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### Law Schools, Cultural Competency, and Discrimination, 21 Berkeley J. Afr.-Am. L. & Pol'y 84 (2021)

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# Law Schools, Cultural Competency, and Anti-Black Racism: The Liberty of Discrimination

Samuel Vincent Jones\*

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## INTRODUCTION

American Bar Association (“ABA”)-approved law schools are constructed and marketed as the primary means by which law students acquire the core competencies to practice law.<sup>1</sup> The conventional wisdom within the legal

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1. See, e.g., Peter A. Joy, *The Uneasy History of Experiential Education in U.S. Law Schools*, 122 DICK. L. REV. 551, 557 (2018) (recounting the ABA’s passage of resolutions in 1881 that an ABA-prescribed law school program should be equivalent training to a law office apprenticeship of the same duration); STANDARDS AND RULES OF PROC. FOR APPROVAL OF L. SCHS. 301(a) (AM. BAR. ASS’N 2020–21); Erwin Chemerinsky, *From the Dean: Diversity and Inclusion at Berkeley Law*, BERKELEY LAW (Dec. 14, 2020), <https://www.law.berkeley.edu/article/diversity-and-inclusion-erwin-chemerinsky-racial-justice/> (stating that “As a law school, our preeminent purposes are preparing students for law practice at

profession is that the ABA-approved law school experience is a programmatic academic response to societal needs that provides all law students with culturally responsive and innovative learning opportunities in a safe environment.<sup>2</sup> This Article challenges the conventional wisdom by advancing what some observers may consider a bold claim—that anti-Black racial discrimination represents a continuous and constitutive feature of the law school experience. It posits that Black law students are expected to learn under a system of legal education governance that ignores their long struggle to escape the calamitous effects of anti-Black racism that denies them equal opportunities to practice law.

Part II critiques the Black law student experience, calling particular attention to traditional suppositions and conceptions of liberty relative to the ABA's apparent unwillingness to curtail anti-Black racial harassment on law school campuses, underrepresentation among Black law students and faculty, and comparatively dismal graduation and bar passage rates among Black law students. It questions the viability of continued reliance on the ABA accreditation paradigm as an appropriate response to anti-Black racial discrimination on law school campuses and examines an existing dichotomy by which well-articulated ABA rules that appear to prohibit anti-Black racial discrimination and advance diversity coexist alongside law school practices that discriminate against members of this highly vulnerable class of law students. In so doing, it confronts contemporary assumptions about ABA expectations regarding law school compliance with antidiscrimination policies as they relate to Black law students.

Part III takes a philosophical incursion into our conceptual mapping of the Black law student experience as it relates to the value of “cultural competency” legal instruction as an effective, and potentially required, response to anti-Black racial discrimination. In so doing, it explores how self-interested notions of freedom of expression, autonomy, and economic interest facilitate racially oppressive outcomes for Black law students.

This Article does not attempt to expound on all categories of anti-Black racial discrimination in law schools or prove a normative thesis regarding law schools. Rather, it shows the inaccuracy of the conventional wisdom and how we are now past the point where it is reasonable to doubt whether current models of law school governance incorporate moral culpability and institutional

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the highest levels of the profession. . . We must, in light of our vital public mission, work to fight racism and work for justice and equality in our community, nation, and the world.”)

2. See ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION 145 (Clinical Legal Education Association ed. 2007), [https://www.cleaweb.org/Resources/Documents/best\\_practices-full.pdf](https://www.cleaweb.org/Resources/Documents/best_practices-full.pdf) (discussing the need for classroom components, adequate resources, and a response to the needs of those in the community); see also *Statement of the Deans of the Ten Texas Law Schools*, TEX. L. NEWS (June 10, 2020), <https://law.utexas.edu/news/2020/06/10/statement-of-the-deans-of-the-ten-texas-law-schools/> (law school deans of the ten law schools in Texas acknowledging that law schools have a duty to prepare future lawyers “with the ability to recognize injustice, including racial injustice—and the commitment to advocate for its eradication”).

accountability sufficiently enough to protect Black law students from anti-Black racial discrimination.

### I. DO LAW SCHOOLS HAVE LIBERTY TO DISCRIMINATE AGAINST BLACK LAW STUDENTS?

The United States appears to be at a unique crossroad. Our nation's allegiance to the idea that we are a nation of laws has, historically, appealed so strongly to the personal ethos of American culture that policymakers routinely cite our legal system as one of the best in the world.<sup>3</sup> The conventional wisdom has been that our laws are colorblind and anti-Black racism poses no significant threat to the average law-abiding Black American.<sup>4</sup> Consequently, for many outside the Black community, the notion that a significant number of our nation's Black citizens are victims of racism not only conflicts with their most patriotic inclinations,<sup>5</sup> it may strike them as preposterous.<sup>6</sup>

Alarmed by the killings of George Floyd,<sup>7</sup> Breonna Taylor,<sup>8</sup> and Ahmaud Arbery,<sup>9</sup> along with widespread news of the disproportionate number of Black

3. Darrell W. Ringer, *Readin', 'Ritin', 'Rithmetic—and Civics*, W. VA. LAW (Nov. 1999), <https://ringerlaw.com/index.php?page=9911> (“80% of the participants [in a national ABA survey] perceive that the American justice system is the best in the world”).

4. John Sides, *White People Believe the Justice System is Color Blind. Black People Really Don't.*, WASH. POST (July 22, 2013), <https://www.washingtonpost.com/news/wonk/wp/2013/07/22/white-people-believe-the-justice-system-is-color-blind-black-people-really-dont/>; Keith E. Sealing, *The Myth of a Color-Blind Constitution*, 54 WASH. U. J. URB. & CONTEMP. L. 157, 159 (1998) (“[G]overnment institutions should not use the myth of a color-blind Constitution to perpetuate the racial problems of a society that itself has failed to reach color-blind status”).

5. Eric Levitz, *The '1619 Project' Isn't Anti-American—It's Anti-White Identity Politics*, N.Y. MAG. (Aug. 23, 2019), <https://nymag.com/intelligencer/2019/08/the-1619-project-isnt-unpatriotic-its-just-anti-whiteness.html> (recognizing that the “typical white conservative” interprets initiatives or discussions that highlight the remnants or lingering effects of slavery as “anti-American”).

6. Samuel Sommers & Michael Norton, *White People Think Racism is Getting Worse. Against White People.*, WASH. POST (July 21, 2016), <https://www.washingtonpost.com/posteverything/wp/2016/07/21/white-people-think-racism-is-getting-worse-against-white-people/> (discussing survey results indicating that white people believe bias against white people is more of a problem in the U.S. than bias against Black people).

7. Chris Graves, *The Killing of George Floyd: What We Know*, MPR NEWS (June 1, 2020), <https://www.mprnews.org/story/2020/06/01/the-killing-of-george-floyd-what-we-know> (reporting nationwide protests after Floyd was killed by an officer who knelt on his neck for over eight minutes).

8. Richard A. Oppel Jr. et al., *What to Know About Breonna Taylor's Death*, N.Y. TIMES (Jan. 6, 2021), <https://www.nytimes.com/article/breonna-taylor-police.html> (attributing “wide-scale demonstrations” after Taylor was killed by police, who were executing a no-knock warrant, while she was sleeping in her bed).

9. Bridget Read & Claire Lampen, *What We Know About the Killing of Ahmaud Arbery*, THE CUT (Jun. 24, 2020), <https://www.thecut.com/article/ahmaud-arbery-shooting-georgia-explainer.html> (noting public outcry after Arbery was shot and killed while jogging by two Caucasian men who had followed him).

Americans affected by COVID-19,<sup>10</sup> people of virtually all races and ethnicities are beginning to express zero tolerance for anti-Black racism and the societal indifference that sustains it. Today's Black law students are no exception.

#### A. *The Black Law Student Experience*

Whereas in prior years Black law students may have exhibited a willingness to endure unequal educational outcomes and racial hostility during law school in exchange for lifelong membership in the legal profession, there appears to be a new awakening sweeping the nation. Black law students are bravely defending their right to live free of racial discrimination and the vestiges of second-class citizenship and calling for robust improvements in the way law schools respond to anti-Black racial discrimination.<sup>11</sup> They are mindful of their need for fair and equal opportunities to take their place among the cadre of young legal thinkers that will engage our nation's most pressing legal problems amid seemingly unprecedented degrees of difficulty.<sup>12</sup>

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10. STATE OF BLACK AMERICA UNMASKED 3 (Nat'l Urban League ed. 2020), <http://sobadev.iamempowered.com/sites/soba.iamempowered.com/files/NUL-SOBA-2020-ES-web.pdf> ("African Americans are reportedly three times as likely to contract the coronavirus and nearly twice as likely to die from COVID-19 as whites.").

11. See, e.g., Karen Sloan, *'This Is the Civil Rights Movement of My Lifetime': Black Law Students Demand Action*, LAW.COM (June 18, 2020), <https://www.law.com/2020/06/18/this-is-the-civil-rights-movement-of-my-lifetime-black-law-students-demand-action/?slreturn=20210028232915> (reporting that "Black law student groups from 17 law campuses in New York, New Jersey, and Connecticut" joined together and called for their law schools to better support racial minority law students); Connor McCarthy, *Black Law Students Demand UO Take More Action*, KEZI.COM (Aug. 11, 2020), <https://www.kezi.com/content/news/Black-law-student-group-demands-UO-take-further-action-572083811.html> (reporting that Black law students at the University of Oregon are formally complaining that their law school does not do enough to address racially insensitive conduct); The Black L. Students Ass'n of the SMU Dedman Sch. of L., *Open Letter: Demands from the Black Law Students Association*, SMU DAILY CAMPUS (Jun. 25, 2020), <https://www.smudailycampus.com/opinion/open-letter-demands-from-the-black-law-students-association> (conveying requests from Black law students at Southern Methodist University that their university leadership acknowledge their university has a problem with "pervasive racism"); Letter from the Georgetown Black Law Students Association to the Georgetown Law Administration, [https://docs.google.com/document/d/1k8WdnOboHIX9H2Lh5ofjDGygiCeUnAYgYICBGBK4GIk/preview?pru=AAABeEZYIo0\\*W6jPUGN4WZzCZZ9xbnss\\_w](https://docs.google.com/document/d/1k8WdnOboHIX9H2Lh5ofjDGygiCeUnAYgYICBGBK4GIk/preview?pru=AAABeEZYIo0*W6jPUGN4WZzCZZ9xbnss_w) (while demanding improvement in Georgetown Law's grading system, the students stated that "conscious and unconscious bias [is] systematically present in law school grading at Georgetown Law and in other law school classrooms nationwide.").

12. See Tim Murphy, *Trump Is Now Bragging About the Popular Vote, Which He Is Also Losing*, MOTHER JONES (Nov. 7, 2020), <https://www.motherjones.com/politics/2020/11/trump-is-now-bragging-about-the-popular-vote-which-he-is-also-losing/>; Sophie Lewis, *Joe Biden Breaks Obama's Record for Most Votes Ever Cast for a U.S. Presidential Candidate*, CBS NEWS (Dec. 7, 2020), <https://www.cbsnews.com/news/joe-biden-popular-vote-record-barack-obama-us-presidential-election-donald-trump/>; Ledyard King, *'The Country's Lost Its Mind': Polls Warning of Civil War, Violence Shows Deep Partisan Chasm over Election*, USA TODAY (Oct. 7, 2020), <https://www.usatoday.com/story/news/politics/elections/2020/10/07/both-sides-worry-doubts-election-integrity-could-spark-violence/5880965002/>.

For too many Black law students, their law school experience poses obstinate academic challenges and is hostile to their presence, value, and contributions.<sup>13</sup> For example, at one law school, a professor reportedly used class time to assert that racial minority law students “have the lowest percentage of passing the bar exam” and advised a Black law student that they “would never pass the bar exam.”<sup>14</sup> At another law school, a professor asked a Black law student, “If I called you the n-word right now, would you fight me?”<sup>15</sup> At another law school, a professor reportedly claimed, “[O]ur country will be better off with more whites and fewer nonwhites”<sup>16</sup> and suggested that Black law students do not “finish at the top half of their class.”<sup>17</sup> A swastika was spray-painted on the steps of at least one law school.<sup>18</sup> And at another law school, racial harassment became so intolerable that Black law students called for school administrators to post “diversity officers” in their classrooms in order to report racially offensive behavior amid fear of retaliation if Black students were perceived to have reported the unlawful conduct.<sup>19</sup> At one school, a law professor, while in discussion with a fellow colleague, stated, “I end up having this angst every semester that a lot of my lower [students] are Blacks.”<sup>20</sup> In addition, numerous complaints regarding law professors’ use of the “n-word,” a term courts have recognized as the “most noxious racial epithet in the contemporary American lexicon,”<sup>21</sup> remain a disruptive and material source of concern.<sup>22</sup> Put succinctly,

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13. Meera E. Deo et al., *Struggles & Support: Diversity in U.S. Law Schools*, 23 NAT’L BLACK L. J. 71, 73–74 (2010) (“[W]hile there have been increasing numbers of students of color on law school campuses as affirmative action and other measures continue to broaden opportunities, legal education continues to focus on white males as the primary recipients of legal knowledge and classroom attention.”).

14. Terry Nguyen, *Students Are Using Instagram to Reveal Racism on Campus*, VOX (July 15, 2020), <https://www.vox.com/the-goods/2020/7/15/21322794/students-instagram-black-at-accounts-campus-racism>.

15. *Id.*

16. Colleen Flaherty, *Penn Law Condemns Amy Wax’s Recent Comments on Race and Immigration as Others Call for Her Ouster*, INSIDE HIGHER ED (July 24, 2019), <https://www.insidehighered.com/news/2019/07/24/penn-law-condemns-amy-waxs-recent-comments-race-and-immigration-others-call-her>.

17. Derek Hawkins, *Penn Law Professor Who Said Black Students Are ‘Rarely’ in Top Half of Class Loses Teaching Duties*, WASH. POST (Mar. 15, 2018), <https://www.washingtonpost.com/news/morning-mix/wp/2018/03/15/penn-law-professor-who-said-black-students-rarely-perform-well-loses-teaching-duties/>.

18. Samuel Turner & Jack Tripp, *Swastika Appears on Law School Steps*, YALE DAILY NEWS (Oct. 8, 2019), <https://yaledailynews.com/blog/2019/10/08/swastika-appears-on-law-school-steps/>.

19. Sarah Imgrund, *Black Law Students Demand Classroom Diversity Monitors to Report ‘Questionable Conduct’*, THE COLL. FIX (Sept. 3, 2020), <https://www.thecollegefix.com/black-law-students-demand-classroom-diversity-monitors-to-report-questionable-conduct/>.

20. Elizabeth Redden, *Georgetown Professor Fired for Statements About Black Students*, INSIDE HIGHER ED (Mar. 12, 2021), <https://www.insidehighered.com/news/2021/03/12/georgetown-terminates-law-professor-reprehensible-comments-about-black-students>.

21. *Monteiro v. Tempe Union Sch. Dist.*, 158 F.3d 1022, 1034 (9th Cir. 1998).

22. See, e.g., David Raban, Opinion, *Racism Thrives at the Law School*, CHI. MAROON (Mar. 5, 2019), <https://www.chicagomaron.com/article/2019/3/5/racism-thrives-law-school/>; Erin

for too many Black law students, their law school experience is wrought with indignation, hostility, and the existential nature of anti-Black racism.

The ABA, which is known for its “excessively strict or rigid accreditation standards”<sup>23</sup> and strong willingness to publicly condemn law schools when there is a “perception of gender discrimination”<sup>24</sup> or failure to meet bar passage standards,<sup>25</sup> appears comparatively silent in response to reports of anti-Black racial discrimination on law school campuses. Indeed, research has not revealed one instance within the last 20 years where the ABA censured, reprimanded, or fined a law school for violating rules that prohibit anti-Black racial discrimination. The ABA’s apparent lack of concrete efforts to curtail anti-Black racial discrimination on law school campuses raises serious questions as to whether law schools have liberty to ignore or endorse anti-Black racial discrimination.

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Woo, *Law Professor Criticized After Reading Racial Slur in Class*, STAN. DAILY (May 30, 2020), [stanforddaily.com/2020/05/30/law-professor-criticized-after-reading-racial-slur-in-class/](https://stanforddaily.com/2020/05/30/law-professor-criticized-after-reading-racial-slur-in-class/); Bill Schackner, *Pitt Law School Adjunct Resigns After Using a Racial Slur in Class*, PITTSBURGH POST-GAZETTE (Oct. 15, 2020), <https://www.post-gazette.com/news/education/2020/10/15/University-of-Pittsburgh-Pitt-law-school-racial-slur-race-teaching-colleges-Pennsylvania/stories/202010150163>; Colleen Flaherty, *2 More Emory Law Professors Reportedly Said the N-Word in Class*, INSIDE HIGHER ED (Sept. 17, 2019), <https://www.insidehighered.com/quicktakes/2019/09/17/2-more-emory-law-professors-reportedly-said-n-word-class>; Ryan Deto, *Duquesne University Professor Fired After Using N-Word Multiple Times in Video Class with Student*, PITTSBURGH CITY PAPER (Oct. 7, 2020), <https://www.pghcitypaper.com/pittsburgh/duquesne-university-professor-fired-after-using-n-word-multiple-times-in-video-class-with-student/Content?oid=17980457>; Joe Patrice, *Law Professor Drops Racial Slur in Class Because Otherwise How Will Black Students Ever Learn About Racism?*, ABOVE THE LAW (Mar. 1, 2018), <https://abovethelaw.com/2018/03/law-professor-drops-racial-slur-in-class-because-otherwise-how-will-black-students-ever-learn-about-racism/>; Eugene Volokh, *The Controversy Over Quoting Racial Epithets, Now at UC Irvine School of Law*, THE VOLOKH CONSPIRACY (Aug. 29, 2020), <https://reason.com/volokh/2020/08/29/the-controversy-over-quoting-racial-epithets-now-at-uc-irvine-school-of-law/>; Erick Johnson, *Exam Question Stirs Outrage at John Marshall Law School*, CRUSADER (Feb. 24, 2021), <https://chicagocrusader.com/exam-question-stirs-outrage-at-john-marshall-law-school/> (reporting that a law professor that used terms, “n\_” and “b\_” (profane expressions for African Americans and women) on a Civil Procedure final exam question claimed, “It just didn’t occur to me that I would get this type of reaction. I’m utterly dumbfounded and surprised that anyone would have a problem with this.”).

23. Eric Posner, *The Real Problem with Law Schools*, SLATE (Apr. 2, 2013), <https://slate.com/news-and-politics/2013/04/the-real-problem-with-law-schools-too-many-lawyers.html>.

24. See, e.g., Angela Morris, *ABA Fines, Publicly Censures Law School for Noncompliance with Anti-Discrimination Standard*, LAW.COM | TEX. LAW. (July 21, 2017), <https://www.law.com/texaslawyer/almID/1202793677669/ABA-Fines-Publicly-Censures-Law-School-for-Noncompliance-With-AntiDiscrimination-Standard/?mcode=1395262493112&curindex=385>.

25. Stephanie Francis Ward, *10 Law Schools Are Out of Compliance with Bar Passage Standard, ABA Legal Ed Section Says*, ABA J. (May 28, 2020), <https://www.abajournal.com/news/article/legal-ed-posts-public-notice-for-schools-out-of-compliance-with-bar-passage-standard#:~:text=Ten%20law%20schools%20are%20out,to%20the%20section's%20website%20Wednesday.>

*B. Law Schools and the Liberty to Foster Anti-Black Racism*

Noted theorist Joel Feinberg reasons that “liberty” is a product of a genuine lack of coercive constraint on behavior because conduct can only be classified as either: (1) required; (2) authorized or permitted; or (3) prohibited.<sup>26</sup> Liberty, as Feinberg views it, corresponds with classification (2) because categories (1) and (3) represent coercive constraints on conduct.<sup>27</sup> Taken to its jurisprudential and applicable limit, whether a law school has liberty regarding certain practices is conditioned on whether reasonable expectations of punishment exist for engaging in a prohibited practices or for failing to perform required practices.<sup>28</sup> Liberty, therefore, is derivative of norms or practices regarding what is genuinely demanded by a rule rather than the rule’s written text.<sup>29</sup> Thus, if an ABA rule genuinely requires a law school to do something or refrain from doing something, there must be evidence of compliance or serious punishment for noncompliance. Consequently, if an ABA rule carries no genuine expectation of compliance, there will be no evidence of serious penalty for noncompliance because the law school has liberty to violate the face of the rule.<sup>30</sup> What appears to be accurate, though not explicitly acknowledged by the ABA, is that there are multiple ABA rules that are aimed at prohibiting race discrimination in education by assuring Black law students receive an equal and fair opportunity to obtain a legal education but nonetheless carry no reasonable expectation of compliance and, therefore, grant law schools the liberty to discriminate.

For instance, ABA Standard 206(a) enunciates that law schools “shall demonstrate by concrete action a commitment to diversity and inclusion” by providing racial and ethnic minority applicants from “underrepresented groups” in the legal profession an opportunity to obtain legal education.<sup>31</sup> Despite the professed obligatory nature of the rule to include Black law students, at some law schools Black students comprise only approximately 2% of the law school’s total number of Juris Doctor degree recipients<sup>32</sup> or only approximately 1% of the

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26. JOEL FEINBERG, HARM TO OTHERS: THE MORAL LIMITS OF THE CRIMINAL LAW 7 (1984).

27. *Id.* at 7.

28. R. KENT GREENAWALT, CONFLICTS OF LAW AND MORALITY 11 (1989).

29. *Id.* at 12.

30. FEINBERG, *supra* note 26, at 7 (noting that liberty includes conduct that is not genuinely prohibited); GREENAWALT, *supra* note 28, at 12 (noting that not every rule carries a genuine expectation of compliance).

31. STANDARDS AND RULES OF PROC. FOR APPROVAL OF L. SCHS. 206(a) (AM. BAR ASS’N 2020–2021), [https://www.americanbar.org/groups/legal\\_education/resources/standards/](https://www.americanbar.org/groups/legal_education/resources/standards/) (“Consistent with sound legal education policy and the Standards, a law school shall demonstrate by concrete action a commitment to diversity and inclusion by providing full opportunities for the study of law and entry into the profession by members of underrepresented groups, particularly racial and ethnic minorities, and a commitment to having a student body that is diverse with respect to gender, race, and ethnicity.”).

32. *See, e.g.*, CHAPMAN U.—2019 STANDARD 509 INFO. REPORT (2019), <https://web.archive.org/web/20200819221547/https://www.chapman.edu/law/files/admission/standard-509-report.pdf> (reporting that Black law graduates received approximately 2% (4) of the 171 Juris Doctor degrees it awarded for 2018–19); *see* CAL. DAVIS, U. OF—2019 STANDARD 509 INFO.

entire law student population, without any apparent censure, sanction, or expression of public concern from the ABA that comparatively low enrollment and graduation rates among Black students do not comply with ABA standards.<sup>33</sup> In addition, the ABA does not require law schools to publicly disclose the number of applications they receive from Black applicants, which essentially shields law schools from criticism regarding the dearth of learning opportunities that are denied to Black law school applicants.

With respect to Black male law students, the comparatively dismal enrollment numbers not only suggest a lack of genuine effort to provide Black males with fair opportunities to obtain a legal education, but may be indicative of an outright intent to deny Black males opportunities to obtain legal education. For instance, at some law schools where Black student enrollment already represents a disproportionately low percentage of the overall law student body, Black males account for less than 20% of the total number of Black law students.<sup>34</sup>

For over a decade, data has shown that the number of Black males entering law schools is comparatively low and that Black males experience unique barriers to obtaining a legal education, such as the “school to prison pipeline.”<sup>35</sup>

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(2019), <https://web.archive.org/web/20200302093353/https://law.ucdavis.edu/jd/files/ABA-standard-509b-information.pdf>. (reporting that Black law graduates received approximately 1% (2) of the 154 Juris Doctors it awarded for 2018–19); see CAL.-HASTINGS, U. OF—2019 STANDARD 509 INFO. REPORT (2019), <https://www.uchastings.edu/wp-content/uploads/2019/12/2019Std509InfoReport.pdf> (reporting that Black law graduates received approximately 2% (7) of the 309 Juris Doctor degrees it awarded for 2018–19).

33. See e.g., GEORGE MASON U.—2019 STANDARD 509 INFO. REPORT (2019), [https://www.law.gmu.edu/assets/files/admissions/Std509InfoReport\\_Dec2019.pdf](https://www.law.gmu.edu/assets/files/admissions/Std509InfoReport_Dec2019.pdf) (reporting that of 497 students enrolled as of October 5, 2019, only 8 students (less than 2%) were African-American); U. OF OR.—2019 STANDARD 509 INFO. REPORT (2019), [https://law.uoregon.edu/sites/law1.uoregon.edu/files/2019\\_standard\\_509\\_report1.pdf](https://law.uoregon.edu/sites/law1.uoregon.edu/files/2019_standard_509_report1.pdf) (reporting that of 412 students enrolled as of October 5, 2019, only 8 students (less than 2%) were African-American); BRIGHAM YOUNG U.—2019 STANDARD 509 INFO. REPORT (2019), <https://law.byu.edu/wp-content/uploads/2019/12/2019-Std509InfoReport-12.11.19-1.pdf> (reporting that of 336 law students enrolled as of October 5, 2019, merely 5 students (approximately 1%) were African-American).

34. See, e.g., S. METHODIST U.—2019 STANDARD 509 INFO. REPORT (2019), <https://www.smu.edu/-/media/Site/Law/documents/Std509InfoReport-2019.pdf?la=en> (reporting that although Black law student enrollment amounted to approximately 4% of its total student body of 700 students, Black males accounted for only approximately 20% (6 students) of its total Black law student population (30 students)); SANTA CLARA U.—2019 STANDARD 509 INFO. REPORT (2019), [https://1x937u16qcralvnejt2hj4jl-wpengine.netdna-ssl.com/wp-content/uploads/Santa\\_Clara\\_2019\\_Std509InfoReport.pdf](https://1x937u16qcralvnejt2hj4jl-wpengine.netdna-ssl.com/wp-content/uploads/Santa_Clara_2019_Std509InfoReport.pdf). (reporting that although Black law student enrollment is approximately 2% (16 students) of its total student body (707 students), Black males account for merely 12% (2 students) out of its total enrollment of Black law students (16)).

35. See Floyd Weatherspoon, *The Status of African American Males in the Legal Profession; A Pipeline of Institutional Roadblocks and Barriers*, 80 MISS. L. J. 259 (2010); see also Njeri Rutledge, *I Thought I Never Experienced Racism. Then I Realized I Just Normalized It*, USA TODAY (Sep. 15, 2020), <https://www.usatoday.com/story/opinion/voices/2020/09/15/racism-everyday-black-women-column/5793258002/> (noting that “Black males face appalling inequities in America”); Matthew Lynch, *Black Boys in Crisis: Eliminating the School-to-Prison Pipeline*, THE EDVOCATE (Sep. 21, 2017), <https://www.theedadvocate.org/black-boys-crisis-eliminating-school->

So comparatively low is Black male law student enrollment that studies now reveal that at least “twice as many Black women as Black men study law.”<sup>36</sup> The particularly oppressive conditions facing Black males has become so catastrophic that the U.S. Congress passed the *Commission on the Social Status of Black Men and Boys Act* (S. 2163) by a 368–1 vote, in order to receive recommendations regarding ways it should address disparities specific to Black males.<sup>37</sup> The ABA appears to have remained silent concerning high attrition rates, comparatively low graduation rates, and enrollment rates among Black law students, particularly Black males. In some respects, the ABA has exacerbated the problem by authorizing law schools to report scholarship data on their Standard 509 Information Reports without regard to race or gender identifiers.<sup>38</sup> The lack of race and gender identifiers relative to scholarship data grants law schools the liberty to exacerbate existing wealth and opportunity gaps between Black students and others.<sup>39</sup>

Equally problematic is the liberty law schools have to admit Black students without adequately preparing them for the practice of law. For example, ABA Standard 301 appears to mandate that law schools “shall maintain rigorous standards that prepare law students, upon graduation, for admission to the bar.”<sup>40</sup>

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prison-pipeline/; *African-American and Mexican-American Enrollment at U.S. Law Schools Continues to Drop, Study Finds*, COLUMBIA L. SCH. (Jan. 5, 2010), <https://www.law.columbia.edu/news/archive/african-american-and-mexican-american-enrollment-us-law-schools-continues-drop-study-finds>. It should be noted that Black women may also experience unique barriers to obtaining a legal education, such as being construed as “angry” during law school when in fact, they are not. See Gregory Scott Parks, *Race, Cognitive Biases, and the Power of Law Student Teaching Evaluations*, 51 U.C. DAVIS L. REV. 1039, 1051 (2017); see also Meera E. Deo, *A Better Tenure Battle: Fighting Bias in Teaching Evaluations*, 31 COL. J. OF GENDER & L., 7, 10 (2015) (noting that Black women are occasionally judged by their “personal style” rather than the quality of their intellect).

36. Gabriel Kuris, *What Underrepresented Law School Applicants Should Know*, U.S. NEWS (Jun. 8, 2020), <https://www.usnews.com/education/blogs/law-admissions-lowdown/articles/what-underrepresented-law-school-applicants-should-know>.

37. Commission on the Social Status of Black Men and Boys Act, Pub. L. No. 116–156, 134 Stat. 700 (2020); see also Victoria Moorwood, *Congress passes bill to examine how systematic racism affects Black men and boys*, REVOLT (Jul. 29, 2020), <https://www.revolt.tv/2020/7/29/21346534/congress-black-men-and-boys-racism-bill> (explaining how the bill evolved and its purpose to “examine ‘the social disparities that disproportionately affect Black males in America.’”).

38. See CAL. HASTINGS, U. OF–2019 STANDARD 509 INFO. REPORT (2019), <https://www.uchastings.edu/wp-content/uploads/2019/12/2019Std509InfoReport.pdf> (The ABA Standard 509 Information Report requires law schools to report “grant and scholarship” information without including race and gender information.).

39. Kristen McIntosh, Emily Moss, Ryan Nunn & Jay Shambaugh, *Examining the Black-white wealth gap*, BROOKINGS (Feb. 27, 2020), <https://www.brookings.edu/blog/up-front/2020/02/27/examining-the-black-white-wealth-gap/> (“[N]et worth of typical white family is nearly ten times greater than that of a Black family.”)

40. See ABA STANDARDS AND RULES OF PROC. FOR APPROVAL OF L. SCHS. 301(a) (AM. BAR ASS’N 2020–2021), [https://www.americanbar.org/groups/legal\\_education/resources/standards/](https://www.americanbar.org/groups/legal_education/resources/standards/) (stating “Objectives of Program of Legal Education: A law school shall maintain a rigorous program of legal education that

Despite the clear tenet of the rule, which, unqualifiedly, professes to require law schools to adequately prepare all law students, including Black law students, to pass the bar exam, the bar exam failure rate for Black law graduates from ABA-accredited law schools for the February 2020 bar exam, in at least one jurisdiction, is as high as 95%, in comparison to 49% for white people, 58% for Asians, and 67% for Latinos.<sup>41</sup> Although the alarmingly high bar exam failure rate among Black law graduates creates a reasonable inference that some law schools are not responsive to the learning needs of their Black law student population, there is no indication that the ABA has taken steps to ensure that law schools implement culturally responsive practices that adequately prepare Black law students to pass the bar exam or address glaring disparities between white and Black law graduate bar passage rates.

The liberty law schools have to admit and collect tuition revenue from Black students who do not appear reasonably capable of successfully completing their program of legal instruction also appears to contravene existing ABA rules. Although the text of ABA Standard 501(b) affirms that a law school “shall only admit applicants who appear capable of satisfactorily completing its program of legal education and being admitted to the bar,”<sup>42</sup> some law schools, with the implicit approval of the ABA, maintain attrition rates among their Black first-year law students that appear upwards of 45% in comparison to approximately 10% for white people.<sup>43</sup> Black student admission and the provision of appropriate instruction necessary for them to succeed in law school should be meritorious and critical components of legal education governance. The liberty law schools have to admit and collect tuition revenue from Black students without providing them appropriate instruction or equal opportunities to succeed encourages a system of legal education governance that ignores anti-Black

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prepares its students, upon graduation, for admission to the bar and for effective, ethical, and responsible participation as members of the legal profession.”).

41. Maura Dolan, *California is easing its bar exam score, which critics argue fails to measure ability*, L.A. TIMES (Jul. 26, 2020), <https://www.latimes.com/california/story/2020-07-26/california-lowers-bar-exam-score-coronavirus> (“Of the first-time test takers from law schools accredited by the American Bar Ass’n., considered the top schools in the state, 51.7% of white graduates passed, compared with 5% Black grads, 32.6% of Latinos and 42.2% of Asians”).

42. See STANDARDS AND RULES OF PROC. FOR APPROVAL OF L. SCHS. 501(b) (AM. BAR ASS’N 2020–2021), [https://www.americanbar.org/groups/legal\\_education/resources/standards/](https://www.americanbar.org/groups/legal_education/resources/standards/) (“A law school shall only admit applicants who appear capable of satisfactorily completing its program of legal education and being admitted to the bar”)

43. See, e.g., GOLDEN GATE U.–2019 STANDARD 509 INFO. REPORT (2019), <https://www.ggu.edu/media/law/documents/about/consumer-information/ggu-law-2019-aba-standard-509-report-rev.pdf> (reporting an attrition rate among its first-year Black law students that appears to be approximately 45%); MCGEORGE SCH. OF L.–2019 STANDARD 509 INFO. REPORT (2019) (reporting attrition rate among first-year Black law students that appears to be roughly 33%); Carolina Alamrante, Lisa Chavez, Christine Holmes, Elizabeth Hom & Hellen Hong, *First Annual Report Card on the Diversity of California’s Legal Profession*, THE STATE BAR OF CAL. (2020), [http://www.calbar.ca.gov/Portals/0/documents/reports/State-Bar-Annual-Diversity-Report.pdf?fbclid=IwAR0br4atZJatJjrig674Vm\\_6W3PwkJtH2PfkHORKggxHG8UN5itOu0DIew](http://www.calbar.ca.gov/Portals/0/documents/reports/State-Bar-Annual-Diversity-Report.pdf?fbclid=IwAR0br4atZJatJjrig674Vm_6W3PwkJtH2PfkHORKggxHG8UN5itOu0DIew) (reporting bar passage rates among various demographic groups).

exploitation and subjugation. Consequently, Black students are now two and a half times more likely than their white counterparts not to complete law school.<sup>44</sup>

Additionally, law schools appear to have been granted liberty to deny opportunities to Black educators to teach law. ABA Standard 206(b) mandates that all ABA-approved law schools “shall demonstrate by concrete action a commitment to diversity and inclusion by having a faculty and staff that are diverse with respect to gender, race, and ethnicity.”<sup>45</sup> Despite the clear terms of the purported mandate, the ABA does not require law schools to report the number of tenured Black law faculty.<sup>46</sup> Thus, it comes as no surprise that Black law faculty members are grossly underrepresented and, at some law schools, unfairly scrutinized.<sup>47</sup> The ABA’s apparent unwillingness to ensure Black law

44. U.S. Comm’n on Civil Rights, *Affirmative Action in American Law Schools* 8 (2007), <https://www.usccr.gov/pubs/docs/AALSreport.pdf>.

45. See STANDARDS AND RULES OF PROC. FOR APPROVAL OF L. SCHS. 206(b) (AM. BAR ASS’N 2020–21), [https://www.americanbar.org/groups/legal\\_education/resources/standards/](https://www.americanbar.org/groups/legal_education/resources/standards/) (provides, “Consistent with sound educational policy and the Standards, a law school shall demonstrate by concrete action a commitment to diversity and inclusion by having a faculty and staff that are diverse with respect to gender, race, and ethnicity.”).

46. Stephanie Francis Ward, *How many tenured law professors are Black? Public data does not say*, ABA J. (Oct. 28, 2020), <https://www.abajournal.com/web/article/how-many-tenured-law-professors-are-black-public-data-does-not-say>.

47. Parks, *supra* note 35, at 1041–44 (pointing to a study that indicates “Black males” are rated much more “negatively” than others on law student evaluations of faculty, and asserting that white law students “make automatic negative associations with blacks and positive ones with whites” on law student evaluations of faculty); Deo, *supra* note 35, at 33 (pointing to a female law student’s anonymous evaluation wherein she claimed a Black male law professor “made her afraid in the classroom”); Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1279–86 (2000) (discussing the probability that Black male law professors are forced to perform additional emotional and “identity” labor in order to counter negative stereotypes inside the classroom or in the legal workplace); see also Darby Dickerson, *Statement Regarding Reported Racist Statements by Students about Faculty of Color*, March 29, 2021 (“The Administration has received reports that some students have been making racist and discriminatory remarks about faculty of color in direct messages or texts exchanged during and outside of class. We understand these exchanges question or challenge faculty members’ intelligence or qualifications. At this point, we do not have specific names and have not opened an investigation. But we wanted to convey unequivocally that we condemn statements that target faculty members—or any person—based on their race and emphasize that such statements have no place in this law school or the legal profession. We implore students who have engaged actively in these exchanges to examine their motivations and biases. You are contributing to the perpetuation of racism. You are also acting unprofessionally. Lawyers have a professional responsibility not to engage in conduct that they know or reasonably should know ‘is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status, or socioeconomic status in conduct related to the practice of law.’ Model Rules of Professional Conduct Rule 8.4(g).”) (on file with author); Collen Flaherty, *Why They Left*, INSIDE HIGHER ED (May 3, 2021), <https://www.insidehighered.com/news/2021/05/03/multiple-black-professors-have-resigned-recent-years-over-racism> (stating that “multiple Black academics have resigned, citing concerns about institutional racism, this academic year,” including Professor Alena Allen of the University of Memphis’s Cecil C. Humphreys School of Law); Tiffany Pennamon, *DePaul Law Professor Sues University*, DIVERSE: ISSUES IN HIGHER EDUCATION (Mar. 11, 2018), <https://diverseeducation.com/article/111950/> (discussing a Black male law professor at the DePaul University College of Law that sued DePaul University on grounds that he “faced racial animus and a ‘hostile environment’ since he first started at the college . . .”).

students have the benefit of tenured faculty members that reflect their particular experiences, history, and perspectives grants law schools, at least implicitly, the liberty to market themselves as racially diverse teaching institutions despite maintaining law faculties that appear completely void of Black full-time faculty members or Black tenured law faculty.<sup>48</sup>

Put succinctly, although not explicitly acknowledged by ABA policy, the ABA does not enforce every aspect of what it represents as genuine requirements for law school accreditation relative to ensuring diversity. There are multiple ABA rules that appear designed to prevent anti-Black racial discrimination in law schools, but despite containing the term, “shall,” an expression generally understood to signify a mandatory obligation, those rules carry no genuine expectation of compliance.<sup>49</sup> In some situations, the liberty the ABA grants law schools to ignore certain anti-discrimination rules encourages anti-Black racism on law school campuses—sometimes under the guise of promoting “diversity.”

For example, many law schools interpret “diversity” to include a broad range of identities, such as sexual orientation, gender, veteran status, socioeconomic status, faith and religious beliefs, disability status, immigrant status, or conditions of hardship.<sup>50</sup> As a consequence, law schools have liberty to promote themselves as diverse institutions while maintaining practices that deny Black applicants equal opportunities to serve as faculty members or to obtain a legal education, while affording other categories of “diverse” individuals favorable opportunities to obtain employment as faculty members or to acquire a legal education.<sup>51</sup> The performative outcome of the widespread use of anti-Black “diversity” practices has facilitated a total decline in Black law student enrollment over the last 20 years,<sup>52</sup> despite increases in the overall Black population.<sup>53</sup> Meanwhile, not only has foreign law student enrollment nearly doubled in the last decade, “reaching 7% among top tier law schools,” but white

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48. See STANDARDS AND RULES OF PROC. FOR APPROVAL OF L. SCHS. 206(b) (AM. BAR ASS’N 2020–21) (“Consistent with sound educational policy and the Standards, a law school shall demonstrate by concrete action a commitment to diversity and inclusion by having a faculty and staff that are diverse with respect to gender, race, and ethnicity.”); See OKLA., U. OF–2019 STANDARD 509 INFO. REPORT (2019), <https://www.law.ou.edu/sites/default/files/ABA/std509info2019.pdf> (reporting having less than 12% of its 2018–19 full-time law faculty that are racial minorities though 30% of its student body is comprised of racial minorities); The U. of Okla. C. of L. Directory, <https://www.law.ou.edu/faculty-and-scholarship/directory> (last visited Jan. 27, 2021), (demonstrating that the University of Oklahoma College of Law, while an excellent law school in most regards, markets itself as a law school that “promotes diversity, service and collegiality,” but it does not appear to have any full-time Black law faculty members.).

49. GREENAWALT, *supra* note 28, at 12 (1989).

50. Kuris, *supra* note 36.

51. *Id.*

52. *Id.*

53. William H. Frey, *The Nation is Diversifying Even Faster Than Predicted, According to New Census Data*, BROOKINGS (Jul. 1, 2020), <https://www.brookings.edu/research/new-census-data-shows-the-nation-is-diversifying-even-faster-than-predicted/> (noting that between 2010 and 2019, the Black population in the U.S. grew by 8.5% while the white population declined).

law students now comprise approximately 62% of the total law student population.<sup>54</sup>

The degree to which anti-Black “diversity” practices operate to discriminate against Black law students in some jurisdictions is illustrated, in part, by the exceptionally low number of Juris Doctor degrees awarded to Black students in comparison to the number of Juris Doctor degrees awarded to their white counterparts in California. For instance, for the 2018–2019 academic year, Black students at: (1) Chapman University Fowler School of Law received approximately 2% of the total number of J.D. degrees awarded, in comparison to approximately 46% for white students;<sup>55</sup> (2) University of California, Davis School of Law received approximately 1% of the total number of J.D. degrees awarded, in comparison to approximately 44% for white students;<sup>56</sup> and (3) University of California, Hastings College of Law received approximately 2% of the J.D. degrees awarded, in comparison to approximately 55% for white students.<sup>57</sup> When one considers that Black people comprise approximately 6% of the adult population of California but only 4% of California attorneys, and white people comprise approximately 40% of the adult population of California but represent 68% of California attorneys,<sup>58</sup> it is reasonable to surmise that too many law schools practice “diversity” in ways that discriminate against Black students in favor of white students. Such practices amplify the legacy of legalized racial subordination and facilitate outcomes that may constitute “badges and incidents of slavery.”<sup>59</sup>

## II. SHOULD LAW SCHOOLS REQUIRE CULTURAL COMPETENCY INSTRUCTION AS A MEANS TO CURTAIL ANTI-BLACK RACIAL DISCRIMINATION?

Ostensibly concerned with both the ABA’s apparent torpidity amid growing concerns over anti-Black racism, and the inadequacy of current ABA rules to

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54. Kuris, *supra* note 36.

55. See CHAPMAN U.–2019 STANDARD 509 INFO. REPORT (2019), [https://web.archive.org/web/20200819221547/https://www.chapman.edu/law/\\_files/admission/standard-509-report.pdf](https://web.archive.org/web/20200819221547/https://www.chapman.edu/law/_files/admission/standard-509-report.pdf).

56. See CAL.-DAVIS, U. OF–2019 STANDARD 509 INFO. REPORT (2019), <https://web.archive.org/web/20200302093353/https://law.ucdavis.edu/jd/files/ABA-standard-509b-information.pdf>.

57. See CAL.-HASTINGS, U. OF–2019 STANDARD 509 INFO. REPORT (2019), <https://www.uchastings.edu/wp-content/uploads/2019/12/2019Std509InfoReport.pdf>.

58. Almarante, Chavez, Holmes, Hom & Hong, *supra* note 43, at 28.

59. James Gray Pope, *Section 1 of the Thirteenth Amendment and the Badges and Incidents of Slavery*, 65 UCLA L. REV. 426, 486 n. 224 (2018) (noting that, in one prominent case, counsel for Rutgers University argued that the “gross exclusion of blacks and similar racial minorities from the medical profession constituted a badge or incident of slavery” under the Thirteenth Amendment. See Brief of the Board of Governors of Rutgers, the State University of New Jersey et al. *Amici Curiae* at 8, 17–18, *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978)); Jennifer Mason McAward, *Defining the Badges and Incidents of Slavery*, 14 U. PA. J. CONST. L. 561, 600 (2012) (recognizing the view that for “conduct to constitute a badge of slavery, it must (1) target African Americans as a class, (2) in a way that labels them inferior, and (3) is historically linked to slavery and its aftermath.”).

simultaneously reduce racial discrimination and improve racial diversity and inclusion on law school campuses, a majority of law school deans sent a letter to the ABA (hereinafter, “Decanal Letter”) urging it to “require or at least consider requiring that every law school provide training and education around bias, cultural competence, and anti-racism” (collectively referred to as “Cultural Competency Instruction”).<sup>60</sup> The timing and character of the Decanal Letter could not be more fitting of the current climate in which we find ourselves. Common among many of the recent demands and impressions from Black law students is that law schools have been complicit in “producing race-illiterate lawyers,” despite having a duty to produce culturally competent attorneys and promote “diversity and inclusion.”<sup>61</sup>

The position of the law students and deans is well-taken. Few can reasonably deny that to be effective in today’s increasingly multicultural society, a lawyer must be culturally competent.<sup>62</sup> Cultural competency is having the skill to pursue “a disciplined approach to viewing the world from different perspectives,” not simply by “practicing non-discrimination or non-bias towards another” but also by practicing the “ability to adapt, work and manage successfully in new and unfamiliar cultural settings.”<sup>63</sup> To some degree it requires an ability to be comfortable being uncomfortable as one confronts deeply rooted biases about race and privilege.<sup>64</sup> A law student or attorney’s

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60. Letter from Alicia Ouellete et al, President and Dean, Albany L. School, to Members of the Council of the ABA Section of Legal Education and Admissions to the Bar (Jul. 30, 2020), <https://taxprof.typepad.com/files/aba-bias-cultural-awareness-and-anti-racist-practices-education-and-training-letter-7.30.20-final.pdf>; see also Josh Blackman, *150 Law School Deans ask ABA to require “every law school [to] provide training and education around bias, cultural competence, and anti-racism,”* REASON, (Aug. 2, 2020), <https://reason.com/volokh/2020/08/02/150-law-school-deans-ask-aba-to-require-every-law-school-to-provide-training-and-education-around-bias-cultural-competence-and-anti-racism/>.

61. Tyler Ambrose, Zarinah Mustafa & Sherin Nassar, *Law Schools’ Complicity on Racism Must Be Challenged*, THE APPEAL (Jun. 24, 2020), <https://theappeal.org/law-schools-racism/>; see also The Black L. Students Ass’n of the SMU Dedman Sch. of L., *supra* note 11; Jamiles Lartey, *Racism at Harvard: Months After Protests Began, Students Demand Concrete Change*, THE GUARDIAN (Apr. 13, 2016), <https://www.theguardian.com/education/2016/apr/13/racism-harvard-law-school-slaveholder-seal> (discussing instances of racial concern at Harvard Law School including a lack of incorporating the implications of racism into the curriculum, diversity and inclusion, and the struggle to “decolonize” the school); Aidan F. Ryan, *Harvard Law School Students Say School Improperly Addressed Racist, Sexist Texts*, THE HARVARD CRIMSON (Jul. 27, 2019), <https://www.thecrimson.com/article/2019/7/27/hls-students-racist-texts/> (discussing instances in which racist and sexist texts aimed at a female students were sent to a group of first year students).

62. Xeris Gregory, *Ignorance is Not Bliss: Why More Than the Model Rules of Professional Conduct Are Necessary for Competency in the Legal Profession*, 42 J. LEGAL PROF. 243, 244 (2018).

63. *Id.*

64. Ellen Yaroshefsky, *Waiting for the Elevator: Talking About Race*, 27 GEO. J. LEGAL ETHICS 1203, 1206 (2014) (Noting that “Cultural competency encompasses an awareness of differences based upon race” and that “the most acute difficulty and discomfort is in confronting explicit and implicit biases about race” because of “false suggestions that we live in a ‘post-racial world,’ . . . [and] racial attitudes [that] are deep seated and reinforced throughout all institutions in American culture including its legal system.”).

failure to recognize that “shared culture, personal identifiers, and experiences help to nurture empathy and understanding” or to properly interpret cultural values could be “treacherous” to the attorney-client relationship.<sup>65</sup>

While there is no question that the Decanal Letter signifies a noteworthy attempt to ensure law students receive instruction that contributes to this most essential aspect of practicing law while introducing historical truths regarding various racial or ethnic groups, at least two inferences can be reasonably drawn from the Decanal Letter. First, the ABA has the authority to require Cultural Competency Instruction but has not exercised its authority to do so. Second, despite the “significant role” law deans have in determining “educational policy,”<sup>66</sup> some law deans are reluctant to use the prestige and power of their position to implement Cultural Competency Instruction without a mandate from the ABA. Notwithstanding the growing concern over racially offensive incidents at some law schools, their apparent reluctance is well-taken for reasons discussed below.

#### A. Cultural Competency Instruction and Student Autonomy

Whether a law school should exercise its liberty to require law students to complete Cultural Competency Instruction forces law school policymakers to confront a dilemma that strikes at our deepest impulses relative to equality and self-interested notions of rightness.<sup>67</sup> At the very least, it engages a potential conflict between the interest of Black law students, those arguably most affected by racial injustice, and that of the significantly larger majority of students, namely white people, who may be required to participate in Cultural Competency Instruction, presumably with moderate to severe discomfort.<sup>68</sup>

One view, naturally, is that the moral rules requiring respect for human dignity should be prioritized, even if adherence to those moral principles disrupts the comfort of the majority of law students who are generally unaffected by racial

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65. Muneer I. Ahmad, *Interpreting Communities: Lawyering Across Language Difference*, 54 UCLA L. REV. 999, 1042 (2007) (recognizing that the failure to properly interpret cultural values could be “treacherous” to the attorney-client relationship); Alexis Anderson, Lynn Barenberg & Carwina Weng, *Challenges of “Sameness”: Pitfalls and Benefits to Assumed Connections in Lawyering*, 18 CLINICAL L. REV. 339, 361 (2012) (recognizing that “shared culture, personal identifiers, and experiences help to nurture empathy and understanding” that “enrich the lawyer’s representation.”).

66. STANDARDS AND RULES OF PROC. FOR APPROVAL OF L. SCHS. § 201(c) (Am. Bar Ass’n 2021).

67. See Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 NW. U. L. REV. 343, 358 (recognizing, “Whether a campus ultimately adopts an antiracism rule or not, the mere suggestion of such rules generates controversy.”).

68. Russell G. Pearce, *White Lawyering: Rethinking Race, Lawyer Identity, and Rule of Law*, 73 FORDHAM L. REV. 2081, 2088 (2005) (noting that “[w]hite people do not easily discuss race relations. For more whites, the range of feelings goes from uncomfortable to severely uncomfortable.”) (quoting Clayton P. Alderfer, *A White Man’s Perspective on the Unconscious Processes Within Black-White Relations in the United States*, Human Diversity: Perspectives on People in Context 201, 202 (Edison J. Trickett et al. eds., 1994)).

discrimination.<sup>69</sup> One could reasonably argue that respect for human dignity is the most important dimension of human life, and thus law schools should be willing to burden the majority of law students for the sake of the collective good.<sup>70</sup> Still, appeals to moral principle are not dispositive. For some observers, the infusion of moral principles that denounce racial discrimination when deciding the trajectory of a law student's legal education arguably, and perhaps unfairly, interferes with a law student's individual autonomy and right of self-determination. Naturally, for some law students, it may be relatively unimportant that a few Black law students suffer racial discrimination.<sup>71</sup>

Such an appeal to student autonomy is deeply rooted in the idea that law students, like most lawyers, know what is best for themselves relative to racial injustice and should have the right to pursue their academic interests without interference.<sup>72</sup> It cannot reasonably be denied that once they become lawyers, many may choose to represent clients whose moral stance and legal objectives will conflict with their personal moral orientations.<sup>73</sup> Viewed in this manner, a law student's individual autonomy is catapulted into the "realm of moral rightness," thereby facilitating a presumption that the prioritization of individual autonomy is inherently just and self-regarding.<sup>74</sup> In so doing, appeals to student autonomy position legal education and racial injustice as separate domains, while simultaneously viewing the moral demands that denounce racial discrimination as matters of individual concern rather than institutional responsibility.<sup>75</sup>

For this reason, among others, the viability of Cultural Competency Instruction in law school may reasonably be conditioned upon whether some law school policymakers believe the interests of the statistically smaller number of law students directly impacted by racial discrimination should shape a law school's curriculum fundamentally, or even marginally, if their interest

69. *Id.* at 2087–88 (advocating for specialized legal instruction regarding race because white law students enjoy the privilege of dominance and authority in law school, within the legal profession, and in society, whereas as students of color must "learn about white culture if they are to survive") (quoting Alderfer, *supra* note 68, at 217).

70. Samuel Vincent Jones, *The Ethics of Letting Civilians Die in Afghanistan: The False Dichotomy Between Hobbesian and Kantian Rescue Paradigms*, 59 DEPAUL L. REV. 899, 902–03 (2010).

71. Robert L. Tsai, *Equality is a Brokered Idea*, 88 GEO. WASH. L. REV. 1, 2 (2020) (recognizing that some theorists reason that "progress on equality, particularly when it comes to safeguarding the rights of African Americans, has been made only when white citizens have perceived some advantage to come from enlarging the notion of equality, producing what Derrick Bell famously called a 'convergence of . . . interests.'").

72. See Samuel V. Jones, *The Moral Plausibility of Contract: Using the Covenant of Good Faith to Prevent Resident Physician Fatigue-Related Medical Errors*, 48 U. LOUISVILLE L. REV. 265, 291 (2009).

73. Paul Brest & Linda Krieger, *On Teaching Professional Judgement*, 69 WASH. L. REV. 527, 553 (1994) (noting that individuals "tend to comply with the requests of people [they] perceive to be in power, even when compliance contradicts [their] strongly held moral beliefs.").

74. Jones, *supra* note 72, at 291.

75. See David B. Wilkins, *Race, Ethics, and the First Amendment; Should a Black Lawyer Represent the Ku Klux Klan?*, 63 GEO. WASH. L. REV. 1030, 1038–40 (1995) (discussing society's tendency to elevate individual autonomy and moral pluralism over the collective good).

materially disrupts the autonomous choices of the significantly greater number of law students who are not directly impacted by racial discrimination.

This “separatist” approach appears well entrenched within the fabric of legal education. Law schools have generally not appeared interested in using the law school curriculum to promote cultural competency.<sup>76</sup> Law schools, as economic maximizers, are keenly aware that students enjoy increased choices in legal education and that a law school’s capacity to meet its economic objectives is inextricably conditioned upon the law school’s skill at attracting and retaining quality students and adapting more quickly to today’s cultural challenges without significantly interfering with student autonomy.<sup>77</sup> For some—if not most—law schools, it is simply unacceptable to disrupt the individual autonomy of the majority of law students by burdening them with Cultural Competency Instruction unless, of course, the ABA requires it.<sup>78</sup> Still, appeal to the individual autonomy claim presents a serious conundrum.

First, as I have reasoned elsewhere, acceptance of student autonomy as intrinsically just and good provides a vehicle for avoiding evaluation of the substantive merits of a law student’s exercise of autonomy in relation to their legal education that could lead to harmful personal consequences.<sup>79</sup> By limiting our concern to whether student autonomy is prioritized, we fail to consider that the law student’s exercise of autonomy relative to legal pedagogy may produce outcomes that frustrate the objectives of legal education or discount the needs of the public.<sup>80</sup>

Second, even the most rigid proponents of the individual autonomy claim are likely to agree that it is appropriate to interfere with a student’s autonomy in situations where the interference is likely to lead to greater prosperity for the student or protect the student from harm.<sup>81</sup> Hence, even if one accepts as true that law schools are not justified in burdening the majority of its students for the

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76. See Heidi Frostestad Kuehl, *Global Legal Ethics and Corporate Social Responsibility*, 46 N.C. J. INT’L L. 111, 150 (acknowledging that there is a “dearth of offerings in cultural competency” courses at law schools); Rosa Kim, *Globalizing The Law Curriculum For Twenty-First Century Lawyering*, 67 J. L. EDUC. 905, 935 (2018) (noting that the “legal academy has been slow to integrate cultural competency in the curriculum . . .”).

77. Brest & Krieger, *supra* note 73, at 556 (noting that legal organizations are generally economic maximizers and relational matters are resolved according to the organization’s self-interest and its transactional costs rather than moral principle).

78. See JONATHAN GLOVER, *UTILITARIANISM AND ITS CRITICS* 85–87 (1990) (observing that one criticism of utilitarianism is that it marginalizes the needs of the individual or numeric minority in favor of the pursuit of general happiness among a greater number of individuals because for proponents of utilitarianism, it is relatively “unimportant if some particular people do badly, so long as the benefits to others outweigh [the] losses.”).

79. Jones, *supra* note 72, at 292.

80. *Id.* at 291–92.

81. See GLOVER, *supra* note 78, at 85; Samuel Vincent Jones, *Judges, Friends and Facebook: The Ethics of Prohibition*, 24 GEO. J. LEGAL ETHICS 281, 293 (2011) (discussing the “‘future-oriented consent’ theory, which involves situations under which a person will come to welcome certain coercive measures in the future rather than the time at which the coercion occurs” when such interference protects them from harmful outcomes).

benefit of the minority of students, law schools are completely justified in burdening law students with Cultural Competency Instruction when, as discussed below, the burden produces future-oriented material benefit.<sup>82</sup>

### B. The Benefits of Cultural Competency Instruction

Among the chief objectives of law schools is to provide students with the necessary skills to resolve complex legal problems that are essential to the needs of an increasingly diverse body of clientele.<sup>83</sup> There is no question that for the foreseeable future, clients will need legal thinkers that can successfully maneuver in multifarious legal environments and manage a wide range of legal and social problems.<sup>84</sup> A new attorney is likely to be tasked with representing veterans with mental health issues,<sup>85</sup> same-gender couples with adopted children,<sup>86</sup> couples that adopt children of a different race,<sup>87</sup> immigrant families,<sup>88</sup> single parents,<sup>89</sup> couples with children that have been unlawfully imprisoned or expelled from school,<sup>90</sup> undocumented workers,<sup>91</sup> members of the LGBTQ+

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82. See GLOVER, *supra* note 78, at 101.

83. See generally, STANDARDS AND RULES OF PROC. FOR APPROVAL OF L. SCHS. Chap. 3 (AM. BAR ASS'N 2020), [https://www.americanbar.org/groups/legal\\_education/resources/standards/](https://www.americanbar.org/groups/legal_education/resources/standards/).

84. Brest & Krieger, *supra* note 73, at 529.

85. See VAntagePoint Contributor, *Breaking the silence: Veterans Speak Up About Mental Health through Make the Connection*, U.S. DEP'T OF VETERANS AFFS. (Nov. 8, 2017), <https://www.blogs.va.gov/VAntage/42901/breaking-silence-veterans-speak-mental-health-maketheconnection/> (discussing the impact combat has on the mental health of those serving and the creation of the Make the Connection outreach program).

86. See Jonathan Osting, *Same-sex Couple Challenging Michigan Adoption Law Seeks Equal Rights for Themselves, Their Kids*, MLIVE, (Jan. 21, 2019), [https://www.mlive.com/news/detroit/2012/01/same-sex\\_couple\\_challenging\\_mi.html](https://www.mlive.com/news/detroit/2012/01/same-sex_couple_challenging_mi.html).

87. See Roxanna Asgarian, *How a White Evangelical Family Could Dismantle Adoption Protections for Native Children*, VOX (Feb. 20, 2020), <https://www.vox.com/identities/2020/2/20/21131387/indian-child-welfare-act-court-case-foster-care> (discussing a lawsuit filed by a couple who had been fostering a baby, but were stopped when they wanted to adopt the child because of the Indian Child Welfare Act).

88. See Laura Jarrett, *Ball in Federal Judge's Court in Key Immigration Case on Family Separations*, CNN (Jun. 30, 2018), <https://www.cnn.com/2018/06/30/politics/flores-plaintiffs-filing/index.html> (discussing an attorney who takes cases with immigrant families dealing with family separations at the border).

89. See Travis Peeler, *Single Mothers Custody Rights*, LEGALMATCH, (Apr. 2, 2019) <https://www.legalmatch.com/law-library/article/child-custody-help-for-single-mothers.html>.

90. See Janan Hanna & Paul Newton, *Law Students Help Free Wrongfully Convicted Inmates*, THE U. OF CHI., (2012), [https://www.uchicago.edu/features/20120618\\_exoneration\\_project/](https://www.uchicago.edu/features/20120618_exoneration_project/).

91. See *Yale Law School Stands Up for Dreamers After DACA Decisions*, YALE L. SCH. (September 5, 2017), <https://law.yale.edu/yls-today/news/yale-law-school-stands-dreamers-after-daca-decision#:~:text=As%20the%20country%20reacts%20to,are%20protected%20throughout%20the%20country> (acknowledging that a Yale Law Clinic was “instrumental in filing the first nationwide legal challenge to the Trump Administration’s executive order banning refugees and other immigrants from certain countries from entering the United [States].”).

community,<sup>92</sup> and other nontraditional clientele.<sup>93</sup> The range of clients' business and personal interactions will be shaped by these various spheres of social, economic, racial, political, and physical identity.<sup>94</sup> Cultural Competency Instruction is apt to provide law students with the capacity to successfully negotiate, collaborate, and advocate across these varying cultural spectrums with knowledge of the law's aims in relation to these distinct groups.<sup>95</sup>

Second, Cultural Competency Instruction is likely to improve a student's cultural literacy and their campus experience in environments where law school administrators are genuinely interested in curtailing race discrimination. By providing law students with a basic knowledge regarding historical subjugation of distinct underserved groups; emerging demographic trends;<sup>96</sup> the biases, fears, and racial stereotypes that disrupt social mobility for some groups;<sup>97</sup> or how various individuals may desire to interpret or express their identity through their personal appearance, mannerisms, names, and other social cues that may not conform to traditional societal expectations; law students will be better positioned to sympathize with their peers and future clients whose identities differ from their own,<sup>98</sup> thus facilitating an educational environment centered on mutuality of trust and respect.<sup>99</sup>

Third, the interdisciplinary nature of Cultural Competency Instruction is likely to enable law students to learn from professionals outside the legal

92. See Catherine Ho, *Five Lawyers Take on History in Supreme Court Gay Marriage Case*, WASH. POST, Apr. 25, 2015, [https://www.washingtonpost.com/business/capitalbusiness/four-lawyers-take-on-history-in-supreme-court-gay-marriage-case/2015/04/25/26915bc6-e84d-11e4-9a6a-c1ab95a0600b\\_story.html](https://www.washingtonpost.com/business/capitalbusiness/four-lawyers-take-on-history-in-supreme-court-gay-marriage-case/2015/04/25/26915bc6-e84d-11e4-9a6a-c1ab95a0600b_story.html).

93. Okianer Christian Dark, *Incorporating Issues of Race, Gender, Class, Sexual Orientation into Law School Teaching*, 32 WILLAMETTE L. REV. 541, 553–555 (1996).

94. Serena Patel, *Cultural Competency Training: Preparing Law Students for Practice in Our Multicultural World*, 62 UCLA L. REV. DISCOURSE 140, 144–46 (2014) (discussing how spheres of identity shape communication and trust between lawyers and clients).

95. Gregory, *supra* note 62, at 244 (noting that lawyers “must possess skills for cross-cultural engagement,” “a disciplined approach to viewing the world from different perspectives,” and the “ability to adapt, work and manage successfully in new and unfamiliar cultural settings.”); Ahmad, *supra* note 65, at 1042 (recognizing that the failure to properly interpret cultural values could be “treacherous” to the attorney-client relationship); Anderson et al., *supra* note 65, at 361 (recognizing that “shared culture, personal identifiers, and experiences help to nurture empathy and understanding” that “enrich lawyer representation of the client.”).

96. U.S. Dep't of Lab., *Labor Force Statistics from the Current Population Survey*, U.S. BUREAU OF LAB. STATISTICS (Modified Jan. 22, 2021), <https://www.bls.gov/cps/demographics.htm#race> (the unemployment rate for Black individuals in 2019 was 6.1% and was 3.3% for white individuals).

97. Shervin Assari & T.J. Curry, *More Money and Education Isn't Reducing Racism and Depression for Black Men, Study Confirms*, NEWSONE, Jul. 22, 2020, <https://newsone.com/3981497/black-men-racism-depression-wealth-education-study/> (noting that advanced education does not improve social mobility for Black men as it does for Black women).

98. Bonny L. Tavares, *Changing the Construct: Promoting Cross-Cultural Conversations in the Law School Classroom*, 67 J. LEGAL EDUC. 211, 215 (2017).

99. Yaroshefsky, *supra* note 64, at 1215–1216 (observing that by law students discussing racial biases and experiences with one another during a Cultural Competency course, “the group grew closer.”).

profession, such as politicians,<sup>100</sup> sociologists,<sup>101</sup> historians,<sup>102</sup> philosophers,<sup>103</sup> and educators,<sup>104</sup> who play a crucial role in bridging gaps between members from varying cultures in addition to being aptly positioned to inform students about the various initiatives,<sup>105</sup> impediments to equality,<sup>106</sup> and methods that organizations outside the legal profession use to promote multiculturalism.<sup>107</sup>

Lastly, Cultural Competency Instruction could be expected to improve law student employment opportunities in J.D. Preferred/J.D. Advantage industries. For example, the Diversity, Equity, and Inclusion (“DEI”) industry has grown into a multi-billion-dollar industry.<sup>108</sup> A 2019 survey of 234 companies in the

100. John Lewis, *Together, You Can Redeem the Soul of Our Nation*, N.Y. TIMES, Jul. 30, 2020, <https://www.nytimes.com/2020/07/30/opinion/john-lewis-civil-rights-america.html?action=click&module=Opinion&pgtype=Homepage> (making comparisons between the Civil Rights movement of Lewis’s time and the current Black Lives Matter movement and the impact it will have on history).

101. PATRICIA HILL COLLINS, *BLACK SEXUAL POLITICS: AFRICAN AMERICANS, GENDER, AND THE NEW RACISM* (1st ed. 2004) (discussing the different forms of racism and analyzing how more subtle forms of racism are still prevalent).

102. HENRY LOUIS GATES, JR., *AMERICA BEHIND THE COLOR LINE* (Grand Central Publishing, 1st ed. 2004) (analyzing the impact of the Civil Rights movement on Black people since the 1960s).

103. ANGELA Y. DAVIS, *FREEDOM IS A CONSTANT STRUGGLE: FERGUSON, PALESTINE, AND THE FOUNDATIONS OF A MOVEMENT* (Haymarket Books, 4th ed. 2016) (discussing the oppression of certain racial groups).

104. Claude M. Steele, *Thin Ice: Stereotype Threat and Black College Students*, THE ATLANTIC (Aug. 1999), <https://www.theatlantic.com/magazine/archive/1999/08/thin-ice-stereotype-threat-and-black-college-students/304663/> (discussing the impact stereotypes have on the performance of Black students in college).

105. Sanya Mansoor, *93% of Black Lives Matter Protests Have Been Peaceful, New Report Finds*, TIME (Sept. 5, 2020), <https://time.com/5886348/report-peaceful-protests/> (discussing different protests that happened in the Summer of 2020 and the fact that the overwhelming majority of them were peaceful as opposed to violent); Ashley Southall & Michael Gold, *Why ‘Stop-and-Frisk’ Inflamed Black and Hispanic Neighborhoods*, N.Y. TIMES (Nov. 17, 2019), <https://www.nytimes.com/2019/11/17/nyregion/bloomberg-stop-and-frisk-new-york.html> (discussing the stop-and-frisk policy that was used in New York and the protests that took place as a result).

106. McIntosh et al., *supra* note 39 (“At \$171,000, the net worth of a typical white family is nearly ten times greater than that of a Black family (\$17,150) in 2016.”).

107. See e.g., Charlotte Carroll, *What is the Rooney Rule? Explaining the NFL’s Diversity Policy for Hiring Coaches*, SPORTS ILLUSTRATED, (Dec. 31, 2018), <https://www.si.com/nfl/2018/12/31/rooney-rule-explained-nfl-diversity-policy> (“[T]he Rooney Rule is an NFL league policy that requires teams to interview ethnic-minority candidates for head coaching jobs,” it has “recently been expanded to include general manager jobs.”); Chairs & Managing Partners of 117 Major L. Firms, *An Open Letter from the 4.0 Firms’ Chairs & Managing Partners*, DIVERSITY LAB (July 1, 2020), <https://www.diversitylab.com/mansfield-rule-4-0/> (“The Mansfield Rule . . . measures whether law firms have affirmatively considered at least 30 percent women, lawyers of color, LGBTQ+ lawyers, and lawyers with disabilities for leadership and governance roles, equity partner promotions, formal client pitch opportunities, and senior lateral positions.”).

108. Pamela Newkirk, *Diversity has Become a Booming Business. So Where Are the Results?*, TIME (Oct. 10, 2019) <https://time.com/5696943/diversity-business/> (discussing how diversity and inclusion has become a lucrative business).

S&P 500 found that DEI opportunities are rising at a miraculous pace,<sup>109</sup> with 63% of DEI professionals having been appointed or promoted within the last several years.<sup>110</sup> In March 2018, the job site *Indeed* reported that postings for DEI professionals rose approximately 35% in the previous two years alone<sup>111</sup> as the desire for greater racial diversity in the workplace continues to grow.<sup>112</sup>

Reports indicate that companies which reach the top quartile for racial diversity among their executives are 33% more likely to have above-average profitability,<sup>113</sup> and “companies that have more diverse management teams experience 19% higher revenue growth.<sup>114</sup> DEI programs and positions have become so economically and socially relevant that *Thomson Reuters* launched a Diversity and Inclusion index to assess the diversity practices of more than 5,000 publicly traded companies.<sup>115</sup> There is little question that the emergent DEI industry is likely to increase job opportunities for culturally competent law graduates who display readiness for leadership responsibility in a multicultural work environment.

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109. Tina Shah Paikeday, Harsonal Sachar & Alix Stuart, *A Leader's Guide: Finding and Keeping Your Next Chief Diversity Officer*, RUSSELL REYNOLDS ASSOC.'S, (Mar. 1, 2019) <https://www.russellreynolds.com/insights/thought-leadership/a-leaders-guide-finding-and-keeping-your-next-chief-diversity-officer>.

110. *Id.*

111. Daniel Culbertson, *Diversity and Inclusion Jobs Grow Briskly*, INDEED (Mar. 26, 2018), <https://www.hiringlab.org/2018/03/26/diversity-and-inclusion-grows-briskly/#:~:text=As%20of%20February%20of%202018,level%20from%202014%20through%2016> (“As of February of 2018, diversity and inclusion postings as a share of all postings in Indeed, are up 18% from the previous year and 35% higher than levels from two years past.”).

112. *Historic U.S. Job Market Continues as African-American Unemployment Rate Hits New Low*, WHITE HOUSE (Nov. 1, 2019), <https://web.archive.org/web/20201104055333/https://www.whitehouse.gov/articles/historic-u-s-job-market-continues-african-american-unemployment-rate-hits-new-low/> (claiming that “the unemployment rate for African Americans reached a new series low”); *Issues note – Plenary II: What is the economic impact of diversity and how can we make a stronger business case?*, OECD, <https://www.oecd.org/inclusive-growth/inequality-and-opportunity/events/international-diversity-forum-2018/Issue%20II-%20-%20Economic-Impact-Diversity-Business-case.pdf> (“[E]qual opportunities with respect to education and jobs can generate a wide range of economic benefits.”).

113. Vivian Hunt, Sara Prince, Sundiatu Dixon-Fyle & Lareina Yee, *Delivering through Diversity*, MCKINSEY & COMPANY (Jan. 2018), [https://www.mckinsey.com/~media/mckinsey/business%20functions/organization/our%20insights/delivering%20through%20diversity/delivering-through-diversity\\_full-report.ashx](https://www.mckinsey.com/~media/mckinsey/business%20functions/organization/our%20insights/delivering%20through%20diversity/delivering-through-diversity_full-report.ashx) (“[c]ompanies in the top-quartile for ethnic/cultural diversity on executive teams were 33% more likely to have industry-leading profitability”).

114. Rocío Lorenzo, Nicole Voigt, Miki Tsusaka, Matt Krentz & Katie Abouzahr, *How Diverse Leadership Teams Boost Innovation*, BOSTON CONSULTING GROUP (Jan. 2018), [https://image-src.bcg.com/Images/BCG-How-Diverse-Leadership-Teams-Boost-Innovation-Jan-2018\\_tcm9-207935.pdf](https://image-src.bcg.com/Images/BCG-How-Diverse-Leadership-Teams-Boost-Innovation-Jan-2018_tcm9-207935.pdf). *But see* Nancy Leong, *Racial Capitalism*, 126 HARVARD L. REV. 2151, 2169 (noting that some companies practice racial “diversity” in a manner that merely “emphasizes numbers and appearances” and is “exclusively concerned with improving the superficial appearance of diversity” rather than practicing racial diversity in a manner that “fosters inclusivity” and “improves cross racial relationships.”).

115. Diversity and Inclusion Indices, REFINITIV, <https://www.refinitiv.com/en/financial-data/indices/diversity-and-inclusion-index> (last visited Apr. 25, 2021).

Put succinctly, permitting law students to graduate without cultural competency training will leave law students with fewer job prospects because they will lack sufficient and competitive skill sets necessary to advocate across multiple cultural spectrums or to achieve prosperous outcomes for diverse clientele.<sup>116</sup>

*C. Law Schools May Be Required to Mandate Cultural Competency Instruction Under Certain Circumstances*

Since Cultural Competency Instruction includes racial sensitivity training,<sup>117</sup> its implementation could be a reasonable or necessary response to a racially hostile educational environment complaint made under Title VI of the Civil Rights Act of 1964,<sup>118</sup> which prohibits race discrimination in education for schools that receive federal funding.<sup>119</sup> Even the most conservative courts and scholars would agree that the spectrum of unlawful practices that may constitute a racially hostile educational environment has broadened over time.<sup>120</sup> A law school administrator's failure to identify and remedy conduct that exposes Black

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116. Pearce, *supra* note 68, at 2092 (noting that white lawyers and law students, on their own "initiative," are not likely to see how race is a factor in legal transactions and disputes).

117. Yaroshefsky, *supra* note 64, at 1206 (noting that cultural competency "encompasses an awareness of differences based upon race" and the associated "discomfort" with rooting out racial biases); Carolyn Copps Hartley & Carrie J. Petrucci, *Practicing Culturally Competent Therapeutic Jurisprudence: A Collaboration Between Social Work and Law*, 14 WASH. U. J. L. & POL'Y 133, 137–39 (2004) (recognizing that student discussions of race are a necessary starting point in Cultural Competency Instruction).

118. 42 U.S.C. Sec. 2000d; *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); Department of Education Office of Civil Rights, Racial Incidents and Harassment Against Students at Educational Institutions; Investigative Guidance, 59 Fed. Reg. 47 (Mar. 10, 1994) (hereinafter, "Racial Harassment Guidance Memo") ("A violation of Title VI may also be found if a recipient has created or is responsible for a racially hostile environment i.e., harassing conduct (e.g., physical, verbal, graphic, or written) that is sufficiently severe, pervasive or persistent so as to interfere with or limit the ability of an individual to participate in or benefit from the services, activities or privileges provided by a recipient. A recipient has subjected an individual to different treatment on the basis of race if it has effectively caused, encouraged, accepted, tolerated or failed to correct a racially hostile environment of which it has actual or constructive notice.").

119. 42 U.S.C. § 2000d; *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998) (recognizing that Title VI prohibits race discrimination in education for all institutions receiving federal funds).

120. Camille Lamar Campbell, *Getting at the Root Instead of the Branch: Extinguishing the Stereotype of Black Intellectual Inferiority in American Education, A Long-Ignored Transitional Justice Project*, 38 L. & INEQ. 1, 55 (2020) (noting that unchecked "stigma threat" or "implicit bias" can result in a racially hostile educational environment).

law students to harassment from professors,<sup>121</sup> “racial insult,”<sup>122</sup> or “systematic denial of equal education opportunities,”<sup>123</sup> would not only impact Black students’ learning outcomes by inviting anxiety, depression, or trauma,<sup>124</sup> but would also place the law school at risk of losing federal funding under Title VI.<sup>125</sup>

Granted, some actors have engaged in or permitted racially offensive speech on campus under the mistaken belief that speech is always protected by the First Amendment.<sup>126</sup> Such reasoning ignores longstanding First Amendment jurisprudence which unequivocally establishes that context and circumstances matter with respect to racially offensive speech.<sup>127</sup> Use of unsourced, racially offensive speech that is not germane to course content before a “captive” group

121. *Wozniak v. Adesida*, 932 F.3d 1008, 1010 (7th Cir. 2019) (rejecting a former tenured professor’s First Amendment claim and noting that “[p]rofessors who harass and humiliate students cannot successfully teach them, and a shell-shocked student may have difficulty learning in other professors’ classes. A university that permits professors to degrade students and commit torts against them cannot fulfill its educational function.”); *see also* Jordan Miller, *OU Professor’s Use of Racial Slur May Not Be Protected, First Amendment Expert Says*, OUDAILY (Feb. 14, 2020) [http://www.oudaily.com/news/ou-professors-use-of-racial-slur-may-not-be-protected-first-amendment-expert-says/article\\_7f8f41d4-4f72-11ea-9037-6b21718bf7e5.html](http://www.oudaily.com/news/ou-professors-use-of-racial-slur-may-not-be-protected-first-amendment-expert-says/article_7f8f41d4-4f72-11ea-9037-6b21718bf7e5.html) (recognizing that a professor may be fired for using a racial slur in the classroom if the university finds “use of the slur irrelevant to the subject matter.”).

122. *Bhombal v. Irving Indep. Sch. Dist.*, 809 F. Appx. 233, 236, 238 (5th Cir. 2020) (recognizing that schools have a legal obligation to take steps to protect students from racially hostile learning environments or student-on-student racial harassment); Carla Pratt, *In the Wake of Hopwood: An Update on Affirmative Action in the Education Arena*, 42 HOWARD L. J. 451, 466 (1999) (recognizing that Title VI “was enacted to protect the rights of descendants of slaves from the vestiges of discrimination.”); Delgado, *supra* note 67, at 381.

123. William M. Carter, Jr., *Race, Rights, and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery*, 40 U.C. DAVIS L. REV. 1311, 1367 (2007).

124. Greta Anderson, *Racism Fuels Poor Mental Health Outcomes for Black Students*, INSIDE HIGHER ED (Oct. 23, 2020), <https://www.insidehighered.com/news/2020/10/23/racism-fuels-poor-mental-health-outcomes-black-students> (noting that exposure to individual acts of racism and hostile campus climates are detrimental to the health of Black students); Bryan K. Hotchkins, *African American Males Navigate Racial Microaggressions*, 118 TCHRS. COLL. REC. 6 (2016); AMA Media & Editorial, *New AMA Policy Recognizes Racism as a Public Health Threat*, AMA (Nov. 16, 2020), <https://perma.cc/X2S4-3AGP> (American Medical Association officially declares racism to be a public health threat.); Adrienne Green, *The Cost of Balancing Academia and Racism*, THE ATLANTIC (Jan. 21, 2016), <https://www.theatlantic.com/education/archive/2016/01/balancing-academia-racism/424887/> (recognizing “that uncomfortable campus climates can take a toll on black students’ mental health”).

125. *Smith v. Underhill*, No. 03:05CV 0176 LRH LRL, 2006 WL 383519, at \*4 (D. Nev. Feb. 17, 2006) (“A federally funded entity that does not comply with Title VI may ultimately lose its federal financial assistance.”) (*citing* 34 C.F.R. § 100.8); *Gensaw v. Del Norte Cnty. Unified Sch. Dist.*, No. C 07-3009 TEH, 2008 WL 1777668, at \*10 (N.D. Cal. Apr. 18, 2008) (“A federally funded entity that does not comply with Title VI may ultimately lose its federal financial assistance.”).

126. *Dambrot v. Central Mich. Univ.*, 55 F.3d 1177, 1190–91 (6th Cir. 1995) (rejecting a coach’s claim his use of the “n word” was protected by the constitutional right to academic freedom).

127. *Connick v. Myers*, 461 U.S. 138, 147–50 (1983) (“Whether an employee’s speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record . . . when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest,” no First Amendment protection is afforded to the speech).

of students is not protected by the First Amendment.<sup>128</sup> Even when speech may be protected, the public's interest in freedom of expression does not outweigh a university's: (1) right to autonomy regarding teaching standards and treatment of its students;<sup>129</sup> (2) right and preemptory duty to maintain an educational environment that is free of racial harassment, abuse, racial hostility, or retaliatory conduct;<sup>130</sup> (3) interest in maintaining federal funding;<sup>131</sup> (4) academic objective to maintain an environment conducive to intellectual inquiry that does not invite "bad publicity" or "harassment" complaints;<sup>132</sup> nor (5) need to maintain a positive public image that connotes an environment that is "free of bias" and conducive to the presence of African Americans.<sup>133</sup> A contrary interpretation of First Amendment protections would eviscerate civil rights obligations and potentially trigger absurd conduct on campuses. Courts have warned that:

[w]hile a professor's rights to academic freedom and freedom of expression are paramount in the academic setting, they are not absolute to the point of compromising a student's right to learn in a hostile-free environment. To hold otherwise . . . would send a message that the First Amendment may be used as a shield by teachers who choose to use their unique and superior position to sexually [or racially] harass students secure in the knowledge that *whatever* they say or do will be protected. Such a result is one that a state college or university is legally obligated to prevent . . . .<sup>134</sup>

When a law school subjects Black students to "a disparately hostile educational environment relative to [their non-Black] peers," such that it forces them to "change their study habits" or results in "the lowering of their grades,"<sup>135</sup>

128. *Hill v. Colo.*, 530 U.S. 703 (2000); *see also* *Martin v. Parrish*, 805 F.2d 583, 584–86 (5th Cir. 1986) (finding termination of a professor appropriate where professor used profanity in the classroom before a "captive audience" who may have been intimidated by the professor).

129. *Martin v. Parrish*, 805 F.2d at 585–86 (holding that fired college professor's use of profane language in the classroom was not protected by the First Amendment where school found his use of profanity detracted from the subject matter being taught, was disrespectful to students, had the potential to negatively influence students, and inhibited his effectiveness as a teacher).

130. *Bonnell v. Lorenzo*, 241 F.3d 800, 824 (6th Cir. 2001) (noting that "speech that rises to the level of harassment—whether based on sex, race, ethnicity, or other invidious premise—and which creates a hostile learning environment that ultimately thwarts the academic process, is speech that a learning institution has a strong interest in preventing.").

131. *Id.* at 811.

132. *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 n.12 (1985); *Vega v. Miller*, 273 F.3d 460, 463 (2d Cir. 2001) (recognizing that college officials were entitled to qualified immunity after firing professor for allowing vulgar language in the classroom that was unnecessary and likely to lead to bad publicity and potential harassment claims).

133. *Bennett v. Metro. Gov't of Nashville & Davidson City., Tenn.*, 977 F.3d 530, 541–43 (6th Cir. 2020) (holding that a terminated public employee's use of a racial epithet on Facebook was not protected by the First Amendment or sufficient to outweigh the employer's interest in the public believing it had a workplace that was "free of bias" and that the employee's behavior influenced the public perception of the agency); *Vega*, 273 F.3d at 468 (recognizing that even when "no students complained, what students will silently endure is not the measure of what a college must tolerate.").

134. *Bonnell*, 241 F.3d at 823–24.

135. *Fennell v. Marion Indep. Sch. Dist.*, 804 F.3d at 410–11; *I.G. v. Jefferson Cnty. Sch. Dist.*, 452 F. Supp. 3d 989, 1002 (finding that a Black student successfully established a Title VI

the law school increases its risk of violating Title VI. The student need only demonstrate the presence of “severe or pervasive” racial harassment and the law school’s “deliberate indifference” to the known racial harassment.<sup>136</sup> The overarching principle is that a school that fosters a racially abusive environment cannot teach students.

Professors who harass and humiliate students cannot successfully teach them, and a shell-shocked student may have difficulty learning in other professors’ classes. A university that permits professors to degrade students and commit torts against them cannot fulfill its educational function.<sup>137</sup>

What is also potentially perilous for law schools in today’s climate, in which Black students are subjected to hostilities ranging from micro-aggressions to use of the “n-word” on law school campuses, is that a single racially offensive act, on occasion, may operate as a racial offense multiplier, under circumstances in which the actor believes their conduct present little or no offense.<sup>138</sup> Courts have acknowledged that:

[R]acially motivated comments or actions may appear innocent or only mildly offensive to one who is not a member of the targeted group, but in reality [they can] be intolerably abusive or threatening when understood from the perspective of a plaintiff who is a member of the targeted group. ‘The omnipresence of race-based attitudes and experiences in the lives of black Americans [may cause] even nonviolent events to be interpreted as degrading, threatening, and offensive.’<sup>139</sup>

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claim where she alleged that “she was forced to drop a class, suffered academic difficulties, and ultimately was forced transfer out of the School.”); *General Building Contractors Ass’n v. Pennsylvania*, 458 U.S. 375, 413 (1982) (Marshall, J. dissenting) (noting that racial discrimination in education is a particularly “devastating and reprehensible policy that must be vigilantly pursued and eliminated from our society . . . Exposure to embarrassment, humiliation, and the denial of basic respect can and does cause psychological and physiological trauma to its victims. The disease must be recognized and vigorously eliminated wherever it occurs.”) (quoting *Croker v. Boeing Co.*, 662 F.2d 975, 1002 (3d Cir. 1981) (Aldisert, J. dissenting in part)).

136. *Williams v. Lenape Bd. of Educ.*, No. 17-7482, 2020 WL 2111221, at \*16 (D. N.J. May 4, 2020).

137. *Wozniak*, 932 F.3d at 1008.

138. Erin C. Lain, *Racialized Interactions in the Law School Classroom: Pedagogical Approaches to Creating a Safe Learning Environment*, 67 J. L. & EDUC. 3 (2018) (discussing how microaggressions affect law school students and analyzing the best practices for law schools to take); Deo et al., *supra* note 13, at 74 (“Research indicates that these students endure daily ‘microaggressions’ in the form of subtle racist and sexist insults”); Catharine P. Wells, *Microaggressions: What They Are and Why They Matter*, 24 TEX. HISP. J. L. & POL’Y 61, 70 (2017) (noting that racial minority students suffer microaggressions on and off campus); Eric Dain, *Experiences of Academically Dismissed Black and Latino Law Students: Stereotype*, 45 J. L. EDUC. 279, 279–80 (2018) (noting that when researchers examined the effect of racial bias on academically dismissed Black law students, they found that linkage between student poor academic performance and “perceptions of systemic betrayal and disparate treatment.”).

139. *McGinest v. GTE Serv. Corp.*, 360 F. 3d 1103, 1116 (9th Cir. 2004) (quoting *Harris v. Int’l Paper Co.*, 765 F. Supp. 1509, 1516 (D. Me. 1991)); *see also* Racial Harassment Guidance Memo (“[R]acial acts need not be targeted at the complainant in order to create a racially hostile environment. The acts may be directed at anyone. The harassment need not be based on the ground of the victim’s or complainant’s race, so long as it is racially motivated (e.g., it might be based on

For this reason, a person may be deemed to have engaged in racially offensive conduct of such gravity that their single act not only discriminates against the Black law student to whom the act was directed but is hostile to multiple Black law students on campus.<sup>140</sup>

The effect of the racial offense, such as use of the “n-word,” is *multiplied* by at least the number of witnesses to the racial offense, to as many as the sum amount of all Black students within a law school community, including those that did not observe the racial offense but later became aware of it, because they are no less subjected to racial indignation and offense because of it.<sup>141</sup> Indeed, courts have long reasoned that a plaintiff may demonstrate a defendant’s racially discriminatory intent against themselves via circumstantial evidence by showing that a defendant committed a racial offense against other members of the same protected group.<sup>142</sup> To avoid a racially hostile educational environment, a law school therefore has a duty to protect each injured student, not simply those to whom the offense was directed or those that complained.<sup>143</sup>

Although a court is likely to deem a law school to have acted with deliberate indifference only where the school’s response to racial harassment is “clearly unreasonable in light of the known circumstances,”<sup>144</sup> a law school’s failure to respond appropriately to certain racial offense multipliers, such as the single use of the “n-word,” substantiates a racially hostile environment claim. When reversing a recent lower court’s ruling regarding a terminated employee’s single use of the “n-word,” the *Bennett* court criticized the district court’s apparent racial apathy by noting that the lower court’s reference to the employee’s use of the “n-word” as “mere use of a single word” demonstrated the lower court’s “failure to acknowledge the centuries of history that make the use of the term more than just ‘a single word’” and that the word actually evokes “a history of

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the race of a friend or associate of the victim). Additionally, the harassment need not result in tangible injury or detriment to the victims of the harassment.”)

140. *Sneed v. Austin Indep. Sch. District*, 490 F. Supp. 3d 1069, 1083–84 (2020); *L.L. v. Evesham TWP Bd. Of Educ.*, 710 F. App’x 545, 548–551 (3d Cir. 2017) (reversing summary judgment where it found that a Black student had successfully established Title VI claim by being present when a white student “said the word ‘n\*\*\*\*\*.’”).

141. *Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d 1022, 1034 (9th Cir. 1998) (denying summary judgement in response to a Black student’s hostile educational environment claim under Title VI and acknowledging that “racial attacks need not be directed at the complainant in order to create a hostile educational environment.”); *Fennell v. Marion Indep. Sch. Dist.*, 804 F.3d 398, 408–09 (5th Cir. 2015) (stating that racist attacks do not need to be directed at a plaintiff in order to establish the requisite racially hostile environment); Colleen Flaherty, *Suspended for Using N-Word*, INSIDE HIGHER ED (Aug. 31, 2018), <https://www.insidehighered.com/news/2018/08/31/n-word-simply-be-avoided-or-emory-wrong-suspend-law-professor-who-used-it> (noting that a Law Professor that used the ‘N-Word,’ admitted “I have no doubt I hurt and offended students who heard it or later learned that I had used the word itself. I apologized the next morning.”).

142. *Chambers v. TRM Copy Ctrs. Corp.*, 43 F.3d 29, 37 (2d Cir. 1994).

143. *Monteiro*, 158 F.3d at 1033 (reasoning that once a school has notice of a racial offense, it “has a legal duty to take reasonable steps to eliminate’ a racially hostile environment” under Title VI).

144. *Sneed*, 490 F. Supp. 3d at 1087.

racial violence, brutality, and subordination.”<sup>145</sup> Similarly, at least two courts have recently observed that “use of the “n-word” is “so plainly egregious that a single utterance can be enough to establish a hostile environment” and a law school’s “failure to act can only be the result of deliberate indifference.”<sup>146</sup>

A law school that fails to implement Cultural Competency Instruction after becoming aware of racial harassment or conduct that amounts to a racial offense multiplier does so at great risk, particularly in cases where use of the “n-word” is an ingredient of the alleged conduct. Whereas courts over a decade ago, particularly prior to widespread use of digital social media like Facebook or Twitter,<sup>147</sup> may have shown leniency towards schools that chose not to implement racial sensitivity training in response to an anti-Black racially hostile educational environment,<sup>148</sup> courts in recent times have been more apt to substantiate claims under Title VI where the school fails to impose racial sensitivity training and find in favor of schools where racial sensitivity training is implemented.

In *Williams*, although the court acknowledged that a school “took steps to address specific instances of harassment by disciplining specific individuals,” the court found the school’s response to racial harassment to be unreasonable when the school failed to “implement any sort of new racial sensitivity program in response to the incidents of racial abuse it learned of.”<sup>149</sup> Similarly, in *Whitfield v. Notre Dame Middle School*,<sup>150</sup> the court found a school’s response to a racial harassment complaint to be reasonable where school administrators disciplined the offenders and implemented a racial sensitivity program.<sup>151</sup> Hence, law schools increase the probability of being found in compliance with Title VI by implementing Cultural Competency Instruction and may be required to do so under certain circumstances.<sup>152</sup>

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145. *Bennett*, 977 F.3d at 543.

146. *Williams v. Lenape Bd. of Educ.*, at \*16 (citing *Castlebery v. STL Grp.*, 863 F. 3d 259, 264-65 (3d Cir. 2017); *Sneed*, 490 F. Supp. 3d at 12.

147. Drew Hendricks, *Complete History of Social Media: Then and Now*, SMALL BUS. TRENDS, (Jan. 22, 2021) <https://smallbiztrends.com/2013/05/the-complete-history-of-social-media-infographic.html> (noting that “by 2006, Facebook and Twitter both became available to users throughout the world.”).

148. *Atkins v. Bremerton Sch. Dist.*, 2005 WL 1356261, at \*3 (2005) (contending that a school’s failure to require formal training to prevent the re-occurrence of a racial slur did not amount to the sort of severe and persuasive, racially hostile educational environment that Title VI was designed to remedy after the court found that a teacher repeatedly called a Black student a “porch monkey” and had a “profound impact” on the student).

149. *Williams v. Lenape Bd. of Educ.* at \*3; *Doe v. Los Angeles Unified Sch. Dist.*, No. 216V00305CASJEMX, 2017 WL 797152, at \*1 (C.D. Cal. Feb. 27, 2017) (denying school’s motion for summary judgment where a Black student claimed school violated Title VI by failing to provide “adequate sensitivity training” and protect student from “hostile educational environment.”).

150. 412 F. App’x 517 (3d Cir. 2011).

151. *Id.* at 521–22.

152. *Sneed*, 490 F. Supp. 3d at 1089–90 (finding that a school district was “not so negligent in training its staff as to amount to deliberate indifference” in violation of Title VI where it conducted training regarding “race relations, [and] bias,” and principals and vice-principles received

## CONCLUSION

We are now past the point where it is appropriate for law schools and the ABA to implement law school governance policies that effectively incentivize compliance with the rules purportedly aimed at curtailing anti-Black racial discrimination. There is no question that Black law students are entitled to equal protection under the law and should have fair and equal access to educational opportunities without suffering the burden and indignation of anti-Black racial discrimination. For too many Black law students, however, the probability of experiencing equal opportunities and successful educational outcomes is materially diminished by racially hostile learning environments and a system of legal education governance that sustains racial subordination and precludes accountability for anti-Black racial discrimination.

It should come as no surprise that Black law students, and those empathetic to their plight, are increasingly engaged in efforts to prevent anti-Black racial discrimination on law school campuses by, in part, calling for institutional accountability for anti-Black racism and the implementation of Cultural Competency Instruction. As discussed, such initiatives are, without question, justifiable given that the principles that underlie respect for student autonomy and racial equality merge to produce materially beneficial outcomes for law students and law schools alike given our increasingly multicultural society and growing observance of the sphere of non-derogable federally protected rights afforded to Black law students.

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training on “how to foster a ‘positive culture’ that includes ‘cultural proficiency and inclusiveness.’”).