

MORE THAN A NUMBER: A CALL TO MEASURE INSTITUTIONAL DIVERSITY THROUGH QUALITATIVE CLASSROOM METHODS

*Danielle M. Lyn**

INTRODUCTION

As tradition holds, the lessons from the first year of law school become the foundation of legal careers. For just a few of us, however, the year also includes lessons about diversity and inclusion in legal education and the awkward moments the lack thereof can create. As a first-generation professional and minority student, my transition to law school has been challenging, but my biggest hurdle in the journey thus far has been adjusting to jarring comments made in class lectures and professors' haphazard handling of racial cases.

Kevin R. Johnson wrote that "any true effort to measure the excellence of law schools requires the evaluation of diversity."¹ I agree with Johnson but question the accuracy of the methods institutions typically use to achieve this end. The legal academy measures diversity quantifiably. Each year, law schools boast about the percentage of minority students admitted, and the U.S. News & World Report publishes a diversity index "[t]o identify law schools where students are most likely to encounter classmates from a different racial or ethnic group."² These metrics alone are insufficient to reveal how inclusion of diverse perspectives fares inside the walls of a law

© 2021 Danielle M. Lyn. Individuals and nonprofit institutions may reproduce and distribute copies of this Essay in any format at or below cost, for educational purposes, so long as each copy identifies the author, provides a citation to *Notre Dame Law Review Reflection*, and includes this provision and copyright notice.

* J.D. candidate 2022, Notre Dame Law School; B.A. 2017, Florida International University. This essay is for my parents: immigrants who came to the United States and sacrificed their dreams so my siblings and I can live ours. Thank you for your love, support, and inspiration.

1 Kevin R. Johnson, *Measuring Law School Excellence: Diversity Among Law Students*, 101 IOWA L. REV. ONLINE 40, 40 (2015).

2 Robert Morse, *Methodology: 2021 Law School Diversity Index*, U.S. NEWS & WORLD REP. (Mar. 16, 2020), <https://www.usnews.com/education/best-graduate-schools/articles/law-school-diversity-index-methodology> (index based on total proportion of minority students and considers African American, Asian, Hispanic, American Indian, Pacific Islander, Caucasian, and multiracial group populations at law schools).

school—where it matters most.³ Institutional efforts to uphold diversity and inclusion must go beyond a simple consideration of the number of non-white admitted students. One possible avenue of evaluation, and the focus of this Essay, is curriculum content.

I. EXPANDING DIVERSITY CATEGORIES

Law schools traditionally consider minority racial and ethnic groups to measure diversity. Other considerations, like LGBTQ+ status and disability, have been included; but some scholars criticize these categories as too limiting. Professor J.T. Manhire has argued that law school diversity indices should consider diversity in age, gender, work history, and geographic origin in addition to race and ethnicity for an accurate look at institutional diversity.⁴ Teresa Stanton Collett goes further. According to her, “[l]iberals appear to have a virtual monopoly on the legal academy, with substantial entry barriers for Christians and socially conservative candidates.”⁵ Collett finds that “considerations of race in admissions [as] a necessary part of achieving a robust exchange of ideas and teaching students to think critically”⁶ does little to achieve those ends. Instead, diversity should measure political and religious differences. I draw from my personal experience as a racial, ethnic, and first-generation minority, but “diversity” in this Essay extends to political, religious, gender identity, disability, and any other form as well.

Expanding categories of diversity in evaluations may provide a more accurate view of quantitative diversity, but it would nevertheless fall short of the kind of results qualitative assessments would offer in safeguarding minority thought in legal education. Further, qualitative assessments remain beneficial whether the proposed expansion of diverse categories are adopted or not. If evaluation methods incorporate factors such as work history and political leanings, such diversity would still be measured solely through admission numbers. Using curriculum content to evaluate diversity would protect the entirety of the diverse population and ensure that classroom discussions reflect the diversity of the school population.

3 See Veronica Root Martinez & Gina-Gail S. Fletcher, *Equality Metrics*, YALE L.J. FORUM (forthcoming 2021) (manuscript at 38–39), for a discussion comparing qualitative and quantitative metric outcomes. “The [quantitative] metrics proposed might reveal information about how a firm was able to recruit and retain a more diverse workforce or how it was able to improve demographic diversity throughout . . . but the metrics will be limited in their ability to provide information about the quality of the experience” *Id.* at 39.

4 Johnson, *supra* note 1, at 41.

5 Teresa Stanton Collett, *A Catholic Perspective on Law School Diversity Requirements*, 15 U. ST. THOMAS L.J. 322, 329–30 (2019).

6 *Id.* at 324.

II. CURRICULAR CONTENT

[A] legal education that seeks to promote a concept of the law as racially neutral (or simply side steps race altogether) can be profoundly troubling to students who know or intuit that the law and race are deeply intertwined. Students of color, already a distinct minority at all but a handful of U.S. law schools, can feel further estranged from the law and their learning environment by an academic culture in which they have reason to suspect that their experiences and beliefs are not those imputed to the ubiquitous ‘reasonable man.’⁷

My first year of law school was marred with moments of shock from the selection of assigned cases, disbelief while listening to classmates confidently lambast the actions of plaintiffs or defendants⁸ that resembled actions of personal friends of mine, and overall anger at how lectures glazed over blatant social elements one could consider pertinent to analyzing the court’s reasoning. In Torts, I learned the elements of Intentional Infliction of Emotional Distress through a case that saw a woman relentlessly attacked for being romantically involved with an African American man.⁹ The abridged casebook version of the opinion reprinted the numerous racial slurs and epithets. It was assigned reading, but the professor made no substantial mention of the atrocities of the facts in the case in the lecture. I wondered why the professor chose to teach this case and if he’d stopped to consider the intense emotional response I (or any of my other classmates that have been forced to personally deal with racism) had to reading the case.

Although the objective for many law professors may be to teach the black letter law, many students live in a reality where the context of a case matters as much as the outcome.¹⁰ In an effort to make the legal education

7 Alexi Nunn Freeman & Lindsey Webb, *Positive Disruption: Addressing Race in a Time of Social Change Through a Team-Taught, Reflection-Based, Outward-Looking Law School Seminar*, 21 U. PA. J.L. & SOC. CHANGE 121, 128–29 (2018) (footnotes omitted).

8 *Williams v. Walker Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965). In *Williams*, defendants challenged a cover-all provision in the sales contract as “unconscionable.” *Id.* at 447. One of the defendants defaulted on a stereo purchase, which entitled the plaintiff to repossess all previous rent-to-own purchases. *Id.* Classmates criticized the mother/defendant for purchasing a non-essential stereo as a poor woman.

9 *Littlefield v. McGuffey*, 954 F.2d 1337, 1340–42 (7th Cir. 1992).

10 See, for example, *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), collectively referred to as “*Twiqbal*.” I was particularly taken with the *Twiqbal* cases in Civil Procedure. Pedagogically, they are important to learning Federal Rule of Civil Procedure (FRCP) Nine—heightened pleading standards. In *Ashcroft v. Iqbal*, however, the FRCP came second to a display of racism and discrimination I was all too familiar with. *Iqbal*, a Pakistani Muslim, was detained post 9/11 and alleged that federal officers adopted an unconstitutional policy allowing them to hold detainees in subpar confinement conditions on account of religion, national origin, and race. *Iqbal*, 556 U.S. at 666. My friend lives near the airport where the hijackers trained for the 9/11 attack. Her

experience truly diverse, the learning atmosphere must represent this reality. This intentionally inclusive environment will provide both an equal learning experience for diverse students and encourage dialogue on a level of social analysis that lawyers need to be successful in practice.¹¹

III. ALIENATING DIVERSE STUDENTS

A 2009 study conducted by [Derald Wing] Sue found that the typical reactions for students during racialized interactions include fear, anxiety, anger, defensiveness, sadness, crying, leaving the classroom, and withdrawing from the class. Another study by Sue explored how students of color experienced racialized incidents in the classroom. Sue's study found that the participants struggled with a cognitive dilemma of whether or not to speak up during these interactions; they felt their integrity being attacked, they were fearful of the consequences of the conversation, and they were exhausted at having to deal with microaggressions.¹²

Admitting diverse students without protecting their classroom experiences disproportionately adds weight to their student burden compared to their non-diverse classmates.¹³ Sitting through a racialized interaction in class, particularly when the student does not think that the professor understands their point of view, raises a cognitive dilemma, or what I consider to be "the minority dilemma." Students must grapple with their emotional reactions to the class discussion, remember to find the legal significance and learn the black letter law, and decide whether they will speak up and offer their perspective. The minority dilemma occurs simultaneously with the developments in a class lecture. In addition to taking notes, diverse students must also contemplate the pros and cons of interrupting the lecture to offer an important perspective the class will consider secondary to the law.

The first few days of Criminal Law were dedicated to working through a list of hypotheticals. In each scenario a child lost his or her life, and students

stories of federal intimidation against her father and her *masjid* in the months following the 9/11 attack still live with me today. My professor spent about a minute discussing the social elements behind the facts of the case.

11 Erin C. Lain, *Racialized Interactions in the Law School Classroom: Pedagogical Approaches to Creating a Safe Learning Environment*, 67 J. LEGAL EDUC. 780, 790–91 (2018) (“[T]he problem with avoiding or minimizing [racialized classroom interactions is] that the comfort of the professor is being valued over the learning of the students. Particularly in the field of law, in which students need a significant amount of cultural competency to be successful in practice, the comfort level of the professor should not play a role. Doing so would be akin to a professor not covering the rule against perpetuities because she was uncomfortable with the topic, despite its being tested on the bar exam.”).

12 *Id.* at 784–85.

13 See ENJURIS, LAW SCHOOL ENROLLMENT BY RACE & ETHNICITY (2019), <https://www.enjuris.com/students/law-school-race-2019.html> (63.4% of students enrolled in ABA law schools in 2019 identified as white).

in the class were asked if they would prosecute the parent and why they arrived at their decision. During the exercise, I thought first of the familiar facts of the case before my mind allowed me to analyze the criminality of the parent's actions. In the Jonathan Perry Courtney case,¹⁴ a loving mother struggling to make ends meet had no money to pay a babysitter or alternatives for childcare. She brought her child to work, left him with food and water, and checked in periodically. The child died while unattended. I am friends with a single mother working paycheck to paycheck; she, too, struggles to find reliable childcare. I understood the mother's reasons in the hypothetical before I understood the reasons my classmates had volunteered as the basis for her prosecution. One classmate chose to prosecute because that's not how *she* would have acted in the same situation. In that moment, my dilemma began: I am one of the few in this classroom with a different perspective, do I speak up? If I do not speak up, my classmates will think they've considered all sides of the situation—is my voice the last line of defense for people like my friend? I can add a new level of analysis that will enrich the legal dialogue, and I believe it's something we should be considering. The parent in this situation isn't just a hypothetical for me—I know people in a similar situation. Do I have a moral duty to speak on their behalf? As I began to raise my hand to offer my perspective, that a struggling mom trying to juggle everything to care for her child had just experienced the worst life had to offer, my dilemma continued. We all share the same workload; it's challenging and demanding to be a law student. Why should I take on the additional emotional burden of teaching my classmates (and sometimes professors) about the nuanced side of the law? Why should I have to teach them that some people live in another reality without access to the same resources? The class will probably think I'm being emotional and illogical and drawing on personal experiences instead of rooting my thoughts in the law. My professor clearly does not want to talk about this aspect, or he would have brought it up himself. What's the point?

The goal of the hypotheticals was to demonstrate the boundless freedoms a prosecutor enjoys. For me, another message came through: I do not relate to the majority of my classmates.¹⁵ To minimize the occurrence of the minority dilemma, law schools and individual professors must foster a teaching atmosphere of psychological safety. Psychological safety is “the sense that one's identity, perspectives, and contributions are valuable, despite the

14 See RICHARD J. BONNIE, ANNE M. COUGHLIN, JOHN C. JEFFRIES, JR. & PETER W. LOW, CRIMINAL LAW 5–6 (2d ed. 2004) (the “Jonathan Perry Courtney” hypothetical).

15 See *id.* at 4. In the “Imani and Jasmine Lawrey” hypothetical, a mother left her three-year-old twins in the care of their eleven-year-old brother after returning home from working a night shift and feeding and playing with her kids. *Id.* She woke up two hours later to find the twins dead in the car. *Id.* Many of my classmates couldn't fathom a mother leaving children in the care of children. I spent many summer days caring for my five-year-old brother as an eleven-year-old when my mother worked night shifts. I understood completely.

experience or possibility of discomfort or harm within a learning setting.”¹⁶ Without this guarantee, diverse law students will continue to be alienated in the classroom environment and the student body at large will not enjoy the intellectual diversity expected when admitting diverse students. One way to foster psychological safety is to recruit a diverse faculty. Diversity of gender, thought, race, and ethnicity leading the classroom discussions provides a better opportunity to address the social aspects of the law not always present in the black letter law. Students who identify with the leader of classroom discussions might feel a sense of safety that allows them to speak freely and offer their perspective to the class. Another way to promote psychological safety is training professors to make an intentional effort to be more inclusive in their content choices and lectures.

IV. BUILDING AN INCLUSIVE CLASSROOM

To maintain an inclusive classroom, it is imperative that all students feel comfortable.

If the students are comfortable, then they are likely to have higher levels of engagement and participation in classroom conversation, which results in all students learning more. This interaction helps to break down racial stereotypes as well, but only when there is more than token representation from various diverse groups. This environment relies upon interaction that includes reciprocal communication as well as contact, and not merely access.¹⁷

Erin C. Lain enumerates three pedagogical approaches to create psychological safety and to make the classroom more inclusive: attunement, authenticity, and power sharing.¹⁸ A showing of genuine attunement, or “the professor’s ability to understand the varying lived experiences of the students,”¹⁹ lets all students know that their opinions are valid and welcomed in the legal discussion. “In the law school learning environment, authority is valued more than inclusion,”²⁰ so authenticity is necessary to demonstrate that students are welcome to share a perspective different from that of the professor. Any number of actions can display authenticity. For example, a professor pausing to acknowledge that she does not understand a social

16 Jasmine D. Williams, Ashley N. Woodson & Tanner LeBaron Wallace, “*Can We Say the N-word?*”: *Exploring Psychological Safety During Race Talk*, 13 RSCH. HUM. DEV. 15, 18 (2016).

17 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, 668 (2008).

18 Lain, *supra* note 11, at 792.

19 *Id.* at 793 (“Attunement requires the professor to notice implicit interactions, pause the course content, and redirect the dialogue to allow for multiple perspectives to be shared or for the professor herself to share [the] differing views.”).

20 *Id.* at 795.

element and asking for comment from the class establishes an atmosphere for authentic conversation.²¹ Lastly, by power sharing, or navigating complex classroom interactions by redistributing the classroom hierarchy, students not represented in the majority of the class demographic feel empowered to share their experiences.

Chris Chambers Goodman offers additional guidance to professors seeking to maximize diversity of thought in the classroom. He suggests strategically cold calling students, learning to understand silence in a classroom, overtly acknowledging privilege, and finding the perfect balance in the tug-of-war in a classroom debate.²²

CONCLUSION

There must be measures of diversity that go beyond a simple count of bodies in the building. The evaluation of diversity in the legal academy should begin in the classroom. To nurture true inclusion within legal institutions and the overall legal profession, law schools should take on the obligation to implement qualitative, substantive change to pedagogical methods. Creating a database that measures how law schools protect diverse students and incorporate alternative perspectives into ordinary teaching methods is the first step to revolutionizing how law schools measure diversity. These changes will encourage professors to be intentional with classroom content and level the playing field for diverse students. In addition to an annual report that announces the percentage of diverse students each law school has admitted, I propose publishing the results from a school-wide voluntary diversity questionnaire.²³ The student feedback would provide a preview for what to expect so that potential students can make an informed decision when choosing which school to attend. The questionnaire also provides an avenue of review for the faculty's current standing in maintaining an inclusive classroom while suggesting action steps for the overall increase and improvement of diversity support. Ultimately, a move like this would facilitate a wholesome learning environment for all students.

21 See, e.g., Goodman, *supra* note 17, at 689. Another example of a display of authenticity can be found in Chris Chambers Goodman's scenario:

"For instance, when I talk about the concept of retaliation as a justification for punishment, I discuss the concept of 'an eye for an eye.' Many students are familiar with the Bible as a source, but are not aware that this maxim is also found in the ancient Code of Hammurabi, the seventeenth century B.C. Babylonian ruler. Providing this information subtly reminds the students that the Judeo-Christian tradition is not the only contributor to our legal system."

Id. (footnote omitted).

22 *Id.* at 688-99.

23 See Appendix.

APPENDIX: MOCK VOLUNTARY DIVERSITY QUESTIONNAIRE

1. Do you consider yourself a “diverse student” for the purposes of diversity and inclusion?
 - Yes
 - No
2. How do you identify? (you may select more than one)

<ol style="list-style-type: none"> a. Ethnicity & race <ul style="list-style-type: none"> <input type="radio"/> White or Caucasian <input type="radio"/> Black or Non-Hispanic African American <input type="radio"/> Hispanic or Latino <input type="radio"/> North African or Middle Eastern <input type="radio"/> Asian <input type="radio"/> Pacific Islander <input type="radio"/> More than One Race <input type="radio"/> Other c. Age <ul style="list-style-type: none"> <input type="radio"/> 18-23 <input type="radio"/> 24-28 <input type="radio"/> 29-32 <input type="radio"/> 32 + e. Religion <ul style="list-style-type: none"> <input type="radio"/> Protestant <input type="radio"/> Catholic <input type="radio"/> Muslim <input type="radio"/> Buddhist <input type="radio"/> Sikh <input type="radio"/> Atheist <input type="radio"/> Nonreligious <input type="radio"/> Other _____ <input type="radio"/> Prefer not to answer 	<ol style="list-style-type: none"> b. Gender <ul style="list-style-type: none"> <input type="radio"/> Female <input type="radio"/> Male <input type="radio"/> Non-binary <input type="radio"/> Prefer not to answer d. Are you a First generation professional? <ul style="list-style-type: none"> <input type="radio"/> Yes <input type="radio"/> No
---	---
3. Psychological safety is defined as “the sense that one’s identity, perspectives, and contributions are valuable, despite the experience or possibility of discomfort or harm within a learning environment.” How would you rate your perceived psychological safety in the classroom this academic year? (1 being the lowest level of psychological safety, 10 being the highest)

1...2...3...4...5...6...7...8...9...10
4. How can XXX law school improve the classroom setting to promote psychological safety?