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CONTESTED MEANINGS: ACHIEVEMENT AND AMBITION AT AN ELITE LAW SCHOOL

© Deborah Waire Post*

Every year, after one of my students discovers that I attended Harvard Law School, I am asked the inevitable question. What is the difference between Harvard Law School and the law school they are attending, the law school where I teach, Touro College Jacob D. Fuchsberg Law Center? This is a question that is unanswerable, at least in the few moments that would be available in a classroom context. In many ways, more ways than my students would suspect, law school is the same wherever you go. In other ways, elite schools are radically different from the schools in the tiers that lie below. If I am to tell the story of my first year of law school in a way that would allow my students, and other students who might be in a similar position, to make a comparison that has any meaning at all, I would have to place my story in a historical and socio-cultural context, which is what I will attempt to do.

Every story has to begin somewhere and the story of my first year in law school, like *One L*, begins with an explanation. How did I end up at Harvard Law School?¹ When I applied to law schools, my former employer and mentor, Margaret Mead, assured me that I did not have “a snowball’s chance in hell” of getting into Harvard. But then Dr. Mead also thought she had no right to ask anything of the Museum of Natural History, where she had her office, or of Columbia, where she taught stadium-size anthropology classes as an adjunct faculty member without tenure. The world was changing, and she played a not inconsiderable role in the transformation, but that doesn’t mean she always understood the particularities of the change. I don’t think I did either.

Harvard University and small towns in upstate New York, where I grew up, exist on different planes of existence. As a friend once said to me “you are where you are from.” Even as we are changed or transformed by time and experience, gaining sophistication and knowledge, the world view with which we began life is a vestigial sensibility, leaving its mark on our initial reaction to new or unusual events or circumstances and shaping our expectations. In the absence of some intervention or external influence, admission to Harvard is not within the contemplation of poor or working class students from small towns, even though every year Harvard admits students who come from such places.² When I was

* Professor of Law, Touro College, Jacob D. Fuchsberg School of Law. I would like to thank the editors of this symposium issue, particularly Professor Nancy Levit, for the opportunity to revisit my first year at law school.

¹ Anecdotes about my first year of law school also appear in an essay that I wrote for the Tenth Anniversary of the *Harvard Blackletter Law Journal*. Deborah Waire Post, *Homecoming: The Ritual of Writing History*, 10 HARV. BLACKLETTER L.J. 5 (1993).

² Elite schools like Harvard have only recently begun to focus on the class divide that is far greater now than it was when I entered the law school. See Karen Arenson, *Harvard Says Poor Parents Won’t Have to Pay*, N.Y. TIMES, Feb. 29, 2004 (describing the elimination at Harvard College of parent contribution for parents earning less than \$40,000); Paula Wasley, *Stanford U. Increases Aid to Cover Tuition for Low- Income Students*, CHRON. HIGHER EDUC., Mar. 31, 2006.

growing up, I did not have a grand plan for my life and if I had had a plan for my life, it would not have included Harvard Law School.³

I was surprised when I got to Harvard and discovered other people there like me—students who probably had not grown up with the expectation that they would attend Harvard Law School. In my contracts class I was flanked by two people who had a great deal in common with me and with each other, although they were very different in appearance and in the values they embraced. Steven J. Eberhard,⁴ a native of Lubbock or some other small city or town in Texas, a graduate of Texas A & M, class president, and proud member of the Corps of Cadets, sat on one side of me. He came to class every day with a Styrofoam coffee cup from the Hark, and I assumed, erroneously it turned out, that he was sipping coffee all through class. Actually he was depositing his “chaw” in that cup. Fern Fisher,⁵ who became my best friend, sat on the other side of me. Fern was a former cheerleader from Riverhead High School in Long Island, the daughter of a single mother and a summa cum laude graduate of Howard University.

It is true that there were many children of privilege at Harvard at the time I was admitted. There were legacy students whose parents attended or taught at Harvard, but there were also a lot of people who came from interesting and unusual backgrounds. Not all of them had been through the pre-school to private or prep school pipeline I learned about only after I graduated from law school and went to work at a firm in Houston, Texas. Why Harvard chooses particular applicants over others is unknowable because of what I call the “human factor.” A mathematical formula only goes so far: some combination of grade point average, LSAT score and a multiplier derived from a ranking of colleges narrows the field and then human beings get involved, subjective judgments are made, and values and ideals come into play. In the late sixties and the seventies, schools addressed past injustices and the structural barriers that kept women and minorities out of law school. We have since moved beyond that singular moment of clarity when there was a collective moral certainty that the almost total exclusion of women and minorities from law schools was wrong and that redress was necessary.⁶ There still are today, however, admissions professionals and

³ MARY BATESON, *COMPOSING A LIFE* 38 (1989) (the child who has dreams, but no or few resources, may not include in his or her dream a “realistic and realistically imagined next step.”).

⁴ Spencer Abraham included a tribute to Steven Eberhard, co-founder of the *Harvard Journal of Law and Public Policy*, on the occasion of the Journal’s 30th anniversary. See Spencer Abraham, *A Founder’s Retrospective: The Journal at 30 Years*, 31 HARV. J.L. & PUB. POL’Y 1 (2008).

⁵ Justice Fern Fisher is now the Deputy Chief Administrative Judge for New York City Courts and is also charged with state-wide responsibility for access to justice issues. New York State Unified Court System, Administrative Directory – Executive Officers, http://www.nycourts.gov/admin/directory/fisher_fern.shtml (last visited Mar. 19, 2010).

⁶ In the iconic anti-affirmative action case, *Regents of the University of California v. Bakke*, 438 U.S. 265, 318 (1978), Justice Powell referred to the “non-objective factors,” including race, and the educational benefits of diversity which were articulated in the admissions standards of Harvard College, which he appended to the opinion. *Bakke* ended the era of self-reflection and remediation of past discrimination through an explicit policy of integration that was the hallmark of the civil

faculty who are purposeful in their desire to create an interesting and diverse mix of students and an educational environment that approximates and furthers the goal of creating a “successful society.” A successful society acknowledges and respects a broader definition of merit. If Harvard Law School were as capable of accommodating competing definitions of merit in its hiring criteria for faculty as it has been in its standards for the admission of students, it might legitimately claim that it is, in fact, an example of the successful society described in the theories of some of its own faculty.⁷

For years I have claimed that the Harvard described by Scott Turow in *One L* is not the Harvard I knew as a first-year student. There is probably more than one explanation for this disclaimer, but the one that is most obvious to me is the place from which we each started. Scott came to Harvard from a teaching position at Stanford. What I didn’t know when I started law school, but I do appreciate now, is that Stanford and Harvard are two sides of the same coin. Stanford definitely has more athletes, more sunshine and fountains, a mind boggling assortment of mini eco-systems, a lake, golf course, and riding stables. Harvard was in 1975, and pretty much still is today, quite gray and very, very old and venerable looking. What Harvard and Stanford have in common is the function they both serve. These are two of a handful of institutions that train most of those who assume positions of power and influence in politics, popular culture, business, and, not so surprising, legal education. Coming from Stanford, Scott would have known a great deal about Harvard before he got there.

I left a job as an executive secretary to Robert Rahtz, editor-in-chief of the school book division of Macmillan Publishing Company, to come to a place I knew nothing about and where I knew no one. For a year or more I had been sitting outside the office of Mr. Rahtz reading unsolicited manuscripts and typing monthly reports on a Selectric typewriter with the aid of carbon paper and white-out. For a year or more, a high powered attorney, outside counsel for Macmillan, walked right by me into Mr. Rahtz’s office without stopping at my desk or addressing me in any way. When Mr. Rahtz told him I had been accepted at Harvard, that attorney made a point of shaking my hand and congratulating me. It was the first time I experienced the power of an institution to confer prestige and status.

A yellowed newspaper clipping is not as romantic as a madeleine, but then I am not Proust and in any event the written word provides a better measure of

rights movement and began the era in which “diversity” became the rhetorical and political tool for the creation of a more inclusive student body.

⁷ The Canadian Institute for Advanced Research has had a Program on Successful Societies funded in part by the Weatherhead Center for International Affairs at Harvard University. One aspect of a successful society discussed by Harvard sociologist Michèle Lamont and referenced in this essay is the extent to which a society is inclusive. In a successful society, members of minority groups are afforded “social recognition and cultural citizenship.” Michèle Lamont, *Responses to Racism, Health, and Social Inclusion as a Dimension of Successful Societies*, in *SUCCESSFUL SOCIETIES: HOW INSTITUTIONS AND CULTURE AFFECT HEALTH* 151 (Peter A. Hall & Michèle Lamont eds., 2009). Successful societies “sustain competing definitions of a worthy life and a worthy person, which empower lower status groups to contest stereotypes and measure their worth independently of dominant social matrices.” *Id.*

reliability where my recollections are concerned. I still have a copy of a *Daily World* news story dated October 22, 1974, which one of the union organizers at the Colliers Encyclopedia research division distributed to Macmillan employees the day the company fired approximately 200 employees. The article refers to the "Columbus Day massacre" at Macmillan.⁸ The company fired eager young employees who were trying to persuade white collar workers to join Local 153 of the AFL-CIO Office and Professional Employees International Union. It also fired a lot of women, including some who must have complained to Louis Lefkowitz, the attorney general of New York State at that time. Prior to the firings, which many thought were retaliatory, Lefkowitz filed a sex discrimination complaint against Macmillan with the New York State Human Rights Division. Women employees had also filed a complaint with the EEOC.

The newspaper story of the Macmillan firings shares the page with a story about the trial of the National Guardsmen who fired on the students at Kent State. On the reverse side there are stories about the Watergate trial and resistance to school desegregation in Boston. The events related in each of these stories remind me of the many contests, small and large, that were occurring in 1974 between those who wanted the world to change and those who wanted to preserve the status quo. Law was everywhere part of those contests, and that may well have been the reason why I began to think about the law as an alternative to a career as an editor in a publishing company.

If I had been reading that newspaper more carefully back then, I might have understood that there are limits to the transformative power of the law.⁹ I was too busy walking the picket line with women who were fired because they complained when they were paid less, promoted less frequently than their male colleagues, and denied the maternity benefits provided to the wives of the male executives. Mr. Rahtz protected me while I was out on strike and I still had my job two weeks later, but law school certainly seemed like a better plan to me as I sat down to write the essay portion of my application to Harvard Law School.

All of this is preface to the real subject of this essay, my first year of law school. You might think that after all that, law school would be a disappointment. You would be wrong. The first case I read in law school was *Monge v. Beebe Rubber Co.*,¹⁰ a New Hampshire case about the retaliatory discharge of a woman who complained about sexual harassment. Considering where I had been and what I had seen, I can't imagine anything more relevant to my own life than that case. Sure there was some wise guy in that first legal methods class who raised his hand and referred to "the instant case" or "the case at bar" and I had no idea how he knew to do that. If he wanted to make an impression, this he did because after all these years, it is one of my clearest recollections of my first year in law school. Even so, it is not an unpleasant

⁸ Janet Shulman, *Looking Back: The 1974 Macmillan Massacre*, PUB. WKLY., Apr. 10, 2008, available at <http://www.publishersweekly.com/article/CA6549570.html>.

⁹ It took eleven years, from 1974 until 1985, before Macmillan signed a consent decree and paid damages to some of the women against whom it discriminated. *Id.*

¹⁰ 316 A.2d 549 (N.H. 1974).

memory. I was startled and amused, perhaps, but not frightened or intimidated. It was obvious to me that this student was either a quick study, picking up on language in the case and repeating it in class, or he was already familiar with the jargon used by lawyers (in cases or briefs, if not in ordinary conversation).

The only real pain I experienced as a first-year law student was vicarious. One of the many professors at Harvard reputed to be the model for Professor Kingsfield in the movie *Paper Chase*—judged the oral arguments that were the culmination of our legal methods or legal process class. It was an interesting case involving the constitutional rights of a class of inmates convicted of rape and sentenced to life imprisonment without the possibility of parole. I defended the sentences on behalf of the State of Kentucky, not an easy task for me. After we finished our arguments and received the comments and critique of our arguments, both teams left the room. It was after the formal critique when I saw this professor pinch the cheek of a woman on the opposing team, the way your great Aunt Agnes might do while murmuring something like: “Aren’t you the sweetest little thing.” What the professor said to her, sotto voce, was something along the lines of “if you had written an exam for me the way you wrote that brief, I would have had to fail you.” I doubt his overly familiar gesture was meant to soften the blow. He must have realized that it simply compounded the humiliation: she was treated like a child while her intellectual ability was called into question.

Perhaps I was not disappointed with law school because law school was different from my undergraduate experience when I felt, more than might have really been the case, that my small town or rural background created social distance between me and my classmates. Law school also was different from the anthropology department at Columbia where I was enrolled as a graduate student and employed as Dr. Mead’s teaching assistant. While I was at Columbia, I had a class with Marvin Harris who criticized Franz Boas and Dr. Mead for being “eclectic”—that is to say, he thought them insufficiently theoretical in their approach to anthropology.¹¹ It didn’t take very long for me to realize that faculty with grand theories need or demand acolytes and that I probably would never be “sufficiently theoretical” in the estimation of Marvin Harris and others like him. In contrast, the first day at Harvard, I knew I had found a place where I fit in, a place where it did not seem to matter if you were eclectic in your approach to legal theory. You might not think so, but this is one of the advantages of a large school with a diverse student body.

At Harvard I became part of a community. My first weekend in Cambridge, the first year black women at Harvard Law School organized a potluck brunch, which we held at my apartment on Pine Street, just past Central Square. There were nine black women, or nine women who chose to identify as

¹¹ The more polite version of this criticism became Harris’ description of cultural anthropology in the tradition of Boas as “historical particularism,” though the term “eclecticism” still appears in his critique. “Eclecticism . . . is often little more than a euphemism for confusion, the muddled acceptance of contradictory theories, the bankruptcy of creative thought, and the cloak of mediocrity.” MARVIN HARRIS, *THE RISE OF ANTHROPOLOGICAL THEORY: A HISTORY OF THEORIES OF CULTURES* 284-85 (1968).

black, in the first-year class of 500 law students at Harvard in 1975.¹² If my memory is correct, the day was bright and the sun lit up the plants lining the shelves on my front room window. The smell of burnt sugar from the Necco factory on Massachusetts Avenue filled the apartment. I was happy to be in Cambridge as I opened the door and welcomed the women who had climbed three flights of stairs with dishes and platters of food. It was a good day and an auspicious beginning to my law school experience.

Like Scott Turow, I was invited to join a study group, but my study group was composed entirely of African-American students, four men and three women.¹³ We had our share of drama around the preparation of outlines, but I never doubted for a moment that the purpose of the group was mutual support and friendship. The debates we had about the meaning of particular doctrines or the theories that were discussed in class were important to our intellectual development, but the friendship we practiced daily sustained us throughout law school and beyond. Since graduation, I have been back to Harvard for only three reunions. One was Celebration Fifty, commemorating the fiftieth anniversary of the admission of women to the law school. The other two were reunions of black alumni. I travel back to Cambridge for these reunions because I know I will have a chance to see the members of my old study group.

I am ashamed to admit that I read *One L* for the first time as I prepared to write this essay. As I said at the beginning of this essay, I had always believed that the experiences Scott had in his section were different from those of students in my section at law school. When I finally read the book, I discovered that both sections had pranksters, although the practical jokes devised in our section were considerably funnier, and that intolerance when it comes to theory is not such a rare commodity among academic overachievers. "Just give me what I need to know" is a demand that I associate with my students, but clearly this is an attitude that spans time and social strata.

Most surprising was the fact that both of our sections rebelled at some point during the school year. The gendered nature of the rebellion in my section is vociferously denied to this day by many of my classmates, especially the women.¹⁴ My section attacked a novice, a first-year law professor and one of only four women on the faculty. Turow's section picked a fight with one of the more powerful faculty members, a much less likely choice from a structural standpoint. I might be inclined to say that rebellion was habitual for my generation because we were living in the aftermath of the 1960s except that I

¹² Patricia Williams wrote a small piece on the ten black women in her class, the class that graduated in 1975, the year I entered Harvard Law School. Patricia Williams, *Notes from a Small World*, NEW YORKER, Apr. 29, 1996, at 87-91. In contrast to my class experience, Pat writes of her black women classmates that "[w]e didn't spend much time together back then, though each of us, I learned, had imagined that the others were off nurturing tight friendships and circles of support." *Id.* at 88.

¹³ The members of my study group were Fern Fisher, Kenneth Frazier, Marsha Mosely, Charles Ogletree, Reginald Thomas and Keith Williamson.

¹⁴ See Deborah W. Post, *Reflections on Identity, Diversity and Morality*, 6 BERKELEY WOMEN'S L.J. 136 (1991).

have now witnessed the same phenomenon on a recurrent basis. Law students often gang up on the least powerful member of a faculty. It is all about anger and displacement.

I know that *One L* is part of the mythos in the legal profession, the trope of education by ordeal.¹⁵ *One L* is social commentary and psychological thriller, the law school equivalent of *Lord of the Flies*. It is a story of men fighting, not for survival—survival was never an issue at Harvard since most students were assumed to be smart enough to pass the exams—but for dominance. These men cooperated with one another, but I do not believe they really liked each other. The relationships and the cooperation were calculated and instrumental, a means to an end, not an end in themselves. Women in this story are incidental, wives that suffer silently and one woman student with children who is made to look particularly pathetic because she allowed herself to be used and then discarded by a Machiavellian male classmate. The desire for success that spawned the fear and the insecurity of the people described in *One L* might have been there in my section or in my study group, but I don't believe it had the same sort of debilitating and disintegrative effect. More importantly, I do not understand why Scott thought this was Harvard's fault. He blamed Harvard for not saving the students from themselves—from the obsessive compulsive, self-destructive behavior that could only end in anger and disappointment.¹⁶

Somewhat late in the tale, Scott notes that women and minorities weathered the law school experience far better than the men who were part of his cohort. I think he conceded that this was more sane and reasonable, but I do not think he really believed it or at least he didn't believe it completely. He couldn't believe it and subscribe to what he called variously the "standard of excellence" or an "achievement ethic" that was the principal justification for the competitive ethos he writes about.¹⁷

What then must he really have thought about the rest of us, the women and minorities, who did not participate in the rituals of competition? The almost footnote about the progress of blacks in the guise of Chris Edley, now Dean of Berkeley Law School, who made law review, or Susan Estrich, erstwhile talking head and former campaign manager for Michael Dukakis, who was elected president of law review, felt contrived, a politically correct afterthought.¹⁸

I have often confessed, sometimes apologetically, to my son and to various friends that my sisters and I share one common characteristic. We are all workaholics. What we are not, I suppose, is ambitious. There was a time, when I was in grade school and high school, when I felt compelled to achieve the

¹⁵ LOUISE HARMON & DEBORAH POST, *CULTIVATING INTELLIGENCE: POWER, LAW AND THE POLITICS OF TEACHING* (1996).

¹⁶ Pat Williams' version of the competition for grades and status by men is nowhere near as dark as mine. Instead of men at one remove from savagery, she saw men who "looked like an eternally roiling mass of puppies, always chewing on one another's legs." PATRICIA J. WILLIAMS, *OPEN HOUSE: OF FAMILY, FRIENDS, FOOD, PIANO LESSONS, AND THE SEARCH FOR A ROOM OF MY OWN* 217 (2005).

¹⁷ See, e.g., SCOTT TUROW, *ONE L* 82, 178 (1977).

¹⁸ *Id.* at 241.

highest score on every exam, to win every award that was on offer for academic performance, to be number one in every class. During my childhood and adolescence I learned that success has its rewards. I also learned that those rewards need not include either social acceptance or happiness. It was a lesson I took with me to law school.

Michèle Lamont, a sociologist at Harvard, has written extensively on race and especially on the response of racial and ethnic groups to inequality and discrimination. In a chapter from a recent book she co-edited, she describes interviews with working class blacks and black elites during which the strategies they used to deal with inequality and discrimination were elicited. I was struck by the difference between the response of the working class black man who said his strategy was to show his white co-workers that he could do “anything they do just as well as them”¹⁹ and the remarks of the subjects she labeled “African American elites” who said that they had to be “twice as smart” or “smarter than” their white colleagues.²⁰

I think it is predictable that those whose success is defined in terms of the “dominant social matrices” would be those least likely to engage in the very strategy that Lamont uses to define a successful society—a strategy that rejects the criteria built into those matrices. It may well be that this research, where there might not have been many opportunities to observe the subjects interacting with others, does not reflect in its entirety what Lamont labels the “cultural repertoire” used by people of color to contest racism.²¹ If I were describing the strategy that I have used in my life, I would say I have lived my life in a way that does indeed express a “competing definition of a worthy life” and this strategy is one that was already in place when I entered Harvard Law School.

What Harvard had to offer that I needed was an opportunity to develop this “competing definition of a worthy life.” In my first year, I was happy to be back in school, happy to be reading and studying and discussing law. I took from Harvard what I needed to know, relished the parts that had meaning for me, the cases and the materials and the people and the relationships that are still important and relevant to my life. What I wanted back then was a good life, and a good life included a career that would have meaning and make a difference. And that is what I have.

In my twenty-five years of teaching I have met many Harvard graduates. I would put them into two categories. At one extreme are those who are uncertain in their affection for Harvard. They do not understand why they have not risen to the top of their professions. Certainly their admission to Harvard, and the degree they earned, was portentous of a larger role on a bigger stage. Some of them believe that Harvard was the high point in their lives. Their disappointment makes me sad.

At the other extreme there are those who are vociferous in their condemnation of Harvard and skeptical about my politics because I do not

¹⁹ Lamont, *supra* note 7, at 159.

²⁰ *Id.* at 160.

²¹ *Id.* at 161.

understand their passion on this subject. In *One L* they would be the character who ran for class marshal on a platform that he would make sure no one ever gave money to Harvard. The progressive cum radical faculty who are critical of Harvard see it as a site of privilege in a society characterized by extreme and unjustified disparities in wealth. Harvard, as far as they are concerned, perpetuates a sense of entitlement, training each new generation to think and act in a way that preserves and perpetuates social injustice. I do not disagree.

At the same time, I am not convinced that Harvard is entirely to blame. I know that for me much more than for any of them, a Harvard Law degree gave me the power to carve out a space in this world where I could write and teach in my own way. I came to Harvard with a world view that could be expanded, but not destroyed, and a value system that could be challenged, but not erased. Law students for generations have believed that law school changes them, but the changes do not reach to the core of who they are as human beings. So, many, many years after the so called "Macmillan Massacre," I still recognize injustice when I see it. Only now, I have the opportunity to write and I teach in a way that I hope will change the world.

