

Spring 3-1-2018

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Recommended Citation

Samia E. McCall, *Thinking Outside of the Race Boxes: A Two-Pronged Approach to Further Diversity and Decrease Bias*, 2018 BYU Educ. & L.J. 23 (2018).

Available at: <https://digitalcommons.law.byu.edu/elj/vol2018/iss1/3>

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THINKING OUTSIDE OF THE RACE BOXES:
A TWO-PRONGED APPROACH TO FURTHER DIVERSITY AND
DECREASE BIAS

SAMIA E. MCCALL*

“Diverse perspectives and experiences are central to academic quality because they expand creative thought and analysis, test unexamined assumptions, challenge accepted truths, and broaden understanding of ourselves and our world”— Reverend Paul L. Locatelli

INTRODUCTION

In spite of increases in diversity across university campuses nationwide,¹American concerns regarding race relations appear to be at an all-time high.²Diversity in law schools is meant to “eliminate bias in the legal profession” by bringing groups of different backgrounds together.³So the fact that reported diversity rates in higher education have increased in the last several decades while race relations in the United States deteriorate may indicate that higher education programs are not effectively eliminating bias—they are not truly achieving diversity. Current events reflect a concerning state of race relations in the United States.⁴Between the rise of white nationalist

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1. See Lisa M. Rudgers & Julie A. Peterson, *Coming in 2017*, INSIDE HIGHER EDUC. (Jan. 13, 2017), available at <https://www.insidehighered.com/views/2017/01/13/upcoming-trends-2017-colleges-should-prepare-essay> (last visited Aug. 16, 2017) (finding that in general the student population is becoming more diverse).

2. See Art Swift, *Americans’ Worries About Race Relations at Record High*, GALLUP NEWS (Mar. 15, 2017), available at <http://www.gallup.com/poll/206057/americans-worry-race-relations-record-high.aspx> (last visited Aug. 16, 2017).

3. See, e.g., DIVERSITY PLAN, A.B.A., 1 (May 2011), https://www.americanbar.org/content/dam/aba/global/ABA_Diversity_Plan_May_2011.pdf (last visited Aug. 16 2017) (setting bias elimination as a goal of diversity).

4. See, e.g., Mahita Gajanan, *70% of Americans Think Race Relations Are Bad*, TIME (Sept. 21, 2017), <http://time.com/4952612/race-relations-poll-charlottesville-donald-trump/> (last visited Oct. 28, 2017) (mentioning police shootings of black suspects and Charlottesville).

groups, the Black Lives Matter movement, and violence regarding the removal of Confederate statutes, the United States appears increasingly polarized.⁵We lack civilized and meaningful engagement among groups of different thought.⁶

Diversity is imperative to the richness of law school debate in particular and is a necessary component to shaping law students into lawyers who can engage with and represent people of different classes, backgrounds, and belief systems.⁷A good lawyer should be able to serve and represent clients from all backgrounds and walks of life, and should be able to advocate for various viewpoints, even those with which that lawyer may not agree.⁸Currently, law schools measure diversity based on an antiquated and arguably unconstitutional “check the box” approach to racial categories, grouping the world’s peoples into five racial categories.⁹Professor Philip Lee called this type of diversity “checkbox diversity” because it “assumes that diversity is simply reducible to the number of students in a college, university, graduate school, or professional program who choose to self-identify as racial or ethnic minorities on their applications.”¹⁰“Checking a box” suggests that the task has been completed and that there is no more work to be done. When it comes to diversity in law schools, however, compiling a racially diverse class is merely the first step. Once groups of different backgrounds are placed together in an incoming class, the school must work hard to bridge differences, find common ground, and break down stereotypes.

Checkbox diversity does not necessarily contribute to the diversity of dialogue in law schools because it cannot factor in individual ex-

5. See, e.g., Harriet Sinclair, *Black Lives Matter Calls for U.S. to Ban Confederate Symbols After Charlottesville Violence*, NEWSWEEK (Aug. 15, 2017), <http://www.newsweek.com/black-lives-matter-ban-confederate-symbols-charlottesville-violence-651106>.

6. “Educators must provide guided interaction among students of different backgrounds to ensure that students engage constructively to understand their similar and different experiences, and develop individual and collective efficacy to impact the world around them.” Biren (Ramesh) A. Nagda, Patricia Gurin, Nicholas Sorensen & Ximena Zúñiga, *Evaluating Intergroup Dialogue: Engaging Diversity for Personal and Social Responsibility*, 12 DIVERSITY & DEMOCRACY 4, 4 (2009).

7. See, e.g., Susan Bryant, *The Five Habits*, 8 CLINICAL L. REV. 33, 36 (2001).

8. See, e.g., Anthony D. Romero, *Equality, Justice and the First Amendment*, ACLU (Aug. 15, 2017, 6:00 PM), <https://www.aclu.org/blog/speak-freely/equality-justice-and-first-amendment> (last visited Aug. 16, 2017).

9. See *infra* section I.A.; Philip Lee, *On Checkbox Diversity*, 27 J. C.R. & ECON. DEV. 203, 203 (2013).

10. *Id.* at 203.

periences that come from each student's unique history. Each student may bring distinctive viewpoints which could add to the richness of the dialogue and development of critical thinking skills in the classroom. Such critical thinking skills help produce lawyers capable of serving clients of all backgrounds and races.

Checkbox diversity is not only problematic; it results in some costly litigation.¹¹In fact, recent news indicates that the Trump administration intends to spend taxpayer dollars investigating race-based admissions policies at universities and while potentially filing lawsuits.¹²The American Bar Association (ABA) and law schools must look at diversity in an individual context as mandated by the Supreme Court and should work toward defining and measuring diversity in the broadest sense.¹³Then, to truly succeed in implementing diversity initiatives, schools must not only admit diverse student bodies and hire diverse faculty and staff, but must also work to ensure that there is meaningful classroom engagement. Such engagement serves to break down negative stereotypes and helps achieve better educational results for students.¹⁴

Part I of this article examines the race categories used to define and measure diversity and the limitations of these categories. The history of affirmative action and United States Supreme Court jurisprudence on affirmative action are also discussed in Part I. Part I further explains how the Supreme Court agrees that diversity should be viewed in context as it pertains to each individual. People do not fit

11. Just one year after the Supreme Court ruled on the University of Texas at Austin's race-based admissions policy in *Fisher v. Univ. of Tex.*, 136 S. Ct. 2198, 2210 (2016), another case has been filed challenging the *Fisher* policy. See Matthew Watkins, *Man behind Fisher affirmative action case files new lawsuit against UT-Austin*, TEX. TRIB. (June 27, 2017), <https://www.texastribune.org/2017/06/27/man-behind-fisher-case-files-new-lawsuit-challenging-affirmative-action/> (last visited Oct. 28, 2017).

12. See Charlie Savage, *Justice Dept. to Take On Affirmative Action in College Admissions*, WASH. POST (Aug. 1, 2017), <https://www.nytimes.com/2017/08/01/us/politics/trump-affirmative-action-universities.html>; Sari Horwitz & Emma Brown, *Justice Department plans new project to sue universities over affirmative action policies*, WASH. POST (Aug. 1, 2017), https://www.washingtonpost.com/world/national-security/justice-department-plans-new-project-to-sue-universities-over-affirmative-action-policies/2017/08/01/6295eba4-772b-11e7-8f39-eeb7d3a2d304_story.html?utm_term=.000e55344561 (last visited Oct. 30, 2017).

13. See *infra* section I.B.

14. Studies have shown that minority students who feel stereotyped in class tend to underperform, to the detriment of both the minority and majority groups. When meaningful dialog and integration occurs, the different groups can work together, break down stereotypes, eliminate implicit bias, and better achieve their academic potential. See Rachel D. Godsil, *Why Race Matters in Physics Class*, 64 UCLA L. REV. DISC. 40, 58–62 (2016).

neatly into four or five racial categories.¹⁵

In Part II, this article considers how schools might define diversity in a broader sense. Racial diversity is certainly important, but it is only one type of diversity.¹⁶ By taking into account other types of diversity, such as socioeconomic diversity, geographic diversity, religious diversity, and political diversity, law schools can consider the diversity contained within each race as well as other underrepresented and marginalized groups. Incorporating broad and race-neutral terms into the definition of diversity can help ensure that more diverse viewpoints are represented in the classroom. Diverse viewpoints and opinions will lead to more opportunities for engagement, which can ultimately lead to the dissolution of stereotypes. When schools promote meaningful engagement amongst a diverse student body and break down stereotypes between diverse groups schools will achieve truer diversity.

Finally, Part III analyzes a two-pronged approach to achieving true diversity: the diversity statement in the admissions process coupled with the implementation of a diversity pedagogy in law school. It is not sufficient to admit students who are diverse according to limited racial categories. Law schools should allow students to express their own identities through a diversity statement. In this way, diversity may be viewed in a more individualized context. Once schools have admitted a class of truly diverse students, schools must work to ensure that the students engage with each other meaningfully, in ways that help break down stereotypes, work toward eliminating bias, and produce lawyers ready to serve all of society.

15. Some people identify with more than one category. Some do not identify with any category strongly. Some think they have ancestry from one, but later learn that their heritage is from an entirely different place. Even others may have strong cultural ties to a race or ethnicity to which they have no biological connection. One student asked, “When do I just get to be American? Why do I always have to carry the burden of my ancestors’ origins when I have nothing to do with them?” JENNIFER L. HOCHSCHILD, VESLA WEAVER & TRACI BURCH, *CREATING A NEW RACIAL ORDER: HOW IMMIGRATION, MULTICULTURALISM, AND GENOMICS, AND THE YOUNG CAN REMAKE RACE IN AMERICA*, 21 (2012).

16. See, e.g., DIVERSITY PLAN, A.B.A., *supra* note 3, at 4 (including “women, minorities, lesbian, gay, bisexual and transgender individuals, and persons with disabilities” as diverse individuals).

I. LIMITATIONS OF RACE CATEGORIES

It is human nature to want to sort things into categories.¹⁷ People put foods into food groups; they put cars into makes and models; they sort plants and animals. People even place sports teams and schools into conferences and divisions. They also seek to categorize each other into neat concepts of race and ethnicity; but categorizing people is neither easy nor neat.

The concepts of race and ethnicity are opaque at best. As early as the eighteenth century, significant debate surrounded the question of how many racial classifications existed.¹⁸ In the early 1700s, Carl Linnaeus, called the father of taxonomy, sorted and classified all living things into the following groups: “*kingdom, phylum, class, order, family, genus, and species.*”¹⁹ He also offered us the following race classifications from which our current race categories are derived:

Americanus: reddish, choleric, and erect; hair black, straight, thick; wide nostrils, scanty beard; obstinate, merry, free; paints himself with fine red lines; regulated by custom.

Asiaticus: sallow, melancholy, stiff; hair black; dark eyes; severe, haughty, avaricious; covered with loose garments, ruled by opinion.

Africanus: black, phlegmatic, relaxed; hair black, frizzled; skin silky; nose flat; lips tumid; women without shame, they lactate profusely; crafty, indolent, negligent; anoints himself with grease; governed by caprice.

Europeus: white, sanguine, muscular; hair long, flowing; eyes blue; gentle. Acute, inventive; covers himself with close vestments; governed by laws.²⁰

Following Linnaeus’s work, Johann Blumenbach separated Pacific Islanders from Asiaticus and labeled and ranked the following five races in 1776: “Caucasian, Mongolian, Malay, American Indian, and Negro (Ethiopian).”²¹ Some scientists, however, thought there should

17. Scott Barry Kaufmann, *The Pesky Persistence of Labels*, PSYCHOLOGY TODAY (Oct. 13, 2012), <https://www.psychologytoday.com/blog/beautiful-minds/201210/the-pesky-persistence-labels> (last visited Oct. 30, 2017) (“The tendency to classify and categorize objects is a deeply ingrained aspect of human nature.”).

18. KENNETH PREWITT, WHAT IS YOUR RACE?: THE CENSUS AND OUR FLAWED EFFORTS TO CLASSIFY AMERICANS 14–17 (2013).

19. *Id.* at 15.

20. *Id.* at 14–15. Linnaeus “favored skin color as the distinguishing trait.” *Id.* at 15.

21. *Id.* at 17 (“Although Blumenbach avoided the moralistic terms embraced by Linnaeus, he offered the first explanation for the presumed superiority of the white race.”).

be only three categories (Caucasian, Mongolian, and Ethiopian), and others argued there should be four (including either Malay/Australian/Polynesian or Ameri-Indians).²² “[T]he vast disagreement among scientists attempting to divide humanity by race only served to reflect the arbitrary and constructed nature of the categories in the first place. . . .”²³ Nevertheless, “[t]oday, nearly two and a half centuries later, these are the same five races into which the U.S. Census divides the American population, making America the only country in the world firmly wedded to an eighteenth-century racial taxonomy.”²⁴

But as interracial marriage and immigration have increased, the task of sorting people into neat categories of race and ethnicity so they can be tracked and evaluated in a meaningful way is becoming increasingly difficult.²⁵ “What constitutes a race or ethnic group has been no more stable over time than how many there are.”²⁶ But, despite the arbitrary nature of racial classification, the United States government and most American law schools continue to divide and sort constituents according to antiquated race categories.

A. Law School Diversity Standards

Though the American Bar Association (“ABA”) commits itself to diversity and inclusion, it, too, relies on antiquated race categories to

22. JOHN TEHRANIAN, *WHITEWASHED: AMERICA’S INVISIBLE MIDDLE EASTERN MINORITY* 20 (2009). There has been extensive debate and disagreement among leading ethnologists regarding the “correct” number of human races, which supports the fact that race is a social construct and subject to change.

23. *Id.* “Of all the odd myths that have arisen in the scientific world, the ‘Caucasian mystery’ invented quite innocently by Blumenbach is the oddest. A Georgian woman’s skull was the handsomest in his collection. Hence it became his model exemplar of human skulls, from which all others might be regarded as deviations; and out of this, by some strange intellectual hocus-pocus, grew up the notion that the Caucasian man is the prototypic ‘Adamic’ man.” *Id.* (quoting Thomas Henry Huxley).

24. PREWITT, *supra* note 18, at 8. “The political understanding in the nineteenth century that counting the population by race could do nationally significant policy work led naturally to a close partnership between race science and census statistics, setting the stage for what 150 years later we call *evidence-based policy*.” *Id.* at 9.

25. *See, e.g.*, HOCHSCHILD, *supra* note 15, at 60–63.

26. *Id.* at 4. American identification and conceptualization of race is currently so unsettled that some argue that we are now in a post-racial society where concepts of race should be abandoned and those who argue that racism is more prominent now than ever. *Id.* at 7. How do we neatly categorize someone who self-identifies as a “gay Jewish Cuban American” or “adopted Chinese into an Indonesia and Filipino family”? *Id.* at 6. “Americans are creating a new racial order as a consequence of increasing heterogeneity in the constituent racial and ethnic groups of the United States.” *Id.* at 8.

assess and accredit law schools. Influenced by the United States Census,²⁷ the ABA has defined race and ethnicity categories as follows:

Hispanics of any race: A person of Cuban, Mexican, Puerto Rican, South or Central American or other Spanish culture or origin, regardless of race.

American Indian or Alaska Native: A person having origins in any of the original peoples of North America and who maintains cultural identification through tribal affiliation or community recognition.

Asian: A person having origins in any of the original peoples of the Far East, Southeast Asia, or the Indian Subcontinent, including, for example, Cambodia, China, India, Japan, Korea, Malaysia, Pakistan, the Philippine Islands, Thailand, and Vietnam.

Black or African American: A person having origins in any of the black racial groups of Africa.

Native Hawaiian or Other Pacific Islander: A person having origins in any of the original peoples of Hawaii, Guam, Samoa, or other Pacific Islands. . .

White: A person having origins in any of the original peoples of Europe, *the Middle East or North Africa*.²⁸

Under its Diversity Plan, the ABA seeks to “eliminate bias and enhance diversity” so as to “promote full and equal participation” in

27. See *Hochschild et al., supra note 15*, at 5 (showing 2010 United States Census form). See also *United States Census Bureau Race Definitions*, <https://www.census.gov/topics/population/race/about.html> (last visited Oct. 19, 2017).

28. *2016 ABA Annual Questionnaire: PART II – ADMISSIONS & ENROLLMENT INFORMATION*, A.B.A., https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/governancedocuments/2016_aq_part2.authcheckdam.pdf (last visited Oct. 2, 2017) (emphasis added). By this definition, Americans who have roots in North African countries, including Egypt, Morocco, Tunisia, Libya and Algeria are not considered African American. *Id.* NBC Today show anchor Hoda Kotb was born to Egyptian parents, so she is considered White under these categorizations. See *TV Host Hoda Kotb on Finding Her Own Way*, WALL ST. J. (Feb. 9, 2016.), <https://www.wsj.com/articles/tv-host-hoda-kotb-on-finding-her-own-way-1455036335> (last visited Oct. 30, 2017). The father of professional volleyball player Gabrielle Reece is from Trinidad. See Alexandra Wolfe, *Weekend Confidential: Gabrielle Reece*, WALL ST. J. (May 17, 2013), <https://www.wsj.com/articles/SB10001424127887324715704578481253038630568> (last visited Oct. 30, 2017). While Trinidad is a Caribbean island and *not* a country in Africa, some tribes there are understood to have come from Africa, so according to these categories, Gabrielle Reece is Black. See *The Black Population: 2010*, 2010 CENSUS BRIEFS (Sept. 2011), 2, <https://www.census.gov/prod/cen2010/briefs/c2010br-06.pdf> (last visited Aug. 7, 2017) (noting that the definition of Black or African American includes “Afro-Caribbean entries, such as Haitian and Jamaican.”).

the legal profession.²⁹The plan references four kinds of diversity: racial and ethnic diversity, gender, disability, and sexual orientation/gender identity.³⁰Standard 206(a) of the ABA Standards and Rules of Procedure for Approval of Law Schools also addresses diversity and inclusion, requiring the following:

[A] law school shall demonstrate *by concrete action* a commitment to diversity and inclusion by providing full opportunities for the study of law and entry into the profession by members of underrepresented groups, *particularly racial and ethnic minorities*, and a commitment to having a student body that is diverse with respect to gender, race, and ethnicity.³¹

The interpretations of Standard 206 further state that “a law school may use race and ethnicity in its admissions process to promote diversity and inclusion.”³²As the other types of diversity mentioned in the ABA Diversity Plan are not specifically mentioned in ABA Standard 206,³³it appears that race and ethnicity carry more weight than the other types of diversity mentioned in the ABA Diversity Plan. Moreover, Standard 509 requires that law schools report certain admissions data, including race and ethnicity data, to the ABA and the public through a Standard 509 Information Report (“509 Re-

29. See DIVERSITY PLAN, *supra* note 3, at 1. Throughout the past few decades, the ABA has taken great efforts to promote diversity through the use of plans, objectives and multiple ABA entities. The term diversity is meant to represent both diversity and inclusion in the ABA Diversity Plan. “Diversity often pertains to the numbers – insuring sufficient numbers of targeted populations are represented. Inclusion addresses how well the diverse individuals are included in all aspects of the organization.” *Id.* at 2.

30. See *Id.* Some types of diversity are easier to identify and measure than other types of diversity. Race and gender, which may be more readily visible, are easier to track and measure, than disability and sexual orientation.

31. *ABA Standards and Rules of Procedure for Approval of Law Schools 2016–2017*, A.B.A. 12 (2016–2017), http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2016_2017_aba_standards_and_rules_of_procedure.authcheckdam.pdf (last visited Aug. 16, 2017) (emphasis added). Although disability and sexual orientation were included in the ABA Diversity Plan, they are not specifically mentioned in ABA Standard 206. *Id.*

32. *Id.* at 13. The ABA is also proposing revisions to Interpretation 206-2 as well as the addition of two new Interpretations 206-3 and 206-4. See Stephanie Francis Ward, *ABA committee weighs adding gender identity, ethnicity to law school accreditation diversity rules*, A.B.A.J., (July 11, 2017), http://www.abajournal.com/news/article/ABA_committee_considers_adding_gender_identity_and_ethnicity (last visited July 27, 2017). The proposed revisions would include consideration of diversity types such as “race, color, religion, national origin, gender, gender identity sexual orientation, age or disability.” *Id.*

33. See *ABA Standards and Rules of Procedure for Approval of Law Schools 2016–2017*, *supra* note 31.

port”).³⁴These data are used to measure the “success” of diversity initiatives.³⁵Race and gender are the only diversity categories mentioned in the ABA Diversity Plan that are tracked through the annual 509 Reports.³⁶

Many law schools report their numbers of minority students, and the schools with higher numbers of minority students are touted.³⁷U.S. News and World Report, a recognized leader in school rankings, has created a “diversity index” to rate and rank schools on their diversity practices. The diversity index works to measure whether law students might encounter a classmate from a different racial or ethnic group at their universities as follows:

To identify law schools where students are most likely to encounter classmates from a different racial or ethnic group, U.S. News has created an index based on the total proportion of full- and part-time minority J.D. students — not including international students — and the mix of racial and ethnic groups on campus during the 2016–2017 academic year.

Groups that form the basis for our calculations are African-American, Asian, Hispanic, American Indian, Pacific Islander, Caucasian and multiracial.

Our formula produces a diversity index that ranges from 0.0 to 1.0. The closer a law school’s diversity index value comes to 1.0, the more diverse the student population and the greater the likelihood that law students will encounter students from a different ethnic group than their own.³⁸

Like the United States Census, the ABA’s definition of White also includes people of Middle East and North African descent.³⁹This

34. See ABA Standards and Rules of Procedure for Approval of Law Schools 2016-2017, *supra* note 31, at 35–36. See also, e.g., UNIVERSITY OF CALIFORNIA DAVIS – 2016 STANDARD 509 INFORMATION REPORT, U.C. DAVIS (2016), <https://law.ucdavis.edu/jd/files/ABA-standard-509b-information.pdf> (last visited Feb. 12, 2017).

35. See, e.g., UNIVERSITY OF CALIFORNIA DAVIS – 2016 STANDARD 509 INFORMATION REPORT, *supra* note 34, at 1. (calculating total minority).

36. See *Id.*

37. See, e.g., AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW DIVERSITY SERVICES BROCHURE, AM. U. <https://www.wcl.american.edu/career/student/sectors/diversity/> (calling itself “one of the most diverse law schools in the country”). Indeed, by checkbox diversity standards, the American University Washington College of Law does exceedingly well.

38. Robert Morse, *Methodology: 2017 Law School Diversity Index*, U.S. NEWS & WORLD REP. (Mar. 13, 2017), <http://www.usnews.com/education/best-graduate-schools/articles/law-school-diversity-index-methodology> (last visited Oct. 2, 2016).

39. See 2016 ABA Annual Questionnaire Instructions, Part II Admissions & Enrollment Information, *supra* note 28.

designation stems from late nineteenth- and early-twentieth-century court rulings where predominantly Christian immigrants from the Greater Syrian region (Syria, Lebanon and Palestine) were seeking to be legally designated as white in order to receive American citizenship.⁴⁰ Thus, an Egyptian immigrant who becomes a United States citizen checks the “White” box right along with a third-generation Scottish family in Massachusetts. And a first-generation Persian from Iran belongs in the same category as the great grandson of a Civil War general from the South. When grouping people into race categories, schools must be cognizant that each of those groups is itself diverse.⁴¹

Arab-Americans and Muslim-Americans may be currently impacted by being labeled White, but they are not the only minority groups labeled White and yet still prone to discrimination. “Italians . . . were one of the most despised groups [in America]. Old-stock Americans called them wops, dagos and guineas and referred to them as the ‘Chinese of Europe’ and ‘just as bad as the Negroes.’”⁴² Many Italian Americans, like African Americans, were also subjected to lynching in the South.⁴³ Nevertheless, Italian Americans have always been classified as White. The definition of White also includes “any of the original peoples of Europe.”⁴⁴ However, Hispanic includes people of Spanish origin.⁴⁵ So is someone whose ancestors are from Spain White or Hispanic? Or two or more races? Muslims lived in Spain for centuries but were expelled during the inquisition, when many went to Morocco.⁴⁶ Are they counted as White? What

40. Alia Malek, “*Dying with the Wrong Name: The Role of Law in Racializing and Erasing Arabs in America*,” 1 GEO. J. L. & MOD. CRITICAL RACE PERSP. 211, 215–18 (2009).

41. See Simon Worrall, *Why Race Is Not a Thing, According to Genetics*, NATIONAL GEOGRAPHIC, Oct. 14, 2017, <https://news.nationalgeographic.com/2017/10/genetics-history-race-neanderthal-rutherford/> (last visited Nov. 6, 2017) (“There is, for instance, more genetic diversity *within* Africa than in the rest of the world put together.”).

42. TEHRANIAN, *supra* note 22, at 24. (citations omitted). Tehranian also described significant racist attacks against Greek immigrants in Idaho and Nebraska in the early 1990s. *Id.* at 24–25.

43. *Id.* at 24.

44. See 2016 ABA Annual Questionnaire Instructions, Part II Admissions & Enrollment Information, *supra* note 28, at 11.

45. See Taylor Pittman, *A Quick Breakdown Of The Difference Between Hispanic, Latino And Spanish*, HUFFINGTON POST (Mar. 14, 2017), http://www.huffingtonpost.com/entry/difference-between-hispanic-latino-and-spanish_us_55a7ec20e4b0c5f0322c9e44 (last visited Aug. 7, 2017).

46. See Gil Shefler, *Spanish Muslims, or Moriscos, seek parity with Jews expelled from Spain*, WASH. POST (June 5, 2014),

about Rachel Dolezal, the ex-NAACP leader who was born white, but identified as black?⁴⁷ How does she fit in to this racial structure? If a person can be born into one gender but identify more with another, a person could be born into one race group but identify more with another.⁴⁸ And what about a White child who is adopted by a black family? Or a Hispanic child adopted by a White family? How would a law school count these individuals for diversity purposes?

Identifying people according to race may be one part of diversity, but it is not the only type of diversity. Many individuals could racially be classified as White but could also be part of an underserved or disadvantaged group. The race categories serve to measure only one aspect of diversity, and even that measurement can be flawed due to the diversity that exists within each racial category as well as the fact that the categories are social constructs and subject to change.⁴⁹ “Fortunately, the world has made significant progress in recognizing that people do not exist in three to five simple and discrete races. Yet for some reason, most Americans continue to acquiesce to being classified by an archaic five-race standard.”⁵⁰ Perhaps this is because check-

https://www.washingtonpost.com/national/religion/spanish-muslims-or-moriscos-seek-parity-with-jews-expelled-from-spain/2014/06/05/3dbf2c78-ece1-11e3-b10e-5090cf3b5958_story.html?utm_term=.48460812063d (“They are descendants of Moriscos, Muslims who were expelled from Spain in 1609 and are scattered across the Mediterranean Sea — cultural cousins of Sephardim, Jews of Spanish descent.”).

47. J. Freedom du Lac & Abby Ohlheiser, *Rachel Dolezal, ex-NAACP leader: ‘Nothing about being white describes who I am’*, WASH. POST (June 16, 2015), https://www.washingtonpost.com/news/morning-mix/wp/2015/06/16/rachel-dolezal-i-identify-as-black/?utm_term=.9d5cc2d387fd. Dolezal claims that she self-identified as black from a young age. *Id.* See also Amy Ellis Nutt, *Black Like Her: Is Racial Identity A State of Mind?*, WASH. POST (June 16, 2015), https://www.washingtonpost.com/national/health-science/black-like-her-is-racial-identity-a-state-of-mind/2015/06/16/765b5a42-142d-11e5-9518-f9e0a8959f32_story.html?utm_term=.650d764b339d (last visited Nov. 6, 2017) (discussing how identity is complicated and can be contradictory).

48. Khaled A. Beydoun & Erika K. Wilson, *Reverse Passing*, 64 UCLA L. REV. 282, 287 (2017) (“For Dolezal, Blackness is more than a racial costume. It is an identity she can fully assume on account of some deep-seated, existential affinity. Presumably, it is also an identity she can shed if her affinity towards Blackness wanes, or is trumped by a competing identity.”).

49. See Simon Worrall, *Why Race Is Not a Thing, According to Genetics*, *supra* note 41.

50. Pratheep Sevanthinathan, *Shifting from Race to Ethnicity in Higher Education*, 9 SCHOLAR 1, 22 (2006) (“[T]hree to five distinct races do not exist.” *Id.*). Again, with the rise of mixed races, it is virtually impossible to statistically track every combination of race and ethnicity with which a person could identify. Race categorization should not be accepted as fact. Rather, it should be viewed with a skeptical eye and subject to change. Critical Race Theorists study the relationship between race and power and question whether laws can be neutral. RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* 3 (2011). Many Critical Race Theorists believe that racism is an ordinary part of American society and that it is difficult to resolve because it is not fully acknowledged. See *id.* at 7–8. Critical

box diversity gives the ABA and law schools school a way to evaluate diversity. However, under these five race groups an Egyptian American is considered white and therefore not diverse.⁵¹ A Jamaican American, however, counts as African American and is diverse.⁵² The Egyptian American, who was born and raised on the continent of Africa, does not count as African American under our current diversity standards; while the Jamaican American, who may have never been to Africa, does.⁵³ In which box do schools put a Basque, a Palestinian, a Mongolian, an Eastern Russian, an Afghani or a Pakistani? As much as some may like them to be, racial categories and distinctions simply are not that neat and clear. It is easy to understand why the ABA and law schools use race categories to evaluate diversity. The race and ethnicity categories, however flawed, give schools a way to quantify diversity. However, since race and gender are the categories tracked and reported through the ABA's 509 Reports, law schools may feel an acute pressure to obtain a particular number of minority admits.⁵⁴

The numbers in a law school's 509 Report, however, do not accurately measure how "diverse" that school might be, because those numbers fail to capture the diversity that may exist in a particular group.⁵⁵ Furthermore, the racial categories are socially constructed, subject to change, and do not represent every underserved group.⁵⁶ They tell us nothing about how these groups are integrated

Race Theorists also believe that race is a social construct with "no biological or genetic reality; rather, races are categories that society invents, manipulates, or retires when convenient." *Id.* at 7. The ABA and law schools should consider how and why the race categories were constructed and question their neutrality. *See also* Adrien K. Wing, *Is There a Future for Critical Race Theory?*, 66 J. LEGAL EDUC. 44, 48 (2016) ("[P]eople in power do not do anything unless it is in their self-interest.").

51. *See 2016 ABA Annual Questionnaire Instructions*, *supra* note 28, (read the definition of "White").

52. *See id.*

53. *See id.*

54. Gail Heriot, *Affirmative Action in American Law Schools*, 17 J. CONTEMP. LEGAL ISSUES 237, 265–67 (2008) ("In the 1990s, fully 31% of law schools admitted to political scientists Susan Welch and John Gruhl that they 'felt pressure' 'to take race into account in making admissions decisions' from 'accreditation agencies.'" *Id.* at 266.). "While nowhere in the ABA's diversity standards (either old or new versions) does it specifically demand that law schools maintain relaxed admissions standards for minority applicants, it has already publically admitted that diversity in law schools can only be maintained through such double standards." *Id.* at 267. Pressure felt by schools may not be unfounded, as the authors go on to describe George Mason University Law School's reaccreditation process and how the law school felt it may have been denied reaccreditation due to minority percentages. *See id.* at 274–79.

55. *See* Vinay Harpalani, *Diversity Within Racial Groups and the Constitutionality of Race-Conscious Admissions*, 15 U. PA. J. CONST. L. 463, 478–79 (2012).

56. *See* DELGADO & STEFANCIC, *supra* note 50, at 7.

once they enter law school, or even if they are meaningfully integrated. They do not measure how a student's mere encounter with classmates from other ethnic groups enhances the classroom experience. There is no test for measuring whether there is actual interaction or exchange of ideas between the groups. It is not clear why international students are not included, for example, in the U.S News and World Report formulation. If the goals are to foster exchange of ideas and to break down stereotypes, international students could certainly help with that. The ABA and law school diversity standards also give no consideration to the demographic of areas where the law schools are located. For instance, a comparison of the demographics of the area surrounding the University of Maryland School of Law with that of the University of Idaho College of Law reveals that Idaho is homogenous, while Maryland is more than half non-White.⁵⁷ This means the University of Idaho may have a more difficult time obtaining a racially diverse student body simply because it is a public school located in Idaho. Both schools could put forth similar efforts as far as recruitment but may obtain different results simply due to the geographic location of the school.

Sorting people into racial groups may also reinforce stereotypes associated with a group.⁵⁸ "Race-based assignments 'embody stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts – their very worth as citizens – according to a criterion barred to the Government by history and the Constitution.'"⁵⁹ Race-conscious admissions, although likely well-intentioned, do not necessarily lead to decreased bias, particularly if law schools are not taking concrete steps to encourage meaningful engagement in the classroom. If a law school admissions committee expects a white Christian male to be the pro-life voice in class, an African American student to be the voice of the Civil Rights movement, and a transgender student to speak up on equal protection issues, then the

57. QUICK FACTS: IDAHO, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/ID/BZA115215> (last visited Oct. 3, 2017), and QUICK FACTS: MARYLAND, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/MD/BZA115215> (last visited Oct. 3, 2017) (first link showing Idaho statistics and the second, Maryland statistics) (according to United States Census Quick Facts, Maryland is 59% White, whereas Idaho is 93% White).

58. See *Miller v. Johnson*, 515 U.S. 900, 911–12 (1995) ("When the State assigns voters on the basis of race, it engages in the offensive and demeaning assumption that voters of a particular race, because of their race, 'think alike, share the same political interests, and will prefer the same candidates at the polls.'") (citations omitted).

59. *Id.* at 912 (citations omitted).

admissions committee is making an erroneous assumption that most or all members of a particular group think alike. Such thinking only serves to reinforce stereotypes and could create more division.

B. Affirmative Action, Diversity, and The Supreme Court

Affirmative action programs were enacted as part of the Civil Rights movement in the 1960s⁶⁰ as an attempt to amend prior wrongs against specific groups (most notably African Americans) who had been discriminated against.⁶¹ As time has passed, affirmative action, and, later, diversity programs have broadened to assist a range of minority groups, not only groups that have been the subject of past discrimination.⁶² However, groups subject to government discrimination may sometimes be negatively impacted by these programs.⁶³

In the landmark 1978 case *Regents of University of California v. Bakke*⁶⁴ and its progeny⁶⁵ the United States Supreme Court examined the constitutionality of such affirmative action programs and concluded that although racial quotas were impermissible, race could be considered as part of an application. Thus, today's concept of diversity was born. As Peter Wood describes in his book *Diversity: The Invention of a Concept*⁶⁶:

President Johnson inaugurated legalized racial preferences in

60. See Exec. Order No. 10925, 26 F.R. 1977 (1961).

61. See David Frum, *The Impossibility of Reparations*, ATLANTIC (Jun. 3, 2014), <https://www.theatlantic.com/business/archive/2014/06/the-impossibility-of-reparations/372041/> (last visited Oct. 3, 2017).

62. See James Webb, *Diversity and the Myth of White Privilege*, WALL ST. J. (July 22, 2010), <https://www.wsj.com/articles/SB10001424052748703724104575379630952309408> (last visited Nov. 6, 2017) (“Those who came to this country in recent decades from Asia, Latin America and Africa did not suffer discrimination from our government, and in fact have frequently been the beneficiaries of special government programs. The same cannot be said of many hardworking white Americans, including those whose roots in America go back more than 200 years.”).

63. See discussion regarding negative impact of affirmative action on Asian Americans, *infra* Section II.A. See also Jeannie Suk Gersen, *The Uncomfortable Truth About Affirmative Action and Asian Americans*, NEW YORKER (Aug. 10, 2017), <http://www.newyorker.com/news/news-desk/the-uncomfortable-truth-about-affirmative-action-and-asian-americans> (last visited Nov. 6, 2017) (“[T]he potential federal civil-rights inquiry signals that the treatment of Asians will frame the next phase of the legal debate over race-conscious admissions programs.”).

64. 438 U.S. 265 (1978).

65. See, e.g., *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Grutter v. Bollinger*, 539 U.S. 306 (2003).

66. PETER WOOD, *DIVERSITY: THE INVENTION OF A CONCEPT* (2003).

1965, but “affirmative action” met increasing popular resistance and legal challenges, culminating in the Supreme Court’s split decision in the 1978 *Bakke* case. The outcome of that case included a one-man opinion drafted by Justice Powell in which he declared that race preferences in college admissions are unconstitutional under most circumstances, but that the minority racial status of an applicant could be considered as “a plus factor” if the college was seeking to increase its intellectual “diversity.”⁶⁷

Affirmative action and diversity initiatives have done a great deal of good for minority groups in higher education.⁶⁸“In the early 1960s, with the exception of students attending historically black colleges and universities, only a relative handful of Americans of color went to college in the United States; today, upwards of one in five undergraduates at four-year schools is a minority.”⁶⁹However, today’s diversity term is so nebulous that it becomes difficult to determine who or what adds or does not add diversity value.⁷⁰In addition, current methods of diversity evaluation do not measure how schools are doing with respect to classroom engagement and actual bias elimination:⁷¹

Diversity, like equality, is an idea that is at once complex and

67. Roger Clegg, *Attacking “Diversity”: A Review of Peter Wood’s Diversity: The Invention of a Concept*, 31 J.C. & U.L. 417, 421 (2005) (quoting WOOD, *supra* note 66, at 289–90). Like affirmative action, diversity has come under attack and will continue to be the subject of litigation. In fact, just one year after *Fisher*, new litigation has been filed in Texas challenging the University of Texas’ admission policies. See Matthew Watkins, *Man behind Fisher affirmative action case files new lawsuit against UT-Austin*, TEX. TRIB., June 27, 2017, <https://www.texastribune.org/2017/06/27/man-behind-fisher-case-files-new-lawsuit-challenging-affirmative-action/> (last visited Oct. 3, 2017).

68. See AM. COUNCIL ON EDUC. & AM. ASS’N. OF UNIV. PROFESSORS, DOES DIVERSITY MAKES A DIFFERENCE?: THREE RESEARCH STUDIES ON DIVERSITY IN COLLEGE CLASSROOMS I (2000), <https://www.aaup.org/NR/rdonlyres/97003B7B-055F-4318-B14A-5336321FB742/0/DIVREP.PDF> (last visited Oct. 5, 2017).

69. *Id.* at 1.

70. According to a 2007 survey, only 30% of HR offices had an official definition of diversity. Kevin Whitelaw, *Defining Diversity: Beyond Race and Gender*, National Public Radio (Jan. 13, 2010), <http://www.npr.org/templates/story/story.php?storyId=122327104> (last visited July 28, 2010). In fact, the term diversity has become so ubiquitous and overused that it is not always viewed in a positive light. See Noah Berlatsky, ‘Diversity’ is a euphemism. *We should be careful how we use it*, L.A. TIMES (July, 10, 2017), <http://beta.latimes.com/opinion/op-ed/la-oe-berlatsky-diversity-20170710-story.html> (last visited Nov. 6, 2017).

71. This is because the law school 509 reports look only at race and gender. See, e.g. UNIV. OF MICH., 2016 STANDARD 509 INFORMATION REPORT, <https://www.law.umich.edu/aboutus/Documents/Std509InfoReport%2012-15-2016.pdf> (last visited Aug. 16, 2017).

empty until it is given descriptive and normative content and context. Unfortunately, most discussions of diversity and the diversity rationale for affirmative action do not explain what it actually means, *much less which groups with what kinds of attributes create diversity-value*. Nevertheless, the ways that affirmative action programs are designed and defended leave little doubt that program advocates *almost always mean racial diversity*, with little regard to the many anomalies, evasions, and confusions that attend most race discourse in America.⁷²

The Supreme Court recently upheld race-based admissions policies on a narrow vote,⁷³ but the Trump administration threatens to investigate universities; additional challenges to race-based admissions policies could result.⁷⁴ Many policies are not clear and simply state that the university views the applicant as a whole.⁷⁵ Recent empirical evidence shows, however, differential treatment accorded to individuals of different races in dozens of university and law school admissions across the country that cannot be explained on grounds other than race.⁷⁶

Discussions of diversity may advocate general notions of inclusion and the incorporation of differences, but diversity is almost always measured by check-the-box racial diversity.⁷⁷ And while law schools may have individual diversity statements, measurement of diversity is controlled by the ABA and the ABA Standards.⁷⁸ ABA Standard 509 does not consider socioeconomic disparities, geographic diversity, or other indicators which could help law schools reach

72. Peter H. Schuck, *Affirmative Action: Past Present and Future*, 20 YALE L. & POL'Y REV. 1, 37 (2002) (emphasis added).

73. *Fisher v. Univ. of Tex.*, 136 S. Ct. 2198 (2016).

74. See Charlie Savage, *Justice Dept. to take On Affirmative Action in College Admissions*, THE NEW YORK TIMES (Aug. 1, 2017), <https://www.nytimes.com/2017/08/01/us/politics/trump-affirmative-action-universities.html> (last visited Oct. 4, 2017).

75. See, e.g., Freshman Application Rev., UNIV. TEX. ADMISSIONS, <https://admissions.utexas.edu/apply/decisions/freshman-review> (last visited Aug. 15, 2017) (noting a holistic review process).

76. Brief *Amicus Curiae* of Pac. Legal Found., Center for Equal Opportunity, Am. Civil Rights Inst., Project 21, Nat'l Ass'n of Scholars, Individual Rights Found., and Reason Found. in Support of Petitioner at 14, *Fisher v. Univ. of Tex.*, 136 S. Ct. 2198 (2016) (No. 14-981) ("Black and Hispanic applicants were preferred at ratios of between 500 and 1500 to 1 over both Asian and white applicants.").

77. See, e.g., ABA 2016 Standard 509 Information Report Data Overview, https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/2016_standard_509_data_overview.authcheckdam.pdf (last visited Oct. 21, 2017) (requiring law schools to report on 1L enrollment by gender and race/ethnicity).

78. See Heriot et al., *supra* note 54, at 265-67.

diversity and lessen bias in student experience.⁷⁹

Professor Philip Lee notes the limitations of “checkbox diversity” and examines whether the use of racial categories to quantify diversity without any individual context is a sufficiently narrowly tailored procedure, as required by the *Grutter* cases.⁸⁰ Professor Lee argues that checkbox diversity assumes that being a certain racial minority necessarily creates a certain worldview and “fails to explore the diversity of experiences and views within groups” as well as “the diversity of perspectives that can be created by the intersection of multiple identities.”⁸¹ Admissions departments focus on the number of applicants in each race box at the end of the admissions cycle, rather than how each individual can add to the diversity of the education experience.⁸² Focusing on the individual would allow admissions departments to view diversity from a contextual standpoint, understanding how each person’s unique experience might contribute to the overall diversity of a law school.⁸³ Viewing diversity from an individual standpoint rather than trying to categorize individuals into a group that presumes a certain viewpoint is more congruent with Supreme Court jurisprudence on diversity.

For example, *Bakke* demonstrated how an admissions department could make a contextual diversity inquiry:

The file of a particular black applicant may be examined for his potential contribution to diversity without the factor of race being decisive when compared, for example, with that of an applicant identified as an Italian-American if the latter is thought to exhibit qualities more likely to promote beneficial educational pluralism. *Such qualities could include exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, ability to com-*

79. *See id.*

80. Lee, *supra* note 9, at 203, 205–06.

81. *Id.* at 209. For example, I am female, Southern, half Egyptian, and was raised by one Muslim parent and one Southern Baptist parent. Checkbox diversity cannot take into account and export these diverse and sometimes competing identities and experiences.

82. Again, because the 509 Reports focus only on race and gender. *See, e.g.*, UNIV. OF MD., 2016 STANDARD 509 INFORMATION REPORT, <https://www.law.umaryland.edu/prospective/documents/ABASstandard509Report-2016.pdf> (last visited Aug. 16, 2017).

83. *See* Lee, *supra* note 9, at 212 (“Contextual diversity looks at the experiences of the individual to see how that person’s perspective may be different than others instead of assuming a different perspective based on a cursory checking of a box.”).

*municate with the poor, or other qualifications deemed important.*⁸⁴

In *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*,⁸⁵ Chief Justice Roberts emphasized the individual nature of constitutional protections under the Equal Protection Clause.⁸⁶ “Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class.”⁸⁷ Justice Powell and Justice O’Connor also emphasized the individual nature of constitutional protections, as well as the importance of looking at diversity in context, in the *Bakke* and *Grutter* decisions. When Justice O’Connor wrote the majority opinion in *Grutter*,⁸⁸ she went to great lengths to analyze Justice Powell’s majority opinion in the *Bakke* case.⁸⁹ Justice Powell specifically rejected the use of race in higher education to either reduce the historic mistreatment of minorities or to remedy discrimination, finding that “such measures would risk placing unnecessary burdens on innocent third parties.”⁹⁰ Justice Powell approved the use of race solely for the purpose of obtaining a diverse student body but with “the important proviso that ‘constitutional limitations protecting *individual rights* may not be disregarded.’”⁹¹ It is not a category of people, such as a race or an ethnic group, that is protected, but rather each and every individual. When writing about the importance of a diverse student body, Justice Powell emphasized the need for wide exposure to a diverse range of ideas.⁹² By looking at diversity in context, law school admissions committees can ensure that classes are comprised of students with a wide range of ideas and opinions. Finally, Justice Powell went on to say that race is but one element in a range of diversity factors that may be considered.⁹³

In agreeing with Justice Powell, Justice O’Connor noted that context matters when viewing race as part of an applicant’s profile.⁹⁴ The Court considers racial balancing as officials and administra-

84. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 317 (1978).

85. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

86. *Id.* at 743.

87. *Id.* at 730.

88. *Grutter v. Bollinger*, 539 U.S. 306 (2003).

89. *Id.* at 330.

90. *Id.* at 323–24 (citing *Bakke*).

91. *Id.* at 324 (citing *Bakke*) (emphasis added).

92. *Id.*

93. *Id.*

94. *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) (“Because the Fourteenth Amendment ‘protects persons, not groups,’ all ‘governmental action based on race . . . should be subjected to detailed judicial inquiry to ensure that the personal right to equal protection of the

tion building a law school class that is a specified percentage of a particular group, and this is “patently unconstitutional.”⁹⁵ Law schools do report on these percentages to the ABA via the 509 Report and other accreditation materials.⁹⁶ This inevitably makes the racial percentages a point of focus for law school admissions and administrations, when the focus should instead be on each individual and understanding how each applicant could potentially contribute to the school’s overall diversity of the school.

The Supreme Court found that the University of Michigan Law School’s policy, which considered race as part of an application, was constitutional because the law school did view diversity in context and considered “the possible diversity contributions of all applicants.”⁹⁷ The Court also noted that narrow tailoring requires “serious, good faith consideration of workable, race-neutral alternatives that will achieve the diversity the university seeks.”⁹⁸ Current ABA reporting and measurement standards do not appear to give serious weight to race-neutral standards that could still achieve diversity.⁹⁹ Since race categories and gender are easiest to measure and report, those categories are measured and reported. However, grouping and reporting along race and gender lines is not consistent with the individualized, contextual diversity that Justice Powell and Justice O’Connor contemplated in *Bakke* and *Grutter*. It is time that the ABA and law schools reconsider their approach to and measurement of diversity, so that law schools can better eliminate bias.

C. The Need for Engagement

Recent events on law school campuses suggest that schools have work to do when it comes to meaningful engagement. Even schools that on paper are admitting racially diverse classes may not be taking sufficiently concrete steps to encourage dialogue that supports the

laws has not been infringed.”) (citation omitted).

95. *Id.* at 330.

96. *See, e.g., 2016 Standard 509 Information Report*, YALE UNIV., <https://law.yale.edu/system/files/area/departments/admissions/document/std509infoforeport.pdf> (last visited Aug. 15, 2016).

97. *Grutter v. Bollinger*, 539 U.S. 306, 341 (2003).

98. *Id.* at 339.

99. *See Ward, supra* note 32. The ABA is currently considering revisions to standard 206, and the revisions would include some race-neutral standards. *Id.*

breakdown of stereotypes.¹⁰⁰In 2016, a law student posted a flier next to a Black Lives Matter poster that read “All Lives Matter.”¹⁰¹Rather than using it as a springboard to discuss the Black Lives Matter movement, the dean of the law school called the handwritten flier a “very disturbing incident.”¹⁰²Law school faculty and staff members were outraged.¹⁰³This same university protected the rights of its students to burn American flags while yelling obscenities to protest the election of Donald Trump; yet the posting of a flier that read “All Lives Matter” was so objectionable that it prompted a letter of outrage signed by sixty law faculty and staff members.¹⁰⁴These members called the “All Lives Matter” statement “a rallying cry for many who espouse the ideas of white supremacy and overt racism,” thereby shutting down the conversation before it had a chance to begin.¹⁰⁵It is concerning that such silencing of “objectionable” ideas was effected by law school faculty members, who, of all people, should encourage dialogue on diverse issues and from diverse viewpoints. By allowing the free exchange of ideas, this law school could have encouraged full participation from its diverse student body. What if, instead of issuing a letter that called the All Lives Matter statement disturbing, the faculty and administration had called a forum to openly discuss the matter with facilitation from experienced faculty and staff? What if they had used the incident as an opportunity for meaningful and respectful engagement?¹⁰⁶Supporters of the Black Lives Matter move-

100. See, for example, Susan Svrluga, *Law school professors say posting “All Lives Matter” flier was an “incident of intolerance,”* WASH. POST, Apr. 4, 2016, https://www.washingtonpost.com/news/grade-point/wp/2016/04/04/law-school-professors-say-posting-all-lives-matter-flier-was-an-incident-of-intolerance/?utm_term=.6ee7ffdb58d8 (last visited Nov. 8, 2017).

101. *Id.*

102. *Id.* Attorneys need to be trained to rationally and sympathetically see both sides of an issue, so it is somewhat concerning that those in charge of training attorneys jump to the conclusion that the statement “All Lives Matter” is synonymous with white supremacy. *Id.* The diverging viewpoints should serve as a springboard for dialogue facilitated by faculty, but faculty should not be participating in the divisiveness.

103. Paul Mirengoff, *American University Law Faculty Members Disgrace Themselves*, POWER LINE, Mar. 30, 2016, <http://www.powerlineblog.com/archives/2016/03/american-university-law-faculty-members-disgrace-themselves.php> (last visited Oct. 4, 2017).

104. *Id.*; Susan Svrluga & Alejandra Matos, *Student protesters burn American flags at confrontation over Trump victory*, WASH. POST, Nov. 9, 2016, https://www.washingtonpost.com/news/grade-point/wp/2016/11/09/student-protesters-burn-american-flags-at-confrontation-over-trump-victory/?utm_term=.78e6f9f78ecc (last visited Nov. 8, 2017) (noting that although the university did not condone flag burning, it did recognize the activity as protected free speech and supported the free expression of political views).

105. Svrluga & Matos, *supra* note 104.

106. Contrast how administration handled a similar issue at the University of North Car-

ment would have had the opportunity to explain why the statement “All Lives Matter” might be seen as offensive and hurtful; likewise, the person or people who felt the need to make the statement “All Lives Matter” would have had the opportunity to state their reasons for making such a statement. The faculty and staff could have facilitated this open dialogue, which could have led to greater understanding on both sides. If law schools decline such opportunities for meaningful engagement, then faculty, staff and students will miss out on chances to learn from one another, to enhance the critical thinking skills needed for the practice of law, and to potentially eliminate bias.¹⁰⁷

Diversity fosters engagement and promotes interaction between different groups.¹⁰⁸ This should include the exchange of *all* ideas and viewpoints. Such free exchange helps law students develop critical thinking and analytical skills, oral advocacy skills, and skills of persuasion needed for the practice of law. “When perspectives are unrepresented in discussions, when some kinds of thinkers aren’t at the table, classrooms become echo chambers rather than sounding boards — and we all lose.”¹⁰⁹ It is imperative that lawyers be trained to think critically and see issues from multiple sides. Diversity and inclusion should mean inclusion of all races, people, backgrounds, experiences, ideas, and viewpoints, including those viewpoints that may be objectionable.

Certainly, students should be expected to express their viewpoints in a respectful manner. However, when diversity of viewpoints is discouraged, schools lose the opportunity for meaningful engagement. When there is a lack of meaningful engagement, there is no oppor-

olina School of Law. See Mary-Rose Papandrea, *The Free Speech Rights of University Students*, 101 MINN. L. REV. 1801, 1859–60 (2017). When a student crossed out the words “Black Lives Matter” and replaced them with “All Lives Matter” on the school’s “Free Speech” board, the administration called a town hall meeting to discuss the incident. At the town hall meeting students learned why crossing out the words “Black Lives Matter” and replacing them with “All Lives Matter” was hurtful to some students; more importantly, the school and the administration learned that the “Free Speech” board was not an effective means of fostering communication and dialogue between different groups. *Id.* at 1860. (“The path forward is hardly clear, but what is clear is that censoring students who disagree with the Black Lives Matter movement will not solve the issues facing the law school.” *Id.*)

107. See ABA Diversity Plan, *supra* note 3, at 1.

108. Vinay Harpalani, *Narrowly Tailored but Broadly Compelling: Defending Race-Conscious Admissions After Fisher*, 45 SETON HALL L. REV. 761, 782 (2015).

109. Nicholas Kristof, *A Confession of Liberal Intolerance*, N.Y. TIMES, May 7, 2016, <https://www.nytimes.com/2016/05/08/opinion/sunday/a-confession-of-liberal-intolerance.html> (last visited Nov. 8, 2017) (citing lack of ideological and religious diversity in universities).

tunity to build bridges and eliminate bias.¹¹⁰

Another law school that prides itself on being diverse (boasting that its Class of 2019 is more than one half women and more than twenty percent “of color”¹¹¹) had a recent opportunity to support meaningful engagement of diverse viewpoints. A professor from this law school hosted a Halloween party at her home and invited her students to attend.¹¹² Non-students were there as well. The law professor dressed up as a character from the book “Black Man in a White Coat” because she enjoyed the book and wanted to raise awareness of the lack of minorities in higher education.¹¹³ As part of her costume, she painted her face black.¹¹⁴ She was unaware that black students might be offended at her black face paint.¹¹⁵ After the party students reported to the law school’s administration that they were offended.¹¹⁶ The professor was suspended; the University conducted an investigation and found that the professor’s behavior constituted discriminatory harassment as well as a violation of the university’s policy against discrimination.¹¹⁷

The University’s report reads as follows:

[The professor’s] conduct, in donning a costume at a Halloween party which hosted both students and faculty, operated to distinguish against a group of people on the basis of race or color. The black makeup she incorporated, whether specifically termed as “blackface” or not, has a very negative racial history and connotations. The use of a costume component with such negative connotations operated to

110. See ABA Diversity Plan, *supra* note 3, at 1.

111. See Class of 2019 Numbers, UNIV. OF OR. SCH. OF LAW, <https://law.uoregon.edu/explore/class-profile> (last visited Dec. 29, 2016).

112. See Eugene Volokh, *At the University of Oregon, no more free speech for professors on subjects such as race, religion, sexual orientation*, WASH. POST, Dec. 26, 2016, https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/12/26/at-the-university-of-oregon-no-more-free-speech-for-professors-on-subjects-such-as-race-religion-sexual-orientation/?utm_term=.8b46266b1645 (last visited Oct. 4, 2017).

113. See *id.*

114. See *id.*

115. See *id.*

116. See *id.*; INVESTIGATIVE REPORT, UNIV. OF OR., 10, https://provost.uoregon.edu/sites/provost1.uoregon.edu/files/final_investigative_report_redacted_-_final.pdf, 22 (last visited Oct 22., 2017) (“The interviews unanimously revealed that nobody told Shurtz during the event that her costume was inappropriate, that it was offensive, or that she should consider removing the black makeup.”).

117. See Volokh, *supra* note 112. (The university’s actions showed that if “you say things about race, sexual orientation, sex, religion and so on that enough people find offensive, you could get suspended (and, following the logic of the analysis) even fired. . . . It’s not limited to personal insults. It’s not limited to deliberate racism or bigotry.”).

unreasonably differentiate between students of color and other students.

From the student interviews, it appears clear that for the majority of the students their presence at the event subjected them to an occurrence sufficiently severe to interfere with their participation in University programs or activities.¹¹⁸

The party described above was not a university-sanctioned program, nor was the activity on school grounds.¹¹⁹ Yet the report seeks to limit behavior and speech because it may interfere with students' participation in university programs or activities.¹²⁰ An incident such as this, leading to a result such as this, chills speech. The professor appeared to have no negative intention.¹²¹ Thus, while she may have exercised poor judgment, she may not have been aware of the historical context, and potential repercussions, of such a decision.¹²²

A better administrative response would have been take the professor aside and educate her on the history, and offensive nature, of "blackface."¹²³ By instead opting for punitive measures, this law school administration has lost an opportunity, and may have fostered an environment of fear within the school, which may lead to individuals refusing to talk about anything that might potentially be offensive to others. This type of environment cannot be conducive to the development of persuasive argument, critical thinking, or mutual understanding and compassion necessary for imbuing attorneys with the skill set they need to serve a diverse society.¹²⁴

118. INVESTIGATIVE REPORT, UNIV. OF OR., https://provost.uoregon.edu/sites/provost1.uoregon.edu/files/final_investigative_report_redacted_-_final.pdf, 22 (last visited Aug. 15, 2017).

119. *See id.* at 9.

120. *See id.* at 16. Students reported to the administration after the party that they could not sleep or concentrate due to the professor's costume.

121. *See id.* at 12.

122. *See id.*

123. *Id.* at 11.

124. How might this type of policy impact the classroom and legal education? What if the class is discussing the controversial topic of Israeli settlements and Palestinian rights in either an International Law or Human Rights class. Can students or professors refer to the settlements as illegal, or would this be called discriminatory harassment? Can a student state that he believes that the State of Israel is an apartheid state, or that Palestinians are terrorists or do not exist, or would such statements be considered discriminatory harassment under the policy? Students and faculty should be able to say things that others may find offensive and debate them freely, particularly in a law school, without fear that they will be held in violation of a discrimination or harassment policy. Meaningful engagement is key. This is a hallmark of the inclusion part of diversity and inclusion. Students and faculty can respectfully disagree with one another and learn from one another. This is how groups that are different and groups that think

Without meaningful engagement between different groups, checkbox diversity alone cannot help law schools achieve the goal of bias elimination.¹²⁵ The stories in this section show that the definition and concept of diversity have changed to the point that it can no longer be measured by race and ethnicity alone:

A recent study from Deloitte and the Billie Jean King Leadership Initiative, found that when it comes to defining diversity, rather than focusing on demographic features, such as race, or gender, Millennials — those born roughly between 1980 and 2000 — are more concerned with hiring those who may have *different cognitive viewpoints* due to growing up in a different part of the country, or attending a different type of school.¹²⁶

Indeed, research findings suggest that individuals with diverse approaches to solving problems outperform a group of talented, but not diverse, problem-solvers.¹²⁷ Interestingly, the Deloitte study found that millennials looked at diversity as “a means to a business outcome, which is in stark contrast to older generations that view diversity through the lens of morality (the right thing to do), compliance, and equality.”¹²⁸ Rather than being so focused on the racial composition of the incoming class, schools should look more at what kind of dialogue does or does not happen inside the law schools once the students get there. The examples above exhibit a need for more meaningful engagement in law schools to ensure that schools are building bridges between different thinking groups, finding common ground, and breaking down stereotypes.

differently will come to understand and respect the differences, and hopefully eliminate bias and break down stereotypes.

125. See ABA Diversity Plan, *supra* note 3, at 1. Checkbox diversity also fails to give schools a good understanding of what views are coming to the table. See Lee, *supra* note 9, at 215 (“[W]ithout any evidence of the ways in which a particular applicant’s worldview has been shaped by the selected checkboxes, the checkboxes themselves would not provide sufficient evidence of diversity of perspective.”).

126. Gillian B. White, *The Weakening Definition of ‘Diversity,’* THE ATLANTIC (May 13, 2105), <https://www.theatlantic.com/business/archive/2015/05/the-weakening-definition-of-diversity/393080/> (last visited Oct. 5, 2017) (emphasis added). (“Differences in race or gender can play a role in those differing viewpoints, but they may not be singled out as important diversifying characteristics.”).

127. See *id.*; Lu Hong & Scott E. Page, *Groups of diverse problem solvers can outperform groups of high-ability problem solvers*, PNAS 1 (Nov. 16, 2004), <http://www.pnas.org/content/101/46/16385.full.pdf> (last visited Nov. 8, 2017).

128. CHRISTIE SMITH & STEPHANIE TURNER, *THE RADICAL TRANSFORMATION OF DIVERSITY AND INCLUSION: THE MILLENNIAL INFLUENCE*, DELOITTE Univ. 7 (2015), <https://www2.deloitte.com/content/dam/Deloitte/us/Documents/about-deloitte/us-inclus-millennial-influence-120215.pdf>) (last visited Nov. 8, 2017).

II. WORKING TOWARD A BETTER DIVERSITY MEASUREMENT

A. Examining the Goal

To understand whether current diversity initiatives are succeeding, schools must first define the goal of their diversity attempts. Justice Kennedy wrote in *Fisher* that “[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.”¹²⁹With that in mind, let us take, for example, The University of Texas, the defendant in the *Fisher* litigation.¹³⁰The University of Texas website states:

Here at The University of Texas at Austin, we embrace and encourage diversity in many forms, striving to create an inclusive community that fosters an open and supportive learning, teaching and working environment. Our strength as a university draws from our wide range of perspectives and experiences, and we support a free exchange of ideas alongside thoughtful consideration of our differences.¹³¹

If the goal is “to create an inclusive community that fosters an open and supportive . . . environment,”¹³²measuring diversity by race and gender alone limits goal achievement. Schools must start viewing and measuring diversity in a broader sense.

Universities and The Supreme Court have used the term “critical mass” to refer to the number under which minorities no longer feel isolated or tokenized.¹³³It is, however, an imprecise and abstract term that is difficult to measure.¹³⁴During the oral argument in the *Fisher* case, Justice Antonin Scalia suggested that “we should probably stop calling it critical mass . . . [and] . . . call it a cloud or something like that.”¹³⁵If diversity is really valuable, and many scholars agree that it is, why would we stop at an unknown critical mass? As Professor Bryan K. Fair proposes, why not seek to attain 100% diversity indefinitely-

129. *Fisher v. Univ. of Tex.*, 136 S. Ct. 2198, 2211 (2016).

130. *See Fisher*, 136 S. Ct., at 2198.

131. *Diversity*, UNIV. OF TEX., <https://www.utexas.edu/about/diversity> (last visited Oct. 5, 2017).

132. *Id.*

133. Harpalani, *supra* note 108, at 786; *see also* Brief for Respondents, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241), 2003 WL 402236 at 13.

134. *See id.*

135. *Id.* at 787 (citation omitted).

ly rather than limit diversity to a “critical mass” of race?¹³⁶

The Supreme Court precedent on affirmative action and race-based admissions policies requires that the programs end at some point. In *Grutter*, the Supreme Court recognized that it is a “core purpose of the Fourteenth Amendment . . . to do away with all governmentally imposed discrimination based on race.”¹³⁷ Accordingly, the Court recognized that “race-conscious admissions policies must be limited in time”¹³⁸ and suggested that 25 years from the date of that opinion, race-conscious admissions policies would no longer be necessary.¹³⁹ Since *Grutter* was decided in 2003, that leaves us with about 12 years to phase out race-conscious admissions policies. “Even if a liberal majority on the Court extends the life of affirmative action . . . the natural pendulum swings of the Court’s composition are likely to lead to a conservative-leaning Court that eventually insists on an end to affirmative action.”¹⁴⁰ Since race-based admissions policies may be headed for even more litigation,¹⁴¹ now is the time for the ABA and law schools to work together toward a broad definition of diversity that can achieve the ABA’s goal of eliminating bias.

Some scholars argue that race-conscious admissions policies do not have any real benefit to students.¹⁴² In fact, even some minority activist groups oppose race-conscious admissions policies.¹⁴³ Take, for example, Asian Americans, who often allege harm through race-

136. Bryan K. Fair, *Taking Educational Caste Seriously: Why Grutter Will Help Very Little*, 78 TUL. L. REV. 1843, 1847 (2004) (“[I]f there are real educational benefits to diversity, why can’t government seek to achieve it indefinitely? And why can’t government seek 100% diversity admits? Why is it limited to some arbitrary, critical mass of students of color?”).

137. *Grutter v. Bollinger*, 539 U.S. 306, 341–42 (2003) (citing *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984)).

138. *Id.* at 342.

139. *See id.* at 343.

140. Kimberly Jenkins Robinson, *Fisher’s Cautionary Tale and the Urgent Need for Equal Access to an Excellent Education*, 130 HARV. L. REV. 185, 186–87 (2016). *See also id.* at 189 (recommending that universities consider “educational disadvantage as a positive race-neutral factor that could assist institutions in assembling a diverse class.”).

141. *See Savage*, *supra* note 74; Horwitz & Bown, *supra* note 12; ABA Diversity Plan, *supra* note 3, at 1.

142. *See Clegg*, *supra* note 67 at 6. (“No scientifically valid statistical evidence has been presented to show that racial and ethnic diversity in school benefits students.”) (quoting Robert Lerner & Althea K. Nagai, *A Critique of the Expert Report of Patricia Gurin in Gratz v. Bollinger*, CENTER FOR EQUAL OPPORTUNITY 1, available at <http://www.ceousa.org/pdf/Gurin1.pdf>).

143. Schuck, *supra* note 72, at 55 (“When the issue is college admissions preferences, the opposition is substantial even among blacks and other minorities.”)

conscious admissions policies.¹⁴⁴One university has been accused of limiting Asian enrollment to maintain white acceptance rates,¹⁴⁵ while another university is currently defending litigation that claims it unfairly discriminates against Asian Americans.¹⁴⁶Incidents such as these have led Asian Americans to avoid identifying themselves on college applications, often at the advice of admissions counselors.¹⁴⁷Asian Americans are not the only students who take such measures: Indian American Vijay Chokal-Ingram, the brother of actress Mindy Kaling, claims that he gained acceptance to medical school by claiming to be black.¹⁴⁸

What purpose does it serve to encourage groups to base their racial self-identification on whether or not they believe such identification will be helpful to their law school admissions prospects?¹⁴⁹And how might such a practice affect these students psychologically? Every student should feel proud of his or her ancestry, not ashamed of it, and certainly not that his or her race or ethnicity may be a handicap. Students should feel free to express their unique identities and backgrounds on their law school admissions applications.

Schools that use race-conscious admissions policies state that those policies are important in helping to break down stereotypes and mitigate feelings of isolation among minority students.¹⁵⁰Diversity is also an important way to ensure that as many people as possible have

144. See Chan Hee Chu, *When Proportionality Equals Diversity: Asian Americans and Affirmative Action*, 23 *ASIAN AM. L. J.* 99, 132-33 (2016) (“There is no disagreement among Asian American legal scholars that Asian Americans are disfavored in admissions under current policies.” *Id.* at 132.).

145. See *id.* at 133. (“To support their argument, scholars have pointed at such policies employed in the past by certain institutions like Brown University, which purposefully limited Asian enrollment to maintain white acceptance rates.”)

146. See John Fund, *Smash the ‘Bamboo Ceiling’ of Racial Quotas*, *NAT’L REV.* Apr. 5, 2015, <http://www.nationalreview.com/article/416473/smash-bamboo-ceiling-racial-quotas-john-fund> (last visited Oct. 5, 2017); John S. Rosenberg, *Asian-American Admissions Suit Proceeds to Discovery*, *HARV. MAG.*, Oct. 13, 2016, <https://harvardmagazine.com/2016/10/harvard-college-asian-american-admissions-lawsuit> (last visited Nov. 8, 2017).

147. Chu, *supra* note 144, at 134.

148. Fund, *supra* note 146.

149. Professors Khaled A. Beydoun and Erika K. Wilson discuss how Supreme Court affirmative action jurisprudence has created incentives for people to identify with certain races over others and have coined the theory Reverse Passing. See Beydoun & Wilson, *supra* note 48, at 353 (“The increased value in diversity has generated a demand for nonwhite individuals in education, employment, and beyond, thereby providing an incentive for whites to reverse pass for purposes of reaping the benefits of the increased push for diversity in all realms of American society.”).

150. See Harpalani, *supra* note 108, at 782.

access to legal representation and legal services.¹⁵¹The legal profession should be representative of the society that it serves.¹⁵²

To break down stereotypes, however, there must be dialogue and engagement between various groups. Solely admitting groups from different backgrounds does not ensure dialogue or interaction between the different groups.¹⁵³It does not even ensure varied viewpoints. Ethnic or racial distinction is only one category that may make a group of students diverse — but it does not necessarily result in diversity on the campuses, or later in the professional field.¹⁵⁴In law school, the goal is not just to have a certain number of students in certain racial categories; it is to create lawyers capable of critical thinking, issue-spotting, and seeing and understanding an issue from all sides.¹⁵⁵Exposure to other races and ethnicities is a critical part of that, but so is exposure to differing and opposing viewpoints. It is presumptuous and biased to assume that just because a student is from a certain racial group, that student will represent a certain opinion in the classroom.¹⁵⁶

It is time to phase out the use of the outdated race and ethnicity categories and focus instead on admitting wholly diverse classes from varied backgrounds in order to promote diversity of opinion. “The belief that knowledge or understanding flourishes best in a climate of vigorous debate dates back to the Socratic tradition, but it is also a part of current multicultural and post-modern perspectivism.”¹⁵⁷

In addition to helping eliminate bias, diverse viewpoints in the classroom will help students develop the critical thinking skills neces-

151. See Faisal Bhabha, *Towards a Pedagogy of Diversity in Legal Education*, 52 OSGOODE HALL L.J. 59, 65 (2014).

152. See *id.* at 69.

153. In spite of decades of affirmative action, racial quotas, and diversity initiatives, resegregation is still a very real issue. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 806 (Stevens, J., dissenting) (“Today, more than one in six black children attend a school that is 99%–100% minority.”).

154. See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 314 (1978).

155. See Courtney G. Lee, *Changing Gears to Meet the “New Normal” in Legal Education*, 53 DUQ. L. REV. 39, 51 (2015) (“This suggests that ‘nurture dominates nature’ in the path to a successful law career, meaning that strong analytical training and student engagement in law school might be even more important than teaching substantive knowledge.”).

156. See Lee, *supra* note 9, at 214 (“[T]he personal qualities of the applicant should be what matters most — not a checkbox identity that may have no relation to the applicant’s actual perspective.”).

157. AM. COUNCIL ON EDUC. & AM. ASS’N. OF UNIV. PROFESSORS, *supra* note 68, at 10 (citations omitted) (noting that education is enriched through the debate of alternative ideas and constructive criticism).

sary to become good attorneys.¹⁵⁸It is essential to have a broad range of ideas in a law school to avoid “groupthink.” Groupthink occurs “when *concurrency-seeking* [in human discourse] becomes so dominant in a cohesive in-group that it tends to override realistic appraisal of alternative courses of action.”¹⁵⁹Lack of diverse thought in the classroom leads to less critical thinking, which leads to less effective attorney skills. Students who do not learn to think critically, recognize weaknesses in their positions, and then defend them do not make good attorneys. Listening to opposing viewpoints is also a necessary skill for effective lawyering.¹⁶⁰To produce the best and strongest attorneys law schools must aim to fill their classrooms, staff and faculty spots with diverse thinkers who will foster a critically thinking environment.¹⁶¹

Lack of diverse viewpoints may lead to a radicalization of existing opinions, a phenomenon known as *group polarization*.¹⁶²For example, “[a] group of moderately profeminist women becomes more strongly profeminist after discuss[ing]” the topic of feminism together.¹⁶³The impact of this phenomenon in a law school setting could be disastrous. In criminal law class, law students will study crimes, intent, and defenses to crimes. If the viewpoints are mostly prosecution-friendly viewpoints, the class will likely become more prosecution friendly. The class will need a variety of viewpoints to ensure that group polarization does not occur. The class could, for example, have students who want to be prosecutors as well as students who

158. See Toni Lester, *Contention, Context and the Constitution: Riding the Waves of the Affirmative Action Debate*, 39 SUFFOLK U. L. REV. 67, 83 (noting relationship between diversity and critical thinking).

159. Faith River James, *Nonprofit Pluralism and the Public Trust: Constructing a Transparent, Accountable, and Culturally Competent Board Governance Paradigm*, 9 BERKELEY BUS. L.J. 94, 114–15 (2012) (quoting IRVING L. JANIS, *GROUPTHINK* 84 (2d ed. 1971)).

160. See Deborah L. Rhode, *From Platitudes to Priorities: Diversity and Gender Equity in Law Firms*, 24 GEO. J. LEGAL ETHICS 1041, 1061 (“[S]ome social science research suggests that diverse viewpoints encourage critical thinking and creative problem solving; they expand the range of alternatives considered and counteract ‘group think.’”).

161. See *id.* at 117 (The “preferred method for guarding against groupthink [in the workplace] is diversity of thought.” (quoting Sharon Allen, *The Death of Groupthink*, BUSINESSWEEK, Feb. 5, 2008, http://www.businessweek.com/managing/content/feb2008/ca2008025_687188.htm)).

162. See Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L.J. 71, 74 (2000). (“[G]roup polarization means that members of a deliberating group predictably move toward a more extreme point in the direction indicated by the members’ pre-deliberation tendencies.” (citation omitted)).

163. See *id.* at 86.

want to be criminal defense attorneys; students who have committed crimes as well as students who have been victims of crimes.¹⁶⁴ Students who have overcome or who are managing mental illness might speak about how mental illness could impact *mens rea*. All of these viewpoints are helpful to understanding various aspects of criminal law. By having an array of opinions available to participate in the discussion, the budding prosecutor will have his presumptions challenged. That student will be forced to think more critically and will develop stronger analytical skills. The aspiring criminal defense attorney will learn from the prosecuting voice. Both may develop compassion from listening to any firsthand experience relating to crimes or mental illness. Better, more well-rounded lawyering is more likely to result.

B. Defining Diversity More Broadly

To effectively create a diverse academic environment, the ABA and law schools should start by defining diversity more broadly, not just by race. These entities should pay attention to the underrepresented on more levels than simply race.¹⁶⁵ A more inclusive definition will help ensure diversity of thought for students in preparation for the legal profession.¹⁶⁶ Law schools who seek to admit, hire, and retain a diverse student body and faculty should define diversity as a focus on areas in which people are underrepresented, including the following:

- Persons with diverse ethnic and racial compositions;
- Persons with socioeconomic disadvantages;
- Persons who are first-generation college graduates or immigrants;
- Persons with international citizenship;
- Persons with physical or learning disabilities;
- Persons with diverse religious and political backgrounds;
- Persons from diverse geographic locations;
- Persons who have experienced discrimination; and

164. See *id.* at 92–93 (finding that depolarization occurs when opposing arguments are offered and group members have some flexibility in their opinions).

165. See Paula Lustbader, *Painting Beyond the Numbers: The Art of Providing Inclusive Law School Admission to Ensure Full Representation in the Profession*, 40 CAP. U.L. REV. 71, 78 (2012) (arguing for a broad definition of diversity).

166. See *id.*

Persons who have a demonstrated commitment to serving diverse populations.¹⁶⁷

The perspective of any person from a lower socioeconomic status is a valuable one to have in a legal setting. In fact, Lisa R. Pruitt has referred to Whites as the “proverbial canaries in the coal mine of class (im)mobility” because “if whites are struggling to achieve upward mobility . . . low-income racial and ethnic minorities are also struggling.”¹⁶⁸ As issues such as income inequality, disappearance of the middle class, working wage issues and escalating wealth of the top 1% rise to the forefront, socioeconomic diversity must pervade legal education.¹⁶⁹

Some education experts have called for a specific focus on socioeconomic diversity.¹⁷⁰ The University of Colorado has developed a socioeconomic approach that admissions departments could use as either an enhancement or an alternative to a race-based approach.¹⁷¹ Higher education and leadership positions should be open not just to people of all races and ethnicities, but to people from a variety of socioeconomic backgrounds. The lack of socioeconomic diversity in the judiciary is stark:

No truly poor people are appointed as federal judges, or as state judges for that matter. Judges, regardless of race, ethnicity or sex, are selected from the class of people who don’t live in trailers or urban ghettos. The everyday problems of people who live in poverty are not close to our hearts and minds because that’s not how we and our friends live.¹⁷²

Adding factors such as socioeconomic status to the definition of diversity would certainly help further the ABA diversity goal of promoting full and equal participation in the law.¹⁷³

167. Derived, in part, from *id.* at 78–79.

168. Lisa R. Pruitt, *The False Choice Between Race and Class and Other Affirmative Action Myths*, 63 BUFFALO L. REV. 981, 987 (2015) (arguing that we need to “dispel the myth that poverty is strictly a Black, Latina/o, and American Indian problem.”).

169. *Id.* at 988 (“In this age of escalating wealth and income inequality, we need socioeconomic diversity in higher education more than ever before, yet it is sorely missing from our nation’s leadership and the pipeline to it.”).

170. Matthew N. Gaertner & Melissa Hart, *Considering Class: College Access and Diversity*, 7 HARV. L. & POL’Y REV. 367, 368 (2013) (citing RICHARD D. KAHLINGBERG, *THE REMEDY: CLASS, RACE, AND AFFIRMATIVE ACTION* 83–120 (1997); Richard H. Sander, *Experimenting With Class-Based Affirmative action*, 47 J. LEGAL EDUC. 472, 474–76 (1997).

171. *See id.* at 369–70.

172. Pruitt, *supra* note 168, at 1054.

173. *See* DIVERSITY PLAN, *supra* note 3, at 1.

Professor James Lindgren has argued that “religious and political diversity are probably more important for viewpoint diversity than gender diversity and roughly as important as racial diversity.”¹⁷⁴ Although typical admissions diversity metrics do not take religious and political diversity into account, “[r]eligious and political underrepresentation is usually greater than racial underrepresentation. Women are strongly underrepresented compared to the full-time working population, but all of that underrepresentation is among Republican women, who are almost locked out of law faculties.”¹⁷⁵ Accordingly, to ensure that there is diversity of thought in the classroom, schools should consider taking steps to ensure that there is religious and political diversity among both the faculty and the student body.

Professor Lindgren found that the current makeup of law faculty is grossly unrepresentative of the current population.¹⁷⁶ For example, he found that “on law faculties there are about 10 times as many Jewish women as Republican women, though in the full-time working population there are about 24 times as many Republican women as Jewish women.”¹⁷⁷ Also, in “the 2010s, the dominant group in legal education remains Democrats, both male and female. Democrats make up nearly 82% of law professors, but only 41% of the English-fluent full time working population of a similar age.”¹⁷⁸ If a goal of diversity is to expose future lawyers to differing viewpoints, law schools need to ensure that multiple viewpoints are adequately represented in the classroom. Professor Lindgren’s study shows that although current metrics have resulted in racially diverse classrooms, schools have failed to achieve viewpoint diversity.¹⁷⁹ To rectify this problem, admissions committees must ensure that law schools are not only racially and ethnically diverse, but diverse in thought as well.¹⁸⁰

Using race categories may produce a racially diverse student body, but these categories alone are not an effective measure of diver-

174. James Lindgren, *Measuring Diversity: Law Faculties in 1997 and 2013*, 39 HARV. J.L. & PUB. POL’Y 89, 99 (2016) (finding that Republicans and Christians are consistently underrepresented in law faculties).

175. *Id.* at 135 (emphasis added) (citation omitted).

176. *See id.* at 106–08.

177. *Id.* at 148.

178. *Id.* at 149.

179. *See Lindgren, supra* note 174, at 150 (“[W]e should also study our failure to promote diversity of viewpoints to learn how to reverse it.”).

180. *See id.* at 99. Although Professor Lindgren’s study was focused on faculty, the same ideas can be applied to students.

sity because they do not represent contextual diversity or viewpoint diversity. A prospective student could be African American, for the purposes of checkbox diversity, but raised in a community of so-called privilege. That prospective student could be upper-middle class, could have attended a private school, and could think very similarly to his Caucasian classmate applying to the same law school. Yet one is generally considered diverse and will be counted as diverse, while the other may not be considered or counted as diverse.¹⁸¹

III. THE TWO-PRONGED APPROACH: DIVERSITY STATEMENT COUPLED WITH DIVERSITY PEDAGOGY

A. Requiring A Diversity Statement in Law School Admissions Applications

Each individual offers a different view of the world, seeing things through a lens shaped by unique experiences. The more varied the experiences, the greater the likelihood that the viewpoints in a given group will diverge. To ensure that law school classrooms contain the greatest number of viewpoints possible, law school applications should include a diversity statement. Similar to a personal statement, a diversity statement would ask prospective students to discuss any life experiences that might set them apart and enable them to offer unique perspectives in the classroom.¹⁸² Law school applications do include a personal statement, and many do contain an optional diversity statement. However, a diversity statement should be required in

181. On the other hand, what if there was a Caucasian prospective student who grew up in a small town in rural America, the son of a single mother who worked two jobs to help provide for this prospective student, with this prospective student also working throughout high school? Or what if the single mom herself applied to law school? How about the prospective student from a small Amish community? The prospective student from a large city who was raised by two dads? The Arab American student raised in the south who faced discrimination and racial profiling throughout his life but has been classified as white? All of these prospective students would bring different views and perspectives to the classroom, yet these students would not be considered diverse under traditional racial diversity metrics. Law schools need to broaden their understanding of diversity to better capture underserved and underrepresented populations as well as those students who are willing to serve underrepresented populations.

182. See Sean P. O'Connor, *How to Discuss Diversity in Your Law School Applications*, U.S. NEWS & WORLD REPORT, (June 10, 2013), <https://www.usnews.com/education/blogs/law-admissions-lowdown/2013/06/10/how-to-discuss-diversity-in-your-law-school-applications> (last visited Oct. 6, 2017) (advising applicants to "consider the myriad ways in which you will bring *diversity of thought and experience* to the school.") (emphasis added).

all law school applications, pursuant to ABA standards, so law school admissions teams can understand how an individual might contribute to the school's diversity, in context, rather than only as a statistic or as a part of a race or gender group.

Writing a diversity statement would enable prospective students to describe their unique views of the world in their own words. A Native American student may have been profoundly impacted by Native American culture, or perhaps not at all. Or, perhaps the student may not even identify as Native American. Checking the "Native American" box does not convey any of this information. Writing a diversity statement, however, allows students to tell their own stories.

Professor Richard Delgado has taught about the importance of using storytelling to break down racial barriers.¹⁸³ "Stories humanize us."¹⁸⁴ Stories allow people to become individuals rather than statistics. Stories "emphasize our differences in ways that can ultimately bring us closer together. They allow us to see how the world looks from someone else's spectacles."¹⁸⁵ A diversity statement would allow each student to tell his or her own unique story. A Native American student can tell the admissions committee exactly how growing up Native American has impacted his or her life. A single mother can describe the obstacles she has overcome and how she worked multiple jobs to put herself through college while raising her children so she could have the opportunity to attend law school. An army veteran could describe how he overcame depression and post-traumatic stress syndrome after serving in Iraq, all to excel academically and apply for law school. These three potential students have different stories and represent three potentially diverse viewpoints. If schools only allow them to check a box, only one of them will appear diverse. However, if they are each permitted to narrate their full and complete stories, they will all look diverse; they will bring diverse perspectives to the law school, perspectives they and their fellow students can learn from and that can mold the law students into broad-thinking, compassionate lawyers.¹⁸⁶

183. Richard Delgado, *Legal Storytelling: Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989).

184. *Id.* at 2440.

185. *Id.*

186. If I had been required to write a diversity statement as part of my law school admissions application, I would have written about what it was like to grow up in the south with a white mother and a Muslim-Egyptian father. I grew up attending a Southern Baptist church with my mother and grandparents but felt shame and confusion when my Sunday school teach-

A diversity statement could help prompt students to discuss ways they could contribute to both the classroom and the legal profession by asking specific application questions geared toward the following:

Understanding whether the individual student has experience with diversity or discrimination;

Learning how the student might have overcome adversity;

Finding out how life experiences have shaped the applicant's values and perspectives;

Understanding what the applicant expects to learn in law school;

Learning how that individual might contribute to the law school environment;

Ascertaining how that student would add to the diversity of the law school environment; and

Gathering whether that applicant might serve the underserved in the legal profession.¹⁸⁷

A diversity statement could be scored based on how likely it is that the applicant will contribute to the law school's overall diversity. Ideally, the categories and scoring system would be set forth by the ABA, through a revised ABA Standard, to ensure uniformity across law schools.¹⁸⁸ The diversity statement could be scored based on categories such as race, gender, socioeconomic status, religion, disability, geography, or other viewpoint or background (such as having overcome adversity or possessing a particular willingness to serve the underrepresented). Admissions committees could give applicants a point for representing a minority or underrepresented viewpoint in any of the categories. The goal would be to maximize the score for the most number of applicants, moving toward Professor Fair's suggestion that

er told me that there was no place in heaven for my father. I felt a greater sense of belonging in the synagogue I attended with my Jewish friend when I would sleep over at her house than I did in that woman's Sunday school class. While studying abroad in Spain during college I became immersed in the Spanish culture and language, developing a deep love and affinity for the country, particularly southern Spain, with its Arab and Moorish influence. While Spain is not a part of my national origin, I feel very close to it. None of this information would be revealed by placing me into my U.S. census and ABA racial category, which is White; yet I feel I can contribute greatly to the diversity efforts of any school or organization. My unique experiences have shaped my opinions and worldview. I enjoy listening to stories from people all over the world, particularly those from immigrants, first generation Americans, and people who have lived in and traveled to places which I have never visited. I try to appreciate and understand different perspectives, even if I do not necessarily agree with them.

187. Derived from Lustbader, *supra* note 165, at 137.

188. There is no better time than the present to address this issue, since the ABA is currently looking at the diversity standards for accreditation of law schools. See Ward, *supra* note -32.

schools strive for 100% diversity 100% of the time,¹⁸⁹ rather than for an illusory critical mass.

Professor J.T. Manhire noted the flaws in the *U.S. News and World Report* diversity index, which looks only at race and ethnicity factors to measure law school diversity.¹⁹⁰ Today's world mandates a richer version of diversity that includes a "diversity of *perspectives*."¹⁹¹ Professor Manhire proposes a cognitive diversity index that would take into account other indicators of diversity such as gender, age, geography, prior education, and life experiences.¹⁹²

Implementing a diversity statement would not occur without some challenges to the universities and the ABA. The reading and scoring of a diversity statement is subject to the bias, both implicit and explicit, of the admissions committees. Admissions committees would need to be trained on how to score the statement. The ABA would therefore need to set forth some clear guidelines for grading.¹⁹³ Of course, the grading would still be subjective. Candidates should have concrete examples on their résumés to support the testimony of their diversity statements. For example, a prospective student who claims to be committed to helping the underserved would need a clear record of having done so with past volunteer work. Implementing a diversity statement in the admissions system may take time and may not be perfect, but it could certainly help improve the current system of measuring diversity and help schools work toward obtaining student bodies that exemplify diversity in its broadest

189. See Fair, *supra* note 136, at 1847 (arguing that diversity should not be limited to an "arbitrary, critical mass of students of color").

190. J. T. Manhire, *Beyond the U.S. News Index: A Better Measure of Law School Diversity*, 101 IOWA L. REV. BULL. 1, 2 (2015-2016) ("If law student diversity is more than just racial and ethnic diversity, then the current *U.S. News* index is incomplete and fails to provide a meaningful law school diversity measure.").

191. *Id.* at 3 ("In addition to traditional notions of diversity, this broader definition includes sexual/affectional orientation, values, personality characteristics, education, language, physical appearance, marital status, lifestyle, beliefs, and background characteristics such as geographic origin, work experience, and economic status."). *Id.* (citation omitted). This view of diversity is consistent with the *Bakke* and *Grutter* opinions. See *id.*

192. See *id.* at 7-8; 10-11 ("Instead of finding the probability that any two students chosen at random are the same, summing those probabilities of sameness, and then subtracting the sum from 1 as the *U.S. News* index does, the cognitive diversity index finds the probability that any two students chosen at random are *different* for a given type and then only requires the sum of these probabilities to find the diversity score for that indicator."). *Id.*

193. Ideally, the ABA would address this issue in the ABA standards. It could even do so currently, while it looks at revisions to the standards. See Ward, *supra* note 32. The ABA could consider offering training CLE's or posting videos on its website to help ensure consistency among schools.

sense.

B. Addressing Bias and Facilitating the Exchange of Ideas in the Classroom

As mentioned above, the work does not stop once law schools have admitted a diverse body of students.¹⁹⁴In fact, that is when the real work begins. Rather than focusing on the physical composition of an incoming class of students and placing them into boxes, law schools should concentrate on their classroom and law school experience to ensure that diversity goals are met there too. It is in the classroom where schools can ensure that ideas are exchanged, that lawyering skills are developed, and that biases are acknowledged and addressed.

Ethics and professional responsibility classes can serve as a great platform for the respectful exchange of diverse ideas. The ABA recently adopted Model Rule 8.4(g), which reads as follows:

It is professional misconduct for a lawyer to:

(g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.¹⁹⁵

Several states are considering adopting a similar rule.¹⁹⁶Ethics professors must be prepared to engage students in open discussions about bias, both explicit and implicit. Law students who do not feel free to discuss their biases will not be challenged. If they are not challenged in their thinking, they will be less likely to consider opposing viewpoints.

Many people, regardless of whether they exhibit any overt biases,

194. See Bhabha, *supra* note 151, at 94 (“[I]t has become clear that the benefits of diversity do not flow automatically upon adjusting representation.”).

195. Peter Geraghty, *ABA adopts new anti-discrimination Rule 8.4(g)*, ABA (Sept. 2016), <https://www.americanbar.org/publications/youraba/2016/september-2016/aba-adopts-anti-discrimination-rule-8-4-g—at-annual-meeting-in-.html> (last visited Aug. 2, 2017).

196. See *id.*; Walter E. Dellinger & John J. Park, *The Fight Over ABA Rule 8.4(g) Proceeds to the States*, The Federalist Society, July 13, 2017, <https://fedsoc.org/commentary/blog-posts/the-fight-over-aba-rule-8-4-g-proceeds-to-the-states>.

harbor some implicit biases.¹⁹⁷“Implicit bias is the unintentional or unaware act of grouping persons or things into categories that can lead to discriminatory behaviors.”¹⁹⁸To produce competent lawyers, law schools must help students discuss and acknowledge these biases, understand how they may impact lawyers and their representation of clients, and learn how to mitigate them. Implicit bias can be difficult to resolve if law students do not work to become aware of the bias.¹⁹⁹The bias can lead attorneys to make inappropriate assumptions and fail to fully perform due diligence.²⁰⁰Awareness of implicit bias is critical to developing effective lawyering skills.²⁰¹Researchers from Harvard University have developed a series of Implicit Association Tests (IATs), in which people can test several implicit associations including gender bias, weight bias, and race bias.²⁰²Tests of this sort could be important to help students develop awareness of implicit bias, which students could use to further their efforts at becoming more inter-culturally competent.

Professors Susan Bryant and Jean Koh Peters have developed a process called the Five Habits, which can be implemented to increase inter-cultural competency in lawyers.²⁰³These Five Habits are: (1) Degrees of Separation and Connection, (2) The Three Rings, (3) Parallel Universes, (4) Pitfalls, Red Flags and Remedies, and (5) The

197. See Anna Roberts, *(Re)forming the Jury: Detection and Disinfection of Implicit Juror Bias*, 44 CONN. L. REV. 827, 834 (2012) (“Implicit bias has been shown to be widespread among the general public . . .”).

198. Aastha Madaan, *Cultural Competency and the Practice of Law in the Twenty-First Century*, 30 PROB. AND PROP. MAG. (March 2016), https://www.americanbar.org/groups/real_property_trust_estate/publications/probate_property_magazine_2012/2016/march_april_2016/2016_aba_rpte_pp_v30_2_article_madaan_cultural_competency_and_the_practice_of_law_in_the_21st_century.html (last visited Oct. 7, 2017).

199. See Roberts, *supra* note 197, at 834.

200. See Madaan, *supra* note 198. Communication is key for attorneys, and good communication must start in law school. An effective attorney must not only be able to communicate clearly, but must also be able to actively listen and gather information from both clients and opposing counsel. *Id.*

201. See Mary Lynch, *The Importance of Experiential Learning for Development of Essential Skills in Cross-Cultural and Intercultural Effectiveness*, 1 J. EXPERIENTIAL LEARNING 129, 146 (2014).

202. See PROJECT IMPLICIT, available at <https://implicit.harvard.edu/implicit/takeatest.html> (last visited Apr. 13, 2017). The IAT’s have come under some criticism regarding validity and reliability, but they are still a good tool for self-exploration and self-awareness. See, e.g., Beth Azar, *IAT: Fad or Fabulous?*, 39 AM. PSYCHOL. ASS’N MONITOR ON PSYCHOL. 7, 44 (July/Aug. 2008), <http://www.apa.org/monitor/2008/07-08/psychometric.aspx> (last visited Aug. 2, 2017).

203. Susan Bryant, *The Five Habits*, 8 CLINICAL L. REV. 33, 36 (2001) (“This article focuses on teaching diversity through use of a framework of cross-cultural lawyering.”).

Camel's Back.²⁰⁴

Habit One teaches students to understand “similarities and differences between the lawyer and client [and how those differences] may influence” a lawyer’s interaction with a client.²⁰⁵ “Habit Two asks students to identify and analyze the possible effects of similarities and differences on the interaction between the client, the legal decision-maker and the lawyer — the three rings.”²⁰⁶ Habit Three teaches students to consider other reasons for a client’s behavior, particularly in instances when the student may be drawing a negative inference and judging the client for his or her behavior; it requires the student to view the client’s cultural framework and consider other alternatives.²⁰⁷ Habit Four asks the student to be culturally sensitive when communicating with a client.²⁰⁸ Habit Five, often considered the most difficult, “involves exploring oneself as a cultural being,” asking students to examine their own biases and how those may affect their lawyering.²⁰⁹ “Habit Five thinking asks the student to engage in self-analysis rather than self-judgment. By engaging in this reflective process, the lawyer is more likely to respond to and respect the individual client.”²¹⁰ When effectively taught, the Five Habits improve a student’s ability to relate to and understand individuals from different backgrounds and cultures, thereby allowing schools to produce more culturally competent lawyers.²¹¹ Students are taught to listen actively and are encouraged to deliberately seek out varying perspectives.

Doctrinal classes can also play an important role in promoting diversity. Spirited discussion often occurs in doctrinal classes. Whether it is the discussion of a criminal law statute or one about applicability of a constitutional law test, much debate and critical thinking occurs

204. *See id.* at 64–78.

205. *See id.* at 64–66. Habit One helps teach lawyers not to make assumptions where there are similarities, for example, during a client intake interview. *Id.*

206. *Id.* at 68. Habit Two helps students consider and analyze the various ways in which culture might play a role and influence a matter. *Id.*

207. *See id.* at 70–71. Habit Three is also called the “parallel universe habit” and asks students or lawyers to consider whether there might be other explanations for a client’s behavior. “The point of the parallel universe habit is to become accustomed to challenging oneself to identify the many alternatives to the interpretations to which we may be tempted to leap, on insufficient information.” *Id.* at 71.

208. *See id.* at 72–76. Habit Four encourages students to learn about how the legal system works in the client’s country of origin. *Id.* at 74.

209. *Id.* at 77.

210. *Id.* at 78.

211. *Id.*

in the doctrinal classes. It is essential that all viewpoints across the spectrum be acknowledged and validated during these debates and discussions. Students can learn just as much from one another in such situations as they can from the professor.²¹²For example, students can challenge each other and help each other see issues from varying perspectives, often better than a professor can.²¹³The professor represents only one set of views and experiences, whereas each individual student represents an entirely different set of views and experiences that brings value to the classroom experience.²¹⁴To maximize engagement and the development of critical thinking skills, professors should encourage students to seek out students who are different from them when forming study groups.²¹⁵

Experiential learning and pro bono opportunities further promote diversity among law students. Through these experiences students learn how to interact with clients and potential clients and confront the biases they discuss in their ethics classes.²¹⁶They are exposed to people they may represent after they graduate from law school and are forced to use lawyering skills that are not required in doctrinal classes:

[E]xperiential learning promotes diversity because it generally employs more diverse evaluation methods than does traditional legal education. It is well known that end-of-term, high-stakes examinations reward particular cognitive skills that only narrowly capture the skillsets required to be a good lawyer. Evaluation in an experiential learning setting tends to gauge a student's progress over time and with an assortment of evaluative tools.²¹⁷

Experiential learning is also more collaborative, allowing students to learn from a mentor-mentee relationship, as opposed to the traditional classroom Socratic method.²¹⁸And through pro-bono work, students may be exposed to diverse socioeconomic backgrounds and

212. Meera E. Deo, *Critical Race Theory and Empirical Methods Conference: Faculty Insights on Educational Diversity*, 83 FORDHAM L. REV. 3115, 3140 (2015).

213. *See id.*

214. *See id.*

215. *Id.* at 3140–41 (“I suggest to them that they find people who they are not like because if you all come from the same place, you will see the problem in the same way, you will begin your analysis from the same point.”).

216. *See Lynch, supra* note 201, at 146.

217. Bhabha, *supra* note 151, at 104.

218. *Id.* at 104–05 (“The ways in which experiential education promotes diversity also align with traits commonly attributed to members of the ‘millennial generation,’ who now constitute the majority of the North American law student body.” *Id.* at 105.).

clients of limited means. This further helps students develop cultural competency as potential practicing lawyers.

Professor Bhabha has observed that diversity pedagogy can contribute to legal education in at least four ways: (1) Allowing “space for different voices”;²¹⁹(2) “Deconstructing power relationships” in order to empower students and portray the attorney “as an agent of change”;²²⁰(3) “Stimulating [an organic] culture shift²²¹; and (4) “Making lawyers better communicators.”²²²“In this sense, diversity necessarily incorporates aspects of transnational fluency, intercultural sensitivity, and global awareness.”²²³Race categories alone, without contextual and individual understanding as contemplated by Justices Powell and O’Connor in *Bakke* and *Grutter*,²²⁴cannot help us further Professor Bhabha’s goals of diversity pedagogy, set forth above.²²⁵

IV. CONCLUSION

It is time to think outside of the race and ethnicity boxes with respect to diversity. Schools need to expand the focus away from the admissions table and toward a two-pronged approach that includes the classroom. Diversity does not happen in admissions committee meetings, although they are an important part of piecing together a diverse class. Diversity and inclusion happen throughout the law school experience. That is where engagement, cultural understanding, and the breakdown of bias occurs. Diversity is not a neat and tidy statistic that can be measured, and it is a disservice to students to attempt to place them into five race categories, and to measure diversity through these antiquated and often inappropriate labels.²²⁶Diversi-

219. *Id.* at 107. “Legal education excels when it ensures space for different voices and distinct or overlapping perspectives on, and experiences with, the law and when it encourages students to craft their own professional identity, rather than try to fit into a predetermined role.”

220. *Id.*

221. *Id.* This is done “by training students to develop a socially responsible professional self-image, to be contributors to the profession, and to realize the transformative potential of their role as lawyers in the broader society.”

222. *Id.*

223. Bhabha, *supra* note 151, at 107 (“Diversity pedagogy can, and should, touch on all aspects of law school life, from the doctrinal classroom to clinical placements to career counseling.” *Id.* at 108.)

224. *See supra* section I.B.

225. Bhabha, *supra* note 151, at 104-107.

226. *See* ABA 2016 Standard 509 Information Report Data Overview, *supra* note 77.

ty promotes the celebration of the uniqueness of each individual.²²⁷Diversity leads to the ability to listen empathetically and without judgment.²²⁸Diversity encourages law students to tolerate and even try to understand opposing viewpoints, even while strongly disagreeing with them.

Diversity pedagogy should include ability to look in the mirror and understand how implicit bias might impact one's decision making and actions.²²⁹It is not enough to check boxes for admission. Law schools and the ABA must also fully engage students in the classroom in order to develop culturally competent and diverse lawyers ready to represent and serve all of society.²³⁰

Race and ethnicity categories are limited in their ability to help law schools reach the ABA diversity goal of eliminating bias.²³¹Using this antiquated system to measure diversity is not the best way to work toward the true elimination of bias. Bias elimination can be achieved through a contextual understanding and implementation of diversity coupled with a diversity pedagogy.

Law schools should focus, first, on admitting a class with diverse backgrounds and viewpoints. To do this, schools should define diversity as broadly as possible and require that students write a diversity statement. Admissions committees can then work to admit cohorts that are not only racially diverse, but also socioeconomically diverse, diverse in religion in politics, geographically diverse, etc. Once students are matriculated, faculty, staff, and administration must then ensure that diverse viewpoints are expressed and meaningfully engaged in the classroom so students can develop persuasive and critical thinking skills. Finally, students should be encouraged throughout law school to confront their implicit and explicit biases and work with diverse populations through experiential learning as well as pro bono opportunities. This will help students develop the intercultural competency skills needed to become skilled lawyers capable of serving all clients. By encouraging self-awareness, promoting dialogue, and developing cultural competency skills, law schools can work towards truly achieving the goal of bias elimination.

227. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 317 (1978).

228. See Daniel Kiel, *Lessons from the Memphis 13: What 13 First-Graders Have to Teach about Law, Live and the Legacy of Brown*, 39 T. Marshall L. Rev. 63, 108 (2013).

229. See Bryant, *supra* note 203 at 56.

230. See *id.*; ABA Diversity Plan, *supra* note 3, at 1.

231. ABA Diversity Plan, *supra* note 3, at 1.

