AFFIRMATIVE REACTION: THE BLUEPRINT FOR DIVERSITY AND INCLUSION IN THE LEGAL PROFESSION AFTER *SFFA*

BRENDA D. GIBSON*

ABSTRACT

This Article is both a descriptive and prescriptive authority on the efforts of the legal profession's ongoing attempts to achieve diversity and inclusion. It lays bare the history of the legal profession's unsuccessful diversity and inclusion efforts and explores the efficacy and success of some of the solutions that the legal profession has crafted to turn the tide on implicit bias and the resulting lack of diversity and inclusion in the profession. Most relevantly for this new post-affirmative action era, I set out a blueprint of sorts for the legal profession that will incentivize Big Law and others who have not figured out why diversity makes sense for the legal profession's bottom line—monetarily and morally speaking. This is the Article that brings to light the possibilities when the legal profession recognizes its most important commodity—its human capital, both the lawyers and their clients.

Part I of the Article begins with a discussion about the difficulties surrounding the language of diversity, which has impacted attempts to address its absence in so many of our institutions and organizations, especially the legal profession. Part II details some of the solutions that have legal institutions have traditionally employed to address the lack of diversity in the profession and some of the impediments preventing those solutions from being successful. Also, Part II discusses the business and medical professions that seemingly have been more successful in incentivizing their educational institutions and professionals to engage in diversity and inclusion efforts. Turning to the more prescriptive part(s) of the Article, Part III discusses the LSAT and bar exam, and the roles they play as gateways to the profession, as well as some current trends that may make these exams less of an impediment to diversity and inclusion in the legal

* Brenda D. Gibson is an Associate Professor of Legal Analysis, Writing and Research at Wake Forest University School of Law. Many thanks to those who helped with research: Wake Law Library Liaison, Lance Burke, and my research assistants, Jordin Carpenter, Simon Daniel, Melanie Mahabir, and Christine Pangborn. Special thanks to the Lutie Lytle Black Women Faculty Workshop and Writing Retreat and Wake Law's Junior's Scholar Group for listening to my early ideas and reading early drafts, respectively. A very special thanks to Nantiya Ruan and Cindy Thomas Archer and my other W.A.R.riors (members of the Writing as Resistance, aka W.A.R., Legal Writing Professors of Color Collective), and Ron Wright, my scholarship mentor, for reading and providing constructive feedback on my later drafts.

profession going forward. Finally, Part IV explains the role that human relationships can play in addressing the lack of diversity and inclusion in the legal profession—that being the covert racism—which is the most prevalent form of racism in society today. Included in this part of the Article is a discussion about the importance of incentivizing members of the legal profession to engage in cross-racial, -cultural, and -gender mentorships, sponsorships, as well as allyships to address this intractable problem, thereby leveraging the profession's human capital in ways that have never been done effectively.

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INTRODUCTION

The 90's R&B Group En Vogue once sang, "free your mind, and the rest will follow. Be colorblind. Don't be so shallow."[1] It would seem that our United States Supreme Court has joined the chorus in its most recent affirmative action case, calling upon the citizens of the United States to be colorblind in their higher education admissions process.[2]

But is it so simple? Based on the science and the experts, it is not.[3] In fact, the United States Supreme Court's instruction directly contradicts science and experts who caution against a colorblind approach to discrimination.[4] Experts have long held that such an approach is actually counterproductive to anti-racism.[5] And, indeed, it seems that despite the passage of time and intensive efforts, our implicit biases, along with historically racist systems that persist in modern day America, impede diversification of many American institutions—particularly the legal profession.

While we are often called upon to solve the problems created by the vestiges of racism and discrimination, the legal profession is fraught with its own problems. Despite being the gatekeepers of justice and the thought leaders of society, the legal profession is most remarkably monochromatic,[6] leading to a plethora of injustices which are perpetrated from our law schools to our judicial system. Notwithstanding the fact that most people agree that the better lawyer is

[1] EN VOGUE, *Free Your Mind*, *on* FUNKY DIVAS (East West 1992).

[2] *See* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141, 2175-76 (2023) [hereinafter SFFA] (holding Harvard's and UNC's affirmative action-based admissions programs to be in violation of Fourteenth Amendment's Equal Protection Clause).

In a separate concurrence, Justice Thomas advocated for a colorblind Constitution—a position wholly rejected in the dissent by Justices Sotomayor, Kagan, and Jackson. *Id.* at 2256-59 (Sotomayor, J., dissenting) (remarking that "Justice Thomas speaks only for himself"). Note that Justice Jackson did not participate in the Harvard decision. *Id.* at 2176.

[3] *See* Brenda D. Gibson, *We Speak the Queen's English: Linguistic Profiling in the Legal Profession*, 88 BROOK. L. REV. 601, 604-09 (2023) (discussing science of implicit bias and why it is so difficult to address).

[4] *See* Brooke A. Cunningham & Andre S. M. Scarlato, *Ensnared by Colorblindness: Discourse on Health Care Disparities*, 28 ETHNICITY & DISEASE 235, 235 (2018) (explaining how colorblindness perpetuates discrimination using healthcare as proving ground).

[5] *See id.*; *see also* Charles A. Gallagher, *Color-Blind Privilege: The Social and Political Functions of Erasing the Color Line in Post Race America*, 10 RACE, GENDER & CLASS 22, 28 (2003).

[6] *Lawyers by Race & Ethnicity*, ABA YOUNG LAWS. DIV., https://www.americanbar.org/groups/young_lawyers/about/initiatives/men-of-color/lawyer-demographics/ (last visited Jan. 15, 2024) (describing how white men and women are overrepresented in legal profession, making up 86% of all attorneys in United States as of 2020).

the culturally competent one,[7] the profession still struggles in the area of diversity and inclusion.[8] We'll save equity for another day.[9]

A growing number of professions require training in cultural competence, including medical vocations, businesses, social work, and education.[10] Indeed, it is critical that all people be invited to the decision-making table and all voices be heard. In fact, research tends to show that groups comprised of diverse individuals tend to outperform a more talented but nondiverse group.[11] It seems that these individuals, having been exposed to various diverse approaches to problem solving, are better problem solvers.[12] To that end, science bears out that law schools need to be more intentional in diversifying their student bodies "to ensure that schools are building bridges between different thinking groups, finding common ground, and breaking down stereotypes."[13] After all, diversity in the profession is yet another way to ensure that a diverse and wide populace have access to effective legal services.[14]

To the extent that diversity is necessary for the continued growth and success of the legal profession,[15] we must be attentive to the recent Supreme Court decision that declared affirmative action unconstitutional in higher education admissions, effectively eliminating one of the tools that has historically been used to achieve diversity in that sector.[16] The loss of this tool makes it even more difficult for the legal profession to chart a path towards achieving diversity and inclusion.

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[7] *See* Kathleen Nalty, *Strategies for Confronting Unconscious Bias*, 45 COLO. LAW. 45, 45 (2016), *cited in* Gibson, *supra* note 3, at 647; *see also* Aastha Madaan, *Cultural Competency and the Practice of Law in the 21st Century*, 30 PROB. & PROP. 29, 29 (2016).

[8] *See* Madaan, *supra* note 7, at 31 (explaining how estate planning attorneys are susceptible to implicit biases, which in turn allows discrimination against clients from diverse backgrounds to fester); *see also* Veronica Root Martinez, *Combating Silence in the Profession*, 105 VA. L. REV. 805, 807-08 (2019).

[9] The equity conversation is a bit more nuanced in that it involves treatment *after a person has gained access* to a group or organization, while diversity and inclusion involves *attempts to gain access* to a group or organization. For that reason, equity will not be discussed in this Article.

[10] Will Breland, *Acres of Distrust: Heirs Property, the Law's Role in Sowing Suspicion Among Americans and How Lawyers Can Help Curb Black Land Loss*, 28 GEO. J. ON POVERTY L. & POL'Y 377, 406 (2021).

[11] *See* Samia E. McCall, *Thinking Outside of the Race Boxes: A Two-Pronged Approach To Further Diversity and Decrease Bias*, 2018 BYU EDUC. & L.J. 23, 46..

[12] *See id.*

[13] *Id.*

[14] *See id.* at 50-51.

[15] *See* Deseriee A. Kennedy, *Access Law Schools & Diversifying the Profession*, 92 TEMP. L. REV. 799, 799-800 (2020) (referencing Charles Hamilton Houston's famous quote and noting, "[i]n order to effectuate change and engineer social justice, it is critical that the legal profession more aptly represent the growing diversity in the United States," which it does not currently do).

[16] SFFA, 143 S. Ct. 2141, 2175-76(2023).

What began as a follow-up to my linguistics profiling article[17] to discuss some of the possible remedies for the lack of diversity and inclusion in the legal profession has evolved into a prescriptive elixir in the wake of the Supreme Court's delivery of the death blow to affirmative action in higher education (which includes the legal academy) as we know it. To that end, this Article wrestles with the travails of diversity and inclusion in our profession and explores the efficacy and success of some of the solutions that the legal profession has crafted to turn the tide on implicit bias and the resulting lack of diversity and inclusion in the profession. Most relevantly, in this new post-affirmative action era, I set out a blueprint of sorts for the legal profession that will incentivize Big Law[18] and others who have not figured out why diversity makes sense for the legal profession's bottom line—monetarily and morally speaking. This is the Article that brings to light the possibilities when the legal profession recognizes its most important commodity—its human capital, both the lawyers and their clients.

Part I of the Article begins with a discussion about the difficulties surrounding the language of diversity, which has impacted attempts to address its lack in so many of our institutions and organizations, especially the legal profession. Part II details some of the solutions that have traditionally been employed by our legal institutions to address the lack of diversity in the profession and some of the impediments preventing those solutions from being successful. Also, Part II discusses the business and medical professions, which seemingly have been more successful in incentivizing their educational institutions and professionals to engage in diversity and inclusion efforts. Turning to the more prescriptive part of the Article, Part III discusses the Law School Admissions Test ("LSAT") and bar exam, and the roles they play as gateways to the profession, as well as some current trends that make them less of an impediment to diversity and inclusion in the legal profession. Finally, Part IV explains the role that human relationships can play in addressing the lack of diversity and inclusion in the legal profession, that being the covert racism, which is the most prevalent form of racism in the workplace (and society) today.[19] Included in this part of the

[17] Gibson, *supra* note 3, at 603. This article discussed the link between implicit bias and linguistic profiling (a specific type of implicit bias that is based on written and oral language skill differences) and how it appears in the legal academy and subsequently the legal profession.

[18] *See id.* at 620 n.124 ("Big Law is a nickname for large, high-revenue law firms that are usually located in major U.S. cities, such as New York, Chicago and Los Angeles. These firms often have multiple branches, sometimes in smaller cities, as well as an international presence." (quoting Ryan Lane, *Big Law: What It Is and What Salary You Should Expect*, NERDWALLET (Nov. 5, 2020), https://www.nerdwallet.com/article/loans/student-loans/big-law-salary [https://perma.cc/86FL-68VT])).

[19] *See* Franita Tolson, *The Boundaries of Litigating Unconscious Discrimination: Firm-Based Remedies in Response to a Hostile Judiciary*, 33 DEL. J. CORP. L. 347, 356-58 (2008) (explaining "that society's rejection of the aversive racist, or 'a person whose ambivalent racial attitudes leads him or her to deny his or her prejudice and express it indirectly, covertly,

Article is a discussion about the importance of incentivizing members of the legal profession to engage in cross-racial, -cultural, and -gender mentorships, sponsorships, and allyships to address this intractable problem, thereby leveraging the profession's human capital in ways that have never been done effectively.

I. THE PROBLEM: SOLVING FOR "WHY"

The legal profession continues to lag behind most, if not all, professions in the area of diversity and inclusion.[20] While we spend untold amounts of money on leadership training, we have failed to focus on diversity and inclusion in that training.[21] At the same time, race relations in the United States continue to spiral downward as it becomes clear that White people will no longer be the majority population by the turn of the century.[22] News stories recount increasing violence and intolerance.[23] Moreover, with the recent *SFFA* affirmative action case(s), affirmative action—a long-existing and key tool for diversity and inclusion in higher education—is a thing of the past.[24] But that cannot be the end of the

and often unconsciously,' has made unconscious discrimination more common than conscious discrimination in today's workplace" (footnote omitted)).

[20] *See* Ellen Yaroshefsky, *Symposium Introduction: Leading Differently Across Difference Conference*, 48 HOFSTRA L. REV. 597, 597 (2020); *see also* Deborah L. Rhode, *Law Is the Least Diverse Profession in the Nation. And Lawyers Aren't Doing Enough To Change That.*, WASH. POST (May 27, 2015, 8:25 AM), https://www.washingtonpost.com/posteverything/wp/2015/05/27/law-is-the-least-diverse-profession-in-the-nation-and-lawyers-arent-doing-enough-to-change-that/.

[21] *See* Yaroshefsky, *supra* note 20, at 597.

[22] *See* William H. Frey, *The US Will Become 'Minority White' in 2045, Census Projects*, BROOKINGS INST. (Mar. 14, 2018), https://www.brookings.edu/blog/the-avenue/2018/03/14/the-us-will-become-minority-white-in-2045-census-projects/ [https://perma.cc/Z9MV-QJEQ].

[23] *See* Kelly Rissman, *Alabama Dockside Brawl Was Racially Motivated, Riverboat Captain Says*, INDEPENDENT (Aug. 9, 2023, 5:17 PM BST), https://www.independent.co.uk/news/world/americas/crime/alabama-riverboat-brawl-video-captain-b2390239.html [https://perma.cc/99Q4-RT4K] (describing brawl that occurred at riverfront dock in Montgomery, Alabama in August 2023 that gained notoriety on social media after three White men were recorded attacking Black deckhand); Press Release, U.S. Dep't of Just., Off. of Pub. Affs., Federal Judge Sentences Three Men Convicted of Racially Motivated Hate Crimes in Connection with the Killing of Ahmaud Arbery in Georgia (Aug. 8, 2022), https://www.justice.gov/opa/pr/federal-judge-sentences-three-men-convicted-racially-motivated-hate-crimes-connection-killing/ [https://perma.cc/Z5A8-DTCW]. *See generally Hate Crimes Case Examples*, U.S. DEP'T OF JUST., https://www.justice.gov/hatecrimes/hate-crimes-case-examples [https://perma.cc/BB6X-8PQ8] (last updated Oct. 31, 2023) (maintaining up-to-date list of press releases about hate crimes by state).

[24] In the challenge to the Harvard policy, the Court heard *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 142 S. Ct. 895 (2022) (granting certiorari). In the challenge to the University of North Carolina at Chapel Hill policy, the Court heard *Students for Fair Admissions, Inc. v. University of North Carolina*, 142 S. Ct. 896 (2022) (granting certiorari). While originally consolidated, these cases were separated so that Justice

diversity and inclusion fight. With so much at stake, we must soldier on. Our success as a profession requires no less. However, like many social science constructs, diversity and inclusion matters are not given to formulaic solutions. Indeed, to achieve diversity and inclusion, it will require a change in thought processes and the very systems that exist in society. Perhaps that is why it has been so difficult to achieve in one of the most esteemed professions—the legal profession.

A. *Level Setting: Diversity vs. Inclusion*

Diversity is having a seat at the table, inclusion is having a voice, and belonging is having that voice heard.
—Liz Fosslien & Mollie West Duffy[25]

This quote seems to say it all to those who ask the question: "What is diversity?" However, with so many people clamoring for their rightful place in the pantheon of equality, it is no wonder that there is confusion regarding what is meant when the terms "diversity" and "inclusion" are used. In fact, some people believe that "inclusion" was added in the area of equality initiatives merely to placate those opposed to the use of the term "diversity."[26]

"Diversity has been used to describe the composition of groups or workforces" (in the employment context).[27] Notably, "diversity may be defined in terms of observable and nonobservable characteristics," with the more traditional notions of diversity falling into the former category—"gender, race, ethnicity, and age, which are legally protected from discrimination, particularly in the United States."[28] "However, definitions and measurements of diversity have evolved to include a wider array of nonobservable characteristics that include cultural, cognitive, and technical differences among [people]."[29] In sum,

Jackson could participate in the UNC case. *See* Kimberly Strawbridge Robinson, *Supreme Court Decouples Harvard, UNC Affirmative Action Cases (2)*, BLOOMBERG L.: U.S. L. WK. (July 22, 2022, 4:16 PM), https://news.bloomberglaw.com/us-law-week/supreme-court-separates-affirmative-actions-cases-for-jackson; Mitchell F. Crusto, *A Plea for Affirmative Action*, 136 HARV. L. REV. F. 205, 205 n.3 (2023); *see generally* SFFA, 143 S. Ct. 2141 (2023).

[25] LIZ FOSSLIEN & MOLLIE WEST DUFFY, NO HARD FEELINGS: THE SECRET POWER OF EMBRACING EMOTIONS AT WORK 185 (2019), *quoted in* Andrea E. Goering, Cheryl E. Resnick, Kristie D. Bradford & Shannon M. Othus-Gault, *Diversity by Design: Broadening Participation Through Inclusive Teaching*, 2022 NEW DIRECTIONS FOR CMTY. COLL. 77, 77.

[26] *See* Quinetta M. Roberson, *Disentangling the Meanings of Diversity and Inclusion in Organizations*, 31 GRP. & ORG. MGMT. 212, 213 (2006) (noting "limited understanding" of whether rise of use of "inclusion" versus "diversity" "represents a material change in organizational actions and outcomes, or simply a change of phrasing to reduce backlash against the same initiatives").

[27] *Id.* at 214.

[28] *Id.*

[29] *Id.* (citing Thomas Kochan et al., *The Effects of Diversity on Business Performance: Report of the Diversity Research Network*, 42 HUM. RES. MGMT. 3, 3-21 (2003)).

diversity reflects the various "perspectives and approaches" that members of different identity groups bring to the decision-making process.[30]

While "diversity" seems to focus on differences and the demographic of a group or organization,[31] "inclusion" focuses on the extent to which persons have access to information and resources and have the opportunity to be involved in, or influence, the decision-making processes.[32] Hence, "inclusion is focused on the degree to which individuals feel a part of critical organizational processes" and their "ability to contribute fully and effectively to an organization."[33] Indeed, inclusion is primarily concerned with "organizational objectives designed to increase the participation of all employees and to leverage diversity effects on the organization."[34]

In sum, research readily distinguishes the two concepts,[35] and few can agree as to why the more novel term gained such widespread use. Regardless, I note that, in tandem, the terms "diversity" and "inclusion" cover both sides of the equality coin—the lack of, and the need for, all voices to be heard in our organizations. In fact,

> by highlighting the similarities and differences between diversity and inclusion in organizations, both researchers and practitioners are better positioned to create, understand, and support changes needed to promote equality for historically disadvantaged groups as well as create organizations in which all employees can use their full portfolio of skills and talents.[36]

Differences, whether in terminology, race, gender, or culture, should not be used as impediments to closing the gap between majority and minoritized populations.

B. *Diversity: Well Worth the Fight*

Recently, new "flashpoint" terminology that denigrates both being "woke" and the exploration of our full history through the lens of Critical Race Theory has attempted to denigrate the importance of diversity and inclusion and to scare potential allies from joining the movement towards achieving it. Today, we exist in a climate where individualistic rights usurp the moral will of the people. To that end, the reasons to fight for diversity are ever-evolving. Where once diversity was viewed "through the lens of morality (the right thing to do), compliance, and equality,"[37] more recent generations view diversity as "a means

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[30] *Id.* (quoting David A. Thomas & Robin J. Ely, *Making Differences Matter: A New Paradigm for Managing Diversity*, 5 HARV. BUS. REV. 79, 80 (1996)).

[31] *Id.* at 219.

[32] *Id.* at 215.

[33] *Id.*

[34] *Id.* at 219.

[35] *See generally id.*

[36] *Id.* at 234.

[37] McCall, *supra* note 11, at 46.

to a business outcome."[38] Indeed, I posit that while true diversity may begin with morality, common ground and breaking down barriers are just as important—but they are not the end. We must acknowledge that diversity produces better outcomes, better people, better institutions, and a better society.

In her article, *Thinking Outside of the Race Boxes: A Two-Pronged Approach To Further Diversity and Decrease Bias*, Samia McCall makes the case for diversity in the legal profession, pointing out that "[d]iversity fosters engagement and promotes interaction between different groups."[39] Through diversity, society hears diverse voices, and an exchange of various ideas and viewpoints takes place.[40] In a profession that values critical thinking and higher-level analytical skills, diversity is crucial as all ideas and viewpoints are necessary to see issues through multiple lenses.[41] As a popular bumper sticker parodying the South says, "Y'all means all!" And, indeed, it should. "Diversity and inclusion should mean inclusion of all races, people, backgrounds, experiences, ideas, and viewpoints, including those viewpoints that may be objectionable."[42]

A recent article titled *A Black Woman Stole My Job: Understanding the Collective Benefit of Diversity* supports the call for diversity and inclusion in the legal profession.[43] In that article, the author, himself a White, male attorney, pithily describes hearing another White man in a coffee shop complaining about (literally) a Black woman stealing his job.[44] In response, the author rolls out a litany of employment statistics of minoritized populations before explaining the present-day importance of diversity.[45] Particularly, he points out that the different life experiences of minoritized populations makes diversity an important tool in the lexicon of capitalism.[46] He notes,

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[38] *Id.* (internal quotations omitted) (quoting CHRISTIE SMITH & STEPHANIE TURNER, DELOITTE UNIV. LEADERSHIP CTR. FOR INCLUSION, THE RADICAL TRANSFORMATION OF DIVERSITY AND INCLUSION: THE MILLENNIAL INFLUENCE 7 (2015), https://www2.deloitte.com/content/dam/Deloitte/us/Documents/about-deloitte/us-inclus-millennial-influence-120215.pdf [https://perma.cc/3JF4-XGZ9]).

[39] *Id.* at 43.

[40] *See id.*

[41] *See id.* (noting that "free exchange helps law students develop critical thinking and analytical skills, oral advocacy skills, and skills of persuasion needed for the practice of law," while its absence results in the classroom becoming mere "echo chambers rather than sounding boards—and we all lose" (quoting Nicholas Kristof, Opinion, *A Confession of Liberal Intolerance*, N.Y. TIMES (May 7, 2016), https://www.nytimes.com/2016/05/08/opinion/sunday/a-confession-of-liberal-intolerance.html)).

[42] *Id.*

[43] Jeffrey Kass, *A Black Woman Stole My Job: Understanding the Collective Benefit of Diversity*, MEDIUM (Mar. 15, 2023), https://zora.medium.com/a-black-woman-stole-my-job-85f732e5aeab.

[44] *Id.*

[45] *Id.*

[46] *Id.*

> When people of varying backgrounds and experiences are full participants in our companies and organizations, we get a broader and more comprehensive perspective on problem solving and, in turn, can collectively achieve a higher level of success. Proposed solutions and ideas get tested, challenged, refined[,] and improved because of diversity.[47]

In the legal profession, it has been noted that the more culturally competent lawyer is the more competent lawyer.[48] Hence, the legal profession also stands to benefit from diversity and inclusion. For example, the "justice gap," defined as "the difference between the legal needs of low-income households and the lawyers available to meet those needs," continues to plague American society.[49] And, to no surprise, this gap is tied to the lack of diversity in the legal profession.[50]

The fact that this profession lags behind others in terms of diversity and inclusion efforts is no secret.[51] The legal profession must join others in embracing our differences to remain relevant, much less flourish. We must begin at the margins (and not exclude those who have historically dwelled there) to achieve this end. After decades of "mirrortocracy"[52] and elitism, diversity and inclusion promise to make the legal profession reflective of the *entire* population that it serves so it may live up to its reputation of being a social engineer and agent for change.

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[47] *Id.* Kass supports his statement by citing three studies: (1) the 2015 McKinsey report that "analyzed hundreds of public companies and found that those in the top quartile for ethnic and racial diversity in management were 35% more likely to have financial returns above their industry mean. Gender diversity equated to 15% higher profit"; (2) "[a]nother McKinsey study [that] found that companies with diverse executive boards had a 95% higher return on equity than those with nondiverse boards"; and (3) "[t]he Boston Consulting Group similarly found that increasing the diversity of leadership teams led to improved financial performance." *Id.*

[48] Wendy Muchman, *The Effective Lawyer: Communication, Cultural Competence, and Civility*, ABA: THE PUB. LAW. (Jan. 20, 2023), https://www.americanbar.org/groups/government_public/publications/public-lawyer/2023-winter/effective-lawyer-communication-cultural-competence-civility/ (explaining cultural competency is essential for effective client-lawyer communication, which is essential to enable clients to make informed decisions).

[49] Kia H. Vernon, Dorothy D. Nachman & Don Corbett, *Bridging the Gap: Developing Pedagogical Solutions for Underrepresented Law Students*, 22 RUTGERS RACE & L. REV. 37, 39-40 (2020).

[50] *Id.* at 40-41.

[51] Yaroshefsky, *supra* note 20, at 597.

[52] Nalty, *supra* note 7, at 46.

But the problem is that diversity does not come without cost.[53] We remember the Civil Rights Movement that cost us so much in terms of lives and energy.[54] The former push for civility is no more important than the current clarion call for diversity. There must be an investment in upending the American systems that were constructed before women and minoritized people had the rights of the White forefathers and which perpetuate harm upon the minoritized and marginalized citizens of this country by their very existence. This, however, is a heavy lift, and it cannot be done without all stakeholders coalescing around the common goal of diversity.

C. *Impediments to Diversity: Systems, Bias, and Examples*

As hinted in my earlier linguistic profiling article, the problem that we have today is a bit more nuanced than the racism of old (i.e., that seen during the Civil Rights Movement).[55] Discrimination, like so many other things in nature, has "adapt[ed] to the legal and social environment by mutating to evade prohibitions against intentional discrimination."[56] Today, we are confronted with the more insidious, covert form of racism informed by our implicit biases and further exacerbated by systemic racism.[57] Science shows that it is impossible to eliminate the former,[58] and history demonstrates that the latter is not easily eliminated either,[59] especially when the majority population fails to acknowledge the problem or, even when acknowledged, is unwilling to deploy the necessary resources to do so.

1. The Interplay of Implicit Bias and Systemic Racism

The manner in which implicit bias often works with systemic racism to create barriers to success for minoritized populations is disconcerting (to say the least). Briefly, implicit bias (also known as unconscious bias) refers to those biases that

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[53] *See generally* SpearIt, *Not for Free: Exploring the Collateral Costs of Diversity in Legal Education*, 48 U. PAC. L. REV. 887, 901-09 (2017) (explaining increases in diversity must be accompanied by support and programming for "non-traditional students" or else they may be vulnerable to isolation, disadvantaged by inability to afford course materials, or penalized for celebrating religious holidays, among other things).

[54] Aldon Morris, *From Civil Rights to Black Lives Matter*, SCI. AM. (Feb. 3, 2021), https://www.scientificamerican.com/article/from-civil-rights-to-black-lives-matter1/ [https://perma.cc/67R5-L8VV].

[55] Gibson, *supra* note 3, at 633-34.

[56] Martinez, *supra* note 8, at 836 (emphasis omitted).

[57] *See id.* (describing structural discrimination as occurring "with 'decisions that are formally fair but functionally biased in favor of the dominant group by using criteria that advantage one group over another for arbitrary reasons'" and implicit bias as including "'underlying unconscious negative feelings and beliefs (i.e., implicit attitudes and stereotypes)' regarding particular groups").

[58] Gibson, *supra* note 3, at 638.

[59] *See generally* Morris, *supra* note 54.

are "activated involuntarily without any awareness or conscious control."[60] Implicit biases are extremely troublesome as they "reside deep in our subconscious" and are "generally not accessed even during deep thought and introspection."[61] On the other hand, systemic racism has been explained thusly:

> *Systemic racism* emphasizes the involvement of whole systems, and often all systems—for example, political, legal, economic, health care, school, and criminal justice systems—including the structures that uphold the systems. *Structural racism* emphasizes the role of the structures (laws, policies, institutional practices, and entrenched norms) that are the systems' scaffolding.[62]

In American society, there is overpolicing of minoritized populations, health care inequities, and unfair lending practices that dictate who can own property and build wealth.[63] Solutions to these issues continue to elude us as systemic racism and implicit bias work in unison to maintain their stranglehold on our society.

Specific to the legal profession, author Raymond H. Brescia recognizes the interplay between implicit bias and systemic racism in his article, *Lessons from the Present: Three Crises and Their Potential Impact on the Legal Profession*.[64] He notes,

> Attorneys of color, women attorneys, women attorneys of color, disabled attorneys, and attorneys who identify as LGBTQ+ have historically experienced [various] sorts of aggressions, macro and micro, which are the products of implicit and explicit bias, ranging from slights and abusive behavior to employment decisions, like hiring, promotion, and compensation.[65]

Particularly, the billable hours model used in law practice illustrates how those two social phenomena work together to impede diversity and inclusion in the legal profession.[66] It is well known that female attorneys have more difficulty

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[60] Gibson, *supra* note 3, at 604-05.

[61] *Id.* at 605.

[62] Paula A. Braveman, Elaine Arkin, Dwayne Proctor, Tina Kauh & Nicole Holm, *Systemic and Structural Racism: Definitions, Examples, Health Damages, and Approaches to Dismantling*, 41 HEALTH AFFS. 171, 172 (2022) (footnote omitted).

[63] *See id.* at 172-74 (recognizing discriminatory policing and sentencing practices, discriminatory public and private lending policies and practices, and disparate impact of environmental injustice on health of Black people, among others, as examples of structural and systemic racism).

[64] *See generally* Raymond H. Brescia, *Lessons from the Present: Three Crises and Their Potential Impact on the Legal Profession*, 49 HOFSTRA L. REV. 607 (2021).

[65] *Id.* at 655-56.

[66] Martinez, *supra* note 8, at 837-38. In law firms, where work is assigned by the more senior members of the firm (partners, who are often White men), implicit bias and this structure deprive female and minority junior associates of an opportunity to be promoted based on the firms' intrinsic structure. *See* Andrew Talpash, *Eliminating Bias in Work Allocation Is a Growing Focus for Law Firms*, ATTORNEYATWORK (Nov. 5, 2023),

billing hours and, therefore, achieving pay equity in the legal profession.[67] Additionally, the concept of "inheritance" in the profession is another example of how systems and implicit biases work to impede diversity and inclusion.[68] For instance, it is well documented that retiring male partners are more likely to pass their client portfolio and "lead partner" status to another male partner with whom they have some affinity.[69] In fact, studies show that engaging in the same conduct as a White male partner makes it less likely that the female or minoritized partner will inherit the retiring partner's client portfolio.[70] Experts agree, however, that these issues are not as a result of a conscious decision to discriminate; they are due to implicit bias, and the systems that are in place only exacerbate it.[71]

Similarly, in the legal academy where tenure track positions have traditionally been held by White men, it is still extremely difficult for women and minoritized persons to be hired and promoted in tenure track ranks.[72] During recruiting and hiring, implicit biases come to the fore without fail, and systems dictate that the best candidate is perceived to be a White male.[73] Research shows that standardized approaches to assessing candidates often results in the qualifications of candidates of color being overscrutinized.[74] Words like "fit" and "we tried" are thrown around when hiring committees yield few (or no)

https://www.attorneyatwork.com/eliminating-inequality-and-bias-in-law-firm-work-allocation/ [https://perma.cc/Q866-ATXE]; Eli Wald, *Biglaw Identity Capital: Pink and Blue, Black and White*, 83 FORDHAM L. REV. 2509, 2515-16 (2015).

[67] Martinez, *supra* note 8, at 837.

[68] *Id.* at 840.

[69] *Id.*

[70] *Id.* ("[T]he inheritance disparity [is] particularly difficult for women to overcome."); *see also* Vitor M. Dias, *Black Lawyers Matter: Enduring Racism in American Law Firms*, 55 U. MICH. J.L. REFORM 99, 119-25 (2021) (discussing role of racial bias in assigning work to junior associates, which would surely negatively affect probability of minoritized associates inheriting retiring partner's portfolio).

[71] Martinez, *supra* note 8, at 840.

[72] *See generally* Kristen K. Tiscione, *Gender Inequity Throughout the Legal Academy: A Quick Look at the (Surprisingly Limited) Data*, 69 J. LEGAL EDUC. 116 (2019) (demonstrating gendered disparity in legal faculty positions and pay); Stephanie Francis Ward, *How Many Tenured Law Professors Are Black? Public Data Does Not Say*, ABA J. (Oct. 28, 2020, 3:25 PM CDT), https://www.abajournal.com/web/article/how-many-tenured-law-professors-are-black-public-data-does-not-say [https://perma.cc/6LL3-2Q77] (explaining challenging and speculative nature of measuring racial disparities between tenured law professors).

[73] Carliss N. Chatman & Najarian R. Peters, *The Soft-Shoe and Shuffle of Law School Hiring Committee Practices*, 69 UCLA L. REV. DISCOURSE 2, 8 (2021) (describing inanity and inequity in legal academy's hiring process, which prevents improvement with diversity and inclusion); *see also* Özlem Sensoy & Robin DiAngelo, *"We Are All for Diversity, but . . .": How Faculty Hiring Committees Reproduce Whiteness and Practical Suggestions for How They Can Change*, 87 HARV. EDUC. REV. 557, 566-67 (2017) (explaining steps of law faculty hiring process and discussing how systematic racism and implicit bias appear in third step, "objective" scrutiny of curriculum vitae).

[74] Sensoy & DiAngelo, *supra* note 73, at 566-67.

minority hires.[75] And even assuming that a minoritized candidate is hired, again, implicit biases and systems make it difficult for that new hire to be successful and thrive.[76] The absence of adequate mentors for minoritized faculty who are unfamiliar with an institution's unwritten cultural norms can be overwhelming (and deadly).[77] It is not because the academy is filled with racists; it is because the academy is filled with people who grossly underestimate the power of implicit biases and systemic racism working together.[78]

It appears that the Supreme Court may have done just that in its most recent affirmative action decision, *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*.[79] In what may appear at first glance to be a well-reasoned decision, the Court grossly underestimated the interplay between implicit biases, the oppressive hand of systemic racism, and its effect on higher education admissions. The ripple effect on diversity in higher education generally, and on law school admissions specifically (and consequently the legal profession), cannot be underestimated.

2. An Eye-Opening Example: The Interplay Between ABA Standards and Diversity and Inclusion

Let's look at the role the ABA, specifically its law school accreditation process, plays in the lack of diversity in the legal profession. Many argue that the ABA Standards requiring that schools only admit those students who appear capable of matriculating and passing the bar have chilled diversity.[80] In their article, *Bridging the Gap: Developing Pedagogical Solutions for Underrepresented Law Students*, professors and former colleagues Kia H. Vernon, Dorothy D. Nachman, and Don Corbett recount the manner in which ABA Standard 501(b) played a role in endangering North Carolina Central University ("NCCU") School of Law's (a historically Black College or University ("HBCU") law school) mission to admit students from underrepresented populations.[81] They explain that with the LSAT being used as

[75] Chatman & Peters, *supra* note 73, at 4-9.

[76] Dias, *supra* note 70, at 120-25.

[77] TaLisa J. Carter & Miltonette O. Craig, *It Could Be Us: Black Faculty as "Threats" on the Path to Tenure*, 12 RACE & JUST. 569, 574 (2022). Without proper institutional support, minoritized junior faculty members are often unaware of expectations and, therefore, fail to meet them. *Id.*

[78] Dias, *supra* note 70, at 122-23.

[79] 143 S. Ct. 2141, 2175-76 (2023).

[80] *See* Vernon et al., *supra* note 49, at 43-46.

[81] *Id.* at 55-56. Founded in 1939, North Carolina Central University School of Law's "mission is to provide a high quality, personalized, practice-oriented and affordable legal education to historically underrepresented students from diverse backgrounds in order to help diversify the legal profession." *2020-2021 Graduate Catalog [Archived Catalog]: Overview*, N.C. CENT. UNIV. SCH. OF L., http://ecatalog.nccu.edu/content.php?catoid=17&navoid=1568 [https://perma.cc/VJH2-9LVN] (last visited Jan. 15, 2024). This includes a pledge to "empower[] all of [its] graduates to become highly competent and socially responsible

the predictor for success during the first year of law school and on the Bar, it follows that HBCU law schools and others that tend to be mission driven and accept students from underrepresented populations often run afoul of Standard 501(b).[82]

With the national average LSAT score for the 75th percentile of all law students being 159, the average LSAT score for the 50th percentile being 156, and the average LSAT score for the 25th percentile being 153—based upon the 2019 ABA 509 Reports from the 200 ABA accredited law schools—it's not surprising that some "49 percent of Black law school applicants received no offers of admission" during the 2016-2017 admissions cycle.[83] Vernon and her co-authors explain, "[d]uring the same admissions cycle, seventy-two percent of Black applicants had LSAT scores below 150."[84]

HBCUs accept students with "a decreased predictor of success for the purpose of educating underrepresented students at a higher rate."[85] However, not only does this population have lower LSAT scores, data shows that these students also have higher attrition rates[86] and lower bar pass rates.[87] When these numbers fall outside of ranges set by the ABA, schools find themselves in the crosshairs of Standard 501(b).[88] Is there any wonder, given these data, that law schools and, hence, the legal profession, continue to struggle with diversity and inclusion? A monolithic group of majority White people (the legal profession), relying on a culturally biased test (the LSAT) to set the standards of success in law school

lawyers and leaders committed to public service and to meeting the needs of underserved communities . . . [to] help create a more just society." *Id.*

[82] *Id.* ABA Standard 501(b) requires that ABA-accredited law schools "only admit applicants who appear capable of satisfactorily completing its program of legal education and being admitted to the bar." STANDARDS AND RULES OF PROC. FOR APPROVAL OF L. SCHS. Standard 501(b) (AM. BAR ASS'N 2023).

[83] *See* Vernon et al., *supra* note 49, at 44.

[84] *Id.* at 44-45.

[85] *Id.* at 45 ("[T]he national average LSAT score for the 75th percentile of all law students attending HBCU law schools was 150, a full nine points lower than the 75th percentile when compared to all law students . . . the 50th percentile of all HBCU law students was 147 [and] the 25th percentile of all law students attending HBCU law schools was 145." (footnote omitted)).

[86] *Id.* at 45-47 (noting that 2019 attrition rates averaged 2% for majority students but 7% for Black students; within HBCU law schools, 2019 509 reports show that attrition is 14% amongst White students, 8.9% amongst Black Students, and 8.5% amongst minorities, generally).

[87] *New Data Shows Bar Passage Rates at HBCU Law Schools Lag the National Average*, J. BLACKS HIGHER EDUC. (Apr. 29, 2019), https://www.jbhe.com/2019/04/new-data-shows-bar-passage-rates-at-hbcu-law-schools-lag-the-national-average/ [https://perma.cc/PD29-AFYS].

[88] *See* Vernon et al., *supra* note 49, at 42 (quoting George B. Shepherd, *No African-American Lawyers Allowed: The Inefficient Racism of the ABA's Accreditation of Law Schools*, 53 J. LEGAL EDUC. 103, 104 (2003)) ("[T]he ABA's accreditation standards operate generally to accredit law schools that serve [W]hite students but to deny accreditation to law schools that would serve [B]lack students.").

can only lead to one result. This is NOT the formula for change; instead, it is a formula for remaining the same. As sagely stated in the article appropriately titled *Black Lives Matter: On Challenging the Soul of Legal Education*, "[t]o live up to this important moment, we must pause longer and look deeper. We must identify and challenge the persisting structural barriers to inclusivity. We must face and challenge the soul of contemporary American legal education."[89]

D. *Lack of Diversity in the Legal Profession*

Based on the preceding example, it is not surprising that despite best efforts, the numbers of minority partners in Big Law, or the legal profession generally, lag abysmally behind the number of majority partners.[90] And what diversification is seen negatively affects the African American race to a disproportionate extent.[91] This is in large part because of the methodology employed in addressing our profession's lack of diversity. As lawyers, we tend to look to the rules and law that we engage with daily, underestimating the value of our own humanity and the relationships that we form in the learning and practicing of law.

1. The Practice and the Academy

When comparing the Black and Latine presence in the profession to U.S. Census data, both groups are underrepresented.[92] While non-Hispanic White people comprise about 60.1% of the U.S. population, 2022 ABA data shows that 81.0% of all lawyers are White.[93] Further, while Latine people make up 19% of the U.S. population, they only make up 5.8% of the legal profession.[94] And while Blacks and African Americans make up 13.4% of the U.S. population, they only comprise 4.5% of the legal profession.[95] Asian Americans make up approximately 5.9% of the U.S. population and comprise 5.5% of all lawyers.[96]

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[89] Phil Lord, *Black Lives Matter: On Challenging the Soul of Legal Education*, 54 TEX. TECH L. REV. 89, 114 (2021).

[90] *See* Martinez, *supra* note 8, at 818.

[91] *See id.* at 817 (noting there has been little to no change in minority representation in legal profession in past decades); *see also* Vivia Chen, *The Momentum for Black Lawyers Might Already Be Fading*, BLOOMBERG L. (Jan. 20, 2023, 10:05 AM), https://news.bloomberglaw.com/business-and-practice/the-momentum-for-black-lawyers-might-already-be-fading.

[92] AM. BAR ASS'N, ABA PROFILE OF THE LEGAL PROFESSION 2022, at 26, https://www.americanbar.org/content/dam/aba/administrative/news/2022/07/profile-report-2022.pdf [hereinafter ABA PROFILE 2022].

[93] *Id.*

[94] *Id.*

[95] *Id.* (explaining that while percentage of Hispanic lawyers rose since 2012, percentage of Black lawyers did not).

[96] *Id.* (noting that after California Bar started reporting demographic information, Asian population seems to be only minority population that has nearly equal representation in legal profession).

Finally, Indigenous people make up approximately 1.3% of the U.S. population and comprise a mere 0.5% of the legal profession.[97]

Similarly, law school demographics show that White students represent approximately 62% of law students, while Latine students represent about 13% of law students compared to 19% of the population.[98] Black students represent about 8% of law students compared to 13.4% of the population, while Asian American and Pacific Islanders represent approximately 7% of law students compared to 5.9% of the population.[99]

Unsurprisingly, Black students are the most disproportionately underrepresented in our law schools. In fact, data from the American Association of Law Schools more than a decade ago showed similar disproportions amongst law school faculty.[100] More recent data shows the same: more than half of all law professors (66.4%) are White, with 11.3% of law professors being Asian, 10.1% being Latine, 7.1% being Black, and just 0.2% being from Indigenous populations.[101] Significantly, most of the female and minority faculty law professors were in legal writing, clinical, or other nontenure track roles at their respective institutions.[102]

As to private practice, data from the ABA's 2022 Profile of the Legal Profession show "27.6% of all associates were lawyers of color" in 2021,[103] while the disparities amongst partners were much more startling: only 11.4% of all law firm partners were lawyers of color, according to the National Association for Law Placement ("NALP") report, which means that 4.6% of law firm partners were Asian American, 3% were Hispanic and 2.3% were Black.[104]

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[97] *Id.*

[98] *Id.* at 44.

[99] *Id.*

[100] *See* Meera E. Deo, *Investigating Pandemic Effects on Legal Academia*, 89 FORDHAM L. REV. 2467, 2471 (2021) (noting data is more than a decade old).

[101] *Law Professor Demographics and Statistics in the US*, ZIPPIA, https://www.zippia.com/law-professor-jobs/demographics [https://perma.cc/LMH5-89RR] (last updated July 21, 2023) (demonstrating that percentages for other minoritized populations have steadily improved, but numbers for Black law professors have continuously hovered around 7%).

[102] Robert Kuehn, *Shifting Law School Faculty Demographics*, CLINICAL LEGAL EDUC. ASS'N NEWSLETTER, Winter 2021-2022, at 1, 9-10.

[103] ABA PROFILE 2022, *supra* note 92, at 27.

[104] NAT'L ASS'N FOR L. PLACEMENT, 2022 REPORT ON DIVERSITY IN U.S. LAW FIRMS 4, 6-7, 19-20 tbls.2-3, https://www.nalp.org/uploads/Research/2022NALPReportonDiversity_Final.pdf [https://perma.cc/8AX6-R3FH] (noting in 2022, women represented 49.42% of associates in U.S. law firms, while associates of color represented 28.32%, women of color represented 16.5% (with Latine women representing 6.55%, Black women representing 5.77%, and Indigenous women representing less than 1%, as well as 3.62% percent of a mixed-race population)). Growth in diversity amongst associates was attributed to growth in the Asian population percentage, which has been at 12% since 2019. *Id.* at 6.

These disproportionate numbers are sobering and telling. It is well settled that representation matters in all walks of society, but it is particularly important in the legal profession.[105] To be clear, when society thinks of solutions to many of its political and social ills, it looks to members of the legal profession.[106] Historically, minoritized populations went without legal assistance because there were no attorneys who looked like them.[107] Today, the gap in legal services for underrepresented populations persists and will continue to do so, so long as diversity and inclusion continues to elude the legal profession.[108] To address the historical (and current) inequities in America, diversity in the Bar (and the Bench) is crucial.[109]

2. The Judiciary

The *ABA Profile on the Legal Profession 2022* highlights the abysmal lack of diversity in the federal judiciary: approximately 70% of sitting federal judges are men and 78% are White, which means that 30% are women and 22% are from minoritized populations.[110] Blacks comprise 11% of the Federal Bench, Latine comprise 7.7%, Asian Americans comprise 3.8%, and Indigenous people comprise 0.40%.[111] To put this into perspective, Latines make up 18.5% of the U.S. population, while Blacks and African Americans make up 13.4%, Asian Americans make up approximately 5.9%, and Indigenous people make up approximately 1.3%.[112] While non-Hispanic White people comprise about 60.4% of the U.S. population, 2022 ABA data shows that 81% of all lawyers are White.[113] Further, while Latines make up 18.5% of the U.S. population, they only make up 5.8% of the legal profession.[114] And while Blacks and African Americans make up 13.4% of the U.S. population, they only comprise 4.5% of

[105] Damian A. Stanley, Peter Sokol-Hessner, Mahzarin R. Banaji & Elizabeth A. Phelps, *Implicit Race Attitudes Predict Trustworthiness Judgments and Economic Trust Decisions*, 108 PROCS. NAT'L ACAD. SCIS. 7710, 7713 (2011); *see supra* Section III.B.

[106] *See* James E. Moliterno, *The Lawyer as Catalyst of Social Change*, 77 FORDHAM L. REV. 1559, 1572-73 (2009).

[107] *See, e.g.*, Yolanda Young, *Why the US Needs Black Lawyers Even More than It Needs Black Police*, GUARDIAN (May 11, 2015, 2:45 PM), https://www.theguardian.com/world/2015/may/11/why-the-us-needs-black-lawyers [https://perma.cc/35YM-R274] (explaining that Black clients often get better outcomes with Black attorneys because of shared communication and minimized biases).

[108] *See* Brian Libgober, *Getting a Lawyer While Black: A Field Experiment*, 24 LEWIS & CLARK L. REV. 53, 56 (2020).

[109] *See* Young, *supra* note 107.

[110] ABA PROFILE 2022, *supra* note 92, at 5.

[111] *Id.*

[112] *Id.* at 26.

[113] *Id.*

[114] *Id.*

the legal profession.[115] Asian Americans are approximately 5.9% of the U.S. population and comprise 5.5% of all lawyers.[116] Finally, Indigenous people make up approximately 1.3% of the U.S. population and comprise a mere 0.5% of the legal profession.[117]

Further, despite the adoption of various iterations of the Model Rules of Judicial Conduct to prevent discrimination, the data show that bias is alive and well in the judiciary.[118] More recently, all eyes have been on the federal court system because of the "hyperpartisanship in the judicial nomination process and recent appointments of overtly partisan judges."[119] This "crisis in diversity," as some may call it, has led to a delegitimization of our federal system, particularly among the marginalized and underrepresented parties in our country.[120] That those parties are most often the very parties who receive disparate and unfair treatment due to inherent biases among judges has not gone unnoticed.[121]

Several studies have shown that even U.S. Supreme Court Justices were biased in their rulings.[122] In one such study—a 2014 study by political scientists to discover whether the Justices would defend the First Amendment regardless of politics—the results revealed that "justices [were] opportunistic free speech[] [supporters]," supporting the speech that kept with their ideology.[123] In another

[115] *Id.* (explaining that while percentage of Hispanic lawyers rose since 2012, Black percentage did not).

[116] *Id.*

[117] *Id.*

[118] *See, e.g.*, MODEL CODE OF JUD. CONDUCT r. 2.3 (AM. BAR ASS'N 2020) (instructing judges to perform duties without bias or prejudice, and barring them from engaging in harassment).

[119] Danielle Root, Jake Faleschini & Grace Oyenubi, *Building a More Inclusive Federal Judiciary*, CTR. FOR AM. PROGRESS (Oct. 3, 2019), https://www.americanprogress.org/article/building-inclusive-federal-judiciary/ [https://perma.cc/CW5R-NY5N].

[120] *See id.* (noting "a consequence of having such a judiciary is that the public may begin to view the courts as another cog in an already oppressive legal system, rather than as a trustworthy and independent institution").

[121] *See id.*; *see also* Brescia, *supra* note 64, at 651-52 (describing discrimination suffered by underserved litigants in U.S. courts).

[122] *See, e.g.*, Latonia Haney Keith, *Cultural Competency in a Post-Model Rule 8.4(g) World*, 25 DUKE J. GENDER L. & POL'Y 1, 29-30 (2017); *see also* Douglas Keith, *A Legitimacy Crisis of the Supreme Court's Own Making*, BRENNAN CTR. FOR JUST. (Sept. 15, 2022), https://www.brennancenter.org/our-work/analysis-opinion/legitimacy-crisis-supreme-courts-own-making [https://perma.cc/9DFD-B8NX] (discussing current crisis in Supreme Court's integrity).

[123] Haney Keith, *supra* note 122, at 30 (quoting Lee Epstein, Christopher M. Parker & Jeffrey A. Segal, Do Justices Defend the Speech They Hate? In-Group Bias, Opportunism, and the First Amendment 1, 7 (2014) (unpublished manuscript), https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID2300572_code662518.pdf?abstractid=2300572&mirid=1&type=2) (studying 4,519 votes in 516 First Amendment cases heard by the Supreme Court from 1953 to 2010 and noting "liberal (conservative) justices are supportive of free speech when the speaker is liberal (conservative)"). Haney Keith quotes noted

study by Harvard Kennedy School of Government Professor Maya Sen, data showed that Black federal district court judges "have a roughly 10 percent greater likelihood of being reversed by the federal appellate courts compared to the reversal rate for their [W]hite colleagues."[124] Sen explained the results: "appeals panels somehow implicitly rely on the race of the lower-court judge in reaching decisions."[125]

Studies of state court judges reveal similar results. In a study by the State of California Commission on Judicial Performance to examine bias in California Supreme Court cases, researchers highlighted twenty-four instances from 1970 through 2011.[126] In those cases, California Supreme Court judges were either "publically [sic] admonished, reprimanded or removed from office for engaging in bias, discrimination or harassment on the basis of race, ethnicity and/or national origin."[127] There were also fifteen documented instances between 1973 and 2012 in which judges were disciplined for sexual harassment or some form of gender bias, including two instances involving sexual orientation.[128] As one could only imagine, bias based on ethnicity or national origin has also been found in immigration courts.[129] There have been numerous reported instances in which immigration judges made inappropriate comments to immigrants or acted unnecessarily "intemperate" to the point of being insulting.[130]

II. TRADITIONAL SOLUTIONS

Race relations are not improving in America nor, by way of analogy, in the legal profession. America has been grappling with the issue of diversity and inclusion in some way for a very long time—to no positive end. In reality, many institutions are attempting to create a diverse and inclusive environment; most, if not all, have failed (or stumbled) because "[t]here are no easy answers to questions that are rooted in America's history of oppression, exclusion, and

constitutional law scholar Erwin Chemerinsky's support of the study's findings: "[I]t offers an explanation for justices' behavior in First Amendment cases and shows how much justices' ideology influences the speech they are willing to protect." *Id.* (quoting Adam Liptak, *For Justices, Free Speech Often Means 'Speech I Agree With'*, N.Y. TIMES: SIDEBAR (May 5, 2014), https://www.nytimes.com/2014/05/06/us/politics/in-justices-votes-free-speech-often-means-speech-i-agree-with.html).

[124] *Id.* Professor Sen's study examined "the reversal rate for 1,054 federal district court judges from 2000 to 2012 . . . controll[ing] for 'previous professional and judicial experience, educational background, qualification ratings assigned by the American Bar Association, and differences in appellate panel composition.'" *Id.* (quoting Maya Sen, *Is Justice Really Blind? Race and Reversal in US Courts*, 44 J. LEGAL STUD. S187, S187, S217 (2015)).

[125] *Id.*

[126] *See id.*

[127] *Id.* (citing STATE OF CAL. COMM'N ON JUD. PERFORMANCE, JUDICIAL MISCONDUCT INVOLVING BIAS: ETHNICITY, NATIONALITY, RACE, GENDER AND SEXUAL ORIENTATION 2-5 (2015)).

[128] *Id.* at 31.

[129] *See id.*

[130] *See id.*

subordination of certain demographic groups for no other reason than their demographic status."[131] Accordingly, it is not surprising that the legal profession, despite its efforts, also struggles.[132]

As discussed in Section I.A., people are unable to agree on the definitions of "diversity" and "inclusion" and still challenge the importance of both, so there is little wonder why there is a similar swirl of disagreement around the manner in which they can be achieved.[133] Our courts, organizations, and governing bodies have engaged in legal policy and rulemaking without much success. And as noted later in this Article, without employing our most valuable resource—our human capital—and incentivizing diversity in the highest echelons of the profession, it is doubtful if these efforts will ever be successful.

A. *The Legacy of Affirmative Action*

"Affirmative action refers to a set of practices undertaken by employers, university admissions offices [(at least until recently)], and government agencies to go beyond nondiscrimination, with the goal of actively improving the economic status of minorities and women with regard to employment, education, and business ownership and growth."[134] Affirmative action has varied forms and "can take the form of special recruitment efforts to draw more applicants in these areas from minorities and women, but might also include some additional consideration of (or preference for) these applicants, given that their credentials along certain dimensions might look weaker than those of their [W]hite male counterparts."[135]

Like most race discourse in America, the design and discussions around affirmative action have been fraught with disagreement. The fact is that affirmative action was created to remedy the effects of Jim Crow racism—overt racism in America originating from the historical ugliness of slavery that has continued as a result of the systems and institutions that perpetuated and tolerated it.[136] What began as a remedy for discriminatory employment amongst federal contractors was also adopted by other noncontractor employers (by choice or by court action based on a history of discrimination), including higher education.[137] Institutions of higher education adopted affirmative action policies as a means to address their absence of diversity.[138] Through policies that forced a look at the number of minoritized applicants versus those who were actually

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[131] Martinez, *supra* note 8, at 834.

[132] *Id.*

[133] Roberson, *supra* note 26, at 214.

[134] Harry J. Holzer & David Neumark, *Affirmative Action: What Do We Know?*, 25 J. POL'Y ANALYSIS & MGMT. 463, 463 (2006).

[135] *Id.*

[136] John Valery White, *What is Affirmative Action?*, 78 TUL. L. REV. 2117, 2120-21 (2004).

[137] Holzer & Neumark, *supra* note 134, at 463-64.

[138] *Id.* at 464.

admitted, many universities adopted admissions standards that gave minoritized populations preferential treatment.[139]

However, times have changed and liberal notions that governmental policies are needed to "help create a just community" seem to have faded to be "replaced by the conservative demand for individual rights."[140] Indeed, in keeping with the most recent clamor for "anti-wokeness"[141]—just another term for a return to Jim Crow—many from the majority (read White males) opine that affirmative action is downright "un-American," threatening "fundamental American values of fairness, equality, and democratic opportunity."[142] Again, this is most often the same majority who erroneously assumes that the process of selection for employment or educational opportunity in America is "fair, meritocratic, and functional" and the absence of proportionate numbers of minoritized persons in these institutions are somehow mere happenstance.[143]

Without a doubt, "affirmative action and diversity initiatives have done a great deal of good for minority groups in higher education."[144] However, in society today, where diversity is spoken of in such nebulous terms, many find it difficult to quantify "who or what adds or does not add diversity value."[145] Furthermore, the current methods that evaluate diversity often fail to measure whether efforts are effective in terms of improving classroom engagement and eliminating actual bias.[146] For these reasons, affirmative action in higher education remained vulnerable to constitutional challenge until it was finally struck down by the Supreme Court recently.[147]

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[139] *See id.* (discussing voluntary implementation of affirmative action admissions policies by universities in absence of federal law requiring such policies).

[140] William G. Tierney, *The Parameters of Affirmative Action: Equity and Excellence in the Academy*, 67 REV. EDUC. RSCH. 165, 166 (1997).

[141] Janai Nelson, Opinion, *Ron DeSantis Wants To Erase Black History. Why?*, N.Y. TIMES (Jan. 31, 2023), https://www.nytimes.com/2023/01/31/opinion/ron-desantis-black-history.html. While the ardor for DeSantis's "anti-wokeness" and anything to do with Black History seems to have cooled outside the state of Florida, there still seems to be a movement in the United States that is away from any racial reckoning as it pertains to the history of slavery and the systems that were built thereafter that continue to affect minoritized populations currently.

[142] White, *supra* note 136, at 2119 (quoting Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 CALIF. L. REV. 953, 953-54 (1996)).

[143] Sturm & Guinier, *supra* note 142, at 954.

[144] McCall, *supra* note 11, at 37 (quoting AM. COUNCIL ON EDUC. & AM. ASS'N OF UNIV. PROFESSORS, DOES DIVERSITY MAKE A DIFFERENCE?: THREE RESEARCH STUDIES ON DIVERSITY IN COLLEGE CLASSROOMS 1 (2000)) ("In the early 1960s, with the exception of students attending historically black colleges and universities, only a relative handful of Americans of color went to college in the United States; today, upwards of one in five undergraduates at four-year schools is a minority.".

[145] *Id.*

[146] *Id.*

[147] SFFA, 143 S. Ct. 2141, 2175-76 (2023). Notably, there were almost one hundred amicus briefs filed in the case—sixty supporting the universities and thirty-three supporting

B. *Efforts of the Bar and the Bench*

Both the Bar and the Bench have promulgated rules to address discrimination and the lack of diversity in the legal profession. However, these rules alone are not sufficiently effective to address the subtleties of implicit bias and systemic racism that exist in the legal profession. The federal and state court systems seem particularly steeped in the politics of the controlling party, regardless of the rules and plans being drafted to abate the long-existing diversity impasse. The ABA is seemingly closer to a solution, having acknowledged the need for cultural competency as part of a lawyer's professional identity. However, this ABA rule appears to be in sharp contrast to the recent decision of the Supreme Court advising a colorblind approach to achieving diversity.[148] Moreover, as discussed in Section I.B.2. and below, the complicated relationship between the ABA and the way its various rules affect minoritized populations may impede ultimate success.

1. The Practitioner: Model Rule 8.4(g)

Like affirmative action, Model Rule 8.4(g)[149] was greeted with resistance and skepticism. Adopted by the ABA House of Delegates in August 2016, it was intended to strengthen anti-harassment and anti-discrimination tenets of the profession by extending the prohibited behavior beyond simply what a lawyer knows to be wrong to what he "reasonably should know" to be wrong.[150] Rule 8.4(g) was adopted in an effort to stem "chronic workplace mistreatment and federal lawsuits that reveal the disparate treatment of female employees."[151] As well, there was the continued reality (based upon empirical and anecdotal evidence) that despite the legal system's foundational values of fairness and

Students for Fair Admissions, espousing a plethora of reasons why affirmative action in college admissions passed constitutional muster (or not). Ellena Erskine, Angie Gou & Elisabeth Snyder, *A Guide to the Amicus Briefs in the Affirmative-Action Cases*, SCOTUSBLOG (Oct. 29, 2022, 6:44 PM), https://www.scotusblog.com/2022/10/a-guide-to-the-amicus-briefs-in-the-affirmative-action-cases/ [https://perma.cc/L5GA-W4FP] (summarizing arguments of each amicus briefs).

[148] *Compare* STANDARDS AND RULES OF PROC. FOR APPROVAL OF L. SCHS. Standard 303(c) (AM. BAR ASS'N 2023) (requiring that all law students be exposed to law school curricula regarding cultural differences, i.e., acknowledging racial and cultural differences), *with SFFA*, 143 S. Ct. at 2205-07 (Thomas, J., concurring) (discussing colorblind college admissions as possible fix to diverse and inclusive admissions).

[149] Model Rule 8.4(g) provides pertinently,

> It is professional misconduct for a lawyer to . . .
>
> (g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law.

MODEL RULES OF PRO. CONDUCT r. 8.4(g) (AM. BAR ASS'N 2023).

[150] *Id.*; Haney Keith, *supra* note 122, at 2.

[151] Anna Offit, *Playing by the Rule: How ABA Model Rule 8.4(g) Can Regulate Jury Exclusion*, 89 FORDHAM L. REV. 1257, 1258 (2021).

equity, it, like most, if not all, American systems, is permeated with continued racial discrimination, as shown through the lack of diversity in the profession.[152] Advocates of the Rule note its importance to keeping "the public's confidence in the impartiality of the legal system and its trust in the legal profession as a whole."[153]

Despite its intended purpose, Rule 8.4(g) has had some unanticipated pushback. First, many lawyers contend that the rule violates the First Amendment due to "its breadth and vagueness that clearly threaten conduct protected by the First Amendment; its viewpoint discrimination, which also violates the First Amendment; and its potential to be applied selectively as a partisan political weapon."[154] Others argue that the rule is duplicitous in that the existing rules sufficiently covered instances of unacceptable conduct,[155] while still others argue as it impermissibly attempts to regulate conduct that is only tenuously connected to the practice of law.[156]

Ultimately, it appears that only two states and three U.S. territories have adopted the Rule in its entirety: Maine and Vermont, as well as the U.S. Virgin Islands, American Samoa, and the Northern Mariana Islands.[157] Moreover, "several states have either formally or informally declined to adopt or consider [its] adoption."[158] Supporting the argument of some states that Rule 8.4(g) is duplicitous, it appears that twenty-nine states had already adopted a rule in their professional code explicitly prohibiting discrimination or harassment.[159] In all, thirty-six states have a rule similar to Rule 8.4(g) or its comments.[160] That leaves

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[152] Haney Keith, *supra* note 122, at 2.

[153] David L. Hudson, Jr., *Conduct Unbecoming*, 106 A.B.A. J. ETHICS 32, 33 (2020).

[154] George W. Dent, Jr., *Model Rule 8.4(g): Blatantly Unconstitutional and Blatantly Political*, 32 NOTRE DAME J.L., ETHICS & PUB. POL'Y 135, 136 (2018).

[155] *See id.* at 137 (discussing how examples of misconduct presented by ABA Ethics Committee to justify new rule involve conduct punishable under existing rules).

[156] Josh Blackman, *ABA Model Rule 8.4(g) in the States*, 68 CATH. U. L. REV. 629, 630 (2019) (arguing rule minimally concerns "representation of clients, a lawyer's fitness, or the administration of justice").

[157] Offit, *supra* note 151, at 1260; Dennis Rendleman, *The Crusade Against Model Rule 8.4(g)*, AM. BAR ASS'N (Oct. 2018), https://www.americanbar.org/news/abanews/publications/youraba/2018/october-2018/the-crusade-against-model-rule-8-4-g-/.

[158] Rendleman, *supra* note 157.

[159] Offit, *supra* note 151, at 1260.

[160] The thirty-six states are Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Idaho, Indiana, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin, Wyoming. *See Status of Antidiscrimination Rules in Each State*, NAT'L CONF. OF WOMEN'S BAR ASSOC., https://ncwba.org/resources/diversityrules/status-of-antidiscrimination-rules-in-each-state/ [https://perma.cc/9UVP-N9NT] (last visited Jan. 15, 2024). As of 2021, of those thirty-six states, twenty-two require that the misconduct be done knowingly; three require that the

seventeen states and two U.S. territories that do not have any ethic rules that address discrimination, harassment, or bias.[161]

While this number represents a minority of states and U.S. territories, it is nonetheless troubling that there are any jurisdictions that do not have prohibitory discrimination language in their ethics code. As gatekeepers of justice, it seems hypocritical that our codes would not include such dictates. However, in line with its opponents, champions of the Rule acknowledge that there are problems with implementing it.[162] While it is a laudable start, Rule 8.4(g) is simply not enough.

In addition to all the objections stated above, more significantly, Rule 8.4(g) fails to address covert discrimination.[163] Because covert discrimination is the more prevalent form of discrimination in society today,[164] "any effort to address the profession's challenge with achieving a more diverse and inclusive environment must include a strategy for combating covert discrimination."[165] As a result, scholars have expressed doubt that the Rule will "achieve the ABA's stated goal of '[e]liminat[ing] bias in the legal profession and justice system'"[166] without "rigorous resolution" of the above-noted concerns.[167]

Notably, there has not been an increase in cases brought against attorneys under Rule 8.4(g),[168] which brings us back to the issue of whether the watered-down versions of the Rule, or the Rule itself, will have any impact in the legal profession's fight against implicit bias and for diversity and inclusion. Also of concern is the fact that Rule 8.4(g) prohibits conduct a lawyer "knows or

lawyer intended the discriminatory conduct and knew that it would likely cause harm, while seven do not have a knowledge or intent requirement with respect to the alleged attorney bias, discrimination, or harassment. Offit, *supra* note 151 at 1261.

[161] NAT'L CONF. OF WOMEN'S BAR ASSOC., *supra* note 160.

[162] *See* Haney Keith, *supra* note 122, at 3 (raising unanswered questions concerning mental state requirement in Model Rule 8.4(g)).

[163] *See* Martinez, *supra* note 8, at 813 (discussing Model Rule 8.4(g)'s focus on overt discrimination).

[164] *Id.*; *see also* Section I.B.

[165] Martinez, *supra* note 8, at 810, 813 (explaining that scholars have expressed doubt that Rule 8.4(g) will achieve ABA's goal of "[e]liminat[ing] bias in the legal profession and the justice system" without some meaningful modification (quoting AM. BAR ASS'N, ABA MISSION AND GOALS, https://www.americanbar.org/content/aba-cms-dotorg/en/about_the_aba/aba-mission-goals/ (last visited Jan. 15, 2024))).

[166] *Id.* at 813 (quoting AM. BAR ASS'N, *supra* note 165); *see also* Andrew F. Halaby & Brianna L. Long, *New Model Rule of Professional Conduct 8.4(g): Legislative History, Enforceability Questions, and a Call for Scholarship*, 41 J. LEGAL PROF. 201, 202 (2017) (noting "the new model rule suffers from substantive infirmities; the rush to secure passage of an anti-bias rule at the August 2016 ABA annual meeting left many issues unresolved" and positing that "[u]ntil scholars and other interested parties resolve these issues satisfactorily . . . there exists considerable doubt whether the new model rule could be enforced in a real world setting against a real world lawyer").

[167] Halaby & Long, *supra* note 166, at 204.

[168] Martinez, *supra* note 8, at 830.

reasonably should know" to be discrimination, but few know what standard will be used in testing the lawyer's knowledge.[169] In her article, *Cultural Competency in a Post-Model Rule 8.4(g) World*, author Latonia Haney Keith wonders whether Rule 8.4(g) will require lawyers to become culturally competent or encourage them to "blind themselves to bias present in the practice of law."[170] Indeed, Keith advocates use of the "'reasonabl[y] culturally competent lawyer' standard", rather than the "traditional 'reasonable lawyer' standard."[171] But, as Keith acknowledges, that will first require lawyers to be properly educated on the subject of cultural competency.[172] This leads to the discussion in Section II.C about New ABA Standards 303(b) and (c), which have been proffered to do just that.

2. The Judiciary: The Model Code of Judicial Conduct and Other Initiatives

The Model Code of Judicial Conduct was adopted by the House of Delegates in 1990, approximately seven years after the Model Rules of Professional Conduct was first adopted.[173] Its overhaul in 2007 resulted in the creation of Rule 2.3, "Bias, Prejudice and Harassment."[174] Rule 2.3 incorporated the prohibitory language regarding bias and prejudice found in the 1990 Model Code concerning bias and discrimination, but included a few key revisions.[175] One revision retained the language that required judges to perform their duties "without bias or prejudice" but extended the prohibition to the judges' "administrative duties."[176] Another revision explicitly prohibited harassment in Rule 2.3's text after previously being relegated to the comments in the 1990 Model Code.[177] Furthermore, in keeping with current social and political trends, Rule 2.3 expanded the listed "protected classes to include gender, ethnicity, marital status and political affiliation."[178] Additionally, the language of Rule 2.3 was tweaked a bit to remind lawyers that not only were "bias, discrimination and

[169] Haney Keith, *supra* note 122, at 3 (quoting Model Rule 8.4(g) and raising question of whether "reasonable lawyer" is culturally competent or has some level of training on cultural competency). Under the reasonable lawyer standard, there is some question as to whether an attorney is charged with any cross-cultural awareness or competence under Rule 8.4(g), whereas under the reasonable culturally competent lawyer standard, a lawyer is presumed to make all decisions with adequate knowledge of cultural competencies.

[170] *Id.*

[171] *Id.* at 26.

[172] *Id.*

[173] *Id.* at 27.

[174] *Id.* at 28 (citing MODEL CODE OF JUD. CONDUCT r. 2.3 (AM. BAR ASS'N 2010)).

[175] *Id.*

[176] *Id.*

[177] *Id.* (noting that Comment to Canon 3B(5) only addressed sexual harassment).

[178] *Id.*

harassment" prohibited, but their actions would "be monitored [for such behavior] in 'proceedings before the court.'"[179]

Additionally, in 2020, the Judicial Conference of the United States updated its strategic plan, which included "Diversity and Respect" as one of its "Core Values."[180] The updated plan identified seven fundamental issues (and responses to each of those issues) that the federal judiciary needed to address.[181] These issues included saliently, "the fair and impartial delivery of justice; the public's trust and confidence in, and understanding of, the federal courts; . . . a diverse workforce and an exemplary workplace; . . . [and] access to justice and the judicial process."[182] Despite this strategic plan, many fear that no progress can be made without "addressing judicial pipeline problems and making judicial nominations and appointments more inclusive."[183] Without compromising the legal qualifications needed to be a judge, Veronica Root and her co-authors submit that notwithstanding party politics, some radical changes must be made "if there is any hope of creating a fairer judiciary that is more representative of the population it serves."[184]

In keeping with the Model Code, state courts are also making the effort to be more diverse and inclusive—from the Bench down to its court administrators and staff.[185] Accordingly, many of the most recent state court diversity initiatives involve all levels of the state court system, with many states hiring "local or state-level staff dedicated to improving DEI in the courts through newly developed policies and practices."[186]

In fact, in July 2020, the Conference of Chief Justices ("CCJ") and the Conference of State Court Administrators ("COSCA") adopted a resolution to create a more racially equal justice system and thereafter created a director of racial justice, equity, and inclusion position at the National Center for State Courts ("NCSC").[187] The current director, Edwin Bell, recognizes the importance of investing in human capital, and has suggested the use of civic

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[179] *Id.*

[180] JUD. CONF. OF THE U.S., STRATEGIC PLAN FOR THE FEDERAL JUDICIARY 2 (2020).

[181] *See generally id.* (outlining seven issues in judiciary and strategies to address them).

[182] *Id.* at 3.

[183] Root et al., *supra* note 119.

[184] *Id.*

[185] Edwin Bell, *Helping Courts Address Diversity, Equity, and Inclusion*, JUDICATURE at 2, 3-4 (2022), https://judicature.duke.edu/wp-content/uploads/2022/09/BriefsNCSC_Summer2022.pdf [https://perma.cc/4E7R-M2BM].

[186] *Id.* at 2.

[187] *Id.*

> The resolution called on state courts to intensify "efforts to combat racial prejudice within the justice system, both explicit and implicit, and to recommit ourselves to examine what systemic change is needed to make equality under the law an enduring reality for all, so that the justice we provide not only is fair to all but also is recognized by all to be fair"

Id.

engagement to show minoritized populations that diversity and inclusion is a priority for the court system.[188] Notably, some state courts have issued statements to that effect, and they are reaching out to experts in the field to assist them in educating their employees on diversity, equity, and inclusion issues.[189]

But is it enough? The legal profession (the academy, practitioners, and the judiciary) is still lagging behind in achieving its own stated diversity goals. And many recognize this. Recognizing the need to focus our efforts to better understand the nature of the problem and why we continue to flounder at cross purposes, in 2020, the ABA promulgated ABA Standards 303(b) and (c).

C. *New ABA Standards 303(b) and (c)*

Like the other more traditional solutions that the legal profession has tried, Standards 303 (b) and (c) embody the heart of the solution that I propose below—but stops short of the framework for long-term, systemic success. In 2020, the ABA revised Standard 303(b) to add, "a law school shall provide substantial opportunities to students for . . . (3) the development of a professional identity."[190] Additionally, a new subsection (c) was added to Standard 303 to require that "[a] law school . . . provide education to law students on bias, cross-cultural competency, and racism: (1) at the start of the program of legal education, and (2) at least once again before graduation."[191] The ABA provided two new interpretations to assist law schools with understanding what professional identity means, so as to understand the interconnectedness of the new Standards.[192] Specifically, New Interpretation 303-5 defines "professional identity" as follows:

> Professional identity focuses on what it means to be a lawyer and the special obligations lawyers have to their clients and society. The development of professional identity should involve an intentional exploration of the

[188] *See id.* at 3.

[189] *Id.* Bell extols the efforts of the Blueprint for Racial Justice, which was created by the NCSC, as a result of the 2020 CCJ/COSCA resolution, "to bring courts together to problem-solve, share best practices and lessons learned, and develop an array of resources that can help courts start or continue efforts to improve racial equity." *Id.* Under the guidance of its steering committee, Bell explains that "more than 150 judicial branch leaders, court executives, and NCSC experts are developing tools to improve racial equity to ensure all court users, litigants, and community members are heard and respected by the justice system." *Id.* at 3-4.

[190] Neil W. Hamilton & Louis D. Bilionis, *Revised ABA Standards 303(b) and (c) and the Formation of a Lawyer's Professional Identity, Part 1: Understanding the New Requirements*, NAT'L ASS'N FOR L. PLACEMENT (May, 2022), https://www.nalp.org/revised-aba-standards-part-1 [https://perma.cc/WEC7-43KS].

[191] *Id.* Notably, this rule seems to address some of the scholars' and practioners' concerns about the governing intent and knowledge standard for addressing Model Rule 8.4(g)'s prohibition against discrimination. *See, e.g.*, Haney Keith, *supra* note 122, at 23.

[192] Hamilton & Bilionis, *supra* note 190.

> values, guiding principles, and well-being practices considered foundational to successful legal practice.[193]

This Interpretation specifically notes that "[b]ecause developing a professional identity requires reflection and growth over time, students should have frequent opportunities for such development during each year of law school and in a variety of courses and co-curricular and professional development activities."[194] Moreover, New Interpretation 303-6 specifically states that "the importance of cross-cultural competence" in representing clients and promoting "a justice system that provides equal access and eliminates bias, discrimination, and racism in the law" should be introduced and taught in law school.[195]

The ABA anticipated that law schools would have worked out the details of how best to comply with these new Standards by academic year 2022.[196] However, despite this guidance, many law schools have struggled with implementing the new Standards 303(b) and (c).[197] As lawyers tend to do, we have overthought and, in some cases, overimplemented the initiatives that will lead our students to cultural competence as they develop their professional identities. Though ABA leadership did not anticipate the implementation of new curriculum or classes, many law schools have done just that—to mixed reviews of faculty, staff, and students.[198]

D. *Comparing the Business and Medical Professions*

Unsurprisingly, other professions have also grappled with the issue of diversity and inclusion. Those professions, however, have been a bit more proactive in their responses; therefore, their schools are more focused on the issue than the legal profession. The diversity and inclusion efforts of the business and medical professions (including their schools) became more focused when they started to recognize the symbiotic relationship between diversity and their bottom line, profit (for the business profession) and patient care (for the medical profession).[199] To be clear, in addressing their diversity issues, both professions have improved their bottom lines.

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[193] STANDARDS AND RULES OF PROC. FOR APPROVAL OF L. SCHS. Standard 303(b), Interpretation 303-5 (AM. BAR ASS'N 2023).

[194] *Id.*

[195] *Id.* at Interpretation 303-6.

[196] Hamilton & Bilionis, *supra* note 190.

[197] *See* Benjamin M. Gerzik, *Reforging the Master's Tools: Critical Race Theory in the First-Year Curriculum*, 76 SMU L. REV. F. 34, 57 (2023) (noting critical race theory courses emerging out of student efforts).

[198] Christine Charnosky, *Law.com, A 'Must-Have' or 'Forced Wokeness'?: Mixed Reaction to ABA's Newly Adopted Diversity Training Mandate for Law Students*, BLOOMBERG L. (Feb. 16, 2022, 2:15 PM), https://www.bloomberglaw.com/document/XBNFT61G000000?jcsearch=fmf45edlimj#jcite .

[199] *See* Givelle Lamano, *Three Tips for Boosting Business Profits: How Investing in Diversity Increases Profitability*, FORBES (Dec. 20, 2021, 7:00 AM),

1. The Business Profession

Currently, data show that minoritized populations make up on average 30% of the top MBA programs.[200] Acknowledging that business students, at some point, will manage a racially, ethnically, culturally, and gender-diverse workforce, business schools have long been addressing the issue of diversity and inclusion.[201] Through pipeline programs and various business school collaborations and consortia, business schools have sought to ensure that their student bodies are diverse.[202] Significantly, most business professionals agree that there is a need for instruction and training regarding diversity and inclusion.[203] However, there is often disagreement regarding how best to do so.[204] For instance, there are some business professors who think it is best for diversity and inclusion to be taught in the classroom, while others think that it can only be learned in the work environment after business school.[205] Still other business professionals focus on diversifying the faculty of business schools to better educate and mentor students.[206]

As early as 1993, much like law schools, the business schools' accrediting body, the American Association of Collegiate Schools of Business, formed a task force to study the problem and provide business schools some assistance in deciding how diversity education should look.[207] However, unlike law schools, business schools, at both the undergraduate and graduate level, have included

https://www.forbes.com/sites/theyec/2021/12/20/three-tips-for-boosting-business-profits-how-investing-in-diversity-increases-profitability/?sh=267e9cb366e8 (highlighting profitability of diversity); L. E. Gomez & Patrick Bernet, *Diversity Improves Performance and Outcomes*, 111 J. NAT'L MED. ASS'N 383, 383 (2019) ("Studies find greater diversity improves the accuracy of clinical decision-making, leading to higher patient satisfaction and resulting in improved health outcomes.").

[200] *Real Numbers of MBA Admissions: Percentage of U.S. Minorities at Top U.S. Business Schools*, CLEAR ADMIT, https://www.clearadmit.com/real-numbers-of-mba-admissions/minorities-top-business-schools/ [https://perma.cc/GCV9-93TK] (last visited Jan. 15, 2024) (showing that some programs, such as Harvard Business School, have as much as 52% while others, such as Emory University Goizueta Business School, have as low as 13%).

[201] Claudia H. Deutsch, *Diversity Bedevils M.B.A. Programs*, N.Y. TIMES (Apr. 4, 1993), https://www.nytimes.com/1993/04/04/education/diversity-bedevils-mba-programs.html.

[202] *See generally* Greg Yang, *Improving Diversity: Lessons from Business Schools*, POETS & QUANTS (June 12, 2022), https://poetsandquants.com/2022/06/12/improving-diversity-lessons-from-business-schools/ [https://perma.cc/29SV-FCNW].

[203] *See* Deutsch, *supra* note 201 (noting how business schools should be teaching students how to "cope with an ethnically, culturally, racially and gender-diverse work force").

[204] *Id.*

[205] *Id.*

[206] *Id. But see generally* Sonya A. Grier & Sonja Martin Poole, *Reproducing Inequity: The Role of Race in the Business School Faculty Search*, 36 J. MKTG. MGMT. 1190 (2020) (examining persistent problem of hiring diverse faculty in business schools).

[207] Deutsch, *supra* note 201.

diversity instruction at some level in their curricula since that time.[208] Some schools use an integrative management approach, which focuses on relationships between people of all types of diversity—race, culture, gender, and even skill.[209] Still others combine classroom instruction with emphasis on cross-cultural, -gender, and -skill interaction through volunteer extracurricular activities.[210] The former Chair of Harvard Business School's MBA Program, James I. Cash, explaining Harvard's use of the latter model, once noted, "[t]he first stage of learning is exposure, . . . [t]he second is understanding, the third is appreciation and the fourth is insight."[211]

It would seem then that business schools understand the impediments of implicit bias and systemic racism that are ever-present and have recognized the difficulty that they bring, but these schools have also dedicated their efforts to harnessing the energy needed from all people involved to make the necessary improvements to their diversity and inclusion efforts. As the former Dean of Michigan's business school once said, "I've seen more mutual respect and stereotype shattering and advances in this subject by people working together than by any other means."[212] Regardless of what it looks like in each program, business schools have leaped ahead in the diversity conversation because of diversity's importance to their bottom line: profit.[213]

In her recent article, *Racial Pay Equity in "White" Collar Workplaces*, law professor Nantiya Ruan discussed many of the methods to encourage diversity and inclusion in business organizations.[214] Professor Ruan discussed the following concrete steps: "(1) foster[] belonging and sponsorship, (2) overhaul[] hiring and promotion practices and standards, (3) build[] DEI data infrastructure with regular pay audits and climate surveys, (4) set[] internal DEI goals and timelines, (5) requir[e] public disclosure and transparency, and (6) mak[e] leadership accountable for diversity [goals] within firms."[215] Remarkably, all of these steps encompass the best way forward in that they recognize the value of human relationships and ensure that *all* stakeholders become involved in diversity and inclusion efforts. They also incentivize corporate "buy-in" with

[208] *Id.* Law schools are just beginning to require instruction on cultural competence. *See* STANDARDS AND RULES OF PROC. FOR APPROVAL OF L. SCHS., Standard 303(c) (AM. BAR ASS'N 2023) (requiring law schools to "provide education to law students on bias, cross-cultural competency, and racism" at different stages of law school career).

[209] Deutsch, *supra* note 201.

[210] *Id.*

[211] *Id.*

[212] *Id.*

[213] *See* Lamano, *supra* note 199 (noting how increased diversity in given industry leads to increased profits).

[214] Nantiya Ruan, *Racial Pay Equity in "White" Collar Workplaces*, 88 BROOK. L. REV. 519, 549-61 (2023) (prescribing how best to achieve racial pay equity in corporate America).

[215] *Id.* at 561.

those efforts at the highest levels.[216] I posit that, by way of analogy, these same methods could inform diversity and inclusion efforts in the legal profession.

2. The Medical Profession

Admittedly, like the legal profession, the minoritized population in the medical profession is not representative of the American population. "In 2018, only 11.2% of medical school graduates were Black, Latine or Native American according to the Association of American Medical Colleges."[217] In 2022, the number of Black, Latine, and Native American medical school enrollees was up to almost 15%.[218] While still low, the minoritized population in medical schools is higher than in law schools.[219] Like the legal profession, this lack of diversity affects access to the delivery of services,[220] which makes the situation especially dire.

The accrediting body of medical schools, the American Medical Association ("AMA") seems to have been a bit more proactive than the ABA in terms of promoting antidiscrimination policies. The AMA lobbies Congress for more effective antidiscrimination laws regularly.[221] Also, the AMA Code of Medical Ethics contains anti-bias language and explicit demands for inclusion, which is a bit stronger than the ABA Model Code.[222] Finally, while the AMA wields a

[216] *See id.* at 560.

[217] Lois Elfman, *White Coats for Black Lives Evaluates Diversity at Select Medical Schools*, DIVERSE: ISSUES HIGHER EDUC. (Nov. 30, 2019), https://www.diverseeducation.com/latest-news/article/15105858/white-coats-for-black-lives-evaluates-diversity-at-select-medical-schools [https://perma.cc/65VP-GDCS].

[218] This statistic was generated by adding the total enrollment of medical students in 2022 who identified as (1) "American Indian or Alaska Native;" (2) "Black or African American;" and (3) "Hispanic, Latino, or of Spanish Origin;" and comparing the figure to the total medical school enrollment of 96,520. ASS'N OF AM. MED. COLLS., 2022 FACTS: ENROLLMENT, GRADUATES, AND MD-PHD DATA tbl.B-5.1 (2022).

[219] Note that 62% of law students were White as of 2019. Gabriel Kuris, *What Underrepresented Law School Applicants Should Know*, U.S. NEWS (June 8, 2020, 9:48 AM), https://www.usnews.com/education/blogs/law-admissions-lowdown/articles/what-underrepresented-law-school-applicants-should-know. Meanwhile, only 52% of those entering medical school in 2021 were White. Michael Devitt, *New Report Finds Medical School Diversity Rising*, AM. ACAD. OF FAM. PHYSICIANS (Feb. 17, 2022, 9:09 AM), https://www.aafp.org/news/education-professional-development/medical-school-diversity.html [https://perma.cc/KM4K-UKDY].

[220] Elfman, *supra* note 217. *See generally* Tori DeAngelis, *How Does Implicit Bias by Physicians Affect Patients' Health Care?*, 50 MONITOR ON PSYCH. 33 (2019).

[221] *See, e.g.*, Press Release, AMA, AMA Opposes Effort To Allow Discrimination Against Patients (June 12, 2020) (https://www.ama-assn.org/press-center/press-releases/ama-opposes-effort-allow-discrimination-against-patients).

[222] *AMA Principles of Medical Ethics*, AMA CODE OF MED. ETHICS, https://code-medical-ethics.ama-assn.org/principles [https://perma.cc/374A-R5RQ]. The AMA has explicit and specific rules covering disparities in health care, physician antidiscrimination obligations, and patient rights. *See* AMA Council on Ethical and Jud. Affs., *AMA* Code of Medical Ethics' *Opinion on Respect for Patient Beliefs*, 11 VIRTUAL MENTOR 766, 766 (2009).

great deal of power, including the ability to process disciplinary action reports directly from state medical boards and other specialty osteopathic boards into the AMA Physician Masterfile and rate and rank physicians, ultimately, much like the legal profession, disciplinary matters of physicians are managed by the state licensing boards and agencies.[223] However, the medical profession has recognized the importance of relationships between physicians and the patients they serve.[224] They have been willing to strengthen their commitment to diversity and inclusion to better serve their patients.[225] Analogously, while we do not practice medicine, the legal profession must do the same for the clients we serve.

Medical schools have worked to increase their diversity chiefly in two ways: (1) through pre-med/pipeline programs that help to educate minoritized students about the profession and ultimately assist them in applying for medical school (including preparing for the medical entrance exam, the "MCAT"); and (2) by using a more holistic approach to admissions (not looking at the MCAT exclusively, but considering the applicant's background and lived experiences).[226] To no surprise, there is a continued call for more faculty diversity in medical schools.[227] In several studies of medical students, data showed that they found contact with minority faculty and patients, and faculty-rolemodeling to be the more beneficial in terms of changing implicit (and explicit) bias.[228] As stated in Section I.D.1 regarding the legal profession, author and doctor Maxime Madhere reiterates, "[r]epresentation matters," adding that "[i]t's empowering."[229]

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[223] *See Frequently Asked Questions*, AM. MED. ASS'N, https://amacredentialingservices.org/faq [https://perma.cc/9AFD-Q4SW] (last visited Jan. 15, 2024); *AMA Physician Professional Data™*, AM. MED. ASS'N, https://amacredentialingservices.org/credentialing/Physician-Professional-data™ [https://perma.cc/YG9P-9V7R] (last updated May 23, 2022); *Discipline*, AM. BAR ASS'N, https://www.abalegalprofile.com/discipline.html (last visited Jan. 15, 2024); *Physician Discipline in 2022*, FED'N OF STATE MED. BDS., https://www.fsmb.org/u.s.-medical-regulatory-trends-and-actions/u.s.-medical-licensing-and-disciplinary-data/physician-discipline/ [https://perma.cc/VP2F-WXN7] (last visited Jan. 15, 2024).

[224] *See infra* notes 226-37 and accompanying text.

[225] *See infra* notes 226-37 and accompanying text.

[226] Elfman, *supra* note 217. With the use of affirmative action in post-secondary schools' admission being declared unconstitutional in *SFFA*, this more holistic approach to admissions will become even more critical to the diversity and inclusion efforts of higher education institutions. *See id.*

[227] *See generally id.*

[228] DeAngelis, *supra* note 220, at 35.

[229] Elfman, *supra* note 217. Madhere co-authored a book, *Pulse of Perseverance: Three Black Doctors on Their Journey to Success*, with Drs. Joseph Semien Jr. and Pierre Johnson. PIERRE JOHNSON, MAXIME MADHERE & JOSEPH SEMIEN JR., PULSE OF PERSEVERANCE: THREE BLACK DOCTORS ON THEIR JOURNEY TO SUCCESS (2018). The book recounts the three Xavier University of Louisiana alumni and their experiences becoming doctors. *See generally id.*

Anecdotally, in 2014, a group of medical students formed the White Coats for Black Lives organization ("WC4BL") to safeguard the well being of patients and eliminate racial bias in healthcare.[230] The WC4BL organization started a report card system under which it rates medical schools on their DEI efforts.[231] This system serves as both a "carrot" and a "stick" in that it encourages medical schools to improve their efforts to recruit diverse students and faculty, as well as to inform student and faculty candidates about the institutions' DEI efforts.[232]

In addition, Stanford Medical School adopted the concept of anti-racist practices by creating "The Presence 5 for Racial Justice," which "adapts the evidence-based strategies to enhance physician presence and foster meaningful connection with patients, while simultaneously promoting antiracism in the clinical setting."[233] These communication strategies are touted to "help healthcare providers counter 'racism that affects their patients' health and well-being' and 'provide a foundation for racially just and equitable care.'"[234] The strategies include the following: (1) Prepare with intention—this step encourages each student physician to familiarize themselves with their patient in order to check their biases prior to meeting them; (2) Listen intently and completely—this step requires that the student physician engage in close and attentive listening during interactions with the patient to reduce misdiagnoses and racial disparity; (3) Agree on what matters most—this step counsels the student physician to "ask the patient about their care priorities and [treatment] preferences and then collaborate with [them]" to minimize any disagreement about their treatment (rather than assuming that the doctor knows best all the time); (4) Connect with your patient's story—this step encourages the student physician to "acknowledge the social and environmental factors that influence health" by listening to the patient's story, without preconceptions about them; and (5) Explore emotional cues—this step requires the student physician to be attentive to their patient's expressions, body language, and emotions during their interaction.[235] These communication strategies also require that the student physician confirm the patient's feelings and offer ways to address a particular obstacle, if appropriate, or just allow the patient a safe space to share their feelings.[236]

Embracing "system-level" changes, which includes acknowledging the role that stakeholders play in those changes much like the business and medical professions have done, seems to be the only way to solve the problems created

[230] Elfman, *supra* note 217.

[231] *Id.*

[232] *Id.*

[233] *The Presence 5 for Racial Justice: Promoting Anti-Racism in Clinical Interactions*, STAN. MED. 25 BLOG, https://stanfordmedicine25.stanford.edu/blog/archive/2021/presence5forracialjustice.html [https://perma.cc/56NA-P8CP] (last visited Jan. 15, 2024).

[234] *Id.*

[235] *Id.*

[236] *Id.*

by a system built on a history of racism.[237] We must involve people at all levels of those systems—from those who are at the helms of our most powerful organizations to the most junior-level associates. As Professor Ruan argued in her recent racial pay equity article, by so engaging and incentivizing that engagement, there is a greater possibility to effect change in business professions that mere rules and historic efforts have not.[238] Analogously, the same can be true for the legal profession.

III. FORWARD MARCH: POST-AFFIRMATIVE ACTION AND BEYOND

What has become clear is that in the march forward, change will be necessary to reach the diversity goals of the ABA and other governing organizations in the legal profession. Even assuming that affirmative action as we knew it still existed, the legal profession must acknowledge the systemic effects of the most embedded practices and strategically employ modifications to achieve diversity and inclusion in the legal profession. For these reasons, this Section discusses two of those embedded practices—law school admission and licensure—and, prescriptively, some of the most recent modifications that are intended to move the profession closer to diversity and inclusion. This Section also discusses recent technological developments that could assist in the profession's march towards diversity and inclusion, if deployed responsibly.

A. *A Brief History of the LSAT and the Bar Exam*

The bar and the LSAT serve as gateways to the profession and are like the windows of the human soul. To explain, to be admitted to law school, a person must take the LSAT; and to be admitted to the practice of law, they must take a bar examination. Speaking metaphorically, as the "eyes are 'the windows of the soul,'"[239] these two culturally biased testing instruments, which are the access points to the profession, are the "eyes" of the legal profession's "soul." As discussed in Section I.D (and throughout this Article), access to the legal profession remains limited for many minorities. Much can be learned by looking at the history of these two testing instruments that have been such a formidable impediment to diversity and inclusion in the profession.

1. The LSAT and Other Methods of Law School Admission, Historically

As mentioned in Section I.C.2, historically, the LSAT has been criticized as one of the impediments to diversity in the legal profession. As with many of the tools established and employed by our majority institutions in America, the

[237] *See* Derek M. Griffith et al., *Dismantling Institutional Racism: Theory and Action*, 39 AM. J. CMTY. PSYCH. 381, 381-90 (2007).

[238] *See generally* Ruan, *supra* note 214.

[239] Anthony Synnott, *How the Eyes Express Emotions and Bodily States*, PSYCH. TODAY (July 23, 2022), https://www.psychologytoday.com/us/blog/rethinking-men/202207/how-the-eyes-express-emotions-and-bodily-states [https://perma.cc/A9PS-S9CK] (meaning that much can be known about a person when we gaze into their eyes).

LSAT and its kin were developed "early in the twentieth century as a way to demonstrate the intellectual superiority of northern European Whites."[240] In fact, there were a progeny of rules and laws of old that were put into place to not only demonstrate, but also maintain "the intellectual superiority of northern European whites."[241] Those rules included Jim Crow laws that prevented (or hindered) voting and education rights in people of color.[242] Again, the systems of old were used to keep the status quo and ensure that American institutions would remain what they were—monolithic replicas of an age old society.[243] This included the legal system and its various institutions and many organizations.[244]

Post-World War I, with thousands of GIs applying to law schools, the Educational Testing Service ("ETS") created the Law School Admissions Council ("LSAC") in 1948.[245] LSAC thereafter chose the ETS as its administration agency, and immediately made itself popular with institutions of higher education and other higher education stakeholders to forestall any efforts to replace its monopoly on law school admissions by other organizations like the American Association of Law Schools ("AALS").[246] Furthermore, despite the creation of the Law School Data Service ("LSDS"), which collects data on undergraduate GPAs, LSAT scores, and other data to predict the first-year success of an entering law student in an effort to make law school admissions appear "simple and pseudo-scientific," there is an undeniable racial gap in law school admissions, which LSDS hid until the late 1990s.[247] More relevantly,

[240] Richard Delgado, *Official Elitism or Institutional Self Interest? 10 Reasons Why UC-Davis Should Abandon the LSAT (and Why Other Good Law Schools Should Follow Suit)*, 34 U.C. DAVIS L. REV. 593, 595 (2001). Delgado's article details the racist past of the Educational Testing Service ("ETS"), the brainchild of Carl Campbell Brigham, an early president of the College Board, and who is described as "an unapologetic race-purifier for whom Catholics, Jews, and east Europeans represented a defective strain of humanity." *Id.* at 596. It appears that America has long been obsessed with testing and separating the races based on perceived cognitive deficiency. *Id.* at 595. Some years after Brigham's leadership, the College Board created the ETS to style and administer the SAT. *Id.* at 596. Initially, many saw the standardized test as a mechanism to replace admissions premised upon family relationships, which was a good thing. *Id.* Importantly, however, at its inception, the compositions of the ETS would have been exclusively White male composed, without regard for what that meant in terms of diversity. *See id.* at 595.

[241] *See id.*

[242] *The Black Codes and Jim Crow Laws*, NAT'L GEOGRAPHIC, https://education.nationalgeographic.org/resource/black-codes-and-jim-crow-laws/ [https://perma.cc/ZDL3-FLHB] (last updated Oct. 19, 2023).

[243] *See id.*

[244] Note that there was a time that the ABA was investigated because of its extremely close ties to LSAC. *See generally* Andy Portinga, *ABA Accreditation of Law Schools: An Antitrust Analysis*, 29 U. MICH. J.L. REFORM 635 (1996).

[245] Delgado, *supra* note 240, at 596.

[246] *Id.* (noting perks of conferences in warm, attractive resorts and programming and marketing geared towards high education leaders and stakeholders being doled out by LSAC officials).

[247] *Id.* at 597.

despite evidence that the LSAT and other standardized tests created by the ETS were culturally biased, their reign in higher education admissions has continued.[248] So, again, the vestiges of systemic racism appear in the legal profession—at the outset, in the law school admissions process.

Perhaps as a result of perfect storm of the past few years—the COVID-19 pandemic, political and social unrest, and the generation of students who are currently being admitted to law school—some law schools considered no longer requiring LSAT scores for admission.[249] However, the ABA recently voted to maintain the law school admissions test requirement, meaning that most law schools in America must still use this biased testing instrument that, in fact, has little correlation to the thing that it purports to predict—first-year law student success.[250] None, however, can ignore its propensity towards racial bias.[251]

a. *The LSAT's Ties to ABA Standard 503*

Though the LSAT was chief among those admissions measures that many have wanted to change,[252] the manner in which the LSAT was inextricably tied to the ABA Standards made this difficult. ABA Standard 503 requires that all entering J.D. students must "take a valid and reliable admission test" to aid their

[248] *See id.* ("Because of conservative challenges to affirmative action, standardized testing today is emerging as the chief barrier to the educational ambitions of minorities and the poor."); *see also* Eremipagamo M. Amabebe, Note, *Beyond "Valid and Reliable": The LSAT, ABA Standard 503, and the Future of Law School Admissions*, 95 N.Y.U. L. REV. 1860, 1869 (2020) (discussing LSAT's decreased predictive validity).

[249] *Is the LSAT Required for Law School?*, KAPLAN, https://www.kaptest.com/study/lsat/is-the-lsat-required-for-law-school/ [https://perma.cc/22KG-3YPG] (last visited Jan. 15, 2024).

[250] Delgado, *supra* note 240, at 600.

> The LSAT is not the only ETS test that does not predict what it professes. . . . [T]he Justice Department found no significant relationship between National Teacher Exam scores and teacher effectiveness. In another study, high scorers on the GRE took longer to graduate than modest scorers. . . . On the SAT, men score forty-five points higher than women, who nevertheless earn higher college grades. And, in the range of test scores in which admissions officers function, the SAT increases schools' ability to predict graduation only one tenth of one percent over class rank alone, while greatly reducing minorities' chances of admission.

Id. (citations omitted); *see also* Section III.A.1.b (discussing alternative methods of law school admissions testing allowed by ABA, GRE or, most recently, University of Arizona Rogers College of Law JD-Next Program).

[251] Delgado, *supra* note 240, at 600. Note HBCUs have long used admissions formulas that "discount" the use of LSAT scores in their admissions formulas to afford minoritized students the opportunity to attend their institutions. This practice resulted in tensions with the ABA in terms of accreditation. *See* Tamara Tabo, *What's More Racist? The Trouble with Low Bar Passage Rates at Historically Black Law Schools*, ABOVE THE LAW (Aug. 8, 2013, 10:07 AM), https://abovethelaw.com/2013/08/whats-more-racist-the-trouble-with-low-bar-passage-rates-at-historically-black-law-schools/ [https://perma.cc/Y2X7-NSPA].

[252] *See* Vernon et al., *supra* note 49, at 44-46 (explaining role LSAT and ABA Standards play in lack of diversity in law school admissions and hence legal profession).

respective institutions in assessing the student's "capability to satisfactorily complete the school's program of legal education."[253] Additionally, Interpretation 503-1 of the Standard requires that should a school wish to use a test other than the LSAT, it must "demonstrate that the alternate test is 'valid and reliable' in assisting the school to assess applicants' capability to complete [its] program."[254]

The ABA has twice seemed ready to amend its standards to make the LSAT optional for law school admissions but ultimately failed to do so.[255] Most recently, in 2022, the ABA's Strategic Review Committee re-examined the issue and "again recommended eliminating the requirement that law schools use a valid and reliable standardized test in admissions."[256] However, on the pinnacle of presenting the measure to the House of Delegates, the ABA again decided to again pull it back at the request of more than 100 law deans.[257] While many supporters heralded the revision of Standard 503 for "bring[ing] the ABA in line with its professional school accreditor peers,"[258] the signatory law deans were

[253] Amabebe, *supra* note 248, at 1875-76 (citing ABA Standard 503).

[254] *Id.* at 1875 (citing ABA Standard 503, Interp. 503-1).

[255] Eulas Boyd, *LSAT-Optional Admissions: A Step in the Right Direction*, N.Y. STATE BAR ASS'N J., Sept./Oct. 2022, at 24, 24 (noting that ABA considered amending its testing standards in 2018 and "ha[d] again recommended eliminating the requirement" at time of article's publication in 2022).

[256] *Id.*

[257] Stephanie Francis Ward, *Plans for Cutting Admissions Test Requirement Paused by ABA Legal Ed Council*, ABA J. (May 12, 2023, 2:28 PM), https://www.abajournal.com/web/article/legal-ed-pauses-plans-for-cutting-admissions-test-requirement [https://perma.cc/2K5X-X3GD]; Letter from Law Deans to Joe West, ABA Council Chair 1 (Apr. 12, 2023), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/may23/23-deans-letter-501-503.pdf [https://perma.cc/JF3G-HGBN] [hereinafter Law Deans Letter] (suggesting more flexible language be inserted into Interpretation 503-3(a) to allow for admission of up to 25% of law school class without valid test for admission). The proposed version of the Interpretation only allowed for 10% of the entering class without a valid LSAT score, but those students had to have performed in the 85th percentile of an ACT, SAT, or GRE and be ranked in the top 10% of their class with a cumulative GPA of at least a 3.5. *Id.*

[258] Boyd, *supra* note 255, at 24.

concerned about the effect of the recission of Standard 503.[259] Other detractors questioned what would take its place.[260]

Supporters of the Standard 503 considered this a small step in diversifying the legal profession because not every ABA-accredited law school will immediately jettison the LSAT for some other admissions tool.[261] Indeed, only the very few "elite" law schools can afford to do so without running afoul of some other ABA accreditation standard meant to ensure the legitimacy of a legal education.[262]

b. Other Admissions Methods

Notwithstanding some seemingly insurmountable hurdles, beginning in 2015, some law schools began to move beyond the LSAT and began accepting other standardized tests, i.e., the GRE, to comply with ABA Standard 503.[263] Just recently, the University of Arizona Rogers College of Law won approval from the ABA to offer its very own admissions test—the first law school to do so.[264] Certainly, wisdom will require law schools to carefully consider the best admissions mechanisms to replace the LSAT.[265] As stated in their April 12 and 13 letters, law deans recommend that whatever the new process is, it should be periodically examined by the ABA to determine its impact on law school

[259] Ward, *supra* note 257. Indeed, those deans were concerned about the possible effects on minority students if the LSAT were no longer required as an admission tool, especially since it was not clear what would take its place. *Id.* Note that an additional April 13 letter from fourteen Black women law deans, pointing to the history of systemic racism in law school admissions, expressed similar concerns in eliminating the LSAT without any data to support that such action would improve diversity in law schools. *Id.* The letter called for a more studied, incremental approach to modifying the Standard, as opposed to its elimination. *Id.*

[260] Amabebe, *supra* note 248, at 1875-76 (noting "interplay between Standard 503, the mandatory disclosure requirements of Standard 509," along with U.S. News & World Report rankings and competitive market of legal education, which ensures "LSAT's position as gatekeeper").

[261] Boyd, supra note 255, at 24, 26.

[262] *See id.*

[263] Nick Mireles, *105 Law Schools That Accept the GRE*, FORBES ADVISOR (Feb. 3, 2023, 5:12 PM), https://www.forbes.com/advisor/education/law-schools-with-gre-score/ [https://perma.cc/4DCA-K5MF].

[264] Karen Sloan, *New Law School Admissions Test Developed by Univ of Arizona Gets ABA Approval*, REUTERS (June 8, 2023, 5:14 PM), https://www.reuters.com/legal/legalindustry/new-law-school-admissions-test-developed-by-univ-arizona-gets-aba-approval-2023-06-08/ [https://perma.cc/4DCA-K5MF]. The University of Arizona has also been approved to offer a JD-Next Program. *Id.* The JD-Next Program, "which includes an eight-week online course for prospective law students . . . give[s] participants a taste of law school and then gauge[s] their ability to learn that material," without requiring that they take the LSAT and attain a particular score to be admitted to law school. *Id.* While other law schools may seek approval for such a program, the University of Arizona is currently the only law school that has done so. *Id.*

[265] Boyd, *supra* note 255, at 26.

admissions.[266] Eventually, the hope is that law schools will begin to utilize some of the more novel initiatives to deepen their shallow pools of minoritized applicants to yield more diverse and inclusive student populations.[267] Brooklyn Law School Admissions Dean Eulas Boyd posits in his article *LSAT-Optional Admissions: A Step in the Right Direction*,

> Without the testing requirement, maybe we'll see more 3+3 programs, accelerated programs and specialized extended programs for nontraditional students from underrepresented, but highly desirable, professional backgrounds. Maybe we'll see schools experiment with alternative curricula for students admitted under nontraditional criteria. Perhaps schools will implement more apprenticeship or lab models. Some schools may develop programs that better address the needs of disabled and neurodiverse students. With new flexibility in distance learning, creative class scheduling, and now a potentially crucial change in admissions criteria, we have a real chance to make this a moment of transformation for our industry.[268]

Notably, depicted in this discourse around revising Standard 503 to allow law schools to move away from exclusive use of the LSAT in law school admissions is the tension that is always present when numerous parties are all working to effect positive change (and diversity and inclusion) in the legal profession. As cautioned by the law deans in their letters to the ABA, change in ABA standards has always been studied and incremental and should not be done any differently now.[269] I posit that this caution may be necessary to focus, but not chill, efforts to achieve diversity. The hope is that future revision of Standard 503 will consider the need for strategic study and incremental change in light of the systemic racism that is always a backdrop in efforts to move forward.

2. The Bar Exam & Other Mechanisms for Licensure, Historically

Like the LSAT, the history of the bar exam is a rather storied one. Initially an oral exam in the late eighteenth through late nineteenth centuries, after the 1870s, local law school graduates were granted diploma privileges, making bar examination unnecessary.[270] However, written bar examinations became more prevalent between 1890 and 1920, when lawyers began to work in jurisdictions other than where they had completed their legal education.[271] Finally, in 1921, the ABA stated a preference for licensure based on performance on a written bar exam rather than on merely receiving a diploma.[272] This preference was

[266] *See* Law Deans Letter, *supra* note 257.

[267] Boyd, *supra* note 255, at 26.

[268] *Id.*

[269] *See* Law Deans Letter, *supra* note 257.

[270] *Bar Exam History and Evolution: UBE Changes*, UWORLD: LEGAL [hereinafter *Bar Exam History*] https://legal.uworld.com/bar-exam/history-and-changes/ [https://perma.cc/PU5M-XAKU] (last visited Jan. 15, 2024).

[271] *Id.*

[272] *Id.*

premised, at least in part, upon backlash against diploma privilege.[273] To that end, state bars began to construct written examinations that tested "candidates' skills and knowledge."[274] By 2022, Wisconsin, Virginia, and California were the only jurisdictions that allowed ABA-approved law school graduates to apply to the State Bar for licensure without first passing a written bar exam.[275]

Predictably, the format of these written examinations has also been through various iterations—beginning with an all essay format until 1972 when the National Conference of Bar Examiners ("NCBE") developed and introduced the Multistate Bar Exam ("MBE"), a 200 question multiple-choice exam.[276] The MBE was introduced "to provide a more objective and consistent means of evaluating candidates for admission to the Bar and to level the playing field."[277] Thereafter, the NCBE introduced the Multistate Essay Examination ("MEE") in 1988 and the Multistate Performance Test ("MPT") in 1997 to further improve standardization in bar examination.[278] Between 2011 and 2017, the majority of jurisdictions adopted the Uniform Bar Exam ("UBE"), which is composed of the MBE, MEE, and the MPT.[279] The MBE portion of the exam consists of 200 questions that allow about 1.8 minutes to read and answer.[280] The essays must be read, analyzed (which includes applying the key and legally significant facts to the relevant rules of law), and answered in thirty minutes each.[281] The MPT portion of the exam, which must be completed in a mere ninety minutes, requires the testers to read a fact pattern and the file consisting of cases, statutes, and other materials; isolate the relevant legal principles from that file; correctly apply the law to the facts, which again is legal analysis; and write that analysis.[282] A real test of skill, huh?

Despite its iterations and changes, critics still decry the bar exam as poorly tailored to its purpose.[283] In reality, the bar exam, focusing heavily on rote memorization of the law and issue-spotting, only tests the ability of applicants

[273] *Id.*

[274] *Id.* By 1980, forty-five of the fifty states had mandated written bar exams. *Id.*

[275] *Id.*

[276] *Id.*; *see also* Carol Chomsky, Dena Sonbol & Tyler Wessman-Conroy, *The Bar Exam Considered*, BENCH & BAR MINN., Sept. 2022, at 12, 14.

[277] *Bar Exam History*, *supra* note 270.

[278] *Id.*

[279] Chomsky et al., *supra* note 276, at 15; *see also* Larry Cunningham, *A New Bar Is Coming*, 34 S.C. LAW. 46, 48 (2022) (noting that California, Virginia, Louisiana, Florida, and Georgia have not adopted UBE but have retained state-specific exams, which may include MBE as component); *see also* NAT'L CONF. OF BAR EXAM'RS, *UBE Jurisdictions*, https://www.ncbex.org/exams/ube/list-ube-jurisdictions [https://perma.cc/JWT6-52T8] (last visited Jan. 15, 2024) (distinguishing those jurisdictions that utilized UBE within time frame).

[280] Chomsky et al., *supra* note 276, at 14.

[281] *Id.*

[282] *Id.*

[283] *Id.* at 13.

to take an exam, not their ability to practice law.[284] Not only does the exam focus too heavily on rote memorization of the rules, but it also tests application in a manner that is unrelated to the manner in which a lawyer practices.[285] The "two-dimensional" hypothetical used on the bar exam is simply not illustrative of the manner in which lawyers must go about collecting the facts of their cases to solve the oftentimes complex legal issues they encounter.[286] Finally, the bar exam, as it exists, tests speed and does not reflect the level of thoughtfulness needed in the practice of law.[287]

In a recent Bar journal article, *The Bar Exam Considered*, law professor Carol Chomsky references a study conducted by Professor Steven Foster in which sixteen practicing attorneys took (and failed) a simulated version of the MBE, the multiple choice portion of the UBE.[288] Chomsky suggests, "[a]n exam that practicing lawyers regularly fail is not a reasonable test of minimum competence."[289] Conversely, in that same article, Dena Sonbol, Dean of Academic Excellence at Mitchell Hamline School of Law, seems to defend the UBE, noting that it does, indeed, "test an applicant's legal skills and knowledge to ensure minimum competence before granting licensure into the legal profession."[290] While acknowledging that it does have "some undesirable aspects," Sonbol notes, "[t]he UBE's most desirable quality is that it tests core legal skills necessary for law practice: reading comprehension; legal analysis, which requires logic and critical thinking skills; and legal writing."[291] Others tout the committees of national experts who draft the exam, the manner in which the questions and scores are statistically analyzed to ensure they are valid and consistent, respectively, and the portability of the UBE's scores.[292]

Examining the three parts of the UBE, it is clear that there are more negatives than positives in its use. First, Sonbol points to the MPT, the most recently added portion of the exam, as a level-setter of sorts, giving all of the testers the same case file containing the law and other factual information necessary to assess the

[284] *Id.*

[285] *Id.* at 13-14 (noting Institute for the Advancement of the American Legal System's ("IAALS") study supports this conclusion).

[286] *Id.* at 14.

[287] *Id.* ("Lawyers work under time pressure, but good legal work requires preparation and care—not shooting from the hip.").

[288] *Id.* ("Not one of the lawyers who took the exam passed it. The best of the group answered just 52 percent correctly, and most scored far below that.").

[289] *Id. But see* Multistate Bar Exam, NAT'L CONF. OF BAR EXAM'RS, https://www.ncbex.org/exams/mbe/about-mbe [https://perma.cc/D7NE-Y2UT] (last visited Jan. 15, 2024) (noting that "[t]he MBE is only one of a number of measures that a board of bar examiners may use in determining competence to practice").

[290] Chomsky et al., *supra* note 276, at 13.

[291] *Id.*

[292] *See* Darin B. Scheer, *NextGen: The Bar Exam of the Future*, 46 WYO. LAW. 18, 18 (2023) (defining "portability" to mean that "the UBE score could be used by the applicant to gain bar admission in other states within the UBE compact").

given hypothetical case.[293] However, the MPT only counts for 20% of the bar exam score.[294] Next, pointing to the MBE portion of the exam, which is the oldest portion of the exam and counts for 50% of the bar exam score, Sonbol contends, "it is a mostly objective and fair assessment of minimum competence," but admits that the testing is "deeper" than ideal.[295] Finally, as to the MEE, developed approximately sixteen years after the MBE, Sobol acknowledges that it is the most troublesome portion of the UBE because of the breadth of subject matters being tested, the subjectivity of the questions, and rigidity of the rubrics.[296] "The MEE counts for 30[%] of the total points and consists of six essays on 12 subject categories."[297]

a. *The NextGen Bar Exam*

To no surprise, what began as an oral exam in the late eighteenth through late nineteenth centuries grew into an ABA-sanctioned written exam that inculcated many of the cultural biases seen in other standardized testing instruments as noted above.[298] For that reason, the bar exam has always had its own critics who decry its methodology and call for its abolition.[299] Indeed, recently, perhaps due to the COVID-19 pandemic, there has been movement to substantially modify the bar exam and provide alternative mechanisms to licensure.[300]

After a never-ending call for the abolition of the bar exam, the NCBE has finally taken the matter under advisement. Following a "three-year, comprehensive, empirical study of the bar exam that included a nationwide practice analysis study of 15,000 lawyers" and subsequent work of the NCBE Testing Task Force ("TTF") to ensure that the exam meets "sound testing practices," the NCBE will begin administering the NextGen Bar Exam in

[293] Chomsky et al., *supra* note 276, at 16.

[294] *Id.*

[295] *Id.* at 13, 16; *see also Bar Exam History*, *supra* note 270 (noting that prior to MBE's introduction in 1972, "bar exams only required applicants to write essays").

[296] Chomsky et al., *supra* note 276, at 16.

[297] *Id.*

[298] *See* Nachman N. Gutowski, *STOP THE COUNT; The Historically Discriminatory Nature of the Bar Exam Requires Adjustments in How Bar Passage Rates Are Reported, if at All*, 21 SEATTLE J. FOR SOC. JUST. 589, 598, 606 (2023); *see also* Margo Melli, *Passing the Bar: A Brief History of Bar Exam Standards*, 21 GARGOYLE 3, 4 (1990) ("Gradually, these statewide boards began conducting written examinations, although oral exams were not unheard of in less populous jurisdictions well into the 20th Century.").

[299] Gutowski, *supra* note 298, at 609 ("Some people believe that the Bar Exam is so steeped in a history of racism and inequality that it must be abolished entirely.").

[300] Marilyn Cavicchia, *In Wake of COVID-19, Several Jurisdictions Explore Other Ways To License New Lawyers*, BAR LEADER (Nov. 1, 2022), https://www.americanbar.org/groups/bar-leadership/publications/bar_leader/2022-23/fallissue/in-wake-of-covid-19-several-jurisdictions-explore-other-ways-to-license-new-lawyers/.

2026.[301] Currently, the exam is still being developed.[302] Not only are new, more integrative questions, formats, and content being developed, but the NCBE is also developing new scoring methodologies and "psychometric methods for equating/scaling scores, developing test administration policies and procedures, and developing study materials and sample test questions to help candidates prepare."[303] Many expect that the NextGen Bar will address all of the deficiencies of the previous iterations of the bar exam, as it will only cover eight (not twelve like the UBE) "foundational subject categories" and "incorporate more assessments that equalize examinee resources and focus on testing skills rather than memorization."[304] Jurisdictions will have a choice whether they will adopt the new exam when it comes online in 2026, much like they did when the UBE was developed.[305] While many will certainly adopt it, others may not, and there is nothing that can be done about that. Significantly, however, there are other methods to licensure being explored that may be viable alternatives to the bar exam.[306]

b. *Other Methods of Licensure Outside of the Bar Exam*

After the COVID-19 pandemic, some jurisdictions began to explore other methods for licensure outside of (or in addition to) the bar exam.[307] For example, California, Massachusetts, Minnesota, Nevada, New York, Oregon, Utah, and Washington have all created groups to study attorney licensure options in their respective states.[308] Of note, in Oregon, in addition to the bar exam, the Oregon Supreme Court has unanimously approved two pathways to new attorney

[301] Cunningham, *supra* note 279, at 49.

[302] I recently attended a regional conference during which one of the sessions discussed the formatting of the NextGen bar exam. With permission from the presenters, Shelly DeAdder and Lisa Kamarchik from North Carolina Central University School of Law, I have attached a copy of the question that they developed as an example of a NextGen bar question. *See infra* Appendix A.

[303] Scheer, *supra* note 292, at 21.

[304] Chomsky et al., *supra* note 276, at 16.

[305] Cunningham, *supra* note 279, at 47 ("Whether states adopt this new bar exam or revert to writing their own exams will profoundly impact the curricula of law schools.").

[306] Stephanie Francis Ward, *Examining the Bar: Should Law Grads Need To Pass the Bar To Practice? Some Say There Is a Better Way*, 108 A.B.A. J. 56, 58 (2022).

[307] *Id.* (noting two primary reasons for alternative licensure options in Oregon: "scant if any data to show a connection between cut scores and competence to practice law; and . . . the pandemic altered the country's notions about how things should be done"). Note also that Utah extended diploma privilege to examinees during the pandemic that allowed "first-time test-takers scheduled to take the state's July 2020 bar and had graduated from ABA-accredited law schools with first-time bar passage rates of at least 86% in 2019," as well as "lawyers already admitted to other state bars who had applied to take the test." *Id.* at 60. All of the candidates were also required to complete 360 hours of supervised practice under a licensed Utah lawyer. *Id.*

[308] *Id.* at 57-58.

licensure.[309] The first would allow a new attorney to obtain a license "after completing a law school experiential learning program focused on skills including legal research, issue spotting and argument development."[310] The second method would allow a candidate to obtain a license "after completing between 1,000 and 1,500 hours of supervised practice after graduation."[311] Much like Oregon, in addition to the bar exam, Minnesota is also exploring two pathways to licensure: a law school program conferring licensure upon completion and supervised practice after graduation.[312]

In addition, most people are unaware that, in 2005, the New Hampshire Supreme Court approved an honors program at the University of New Hampshire Franklin Pierce School of Law that allows graduates to be admitted to the Bar upon graduation (without a bar exam).[313] Further, in 2020 during the COVID-19 pandemic, Utah was among one of the first states to grant diploma privilege to new lawyers who had completed law school and worked under the supervision of a licensed attorney for a specified number of hours.[314] Canada also launched an alternative to the bar exam during the pandemic, the Practice Readiness Education Program ("PREP").[315] This nine-month program, offered by the Canadian Centre for Professional Legal Education, came online for approximately 800 new lawyers in Alberta, Manitoba, Nova Scotia, and Saskatchewan on June 1, 2020.[316] Interestingly, PREP's online learning model, which operates in tandem with the licensing candidates' last formal part of their legal education,[317] focuses on developing the practical skills required of an entry-level attorney.[318] It uses a virtual law firm format, offered in four phases, which allows the program participants to see how a law firm operates.[319] The program involves "interactions, transactions, and simulations" and "promotes competencies such as professional ethics and practice management."[320]

Undoubtedly, the previously noted jurisdictions (and probably others) will be considering similar alternatives for licensure in the future with an eye towards

[309] *Id.* at 57.

[310] *Id.*

[311] *Id.*

[312] *Id.* at 58; *see generally* Leanne Fuith, *Building a Better Bar Admissions Process: A Look at What the Minnesota State Board of Law Examiners Is Doing in Its Two-Year Study of the Bar Exam—and What Other Jurisdictions Are Considering*, BENCH & BAR MINN., Aug. 2022, at 14, 14 (discussing Minnesota's efforts to expand mechanism for licensure).

[313] Ward, *supra* note 306, at 60.

[314] Fuith, *supra* note 312, at 18; *see also* Ward *supra* note 306, at 60.

[315] Fuith, *supra* note 312, at 18.

[316] *Id.*

[317] *Id.* at 18 n.18. (defining articling, which is required "in most Canadian provinces and consists of working under the supervision of a qualified, licensed lawyer for a period of time after graduation from a Juris Doctor (JD) or Bachelor of Laws (LLB) program").

[318] *Id.* at 18.

[319] *Id.*

[320] *Id.*

improving diversity and inclusion in the profession. Change, however, will not come overnight nor will it be seamless,[321] as it will require buy-in from the legal academy, the Bar, and the Bench. While many are encouraged that these conversations are being had at all,[322] I opine that such buy-in should be encouraged and, indeed, incentivized by our governing bodies, institutions, and workplaces[323] to ensure that they become effective tools in diversifying the legal profession.

B. *Technology To Modify Legal Education*

The quick pivot to online learning, as a result of the COVID-19 pandemic, changed legal education forever—and many argue that it was needed.[324] First, the online delivery of legal education showed our profession the possibilities—leveling the "playing field" in terms of the delivery of legal services to marginalized communities or, at least, increasing the ways in which legal services could be delivered.[325] Professors, students, practicing attorneys, and judges alike saw that we could continue our work despite the inability to meet in person.[326] As I noted in my essay, *Teaching in the Midst of Trauma*, this new modality will continue to cause reverberations throughout the academy and the profession writ large.[327]

While the more frenetic days of the pandemic are past, the knowledge gained during those rather bleak days shines like a beacon on our path forward. The flexibility to teach class, meet clients, and hold court remotely can still be appreciated by law professors, practitioners, and judges. The possibilities for access to justice are not unnoticed.[328] In addition, generative artificial

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[321] Ward, *supra* note 306, at 59 (noting limited number of schools in particular jurisdiction or number of supervised practice positions may limit number of people who can participate in alternative licensure options, meaning majority of new attorneys being licensed by way of bar exam).

[322] *Id.*

[323] *See* Ruan, *supra* note 214, at 549-61.

[324] Brescia, *supra* note 64, at 611 ("Law schools are also examining ways to improve pedagogy in light of systemic and implicit bias and to improve the educational experience for students of color and those from other groups woefully underrepresented in the legal profession.").

[325] *Id.* at 616-20.

[326] *Id.* at 618 ("Private firms, in-house counsel, government legal departments, and nonprofit legal services providers continued practicing law even as the pandemic essentially closed the physical law offices . . . .").

[327] Brenda D. Gibson, *Teaching in the Midst of Trauma*, 27 J. LEGAL WRITING INST. 251, 271 (2023).

[328] *See* Marina Matić Bošković & Marko Novaković, *Adaptation of Judicial Systems to the Global Pandemic-A Short and Long-Term Impact of COVID-19 on Judicial Systems*, 14 J. MARSHALL L. REV. 188, 193 (2021) (indicating that some courts have reduced court fees to encourage party settlement, and courts are furthering accessibility to parties through digitization).

intelligence ("AI") has also made its way into the lawyer's toolbox.[329] While law professors are wrestling with "best practices" in incorporating AI into our courses, law practices are using the technology to save millions of dollars (and human work hours) on tasks like document review.[330] AI is also being used by larger firms in the area of "'knowledge management' and predictive legal research."[331] Firms are able to use ChatGPT and other algorithmic technologies to generate legal research briefs, draft contracts, and other transactional documents, and assist with resolving basic legal problems.[332]

Although technology does have benefits, as with many of the solutions previously discussed, it does not come without a cost. AI is not infallible. For example, during the COVID-19 pandemic, when some jurisdictions used the NCBE testing materials, facial recognition identity verification and proctoring videos were required, which reportedly led to some significant computer problems for some examinees during the test.[333] In fact, unfounded allegations of cheating were made against hundreds of examinees by the state bar, mostly in California, based on the video footage.[334] Imagine the stress and uproar that these two technological glitches caused.

Moreover, the possible perpetuation of systemic disadvantages in the use of these technological advancements must not be ignored. Alas, there are built-in inequities with the new technology. In his 2020 article, *The Future of Law Schools: Covid-19, Technology, and Social Justice*, author Christian Sundquist notes the concerns that AI is "a threat to the future of legal education and law practice," especially as "[AI] technologies tend to embed the social biases of their coders while automating the functions of lawyers."[335] More generally is the fear that many jobs in legal education (and practice) will be eliminated.[336] Many law school and firm staff members, furloughed during the COVID-19 pandemic,

[329] Significantly, AI has been a part of law practice and our everyday lives for some time as our searches on our web browsers and legal research platforms, such as Westlaw and LexisNexis, have been powered by this technology to facilitate information gathering and dissemination since the late 1900s. *See What Is the History of Artificial Intelligence (AI)?*, TABLEU, https://www.tableau.com/data-insights/ai/history [https://perma.cc/SF86-VSC3] (last visited Jam. 15, 2024). Generative AI, however, is the more recent technology that is being referenced herein.

[330] *See* Christian Sundquist, *The Future of Law Schools: Covid-19, Technology, and Social Justice*, CONN. L. REV. ONLINE, Dec. 2020, at 1, 16.

[331] *Id.*

[332] *Id.* at 16-17.

[333] Ward, *supra* note 306, at 58. These difficulties echo common concerns about the "implicit bias" in AI programs that "favor" White users. Beth Findley, *Why Racial Bias Is Prevalent in Facial Recognition Technology*, HARV. J.L. & TECH., (Nov. 3, 2020), https://jolt.law.harvard.edu/digest/why-racial-bias-is-prevalent-in-facial-recognition-technology [https://perma.cc/BZX4-NXW2].

[334] Ward, *supra* note 306, at 58-59.

[335] Sundquist, *supra* note 330, at 18.

[336] *See id.*

were not brought back due, in part, to the use of technology.[337] Additionally, minoritized and rural populations tend to have less reliable access to Wi-Fi.[338] Similarly, different home dynamics may place minoritized students and faculty at a disadvantage.[339]

Again, we must carefully tailor and temper any technological advancements to interrupt (and not foster) the systemic inequities of the past. While technology has certainly made us all think of even more ways to change and impact diversity and inclusion in the legal profession, we must be willing to do more. Indeed, "We, the people," who came together "to form a more perfect Union,"[340] must come together to form a more diverse and inclusive profession. However, considering the inertia of our past and our biases, as posited by Professor Ruan in her seminal article about racial pay equity, the legal profession analogously must somehow incentivize that effort.[341]

IV. POST-AFFIRMATIVE REACTION: LEVERAGING OUR HUMAN CAPITAL AND INCENTIVIZING CHANGE

Prescriptively, we must be concerned about the way in which the tools for admission to the legal profession are deployed in moving forward to accomplish a more diversified and inclusive population. With affirmative action no longer available, we must be careful as we continue to widen the gateway (access) to the profession. To that end, we must look at the problem of diversity and

[337] *See* Gibson, *supra* note 327, at 256-57.

[338] *See* Emily A. Vogels, *Some Digital Divides Persist Between Rural, Urban and Suburban America*, PEW RSCH. CTR. (Aug. 19, 2021), pewresearch.org/short-reads/2021/08/19/some-digital-divides-persist-between-rural-urban-and-suburban-america/ [https://perma.cc/7VT4-J4QL]; Sara Atske & Andrew Perrin, *Home Broadband Adoption, Computer Ownership Vary by Race, Ethnicity in the U.S.*, PEW RSCH. CTR. (July 16, 2021), https://www.pewresearch.org/short-reads/2021/07/16/home-broadband-adoption-computer-ownership-vary-by-race-ethnicity-in-the-u-s/ [https://perma.cc/Q63E-VFUT].

[339] *See* Emily A. Vogels, *Digitial Divide Persists Even as Americans with Lower Incomes Make Gains in Tech Adoption*, PEW RES. CTR. (June 22, 2021), https://www.pewresearch.org/short-reads/2021/06/22/digital-divide-persists-even-as-americans-with-lower-incomes-make-gains-in-tech-adoption/ [https://perma.cc/VP89-7PS4]. Oftentimes, minority families may have multigenerations living at home. *See* D'Vera Cohn, Juliana Menasce Horowitz, Rachel Minkin, Richard Fry & Kiley Hurst, *1. The Demographics of Multigenerational Households*, PEW RES. CTR. (Mar. 24, 2022), https://www.pewresearch.org/social-trends/2022/03/24/the-demographics-of-multigenerational-households/ [https://perma.cc/G8V2-JLYM] ("Among major racial and ethnic groups, Americans who are Asian, Black or Hispanic are more likely than those who are White to live in a multigenerational family household."). Minoritized students and faculty may be caregivers for younger or older family members. *Id.* Their "workspace" may be a shared, congested space, or they may be relegated to their bedrooms, which is ordinarily considered a private space. *Id.*

[340] *See* U.S. CONST. pmbl.

[341] Ruan, *supra* note 214, at 549-61.

inclusion in the legal profession at a more granular level, the people who make up the profession and the relationships they have with one another.

Famous American singer, songwriter, and actress Barbara Streisand once sang, "People who need people are the luckiest people in the world."[342] Streisand definitely had something there. In working towards its diversity goals, the legal profession must utilize its greatest asset—the people who undertake this honorable profession to uphold the laws of this land and to right the wrongs of society. To gain diversity and inclusion, we must leverage our human capital. The people who make up the profession and the relationships that they form are the "secret sauce" in our recipe for a more diverse and inclusive profession. But because of systemic racism and our implicit biases, necessarily, there must be incentives in place to move people beyond these impediments and encourage them to embrace diversity for the sake of this honorable profession.

A. *The Importance of Relationships*

To achieve diversity and inclusion in the legal profession, we must continue to educate ourselves and to accept our differences, which will at times mean different interpretations of concepts around diversity and inclusion and methods for achieving it. More saliently, we must tap into something that many of us take for granted and have not explored as the mechanism for change that it is—relationships, particularly, allyship, mentorship, and sponsorship. These relationships exist right in front of our eyes, in the rooms we sit and stand in, and between the people with whom we work and socialize. These relationships are a critical part of the solution that the legal profession has ignored or underestimated in our recipe for diversity and inclusion.

The inhumanity that we see in the treatment of minoritized populations is best addressed by exploring the thing that makes us human—our ability (and need) to form and maintain relationships. Through formed relationships between people of diverse educational, socioeconomic, political, professional ideologies, and backgrounds, great movement can be made in diversifying the legal profession. These relationships—all of them—will take time and human capital. People must be willing to be appropriately transparent[343] and open to change. This is where all the other items (tools for change in the legal profession) mentioned in Sections II and III of this Article come in. This is also where incentives become vital.

It bears saying that while these relationships are a critical part of the blueprint for change in the legal profession, the other efforts discussed above remain necessary. Without new law school and bar admissions standards, the pool of diverse applicants would be more shallow. Moreover, without the Model Rules,

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[342] BARBARA STREISAND, PEOPLE (Columbia Records 1964).

[343] *See Transparent*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/transparent [https://perma.cc/5ESG-TS4P] (last visited Jan. 15, 2024) (defining transparent as "free from pretense or deceit"). By appropriate transparency, I mean transparency that is best as determined by the circumstances.

the Canons of Judicial Conduct, and ABA Standard 303(b), there would not be adequate preparation to engage meaningfully in those relationships. Because of the previous efforts by those in the legal profession, we are better able to form these relationships and pave the way to a better understanding amongst people regarding their differences, which will reduce implicit biases and enhance diversity and inclusion. If fostered effectively, relationships will become the glue that binds people together, despite their differences.

To be clear, DEI work is excruciatingly tiring![344] And based on the percentages noted in Section I.A above, there are insufficient minority members within the legal profession to do this work. Hence, it is imperative that nonminority members of the profession assist in this work. This, however, is often missing, which supports the need to incentivize the assistance of nonminority members of the legal profession in this very important work.

Some nonminority lawyers are resistant to DEI efforts, while others are simply reticent to venture into uncharted waters.[345] Ever the perfectionists and cloaked in the notion that they must be the expert in the room (always), White lawyers are often unwilling to do the work that would make them as vulnerable as the population that they would be engaging.[346] As we well know, fear of failure is a powerful thing.[347] Fear of failure for the sake of someone you do not know or for a cause that you are not sure you even believe in is ridiculous. And so here we are—a burdened, burned out few (minority population) and an extremely reluctant nonminority population. To move forward, there must be some incentives for the many to support the few as it is only through mentorships, sponsorships, and allyships that the disjointed efforts described in the foregoing sections will come together and yield the long-sought diversity and inclusion that the legal profession has been missing.

1. Definitions and Importance

First, to define these "relationship" terms: mentorship has been defined as "a protected relationship"[348] in which a more experienced or knowledgeable person (mentor) uses their experience knowledge "to enhance[] career-related and

[344] *See* Porter Braswell, *Companies Have 'Diversity Fatigue.' This Is How To Fix It*, FAST CO. (Nov. 16, 2022), https://www.fastcompany.com/90811076/companies-have-diversity-fatigue-this-is-how-to-fix-it [https://perma.cc/8GDV-H4YF] (describing and defining "diversity fatigue" as "emotional resistance, stress, and frustration that can build up over time, especially as an organization works to address DEI issues within its own walls (and in society at large")).

[345] *See* Mariana Noli & Elyssa LeFevre Chayo, *Diversity, Equity, and Inclusion in the Profession*, 44 LA. L. REV. 40, 40 (2021).

[346] *See* Libgober, *supra* note 108, at 82.

[347] *See* Alberto Chong & Marco Z. Chong, *Feeling the Heat? Fear of Failure and Performance*, KYKLOS 2023, at 3, 3.

[348] U.S. Dep't of Energy, *What is Mentorship?*, BERKELEY LAB COMPUTING SCIS., https://cs.lbl.gov/diversity-equity-and-inclusion/csa-mentoring-program/what-is-mentorship/ [https://perma.cc/F9X3-DU8R] (last visited Jan. 15, 2024).

psychosocial development for the [less knowledgeable] protégé,"[349] while "sponsorship is a 'helping relationship in which senior, powerful people use their personal clout to talk up, advocate for, and place a more junior person in a key role.'"[350] Similarly, allyship is a relationship in which a person(s) who is not a member of a marginalized group acts to support and help others in that group.[351] All three relationships are born of dialogue and some level of engagement between at least two people.[352] Dialogue and engagement, which also serve to break down biases,[353] benefit all parties involved, but the focus is necessarily on those in the subordinate position.[354]

For example, in the mentoring relationship, the mentee's concerns are of paramount importance. For that reason, the mentor's role is to listen empathetically, share their experiences through discussion and reflection, and develop insight about the best course of conduct for the mentee to fulfill their goals.[355] Sponsorship also places the protégé's concerns at the fore.[356] However, in addition to giving feedback and advice, sponsors actively use their influence to secure opportunities for their protégées, promoting their interests and ensuring their visibility amongst key decisionmakers.[357] Allyships are the most loosely-structured relationship of the three in which the nonminority ally (in the DEI context) stands with (and does not necessarily lead, like the mentor and sponsor) the minority persons.[358] Unlike mentorships and sponsorships, allyships do not require the same level of one-on-one communication between the ally and

[349] Lori D. Patton, *My Sister's Keeper: A Qualitative Examination of Mentoring Experiences Among African American Women in Graduate and Professional Schools*, 80 J. HIGHER EDUC. 510, 511-12 (2009) (noting that "[d]espite the benefits, . . . no widely accepted definition of mentoring exists," as well as explaining that there are more "[t]raditional, male-dominated perspectives" and more modern perspectives that take into account "the personal, complex nature of the mentoring experience by under-represented groups such as African American students . . ." (citations omitted)).

[350] Herminia Ibarra & Nana von Bernuth, *Want More Diverse Senior Leadership? Sponsor Junior Talent.*, HARV. BUS. REV. (Oct. 9, 2020), https://hbr.org/2020/10/want-more-diverse-senior-leadership-sponsor-junior-talent.

[351] Rosie Clarke, *A Quick Guide: What Is Allyship?*, INCLUSIVE EMPS. (Feb. 21, 2022), https://www.inclusiveemployers.co.uk/blog/quick-guide-to-allyship/ [https://perma.cc/RLD5-9NE7] ("Allyship in the workplace is crucial for inclusion and equality.").

[352] I say "at least" two people because some of these relationships occur in a group setting, i.e., junior faculty cohort, junior associate cohort, or law school small section cohort.

[353] McCall, *supra* note 11, at 50.

[354] *See id.*

[355] U.S. Dep't of Energy, *supra* note 348.

[356] Ibarra & von Bernuth, *supra* note 350.

[357] *Id.*

[358] *See* Clarke, *supra* note 351.

minority person(s), but it may exist.[359] In fact, allyships may be focused around movements (not so much individuals), e.g., the Civil Rights Movement and, more recently, the Black Lives Matter Movement enjoyed the support of many nonminorities.[360] It is incumbent upon nonminority allies to be knowledgeable but self-effacing about their relationship with the minority population (or cause) they seek to support.[361] It is important to remember that it is not the cause of the nonminority person; the cause is that of the minority person or population.[362]

Mentoring has been recognized as being "important in graduate education";[363] however, I posit that it is important beyond higher education. Because mentorships support career advancement, job satisfaction, as well as increased pay, it is an important part of a person's career beyond school.[364] It has been noted that "[p]roviding mentors to students of color plays a major role in diversifying university faculty."[365] In his essay, *A Plea for Affirmative Action*, law professor Mitchell F. Crusto speaks candidly about the relationships that attributed to his success at Yale Law School in the early '70s—allies, mentors, and sponsors without which he would not have been able to successfully navigate the intricacies of an elite Ivy League law school environment as a first-generation African American male law student from a lower socioeconomic background.[366] Science tends to bear this out.

Data collected from law school students through survey and focus group research as a part of the Educational Diversity Project ("EDP") in 2004 and 2005 show that minority students rely heavily on relationships with faculty members and others in law school.[367] Further, Black women, because of our dual minority

[359] *See* Claire Hastwell, *What Is Allyship in the Workplace?*, GREAT PLACE TO WORK (Dec. 14, 2022), https://www.greatplacetowork.com/resources/blog/what-is-allyship-in-the-workplace [https://perma.cc/4VUM-GJCL].

[360] *See The White Southerners Who Fought US Segregation*, BBC NEWS (Mar. 12, 2019, 4:24 AM), https://www.bbc.com/news/world-us-canada-47477354 [https://perma.cc/4Q43-4B6F].

[361] *See Working Definition of Allyship: The Handout*, OR. COAL. AGAINST DOMESTIC & SEXUAL VIOLENCE, https://www.ocadsv.org/sites/default/files/resource_pub/allyshipdefinition_handout.pdf [https://perma.cc/FW46-5SZM] (noting arduous nature of being effective ally and including curated list of best practices for being nonminority ally).

[362] *See id.*

[363] Patton, *supra* note 349, at 511.

[364] *See id.* at 511-12 (highlighting mentors can afford mentees opportunities to gain experience and reward mentees as mentees' knowledge and performance increase).

[365] *Id.* at 513.

[366] Mitchell F. Crusto, *supra* note 24, at 214.

[367] Meera E. Deo, Walter R. Allen, A.T. Panter, Charles Daye & Linda Wightman, *Struggles & Support: Diversity in U.S. Law Schools*, 23 NAT'L BLACK L.J. 71, 86 (2010) (stating that 36% of APIs, 33% of African Americans, and 28% of Latines report receiving "strong support" from faculty members and other mentors versus only 20% of White law students). The EDP was a "national, longitudinal, mixed-method study of law school diversity followed one cohort [(about 8063 from 64 institutions)] of students throughout the three years

status, greatly benefit from supportive relationships such as mentorships, sponsorships, and allyships, especially when attempting to navigate the good "old boy" network often found in the legal profession.[368] Significantly, EDP focus group data tended to show "that many of the students [surveyed] rely specifically on professors of color and female professors to provide support and mentorship,"[369] which is not surprising in light of what we know about implicit bias and how it operates in the legal profession.[370] Further, Black women and people generally tend to respond better to same gender or race mentors, which again aligns with what we know about cognitive science and implicit bias.[371]

Therein, the difficulty lies—we have fewer minorities than are needed to serve as mentors and sponsors to those minorities who are in need of such support. But I posit that with proper cross-cultural and diversity training to ameliorate our implicit biases, nonminoritized persons can fill the gap.[372] While difficult, it is wholly possible with appropriate incentives for nonminoritized persons to fill those gaps.

2. The Difficulty: The Gap and the Gap-Fillers

First, the numbers do not lie: there is a gap between the percentage of minorities in the American population and those in the legal profession.[373] Data tend to show that mentoring, sponsoring, and building alliances help minorities better navigate unwelcoming spaces like the legal profession.[374] However, these relationships only work if they are designed with care, meaning that the mentors/sponsors/nonminority allies are strategically paired with mentees/sponsors/minority persons to positively impact those receiving support.[375] In the absence of perfect gender and race matches, the legal profession must nonetheless press forward using available resources to address the ever-present diversity and inclusion issue in the legal profession.[376] To

of their law school careers." *Id.* at 77. Students initially completed surveys, and those who agreed to do so were subsequently contacted and participated in follow-up focus groups and surveys. *Id.* at 77-78.

[368] Patton, *supra* note 349, at 511 (citing Richard Gregory, Editorial, *Public Perception of Perception*, 30 PERCEPTION 131, 131 (2001)) (chronicling vitality of supportive networks for Black faculty women in unfriendly and isolating academic setting).

[369] Deo et al., *supra* note 367, at 87.

[370] *See supra* Section I.C.2 (highlighting how allowing predominately White legal profession that relies on culturally biased LSAT test for entry to set standards of success in law school only perpetuates exclusionary legal traditions).

[371] *See* Patton, *supra* note 349, at 513 (discussing studies that showed female graduate students responded better to female professors and graduate advisors).

[372] *See* Gibson, *supra* note 3, at 637-47.

[373] ABA PROFILE 2022, *supra* note 92, at 26; Martinez, *supra* note 8, at 807.

[374] *See supra* Section III.B.

[375] *See* Ibarra & von Bernuth, *supra* note 350.

[376] *See id.* (noting that in context of sponsorships, "[e]ven without good matches for similarity," there have been "demonstrable benefits").

ensure that these relationships provide the support necessary for the minority protégé to thrive in the legal profession, their nonminority partners must not only be willing to fill in the gap, but they must also be willing to fully immerse themselves in what that means.[377]

Mentorship requires the selflessness of a saint and a willingness to be vulnerable and acknowledge shortcomings.[378] Both the nonminority partner and the minority protégé will need to be trained to harness their biases.[379] Because research shows that humans prefer those who are like them, cross-race, cross-gender, and cross-cultural relationships may be difficult.[380] Oftentimes, as authors Herminia Ibarra and Nana von Bernuth note in their article, *Want More Diverse Senior Leadership? Sponsor Junior Talent.*, "when we code another person as 'not like me,' what we hear from them is less likely to resonate as true, valuable, or comprehensible, and we are less likely to give them the benefit of the doubt."[381]

However, this can be fixed (or at least ameliorated)[382] by training that allows both parties to level-set their expectations and move past their biases. As noted in my earlier linguistic profiling article, moving past our biases is a multi-step, iterative process, which involves behavioral and structural (systemic) change.[383] A person must first be aware of their biases before they can address them.[384] Then, they must take concrete steps to modify their behavior.[385] The final change—structural change—is not as easily made inasmuch as the parties involved in these relationships are but a small part of those structures or systems that are in place in the legal profession writ large.[386] The hope is, however, that as these parties become educated about and begin to address their biases—forming cross-racial, cross-gender, cross-cultural relationships (be they mentorships, sponsorships, or allyships)—the structures will consequently change.

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[377] *See id.* (acknowledging complicated nature of sponsorships as pairings require that sponsor knows and appreciates protégé's ability and potential).

[378] *See* Mary-Frances Winters, *Managing the Toll of DEI Work: Dissecting the Emotional Toll and Fatigue of DEI Work*, INCLUSION SOL. (Feb. 6, 2020), https://theinclusionsolution.me/managing-the-toll-of-dei-work-dissecting-the-emotional-toll-and-fatigue-of-dei-work/ [https://perma.cc/J5CU-WTHD] (remarking on emotional toll and fatigue that many millennials of color describe experiencing while trying to educate White people on inequities that people of color face).

[379] Ibarra & von Bernuth, *supra* note 350.

[380] *See* Tamami Nakano & Takuto Yamamoto, *You Trust a Face Like Yours*, 9 HUM. & SOC. SCI. COMMS. 226, 226 (2022) (deducing that self-resemblance is important factor that affects peoples' social judgements of trustworthiness).

[381] Ibarra & von Bernuth, *supra* note 350.

[382] Gibson, *supra* note 3, at 641-42.

[383] *Id.* at 637-47.

[384] *Id.* at 638-40.

[385] *Id.* at 641-42.

[386] *Id.* at 644-45.

B. *Incentivizing the Change*

Significantly, in the absence of full willingness (or considering usual human inertia against change), there needs to be some incentives for diversity and inclusion in the legal profession. As noted in Section II.D, the business and medical professions have recognized the way diversity and inclusion affects their bottom lines—profits and patient care, respectively.[387] As a result, these professions have moved the needle in diversity efforts a bit farther than the legal profession.[388] The legal profession could quickly catch up if it would recognize the importance of diversity in its bottom line (beyond any higher, moral value that it may have), the client.

Professor Ruan presents a synthesized summary of "best practices, reform strategies, and interventions" to incentivize her audience to work towards racial pay equity.[389] Therein, she recognizes that to get the best results in matters involving issues of race in big business, there must be strategy in the way diversity initiatives are deployed and measured.[390] First, the organizations involved—in our case, the legal academy, law practices (big and small), the judiciary, governmental attorneys, our governing bodies, etc.—must be integrally involved in these efforts.[391] They must develop processes that show their commitment to diversity and inclusion.[392] To that end, Ruan suggests that there should be regular surveys to assess the climate of the organization.[393] These surveys will help set necessary internal diversity and inclusion goals and timelines to meet those goals.[394] To further ensure accountability, Ruan recommends that these organizations also have in place mandatory public disclosures around their diversity and inclusion efforts.[395]

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[387] *See supra* Section II.D; Hamilton & Bilionis, *supra* note 190.

[388] *See supra* Section II.D; Helia Garrido Hull, *Diversity in the Legal Profession: Moving from Rhetoric to Reality*, 4 COLUM. J. RACE & L. 1, 15 (2013).

[389] Ruan, *supra* note 214, at 549 (noting that after synthesizing "the most recent authority from scholars, advocates, and litigation efforts to inform innovative solutions . . . [t]hree themes emerge: (1) accountability, (2) transparency, and (3) redesign").

[390] *See id.* at 549-61.

[391] *See* Gibson, *supra* note 3, at 644-47 (discussing need for structural change to address implicit bias in legal profession).

[392] Ruan, *supra* note 214, at 549-55 (discussing need for programs and practices that foster belonging and sponsorship for minoritized populations and need to overhaul hiring and promotion practices and standards to reduce racial bias and foster diversity and inclusion).

[393] *Id.* at 555-56.

[394] *See id.* at 556.

[395] *Id.* at 558-59. Note that the ABA requires each ABA-accredited law school to have certain disclosures regarding the composition of its student population on its website and have that information be reported to the ABA. *See* STANDARDS AND RULES OF PROC. FOR APPROVAL OF L. SCHS., Standard 509 (AM. BAR ASS'N 2023). Further, while many of those schools have diversity statements posted to their websites, many of them do not have "SMART" (Specific, Measurable, Achievable, Relevant, and Time-Bound) diversity and inclusion goals towards which they are working.

Further, Ruan points out that all people involved—including the organization's leaders—must be accountable,[396] meaning that everyone in the organization should have metrics in their evaluations that measure their efforts to assist in the company's diversity efforts.[397] In my earlier linguistic profiling article, I cited an article by author and practitioner Kathleen Nalty, who noted the need to mentor and sponsor minoritized junior associates. Nalty also illustrated the benefit of incentivizing mentorship and making it an integral part of a corporation's diversity and inclusion plan.[398] In her article, Nalty spoke of a firm that added a question about mentoring and sponsorship on each partner's year-end evaluation: "What are the names of the associate attorneys you are mentoring or sponsoring?"[399] Significantly, that firm subsequently developed a Diversity and Inclusion Action Plan that specifically focused on "mentorship and sponsorship" and implemented "a 'Culture of Mentorship' to ensure that all attorneys receive equitable development opportunities so they can do their best work for the firm."[400] Here, the particular firm recognized (1) the value of diversity and inclusion and sponsorship to its bottom line—the client and the firm's profit margin—and (2) the importance of mentorship and sponsorship in achieving diversity and inclusion.

What becomes clear is that to be effective, the efforts of the corporation and individual employees must be measured from recruitment to retention.[401] The very same is true for the legal academy in terms of recruitment and retention efforts of students and faculty, as well as the legal profession, generally, and retention of its minoritized employees.[402] Undeniably, for many in the legal profession, these steps will require redesign of their organizational systems because, as previously noted, many of our American systems are heavily influenced by our history of racism.[403] This redesign, however, seems to be well underway, based upon the noted modifications in Sections II and III that the ABA and other stakeholders have made in the past or have been making more

[396] Ruan, *supra* note 214, at 560 (noting that leadership should be accountable for diversity goals in firms); *see also* Gibson, *supra* note 3, at 645-46 (explaining need for all levels of employees to be involved in diversity and inclusion efforts).

[397] Gibson, *supra* note 3, at 645 (discussing importance of forming diversity action plans or "D+I competencies framework[s]" that include measurable objectives for employees' diversity and inclusion efforts).

[398] *Id.* at 645-46 (citing Nalty, *supra* note 7, at 49-50).

[399] *Id.* at 645.

[400] Nalty, *supra* note 7, at 50.

[401] *Id.*

[402] *Id.* (emphasizing that frameworks supporting diversity and inclusion competencies are critical in any legal organization).

[403] Braveman et al., *supra* note 62, at 172 (explaining "[s]ystemic racism is so embedded in [American] systems" that many people assume it is reflective of "the natural, inevitable order of things").

recently in the last few years.[404] Certainly, all the strategic steps described herein will assure that the legal profession attains that long-sought diversity and inclusion that has eluded it for so long.

CONCLUSION

History has made us almost numb or, dare I say, "color-blind" to the vicious inequities that minoritized populations have suffered in this country. Current events are more disturbing when juxtaposed to that history. The most recent rollback of rights in the name of healing this country's racist past is no more than a cover for a return to Jim Crow, an era during which women, African Americans, and gay people had limited rights.[405] White men—who are projected to no longer be the racial majority U.S. population as of 2045—have risen up to reclaim what they see as their dwindling privilege.[406] Along with this uprising will be the downfall of the hard-fought progress the country has seen in anti-racism. More saliently, the legal profession, which has been the gatekeeper of justice, will fall even further behind in its quest for diversity and inclusion.

To address this very important issue, the legal profession has promulgated and modified various rules and testing instruments.[407] However, more is needed, particularly in the absence of one of our most often used tools, affirmative action, which is no longer available to us.[408] We must look closer at the people who comprise the profession and seek to build relationships, notwithstanding our differences, that will foster diversity and inclusion. We must be strategic about the relationships that we form, making sure that some of those relationships are with people who do not look (or, alternatively, act or learn) like us, especially considering the gap between those minoritized persons in need of mentors or sponsors and those who are available to serve in those roles. Accordingly, we must provide incentives to the nonminority people who are willing to step in the gap and ensure the success of more cross-cultural, cross-racial, and cross-gender mentorships and sponsorships. This is the "secret sauce" (or missing ingredient) in the legal profession's diversity and inclusion efforts and is almost guaranteed to address the lingering vestiges of racism (and the lack of diversity and inclusion) in the legal profession.

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[404] *See supra* Sections II and III (discussing steps taken by ABA and other governing bodies and stakeholders to remedy legal profession's longstanding problem with diversity and inclusion).

[405] White, *supra* note 136, at 2120-21.

[406] *See* Frey, *supra* note 22 (confirming 74% gain for racial minority populations between 2018 and 2060).

[407] *See supra* Sections II and III (discussing attempts made by legal governing bodies to increase diversity and inclusion in legal profession).

[408] *See* SFFA, 143 S. Ct. 2141, 2175 (2023).

APPENDIX A: EXAMPLE NEXTGEN BAR QUESTION

Last week you met with Tamara Brown, a twenty-five-year-old mother of two. Ms. Brown told you that on November 14, 2022, she received a text from her neighbor, Pamela Jackson, asking her if she could take Ms. Jackson's daughter, Sara, to school. Ms. Brown's daughter, Jessica, attended the same elementary school as Sara, and Ms. Brown did not mind transporting Sara that day. Ms. Brown picked Sara up, and Sara sat in the back seat with Jessica.

Jessica is in kindergarten. She was five years old and weighed fifty pounds at the time. Jessica was three feet, eleven inches tall. She was sitting in a booster seat.

Sara is in the second grade. She was eight years old and weighed seventy pounds at the time. Sara was four feet, two inches tall. She was wearing a seat belt; she was not in a booster seat. Ms. Brown noticed that Sara's seat belt did not fit exactly right — the shoulder belt seemed a bit high, and the lap belt was loose — but they were in a hurry and the school was only two miles away.

On the way to the school, Ms. Brown, Jessica, and Sara were involved in a car accident. Ms. Brown claims that another driver ran a red light and hit the rear passenger side of her vehicle. The other driver, however, claims that Ms. Brown was the one who ran the red light. Who was at fault has not been resolved. Upon impact, Sara was thrown into the front of the car and hit her head on the front windshield. She was taken to the hospital where she was treated for a concussion and received sixty stitches to close multiple head wounds. She was in the hospital for three days under observation. While Sara is expected to make a full recovery, she will likely have significant, permanent scarring.

Ms. Jackson filed a negligence claim against Ms. Brown. She claims that Ms. Brown ran the red light. Moreover, she claims that Sara would not have been injured if she had been in a booster seat. Ms. Jackson said that Sara always sits in a booster seat, and she assumed that Ms. Brown would have Sara sit in the booster seat that was typically reserved for Ms. Brown's other daughter, Claire, who was not present that day.

Ms. Brown has hired you to represent her in this matter. She maintains that she did not run the red light. She wants to know if Ms. Jackson's claim about the booster seat is valid. You are not sure what the legal requirements are for restraining minors in booster seats. You engaged in some preliminary statutory research and located N.C. Gen. Stat. § 20-137.1. A booster seat is a child passenger restraint system. There is no dispute that the seat belts in Ms. Brown's vehicle met federal standards applicable at the time the vehicle was manufactured.

§ 20-137.1. Child restraint systems required.

(a) Every driver who is transporting one or more passengers of less than 16 years of age shall have all such passengers properly secured in a child passenger restraint system or seat belt which meets federal standards applicable at the time of its manufacture.

(a1) A child less than eight years of age and less than 80 pounds in weight shall be properly secured in a weight-appropriate child passenger restraint system. In vehicles equipped with an active passenger-side front air bag, if the vehicle has a rear seat, a child less than five years of age and less than 40 pounds in weight shall be properly secured in a rear seat, unless the child restraint system is designed for use with air bags. If no seating position equipped with a lap and shoulder belt to properly secure the weight-appropriate child passenger restraint system is available, a child less than eight years of age and between 40 and 80 pounds may be restrained by a properly fitted lap belt only.

(b) The provisions of this section shall not apply: (i) to ambulances or other emergency vehicles; (ii) if all seating positions equipped with child passenger restraint systems or seat belts are occupied; or (iii) to vehicles which are not required by federal law or regulation to be equipped with seat belts.

(c) Any driver found responsible for a violation of this section may be punished by a penalty not to exceed twenty-five dollars ($25.00), even when more than one child less than 16 years of age was not properly secured in a restraint system. No driver charged under this section for failure to have a child under eight years of age properly secured in a restraint system shall be convicted if he produces at the time of his trial proof satisfactory to the court that he has subsequently acquired an approved child passenger restraint system for a vehicle in which the child is normally transported.

(d) A violation of this section shall have all of the following consequences:

(1) Two drivers license points shall be assessed pursuant to G.S. 20-16.

(2) No insurance points shall be assessed.

(3) The violation shall not constitute negligence per se or contributory negligence per se.

(4) The violation shall not be evidence of negligence or contributory negligence.

Questions for Discussion and Writing Assignment

1) Is there a legal issue raised by Section 20-137.1(a)? If so, write the legal issue below. If not, briefly explain why there is no legal issue.

2) Regardless of your answer to question one, is there a legal issue raised by Section 20-137.1(a1)? If so, write the legal issue below. If not, briefly explain why there is no legal issue.

3) You conducted some additional research and discovered the following message from the American Academy of Pediatrics: "Booster seats are for older children who have outgrown their forward-facing seats. All children whose weight or height exceeds the forward-facing limit for their car safety seat should use a belt-positioning booster seat until the vehicle seat belt fits properly. Typically, this is when they have reached 4 feet 9 inches in height and are 8 to 12 years of age. Most children will not fit in most vehicle seat belts without a booster until 10 to 12 years of age." Moreover, "[a]n adult seat belt fits correctly when . . . [t]he shoulder belt lies across the middle of the chest and shoulder, not the neck or throat."

Using this information, answer the legal question(s) raised by Sections 20-137.1(a) and/or (a1), even if you cannot provide a definitive answer.

4) Select the *best* answer, explaining whether the law required Sara to be secured in a child passenger restraint system:

   a. Sara was required to be secured in a child passenger restraint system because she weighed less than 80 pounds.
   b. Sara was required to be secured in a child passenger restraint system because she was not properly secured by the seat belt.
   c. Sara was required to be secured by a seatbelt because she was less than 16 years of age.
   d. Sara was not required to be secured in a child passenger restraint system because she was eight years of age.
   e. Sara was not required to be secured in a child passenger restraint system because she was secured by a seat belt.
   f. Sara was not required to be secured in a child passenger restraint system because she had outgrown a forward-facing seat.

5) Assuming Sara was required to be secured in a child passenger restraint system, explain Ms. Brown's potential liability under Section 20-137.1.

6) Write a letter to Ms. Brown explaining the results of your research. The letter must not exceed one page and the font must be Century Schoolbook or Times New Roman, 12-point font. Do not include a letterhead or caption.