

Law School: Introduction

Guinier and Sturm, as law professors at the University of Pennsylvania Law School, facilitated an experimental student-run seminar, “Critical Perspectives on the Law: Issues of Race and Gender,” in response to the absence of explicit engagement with race, gender and critical theory within the curriculum. Over a seven-year period, we developed a set of operating principles to experiment with the pedagogy. Our role was to push students to challenge the adequacy of established categories of race and gender, issues of professionalism and the conventions of legal analysis, and to create occasions for critical thinking and problem-solving.

We realized that we had developed a pedagogy that focused on three goals:

- motivating students to come to terms with their own moral agency,
- developing a space where different people can participate in addressing controversial and potentially polarizing issues, and
- challenging students to connect what they are learning in the classroom to their professional roles and their pursuit of social justice.

Both Guinier and Sturm have experimented with the operating principles in other law school settings including a civil procedure class at Columbia of more than 100 students, an upper level employment discrimination class of 40-60 students, and a required professional responsibility class of 50 students at Harvard Law School.

Setting a Tone and Establishing Expectations

When race and gender shift from fixed to malleable diagnostic categories, productive dialogue often results. The tenor of discussion changes, so that genuine disagreements do not degenerate into disruptive or futile verbal combat. Even when this framework fails to bridge differing perspectives, it still opens up possibilities for creative problem-solving.

Problem-Oriented Focus

Orient the content, syllabus, and materials around issues and problems of common concern. Draw on a variety of perspectives from different disciplines and professions. Encourage students to suggest readings and topics from their own experiences.

A copy of class syllabi is available on the resource page.

Group Size and Diversity

Pick a group large enough to provide diversity in background, identity, and interest, avoiding tokenism where possible. Small size is key for building relationships and meaningful participation. Approximately 15-17 participants strike an ideal balance for seminar discussion, although many of the operating principles are scalable to 40-50 students.

Selecting Participants

If choices are possible, select students who are willing to experiment with creative and innovative solutions for race and gender issues and who seek connections between personal, professional, and academic goals.

Creating a Casual Setting

Meet in a space with movable furniture and room for break-out groups. Schedule two hours minimum to enable less structured interactions. Serve food to sustain energy.

Linking Race, Gender, Class and Social Change

Approach race, class, gender and other categories of exclusion as diagnostic tools. Encourage students to consider the experiences of those on the margin as symptomatic of more general institutional shortcomings. This framework and related strategies are developed further in the book, *Miner's Canary*.

See resources for syllabi and lesson plans that connect race, gender, and social justice.

Establishing and Adjusting Guidelines

Attentiveness to Process

We have found the following guidelines helpful in assuring the creation of a learning community:

- Set terms for discussion and interaction at the outset to forge trust.
- Assure that no one person dominates the conversation.
- Expand the concept of professionalism to foster interaction and reflection.

Sharing Power and Responsibility

- Share and rotate power and responsibility for planning and running class sessions and projects.
- Enable students to play a major role in the learning process. This provides motivation for learning the material thoroughly. It also builds diversity directly into the planning process.

Students work together in small groups, by planning and collectively facilitating class sessions, and for some, implementing group research and community action projects.

Collaboration

Provide opportunities for students to work together in small groups. This can be done by:

- Assigning groups to help plan and facilitate class sessions.
- Using break-out sessions in class.
- Encouraging group research and community action projects.

Student Facilitation

Students meet with the faculty facilitator(s) to organize their pedagogical goals around an important problem and an engaging format. They allocate roles and responsibilities for leading the class, collaborate to run the class, and debrief together. Such interactions and relationships motivate students, who do not want to disappoint their group. The groups are encouraged to work out disagreements among themselves about class readings or structure, preparing them for conflicts within the larger seminar.

Faculty Facilitation

Initially, our faculty facilitation was characterized by:

- Co-facilitation by two faculty members who reflect diversity in race, expertise, and style. This was an ideal arrangement and we recommend it to others. However, individual faculty members can successfully facilitate this process.
- Willingness to share power with students over the agenda, content, and process, even when this means extensive meetings outside of the formal class session.
- Attentiveness to the methods and process, over time, including engagement with conflict.
- Shared commitment to experiment with new roles and ideas.

Faculty work with students to help them select materials, plan classes, and facilitate interaction within the seminar. Faculty also encourage students to

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address hard questions, to disagree, and to remain connected to one another. Faculty-student meetings are often the site of the most intensive learning for many individual students, triggering the "aha" moment.

This type of facilitation requires substantial time commitments by both faculty and students. Simply putting diverse people together with an agenda is not enough. Efforts must be taken to develop opportunities for active participation and learning, for gaining skills of listening and communication, and for developing relationships that can transform individuals and the group.

It is helpful to integrate artists, organizational consultants, community theater participants, and innovative lawyers into the interactive methodology of the class. Outside experts often bring different disciplinary or methodological approaches to their role as facilitators. They should be invited to work with students in planning their own sessions, conducting role plays and helping the class experiment with new forms of inquiry.

Large Classes

We have used variations on these techniques in professional responsibility classes of 50 students, employment discrimination classes of 75 students and first year civil procedures classes of more than 100 students.

Although it is not possible to pursue an interactive, student-facilitated format in every law class, we have successfully experimented with active learning through role plays, three person group take-away exams, and small discussion break-out groups. In a professional responsibility class, we have met with rotating groups of student facilitators in advance of class who then develop lesson plans for the entire class.

Ideas for Shaking Up Habits and Encouraging Innovation

Experimentation stimulates participants to prioritize, define goals, and assume responsibility for their own learning. We vary the class formats to accommodate different learning styles and to tailor what people learn to how they learn.

Formulating Lesson Plans with Students

Faculty and teaching fellows conduct planning meetings with small groups prior to class. Student facilitators prepare by reading assigned materials and thinking about goals for the class. In larger classes, student facilitators write persuasive essays based on the readings and share these essays among themselves and with faculty before class. Student facilitators brainstorm

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different approaches to the material, often drawing from personal and professional experiences. Conflict sometimes arises in the planning process, and it is helpful to explore its relationship (if any) to the subject matter, to learn from and resolve those conflicts.

Experimentation with Teaching Formats

The seminar invites problem solving and brainstorming using unconventional formats, from discussion to storytelling, from role plays to theater. Lesson plans may also include structured discussion and small group work. A variety of formats accommodates diverse learning styles and backgrounds and spawns novel methods of inquiry based on session goals.

This methodology is designed:

- to move continuously from the personal to the political, the conceptual and the professional and back again;
- to reveal how our "ideologies" are often rooted in our personal stories;
- to use story telling and other active methods to create trust, openness and the willingness to take the intellectual risks that lead to reframing problems.

The role of the faculty facilitator includes keeping the conversation going long enough to make these moves and to keep pushing students from one dimension to another, to get them unstuck, or to allow them to "fail" in the short run and not be defined by that failure in the long run.

Connecting Academic, Professional, and Personal Inquiry

The deepest learning often happens when students relate theory to personal experiences and professional aspirations, via storytelling or other means. Emotional connection to the material and long-term commitment through practice or field research amplify students' interest and involvement.

Linking Student Writing to Faculty Feedback, Peer Comments and Self-assessment

One option is for students to write weekly reflection pieces in the format of their choice to grapple with course material. Students' personal and intellectual journeys become a site for learning through a draft political autobiography that describes how the strands of their life and their identity come together to strengthen or impede their commitment to social change. The autobiography is revised over the semester to incorporate peer and faculty feedback, as well as new content based on subsequent class sessions. The essay formats range from linear arguments to expository writing and narrative collage. Students, who are urged to meditate on how the strands of their life and their identity come together to strengthen or impede their commitment to social change, consistently report that writing the political autobiography is one of the most

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meaningful exercises they had been asked to do in law school.

"My political autobiography was immensely satisfying (though it will remain a work in progress) and one of my very favorite things about the whole experience. It is perhaps somewhat ironic that in a group-intensive seminar-setting, the solitary assignment was the most satisfying for me – but, I know that the autobiography would have been nothing without having participated in the seminar and with the group that we had."

To encourage and assess class participation, students submit a self-evaluation memo commenting on their own contributions and that of their peers. They are also asked to include in the memo a debriefing of lesson plans that worked well for them.

Constructive Conflict

What took place in this class was plenty of disagreement, but it was a very different kind of disagreement. People wanted to understand, to trace back to the source why they were disagreeing. The disagreement became a source of creative tension in the class.

Avoiding the Zero-Sum Game, Working Through Conflict

Conflict is often viewed as a competition that produces a winner and a loser. Conflict, however, need not be zero-sum. Indeed, conflict can be a basis for learning. In one class, our students disagreed about the role of stigma in the context of affirmative action. We prodded them to understand why they disagreed. Surprising connections were made between both ideas and people.

Affirmative Action

The topic of this week's class is "Affirmative Action." Professors Sturm and Guinier listen as the student facilitator, a light-skinned black woman named Alicia, jump-starts the class debate. To involve her other classmates, Alicia uses her moment on the soapbox to quote from another student's reflection piece, which refers to the perceived stigma of affirmative action as a "badge of inferiority."

Alicia has barely finished her sentence when Nancy, a heavy-set woman with twisted braids and round glasses, cuts her off. "I don't believe in the stigma argument," she exclaims. "I have never felt stigmatized by affirmative action. Other people might have, but I don't think it matters."

Professor Guinier, intrigued by this outburst, leans forward and asks, "Why didn't it matter to you?"

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“Why didn't it matter to me? Because I felt I had worked really hard to get where I was,” says Nancy, firmly placing both hands on the desk before her. “I also felt that this goes back to the privilege article we read. Other people have other kinds of privileges that I didn't have. People don't feel stigmatized when their parents get them a job because their parents are a partner at a law firm.” Juan stops twirling his pen for a second to ponder upon Nancy's thought process. “That's interesting because I know that I did feel a certain stigma. And I know from reading the reflection pieces there is another person in this class who had a very similar background or upbringing,” he says, with a secret smile, not revealing the identity of the writer. “When they were at the top of their class in elementary school or junior high, they were the golden child or rather—no, the brown, sienna child.” The other students grin at this slight, but apropos, lapse in metaphor.

Juan continues, “You get to college and you do really well. Then you get to law school and everything shifts, and you wind up wherever you wind up. It is not where you are used to being. And then you'll be walking down the hall and you'll hear ‘Oh, so-and-so is here because they're black’—especially when there are only one or two people of color in the class.”

“What about stigma in relation to merit?” asks Alicia, the student facilitator. “Let's say an affirmative action policy takes merit into consideration and will lower a test score that is not lowered for another candidate. Do you think that stigma plays into it then?” Always quick-witted, Nancy responds, “No, because I think the tests are biased.”

“How do you know the tests are biased?” asks Professor Sturm, encouraging elaboration.

“You just know,” says Nancy. The professor who has posed the question raises an eyebrow. Nancy feels compelled to divulge a personal anecdote by way of explanation. “Okay, it's just like when I sit down and sometimes I do the New York Times' crosswords puzzle, and you see the questions that they ask and it's biased! Certain people that grew up in white communities are more likely to get those answers because they have been exposed to those things all the time. If my LSAT was based on black culture, I think I would have gotten a 180.”

Bob, a serious-looking boy outfitted in prep school attire, has latched onto Nancy's critique. He looks at her intently while chiming in, “I was thinking about what Nancy was saying, and it makes sense to me because there are certain working class people of all races who would probably have a difficult time with the New York Times crossword puzzle because of the way they were raised. And if they were given a crossword puzzle on NFL football then they would

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probably do a lot better on it, because of the way they were raised. I am wondering whether or not you believe that maybe African Americans or women who come from somewhat privileged backgrounds should be taken off of affirmative action?”

Nancy nods. “Yes, I think that if you come from a privileged background you shouldn’t be a recipient of something like affirmative action because you are displacing someone else who actually was disadvantaged.”

Now, Lisa, a woman with wavy chestnut hair, tries to cut at the topic from a slightly different angle. “When I think about affirmative action, I don’t think about the immediate economic effects as much as the long term effects.” She folds and refolds her hands. “Take an employer, who has African-Americans or any minority for that matter in their work situation. Now they are exposed to another type of person from a different socio-economic background. Affirmative action is a way to educate and familiarize people with someone’s circumstances who they may not have been familiar with beforehand. I think that would help decrease ignorance or discrimination in a long term.”

Whispered murmurs of approval can be heard about the room. Bob sits up straighter in his seat and counters, “This may be true, but one of the problems of affirmative action as it stands now is that a larger percentage of its rewards tend to go to upper-class African Americans who have more to begin with.”

“So the point of affirmative action is to eradicate poverty?” asks Alicia, skeptical.

“Well, I don’t know if it is to eradicate poverty,” mumbles Bob, regathering his thoughts for a moment. “But I think the way the program is set up the rewards are economic.”

Lisa purses her lips, visibly perturbed. She looks at Nancy and then looks back at Bob. “I just don’t understand how the rewards can be categorically classified as always economic,” says Lisa. “If I wanted as a well-educated white woman with a family that is very supportive and has some connections, that wouldn’t help me if I wanted to get a job as a longshoreman. If that had always been my dream. If I wanted to get a job rounding up cattle on a ranch. There are a lot of jobs that are closed off to me as a woman that don’t pay very much. I could make a perfectly good living in other ways-but there are doors closed to me just because I am a woman unless there is an affirmative action policy or some other remedy for discrimination. Access counts for something. Knowing the doors are not closed to you based on gender or race counts for something, in how accepted you feel by your society. I think that counts for something more than just money.”

Let us now subject the dialogue above to a play-by-play scrutiny:

Nancy reacts emotionally to Alicia’s comment on stigma. Juan disagrees with

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Nancy, using his own experience as a reference point. Bob expands on Nancy's argument by tying in issues of class privilege into the mix of race and gender issues, aligning himself with Nancy in a surprising way. Alicia questions Bob's assumptions as to the purpose of affirmative action, pressuring him to refine his thought process. Lisa bristles in response to Bob and Nancy's economic arguments and attempts, instead, approaches the problem in a new way by asking: what does access symbolize?

Discussions about sensitive controversial issues, such as affirmative action, strike close to home for many of our seminar participants. Whether on a conscious or subconscious level, those involved in these talks frequently discover that race and gender often lie at the very axes of their individual identities. Thus, these debates provoke strong emotions and reactions and, inevitably, conflict. Despite the negative connotations associated with "conflict," a clash of free wills can prove to be a crucial device in intellectual progress. Instead of smoothing over discussions with a superficial gloss of consensus, exposing conflict allows students to delve deeper, rethinking issues. Embracing conflict frees students from surface-level skimming and places the pressure on them, instead, to go deep-sea diving for thorough answers.

The question remains, then: how do we harness conflict into a creative, rather than destructive, force? We use a dialectic style that seeks to inspire, rather than destroy, original thought. This becomes the basis for what we term the "failure theory of success," whereby the process of error and correction is used to refine the pursuit of learning.

Using Conflict to Push Innovation

Not every class works, and our "failures" frequently cause disagreement, frustration, and stress. Conflict is not always resolved. When left unresolved it can reinforce antagonism and can make collaboration more difficult. Without these uncomfortable elements, however, students might not be stimulated to do any new or introspective rethinking. Instead of shutting down conflict, we keep the heat on by revisiting tense issues in subsequent classes. Seminar participants learn to identify patterns and connections, generate principles, experiment, and then reflect from their insights to question and revise their theories. As they grow to trust each other, they feel more comfortable expressing themselves. The extent to which students have gotten to know each other outside of class – as well as the opportunities for informal class meetings – helps this process. We call this "the failure theory of success."

"I've never 'lost my cool' in law school. I've never been invested enough to get angry or mad. But here I was, and I 'lost it' only to find something very real and important – something that I have never had. And while it was very hard, the confrontation resulted in a new understanding and an honesty that I never thought I could share across so many differences. Instead of running away, I stood by and confronted the issues."

Examining Assumptions and Modeling Role Innovation

The multi-racial learning community aims to create a space where students can rethink their assumptions about what it means to be a lawyer and reconnect with the aspirations that led them to law school in the first place. The learning community exposes students to alternative models and approaches to practice, urging them to claim responsibility for defining their identity as lawyers. Students are encouraged to develop and enact innovative strategies for addressing complex problems. Role innovators – people who are willing to experiment in their professional or community practice – are invited to join the students in developing lesson plans, creating group projects or working on field research. By observing others who redefine their professional or community roles to mobilize information, construct relationships across difference, and address the systemic nature of the problems they confront, students see the possibility that they too can be role innovators.

Evaluating Success

Over time, we recognized that classes that seemed to work shared certain features.

Motivation

Students threw themselves into the class with an enthusiasm and commitment that was rare in our experience. Their energy transcended the classroom itself. They devoted many hours preparing for the class and continued talking even after class with classroom participants and others. The issues raised in class gnawed at them, pushing them to explore ideas in new ways. Even after the semester ended, many students continued to work on projects begun in the seminar as they connected their passions with an intellectual agenda.

Relationship-Building

They began to look to each other as resources both inside and outside the classroom. From these relationships three things emerged: the trust necessary to take intellectual risks, the ability to learn from people who are different, and a sense of responsibility for the classroom dynamic.

Critical Analysis and Communication Skills

Students learned how to identify underlying assumptions and surface alternative frameworks. They also began to focus on the dynamics of communication, including the meaning of silence, how to listen for what is actually intended to be said, how to create a discussion that includes diverse participants, how to engage conflict, how to persuade without closing out alternative viewpoints and how to marshal different types of narrative format.

Intellectual Risk-Taking

Participants surfaced and dealt with areas of disagreement that they reported as having been avoided or neglected in other law school settings. People took risks in the classroom that exposed their vulnerability and showed a willingness to learn from challenging previously unexplored preconceptions. These included issues of race versus class, the relationship between white women and women of color, the relationship between the adversary process and problem solving and the role of law itself.

Transformation

Both in the classroom work and in the group projects, we were often surprised by the innovative approaches students took. We as teachers were continuously learning from our students. The groups often developed their own set of questions and vocabulary, becoming an identifiable and dynamic entity. Students often reported a renewed sense of moral agency and a deeper understanding of their own political and personal identity. Many connected this learning to their formation of a professional identity.

When It Doesn't Work

The seminar does not always work. Indeed individual class members may experience dissatisfaction, may not change, and may hold onto the negative emotions associated with recurring conflict. Unresolved conflict between two class members, however, does not necessarily mean the overall seminar has failed as a multiracial learning community. Indicators of a problem that affects the class as a whole include evidence of sustained polarization or disaffection of a sufficient number of students to suggest a discernible pattern. When conflicts recur that prevent risk-taking and critical rethinking, student motivation wanes and trust is suppressed. In particular, the seminar often does not gel when it is too large; when students' prior relationships outside of class constrain in-class interaction; or when a few individuals dominate the classroom discussion, are unresponsive to classmate's dissatisfaction and are resistant to different formats. People who are unaccustomed to sharing power or who are wedded to their initial position and who respond to intellectual challenge with resentment rather than openness pose a distinct challenge to faculty facilitators.