

# The Discounted Labor of BIPOC Students & Faculty

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*“In the early days of the COVID-19 pandemic and the spike in televised police murders in the spring of 2020, I felt an increased sense of urgency in my activism – particularly within my community at law school. Myself and my colleagues of color were experiencing multiple crises: a pandemic that disproportionately impacts minority and lower-income communities and civil unrest in response to police brutality, all while being expected to perform academically at the same level as our white counterparts.”*

—A Black law student<sup>1</sup>

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1. These quotes were taken, with permission, from a narrative written by a Black law student. The quotes were anonymized, with the student’s approval, because we did not want the student to suffer repercussions from university administration for their honesty. Students and faculty were not interviewed for the production of this piece, so internal review board (IRB) approval was not sought. Instead, we relied on our own observations, experiences, and public writings by law students and faculty of color.

## INTRODUCTION

Law school can be likened to a foot race—one that pits students against one another for the prize of a class rank and the benefits that come with it. Students approach the starting line with varying levels of endurance and speed. They begin clothed in standard running attire, but as the race progresses, some are required to carry additional weights as they run. This invariably slows the weighted students down and even if the weights are removed at some later point in the race, the weightless students have already surmounted a lead that the students burdened with weights can rarely overcome.

On another field, law faculty are also running a race, but one structured differently than that of the students. Rather than running alongside each other, faculty are racing against the clock—the tenure or promotion clock. Their times are compared with those of their colleagues, who may have run their races yesterday or many years ago. Each colleague acts as a judge who brings with them their own informal criteria that define how the faculty’s performance will be judged. The faculty runner dons standard running apparel, but here, too, some faculty are given additional weights to carry as they run. And, again, these weights slow down the weighted faculty member decreasing both their speed and endurance and affecting their overall performance.

In both the student and faculty races—if an audience member is willing to disengage from their phones, conversations or other distractions, and walk down to the field—it would become clear to the observer that some runners are weighted. In other words, the weights are not hidden; they are not invisible to the eye. They are ignored, overlooked or unnoticed; the labor of carrying the weights is discounted<sup>2</sup>, with most spectators focused only on the finish line.<sup>3</sup>

For BIPOC<sup>4</sup> students and faculty, the weights that they bear in these races are many and divergent, depending in large part on their lived experiences as

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2. The term “discounted” here and throughout the essay refers to the work of law students and faculty of color who are often depended on, but not compensated nor acknowledged for devising and implementing diversity, equity, inclusion and anti-racist initiatives. Instead of investing in the resources or personnel to bring these initiatives to fruition, administrations continue to take advantage of their students and faculty of color as free labor. While previous scholars have suggested that these burdens are invisible, we challenge the idea that these burdens are invisible and argue, instead, that they are “unseen” or unacknowledged, because others have not bothered to look hard enough or have seem them but chosen to discount them. For examples of scholars that have depicted these burdens as invisible, see, for example, Peggy McIntosh, *White Privilege: Unpacking the Invisible Knapsack*, PEACE & FREEDOM MAG., July/Aug. 1989, at 10, [https://psychology.umbc.edu/files/2016/10/White-Privilege\\_McIntosh-1989.pdf](https://psychology.umbc.edu/files/2016/10/White-Privilege_McIntosh-1989.pdf).

3. The finish line can represent many things—including the focus on performance measures (grades, class rank, publication records, etc.) that do not acknowledge how difficult the process is to accomplish that outcome.

4. In this essay, we use the term BIPOC intentionally to acknowledge the “unique relationship to whiteness that Indigenous and Black people have.” See “About Us,” THE BIPOC PROJECT, <https://www.thebipocproject.org/> (last visited Apr. 21, 2021). In our use of the term BIPOC vs. people of color, we aim to acknowledge “Native invisibility”, or the common tendency to erase or forget Native American history or how Indigenous persons are othered by being forgotten. *Id.* When referring to

well as how they are racialized and gendered by colleagues, superiors, and society at large. This essay draws attention to the burden of these weights and their effects on the performance of BIPOC students and faculty. It does so by shining a spotlight on a particularly heavy set of weights: the discounted labor of creating inclusive, anti-racist law schools.

To accomplish this, we share our lived experiences as a junior faculty of color and a Black law student who felt compelled to take on additional discounted labor to help foster a more anti-racist law school in response to the public and racialized violence and unrest that defined 2020. Though this narrative is ours, it is by no means ours alone. Throughout this essay we share citations to public expressions that echo our narrative.

It is not our intent to provide readers with a literature review of the empirical literature on diversity, equity and inclusion—for that we refer to our colleagues who have dedicated their careers to writing on issues of diversity, equity and inclusion.<sup>5</sup> Our purpose here is to share our lived experience and those of others, so as to call attention to these weights, to call for the meaningful recognition of the discounted labor of carrying them, and to demand the equitable redistribution of these weights.

Throughout this essay, we weave in excerpts from a narrative written by an anonymous Black law student, with their permission. We have made a stylistic choice to present these quotes in a jarring way, one that unapologetically interrupts the essay at topically relevant points, so that the weights so clearly depicted by these quotes become even more difficult to ignore.

We focus our story on two examples of weights carried during the COVID-19 pandemic: (1) the burden of anti-racism activism borne by our Black law students and (2) the weights of advocacy, oversight and implementation of anti-racism initiatives borne by BIPOC faculty. Though we limit our narrative to sharing these stories because they best reflect what we can speak to as a faculty of color and a Black law student, we know our BIPOC colleagues have stories of their own of anti-Asian racism, anti-Hispanic racism, anti-immigration rhetoric, Native invisibility, violence against Muslims and Jews, and so on. The commonality between these stories, and the running theme throughout this essay, is that the burden of creating inclusive spaces in law schools for our BIPOC

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experiences that impact some persons of color more than others, we do refer to these groups of persons specifically (e.g. “Black” for the Black experience). We understand and acknowledge the criticisms that have been leveraged against the use of the term BIPOC and we do agree that the term is overused. *See generally*, Meera E. Deo, *Why BIPOC Fails*, 107 Va. L. Rev. Online (2021) (criticizing the use of the term BIPOC). But, we do believe that the use of the term BIPOC throughout this essay serves our purpose and we use the term with intentionality and caution.

5. As examples of such works, we recommend the scholarship of Prof. Meera Deo. *See, e.g.*, Meera E. Deo, *Looking Forward to Diversity in Legal Academia*, 29 BERKELEY J. GENDER L. & JUST. 352 (2014); Meera E. Deo, *The Ugly Truth About Legal Academia*, 80 BROOK. L. REV. 943, 943–1014 (2014); Meera E. Deo, *Trajectory of a Law Professor*, 20 MICH. J. RACE & L. 441, 441–484 (2014).

students has fallen disproportionately on BIPOC students and faculty and, as we will show, the pandemic only intensified this discounted labor.

## I.

### THE PANDEMIC WEIGHTS

The weights carried by Black law students during the COVID-19 pandemic have been particularly heavy, as they experienced a different COVID-19 pandemic than their white counterparts due in part to the emotional and physical toll caused by the violent, public mistreatment of Black persons at the hands of law enforcement.<sup>6</sup> For some who have experienced or witnessed law enforcement mistreatment themselves, the killings of George Floyd, Breonna Taylor, Ahmaud Arbery, and Tony McDade triggered their past traumas. Others lived through new traumas as they were subjected to racial slurs, brandished weapons, and tear-gas while protesting for reforms.

For Black law students, these stressors were further compounded by the pressures<sup>7</sup> to perform academically and to simultaneously “do something” about the injustices that Black persons continue to face.<sup>8</sup> At some universities the polarized national political climate intersected with the movement for racial justice, magnifying racial tensions between BIPOC students and their white colleagues.<sup>9</sup> The degree to which Black law students experienced these struggles likely differed by student, institution, and perhaps even region or locality. However, during our advocacy efforts our conversations with representatives of Black Law Students Association members across the country confirmed that the aforementioned experiences were widespread and only scratched the surface of the difficulties that many of our Black law students faced. For some, these experiences were worsened by law school administration (and faculty) who only

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6. Meera E. Deo, *Investigating Pandemic Effects on Legal Academia*, 89 *FORDHAM L. REV.* - (forthcoming 2021) (“Along with the pandemic, other traumatic events from the past year—including George Floyd’s killing and resulting protests, the 2020 election and the 2021 capitol takeover, and the resumption of mass shootings involving people of color—will have outsized and disproportionate effects on those who were already vulnerable and marginalized.”)

7. Even before the pandemic, evidence suggested that law school negatively affected mental health. See Mariah Stewart, *Improving the Legal Profession’s Mental Health Crisis Begins in Law School*, *INSIGHT INTO DIVERSITY* (June 25, 2020), <https://www.insightintodiversity.com/improving-the-legal-professions-mental-health-crisis-begins-in-law-school/>.

8. See, e.g., Karen Sloan, “*This Is the Civil Rights Movement of My Lifetime*”: *Black Law Students Demand Action*, *LAW.COM* (June 18, 2020, 3:40 PM), <https://www.law.com/2020/06/18/this-is-the-civil-rights-movement-of-my-lifetime-black-law-students-demand-action/>. (“Black law student groups from 17 law campuses in New York, New Jersey and Connecticut are pushing their schools to do more to end racial injustice and police brutality and to better support their minority students.”)

9. Joe Patrice, *Addressing Law School Racism & Neomi Rao’s School Of Legal Writing Don’ts*, *ABOVE THE LAW* (June 30, 2020, 6:13 PM) <https://abovethelaw.com/2020/06/addressing-law-school-racism-neomi-raos-school-of-legal-writing-donts/>.

issued perfunctory responses or those that chose passive silence as their initial response to the growing racial violence.<sup>10</sup>

While some law faculty and administrators, who were proactive in identifying the struggles that their Black students faced, reached out to their students to determine the ways in which they could support them during these trying times, many did nothing.<sup>11</sup> Based on our experiences, those faculty that did reach out to the affected students were predominately BIPOC faculty or faculty who are gendered women.<sup>12</sup>

In general, the pain, the grief, and the discord that Black law students faced at the outset of the pandemic were too often greeted with administrative silence or email statements that acknowledged the hardships suffered but offered no actionable steps to ameliorate them.<sup>13</sup> The lack of administrative action prompted Black students to turn their activism toward their own institutions, demanding that their law schools do their part by adopting anti-racist policies.<sup>14</sup> These

10. While there has been some law schools and law school administrators that have now adopted anti-racist programs or policies, these responses were not the norm and they were reactionary and spurred by the initial activism by Black law students. For example, the Anti-Racism Clearinghouse was launched in June of 2020, months after Black law students began their activism. Rachel Casper, *Law Deans Antiracist Clearinghouse Project: Resources & Guidance for Antiracism Work*, LCL (June 16, 2020), <https://www.lclma.org/2020/06/16/law-deans-antiracist-clearinghouse-project-resources-group/>.

11. Although there has yet to be an empirical article that quantifies law school responses to the televised police violence against Black persons in 2020, we base our statements on the magnitude of student organizations that issued public letters and social media statements, cited throughout this essay, which called out law schools for their inaction. See *infra* note 8 and accompanying text. See, e.g., Areeba Jibril, McKayla Strokes & Mariah Young, *Students Take to Twitter to Demand Racial Equality*, ABA FOR LAW STUDENTS (July 1, 2020), <https://abaforlawstudents.com/2020/07/01/students-take-to-twitter-to-demand-racial-equality/> (which details the activism conducted by students at the University of Michigan and Northwestern Schools of Law to demand action).

12. *Id.* (“Actively seek out mentees so that your BIPOC colleagues are not buried by the insurmountable and unrewarded task of uplifting an entire community.”).

13. See, e.g., Eman Bare, *Open Letter to Law School Deans*, EMAN BARE (June 14, 2020), <https://medium.com/@eman.bare/open-letter-to-law-school-deans-fd6d621bceab>.

14. The following are examples of letters and op-eds by law students demanding anti-racist action from their law schools: HBSA Admin., *Harvard’s Black Law Student Association’s Letter to the Administration Regarding Black Lives*, Harv. BLACK L. STUDENTS ASS’N (June 5, 2020), <https://orgs.law.harvard.edu/blsa/2020/06/05/harvards-black-law-student-associations-letter-to-the-administration-regarding-black-lives/>; The Yale Law School Black Law Students Association Executive Board ‘20-’21, *How Not to Respond to America’s Racial Reckoning: Lessons From Yale Law School*, LAW.COM (August 31, 2020, 5:00 PM) <https://www.law.com/2020/08/31/how-not-to-respond-to-americas-racial-reckoning-lessons-from-yale-law-school/>; UCLA Black Law Student Association (BLSA), *UCLA Law, Stop Excusing White Supremacy and Start Supporting Black Students*, JURIST (April 22, 2020, 8:11 PM), <https://www.jurist.org/commentary/2020/04/ucla-blsa-support-black-students/>; Demand Letter from Black Law Students Association of Wayne State University Law School, et al, to Richard Bierschbach, Dean of Wayne State University School of Law (June 18, 2020), (available at [https://law.wayne.edu/pdfs/letter\\_from\\_blsa\\_june\\_2020\\_-\\_tagged\\_06-18-20.pdf](https://law.wayne.edu/pdfs/letter_from_blsa_june_2020_-_tagged_06-18-20.pdf)); Bare, *supra* note 14; David Golbitz, *Creighton Black Law Student Group Pens Letter on Racism*, OMAHA DAILY REC. (Sept. 14, 2020, 5:00 AM), <https://omahadailyrecord.com/content/creighton-black-law-student-group-pens-letter-racism>; The Black Law Students Association of the SMU Dedman School of Law, *OPEN LETTER: Demands From The Black Law Students Association*, DAILY CAMPUS (June 25, 2020, 5:04 PM), <https://www.smudailycampus.com/opinion/open-letter-demands-from-the-black-law-students->

students took time away from their studies to organize, draft letters, gather signatures, and have very uncomfortable conversations with university administrators<sup>15</sup> and faculty about the need for change.<sup>16</sup>

*“Our experiences fighting for what we believe in quickly turned from empowering to time-consuming and, frankly, uncomfortable. As the events of the spring were unfolding, students of color began venting our grievances with the school’s lack of acknowledgment and support for minority students struggling to focus on their academic obligations while their world, as they knew it, was literally crumbling.”*

—A Black law student

Meanwhile, at some law schools, BIPOC faculty—who were experiencing their own trials with pandemic teaching, childcare, increased service obligations and mental fatigue from the political and racial unrest—were called upon to contribute substantial time to design and implement “diversity,” “inclusion,” or “anti-racism” initiatives with the hopes of increasing diversity and creating inclusive environments for BIPOC students and faculty.<sup>17</sup> While these requests were presumably well-meaning efforts to include the perspectives of BIPOC faculty, they resulted in BIPOC faculty diverting even more time and energy away from the production of scholarship—the coin of the realm<sup>18</sup>—placing them at further disadvantage in a promotion and tenure system already wrought with institutional biases.<sup>19</sup> BIPOC faculty also found themselves devoting additional time and energy to providing guidance and emotional support to their

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association; USD Law BLSA, *USD Law BLSA Open Letter* (Aug. 31, 2020), <https://www.facebook.com/usdlawblsa/posts/149088663540498>.

15. Jibril, Strokes, and Young, *supra* note 12.

16. HBSA Admin., *supra* note 15; The Black Law Students Association of the SMU Dedman School of Law, *supra* note 15.

17. See, e.g., Black Faculty and Faculty of Color at CUNY Law, *Statement and Demand for Action to Create an Anti-Racist Campus*, CUNY SCH. LAW, (June 30, 2020), [https://www.law.cuny.edu/newsroom\\_post/statement-from-black-faculty-of-color/](https://www.law.cuny.edu/newsroom_post/statement-from-black-faculty-of-color/) (“Black and non-Black faculty and staff of color, both at CUNY Law and throughout the U.S., routinely perform unrecognized labor beyond their job descriptions and in the service of their institutions, to confront anti-Blackness and other forms of racism. A wealth of research shows these contributions both sustain diversity and inclusion efforts in the academy and create additional demands that detract from the time required for fulfilling traditional expectations of all faculty.”).

18. See, e.g., Colleen Flaherty, *Where Caregiving and Gender Intersect*, INSIDE HIGHER ED (Mar. 31, 2021), <https://www.insidehighered.com/news/2021/03/31/where-and-how-gender-and-caregiving-intersect-professors-during-covid-19> (“[T]he gendered effects of the pandemic, including increased student needs that fall disproportionately on women and faculty of color, will also produce gaps in later career stages.”).

19. For discussions of the various hurdles that women of color face in the legal academy See Meera E. Deo, *A Better Tenure Battle: Fighting Bias in Teaching Evaluations*, 31 COLUM. J. GENDER & L. 7 (2015); Sahar F Aziz, *The Alpha Female and the Sinister Seven*, PRESUMED INCOMPETENT II: RACE, CLASS, POWER, & RESISTANCE WOMEN ACADEMIA 180 (Nov. 2020); MARCIA ALLEN OWENS ET AL., PRESUMED INCOMPETENT II (2020); Ann C McGinley, *Reproducing Gender on Law School Faculties*, 2009 BYU L. REV. 99 (2009).

BIPOC students at rates that appeared to be greater than their colleagues.<sup>20</sup> In addition, some BIPOC faculty had to make difficult decisions about the extent to which they would challenge the status quo or call for needed reforms, even when doing so could ostracize them politically or brand them as a trouble-maker or poor institutional citizen.<sup>21</sup> Needless to say, the weights were many and the burdens were heavy, and they continue to weigh us down.

Many law schools have slowly become more receptive to addressing the issues of diversity, equity, inclusion, and anti-racism (DEIA)<sup>22</sup> that were brought to their attention during the COVID-19 pandemic and Black Lives Matter (BLM) protests, and yet again after the mass shooting of Asian women in Atlanta.<sup>23</sup> While such efforts are sorely needed, law schools must also pay attention to the process through which these DEIA initiatives are designed and implemented, because the process in and of itself can further disadvantage and burden BIPOC students<sup>24</sup> and faculty<sup>25</sup> by placing additional discounted labor on these already weighted populations. We provide the following snapshot of this discounted labor based on public discourse, dialogue and conversations amongst our colleagues during the first year of the COVID-19 pandemic.

## II.

### THE DISCOUNTED LABOR OF PROBLEM IDENTIFICATION

The murder of George Floyd at the hands of police officers was a focusing event that drew attention not only to the disproportionate excessive use of force against Black persons, but also to the failure of law schools to address the ongoing racial violence and political upheaval, even when such external social problems created racial and ideological tensions within the law school classes themselves.<sup>26</sup> The lack of immediate action doubtlessly reinforced feelings of

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20. See, e.g., Kimberly Nettles-Barcelon et al., *Statement of Solidarity with Black Faculty*, UC DAVIS HEALTH (June 4, 2020), [https://health.ucdavis.edu/diversity-inclusion/leadership-messages/messages\\_statement-solidarity-with-Black-faculty.html](https://health.ucdavis.edu/diversity-inclusion/leadership-messages/messages_statement-solidarity-with-Black-faculty.html) (“At UC Davis, faculty of color are again on the frontlines of classrooms, labs, studios, and in our communities working tirelessly to attempt to provide answers to the unanswerable, solutions to what seems impossible, and hope for what seems unreachable. This arduous emotional and intellectual labor, which Black faculty must carry when they themselves are spent, is too often unseen.”).

21. Angela Onwuachi-Willig, *The Fire This Time: Reflections on Recent Killings and Protests*, RECORD (June 1, 2020), <https://www.bu.edu/law/record/articles/2020/dean-angela-onwuachi-willig-commentary-the-fire-this-time/>.

22. As opposed to the more historical and passive approach of “just not being racist,” anti-racism takes on the proactive approach of actively dismantling racist systems and integrating equity into the environment and curriculum of these institutions.

23. *Law Deans Antiracist Clearinghouse Project*, ASS’N AMERICAN L. SCHOOLS, <https://www.aals.org/antiracist-clearinghouse/> (last visited Feb. 25, 2021).

24. See, e.g., UCLA Black Law Student Association (BLSA), *supra* note 15.

25. Patricia A. Matthew, *What Is Faculty Diversity Worth to a University?* THE ATL., November 23, 2016, <https://www.theatlantic.com/education/archive/2016/11/what-is-faculty-diversity-worth-to-a-university/508334/>.

26. See *supra* note 15 (which includes a partial list of letters written by Black law students calling out their law schools for inaction and demanding action).

exclusion that have been voiced by BIPOC students.<sup>27</sup> The onus was placed on Black law students, or the BIPOC faculty whom they confided in, to demand that law schools address the lack of anti-racism and inclusion that became even more glaringly obvious during the aftermath of George Floyd’s murder.<sup>28</sup>

This scenario is not unique in that BIPOC faculty and students are commonly burdened with the task of identifying and raising DEIA issues to the attention of the governing body of the law school.<sup>29</sup> Being the community member that always raises issues comes at political costs, particularly for non-tenured faculty, who may be branded by administrators or colleagues as someone who is “difficult”, impolite, and even, at times, too revolutionary.<sup>30</sup> Gendered women BIPOC faculty may also be labeled as emotional or overreacting.<sup>31</sup>

During the course of our activism, we were frequently reminded of the power deferential that exists when BIPOC law students bring such issues to the attention of their faculty or law school administration—as they may be subjecting themselves to anxiety-provoking and at times hostile or dismissive interactions.

*“There is no comfortable way to challenge an institution or figure that can very literally end your career before it begins. I am mindful that I am challenging the Dean that will certify my Bar Application and the professors that shape my legal education. Even so, I do not believe that my desire to be an attorney is superior to my identity as a Black woman. And, the condescending nature of these conversations are equally infuriating and discouraging”*

—A Black law student

27. Travis Thickstun, *LSSSE Report: Law Schools Have More Work to Do On Diversity, Inclusion*, ABA (Oct. 13, 2020), <https://abaforlawstudents.com/2020/10/13/law-school-survey-student-engagement-diversity-inclusion/>.

28. See *supra* note 15; Nettles-Barcelon et al., *supra* note 21.

29. See, e.g., Colleen Flaherty, *The Souls of Black Professors*, INSIDE HIGHER ED (Oct. 21, 2020), <https://www.insidehighered.com/news/2020/10/21/scholars-talk-about-being-black-campus-2020> (“You have an issue, you bring it to a nontenured faculty member who is a person of color, or a woman, and they have to do all the heavy lifting because they teach race or some related issue. Everyone’s calling them all the time, they can’t get enough work done and you’ve already set that person up for failure.”); see also Amy Wagoner Johnson, *Institutional Mixed Messaging*, INSIDE HIGHER ED (June 30, 2020), <https://www.insidehighered.com/advice/2020/06/30/all-faculty-members-should-work-diversity-and-equity-initiatives-and-be-rewarded>. (“What also needs to change is institutional mixed messaging, as well as the overtaxing of certain faculty and staff members. We must turn our attention to inclusion, which implies some understanding of additional burdens and systemic and sustained biases underrepresented groups face, especially those of color.”)

30. See generally, MEERA E. DEO, *UNEQUAL PROFESSION: RACE AND GENDER IN LEGAL ACADEMIA*, Chapter 2 (2019). While the entire book addresses disparities among faculty of color and their white counterparts, Chapter 2 hones in on how these disparities and even potential solutions impact the relationships among colleagues.

31. *Id.*



While some may argue that the skills that these Black students use in advocating for themselves will help make them good lawyers, it is exhausting, distracting from their studies, and inequitable, because majority students are free to focus on academic performance without the additional responsibility of fighting for inclusion and respect. The attrition rate of BIPOC law students is already greater than that of their white colleagues.<sup>32</sup> How can we, as a profession, expect to improve retention and matriculation of BIPOC students when law schools saddle these same students with the discounted labor of problem identification and the emotional residue that is left behind from repeatedly recounting their experiences of ostracization and racial violence?

*“Articulating these constant feelings of grief and trauma not only weighed on us emotionally, but was time-consuming [as well].”*

—A Black law student

BIPOC students often seek out BIPOC faculty for guidance, particularly over matters that involve exclusion, ostracization, or even explicit discrimination.<sup>33</sup> While not all BIPOC persons in the legal profession have the same lived experience, the shared experience of being a minority member of a profession and the challenges that come with it lead BIPOC students to rightfully believe that their BIPOC faculty will offer guidance that is more in-tune with their lived realities.<sup>34</sup> In the presence of their BIPOC faculty, these students do not have to undertake the emotionally exhausting exercise of explaining what it is like to be discriminated against or excluded, because odds are that their BIPOC faculty had similar experiences as law students themselves and may currently, as BIPOC faculty, be living reincarnations of those experiences. If there are only a couple of BIPOC faculty at a law school, these few BIPOC faculty take on greater mentorship responsibilities than their majority counterparts.<sup>35</sup> After all, BIPOC faculty may feel that they are in the fortunate positions that they are in because of the help of BIPOC faculty that came before them and feel the need to give back to the BIPOC community. These responsibilities, though rewarding and fulfilling, can become overwhelming, especially amidst social upheaval that directly affects both faculty and students. This time and energy spent is just another form of discounted labor. Sure— BIPOC faculty can list their

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32. Kylie Thomas & Tiffane Cochran, *ABA Data Reveals Minority Students Are Disproportionately Represented in Attrition Figures*, ACCESSLEX INST. (Sept. 18, 2018), <https://www.accesslex.org/xblog/aba-data-reveals-minority-students-are-disproportionately-represented-in-attrition-figures>.

33. See *supra* note 31 and accompanying text.

34. Meera E. Deo, Walter R. Allen, A.T. Panter, Charles Daye, & Linda Wightman, *Struggles & Support: Diversity in U.S. Law Schools*, 23 Nat'l Black L.J. 71, 87 (2010) (“Students of color and white students alike report that faculty of color are often more accessible than whites and that female faculty tend to engage students more than male faculty.”).

35. See *supra* note 30 and accompanying text.

mentorship activities in their tenure application, but, at best, this service record offers a few bonus points, and does not compare to the weight given to single authored, traditionally placed law review articles.<sup>36</sup>

*“In holding the law school accountable, and helping with the implementation of multiple diversity initiatives, I relied heavily on mentorship from faculty of color. To be a student of color in any predominantly white space is to move with the belief that simply existing would be selfish – you must lift as you climb. I not only relied on these faculty members to advise me academically, but also navigate advocating for my beliefs to our administration and actually implement the changes the school dragged its feet on.”*

—A Black law student

### III.

#### THE DISCOUNTED LABOR OF SOLUTION GENERATION

Not only are BIPOC students and faculty relied upon to raise DEIA issues and provide mentorship regarding these issues, but they are also asked to propose solutions to the problems. BIPOC students and faculty may be asked to make recommendations directly or through their appointment to and expected involvement with a committee. While at times BIPOC students and faculty are given the opportunity to decline committee appointments, the existing power differentials may lead BIPOC students and faculty, particularly junior faculty, feeling that their participation is required.<sup>37</sup> Moreover, BIPOC students and faculty responsible for identifying problems may feel additional pressures to assist in solving the problem, lest they be accused of complaining, being disloyal to the law school, or raising the problem but failing to be a “part of the solution.” Here again, BIPOC students and faculty are expected to take time away from their studies and tenure/promotion activities to engage in discounted labor that only gives marginal career gains.<sup>38</sup> In addition to the time and emotional labor that this requires, BIPOC students and faculty may feel ill-

36. Richard J. Reddick et al., *(Cultural) Taxation Without Representation? How Educational Developers Can Broker Discourse on Black Faculty Lives in the #BlackLivesMatter*, 39 *TO IMPROVE THE ACADEMY* 1 (Spring 2020).

37. See Sharon L. Fries-Britt et al., *Underrepresentation in the Academy and the Institutional Climate for Faculty Diversity*, 5 *J. PROFESSORIALITY* 1, 5 (Jan. 2011), [https://www.researchgate.net/profile/Jeffrey-Milem/publication/264003593\\_Underrepresentation\\_in\\_the\\_Academy\\_and\\_the\\_Institutional\\_Climate\\_for\\_Faculty\\_Diversity/links/53f388200cf2155be34f0a3f/Underrepresentation-in-the-Academy-and-the-Institutional-Climate-for-Faculty-Diversity.pdf](https://www.researchgate.net/profile/Jeffrey-Milem/publication/264003593_Underrepresentation_in_the_Academy_and_the_Institutional_Climate_for_Faculty_Diversity/links/53f388200cf2155be34f0a3f/Underrepresentation-in-the-Academy-and-the-Institutional-Climate-for-Faculty-Diversity.pdf) (which explores how universities often rely on BIPOC students and faculty when it comes to their DEIA efforts).

38. For tenure-track faculty positions, publication record weighs significantly more heavily in the tenure and promotion process than does service. Meera E. Deo, *Intersectional Barriers to Tenure*, 51 *U.C. DAVIS L. REV.* 997, 1022 (2018); Kathrine Barnes & Elizabeth Mertz, *Is It Fair? Law Professors' Perceptions of Tenure*, 61 *J. Legal Educ.* 511, 530 (2012).

equipped to offer evidence-based solutions to these complex problems. To do justice for their fellow BIPOC colleagues, they may take on the responsibility of researching, devising, and proposing effective solutions. For example, in proposing law school community discussions of racially charged current events, BIPOC students and faculty might elicit input from impacted groups and university administrators, research what types of events are taking place at other schools, research best practices of delivering trauma-informed educational experiences, and perform other time-intensive tasks.

*“I remember being asked, ‘What would success look like to you? What would make our law school successful in its diversity efforts?’ I couldn’t help but laugh. I have never existed in a world with equity, and to draw on my human experience to give these people a solution they can stomach is quite the ask. Law schools were not meant for Black people and were certainly not designed with Black students in mind.”*

—A Black law student

Even if BIPOC students and faculty are not explicitly asked to provide solutions, they may feel the responsibility to propose (or demand) solutions, because of inaction from the law school governing body. For example, many Black student organizations that penned letters to law school administrators in response to the public injustices committed against Black persons in 2020 expressed feeling the responsibility to do so because of a failure of law school administrators to take concrete steps to support their Black students amidst publicly televised incidents of racialized violence.<sup>39</sup>

#### IV.

#### THE DISCOUNTED LABOR OF POLICY DESIGN, IMPLEMENTATION & ENFORCEMENT

The discounted labor does not end at problem identification or solution generation, but rather continues to include assistance with policy design, implementation and enforcement. Because many law schools do not have a full-time administrator that is assigned to DEIA policy design and implementation<sup>40</sup>, at least part of this work may fall back onto the BIPOC faculty (and students). And, even when schools have DEIA officers or administrators, they may lack the sufficient power and/or support staff to oversee such policy or program reform. Moreover, because of historic failures on the part of law school administrators to follow-through with promises to address issues of DEIA, BIPOC students and faculty may feel that it is their duty to hold the law school

39. See, e.g., *supra* note 15 and accompanying text.

40. Only 60% of law schools reported having a dedicated DEIA staff member. See *Findings on Racial Justice and DEI Efforts at U.S. Law Schools and Legal Employers*, National Association for Law Placement (October 2020), <https://www.nalp.org/1020research>.

accountable and ensure follow-through. The time and emotional work required to engage in such discounted labor again detracts from the performance measures against which BIPOC student and faculty are judged.

*“Just in the past several months, I have created a black student task force to check in regularly with the Dean of the law school and appropriate members of the law school’s community to help implement our demands, assisted in adopting a graduate chapter of Sisterhood Circle, and consulted faculty in an independently-run faculty group seeking to integrate anti-racism into the curriculum and further engage majority faculty and students. These changes do not just appear, but require groundwork that is commonly left to the minority faculty and students.”*

—A Black law student

## V.

### LIFTING THE WEIGHTS

BIPOC students and faculty should not be burdened with the responsibility of identifying, solving, and overseeing the implementation of DEIA initiatives. Law schools should hire DEIA staff tasked with this responsibility. These staff should be provided with enough power, resources and support to fulfill their duties, so that they can truly absorb some of the discounted labor currently being placed on BIPOC students and faculty. Moreover, since persons hired to oversee and implement DEIA initiatives are specialists with training in DEIA work, they will be able to propose and implement the most evidence-based initiatives. DEIA staff can assist law schools in providing proactive mentorship and support of BIPOC students, especially during times of crises.

In addition, administrators should take steps to decrease the service labor assigned to BIPOC faculty. Deans should assume that BIPOC faculty are performing greater levels of mentorship than the average faculty member, and when determining committee assignments or other service obligations to the law school, should assign a lighter load to BIPOC faculty, particularly those that are pre-tenure. Law schools should hire more BIPOC faculty to help more equally distribute the work of mentoring BIPOC students on issues that benefit from the shared perspective of lived experience. Moreover, increasing BIPOC faculty in law school ranks communicates inclusion to BIPOC students through representation.

Finally, non-BIPOC tenured full professors and high-ranking administrators—persons who have institutional power, protection and privilege—should pick up the weights so that their BIPOC colleagues and students do not have to. They can do this by proactively checking-in with BIPOC colleagues and students, asking them if there are issues that should be addressed,

listening non-judgmentally to the response, and then zealously and tirelessly advocating on behalf of their BIPOC colleagues.

We acknowledge that there is much work to be done and that the weights that BIPOC faculty and students carry during their respective races are many, varied, and arduous, and that those who are privileged to run weightless may resist the call to burden themselves with the weights carried by others. However, without a proper accounting of discounted labor and redistribution of burdens, among other DEIA work, the race to the top in the legal profession and the legal academy will continue to be a rigged race.

*“There are gatekeepers, and these gatekeepers can come in the form of a blatant racist or someone too comfortable or scared to go up against the systemic racism in our country. Both must be challenged.”*

—A Black law student