by using the term ‘transcended’? What did O.J. Simpson become? What had he moved above? What hidden assumptions were included in the use of the word ‘transcended’? Who benefits from that characterization?” The subtlety of the comment assisted in the “disorienting moment.” Most of the people in the room, whatever their color, could see themselves using the term “transcending race.” It was only then, upon reflection and reorientation, that the negative image was revealed.

One way to create room for students to bring their own values to the subject matter is to require that students keep a journal. Journals offer learners a chance to reflect on their experiences, bring their own perspective to a problem, and analyze the issues without the pressure and immediacy of a class discussion. Such an exercise can result in a disorienting moment. For example, in a criminal procedure class in which the topic was search and seizure and criminal profiles, a student wrote:

This area of the law just gets under my skin and I can’t really put my finger on it but it’s not just the issue of what’s a search or seizure but also “profiles” and the definition of reasonable expectation and the court’s acceptance of a person’s ability to completely waive his/her fourth amendment right without even knowing that he/she has done so. . . . If the police can give a valid reason for their actions
(basing decisionmaking on race is expedient and catches criminals)
it's O.K. I thought it was interesting that people can agree that race
can be a consideration in trying to get criminals but it can't be a
factor in hiring, housing, raises. . . .

This kind of comment may occur in small classes, but it is obvious
from the way the journal entry is written that it took time to develop
and was prompted by a sense of discomfort. It appears as if the
learner is experiencing a disorienting moment facilitated by the jour-
nal. What is missed through the journal experience is the opportunity
for a teacher to push the student into examining what this means
about privilege in our society and reflecting on who benefits. Some of
this can be done through the teacher's comments upon reading the
journal. No matter how successful that effort may be, however, the
teacher loses the opportunity to examine this reflection with the class
as a whole.

Traditional classes need not be sterile. We can create opportuni-
ties for our students to have a first-hand experience. Techniques for
creating this experience include combining the class with a clinical
component, tours of legal institutions outside of the law school, and
assignments that require students to observe or experience how peo-
ple are treated by the legal system. One teacher suggests that we
should specifically focus the students on privilege and the effects of
privilege. She asks her students to notice, for example, who is asked
to empty his or her pockets when going through the metal detector in
court; inevitably, the students see the racial pattern in those requests.
Another teacher requires his students to live on a welfare budget.
He has them keep a record of what their budget is for two weeks, and
then asks them what their life would be like if they had to live on that
budget for the rest of their lives. What would they eliminate from
their own budget in order to live? How are the things that they elimi-
nate nonessential? He posits a situation in which their child's birthday
is coming up and they want to buy a birthday present. Is that an es-

tential item? This exercise often changes the way the students view
the poor. Once the student can see contextual nuance, the opinions
and perspectives of others become more valuable. This sets a tone in
the classroom that allows for discussions of perspective, power, and
justice.

The traditional socratic teaching method using appellate deci-
sions may also be a source for “disorienting moments.” For example, *People v. Hall* is a rich case for opening windows of critical consciousness. The case, which was decided in 1854, concerns an appeal by a white defendant challenging his conviction for murder. The primary evidence against the defendant was provided by a Chinese witness. On appeal, the defendant argued that the Chinese witness should have been barred from testifying because an 1850 statute provided that “no Black, or Mulatto person, or Indian shall be allowed to give evidence in favor of, or against a White man.” The court’s task was to determine whether a Chinese person was included in the statute and therefore should have been prohibited from testifying. The court arrived at several ways in which the Chinese were implicitly included in the testimonial prohibition. It reasoned that Indians originally migrated from Asia, so the Chinese fit within the Indian category. It determined that “Black” was a generic term encompassing all non-whites and clearly the Chinese were not white. Thus the conviction was overturned. The case starkly demonstrates the imposition of racism through evidentiary rules.

It is not difficult for the students to criticize this precedent. Inevitably students recognize that past cases embody racist and sexist assumptions which color the analysis, yet many steadfastly contend that those days are gone. They argue that such contaminated logic is not found in modern cases. Often class discussion becomes so focused on how far we have come in our analysis of race in the law that there is very little chance of opening any windows of critical consciousness through the criticism of this precedent. Such class discussion may be deceptive, however. A journal entry about *People v. Hall* demonstrates that at least one of the students in the class was beginning to get disoriented. This student, a white male, wrote:

> I am struck here by the assumption that, to divine the correct answer, we need only define our terms and apply the statute. I am struck because, although the result was so outrageous to our eyes today, we apply the same reasoning, with the same acquiescence to authority, to the cases we read everyday! Perhaps we should be asking — Wait — who wrote the statute? Or more importantly, what point of view was absolutely absent from the statute?

Certainly the kind of analysis offered in this journal entry can be raised in class. Although the learner did not complete the examination of privilege by analyzing how he has benefitted from that reasoning, this additional step can be taken in class.

In the journal entry, the student used one approach to bring *Hall*
into the present. Another way to accomplish this result is to focus on the court's assertion that Chinese are non-whites. I ask my students: "Are Chinese people white people?" They answer easily, "No." I respond: "How do you know that they are not white?" This often baffles them as they struggle to tell me why. The answer, of course, has much to do with the precedential value of *Hall* in defining what is white. That precedent clearly affects the students' present-day assumptions about the distinction among races. Once the students begin to see how race is an entirely constructed notion and not something they can "prove," I ask them to analyze who benefits in our culture from the seeming ability to identify people as white or non-white.

To reach the majority of the students, I must demonstrate that racist logic infects cases today. I have had some success in disorienting the students by using the case of *City of Memphis v. Greene*. The City of Memphis erected a barrier to stop traffic through an all-white neighborhood based on the white residents' asserted interest in traffic safety. The barrier was strategically placed at the line between the white neighborhood and the predominately black neighborhood. The United States Supreme Court found no invidious racial discrimination and no violation of law. I begin the analysis of the case by offering the students some context in which to place this opinion. I have found that when studying race cases that are based in residential segregation, I have to overcome the belief that such segregation is the result of a natural phenomenon rather than a social construction. Therefore, it is essential to provide enough historical information to evaluate that privileged belief.

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182 For a comprehensive analysis of the legal construction of race and the impact of these precedents, see *Lopez*, supra note 9.

183 Ian Haney Lopez analyzes the prerequisite cases that construct our conception of race. He then turns to how these cases are reinforced in modern cases. His discussion of the legal construction of race raises many questions about the law's neutrality and the operation of privilege. These questions are useful for stimulating discussion among students when analyzing the race cases. He notes:

> That law constructs race is evident. How it does so, however, remains a more difficult question. In assessing this, inquiries along two roughly parallel axes can be pursued. First, how do legal rules fashion races? Does law operate simply to control behavior through a series of penalties and rewards, and if so, how can these devices define races? Or does the law operate as an ideological system, as a source of beliefs about what society does and must look like? If the latter, how does this system influence or create ideas about race? Second, what role do legal actors play? More particularly are judges, lawyers and legal consumers conscious creators of racial beliefs? Or are these actors largely unaware of the legal construction of race, unwitting participants in such processes and passive victims of law's constitutive powers?

*Id.* at 113.

184 451 U.S. 100 (1980).
City of Memphis concerns the neighborhood of Hein Park. This part of the city was developed well before World War II as an exclusive residential neighborhood for white citizens and these characteristics have been maintained. In 1963 the Supreme Court unanimously invalidated the segregation of Memphis' public parks. The Court found "an unmistakable and pervasive pattern of local segregation, which, in fact, the city makes no attempt to deny." The white Hein Park residents' original proposal for the barrier at issue in Greene sought closure of all four streets connecting the neighborhood to the nearby black community. The City of Memphis had never before closed a street for traffic control purposes. The white residents asserted that "undesirable traffic" had the effect of staining their neighborhood's "good" qualities. Uncontested testimony by the plaintiff's expert established that the barrier was likely to have a significant negative psychological effect on the black residents in the adjoining neighborhood.

The Supreme Court majority did not address the plain and powerful symbolic message of the inconvenience. Although Brown v. Board of Education recognized that "separat[i]on of a group of people solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone," and although the African American residents in Greene had testified that they were stigmatized, humiliated and relegated to a lower status in Memphis, the Court totally ignored the demoralizing message conveyed by the barrier.

The process by which the city decided to close the street reflected administrative exclusion of the black residents of Hein Park. Despite an unambiguous requirement that applications for street closings be signed by all owners of property abutting on the thoroughfare to be closed, the city permitted this application to go through without the signature or the consent of a person who owned property abutting the

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185 Id. at 139-43.
187 Justice Marshall stated that such words were little more than code words for racial discrimination. Greene, 451 U.S. at 136.
188 See id. at 139.
189 Id. at 138.
191 Id. at 494.
192 Greene testified: "[B]ecause we are black, we cannot drive through a piece of property that is collectively owned by us. This would cause psychological damage to me personally." Greene, 451 U.S. at 140 n.3. He also said that he perceived the barrier as "simply an extension of the insult and humiliation that we have tolerated and experienced too long already." Id.
193 See id. at 146-48.
proposed barrier. Furthermore, the black property owners living north of Hein Park were not given notice that the Planning Commission was considering an application to close West Drive. When Respondents discovered that the issue was being considered, the City gave them only 15 minutes to speak. Thus, the black residents on the north end of Hein Park were effectively excluded from participation in the political and administrative process that culminated in the decision to erect the barrier.

Once the students are aware of the foregoing details, we examine the opinion's reasoning. Many students note the Court's studied determination to ignore the racial implications and they identify the rhetorical techniques used by the justices to support their findings. Occasionally, there is a racial split within the class as to whether the decision to erect the barrier was based on the desire of the white community to shut out black travelers. This creates an opportunity to explore the neutrality issue more specifically. We can look at the differences in the learners' perspective based on background and experience and how that affects their tendency to credit or ignore certain evidence. No matter whether the students believe the opinion was correctly decided or not, the case is extremely useful in demonstrating that the administration of justice is not neutral. From that recognition of non-neutrality, I can ask the students to reflect upon how their own experience may affect their reading of the case and the weighing of the evidence. I ask them to answer the ultimate question: Who benefits from the Supreme Court's interpretation of the evidence?

Affirmative action is a subject that is likely to stimulate "confirming moments" in the traditional classroom. It touches deeply-held ideas about merit and guilt that are very difficult to discuss in a manner that moves the class forward. The key, of course, to understanding the need for affirmative action is through a recognition of the ways in which privilege operates as a perpetual affirmative action program for those who have it. Challenging precedent risks reinforcing stereotypes as the students fight to support a decision already reinforced by a court's reasoning. We must be careful how we proceed. Hopwood v. State of Texas offers a stark opportunity to have the students examine the ways in which privilege affects the law. Cheryl Hopwood and several other white applicants to the University of Texas School of Law (UT) challenged the school's admissions process on equal protection grounds. They alleged and proved that minority race was used as a plus factor in evaluating files. The Law School defended the case by

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194 Id. at 144.
195 Id. at 143.
asserting that the state had a compelling interest in remedying past discrimination in primary and secondary schools and also had a compelling interest in promoting diversity in the student body. Applying the "strict scrutiny" standard, the Court found these interests insufficient to support a race-conscious admissions program and ruled that such a policy had indeed violated the plaintiffs' equal protection rights. The following is a portion of the opinion evaluating the Law School's asserted interest in diversity:

Within the general principles of the Fourteenth Amendment, the use of race in admissions for diversity in higher education contradicts, rather than furthers, the aims of equal protection. Diversity fosters, rather than minimizes the use of race. It treats minorities as a group, rather than as individuals. It may further remedial purposes but, just as likely, may promote improper racial stereotypes, thus fueling racial hostility.

The use of race, in and of itself, to choose students simply achieves a student body that looks different. Such a criterion is no more rational on its own terms than would be choices based upon the physical size or blood type of applicants. Thus, the Supreme Court has long held that governmental actors cannot justify their decisions solely because of race.

A university may properly favor one applicant over another because of his ability to play cello, make a downfield tackle, or understand chaos theory. An admissions process may also consider an applicant's home state or relationship to school alumni. Law schools specifically may look at things such as unusual or substantial extracurricular activities in college, which may be atypical factors affecting undergraduate grades. Schools may even consider factors such as whether an applicant's parents attended college or the applicant's economic and social background.197

I ask my students to evaluate several questions after reading this opinion: What are the assumptions about race and diversity inherent in the decision? Are they true? What are the implications of these assumptions? How is race different from the factors that can be considered for purposes of admission? These questions prompt the students to make the privilege inherent in this decision visible. They force the students to analyze privilege before we discuss the underlying question of the legitimacy of affirmative action. In this manner, I attempt to avoid allowing the Court to foster the creation of a "confirming moment."

These are examples of techniques that can be used on occasion in traditional law school classes. Increasingly, law schools are offering

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197 Id. at 945-46 (citations omitted).
perspective courses that allow the teacher to make the examination of privilege an explicit part of the agenda. Over the past three years, I have been teaching a course called “Gender, Race, Sexuality and the Law.” The course has drawn approximately fifty or more students each time it is offered. The course description is as follows:

Privilege and power affect assumptions made in the law about differences among people. This perspective course will examine assumptions made in the law about gender, race, class, sexuality, and disability, and the impact of those assumptions on the application of law. The course looks at the meaning of power and privilege, the construction of exclusion within the law, and the concept of difference. What does difference mean, i.e. different from whom? What legal significance should be given and who decides the legal significance of the perceived “difference”? What role does dominance and hegemony play in our concept of difference? The course will close with alternative visions of justice. The goal of this course is to learn to read the law critically, and with a sensitivity to the ways in which legal techniques reproduce patterns of power and privilege that subordinate groups on the basis of categories of identity.

As is evident from this description, the course has an explicit agenda to raise questions about the distribution of power and privilege in our present legal system.

The course attracts an interesting mix of students. Many of the students are longing for a critical outlet for their frustrations with the law. Most of these students are “outsiders.” In spite of the fact that African Americans comprise only 7-8 percent of the total student body, they comprise roughly 20 percent of the students in this class. Women make up roughly 50-60 percent of the population of the class, but only 41 percent of the population of the law school. Openly gay and lesbian students make up roughly 5-10 percent of the class but only about two percent of the law school population. Recently, I have attracted more heterosexual, white men (about 35 percent of the class). This group tends to be divided between men who identify themselves as having progressive politics and a group of Federalist So-

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198 See also, e.g., Balos, supra note 166; Mary I. Coombs, Non-sexist Teaching Techniques in Substantive Law Courses, 14 S. ILL. U. L.J. 507 (1990); Mary Jo Eyster, Integrating Non-Sexist/Racist Perspectives into Traditional Course and Clinical Settings, 14 S. ILL. U. L.J. 471 (1990); Stephanie Wildman, The Question of Silence: Techniques to Ensure Full Class Participation, 38 J. LEGAL EDUC. 147 (1988).

199 The course promises far more than it can deliver. However, one of its strengths is the excellent book that the students use, LESLIE BENED & DAAN BRAVEMAN, POWER, PRIVILEGE AND LAW: A CIVIL RIGHTS READER (1995).

200 It is difficult to assess the number of gay students in the law school overall. I have found that some of the gay students come out in the class but are not generally “out” in the law school population.
ciety members who look forward to challenging the other students and me. These demographics make for a group with plenty of diversity in both experience and opinion.

The subjects we cover are race, gender, sexuality, class, disability, and the intersection of these characteristics. The materials are systematically structured to move the students through a certain process of understanding. For each segment, I ask the students to identify their personal beliefs and cultural stereotypes about the group we are studying. Next, we analyze how societal structures reinforce the positions of power and privilege that shape our personal views and cultural stereotypes. In doing so, we look at a variety of law review articles, books, and cross-disciplinary texts. Finally, we analyze how legal decisions reinforce societal structures, and we identify the false assumptions that may be present in the court decisions we read. The course counters the notion that the law is neutral; the students are fully aware of the need to identify how privilege affects their analysis. The students' background and experience play a significant role in classroom discussions. These conditions often prompt "disorienting moments." As a part of the course, the students keep journals to afford opportunities for reflection outside the classroom.

Once the students begin to question the law's neutrality, many express concern that they may unwittingly view evidence and claims by their clients in ways that reinforce existing power structures. They are eager for ways to combat the effect of limited perspectives. I build into the classroom opportunities for the students to try to identify how their experience affects their perspective:

Once again, the O.J. Simpson case is irresistible for this purpose. I divided the students into small diverse groups. I asked stu-

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201 Frances Ansley suggests that we introduce our students to readings about legal education. As she states, "I certainly didn't know about it when I was in law school. At that time, I thought all professors simply taught the material without much soul-searching, and certainly without arguing among themselves about it." Frances L. Ansley, Bringing Values and Perspectives Back into the Law School Classroom: Practical Ideas for Teachers, 4 S. CAL. REV. L. & WOMEN'S STUD. 7, 17 (1994). Because of the occasional disdain that these courses provoke, related readings on legal education give additional support to the idea that these issues are important outside the classroom setting, that these issues are not completely "personal" and merit serious scholarly debate.

202 Personal, experience-based papers by students carry several advantages. As Ansley notes, "First, they validate and honor student experience in a way that I believe is all too rare in law school. They can also be a real aid in the pedagogical project I have just identified: helping us anchor our teaching approaches in our students' own varied experiences while making it more possible for them to similarly anchor their own approaches to learning." Id. at 19. As previously noted, the main disadvantage of reflection papers is that students may try to "second-guess" what they believe the teacher wants to hear. Equally troubling are those students who refuse to acknowledge any change in their assumptions.

203 Stephanie Wildman and Margalynne Armstrong also use the O.J. Simpson case as an
students to describe how they felt about the case when they first heard about it, in the middle of the trial, and after the announcement of the verdict. Once they identified their personal positions, I asked them to examine what aspects of their own background may have affected their views of the case and may have caused them to see the case differently from others in the group who came from different backgrounds. I explained that they should not argue about who was right or wrong, but rather identify how different experiences might influence one’s opinion of the evidence, its relevance, and its significance. Not unpredictably, the black students — both male and female — tended to credit the race issue more than the white students did. White women often focused primarily on the issue of spousal abuse, and white men often mentioned class as a phenomenon affecting the outcome of the case. We then came back to the group. I asked for some volunteers to talk about what they had learned in the small discussion groups. I asked questions to encourage the students to identify how their perspectives might be limited by their experiences and might prevent them from acknowledging phenomena that affected the case. We then focused on the patterns that emerged and we talked about what legal strategies we might be able to glean from the exercise.

This class exercise is only the beginning. What is missing from this class is an evaluation of the differences. The question remains: “What do we do with the difference in perspective?” If white people and people of color experience police practices differently, for example, whose perspective should control? In order for this exercise to be useful in teaching about justice, the students should be able to examine that question in light of what they are learning about privilege. The media response to the O.J. Simpson verdict endorsed a particular view that privileged the white reaction.204 As long as we fail to identify the effect of white privilege, we will maintain its corrupting power and domination and be unable to address racial oppression.

If one’s goal is to teach law students how their own perspectives affect the world, classes that have a clear agenda of examining privilege are often very satisfying (although extremely unnerving). Furthermore, such classes generally attract students who are open to such an approach. However, the important messages about judgment, privilege, and perspective should not be relegated to a single course. We have seen the problems with such treatment in the professional re-

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204 Id.
It is essential that we integrate analysis of difference into traditional courses to ensure that students begin the life-long process of examining their exercise of privilege and develop an appreciation of the professional value of striving for justice, fairness, and morality. What I am suggesting is a fundamental restructuring and rethinking of the way we approach legal education at its base.

CONCLUSION

The MacCrate Report has reinvigorated legal education by identifying fundamental skills and values that are essential to effective lawyering. As we go through the process of ensuring that we train students in these fundamentals, we should not ignore the values identified in the report. At the heart of these values is the injunction that lawyers should strive to promote justice, fairness, and morality. Law schools and law teachers can play a significant role in instilling in our students a passion to ensure justice.

This endeavor is deeply satisfying. I live for the moments in teaching when my students gain new insights into social justice and, perhaps more precisely, social injustice. Passive understanding, without a deeper internalization, is insufficient. The goal is to have the student capture the experience and hold its lesson for a lifetime. I believe that we can best teach students to be compassionate and to do justice if we stop focusing on the "other" and turn their focus on themselves.

Injustice is disorienting. I have argued that when disorienting moments occur, we should seize upon them and help our students develop a critical consciousness of the operation of power and privilege both in the situation that they are observing and in themselves. I have described ways that we can construct learning experiences that will maximize the possibilities of "disorienting moments." Even if those moments remain rare, legal educators concerned about social justice and racism can embrace those moments as windows of opportunity. We can use them to educate our students not only about how power and privilege caused the unfairness or reinforced the stereotype to which they are reacting, but also examine how the students' own power and privilege allowed them to be oblivious to the effects and inadvertently contribute to suffering. Once privilege is unmasked, the student can no longer be unaware. First, the students must recognize that the law is not neutral. Second, the individual must extend the protection and perquisites of that privilege to people who are op-

205 See generally Teaching and Learning Professionalism, supra note 4.
pressed and subordinated. In this manner, we can help our students develop the skill of compassion and encourage them to join in the collective effort to do justice.

These are just initial suggestions, and I urge those interested in this area to add to the list of what can be done once a student realizes the structure of oppression. We have to offer ideas so that students who are ready to accept this role in pursuing justice do not abandon the struggle out of frustration or a sense of helplessness.

This is essentially a jurisprudence of justice that goes beyond critique to conceptualizing a vision about the future. As Linda Greene notes:

> It would be a jurisprudence of hope, a vision about the circumstances under which the boundaries about existing law and our aspirations about a just society might be eliminated. We could incorporate in this idea of justice the knowledge of both male and female visions of justice, not essentialized but evaluated for the richness they might give for an inclusive vision of justice. We need to understand how justice is perceived, manipulated, made to appear apparent or irrelevant, and how the blatant absence of justice reinforces a coercive ideal which may be tolerable only because the weak and the powerless suffer its effects.