



2017

Seeking Inclusion from the Inside Out: Towards A Paradigm of Culturally Proficient Legal Education

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SEEKING INCLUSION FROM THE INSIDE
OUT: TOWARDS A PARADIGM OF
CULTURALLY PROFICIENT LEGAL
EDUCATION

*Anastasia M. Boles**

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* Assistant Professor, University of Arkansas, Little Rock, William H. Bowen School of Law; J.D. Columbia Law School, B.A. Stanford University. I am grateful to God and my loving family. I want to express special gratitude to my amazing husband Edward C. Boles as well as our two wonderful children. I am especially grateful to Professor Adjoa Aiyetoro for her insight, mentorship, and support, and Professor Elizabeth McCuskey for her helpful comments. I thank the faculty members of the William H. Bowen School of Law and University of Memphis Cecil C. Humphreys School of Law for the engaging and reflective comments on the ideas presented in this Article. Finally, I thank the Writers Colony at Dairy Hollow for the gift of quiet and inspirational writing space and time, and Professors J. Lyn Entrikin, Richard Neumann, Twinette Johnson, and Dawn Dow for their company and encouragement. Finally, thanks to Dr. Kikanza Nuri-Robins for inspiring and tireless work in this area.

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I. INTRODUCTION

On November 19, 2015, the Harvard Law School community discovered the portraits of black law professors at Wasserstein Hall had been vandalized.¹ In what university police characterized as a hate crime, black tape was placed across the pictures of the law school's tenured black faculty.² The act was in apparent retaliation for a prior protest by a student group that previously placed black tape over the law school's crest.³ The Harvard Law School crest, which has now been changed by the school in response to the November protest,⁴ was derived from

1. Steve Annear, *Harvard police calling marred portraits a 'hate crime,'* BOSTON GLOBE, Nov. 19, 2015.

2. *Id.*

3. Jamiles Lartey, *Harvard 'black tape' vandalism brings law school's controversial past to fore,* THE GUARDIAN, Nov. 21, 2015; Claire E. Parker, *HUPD Closes Law School's Black Tape Investigation,* THE HARVARD CRIMSON, Jan. 25, 2016 (describing conclusion of investigation without identification of a perpetrator).

4. Steve Annear, *Harvard Law School to ditch controversial shield,* BOSTON GLOBE, Mar. 14, 2016.

the family coat of arms of Isaac Royall, Jr., the slaveholder whose endowment founded the law school.⁵ One Harvard doctoral student at the school of education called the protest a “symbolic act,” intended to reject Harvard Law’s “legacy of slavery.”⁶ A Harvard Law student opined that the core issue was not the vandalism, but “a *culture*⁷ that allows these things to occur.”⁸ He explained, “[s]o when these things happen, a lot of white students are surprised but a lot of the black students feel the pressures of it every day.”⁹

The students at Harvard Law are not alone in criticizing a higher education “culture” that perpetuates social hierarchy over equity. All over the country, institutions of higher education are struggling to navigate systems of institutionalized racism, sexism, and heterosexism¹⁰ along with issues of marginalization, socioeconomic bias, and immigration.¹¹ Many are criticizing these

5. Janet Halley, *My Isaac Royall Legacy*, 24 HARV. BLACK LETTER L.J. 117, 120 (2008).

6. Lartey, *supra* note 3.

7. *Id.*; Merriam Webster defines “culture” as, *inter alia*, “a way of thinking, behaving, or working that exists in a place or organization (such as a business).” *Culture*, MERRIAM-WEBSTER’S LEARNER’S DICTIONARY (2016). Thus, this Harvard Law student is critiquing the patterns of thought, behavior, and interaction among faculty, staff, and students that worked to encourage the vandalism.

8. Lartey, *supra* note 3.

9. *Id.*

10. While this Article will often discuss “isms,” subordination, social dominance, and systems of privilege as a general matter, the Article emphasizes race as a departure point. I argue that development of strategies for racial inclusion can serve as a paradigm for diversity inclusion generally. See Marjorie A. Silver, *Emotional Competence, Multicultural Lawyering and Race*, 3 FLA. COASTAL L.J. 219, 231 (2002) (“Race in America is the most salient, the most toxic of all areas of difference.”).

11. See, e.g., Alan Scher Zagier & Summer Ballentine, *Before recent protests, U. of Missouri’s main campus saw decades of strained race relations*, ASSOCIATED PRESS (Nov. 11, 2015), <https://perma.cc/4G68-EACW> (outlining history of racial tension and violence at University of Missouri); Noah Remnick, *Yale Grapples With Ties to Slavery in Debate Over a College’s Name*, N.Y. TIMES (Sept. 11, 2015), <https://perma.cc/5275-X8G2> (discussing naming of Calhoun College, a residential college at Yale named after white supremacist John C. Calhoun); Andy Newman, *At Princeton, Woodrow Wilson, a Heralded Alum, Is Recast as an Intolerant One*, N.Y. TIMES (Nov. 22, 2015), <https://perma.cc/69X9-YJ7E> (discussing Wilson’s support of racial segregation); Jake New, *Protests Spur Another Resignation: Claremont McKenna dean of students resigns amid*

institutions as ill-equipped to deal with student demands for more diverse and inclusive educational spaces.¹²

Standard 206 of the American Bar Association (ABA) Standards and Rules of Procedure for Approval of Law Schools requires that law schools “demonstrate by concrete action a commitment to diversity and inclusion” by encouraging a diverse student body, faculty, and staff.¹³ To date, legal education has relied mainly on affirmative action programs to achieve its structural diversity goals.¹⁴ Structural diversity is the “numerical and proportional representation of diverse groups on campus.”¹⁵ The reasoning is that if enough of one category of underrepresented students or professionals can be introduced into legal education and ultimately the legal profession, then a

protests over comments on race and campus climate, INSIDE HIGHER ED (Nov. 13, 2015), <https://perma.cc/5275-X8G2> (explaining the resignation of Claremont McKenna dean of students after email response to student that she and her staff were ‘working on how we can better serve students, especially *those who don’t fit our CMC mold*’ (emphasis added)); Ryan M. McDermott, *Georgetown to offer preferred admission to descendants of school’s former slaves*, WASHINGTON TIMES (Sept. 1, 2016), <https://perma.cc/ZEH9-SA8N>; Leonor Vivanco & Dawn Rhodes, *U. of C. tells incoming freshmen it does not support ‘trigger warnings’ or ‘safe spaces.’* CHICAGO TRIBUNE (Aug. 25, 2016), <https://perma.cc/WGV7-82HE> (describing letter from university to freshman emphasizing “academic freedom” over “intellectual safe spaces”).

12. See, e.g., Guy Russo & Erin Logan, *Vanderbilt University Wants Our Bodies But Not Our Baggage*, HUFFINGTON POST COLLEGE BLOG (Nov. 16, 2015, 07:22 PM), <https://perma.cc/3F9U-49VN>.

13. AM. BAR ASS’N SECTION OF LEGAL EDUC. & ADMISSION TO THE BAR, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2015-2016, at 12 (2015) [hereinafter ABA STANDARDS AND RULES OF PROCEDURE]. ABA Standard 205, entitled “Non-Discrimination and Equal Opportunity,” forbids law schools from discriminating on the basis of race, color, religion, national origin, gender, sexual orientation, age, or disability. *Id.* at 11-12.

14. Meera Deo, *The Promise of Grutter: Diverse Interactions at the University of Michigan Law School*, 17 MICH. J. RACE & L. 63, 65 (2011) [hereinafter Deo, *The Promise of Grutter*]; American Bar Association Presidential Diversity Initiative, *Diversity in the Legal Profession: The Next Steps*, ABA (2009), <https://perma.cc/959Z-C6BX> [hereinafter ABA Presidential Diversity Initiative] (most law schools focus diversity initiatives on student admissions).

15. Meera E. Deo et al., *Struggles and Support: Diversity in U.S. Law Schools*, 23 NAT’L BLACK L.J. 71, 74 (2010) (citing Sylvia Hurtado et al., *Enhancing Campus Climate for Racial/Ethnic Diversity: Educational Policy and Practice*, 21 REV. OF HIGHER EDUC. 279 (1998)).

certain “critical mass”¹⁶ can be achieved and social ills such as bias, racism, sexism, and discrimination will magically disappear.¹⁷ This “critical mass” ideology is epitomized in the landmark Supreme Court decision upholding the use of affirmative action programs in higher education, *Grutter v. Bollinger*.¹⁸ Yet, the majority of law students continue to be white; the vast majority of law faculty, associate deans, and deans are white, with white males representing the largest groups among tenure-track faculty and law school leadership.¹⁹ Conversely, attrition rates are higher, and both tenure and graduation rates are lower, for diverse²⁰ law faculty and students

16. The term “critical mass” is defined as “the variable number or percentage of individuals from a particular group who must be present for their presence to be meaningful.” *Id.*

17. Rachel F. Moran, *Diversity and its Discontents: The End of Affirmative Action at Boalt Hall*, 88 CAL. L. REV. 2241, 2254 (2000) [hereinafter Moran, *Diversity and its Discontents*] (“As for the enrollment targets for Blacks and Latinos, these were linked to a notion of “critical mass.” Asserting that “[t]okenism is the enemy of diversity,” the law school’s report relied on social science evidence showing that when people of color attended colleges and universities in very small numbers, their achievement was depressed and they often became alienated and isolated from the rest of the student body. Once a critical mass of ten percent was achieved, these students’ academic performance improved, and they were better able to bring the qualities of voice and perspective that [*Regents of the University of California v. Bakke*, 438 U.S. 265 (1978)] endorsed. The report also noted that the concept of critical mass was linked to perceptions of proportionality; for example, women might feel underrepresented, even if they accounted for ten percent of the class, because they made up fifty percent of the general population.”).

18. Deo, *The Promise of Grutter*, *supra* note 14, at 4 (citing excerpts from *Grutter v. Bollinger*, 539 U.S. 330 (2003). While *Grutter* recognized that, “[a]ccess to legal education (and thus the legal profession) must be inclusive of talented and qualified individuals of every race and ethnicity. . .,” 539 U.S. at 332, the Supreme Court conceptualized achieving the goals of diversity and inclusion mainly through the mechanism of a critical mass of diverse students.

19. See discussion *infra* Section II.A.2.

20. I use the term “diverse” as an umbrella term to embrace and to describe individuals or groups representing cultural backgrounds that are historically underrepresented in higher education or legal education, such as race, gender, sexual orientation, ethnicity, and national origin. I use the term in an attempt to affirm the existence of diverse individuals, instead of defining them as a “non”-entity in relation to an entity (e.g. non-White). I use the term “person of color” to describe a racially diverse individual. Conversely, I will sometimes describe membership in a numerically or culturally dominant group in terms of “majority” membership. I have used these terms to support the

than their white counterparts.²¹

Thus, it is apparent that the actual law school experience of diverse law students and diverse faculty members belies the notion that structural diversity or a critical mass of students is enough to accomplish the full vision of diversity and inclusion described in *Grutter*.²² Structural diversity is a “necessary but not sufficient” condition to the cultural shift that needs to occur within the hallways of legal education—a cultural shift that guarantees educational equity for all students.²³ Legal education has yet to take on the work of making palpable changes to the law school environment.²⁴ Given the lack of structural diversity in law school faculty, this article serves as a call for *all* members of the legal academy, not just diverse faculty and administration, to actively work towards more inclusive, supportive, and diverse law school environments.

This article argues that the paradigm of cultural proficiency can guide the environmental change needed in legal education.²⁵

constantly evolving effort to avoid the subtle yet real denigration of those individuals who do not enjoy the privilege of dominant-group membership with subordinating language and labels. In doing so, I also intend to challenge whiteness as a cultural norm.

21. See discussion *infra* Sections II.A.3 and II.A.4.

22. *Grutter*, 539 U.S. at 327 – 333. See discussion *infra* Sections II.A.3 and II.A.4.

23. Deo, *The Promise of Grutter*, *supra* note 14, at 84. In the scholarship, this need has often been identified as a need for “classroom diversity” or a diverse “campus environment.” *Id.* at 83 (“ . . . classroom diversity refers specifically to the site and content of interactions between diverse students, with a focus on the benefit of enhanced educational opportunities”).

24. Proposed ABA Standard 206(a) goes further by requiring law schools to “provide an environment in which diversity and inclusion are welcomed and embraced . . . [and] demonstrate this commitment . . . by concrete action.” *Memorandum from ABA Section on Legal Education regarding ABA Standards for Approval of Law Schools Matters for Notice and Comment 6* (Dec. 11, 2015). In February 2016, the Standards Review Committee proposed an alternate revision that retained the environmental language but added specific reference to diverse groups. *SRC Memo to Council regarding Items Circulated for Notice and Comment* (Feb. 22, 2016). Discussion on Proposed Standard 206 was tabled in March 2016 and referred to a working group of the Council. Council of the Section of Legal Educ. and Admissions to the Bar, *Summary of Council Actions* (March 2016).

25. There are many labels for the doctrinal concept of “cultural proficiency” such as “cultural competency” and “cultural sensitivity.” I use the term

Dr. Kikanza Nuri-Robins and her colleagues define cultural proficiency as “the policies and practices of an organization or the values and behaviors of an individual that enable that agency or person to interact effectively in a diverse environment.”²⁶ It is both normative and pragmatic. The paradigm of cultural proficiency has been utilized effectively in a variety of professional fields such as health care, social work, law enforcement, and corporate industry.²⁷ It is a set of ideals that requires an individual or organization to commit to constant evaluation and re-evaluation of learning more effective cross-cultural practices. Most important, cultural proficiency starts at the root of the problem by seeking to dismantle the biased beliefs and hegemonic values of the individual or organization. Specifically, this article advocates that law schools integrate the framework of cultural proficiency in their administrations by training legal educators to provide culturally proficient instruction²⁸ to law students and by integrating culturally proficient lawyering skills into the law school curriculum.

Unlike other professions, the legal profession has underemphasized the dismantling of social hierarchies through

“cultural proficiency” in this article both generally in reference to the body of literature for consistency and specifically to reference the continuing work of Dr. Kikanza Nuri Robins and her colleagues. *See, e.g.*, KIKANZA J. NURI-ROBINS ET AL., CULTURALLY PROFICIENT INSTRUCTION: A GUIDE FOR PEOPLE WHO TEACH xxiv (3d. ed. 2012) [hereinafter NURI-ROBINS ET AL., CULTURALLY PROFICIENT]. In their important 2004 article on the need for cultural proficiency in legal education, Professors Hartley and Petrucci noted that while there are many different models of cultural proficiency, “similar threads” exist throughout the doctrine that “vary in their emphasis and focus.” Carolyn Copps Hartley & Carrie J. Petrucci, *Practicing Culturally Competent Therapeutic Jurisprudence: A Collaboration Between Social Work and Law*, 14 WASH. U. J. L. & POL’Y 133, 170 (2004).

26. *See* NURI-ROBINS ET AL., CULTURALLY PROFICIENT, *supra* note 25.

27. KIKANZA NURI-ROBINS & LEWIS G. BUNDY, FISH OUT OF WATER: MENTORING, MANAGING AND SELF-MONITORING PEOPLE WHO DON’T FIT IN (Corwin 2016) (forthcoming).

28. Culturally proficient instruction is defined as “a way of teaching in which instructors engage in practices that provide equitable outcomes for all learners.” NURI-ROBINS ET AL., CULTURALLY PROFICIENT, *supra* note 25, at xxvi. “Through culturally proficient instruction, instructors inquire about best practices and reflect on their behavior in response to the various needs of learners rather than simply repeating rote skills and preparing for tests.” *Id.*

cultural proficiency efforts.²⁹ A number of professions have begun the work of integrating cultural proficiency training efforts in both the education of those entering the profession and the clinical standards.³⁰ The hallways of legal education need to follow this model and work to become culturally proficient spaces. Thus far, ad hoc diversity efforts have been the norm. Law schools must make the commitment to become culturally proficient spaces and law faculty must deliver culturally proficient instruction to law students. Only then can we expect law students to be trained to deliver culturally proficient legal counsel to future clients.

Much of the current scholarship on cultural proficiency and diversity efforts in legal education³¹ focuses in a few areas: (1) the challenges faced in admitting, recruiting, retaining and supporting “diverse” academics and law students,³² (2) the need to train law students to represent clinical and future clients in a culturally proficient way,³³ and (3) the need for the legal

29. For example, Sue and Sue have recognized cultural proficiency as a critical component of mental health work. See DERALD WING SUE & DAVID SUE, *COUNSELING THE CULTURALLY DIFFERENT: THEORY AND PRACTICE* (2d ed., 1990) [hereinafter SUE & SUE, *COUNSELING THE CULTURALLY DIFFERENT*]; see also Andrea A. Curcio, Teresa E. Ward, and Nishi Dogra, *A Survey Instrument to Develop, Tailor, and Help Measure Law Student Cultural Diversity Education Learning Outcomes*, 38 NOVA L. REV. 177, 186-87 (2014) [hereinafter Curcio, Ward, and Dogra, *Survey Instrument*] (discussing cultural competency efforts in medical school education).

30. Curcio, Ward, and Dogra, *Survey Instrument*, *supra* note 29, at 185.

31. For an excellent review of the legal scholarship related to cultural proficiency from 2000 – 2011, see Annette Demers, *Cultural Competence and the Legal Profession: An Annotated Bibliography of Materials Published Between 2000 and 2011*, 39 INT’L J. LEGAL INFO. 22 (2011).

32. See, e.g., DOROTHY H. EVENSEN & CARLA D. PRATT, *THE END OF THE PIPELINE: A JOURNEY OF RECOGNITION FOR AFRICAN AMERICANS ENTERING THE LEGAL PROFESSION* 55 (2011) [hereinafter EVENSEN & PRATT, *THE END OF THE PIPELINE*]; Deo, *The Promise of Grutter*, *supra* note 14; Deo, Allen, Panter, Daye & Wightman, *supra* note 15; Moran, *supra* note 17; Meera Deo, *The Ugly Truth About Legal Academia*, 80 BROOK. L. REV. 943 (2015) [hereinafter Deo, *The Ugly Truth*].

33. See, e.g., Michelle S. Jacobs, *People from the Footnotes: The Missing Element in Client-Centered Counseling*, 27 GOLDEN GATE U.L. 345 (1997); Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLINICAL L. REV. 33 (2001); Ascanio Piomelli, *Cross-Cultural Lawyering by the Book: The Latest Clinical Texts and a Sketch of a Future Agenda*, 4 HASTINGS RACE & POVERTY L.J. 131 (2006).

profession to address critical issues such as increasing access to justice for disadvantaged populations.³⁴ There is a rich discourse analyzing the white male normative foundation of legal education, and the need to dismantle it.³⁵ Less scholarship has focused explicitly on what is a practical precursor to the topics above—the need for legal educators to take on the work of educating law students in a culturally proficient way.³⁶

Tellingly, almost every study of law student and faculty experience analyzing race has recommended some type of culturally proficient policy for legal education.³⁷ Those studies failing to explicitly propose diversity training have recognized the failing of the traditional pedagogical approach.³⁸ And much of the

34. See, e.g., Michelle J. Anderson, *Legal Education Reform, Diversity and Access to Justice*, 61 RUTGERS L. REV. 1011 (2009); Bidish J. Sarma, *Challenges and Opportunities in Bringing the Lessons of Cultural Competence to Bear on Capital Jury Selection*, 42 U. MEM. L. REV. 907 (2012); Luz E. Herrera, *Educating Main Street Lawyers*, 63 J. LEGAL EDUC. 189, 209 (2013); Michele Benedetto Neitz, *Socioeconomic Bias in the Judiciary*, 61 CLEV. ST. L. REV. 137 (2013) [hereinafter Neitz, *Socioeconomic Bias*].

35. Margalynne J. Armstrong & Stephanie M. Wildman, *Teaching Race/Teaching Whiteness: Transforming Colorblindness to Color Insight*, 86 N.C. L. REV. 635, 638 (2008) [hereinafter Armstrong & Wildman, *Teaching Race/Teaching Whiteness*]; (“[L]egal educators must develop an understanding of the role of whiteness in the construction of equality and teach future lawyers to do so as well.”); Robert S. Chang & Adrienne D. Davis, *An Epistolary Exchange, Making Up is Hard to Do: Race/Gender/Sexual Orientation in the Law School Classroom*, 33 HARV. J. L. GENDER 1 (2010).

36. This is beginning to change. See, e.g., Hartley & Petrucci, *supra* note 25; Andrea A. Curcio, *Addressing Barriers To Cultural Sensibility Learning: Lessons From Social Cognition Theory*, 15 NEV. L.J. 537 (2015).

37. See, e.g., Nancy E. Dowd, Kenneth B. Nunn & Jane E. Pendergast, *Diversity Matters: Race, Gender, and Ethnicity in Legal Education*, 15 U. FLA. J.L. & PUB. POL’Y 11, 42-43 (2003) (examining a study from the University of Florida College of Law finding “[a]ll of this would suggest that faculty would benefit from diversity training and study, to unearth both conscious and unconscious prejudices that serve as barriers to their students. . . . The premise of faculty training is simple acknowledgment of the presence of biases as well as the desire to teach to all the students in the room.”); Deo, *The Promise of Grutter*, *supra* note 14, at 111 (reporting a Michigan study finding that “[i]n fact, many faculty members, along with anyone interested in more effectively communicating with people from diverse backgrounds, could benefit from workshops or training sessions designed to help facilitate diversity discussions.”).

38. See, e.g., Moran, *Diversity and its Discontents*, *supra* note 17, at 2343 (finding that “Boalt, like other law schools, only incompletely fulfilled the

legal scholarship analyzing diversity in legal education has called for some sort of diversity training to be offered to legal educators.

39

This article examines the need for legal education to adopt a culturally proficient paradigm that begins at the administrative and faculty level. Part II scrutinizes this need from several perspectives, briefly surveying ongoing cultural proficiency efforts in the legal profession. Part III advocates for adoption of the paradigm of cultural proficient instruction utilized by education and diversity scholar Dr. Kikanza Nuri-Robins and her colleagues as a way forward towards inclusive change in legal education.⁴⁰ It then examines the role of privilege systems, the largest barrier to an individual's or institution's adoption of culturally proficient practices. Part III discusses the implications of adoption of a culturally proficient paradigm by law school administration and faculty. Implementing cultural proficiency at the administration and faculty level in law schools will help move forward from structural diversity to cultural change.

promise of diversity, despite the growing heterogeneity of its student body throughout the late 1970s, 1980s, and much of the 1990s. As Boalt enters the new century, its opportunity to capitalize on student diversity has greatly diminished, but its obligation to reflect on and reform the pedagogical process remains.”).

39. See, e.g., Morrison Torrey, *Yet Another Gender Study? A Critique of the Harvard Study and a Proposal For Change*, 13 WM. & MARY J. WOMEN & L. 795, 813-14 (2007) [hereinafter Torrey, *Yet Another Gender Study?*] (suggesting law schools commit to hiring and retaining diverse faculty, ensure diverse faculty teach in the first-year curriculum, improve teaching techniques through faculty development, reward faculty based on teaching techniques, and enforce and educate the law school community about racial and sexual harassment policies); Morrison Torrey, *Actually Begin To Satisfy ABA Standards 211(a) and 212(a): Eliminate Race and Sex Bias in Legal Education*, 43 HARV. C.R.-C.L. L. REV. 615, 616 (2008) [hereinafter Torrey, *Satisfy ABA Standards*] (proposal to require a first-year course “centered on issues of subordination and privilege”).

40. NURI-ROBINS ET AL., CULTURALLY PROFICIENT, *supra* note 25; FRANKLIN CAMPBELL JONES ET AL., THE CULTURAL PROFICIENCY JOURNEY: MOVING BEYOND ETHICAL BARRIERS TOWARD PROFOUND SCHOOL CHANGE (Corwin, 2010).

II. NEED FOR LEGAL EDUCATORS TO BE CULTURALLY PROFICIENT

To understand the “culture” referenced by the Harvard Law student precipitating the act of vandalism at Harvard Law School in November 2015, it is useful to give voice to one of the enslaved women whose labor directly contributed to the law school’s founding. Belinda was enslaved by the Royall family, whose endowment founded the law school, for fifty years.⁴¹ She was born near the banks of the Volta River in what is now Ghana.⁴² Belinda was about twelve years old when she was captured, torn from her parents arms during a prayer ceremony by men “whose faces were like the moon, and whose Bows and Arrows were like the thunder and the lightning of the Clouds.”⁴³ This young girl endured passage by sea “along with three hundred Affricans [sic] in chains, suffering the most excruciating torments” and watched some rejoice, welcoming suicide, “that the pangs of death came like a balm to their wounds.”⁴⁴ Belinda arrived in Massachusetts and was sold as a slave to Isaac Royall, Sr. in 1732, a public figure in the Massachusetts colony whose wealth was built on slave trading and sugar cane farming in Antigua.⁴⁵ Belinda toiled as a slave for the Royall family at Ten Hills Farm in Medford, Massachusetts for fifty years.⁴⁶

Belinda would have been at Ten Hills Farm to hear the stories of the fifteen enslaved Africans who Royall imported from his Antigua plantation in 1739.⁴⁷ The enslaved Antiguans would

41. Roy E. Frankenbine, *Belinda’s Petition: Reparations for Slavery in Revolutionary Massachusetts*, 64 WM. & MARY QUARTERLY 95 (2007).

42. *Id.* at 96.

43. *Id.*; *Belinda’s Petition to the Massachusetts General Court* (Feb. 14, 1783) (unpublished manuscript) (on file with Massachusetts Archives, RHA files).

44. Frankenbine, *supra* note 41; *Belinda’s Petition to the Massachusetts General Court* (Feb. 14, 1783) (unpublished manuscript) (on file with Massachusetts Archives, RHA files).

45. Frankenbine, *supra* note 41, at 97-98.

46. C.S. Manegold, *TEN HILLS FARM: THE FORGOTTEN HISTORY OF SLAVERY IN THE NORTH*, 154 (Princeton University Press, 2009) [hereinafter *Manegold, TEN HILLS FARM*].

47. Halley, *supra* note 5, at 119.

have told her of the constant drought, disease, and the brutality they experienced after those enslaved on the island tried to revolt in 1736.⁴⁸ Hector, the Royall family's overseer, was burned alive by the Antiguan government for his alleged role in the conspiracy.⁴⁹ By the end of March 1737, eighty-eight enslaved Africans had been executed.⁵⁰ "The final tally, meticulously recorded in Antiguan records, was as follows: "[f]ive broken on the wheel. Six gibbeted. Seventy-seven burned to death."⁵¹ The Royall family enslaved and traded hundreds of people during Belinda's enslavement.⁵² Isaac Royall, Jr. took over the family's business in 1739 when his father died and enslaved six times more Africans than any other household in Medford, Massachusetts by 1754.⁵³

The labor of these enslaved Africans was directly responsible for the massive Royall family wealth.⁵⁴ In 1817, the Harvard Law School was founded due to Isaac Royall, Jr.'s endowment.⁵⁵ The school has an endowed professorship in Royall's name.⁵⁶ Historic law school documents describing Royall's life emphasize his public service and generosity.⁵⁷ As described above, the former Harvard Law School crest, three sheaves of wheat, was derived from the Royall family coat of arms.⁵⁸ Hanging in the law library is one of the law school's "most prized possessions," a portrait of Isaac Royall, Jr. and his family.⁵⁹

48. *Id.* at 120 (citing Alexandra A. Chan, *The Slaves of Colonial New England: Discourses of Colonialism and Identity at the Isaac Royall House, Medford, Massachusetts, 1735-1755*, at 254 (2003) (unpublished Ph.D. dissertation, Boston University) (on file with the Harvard Law School Library)).

49. *Id.*

50. Manegold, TEN HILLS FARM, *supra* note 46, at 161.

51. *Id.*

52. *Id.* at 154.

53. Halley, *supra* note 5, at 119. Records indicate the Royall household held twelve slaves, while the next largest household in Medford held two slaves. Eighteen households in Medford held one slave.

54. *Id.* at 120 ("The wealth that allowed the Royall family to acquire their Massachusetts holdings thus derived from a slave-based enterprise.").

55. Manegold, TEN HILLS FARM, *supra* note 46 at 170.

56. Halley, *supra* note 5, at 117.

57. Manegold, TEN HILLS FARM, *supra* note 46 at 174-175.

58. Halley, *supra* note 5, at 121.

59. Manegold, TEN HILLS FARM, *supra* note 46, at 174 (quoting Erika

By maintaining the Royall family crest for so long, the culture of Harvard Law School embraced Isaac Royall, Jr., obscured the contribution of Belinda and the hundreds of other enslaved Africans that built the Royall family's wealth, and "whitewash[ed]" history.⁶⁰ The Harvard students seek acknowledgment for the sacrifice of the enslaved Africans owned and traded by the Royall family.⁶¹ The students seek remembrance of a painful, but important, history.⁶² Importantly, the law students who placed tape over the school's crest desired a culture of racial inclusion. The vandals who took the tape and placed it over the portraits of the tenured black professors were both acknowledging and perpetuating a culture of racial dominance.

A. Perspectives on the Need for Culturally Proficient Legal Instruction

The recent vandalism incident following the student protest at Harvard Law is unsurprising. Most law students are taught from an invisible and assumed perspective that is largely white, male, heterosexual, economically advantaged, and able-bodied. This assumed perspective forms an invisible pedagogical norm. While legal educators teach students to identify, isolate, and even question the legal rules in a particular case, it is from a white-privileged normative foundation. Law professors rarely teach law students to systematically question the biased foundation of the

Chadbourn, founding curator of manuscripts and archives at Harvard Law School).

60. Manegold, TEN HILLS FARM, *supra* note 46, at 174. Manegold observes: "Not a brushstroke creates the shadow of a slave. No painterly symbol—not even a pineapple—alludes to the hundreds of workers in the West Indies whose labor made the family rich. No sly clue implies the family's trade in human beings. Instead it is a whitewash, and the first of many, that celebrates arrival even as it disinfects the family's path to riches. Fine living and refinement are presented here as absolutes, a happy accident of life, perhaps, and just as much worth crowing about as the Master's giddy news from decades earlier that he did not care to boast, but friends might want to know: He was rich! That was what mattered, what was memorialized and kept, as though luxury was destiny for a generation bred to rule." *Id.*

61. Collective Demands for Change at Harvard Law School, www.thedemands.org.

62. *Id.*

legal system, or the ways in which dominate culture and systems of privilege influence the law.⁶³ There is little to no discussion of how a student's personal biases, values, and unconscious beliefs shape their opinion of the law, future practice, and future client relationships.⁶⁴

This omission has at least four repercussions: (1) it communicates that law exists in a place void of conflicting cultures, privileges, and values, (2) it reinforces the isolation felt by those not benefiting from the assumed dominant privileges (which in turn fosters the retention problems in legal education), (3) it leaves law students ill-equipped to practice in a culturally diverse legal environment (to the disadvantage of underserved legal communities), and (4) it fails to answer the charge that law schools develop the emotional, ethical, and cultural competence of law graduates.

This section continues by examining the need for legal education to shift from a white male pedagogical norm to culturally proficient instruction from various perspectives.

i. The Reform Canon and ABA Response

In recent years, legal education has faced broad-based criticism and attack for its failure to develop critical legal skills in law graduates. Criticisms from the "reform canon" literature include that legal education places too little emphasis on practical skills, the development of ethical decision-making, and the need to increase access to legal services for underserved communities.⁶⁵ In 2007, the Clinical Legal Education Association

63. See Kimberle Williams Crenshaw, *Foreword: Toward A Race-Conscious Pedagogy in Legal Education*, 4 S. CAL. REV. L. & WOMEN'S STUD. 33, 35 (1994) [hereinafter Crenshaw, *Foreword*] (describing an "analytical stance" in legal education called "perspectivelessness" that reinforces the beliefs of the dominant cultural and has no apparent "cultural, political, or class characteristics.").

64. *Id.*

65. WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 7 (2007), <https://perma.cc/S5PK-N7LP> [hereinafter Carnegie Report]; ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP 1, 18-19 (Clinical Legal Education Association 2007) (describing failure of law schools to graduate lawyers who serve the working and middle class) [hereinafter Best Practices Report]; American Bar Association

issued a set of “best practices for legal education.”⁶⁶ Among the Association’s recommendations was that law students be trained to “deal sensitively and effectively with diverse clients and colleagues.”⁶⁷ Citing Susan Bryant and Jean Koh Peters seminal article on the need for cross-cultural legal education,⁶⁸ the Best Practices Report emphasized:

It is important for law schools to help students develop their capacity to deal sensitively and effectively with clients and colleagues from a range of social, economic, and ethnic backgrounds. Students should learn to identify and respond positively and appropriately to issues of culture and disability that might affect communication techniques and influence a client’s objectives. Cross-cultural competence is a skill that can be taught.⁶⁹

In perceived response to this criticism, there is also a move to incorporate cultural proficiency into the ABA standards for law

Section of Legal Education and Admissions to the Bar, Legal Education and Professional Development--An Educational Continuum; *Report of the Task Force on Law Schools and the Profession: Narrowing the Gap* 117 (1992), [hereinafter MacCrate Report].

66. Best Practices Report, *supra* note 65.

67. *Id.* at 66.

68. *Id.* (citing Bryant, *supra* note 33 (internal citations omitted)).

69. *Id.* The Best Practices Report explicitly advocated for diversity in legal education, albeit with structural diversity as the primary vehicle:

“One way in which law schools can enhance their students’ abilities to deal sensitively and effectively with diverse groups of clients and colleagues is by serving as a model for promoting diversity in law practice and the community, including having in the law school community a critical mass of students, faculty, and staff from minority groups that have traditionally been the victims of discrimination. As students progress through law school, they identify and analyze their conscious and subconscious biases regarding race, culture, social status, wealth, and poverty through discourse with their teachers and fellow students. They test their own perceptions against those of their peers and teachers. If the law school community is racially, culturally, and socio-economically diverse, students develop better understandings of the ways in which race and culture can affect clients’ and lawyers’ world views and influence their objectives and decisions.”

Best Practices Report, *supra* note 65.

schools.⁷⁰ Recently amended ABA Standard 302 requires law schools to develop learning outcomes that assess student competency in a number of areas including “[o]ther professional skills needed for competent and ethical participation as a member of the legal profession.”⁷¹ Interpretation 302-1 lists cultural proficiency as one professional skill for law schools to both develop and assess.⁷²

For the purposes of Standard 302(d), other professional skills are determined by the law school and may include skills such as: interviewing, counseling, negotiation, fact development and analysis, trial practice, document drafting, conflict resolution, organization and management of legal work, collaboration, ***cultural competency***, and self-evaluation.⁷³

The biggest barrier to teaching culturally proficient lawyering skills to law students, and then assessing those skills as contemplated by Standard 302, is that most legal educators have never been trained to be culturally proficient lawyers.⁷⁴ Simply put, most law schools currently are ill-equipped to accomplish the mandates of Rule 302 with regard to cultural proficiency. Legal educators, even those with significant practice experience, are not trained to deliver culturally proficient client services, nor are legal educators trained in how to deliver culturally competent legal instruction to a diverse group of law students.⁷⁵ The result is empty, abstract, and ill-educated efforts to meet a rather lofty and elusive goal. To truly accomplish the goal of advancing a culturally proficient curriculum, legal academics must be equipped to first dismantle their own biased and privileged perspective of the law and legal education. Only after this deconstruction can faculty and administrators engage in fruitful efforts to train law students to competently represent clients.

70. *Id.* at 203.

71. ABA STANDARDS AND RULES OF PROCEDURE, *supra* note 13, at §302(d).

72. *Id.*

73. *Id.* (emphasis added).

74. Best Practices Report, *supra* note 65, at 133.

75. *Id.*

ii. The Status Quo - White Administration and Faculty

Because the majority of stakeholders in legal education come from a background of the white dominant culture, shifting to a paradigm of cultural proficiency needs to be an intentional effort. The majority of administrators, faculty members, and staff in legal education are white.⁷⁶ The ABA collects and releases data on ABA-approved law schools.⁷⁷ The most recent ABA gender and ethnicity data is from 2013 and contains information on 202 law schools.⁷⁸ At that time, 79.9% of full-time teaching faculty members (including tenured, tenure-track, clinical, and visitors) were white.⁷⁹ The majority of law school deans (79.2%), associate or vice-deans (77.2%), and assistant-dean/directors (74.7%) were also white.⁸⁰ White men were over-represented in many categories, comprising 48.4% of full-time teaching faculty and 58.9% of law school deans.⁸¹

One of the effects of this lack of diversity is that white faculty members often feel ill-equipped to deal with issues of race when they arise on campus. When presenting an early draft of this article, one white faculty member shared that although she approaches other sensitive issues in her legal seminar with humor, she takes a more somber tone when discussing racial issues for fear of offending a student or making a mistake. Her fears are not unfounded.⁸² Rockquemore and Laszloffy observed that “[w]hites fear that anything they say about race in the

76. Meera E. Deo, *Trajectory of a Law Professor*, 20 MICH. J. RACE & LAW 441, 446 (2015) (discussing 2009 law faculty statistics from the American Association of Law Schools revealing 71% of law faculty, 83% of deans, and 79% of associate deans were white; white men comprised 46% of law faculty).

77. American Bar Association, Section of Legal Education and Admissions to the Bar, *ABA Approved Law School Staff and Faculty Members, Gender and Ethnicity: Fall 2013*, <https://perma.cc/UHG4-BEEP>.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. See Moran, *Diversity and its Discontents*, *supra* note 17, at 2335 (student respondents critical of “clumsy treatment of cases” involving racial and gender issues and expectation that faculty avoid “any semblance of racist thinking”).

company of people of color will be used to label them as racist...”⁸³

Too often, white faculty members either fail to perceive racial issues affecting legal education or reject the responsibility to take on a solution or even a conversation.⁸⁴ Armstrong and Wildman write: “[t]oo often legal educators suppress opportunities to examine issues of race, including whiteness, when they could help students to engage thoughtfully with these issues.”⁸⁵ In her study of the diversity and law student experience at the University of Michigan, Professor Meera Deo found that while students were generally happy with the level of informal interaction among diverse peers, students were unhappy with the way a majority of faculty handled conversations of diversity in the classroom.⁸⁶

Rockquemore and Laszloffy conclude:

The failure to engage in open, honest cross-racial dialogue stands as a barrier between white and black academics. As long as silence about racial issues remains the norm, academe will never truly be a welcoming and supportive environment for black faculty. . . . The unwritten prohibition against open discussions about race communicates that white faculty are largely uninformed about the complexities of race and are unwilling to be accountable for their racial privilege. Consequently, the failure to engage in open cross-racial conversations protects white power and undermines a spirit of racially progressive engagement.⁸⁷

Students like Darlene, a respondent in a study conducted by professors Dorothy Evensen and Carla Pratt at Pennsylvania

83. KERRY ANN ROCKQUEMORE & TRACEY LASZLOFFY, *THE BLACK ACADEMIC'S GUIDE TO WINNING TENURE WITHOUT LOSING YOUR SOUL* 13, 25 (2008) [hereinafter ROCKQUEMORE & LASZLOFFY, *WINNING TENURE*]; Armstrong & Wildman, *Teaching Race/Teaching Whiteness*, *supra* note 35 at 653.

84. Armstrong & Wildman, *Teaching Race/Teaching Whiteness*, *supra* note 35, at 651 (“As legal educators, we often do not notice the operation of race in our classrooms and daily lives. In those rare instances when race is the subject, race remains defined as an issue about people of color.”).

85. *Id.* at 653; Crenshaw, *Foreword*, *supra* note 63, at 36–39 (discussing examples of faculty members suppressing opportunities to discuss issues of race in the law school classroom).

86. Deo, *The Promise of Grutter*, *supra* note 14, at 109-110.

87. ROCKQUEMORE & LASZLOFFY, *WINNING TENURE*, *supra* note 83, at 25-26.

State University about the pipeline of black students to law school, describe the familiar experience of a white professor talking about race in a demeaning way:

Well, there was this one professor, I think it was in Constitutional Law class, and there was a case we were reading. A black student was asked to read the case aloud and we were referred to as “Negroes” in the case. So she substituted for the word “Negro” with “African American.” The professor stopped her and told her this long history on why at some point in time African Americans wanted to be called Negro because they felt the term African American was offensive. And then she went on. I don’t know how in the world it got to this point, but she went on to say black people play basketball and they’re really good at it because that’s their only way of getting out of the ghetto. And you know, you look around the classroom which is predominately white, and you see all these white students nodding their heads like they understand.⁸⁸

After the class, Darlene helped organize a group of students to speak with the offending faculty member about the incident.⁸⁹ In response, the school held an open meeting with the students.⁹⁰ Darlene was frustrated because one faculty member suggested students of color take on the job of researching all cases potentially presenting racial issues, shifting the burden from the professor to the students.⁹¹ She explained, “that’s not our job to do that. That’s the professor’s job!”⁹²

Faculty who are ill-equipped to discuss racial issues in class do a large disservice to their students. One of Evensen and Pratt’s participants offers a poignant example:

With faculty I think some of the things that happened was there was stuff that would be said in classes that just wasn’t sensitive to other cultures. They expressed a lot of bias and prejudice in certain ways and to me it just kind of reinforced some of the stereotypes that come along with being an African-American or black student. Another thing that professors

88. EVENSEN & PRATT, *THE END OF THE PIPELINE*, *supra* note 32, at 55.

89. *Id.*

90. *Id.*

91. *Id.* at 55-56.

92. *Id.* at 56.

would do in some classes was work very hard to ignore the racial content altogether . . . and make excuses or deny that that [race] had anything to do with it . . . and if it was raised by a black student then all of a sudden the black student was being a troublemaker or always pulling the race card.⁹³

Despite the need for an increase in culturally proficient instruction in legal education, most white faculty fail to perceive a problem with the racial environment at their specific law school. Even those faculty that recognize there is a problem often do not take personal responsibility for remedying the issues on their particular campus.

iii. Diverse Faculty

The theme in the limited scholarship examining the experience of diverse law faculty is clear – law professors of color and women experience the law academy very differently than their white-privileged male counterparts.⁹⁴ In 1989, Professor Derrick Bell and Professor Richard Delgado published the results of their qualitative survey of 106 law professors of color following a racist incident involving Professor Bell at Stanford Law School.⁹⁵ Bell and Delgado characterized the participant responses as “sobering.”⁹⁶ Law professors of color reported “a decline in civility and toleration of difference,” law school

93. EVENSEN & PRATT, *THE END OF THE PIPELINE*, *supra* note 32.

94. *See, e.g.*, Richard Delgado & Derrick Bell, *Minority Law Professors' Lives: The Bell-Delgado Survey*, 24 HARV. C.R.-C.L. L. REV. 349 (1989); Katherine Barnes & Elizabeth Mertz, *Is It Fair? Law Professors' Perceptions of Tenure*, 61 J. LEGAL EDUC. 511, 512 (2012); PRESUMED INCOMPETENT: THE INTERSECTIONS OF RACE AND CLASS FOR WOMEN IN ACADEMIA 3 (Gabiella Gutiérrez y Muhs, Yolanda Flores Niemann, Carmen G. González, and Angela P. Harris eds., U. Press of Colo. 2012) [hereinafter PRESUMED INCOMPETENT]; Deo, *The Ugly Truth*, *supra* note 32. In their book on the professional development of black academics, sociologist Kerry Ann Rockquemore and therapist Tracy Laszloffy list seven ways the black faculty experience differs from that of their colleagues in predominately white institutions: “(1) isolation, alienation, and excessive visibility; (2) classroom hostility; (3) racially based double standards, (4) persistent stereotypes, (5) exclusion from networks; (6) the curse of colorblindness; and (7) devaluation and marginalization of scholarship.” ROCKQUEMORE & LASZLOFFY, *WINNING TENURE*, *supra* note 83.

95. Delgado & Bell, *supra* note 94 at 353, 371.

96. *Id.* at 352.

environments that were “racist or subtly racist,” inequitable work assignments that included “crushing loads of committee work and student counseling,” and levels of job stress that were “severe or nearly intolerable.”⁹⁷

Unfortunately, the environment for diverse legal academics has changed very little in almost thirty years. In 2015, Professor Meera Deo published a study of law faculty experiences and the way those experiences vary based on race and gender.⁹⁸ In comparison to diverse legal academics, Deo found that white faculty members report closer relationships with their colleagues.⁹⁹ Deo also found racial differences in the perceived closeness of relationships; for example, while 24% of the black female faculty members reported “distant” relationships with white faculty (5 of the 21 surveyed), only one white faculty member reported a “distant” relationship with black faculty.¹⁰⁰ Deo describes this “mask of collegiality” as an environment where non-diverse faculty members often appear civil and supportive of diverse law faculty members, but engage in racist and sexist behaviors when it comes to decisions about tenure, allocation of resources and support, and mentoring.¹⁰¹ Unlike their white peers, the law professors of color in Deo’s study reported feeling “extremely marginalized” and like a “non-entity” as well as stressed, exhausted, disengaged, and disappointed.¹⁰² Several of the diverse professors Deo studied described the “emotional toll” of teaching in predominately white institutions and the experienced negative mental health consequences; the white male respondents in Deo’s study did not describe the same

97. *Id.* at 352-353.

98. Deo, *The Ugly Truth*, *supra* note 32.

99. *Id.* at 964-65. Seventy-three percent of white female faculty members and seventy-five percent of white male faculty members reported “very friendly” interactions with colleagues. *Id.* Diverse law professor responses varied by identity group with the highest being Asian/Pacific Islander and Native American women (60% of both groups reported “very friendly” interactions) and lowest being Middle Eastern female law professors (0% reporting “very friendly” interactions). *Id.* Fifty-four percent of the male faculty members of color reported “very friendly” interactions. *Id.*

100. *Id.* at 965.

101. *Id.* at 968-70.

102. *Id.* at 976, 980-81, 984.

emotional harm.¹⁰³

The findings from the Bell-Delgado and Deo surveys lend empirical support to troubling trends discussed by many legal scholars of color. Diverse academics in particular face a “presumption of incompetency”¹⁰⁴ from the students, the faculty members, and the administration at the law school.¹⁰⁵ The presumption of incompetency manifests in barriers such as hostility in and outside of the classroom,¹⁰⁶ unfair and inappropriate teaching evaluations,¹⁰⁷ tenure denials,¹⁰⁸ and open

103. *Id.* at 981-82, 984-85. One respondent explained, “I find myself missing more days from illness and being a lot more stressed with no breaks.” *Id.* at 982. Another respondent left her law school due to the emotional toll from the racism and sexism she experienced: “I actually have PTSD syndrome because of the amount of stress. I still have nightmares on a regular basis even though I’m very happy at my current institution.” *Id.* at 984.

104. PRESUMED INCOMPETENT, *supra* note 94.

105. Delgado & Bell, *supra* note 94, at 349 (referencing “presumption of competence” enjoyed by white professors); ROCKQUEMORE & LASZLOFFY, WINNING TENURE, *supra* note 83, at 18:

Although general standards of decorum and classroom civility are on the decline throughout US college classrooms, the disrespect and aggressive nature of classroom hostility faced by black faculty differ in both frequency and tenor from those experienced by white faculty and are grounded in a deep sense that a black faculty member must prove his or her competency in the classroom, as opposed to being given the benefit of the doubt that is so readily extended to white male faculty.

106. ROCKQUEMORE & LASZLOFFY, WINNING TENURE, *supra* note 83, at 18:

White students regularly critique the competency of black faculty as teachers, challenge their authority aggressively in the classroom, question their legitimacy as scholars, fail to show the most basic level of respect, and express overly familiar communication styles and greetings (as if interacting with a peer).

107. *See* PRESUMED INCOMPETENT, *supra* note 94, at 224:

Both people of color and white women must prove themselves in the classroom, as well as in other aspects of institutional life. They must overcome the presumption of incompetence that their mere appearance triggers. That classroom reaction to the professor may become a litmus test for retention by the institution. Thus, professors of color (and anyone who triggers the presumption of incompetence) face an added challenge to overcome – not always recognized by their colleagues- in negotiating a retention process that relies heavily on student evaluations.

108. *See* Barnes & Mertz, *supra* note 94, at 512.

disrespect.¹⁰⁹ Additionally, due to stereotypes about the types of professions people of color work in, academics of color are often mistaken for low-wage workers such as delivery persons or food service workers.¹¹⁰

These challenges can impede the effectiveness of faculty members of color in the classroom, forcing diverse legal academics into what Angela Onwuachi-Willig describes as strategic and emotional “silence” as a “key to . . . survival in academia.”¹¹¹ Professor Onwuachi-Willig, a black female law professor who wears her hair in locks,¹¹² describes her initial hesitancy to fully engage her employment discrimination class while discussing a racial discrimination case about braided hairstyles:

I discovered that I was nervous about voluntarily making myself both a subject and object – of being both highly visible and completely invisible at the same time: being visible as a piece of evidence on display but completely invisible in terms of understanding about my hair, my being. Because of this fear (coupled with my usual worries as a black female professor), I left many questions unasked, questions that I believed that judges and other lawyers had left unasked and unevaluated for many years. Although seemingly the most powerful person in the room, I felt somewhat powerless in my ability to press my

109. See generally PRESUMED INCOMPETENT, *supra* note 94 at 24; Chang & Davis, *supra* note 35, at 8.

110. ROCKQUEMORE & LASZLOFFY, WINNING TENURE, *supra* note 83, at 16-17:

One of the most painful indignities resulting from the combination of the scarcity of black faculty and the disproportionately high number of black people in low-wage service positions on college campuses is that you may regularly be mistaken for a janitor, food delivery person, waiter, support staff, homeless person who has wandered onto campus, or a person in some other stereotypical role that is the only way some white people can make sense of your presence on their campus.

111. Angela Onwuachi-Willig, *Silence of the Lambs*, in PRESUMED INCOMPETENT, *supra* note 94, at 143.

112. Locks are a hairstyle where hair “has permanently locked together and cannot be unlocked without cutting.” *Id.* at 148 (citing S.B. White (2005) at 296, note 3. The term “dreadlock” is disfavored because enslaved Africans’ hair was described as “dreadful” when it likely naturally locked during Middle Passage. *Id.*

students harder about a race-based analysis of this case – one that many courts have referred to dismissively as just a “hair” case.¹¹³

Professor Onwuachi-Willig revisited the case later in the semester and spoke “openly” about the coded racism in the case.¹¹⁴ Her narrative, however, describes the quandary faced by legal academics of color in the classroom and the danger that law professors of color strategically engage silence. Faculty members of color, who champion issues of race in legal academia, risk being labeled over-sensitive, face dismissive attitudes towards their concerns, and hostility from colleagues.¹¹⁵

Adopting a paradigm of cultural proficiency in law schools and then establishing the expectation that law professors engage in culturally proficient instruction will go far in improving the experience of diverse faculty.

iv. Law Students of Color

There is a fair amount of scholarship examining the law school experience of diverse law students.¹¹⁶ A major trend throughout the empirical literature is that law students of color have a vastly degraded classroom experience in comparison to their white colleagues.¹¹⁷ Another trend is the difficult choice law students of color must make between articulating a race-informed perspective that leaves them vulnerable to being labeled biased, self-interested, or emotional and playing the safer “good student” role that appears rational and objective, yet failing to challenge the privileged assumptions of the dominant

113. *Id.* at 148.

114. *Id.*

115. ROCKQUEMORE & LASZLOFFY, WINNING TENURE, *supra* note 83, at 12.

116. Deo, *The Promise of Grutter*, *supra* note 14, at 109-110 (surveying empirical data on diverse law student experiences).

117. *See, e.g.* Nancy E. Dowd, Kenneth B. Nunn & Jane E. Pendergast, *Diversity Matters: Race, Gender, and Ethnicity in Legal Education*, 15 U. FLA. J.L. & PUB. POL'Y 11, 25-30 (2003) (when asked whether class “questions or discussions” at the University of Florida College of Law made the student uncomfortable, 43% of African-American students answered affirmatively compared to 28% of white students and 27% of other students).

culture.¹¹⁸

Many law students of color have described feeling isolated and alienated during law school.¹¹⁹ Brian Owsley, a former federal magistrate judge and now a law professor,¹²⁰ recounted his experience as a Columbia Law student as one of racism and marginalization. “Most people day to day had no problems with black students. There were not enough of us to constitute a serious threat. However, if there was some prize at stake like grades, we quickly became the target for such blatant racist attacks.”¹²¹ Owsley continued, stating, “[t]hey don’t seem to be interested in letting us change the rules. We are clearly told that our existence at this fine University (and others too I imagine) is tolerated but by no means welcome. It’s their school not ours and they make sure we don’t forget that.”¹²²

It was true that we were accepted on some level. We could sit in class and take notes, interview with our peers, and eventually expect to graduate. If, however, we wanted to be on law review or push for more black professors, then the level of acceptance began to wane. The moment we tried to interject new ideas or challenge the old ones with our experiences and perspectives, we were kindly pushed to the side. We often received the impression that we should be grateful with what we were given and not bite the hand that feeds us.¹²³

118. Crenshaw, *Foreword*, *supra* note 63, at 40 (“This dichotomy between rational, objective commentary, and mere emotional denunciation is often a false one, maintained by the belief that when minority students step outside the bounds of rote rule application to express their criticisms or concerns, they are violating classroom norms by being racially biased.”).

119. *Id.* at 35-36.

120. Brian L. Owsley, <https://perma.cc/59SW-8LW4> (the biography of UNT Dallas College of Law Professor Brian L. Owsley, which was last modified on May 12, 2015 at 11:33 a.m.).

121. Brian Owsley, *Black Ivy: An African-American Perspective on Law School*, 28 COLUM. HUM. RTS. L. REV. 501, 516-17 (1997); *see id.* at 538-539 (describing sheets distributed publicly at Touro Law School listing the name, undergraduate grades, and LSAT score of the class of 1993, with minority student names printed in boldface type) (citing Ken Myers, *Touro is Latest to Be Hit by Trend of Revealing Minorities’ Grades*, NAT’L L.J., June 17, 1991, at 4).

122. Brian Owsley, *Black Ivy: An African-American Perspective on Law School*, 28 COLUM. HUM. RTS. L. REV. 501, 539 (1997).

123. *Id.* at 539-40.

Towards the end of his first year, Owsley became so “caught up in it all that [he] became overwhelmed.”¹²⁴ At one point, Owsley considered leaving law school.¹²⁵

Evensen and Pratt argue that the experience of racism in legal education leads to additional “identity work” for law students of color that can be an obstacle to learning.¹²⁶ Some of the participants in Evensen and Pratt’s study describe indignities such as being mistaken for support staff while working on law review work,¹²⁷ feeling “alienat[ed]” by the “harsh remarks” from other students due to the perception that students of color were given an unfair admission advantage,¹²⁸ having to ignore “ignorant remarks” made in class, in the law school building, and on internet blogs.¹²⁹ The researchers explain, “[t]he additional cognitive work that black students perform in law school, thinking about whether to tackle an issue related to their race or not, and sometimes actually expending precious research energy preparing to rebut a remark, is likely a distraction to their learning.”¹³⁰

Other studies, focusing mainly on gender, have noted detrimental mental health effects on law students. For example, Professor Morrison Torrey observes the abundance of social

124. *Id.* at 523.

125. *Id.*

126. EVENSEN & PRATT, *THE END OF THE PIPELINE*, *supra* note 32, at 105.

127. *Id.* at 70 (top-tier law school student explained, “I just think that in many circles that you’re navigating as a minority, the assumption is that you’re the help.”).

128. *Id.* at 79-80.

129. *Id.* at 80, 95 (survey participant believed non-minority students expressed, “Blacks only get into law school because they’re black—they didn’t earn it—they think you got a free ride in—people treat you that way until you prove that there is something you have that is distinguishable—[such as making] law review.”).

130. EVENSEN & PRATT, *THE END OF THE PIPELINE*, *supra* note 32, at 109; *see also* Owsley, *supra* note 121, at 524. As a student, Owsley reflected:

[i]t’s funny how whites can turn on and off this whole dialogue, but once I get started, I’m so screwed up and freaked out by it I can’t concentrate or study. . . Unfortunately, when I hear racist statements I do not tend to have the strength to go discuss them with the person who said them. I am more likely to withdraw after such a personal attack.

science data:

[D]oes provoke the question of exactly when we have enough “evidence” of the gender, race, and heterosexual bias in legal education for legal educators to take this problem seriously. How many more studies do we need? The problems are clearly identified and the solutions are not a great mystery.¹³¹

Professor Torrey’s sentiment goes to the heart of why adoption of culturally proficient practices is sorely needed in legal education. There is already an abundance of information about the need for law schools to make a cultural change. The recent incident at Harvard Law School is one more example of the need for a cultural shift in legal education. Culturally proficient legal instruction has the potential to greatly improve the classroom and general experience of law students of color.

v. Majority Law Students

Research on the perspective of white law students reveals that most white law students support the idea of discussing race and gender issues in the classroom.¹³² White law students report that increased diversity can result in increased racial understanding in the classroom. One white female law student explained:

Classroom discussion would be way better [with more diversity]. For me, coming from a [more mainstream] background, there are so many things that I do not even think about. They’re in the front of somebody else’s mind because it’s something they experienced or something they’re concerned about. I wouldn’t even think about it but I’d like to be thinking about it. I need somebody to show me other things to be concerned with and to be aware of.¹³³

131. Torrey, *Yet Another Gender Study?*, *supra* note 39, at 797.

132. Deo, *The Promise of Grutter*, *supra* note 14, at 96 (“Roughly three-quarters of students from all racial and ethnic backgrounds (89% of White respondents, 82% of Latino respondents, 78% of API respondents, 77% of Other respondents, 75% of Native American respondents, and 73% of Black respondents) agree that they themselves are supportive ‘when faculty include discussions of race, gender, or sexual orientation in the classroom.’”).

133. *Id.* at 98.

However, majority law students face various challenges in understanding issues of cultural proficiency, diversity, and inclusion.¹³⁴ Hartley & Petrucci suggest that most white law students remain “resistant to learning about racism” because of the pervasiveness of racial stereotypes and the desire to preserve racial privilege.¹³⁵ Much of the racism experienced by law students and faculty of color, discussed above, comes at the hands of majority law students. Thus, engaging majority law students with culturally proficient instruction has broad implications.

vi. Clinical Law and Skills Faculty

Arguably, the exception to the tendency of white faculty to ignore the need for culturally proficient lawyering skills is law faculty members who teach in legal clinics and skills courses. In fact, most of the scholarship on cultural proficiency in legal education has come from faculty members who see a dire need to instill culturally proficient lawyering skills in students before client contact.¹³⁶ Many clinical faculty members have taught students to explore their own personal bias in representing clinical law clients.¹³⁷

However, there are at least two problematic trends in the cultural proficiency scholarship as it relates to clinical and skills courses. First, because law faculty are teaching culturally proficient lawyering in the context of active client representation, there is a danger of limiting cultural proficiency to a framework of legal skill development instead of a holistic, constantly evolving, developmental approach that aims to change the

134. Hartley & Petrucci, *supra* note 25, at 165.

135. *Id.*

136. See, e.g., ROBERT F. COCHRAN ET AL., *THE COUNSELOR-AT-LAW: A COLLABORATIVE APPROACH TO CLIENT INTERVIEWING AND COUNSELING* (3d Lexis Nexis 2014).

137. Although Professor Silver uses different terminology, she differentiates between the separate processes of dismantling privilege and bias. Silver, *supra* note 11 (“Acquiring such competence also requires a deliberate exploration of the deeply rooted cultural assumptions that claim us. This, in turn, requires an exploration of our own biases and stereotypes about individuals and groups different from ourselves.”).

culture of the law school space. As Professors Hartley and Petrucci observed: “[e]ven in clinical training programs, where more attention is paid to the lawyer-client relationship, the effects of racial difference, privilege, and oppression . . . are minimally addressed.”¹³⁸ For example, Professor Bryant’s highly influential and important work on cross-cultural lawyering is presented as a set of cross-cultural skills for students to master in client representation.¹³⁹ While client representation is a critical goal of bringing a cultural proficiency paradigm to legal education, development of client representation skills should be part of a larger cultural proficiency paradigm.

Second, most law professors teaching clinical and client skills courses, like other law faculty, have not been exposed in a structured way to culturally proficient lawyering skills. A poignant example is Professor Clark Cunningham and his courageous critique of his representation of M. Dujon Johnson, his black criminal defense client.¹⁴⁰ Professor Cunningham represented Mr. Johnson along with two clinic students at the University of Michigan Law School.¹⁴¹ After reviewing the police report and assuming it to be true, Cunningham believed the case involved routine Fourth Amendment issues; he planned to argue his client was subject to an improper search under *Terry v. Ohio*.¹⁴² After interviewing the client, the team noticed several inconsistencies between their client’s story and the police report; specifically, Mr. Johnson was very angry and adamant that the officers were unjustified in stopping him in the first place, and that the disorderly conduct charge that followed was unfounded.¹⁴³

Cunningham and the students filed a motion to suppress all of Mr. Johnson’s statements after he was subject to the

138. Hartley & Petrucci, *supra* note 25, at 165.

139. Bryant, *supra* note 33, at 33-34.

140. Clark D. Cunningham, *The Lawyer as Translator, Representation as Text: Towards an Ethnography of Legal Discourse*, 77 CORNELL L. REV. 1298, 1299 (1992).

141. *Id.* at 1304.

142. *Id.* at 1309.

143. *Id.* at 1311.

unconstitutional search.¹⁴⁴ At the suppression hearing, despite eliciting “near perfect” testimony from one of the police officers that the stop was improper, the judge was dismissive of the team’s arguments and misapplied the Supreme Court’s Fourth Amendment decision in *Terry v. Ohio*.¹⁴⁵ The judge then accused Mr. Johnson of having an “attitude” that provoked the police officers and caused his own arrest.¹⁴⁶ Cunningham describes being “momentarily paralyzed,” “numb,” and “speechless.”¹⁴⁷ After the hearing, Cunningham re-reviewed Mr. Johnson’s interview and noticed several parts of his client’s story he had failed to perceive before: the harassing and degrading tone of the officers, the demeaning manner in which Mr. Johnson was arrested, and the fact that his client was considered “disorderly” simply for asking simple and reasonable questions of the officers.¹⁴⁸ When the prosecution dismissed the case before trial, Mr. Johnson was livid.¹⁴⁹ He wanted a chance to confront the officers in court and vindicate his rights.¹⁵⁰ Outside the courtroom, Mr. Johnson expressed his rage.¹⁵¹ Addressing the students, Mr. Johnson said:

I have a big thing about respect. Sometimes it was as if you were talking to a child, trying to make me understand as if I had no common sense Do you guys actually think I’m stupid, lazy and slow? Most black people have that stereotype, of being that way. You don’t know that? The way you guys talk to me and approach me- it’s a little like the way [the officer] approached me.¹⁵²

Turning to Cunningham, Mr. Johnson explained:

You’re the kind of person who usually does the most harm. You have a guardian mentality, assume that you know the answer. You presume you know the needs and the answers.

144. *Id.* at 1312.

145. *Terry v. Ohio*, 392 U.S. 1, 33-34 (1968).

146. Cunningham, *supra* note 140, at 1330.

147. *Id.* at 1321.

148. *Id.* at 1324-25.

149. *Id.* at 1329.

150. *Id.*

151. *Id.*

152. *Id.* at 1330.

Oversensitivity. Patronizing. All the power is vested in you. I think you may go too far, assuming that you would know the answer.¹⁵³

In their lack of culturally proficient lawyering skills, Cunningham and his students had missed the real issue. For their client, Mr. Johnson, the case was about being treated with respect, dignity, and as a human being.¹⁵⁴ While the case was dismissed and their client technically prevailed, in many ways the team failed their client, both in their interactions with him and in their advocacy.¹⁵⁵ Professor Cunningham reflected:

This is a true story. It is the story of how the law punished a man for speaking about his legal rights; of how, after punishing him, it silenced him; of how, when he did speak, he was not heard. This pervasive and awful oppression was subtle and, in a real way, largely unintentional. ***I know because I was one of his oppressors. I was his lawyer.***¹⁵⁶

Thus, law professors teaching legal clinics and skills courses are in danger of attempting to pass along skills they may not themselves possess. More insidious, clinical faculty may pass along client representation skills that perpetuate racially biased practices.

B. Cultural Proficiency Training Efforts Outside Legal Education

Transforming legal environments into culturally proficient institutions is an ethical mandate. The ethical rules governing lawyers, prosecutors, and judges require the avoidance of bias and discrimination.¹⁵⁷ Therefore, representing clients without

153. *Id.*

154. See COCHRAN ET AL., *supra* note 136, at 20-24.

155. *Id.* (describing Clark Cunningham narrative as an example of the failure to collaborate effectively in the lawyer-client relationship).

156. Cunningham, *supra* note 140, at 1299.

157. AMERICAN BAR ASSOCIATION, MODEL RULES OF PROFESSIONAL CONDUCT 8.4 (Rule 8.4 of the ABA Model Rules of Professional Conduct provide that it is professional misconduct for a lawyer to, *inter alia*, “engage in conduct that is prejudicial to the administration of justice.” The comment to subparagraph (d) specifies, “[a] lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion,

active steps to engage in culturally proficient lawyering perpetuates racism and discrimination. In other words, it can be (and should be) an ethical violation not to work actively against eradicating privilege systems in one's legal work.

Several important model training programs for judges, prosecutors, practitioners, and court personnel exist to further this ethical mandate. An important cultural proficiency joint project between the ABA Criminal Justice Section, Section of Individual Rights and Responsibilities, and Council on Racial

national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice.”). In August 2016, the ABA's Diversity and Inclusion 360 Commission co-sponsored a proposed revision to Rule 8.4 that would directly make it professional misconduct for a lawyer to “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.” AMERICAN BAR ASSOCIATION, Resolution 109 and Report to the House of Delegates (available at <https://perma.cc/242N-G9UT>). With regard to federal prosecutors, § 9-27.260 of the United States Attorneys' Manual provides:

In determining whether to commence or recommend prosecution or take other action against a person, the attorney for the government should not be influenced by: The person's race, religion, sex, national origin, or political association, activities or beliefs; The attorney's own personal feelings concerning the person, the person's associates, or the victim; or The possible effect of the decision on the attorney's own professional or personal circumstances.

UNITED STATE DEPARTMENT OF JUSTICE, UNITED STATES ATTORNEY'S MANUAL, § 9-27.260.

The standard for federal judges is more explicit. Rule 2.3 of the Model Code of Judicial Conduct, entitled “Bias, Prejudice and Harassment” prohibits judges from speech or conduct that may, “manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation.” AMERICAN BAR ASSOCIATION, MODEL CODE OF JUDICIAL CONDUCT Canon 2. The comment to Rule 2.3 enumerates specific overt conduct that could be considered a manifestation of prejudice or bias, like the use of racial slurs, negative stereotypes, intimidation, hostility, or “attempted humor.” *Id.* Notably, the comment goes on to emphasize that, “[e]ven facial expressions and body language can convey to parties and lawyers in the proceeding, jurors, the media, and others an appearance of bias or prejudice. A judge must avoid conduct that may reasonably be perceived as prejudiced or biased.” *Id.*

and Ethnic Justice was released in 2010 entitled *Building Community Trust: Improving Cross-Cultural Communication in the Criminal Justice System*.¹⁵⁸ The Building Community Trust manual recognizes:

Increasing cultural competency skills holds the promise of providing leaders and managers of prosecution, defense, and court agencies with the information, training, and resources they need to create culturally competent work environments. Such environments allow leaders and managers to effectively address personnel, communication, and management issues related to race and culture, and to recruit, retain, and promote a diverse work force. Increasing cultural competency skills has the added benefit of introducing a common language for addressing the racial disparities inherent in the American criminal justice system and for engaging in the challenging discussion that could lead to more effective solutions.¹⁵⁹

The extensive Building Community Trust project, which focuses on addressing disparities in the criminal justice system, developed a 9-unit model curriculum with accompanying materials including recommended readings for participants and instructor materials.¹⁶⁰

Court systems are also beginning to examine ways to become more culturally proficient. For example, two grant-funded “Culturally Competent Court” programs ran in Imperial County, California and Maricopa County, Arizona.¹⁶¹ The report

158. AMERICAN BAR ASSOCIATION, CRIMINAL JUSTICE SECTION, SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES, AND COUNCIL ON RACIAL AND ETHNIC JUSTICE, *BUILDING COMMUNITY TRUST: IMPROVING CROSS-CULTURAL COMMUNICATIONS IN THE CRIMINAL JUSTICE SYSTEM*, <https://perma.cc/KQ9H-W5AA>.

159. AMERICAN BAR ASSOCIATION, CRIMINAL JUSTICE SECTION, SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES, AND COUNCIL ON RACIAL AND ETHNIC JUSTICE, *BUILDING COMMUNITY TRUST: IMPROVING CROSS-CULTURAL COMMUNICATIONS IN THE CRIMINAL JUSTICE SYSTEM*, Model Curriculum and Instruction Manual at 1-2.

160. The nine units in the Building Community Trust curriculum begin with cultural competency and move on to address social cognition and bias, privilege, micro aggressions, systemic disparities, cross-cultural communication, strategies for change, and cross-cultural issues in courts. *Id.*

161. John A. Martin, Marcus Reinkensmeyer, Hon. Barbara Rodriguez

summarizing the project's finding found the need to implement a culturally proficient paradigm in courts to be "essential."¹⁶² The authors recommended seven steps courts could take to become culturally competent.¹⁶³

There are also several important efforts that focus on implicit bias instead of a broader cultural proficiency paradigm. In an effort to expand the work of the Building Community Trust project beyond the criminal context, the ABA Section of Litigation's Task Force on Implicit Bias recently launched a website offering resources for the legal community as part of their Implicit Bias Initiative.¹⁶⁴ Through the Implicit Bias Initiative, the Task Force produced an educational video entitled *The Neuroscience of Implicit Bias* and assembled a "toolbox" with a 90-minute presentation and facilitator resources.¹⁶⁵ Additionally, the National Center for State Courts (NCSC) maintains a website of resources to assist courts with addressing implicit bias.¹⁶⁶ As part of the effort, the NCSC released a report examining pilot testing of the NCSC implicit bias materials in three states—California, Minnesota, and North Dakota.¹⁶⁷

Mundell, and Jose Guillen, *Becoming a Culturally Competent Court*, THE COURT MANAGER, Vol. 22, 1 (March 20, 2007).

162. *Id.*

163. *Id.* at 11. The seven steps are: (1) build cultural competency teams, (2) identify the implications of culture, (3) understand the community served by the court, (4) assess the organizational culture of the court, (5) assess critical processes, programs and services, (6) develop and implement culturally appropriate processes, and (7) monitor performances. *Id.* at 11-14. As outlined below in Part II, an additional step to move this model from cultural competency to cultural proficiency would be to continually adjust court processes in response to the performance assessments outlined in Step 7.

164. American Bar Association, Section of Litigation, Task Force on Implicit Bias, <https://perma.cc/JK8X-DEY8>.

165. American Bar Association, Section of Litigation, Task Force on Implicit Bias Toolbox, <https://perma.cc/27XB-5UAF>.

166. National Center for State Courts, *Helping Courts Address Implicit Bias: Resources for Education*, <https://perma.cc/9KSE-H2CG>.

167. *Id.*

III. A WAY FORWARD – THE CULTURAL PROFICIENCY PARADIGM

[L]aw schools must advocate for greater inclusion, equity, and diversity as well as transform their pedagogical, scholarly and management practices and policies to accelerate the pace of change.¹⁶⁸

Cultural proficiency is a framework that enables both an organization, and individuals within an organization, to work equitably and effectively across cultures.¹⁶⁹ It is a multi-faceted paradigm that engages all stakeholders. A culturally proficient court would seek to engage all those involved in the court system—litigants, defendants, jurors, lawyers, court staff and judges—to fairly and effectively adjudicate the cases moving through the court. A culturally proficient law firm would seek to engage all those in the law firm, from the firm’s clients to the firm’s senior attorneys. The firm’s clients would receive effective and competent legal representation regardless of cultural background. The firm’s associate attorneys would work in a supportive environment and would be more likely to stay. The firm’s partnership would continually engage in evaluating the firm’s policies and mission statement.

Similarly, a culturally proficient law school must seek to engage all the stakeholders in the school to create a culturally proficient space. Too often, cultural proficiency efforts in legal education focus only on training law students to deliver culturally proficient legal services to future clients. While a worthy goal, this is only part of the problem. A true culturally proficient effort in legal education would be holistic and engage every stakeholder—the potential client of the law school graduate, current students, future students, faculty, staff members, administrators, and alumni.

Educator Kikanza Nuri-Robins and her colleagues explain that cultural proficiency is an “inside-out” approach to the work

168. ABA Presidential Diversity Initiative, *supra* note 14, at 18 (most law schools focus diversity initiatives on student admissions).

169. NURI-ROBINS ET AL., CULTURALLY PROFICIENT, *supra* note 25, at xxiii.

of diversity and inclusion:

Cultural Proficiency is an inside-out approach, which focuses first on the insiders of the school or organization, encouraging them to reflect on their own individual understandings and values. It thereby relieves those identified as outsiders, the members of excluded groups, from the responsibility of doing all the adapting. Cultural Proficiency as an approach to diversity surprises many people, who expect a diversity program to teach them about others. This inside-out approach acknowledges and validates the current feelings of people, encouraging change and challenging a sense of entitlement without threatening one's feelings of worth.¹⁷⁰

This Article argues that Cultural proficiency's emphasis on internal transformation offers a promising approach to cultural change in legal education.

The "inside-out" approach is a critical transformation to the cultural proficiency literature. The doctrine has evolved from an external focus of learning about a new culture that may encourage an individual to generalize and stereotype without ever questioning their own internally-held beliefs.¹⁷¹ There are no gimmicky tests, cultural quizzes, or checklists "for identifying culturally significant characteristics of individuals, which may be politically appropriate, but socially meaningless."¹⁷² Instead, the cultural proficiency paradigm encourages deep engagement, fluid solutions by stakeholders, and lasting cultural change.

Notably, the cultural proficiency paradigm is not simply a training program. "Diversity" and "sensitivity" training programs have become a cottage industry in recent decades.¹⁷³ Some legal

170. *Id.* at 8.

171. See Curcio, Ward, and Dogra, *Survey Instrument*, *supra* note 29 (criticizing structure and focus of older, cultural competency programs); Hartley & Petrucci, *supra* note 25, at 170 (citing PAUL PEDERSEN, A HANDBOOK FOR DEVELOPING MULTICULTURAL AWARENESS (2d ed. 1995) (discussing deficiencies in cultural proficiency education programs)).

172. NURI-ROBINS ET AL., CULTURALLY PROFICIENT, *supra* note 25, at 9.

173. See, e.g., David Horneatay, *Sensitivity Training Can Strike a Nerve*, GOVERNMENT EXECUTIVE (Feb. 1, 2001), <https://perma.cc/36H3-7TG6>; Seth Lubov, *Damned if you do, damned if you dont*, FORBES.COM (Dec. 15, 1997 at 12:00 AM), <https://perma.cc/A76J-8ZAD>; Jefferson P. Marquis, Nelson Lim, Lynn M. Scott, Margaret C. Harrell, Jennifer Kavanagh, *Managing Diversity in*

scholars have argued that most of these programs have little to no effect.¹⁷⁴ There are several themes in the literature that might explain why. First, many sensitivity training programs emphasize avoidance of liability over effectuating change or transformation.¹⁷⁵ For example, employers have an affirmative defense to a sexual harassment suit if, in part, they can prove there are certain policies and procedures in place to prevent sexual harassment.¹⁷⁶ A sexual harassment training program is part of this. Second, many of these training efforts are “one shot” sessions that focus primarily on avoiding the employer’s legal liability.¹⁷⁷ Some superficial training programs have little to no effect on corporate culture.¹⁷⁸ At worst, the training programs may “produce a polarizing effect on employee attitudes . . . [by] reinforce[ing] stereotypes about groups and inspire[ing] animosity between employees who, as part of the course, are encouraged to reveal their true feelings.”¹⁷⁹

Apply the cultural proficiency paradigm to legal education as this Article proposes below replaces these ineffective and

Corporate America: An Exploratory Analysis, RAND.ORG (2008), <https://perma.cc/LRM4-4FLG>.

174. Susan Bisom-Rapp, *An Ounce of Prevention Is a Poor Substitute for a Pound of Cure: Confronting the Developing Jurisprudence of Education and Prevention in Employment Discrimination Law*, 22 BERKELEY J. EMP. & LAB. L. 1, 2-3 (2001).

175. Peter Bregman, *Diversity Training Doesn’t Work*, PSYCHOLOGY TODAY (Mar. 12, 2012), <https://perma.cc/NA9Z-BYQL> (arguing that diversity training “doesn’t extinguish prejudice. It promotes it,” and that

[t]here are two reasons to do diversity training. One is to prevent lawsuits. The other is to create an inclusive environment in which each member of the community is valued, respected, and can fully contribute their talents. That includes reducing bias and increasing the diversity of the employee and management.

(internal citations omitted).

176. See *Faragher v. City of Boca Raton*, 524 U.S. 775, 807-08 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998) (establishing affirmative defense to sexual harassment liability if, *inter alia*, the employer had appropriate mechanisms in place to prevent harassment and quickly corrected harassing behavior. *Faragher*, 524 U.S. at 807-08; *Ellerth*, 524 U.S. at 765).

177. Bisom-Rapp, *supra* note 174.

178. *Id.* at 4.

179. *Id.*

superficial approaches with an evolutionary approach to cross-cultural interactions. The cultural proficiency paradigm takes an intentional posture designed to address the deep roots of cultural diversity and the entrenched forces that have impeded meaningful gains for diversity and inclusion. In particular, this Article argues that application of the paradigm to legal education is particularly urgent and appropriate.

A. The Essential Elements

The essential elements of cultural proficiency provide the standards for individual behavior and organizational practices. “The essential elements are an interdependent set of standards to guide being intentional in [the] journey to cultural proficiency.”¹⁸⁰ There are five essential elements: (1) assess culture, (2) value diversity, (3) manage the dynamics of difference, (4) adapt to diversity, and (5) institutionalize cultural knowledge.¹⁸¹

The first essential element, to *assess culture*, means to learn to identify the cultural groups present in the system, including your own.¹⁸² Importantly, “[e]veryone has or is part of a culture.”¹⁸³ Hartley and Petrucci argue that incorporating this essential element requires a law school to engage in a “cultural self-assessment” that allows the school to gain “a sense of its own culture, how the school is shaped by that culture, and how that culture influences the school’s interactions with other cultures.”¹⁸⁴ Nuri-Robins explains:

As a culturally proficient educator, you start with yourself and your own school. You do not assume that everyone will share your values, nor do you assume that everyone knows what behaviors are expected and affirmed in a culturally proficient

180. RANDALL B. LINDSEY ET AL., CULTURAL PROFICIENCY: A MANUAL FOR SCHOOL LEADERS 2662 (3d. Corwin, 2009).

181. NURI-ROBINS ET AL., CULTURALLY PROFICIENT, *supra* note 25, at 6.

182. *Id.*

183. TERRY CROSS ET AL., TOWARD A CULTURALLY COMPETENT SYSTEM OF CARE 18, GEORGETOWN UNIVERSITY CHILD DEVELOPMENT PROGRAM, CHILD AND ADOLESCENT SERVICE SYSTEM PROGRAM (Washington D.C., 1989).

184. Hartley & Petrucci, *supra* note 25, at 172.

school Therefore, you understand how the cultures of your school [] affect those whose cultures are different . . . by recognizing how the school's culture affects other people, you will gain the information you need to make adjustments in style or processes so that all people feel comfortable and welcomed.¹⁸⁵

The second essential element requires an individual or organization to *value diversity*.¹⁸⁶ In valuing diversity, an individual or organization “demonstrate[s] an appreciation for the differences among and between groups.”¹⁸⁷ Nuri-Robins and her colleagues emphasize that for diversity to be truly valued, it must be done with intention.¹⁸⁸ Valuing diversity with intention requires the culturally proficient instruction to identify specific behavioral and attitudinal changes and commit to making those changes at every interaction with colleagues and students.¹⁸⁹ Importantly, intentionally valuing diversity means seeing increased diversity in the legal education as an “opportunity to enhance . . . teaching and learning.”¹⁹⁰

The third essential element is to *manage the dynamics of difference*.¹⁹¹ The goal of the third element is to learn to respond appropriately and effectively to the issues that arise in a diverse environment.¹⁹² Mismanagement of diversity differences in education often leads to an over-reliance on blanket rules that may “control” the classroom environment but do not benefit the diversity of learners.¹⁹³ It is important to recognize that conflict in the learning environment is not inherently negative, and can be leveraged to help everyone involved become more culturally proficient.¹⁹⁴

185. LINDSEY ET AL., *supra* note 180, at 2720-23.

186. NURI-ROBINS ET AL., CULTURALLY PROFICIENT, *supra* note 25, at 6.

187. *Id.*

188. *Id.* at 118-119.

189. *Id.* at 119.

190. *Id.*

191. *Id.* at 6.

192. *Id.*

193. *Id.* at 134.

194. *Id.*

The fourth element is to *adapt to diversity*.¹⁹⁵ Here, an organization or individual must engage in adopting or changing practices to support diversity and inclusion.¹⁹⁶ This extends to policy, language, and procedures. Hartley and Petrucci suggest that a law school may adapt to diversity by modifying its mission statement, creating a faculty committee focused on cultural proficiency, engaging outside consultants on cultural proficiency, passing initiatives focused on increasing the school's cultural proficiency, and then ensuring those initiatives are implemented.¹⁹⁷

Finally, the fifth element is to *institutionalize cultural knowledge*.¹⁹⁸ The goal of the fifth element is to drive the changes into the systems of the organization so that culturally proficient practices are not dependent on the leadership of a particular person or group.¹⁹⁹ Nuri-Robins explains that, “[i]nstitutionalizing the process of learning removes it from the realm of the special occasion and places it among things as basic and as important as brushing one’s teeth.”²⁰⁰

B. The Cultural Proficiency Continuum

In addition to the Essential Elements,²⁰¹ Nuri-Robins and her colleagues utilize the cultural continuum to illustrate the process towards culturally proficient practice. Although not specific to legal environments, the model provides a useful framework that can be adapted to legal education. There are six points along the continuum: (1) cultural destructiveness, (2) cultural incapacity or cultural intolerance, (3) cultural blindness or cultural reductionism, (4) cultural pre-competence, (5) cultural competence, and (6) cultural proficiency.²⁰²

Cultural proficiency takes an evolutionary approach,

195. *Id.* at 6.

196. *Id.*

197. Hartley & Petrucci, *supra* note 25, at 173.

198. NURI-ROBINS ET AL., CULTURALLY PROFICIENT, *supra* note 25, at 6.

199. *Id.* at 6.

200. *Id.* at 164.

201. NURI-ROBINS & BUNDY, *supra* note 27, at 39.

202. *Id.* at 38.

emphasizing progress along a continuum, rather than a rote checklist. Although the continuum contains six points of reference, it cannot and should not be used to “label” individuals or organizations.²⁰³ To the contrary, the evolution towards cultural proficiency is fluid, complex, and nuanced.²⁰⁴ It is far more useful to examine specific situations, policies, and behaviors along the continuum, and then develop ways to move legal education towards the final point of cultural proficiency.²⁰⁵ The evolutionary nature of the cultural proficiency continuum holds particular relevance for law schools because it empowers legal educators, in the immediate sense, to begin analyzing ways to move along the continuum while pushing law schools towards conceptualizing the long-term achievement of culturally proficient practices.

i. Cultural Destructiveness

The first point in the cultural continuum is cultural destructiveness, which is “any policy, practice, or behavior that effectively eliminates all vestiges of another peoples cultures.”²⁰⁶ At the culturally destructive point along the continuum, language, behaviors and actions, “disparage, negate, or purge cultures that are different” than the dominant culture.²⁰⁷ Cultural destructiveness can be highly structured and legal and violent, such as the institution of American slavery, Jim Crow and segregation,²⁰⁸ or the Rwandan genocide.²⁰⁹ Often, culturally destructive practices persist as embedded in an organization’s policies and procedures, or an individual’s value system.²¹⁰

From a general education perspective, Nuri-Robins and her colleagues explain that instruction practices such as “eliminating

203. NURI-ROBINS ET AL., CULTURALLY PROFICIENT, *supra* note 25, at 79.

204. *Id.*

205. *Id.*

206. *Id.*

207. JONES ET AL., THE CULTURAL PROFICIENCY JOURNEY, *supra* note 40, at 23, Table 2.3.

208. NURI-ROBINS ET AL., CULTURALLY PROFICIENT, *supra* note 25, at 79.

209. JONES ET AL., THE CULTURAL PROFICIENCY JOURNEY, *supra* note 40, at 23, Table 2.3.

210. NURI-ROBINS ET AL., CULTURALLY PROFICIENT, *supra* note 25, at 79.

historical accounts of [non-dominant] cultures from school curriculum [and] eliminating societal contributions of groups other than the dominant culture” are culturally destructive.²¹¹ Other examples of culturally destructive practices commonly found in education are textbooks that “do little to link modern racism to historical white complicity,”²¹² the marginalization and removal from the classroom of special-education and special needs students,²¹³ and the focus on Christian holidays when building the academic calendar.²¹⁴

Legal education has a history of cultural destructiveness.²¹⁵ Black students were systematically excluded from law schools.²¹⁶ Indeed, the Association of American Law Schools was not able to report a lack of formal racial discrimination among its member schools until 1964—147 years after legal education formally began in the United States.²¹⁷ Despite the apparent end of formal exclusion from predominately white law schools, the majority of black lawyers were trained at four historically-black institutions: Howard Law School, North Carolina Central University Law School, Texas Southern University Law School, and Southern University Law School—until the early 1980’s.²¹⁸ Legal educators can identify culturally destructive practices within their institutions as a starting point along the continuum.

211. JONES ET AL., *THE CULTURAL PROFICIENCY JOURNEY*, *supra* note 40, at 23, Table 2.3.

212. NURI-ROBINS ET AL., *CULTURALLY PROFICIENT*, *supra* note 25, at 80.

213. JONES ET AL., *THE CULTURAL PROFICIENCY JOURNEY*, *supra* note 40, at 23, Table 2.3.

214. *Id.*

215. Armstrong & Wildman, *Teaching Race/Teaching Whiteness*, *supra* note 35, at 635.

216. MacCrate Report, *supra* note 65, at 23 (describing historical exclusion of black students from white institutions).

217. WALTER LEONARD, *BLACK LAWYERS: TRAINING AND RESULTS, THEN AND NOW 1* (Harvard Univ. Press, 1977). Of the 50,000 law students enrolled in predominately white law schools, only 433 were black. MacCrate Report, *supra* note 65, at 23-24.

218. MacCrate Report, *supra* note 65, at 23.

ii. Cultural Intolerance

The second point along the continuum is cultural intolerance or cultural incapacity.²¹⁹ At this stage, an individual, organization, or system acts to demean differences. One holds a belief in the superiority of one's own culture. Other cultures are specifically disempowered. "Cultural incapacity tolerates differences without valuing diversity."²²⁰ Instead, actions are taken and decisions are made "based on negative stereotypes" and "a token acceptance of difference."²²¹

Nuri-Robins argues that the most frequent expression of cultural intolerance in classrooms is disempowerment through lowered expectations and tokenism.²²² She explains:

[D]isempowerment is an interactive phenomenon in which a dominant group renders another group powerless and the non-dominant group perceives (and reinforces) its own powerlessness by internalizing its own oppression. . . They see themselves as inferior and often treat one another in the same demeaning way as their external oppressor has treated them.²²³

Cultural intolerance is reflected throughout the students' perspectives discussed above in the need for culturally proficient legal instruction.²²⁴ Darlene's narrative about her Constitutional Law classroom discussion is instructive.²²⁵ There, class discussion quickly moved from a case's use of the word "negro" to the professor's comment that "black people play basketball and they're really good at it because that's their only way of getting

219. NURI-ROBINS & BUNDY, *supra* note 27, at 41. The terms "cultural incapacity" and "cultural intolerance" are interchangeable in the literature. In the organizational consultation environment, Dr. Nuri-Robins and her colleagues have found the term "cultural intolerance" easier for clients to understand. *Id.*

220. NURI-ROBINS ET AL., *CULTURALLY PROFICIENT*, *supra* note 25, at 83.

221. *Id.*

222. *Id.*

223. *Id.*

224. EVENSEN & PRATT, *THE END OF THE PIPELINE*, *supra* note 32, at 55.

225. *Id.*

out of the ghetto.”²²⁶ When the black students approached the faculty about the incident, the faculty suggested the students take on the burden of researching cases that may raise racial issues.²²⁷ No effort was made to address the professor’s stereotypical remark, or to invest in a deeper understanding of the cultural issues involved.²²⁸

The social science on the differential classroom treatment supports the idea that many law school classrooms are culturally intolerant.²²⁹ For example, in a study at the University of Florida College of Law, there were significant racial differences between black and white survey respondents when describing classroom treatment.²³⁰ A majority of black student respondents reported that white students asked more questions (73%), white students were called on with greater frequency (66%), white students received more classroom attention (73%), and white students received more classroom tolerance (70%).²³¹ In comparison, a majority of white student respondents reported “no difference by race” in the categories of who asked more questions (49%), who was called on (71%), recipients of classroom attention (70%), and class tolerance (62%).²³² Legal educators should pay particular attention to remedying culturally intolerant practices in the classroom such as engaging in classroom discussions based on stereotyped thinking and exhibiting a preference for majority students.

iii. Cultural Reduction

The third point is cultural blindness or cultural reduction.²³³

226. *Id.*

227. *Id.* at 56.

228. *Id.*

229. *Id.*

230. Dowd, Nunn & Pendergast, *supra* note 37, at 29.

231. *Id.*

232. *Id.*

233. NURI-ROBINS & BUNDY, *supra* note 27, at 43. The terms “cultural blindness” and “cultural reduction” are interchangeable in the literature. Dr. Nuri-Robins and her colleagues have adopted the term “cultural reduction” due to concerns articulated by disabled communities that the phrase “cultural blindness” perpetuates ableism and denigrates the physical condition of blindness. *Id.* In an effort to push towards culturally proficient scholarship, this

“Cultural blindness is any policy, practice, or behavior that ignores existing cultural differences or that considers such differences inconsequential.”²³⁴ At the stage of cultural reduction, cultural differences are minimized and dismissed, often proudly, with well-intentioned people boasting of “not seeing color, just seeing human beings.”²³⁵ Nuri-Robins and her colleagues label cultural blindness the most “vexing” of all points on the continuum because instructors holding a culturally reductionist perspective do not intend the harm they cause.²³⁶ Cultural reduction is particularly destructive because it both obscures the privileges and benefits experienced by the dominant group, and devalues the experience and harms of members of non-dominant groups.²³⁷

In education, Nuri-Robins explains the importance of the distinction between *educational equality*, which means giving every student “identical privileges, status or rights, regardless of the individual’s needs, current situation, background, or context,” and *educational equity*, defined as “being just, impartial, and fair, taking into consideration individual differences.”²³⁸ Many legal

article will use the term cultural reduction while incorporating the wealth of literature about the deficiencies of “culturally blind” and “color blind” approaches. See Armstrong & Wildman, *Teaching Race/Teaching Whiteness*, *supra* note 35 at 648-649 (citing student comment, stating:

The focus on colorblindness values not-seeing-color and stops the possibility of dialogue about race before it can begin. In stopping the discussion, the mantra of colorblindness also cuts off any dialogue about power or racial privilege. With no ability even to talk about race or racial justice, the status quo remains. Thus, the dominant value of colorblindness maintains the status quo of white privilege: ‘Colorblindness is the new racism.’”).

234. NURI-ROBINS ET AL., CULTURALLY PROFICIENT, *supra* note 25, at 87.

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.* at 88. Using the example of the Scholastic Assessment Test (SAT), students take the same test under the same circumstances, thus receive educational equality. *Id.* However, outside factors influence student performance on the SAT, such as student wealth (ability to access test preparation materials and tutoring), home environment (which can affect sleep and nutrition), environmental stress, and adequate or inadequate school facilities. *Id.* Thus, the SAT is not an educationally equitable test. *Id.*

Another example is the minimum height and weight requirements for

educators are impaired from working towards educational equity because they are operating from a colorblindness perspective, unaware of the nuanced distinction between an emphasis on equitable inputs versus achieving equitable outputs for different student populations. Discussions about race today occur in an era when the societal notion of colorblindness is a dominant value. The idealized notion of colorblindness tells us that noticing race is wrong because people are equal. The hegemony of colorblindness suggests that by noticing race, one is undermining equality itself. Any conversation about race, or about whiteness in particular, must work against that dominant social norm.²³⁹

With regard to race in legal education, the prevalence of cultural reduction as a normative goal similarly perpetuates historic systems of cultural destructiveness and cultural incapacity. Barbara Flagg writes that “Whites’ consciousness of whiteness is predominately unconsciousness of whiteness.”²⁴⁰ Thus, the social norms, behaviors, characteristics and beliefs of whites become invisible and indistinct. Whites tend to make decisions from this unconsciously white foundation. Because the white normative foundation is invisible, the resulting decisions take on an air of neutrality.²⁴¹ So, when we talk about fairness and the neutrality of law, we are assuming a historically white perspective.²⁴² Flagg later described this idea that white social norms birth seemingly neutral decisions as the “transparency phenomenon”:

Just as whites tend to regard whiteness as racelessness, the transparency phenomenon also affects whites’ decision-making; behaviors and characteristics associated with whites take on

applicants to police and fire departments. *Id.* Although the requirements applied equally to all applicants, the requirements were not equitable because women applicants were disproportionately excluded. *Id.* A move towards testing focused on strength, endurance and flexibility improved equity in the hiring process because both men and women could work to pass the tests. *Id.*

239. Armstrong & Wildman, *Teaching Race/Teaching Whiteness*, *supra* note 35, at 648.

240. Barbara J. Flagg, “Was Blind But Now I See”: *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 968-70 (1993).

241. *Id.* at 968.

242. *Id.*

the same aura of race neutrality. Thus, white people frequently interpret norms adopted by a dominantly white culture as racially neutral, and so fail to recognize the ways in which these norms may be in fact covertly race-specific.²⁴³

The continuum point of Cultural Reduction can be particularly poignant in the law school classroom, which by necessity engages legal constructs such as equality, neutrality and formalism. To address Cultural Reduction, legal educators can question, and challenge law students to question, colorblindness as a normative goal.

iv. Cultural Pre-Competence

During the stage of cultural pre-competence, cultural differences are brought to a conscious level. Organizations and individuals in the cultural pre-competent state “recognize that their skills and practices are limited when interacting with other cultural groups.”²⁴⁴ In the cultural pre-competence stage, differences are often engaged inappropriately.²⁴⁵ “[R]esponses are typically non-systemic and haphazard, often requiring little to no change in regular school or classroom operations to meet the cultural needs of students.”²⁴⁶ Nuri-Robins cites the acknowledgement of culture only through “superficial” cultural events such as Black History Month and Cinco de Mayo as examples of cultural pre-competence.²⁴⁷

Indeed, awareness of cultural differences does not, in itself, create change. In fact, the pre-competence stage can be especially dangerous if an individual does not take seriously the commitment to continue towards cultural proficiency. A little bit of knowledge can make an individual more entrenched in his own perspective. Social scientists studying implicit bias call this “the

243. Barbara J. Flagg, *Transparently White Subjective Decisionmaking: Fashioning a Legal Remedy*, CRITICAL WHITE STUDIES: LOOKING BEHIND THE MIRROR 85, 87 (Richard Delgado & Jean Stefancic, eds. 1997).

244. NURI-ROBINS ET AL., CULTURALLY PROFICIENT, *supra* note 25, at 90.

245. JONES ET AL., THE CULTURAL PROFICIENCY JOURNEY, *supra* note 40, at 23, Table 2.3.

246. *Id.*

247. *Id.*

illusion of objectivity.”²⁴⁸ Researchers point out that a belief in one’s objectivity can serve as a “license” to act on one’s own bias.²⁴⁹

Social scientists have documented the danger of cultural pre-competence in the judiciary. For example, one team of researchers found that 97% of judges placed themselves in the top half of “avoid[ing] racial prejudice in decision-making,” while 50% placed themselves in the top quartile.²⁵⁰ This is, of course, statistically impossible.²⁵¹ In another study revealing a statistical impossibility, 97% of administrative law judges ranked themselves in the top half of administrative law judges in ability to avoid bias.²⁵² Thus, a judge’s decision to more harshly sentence a darker-skinned black defendant²⁵³ can be explained not because the circumstances of the crime itself justify distinction, but because the judge (viewing him or herself as objective) is more entrenched in her decision and less likely to question her own bias.

Another danger of the cultural pre-competence stage is the tendency to view new knowledge about cultural differences as an endpoint instead of a starting point. The endpoint perspective satisfies an individual’s responsibility to continue along the pathway towards cultural proficiency. One example of this is the use of new cultural knowledge as a replacement for old stereotypes.²⁵⁴ Rockquemore and Laszloffy write, “by taking the

248. Eric Luis Uhlmann & Geoffrey L. Cohen, *“I think, therefore its true”: Effects of self-perceived objectivity on hiring discrimination*, ORGANIZATIONAL BEHAVIOR AND HUMAN DECISION PROCESSES 207, 208 (2007).

249. *Id.* at 208, 211.

250. Jeffrey J. Rachlinski, Sheri Lynn Johnson, Andrew J Wistrich, and Chris Guthrie, *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1225-26 (2009).

251. *Id.*

252. Chris Guthrie, Jeffrey J Rachlinski, and Andrew J Wistrich, *The “Hidden Judiciary”: An Empirical Examination of Executive Branch Justice*, 58 DUKE L.J. 1477, 1519 (2009).

253. Jill Viglione et al., *The impact of light skin on prison time for black female offenders*, 40 SOC. SCI. J. 250, 256 (2011).

254. See CROSS ET AL., *supra* note 183 at 25 (Cross observed that, “[e]ven when mental health professionals learn about a culture there is a tendency to simply replace old stereotypes with new ones and assume that all members of a particular minority subgroup engage in a pattern or activity and interact in a

viewpoint advocated by one black faculty member and then generalizing it to all blacks, some white colleagues consider themselves educated, aware, and informed without having to invest energy into seeking additional viewpoints and perspectives.”²⁵⁵ To move beyond Cultural Pre-Competence, legal educators can recognize that the journey towards cultural proficiency is fluid and evolutionary; there is no endpoint.

v. Cultural Competence

Cultural competence is defined as a “policy, practice, or behavior that uses the essential elements of Cultural Proficiency as the standard for the individual or the organization.”²⁵⁶ A culturally competent instructor seeks “regular opportunities for students to contribute their knowledge, and perspectives” and uses that knowledge to structure the curriculum.²⁵⁷ In short, a culturally competent educator is able to “see the difference that difference makes” and use that knowledge to structure both the policies of the learning institution and the curriculum.²⁵⁸

vi. Cultural Proficiency

At the final stage of the continuum, cultural proficiency, the organization or individual is able to “esteem and learn from differences as a lifelong practice.”²⁵⁹ Nuri-Robins defines “esteeming culture” as “knowing how to learn about individual and organizational culture” and “interacting effectively in a variety of cultural environments.”²⁶⁰ In a culturally proficient classroom, there is a “transformation of curriculum and pedagogical practices that place students’ cultural attributes at the center of classroom learning” and “integra[tion] of social

certain way.”).

255. ROCKQUEMORE & LASZLOFFY, WINNING TENURE, *supra* note 83, at 16.

256. NURI-ROBINS ET AL., CULTURALLY PROFICIENT, *supra* note 25, at 94.

257. JONES ET AL., THE CULTURAL PROFICIENCY JOURNEY, *supra* note 40, at 24, Table 2.3.

258. *Id.*

259. NURI-ROBINS ET AL., CULTURALLY PROFICIENT, *supra* note 25, at 98, Table 6.2.

260. *Id.*

justice and multiple perspectives”²⁶¹

C. Barriers to Cultural Proficient Instruction

The barriers to cultural proficiency are the attitudes, policies, and practices that impede the establishment of culturally proficient practices.²⁶² Failure to address the barriers will prevent an organization or individuals from moving toward cultural proficiency. The four barriers are: (1) resistance to change, (2) unawareness of the need to adapt, (3) the presumption of entitlement, and (4) systems of oppression and privilege.²⁶³ All exist at some level in legal education today.

i. Resistance to Change, Unawareness of the Need to Adapt, & the Presumption of Entitlement

The first barrier reflects a refusal to make changes in policy or practice that would make the organization, or the individuals within it, more culturally proficient. In the second barrier, there is a failure to perceive the need to change to be more inclusive. In the third barrier, individuals and institutions are invested in the status quo and assume entitlement to the societal benefits of dominant group status based on misperceptions of merit. As discussed herein, many white faculty members believe that culturally proficient efforts are either unnecessary or are the concern of faculty members of color.

To overcome these barriers, law schools interested in implementing a cultural proficiency paradigm should move forward with those members of the administration and faculty motivated to make changes. There need not be agreement from the entire faculty for transformational shift to occur. Law Professor William Henderson has proposed a “12% solution”—law schools can enact major changes in their curriculum with just twelve percent of their faculty members working in consortium-based working groups, through twelve percent of the curriculum

261. JONES ET AL., THE CULTURAL PROFICIENCY JOURNEY, *supra* note 40, at 24, Table 2.3.

262. LINDSEY ET AL., *supra* note 180, at 69.

263. *Id.* at 70.

(one course per year).²⁶⁴ The point is, when implementing a cultural proficiency paradigm, law schools can work with the willing.

ii. Systems of Oppression and Privilege

In her seminal work on white privilege, Peggy McIntosh self reflects on a lifetime of unearned advantage as a white person and the corollary “oblivion” white privilege confers on its beneficiaries:

As a white person, I realized I had been taught about racism as something which puts others at a disadvantage, but had been taught not to see one of its corollary aspects, white privilege, which puts me at a disadvantage. . . I have come to see white privilege as an invisible package of unearned assets which I can count on cashing in each day, but about which I was “meant” to remain oblivious. White privilege is like an invisible weightless knapsack of special provisions, assurances, tools, maps, guides, codebooks, passports, visas, clothes, compass, emergency gear, and blank checks.²⁶⁵

Throughout most organizations are systems of institutionalized racism, sexism, heterosexism, ageism, and ableism.²⁶⁶ Moreover, these systems are often supported and sustained without the permission of and, at times, without the knowledge of the people whom they benefit. These systems perpetuate domination and victimization of individuals and groups. Racial privilege allows whites not to think about race.²⁶⁷ In contrast, people of color must think about race constantly to navigate the lack of race privilege.

Acknowledging one’s role as a beneficiary of historic systems of privilege is not easy or comfortable. It requires a level of

264. William D. Henderson, *A Blueprint for Change*, 40 PEPP. L. REV. 461, 503-504 (2013).

265. Peggy McIntosh, *White Privilege and Male Privilege: A Personal Account of Coming to See Correspondences Through Work in Women’s Studies*, Working Paper No. 189, Wellesley College Center for Research on Women (1988). Later scholarship noted changing definition of “whiteness” and need to focus on structural privilege systems.

266. *Id.* at 8.

267. *Id.* at 5.

personal responsibility and engagement with the problem. That is precisely why examining privilege is such a powerful gateway in cultural proficiency work; it takes the process from merely educational (cultural diversity training), to unconscious (implicit bias), to personal responsibility. Engaging with oneself as a privileged individual amplifies the societal mechanisms supporting that privilege. It is one thing to view members of certain groups as “disadvantaged” or “underprivileged.” It is another to openly acknowledge that the flip side of one group’s lack of privilege is not in relation to a neutral barometer. Rather, one group’s lack of privilege is the direct result of another group’s over-privilege.

The transition between acknowledging societal disadvantage and discrimination to recognizing oneself as a beneficiary of privilege systems is where most efforts in proficiency training break down. In analyzing male privilege, Peggy McIntosh writes about the reluctance of male academics to move from an acknowledgement of institutionalized sexism to recognition of personal privileges:

The denial of men’s over-privileged state takes many forms in discussions of curriculum change work. Some claim that men must be central in the curriculum because they have done most of what is important or distinctive in life or in civilization. Some recognize sexism in the curriculum but deny that it makes male students seem unduly important in life. Others agree that certain individual thinkers are blindly male-oriented but deny that there is any systemic tendency in disciplinary frameworks or epistemology to over-empower men as a group. Those men who do grant that male privilege takes institutionalized and embedded forms are still likely to deny that male hegemony has opened doors for them personally.²⁶⁸

Being a member of the legal profession, in itself, generally places the attorney in a relative position of privilege *vis a vis* most clients.²⁶⁹ Few lawyers take time to examine the relative

268. McIntosh, *supra* note 265.

269. Lucille A. Jewel, *Bourdieu and American Legal Education: How Law Schools Reproduce Social Stratification and Class Hierarchy*, 56 *BUFF. L. REV.* 1155, 1165 (2008) (citing Pierre Bourdieu, *The Force of the Law: Toward A Sociology of the Juridical Field*, 38 *HASTINGS L. J.* 805, 850 (Richard Terdiman

imbalance of racial privilege at all, let alone actively work to dismantle it as a necessary part of the client relationship. Law professor Marjorie Silver observes:

Most lawyers are white, and most white people tend not to think about race unless it arises in the context of discrimination claims or other explicit race-related conflicts. Most lawyers are unlikely to perceive the relevance of race to lawyering. Lawyers approach interactions with clients with unexamined, often unconscious, assumptions that our clients do, or at least should, share our worldview. We seldom pause to think about what our own racial and cultural assumptions are, let alone whether they are generally shared.²⁷⁰

In the judiciary, law professor Michele Benedetto Neitz has examined the problem of socioeconomic bias.²⁷¹ Most judges earn more than double the average salary in the United States.²⁷² Neitz observes “[j]udges overwhelmingly come from wealthy backgrounds, and many have never walked in the shoes of economically disadvantaged people. In effect, elite judges may render decisions that negatively impact poor individuals simply because they do not recognize that they are doing so.”²⁷³

trans., 1987)):

Persons on the outside of the legal field (lay persons) must “submit to the ‘power of form,’ that is, to the symbolic violence perpetrated by those who, thanks to their knowledge of formalization and proper judicial manners, are able to put the law on their side.” By maintaining a logical and aristocratic detachment, lawyers and judges are able to maintain the symbolic value of the legal system as a neutral and trustworthy way for resolving disputes, obscuring the fact that the law allows powerful groups to impose their vision of social order onto the less powerful.

270. Silver, *supra* note 11, at 220.

271. Neitz, *Socioeconomic Bias*, *supra* note 34, at 141 (“Because judges are more economically privileged than the average individual litigant appearing before them, they may be unaware of the gaps between their own experiences and realities of those of poor people.”).

272. *Id.* at 142.

273. *Id.* at 139-140 (discussing the dissenting opinions of Justice Marshall in *United States v. Kras*, 409 U.S. 434, 460 (1973) (“[I]t is disgraceful for an interpretation of the Constitution to be premised upon unfounded assumptions about how [poor] people live”) and of Chief Judge Alex Kozinski in *United States v. Pineda-Moreno*, 617 F.3d 1120, 1123 (9th Cir. 2010) (“No truly poor people are appointed as federal judges, or as state judges for that matter.

Racial privilege also operates in law schools. The centrality of whiteness in the law school curriculum is assumed to be neutral. There is the claim that law is “race neutral.”²⁷⁴ Those claiming law is neutral support the view that race-specific discussions should be left to specialty and seminar courses or race-specific topics. Other faculty members dismiss racial issues in the law school classroom as the products of individual actors instead of systemic racism and privilege. Those members of the faculty that are willing to acknowledge race privilege are disinclined to dismantle systems of race privilege in the law school. This leaves the burden of dealing with race issues mainly on the shoulders of those who are disadvantaged by racism—students of color, professors of color, and the administration and staff.²⁷⁵

To deconstruct the structural systems of racism and implicit bias in legal education through proficiency training, we must first attain a level of consciousness. It is only after achieving a level of race recognition and consciousness that one can access privilege. Only after investigating the ways each of us is the beneficiary of systems of privilege can we dismantle those systems as well as those of explicit and implicit bias, discrimination, and the like. The acknowledgement of personal privilege is the catalyst for individual-level efforts to dismantle societal hegemonic systems of privilege. Then and only then can we consider ourselves equipped to build cultural proficient lawyering skills in our students.

IV. CULTURAL PROFICIENCY’S PROMISE FOR LEGAL EDUCATION

In *Grutter v. Bollinger*, the Supreme Court recognized that improving diversity and inclusion in legal education can have profound societal implications:

Judges, regardless of race, ethnicity, or sex, are selected from the class of people who don’t live in trailers or urban ghettos.”)).

274. Sherry J. Williams, *Race Neutrality: What Does it Really Mean?*, MBE (July 2001), <https://perma.cc/F6XZ-DR2W>.

275. ROCKQUEMORE & LASZLOFFY, WINNING TENURE, *supra* note 83, at 14-15 (discussing phenomenon of “race tax” paid by black academics in the form of diversity-related service demands not expected of white academics).

In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity. All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training. As we have recognized, law schools “cannot be effective in isolation from the individuals and institutions with which the law interacts.” Access to legal education (and thus the legal profession) must be inclusive of talented and qualified individuals of every race and ethnicity, so that all members of our heterogeneous society may participate in the educational institutions that provide the training and education necessary to succeed in America.²⁷⁶

This Article has argued that there is a need for a cultural shift towards inclusion in legal education that goes beyond the structural diversity mechanism articulated in *Grutter*.²⁷⁷ This section articulates the potential benefits of adopting a cultural proficiency paradigm in the law school environment.

A. Deconstruction and Reconstruction

Cultural proficiency empowers legal educators to question their internally-held cultural beliefs, not simply police their outward manifestations of bias and prejudice. This takes effort, and the more entrenched a law school environment is in the dominant culture, the harder the processing of questioning, dismantling, and reconstructing a new culture may be.²⁷⁸ However, adopting the tenets of cultural proficiency is a promising first step in changing the culture throughout the law school.

Armstrong and Wildman observe:

Developing an ability to talk in the classroom and in the institution about race and the whiteness that is part of race necessarily begins with faculty studying the issue for

276. *Grutter*, 539 U.S. at 332 – 333 (citations omitted).

277. *See supra* at Introduction.

278. *See* COCHRAN ET AL., *supra* note 136, at 192 (“Generally, the more characteristics a person has that are dominant within a society, the harder the person has to work to challenge his own assumptions.”).

ourselves, in our own lives. That work invokes a commitment to a lifetime of learning; teachers cannot talk with a class about these issues without first thinking about them or discussing them in our own circle of peers. Preparation outside the classroom will help the instructor lead conversations that may arise within it.²⁷⁹

Systems of privilege, one of the highest barriers to cultural proficiency discussed above, is a key example of how the “inside out” approach of cultural proficiency paradigm can be an effective tool in legal education. Legal educators must first self-assess how they are beneficiaries of the privilege systems at work. Then, there must be focused internal efforts to recognize all the ways the privilege operates *in their personal lives*. It is only after committing to understanding racial privilege and its perpetuating operation of subordination that the law professor can learn to communicate through the privilege divide and seek to reduce outward manifestations of bias.²⁸⁰

Other professions²⁸¹ have begun to recognize that internal recognition and deconstruction of unearned privilege, racist attitudes, and unconscious bias must come before turning to changing outward manifestations of bias and prejudice. For example, in advocating cultural proficiency in the provision of mental health services to minority patients, Sue and Sue observed:

While cognitive understanding and counseling-skill training are important, *what is missing for the trainee is self-exploration of one’s own racism*. Without a strong antiracism training component, trainees (especially Whites) will continue to deny responsibility for the racist system that oppresses their minority clients. Thus, White trainees may continue to view racism from an intellectual perspective that allows them to distance

279. Armstrong & Wildman, *Teaching Race/Teaching Whiteness*, *supra* note 35, at 658.

280. See Silver, *supra* note 11 at 228-29 (“Understanding unconscious racism and the dynamics of privilege, learning how to recognize it in ourselves and others, is an important step in the successful crossing [of the racial divide].”).

281. See, e.g., Curcio, Ward, and Dogra, *Survey Instrument*, *supra* note 29 (discussing the evolution of cultural proficiency in the medical profession).

themselves from the true meaning of cross-cultural work.²⁸²

Bringing cultural proficiency training into legal education brings tools for addressing the underlying causes of bias, racism, and discrimination into the hallways of laws schools.²⁸³ On an organizational level, law schools should scrutinize their curriculum and policies to ensure the school is positioned to travel along the cultural proficiency continuum. On an individual level, law professors should each take the responsibility to move along the cultural proficiency continuum in their teaching, scholarship, and service. We cannot pass along cultural proficiency skills to students until we are willing to hold ourselves to the same all-encompassing standard.

B. Redistribution of Responsibility

As it stands now, those legal educators who shoulder the most responsibility for cultural proficiency efforts are also the most frequent victims of discriminatory conduct. Professors and administrators privileged with dominant group membership in legal education are also privileged with the ability to walk away from uncomfortable issues of race, gender, sexual orientation, and similar issues when a faculty meeting is over. Professors of color who champion race issues risk being labeled as oversensitive or “playing the race card.” Other law teachers shrug their shoulders in discomfort and wait for the discussion to pass. While some law professors may have a sincere desire to more deeply engage in cultural proficiency work, they fear

282. SUE & SUE, COUNSELING THE CULTURALLY DIFFERENT, *supra* note 29, at 15 (emphasis added). *See also* Silver, *supra* note 11, at 238-39 (reflecting on Sue and Sue’s work and emphasizing that counseling is a necessary component of legal practice).

283. In 2009, the ABA Presidential Initiative Commission on Diversity issued a report on diversity in the legal profession containing several recommendations for law schools that would further the goal of cultural proficiency, including that law schools make diversity an integral part of their mission (moving beyond a mission statement), educate the law school community on privilege and unconscious bias, require training for all stakeholders in legal education, and focus on the hiring and retention of diverse law faculty. *See* ABA Presidential Diversity Initiative, *supra* note 14, at 18-19 (discussing how most law schools focus diversity initiatives on student admissions).

making a mistake or offending. The end result is that members of non-dominant groups carry the additional burden within the hallways of legal education.

Bringing a cultural proficiency paradigm into legal education begins the work of redistributing responsibility for traveling along the cultural continuum among additional stakeholders. All members of the law faculty should be positioned—and should accept the responsibility—to discuss issues of race, gender, class, sexuality, disability, and other culturally pertinent issues in their courses.²⁸⁴ Law school administrators and individual law teachers should adopt the “inside-out” approach of cultural proficiency.²⁸⁵ The mission statement and academic policies of the school should be evaluated. When there is an issue, the administration of the school should be active in crafting a culturally proficient response. At the same time, individual faculty and staff should seek to continually advance their travel along the cultural proficiency continuum. Schools should utilize different formats; including workshops, presentations, films, speaker series, town halls, lunch discussions, and courses. The school should be as creative as possible.

Active engagement of the cultural proficiency paradigm can help reverse the status quo where that the same faculty members who bear the brunt of challenging the oppressive law school environment are also the ones labeled incompetent. Reversal of the culture of this “presumption of incompetency” needs to be a sustained and top-down effort. It must be engrained in the culture of the school, by the administration and the faculty, to ensure that diverse faculty members are cultivated and supported.

C. Positioning to Teach Culturally Proficient Lawyering Across Curriculum

There is constant debate among law professors about how to balance the addition of new information into the already-packed

284. See Torrey, *Satisfy ABA Standards*, *supra* note 39, at 617 (“...all teachers should be encouraged to address race and gender issues *in all* of their classes.”).

285. NURI-ROBINS ET AL., *CULTURALLY PROFICIENT*, *supra* note 25.

law school curriculum. With the passage of ABA Rule 303, law schools are trying to find creative ways to offer law students experiential learning while preparing students with the core information to take the bar exam. One solution that is often offered to this dilemma is that instead of adding another class (required or elective), skills or experiential learning should be “infused” throughout the law school curriculum.²⁸⁶ While aspirational, some law professors do not feel equipped to add experiential learning into their doctrinal courses.²⁸⁷

Building culturally proficient lawyers is vulnerable to the same critique, and an analogy is useful. The glaring difference is that law professors were at least taught to be practitioners, even if many legal academics never practiced or practiced long ago. Most law professors never developed culturally proficient lawyering skills. We are given an ethical mandate without training on how to accomplish it. Indeed, we live in a society—and are educated in a way—that fosters the very discriminatory and biased conduct that we are now ethically obligated to avoid. It is no wonder discrimination and disparities are pervasive in our profession.

Often in legal education, the focus is on a specific outcome instead of the underlying cause of that outcome. For example, the Model Rules for Professional Conduct focus on avoiding outward manifestations of privilege and bias.²⁸⁸ Many law students are taught to avoid racial bias only in the context of client representation skills. Similarly, many cultural proficiency efforts focus on improving the participants’ communication skills. While developing effective cross-cultural communication is an important skill, characterizing proficiency work simply as an

286. Hartley & Petrucci, *supra* note 25, at 175 (“Infusing and reinforcing cultural competency content throughout the curriculum is needed, because an ‘infusion approach’ . . . is [] more effective in helping students overcome their resistance to examining cultural competency content on racism, discrimination, and oppression.”).

287. Emily Zimmerman, *Should Law Professors Have a Continuing Practice (CPE) Requirement?*, 6 N.E. U. L.J. 131 (2013) (examining arguments for and against law professors maintaining practices connected to the “real world” of law outside of the Academy).

288. AMERICAN BAR ASSOCIATION, MODEL RULES OF PROFESSIONAL CONDUCT 8.4(d).

effort to improve a specific outcome (e.g. better communication skills) is an oversimplification. While a critical step, it is not the threshold issue.

Training law professors in culturally proficient instruction is the threshold step in building a culturally proficient legal profession. Students learn best by how they are taught, by how we as professors model, by how they are treated. The first step in teaching law students how to be culturally proficient lawyers is by interacting with them in a culturally proficient way. It is by reconfiguring law schools to be culturally proficient spaces.

Only then we will be able to have the tools to build in the substantive lessons of cultural proficiency throughout the curriculum. Cultural proficiency should be taught in seminars, in professional courses, and in clinics. But it should be taught at every moment during the curriculum where there is an opportunity to do so, in the same way we teach attention to detail and analytical thinking.

V. CONCLUSION

In a sense, if things are unfair, inequitable, or biased in legal academia, what hope do we have for other professions, academic institutions, workplaces, and campuses? If this avenue does not truly provide opportunities for advancement, there is little hope that other positions can create those changes. Improving the environment in law schools can thus not only enrich law teaching, legal education, and the legal profession, but also serve as an example to other professional and educational environments for how to contribute to social change generally.²⁸⁹

This article began by examining the need for culturally proficient instruction in legal education through the lens of Harvard Law School's experience with and response to a needed cultural shift—the November 2015 vandalism of the portraits of black law professors. In evaluating the event, the students at Harvard called for a cultural shift in the school's environment. Those discussions have led to adoption of a new law school crest

289. Deo, *The Promise of Grutter*, *supra* note 14, at 956.

at the Harvard Law School. Hopefully, the law school will continue to engage in similar cultural changes. Hopefully, law schools around the country can engage in similar cultural shifts by becoming more culturally proficient.

Bringing a cultural proficiency paradigm into legal education empowers law professors and administrators to transform law schools into culturally proficient spaces. The empirical evidence is clear—structural diversity is not enough to effect cultural change in the hallways of legal education.²⁹⁰ As legal educators, we must first take on the work of becoming culturally proficient in our administrative policies, curriculum, instruction, and interaction with students.

290. See Torrey, *Yet Another Gender Study?*, *supra* note 39, at 797 (“If it takes overwhelming evidence of the gender, racial, and heterosexual bias in legal education to get deans and faculties to pay attention, we now have it.”).