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## Teaching Cultural Competence in Law School Curricula: An Essential Step to Facilitate Diversity, Equity, & Inclusion in the Legal Profession

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TEACHING CULTURAL COMPETENCE IN LAW SCHOOL CURRICULA:  
AN ESSENTIAL STEP TO FACILITATE DIVERSITY, EQUITY,  
& INCLUSION IN THE LEGAL PROFESSION

Phyllis C. Taite\* & Nicola “Nicky” Boothe\*\*

INTRODUCTION

A judge made national news when a video was leaked of her and her family using racial slurs.<sup>1</sup> A lawyer’s racist rant, where he threatened to call Immigration and Customs Enforcement on New York restaurant workers because they were speaking Spanish, went viral and earned him a public scolding by the court.<sup>2</sup> The defense team for Ahmaud Arbery’s murderers had an issue with Black people on the jury and sought to have the judge bar high profile members of the Black community from the courtroom.<sup>3</sup> That same defense team used racist tropes as part of the closing argument to appeal to the presumed racial bias of a nearly all-white jury.<sup>4</sup>

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<sup>1</sup> Amanda Holpuch, *Louisiana Judge to Take Unpaid Leave After Using Racial Slur*, N.Y. TIMES (Dec. 15, 2021), <https://www.nytimes.com/2021/12/15/us/michelle-odinet-burglary-racial-slur-sedative.html> [<https://perma.cc/5WMT-2C5Q>] (“A Louisiana judge said she would take an unpaid leave of absence after a video recorded her using a racial slur while watching security footage of a foiled burglary outside her home.”).

<sup>2</sup> Priscilla DeGregory, *‘Racist Lawyer’ Aaron Schlossberg Publicly Scolded by Appeals Court*, N.Y. POST (Dec. 22, 2020, 2:18 PM), <https://nypost.com/2020/12/22/racist-lawyer-aaron-schlossberg-scolded-by-appeals-court/> [<https://perma.cc/BAW7-JTLC>].

<sup>3</sup> Eric Lutz, *Lawyer for Ahmaud Arbery’s Killer: Sorry if My Racist Comment Offended Anyone*, VANITY FAIR (Nov. 12, 2021), <https://www.vanityfair.com/news/2021/11/lawyer-for-ahmaud-arbery-killer-sorry-if-my-racist-comment-offended-anyone> [<https://perma.cc/HK7J-XNS2>].

<sup>4</sup> Nicole Chavez & Brandon Tensley, *Demonizing Black Victims Is an Old Racist Trope that Didn’t Work for Defense Attorneys this Time*, CNN (Nov. 25, 2021, 7:37 AM), <https://www.cnn.com/2021/11/25/us/ahmaud-arbery-racist-rhetoric-trial-takeaways/index.html> [<https://perma.cc/G9F2-QVGT>] (“Ahmaud Arbery was the victim. But for weeks, he was painted as a brute and a thug in the trial of the three White men who killed him. This tactic isn’t new, but rather the latest example in a long history of court cases that criminalize and dehumanize Black victims.”).

Sadly, these were not isolated incidences of racist or racially insensitive behavior from the bar and the bench.<sup>5</sup> Despite subsequent expressions of remorse, racist behaviors raise concerns about the underlying root causes or belief systems that fueled these previous actions. Such root causes and implicit beliefs have the potential to impact future judicial decisions, defense strategies, and prosecutorial discretion where applicable. These concerns are not limited to the criminal justice system; however, this is where the greatest impact is often most visible.

Questions of racial bias and racism in the law are not new.<sup>6</sup> Technology and social media have, however, made it easier to expose them nationally and globally. In perhaps the most famous example, a teenager's recording and social media exposure of the murder of George Floyd was the catalyst for worldwide protests and renewed calls for racial justice.<sup>7</sup>

Global protests and the subsequent trial of Mr. Floyd's murderers highlighted systemic racism and deeply-rooted problems of bias in America, oftentimes bred from a lack of cross-cultural understanding. Coupled with the national attention of racist behaviors of some judges and lawyers, these protests simultaneously

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<sup>5</sup> See, e.g., Gary Craig, *Wayne County Judge Accused of Using Racist Slurs Dies*, DEMOCRAT & CHRON. (Nov. 9, 2021, 9:27 AM), <https://www.democratandchronicle.com/story/news/2021/11/09/judge-paul-sucher-dies-after-resigning-over-racist-allegations/6301634001/> [<https://perma.cc/96WL-USNZ>]. See also Mykal Vincent & Scottie Hunter, *Gov. Edwards Calls on Judge Who Admitted to Sending Racists Text to Resign; Attorneys Respond*, KSLA 12 NEWS (Feb. 27, 2020, 10:49 AM), <https://www.ksla.com/2020/02/26/gov-edwards-calls-judge-who-admitted-sending-racist-texts-resign/> [<https://perma.cc/8F54-KE7Q>] (“Governor John Bel Edwards has called on 23rd Judicial District Court Judge Jessie LeBlanc to resign after she admitted to sending racist text messages in an interview with WAFB’s Scottie Hunter. The racial slurs were used in reference to an Ascension Parish deputy and a court employee.”).

<sup>6</sup> See generally Erin C. Lain, *Racialized Interactions in the Law School Classroom: Pedagogical Approaches to Creating a Safe Learning Environment*, 67 J. LEGAL EDUC. 780, 782 (2018); Phyllis C. Taite, *Exploding Wealth Inequalities: Does Tax Policy Promote Social Justice or Social Injustice?*, 36 W. NEW ENG. L. REV. 201, 202 (2014); Bryan A. Stevenson & Ruth E. Friedman, *Deliberate Indifference: Judicial Tolerance of Racial Bias in Criminal Justice*, 51 WASH. & LEE L. REV. 509, 510 (1994); Margaret Bull Kovera, *Racial Disparities in the Criminal Justice System: Prevalence, Causes, and a Search for Solutions*, 75 J. SOC. ISSUES 1139, 1139 (2019).

<sup>7</sup> See Harmeet Kaur, *The Teen Who Sparked a Global Movement with Her Video of George Floyd’s Final Moments Receives an Award for Her Bravery*, CNN (Dec. 9, 2020, 1:07 PM), <https://www.cnn.com/2020/12/09/us/teen-recorded-george-floyd-award-trnd/index.html> [<https://perma.cc/7LKD-3TUP>] (“Darnella Frazier’s impulse to pull out her cell phone and hit record on May 25 had a profound impact. The 17-year-old had ventured out to the store with her younger cousin that day when she saw a man handcuffed and face down on the ground. She captured former Minneapolis Police officer Derek Chauvin pressing his knee into George Floyd’s neck for nearly nine minutes—what would be Floyd’s final moments. She shared the video on social media and it was soon seen around the world. It sparked change in her local community, leading to the firing of the four officers involved, a ban on police chokeholds and a federal investigation. It also became the catalyst for a global racial justice movement.”).

highlighted the need for diversity of thought, and the lack of cross-cultural understanding, in both the bench and the bar. These examples underscore the need for acknowledgment and appreciation for how race and culture influence all aspects of the legal system.

Integrating cultural competence in the legal profession is a necessary step to combat pervasive inequities and inequalities. As lawyers, we have an obligation to act equitably, transparently, and with integrity.<sup>8</sup> As law professors, we have an obligation to prepare our students for effective, ethical, and responsible participation in the legal profession.<sup>9</sup> Accordingly, it is incumbent on the legal academy to instill cultural competence into the curricular framework of legal education as a critical step in facilitating diversity, equity, and inclusion (“DEI”) in the legal profession.

The American Bar Association (“ABA”) has further recognized the importance of expanding DEI in legal education. The May 2021 Standards Committee Memorandum on Proposed Changes (“ABA Memorandum”) outlined a number of proposed standards for expanding DEI for law schools, including, but not limited to, training on bias, cross-cultural competency, and racism for law students, faculty, and staff.<sup>10</sup> Recognizing that academic integrity requires law schools to prepare future lawyers for a world where racism and bias exists,<sup>11</sup> the ABA adopted the proposed standard in February 2022.<sup>12</sup> The new Standard 303 (c) dictates that “[a] law school shall provide education to law students on bias, cross-cultural competency, and racism: (1) at the start of the program of legal education, and (2) at least once again before graduation.”<sup>13</sup>

The ABA’s implementation of this standard acknowledges that law schools provide the best opportunity to create a foundation and reinforce these additional competency skills for new lawyers.<sup>14</sup> As schools across the country determine how

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<sup>8</sup> See MODEL RULES OF PRO. CONDUCT Preamble & Scope (AM. BAR ASS’N 2021).

<sup>9</sup> See ABA STANDARDS AND RULES OF PROC. FOR APPROVAL OF L. SCHS. 301(a), at 17 (AM. BAR ASS’N 2020) (“A law school shall maintain a rigorous program of legal education that prepares its students upon graduation, for admission to the bar and for effective, ethical, and responsible participation as members of the legal profession.”).

<sup>10</sup> See Memorandum from the ABA Standards Comm. to the Council (May 7, 2021), [https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/council\\_reports\\_and\\_resolutions/may21/21-may-standards-committee-memo-proposed-changes-with-appendix.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/may21/21-may-standards-committee-memo-proposed-changes-with-appendix.pdf) [https://perma.cc/HM94-PYNK].

<sup>11</sup> See Erin C. Lain, *Racialized Interactions in the Law School Classroom: Pedagogical Approaches to Creating a Safe Learning Environment*, 67 J. LEGAL EDUC. 780, 782 (2018) (describing how race permeates every aspect of society).

<sup>12</sup> American Bar Association, Resolution, 2022 Midyear Meeting (Feb. 14, 2022), <https://www.americanbar.org/content/dam/aba/directories/policy/midyear-2022/300-midyear-2022.pdf> [https://perma.cc/JUC8-ZP97] [hereinafter ABA Resolution].

<sup>13</sup> *Id.*

<sup>14</sup> See Nicola A. Boothe-Perry, *Professionalism’s Triple E Query: Is Legal Academia Enhancing, Eluding, or Evading Professionalism?*, 55 LOY. L. REV. 517, 542 (2009) (noting that law schools necessarily have a responsibility in developing new lawyers attitudes and dispositions regarding the practice of law); Jack T. Camp, *Thoughts on Professionalism in*

best to meet the new standard, it is critically important that law school faculty understand the value of cultural competency training, and that law schools be provided with key considerations in planning curriculum to provide such training.

Part I of this Essay provides the path to integrating DEI in the legal profession, beginning with a definition of cultural competency and providing an explanation of the importance of cultural competency teaching on DEI in the legal profession. Part II will explore barriers to teaching cultural competency, followed by Part III, which provides specific strategies to conquer those barriers. Part IV focuses on specific strategies for the first-year curriculum, and Part V suggests ways to avoid common mistakes. The Essay concludes with a call to action for workable modifications to law school curricula to ensure appropriate training for professors and the next generation of lawyers.

### I. FROM CULTURAL COMPETENCY TO DIVERSITY, EQUITY, AND INCLUSION

In its 2007 “Mission and Goals,” the ABA stated that one of its four goals was to “[e]liminate Bias and Enhance Diversity,” which includes two objectives: (1) “[p]romote full and equal participation in the association, our profession, and the justice system by all persons” and (2) “[e]liminate bias in the legal profession and the justice system.”<sup>15</sup>

Despite these stated objectives, there remain notable racial and ethnic disparities within the bar.<sup>16</sup> Data from the ABA evidence that 85% of all lawyers are white, 5% are Black, 5% are Hispanics, and 2% are Asians.<sup>17</sup> These statistics sharply contrast the growing diversity in the United States general population. According to the U.S. Census Bureau’s 2020 analyses, the overall ethnic diversity of the country has increased over the past decade,<sup>18</sup> with some ethnic groups surpassing ‘white

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*the Twenty-First Century*, 81 TUL. L. REV. 1377, 1394 (2007); see also Douglas S. Lang, *The Role of Law Professors: A Critical Force in Shaping Integrity and Professionalism*, 42 S. TEX. L. REV. 509, 511–12 (2001) (suggesting that new law students come to school with no knowledge of professional standards in legal practice).

<sup>15</sup> ABA *Mission and Goals*, AM. BAR ASS’N, [https://www.americanbar.org/about\\_the\\_aba/aba-mission-goals/](https://www.americanbar.org/about_the_aba/aba-mission-goals/) [<https://perma.cc/33BS-3MTJ>] (last visited Jan. 16, 2022); see also Stephen Gillers, *A Rule to Forbid Bias and Harassment in Law Practice: A Guide for State Courts Considering Model Rule 8.4(g)*, 30 GEO. J. LEGAL ETHICS 195, 201–02, 202 n.25 (2017) (citing the ABA Mission Statement in a discussion of ABA’s anti-bias rule).

<sup>16</sup> Veronica Root Martinez, *Combating Silence in the Profession*, 105 VA. L. REV. 805, 808 (2019) (discussing the historical and continuing “notable disparity amongst demographic groups within the bar”).

<sup>17</sup> AM. BAR ASS’N, ABA NATIONAL LAWYER POPULATION SURVEY: 10-YEAR TREND IN LAWYER DEMOGRAPHICS (2019), [http://www.americanbar.org/content/dam/aba/administrative/market\\_research/national-lawyer-population-demographics-2009-2019.pdf](http://www.americanbar.org/content/dam/aba/administrative/market_research/national-lawyer-population-demographics-2009-2019.pdf) [<https://perma.cc/K5ME-62ZQ>].

<sup>18</sup> Eric Jensen, Nicholas Jones, Megan Rabe, Beverly Pratt, Lauren Medina, Kimberly Orozco & Lindsay Spell, *2020 U.S. Population More Racially and Ethnically Diverse than Measured in 2010: The Chance that Two People Chosen at Random Are of Different Race*

only' populations to become the second or most prevalent groups in certain states.<sup>19</sup> Yet, the legal profession does not reflect this growing diversity in the United States, with observers noting that it is perhaps the 'whitest' profession,<sup>20</sup> continuing a historical practice of being an "exclusive province of Anglo-Saxon, [w]hite men."<sup>21</sup>

Acknowledging the evolving DEI concerns in the profession, the ABA Standards Committee's stated purpose for Standard 303(c) requirement that law schools provide "training and education to law students on bias, cross-cultural competency, and racism"<sup>22</sup> was to ensure fulfillment of an obligation to "promote a justice system that provides equal access and eliminates bias, discrimination, and racism in the law . . . ."<sup>23</sup>

In light of the newly-implemented requirement for cross-cultural learning, law schools must provide students with the tools to deliver legal services to a diverse world. Standard 206(a) already required law schools to "demonstrate by concrete action a commitment to diversity and inclusion by providing full opportunities for the study of law and entry in the profession by members of underrepresented groups, particularly racial and ethnic minorities."<sup>24</sup> Now, under Standard 303(c), law professors will need to navigate diverse ideas and enable students to recognize how their own implicit biases impact their ability to understand and interact with people from other races, cultures, or belief systems different from their own.

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*or Ethnicity Groups Has Increased Since 2010*, U.S. CENSUS BUREAU, (Aug. 12, 2021), <https://www.census.gov/library/stories/2021/08/2020-united-states-population-more-racially-ethnically-diverse-than-2010.html> [<https://perma.cc/29CZ-7NZF>].

<sup>19</sup> *Id.* (noting that the "[w]hite alone non-Hispanic population was the most prevalent racial or ethnic group for all states except California (Hispanic or Latino), Hawaii (Asian alone non-Hispanic), New Mexico (Hispanic or Latino), and the District of Columbia," a state equivalent where the Black or African American alone non-Hispanic population surpassed that of the white alone non-Hispanic population).

<sup>20</sup> *E.g.*, Michelle J. Anderson, *Legal Education Reform, Diversity, and Access to Justice*, 61 RUTGERS L. REV. 1011, 1012 (2009) (noting that U.S. Census data reveals a higher rate of cultural diversity in fields of medicine, accounting, architecture, engineering, computer science, and physical science research); *see also* Beverly I. Moran, *Disappearing Act: The Lack of Values Training in Legal Education—A Case for Cultural Competency*, 38 S. UNIV. L. REV. 1, 39 (2010) ("[T]here are few professional spaces as segregated as United States law schools.").

<sup>21</sup> Milo Colton, *What Is Wrong with the Texas Bar Exam? A Minority Report*, 28 T. MARSHALL L. REV. 53, 55 (2002) (noting that, for most of American history, the practice of law in the United States has been considered the exclusive province of Anglo-Saxon, white men. Today, non-Hispanic white males throughout the nation still overwhelmingly dominate the practice of law).

<sup>22</sup> ABA Resolution, *supra* note 12.

<sup>23</sup> *Id.*

<sup>24</sup> ABA STANDARDS AND RULES OF PROC. FOR APPROVAL OF L. SCHS. 206(a), at 14 (AM. BAR ASS'N 2020).

*A. Cultural Competence for Legal Community*

The Census Bureau estimated that in 2020, net international migration would add one person to the U.S. population every thirty-four seconds.<sup>25</sup> As such, the pool of prospective clients for future attorneys will be more racially, ethnically, and culturally diverse. The ABA Standards governing the program of legal education require law schools to provide training, including “professional skills needed for competent and ethical participation as a member of the legal profession.”<sup>26</sup> As such, law students must be prepared to provide competent representation in an increasingly connected and diverse world.

Unless law students intend to be monolithic lawyers who serve the needs of singularly-defined communities, it is a disservice to not provide them with the skills and knowledge to ensure effective and appropriate communication across different cultures. Further, failing to provide these skills may also threaten a law school’s compliance with Standard 303(c). Law schools must prepare to provide students with the tools necessary to work effectively to engage with culturally diverse clients and communities.

Cultural competency for legal professionals is defined as “the ability to adapt, work and manage successfully in new and unfamiliar cultural settings.”<sup>27</sup> The requirements to provide competent representation,<sup>28</sup> therefore, necessitate an acknowledgment, basic understanding, and respect for the values, skills, and principles that influence human behavior, including our own.<sup>29</sup>

A competent lawyer should have the ability to interact respectfully and knowledgeably with prospective and current clients, as well as other lawyers and participants interacting with the legal system. It is often challenging to engage and connect with other people when we do not know or understand their background,

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<sup>25</sup> United States Census Bureau, *Census Bureau Projects U.S. and World Populations on New Year’s Day*, (Dec. 30, 2019), <https://www.census.gov/newsroom/press-releases/2019/new-years-2020.html> [<https://perma.cc/Z8JK-T97Q>].

<sup>26</sup> See ABA STANDARDS AND RULES OF PROC. FOR APPROVAL OF L. SCHS. 302(d), at 17 (AM. BAR ASS’N 2020) (“A law school shall establish learning outcomes that shall, at a minimum, include competency in . . . [o]ther professional skills needed for competent and ethical participation as a member of the legal profession.”).

<sup>27</sup> Aastha Madaan, *Cultural Competency and the Practice of Law in the 21st Century*, 30 PROBAT. & PROP. 29, 30 (2016) (internal quotation marks omitted) (quoting Sylvia Stevens, *Cultural Competency: Is There an Ethical Duty*, OR. STATE BAR BULL. (Jan. 2009)).

<sup>28</sup> See MODEL RULES OF PRO. CONDUCT r. 1.1 (AM. BAR ASS’N 2021).

<sup>29</sup> See JEAN KOH PETERS, REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS: ETHICAL AND PRACTICAL DIMENSIONS 298–300 (3d ed. 2007) (explaining that “know oneself” is a major principle in the approach to cross-cultural lawyering); see also Christina A. Zawisza, *Teaching Cross-Cultural Competence to Law Students: Understanding the “Self” as “Other,”* 17 FLA. COASTAL L. REV. 185, 188 (2016) (“[S]tripped to its essence, effective cross-cultural lawyering requires understanding that one’s self is always distinguishable from the other.”).

culture, or race.<sup>30</sup> For example, when a biased judge has reacted with racial undertones towards a client, witness, juror, or lawyer, the lawyer of record must have the tools to recognize the racial bias, discern how the bias impacts the case, and respond to and preserve the incident on the record.<sup>31</sup>

As importantly, competent lawyers must understand racial bias and how it may influence their own actions. When lawyers are unaware of how implicit bias<sup>32</sup> influences their judgment, a client's behavior, or a client's values, they risk substituting their own judgment for that of their client's, and may fail to represent the client's best interests.<sup>33</sup> This may cause the lawyer to be unprepared for negotiations or questioning or to fail to react to a culturally-related issue that could impact the outcome of the case.<sup>34</sup> The trial of George Zimmerman illustrated an example where a lack of cultural competence may have influenced the outcome of the case. George Zimmerman's trial exposed the prosecutors' clear discomfort with the direct racial implications of the case and their disconnection with the lead witness, a young, Black woman.<sup>35</sup>

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<sup>30</sup> See Sue Bryant & Jean Koh Peters, *Five Habits for Cross-Cultural Lawyering*, in RACE, CULTURE, PSYCHOLOGY, & LAW 50–51 (Kimberly Holt Barrett & William H. George eds., 2004) (noting that differences in characteristics and culture can cause even well-intentioned lawyers to misjudge clients based on bias or stereotype, which may interfere with the lawyer's ability to understand the client's behaviors, communications, values, and goals).

<sup>31</sup> See Cassie Miller, *Allegheny Court Judge Who Used Racial Slurs Charged with Violating Judicial Code of Conduct*, PITT. CITY PAPER (Aug. 13, 2020), <https://www.pghcitypaper.com/pittsburgh/allegheny-county-judge-who-used-racial-slurs-charged-with-violating-judicial-code-of-conduct/Content?oid=17811141> [<https://perma.cc/WZ8Y-KAGK>] (“According to the documents, Tranquilli used racial slurs, including calling a Black juror ‘Aunt Jemima,’ and made other inappropriate comments about his job, those appearing before him and jurors, in the courtroom, and to others.”).

<sup>32</sup> Implicit bias theory derives from social cognition research and refers to a behavioral propensity that results from implicit attitudes and stereotypes, which is a nonconscious “mental association between a social group or category and a trait” and can determine how individuals treat members of social groups. Darren Lenard Hutchinson, “*Continually Reminded of Their Inferior Position*”: Social Dominance, Implicit Bias, Criminality, and Race, 46 WASH. U. J.L. & POL’Y 23, 36 (2014) (quoting Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945, 949 (2006)).

<sup>33</sup> See Madaan, *supra* note 27, at 31 (explaining how implicit bias may cause a lack of effort and using the lawyer's own experience instead of listening to the client was a violation of the duties of diligence and competence); see also Debra Chopp, *Addressing Cultural Bias in the Legal Profession*, 41 N.Y.U. REV. L. & SOC. CHANGE 364, 373 (2017) (citing Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLINICAL L. REV. 33, 42–43 (2001)).

<sup>34</sup> Madaan, *supra* note 27, at 31 (“The danger of implicit bias lies in the lack of self-awareness because it can present itself and allow discrimination not only in situations of conflict, such as in litigation, but also in situations without conflict, such as in interactions with clients from certain backgrounds.”).

<sup>35</sup> Yamiche Alcindor & Jordan Friedman, *Zimmerman Prosecutor Takes Hit in Court of Public Opinion*, USA TODAY (Sept. 14, 2013, 8:03 AM), <https://www.usatoday.com/sto>



The prosecution team did not understand her language, culture, or mannerisms, and the defense's cross-examination left the witness appearing hostile and unreliable.<sup>36</sup> This led to the defense team's claim that the young black male victim was the one who made the encounter with the defendant racial; and the ridicule and demonizing of the prosecutor's lead witness.<sup>37</sup> The mishandling of this young, Black witness was so obvious that the Florida Civil Rights Association called for the State Attorney's removal on the Michael Dunn case because of the expected racial implications.<sup>38</sup>

Students who matriculate through law schools should leave with a holistic understanding of the law and how it impacts people from various cultures and backgrounds. Cultural competence is an essential skill the next generation of lawyers must develop to become successful lawyers and accomplish necessary reforms in the legal system. Law schools are the best equipped to deliver the resources, but they must prepare to do so responsibly.

### *B. Shaping the Next Generation of Societal Leaders*

Developing a foundation of cultural competency requires an understanding of oneself, other people, and a provision of equitable treatment despite racial, ethnic, and/or cultural differences.<sup>39</sup> A lack of understanding may significantly impact a lawyer's ability to provide effective and unbiased representation and may create barriers to access.<sup>40</sup> As another scholar noted:

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ry/news/nation/2013/09/14/angela-corey-george-zimmerman-trayvon-martin-murder-florida/2763835/ [https://perma.cc/9L3K-E4H9]; see also Jelani Cobb, *Rachel Jeantel on Trial*, NEW YORKER (June 27, 2013), https://www.newyorker.com/news/news-desk/rachel-jeantel-on-trial [https://perma.cc/96DJ-F4QN] ("The prosecution had opened this case with a nearly concussive series of cuss words meant to convey what George Zimmerman thought as he confronted Trayvon Martin: 'fucking punks, fucking punks, fucking punks.' Thursday, we learned what—if Jeantel is to be believed—Martin thought of Zimmerman in the moments before he was fatally shot: 'creepy-ass cracker.'").

<sup>36</sup> See Cobb, *supra* note 35.

<sup>37</sup> *Id.* See also *George Zimmerman Trial Battle: Rachael Jeantel vs. Don West*, LOCAL10.COM (June 27, 2013 11:20 PM), https://www.local10.com/news/2013/06/28/george-zimmerman-trial-battle-rachel-jeantel-vs-don-west/ [https://perma.cc/9D88-KJ3Y].

<sup>38</sup> Alcindor & Friedman, *supra* note 35 ("Recently, Corey has come under fire from the Florida Civil Rights Association, which says it aims to advance equal opportunity and diversity. The association is calling for Corey to be removed from the trial of Michael Dunn, who has been charged with first-degree murder for shooting unarmed, 17-year-old Jordan Davis at a Jacksonville gas station. Davis, who was [B]lack, was sitting in a vehicle in November 2012 when Dunn, who is white, fired at the teen after an argument about loud music coming from Davis' car. The group says a special prosecutor is needed in the Davis case 'to quell racial tension' created by Corey and the state attorney office's 'failed prosecution' of Zimmerman.").

<sup>39</sup> Serena Patel, *Cultural Competency Training: Preparing Law Students for Practice in Our Multicultural World*, 62 UCLA L. REV. DISCOURSE 140, 143 (2014).

<sup>40</sup> *Id.* at 144 ("Barriers to access occur when misunderstandings or miscommunication prevent successful representation.").

Lawyers who possess and exercise [cultural competency] skills are able to meaningfully serve diverse populations. They can serve [B]lack and white, rich and poor, educated and uneducated, helping each to draw on their available skills and resources without mistakenly misjudging any to be uncommunicative or unintelligent. Lawyers who do not possess and exercise these skills cannot serve diverse populations effectively.<sup>41</sup>

Further, “it is important that lawyers know both how to gain a client’s trust in a culturally sensitive way and how to attribute the client’s intended meaning to [the client’s] behavior and communication.”<sup>42</sup> The ability to integrate information about a client’s culture to determine appropriate strategies for communication will reduce the risk of misunderstandings and bias and build mutual trust.<sup>43</sup> It will also create an environment where a client’s culture will be matched with their objectives to increase the appropriateness and quality of legal service outcomes and contribute to the elimination of cultural, racial, and ethnic disparities.<sup>44</sup>

“Cultural competency also plays an important role in civility and professionalism in the legal community,”<sup>45</sup> as lawyers navigate relationships with colleagues and the judiciary. Although it may be unrealistic to gain a full grasp of another individual’s cultural experience, the willingness to try and understand may prove to give the lawyer a better understanding of different cultures and enrich interactions with clients and legal professionals.

Decades ago, in a “groundbreaking contribution to the clinical literature[,]” Susan Bryant and Jean Koh Peters “inspired clinical law professors to address cultural competence in their teaching.”<sup>46</sup> In today’s increasingly diverse world, all

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<sup>41</sup> Nelson P. Miller, *Beyond Bias—Cultural Competence as a Lawyer Skill*, MICH. BAR J. 38, 39 (June 2008).

<sup>42</sup> Patel, *supra* note 39, at 144; *see also* Bryant, *supra* note 33, at 42–43 (“One important goal of cross-cultural training is to help students make isomorphic attributions, *i.e.*, to attribute to behavior and communication that which is intended by the actor or speaker.” (emphasis in original)).

<sup>43</sup> *See* Patel, *supra* note 39, at 145 (“Since trust is an important part of creating any relationship, one of the goals of cultural competency training must be to teach students how to create trusting lawyer-client relationships with clients from different cultures than their own.”).

<sup>44</sup> *See generally* *Our Commitment to Racial Justice*, NAT’L CTR. CULTURAL COMPETENCE (JUNE 2020), <https://nccc.georgetown.edu/> [<https://perma.cc/Y7A8-7U78>] (“Fighting racism and other forms of social injustice is a component of the work of cultural and linguistic competence—unarguably cultural and linguistic competence helps to disrupt racism.”).

<sup>45</sup> Madaan, *supra* note 27, at 29.

<sup>46</sup> Christina A. Zawisza, *Teaching Cross-Cultural Competence to Law Students: Understanding the ‘Self’ as ‘Other,’* 17 FL. COASTAL L. REV. 185 (2016); Bryant, *supra* note 33, at 37; *see also* Deleso Alford Washington, *Critical Race Feminist Bioethics: Telling Stories in Law School and Medical School in Pursuit of “Cultural Competency,”* 72 ALB. L. REV. 961, 963–66 (2009) (proposing Critical Race Feminist Bioethics as a means to address cultural competence); *see generally* Bryant & Peters, *supra* note 30, at 47.

professors (doctrinal and experiential) should follow their lead and learn to teach cultural competency in their courses. To be effective, professors must recognize its importance in the legal profession; embrace the continuous process of learning how the law interacts with different cultures, races, ethnicities, sexual orientation, and gender identity status; and integrate their unique strengths and perspectives. By doing so, professors will provide an impactful learning environment for students and prepare them for the work they should continue in the legal profession.

## II. BARRIERS TO TEACHING CULTURAL COMPETENCY

### A. *Shifting Responsibility*

Shifting responsibility is one of the most obvious barriers to teaching cultural competency in law schools. For example, law schools offering courses such as Race and the Law, Latinos and the Law, Women and the Law, Sexual Orientation and the Law, or Critical Race Theory (“CRT”) may assert their students already receive adequate exposure to DEI issues and development of cultural competency skills. These offerings, however, are usually limited enrollment electives. As such, students exposed to these elective courses may represent only a small percentage of the student body. Historically, it has been easy to shift the responsibility to professors who teach DEI-based electives, and these professors are disproportionately people of color.<sup>47</sup>

A related obstacle to teaching cultural competency is the perception of DEI-based courses as elective affinity courses.<sup>48</sup> Consequently, students are more likely to self-select electives they most identify with and avoid those they believe have no specific relation to them. As such, there are likely significant gaps in students’ selected exposure to DEI versus what they should be exposed to for sufficient mastery of DEI and cultural competency. For example, CRT will likely attract Black students, and Women and the Law is likely to interest women students when, ideally, students should also have exposure to courses that teach cultures and experiences different from their own. Exposure to courses that challenge students’ own unconscious biases and stretch their critical thinking skills is key to developing cultural competency skills.

There are opportunities to cover cultural competency and DEI matters in all law courses, and all professors should bear some responsibility for gaining the necessary knowledge to provide minimum coverage in their respective courses. To facilitate

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<sup>47</sup> See, e.g., Anastasia M. Boles, *The Culturally Proficient Law Professor: Beginning the Journey*, 48 N.M. L. REV. 145, 146 (2018) (“[L]aw faculty of color often bear a disproportionate share of the work, when compared to white faculty members, in efforts to make law school environments more inclusive.”).

<sup>48</sup> Elective affinity is generally defined as “preferences and common feelings that constitute a cultural or national identity or that distinguish groups and subgroups from one another.” *Elective Affinity*, APA DICTIONARY OF PSYCHOLOGY, AM. PSYCH. ASS’N, <https://dictionary.apa.org/elective-affinity> [<https://perma.cc/PC9L-CQV6>] (last visited Jan. 16, 2022).

the shift, law school administration should provide resources to responsibly prepare professors for this next level of training.<sup>49</sup>

### B. *Presumption of Law Neutrality*

People generally presume laws are neutral if they do not mention restrictions based on a protected class or status.<sup>50</sup> It was easy to identify racist laws when laws were explicitly racist during legalized segregation and the Jim Crow era. However, teaching subjects with direct implications of race are difficult for numerous reasons. First, professors must deal with the misconception that we live in a post-racial, post-*Obergefell* world where racial and LGBTQ+ discrimination no longer exist.<sup>51</sup>

Second, discussing matters of any race, other than white race, is generally uncomfortable and may be perceived as alienating. If a student does not understand the culture of a racial or ethnic minority group discussed, they may feel apprehensive about responding to or asking questions, even though minority students are expected to fully participate in cases that ignore racial implications.<sup>52</sup> Third, even when laws do not explicitly discriminate based on race, sex, ethnicity, gender identification, et cetera, the laws may still be biased.<sup>53</sup> Teaching about biased laws is also difficult. In addition to discussing the cases and underlying subject matter, the professor must demonstrate how the laws are biased. This requires the professor to explain disparate impact, which requires strategic use of multiple cases and laws over the course of the semester.

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<sup>49</sup> For more information on professor development, see *infra* Part III.

<sup>50</sup> Tara Smith, *Neutrality Isn't Neutral: On the Value-Neutrality of the Rule of Law*, 4 WASH. UNIV. JURIS. REV. 49, 51 (2011) (“Many regard the Rule of Law as value-neutral. Insofar as they view it as desirable, they do believe it has some value, of course. Where scholars differ is over the exact character of that value, in particular, whether the Rule of Law offers moral value. Many believe the strength of the ideal stems precisely from its moral neutrality.” (internal citation omitted)).

<sup>51</sup> See generally Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589 (2009) (discussing the impact of post-racial ideology on diversity in the legal academy); Takeia R. Johnson, *Cultural Competence to Represent LGBTQ Clients Post-Obergefell*, 34 GPSOLO 44, 46–47 (2017) (explaining that LGBTQ people are free to marry but remain at risk for being fired).

<sup>52</sup> See Lain, *supra* note 11, at 782 (“Since the abolition of segregation and the civil rights movement, our cultural and legal systems have adopted colorblind methods of operation in which race and color are not acknowledged. Merely ignoring color serves to perpetuate whiteness as the norm, and the impact of law on nonwhites is readily noticeable.” (internal citation omitted)).

<sup>53</sup> See generally Phyllis C. Taite, *Tax Code Bias and Its Starring Role in Perpetuating Inequalities*, 72 S.C. L. REV. 735, 735 (2021) (exploring the levels to which tax code bias perpetuates the racial wealth gap); DOROTHY A. BROWN, *THE WHITENESS OF WEALTH: HOW THE TAX SYSTEM IMPOVERISHES BLACK AMERICANS—AND HOW WE CAN FIX IT* (2021); MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2012) (explaining how neutral laws have disparate impact).

*C. Professor Discomfort and Implicit Bias*

Most new things engender levels of discomfort, but race inevitably engenders higher levels of anxiety because professors may be afraid to say the wrong thing.<sup>54</sup> The first step toward alleviating the discomfort is acknowledging it and self-exploring the root cause.

Professors may be uncomfortable because they do not understand how to discuss DEI or culturally-based subject matter, especially in doctrinal courses.<sup>55</sup> For example, a professor of one ethnicity may not understand how race or culture was impacted in an outlier case because the professor did not critically analyze why it was an outlier. Alternatively, a professor may choose to skip that case or the critical analysis because neither the court, nor author, addressed it. This is why structural level implementation and training are necessary.

Another barrier is the professor's own implicit bias.<sup>56</sup> Implicit bias is difficult to address without training. Because it is unconscious, the professor is unaware that teaching content and context are impacted.<sup>57</sup> Professors cannot teach cultural competence if they do not possess it. Professors must, therefore, challenge their own unconscious biases and stretch their critical thinking skills to develop the personal skills needed to teach students cultural competency.

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<sup>54</sup> Samuel J. Abrams, Opinion, *My New Study Proves It: Cancel Culture Is Much Worse on the Left*, NEWSWEEK (June 8, 2021, 3:06 PM), <https://www.newsweek.com/my-new-study-proves-it-cancel-culture-much-worse-left-opinion-1598727> [<https://perma.cc/C6KQ-GRK3>] (discussing cancel culture threats at various universities); see also Gabe Fleisher, *Professor's Use of N-Word in Class Prompts Letter, Formal Complaint*, HOYA (Apr. 23, 2021), <https://thehoya.com/professors-use-of-n-word-in-class-prompts-letter-formal-complaint/> [<https://perma.cc/6XD5-LLSR>] (“A Georgetown University professor is facing backlash from students after quoting the N-word during a lecture on free speech last Thursday.”). This is not to be confused with professors expressing their own racist or racially biased statements and invoking cancel culture to deflect attention from their behavior. See, e.g., Sabra Ayers, *Univ. of Dallas Professor Says Student Newspaper Used ‘Cancel Culture,’* SPECTRUM NEWS 1 (Sept. 23, 2021, 4:54 PM), <https://spectrumlocalnews.com/tx/south-texas-el-paso/news/2021/09/23/dallas-professor-claims--cancel-culture--has-invaded-north-texas-campus> [<https://perma.cc/MJM2-JVH3>]; Janhvi Bhojwani, *Georgetown Law Professor Fired for Comments on Black Students' Performance*, NBC NEWS (Mar. 11, 2021, 5:21 AM), <https://www.nbcnews.com/news/education/georgetown-law-professor-under-fire-comments-about-black-students-performance-n1260559> [<https://perma.cc/BKG9-4K6T>].

<sup>55</sup> See Ederlina Co, *Teaching Cultural Competence as a Fundamental Lawyering Skill*, 23 J. LEGAL WRITING INST. 4, 5 (2019).

<sup>56</sup> Boles, *supra* note 47, at 149 (“[A] law professor interested in culturally proficient instruction must take the crucial first step of focusing on ‘inside-out’ change by identifying her own cultural values and associated biases.”).

<sup>57</sup> See generally Anne D. Gordon, *Better than Our Biases: Using Psychological Research to Inform Our Approach to Inclusive, Effective Feedback*, 27 CLINICAL L. REV. 195, 195 (2021) (discussing cognitive and implicit bias as involuntary and unavoidable actions that impact human actions).

#### D. Lack of Institutional Support

Academic freedom is defined as the “indispensable requisite for unfettered teaching and research in institutions of higher education.”<sup>58</sup> Academic freedom provides the autonomy to express ideas and diversity of thought in the classroom and do so without risk of professional harm or external interference. Even so, the attack on CRT has placed academic freedom at risk.

In 2021, Arkansas,<sup>59</sup> Florida,<sup>60</sup> and Idaho<sup>61</sup> introduced legislation to ban teaching CRT courses.<sup>62</sup> These laws were dubbed “misguided and unconstitutional,” and there have been calls for the federal courts to invalidate them on First Amendment grounds.<sup>63</sup> In the meantime, a ban on CRT teaching and critiques of the university tenure system<sup>64</sup> may quell conversations relating to race and culture, even where those conversations are not offering critiques of any ethnic or racial group. Faced with anti-CRT laws, professors—particularly untenured professors—may curtail teaching cultural competency and DEI for fear of retribution.<sup>65</sup>

### III. STRATEGIES TO DEAL WITH BARRIERS

There are numerous barriers to teaching cultural competence. As set forth above, this Essay limits its discussion to the cultural competency barriers of shifting

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<sup>58</sup> *Advancing Academic Freedom*, AM. ASS’N UNIV. PROFESSORS, <https://www.aaup.org/our-work/protecting-academic-freedom> [https://perma.cc/NQ7L-J3D9] (last visited Jan. 20, 2022).

<sup>59</sup> S.B. 627, 93rd Gen. Assemb., Reg. Sess. (Ark. 2021).

<sup>60</sup> FLA. ADMIN. CODE ANN. r. 6A-1.094124 (2022).

<sup>61</sup> H.B. No. 377, 66th Leg., 1st Reg. Sess. (Idaho 2021).

<sup>62</sup> States include Iowa, Montana, Oklahoma, Tennessee, Maine, Michigan, Missouri, New Hampshire, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, Texas, and Utah. Sarah Schwartz, *Map: Where Critical Race Theory Is Under Attack*, EDUC. WEEK, <https://www.edweek.org/policy-politics/map-where-critical-race-theory-is-under-attack/2021/06> [https://perma.cc/YWD8-6VXW] (last updated Feb. 8, 2022).

<sup>63</sup> Ronald J. Krotoszynski, Jr., *Opinion, Laws Against Teaching Critical Race Theory in College Are Unconstitutional*, WASH. POST (May 26, 2021, 9:00 AM), <https://www.washingtonpost.com/opinions/2021/05/26/laws-against-teaching-critical-race-theory-college-are-unconstitutional/> [https://perma.cc/N2JH-XFST].

<sup>64</sup> See *AAUP Updates: University System of Georgia Eviscerates Tenure*, AM. ASS’N UNIV. PROFESSORS (Dec. 8, 2021), <https://www.aaup.org/news/university-system-georgia-eviscerates-tenure#.YcNLuZLMKUK> [https://perma.cc/PCU7-KMFR]; Kate Hidalgo Bellows, *South Carolina Legislators Want to ‘Cancel’ Tenure*, CHRON. HIGHER EDUC. (Nov. 22, 2021), <https://www.chronicle.com/article/south-carolina-legislators-want-to-cancel-tenure> [https://perma.cc/HF5L-RFVE].

<sup>65</sup> See generally Keith E. Whittington, *The Intellectual Freedom that Made Public Colleges Great Is Under Threat*, WASH. POST (Dec. 15, 2021, 6:00AM), <https://www.washingtonpost.com/outlook/2021/12/15/academic-freedom-crt-public-universities/> [https://perma.cc/687B-W7PW] (discussing the impact of state legislator’s policy on the retention of teachers and professors in the United States).

responsibility, the presumption of law neutrality, professor discomfort, implicit bias, and lack of institutional support for discussion. This Part suggests two strategies—building a pedagogical foundation and integrating cultural competency materials into the curriculum—to conquer these specific barriers.

### *A. Building a Pedagogical Foundation*

Shifting responsibility, professor discomfort, and institutional support may be addressed with the first strategy of building a pedagogical foundation. An ideal component of the foundation involves curriculum committees developing course maps for subject groups to distribute for faculty adoption. Realistically, that would take a long time to develop and, without some expert assistance, probably would not be as thorough.<sup>66</sup>

To facilitate a macro-level initiatives in law schools, law deans should fund multiple workshops with professional consultants to train professors. These workshops should include exercises to help professors identify and acknowledge their own implicit biases to assist them in developing strategies to overcome their individual barriers.

These workshop sessions should culminate in strategies for coursebook selection and identifying subject matter content specific to each course. They should also include minimum standards to measure cultural competence as a part of teaching effectiveness. This inclusion will contribute to satisfaction of Standard 303(c)'s mandate for education and training on bias, cross-cultural competence, and racism at the start of law school and once more before graduation.<sup>67</sup>

Even though the Standard does not impose the requirement for every course, law schools should require every professor to participate in the training as part of their teaching responsibilities. Professors who choose not to teach it should, at a minimum, have tools to identify biased laws, recognize their own implicit biases, and learn how biases affect the classroom environment. This model of shared responsibility has a higher probability of success because law deans and professors are both invested.

Collaborative teaching is another strategy. Natural collaborators are professors teaching the same courses. A collaborator can share the workload, provide diversity of thought, and challenge the other's thinking. Even when planned in advance, professors may not execute as well in reality as they did in their minds. Having the opportunity to consult with each other provides accountability and encouragement, even if things do not go well on the first attempt.

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<sup>66</sup> Michael Hunter Schwartz & JB Smiley Jr., *What Do You Do When Nothing Seems to Work: An Evaluation and Suggested Approach to Addressing the Diversity Issue in the Legal Profession*, 49 ARK. LAWYER 12, 13 (2014), [https://lawrepository.ualr.edu/faculty\\_scholarship/100](https://lawrepository.ualr.edu/faculty_scholarship/100) [<https://perma.cc/M936-5B56>] (suggesting that law faculty, staff, and students should have cross-cultural training).

<sup>67</sup> See generally ABA Resolution, *supra* note 12.

*B. Integrate Not Supplement*

Professors teaching cultural competency and DEI subject matters for the first time may feel overwhelmed by the abundance of information. As such, they may find it difficult to determine what to cover and an appropriate amount of coverage. Rather than assigning a lot of research in one assignment, the professor may strategically teach in layers, with one assignment building up to the next.

Icebreakers and introductory discussions are useful tools to start cultural competency and DEI discussions. Icebreakers are generally structured conversations with open dialogue. The conversation should be structured to manage the time and focus. Instinctively, students will respond based on their own implicit biases and specific experiences. The goal is not to change minds, brainwash, or find an answer; the goal is to limit the discussion to one or two topics so the professor may ask specific questions to challenge student thinking.<sup>68</sup> It is important to be deliberate about the content and provide sources for the information because discussions based on facts are easier to navigate. Over time, the layers should expand critical thinking skills with the ultimate goal of building cultural competence.

Professors should also conduct a critical analysis of course subjects after selecting the coursebook.<sup>69</sup> Most coursebooks do not directly address cultural competency or DEI. As such, the professor must do the extra work to determine the best places to integrate the information.

Professors should strive to integrate, instead of supplement, core course material with cultural competency and DEI subject matter. This is a challenging process. Even though supplementing may be easier, assigning cultural competency and DEI work as extra credit or asynchronous work will send a message that those assignments are distinct and not an integral part of the law being taught; or worse, that it is optional.

If the coursebook does not contain the necessary information, the professor should expand the discussion from existing cases in the coursebook. This will likely require extra research for the professor. Students should also have an opportunity to research the assignments ahead of class. The additional research serves multiple purposes: it provides students the opportunity to enhance their research skills, learn appropriate sources, and better engage in discussions on the topic. Because there is a strong preference to believe the law is fair and neutral, and in light of the over-reliance on social media, professors should provide foundational research to guide the students.<sup>70</sup>

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<sup>68</sup> See *infra* Part IV (discussing specific strategies for icebreakers in first year courses).

<sup>69</sup> See *id.* (providing further discussion of course book and subject matter selection).

<sup>70</sup> Smith, *supra* note 50, at 84.



## IV. SPECIFIC STRATEGIES FOR THE FIRST YEAR CURRICULUM

A. *Why the First Year Courses*

The edict of teaching law students to “think like a lawyer” encapsulates the goal to teach students to learn a new and complex language: the law. To that end, the first year is the foundational year and is critical in ensuring basic competencies for success in law school and law careers. The majority of law students are adults with preconceived notions of the law, habitual behavior traits, and established moral beliefs and virtues.<sup>71</sup> Yet, research evidences that law schools promote the development of more mature and refined thinking about the practice of law.<sup>72</sup>

Established beliefs and identity may be enhanced and improved through a student’s lifetime and impact their experience in law school.<sup>73</sup> The opportunity to impact critical thinking is available in every course. Therefore, cultural competency instruction should be pervasive throughout the entire law school curriculum. To establish a proper foundation, it is essential to introduce cross-cultural training in the formative 1L year when all courses are required.

First-year courses are foundational for upper-level courses. When students develop their cultural competency skills in the foundational courses, it will be easier to expand those skills as they matriculate to upper-level courses. For example, if students develop critical thinking skills in Property Law, they will be ready for the next level of critical thinking in trusts and estates courses. Upon graduation, students

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<sup>71</sup> Timothy W. Floyd, *Moral Vision, Moral Courage, and the Formation of the Lawyer’s Professional Identity*, 28 MISS. COLL. L. REV. 339, 347 (2009) (noting that many believe that law students are adults whose ethics and values are fully formed and relatively immutable once they come to law school).

<sup>72</sup> See Nicola A. Boothe-Perry, *Standard Lawyer Behavior? Professionalism as an Essential Standard for ABA Accreditation*, 42 N.M. L. REV. 33, 37 (2012); see also WILLIAM M. SULLIVAN, ANNE COLBY, JUDITH WELCH WEGNER, LLOYD BOND & LEE S. SHULMAN, *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* 134 (2007) (recounting research on legal education which shows that specially designed courses in professional responsibility and legal ethics do support the development of more mature moral thinking and moral judgment); see generally JAMES R. REST, *MORAL DEVELOPMENT: ADVANCES IN RESEARCH AND THEORY* (1986) (discussing the moral development rooted in the social condition).

<sup>73</sup> Nicola A. Boothe-Perry, *The “New Normal” for Educating Lawyers*, 31 BYUJ. PUB. L. 53, 69 (“[E]ducational programs that are ‘continually refined . . . can foster an identity that is grounded in the public purposes, core values, and ideals of a profession.’” (internal citation omitted)); *id.* (citing Lawrence Kohlberg, *The Claim to Moral Adequacy of a Highest Stage of Moral Judgment*, 70 J. PHIL. 630, 630–31 (1973) (“[O]utlining the six stages of moral judgment indicating that logic and morality develop through constructive stages.”)); *id.* (citing Neil Hamilton, *Assessing Professionalism: Measuring Progress in the Formation of an Ethical Professional Identity*, 5 U. ST. THOMAS L.J. 470, 482 (2008) (“Professor Hamilton’s model of professionalism indicates that ethical identity can be developed across one’s lifespan.”)).

will have three solid years of building their cultural competency skills and will have the necessary tools for competent representation and enhancement of DEI in the legal profession.

### *B. Casebook Selection*

Adopting a casebook is a difficult but crucial decision made by a law professor. The choice will have an enormous impact on the professor's "life both in and out of the classroom."<sup>74</sup> In furtherance of teaching cultural competency, casebook selection must include considerations of how the selected material will impact the readers (i.e., the students) through their own cultural lenses. The structure and content of a casebook can either be a resource for developing a deeper understanding of cultural competency in law or a source of offensive and insulting triggers.

A critical analysis of some casebooks may reveal this type of offensive or culturally insensitive material. Even as new casebooks are written and options are expanding, professors may still choose not to adopt more culturally sensitive casebooks because they have taught from the older books for many years, or the casebook has strengths in other areas that outweigh the cultural insensitivity. However, using casebooks that contain culturally insensitive text can still provide professors with the opportunity to integrate cultural competency teaching.

### *C. Subject Matter and Course Coverage*

All the doctrinal courses typically offered in the first year lend themselves to discussions of cultural competency and DEI. Even so, some professors avoid the topics, even when the issues are glaring, or they choose to skip those cases. Avoidance may be based on the professor's discomfort, unwillingness to do the work, or own implicit biases as previously described.<sup>75</sup> To alleviate such discomfort, this section provides a few suggestions for subject matter and course coverage selection in three typical 1L classes: Property, Torts, and Civil Procedure.

#### *1. Property Law*

In Property, most professors start with discussing fundamental property rights such as defining property, property ownership, the right to transfer, and how possession fits in the analysis. One of the early cases involved a dispute over the right to a fox. The disputing parties were a hunter in pursuit of the fox and another

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<sup>74</sup> Eric L. Muller, *A New Law Teacher's Guide to Choosing a Casebook*, 45 J. LEGAL EDUC., 557, 557 (1995) (noting that the choice of casebook "will have an enormous impact on [a new law teacher's] life both in and out of the classroom throughout [a new law teacher's] first year, and probably beyond" because while "[t]he book's strengths will pull [the new law teacher] through some rough moments; its weaknesses will create some").

<sup>75</sup> See *supra* Section II.C.

hunter who intervened, shot, and took the fox.<sup>76</sup> The pursuing hunter claimed rightful ownership and sued the hunter who intervened, shot, and took physical possession of the fox.<sup>77</sup>

The court defined possession as physical possession or occupancy.<sup>78</sup> This is an opportunity for an icebreaker. Ask the students about the backgrounds of the litigants. What, if any, references did the court make about the individuals? There are none. However, the fox case will set up the discussion about land ownership and the right to transfer established in *Johnson v. M'Intosh*:<sup>79</sup>

[As a result of “discovery” by England, the rights of Native American tribes] to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.

...

But the tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness; to govern them as distinct people, was impossible, because they were as brave and as high spirited as they were fierce, and were ready to repel by arms every attempt on their independence.<sup>80</sup>

This language demonstrates clear biases by the court. This is another layer and a natural opportunity to discuss biases and prejudicial beliefs held by judges and how they infiltrate their way into the law. Outlier case results or cases in which the court makes negative descriptions of one party and not the other indicate that cultural competency and DEI issues may be implicated.

When such cases include biased, misogynist, or racist language, selecting a student to read the language aloud is an effective strategy to start the discussion. Strategically, it ensures students do not skim and miss the language, and hearing the words aloud provides added focus the subject matter warrants. However, plan to select a student of a different race, ethnicity, or other minority status at issue to read it to avoid stereotype threat.<sup>81</sup>

For example, the court made a point of declaring the tribes as unruly “savages” who were incapable of managing the country.<sup>82</sup> This narrative facilitates a discussion

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<sup>76</sup> *Pierson v. Post*, 3 Cai. R. 175, 175 (N.Y. Sup. Ct. 1805).

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 178–79.

<sup>79</sup> 21 U.S. 543 (1823).

<sup>80</sup> *Id.* at 574, 590.

<sup>81</sup> Claude M. Steele & Joshua Aronson, *Stereotype Threat and the Intellectual Test Performance of African Americans*, 69 J. PERSONALITY & SOC. PSYCH. 797, 797 (1995) (defining “stereotype threat” as “being at risk of confirming, as self-characteristic, a negative stereotype about one’s group” and the impact it has on student performance).

<sup>82</sup> *M'Intosh*, 21 U.S. at 590.

about why the court felt compelled to make these descriptions, especially when there was no such language in other cases. It also offers the opportunity to compare court holdings based on the litigants.

For example, in *Pierson*, where the participants were presumably white, the court made neither anecdotal nor physical descriptions of the men and no reference about their worthiness to own property.<sup>83</sup> Next, the professor may discuss how the existing law, that physical possession meant ownership, was disregarded and explore the role race or ethnicity played in that determination. The *M'Intosh* case held that Indian occupancy title was extinguished and land ownership was determined by the discovery and conquests of the land just a few years after the *Pierson* ruling.<sup>84</sup>

A final example of teaching by integration involves the *BP Chemicals* case dispute over subsurface property rights.<sup>85</sup> Historically, American law held that property owners had subsurface property rights to the center of the earth.<sup>86</sup> In the *BP Chemicals* case, the owners sued for trespass based on *BP Chemical's* hazardous waste invading the subsurface area below their respective properties, and BP Oil prevailed.<sup>87</sup>

This case did not mention the race or anecdotal descriptions of the plaintiffs; nevertheless, this is an opportunity to discuss where oil and hazardous waste plants are often located. Because the case did not provide information regarding the neighboring communities, the students must conduct additional research. "Research shows that people who live near oil and gas drilling sites are exposed to harmful pollution and are at greater risk of preterm births, asthma, respiratory disease, and cancer," among other health concerns.<sup>88</sup> This case provides the opportunity to

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<sup>83</sup> *Pierson v. Post*, 3 Cai. R. 175 (N.Y. Sup. Ct. 1805).

<sup>84</sup> *M'Intosh*, 21 U.S. at 603–04.

<sup>85</sup> *Chance v. BP Chemicals, Inc.*, 670 N.E.2d 985 (Ohio 1996).

<sup>86</sup> John G. Sprankling, *Owning the Center of the Earth*, 55 UCLA L. REV. 979, 983 (2008) ("Blissfully ignorant of subsurface geology, English and American courts repeated this center of the earth dictum over the ensuing decades, often in cases where subsurface rights were not even in dispute. Authors of legal treatises and legal dictionaries similarly adopted the dictum, using it broadly to help define the meaning of 'land,' or to explain the scope of property rights that were conveyed by a deed. By the end of the nineteenth century, frequent repetition had transformed Blackstone's naked assertion into a supposed rule of American law."). *Chance v. BP Chems., Inc.* is one of a few modern decisions to expressly challenge this approach. *Id.* at 992 n.67, 1019–20.

<sup>87</sup> *BP Chemicals*, 670 N.E.2d. 985.

<sup>88</sup> Emma Newburger, 'Ground Zero for Pollution: In this L.A. Neighborhood Surrounded by Oil Refineries, Residents Grapple with Health Issues', CNBC (Oct. 9, 2021 9:38 AM), <https://www.cnbc.com/2021/10/09/oil-wells-in-la-nearby-residents-grapple-with-health-problems.html> [<https://perma.cc/9YA6-F695>]; Zoë Schlanger, *Race Is the Biggest Indicator in the US of Whether You Live near Toxic Waste*, QUARTZ (Mar. 22, 2017), <https://qz.com/939612/race-is-the-biggest-indicator-in-the-us-of-whether-you-live-near-toxic-waste/> [<https://perma.cc/NEM7-6ZCM>]; Emily Denny, *Living near a Toxic Site Could Lower Life Expectancy by a Year, Study Finds*, ECOWATCH (Apr. 14, 2021, 8:37 AM), <https://www.ecowatch.com/living-near-toxic-waste-superfund-2652573669.html> [<https://perma.cc/X2DU-QP77>].

discuss that the socioeconomic status, race, and ethnicity of the property owners who live near oil and hazardous waste plants are disproportionately lower-income people of color.<sup>89</sup>

## 2. Torts

In a Torts class, coverage of the seminal case of *New York Times v. Sullivan*<sup>90</sup> provides an opportunity to discuss the societal climate in 1964 that may have influenced the court's decision. An advertisement in the *New York Times* accused Alabama officials of willfully abusing civil rights activists.<sup>91</sup> The Montgomery police commissioner filed suit for defamation, and the Alabama courts ordered the Times to pay half a million dollars in damages.<sup>92</sup> On appeal, the Supreme Court's decision introduced a new First Amendment test for libel involving public officials, holding that the First Amendment protects newspapers even when they print false statements, as long as the newspapers did not act with "actual malice."<sup>93</sup>

Prior to the *Times* case, the Supreme Court had deferred to states on libel issues.<sup>94</sup> However, "[t]he justices, recognizing that Alabama's application of libel law threatened both the nation's free press and equal rights for African Americans, the Court unanimously sided with the 'Times.'"<sup>95</sup> As Justice William Brennan wrote for a unanimous Court, "[t]hus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes, unpleasantly sharp attacks on government and public officials."<sup>96</sup>

When discussing the *Times* case, a law professor can spend mere minutes pointing out the importance of recognizing the cultural impacts of the case on the Court's decision. It was important that the lawyers representing the *New York Times* recognized and argued the implications for classes of cultural groups who were vigorously fighting for equal rights and protection under the law. The case was a

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<sup>89</sup> Paul Mohai & Robin Saha, *Which Came First, People or Pollution? Assessing the Disparate Siting and Post-Siting Demographic Change Hypotheses of Environmental Injustice*, 10 ENV'T. RSCH. LETTERS 1, 1 (Dec. 22, 2015).

<sup>90</sup> *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).

<sup>91</sup> *Id.* at 254.

<sup>92</sup> *Id.* at 254, 294.

<sup>93</sup> *Id.* at 278–80.

<sup>94</sup> Samantha Barbas, *The Press and Libel Before New York Times v. Sullivan*, 44 COLUM. J.L. & ARTS 511, 513 (2021) (asserting that the Supreme Court "intervened in what was perceived at the time as a near-crisis for the press caused by an increasing number of libel suits and large damage awards against publishers in the 1950s and '60s. This escalation was a notable departure from the relatively tame 'libel climate' of the previous forty years.").

<sup>95</sup> KERMIT L. HALL & MALVIN I. UROFSKY, *NEW YORK TIMES V. SULLIVAN: CIVIL RIGHTS, LIBEL LAW, AND THE FREE PRESS* (2011) (quote taken from book jacket summary); *N.Y. Times Co.*, 376 U.S. at 292, 300–01.

<sup>96</sup> *Id.* at 270.

product of its time, influenced by politics and culture,<sup>97</sup> and implicated civil rights law and the First Amendment's freedom of the press. Thus it provides fertile opportunity to have a short, non-distracting discussion about cultural competency.

### 3. *Civil Procedure*

Similarly, in a Civil Procedure course, the "well-pleaded complaint" requirement in *Ashcroft v. Iqbal*<sup>98</sup> provides a natural opportunity to discuss cultural competence. Iqbal, a Pakistani Muslim, was arrested and detained by federal officials following the September 11, 2001, terrorist attacks.<sup>99</sup> Iqbal filed a *Bivens* action<sup>100</sup> against numerous federal officials, including petitioners Ashcroft, the former Attorney General, and Mueller, the former Director of the Federal Bureau of Investigation (FBI).<sup>101</sup>

The complaint alleged that the petitioners "designated Iqbal a person 'of high interest' on account of his race, religion, or national origin in contravention of the First and Fifth Amendments."<sup>102</sup> The complaint further alleged that Iqbal's "harsh conditions of confinement" was a matter of a policy crafted by Ashcroft, with Mueller and the FBI being "'instrumental' in its adoption and execution."<sup>103</sup>

The United States Court of Appeals for the Second Circuit held that Iqbal's complaint was "adequate to allege petitioners' personal involvement in discriminatory decisions which, if true, violated clearly established constitutional law."<sup>104</sup> On certiorari to the Supreme Court, the Court reversed and remanded the case, holding that the "complaint failed to plead sufficient facts to state [a] claim for purposeful and unlawful discrimination."<sup>105</sup> In making this finding, the Court held that:

[t]he factual allegations that the FBI, under Mueller, arrested and detained thousands of Arab Muslim men, and that he and Ashcroft approved the detention policy, do not plausibly suggest that petitioners purposefully discriminated on prohibited grounds. Given that the September 11 attacks

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<sup>97</sup> Barbas, *supra* note 94, at 543 (noting that the case "grew out of the political and cultural environment of the early 1960s").

<sup>98</sup> *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

<sup>99</sup> *Id.* at 662.

<sup>100</sup> *Id.*; see also *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 388 (1971) (holding that a complaint stated a federal cause of action under the Fourth Amendment for which damages are recoverable upon proof of injuries resulting from agents' violation of that Amendment, alleging that agents of Federal Bureau of Narcotics, acting under color of federal authority, made warrantless entry of petitioner's apartment, searched the apartment and arrested him on narcotics charges, all without probable cause).

<sup>101</sup> *Iqbal*, 556 U.S. at 662.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 670.

<sup>105</sup> *Id.* at 663.

were perpetrated by Arab Muslims, it is not surprising that a legitimate policy directing law enforcement to arrest and detain individuals because of their suspected link to the attacks would produce a disparate, incidental impact on Arab Muslims, even though the policy's purpose was to target neither Arabs nor Muslims.<sup>106</sup>

The Civil Procedure professor may use the *Iqbal* case to briefly discuss (1) any contrast in the federal government's arrest and detention of suspects after other domestic terrorist attacks, such as the Oklahoma City Bombing<sup>107</sup> or the Centennial Olympic Park bombing,<sup>108</sup> and whether race or ethnicity was a factor; and (2) any cultural norms that an attorney for a client such as Javaid Iqbal should make to ensure thorough and competent representation. These types of conversations foster awareness and acknowledgment of cultural impacts on the law and increase students' cultural competency.

#### V. AVOID COMMON MISTAKES

Common mistakes when introducing cultural competency skills are dumping too much on the students, silence in the face of micro or macro aggressions, and burdening students of color. Avoid the dump. Resist the urge to unload a lot of information on students and expect them to navigate it on their own. For professors who are newly motivated, it is wonderful to be excited about including cultural competency and DEI topics, but the information must be taught in a way that does not overwhelm students. The layering approach, previously discussed, is an effective method of managing information flow.<sup>109</sup>

Professors of color generally have more experience with hostile microaggressions or negative behaviors and are more likely to have strategies for

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<sup>106</sup> *Id.* at 664.

<sup>107</sup> *Oklahoma City Bombing*, HISTORY (Apr. 16, 2021), <https://www.history.com/topics/1990s/oklahoma-city-bombing> [<https://perma.cc/523M-HHJY>] (“The Oklahoma City bombing occurred when a truck packed with explosives was detonated on April 19, 1995, outside the Alfred P. Murrah Federal Building in Oklahoma City, Oklahoma, killing 168 people and leaving hundreds more injured. The blast was set off by anti-government militant Timothy McVeigh, who in 2001 was executed for his crimes.”).

<sup>108</sup> Easton Bush & Kareem El Damanhoury, *Media Framing in the Centennial Olympic Park Bombing: How Media Coverage of Terrorism Shifts When a Suspect Is Revealed*, 2 DU UNDERGRADUATE RSCH. J. ARCHIVE 1, 1 (2021), <https://digitalcommons.du.edu/duurj/vol2/iss2/4> [<https://perma.cc/6EYS-LBDZ>] (“On July 27, 1996 during the Summer Olympics, a pipe bomb exploded at the Centennial Olympic Park in Atlanta, Georgia, killing two people and injuring over one hundred more. The explosion would have been far deadlier if the bag concealing the bomb had not been discovered by security guard Richard Jewell, who began clearing the area after alerting the Georgia Bureau of Investigation.”).

<sup>109</sup> *See supra* Section III.B.

the expected interactions.<sup>110</sup> On the other hand, white male professors are generally presumed competent and may not recognize microaggressions.<sup>111</sup> As such, it may be difficult for them to see it directed towards themselves or students. This emphasizes the need for proper training and properly designed workshops to train professors to recognize micro and macroaggressions and equip professors with tools to address them. Building the foundation will ease professor discomfort and may reduce resistance by students.

Finally, do not overburden minority groups.<sup>112</sup> While diversity is encouraged to provide for robust discussions, Black students should not be required to provide the Black perspective, and LGBTQ+ students should not be required to provide the LGBTQ+ perspective to avoid stereotype threat.<sup>113</sup> Further, these students are informed by their own experiences and may lack the macro-level vision to understand and relay material to their classmates using fact-focused analysis. Further, an over-reliance on students of color and other minority groups could subject them to undue pressure and adversely affect mental health.<sup>114</sup>

#### CONCLUSION

A lawyer who lacks cultural competency skills will be deficient in the tools necessary to fulfill the obligation of competence under the law. And law schools who fail to offer education on the topics risks endangering ABA accreditation. Law schools have a unique opportunity and important responsibility to educate the next generation of lawyers and ensure their competency to serve a diverse population. As such, law professors must do more than transfer legal knowledge to students. Professors must not remain silent about topics regarding culture, diversity, equity,

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<sup>110</sup> See generally PRESUMED INCOMPETENT: THE INTERSECTIONS OF RACE AND CLASS FOR WOMEN IN ACADEMIA (Gabriella Gutiérrez y Muhs, Yollanda Flores Niemann, Carmen G. Gonzales & Angela P. Harris eds., 2012).

<sup>111</sup> Margalynne J. Armstrong & Stephanie M. Wildman, *Working Across Racial Lines in a Not-So-Post-Racial World*, in PRESUMED INCOMPETENT: THE INTERSECTIONS OF RACE AND CLASS FOR WOMEN IN ACADEMIA 224 (Gabriella Gutiérrez y Muhs, Yollanda Flores Niemann, Carmen G. Gonzales & Angela P. Harris eds., 2012) (“Presumptions of the competence of white men and the incompetence of others arise from the creation of dominant stereotypes in the legal academy and profession. The archetypal law professor is white, male, heterosexual, and older.” (internal citation omitted)).

<sup>112</sup> See Lain, *supra* note 11, at 793 (“Avoiding stereotyped assumptions about the students and their realities allows a professor to identify when an interaction can result in a lack of psychological safety.”).

<sup>113</sup> See *id.* (describing classroom experiences from various students of color).

<sup>114</sup> See *id.* at 787 (“A lack of psychological safety can harm all students, but students of color can be adversely affected on a more significant level.”). See also Erin Lain, *Experiences of Academically Dismissed Black and Latino Law Students: Stereotype Threat, Fight or Flight Coping Mechanisms, Isolation and Feelings of Systemic Betrayal*, 45 J.L. & EDUC. 279, 279 (2015) (describing the different ways stereotype threat, microaggressions, and educational environments may impact the academic experience and performance of Black and Latino students).



and inclusion in mainstream doctrinal classes and expect such issues to be discussed only in affinity-specific electives. Silence on these topics in doctrinal courses will speak volumes to matriculating students and send the message that cultural competency is not important or may casually be attained over time.

Law schools must recognize and seek to remove the barriers to teaching cultural competence and DEI and provide appropriate training and workshops for law professors. Providing law professors with the tools to integrate cultural competency into existing curricula is a first and crucial step to ensure that law professors are well-versed in both their own cultural competency, and in the ability to provide cultural competency training to their students. The culturally competent student will become a culturally competent lawyer with the skillset to make impactful contributions towards DEI in and beyond the practice of law.