

INTEGRATING DIVERSITY, EQUITY & INCLUSION IN LEGAL EDUCATION: TEACHING WHERE IT'S UNEXPECTED

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Abstract

In today's multicultural world, young professionals and would-be professionals must understand and be competent to serve people from diverse races, ethnicities, sexualities, and other backgrounds different from their own. Yet ordinarily when we introduce issues of diversity and inclusion in the classroom, we do so in cases and situations that specifically raise the topic like anti-discrimination matters or adoption by cross-racial or same-sex couples. In such explicit matters, it is easy to see that those issues are relevant, significant, and deserving of classroom attention. Unsurprisingly, using cases with a clear connection to fairness and equality is a common technique for ensuring that students see and appreciate historical and social meaning and context to better understand doctrine and how that context affects clients and others who face these situations.

This traditional approach has the advantage of being easily understood by beginning law students, since the diversity issues are visible and concrete. Nevertheless, not every foundational course or textbook includes cases or legal rules in which race, gender, disability, or other characteristics are central to the doctrinal topic. Indeed, most do not. Rather than defer to other classes or wait for those few times when teachers have cases that call out for equity and bias analysis, this paper recommends an alternate approach: raising diversity and inclusion in cases and contexts where students may not expect it.

This method capitalizes on the nature and context of pre-professional training: students will leave school and work with clients. Even if they are not noted in legal opinions and textbooks, litigants have race, economic status, gender, religion, ethnicity, sexual orientation, physical or mental abilities, gender identity, or some combination of these and many other dimensions. Our apprentice and novice professional students will have clients who also have these features, just as students, their classmates and teachers do. This paper shows how to teach students to see who and what lies hidden behind diversity-blind, neutral doctrine. It also addresses the challenges involved with the method and how to overcome them.

Keywords: *Diversity, professional education, race, gender, inclusion.*

1. Introduction

In today's multicultural world, young professionals and would-be professionals must understand and be competent to serve people from diverse races, ethnicities, sexualities, and other backgrounds different from their own. Yet ordinarily when we introduce issues of diversity and inclusion in the classroom, we do so in cases and situations that specifically raise the topic like anti-discrimination matters (Holmes, 2005) or adoption by cross-racial (Papke, 2013) or same-sex couples (Washington, 2011). In such explicit matters, it is easy to see that those issues are relevant, significant, and deserving of classroom attention. Unsurprisingly, using material with a clear connection to fairness and equality is a common technique for ensuring that students see and appreciate historical and social meaning and context to better understand doctrine and how that context affects clients and others who face these situations.

This traditional approach has the advantage of being easily understood by students training to enter their chosen professional, since the diversity issues are visible and concrete. Nevertheless, not every foundational course or textbook includes cases or codes in which race, gender, disability, or other characteristics are central to the doctrinal topic. Indeed, most do not. In US law schools, this concern is magnified because legal education uses the case study method in which students read opinions and decisions issued by courts hearing legal matters that have arisen in the ordinary course US judicial system business rather than study and discussion of academic treatises or explanatory summaries of jurisprudential codes (Patterson, 1951). Accordingly, there are few obvious opportunities to bring

diversity and inclusion matters to the forefront of class discussion. Rather than defer to other classes or wait for those few times when teachers have cases that call out for equity and bias analysis, this paper recommends an alternate approach: raising diversity and inclusion in cases and contexts where students may not expect it.

2. Methodology and pedagogy

It is commonplace in US law schools to ask students to recite the facts of a legal case and describe the legal doctrines the court applied in deciding the matter and writing its opinion. Professors then draw students' attention to the legal rules extracted from the specific factual setting and the particular people involved in the case to generate discussion of the principles, rules and policies that should be applied in future situations. Often hypothetical situations are used to demonstrate that these doctrines apply in situations far removed from the original factual settings of the case at hand (Sullivan et al., 2007).

Because this pedagogy moves from the specific to the general, from individual circumstances to broad principles and canons, raising diversity and inclusion matters is frequently constrained by whether those issues appear in the larger doctrine. Where the jurisprudence incorporates diversity matters, relevance to larger legal application flows naturally. Where the jurisprudence does not include those matters, however, the case study method sometimes erects a barrier to including them. Because teachers traditionally are quick to leave the facts of a legal case behind to explore larger doctrinal concerns, they may believe that they are limited in the topics that are suitable for classroom discussion. We may shift this pedagogical paradigm to broaden opportunities to engage students on diversity issues. Raising diversity matters where they may not obviously appear means exploiting the nature of the case method of legal study and professional training rather than fighting against it – using legal cases that seem not to raise diversity and inclusion issues as vehicles for this study in order to emphasize that these concerns are omnipresent instead of only occasionally situational.

The recommended change is not complicated; instead of throwing away the specific facts of a legal matter, teachers can explore the individual parties, their actions, and their motivations. They can ask students why the parties behaved as they did. This method capitalizes on the nature and context of pre-professional training: students will leave school and work with clients. Even if they are not noted in legal opinions and textbooks, litigants have race, economic status, gender, religion, ethnicity, sexual orientation, physical or mental abilities, gender identity, or some combination of these and many other dimensions. Our apprentice and novice professional students will have clients who also have these features, just as students, their classmates and teachers do. This approach enables teachers to encourage students to see who and what lies hidden behind diversity-blind, neutral doctrine.

For example, in a very common textbook on property and legal interests in land one case study concerns a property ownership status called a joint tenancy. In a joint tenancy, two or more people own land together. One important legal feature is that on death of one joint tenant, that person's interest in land simply ceases to exist; nothing is passed to heirs at death or by will. Accordingly, if three people have a joint tenancy, if one person should die before the others, the remaining persons simply continue to own the land just without the deceased person sharing that property. If there are two joint tenants, when one dies the survivor simply continues to own the land as a sole individual. However, if during the life of a joint tenant she transfers her share in the property to another, then the joint tenancy ends as to that share; the property becomes a separate share of the common property that can be or inherited or willed to others at the death of that former joint tenant (Helmholtz, 1998).

In the case in the textbook, in 1981 two brothers, John and William, were joint tenants in a house in a small rural village. John mortgaged his interest in the house to provide money so that a third party, Charles, could purchase a different house in the same small town. After Charles purchased the house, John moved into Charles' dwelling and lived there until John died. John's will left Charles all his property including the joint tenancy interest in the house John owned with his brother, William. Charles and William sued each other to determine whether William owned the former joint tenancy house solely or whether Charles also owned a share in the house because John's will gave his interest in the house to Charles (*Harms v. Sprague*, 1983).

Doctrinally, the case is simple. The issue is whether the mortgage is considered a transfer of property that would end the joint tenancy as to that share or not. If it was a transfer, Charles would win because he could receive John's share under the will; if it was not a transfer, then John died still owning joint tenancy property and William would be the sole owner. The case presents no doctrinal issues involving race, gender, or other diversity and inclusion issues. Thus, under usual law school pedagogy there would be no occasion to bring them up. Teachers would use the case to discuss the legal question and may apply it to different types of property transfers to see how joint tenancy rules apply.

Nevertheless, consider this alternative approach. After talking about the legal issues outlined above, the professor might ask students what motivated John's behavior. Students may be puzzled since traditionally law professors do not ask about litigants' motives for taking an action, only about the legal consequences of that actions once taken. Nevertheless, the professor may then seek to elicit a deeper understanding of the diversity and inclusion issues masked by the court's and the textbook's presentation of the case.

For example, the teacher might ask students to change Charles's name to Charlotte. In my experience, once that change is made, students almost immediately posit that John and Charlotte were a couple. The professor may then ask students why they saw the possible relationship when the facts appeared to be the actions of a different-sex couple, but not a same-sex one (Brower, 2009). This shift may start a conversation about baselines and how 'neutral' or 'default' rules often assume heterosexual, white, able-bodied, cisgendered, etc. protagonists (Wickberg, 2005). Some students may be surprised that unexamined baselines or assumptions may also affect ostensibly "noncontroversial" legal decisions as well as how those baselines influence their own perspectives and reasoning about cases. But this insight is an important lesson; and one perhaps best taught in a class that ostensibly has little to do with diversity and inclusion.

The professor might also explore whether the parties being same- or different-sex partners would have made a difference in the case. Doctrinally the answer is no. But in 1981 at the time of the case, it certainly would have affected the legal choices John and Charles had before them – both to formalize their relationship and to deal with the property and inheritance consequences of that relationship. The teacher might enquire what options were available in 1981 to same-sex couples to protect the two partners' rights in shared residences. How is that different from the current legal regime where the jurisdiction legally recognizes marriage between same-sex couples? Moreover, although John mortgaged his joint tenancy property to provide money for Charles to buy the new house, only Charles was listed as the legal owner of the new property. Given that decision, what could John have done to continue to live in the house had Charles predeceased him and died without a will, or if they had split up? Finally, the court's opinion that the students read barely mentioned Charles and the effects of the court's decision on him; instead, it focused on William's property rights and those of the holder of the mortgage. Would the court's opinion have emphasized that relationship if Charles had been a woman in a heterosexual relationship? Do those omissions say something about how the court values same-sex relationships or how it sees their relationship reflected in the law?

Finally, this class takes place in a law school, a degree program that serves as training for pre-professionals and is designed to prepare them with the skills to be a competent professional (Sullivan, et al., 2007). Therefore, one follow up line of inquiry might be how will you, the student, address these issues when these persons walk into your office? Will you recognize these issues should they occur in your clients' problems? How, if at all, will you ask your clients about them? These topics speak to the lawyer's role vis-à-vis the people they serve and how to best provide competent and effective counsel. Thus, they are appropriate subjects for law school inquiry in all classes, particularly those where the subject matter may not obviously or naturally present itself for discussion.

3. Some challenges and responses

Some teachers might question spending time on hypotheticals or questions that create few or no doctrinal differences. Indeed, professional school students themselves may doubt that approach preferring to focus on what will be tested in class or on the professional entrance examinations. One response is that exploring hypothetical situations and application of changed facts are common law professor tools, often used to expose analytical weaknesses or differences in outcome generated by changing facts or legal doctrines (Thorne, 2011). Part of the purpose of these hypothetical cases is to explore implicit assumptions and limitations.

More importantly, classroom discussions should be relevant beyond the close of the semester or end of law school, but be valuable well into students' legal careers. Indeed, the 2007 Report of the Carnegie Foundation for the Advancement of Teaching, *Educating Lawyers*, criticized American legal education for not teaching law students to develop professional competence and identity, while focusing too much attention on legal principles and theory (Sullivan, et al., 2007). Accordingly, students must realize that diverse people and relationships are part of the legal world. By engaging solely with what judicial opinions choose to make visible, we sometimes ignore the real people behind case captions. The tendency to forget actual litigants in casebooks is exacerbated because US legal textbooks primarily use appellate court decisions (Mashburn, 2007) – a world in which clients have limited roles, one usually relegated to sitting in the audience in the courtroom. Appellate argument is only a very small slice of legal litigation practice, and an even smaller segment of the daily work of a lawyer.

Further, the role of lawyers in the US legal system is different from that of the legal profession in the United Kingdom, for example. There lawyers are divided into barristers who argue before the courts and solicitors who have more direct client contact and who provide legal advice and services predominantly outside the courtroom (Zander, 1968). In the US, lawyers may serve in any of those capacities. They all have the ability to exercise direct client contact and offer legal advice and perform legal services inside and outside of the courtroom (Carson & Park, 2012). Thus, the ability to interact with clients and their life circumstances could and should be taught in US law schools – even in courses that focus on legal rules and doctrine.

Moreover, even if they are not noted in a legal opinion studied in a class, litigants in cases and casebooks have race, economic status, gender, religion, ethnicity, sexual orientation, physical or mental abilities, gender identity, or some combination of these and other dimensions. Clients will also have these salient characteristics, just as students, their classmates, and teachers do (Macrae & Bodenhausen, 2000).

Finally, bringing these issues into classroom where students do not expect to see them may provide students with a richer law school experience, and one that more directly resonates with their own backgrounds or experiences. The language and curricular choices teachers make signal to students the professor's openness or awareness of things that law school sometimes ignores. These bridges between student and teacher are not inconsequential. Scholars have noted the phenomenon of perceptual divergence, whereby outsiders are more likely than insiders to be self-conscious of that difference between themselves and the majority, to view their outsider status as relevant to others' perceptions of them, and to state that their difference contributed to their treatment in a particular situation. That heightened perception of dissimilarity may produce alienation and stress in those students that their classmates do not experience and that may impose barriers to student success. Student-teacher connections can ameliorate that isolation (Feingold & Souza, 2013). By making the real people behind cases visible and seeing them as individuals who have gender, race, sexuality, and other characteristics even when those aspects seem doctrinally insignificant, we remind our students that perceptual divergence can shape clients' options and expectations and possibly their treatment within legal institutions, just as it may affect their own or their fellow law students' experiences.

Perceptual divergence can also mean that people may observe the same event but experience it differently (Steele, 1997), or can read the same case but see different things in it. The classroom should not disregard those divergent perspectives; it could embrace them. If law teachers bring up diversity and inclusion issues only when they are explicit in legal cases studied in class, this suggests that sexuality, race and gender, etc. are not present in casebooks, classrooms nor germane to legal discussions. That conclusion is not only false but may conflict with students' personal history and background (Purdie Vaughns, et al., 2008). Their life experiences and that of teachers, as well as those of the litigants in our casebooks should be brought forward in the classroom. Doctrine and knowledge are important, but they are neither abstract nor do they exist in a vacuum. Law teachers (and educators generally) should insist students see the fields they study as affecting real people and shaping the diverse communities of which they are a part.

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