We Are *All* on the Journey: Transforming Antagonistic Spaces in Law School Classrooms

Palma Joy Strand

"[W]e are all part of the problem . . .
[W]e must also all be part of the solution."[1]

This essay begins and ends with *Fisher II*,[2] the most recent addition to the law on diversity in admissions to institutions of higher education. The body of the essay, however, focuses on diversity in law schools and specifically on transforming the law school classroom, which is too often antagonistic space for traditionally underrepresented students. The long-term project of creating law schools and a legal profession that are inclusive, that are spaces of belonging, is a journey on which admissions is only one milestone. Though this is a shared project—we are *all* on the journey—our individual experiences inform and guide this larger journey.

I begin with my own work on equity and inclusion in the law school classroom. The goal is to create a learning environment that communicates to students from groups that have traditionally been underrepresented and/or marginalized that they belong in law school and that they bring valuable experiences and perspectives to the enterprise of law. I include specific teaching strategies that exemplify how faculty can integrate equity and inclusion into

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1. Robert G. Smith et al., Gaining on the Gap: Changing Hearts, Minds, and Practice 176 (2011) [hereinafter Gaining on the Gap].

2. Fisher v. Univ. of Tex. at Austin, 136 S.Ct. 2198 (2016).

"regular" doctrinal classes. I then draw from research on the importance of social belonging to learning and work on microaggressions to provide a framework for these strategies. I end with reflections on how teaching for belonging leads to more searching and more extensive struggle to move law toward equity and justice.

My core insight in this essay is that concrete and usable strategies exist that counter antagonistic space in law schools for students from traditionally underrepresented groups and that concurrently stretch students across the board. Law professors can intentionally engage in "microinclusions" in our classrooms—teaching practices that not only counter microaggressions but that affirmatively create a learning environment of belonging in which historically marginalized and other students can thrive. A mindset of intentional validation—as opposed to microinvalidation—offers a frame for law school pedagogy that goes beyond belonging to empowerment.

I. *Fisher II* and Diversity in Admissions—Expanding the Equity Inquiry

The constitutional question of the permissibility of race being considered in admissions to institutions of higher education is of practical, legal, and symbolic importance. Yet I find myself frustrated that on the larger social question of continuing racial disparities in the professions specifically and in access to higher education more generally the constitutional spotlight seems to shine again and again on admissions. *Bakke*,[3] *Grutter*,[4] *Fisher I*,[5] and now *Fisher II*.

Admissions processes result in up-down decisions that have immediate consequences for individual applicants. These characteristics render admissions decisions, and the processes from which those decisions emerge, particularly suitable for legal challenge and judicial disposition under current discrimination law. What happens before and after the admissions decisions, however, shapes those decisions: Before, qualifications as measured by admissions criteria define the admissions landscape; after, relative success or lack thereof circles back to reaffirm or undercut the admissions decisions made in previous cycles.

Before admissions decisions lie institutional and structural systems of racial advantage and disadvantage. The operation of these systems results in applicant pools in which qualification for admission under traditional criteria is skewed along racial lines of White advantage and Black disadvantage.[6] After admissions decisions, at least where law schools are concerned, lie the institutions of law, including law schools and the legal profession. The

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3.   Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

4.   Grutter v. Bollinger, 539 U.S. 306 (2003).

5.   Fisher v. Univ of Texas at Austin, 133 S.Ct. 2411 (2013).

6.   I use Black, White, and Hispanic as racial and ethnic identifiers. *See* Palma Joy Strand, *Is* Brown *Holding Us Back? Moving Forward, Six Decades Later: Visionary States, Civic Locals, and Trusted Schools and Teachers*, 23 Kan. J.L. & Pub. Pol'y 283, 285 n.15 (2014).

ways in which these institutions interact with the systemic skew coming into admissions decisions is a matter of discussion, as evidenced by Justice Scalia's heavy-handed question about "mismatch" theory at the *Fisher II* oral argument.[7]

Rather than focusing on admissions decisions and their implications, I focus here on the law school classroom. The classroom is the locus of the core interaction that most of us as law faculty have with the legal system. The classroom is a place in which I as a faculty member meet my students around legal subject matter and skills. I am connecting them with a profession that they seek to enter. Bringing diversity and equity into my classroom communicates volumes to my students about their relationship to the law and the law's relationship to them. Conversely, excluding diversity and equity from the classroom also speaks volumes.

II. Institutional Isms: Expectations, Respect, Difference, and Stories

My approach to equity and inclusion in the law school classroom is grounded in experience and research on equity and inclusion in the K-12 classroom. I was fortunate to be in the middle of my local public school district's efforts to address racial and ethnic student achievement gaps, and one of the lessons learned is that understanding my own story of equity and diversity is essential for me to engage in inclusive pedagogy. I need a firm grounding in my own racial and ethnic identity and history to be able to reach out to my students. My law school teaching grows from and is an extension of my personal experiences and perceptions. Though my story is unique, the process of reflecting and grappling with race is essential to equitable and inclusive pedagogy.

A. Challenging Race and Other Isms With Respect

When my oldest child was headed for kindergarten in the early 1990s, I searched for a school that had a student body of kids who were diverse racially, ethnically, economically. Easy enough to find in Arlington, Virginia, where we were living.

All three of my kids went to kindergarten at Key School/Escuela Key, a bilingual, two-way, partial-immersion school in which half native English speakers and half native Spanish speakers learned half their subjects in English and half their subjects in Spanish. The socially constructed line in the school was language rather than race. My biracial White/Black kids fell on the Anglo side of the line. At Key, they had multiple identities; many kids did.

I also wanted the kids in the diverse school I was seeking to be doing well regardless of race, ethnicity, economics. This turned out to be not so easy to find. Like many White people, I was racially naïve.

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7.   Yanan Wang, *Where Justice Scalia Got the Idea That African Americans Might Be Better Off at "Slower-Track" Universities*, Wash. Post Morning Mix (Dec. 10, 2015), https://www.washingtonpost. com/news/morning-mix/wp/2015/12/10/where-justice-scalias-got-the-idea-that-african- americans-might-be-better-off-at-slower-track-universities/?utm_term=.e41e303603b6 [https://perma.cc/5NAB-GA48].

On this score, Key wasn't nirvana. The academic achievement of the Anglo kids generally was better than the achievement of the Hispanic kids. And the achievement of the White kids was generally better than the achievement of the Black kids.

Arlington at the time was, even before No Child Left Behind, beginning the agonizing soul-searching that accompanies disaggregating achievement data. Arlington was a high-performing school district overall, and it was painful for teachers and administrators, parents and community members to see gaping achievement gaps along racial and ethnic lines.

The Arlington Public Schools (APS) first picked off the low-hanging fruit, changing policies and practices that clearly disadvantaged some kids. That made a difference, but the gaps persisted. Over a period of years, a combination of external trainings and internal discussions led to a shift in focus: Though many students came to the schools with needs and troubles, they were not the problem. Fixing the kids was therefore not the solution. Instead, the problem was the schools, and fixing them was the work to be done.[8]

In time, Seeking Educational Equity and Diversity (SEED) groups[9] and other professional development[10] led to systemwide training for all instructional personnel. The training named institutional racism as the cause of disparate achievement. It called for teachers to look inward at their own identities and privilege and to transform their interactions with their students—to "see" students of different races and cultures and to set and communicate a sense of belonging and expectation.

I was part of the team that developed this training. After a hiatus from teaching when my kids were young, I was teaching part time at Georgetown and working toward an LL.M. in alternative dispute resolution and legal problem-solving. I brought to the table the insight that skilled facilitation was essential for this kind of training to be successful; I also contributed an awareness of the importance of stories and the way that storytelling and story-listening can heighten self-awareness and build relationship across racial lines.

With others from the APS team, I co-authored *Gaining on the Gap: Changing Hearts, Minds, and Practice*, a book documenting our experience undertaking

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8. Gaining on the Gap, *supra* note 1, at 2, 63–83, 86–87.

9. SEED is a multicultural training program focused on teachers and education. *About SEED*, The Nat'Seed Project, http://www.nationalseedproject.org/ (last visited August 3, 2017) [https://perma.cc/N75F-UV9S]. SEED was co-founded by Peggy McIntosh, author of the classic essay *White Privilege: Unpacking the Invisible Knapsack*, Peace & Freedom Mag. (Women's Int'l League for Peace and Freedom, Phila., Pa.), July-Aug. 1989, at 10, https://nationalseedproject.org/images/documents/Knapsack_plus_Notes-Peggy_McIntosh.pdf.

10. Gaining on the Gap, *supra* note 1, at 107–46 ("Improving Total Minority Achievement Through Teacher Experience-Related Seminars" (IT MATTERS) and "Teaching Across Cultures: Curriculum and Instructional Strategies for Success with Culturally and Linguistically Diverse Students Developed Through Literature and Conversations with Parents" (TAC)).

systemic institutional change toward racial equity. Our goal was to write from inside a school system and to highlight the voices of people in a variety of roles—with buy-in across the board being important for systemic change. These roles, and my co-authors, included superintendent, assistant superintendent responsible for diversity, supervisor of minority achievement, teachers, and parents.[11]

I traveled a long way in my own equity journey through the process of participating in APS conversations about race and helping to develop cultural-competence training not only for teachers but also for parents and community members.[12] Most important, I became more comfortable talking about race. My experience is that most White people in this country have very little practice talking about race and in fact are socialized to actively avoid doing so. When we find ourselves in situations in which race is salient, "colorblindness" is a useful excuse for being "colormute."[13] Being in an interracial family pulled me to the Arlington work, which provided a set of insights and skills for thinking and talking about race and other social dividing lines in professional as well as personal contexts.

Contributing to the equity project of transforming the Arlington Public Schools and reflecting on that work led to a set of "lessons learned."[14] These lessons have shaped how I do my work as a law professor. Most fundamental is the awareness that the behavior and interactions of the individual people in schools determine students' experiences. Teachers and others can communicate a sense of belonging and expectation of success. And we can do this deliberately and with intention.

Moreover, responsibility for countering the institutional racism of disconnection and low expectations is personal and individual. When I am part of an institution with racist outcomes, I am part of the problem. When I am part of the problem, I have a responsibility to be part of the solution.[15] Addressing institutional racism calls for transforming how the institution operates from the inside out.[16]

My foundational responsibility is to "see" students for who they are. To see students in this way is to respect them—the "spec" root of the word respect

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11.   Gaining on the Gap, *supra* note 1, at 1-8.

12.   Community anti-racism conversations continue to be led by the organization Challenging Racism: through Stories and Conversations. http://www.challengingracism.org/ (last visited Aug. 3, 2017).

13.   *See generally* Mica Pollock, Colormute: Race Talk Dilemmas in an American School (2004) (observing that despite people claiming that they are "colorblind," most people see race and are rather "colormute" in declining to name or talk about race).

14.   Gaining on the Gap, *supra* note 1, at 58-61 (Robert G. Smith); 77-79 (Palma Strand); 101-02 (Cheryl Robinson); 120-21 (Timothy G. Cotman, Jr.); 140-45 (Marty Swaim); 163-64 (Alvin Crawley); 181-84 (all).

15.   *See supra* note 1 and accompanying text.

16.   Gaining on the Gap, *supra* note 1, at 2.

being grounded in seeing. Sociologist Sara Lawrence-Lightfoot in her book *Respect*[17] highlights how respect transforms relationships when offered by people in roles ordinarily associated with higher status and greater power to those with whom they interact. The teacher-student dynamic is one of these traditionally hierarchical relationships,[18] and respect from teacher to student acknowledges the personhood of the student as well as his or her potential for contributing to the shared enterprise of teaching and learning.

Showing this kind of respect to students embraces a range of actions—from the small to the large. An example of the small is noting when students apologize as they speak in class (always, in my experience women/students of color) and intentionally affirming to them that they belong there. An example of the large is having faculty who are women/people of color,[19] which sends a message that the legal profession encompasses lawyers from nontraditional backgrounds.

When a teacher adds a "ply" of authentic and egalitarian respect to the status-based thread between her and her students, she communicates to individual students that they belong. Though they are currently apprentices in the field of study, the "I see you" message communicates a base level of equality and belonging that supports achievement and eventually collegiality. This message is particularly important for students who may have internalized or actually be receiving messages that law school is not really "their space."

Two specific strategies of respect for traditionally underrepresented students in the law school classroom have emerged in my teaching.

- Because people's differences are key parts of their identities, "see"ing people requires *naming and discussing difference.*
- Because differences include various ways of interacting and divergent perspectives, *creating space for different stories and opportunities for different ways of participating* offers greater potential for student connection.

I use each of these strategies in a variety of traditional law school classes.

B. *Naming and Discussing Difference—Trusts and Estates*

For ten years, I taught the survey Trusts and Estates class, a required class at Creighton. The class generally ranges in size between forty and sixty students, though I have had as many as 100 students. The class is taught in a standard stadium room with the instructor at a lectern in the front of the classroom. Though it is set up as a lecture class, I facilitate discussion by including regular small-group work. I use the Dukeminier and Sitkoff casebook,[20] which I appreciate for how it reveals the people behind the cases through photos,

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17. Sara Lawrence-Lightfoot, Respect: An Exploration 9–10 (1999).

18. *See id.* at 92–116.

19. These two specific examples come from my daughter, Elaine Strand Sylvester, J.D., Univ. of Va. Sch. of Law (2017).

20. Jesse Dukeminier & Robert H. Sitkoff, Wills, Trusts, and Estates (9th ed. 2013).

thoughtful notes and questions, and sidebars and footnotes with comments about or direct communications from individuals involved in the excerpted cases.

For most students, Trusts and Estates isn't one of the first areas of law that comes to mind when diversity is the topic. T&E has the reputation of being moldy and covered in cobwebs, akin to and perhaps even more arcane than the future interests of property law. Student expectations are that T&E will be like the "begats" in the Old Testament.

Because of its reputation, T&E is in many ways the perfect class to model naming and discussing difference. T&E, like many areas of law today, operates with facial neutrality in matters of race and gender. The law of testation does not contain racial categorizations. Primogeniture has been abolished, as have dower and curtesy. Intestacy statutes are gender-neutral as to children and descendants as well as to surviving spouses. Not far below the surface, however, lie swift currents of equity and inequity.

When I taught the class most recently, I had to be out of town early in the semester and I arranged my syllabus so that the class discussion of the ways in which inheritance law contributes to the perpetuation of our social structure took place online. In this way, each student was required to participate; each student also had time to consider what he or she would offer. Online discussion forums pull in the students who take a few extra minutes to think through their comments before sharing them and the students who are reluctant to take up air time in class, especially in a lecture-sized class.

I divided the class into small discussion groups of approximately ten students each. Before the online discussion forum, students were assigned the materials in the casebook on inheritance policies, the relationship between inheritance and wealth distribution, and racial wealth disparities and their connection to inheritance. They also read the "freedom of testation" section, including the notorious *Shapira* case involving a father's bequest to his son that is conditioned on the son marrying a woman who is Jewish.[21] The students also watched the brief video *Wealth Inequality in America*,[22] which compares Americans' perceptions of the socially desirable level of wealth inequality, their perceptions of what the current level of wealth inequality in the U.S. is (higher), with the actual level of wealth inequality (higher still).

The prompts for the discussion forum asked students to respond to Lawrence Friedman's insight about T&E law and the continuity of our social structure: "Rules of inheritance and succession are, in a way, the genetic code of a society. They guarantee that the next generation will, more or less, have the same structure as the one that preceded it."[23] After writing their own initial

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21.   Shapira v. Union Nat'l Bank, 315 N.E. 2d 825 (Ohio Ct. Com. Pl. 1974).

22.   *Wealth Inequality in America*, YouTube (Nov. 20, 2012), https://www.youtube.com/watch?v=QPKKQnijnsM.

23.   Lawrence M. Friedman, *The Law of Succession in Social Perspective*, in Death, Taxes and Family Property: Essays and American Assembly Report 9, 14 (Edward C. Halbach, Jr., ed., 1977).

entries, students read the other posts from their small group and responded to their classmates.[24]

The student responses touched on all the assigned materials, though most students focused on just one or two of the excerpts. In form, the posted comments ranged from analytical essays focusing on the law to reflective pieces based on personal experiences to ruminations that drew from undergraduate studies. A majority of students supported the status quo of freedom of testation—not surprising given its familiarity. Many students, however, including a significant number in that majority, also saw the problems of perpetuated inequalities through freedom of testation. Students already attuned to these differences and their implications had an avenue for sharing their knowledge; students not previously aware had the opportunity to gain new perspectives. Naming the differences of race and wealth and providing a way for students to process those differences in the context of trusts and estates law revealed the relevance of T&E to the world the students live in. The relevance of T&E to their world in turn demonstrates their own relevance to the world of the law of T&E.

Difference—gender in particular—also lurks just below the surface in many T&E cases. I start the class with *Mahoney*,[25] the classic slayer case out of Vermont, which provides a textured introduction to testacy and intestacy, probate, and common law versus the UPC versus state probate codes. Carla Spivack's deep dive into the underlying facts of the manslaughter in *Mahoney*,[26] excerpted in the casebook, brings gender into focus by illuminating the evidence of domestic violence that may have led the potential beneficiary wife to kill her husband.

Gender and race resurface throughout the semester. We discuss the equities of a wife's claim on assets built jointly but titled in her husband's name in a separate property state when we read the insane delusion case of *Honigman*.[27] We discuss these equities again in the context of community and separate property legal regimes for marital property. We note the greater likelihood of informality in child-rearing arrangements in the African-American community when we cover *O'Neal*,[28] the equitable adoption case. The doctrines of undue influence and duress provide a cornucopia of examples of courts bringing social

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24.   The prompts for the online Discussion Forum were as follows:

>   Round 1: Post a comment of 250–300 words as follows**:** Choose an excerpt from the reading assignment that resonated with you and explain why. Discuss that assigned reading in light of Friedman's comment.

>   Round 2: Post an additional comment of approximately 100 words that responds to one of your classmates' original post. Remember to be respectful and professional in addressing your classmates online.

25.   In re Estate of Mahoney 220 A. 2d 475 (Vt. 1966).

26.   Carla Spivack, *Killers Shouldn't Inherit from Their Victims—Or Should They?*, 48 Ga. L. Rev. 145 (2013).

27.   In re Honigman's Will, 168 N.E. 2d 676 (N.Y. 1960).

28.   O'Neal v. Wilkes, 439 S.E.2d 490 (Ga. 1994).

mores about difference to bear on estate decisions: interracial relationships;[29] women's rights;[30] gay partnerships;[31] older women and younger men.[32] All of these differences make an appearance. Do they explain the court decisions? Would those decisions be decided the same way today? What "of course" social mores of today will we look askance at in the future? All of these questions thread into the class discussion.[33]

Naming these differences normalizes them, not in the sense of relegating them to unimportant background but in the sense of their presence and salience being not unusual—being, in fact, the norm. And discussing these differences in class normalizes them in moving students toward becoming accustomed to them being part of the conversation. Race and gender in particular can be red-flag topics; touching on them frequently yet relatively casually in a private-law class like T&E lets students know that these differences are salient yet approachable.

None of these questions is the primary theme of the class. But when I name and include these social categories as a routine part of our discussion, these differences become part of the conversation. I have found it especially effective to name the differences of race and gender early in the semester. *Mahoney* puts gender on the table the very first time the class meets. The online discussion names race and economic inequality as key issues during the first weeks. Once these differences are named, the space of respect is opened up—even though for the remainder of the course as we cover the doctrinal material these differences are only one theme among many.

Diversity at the school or *Fisher II* level plays out at the interpersonal level in encounters with difference in everyday life. Diversity is the system-level characteristic; difference is how individuals—faculty and students in law schools, for example—experience diversity. Normalizing difference at the class or interpersonal level communicates to women, students of color, and other groups who may feel that law and law school weren't designed with them in mind (as they in fact weren't) that the differences they represent are part of the texture of law. Their presence as who they are is important to the enterprise. Conversely, normalizing difference also communicates to those who may fit into the traditional law school norm that law is a broader and more diverse enterprise than they may have thought and that difference is important and valuable.

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29. *See, e.g.*, Latham v. Father Divine, 85 N.E. 2d 168 (N.Y. 1949).

30. *See, e.g.*, In re Strittmater's Estate, 53 A. 2d 205 (N.J. Ct. Err. & App. 1947).

31. *See, e.g.*, In re Will of Kaufmann, 20 A.D. 2d 464 (N.Y App. Div. 1964).

32. *See, e.g.*, In re Estate of Reid, 825 So. 2d 1 (Miss. 2002); Estate of Lakatosh, 656 A. 2d 1378 (Pa. Super. Ct. 1995).

33. For a critical discussion of the doctrine of undue influence, see Carla Spivack, *Why the Testamentary Doctrine of Undue Influence Should Be Abolished*, 58 Kan. L. Rev. 245 (2010).

C. *Creating Space for Stories—From Civic Organizing and Democracy to T&E and PR*

Perhaps the most compelling lesson I took away from the work in Arlington was the power of stories. My colleague Marty Swaim led the way in her Teaching Across Cultures class, a precursor to the work with the entire school system. Marty found that reading Toni Morrison's *The Bluest Eye*,[34] Esmerelda Santiago's *When I Was Puerto Rican*,[35] Maxine Hong Kingston's *Woman Warrior: Memoirs of a Girlfriend Among Ghosts*,[36] and other novels and memoirs with compelling nonmainstream stories allowed predominantly White teachers to begin to access the worlds of their students of color—and to do so with their hearts as well as their heads. Marty brought those stories closer to home by inviting people of color, especially parents of kids in the district or adults who had themselves attended the Arlington schools, to share their own personal stories.

When we began the parent and community groups to complement the in-house instructional training,[37] Marty and I added to the mix structured storytelling among group members. In response to prompts such as "Tell a story about the first time you were aware of race," group members told personal stories to each other through structured storytelling and story-listening.[38] Telling stories helped people of various races and ethnicities explore and coalesce their backgrounds and identities. Listening to someone else's story to hear and understand their personal experience creates a relationship that operates at the level of "you and I are human beings"[39] sharing our community. Stories slip through people's defenses against difference, against the *other*, against simply getting outside of one's familiar comfort zone. Stories were the turning point in recording a different tape about race and ethnicity to play in people's heads.[40]

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34.   (1970).

35.   (1993).

36.   (1976).

37.   *See supra* note 12 and accompanying text.

38.   *See* Paul Costello, Center for Narrative Studies, Story as the Shape of Our Listening (2006) (describing listening teams story process).

39.   Martin Buber, I and Thou (1971); Palma Joy Strand, *The Civic Underpinnings of Legal Change: Gay Rights, Abortion, and Gun Control*, 21 Temp. Pol. & C..R. L. Rev. 117, 137–41 (2011) [hereinafter Strand, *Civic Underpinnings*].

40.   "While implicit bias may be pervasive, it is also malleable." Palma Joy Strand, *Racism 4.0, Civity, and Re-Constitution*, 42 Hastings Const. L.Q. 763, 782 (2015) [hereinafter Strand, *Racism 4.0*].

We discovered Chimamanda Adichie's powerful TED talk, "The Danger of a Single Story,"[41] in which this novelist and feminist[42] gently and with humor lays bare our universal tendency to stereotype and minimize people we don't know. By telling her own story about stories, Adichie invites us to reflect for ourselves on when we have been the Nigerian girl reading books about White children in England, when we have been the middle-class city girl one-dimensionalizing someone's village family because they are poor, when we have been the African roommate who surprises the American by liking Mariah Carey, and when we have been the cosmopolitan who sees all Mexicans through a media stereotype.

I first used stories in my law classes in a course I created for my LL.M. at Georgetown and continued teaching at Creighton called Civic Organizing and Democracy. The class shifts the focus of law creation from politicians and lawyers to social interactions and organizing for change and justice; it also recognizes the story nature of law creation and of law itself.[43] An initial focus on Ella Baker, a powerful yet often unknown organizer in the civil rights movement,[44] reveals the scaffolding of relationship and activism that supported Martin Luther King's oratory and Thurgood Marshall's advocacy. As the course progresses, we consider the role of Stonewall, Harvey Milk, and the LGBTIQ coming-out movement,[45] which continues to this day in the astonishing march from *Bowers v. Hardwick*[46] through *Lawrence v. Texas*[47] to *Windsor*[48] and *Obergefell*.[49] In both social equity movements, relationships and stories bridged difference to transform culture. In both movements, transformed culture eventually transformed law.[50]

Telling one's own story empowers by discovering, revealing, and affirming one's own identity. Listening to another's story is a gift of recognition, validation, and respect. Students in the Civic Organizing and Democracy class

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41.   Chimamanda Adichie, *The Danger of a Single Story*, YouTube (July 2009), https://www.ted.com/talks/chimamanda_adichie_the_danger_of_a_single_story (presented at the official 2009 TEDGlobal Conference).

42.   Chimamanda Ngozi Adichie, Americanah (2013); Chimamanda Ngozi Adichie, We Should All Be Feminists (2015).

43.   *See* Palma Joy Strand, *Law as Story: A Civic Concept of Law (with Constitutional Illustrations)*, 18 S. Cal. Interdisc. L.J. 603 (2009) [hereinafter Strand, *Law as Story*] (law is socially constructed through processes of collaborative emergence (voice) and immergence (resonance) involving the stories of those who are governed).

44.   Video: Fundi: The Story of Ella Baker (Icarus Films 1981).

45.   *See* Strand, *Civic Underpinnings, supra* note 39, at 119-24.

46.   Bowers v. Hardwick, 478 U.S. 186 (1986).

47.   Lawrence v. Texas, 539 U.S. 558 (2003).

48.   United States v. Windsor, 133 S.Ct. 2675 (2013).

49.   Obergefell v. Hodges, 135 S.Ct. 2584 (2015).

50.   *See* Strand, *Law as Story, supra* note 43, at 612–13, 615–18; Strand, *Civic Underpinnings, supra* note 39, at 150–62.

practiced their own stories, heard their classmates', and intentionally elicited and listened to the stories of others for a course capstone project connecting organizing and law. I now use the story fundamentals from this class in every class I teach.

In T&E, I require students to interview someone who has engaged in estate planning or been involved in administering an estate—not as an attorney. The assignment is to elicit that person's story, to get a glimpse into how a client experiences the process, and to reflect on how that understanding matters to a T&E attorney. Part of the interview exercise is to ask open-ended questions that create the space for the other person to tell his or her story and then to listen to that story with the goal of understanding. Many students interview a family member, and they are often surprised at how much is shared when they simply ask and listen.

When I teach professional responsibility (PR), my students interview a practicing attorney (one of the benefits of being in a mid-sized metro area such as Omaha is that there are a lot of accessible alumni and other attorneys in town) and ask about ethical challenges he or she has encountered in practice. Though this is a professional interview, the instructions are again to ask open-ended questions, to create the space for the other person to tell his or her story, and to listen with the goal of understanding. Again, students are often surprised at how much is shared. Most of the attorneys interviewed do wrestle with ethical issues; students see the relevance of the class to their future professional lives.

In reading reflection papers from these assignments over the years, it is remarkable how often women and students of color slide into the stories and personal interactions like a comfortable slipper after a long day walking. Completely appropriately, they bring themselves into the frame; they connect who they are with the work they are doing. This is for many a comfortable mode. And because it is comfortable and familiar, it is empowering in the law school setting.

Other students, more often than not White men, express impatience: These assignments are not "real law." Some change their perspective in the process of sitting down and talking, hearing other people speak of their experiences with emotions ranging from disquiet to anguish. In each round of papers, I read comments from students who admit they were skeptical about the assignment and yet, having completed it, see the importance of relationship to effective representation. They also, by going through the process of setting out to ask and to listen, begin to comprehend the power of intentionally listening not to respond but to learn.

The Creighton JD Learning Outcomes include interpersonal skills and, in particular, the ability to work effectively across race, gender, culture, and

other important social identifiers.[51] The law faculty drew these learning outcomes from the lawyer competencies identified by Marjorie Shultz and Sheldon Zedeck,[52] as well as from the broader student learning outcomes of the university as a whole.[53] Interpersonal skills, relationship-building, and cross-cultural dexterity are important professional skills for lawyers. So too are understanding that every client has a story and the ethics of representation that flows from this recognition of human dignity.[54] Story assignments give students the opportunity to practice these skills as aspects of interacting with clients and others.

Story assignments are part of the deepening of diversity into inclusivity and belonging. Story assignments declare the value of others' experiences and stories. Story assignments, by calling on students to reflect on the stories they hear, also affirm the value of the students' own stories and experiences: In reflecting, they begin to understand how they listen to other people's stories through their own. Story assignments also emphasize the importance of being present, of asking questions of genuine interest and curiosity, of listening with attention to communicate respect: "I see you." My goal is to invite students to the practice of offering respect as well as to offer them respect myself.

The person-to-person practices of naming differences and creating space for diverse stories provide adaptable strategies for law teachers to communicate "I see you" respect. "See"ing traditionally underrepresented students in these ways emphasizes how the law is relevant to individuals with their social identities and also affirms the relevance of people with their social identities to the law. This respect disrupts the institutional racism and other isms that silence and marginalize groups by failing to take notice of them.

III. Structural Isms: Disparities, Inequities, Advantage, and Disadvantage

Developing the habit of disrupting institutional racism and other isms opens the door to a rich and troubling set of issues. Once we name differences, we are drawn to consider how they matter or don't matter under the law. We begin to see patterns of which we may not previously have been aware. When we open the space for new stories to be heard, the "right"ness of the way law

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51.   *JD Learning Outcomes*, Creighton U. Sch. of L. (Mar. 4, 2014), https://law.creighton.edu/sites/law.creighton.edu/files/JD%20Learning%20Outcomes.pdf [https://perma.cc/CM36-CUMS].

52.   Marjorie Shultz & Sheldon Zedeck, Final Report: Identification, Development, and Validation of Predictors for Successful Lawyering 26–27 (2008), https://www.law.berkeley.edu/files/LSACREPORTfinal-12.pdf [https://perma.cc/9UBH-V85U]; Marjorie M. Schultz & Sheldon Zedeck, *Predicting Lawyer Effectiveness: Broadening the Basis for Law School Admissions Decisions*, 36 Law & Soc. Inquiry 620, 630 (2011).

53.   *University Level Outcomes*, Creighton U., https://www.creighton.edu/aea/assessmentofstudentlearning/universityleveloutcomes/ [https://perma.cc/45J6-RVDC] (last visited August 3, 2017).

54.   David Luban, Legal Ethics and Human Dignity 65–71 (2007).

plays out may be called into question. Being present in the *how* of anti-ism pedagogy draws us toward deeper questions about the justice of *what* we are teaching, about the justice of law itself. The path that each of us follows on this journey will vary according to our own personal background, the students we engage with, and the subjects we teach.

A. Making the Invisible Visible

The primary focus of the Arlington Public Schools work was institutional racism, defined as interpersonal interactions within institutions leading cumulatively to racially disparate outcomes.[55] In reflecting on that work, my *Gaining on the Gap* co-authors and I highlighted the often-invisible individual interactions that make up students' experiences of school: "It is, after all, in classrooms, hallways, and on the playground before, during, and after school that kids experience school—whether they feel anonymous and disregarded and likely to fail or known and respected and likely to succeed."[56] Through these interactions and relationships, students absorb what the adults in a school expect of them. Once kids discern expectations, they often rise or fall to what is expected of them. If White middle-class teachers have high expectations for kids who are like them and not-so-high expectations for kids who aren't, kids first internalize and then embody those expectations.

Making expectations and relationships visible illuminates the dynamics of institutional racism and other isms. Schools and school districts are complex adaptive systems in which "system-level results depend on the relationships and interactions of the individuals within [them], including students."[57] In Arlington, we contrasted a "those kids" mindset that marginalizes some students by *other*ing them with an "our kids" approach that respects and embraces all students. The APS cultural competence training was designed to "transform[ ] individual interactions, changing them from those that comprise institutional racism, unthinking but nonetheless devastating 'those kids' interactions . . . by helping adults in schools recognize attitudes that are so deeply ingrained that they have become second nature."[58]

As described above, offering respect via naming differences and creating space for stories enables moving from a "those kids" mindset to an "our kids" approach. This shift deepens as teachers gain an understanding of students' racial identities[59]—and recognize their own. The latter is especially relevant for

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55. Gaining on the Gap, *supra* note 1, at 2.

56. *Id*. at 73.

57. *Id*.

58. *Id*. at 74.

59. For background on racial identity development, see Beverly Daniel Tatum, "Why Are All the Black Kids Sitting Together in the Cafeteria?" And Other Conversations About Race 31-90 (Black racial identity); 93–128 (White racial identity); 131–166 (Latino, American Indian, and Asian Pacific American racial identities); 167–190 (multiracial racial identity) (1997).

White teachers who may not have previously given much thought to their own racial identity. Because being White has traditionally been the invisible norm, lack of awareness of our own Whiteness can prevent teachers from seeing the dominance of White in what we teach. Deconstructing a "those kids" mindset requires acknowledging who we are referring to when we use or contemplate an "our kids" frame.

Moving from coded language and thinking to straightforward talk about race and other social signifiers brings into focus issues relating to how identity can connect or alienate students in learning. Subject matter that includes Black, Latino, Asian, and Native American experiences as part of the American experience says to kids of color, "You are an important part of who we are." When kids see themselves in school, what they are learning becomes relevant. Diversity in the curriculum also sends an important message to White kids: "There are lots of different threads to the American tapestry."

In the law school setting, an "our students" approach calls us to become familiar with and recognize as valid the legal stories of the social groups with which "those students" identify. For women and students of color, these legal stories have much to do with how the law treats difference. When is difference salient? When should it be? When does a difference create a majority and a minority or minorities? What differences trigger social and economic advantage and disadvantage? How do we recognize advantage and disadvantage? When are advantage and disadvantage socially endorsed? When should they be? How are advantages and disadvantages solidified via law? When law that has served to solidify advantage and disadvantage is revoked, to what degree is that revocation retroactive or wholly prospective? When advantages and disadvantages come to be deemed illegitimate, how are they dismantled?

Taking on these questions leads to pedagogical roles and responsibilities for law faculty that pertain specifically to law.

- Because group differences are tangible, substantial, and systemic, *making difference visible means understanding systems as well as naming and challenging inequities and isms*.

- Because racism and other isms are structural, *working toward equity requires unpacking and challenging facially neutral structures that reproduce advantage and disadvantage.*

Structural racism and other isms are the social context within which law schools and the legal profession operate. They are also an essential focus for law schools and the legal profession because these isms and inequities are held in place by law. The law school curriculum tends to bracket these questions in constitutional law classes and in specialty electives. The nexus of difference, law, and justice, however, is germane throughout the curriculum.

B. *Understanding Systems and Naming and Challenging Inequities*
and Isms—Professional Responsibility

For six or seven years I taught the required professional responsibility class, usually in a class of about forty to fifty students. As with T&E, I taught the class in lecture format using small-group work to facilitate discussion. After the first year I did not adopt a casebook. My class materials consisted of the Model Rules published by the ABA,[60] the *Legal Ethics Stories*[61] book of in-depth case studies, and additional materials I prepared with scenarios and perspectives. The large number of PR casebooks available for adoption has led me to believe that others also have difficulty deciding how to teach the class. My choice was to work through the rules while also delving into narratives so that students had the opportunity to grapple with the deep ethical and moral issues legal practice can present.

The case study format and the subject matter offered the opportunity to introduce students to inequities and isms and their systemic nature. The focus in PR is on individual lawyer behavior. Yet inequities and institutional or structural isms frequently manifest themselves at the social or system level. Highlighting the individual against the background of the systemic gives students a sense of the dynamics of many current inequities.

For example, the Model Rules include special and specific provisions for lawyers practicing in the role of criminal prosecutors.[62] As agents of the state, prosecutors wield great power. They also represent not only the immediate interest in convicting a particular defendant but the longer-term public interest in justice and fair play.[63]

Even before the publication of *The New Jim Crow*[64] and the emergence of the Black Lives Matter movement, massive racial disparities in incarceration in the United States were the systemic backdrop for individual prosecutions. For the class day that we devoted to the ethical requirements of prosecutors, students were responsible for perusing the Sentencing Project website, especially the interactive data map with state-by-state data on racial disparities in incarceration rates.[65] I introduced the Vera Institute of Justice's work on

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60. *See, e.g.*, Ctr. for Prof'l Responsibility, Am. Bar Ass'n, Model Rules of Professional Conduct (2017 ed.). The Model Rules are updated and published annually.

61. Legal Ethics Stories (Deborah L. Rhode & David Luban eds., 2006).

62. Model Rules of Professional Conduct r. 3.8 ("Special Responsibilities of a Prosecutor") (Am. Bar Ass'n 2016).

63. "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate." Model Rules of Professional Conduct r. 3.8 cmt. 1 (Am. Bar Ass'n 2016).

64. Michelle Alexander, The New Jim Crow: Mass Incarceration in the Age of Colorblindness (2010).

65. *State-by-State Data*, The Sent'g Project, http://www.sentencingproject.org/the-facts/#map [https://perma.cc/4R96-G4NQ](last visited August 3, 2017).

increasing awareness of racial disparities in the exercise of prosecutorial discretion.[66] We discussed implicit bias.

I posed discussion questions for students: Putting yourself in the role of prosecutor, of what relevance to your work is the information on racial disparities in incarceration? What actions can you take to address these disparities? What actions should you take?

Almost always, there was pushback. "These are statewide problems that have no relevance to the decisions of an individual prosecutor." "Prosecutors should be colorblind."

At the same time, there were also in every class White students who gained new insight: "I never thought about it that way before."

The kind of institutional racism that runs on implicit bias affecting the exercise of discretion and that leads to disparities in outcome lies outside of the paradigm of individual causation and discrete effect that pervades most legal thinking. There is, as yet, no constitutional right or remedy, no broad-based legal theory that addresses the kind of discrimination that arises from bias and that manifests as disparities.[67] But when we introduce our students to institutional racism, name it, and frame the struggles that they will and should encounter with their role in perpetuating it, we equip them to realize when they are part of the problem in the legal system as it currently exists. Further, we may spark in them the desire and ability to be part of the solution in their own practice.

Systemic inequities fall along many lines. One of the most compelling narratives in the *Legal Ethics Stories* book is the story of Marilyn Arons, founder of the Parent Information Center for supporting parents in hearings under the Individuals with Disabilities Education Act (IDEA).[68] For many years Arons, knowledgeable about disabilities and special education but not herself an attorney, assisted and represented parents in special education hearings in New Jersey and Delaware. These hearings are complicated and individualized and of the utmost importance to parents who are seeking the best education possible for their children. In these adversarial hearings, school districts are represented by counsel. Parents are generally not: There are no substantial hourly billables, no contingency fees, and lots of time and thought to be invested. The state of Delaware went after Arons as engaged in the unauthorized practice of law, and a series of arguments and decisions ensued

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66.   VERA INST. OF JUST., https://www.vera.org. *See also* Sarah Mui, *Project Aimed at Eliminating Prosector Race Bias Shows Promising Results*, ABA J. (Mar. 9, 2010, 5:56 PM), http://www.abajournal. com/news/article/milwaukee_prosecutor_cites_good_results_from_project_targeting_racial_bias/?utm_source=feedburner&utm_medium=feed&utm_campaign=ABA%20Journal%20Daily%20News [https://perma.cc/4DW7-JNB3].

67.   *See* Strand, *Racism 4.0, supra* note 40, at 766–70.

68.   Pub. L. No. 101-476; 104 Stat. 1142 (1990).

in which she was represented by David Vladeck, who also wrote the *Legal Ethics Stories* chapter.[69]

Arons's story is compelling, and frequently when we discussed it in class (complete with video of Arons and testimonials from some of the parents she assisted[70]) one or more students would offer personal experiences as former teachers or family members relating to the difficulties of the IDEA hearing process and the high stakes for the individuals involved. This generation of students is very aware of "special ed," and many of them have benefited from the federal statutes requiring it. They can identify with special ed kids, families, and Arons.

They can also understand and identify with the general problem of "regular" people having legal rights but being in no financial position to hire a lawyer to protect those rights. This broader problem is rampant—is *systemic*—in our country in special ed hearings and also evictions, divorces, wills, personal injuries, employment issues, and more. Lawyers are in short supply because people cannot pay hefty lawyer fees. And lawyers are not lining up to take these cases.

At the same time, law students are extremely aware of the debt they are incurring to get their J.D., and they are extremely aware of the soft market for lawyers in the post-2008 United States. Earlier in the semester we have looked at the National Association for Law Placement (NALP) graph reflecting the bifurcation of average starting salaries for new attorneys—one cluster for those entering large corporate firms (well above $100,000) and one cluster for those taking other positions (well below $100,000).[71] They understand why lawyers are not lining up to take Arons's special ed cases. The class discussion that brings together unauthorized practice of law, protectionism and monopoly, student debt, client/consumer protection, and the value of legal representation is robust.

The *Arons* case brings home to students what it means for inequity to be systemic. They see how both special ed families and lawyers are locked in their structural roles and how in many ways it is the structure that imprisons them. They see how a legal right can be less meaningful when not accompanied by a realistic way to bring that right to fruition. And they also see that a law school legal clinic here or there to represent these potential clients is only a drop in the bucket.

Inequities and isms today are often systemic. Understanding the way systems work and how advantage and disadvantage emerge from them is indispensable if we are to dismantle or transform them. Once our students

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69. David C. Vladeck, In re Arons: *The Plight of the "Unrich" in Obtaining Legal Services*, *in* Legal Ethics Stories, *supra* note 61, at 255.

70. These resources appear to no longer be available online. See, however, Marilyn Arons, The Nonlawyer Lady—A Life in Special Education (2014).

71. *See, e.g.*, *The NALP Salary Curve for the Class of 2011*, NALP (July 2012), http://www.nalp.org/salarycurve_classof2011 [https://perma.cc/9N45-ZTZ4].

have a working grasp of systems, they are poised to understand the inequities and isms that characterize diversity in the United States today.

C. *Unpacking and Challenging Facially Neutral Structures that Reproduce Advantage and Disadvantage—State and Local Government Law*

A danger associated with understanding the kind of institutional racism that runs on everyday interactions affected by implicit bias is that attention can be deflected from structural racism. Many of our institutions were forged to exclude non-Whites and non-males (and others). Even as these institutions have been opened up, they continue to operate in non-overt ways to exclude.

For example, workplaces are structured around "ideal workers" who do not have the responsibility of caring for others.[72] Because of our socialization, more women than men assume care responsibilities.[73] Taking on care responsibilities makes it more difficult for women to perform as ideal workers. Women are thus disadvantaged in the workplace. The structure of workplaces interacts with cultural norms to create group advantage (for men) and group disadvantage (for women).

Moreover, structural advantage and disadvantage can be reproduced without interactive, implicit-bias-based institutional racism or sexism. Even institutional structures that are in fact neutral can reproduce advantage and disadvantage.[74] Disparate and inequitable inputs, which result from centuries of discrimination in access to wealth creation, lead to disparate and inequitable outputs.[75]

Structural advantage and disadvantage can often be seen through the lens of history. History makes visible both the disadvantage, which we are more used to noticing, and the advantage, which we are conditioned to view as the norm. A certain kind of institutional forensics—dissecting the development of current institutions and understanding the etiology of their structure— reveals the source of current advantage and disadvantage as well as the way

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72. Joan Williams, Unbending Gender: Why Family and Work Conflict and What to Do About It 64-113 (2000).

73. *Id*. at 13-39, 245-54. *See also generally* Cecilia L. Ridgeway, Framed by Gender: How Gender Inequality Persists in the Modern World (2011) (describing how individual interactions in male-female marriages and relationships embody traditional gender roles, which reifies existing gender disparities at the social/system level).

74. Strand, *Racism 4.0*, *supra* note 40, at 778-79.

75. *Id*. *See also, e.g.*, Palma Joy Strand, *Education-as-Inheritance Crowds Out Education-as-Opportunity*, 59 St. Louis U. L.J. 283, 292-97 (2015) [hereinafter Strand, *Education-as-Inheritance*] (documenting how wealth inequalities are reproduced over generations based on different abilities of parents to invest in their children's educations).

that facially neutral institutions may not actually be neutral.[76] For example, neutral inheritance laws that allow families to leave their wealth to their children perpetuate the racial wealth disparities that exist today.[77] Should such an inheritance regime be considered truly neutral?

I find that law students are unpracticed at thinking of the law that they study as contingent, especially at the system scale. Yet a concept of the system is enormously helpful for many students: Understanding that you are swimming upstream against a current makes clear that the effort isn't necessarily because you are weak but because the current is strong. Alternatively, floating with the current is often an easier way to travel: For other students, awareness of one's air mattress can be discomfiting.

I teach State and Local Government Law, an elective that usually enrolls between twenty and twenty-five students, which I teach as a seminar. The class materials include education and housing, familiar systems with which all students have personal experience. Moreover, the issues involving systems and discrimination presented in cases such as *Rodriguez*[78] and *Milliken*[79] in education and *Arlington Heights*[80] and *Mt. Laurel*[81] in housing are discussed in an unusually forthright manner. *Rodriguez* names the Texas state system of financing public education.[82] The *Milliken* dissents highlight that operating through local school districts and drawing school district boundary lines are choices the state has made in structuring its public education system.[83] *Arlington Heights* makes clear that liability for discrimination based on racial disparities can be easily avoided

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76.   *See, e.g.*, Palma Joy Strand, *"Mirror, Mirror, on the Wall . . .": Reflections on Fairness and Housing in the Omaha-Council Bluffs Region*, 50 Creighton L. Rev. 183, 185 (2017) [hereinafter Strand, "*Mirror, Mirror, on the Wall*"] ("using history, sociology, and law to dissent current structures of inequity . . . to understand how structural racism works" in the context of racially and socioeconomically segregated housing).

77.   Palma Joy Strand, *Inheriting Inequality: Wealth, Race, and the Laws of Succession*, 89 Or. L. Rev. 453, 464–68 (2010).

78.   San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

79.   Milliken v. Bradley, 418 U.S. 717 (1974).

80.   Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977).

81.   S. Burlington Cty. NAACP v. Mount Laurel Twip, 336 A. 2d 713 (N.J. 1975).

82.   *Rodriguez*, 411 U.S. at 4 ("This suit attacking the Texas system of financing public education was initiated by . . . .") (Powell, J., opinion of the Court).

83.   *Milliken*, 418 U.S. at 759 ("[T]here can be no doubt that as a matter of Michigan law the State itself has the final say as to where and how school district lines should be drawn.") (Douglas, J., dissenting); 418 U.S. at 763 ("[T]he State of Michigan, the entity at which the Fourteenth Amendment is directed, has successfully insulated itself from its duty to provide effective desegregation remedies by vesting sufficient power over its public schools in its local school districts.") (White, J., dissenting); 418 U.S. at 798 ("Michigan operates a single statewide system of education, a substantial part of which was shown to be segregated in this case.") (Marshall, J., dissenting).

by circumspect local decision-makers.[84] *Mt. Laurel* puts decisions by individual localities into regional context.[85]

Students come into the class well aware of existing patterns of residential segregation in housing, which result in segregation in public education. Few students, however, are aware of the history of suburbanization and redlining, of the policies and practices at multiple levels of government that led to today's status quo. Few students have seen either a redlining map from the 1930s[86] or the racial dot maps based on current census data that align with those maps to a remarkable degree.[87] To the extent that they have thought about how our communities came to be configured as they are today, they generally conclude that people choose to live where they live and the people who will be their neighbors. The realization that the current system was intentionally created is new to most. Yet this realization is critical to viewing the current system as not immutable and as susceptible of change.

Awareness of structural or systemic racism or other isms can be incapacitating. Changing a system is an undertaking of intimidating proportions: How can one law student, citizen, lawyer take on something so immense? Just as State and Local Government Law is a likely vehicle for showing systemic racism and classism to students, it also provides the opportunity for offering an understanding of system dynamics and therefore the possibility of systemic change.

A foundational tension in the course is between centralization and decentralization. A core issue is the degree to which local entities may adapt or innovate local rules for interaction against a backdrop of the more general rules created by state law. Can a city enact a living wage ordinance?[88] Can a city act as an entrepreneur?[89] Can a county provide domestic partner benefits

84.   *Arlington Heights*, 429 U.S. at 269 ("The impact of the Village's decision does arguably bear more heavily on racial minorities . . . . But there is little about the sequence of events leading up to the decision that would spark suspicion.") (Powell, J., opinion of the Court).

85.   *Mount Laurel*, 336 A. 2d at 727–28 ("[T]he universal and constant need for such housing is so important and of such broad public interest that the general welfare which developing municipalities like Mount Laurel must consider extends beyond their boundaries and cannot be parochially confined to the claimed good of the particular municipality.") (Hall, J., opinion of the Court).

86.   *See* Strand, *"Mirror, Mirror, on the Wall," supra* note 76, at 185–86 (describing Omaha redlining map), 247 (Omaha redlining map).

87.   *Compare* Mapping Inequality: Redlining in New Deal Am., https://dsl.richmond.edu/panorama/redlining/#opacity=0.8&loc=10/42.7258/-87.8089 [https://perma.cc/A6HU-LGX6], *with* Dustin Cable, *The Racial Dot Map: One Dot Per Person for the Entire United States*, U. of Va. Demographics Res. Group (July 2013), http://www.coopercenter.org/demographics/Racial-Dot-Map [https://perma.cc/S8GG-ARDL].

88.   New Orleans Campaign for a Living Wage v. City of New Orleans, 825 So. 2d 1098 (La. 2002) (no); New Mexicans for Free Enter. v. City of Santa Fe, 126 P. 3d 1149 (Court of Appeals of N.M. 2005) (yes).

89.   Toledo Edison Co. v. City of Bryan, 737 N.E. 2d 529 (Ohio 2000) (no).

for its employees?[90] Can a city that operates a bar serve food?[91] Can a city create a cause of action against gun manufacturers?[92] Can a local government regulate developers to increase its supply of affordable housing?[93] Can a city take action against subprime loans when it is experiencing negative effects before the housing bubble bursts at the state and national levels?[94] Can local governments enact protections for LGBTIQ residents despite state initiatives to prevent such protections?[95]

In considering these specific conflicts, the tension between metropolitan areas and more rural areas and states becomes apparent. So too do both the importance of uniformity and the value of local variation. More deeply, the dynamics of the system start to come into focus. In truth, it is not only the states that are the laboratories of federalism; it is the local governments within those states. Change starts at the local level. Some of the issues we consider reveal inequities of substantial current significance. And the cases themselves show that initiating change at the local level is much more possible than at the federal or even the state level.

I supplement the Frug, Ford, and Barron *Local Government Law* casebook,[96] which I use because I appreciate the policy and political context it provides, with materials that emphasize the accessibility and relationality of change at the local level. The class reads and discusses through role play a case study about the Indiana Household Hazardous Waste Task Force, a classic example of governance through a network of federal, state, local, individual, and private actors.[97] After watching *9500 Liberty*, a documentary film about Prince William County, Virginia's, adoption of an anti-immigrant ordinance that divided and weakened that community,[98] we consider both the ease with which a small group moved the county board to enact a desired policy and the

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90.   Arlington Cty. v. White, 528 S.E. 2d 706 (Va. 2000) (no).

91.   Olesen v. Town (City) of Hurley, 691 N.W. 2d 324 (S.D. 2004) (no).

92.   Morial v. Smith & Wesson Corp., 785 So. 2d 1 (La. 2001) (no).

93.   Marshal House, Inc. v. Rent Review and Grievance Bd. of Brookline, 260 N.E. 2d 200 (Mass. 1970) (no); Town of Telluride v. Lot Thirty-Four Venture, 3 P. 3d 30 (Colo. 2000) (no).

94.   Am. Fin. Servs. v. City of Oakland, 104 P. 3d 813 (Cal. 2005) (no).

95.   Romer v. Evans, 517 U.S. 620 (1996) (yes).

96.   Gerald E. Frug, Richard T. Ford & David J. Barron, Local Government Law: Cases and Materials (6th ed. 2015).

97.   Mark W. Davis & Danielle M. Varda, *The Indiana Household Hazardous Waste Task Force: A Case Study*, Syracuse U. Maxwell Sch. E-PARCC (2011), https://www.maxwell.syr.edu/uploadedFiles/parcc/eparcc/cases/Davis-Varda%20HHWTF%20Case%202011.pdf [https://perma.cc/J8TJ-FDWW].

98.   DVD: 9500 Liberty (Interactive Democracy Alliance 2009).

personal nature of governance the film portrays. Students watch Clay Shirky's "How social media can make history" TED talk focusing on the effects of technology on governance,[99] and we contemplate how smartphones have fundamentally changed public awareness and government accountability and given rise to movements such as the Occupy Movement and Black Lives Matter domestically and Arab Spring abroad.

Systemic change happens when local shifts ripple out to nearer and then more distant parts of the system. This bottom-up dynamic is diametrically opposed to the standard story of legal change taught in law schools, which focuses on constitutional decrees issued by the United States Supreme Court. Awareness of the significance and the possibility of local change makes swimming against the current both more important and a not-quixotic choice.

IV. From Antagonistic Spaces to Belonging

I took the opportunity in preparing for the presentation on which this essay is based to reflect on the teaching strategies described in the previous two parts of this essay. My goal was to understand them in the context of other work done on teaching for equity in law schools and higher education generally. Derald Wing Sue's work on microaggressions offers a useful framework.[100] In particular, recognizing status quo law as microinvalidation has implications for not only how we teach but what we teach.

A. Defining Antagonistic Space

Sean Darling-Hammond and Kristen Holmquist conducted in-depth interviews with a number of students at Berkeley Law whom they identified as under a "triple-threat": "They suffer from the solo status that accompanies being a member of an underrepresented group, the stereotype threat that accompanies being a member of a stereotyped group, and the challenges that attend lacking a background in the law before beginning law school."[101] The authors' purpose was to highlight faculty practices that make law school "safe" for these students: "We have used the term 'safe' to describe techniques and environments that allay stereotype threat and solo status and allow students from underrepresented backgrounds to focus on learning."[102]

A space in which students fear confirming stereotypes is a space in which stereotypes are present and communicated. A space in which students feel prejudged by race or gender is a space in which messages are sent and received that race and gender are both salient and negative to the legal enterprise.

99.   Clay Shirky, *How Social Media Can Make History*, TED (June 2009), https://www.ted.com/talks/clay_shirky_how_cellphones_twitter_facebook_can_make_history.

100. Derald Wing Sue, Microaggressions in Everyday Life: Race, Gender, and Sexual Orientation (2010).

101. Sean Darling-Hammond & Kristen Holmquist, *Creating Wise Classrooms to Empower Diverse Law Students: Lessons in Pedagogy from Transformative Law Professors*, 25 Berkeley La Raza L.J. 1, 1 (2015).

102. *Id.* at 1 n.1.

Darling-Hammond and Holmquist thus characterize the law school environment described by the students they interviewed as not "safe."

The word "safe" is controversial when used this way in the academic context.[103] Students in universities and colleges may seek "safe" spaces in which they can let down their guard and feel supported regardless of what social identifiers attach to them.[104] At the same time, the entire academic enterprise is about taking risks, about growth and change, about discomfort. The goal is to apprentice students to the academic enterprise, to equip them and bring them into this way of encountering the new and the different.

I prefer to use the phrase "antagonistic space" to describe learning environments in which students encounter headwinds that make it more difficult for them to do the work they are there to do. And while some learning environments may be antagonistic space for all students, I focus here on the law school learning environment and the antagonistic experience of students from traditionally underrepresented groups.

The existence of antagonistic space does not necessarily mean that faculty and other students are antagonistic in the active hostility or oppositional sense that we usually understand it.[105] Antagonistic spaces, rather, may arise in the biochemical sense of interference of the environment with the functioning of some individuals within it. It may well be that faculty and administration are not intentionally confirming stereotypes or generating negative messages about students of color or women. But lack of intent does not mean that stereotypes are not confirmed and negative messages sent. If students experience the environment as antagonistic, it is antagonistic. Perception here is reality.

The work of Darling-Hammond and Holmquist is well-grounded in their own qualitative research. The results from their student interviews, moreover, tie into broader psychological research on the interactions of culture, environment, pedagogy, and learning.

Stereotype threat, as described by psychologists Claude Steele and Joshua Aronson, arises when someone is "at risk of confirming, as self-characteristic, a negative stereotype about one's group."[106] Black students, for example, perform academic tasks less successfully when they are reminded of being Black because Blackness is associated with the stereotype of being less capable academically. Awareness of the stereotype creates anxiety, which hampers performance.

103. *See, e.g.*, Leonor Vivanco & Dawn Rhodes, *U. of C. Says No to "Safe Spaces*,*"* CHI. TRIBUNE, Aug. 26, 2016, at 1.

104. *See, e.g.*, TATUM, *supra* note 59, at 54–62 (describing self-segregation by Black teenagers in integrated school settings); 77-78 (describing a similar phenomenon at the university level).

105. For purposes of this essay, antagonistic space in which aggression is covert is defined as distinct from hostile space in which aggression is overt. *See infra* notes 117–21 and accompanying text.

106. Claude M. Steele & Joshua Aronson, *Stereotype Threat and the Intellectual Test Performance of African Americans*, 69 J. PERSONALITY & SOCIAL PSYCHOL. 797, 797 (1995).

Psychologists Gregory Walton and Steven Spencer found that stereotypes created significant negative effects on cognitive performance in the familiar context of the SAT:

> Research on stereotype threat implies that widely known negative stereotypes could systematically undermine performance among women and ethnic-minority students . . . [W]hen threat was removed . . . women and minorities performed *better* than men and non-minorities who had the same prior test scores and grades . . . . The size of the effect suggests that most of the gender gap on the SAT-Math test, for instance, and much of race gaps on the SAT are due to psychological threat.[107]

An environment in which stereotype threat is present can skew assessment of students' achievements to the disadvantage of students from traditionally underrepresented groups.

In fact, Darling-Hammond and Holmquist found that "Black students were twice as likely as White students to fear confirming stereotypes . . . ."[108] In addition, "[w]omen were twice as likely as men to indicate that racial and gender stereotypes made them uncomfortable admitting to peers and professors when they did not understand content . . . ."[109] Further, Blacks, Latinos, and women were all substantially more likely than White and male students respectively to feel prejudged by their teachers based on race or gender; in the case of race/ethnicity, these differences were orders of magnitude.[110]

Solo status, defined by Charles Lord and Delia Saenz, occurs when an individual is "the only person of their kind in an otherwise homogeneous group."[111] As with stereotype threat, those who are tokens may experience stress and anxiety that lead to a compromised ability to call on all their cognitive abilities for top performance: Lord and Saenz found "detrimental effects on cognitive functioning [that were] a direct result of being in the token position."[112] When being a token disrupts cognitive processing, "[w]hat appears to be an average performance by a token may actually reflect above-

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107. *Research*, Gregory M. Walton, http://gregorywalton-stanford.weebly.com/research.html (last visited August 3, 2017) [https://perma.cc/K7AN-DDEB] (characterizing findings in Gregory M. Walton & Steven J. Spencer, *Latent Ability: Grades and Test Scores Systematically Underestimate the Intellectual Ability of Negatively Stereotyped Students*, 20 Psychol. Sci. 1132 (2009)) (emphasis in original).

108. Darling-Hammond & Holmquist, *supra* note 97, at 8.

109. *Id.*

110. *Id.*

111. Charles G. Lord & Delia S. Saenz, *Memory Deficits and Memory Surfeits: Differential Cognitive Consequences of Tokenism for Tokens and Observers*, 49 J. Personality & Soc. Psychol. 918, 918–19 (1985).

112. *Id.* at 924.

average ability and effort, in that the token has had to overcome different and perhaps greater obstacles."[113]

This observation, as well as the research by Walton and Spencer, is crucial to the discussion of achieving equity in diversity in the law school context. If students from traditionally underrepresented groups require greater ability and effort to achieve the same results as students from traditionally overrepresented groups, then the entire system of assessing students from before admission, through law school, at the bar exam, and after may be systematically undervaluing the achievements of those students.[114]

This research also destabilizes the universe of admissions decisions in general. If the criteria for admissions and the measurement of academic success systematically discount the qualifications and achievements of students from traditionally underrepresented groups, the standard "apples-to-apples" comparison turns into an "apples-to-some-other-fruit-that-we-don't-really-know-much-about" comparison. But because we know apples, we choose apples.

This research is sufficiently robust and applicable to law schools to venture the following observations. Students from traditionally underrepresented groups may apply to and arrive at law school with greater ability and achievement than standard criteria indicate. These students may well encounter a learning environment in which more ability is required of them to achieve the same measured results as historically overrepresented students. Moreover, the conditions that compromised the performance of these students before and during law school may well continue at least through the bar exam.

B. *"Microinclusive" Teaching*

Darling-Hammond and Holmquist provide a useful window into students' perceptions of law school as an antagonistic learning environment, though they do not detail the specific student experiences that give rise to those perceptions.[115] Instead, they focus on positive pedagogy. This is highly important, especially in directing attention to law schools as the source of the solution—and by implication the source of the problem. Yet additional information about how to eliminate and/or compensate for antagonistic space can be gleaned from identifying and describing the specifics of student experiences, which can then enable more targeted ameliorative responses.

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113. *Id.*

114. This research adds to the chorus of rebuttals to the "mismatch" hypothesis that admitting Black students to traditionally White schools disadvantages those students. *See, e.g.*, Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 Stan. L. Rev. 367 (2004); Ian Ayres & Richard Brooks, Response, *Does Affirmative Action Reduce the Number of Black Lawyers?*, 57 Stan. L. Rev. 1807 (2005).

115. Their interest is on positive pedagogy that can negate or compensate for the overall antagonistic learning experience of traditionally underrepresented students. This focus is extremely helpful in moving toward action. The strategies and discussion in this essay are intended to augment and extend the Darling-Hammond and Holmquist observations.

Work on microaggressions offers a bridge from the general experience of antagonistic space to specific types of interactions that give rise to that experience. Sue, in his extensive work on microaggressions,[116] identifies three distinct forms of microaggressions. While this particular discussion focuses on race, the typology applies to other social identifiers.

The most overt form of microaggressions consists of microassaults, which are conscious "[e]xplicit racial derogations . . . meant to hurt the intended victim."[117] A less intentionally aggressive category is microinsults, which are often unconscious "[c]ommunications that convey rudeness and insensitivity and demean a person's racial heritage."[118] Sue identifies microinsults as assigning lesser intelligence based on race (or gender); treating someone as second-class; characterizing group values or communication style as abnormal; and assuming that someone is criminal, dangerous, or deviant.[119] The microinsult of crossing the street to avoid encountering an individual, for example, telegraphs a perception of danger.

The third form that microaggressions take is microinvalidation, which is also often unconscious. The themes of microinvalidation are:

Alien in Own Land
Belief that visible racial/ethnic minority citizens are foreigners.

Colorblindness
Denial or pretense that a White person does not see color or race.

Myth of Meritocracy
Statements that assert that race plays a minor role in life success.

Denial of Individual Racism
Denial of personal racism or one's role in its perpetuation.[120]

Microinvalidation encompasses "[c]ommunications that exclude, negate, or nullify the psychological thoughts, feelings, or experiential reality of a person of color."[121]

In my experience, microassaults are relatively uncommon in the law school environment and generally called out as unacceptable if they occur.

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116. Sue, *supra* note 100.

117. *Id*. at 29.

118. *Id*.

119. *Id*. A recent publicized example of a microinsult was reported in the *Chronicle of Higher Education*. The microinsult was directed to a Latina sociology major whose senior seminar professor made the comment, in front of the entire class, "This is not your word," referring to the student's use of the word "hence." Fernanda Zamudio-Suarez, *"This Is Not Your Word": Microaggression in the Classroom*, Chron. Higher Educ. (D.C.), Nov. 11, 2016, at A28. In Sue's terms, this accusatory statement was rude, insensitive, ascribed lesser intelligence, and treated the student as a second-class citizen. Though her ethnicity was not stated, the comment communicated to the student a message of "you don't fit in."

120. Sue, *supra* note 100, at 29.

121. *Id*.

If microassaults do occur with any frequency and/or they are not clearly disapproved, the learning environment may be better defined as hostile rather than antagonistic.[122] The discussion of antagonistic space here assumes that law school faculty consciously support—though they may inadvertently undermine—the success of students from traditionally underrepresented groups.

Microinsults, in contrast, occur with disquieting frequency in law schools and often go unchallenged. Though they may arise unconsciously and be delivered without invidious intent, microinsults are by and large microaggressions of commission. Moreover, microinsults tend to the personal. A compliment on someone being articulate, for example, can convey a contrary expectation or "exception" status. Ignoring a person's contribution to a discussion until it is picked up by someone from the dominant group sends a message of being out of the circle of those who matter.

There is a significant body of psychological literature documenting the effectiveness of relatively small behavioral changes to counter microaggressions and the experience of antagonistic space. Psychologists Cohen, Steele, and Ross, for example, highlight characteristics of instructor feedback to students that neutralize or overcome stereotype threat.[123] Communicating high expectations along with a "you can do this" message effectively imparts a growth mindset to students. A growth mindset emphasizes the role of "dedication and hard work" in achievement, compared with a fixed mindset that views "basic qualities, like . . . intelligence or talent" as matters of innate ability that alone create success.[124]

This and other "wise interventions"[125] are grounded in psychological research showing that when small alterations in interaction are attuned to the dynamics of what is happening psychologically, they can effect significant shifts in behavior and outcome. In learning environments, one touchstone for these interventions is to communicate a sense of belonging to students who might have reason to feel alienated or excluded, students who are traditionally underrepresented in those environments. In one experiment with Stanford University undergraduates, a small "belonging interaction" with African-American students resulted in statistically significant upward shifts *three years later* not only in academic achievement but in health as well.[126]

122. *See supra* note 105 and accompanying text.

123. Geoffrey L. Cohen, Claude M. Steele & Lee D. Ross, *The Mentor's Dilemma: Providing Critical Feedback Across the Racial Divide*, 25 Personality & Soc. Psychol. Bull. 1302 (1999).

124. *What Is Mindset*, Mindset, https://mindsetonline.com/whatisit/about/ (last visited August 3, 2017; Carol Dweck, Mindset: The New Psychology of Success (2006). *See also* David Paunesku et al., *Mind-Set Interventions Are a Scalable Treatment for Academic Underachievement*, 26 Psychol. Sci. 784 (2015).

125. Gregory M. Walton, *The New Science of Wise Psychological Interventions*, 23 Current Directions in Psychol. Sci. 73 (2014).

126. David S. Yeager & Gregory M. Walton, *Social-Psychological Interventions in Education: They're Not Magic*, 81 Rev. Educ. Res. 267, 282 (2011).

Social belonging, according to this research, is critical. *"[B]elonging uncertainty can cause students to monitor school for indicators of whether they belong or not."*[127] When students come into a learning environment unsure of whether they belong, they will be on the lookout for signs that say "pull up a chair" or "stay in the outer circle." If the messages reassure them that they belong, the effort associated with overcoming self-doubt and monitoring the environment for potential pitfalls can be harnessed toward learning. Creating the experience of belonging aligns with the increasing use of the idea of inclusiveness,[128] which goes beyond diversity.

In a microaggressions frame, "wise interventions" that support the academic achievement of students from traditionally underrepresented groups by communicating social belonging act as "microinclusions."[129] While microaggressions create antagonistic space, microinclusions create spaces of social belonging. Microinclusions give us a word for naming the practice of adopting small intentional strategies for interacting with our students in ways that tell them that while law school is hard, we are confident that they will master the knowledge and skills necessary to succeed.

Microinclusive strategies can easily become habits, as suggested in the discussion by Darling-Hammond and Holmquist of successful pedagogical strategies that the students they interviewed identified as used by particular faculty. Their list of "10 Habits of Transformative Professors" begins with relationship and high expectations. These "I see you" and "I know you can do this" messages provide the context for specific strategies designed to elicit and reinforce growth and connection with the material on the part of potentially hesitant students.[130] These strategies create oases of belonging in otherwise antagonistic space.

C. Intentionally Countering Microinvalidation

Microinvalidation is the hardest type of microaggression to pinpoint. Microinvalidation is often a microaggression of either omission or indirection and may be diffused to an entire group rather than a particular individual. Microinvalidation may take the form of assumptions about or obliviousness to the experience of an entire group. Assumptions about "Americans"

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127. *Research*, Gregory M. Walton, http://gregorywalton-stanford.weebly.com/research.html (last visited August 3, 2017) [https://perma.cc/K7AN-DDEB] (characterizing findings in Gregory M. Walton & Geoffrey L. Cohen, *A Question of Belonging: Race, Social Fit, and Achievement*, 92 J. Personality & Soc. Psychol. 82 (2007)) (emphasis in original).

128. *See*, *e.g.*, Vernā Myers, *Diversity Is Being Invited to the Party; Inclusion Is Being Asked to Dance*, GPSolo eReport (June 2012) http://www.americanbar.org/publications/gpsolo_ereport/2012/june_2012/diversity_invited_party_inclusion_asked_dance.html [].

129. I was first introduced to this term by Lauren Aguilar of Stanford University. *See, e.g.*, Lauren Aguilar, *Belonging in Science*, Brookhaven Nat'l Laboratory (July 2016), https://www.bnl.gov/aum2016/content/workshops/science/aguilar_lauren.pdf [https://perma.cc/W8SS-6J2Q] (slides from a presentation on "Who Is Doing Science, Who Isn't and Why?" at the June 2016 RHIC and AGS Annual Users' Meeting).

130. Darling-Hammond & Holmquist, *supra* note 101, at 17-64.

that exclude people of color, statements that "I don't see color," and characterizations of history that omit the experience of certain groups are examples of microinvalidation. In the classroom, these sweeping maneuvers render invisible entire groups with which individual students may identify. Alternatively, microinvalidation may manifest as even broader assumptions that group membership is irrelevant to social experience. "My [White] family worked hard to get where we are," may well be a true statement, but it declines to recognize the historical advantages of being part of the group that is raced White.

Countering microinvalidation calls us to change not just *how* we teach but *what* we teach. At the National Museum of African-American History and Culture in Washington, D.C., is an exhibit along one long wall with milestones of pre-Civil War U.S. history such as the Missouri Compromise, the Dred Scott decision, and the Kansas-Nebraska Act. Interspersed with these familiar markers are displays on events that make only brief appearances in the history books, if they make it in at all: slave revolts and other actions of resistance. A U.S. history teacher who is intentional about countering microinvalidation in the classroom weaves that strand of history in with the familiar milestones. This approach benefits not only students with Black heritage who see the experiences of African-Americans acknowledged and validated; it benefits all the students in a class by providing fuller context for their own group experiences and identities.

The teaching strategies of naming differences and creating space for stories described above are concrete examples of microinclusions to counter microinvalidation in the law school classroom. Naming differences conveys awareness and acceptance of diverse identities. Group membership is not just *socially* salient; it is *legally* salient. Groups that are traditionally underrepresented in law are relevant, even when the law itself elides that relevance.

Casual reference to differences also bespeaks a level of comfort or dexterity in navigating social difference that lets students know that they will not carry the entire responsibility of dealing with race, gender, or other social signifiers in classroom interactions. Group identity is recognized, and it is recognized by the most powerful person in the room—the instructor, who will carry the weight of acknowledging the identity. Students may choose to help carry that weight, but they will not be assigned that task ("Student X, please inform the class about this issue relating to your group") or be forced to choose between the issue not being presented at all (nonrecognition by the professor) or their assuming full responsibility for doing so (by raising the issue themselves).

Creating space for stories communicates that multiple ways exist to access the material and concepts of law. Validating alternative stories as relevant also renders traditional law more permeable because of its own "story"-ness. A story understanding of law itself is fundamentally inconsistent with an authoritarian view of law as "truth," which is invariably discerned exclusively by a particular

group. Recognizing that law is story puts it on an equal footing with other stories; it becomes constructed and contingent rather than revealed and immutable.[131] Law becomes accessible even to those who have not historically been afforded access to it.

Understanding systems makes visible the "group" nature of inequities and isms, which is often invisible in our individualistic culture and system of law. Individual struggles become decipherable and coherent as manifestations of larger phenomena. A Latino student of mine a couple of years ago found the class discussion of disparities in education in State and Local Government Law transformative. For the first time he had a context in which to understand why so many of his Latino friends from high school did not make it into or through college. Understanding the systemic forces of advantage and disadvantage in education both affirmed his own experience by making it comprehensible and inspired him to master the legal apparatus that perpetuates the inequity.

Finally, unpacking and challenging facially neutral structures that reproduce advantage and disadvantage reveals the roles that we as lawyers—and the law itself—play in perpetuating racist and sexist and other "-ist" outcomes. Simply becoming aware of the systemic or structural nature of injustice can be overwhelming; systems or structures can seem too enormous, too intractable to affect. Understanding inequities as systemic can, however, also be empowering. Because systems comprise individual agents, each agent has power to affect his or her own local vicinity—and thus potentially the network or system as a whole. In addition, diagnosing how structural inequities actually operate legally and institutionally is an essential step toward dismantling them.

Taking awareness of systemic isms to the level of how they work moves even further along the spectrum of countering invalidation of the role of traditionally underrepresented groups in law. It takes students under the hood or into the kitchen to see how the car runs, how the cake is baked. This level of understanding offers students agency. Systems of injustice were created, law by law. They continue to operate because this law authorizes that ordinance, which sets up this institutional entity and enables these contracts, which directs these resources here rather than there. Legal structure arises from and shapes cultural norms and practices, and all of it is constructed and contingent. Knowing that it is constructed and contingent and how it is constructed and contingent gives students what they need not only drive but rebuild the car, to not only bake but reimagine the cake.

Understood this way, countering microinvalidation extends beyond the classroom. Effectively countering microinvalidation—countering invalidation of any scope—means actively validating experiences, stories, histories, alternative perspectives.[132] Validation requires not just making the invisible

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131. Strand, *Law as Story, supra* note 43, at 626-30.

132. This aligns with the critical race theory recognition of the importance of counterstories. *See, e.g.*, Richard Delgado & Jean Stefancic, Critical Race Theory: An Introduction (2d ed. 2012).

visible and diagramming how it works; validation also calls for figuring out what's out there that is invisible.

This is not a "rocket science" enterprise. Making the invisible visible is often merely a matter of asking different people what they see, eliciting different stories. I'm thinking of a recent study by Naomi Cahn and Amy Ziettlow about estate planning.[133] The researchers combed through obituaries in Baton Rouge, contacted people who had recently lost a family member, and interviewed them to find out how estates were handled, whether advance planning was undertaken, what went well and what didn't. It turns out that advance planning helps but many/most people don't do it. It also turns out that nontraditional families needed law most but found it least adapted to their needs. By simply asking ordinary people about their experiences, Cahn and Ziettlow gained a new and useful perspective—one that shines a different light on trusts and estates law.

Similarly, a couple of years ago I set up conversations with several dozen individuals in the housing ecosystem in Omaha. I'm a local government generalist who knows a lot about education and wanted to learn more about housing because of new Affirmatively Furthering Fair Housing regulations updating HUD implementation of the Fair Housing Act.[134] I talked to planners, to fair housing advocates, to HUD, to local attorneys. Over the course of these conversations, I noticed the absence of discussion about inclusionary zoning for affordable housing. When I probed further, I concluded that the post-WWII institutional structures for suburban development in Omaha combined with broad annexation power have essentially been perpetuating residential segregation without a forum for serious public discussion of development decisions for decades.[135] This shines a different light on the legal story about the prevalence of segregated housing eighty years after the federal government's adoption of redlining.

We also gain perspective from going up in scale. A few years ago my Immigration Law colleague and I, along with two colleagues from our College of Arts and Sciences, started Creighton's 2040 Initiative.[136] 2040 is the year around which the Census Bureau predicts that the nation will be majority minority. We created a seminar for J.D. students and Arts and Sciences seniors to explore together how this and other long-term demographic trends such as aging baby boomers, increased urbanization, and rising economic inequality are affecting law and politics. We built in a community engagement piece to

133. Naomi Cahn & Amy Ziettlow, *"Making Things Fair": An Empirical Study of How People Approach the Wealth Transmission System*, 22 Elder L. J. 325 (2015).

134. *See* Strand, *"Mirror, Mirror, on the Wall," supra* note 76, at 187–98.

135. *Id*. at 240.

136. *Addressing the Challenges That Await Our Changing Nation*, Creighton U.: The 2040 Initiative, https://gradschool.creighton.edu/academics/department-interdisciplinary-studies/2040-initiative [https://perma.cc/5FHB-ESFS] (last visited August 3, 2017).

bring in speakers for the law school, the university, and the Omaha community. Though we didn't predict the 2016 presidential election, the 2040 Initiative offers a context for our students to begin to understand how they, and the groups they identify with, fit into the bigger picture. The story of the system at the system's scale reveals connections and patterns we might not otherwise see.

Different disciplines can also make the invisible visible. Psychology brings to our examination of institutional racism useful perspectives on identity and implicit bias.[137] Sociology helps us see how gender inequality is perpetuated not only by workplace structure but by the cumulation of decentralized choices regarding gender roles in families.[138] Philosophy illuminates alternative ways of understanding the gender effects of markets more generally.[139] Political science offers us insights into gerrymandering and the difficulties associated with ensuring equal voice for people with different politics.[140] Economics provides an explanation for understanding how wealth is transmitted through investing in the education of one's children.[141] From biology and physics have emerged the new science of complex adaptive systems, which sheds new light on the dynamics of social systems such as law.[142] Network theory from mathematics, applied by sociologists, helps us to understand social movements and legal change.[143] Our colleagues in other disciplines are also struggling against inequities, and their work as applied to law makes the previously invisible visible.

Countering (micro)invalidation, it turns out, spills over to our research and our service as well as our teaching. The common thread is naming and being open to differences and the stories that arise from those differences. This essential attitude of law as constructed and therefore open to change by the people it touches runs counter to invalidation of particular groups of people—and microinvalidation of individual law students. Inclusivity may call inevitably toward unpacking and challenging the status quo.

137.   *See, e.g.*, Tatum, *supra* note 59 and accompanying text (identity); Justin D. Levinson, Danielle M. Young & Laurie A. Rudman, *Implicit Racial Bias: A Social Science Overview*, *in* Implicit Racial Bias Across the Law 9 (Justin D. Levinson & Robert J. Smith eds., 2012) (implicit bias).

138.   *See, e.g.*, Ridgeway, *supra* note 73.

139.   *See*, *e.g.*, Palma Joy Strand, *Do We Value Our Cars More than Our Kids? The Conundrum of Care for Children*, 19 Duke J. Gender L. & Pol'y 1, 27-28 (2011).

140.   *See*, *e.g.*, Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. Chi. L. Rev. 831 (2015).

141.   *See*, *e.g.*, Strand, *Education-as-Inheritance*, *supra* note 75, at 297-301.

142.   *See*, *e.g.*, J.B. Ruhl et al., *Harnessing Legal Complexity: Bringing Tools of Complexity Science to Bear on Improving Law*, Science 1377 (2017); Palma Joy Strand, *Cultivating "Civity": Enhancing City Resilience with Bridging Relationships and Increased Trust*, 50 Idaho L. Rev., no. 2, at 153, 157-67 (2014).

143.   *See, e.g.*, Strand, *Civic Underpinnings, supra* note 39, at 144-49.

V. Beyond *Fisher*

Justice O'Connor, in her 2003 *Grutter* opinion upholding affirmative action in law school admissions to promote student body diversity, articulated an expectation that "25 years from now, the use of racial preferences will no longer be necessary."[144] *Fisher II* in 2016 marked more than half of that quarter-century. What can we glean from reflecting on the progress we have made?

In moving toward racial equity, admissions decisions to attain a diverse student body in institutions of higher education are one very small piece of a large, complex, and dynamic puzzle. Discussions such as the session at AALS that gave rise to this essay are another piece. These discussions allow us to reflect on our own work, learn from our peers, and validate this work.

The work that we do in our academic environments and elsewhere is also part of the puzzle. Our work intersects with the work of others, and change occurs. We are all part of the problem; we are all part of the solution. The problem extends far beyond admissions; the solution must reach both what comes before and what comes after admissions decisions.

The goal is for the before-and-after work to eventually transform the nature of the admissions decisions. Justice O'Connor expressed a hope that increased racial equity in the nation would eliminate the need for race-conscious admissions as practiced at the University of Michigan. My hope is that the work that we and others do changes the paradigm. Deeper understanding of systemic racism and sexism in the form of racial and gender disparities and other isms is already pushing on current conceptions of equality. Just as our understanding of the dynamics of advantage and disadvantage has become more sophisticated, so too can the law of equity and justice evolve.

The work of making space for and eliciting diverse voices, diverse experiences, and diverse perspectives is fundamental to this evolution. Difference and diversity are the drivers of creativity and evolution. Including people with diverse experiences and perspectives, eliciting their voices, and weaving their stories into the whole changes the collective story, which changes the law. The goal is to facilitate encounters with difference, which is where energy sparks insight, innovation, and growth.

Students from traditionally underrepresented groups are at the center of this work. But it is important to remember that we are *all* on this journey, though we start from different places and move forward with different trajectories. We move at the pace that we move; sometimes we take a few steps back or sideways. It helps to be kind to ourselves and to the others who are on the journey with us. And this kindness must extend toward our White, male students and colleagues; struggling toward a transformed White, male voice is an important part of this journey.

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144. Grutter v. Bollinger, 539 U.S. 306, 343 (2003).

A few days after the 2016 presidential election, Nell Irvin Painter wrote in *The New York Times* about the way that the election had called out White voters.[145] Instead of being the norm, Whites are transitioning to being one among many voting and interest groups. Being White when Whiteness is the norm requires little reflection as to one's identity and the meaning of that identity. Being White as a named group, in contrast, calls for articulating what it means to be White.

Whiteness is on the table, and we are poised to engage with the idea of Whiteness in a new way. What kind of White identity lies beyond the recognition of White privilege and White advantage? Is there a White identity other than one that discounts others who are not White? Are we deconstructing Whiteness or reconstructing it—or both?

This and other renegotiations of other social identities and their relationships with each other lie at the core of law. The work that we do to facilitate that renegotiation, to prepare our students to engage in it, to articulate the grounding values and goals—I can think of no work more important.

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145. Nell Irvin Painter, Opinion, *What Whiteness Means in the Trump Era*, N.Y. Times, Nov. 12, 2016, at 4.