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# A TEACHER WHO LOOKS LIKE ME

CHRIS CHAMBERS GOODMAN\*  
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## INTRODUCTION

The justice, business, and education “cases” for diversity are widely discussed and reported elsewhere in depth.<sup>1</sup> While the common value of diversity is recognized in each realm, moving from discussion to reality for diversity in any of these realms remains elusive.<sup>2</sup> As the various cases suggest, the term “diversity” is defined and used in many different ways.<sup>3</sup>

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<sup>1</sup> See, e.g., Brief for 65 Leading American Businesses as Amici Curiae Supporting Respondents, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241) (arguing that leading businesses in-turn benefit from hiring employees educated in diverse environments and finding that universities have a compelling interest in attaining a diverse student body); ASS’N. OF AM. COLLS. & UNIVS., *Making Excellence Inclusive Series* (2005), <http://www.aacu.org/compass/publications.cfm> (providing a list and summary of the papers that outline a comprehensive procedure for universities to benefit from diversity through inclusive excellence).

<sup>2</sup> See SARAH E. REDFIELD, *DIVERSITY REALIZED: PUTTING THE WALK WITH THE TALK FOR DIVERSITY IN THE LEGAL PROFESSION* 1–3 (2009) (“Efforts for diversity will fail because the numbers of potentially qualified entrants cannot support anything close to parity with the diversity in the American population.”).

<sup>3</sup> See, e.g., Charles E. Daye et al., *The Educational Diversity Project: Analysis of Longitudinal and Concurrent Student and Faculty Data* 4-6 tbl.2 (Law Sch. Admissions Council, LSAC Grants Report Ser. 10-01, 2010), available at <http://www.lsac.org/lsacresources/research/gr/pdf/gr-10-01.pdf> (listing six different domains of diversity and the differing factors that contribute to each); Chris Chambers Goodman, *Retaining Diversity in the Classroom: Strategies for Maximizing the Benefits that Flow from a Diverse Student Body*, 35 PEPP. L. REV. 663, 667–72 (2008) (describing the benefits that flow from student diversity).

While there may be a tendency to think of diversity in terms of numbers of minorities or women present in a given setting, in the educational context — our primary area of focus here — diversity concepts extend well beyond the numbers to encompass both inclusive excellence and educational engagement. The Association of American Colleges and Universities (“AACU”), defines diversity as “engagement across racial and ethnic lines comprised of a broad and varied set of activities and initiatives.”<sup>4</sup> In keeping with this definition, the AACU work on diversity focuses not on individual student characteristics or numbers, but on engagement benefits, where diversity exposes students to a wider range of viewpoints and contributes to broader learning.<sup>5</sup> To support this approach, the AACU authors refer back to John Stuart Mill’s concept of the marketplace of ideas<sup>6</sup> and explain, “[p]erhaps this core characteristic of a diverse campus community is the key mechanism by which diversity makes an intellectual atmosphere, in the words of Justice Lewis Powell, more ‘conducive to speculation, experiment and creation—so essential to the quality of higher education.’”<sup>7</sup>

As understanding of the role of diversity in learning has evolved, educators have recognized that diversity is no longer “a collection of static pieces—a programmatic element here, a compositional goal for the student body there.”<sup>8</sup> Instead, a model of “inclusive excellence” has emerged, which “re-envision[s] both quality and diversity.”<sup>9</sup> Such inclusive excellence “reflects a striving for excellence in higher education that has been made more inclusive by decades of work to infuse diversity into recruiting,

<sup>4</sup> Jeffrey F. Milem et al., *Making Diversity Work on Campus: A Research-Based Perspective* 4 (2005), available at [http://www.aacu.org/inclusive\\_excellence/documents/Milem\\_et\\_al.pdf](http://www.aacu.org/inclusive_excellence/documents/Milem_et_al.pdf).

<sup>5</sup> See *id.* at 7 (“It appears from these findings that increasing the compositional diversity of a campus by increasing the representation of students from various racial and ethnic groups leads to a broader collection of thoughts, ideas, and opinions held by the student body, and this in turn increases the probability of exposing a student, irrespective of his or her race and opinion, to a wider range of perspectives on a particular issue.”).

<sup>6</sup> See *id.* (“In that essay, Mill argues that popular opinions must be submitted to the ‘marketplace of ideas’ and suggests that when perceptions are narrowed by the limits or biases of experience, geography, education, or class, they become the basis of judgment and social policy, and true social advancement is ostensibly compromised.”); see also *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (“The classroom is peculiarly the ‘marketplace of ideas.’ The Nation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth ‘out of a multitude of tongues, [rather] than through any kind of authoritative selection.’” (citations omitted)).

<sup>7</sup> Milem et al., *supra* note 4, at 7 (citing *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978)). The authors go on to further explain various theories supporting the value of diversity in education. *Id.* at 7–8.

<sup>8</sup> Damon A. Williams et al., *Toward a Model of Inclusive Excellence and Change in Postsecondary Institutions* 3 (2005), available at [http://www.aacu.org/inclusive\\_excellence/documents/Williams\\_et\\_al.pdf](http://www.aacu.org/inclusive_excellence/documents/Williams_et_al.pdf).

<sup>9</sup> Milem et al., *supra* note 4, at iii.

admissions, and hiring; into the curriculum and co-curriculum; and into administrative structures and practices.”<sup>10</sup> That is, inclusive excellence demands that the whole institution and community of learners be involved in assuring and deriving benefit from diversity on campus.<sup>11</sup> The core definition of inclusive excellence as used in this context includes:

1. *A focus on student intellectual and social development.* Academically, it means offering the best possible course of study for the context in which the education is offered.
2. *A purposeful development and utilization of organizational resources to enhance student learning.* Organizationally, it means establishing an environment that challenges each student to achieve academically at high levels and each member of the campus to contribute to learning and knowledge development.
3. *Attention to the cultural differences learners bring to the educational experience and that enhance the enterprise.*
4. *A welcoming community that engages all of its diversity in the service of student and organizational learning.*<sup>12</sup>

These definitions of diversity and inclusive excellence provide the context for this article’s focus on the significance of the *look* of the faculty, particularly law school faculty, and on how such a *look* may or may not further the accomplishment of diversity. As the broader definitional context would indicate, there are many kinds of diversity that make up this *look*, both those that are visible and those less so—race, ethnicity, gender, age, sexual orientation, religion, socioeconomic status, family status, and background. While most studies consider mainly those aspects of diversity that are most visible and apparent to students, particularly gender, race and ethnicity,<sup>13</sup> this article encourages a view beyond the most obvious and offers an approach for a “makeover” of a faculty’s *look* so as to maximize positive aspects of existing diversity in numbers and in institutional appearance across as broad a perspective as possible.<sup>14</sup> The article also

<sup>10</sup> *Id.*

<sup>11</sup> *See id.* at vi; *see also infra* Part III.

<sup>12</sup> Milem et al., *supra* note 4, at vi.

<sup>13</sup> *Id.* at 3 (noting that numerous programs have been implemented to heighten awareness of these factors). *See generally* REDFIELD, *supra* note 2.

<sup>14</sup> *See, e.g.,* Damon A. Williams et al., *Toward a Model of Inclusive Excellence and Change in Postsecondary Institutions* 9–10 (2005), available at [http://www.aacu.org/inclusive\\_excellence/documents/Williams\\_et\\_al.pdf](http://www.aacu.org/inclusive_excellence/documents/Williams_et_al.pdf). The authors criticize what they call “first order change,” which occurs with superficial “fixes” like adding photographic diversity to advertising brochures, stating “an institution interested in recruiting more students of color may

discusses how to enhance each component of such a *look* in combination with an inclusive excellence approach to higher education.

The attention to *look*, however, is only the foundation for a focus on broader issues and benefits of a diverse faculty and institutional commitment to inclusive excellence and student engagement. These broader commitments provide exposure to multi-cultural perspectives, recognize and make effective use of the cultural differences in learning styles, and provide a more welcoming community, all of which contribute to social and intellectual development for all of our students.<sup>15</sup> In this broader perspective, this article begins with a focus on the significance of the *look* of the faculty for successful student outcomes and then discusses possible “makeovers” to that *look*, both short and long-term. Part I discusses diversity in terms of numbers and briefly summarizes the history and other research literature on the importance of faculty diversity in law schools. Part II moves beyond just numbers to inclusive excellence and engagement and analyzes the particular manifestations of inadequate faculty diversity, addressing not only the student perspective, but also perspectives of faculty, administrators, and the larger communities with which they interact. This Part also includes an exploration of the culture of integration in law schools and the psychological research on how greater diversity lessens biases and permits a critical reframing of conventional approaches to education. In order to reap the greater rewards of diversity in higher education, that diversity must not be concentrated in one group, such as students or faculty. Instead, diversity must permeate the institution from the students to the staff to the faculty. Part III addresses how to change a faculty *look* and offers an approach to surveying existing resources and redefining them to maximize benefits of diversity. This Part also explains

include more pictures of these students in campus brochures and may recruit at more racially diverse high schools, but these attempts are usually done only within admissions and enrollment management and do not influence the larger norms and practices of the institution.” *Id.* Others have written about the lack of institution wide commitment. When a university president is asked the percentage of students of color, poverty, or the like in the incoming class, he (or she, occasionally) can recite the statistic. However when asked the percentage of students of color within the top ten percent of the graduating class, or some other such achievement, “they probably would not know the answer.” Georgia L. Bauman et al., *Achieving Equitable Educational Outcomes with All Students: The Institution’s Roles and Responsibilities* 11 (2005), available at [http://www.aacu.org/inclusive\\_excellence/documents/Bauman\\_et\\_al.pdf](http://www.aacu.org/inclusive_excellence/documents/Bauman_et_al.pdf). As the authors note, “[m]ost institutions evaluate their effectiveness in serving historically underrepresented students in terms of access, to a lesser extent in terms of persistence and completion, and rarely ever in terms of high achievement among specific groups.” *Id.* at 11.

<sup>15</sup> See *infra* Part III.B. Because the three categories of diversity (student, faculty, and staff) are co-extensive and have an impact on each other, one cannot fully discuss faculty diversity without reference to student diversity and vice versa. Given that much has been written on student diversity, this article revisits some of that material, but emphasizes the specific issue of faculty diversity to the extent possible.

the impact of faculty diversity on the goal of inclusive excellence, focusing on the climate, environment, and pedagogical issues that revolve around diversity.

While an institutional commitment and dedication of resources to diversity would lead to the obvious solution—hiring a greater number of faculty from non-dominant cultural groups—institutions falter at the implementation stage. Recognizing that the obvious answer is not the immediately practical one, Part III.B provides a step-by-step approach of identifying and publicizing diversity goals, surveying human and other resources and considering other assets, and otherwise implementing identified strategies to maximize the school's manifestation of diversity characteristics, and thereby augment existing diversity. When hiring opportunities are infrequent, or non-existent, these strategies can showcase the school's current level of diversity in a more positive light and bring about some real change (short of new hires).

## I. HISTORICAL BACKGROUND ON DIVERSITY IN EDUCATION

### A. From Student Segregation to Integration

Educational institutions were long segregated and largely mono-racial. Anglo professors and teachers taught predominantly Anglo students, and African American professors and teachers taught African American students.<sup>16</sup> Desegregating educational institutions was a long process, as the country moved from segregated to integrated facilities under the impetus of the United States Supreme Court's pronouncement that "[s]eparate educational facilities are inherently unequal."<sup>17</sup> After *Brown*, working under the United States Supreme Court edict "with all deliberate speed,"<sup>18</sup> some schools integrated more quickly and fully than others.<sup>19</sup> However, just as simply outlawing segregation in the workplace did not necessarily lead to integration in every workplace, prohibiting segregation in schools did not actually or equitably integrate every school, especially

<sup>16</sup> See Debra Humphreys, *Faculty Recruitment in Higher Education: Research Findings on Diversity and Affirmative Action*, DIVERSITY WEB, [http://www.diversityweb.org/diversity\\_innovations/faculty\\_staff\\_development/recruitment\\_tenure\\_promotion/faculty\\_recruitment.cfm](http://www.diversityweb.org/diversity_innovations/faculty_staff_development/recruitment_tenure_promotion/faculty_recruitment.cfm) (last visited Sept. 26, 2012) (noting that in 1941, only two African American faculty members taught at all of the predominantly white colleges and universities surveyed).

<sup>17</sup> See *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

<sup>18</sup> *Brown v. Bd. of Educ.*, 349 U.S. 294, 301 (1955).

<sup>19</sup> The general progress of integration is beyond the scope of this article. See generally MARTHA MINOW, IN BROWN'S WAKE: LEGACIES OF AMERICA'S EDUCATIONAL LANDMARK 92 (2010) (reflecting on the educational legacy of *Brown*).

those at the top ranks of the educational hierarchy—four year colleges and graduate schools.<sup>20</sup>

To help quicken the pace of dismantling segregation in the workplace, then-President Johnson issued an executive order to those who contracted with the federal government to take “affirmative action” to ensure non-discrimination based on race or ethnicity.<sup>21</sup> The Civil Rights Act of 1964 expanded the coverage of the executive order, through federal legislation, by providing for non-discrimination in public accommodations, by large employers and businesses, and by other entities that receive federal funding.<sup>22</sup> The federal funding requirement was an incentive that applied to colleges and graduate schools, and thus these institutions began implementing their own affirmative action programs to satisfy the dual goals of discontinuing discrimination and remedying past discrimination in their admissions and employment processes.<sup>23</sup>

The focus of affirmative action in an educational context began with admitting and enrolling students in increasing numbers from previously underrepresented groups, namely Asians, Latinos, and African Americans.<sup>24</sup> As these integration policies began to succeed and to make progress towards diversifying student bodies, the phrase “reverse discrimination” entered the dialogue and the first lawsuits were filed by Anglo students who were denied admission under affirmative action policies.<sup>25</sup> *Regents of the University of California v. Bakke* was the first of the complaints by such students to bring the constitutional issues to the Supreme Court.<sup>26</sup> Bakke sued because he was denied admission to medical school; he claimed that he was better qualified than minority students who

<sup>20</sup> Mary Ann Connell, *Race and Higher Education: The Tortuous Journey Toward Desegregation*, 36 J.C. & U.L. 945, 979 (2010) (“While the massive higher education desegregation cases are ended, desegregation is still ‘unfinished business.’”).

<sup>21</sup> Exec. Order No. 11, 246, 3 C.F.R. 339 (1964-1965).

<sup>22</sup> Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 28 U.S.C. and 42 U.S.C. (2006)). In addition, Title IX of the Education Amendments of 1972 prohibited sex discrimination in educational programs that receive federal funding. See Pub. L. No. 92-318, 86 Stat. 235, 373 (codified as amended at 20 U.S.C. §§ 1681-1688 (2006)).

<sup>23</sup> CHARLES V. DALE, CONG. RESEARCH SERV., RS22256, FEDERAL AFFIRMATIVE ACTION LAW: A BRIEF HISTORY 2 (2005), available at <http://fpc.state.gov/documents/organization/53577.pdf>.

<sup>24</sup> See Nadine Strossen, *Thoughts on the Controversy Over Politically Correct Speech*, 46 SMU L. REV. 119, 135 (1992) (“Since the advent of affirmative action programs in higher educational institutions, various minority groups and women have participated in all phases of higher education in substantially greater numbers.”).

<sup>25</sup> See, e.g., *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 269–70 (1978) (explaining how an Anglo male challenged the admissions process of a medical school); *Gratz v. Bollinger*, 539 U.S. 244, 249–50 (2003); *Hopwood v. Texas*, 236 F.3d 256, 261 (5th Cir. 2000) (holding that a law school had discriminated against an Anglo student).

<sup>26</sup> *Bakke*, 438 U.S. at 269–70.

were admitted and that he had been discriminated against in reverse, as an Anglo, because of the school's special admissions program which reserved a set number of slots (16 out of 100) for students of color.<sup>27</sup> In response, the United States Supreme Court delivered a fractured group of opinions, with no more than a plurality for any portion of the decision.<sup>28</sup> The plurality opinion settled on the illegality of strict quotas and the permissibility of diversity as a goal to help enrich the educational process.<sup>29</sup> The *Bakke* case permitted consideration of race and ethnicity as a "plus" factor, in a flexible system such as the "Harvard Plan" referenced in the opinion.<sup>30</sup> *Bakke* thus launched the concept of diversity as both a means and an end—a means towards the end—of a more complete diverse education.<sup>31</sup>

The United States Supreme Court's approval of affirmative action in the *Bakke* case allowed institutions of higher education to constitutionally seek to gain the benefits of a more diverse population by increasing diverse admissions to their student body.<sup>32</sup> In the short term, students from underrepresented groups were admitted and enrolled in larger numbers.<sup>33</sup>

<sup>27</sup> *Id.* at 278–79.

<sup>28</sup> *See id.* at 272.

<sup>29</sup> *Id.* at 316; see Rachel F. Moran, *Diversity and Its Discontents: The End of Affirmative Action at Boalt Hall*, 88 CALIF. L. REV. 2241, 2252 (2000) ("Whether or not an institution of higher education had engaged in past discrimination, it could select its student body in ways that enriched the learning process. Along with other personal traits, race and ethnicity could be considered to the extent that they correlated with perspectives that would otherwise be absent in the entering class.").

<sup>30</sup> *Bakke*, 438 U.S. at 379.

<sup>31</sup> *See id.* at 314–16.

<sup>32</sup> *See* Luz E. Herrera, *Challenging a Tradition of Exclusion: The History of an Unheard Story at Harvard Law School*, 5 HARV. LATINO L. REV. 51, 63 (2002) (detailing the need for more diverse faculty at Harvard Law School); Moran, *supra* note 29, at 2300-01 (discussing the dynamics of faculty at Boalt Hall and its effects on diversity).

<sup>33</sup> *See* Joseph Berger, *The Bakke Case 10 Years Later: Mixed Results*, N.Y. TIMES, July 13, 1988, at B6; *see also* SUSAN WELCH & JOHN GRUHL, AFFIRMATIVE ACTION AND MINORITY ENROLLMENTS IN MEDICAL AND LAW SCHOOLS 31 (1998). Indeed, in some cases, students from certain Asian groups, including Korean, Japanese, Chinese and Taiwanese began to perform on paper at least as well as, if not better than the Anglo applicants, and "[o]nce a satisfactory amount of diversity could be achieved without special attention to race or ethnicity, these characteristics were treated like any other. For example, certain Asian-American subgroups no longer received a plus because they were adequately represented without one." Moran, *supra* note 29, at 2254 & nn.53–55. Thus, those groups already having adequate representation would not receive preference in the admissions process. *Id.* The point system approved of in *Bakke* and *Grutter* is an effective way to enforce affirmative action, while still not burdening the ethnic majority to the point of reverse discrimination, due to the flexibility of the system. *See* Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of Affirmative Action*, 94 CALIF. L. REV. 1063, 1112 (2006). Asian groups were seen as "affirmative action success stories" and the myth of the "model minority" was born. Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism and Narrative Space*, 81 CALIF. L. REV. 1241, 1258–65 (1993). Unfortunately, though, the portrayal of Asian Americans "model minority" tries to justify "ignoring the unique discrimination they face." *See id.* The situation of Asian Americans tends to be seen differently from the typical Black/White paradigm of American race relations. *See* STACEY J. LEE, UNRAVELING THE "MODEL MINORITY" STEREOTYPE 4 (2d ed. 2009).



With this increase in student diversity in the decades after *Bakke*,<sup>34</sup> however, the divide between the percentages of professors of color and students of color became even more obvious, and students began asking for, and later demanding, a more diversified faculty.<sup>35</sup> Schools began using affirmative action for faculty appointments in efforts to add some faculty of color to their ranks. This movement to practice affirmative action in faculty hires was not insulated from the backlash against affirmative action in student matriculation. Just as the “reverse discrimination” chants had been raised in student admissions, so faculties have to consider the “potential lawsuit” from Anglo male professor applicants. Some studies note that these fears are unfounded,<sup>36</sup> but nevertheless, these threats tend to resonate at faculty meetings and the diversity of law school faculty has not increased dramatically over the last decade.<sup>37</sup>

While some progress has been made over the past several decades in diversifying American institutions, the flexibility, and hence uncertainty, in the fractured *Bakke* opinion opened the way for future anti-affirmative action litigation, which in turn chipped away at the affirmative action mandate, first in the areas of public contracting,<sup>38</sup> and then in the field of higher education.<sup>39</sup> This continuing debate over whether affirmative action

<sup>34</sup> LSAC Volume Summary Archive: *Matriculants by Ethnic and Gender Group*, LAW SCH. ADMISSIONS COUNCIL (2000), <http://lsac.org/lisacresources/data/vs-ethnic-gender-metrics-archive.asp> [hereinafter *Matriculants by Ethnic and Gender Group*].

<sup>35</sup> See Jonathan S. Cohn, *A Student Sit-In*, HARV. CRIMSON, June 9, 1988, available at <http://www.thecrimson.com/article/1988/6/9/a-student-sit-in-pwishing-the-more/>.

<sup>36</sup> See, e.g., Humphreys, *supra* note 16 (stating that “[i]n fact, evidence suggests that white men are still the most successful group at securing the best jobs in higher education”; noting another study which concluded that “only 11 percent of scholars of color were actively sought after by several institutions simultaneously”; and also finding a near equal distribution (around 25% each) of faculty with the most job options when categorized as white male, white female, female of color, or male of color).

<sup>37</sup> See Meera E. Deo et al., *Paint by Number? How the Race and Gender of Law School Faculty Affect the First-year Curriculum*, 29 CHICANO-LATINO L. REV. 1, 8 (2010) In the 2004-05 academic year, 17.5% of law professors of all ranks were faculty of color. *Id.* For instance, notwithstanding the significant increase in Asian students, Asian faculty, particularly in law schools, remain underrepresented and therefore remain part of many affirmative action hiring policies. *The Racial Gap in the Promotion to Tenure of Law Professors: Report of the Committee on the Recruitment and Retention of Minority Law Teachers*, ASS’N OF AM. LAW SCH., <http://www.aals.org/documents/racialgap.pdf> (last visited Oct. 16, 2012) [hereinafter *Racial Gap*]. “[A]n Asian American male professor reported that, when he was first hired by a law school, one of the senior white male faculty members sued the law school for ‘reverse discrimination.’” *Id.* The number of Asian American law faculty during the 2004-05 year was 23, out of a total of 5876 law faculty at AALS accredited law schools nationwide. Deo et al., *supra*, note 37, at 9.

<sup>38</sup> See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 505 (1988) (holding that, in public construction contracts, the treatment of citizens on a racial basis violates the Equal Protection Clause).

<sup>39</sup> See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 317 (2003); *Gratz v. Bollinger*, 539 U.S. 244, 244 (2003). In both *Grutter* and *Gratz*, the Court ruled that the schools’ affirmative action policies discriminated against Anglo students. See *Grutter*, 539 U.S. at 317; *Gratz*, 539 U.S. at 244. Since the Court’s 2003 decision in *Grutter*, two major college admissions test cases have developed. Lyle

is reverse discrimination and therefore violates the equal protection clause of the constitution led to the *Grutter* and *Gratz* decisions of the United States Supreme Court in 2003.<sup>40</sup> *Grutter* affirmed Justice Powell's notion from the plurality opinion in *Bakke* that diversity is a compelling interest adequate to justify some race-based consideration in the admissions process.<sup>41</sup> The *Grutter* Court noted that "attaining a diverse student body is at the heart of the Law School's proper institutional mission," and discussed some of the benefits of diversity in education: promoting "cross-racial understanding," "prepar[ing] students for an increasingly diverse workforce and society," providing "access for all" and helping to deconstruct racial stereotypes.<sup>42</sup> As the *Grutter* Court realized, the educational benefits from diversity are many: "the vitality, stimulation, and educational potential of an institution are directly related to the composition of its student body, faculty, and staff."<sup>43</sup> Part of the diversity goal is realized "not only by virtue of students sitting next to one another in the classroom, but through various types of interaction, including classroom discussions."<sup>44</sup> Law schools can best serve their students, and prepare them for the increasingly borderless world, by promoting an environment where diverse people come together.<sup>45</sup>

### B. Faculty Diversity Lags Behind Student Diversity

Under *Bakke* and then *Grutter*, diversity in the student population has increased.<sup>46</sup> In the fall of 2010, out of a total of 49,700 law school matriculants, 3,530 were Asian; 3560 were African American or Black; 3020 were Hispanic, Latino, or Puerto Rican; and 1900 claimed two or

Denniston, *New Test of College Affirmative Action*, SCOTUS BLOG (Sept. 15, 2011, 10:59 PM), <http://www.scotusblog.com/?p=127255>. One, *Fisher v. University of Texas at Austin*, where the plaintiff is white and was denied admission to the University, challenged the school's use of a "race-based coding system" in determining admissions. *Id.* The second case involves the University of Michigan in Ann Arbor and a statewide referendum banning the use of race in admissions; it is unlikely to reach the Court for some time. *Id.*

<sup>40</sup> See *Grutter*, 539 U.S. at 306; *Gratz*, 539 U.S. at 244.

<sup>41</sup> *Grutter*, 539 U.S. at 324 (quoting Regents of the University of California v. Bakke, 438 U.S. 265, 311 (1978) (Powell, J., concurring)).

<sup>42</sup> *Id.* at 329–30 (discussing some of the benefits that flow from having a diverse student body).

<sup>43</sup> Milem et al., *supra* note 4, at 6.

<sup>44</sup> Deo et al., *supra* note 37, at 7.

<sup>45</sup> Kang & Banaji, *supra* note 33, at 1101 (suggesting via the "social contact hypothesis," that "when individuals of different social categories interact face-to-face under certain conditions, their stereotypes and prejudice will be tempered." When diverse law school environments are fostered the negative conceptions due to stereotypes can be disproved first hand, resulting in overall less prejudicial thinking).

<sup>46</sup> See *Matriculants by Ethnic and Gender Group*, *supra* note 34.

more races or ethnicities.<sup>47</sup> While these numbers show an increase from 2000, admittedly, room for improvement remains if there is to be any parity with the population of the nation, where each level of the profession remains out of sync from a population that is increasingly more diverse.<sup>48</sup>

Recognizing the importance of the issue, the American Association of Law Schools (AALS),<sup>49</sup> the Society of American Law Teachers (SALT),<sup>50</sup> and the American Bar Association<sup>51</sup> have long-standing commitments to diversifying the profession and the professoriate. Not surprisingly, understanding the attributes of diversity and how best to achieve diversity in the academy has been the subject of numerous law review articles, studies, reports, and conferences.<sup>52</sup> Notwithstanding decades of such

<sup>47</sup> *Id.*

<sup>48</sup> See U.S. CENSUS BUREAU, CENSUS DATA 2010, available at <http://2010.census.gov/2010census/data/>; U.S. Minorities Will Be the Majority by 2042, Census Bureau Says, AMERICA.GOV, available at <http://www.america.gov/st/peopleplace-english/2008/August/20080815140005xlrennef0.1078106.html> (finding that by 2042, minorities are expected to comprise more than 50 percent of the U.S. population).

<sup>49</sup> See ASS'N OF AM. LAW SCH., *Bylaws of the Association of American Law Schools, Inc., Section 6-3. Diversity: Nondiscrimination and Affirmative Action* (2008), available at [http://www.aals.org/about\\_handbook\\_bylaws.php](http://www.aals.org/about_handbook_bylaws.php); see also Richard Delgado & Derrick Bell, *Minority Law Professors' Lives: The BellDelgado Survey*, 24 HARV. C.R.-C.L. L. REV. 349, 351-52 (1989) (describing calls of AALS presidents on this point); Veryl Victoria Miles, *Recruiting and Retaining Faculty of Color in the Legal Academy: A Longstanding Commitment of the Association of American Law Schools*, 10 WASH. & LEE RACE & ETHNIC ANC. L.J. 65, 65-67 (2004) (describing AALS history on this point).

<sup>50</sup> See SOC'Y OF AM. LAW TEACHERS, *About Us*, <http://www.saltlaw.org/sections/view/aboutus> (last visited Sept. 24, 2012) ("SALT's mission is to: make the legal profession more inclusive and reflective of the great diversity of this nation. . .").

<sup>51</sup> See AM. BAR ASS'N, *ABA Standard 211, ABA Standards for Approval of Law Schools 2011-2012* 12-14 (2012), available at [http://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/Standards/chapter\\_2\\_2012\\_2013\\_aba\\_standards\\_and\\_rules.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/chapter_2_2012_2013_aba_standards_and_rules.authcheckdam.pdf) ("A law school shall foster and maintain equality of opportunity in legal education, including employment of faculty and staff, without discrimination or segregation on the basis of race, color, religion, national origin, gender, sexual orientation, age or disability." Standard 212 provides that "(a) Consistent with sound legal education policy and the Standards, a law school shall demonstrate by concrete action a commitment to providing full opportunities for the study of law and entry into the profession by members of underrepresented groups, particularly racial and ethnic minorities, and a commitment to having a student body that is diverse with respect to gender, race, and ethnicity[] [and] (b) Consistent with sound educational policy and the Standards, a law school shall demonstrate by concrete action a commitment to having a faculty and staff that are diverse with respect to gender, race and ethnicity.").

<sup>52</sup> See, e.g., Pati Abdullina, *AALS Statistical Report on Law School Faculty and Candidates for Law Faculty Positions*, ASS'N OF AM. LAW SCH. (2009), <http://www.aals.org/statistics/2009dl/gender.html> [hereinafter *AALS Statistical Report*]; *Perspectives on Diversity: AALS Special Commission on Meeting the Challenges of Diversity in an Academic Democracy*, ASS'N OF AM. LAW SCH. (1997), available at [http://www.aals.org/services\\_specialreports\\_diversity.php](http://www.aals.org/services_specialreports_diversity.php); ABA Presidential Initiative Comm'n on Diversity, *Diversity in the Legal Profession: The Next Steps?*, AM. BAR ASS'N 17-24 (Apr. 2010) [hereinafter *Next Steps*]; *Racial Gap*, *supra* note 37; Richard A. White, *The Promotion, Retention, and Tenuring of Law School Faculty: Comparing Faculty Hired in 1990 and 1991 to Faculty Hired in 1996 and 1997* (2004), available at <http://216.203.210.230/racialgap.html>; Jon C. Dubin, *Faculty Diversity as a Clinical Legal Education Imperative*, 51 HASTINGS L.J. 445, 455 (2000); Suzanne E. Eckes,

commitment and study, the diversity of the professoriate and law school administration remains limited.<sup>53</sup> Reporting in 2010, the ABA Section of Legal Education and Admissions to the Bar showed that for all full-time faculty, 698 or 8.6% were African American; 48 or 0.6% were American Indian; 310 or 3.8% were Asian; 77 or 1.0% were Mexican American; 78 or 1.0% were Puerto Rican; 148 or 1.8% were Other Hispanic; and 6,599 or 81.5% were White. For tenured faculty, 84.3% are White.<sup>54</sup> Significant change in this representation does not seem likely. New professors continue to be predominantly male at each level except lecturer and instructor, and predominantly White at all levels; for 2008-2009, 82% of new professors were male and the same percentage was White.<sup>55</sup> Among the deans of the nation's law schools, the AALS reports that there are no American Indian/Alaskan Natives, one Asian, seventeen Blacks, and nine Hispanics; forty-one deans are women and 158 men.<sup>56</sup> These percentages are lower than the comparable student enrollment in all minority categories except African American and Puerto Rican: African American, 10,173 students or 7.00%; American Indian, 1273 students or 0.88%; Asian Pacific Islander 11,327 or 7.80%; Mexican American 2,592 or 1.78%; 626 Puerto Rican students or 0.43%; and Other Hispanic 6,514 or 4.49%.<sup>57</sup>

*Diversity in Higher Education: The Consideration of Race In Hiring University Faculty*, 2005 BYU EDUC. & L. J. 33, 33; Patrick M. Garry, *The Next Step in Diversity: Extending the Logic of Grutter v. Bollinger to Faculty Tenure*, 82 DENV. U.L. REV. 1, 1 (2004); Kevin R. Johnson, *The Importance of Student and Faculty Diversity in Law Schools: One Dean's Perspective*, 96 IOWA L. REV. 1549, 1550 (2011); Miles, *supra* note 49, at 69-71 (summarizing approaches for enhancing minority hires); Ediberto Roman & Christopher B. Carbot, *Freeriders and Diversity in the Legal Academy: A New Dirty Dozen List?*, 83 IND. L.J. 1235 (2008); Deo et al., *supra* note 37, at 8-10; *see also* Delgado & Bell, *supra* note 49, at 349 (detailing a survey and analysis of the place and experience of minority faculty in the legal academy).

<sup>53</sup> *See, e.g.*, Lauren Carasik, *Renaissance or Retrenchment: Legal Education at a Crossroads*, 44 IND. L. REV. 735, 771-72 (2011). As Dean Johnson summarizes, "[d]espite this oft-stated commitment, the racial diversity of law-school student bodies and faculties leveled off in the early twenty-first century." Johnson, *supra* note 52, at 1550. For example, there is a need for increased hiring of Latina/o faculty. Roman & Carbot, *supra* note 52, at 1238-39.

<sup>54</sup> AM. BAR ASS'N, SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE TABLE B-6 TOTAL STAFF & FACULTY MEMBERS 2008-2009 (2010), *available at* <http://www.americanbar.org/content/dam/aba/migrated/legaled/statistics/charts/facultyinformationbygender.authcheckdam.pdf>. There are also status differences. *See, e.g.*, Ann C. McGinley, *Reproducing Gender on Law School Faculties*, 2009 BYU L. REV. 99, 102, 150-51 (2009). For reasons which remain unclear to the authors, these numbers are not identical to those reported by the AALS, *see AALS Statistical Report, supra* note 52. However, for either set, the numbers are low.

<sup>55</sup> *AALS Statistical Report, supra* note 52.

<sup>56</sup> *Id.*

<sup>57</sup> *African American J.D. Enrollment 1971-2010*, AM. BAR ASS'N, [http://www.americanbar.org/content/dam/aba/migrated/legaled/statistics/charts/stats\\_13.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/legaled/statistics/charts/stats_13.authcheckdam.pdf) (last visited Sept. 21, 2013); *American Indian or Alaska Native J.D. Enrollment 1971 - 2010*, AM. BAR ASS'N, [http://www.americanbar.org/content/dam/aba/migrated/legaled/statistics/charts/stats\\_11.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/legaled/statistics/charts/stats_11.authcheckdam.pdf) (last visited Sept. 21, 2013); *Asian or Pacific Islander J.D. Enrollment 1971 - 2010*, AM. BAR

These numbers present issues in two ways: first and most obvious, the numbers are out of sync with the population of the nation and even with the student population, and second, they continue to limit diversity in approach—the very benefits extolled by *Grutter*—at our law schools. As compared to the student body, the small number of Asians<sup>58</sup> and the lack of an equal percentage of women in the faculty ranks are perhaps the most pronounced disparity. For example, while women law students approach 46% on average nationwide, and are closer to parity in many schools,<sup>59</sup> women law faculty are about 37%;<sup>60</sup> within this percentage more of these are in contract or short-term positions rather than tenured or tenure track positions than their male counterparts.<sup>61</sup>

## II. MOVING BEYOND THE NUMBERS TO A CULTURE OF INTEGRATION, INCLUSIVENESS, AND ENGAGEMENT

Given the languid pace of diversity gains in recent years, some question whether law schools should bother trying to re-energize their efforts to these ends. But without continued focus and attention, the benefits of diversity and inclusive excellence will remain elusive at best. So, too, the impact of a lack of diversity is apt to be self-perpetuating, as a community, which is not diverse, tries to increase its diversity.<sup>62</sup> Without diversity efforts, law schools and their graduates will remain “ill-equipped to critically examine stereotypes and ill-prepared to work in diverse environments and to appreciate the value of multiple perspectives and

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[http://www.americanbar.org/content/dam/aba/migrated/legaled/statistics/charts/stats\\_12.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/legaled/statistics/charts/stats_12.authcheckdam.pdf) (last visited Sept. 21, 2013); *Mexican American J.D. Enrollment, 1971 – 2010*, AM, BAR ASS'N, [http://www.americanbar.org/content/dam/aba/migrated/legaled/statistics/charts/stats\\_14.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/legaled/statistics/charts/stats_14.authcheckdam.pdf) (last visited Sept. 21, 2013); *Puerto Rican J.D. Enrollment 1971 – 2010*, AM, BAR ASS'N, [http://www.americanbar.org/content/dam/aba/migrated/legaled/statistics/charts/stats\\_15.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/legaled/statistics/charts/stats_15.authcheckdam.pdf) (last visited Sept. 21, 2013); *Other Hispanic J.D. Enrollment 1971-2010*, AM, BAR ASS'N, [http://www.americanbar.org/content/dam/aba/migrated/legaled/statistics/charts/stats\\_16.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/legaled/statistics/charts/stats_16.authcheckdam.pdf) (last visited Sept. 21, 2013). The percentages were calculated with reference to total J.D. enrollment of 145,231. See *First Year and Total J.D. Enrollment by Gender 1947 – 2010*, AM, BAR ASS'N, [http://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/council\\_reports\\_and\\_resolutions/1947\\_2010\\_enrollment\\_by\\_gender.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/1947_2010_enrollment_by_gender.authcheckdam.pdf) (last visited Sept. 21, 2013).

<sup>58</sup> The 3.8% of fulltime faculty and 7.8% of students compares with 4.6% of the national population. *The Asian Population in the United States*, U.S. CENSUS BUREAU <http://www.census.gov/population/www/socdemo/race/Asian-slide-presentation.html>.

<sup>59</sup> *Matriculants by Ethnic and Gender Group*, *supra* note 34.

<sup>60</sup> *AALS Statistical Report*, *supra* note 52.

<sup>61</sup> *Id.*

<sup>62</sup> See Michael A. Rebell & Robert Hughes, *Schools, Communities and the Courts: A Dialogic Approach to Education Reform*, 14 YALE L. & POL'Y REV. 99, 107–10 (1996).

differing experiences.<sup>63</sup> This Part discusses ways in which diversity contributes to the academy and the community, and, conversely, ways in which lack of diversity contributes negatively.

*A. Greater Diversity Lessens Racial, Ethnic, and Gender Biases*

Diversity is a “journey,” an “ongoing practice, and not an endstate.”<sup>64</sup> Where diversity is a highly held institutional goal, its positive impact is measurable.<sup>65</sup> For just one example, an LSAC study that analyzed the differences among students from the time of law school enrollment to the date of graduation found that the more inter-group contact, the greater perception of “diversity of ideas” and the lesser perception of “prejudiced attitudes.”<sup>66</sup> But in other instances, as Professor, now Dean, Rachel Moran has noted, Justice Powell’s version of using diversity to further education through “draw[ing] on students’ values and experiences, and encourag[ing] a robust exchange of ideas with their peers” has not been realized.<sup>67</sup> Professor Moran is not alone when she laments that Powell’s vision “remain[s] a theory, seldom put into practice in institutions with large classes, a focus on abstract concepts and universal principles, and a hierarchical system of authority and rewards.”<sup>68</sup>

For more distance to be gained on this journey toward diversity and the benefits that Dean Moran, Justice Powell, and the LSAC analysis highlight, enough non-Anglos need to be represented in the legal academy, and in undergraduate institutions that are feeding into law schools,<sup>69</sup> to establish a critical mass.<sup>70</sup> Without such a critical mass moving through the educational pipeline to law school, law schools will remain fertile ground

<sup>63</sup> Kathryn R.L. Rand & Steven Andrew Light, *Teaching Race Without a Critical Mass: Reflections on Affirmative Action and the Diversity Rationale*, 54 J. LEGAL EDUC. 316, 332 (2004).

<sup>64</sup> *Next Steps*, *supra* note 52, at 49.

<sup>65</sup> See Milem et al., *supra* note 4, at 6.

<sup>66</sup> See Nisha C. Gottfredson et al., *The Effects of Educational Diversity in a National Sample of Law Students: Fitting Multilevel Latent Variable Models in Data With Categorical Indicators*, 44 MULTIVARIATE BEHAV. RES. 305, 321 (2009).

<sup>67</sup> Moran, *supra* note 29, at 2342–43.

<sup>68</sup> *Id.* at 2234. “[R]eformers have urged university administrators to encourage interracial contact inside and outside the classroom. Cooperative learning activities, faculty-student contact, and multicultural centers offer opportunities to create a positive racial climate on campus.” *Id.* at 2259.

<sup>69</sup> See REDFIELD, *supra* note 2, at 2–3; see generally Charles R. Calleros, *Enhancing the Pipeline of Diverse K-12 and College Students to Law School: The HNBA Multi-Tier Mentoring Program*, 58 J. LEGAL EDUC. 327 (2008); Jodie G. Roure, *Achieving Educational Equity and Access for Underrepresented Students in the Legal Profession*, 19 TEMP. POL. & CIV. RTS. L. REV. 31 (2009); Catherine E. Smith, *Seven Principles: Increasing Access to Law School Among Students of Color*, 96 IOWA L. REV. 1677 (2011); Floyd Weatherspoon, *The Status of African-American Males In the Legal Profession: A Pipeline of Institutional Roadblocks and Barriers*, 80 MISS. L.J. 259 (2010).

<sup>70</sup> *Gutter v. Bollinger*, 539 U.S. 306, 335–36 (2003).

for the continued development of implicit biases that favor Anglos and the majority culture.<sup>71</sup> Without such a critical mass in law schools, members of minority groups—students and faculty<sup>72</sup>—will be tokens, their involvement marginalized, and the ability to reframe education to reflect the current culture marginalized as well. Without commitment to such a critical mass, the law schools' assertions of interest in promoting and increasing diversity will lack credibility. Such a lack of credibility will, in turn, result in an inability to retain diverse teachers and faculty and the cycle will continue.<sup>73</sup> Whether a critical mass to support diversity is developed is influenced by many factors. This section examines emerging research on two areas of particular relevance to attaining both significant numerical diversity and equitable educational engagement and excellence—implicit bias and cultural groups and our response to individuals in and out of our self-perceived groups.

Our own identities influence our approach to others, often implicitly. We respond to individuals and groups based on our previously developed mental schema,<sup>74</sup> often unknown to us and certainly not explicitly reported by us.<sup>75</sup> This kind of response is identified by current psychological research as implicit bias.<sup>76</sup> Such implicit biases play a significant role in the academy where “biases operating below the threshold of deliberate

<sup>71</sup> See, e.g., Tracey G. Gove, *Implicit Bias and Law Enforcement*, POLICE CHIEF MAG. (Oct. 2011) [http://www.policchiefmagazine.org/magazine/index.cfm?fuseaction=display&article\\_id=2499&issue\\_id=102011](http://www.policchiefmagazine.org/magazine/index.cfm?fuseaction=display&article_id=2499&issue_id=102011) (“Implicit biases are pervasive. They appear as statistically ‘large’ effects that are often shown by majorities of samples of Americans. . . . [For example,] 75 percent to 80 percent of self-identified whites and Asians show an implicit preference for racial white relative to black.”).

<sup>72</sup> Faculty tokens are just as subject to ostracism, disrespect, and “otherness” as are token students. For instance, when the sole Mexican American law professor speaks about an immigration case, he may be labeled as speaking for his racial and ethnic group, just as the lone Latino student also would be. Similarly, a predominantly Anglo professoriate will have difficulties with modeling an appreciation for diverse perspectives and voices.

<sup>73</sup> See *AALS News.*, ASS'N OF AM. LAW SCH. (1996), available at [http://www.aals.org/services\\_newsletter\\_articles\\_8-96.php](http://www.aals.org/services_newsletter_articles_8-96.php); see also Charmaine P. Clowney, *Best Practices in Recruiting and Retaining Diverse Faculty*, WEB CONF. FOR E. WASH. UNIV., available at <http://www.ewu.edu/groups/academicaffairs/BestPractices.ppt> (last visited Sept. 21, 2013); Anthony G. Greenwald, *The Implicit Association Test (IAT) in Legal Settings*, ASS'N OF AM. LAW SCHOOLS, Jan. 6, 2011 [hereinafter *Greenwald Presentation*].

<sup>74</sup> Schemas are sets of propositions or mental constructs for relationships; they create generalizations and expectations about categories of objects, places, events, activities, and people. See DOUGLAS A. BERNSTEIN ET AL., *PSYCHOLOGY* 292 (9th ed. 2011).

<sup>75</sup> See, e.g., Willhem Hoffman et al., *A Meta-Analysis on the Correlation Between the Implicit Association Test and Explicit Self-Report Measures*, 31 *PERSONALITY & SOC. PSYCHOL. BULL.* 1369, 1369 (2005), available at [http://faculty.washington.edu/agg/IATmaterials/PDFs/Hofmann%20%26%20al%20\(PSPB,2005\).pdf](http://faculty.washington.edu/agg/IATmaterials/PDFs/Hofmann%20%26%20al%20(PSPB,2005).pdf).

<sup>76</sup> Implicit bias is defined as a preference (positive or negative) for a group based on a stereotype or attitude we hold that operates outside of human awareness and can be understood as a lens through which a person views the world that automatically filters how a person takes in and acts in regard to information. *What is Implicit Bias?*, AM. VALUES INST. (2009), <http://americansforamericanvalues.org/unconsciousbias>.

consciousness, biases in interaction that are unrecognized and unintended, can systematically put women and minorities at a disadvantage.”<sup>77</sup>

While “the standard understanding of discrimination is that it stems from prejudice, generally defined as out-group hostility, but a revised understanding (influenced by research on implicit bias) is that most significant societal discrimination may be ‘discrimination-in-reverse’”—the effect of in-group preferences or favoritism rather than out-group aversion.<sup>78</sup> When we categorize people into groups, we tend to regard members of the same group as “more similar than they actually are, and more similar than they were before they were categorized together.”<sup>79</sup> Being a member of a group creates a preference for that group, the in-group, and against the out-group.<sup>80</sup> Other research suggests an inability to distinguish between members of a group once the group is created,<sup>81</sup> and a tendency to find our own in-groups affirming of our accomplishments.<sup>82</sup> In

<sup>77</sup> Alison Wylie et al., *Women, Work, and the Academy Strategies for Responding to ‘Post-Civil Rights Era’ Gender Discrimination*, NEW FEMINIST SOLUTIONS, 2 (2007), [http://faculty.washington.edu/aw26/WorkplaceEquity/BCRW-WomenWorkAcademy\\_08.pdf](http://faculty.washington.edu/aw26/WorkplaceEquity/BCRW-WomenWorkAcademy_08.pdf) [hereinafter *Barnard Conference*].

<sup>78</sup> Chris Chambers Goodman & Sarah E. Redfield, *A Teacher Who Looks Like ME, Making Over Professional Education to Assure Students of Champions and Success in a Diverse Classroom* (June 4, 2011), available at <http://edlaw.org/wordpress/wp-content/uploads/2012/05/wholookslikeme6.pdf>; see *Who is Vulnerable to Stereotype Threat?*, REDUCINGSTEREOTYPETHREAT.ORG, <http://www.reducingstereotypethreat.org/vulnerable.html> (last visited Oct. 1 2012) [hereinafter *Who is Vulnerable*].

<sup>79</sup> John F. Dovidio & Samuel L. Gaertner, *Intergroup Bias*, in HANDBOOK OF SOCIAL PSYCHOLOGY 1089 (Susan T. Fiske, Daniel T. Gilbert & Gardner Lindzey eds., 5th ed. 2010).

<sup>80</sup> See Marilyn B. Brewer, *The Importance of Being We: Human Nature and Intergroup Relations*, 62 AM. PSYCH. 728, 729 (2007) (“The fact that individuals value, favor, and conform to their own membership groups (in-groups) over groups to which they do not belong (out-groups) is among the most well-established phenomena in social psychology.”); see also Charles W. Perdue et al., *Us and Them: Social Categorization and the Process of Intergroup Bias*, 59 J. OF PERSONALITY & SOC. PSYCH. 475, 484 (1990) (discussing the results of an experiment showing that subjects viewed nonsense words associated with in-group pronouns (such as ‘we’) more positively than those associated with out-group pronouns (such as ‘they’)).

<sup>81</sup> “Stereotyping” members of a group, which involves judging them “in terms of group-based expectations or standards” was first established in the early 20th century. Dovidio & Gaertner, *supra* note 79, at 1085. This has come to be known in social psychology research as “entitativity perception,” which means perceiving all the members of a group as a single entity that shares a collection of characteristics, rather than as a group of individuals. See, e.g., Grace Wai-man Ip et al., *Birds of a Feather and Birds Flocking Together: Physical Versus Behavioral Cues May Lead to Trait- Versus Goal-Based Group Perception*, 90 J. PERSONALITY & SOC. PSYCH. 368, 368 (2006).

<sup>82</sup> See Adam Benforado & John Hanson, *The Great Attributional Divide: How Divergent Views of Human Behavior are Shaping Legal Policy*, 57 EMORY L.J. 311, 326 (2008). Researchers in the field of intergroup relations generally acknowledge that people with a high level of collective self-esteem (CSE) seek out membership in in-groups that positively reinforce group members’ favorable traits and characteristics. See also David De Cremer, *Relations of Self-Esteem Concerns, Group Identification, and Self-Stereotyping to In-Group Favoritism*, 141 J. OF SOC. PSYCH. 389, 390–91 (2001). Note, however, that the use of an in-group by group members as a means of self-affirmation can be so pronounced that it leads to a phenomenon known as “collective narcissism,” in which in-group members “may see groups as extensions of themselves and expect everybody to recognize not only their individual greatness but also the prominence of their in-groups.” Agnieszka Golec de Zavala et al.,



a now-classic experiment, it appeared that this group loyalty occurred even if factors that put a person into that group were random and arbitrary, meaning that the very act of categorization may be enough to create an in-group preference.<sup>83</sup> For instance, categorizing people by whether their shoes have laces or no laces produces an in-group/out-group identity, even though most people own both types of shoes. The reverse is also true and can be self-perpetuating. This means that once categorized into groups, we see the differences as inherent and remember the in-group more and more favorably. Consequently, we see the out-group as more different, and as less favorable.<sup>84</sup>

Experiments on the social construction of racial groups reach similar results. For instance, the “greater difference a respondent perceives between racial minorities and white Americans, the less positive will be that person’s attitude toward multiculturalism.”<sup>85</sup> Those who see the biggest differences are the least likely to care about learning or understanding diversity and are the least likely to voluntarily engage in multi-cultural situations.<sup>86</sup> We also may show a preference for in-group members who themselves show a bias against out-group members.<sup>87</sup>

The salience of internalized mental schema, implicit bias, and in-group and out-group preferences and prejudices apply as closely in faculty/faculty and faculty/student relationships as other human relationships. The White identity brings with it both implicit<sup>88</sup> and explicit<sup>89</sup> bias and transparency issues.<sup>90</sup> For instance, Professor Wildman has described searching for an analogy to a racial epithet, an analogy that would resonate and foster some empathy in her Anglo students.<sup>91</sup> When she realized the closest epithet she

*Collective Narcissism and Its Social Consequences*, 97 J. PERSONALITY & SOC. PSYCH. 1074, 1075 (2009).

<sup>83</sup> Henry Tajfel, *Experiments in Intergroup Discrimination*, 223 SCI. AM. 96, 101–02 (1970).

<sup>84</sup> See Brewer, *supra* note 80; see also Benforado & Hanson, *supra* note 82, at 326.

<sup>85</sup> Michael W. Link & Robert W. Oldendick, *Social Construction and White Attitudes Towards Equal Opportunity and Multiculturalism*, 58 J. OF POL. 149, 161 (1996) (“Individuals who perceived greater differences between whites and blacks tended to be less supportive of the need for equal opportunity.”).

<sup>86</sup> See *id.* at 152 (“The stronger or more firmly held the social construction, the more resistant this set of attitudes will be to new information.”).

<sup>87</sup> Dovidio & Gaertner, *supra* note 79, at 1089.

<sup>88</sup> Nilanjana Dasgupta & Shaki Asgari, *Seeing is Believing: Exposure to Counterstereotypic Women Leaders and Its Effects on the Malleability of Automatic Gender Stereotyping*, 40 J. EXPERIMENTAL SOC. PSYCHOL. 642, 655 (2004).

<sup>89</sup> Stephanie M. Wildman, *Privilege and Liberalism in Legal Education: Teaching and Learning in a Diverse Environment*, 10 BERKELEY WOMEN’S L.J. 88, 90 (1995).

<sup>90</sup> Sheri Castro Atwater, *Waking Up to Difference: Teachers, Color-Blindness, and the Effects on Students of Color*, 35 J. OF INSTRUCTIONAL PSYCHOL. 246, 247–48 (2008).

<sup>91</sup> Wildman, *supra* note 89, at 90.

could imagine involved homosexuality, she discovered something new about herself—a privilege of belonging to a race for which the English language had no severely debilitating racial epithets.<sup>92</sup> This example highlights in-group perceptions. Faculty members who use the specific language of racial epithets when addressing hypotheticals, even when they try to use an analogy (such as substituting Jewish for African American, as one law student noted), also highlight in-group perception and loyalty.<sup>93</sup> Even using specific quotations from court decisions may show an in-group preference by failing to show full understanding of the pain that such a classroom conversation might cause for students who are actually affected by that epithet. It is equally problematic when faculty “gloss over” or ignore such language, thus fostering the belief that the law’s approach is “colorblind” and suggesting that issues not discussed are of no, or lesser, importance. In terms of group dynamics, if most of the faculty and students belong to the in-group, in-group accomplishments will be seen as more positive.<sup>94</sup> The types of comments, questions, and issues raised by in-group members will be acceptable, appropriate, and, in some cases, authoritative. Conversely, the participation, focus, and achievements of those from the out-group will be less acceptable, not as “on point” and potentially even frowned upon.<sup>95</sup>

The negative implications of implicit bias and related approaches can be addressed. Psychological research shows that increasing awareness of our surroundings and of our colleagues/groups, together with increasing awareness of our pre-established mental schema<sup>96</sup> that led to biased or stereotypical responses, can change those responses.<sup>97</sup> Sometimes referred

<sup>92</sup> *Id.*

<sup>93</sup> Moran, *supra* note 29, at 2290-91.

<sup>94</sup> Link & Oldendick, *supra* note 85, at 163.

<sup>95</sup> See Margaret W. Rossiter, *The Matthew Matilda Effect in Science*, 23 SOC. STUDIES SCI. 325, 335 (1993); *infra* note 168 and accompanying text; see also *What is Stereotype Threat?*, STEREOTYPETHREAT.ORG, <http://www.reducingstereotypethreat.org/definition.html> (last visited Oct. 1, 2012) [hereinafter *Stereotype Threat*].

<sup>96</sup> Research tells us that both implicit and explicit attitudes can change. See Dolores Albarracín & Patrick Vargas, *Attitudes and Persuasion: From Biology to Social Responses to Persuasive Intent*, in HANDBOOK OF SOCIAL PSYCHOLOGY 406-08 (Susan T. Fiske, Daniel T. Gilbert & Gardner Lindzey eds., 5th ed. 2010); Dovidio & Gaertner, *supra* note 79, at 406-08, 1090.

<sup>97</sup> See Shawn C. Marsh, *The Lens of Implicit Bias*, JUV. & FAM. JUST. TODAY 17-19 (2009), available at [http://www.ncsconline.org/D\\_Research/ref/IMPLICIT%20BIAS%20Marsh%20Summer%202009.pdf](http://www.ncsconline.org/D_Research/ref/IMPLICIT%20BIAS%20Marsh%20Summer%202009.pdf) (reviewing implicit bias and ways to address same); John F. Dovidio et al., *On the Nature of Prejudice: Automatic and Controlled Processes*, 33 J. OF EXPERIMENTAL SOC. PSYCHOL. 510, 535 (1997) (concluding that those aware of their own implicitly biased reactions will be able to control or have a controlled rather than automatic process response to race related stimuli and that participants who find out they have implicit attitudes which are inconsistent with their more egalitarian explicit attitudes are motivated to act against their implicit bias); ABA Criminal Justice Section et al., *Building Community*

to as social contact theory, this research shows that meaningful contact with others from cultural groups different from our own can change implicit biases and the climate.<sup>98</sup> For example, research that tracked girls of equal qualifications who showed implicit bias toward males before college, showed that those girls who went to all-women schools and were exposed to women leaders lost that bias as compared to those who went to coed institutions where the bias became stronger.<sup>99</sup> When women students were exposed to famous women, the women students were “more likely to express automatic counter-stereotypic beliefs about women compared to others in a control situation.”<sup>100</sup> Similarly, female leaders in the classroom reduce female students’ stereotypic gender beliefs and expression of such beliefs so that the more the students were exposed to female instructors, “the less gender stereotypes they expressed at an automatic level.”<sup>101</sup> The study also notes that the frequency of exposure to female faculty moderates the expression of stereotypic gender beliefs when the students are in co-educational environments.<sup>102</sup> In a law school context, the LSAC research cited earlier suggests similar results: “[a]s racial diversity of a law school increases, there are strong increases in endorsements of perceived diversity of ideas and strong decreases in prejudiced attitudes.”<sup>103</sup> Prejudiced attitudes of students decline as the perceived diversity of ideas increases.<sup>104</sup>

It should be noted, however, as these studies would also suggest, that just contact may not be enough. Simply being in the same school or university does not mean that meaningful interactions are taking place outside of the classroom such as with informal study groups and the numerous other ways that students learn from each other. For instance, in one study performed by Gary Orfield, only sixteen percent of students said they had “little or no contact with person of other races and ethnicities, but nearly [forty percent]

*Trust: Improving Cross-cultural Communication in the Criminal Justice System, Unit 2*, AM. BAR ASS’N (2010) [hereinafter *Building Community Trust*], [http://www.americanbar.org/groups/criminal\\_justice/pages/buildingcommunity.html](http://www.americanbar.org/groups/criminal_justice/pages/buildingcommunity.html) (discussing specific ways to accomplish this goal in Part III.D).

<sup>98</sup> See Kang & Banaji, *supra* note 33, at 1101; see also Eric L. Dey et al., *Engaging Diverse Viewpoints*, ASS’N OF AM. COLLS. & UNIVS. 18–20 (2010), available at [http://www.aacu.org/core\\_commitments/documents/Engaging\\_Diverse\\_Viewpoints.pdf](http://www.aacu.org/core_commitments/documents/Engaging_Diverse_Viewpoints.pdf).

<sup>99</sup> Dasgupta & Asgari, *supra* note 88, at 654.

<sup>100</sup> *Id.* If there is more diversity in the law school’s student body, there will be more women serving as law review editors. See *2010-2011 Law Review Diversity Report*, N.Y.L. SCH. LAW REV. 2 (2011), available at: <http://www.nylslawreview.com/wordpress/wp-content/uploads/2011/10/2010-2011-Law-Review-Diversity-Report.pdf>.

<sup>101</sup> Dasgupta & Asgari, *supra* note 88, at 654.

<sup>102</sup> See *id.* at 644.

<sup>103</sup> Daye et al., *supra* note 3, at 47.

<sup>104</sup> See *id.*

stated that they rarely or never studied with people from different racial or ethnic backgrounds.”<sup>105</sup> Meaningful contact must include opportunities to experience diversity both inside and outside of the classroom, but availability of opportunity for contact is a necessary first step.

### *B. Greater Diversity Permits Critical Reframing of Conventional Approaches*

The learning of all students and the professional growth of faculty are strengthened by a diverse environment. In addition to changing attitudes and climate, a critical mass of diverse community members, particularly in the law school context, can provide a mechanism for “critical reframing,” a term coined by law Professors Lani Guinier and Susan Sturm.<sup>106</sup> Such reframing focuses on diversity in education as a means of ferreting out the assumptions and values underlying conventional approaches to controversial issues. Guinier and Sturm suggest that an important goal of diversity education is to step away from “zero-sum thinking” and “stretch for new paradigms.”<sup>107</sup> Professor Okianer Christian Dark explains that when students learn to use “a multidisciplinary approach to evaluate or diagnose a problem, more complete and varied solutions are likely to result.”<sup>108</sup> In addition, Dark notes that exposure to diversity and diverse ideas helps students to become better listeners, particularly for ideas and approaches that do not necessarily resonate for them.<sup>109</sup> This exposure may also discourage the pattern of avoiding controversial topics and hypotheticals. Encouraging this kind of approach is more common in diverse than majority faculty,<sup>110</sup> likely because of the majority concern that “students’ personal concerns will disrupt the learning process” and “fear that emotions will divert students from mastering doctrine and irreparably

<sup>105</sup> Moran, *supra* note 29, at 2266 & nn.124–31 (examining attitudes towards diversity in the law school setting at elite schools); see Gary Orfield & Dean Whitley, *Diversity and Legal Education: Student Experiences in Leading Law Schools*, in DIVERSITY CHALLENGED: EVIDENCE ON THE IMPACT OF AFFIRMATIVE ACTION 143, 158 (Gary Orfield ed., 2001).

<sup>106</sup> Susan Sturm & Lani Guinier, *Learning from Conflict: Reflections on Teaching About Race and Gender*, 53 J. LEGAL EDUC. 515, 530–31 (2003).

<sup>107</sup> *Id.* at 531.

<sup>108</sup> Okianer Christian Dark, *Incorporating Issues of Race, Gender, Class, Sexual Orientation, and Disability into Law School Teaching*, 32 WILLAMETTE L. REV. 541, 555 (1996).

<sup>109</sup> *Id.* at 554.

<sup>110</sup> Deo et al., *supra* note 37, at 25 (“In sum, the data strongly suggest that white male professors are generally reluctant to include issues of race and gender in classroom discussions. Some professors expect students to raise these issues and educate their peers, which effectively recuses professors from including relevant gender and racial context in discussions on case law. Still others refuse to introduce diversity discussions altogether and discourage students from initiating these topics.”).

damage the classroom climate.”<sup>111</sup>

Without meaningful numeric diversity, there is no reference point for exposing such fears or for addressing Guinier and Sturm’s critique on conventional approaches to controversial topics. This absence adversely impacts the substantive discussion and further adversely impacts diverse students, who find themselves becoming “tokens” perceived as representing their whole race or cultural group.<sup>112</sup> This ostracizing position can be harmful not only to the individual student,<sup>113</sup> but to his or her peers as well, as, if the token chooses to remain silent, the others lose the benefit of insight on important issues affecting race.<sup>114</sup> Culture also plays a related role. Too often, minorities are encouraged, subtly or explicitly, to fit in, rather than to allow their differences to show. To fully realize the benefits of diversity, the culture “must actively allow and respect diverse ways of being, speaking, dressing, and interacting.”<sup>115</sup> Similarly, where diversity is “masked” or covered up in order to better fit into the educational environment, its benefits are often lost or subdued. Increasing diversity tends to put different perspectives and approaches on a more equal footing, and can help to “create more richly varied educational experiences that enhance students’ learning and better prepare them for participation in a democratic society.”<sup>116</sup>

### C. *The Impact of Faculty Diversity is Significant*

This section concentrates on faculty, first discussing how faculty and

<sup>111</sup> Moran, *supra* note 29, at 2332.

<sup>112</sup> As one study noted, “without a critical mass the value of diversity to students of color is undermined: they do not have the support of classmates with similar experiences, they face the possibility of being treated as racial or ethnic spokespersons, and they may experience racial insensitivity or even backlash in the classroom.” Rand & Light, *supra* note 63, at 332; see Milem et al., *supra* note 4, at 6 (“On college campuses that lack a diverse population of students, underrepresented groups have an increased chance of being viewed as tokens. Tokenism contributes to the enhanced visibility of underrepresented groups, the exaggeration of group differences, and the alteration of images to fit existing stereotypes. On predominantly white campuses, the fact that students of color are underrepresented can produce both negative social stigma and ‘minority status’ stressors that adversely affect student achievement.” (internal citations omitted)); see also *Stereotype Threat*, *supra* note 95.

<sup>113</sup> *Stereotype Threat*, *supra* note 95.

<sup>114</sup> *Id.*

<sup>115</sup> *Next Steps*, *supra* note 52, at 43 (“All too often, attorneys whose race, ethnicity, gender, sexual orientation or abilities place them in the minority at their workplace are compelled—explicitly or covertly—to try and perform socially in a way that erases the affective dimensions of their identities. Such compulsion undermines inclusion and leads to attrition. Countering these covert, often unintentional, forms of exclusion requires active acceptance of not only different identities in the abstract, but also different and perhaps seemingly unconventional ways of being.”).

<sup>116</sup> See Milem et al., *supra* note 4, at 6 (“[t]his richness is due in part to the continuing role that race and ethnicity plays in shaping opportunities and experiences in U.S. society.”); see also Goodman, *supra* note 3, at 667–68.

students view the value of diversity and then discussing ways in which diversity contributes to pedagogy, culture, climate, engagement, and inclusive excellence in an academic community.

a. Perspectives on diversity

Most law faculty support increasing diversity. An AALS survey of law professors found that most felt strongly that having diversity in both the student body and the faculty is important to their law schools and that increasing diversity in their institutions has not had negative effects.<sup>117</sup> More than 50% of the law faculty respondents felt “strongly” or “very strongly” that “diversity broadens the variety of experiences shared [in the classroom environment], has students confront stereotypes on social and political issues as well as racial and ethnic issues, . . . allows broader variety of experience to be shared,”<sup>118</sup> and raises perspectives not addressed by Anglo students.<sup>119</sup> Approximately 75% felt “strongly” or “very strongly” that diversity was important to “developing student willingness to examine their own perspectives and for exposing students to new perspectives,”<sup>120</sup> and that it had a positive effect “on the issues that white students consider.”<sup>121</sup> It is not surprising that faculty of color and female faculty were more likely than their Anglo and male colleagues, respectively, to see the benefits of diversity for all students and to strongly agree that diversity affects both their teaching and writing.<sup>122</sup> These groups also viewed the diversity climate in their schools less positively, respectively, than did their Anglo or male colleagues.<sup>123</sup>

By comparison, the LSAC survey also noted that the lack of faculty diversity remains “a significant issue for students; many said they could count the number of faculty of color on one hand.”<sup>124</sup> The tokenism that results from a lack of faculty diversity also negatively impacts diverse students by magnifying their own token status.<sup>125</sup> When a student is the only African American in the class, and the professor is the only African American in the school, that student’s encounters with that faculty member can form an in-group/out-group mentality that can be detrimental to faculty

<sup>117</sup> White, *supra* note 37, at 3–5.

<sup>118</sup> *Id.* at 3.

<sup>119</sup> *Id.* at 4.

<sup>120</sup> *Id.* at 5.

<sup>121</sup> *Id.* at 6.

<sup>122</sup> *Id.* at 10.

<sup>123</sup> *Id.*

<sup>124</sup> See Daye et al., *supra* note 3, at 16.

<sup>125</sup> See *supra* Part III.A.

and student alike.<sup>126</sup> For example, the faculty member and lone student might commiserate about what it is like to be the only one in the room (for the classes they do not share). The professor may lament that the other students “just don’t get me,” and the student may say the same thing about her other professors. This lamentation can become a crutch for each of them and a rationale for avoiding the hard work that it takes to convince a person who is not like you that you belong as well as he does. Of course, these two may suffer separately, if the token professor and token student have little or nothing in common aside from race or ethnicity.

The more diverse the faculty, the higher diversity is valued within law schools. Though none of the post-*Grutter* higher education employment cases have yet directly addressed the importance of diversity in faculty hiring, the rationale is similar. The legitimacy of the law school training, the role models that diverse faculty provide, the range of experiences and perspectives, as well as the different classroom interactions, are all *Grutter*-based rationales that apply to law faculty hiring as well as to student admissions. While *Grutter* specifically addressed the student admissions issue, unless minority law faculty numbers increase along with student enrollment numbers, those students will not realize the full benefits of diversity in their law school education. This uneven diversity may undermine or stall the achievements of students of color, particularly those interested in exploring a career in teaching law.<sup>127</sup> Diversity is symbiotic: faculty diversity attracts greater student diversity; just as student diversity attracts more faculty diversity. As the survey data suggest, there are a number of rationales supporting increasing law faculty diversity. Discussed in the next sections are (ii) the availability of increased diverse presence in the community as mentors, role models, and community representatives; and (iii) a more inclusive and engaged climate and classrooms.<sup>128</sup>

<sup>126</sup> See *infra* notes 72, 112 and accompanying text.

<sup>127</sup> See, e.g., Stephen John Quaye et al., *Engaging Racial/Ethnic Minority Students in Predominantly White Classroom Environments*, in *STUDENT ENGAGEMENT IN HIGHER EDUCATION: THEORETICAL PERSPECTIVES AND PRACTICAL APPROACHES FOR DIVERSE POPULATIONS* 157, 161 (SHAUN R. HARPER & STEPHEN JOHN QUAYE eds., 2008).

<sup>128</sup> See, e.g., *id.* at 157–68 (referencing Smith’s five arguments for diverse faculty, which include: (1) ability to serve as mentors; (2) commitment to a more diverse campus climate; (3) their role in creating comfortable and inclusive environments for faculty and staff; (4) their ability to offer diverse perspectives on teaching and learning; and (5) their commitment to a pluralistic view of higher education); see also Herrera, *supra* note 32, at 121–23 (describing several theories for hiring diverse law professors including: the role model theory, the perspective theory, and the “community representative” theory).

b. Increased diverse presence available in the community

Increased diversity among a faculty offers increased opportunities for the community at large (community representation theory) and for role models and mentors. In *Grutter*, the Court highlighted the value of diversity to secure legitimacy for the profession.<sup>129</sup> A law degree is a stepping-stone to many prestigious careers and is an especially important step towards political office. As Justice O'Connor explained in *Grutter*,

[i]n order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity. All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training.<sup>130</sup>

An integral part of the representation theory is that the legitimacy of the legal system is based on it being open and inclusive for all. The legitimacy of the laws and legal precedents relies upon the people's confidence that the system is fair. Professor Herrera posits a "community representative" theory based on population statistics –given their percentage of people of color in the population at large, the people of color should be present in larger numbers on law faculties.<sup>131</sup> This parity provides a sense of inclusion that expands the notion of who is welcome in the classroom and in the academy and allows faculty to serve as a representative of the law school and larger society.

Another aspect of legitimacy is offered by the role model theory, which states that having law professors of color helps students of color because their presence "challenges the presumption of intellectual inferiority" of people of color.<sup>132</sup> The dearth of minority professors reduces the number of professors who can be either role models or mentors.<sup>133</sup> Admittedly this assertion masks some other underlying issues; merely having a more diverse faculty does not mean the effective role models and mentors will be present in adequate numbers to meet student needs. Indeed, the limited numbers of effective and desired role models and mentors is a problem for both minority and majority students, and Anglo students have trouble

<sup>129</sup> See *Grutter v. Bollinger*, 539 U.S. 306, 330–32 (2003).

<sup>130</sup> *Id.* at 332.

<sup>131</sup> See Herrera, *supra* note 32, at 121–23.

<sup>132</sup> *Id.* at 111; see *Stereotype Threat*, *supra* note 95.

<sup>133</sup> See Moran, *supra* note 29, at 2297–99 (noting that several students also cited the lack of minority and women faculty in their answers about why they did not have role mentors in law school).



finding role models among the majority faculty.<sup>134</sup> As the Boalt Hall study noted, “faculty limited their interest in students to the few stars in the class, such as those who ‘are going to clerk for Ninth Circuit judges and remind them of them.’”<sup>135</sup> Some students explained that they did not reach out to cultivate a mentor relationship; others said they had no one they wanted to be their mentor; and still others felt that the faculty members were too busy with research and scholarship to mentor them.<sup>136</sup> Even while recognizing students’ own responsibility, the Boalt study also found that race and gender were relevant with women faculty being seen as more amenable to mentoring and to forming a close professional relationship than their male counterparts.<sup>137</sup> Along the same lines is the issue of the female professors and male professors of color being overextended,<sup>138</sup> “torn between their professional responsibilities and their desire to help and mentor those in the community.”<sup>139</sup> It is also true, of course, that regardless of sharing a common race or ethnicity, not all professors will be good role models for students who share that race or ethnicity, and not all professors will be good mentors.<sup>140</sup>

The role model approach is also grounded in the “unique perspective theory,” which asserts that faculty of color will have different backgrounds and experiences, and thus different perspectives than majority faculty.<sup>141</sup> However, a proviso is called for here. While there is overall truth to the notion that many faculty of color will have different perspectives on certain issues than many of their Anglo colleagues, the unique perspective argument relies on generalizations that cannot be supported in every specific case. Experience tells us that not all Latino professors will have a special affinity for issues affecting Latinos, and that not all Latino professors will teach subjects that lend themselves to a prolonged discussion of the impact of race. The unique perspective rationale also raises the question of whether the faculty of color hold “expected” or “unexpected” political, social, and other views associated with their race or ethnicity. Some will not have the political or other views that the students

<sup>134</sup> See *id.* at 2295 (“A substantial minority blamed themselves, however.”).

<sup>135</sup> *Id.*

<sup>136</sup> See *id.* at 2295–96.

<sup>137</sup> See *id.* at 2297–98.

<sup>138</sup> See *id.* at 2299.

<sup>139</sup> *Id.*

<sup>140</sup> See *id.* at 2297–98.

<sup>141</sup> Similarly, Professor Herrera explains how Latino/a law faculty can offer a unique perspective to students from within and outside of their affinity groups. There are few Latino/professors who serve as symbols, as examples (role models) or mentors. See Herrera, *supra* note 32, at 117–18 (2002).

will identify with and want to emulate.<sup>142</sup>

c. Inclusive and engaged climate and classrooms

In predominantly White classrooms, where the curriculum focuses on dominant Western culture, Anglo experiences reflect the in-group and become the benchmark for normal or regular, and students of color can feel ostracized and further marginalized as the out-group.<sup>143</sup> The AACU authors note that:

[j]uxtaposed against a diverse student body, a lack of diverse perspectives in the curriculum may not only cause moments of psychic disequilibrium, but also contribute to a campus climate of exclusion. As with pedagogical reform, achieving curricular change—successfully incorporating diverse information, ideas, and perspectives into the curriculum—requires aligning faculty development and rewards to these goals.<sup>144</sup>

In this context, some in the law school community lament that Justice Powell's vision in *Bakke* to inculcate a true deference to diversity in the educational process has been "imperfectly realized" with one scholar noting that this is "because nontraditional perspectives remain marginalized and because perceived balkanization has a chilling effect on student interaction."<sup>145</sup>

d. Diversity offers opportunity for changed curricula

In his work on student engagement, Professor Quaye and his colleagues raise a crucial question: "How does the content of the course enable students to develop and learn more about themselves if the material does not reflect topics, issues, or models that are meaningful to the student?"<sup>146</sup> This question embodies the concept of "culturally responsive content" and entails making the content of the curriculum relevant to the students in order to increase engagement and learning.<sup>147</sup> This section discusses how such increased relevance and cultural responsiveness is greater where faculty diversity is greater and where the climate and environment are more conducive to maximizing the effects of that diversity.

<sup>142</sup> See *id.* at 115–16.

<sup>143</sup> Quaye et al., *supra* note 127, at 157–58.

<sup>144</sup> Milem et al., *supra* note 4, at 25–26.

<sup>145</sup> Moran, *supra* note 29, at 2271.

<sup>146</sup> Quaye et al., *supra* note 127, at 162.

<sup>147</sup> *Id.*

Both student and faculty diversity contribute to curricular change. In a diverse environment, course content and context are enhanced<sup>148</sup> and professor-student, as well as student-professor stereotyping is minimized.<sup>149</sup> While curricular modifications can help universities to more closely achieve Justice Powell's vision of diversity, too few faculty members employ such approaches. The AALS Preliminary Report showed that 39% of the responding faculty explained that they incorporated racial and ethnic issues into their classes, because of student diversity, and approximately one-fourth of the faculty reported adjusting their classes to include racial and ethnic issues, and/or changing their pedagogy to facilitate discussion between students of different racial and ethnic groups.<sup>150</sup> More law faculty of color report that they are likely to adopt such culturally responsive content and other curricular changes than other groups.<sup>151</sup> Indeed, researchers generally have found that faculty of color are more likely to initiate discussions about diversity issues and have a greater chance of including diversity-related content into the curriculum;<sup>152</sup> they also model good classroom behavior in respectful conversations about race and ethnicity, thereby opening the doors for students of all colors to do the same.<sup>153</sup> While a quarter of the law faculty is a start, there is further to go.<sup>154</sup> As Professor Moran explained, "[f]aculty have not altered the formal or hidden curriculum, and administrators have not done enough to create opportunities for interracial contact. This work concludes that the benefits of diversity can be achieved only when institutions, and not just students, are expected to change."<sup>155</sup>

In addition to faculty attitude, the surveys and research also suggest that the presence of student diversity affects faculty behavior in a way that makes the institution more open to addressing racial and ethnic issues and

<sup>148</sup> See Richard A. White, *Preliminary Report, Law School Faculty Views on Diversity in the Classroom and the Law School Community* 8 (2000); Milem et al., *supra* note 4, at 24–25.

<sup>149</sup> But simply having greater numbers has not shown to maximize these other benefits that diversity can offer. See *supra* notes 45, 98–105 (discussing social contact).

<sup>150</sup> White, *supra* note 148, at 8.

<sup>151</sup> Milem et al., *supra* note 4, at 25 ("Faculty of color are also more likely than other faculty to include content related to diversity in their curricula and to utilize active learning and student-centered teaching techniques.")

<sup>152</sup> See *id.*; Johnson, *supra* note 52, at 1560–61 (noting that law school faculty of color are likely to bring different perspectives to the classroom and teach differently than white faculty).

<sup>153</sup> See Deo et al., *supra* note 37, at 11–12 (drawing on law school data collected as part of the Educational Diversity Project (EDP) and concluding that white male law school faculty "typically are reluctant to approach diversity discussions in the classroom," while "faculty of color and female faculty make significant efforts to engage the classroom in diversity discussions.")

<sup>154</sup> Of course, this percentage may have changed, for better or for worse, in the intervening years since the last study was conducted. This would be fertile ground for additional research.

<sup>155</sup> Moran, *supra* note 29, at 2271–72.

that the presence of faculty diversity impacts institutional receptivity to diversity issues.<sup>156</sup> The institutional receptivity to minority and women faculty and to these curricular additions and changes is also significant.<sup>157</sup> This institutional receptivity to diversity must occupy a space between the extremes of race “essentialism” and “exceptionalism.”<sup>158</sup> The former is the “tendency to overemphasize the relevance of race to the merits of laws,” and the latter as the opposite: “to minimize the relevance of race to the merits of a law or doctrine, viewing the law’s relationship to race as exceptional or aberrational, having little or nothing to say about the law’s merits in general with respect to contexts or purposes unrelated to race.”<sup>159</sup> Faculty members often work at one extreme or the other, rather than in the middle space that finds an appropriate place and time for conversations, communications, and for the study of the effects and ramifications of race and ethnicity.

Institutional commitment can mediate these differences and is critical at many levels for both faculty and students.<sup>160</sup> In its absence, and without a critical mass and broad base, teachers can be expected to continue to shy away from racial issues in courses that are not “explicitly” about race, and that may give the message to students that race is an “exceptional” consideration or even a point unworthy of consideration. In contrast, in

<sup>156</sup> See Bauman et al., *supra* note 14, at 31.

<sup>157</sup> Milem et al., *supra* note 4, at 11 (“According to the reviews, higher perceived levels of institutional commitment to diversity are associated with perceptions of relatively low racial tension among African American, Chicano, and, to some extent, white students. Higher perceived levels of commitment have also been shown to be associated with higher reported college grade-point averages and increases in personal goals to promote racial understanding. In contrast, lower levels of perceived institutional commitment to diversity are accompanied by higher levels of perceived hostility and discrimination and are associated with low grades for African American students, feelings of isolation among Native American students, higher levels of alienation among all students, and lower scores on college adjustment and sense of belonging among Latino students. Likewise, white students’ perceptions of hostility or discrimination on campus have both direct and indirect effects on their persistence in college and are related to their lower sense of belonging on diverse campuses.”).

<sup>158</sup> Kim Forde-Mazrui, *Learning Law Through the Lens of Race*, 21 J.L. & POL. 1, 4 (2005).

<sup>159</sup> *Id.* at 4.

<sup>160</sup> See Milem et al., *supra* note 4, at 11. Given the above findings, it appears that students’ assessments and perceptions of their institution’s overall commitment to diversity are influential in determining whether or not they are able to benefit from diversity. Evidence suggests that students are more likely to perceive greater levels of institutional commitment when campuses enact a more comprehensive diversity approach, as opposed to a piecemeal one. The effects of strong institutional commitment to diversity may positively affect not only individual outcomes but also the campus climate, which further reinforces the benefits associated with diversity. See generally Laura Rothstein, *Shaping the Tributary: The Why, What, and How of Pipeline Programs to Increase Diversity in Legal Education and the Legal Profession*, 40 J. L. & EDUC. 551, 557 (2011) (reporting on the benefit of pipeline mentorship projects to the law students who participate as mentors); Smith, *supra* note 69, at 1686–88 (describing seven guiding principles of the University of Denver’s Sturm College of Law to promote a diverse student body); Kellye Y. Testy, *Best Practices for Hiring and Retaining a Diverse Law Faculty*, 96 IOWA L. REV. 1707, 1714–16 (2011) (outlining best practices for law schools to retain faculty of color).

courses on race and the law, some professors model that everything is about race, thus falling into the race essentialism trap. In the middle, however, “there are significant controversies involving race that an adequate introduction to these fields<sup>161</sup> should address,” and yet the faculty response is likely to be “the syllabus is full.”<sup>162</sup> Teacher training can increase their comfort level and their ability to engage race and culture more in classroom conversations as discussed in more detail in Part III.C.<sup>163</sup>

e. Diversity offers opportunities for equitable communication and higher expectations

The preceding subsection focused on faculty attitudes and work as they may impact the classroom, but inclusiveness in the learning community generally is another necessary component of realizing the benefits of diversity and equitable engagement. Understanding this broader context is again enriched by reference to emerging work of the social sciences, particularly around the related concepts of expectations and messaging.

While we would all, no doubt, steer clear of a negative or comparatively negative statement about the capabilities of women or minority students, our implicit attitudes and small actions may be sending a different message. Social scientists recognize micro-messages (which can be or micro-affirmations or micro-inequities or aggressions) as small messages that are sent, typically without conscious thought or intent.<sup>164</sup> Such messages can be cumulative:

A useful concept in sociology is the accumulation of advantage and disadvantage. It suggests that . . . advantages accrue, and . . . disadvantages also accumulate. Very small differences in treatment can, as they pile up, result in large disparities. . . . It is unfair to neglect even minor instances of group-based bias.<sup>165</sup>

Research also shows that these “small” messages have power for insiders and outsiders. For example, when a person with higher status acknowledges someone at a meeting, that acknowledgement influences others to also think better of that acknowledged person.<sup>166</sup> Some

<sup>161</sup> For example, it is easy to see how the fields of property, contracts, and environmental law could benefit by addressing issues of race in the curriculum. See *infra* Part IV.C.

<sup>162</sup> Forde-Mazrui, *supra* note 158, at 21.

<sup>163</sup> See *infra* notes 320-24 and accompanying text; see, e.g., Atwater, *supra* note 90.

<sup>164</sup> VIRGINIA VALIAN, WHY SO SLOW? THE ADVANCEMENT OF WOMEN 3 (1999).

<sup>165</sup> *Id.* at 1-3; see *Barnard Conference*, *supra* note 77, at 2, 9-10.

<sup>166</sup> VALIAN, *supra* note 164, at 3.

researchers have called this pattern of accumulation of positive messages the “Matthew effect” from the biblical quotation—“For unto every one that hath, shall be given, and he shall have abundance; but from him that hath not shall be taken away even that which he hath.”<sup>167</sup> Other researchers have focused on reformulating this idea and called it the “Matilda effect,” named for one of the early suffragettes, Matilda Gage.<sup>168</sup>

Translating the Matthew or Matilda effect and other research on micro-messaging into the classroom, one can readily see the importance of the messages faculty send, often unknowingly, by whom they call on and with whom they engage. Indeed, addressing the topic of diversity in the substantive discussion often will not be enough to outweigh any implicit message sent in the process. Some studies analyze the unique challenges that these micro-messages bring to the goal of engaging students of color in predominantly Anglo classrooms.<sup>169</sup> Participation may be limited and constricted artificially, where some students participate only on issues that reflect diversity (after receiving the message that their views are welcome and even expected on those issues), while others purposefully remain silent on those issues. Other students put pressure on themselves to participate only when their comments will be seen as a “credit to their race,” demonstrating insightful legal analysis that earns the praise of the professor. This latter group of students will not ask a legitimate question that shows confusion, uncertainty, or simply a need for more information—the latter of which produces a micro-message that the question is not worth asking or that the questioner is not worthy of participating in the classroom discussion or the learning community.

Some researchers describe these variations on participation as invisibility, where students are unspeaking and unheard for much if not all of a class discussion.<sup>170</sup> When a Latina student speaks in class she is putting herself through a test—the test of convincing her fellow law students as well as her professor that she is being analytical and not emotional; that she is being lawyerly and not “Latina-ly.” On the other hand, if the professor was also Latina, or even Latino, the student might

<sup>167</sup> Robert K. Merton, *The Matthew Effect in Science*, 159 SCI. 56, 58 (1968).

<sup>168</sup> See Margaret W. Rossiter, *The ~~Matthew~~ Matilda Effect in Science*, 23 SOC. STUD. OF SCI. 325, 335 (1993).

<sup>169</sup> See Quaye et al., *supra* note 127, at 172; Herrera, *supra* note 32, at 110–23; Wildman, *supra* note 89, at 92–97.

<sup>170</sup> See Herrera, *supra* note 32, at 119–20; Margaret E. Montoya, *Mascaras, Trenzas, y Grenas: Un/Masking the Self while Un/Braiding Latina Stories and Legal Disclosure*, 17 HARV. WOMEN'S L.J. 185, 200–09 (1994); see also Goodman, *supra* note 3, at 692–93; Claude M. Steele, *Race and the Schooling of Black Americans*, THE ATLANTIC, Apr. 1992, at 72–75.

feel a cultural bond; more part of the in-group, and that feeling of belonging would increase her comfort with entering the discussion in this professor's course. Still, a non-Latina professor could increase her comfort, if he modeled behavior that showed receptivity to diversity and openness to divergent perspectives and approaches. Professor Montoya provides a poignant example of a classroom conversation about being silenced when discussing a case involving a teenage Latina who gave birth in the bathroom of her home without her family hearing a sound.<sup>171</sup> The professor was unable to relate the story in a way that gave Montoya as a student the comfort she needed in order to open her mouth to provide some context to augment her peers' understanding of the cultural and gender pressures operating on that young mother.<sup>172</sup>

As these examples suggest, the Matthew or Matilda effect perpetuates invisibility and silence, and simultaneously permits more "space" for the visible students to become even more so. As these examples also suggest, diverse students have diverse learning styles, and a one-size-fits-all approach to teaching methodologies and developing course competencies is bound to be exclude some students of color, and miss the opportunity to maximize the strengths of others.<sup>173</sup> A recent study released by the National Bureau of Economic Research evaluating community college students found that the students of color perform better when their professor is from their same underrepresented minority group.<sup>174</sup> Native American, Latino and African American students who took a course with an instructor from their same racial or ethnic group "can cut in half the rate by which their academic performance lags behind their white peers in three key categories: "less likely to drop a course, more likely to pass that course, more likely to score a 'B' or better."<sup>175</sup>

The Economic Research study is not surprising when read with other

<sup>171</sup> See Montoya, *supra* note 170, at 201–06; Herrera, *supra* note 32, at 119–20 (describing this situation and the frequent dismissal of personal experiences as irrelevant to the classroom discussion of legal issues).

<sup>172</sup> See Montoya, *supra* note 170, at 201–202; see Herrera, *supra* note 32, at 119–20.

<sup>173</sup> Alvin Y. So, *Hispanic Teachers and the Labeling of Hispanic Students*, 71 HIGH SCH. J. 5 (1987), [http://theresadehoyon.com/ruiiz\\_summer/So.pdf](http://theresadehoyon.com/ruiiz_summer/So.pdf) (explaining, in the pre-higher education field, that teacher labeling of students as "good" and "bad" results in differential treatment, and thus leads to differential student performance); see Quaye et al., *supra* note 127, at 162 ("Regardless of the resources available, predominantly White colleges and universities must ensure that culturally responsive pedagogy is utilized in learning settings to minimize disparities in educational outcomes.").

<sup>174</sup> See Dan Berrett, *Study Finds Minority Students Benefit From Minority Instructors*, CHRON. OF HIGHER EDUC., Sept. 6, 2011, available at <http://chronicle.com/article/Study-Finds-Minority-Students/128893>. See generally Robert W. Fairlie et al., *A Community College Instructor Like Me: Race and Ethnicity Interactions in the Classroom* (2011), available at <http://ftp.iza.org/dp5983.pdf>.

<sup>175</sup> Berrett, *supra* note 174, at 3–4.

data showing that Anglo faculty, by and large, have lower expectations of minority students.<sup>176</sup> Matthew, Matilda, and the micro-messaging that surrounds them reflect an even more troubling aspect of education, that is the tendency toward low expectations for out-groups,<sup>177</sup> based on background and stereotyping.<sup>178</sup> Race, ethnicity, and gender dynamics between students and teachers have a consistently “large effect on teacher perception of student performance.”<sup>179</sup> Studies of elementary school age children document the lower expectations that Anglo teachers have for minority students,<sup>180</sup> and low expectations occur at every stage in the education pipeline—from pre-school to elementary, high school, college, and law school.<sup>181</sup>

While the results of low expectations *may* be less obvious or pronounced in law schools with blind grading for exams, the perception would still be relevant to in-class feedback on everyday questions and answers during the course of the semester. Considered in the context of law schools, professors may perceive students as “law review material” or “not journal material,” as “going to be in the top of the class” to “going to be the bottom of the class,” as “smart and incisive” or as a “fuzzy thinker lacking analytic discipline.” Those identified as “with potential” seek additional help and additional challenges, such as being a research assistant or tutor, writing on to law review or another journal, submitting a paper for potential publication, applying for clerkships and other prestigious employment.<sup>182</sup> In comparison, students who “know” the teacher does not think highly of

<sup>176</sup> See generally Fairlie et al., *supra* note 174.

<sup>177</sup> So, *supra* note 173, at 8 (concluding that while Anglo teachers treated Anglo students more positively than Hispanic students, when Hispanic teachers treated those same students more positively, once the Hispanic student was labeled as ‘college-going,’ the Anglo teachers treated him the same way as Anglo students with that same label).

<sup>178</sup> See Claude M. Steele, *Thin Ice: Stereotype Threat and Black College Students*, THE ATLANTIC, Aug. 1999, at 44–46, available at <http://www.theatlantic.com/magazine/archive/1999/08/thin-ice-stereotype-threat-and-black-college-students/4663/> [hereinafter Steele, *Thin Ice*]; Claude M. Steele, *A Threat in the Air: How Stereotypes Shape Intellectual Identity and Performance*, 52 AM. PSYCHOLOGIST 613, 616–18 (1997) [hereinafter Steele, *A Threat in the Air*].

<sup>179</sup> Deo et al., *supra* note 37, at 1.

<sup>180</sup> See Atwater, *supra* note 90, at 247–48.

<sup>181</sup> See *id.*

<sup>182</sup> See, e.g., Frank Pasquale, *Publishing Student Work*, CONCURRING OPINIONS (Apr. 4, 2006, 2:17 PM), [http://www.concurringopinions.com/archives/2006/04/publishing\\_stud.html](http://www.concurringopinions.com/archives/2006/04/publishing_stud.html) (encouraging law students who are interested in publishing their student papers); Allison D. Martin & Kevin L. Rand, *The Future’s So Bright, I Gotta Wear Shades: Law School Through the Lens of Hope*, 48 DUQ. L. REV. 203, 218–222 (2010) (challenging legal educators to broadly encourage any law student who sets “learning goals” to participate in law school activities, such as journals, moot court, and externships, in pursuit of those goals); Douglas E. Ray & Heather S. Karns, *Job Search Skills for the New Economy*, 40 U. TOL. L. REV. 403, 407 (2009) (urging law students to participate in activities like law review, moot court, and student writing competitions as a way to effectively show future employers their unique skills and capabilities).



them avoid talking to that teacher. That prevents those who need help from getting help, thus confirming the teacher's preconceived notion of the student being a bad, or at least not good, student.<sup>183</sup>

Recent Law School Admission Council research shows that law students, like their counterparts in lower grades, take note of the professor's perceptions about them. Minority students reported more episodes of law professors treating them with less respect, acting as if they were less smart, and as though they were afraid of the students in these groups.<sup>184</sup> No one rises to low expectations.<sup>185</sup> Students perceive when little is expected of them, and they will not respond well<sup>186</sup>—a phenomenon sometimes described by Professor Steele and other researchers as “stigma consciousness”<sup>187</sup> or stereotype threat.<sup>188</sup> A stereotype threat “is a situational threat—a threat in the air—that, in general form, can affect the members of any group about who, a negative stereotype exists . . . Where bad stereotypes about these groups apply, members of these groups can fear being reduced to that stereotype.”

[R]esearch has extended its reach to understanding the *situations* that are most likely to lead to stereotype threat. In general, the conditions that produce stereotype threat are ones in which a highlighted stereotype implicates the self though association with a relevant social category. When one views oneself in terms of a salient group membership (e.g., “I am a woman, women are not expected to be good at math, and this is a difficult math test”), performance can be undermined because of concerns about possibly confirming negative stereotypes about one's group. Thus, situations that increase the salience of the stereotyped group identity can increase vulnerability to stereotype threat.<sup>189</sup>

That is, for those who identify with the domain to which the stereotype is relevant, this predicament can be self-threatening<sup>190</sup> or “self-

<sup>183</sup> Fairlie et al., *supra* note 174.

<sup>184</sup> See Daye et al., *supra* note 3, at 38–40.

<sup>185</sup> See REDFIELD, *supra* note 2, at 70–85.

<sup>186</sup> See *id.*; see also, Atwater, *supra* note 90, 247–48.

<sup>187</sup> *Stereotype Threat*, *supra* note 95 (citing authority about stigma consciousness and defining stigma consciousness as “the chronic awareness and expectation of one's stigmatized status”).

<sup>188</sup> See Kang & Banaji, *supra* note 33, at 1087–88; *Stereotype Threat*, *supra* note 95; see also REDFIELD, *supra* note 2; Steele, *Thin Ice*, *supra* note 178, at 46; Steele, *A Threat in the Air*, *supra* note 178, at 613.

<sup>189</sup> *Stereotype Threat*, *supra* note 95 (internal citations omitted).

<sup>190</sup> Steele, *A Threat in the Air*, *supra* note 178, at 614; see also Goodman, *supra* note 3, at 673–78 (exploring how stereotype threat interferes with the benefits of diversity in higher education).

handicapping.”<sup>191</sup> The impact of stereotype threat is greatest for those students who care most about their educational prowess.<sup>192</sup> These students question their own entering credentials fearing that they are not as qualified as their peers and wondering whether each time they open their mouths they will be seen by the professor and their peers to be confirming what they most fear.<sup>193</sup> When the micro-messages of the professor confirm those fears, those students return to silence.

It is easy to see how low expectations and stereotype threat might easily play out for 1L courses, and how race and gender diversity among faculty teaching those 1L courses influences student learning. For instance, Deo and Woodruff note that the use of the Socratic method is more common in first year faculty,<sup>194</sup> but nonetheless, the race and gender of the faculty make a difference in how the faculty teach their 1L classes.<sup>195</sup> Faculty of color and women are more likely to open up the discussion even during these first year classes, to provide context on diversity issues by relating their own experiences and stories.<sup>196</sup> Deo concluded that “students, regardless of race or gender, tend to prefer the approach most often used by female faculty and faculty of color, who actively involve diversity discussions in their law teaching.”<sup>197</sup>

As could be inferred from Deo’s observations, expectations and perceptions can change through a more diverse faculty. In-groups and out-groups will be differently perceived. Teachers who come from non-dominant cultures are likely to have had experiences of being on the outside, and many will be more sensitive to classroom conversations and discussions that put their students on the outside as well.<sup>198</sup> A more diverse

<sup>191</sup> *Stereotype Threat*, *supra* note 95; *What are the Consequences of Stereotype Threat*, REDUCINGSTEREOTYPETHREAT.ORG, <http://www.reducingstereotypethreat.org/consequences.html> (last visited Sept. 27, 2012) [hereinafter *Consequences*].

<sup>192</sup> See Steele, *Thin Ice*, *supra* note 178, at 50; *Consequences*, *supra* note 191; *Who Is Vulnerable*, *supra* note 8.

<sup>193</sup> See Steele, *Thin Ice*, *supra* note 178, at 52; *Who Is Vulnerable*, *supra* note 78.

<sup>194</sup> Deo et al., *supra* note 37, at 16–17.

<sup>195</sup> *Id.* at 17.

<sup>196</sup> *Id.* (“Data reveal a pattern based on race and gender such that female faculty and faculty of color are more likely to engage in these discussions, while white male faculty not only are more likely to disregard the racial/gender context of the law but may even be insensitive to diversity issues, contributing to a more challenging environment for some students of color and female students”); see *id.* at 27 (explaining that “[u]nsurprisingly, therefore, sometimes professors of color and female professors rely on and relate their own personal experiences to the law so that the class gains a perspective that white male professors would be hard pressed to provide.”).

<sup>197</sup> *Id.* at 17.

<sup>198</sup> Atwater, *supra* note 90, at 251 (“[T]eachers who identify themselves within the majority ‘White’ culture may hold different beliefs about how to discuss race, and whether it is important or effective to do so in their classrooms. Conversely, non-White teachers may be more sensitive about the use of a philosophy that reportedly denies the experience and heritage of children of color due to their

faculty will be able to diminish the use and the impact of micro-messaging, by recognizing and rewarding those who problem-solve in different ways and whose comments expand paradigms. Students who learn to make arguments based on their experiences, and find micro-validation for those arguments from their professors in the classroom, will be better suited to increase their own knowledge and that of their law school peers.<sup>199</sup> Thus, expanding notions of acceptable and even outstanding arguments as well as including more diverse reasoning in the classroom and in the legal profession are additional justifications for faculty diversity. The next Part addresses the why and how to change your faculty *look* to help confront some of the approaches that this section identifies as problematic.

### III. CHANGE YOUR LOOK, CHANGE YOURSELVES

As Part I.A of the article discusses, *Grutter* provides that more diversity in law school education helps to increase the legitimacy of the law and legal system.<sup>200</sup> More diversity also increases the legitimacy of law schools themselves. To achieve this legitimacy, faculty diversity is critical. As U.C. Davis's Dean Kevin Johnson put it: "In these times, can a truly excellent law school have a homogenous student body and faculty? Can we truly - and do we want to - imagine a top-twenty-five law school comprised of predominantly white men?"<sup>201</sup> Even law schools that are not in the upper echelon need diversity to maintain their legitimacy:

In the next 50 years it is projected that current minority groups (Hispanic, Asian, and African American) will double their representation in the workforce; together they will account for nearly half the U.S. workforce. These demographic shifts reinforce the point that academic institutions cannot afford to maintain hiring, retention, and promotion practices that deflect qualified women and minority scholars.<sup>202</sup>

own unique experiences as past 'children of color.'").

<sup>199</sup> Quaye et al., *supra* note 127, at 164 ("Critical race theory enables people to understand the intersections among different social identities, such as race/ethnicity, gender sexual orientation and socioeconomic status, and promotes a discourse in which racial/ethnic minority students focus on the connections between different oppressed groups.").

<sup>200</sup> See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 330-32 (2003); see also, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954); Goodman, *supra* note 3, at 670-71.

<sup>201</sup> Johnson, *supra* note 52, at 1550. In an education context, when teachers are known to share an affinity group with the students, such as a common race, gender, or ethnicity, it is likely that those teachers enjoy increased legitimacy with students and are perceived as more credible on issues involving that category of that affinity. Carasik, *supra* note 53, at 774-77.

<sup>202</sup> *Barnard Conference*, *supra* note 77, at 4.

In law, as in other parts of academia and in the legal profession as a whole, the likelihood of the academy reaching parity with the population appears to be virtually nil, if the current policies, procedures, and outcomes continue.<sup>203</sup>

This Part discusses how the academy can change the face of law school faculty to be more representative of their students and of the nation. The direct and obvious answer to making our faculties more diverse is, as it always has been, to recruit and hire more people of color than Anglos, from your starting point forward, support and retain them, and hire even more. Because this direct answer is rarely as simple to implement as it is to say, the remainder of the article offers suggestions for a faculty makeover in the interim to offer alternative methods of reaping at least some of the benefits of enhanced diversity in ways short of the necessary increase of faculty through additional and more successful hiring and retention efforts.

#### *A. Why Do We Say Looks Matter? Looks Matter Because They Are a Catalyst for Change*

We start from the premise that looks matter—indeed, that they matter a great deal. A makeover of a faculty’s look can be valuable in many ways including providing a stronger and more supportive foundation for achieving the longer-term objective of expanded hiring and retention of diverse faculty. That said, of course, we agree with Professor Dorothy Brown’s remarks when she observes on taking *Grutter* seriously that “a university must tie its commitment to diversity into educational benefits for all of its students if it wants to impact educational outcomes” and that “[c]lassroom features that maximize diversity make use of the diverse student body in order to enhance interaction and learning.”<sup>204</sup> We are mindful that a makeover is not the correct or lasting answer to her question: “Does a university simply state a commitment to diversity in a brochure, enroll a racially diverse class, and do nothing else? Does the university

<sup>203</sup> Indeed, researchers have concluded that parity in the academy, or in the legal profession, may never be reached. *Id.* at 5 (discussing higher education generally); *ABA Leadership-Office of Diversity Initiatives*, AM. BAR ASS’N, <http://www.americanbar.org/groups/leadership/diversity.html> (last visited Sept. 27, 2012) (“This disparity between the legal profession and the general population is increasing. In the next 50 years the general population is projected to be about 50% people of color but enrollment in American law schools is less than 20% students of color. These trends suggest that the proportion of minorities in the legal profession is not likely to attain parity with that in the general population in the foreseeable future.”); see REDFIELD, *supra* note 2, at 9–13 (discussing law school student admissions and parity).

<sup>204</sup> Dorothy A. Brown, *Taking Grutter Seriously: Getting Beyond the Numbers*, 43 HOUS. L. REV. 1, 19 (2006).

walk the talk?”<sup>205</sup> So, too, by focusing as we do on looks and a makeover we have no intention of diminishing attention to these real needs for meaningful expansion and acceptance of faculty diversity in the legal academy, and no desire to lessen attention to the difficulties experienced by women and minorities in entering and remaining in that academy as equals.<sup>206</sup> We agree that look and “symbolic representation . . . while necessary, will never serve as the impetus for measurable statistical progress” or other substantive progress.<sup>207</sup> And we are mindful that look and talk do not necessarily make an inclusive and welcoming environment for diversity such as might be achieved by true growth in numbers.<sup>208</sup>

Still, we offer this somewhat surface approach, with the view that changing appearances can change perception and, sometimes, reality. Diverse and non-diverse students and staff have been shown to prefer a diverse environment,<sup>209</sup> to appreciate the opportunity to engage in diverse learning and conversation,<sup>210</sup> and to accept or reject offers on that basis.<sup>211</sup> Changing your look in the ways suggested by this article can increase the *perceived* diversity of your faculty, which in turn can assist with recruiting and retention of additional faculty, students, and staff; that is diversity

<sup>205</sup> *Id.*

<sup>206</sup> The general situation of minority faculty, like faculty recruitment, is beyond the scope of this article, but is well discussed in the literature over the past two decades. See generally Robert S. Chang & Adrienne D. Davis, *An Epistolary Exchange Making up Is Hard to Do: Race/Gender/Sexual Orientation in the Law School Classroom*, 33 HARV. J.L. & GENDER 1 (2010); Robert S. Chang & Adrienne D. Davis, *The Adventure(s) of Blackness in Western Culture: An Epistolary Exchange on Old and New Identity Wars*, 39 U.C. DAVIS L. REV. 1189 (2006); Judith A.M. Scully, *Seeing Color, Seeing Whiteness, Making Change: One Woman's Journey in Teaching Race and American Law*, 39 U. TOLEDO L. REV. 59 (2007); Delgado & Bell, *supra* note 49, at 349.

<sup>207</sup> Linda Maria Wayner, *The Affirmatively Hispanic Judge: Modern Opportunities for Increasing Hispanic Representation on the Federal Bench*, 16 TEX. WESLEYAN L. REV. 535, 550 (2010).

<sup>208</sup> Celestial S.D. Cassman & Lisa R. Pruitt, *A Kinder, Gentler Law School? Race, Ethnicity, Gender, and Legal Education at King Hall*, 38 U.C. DAVIS L. REV. 1209, 1278–79 (2005).

<sup>209</sup> See, e.g., Meera E. Deo et al., *Struggles & Support: Diversity in U.S. Law Schools*, 23 NAT'L BLACK L.J. 71, 81 (2010) (“[A] full 77% of students either agree or strongly agree that, ‘A more racially diverse student body can challenge all students to think about different viewpoints.’ In addition, 78% agree or strongly agree that, ‘Racial diversity on campus will improve students’ abilities to work and get along with others after graduating in an increasingly diverse society.’ Finally, 74% agree or strongly agree that, ‘My educational experience has been enhanced significantly by being exposed to diverse points of view expressed in the classroom.’”) [hereinafter Deo, *Struggles*]; Daye et al., *supra* note 3, at 15, 63; Herrera, *supra* note 32, at 63; Philip Lee, *The Griswold 9 and Student Activism for Faculty Diversity at Harvard Law School in the Early 1990s*, 27 HARV. J. ON RACIAL & ETHNIC JUST. 49, 89–91 (2011) (describing involvement of other diverse groups in quest that began focused on Latino faculty).

<sup>210</sup> Deo et al., *supra* note 37, at 31.

<sup>211</sup> See, e.g., Kathleen Raquel Page et al., *Faculty Diversity Programs in U.S. Medical Schools and Characteristics Associated with Higher Faculty Diversity*, 86 ACAD. MED.: J. ASS'N AM. MED. C. 1221 (2011) (“Medical student diversity 10 years earlier was the strongest modifiable factor associated with faculty diversity.”); *Next Steps*, *supra* note 52, at 26.

attracts diversity.<sup>212</sup>

This article's admittedly minimalist approach of using a makeover to change the situation for diversity finds support in current psychological research, including research on ways in which we automatically respond to various individuals and groups, as explained in Part II.B, above.<sup>213</sup> A further nuance to the discussion above involves the use of "change agents." Psychologists writing in this field describe change as being achieved through change agents such as the modification of contextual cues; the addition of new information; and the opportunity to directly experience objects so as to create "new strong associations that are incompatible with existing stereotypes or prejudice."<sup>214</sup> This "debiasing" is especially likely to occur where underlying motivation to be fair is present.<sup>215</sup> It is relatively easy to see how these change agents and factors can play a role in a makeover environment. A faculty makeover that considers these change agents and uses a layering of approaches that match them can give an overall credible surface—and some substance—for continued improvement inside and outside the classroom and institution. Aspects of the makeover can provide greater opportunity for a positive message to be sent to women and minority faculty and students already in the school, often with benefits accruing to all,<sup>216</sup> and can project a strong image of access and fairness to the larger community.<sup>217</sup> As Dean Johnson observes:

[F]ull representation of women in law-school faculties, for example, confirms in the eyes of women law students that they can be effective lawyers, can succeed, and do belong in the legal profession. It also can provide similar lessons to women

<sup>212</sup> Page et al., *supra* note 211. *But see* Herrera, *supra* note 32, at 58–59 (discussing Chicano students and their quest for Latino faculty at Harvard).

<sup>213</sup> *See, e.g., Greenwald Presentation, supra* note 73; Thomas F. Pettigrew & Linda R. Tropp, *A Meta-Analytic Test of Intergroup Contact Theory*, 90 J. PERSONALITY & SOC. PSYCHOL. 751 (2006).

<sup>214</sup> Dovidio & Gaertner, *supra* note 79, at 1110.

<sup>215</sup> While the research is not uniform, some research does conclude that a desire to be fair can change implicit attitudes through developing "chronic egalitarian values." *Id.*; *see* Nilanjana Dasgupta, *Mechanisms Underlying Malleability of Implicit Prejudice and Stereotypes: The Role of Automaticity Versus Cognitive Control*, in HANDBOOK OF PREJUDICE, STEREOTYPING, AND DISCRIMINATION (2009) (T. Nelson, ed.); Jerry Kang, *Nat'l Ct. State Courts, Implicit Bias: A Primer for Courts* (2009), available at <http://wp.jerrykang.net.s110363.gridserver.com/wp-content/uploads/2010/10/kang-Implicit-Bias-Primer-for-courts-09.pdf>.

<sup>216</sup> *See, e.g.,* Elizabeth F. Emens, *Integrating Accommodation*, 156 U. PA. L. REV. 839, 845 (2008) (discussing third party benefits from accommodations for students with disabilities); *Barnard Conference, supra* note 77, at 15 (describing benefits as accruing to all from improvements for women and minorities).

<sup>217</sup> *See* Johnson, *supra* note 52, at 1557 n.34; Enrique R. Carrasco, *Collective Recognition as a Communitarian Device: Or, Of Course We Want To Be Role Models!*, 9 LA RAZA L.J. 81, 99–101 (1996); Cassman & Pruitt, *supra* note 208, at 1276–77 (reviewing student perceptions regarding role models of same gender/race at one law school).

generally, men (including but not limited to other students), and the general public.<sup>218</sup>

While he speaks primarily to impact on students, the point is well-taken for all audiences. Dean Johnson continues:

The presence of historically underrepresented minorities on law faculties sends an unmistakable message to students of color - and most effectively “teaches” them - that they in fact belong in law school and the legal profession, as well as that they have the ability to be top-flight lawyers, scholars, judges, and policy makers.<sup>219</sup>

As previously discussed, diverse faculty play important roles as symbols, examples, and mentors;<sup>220</sup> visible and acknowledged diversity offers proof that the law school and profession are open to success for individuals of all backgrounds. While mindful that it is not reasonable or appropriate to ask or expect each diverse faculty member to represent his/her cultural group<sup>221</sup> or to speak particularly to that group’s needs,<sup>222</sup> their visible and acknowledged presence does signal a welcoming message for future students of diverse backgrounds; this is a message that may offer the added intangible benefits of increasing self-confidence among students in diverse groups.<sup>223</sup> Faculty benefits are parallel,<sup>224</sup> and can also offer more

<sup>218</sup> Johnson, *supra* note 52, at 1557.

<sup>219</sup> *Id.* at 1558; see Dasgupta & Asgari, *supra* note 88 (describing research with comparable groups of women attending all-women’s and coeducation schools and concluding that the “more women see counterstereotypic ingroup members in their immediate environment the more it undermines their automatic gender stereotypes . . .”).

<sup>220</sup> See Deo, *Struggles*, *supra* note 209, at 87 (“Focus group data reveal that many of the students rely specifically on professors of color and female professors to provide support and mentorship. Students of color and white students alike report that faculty of color are often more accessible than whites and that female faculty tend to engage students more than male faculty.”); Herrera, *supra* note 32, at 111–15. Compare Richard Delgado, *Affirmative Action as a Majoritarian Device: Or, Do You Really Want to Be a Role Model*, 89 MICH. L. REV. 1222, 1222–23 n.5 (1991) (“The role model argument, in simplest form, holds that affirmative action is justified in order to provide communities of color with exemplars of success, without which they might conclude that certain social roles and professional opportunities are closed to them. Role models are expected to communicate to their communities that opportunities are indeed available and that hard work and perseverance will be rewarded.”), with Moran, *supra* note 29, at 2298–99 (discussing student interviews supporting this proposition but also those suggesting not necessarily a reality).

<sup>221</sup> See Herrera, *supra* note 32, at 115–16.

<sup>222</sup> See Carla D. Pratt, *Taking Diversity Seriously: Affirmative Action and the Democratic Role of Law Schools: A Response to Professor Brown*, 43 HOUS. L. REV. 55, 73 (2006); Herrera, *supra* note 32, at 115–17, 120; see also Delgado, *supra* note 220, at 1226.

<sup>223</sup> See generally Leslie Ashburn-Nardo, *The Importance of Implicit and Explicit Measures for Understanding Social Stigma*, 66 J. SOC. ISSUES 508 (Oct. 2010) (discussing implicit and explicit measures of bias and how they relate to self-concept and self-stigma); Goodman, *supra* note 3, at 693 (“When the issues avoided always seem to involve gender, race, or socio-economic class, a subtle message and subtext is conveyed that these voices and forms of diversity lack value. Students who come from the unrecognized race, gender, or socio-economic class will feel less engaged and less able

noticeable patterns and opportunity for a broader community of scholars and scholarship,<sup>225</sup> one which is more open across “intellectual, race, and gender divides.”<sup>226</sup>

### *B. Solutions: State Goals and Survey Resources to Create a Checklist of Implementation Strategies*

Given the challenges in hiring new faculty, and with the benefits reviewed in Part II in mind, what are the interim solutions or stop-gap measures schools can employ? The answer is grounded first in identifying and making visible and noticeable your institutional goals for increasing diversity, and, second, in conducting a comprehensive survey of your institution’s current diversity resources to recognize in as broad a way as possible your existing base. With this background, you can use the approaches developed in this section to define and implement the specific strategies that offer best practices and potential for your institution.

#### a. Identify and publicize diversity goals

Turning to the first step, it is crucial for each institution to examine its own institutional goals for diversity in order to pursue those aspects most crucial to its function. In many cases, these goals will already be part of the

to participate in the conversation. As a result, these students will self-silence from the conversation, which further degrades the learning opportunity in that topic area and denies the benefit of diversity in that context.”); Herrera, *supra* note 32, at 120 (describing a Latina student’s perspective on speaking in class).

<sup>224</sup> See generally, e.g., L. Darnell Weeden, *Back to the Future: Should Grutter’s Diversity Rationale Apply to Faculty Hiring? Is Title VII Implicated?* 26 BERKELEY J. EMP. & LAB. L. 511, 513 (2005) (discussing applicability of Grutter to employment generally and faculty particularly); Kristin Booth Glen, *Deaning for Whom - Means and Ends in Legal Education*, 31 SEATTLE U. L. REV. 739, 744 n.26 (2008) (describing applicability of Grutter-type analysis to faculty and observing most faculty are white); Johnson, *supra* note 52, at 1556–67 (offering a dean’s perspective).

<sup>225</sup> Recognition of broader aspects of diversity and formation and expansion of such a community can perhaps increase comfort level with future diverse hires. See, e.g., Angela Onwuachi-Willig, *Complimentary Discrimination and Complementary Discrimination in Faculty Hiring*, 87 WASH. U. L. REV. 763, 766–67 (2010); Johnson, *supra* note 52, at 1562–63.

<sup>226</sup> Beverly I. Moran, *Disappearing Act: The Lack of Values Training in Legal Education - A Case for Cultural Competency*, 38 S.U. L. REV. 1, 38 (2010). In commenting on the continued lack of women and minorities the STEM disciplines, the National Academy of Science put it this way: “The United States can no longer afford the underperformance of our academic institutions in attracting the best and brightest minds to the science and engineering enterprise. Nor can it afford to devalue the contributions of some members of that workforce through gender inequities and discrimination. It is essential that our academic institutions promote the educational and professional success of all people without regard for sex, race, or ethnicity.” COMM. ON SCI., ENG’G, & PUB. POLICY, NAT’L ACAD. OF SCIS., NAT’L ACAD. OF ENG’G, & INST. OF MED., *BEYOND BIAS AND BARRIERS: FULFILLING THE POTENTIAL OF WOMEN IN ACADEMIC SCIENCE AND ENGINEERING* 4 (2007), available at [http://www.nap.edu/openbook.php?record\\_id=11741&page=4](http://www.nap.edu/openbook.php?record_id=11741&page=4).



school's long range and diversity plans.<sup>227</sup> In any case, we suggest later that these goals, whether newly developed or preexisting, be prominently featured on the school's websites and in its publications. While each institution will have its own diversity and inclusion blueprint,<sup>228</sup> there are some relatively common pedagogical goals for augmenting faculty diversity that you may want to consider:<sup>229</sup> inclusive excellence;<sup>230</sup> color-insight;<sup>231</sup> meaningful experience and engagement for all including women and minorities;<sup>232</sup> and a more welcoming, safe, and unbiased institutional culture—all contributing to a richer and more relevant educational experience.<sup>233</sup>

Such a highlighted statement of institutional goals sets a tone,<sup>234</sup> and

<sup>227</sup> By way of example, you might consider these faculty-oriented goals from the University of Washington's Diversity Blueprint: "Goal 4: Attract and Retain a Diverse Faculty and Staff; Goal 5: Encourage and Support Diversity Research; Goal 6: Creating and Sustaining a Welcoming Climate for Diversity." Univ. Diversity Council, *Diversity at UW: A Blueprint for the Future, 2010-2014*, UNIV. OF WASH. at 9–12 (2010), <http://www.washington.edu/diversity/blueprint/Diversity%20Blueprint.pdf> [hereinafter *Washington Diversity Blueprint*]. One of the co-author's attended a session at the 2011 AALS meeting entitled *Diversity in Faculty Hiring and Recruitment: A Candid Discussion from the Front Lines*; the speakers were three deans described as having been successful in attracting diverse faculty, Kevin R. Johnson, University of California, Davis School of Law; Kent D. Syverud, Washington University in St. Louis School; and Kellye Y. Testy, University of Washington School of Law. See *AALS 2011 Annual Meeting*, ASS'N OF AM. LAW SCH. (2010), [https://memberaccess.aals.org/eWeb/DynamicPage.aspx?webcode=SesDetails&ses\\_key=99e7343c-391e-4620-b07e-d3a4441420c0](https://memberaccess.aals.org/eWeb/DynamicPage.aspx?webcode=SesDetails&ses_key=99e7343c-391e-4620-b07e-d3a4441420c0). Dean Testy's remarks inspired a review of the University of Washington's diversity materials, some of which are referenced in this article as strong examples of such plans.

<sup>228</sup> See, e.g., Goodman, *supra* note 3, at 671–72.

<sup>229</sup> Professors Devon W. Carbado and Mitu Gulati propose these seven functions of diversity: "(1) inclusion; (2) social meaning; (3) citizenship; (4) belonging; (5) colorblindness; (6) speech; and (7) institutional culture. Each function derives from the relationship between race and social experiences." Devon W. Carbado & Mitu Gulati, *What Exactly is Racial Diversity? Silence at Boalt Hall: The Dismantling of Affirmative Action*, 91 CALIF. L. REV. 1149, 1154 (2003).

<sup>230</sup> See, e.g., Milem et al., *supra* note 4.

<sup>231</sup> We use the term color-insight in lieu of colorblindness. See Margalynne J. Armstrong & Stephanie M. Wildman, *Teaching Race/Teaching Whiteness: Transforming Colorblindness to Color Insight*, 86 N.C. L. REV. 635, 639 (2008); Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind"*, 44 STAN. L. REV. 1, 2–5 (1991); Herrera, *supra* note 32 at 51 (discussing the value of color-visible diverse faculties); Jerry Kang & Kristine Lane, *Seeing through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465, 465 (2010) (summarizing the empirical evidence against perceptual, cognitive, and behavioral colorblindness).

<sup>232</sup> See *Barnard Conference*, *supra* note 77 at 14–15; see also Cassman & Pruitt, *supra* note 208, at 1219–25 and references cited there (summarizing the literature); Deo et al., *supra* note 37, at 12 (describing diversity discussions as being particularly relevant to women and minorities and suggesting that women and minority faculty more welcoming of such); Karen Sloan, *Faculty Diversity Means Gains for Female Law Students, According to Study*, NAT'L LAW J. (Nov. 2, 2011), available at [http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202522297808&Faculty\\_diversity\\_means\\_gains\\_f\\_or\\_female\\_law\\_students\\_according\\_to\\_study&slreturn=1](http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202522297808&Faculty_diversity_means_gains_f_or_female_law_students_according_to_study&slreturn=1).

<sup>233</sup> See, e.g., Johnson, *supra* note 52, at 1550–51.

<sup>234</sup> Kellye Y. Testy, *Best Practices for Hiring and Retaining a Diverse Law Faculty*, 96 IOWA L. REV. 1707, 1711 (2011) ("Moving from commitment to action has multiple components. First, leaders in the institution, including the dean, associate and assistant deans, and tenured faculty members, must set a tone that conveys the importance of diversity. This step should not be a difficult one - all of us in

serves to remind the inside community of its commitments. A visible statement also offers a touchstone for a shared sense of the school's commitment later when the institution is making choices on hiring and other resource allocation. The perception of greater faculty (and student) diversity will have effects outside your institution as well, telling others that the institution cares about such issues. It can contribute to a sense of credibility and an increase in alumnae support and potentially to the esteem in which the institution is held by judges and attorneys in the local geographic area.<sup>235</sup>

As you are identifying your goals and approaching your survey, also consider what current diversity measuring devices you have in place. Is there an annual dashboard measuring student, faculty, staff diversity (whatever your categories)?<sup>236</sup> Is there an annual report on diversity scholarship, publications, and other initiatives?<sup>237</sup> Are there any diversity awards? Consider how each of these might fit with your goals.

#### b. Broadly survey human and other resources

If “you’ve got the look,” it can only strengthen the law school’s ability to engage and educate; that is, the look will help you to not only be able to “talk the talk” but also to be able to “walk the walk.” To these ends, the second step of the makeover requires a more detailed analysis to find and focus attention on as many diverse affinities as possible. First, consider what diversity you measure, and then measure it. Most of us think first about race, ethnicity, and gender; we encourage thinking broadly in these categories beyond those groups historically considered underrepresented in educational arenas<sup>238</sup> and within subsets of a particular category. We also encourage you to think beyond these categories and to include those who

legal education are devoted to academic excellence and to providing our students the very best education possible for their futures. That future is undeniably one that will require cultural competency, as legal services cross the boundaries of nation-states at accelerating rates and the demographics of our citizenry change at exponential rates. Academic excellence and devotion to our students’ welfare requires a diverse faculty. Excellence and diversity are part and parcel of one another.”)

<sup>235</sup> See generally Elizabeth Rindskopf Parker, *A Dean's Dilemma or Lessons in Diversity*, 37 U. TOL. L. REV. 117, 120 (2005) (discussing improving reputation, rankings, and diversity); Melinda S. Molina, *Role Models: Theory, Practice, and Effectiveness among Latina Lawyers*, 25 J. C.R. & ECON. DEV. 125, 137 (2010).

<sup>236</sup> See, e.g., *UW Diversity Blueprint Goal Attainment Dashboard Baseline Year: Autumn 2010* (2010), UNIV. OF WASH., <http://www.washington.edu/diversity/blueprint/Diversity%20Blueprint%20Dashboard.pdf>.

<sup>237</sup> Herrera, *supra* note 32, at 56 (discussing the role of *Harvard Civil Rights-Civil Liberties Law Review* in student organizing around Chicano issues).

<sup>238</sup> See, e.g., Deo et al., *supra* note 37, at 3-4; Johnson, *supra* note 52, at 1566; *supra* notes 69-75 (discussing Asians as an underrepresented minority).

offer backgrounds or approaches that are not always facially apparent. Such a broadened definition of diversity could include, for example, sexual orientation, socioeconomic background, disability, religion, native language, ideology, cultural groups,<sup>239</sup> and perhaps other values relevant to your community.<sup>240</sup> This section asks you to take a careful look around and make an accounting of your diversity resource base as it relates to human resources, public-oriented resources, and other possible assets.

### c. Human Resources

While this article is about making over your faculty look to improve your faculty diversity, there are already obvious and important resources in the diversity in your student body, your area bar, and your community. This is good place to start your review, noting the diversity numbers and activities in each arena and identifying what connection your faculty has with various student and community groups as members, advisors, mentors, contributors, and in other similar roles. Closer to home, one way to determine your current picture of diverse human capital is, of course, a survey, and a conventional anonymous questionnaire is a straightforward possibility. You may also decide to make this measuring a part of the makeover itself as a step for increasing both awareness and visibility.<sup>241</sup> If you choose the latter approach, consider using a cultural awareness exercise as a precursor to the survey to ferret out some of these non-obvious identities in your community.

The Five Circles Exercise<sup>242</sup> is one option<sup>243</sup> that can be used to make the survey part of increased awareness. The Five Circles Exercise allows

<sup>239</sup> See discussion *infra* note 245.

<sup>240</sup> Johnson, *supra* note 52, at 1566.

<sup>241</sup> You may want to make this survey and the suggested exercises community wide, as well as for your faculty.

<sup>242</sup> *Building Community Trust*, *supra* note 97.

<sup>243</sup> Others who teach in the area of race and the law suggest other possible exercises and learning activities. For example, Professors Armstrong and Wilder offer two exercises about race: The first exercise involves asking students (or others) to reflect on these questions: "What is your Race? How do you know? What is your first memory of race?" The second exercise, entitled "Color Insight Exercise Two (Observation Project)," sets forth the following steps: "Notice the racial composition of your environment for a twenty-four hour period and record your observations. What are the apparent races of the people you view? Note their jobs and/or the activities in which they are engaged. Note the kinds of interactions you observe and your position. Are you privileged in the interaction? . . . Make sure that you are in several different localities during the day (not *just* at home or the law library, although time spent in these places is pertinent). Conclude by sharing your reactions about that which you have observed." Armstrong & Wildman, *supra* note 231, at 670. Professor Baynes uses another approach; he asks students to write an "autobiography of racial formation and development" as a (graded) reflection paper. Leonard M. Baynes, *The Use of Reflection Papers and Student Autobiographies in Teaching Race, Racism and the Law*, 1 CRITICAL STUD. J. 121, 123 (2008).

participants to identify their self-perceived cultural groups in a non-invasive way.<sup>244</sup> The Five Circles Exercise uses a simple graphic of five blank circles and asks each participant to list five cultural groups to which he or she feels he or she belongs, one in each circle. For purposes of this exercise (and indeed generally speaking), cultural groups are defined as “group[s] of people who consciously or unconsciously share identifiable values, norms, symbols, and some ways of living that are repeated and transmitted from one generation to another.”<sup>245</sup> Common examples of cultural groups might include race, ethnicity, and gender, but there are many others that provide a commonality such as family background, geographic background, profession, religion, political persuasion, and the like. By way of example, when the authors first encountered this exercise, their circles included mother, professor, Democrat, Catholic, African American, and Yankee. Once the participants have charted their categories, each should circulate around the room and find others with similar entries, trying to find a match for all five of their cultural groups. Race and gender are the most common ways that people identify themselves, but that only accounts for two of the five circles. You may find that most of your faculty members also identify as law professor, and, if so, you might want to add some additional circles to the exercise to draw associations out further.<sup>246</sup> If you do this in a larger group, it is likely you will find some surprising affiliations and commonalities; even in a smaller group of faculty who have likely known each other for some time, new information about cultural backgrounds is likely to appear.

A positive outcome of the Five Circles Exercise or similar exercises is the ability to identify affinity groups that may not have been previously known to the participants, but which may contribute to the look and sense of diversity in your community. Other parts of awareness can flow from this exercise as well. For instance, recognizing that one person identifies as “parent” while another identifies as “mother” can help both to be conscious

<sup>244</sup> We describe the exercise as non-invasive because each participant is free to declare visible or nonvisible attributes as he or she will. See Wildman, *supra* note 89, at 92.

<sup>245</sup> *Building Community Trust*, *supra* note 97.

<sup>246</sup> In its study of how diversity affects the law school educational experience, the Law School Admission Council (LSAC) uses a series of domains that might inform your groupings: “Diversity of Student Background, Diversity of Family and Context, Diversity of Experiences, Diversity of Perspective, Diversity of Educational Expectations, and Diversity of Career Aspirations.” As used in the LSAC study, each domain offered subsets of characteristics. For example, Socio-Demographic Characteristics included Gender, Racial/ethnic background, Age, U.S. citizenship, nationality, Hometown, Current marital status, Religion spirituality, Political orientation, Sexual orientation. Each category is similarly detailed and offers a very close look at potential commonalities. Daye et al., *supra* note 3, at 4.

of different gender stereotyping affiliated with parental roles.<sup>247</sup> Recognizing both subsets<sup>248</sup> and overarching categories (as with the term “parents” in the circle) in cultural groups allows a focus on individual attributes and also allows an opportunity to maximize the ideas of affinity and inclusion that eventually may be shared more broadly.

A second, and probably more significant, purpose of exercises like this is to bring to a more conscious level<sup>249</sup> participants’ thinking about groups and attributes that might otherwise be automatic.<sup>250</sup> As discussed in Part II.A, psychology research shows that when we categorize people into groups, we implicitly tend to regard members of our in-group favorably,<sup>251</sup> and out-groups less so.<sup>252</sup> In the legal academy this tendency toward our own might be the explanation of what some have called a “lack of perspective and cognitive diversity;”<sup>253</sup> it is certainly an explanation of the tendency to continue to hire and promote those who look like us.<sup>254</sup> In contrast, affirmatively recognizing our backgrounds and group affiliations can broaden our sphere of in-groups and loyalty to them.

#### d. Website and Publicity Resources

Another place to survey your diversity footprint is on your website. Review the home page and consider what the first diversity impression is for visitors. Does your website have a statement of your school’s diversity

<sup>247</sup> See, e.g., McGinley, *supra* note 54, at 107–08. The Harvard Implicit Bias Association test site described *infra* at note 249 offers a test on implicit bias in male/female roles.

<sup>248</sup> See Afi-Odelia E. Scruggs, *Traditional Racial Labels No Longer Define New Generation of College Students*, DIVERSEEDUCATION.COM (Mar. 14, 2011), <http://diverseeducation.com/cache/print.php?articleId=14887>.

<sup>249</sup> Readers interested in exploring this topic further should consider taking the Implicit Association Test at its Harvard website, Implicit.Harvard.edu. *IAT Home*, PROJECT IMPLICIT, <https://implicit.harvard.edu/implicit/demo/> (last visited Sept. 21, 2013). See generally Shankar Vedantam, *See No Bias*, WASH. POST, Jan. 23, 2005, at W12, available at <http://www.washingtonpost.com/wp-dyn/articles/A27067-2005Jan21.html> (offering a good popular press discussion of the development and history of the IAT, including the story of Mahzarin Banaji’s and civil rights activists’ bias scores and discussing views from those critical of the IAT.)

<sup>250</sup> See, e.g., Filippa Marullo Anzalone, *It All Begins with You: Improving Law School Learning through Professional Self-Awareness and Critical Reflection*, 24 HAMLIN L. REV. 324, 325 (2001); see generally Sarah E. Redfield, ABA Section of Litigation, *Implicit Bias Task Force* (publication forthcoming, on file with authors) (providing an overview of development of schemas, automatic associations, and implicit bias).

<sup>251</sup> SUSAN T. FISKE, SOCIAL BEINGS: CORE MOTIVES IN SOCIAL PSYCHOLOGY 434 (2d ed. 2010).

<sup>252</sup> See, e.g., Nilanjana Dasgupta, *Implicit Ingroup Favoritism, Outgroup Favoritism, and Their Behavioral Manifestations*, 17 SOC. JUST. RES. 143 (2004); *Greenwald Presentation*, *supra* note 73.

<sup>253</sup> Moran, *supra* note 226, at 40.

<sup>254</sup> See generally Bertram Gawronski et al., *I Like It, Because I Like Myself: Associative Self-anchoring and Post-decisional Change of Implicit Evaluations*, 43 J. OF EXPERIMENTAL SOC. PSYCHOL. 221 (2007) (explaining that people prefer and stay loyal to what they can identify with or what looks like them.)

goals and commitments that is obvious at first glance? Do the first pictures visitors see reflect diversity? What else does your website highlight? Does a visitor quickly encounter diverse faculty and the work and writing by those at your institution related to diversity? Are there links to photos and articles and scholarly presentations of this genre? Who and what gets star billing?<sup>255</sup> The co-authors note that one of them has never received star billing on her school's website and that the other has.<sup>256</sup> Consider the message this sends to the professors themselves, to their colleagues and students, and to the outside readers.

In addition to your study of your own website, spend a few minutes looking at other school's websites and see how yours compares. For example, the William S. Richardson School of Law at the University of Hawai'i's front page<sup>257</sup> offers an explicit statement as to its diversity mission: "We embrace Hawai'i's diversity and values and recognize a special responsibility to our state and the Pacific region", displays diverse pictures, and highlights diverse faculty and international and civil rights scholarship;<sup>258</sup> Hawai'i is ranked number one on the U.S. World and News Report Diversity Index<sup>259</sup> and 95 on the Best Law Schools rankings.<sup>260</sup> The Duquesne University Law School front page presents a far less diverse image;<sup>261</sup> Duquesne is ranked last on the Diversity Index and 119 on the Best Law School rankings.<sup>262</sup> Interestingly, the Yale Law School website falls somewhere between the two; Yale is the top ranked law school overall and 33rd on the Diversity Index.<sup>263</sup>

<sup>255</sup> For instance, does the website note when a faculty member has spoken at the National Bar Association (NBA) or Hispanic National Bar Association as prominently as a presentation at the American Bar Association (ABA)? Does a faculty panel at the Society of American Law Teachers (SALT) Conference (a progressive law professor organization) hold the same prominence on the web page as a presentation at the more traditional American Association of Law Schools (AALS) conference? In both cases, the former can have a greater impact on your faculty look and the appearance of inclusion than the latter.

<sup>256</sup> We leave to the readers to consider who and for what.

<sup>257</sup> See William S. Richardson School of Law, UNIV. OF HAW. AT MANOA, <http://www.law.hawaii.edu/> (last visited Oct. 1, 2012).

<sup>258</sup> *Id.*

<sup>259</sup> *Law School Diversity Index Best Law Schools Ranked in 2011*, U.S. NEWS AND WORLD REPORTS (2011), <http://premium.usnews.com/best-graduate-schools/top-law-schools/law-school-diversity-rankings/page+8> [hereinafter *Diversity Index*]. There is considerable debate and controversy as to the impact of the U.S. News and World Report rankings on diversity in law schools generally and in regard to whether diversity should be included in the ranking formula. Although we use the rankings to show a range of website initiatives, these topics are beyond the scope of this article.

<sup>260</sup> *Best Law Schools Ranked in 2011*, U.S. NEWS AND WORLD REPORTS, <http://premium.usnews.com/best-graduate-schools/top-law-schools/law-rankings> [hereinafter *Best Rankings*].

<sup>261</sup> DUQUESNE UNIV. SCH. OF LAW, <http://www.duq.edu/law/> (last visited Nov. 4 2011).

<sup>262</sup> *Best Rankings*, *supra* note 260; *Diversity Index*, *supra* note 259.

<sup>263</sup> YALE LAW SCHOOL, <http://www.law.yale.edu/> (last visited Nov. 4 2011); *Best Rankings*, *supra*

e. Consider other assets: Who speaks and how?

1. Curriculum, Class Materials, Methodology, et al.<sup>264</sup>

Take a virtual mirror to the law school podium. Look at who stands in front of the room for the various high profile or high attendance events at your law school. Ask whether the school shows a diverse presence at orientation, debates, and even lunchtime panel discussions. Who speaks for the school, or even from the school, in the newspapers, on the radio, or on television?<sup>265</sup> Do faculty blogs at the school reflect diversity?

Also look at your course catalogue and the curriculum laid out there. As Michelle Anderson, Dean of CUNY Law School has observed, numbers and appearances of diversity are not enough without work by “law schools to create a learning environment in which diversity thrives - an environment conducive to the intellectual development of all law students. . . . Inviting a diverse group into an unyielding institution will not advance the goal of diversity, even if all those invited make an appearance.”<sup>266</sup> As part of your survey, ask: Where is the diversity in this school / in this class? For instance, is there only one course in Race and the Law, or Gender and the Law?<sup>267</sup> Are the “diversity” courses taught by Anglo faculty? Tenured faculty?<sup>268</sup> Who takes these courses in terms of student numbers, characteristics, race, ethnicity, gender, political viewpoint, or some other group characteristic?<sup>269</sup> What about the diversity within the content of other / all courses (course descriptions, topics covered in the syllabi)?<sup>270</sup>

note 260; *Diversity Index*, *supra* note 259; *see also* Celestial S.D. Cassman & Lisa R. Pruitt, *supra* note 208, 1228-29 (describing the U.C. Davis website and materials referencing diversity).

<sup>264</sup> *See, e.g.*, Morrison Torrey, *You Call That Education?*, 19 WIS. WOMEN’S L.J. 93, 94 n.4, 111 (2004) (offering an accumulation of writings on this topic and a teaching bibliography).

<sup>265</sup> *See generally* *Barnard Conference*, *supra* note 77 (recommending reasonable representation of women and minority scholars on programs, editorial boards, and the like).

<sup>266</sup> Michelle J. Anderson, *A Legal Education Prospectus: Law Schools & Emerging Frontiers: Legal Education Reform, Diversity, and Access to Justice*, 61 RUTGERS L. REV. 1011, 1022 (2009).

<sup>267</sup> Abdullina, *supra* note 52 (stating that where numbers do not total equally, there were some faculty for whom race and ethnicity was not reported and reporting that 20 men and 252 women teach Women and the Law, 45 non-white and 220 white; 3 men and 37 women teach Feminist Legal Theory, 5 non-white and 35 white; 18 men and 38 women teach Critical Race Theory, 48 non-white and 8 white).

<sup>268</sup> *See generally* Robert S. Chang, *Forget the Alamo: Race Courses as a Struggle over History and Collective Memory*, 13 BERKELEY LA RAZA L.J. 113, 116 (2002) (discussing that most race-related courses are taught by minorities); Francisco Valdes, *Barely at the Margins: Race and Ethnicity in Legal Education - A Curricular Study with LatCritical Commentary*, 13 BERKELEY LA RAZA L.J. 119, 138 (2002) (observing that minority faculty and students had carved out a “safe zone” for such courses).

<sup>269</sup> *See* Goodman, *supra* note 3, at 701 (suggesting expanding enrollment in such courses); Baynes, *supra* note 243, at 121.

<sup>270</sup> *See, e.g.*, Armstrong & Wildman, *supra* note 231, at 667 (discussing the addition of

## 2. Other Assets

One of the co-authors has observed that when she was pregnant everywhere she looked she saw other pregnant women. When you start surveying and cataloguing your diversity assets, you may well find others. Look in your library for resources, your publications and works in progress list for scholarship, your speaker series, your weekly lunches, your student or other affinity groups and clubs and their advisors. As you are surveying these and the other items, begin to think how they could perhaps be combined or reconfigured for maximum value, as discussed further in the next section.

### *C. Implement Identified Strategies to Maximize Existing Diversity*

It is useful to call to mind the *Grutter* case's identification of the benefits of diversity in higher education, in which the court stated:

These benefits are substantial. As the District Court emphasized, the Law School's admissions policy promotes "cross-racial understanding," helps to break down racial stereotypes, and "enables [students] to better understand persons of different races." These benefits are "important and laudable," because "classroom discussion is livelier, more spirited, and simply more enlightening and interesting" when the students have "the greatest possible variety of backgrounds."<sup>271</sup>

The identification of goals and the survey of existing diversity resources described in the section above will provide a starting point and suggest a list of areas where your school may choose to augment its diversity footprint. This section discusses the common areas of focus for diversity makeovers: highlighting the resources you have by direct attention or perhaps reconfiguration for more visibility and availability; considering and adjusting your classroom and curricular approaches as they relate to diversity to take full advantage of your current faculty and to strengthen the learning environment; and accounting for diversity work in your current faculty structures to encourage its continuation and expansion.

perspectives segments to core curriculum). Research at the college level suggests that women and minorities are more likely to include diversity issues in their regular curriculum; Thomas F. Nelson Laird, *Measuring the Diversity Inclusivity of College Courses*, 52 RES. IN HIGHER EDUC. 572 (2011) (on file with authors); Thomas F. Nelson Laird, Presentation, *Encouraging Diversity Inclusivity in All Courses Developing New Approaches*, Slide 25. Slides 21 and 22 offer survey questions for measuring diversity and inclusivity in course content. *Id.*

<sup>271</sup> *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003).



In considering your strategies it may be valuable to return as a touchstone to the initial survey and Five Circles Exercise. Consider again what students and others in your community see. Whether participants see someone who looks like them in their learning environment is important for learning. For students, such visibility (and hopefully connection) has been shown to be a significant factor in their motivation. As the quotations from Dean Johnson referenced previously indicate,<sup>272</sup> the existence of same gender/race ethnicity role models can send a message that the student is a “first class” citizen<sup>273</sup> and not a “society of one.”<sup>274</sup> One Latina law student described the significance of role model simply; she described that a woman she saw was Latina and a lawyer:

And so it just made sense. If she does that, I could do that. Some of my peers when I got to college and law school didn't have this sense from early on, seeing someone who was very real and tangible who had this job . . . and so it was open to me.<sup>275</sup>

Because students may tend to more often seek out faculty of the same cultural groups for advice, having these people noticeable in the community adds value.<sup>276</sup> *The Too Few and Far Between* report from the Hispanic National Bar Association put it thus:

Female attorneys need female mentors, and those who are mothers need mentors who are mothers. I performed much better in law school and in employment when I had a trusted mentor who understood me, my circumstances, my background, and my perspective. I was able to trust and confide in that person and ask important questions. When I lacked that resource, I didn't ask and therefore was not informed.<sup>277</sup>

<sup>272</sup> Kevin R. Johnson, *The Future of Legal Education: The Importance of Student and Faculty Diversity in Law Schools: One Dean's Perspective*, 96 IOWA L. REV. 1549, 1557 (2011).

<sup>273</sup> Bernice Sandler, *The Campus Climate Revisited: Chilly for Women Faculty, Administrators, and Graduate Students*, ASS'N OF AM. COLLS. 3 (1986), <http://www.eric.ed.gov/PDFS/ED282462.pdf>.

<sup>274</sup> Descriptor taken from Dean Rachel Moran's writings, *Commentary, The Implications of Being a Society of One*, 20 U.S.F. L. REV. 503 (1986); see Herrera, *supra* note 32, at 67–68 (describing the impact on students of Professor Gerald Lopez at Harvard).

<sup>275</sup> Jill L. Cruz & Melinda S. Molina, *Hispanic National Bar Association National Study on the Status of Latinas in the Legal Profession Few and Far Between: The Reality of Latina Lawyers*, 37 PEPP. L. REV. 971, 1005 (2010).

<sup>276</sup> *Stereotype Threat*, *supra* note 95.

<sup>277</sup> Melinda S. Molina, *Role Models: Theory, Practice, and Effectiveness among Latina Lawyers*, 25 J. C.R. & ECON. DEV. 125, 131 (2010).

Where diverse faculty cannot be identified the impact on students can be very real.<sup>278</sup>

a. Marshal and highlight resources to make your diversity presence visible.<sup>279</sup>

With your survey and goals in mind, review your resources and offerings and determine if you can combine them to draw more focus. If you already have a brown-bag lunch series, perhaps you can reform it slightly to offer a weekly forum on diversity-related topics. Berkeley, for example, offers a series of Social Justice Thursdays that are described as follows on their website:

Get re-inspired and remember why you came to law school by coming to A Social Justice Thursdays!

This Center for Social Justice discussion series enriches the first year curriculum by providing first-year law students with a forum in which to discuss social justice issues of all kinds and alternative perspectives on legal education and first year subject areas. All first-year students are encouraged to attend. The fall series will emphasize issues of race, ethnicity, gender, and poverty.<sup>280</sup>

Similarly, perhaps you can combine existing programs, with minimal additional inputs, into a Center or group that will speak to diverse faculty, students, and concerns. CUNY, for example, has formed Centers for Diversity in the Legal Profession and on Latino and Latina Rights and Equality.<sup>281</sup> Also review your outreach and service work and consider strengthening and emphasizing your work along the educational pipeline<sup>282</sup>

<sup>278</sup> Sandler, *supra* note 273, at 16.

<sup>279</sup> See, e.g., *Washington Diversity Blueprint*, *supra* note 227 (articulating as a first priority Goal 1: Provide Leadership and Communicate Commitment to Diversity . . . . Articulate a bold diversity mission statement and communicate it in institutional documents, websites, and internal and external communications).

<sup>280</sup> *Social Justice Thursdays*, BERKELEY LAW, <http://www.law.berkeley.edu/1096.htm> (last visited Sept. 27, 2012).

<sup>281</sup> Anderson, *supra* note 266, at 1027 n.86; see Forde-Mazrui, *supra* note 158, at 1 (describing in part the University of Virginia's Center for Race and Law).

<sup>282</sup> See, e.g., REDFIELD, *supra* note 2, at Ch. 7 (describing successful pipeline programs); SARAH E. REDFIELD, EDUCATION PIPELINE TO THE PROFESSIONS: PROGRAMS THAT WORK TO INCREASE DIVERSITY (2012); Jodie G. Roure, *The Future of Education: Educational Equities in Communities of Color: Achieving Educational Equity and Access for Underrepresented Students in the Legal Profession*, 19 TEMP. POL. & CIV. RTS. L. REV. 31, 42 (2009) (describing the Ronald H. Brown summer prep program at John Jay College held at St. John's University School of Law); Brett G. Scharffs, *Starting a Law School Youth Mentoring Program*, 2002 BYU EDUC. & L. J. 233 (2002) (describing an elementary school mentoring program at Brigham Young University Law School); Anderson, *supra* note 266, at 1029–34.

as a direct commitment to improving diverse access and as a common and visible arena for showcasing this commitment. This, for example, is one of the strategies described by the Associate Dean of Institutional Diversity and Inclusiveness, Catherine Smith, at Denver's Sturm College of Law.<sup>283</sup> Another area to focus attention is on showing diversity presence, subjects, and positive exemplars through programming at public events. Work to assure diversity in orientation presentations, panels and forum, club meetings, and extracurricular activities; this can be done internally from among your colleagues or with invited guests from your communities and other schools.

Once you create or refocus these activities, make sure they are prominent on the school website. In today's world, the website is the main window into the school, its students, and its faculty. In addition to specific activities or centers, if the website does not highlight the existing diversity of the faculty, their writings and presentations on diversity and the school's demonstration of commitment to diversity in its mission, then consider modifications to show a diversity mission statement and to put diversity and diverse faculty on the front and in the center. While fewer people travel our actual site as compared to our virtual site, the school's physical plant also conveys a message. Many of our legal institutions were dominated for decades by white men. When we display the past presidents of these groups in our boardrooms and hallways, we send an implicit if not explicit message that the real value is in such practitioners. When the statue of the women suffragettes<sup>284</sup> joined the many, many male statues in the Capitol Rotunda, Senator Olympia Snowe, already a powerful woman in her own right, commented how happy it made her to see those women there.<sup>285</sup> Work to broaden the images used in your building to show successful members of the community of all cultures.

Your library can also contribute to the improved look of diversity. Ask your librarian to highlight its collection on race, gender, socio-economic

<sup>283</sup> Smith, *supra* note 69, at 1689.

<sup>284</sup> Explore Capitol Hill, *Portrait Monument to Lucretia Mott, Elizabeth Cady Stanton and Susan B. Anthony*, ARCHITECT OF THE CAPITOL, <http://www.aoc.gov/cc/art/rotunda/suffrage.cfm> (last visited Sept. 24, 2012).

<sup>285</sup> See Sheryl Gay Stolberg, *Face Value at the Capitol; Senator Wants to 'Promote Some Diversity' in Congressional Artwork*, NY TIMES (Aug. 13, 2003), <http://www.nytimes.com/2003/08/13/arts/design/13CAPI.html>; see also *Univ. of Virginia Portraits of Law School Deans Focus Attention on Need for Diversity*, JET, Mar. 3, 1997, at 32; *Men Still Rule on Harvard Walls*, HARVARD CRIMSON, Feb. 27, 2002, at 1 (describing the need for greater representation by women and minorities at the University of Virginia Law School); Morrison Torrey, *Actually Begin to Satisfy ABA Standards 211(a) and 212(a): Eliminate Race and Sex Bias in Legal Education*, 43 HARV. C.R.-C.L. L. REV. 615, 616 (2008) (describing the gender disparity in portraits displayed in the faculty room of a university).

status, inclusion, social justice, access to justice, and the like.<sup>286</sup> For example, at UNH, to support the work of the Joint Trustee Diversity Committee, research librarian Kathy Fletcher developed a selected bibliography of books about diversity in higher education, and the library committed to acquiring them for the collection. Another approach might be to display a “book of the month” on topic at the circulation desk. If the library has a paltry collection of critical race and other materials that address such issues, ask that the collection be expanded to build up diverse authors and offerings. Also ask the librarians to assure that research assistants are schooled in how to find and use diverse sources in their research.

- b. Maximize your curriculum and classroom resources and opportunities to make your diversity resources available.

It does not necessarily require new resources to bring the issues of diversity and bias into the classroom where they can be seen. The Carnegie report on *Educating Lawyers* emphasizes the importance that attaches to what is seen and unseen, said and unsaid:

In law school, students learn from both what is said and what is left unsaid. There is a message in what the faculty address and what they do not. When faculty routinely ignore - or even explicitly rule out of bounds - the ethical-social issues embedded in the cases under discussion, whether they mean to or not, they are teaching students that ethical-social issues are not important to the way one ought to think about legal practice. This message shapes students' habit of mind, with important long-term effects on how they approach their work. Conversely, when faculty discuss ethical-social issues routinely in courses, clinics, and other settings, they sensitize students to the moral dimensions of legal cases.<sup>287</sup>

Once “seen” and heard, diversity and related issues take on importance. Within curricular matters there are several avenues to consider to achieve visibility (and beyond): the curriculum viewed as a whole; particular

<sup>286</sup> Kathy Fletcher, *Selected Bibliography Books about Diversity in Higher Education* (2005-2011) (on file with authors).

<sup>287</sup> WILLIAM M. SULLIVAN ET AL., *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* 140 (2007); see also Goodman, *supra* note 3, at 693 (“When the issues avoided always seem to involve gender, race, or socio-economic class, a subtle message and subtext is conveyed that these voices and forms of diversity lack value. Students who come from the unrecognized race, gender, or socio-economic class will feel less engaged and less able to participate in the conversation. As a result, these students will self-silence from the conversation, which further degrades the learning opportunity in that topic area and denies the benefit of diversity in that context.”).

courses; particular parts of courses, such as assignments, hypotheticals, and—of particular relevance—class discussion.

### c. Curriculum & Its Delivery Overall

The survey discussed in the previous section should give you a good idea about what is offered at your school in terms of diversity and by whom. Changes within existing resources and assignments may be appropriate as part of the makeover, consistent with your school's articulated goals.

Use your survey data to augment the diversity in front of the podium as part of your makeover by course assignments or by co-teaching or similar opportunities. Because the strategies in this article are stop-gap and interim measures, increasing diversity in the classroom presence requires leveraging existing resources. This can be done by infusing diversity conversations in a broad array of classes and by otherwise supplementing what would be totally white-male-led classes with diverse faculty and a new look. The institution can enhance the makeover by careful attention to faculty assignments. Research shows that minority and women students are less comfortable interacting with faculty than are white male students.<sup>288</sup> Research also shows that students are more comfortable interacting with faculty who share their attributes. Again, while new faculty hires may be preferable, a reconfiguration may offer a better opportunity for affinity with various culture groups and exposure to diverse faculty at various stages of a student's time at the school.

Another way to achieve some of these objectives without additional hires would be an arrangement where diverse faculty members co-teach with non-diverse faculty. For instance, two Anglo male professors can be paired with one Asian female professor. She will co-teach one or two classes in each of their courses, and they will teach (rather than co-teach, to equalize the burden of her having two pairings and them only one) two classes in her course. Thus, the faculty member of color will co-teach two or four

<sup>288</sup> As Cassman and Pruitt conclude on their review of U.C. Davis, "On the whole, it is evident that women and students of color tend to endure more negative law school experiences than their white and male classmates. As summarized in the table below, the essential elements of legal education at King Hall - teaching methods, student body and faculty composition, professional and social environment, and academic evaluation systems - appear to fit and favor white and male students, while distressing and alienating women and students of color. Also telling is the tendency of students' opinions of their legal educations to deteriorate, rather than improve, during their tenure in law school." Cassman & Pruitt, *supra* note 208, at 1278. King Hall is not the only place where such results would be found. *Id.* at 1219 nn.12-13 (discussing other studies); Sari Bashi & Maryana Iskander, *Why Legal Education is Failing Women*, 18 YALE J.L. & FEMINISM 389, 393-94 (2006) (finding continued differences in treatment of women including differences in class participation and mentor and advocacy relationships with faculty despite equivalent credentials); Moran, *supra* note 226, at 11.

additional class sessions of someone else's course, and in turn will have two or four of her class sessions covered by an Anglo colleague. While this approach might seem to be an easy one to implement, the administration should give careful thought to the "status" of the course and co-teaching so as not to send a wrong or mixed signal about these attempts to maximize student exposure based on diversity and gender.<sup>289</sup> The institution could expand the co-teaching option to have a more fruitful collaboration with a longer exchange of class sessions, or a focus on co-teaching each session. However, justice and fairness will be an issue, and Deans must be mindful of putting a greater burden on the faculty of color that cannot be shared by the Anglo faculty.<sup>290</sup> Here expanding the notion of diversity to include the non-facial characteristics discussed above will add more possibilities to the pool of "diverse" professors, and may even provide for a one-on-one co-teaching ratio for some law faculties. Of course, the non-facially diverse professor must announce that characteristic and incorporate it into the classroom experience in order for the students to recognize that co-teaching session as a diverse one.

#### d. Courses

Many law schools already offer a course or courses directed at diversity issues, e.g., Critical Race Theory, Disability Law, Feminist Legal Theory, or Human Rights.<sup>291</sup> A part of your makeover might include a bit of "star billing" for these courses either on your website and in the catalogue or by a note from the dean or faculty advisors. Such comments or "glow" may already be happening for more mainstream courses. This is an area where

<sup>289</sup> See, e.g., McGinley, *supra* note 54, at 136–38 (discussing research showing that even with similar credential white men more likely to teach "status" courses such as constitutional law); *AALS Statistical Report*, *supra* note 52; see generally Michael A. Olivas, *Reflections on Academic Merit Badges and Becoming an Eagle Scout*, 43 HOUS. L. REV. 81, 84 (2006) (offering an extensive series of illustrations from litigation and the academy related to perception and status in the distribution of "the highest level of prestige resources, those of the various merit badges earned or handed out in the daily business of academia.").

<sup>290</sup> See *Racial Gap*, *supra* note 37, at 7 (explaining the overburdening of minority faculty with diversity issues, committees, student mentoring, and crisis management, to the detriment of writing and speaking and other scholarly pursuits); see also, e.g., McGinley, *supra* note 54 (discussing committee workload as gendered in favor of men); Testy, *supra* note 234, at 1715–16 (warning against overburdening minority faculty with student advising, committee assignments and the like). The same issues plague medical school faculty. See Page et al., *supra* note 211, at 1221 (describing "a disproportionate demand on this group of faculty to meet obligations that do not traditionally translate into products recognized by promotion processes, such as serving on committees, mentoring racial and ethnic minority students, or volunteering in the community"); see also *Barnard Conference*, *supra* note 77, at 6 (discussing gender-normative expectations regarding committee work).

<sup>291</sup> Selected by title without information on content, others may also be diversity-based. See *AALS Statistical Report*, *supra* note 52.

new micro-messaging can be significant to your makeover.<sup>292</sup>

It does not require new hires to add diversity and related issues to current course offerings, and there is some research suggesting that this is a better approach than a separate offering, which may not be available to or taken by all students. As *Educating Lawyers*, quoted above, indicates, adding these topics to a class shows clearly that these topics are important and also provides additional substantive knowledge flows from the supplemental material. Adding such material does not necessarily require a large amount of work for current faculty. For example, Mary Whisner, Reference Librarian at the Marian Gould Gallagher Law Library prepared for the Dean's Advisory Committee on Diversity at the University of Washington School of Law an extensive and tremendously useful list of materials for readings on "Race, Class, Sex, and Sexuality" for first-year courses.<sup>293</sup> The bibliography covers civil procedure, constitutional law, contracts, property, and torts.<sup>294</sup> By way of example, the Civil Procedure section includes such topics as General, Alternative Dispute Resolution, Class Actions, Discovery, Injunctions, Jurisdiction, and Summary Judgment. The Injunctions section focuses on *Walker v. City of Birmingham* and Martin Luther King's march on Birmingham. The Supreme Court's opinion in *Walker* itself offers two different perspectives on the marchers;<sup>295</sup> and the bibliography offers further comparative suggested readings that include Dr. King's Letter from Birmingham Jail *offer further perspective*.<sup>296</sup> *Along similar lines, additional materials are outlined in Professor Moran's*

<sup>292</sup> See VALIAN, *supra* note 164, at 3 (furthering discussion of micro-messaging); see also *Barnard Conference*, *supra* note 77, at 2 (explaining the cumulative effects of subtle "micro-inequities").

<sup>293</sup> Mary Whisner, *Readings on Race, Class, Sex, and Sexuality Related to First-Year Courses*, GALLAGHER LAW LIBRARY, <http://www.law.washington.edu/diversity/Readings.aspx> (last visited Aug. 10, 2010); see, e.g., Charles R. Calleros, *In the Spirit of Regina Austin's Contextual Analysis: Exploring Racial Context in Legal Method, Writing Assignments and Scholarship*, 34 J. MARSHALL L. REV. 281, 284-91 (2000) (offering culturally relevant examples in contract, domestic relations, and criminal law); Kevin Johnson, *Integrating Racial Justice into the Civil Procedure Survey Course*, 54 J. LEGAL EDUC. 242 (2004); Moran, *supra* note 226, at 36 nn.86-87 (discussing materials generally and providing another extensive list of curricular materials); Julie M. Spanbauer & Katerina P. Lewinbuk, *Embracing Diversity through a Multicultural Approach to Legal Education*, 1 CHARLOTTE L. REV. 223, 247-249 (2009) (discussing *Walker v. City of Birmingham*, 388 U.S. 307, 327 (1967), which found the parade ordinance at issue unconstitutional).

<sup>294</sup> Whisner, *supra* note 293.

<sup>295</sup> *Walker v. City of Birmingham*, 388 U.S. 307, 307 (1967) (upholding conviction for violation of injunction).

<sup>296</sup> See generally David Benjamin Oppenheimer, *Martin Luther King, Walker v. City of Birmingham, and the Letter from Birmingham Jail*, 26 U.C. DAVIS L. REV. 791 (1993); David Benjamin Oppenheimer, Kennedy, King, Shuttlesworth and Walker: The Events Leading to the Introduction of the Civil Rights Act of 1964, 29 U.S.F. L. REV. 645 (1995); David Luban, *Difference Made Legal: The Court and Dr. King*, 87 MICH. L. REV. 2152 (1989). Whisner treats other topics similarly. Whisner, *supra* note 293.

article calling for cultural competency training.<sup>297</sup> Again, by way of example, she offers this opening observation about such integration and infusion in torts courses:

Tort law has a rich feminist literature. Some areas that gender scholars have touched on in tort law include: what does the reasonable man standard mean in the context of female defendants; “the loss of consortium and compensation for providing care to tortuously injured persons; and the calculation of damages. In addition to a feminist analysis, tort law also raises race concerns.<sup>298</sup>

While materials are available for fairly ready adoption, their actual adoption and effectiveness is less clear. Recent research from the Law School Admissions Council referenced earlier sheds some light on how much or how effective faculty are in conveying a diversity context for particular cases in their courses. While not precise on faculty intent or faculty characteristics, the LSAC report does offer some sense of the bigger picture by offering data on how students perceive certain foundational cases in terms of their racial implications, or not. The cases reviewed are, as described by LSAC:

*People v. Goetz* (a man charged with shooting youth who approached him for money on a New York subway); *Grutter v. Bollinger* (a case involving law school diversity); *Batson v. Kentucky* (a case involving peremptory strikes and the right to serve on juries); *Korematsu v. U.S.* (a case involving wartime powers); *Hamdi v. Rumsfeld* (a case about the right of the United States to detain citizens during wartime); *Williams v. Walker-Thomas Furniture Co.* (unconscionability in an installment contracts case is grounds to invalidate the contract).

Most students surveyed recalled that they had reviewed the proffered cases in law school. The data collected showed that for some cases, namely *Grutter v. Bollinger*, *Batson v. Kentucky*, and *Korematsu v. U.S.*, there was strong agreement among all of the racial and ethnic groups that these cases were “‘extremely’ or ‘very’ relevant to race.” Other cases, such as *Hamdi* and *Williams*, showed less uniform and clear results in terms of how students saw their relevance to race. LSAC summarized:

<sup>297</sup> Moran, *supra* note 226, at 34–35. Further review of the writings on race and law courses and curriculum and their value is beyond the scope of this article.

<sup>298</sup> *Id.* at 47.



1. For these cases, there was substantial variance (spread across groups) in how relevant to race students perceived these cases to be.
2. In some cases a lower percentage of Asian students reported that the cases were relevant to race compared to other students (People v. Goetz, Batson v. Kentucky, Williams v. Walker Thomas Furniture Co.).
3. In most cases Black students and Latino students perceived the cases to be more relevant to race than did White students.
4. Across the cases, men and women ordered the cases similarly in terms of race relevance, but a higher percentage of women saw the cases as race relevant.<sup>299</sup>

LSAC also found that: “If law school classes only included White students, the full range of voices and perspectives about the nature of common legal cases would not be present.”<sup>300</sup>

#### e. Hypotheticals and Assignments

Refocusing attention on hypotheticals is another approach to making over the visibility of diversity without additional cost. It is valuable to encourage your faculty to incorporate diversity, including biculturalism<sup>301</sup> and bias issues,<sup>302</sup> into classroom hypotheticals,<sup>303</sup> legal research and writing assignments,<sup>304</sup> and even exam questions. As Professor Calleros puts it:

At the subtlest level, law school instructors can be inclusive simply by recognizing ethnic and other diversity in the lawyers, judges, parties, and other actors and events that parade through hypotes, problems, and assignments. . . . We don’t need to dwell much on that relatively superficial level, but we shouldn’t minimize it either. The first step in preparing

<sup>299</sup> Daye et al., *supra* note 209, at 28.

<sup>300</sup> *Id.*; see Rand & Light, *supra* note 63, at 330; Deo et al., *supra* note 37, at 20–21; Moran, *supra* note 29, at 2284–85.

<sup>301</sup> Spanbauer & Lewinbuk, *supra* note 293, at 225 (“This social science literature defines a bicultural individual as someone who has internalized more than one culture and language due to migration, mixed cultural heritage, or frequent travel to-or living for a time in-a different culture.”).

<sup>302</sup> Lorraine Bannai & Anne Enquist, *(Un)Examined Assumptions and (Un)Intended Messages: Teaching Students to Recognize Bias in Legal Analysis and Language*, 27 SEATTLE U. L. REV. 1, 8 nn.25–27 (2003); Susan S. Kuo, *Culture Clash: Teaching Cultural Defenses in the Criminal Law Classroom*, 48 ST. LOUIS U. L.J. 1297, 1299–1300 (2004); Stephanie Y. Brown, *Law Teaching and Social Justice: Teaching Until the Change Comes*, 25 J. C.R. & ECON. DEV. 195, 222 (2011).

<sup>303</sup> See Whisner, *supra* note 293; Calleros, *supra* note 293, at 282.

<sup>304</sup> Calleros, *supra* note 293, at 282.

our students for practice in a pluralistic society is to get them accustomed to picturing their clients and other actors in the legal system in an inclusive, realistic manner.<sup>305</sup>

The context of this observation is confirmed by the remarks about one of the early Latino students at Harvard described as “not just unhappy but in many ways unchallenged. Unchallenged by a place that had no idea about, and apparently little interest in, how to design its curriculum to systematically expose students to the complex lives of people like those with whom I had grown up.”<sup>306</sup>

Professor Calleros has also written an excellent guide as to the why and how of incorporating diversity into legal research and writing courses on subjects of race, class, ethnic culture, gender, sexual orientation, mental and physical disability and the like.<sup>307</sup> In addition to his commentary on the value and difficulties of such an approach, Calleros offers an Appendix listing topics and assignments developed by legal writing faculty together with comments on student and faculty reaction.<sup>308</sup> While this kind of approach may require some change on the part of individual faculty, conscious efforts to diversify references and hypotheticals used in class can be an important part of the new look, a look which demonstrates that the instructor and institution have concern about such issues and that they are not subject to the “power of silence” or part of the “null curriculum,”<sup>309</sup> but rather are relevant to “real” law courses and worthy of class time for discussion.

#### f. Class Discussions and Participation<sup>310</sup>

As indicated in previous sections, the classroom will be an important forum for implementing a diversity makeover, in terms of both process and

<sup>305</sup> *Id.*

<sup>306</sup> Herrera, *supra* note 32, at 54.

<sup>307</sup> See Calleros, *supra* note 293, at 282; Charles R. Calleros, *Training a Diverse Student Body for a Multicultural Society*, 8 LA RAZA L.J. 140, 150–51 (1995) [hereinafter Calleros, *Training*]; see also, as to disability particularly, Jennifer Jolly-Ryan, *Disabilities to Exceptional Abilities: Law Students with Disabilities, Nontraditional Learners, and the Law Teacher as a Learner*, 6 NEV. L.J. 116, 126 (2005); Robin A. Boyle, *Law Students with Attention Deficit Disorder: How to Reach Them, How to Teach Them*, 39 J. MARSHALL L. REV. 349, 373 (2006).

<sup>308</sup> Calleros, *supra* note 293, at 298.

<sup>309</sup> Moran, *supra* note 226, at 28–29.

<sup>310</sup> Recognizing that infusing diversity into class discussion may present challenges, one of the co-authors offers these pointers: “Acknowledge the professor’s own background and biases. Acknowledge the predispositions and biases of students as well. Listen to the students, using active listening techniques, as well as giving them a voice that can be heard. Welcome conflict and dissonance and show students how to resolve it. Watch personalization and de-objectify, when possible, harsh statements. Mediate the tug of war that different students may engage in. Make effective use of silence to encourage more participation by other voices.” Goodman, *supra* note 3, at 702.

content. As to process, this is a place where increased awareness can help.

Examining classroom behaviors and adjusting them to be visibly more inclusive is a relatively cost-free step in the makeover. Recognizing micro-inequities in the process of classroom discussion can be a significant area for a new look. You might take a step one of the co-authors tried to gauge this. She asked her research assistant to track whom she called on first and most often over a period of a few days. She was surprised to find it was consistently white male students (who admittedly always sat front and center and volunteered visibly).<sup>311</sup> Even if you don't try a tally like this, ask yourselves, "Whom do I call on first?"<sup>312</sup> Do I allow fair time for thoughtful silence?<sup>313</sup> Do I credit good answers from unexpected places? Do I act surprised when a quiet young woman answers a question well? Do I merely accept the first reluctant or uncertain answer from minority students, but spend more time pushing (and therefore truly engaging with) Anglo male students with confident presentations? Do I avoid putting diverse students in the place of speaking for all similarly diverse students?<sup>314</sup> Also consider, where applicable, assigning students for projects based on diversity of look and of skills rather than allowing self-selection.<sup>315</sup>

Opening any discussion fairly to diverse participants is an important step, but so is opening the substance.<sup>316</sup> Here a prerequisite is a willingness

<sup>311</sup> See generally Margaret E. Montoya, *Silence and Silencing: Their Centripetal and Centrifugal Forces in Legal Communication, Pedagogy and Discourse*, 33 U. MICH. J.L. REFORM 263, 297-98 (2000) (commenting on the "crowders" and silence).

<sup>312</sup> See, e.g., Goodman, *supra* note 3, at 691.

<sup>313</sup> *Id.* at 691-92.

<sup>314</sup> See Deo et al., *supra* note 37, at 20-21, 35-36 (describing this as a burden and describing a student reporting that a white male professor singled out a black male student to represent the criminal in class hypotheticals); *Gutter v. Bollinger*, 539 U.S. 306, 334 (2003) ("The Law School does not premise its need for critical mass on 'any belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue.'"); Moran, *supra* note 29, at 2258-59 (discussing tokenism).

<sup>315</sup> See generally, TEAM-BASED LEARNING: A TRANSFORMATIVE USE OF SMALL GROUPS IN COLLEGE TEACHING (Larry K. Michaelsen et al. eds., 2002) (discussing a team approach to learning); Larry Michaelsen, *Team Based Learning*, <http://www.teambasedlearning.org/Default.aspx?pageid=1032336> (last visited Sept. 26, 2012) (advising against self-selection and in favor of diversity).

<sup>316</sup> Professor Calleros outlines three pedagogical reasons for doing so: "The advantages of raising issues that cut to the heart of gender, race, or other fundamental or perceived differences are at least threefold. First, such issues can be excellent vehicles for developing skills of critical thinking, both because students care deeply about the issues and can challenge each other to analyze the issues from a variety of perspectives. Second, a diverse group of students addressing such issues are likely to educate one another about cultural differences, better preparing all students for professional practice in a multicultural society. Third, by setting issues in the context of different cultures and encouraging the expression of a variety of perspectives, an instructor can reduce the alienation often experienced by students who feel like "outsiders" to the legal profession and an educational system that retains many vestiges of white, heterosexual male traditions." Calleros, *Training*, *supra* note 307, at 141.

to name names. Race, ethnicity, gender, English as second language speakers, sexual orientation and other differences are in the classroom anyway, whether we explicitly acknowledge them or not. Letting the students and your faculty know that “it’s okay to notice” offers an opportunity for diversity that is both cosmetic and real.<sup>317</sup> We do not suggest this is easy, but recognizing the variety in our audiences may well contribute to improved learning outcomes and student engagement.<sup>318</sup> For an example of the value of this approach, Professor Calleros describes a criminal law comparison that he gleaned from conversations with an informal diverse student group that he convened to discuss these issues. We quote him at length as a good illustration of what students can learn and how they view their opportunities for learning, as well as of the impact of the professor’s discomfort with a sensitive and difficult topic:

#### Developing Skills of Critical Analysis

An example from the Student Group illustrates how topics that raise issues of sex, race, or other fundamental or perceived differences among people can be effective vehicles for developing skills of critical analysis. One member of the Student Group, a white woman who will be referred to as “LF,” recalled three consecutive class hours in her Criminal Law class during which her instructor led the group in riveting and wrenching discussions of the crime of rape and the defense of consent. The instructor encouraged her students to explore all perspectives.

LF found the discussion to be frustrating, emotionally trying, and occasionally explosive. Questions concerning the scope of the doctrine of consent revealed different perspectives associated with sexually assertive men on the one hand and women who have experienced aggressive sexual advances on the other. Nonetheless, LF found these discussions to be an “incredible learning experience” during which she honed her oral advocacy skills by articulating her arguments for a narrow definition of consent. Equally important, she better understood the “male perspective” and learned that it was not truly gender specific, since a few women as well as many men in the class argued in favor of a broader view of consent.

<sup>317</sup> Wildman, *supra* note 244, at 93–94.

<sup>318</sup> See, e.g., Herrera, *supra* note 32, at 68 (“At last we hear someone talk about the cultural aspects of law and community and how the two assume equal importance in resolving civil rights disputes. The professor, in this case, is not patronizing or condescending when addressing issues of race or sex, and that, too, feels good.”).

Interestingly, a different section of Criminal Law in the same semester did not discuss the crime of rape. The professor had declared the topic “too sensitive” and that he was uncomfortable covering it. A member of the Student Group noted that many students felt “cheated” of the opportunity to confront a difficult issue that could help prepare them for addressing similar questions in practice.

The lesson of this story seemed clear to the members of the Student Group: as painful as they may be to confront, students tend to care deeply about issues of race, sex and other differences, leading to particularly intense and lively class discussion under the direction of an able and fearless instructor. Moreover, a diverse group of students will tend to express a variety of perspectives to the educational benefit of all. For example, LF honed her skills when forced to confront and evaluate the perspectives of others in her Criminal Law class; in turn, other students had the opportunity to benefit from confronting and evaluating her perspective.<sup>319</sup>

Other students make similar observations.<sup>320</sup>

As Professor Calleros suggests, some faculty may already be incorporating diversity in their classes,<sup>321</sup> but this is an area where many faculty report that they do not feel comfortable engaging with the students (and where students recognize this discomfort).<sup>322</sup> Some of that discomfort may be based on the faculty member’s own perception that he or she is not “diverse,” and therefore should not be speaking on topics of diversity. Discomfort may also be based on worry about what responses might be elicited,<sup>323</sup> including worry about too much emotion being evoked.<sup>324</sup> Some gentle conversation and even mild “training” by those more experienced with addressing diversity issues in the classroom can go a long

<sup>319</sup> Calleros, *Training*, *supra* note 307, at 141–42; *see also* Deo et al., *supra* note 37, at 10–11.

<sup>320</sup> *See* Deo et al., *supra* note 37, at 19–20 (“I feel like all the discussions and the opportunities to really talk about race, and class, and gender, sexual orientation, any type of diversity, I think, has really been sort of like this add-on thing that I feel like the administration has just tacked on to other things. It’s not really given its due. In the sense that I don’t think professors really talk about it. I feel like these are the cases that get cut off. Like when we have to cut something from the syllabus, those are the cases.”).

<sup>321</sup> *See, e.g., id.* at 25–30 (discussing this may be more common for diverse faculty or faculty with particular diversity or civil rights expertise).

<sup>322</sup> *See, e.g., id.* at 23–24.

<sup>323</sup> Armstrong & Wildman, *supra* note 231, at 653; *see also* Deo et al., *supra* note 37, at 12, 21; Goodman, *supra* note 3, at 692.

<sup>324</sup> Moran, *supra* note 29, at 2332.

way towards lessening this discomfort.<sup>325</sup> In addition, by reference to the expanded diversity characteristics developed in the survey, many faculty members can come to understand the ways in which they may be part of cultural groups different from the majority of their colleagues.

g. Account for and reward diversity efforts and successes

It is axiomatic that what gets counted, measured, or tested is what is considered worthy of attention. Here, assuring that such accountings are visible is another part of the makeover, and one which may well lead to the most real change. Consider adding a question to student evaluations about how culturally competent the class was or how often the professor encouraged engagement on diversity. Have the administration add a component to faculty reporting and evaluation as to the work the individual has done to further diversity over the reporting period. Like counting, a similar truism might be that recognition is valued. Consider offering a Dean's prize for the most significant work relating to diversity each year. The authors will love to come and see it awarded! The University of Washington Diversity Blueprint referenced earlier regarding its goals offers an illustration of these points. Under Goal 1 to "Provide Leadership and Communicate Commitment to Diversity" it provides:

- Place top priority on creating accountability measures and incentives and embed diversity into the central University functions of teaching, research, service, and infrastructure development and management
- Develop unit plans and measures consistent with the University Diversity Blueprint
- Include progress on diversity in the performance reviews of vice presidents, vice provosts, deans, directors, and chairs
- Develop multiple means of recognition that reward participation in diversity related work and programs
- Strengthen data collection (quantitative, qualitative, and longitudinal) about diverse populations and share these data with University leadership for their use in decision-making and resource allocation.<sup>326</sup>

These recommendations are just a beginning, but can help your institution to assess its diversity efforts and monitor progress and regress along the way.

<sup>325</sup> Such training can include a conversation about the role of faculty and students and the need to avoid putting all obligations for diversity discussions on diverse students.

<sup>326</sup> See *Washington Diversity Blueprint*, *supra* note 227, at 5.

## CONCLUSION

The lack of faculty diversity is an enduring problem, which many law schools, indeed many professional schools, and universities generally, have faced for years. These same schools are also striving to maintain or expand their student diversity numbers. In the long term, pipeline initiatives already underway, including many identified by one of the co-authors of this article in her recent book, will help expand the pools of both students and faculty.<sup>327</sup> But the issue is not only a pipeline issue. This article recognizes some of the causes, explicit and implicit, that have contributed to making the face of the legal academy what it is, and is not. Many of these factors are invisible indeed; many are unknown to—and would likely be denied by key players. While much serious long-term substantive work remains to be done, to bring these factors to the attention of the community, the makeover offers a set of possible short or intermediate steps that faculty can implement to makeover their look and augment their existing diversity—to showcase their work in the best and most diverse light possible until longer-term strategies succeed.

Some may ask why bother to make your faculty look more diverse because the real issue is not a cosmetic one. Small steps, even cosmetic ones, can make a difference in awareness, and as discussed in the previous sections, can represent real change even without additional hires or significant resources. As you review your institution's diversity footprint, consider the institutional as well as classroom strategies for maximizing your faculty look, working from the strategies outlined in this article. And remember this is just for the short term.

The long-term goal is to hire more so you can more easily be diverse and inclusive for the educational benefit of our communities. No makeover can do this. There is much hard work ahead.

<sup>327</sup> *Barnard Conference*, *supra* note 203; *Forde-Mazrui*, *supra* note 282, at 28.