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INTENTIONALLY AND SYSTEMATICALLY INTEGRATING DIVERSITY DISCUSSIONS AND LESSONS IN THE LAW SCHOOL CLASSROOM DURING A RACE-CONSCIOUS ERA

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ABSTRACT

The value of classroom diversity in higher education in the United States has always been controversial. It was first identified as a compelling interest in the fractured yet landmark Regents of the University of California v. Bakke *decision by Justice Powell in 1978,[1] with no other Justice joining his opinion.[2] In* Bakke*, Justice Powell concluded that the government had a significant interest in classroom diversity that justified the consideration of race in college admissions.[3] His reasoning amounted to a defined, yet still elusive, judicial deference awarded to academic freedom.[4] With little further elucidation, Justice Powell averred "tradition and experience lend support to the view that the contribution of diversity is substantial"[5] and thus set the groundwork for educational diversity jurisprudence for the next four decades.*

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1. 438 U.S. 265, 269 (1978).
2. *Id.* at 271–72.
3. *Id.* at 320.
4. *Id.* at 311–12.
5. *Id.* at 313.

Not until Grutter v. Bollinger *in 2003 did a majority of justices hold that diversity in education was a compelling interest,*[6] *and even that drew a strong dissent from Justice Thomas.*[7] *In* Grutter*, Justice O'Connor endorsed Justice Powell's conclusion, and once again the high court deferred to the notions of academic freedom and educational autonomy, while also expounding on the benefits of having a heterogeneous student body.*[8] *Substituting the term "aesthetic" for "diversity,"*[9] *Justice Thomas's dissent criticized "[t]he majority's broad deference to . . . the law school's judgment that racial aesthetics leads to educational benefits."*[10] *Justice Thomas, doubting the value of having an elite law school in Michigan, and thus also most certainly doubting the value of classroom diversity at the elite law school, preferred that the "Law School . . . be forced to choose between its classroom aesthetic and its exclusionary admissions system."*[11]

The Fisher v. University of Texas *majority opinion, for a third time, accepted educational diversity as a compelling interest;*[12] *nevertheless, that conclusion likewise drew strong criticism. Justice Kennedy, writing for the majority, confirmed that "[c]onsiderable deference is owed to a university in defining . . . intangible characteristics, like student body diversity, that are central to its identity and educational mission."*[13] *Justice Alito, however, determinedly continued the visible, yet somehow still persistently elusive, doubting of the value of inclusion by systematically cutting a swath through the majority's acceptance of the University's expanded goals of classroom diversity, interracial diversity, and the avoidance of racial isolation.*[14]

The doubt and controversy existing since Bakke *must be put to rest through the integration of classroom discussions and lessons the majority arguably envisions in its opinions. This Article begins by historically tracing the Court's valuation of the*

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6. 539 U.S. 306, 343–44 (2003).
7. *See id.* at 349–78 (Thomas, J., concurring and dissenting).
8. *Id.* at 324 (majority opinion).
9. *Id.* at 354 n.3 (Thomas, J., concurring and dissenting).
10. *Id.* at 364.
11. *Id.* at 357, 361.
12. 136 S. Ct. 2198, 2211 (2016).
13. *Id.* at 2214.
14. *Id.* at 2224 (Alito, J., dissenting).

educational benefits of a diverse student body. It continues with a close examination of the Fisher II *decision and a critical review of Justice Alito's dissent. In Part III, the Article explains the reasons and methodologies for incorporating lessons on diversity in traditional law school courses. The Article provides explicit ideas for teaching racially sensitive topics; but because it questions whether everyone is equipped to handle diversity issues openly, it also makes suggestions on how to do so quietly and even silently. In Part IV, the Article assesses the continued need for diversity lessons in a failed post-racial culture by briefly reviewing recent litigation efforts attacking schools' admissions policies. Finally, after Justice Thomas's example of substituting the term "aesthetic" for "diversity," this Article too suggests the Court adopt a different term for diversity—inclusion. The Article concludes that the educational benefits of diversity are not only a compelling interest in higher education, but also a crucial one, and law school teachings need to be sensitive to the lessons that are only achievable in an inclusive environment comprised of diverse members.*

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The Fourteenth Amendment of the United States Constitution guarantees equal protection of the law,[15] and any racial classification must be analyzed under strict scrutiny.[16] To survive strict scrutiny analysis, the racial classification must be a narrowly tailored way of serving a compelling interest.[17] In the fissured[18] breakthrough *Bakke* decision from over forty years ago, the Court reviewed University of California at Davis's admissions process of reserving sixteen of 100 seats in each medical school class for individuals who are American Indian, Asian, black, or Chicano.[19] The Court refrained from enjoining the University from ever considering an applicant's race based on the compelling interest "that legitimately may be served by a properly devised admissions program involving the competitive consideration of

15. U.S. CONST. amend. XIV, § 1.
16. *Grutter*, 539 U.S. at 326–27.
17. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 299 (1978).
18. The *Bakke* decision failed to obtain a majority of the Court. *Id.* at 269–72. The decision was comprised of six separate opinions. *Id.*
19. *Id.* at 274–75.

race and ethnic origin."[20] In pronouncing this interest, Justice Powell[21] rejected three of the university's four claims of compelling interests: "(i) reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession . . .; (ii) countering the effects of societal discrimination; . . . [and] (iii) increasing the number of physicians who will practice in communities currently underserved."[22] After rejecting the university's first three claims, Justice Powell approved the fourth and final assertion of a compelling interest in "obtaining the educational benefits that flow from an ethnically diverse student body."[23]

He relied on the four essential academic freedoms first set out by the Open Universities in South Africa[24] and quoted in Justice Frankfurter's concurring opinion in *Sweezy v. New Hampshire*[25] "to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study."[26] In focusing on who should be admitted, the prevailing opinion emphasized that diversity in the student body was "essential to the quality of higher education" because it created an "atmosphere of 'speculation, experiment and creation'" and noted that "the 'nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples."[27]

Because the appellant was a medical school, Justice Powell's opinion took special care to recognize the didactic value of diversity in all schools of higher education: not only undergraduate schools, but also

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20. *Id.* at 320.

21. As noted in *Grutter*, Justice Powell's opinion, although joined by no other members of the bench, has become "the touchstone for constitutional analysis of race-conscious admissions policies." *Grutter*, 539 U.S. at 323; *see Bakke*, 438 U.S. at 271–72.

22. *Bakke*, 438 U.S. at 306–11. The Court rejected petitioner's first claim of a compelling interest because holding to the contrary would not promote a sufficient racial balance in medical schools and the medical profession, petitioner's second claim because a holding to the contrary would disadvantage those individuals not responsible for societal discrimination, and petitioner's third claim of a compelling interest because petitioner's special admission program did not adequately promote the proposed interest. *Id.* at 307–11.

23. *Id.* at 306, 311–12.

24. UNIV. OF CAPE TOWN, ACAD. FREEDOM COMM., THE OPEN UNIVERSITIES IN SOUTH AFRICA AND ACADEMIC FREEDOM 1957–1974, at 11 (1974).

25. 354 U.S. 234, 250–52 (1957) (discussing the importance of balancing a professor's right to be free from political authority regarding the substance of academic lectures with the state's right to self-protection).

26. *Bakke*, 438 U.S. at 312 (quoting *Sweezy*, 354 U.S. at 263).

27. *Id.* at 312–13 (first quoting Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967); and then United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)).

professional schools.[28] Noting that the worth of a diverse student body in professional schools is substantial, it reiterated Chief Justice Vinson's observation in *Sweatt v. Painter*[29] that a law school "cannot be effective in isolation from the individuals and institutions with which the law interacts."[30] In *Sweatt*, the Court concluded that the equal protection clause required the University of Texas to admit a black applicant because a separate law school established by Texas "for Negroes . . . cannot . . . [provide] substantial equality in the educational opportunities offered white and Negro law students."[31] Chief Justice Vinson noted that the

> new law school for Negros . . . . excludes from its student body members of the racial groups which number 85% of the population of the State and include most of the lawyers, witnesses, jurors, judges and other officials with whom petitioner will inevitably be dealing when he becomes a member of the Texas Bar.[32]

While Chief Justice Vinson in the *Sweatt* opinion focused on the practical impact diversity had on education—the preparation of lawyers to serve a diverse population[33] —Justice Powell in *Bakke* focused on how education is enriched through the exchange of outlooks and ideas among a diverse student body.[34]

In *Grutter v. Bollinger*, Justice O'Conner's majority opinion recognized both the external societal benefit and the internal educational benefit while also acknowledging the third benefit espoused in *Sweatt*: providing access to a professional school education to all members of society.[35] In *Grutter*, Michigan Law School asserted that achieving a diverse student body was "essential to its educational mission" because of the "educational benefits that flow from a diverse student body."[36] The Court agreed with the law school and concluded that the goal of achieving

28. *Id.* at 313–15.
29. 339 U.S. 629, 634–35 (1950) (discussing a minority student's constitutional right to receive a legal education equivalent to that received by white students).
30. *Bakke*, 438 U.S. at 314 (quoting *Sweatt*, 339 U.S. at 634).
31. *Sweatt*, 339 U.S. at 633–34.
32. *Id.* at 633–34.
33. *Id.* at 634.
34. *Bakke*, 438 U.S. at 313.
35. Grutter v. Bollinger, 539 U.S. 306, 328–33; *see also* Smith v. Univ. of Wash. Law Sch., 233 F.3d 1188, 1195–97 (9th Cir. 2000) (noting the benefit of providing professional school education to society and its members).
36. *Grutter*, 539 U.S. at 328.

a diverse student body met the first requirement of the strict scrutiny standard: the furthering of a compelling governmental interest.[37] In so doing, Justice O'Connor followed the Court's tradition of deferring to a school's educational judgment on its mission.[38]

The Court accepted the lower court's finding of external societal benefits to having a diverse student body: the promotion of "cross-racial understanding," the breakdown of racial stereotypes, and the enabling of students "to better understand persons of different races."[39] Focusing additionally on the internal educational benefits, the Court found the benefits to be "'important and laudable,' because 'classroom discussion is livelier, more spirited, and simply more enlightening and interesting' when the students have 'the greatest possible variety of backgrounds.'"[40] Finally, the Court concluded that "[a]ccess to legal education . . . must be inclusive of talented and qualified individuals of every race and ethnicity, so that all members of our heterogeneous society may participate in the educational institutions that provide the training and education necessary to succeed."[41]

Justice Thomas concurs in the majority's opinion, arguing that the use of race in admissions is unlawful, but ultimately disagrees that Michigan Law School's use of race in admissions satisfies the Equal Protection Clause.[42] He begins with the basic premise that educational diversity is not a compelling interest; and he sets to substantiate this ground by tracing the Court's treatment of racial classification.[43] He concludes "that only those measures the State must take to provide a bulwark against anarchy, or to prevent violence, will constitute a 'pressing public necessity.'"[44] For Justice Thomas, educational diversity does neither, and he criticizes the court for "expanding the range of permissible uses of race to something as trivial (by comparison) as the assembling of a law school class."[45]

37. *Id.*
38. *Id.*
39. *Id.* at 330.
40. *Id.*
41. *Id.* at 332–33.
42. *Id.* at 350–51 (Thomas, J., concurring and dissenting).
43. *Id.* at 351–52.
44. *Id.* at 353.
45. *Id.* at 357.

Justice Kennedy's dissent in *Grutter* also criticized the majority's deference to Michigan Law School.[46] Somewhat surprisingly,[47] his dissent foreshadowed the majority opinion he penned thirteen years later in *Fisher v. University of Texas* upholding the use of race in admissions.[48] In contrast to Justice Thomas's dissent, in *Grutter*, Justice Kennedy approvingly acknowledged Justice Powell's deference in *Bakke* to "a university's conception of its educational mission," stating that this deference was "a tradition, grounded in the First Amendment."[49] He specified that precedent supported this deference, but only when supported by empirical evidence.[50] Justice Kennedy refrained from joining the majority, not because of deference to the university's educational mission, but because "[t]he Court confuse[d] deference to a university's definition of its educational objective with deference to the implementation of this goal."[51]

II. THE *FISHER* DECISIONS

Justice Kennedy penned both Supreme Court *Fisher* decisions,[52] reaching seemingly conflicting holdings[53] and leaving Justice Alito to lament that "[s]omething strange has happened since our prior decision in this case."[54] In *Fisher I* and *II*, the Court considered whether a public university violated the Equal Protection Clause of the Fourteenth Amendment by considering applicants' racial identification in its

46. *Id.* at 388 (Kennedy, J., dissenting).

47. *See* Yuvraj Joshi, Bakke *to the Future: Affirmative Action After* Fisher, 69 STAN. L. REV. ONLINE 17, 17 (2016) ("No single feature of *Fisher* surprised court watchers more than its author, Justice Anthony Kennedy.").

48. Fisher v. Univ. of Tex. (*Fisher II*), 136 S. Ct. 2198, 2204, 2214–15 (2016).

49. *Grutter*, 539 U.S. at 387 (Kennedy, J., dissenting).

50. *Id.* at 387–88.

51. *Id.* at 388.

52. Fisher v. Univ. of Tex. (*Fisher I*), 570 U.S. 297, 299 (2013); *Fisher II*, 136 S. Ct. at 2205.

53. *See Fisher I*, 570 U.S. at 314–15; *Fisher II*, 136 S. Ct. at 2214–15; *see also* Alan Morrison, Fisher v. University of Texas*: An Affirmative Decision the Second Time Around*, GEO. WASH. L. REV. ON THE DOCKET (June 26, 2016), http://www.gwlr.org/fisher-v-university-of-texas-an-affirmative-decision-the-second-time-around ("[N]o one can overlook the fact that the record in the second case was no different from what it was before. That raises the question of why this decision could not have been issued three years earlier. The answer is quite clear: Justice Antonin Scalia would have voted to block it so that there would have been a 4-4 tie because of the recusal of Justice Elena Kagan. Indeed, there is strong evidence that the prior *Fisher* opinion was very much a compromise, perhaps issued on the hope that the record would become clearer after a remand.").

54. *Fisher II*, 136 S. Ct. at 2215 (Alito, J., dissenting).

admissions decisions.[55] Petitioner Abigail Fisher, a white Texas resident, sued the University of Texas at Austin for denying her admission to its undergraduate program, while it admitted minority applicants with weaker credentials through a holistic admissions process that considered race.[56]

In *Fisher I*, the Court vacated the Fifth Circuit's decision upholding the University of Texas's admissions policy and remanded the case back for further inquiry.[57] Arguing to the Fifth Circuit, the University had followed the University of Michigan's footsteps in *Grutter* and cited a "compelling interest in obtaining the educational benefits of diversity."[58] The university itemized the benefits as "promot[ing] 'cross-racial understanding,' 'break[ing] down racial stereotypes,' enabl[ing] students to better understand persons of other races, better prepar[ing] students to function in a multi-cultural workforce, cultivat[ing] the next set of national leaders, and prevent[ing] minority students from serving as 'spokespersons' for their race."[59] In addressing the level of deference afforded to the university by the Fifth Circuit Court of Appeals, Justice Kennedy stated that what "the University deems integral to its mission is, in substantial measure, an academic judgment to which some, but not complete, judicial deference is proper under *Grutter*."[60]

While acknowledging a "disagreement about whether *Grutter* was consistent with the principles of equal protection in approving this compelling interest in diversity," the Court refrained from revisiting this aspect of *Grutter*'s holding because the parties did not frame it as an issue.[61] Instead, Justice Kennedy faulted the lower court for not conducting a further judicial determination that the University of Texas's admissions policy met strict scrutiny standards.[62] Justice Thomas, concurring in the judgment, took the opportunity to reframe the objections he originally identified in *Grutter*, and once again questioned "the educational benefits flowing from student body diversity—assuming they exist—. . . as a compelling state interest," [63] while disparaging each compelling interest in educational diversity identified by the university.[64]

55. *Id.* at 2205 (majority opinion); *Fisher I*, 570 U.S. at 300–02.
56. *Fisher I*, 570 U.S. at 300–02; *Fisher II*, 136 S. Ct. at 2207.
57. *Fisher I*, 570 U.S. at 303.
58. Fisher v. Univ. of Tex., 631 F.3d 213, 230 (5th Cir. 2011).
59. *Id.*
60. *Fisher I*, 570 U.S. at 310.
61. *Id.* at 311.
62. *Id.* at 312–14.
63. *Id.* at 320 (Thomas, J., concurring).
64. *Id.* at 320–26.

In *Fisher II*, the petitioner argued that the University of Texas failed to state with sufficient transparency its compelling interest in the benefits of educational diversity.[65] The Court agreed that "asserting an interest in the educational benefits of diversity writ large is insufficient. A university's goals cannot be elusory or amorphous—they must be sufficiently measurable to permit judicial scrutiny of the policies adopted to reach them."[66] Justice Kennedy relied on the [u]niversity's articulated goals from the Fifth Circuit's proceedings to conclude that these benefits were sufficiently articulated.[67] He additionally noted the compelling interest of "striv[ing] to provide an 'academic environment' that offers a 'robust exchange of ideas, exposure to differing cultures, preparation for the challenges of an increasingly diverse workforce, and acquisition of competencies required of future leaders.'"[68] Quoting *Sweatt*, the Court eloquently concluded, "[a] university is in large part defined by those intangible 'qualities which are incapable of objective measurement but which make for greatness.' Considerable deference is owed to a university in defining those intangible characteristics, like student body diversity, that are central to its identity and educational mission."[69]

Justice Alito, joined by Justices Roberts and Thomas, dissented because, in their assessment, the Court administered blind deference to the university's articulated interest in educational diversity.[70] Justice Alito, perhaps with some pretense alluded to by what followed, labeled four of the university's originally articulated societal goals of destroying stereotypes, fostering cultural awareness, preparing students for inclusion in a diverse workforce, and nurturing leadership as "laudable."[71] Predictably, he went on to criticize these goals for their lack of concreteness or precision and for "offer[ing] no limiting principle for the use of racial preferences."[72] Justice Alito focused on, and somewhat belittled, the affidavits provided by the university employees to partially justify the need,[73] while selectively ignoring "a year-long study, which

65. *Fisher II*, 136 S. Ct. 2198, 2210 (2016).
66. *Id.* at 2211.
67. *Id.*
68. *Id*. These goals were set forth in a 2004 "Proposal to Consider Race and Ethnicity in Admissions" by the University. *Id.*
69. *Id.* at 2214 (citation omitted).
70. *Id.* at 2215–16 (Alito, J., dissenting).
71. *Id.* at 2223.
72. *Id.*
73. *Id.* ("If a university can justify racial discrimination simply by having a few employees opine that racial preferences are necessary to accomplish these nebulous goals, then the narrow tailoring inquiry is meaningless.") (citation omitted).

concluded that "[t]he use of race-neutral policies and programs ha[d] not been successful."[74]

Justice Alito next turned to the educational benefits of "demographic parity, classroom diversity, intraracial diversity, and avoiding racial isolation."[75] Justice Alito did not seriously reflect on the virtues of classroom diversity that repeatedly have been confirmed in studies;[76] instead, he opted to focus on the university's failure to define the different ethnic groups, and how amply each race was represented in the classroom.[77] Although the issue of the benefits of classroom diversity is complex, Justice Alito's focus attempted to break it down into something much simpler, which it is not and cannot be.[78] By speculating on the university's goal for each class to have "two African–Americans, two Hispanics, and two Asian–Americans present in each of the relevant classrooms,"[79] Justice Alito mimicked the failed argument made by petitioner that the university was pursuing demographic parity, a point the university "repeatedly explained that it has never pursued,"[80] while silently resorting back to Thomas's aesthetics argument.[81]

The dissent also mistakenly attributed the lack of diversity to the university's curriculum. Citing the "enormous number of classes in a wide range of subjects," and the offering of "courses in subjects that are likely to have special appeal to members of the minority groups given preferential treatment," Justice Alito suggested the university itself "ensure[d] a lack of classroom diversity."[82] This suggestion fundamentally ignored the university study's finding that ninety percent of undergraduate classes with five to twenty-four students had zero to one African-American students.[83] The criticism that the Court could not "determine whether UT's race-conscious program was necessary to remove the so-called 'red flag' without understanding the precise nature

74. *Id.* at 2211 (majority opinion).
75. *Id.* at 2224 (Alito, J., dissenting).
76. *See* Grutter v. Bollinger, 539 U.S. 306, 330 (2003). The *Grutter* Court stated that the Law School's admissions policy promoted "'cross-racial understanding,' help[ed] to break down racial stereotypes, and 'enable[ed] [students] to better understand persons of different races.'" *Id.*
77. *See Fisher II*, 136 S. Ct. at 2229–30.
78. *See id.* In some ways, it appears that Justice Alito is faulting the university for not looking to racially balancing the classes, something it cannot constitutionally do. *See id.* at 2225, 2229–30.
79. *Id.* at 2226 n.3.
80. Brief for Respondents at 27, *Fisher II*, 136 S. Ct. 2198 (No. 14-981).
81. *See supra* text accompanying notes 9–11.
82. *Fisher II*, 136 S. Ct. at 2230 (Alito, J., dissenting).
83. Brief for Respondents, *supra* note 80, at 26.

of that goal or knowing when the 'red flag' will be considered to have disappeared"[84] conveniently failed to acknowledge the university study's revelation that a red flag had to be addressed in the first instance.[85]

Finally, Justice Alito appeared keen to break the tradition held by previous courts of providing some judicial deference to the university by demanding a much higher level of specificity than the majority and precedent accepted.[86] In so doing, he, along with Justices Roberts and Thomas, arguably contradicted the position they took in 2010 in *Holder v. Humanitarian Law Project*.[87] In applying a strict scrutiny standard to issues of national security, the Court admitted in *Holder*, "when it comes to collecting evidence and drawing factual inferences in this area, 'the lack of competence on the part of the courts is marked,'"[88] right after stating that it does "not defer to the Government's reading of the First Amendment."[89] Interestingly, in *Holder*, the Court began the analysis by relying on precedent,[90] something Justice Alito seemed comfortable discounting in *Fisher II*. The opinion went on to allow for judicial respect of the government's assertions because "national security and foreign policy concerns arise in connection with efforts to confront evolving threats in an area where information can be difficult to obtain and the impact of certain conduct difficult to assess."[91] This position, however, did not prevent Justice Alito in *Fisher II* from wanting to require the University of Texas to specifically "pin down the goals" to satisfy strict scrutiny,[92] presumably because concrete measures in education would be easier to obtain.

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84. *Fisher II*, 136 S. Ct. at 2226 (Alito, J., dissenting).

85. *See* OFF. OF ADMISSIONS, DIVERSITY LEVELS OF UNDERGRADUATE CLASSES AT THE UNIVERSITY OF TEXAS AT AUSTIN 1996–2002, at 4–5 (2003), *in* Defendants' Statement of Facts, Fisher v. Univ. of Tex. at Austin, 645 F. Supp. 2d 587 (W.D. Tex. 2009) (No. 1:08-CV-00263-SS), https://utexas.app.box.com/s/qbpnszm3zqnr5mao7yw6y1fg9egmimur (including the results of the classroom study as Gary M. Lavergne Affidavit Exhibit B).

86. *Fisher II*, 136 S. Ct. at 2236–37 (Alito, J., dissenting).

87. David Cole, *The Affirmative Action Surprise*, N.Y REV. OF BOOKS (June 24, 2016, 5:39 PM) http://www.nybooks.com/daily/2016/06/24/the-affirmative-action-surprise-fisher-v-university-texas/; *see also* Holder v. Humanitarian L. Project, 561 U.S. 1, 6–8, 40 (2010) (holding that 18 U.S.C.S. § 2339B did not violate the Fifth Amendment due to vagueness or the plaintiffs' First Amendment rights to free speech and association).

88. *Holder*, 561 U.S. at 34 (quoting Rostker v. Goldberg, 453 U.S. 57, 65 (1981)).

89. *Id.*

90. *Id.* ("Our precedents, old and new, make clear that concerns of national security and foreign relations do not warrant abdication of the judicial role.").

91. *Id.*

92. *Fisher II*, 136 S. Ct. 2198, 2224 (2016) (Alito, J., dissenting); *see* Cole, *supra* note 87.

Although they may be easier to obtain in the abstract, concrete measures simply are not materially easier to obtain in practice because of their intangible qualities. In *Holder*, the government was "not required to conclusively link all the pieces in the puzzle before [the Court] grant[ed] weight to its empirical conclusions."[93] Instead, the Court decidedly deferred to the government's extensive knowledge on national security.[94] The acknowledgment in *Holder* that "conclusions must often be based on informed judgment rather than concrete evidence, and that reality affects what we may reasonably insist on from the Government"[95] was arguably in some measure extended to the University of Texas by the majority in *Fisher II*. Just as the government was "uniquely positioned to make principled distinctions between activities that will further terrorist conduct and undermine United States foreign policy, and those that will not,"[96] so too was the University of Texas uniquely equipped to make judgments on admissions and the benefits of achieving educational diversity in the classroom. Considerable deference to learned institutions is appropriate on interests of admissions policies, scholastics, and diversity.

III. EXPLORING MARPLOTS, MOTIVES, AND METHODOLOGIES FOR TEACHING LESSONS ON DIVERSITY

A. Marplots and Motives

The robust academic environment, rightly ballyhooed by universities and the Court, is difficult to obtain without careful planning and thoughtful teaching in law schools. Most law school classes duly focus on teaching substantive law and lawyering skills. They require students to read court opinions and come to class ready to discuss these opinions or to work on developing tangible lawyering skills. Where the classroom focus and requirements obstruct and fail, however, are by fostering the teaching of legal skills, theories, and outcomes habitually without regard to issues of class, gender, race, and sexual orientation.[97] In other words, classes are taught without much consideration given to how diversity lessons matter because differences matter.[98]

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93. *Holder*, 561 U.S. at 35.
94. *Id.*
95. *Id.* at 34–35.
96. *Id.* at 35.
97. Vernellia R. Randall, *Teaching Diversity Skills in Law School*, 54 ST. LOUIS U. L.J. 795, 796–98 (2010).
98. *Id.*

Perhaps this paucity of pondering occurs because few professors enter law school faculties equipped with the skills needed to lead diversity discussions and even fewer are encouraged to develop the essential skills necessary to do so.[99] At most schools, mandatory diversity training is nonexistent or occurs only after a regrettable incident points out its necessity.[100] Even when training is provided, it is rarely followed up with what to do next.[101] Instead, training is treated as a once-and-done occurrence, and the predictable product is professors who are not

99. "A law school that truly institutionalized diversity's values would more naturally foster pedagogical and curricular innovation. Its faculty, recognizing the educational benefits of diversity and motivated by its potential for their students, would be more inclined to construct situations to optimize those benefits." Cruz Reynoso & Cory Amron, *Diversity in Legal Education: A Broader View, A Deeper Commitment*, 52 J. LEGAL EDUC. 491, 503 (2002). Pedagogical conservatism, however, thrives in the law school classroom evident by the traditional Socratic method. *Id.* at 503; *see* Richard Delgado, *Minority Law Professors' Lives: The Bell-Delgado Survey*, 24 HARV. C.R.-C.L. L. REV. 349, 356–57 (1989) (finding that while seventeen percent of minority law school faculty felt pressured by white colleagues to avoid teaching in areas such as civil rights or race remedies areas, most minority faculty felt scholarship in these areas was devalued); Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1284 (1999) (discussing the struggle a minority professor has between avoiding racial discussions, when student evaluations play an important role in the tenure and promotion process at an institution, and recognizing that a minority professor has to find ways to "meaningfully integrate politics, history, and race into a discussion of the narrow doctrinal questions" presented by the cases studied in class, "while avoiding alienating students or creating the impression that he is partial and obsessed with race."); *see also* Vernellia R. Randall, *A Reply to Professor Ward*, 26 CUMB. L. REV. 121, 121 (1995) ("[Legal educators] teach, using one dominant method without regard to its educational effectiveness"). Moreover, faculty expressing interest in introducing diversity into classroom discussions, lessons, or academic scholarship often feel their efforts are undervalued or harshly criticized by other faculty and students alike. *See* Carbado & Gulati, at 1284 n.70; Delgado, at 356–57.

100. *See generally* Hannah Edsall, *Life After Diversity Training*, TEACHING TOLERANCE (Oct. 17, 2016), http://www.tolerance.org/blog/life-after-diversity-training (After an investigation by the U.S. Department of Education's Office for Civil Rights ("OCR") into an issue between a high school teacher and student, the government mandated training and provided resources to resolve the issue. But "[m]ost of the time, the story ends there: The government righted a wrong and gave clear directions for resolution.").

101. *Id.* The OCR created a plan for the school district involved, but the district had already begun diversity training for faculty and school assemblies for students. *Id.* While the subsequent faculty conferences and schoolwide events created tension between students, parents, and faculty members, the strife turned the school's attention onto race and diversity. *Id.* A Next Steps Committee formed to address student, family and teacher responses; some of the school's departments began teaching lessons on active listening and race, and students in a social justice club worked with teachers to make material more representative of various races and to create a safe space where race could be discussed. *Id.* Notably, the faculty members involved in the efforts became allies to students. *Id.*

adequately directed on how to best inspire, develop, or navigate racial discourse.[102]

Yet, diversity lessons incorporated in an unintentional or haphazard manner can act as marplots and have a negative impact. A 2017 study out of the University of Virginia tracked and surveyed over 2,500 undergraduate students and concluded that negative diversity experiences harm learning and stifle cognitive development.[103] Building from social-psychological studies previously concluding that cognitive growth relies on disequilibrium,[104] the study examined how students' positive and negative diversity experiences colored their cognitive tendencies and skills.[105] Predictably, both were adversely impacted by high levels of negative diversity interactions, including experiences not only with prejudice and discrimination, but also with hurtful and tense interactions.[106] Markedly, the researchers noted that experiencing a high level of positive diversity interactions countered the damaging effects of

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102. *See* Joseph E. Garcia et al., *Diversity Flashpoints: Understanding Difficult Interpersonal Situations Grounded in Identity Difference*, 29 INNOVATIVE HIGHER EDUC. 275, 276 (2005). This study focused on "diversity flashpoints" between faculty members and students, defined as moments occurring when there is a difficult interpersonal situation involving identity differences like those in race, ethnicity, gender, or sexual orientation. *Id.* at 275–76. When professors are adequately trained to respond in a supportive manner to contributions from students about diversity, they have the "opportunity to validate an important and practical perspective and to encourage subsequent contributions from learners in the class." *Id.* at 276. Mostly, however, "[u]niversity and college faculty members are not systematically prepared either through their graduate education or ongoing on-campus faculty development programs to manage difficult interpersonal situations which are driven by diversity issues." *Id.*

103. Josipa Roska et al., *Engaging with Diversity: How Positive and Negative Diversity Interactions Influence Students' Cognitive Outcomes*, 88 J. HIGHER EDUC. 297, 303, 314 (2017). The study focused on first year students entering college in the fall of 2006, 2007, and 2008, tracking their need for cognition and critical thinking skills as a result of positive and negative diversity interactions. *Id.* at 298, 302. Positive interactions were defined as meaningful discussions about diversity and the sharing of personal feelings and problems. *Id.* at 304. Negative diversity interactions were defined as experiences of prejudice and discrimination. *Id.* The study found that negative diversity interactions had a strong negative relationship to the need for cognition and critical thinking skills at the end of college for both students of color and white students. *Id.* at 314.

104. *Id.* at 299. Disequilibrium is known as discontinuity and discrepancy, producing uncertainty and instability. *See id.*

105. *Id.* at 298.

106. *Id.* at 304–05. To measure these effects, researchers asked questions "on a 5-point scale ranging from very often to never." *Id.* at 305 tbl.1. These questions asked students how often they had felt silenced by prejudice and discrimination from sharing their own experiences with diverse students; had hurtful, unresolved interactions with diverse students; had tense, somewhat hostile interactions with diverse students; and felt insulted or threatened based on their race, national origin, values, or religion with diverse students. *Id.*

negative diversity experiences.[107] The results underscored the "importance of not only creating diverse campuses but ensuring that students are exposed to positive as opposed to negative experiences on their journeys through higher education."[108]

Consequentially, racial discourse persists as a vital part of a complete legal education that requires systematic incorporation into law school classes because of the emotional, cognitive, and societal benefits these dialogs provide.[109] First, adding lessons on diversity supports a more inclusive learning environment[110] because law students come from a variety of multicultural backgrounds. Diversity lessons and a display of sensitivity to the needs of dissimilar groups help faculty members reach a wider group of law students who feel more respected by the professor and further connected to one another.[111] This, in turn, should create a more positive academic experience for students because it furthers a constructive disposition to learning. Second, adding diversity lessons enhances meaning, deepens learning, and prompts competence.[112] Simply put, it makes students smarter.[113] Relating teaching content to

107. *Id.* at 313. In regard to the need for cognition, the study found that the effects of negative diversity interactions were neutralized if the student had experienced a high level of positive diversity interactions. *Id.*

108. *Id.* at 315.

109. *See* Amy Stuart Wells et al., *How Racially Diverse Schools and Classrooms Can Benefit All Students*, CENTURY FOUND. (Feb. 9, 2016), https://tcf.org/content/report/how-racially-diverse-schools-and-classrooms-can-benefit-all-students/ (indicating that the emotional, cognitive, and societal benefits stemming from racial discourse and discussions exist at the college level).

110. *Incorporating Diversity*, CORNELL UNIV. CTR. FOR TEACHING INNOVATION, https://teaching.cornell.edu/resource/incorporating-diversity (last visited Oct. 15, 2020).

111. *See* Margery B. Ginsberg & Raymond J. Wlodkowski, *Professional Learning to Promote Motivation and Academic Performance Among Diverse Adults*, CAEL F. & NEWS, Nov. 2009, at 23, 26.

112. *Id.*

113. While research highlighting important educational benefits to learning in environments has been conducted in colleges and universities, researchers have returned their focus to the benefits of diversity to K-12 students. *See* Wells et al., *supra* note 109. Diversity in K-12 classrooms promotes creativity, motivation, deeper learning, critical thinking, and problem-solving skills, while also closing the achievement gaps between students of different racial backgrounds. *Id.* Additionally, a student's exposure to other students who are different from themself is likely to bring such benefits to law students. *Id.*; *see also* Meera E. Deo, *The Promise of* Grutter*: Diverse Interactions at the University of Michigan Law School*, 17 MICH. J. RACE & L. 63, 99 (2011) ("It is important to make clear here that the purpose of including diverse perspectives in law school . . . is to expose people to varied perspectives so that they may learn better and become more effective lawyers than those who can only analyze issues from one viewpoint. Since so much of the law requires the ability to look at problems from multiple angles, in order to fully understand different

students' varied cultural backgrounds promotes student engagement by motivating discussion.[114] It also increases professional competence because it requires students to consider varied outlooks they may not have considered otherwise before forming opinions.[115] Finally, adding intended diversity discussions helps students grasp multicultural perspectives and backgrounds.[116] Because "culture is not an isolated, mechanical aspect of life that can be . . . learned as a series of facts,"[117] equipping future lawyers with a wider understanding of clients' needs, especially those needs that may be specific to particular groups, is fundamental to good lawyering.[118] For lawyers who serve diverse clients, and for the communities they serve, this understanding is invaluable. This emotional, cognitive, and social trifecta of benefits provides ample motive to incorporate diversity lessons into the law school classroom.

B. The Methodologies

As law faculty recognize, classes become more productive through lesson planning.[119] Although admixing most planned diversity lessons would be beneficial, lessons with the best impact are organized into

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experiences and assumptions, it may be especially important to include diversity in the legal classroom.").

114. Raymond J. Wlodkowski & Margery B. Ginsberg, *A Framework for Culturally Responsive Teaching*, EDUC. LEADERSHIP, Sept. 1995, at 17, 18–19.

115. Randall, *supra* note 97, at 796–98.

116. *See id.*

117. Ginsberg & Wlodkowski, *supra* note 111, at 23.

118. Brief of Fortune-100 and Other Leading American Businesses as Amici Curiae in Support of Respondents at 5–6, *Fisher II*, 136 S. Ct. 2198 (2016) (No. 14-981) ("[P]eople who have been educated in a diverse setting . . . have an increased ability to facilitate unique and creative approaches to problem-solving by integrating different perspectives and moving beyond linear, conventional thinking; they are better equipped to understand a wider variety of consumer needs, including needs specific to particular groups, and thus to develop products and services that appeal to a variety of consumers and to market those offerings in appealing ways; they are better able to work productively with business partners, employees, and clients in the United States and around the world; and they are likely to generate a more positive work environment by decreasing incidents of discrimination and stereotyping.").

119. *See* Melyarber, *Get Tips on Incorporating Diversity in Your Classroom & Make It Part of Your Lesson Planning*, BRIGHT HUB EDUC. (July 16, 2008), http://www.brighthubeducation.com/teaching-methods-tips/2662-three-diversity-activities-for-the-classroom; Jim Winship, *An Approach for Teaching Diversity: A Dozen Suggestions for Enhancing Student Learning*, UNIV. WIS. WHITEWATER LEARN CTR., https://www.uww.edu/learn/aboutdiversity/approachdiversity (last visited Oct. 15, 2020). See also *Diversity & Inclusive Teaching*, VAND. UNIV. CTR. FOR TEACHING, https://cft.vanderbilt.edu/guides-sub-pages/diversity/ (last visited Oct. 15, 2020) for a list of inclusive teaching strategies.

courses in a methodical and holistic manner.[120] Methodologies used to teach diversity lessons should at a minimum (1) create a safe and inclusive environment, (2) display respect for diversity, and (3) promote equitable participation and communication so that equitable learning can occur.[121] For some law professors, this schema will present a significant shift to their classroom snap: instead of being chiefly concerned with covering doctrine, they will also noticeably need to increase their focus on the impact the lesson has on the learning environment and each learner.[122]

Current methodologies for law teaching seem to be deeply rooted in the concepts of extrinsic motivation principles that are antithetical to effectively incorporating diversity lessons that promote inclusivity, respect, and equality. Extrinsic motivation employs positive reinforcement by serving contingent rewards for desired behavior.[123] Law schools apply extrinsic motivation by using competitive assessment, class ranks, grade point averages, and eligibility for participation in certain honor societies such as law review and moot court. Extrinsic motivators are embraced by law professors because they "readily produce behavior changes" in an efficient manner.[124] They also require a less "extensive knowledge of individual students."[125] Unfortunately, because this win-lose paradigm emphasizes the reward and not the learning, extrinsic motivators correspondingly weaken students' experiences of self-sufficiency, ability, and connection with others.[126]

Intrinsic motivators, on the other hand, focus on the subject matter and the learning.[127] They are employed less readily in law schools because they require greater preparation, knowledge of individual students, and time to influence behavior.[128] Studies, however, consistently report that intrinsic motivators have a greater impact on

120. *See* Ginsberg & Wlodkowski, *supra* note 111, at 24.
121. *See id.*
122. *See id.*
123. Ronald Bénabou & Jean Tirole, *Intrinsic and Extrinsic Motivation*, 70 REV. ECON. STUD. 489, 489–90 (2003).
124. *Motivating Students*, VAND. UNIV. CTR FOR TEACHING, https://cft.vanderbilt.edu/guides-sub-pages/motivating-students/ (last visited Oct. 15, 2020) (citing MATT DELONG & DALE WINTER, LEARNING TO TEACHING AND TEACHING TO LEARN MATHEMATICS: RESOURCES FOR PROFESSIONAL DEVELOPMENT 163 (2002)).
125. *Id.*
126. *See* Wendy Larcombe, Ian Malkin & Pip Nicholson, *Law Students' Motivations, Expectations and Levels of Psychological Distress: Evidence of Connections*, 22 LEGAL EDUC. REV. 71, 74–75 (2012).
127. *Motivating Students*, *supra* note 124.
128. *See id.*

long-lasting knowledge, whereas extrinsic motivators negatively impact subject mastery, as well as intrinsic motivation and wellbeing.[129]

At their core, extrinsic and intrinsic motivation both relate to educational achievement. Helping students engage through intrinsic motivation, however, is better suited to diversity lessons because intrinsic motivation is rooted in the concepts of respect, inclusion, and communication[130]—the three minimum requirements for the methodologies to incorporate diversity lessons. These concepts set the framework necessary for professors to "evoke, encourage, and sustain intrinsic motivation," and consequently develop culturally responsive teaching.[131] Displaying a respect for diversity creates an atmosphere of inclusion where "students and teachers feel respected by and connected to one another."[132] Similarly, promoting equitable participation and communication enhances meaning to students by "creating challenging, thoughtful learning experiences that include student perspectives and values."[133] Intrinsic motivation accordingly sets the framework for beginning the lessons on diversity imagined by the courts.

1. Silently

The vibrations from silent integrations of diversity lessons are reverberated by the representation and inclusion of not only diverse students, but also diverse faculty. Although "[t]he rise of the civil rights era largely started at the end of World War II," when a labor shortage "resulted in stronger employment opportunities for minorit[ies]"[134] and *Brown v. Board of Education* led to greater educational equality,[135] the law school academic labor force has surprisingly lagged. As University of California at Davis School of Law Dean Kevin Johnson noted, "the racial

129. *Id.*; *see also* Larcombe et al., *supra* note 126, at 74.

130. Wlodkowski & Ginsberg, *supra* note 114, at 18–19. Intrinsic motivation bolsters educational achievement by allowing students to make sense of what they are learning. *Id.* When the student-professor relationship encompasses an understanding of the students' cultural background, the result is an increase in self-motivation and a deeper level of learning. *Id.* This result is only possible through motivationally effective teaching, which is the product of respect, inclusion, and communication concerning the various cultures of students. Respect, inclusion, and communication are the essential prerequisites to establishing inclusion, developing an attitude, enhancing meaning, and engendering competence. *Id.* at 19. Striving for these goals in the classroom ushers in a deeper connection amongst students and with the professor. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. JOSEPH A. SEINER, EMPLOYMENT DISCRIMINATION 7 (2d ed. 2019).

135. *See* 347 U.S. 483, 493–95 (1954).

diversity of law-school . . . faculties leveled off in the early twenty-first century," despite law schools' expressed commitment to diversity.[136] In 2017, the number of females matriculating in law schools outnumbered the number of males for the first time, and thirty-two percent of the students self-identified as a minority.[137] This trend continued for three years, with over 53 percent of the matriculating law students in 2019 being female, while the number of self-identifying minority students declined slightly to just over 31 percent.[138] In contrast, in 2019 only 39.9 percent of full-time and part-time faculty at 203 Association of American Law Schools ("AALS") law schools were female and only 16.7 percent were minorities.[139] Fortunately, the 16.7 percent of minority faculty was a slight increase since 2013 when the numbers were 15.9 percent.[140]

Today, some law schools report having none or only one minority, full-time, faculty member.[141] For example, in 2019, the Appalachian

136. Kevin R. Johnson, *The Importance of Student and Faculty Diversity in Law Schools: One Dean's Perspective*, 96 IOWA L. REV. 1549, 1549–50 (2011).

137. *2017 1L Enrollment by Gender & Race/Ethnicity (Aggregate)*, AM. BAR ASS'N: STATISTICS, https://www.americanbar.org/groups/legal_education/resources/statistics.html (select "2017 1L Enrollment by Gender & Race/Ethnicity (Aggregate)") (last updated Apr. 2, 2018). This statistical analysis broke down the gender and race/ethnicity of each 2017 matriculant at law schools across the United States. *See id.* The categories of race/ethnicity included nonresident aliens, students whose race and ethnicity were unknown, Hispanics of any race, American Indians, Asians, Blacks or Africans, Native Hawaiians, Whites, and students of two or more races. *Id.* These categories were further separated into full-time male, female, and other, as well as part-time male, female, and other. *Id.*

138. *Legal Education at a Glance: 2019*, ASS'N OF AM. L. SCHS., https://www.aals.org/wp-content/uploads/2020/02/2019-Legal-Education-At-a-Glance.pdf (last modified Feb. 10, 2020); *2019 1L Enrollment by Gender & Race/Ethnicity (Aggregate)*, AM. BAR ASS'N: STATISTICS (Dec. 12, 2019), https://www.americanbar.org/groups/legal_education/resources/statistics.html (choose "2019 1L Enrollment by Gender & Race/Ethnicity (Aggregate)").

139. *Legal Education at a Glance: 2019*, *supra* note 138.

140. *Id.*; Alfred L. Brophy, *African American Student Enrollment and Law School Ranking*, 27 J. C.R. & ECON. DEV. 15, 24 (2013).

141. *2019 Faculty Resources*, AM. BAR ASS'N: 509 REQUIRED DISCLOSURES, https://www.abarequireddisclosures.org (within "Compilation – All Schools Data," select "2019" and "Faculty Resources," then "Generate Report") (last visited June 24, 2020). Appalachian School of Law reported zero minority, full-time faculty members and two minority, part-time faculty members in the required 2019 ABA disclosures. 2019 *Standard 509 Information Report*, APPALACHIAN SCH. OF LAW, http://asl.edu/wp-content/uploads/2015/08/Std509InfoReport-2019.pdf (last visited June 24, 2020). Forty-seven of its 164 students identified themselves as belonging to a minority. *Id.* Capital University Law School reported three minority, full-time, faculty members and six minority, non-full-time faculty members. *2019 Standard 509 Information Report*, CAP. UNIV. L. SCH., https://law.capital.edu/required-disclosures/ (under "Number of Full-Time and Part-Time Faculty, Professional Librarians and Administrators," select "Standard 509 Information Report") (last visited June 24, 2020). Eighty-one out of its 432 students identified themselves as

School of Law reported employing no full-time, minority faculty members and the University of Massachusetts-Dartmouth School of Law reported employing one full-time, minority faculty member.[142] In contrast, approximately twenty-five percent of both law schools' student populations identified as belonging to a minority.[143] Of course, the value of having a diverse faculty extends not just to minority students hoping to practice in areas with diverse populations, or even just to minority students; rather, the value extends to all students. Law schools with diverse faculty members stage stronger legal educations for every student because they further (1) the inclusivity of viewpoints, (2) the mentoring of minority students, and (3) the shaping of campus cultures. These supports can bolster success for all students.

First, a diverse law faculty encourages an inclusive environment where many viewpoints are represented. Students, faculty, and administrators benefit from drawing upon the multicultural perspectives of a heterogeneous group in a way they would not benefit from a homogenous group. The United States Supreme Court serves as an example of how silent teachings from a heterogeneous group can work. The United States Supreme Court Justices, law students, law faculty, and society in general have all benefited from having diversity on the bench.[144] Justice Thomas, who rarely speaks from the bench, silently

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belonging to a minority. *Id.* University of Massachusetts Dartmouth Law School reported one minority, full-time faculty member and four minority, non-full-time, faculty members. *2019 Standard 509 Information Report*, UNIV. OF MASS. DARTMOUTH L. SCH., https://www.umassd.edu/media/umassdartmouth/school-of-law/admissions/aba-required-disclosures/UMass-Law-509-Report-2019.pdf (last visited June 24, 2020). Seventy-six out of 280 students identified themselves as belonging to a minority. *Id*. University of New Hampshire Law School reported two minority, full-time, faculty member, and one minority, non-full-time, faculty members. *2019 Standard 509 Information Report*, UNIV. OF N.H. FRANKLIN PIERCE SCH. LAW, https://law.unh.edu/sites/default/files/media/2019/12/std509inforeport-92-92-12-13-2019_13-39-09.pdf (last visited June 24, 2020). Forty-seven out of its 305 students identified themselves as belonging to a minority. *Id.* University of South Dakota Law School reported one minority, full-time, faculty member, and five minority, non-full-time, faculty members. *2019 Standard 509 Information Report*, UNIV. OF S.D. SCH. LAW, https://www.usd.edu/-/media/files/law/aba-info/std509inforeport12-19.ashx (last visited June 24, 2020). Eighteen of its 204 students identified themselves as belonging to a minority. *Id.*

142. APPALACHIAN SCH. OF LAW, *supra* note 141; UNIV. OF MASS. DARTMOUTH L. SCH., *supra* note 141.

143. APPALACHIAN SCH. OF LAW, *supra* note 141; UNIV. OF MASS. DARTMOUTH L. SCH., *supra* note 141.

144. Albeit, Justices are not faculty, but they are legal educators in every sense: their opinions serve as materials for case books, their social commentary as lectures, and their questioning during oral argument as assessment.

teaches, and some of his silent lesson plans seem to involve race.[145] In *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*, Justice Thomas joined Justices Ginsburg, Kagan, and Sotomayor in Justice Breyer's opinion upholding the Texas Department of Motor Vehicle Board's decision to reject a proposed license plate design featuring the confederate flag.[146] The Court reasoned that Texas's specialty license plate program constituted government, and not private, speech, and the Board's rejection was therefore not barred by the Free Speech Clause.[147] Justice Thomas's rare alliance with the four moderate liberals on the bench may have stemmed from the "renewed attention to the divisive character of the Confederate flag."[148] Or perhaps, as some reporters and scholars have speculated, his alliance stemmed from his own life experiences as an African-American growing up in the Jim Crow South.[149] Because Justice Thomas did not write separately on the issue, his reasoning is unknown, yet his silence is still instructive. Arguably, and probably, as the only African-American male justice on the bench, he was silently teaching that in some circumstances history and race nonetheless matter today.

Second, including diverse members on law school faculties displays a respect for diversity and provides support for a more inclusive learning environment by presenting different mentors and role models for students. Beyond being a representation of skin color and hair texture, race can also be thought to demonstrate social class and education.[150] Silent teaching recognizes that although race can be "significant independent of anything else,"[151] it can also represent social characteristics typically associated with different races through positive

145. *See* Mark Walsh, *Once Again, Experts Sound Off on Justice Thomas' Silence*, AM. BAR ASS'N J. (May 1, 2014, 8:50 AM), https://www.abajournal.com/magazine/article/experts_sound_off_once_again_on_justice_thomas_silence/.

146. 576 U.S. 200, 202–03 (2015).

147. *Id*. at 207, 219–20.

148. Peter J. Smith & Robert W. Tuttle, Response, Walker v. Texas Division, Sons of Confederate Veterans, Inc., GEO. WASH. L. REV. ON THE DOCKET (June 23, 2015), https://www.gwlr.org/walker-v-sons-of-confederate-veterans/.

149. *See* Garrett Epps, *Clarence Thomas Takes on a Symbol of White Supremacy*, ATL.: POL. (June 18, 2015), https://www.theatlantic.com/politics/archive/2015/06/clarence-thomas-confederate-flag/396281/; Timothy R. Holbrook, *Polyamory, Offense, and* Obergefell, 49 CONN. L. REV. ONLINE 1, 8 (2017).

150. Osamudia R. James, *White Like Me: The Negative Impact of the Diversity Rationale on White Identity Formation*, 89 N.Y.U. L. REV. 425, 461, 464 n.195 (2014).

151. Carol Goforth, *Diversity in Law School Faculty Hiring: Why It Is a Mistake to Make It All About Race*, 56 U. LOUISVILLE L. REV. 237, 251 (2018). The author goes on to note that skin color should not matter the most for diversity. *Id.*

and negative stereotypes.[152] A lack of faculty diversity, accordingly, can incorrectly represent that the legal profession and academy are only available and attainable to those with a white racial identity. In contrast, as Dean Johnson noted, "[t]he presence of historically underrepresented minorities on law faculties sends an unmistakable message to students of color—and most effectively 'teaches' them—that they in fact belong in law school and the legal profession, as well as that they have the ability to be top-flight lawyers, scholars, judges, and policy makers."[153] Inclusion on faculties sends law students the silent message that minority faculty members are valued as significant contributors to the legal profession and the legal academy.

Although a homogenous faculty does not unavoidably indicate a disrespect for inclusion, it does indicate that a commitment to inclusion alone can fail if real resources and resolution are not dedicated to the effort. The American Bar Association ("ABA") and the AALS have made inclusion a priority by creating goals, centers, committees, and programs to enhance diversity in the legal profession.[154] The *AALS Statement of Good Practices for the Recruitment and Retention of Minority Faculty* instructs, "[b]efore any consideration of individual candidates, deans should also lead their faculties in a conversation about the value of diversity, its role and significance in faculty searches, and the institution's commitments under the AALS Bylaws."[155] The statement elaborates further that appointment committees should be diverse and held accountable for failing to meet "diversity goals."[156] It suggests that

152. James, *supra* note 150, at 461–62. As James notes, these social characteristics include "class, geography, or politics." *Id.* at 461.

153. Johnson, *supra* note 136, at 1558.

154. *See Commission on Racial and Ethnic Diversity in the Profession*, AM. BAR ASS'N, https://www.americanbar.org/groups/diversity/DiversityCommission/ (last visited July 3, 2020); *Council for Diversity in the Educational Pipeline*, AM. BAR ASS'N, https://www.americanbar.org/groups/diversity/diversity_pipeline/ (last visited July 3, 2020); *Diversity & Inclusion Advisory Council*, AM. BAR ASS'N, https://www.americanbar.org/groups/diversity/leadership/diversity-and-inclusion-advisory-council/ (last visited July 3, 2020); *Section on Minority Groups*, ASS'N OF AM. L. SCHS., https://aals.org/sections/list/minority-groups/ (last visited July 3, 2020); *Committees*, ASS'N OF AM. L. SCHS., https://www.aals.org/about/committees/ (last visited July 22, 2020) (including the "Recruitment and Retention of Minority Law Teachers and Students" standing committee).

155. *AALS Handbook: Statement of Good Practices: Recruitment and Retention of Minority Law Faculty Members*, ASS'N OF AM. L. SCHS. (July 12, 2017), https://www.aals.org/members/other-member-services/aals-statements/minority-law-faculty-members/ [hereinafter *AALS Handbook*].

156. *Id.*; *see also Committees*, *supra* note 154 (explaining the role of the "Recruitment and Retention of Minority Law Teachers and Students" standing committee).

law schools should set a tone emphasizing the value of faculty diversity.[157]

Even with this directive, however, law schools are not always able to attract and retain minority faculty members due to (1) a lack of a qualified applicant pool or (2) an overqualified and difficult to attract applicant pool.[158] Possibly, when traditional hiring credentials, such as graduation from elite law schools and preferred clerkships, continue to be highly sought after by law schools' appointment committees, both limitations are at least somewhat self-imposed and could be removed. Implicit in the notion that the superstar minority candidate is not an attainable hire for most law schools, is the unfortunate suggestion that other minority candidates may be less worthy of hire, if they are worthy of hire at all.[159] Perhaps law schools should consider looking beyond the "stratospheric credentials that are most coveted by law schools"[160] and reflect on what credentials are truly needed to teach, write, and serve. Multiple models and definitions of achievement, including those embracing diversified paths to success, could emerge to help expand the legal academy and provide excellent mentors and role models for students.[161]

In creating new paradigms, faculties should study whether the need to expand traditional mentors for students outweighs the need for additional faculty with super-elite credentials. Faculties should make allowances for the idea that mentors with similar backgrounds keep students motivated and help them succeed in ways others may not.[162] For example, minority students who attend schools without an inclusive faculty can have a particularly challenging time visualizing achievement.[163] Although minority law students certainly do not need minority law professors to learn, law school workloads can be grueling and result in feelings of isolation and exhaustion, which can derail

157. *AALS Handbook*, *supra* note 155.

158. Angela Onwuachi-Willig, *Complimentary Discrimination and Complementary Discrimination in Faculty Hiring*, 87 WASH. U. L. REV. 763, 766–67 (2010).

159. *Id.* at 791.

160. Johnson, *supra* note 1536, at 1559.

161. For example, "noteworthy social or economic experiences that either equal or exceed elite credentials" could be considered. L. Darnell Weeden, *Back to the Future: Should* Grutter*'s Diversity Rationale Apply to Faculty Hiring? Is Title VII Implicated?*, 26 BERKELEY J. EMP. & LAB. L. 511, 523–24 (2005).

162. Chris Chambers Goodman & Sarah E. Redfield, *A Teacher Who Looks Like Me*, 27 J. C.R. & ECON. DEV. 105, 152 (2013).

163. *Id.* at 126–27, 152.

success.[164] Diverse faculty role models who serve as examples of success can help smooth those beliefs simply by being present.[165] They do not need to have had the same experiences or struggles as their students; rather, their presence can signify an institutional affirmation to students that they belong and can succeed.[166]

Supporting diverse faculty hires because they can be role models and perhaps silently teach diversity lessons is admittedly complicated. In *Wygant v. Jackson Board of Education*, the Court considered whether a collective bargaining provision for race-based layoffs violated the Equal Protection Clause.[167] The Court ruled in favor of the nonminority, displaced teacher, finding that the teacher's layoff stemmed from race and could not be justified.[168] In a plurality decision, Justice Powell rejected the lower court's reasoning that more minority faculty were needed because the percentage of minority teachers was smaller than the percentage of minority students.[169] The ruling reversed the lower court's decision to uphold the permissibility of the provision as an attempt to remedy past societal discrimination by making minority role models available to minority students.[170] The Court reasoned, "the idea that black students are better off with black teachers could lead to the very system the Court rejected in *Brown v. Board of Education*."[171] In other words, the role model theory did not serve a legitimate remedial purpose because it was reminiscent of the separatist theory rebuffed in *Brown*.

The Court's reasoning suggests that it was rejecting the idea that students would learn better from identical-race teachers. In so doing, it limitedly defined "role model" exclusively to mean "teacher."[172] Identical-

164. *See* Carole J. Buckner, *Realizing* Grutter v. Bollinger*'s "Compelling Educational Benefits of Diversity" - Transforming Aspirational Rhetoric into Experience*, 72 UMKC L. REV. 877, 891–92 (2004).

165. Johnson, *supra* note 136, at 1557. For example, a robust representation of women in law school faculties reiterates to female law students that they can be effective, successful lawyers. *See* Herma Hill Kay, *UC's Women Law Faculty*, 36 U.C. DAVIS L. REV. 331, 352–53 n.106 (2003).

166. Adeno Addis, *Role Models and the Politics of Recognition*, 144 U. PA. L. REV. 1377, 1410 (1996) (explaining that minority and women role models can help provide institutional affirmation and also signal that "the community does not continue to devalue the lives of these groups.").

167. Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 269–70 (1986).

168. *Id.* at 283–84.

169. *Id.* at 274–76.

170. *Id.* at 272–73.

171. *Id.* at 276 (citing 347 U.S. 483 (1954)).

172. *Id.* at 274–276 (using the role-model theory to explain the relationship between percentages of black teachers and black students); *see also* Jonathan Alger, *When Color-*

race teachers who serve as role models, however, do more than just instruct. They can also serve to "provide visible reassurance to the aspiring role occupants that the dominant group does not devalue them."[173] The presence of a diverse faculty can combat marks of disrespect and nonrecognition by providing minority students a counter-narrative that their goals are attainable.

The Court has not embraced the role-model theory;[174] yet, the theory still has merit in legal education. Diverse faculty role models provide much-needed recognition because students can emulate them. Their exclusion, either intentional or inadvertent, can lead to presumptions that minority faculty are not valued or do not possess the requisite skills needed to do well. On the other hand, their inclusion represents respect, recognition, and the priceless possibility of success.

Finally, the presence of diverse faculty members helps to shape campus cultures by influencing (1) law school hiring, (2) curriculum, and (3) policies. To begin, silent diversity lessons often reverberate the loudest when faculty hiring demonstrates a commitment to diversity. In 1991, then Harvard law professor Derrick Bell announced that he would go on unpaid leave until the school hired its first tenured female faculty member of color.[175] It took seven years, and Bell not returning to Harvard Law School, but in 1998, the law school finally hired an African-American woman.[176] Somewhat ironically, at the time of Bell's leave, Harvard's

Blind is Color-Bland: Ensuring Faculty Diversity in Higher Education, 10 STAN. L. & POL'Y REV. 191, 194 (1999).

173. Addis, *supra* note 166, at 1430.

174. Some scholars have argued that *Grutter v. Bollinger* favored the role-model theory when stating: "In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity." 539 U.S. 306, 332 (2003); *see, e.g.*, Eric A. Tilles, *Lessons from* Bakke*: The Effect of* Grutter *on Affirmative Action in Employment*, 6 U. PA. J. LAB. & EMP. L. 451, 460 (2004) (refuting Robert Post's argument that there is tension between *Grutter* and *Wygant* due to the former's supposed acceptance of the "role model" theory).

175. David A. Graham, *Black Tape Over Black Faculty Portraits at Harvard Law School*, ATL. (Nov. 19, 2015), https://www.theatlantic.com/politics/archive/2015/11/harvard-law-faculty-black-tape/416877/.

176. Claire E. Parker, *Students Carry on Tradition of Race Activism at the Law School,* HARV. CRIMSON (May 24, 2016), https://www.thecrimson.com/article/2016/5/24/HLS-activism-revival/. Although numbers still lag, in 2017 Harvard Law School reported thirty-two minority, full-time faculty members. *2017 Standard 509 Information Report*, AM. BAR ASS'N: REQUIRED DISCLOSURES, http://www.abarequireddisclosures.org/Disclosure509.aspx (under "Standard 509 Information Reports," select "2017" and "Harvard University," then press "Generate Report") (last visited Sept. 19, 2020). Harvard Law School reported 171 full-time faculty members. *Id.*

administration "termed Mr. Bell's act 'counterproductive' because 'he will be removing a prominent role model for blacks.'"[177]

Diverse faculty members can further help increase inclusive faculty hiring by serving on appointments committees. The *AALS Statement of Good Practices for the Recruitment and Retention of Minority Faculty* instructs law schools to "lay a solid foundation for success with the appointment of [c]ommittees that are themselves diverse."[178] Studies have shown that "[t]he more diverse the committee, the more diverse the candidates are likely to be"[179] because "people value and are most comfortable with that which they are most familiar."[180] A heterogeneous hiring committee, therefore, will help lead to an increasingly diverse faculty. A homogenous appointments committee, on the other hand, will more closely resemble those who have succeeded in the past, and as a result may not send a message of inclusion to the candidates.

Compounding the issue, most law school faculty committees are by design fairly homogenous in the academic discipline of law, with only some variation occurring in status and rank, and perhaps in specialty if a tax, legal writing, or clinical faculty position is being filled. The traditional law school faculty hiring committee consists of a committee chairperson who is a full professor, one or two tenured professors who are subject-matter experts, and a junior faculty member. If none of these members identify as a minority, a minority faculty member will be added to the mix to help diversify the committee.[181] Unfortunately, this committee composition can lead to an uncomfortable dynamic and failed search because diversity is viewed as an add-on and not a core part of the committee composition.

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177. Fox Butterfield, *Harvard Law Professor Quits Until Black Woman Is Named*, N.Y. TIMES (Apr. 24, 1990), https://www.nytimes.com/1990/04/24/us/harvard-law-professor-quits-until-black-woman-is-named.html. In 2019, Harvard reported having a thiry-three percent women and minority faculty. *15 Years of Faculty Demographics, 2004-2019,* HARV. U. (2019), https://faculty.harvard.edu/fdd-annual-reports (scroll to open "FD&D Annual Report Archives," then select "2018–2019 Faculty Snapshot"). Out of that thirty-three percent, five percent are underrepresented minority women. *Id.*

178. *AALS Handbook*, *supra* note 155.

179. Ann Springer & Charlotte Westerhaus, *How to Diversify the Faculty*, AM. ASS'N OF UNIV. PROFESSORS (Mar. 2006), https://www.aaup.org/issues/diversity-affirmative-action/diversify-faculty#b3; *see also* Onwuachi-Willig, *supra* note 158, at 772–73.

180. Springer & Westerhaus, *supra* note 179.

181. Özlem Sensoy & Robin DiAngelo, "*We Are All for Diversity, but . . .": How Faculty Hiring Committees Reproduce Whiteness and Practical Suggestions for How They Can Change*, 87 HARV. EDUC. REV. 557, 564–65 (2017), https://pdfs.semanticscholar.org/c908/7d0f980efd920bc5a1eb50df33fc691164df.pdf?_ga=2.111209036.912033369.1601074722-1666750986.1572457393.

To combat this issue, deans should consider appointing hiring committees comprised of more minority faculty members than nonminority faculty members. Additionally, a minority faculty member could be appointed as chair of the committee.[182] Regardless of race[183] or scholarly specialty, members who have racial expertise must be a part of the committee, and the chair must be adept at handling diversity discussions among committee members as well as candidates.[184] Specific diversity recruiting resources and materials reflecting the law school's commitment should be provided to the committee members to help them gain expertise.[185] Committee members must be secure and knowledgeable in answering candidates' concerns regarding diversity and identity.[186] At schools lacking either diverse faculty members or faculty members knowledgeable on inclusion issues, deans should consider other ways to promote the successful hiring of diverse faculty members. For example, the hiring committee could carefully consider the composition of the student body to make sure that its diversity is represented in the students chosen to speak with the candidates. Student appointment panels composed of members from a variety of student organizations beyond just law review will add perspectives that would otherwise go unnoted.[187] In addition, questions reflecting the value placed on inclusion by the law school can help candidates gain an appreciation of the school's values.[188] Keeping the goal of inclusion at the forefront of faculty hiring will provide a message of inclusion to all faculty candidates and lead to increasingly diverse faculties.[189]

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182. *See id.* at 565–66. Deans should be careful to not place overly burdensome workloads on faculty members by relying on the same individuals to fill service positions. *Id.*

183. Springer & Westerhaus, *supra* note 179 (noting that "[j]ust as professors don't need to be white to teach Shakespeare, neither do they need to be black to teach African American Studies."). Similarly, faculty committees do not need to be comprised of diverse members to effectively hire diverse candidates, however, they must be educated on the hiring process. *Id.*

184. Sensoy & DiAngelo, *supra* note 181, at 565–66.

185. Springer & Westerhaus, *supra* note 179.

186. Sensoy & DiAngelo, *supra* note 181, at 571. These concerns can include a candidate's questions regarding racial composition of the school's faculty and student body, as well as safety issues, and the school's commitment to diversity. *Id.* at 569.

187. *Id.* at 572. In addition to considering racial diversity, economic, gender, and students of different abilities should be represented.

188. *Id.* at 571–72. These questions may include asking candidates about how they teach in a culturally responsive way, and how they handle diversity discussions in the classroom. *Id.*

189. *See* Kevin R. Johnson, *How and Why We Built a Majority-Minority Faculty*, CHRON. OF HIGHER EDUC. (July 24, 2016), https://www.chronicle.com/article/HowWhy-We-Built-a/237213.

Next, silent diversity lessons resound in the curriculums set by law school faculties. At most law schools, curriculum and pedagogy are determined by the faculty and therefore influenced by its composition. Law faculty "choose and define the scope and content of legal knowledge[] and they transmit that knowledge through doctrinal instruction, practical and skills training, and ethical framing."[190] A reasonable inference can be made that faculty diversity encourages course offerings such as "Women and the Law" and "Critical Race Theory." Similarly, a diverse faculty broadens "the range of what is taught and how it is taught, lending new ideas and collaboration in pedagogies."[191] A diverse faculty encourages innovative curriculums and teaching methods because of the different experiences, perspectives, and attitudes they bring to the classroom.[192]

Currently, at many law schools, curriculums set by law faculties reflect a marginal commitment to diversity. Courses specifically focused on diversity issues can "be found on the periphery, [with] little . . . altered in the core of legal education."[193] Few law schools require students to take courses focused on diversity issues,[194] and many offer less than a handful of electives focused on diversity topics.[195]

A few law schools, however, offer an array of electives not just on diversity topics, but also on cross-cultural training. Interestingly, there seems to be anecdotal evidence that a correlation exists between the number of law school faculty identifying as a minority and the number of courses offered that focus on diversity issues and cross-cultural

190. Faisal Bhabha, *Towards A Pedagogy of Diversity in Legal Education*, 52 OSGOODE HALL L.J. 59, 93 (2014).

191. Crystal J. Collins & William Allan Kritsonis, *National Viewpoint: The Importance of Hiring a Diverse Faculty*, 3 NAT'L J. PUBL'G & MENTORING DOCTORAL STUDENT RSCH., no. 1, 2008, at 6.

192. *See id.* at 3.

193. Bhabha, *supra* note 190, at 86.

194. For example, Vermont Law School has a perspectives requirement. Courses fulfilling this requirement "substantially and systematically expose students to the broader foundations of law, including its social, cultural, historical, philosophical, comparative, or scientific contexts." *2018-2019 Student Handbook*, VT. L. SCH. 38, https://www.vermontlaw.edu/sites/default/files/2018-08/2018-2019%20Student%20Handbook.pdf (last visited Sept. 6, 2020). Courses satisfying the requirement include Race and the Law, Sexual Orientation and the Law, and Native Americans and the Law. *See JD Degree Requirements*, VT. L. SCH., https://www.vermontlaw.edu/academics/academic-catalogs/jd-degree-requirements (last visited June 24, 2020).

195. For example, most law school course catalogs include courses on Race and the Law and Women and the Law.

training.[196] William and Mary Law School, for example, reports that eight percent of its faculty identify as a minority, and it offers courses such as "Race, Law and Lawyering in Diverse Environments" and "Selected Topics in Race [and] American Legal History."[197] Suffolk Law School reports that over thirteen percent of its faculty identify as a minority and it offers a Diversity and Social Justice area of focus.[198] Courses include "Housing Discrimination Law, Theory and Practice: Brainstorming and Implementing Solutions to Discrimination" and "Advanced Topics in Constitutional Law: Equal Protection and Due Process."[199] University of California at Davis Law School, reporting that over thirty percent of its faculty identify as a minority,[200] offers courses going beyond Women and the Law and Critical Race Theory. Its course catalog includes specifically defined electives on "Asian American Jurisprudence," "Latinos [and] Latinas and the Law," "Native American Law," and "Women, Islam, and the Law."[201]

Not surprisingly, at most of these schools, diverse faculty teach most of the courses focused on diversity issues. The courses are often led by someone who identifies as a person of color, a member of the LGBTQIA+ community, or another minority.[202] If these diverse faculty members have an interest and an expertise in diversity topics, they certainly provide a strong voice to lead these courses. As Dean Johnson noted, a minority law professor can share with students a "difference of

196. *Cf.* Francisco Valdes, *Barely at the Margins: Race and Ethnicity in Legal Education - A Curricular Study with LatCritical Commentary*, 13 BERKELEY LA RAZA L.J. 119, 129–30, 138 (2002) (presenting results of a study of the number of law school classes related to Latinas/os, race and ethnicity and noting "the existence of these courses in the formal law school curriculum seems rooted more in the incremental diversification of the legal professorate during the past twenty years than in the embrace of race/ethnicity studies by the still-predominantly white legal academy of the United States.").

197. *2019 Standard 509 Information Report*, WM. & MARY L. SCH., https://law.wm.edu/admissions/consumer-information/2019aba509.pdf (last visited Nov. 5, 2020); *Perspective*, WM. & MARY L. SCH., https://law2.wm.edu/academics/programs/jd/electives/courses/bypracticearea/perspective.php (last visited June 25, 2020).

198. *2019 Standard 509 Information Report*, SUFFOLK UNIV., https://www.suffolk.edu/-/media/suffolk/documents/law/about/aba/std509inforeport-72-4381-12-04-2019-10-49-05-1.pdf?la=en&hash=D8E6E7223614E5C0C3BFA9005EC190ECB0796A7C (last visited Nov. 5, 2020); *Diversity & Social Justice*, SUFFOLK U. L. SCH., https://www.suffolk.edu/law/academics-clinics/what-can-i-study/diversity-and-social-justice (last visited June 25, 2020).

199. *Id.*

200. *2019 Standard 509 Information Report*, UC DAVIS SCH. OF L., https://law.ucdavis.edu/jd/files/ABA-standard-509b-information.pdf (last visited Nov. 5, 2020).

201. *Upper Division: Curriculum Clusters Years Two and Three*, U.C. DAVIS SCH. OF L., https://law.ucdavis.edu/registrar/curriculum/ (last visited July 1, 2020).

202. *See* Valdes, *supra* note 196, at 141.

perspective" on a variety of legal issues.[203] Presumptions regarding expertise and desire to teach courses focused on diversity issues, however, should never be made. Just as a law professor should not look to the Latina student to answer questions on issues of poverty or ethnicity in classroom discussions, administrations must be careful to not presume a minority professor wants to be the one to educate students on diversity topics.[204] Put simply, minority law professors should not need to fly solo, or at all if they do not wish to do so, when educating students on these topics. Rather, this teaching responsibility should be shared and met by nonminority faculty members who are interested and educated on the topics. Sharing teaching responsibilities and interests silently teaches the lesson that diversity topics are a concern to everyone.

Finally, the presence of diverse faculty members helps to shape campus cultures by influencing law school policies. At most law schools, policies are set by faculty members and administrators working collaboratively to create governing documents such as student and faculty handbooks. They also work together on admissions policies, tenure matters, and guidelines for student organizations; in some instances, they even impact how precious law school resources are spent. At many schools, policies still revolve "around the needs of the traditional law student,"[205] with law school policies being slow to change. Not surprisingly, policies supporting the traditional law student boost the success rate of traditional law students but may not equally help diverse law students.[206] As the makeup of student bodies changes to reflect a diverse society, so should policies and campus cultures.

Having a diverse faculty can help shape policies by way of expanding viewpoints presented during faculty discussions. To begin, diverse faculty bring perspectives from their own law school experiences which can help educate their peers. For example, many law schools consider the issue of diversity when setting admissions standards—this news-generating issue has been at the forefront of legal education for over fifteen years and is no longer overlooked at most law schools.[207] Having

203. Johnson, *supra* note 1536, at 1561.

204. Shaun R. Harper & Charles H. F. Davis III, *Eight Actions to Reduce Racism in College Classrooms*, AM. ASS'N OF UNIV. PROFESSORS (Nov. 2016), https://www.aaup.org/article/eight-actions-reduce-racism-college-classrooms#.XuoRe0BFzoo.

205. SpearIt, *Not for Free: Exploring the Collateral Costs of Diversity in Legal Education*, 48 MCGEORGE L. REV. 887, 907 (2017).

206. *See id.* at 901–07.

207. Arguably, law schools have considered the issue of diversity in law school admissions for a longer period of time, but *Grutter v. Bollinger*, 539 U.S. 306 (2003), brought it to the forefront.

diverse faculty present at these discussions can help expand the scope of the discussion to reach areas that may be overlooked if no minority faculty participate. The discussion, for instance, could expand to question the utility of the Law School Admission Test, which some argue "ensures that Black applicants face steep disadvantages in gaining admission."[208] It could further swell to a discussion on the timing of applications, notably that Black applicants are more likely to apply later in the admissions cycle than White or Asian applicants.[209] Although these topics certainly can arise among a homogenous faculty, having faculty who have experienced the admissions process as minority applicants may increase the chances of a flourishing discussion occurring and informing policy setting.

Next, diverse life experiences can help expand the consideration of diversity to areas beyond admissions. While most law schools are familiar with admissions and diversity issues, some miss the issues impacting minority students in other areas. For example, graduation rates, bar preparation efforts, and career tracks of minority students can go unnoticed if not intentionally seen.[210] Once minority students are admitted, law schools must continue to monitor "their stated goals, the length of [their] commitment, and its measurement."[211] Having minority faculty members involved in discussions regarding these policies can help schools develop more robust strategies for student success because they can add varied perspectives.

They can also help bring other unnoticed or discounted student issues to the attention of faculty colleagues and administration. A school's culture is undeniably set by its student body, a group of individuals who are simultaneously cultivating their "social and cultural capital"[212] while working within policies set by the school. Developing social and cultural capital while in law school can be especially daunting for minority students who may rightly believe they have limited access to the networks they need to succeed. For example, minority students may have concerns about school policies that they are uncomfortable bringing to the faculty because they believe doing so may jeopardize their academic

208. Aaron N. Taylor, *The Marginalization of Black Aspiring Lawyers*, 13 FIU L. REV. 489, 490 (2019). Taylor goes on to argue that the use of the LSAT results in the marginalization and exclusion of Black law students. *Id.* at 496–97, 500, 502, 505–06.

209. *Id.* at 498.

210. Eli Wald, *A Primer on Diversity, Discrimination, and Equality in the Legal Profession or Who Is Responsible for Pursuing Diversity and Why*, 24 GEO. J. LEGAL ETHICS 1079, 1084–85 (2011).

211. *Id.* at 1086.

212. *Id.* at 1085.

and social positions. In this situation, minority faculty members who have become trusted confidants may be able to help minority students navigate their concerns more easily. Although other faculty members may also be confidants, minority students may feel more comfortable expressing school policy concerns to professors who once might have had to confront the same issues when they were law students. In turn, minority faculty members may act as conduits for the students' concerns during faculty discussions where law school policies are being set.

Admittedly, setting policies with diversity issues in mind can be "controversial, costly, and complicated;" however, the issues should not be ignored.[213] Just as diversity has been noted as a "critical component to increasing the intellectual capital of the bar," it is also a critical component to increasing the intellectual capital of law school faculties.[214] Diverse faculty, with differences in experiences and perspectives, can greatly impact policies and procedures. Because multivocal diverse experiences enrich law school discussions, they help to create policies that go beyond benefiting the traditional law student to benefiting all law students' success.

Inclusive law school faculties silently integrate diversity discussions into the law school experience. They support a stronger legal education for all students by adding invaluable ideas and positions. Their perspectives often provide vantage points and viewing platforms that would otherwise be unheard and overlooked. By sharing perspectives, serving as mentors, and shaping campus identities, diverse voices help to advance not only students, but also administrations and faculties.

2. Quietly

While the silent integrations of diversity lessons are an important step for legal educators to take, silent actions alone are insufficient. In fact, remaining silent and providing no further venues for diversity discussions can speak volumes to students.[215] At best, silence without more can signal to students that diversity discussions are irrelevant in the classroom; at worst, silent actions alone insult students and leave them wanting for the opportunity to acknowledge the importance of diversity issues. A lack of acknowledgement that diversity matters, that the role it plays in setting legal precedence and studying law matters, is

213. *See id.* at 1088.

214. Linda Brandt Myers, *Why Diversity Matters*, CORNELL U. L. SCH.: FORUM, Spring 2013, http://forum.lawschool.cornell.edu/Vol39_No1/Feature-4.cfm.html.

215. Jamilah Pitts, *Don't Say Nothing*, TEACHING TOLERANCE, Fall 2016, https://www.tolerance.org/magazine/fall-2016/dont-say-nothing.

harmful to all students because it fails to acknowledge the blatant reality that diversity does matter and has impacted laws for centuries. In other words, silent teachings are necessary but insufficient.

Instead of remaining silent on diversity issues in the classroom, law faculty can consider ways to quietly integrate coverage of diversity issues in their classes. Three ways to quietly acknowledge the role diversity plays in legal education include (1) using a problem-based approach in class, (2) selecting course materials that present issues impacting different cultures, and (3) actively engaging with students in a manner that displays respect for diversity. These methods may be particularly helpful to faculty who are not equipped to explicitly talk about diversity issues but acknowledge that continued silence is not an option because it is disrespectful to students to continue to behave in a manner that indicates diversity does not play a role in legal education.[216]

First, the problem-based approach allows law faculty to present students with real-world scenarios where diversity lessons can quietly surface. Problem-based teaching in legal education is multifaceted. Professors must construct factual scenarios that allow students to conduct heuristic searches, recognize patterns, and ultimately develop schemas and mental models for problem solving.[217] At the heart of problem-based teaching, however, is not the methodology or even the law; rather, it is the client and the problem presented for discussion.[218] Because the focus is on the problem and the people, the problem-based approach requires students to consider aspects reaching beyond the law to larger client goals.[219] For example, a problem also may ask students to consider "financial, emotional, personal, moral, religious, political, and psychological" goals.[220] This allows problems that quietly intermingle diversity considerations to be presented for classroom discussion.

Requiring students to look at the problem from the client's and opponent's perspective[221] creates many opportunities to quietly integrate diversity issues. To begin, cultural links can be worked into the problems

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216. *See* Taifha N. Baker, Note, *How Top Law Schools Can Resuscitate an Inclusive Climate for Minority and Low-Income Law Students*, 9 GEO. J. L. & MOD. CRITICAL RACE PERSP. 123, 149–50 (2017) (explaining the value of faculty diversity training and recommending training that "highlight[s] the reality of the faculty's cultural incompetence.").

217. Gary L. Blasi, *What Lawyers Know: Lawyering Expertise, Cognitive Science, and the Functions of Theory*, 45 J. LEGAL EDUC. 313, 333–40 (1995).

218. Kathleen Elliott Vinson, *What's Your Problem?*, 44 STETSON L. REV. 777, 778–79 (2015).

219. *Id.* at 788.

220. *Id.* at 788.

221. *Id.* at 788–89.

by carefully selecting the client and the opponent and having the cultural links explicitly or implicitly stated for students.[222] For example, a problem could identify the client or the opponent as belonging to a particular race or ethnic group. It could further explain the client's or opponent's financial situation, religious group, age, and marital status. Next, it could include facts "[f]raming the problem using ethnic events"[223] to introduce cultural and diversity issues more implicitly. When professors thoughtfully create the pictures of the client and opponent involved in the problem, students are better able to envision them as people and to gauge their own reactions to these fictitious individuals.[224]

When creating fictitious clients and writing facts, faculty must carefully avoid promulgating gender, racial, and ethnic stereotypes because they create false pictures in students' minds and can be harmful to the development of students as lawyers. Stereotypes artificially create incomplete pictures and undermine students' creative problem solving by leading to incorrect assumptions. The assumptions can limit the bonds that students can develop even with made-up clients. Stereotypes can lead to judgmental mindsets which ultimately hinder creative problem solving.[225]

When faculty members write problems to include fictitious people who have diverse, non-stereotypical, and non-cliched backgrounds, students are given the opportunity to consider and contribute their own unique cultural perspectives to solve the problem.[226] This is often best accomplished when faculty create student teams. The team-based approach "mimics practice where lawyers must work collaboratively with colleagues, clients, judges, and others"[227] who may not share similar backgrounds. It supports sharing ideas from various perspectives, particularly if professors learn their students' backgrounds prior to assigning and creating teams that include students with diverse life

222. Marcus Guido, *15 Culturally-Responsive Teaching Strategies and Examples + Downloadable List*, PRODIGY (Sept. 14, 2017), https://www.prodigygame.com/blog/culturally-responsive-teaching. Although the article is primarily directed towards culturally-responsive teaching for grade schools, many of its points transcend to the law school classroom, such as establishing inclusion and developing a positive attitude. *See id.*

223. *Id.*

224. *See* Vinson, *supra* note 218, at 817.

225. *See* Ann-Christin Posten & Thomas Mussweiler, *When Distrust Frees Your Mind: The Stereotype-Reducing Effects of Distrust*, 105 J. PERSONALITY & SOC. PSYCH. 567, 568, 580 (2013).

226. *See* Guido, *supra* note 222.

227. Vinson, *supra* note 218, at 796.

experiences.[228] Ideally, students will discuss their approaches to problem solving in a way that helps them value each other's positions, even when they stand in contrast to one another. This discussion should help students realize the contributions of their team members and appreciate how diversity of backgrounds can lead to the diversity of ideas and approaches.

To further facilitate authentic reporting back from each team to the entire class, faculty should encourage the simultaneous recounting of results instead of sequentially hearing from each team. Sequential reporting can be artificially skewed by initial reports.[229] This can create a false majority which will quash the rich, diverse discussion of ideas. Instead of successive reporting, students should be asked to simultaneously publicize their team decision via Poll Everywhere, hold up a piece of paper with their answer, or write on the board.[230] This synchronized style of reporting will lead to teams being more heavily invested in defending and explaining their positions.[231] Ultimately, this leads to more diverse voices being heard.

Finally, the problem-based method encourages diversity lessons quietly because it is a form of self-regulated learning which promotes introspection. Self-regulated learning "involves three stages: 'forethought, performance, [and] reflection.'"[232] During the forethought stage, students rely mostly on their own knowledge and internal schema to initially evaluate the situation. In doing so, they will "define the problem, ponder the problem, and gather the context first."[233] In gathering the context, students will "identify . . . the subject of the task, and how it relates to learning tasks previously undertaken."[234] To help themselves understand what the problem is asking, students will likely rely on their unique backgrounds and life experiences. Therefore, in some

228. Sophie M. Sparrow & Margaret Sova McCabe, *Team-Based Learning in Law*, 18 LEGAL WRITING: J. LEGAL WRITING INST. 153, 196–97 (2012). There are a number of ways to learn about students' backgrounds quickly. For example, students could be asked to answer surveys or in-class questionnaires regarding "relevant knowledge, skills, and values." *Id.* at 197. Professors should not make assumptions regarding student experiences and beliefs based on students' appearances.

229. *Id.* at 194.

230. *Id.* at 195.

231. *Id.* at 194.

232. Vinson, *supra* note 218, at 811 (quoting E. SCOTT FRUEHWALD, THINK LIKE A LAWYER: LEGAL REASONING FOR LAW STUDENTS AND BUSINESS PROFESSIONALS 210 (2013)).

233. E. Scott Fruehwald, *How to Help Students from Disadvantaged Backgrounds Succeed in Law School*, TEX. A&M L. REV., Fall 2013, at 83, 120.

234. *Id.*

ways, they may be limited by their views and how they understand the fictitious people and facts in the problem.[235]

During the performance stage, students focus on the "activity itself" and "the self-monitoring the [learner]" completes.[236] The performance stage in the problem-based approach will undoubtedly include "proposing and evaluating solutions,"[237] which includes thinking of the impact on the parties beyond the legal consequences. When both the problems and the teams include diverse individuals, the potential for quiet diversity lessons escalates because of the multitude of ideas that will be presented for team examination. Students collaboratively create better solutions for the problem by sharing their understanding of it. Because their understanding of the problem is based on the beliefs they have formed about their clients and opponents, as well as themselves and their teammates, learning goes beyond understanding and applying doctrine. Learning includes an increased awareness of diverse viewpoints and experiences.

During the reflection stage, students consider what they learned.[238] The focus in this stage is evaluating the effectiveness of the learning strategy[239] and learning from the experience.[240] The reflection stage encourages students to assess their own progress and evaluate their thought processes.[241] Additionally, it requires students to self-react and adapt.[242] Used with the problem-based method, it allows students to compare their performance with the performance of other students. While considering self-reactions, students will ponder their emotional feelings regarding their learning and adapt their learning strategies.[243] With diversity lessons quietly worked into the problem, students are more likely to assess their attitudes and reactions to their classmates, as well as the problem's client and situation. This allows for real growth in

235. For example, during the bar examination, "an examinee who grew up in an urban city might interpret factual scenarios about agricultural practices differently than an examinee who grew up on a farm in rural American" because of their varying background and life experiences. Christina Shu Jien Chong, *Battling Biases: How Can Diverse Students Overcome Test Bias on the Multistate Bar Examination*, 18 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 31, 47 (2018).

236. Fruehwald, *supra* note 233, at 121 (quoting Michael Hunter Schwartz, *Teaching Law Students to Be Self-Regulated Learners*, 2003 MICH. ST. L. REV. 447, 458).

237. Vinson, *supra* note 218, at 811.

238. Fruehwald, *supra* note 233, at 121.

239. *Id.*

240. Vinson, *supra* note 218, at 812.

241. *Id.* at 812–13.

242. Michael Hunter Schwartz, *Teaching Law Students to Be Self-Regulated Learners*, 2003 MICH. ST. L. REV. 447, 461.

243. *Id.*

learning about the importance of considering others' life situations as students reflect on their reactions and how they value and understand diversity.

Second, faculty can quietly teach diversity lessons using the case method by carefully selecting course materials that present issues involving diverse groups of people and stories. In preparing to teach, professors habitually begin by selecting a case book and focusing on the law they want to cover when selecting cases for class discussion. In this process, cases are thought of as food for class consumption where the law will slowly be digested, and deep learning will occur. This is the framework for the case study method and the Socratic dialogue which accompanies it in many law school classes.

To integrate quiet diversity lessons in the case method, however, professors will need to go beyond legal doctrine coverage considerations; they will need to additionally consider the parties involved in each case and the stories they tell. "Storytelling has played a central role in transferring knowledge across generations for millennia."[244] Every case contains a story within it that can serve as a "touchstone[] for recalling legal principles."[245] Some cases, however, can additionally serve as prompts for quiet diversity discussions. While many cases lend themselves to diversity discussions that can get quite loud, there are also cases that quietly suggest issues through "cultural lens[es] such that students will develop the awareness that cultural issues may affect the relevance of facts and application of the law."[246] For example, a property law course could cover *Department of Housing and Urban Development v. Rucker*, a case involving the eviction of four public housing tenants for acts of third parties.[247] Although the Supreme Court unanimously upheld the evictions, it also explained the living conditions of sixty-three-year-old great-grandmother Pearlie Rucker, the leaseholder who had her mentally disabled daughter, two grandchildren, and one great-grandchild living with her.[248] Eviction proceedings had begun when her daughter was caught with a crack cocaine pipe three blocks away from

244. Warren Binford, *How to Be the World's Best Law Professor*, 64 J. LEGAL EDUC. 542, 550 (2015).

245. *Id.*

246. Monica Todd, *Matchmaking in Law School: Practical Skills and Doctrine in Family Law Course Design*, 46 W. ST. L. REV. 127, 133 (2019).

247. 535 U.S. 125, 128 (2002).

248. *See* Melissa A. Cohen, *Vindicating the Matriarch: A Fair Housing Act Challenge to Federal No-Fault Evictions from Public Housing*, 16 MICH. J. GENDER & L. 299, 300, 302 (2009); *Rucker*, 535 U.S. at 128.

their home.[249] Although the case does not specifically stand as a critical race or equality case in the same manner a case involving restrictive racial covenants would, the story of a poor, elderly, minority woman helps students develop client sensitivity and cultural competency.

Professors should be mindful not to select cases where minorities are overrepresented in a culturally cliched or inconsequential manner. To help prevent this from happening, professors could swap how they teach certain cases. For instance, researching beyond the legal principles into the stories of *Rucker* reveals that the oral arguments in the case were delivered by successful attorneys of different races.[250] During class coverage of the case, therefore, professors could play parts of the oral arguments with pictures and brief narratives of the attorneys on the board.[251] This may help students, particularly minority students, "collectively piece together . . . the legal identity they are constructing for themselves"[252] to include more successful images. In some ways, law professors are quiet storytellers who are whispering others' stories through the cases they assign, while simultaneously helping to construct their students' stories as new lawyers.

Finally, law professors can actively connect with students in a manner that further displays a quiet respect for diversity. Two ways a quiet respect for diversity can be expressed are by (1) bringing in diverse guest speakers and (2) delivering culturally-relatable content.[253] First, diverse guest speakers impact students' academic studies and mindsets by providing different perspectives.[254] Guest speakers are generally brought into classes to provide students with alternative or expert viewpoints on relevant course topics.[255] Inviting a successful and impactful guest speaker of a different gender, culture, or race from the professor, challenges preconceived ideas regarding the competence of

249. *Rucker*, 535 U.S. at 128.

250. *See, e.g.*, *Department of Housing and Urban Development v. Rucker*, OYEZ, https://www.oyez.org/cases/2001/00-1770 (last visited July 14, 2020); *Gary T. Lafayette*, LAFAYETTE & KUMAGAI, https://lkclaw.com/attorneys/gary-t-lafayette/ (last visited Nov. 5, 2020).

251. For example, an audio recording of the *Rucker* arguments can be found at *Department of Housing and Urban Development v. Rucker*, *supra* note 250.

252. Cassandra Sharp, *The "Extreme Makeover" Effect of Law School: Students Being Transformed by Stories*, 12 TEX. WESLEYAN L. REV. 233, 248 (2005).

253. Matthew Lynch, *Ways to Promote Diverse Cultures in the Classroom*, EDVOCATE (Apr. 13, 2016), https://www.theedadvocate.org/ways-to-promote-diverse-cultures-in-the-classroom/.

254. *See The Real-World Value of University Guest Speakers*, STUDY INT'L NEWS (Oct. 3, 2019), https://www.studyinternational.com/news/real-world-value-university-guest-speakers/.

255. *Id.*

individuals from different backgrounds. An invitation to a diverse guest speaker also conveys the message to students that this person is important, admired, and respected.[256]

Second, using diverse relatable content expresses a respect for different cultures and can help professors connect with students by quietly suggesting that students should hold onto their own cultural values while still becoming part of the law school community. Some minority students feel "pressured to dispose of their cultural norms, behaviors, and traditions in order to fit in with the prevalent social order."[257] This can especially be true in a law school setting where legal education often presents itself as a social and academic disconnect from previous experiences for all students.[258] Using hypotheticals and examples in class discussions that reflect diverse demographic realities makes the material more relatable for all students and can help minority students feel more socially connected to the lesson being taught and to the law school experience. Professors should carefully and fully integrate examples that go beyond finding a racially conscious connection to "make it 'relevant' to minority students."[259] Instead, professors should strive to include diverse, relatable content that is culturally responsive and engaging. This approach quietly indicates that there is no need to dispose of cultural norms to earn a legal education and be accepted.

While law students tend to notice what goes unsaid, they equally notice what is said in a quiet manner. Quietly integrating the opportunity to hear and reflect on diverse voices in the classroom loudly showcases the essential humanity of all people—even the students' humanity—and enriches the law school experience. All students become more deeply engaged because the integration fosters a sense of belonging in an environment that has traditionally left students feeling inadequate. The quiet lessons of diversity are the lessons that display a deep respect for students, society, and legal education.

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256. Lynch, *supra* note 253.

257. *Id.*

258. *See* Susan Sturm & Lani Guinier, *The Law School Matrix: Reforming Legal Education in a Culture of Competition and Conformity*, 60 VAND. L. REV. 515, 529–30 (2007).

259. Zaretta Hammond, *3 Tips to Make Any Lesson More Culturally Responsive*, CULT OF PEDAGOGY (Apr. 1, 2015), https://www.cultofpedagogy.com/culturally-responsive-teaching-strategies/.

3. Audibly

Ample opportunities exist in legal education for audible lessons on diversity issues that would both benefit from—and provide a benefit to—an inclusive group of students and faculty. In truth, audible lessons in classes are most likely the lessons envisioned by Justice Powell in *Bakke*,[260] Justice O'Connor in *Grutter*,[261] and Justice Kennedy in *Fisher II*.[262] They are the a posteriori discussions of academia, imagined as lofty, noble, and thought-provoking, and led by professors with rigor and temerity. They probe hot issues in a respectful manner that leave students and professors enlightened and educated. Unfortunately, but realistically, they are also daunting and deterring to many faculty members.

Discussions on diversity topics can appear threatening because they involve relinquishing some control of the classroom while delving into controversial topics that can be difficult to navigate. Cases taught in law school often involve issues of race, culture, sexual orientation, and gender because at their core they are disputes between parties which involve human behavior and rights. Exploring these topics beyond a superficial level provides a challenge to many faculty members because the topics are often politically and emotionally charged. The challenge in delving into these issues is the unknown. Professors worry that no matter how well planned the lesson is, they have little control over what students voice in the discussion. The fear is that something will be said by a student—or perhaps even the professor—that will be offensive to others and will make the discussion go terribly awry and be uncontrollable.

With advanced planning, however, these concerns can be negated. Five steps professors can take to overcome these issues include: (1) establishing clear ground rules, (2) modeling behavior, (3) consistently connecting the discussion to the material, (4) leading with learning objectives, and (5) planning for what to do if the discussion goes awry.[263] By thinking carefully about classroom discussions, professors can develop the skills needed to confidently lead spirited conversations involving diversity issues.

260. *See* Regents of Univ. of Cal. v. Bakke 438 U.S 265, 311–13 (1978).
261. *See* Grutter v. Bollinger, 539 U.S. 306, 332–33 (2003).
262. *See* 136 S. Ct. 2198, 2211 (2016).
263. *Managing Difficult Classroom Discussions*, IND. UNIV. BLOOMINGTON: CTR. FOR INNOVATIVE TEACHING & LEARNING, https://citl.indiana.edu/teaching-resources/diversity-inclusion/managing-difficult-classroom-discussions/index.html (last visited July 31, 2020).

First, professors should establish well-defined ground rules for class discussions at the start of each course.[264] These rules should go beyond the customary rules of having students raise their hands and wait to be called on before speaking.[265] Instead, professors should address the fact that class topics may be controversial, and that rules are a necessary part of the armature needed to build knowledge.[266] Rules should be specific to each course but could, at a bare minimum, suggest civility and respect for each other's views as a prerequisite for engaging in class discussion.[267] This stark requirement could be further developed by setting guidelines for criticizing ideas instead of people and avoiding inflammatory language and assumptions that individuals speak on behalf of their race, gender, or ethnic group.[268] For example, professors concerned about their students' use of urban slang or racial epithets could establish a guideline stating that words that make others uncomfortable should be avoided in classroom discussions. Indeed, some words are so toxic to the learning environment that professors could explain early on that the use of them will not be tolerated in the classroom, just as they would not be tolerated in the workplace.[269]

Providing students with these basic guidelines may seem unnecessary in the law school setting where most students are adults. When dealing with sensitive issues concerning diversity, however, guidelines help create safe environments because they set expectations. They help establish trust by telling students that words and behavior matter in the law school classroom. They also serve as a reminder if class discussions become a problem at any time during the course.[270] Because law students come from different backgrounds and social norms, they will likely appreciate having a set of guidelines to better gauge what is appropriate in the law school setting.

Second, professors should plan on modeling appropriate behavior. Because students watch professors for guidance on what is appropriate in the classroom,[271] professors must model civil behavior. Exhibiting

264. *Id.*
265. *Id.*
266. *Id.*
267. *Id.*
268. *Id.*
269. *See* Gates v. Bd. of Educ. of Chi., 916 F.3d 631, 640–41 (7th Cir. 2019) (holding that the use of the "N-word" by a supervisor could create a hostile work environment).
270. START TALKING: A HANDBOOK FOR ENGAGING DIFFICULT DIALOGUES IN HIGHER EDUCATION 12 (Kay Landis ed., 2008).
271. *Teaching Controversial Topics*, YALE: POORVU CTR. FOR TEACHING & LEARNING, https://poorvucenter.yale.edu/teaching/ideas-teaching/teaching-controversial-topics (last visited Aug. 13, 2020).

thoughtfulness in word choice and respect for others in heated discussions encourages students to follow and adjust their behavior accordingly. When discussing diversity issues, professors also should be careful to own their own shortcomings and acknowledge that their background influences their behavior.[272] While extensive implicit bias training[273] is outside the realm of most doctrinal law school classes, professors can model appropriate behavior by refusing to condone explicit and conscious bias.[274] Instead, professors should model how to engage in appropriate and productive dialogue by speaking with respect and care.

Third, professors should consistently work to link diversity discussions with classroom material, when appropriate. Diversity discussions should not be detached, disingenuous, or distended. Rather, they should develop from carefully selected materials. For example, professors teaching property law may touch on issues involving property rights in the human body. Although some professors would cover the concept by assigning and reviewing the notorious *Moore v. Regents of the University of California*[275] case, others may want to go further and also assign notes from *The Immortal Life of Henrietta Lacks*[276] and *The Antelope*[277] case. *Moore*, a great teaching tool for exploring issues of self-ownership and personal autonomy, touches on the historical question of slavery in a more contemporary context.[278] It is a good case to use to discuss the morality and marketing of human body parts.[279] A discussion involving diversity issues, while not completely disconnected, is not directly on point either. Adding notes from *The Immortal Life of Henrietta Lacks* would more explicitly connect the course material to issues of race in property rights in the human body because the book involves a poor black tobacco farmer who had her cells taken and used without her knowledge for medical research.[280] To link a diversity

272. *See* Jan De Houwer, *What is Implicit Bias?*, PSYCH. TODAY (Oct. 13, 2019), https://www.psychologytoday.com/us/blog/spontaneous-thoughts/201910/what-is-implicit-bias.

273. Implicit bias training should be offered to all law school faculty and students; ideally, it would be led by professionals who have an expertise in implicit bias training.

274. Social psychologists consider explicit and conscious bias to be intentional discrimination. *See* Michael Selmi, *The Paradox of Implicit Bias and a Plea for a New Narrative*, 50 ARIZ. ST. L.J. 193, 208 (2018).

275. 793 P.2d 479 (Cal. 1990) (en banc).

276. REBECCA SKLOOT, THE IMMORTAL LIFE OF HENRIETTA LACKS (2011).

277. 23 U.S. (10 Wheat.) 66 (1825) (considering the validity of claims to title in human beings against their claims to their own freedom).

278. *Moore*, 793 P.2d at 480, 493–94 (assessing the property interest human beings have in the parts of their bodies).

279. *Id.*

280. *See* SKLOOT, *supra* note 276, at 3–4.

discussion legitimately and simply to the classroom material, however, *The Antelope* could be assigned as an introductory case to the topic of property rights in the human body. *The Antelope* confronts a property dispute over the ownership of human beings and lends itself to a discussion of slavery, the slave trade, and judicial decision-making.[281] If a professor wishes to delve deeper into the issues of racism and property ownership, the collocation of the two cases, along with the notes from *The Immortal Life of Henrietta Lacks,* provide sufficient background to start the discussion. The use of carefully selected pedagogical tools creates opportunities to engage students on diversity topics that can help them more fully appreciate the development of the law, its shortcomings, and its strengths. This reflects American pluralism in a manner that increases awareness of issues going beyond black letter law.

Fourth, professors can include a learning objective in course syllabi that is aimed at exposing students to diverse perspectives. In doing so, professors should explain to their students why they have a learning objective connected to diversity. For some, the reason may be to simply increase awareness of different viewpoints.[282] For others, the reason may be to further understanding of diversity issues.[283] For still others, the reason may be to further the application of diversity principles.[284] The key is for professors to be clear with students as to why they are going to be having diversity conversations and what learning outcomes are expected.[285]

Two legitimate concerns arising from including a learning objective related to diversity are that it may make diversity seem to be (1) a special stand-alone concept, or (2) an attempt to indoctrinate students to a specific way of thinking. When viewed as a stand-alone concept, the unfortunate result is that diversity discussions appear to be stilted efforts by professors who are isolating the objective.[286] Carefully finding points in the curriculum where the material naturally supports diversity discussions should eliminate the notion that diversity is only an add-on to more essential topics.[287] Equally important, however, is avoiding

281. *See generally The Antelope*, 23 U.S. (10 Wheat.) 66.
282. *See generally Diversity in the Curriculum*, ASS'N OF SCHS. OF JOURNALISM AND MASS COMMC'N, http://asjmc.org/resources/diversity_booklet/5_curriculum.pdf (last visited Aug. 11, 2020).
283. *Id.*
284. *Id.*
285. *Managing Difficult Classroom Discussions*, *supra* note 263.
286. *See Diversity in the Curriculim*, supra note 281.
287. *Id.*

"whack[ing] students over the head with diversity"[288] by including a learning objective that some would conclude amounts to indoctrination. To combat this, professors should continue to model civility and open-mindedness in class discussions. For example, the learning objective could explain that all diversity discussions will be approached with "open-mindedness and intellectual humility."[289] The explanation, of course, will have to be followed up with the pursuit of both. Doing so should help professors audibly, but not piercingly, create meaningful learning objectives on diversity that promote powerful discussions.

Finally, professors must plan for what they will do if diversity discussions become muddled, insensitive, or offensive. Discussions can become confusing if they are not carefully considered and planned before being introduced in class. Discussions can also quickly become insensitive if the professor does not actively monitor the dialogue. Most concerning to professors, however, are discussions that offend students and leave them feeling uncomfortable in the classroom. For example,[290] in one classroom, a professor teaching a first-year law school class had the unhappy experience of having a student say the "N-word" during a discussion about a case involving diversity issues. The professor had previously set out guidelines specifically stating that the word was unacceptable to him. He also modeled civility and proper discourse throughout all previous class discussions, and he carefully linked the diversity discussion to relevant class materials. When the incident occurred, the other students in the class were greatly upset by the use of the word, and the student saying the word was associated with her classroom behavior for the rest of her time in law school.

Admittedly, this incident would shake most professors, even those with a significant amount of teaching experience. If an incident like this occurs, however, the professor should remain composed and work to turn it into a teaching moment. To begin, the professor could give a gentle reminder of the established ground rules. In fact, a reminder before the discussion begins may prevent the incident. Next, the professor could address the incident directly by sharing the professor's discomfort and explaining why the ground rule exists. Perhaps the professor could explain the significance of words in the legal profession and the skill of knowing what words to use in different situations. Finally, the professor

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288. *Id.*

289. David Gooblar, *What Is "Indoctrination?" And How Do We Avoid It in Class?*, THE CHRON. OF HIGHER EDUC. (Feb. 19, 2019), https://www.chronicle.com/article/what-is-indoctrination-and-how-do-we-avoid-it-in-class/.

290. This anecdote comes from a colleague teaching at another law school.

would need to decide when and how to further address the student whose behavior upset the discussion. The situation would need to be judged to determine whether the incident should be further discussed with the entire class present or with the student privately after class. In either situation, the class should receive the message that the incident is taken seriously and will be addressed. In addressing the incident, the professor could try to determine whether the statement was made out of ignorance, naïve consideration, or malice. The key is to approach the situation as an educator.

Audible diversity lessons may seem daunting at first, especially when controversial topics are being discussed. Planning for the discussions, however, can relieve some of the apprehension associated with them. Weaving diversity discussions directly into courses gives them meaning in a manner that goes beyond the nonexistent or somewhat stagnant appearance that can occur when they are not planned. Having an explicit and purposeful plan helps students understand expectations and makes them feel more comfortable speaking up in class. As a result, the discussions have the potential to ring and be heard in law school education, just as the justices perhaps imagined.

IV. THE CONTINUED NEED FOR INCLUSION IN LAW SCHOOL IN A RACE- CONSCIOUS CULTURE

The continued need for diverse students, law schools, and lessons becomes evident with a quick review of post-*Fisher* state congressional action and litigation. Shortly after *Fisher II* was decided, the Texas legislature, unhappy with the *Fisher II* decision, made a failed attempt to restrict the number of students who could be automatically admitted through the Top Ten Percent Law.[291] Additionally, a new lawsuit was filed against the University of Texas, questioning whether the University was "engag[ing] in constant deliberation and continued reflection"[292] of its admissions policies.[293] The suit, filed in state court for violating the

291. Shakira D. Pleasant, *Fisher's Forewarning: Using Data to Normalize College Admissions*, 21 U. PA. J. CONST. L. 813, 817 (2019).

292. *Fisher II*, 136 S. Ct. 2198, 2215 (2016).

293. *See* Pleasant, *supra* note 291, at 816.

Texas Constitution,[294] was dismissed but refiled in 2019.[295] In 2020, the University of Texas was sued again by Students for Fair Admissions, an organization representing two white students who were denied admission to the University.[296]

Of course, displeasure with *Fisher II* and affirmative action litigation is not limited to the University of Texas. While Justice Powell may have celebrated Harvard's admission plan in *Bakke*,[297] the school was sued in 2017 for allegedly discriminating against Asian-Americans.[298] Similarly, the University of North Carolina-Chapel Hill was sued for claimed racial discriminatory admissions policies against Asian-Americans.[299] In both cases, the same plaintiff—again, Students for Fair Admission—claimed that the universities unfairly used race to give preference to underrepresented minorities at the expense of Asian-American applicants.[300] While the lawsuit against the University of North Carolina is presently ongoing, Harvard recently prevailed in defending its suit.[301] The court, in deciding that Harvard can continue to use race-conscious admissions, opined:

> The students who are admitted to Harvard and choose to attend will live and learn surrounded by all sorts of people, with all sorts of experiences, beliefs and talents. They will have the opportunity to know and understand one another beyond race, as whole individuals with unique histories and experiences. It is this, at Harvard and elsewhere that will move us, one day, to the point where we see that race is a fact, but not the defining fact and not

294. Plaintiff's Original Petition & Application for Permanent Injunction at 9–10, Students for Fair Admissions, Inc. v. Univ. of Tex. at Austin, 2019 WL 10369702 (Tex. Dist. Ct. Mar. 5, 2019) (No. D-1-GN-17-002930).

295. Nell Gluckman, *U. of Texas Is Sued Over Affirmative Action in Admissions. Yes, Again.*, CHRON. OF HIGHER EDUC. (May 16, 2019), https://www.chronicle.com/article/u-of-texas-is-sued-over-affirmative-action-in-admissions-yes-again/.

296. Raga Justin, *UT Austin Faces Lawsuit After 2 White Students Denied Admission*, TEX. TRIB. (July 27, 2020), https://abc13.com/ut-austin-university-of-texas-lawsuit-affirmative-action-students/6336142/.

297. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 316–18 (1978).

298. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 261 F. Supp. 3d 99, 103 (D. Mass. 2017).

299. Gabriella Muñoz, *Harvard, UNC Sued for Racial Discrimination Against Asian-American Students*, WASH. TIMES (June 15, 2018), https://www.washingtontimes.com/news/2018/jun/15/harvard-university-sued-alleged-racial-discriminat/.

300. *Id.*

301. Clare Lombardo & Elissa Nadworny, *Federal Judge Upholds Harvard's Race-Conscious Admissions Process*, *All Things Considered*, NPR (Oct. 1, 2019, 3:31 PM), https://www.npr.org/2019/10/01/730386096/federal-judge-rules-in-favor-of-harvard-in-admissions-case.

> the fact that tells us what is important, but we are not there yet.[302]

The decision was appealed to the First Circuit Court of Appeals.[303]

Most recently, the Justice Department has accused Yale University of violating Title VII of the Civil Rights Act[304] for allegedly using race as a predominant factor in admissions.[305] The Justice Department's investigation indicated that Yale University's diversity goals are "vague, elusory and amorphous," and result in discrimination against Asian-American and white applicants.[306] Because Yale University officials have stated that the allegations are baseless and they are unlikely to change their admissions policies,[307] the Justice Department is expected to file a lawsuit similar to the suits against Harvard and the University of North Carolina-Chapel Hill.[308]

This ongoing litigation suggests that the true value of diversity in higher education has not yet been fully recognized. In Justice Thomas's concurrence in part and dissent in *Grutter*, he stated, "[i]t is the *educational benefits* that are the end, or allegedly compelling state interest, not 'diversity.'"[309] In fact, as has been repeatedly recognized since *Grutter*, it is the educational benefit *of the diversity* that is most compelling.[310] In a country that remains deeply divided by race, the educational benefit of having diverse students and faculty engaged in dialogue is fundamental to higher education because it deepens the understanding of one another's positions and ultimately leads to stronger societal ties. Perhaps one day these ties will be strong enough that the Court's focus on "diversity" in education can be shifted to the more compelling interest of the educational benefits emanating from "inclusion" in education.

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302. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 397 F. Supp. 3d 126, 205–06.

303. Kirk Carapezza, *Advocacy Group Appeals Harvard Discrimination Decision*, WGBH NEWS (Feb. 18, 2020), https://www.wgbh.org/news/local-news/2020/02/18/advocacy-group-appeals-harvard-discrimination-decision.

304. 42 U.S.C. §§ 2000e to 2000e-17 (1964).

305. Anemona Hartocollis, *Justice Department Accuses Yale of Discrimination in Application Process*, N.Y. TIMES (Aug. 13, 2020), https://www.nytimes.com/2020/08/13/us/yale-discrimination.html.

306. *Id.*

307. *Id.*

308. *Id.*; *see* Muñoz, *supra* note 299.

309. Grutter v. Bollinger, 539 U.S. 306, 355 (2003) (Thomas, J., concurring and dissenting).

310. *See, e.g.*, Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 703 (2007).

V. CONCLUSION

The benefits of inclusion in higher education serve not only as compelling state interests for the high court, but also as significant interests in legal education. Legal education should be a multicultural, comprehensive experience. Law schools' faculties and students should reflect the race-conscious societies they serve. Lessons promoting the importance of understanding differences, whether given silently, quietly, or audibly, promote a culture going beyond the humble value classroom aesthetics provide. They promote a culture of inclusivity. Because lawyers serve people of all races and genders, law schools should strive to better prepare students to work in an inclusive society. The more diversity becomes a topic of discussion in law schools, the more comfortable and engaging the discussions will become. Ideally, these conversations will help students and faculties develop increased insights and will promote equality in the educational experience.