

Discussion Draft

Coalition for Peace & Ethics



No. 3/1 (March, 2017)

Diversity in Legal Education: Considering the Hollow Spaces Between Speech and Action

Larry Catá Backer, W. Richard and Mary Eshelman Faculty Scholar Professor of Law and International Affairs
Pennsylvania State University

Prepared for Event: *All in at Penn State Law: Addressing Diversity & Implicit Bias*, Sponsored by the Diversity
Committee Penn State Law
March 16, 2017

ABSTRACT: This presentation considers the way that institutions approach diversity and the conceptual problems that continue to separate the development of a conceptual basis for embracing diversity from the actual sustained implementation of diversity concepts. I will be focusing on the ABA's 2010 Report "Diversity in the Legal Profession: The Next Steps" especially as they relate to "Recommendations to Law Schools and the Academy (pp.17-25) and in light of the work last year of the Penn State Joint Diversity Awareness Task Force. The ABA described a broad and transformative agenda for embedding diversity at the core of the social structures of legal education. The JDATF sought to build on similar concepts within the context of Penn State's approach to the project of diversity. I thought it might be interesting to see how law schools have moved toward those goals in the six years since the report. To that end it might be useful to also consider the substantial recommendations that Penn State's JDATF also made in its reports in 2016, all approved by the University Faculty Senate. I conclude in both cases that the focus on lowest level stakeholders to bear the burden of realizing diversity creates a misalignment between obligation and responsibility. The focus on principles permits a broad exercise of administrative discretion that is unbounded by principles of abuse and may be exercised with impunity. The failure to tie diversity to accountability and performance review among middle and upper managers substantially inhibits the implementation of robust programs. But more fundamentally, socialization based diversity efforts will continue to effectively isolate and marginalize diversity as an operational objective of academic institutions—either at the university or the law school level. And there is the great irony—the conceptual basis of diversity reform itself replicates the marginalization that itself gives rise to the need to engage in diversity. Until institutions move to naturalize diversity within its operations, the objectives of diversity and the embedding of its principles will remain only aspirational.



COALITION FOR
PEACE AND ETHICS

Institutions of post-secondary education, has been struggling with the very hard work of moving from the embrace of flowery statements of solidarity respecting diversity to actually making it a lived reality in the environment in which students, staff, faculty and particularly administrators operate. (Statement From the Penn State University Faculty Senate Chair). Much of the discussion has focused on obligation centers—students, faculty and others at the lowest end of the institutional pyramid. But fairly little attention has been paid to responsibility centers—middle Managers (deans and their staff), central university administrators. Is it time to refocus the analysis of diversity and diversity related programs from conformity at the bottom to shaping responsibility at the top? How does an institution create robust measures to assess and discipline those whose responsibility is to shape the organizational cultures of their units? I will speak to issues of institutional implementation and accountability of diversity projects for law schools specifically and large research universities more generally. I started with a consideration of the 2010 ABA Report [“Diversity in the Legal Profession: The Next Steps”](#) especially as they relate to “Recommendations to Law Schools and the Academy (pp.17-25). This was used as a baseline for analysis. I then reflected on their consequences for Law Schools in light of the work of Penn State’s [Joint Diversity Awareness Task Force and their Reports of 2016](#) adopted by the Penn State University Faculty Senate in 2016.

The ABA’s Report and Recommendations included a section that targeted law schools as a component in the law industry. “The Report’s Recommendations for next steps reflect and incorporate the multiple experiences, false starts, insights, frustrations and new beginnings that represent the various ways that diversity works within the different sectors of the legal profession.” (PP. 6). The Report included recommendations already being used as well as some that are ambitious and aspirational. The recommendations were broadly categorized, but not prioritized. They recognized that organizations have its own contextually compelling circumstances. Thus while the recommendations were to some extent aggressive and transformational, they were also meant to be aspirational. And six years later they remain largely aspirational—a set of transformative principles and objectives that institutions can point to and embrace as overarching concepts, without the need to do much else. Social media, after all, and public gatherings, tend to be abstract affairs.

The foundational principles of the ABA Report were fairly straightforward, bit also narrow and formalist—focusing on formal structures of exclusion and of the embedding within the law industry. Consider the ABA Report’s definition of diversity (pp. 9): “When we talk about increasing diversity in the profession, we are addressing a history of laws, practices, and employment decisions that excluded broad sectors from participation in the political, economic, and social activities and benefits of this society.” The focus of these diversity efforts were targeted as well: “The specific groups that fall within ABA diversity programs and policies include racial and ethnic minorities, women, persons with disabilities, and the LGBT (lesbian, gay, bisexual, and transgender) community.” (Ibid).

The ABA Report nicely articulated the conventional rationales for diversity that have been used in current litigation. The three principal rationales are the business case for diversity, the leadership rationale and the demographic rationale. For the business rationale the ABA Report explained: “A diverse workforce within legal and judicial offices exhibits different perspectives, life experiences, linguistic and cultural skills, and knowledge about international markets, legal regimes, different geographies, and current events.” (pp 9). With respect to the Leadership Rationale the ABA Report noted that this society draws its leaders from the ranks of the legal profession and that is one reason why diversity is a constitutionally protected principle and practice. (pp. 10). The well known demographic rationale was easy to describe. In a nation grounded in the power of popular will and its reflection in the make up of our national hierarchies, the shift in demographics—organized by race, ethnicity, etc.—should be reflected *pari passu* in our hierarchies as well. (Ibid.).

From these rationales it was an easy conceptual step to the ABA Report's recommendations for law schools. "Law schools contribute to the ongoing transformation of the profession from one that has historically been dominated by white men from the upper classes to one that is inclusive of persons from many different backgrounds with different perspectives, cultures, abilities, worldviews, and tastes." (PP. 15). More importantly, the recommendations were drawn with this in mind: "Diversity in law schools, as in other institutions, affects all areas of activity." (PP. 15).

With that framework in mind, the breadth of the recommendations suggested the possibilities and limits of transformation. These focused on seven key areas: A. Culture: Building consensus/creating accountability; B. Planning ; C. Accountability; D. Diverse faculty: Hiring and Retention; E. Educational practices: admissions, Law school Debt; F. Data collection, Law school Rankings; and G. Pipeline practices. Together they suggest an all around approach to the reconstitution of the law school and the reform of deeply engrained law school cultures around diversity as the central normalizing principle of law school operation. (ABA Report pp. 17-25).

Yet a closer look at the specifics of the recommendations reveal some weakness, both conceptual and implementation. The challenges can be usefully broken down into six categories. *The first touches on issues of definition.* The definition excludes religion. Most might focus on the travails of global majority religions with minority status in the United States—particularly Islam. But the better test is the protection of practitioners of religion in the shadow of these dominant religions—the Lukumi practices of Caribbean and South American students, and Wicca, come to mind. Additionally the ABA Report definition of diversity tends to focus on formal, rule based impediments. It avoids cultural and social practices the functional effects of which might also be profound. As such, the ABA's focus is on formal systems, systems of rules and practices; they avoid entanglement with social systems and values, and avoid consideration of the functional burdens on diversity efforts. Effects.

The second touches on the issues of approaches grounded in the value of socialization of targeted populations as opposed to the naturalization of principles and approaches within that population. There is no fault here, of course. The ABA Report follows a popular consensus among American elites that is now several generations old. Yet consensus does not guarantee success; and nor does it protect against the consequences of embracing the approach selected. The problem with socialization is not specific to law schools. It has become clearer (again) that individuals and social groups tend to resist being told what to do; especially when it comes from or through another social group. The result is predictable—resistance—and unnecessary. For the reasons that the acculturation of minorities in Europe failed miserably during the 19th century, acculturation efforts within the United States are likely to suffer similar resistance effects. That is a pity. It is a greater pity for its almost conscious disregard of alternatives: there appears to be little sense of the possibilities of naturalizing diversity principles in the everyday lives of Law School stakeholders.

The third touches on metrics. The focus of the ABA appears to emphasize outside and formal metrics. There appears little focus on inside metrics or to attach them to embedded changes with lasting effects. Counting bodies and programs is useful as an initial indicator but provides little by way of markers of longer term and embedded effects of these efforts. Indeed, as is not unusual at larger institutions of this sort, there appears to be little real engagement with the relationship between principles and metrics. Simple output measures will distort and promote strategic avoidance around metrics.

The fourth touch on issues of accountability. The ABA perhaps unconsciously distinguishes between institutional and individual accountability. It focuses its measures on the former rather than the latter; yet it is through the latter that implementation can be effectuated. Thus there are few accountability measures that reach institutional leaders. There are consequences of course. This focus opens the door to broad administrative discretion and impunity.

Discipline is concentrated at the bottom of the hierarchy among those with the least authority. *The fifth touches on creating incentives for cultures of passive rather than active engagement.* The ABA Report approach appears to cultivate passivity among stakeholders. Individuals and institutional actions are treated to some extent as objects of institutional productivity. Diversity is just another factor in the production of better rankings and “new wave” hierarchies. Perhaps this is a consequence of the focus on the “business case” for diversity—diversity becomes a strategic instrument of business planning and along the way individuals are objectified. *The sixth touches on diversity as a cloak for hidden institutional agendas.* Is diversity merely an instrument to counter dominance of US News rankings? To what extent does the business case suggest that diversity is only as valuable as it can be shown to contribute to the bottom line? Is diversity a means of avoiding discussion of some of the more basic issues with respect to which diversity itself is merely a symptom? These questions, unasked, remain unanswered today.

Given the potential and the challenges facing projects of diversity—even those most sympathetic to its goals—it comes as no surprise that the ABA Report recommendations remain very much a work in progress. But much has changed since 2010. Time might well have broadened, rather than narrowed, the challenges; at the same time approaches to diversity might have changed as well. In that context it might be useful to see what a contemporary and influential large research 1 university has done. To that end Penn State offers a window on changes in approaches to diversity—from its definition to approaches to embracing its principles. Penn State is particularly interesting in light of the work of its [Penn State University Joint Diversity Awareness Task Force](#) (JDATF), mandated by the University Provost and the chair of the University Faculty Senate to consider diversity and approaches to its attainment. It was my great honor to serve as the Chair of the JDATF. JDATF was charged April to consider a number of important diversity initiatives at Penn State ([Charge \(PDF\)](#); [Members](#)).

The JDATF charge was divided in six parts. First, it was to continue to undertake a review of issues related to cultural awareness, curricular and out-of-class climate changes which could enhance the environment for all students across the University. Second, it was to continue to work with and contribute to any effort relating to curricular programs, including general education and engaged scholarship. Third, it was to assess the document “A Framework to Foster Diversity at Penn State” paying particular attention how the Faculty Senate can assist with the following Framework challenges: . . . Campus Climate, Recruiting and Retaining a Diverse Work Force, Developing a Curriculum That Fosters United States and International Cultural Competencies. Fourth, it was to explore creation of a framework for advancing diversity and inclusion that goes beyond the current Framework to Foster Diversity. Fifth, it was to contribute to the President’s “Student Career and Economic Development” Imperative in coordination with the Provost and the Office of the President. Sixth, it was to conduct an analysis of the current US and IL diversity courses across the University. This includes gathering data, considering the ways in which outcomes are monitored and systems of accountability. Such a study should benchmark across CIC Institutions as it relates to the course content that focuses on diversity, and consider alternative models to monitoring and accountability.

The charge was undertaken in light of the development of a distinct (from the ABA) definition of [diversity](#):

The Pennsylvania State University is committed to and accountable for advancing diversity, equity, and inclusion in all of its forms. We embrace individual uniqueness, foster a culture of [inclusive excellence](#) that supports both broad and specific diversity initiatives, leverage the educational and institutional benefits of diversity, and engage all individuals to help them thrive. We value inclusive excellence as a core strength and an essential element of our public service mission.

At Penn State:

—We will foster and maintain a safe environment of respect and inclusion for faculty, staff, students, and members of the communities we serve

- We will educate our faculty, staff, and students to be [social justice advocates](#), creatively providing curricula, programs, and environments that reflect the diversity of our communities, and elevate cultural awareness.
- We will ensure fair and inclusive access to our facilities, programs, resources, and services, and ensure that all of our policies and practices are inclusive and equitable.
- We will advance and build our workforce by assessing hiring practices and performance review procedures to attract, retain, and develop talented faculty and staff from diverse backgrounds.
- We will address intergroup disparities in areas such as representation, retention, learning outcomes, and graduation rates.

The JDATF divided itself into three groups considering different aspects of the diversity project at Penn State. These included a Technical/Curricular Subcommittee, a Policy Coordination Sub-Committee, and a Substantive Policy Sub-Committee. Its work produced four reports with recommendations for substantial changes in a number of areas. Three were presented March 2016 for consideration by the PSU Faculty Senate April 2016:

1. US/IL Courses Survey--Recommendations ([Legislative](#); [Advisory/Consultative](#))
2. [Diversity Best Practices](#)
3. [Moving Forward Embedding Diversity Policy](#)

One was presented February 2016 and Approved by the PSU Faculty Senate March 2016: [Moving Forward](#) .

The work of the Technical Sub-Committee produce a report with the following recommendations that focused on fostering changes to courses and their content. *The object was to better naturalize diversity principles within the ordinary course of teaching and to avoid detaching diversity as something special, temporary and foreign to the ordinary course task of teaching and learning.*

The following criterion should be added to the list of criteria that are used to designate a course as a US or IL course (strongly supported by the newly adopted PSU Statement on Diversity, Equity, and Inclusive Excellence): (1) For US: Increase student understanding of the nature of social justice, and equity in the United States at the societal, institutional, and individual levels; (2) For IL: Increase student understanding of the nature of social justice, and equity in international nations at the societal, institutional, and individual levels.. Future courses that receive the US or IL designation should include at least 50% of the course content addressed by the US or IL course designation criteria. Importantly, the Committee recommended as well that *appropriate funding should be provided to implement the Recommendations.*

The work of the Policy Coordination Sub Committee focused on a broader view of the diversity project. Its object was to consider issues of policy coordination and coordinated approaches especially within large institutions, like Penn State, where units have sometimes substantial discretionary authority in program and policy implementation. This was a topic that was not considered particularly by the ABA Report. Yet is a critical part of any program of institutional engagement—especially important to avoid one part of the institution working against the objectives and programs of another. In that context the Sub-Committee recommendations focused on the following areas:

- Engaged Scholarship initiative and Student Career and Economic Development: incorporate principles of inclusive excellence. In that context *assessment metrics* should be established at the outset to monitor for intergroup disparities in participation and outcomes.

- Further study to assess institutional embedding of the Framework Review recommendations. Units should highlight information about diversity and inclusion resources online, following the best practices indicated above.
- Adequate resources are necessary to support institutional priorities; diversity efforts cannot be successful as an “unfunded mandate.”*
- In addition to adequate resources for pursuing diversity and inclusive excellence initiatives, significant accomplishments and outcomes should earn rewards, which will help to incentivize progress. In that context a uniform system of rewards for diversity enhancing measures ought to be established in a fair manner.
- New executives and administrators should be made aware of University expectations and priorities regarding diversity and inclusive excellence, and should be made aware of University strategic planning and particularly their unit’s diversity strategic planning and associated Framework Reviews.
- Administrative reviews AD-14 should include measures for incorporation of the A Framework to Foster Diversity at Penn State.
- Units should make use of informational resources available to guide strategic planning, implementation, reporting, and assessment efforts, available on the Diversity Strategic Planning website of the Office of the VP for Educ. In that context, unit executives and their representatives should utilize the consultation services available from Vice President for Educational Equity representatives to assist with diversity strategic planning, implementation, reporting and assessment initiatives.

The Substantive Policy Sub-Committee adopted the broadest view of the diversity mandate. It’s recommendations suggested the focus of appropriate institutional actions that might better embed diversity objectives as an ordinary course obligation of the university and an integral part of its culture. Some of its recommendations were directed to the central administration:

The Office of Educational Equity and Campus Environment should:

- (a) develop a diversity action plan, in collaboration with unit administrators to enhance recruitment and retention of students, faculty, and staff,
- (b) develop recommended standards and metrics, centered on the objectives of the University’s Diversity Statement, for assessing recruitment and retention;
- (c) work with relevant stakeholders, such as Human Resources, unit administrators, and others to develop unit plans for effective implementation of the goals and metrics for administrative assessment.

Some of the recommendations were directed to the University Faculty Senate:

The Senate Committee on Educational Equity and Campus Environment should sponsor an annual report from the Office of Educational Equity and Campus Environment assessing its programs, initiatives and other significant work, and provide an opportunity for Senators to pose questions.

And others were directed to the Office of Senior Vice President for Development and Alumni Relations. These were important as part of the naturalization objectives of the JDATF project within all of the operations of the university.

The Office of Senior Vice President for Development and Alumni Relations should prepare a written articulation of standards and objectives that link development campaign themes to diversity initiatives. That office should provide summary information, annually, to the university faculty senate assessing the implementation of those standards and providing senators with an opportunity to pose questions.

More generally the Substantive Policy Sub-Committee made recommendations that were meant to embed diversity into the everyday operations of the university—from assessment, to health care and benefits:

- Create a platform for “conversations” on diversity. The focus of this discussion should center on the concepts built into the University Diversity Statement. In that regard, the University should consider adopting the statement on expressive freedom that is not grounded on protection from speech or speech acts that may be merely offensive.
- Diversity in recruiting and retention of students, staff and administrative personnel should be an element in administrative reviews at the unit and senior administrative levels
- The university should develop *binding and transparent measures by which unit administrators, and senior administration officials, may account for the embedding of diversity issues in ethics based decision making.*
- The university should establish a *mechanism for the rigorous review of the administrative structures* of diversity units at the university. The process should be transparent and inclusive.
- Diversity ought to be incorporated as part of the metrics for assessing all aspects of strategic plan implementation.*
- The university should include issues of diversity in the *construction and elaboration of its health benefit programs*—including programs of mental and physical health—as well as in its operations and the administration of all human resources programs.
- Responsible administrators should report annually on the progress made in this regard.

Yet, for all of the potential advances represented by the approach of the Penn State JDATF, challenges remain, many of them of a similar type to that faced by the ABA Report. *The first touches on issues of definition.* The problem faced at Penn State is almost the inverse of ABA approach—a definition of diversity that works hard to avoid defining diversity. Its value is also its weakness, an open ended and ambiguous definition that effectively shifts power over inclusion to senior administrators who hold the keys to the “diversity kingdom.” *The second touches on the issues of approaches grounded in the value of socialization of targeted populations as opposed to the naturalization of principles and approaches within that population.* To some extent the work of the JDATF also retained the focus on socialization that impeded the APA Report. There were efforts to naturalize diversity—for example through embedding in ordinary course pedagogy, in benefits and alumni relations. Indeed, even the significant effort to naturalize in the recommendations—via inclusion in courses and in the ordinary operations of units; yet even this largely undefined and thus open to abuses of discretion. What became clear was that *in an institution built on hierarchy, it is easy enough to use diversity to reframe but not eliminate the hierarchies that produce the need for “diversity measures” in the first place.*

The third touched on metrics. Despite efforts to push beyond hortatory calls to action, metrics remain aspirational. The call for better metrics in the JDATF reports is a necessary first step. The problem is that this is commonly also the last step. Bridging that gap between good sounding language and implementation remains a problem in large institution, and mote specifically in law schools. Indeed, *metrics require “all-in” conversations that are unlikely in an unwieldy institutional organization like a large research university.* Lastly, the inclusion in the definition of diversity of “social justice advocacy” creates unintended consequences. Among the most important of the potential problematic consequences of “social justice advocates”: the temptation, with impunity, to use it as a back door to constraining academic freedom and broader discretionary authority to middle managers to discipline faculty and students.

The fourth touches on accountability. The focus ought to on accountability measures that reach institutional leaders. Accountability ought to produce a means to narrow and manage broad administrative discretion and impunity.

Certainly, that was a broad objective of the JDATF Reports. Yet the administrators charged with the implementation of these reports have no incentive to burden themselves with accountability. They perhaps as rational actors, prefer the more responsibility diffusing approaches of the ABA Report that shifts responsibility to an abstraction—the university—without actually vesting managers with managerial accountability that has any sort of sting. And that is the great pity of most of these efforts. *As important, and often overlooked, is the issue of fiscal accountability:* no unfunded mandates. Unfunded mandates tend to be a convenient way of appearing to act (formal compliance) with the knowledge that lack of funding will make implementation unlikely in any robust form (effective avoidance). The solution requires managers, and especially leadership from the top, to move beyond pretty words and good intentions.

The fifth touches on the difficulties of passive rather than active engagement. The JDATF sought to reduce passivity among stakeholders; but is it enough? Is it targeted in the right direction? *In many respects, faculty and students remain objects of diversity as instruments to better rankings and “new wave” hierarchies.* Given the logic of the organization of the university, and the importance of the business case, it is unlikely that active engagement, or accountability, will gain much traction. *The sixth touches on hidden agendas.* As with the ABA Report, it is worth asking; is diversity merely an instrument to counter dominance of rankings? This also poses the problems of the ABA business case in a new guise—if diversity is framed in terms of the business case then does it reduce merely to an instrumental mechanism for greater profit? Is that a sufficient rationale? How does that affect approaches? And critically, within these hidden agendas lies a trap and a challenge for proponents of diversity regimes. It is altogether too easy to move from efforts to promote inclusion to efforts that effectively seek to overturn one orthodoxy for another that, in its own way is as rigid and marginalizing as the one replaced. Confidence building is an important element of diversity efforts that tend to be ignored for both the majority and minority communities.

What can we conclude from this brief consideration of the arc of diversity as an institutional exercise within the academy in general and law schools in particular? The gulf that separates aspiration and realization remains quite broad. The focus on lowest level stakeholders to bear the burden of realizing diversity creates a misalignment between obligation and responsibility. The focus on principles permits a broad exercise of administrative discretion that is unbounded by principles of abuse and may be exercised with impunity. The failure to tie diversity to accountability and performance review among middle and upper managers substantially inhibits the implementation of robust programs. But more fundamentally, socialization based diversity efforts will continue to effectively isolate and marginalize diversity as an operational objective of academic institutions—either at the university or the law school level. And there is the great irony—the conceptual basis of diversity reform itself replicates the marginalization that itself gives rise to the need to engage in diversity. Until institutions move to naturalize diversity within its operations, the objectives of diversity and the embedding of its principles will remain only aspirational. More importantly, naturalization will work best only within inclusive regimes appears that do not appear to be a front for replacing one set of orthodoxies for another. Perhaps, then, the most successful diversity projects are those that focus on human dignity rather than any sort of essentialist project of socialization under the command of constituted power elites.