RULE 1.1:
COMPETENCE

(a) A lawyer should provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

(b) A lawyer shall not handle a legal matter that the lawyer knows or should know that the lawyer is not competent to handle, without associating with a lawyer who is competent to handle it.

(c) A lawyer shall not intentionally:

(1) fail to seek the objectives of the client through reasonably available means permitted by law and these Rules; or

(2) prejudice or damage the client during the course of the representation except as permitted or required by these Rules.

Comment

Legal Knowledge and Skill

[1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter, and whether it is feasible to associate with a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances. One such circumstance would be where the lawyer, by representations made to the client, has led the client reasonably to expect a special level of expertise in the matter undertaken by the lawyer.

[2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kinds of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

[3] [Reserved.]

[4] A lawyer may accept representation where the requisite level of competence can be achieved by adequate preparation before handling the legal matter. This applies as well to a lawyer who is appointed as counsel for an unrepresented person.

Thoroughness and Preparation

[5] Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence. An agreement between the lawyer and the client may limit the scope of the representation if the agreement complies with Rule 1.2(c).

Retaining or Contracting with Lawyers Outside the Firm

[6] Before a lawyer retains or contracts with other lawyers outside the lawyer's own firm to provide or assist in the provision of legal services to a client, the lawyer should ordinarily obtain informed consent from the client and should reasonably believe that the other lawyers' services will contribute to the competent and ethical representation of the client. *See also* Rules 1.2 (allocation of authority), 1.4 (communication with client), 1.5(g) (fee sharing with lawyers outside the firm), 1.6 (confidentiality), and 5.5(a) (unauthorized practice of law). The reasonableness of the decision to retain or contract with other lawyers outside the lawyer's own firm will depend upon the circumstances, including the needs of the client; the education, experience and reputation of the outside lawyers; the nature of the services assigned to the outside lawyers; and the legal protections, professional conduct rules, and ethical environments of the jurisdictions in which the services will be performed, particularly relating to confidential information.

[6A] Client consent to contract with a lawyer outside the lawyer's own firm may not be necessary for discrete and limited tasks supervised closely by a lawyer in the firm. However, a lawyer should ordinarily obtain client consent before contracting with an outside lawyer to perform substantive or strategic legal work on which the lawyer will exercise independent judgment without close supervision or review by the referring lawyer. For example, on one hand, a lawyer who hires an outside lawyer on a per diem basis to cover a single court call or a routing calendar call ordinarily would not need to obtain the client's prior informed consent. On the other hand, a lawyer who hires an outside lawyer to argue a summary judgment motion or negotiate key points in a transaction ordinarily should seek to obtain the client's prior informed consent.

[7] When lawyer from more than one law firm are providing legal services to the client on a particular matter, the lawyers ordinarily should consult with each other about the scope of their respective roles and the allocation of responsibility among them. *See* Rule 1.2(a). When allocating responsibility in a matter pending before a tribunal, lawyers and parties may have additional obligations (*e.g.*, under local court rules, the CPLR, or the Federal Rules of Civil Procedure) that are a matter of law beyond the scope of these Rules.

[7A] Whether a lawyer who contracts with a lawyer outside the firm needs to obtain informed consent from the client about the roles and responsibilities of the retaining and outside lawyers will depend on the circumstances. On one hand, of a lawyer retains an outside lawyer or law firm to work under the lawyer's close direction and supervision, and the retaining lawyer closely reviews the outside lawyer's work, the retaining lawyer usually will not need to consult with the client about the outside lawyer's role and level of responsibility. On the other hand, if the outside lawyer will have a more material role and will exercise more autonomy and responsibility, then the retaining lawyer usually should consult with the client. In any event, whenever a retaining lawyer discloses a client's confidential information to lawyers outside the firm, the retaining lawyer should comply with Rule 1.6(a).

[8] To maintain the requisite knowledge and skill, a lawyer should (i) keep abreast of changes in substantive and procedural law relevant to the lawyer's practice, (ii) keep abreast of the benefits and risks associated with technology the lawyer uses to provide services to clients or to store or transmit confidential information, and (iii) engage in continuing study and education and comply with all applicable continuing legal education requirements under 22 N.Y.C.R.R. Part 1500.

RULE 1.3:
DILIGENCE

(a) A lawyer shall act with reasonable diligence and promptness in representing a client.

(b) A lawyer shall not neglect a legal matter entrusted to the lawyer.

(c) A lawyer shall not intentionally fail to carry out a contract of employment entered into with a client for professional services, but the lawyer may withdraw as permitted under these Rules.

Comment

[1] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. *See* Rule 1.2. Notwithstanding the foregoing, the lawyer should not use offensive tactics or fail to treat all persons involved in the legal process with courtesy and respect.

[2] A lawyer's work load must be controlled so that each matter can be handled diligently and promptly. Lawyers are encouraged to adopt and follow effective office procedures and systems; neglect may occur when such arrangements are not in place or are ineffective.

[3] Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness. A lawyer's duty to act with reasonable promptness, however, does not preclude the lawyer from agreeing to a reasonable request for a postponement that will not prejudice the lawyer's client.

[4] Unless the relationship is terminated, as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. If a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client and the lawyer and the client have not agreed that the lawyer will handle the matter on appeal, Rule

1.16(e) may require the lawyer to consult with the client about the possibility of appeal before relinquishing responsibility for the matter. Whether the lawyer is obligated to prosecute the appeal for the client depends on the scope of the representation the lawyer has agreed to provide to the client. *See* Rule 1.2.

[5] To avoid possible prejudice to client interests, a sole practitioner is well advised to prepare a plan that designates another competent lawyer to review client files, notify each client of the lawyer's death or disability, and determine whether there is a need for immediate protective action.

WASHINGTON RACE EQUITY & JUSTICE INITIATIVE

WASHINGTON PRO BONO EQUITY TRAINING GUIDE:

Race Equity & Cultural Competency Curriculum for Volunteer Lawyers

JUSTLEAD WASHINGTON

TABLE OF CONTENTS

PURPOSE OF THE TRAINING GUIDE

The following resource is designed for programs working with pro bono attorneys and legal advocates in Washington State. Our goal is to provide a starting point for volunteers seeking to understand and practice key concepts related to race equity and anti-bias work. The resources offered below and companion video guides to follow cover the role of attorneys as stewards of racial justice, the intersection of racism and poverty, strategies for addressing implicit bias and internalized racism, and mechanisms for improving client interactions through a multicultural and anti-racist approach.

The content provided can be offered and shared as a stand-alone resource for pro bono attorneys, though ***Appendix A*** also outlines how pro bono coordinators and programs can utilize the curriculum and companion materials to host customized trainings. We acknowledge that programs differ with respect to resources, bandwidth, geography, practice area, and focus but offer these materials as a foundation that can be used and adapted freely to fit the unique context of local communities and specific programs.

CURRICULUM PARTNERS

This resource is offered through the Washington Race Equity & Justice Initiative (REJI), an effort staffed by JustLead Washington, in close partnership with the Washington State Pro Bono Council, the Washington State Bar Association, and Wayfind. REJI seeks to ensure that all who are a part of, and who are affected by, the law and justice systems have the awareness, tools, and ability to center a race equity approach toward their work within those systems. With this focus in mind, REJI provides training, connection, and resources to support law & justice organizations and advocates in their work towards racial equity.

Special thanks to Dominique Shannon from Family Law CASA of King County and the many colleagues who reviewed this resource. Funding for the Pro Bono Equity Training Guide has been generously provided by the Washington State Office of Civil Legal Aid.

LICENSING AND ATTRIBUTION

PART I:

WHY AN EQUITY MINDSET IS CRITICAL FOR VOLUNTEER ATTORNEYS

As outlined in REJI's Acknowledgments & Commitments, U.S. society, policies, structures, and systems operate to benefit certain groups and disadvantage others. Systems including the legal system have been infused over time by conscious and unconscious bias and continue to operate in ways that harm communities of color and other groups that have been targeted due to social identity factors such as gender and gender identity, immigration status or nationality, age, disability, religion, poverty and social class, sexual orientation, membership in an Indigenous community and ethnicity.

WHY TALK DIRECTLY ABOUT RACE?

For the purposes of this Guide we focus explicitly but not exclusively on race and racism. While bias and oppression based on other social identities are equally harmful, and in fact the damaging effects of oppression are multiplied when race intersects with other factors like gender, class, and others, for reasons set forth below we are utilizing the frame of race and racism throughout this curriculum. However, many of the frameworks and concepts provided are to help navigate other forms of bias and oppression. Companion pieces will be released in the coming year that dig more deeply into other frequently requested topics.

Our Role as Stewards of the Justice System

The effects of bias and racism are especially damaging when they are woven into the law, legal profession, and justice system, where they can weaken the ability of these systems to safeguard equity and justice under the rule of law. As attorneys and legal advocates, our obligation is to ensure that meaningful access to the law and justice systems is a reality for all members of society. We also understand the law, access, and technical expertise that we can lend towards a greater good. With this knowledge, we must lend our skills and access towards advancing justice, pro-actively supporting anti-racist policies, practices, and movements.

One framework used by REJI Partners is the Circle of Human Concern, coined by Professor john a. powell and the Haas Institute. Those operating within the Circle of Human Concern are those who are considered full members of society, who feel a sense of belonging. Those outside of the circle are intentionally targeted, excluded, and "othered." Our work to pursue equity and justice demands that we expand the circle of human concern as widely as possible and that our limited resources are directed toward those who are experiencing the most harm and exclusion.

Special Duty of Attorneys Engaging with Low-Income Clients

The 2017 Justice Gap Report issued by the national Legal Services Corporation found that 71% of low-income households experienced at least one civil legal problem that year, including problems with health care, housing conditions, disability access, veterans' benefits, and domestic violence. However, 86% of the time households did not receive any or adequate legal help. Similarly, here in Washington State, we know from the 2015 Civil

Legal Needs Study Update that seven in ten low-income households in Washington face at least one significant civil legal problem each year, and more than three-quarters (76%) of those who have a legal problem do not get the help they need. Given the limited resources of civil legal aid and nonprofit civil rights organizations, pro bono attorneys play a critical role in ensuring equitable justice for all.

Pro bono service – the provision of free legal services to those unable to pay – is even codified as a professional and ethical obligation of all attorneys. In the Washington Rules of Professional Conduct (RPCs), Rule 6.1 states that "every lawyer has a professional responsibility to assist in the provision of legal services to those unable to pay."[1] In addition to our ethical responsibility, RPC 1.1 also reminds us of our duty of competence, which "requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." When providing pro bono services, attorneys must endeavor to acquire the skills needed to best serve low-income clients.

DID YOU KNOW?

The preamble to Section 6 of the RPCs states that "all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel."

Because by definition pro bono attorneys are working almost exclusively with clients and communities experiencing poverty, racism, and other forms of oppression, our pro bono partners must have the competence and confidence to carry out their work in ways that acknowledge, respect, and support the lived experiences of those they work with.

PAUSE & REFLECT:

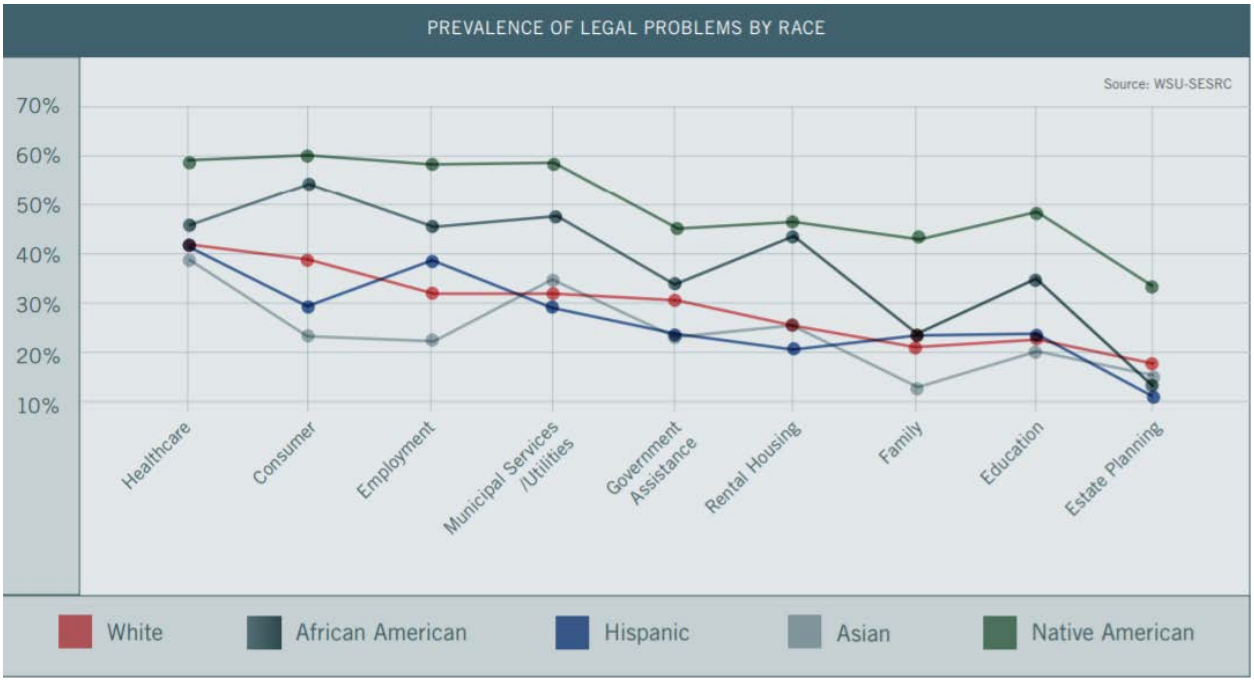
What motivated you to want to offer your services as a volunteer legal advocate?

Race, Poverty, & the Law

Many pro bono attorneys work with clients experiencing poverty, and often in training we are asked, "Why are we talking about race? Isn't this really about class or poverty?" Yet race and poverty have always been linked and remain so today. The Washington State Civil Legal Needs Study Update conducted in 2015 confirms that who you are still matters:

[1] Rule 6.1, Pro Bono Publico Service. Washington State Courts, Rules of Professional Conduct. Website. Access at https://www.courts.wa.gov/court_rules/?fa=court_rules.list&group=ga&set=RPC

Native Americans, African Americans, people who identify as Hispanic or Latino, victims of sexual assault, young adults and families that include military members or veterans experience substantially greater numbers of problems and different types of problems than the low-income population as a whole.[2] *Often these problems adversely affect their ability to get or keep a job, secure stable housing and access necessary consumer credit. They also lead to greater difficulties with debt collection and their ability to secure government benefits to which they are entitled by law.*



The Study also highlights that communities of color experience higher degrees of discrimination and unfair treatment and that those with the highest proportion of legal issues have the least confidence that the legal system can solve their problems. More than one in four low-income Black households and nearly one-third (31.5%) of low-income Hispanic households believe the legal system solves their problems "rarely" or "not at all."

Historical Context

Understanding how class, race, and the law intersect requires knowing the historical and racialized context of our legal system. Our current system is rooted in the English Common Law System and was initially established to protect and enforce the rights and property of the white land-owning class at the inception of the United States and its colonization of Indigenous land. At that time, African Americans were enslaved and considered chattel property without rights of their own.

[2] 2015 Washington State Civil Legal Needs Study Update. Washington State Supreme Court. October 2015. Website. Accessed at https://www.courts.wa.gov/court_rules/?fa=court_rules.list&group=ga&set=RPC

Unjust laws throughout US history have perpetuated racism and helped to racialize poverty. The premise of the law and justice system rests upon two frameworks designed to maintain the status quo: 1) Common Law doctrine known as "stare decisis," which means that courts should use precedent (what has happened in the past) in decision making; and 2) the structure of the law as an adversarial "them versus us" system. In other words, those who benefit most by things staying as they are can count on the law and justice system to help perpetuate a status quo that advantages them and creates inequities and harm for others. For example:

Getty Images

- Genocidal policies towards Indigenous communities allow white people to lay claim to their children, land and natural resources[3];
- The enslavement of Africans during times of chattel slavery, Jim Crow laws and "The New Jim Crow" manifested through our modern-day prison system[4]; and
- The Chinese Exclusion Act of 1882, Immigration Act of 1924, and other travel bans targeting immigrant communities and primarily immigrants of color such as the most recent Muslim Ban in 2018/19.[5]

In Washington State, civil rights were undermined by racist policies such as redlining and racial covenants on house deeds as part of a national crusade to racially segregate neighborhoods. For example, redlining was a discriminatory policy by banks, insurance companies, and other financial institutions to refuse or limit loans, mortgages, insurance to People of Color to create "white-only" neighborhoods. This deliberately segregated People of Color to neighborhoods that were under-resourced in schools and employment opportunities. Racial covenants added to this effort by ensuring land could only be owned by the "Caucasian race." If you own a home, you might still view these "white-only" clauses written in your house deed as they have not been removed from many home deeds although they are illegal to enforce. Today, the Washington State Department of Health deems racism and its relationship to what neighborhood you live in as a critical determinant of health equity and overall well-being.[6]

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[3] Fixico D. When Native Americans Were Slaughtered in the Name of 'Civilization.' HISTORY. Website. March 2, 2018. https://www.history.com/news/native-americans-genocide-united-states.

[4] Alexander M. The New Jim Crow: Mass Incarceration in the Age of Colorblindness. New York : New Press ; [Jackson, Tenn.] : Distributed by Perseus Distribution, 2010. https://search.library.wisc.edu/catalog/9910095136402121

[5] Munshi S. Beyond the Muslim Ban. South Asian American Digital Archive. Website. October 10, 2018. https://www.saada.org/tides/article/beyond-the-muslim-ban

[6] Washington State Department of Health. Race and Place: The Influence of Place on Health. Website. https://www.doh.wa.gov/CommunityandEnvironment/HealthEquity/ RaceandPlace. Accessed August 3, 2018.

Poverty is a serious issue that limits access to food, employment, jobs, and safe neighborhoods in both urban and rural environments across Washington State and the United States. There are poor Americans of every race, ***and*** we also continue to see that the harms of poverty are worsened by racist policies. For example, owning land is a marker of prosperity and wealth in the United States, yet the land the U.S. occupies was forcefully taken from Indigenous tribal nations and other Indigenous communities (i.e. Native Hawaiians). Japanese internment during World War II forced Japanese Americans to give up their homes, property and freedom, and incarcerating them in camps. The G.I. bill, which provided employment, housing, and educational opportunities to veterans returning from World War II, largely excluded Black veterans due to a combination of redlining, restrictive covenants, and informal racism, resulting in patterns of segregation that persist today across the U.S. Policies that limit the ability for communities of color to accumulate intergenerational wealth create, maintain and exacerbate poverty within their communities. In this way, poverty has been racialized and race and class are inextricably linked.

In rural communities, we see the impacts of poverty worsened as compared to urban communities, as rural communities often have poor or more dispersed infrastructure, resulting in less access to resources such as healthcare and legal services. People of color living in rural communities as well as Indigenous communities living on reservations (in some of the most remote and poor areas of our state due to the Indian Removal Act of 1830), face worsened outcomes due to the compounding bias of racism overlaid onto rural-based barriers to resources. In Washington State, about 25 percent of rural residents are Indigenous and People of Color. Immigrants in rural areas also face challenges as well including language, cultural differences, and barriers to accessing health care.[7]

One example of progress toward more equitable goals is the Washington State Access to Justice Board's 2018-2020 State Plan for the Coordinated Delivery of Civil Legal Aid to Low-Income People, which states as Goal 1 that racial equity must be promoted both systemically and within organizational practices, working toward a vision that race or color does not determine the availability and quality of services, fairness of outcomes, and opportunities for communities and individuals. The resources that follow support the civil legal aid organizations guided by the State Plan and other equity & justice partners that seek to center racial equity within the delivery of volunteer-based legal services.

PAUSE & REFLECT:

What racial or other disparities are most prevalent within the systems you work with? How might an intentional focus on race equity benefit your work with pro bono clients?

[7] http://muse.jhu.edu/article/686951

PART II:

FOUNDATIONAL EQUITY CONCEPTS

Race & Racism

We must define race and racism separately as they are not the same thing. "Race" is a social and political construction created to categorize human beings within a hierarchy. Historically in the United States, race has been used to concentrate power by and for white people, or those of European descent, to justify oppression over Indigenous communities and People of Color, or those not of European descent. Race is not biologically determined as our textbooks once declared. Racial classifications can be traced back some 400 years ago to European scientists who sought to classify human beings under the false belief that European civilization at the time was "civilized" and "advanced," contributing to the perpetuated belief that white and European ideals and modes of operating are better and should dominate (e.g. white organizational culture, white supremacy).

"Racism" similarly focuses on concentrating power yet operates through structural oppression. Racism is often defined as racial prejudice combined with power, creating the structural racial oppression and inequitable outcomes we see across US society. One's race does not inherently lead to harm - there is nothing inequitable about being a person of color. However, the social and political context of living in the United States *exposes* People of Color and Indigenous communities to dehumanizing ideologies, structural bias, and stereotypes that have become part of the dominant American culture. Similarly, being of European descent does not inherently lead to the oppression of others. However, a person's whiteness yields power and benefits from a racialized US society. In this context, a white person benefits from structural racism and can both intentionally and unintentionally perpetuate it.

PAUSE & REFLECT:

When was the first time you became aware of your racial identity?

Equity

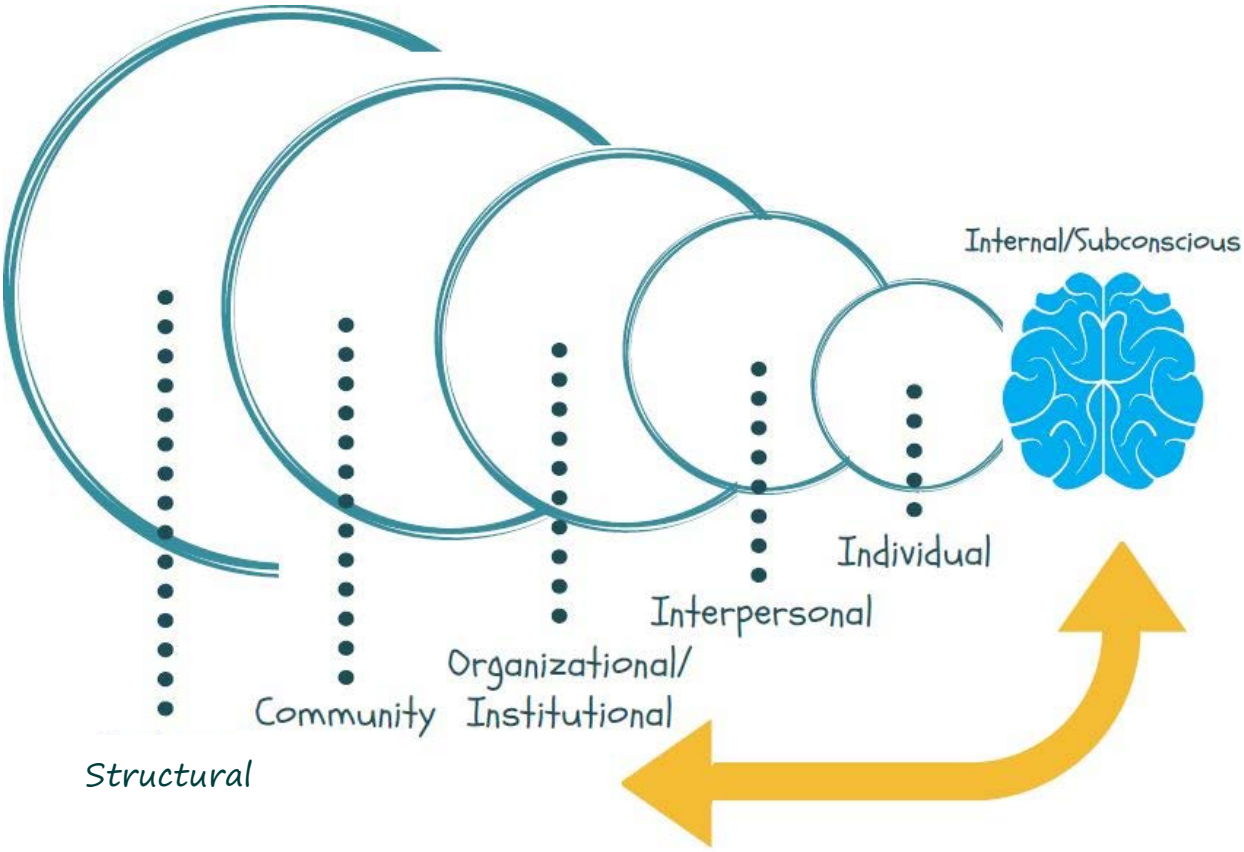
In a societal context, "equity" is about ensuring all people have opportunities to reach their full potential. It necessitates the creation and strengthening of policies, practices, and organizational structures that produce fair outcomes and eliminate disparities based on social factors such as race, class, gender, sexual orientation, ability, age, place of origin, religion, and Indigenous heritage. We particularly note that "equity" is not the same as "equality." Equality means that everyone is treated the same; equity means that our strategies and approach should look different to account for social and historical context and different forms of structural oppression.

Race equity means specifically that race no longer determines one's outcomes. It is the condition that would be achieved if one's racial identity no longer predicted, in a statistical

sense, how one fares. When we use the term, we are thinking about racial equity as one part of racial justice, and thus we also include work to address root causes of inequities and not just their manifestation. This includes developing and reinforcing policies, practices, attitudes, and cultural messages that eliminate differential outcomes by race.

Five Levels of Equity Work

A critical component of race equity work is engaging in this work across a variety of circumstances and levels:



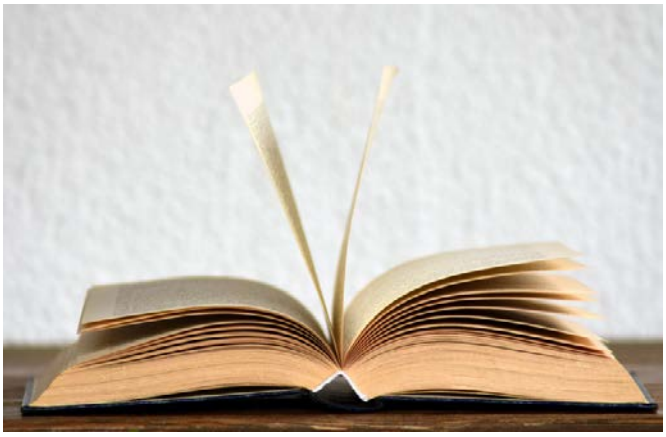
Within each "level" of equity work there is a different, though related, approach. All levels are important and interconnected yet each come with valuable strategies and goals:

- The individual level (includes both conscious and unconscious bias) is the awareness and understanding of the work we need to do within ourselves to combat implicit and explicit racial biases that we hold and are fed daily by living in an inherently racist society.
- The interpersonal level requires growing our race equity "muscles" - our competence and confidence - to deal with race and bias issues when they arise in our interactions with clients, colleagues, and others in our personal life.

- Organizational/institutional level work invites organizations with a stated commitment to equity and justice to analyze if and whether they are "walking the talk," that is, behaving organizationally in ways that are wholly consistent with their stated race equity values and intent.
- At the community level we ask how we advance racial justice in our work across organizations, coalitions, and networks in ways that hold ourselves accountable to those communities most harmed by structural racism. Those who are most acutely harmed by racism are closest to the problem and know best what needs to change.
- The structural level considers how and whether we are aligned and allied with social justice movements that emanate out of communities most harmed by racism, eliminating policies, practices, and structures that perpetuate harm to communities of color, and taking action to make broad change.

Additional Definitions

We recognize that not every person is at the same place with this work and offer the following definitions. Explore a full list of definitions by viewing the official glossary of the REJI Organizational Race Equity Toolkit.



Pixabay Image

Anti-Racism: A concept described as "the active process of identifying and eliminating racism by changing systems, organization structures, policies and practices and attitudes, so that power is redistributed and shared equitably." (NAC International Perspectives: Women and Global Solidarity). Found here. This is more a pro-active stance that requires individual work rather being simply "non-racist."

Person/People of Color: A Person of Color, sometimes abbreviated as "POC," is a person that does not identify as white or does not have white/Caucasian/European ancestry. This term gets complicated when you consider mixed-race or biracial persons (particularly people who have both European and non-European ancestry), but many mixed-race people identify as People of Color. As race is socially constructed in the United States, who is considered "white" or a Person of Color also shifts over time.

There have also been recent movements to use "BIPOC," (Black, Indigenous & People of Color) to specifically bring attention to the complex and racist histories faced by both Black and Indigenous communities in the United States. It also acknowledges that even within "non-white" spaces, people of different races are treated differently, especially Black and Indigenous women.

Latinx: Latina/o (a person whose background is from a country in Latin America) often gets used interchangeably with the term Hispanic (from a Spanish-speaking country). However,

there are very important and real historical, linguistic, geographical, and cultural nuances that have influenced those terms and their usage.[8] The "x" in Latinx, as opposed to Latino or Latina, shifts the language away from the male/female gender binary and is intended to be more inclusive of all gender identities. In this text, we will use Latinx.

white person: A person who identifies as white/Caucasian/of European descent.[9]

Culture: A shared set of attitudes, values, goals, and practices that characterizes an institution or an organization.[10]

Cultural Competency: As defined by the Seattle-King County Department of Health, cultural competency is "the ability of individuals and systems to respond respectfully and effectively to people of all cultures, classes, races, ethnic backgrounds and religions in a manner that recognizes, affirms, and values the cultural differences and similarities and the worth of individuals, families, and communities and protects and preserves the dignity of each."[11] As pro bono attorneys we should not just be providing good legal advice, our work must be rooted in taking the client's needs and values into account.

Recently, professional communities have shifted away from the "cultural competency" framework to instead talk about "cultural humility," which is considered the "ability to maintain an interpersonal stance that is other-oriented (or open to the other) in relation to aspects of cultural identity that are most important to the person."[12] Cultural humility also suggests that our work is ongoing, rather than a setting a benchmark level of "competency" that can be reached. The below concepts and practices encourage both cultural competency and humility, yet reach even further to also offer frameworks for proactively eliminating bias and oppression within our client relationships and law & justice efforts.

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[8] Simón, Yara. Hispanic vs. Latino vs. Latinx: A Brief history of How These Words Originated. Website. https://remezcla.com/features/culture/latino-vs-hispanic-vs-latinx-how-these-words-originated/. See also the video "What's the difference between Hispanic, Latino, and Spanish?" by Kat Lazo.

[9] You may notice that throughout this text we do not capitalize the term "white" when referring to white people; whereas the term "Black" when referring to African American or Black-identified folks will use an uppercase "B." This is intentional. "Black" reflects a recognition for the cultural, historical, political, and social identity of the African diaspora. Although race is a social construct, "Black" is an identity. For example, Irish American or Caucasian are also capitalized. Further, several white supremacy organizations have chosen to capitalize the "w" in white to reflect their ideologies; this text does not, in an effort to decenter whiteness. Sources: McKenzie Jr, Sam. "Capital B, Please: Why I Capitalize the B in Black". Medium, 2017. Website. https://medium.com/@SamMcKenzieJr/capital-b-please-d4c16e7cdaa5; Why Detroit Times now capitalizes 'Black.' iMediaEthics, 2019. Website. https://www.imediaethics.org/why-detroit-metro-times-now-capitalizes-black/

[10] Ehman M. Transforming Culture-An Examination of Workplace Values Through the Frame of white Dominant Culture. www.pbs.org/race/000_About/002_04-about-03-01. Accessed August 5, 2019.

[11] The Cross Cultural Health Care Program. Why Cultural Competency? https://xculture.org/cultural-competency-programs/about-cultural-competency/. Published 2003. Accessed August 5, 2019.

[12] Hook JN, Davis DE, Owen J, Worthington EL, Utsey SO. Cultural humility: Measuring openness to culturally diverse clients. J Couns Psychol. 2013;60(3):353-366. doi:10.1037/a0032595

PART III:

ADDRESSING IMPLICIT BIAS, INTERNALIZED RACISM, & MICROAGGRESSIONS

Implicit Bias & Internalized Racism

Using the "Five Levels" as a reference, the engine driving race equity work is who we are and how we operate as individuals. This includes considering how we both intentionally and unintentionally perpetuate bias and racism through our own attitudes and learned behaviors. Implicit bias, also known as implicit social cognition, refers to the attitudes or stereotypes that affect our understanding, actions, and decisions in an unconscious manner.[13] This frame suggests that, due to the systems with which we interact every day, we are constantly and unconsciously creating meaning and associations as we experience the world, including associations based on race which become our implicit racial biases. As our assumptions, conversations, consumption of culture and media, and interactions with systems reinforce one another, our brains "normalize" what we see and result in the internalization - both by white people and People of Color - of racial stereotypes.

Social media and the ease of video recording events have led many to the realization that disparate treatment based on race is less the result of overt and intentional discrimination than of a structurally racialized society and culture. For example, when in April 2018 a white store manager called the police to have two Black men arrested for waiting for their friend at Starbucks, and a white student reported a suspicious and "not belonging" Black student at Yale University sleeping in a dorm common room, conversations circulated at the national level about how our implicit biases translate into actions with real-world consequences. While such events are happening all the time, they are now being recorded and shared broadly, including with white people, leading to greater accountability and less isolation of those subjected to race bias-motivated harm.

For those of us working within the law and justice systems, and truly any profession, understanding our own implicit biases is critical to understand how we may be unintentionally allowing racial bias to enter our daily decision-making and interpersonal interactions. With this increased self-awareness of our own internalized racism we can begin to have more open conversations about race and racism and reduce the negative impact that our biases have on our clients, co-workers, colleagues and partners.

TAKE IT FURTHER

Test your own unconscious, subconscious, and hidden biases and learn about implicit bias through the Harvard Project Implicit's Implicit Association Test (IAT). Or, take a deep-dive into implicit bias through the Kirwan Institute's online video modules, http://kirwaninstitute.osu.edu/implicit-bias-training/

[13] Kirwan Institute for the Study of Race and Ethnicity. Implicit Bias.; 2016. http://kirwaninstitute.osu.edu/wp-content/uploads/2016/07/implicit-bias-2016.pdf. Accessed August 3, 2018

Additional Resources on Implicit Bias:

- REJI "Understanding & Addressing Implicit Bias" Webinar*:* 90 minute free webinar (with CLE credit) led by JustLead Washington. Please contact info@justleadwa.org to request companion slides and training materials.
- Implicit Bias in the Courtroom Article: This law review article from 2012 introduces implicit bias, applies the science to two trajectories of bias in the courtroom (criminal and civil) and explores intervention strategies to counter implicit biases in the justice system.

Microaggressions

The term "microaggression" was initially coined in the 1970s by psychiatrist Dr. Chester M. Pierce. The concept was popularized by psychologist Derald Wing Sue, who defined racial microaggressions as "brief and commonplace daily verbal, behavioral, or environmental indignities, whether intentional or unintentional, that communicate hostile, derogatory, or negative racial slights and insults toward People of Color."[14] Microaggressions - which are slights and insults based on race or other social identities - are distinguished from macroaggressions' by their more subtle, frequent, and often unconscious nature. They can be broken down into different categories, including:

Microinsults
Subtle snubs that convey insulting messages.

Example: An attorney compliments their Asian American client's ability to speak English. Even if well-intentioned, this microinsult suggests and perpetuates a stereotype that People of Color are less articulate or are perpetual "foreigners" or "others" in their own country.

[14] Sue DW, Capodilupo CM, Torino GC, et al. Racial Microaggressions in Everyday Life Implications for Clinical Practice. 2007. doi:10.1037/0003-066X.62.4.271. https://world-trust.org/wp-content/uploads/2011/05/7-Racial-Microagressions-in-Everyday-Life.pdf

Microassaults
Verbal attacks or behaviors designed to hurt the intended victim, whether intentionally or unintentionally,

Example: An intake coordinator is managing a full waiting room of clinic participants. The coordinator continues to approach and process requests from white and lighter-skinned community members but ignores two Black women who have been waiting. This type of microassault, whether intentional or not, causes the women to feel devalued and question whether they are intentionally being discriminated against.

Microinvalidations
Messages that invalidate or devalue the feelings, thoughts, or experiences of the target

Example: An attorney is questioned about a statement that they made to a community partner that was received as racist. The attorney responds "that's impossible - I don't see race. We're all members of one race - the human race." This microinvalidation ignores the impact on the community member and discounts racial differences. The denial of racial differences negates the community members feelings and lived and cultural experiences.

Though often subtle, microaggressions are a common and everyday reality experienced by people of color and simultaneously affirms and reinforces structural racism through interpersonal interactions. The cumulative effect can lead to feelings of frustration, anger, self-doubt, and isolation. For a quick and accessible video that illustrates the impact of microaggressions, consider viewing the brief video "How Microaggressions Are Like Mosquito Bites."

PAUSE & REFLECT:

Think of a microaggression you have observed or been the recipient of. How did you respond? Was it productive? What would you have done differently if given the chance?

Strategies to Address Our Implicit Biases & Microaggressions

Addressing our implicit biases starts with cultivating self-awareness of who we are, our cultural background, and our unique lived experience. Self-awareness allows a level of introspection of how our worldview is shaped and thus where our implicit biases may lie within our minds. In turn, enhanced self-awareness also leads to increased "other-awareness" – a deeper understanding of what clients, colleagues, and others experience.

As legal advocates working to advance equity and justice, cultivating self-awareness requires we examine where we are *privileged* and *marginalized* in society. The experience of a Person of Color living in the United States is distinct from that of a white person. Women navigate different experiences and dynamics than men; Indigenous people live distinct experiences than those who are non-Indigenous. Understanding different experiences between social groups in the United States – particularly within the context of which experiences and identities carry privileges attached to them and which are targeted as less valued, or marginalized – can mitigate our implicit biases.

ADRESSING Model

One powerful tool to understand our social identities and examine how we interact with others is called the "ADRESSING" model.[15] Used locally by psychotherapist and anti-oppression trainer Dr. Leticia Nieto and adapted from the work of Pamela Hayes, each letter stands for what Dr. Nieto calls our social rank categories: **A**ge, **D**isability, **R**eligion, **E**thnicity and race, **S**exual orientation, **S**ocial class, **I**ndigenous heritage, **N**ational origin, and **G**ender identity. Though each individual carries their own set of complex identities, generally speaking these social rank categories break down across a duality of either being "targets" for marginalization or "agents" (seen as the dominant or advantaged group). In the United States, with or without our consent, society treats and socializes us based on our social rank categories:

Social Rank Category	Agent Rank	Target Rank
Age	Adults (18-64)	Children, Adolescents, Elders
Disability *	Able-Persons	Persons with Disabilities
Religion ** (relates to religious culture)	Cultural Christians, Agnostics and Atheists	Jews, Muslims, and members of all other non-Christian religions
Ethnicity	White Euro-Americans	People of Color
Social Class Culture	Middle and Owning Class Persons (Access to Higher Education)	Poor and Working Class Persons (No Access to Higher Education)
Sexual Orientation	Heterosexuals	Lesbian, Gay, Bisexual, Questioning
Indigenous Heritage	Non-Native	Native
National Origin	US-Born	Immigrants and Refugees
Gender	Cisgender Men	Intersex and Transgender Persons, Cisgender Women, Questioning

* Now identified by Hays as "Developmental and Acquired Disabilities"
** Now Identified by Hays as "Religion and Spiritual Orientation"

Each category warrants exploration, but for the limited purpose of addressing our implicit racial bias, the work is focused on building awareness of our unique relationship to race and racism, to understand the ways we have unconsciously internalized racial attitudes, behaviors, and beliefs that cause harm in our lives independent of our best intentions. People who are seen or socialized as white must develop skills as "Agents," building

[15] Nieto L, Boyer M. Beyond Inclusion, Beyond Empowerment, About the Book. https://beyondinclusionbeyondempowerment.com/about-the-book/. Accessed August 5, 2019.

awareness about what privilege attaches to living white in the U.S. and determining how those privileges can be leveraged toward anti-racist behaviors in support of People of Color For People of Color, whose racial identities have been targeted and othered within the context of U.S. society, the work is surviving racism while moving toward fuller agency and power, discerning "our own optimal, liberating norms and values from oppressive, dehumanizing ones, and supporting members of our own and other "Target" groups."[16] Learn more through three articles by Dr. Nieto.

WHAT ABOUT ME?

People who are not targeted for their racial identity often think about the oppression and discrimination they may have experienced based on our other social identities. "I know what it's like because I grew up poor (or gay, or as a member of a religious minority, or any other Target group)." These experiences are indeed real and painful, and other identities intersect and compound harm when combined with race. Reflecting on where you have been targeted can even help generate empathy, but this is not the same as experiencing racism. It can also deflect from focusing on race. To reflect further on this and other common "detours" that can divert attention from directly confronting race and racism, visit Cultural Bridges to Justice.

Intent vs. Impact

Another key component of interrupting bias is increasing our awareness of the impact we have on others in our lives. As attorneys, we are taught to always consider intent – think back to law school and the time spent on studying the intent elements for criminal acts or torts. While intent can be taken into consideration to give context, when building attorney-client relationships, the focus should be on the impact or harm experienced by the client.

Often, however, when a negative impact is felt and communicated back to us, we feel it challenges our perception of ourselves as "good" people. What we must work towards is the understanding that it is not about being a good or bad person, it is about changing behavior in ways that we can eliminate what our clients and others are experiencing negatively. It is essential to establish trust and respect with our clients and strive to repair relationships when we

Pexels Image

[16] Nieto L, Boyer M. Beyond Inclusion, Beyond Empowerment, Understanding Oppression, Second Installment: Skill Sets for Targets. https://beyondinclusionbeyondempowerment.com/about-the-book/. Accessed August 5, 2019.https://beyondinclusion.files.wordpress.com/2011/07/ask_leticia_part_2.pdf

cause harm. By focusing on intent, we are often prioritizing our own feelings rather than admitting to mistakes, apologizing, and taking corrective action.

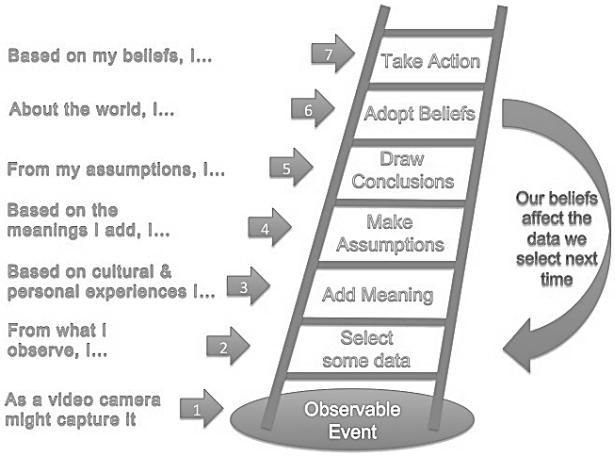
Examples:

- Person A accidentally steps on Person B's foot, breaking Person B's toe. Although this was an accident, the more important issue is that Person B was harmed. Rather than spending their energy convincing Person B that this was unintentional; Person A could better rectify this mistake by acknowledging the harm caused, apologizing and working to avoid a similar mistake.

- An attorney misgenders their trans client repeatedly during their clinic consultation (transgender means the person's gender identity or expression differs from their sex assigned at birth). Noticing this mistake, the clinic assistant interrupts and corrects the attorney. The attorney responds, "but I did not intend to offend my client." Although the attorney was sincere that they had no ill intent, the reality is that the client was harmed by having their identity and humanity denied.[17] This is further compounded by the fact that this client may have also been misgendered multiple times that month, week, or even day. Although intent provides context, it does not acknowledge the harm that impacted the client.

Ladder of Inference

In fast-paced environments like a legal clinic – and in our everyday lives – we often make assumptions and draw conclusions based on those assumptions, leading to misunderstanding and stereotyping. The "ladder of inference," or "ladder of assumptions," details the process our minds undertake between observing an event, selectively making meaning of what we see, generating conclusions, and then acting upon those conclusions.



Adapted from: The Fifth Discipline by Peter Senge, 1994

17 St. Patrick, J. What You're Really Saying When You Misgender. The Body is Not an Apology. May 2017. Website. Accessed at:https://thebodyisnotanapology.com/magazine/what-youre-really-saying-when-you-misgender/

If you find yourself moving up "the ladder," pause, surface where you are drawing conclusions, and walk back down the ladder to determine what the observable reality is, what you may be selectively noticing, and whether your assumptions are valid. If you can get in practice of questioning your assumptions and conclusions, you will improve your ability to avoid flawed judgements.

PAUSE & REFLECT:

Think of a time you have "jumped up the ladder" or seen someone do this. What assumptions were made? What turned out to be the factual reality? What information was missed that may have provided the full picture?

In the alternative, take a few minutes to watch the brief video "Why the Ladder of Inference Creates Bad Judgment."

Rebounding from Mistakes

Perfectionism, valuing efficiency, prioritizing "reason" and objectivity over feelings and subjectivity, being risk-averse…. These are all characteristics of the legal system and most of our workplace cultures that - as a result - discourage vulnerability, making time for relationships, and learning from mistakes. Yet our clients, our colleagues, and our humanity all stand to gain from a culture that allows for learning and growth. One critical component of building a relational and learning culture is acknowledging that we all are imperfect and make mistakes. In the pro bono context, our clients are in crisis and everyone is operating under extreme time constraints and other pressures. And, attorney-client relationships inherently have unequal power dynamics because of the attorney's system access and technical expertise. In addition, often the attorney and client do not share the same class, racial identity, or other social identities. As a result, some miscommunication and discomfort may be inevitable.

If you have said or done something that had a negative impact on someone else, and that person had the time and energy to share with you of that negative impact, here are tips and practices that can support you to recover from unintentionally causing harm:

FIVE Tips for Recovering from Mistakes and Microaggressions

1. ***Take a Breath and Own the Mistake***. Resist the inevitable urge to defend or explain yourself. This may come off as making excuses, so instead, accept that the impact of your words or actions may have caused harm despite your intent.

2. ***Apologize - Directly, Sincerely, and Quickly. Then Move On.*** We often skip over apologies or offer backhanded apologies, like "I'm sorry if what I said hurt your feelings." Directly apologizing shows you own your words and actions. But, also move on so that we are not centering our own feelings and desire for reassurance or forgiveness. Instead, focus on the client and demonstrate changed behaviors.
3. ***Offer Gratitude.*** If someone has bravely shared how they or others have been harmed, we owe it to them and ourselves to take their feedback as a gift and learning opportunity. Offer thanks, and if you have a relationship with the person you may choose to briefly share what you have learned from the experience or inquire first if they are interested in discussing it further with you.
4. ***Don't Expect Anything in Return.*** You won't win a cookie for apologizing or accepting criticism, and you may not necessarily be forgiven either. It is up to the person who has been harmed to decide how they will respond. Remember, an apology is about repairing harm and not about getting recognition.
5. ***Keep Learning & Evolving.*** Becoming more self-aware and proactively anti-racist is a lifelong process. We all have learning and unlearning to do. Take each chance to learn what to do differently the next time (and do your own work, not relying on those who are harmed to educate you beyond what they want to share, as this may cause further harm and frustration). Resist the urge to defend yourself; focus on listening and understanding. The best apology is changed behavior.

What About Witnessing Microaggressions as a Recipient or Bystander?

- ***Ask*** **a question: "What did you mean when you said ...?"**
- ***Avoid*** **accusations.**
- ***Arouse*** **dissonance – people don't like to be inconsistent: "I'm surprised you would say something like that considering how supportive you are of women in leadership."**
- ***Pivot/Redirect*** **the conversation and stop the harm. This is a way of not confronting the person directly, but still letting people know they made a mistake in a socially graceful way.**
- ***Educate,*** **either in the moment or later. Sometimes people simply don't know the negative power behind certain words or phrases. Explain why the term or phrase is offensive.**
- ***Use Humor*** **(when appropriate for the situation or your relationship with a colleague).**
- ***Echo:*** **Its powerful to be the first voice that interrupts bias.**
- ***Support*** **the person who has been targeted.**

(Source: **Washington State Bar Association)**

PART IV:

PRINCIPLES FOR BUILDING EQUITABLE CLIENT RELATIONSHIPS

White Dominant Work Culture and Its Relevancy to Building Equitable Relationships

"Culture is powerful precisely because it is so present and at the same time so very difficult to name or identify."[18]

Tema Okun, author and activist, writes about ways in which "white supremacy culture" comes up in our systems, institutions, organizations, and our work—thereby shaping the dominant work culture. "The premise of white dominant culture is the often unspoken and coded notion that the values, behaviors, practices, beliefs, and ways of working associated with white people are seen as superior to those of People of Color and other marginalized identities."

Okun outlines several characteristics attributed to white dominant culture. We have selected a few characteristics that often come up in our profession and pro bono work:

- ***Perfectionism***: Perfection is the standard for all work product, mistakes are given value judgments and poorly reflects on the individual rather than seeing it as a mistake.
- ***Quantity over Quality***: Resources and energy are spent on measurable outcomes; value is defined in quantifiable terms rather that valuing deepening of relationships or quality of work. This comes up often in a pro bono legal clinic when an attorney is expected to see as many clients as possible in a single shift, sometimes at the cost of prioritizing the needs of each client.
- ***Worship of the Written Word***: This is incredibly common in the legal profession—memoranda, emails, letters, etc. are valued over conversations or in-person meetings. In legal clinics, sometimes our clients do not have access to documentation that could be helpful to their case. However, as an attorney part of our role is to adapt to finding alternative ways to capture information.
- ***Paternalism***: As legal advocates we often believe our technical expertise makes us best situated to make decisions for our clients, especially our pro bono clients. However, it removes agency from the client and devalues a client's ability to think and decide for themselves.
- ***Either/Or Thinking***: Okun shares that this characteristic often "results in trying simplify complex things, for example believing that poverty is simply a result of lack of education." It can also prevent people from exploring alternatives.

It is necessary to recognize how pervasive this culture is within the U.S. context and in legal advocacy. Those who follow the norms laid out by white dominant culture are afforded power and ease when navigating institutions. Given its pervasiveness, even People of Color may internalize and uphold white dominant culture to gain a bit of access

[18] Okun, T. white Supremacy Culture. dRWorks, Dismantling Racism: A Workbook for Social Change Groups. Access at: http://www.dismantlingracism.org/uploads/4/3/5/7/43579015/okun_-_white_sup_culture.pdf

to power and ease. *Any* organization can be guilty of perpetuating these characteristics. This is often why diversity efforts in the workplace are not enough; organizations must intentionally work to address and dismantle white dominant culture. Without engaging, committing to naming, and working to expel ourselves of white dominant culture, institutions will continue to perpetuate harm towards the very clients we have agreed to assist.

PAUSE & REFLECT:

Think about the qualities that you value as qualities of a "good" colleague, boss, or client. How many of the characteristics listed above sound familiar to you as "good" work ethic?

Why an Equitable Approach to Lawyering Matters

The heart of why race equity in lawyering matters can be surmised through practices called movement lawyering, or community lawyering. According to Law For Black Lives, movement lawyering means "taking direction from directly impacted communities and from organizers, as opposed to imposing our leadership or expertise as legal advocates. It means building the power of the people, not the power of the law."[19] Within the context of pro bono work, how can volunteer lawyers take the direction of their client in ways that shifts power away from the attorney and to the client? How can a volunteer lawyer community be a part of a larger movement towards race equity?

If reaching equity necessitates creating and strengthening policies, practices, and structures that produce fair outcomes and eliminate disparities based on social factors, then for equitable attorney-client relationships to exist, we must consider how these social factors impact the attorney-client power dynamic. As advocates, we must recognize the ways in which we might perpetuate harm towards our clients by ignoring the nuances of our clients' needs and thereby limiting the effectiveness of our legal assistance. For example:

- A client, a Woman of Color and domestic violence survivor, shares her hesitancy about involving the police when her abuser violates a domestic violence protection order. The attorney grows increasingly frustrated at the client for not contacting law enforcement right away and chastises the client for not following her advice. By ignoring or not asking why the client is hesitating, the attorney is ignoring a very real fear that the client may have about engaging the police,

[19] Law For Black Lives. What We Can Do: Movement Lawyering in Moments of Crisis. Website. Access at http://www.law4blacklives.org/respond

which will then influence the client's willingness to be open and trusting of the attorney in the future.

- An attorney on a family law listserv asks her fellow attorneys to help advise her on a dissolution. She summarizes the case and says that the client (a survivor of domestic violence and an immigrant women of East Asian descent) is waffling on leaving her abusive husband. The attorney writes, "I don't know why she won't just leave him. This would never happen in the U.S." Several attorneys promptly respond by stated that not only does this in fact happen in the U.S. with white survivors of domestic violence, but also that she is making biased assumptions about an entire community, particularly perpetuating stereotypes of Asian women as "submissive."

Washington RPC 2.1[20] specifically states: "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors that may be relevant to the client's situation." Using the examples above, the attorney is ethically obligated under RPC 2.1 to consider the various factors as to why a survivor of domestic violence might not want to contact the police or leave their abusive partner. Then, based on those considerations offer advice that puts the client in the best position possible to make an informed decision, rather than impart the attorney's own viewpoint or objectives.

DID YOU KNOW?

Comment 2 to RPC 2.1 says that "advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant." This is particularly applicable with domestic violence survivors, where leaving their abusers might result in loss of income, housing, custody of children, or may have potential immigration or legal consequences.

The concept of equitable lawyering directly relates to the Access to Justice Board's State Plans call for "holistic" and "client-centered" approaches to legal services. Holistic services "are provided in a manner that takes into account the entirety of a client's barriers and goals, legal and non-legal."[21] When working with clients, this includes helping clients parse out legal and non-legal issues as well as addressing

20 Rule 2.1, Pro Bono Public Service. Washington State Courts, Rules of Professional Conduct. Website. Access at https://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=ga&set=RPC&ruleid=garpc2.1

21 ATJ 2018-2020 State Plan for the Coordinated Delivery of Civil Legal Aid to Low Income People. Access at https://www.wsba.org/docs/default-source/legal-community/committees/atj-board/guiding-docs/atj-state-plan-final.pdf?sfvrsn=b08d3ef1_2

them in collaboration with community partners. RPC 2.1 corresponds to the holistic lawyering concept, as it frees up an attorney to go beyond advising about the technical aspects of the law. Also, when reflecting on the dominant white culture concept, placing the client in the best position possible to make their own decisions disrupts the concept of paternalism by including the person most impacted by the decision-making.

Competent lawyering recognizes and understands that a client's race, ethnicity, or culture should play a role in the attorney's legal analysis and advocacy, rather than relying on a "one-size-fits all" methodology. Often the latter tactic fails to take into consideration the history of race in the legal system and will less likely produce equitable outcomes for clients of color.

Key Principles for Equitable Relationships

Active Listening

Let clients tell their stories. They are the expert of their own lived experiences; lawyers are the experts in an unfair system. Although all the facts may not be legally relevant, listening to what a client most desires to share with you is essential to developing a trusting attorney-client relationship. Everyone wants an opportunity to be heard, understood, and respected.

This is an opportunity to disrupt the "sense of urgency" we feel as attorneys to get things done quickly and efficiently. This feeling particularly surfaces in legal clinics, when time and human resource constraints severely limit the amount of contact an attorney will have with a client. However, by rushing the client, you may unintentionally be causing harm by preventing the client from sharing their story—sometimes being heard is just as important as the solution itself. Clinics and pro bono attorneys must seek balance between quantity – helping as many people as possible – with quality of service to each client.

TAKE IT FURTHER:

See Pages 35-36 for exercises to practice and further reflect on deep and active listening techniques.

Valuing the Client's Experience: Positionality

"Positionality" is a concept that recognizes where an individual is positioned in relation to others within society, thereby impacting how the person experiences the world. As volunteer attorneys and legal advocates, we should evaluate our position within the attorney-client structure, in order to identify and address power dynamics. This means recognizing that not every client will share the same trust in the legal system or in attorneys, and that clients may not desire the same outcomes that you may want to seek. Rather than reassuring the client that the system does work, which can unintentionally devalue the client's lived experiences, it is important to understand the client's concerns about why the system is not working, identify the client's ultimate goals, and address the best strategies for the client to meet their legal needs.

DID YOU KNOW?

RPC 1.2 states that "…a lawyer shall abide by a client's decisions concerning the objectives of representation, and as required by RPC 1.4, shall consult with the client as to means by which they are to be pursued." This calls attorneys to recognize paternalistic moments when an attorney might feel like "they know better." This is not to say that attorneys should not share their assessment or recommendation; rather, it reminds us that it should be the clients who are driving their cases and making the ultimate decisions.

Often as attorneys we are trained as problem-solvers: we believe that we have the most knowledge, understand the nuances of the law, and can apply law to fact. However, as we work towards more equitable lawyering, we need to hear, acknowledge, and value the lived experiences of our clients. If we do not include the perspectives of the most marginalized, the communities we seek to serve will continue to be excluded and harmed. Our clients are best positioned to tell us what they want, and our role is to offer information that they can use to inform their decisions.

Non-Judgmental Attitude

It is important to approach attorney-client relationships without judgment. Often times people will say (and believe) "I don't judge others" however, by way of example, how many times have we heard or made judgments about poor people with "luxury" items, implying that they do not know how to take personal responsibility or "correct" choices about items such as cellphones, organic food, brand name apparel, etc.? In reality, we know nothing about a person's life or past life; it is unreasonable to judge them based on their

appearance or lifestyle choices. This is a paternalistic response and has a harmful impact on people in poverty.[22]

It also fails to take into account the systems that keep people in poverty. Poor People of Color, especially poor Black women, are often judged the harshest. "Welfare queen" was a racially-coded and derogatory term used against Black women on welfare programs, most famously by former President Ronald Reagan. Internalizing these beliefs that poor people do not deserve to have nice things will affect how we as attorneys interact with our clients. It is important to be consciously aware of how our implicit biases against people in poverty manifest in our lives and in representing clients.

Further, access to a smart phone is incredibly important when you may not have regular access to the internet. Cell phones help people stay connected to their communities, help them practice self-care, and help them navigate life. If thoughts like these come up when working with a client, take a moment to reflect on why you might be feeling that way.

TAKE IT FURTHER:

We all carry bias with us, often unconsciously, as our culture and systems create and reinforce meaning and associations around our daily interactions. Test your own unconscious, subconscious, and hidden biases and learn about implicit bias through Project Implicit, based out of Harvard, and the Implicit Association Test (IAT).

[22] Rios, C. This Is Why Poor People Can (and Should) Have Nice Things. Everyday Feminism. February 2016. Access at https://everydayfeminism.com/2016/02/poor-people-having-nice-things/

PART V:

PRACTICES FOR HUMBLE & MINDFUL CLIENT INTERVIEWING

We all have a cultural experience, background, assumptions and biases based on our lived experience that impacts the way we engage, listen to, and advocate for our clients. If we accept that implicit bias and internalized and structural racism exists, we must explore how these dynamics are affecting our client relationships, including how we understand clients' interests, needs, issues, and goals related to their legal matters.

Practice #1: Cultivate Self Awareness.

Consider your own background, values, traditions, habits, experiences, beliefs and assumptions. How might they be similar or different from your clients? How would you know? We often unknowingly impose our values, perceptions and beliefs on others, which can negatively impact our relationship with clients. We sometimes unknowingly engage in microaggressions (see above) when we engage with others who have different lived experiences from us.

Building this awareness is a baseline to culturally humble client interviewing. It also helps us build empathy and challenge ourselves when clients do not always meet our expectations related to things like communication style, time management, predictability, composure, conduct and appreciation.

REFLECTIVE EXERCISE

On a sheet of paper draw a grid with four labels for each category: Background, Values, Habits, Beliefs. Reflect and jot down words and feelings that explain each quadrant about you. Here's an example:

Background	Values
Middle class Law school educated Survivor of violence white Cisgender Male (gender identity matches sex assigned as birth) Christian	Honesty Integrity Hard working Results Fairness Kindness Personal responsibility
Habits	**Beliefs**
Dependable Predictable Timely/Punctual	Justice shouldn't be only available to the wealthy. More attorneys need to give back to the community. Hard work always pays off.

What themes can you identify? How might who you are and what you believe impact the way you advocate from clients who are different from you in real or perceived ways?

Practice #2: Pause, Slow Down and Reflect.

We are busy. We feel pressure. We have a lot of information to share. We have too many clients and not enough time and resources. We are sometimes impatient. We don't always know how to fix the problem and feel like we are (or should be) the experts. As attorneys we operate in a rigid justice system with rules and deadlines. Intentionally switching gears to be more present and to connect with clients can sometimes nearly feel impossible. As attorneys, we must intentionally clear out the mental chatter of the justice system and shift towards a more holistic practice with clients at the center. The starting point is s-l-o-w-i-n-g down.

TIP: Share information about your organization, the legal process, your role, the policies and laws that impact their case; their family; their life. The information you share may be new, complex and seem strange. Be sure to 1) use clear simple statements; 2) repeat key details at different times during your conversation; and 3) check for understanding throughout the conversation.

Practice #3: Understand Context.

Speaking and advocating on behalf of someone always runs the risk of inadvertently creating a paternalistic relationship. This can happen when people with real or perceived authority make decisions for others which, even when benefiting them may prevent them from taking responsibility for their own lives. There are also often vast differences in the social and cultural reality in which we live and work and in which our clients live and work. Do not assume what exactly those differences are but do know that they are there.

Don't let paternalism get in the way. Instead, approach your client relationship and your client with curiosity and humility. Everyone has agency, a story to share, and socio-cultural context that impacts the experience and outcome of their story. You are part of your client's story now, which impacts their experience of the justice system.

Practice #4: Understand How You Deal with Conflict.

Conflict is inevitable and is common in our daily lives in our human interactions. In the context of pro bono work, we are often engaging with clients in crisis, which can mean emotions and tension sometimes run high. Having a strong relationship will allow you to move through and often overcome conflict. Consider your own experience with and relationship to conflict. How do you deal with it?

PAUSE & REFLECT:

Think back to your family of origin and jot down notes on how your family dealt with conflict. How was it expressed? How was it not expressed? How did it feel? How is it similar or different from your experience as a professional and advocate trained to operate in an adversarial justice system? What has changed, what hasn't? How has it played out when you've had a client relationship with tension or conflict?

Practice #5: Engage Empathetically.

> "Humans aren't as good as we should be in our capacity to empathize with feelings and thoughts of others, be they humans or other animals on Earth. So maybe part of our formal education should be training in empathy. Imagine how different the world would be if, in fact, that were 'reading, writing, arithmetic, empathy." - Neil deGrasse Tyson

As an advocate you work within and navigate systems seamlessly, systems that many fear or have negative experiences with including bureaucracy, law enforcement, incarceration, detention, judges, case workers, court clerks and lawyers. You are a gatekeeper and often control critical information and services that clients need meaningful access to. Most of us are pretty good at this. But what keeps us from engaging our empathy? Sometimes we feel the need to detach. We often unconsciously do this to protect ourselves emotionally from secondary trauma (taking in stress and distress from exposure to someone else who has been traumatized). Attorneys have also been trained to prioritize objectivity and efficiency. But what do we lose when we don't understand the whole story? What if our clients do not trust us enough to share or engage meaningfully?

TIPS: During interviewing and even at initial stages like intake and reviewing financial eligibility, acknowledge that you are asking very personal questions. Every client interaction presents an opportunity for communicating with empathy and establishing a trusted relationship. We ask our clients to open their lives to us, revealing intensely personal information at stressful times in their lives.

- ➔ Consider how you might feel if someone were asking you these questions including how vulnerable you might feel.
- ➔ Explain why information needs to be collected, how it will be used, and how it won't be used.
- ➔ Thank clients for trusting you and your organization with their information and story.

➔ Do your homework ahead of time – if the client has already shared painful facts and experiences, avoid asking them to repeat their stories over and over again.

PAUSE & REFLECT:

What practices do you already engage in to connect empathetically and relationally with friends and colleagues that might help you build a trusted relationship with your client (while maintaining appropriate boundaries)? What support do you have to address any secondary trauma and compassion fatigue you might be experiencing?

Practice #6: Practice Active Listening.

As a volunteer advocate, you may be one of the first people a client will interact with. Active engagement is a way to establish rapport and ensure understanding of your client's issue and its real-world effects on them. ***Active engagement in listening ensures both that the client feels heard and that the attorney understands what has been communicated.***

Active listening implores us to engage all our senses to be attuned to what is going on for our client and what they are communicating – or not communicating – both intentionally and unintentionally. To act and speak on behalf of our client is a great privilege and responsibility; we need to pay attention to mannerisms, body language, and voice and to listen to what is said and how it is said.

TIPS:

➔ Ask open-ended and clarifying questions. This demonstrates you are listening and helps builds trust. Keep in mind, the person you're talking with may not give you all the information all at once. This also keeps you from making incorrect assumptions.

➔ Reflect back what you're hearing and the feelings that the client is expressing. This includes taking the time to summarize, paraphrase, or restate the client's message to check for understanding.

➔ Remember that what is important to you and what is important to the client might be different. Allow space for what the client most wants to communicate but gently redirect away from unhelpful information when necessary.

PAUSE & REFLECT:

Lawyers are problem solvers, and we're expected to have answers. Has this dynamic ever led you to tune out when someone is talking because you are already formulating a response and waiting to interrupt or jump in? This type of "predatory listening" stands in contrast to active listening and to the other person feeling heard. What practices can you develop to keep yourself present when your client (or colleague, or partner), is sharing with you?

Practice #7: Understand the Power of Questioning

Skillful questioning serves many purposes. Used well, questions not only collect needed information but also demonstrate that you are listening, allow you to seek clarification, and help redirect your client toward the information you need.

TIPS:

- ➔ Use a mix of closed questions (yes or no answer), open questions (what/how/why), and follow-up/clarifying questions, depending on what you need. Try not to ask leading questions, as they may lead you toward faulty or incomplete assumptions.
- ➔ Make sure your questions are short and clear, and try to avoid asking multiple questions at once.
- ➔ Allow time and space for your client to process and think.

INTERVIEWING ROLE PLAY EXERCISE:

In triads, have one person (in a client role) read the following fact pattern while a second person plays the attorney/interviewer:

"My landlord told me that no children's toys can be left in the stairwell. I think that's unfair because other tenants leave their sports stuff there. The landlord only complains about me and my kids. We are the only Latinx family in the building. He is constantly leaving notes on my door. It is awful. I hate living here, but it's the only place I can afford."

- ***Drawn from a hypothetical originally developed by the Housing Justice Project***

How would you engage the client? What questions would you ask to make it a 2-way dialogue? Practice a few minutes of back and forth then have the third person (observer) share feedback.

Practice #8: Become Skilled at Communicating Through Interpreters.

Many clients speak more than one language. We often determine at the intake and eligibility stage when a client might need the assistance of an interpreter. Assessing whether a client needs an interpreter, however, isn't always obvious. Many English Language Learners speak some English, but aren't proficient enough to effectively communicate regarding their legal matter. Sometimes language interpretation needs are revealed well after an attorney-client relationship has been established. It is never too late to ask a client directly whether it would it be easier for them to understand and speak through an interpreter.

Best Practices for Working with an Interpreter[23]:

- ➔ Whether you are meeting in person, by phone, or video conference, center all dialogue directly with the client, not the interpreter. Speak directly to the client as you would to any client. For example, say, "what is your legal issue?" rather than "what is his legal issue?" Focus your attention and eye gaze on the client.
- ➔ Speak clearly and at your usual pace and volume. It is easier for the interpreter to establish context and (for interpreters for the deaf) a natural signing flow if you speak normally. The interpreter will tell you if it is necessary to change your rate.
- ➔ Please do not ask the interpreter's opinion. Interpreters are bound to a Code of Ethics which prohibits them from giving opinions about the legal matter for which they are interpreting.
- ➔ Do not make asides you do not wish interpreted. The interpreter is ethically obligated to interpret everything that the client would have understood if he/she had understood (spoken) English.
- ➔ Provide copies of documents, pleadings, and even the parties' names *before* a meeting or hearing to give context to the interpreter.
- ➔ Give a little extra time for the client to answer any questions you have asked, as there is always a time lag interpreting from spoken English into a different language. The degree of delay will vary with interpreters and the complexity of the material. This is especially important during group discussions. Depending on the situation, some interpreters will choose to interpret consecutively (waiting until you have finished speaking). If this is the case, please speak or sign in short 'chunks" so that the interpreter can more easily remember what you have said.
- ➔ For deaf clients, allow time for the client to take notes or read any printed material. It is impossible for a deaf person to watch an interpreter and read/write at the same time.
- ➔ Be mindful about how much the interpreter has been speaking during the client meeting or hearing and offer them breaks.

[23] The Washington Courts Interpreter Commission. Top 10 Suggestions for Attorneys Working with Court Interpreters. Access at https://www.seattle.gov/Documents/Departments/Court/10tips.pdf

Interpretation Red Flags
(Practices That May Be More Damaging Than Helpful)

- ***Using family members, including children*. With scarce resources and time, it is tempting to use the interpretation assistance of a client's family members, including children. Not only might this violate confidentiality it may also create other unintended consequences that may impact your client's legal matter.**

***Relying on your own language skills*. As with family members it is equally tempting as an advocate to rely on your own language skills. If you are not a native speaker you may not be proficient enough to communicate regarding the complexity of a legal matter. Have your language skills assessed beforehand and be sure to familiarize yourself with your program's process for obtaining and prioritizing professional legal interpretation services.**

Additional Interpretation Resources & Tips

- From the American Bar Association: 'Say What?' Using Interpreters in Children's Cases.
- From the Oregon State Bar Association: Proper Use of Interpreters and Translators
- From the Registry of Interpreters for the Deaf: What Can we Do? Intersection of Interpreting Complexity in the Legal System.

APPENDIX A:
PRO BONO COORDINATOR USER'S GUIDE

While the Pro Bono Guide may be used as a stand-alone resource to share with pro bono attorneys and staff, we encourage pro bono programs to utilize the material as a foundation for live or recorded training with new and existing volunteers. The following provides a suggested training agenda and connections to additional resources for utilizing this Guide for live training.

Most content would be eligible for Washington State Continuing Legal Education (CLE) "ethics" credits. For instructions on serving as a sponsor for a CLE program or requesting CLE approval, please visit: http://mcle.wsba.org.

Sample 3 Hour Training Agenda

With a 3 hour or half-day training, participants can start to:

- Understand why and how equity and racial equity are critically connected to pro bono work
- Recognize that legal systems and structures have been "racialized" and how explicit and implicit bias creates and maintains racialized systems
- Learn and practice strategies for interrupting bias and microaggressions that may occur within client interactions

9:00am – 9:30am ***Welcome & Grounding in the 'Why'***

Welcome attendees to the training, offer time for introductions if the group is small enough, and invite dialogue about why race equity and anti-bias work is critical to the work of pro bono attorneys. Include information about the intersection between race and poverty (or race and substantive areas of practice depending on audience).

Resources:

- Core Curriculum, Part I
- For a copy of JustLead's slides and facilitator notes for this section, please contact info@justleadwa.org.
- Race Equity & Justice Initiative (REJI) Acknowledgments & Commitments
- Sample Community Agreements

9:30am – 10:20am ***Foundational Concepts***

Introduce core concepts such as structural racism, race equity, and implicit bias, including social cognition (the "brain science" behind

bias). Where possible, include examples of how the local community has been racialized, such as historical examples of redlining and segregation and/or local perspectives from community leaders of color about the current reality of living in the community and/or interfacing with the justice system.

Resources:

- Core Curriculum, Part II
- For a copy of JustLead's slides and facilitator notes for this section, please contact info@justleadwa.org.
- Mapping Inequality offers redlining maps and examples for communities throughout the United States, including Seattle, Tacoma, and Spokane.
- Project Implicit - Implicit Association Tests

10:20 – 10:30am ***Break***

10:30 – 12:00pm ***Strategies for Interrupting Implicit Bias and Building Equitable Client Relationships***

Offer strategies to interrupt racism and microaggressions and engage more competently with clients of color and clients experiencing poverty. Examine the ways in which attorney-client relationships often mirror white dominant culture values and impact our ability to effectively serve our clients' needs. Close with reflective questions: What is one step you'd like to take to further your own learning & development on these topics? What resources, information, additional training, or other support would help you be successful in your work going forward?

Resources:

- Core Curriculum, Parts III - V
- For a copy of JustLead's slides and facilitator notes for this section, please contact info@justleadwa.org.
- Kirwan Institute Online Implicit Bias Video Training, http://kirwaninstitute.osu.edu/implicit-bias-training/
- Dr. Nieto's ADRESSING Model and Social Rank Categories
- Transforming Culture: An Examination of Workplace Values Through the Frame of White Dominant Culture

Sample 90-Minute Training Agenda

In a 90-minute training (or even in a half-day training), it is difficult to explain or explore the many different power and cultural dynamics that may arise within the context of pro bono work. We recommend starting with broad frameworks that help participants build their understanding of bias and oppression as well as strategies for building self-awareness (while interweaving suggestions for further resources and training), as these concepts can encourage a respectful and client-centered approach to interactions.

For short trainings we recommend:

- Starting with dialogue about why and how equity and racial equity are critically connected to pro bono work
- Including a brief overview of how legal systems and structures have been "racialized" and how explicit and implicit bias creates and maintains racialized systems

9:00am – 9:20am ***Welcome & Grounding in the 'Why'***

Welcome attendees to the training, offer time for introductions if the group is small enough, and invite dialogue about why race equity and anti-bias work is critical to the work of pro bono attorneys. Include information about the intersection between race and poverty (or race and substantive areas of practice depending on audience).

Resources:

- Core Curriculum, Part I
- For a copy of JustLead's slides and facilitator notes for this section, please contact info@justleadwa.org.
- Race Equity & Justice Initiative (REJI) Acknowledgments & Commitments
- Sample Community Agreements

9:20am – 10:00am ***Foundational Concepts***

Brief introduction to core concepts such as structural racism, race equity, and implicit bias, including social cognition (the "brain science" behind bias). Where possible, include examples of how the local community has been racialized, such as historical examples of redlining and segregation and/or local perspectives from community leaders of color about the current reality of living in the community and/or interfacing with the justice system.

Resources:

- Core Curriculum, Part II

- For a copy of JustLead's slides and facilitator notes for this section, please contact info@justleadwa.org.
- Mapping Inequality offers redlining maps and examples for communities throughout the United States, including Seattle, Tacoma, and Spokane.
- Project Implicit - Implicit Association Tests

10:00 – 10:30am ***Strategies for Interrupting Implicit Bias***

Preview strategies to interrupt racism and microaggressions and engage more competently with clients of color and clients experiencing poverty. With a limited amount of time, encourage general principles of increased self-awareness and understanding of one's own social identities with options and resources for further learning.

Resources:

- Core Curriculum, Parts III - V
- For a copy of JustLead's slides and facilitator notes for this section, please contact info@justleadwa.org.
- Kirwan Institute Online Implicit Bias Video Training, http://kirwaninstitute.osu.edu/implicit-bias-training/
- Dr. Nieto's ADRESSING Model and Social Rank Categories

Corporate Compliance That Advances Racial Diversity and Justice and Why Business Deregulation Does Not Matter

*Cheryl L. Wade**

This Essay considers the problem of racial harassment and discrimination in the aftermath of the recent and more thorough discussion about gender inequality. It begins by explaining the inadequacies of the SEC Board Diversity Rules and Section 342. It then describes the reasons why, despite these inadequacies, more regulation relating to discrimination and diversity is not needed. Finally, it discusses how to improve U.S. businesses' compliance with existing antidiscrimination law.

INTRODUCTION

The diversity business is an increasingly important and dramatically expanding niche. Business organizations spend large amounts of money on diversity efforts. They employ diversity and inclusion officers and workers who lead and operate diversity and inclusion departments that typically oversee diversity training.[1] I consider the adequacy of diversity

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efforts, programs, and discourse at U.S. companies in this Essay. I do so in the context of compliance with antidiscrimination law, and by focusing primarily on the problem of the racial homogeneity of business constituencies. Continuing discrimination and racism are the genesis of a lack of diversity among corporate directors, executives, business leaders, employees, and suppliers. Persisting bias also explains the inferior service many consumers of color receive.[2]

Scholarly consideration of constituents other than shareholders is typically dismissed as contrary to the prevailing paradigm of shareholder primacy. But a focus on non-shareholder groups leads to best practices that are ethical, compliant, and protective of a firm's reputation. This focus reduces the likelihood that non-shareholder groups will sue a firm. It mitigates the impact of litigation brought on behalf of non-shareholder constituencies for failure to comply with the laws and regulations aimed at their protection. It reduces the risk of scandals that result in negative publicity and harm to a firm's reputation. Seen this way, corporate governance practices that include consideration of the interests of non-shareholder constituencies reduce harm to firms and their shareholders. This is a practical and realistic approach to shareholder primacy.

Business leaders can design more effective diversity programs and ethical and compliant corporate cultures that promote rather than suppress racial equity if they understand the impact that continuing societal discrimination has on corporate cultures. Large public companies employ hundreds, sometimes thousands of people who interact with other employees, communities and consumers of color, and minority-owned businesses. Implicit or unconscious racism that affects the relationships between public companies and their constituents of color is inevitable because the individuals who act on behalf of these companies live in a nation in which racism and discrimination endure. The racism that continues to plague our national culture is in some instances unconscious, implicit, and subtle. Sometimes it is blatant and overt. Whatever its manifestation, the racism that continues to be part of U.S. culture impacts corporate cultures and shapes the relationships between public companies and their constituents of color.

Conference on Corporate Ethics and Compliance in the Era of Re-Deregulation presented by Loyola University Chicago School of Law and the Institute for Law and Economic Policy. Steven's scholarship and advocacy for ethical conduct in the business setting provided an excellent foundation for discussion at the conference.

1. Diversity professionals frequently gather together to share details about their firms' diversity efforts. *See* INSTITUTE FOR INCLUSION IN THE LEGAL PROFESSION, http://www.theiilp.com/ (last visited Feb. 13, 2018).

2. For a discussion about the impact of business activity on constituents of color, see Cheryl L. Wade, *Fiduciary Duty and the Public Interest*, 91 B.U. L. REV. 1191 (2011).

Large public companies, however, provide a promising locus for cultural transformation when it comes to race and racism. This is because while individualism reigns in U.S. culture, norms are homogeneous in the corporate context. In corporate cultures, individuals must conform to the norms and priorities established by the CEO and other senior executives. This is why a focus on corporate governance is an important first step toward achieving racial equity.[3] The diversity industry can transform expectations within a firm, and those expectations can impact the nation. We saw this happen in 2017 when several women accused powerful men of sexual harassment. The alleged harassers in the private sector were quickly fired. Private firms responded quickly to accusations of sexual misconduct. In the public sector, however, the response to the accusers' allegations was slower, and the accused men's presence in Congress, in the oval office, or as political candidates was tolerated until some of them voluntarily resigned.

As a nation, we have engaged in a good amount of discourse (but not enough) about the status of women in business and politics. The sexual harassment policies at private sector firms may have helped to create corporate and business cultures that are less tolerant (when compared to the public sector) of credible sexual misconduct. This suggests that corporate governance best practices, particularly those focusing on race and gender equity, can promote and encourage ethical and compliant conduct throughout an organization. In this Essay I consider the problem of racial harassment and discrimination in the aftermath of the recent and more thorough discussion about gender inequality. I suggest improvements in corporate and organizational governance that will diminish racial bias in the business context. My suggestions are modest. I do not propose reformation of corporate governance. I merely suggest a focus on best practices under the corporate governance principles that are already in place. Business leaders should understand that racism and discrimination persist in the twenty-first century, even though their occurrence is frequently implicit, unconscious, and more subtle. It is only with this understanding that business leaders will be able to govern companies in a way that ensures that racial bias can be detected, monitored, and addressed.

On the rare occasions that we discuss racism in the United States, we

3. *See generally* Cheryl L. Wade, *Transforming Discriminatory Corporate Cultures: This Is Not Just Women's Work*, 65 MD. L. REV. 346 (2006) (arguing that the advancement of women of color in the corporate context requires that white male CEOs understand the status and experience of women of color within the corporation); *see also* Cheryl L. Wade, *Effective Compliance with Antidiscrimination Law: Corporate Personhood, Purpose and Social Responsibility*, 74 WASH. & LEE L. REV. 1187 (2017) (exploring corporate governance and corporate social responsibility).

condemn it. The national message is clear: racism is wrong. But, public discussions about race and racism are infrequent, and as a result they are typically limited and superficial. It is difficult to talk about race and racism, even in the twenty-first century. The words themselves—"racism" or "racist"—chill discussion about the issues that still plague our nation.[4] News stories about racism and race discrimination appear in news broadcasts and newspapers for several days during which the pundits disagree and argue. Then, the public discussions end, and many white Americans continue with their lives, oblivious to the perennial nature of steadfast racism and race discrimination. The daily occurrences of modern-day racism—the micro aggressions—are not dramatic enough to be deemed newsworthy. Racist cultures—corporate or national—are not newsworthy. They are not even noticed.

So, as a nation, when it comes to public interracial discourse about racism, we are out of practice because we only talk about racism in reaction to a "newsworthy" controversy or catastrophe. The infrequency of an ongoing, in-depth national discourse about race and racism belies the persistence and ubiquity of the kind of subtle and covert discrimination that infects the lives of people of color every day, particularly in the business setting. Even when the discrimination that people of color face is blatant and overt, it rarely inspires national discussion if it does not involve physical harm or the loss of life. Discrimination that impacts the economic or financial lives of people of color is infrequently discussed.

As the twenty-first century's first decade closed, two corporate governance enactments—one regulatory, the other legislative—ostensibly addressed diversity issues in the business setting. First, in December 2009, the Securities and Exchange Commission ("SEC") amended Item 407(c) of Regulation S-K to require disclosure of certain information relating to corporate board diversity ("SEC Board Diversity Rules" or "SEC Rules"). Second, in 2010, Congress enacted Section 342 of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"), requiring various federal agencies to create offices charged with monitoring the diversity efforts of the agencies, the entities they regulate, and the firms with whom the agencies do business.

Both the SEC Board Diversity Rules and Dodd-Frank's Section 342 are likely to survive in the Trump administration's era of deregulation, but their survival matters little because their enactment utterly failed to

4. Philip Galanes, *Bill Maher and Fran Lebowitz: When Comedy Cuts Deep*, N.Y. TIMES (July 15, 2017), https://www.nytimes.com/2017/07/15/fashion/bill-maher-fran-lebowitz-table-for-three-trump.html ("We need to find a middle ground on race. If you look at the polling of conservatives, Republicans and Fox News watchers, they think racism is over – which is insane. Denying racism is the new racism.").

elevate the discourse on discrimination and bias in the business setting. Both reforms employed the rhetorical discourse of diversity that ignores the real problems: racism, sexism, and discrimination. The SEC Board Diversity Rules have led to more disclosure that has done little to advance the interests of people of color on corporate boards. Section 342 has generated more disclosure relating to people of color and women, but the benefits for people of color are obscured in the avalanche of information that has resulted.

In the first two Sections of this Essay, I explain the inadequacies of the SEC Board Diversity Rules and Section 342. The reforms have not inspired companies to move beyond empty rhetorical flourishes about diversity and have added little of value for anyone seeking real information about racial equity goals in the business setting. In the rest of the Essay, however, I describe the reasons why more regulation relating to diversity and discrimination is not needed, and why some amount of deregulation (undoing, for example, Section 342 and the SEC Rules) would not impede the advancement of people of color in the business setting. Section 342 and the SEC Rules are superfluous. The requirement that U.S. businesses and the financial sector comply with Title VII and other federal and state laws that prohibit discrimination is enough without Section 342 or the SEC Rules. That is why the focus of the remainder of this Essay is on how to improve U.S. businesses' compliance with existing antidiscrimination law.

I. THE SEC'S BOARD DIVERSITY RULES

It is common to find African Americans and Latinos at or near the bottom of business hierarchies.[5] But what about attaining greater racial diversity at the top of business hierarchies in the U.S.? There has been a great deal of academic and business literature about diversifying corporate boards of directors,[6] and slightly less robust discourse about

5. McDonald's has been named one of the most diverse companies in the U.S. Most of its racial diversity, however, is found among the lowest-paid workers with the fewest benefits. *Compare* Aman Singh, *McDonald's Makes Diversity About the Bottom Line*, FORBES (Sept. 8, 2010, 10:39 AM), https://www.forbes.com/sites/csr/2010/09/08/mcdonalds-makes-diversity-about-the-bottom-line/#357240a2506a ("Women and people of color make up 73% of McDonald's total workforce, 43% of all franchise staff and 55% of suppliers."), *with* Llezlie Green Coleman, *Rendered Invisible: African American Low-Wage Workers and the Workplace Exploitation Paradigm*, 60 HOW. L.J. 61, 70–71 (2016) ("According to the Economic Policy Institute, 5.9 million African Americans (38% of all African American workers) make less than $12 per hour and 8.2 million African Americans (roughly 53% of all African American workers) make less than $15 per hour.").

6. *See, e.g.*, Steven A. Ramirez, *Diversity and Ethics: Toward an Objective Business Compliance Function*, 49 LOY. U. CHI. L.J. 569, 595 (2018) (discussing the issue of large banks and corporations tolerating unethical practices).

diversity among the ranks of senior managers and executives. U.S. boards are far more diverse than they were a decade ago. Today, far fewer corporate boards are all white or all male.[7]

The relatively recent focus in the U.S. on board diversity began in earnest on December 16, 2009, when the SEC amended Item 407(c) of Regulation S-K. Under the amended rule, corporate boards must disclose in their proxy and registration statements the processes they use to find and evaluate board nominees. In describing their process, boards must disclose whether they include diversity as one of the bases for identifying and choosing board members. If diversity is a consideration, boards must describe how it factors into the decisionmaking. If a firm has a policy about diversity in the board's nomination process, the company must disclose the policy, the way it is implemented, and the way its effectiveness is evaluated.[8]

The goal of disclosure is to provide potential investors and security holders with material information. But disclosure also has the potential to change corporate behavior.[9] A requirement that firms disclose

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7. *See* Cheryl L. Wade, *Gender Diversity on Corporate Boards: How Racial Politics Impedes Progress in the United States*, 26 PACE INT'L L. REV. 23, 29 (2014) ("The numbers of white women and people of color on boards have increased significantly, yet in recent years, the numbers of white women serving as directors have stagnated.").

8. Corporate governance, 17 C.F.R. § 229.407(c)(2)(vi) (2012). The effective date for the SEC rule on board diversity disclosure was February 28, 2010, and the exact language of the amended rule states that boards must:

> [d]escribe the nominating committee's process for identifying and evaluating nominees for director . . . and whether, and if so how, the nominating committee (or the board) considers diversity in identifying nominees for director. If the nominating committee (or the board) has a policy with regard to the consideration of diversity in identifying director nominees, describe how this policy is implemented, as well as how the nominating committee (or the board) assesses the effectiveness of its policy. *Id.*

See generally ALLIANCE FOR BOARD DIVERSITY AND DELOITTE, MISSING PIECES REPORT: THE 2016 BOARD DIVERSITY CENSUS OF WOMEN AND MINORITIES ON *FORTUNE* 500 BOARDS 20, 23 (2017), http://www.catalyst.org/system/files/2016_board_diversity_census_deloitte_abd.pdf (noting that that in 2010, 74.5 percent of Fortune 500 directors were white men; white women held 12.7 percent of the board seats at Fortune 500 companies; African American men held 5.7 percent of Fortune 500 directorships; African American women held 1.9 percent of the seats; Latinos held 2.3 percent of the seats; and Latinas held just 0.7 percent); *see also Women on Boards*, CATALYST 5 (Dec. 14, 2011), http://boardagender.org/files/Catalyst-2011-Quick-Takes-Women-on-Boards.pdf (in 2011, the percentage of white women on the boards of Fortune 500 companies rose slightly to 13.1 percent. African American women, Latinas, and Asian women held 3.0 percent of the board seats of Fortune 500 companies that year. In 2011, most Fortune 500 companies (70.7 percent) had *no* women of color serving on their boards).

9. *See Notice of Commission Conclusions and Rulemaking Proposals in the Public Proceeding Announced in Securities Act Release No. 5569*, Fed. Sec. L. Rep. (CCH) ¶ 85,706, at 85,712 (Oct. 14, 1975). In the 1970s, several public interest groups petitioned the SEC to revise mandatory disclosure rules to include information regarding a company's civil rights and environmental performance. The SEC declined to mandate that companies disclose equal employment opportunity practices, nor would it require disclosure of unlawful employment discrimination. The Commission

information relating to their diversity policies has the potential to inspire meaningful change. Corporate managers may change policies or practices that could damage their companies' reputations if they are required to disclose information relating to those policies or practices. Or, companies may boost their reputations by voluntarily disclosing certain facts. For example, some companies voluntarily disclose the racial and gender composition of their boards by sending shareholders proxy materials that include directors' pictures. These companies have more minority and women directors than companies that do not engage in this kind of voluntary disclosure.[10]

There was some intrinsic potential for the SEC's Board Diversity Rules to inspire corporate directors to think about the homogeneity of their boards in a meaningful way. The SEC Board Diversity Rules could have encouraged boards with no formal or informal diversity policy to think about adopting one. The requirement that boards describe how they implement their diversity policy could have encouraged reflection about the process. And, the SEC's mandate for boards that have a diversity policy to disclose how they evaluate their policy's effectiveness had the power to promote introspection about the adequacy of the process. Unfortunately, however, the SEC Rules do not seem to have inspired meaningful reflection about the lack of racial diversity on corporate boards.

After the SEC Board Diversity Rules became effective in 2010, more corporate boards added discussion about diversity in their proxy statements. But, even in the first few months after the Rules' effective date, it was clear that the diversity discussion inspired by the SEC's changes was diversity doublespeak.[11] The SEC Rules did not define diversity, so some companies articulated a commitment to diversity but defined the concept expansively. Many companies expressed a commitment not only to racial and gender diversity, but also enumerated a long list of other factors including ethnicity, age, and national origin,

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stated: "As a practical matter, it is impossible to provide every item of information that might be of interest to some investor in making investment decisions. . . ." According to the Commission, several commenters "suggested more than 100 topics concerning which they desired disclosure. A disclosure document which incorporated each of the suggestions would consist of excessive and possibly confusing detail. . . ." *Id.*

10. Richard A. Bernardi, David F. Bean & Kristen M. Weippert, *Minority Membership on Boards of Directors: The Case for Requiring Pictures of Boards in Annual Reports*, CRITICAL PERSP. ON ACCT. 16, 1019 (2005).

11. In another article, I discuss the problem with using the rhetoric of diversity, inclusion, access, and equal opportunity without focusing on the genesis of the problem—discrimination, racism and sexism. *See* Cheryl L. Wade, *"We Are an Equal Opportunity Employer": Diversity Doublespeak*, 61 WASH. & LEE L. REV. 1541 (2004) [hereinafter Wade, *Diversity Doublespeak*].

along with diversity of geographic location, experience, background, viewpoint, and skills.[12] The disclosure was vague, superficial, and obscure.

With this kind of expansive definition of diversity, the concepts of racial and gender diversity get lost among the various types of diversity that business leaders claim to value. This approach to diversity obscures the fact of historical discrimination against women and people of color. Diversity efforts are necessary because, for decades, women and people of color have faced discrimination that has impeded their entry into and success in the business world. The history of discrimination in the United States on the basis of age, ethnicity, and national origin is comparable in many ways. But there is no similar history of discrimination on the basis of viewpoint, experience, background, or skills in the United States. It is true that elitism, class-consciousness, and politics have impeded the professional advancement of individuals with certain viewpoints, or those from modest backgrounds. But these individuals have not faced the pervasive and systemic discrimination that women and people of color have endured. Diversity of skills, viewpoint, experience, background, and even geographical location are essential for successful firms. These are important considerations when hiring employees, promoting managers, and identifying board members. Companies, however, should pursue viewpoint, experiential, and background diversity without eclipsing the very different goals of racial and gender diversity.[13]

II. SECTION 342 OF THE DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT

In 2010, another corporate governance reform addressed racial and gender diversity in the financial sector. Section 342 of the Dodd-Frank Wall Street Reform and Consumer Protection Act created an Office of Minority & Women Inclusion at various agencies: the Federal Deposit Insurance Corporation, the Securities and Exchange Commission, the Department of the Treasury, the Office of the Comptroller of the Currency, the Consumer Financial Protection Bureau, and each of the twelve Federal Reserve Banks. These "Inclusion Offices" are charged

12. Kimberly Gladman, *Beyond The Boilerplate: The Performance Impacts of Board Diversity*, THE CORPORATE LIBRARY (July 29, 2010).

13. The debate about corporate board diversity is a global one. Norway and France have, with varying degrees of success, imposed quotas on public companies that set specific goals for more gender parity on boards of directors. Of course, the U.S., for a variety of reasons, will never impose board composition quotas, but comparisons between the approaches taken in other nations with the U.S. approach to board diversity provide insight into the U.S. discourse about race and gender itself. *See* Anne Sweigart, *Women on Board for Change: The Norway Model of Boardroom Quotas As a Tool For Progress in the United States and Canada*, 32 NW. J. INT'L L. & BUS. 81A, 83A–84A (2012) (providing a synopsis of Norway's quota system for female board membership).

with monitoring the diversity efforts of the agencies, the entities they regulate, and the firms with whom the agencies do business. The disclosure and monitoring required under Section 342 applies to almost all participants in the private sector because the agencies covered by the provision regulate corporations, and they do business with financial institutions, investment banks, mortgage banking firms, brokers, dealers, underwriters, accountants, and even law firms.

Under Section 342, each Inclusion Office must establish procedures to "ensure the fair inclusion and utilization of minorities and women" at the businesses with which the agencies contract, at the companies they regulate, and at the agencies themselves. Regulated firms, contractors, and subcontractors must "provide a written statement that the company will ensure the inclusion of women and minorities in its workforce to the maximum extent possible." Directors of each Inclusion Office must determine whether regulated firms, contractors, and subcontractors have made a "good faith effort" to include women and minorities. If no good faith effort is made, directors may recommend that their agency terminate the contract. The provision also requires the directors to monitor the fair inclusion of women- and minority-owned businesses as suppliers to the covered agencies.[14]

Representative Maxine Waters proposed adding Section 342 to the Dodd-Frank legislation. In a 2009 speech she made to the House of Representatives, she explained that, even though they are qualified, women- and minority-owned businesses "continue to be excluded from contracting opportunities made available by the government's historic intervention at banks and other financial institutions."[15] Some have criticized the provision, calling it "vague" and "redundant."[16] They argue that rules prohibiting discrimination against women and minorities in the business setting are already in place.[17] The provision, however, is

14. Similar provisions have been established in other statutes as well as companies such as Fannie Mae and Freddie Mac. *E.g.*, Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, 122 Stat. 2654 § 1116 (2008) (requiring that entities develop and implement standards to ensure that minorities and women are included "in all business and activities of the regulated entity at all levels, including in procurement, insurance, and all types of contracts"); *Diverse Suppliers*, FANNIE MAE, http://www.fanniemae.com/portal/suppliers/diverse-suppliers.html (last visited Feb. 13, 2018) (documenting Fannie Mae's commitment to hiring diverse suppliers); *Freddie Mac's Supplier Diversity Policy*, FREDDIE MAC, http://www.freddiemac.com/about/supplier-diversity-policy.html (last visited Feb. 13, 2018).

15. Kevin Roose, *Seeking Guidance on Dodd-Frank's Diversity Clause*, N.Y. TIMES: DEALBOOK (Nov. 11, 2010, 5:04 PM), dealbook.nytimes.com/2010/11/11/seeking-guidance-on-dodd-franks-diversity-clause/.

16. *Id.*

17. Final Interagency Policy Statement Establishing Joint Standards for Assessing the Diversity Policies and Practices of Entities Regulated by the Agencies, 80 Fed. Reg. 33016, 33020 (June 10,

intended to reinforce and reiterate principles relating to racial justice and fairness for women, and for these reasons, the provision's redundancy is potentially helpful.[18] But opponents of Section 342 are correct in that the provision adds nothing that will protect people of color and women from bias.

Right after Section 342 was enacted, law firms promised clients that they would follow the provision's development and keep clients up to date about its details. This presented an opportunity for meaningful discourse about race. Proskauer Rose LLP, a prominent New York City law firm, explained to its clients that "the ultimate impact of the [Inclusion Offices] will not be known until they are operational, but it certainly is one reason to stay abreast of developments under the Dodd-Frank Act and ensure that [our clients] are familiar with all of the relevant provisions contained in it."[19] Another law firm, Baker McKenzie, assured its clients that the firm would "monitor the development of standards by the Inclusion Offices and report on them as the program" evolved.[20]

Section 342 presented an opportunity to elevate the discourse on racism and sexism with respect to discriminatory attitudes that may exclude women and people of color from the financial sector and impede their progress once they join the sector. Corporate lawyers, however, failed to seize this opportunity. While Proskauer Rose LLP promised to keep clients informed about Section 342's development, it denounced the Section, telling its clients that the provision was "potentially onerous."[21] Baker McKenzie wrote to its clients dismissing Section 342 as a potentially "significant administrative burden for contractors and service providers to Dodd-Frank covered agencies."[22] Neither firm addressed the issue of racial and gender homogeneity in the private sector. Corporate law firms in general squandered an opportunity to address the issue of racial and gender injustice in the business setting.

2015) ("Another commenter argued that these standards are unnecessary because regulated entities can achieve diversity and inclusion without disclosing this information, while others noted that many entities already publish information about their diversity and inclusion efforts.").

18. *See generally* Kristin Johnson et al., *Diversifying to Mitigate Risk: Can Dodd-Frank Section 342 Help Stabilize the Financial Sector?*, 73 WASH. & LEE L. REV. 1795 (2016) (positing the provision's importance with respect to diversifying the financial sector).

19. *Uncertainty in the Dodd-Frank Act's "Office of Minority and Women Inclusion" Provision*, PROSKAUER ROSE LLP (July 27, 2010), http://www.proskauer.com/publications/client-alert/uncertainty-in-the-dodd-frank-act/ [hereinafter PROSKAUER ROSE].

20. Cheryl L. Wade, *Corporate Lawyers and Diversity Discourse*, *in* IILP REVIEW 2017: THE STATE OF DIVERSITY AND INCLUSION IN THE LEGAL PROFESSION 124, 130 (2017), http://www.theiilp.com/resources/Pictures/IILP_2016_Final_LowRes.pdf [hereinafter Wade, *Corporate Lawyers and Diversity Discourse*].

21. PROSKAUER ROSE, *supra* note 19.

22. Wade, *Corporate Lawyers and Diversity Discourse*, *supra* note 20, at 130.

Section 342, like the SEC's Board Diversity Rules, does not require that companies diversify workforces or supplier groups. Both are disclosure measures. Section 342 required the creation of Inclusion Offices to monitor diversity, but that monitoring is based on written reports—or disclosure—about diversity. Yet, even though it merely requires disclosure about diversity, Section 342 creates a perception for some that it advantages women and minorities at the expense of white men. One observer resorted to an old and arguably racist and sexist position, lamenting that Section 342 "is likely to encourage" affected employers to "hire women and minorities for the sake of appearances, even if some new hires are less qualified than other applicants."[23]

Section 342's effectiveness was compromised not only by the corporate bar's dismissal and criticism of the provision, but also by the language its drafters used, which blunts its potential impact. The provision refers to women and minorities as though the issues the two groups face are identical and interchangeable. This is common in discussions about diversity, but is problematic because a call for racial equity in business requires considerations that are different than those intended to create equity for women in the business context.

III. INTERPLAY BETWEEN AMERICAN CULTURE AND CORPORATE AMERICAN CULTURE

The SEC Board Diversity Rules and Dodd-Frank's Section 342 provide two vivid examples of the inadequacy of the discourse on race and gender inequities in the business setting. Understanding the inadequacy of the national discourse about race and racism is imperative. Our national inability to understand and address the complexity of twenty-first century racial injustice infects the discussion in corporate America on these issues. But there is an interesting interplay between American culture and the culture of American businesses. The inadequacy of our national discourse about race and racism impacts corporate discourse and views on the issue, but the reverse is also true. Corporate culture, discourse, and practices impact the national discourse on race and racism.

In our national culture, individuality is valued. Norms are heterogeneous in U.S. culture. In corporate and business cultures, however, individuals must conform to the norms of the firm. Norms are homogeneous in business organizations, and internal cultural precepts

23. Diana Furchtgott-Roth, *Racial, Gender Quotas in the Financial Bill?*, REALCLEAR MARKETS (July 8, 2010), https://www.realclearmarkets.com/articles/2010/07/08/diversity_in_the_financial_sector_98562.html.

require compliance and uniformity. For this reason, business settings provide unique opportunities for improving race relations. Individuals who work for and represent businesses must conform to the priorities, culture, and expectations established by the CEO and other senior executives. If they do not, they will not be successful within the company. When individuals fail to conform to the cultural precepts of the firms they work for, they will eventually be forced out. Employees, managers, and agents—who conform to a corporate culture in which racial equity is a priority—will shape the relationships between the company and its consumers, employees, suppliers, and the communities in which the firm does business. Cultural mandates frame and define the ways that employees and agents interact with the constituencies impacted by their firms. This is why a focus on corporate and organizational governance is an important first step toward racial reconciliation. This focus presents hope for a modest transformation of race relations in the business context if those who govern business associations make racial equity a priority. Meaningful discourse about race, racism, and discrimination, along with committed anti-discrimination discourse and efforts, can create cultural expectations of racial equity within organizations. And when racial discourse is elevated and interracial relationships are healed within the firm, there is a potential for improvement of interracial relationships beyond the organization.

In order for this to happen, corporate and organizational cultures must support and affirm racial equity. Business leaders have the power to create cultures that support equitable relationships between their companies and constituents of color. Chief executive officers (and their counterparts in other types of business organizations) can use their considerable influence on corporate and business culture to achieve racial equity in the business context by encouraging those who work for them to make racial equity a priority.

Experts on executive leadership and management development define corporate culture as:

> [T]he deeply felt system of shared values and assumptions, conveyed through stories, myths, and legends, that explains how members of the organization think, feel, and act. . . . This culture, and the level of conformity it imposes, is willingly accepted by the members, and this bargain between the members and the culture gives the organization its stability, predictability, and continuity.[24]

How does a CEO contribute to a company's "system of shared values and assumptions"? To what extent do CEOs control how corporate managers, employees, and agents "think, feel, and act"?

24. PRICE M. COBBS & JUDITH L. TURNOCK, CRACKING THE CORPORATE CODE xi–xii (2003).

Business leaders, particularly CEOs, exert a remarkable amount of influence and power over their subordinates. Leaders have a great deal of influence on the ethical cultures of their companies.[25] CEOs typically command unrestrained devotion from managers and employees, who almost blindly adhere to the CEO's business philosophy. Chief executives shape the thoughts, ideas, and goals of those who work for them. Most CEOs expect their views on how the company should be governed and the views of their executives and employees to be identical—at least ostensibly. Corporate and business culture commands conformity. Employees and managers must conform to the corporate or organizational culture created by senior executives, and if they do not, they will eventually have to leave the company.

Chief executives are able to transform corporate culture because it is typical for managers and employees to be blindly loyal to the CEO's vision. Ursula Burns, the first African-American woman to chair Xerox Corporation, and who served as the company's CEO from 2009–2016, confirmed the uniquely powerful position that CEOs enjoy: "Being CEO is almost instant credibility. It's instant power."[26] This makes corporate governance an extremely promising source of cultural transformation as it relates to race and racism. If a CEO's vision for his or her company includes establishing a corporate culture that promotes and supports racial equity, managers and employees must conform to the CEO's vision and the company's culture. If they do not, they will not survive at the company.

CEOs must work hard to communicate their vision about corporate policy to managers and employees. A chief executive can command loyalty to his or her vision and adherence to the company's cultural requirements, but the vision and requirements must be clearly articulated. As one commentator observed, "it was no good writing [guidelines regarding conformity to the firm's culture] in memo form and distributing them. People would simply read them and toss the memo aside."[27]

IV. FIDUCIARY DUTY, EMPATHY, AND THE TRANSFORMATION OF CORPORATE CULTURE

A focus on racial justice is just one of many opportunities for

25. Lynne L. Dallas, *A Preliminary Inquiry into the Responsibility of Corporations and Their Officers and Directors for Corporate Climate: The Psychology of Enron's Demise*, 35 RUTGERS L.J. 1, 41 (2003) ("Top management and supervisors are in authority positions that enable them to influence employees' interpretations of corporate policies and practices.").

26. Gallatin Business Club, *A Conversation with Ursula Burns*, YOUTUBE (Feb. 16, 2012), https://www.youtube.com/watch?v=lejX2SjGBrY.

27. ROBERT SLATER, THE WAL-MART DECADE 44 (2003).

corporations to behave in a way that is socially responsible. But these matters are not just corporate social responsibility matters. Corporations *must* comply with anti-discrimination law. This makes racial justice work in the business context a corporate governance matter in that directors and officers must install information and reporting systems that monitor compliance with law in order to fulfill fiduciary duties. Corporate directors owe a duty of loyalty to shareholders that includes a good faith obligation to monitor their companies' compliance with law.[28] Compliance programs are an integral part of corporate governance, and they typically include training for employees about how to comply with the various laws that apply to a firm and its business.[29] When business leaders monitor their employees' compliance with law, they help to avoid harm to the corporation and its shareholders. Monitoring law compliance may uncover employee conduct that would harm a company's reputation or invite civil litigation or criminal prosecution if it continues unchecked.[30]

Racial equity has not been a priority in the business setting. CEOs and senior executives rarely move beyond diversity doublespeak[31] and the check-the-box approach of most diversity programs. Can CEOs be motivated to use their power to transform corporate cultures in a way that would foster equitable relationships between their companies on the one hand, and employees, consumers, and communities of color on the other?

Consider the role of empathy in corporate governance in achieving more meaningful discussions about racial equity in the business setting. Discourse and empathy are amorphous concepts. But it is the amorphousness of these concepts that makes them relevant in the attempt to achieve racial equity within the contexts in which businesses operate. An analysis of discourse and empathy in the business setting has none of the preciseness of rulemaking. But we already have rules, laws, and governance principles in place that address race discrimination in

28. Stone *ex rel.* AmSouth Bancorporation v. Ritter, 911 A.2d 362, 370 (Del. 2006).

29. In matters regarding racial justice, this includes diversity training and handbooks.

30. Consider the Texaco and Coca-Cola class actions that led to each company's pledge to change workplace realities for employees of color. This pledge was an integral settlement term. Both companies agreed to establish systems that would monitor and respond to discrimination allegations. The companies promised to create programs to train employees on diversity issues, and agreed to oversight by a task force composed of members who were not employed by or otherwise affiliated with the companies. In other words, after the litigation was settled, the companies agreed to take the kind of action that directors and officers should have been taking all along to satisfy the fiduciary obligations they owe their shareholders. The companies agreed to prevent avoidable corporate loss by monitoring their firms' compliance with applicable law. If directors and managers had monitored compliance with anti-discrimination law, they may have avoided the litigation altogether.

31. *See generally* Wade, *Diversity Doublespeak*, *supra* note 11.

business. Anti-discrimination law—like Title VII[32] and the Civil Rights Act of 1991[33]—prohibits discrimination. Basic corporate governance principles require directors and officers to monitor their firms' compliance with anti-discrimination law. Best practices dictate that firms establish compliance departments, appoint compliance officers, install compliance telephone hotlines, and draft compliance policies and handbooks. The problem for people of color who are impacted by bias in the business setting, however, is that these steps are typically taken as part of a check-the-box approach that focuses on the details of the steps rather than the principles on which good governance and anti-discrimination are based.

Anti-discrimination law and corporate governance best practices cannot change corporate cultures and climates. Too often, corporate actors devote time and attention to getting around the law or bending rules. Corporate governance best practices are typically deemed aspirational and too lofty to attain, and therefore justifiably ignored. We have seen stunning examples of this in the twenty-first century in the predatory lending context[34] and at companies like Enron, WorldCom, Tyco, and Adelphia, where accounting and financial fraud destroyed the lives of individuals and the companies themselves.[35]

Elevating discourse about the continuing problem of race discrimination and examining the capacity for and potential of corporate managers' empathic understanding about race may help to change corporate cultures in a way that more regulation and rulemaking cannot. That is why I suggest a principles-based approach to corporate governance that does not rely solely on rules, law, and regulation. Business leaders should focus on the principles of good governance, such as adequately and honestly monitoring compliance with anti-discrimination law. Leaders should also focus on the principles that underlie the laws with which they must comply. This includes a focus on the principle of uncovering and dealing with discrimination rather than relying solely on the rhetoric of diversity.

Boards and managers must gather information about their firms' compliance with the laws that prohibit discrimination. Empathic

32. 42 U.S.C. §§ 2000e–2000e17 (2012).

33. 42 U.S.C. § 1981 (2012).

34. *See generally* Melissa Huelsman, *A Brief Primer on Fighting Predatory Lending Practices*, GP SOLO: LAW TRENDS & NEWS (Sept. 2005), https://www.americanbar.org/newsletter/publications/law_trends_news_practice_area_e_newsletter_home/0509_business_predatorylending.html#top (examining the trend of "nontraditional" lending practices and warning practitioners of their potentially predatory nature).

35. *See* Penelope Patsuris, *The Corporate Scandal Sheet*, FORBES (Aug. 26, 2002, 5:30 PM), https://www.forbes.com/2002/07/25/accountingtracker.html#419e910257e8 (providing an alphabetical list of accounting scandals up to the date of publishing in 2002).

understanding can convince corporate directors and managers to live up to the fiduciary duties they owe shareholders to monitor compliance with anti-discrimination law. The corporate board's monitoring obligation that is part of its fiduciary duty of loyalty, like the process that inspires empathy, includes the work of gathering information. If this information gathering is done properly, it has the power to inspire empathy for minority communities, consumers, potential suppliers, and employees by providing information about the relationship of these constituencies to the company. In other words, the information-gathering process that helps business leaders fulfill their fiduciary duties is similar to the process that inspires empathy for others.

Empathy has been defined as the "identification with and understanding of another's situation, feelings, and motives."[36] "Empathy . . . is more than an intellectual predisposition, or belief; it is a readiness to be engaged in the experience of others."[37] Empathy has also been described as a "process" and an "information-gathering activity."[38]

Empathy plays a significant role in corporate governance. The Delaware Supreme Court explicitly acknowledged the role empathy plays when companies form special board committees to determine whether shareholder litigation alleging directorial wrongdoing that harmed the corporation should go forward.[39] The court held that it would review the substance of a committee's decision to dismiss this type of litigation because committee members may empathize with the fellow directors whose conduct is challenged. The court acknowledged that it had to "be mindful that directors are passing judgment on fellow directors in the same corporation. . . . The question naturally arises whether a 'there but for the grace of God go I' empathy might not play a role."

Another example of a corporate governance practice that implicitly recognizes the importance of empathy is the provision of stock options for corporate managers in order to align the interests of the corporate decisionmaker with the interests of the group for whom decisions are made: the shareholders. Stock option grants align the manager's personal wealth with that of shareholders. They foster a manager's identification with, or empathy for, shareholders.[40]

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36. *Empathy*, THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 369 (4th ed. 2000).

37. Kenneth L. Karst, *Judging and Belonging*, 61 S. CAL. L. REV. 1957, 1966 (1988).

38. Douglas O. Linder, *Juror Empathy and Race*, 63 TENN. L. REV. 887, 891 (1996).

39. Zapata Corp. v. Maldonado, 430 A.2d 779 (Del. 1981).

40. SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 844 (2d Cir. 1968). Other examples of corporate governance rules implicitly aimed at inspiring empathy are found in federal securities law. For example, one provision protects corporate actors from liability for materially misleading statements or omissions in registration statements. This is called the "due diligence" defense. It is

It seems, however, that there is an empathy imbalance in corporate governance. It is easier to find corporate governance practices that are based on empathy for relatively privileged groups like board members or shareholders than it is to find examples of empathy for constituencies that are impacted by corporate activity, such as labor, consumers, and communities. The law that protects labor, consumers, and communities is external to the corporation, and consideration of the interests of these constituencies is not typically considered a corporate governance issue or a matter internal to the company. In other words, corporate governance practices—internal to the corporation—have been inspired by empathy for directors, officers, and shareholders, but the same is not true for labor, consumers, and communities. This empathy imbalance becomes especially compelling when it comes to minority communities, employees, and consumers.

Business leaders, successful themselves, are not likely to understand the impediments to success faced by many people of color. Professor Richard Delgado concluded that "we think we—and others—have much more empathy for the downtrodden than we, in fact, do," and that this kind of "false empathy is worse than indifference. . . . It encourages the possessor to believe he is beyond reproach."[41] Professors Trina Grillo and Stephanie Wildman observed that "the way we empathize with and understand others is by comparing their situations with some aspects of our own."[42] Empathy is engendered by finding similarities with the object of empathic understanding or by analogizing the other's situation to that of the one who empathizes. The comparisons that inspire empathy obscure important experiential distinctions and reduce the possibility for true understanding of another's circumstances.

Professor Dorothy Roberts wrote that "empathy is often interpreted as finding oneself in others," and that "unequal power arrangements can block any instinct toward empathy."[43] Corporate hierarchies are defined by unequal power arrangements. This is yet another barrier to empathy for Americans of color, whose presence at the lower levels of corporate

available to any defendant who conducted a reasonable investigation about the truthfulness of registration statement materials. The Securities Act of 1933 defines reasonable investigation as requiring a level of reasonableness that "a prudent" person would apply "in the management of his own property." 15 U.S.C. § 77k (2000). This standard inspires empathy for shareholders, or potential shareholders, who may rely on a registration statement by requiring defendants to manage shareholders' affairs in the same way they would manage their own.

41. Richard Delgado, *Rodrigo's Eleventh Chronicle: Empathy and False Empathy,* 84 CAL. L. REV. 61, 69, 78 (1996).

42. Trina Grillo & Stephanie M. Wildman, *Obscuring the Importance of Race: The Implication of Making Comparisons Between Racism and Sexism (Or Other –Isms)*, 1991 DUKE L.J. 397, 400 (1991).

43. Dorothy E. Roberts, *Sources of Commitment to Social Justice*, 4 ROGER WILLIAMS U. L. REV. 175, 188, 191 (1998).

hierarchies is disproportionately higher. The inequality of these power arrangements is vivid when considering the huge amount of power that CEOs and other executives and senior managers have as compared to the relatively low level or complete lack of bargaining power for those on the lower rungs of the corporate ladder. And the reality of de facto segregation that separates many Americans of color from white Americans precludes empathic understanding. This societal segregation reduces the possibility of interaction between business leaders, most of whom are white, and the members of the communities of color that are impacted by corporate activity. Moreover, the de facto segregation that impedes access for minority-owned businesses as potential suppliers to larger firms is another manifestation of empathic barriers.

Because "empathy does not guarantee that our emotions will lead us to act in an ethical or just way,"[44] taking action to enhance empathy for Americans of color will not resolve persistent race discrimination in the business setting. In fact, empathy may not be the solution. It may be the problem. "Empathic feelings toward members of one's own racial group . . . explain indifference or even hostility toward members of other racial groups."[45] Empathy for others who are similarly situated is not difficult, and in the corporate setting, this means that corporate managers and directors, most of whom are white, will easily empathize with the corporate constituents who are most like them. This empathy imbalance privileges white entrepreneurs who want to do business with public companies. It privileges white workers and disadvantages minority consumers, communities, employees, and suppliers. Acknowledging and understanding this empathy imbalance is an important first step toward establishing more equitable business climates.

Unfortunately, instead of understanding the possibility that an empathy imbalance exists or acknowledging the persistence of race discrimination in both American and corporate culture, most senior executives avoid meaningful discussion about race and racism. They typically display a dangerously simplistic and unsophisticated approach to the discussion of race matters. For example, I asked the CEO of a large transnational corporation who visited my Corporate Governance and Accountability class to discuss the aftermath of the 1996 settlement of the racial discrimination suit brought against Texaco. He told my students that one of the questions most frequently asked of chief executives by their boards immediately after the settlement was: "Do *we* have a Texaco problem?" He went on to say that he was able to assure his board that there was no "Texaco problem" at his company. I asked the CEO how he was able to

44. *Id.* at 193.
45. Linder, *supra* note 38, at 893.

determine that there was no racial discrimination anywhere in a multinational corporation that employed thousands of people. His response was: "There is no racism at my company because I'm not a racist. It all starts from the top." While the concept of establishing a corporate culture that "starts from the top" is a frequently articulated proposition, its unthinking and empty reiteration in this context is corporate governance by rote. Without making appropriate inquiries, it is dangerously naïve to think that none of the company's thousands of employees engaged in racially biased decisionmaking.

CEOs have the power to establish corporate cultures in which racial equity is a priority. But this will happen only if empathic understanding for minority communities, consumers, suppliers, and employees inspires CEOs and other senior executives and managers to focus some of their power on achieving racial equity within their firms. Empathy can be inspired by gathering information about another's situation. Even though not explicitly undertaken to inspire empathy, similar information-gathering processes in the business setting are integral to the fulfillment of corporate officers' and directors' fiduciary obligations to adequately monitor compliance with law within their firms.

Understanding the impact of empathic consideration, or lack thereof, for constituencies of color that are affected by corporate activity is imperative. Relationships between a business on the one hand, and minority employees, communities, consumers, and businesses as potential suppliers on the other, are dramatically shaped by the ability, or the inability, of business leaders to empathize with these constituencies.

V. WHAT CAN COMPANIES DO?: CRITICAL RACE THEORY AND DIVERSITY TRAINING AND PROGRAMS

In this Section, I make concrete suggestions for corporate governance reform as it relates to constituencies of color who are impacted by business. The reform I suggest requires the attention of officers, managers, and even directors, and will inure to the benefit of shareholders whose long-term interests are served when discrimination litigation and the attendant negative publicity are avoided.

Professor David Thomas of the Harvard Business School recommends "educating managers . . . by teaching them how to mentor effectively."[46] Thomas acknowledges that all workers, regardless of race, benefit from good mentoring relationships, but he recognizes that for minorities, good

46. David A. Thomas, *The Truth About Mentoring Minorities: Race Matters*, HARV. BUS. REV. 98, 104 (Apr. 2001), http://www.emfp.org/Main-Menu-Category/Library/Mentoring/The-Truth-About-Mentoring-Minorities-PDF.pdf.

mentors are essential in garnering company-wide support for employees of color. Mentors may be able to protect minority employees from disadvantages and criticisms that are tinged with racism. Mentors can create opportunities for minority employees that others would deny them.[47] The need to effectively train mentors as part of an established, formal mentoring program cannot be overemphasized. The mentors' training must encourage open and honest discussions with mentees about racial differences, privilege, and disadvantage.

A mentoring program is typically part of a firm's overall diversity efforts and training. The goal for any firm should be to install a diversity program that elevates the discourse on race beyond superficial utterances about diversity, inclusion, and equal opportunity. Mentors and diversity program participants should read excerpts from accessible scholarly articles that advance understanding about racial reality. For example, Peggy McIntosh, a white American activist and scholar, has thought about and explained the notion of white privilege—a concept that is especially relevant when examining issues of race in the business setting.[48] McIntosh writes that "whites are carefully taught not to recognize white privilege. . . ."[49] She explains why she thinks this is so: "The pressure to avoid [white privilege] is great, for in facing it [whites] must give up the myth of meritocracy."[50]

Most salient in McIntosh's essay is her list of ways that whiteness provides her with unearned advantages that people of color do not have. One of her observations relates directly to mentoring: "I can be pretty sure of finding people who would be willing to talk with me and advise me about my next steps, professionally."[51] She also observes: "I can take a job with an affirmative action employer without having coworkers on the job suspect that I got it because of race" and "I can speak in public to a powerful male group without putting my race on trial."[52] Few white mentors, managers, supervisors, or employees would have occasion to think about these simple examples of white privilege and how it impacts

47. *Id.*

48. Peggy McIntosh, *White Privilege: Unpacking the Invisible Knapsack*, PEACE AND FREEDOM MAGAZINE 10–12 (July/Aug. 1989), https://nationalseedproject.org/images/documents/Knapsack_plus_Notes-Peggy_McIntosh.pdf. McIntosh is the Associate Director of the Wellesley Center for Research on Women. Other notable scholars have written about white privilege. *See* Jerome McCristal Culp, Jr., *To the Bone: Race and White Privilege*, 83 MINN. L. REV. 1637 (1999) (discussing race as an issue); Stephanie M. Wildman, *The Persistence of White Privilege*, 18 WASH. U. J.L. & POL'Y 245 (2005) (discussing white privilege as perception).

49. McIntosh, *supra* note 48.

50. *Id.*

51. *Id.*

52. *Id.*

minority workers, community members, consumers, and actual or potential suppliers. Including these observations as part of a diversity training program would inspire deeper thinking on the part of managers about the struggles of many people of color in the business setting.

In addition to addressing the notion of white privilege, a good diversity program should address other subtle, complex matters of race about which critical race theorists have written. Programs should introduce participants to Derrick Bell's work, in which he concludes that racism is permanent.[53] Bell did not give up on the fight for racial justice with his permanence-of-racism thesis. He understood that the type of blatant, overt racism that was prevalent in the United States from the seventeenth century through the twenty-first century has evolved, for the most part, into a subtler, more covert, and implicit racism. Overt racism still exists in the twenty-first century, but most of the racism that people of color continue to deal with is hidden just below the surface—particularly in the business context. Racism is no longer acceptable in the minds of most Americans, but it persists. Understanding this is essential to mitigating racism's impact on the lives of people of color. If racism's permanence is not acknowledged, some may conclude that the problem is resolved, and festering problems will never be addressed.

Many white Americans are likely to resist McIntosh's observations about white privilege and Bell's permanence-of-racism thesis. There is little reason for white Americans to observe the subtleties of white privilege, and the same is true regarding modern-day racism because it is not directed at them. Moreover, Bell's thesis is hard to accept because most Americans continue to think that racism is confined to instances of racial hatred, the use of racist epithets, and other overtly hostile acts and attitudes. Most Americans condemn overtly racist behavior.

Because of the almost universal public condemnation of blatantly racist behavior, many white Americans, including business leaders, conclude that modern-day racism is rare and that overt or hate-filled racists are outliers who are not in the mainstream. When these white Americans join in the condemnation of blatant racism, they conclude that they themselves are not racists because they abhor the condemned conduct. In this regard, Charles Lawrence's work about unconscious

53. DERRICK BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM (Basic Books ed., 1992) (arguing that the nature of racism in the United States is ingrained and institutional, and that self-preservation instincts of the white majority inherently reject the premise of civil rights activism).

racism[54] and more recent writings about implicit bias[55] are illuminating. Diversity training should include discussion of the idea that most Americans, regardless of race, carry with them implicit biases of which they are not aware.

When business activity negatively impacts people of color who are employees, consumers, potential and actual suppliers who are small business owners, and community members, it is frequently the result of unconscious racism or implicit bias rather than overtly blatant racism. The implicit bias that infects some corporate decisions can be confronted only if it is acknowledged. Business leaders, agents, and representatives would more fully understand the nature of modern-day racism if diversity training programs included Lawrence's thesis about unconscious racism.

If business leaders were to hear the narratives of people of color who are negatively impacted by business activity, they would more easily understand unconscious racism or implicit bias. Richard Delgado's work on the importance of narrative would elevate the discourse about race in diversity programs. Delgado explains that the stories of outsiders or individuals who are marginalized must be told and heard in order to attempt to resolve racial inequity.[56] Critical race theory can also help business leaders understand the issues with which women of color grapple when private firms employ them, when they consume goods and services, or when they attempt to do business with firms. Intersection theory explains that women of color typically face discrimination on the basis of race *and* gender, and that it is conceptually impossible to separate these two components of an individual's identity.[57] Legal scholars have

54. Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

55. *See generally* IMPLICIT RACIAL BIAS ACROSS THE LAW (Justin D. Levinson & Robert J. Smith eds., 2012).

56. Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 91 (1989).

57. *See generally* Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 168 (1989) (noting that the intersectional experience is greater than the sum of racism and sexism). The authors of a 2017 article concluded that female attorneys of color, when compared to other attorneys, have greater perceptions of unfair treatment where they work. Todd A. Collins, Tao L. Dumas, & Laura P. Moyer, *Intersecting Disadvantages: Race, Gender, and Age Discrimination Among Attorneys*, 98 SOC. SCIENCE Q. 1643 (2017). This article found that perceptions of age discrimination among female attorneys of color were also high. *Id.* The authors demonstrate an understanding of intersection theory that is typically not prevalent in the context of diversity discussions, programs, and training in businesses. *Id.* This study reveals how the problems that plague corporations and other business organizations also affect law firms. *Id.* This is stunning because one would expect attorneys to be cognizant of antidiscrimination law and policy. *Id.*

also written about the dangers of essentialism.[58] They have warned against attempts to reduce an entire group—African Americans or women, for example—to a simplistic monolith that fails to acknowledge other facets of an individual's identity.

Critical race theorists have written about the ideas I describe in the preceding paragraphs for decades. It is stunning that the impact of their work has been, for the most part, confined to academic circles. The permanence of racism, implicit bias, the importance of narrative, intersection theory, and essentialism are concepts worn thin from seemingly endless dissection and examination among academics. Few in the business setting, however, engage with these ideas. Diversity training and programs, when designed properly, can expose business actors to insights about race that can be culturally transformative.

One of the most significant structural changes that companies can make would be to ensure that workers, managers, and leaders at all levels of corporate hierarchies take the work done by human resources and diversity and inclusion department professionals seriously. One former Associate Development Supervisor in Human Resources at The Home Depot, Inc., complained that the company did not take its human resources department and professionals seriously.[59] Her lawyer confirmed this, adding:

> [D]iscrimination is usually not a matter that really gets that far up the chain in the corporate structure. It is not a matter that anyone is really concerned about. They issue the policies, they issue all the programs on diversity but truthfully it has always been a matter that's dealt with at a very low level in any corporation.[60]

CONCLUSION

Most public corporations and many other types of business organizations expend significant effort and resources on diversity efforts. I encourage business leaders to consider that the genesis of the need to engage in these efforts is the continuing problem of discrimination. Efforts to increase diversity can only be successful if business leaders understand that discrimination persists. Leaders must understand that the groups of employees, suppliers, and consumers who work and do business with a firm will be diverse, and will be treated fairly, only if firm managers diligently monitor compliance with anti-discrimination law. Once business leaders understand that a lack of diversity among various

58. The seminal work on essentialism was written by Elizabeth Spelman decades ago. ELIZABETH V. SPELMAN, INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT (Beacon Press ed., 1988).

59. Interview with Glenor Cyrus (Oct. 6, 2006).

60. Interview with James Vagnini, Employment Discrimination Attorney (July 27, 2011).

corporate constituents results from a failure to monitor compliance with the laws that prohibit discrimination, diversity efforts become more meaningful and potentially successful.

A focus on compliance is a significant step toward achieving more ethical corporate cultures in general, and a focus on compliance with antidiscrimination law moves a firm toward greater diversity. However, "[l]ots of organizations focus on the latest compliance trends but fail to establish an ethical culture that deters misconduct."[61] Business managers must move beyond the check-the-box type of compliance in order to create more ethical climates.

Why should business leaders invest in meaningful compliance and diversity efforts? Do shareholders care about these issues? Some shareholders may not. When it comes to diversity on corporate boards, for example, a 2017 report from the Investor Responsibility Research Center Institute focuses on activist shareholders seeking to change or influence the composition of corporate boards at S&P 1500 firms.[62] According to the report, this type of shareholder activism did not increase racial, ethnic, or gender diversity. But some shareholders see board diversity as a crucial corporate governance issue. After 21st Century Fox paid millions to settle sexual harassment suits, an investment group approached the firm about increasing the number of women on its board beyond the one female director then serving.[63] Any disagreement that may exist among shareholders about the importance of diversity among the constituent groups with which their firms deal may not be salient. In other words, shareholder tastes for diversity may not be the most important factor in motivating business leaders to pursue diversity and anti-discrimination efforts. One recurring lesson in the aftermath of corporate scandal is that business leaders must consider their firms' reputations and potential public outrage in reaction to misconduct at their firms. This is an important lesson that is illustrated by the expression of public outrage to workplace sexual harassment and abuse that ignited the

61. Stephanie Francis Ward & Rachel M. Zahorsky, *Legal Rebels 2012: If the Shoe Fits . . .*, ABA J.: LEGAL REBELS (Sept. 2012), http://www.abajournal.com/magazine/article/legal_rebels_2012_if_the_shoe_fits (quoting Jordan Thomas, a lawyer who represents Dodd-Frank whistleblowers).

62. Andrew Borek, Zachary Friesner, & Patrick McGurn, *The Impact of Shareholder Activism on Board Refreshment Trends at S&P 1500 Firms*, INVESTOR RESP. RES. CTR. INST. (2017).

63. *See* Emily Steel, *21st Century Fox Pressed by Investment Group to Overhaul Board,* N.Y. TIMES (Oct. 12, 2017), https://www.nytimes.com/2017/10/12/business/media/21st-century-fox-sexual-harassment.html (calling for an overhaul of 21st Century Fox's board). *See also* Kristin N. Johnson, *Banking on Diversity: Does Gender Diversity Improve Financial Firms' Risk Oversight?*, 70 S.M.U. L. REV. 327 (2017) (contending that the failure to enhance gender diversity in leadership ranks of financial services firms may undermine important goals, such as risk management oversight).

2017–2018 #MeToo and #TimesUp movements.

It is clear that the discourse, norms, and practices relating to sexual discrimination and harassment in the business context have evolved. Feminist activists and their outspoken intolerance of sexual harassment, abuse, and discrimination have created new norms for women in business. This activism has uncovered hidden, but persistent, sexism, and this revelation has resulted in intolerance for behavior once tolerated. Private businesses quickly fired powerful men in the face of credible allegations of sexual harassment. That is why I celebrate the private sector as a potentially promising locus for the fair treatment of women.

In an insightfully critical opinion piece about the changes in employer response to sexual abuse and harassment allegations, Daphne Merkin, a critic and writer, challenged recent employer responses to sexual harassment and abuse allegations. "We are witnessing the re-moralization of sex, not via the Judeo-Christian ethos but via a legalistic, *corporate* consensus."[64] My thoughts regarding the correctness of this comment are beyond the scope of this Essay. My point in citing to this observation is simply to highlight the salience of business organizations in general, and more narrowly corporations, in shaping our lives, relationships, and interactions, and potentially mitigating the impact of racism and sexism in the business setting.

Most salient for me are Merkin's observations that dig deeply into the notions and discourse about how women are treated in the business setting. Lamenting the loss of "subtlety and reflection" in public discussion about and employer reaction to sexual harassment and abuse allegations, Merkin longs for nuance and clarification. She asks: "What is the difference between harassment and assault and inappropriate conduct?"[65] Further demonstrating the careful and in-depth thinking and discourse on this issue, others engaged and disagreed with her positions.[66]

It is important that the nation is engaging in a discussion that moves

64. Daphne Merkin, Opinion, *Publicly, We Say #MeToo. Privately, We Have Misgivings*, N.Y. TIMES (Jan. 5, 2018), https://www.nytimes.com/2018/01/05/opinion/golden-globes-metoo.html (emphasis added).

65. *Id.* Anticipating the protest where celebrities promised to dress in black to protest sexual harassment and abuse of women in the workplace, Merkin wrote:

> [M]any of us, including many longstanding feminists, will be rolling our eyes, having had it with the reflexive and unnuanced sense of outrage that has accompanied the [anti-sexual harassment movement] from its inception, turning a bona fide moment of moral accountability into a series of ad hoc and sometimes unproven accusations. *Id.*

66. *See, e.g.*, Samantha Grasso, *Do Women with #MeToo 'misgivings' have the right to call themselves feminists?*, DAILY DOT (Jan. 5, 2018), https://www.dailydot.com/irl/daphne-merkin-metoo (characterizing Merkin's writing as attempting to shame women into silence).

beyond the superficiality that typified previous discussions about sexism and sexual harassment. This evolution of thought, nuanced discourse, and practice, however, that characterizes the 2017–2018 protest movement relating to sexism in the business setting has not yet occurred with respect to issues relating to race and racism.[67] My hope is that these important potential changes in the business context in the way (white) women are treated will lead eventually to a similar intolerance for race discrimination and harassment that impede the attainment of racial diversity in the private sector. My more modest, but perhaps more attainable, hope is that the discourse on race and racism will become less superficial and more nuanced in a way that is similar to the discourse about sexual abuse, harassment, and discrimination.

67. For example, there was far less reporting and discussion about race discrimination at Fox even though eleven employees filed a class action and one individual filed a suit alleging racial harassment. *See* Sydney Ember, *11 Sue Fox News, Citing 'Intolerable' Racial Bias*, N.Y. TIMES (Apr. 25, 2017), https://www.nytimes.com/2017/04/25/business/media/fox-news-racial-discrimination-lawsuit.html (noting the lawsuits contend that Fox News employees repeatedly complained about racial discrimination to current network executives but no action was taken and the inappropriate behavior continued).

POSITIVE DISRUPTION: ADDRESSING RACE IN A TIME OF SOCIAL CHANGE THROUGH A TEAM-TAUGHT, REFLECTION-BASED, OUTWARD-LOOKING LAW SCHOOL SEMINAR

ALEXI NUNN FREEMAN AND LINDSEY WEBB*

Addressing race in the legal classroom has long been a potentially disruptive, even professionally hazardous, act. Despite multiple innovations in the legal curriculum, the decades-long discussion regarding racial inclusion in law schools has led us to the same, largely race-avoidant, place. Now, as we navigate a tumultuous period in which issues of marginalization, structural oppression, and active movement are occupying a prominent space, the need to respond to the growing demands of marginalized communities as well as students' desires to deepen their understanding of racial injustice is even more pressing. This Article contributes to the literature addressing the inclusion of race in the law school curriculum by providing an analysis of one race-focused course, the Critical Race Reading Seminar (CRRS), developed and taught by a group of professors at the University of Denver Sturm College of Law.

The CRRS is designed to be a source of positive disruption in the legal academy in several ways. Unlike the traditional legal classroom, in which the racial origins and implications of law and policy may be invisible or marginalized, the CRRS centralizes race as its primary focus. Because it is co-taught by a team of instructors, it upends the hierarchical nature of law school classrooms and faculties by modeling collaboration and a shared commitment to the study of race and the law. The seminar also uses non-fiction books rather than legal texts as framing devices for each semester and embraces assessments that are grounded in students' reflections. With its in-depth discussion and analysis of this structure, including lessons learned from implementation, this Article provides a template for other faculty members to more nimbly create and teach classes that address questions of race and other social justice issues of concern to law students and society.

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INTRODUCTION

Even now, well into the 21st century, addressing race in the legal classroom can be a disruptive, even professionally hazardous, act. Although legal scholars, practitioners, and students – along with studies of legal education – have long advocated for law schools to address the ways that race[1] is deeply embedded in the law and its practice, discussions of race in the legal academy often occur sporadically or in a subset of courses. While many law professors understand that the study and practice of law cannot be neatly separated from its racial history and implications, a variety of pressures and fears can push a focus on race to the margins of the course or out of the classroom altogether.

Critics have argued that when a legal curriculum lacks a sustained and thoughtful analysis of race and the law, law students of color can feel marginalized or worse;[2] white students are not required to examine legal issues from other perspectives or examine the role of race in their own

[1] Because the CRRS focuses primarily on issues of race, we focus on race and legal education in this Article; however, we are cognizant of the importance of intersectionality and ask readers to understand "race" here as representing all identities that require inclusion in the law school classroom, including but not limited to gender, sexual orientation, immigrant status, disability, and religion. The CRRS model could be adapted to address any or all of these topics.

[2] *See* Chris J. Iijima, *Separating Support from Betrayal: Examining the Intersections of Racialized Legal Pedagogy, Academic Support, and Subordination*, 33 IND. L. REV. 737, 754-55 (2000) (arguing that the "fiction that the dominant racial perspective is neutral" in law school courses causes law students of color to experience objectification, subjectification, and a sense of invisibility, which can lead to "disengagement and alienation"); Rhonda V. Magee, *Competing Narratives, Competing Jurisprudences: Are Law Schools Racist? And the Case for an Integral Critical Approach to Thinking, Talking, Writing, and Teaching About Race*, 43 U.S.F. L. REV. 777, 780-81 (2009) ("That law schools can and do perpetuate the privileges of "Whiteness" and disadvantages of "Blackness" and "Coloredness" embedded in our culture since the founding – i.e. that law schools inevitably manifest institutionalized racism against people of color – should by now be beyond cavil.").

lives;[3] and all students are deprived of a full understanding of legal history, our legal system, and cultural and interpersonal skills that will benefit their clients and their practice.[4] Add to these concerns the fact that the legal profession remains among the least diverse vocations in the U.S.,[5] and it can seem that, despite multiple innovations in the legal curriculum, the decades-long discussion regarding racial inclusion in law schools[6] has led us to the same, largely race-avoidant, place.

This Article contributes to the literature addressing the inclusion of race in the law school curriculum by providing an analysis of one race-focused course, the Critical Race Reading Seminar (CRRS), developed and taught by a group of professors at the University of Denver Sturm College of Law (Denver Law). The CRRS is designed to be a source of positive disruption in the legal academy in several ways. Unlike the traditional legal classroom, in which the racial origins and implications of law and policy may be invisible or marginalized, the CRRS centralizes race as its primary focus.[7] Because it is co-taught by a team of instructors, it upends the hierarchical nature of law school classrooms and faculties by modeling collaboration and a shared commitment to the

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[3] *See* Margalynne J. Armstrong and Stephanie M. Wildman, *Teaching Race/Teaching Whiteness: Transforming Colorblindness to Color Insight*, 86 N.C. L. REV. 635, 638-39 (2008) (contending that whiteness "often remains invisible during discussions of race," in law schools and elsewhere, and arguing that "legal educators must develop an understanding of the role of whiteness in the construction of equality and teach future lawyers to do so as well"); Marjorie A. Silver, *Emotional Competence, Multicultural Lawyering and Race*, 3 FLA. COASTAL L.J. 219, 220 (2002) ("[M]ost American lawyers are oblivious to the impact of race on the *practice* of law. Most lawyers are white, and most white people tend not to think about race unless it arises in the context of discrimination claims or other explicit race-related conflicts.").

[4] *See* Ellen Yaroshefsky, *Waiting for the Elevator: Talking About Race*, 27 GEO. J. LEGAL ETHICS 1203, 1203-1204 (2014) (discussing the need for law schools to teach cultural competency, which "allows students to explore the judgements that we all make through our own cultural lens;" helps lawyers establish strong attorney-client relationships by improving their ability to "identify and respond to the needs of their diverse clients" and effectively engage with clients of all backgrounds; and assists lawyers in their "ability to work with colleagues in a multicultural environment, and . . . to be engaged as members of a global world.").

[5] Deborah Rhode, *Law is the Least Diverse Profession in the Nation. And Lawyers Aren't Doing Enough to Change That,* WASH. POST (May 27, 2015), https://www.washingtonpost.com/posteverything/wp/2015/05/27/law-is-the-least-diverse-profession-in-the-nation-and-lawyers-arent-doing-enough-to-change-that/ [https://perma.cc/MYB9-J5SP] ("[A]ccording to Bureau of Labor statistics, law is one of the least racially diverse professions in the nation. Eighty-eight percent of lawyers are white. Other careers do better – 81 percent of architects and engineers are white; 78 percent of accountants are white; and 72 percent of physicians and surgeons are white."); Beverly I. Moran, *Disappearing Act: The Lack of Values Training in Legal Education – A Case for Cultural Competency,* 38 S. UNIV. L. REV. 1, 31 (2010) (describing the lack of diversity in the legal profession and noting that "there are few professional spaces as segregated as United States law schools").

[6] *See, e.g.*, Frances Lee Ansley, *Race and the Core Curriculum in Legal Education*, 79 CAL. L. REV. 1511 (1991) (arguing that law schools should integrate a focus on race into the core curriculum); Okianer Christian Dark, *Incorporating Issues of Race, Gender, Class, Sexual Orientation, and Disability into Law School Teaching*, 32 WILLAMETTE L. REV. 541 (1996) (encouraging law professors to incorporate conversations about "diversity issues" in law school courses); Gerald P. López, *Training Future Lawyers to Work with the Politically and Socially Subordinated: Anti-Generic Legal Education*, 91 W. VA. L. REV. 305, 307 (1989) (presenting a critique of legal education's failure to adequately educate attorneys to represent subordinated people through "its restricted models of teaching and learning, its disdain for lawyering and for training in all but a relatively small number of skills, its neglect of interdisciplinary theoretical ideas, its disregard of everyday life . . . ").

[7] Denver Law certainly offers other courses that intentionally address race. For example, in addition to several in-house clinics that directly grapple with racial considerations, the law school offers classes such as Multiculturalism, Race and the Law; Race and Reproductive Rights; and Critical Race Theory; among others.

study of race and the law. In order to challenge the conviction, easily gained in law school, that every problem can and should be solved with a legal solution, the course often incorporates experts from other disciplines and requires students to engage in the larger community that is addressing the issues we discuss in class. Finally, while topics discussed in the CRRS have changed each semester, the seminar uses a single, non-fiction book as a framing device each time, thus providing a view of the law that differs from the appellate case study to which most students are accustomed. Through these methods, the CRRS seeks to provide students with a substantive understanding of the application of critical race theory to a variety of contemporary legal and social issues, as well as a sense of professional identity through the examination of lawyering practice in the context of critical race theory.

We are living in a tumultuous period, in which issues of marginalization, structural oppression, and active movement are occupying a prominent space, and many in the legal academy are seeking to address these topics and their legal origins and implications while also coping with time and other demands that can impede meaningful analysis. By examining the structure of the CRRS, along with lessons learned from its implementation, this Article suggests that the course can serve as a template for other law faculties to more nimbly create and teach classes that address questions of race and other social justice issues of pressing concern to law students and society.

Part One reviews the arguments for incorporating race into the law school curriculum and asserts that these arguments have even greater urgency in our current political and social era. Part Two reviews the origins of the CRRS and its pedagogical goals and philosophy, and analyzes whether and how the CRRS has been successful in advancing those ideals. This Part also provides a nuts-and-bolts analysis of how the course is designed and managed, in order to assist other law school faculties who may wish to replicate the class in whole or in part. The Article then concludes.

I. LEGAL EDUCATION IS RACIAL EDUCATION

Whether or not law professors explicitly discuss race in their classes, law students are absorbing lessons about race and the law. Academic silence regarding race does not mean that race is invisible or absent; rather, many argue, the void left by this silence contains the presumption that the law is for and about white people or is somehow racially "neutral."[8] Legal professionals, including in formal studies of legal education,[9] have advocated for decades for a richer curriculum that better reflects the racial underpinnings and impacts of our laws and legal system. They argue that failure to do so can impede students from gaining pragmatic legal skills,[10] fully understanding

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[8] Armstrong and Wildman, *supra* note 3, at 655 ("Even when professors do not mention race as part of a course, race in general and whiteness in particular are present in the law school classroom and embedded in the law that the professor teaches. Race and the whiteness within race infuse discussions from which race is verbally absent, often resulting in alienation of students who become frustrated by the classroom silence on this important topic. Race and whiteness affect students and faculty from all racialized groups, but they often affect students and faculty of color differently from white students and faculty."); Moran, *supra* note 5, at 29 ("The idea that students learn as much from what schools exclude as from what schools teach is . . . [k]nown as the 'null curriculum").

[9] *See* Moran, *supra* note 5, at 50 (reviewing the findings of two reports analyzing legal education – the 1992 report from the American Bar Association's Legal Education and Professional Development Committee (the "MacCrate Report") and a 2007 report from the Carnegie Foundation for the Advancement of Teaching ("Educating Lawyers"), and writing that "[b]oth of these reports make strong claims for the importance of educating law students about gender, race, ethnic, and class differences, and the legal issues and professional responsibilities that accompany these identity categories").

[10] Shin Imai, *A Counter-Pedagogy for Social Justice: Core Skills for Community-Based Lawyering*, 9 CLINICAL L. REV. 195, 200 (2002) (arguing that law schools should teach students "three core skills necessary for community

legal doctrine,[11] and grappling with essential questions implicating values, morality, and justice essential to the practice of law.[12] Suggestions for improvement have included incorporating race throughout the first-year (or entire) curriculum, in clinics and externships, and in specialized seminars.[13] Some have argued that true reform requires transforming a law school culture that upholds the status quo, promotes hierarchy, and quashes an understanding of and desire to promote social justice.[14]

Law schools and individual professors have responded to these critiques by introducing specific classes focused on race[15] and by incorporating racial analyses into courses in creative and meaningful ways.[16] Further, the rise of experiential learning in legal academia has exposed students to the racial origins and impacts of our laws by virtue of increased student contact with clients and the legal system, and many law professors teaching experiential courses explicitly incorporate race into the curriculum. Still, despite these efforts, legal education as a whole is far from a race-conscious discipline,[17] and critiques of its failure to require students to study the connections

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lawyering – collaborating with a community . . . recognizing individuality . . . and taking a community perspective").

[11] Dark, *supra* note 6, at 544 (presenting multiple reasons for law professors to include issues of "race, gender, class, sexual orientation, and disability in law school education," including the argument that "these issues can assist in revealing the limits of legal doctrines and, in some cases, how the doctrine itself undermines the overriding purpose or goals of the law").

[12] Peter L. Davis, *Why Not a Justice School? On the Role of Justice in Legal Education and the Construction of a Pedagogy of Justice*, 30 HAMLINE L. REV. 513, 519-525 (2007) (arguing that "law school has made almost a fetish of discouraging exploration of morality, fairness, and justice," and suggesting that "in order to fulfill their roles as lawyers, citizens, and morally autonomous individuals, lawyers must also be trained in the issues of justice and inequity facing our society," including issues relating to race).

[13] *See, e.g.,* Frank René López, *Pedagogy on Teaching Race & Law: Beyond 'Talk Show' Discussions*, 10 TEX. HISP. J. L. & POL'Y 39, 41-42 (2004) (asserting that "[l]aw school by its very nature" has ample opportunities to discuss race, "[b]esides topics such as affirmative action, where a discussion on race and racism is essential, there are many other subjects that could easily include material on race, discrimination, and/or racial healing," including constitutional law, education law, and sports law, but in order to discuss race effectively professors must address history, statistical data, social science, and "critical analysis on how the law is shaped."); Moran, *supra* note 5, at 29 (discussing ways to incorporate race – and gender, class, and ethnicity – throughout the legal curriculum).

[14] *See, e.g.,* Iijima, *supra* note 2, at 758 ("[M]ere inclusion of racial, gender, or sexual orientation issues into the curriculum is not enough, but rather what is also necessary is the understanding and the acknowledgement of how these issues play out within the law, the society, and the classroom.") (citing Stephanie M. Wildman, *Privilege and Liberalism in Legal Education: Teaching and Learning in a Diverse Environment*, 10 BERKELEY WOMEN'S L.J. 88, 89 (1995); Kathryn M. Stanchi, *Resistance Is Futile: How Legal Writing Pedagogy Contributes to the Law's Marginalization of Outsider Voices*, 103 DICK. L. REV. 7, 9 n.14, 21 n.83 (1998)).

[15] *See, e.g.,* Bill Ong Hing, *Raising Personal Identification Issues of Class, Race, Ethnicity, Gender, Sexual Orientation, Physical Disability, and Age in Lawyering Courses*, 45 STAN. L. REV. 1807 (1993) (discussing teaching courses with a focus on a variety of skill sets valuable to working with "subordinated or disadvantaged communities or in public interest law," including a focus on racial and other identities).

[16] *See, e.g.,* Alina S. Ball, *Disruptive Pedagogy: Critical Theory in Business Law Clinics*, 22 CLINICAL L. REV. 1 (2015) (describing the introduction of critical theory into business law clinics, thus "exposing future corporate lawyers to critical legal theory").

[17] *See* Deborah N. Archer, *There is No Santa Claus: The Challenge of Teaching the Next Generation of Civil Rights Lawyers in a "Post-Racial" Society*, 4 COLUM. J. RACE & L. 55, 61 (2013) (noting that "[r]ace is not significant focus of the typical law school curriculum. Unless a student seeks out courses on race, she will likely graduate having only studied racial discrimination in her constitutional law course." Further explaining that because the racial cases studied in law school focus "on unambiguous evidence of an intent to discriminate on the basis of race," and Supreme Court cases in recent years

between race and the law remain relevant today. Before focusing on the development and structure of the CRRS, it is helpful to briefly review the arguments that scholars and practitioners have made for inclusion of race in the legal academy. These arguments both help frame the formation of the CRRS and can guide the analysis of how this model of teaching race in the legal academy succeeds and where it falls short.

A. Addressing Race Promotes Competency in Legal Practice

When law schools fail to address race in a meaningful way, critics argue, students can graduate from law school lacking fundamental skills inherent to the successful practice of law. As Professor Margaret M. Russell wrote more than twenty years ago, law students who have not been required to think meaningfully about race and the law are impeded in achieving one of the fundamental goals of a legal education – learning to "think like a lawyer."[18] This skill extends beyond the memorization of legal rules to understanding how "to think critically about the function of subordination on the basis of race, gender, sexual orientation, class, age, and disability."[19]

Lawyers lacking an understanding of racial inequities in the application of the law may also fail to fully understand the ways that judges or juries may view their clients or particular legal arguments. This deficiency can negatively impact the ability of lawyers to make informed decisions about their cases and adequately advise their clients about their options.[20] In addition, law school graduates may possess insufficient cultural literacy and lack "cross-cultural competencies," thus impeding relationship-building with their clients and colleagues.[21] When attorneys are trained in legal academies where they have not been taught to engage with the law from multiple perspectives, they may be hindered in their ability to creatively problem-solve in practice.[22] Further, without an understanding of racial realities in our legal system, lawyers may be less inclined or prepared to think critically about the system or pursue reform where needed.[23] When law schools neglect the study of race, they are therefore failing to provide their students with fundamental professional skills required to practice law competently and thoughtfully.

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have adopted a "colorblind" perspective, many students are only able to identify racism in "blatant acts of discrimination.").

[18] Margaret M. Russell, *Beginner's Resolve: An Essay on Collaboration, Clinical Innovation, and the First-Year Core Curriculum*, 1 CLINICAL L. REV. 135, 138-142 (1994).

[19] *Id.* at 142.

[20] Archer, *supra* note 17, at 67, 69-70 (arguing that "post-racial analysis . . . erects barriers to effective representation by limiting students' thoughts about potential legal options and courses of action" and further noting that an attorney must recognize her own attitudes towards race and racism because those attitudes may "impact her interactions with her client, her examination of the legal and factual issues presented in the case, the course of action selected, and the attribution of blame").

[21] *Id.* at 67 (noting that in her experiences supervising clinical students, "the students' post-racial orientation inhibited the development of a positive lawyer-client relationship. In the end, the burden was placed upon the clients to prove the relevance of race and to thus overcome the students' post-racial orientation"); Yaroshefsky, *supra* note 4, at 1204 (discussing how cultural competence improves relationships with clients and colleagues).

[22] Dark, *supra* note 6, at 552 (stating that incorporating diversity issues into the law classroom pushes students to consider a broader range of problem-solving skills; students must be "shown how they might build a bridge between the legal problem-resolving system and their own so they can be effective lawyers and citizens").

[23] Davis, *supra* note 12, at 525-527 (asserting that the law school curriculum is designed to create lawyers who defend the status quo, and suggests instead a justice-focused pedagogy that would assist students to "embrace change of a legal system in which fairness, inequity, and injustice cry out for change").

B. Addressing Race Advances a More Accurate Understanding of the Law

Critics further argue that when law professors do not address issues of race in their courses, they are not providing students with a full and accurate understanding of legal doctrine. Law students have long been encouraged to think of the law as a series of logical principles derived by appellate judges. In truth, as noted by scholars and others, our laws and legal system have emerged from both noble principles and rank bigotry, from egalitarian beliefs and from the desire to maintain power, from human acts ranging from the most principled to the most depraved.[24] Property law has connections to slavery and Native American land claims,[25] evidence to the introduction of racial bias into criminal trials,[26] contract law to questions of inequality in bargaining choices,[27] constitutional law to racist legislation.[28] When law schools do not address these aspects of the law, students arguably do not have a complete understanding of how legal doctrine is created and of the fact that even seemingly race-neutral laws can be applied in racially discriminatory ways. Without such an understanding, lawyers are not equipped with the tools needed to thoughtfully engage with the law throughout their careers and to participate in creating new law through legislation, rule-making, and litigation.

C. Addressing Race Furthers the Consideration of Justice and Values in the Legal Profession

Among the arguments for the meaningful inclusion of race in the law school curriculum is the belief that considerations of justice and societal values are necessary both to a robust legal education and to the health of the legal profession.[29] Students cannot adequately consider what

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[24] *See, e.g.,* López, *supra* note 13, at 63 (describing aspects of critical race theory, including its analysis of how the law is created and by whom; noting that "[p]eople are influenced by their personal experiences and biases . . . one must not only evaluate the application of the law, but must also remember that it is equally important to consider *who* shapes the law").

[25] *See* Moran, *supra* note 5, at 46-47 (discussing opportunities to introduce questions of class, sex, race, and ethnicity into first-year law school courses); *see also* Florence Wagman Roisman, *Teaching About Inequality, Race, and Property*, 45 ST. LOUIS U. L.J. 665, 675 (2002) (discussing the incorporation of a racial focus into a Property course, including addressing the "many cases that appear throughout the Property curriculum [that] illuminate ways in which white supremacist ideology and action have been a substantial cause of racial disparities in control of property").

[26] Isabelle R. Gunning, *An Essay on Teaching Race Issues in the Required Evidence Course: More Lessons from the O.J. Simpson Case*, 28 SW. U. L. REV. 355, 356 (1999) (discussing use of the Simpson case to discuss "the intersection between bias – in particular, racial bias – and various restrictions and prohibitions on the use of character evidence").

[27] Deborah Zalesne, *Racial Inequality in Contracting: Teaching Race as a Core Value*, 3 COLUM. J. RACE & L. 23, 24-25 (2013) (discussing the inclusion of race in a contracts course; "[c]ontract law provides a particularly rich and interesting backdrop for the analysis of racial assumptions, in part because of its racially-charged history and the ways in which the doctrine is inextricably linked to race. Further, a complete understanding of contract disputes routinely requires an analysis of the effects of inequality, including race dynamics, on parties' bargaining choices.").

[28] *See* Ansley, *supra* note 6 (discussing teaching race in a variety of law school courses, including Property and a focus on race and the Constitution in a Discrimination class).

[29] *See, e.g.,* Moran, *supra* note 5, at 30-31 (positing that values training – including the "gender, race, ethnic, and class aspects" of that training – is essential to legal education, because "[n]ot only are values an essential part of professional development, but law school is the proper place to acquire values. Professional licensing recognizes that professional morals are not private. Instead, professional morals are public morals . . . Public morals require transmission as part of the apprenticeship experience because professional values are an essential part of professional life.").

constitutes 'justice' or 'good law,' or what values they themselves hold, without understanding how the law impacts the lives of all those in our society. Failing to address race in law schools thus inhibits a thorough examination of what constitutes a 'just' outcome in a case or in addressing an issue of social concern, as students will be ill-equipped to think critically about how and why such outcomes might impact people of color and white people differently.[30] Professor Peter Davis and others advocate instead for a legal academy in which "wrestling with justice and injustice" is of as much importance as "advocacy based on distinguishing precedents."[31] Students educated in such an academic environment would have the opportunity to gain a more complex and nuanced understanding of what it means to pursue or obtain justice and a more critical lens through which to contemplate whether or not their own law practice is consistent with their values.[32]

D. Addressing Race (Competently) Reduces Alienation in the Legal Academy

Critiques of the ways in which legal education fails to adequately address race extend to the traditional Langdellian, lecture-and-Socratic-questioning method of teaching the law.[33] Some observers note that this approach, particularly when coupled with academic silence about race, has served to alienate and even silence students of color.[34] To these critics, the hierarchical nature of the traditional law school classroom mirrors structural inequalities in society,[35] and a legal education that seeks to promote a concept of the law as racially neutral (or simply side-steps race altogether) can be profoundly troubling to students who know or intuit that the law and race are deeply intertwined.[36] Students of color, already a distinct minority at all but a handful of U.S. law

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[30] M.K.B. Darmer, *Teaching Whren to White Kids*, 15 MICH. J. RACE & L. 109 (2009) (describing the challenges of teaching racial profiling to a classroom of mostly white students who have not experienced profiling themselves, as white people and people of color are likely to have experienced the criminal justice system in vastly different ways).

[31] Davis, *supra* note 12, at 518, 522.

[32] Laurie A. Morin, *Reflections on Teaching Law as Right Livelihood: Cultivating Ethics, Professionalism, and Commitment to Public Service From the Inside Out*, 35 TULSA L. J. 227, 229 (2000) (discussing the importance of teaching values in law school through a learning process that will help students "continue to question how to practice law in a way that is consistent with their deepest held values, beliefs, and goals").

[33] *See* Iijima, *supra* note 2, at 742-759 (reviewing the critiques of traditional law school pedagogy, and concluding that "[w]ith all the criticism of the law school's curriculum, the most damning are not those which criticize the distance between what is taught and what must be learned to practice competently and ethically; the most damning are those criticisms about how law teaching obfuscates what law 'is' and how that obfuscation exacerbates the alienation of students of color and women from the study of law itself. It is this dynamic that ultimately duplicates and perpetuates the same subordination that these law school populations experience in the larger society."); Filippa Marullo Anzalone, *It All Begins with You: Improving Law School Learning Through Professional Self-Awareness and Critical Reflection*, 24 HAMLINE L. REV. 324, 345 (2001) (reviewing the history of legal education and the development of the case method and writing that "critical pedagogy views the educational process as an effort by dominant social groups to impose a particular value system on students").

[34] *See* Iijima, *supra* note 2, at 751-752.

[35] *Id.* at 751-752; Lolita Buckner Inniss, *'Other Spaces' in Legal Pedagogy*, 28 HARV. J. RACIAL & ETHNIC JUST. 67, 80 (2012) (noting the educational scholarship that "addresses the extent to which the spatiality of the academy and educational institutions both produce and reproduce social hierarchy").

[36] Inniss, *supra* note 35, at 82-84 ("C[ritical] R[ace] T[heory] classes are often conceived of as 'safe spaces' for students of color or other socially-subordinated groups in the legal academy, places where such students can take refuge from the cool rationalism, empiricism, and universalism on display in many standard law school classes."

schools,[37] can feel further estranged from the law and their learning environment by an academic culture in which they have reason to suspect that their experiences and beliefs are not those imputed to the ubiquitous 'reasonable man.'[38] To those who view legal education in this way, merely incorporating race into the curriculum – while a meaningful effort – does not sufficiently address the deeper inequities of legal academia and its allegiance to hierarchy, power, and prestige.[39] In order to take on these issues, legal academics must not only address race in the classroom and the lack of diversity in the profession, but also consider ways to restructure traditional teaching methods and classroom dynamics in an effort to increase collaboration and equality in the legal academy.[40]

Recent years have brought race to the forefront of our social consciousness, with the election of President Barack Obama, societal belief in – and pushback against – a vision of the United States as "colorblind,"[41] a sustained focus on police violence against African American people,[42] the Black Lives Matter movement, and the election of President Donald Trump with its attendant race-based policies, racial attacks, and rhetoric.[43] These events add more urgency to the arguments for addressing race in the law school curriculum, and many law professors are working hard to incorporate these and other race-focused topics into their classrooms, clinics, and externship seminars.

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[37] *See* Mike Stetz, *Most Diverse Law Schools*, PRE-LAW 34 (Winter 2015), http://www.nxtbook.com/nxtbooks/cypress/prelaw_2015winter/index.php#/32 [https://perma.cc/54K9-PZKA] (listing the law schools that "best match the nation's mix for racial diversity").

[38] Susan Sturm and Lani Guinier, *The Law School Matrix: Reforming Legal Education in a Culture of Competition and Conformity*, 60 VAND. L. REV. 515, 516 (2007) (discussing the ways in which law school culture fails to adequately prepare students to be attorneys, and "contributes to law student disengagement, particularly for women and people of color").

[39] *Id.* at 524 (noting that those who seek to reform law schools "do not engage those features of law schools that reinforce the culture of competition and conformity . . . They focus on the substance of the curriculum, but leave the underlying culture intact").

[40] *See, e.g.,* Armstrong and Wildman, *supra* note 3, at 658 (discussing ways that law faculty can "[develop] an ability to talk in the classroom and in the institution about race and the whiteness that is part of race," including institutional programming, common reading, and introducing race into a variety of classes).

[41] *See* Archer, *supra* note 17, at 57 (describing the rise of a "post-racial narrative" in the United States beginning shortly after the abolition of slavery and culminating in the election of Barack Obama, and observing the impact of that narrative on the view, held by some law students, that "racial distinctions are largely irrelevant to them as individuals and their role as lawyers"); Sturm and Guinier, *supra* note 38, at 533 (noting that law schools do not prepare students to work collaboratively).

[42] *See, e.g.,* Nancy C. Marcus, *From Edward to Eric Garner and Beyond: The Importance of Constitutional Limitations on Lethal Use of Force in Police Reform*, 12 DUKE J. CONST. L. & PUB. POL'Y 53 (2016) (focusing "on a series of notorious police killings of unarmed black civilians that occurred from July 2014 through July 2015 . . . police killings that inspired the Black Lives Matter movement and nationwide discourse--often quite heated--around the issue of discriminatory and excessive police force").

[43] *See, e.g.,* Katie Reilly, *Racist Incidents Are Up Since Donald Trump's Election. These Are Just a Few of Them,* TIME MAG. (Nov. 13, 2016), http://time.com/4569129/racist-anti-semitic-incidents-donald-trump/ [https://perma.cc/52EN-SNMU] (describing series of race or religion-based attacks in the United States following the election of Donald Trump); Alan Blinder, Serge F. Kovaleski, and Adam Goldman, *Threats and Vandalism Leave American Jews on Edge in Trump Era*, N.Y. TIMES (March 1, 2017), https://www.nytimes.com/2017/02/28/us/jewish-community-center-donald-trump.html [https://perma.cc/G7RE-PNQA] (describing bomb threats at more than 100 Jewish community centers and vandalism at Jewish cemeteries since the beginning of 2017); Tim Marcin, *In Donald Trump's America, Racism is Becoming an Even Bigger Prolem, Americans Say in Poll*, Newsweek (Sept. 14, 2017), http://www.newsweek.com/donald-trumps-america-racism-becoming-even-bigger-problem-americans-say-poll-665024 [https://perma.cc/2VTJ-7S3N].

Still, the task can seem daunting. Law professors struggle with fears and pressures when they consider how best to undertake this work, including the need to "cover" the law in a single course in a limited period of time; the risk of poor student reviews; the threat of a professional backlash against professors, particularly professors of color or professors without tenure status, who attempt to address race; and nervousness about handling a racial issue insensitively or clumsily.[44] Mindful both of these concerns and of seeking to promote greater inclusion of race in law school pedagogy, this Article describes a model that can assist law professors in creating courses that address race, with a template that can be adapted to address current events more easily than many traditional law school courses,[45] and a format that serves to promote collaboration and community, and disrupt hierarchy.[46]

II. THE CRITICAL RACE READING SEMINAR AT DENVER LAW

A. The Origins of the CRRS

In 2013, a group of professors at Denver Law formed the Rocky Mountain Collective on Race, Place, and Law (RPL).[47] This group is open to all employees at the law school who agree to sign on to a list of shared principles rooted in critical race theory,[48] and currently includes members

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[44] *See, e.g.,* Armstrong and Wildman, *supra* note 3, at 655-656 (discussing barriers to addressing issues of race in the law school classroom, including student hostility to professors of color who address race issues and fears of professors of being "misinterpreted or . . . perceived by students as racially insensitive"); Ansley, *supra* note 6, at 1559 (reporting student comments that the author "favors 'people of color' and their comments" in class and also recounting that "some students came to me privately to express their fears of the reaction I might provoke against myself and against other students if I expressed too many 'pro-black' or 'pro-woman' sentiments"); Kathryn Pourmand Nordick, *A Critical Look at Student Resistance to Non-Traditional Law School Professors*, 27 W. NEW ENG. L. REV. 173, 193 (2005) (reviewing course evaluations of women faculty members and people of color, and noting the differences in criticism of those professors in comparison to male and/or white professors, including comments that these "non-traditional" professors were "too political" and "share their personal views too much"); Dark, *supra* note 6, at 557-560 (addressing barriers to discussing "diversity" in the law school classroom, including fears of student criticism, causing unintentional offense, and introducing strong emotion into the classroom).

[45] *See* Ansley, *supra* note 6, at 1590 (proposing that among the barriers to increasing the discussion of race in law schools are "institutional inertia and concerns about teacher autonomy. It is costly for teachers to change the ways they teach; time spent developing new materials and approaches is time not spent on all the other things that professors do.").

[46] *See* Sheila I. Vélez Martínez, *Towards an Outcrit Pedagogy of Anti-Subordination in the Classroom*, 90 CHI.-KENT L. REV. 585, 590-591 (2015) (describing methods by which law professors can avoid "the reproductions of hierarchies of power and subordination" in the classroom).

[47] The Rocky Mountain Collective on Race, Place, and Law (RPL) "offer[s] a critical lens on the complex dynamics of power, locality, and law, and their impact on subordinated communities. As scholars rooted in critical legal theory, we recognize the intersectionality of all individuals; through our teaching, scholarship and activism we aim to expose and challenge law's role in perpetuating inequities based on race, class and gender and other sources of disadvantage. We employ our collective efforts and expertise to effect change and pursue social justice." *Rocky Mountain Collective on Race, Place, and Law*, UNIV. DENV. STURM C. L., http://www.law.du.edu/index.php/rocky-mountain-collective-on-race-place [https://perma.cc/F4WR-AMSH] (last visited Nov. 26, 2017).

[48] The list of RPL principles reads:

- Antiessentialism – We resist attributing particular sets of traits to particular groups, or to individual members of those groups.
- Antisubordination – We are concerned about subordination, power, and substantive justice, rather than mere normal equal treatment.

of the staff, administration, and faculty.[49] RPL hosts and sponsors a variety of events focused on racial justice topics, including lecture series, conferences, and student-oriented lunch presentations, and its members are committed to scholarship, teaching, and action in furtherance of their shared principles.

The idea for the CRRS grew out of RPL's first Critical Race Reading Group, in which employees at the law school met over the course of a semester to discuss Professor Michelle Alexander's influential work, *The New Jim Crow*.[50] After learning that law students were interested in participating in this group, RPL members began to discuss the possibility of starting a similar program involving students at the school. Upon further reflection, including the belief that law students would have more time to read and prepare for these discussions if they received academic credit, RPL members proposed creating a course focused on racial justice issues, an idea which led to the creation of the Critical Race Reading Seminar.

In many ways, Denver Law is ahead of the curve when it comes to studying race and the law. Many members of the faculty are engaged around these issues, courses focused on race or incorporating racial topics are often included in the curriculum, and the school boasts a well-established clinical program and externship office through which many students experience questions of race and the legal system first-hand. It became clear from speaking with students, however, that during a time of racial tensions and societal turmoil, in a law school with a student body that is majority white, students of all races desired additional forums to address issues involving race, society, and the law.[51]

B. The CRRS Model

While the CRRS acts in some ways as a traditional legal seminar – a small class focused on a discrete topic, held within the law school and primarily taught by law professors – both the pedagogy and materials of the course are intended to challenge students to think meaningfully about

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- Globalism – We believe that subordination is both a local and a global phenomenon, and that our principles and values can inform and be informed by subordinated communities, both domestically and internationally.
- Hegemony – We believe that power works not only directly and coercively but also hegemonically – that power affects the ways people perceive "reality" as well as their understandings of what constitutes "knowledge" about the world.
- History – We believe that critical engagement with history is centrally important to understanding how power operates through race, gender, sexuality, and class to de-center and marginalize the lived experiences of subordinated peoples.
- Intersectionality – We recognize the multidimensionality of individual identity and the complex, mutually reinforcing relationships among systems of subordination.
- "Meritocracy" – We question the notion of "meritocracy," and the assumption that standards of "merit" can be neutral under current social conditions.
- Multiplicity of Non-Whiteness – We recognize that non-whiteness takes many forms and has varied impacts.
- Praxis – We believe in doing as well as talking, in working to make real change in the world.
- Privilege – We believe that group based privilege, such as race, class, gender, and heterosexual privilege, is pervasive in society.

[49] RPL does not represent every member of the Denver Law community dedicated to racial justice and critical race theory, and RPL members stand together with our colleagues who may not be a part of RPL but work to further our common values and principles.

[50] MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2011).

[51] This instinct has been reinforced by the waiting lists associated with this course each semester it is offered.

the interconnections between race, society, and the law in a format that seeks to disrupt the dynamics of a traditional law school classroom. At the time of the writing of this Article, the CRRS has been offered four times at Denver Law, and the following observations are based on those four semesters of teaching experiences, student reflections, and student and faculty feedback. The Authors are the two RPL faculty members who have served as CRRS course administrators, and we note that the following analysis reflects our opinions only and not necessarily those of our colleagues.

1. Faculty Collaboration and the Tag-Team Model of Teaching

There is a growing recognition that the art of collaboration is needed for ultimate success as a lawyer.[52] And, in recent years, more and more faculty are finding ways to teach and foster collaboration in their classrooms.[53] What appears to be less common, however, is the idea of collaborative teaching in the legal classroom.[54] Scholars at the Sandra Day O'Connor College of Law explain collaborative teaching in the following way:

> Collaborative teaching (or co-teaching) involves two or more faculty who regularly and purposefully share instructional responsibility for a single group of students. Collaborative teaching has been used in secondary education, special education, and undergraduate courses for quite some time, but has been slow to

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[52] *See The Whole Lawyer and the Character Quotient*, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS. 27 (2016), http://iaals.du.edu/sites/default/files/reports/foundations_for_practice_whole_lawyer_character_quotient.pdf [https://perma.cc/J25X-RVE5] (reporting that a survey of over 24,000 lawyers from a range of practices found that nearly three in four respondents (73%) indicated that the ability to work collaboratively as part of a team was necessary in the short term for success as new lawyers.). A study by Harvard Law School professor Heidi Gardner found that collaboration creates a "more client-focused approach, and then clients care that their firms are collaborating." Gardner also found that "collaboration has become necessary in part, because lawyers have become so specialized." Eilene Spear, *Law Firm Collaboration: A Way Forward,* NAT'L L. REV. (Sept. 29, 2015), http://www.natlawreview.com/article/law-firm-collaboration-way-forward [https://perma.cc/ZYU3-4AA7].

[53] For example, Professor Robert Schuwerk asks students in a 1L course to organize themselves on the basis of friendship into law firms comprised of two to four students. Robert P. Schuwerk, *The Law Professor as Fiduciary: What Duties Do We Owe to Our Students*, 45 S. TEX. L. REV. 753, 791 (2004). *See also* Barbara Taylor Mattis, *Teaching Law: An Essay,* 77 NEB. L. REV. 719, 721 (1998); Orin S. Kerr, *The Decline of the Socratic Method at Harvard,* 78 NEB. L. REV. 113, 123-26 (1999*)*; Sarah E. Thiemann, *Beyond* Guinier: *A Critique of Legal Pedagogy*, 24 N.Y.U. REV. L. & SOC. CHANGE 17, 28-29 (1998); M.H. Sam Jacobson, *A Primer on Learning Styles: Reaching Every Student,* 25 SEATTLE U. L. REV. 139, 168 (2001); Steven I. Friedland, *How We Teach: A Survey of Teaching Techniques in American Law Schools*, 20 SEATTLE U. L. REV. 1, 29-30 (1996) (explaining that a survey exploring professors' teaching models found that small groups of two or more students in order to work together to resolve doctrinal issues, work out problems, or synthesize rules of law is becoming common, but is used primarily in "skills courses"; in first year courses, for example, only seventeen percent of the respondents who teach those courses stated they used small group methods, while sixty-two percent said they did so in upper level courses).

[54] Melissa Marlow, *Law Faculties: Moving Beyond Operating as Independent Contractors to Form Communities of Teachers*, 38 OHIO N. UNIV. L. REV. 243, 247 (2011), (noting that the push toward teaching our students to become independent thinkers likely impacts our disinclination to work cooperatively as teachers and that few of us have much real knowledge about what others do in their classes). ANN E. AUSTIN & ROGER G. BALDWIN, FACULTY COLLABORATION: ENHANCING THE QUALITY OF SCHOLARSHIP AND TEACHING 44, 62-81 (Bryan Hollister & Barbara Fishel eds., 1991) ("Collaboration among faculty often raises issues of power, influence, professional identity, and integrity. Evaluating individual contributions to collaborative endeavors and allocating credit fairly among partners are difficult challenges that frequently plague collaborators.").

catch on in legal education . . . [55]

The CRRS is therefore atypical in legal education in that it employs a collaborative, team-teaching model. Because the study of race[56] – and students interested in studying race,[57] as well as students of color in general[58] – have been historically marginalized within legal education, reducing student alienation and promoting community through team-teaching was an explicit pedagogical goal in the development of the CRRS. A team-teaching approach also allows multiple professors to address race in the same class, which may reduce the risk of 'backlash' against a particular professor for addressing difficult or controversial issues,[59] but also serves as a demonstration that teaching and discussing race is the responsibility of all members of the faculty.[60]

The CRRS team-teaching model incorporates faculty from different disciplines within the law school – externship, in-house clinical, podium, and legal writing – who have interest and expertise in critical race theory and racial justice.[61] In addition to the variety in our teaching methods

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[55] Susan M. Chesler and Judith M. Stinson, *Team Up for Collaborative Teaching*, 23 PERSPECTIVES: TEACHING LEGAL RES. & WRITING 169, 170 (2015) ("[T]eachers take turns presenting different content to the same group of students. Alternative teaching can be used for an entire course or select topics. Teachers could, for example, alternate by teaching different topics every class period throughout the semester, or one faculty member may teach only one (or a few) topics throughout the course. Alternative teaching does involve more than just being a guest lecturer; both faculty have responsibility, to some extent, for planning, teaching, and assessing students . . . Alternative teaching works well in classes with discrete topics that can be naturally divided.").

[56] *See, e.g.,* Francisco Valdes, *Insisting on Critical Theory in Legal Education: Making Do While Making Waves*, 12 BERKELEY LA RAZA L.J. 137, 153 (2001) (citing Francisco Valdes, *Foreword—Under Construction: LatCrit Consciousness, Community and Theory,* 85 CAL. L. REV. 1089, 1093-94 (1997), 10 LA RAZA L.J. 1, 7-8 (1998)) (discussing "'outsider jurisprudence,'" a category that includes "critical legal studies, feminist legal theory, critical race theory, critical race feminism, Asian American legal scholarship, . . . queer, and LatCrit theory"; "these different genres of outsider jurisprudence have in common a critical outsider perspective vis-à-vis law and society . . . ").

[57] Mary Jo Eyster, *Designing and Teaching the Large Externship Clinic,* 5 CLINICAL L. REV. 347, 358 (1999) ("My sense is that for these students [interested in social justice], there is little enough in the curriculum to sustain them while they are in law school. It is usually their passion that brings them to law school, and in the three or four years of law school they have limited opportunities to express that passion, or to discuss it with others."). *See also* Robert A. Solomon, *Teaching Morality,* 40 CLEV. ST. L. REV. 507, 507-08 (1992).

[58] *See, e.g.,* Iijima, *supra* note 2, at 757.

[59] Although most if not all of the professors teaching in the CRRS, along with other professors at Denver Law who have not taught the course, do address race in their individual classes as well.

[60] *See* Armstrong and Wildman, *supra* note 3, at 656-57 ("Some white students even may assume they lack as much of a personal stake in racial justice issues as non-white students. However, because lawyers are officers of the court, race and whiteness are issues for which we are all responsible."); Stephanie M. Wildman, Margalynne Armstrong, and Beverly Moran, *Revisiting the Work We Know So Little About: Race, Wealth, Privilege, and Social Justice*, 2 U.C. IRVINE L. REV. 1011, 1015 (2012) (citing William M. Sullivan Et Al., *Educating Lawyers: Preparation For The Profession of Law* (2007)) (noting that law students can graduate from law school "without ever considering wealth or race as legitimate topics of study," and arguing that "[w]e all have a stake in changing this omission. Students and faculty of color should not be the only ones to care about race, nor should they shoulder the primary responsibility for educating white colleagues, who also have a race, about the role of race and socioeconomic wealth in society").

[61] The set of principles outlined in note 48 represent the core of the critical race perspective of RPL-affiliated employees at Denver Law, but there is extensive literature on the history and pedagogy of the critical race movement. *See, e.g.,* Kimberlé Williams Crenshaw, *Twenty Years of Critical Race Theory: Looking Back to Move Forward*, 43 CONN. L. REV. 1253 (2011) (providing a review and analysis of the history of Critical Race Theory); Daniel G. Solorzano and Tara J. Yosso, *Maintaining Social Justice Hopes Within Academic Realities: A Freirean Approach to Critical Race/Latcrit*

and areas of expertise, the CRRS faculty is diverse in other ways, including our races, genders, ages, and amount of experience in legal education. The professors in the teaching team decide on the topic of the course, choose the book or series of works that will serve to frame that topic, teach individual classes, and report back[62] on those classes to the team as a whole.[63] Under this format, students form the permanent "core" of the class and professors are rotating visitors to the classroom, a change in dynamic from the hierarchical professor-as-lawgiver model of traditional legal education.

In order to keep the faculty team organized and connected, one or two professors serve as faculty administrators for the course each semester. The faculty administrator[64] serves as the main contact for students, participating faculty, and the administration. The administrator recruits faculty to teach, organizes faculty conversations regarding the course topic and readings, advertises the course to students, and works with the administration to offer the course. During the semester, the administrator serves as point person for students, fielding questions, sharing announcements, and leading and responding to all reflection-based assessment, for example. On the faculty side, the administrator collects and distributes any additional readings chosen by the professor teaching each class, ensures the relevant information from class to class is shared among faculty, disseminates formal and informal feedback from the students, and handles grading.

This team-teaching effort is aided by the faculty's commitment to the shared RPL principles – principles which are shared with the students but to which they are not required to subscribe – as well as a mutual belief in the importance of addressing race in the law school curriculum. These shared principles and mutual engagement in a common teaching enterprise help the CRRS faculty overcome barriers that often divide legal academics, including status

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Pedagogy, 78 DENV. L. REV. 595, 596-99 (2001) (citing Daniel G. Solórzano, *Critical Race Theory, Race and Gender Microaggressions, and the Experience of Chicana and Chicago Scholars,* 11 Int'l J. Qualitative Stud. Edu. 121 (1998); Daniel G. Solórzano, *Images and Words that Wound: Critical Race Theory, Racial Stereotyping, and Teacher Education,* 24 TEACHER EDUC. Q. 5 (1997)) (defining the "five elements" of "critical race pedagogy in education" as "(1) the centrality and intersectionality of race and racism; (2) the challenge to dominant ideology; (3) the commitment to social justice; (4) the importance of experiential knowledge; (5) the use of interdisciplinary perspectives"); Lolita Buckner Inniss, *'Other Spaces' in Legal Pedagogy*, 28 HARV. J. RACIAL & ETHNIC JUST. 67 (2012) (discussing the history and principles of critical race theory in legal pedagogy).

[62] Each class session is recorded so that participating faculty can view what happened in a session. This helps inform faculty foci and avoid redundancy. In addition, generally after each session, the teaching faculty member writes a short blurb on how the class went, including the topics students expressed particular interest in, ideas for what might be good discussion points or questions to explore in future sessions, challenges encountered, and any other information that would be helpful to the team.

[63] Benefits of collaborative teaching for faculty that are not tied to the study of race include: improving the quality of faculty teaching and scholarship by "learn[ing] new perspectives, teaching techniques, and areas of expertise" and "learn[ing] from each other and broadening horizons in terms of how faculty teach, what they teach, and what knowledge they have to offer others (in terms of scholarship and conference presentations). Learning from each other can occur during planning discussions, through sharing teaching ideas, and by watching each other in the classroom. Collaborative teaching can also promote effective mentorship to new faculty, presenting unique opportunities for hands-on mentoring of newer teachers or teachers who are new to the particular field . . . sharing some of the workload involved in planning, teaching, and assessing students can lessen faculty fatigue and burnout, especially for those who have been teaching the same courses for a long time. Collaborative teaching also provides an incentive to do things differently in your classes." Chesler and Stinson, *supra* note 55, at 170.

[64] For three semesters, the course was administered by two professors, the authors of this article. Professor Freeman administered the course alone for one semester. For ease of reference, however, we refer to the "administrator" role in the singular throughout this Article.

differences,[65] silos that can be created by different pedagogies within academia,[66] and the racial and gender divisions reported by many law professors.[67] The course thus models an approach to teaching that seeks to promote a non-hierarchical and inclusive community of instructors, with the intention that the course structure reflects rather than undermines its instructional goals.

While the collaborative teaching model is not without its challenges,[68] it can provide a range of benefits to students that serve to advance meaningful engagement around race and our legal system. These advantages include broader coverage of course material due to the expanded expertise of the teachers; exposure to different teaching styles which may keep students more engaged by avoiding monotony, increasing creativity in the classroom, and appealing to different ways of learning; and giving students an opportunity to engage with professors with differing vantage points, thus promoting engagement with more than one side of or perspective on an issue.[69] As some students noted:

> I was really happy to have the guidance of people who see issues of race from a variety of perspectives . . . It provided me with a better overall picture of the issues and a better idea about the many ways in which I might be able to contribute my efforts to changing the status quo.[70]

> Since the brief few weeks of Constitutional Law that addressed Equal Protection and affirmative action, I have not had such an opportunity to engage in conversations about race and the law. I have never had the opportunity to engage in the dialogue about the racial components of our criminal justice system in an academic setting. I appreciated having professors who have spent years studying and exploring these notions there to guide me through these thoughts, to help connect the dots, and to facilitate reflection and action.

While these benefits are noteworthy, what is perhaps most significant is the message that students received from the collaborative, team-teaching model itself. The CRRS faculty hoped that the experience of being taught by a group of law professors with a commitment to the study of race could help students feel more connected to the law school and to the practice of law. Some students reflected:

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65 Sameer M. Ashar, *Deep Critique and Democratic Lawyering in Clinical Practice*, 104 CAL. L. REV. 201, 226, 231 (2016) (noting that the lack of faculty "parity across faculties, including clinicians, legal writing teachers, and academic support specialists" can result in marginalization of these members of the faculty, but also stating that "legal educators have the capacity to break down subject matter silos within our institutions and across the university").

66 Marlow, *supra* note 54, at 245-46 ("In terms of forming communities of teachers, status differences cause us to work and plan our teaching in separate ways. In essence, the various subsets of the academy, with their corresponding status distinctions, operate as separate teaching units within the same building.").

67 *See, e.g.,* Robert A. Williams, Jr., *Vampires Anonymous and Critical Race Practice*, 95 MICH. L. REV. 741 (1997) (discussing the author's experiences as a Native American law professor in the primarily white legal academy).

68 Challenges, and how we have managed them, are discussed in detail below.

69 Chesler and Stinson, *supra* note 55, at 170.

70 This and all subsequent reflections submitted by students enrolled in the Critical Race Reading Seminar are on file with the authors.

> I think seeing different professors, who all looked different and came from different backgrounds but shared the same passions, was very comforting. These are hard topics, and it's not easy to open up to a room full of people. Knowing that it's not just one professor that cares about these things, but there is a team of professors that think the way I do was a great feeling. I think it provided different perspectives and allowed me to see that people really do care about these issues.
>
> I thought it was interesting to have a different professor during each class. I liked it because I feel like I gained "allies" (for lack of a better term) at school. Law school has a very privileged, conservative atmosphere, and it has been nice to connect with professors who share my point of view.
>
> I really appreciated the ways in which free thought and expression [were supported] that I don't think I have ever experienced elsewhere at the law school.
>
> . . . to be able to see such a spectrum of professors that are focused on and aware of the importance of race in all areas of law is really encouraging.

These comments indicate that the CRRS's team-teaching model, when coupled with the course's explicit focus on race, may contribute to reduced feelings of isolation in the law school building and, while it is an unfamiliar teaching and learning method, it disrupts the status quo in a productive and supportive way.[71]

2. Using a Non-Legal Text as a Framing Device

The CRRS is not meant to be a static course, but rather one that reacts to and addresses the changing world. The team-teaching model, which divides teaching responsibilities among faculty members and makes it fairly easy for professors to join or step away from the teaching team each semester, supports the incorporation of variation in the curriculum. New topics for the course, centered on questions of race, law, and society, are determined by the faculty team as well. In making this decision, the faculty considers a number of factors, including whether any relevant books or articles have recently been published, what current events require discussion, and what race-based topics have been formally addressed within the school in recent months. The faculty takes a pulse on what sounds most exciting, intellectually interesting, and relevant to the political climate, racial dynamics, and student interest.

While the focus of the class may change, the seminar consistently uses a non-fiction written work to serve as a framing device. Individual professors are welcome to supplement this text with additional resources such as articles or videos, but the primary text provides the through-line that binds the course together. For its first two semesters, the students enrolled in the CRRS considered issues of race and the criminal justice system by undertaking a systemic analysis of *The New Jim Crow* by Professor Michelle Alexander.[72] In its third semester, which took place as the

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[71] For an example of a collaboratively-taught class on race, *see* Crenshaw, *supra* note 61, at 1264-87 (discussing the creation of an "Alternative Course" at Harvard Law School in the early 1980s in reaction to the lack of a race-focused courses and professors of color at the law school; "various student groups agreed to pool resources to invite . . . purportedly non-existent minority scholars to come Harvard to offer lectures in the weekly series").

[72] Alexander, *supra* note 50.

2016 presidential primaries got underway, the course focused on the ways in which issues of race were presented and analyzed on a variety of subjects (immigration, criminal justice, and more) within the context of the presidential election, using *Dog Whistle Politics* by Professor Ian Haney López as the overarching text.[73] In its fourth semester, the CRRS centered on the writings of Ta-Nehisi Coates,[74] including his best-selling book, *Between the World and Me*,[75] as well as other essays[76] and a portion of his comic, *Black Panther*,[77] as a frame for its focus on African-Americans in the United States during a time of political upheaval.

The use of non-traditional texts as primary course materials is not particularly common in legal academia, although it does occur most frequently within clinical or simulation courses.[78] The focus on such materials in the CRRS reflects the faculty's desire to push students to think broadly and creatively about the problems regarding, and solutions to, racial injustice in our society. This approach was also motivated by conclusions drawn by scholars and others who associate traditional law school course content, materials, and structure as contributing to the disengagement of students, particularly those drawn to the law as a tool for social justice and reform. These critics have argued that law schools should explore methods of teaching and learning beyond the traditional case method format;[79] Professors Erlanger and Lessard, for example, describe how groups of professors who seek to provide more than substantive legal knowledge and expand students' consciousness do this, in part, by incorporating theoretical and nonlegal concepts and readings, and by "teaching perspectives as well as rules."[80]

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[73] Ian Haney López, Dog Whistle Politics: How Coded Racial Appeals Have Reinvented Racism and Wrecked the Middle Class (2014).

[74] Due to the of the timing of the submission of this article, we do not go into detail on the experience of the Spring 2017 seminar.

[75] TA-NEHISI COATES, BETWEEN THE WORLD AND ME (2015).

[76] For example, students read Ta-Nehisi Coates, *The Case for Reparations,* THE ATLANTIC (June 2014) and Ta-Nehisi Coates, *My President was Black*, THE ATLANTIC (January/February 2017).

[77] TA-NEHISI COATES, BLACK PANTHER: A NATION UNDER OUR FEET, Book 1 (Sept. 13, 2016). This has been the one fictional component of the course.

[78] *See, e.g.* Andrea M. Seielstad, *Community Building As A Means of Teaching Creative, Cooperative, and Complex Problem Solving in Clinical Legal Education*, 8 CLINICAL L. REV. 445, 500–01 (2002) ("While students may learn most actively when engaged in the actual experiential process of community building, exposure to contextual information and background readings and dialogue about culture and community may assist in the acquisition of problem-solving skills . . . In circumstances where students may plan to work with specific communities, those students may be encouraged to conduct contextual research about the geography, demographics, politics, economics, and cultural characteristics of the relevant community."); Susan B. Apel, *No More Casebooks: Using Simulation-Based Learning to Educate Future Family Law Practitioners*, 49 FAM. CT. REV. 700, 701 (2011) (describing a course where students assume the role of practicing attorneys, but rather than a casebook they are provided with a short treatise on family law: a copy of Vermont Family Law which contains Vermont statutes and family court rules, a course pack, a copy of the Model Rules of Professional Conduct, a text on interviewing, counseling and negotiation skills, and some other online resources are made available to students.).

[79] Claudio Grossman, *Chapter 3: Building the World Community Through Legal Education*, 14 IUS GENTIUM 21, 30 (2008) ("Clinical programs, moot court competitions, study-abroad courses, debate clubs, and an increased reliance on non-legal disciplines such as economics, psychology, political science, anthropology, and sociology have made the study of law based exclusively on readings cases obsolete. Today's law school graduates must have the skills to play the role of facilitators and problem solvers in international transactions. They must also be able to act as liaisons between and among formally organized legal systems with differing national histories, customs, and experiences. Put simply, the philosophical foundation of Langdell's case theory is insufficient to prepare law students for the world they will encounter.").

[80] Howard S. Erlanger & Gabrielle Lessard, *Mobilizing Law Schools in Response to Poverty: A Report on*

In the CRRS, the faculty have opted to use non-traditional texts in the law school classroom with two goals in mind. The first, in the spirit of Erlander and Lessard, is to expand students' understanding around racial justice and make explicit connections to structural racism and critical race theory. By focusing on readings other than cases and statutes, students are encouraged to evaluate the law's impact on people of color from a variety of perspectives. Reading the law in the context of politics, campaigns, grassroots efforts, and history offers a different view than do the appellate cases and statutes to which the students are generally most accustomed. Some student reflections commented on a sense of expanded understanding of race and the law as a result of the fact that the CRRS focuses on more than pure "legal" materials:

> I enrolled [in the CRRS] because, after the first year curriculum, I was quite desperate for context. In so many of our doctrinal classes, if you want context (i.e. whiteness as property), you have to read it outside on your own time. These conversations aren't happening in class, and when they do, people are quite annoyed.
>
> This class frames criminal law and criminal procedure in a way that is very different from the doctrinal classes (because it challenges the assumptions underlying all of the jurisprudence). It was critical to being able to articulate the flaws in the current criminal justice system in a way that I have not been taught before.

Second, the CRRS's use of non-traditional texts is an attempt to challenge student reliance on the notion that every social problem should be viewed solely through a legal lens. Law schools can be too far removed from the perspectives of non-lawyers and other community members.[81] The reality is that racial justice issues are not relegated to the courthouse. The CRRS is designed to expose students to broader sociopolitical dynamics and to challenge them to connect the law to those dynamics. Thus, because the first two books addressed in the CRRS – *The New Jim Crow* and *Dog Whistle Politics* – are written by law professors, we ensured that students also were assigned complementary articles by non-lawyers. Because Coates is not a lawyer, faculty members supplemented his readings with law review articles, and also used our classroom discussions to relate his writings to the study of the law. Student comments reflected appreciation of an approach to studying race that pushed them to consider causes of and solutions to issues of racial concern beyond the law:

> It was a refreshing experience being able to approach such a large problem from so many angles. Most social problems are multi-faceted and focusing on one

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Experiments in Progress, 43 J. LEGAL EDUC. 199, 203 (1993).

[81] A notable exception here of course can be within the clinical legal education model, though that model is also not without its critics. *See, e.g.,* Sameer M. Ashar, *Law Clinics and Collective Mobilization*, 14 CLINICAL L. REV. 355, 357–58 (2008) ("The canonical approaches to clinical legal education, which focus nearly exclusively on individual client empowerment, the transfer of a limited number of professional skills, and lawyer-led impact litigation and law reform, are not sufficient to sustain effective public interest practice. These approaches . . . reinforce the norms of conventional practice in the legal profession. However, they rely on a practice narrative that does not accurately portray the conditions that poor people face, the resistance strategies that activist, organized groups deploy, or the new reality of public interest practice.").

> aspect would be doing it a disservice.
>
> I liked that we were regularly challenged to try to think about how to create a change. I think that talking about the problem doesn't necessarily really make you think critically about a topic, because you can just accept that it is a problem and move on, versus having to think about why it is a problem in order to find a solution to directly address it.
>
> The crimmigration class was great because I was not familiar with the subject, and I loved being challenged on my ideas. I also liked the school to prison pipeline discussion and the fact that the guest speaker was able to contribute and give different grassroot[s] ideas rather than litigation to fix a problem. I thought the discussion about the intersection of race and gender was great because it is often an issue that is disregarded in the context of prison and mass incarceration issues.

These comments demonstrate the value of identifying ways for students to study how topics of race are examined and portrayed, but then also to begin to transition to praxis – what can be done to address the injustices beyond the strictly legal lens. Moving to solution is hard – and unfamiliar – for many within legal education, especially outside of the clinical setting. This movement is necessary, however, if we ultimately want our students to not just deepen their understanding of critical theory, but also be armed with knowledge and tools to impact racial justice.

3. Interdisciplinary Focus and Experiences in the Field

After having offered the CRRS once in a (somewhat) traditional seminar format, the administrators applied for and received a university grant that provided sufficient funding to allow expansion of the Critical Race Reading Seminar in two ways: (1) by introducing "fieldwork" into the course and (2) by adding an interdisciplinary component. By requiring students to move outside of the classroom and asking them to think about issues of race from different perspectives, the CRRS encouraged students to take their study of race and the law from the theoretical and law-focused to the practical and multi-faceted.

In the semester in which these components were introduced into the CRRS, the course focused on race and criminal justice. Students in the seminar were required to observe or participate – and then reflect on – a range of different events occurring in the community related to the study of racial inequities in the criminal justice system. First, all students were required to observe the proceedings in any criminal court for a minimum of one hour. Students were then asked to choose between attending an organizing conference offered by the Denver Freedom Riders – Black Lives Matter group, or attending a Colorado legislature session addressing criminal justice issues. These experiences were intended to encourage students to connect local action around criminal justice to the legal and policy historic study that Professor Alexander presents in *The New Jim Crow*. Finally, students were given the choice of either participating in a police ride-along in the metro Denver region or attending a board meeting or a quarterly public forum organized by the Office of the Independent Monitor (Denver's police oversight organization). Initially some students were nervous and maybe even a bit skeptical about engaging in these activities. With this exception of visiting a criminal courtroom, these types of assignments were not typical of what they had experienced in their legal education thus far.

However, after participating in these events, students commented:

> I think the most beneficial aspect of requiring students to have these experiences was that it enriched classroom discussions. People could refer to what they saw and everyone had different experiences and perspectives. As far as my own enrichment from participating in the experience, they were all experiences I would like to have but often don't have the motivation to go beyond my commitments to arrange. It was a great motivator to get out in community and learn about important things going on outside the law school.

> I think the "learning in the field" components were very helpful. My first attempt at applying the issues we discussed to what I saw in the courtroom felt very clumsy. However, going to a range of events helped to give me a better understanding of how these issues play out in the real world and also gave me a greater sense of urgency in achieving some form of resolution.

In addition to incorporating experiential components, and toward the same ends, the administrators of the CRRS also invited guest speakers from a range of professions to address various aspects of criminal law and reform. These interdisciplinary guest lecturers included a former police officer, a member of an organization that focuses on the societal reintegration of incarcerated persons, a youth organizer, and a media specialist with a national advocacy group who focused on effective messaging and communication around issues of race. Students commented:

> I felt that it was helpful to get different perspectives on this important issue. The guest speakers provided us with tangible information and the guest professors all had a different teaching approach, which allowed every student to participate in useful dialogue.

> I enjoyed our guest speaker from the Colorado organization who helps felons reenter into society. It gives me great comfort to know that there are people/organizations providing tangible assistance. Also, the guest speaker who trained us on the importance of your message. There were important tips and examples that she gave us to use in the future, but more importantly showed us what we are doing wrong. In addition, I enjoyed the . . . former police officer . . . The speaker was able to explain the conduct of police officers in certain situations. It provided me with a perspective I had never taken into consideration.

These experiential and interdisciplinary components were intended to assist students in contextualizing the complex topics addressed in class and to help students consider the broad range of strategies that can be employed to combat racial inequities in the criminal justice system. Student reflections demonstrated that they were seeking to look beyond the surface of the criminal proceedings, police enforcement, or other events that they observed, and were pushing themselves to think more carefully about ways in which discrimination can shape a system that is, formally at least, race-neutral. While classroom discussions can of course invoke these types of questions, these and other student reflections demonstrated that the experience of engaging with the community and heeding non-lawyer voices can help students to become more immersed in a subject and to begin to question their role and their identity in racial inequality work.

4. Reflection-Focused Assessment

Student enrolled in the CRRS are assessed based on three sets of expectations: meaningful class participation, three short reflection journals, and a final paper. These requirements are designed to encourage students to engage in reflective practice. Reflective practice has been defined as "[t]he integration of intentional thought and specific action within a professional context . . . Reflective practice is not the same as occasional review or reflection about a past professional experience, rather, it is the ingrained habit of constant reflection."[82] Another scholar "has described reflective practice as the process that produces *praxis* – informed, committed action."[83] A third has described reflection as "a basic mental process with a purpose, an outcome, or both, applied in situations in which material is unstructured or uncertain and where there is no obvious solution."[84]

While reflective practice is a fundamental value in clinical legal education (both in-house clinics and externships, among other experiential learning opportunities),[85] it is far less common in other law school courses.[86] Even though the CRRS does not involve live-client experiences, it is nevertheless designed with the goal of helping students develop the reflective skills that can contribute to effective decision-making, learning from past action, and gaining a deeper sense of one's own values as an attorney and person.[87] The CRRS also focuses on active reflection as a pathway to increased cultural competence and reduced bias, both of which are relevant to RPL's philosophy and vision for lawyering and are goals that the CRRS faculty have individually and as a collective for the legal profession and society.[88]

Reflective practice is helpful for all attorneys, and self-reflection by members of the dominant culture in particular can assist them in helping to identify biases and cultural assumptions that can negatively affect their relationships with their clients and their legal practice as a whole.[89]

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[82] Timothy Casey, *Reflective Practice in Legal Education: The Stages of Reflection,* CLINICAL L. REV. 318, 322 (2014) (citing CHRIS ARGYRIS & DONALD A. SCHOEN, THEORY IN PRACTICE: INCREASING PROFESSIONAL EFFECTIVENESS 12 (1989)).

[83] *Id.* at n. 21 (citing Stephen Kemmis, *Action Research and the Politics of Reflection*, *in* REFLECTION: TURNING EXPERIENCE INTO LEARNING 139, 141 (David Boud, Rosemary Keough & David Walker eds., 1985)).

[84] *Id.* at n. 22 (citing JENNIFER A. MOON, REFLECTION IN LEARNING AND PROFESSIONAL DEVELOPMENT: THEORY AND PRACTICE (1999)).

[85] *See, e.g.,* Brook K. Baker, *Learning to Fish, Fishing to Learn: Guided Participation in the Interpersonal Ecology of Practice*, 6 CLINICAL L. REV. 1, 21–22 (1999) ("No decent clinician would allow a student to move on to his or her next task without a ritual degree of reflection whether in a journal, in grand rounds, or in direct inquisitive conversation with the clinician.") (citing Jennifer P. Lyman, *Getting Personal in Supervision: Looking for That Fine Line*, 2 CLINICAL L. REV 211, 214 (1995)); Rebecca B. Rosenfeld, *The Examined Externship Is Worth Doing: Critical Self-Reflection and Externship Pedagogy,* 21 CLINICAL L. REV. 127, 130 (2014) ("Externships should teach skills to help students learn from mistakes, solve supervision problems, critique institutions from within, and sound out the values that will undergird their careers among other skills.").

[86] Rosenfeld, *supra* note 85, at 158 (*"*The idea that reflection is itself a stand-alone lawyering skill that can be taught in a classroom is likely to be completely new to those outside the clinical academy.").

[87] *Id.* at 145; L. LERMAN, J.P. OGILVY, L. WORTHAM, LEARNING FROM PRACTICE (Westgroup 1998).

[88] *Rocky Mountain Collective on Race, Place, and Law*, UNIV. DENV. STURM C. L., http://www.law.du.edu/index.php/rocky-mountain-collective-on-race-place [https://perma.cc/F4WR-AMSH] (last visited Nov. 26, 2017).

[89] Paul R. Tremblay, *Interviewing and Counseling Across Cultures: Heuristics and Biases*, 9 CLINICAL L. REV. 373, 410-15 (2002); Antoinette Sedillo López, *Making and Breaking Habits: Teaching (and Learning) Cultural Context, Self-Awareness, and Intercultural Communication Through Case Supervision in A Client-Service Legal Clinic*, 28 WASH. U. J.L. & POL'Y 37, 47-48 (2008).

In Professor Susan Bryant's frequently cited article, *The Five Habits of Cross-Cultural Lawyering,* each of the five habits emphasizes reflection as a way to examine one's bias and promote effective cross-cultural communication.[90] As scholars proposing a survey instrument to assess students' cultural sensitivity recently noted, "[the]culturally sensible lawyer is aware of the need to be self-reflective about the role culture plays in our interactions."[91]

As professors responsible for helping students prepare for the practice of law, the CRRS faculty are invested in helping students further develop their interpersonal skills and self-awareness through reflection, towards the goal of reducing bias and promoting cross-cultural skills among other benefits. Further, by prioritizing reflection as a necessary skill and assessment point in the seminar, we demonstrate that we as faculty are concerned about students' experiences, thoughts, and questions as much as we are with their analysis of cases and statutes, with the intention of increasing student connection to the study and practice of law.[92]

Despite our firm beliefs in the value of reflection, we know that students may, at least initially be resistant to this form of engagement. In his piece studying the process and teaching of reflection, Professor Tim Casey lays out some obstacles of teaching reflection, including student resistance to the "touchy-feely" practice[93] and discouragement among professors regarding student engagement. [94]

Overall, however, we have found that while students may initially be surprised by this component of the course, over time they become willing to engage in this nontraditional assessment and appear to appreciate the opportunity to reflect. Certainly for the students who are less comfortable or less confident with speaking in class, the reflection assignments afford them an opportunity to ask questions, voice concerns, and think on their own experiences in a more private outlet.

While how students reflect ranges, we understand that students arrive at this work from different places, at different times, with different experiences, and with different perspectives. Reflection-based assessments allow us to understand where they are coming from, and then assess their growth in thought over time. The faculty administrators who are responsible for reviewing the reflection assignments also genuinely enjoy and learn from the relationships such assignments allow us to develop with the students. Outside of the clinical setting, we are less likely to engage in such thoughtful dialogue with students and this disruption of the traditional professor student relationship serves as a welcome change.

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[90] Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLINICAL L. REV. 33, 75-78 (2001). As one example, Habit Five requires lawyers to explore their own cultural framework and view of the world. It asks the attorney to acknowledge every thought, including the "ugly ones," and find a way to investigate and control for those factors that influence lawyering in unacceptable ways. Habit Five focuses on self-analysis and reflection (not self-judgment) with the goal of changing perspectives and eliminating biases, thus ultimately affecting the way the lawyer engages with the client.

[91] Andrea A. Curcio, Teresa E. Ward, & Nisha Dogra, *A Survey Instrument to Develop, Tailor, and Help Measure Law Student Cultural Diversity Education Learning Outcomes*, 38 NOVA L. REV. 177, 228 (2014).

[92] Anzalone, *supra* note 33, at 335 (Stating that "[a]lthough the choice of teaching methodologies and techniques is of utmost importance, the pedagogical goal of encouraging law students to become reflective practitioners has greater significance," and urging law professors to practice reflection themselves and thus "model[] positive self-assessment for their students).

[93] Casey, *supra* note 82, at 320.

[94] *Id.*

a. Reflection Through Journal Assignments

Students in the CRRS must complete three individual reflection journals each semester. The topics of the journals differ depending on the focus of the course. For example, for the seminars centered around race, criminal justice, and *The New Jim Crow,* the journals directly related to the events they were asked to attend. With each event, they were specifically asked to examine the racial and power dynamics with a critical lens. For example, those students who attended a legislative hearing or city council meeting in which bills or issue related to issues of race, criminal justice, and/or juvenile justice, were asked to consider:

> What was taking place, and who were the actors? What did you observe about the interactions between those testifying and those listening? What, if any, thoughts do you have about the role that race played in those interactions or in the hearing generally? Did anyone's testimony resonate with you and why? What are your thoughts overall on the idea of legislative strategies for reform[ing] criminal justice issues and/or issues related to race?

Each journal assignment was intended to help students make connections between the discussion of mass incarceration and race in *The New Jim Crow* and in class with the realities of their own community. The assignments further served to encourage students to explore the dynamics Alexander describes in the book in 'real life' settings in which the law plays a role but is not the sole factor. In their journal responses, students reflected on what these experiences helped them to learn about themselves and the criminal justice system:

> I have always considered myself pro-police and pro-military, meaning I have family members in both lines of service and I was raised to respect that kind of authority. I still feel that way, but I'm conflicted. No one should get that kind of respect, coupled with automatic assignment of power, unless they deserve it. Having a badge and gun means something different than it did when I was younger. Or does it? Obviously we have been arresting and imprisoning people of color at astonishing rates for much longer than my adulthood. I guess I feel naive and a little clueless about what's been going on around me.

> The court ran like a machine, with prosecutors directing defendants through the system and managing their every move from the moment they arrived until the moment they left. What struck me most was the sense that the prosecutors were in complete control of the space below the bench. The chaotic scene, the fast pace, and the use of legalese seemed to provide a clear advantage to prosecutors while disorienting those appearing as defendants. Making it to the front of a long line of defendants, a young Hispanic male, barely 18 and appearing *pro se*, approached one prosecutor. The prosecutor took his name, pulled up his case number and rapidly ran through the State's offer for a plea deal, telling him that, in exchange for his guilty plea, he would stipulate to liability, etc., etc. He asked for whatever would get him out of there fastest.

> Comparing what's been happening across the country regarding police interactions to what I witnessed during my ride along, I can say that even though

> I was not expecting to see any kind of police abuse. . . .I found an explanation for people's general mistrust of police. The police's superiority over people and discretion as to whom to charge with the crime and how to treat people are the reasons why the recent events happened. . . .

Throughout the four iterations of the course, journal assignments were not limited to reflections on fieldwork experiences. They also focus on the course materials or other aspects of the class. For example, during the semester in which the course focused on race and the presidential campaigns, students did not participate in fieldwork of the type described above. Students were instead required to view the four presidential debates that took place during the course of the semester. They were then asked to choose among the following journal topics, which were intended to push students to watch the debates through a critical race lens:

> Reflect on any topic [in the debate] in which race was explicitly or implicitly at issue. If race is not discussed explicitly, what are the implications of that omission? Consider also the readings from week one[95] – were the candidates systemically aware or absent? Did you notice any of the seven harmful discourses at practice? When reflecting on these questions, consider whether you noticed any differences between the two debates and how the moderators/sponsors impacted those differences.
>
> Share what, if anything, you have learned about the candidates from these debates as it relates to their analysis of, understanding of, and agenda for racial justice issues.
>
> Now that you have watched four debates, who do you think is the best candidate – regardless of political party – for fighting for racial justice issues specifically and why?

Observations shared by students in response to these prompts included:

> The question of race was . . . never raised by the moderators. But to me it's this silence that is most troubling. . . . Confronting the likely-candidate on his racist remarks and proposed policies is not how the republican party calls the masses to its side. That would be far too audible. Instead, the moderators comfortably blew on their dog whistles (one question specifically referred to undocumented immigrants as "aliens"). The candidates followed suit (i.e. "we need welfare reform that gets people off welfare and back to work").
>
> During the Democratic debate the Twitter hashtag #DemDebateSoWhite was created and people took time to compare the lack of diversity of the Democratic presidential candidates to the lack of diversity at the Oscars . . . The candidates on stage do come from a place of privilege and do lack the personal experiences

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[95] *Race Forward: Moving the Race Conversation Forward Part 1 – How the Media Covers Racism and other Barriers to Productive Racial Discourse*, CTR. FOR RACIAL JUST. INNOVATION (January 2014), http://act.colorlines.com/acton/attachment/1069/f-0114/1/-/-/-/-/Racial_Discourse_Part_1.PDF [https://perma.cc/H264-NVCJ].

> that many people of color have. The lack of diversity seems symptomatic of the systemic problems identified in the debate as well as our class . . . it seems like an indictment of a party that believes in elevating communities of color when their candidates lack racial diversity. It's a conversation to be had and this hashtag identified that. This conversation also shows that we are still grappling with how to talk about these issues and proactively promote the voices of people of color.
>
> Though the moderators of the Republican debate [chose] to include a question from a YouTube contributor about whether they believed that insensitive rhetoric regarding immigration was having a negative effect on the country, in particular by discouraging entrepreneurial people from other countries from immigrating to the U.S. Unfortunately, though the question invited the candidates to think about stereotypes that they relied upon to support their policy suggestions, the candidates merely doubled down on the rhetoric. . . .The message from the candidates regarding immigration was not explicit, but it was nonetheless clear: people with brown skin, especially from Middle-Eastern countries, are dangerous. This narrative, in the minds of the candidates, justified immigration reform that would codify institutional racism. Further, the discussion focused on prioritizing intent (policy) over impact. For the republican candidates, the focus was on "safety" and "legality," and the conversation disregarded discriminatory impact and that they were reinforcing false stereotypes.

b. Reflection Through a Final Paper

The capstone course assignment is a paper. The prompts for this paper are intended to encourage students to think broadly about the racial issues they have considered in the course. The final paper is distinct from the journals in that, while it is not a research paper, it cannot solely discuss personal observations and reactions. Personal reactions and experiences can and should be a component of the paper, but it must also include an analysis and assessment based on a semester's worth of study, readings, and class discussions. Examples of prompts for the final paper included:

> Now that you have completed *The New Jim Crow*, if you had the freedom and flexibility to address issues of race and the criminal justice system with no funding constraints, what would you do and why? How would you do it?
>
> What other topics do you think Michele Alexander should have addressed in the book and why? How do you think these topic(s) would have strengthened her argument?
>
> You are running for President of the United States. Share with us the core components of your racial justice agenda. When crafting your agenda, consider: What barriers you anticipate facing (include legal and socio-political challenges), who might be key allies and detractors, and what are your key talking points.

This final assignment is intended to challenge the notion that non-research based papers are less intellectually rigorous, and to require students to consider their own perspectives on the issues studied in class as well as the complexities of seeking solutions to these racial concerns.

Having students grapple with this challenge is part of our vision for assigning this type of paper rather than a heavily research-based paper in which students can fail to think beyond the targeted issue they are addressing or get lost in providing too much detail.

Students who have actively engaged with the topics become creative and think outside of the box. For example, one student proposed starting urban farms as an option for youth who had been expelled or suspended from school or adults with criminal convictions, where work would be complemented by robust curricula on power, oppression, and inequities. Another student discussed the idea of ensuring that police arrest rates tracked the racial composition of the community, suggesting that if the community you police is 50% African American, then no more than 50% of arrestees should be African American.

Based on formal evaluations and informal student feedback, students tend to enjoy writing the final paper, but it is also evident that some struggle with how to answer these broad-based questions. Given that legal education tends to train students to answer questions issue by issue and to find discrete answers,[96] this is perhaps not surprising. Compounding the challenge is the fact that many of the white students in the CRRS report that they are thinking and studying about racial issues for the first time, and struggling with personal challenges such as how best to "talk about race" with friends and family members. The CRRS faculty is mindful that the students come to the class from different backgrounds and experiences but justice work, and certainly work on behalf of people of color, does not end with an easy fix and is rarely easily siloed.[97] If we do not introduce students to big picture thinking about these issues, their ability to begin to consider how to address issues of injustice will fall short.

c. Feedback on Student Reflection

The CRRS's reflective focus is intended to prepare students to become reflective learners and lawyers throughout the duration of their careers. Faculty feedback on reflective efforts is an essential component to remaining on that path. Because students in the CRRS are asked to share so much of themselves throughout the semester, and because we provide a grade that assesses the products of such sharing, it is incumbent upon the faculty administrators not just to review their work, but also to respond to it in meaningful ways. The CRRS course administrator provides written feedback to students on the work they submit, posing questions and offering commentary, as well as providing guidance on the structural topics such as writing, narrative, and organization.

For example, in response to a journal that focused on observations made at legislative

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[96] *See, e.g.,* Matthew J. Wilson, *U.S. Legal Education Methods and Ideals: Application to the Japanese and Korean Systems*, 18 CARDOZO J. INT'L & COMP. L. 295, 303 (2010) (noting how one of the fundamental goals of all law schools is teaching students "'how to think like lawyers,' which requires them to learn how to spot legal issues, carefully analyze all aspects of a legal problem, and formulate possible solutions"); Linda H. Edwards, *The Trouble with Categories: What Theory Can Teach Us About the Doctrine-Skills Divide*, 64 J. LEGAL EDUC. 181, 194 (2014) (discussing how Best Practices for Legal Education, the study initiated in 2001 by the Clinical Legal Education Association (CLEA), recognizes the case method as the principal method for teaching analytical legal skills)

[97] *See, e.g.,* Elizabeth L. MacDowell, *Reimagining Access to Justice in the Poor People's Courts*, 22 GEO. J. ON POVERTY L. & POL'Y 473, 530 (2015) (discussing how a social justice advocacy perspective demands that advocates advise client-litigants in a more comprehensive and holistic manner than the manner artificially imposed by the structure of the legal system or practice "silos" created through legal specialization); Ali Miller, *Fighting over the Figure of Gender*, 31 PACE L. REV. 837, 871 (2011) (discussing how intersectionality is needed in rights-oriented policy work as a way to move advocates away from isolating or de-contextualizing solutions for silo-ed groups of victims and toward more structural and sustainable change).

testimony, the professor encouraged a student to think about restorative practices as an alternative:

> I think your point about re-victimization is a very good one and one that is often overlooked. People have to live through their experiences day in and day out . . . With that said, on the other side, people who made a mistake in life or who face the effects of structural oppression in their daily lives, also have to relive their experiences all the time (as do their families as they notice the lack of presence of another family member and feel that void constantly). My point is not to minimize the traditional victim but to realize that perhaps this system is broken and our process is simply not working for anyone who has been harmed. I wonder if the restorative justice based techniques we touched on briefly in class yesterday could be useful in these types of situations. Giving people space to talk out about what happened, issuing apologies, and the like. . . .It might help people see both sides as human beings who are suffering just in different way . . .

In response to a student's observations of events at a community forum, the professor engaged the student in a discussion of strategies for successfully navigating power dynamics:

> Based on your description, the community gave some of the same suggestions as the board did, but delivered them with more hostility. This may be true – and unwarranted. But, I wonder how the board members reacted? For example, did they say something to the effect that indicated they had already given the suggestion? I ask because I think sometimes it would be beneficial for people to think an idea was their own versus simply agreeing with another, let alone a "power player." Strategically, the board . . . could . . . react in a way that is appreciative of the community's suggestions and allows them to believe it was their suggestion that caused reform. This same approach could be said for a situation that is reversed. A community can often benefit by somehow having a power player take credit for an idea that they brought to the table. The key is satisfying the hostile/upset party – and sometimes that might mean swallowing a pill that takes the glory and credit away from you but ultimately gets the job done that you are seeking.

Providing feedback is an essential part of reinforcing reflection, and is of particular importance when students open up in their reflective work. They share their vulnerabilities and such vulnerability warrants acknowledgement. Further, in justice related and racial justice work specifically, research indicates that when organizations fail to provide feedback that holds decision makers accountable for their judgments and actions, individuals are less likely to remain vigilant for possible bias in their own decision-making processes.[98] While the dynamics between organizations and their leadership are different than those of students and faculty, an analogy can be made. If we engage and offer suggestions and commentary on the reflective work that students have done, students may then have a deeper or more nuanced perspective on their thoughts, judgments, and actions that will help them continue to grow as attorneys.

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[98] Pamela M. Casey et. al., *Addressing Implicit Bias in the Courts*, 49 CT. REV. 64, 68 (2013), http://aja.ncsc.dni.us/publications/courtrv/cr49-1/CR49-1Casey.pdf [https://perma.cc/DK3P-56ZG].

C. The CRRS and Its Challenges

Before turning to final thoughts about the ways in which the CRRS contributes positively to the incorporation of race in legal academia, along with addressing potential critiques of this model, it is important to identify the challenges encountered in the planning, teaching, and administration of the CRRS as well as to suggest ways to manage them. Ultimately, we have found that the benefits for faculty and students outweigh such challenges. Nevertheless, challenges do and always will occur, and acknowledging what we have experienced thus far and how we have sought to resolve these issues may be of use to those seeking to replicate the CRRS model.

1. Challenge One: Faculty Commitments

In addition to required teaching loads, faculty have other existing commitments. Research and scholarly pursuits tend to flare up at particular moments; clinical professors' caseloads and ever-changing schedules often make it hard to commit to teach overall, let alone on a particular preassigned date. Faculty members have pro bono work, community service, or other broader university responsibilities. Signing on to teach an additional class and being willing to put the time in to collaborate and engage in discussions about the model, best practices, and even grading is not manageable for everyone who might otherwise be interested in participating.

The CRRS faculty have addressed this issue both by creating the administrator role and by streamlining faculty participation in the course. Participating faculty members are only required to teach one, 100-minute session class. If there are insufficient faculty to cover all the class sessions – a rare occurrence – the administrator typically steps in and teaches extra session(s) and/or invites guest speakers to participate in the course. Teaching faculty have limited grading responsibilities (with the exception of evaluating class participation, described further below); while all participating faculty are encouraged to provide input into grading, including reviewing final papers and the like, ultimately the administrator is responsible for reading student assignments, providing feedback, and assigning grades. As the seminar has become more established, the faculty as a whole has found it helpful for one or two faculty members take the lead on student feedback and assessment as well as general course organization.

2. Challenge Two: Shared Faculty Principles

The question of whether or not a group of faculty members co-teaching a race-focused course should possess a set of common principles and beliefs is one to which thoughtful people can disagree. Because the CRRS grew out of a RPL, it is primarily, though not exclusively, taught by RPL members who, while diverse in many ways, share a set of critical race-informed beliefs. These principles, as stated previously, are provided to the students in the interests of transparency and as a basis for discussion, and each time the course is taught it begins with a class session focused on the core doctrines of critical race theory. Students are thus made aware of the shared commitment of many of the faculty members to these viewpoints, while also being explicitly reassured that the purpose of the course is to encourage students to develop their own thoughtful, informed, and independent perspectives on the issues discussed in class.

Others teaching a course such as this may choose a different tactic, and even in the CRRS, guest speakers and others who join in the course are not necessarily those conversant in or in agreement with all aspects of critical race theory. Further, a diversity of perspectives is one of the aspects of the class that students reported enjoying most about the CRRS, and is among the reasons

that the course requirements have included community engagement with a variety of organizations and exposure to multiple viewpoints (for example, through the required viewing of all presidential debates). At the same time, the CRRS faculty is of the belief that fostering a "subculture" around social justice issues can be essential to supporting students with social justice interests,[99] and is also seeking to create a classroom environment that promotes the exchange of ideas while also supporting those students who may have felt marginalized or alienated in other courses.[100] While of course all the faculty teaching the CRRS have different life experiences, belief systems, and outlooks on the world, a shared set of viewpoints has assisted in creating consistency and coherence in this team-taught class.

3. Challenge Three: Consistency in Teaching

When a class is taught by a team of professors, students are exposed to diverse teaching styles in the classroom. Some professors prefer a lecture style format; some professors like to weave into related topics that are not precisely tied to the theme. Ultimately, this diversity can be beneficial, as students experience a range of methods, expertise, and approaches. Nevertheless, striking the appropriate balance between academic freedom[101] and cohesion in a seminar can be difficult with a

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[99] By analogy, consider the well-documented public interest subculture within legal education:

> This separation inherent in legal education's curriculum often contributes to the creation of a subculture within many law schools of public interest students. Students who want to enter the public sector face similar situations. They fail to see their interests reflected in their doctrinal classes and often feel like pressured to enter the private world. In an attempt to resist such pressure, public interest students can fortify themselves in the small communities at their law schools with other public interest students. Such communities are beneficial and crucial to help students to understand other career paths, create strong bonds and networks, and keep students' commitment to the public sector strong. Indeed, numerous scholars have noted the importance of a public interest subculture for students who maintain their commitment to practice public interest law upon graduation.

Alexi Freeman and Katherine Steefel, *The Pledge for the Public Good: A Student-Led Initiative to Incorporate Morality and Justice in Every Classroom*, 22 WASH. & LEE J. CIV. RTS. & SOC. JUST. 49, 72 (2016) (citations omitted).

See also Lynn A. Addington and Jessica L. Waters, *Public Interest 101: Using the Law School Curriculum to Quell Public Interest Drift and Expand Students' Public Interest Commitment,* 21 AM. U. J. GENDER, SOC. POL'Y & L. 79, 87 (2012) ("Researchers have found that 'subcultural support'-that is, 'students' involvement in law school subcultures supportive of public interest employment'-may act as a 'bulwark' against this drift."); Robert Stover, *Making It And Breaking It, The Fact of Public Interest Commitment During Law School* 46 (Howard S. Erlanger 1989); Howard S. Erlanger et al., *Law Student Idealism and Job Choice: Some New Data on Old Question,* 30 LAW & SOC'Y REV. 851, 860-62 (1996) (summarizing legal scholars' suggestions that subcultural support help students maintain their commitment to pursuing "nontraditional" or public interest jobs).

[100] *See* Anzalone*, supra* note 33, at 345 (citing Stephen D. Brookfield, *Becoming a Critically Reflective Teacher* 208, 214 (1995) (explaining that teachers "may either impose . . . dominant [social] values in the classroom, or act as an agent of change, liberation, and transformation. Through this prism, teaching is a political act and a key concern of critical pedagogy is that educators recognize the innate imbalance of power in our institutions and classrooms.")); Ansley, *supra* note 6, at 1579-80 (stating that professors should respect the autonomy of their students and empower them to take ownership of their own learning, and going on to discuss "what role the teacher's own values should play in the classroom").

[101] Walter P. Metzger, *Profession and Constitution: Two Definitions of Academic Freedom in America,* 66 TEX. L. REV. 1265, 1265-67 (1988); *see also* Robert R. Kuehn & Peter A. Joy, *Lawyering in the Academy: The Intersection of Academic Freedom and Professional Responsibility,* 59 J. LEGAL. EDUC. 97, 103 (2009) ("The AAUP, AALS, and ABA each promote academic freedom principles in law school teaching. The AAUP separates academic freedom into three elements: freedom of inquiry and research; freedom of teaching, including both what may be taught and how it shall be

multitude of voices. Among the primary student critiques of the CRRS is a concern that each class stands on its own rather than building together towards a larger goal, as well as comments about repetition of material over several classes or individual professors veering off-topic, that students (perhaps rightly) attribute to insufficient communication among the teaching team.

In addressing this challenge, CRRS faculty have found that maintaining faculty focus on the overall course topic is key; when the faculty are clear about the course theme and how each person is contributing towards it the students experience far more consistency over the course of the semester. Ongoing communication, facilitated by the administrator, regarding the materials assigned and the information covered in each class is also essential to reducing confusion and inconsistency. In the first class, the faculty administrator explains that because the class is team-taught, students should expect a variety of teaching approaches and, while we do our best to ensure connection and consistency, there may be times when things do not gel perfectly. Sharing our expectations and reality often helps offset any surprise or confusion if and when a particular session seems a little different than the rest.

Another concern can be variation in the materials that individual professors assign for each class. The course often follows the particular chapters of the framing book, but professors almost always assign supplemental reading assignments as well. The largest challenge becomes deviation in the volume of reading assigned per week. Variation in the volume of assignments makes it difficult for students to know how much time to allot for class preparation, and students are also sensitive to coursework expectations that appear excessive in comparison to the number of credits they are earning.

In the CRRS, we have sought to address this issue in a variety of ways. The course administrator informs students from the outset that a particular book frames the class, but other readings from a range of sources, including law review articles, news clips, and other materials, will be assigned. The administrator also provides the faculty with loose guidelines regarding assignments, namely reminding professors of the number of credits for the seminar, providing examples of readings assigned for previous semesters, and sharing past student reflections on what the materials they enjoyed most and found most useful. These efforts have assisted in maintaining uniformity in the volume of assignments throughout the course of the semester.

4. Challenge Four: Assessment of Students

How do you assess student performance in which there are rotating faculty? Does every faculty member offer their assessments? Who assigns the grades? When we embarked on teaching this seminar, these were questions we attempted to address early on, knowing that students generally asking about grading mechanisms right away (even prior to enrollment) and that this would be a critical component of securing administration approval. The CRRS faculty ultimately determined that the faculty administrator would take on the bulk of the grading role, which is important for organization, lightening of the load for faculty participants, and consistent engagement with students. Individual professors do play a smaller role in grading, and have the option of being more

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taught; and freedom of extramural utterance or action. The AAUP notes that academic freedom in teaching is 'fundamental for the protection of the rights of the teacher in teaching and of the student to freedom in learning.' Through its bylaws, the AALS and its member law schools have adopted the AAUP academic freedom principles, and stated that law professors must enjoy the benefit of academic freedom to pursue their teaching obligations effectively.") (citing AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, *1940 Statement of Principles on Academic Freedom and Tenure with 1970 Interpretive Comments*, *reprinted in* AAUP, POLICY DOCUMENTS & REPORTS 13, 10th ed. (2006)).

involved if they express interest.

Teaching professors provide a participation grade for their individual session. The administrator provides each professor with a grading rubric, a number scale, and pictures of the students, and the professors sends their participation grade to the administrator after their course session is concluded. If, at the end of the semester, the administrator observes a large discrepancy between faculty members regarding points awarded (for example, one professor giving all students very low scores, while another giving each student the highest score possible), there are two options available to the administrator: follow up with the individual professor to gain more insight and/or review a recording of the class session.[102]

The faculty administrator is responsible for awarding grades and providing feedback on each of the reflection journals. The administrator does not generally share the journals with the other participating faculty. This is so because the reflection journals submitted are often quite intimate and honest. For those students who are less active in class, these journals also provide another outlet in which to express reactions and questions. The success of the CRRS relies in many ways on students sharing their thoughts and questions in writing, and if ten or more faculty members reviewed such journals, we fear that it could have a chilling effect on student participation. We also find that as we provide our own reflections to the students in response to their writing, students tend to open up even more in the remaining journals. Thus, a relationship forms between administrator and student, and preservation of this relationship seems important given the risk of disconnection in a team-taught environment.

This relationship continues with the review of the final paper. While all faculty can provide input if they wish, the administrator is ultimately responsible for reading and reviewing the final paper. Again, this approach is important for continuity for the student and for the preservation of the trust that has been formed. The administrator can also assess growth in the student's perspective, having read the other written assignments, and can provide insight and feedback that builds on this prior work.

5. Challenge Five: Compensation for Faculty

As the CRRS is not a required teaching load for any of the faculty members, and because it involves a large number of professors teaching a single course, the question of how to handle compensation is an understandable concern. Because the CRRS emerged out of a collective and follows a team model, we have been able to navigate this question fairly easily. Only the administrator receives a stipend from the law school, and other participating faculty teach sessions on a volunteer basis. The shared belief among CRRS faculty in the effectiveness of the course model, as well our belief in the need to teach a course that responds to current issues in racial justice (and the minimal commitment required of individual faculty), has created a spirit of collaboration and mutual support. Everyone contributes to the course equally, and the faculty administrator who

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[102] At Denver Law, our technology system allows us to videotape each individual session without having an actual video camera on display. While students are made aware both in the syllabus and in person during the first day of the seminar that they will be taped, the lack of a noticeable physical camera helps conversation continue naturally and limits distraction to both the students and the professor. The faculty administrator views the video to assess participation as needed. The videos are also made available to each individual professor in case someone wants to view what occurred in previous sessions. The videos are only viewed by participating faculty in the course, and again students are made aware of this at the onset of the semester.

carries the bulk of the organizational and grading load is compensated for that additional time and effort.

III. CONCLUSION

In creating the CRRS at Denver Law, the faculty was mindful of the work of those who have long advocated for, and sought to create, a law school curriculum in which race is centralized. These voices have called for law school courses that focus on race, for new teaching methods that dismantle the hierarchy of the traditional law school classroom, and for professors to incorporate race into the curriculum as part of a larger challenge to a law school culture that values neutrality and conformity over creativity and critique. The CRRS seeks to embody these values by centralizing race, pushing law students to think beyond the law and the law school classroom when considering the origins of and solutions to racial concerns in our society, and modeling collaboration rather than an allegiance to status or divisions.

The CRRS is imperfect, of course; one clear critique is that the creation of a small, race-focused seminar suggests that the study of race is an add-on topic to the legal curriculum rather than an integral part of the practice of law. Further, as discussed above, the CRRS has its organizational and pedagogical challenges, and team-teaching, even among the most devoted of colleagues, does not erase inequities within or outside the legal academy. In addition, while the reflective nature of the course assignments and the feedback we have received gives us some insight into student opinions regarding the course, there is still much to explore regarding the ways in which the class may be experienced differently by white students and students of color. In reflecting on their teaching experiences in the CRRS, the faculty must think carefully about the role that students of color play or feel called upon to play in a race-focused class taught in a majority-white institution, as well as whether the teaching methods and structure of the course are providing all students with a learning experience that is both challenging and compassionate. Finally, faculty must ensure the CRRS is viewed as an additional, complementary model to existing race-focused courses versus a cheaper replacement.

Despite its challenges and areas for caution, the CRRS does provide a model by which faculties can incorporate race into the legal curriculum in ways that are positively disruptive but not prohibitively onerous. In sharing this model, along with its successes and limitations, we hope to provide law school faculties with a clear path by which to create similar courses in their own institutions. In a time of social upheaval, when legal education has an even greater obligation to address racial and other societal concerns, the CRRS format allows for classes to be created more quickly, to change focus more easily, and to provide space for more creativity and collaboration than do many traditional law school classes. This approach doesn't require a formal organization of critical race-focused professors; all that is required is a group of interested faculty with the will to work together and try something new.

Additional Resources and Reading Materials

Below you will find a sampling of resources and reading materials regarding racial justice and bias.

Articles and Resources:

Article on working while under the stress of racially charged incidents. Advice for those experiencing the trauma as well as allies.
https://www.linkedin.com/pulse/recent-police-shootings-can-make-tough-work-paula-edgar/?trackingId=mdemPhCZRyLK0u1IS4jNEA%3D%3D

Op-Ed containing important information and insights for managers and allies.
https://www.nytimes.com/2020/06/02/opinion/police-killings-black-mental-health.html?referringSource=articleShare

Essay containing advice on being an ally for racial justice.
https://sojo.net/articles/our-white-friends-desiring-be-allies

Collection of resources under the headings: Read, Watch, Act. Compiled by Syracuse University student.
https://www.maxwellboise.com/

Reading List from the Center for Racial Justice in Education
https://centerracialjustice.org/resources/reading-lists/

List of resources for discussing racism and racial violence with kids.
https://centerracialjustice.org/resources/resources-for-talking-about-race-racism-and-racialized-violence-with-kids/

Harvard University's Implicit Association Test
https://implicit.harvard.edu/implicit/takeatest.html

Short List of Books (many included in other resources above):

- "How to Be an Antiracist" by Ibram X. Kendi
- "So You Want to Talk About Race" by Ijeoma Oluo
- "I'm Still Here: Black Dignity in a World Made for Whiteness" by Austin Channing Brown
- "An African American and LatinX History of the United States" by Paul Ortiz
- "Color of Law: The Forgotten History of How Our Government Segregated America," Richard Rothstein

BEFORE THE UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

BRENTWOOD UNION FREE SCHOOL DISTRICT

Complainant,

v.

STATE OF NEW YORK, NEW YORK STATE LEGISLATURE, GOVERNOR OF THE STATE OF NEW YORK, NEW YORK STATE DEPARTMENT OF EDUCATION, NEW YORK STATE BOARD OF REGENTS

Respondents.

COMPLAINT UNDER TITLE VI OF THE CIVIL RIGHTS ACT OF 1964

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I. INTRODUCTION

The United States Government has recognized that public school education, and the systems by which it is financed, are critical to our Nation's economic security and social well-being. A necessary corollary of this recognition is that a system of education fails in its mission where the system provides comparatively fewer educational opportunities for minority students.

Against this backdrop, the United States has developed a complex web of grant funding mechanisms and statutory protections to ensure that minority students are not deprived of equal access to and participation in public education. Unfortunately, as demonstrated below, New York State has violated these statutory proscriptions by promulgating a school funding scheme that facially and disparately discriminates against students based on their race.

This Complaint is brought against New York State, the New York State Legislature, the Governor of the State of New York, the New York State Education Department ("NYSED") and the New York State Board of Regents, collectively ("Respondents"), by the Brentwood Union Free School District ("Brentwood" or the "District") by and through its duly elected Board of Education on behalf of its students.

The Respondents are recipients of federal financial assistance and are named as Respondents because they have discriminated against students on the basis of race in a publicly funded educational system in violation of Title VI of the Civil Rights Act of 1964.

In 2007, New York State enacted legislation to reform the State's method of allocating resources to school districts in order to comply with the 2006 New York Court of Appeals' order in *Campaign for Fiscal Equity v. State of New York*, 8 N.Y.3d 14, 828 N.Y.S.2d 235, 861 N.E.2d 50 (2006) (hereafter the "CFE Case"). In the CFE Case, CFE successfully

challenged New York State's school finance system on the grounds that the system underfunded New York City public schools and denied students the right to a "sound basic education" guaranteed by the New York State Constitution.

Repeated budget freezes, combined with NYSED's inequitable allocation of resources in connection with a 2008-2009 Deficit Reduction Assessment ("DRA"), have resulted in an inequitable distribution of State aid that has had a disparate and inequitable impact on New York's Black and Hispanic students.[1] Under the current funding scheme, the more White a school district's population, the more likely it is that the district receives all, or close to all, of the public aid it was promised in 2007.[2] The effects of this disparity are palpable. In 2017, the New York State graduation rate for White students was 89%, whereas the graduation rate for Black/African American students was only 69% and the graduation rate for Hispanic/Latino students was only 68%.[3]

The Complainant is a school district in New York, the students of which have suffered egregiously from the Respondents' inequitable funding practices, and received less public funding for their education than students in predominantly White school districts due to the Respondents' arbitrary and inequitable practices. The State's allocation of Foundation Aid

[1] For the purposes of this Complaint, "Black" encompasses both Black and African American students, and "Hispanic" encompasses both Hispanic and Latino students. In accordance with the New York State Education Department's definition of "Black or African American", this group includes persons "having origins in any of the black racial groups of Africa" and "Hispanic or Latino" includes persons of "Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish culture or origin, regardless of race". All racial identifications are based upon the race or races with which the student primarily identifies as indicated by the student or the parent/guardian, according to the information reported to the New York State Education Department. Available at: https://data.nysed.gov/glossary.php?report=enrollment

[2] In accordance with the New York State Education Department's definition of "White", this group includes persons "having origins in any of the original peoples of Europe, North Africa, or the Middle East". All racial identifications are based upon the race or races with which the student primarily identifies as indicated by the student or the parent/guardian, according to the information reported to the New York State Education Department. Available at: https://data.nysed.gov/glossary.php?report=enrollment

[3] https://data.nysed.gov/gradrate.php?year=2017&state=yes

has created a dual system of education and impeded the academic progress of New York's Black/African American and Hispanic/Latino children. The State's failure to fully distribute Foundation Aid in an equitable manner violates Title VI, 34 C.F.R. § 100.3(b). Complainant therefore asks the United States Department of Education, Office for Civil Rights to:

- fully investigate these claims;
- declare that the State's current distribution of Foundation Aid disparately impacts New York's minority students and thus violates Title VI;
- require the State to restore the $129 million of Foundation Aid funding that is currently owed to the District on an *annual* basis[4];
- enjoin the State from distributing Foundation Aid in a discriminatory manner;
- grant any other relief it deems just and proper

II. PARTIES

A. The Brentwood Union Free School District

Brentwood is the largest suburban school district in New York State and it served 19,052 students during the 2016-2017 school year, 93 percent of whom were Black/African American or Hispanic/Latino, and 88 percent of whom were economically disadvantaged.[5] The New York State average for Total Expenditures Per Pupil is $23,361, whereas Brentwood's

[4] Data set courtesy of Dr. Rick Timbs, Executive Director, Statewide School Finance Consortium, R.G. Timbs Advisory Group, Inc., 2018 (Attached to this Complaint as Appendix A)

[5] Brentwood UFSD enrollment 2016-2017, available at: https://data.nysed.gov./fiscal.php?year=2017sinstid=800000037066

average Total Expenditures Per Pupil is only $19,074 – a shortfall of more than $4,000 per pupil.[6]

Brentwood has standing to bring this Complaint because the Respondents' discriminatory educational funding structure has substantially impaired Brentwood's ability to provide basic educational opportunities to the pupils it educates.

Brentwood has managed to produce remarkable examples of student achievement despite being forced to operate with significant challenges based upon New York State's practice of inequitable funding.

Nevertheless, despite the District's best efforts, there is no doubt that the children of Brentwood have suffered from a series of cuts to the District's programs, staff and operations. During the 2012-2013 school year alone, the District's instructional budget was cut by almost $7 million dollars and inconsistent small increases in Foundation Aid during recent years have not come close to filling the void that New York State created. Due to staff reductions, each Brentwood guidance counselor has a case load of students that far exceeds the State average; art and music in the elementary schools were drastically cut from daily programs to once or twice a week; the number of social workers and school psychologists have been reduced throughout the District at a time when their support is needed more than ever by the District's students; several junior varsity and middle school sports teams have been eliminated; and elective classes at the high school have been significantly reduced.

The District's operational budget has also been severely impacted, and staff reductions have occurred in virtually every operational area over the course of the past five years. Custodians, buildings and grounds supervisors, technicians, secretaries, and other

[6] Brentwood UFSD fiscal accountability summary 2016-2017, available at: https://data.nysed.gov/fiscal.php?year=2017&instid=800000037066

operational positions have all been placed on the budget chopping block. The District is finding itself unable to perform even routine maintenance due to limited staff. This creates a vicious cycle because, in the long run, the lack of maintenance leads to more costly repairs in the future.

There is no doubt that the District is resourceful and resilient. The District has weathered the storm, year after year, in the hopes that, eventually, financial relief would be on the horizon. But as Brentwood has waited along with other "minority-as- majority" school districts, they have watched as some White majority school districts have received full funding or more than their fair share of Foundation Aid funding, year after year, for reasons that are simply inexplicable. The statistical data leaves no question about the existence of this disparate funding scheme, and its disparate impact upon Black and Hispanic minority students must be remedied.

B. The Respondents

Respondents are the State of New York and the entities chiefly responsible for the allocation and distribution of moneys to the State's school districts, including Brentwood. Those entities include the New York State Legislature, the Governor of the State of New York, the New York State Education Department and the New York State Board of Regents.

NYSED holds itself out to be one of the most complete, interconnected systems of educational services in the United States.[7] Its stated mission is to "raise the knowledge, skill, and opportunity of all the people in New York" (emphasis added).[8] NYSED and the Board of

[7] About the New York State Education Department, available at: http://usny.nysed.gov/about/

[8] *Id.*

Regents direct where educational funds are distributed in accordance with education aid formulas established and approved by the New York State Legislature and the Governor.

At all times relevant to this Complaint, New York State and NYSED have been substantial recipients of federal financial assistance. Notably, New York State and NYSED were recipients of American Recovery and Reinvestment Act funds in 2009, and NYSED, as New York's education agency, was responsible for distributing these funds to school districts in New York.

III. NEW YORK'S DISCRIMINATORY STATE FUNDING STRUCTURE

Support for public education in New York comes from three sources: (1) the federal government (approximately 4 percent); (2) state formula aids and grants (approximately 42 percent); and (3) revenues raised locally (approximately 55 percent).[9] State aid for public schools comes primarily from the State General Fund.[10] Foundation Aid is the largest unrestricted aid category supporting public school expenditures in New York State. In the 2017-2018 school year, it represented approximately 68% of the total State Aid received by districts statewide.[11] More than 90 percent of the variability of local revenue in New York school districts

[9] 2017-2018 State Aid Handbook, The University of the State of New York, The State Education Department, available at:
https://stateaid.nysed.gov/publications/handbooks/handbook_2017.pdf

[10] New York State Education Department Fiscal Analysis and Research Unit, Primer on State Aid, available at: http://www.oms.nysed.gov/faru/PDFDocuments/Primer13-14B.pdf.

[11] 2017-2018 State Aid Handbook, The University of the State of New York, The State Education Department, available at:
https://stateaid.nysed.gov/publications/handbooks/handbook_2017.pdf

is attributable to property taxes, the burden of which the State in large part assumes through the School Tax Relief (STAR) program.[12]

The Laws of 2007 consolidated approximately thirty existing aid programs into a Foundation Aid formula that was designed to distribute funds to school districts based on the cost of providing an adequate education, adjusted to reflect regional costs and concentration of needy pupils.[13] Pursuant to the Foundation Aid formula, needy districts like Brentwood were deemed to require a minimum amount of state funding to provide a "sound basic education" to all of their students.

The 2007-2008 Enacted Budget included a four-year phase-in of Foundation Aid.[14] The 2009-2010 Enacted Budget extended the phase-in to 2013-2014 and froze 2009-2010 and 2010-2011 payable Foundation Aid to 2008-2009 Foundation Aid levels. The 2011-2012 Enacted Budget extended the phase-in to 2016-2017 and froze 2011-2012 payable Foundation Aid to 2008-2009 Foundation Aid levels. The 2012-2013 Enacted Budget provided no phase-in of 2013-2014 aid except for the New York City School District at 5.23 percent.[15]

The effects of these freezes on Foundation Aid were compounded by budget cuts in 2009. Pursuant to Section 24 of Part A of Chapter 57 of the Laws of 2009, New York's

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[12] Baker, B., Corcoran, S., "The Stealth Inequities of School Funding: How State and Local School Finance Systems Perpetuate Inequitable Student Spending," *AmericanProgress.com*, Sept. 2012.

[13] *Id.*

[14] Description of 2008-09 Executive Budget Recommendations for Elementary and Secondary Education, January 22, 2008, available at:
https://www.budget.ny.gov/pubs/archive/fy0809archive/eBudget0809/fy0809localities/schoolaid/schoolAid.pdf

[15] Baker, B., Corcoran, S., "The Stealth Inequities of School Funding: How State and Local School Finance Systems Perpetuate Inequitable Student Spending," *AmericanProgress.com*, Sept. 2012.

school districts were assessed a Deficit Reduction Assessment ("DRA") of $2.097 billion to close New York's fiscal deficit.[16]

In 2009, New York State received a $2.5 billion State Fiscal Stabilization Fund ("SFSF") Education Fund grant pursuant to the American Recovery and Reinvestment Act ("ARRA") and NYSED was responsible for distributing these funds to school districts in New York to close the gap created by the DRA.[17] However, rather than distributing the SFSF funds according to the Foundation Aid formula, the funds were distributed to return Foundation Aid to the "freeze" level across the board, and to fund other school expense-driven aids at higher levels.

Since 2007, New York State has gradually adjusted the Foundation Aid formula to provide more state funding to low poverty districts and less state funding to high poverty districts.[18] The effects of these adjustments have been exacerbated by the State's STAR aid formula, which has enhanced the state aid provided to affluent districts by a considerable margin.[19] Together, the Foundation Aid freezes, NYSED's distribution of SFSF funds, persistent state aid cuts, and the inequitable STAR aid formula have undermined the purpose of the Foundation Aid formula of prioritizing funding to needy school districts, and instead resulted in

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[16] New York State Education Department, Deficit Reduction Assessment Restoration by District, available at: https://stateaid.nysed.gov/budget/html_docs/dra_restoration.htm

[17] New York State Monitoring Plan and Protocols For the State Fiscal Stabilization Education and Other Government Services Fund, available at: http://usny.nysed.gov/arra/monitoring-auditing/documents/NewYorkState_SFSF_MonitoringPlan.pdf.

[18] Baker, Bruce, "School Funding Fairness in New York State," prepared on behalf of the New York State Association of Small City School Districts, Oct. 1, 2011.

[19] *Id.* at 22.

the neediest school districts receiving a much smaller percentage of the Foundation Aid they were promised in 2007 than affluent districts.[20]

In addition to inequitably disadvantaging high-poverty districts, the data reveals that the State's current funding structure is unlawfully disadvantaging students based on race. School districts with higher concentrations of minority students have been underfunded to a *greater* extent than school districts with higher concentrations of White students.

There are a total of 674 school districts in New York State that currently receive Foundation Aid.[21] Only 80 of these districts serve a majority of "non-White" students.[22] The student population of these 80 "minority-as-majority" districts is, on average, 73.1 percent Non-White and 26.9 percent White.[23] The student population of the remaining 594 districts is, on average, only 14.5 percent Non-White and 85.5% White.[24]

% of Students White	Average of % of White Students	Average of Save Harmless Per Student Final Budget 2018-19	Average of UnderFunded Per Student Final Budget 2018-19	Average of G(WM0180) 05 PUPIL WEALTH RATIO (PWR)	Average of H(WM0181) 05 ALTERNATE PUPIL WEALTH RATIO (APWR)	Average of I(WM0182) 05 COMBINED WEALTH RATIO (CWR) FOR 18-19 AID	Average of M(PC0260) 04 LUNCH %, K-6, 3-YEAR AVG. 2018-19	Average of W(PC0277) 04 CENSUS POVERTY 2018-19	Sum of J(PC0257) 00 2017-18 PUBLIC ENROLLMENT EST.	Sum of % of Change in Foundation Aid	% of All Public Enrollment Estimate	Average Amount Needed to Reach Full Funding per Student (Full Phase-in)
Less that 50% White	26.9%	$936	($2,954)	2.119	0.978	1.55	58.6%	16.1%	1,525,641	72.1%	57.4%	$2,954
50% or more White	85.5%	$1,771	($1,144)	1.668	0.907	1.29	40.2%	10.9%	1,131,189	27.9%	42.6%	$1,144
Grand Total	78.5%	$1,736	($1,452)	1.722	0.915	1.32	42.4%	11.5%	2,656,830	100.0%		

Data set courtesy of Dr. Rick Timbs, Executive Director, Statewide School Finance Consortium, R.G. Timbs Advisory Group, Inc., 2018

[20] The effects of this inequitable distribution of state aid on low-wealth school districts have been compounded by the State's tax cap legislation, which has divested school districts of the power to generate local revenue to meet their growing needs. *See* L.2011, ch.97.

[21] New York State School Funding Transparency Form, August 8, 2018 (at page 5). Available at: https://www.budget.ny.gov/schoolFunding/NYSchoolTransparencyFAQ.pdf

[22] *See* Appendix B (attached to this Complaint)

[23] *Id.*

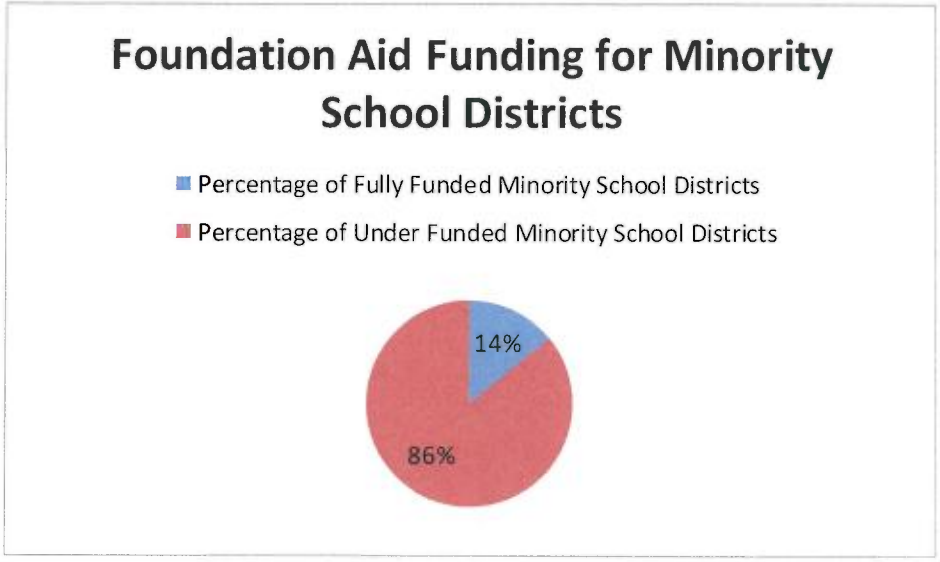
[24] *Id.*

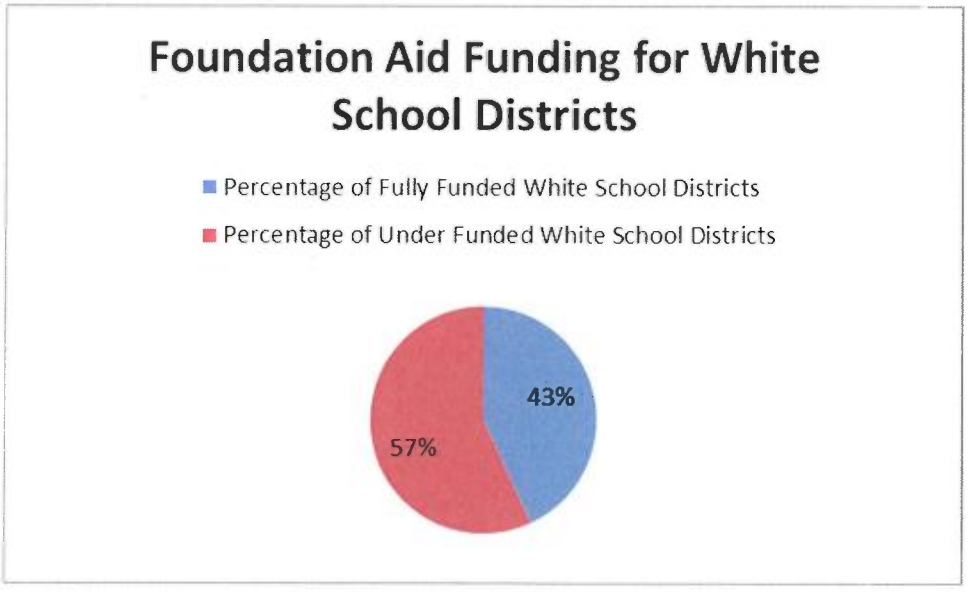
The median per pupil amount of Foundation Aid that is owed to a student attending a school district that serves a majority of *White* students is $1,010. The median per pupil amount of Foundation Aid owed to a student attending one of the 80 "minority-as-majority" school districts is $2,455:

All Underfunded Per Student Mean Average	All Underfunded Per Student Median Average	Underfunded Per Student Mean Average < 50% White	Underfunded Per Student Median Average <50% White	Underfunded Per Student Mean Average => 50% White	Underfunded Per Student Median Average => 50% White
-$1,452	-$1,156	-$2,954	-$2,455	-$1,144	-$1,010

Data set courtesy of Dr. Rick Timbs, Executive Director, Statewide School Finance Consortium, R.G. Timbs Advisory Group, Inc., 2018

The 80 "minority-as-majority" districts are currently owed an aggregate amount of $2,615,854,427, nearly ***three times*** the aggregate amount that is owed to the remaining 594 White school districts ($924,417,858). Likewise, while only ***14 percent*** of the "minority-as-majority" school districts (11 out of 80 total districts) are receiving all of the Foundation Aid they were promised following the *CFE* case, ***43 percent*** of White districts (258 out of 594 total districts) in New York State are receiving all (and, in some instances, more) of the Foundation Aid funding to which they are entitled:


Foundation Aid Funding for Minority School Districts
Percentage of Fully Funded Minority School Districts
Percentage of Under Funded Minority School Districts
14%
86%


Foundation Aid Funding for White School Districts
Percentage of Fully Funded White School Districts
Percentage of Under Funded White School Districts
43%
57%

% of Students White	Average of % of White Students	Sum of E(FA0198) 00 2017-18 FOUNDATION AID	Sum of E(FA0197) 00 2018-19 FOUNDATION AID	Sum of $ CHANGE IN FOUNDATION AID	Average of % CHANGE IN FOUNDATION AID	Sum of % of all Foundation Aid 2017-18	Sum of % of all Foundation Aid 2018-19	Sum of COUNT SAVE HARMLESS FINAL BUDGET (Based on W(FA0001) 00 FOUNDATION AID BEFORE PHASE-IN (3/29/18 DSAB1)	Sum of COUNT UNDER FUNDED FINAL BUDGET (Based on W(FA0001) 00 FOUNDATION AID BEFORE PHASE-IN (03/29/18 DSAB1)	Sum of Save Harmless # of Students Final Budget 2018-19	Sum of UnderFunded # of Students Final Budget 2018-19	Sum of W(FA0001) 00 FOUNDATION AID BEFORE PHASE-IN	Sum of SAVE HARMLESS FINAL BUDGET (Based on W(FA0001) 00 FOUNDATION AID BEFORE PHASE-IN (03/29/18 DSAB1)	Sum of UNDER FUNDED FINAL BUDGET (Based on W(FA0001) 00 FOUNDATION AID BEFORE PHASE-IN (03/29/18 DSAB1)
Less that 50% White	26.9%	$11,019,399,682	$11,465,097,860	$445,698,178	4.40%	64.16%	64.44%	11	69	16,305	1,509,336	$14,068,318,819	$12,633,468	($2,615,854,427)
50% or more White	85.5%	$6,154,296,068	$6,326,943,454	$172,647,386	3.13%	35.84%	35.56%	258	336	294,485	836,704	$6,971,030,798	$280,330,514	($924,417,858)
Grand Total	78.5%	$17,173,695,750	$17,792,041,314	$618,345,564	3.28%	100.00%	100.00%	269	405	310,790	2,346,040	$21,039,349,617	$292,963,982	($3,540,272,285)

Data set courtesy of Dr. Rick Timbs, Executive Director, Statewide School Finance Consortium, R.G. Timbs Advisory Group, Inc., 2018

In short, the "Whiter" a school district's population, the more likely it is that the district is receiving full or close to full funding. A "minority-as-majority" district is nearly three times as likely to be underfunded as a predominantly White district.

Brentwood, a "minority-as-majority" school district in New York, has been harmed by New York's racially discriminatory funding practices. Approximately 96 percent of Brentwood's student population is "non-White" (93 percent Black and Hispanic), and Brentwood is currently owed $129,537,544 in Foundation Aid annually, or approximately $6,686 per pupil annually (more than four times the statewide mean underfunding of $1,452 per pupil, and nearly six times the statewide median underfunding of $1,156 per pupil).

IV. ARGUMENT

The State's Distribution Of Foundation Aid Disparately Impacts New York Students On The Basis Of Race.

Title VI prohibits discrimination on the basis of race, color, or national origin in programs and activities receiving Federal financial assistance. Specifically, Title VI provides that:

> [n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the

> benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Title VI, § 601; 42 U.S.C. § 2000d. The United States Supreme Court has held that Section 601 only prohibits intentional discrimination. *See Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582 (1983). However, Section 602 "authorize[s] and direct[s]" federal financial assistance to particular programs or activities "to effectuate the provisions of Section 601 . . . by issuing rules, regulations, or orders of general applicability." 42 U.S.C. § 200d. At least 40 federal agencies have adopted regulations that prohibit *disparate-impact* discrimination pursuant to this authority. *See Guardians*, 463 U.S. at 619 (Marshall, J. dissenting). Department of Education regulations state:

> A recipient, in determining the types of services, financial aid, or other benefits, or facilities which will be provided under any such program, or the class of individuals to whom, or the situations in which, such services, financial aid, other benefits, or facilities will be provided under any such program, or the class of individuals to be afforded an opportunity to participate in any such program, may not, directly or through contractual or other arrangements, utilize criteria or methods of administration *which have the effect* of subjecting individuals to discrimination because of their race, color, or national origin, or *have the effect* of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin."

34 C.F.R. § 100.3(b) (emphasis added). Pursuant to such regulations, all entities that receive federal funding, including New York State and NYSED, enter into standard agreements or provide assurances that require certification that the recipients will comply with the implementing regulations under Title VI. *Guardians*, 463 U.S. 582, 642 n.13. The Supreme Court has held that these regulations may validly prohibit practices having a disparate impact on protected groups, even if the actions or practices are not intentionally discriminatory. *Id*;

Alexander v. Choate, *supra*; *see also Villanueva v. Carere*, 85 F.3d 481 (10th Cir. 1996); *New York Urban League v. New York*, 71 F.3d 1031, 1036 (2d Cir. 1995); *Chicago v. Lindley*, 66 F.3d 819 (7th Cir. 1995); *David K. v. Lane*, 839 F.2d 1265 (7th Cir. 1988); *Gomez v. Illinois State Bd. Of Educ.*, 811 F.2d 1030 (7th Cir. 1987); *Georgia State Conf. v. Georgia*, 775 F.2d 1403 (11th Cir. 1985); *Larry P. v. Riles*, 793 F.2d 969 (9th Cir. 1984).

A recipient's practices have a racially discriminatory impact if they have a disproportionate impact on a group protected by Title VI. *Lau v. Nichols*, 414 U.S. 563 at 568 (1974). Disparate impact violations occur where recipients utilize policies or practices that result in the provision of fewer services or benefits, or inferior services or benefits, to members of a protected group. *See Meek v. Martinez*, 724 F. Supp. 888 (S.D.Fla. 1987) (Florida's use of funding formula in distributing aid resulted in a substantially adverse disparate impact on minorities and the elderly); s*ee also Campaign for Fiscal Equity, Inc. v. State of New York*, 86 N.Y.2d 307, 655 N.E.2d 1178 (N.Y. Ct. App. Jun 15, 1995) (*prima facie* case established where allocation of educational aid had a racially disparate impact); *see Robinson v. Kansas*, 295 F.3d 1183 (10th Cir. 2002) (finding state and its education officials did not enjoy sovereign immunity for claim based on "Kansas' state school financing system [which,] through a provision for 'low enrollment weighting' and 'local option budgets,' allegedly resulted in less funding per pupil in schools where minority students, students who were not of United States origin, and students with disabilities [were] disproportionately enrolled."); *Powell v. Ridge*, 189 F.3d 387 (3d Cir. 1999) (reversing dismissal and finding that complaint alleging that school districts with higher proportions of "non-White" students received less Commonwealth treasury revenues than districts with higher proportions of White students stated a claim for disparate impact under Title VI).

Claims of disparate impact under Title VI must necessarily rely on statistical proof. *See Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 987 (1988). However, because statistical analysis can never scientifically prove discrimination, courts have held that a plaintiff may establish a prima facie case of disparate impact discrimination by proffering statistical evidence which reveals a disparity substantial enough to raise an inference of causation. *EEOC v. Joint Apprenticeship Committee of Joint Industry Bd. of Elec. Indus.*, 186 F.3d 110, 117 (2d Cir. 1999) (quoting *Bazemore v. Friday*, 478 U.S. 385, 400 (1986) and *Bridgeport Guardians, Inc. v. City of Bridgeport*, 933 F.2d 1140, 1146 (2d Cir. 1991)).

There is no question that the State of New York and its Education Department are "recipients" of federal funding for purposes of federal civil rights laws. New York has promised its school districts a minimum amount of state aid in order to ensure that each district is able to provide basic instruction to its students. Currently, however, the likelihood that a school district is receiving the full measure of state educational aid that it has been promised, and consequently, the likelihood that the district is adequately funded, is heavily impacted by whether the district serves predominantly White students. The disparity between the percentage of required aid received by predominantly White districts and the percentage received by "minority-as-majority" districts is too significant to be coincidental, and too inequitable to be supported by a "legitimate justification." The State's maintenance of this funding structure, which has the effect of discriminating against students on the basis of race, violates Title VI.

This inequitable distribution of aid has had a foreseeable negative impact on "minority-as-majority" school districts, like Brentwood. The educational opportunities for Brentwood's students have been seriously impaired by the State's failure to adequately fund "minority-as-majority" districts. The funding disparity has created, *inter alia*:

- larger class sizes and higher student-to-teacher ratios;
- higher guidance counselor-to-student ratios;
- higher school social worker-to-student ratios;
- higher school psychologist-to-student ratios;
- reduced curricula;
- cuts in and elimination of programs and electives and advanced placement courses;
- shortages of textbooks and resources;
- shortages of technology;
- insufficient physical education and extracurricular activities;
- insufficient library resources;
- insufficient facilities.

Increasing educational funding has been documented to result in a corresponding increase is positive educational outcomes.[25] The practical and actual effect of the State's distribution of Foundation Aid has been to create a public education system where the "Whiter" a school district's population, the more likely it is that the district is receiving full or close to the full funding it has been promised. The State has been on notice of this racial inequality since 2013, when the undersigned filed a complaint with the United States Department of Education, Office for Civil Rights, on behalf of the Enlarged City School District of Middletown. The State's failure to fulfill its Foundation Aid obligations has disproportionately and unlawfully

[25] Jackson, C. K., R. Johnson, and C. Persico. (2015). The effects of school spending on educational and economic outcomes: Evidence from school finance reforms. The Quarterly Journal of Economics 131(1): 157-218; Philip Gigliotti, Lucy Sorensen, Educational Resources and Student Achievement: Evidence from the Save Harmless Provision in New York State, Economics of Education Review (2018), available at: https://doi.org/10.1016/j.econedurev.2018.08.004

impacted minority students. As a public entity and a recipient of federal assistance, New York State is responsible for ensuring that its methods of distributing aid do not adversely and disparately impact minorities. It has failed to do so.

V. CONCLUSION

For the above-stated reasons, the U.S. Department of Education should fully investigate this Complaint and direct the Respondents to: (1) remedy their inequitable, racially discriminatory methods of funding public education in New York with respect to Brentwood by restoring the moneys owed to Brentwood; and (2) discontinue their inequitable, racially discriminatory methods of funding public education in New York.

Dated: Garden City, New York
Syracuse, New York
October 22, 2018

Respectfully submitted,

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Appendix A

SSFC

03/29/18

County	E(FA0198) 00 2017-18 FOUNDATION AID	E(FA0197) 00 2018-19 FOUNDATION AID	$ CHANGE IN FOUNDATION AID	% CHANGE IN FOUNDATION AID	W(FA0001) 00 FOUNDATION AID BEFORE PHASE-IN	UNDER/ SAVE HARMLESS FUNDED FINAL BUDGET (Based on W(FA0001) 00 FOUNDATION AID BEFORE PHASE-IN (03/29/18 DSAB1)
UNIONDALE	Nassau	$33,269,423	$36,966,195	$3,696,772	11.11%	$82,056,562	-$45,090,367
WESTBURY	Nassau	$33,308,643	$36,325,817	$3,017,174	9.06%	$73,285,765	-$36,959,948
WYANDANCH	Suffolk	$29,666,156	$31,338,567	$1,672,411	5.64%	$52,438,896	-$21,100,329
HEMPSTEAD	Nassau	$83,930,884	$88,942,070	$5,011,186	5.97%	$157,274,951	-$68,332,881
EAST RAMAPO	Rockland	$36,810,896	$37,802,586	$991,690	2.69%	$63,634,732	-$25,832,146
BRENTWOOD	Suffolk	$194,173,674	$204,931,976	$10,758,302	5.54%	$334,469,520	-$129,537,544
AMITYVILLE	Suffolk	$15,973,173	$16,817,148	$843,975	5.28%	$27,064,999	-$10,247,851
CENTRAL ISLIP	Suffolk	$70,351,705	$75,324,563	$4,972,858	7.07%	$138,829,921	-$63,505,358
MOUNT VERNON	Westchester	$71,128,857	$73,226,195	$2,097,338	2.95%	$80,306,533	-$7,080,338
POUGHKEEPSIE	Dutchess	$54,295,485	$55,392,864	$1,097,379	2.02%	$64,774,129	-$9,381,265
FREEPORT	Nassau	$50,688,018	$54,373,179	$3,685,161	7.27%	$99,274,869	-$44,901,690
PEEKSKILL	Westchester	$29,235,263	$30,365,832	$1,130,569	3.87%	$42,417,093	-$12,051,261
ROCHESTER	Monroe	$421,948,812	$434,491,807	$12,542,995	2.97%	$527,889,570	-$93,397,763
COPIAGUE	Suffolk	$35,439,909	$37,754,103	$2,314,194	6.53%	$65,746,020	-$27,991,917
PORT CHESTER	Westchester	$18,223,994	$19,927,117	$1,703,123	9.35%	$41,840,574	-$21,913,457
MIDDLETOWN	Orange	$66,452,997	$70,116,679	$3,663,682	5.51%	$114,128,594	-$44,011,915
LAWRENCE	Nassau	$6,383,427	$6,552,950	$169,523	2.66%	$1,884,500	$4,668,450
YONKERS	Westchester	$195,793,034	$203,139,364	$7,346,330	3.75%	$242,872,745	-$39,733,381
BUFFALO	Erie	$511,147,503	$525,885,097	$14,737,594	2.88%	$596,593,663	-$70,708,566
NEWBURGH	Orange	$109,227,337	$112,367,962	$3,140,625	2.88%	$153,980,118	-$41,612,156
SYRACUSE	Onondaga	$271,731,423	$280,335,241	$8,603,818	3.17%	$317,257,379	-$36,922,138
SCHENECTADY	Schenectady	$94,352,807	$97,453,304	$3,100,497	3.29%	$137,817,799	-$40,364,495
SALMON RIVER	Franklin	$18,499,063	$19,244,552	$745,489	4.03%	$20,228,852	-$984,300
UTICA	Oneida	$94,917,871	$98,843,082	$3,925,211	4.14%	$139,082,838	-$40,239,756
FALLSBURG	Sullivan	$13,478,070	$13,955,237	$477,167	3.54%	$16,374,008	-$2,418,771
GREENPORT	Suffolk	$1,144,221	$1,184,098	$39,877	3.49%	$1,936,844	-$752,746
DUNKIRK	Chautauqua	$20,808,062	$21,237,935	$429,873	2.07%	$26,552,728	-$5,314,793
NIAGARA FALLS	Niagara	$79,766,331	$81,281,891	$1,515,560	1.90%	$95,599,039	-$14,317,148
TROY	Rensselaer	$41,653,716	$42,873,085	$1,219,369	2.93%	$54,374,431	-$11,501,346
AMSTERDAM	Montgomery	$29,807,004	$30,739,207	$932,203	3.13%	$43,014,774	-$12,275,567

Appendix B

New York State School Districts
2016-17 Enrollment Data*

BEDS Code	District	White Percentages
280208	ROOSEVELT	0.00
280202	UNIONDALE	0.01
280401	WESTBURY	0.01
580109	WYANDANCH	0.01
280201	HEMPSTEAD	0.02
500402	EAST RAMAPO	0.04
580512	BRENTWOOD	0.04
280230	VALLEY STR UF	0.05
580106	AMITYVILLE	0.05
580513	CENTRAL ISLIP	0.05
660900	MOUNT VERNON	0.05
280216	ELMONT	0.07
131500	POUGHKEEPSIE	0.08
280209	FREEPORT	0.08
661500	PEEKSKILL	0.08
261600	ROCHESTER	0.10
660409	ELMSFORD	0.11
660407	GREENBURGH	0.12
300000	NEW YORK CITY*	0.15
580105	COPIAGUE	0.15
661904	PORT CHESTER	0.15
280210	BALDWIN	0.16
441000	MIDDLETOWN	0.16
280215	LAWRENCE	0.17
662300	YONKERS	0.17
280212	MALVERNE	0.18
010100	ALBANY	0.20
140600	BUFFALO	0.20
441600	NEWBURGH	0.20
280251	VALLEY STR CHS	0.21
280224	V STR TWENTY-F	0.22
421800	SYRACUSE	0.22
661401	OSSINING	0.23
662200	WHITE PLAINS	0.23
530600	SCHENECTADY	0.24
580909	BRIDGEHAMPTON	0.25
280100	GLEN COVE	0.27
500201	HAVERSTRAW-ST	0.27
661100	NEW ROCHELLE	0.27
280213	V STR THIRTEEN	0.28
010615	MENANDS	0.29
280405	NEW HYDE PARK	0.29
580913	TUCKAHOE COMMO	0.29

Source: https://data.nysed.gov/
*2015-16 for New York City Public Schools

New York State School Districts
2016-17 Enrollment Data*

BEDS Code	District	White Percentages
280227	WEST HEMPSTEAD	0.30
280409	HERRICKS	0.30
161201	SALMON RIVER	0.31
412300	UTICA	0.31
580501	BAY SHORE	0.31
660401	TARRYTOWN	0.32
280517	HICKSVILLE	0.33
590501	FALLSBURG	0.34
581010	GREENPORT	0.35
060800	DUNKIRK	0.36
280252	SEWANHAKA	0.36
580301	EAST HAMPTON	0.40
580403	HUNTINGTON	0.40
580602	RIVERHEAD	0.40
280515	JERICHO	0.41
580235	SOUTH COUNTRY	0.41
580304	SPRINGS	0.41
580905	HAMPTON BAYS	0.42
660802	POCANTICO HILL	0.42
400800	NIAGARA FALLS	0.43
491700	TROY	0.43
580413	S. HUNTINGTON	0.43
101300	HUDSON	0.44
270100	AMSTERDAM	0.44
580103	NORTH BABYLON	0.44
580107	DEER PARK	0.44
030200	BINGHAMTON	0.45
140701	CHEEKTOWAGA	0.45
130200	BEACON	0.46
500304	NYACK	0.46
591401	MONTICELLO	0.46
430700	GENEVA	0.47
590901	LIBERTY	0.47
580906	SOUTHAMPTON	0.48
622002	ELLENVILLE	0.48
580212	LONGWOOD	0.49
580232	WILLIAM FLOYD	0.49
260801	E. IRONDEQUOIT	0.50
580224	PATCHOGUE-MEDF	0.50
140703	CLEVELAND HILL	0.51
280407	GREAT NECK	0.51
011200	WATERVLIET	0.52
660406	EDGEMONT	0.52

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*2015-16 for New York City Public Schools

New York State School Districts
2016-17 Enrollment Data*

BEDS Code	District	White Percentages
043200	SALAMANCA	0.54
280203	EAST MEADOW	0.54
440201	CHESTER	0.54
620600	KINGSTON	0.55
500108	NANUET	0.56
280410	MINEOLA	0.57
491200	RENSSELAER	0.57
660102	BEDFORD	0.57
660805	VALHALLA	0.57
260401	GATES CHILI	0.59
280231	ISLAND PARK	0.59
280300	LONG BEACH	0.59
441201	MONROE WOODBUR	0.59
580405	HALF HOLLOW HI	0.59
280502	SYOSSET	0.60
480601	BREWSTER	0.60
490601	LANSINGBURGH	0.60
500401	SUFFERN	0.60
660203	HENDRICK HUDSO	0.60
031502	JOHNSON CITY	0.62
131602	SPACKENKILL	0.62
440901	HIGHLAND FALLS	0.62
580514	FIRE ISLAND	0.62
651201	SODUS	0.62
261701	RUSH HENRIETTA	0.63
660405	ARDSLEY	0.63
141800	LACKAWANNA	0.64
260501	GREECE	0.64
280214	HEWLETT WOODME	0.64
280222	FLORAL PARK	0.64
280404	PORT WASHINGTO	0.64
420807	LA FAYETTE	0.64
442115	FLORIDA	0.64
500101	CLARKSTOWN	0.64
580203	COMSEWOGUE	0.64
580502	ISLIP	0.64
660403	DOBBS FERRY	0.64
061700	JAMESTOWN	0.65
240901	MOUNT MORRIS	0.65
280217	FRANKLIN SQUAR	0.65
280219	EAST ROCKAWAY	0.65
280522	FARMINGDALE	0.65
440102	WASHINGTONVILL	0.65

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*2015-16 for New York City Public Schools

New York State School Districts
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BEDS Code	District	White Percentages
441301	VALLEY-MONTGMR	0.65
580102	WEST BABYLON	0.65
580306	MONTAUK	0.65
610600	ITHACA	0.65
661901	RYE NECK	0.65
042801	GOWANDA	0.66
220301	INDIAN RIVER	0.66
421504	LYNCOURT	0.66
580401	ELWOOD	0.66
130801	HYDE PARK	0.67
140207	SWEET HOME	0.67
580211	MIDDLE COUNTRY	0.67
660302	TUCKAHOE	0.67
660501	HARRISON	0.67
662001	SCARSDALE	0.67
280402	EAST WILLISTON	0.68
480102	CARMEL	0.68
621801	WALLKILL	0.68
661601	PELHAM	0.68
010601	SOUTH COLONIE	0.69
010623	NORTH COLONIE	0.69
130502	DOVER	0.69
140201	AMHERST	0.69
280406	MANHASSET	0.69
440301	CORNWALL	0.69
440401	PINE BUSH	0.69
580902	WESTHAMPTON BE	0.69
662401	LAKELAND	0.69
190401	CATSKILL	0.70
260101	BRIGHTON	0.70
280205	LEVITTOWN	0.70
280506	OYSTER BAY	0.70
441800	PORT JERVIS	0.70
581005	SOUTHOLD	0.70
621001	MARLBORO	0.70
650501	LYONS	0.70
660301	EASTCHESTER	0.70
660701	MAMARONECK	0.70
031501	UNION-ENDICOTT	0.71
121401	MARGARETVILLE	0.71
222000	WATERTOWN	0.71
280220	LYNBROOK	0.71
280226	ISLAND TREES	0.71

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*2015-16 for New York City Public Schools

New York State School Districts
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BEDS Code	District	White Percentages
440601	GOSHEN	0.71
442111	GREENWOOD LAKE	0.71
580104	LINDENHURST	0.71
580917	EAST QUOGUE	0.71
620803	HIGHLAND	0.71
660402	IRVINGTON	0.71
061501	SILVER CREEK	0.72
131601	ARLINGTON	0.72
132101	WAPPINGERS	0.72
260803	W. IRONDEQUOIT	0.72
280403	ROSLYN	0.72
280521	BETHPAGE	0.72
530301	NISKAYUNA	0.72
650101	NEWARK	0.72
660202	CROTON HARMON	0.72
070600	ELMIRA	0.73
280411	CARLE PLACE	0.73
280504	PLAINVIEW	0.73
400400	LOCKPORT	0.73
441903	TUXEDO	0.73
500301	S. ORANGETOWN	0.73
661402	BRIARCLIFF MAN	0.73
662402	YORKTOWN	0.74
010802	GUILDERLAND	0.75
131101	NORTHEAST	0.75
180300	BATAVIA	0.75
222201	CARTHAGE	0.75
262001	WHEATLAND CHIL	0.75
280204	NORTH BELLMORE	0.75
280211	OCEANSIDE	0.75
420411	JAMESVILLE-DEW	0.75
421501	LIVERPOOL	0.75
450101	ALBION	0.75
580303	AMAGANSETT	0.75
581002	OYSTERPONDS	0.75
010500	COHOES	0.76
140203	WILLIAMSVILLE	0.76
140702	MARYVALE	0.76
261313	EAST ROCHESTER	0.76
261401	PITTSFORD	0.76
280503	LOCUST VALLEY	0.76
480503	PUTNAM VALLEY	0.76
580233	CENTER MORICHE	0.76

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New York State School Districts
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BEDS Code	District	White Percentages
580305	SAG HARBOR	0.76
580503	EAST ISLIP	0.76
660404	HASTINGS ON HU	0.76
280221	ROCKVILLE CENT	0.77
421201	ONONDAGA	0.77
441101	MINISINK VALLE	0.77
480101	MAHOPAC	0.77
580205	SACHEM	0.77
580406	HARBORFIELDS	0.77
580506	HAUPPAUGE	0.77
580701	SHELTER ISLAND	0.77
621101	NEW PALTZ	0.77
621201	ONTEORA	0.77
131201	PAWLING	0.78
180901	ELBA	0.78
420702	SOLVAY	0.78
520302	SHENENDEHOWA	0.78
630918	GLENS FALLS CO	0.78
661004	CHAPPAQUA	0.78
141401	EVANS-BRANT	0.79
142601	KENMORE	0.79
280229	NORTH MERRICK	0.79
442101	WARWICK VALLEY	0.79
450801	MEDINA	0.79
580507	CONNETQUOT	0.79
591302	LIVINGSTON MAN	0.79
661301	NORTH SALEM	0.79
031601	VESTAL	0.80
050100	AUBURN	0.80
280501	NORTH SHORE	0.80
480404	GARRISON	0.80
580101	BABYLON	0.80
621601	SAUGERTIES	0.80
660809	PLEASANTVILLE	0.80
042400	OLEAN	0.81
062201	FREDONIA	0.81
261501	CHURCHVILLE CH	0.81
471400	ONEONTA	0.81
490301	EAST GREENBUSH	0.81
500308	PEARL RIVER	0.81
580206	PORT JEFFERSON	0.81
580901	REMSENBURG	0.81
660801	MT PLEAS CENT	0.81

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*2015-16 for New York City Public Schools

New York State School Districts
2016-17 Enrollment Data*

BEDS Code	District	White Percentages
100501	COPAKE-TACONIC	0.82
132201	MILLBROOK	0.82
190901	HUNTER TANNERS	0.82
261001	SPENCERPORT	0.82
261801	BROCKPORT	0.82
280207	BELLMORE	0.82
400701	NIAGARA WHEATF	0.82
411800	ROME	0.82
421001	FAYETTEVILLE	0.82
580201	THREE VILLAGE	0.82
580410	COMMACK	0.82
581012	MATTITUCK-CUTC	0.82
660101	KATONAH LEWISB	0.82
010402	RAVENA COEYMAN	0.83
131301	PINE PLAINS	0.83
280253	BELLMORE-MERRI	0.83
530515	MOHONASEN	0.83
580209	ROCKY POINT	0.83
651402	WILLIAMSON	0.83
660303	BRONXVILLE	0.83
661800	RYE	0.83
661905	BLIND BROOK-RY	0.83
010701	GREEN ISLAND	0.84
062301	BROCTON	0.84
140709	SLOAN	0.84
190301	CAIRO-DURHAM	0.84
261201	PENFIELD	0.84
420303	NORTH SYRACUSE	0.84
560701	SENECA FALLS	0.84
580234	EAST MORICHES	0.84
580801	SMITHTOWN	0.84
591301	ROSCOE	0.84
610801	LANSING	0.84
650301	CLYDE-SAVANNAH	0.84
050701	SOUTHERN CAYUG	0.85
142101	AKRON	0.85
170500	GLOVERSVILLE	0.85
191401	WINDHAM ASHLAN	0.85
240401	GENESEO	0.85
261901	WEBSTER	0.85
411501	NEW HARTFORD	0.85
580207	MOUNT SINAI	0.85
580509	WEST ISLIP	0.85

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*2015-16 for New York City Public Schools

New York State School Districts
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BEDS Code	District	White Percentages
591502	SULLIVAN WEST	0.85
010306	BETHLEHEM	0.86
131701	RED HOOK	0.86
190501	COXSACKIE ATHE	0.86
261301	FAIRPORT	0.86
280225	MERRICK	0.86
411504	NEW YORK MILLS	0.86
431701	VICTOR	0.86
450704	HOLLEY	0.86
480401	HALDANE	0.86
512001	MASSENA	0.86
560603	ROMULUS	0.86
580404	NORTHPORT	0.86
610901	NEWFIELD	0.86
620901	RONDOUT VALLEY	0.86
650902	GANANDA	0.86
100902	GERMANTOWN	0.87
110200	CORTLAND	0.87
131801	RHINEBECK	0.87
141501	GRAND ISLAND	0.87
420401	E SYRACUSE-MIN	0.87
420701	WESTHILL	0.87
451001	LYNDONVILLE	0.87
580208	MILLER PLACE	0.87
591201	TRI VALLEY	0.87
630300	GLENS FALLS	0.87
651501	N. ROSE-WOLCOT	0.87
661201	BYRAM HILLS	0.87
061503	FORESTVILLE	0.88
070901	HORSEHEADS	0.88
101001	CHATHAM	0.88
121601	SIDNEY	0.88
140707	DEPEW	0.88
142500	TONAWANDA	0.88
270701	FORT PLAIN	0.88
280218	GARDEN CITY	0.88
280223	WANTAGH	0.88
401301	BARKER	0.88
420901	BALDWINSVILLE	0.88
430300	CANANDAIGUA	0.88
530501	SCHALMONT	0.88
580505	BAYPORT BLUE P	0.88
580805	KINGS PARK	0.88

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New York State School Districts
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BEDS Code	District	White Percentages
590801	ELDRED	0.88
611001	TRUMANSBURG	0.88
650701	MARION	0.88
662101	SOMERS	0.88
031101	MAINE ENDWELL	0.89
060201	SOUTHWESTERN	0.89
091200	PLATTSBURGH	0.89
120906	HANCOCK	0.89
142801	WEST SENECA	0.89
261101	HILTON	0.89
280206	SEAFORD	0.89
420101	WEST GENESEE	0.89
431101	MANCHSTR-SHRTS	0.89
431301	PHELPS-CLIFTON	0.89
450607	KENDALL	0.89
571000	CORNING	0.89
571800	HORNELL	0.89
580402	COLD SPRING HA	0.89
580504	SAYVILLE	0.89
580601	SHOREHAM-WADIN	0.89
580912	EASTPORT-SOUTH	0.89
641301	HUDSON FALLS	0.89
030601	SUSQUEHANNA VA	0.90
040901	ELLICOTTVILLE	0.90
043001	RANDOLPH	0.90
051901	UNION SPRINGS	0.90
070902	ELMIRA HEIGHTS	0.90
080101	AFTON	0.90
081200	NORWICH	0.90
101401	KINDERHOOK	0.90
140801	CLARENCE	0.90
141604	FRONTIER	0.90
150601	KEENE	0.90
210601	HERKIMER	0.90
250901	CANASTOTA	0.90
251400	ONEIDA CITY	0.90
470801	LAURENS	0.90
471601	OTEGO-UNADILLA	0.90
471701	COOPERSTOWN	0.90
510401	CLIFTON FINE	0.90
521800	SARATOGA SPRIN	0.90
580903	QUOGUE	0.90
610301	DRYDEN	0.90

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*2015-16 for New York City Public Schools

New York State School Districts
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BEDS Code	District	White Percentages
011003	VOORHEESVILLE	0.91
030701	CHENANGO VALLE	0.91
031701	WINDSOR	0.91
050301	WEEDSPORT	0.91
062901	WESTFIELD	0.91
081501	OXFORD	0.91
121702	S. KORTRIGHT	0.91
220909	BELLEVILLE-HEN	0.91
240101	AVON	0.91
251501	STOCKBRIDGE VA	0.91
280518	PLAINEDGE	0.91
400301	LEWISTON PORTE	0.91
400900	N. TONAWANDA	0.91
412902	WHITESBORO	0.91
460500	FULTON	0.91
461300	OSWEGO	0.91
490804	WYNANTSKILL	0.91
522101	WATERFORD	0.91
541102	COBLESKL-RICHM	0.91
550301	WATKINS GLEN	0.91
561006	WATERLOO CENT	0.91
640601	FORT EDWARD	0.91
650901	PALMYRA-MACEDO	0.91
041401	HINSDALE	0.92
080201	BAINBRIDGE GUI	0.92
101601	NEW LEBANON	0.92
120301	DOWNSVILLE	0.92
120701	FRANKLIN	0.92
141901	LANCASTER	0.92
142201	NORTH COLLINS	0.92
180701	BYRON BERGEN	0.92
181101	OAKFIELD ALABA	0.92
221401	LA FARGEVILLE	0.92
250301	DE RUYTER	0.92
251601	CHITTENANGO	0.92
260901	HONEOYE FALLS	0.92
400601	NEWFANE	0.92
401501	WILSON	0.92
411101	CLINTON	0.92
412901	ORISKANY	0.92
430501	EAST BLOOMFIEL	0.92
470901	SCHENEVUS	0.92
471201	MORRIS	0.92

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BEDS Code	District	White Percentages
490202	BRUNSWICK CENT	0.92
510101	BRASHER FALLS	0.92
512902	POTSDAM	0.92
530202	SCOTIA GLENVIL	0.92
572901	HAMMONDSPORT	0.92
630101	BOLTON	0.92
671201	PERRY	0.92
680601	PENN YAN	0.92
020101	ALFRED ALMOND	0.93
021601	FRIENDSHIP	0.93
030101	CHENANGO FORKS	0.93
040302	ALLEGANY-LIMES	0.93
120401	CHARLOTTE VALL	0.93
142301	ORCHARD PARK	0.93
150801	MINERVA	0.93
170901	NORTHVILLE	0.93
181001	LE ROY	0.93
181302	PEMBROKE	0.93
210402	FRANKFORT-SCHU	0.93
220701	THOUSAND ISLAN	0.93
221001	SACKETS HARBOR	0.93
230201	COPENHAGEN	0.93
241001	DANSVILLE	0.93
270601	FONDA FULTONVI	0.93
280523	MASSAPEQUA	0.93
401001	STARPOINT	0.93
401201	ROYALTON HARTL	0.93
490501	HOOSICK FALLS	0.93
491302	AVERILL PARK	0.93
491501	SCHODACK	0.93
521200	MECHANICVILLE	0.93
521301	BALLSTON SPA	0.93
521401	S. GLENS FALLS	0.93
530101	DUANESBURG	0.93
541401	SHARON SPRINGS	0.93
550101	ODESSA MONTOUR	0.93
560501	SOUTH SENECA	0.93
572301	PRATTSBURG	0.93
600301	CANDOR	0.93
610501	GROTON	0.93
630202	NORTH WARREN	0.93
630701	LAKE GEORGE	0.93
631201	WARRENSBURG	0.93

Source: https://data.nysed.gov/
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BEDS Code	District	White Percentages
640502	FORT ANN	0.93
641610	CAMBRIDGE	0.93
650801	WAYNE	0.93
031301	DEPOSIT	0.94
041101	FRANKLINVILLE	0.94
042302	CATTARAUGUS-LI	0.94
042901	PORTVILLE	0.94
050401	CATO MERIDIAN	0.94
060401	CASSADAGA VALL	0.94
060601	PINE VALLEY	0.94
060701	CLYMER	0.94
080601	GREENE	0.94
110304	MCGRAW	0.94
120102	ANDES	0.94
121502	ROXBURY	0.94
121701	STAMFORD	0.94
140301	EAST AURORA	0.94
141101	SPRINGVILLE-GR	0.94
141301	IROQUOIS	0.94
141601	HAMBURG	0.94
151102	LAKE PLACID	0.94
151701	WILLSBORO	0.94
161801	ST REGIS FALLS	0.94
170600	JOHNSTOWN	0.94
180202	ALEXANDER	0.94
190701	GREENVILLE	0.94
211103	POLAND	0.94
212101	CENTRAL VALLEY	0.94
230901	LOWVILLE	0.94
231101	SOUTH LEWIS	0.94
240201	CALEDONIA MUMF	0.94
250401	MORRISVILLE EA	0.94
250701	HAMILTON	0.94
271201	OP-EPH-ST JHNS	0.94
411603	SAUQUOIT VALLE	0.94
420501	JORDAN ELBRIDG	0.94
460801	CENTRAL SQUARE	0.94
462001	PHOENIX	0.94
471101	MILFORD	0.94
520101	BURNT HILLS	0.94
522001	STILLWATER	0.94
540901	JEFFERSON	0.94
600601	OWEGO-APALACHI	0.94

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BEDS Code	District	White Percentages
630902	QUEENSBURY	0.94
640101	ARGYLE	0.94
641501	SALEM	0.94
671501	WARSAW	0.94
680801	DUNDEE	0.94
020702	GENESEE VALLEY	0.95
022302	CUBA-RUSHFORD	0.95
022601	WELLSVILLE	0.95
030501	HARPURSVILLE	0.95
040204	WEST VALLEY	0.95
051101	PORT BYRON	0.95
060301	FREWSBURG	0.95
060503	CHAUTAUQUA	0.95
061101	FALCONER	0.95
061601	PANAMA	0.95
081003	UNADILLA	0.95
090301	BEEKMANTOWN	0.95
090501	NORTHEASTERN	0.95
091101	PERU	0.95
110701	HOMER	0.95
121901	WALTON	0.95
141201	EDEN	0.95
151001	NEWCOMB	0.95
160101	TUPPER LAKE	0.95
170801	MAYFIELD	0.95
171102	BROADALBIN-PER	0.95
181201	PAVILION	0.95
200401	INDIAN LAKE	0.95
200601	LAKE PLEASANT	0.95
210302	WEST CANADA VA	0.95
220101	S. JEFFERSON	0.95
220202	ALEXANDRIA	0.95
221301	LYME	0.95
230301	HARRISVILLE	0.95
240801	LIVONIA	0.95
241701	YORK	0.95
250201	CAZENOVIA	0.95
410601	CAMDEN	0.95
412801	WESTMORELAND	0.95
420601	FABIUS-POMPEY	0.95
421902	TULLY	0.95
460102	ALTMAR PARISH	0.95
460701	HANNIBAL	0.95

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BEDS Code	District	White Percentages
461901	SANDY CREEK	0.95
470202	GLBTSVLLE-MT U	0.95
472202	CHERRY VLY-SPR	0.95
510201	CANTON	0.95
513102	EDWARDS-KNOX	0.95
520401	CORINTH	0.95
521701	SCHUYLERVILLE	0.95
540801	GILBOA CONESVI	0.95
570201	AVOCA	0.95
571901	ARKPORT	0.95
600801	SPENCER VAN ET	0.95
640701	GRANVILLE	0.95
640801	GREENWICH	0.95
641001	HARTFORD	0.95
651503	RED CREEK	0.95
670201	ATTICA	0.95
022401	SCIO	0.96
031401	WHITNEY POINT	0.96
043501	YORKSHRE-PIONE	0.96
051301	MORAVIA	0.96
061001	BEMUS POINT	0.96
062601	SHERMAN	0.96
081401	GRGETWN-SO OTS	0.96
110901	MARATHON	0.96
120501	DELHI	0.96
140101	ALDEN	0.96
141701	HOLLAND	0.96
151501	TICONDEROGA	0.96
151601	WESTPORT	0.96
161501	MALONE	0.96
200901	WELLS	0.96
211901	TOWN OF WEBB	0.96
220401	GENERAL BROWN	0.96
231301	BEAVER RIVER	0.96
250109	BROOKFIELD	0.96
270301	CANAJOHARIE	0.96
411902	WATERVILLE	0.96
412000	SHERRILL	0.96
421101	MARCELLUS	0.96
421601	SKANEATELES	0.96
431201	NAPLES	0.96
460901	MEXICO	0.96
470501	EDMESTON	0.96

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BEDS Code	District	White Percentages
472001	RICHFIELD SPRI	0.96
491401	HOOSIC VALLEY	0.96
511301	HERMON DEKALB	0.96
512201	NORWOOD NORFOL	0.96
512404	HEUVELTON	0.96
541001	MIDDLEBURGH	0.96
541201	SCHOHARIE	0.96
570603	CAMPBELL-SAVON	0.96
571502	CANISTEO-GREEN	0.96
573002	WAYLAND-COHOCT	0.96
600101	WAVERLY	0.96
600402	NEWARK VALLEY	0.96
630601	JOHNSBURG	0.96
641701	WHITEHALL	0.96
670401	LETCHWORTH	0.96
671002	WYOMING	0.96
010201	BERNE KNOX	0.97
021102	CANASERAGA	0.97
022902	BOLIVAR-RICHBG	0.97
062401	RIPLEY	0.97
082001	SHERBURNE EARL	0.97
090201	AUSABLE VALLEY	0.97
090601	CHAZY	0.97
091402	SARANAC	0.97
150301	ELIZABETHTOWN	0.97
170301	WHEELERVILLE	0.97
211701	VAN HORNSVILLE	0.97
212001	MT MARKHAM CSD	0.97
241101	DALTON-NUNDA	0.97
411701	REMSEN	0.97
430901	GORHAM-MIDDLES	0.97
431401	HONEOYE	0.97
461801	PULASKI	0.97
472506	WORCESTER	0.97
490101	BERLIN	0.97
511101	GOUVERNEUR	0.97
511901	MADRID WADDING	0.97
570101	ADDISON	0.97
570302	BATH	0.97
570401	BRADFORD	0.97
581004	FISHERS ISLAND	0.97
600903	TIOGA	0.97
630801	HADLEY LUZERNE	0.97

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BEDS Code	District	White Percentages
020801	BELFAST	0.98
022001	FILLMORE	0.98
090901	NORTHRN ADIRON	0.98
110101	CINCINNATUS	0.98
150901	MORIAH	0.98
151401	SCHROON LAKE	0.98
161401	SARANAC LAKE	0.98
161601	BRUSHTON MOIRA	0.98
210800	LITTLE FALLS	0.98
251101	MADISON	0.98
410401	ADIRONDACK	0.98
412201	HOLLAND PATENT	0.98
511602	LISBON	0.98
512101	MORRISTOWN	0.98
512300	OGDENSBURG	0.98
520701	GALWAY	0.98
020601	ANDOVER	0.99
022101	WHITESVILLE	0.99
150203	CROWN POINT	0.99
160801	CHATEAUGAY	0.99
510501	COLTON PIERREP	0.99
520601	EDINBURG	0.99
572702	JASPER-TRPSBRG	0.99
200701	LONG LAKE	1.00
211003	DOLGEVILLE	1.00
441202	KIRYAS JOEL	1.00
511201	HAMMOND	1.00
512501	PARISHVILLE	1.00
641401	PUTNAM	1.00

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