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## ARE DISCIPLINE CODE PROCEEDINGS ANOTHER EXAMPLE OF RACIAL DISPARITIES IN LEGAL EDUCATION?

ANDREA A. CURCIO & ALEXIS MARTINEZ\*

### ABSTRACT

*Addressing racism within legal education has historically focused on diversifying the faculty and student body, as well as integrating teaching about institutional and structural racism into the law school curriculum. More recently, law school faculty have begun to focus on creating an inclusive campus culture, which requires looking at all systems and procedures that affect our students' sense of belonging and potential success as students and lawyers. One system that merits this attention is law school disciplinary code proceedings. This Article reviews studies from K-12, undergraduate, and lawyer disciplinary proceedings—all of which have found disparities exist. Given those findings, it is unlikely law school disciplinary code proceedings are a disparity-free zone. Because of the effect of disciplinary code proceedings on students' academic and career trajectories, as well as their emotional well-being, if law schools truly seek to address the institutional, structural, and interpersonal racism within our institutions, this area needs to be explored. The Article argues that law schools should collect demographic data from all phases of disciplinary code proceedings. Without this data, law schools cannot fully understand the impact of systems believed to operate neutrally but are, in fact, not neutral. If, as we suspect, the data shows disparities, the data also moves legal educators from a framework where we believe disparities, if they exist, are unintentional and we have no accountability, to a new framework of collective accountability for institutional practices that systemically disadvantage particular groups. The Article concludes with ideas to help ameliorate disciplinary code proceeding disparities should a law school find that they exist.*

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## INTRODUCTION

Legal education has a long history of embedding racism into our admissions and education processes, sometimes consciously, and other times by ignoring the history of the systems that have become the norm. While law schools have come a long way since the days of fighting court battles to shut the door to students of color,<sup>1</sup> law schools continue to struggle with identifying and eradicating systems and processes that result in racial disparities and create an unwelcoming atmosphere for students of color.

Those processes exist from admissions through entry into the profession. For example, numerous scholars have examined the institutional and structural racism that underlies the seemingly “neutral” and “merit-based” assessment tools that limit diversity in law schools and the legal profession. As Professor Pamela Edwards notes, the LSAT, which originally was largely based on aptitude tests that had their foundation in racist and anti-immigrant sentiment, was created when law schools began to see more applications from people other than upper-class white men.<sup>2</sup> For decades, scholars have questioned law schools’ over-reliance on the LSAT in the context of its limited predictive value and its discriminatory impact.<sup>3</sup> Likewise, scholars have long questioned the reliance on the traditional bar exam—a licensing method that often plays an outsize role in law school curriculum and teaching methods decisions.<sup>4</sup> They argue it has little relationship to

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<sup>1</sup> Numerous law schools engaged in lengthy litigation in an effort to deny admission to African American applicants because of their race. *See, e.g.*, *Pearson v. Murray*, 182 A.590 (Md. 1936) (University of Maryland); *Sipuel v. Bd. of Regents of Univ. of Okla.*, 332 U.S. 631 (1948) (University of Oklahoma); *Sweatt v. Painter*, 339 U.S. 629 (1950) (University of Texas); *Florida ex rel. Hawkins v. Board of Control*, 350 U.S. 413 (1956) (University of Florida).

<sup>2</sup> Pamela Edwards, *The Shell Game: Who is Responsible for the Overuse of the LSAT in Law School Admissions*, 80 ST. JOHN’S L. REV. 153, 164-65 (2006).

<sup>3</sup> *See, e.g., id.*; William C. Kidder, *The Rise of the Testocracy: An Essay on the LSAT, Conventional Wisdom, and the Dismantling of Diversity*, 9 TEX. J. WOMEN & L. 267 (2000); Phoebe Haddon & Deborah W. Post, *Misuse and Abuse of the LSAT: Making the Case for Alternative Evaluative Efforts and a Redefinition of Merit*, 80 ST. JOHN’S L. REV. 41 (2006); Andrea A. Curcio et al., *Testing, Diversity and Merit: A Reply to Dan Subotnik and Others*, 9 U. MASS L. REV. 206 (2014). Over-reliance on LSAT scores in admissions and scholarship decisions continue despite the test’s well-known racially disparate impact, its limited predictive value, and in direct contravention to admonitions from the test designer itself. *Id.* at 258-59; *see also LSAT Fairness Procedures*, LSAC, <https://www.lsac.org/about/lsac-policies/lsat-fairness-procedures> (last visited Feb. 20, 2022) (encouraging law schools not to use the test as a sole criterion, to evaluate its predictive value at their school, to avoid improper use of cut-off scores, and not to place excessive significance on score differences).

<sup>4</sup> *See SALT, Society of American Law Teachers Statement on the Bar Exam*, 52 J. LEGAL EDUC. 446, 446 (2002) (critiquing the exam’s impact on law school curriculum); Emmelline Paulette

measuring minimum competence to practice law,<sup>5</sup> and has a long-demonstrated significant disparate impact.<sup>6</sup> Recent data-based studies about these issues with the bar exam have created momentum for changing how we license lawyers, demonstrating the impact data can have on long-entrenched systems.<sup>7</sup>

To date, the focus of examining and eradicating structural, institutional, and interpersonal racism within legal education has largely focused on creating more diverse student bodies and faculty,<sup>8</sup>

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Reeves, *Teaching to the Test: The Incorporation of Elements of the Bar Exam in Legal Education*, 64 J. LEGAL EDUC. 645, 646 (arguing that law schools should help students prepare for the bar exam by teaching the skills and content needed to pass the exam).

<sup>5</sup> See Andrea A. Curcio, *Building a Better Bar Exam: How and Why the Existing Bar Exam Should Change*, 81 NEV. L. REV. 363 (2002); Kristin Booth Glen, *Thinking Out of the Bar Exam Box: A Proposal to “MacCrate” Entry to the Profession*, 23 PACE L. REV. 343, 347 (2003) (discussing the exam’s limited relationship to law practice); Joan W. Howarth, *The Professional Responsibility Case for Valid and Nondiscriminatory Bar Exams*, 33 GEO. J. LEGAL ETHICS 931, 934 (2020); see also Deborah Jones Merritt & Logan Cornett, *Building a Better Bar: The Twelve Building Blocks of Minimum Competence*, IAALS (2020), <https://iaals.du.edu/publications/building-better-bar> (discussing results of a national focus group study that helps define minimum competence and illustrates why the exam fails to measure it).

<sup>6</sup> Numerous studies have detailed disparities. See, e.g., LINDA F. WIGHTMAN & HENRY RAMSEY, JR., LAW SCHOOL ADMISSION COUNCIL, LSAC NATIONAL LONGITUDINAL BAR PASSAGE STUDY at viii (1998), <https://lawschooltransparency.com/reform/projects/investigations/2015/documents/NLBPS.pdf> [<https://perma.cc/MWA2-WHSB>] (showing, inter alia, eventual pass rates of 77.6% for Black candidates and 96.7% for white candidates); NAT’L CONF. OF BAR EXAM’RS, IMPACT OF ADOPTION OF THE UNIFORM BAR EXAMINATION IN NEW YORK 166 tbl.4.2.24 (2019), <https://www.nybarexam.org/UBEReport/NY%20UBE%20Adoption%20Part%202%20Study.pdf> [<https://perma.cc/GFT8-MMNA>] (finding that Black candidates passed at 68.5%, and white candidates passed at 90.1%); *California Bar Examination Statistics*, ST. BAR CAL., <https://www.calbar.ca.gov/admissions/law-school-regulation/exam-statistics> [<https://perma.cc/EV2Z-587T>] (showing similar disparities from 2009 to 2018 across multiple racial and ethnic categories every year).

<sup>7</sup> See, e.g., Merritt & Cornett, *supra* note 5. The Merritt and Cornett ground-breaking study, combined with the racially disparate impact of the current bar exam, has served as impetus for states to consider the development of alternative pathways to law licensure. See, e.g., NEW YORK STATE BAR ASSOCIATION, THIRD REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON THE NEW YORK BAR EXAM (2021), <https://nysba.org/app/uploads/2021/06/9.-Task-Force-on-the-New-York-Bar-Examination-with-staff-memo.pdf>; *Recommendations of the Alternatives to the Bar Exam Task Force*, OR. STATE BD. OF BAR EXAM’RS (June 18, 2021), <https://taskforces.osbar.org/files/Bar-Exam-Alternatives-TFReport.pdf>; see also Eileen Kaufman, Carol L. Chomsky & Andrea Anne Curcio, *A Merritt-orious Path for Lawyer Licensing*, 82 OHIO ST. L. J. 883, 906 n.111 (2021) (discussing the work of various state commissions on alternative pathways).

<sup>8</sup> See generally Heia Garrido Hull, *Diversity in the Legal Profession: Moving from Rhetoric to Reality*, 4 COLUM. J. RACE & L. 1 (2013); Paula Lustbader, *Painting Beyond the Numbers: The Art of Providing Inclusive Law School Admission to Ensure Full Representation in the Profession*, 40 CAP. U. L. REV. 71 (2012); Kelle Y. Testy, *Best Practices for Hiring and Retaining a Diverse Law Faculty*, 96 IOWA L. REV. 1707 (2011); Meera E. Deo, *Trajectory of a Law Professor*, 20 MICH. J. RACE & L. 441 (2015).

integrating teaching about institutional and structural racism into the curriculum,<sup>9</sup> and examining how faculty members' own biases affect how and what we teach.<sup>10</sup> Some faculties have begun addressing other areas, such as interpersonal interactions inside and outside of the classroom that foster either a sense of belonging or alienation.<sup>11</sup> These

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<sup>9</sup> "There is no 'official' definition of structural racism—or of the closely related concepts of systemic and institutional racism—although multiple definitions have been offered (citations omitted). All definitions make clear that racism is not simply the result of private prejudices held by individuals (citation omitted) but is also produced and reproduced by laws, rules and practices, sanctioned and even implemented by various levels of government and embedded in the economic system as well as in cultural and societal norms (citations omitted)." Zinzi D. Bailey, *How Structural Racism Works—Racist Policies as a Root Cause of U.S. Racial Health Inequities*, 384 NEW ENG. J. MED. 768, 768 (2021); see also Rhonda V. Magee, *Competing Narratives, Competing Jurisprudences: Are Law Schools Racist? And the Case for an Integral Critical Approach to Thinking, Talking, Writing and Teaching About Race*, 43 U.S.F. L. REV. 777, 784-85 (2009) (noting that unconscious bias and institutionalized racism may exist even in the absence of personal racism or bigotry). Efforts to integrate teaching about structural racism have their genesis in the Critical Race Theory movement which began over forty years ago. Today, those efforts continue. See, e.g., Erin C. Lain, *Racialized Interactions in the Law School Classroom: Pedagogical Approaches to Creating A Safe Learning Environment*, 67 J. LEGAL EDUC. 780 (2018); Meera E. Deo, *Two Sides of a Coin: Safe Space & Segregation in Race/Ethnic-Specific Law Student Organizations*, 42 WASH. U. J.L. & POL'Y 83 (2013); see also *Law Deans Anti-Racist Clearinghouse Project*, ASS'N OF AM. L. SCHS., <https://www.aals.org/about/publications/antiracist-clearinghouse/> (last visited Feb. 24, 2022) [hereinafter *Law Deans Anti-Racist Clearinghouse*] (suggesting schools engage in campus climate surveys).

<sup>10</sup> To help counter subconscious biases that seep into how and what we teach, law faculty are encouraged to examine our own cognitive biases, how those shape our thinking and affect our teaching and assessment processes, and how we might address some of the racially disparate impact those biases produce. See, e.g., Anne Gordon, *Better Than Our Biases: Using Psychological Research to Inform Our Approach to Inclusive, Effective Feedback*, 27 CLINICAL L. REV. 196, 198 (2021); Andrea A. Curcio, *Addressing Barriers to Cultural Sensibility Learning: Lessons from Social Cognition Theory*, 15 NEV. L.J. 537, 539 (2015) [hereinafter *Barriers to Multi-Cultural Lawyering*]; Christian Sundquist, *The Future of Law Schools: Covid-19, Technology, and Social Justice*, 53 CONN. L. REV. 1, 4 (2021). As with much of legal education, clinical faculty have been at the forefront of this issue. See, e.g., April Land, *"Lawyering Beyond" Without Leaving Individual Clients Behind*, 18 CLINICAL L. REV. 47, 59-60 (2011) (noting that the social justice mission "is woven into the fabric of clinical legal education"); Lynnise E. Phillips Pantin, *The Economic Justice Imperative for Transactional Law Clinics*, 62 VILL. L. REV. 175, 177 (2018) (noting that "[t]he traditional foundational pedagogy of clinical legal education gives students a vehicle for recognizing and combating injustice").

<sup>11</sup> See, e.g., Judith D. Fischer, *Portia Unbound: The Effects of a Supportive Law School Environment on Women and Minority Students*, 7 UCLA WOMEN'S L.J. 81, 82-83 (1996) (discussing a study which demonstrates that a more inclusive environment better supports women and students of color); Taifha N. Baker, *How Top Law Schools Can Resuscitate an Inclusive Climate for Minority and Low Income Students*, 9 GEO. L. & MOD. CRITICAL RACE PERSP. 123, 126 (2018) (criticizing the un-inclusive law school environment and offering suggestions for changing the law school climate); Demetria Frank, *Social Inequity, Cultural Reform & Diversity in the Legal Profession*, 13 S. J. POL'Y & JUST. 25, 26 (2019) (arguing that law school culture should shift to one that is collaborative, engaging, and inclusive to better support the profession's diversity goals).

efforts are all necessary and laudable. However, if we truly want to address the institutional, structural, and interpersonal racism within legal education, we need to look beyond the classroom and employ a “whole systems” approach to identify and address areas where structural, institutional, and interpersonal racism impact the student experience.<sup>12</sup>

The whole systems approach encourages schools to examine admissions practices, scholarship awards, access to graduate/research assistant positions, access to co-curricular activities, the funding and prestige awarded to co-curricular activities, and the myriad of law school policies and procedures that affect the culture and experiences of our students.<sup>13</sup> To do that, we need to systematically review all the component pieces of legal education to identify problematic processes.<sup>14</sup>

In this Article, we discuss one piece of that picture that has not been previously addressed: Honor and Disciplinary Code<sup>15</sup> accusation, investigation, charging, adjudication, and sanction systems. We suggest

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<sup>12</sup> The whole systems approach was articulated by a group of Black women deans who collaboratively created the Law Deans Anti-Racist Clearinghouse research page. *See Law Deans Anti-Racist Clearinghouse*, *supra* note 9. They suggest that schools look at a range of issues from demographics of faculty and students, integrating anti-racist teaching throughout the curriculum, providing protections for faculty and students against both explicit and implicit biases, and ensuring that definitions of merit for honors and rewards are equitable to students of color. *Id.*; *see also* Francesco Arreaga, *Law Schools Have a Moral and Social Responsibility to End Systemic Racism*, CALIF. L. REV. ONLINE (July 2020) (arguing that law schools have an obligation to acknowledge their role in perpetuating systemic racism, and a responsibility to dismantle structures that contribute to systemic racism both within law schools and within society at large); Magee, *supra* note 9, at 780-81 (noting that law schools have perpetuated “the privileges of ‘Whiteness’ and disadvantages of ‘Blackness’ and ‘Coloredness’ embedded in our society and legal culture since the founding” and proposing we address issues of race within the legal system and the legal academy by committing to engage in conversations that “marry honesty, self-revelation, and personal accountability with a commitment to mutual respect self-awareness, and interpersonal consideration of our interconnectedness that is not commonly brought to bear within the academy, let alone without”).

<sup>13</sup> *See Law Deans Anti-Racist Clearinghouse*, *supra* note 9 (suggesting schools look at a range of issues from demographics of faculty and students, integrating anti-racist teaching throughout the curriculum, providing protections for faculty and students against both explicit and implicit biases, and ensuring that definitions of merit for honors and rewards are equitable to students of color).

<sup>14</sup> *See Law Deans Anti-Racist Clearinghouse*, *supra* note 9 (discussing the steps law schools should take to identify problematic processes in legal education).

<sup>15</sup> As noted by Professor Boothe-Perry, “[d]ifferent terms, apparently chosen indiscriminately, have been used to identify regulatory codes governing student conduct, such as ‘honor codes,’ ‘ethics codes,’ and ‘disciplinary code.’” Nicola A. Boothe-Perry, *Enforcement of Law Schools’ Non-Academic Honor Codes: A Necessary Step Towards Professionalism*, 89 NEB. L. REV. 634, 640 n.27 (2010). Throughout this Article, we use the more generic term “Code” to include any combination of rules and policies that the institution uses to hold students accountable for academic and non-academic behaviors.

that the devastating impact of even a Code violation accusation, let alone adjudication and sanctions, requires schools pay attention to these systems to fully understand whether systems we believe operate neutrally are, in fact, neutral. We also suggest, based on findings from K-12, undergraduate institutions, and bar disciplinary proceedings, that many law schools will likely find that disparities exist and will need to address those disparities if they want to create inclusive institutions that seek to ensure equity and fairness for all students.

Part I of this Article examines the potential psychological harm and educational and career altering effects of the disciplinary process.<sup>16</sup> Part II reviews the studies from K-12, undergraduate institutions, and lawyer bar disciplinary proceedings that find disparities from initial reports through sanctions.<sup>17</sup> It also reviews studies on the impact those disparities have on those charged. It notes that while disparate disciplinary reports and sanctions are the subject of intense study in K-12 and are beginning to be examined in undergraduate and bar disciplinary proceedings, most law schools have not addressed this issue. Part III discusses both why law schools should collect data and how it can be done in a cost-effective manner.<sup>18</sup> It suggests that the ABA should include this data collection requirement as part of the work schools must already do to ensure compliance with Standard 206—the standard that requires law schools to demonstrate a commitment to inclusion and diversity.<sup>19</sup> Finally, Part IV draws from work done in the K-12, undergraduate, and lawyer disciplinary contexts to discuss potential reasons for disparities that are likely as applicable in legal education as in these other arenas, and it suggests ways schools can begin addressing disparities they may find.<sup>20</sup> The Article concludes by arguing that legal educators need demographic data collection about disciplinary code proceedings to move from a framework where we believe disparities, if they exist, are unintentional and thus we have no accountability, to a framework of collective accountability for

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<sup>16</sup> See *infra* Part I.

<sup>17</sup> See *infra* Part II.

<sup>18</sup> See *infra* Part III.

<sup>19</sup> ABA STANDARDS & RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS, Standard 206 (AM. BAR ASS'N 2021-2022). During the writing of this Article, the ABA's Section on Legal Education and Admissions to the Bar has undertaken a significant review and potential re-write of Standard 206. This revision, (included in the Section's website at: [https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/council\\_reports\\_and\\_resolutions/aug21/21-aug-final-std-recs-with-appendix.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/aug21/21-aug-final-std-recs-with-appendix.pdf)) has been sent back for further comment and review as of August 2021. It will come before the Council again in August 2022.

<sup>20</sup> See *infra* Part IV.

institutional practices that systemically disadvantage particular groups.<sup>21</sup>

### I. THE IMPACT OF CODE VIOLATION ACCUSATIONS, INVESTIGATIONS, AND ADJUDICATIONS

Historically, institutions have implemented conduct codes for a variety of reasons, but the three main purposes are aspirational, educational, and regulatory.<sup>22</sup> The Codes seek to influence student behavior through education about ideal conduct as well as by providing detailed rules that require reporting, monitoring, and sanctions when students violate prescribed behaviors.<sup>23</sup> The majority of the previous scholarly work, as well as legal challenges, to school conduct codes has focused on legal arguments about the extent of due process that should be afforded to those accused.<sup>24</sup> This Article goes beyond the call for procedural protections and looks at deeper equity issues. We suggest legal education institutions should start reviewing their own data to identify how structures of student accountability, in this case student Codes, could be affecting portions of their student population differently.

In law schools, Codes typically connect behaviors and expectations to the legal profession—particularly focusing on honesty, integrity, and trust.<sup>25</sup> Codes also seek to maintain academic integrity and

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<sup>21</sup> This idea was articulated in context of gendered faculty service workloads. Mary A. Lynch & Andrea A. Curcio, *Institutional Service, Student Care Work and Misogyny: Naming the Problem and Mitigating the Harm*, 65 VILL. L. REV. 1083, 1138 (2020). See generally KerryAnn O'Meara et al., *Whose Problem is it? Gender Differences in Faculty Thinking About Campus Service*, 118 TCHRS. COLL. REC. 1, 31-32 (2016). These observations are equally applicable to the racial disparity issues discussed in this Article.

<sup>22</sup> Mark S. Frankel, *Professional Codes: Why, How, and With What Impact?*, 8 J. BUS. ETHICS 109, 110-11 (1989) (discussing how ethical codes are written to either communicate ideals to strive for, provide understanding through “commentary and interpretation,” or provide detailed rules to govern conduct through reporting, monitoring, and sanctions).

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

<sup>24</sup> See, e.g., H.L. Silets, *Of Students' Rights and Honor: The Application of the Fourteenth Amendment's Due Process Structures to Honor Code Proceedings at Private Colleges and Universities*, 64 DENV. L. REV. 47, 47 (1987); *Bd. of Curators v. Horowitz*, 435 U.S. 78 (1978); *Goss v. Lopez*, 419 U.S. 565 (1975); *Dixon v. Ala. State Bd. of Educ.*, 294 F.2d 150 (5th Cir. 1961).

<sup>25</sup> “A lawyer should be one whose record of conduct justifies the trust of clients, adversaries, courts and others with respect to the professional duties owed to them.” ABA/NCBE MODEL CODE OF RECOMMENDED STANDARDS FOR BAR EXAMINERS, Standard 12, <https://reports.ncbex.org/comp-guide/code-of-recommended-standards/#ftoc-heading-1> (last visited Apr. 1, 2022).



potentially the overall grading system, which in legal education play a critical role in the access to future opportunities.<sup>26</sup>

Legal educators emphasize the importance of professional ethics and behaviors while also participating in a culture that fosters competition via curved grading systems, as well as an overemphasis on grades and the rewards that accompany high grades, such as employment prospects, coveted positions on law journals, and other merit awards.<sup>27</sup> Given these competing messages, it is not surprising that one multi-institutional, multi-year student survey found that thirty percent of law students participating in the survey self-reported one or more cheating behaviors.<sup>28</sup>

This Article does not focus on whether cheating and other prohibited behaviors exist or how widespread they may be, although that question certainly merits further research. Instead, we ask whether law school academic code proceedings cultivate an area of structural, institutional, and interpersonal racism that we need to address because of the effect Code violation charges, adjudications, and sanctions have upon students and the institutional culture.

Law students experience a range of stressors that affect their well-being.<sup>29</sup> Code violation accusations, investigations, and adjudications likely compound those stressors. Students may experience the shame that comes with an accusation that the student has violated one of the profession's core values, concerns about reputational damage,<sup>30</sup> and fears about the investigative, adjudicative, and sanction process. These concerns can have a powerful negative impact on a student's mental and emotional health. A charge alone can have a negative effect on students' emotional well-being. The emotional harm may be particularly acute for students of color, who already face psycho-social stressors not carried by their white counterparts during

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<sup>26</sup> Lori A. Roberts & Monica M. Todd, *Let's Be Honest About Law School Cheating: A Low-Tech Solution for a High-Tech Problem*, 52 AKRON L. REV. 1155, 1167 (2019).

<sup>27</sup> *Id.*

<sup>28</sup> DONALD L. MCCABE ET AL., CHEATING IN COLLEGE: WHY STUDENTS DO IT AND WHAT EDUCATORS CAN DO ABOUT IT 149-50 (2012) (finding that based on survey data from 2002-2010, "30% [of the law students responding to the survey] self-reported one or more cheating behaviors on the Bowers index, compared with 39% of the total graduate student sample . . . attending one of the 13 schools in our sample that had a law school").

<sup>29</sup> Debra S. Austin, *Positive Legal Education: Flourishing Law Students and Thriving Law Schools*, 77 MD. L. REV. 649, 657 (2018) (noting that stress is a characteristic of law school that affects well-being and, when it is chronic, diminishes cognitive capacity); see also Lawrence S. Kreiger, *Institutional Denial About the Dark Side of Law School, and Fresh Empirical Guidance for Constructively Breaking the Silence*, 52 J. LEGAL EDUC. 112, 114-15 (2002).

<sup>30</sup> See *infra* text accompanying notes 35-36.

law school<sup>31</sup> and must negotiate a range of incidents that increase feelings of alienation or marginalization.<sup>32</sup> Adding the toll of being reported for possible academic or conduct violations, and potentially a subsequent investigation and hearing, can exacerbate the emotional toll that comes with simply being a law student from a marginalized community.

The harm goes beyond emotional well-being. The entire process can have an academic impact, even if no violation is found. The stressors that accompany a Code violation charge potentially interfere with a student's ability to focus on academics.<sup>33</sup> This, in turn, can lead to the additional negative effects that flow from lower grades, including diminished externship and employment opportunities, and ability to participate in prestigious co-curricular activities such as law review.<sup>34</sup> These harms may occur simply when a potential violation is reported, and they likely increase during the investigation and adjudication phase.

Students also face reputational harm. At most schools, alleged reports of misconduct are supposed to be kept confidential. However, in our experience, leaks are common. Students' reputation with colleagues may be affected by student gossip, and even faculty perceptions of a student may be influenced by charges—even if only a few faculty members know about the charges or outcome. Particularly when it comes to faculty members, the reputational harm of simply being investigated can cause the “pitchfork effect” in which a decision-maker's overall assessment is, often unconsciously, affected by a

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<sup>31</sup> Sha-Shana Crichton, *Incorporating Social Justice Into the 1L Legal Writing Course: A Tool for Empowerment*, 24 MICH. J. RACE & L. 251, 257 (2019) (discussing the psycho-social factors that create a higher level of fear and anxiety in students from marginalized communities).

<sup>32</sup> Sometimes those incidents are overt, like faculty scholarship that denigrates Black students' intellect and abilities. See, e.g., Kendra Fox-Davis, *A Badge of Inferiority: One Law Student's Story of a Racially Hostile Environment*, 23 NAT'L BLACK L.J. 98, 104-06 (2010) (describing the experiences of Black law students taught by Professor Richard Sanders whose writings questioned whether Black students belonged in elite law schools). Other times they are covert and more subtle. See Walter R. Allen & Daniel Solórzano, *Affirmative Action, Educational Equity, and Campus Racial Climate: A Case Study of the University of Michigan Law School*, 12 BERKELEY LA RAZA L.J. 237, 277-78 (2001) (describing the various racialized encounters and incidents faced by students of color and the impact of those on students' mental health, well-being, and belief that they can succeed); Susan Grover & Nikeshia Womack, *Stories at the Edge of Class—Marginalization in the Law School Experience*, 16 SEATTLE J. SOC. JUST. 41, 43-45 (2016) (discussing the alienating and marginalizing experiences that occur when faculty target students because of their race or ethnicity and when faculty or administrators publicly make flagrantly biased statement with no awareness of the statements' offensiveness).

<sup>33</sup> Crichton, *supra* note 31, at 280-81 (discussing the neurobiology of stress and its potential effect on learning). These harms parallel some of the harms seen in the disparities in K-12 discipline. See *infra* Section II.A.

<sup>34</sup> Roberts & Todd, *supra* note 26, at 1167.

negative detail or trait.<sup>35</sup> For students who are often outsiders, these reputational harms may be even greater.<sup>36</sup>

If a student is found to have violated a Code provision, a range of sanctions exist. Even relatively minor sanctions, e.g., lowering a course grade or a letter of reprimand, can have significant long-term impacts. A low or failing grade impacts a student's overall GPA, potentially their academic standing at the institution, and can negatively impact the ability to participate in traditional co-curriculars such as law review and moot court.<sup>37</sup> Findings of violations may also impact a student's ability to continue paying for law school because "many grants and scholarships are predicated on maintaining good academic standing."<sup>38</sup> These financial penalties may be particularly burdensome on students who do not have family connections to help them get a job or family wealth and resources to help them pay for law school.

Students' admission to the bar may also be at risk. As part of the bar admissions process, applicants must disclose all accusations of misconduct at any educational institution.<sup>39</sup> Even a charge that was dismissed without investigation must be disclosed.<sup>40</sup> Included in the bar application is a waiver that allows bar character and fitness committees to receive additional information from the school about charges, evidence, adjudication, and sanctions.<sup>41</sup> While character and fitness

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<sup>35</sup> See BARRY L. JOHNSON, IMPACTS OF WORLDVIEW, IMPLICIT ASSUMPTIONS, BIASES, AND GROUPTHINK ON ISRAELI OPERATIONAL PLANS IN 1973 11 (2013), <https://apps.dtic.mil/sti/pdfs/ADA584193.pdf> (explaining the pitchfork effect and its cognitive bias opposite, the halo effect).

<sup>36</sup> See, e.g., William A. Smith et al., "Assume the Position . . . You Fit the Description": Psychosocial Experiences and Racial Battle Fatigue Among African American Male College Students, 51 AM. BEHAV. SCIENTIST 551, 552-55 (2007) (discussing the psychological and emotional impact of racial battle fatigue experienced by African American male undergraduates attending primarily white institutions).

<sup>37</sup> Roberts & Todd, *supra* note 26, at 1168.

<sup>38</sup> *Id.*

<sup>39</sup> NAT'L CONF. OF BAR EXAM'RS, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS 2021viii (2021). It is recommended that state bar examiners treat any of the following "as cause for further inquiry before the bar examining authority decides whether the applicant possesses the character and fitness to practice law: unlawful conduct, academic misconduct, making of false statements, including omissions, misconduct in employment, acts involving dishonesty, fraud, deceit or misrepresentation . . ." *Id.* These acts are the type of acts that underlie Code violations. *Id.*

<sup>40</sup> Mary Dunnewold, *The Other Bar Hurdle: The Character and Fitness Requirement*, ABA STUDENT LAW (Dec. 1, 2013), <https://abaforlawstudents.com/2013/12/01/bar-hurdle-character-fitness-requirement/>.

<sup>41</sup> For an example of what the character and fitness process involves, see Diana Van Aken, *Unraveling the Mystery of the Character and Fitness Process*, ST. BAR MICH. CHARACTER & FITNESS DEPT., <https://www.michbar.org/file/professional/pdfs/unraveling.pdf>. See, e.g., NAT'L

inquiries are appropriate, they also are incredibly stressful. In some jurisdictions, the character and fitness investigations occur during the school year, while the applicant is trying to complete their education and can spill over into the period where the student is studying for the bar exam.<sup>42</sup> In others, the character and fitness exams are conducted after the bar exam,<sup>43</sup> leaving students wondering whether they will be admitted even if they pass the bar exam. Whenever the investigation occurs, the bar applicant experiences the stress and emotional toll of another investigation, or the specter of an investigation—stress that may interfere with the ability to prepare for the bar exam. Even for those who pass character and fitness scrutiny, the stress of having gone through another investigation, review, and possible adjudication, may be particularly harmful to students of color. Students of color experience stressors that relate to bar passage, such as financial and family burdens and stereotype threats, at higher rates than their white counterparts.<sup>44</sup>

As discussed above, students may suffer numerous potential negative effects from a disciplinary charge, and the effects likely increase as the process proceeds. The harms caused by disciplinary proceedings in law school may be particularly acute for marginalized students. Investigating whether there are racial disparities in who is reported, all the way through severity of sanctions should be a component of a “whole systems” approach to identifying when and how biases come into play in legal education. If students of color are more frequently reported and sanctioned, that may reveal biases in the community that should be addressed. Additionally, if there are disparities in reports and sanctions between students of color and white students, law schools need to examine whether they have failed to

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CONF. ST. BAR EXAM'RS, *Character & Fitness Sample Application*, <https://www.ncbex.org/dmsdocument/134> (last visited Apr. 18, 2022) (including sample application questions related to academic disciplinary action including convictions and accusations).

<sup>42</sup> See, e.g., SUP. CT. GA OFF. BAR ADMISSIONS, *Certification of Fitness*, <https://www.gabaradmissions.org/certification-of-fitness> (noting the need to file a character and fitness application prior to applying to sit for the bar exam in Georgia); ST. BAR CAL., *Process for Filing a Moral Character Application*, <https://www.calbar.ca.gov/Admissions/Moral-Character/Process> (describing the California process in which law students are encouraged to begin the character and fitness application process during their last year of law school).

<sup>43</sup> See, e.g., *Are You Fit to Be a Lawyer?*, N.Y. ST. LAW. ASSISTANCE TR., <http://www.nylat.org/publications/brochures/documents/characterandfitnessbrochure09.pdf> (last visited Apr. 27, 2022) (describing New York's process after bar applicants have taken the exam).

<sup>44</sup> Deborah Jones Merritt et al., *Racial Disparities in Bar Exam Results—Causes and Remedies*, BLOOMBERG NEWS (July 20, 2021, 4:00 AM), <https://news.bloomberglaw.com/us-law-week/racial-disparities-in-bar-exam-results-causes-and-remedies> (using data from the AccessLex study on First Time Bar Exam Passage on the UBE in New York to discuss the role stereotype threat plays in bar passage for examinees of color).

protect the integrity of their grading systems for all students and failed to create a culture in which honor and integrity are valued and enforced uniformly. These concerns reflect the fact that student conduct codes and disciplinary systems impact the entirety of the learning environment and culture of an institution. The Council for the Advancement of Standards in Higher Education (CAS), a consortium of higher education professional associations, recognizes the integration of conduct codes into the educational process,<sup>45</sup> and it has produced a self-assessment guide for universities to use in evaluating their student conduct programs from the content of their codes through the adjudication process.<sup>46</sup> That self-assessment includes a section on diversity because of the role the conduct process plays in creating environments that are respectful of, and welcoming to, people of diverse backgrounds.<sup>47</sup>

## II. EXISTING DATA INDICATE PEOPLE OF COLOR DISPROPORTIONALLY GET REPORTED AND SANCTIONED FROM KINDERGARTEN THROUGH BAR DISCIPLINARY PROCEEDINGS

Below we discuss the data on disparities in disciplinary-related reports and sanctions in K-12 and undergraduate institutions—the educational settings that serve as pathways to law school. We also discuss disparity data in lawyer disciplinary proceedings—a post-graduate experience. We do so because these settings are the bookends to a legal education in the United States.

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<sup>45</sup> The Council notes that the development and enforcement of standards of conduct for students is part of the educational process that fosters students personal and social development, forms the basis for behavioral expectations, and protects academic integrity. *See* COUNCIL FOR THE ADVANCEMENT OF STANDARDS IN HIGHER EDUC., CAS GENERAL STANDARDS (2018), <http://standards.cas.edu/getpdf.cfm?PDF=E868395C-F784-2293-129ED7842334B22A>.

<sup>46</sup> Grinnell completed that self-assessment and published the questions and answers on their web page. Their self-assessment illustrates the type of questions institutions should be asking themselves. *See* COUNCIL FOR THE ADVANCEMENT OF STANDARDS IN HIGHER EDUC., CAS SELF-ASSESSMENT GUIDE FOR STUDENT CONDUCT PROGRAMS, (2009), <https://www.grinnell.edu/sites/default/files/documents/Grinnell%20College%20Student%20Conduct%20Self%20Study%20-%20Part%20II.pdf>.

<sup>47</sup> *Id.* at 29.

### A. *Disparate Reporting and Sanctions in K-12*

Data indicate disproportionate discipline of students of color in K-12.<sup>48</sup> For example, one study from the Government Accountability Office analyzed five school districts across five states and found that Black students were disciplined more frequently than other students.<sup>49</sup> The study found the disparity was “widespread and persisted regardless of the type of disciplinary action, level of school poverty, or type of public school attended.”<sup>50</sup> The study looked at six different types of punishments including out-of-school suspension, in-school suspension, referrals to law enforcement, expulsion, corporal punishment, and school-related arrest.<sup>51</sup> Black students were overrepresented in every type of punishment compared to their white counterparts.<sup>52</sup> Other studies have found similar results, and have found that the disparities are not due to higher levels of delinquent conduct by students of color.<sup>53</sup>

In addition to more frequent discipline, Black K-12 students are disciplined more harshly for the same conduct as white students.<sup>54</sup> A

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<sup>48</sup> See, e.g., Elbert H. Aull IV, *Zero Tolerance, Frivolous Juvenile Court Referrals, and the School-to-Prison Pipeline: Using Arbitration as a Screening-Out Method to Help Plug the Pipeline*, 27 OHIO ST. J. DISP. RESOL. 179, 185 (2012) (noting that studies show that Black students, and other students of color, face harsher punishment when committing the same misconduct as their white counterparts); Constance A. Lindsay & Cassandra M.D. Hart, *Exposure to Same-Race Teachers and Student Disciplinary Outcomes for Black Students in North Carolina*, 39 EDUC. EVALUATION & POL’Y ANALYSIS, 485, 485 (2017); Travis Riddle & Stacy Sinclair, *Racial Disparities in School-Based Disciplinary Actions are Associated with County-Level Rates of Racial Bias*, 116 PNAS 8255, 8255 (2019); Frances Vavrus & KimMarie Cole, “I Didn’t Do Nothin’”: *The Discursive Construction of School Suspension*, 34 URBAN REV. 87, 87 (2002); Sam Chaltain, *Restorative Justice: A Better Approach to School Discipline*, GREATSCHOOLS.ORG (Mar. 14, 2016), <https://www.greatschools.org/gk/articles/discipline-in-schools-moves-toward-peace-making/>.

<sup>49</sup> U.S. GOV’T ACCOUNTABILITY OFF., GAO-18-258, K-12 EDUCATION: DISCIPLINE DISPARITIES FOR BLACK STUDENTS, BOYS, AND STUDENTS WITH DISABILITIES (2018), <https://www.gao.gov/assets/gao-18-258.pdf> [hereinafter DISCIPLINE DISPARITIES].

<sup>50</sup> *Id.* The study found that Black students were overrepresented in every form of punishment compared to their white counterparts and that for in school suspensions, Black students “represented 15.5[%] of all public-school students, but . . . 39[%] of students suspended from school.” *Id.* at 12-13.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> UnidosUS, *A Look at the Disproportionate Impact of School Discipline on Children of Color in Pennsylvania*, PROGRESS REPORT, UNIDOSUS.ORG (July 28, 2021), <https://www.unidosus.org/progress-report/a-look-at-the-disproportionate-impact-of-school-discipline-on-children-of-color-in-pennsylvania/>.

<sup>54</sup> COLUMBIA L. SCH. CTR. INTERSECTIONALITY & SOC. POL’Y STUD., BLACK GIRLS MATTER: PUSHED OUT, OVERPOLICED AND UNDERPROTECTED, 9 (2015), [http://static1.squarespace.com/static/53f20d90e4b0b80451158d8c/t/54d23be0e4b0bb6a8002fb97/1423064032396/BlackGirlsMatter\\_Report.pdf](http://static1.squarespace.com/static/53f20d90e4b0b80451158d8c/t/54d23be0e4b0bb6a8002fb97/1423064032396/BlackGirlsMatter_Report.pdf) [hereinafter BLACK GIRLS MATTER]; DANIEL

report by Columbia Law School’s Center for Intersectionality and Social Policy Studies found that Black girls were more likely to be suspended or expelled for “subjective behavioral infractions.”<sup>55</sup> Further, studies found teachers were more likely to find the behavior of Black students to indicate a “long-term problem” that required harsher disciplinary action in comparison to similar behavior from white students.<sup>56</sup>

Amongst the reasons suggested for these disparities are K-12 educators’ subconscious racial biases,<sup>57</sup> biases which may be stronger in areas with a higher population of white people.<sup>58</sup> For example, Professors Lindsay and Hart found that in elementary, middle, and high schools in North Carolina schools with a more diverse and representative teaching force exhibit lower rates of racial disparities in school discipline.<sup>59</sup> They suggest that one reason for this is the difference in how Black teachers handle referrals for subjective conduct, such as “defiant behavior.”<sup>60</sup> Other scholars have found similar results that suggest that differences in K-12 disciplinary referrals and sanction outcomes may be a product of teachers’ implicit biases.<sup>61</sup>

Implicit biases, along with white favoritism,<sup>62</sup> “can influence behaviors and judgments in ways that can cause unwarranted racial

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J. LOSEN, DISCIPLINE POLICIES, SUCCESSFUL SCHOOLS, AND RACIAL JUSTICE, 6-8 (Kevin Welner ed., 2011), <https://nepc.colorado.edu/publication/discipline-policies>.

<sup>55</sup> BLACK GIRLS MATTER, *supra* note 54, at 24 (analyzing discipline records of students in the New York and Boston school districts which enrolled 1,104,479 students and 54,300 students, respectively).

<sup>56</sup> Riddle & Sinclair, *supra* note 48, at 8255; *see also* Aull, *supra* note 48, at 179.

<sup>57</sup> Riddle & Sinclair, *supra* note 48, at 8255.

<sup>58</sup> *Id.* at 8258 (hypothesizing that disciplinary disparities may be attributed to the “sociopolitical power of white residents who are able to dictate legislation, policies, or norms that contribute to these disparate outcomes”).

<sup>59</sup> Lindsay & Hart, *supra* note 48, at 507 (finding that exposure to same race teachers lowers referrals for willful defiance and is associated with reduced rates of exclusionary discipline for Black students).

<sup>60</sup> *Id.*; *see also* Douglas B. Downey & Shana Pribesh, *When Race Matters: Teachers’ Evaluations of Students’ Classroom Behavior*, 77 SOCIO. EDUC. 267 (2004) (finding that the reason Black students’ classroom behavior is more likely to be identified as “defiant” by white teachers than by Black teachers likely results from white teachers’ biases).

<sup>61</sup> Riddle & Sinclair, *supra* note 48, at 8258 (finding both explicit and implicit biases play a role in the disciplinary gap between Black and white students); Cheryl Staats, *Understanding Implicit Bias: What Educators Should Know*, 39 AM. EDUC. 29, 31 (2015); Terrance M. Scott, *Implicit Bias, Disproportionate Discipline, and Teacher Responsibility for Instruction as Prevention*, 65 PREVENTING SCH. FAILURE: ALT. EDUC. CHILD. & YOUTH 291 (2021).

<sup>62</sup> White favoritism is in many ways the opposite of implicit biases against Black people. Instead, an actor, often unconsciously, associates positive stereotypes and attitudes with members of a favored group, leading to preferential treatment for members of that group. Ariela Rutbeck-Goldman & L. Song Richardson, *Race and Objective Reasonableness in Use of Force*

disparities. This is most likely to occur when decision-making is highly discretionary, decision-makers are cognitively depleted (also referred to as cognitive overload), and information is limited and ambiguous.”<sup>63</sup> This phenomenon may manifest in the context of more closely scrutinizing Black students’ conduct to look for bad behavior.<sup>64</sup> For example, in one study of preschoolers, teachers were told to look for misbehaviors as they watched video clips of four children: a Black girl; a Black boy, a white girl, and a white boy, all of whom were seated at a table.<sup>65</sup> None of the children misbehaved, but eye trackers revealed teachers spent more time tracking the Black boy’s conduct.<sup>66</sup> The participants also identified Black boys as requiring the most attention.<sup>67</sup> The researchers concluded that “[t]he tendency to observe more closely classroom behaviors based on the sex and race of the child may contribute to greater levels of identification of challenging behaviors with Black preschooler and especially Black boys . . . .”<sup>68</sup> Subconscious racial biases do not magically disappear when one graduates high school. As discussed in Sections B and C below,<sup>69</sup> these biases may also be at play in undergraduate and lawyer disciplinary contexts. It would not be surprising to discover they also are at work in law schools.

Another factor identified in K-12 that may contribute to the disparities is the racial composition of educators. One study showed decreases in disciplinary action when Black students consistently interacted with Black educators.<sup>70</sup> In most law schools, faculty of color, and particularly Black faculty are under-represented.<sup>71</sup> And, given that reports of misconduct can also be student-generated, the racial

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*Cases: An Introduction to Some Relevant Social Science*, 8 ALA. C.R. & C.L. L. REV. 145, 150 (2017).

<sup>63</sup> *Id.* at 151

<sup>64</sup> See *infra* Section IV.A.ii.a. (discussing spotlighting and dimming).

<sup>65</sup> Walter S. Gilliam et al., *A Research Study Brief: Do Early Educators’ Implicit Biases Regarding Sex and Race Relate to Behavior Expectations and Recommendations of Preschool Expulsions and Suspensions?*, YALE CHILD STUDY CTR. 1 (2016).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 11.

<sup>68</sup> *Id.*

<sup>69</sup> See *infra* Sections II.B & II.C.

<sup>70</sup> Lindsay & Hart, *supra* note 48, at 485. Similar studies found the same reduction in discipline rates for white students with greater exposure to white teachers and Latinx students with greater exposure to Black teachers. *Id.* at 488.

<sup>71</sup> See generally MEERA E. DEO, UNEQUAL PROFESSION: THE INTERSECTION OF RACE AND GENDER IN LEGAL ACADEMIA (2019); Lawprofblawg, *Your Law School’s Predominantly White Male Faculty Profile Pics*, ABOVE THE LAW (Oct. 16, 2018), <https://abovethelaw.com/2018/10/your-law-schools-predominantly-white-male-faculty-profile-pics/> (noting a review of more than fifty law school websites confirm that tenured and tenure-track faculty are predominantly white men).



composition of the student body also matters when it comes to law school code accusations. In law schools, we see under-representations of students of color, particularly Black students.<sup>72</sup>

Whatever the reason for the disparities in K-12, they come at a high cost for students of color. Studies indicate that harsher and more frequent disciplinary action leaves a lasting impact on students' lives. The racial disciplinary disparity is linked to lower retention rates,<sup>73</sup> higher drop-out rates,<sup>74</sup> unemployment,<sup>75</sup> widening of the achievement gap,<sup>76</sup> and a greater likelihood that students of color will become another statistic in the school-to-prison pipeline.<sup>77</sup> Increased discipline for students of color creates a domino effect that is hard to stop once it has started. Higher days of missed school due to suspensions and expulsions lead to a greater likelihood that students will fall behind in school and, often, leave school altogether.<sup>78</sup> The impact on K-12 students may differ from the impact on law students, yet potential parallels exist, particularly in the context of achievement gaps and employment opportunities for those students identified as having violated conduct codes.<sup>79</sup>

The K-12 data have identified the problem and, as a result, educators have begun exploring reasons for the differences and working to find solutions. Because we do not know about the racial composition of those accused in law school, we do not know if disparities exist, and if they do, we have not studied the causes of such disparities, nor have we quantified the impact the accusations and disciplinary actions may have. While we can analogize as we have done throughout this section,

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<sup>72</sup> *Law School Enrollment by Race & Ethnicity (2019)*, ENJURIS, <https://www.enjuris.com/students/law-school-race-2019.html> (last visited Apr. 19, 2022).

<sup>73</sup> DANIEL J. LOSEN, DISCIPLINE POLICIES, SUCCESSFUL SCHOOLS, AND RACIAL JUSTICE, 11 (Kevin Welner ed., 2011), <https://nepc.colorado.edu/sites/default/files/NEPC-SchoolDiscipline.pdf>.

<sup>74</sup> *Id.*

<sup>75</sup> Riddle & Sinclair, *supra* note 48, at 8255.

<sup>76</sup> BLACK GIRLS MATTER, *supra* note 54, at 8; Carrie Spector, *How Unequal Discipline Hurts Black Students*, GREATER GOOD MAG. (Feb. 6, 2020), [https://greatergood.berkeley.edu/article/item/how\\_unequal\\_discipline\\_hurts\\_black\\_students](https://greatergood.berkeley.edu/article/item/how_unequal_discipline_hurts_black_students). (noting that a Stanford study found increases in the discipline gap or the achievement gap “predicts a jump in the other . . . as one gap narrows, so does the other”).

<sup>77</sup> NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, DISMANTLING THE SCHOOL-TO-PRISON PIPELINE (2005), [https://www.naacpldf.org/wp-content/uploads/Dismantling\\_the\\_School\\_to\\_Prison\\_Pipeline\\_\\_Criminal-Justice\\_\\_.pdf](https://www.naacpldf.org/wp-content/uploads/Dismantling_the_School_to_Prison_Pipeline__Criminal-Justice__.pdf); *Who is Most Affected by the School-to-Prison Pipeline*, AM. U. SCH. OF EDUC. (Feb. 24, 2021), <https://soeonline.american.edu/blog/school-to-prison-pipeline> [hereinafter *Who is Most Affected*].

<sup>78</sup> *Who is Most Affected*, *supra* note 77.

<sup>79</sup> *See supra* Part I.

without data, we do not know if those analogies are accurate. Data may show us parallels between K-12 findings, or we may find significant differences. We also cannot study the efficacy of potential solutions until we have the underlying data. The data are critical because, as the Sections B and C below indicate, the K-12 disparities seem to continue into undergraduate institutions and even amongst practicing lawyers.<sup>80</sup> Given that, it is unlikely that law schools are a “disparity free” zone.

### B. *Disparities Continue in Higher Education*

The limited data on code violation reports and sanctions in undergraduate institutions suggest that the disproportional discipline seen in K-12 continues into college.<sup>81</sup> For example, one study tracked three years of honor court cases at a small liberal arts college and found that students of color were more likely to be found guilty of violations than their white colleagues.<sup>82</sup> Another study found that between 2004-2007, students of color constituted 13.3% of the undergraduate population at Bowling Green University, and yet they accounted for 33.4% of those reported for academic dishonesty.<sup>83</sup> A recent study looking at four years of discipline data from two public institutions found that “men and students of color were represented at higher rates in the suspension population than they were in the overall violation population.”<sup>84</sup>

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<sup>80</sup> See *infra* Sections II.B. & II.C.

<sup>81</sup> Anna G. Bobrow, *Restoring Honor: Ending Racial Disparities in University Honor Systems*, 106 VA. L. REV. ONLINE 47, 53 n.51 (June 18, 2020). “Only UVA, the University of North Carolina at Chapel Hill (“UNC”), and The Ohio State University (“Ohio State”) have published any reports about the number of students reported for and found guilty of honor offenses, and only UVA has provided a public report analyzing the number of students reported to and sanctioned by the university honor system broken down by race and ethnicity.” *Id.* at 53.

<sup>82</sup> Quinn Larwood & Elizabeth L. Rankin, *Guilty as Charged! The Determinants of Honor Court Convictions*, 38 ATLANTA ECON. J. 461, 462 (2010).

<sup>83</sup> Casey K. Sacks, *Academic and Disciplinary Outcomes Following Adjudication of Academic Dishonesty* 29 (May 2008) (Ph.D. dissertation, Bowling Green University), [https://etd.ohiolink.edu/apexprod/rws\\_etd/send\\_file/send?accession=bgsu1206386966&disposition=inline](https://etd.ohiolink.edu/apexprod/rws_etd/send_file/send?accession=bgsu1206386966&disposition=inline). Like others, this scholar found men, international students, and student athletes were also over-represented in those reported for academic misconduct. *Id.* at 28. While it is outside the scope of this Article to look at demographic disproportionality beyond race and ethnicity, we note that international students are another disproportionately represented group in both academic misconduct reports and sanctions for that misconduct. See *infra* note 89.

<sup>84</sup> Katherine Renee Kaminski, *Double Secret Probation, Bias, and Equity: A University Conduct Review* (Apr. 2018) (Ph.D. dissertation, Montana State University), <https://scholarworks.montana.edu/xmlui/bitstream/handle/1/14560/KaminskiK0518.pdf>.

One of the most significant data sources is a University of Virginia (UVA) study looking at 100 years of code violation data.<sup>85</sup> The historical data, looking at overall enrollment data, show disproportionate reports of Black students for potential academic misconduct violations as compared to their white counterparts, although the disparities seemed to decrease over time.<sup>86</sup> The data also show that the number of Asian students facing sanctions markedly increased over time,<sup>87</sup> although many of those students were also international students<sup>88</sup>—a cohort that numerous studies find are disproportionately represented amongst those reported and sanctioned for Honor Code violations.<sup>89</sup> While the UVA study found that racial disparities existed when looking at the number of misconduct reports, it also found race had no significant effect on whether a reported student ultimately received a sanction.<sup>90</sup> However, as noted in Part I, a report alone can have a range of harmful effects.<sup>91</sup>

The authors of the UVA study note that they were missing substantial data on racial demographics and that that data could show even more significant misconduct reporting disparities than were shown by existing data.<sup>92</sup> They also state that missing racial demographic data makes it difficult to pinpoint potential issues and draw meaningful conclusions about disparities and their potential causes.<sup>93</sup> Lack of data on racial demographics has also hampered other scholars seeking to determine if racial disparities in violations reports and sanctions exist in undergraduate institutions.<sup>94</sup>

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<sup>85</sup> UVA HONOR COMM., BICENTENNIAL ANALYSIS A REPORT BY THE HONOR ASSESSMENT & DATA MANAGEMENT WORKING GROUP (2018-2019), <https://report.honor.virginia.edu/sites/report.honor/files/honor-bicentennial-analysis.pdf> [hereinafter BICENTENNIAL ANALYSIS].

<sup>86</sup> *Id.* at 12-13.

<sup>87</sup> *Id.* at 12-13, 15.

<sup>88</sup> *Id.* at 15, 29. We note that international students come from different cultures with different understanding of acceptable behavior—what might be considered cheating in the United States might be considered appropriate behavior in another culture. This area is one that is ripe for study.

<sup>89</sup> *Id.* at 30; *see also*, Denise Simpson, *Academic Dishonesty: An International Student Perspective*, 2 HIGHER EDUC. POL. & ECON. 1, 5-6 (2016) (citing numerous studies finding that international students “violate academic integrity at a disproportionate rate than their domestic peers”).

<sup>90</sup> *Id.* at 37.

<sup>91</sup> *See supra* Part I.

<sup>92</sup> BICENTENNIAL ANALYSIS, *supra* note 85, at 16.

<sup>93</sup> *Id.* at 16, 24, 30.

<sup>94</sup> *See* Eric M. Beasley, *Comparing the Demographics of Students Reported for Academic Dishonesty to Those of the Overall Student Population*, 26 ETHICS & BEHAV. 45, 51 (2016). (“In

In sum, the limited data from undergraduate institutions indicate a problem exists in undergraduate institutions, although the failure to systematically collect and report data limits knowledge about the extent of that problem and hampers the study necessary to correct the problem.<sup>95</sup> That same limited data problem exists with bar complaints and sanctions.

### C. *Disparities in Lawyer Bar Complaints and Sanctions*

Most state bars, like most universities and law schools, do not keep or publicize data on race and ethnicity when it comes to disciplinary procedures. However, the few that do gather this data have found racial disparities. For example, the State Bar of Texas' 2019-2020 disciplinary report indicates the Texas Bar disproportionately sanctioned lawyers of color.<sup>96</sup> Of the 403 sanctions handed down in 2019-2020, 13% of those sanctioned were Black; 21% were Hispanic; and 54% were white.<sup>97</sup> The Texas State Bar Membership is 79% white; 6% Black; and 10% Hispanic.<sup>98</sup> The report did not attempt to explain the disparities.<sup>99</sup>

Illinois and New Mexico state bar studies found similar disproportionality in sanctions of Black and Hispanic lawyers and then attributed the disproportionality to the fact that those lawyers practiced in small and solo practices—practices in which lawyer sanctions are more likely.<sup>100</sup> The Illinois and New Mexico reports did not look at proportionality in context of all lawyers practicing in solo or small firms and thus did not examine whether white lawyers and those from under-

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the end, I chose not to include race in my analysis, as I did not have racial information for almost half of the students. For all other variables, demographic information was made available to me for 298 of the student respondents out of a total of 312 total responses.”).

<sup>95</sup> As more evidence of the need for, but lack of, more data, one scholar points to the fact that data are rarely official or published and notes, as an example, unofficial data from the University of North Carolina where faculty council meeting minutes contained notes from a presentation of student leaders who reported “that 56% of UNC’s academic misconduct cases concerned students of color while the UNC student body was only 37% non-white.” Bobrow, *supra* note 81, at 53-54. There was no way to confirm whether the accuracy of this report because UNC does not publish data on the race or ethnicity of those charged with academic misconduct.

<sup>96</sup> STATE BAR OF TEX. COMM’N FOR LAW. DISCIPLINE, ANNUAL REPORT 2019-2020 at 7, 14 (2020),

[https://www.texasbar.com/AM/Template.cfm?Section=Annual\\_Reports&Template=/CM/ContentDisplay.cfm&ContentID=55297](https://www.texasbar.com/AM/Template.cfm?Section=Annual_Reports&Template=/CM/ContentDisplay.cfm&ContentID=55297) [hereinafter Texas Bar Report].

<sup>97</sup> *Id.* at 7.

<sup>98</sup> *Id.* at 14.

<sup>99</sup> *Id.* at 7.

<sup>100</sup> Leslie Levin, *The Case for Less Secrecy in Lawyering Discipline*, 20 GEO. J. LEGAL ETHICS 1, 7-8 (2007) [hereinafter *Less Secrecy*] (discussing the Illinois and New Mexico reports).

represented communities practicing in the same type of firms were reported and sanctioned similarly.<sup>101</sup>

In response to perceived inequities in bar disciplinary proceedings and sanctions, the State Bar of California commissioned a study of attorney discipline from 1990 to 2018, looking at California attorneys admitted to the bar between 1990 and 2008. The study focused on whether probation and disbarment sanction disparities existed.<sup>102</sup> It found that they did—with Black males being more likely to face harsher sanctions (both probation and disbarment) than their white counterparts.<sup>103</sup>

The disciplinary sanction disparities were preceded by significant disparities in bar disciplinary complaints. Black and Hispanic attorneys received far greater numbers of complaints than their white colleagues.<sup>104</sup> During the study period in the state of California, 45% of Black male attorneys, 44% of Hispanic male attorneys and 32% of white male attorneys had a bar disciplinary complaint filed against them, with multiple complaints being more likely to be filed against Black and Hispanic male lawyers than their white colleagues.<sup>105</sup> Like other studies, this one also found a higher rate of complaints filed against lawyers practicing in solo or small firms.<sup>106</sup> They note “[a]s a result of receiving more complaints than attorneys in large firms or other practice settings, solo and small firm attorneys are faced with a higher chance of being investigated and ultimately disciplined.”<sup>107</sup>

This is not surprising for many reasons, including structurally racist ones. Historically, state bar elites created ethical rules aimed at “curb[ing] the business-getting” abilities of those practicing in small and solo firms—positions disproportionately occupied by ethnic minorities.<sup>108</sup> Other potential reasons for the disparities include small and solo firm lawyers who often face constant cash flow pressure, with a need to bring in new clients.<sup>109</sup> They also tend to represent individual clients who may be more likely than corporate clients to file discipline

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<sup>101</sup> *Id.* at 8.

<sup>102</sup> DAG MACLEOD & RON PI, REPORT ON DISPARITIES IN THE DISCIPLINE SYSTEM (2019), <https://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000025090.pdf> [hereinafter CA Bar Report].

<sup>103</sup> *Id.* at 2.

<sup>104</sup> *Id.* at 3, Table 1.

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

<sup>106</sup> *Id.* at 5.

<sup>107</sup> *Id.*

<sup>108</sup> Leslie Levin, *The Ethical World of Solo and Small Firm Practitioners*, 41 HOUS. L. REV. 309, 311-12 (2004) [hereinafter *Ethical World*].

<sup>109</sup> *Id.* at 311.

complaints.<sup>110</sup> Finally, they may face state bar ethics' committee decision-maker biases against those practicing in small or solo practices.<sup>111</sup> While the state bar studies illuminate disparities, and try to explain them with seemingly neutral reasons, the studies may not be digging deep enough.<sup>112</sup>

In addition to finding a disproportionate number of overall complaints levelled against Black lawyers, the California study also found that more complaints led to more hearings which led to more sanctions, and more sanctions led to ultimately harsher sanctions.<sup>113</sup> Thus, the report authors attributed the harsher sanctions meted out to Black attorneys, in part, to the fact that these attorneys had multiple prior complaints lodged against them which resulted in prior disciplinary actions.<sup>114</sup> The study's authors also found that differences in sanction severity—with Black males more likely to receive probation or disbarment—were also a product of the fact that “when being investigated by the Bar, more Black than White attorneys did not have counsel.”<sup>115</sup> The study's authors concluded that differences in the severity of sanctions could largely be explained by higher numbers of complaints, prior disciplinary actions (which are likely a product of higher numbers of bar complaints), and lack of counsel at bar disciplinary proceedings.<sup>116</sup>

In sum, to date, extensive studies have been done in K-12, and studies have begun at the university level and in bar disciplinary proceedings. All of those studies first collected demographic data, and

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<sup>110</sup> *Id.* at 314.

<sup>111</sup> *Id.* at 315 (noting that those working in small and solo practices “suffer from the perception that they are less ethical than other lawyers”).

<sup>112</sup> For example, what has not been systematically studied is whether white lawyers working in small or solo firms are reported and sanctioned at the same rates as their Black counterparts. A recent ABA report notes “African American and Hispanic lawyers are most likely to be solo practitioners (12% of each), followed by lawyers who are white (10%), Asian American (8%) and Native American (7%).” AM. BAR ASS'N, ABA PROFILE OF THE LEGAL PROFESSION, 43 (2020),

<https://www.americanbar.org/content/dam/aba/administrative/news/2020/07/potlp2020.pdf> (citing to After the JD studies). However, between 2010 and 2020, approximately 85-88% of all lawyers in this country were white, while only approximately 5% were Black. *Id.* at 109. While white lawyers constitute a slightly smaller percentage of those practicing solo, the overall number of white lawyers is so much higher than the number of Black lawyers that if the issue were mainly a question of firm size, one would still expect to see a much higher number of complaints filed against white lawyers.

<sup>113</sup> CA Bar Report, *supra* note 102, at 4.

<sup>114</sup> *Id.* at 9.

<sup>115</sup> *Id.* at 10.

<sup>116</sup> *Id.* at 17.

when the data showed disparities, the search for explanations and solutions began.

### III. DATA COLLECTION: WHY AND HOW

#### A. *Why Data Collection Matters*

Higher education institutions have been moving toward data-driven decision making. This systemic movement toward using data is borrowed from business practices, and usually referred to as total quality management (TQM), and rests on the basic concept that information/data helps to improve organizations.<sup>117</sup> In the educational setting, from accrediting agencies to institutional leadership, institutions have been directed to “systematically collect and analyze various types of data, to guide a range of decisions to help improve the success of students and schools.”<sup>118</sup> The decision-making process starts with gathering a range of raw data and relies on the organization of that information, as well as contextualization, to create opportunities for action. In other words, gathering and organizing data helps institutions understand trends and particularly whether disparities exist. Thus, as the decision-making model suggests, the first accountability step when it comes to conduct codes is data collection.

At the undergraduate level, the failure to systematically collect and publish aggregate data at many institutions has sparked protests amongst students. As part of the “We the Protestors” movement that gained national prominence, students at the University of Baltimore included the following: “We ask for institutional reporting on student disciplinary outcomes broken down by ethnicity and gender, and an opportunity for students to be involved in the reform process if discrepancies are involved” in their list of demands to institutional leadership.<sup>119</sup>

While collecting the data is the first step, making it accessible is the second step. Scholars have noted that lack of transparency about standards, and how those standards are applied, creates a “foggy

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<sup>117</sup> JULIE A. MARSH ET AL., MAKING SENSE OF DATA-DRIVEN DECISION MAKING IN EDUCATION: EVIDENCE FROM RECENT RAND RESEARCH 2 (2006), [https://www.rand.org/pubs/occasional\\_papers/OP170.html](https://www.rand.org/pubs/occasional_papers/OP170.html).

<sup>118</sup> *Id.* at 1.

<sup>119</sup> People of Color Coalition, *The Petition of the People of Color Coalition at University of Baltimore* (2016) (Apr. 1 2022, 8:30 PM), <https://www.thedemands.org/s/POCC-Demand-List.docx>

climate.”<sup>120</sup> A foggy climate fosters uninformed decision-making that perpetuates inequities and biased decision-making in ways that particularly harm women and under-represented populations.<sup>121</sup> The unavailability of data about charges, findings, and sanctions makes it difficult for faculty and student Code committees, whose members change from year to year, to ensure uniformity in similar cases—allowing individual or institutional biases to potentially come into play.<sup>122</sup>

As the student protesters recognize, the lack of collection and dissemination of data means that those reported for misconduct do not know if there are ethnic or racial biases likely in play in the reporting, investigative, hearing, or sanction processes.<sup>123</sup> For example, students do not know the racial and ethnic backgrounds of who gets reported for plagiarism, cheating on tests, inappropriately collaborating on written assignments, etc. Likewise, the unavailability of information about misconduct proceeding outcomes means those charged do not know what the likely outcome of their proceeding may be. Is the average sanction for plagiarism a letter of reprimand, suspension, expulsion? Does that sanction differ based on a student’s race or gender? This lack of information both hides potential disparities and eliminates the ability of individual students to make informed decisions about whether to accept responsibility in a potentially contested case.<sup>124</sup>

Data collection and dissemination are possible and necessary to identify trends, search for disparities, and provide transparency and accountability. While schools have a responsibility to keep an individual student’s misconduct reports, outcomes of an investigation, hearing, and any sanctions private under FERPA,<sup>125</sup> they are permitted to publish de-

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<sup>120</sup> See Kerry Ann O’Meara et al., *Undoing disparities in faculty workloads: A randomized trial experiment*, PLOS ONE, 1, 3 (2018) (noting that when evaluation standards are “foggy” historically disadvantaged groups do not receive the same benefit of the doubt as those in a majority group).

<sup>121</sup> Mary A. Lynch & Andrea A. Curcio, *Institutional Service, Student Care Work and Misogyny: Naming the Problem and Mitigating the Harm*, 65 VILL. L. REV. 1083, 1138-39 (2020).

<sup>122</sup> See generally Leslie Levin, *The Emperor’s Clothes and Other Tales About the Standards for Imposing Lawyer Discipline Sanctions*, 48 AM. U. L. REV. 1 (1998) [hereinafter *Emperor’s Clothes*] (arguing the lack of well-defined standards for sanctions, as well as the lack of public sanctions, lead to inconsistent sanctions that often are based as much on who you know as what you did—a standard that disadvantages non-elites).

<sup>123</sup> Ben Trachtenberg, *How University Title IX Enforcement and Other Discipline Processes (Probably) Discriminate Against Minority Students*, 18 NEV. L.J. 107, 124 (2017); *Less Secrecy*, *supra* note 100, at 2, 49.

<sup>124</sup> Trachtenberg, *supra* note 123 at 141-42.

<sup>125</sup> 20 U.S.C. § 1232g(4)(A) (2012); 34 C.F.R. § 99 (2022).



identified aggregate Honor Code violation data,<sup>126</sup> much like they publish disaggregated campus crime data.<sup>127</sup> This is as true for law schools as undergraduate schools, with the caveat that unlike universities and other entities, law schools may have data sets that are so small that disseminating the data risks revealing individual identities. If that is the case, schools can minimize that risk by grouping students, e.g., rather than identify a student as Black or Latinx, a school with a small data set could identify students as non-Asian students of color.

### *B. ABA Accreditation Standard 206 and Data Collection*

While some schools may be willing to voluntarily collect data and disseminate aggregate data, others may be reluctant to do so. Professor Bobrow suggests that the Department of Education, through its regulatory function, require universities to provide racial data on honor/disciplinary code accusations and violations.<sup>128</sup> We agree with Professor Bobrow on the need for transparency and data, and we believe there is a unique opportunity for legal education to set the tone for higher education.

Standard 206 of the ABA's standard of legal education specifically includes the need for law schools to demonstrate a commitment to diversity and inclusion. The standard currently states:

Consistent with sound legal education policy and the Standards, a law school shall demonstrate by concrete action a commitment to diversity and inclusion by providing full opportunities for the study of law and entry into the profession by members of underrepresented groups, particularly racial and ethnic minorities, and a commitment to having a student body that is diverse with respect to gender, race, and ethnicity.<sup>129</sup>

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<sup>126</sup> Bobrow, *supra* note 81, at 54-56 (discussing how data can be aggregated).

<sup>127</sup> The Clery Act requires schools to report a wide array of data related to campus crimes. 20 U.S.C. § 1092(F).

<sup>128</sup> Bobrow, *supra* note 81, at 50.

<sup>129</sup> 2021-2022 *Standards and Rules of Procedure for Approved Law Schools: Organization and Administration*, AM. BAR ASS'N (last visited Apr. 2, 2022), [https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/standards/2021-2022/2021-2022-aba-standards-and-rules-of-procedure-chapter-2.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2021-2022/2021-2022-aba-standards-and-rules-of-procedure-chapter-2.pdf) [hereinafter 2021-2022 Standards and Rules]. During the writing of this Article, the ABA's Section on Legal Education and Admissions to the Bar has undertaken a significant review and potential re-write of Standard 206. This

The Council on Legal Education requires re-accreditation review every ten years<sup>130</sup>. During that review process, to ensure compliance with Standard 206, the Council requires law schools provide information about:

How the Law School has demonstrated by concrete action a commitment to providing full opportunities for the study of law and entry into the profession by members of underrepresented groups, particularly racial and ethnic minorities, and to having a student body that is diverse with respect to gender, race, and ethnicity.<sup>131</sup>

We suggest expanding the Standard 206 Interpretation to require law schools to report on the impact and effects of institutional policies, such as Honor Code charges and adjudications, during the self-assessment process and to include that information in the site evaluation for accreditation purposes. The ABA has already begun seeking demographic data on retention, bar results, and scholarship and financial aid decisions so that it can better evaluate the effectiveness of law schools' actions in connection with Standard 206.<sup>132</sup> The data collection suggested in this Article is another important piece of the puzzle in understanding whether the law school has identified areas of discrimination and begun addressing those areas.

The beginning phase of ABA mandated data collection would include collecting and reviewing the data regarding demographics of those charged, referred for a hearing, found responsible for committing a violation, and about the sanction imposed. Once that information is available, if disparities are identified, the question then becomes: what has the institution done about that issue? Given the accreditation process is scheduled for every ten years,<sup>133</sup> there is plenty of time to collect and

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revision has been sent back for further comment and review as of August 2021. It will come before the Council again in August 2022. The Standards Committee, *Memorandum Re: Final Recommendations: Standards 205, 303, 507, and 508*, AM. BAR ASS'N (last visited Aug. 16, 2021), [https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/council\\_reports\\_and\\_resolutions/aug21/21-aug-final-std-recs-with-appendix.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/aug21/21-aug-final-std-recs-with-appendix.pdf).

<sup>130</sup> *Frequently Asked Questions*, AM. BAR ASS'N, [https://www.americanbar.org/groups/legal\\_education/resources/frequently\\_asked\\_questions/](https://www.americanbar.org/groups/legal_education/resources/frequently_asked_questions/) (last visited Apr. 2, 2022).

<sup>131</sup> 2021-2022 Standards and Rules, *supra* note 129.

<sup>132</sup> *Id.*

<sup>133</sup> *Frequently Asked Questions*, *supra* note 130.

review information, identify any trends or concerns in the data, and review policies or practices associated with the conduct process that disparately impact students of color or minority populations. This would allow institutions to engage in the data driven decision making process identified above and demonstrate their commitment to diversity and inclusion as required by the Standards of Legal Education.

Given existing data on the bookends of legal education,<sup>134</sup> ideally, law schools will recognize the likelihood that Code proceeding disparities exist and will begin the work necessary to identify disparities and their causes, and to implement changes that may help ameliorate disparities.<sup>135</sup> However, law schools do not always do the right thing simply because it is the right thing to do. Thus, including data collection as part of the accreditation process requires all schools to engage in that process.

### *C. Data Collection Logistics and Concerns*

Administrators may have concerns about the cost and staffing burdens additional data collection entails. We suggest those concerns, while valid, are not a major hurdle to data collection because case management systems already utilized by colleges and universities can help create the requested information. Higher education institutions across the country are implementing and utilizing case management systems that allow for regular reports on a plethora of variables to make data driven decisions on policy or other changes needed at the institutional level such as efforts related student success or at-risk students.<sup>136</sup> Commercial case management systems, such as Maxient, Guardian or Advocate/Symplicity, allow for data organization and analysis.<sup>137</sup> Some institutions or departments have utilized IT expertise to create their own case management systems specific to their needs. Due to the already available information in institutional databases (either through Banner or Peoplesoft<sup>138</sup>), these case management

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<sup>134</sup> See *supra* Part II.

<sup>135</sup> See *infra* Part IV (discussing these issues further).

<sup>136</sup> Meghan Bogardus Cortez, *Universities Make Positive Changes Through Data Collection*, EDTECH (Sept. 16, 2016), <https://edtechmagazine.com/higher/article/2016/09/universities-make-positive-changes-through-data-collection>.

<sup>137</sup> See generally MAXIENT, <https://www.maxient.com> (last visited Apr. 2, 2022); GUARDIAN, <https://guardianconduct.com> (last visited Apr. 2, 2022); SYMPPLICITY, <https://www.symplicity.com/higher-ed/solutions/advocate> (last visited Apr. 2, 2022).

<sup>138</sup> See generally ELLUCIAN, <https://www.ellucian.com/solutions/ellucian-banner> (last visited May 23, 2022); PEOPLESOFT, <https://www.oracle.com/applications/peoplesoft/> (last visited May 23, 2022).

systems allow for the integration of already available data (including student demographics), instead of creating another data collection system. It would be relatively easy to collect and enter variables on Code investigations, charges, sanctions, as well as demographic information of accused, as well as of adjudicators into these existing systems.

Another concern schools may have about mandatory data collection is that the data would become discoverable in a racial discrimination lawsuit. Others have ably discussed how data may affect the viability of discrimination claims against law schools for racially discriminatory disciplinary procedures.<sup>139</sup> We suggest fear that data may support racial discrimination lawsuits suggests an underlying fear of what the data may demonstrate. While it is understandable that a school may fear that gathering data will support discrimination claims, that argument cannot justify a refusal to collect the data,<sup>140</sup> particularly in light of many law schools' stated commitment to addressing racism within our own institutions<sup>141</sup> and ABA Standard 206's directive.

#### IV. IF LAW SCHOOLS FIND DISPARITIES, WHAT NEXT?

In Part III, we discussed the need for data collection and dissemination.<sup>142</sup> At the end of that process, some schools might find that no disparities exist. Others may find the opposite. Those schools then need to begin the difficult process of determining why those disparities exist and how they might be addressed. In this section, we provide some thoughts on both those issues.

Some may speculate that the existing data from K-12, universities, and bar disciplinary committees simply reflect differential rates of wrongdoing,<sup>143</sup> and that the same would be true in law schools. First, we note that all accusations against students of color do not have to be wrong for the system to be unfair. It can be equally or more unfair, even if students of color engage in inappropriate behavior, if white students doing the same thing are never accused or adjudicated. Second,

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<sup>139</sup> Trachtenberg, *supra* note 123, at 124-27; Bobrow, *supra* note 81, at 57-60.

<sup>140</sup> Trachtenberg, *supra* note 123, at 127. To counter the argument that somehow schools should be insulated for accountability for their conduct and not have to collect data because of fear that it will aide litigants, Professor Trachtenberg points out numerous examples of federally mandated data collection such as that required by OSHA, the FDA, and NTSB, that may aide plaintiffs' lawyers and argues that schools should not get a free pass. *Id.* at 127-28.

<sup>141</sup> *Law Deans Anti-Racist Clearinghouse*, *supra* note 9.

<sup>142</sup> See *supra* Part III.

<sup>143</sup> See generally Gail Heriot & Somin Alison, *The Department of Education's Obama-Era Initiative on Racial Disparities in School Discipline: Wrong for Students and Teachers, Wrong on the Law*, 22 TEX. REV. L. & POL'Y 471, 474 (2017-2018).

we suggest that disparities in disciplinary reports and sanctions have not occurred in a historical vacuum. Bar disciplinary proceedings historically protected the bar's elite<sup>144</sup> who were, and remain, largely white men in large firm settings. University and K-12 disciplinary proceedings also historically disadvantaged people of color.<sup>145</sup> Law schools are not immune to perpetuating systems that historically disadvantage students of color.<sup>146</sup>

*A. Potential Reasons Disparities May Exist in Law School  
Disciplinary Code Proceedings*

Sexual Misconduct/Title IX proceedings are an example of university disciplinary proceedings that can have significant impacts on the educational trajectory of an individual, as well as on the culture of an institution. In an article discussing the need for demographic information in university Title IX proceedings to determine if disparities exist in that realm,<sup>147</sup> Professor Ben Trachtenberg notes multiple reasons why Title IX investigations, as well as non-Title IX university disciplinary processes, may have disparate racial impacts.<sup>148</sup> Below we look at how some of the explanations he suggests, as well as others, may come into play in the law school disciplinary process. We particularly examine how stereotypes and implicit biases, under-representation, lack of transparency in proceedings, and disparities in access to counsel or advisors may play a role in creating and perpetuating racial disparities. We also discuss how to begin addressing those issues should schools find their data indicates a need to address existing disparities.

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<sup>144</sup> *Emperor's Clothes*, *supra* note 122, at 2.

<sup>145</sup> BICENTENNIAL ANALYSIS, *supra* note 85, at 12-13.

<sup>146</sup> *See supra* notes 2-3 and accompanying text (discussing schools' insistence on using the LSAT in admissions processes and for scholarships despite knowledge that the test has a discriminatory impact and in contravention of the test designer's instructions on how to use the test in admissions decisions).

<sup>147</sup> While Professor Trachtenberg's article is largely about Title IX proceedings, he notes that many of the concerns he raises likely also apply to university disciplinary proceedings. *See generally* Trachtenberg, *supra* note 123.

<sup>148</sup> *Id.* at 123 (finding the following reasons may help explain the disparities: implicit biases that affect participants' perceptions throughout the process; broad and vague offense definitions; hearings conducted in secret with informal and non-uniform procedures; faculty and administrators who might speak out for racial justice who do not want to undermine Title IX enforcement; and American attitudes about race and sex that affect sexual misconduct investigations).

*i. Stereotypes and Biases*

To efficiently process information, our brains create shortcuts to help process the volume of “data” received on a constant basis.<sup>149</sup> Stereotypes are a type of shortcut created to organize information, usually on the bases of different categories, and often manifests as a belief about a group.<sup>150</sup> Biases are attitudes that arise when we apply stereotypes to individuals.<sup>151</sup> While many people do not consciously adhere to racial biases and stereotypes, these beliefs are embedded into subconscious thought processes,<sup>152</sup> leading to judgments made based upon stereotypical beliefs and biases rather than judgments based upon an individual actor’s actual behavior.<sup>153</sup>

Throughout this country’s history, white people have attributed normatively positive characteristics such as being ambitious, moral, intelligent, responsible, and law-abiding to themselves, while attributing the opposite characteristics to Black people, resulting in stereotypes about Black people that persist today.<sup>154</sup> Stereotypes such as these bias judgments, often unconsciously, and may predispose people to judge a group member’s conduct in ways that confirm their biases.<sup>155</sup> The disproportionate reporting of wrongdoing seen in K-12, university, and lawyer misconduct arenas may be due, at least in part, to those reporting misconduct consciously or unconsciously applying stereotypes and looking for conduct that confirms their beliefs.<sup>156</sup> This

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<sup>149</sup> Linda Hamilton Kreiger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1187-88 (1995).

<sup>150</sup> *Id.* (explaining the cognitive processes involved in stereotyping).

<sup>151</sup> *Barriers to Multi-Cultural Lawyering*, *supra* note 10, at 545.

<sup>152</sup> Anthony Page, *Batson’s Blind Spot: Unconscious Stereotyping and the Peremptory Challenges*, 85 B.U. L. REV. 155, 190-210 (2005) (explaining how people develop stereotypical beliefs and biases).

<sup>153</sup> Mahzarin R. Banaji & Anthony G. Greenwald, *Implicit Stereotyping and Prejudice*, 7 PSYCH. PREJUDICE: ONT. SYMP. 55, 58 (1994) (noting that stereotyping is “the application of beliefs about the attributes of a group to judge an individual member of that group”).

<sup>154</sup> Kimberlé Williams Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1373-78 (1988) (discussing the normatively positive traits associated with white people and how the opposite traits became attributable to Black people, resulting in centuries long stereotypes that have become embedded into the fabric of society in the United States).

<sup>155</sup> ANNE WARFIELD RAWLS & WAVERLY DUCK, TACIT RACISM, (2020); *see also* Clem Turner, *What’s the Story? An Analysis of Juror Discrimination and a Plea for Affirmative Jury Selection*, 34 AM. CRIM. L. REV. 289, 292-98 (1996) (discussing studies that demonstrate how stereotypes affect decision making in the criminal law context).

<sup>156</sup> Confirmation bias occurs when people seek or interpret evidence in ways that are partial to existing beliefs, expectations, or hypothesis. Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. GEN. PSYCH. 175, 175 (1998).

is the conclusion of numerous studies in the K-12 arena.<sup>157</sup> Also, as found in studies of K-12,<sup>158</sup> to the extent behaviors occur in ambiguous situations, stereotypes and unconscious biases likely affect how reporters interpret behaviors,<sup>159</sup> again leading to reporting of misconduct for group members from whom they expect that type of behavior.

The impact of stereotypes and implicit biases also are at play in the context of the investigative stages of disciplinary proceedings. While we know of no studies on the role stereotyping and implicit biases play in university and attorney misconduct proceedings, at least one study of the criminal investigatory process demonstrates that investigations and charging decisions often are influenced by the suspect's race.<sup>160</sup>

Finally, these cognitive processes likely also come into play in adjudications. As much as people like to think of themselves as capable of objectively assessing evidence, most of us suffer from what cognitive theorists call "bias blind spot."<sup>161</sup> People believe they can accurately assess when their judgments are based on stereotypes and biases, when in fact, that simply is not true.<sup>162</sup> The reality is that everyone has biases that play a role in how we interpret information,<sup>163</sup> and legal training does not eliminate those. When we make assessments about whether someone committed a particular offense, we make that decision in the context of our life experiences, including our beliefs and biases. To the extent those biases stem from negative stereotypes we have internalized, the often implicit biases may result in racially disparate investigative and hearing outcomes.<sup>164</sup> These biases may be at play in law school disciplinary code proceedings as well as in K-12, university, and lawyer disciplinary processes.

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<sup>157</sup> See *supra* text accompanying note 57-61 (discussing studies that indicate biases may be at play in explaining racial disparities in disciplinary outcomes in K-12).

<sup>158</sup> See *supra* text accompanying notes 64-68 (discussing the impact of unconscious biases in ambiguous situations).

<sup>159</sup> Cheryl Staats, *Implicit Racial Bias and School Discipline Disparities*, KIRWAN INST. (May 2014), <http://kirwaninstitute.osu.edu/implicit-bias-training/resources/ki-ib-argument-piece03.pdf>.

<sup>160</sup> Rashid Minhas & Dave Walsh, *Influence of Racial Stereotypes on Investigative Decision-making in Criminal Investigations: A Qualitative Comparative Analysis*, 4 COGENT SOC. SCI. 1, 12-13 (2018).

<sup>161</sup> *Barriers to Multi-Cultural Lawyering*, *supra* note 10, at 544.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> Trachtenberg, *supra* note 123, at 128-130 (arguing that implicit biases affect the university disciplinary process).

ii. *Under-Representation*

a. *Dimming and Spotlighting*

People of color, and particularly Black men, are under-represented in law schools<sup>165</sup> and the legal profession.<sup>166</sup> Simply being part of an under-represented group may cause one to be watched more closely. The authors of the UVA Honor Code report suggest that disparate reporting of Honor Code violations at UVA may be due, in part, to spotlighting and dimming.<sup>167</sup> They explain:

Spotlighting occurs when a student becomes more visible because of their minority identity, potentially making it more likely the student is watched closely and reported for cheating. Dimming occurs when a student is less visible because their identity is in the majority, making the student less likely to be reported.<sup>168</sup>

They postulate that these phenomena may contribute to the over-reporting of Black students and under-reporting of white students.<sup>169</sup> The same phenomena may be at play with the over-reporting of Black attorneys. Without data, we do not know if there is over-reporting of law students of color for code violations. However, given the data from both before and after law school, it would not be surprising to find that law schools are not immune to dimming and spotlighting issues when it comes to code violation reports.

b. *Impact of Under-Representation on Decision-Making Processes*

Under-representation may also make a difference in adjudications.<sup>170</sup> Again, scant data exist about the demographic make-

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<sup>165</sup> Eunyoung Kim & Demond T. Hargrove, *Deficient or Resilient: A Critical Review of Black Male Academic Success and Persistence in Higher Education*, 82 J. NEGRO EDUC. 300, 300-07 (2013).

<sup>166</sup> See AM. BAR ASS'N, *supra* note 112.

<sup>167</sup> BICENTENNIAL ANALYSIS, *supra* note 85, at 29.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* at 29-30.

<sup>170</sup> One scholar notes the lack of diversity in state supreme courts, the ultimate arbiters of attorney disciplinary proceedings, is problematic. Nancy Leong, *State Court Diversity and*



up of hearing bodies at the university level or in attorney disciplinary proceedings.<sup>171</sup> Nor have studies been conducted to determine the impact of hearing body diversity on disciplinary proceeding outcomes. However, others have noted that when judicial hearing bodies lack diversity, that lack of diversity may affect hearing processes, outcomes, and sanctions.<sup>172</sup> The need for diverse decision-making bodies was aptly explained by Justice Marshall in 1972 in *Peters v. Kiff*. He noted:

When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented.<sup>173</sup>

That reasoning remains equally true today. In discussing why lack of diversity on state supreme courts is important in context of attorney disciplinary proceedings, Professor Nancy Leong notes that people tend to empathize more with those to whom they relate, and people tend to “relate more to those who share their race and gender characteristics.”<sup>174</sup> She explains that in-group empathy makes one more likely to believe explanations from those who share your group characteristics; when there is no, or limited, diversity amongst decisionmakers, those in the “out group” don’t get the benefit of the doubt that comes with in-group empathy.<sup>175</sup>

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*Attorney Discipline*, 89 FORDHAM L. REV. 1223, 1226-27 (2021). Students also recognize the potential problems lack of diversity in the disciplinary process. See We the Protestors, *Across the Nation, Students Have Risen Up to Demand an End to Systemic and Structural Racism on Campus. Here are their Demands*, THE DEMANDS (2016), <https://www.thedemands.org/> (seeking more diversity in the disciplinary process).

<sup>171</sup> While little data exist, we do note that some states have made a special effort to create grievance committees that reflect the racial, ethnic and gender make up of their membership. See Texas Bar Report, *supra* note 96.

<sup>172</sup> Leong, *supra* note 170, at 1234.

<sup>173</sup> *Peters v. Kiff*, 407 U.S. 493, 503-04 (1972).

<sup>174</sup> Leong, *supra* note 170, at 1229.

<sup>175</sup> *Id.* at 1229-30. This argument is similar to the points raised by Professors Koh and Bryant when discussing the parallel universe imagination required for cross-cultural lawyering and noting that our thoughts and actions often are limited to our known universes which are

Professor Leong's reasoning finds support in a study that indicates diverse juries have wider ranging and more accurate deliberation discussions.<sup>176</sup> The study's authors suggest one reason for this finding is that in diverse groups, Black participants raised points of view that differed from those of their white counterparts<sup>177</sup> and that white participants in diverse groups engaged in more wide-ranging and careful deliberation processes.<sup>178</sup> On the other hand, the deliberations were less thoughtful and careful when the deliberating groups were entirely made up of white people.<sup>179</sup> The authors postulate that the reason for this difference is: "that White jurors processed the trial information more systematically when they expected to deliberate with a heterogeneous group."<sup>180</sup>

Additionally, the people who write the rules, both substantive and procedural, may make a difference in the content of the rules as well as how they are enforced.<sup>181</sup> It is likely that people of color are under-represented in that group as well. This concern, as well as the racial composition of Honor Court hearing members, is also an issue that merits data collection. If under-representation exists amongst these bodies, that fact may also contribute to racial disparities throughout the Code process.

*iii. Access to Counsel*

One reason cited for disparities in sanction outcomes in Title IX and state bar proceedings is the lack of legal counsel during those proceedings.<sup>182</sup> The authors of the California Bar Study noted that

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culturally and racially laden because of our life experiences. Sue Bryant & Jean Koh Peters, *Five Habits for Cross-Cultural Lawyering*, in SCHOLARLY COMMONS (2011), <https://scholarlycommons.pacific.edu/cgi/viewcontent.cgi?article=1048&context=global-center-symposium>.

<sup>176</sup> Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. PERS. SOC. PSYCH. 597, 606-07 (2006).

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Id.* at 606.

<sup>180</sup> *Id.* at 607.

<sup>181</sup> David A. Thomas & Robin J. Ely, *Making a Difference Matters: A New Paradigm for Managing Diversity*, HARV. BUS. REV. Sept.-Oct. 1996, 79-90 ("Diversity should be understood as the varied perspectives and approaches to work that members of different identity groups bring."). Those voices and perspectives should be included in codes used to hold students accountable. *Id.*; see also Donald J. Polden, *Forty Years After Title VII: Creating an Atmosphere Conducive to Diversity in the Corporate Boardroom*, 36 U. MEM. L. REV. 67, 84 (2005) (arguing that diverse corporate governance boards lead to better governance).

<sup>182</sup> Trachtenberg, *supra* note 123, at 150-52; CA Bar Report, *supra* note 102 at 4.

lawyers in small and solo practices often are un-represented at disciplinary hearings—a fact that the study’s authors believe “plays a major role in explaining the differential rates of discipline for solo practitioners.”<sup>183</sup> We could find no data on the impact of hiring a lawyer in university disciplinary proceedings or Title IX proceedings. However, as Professor Trachtenberg notes, lawyers may make a difference in university and Title IX disciplinary proceedings, even given the limited role lawyers often play in those forums.<sup>184</sup> He suggests that lack of access to counsel may be another reason for disparate outcomes in disciplinary proceedings. “If lawyers are helpful to accused students – even under the constraints imposed by universities upon lawyers – and minority students are less likely to have lawyers, then the university discipline system becomes that much more likely to have a disparate impact.”<sup>185</sup> Notably, a recent addition to the Title IX regulations now requires universities to either allow independent advisors or provide advisors in the Title IX process for each party.<sup>186</sup>

### *B. Potential Solutions to Begin Addressing Disparities*

Data collection will illuminate whether, and to what extent, an individual school’s disciplinary processes demonstrate the same disparities seen in K-12, university processes, and bar disciplinary proceedings. Some schools may want to begin addressing potential disparities before they collect data; others may choose to wait. In either case, below we suggest some potential solutions that may help ameliorate some of the problems.

#### *i. Increasing Diversity in Students and Faculty*

One recommendation for a comprehensive approach to addressing racism within legal education is to increase the diversity of both faculty and students.<sup>187</sup> Increasing the diversity of the law student body and law faculties is important for many reasons. However, one additional benefit may be the impact on disparities in disciplinary code allegation, adjudication outcomes, and sanctions.

As noted earlier, discipline disparities in universities and lawyer disciplinary proceedings may be due to under-representation of people

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<sup>183</sup> CA Bar Report, *supra* note 102, at 5

<sup>184</sup> Trachtenberg, *supra* note 123, at 150.

<sup>185</sup> *Id.* at 152.

<sup>186</sup> 34 C.F.R. § 106 (2020).

<sup>187</sup> See *Law Deans Anti-Racist Clearinghouse*, *supra* note 9.

of color within higher education and the bar.<sup>188</sup> Researchers have found that under-representation amongst teachers in K-12 may contribute to the discipline disparities found there.<sup>189</sup> The “increased scrutiny theory” underlies the UVA report’s conclusion that one reason for disparate university reports of Honor Code violations could be due to dimming and spotlighting.<sup>190</sup>

Again, we don’t know whether the same disparities found elsewhere exist in law schools, but assuming they do, increasing faculty and student body diversity may help ameliorate the subjective reaction to behaviors that may be interpreted in a range of ways and the over-scrutiny that may occur when it comes to looking for Code violations. A more diverse law school student body and faculty may reduce some reporting disparities because ambiguous conduct may not be interpreted in ways that trigger stereotypes and implicit biases<sup>191</sup> and may minimize the impact of spotlighting and dimming.<sup>192</sup> Also, as noted earlier, discussions during adjudications may be more robust when hearing panels are diverse,<sup>193</sup> something more likely to happen in schools with diverse faculty and student bodies.

*ii. Implicit Bias Training/Education*

As discussed throughout this Article, implicit biases may play a role in report, adjudication, and sanction disparities. One suggestion that often arises to address this issue is to conduct implicit bias trainings.<sup>194</sup> The training could be limited to those students and faculty involved in Code proceedings, including those responsible for review and publication of the Code, or, since the problem often begins with Code violation reports, it could be done with the entire student body and faculty. Whichever path is chosen, overall, implicit bias training has been shown to have limited effectiveness.<sup>195</sup> If schools decide to engage in implicit bias trainings, we suggest education about a range of social cognition biases that may be in play when we make judgments about

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<sup>188</sup> See *supra* Section IV.A.ii.

<sup>189</sup> See *supra* text accompanying notes 58-59.

<sup>190</sup> See *supra* Section IV.A.ii.

<sup>191</sup> See *supra* Section IV.A.i. (discussing stereotypes and biases).

<sup>192</sup> See *supra* Section IV.A.ii.a. (discussing spotlighting and dimming).

<sup>193</sup> See *supra* Section IV.A.ii.b. (discussing the value of diverse decision-makers).

<sup>194</sup> Trachtenberg, *supra* note 123, at 159-160 (suggesting training for those who make decisions related to student discipline); Bobrow, *supra* note 81, at 68-69 (advocating for implicit bias training of faculty to address issues of spotlighting and of Honor Court jurors to raise awareness of racial biases during honor court proceedings).

<sup>195</sup> See generally P.S. Forscher et al., *A Meta-Analysis of Procedures to Change Implicit Measures*, 117 J. PERSONALITY & SOC. PSYCH. 522 (2019).

other people's conduct. For example, we may need to learn about aversive racism,<sup>196</sup> bias blind spot,<sup>197</sup> and confirmation bias.<sup>198</sup> These subconscious biases often not only come into play when we make judgments, they also may affect receptivity to educating ourselves about the role subconscious biases play in our decisions.<sup>199</sup>

While social cognition theory training about implicit biases may be useful, it is also a fraught endeavor that can induce anger and frustration amongst those being "trained."<sup>200</sup> To mitigate negative student reaction, it may be useful to frame the student-education piece as a component of effective lawyering to explain both why it is part of a law school education, and potentially to decrease resistance to what, for many, are challenging and threatening concepts.<sup>201</sup> We note, however, that because of the structural and institutional problems that perpetuate disparities, devoting significant resources to training individuals about implicit bias may be a less efficacious use of resources than looking at, and overhauling, the ways law schools operate generally when it comes to addressing racism within our institutions. This overhaul is an ongoing endeavor at many law schools, with many schools using the multiple resources provided by the law school deans' clearinghouse<sup>202</sup> to create meaningful institutional change.

### iii. *Providing Advisors*

One finding of the California bar disciplinary study is that hiring a lawyer made a difference in the outcome.<sup>203</sup> This result is not

<sup>196</sup> Aversive racism is the term used to describe those who endorse egalitarian views yet have negative racial beliefs that often are a result of how they have been socialized. John F. Dovidio, *On the Nature of Contemporary Prejudice: The Third Wave*, 57 J. SOC. ISSUES 829, 835 (2001). Aversive racists are either unaware of their negative racial beliefs, or in denial about them because those beliefs are incompatible with their egalitarian self-image. *Id.*

<sup>197</sup> Bias blind spot refers to the idea that people underestimate their own biases and overestimate their ability to avoid biased judgments and feelings. Joyce Ehrlinger et al., *Peering Into the Bias Blind Spot: People's Assessments of Bias in Themselves and Others*, 31 PERSONALITY & SOC. PSYCH. BULL. 680, 681 (2005).

<sup>198</sup> Confirmation bias involves the tendency to seek evidence consistent with our views and to dismiss or re-interpret evidence that is inconsistent with our conscious and subconscious beliefs. Scott O. Lilienfeld et al., *Giving Debiasing Away: Can Psychological Research on Correcting Cognitive Errors Promote Human Welfare?*, 4 PERSP. ON PSYCH. SCI. 390, 391 (2009).

<sup>199</sup> See generally *Barriers to Multi-Cultural Lawyering*, *supra* note 10 (discussing the role these biases play in educating students to be culturally sensible lawyers).

<sup>200</sup> Alexandra Kalev et al., *Best Practices or Best Guesses? Assessing the Efficacy of Corporate Affirmative Action and Diversity Policies*, 71 AM. SOCIO. REV. 589, 595 (2006).

<sup>201</sup> *Barriers to Multi-Cultural Lawyering*, *supra* note 10, at 562-63.

<sup>202</sup> *Law Deans Anti-Racist Clearinghouse*, *supra* note 9.

<sup>203</sup> CA Bar Report, *supra* note 102.

surprising given the role lawyers play in ensuring fair proceedings and advocating for their clients. Lawyers, or other independent and trained advisors, may be particularly useful in law school proceedings where often a law faculty member presents evidence against a student,<sup>204</sup> creating an inequity between the presenting party and the accused student. Both limited access to counsel, and the limited role attorneys may play during some schools' hearings, may lead to disparities in law school code proceedings.

Not all students have equal access to the financial resources necessary to hire a private lawyer or to find an advisor. Financial issues aside, access issues may exist for those who are first generation students, or those who come from families that do not know lawyers. These students may not have easy access to a qualified lawyer. Recognizing the critical role played by advisors familiar with procedural processes, federal law now requires universities to ensure that each party in a Title IX proceeding has access to an advisor—either their own, or one provided by the university.<sup>205</sup> Law schools could do the same for accused students. They could develop a list of lawyers<sup>206</sup> or trained advisors willing to advise and support accused students. These Code cases are not usually tremendously complicated or time-consuming. Emeriti faculty, or alumni, or others may be willing to perform pro bono or low bono work and take on these cases for minimal fees. An alternative includes training advocates or advisors to fulfill the same or similar role. While law school budgets are tight, this cost would be comparatively minimal.

While law school administrators and hearing panels may not welcome lawyers to the process, in our experience, lawyers already are a part of the process—for students with the money or family connections to hire them. Providing lawyers or advisors to all students levels the playing field, and potentially reduces disparities in outcomes.

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<sup>204</sup> The presenting party may vary from school to school; at some schools, law students prosecute an Honor Code violation; at others, that role is left to faculty members. *See, e.g.*, MERCER UNIVERSITY, MERCER LAW STUDENT HONOR CODE & MERCER UNIVERSITY STUDENT CODE OF CONDUCT (1995) (Ch. 1 Sec. VII(E) prosecutor is student assisted by faculty member); UNIVERSITY OF TENNESSEE COLLEGE OF LAW, CODE OF ACADEMIC CONDUCT (Ch. 4 403(H): (Dean of Students presents evidence); DUKE LAW, SECTION V: STUDENT PROFESSIONAL MISCONDUCT (2022), (evidence presented by a student advocate panel); GEORGIA STATE UNIVERSITY, GEORGIA STATE LAW HONOR CODE (2021) (evidence presented by faculty investigator).

<sup>205</sup> 34 C.F.R. § 106 (2020).

<sup>206</sup> There would need to be three or four lawyers available to avoid conflicts of interest if multiple students were charged with the same offense.

*iv. Annual Review*

At most schools, there is usually at least one faculty member or administrator with oversight or responsibilities associated with the Code. In addition to the ten-year reporting with the ABA/Council on Legal Education,<sup>207</sup> individual institutions should create opportunities for that person to provide an annual report to the faculty of the number and types of cases heard during that academic year as well as to provide cumulative data for the past five to ten years. This information develops faculty knowledge about the types of student issues that are being heard, as well as gives the faculty the opportunity to review and reflect upon the data provided. Additionally, Code committees comprised of either faculty, students, or some combination thereof, should be charged with annual review of the information and the duty to identify problem areas and suggest changes to remedy problems.

This annual process would allow for trends to be identified well before the re-accreditation process and allows the institution to identify and document changes in the process. In addition, this type of iterative practice facilitates the collective creation of best practices in legal education to address potential problems within our own justice systems.

## CONCLUSION

As law professors, we understand the need to acknowledge and educate future lawyers about how structural racism has impacted the justice system.<sup>208</sup> This leadership role is particularly important today, when many state legislatures seek to limit how we educate tomorrow's leaders about structural racism and the need for inclusion.<sup>209</sup> In addition

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<sup>207</sup> See *supra* Section III.B.

<sup>208</sup> See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (1st ed. 2010) (describing how the legacy of Jim Crow became embedded in the criminal justice system); RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* (2018) (discussing how laws and policies, backed up by police and prosecutors, created racially segregated metropolitan areas across the country and the inequities that flowed from this legally created segregation); IBRAM X. KENDI, *STAMPED FROM THE BEGINNING: THE DEFINITIVE HISTORY OF RACIST IDEAS IN AMERICA* (2016) (chronicling the history of anti-Black racist ideas created to justify and rationalize inequalities and discriminatory policies); THEODORE W. ALLEN, *THE INVENTION OF THE WHITE RACE* (Verso, 2d ed. 1994) (discussing how a "white" race was created to further political and economic goals).

<sup>209</sup> See generally JONATHAN FRIEDMAN, JAMES TAGER, & ANDY GOTTLIEB, *EDUCATIONAL GAG ORDERS* (2022), [https://pen.org/wp-content/uploads/2022/02/PEN\\_EducationalGagOrders\\_01-18-22-compressed.pdf](https://pen.org/wp-content/uploads/2022/02/PEN_EducationalGagOrders_01-18-22-compressed.pdf) (compiling and updating the list of legislation that seeks to restrict how race is taught in America within "K-12 schools, higher education, and state agencies and

to teaching our students about those issues, we must also look inward—at our own systems within our institutions. One step on that path is to gather data about Code violation reports and sanctions.

As part of a whole-systems approach to addressing potentially racist systems within legal education, law schools cannot turn a blind eye to disparities in disciplinary reports, adjudication, and sanctions data we see elsewhere. We cannot assume that our lack of data also means a lack of disparities. Instead, law schools, and the ABA Council on Legal Education, should take the lead and systematically collect data about our Code proceedings.

Only when we have the data, and transparency about the data, can we have accountability and move forward in our quest to create more equitable institutions. Data collection like that suggested in this Article moves us from a framework where we believe disparities, if they exist, are unintentional, and thus relinquish any accountability, to a new framework of collective accountability for institutional practices that may systemically disadvantage particular groups.

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institutions.”); *see also, e.g.*, H.R. 4325, 114th Sess. (S.C. 2021) (prohibiting instruction of critical race theory in public institutions including colleges and universities).