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GET OUT: STRUCTURAL RACISM AND ACADEMIC TERROR

RENEE NICOLE ALLEN*

ABSTRACT

The horror is that America . . . changes all the time, without ever changing at all.

—James Baldwin¹

Released in 2017, Jordan Peele's critically acclaimed film *Get Out* explores the horrors of racism. The film's plot involves the murder and appropriation of Black bodies for the benefit of wealthy, white people. After luring Black people to their country home, a white family uses hypnosis to paralyze victims and send them to the Sunken Place where screams go unheard. Black bodies are auctioned off to the highest bidder; the winner's brain is transplanted into the prized Black body. Black victims are rendered passengers in their own bodies so that white inhabitants can obtain physical advantages and immortality.

Like *Get Out*, this Article reveals academic horrors that are far too familiar to people of color. In the legal academy, structural racism is the monster, and under the guise of academic freedom, faculty members inflict terror on marginalized people. Black bodies are

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I chose to anchor this Article with James Baldwin quotes because his words—a product of his lived experiences with racial violence and trauma—continue to powerfully critique American racism. In similar fashion, I hope to inspire a critique of racism and discrimination in the legal academy. See EDDIE S. GLAUDE JR., BEGIN AGAIN: JAMES BALDWIN'S AMERICA AND ITS URGENT LESSONS FOR OUR OWN xxii (2020) ("Baldwin saw the brutality of Jim Crow up close and witnessed its effects on those who struggled against brutality, as well as those who defended it. He also felt its effects on himself. He saw friends murdered in cold blood. The deaths of Medgar Evers, Malcolm X, and Martin Luther King, Jr., became symbolic of a broader and more systemic betrayal by the country.").

1. See EDDIE S. GLAUDE JR., BEGIN AGAIN: JAMES BALDWIN'S AMERICA AND ITS URGENT LESSONS FOR OUR OWN 150 (2020) (quoting James Baldwin).

objectified and colonized in the name of diversity and anti-racism. No matter how loud we scream, it remains a Sunken Place. Only time will tell if the anti-racism proclamations of 2020 are a beginning or a killer ending.

This Article explores the relationship between structural racism and academic terror in the legal academy and articulates an effective framework for analyzing academic terrorism.

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INTRODUCTION

The obligation of anyone who thinks of himself as responsible is to examine society and try to change it and to fight it—at no matter what risk.

—James Baldwin²

2. James Baldwin, A Talk to Teachers (Oct. 16, 1963), <http://www2.fairmontstate.edu/users/pedwards/talktoteachers.htm> [<https://perma.cc/JSL3-YSNZ>].

The film *Get Out* explores the horrors of racism.³ On the surface, it's a typical horror story. Chris, a Black man, is lured to the home of his white girlfriend's parents so that they can auction off his body, kill him, and implant his brain into the body of a white person.⁴ And following a common horror film trope, a Black person is killed in the opening scene.⁵ As the plot unfolds, we learn that Chris' planned death is a family affair where each family member—also members of the Order of the Coagula cult—has a key assignment.⁶ Rose, the girlfriend, engages in fake platonic and romantic relationships to capture Black victims.⁷ Missy, the mother and a therapist, uses hypnosis to paralyze victims and send them to the Sunken Place where their screams go unheard.⁸ Jeremy, Rose's brother, captures and kills Black victims.⁹ Dean, the father and a physician, performs the brain implants that give white people physical advantages and immortality.¹⁰

When you dig deeper, it's a story about racism that is far too familiar to people of color. The film's plot involves the murder and appropriation of Black bodies for the benefit of wealthy, white people. Black bodies are auctioned off to the highest bidder; the winner's brain is transplanted into the prized Black body. Black victims are rendered passengers in their own bodies so that white inhabitants can obtain physical advantages and immortality. In subsequent viewings (and after reading a few blogs),¹¹ three major themes emerge: white liberalism, the Sunken Place, and the appropriation of Black bodies for white social and economic gain.

3. See *GET OUT* (Universal Studios 2017).

4. *Id.*

5. See *id.*

6. See *id.*

7. *Id.*

8. *Id.*

9. *GET OUT*, *supra* note 3.

10. *Id.*

11. E.g., Alissa Wilkinson, *Get Out is a horror film about benevolent racism. It's spine-chilling*, VOX (Feb. 25, 2017, 10:30 AM), <https://www.vox.com/culture/2017/2/24/14698632/get-out-review-jordan-peelee> [https://perma.cc/KF3Q-UD2B]; Elena Howe, *Seven directors 'weaponize storytelling' to stand against hatred and violence*, L.A. TIMES (Nov. 30, 2017, 5:00 AM), <https://www.latimes.com/entertainment/envelope/la-en-mn-di-rectors-roundtable-20171129-story.html> [https://perma.cc/S98M-PQ67]; Aja Romano, *How Get Out deconstructs racism for white people*, VOX (Mar. 7, 2017, 1:30 PM), <https://www.vox.com/culture/2017/3/7/14759756/get-out-benevolent-racism-white-feminism> [https://perma.cc/8T7A-7GNK]; Ricardo Lopez, *Jordan Peele on How He Tackled Systemic Racism as Horror in 'Get Out'*, VARIETY (Nov. 1, 2017, 3:39 PM), <https://variety.com/2017/film/news/jordan-peelee-get-out-systemic-racism-1202604824> [https://perma.cc/TCS4-DUGR].

White liberals espouse commitments to anti-racism¹² but act in ways that closely identify with post-racial racism.¹³ Masked in the language of fairness and equity, white liberalism actually further subordinates non-white people.¹⁴

[W]hite liberalism[] is the actual liberalism that has been historically dominant since modernity: a liberal theory whose terms originally restricted full personhood to whites (or, more accurate, white men) and relegated nonwhites to an inferior category, so that its schedule of rights and prescriptions for justice were all color-coded. . . . Though there have always been white liberals who have been antiracist . . . they have been in the minority.¹⁵

Color blindness,¹⁶ benevolent racism, and racial microaggressions are manifestations of white liberalism that mask a system of racial dehumanization.¹⁷ Recognizing that people of color are gaslighted by these subtle forms of racism, Jordan Peele, director of *Get Out*, said,

12. SHANNON SULLIVAN, GOOD WHITE PEOPLE: THE PROBLEM WITH MIDDLE-CLASS WHITE ANTI-RACISM 3 (2014) (citing Lerone Bennett) (“[T]he bulk of white people in the post–Jim Crow United States and other similar white-dominated nations who consider themselves to be non- or anti-racist . . . the ‘good’ white people whose goodness is marked by their difference from the ‘bad’ white people who are considered responsible for any lingering racism in a progressive, liberal society.”).

13. See EDUARDO BONILLA-SILVA, RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN AMERICA 37 (6th ed. 2021) (describing how the general acceptance that racial discrimination disappeared in the 1970s went “viral” when Barack Obama became America’s first Black president); while most post-racial scholarship defines the origin of white liberalism in the context of Barack Obama’s presidential election, Dr. King cautioned of white moderates. See Martin Luther King, Jr., Letter from a Birmingham Jail (Apr. 16, 1963), https://www.africa.upenn.edu/Articles_Gen/Letter_Birmingham.html [<https://perma.cc/Q2US-F9HN>] (“Shallow understanding from people of good will is more frustrating than absolute misunderstanding from people of ill will.”); Jeanne Theoharis, *Martin Luther King and the ‘polite’ racism of white liberals*, WASH. POST (Jan. 17, 2020, 6:49 AM), <https://www.washingtonpost.com/nation/2020/01/17/martin-luther-king-polite-racism-white-liberals/> [<https://perma.cc/K3LA-CXRT>].

14. Charles W. Mills, *Racial Liberalism*, 123 PUBL’NS OF THE MODERN LANGUAGE ASS’N OF AM. 1380, 1381 (2008) (“Liberalism . . . has historically been predominantly a racial liberalism, in which conceptions of personhood and resulting schedules of rights, duties, and government responsibilities have all been racialized. And the contract, correspondingly, has really been a racial one, an agreement among white contractors to subordinate and exploit non-white noncontractors for white benefit.”); see also Marissa Jackson Sow, *Whiteness as Contract*, 78 WASH. & LEE L. REV. 1803, 1804 (2022).

15. Mills, *supra* note 14, at 1382.

16. Adia Harvey Wingfield, *Color Blindness Is Counterproductive*, THE ATLANTIC (Sept. 13, 2015), <https://www.theatlantic.com/politics/archive/2015/09/color-blindness-is-counterproductive/405037/> [<https://perma.cc/NL9X-AN6D>] (defining colorblindness as an ideology that ignores discrimination by claiming not to see race).

17. See Romano, *supra* note 11 (defining microaggressions as “a seemingly innocuous casual comment or gesture that’s typically used to dismiss and degrade the experience and identities of women and minorities and other marginalized people.”).

“Part of being [B]lack in this country, and I presume being any minority, is constantly being told that . . . we’re seeing racism where there just isn’t racism.”¹⁸ Peele strategically locates the story in upstate New York to show racism in a place the audience might not expect¹⁹ and highlights “the insidious qualities that white liberals have.”²⁰ In *Get Out*, Dean, the father and a physician who carries out the transplants, reassures Chris that his family is not racist while engaging in subtle racial discrimination and blatant racial violence.²¹ We see white liberalism in his rants about deer,²² having Black servants,²³ voting for Obama,²⁴ and his father losing an Olympic race to Jesse Owens.²⁵ We see it again later in the film when, relying on stereotypes about Black masculinity and sexuality, white guests at the garden party interrogate Chris about his physical strength and sexual abilities.²⁶

Analyses of the Sunken Place consistently highlight the oppression of marginalized people. It is “recognized as a metaphor for the feelings of helplessness and subjugation that [B]lack people experience in [a] society built on systemic, institutional racism. It also represents the control that white people can assert over [B]lack people through psychological, economic, and cultural oppression.”²⁷ Peele tweeted, “The Sunken Place means we’re marginalized. No matter how hard we scream, the system silences us.”²⁸ He also explained,

18. John Mangan, *Get Out’s Ending Explained*, LOOPER (May 14, 2020, 2:24 PM), <https://www.looper.com/143902/get-out-ending-explained> [<https://perma.cc/J7EG-6CXW>] (quoting Jordan Peele).

19. Geoff Herbert, *Hit new movie ‘Get Out’ turns racial issues into horror story in Upstate NY*, SYRACUSE.COM (Feb. 28, 2017, 4:34 PM), https://www.syracuse.com/entertainment/2017/02/get_out_movie_jordan_peele_upstate_ny.html [<https://perma.cc/H73B-G9NW>] (quoting Jordan Peele) (“It was really important for me to not have the villains in this film reflect the typical red state type who is usually categorized as being racist.”).

20. Lopez, *supra* note 11 (quoting Jordan Peele).

21. See GET OUT, *supra* note 3.

22. *Id.* (“You know what I say? I say one down, a few hundred thousand to go. . . . They’re everywhere; like rats. The threat they pose to the ecology is pretty serious stuff.”).

23. *Id.* (“I know what you’re thinking. White family, [B]lack servants. Total cliché. . . . We hired them a few years ago to help care for my parents; they’re like part of the family now. Couldn’t bear to let them go. I hate the way it looks though. . . .”).

24. *Id.* (“And by the way, I would’ve voted for Obama a third term if I could’ve. Best President in my lifetime. Hands down.”).

25. *Id.* (“My dad’s claim to fame. He was beat out by Jesse Owens in the qualifying round for the Berlin Olympics in ’36. . . . Talk about a perfect moment in history. There’s Hitler on his high horse with his perfect Aryan race, and here comes this [B]lack fella to prove him wrong in front of the world. What a moment. . . . He almost got over it.”).

26. *Id.*

27. *Where Does Sunken Place Come From?*, DICTIONARY.COM, <https://www.dictionary.com/e/pop-culture/sunken-place> [<https://perma.cc/9R6T-Q26F>] (last visited Apr. 13, 2023).

28. Jordan Peele (@JordanPeele), TWITTER (Mar. 17, 2017, 12:12 AM), <https://twitter.com/JordanPeele/status/842589407521595393> [<https://perma.cc/E75F-CNS3>].

“the [S]unken [P]lace is this metaphor for the system that is suppressing the freedom of [B]lack people, of many outsiders”²⁹ In *Get Out*, Missy invokes the trauma of Chris’ mother’s death and taps a tea cup to send Chris to the Sunken Place where he can see life happening on a TV screen, but he lacks agency to do anything about it.³⁰ His screams go unheard.³¹

While *Get Out* focuses on Chris, we learn that other Black bodies are taken without authority or right.³² The appropriation of Black bodies is foreshadowed in the opening scene where we see a Black man abducted and murdered.³³ The murder of a Black character during the first few minutes of the movie appears to be nothing more than a common horror trope and Peele’s critique of the lack of representation of Black people in horror films (and films generally). But, we see him again in the film and learn that his body has been appropriated for use by an elderly white woman—her husband’s brain has been transplanted into his body.³⁴ At the annual garden party, unknown to Chris, white guests inspect and interrogate him for potential appropriation.³⁵ One guest remarks that “Black is ‘in fashion[.]’”³⁶ Interested in his physical ability, an elderly former professional golfer requests, “[l]et’s see your form.”³⁷ It may become clear to the audience that guests are inspecting Chris for auction when, in what may be the most egregious act of the party scene, an elderly woman whose husband is wheelchair-bound interrogates Rose (the girlfriend) about Chris’ sexual prowess specifically asking, “is it true? . . . Is *it* better?”³⁸

For people of color, law schools are a metaphorical Sunken Place. Though not literally screaming, legal scholars and law students have been telling stories of academic horror for decades.³⁹ And since law schools have taken little action to address structural racism,⁴⁰

29. Howe, *supra* note 11.

30. *GET OUT*, *supra* note 3.

31. *Id.*

32. See *Appropriate*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/appropriate> (last visited Apr. 13, 2023) (defining appropriate as the act of taking or making use of a person or thing “without authority or right”).

33. *GET OUT*, *supra* note 3.

34. After his encounter with Chris, we see “Logan” showing off his new body to other partygoers. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.* (emphasis added).

39. It is impossible to fully list the works of legal scholars and law students here.

40. Law schools have long participated in “diversity doublespeak,” while ignoring structural and systemic racism. See Cheryl L. Wade, “*We Are An Equal Opportunity Employer*”: *Diversity Doublespeak*, 61 WASH. & LEE L. REV. 1541, 1543 (2004) (defining

we can conclude our screams have gone unheard. While our bodies aren't being stolen, they are being used to promote diversity and further the appearance of anti-racism.⁴¹ The appropriation of anti-racist rhetoric helps law schools capitalize on public personas of racial justice while doing little to address the power structures that protect faculty members who, under the guise of academic freedom, inflict harm on marginalized students, staff, and faculty. In 2020, in the wake of a national reckoning with race, law schools joined the plethora of institutions espousing commitments to anti-racism.⁴² But law schools cannot satisfy their commitments to anti-racism without dismantling the policies and traditions that implicitly and explicitly perpetuate racism. In the legal academy, real-life horrors are rooted in structural racism.

This Article is the first to articulate a framework for academic terror—overt and covert faculty behaviors directed at racially marginalized students, staff, and faculty under the guise of academic freedom—in institutions steeped in structural racism.⁴³ We see academic terror in the classroom and in the broader academy when, for example, law professors assert that there is pedagogical value in using contemptuous terms to reference Black people and actually use them,⁴⁴ and when law professors encourage junior faculty of

“diversity doublespeak” as the practice of promoting diversity, inclusion, and access to equal opportunity while ignoring ongoing racism and implying that these issues have been resolved).

41. *Id.*

42. *Law Deans Antiracist Clearinghouse Project*, ASS'N OF AM. L. SCHS., <https://www.aals.org/antiracist-clearinghouse> [<https://perma.cc/YZJ7-FFSS>] (last visited Apr. 13, 2023).

43. This Article focuses on racial marginalization—specifically academic terror that results from a history of anti-Black racism for Black students, staff, and faculty—but the definition could be applied to other *racially* marginalized groups.

44. See, e.g., Karen Sloan, *Stanford Law Embroiled in Another 'N-Word' Controversy*, LAW.COM (June 1, 2020, 2:46 PM), <https://www.law.com/therecorder/2020/06/01/stanford-law-embroiled-in-another-n-word-controversy> [<https://perma.cc/BVC8-VJLL>] (describing two incidents of professors using the racial epithet at Stanford law in a seven-month time period); David Raban, *Racism Thrives at the Law School*, CHI. MAROON (Mar. 5, 2019), <https://www.chicagomaron.com/article/2019/3/5/racism-thrives-law-school> [<https://perma.cc/9TFZ-3VSN>] (describing a law professor's use of the N-word and sharing a racist story); LAWPROFBLOWG, *Use Racial Slurs In The Classroom!*, ABOVE THE LAW (May 4, 2021, 1:13 PM), <https://abovethelaw.com/2021/05/use-racial-slurs-in-the-classroom> [<https://perma.cc/EH85-7VSU>] (critiquing a law review article authored by two law professors who argue that there is pedagogical value in quoting epithets in and outside of class); Kathryn Rubino, *Prominent Law School Professor Drops the N-Word After Specifically Being Asked Not To Do So*, ABOVE THE LAW (Mar. 5, 2020, 1:20 PM), <https://abovethelaw.com/2020/03/prominent-law-school-professor-drops-the-n-word-after-specifically-being-asked-not-to-do-so> [<https://perma.cc/365S-2VD8>]; Debra Cassens Weiss, *Stanford law prof who used quote with racial slur in class says he won't do it again*, AM. BAR ASS'N J. (June 2, 2020, 3:25 PM), <https://www.abajournal.com/news/article/stanford-law-prof-who-used-quote-with-racial-slur-in-class-says-he-wont-do-it-again> [<https://perma.cc/5T2H-Q3P5>].

color to not write about race and racial justice.⁴⁵ Next, the harmed student, staff, or faculty member reports the incident to law school administration. Often details of academic terror are shared publicly. Then, law deans make public statements denouncing racism and announce an investigation. And finally, with speech and behaviors protected by so-called academic freedom, the faculty member continues to teach, creating opportunities for academic terror to continue to occur. Marginalized students, staff, and faculty are directly and indirectly harmed by incidents of academic terror. And when perpetrators are retained and celebrated, they feel the effects of structural violence. Incidents of academic terror and structural violence make up the system of academic terrorism.

While the definition of academic terror could be applied to any racially marginalized group, my focus is on the academic terror that Black students, faculty, and staff experience as the result of a history of anti-Black racism. The connection between modern marginalization and historical efforts to condemn Blackness cannot be ignored. Falsehoods about Black people were created to justify enslavement and place white people highest on the racial hierarchy; maintenance of the hierarchy required the creation of discriminatory race laws.⁴⁶ Black people “deemed neither U.S. citizens or people, existed to merely better the lives of Whites.”⁴⁷ Anti-Black narratives continued post emancipation in attempts to prove that Black people were exceptionally disease-prone, better off enslaved, and that the race was heading towards extinction.⁴⁸ Condemnation of Blackness exemplified through pervasive negative stereotypes that started during the period of enslavement persists in the ways Black people are criminalized and abused by police.⁴⁹ Anti-Black racism is present

45. See Okianer Christian Dark, *Just My 'Magination*, 10 HARV. BLACKLETTER L.J. 21, 22 (1993) (“Don’t write that Black stuff.”); Lori Latrice Martin, Biko Mandela Gray & Stephen C. Finley, *Endangered and Vulnerable: The Black Professoriate, Bullying, and the Limits of Academic Freedom*, 10 AM. ASS’N OF UNIV. PROFESSORS J. ACAD. FREEDOM 1, 8 (2019) (“The scholars themselves are viewed as inferior because of their race, and their scholarship is also viewed as inferior because of its focus on race.”); Goldburn P. Maynard Jr., *Killing the Motivation of the Minority Law Professor*, 107 MINN. L. REV. 245, 245–46 (2022).

46. See GLORIA J. BROWNE-MARSHALL, *RACE, LAW, AND AMERICAN SOCIETY: 1607 TO PRESENT* 5 (2d ed. 2013).

47. *Id.* at 9. “As relates to these States, it is too plain for argument, that they [Blacks] have never been regarded as a part of the people or citizens of the State, nor supposed to possess any political rights which the dominant race might not withhold or grant at their pleasure.” *Id.* (quoting *Scott v. Sandford*, 60 U.S. (19 How.) 393, 412 (1857) (enslaved party)).

48. See FREDERICK L. HOFFMAN, *RACE TRAITS AND TENDENCIES OF THE AMERICAN NEGRO* 325 (1896).

49. See KHALIL GIBRAN MUHAMMAD, *THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA* 2 (2019).

in every aspect of American life including the legal academy. Thus, even in academic spaces, “[t]o be [B]lack and conscious of anti-[B]lack racism is to stare into the mirror of your own extinction.”⁵⁰

In the Sunken Place that is law school, accounts of academic terror are often met with silence and indifference from people in power. Law schools often fail to examine and acknowledge structural racism when incidents of academic terror occur; such incidents are often regarded as protected by academic freedom without an examination of whether speech or conduct is *actually* protected by academic freedom. An academic terror framework can help us better analyze incidents of academic terror. Under the framework, when incidents of academic terror occur, we should:

- a) apply the definition of academic terror to each incident;
- b) evaluate whether a faculty member’s speech or conduct is actually protected by academic freedom;
- c) evaluate the institutional response by applying the definition of structural violence; and
- d) assess the collective, cultural trauma.

This four-step process for analyzing incidents of academic terror allows us to see academic terrorism as systemic as each incident further subordinates racially marginalized groups, not just the student, staff, or faculty member involved. And while academic terrorists should be held accountable for their actions, it allows us to see racism as more than an individual, malicious endeavor. Further, when law schools are genuinely invested in anti-racism, the framework can be used to forestall incidents of academic terror and dismantle structural racism. For example, when examining the ways Blackness is a disability in the law school white space as I argue herein, a faculty curriculum committee could: examine the ways Black students experience academic terror when law is taught without regard to race and social context; provide faculty members with resources to incorporate race and social context into existing required courses; recommend an institutional approach that prioritizes an incorporation of race and social context into required courses; and assess the collective, culture trauma that occurs when the evolution of law is taught without regard to social context, when whiteness is accepted as a norm, and when the application of law is regarded as race-neutral.

50. Ibram X. Kendi, *The American Nightmare*, THE ATLANTIC (June 1, 2020), https://www.theatlantic.com/ideas/archive/2020/06/american-nightmare/612457/?utm_source=copy-link&utm_medium=social&utm_campaign=share [https://perma.cc/6CWC-CW8G].

This Article explores the relationship between structural racism and academic terror in the legal academy. First, this Article addresses the fact that structural reforms have not resulted from Black trauma being on display in popular media and everyday life. Next, this Article examines structural racism. Specifically, it explores how academic policies, practices, and traditions—specifically, academic freedom—permit academic terror and protect academic terrorists. Then, this Article defines structural violence and academic terror and articulates an effective framework for analyzing academic terrorism. Next, it outlines an academic terrorism framework, which will allow us to analyze racism in the legal academy more effectively. Finally, this Article surveys anti-racism statements and identifies themes to assess whether law schools aspire to dismantle structural racism and tackle academic terror, or whether the statements are simply appropriations of anti-racism rhetoric for social and economic gain.

I. TRAUMA FOR PROGRESS⁵¹

I can't be a pessimist, because I'm alive. To be a pessimist means you have agreed that human life is an academic matter, so I'm forced to be an optimist. I'm forced to believe that we can survive whatever we must survive.

—James Baldwin⁵²

In 1991, video captured multiple Los Angeles Police Department (LAPD) officers beating Rodney King.⁵³ More than thirty years later, the white American conscience is somehow still shocked to learn about harm and murder of unarmed Black people by police

51. I added this section in response to multiple requests from white law faculty members that I add more examples of the academic terror I describe in this Article. After three law faculty workshops, I received no similar comments from Black faculty or faculty of color. Why is that? If this Article is an academic protest of academic terror, then I am declining to change the way I protest. I am not convinced more examples are necessary or matter. See Zack Linly, *It's time to stop talking about racism with white people*, WASH. POST (Sept. 7, 2016, 6:00 AM), <https://www.washingtonpost.com/posteverything/wp/2016/09/07/its-time-to-stop-talking-about-racism-with-white-people> [https://perma.cc/FC6M-D8ZB] (“[M]uch of white America is more bothered by our methods of protest than they ever will be about the injustices we’re protesting. Let’s dispel the notion that if we only protested better, white people will miraculously become more receptive of our message . . .”).

52. JAMES BALDWIN, *I AM NOT YOUR NEGRO* 108 (2017).

53. *LAPD officers beat Rodney King on camera*, HISTORY, <https://www.history.com/this-day-in-history/police-brutality-caught-on-video> [https://perma.cc/DA3H-NBBJ] (last visited Apr. 13, 2023).

and civilians despite the fact that in recent years Americans have been inundated with viral videos of such harm.⁵⁴ And, although the often-forced inclusion of Black people has been met with sometimes violent push-back,⁵⁵ academics are somehow still seemingly shocked to learn of incidents of academic terror. Surely law professors, whether through personal experience or observation, know about explicit racist acts in the academy. And certainly, some are aware of harms that result from structural racism. Black lives and the academic terror Black people experience in the legal academy, are not academic matters. So, this Article aims to give voice to the Black experience⁵⁶ and provide an academic framework for negative experiences that result from structural racism without offering trauma for progress.

While *Get Out* provides a framework for my analysis, the film is not without criticism. *Get Out*'s powerful messages about racism are not intended to benefit Black people's understanding of race and racism. Black people already know about white liberalism, the Sunken Place, and the appropriation of Black bodies for white social and economic gain as these themes make up our lived experience. In reality, what we see in the film is Black trauma on display in exchange for white understanding or enlightenment. This Article does not offer trauma for such progress.

Considering anti-racism, particularly anti-Black racism, years of public displays of Black harm has resulted in minimal progress in terms of structural reform, equity, and positive experiences for Black people. This is demonstrated by the fact that since the hashtag

54. See Savala Nolan, *Black and Brown People Have Been Protesting for Centuries. It's White People Who Are Responsible for What Happens Next*, TIME (June 1, 2020, 1:32 PM), <https://time.com/5846072/black-people-protesting-white-people-responsible-what-happens-next> [https://perma.cc/4E3R-3MB4] (“[Whiteness] is a significant part of America’s problem with race. . . . [W]here dozens of cities are convulsing with racial pain, state violence, and the shell-shocked gaze of many white Americans asking themselves how this can be happening again. (It is not a mystery to [B]lack people of color.)”); Tre Johnson, *When black people are in pain, white people just join book clubs*, WASH. POST (June 11, 2020, 6:10 PM), https://www.washingtonpost.com/outlook/white-antiracist-ally-ship-book-clubs/2020/06/11/9edcc766-abf5-11ea-94d2-d7bc43b26bf9_story.html [https://perma.cc/ZS8K-PLGL] (“Once again, as the latest racial travesty pierces our collective consciousness, I watch many of my white friends and acquaintances perform the same pieties they played out after Trayvon, Eric, Sandra, Korryn, Botham, Breonna. . . . This is the racial ouroboros our country finds itself locked in, as [B]lack Americans relive an endless loop of injustice and white Americans keep revisiting the same performance . . .”).

55. See Gail S. Stephenson, *The Unsung Heroes of the Desegregation of American Law Schools*, 51 J. L. AND EDUC. 118, 181–85 (2022).

56. Because, like Issa Rae, “I’m rooting for everybody Black.” See Variety, *Issa Rae—‘I’m rooting for everybody black’—Full Emmys Red Carpet Interview*, YOUTUBE (Sept. 17, 2017, 5:04 PM), <https://youtu.be/WafoKj6MzcU> [https://perma.cc/5D96-HACD].

first appeared in 2013,⁵⁷ people have continued to rally around the concept of Black people simply mattering out of necessity as Black people continue to experience death, violent harm, explicit and implicit racism.⁵⁸ And in 2022, despite the adoption of #BlackLivesMatter as a rallying cry from people of all races, Black people in all spaces—including academia—are still expected to put trauma on display “to be of importance.”⁵⁹ Of the most egregious examples of academic terror is the persistence of law professors who insist on using racial epithets to refer to Black people in total disregard to the harm Black students and Black faculty repeatedly express such terms cause.⁶⁰ Do legal academics need multiple examples of academic terror to understand that it exists? No, and such enlightenment is not my goal or my responsibility.⁶¹ To that end, limited examples of Black trauma are provided herein.⁶²

II. STRUCTURAL RACISM

To accept one's past—one's history—is not the same thing as drowning in it; it is learning how to use it. An invented past can never be used; it cracks and crumbles under the pressures of life like clay in a season of drought.

—James Baldwin⁶³

57. See *8 Years Strong*, BLACK LIVES MATTER (July 13, 2021), <https://blacklivesmatter.com/8-years-strong> [<https://perma.cc/EMJ8-MMM3>].

58. See BONILLA-SILVA, *supra* note 13 (noting the view held by white people that racism has all but disappeared has led to increased direct racism in recent years).

59. *Matter*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/matter> [<https://perma.cc/2BKD-7CWF>] (last visited Apr. 13, 2023).

60. See Rubino, *supra* note 44 (describing a law professor's repeated use of a racial epithet, even after they were asked not to do so).

61. I will not leave my pen in the blood of my people to prove a point. See AUDRE LORDE, *OUR DEAD BEHIND US: POEMS* (W. W. Norton, 1986) (“I cannot recall the words of my first poem but I remember a promise I made my pen never to leave it lying in somebody else's blood.”); Nolan, *supra* note 54 (“[I]t is white people . . . who are responsible for what happens now. Either they work to understand—and change—how white supremacy moves in and through their lives, hearts, minds, and spaces, or they decide they don't have time, they're too scared, they can't deal with it, or . . . they linger in the fallacy that they could never be involved in a racist incident. Either they accept that they have inherited this house of white supremacy, built by their forebears and willed to them, and they are now responsible for paying the taxes on that inheritance, or the status quo continues.”).

62. Linly, *supra* note 51 (“We've spelled it out for white America a hundred different ways . . . We've laid out all the statistics and all of our millions of personal testimonies. We've made it clear that even though the subject of police brutality, as a sensationalized national discussion covered by mainstream media, is a relatively new phenomenon, it is an issue as old as our involuntary occupation of this country.”).

63. JAMES BALDWIN, *THE FIRE NEXT TIME* 95 (1963).

If we are to accept our past, the history of Black people in the legal academy starts with exclusion. Our uninvented past includes law schools across the country fighting hard to prevent the admission of Black students.⁶⁴ And while Black people are no longer physically excluded from law schools, in the same way Jim Crow laws are no longer used to reinforce Black subordination, the structural inequality that resulted from policies of exclusion continue to harm Black people in the academy.⁶⁵ To understand the relationship between structural racism and academic terror, we must first examine structural racism in the legal academy.

This section begins by defining structural racism. Then, it provides meaningful examples of how structural racism presents in the legal academy. Next, it defines the law school white space. And finally, I argue that Blackness is a disability in the law school white space because of the racial caste system that causes Black people to experience explicit and implicit discrimination.

A. Structural Racism

Structural racism is a societal web of social, economic, and governmental practices, systems, and policies that, though typically race-neutral, advantages people classified as white and disadvantages those who are classified as people of color. This form of racism operates regardless of the intent of individual actors and can only be understood by taking into account a given social and historical context. It is distinguished from individual-style racism by its systemic, self-replicating qualities. Where individual racism is about prejudiced attitudes and behaviors, structural racism is about societal systems.⁶⁶

Structural racism is challenging to conceive because racism is often thought “narrowly to mean dramatic, indefensible, and intentional acts of vicious bigotry.”⁶⁷ While explicit acts of interpersonal racism are easy for most to identify, the more subtle consequences

64. See, e.g., *Sweatt v. Painter*, 339 U.S. 629, 631, 636 (1950) (holding that University of Texas School of Law’s refusal to admit Herman Marion Sweatt, a Black man, was unconstitutional because the school established for Black students was not substantively equal).

65. Kimani Paul-Emile, *Blackness as Disability?*, 106 GEO. L.J. 293, 312 (2018) (“Structural inequality is often the result of unaddressed racial stratification caused by prior legally sanctioned restrictions on [B]lack people. These inequities were ultimately frozen in place when the restrictions were lifted but no reparations were ever made.”).

66. Doron Samuel-Siegel, Kenneth S. Anderson & Emily Lopynski, *Reckoning with Structural Racism: A Restorative Jurisprudence of Equal Protection*, 23 RICH. PUB. INT. L. REV. 138, 138–39 (2020).

67. Richard Delgado, *Recasting the American Race Problem*, 79 CALIF. L. REV. 1389, 1395 (1991) (quoting Delgado).

of structural racism can be challenging for some to conceive. This is especially true of structural racism in the legal academy although we know that law and legal institutions have long supported white male supremacy and “the continued systemic operation of practices that advantage the historically privileged in law”⁶⁸ One way to think about structural racism in the legal academy is to think of it as an ecosystem where systems—institutions, law, and education—are interconnected and each system maintains homeostasis, the stable execution of traditions, practices, and policies which disadvantage Black people and people of color.⁶⁹ And “when one institution disadvantages People of Color, the harm created is felt across all the components, making it exponentially more difficult to escape the disadvantage.”⁷⁰

Academic terror is the result of individual and structural racism, but often the focus on individual acts misdirects our attention as such individual acts do not account for the ways traditions, practices, and policies within the legal academy “produce foreseeable, even if unintended, racial harms.”⁷¹ Attorneys are trained to solve problems in a linear way such that one can attribute a primary cause for each legal issue or problem.⁷² Legal scholarship often replicates this training. But to assess problems that arise from structural racism, we must understand causation “as cumulative within and across domains.”⁷³ Any effort to identify a particular cause by a particular actor at a single institution, will not account for the cumulative disadvantage caused by structural racism.⁷⁴

To understand structural racism in the legal academy, you must understand the historical context by which Black people were explicitly excluded from the academy, the extent to which we are still celebrating firsts, and the infinitesimal increase in the number of Black people in the profession in recent years. The stories of Black exclusion from the academy are too many to recount. In 1945, there were sixteen southern law schools for white students and only one

68. 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, 783 (2009).

69. See Katherine B. Woliver Insogna, *Structural Racism and “The Wire”: Reproducing Racial Inequality on the Small Screen*, 2 GEO. J.L. & MOD. CRITICAL RACE PERSP. 163, 165 (2010).

70. *Id.*

71. See John A. Powell, *Structural Racism: Building Upon the Insights of John Calmore*, 86 N.C. L. REV. 791, 794 (2008).

72. See *id.* at 796.

73. See *id.*

74. See *id.*

segregated school for Black students.⁷⁵ Despite a U.S. Supreme Court order, Virgil Hawkins was repeatedly refused admission to law school at the University of Florida.⁷⁶ Cleve McDowell, admitted to University of Mississippi's law school by court order in 1963, "was jeered at and taunted as he walked across campus, rocks were thrown at his car, and he was almost run off the road once."⁷⁷ The firsts are also too many to recount. It was just 2017 when, after 130 years, *Harvard Law Review* elected ImeIme Umana as its first Black female president.⁷⁸ In 2019, Veronica Root Martinez became the first Black woman tenured full professor on the Notre Dame Law School faculty.⁷⁹ And in 2021, Charisma Hunter became the first Black woman on Washington & Lee's *Law Review*.⁸⁰ And while law schools continue to celebrate diversity by touting the admission of record numbers of Black students, the number of Black people in the legal profession has remained essentially unchanged since 2010.⁸¹

While structural racism is mostly invisible, it is made visible in the ways those affected experience the legal academy. For example, from standardized test scores like the LSAT to the bar exam to our processes for promotion and tenure, we see structural racism in the legal academy when we measure merit in ways that discount and ignore historical privilege.⁸² The LSAT and the bar exam exist despite a "history of standardized tests . . . filled with racist attempts to

75. Stephenson, *supra* note 55, at 122–23.

76. *Id.* at 168–74.

77. *Id.* at 181–82 (McDowell was later expelled after law students reported that he was carrying a gun he purchased for protection on campus).

78. Katharine Q. Seelye, *After 130 Years, Harvard Law Review Elects a Black Woman President*, N.Y. TIMES (Feb. 27, 2017), <https://www.nytimes.com/2017/02/27/us/after-130-years-harvard-law-review-elects-a-black-woman-president.html> [https://perma.cc/54PC-6GX6].

79. Veronica Root Martinez, *On Being First, On Being Only, On Being Seen, On Charting a Way Forward*, 96 NOTRE DAME L. REV. REFLECTION 215, 215 (2021).

80. Peter Jetton, *Part of the Plan: Charisma Hunter '23L Becomes the First African American Woman on Law Review*, THE COLUMNS (Oct. 6, 2021), <https://columns.wlu.edu/part-of-the-plan> [https://perma.cc/MR9P-27UF].

81. DeShun Harris, *Do Black Lawyers Matter to the Legal Profession?: Applying An Antiracism Paradigm to Eliminate Barriers to Licensure for Future Black Lawyers*, 31 FLA. J. L. & PUB. POL'Y 59, 61 (2020) ("[F]or the year 2020, the American Bar Association (ABA) provides statistics showing that 86% of American attorneys are [w]hite and 5% are Black. The percentage of Black attorneys has been virtually unchanged since 2010.").

82. See Magee, *supra* note 68, at 785; see also Gary Peller, *Legal Education and the Legitimation of Racial Power*, 65 J. LEGAL EDUC. 405, 411 (2015) ("Do you mean the same legal practice that was developed during racial apartheid, and that legitimated Jim Crow? And that developed various customs and norms about how courts should operate and how legal arguments should proceed? Is that what you mean by *the legal profession* that's going to provide the baseline to tell you that your meritocracy is something different than hidden white supremacy ideology?" (emphasis in original)).

demonstrate that [w]hites are intellectually superior.”⁸³ The LSAT, a seemingly race-neutral examination, is the determining factor in most law school admission decisions. While many schools claim to employ holistic admission practices, the LSAT continues to be the most weighted consideration for admission likely because LSAT scores are a key factor in law school rankings.⁸⁴ When we regard the LSAT as a test of merit, we ignore historical education inequalities⁸⁵ that produce racially disparate outcomes which serve as barriers to admission for Black people.⁸⁶ Likewise, using the bar exam for licensure is a policy that creates disparities for Black people.⁸⁷ Despite numerous studies conducted by bar examiners that demonstrate disparities in bar pass by race, most jurisdictions continue to employ the exam as the sole mechanism for licensure.⁸⁸ Finally, while processes for promotion and tenure appear race neutral, they often ignore the ways race affects metrics like student evaluations.⁸⁹ For example, persistent negative stereotypes of Black women as Mammy, Sapphire, or Jezebel are reproduced in mass media and popular culture and implicitly affect how students perceive and evaluate them.⁹⁰

Structural racism “comprises cultural beliefs, historical legacies, and institutional policies within and among public and private organizations that interweave to create drastic racial disparities”⁹¹ Considering historical and social contexts, Black admission to the legal academy did not end structural racism and certainly did not mean that Black people were fully integrated because “racial equality is achieved when people of color and [w]hites share power in an integrated environment.”⁹² Though diversity is often touted and

83. See Harris, *supra* note 81, at 70.

84. See Rory D. Bahadur, *Law School Rankings and the Impossibility of Antiracism*, 53 ST. MARY'S L.J. 991, 995 (2022) (noting that the median LSAT score reflects 11.25% of the total ranking).

85. Aaron N. Taylor, *Reimagining Merit as Achievement*, 44 N.M. L. REV. 1, 14–17 (2014) (“The unyielding achievement gaps we see between the races are an enduring legacy of past inequity.”).

86. See LaTasha Hill, *Less Talk, More Action: How Law Schools Can Counteract Racial Bias of LSAT Scores in the Admissions Process*, 19 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 313, 322–25 (2020).

87. Harris, *supra* note 81, at 69–70.

88. *Id.*

89. Raquel Wright-Mair & Delma Ramos, *Neutrality for Whom? Racially Minoritized Tenure-Track Faculty Navigating Resource Deficit Consciousness in the Academy*, 12 J. PROFESSORIALITY 82, 92 (2021).

90. See Renee Nicole Allen, *From Academic Freedom to Cancel Culture: Silencing Black Women in the Legal Academy*, 68 UCLA L. REV. 364, 385–87 (2021).

91. William M. Wiecek, *Structural Racism and the Law in America Today: An Introduction*, 100 KY. L.J. 1, 5 (2011).

92. Sharon E. Rush, *Beyond Admissions: Racial Equality in Law Schools*, 48 FLA. L. REV. 373, 378 (1996).

celebrated, the racial diversity of the legal academy leaves much to be desired and the nominal presence of people of color only represents symbolic progress as the practices, systems, and policies are essentially the same as they were when people of color were excluded by law.⁹³ Therefore, while we must acknowledge individual acts of academic terror, we must move away from focusing solely on individuals and examine the ways structures produce behaviors and “individual and institutional behavior interact across domains and over time to produce unintended consequences with clear racialized effects.”⁹⁴ We must also acknowledge that when there is an awareness of structural racism and no actions are taken, the resulting disadvantages Black people experience in the legal academy *are* intended as structural racism is perpetuated when we do nothing about it.⁹⁵

B. The Law School White Space

I previously defined the law school white space as one characterized by the exclusion of Black people, the overwhelming presence of white people, and embedded white norms.⁹⁶ Characterizing elite law schools as white spaces, Professor Wendy Leo Moore provided “a theoretical model of white space” that analyzes how “advantage and disadvantage, exploitation and control, action and emotion, and meaning and identity are patterned in terms of a distinction” between whiteness and non-whiteness.⁹⁷ Here, “[w]hiteness is a constructed identity that is imbued with power and control”⁹⁸ But elite law schools do not have a monopoly on white space. Professor Capers notes that *all* law schools are white spaces by virtue of numbers, but even Historically Black College and University law schools can be white spaces “in what they teach, in how they teach, and even in their architecture.”⁹⁹ Space is not limited to a physical space;

93. See Derrick Bell, *Racism Is Here to Stay: Now What?*, 35 HOW. L.J. 79, 83 (1991); 70 years after ‘Sweatt,’ how much progress have African American law students made?, AM. BAR ASS’N (Feb. 16, 2020), <https://www.americanbar.org/news/abanews/aba-news-archives/2020/02/70-years-after-sweatt--how-much-progress-have-african-american-l> [https://perma.cc/7872-CFKL].

94. See Powell, *supra* note 71, at 791.

95. See Wiecek, *supra* note 91, at 7.

96. Allen, *supra* note 90, at 371–72 (citing Elijah Anderson, *The White Space*, 1 SOCIO. RACE & ETHNICITY 10, 13 (2015) and WENDY LEO MOORE, REPRODUCING RACISM: WHITE SPACE, ELITE LAW SCHOOLS, AND RACIAL INEQUALITY 158 (2008)).

97. WENDY LEO MOORE, REPRODUCING RACISM: WHITE SPACE, ELITE LAW SCHOOLS, AND RACIAL INEQUALITY 26 (2008).

98. See also Jackson Sow, *supra* note 14, at 1842.

99. I. Bennett Capers, *The Law School as a White Space*, 106 MINN. L. REV. 1, 22 (2021).

it includes meaning.¹⁰⁰ Meaning in the white space is reinforced by history and law.¹⁰¹ As Capers notes, law schools are no longer majority male, but remain very masculine spaces.¹⁰² The physical space, for example, is filled with portraits of white men that send tacit messages that the space was created by and for them.¹⁰³

The exclusion of Black people (and other people of color) and the overwhelming presence of white people are key characteristics of the law school white space. Law student bodies are overwhelmingly white.¹⁰⁴ Law school faculties and administrations are also overwhelmingly white and male.¹⁰⁵ The 2020 Law School Survey of Student Engagement (LSSSE) Annual Survey Results, aptly titled *Diversity and Exclusion*, demonstrates a lack of a sense of belonging shared by Black students and students of color.¹⁰⁶ LSSSE Director Meera Deo accurately notes, “[a]dmitting and even enrolling more students of color . . . is not enough unless that diversity is accompanied by inclusion.”¹⁰⁷ The survey results do not indicate that Black law students feel included, or that they belong. While thirty-two percent of white students believe their schools do very much to support racial diversity, twenty-three percent of Black students believe their schools do very little.¹⁰⁸ Only twenty percent of Black students think their schools do very much to create a sense of community.¹⁰⁹ And twenty-five percent of Black students strongly disagree that they feel comfortable being themselves on campus.¹¹⁰ Finally, only twenty-one percent of Black students strongly agreed that they felt like they belonged.¹¹¹

Embedded white norms are best observed in what we teach and how we teach. Regarding what we teach, in the law school white space, whiteness is regarded as neutral and race issues belong to

100. *Id.*

101. *Id.* at 20.

102. *Id.*

103. *Id.* at 25–28.

104. See Vernalia Randall, *2021 The Whitest Law School Rankings*, RACISM.ORG (Mar. 8, 2021), <https://racism.org/2021-law-school-rankings?showall=1>.

105. Tiffany D. Atkins, *#FortheCulture: Generation Z and the Future of Legal Education*, 26 MICH. J. RACE & L. 115, 141 (2020) (citing 2013 ABA statistics showing that law school faculty and deans were roughly 80% white).

106. MEERA E. DEO & CHAT CHRISTENSEN, DIVERSITY & EXCLUSION: 2020 ANNUAL SURVEY RESULTS 6, 8–9 (2020), <https://lsse.indiana.edu/wp-content/uploads/2020/09/Diversity-and-Exclusion-Final-9.29.20.pdf> [<https://perma.cc/XS73-TNEQ>].

107. *Id.* at 5.

108. *Id.*

109. *Id.* at 8.

110. *Id.* at 10.

111. *Id.* at 9 (asking if students felt like “part of the community at this institution”).

people of color.¹¹² “The problem is not that race is absent from the classroom. It is that the whiteness of the curriculum goes unsaid and unremarked upon.”¹¹³ We teach students to revere the law and often encourage them to be change agents in our justice system, while devoting minimal attention to its flaws.¹¹⁴ The persistence of race neutrality in the law school curriculum causes race avoidance.¹¹⁵ For example, “the norm for the professional identity taught by most law schools largely, if not entirely, elides any consideration of the role race and racism plays in reproducing the system in which that identity is intimately bound.”¹¹⁶ “Law students are taught to be detached, adversarial, ‘neutral,’ and unreflective. They are trained, to borrow from and extend . . . racial hierarchy.”¹¹⁷

Regarding how we teach, while law schools feign interest in educational psychology, there remains an over-reliance on the Socratic Method. “Dysconscious racism is a form of racism that tacitly accepts dominant white norms . . .”¹¹⁸ In line with the norm of race neutrality, Socratic dialogue privileges students who provide answers that a professor deems important¹¹⁹—answers that often ignore the role of race and racism. “The Socratic method, at least as it is employed by many professors, devalues the very things that make . . . students different: their race, their backgrounds, them.”¹²⁰ Racial unevenness “describes the presence of particular burdens that uniquely tax certain individuals in a given setting; other members of the community do not face these burdens.”¹²¹ While the case method is accepted as a scientific manner of examining appellate opinions, it relies on race-silent principles in its presentation of the evolution of the law.¹²²

112. Eduardo R. C. Capulong, Andrew King-Ries & Monte Mills, *Antiracism, Reflection, and Professional Identity*, 18 HASTINGS RACE & POVERTY L.J. 3, 6, 12 (2021) (quoting Russell Pearce).

113. Capers, *supra* note 99, at 31; Zahrra Nasser & Marquan Robertson, *The Need for Meaningful Representation in Legal Education*, 96 NOTRE DAME L. REV. 239, 239 (2021) (current law students reflect on reading *Iqbal* “without addressing the anti-Muslim rhetoric . . .”).

114. Capers, *supra* note 99, at 32 (“[W]e teach students how to rearrange the apples in the apple cart. We don’t teach students how to upset the apple cart altogether.”).

115. See Capulong, King-Ries & Mills, *supra* note 112, at 6.

116. *Id.* at 6.

117. *Id.* at 14.

118. Rory Bahadur & Liyun Zhang, *Socratic Teaching and Learning Styles: Exposing the Pervasiveness of Implicit Bias and White Privilege in Legal Pedagogy*, 18 HASTINGS RACE & POVERTY L.J. 114, 146 (2021).

119. Capers, *supra* note 99, at 35.

120. *Id.* at 39.

121. Jonathan Feingold & Doug Souza, *Measuring the Racial Unevenness of Law School*, 15 BERKELEY J. AFR.-AM. L. & POL’Y 71, 72 (2013).

122. *Id.* at 96–97; see also Shaun Ossei-Owusu, *For minority law students, learning*

Thus, Black students experience racial unevenness when they are expected to objectively analyze cases without consideration of race or other important social and historical factors.

C. Blackness as Disability in the Law School White Space

In *Blackness as Disability?*, Professor Paul-Emile provides a framework for analyzing racial discrimination where existing civil rights laws fail: blackness as disability.¹²³ In order to understand her framework, we must first understand and accept our history. Race is a social construct.¹²⁴ Historically, so-called scientists ascribed meaning to skin color: positive attributes for white skin and negative attributes for non-white skin.¹²⁵ And although we now know that race is not a genetic attribute, the ascribed racial stigma and resulting discrimination and inequality persist in the twenty-first century.¹²⁶ Race, a social construct, continues to have a stronghold on American society and forms the basis for persistent caste hierarchies.

Next, we must understand the rationale behind the social model of disability law. “The social model of disability does not contest the idea that some disabilities are profoundly limiting, real, and meaningful consequences of biology . . . [but it also recognizes] that society is not neutral and that biases are built into its very structures, norms, and practices, which can then produce disability.”¹²⁷ “[S]ome conditions that we consider disabling are not inherent impairments, but are instead just traits that, when coupled with an unwelcoming social setting, can create disadvantage.”¹²⁸ “Disability laws are not concerned about whether this process occurred intentionally or consciously, only that it disables certain individuals and precludes their access, opportunity, and meaningful inclusion in society.”¹²⁹ Examining race through a disability lens “forces us to recognize how social practices, attitudes, and choices produced a social environment that is disabling for [B]lack people.”¹³⁰

the law can be intellectually violent, AM. BAR ASS'N J. (Oct. 15, 2020, 11:23 AM), https://www.abajournal.com/voice/article/for_minority_law_students_learning_the_law_can_be_intellectually_violent [<https://perma.cc/8336-8E3K>] (“Students wrestling with the intellectual mismatch of the world’s racial realities on the one hand and the racial silence-cum-neutrality of their legal education on the other hand should know that they are not irrational.”).

123. Paul-Emile, *supra* note 65, at 293.

124. *Id.* at 333.

125. *Id.* at 334–36.

126. *Id.* at 337.

127. *Id.* at 331.

128. *Id.*

129. Paul-Emile, *supra* note 65, at 331.

130. *Id.* at 338.

While “Blackness . . . is neither a medical impairment nor operational deficiency . . . within many contexts it serves as a functional impediment.”¹³¹ As reflected in broad society, Blackness is a disability in the law school white space and, as discussed herein, existing laws, policies, and practices are inadequate at addressing the discrimination Black students, staff, and faculty face.¹³² Here I apply Professor Paul-Emile’s framework. First, law and legal education are not neutral.¹³³ Thus, structural racism—racial biases woven into our structures, norms, and practices—produce disability for Black people in the legal academy. Second, the numbers demonstrate that Black students and faculty continue to have limited access to the legal academy.¹³⁴ Limited access leads to limited opportunities to recruit Black people, mentor Black people already in the academy, and diversify the legal profession. It also leaves Black people to bear the contrasting burdens of hyper-visibility and invisibility.¹³⁵ These burdens are not shared by non-Black students, faculty, and staff.¹³⁶ Finally, as discussed above, though Black people are no longer excluded by law, their inclusion in the law school white space is far from meaningful as the physical space, what we teach, and how we teach, often fails to account for the historical and social contexts relevant to the Black experience.¹³⁷ Thus, Blackness—our mere existence—is a disability in the law school white space.

III. ACADEMIC FREEDOM

*[T]he most dangerous creation of any society is
that man who has nothing to lose.*

—James Baldwin¹³⁸

When the protection of academic freedom is regarded as absolute, a faculty member has nothing to lose. The 1940 Statement of

131. *Id.*

132. *See id.*

133. *See id.* at 299.

134. *See* Christopher Williams, *Gatekeeping the Profession*, 26 CARDOZO J. EQUAL RTS. & SOC. JUST. 171, 174 (2020).

135. *See id.* at 190 (“[M]any minority students feel simultaneously hyper-visible as a result of being the sole [B]lack student in the classroom, and invisible due to being the only [B]lack voice drowned out by others.”).

136. *See id.* (“Black students are often left with the choice of either speaking and being the voice of all [B]lack people, or not speaking up at all to avoid being the voice of all [B]lack people—a burden not shared by all students.”).

137. *Id.* at 200.

138. The man who has nothing to lose Baldwin references is Black and has been oppressed; it certainly is not the law school faculty member who inflicts academic terror because they can. BALDWIN, *supra* note 63, at 76.

Principles of Academic Freedom is akin to a constitution¹³⁹ for higher education, and key articles prescribe academic freedom. In theory, academic freedom is a policy which protects faculty members from retribution while engaging in teaching and scholarship.¹⁴⁰ However, in practice and tradition, it is often viewed as a free pass for faculty members to engage in questionable conduct without recourse.¹⁴¹

This section explores academic freedom, a key norm in the legal academy. It uncovers that, from origin to present, it is not a neutral policy that can be separated from structural dynamics like those which perpetuate racism and sexism. Finally, it examines faculty ethics, pedagogical utility, and the boundaries of academic freedom.

A. Academic Freedom: A Policy

The American Association of University Professors (AAUP) codified the concept of academic freedom in its 1940 Statement of Principles on Academic Freedom and Tenure.¹⁴² In its 1915 Declaration, the AAUP first codified the concept stating that, “[a]cademic freedom . . . comprises three elements: freedom of inquiry and research; freedom of teaching within the university or college; and freedom of extramural utterance and action.”¹⁴³ “Traditionally in the United States, academic freedom consists of the right of individual professors to teach and conduct research without fear of sanction or loss of employment. It also generally includes their right to speak in public as professionals and as private citizens”¹⁴⁴ And while “[a]cademic freedom obligates scholars to use disciplinary standards,

139. Joan W. Scott, *Knowledge, Power, and Academic Freedom*, 76 SOC. RSCH. 451, 468 (2009).

140. *Id.* at 461.

141. See Gary A. Olson, *The Limits of Academic Freedom*, CHRONICLE OF HIGHER EDUC. (Dec. 9, 2009), https://www.chronicle.com/article/the-limits-of-academic-freedom/?cid2=gen_login_refresh&cid=gen_sign_in (“I have known colleagues who believed that academic freedom allows them to say anything they want, to anyone, in any venue, or to engage in behavior that most observers would assume to be inappropriate in any other workplace. In fact, academic freedom has been claimed as an excuse for the most abusive and uncollegial behavior—shouting at colleagues, publicly berating students or staff members, defaming supervisors or other university administrators, shirking professional duties.”).

142. AM. ASS’N OF UNIV. PROFESSORS, 1940 STATEMENT OF PRINCIPLES ON ACADEMIC FREEDOM, <https://www.aaup.org/report/1940-statement-principles-academic-freedom-and-tenure> [<https://perma.cc/7PS4-ZMVT>] (last visited Apr. 13, 2023).

143. Robert C. Post, *Academic Freedom and Legal Scholarship*, 64 J. LEGAL EDUC. 530, 532 (2015) (quoting AM. ASS’N OF UNIV. PROFESSORS, 1915 DECLARATION OF PRINCIPLES ON ACADEMIC FREEDOM AND ACADEMIC TENURE STATEMENT OF PRINCIPLES ON ACADEMIC FREEDOM 292 (1915), <https://www.aaup.org/NR/rdonlyres/A6520A9D-0A9A-47B3-B550-C006B5B224E7/0/1915Declaration.pdf> [<https://perma.cc/AV9D-FQS4>]).

144. Charlotte A. Kunkel & Sheila Radford-Hill, *Engaging Advocacy: Academic Freedom and Student Learning*, 76 MINN. REV. 97, 97 (2011).

not political standards, to guide their teaching[.]”¹⁴⁵ its meaning seems fluid based on the actor or the circumstance. “Academic freedom has come to mean the absolute right of a faculty member to ‘the freedom of citizens’ off-campus, but restrictions on those rights of expression in the classroom.”¹⁴⁶ As a professional concept, “academic freedom is the product of the guild’s desire . . . to order its own affairs with a minimum of interference from the outside; academic freedom is the freedom, first, to pursue professional goals, and, second, to specify for itself the appropriate means of realizing those goals.”¹⁴⁷

Academic freedom has constitutional protections. In *Sweezy v. State of New Hampshire*, under the authority of New Hampshire law designed to identify subversives, the state attorney general questioned a college professor about his academic writing and lectures.¹⁴⁸ *Sweezy* declined to answer citing the First Amendment.¹⁴⁹ As a result, he was tried and convicted of contempt.¹⁵⁰ The Court reversed the conviction finding that the conviction “was an invasion of [his] liberties in the areas of academic freedom and political expression”¹⁵¹ The Court recognized the relationship between academic freedom and the Constitution:

The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.¹⁵²

Ten years later, in *Keyishian v. Board of Regents*, University of Buffalo full- and part-time faculty members sought declaratory and

145. MATTHEW W. FINKIN & ROBERT C. POST, *Freedom of Teaching*, in FOR THE COMMON GOOD: PRINCIPLES OF AMERICAN ACADEMIC FREEDOM 79, 104 (2009).

146. Scott, *supra* note 139, at 469–70.

147. STANLEY FISH, *VERSIONS OF ACADEMIC FREEDOM: FROM PROFESSIONALISM TO REVOLUTION* x (2014).

148. *Sweezy v. New Hampshire*, 354 U.S. 234, 249 (1957).

149. *Id.* at 239–42.

150. *Id.* at 245–49.

151. *Id.* at 250.

152. *Id.* at 250.

injunctive relief regarding state statutes and administrative regulations aimed at identifying subversives.¹⁵³ The faculty members were terminated after refusing to sign statements declaring that they were not communist and declining to answer questions in writing under oath about association with groups who taught or advocated for overthrowing government.¹⁵⁴ Finding that the statute and administrative procedures were unconstitutionally vague and violated the First Amendment, the Court reaffirmed the relationship between academic freedom and the First Amendment: “Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.”¹⁵⁵

Regarding classroom teaching and First Amendment speech, the Supreme Court applied the *Pickering* test in 1968.¹⁵⁶ *Pickering*, a high school teacher, was terminated after making public comments in a local newspaper that criticized the district superintendent.¹⁵⁷ Here, the Court found that “[f]ree speech protection for public employees was . . . not absolute.”¹⁵⁸ First, the “public employee [must speak] . . . as a citizen on ‘matters of public concern.’”¹⁵⁹ If so, “a balancing test would then be employed to determine if the speech would be protected under the First Amendment.”¹⁶⁰ However, in 2006, the *Pickering* test was somewhat limited by *Garcetti* which held that “when public employees make statements pursuant to their official duties, the employees are not speaking as citizens . . . and the Constitution does not insulate their communications from employer discipline.”¹⁶¹

These Supreme Court cases recognize a unique speech right in the context of the pursuit of academic endeavors.¹⁶² But scholars note that constitutional protections differ based on the endeavor.¹⁶³ Robert Post distinguishes the constitutional protection academic

153. *Keyishian v. Bd. of Regents*, 385 U.S. 589, 592 (1967).

154. *Id.*

155. *Id.* at 603 (emphasis omitted).

156. PHILIP LEE, *Modern Constitutional Conceptions of Academic Freedom*, in *ACADEMIC FREEDOM AT AMERICAN UNIVERSITIES: CONSTITUTIONAL RIGHTS, PROFESSIONAL NORMS, AND CONTRACTUAL DUTIES* 77 (2015).

157. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 564 (1968).

158. LEE, *supra* note 156, at 77.

159. *Id.*

160. *Id.*

161. *Id.* at 79 (quoting *Garcetti v. Ceballos*, 547 U.S. 410 (2006)).

162. See LEE, *supra* note 156, at 70–76 (discussing the variation in application of First Amendment between various cases involving academic institutions and their employees).

163. *Id.*

freedom affords to research—an endeavor clearly protected by the Constitution—from the academic freedom associated with professional speech which is somewhat precarious.¹⁶⁴ Regarding constitutional protections, Stanley Fish notes that “[a]cademic freedom is rhetorically strong but legally weak.”¹⁶⁵

Institutions and students also have academic freedom.¹⁶⁶ An institution has the freedom “to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.”¹⁶⁷ In the classroom, academic freedom protects student expression and academic evaluation.¹⁶⁸ Under the AAUP 1967 Joint Statement on Rights and Freedoms of Students (Joint Statement), “Students should be free to take reasoned exception to the data or views offered in any course of study and to reserve judgment about matters of opinion, but they are responsible for learning the content of any course of study for which they are enrolled.”¹⁶⁹ Additionally, “[s]tudents should have protection through orderly procedures against prejudiced or capricious academic evaluation.”¹⁷⁰

B. Academic Freedom: A Practice and Tradition

Academic freedom is an academic value, not freedom as speech protected by the First Amendment.¹⁷¹ While there is a relationship between First Amendment protections and academic freedom, the practices and traditions that govern academic freedom are “cultural, not legal.”¹⁷² “Determining who will not be allowed to speak is the regular business of departments, search committees, promotion

164. ROBERT POST, DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE 73 (2012).

165. FISH, *supra* note 147.

166. Recently, the U.S. Supreme Court affirmed institutional academic freedom in matters of discretion in admissions and student dismissals, relying on good faith and educational judgment so long as decisions do not violate the constitution. *See* LEE, *supra* note 156, at 74.

167. DONNA R. EUBEN, ACADEMIC FREEDOM OF INDIVIDUAL PROFESSORS AND HIGHER EDUCATION INSTITUTIONS: THE CURRENT LEGAL LANDSCAPE 6 (May 2002), <https://www.aaup.org/issues/academic-freedom/professors-and-institutions> [<https://perma.cc/TH8T-LAJF>] (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957)).

168. AM. ASS'N OF UNIV. PROFESSORS, JOINT STATEMENT ON RIGHTS AND FREEDOMS OF STUDENTS, <https://www.aaup.org/report/joint-statement-rights-and-freedoms-students> [<https://perma.cc/5W7L-PRFP>] (last visited Apr. 13, 2023).

169. *Id.*

170. *Id.*

171. STANLEY FISH, THE FIRST: HOW TO THINK ABOUT HATE SPEECH, CAMPUS SPEECH, RELIGIOUS SPEECH, FAKE NEWS, POST-TRUTH, AND DONALD TRUMP 53 (2019).

172. *Id.* at 57.

committees, deans, provosts, presidents, and editors of learned journals.”¹⁷³ Thus, academic institutions relegate accuracy, completeness, and relevance of speech as these are academic values related to “principles of the academic enterprise”¹⁷⁴

Though regarded as a neutral norm, academic freedom is not disconnected from structural dynamics that reinforce power and privilege. Higher education is simultaneously a site of resistance and reproduction of power and privilege.¹⁷⁵ First, “[l]anguage is never neutral because it is inscribed in power relations in terms that shape our thinking and perceptions about our reality.”¹⁷⁶ Second, as discussed below and in a prior work, who exercises academic freedom and to what extent, is often determined by race and gender.¹⁷⁷ When examining academic freedom, we cannot ignore the positionality—“how aspects of one’s identity such as race, gender, class, sexual orientation, or ableness significantly affect how one is ‘positioned’ relative to the dominant culture”¹⁷⁸—of the person claiming protection and persons who are experiencing abuse.

In the law school white space where faculty members are overwhelmingly white and male,¹⁷⁹ unexamined power and racial privilege can undermine student learning. For example, a faculty member who asserts “academic freedom in defense of language that harms students turns the very principle that makes true learning possible into a mechanism for enforcing institutional racism.”¹⁸⁰ Further, when a faculty member downplays student concerns about gendered racist language on a law school final exam,¹⁸¹ ignores his positionality by

173. *Id.* at 53–54 (emphasis omitted).

174. *Id.* at 54.

175. Elizabeth J. Tisdell, *The Politics of Positionality: Teaching for Social Change in Higher Education*, in *POWER IN PRACTICE: ADULT EDUCATION AND THE STRUGGLE FOR KNOWLEDGE AND POWER IN SOCIETY* 145, 149–55 (Ronald M. Cervero & Arthur L. Wilson eds., 2001).

176. Johnny Eric Williams, *The Academic Freedom Double Standard: “Freedom” for Courtiers, Suppression for Critical Race Scholars*, 9 AM. ASS’N OF UNIV. PROFESSORS J. ACAD. FREEDOM 8 (2018), <https://www.aaup.org/sites/default/files/Williams.pdf> [<https://perma.cc/4QHV-6ERG>].

177. See FISH, *supra* note 171, at 54; Allen, *supra* note 90, at 373.

178. Tisdell, *supra* note 175, at 148.

179. See Allen, *supra* note 90, at 373.

180. Sarah Groeneveld Kenney, Mzenga Wanyama & Sarah Combellick-Bidney, *Faculty respond to professor’s use of N-word by calling for institutional change around racial justice*, THE ECHO (Nov. 30, 2018), <https://augsburgecho.com/2018/11/30/faculty-respond-to-professors-use-of-n-word-by-calling-for-institutional-change-around-racial-justice> [<https://perma.cc/C62H-MTNN>].

181. Colleen Flaherty, *Bad Education*, INSIDE HIGHER ED (Nov. 10, 2021), <https://www.insidehighered.com/news/2021/11/10/when-suspending-professor-isnt-enough> [<https://perma.cc/46YM-9TJL>] (“[H]e’s glad the university let him know he’d ‘rubbed students the wrong way’”).

expressing regret that students did not meet with him directly to address said concerns,¹⁸² and laments that his rights were not fully vindicated after reaching an agreement that allows him to return to the law school classroom after a brief suspension,¹⁸³ we see how the practice of academic freedom can reinforce power and privilege.

Regardless of their status at an institution and due to structural racism, marginalized faculty members including women and people of color, are often denied the full benefits of academic freedom.¹⁸⁴ The bylaws of the Association of American Law Schools (AALS) incorporate the AAUP's definition of academic freedom.¹⁸⁵ Regarding academic freedom, AALS defines "faculty member" as "a professional who is or was tenured, on the tenure track, or, although not on the tenure track, engaged in teaching or scholarship, including work in a clinical or research and writing program at a member school."¹⁸⁶ Thus, in the legal academy, all faculty have academic freedom.¹⁸⁷ Yet, the protection it affords may vary due to faculty status. As such, tenured faculty have almost absolute protection under academic freedom, tenure track and contract faculty have less, and adjunct faculty have the least.¹⁸⁸

C. Ethics and Pedagogical Utility

In the classroom, academic freedom is intrinsically connected to student learning as student learning is the "fundamental purpose of teaching."¹⁸⁹ Thus, when considering the pedagogical utility of classroom speech and behavior, faculty members must consider the relationship between their pedagogical choices and student learning.¹⁹⁰

182. *Id.* (Kilborn also said he regretted that no student addressed the matter with him personally before taking it to the university, or to social media).

183. *Id.*

184. Williams, *supra* note 176, at 5.

185. *Bylaws, Article 6 Sect. 6-6(d)*, ASS'N OF AM. L. SCHS., <https://www.aals.org/about/handbook/bylaws> [<https://perma.cc/H3S5-VXQH>] (last visited Apr. 13, 2023) ("A faculty member shall have academic freedom and tenure in accordance with the principles of the American Association of University Professors.").

186. *Executive Committee Regulations 3.7(a)*, ASS'N OF AM. L. SCHS., <https://www.aals.org/about/handbook/executive-committee-regulations> [<https://perma.cc/AA2N-KYTU>] (last visited Apr. 13, 2023).

187. See FINKIN & POST, *supra* note 145, at 80 ("Lecturers who are neither obligated nor expected to conduct research nevertheless enjoy academic freedom regarding their pedagogical responsibilities.").

188. See Williams, *supra* note 176, at 4 ("The autonomy afforded both tenured and, less reliably, untenured faculty members in their capacity as teachers and scholars fulfilling the academic mission of colleges or universities is what is commonly known as academic freedom.").

189. Kunkel & Radford-Hill, *supra* note 144, at 104.

190. See *id.* at 99 ("[S]tudent learning is central to the academy; therefore, all

The practice of academic freedom in the classroom emphasizes four main principles about student learning. . . . [S]tudent learning is central to the academy [S]tudents learn best when they are actively engaged in a learning process that has a meaningful relationship to their needs, interests, values, and commitments [S]tudents learn not only by being exposed to differences in perspectives . . . but also by being compelled to grapple with issues involved in working with such differences. . . . [W]hen students are encouraged to advocate for their positions and defend their ideas, they are better prepared to explore new concepts by listening critically and challenging basic assumptions.¹⁹¹

An ethical practice of academic freedom that is focused on student learning includes recognition of the power dynamics—a result of educational histories of oppression—present in the classroom.¹⁹² It also includes a recognition that neutrality “is impossible and undesirable for student learning.”¹⁹³

If learning is the fundamental purpose of teaching, academic freedom in the law school classroom includes an obligation that faculty members create psychologically safe learning environments. “[P]sychological safety is ‘the sense that one’s identity, perspectives, and contributions are valuable, despite the experience or possibility of discomfort or harm within a learning setting.’”¹⁹⁴ Though often ignored, race is inherent in the law school classroom. Ignoring race “perpetuate[s] whiteness as the norm.”¹⁹⁵ Mishandling race can disturb learning and add trauma for all students, but especially Black students.¹⁹⁶ Therefore, how law professors prepare for, and actually handle, racialized interactions—“interactions [that] consist of unequal power and privilege[d] relationships . . . [and] reveal differences in perspectives, can be found offensive to others, may display prejudices and biases, and can elicit an emotional response”¹⁹⁷—is

proposals regarding intellectual diversity, freedom of speech, tenure, and faculty autonomy should be considered in light of their impact on student learning.”).

191. *See id.*

192. *Id.* at 101; *see also* BELL HOOKS, *TEACHING TO TRANSGRESS: EDUCATION AS THE PRACTICE OF FREEDOM* 4, 12 (1994) (describing the difference “between education as the practice of freedom and education that merely strives to reinforce domination”).

193. Kunkel & Radford-Hill, *supra* note 144, at 102 (“Claiming neutrality in the classroom is like the wealthy elites claiming middle-class status in a class-stratified society, or like whites claiming to be color blind in a white-dominated society—each offers up neutrality in a non-neutral setting.”).

194. Erin C. Lain, *Racialized Interactions in the Law School Classroom: Pedagogical Approaches to Creating a Safe Learning Environment*, 67 J. LEGAL EDUC. 780, 786 (2018).

195. *Id.* at 782.

196. *See id.* at 788.

197. *Id.* at 783.

a pedagogical choice that can result in academic terror. Law faculty create psychologically unsafe environments when they fail to recognize, avoid or minimize, or attempt to control racialized reactions in the law school classroom.¹⁹⁸

But law professors are making the argument that there is pedagogical utility in academic terrorism. In defense of using epithets in the law school classroom, professors Kennedy and Volokh assert that

[e]pithets are part of the lexicon of American culture about which people, especially lawyers, need to be aware. Omitting them veils or mutes an ugliness that, for maximum educational impact, and indeed for maximum candor, ought to be seen or heard directly. And omitting them sends the message to students that they should talk around offensive facts, rather than confronting them squarely¹⁹⁹

Of course, this argument assumes that law students, especially Black students, are not aware of the culture that produced such terms. It also assumes that omitting them sends a message that is not already consistent in traditional law school teaching: that race, including whiteness, is disconnected from the operation of law. Finally, it assumes that all students have an education that is historically sound so that they are aware of the historical and social context by which such terms became part of American culture.²⁰⁰ How can we find pedagogical utility in using racial epithets, but not in teaching whiteness or the ways white people have intentionally created and enforced laws designed to subjugate Black people? When do we squarely confront the ways using racial epithets in the law school classroom traumatizes Black students and disadvantages their learning experience?

D. Boundaries

According to professors Chatman and Peters, “the legal academy is one of the last safe spaces for white supremacist ideas to flow freely under the cover of academic freedom and distorted First Amendment

198. *Id.* at 790–92.

199. Randall Kennedy & Eugene Volokh, *The New Taboo: Quoting Epithets in the Classroom and Beyond*, 49 CAP. U. L. REV. 1, 9 (2021).

200. Recent debates about Critical Race Theory (CRT) reveal how little Americans know about American history. And my students consistently reveal how much they have not learned about racism in America’s history.

arguments.”²⁰¹ There are common sense and intellectual bounds to academic freedom.²⁰² We expect that people with intellectual and emotional intelligence recognize existing and evolving boundaries. While a faculty member as a citizen has free speech rights, certain speech is not free from consequence. However, it is challenging to see the boundaries of speech in the legal academy as there are no clear guidelines.²⁰³

While some view academic freedom as offering “instant indemnity . . . it is not a blanket protection.”²⁰⁴ The Joint Statement warns that faculty “should be careful not to introduce into their teaching controversial matter which has no relation to their subject.”²⁰⁵ While “academic freedom is specifically intended to foster free exchange of ideas within a community of scholars, it does not protect [faculty] from other types of utterances and behavior, such as . . . bullying co-workers . . . or conducting one’s classes in irresponsible ways.”²⁰⁶ Former AAUP president Cary Nelson notes, “[a]cademic freedom does not mean a faculty member can harass, threaten, intimidate, ridicule, or impose his or her views on students.”²⁰⁷ It does not guarantee lifetime employment or protect faculty from sanctions resulting from misconduct.²⁰⁸

Regarding a faculty member’s use of a racial epithet, members of the Augsburg University faculty released a public statement noting that racial harassment is a clear boundary of academic freedom:

“[F]reedom in learning” for students means freedom from racism, from harassment, from discrimination, from oppression and from

201. Carliss N. Chatman & Najarian R. Peters, *The Soft-Shoe and Shuffle of Law School Hiring Committee Practices*, 69 UCLA L. REV. IN DISCOURSE 2 (May 8, 2021), <https://www.uclalawreview.org/the-soft-shoe-and-shuffle-of-law-school-hiring-committee-practices> [https://perma.cc/2Q2G-6UR6].

202. Derived from Professor Sheldon Evan’s thoughtful critique of the nascent idea that led to this Article.

203. See Evan Gerstmann, *Universities Need To Protect Academic Freedom And Establish Clear Policies On Use Of The N-Word*, FORBES (May 3, 2021, 3:44 PM), <https://www.forbes.com/sites/evangerstmann/2021/05/03/universities-need-to-protect-academic-freedom-and-establish-clear-policies-on-use-of-the-n-word/?sh=77e506ba135c> [https://perma.cc/LHR3-CPRF] (“Rather than protect academic freedom by clearly stating a policy on racial epithets, administrators leave students and faculty to take their chances through trial and error.”); Olson, *supra* note 141 (“Most of us in academe cherish the protections afforded by academic freedom, but too many are unclear as to its limits.”).

204. Olson, *supra* note 141.

205. AM. ASS’N OF UNIV. PROFESSORS, *supra* note 142.

206. Olson, *supra* note 141.

207. Cary Nelson, *Defining Academic Freedom*, INSIDE HIGHER ED (Dec. 21, 2010), <https://www.insidehighered.com/views/2010/12/21/defining-academic-freedom> [https://perma.cc/Y885-HAX8].

208. *Id.*

trauma at the hands of faculty and the university. We faculty may, in exercising academic freedom and freedom of speech, unintentionally make unwise or biased pedagogical decisions that hurt our students. But it is our responsibility to respond with empathy in those moments, be open to criticism and have the humility and courage to make the necessary changes within ourselves in order to protect our students' freedoms, wellbeing and humanity.²⁰⁹

Regarding an adjunct faculty member's viral comments, Georgetown Law's Black faculty released a public statement noting that racializing student performance is a clear boundary of academic freedom:

[T]he professor's comments also brutally undermine our Black students' freedom to focus on learning. We are deeply concerned that our Black students will (rationally) spend their time worried that their law professors may hold white supremacist viewpoints. Many will preemptively strategize how and in what ways to approach faculty who in fact are employed to educate and promote their well-being. They will worry if their class performance will be assessed through a racialized lens. Responding to anti-Black racism and bias regularly consumes our Black law students' time and energy. It is demoralizing, and it is unfair. They deserve the same opportunities as other students to pursue excellence.²¹⁰

Regarding the use of gendered racist terms²¹¹ on a Civil Procedure II final exam, and in response to concerns expressed by the Black Law Student Association,²¹² then University of Illinois Chicago Law School Dean Darby Dickerson released a public statement that highlighted the relationship between academic freedom and power:

The Law School recognizes the impact of this issue. Before winter break, Dean Dickerson apologized to the students who

209. Groeneveld Kenney, Wanyama & Combellick-Bidney, *supra* note 180.

210. *Georgetown Black Faculty Statement*, TAXPROF BLOG, <https://taxprof.typepad.com/files/georgetown-black-faculty-statement.pdf> [<https://perma.cc/T65X-EC5E>] (last visited Apr. 13, 2023).

211. Specifically, "n____ b____." See Katherine Rubino, *Law School N-Word Controversy Is More Complicated Than It Appears At First Glance*, ABOVE THE LAW (Jan. 13, 2021, 4:53 PM), <https://abovethelaw.com/2021/01/law-school-n-word-controversy-is-more-complicated-than-it-appears-at-first-glance> [<https://perma.cc/X9N3-C2D7>].

212. UIC JMLS BLACK L. STUDENT ASS'N (@uic_jmls_blsa), TWITTER (Dec. 30, 2020, 9:34 AM), https://twitter.com/uic_jmls_blsa/status/1344290657825935360?s=20 [<https://perma.cc/CPM2-L943>] ("BLSA would like to call to attention the inexcusable usage of 'N____' and 'B____' on a Civil Procedure II Exam. This slur shocked students and created a huge distraction from taking the exam.").

expressed hurt and distress over the examination question. The Law School acknowledges that the racial and gender references on the examination were deeply offensive. Faculty should avoid language that could cause hurt and distress to students. Those with tenure and academic freedom should always remember their position of power in our system of legal education.²¹³

While boundaries seem clear in academic settings, they are less certain regarding a faculty member's right to speak in public as professionals and as private citizens. In response to recent and persistent racist commentary from Professor Amy Wax,²¹⁴ University of Pennsylvania Carey Law School Dean Theodor Ruger wrote:

Once again, Amy Wax has, through her thoroughly anti-intellectual and racist comments denigrating Asian immigrants, underscored a fundamental tension around harmful speech at American universities. Like all racist generalizations, Wax's recent comments inflict harm by perpetuating stereotypes and placing differential burdens on Asian students, faculty, and staff to carry the weight of this vitriol and bias. Yet Wax makes these statements as a faculty member with tenure, a status that has done, and continues to do, important work in protecting the voices of scholars on a range of controversial topics including those who are actively challenging racism, sexism, and other inequities in society. The same academic freedom principles that permit current scholars to engage in critical and overdue analysis of this nation's historical and structural discrimination—despite zealous efforts to censor such speech by some—also apply to faculty like Wax who voice xenophobic and white supremacist views.²¹⁵

Regarding a law lecturer's tweet that Supreme Court nominee Judge Ketanji Brown Jackson was a "lesser [B]lack woman"²¹⁶

213. Rubino, *supra* note 211.

214. Joe Patrice, *Law Professor Amy Wax Expands Racism Portfolio To Declare That America Needs 'Fewer Asians'*, ABOVE THE LAW (Jan. 3, 2022, 3:45 PM), <https://abovethelaw.com/2022/01/law-professor-amy-wax-expands-racism-portfolio-to-declare-that-america-needs-fewer-asians> [https://perma.cc/Z48H-KGB2].

215. Theodore Ruger, *A statement from Dean Ruger in response to recent comments made by Professor Wax*, UNIV. PA. L. SCH. (Jan. 3, 2022), <https://www.law.upenn.edu/live/news/14369-a-statement-from-dean-ruger-in-response-to-recent> [https://perma.cc/7SVC-8TRT].

216. In a since-deleted series of tweets, Ilya Shapiro wrote, "[o]bjectively best pick for Biden is Siri Srinivasan, he is solid prog & v smart. . . . Even has identity politics benefit of being the first Asian (Indian) American. But alas doesn't fit into the latest intersectionality hierarchy so we'll get lesser [B]lack woman. Thank heaven for small favors?" Lauren Lumpkin, *Incoming Georgetown Law administrator apologizes after tweets dean called 'appalling'*, WASH. POST (Jan. 27, 2022, 9:25 PM), <https://www.washingtonpost>

Georgetown Law Professor Paul Butler asserted that the author of the tweet should be fired:

The problem with the academic freedom argument is that it proves too much. It is true that Shapiro has the “right” to say anything he pleases, including any stupid racist or sexist thing. But a university should not be indifferent to the meaning and impact of those words, especially on students. Allowing Shapiro to teach would force Black women—and other Black students and other women—to make the kind of wretched choice no student should have to make: accept that one of their school’s courses is off limits to them because of credible evidence the instructor is prejudiced, or enroll and serve as test cases for whether Shapiro’s claims to the contrary are correct.²¹⁷

Though there are few clearly defined boundaries to academic freedom, faculty members as part of the governing body of institutions and deans as institutional leaders have sought to articulate boundaries. As seen in the examples here, these boundaries focus on the fundamental principle of student learning and make it clear that, in the classroom, racism is an unquestionable violation of students’ academic freedom. However, when a faculty member espouses blatant racist views in non-academic settings, the boundaries of speech are less clear. The fact that off-campus speech, even racist speech, is often regarded as speech protected by academic freedom harms marginalized faculty, staff, and students by ignoring the fact that academic freedom is an academic value, not freedom as speech protected by the First Amendment.²¹⁸ Genuinely confronting academic terror will require that law schools account for the ways racist speech, whether conducted in the context of teaching or off campus,

.com/education/2022/01/27/georgetown-law-ilya-shapiro-tweets [https://perma.cc/ZV9X-NLLH]. It’s important to note that only minutes later, Shapiro continued to tweet “Because Biden said he’s only consider [sic] [B]lack women for SCOTUS, his nominee will always have an asterisk attached. Fitting that the Court takes up affirmative action next term.” *Id.* Shapiro then continued with a poll asking if Joe Biden was racist and sexist for saying his Supreme Court nominee will be a Black woman. *Id.* See Joshua Rhett Miller, *Georgetown Law lecturer Ilya Shapiro resigns after probe into controversial SCOTUS tweet*, N.Y. POST (June 7, 2022, 12:18 PM), <https://nypost.com/2022/06/07/georgetown-law-lecturer-ilya-shapiro-resigns-after-scotus-tweet> [https://perma.cc/E2BZ-R5V9]; see also Jack Holmes, *Conservatives Are Pre-Mad at Biden’s Supreme Court Pick Before the Pick Has Been Made*, ESQUIRE (Jan. 27, 2022), <https://www.esquire.com/news-politics/a38914282/biden-black-woman-supreme-court-nominee> [https://perma.cc/9PCG-35P9].

217. Paul Butler, *Opinion: Yes, Georgetown should fire an academic for a racist tweet*, WASH. POST (Feb. 20, 2022, 8:00 AM), <https://www.washingtonpost.com/opinions/2022/02/20/georgetown-should-fire-ilya-shapiro-tweet-supreme-court-lesser-black-women> [https://perma.cc/XD46-U8TN].

218. See FISH, *supra* note 147, at 63.

subverts the values of free speech,²¹⁹ distorts principles of academic freedom, and disrupts the fundamental reason for which faculty members exist.

IV. ACADEMIC TERROR

Please try to remember that what they believe, as well as what they do and cause you to endure, does not testify to your inferiority but to their inhumanity and fear.

—James Baldwin²²⁰

In the United States, fear and terror have long been mechanisms used to maintain subordination of marginalized groups. Merriam-Webster defines terror as “violence or the threat of violence used as a weapon of intimidation . . . ; someone or something that inspires fear; an extremely disruptive . . . person or thing.”²²¹ Terrorism is “the use of violence as a means of achieving a goal.”²²² In *Caste*, Isabel Wilkerson identifies the foundations and eight pillars of the American caste system.²²³ The seventh pillar, “terror as enforcement, cruelty as a means of control” describes the ways violence and terror are used to maintain the positions of the dominant and subordinate castes.²²⁴ She writes “[t]he only way to keep an entire group of sentient beings in an artificially fixed place, beneath all others and beneath their own talents, is with violence and terror, psychological and physical, to preempt resistance before it can be imagined.”²²⁵

In the same way “Americans are loath to talk about enslavement . . . [because] it goes against our perception of our country as a just and enlightened nation . . . ,”²²⁶ legal academics are slow to acknowledge the effects of structural racism because it is antithetical to our egalitarian values. Arguably, because structural racism is antithetical to their values, many academics cannot see it. In this

219. *See id.* at 36 (“If we want to be faithful to the values free speech supports—values like the search for truth and the democratization of political debate—we must on occasion curtail speech deemed subversive of those same values.”).

220. BALDWIN, *supra* note 63, at 22.

221. *Terror*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/terror> [<https://perma.cc/GN76-VZD3>] (last visited Apr. 13, 2023).

222. *Terrorism (Kids Definition)*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/terrorism> [<https://perma.cc/GKB2-TPAN>] (last visited Apr. 13, 2023).

223. ISABEL WILKERSON, *CASTE: THE ORIGINS OF OUR DISCONTENTS* 99–164 (2020).

224. *Id.* at 152.

225. *Id.* at 151.

226. *Id.* at 43.

section, I examine racial discrimination, collective trauma, and structural violence in academia. These examinations form the basis for my definition of academic terror.

A. Racial Discrimination and Bullying in Academia

Federal law protects students from race-based discrimination.²²⁷ Under Title VI of the Civil Rights Act of 1964 (Title VI), “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”²²⁸ Institutions that receive federal funding, including colleges and universities must comply with Title VI meaning faculty and administrators must not discriminate against students.²²⁹ However, Title VI private actions are significantly challenging because it is difficult to prove intentional discrimination.²³⁰ Thus, Title VI litigation rarely results in penalty for institutions.²³¹

The AALS bylaws prescribe nondiscrimination and affirmative action policies for member schools. Under section 6-3(a):

A member school shall provide equality of opportunity in legal education for all persons, including faculty and employees with respect to hiring, continuation, promotion and tenure, applicants for admission, enrolled students, and graduates, without discrimination or segregation on the ground of race, color, religion, national origin, sex, gender (including identity and expression), sexual orientation, age, or disability.²³²

A member school that fails to comply with the bylaws “may be censured, placed on probation, suspended, or excluded from membership.”²³³

Where structural racism is not dismantled, marginalized students, faculty, and staff are subject to racist bullying and intimidation.²³⁴

227. 42 U.S.C. § 2000d.

228. *Id.*

229. *See id.*

230. Kimberly Jenkins Robinson, *Designing the Legal Architecture to Protect Education as a Civil Right*, 96 IND. L.J. 51, 67–68 (2020).

231. *Id.* at 72–74 (noting the shortcoming of federal civil rights law, including the fact that the enforcement of Title VI varies under different presidential administrations).

232. *Bylaws, Article 6, sect. 6-3(a)*, ASS’N OF AM. L. SCHS., <https://www.aals.org/about/handbook/bylaws> [<https://perma.cc/CV56-TAY4>] (last visited Apr. 13, 2023).

233. *Bylaws, Article 7, sect. 7-1(a)*, ASS’N OF AM. L. SCHS., <https://www.aals.org/about/handbook/bylaws> [<https://perma.cc/ZN4Y-JHBY>] (last visited Apr. 13, 2023).

234. *See* Martin, Mandela Gray & Finley, *supra* note 45, at 3.

The Center for Disease Control defines bullying as “unwanted aggressive behavior(s) . . . that involves an observed or perceived power imbalance, and is repeated multiple times or is highly likely to be repeated.”²³⁵ “Academic bullying is . . . systematic long-term interpersonal behavior as it occurs in the academic workplace setting in both covert and overt forms against faculty who are unable to defend themselves against the aggressive behavior committed by fa[c]ulty in power in the workplace.”²³⁶ It includes racist insults—“face-to-face private speech that demeans individuals on the basis of their actual or perceived race, color, ethnicity, or national origin”²³⁷—which are harmful to the individual and the entire racial group.²³⁸ There is a wealth of scholarship devoted to individual and institutional academic bullying.²³⁹ A thorough examination of the literature is beyond the scope of this Article, however, it is important to note that for marginalized people, these often subtle occurrences make up the “lived reality of everyday oppression.”²⁴⁰ The “use of vulgar forms of oppression to exercise power and domination” of the past has been replaced with the everyday practice of subtle oppression that is difficult for those unaffected to imagine.²⁴¹ “[B]ullying . . . can become tangible through ‘[v]erbal abuse, threatening and intimidating conduct, constant criticism, undermining work performance, exclusion, marginalization, overloading of work, and taunting.’”²⁴²

Marginalized faculty are especially vulnerable to academic bullying.²⁴³ The

235. *Bullying*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/violenceprevention/youthviolence/bullyingresearch/fastfact.html> [<https://perma.cc/F8Q4-MPDD>] (last visited Apr. 13, 2023) (defining bullying as violence between youth or youth groups).

236. Kimberly N. Frazier, *Academic Bullying: A Barrier to Tenure and Promotion for African-American Faculty*, 5 FLA. J. EDUC. ADMIN. & POL’Y 1, 2 (2011).

237. Tasnim Motala, *Words Still Wound: IIED & Evolving Attitudes toward Racist Speech*, 56 HARV. C.R.-C.L. L. REV. 115, 117 (2021).

238. *Id.* at 119.

239. Harry Denny, *Of Sticks and Stones, Words That Wound, and Actions Speaking Louder: When Academic Bullying Becomes Everyday Oppression*, in *DEFINING, LOCATING, AND ADDRESSING BULLYING IN THE WPA WORKPLACE* 1, 4–5 (Cristyn L. Elder & Bethany Davila eds., 2019).

240. *Id.* at 2.

241. *Id.* at 3, 4 (“By and large, society has a difficult time imagining oppression that happens on the everyday level, interaction that harms through passing words, averted eyes, whispered innuendos, and the general microphysics of formal and informal networks of mutual support mobilized to punish and ostracize.”).

242. *Id.* at 5 (quoting Jamie Lester, *Not Your Child’s Playground: Workplace Bullying among College Faculty*, 33 CMTY. COLL. J. RSCH. AND PRAC. 444, 445 (2009)).

243. Martin, Mandela Gray & Finley, *supra* note 45, at 2.

lack of robust numbers of African American students and faculty makes [B]lack professors exceptionally vulnerable to bullying, especially given that [predominantly white institutions], in particular, as structurally white institutions, are seen as sacred white spaces in which [B]lack bodies—[B]lack professors—represent an antagonism in that their presence cannot be adequately incorporated into the structure.²⁴⁴

Further, bullying occurs because, “[a]s in the broader society, [B]lack people on college and university campuses hold up a mirror to the institution and provide it with a reality check about the gap between what the college or university says it values and what it actually does value.”²⁴⁵ For Black faculty, this bullying places limits on academic freedom as they must make calculated decisions about their scholarship while non-Black scholars are free to research without such consideration or intervention.²⁴⁶ It also threatens the Black professoriate pipeline.²⁴⁷ Due to lack of representation and structural racism, marginalized students and staff are also vulnerable to academic bullying.

B. Collective, Cultural Trauma

Individual acts of trauma become collective when they are publicized through the media and the message of oppression reaches marginalized people throughout the legal academy.²⁴⁸ Collective trauma “refers to the psychological reactions to a traumatic event that affect an entire society It suggests that the tragedy is represented in the collective memory of the group, and . . . it comprises . . . an ongoing reconstruction of the trauma in an attempt to make sense of it.”²⁴⁹ Collective trauma lives in the memory of the individual survivor and in the collective memories of the group.²⁵⁰

Cultural trauma arises from shock to the routine *and* from the routine.²⁵¹ Building on the research of cultural sociologist, Professor Onwuachi-Willig argues that,

244. *Id.*

245. *Id.* at 8 (citation omitted).

246. *Id.*

247. *Id.* at 2.

248. See Denny, *supra* note 239, at 4.

249. Gilad Hirschberger, *Collective Trauma and the Social Construction of Meaning*, 9 FRONTIERS PSYCH. 1441, 1441 (2018).

250. See *id.*

251. See Angela Onwuachi-Willig, *The Trauma of the Routine: Lessons on Cultural Trauma from the Emmett Till Verdict*, 34 SOCIO. THEORY 335, 336 (2016).

for certain subordinated groups and under certain circumstances, it is not the interruption of common routines that lays the foundation for a cultural trauma but rather the continuation of what is considered to be a given or expected subordination, usually through law or government sanction, that creates the context in which a cultural trauma can be narrated.²⁵²

“[C]ultural trauma narratives can arise . . . when regularly expected occurrences—the matters that communities have come to know and take for granted—occur and in fact get reaffirmed in a public or official manner.”²⁵³ Cultural trauma arises from routine harm when there is: a history of routine harm directed at a subordinate group, widespread media attention that causes people inside and outside of the subordinated group to take notice, and “there must be public discourse about the meaning of the routine harm, a harm that usually occurs in the form of governmental or legal affirmation of the subordinated group’s marginal status.”²⁵⁴

C. Structural Violence

Where there is structural racism, there is structural violence. While my focus is structural violence, it is important to understand the relationship between direct, structural, and cultural violence. Direct violence is interpersonal—individual or group violence directed at a person or group.²⁵⁵ “Structural violence is ‘violence that occurs in the context of establishing, maintaining, extending, or reducing the hierarchal ordering of categories of people in a society.’”²⁵⁶ Cultural violence refers to “those aspects of culture . . . that can be used to justify or legitimize direct or structural violence.”²⁵⁷ Direct violence is “depersonalized when perpetrated in the context of structural and cultural violence”²⁵⁸ as it often is.²⁵⁹

252. *Id.*

253. *Id.*

254. *Id.*

255. See Andrew P. Cohen, *The Lynching of James Scales: How the FBI, the DOJ, and State Authorities “Whitewashed” Racial Violence in Bledsoe County, Tennessee*, 19 TEX. J. ON C.L. & C.R. 285, 288 (2014).

256. *Id.* at 288 (quoting John Galtung, *Cultural Violence*, 27 J. PEACE RSCH. 291, 294 (1990)).

257. *Id.* at 289 (quoting John Galtung, *Cultural Violence*, 27 J. PEACE RSCH. 291, 294 (1990)).

258. *Id.* (citing see Kathleen M. Blee, *Racial Violence in the United States*, 28 ETHNIC & RACIAL VIOLENCE 599, 606–07 (2005)).

259. Brian Kritz, *Direct and Structural Violence Against Transgender Populations: A Comparative Legal Study*, 31 FLA. J. INT’L L. 211, 218 (2019) (paraphrasing Johan

Structural violence reinforces inequity and perpetuates the oppression of marginalized groups.²⁶⁰ “Structural violence refers to injustices embedded in social and institutional structures within societies that result in harm to individuals’ well-being.”²⁶¹ It is “enacted indirectly by hierarchal structures and belief systems, which legitimize exclusion, prejudice and discrimination practices.”²⁶² “This legitimization can take a variety of forms including unfair laws and policies that in turn can influence popular beliefs and negative attitudes and behaviors toward targeted groups”²⁶³ because of imputable characteristics like race or gender. Scholar Koritha Mitchell characterizes structural violence as “know-your-place aggression.”²⁶⁴ This aggression is

the flexible, dynamic array of forces that answer the achievements of marginalized groups such that their success brings aggression as often as praise. Any progress by those who are not straight, white, and male is answered by a backlash of violence—both literal and symbolic, both physical and discursive—that essentially says, know your place!²⁶⁵

Because our society is laser-focused on intent when evaluating violence and harm, there is likely no remedy for structural violence.²⁶⁶

D. A Framework for Academic Terror

Building on existing scholarship, I posit that academic bullying—when directed at marginalized students, staff, and faculty—is actually a type of academic terror. Individual and structural academic terror

Galtung’s scholarship on peace and conflict resolution) (“[S]tructural violence often causes direct violence, which in turn is justified and normalized . . .”).

260. Jennifer M. Ortiz & Hayley Jackey, *The System Is Not Broken, It is Intentional: The Prisoner Reentry Industry as Deliberate Structural Violence*, 99 PRISON J. 484, 498 (2019).

261. Rakhshanda Saleem, Akansha Vaswani, Emily Wheeler, Meredith Maroney, Marta Pagan-Ortiz & Madeline Brodt, *The Effects of Structural Violence on the Well-being of Marginalized Communities in the United States*, 8 J. PEDAGOGY, PLURALISM, AND PRACTICE 181, 184 (2016).

262. *Id.* (citing Peter Benson, *El Campo: Faciality and Structural Violence in Farm Labor Camps*, 23 CULTURAL ANTHROPOLOGY 589, 589–629 (2008)).

263. *Id.* at 184–85.

264. Koritha Mitchell, *Identifying White Mediocrity and Know-Your-Place Aggression: A Form of Self-Care*, 51 AFR. AM. REV. 253, 253 (2018) (emphasis omitted).

265. *Id.* (emphasis omitted).

266. See Linda Sheryl Greene, *Before and After Michael Brown—Toward an End to Structural and Actual Violence*, 49 WASH. U. J.L. & POL’Y 1, 22 (2015) (quoting Johan Galtung, *Violence, Peace, and Peace Research*, 6 J. PEACE RSCH. 167 (1969)) (emphasis omitted).

produces collective, cultural trauma. Academic terror—the overt and covert faculty behaviors directed at racially marginalized students, staff, and faculty under the guise of academic freedom—is pervasive in institutions steeped in structural racism.²⁶⁷ Detailed accounts of academic terror in the legal academy have been essentially ignored.²⁶⁸ The effects of academic terror are compounded when institutions espouse commitments to egalitarian values, but fail to adequately address the harm.²⁶⁹ While the circumstances are far too many to name, we see academic terror in the classroom when: law professors assert that there is pedagogical value in using contemptuous terms to reference Black people and actually use them,²⁷⁰ law professors deny the existence of systemic racism,²⁷¹ law professors express expectations that Black students earn the lowest grades,²⁷² law professors exclusively cold call Black students in a misguided effort to empower them,²⁷³ when law professors are not prepared for, and often ignore, racialized interactions in the law

267. See Elizabeth Anderson, *Racism Vs. Academic Freedom*, AGAINST THE CURRENT (May 1991), <https://againstthecurrent.org/atc032/racism-vs-academic-freedom> [<https://perma.cc/6GDZ-NYFL>] (focusing on racially marginalized students, faculty, and staff—particularly Black people—the definition can be applied to any marginalized group).

268. See *id.*

269. See Denny, *supra* note 239, at 6.

270. See Sloan, *supra* note 44.

271. See Joe Patrice, *Law School Prof Rants About Women and Minorities and Their Pesky Insistence on 'Rights' and 'Equality'*, ABOVE THE LAW (Oct. 23, 2020, 2:14 PM), <https://abovethelaw.com/2020/10/law-school-prof-rants-about-women-and-minorities-and-their-pesky-insistence-on-rights-and-equality/?rf=1> [<https://perma.cc/8VX3-6PPD>]; see also Various faculty-authored comments contesting proposed ABA standard 3030(c), *Notice and Comment May 2021*, AM. BAR ASS'N, https://www.americanbar.org/groups/legal_education/resources/notice_and_comment [<https://perma.cc/43ZQ-D7NL>] (last visited Apr. 13, 2023).

272. See Elizabeth Redden, *Georgetown Professor Fired for Statements About Black Students*, INSIDE HIGHER ED (Mar. 12, 2021), <https://www.insidehighered.com/news/2021/03/12/georgetown-terminates-law-professor-reprehensible-comments-about-black-students> [<https://perma.cc/RT79-2FY3>] (noting the termination of the adjunct faculty member whose comments about Black students often being in the bottom of the class were recorded and shared on social media); see also Joe Patrice, *Professor Declares Black Students 'Rarely' Graduate in the Top Half of Law School Class*, ABOVE THE LAW (Mar. 8, 2018, 11:07 AM), <https://abovethelaw.com/2018/03/professor-declares-black-students-rarely-graduate-in-the-top-half-of-law-school-class> [<https://perma.cc/4KM3-YU5X>]; see also Holly Fudge, *It Is Time to End Ability Grouping and "The Soft Bigotry of Low Expectations" It Imposes on Minority Students*, 46 U. DAYTON L. REV. 197, 202 ("While ethnicity should never affect judgments about students' achievements, previous research has indicated that it might, indeed, play a role in teachers' judgments.").

273. In my 12 years in the legal academy, numerous Black students have confided in me about this experience. No specific accounts are listed here because I do not intend to further the harm they suffer or betray their confidences in me. See also LAWPROF BLAWG, *An Open Letter To 'Liberal' Law Professors*, ABOVE THE LAW (Nov. 10, 2020, 1:13 PM), <https://abovethelaw.com/2020/11/an-open-letter-to-liberal-law-professors> [<https://perma.cc/LZ6E-8S6U>] (identifying the hypocrisy of liberal law professors).

school classroom.²⁷⁴ We see academic terror in the broader academy when: law professors encourage violence against protestors of color,²⁷⁵ law professors encourage junior faculty of color to not write about race and racial justice,²⁷⁶ law professors argue that removal of slaveholder names from institutions is “cancel culture,”²⁷⁷ law professors celebrate diversity and inclusion,²⁷⁸ law schools fail to acknowledge that promotion and tenure processes can be different for people of color.²⁷⁹ Racially marginalized students, staff, and faculty are directly and indirectly harmed by incidents of academic terror. Power and hierarchy add to the fear or deference marginalized people grant the existing power structure.²⁸⁰ This is especially true for pre-tenure faculty, contract faculty, and interactions between students and faculty and interactions between faculty and staff.²⁸¹

In the Sunken Place that is law school, accounts of academic terror are often met with silence and indifference from people in

274. See Lain, *supra* note 194, at 784.

275. See Colleen Flaherty, *No Punishment for ‘Run Them Down’ Tweet*, INSIDE HIGHER ED (Sept. 28, 2016), <https://www.insidehighered.com/quicktakes/2016/09/28/no-punishment-run-them-down-tweet> [<https://perma.cc/4394-RUR3>] (describing a law professor’s tweet which encouraged motorists to run down protesters with their vehicles).

276. See Dark, *supra* note 45, at 23; see also Martin, Mandela Gray & Finley, *supra* note 45, at 8 (“The scholars themselves are viewed as inferior because of their race, and their scholarship is also viewed as inferior because of its focus on race.”).

277. See Josh Blackman, *Cancelling John Marshall: Two Law Schools Named After the Great Chief Justice Consider Dropping His Name*, REASON: THE VOLOKH CONSPIRACY (Sept. 27, 2020, 10:00 AM), <https://reason.com/volokh/2020/09/27/cancelling-john-marshall-two-law-schools-named-after-the-great-chief-justice-consider-dropping-his-name> [<https://perma.cc/D76U-9KHS>]; see also Joe Patrice, *Law School STILL Named After Slaveholder*, ABOVE THE LAW (Mar. 24, 2021, 3:15 PM), <https://abovethelaw.com/2021/03/law-school-still-named-after-slaveholder> [<https://perma.cc/X9ZU-QBH6>].

278. See Chatman & Peters, *supra* note 201, at 7–8 (“Diversity and inclusion is harm at inception—at naming—because it is another form of segregation. It repeats the historic pattern of white people, mostly men, deciding when others may have access and individual crumbs, but not exactly equality.”).

279. See MEERA DEO, *UNEQUAL PROFESSION: RACE AND GENDER IN LEGAL ACADEMIA* 82 (2019) (“Even when policies are clearly laid out, the way that various requirements are applied to women of color and other underrepresented faculty affects both the process and the outcome.”); Grace Park, *My Tenure Denial in Presumed Incompetent II: Race, Class, Power, and Resistance of Women in Academia* 280 (Yolanda Flores Niemann, Gabriella Gutiérrez y Muhs & Carmen G. González eds. 2020) (“They [senior faculty] do not acknowledge that as [w]hite men they were already part of an old boys’ network, and that [w]hite women can also create their own parallel structures.”).

280. See Denny, *supra* note 239, at 38; Staci Perryman-Clark, *Race, Teaching Assistants, and Workplace Bullying: Confessions from an African American Pre-Tenured WPA*, in *DEFINING, LOCATING, AND ADDRESSING BULLYING IN THE WPA WORKPLACE* 126 (Cristyn L. Elder & Bethany Davila eds., 2019) (“[I]n institutional spaces, power dynamics, which pertain to who gets to say and do what to whom, are often abused by those with greater positions of power and authority. This authority often creates hostile working conditions when those in positions of power attempt to exercise control by using their authority to inflict punishment on those with less authority.”).

281. See Denny, *supra* note 239, at 3, 5.

power.²⁸² Students often lead the charge of calling for disciplinary actions against law faculty members,²⁸³ but because faculty members are protected by academic freedom, there is no recourse for the harm they inflict.²⁸⁴ We see structural violence in the legal academy when faculty members who inflict academic terror are protected and retained.²⁸⁵ The fact that these faculty members are often retained and celebrated “effectively signals adoring and cheering for racial subordination and violence.”²⁸⁶ Though they often know it exists and who the perpetrators are, faculty members are generally silent about academic terror because they do not care or because the benefits they receive from structural racism outweigh their concerns.²⁸⁷ Their silence or neutrality perpetrates “racist thinking and policy decisionmaking [sic].”²⁸⁸

In the legal academy, incidents of academic terror and structural violence make up the system of academic terrorism.²⁸⁹ First, an incident of academic terror occurs.²⁹⁰ Next, the harmed student, staff, or faculty member reports the incident to law school administration.²⁹¹ Often details of academic terror are shared publicly.²⁹² Next, law deans make public statements denouncing racism and structural racism and announce an investigation.²⁹³ And finally,

282. See Alex Rayner, *Trapped in the Sunken Place: how Get Out's purgatory engulfed pop culture*, THE GUARDIAN (Mar. 17, 2018, 3:00 PM), <https://www.theguardian.com/film/2018/mar/17/trapped-in-the-sunken-place-how-get-outs-purgatory-engulfed-pop-culture> [<https://perma.cc/T4TK-3XE8>].

283. See Chatman & Peters, *supra* note 201, at 2 (“Students speak up when faculty use their teaching platforms to espouse harmful rhetoric and when decisions disproportionately and negatively harm marginalized people. Marginalized students often lead the service and contributions on these issues . . .”); see also Atkins, *supra* note 105, at 151 (“Mis-handled incidents of bias and racism in law school classrooms lead to ‘fight or flight’ experiences for students of color left to navigate these incidents largely on their own.”).

284. See Kathryn Rubino, *N-Word-Using Law School Professor Gets to Keep His Job*, ABOVE THE LAW (Mar. 5, 2020, 11:17 AM), <https://abovethelaw.com/2020/03/n-word-professor-emory-results> [<https://perma.cc/3UZ5-Z652>]; see also Joanne C. Jones, *What's in it for Me? An Examination of Accounting Students' Likelihood to Report Faculty Misconduct*, 123 J. BUS. ETHICS 645, 646 (2014) (noting that faculty members have a high degree of autonomy and universities do little to control or prevent faculty misconduct, especially compared to mechanisms in place to monitor student misconduct).

285. See, e.g., Rubino, *supra* note 284.

286. See Brandon Hasbrouck, *White Saviors*, 77 WASH. & LEE L. REV. ONLINE 47, 52 (2020), <https://scholarlycommons.law.wlu.edu/wlulr-online/vol77/iss1/4> [<https://perma.cc/8BPM-VALA>].

287. *Id.* at 53.

288. *Id.* at 55.

289. See Capulong, King-Ries & Mills, *supra* note 112, at 12.

290. See, e.g., Redden, *supra* note 272.

291. See Chatman & Peters, *supra* note 201, at 2.

292. See, e.g., Redden, *supra* note 272.

293. See, e.g., *id.*

protected by academic freedom, the faculty member continues to teach creating opportunities for academic terror to continue to occur.²⁹⁴ Quietly, marginalized students, staff, and faculty are counseled to keep quiet about incidents of academic terror, warned to avoid these known actors if possible, and encouraged that faculty behaviors will improve over time.²⁹⁵ And while this advice reinforces implicit messages that for marginalized people existence and academic freedom means silence, most acquiesce until another incident occurs.²⁹⁶

Instead of focusing on the often highly publicized incidents of academic terror, an academic terrorism framework allows us to more effectively analyze structural racism in the legal academy. Under the academic terror framework, we

- a. apply the definition of academic terror to each incident;
- b. evaluate whether a faculty member's speech or conduct is actually protected by academic freedom;
- c. evaluate the institutional response by applying the definition of structural violence; and
- d. assess the collective, cultural trauma.

This four-step process for analyzing incidents of academic terror allows us to see academic terrorism as systemic as each incident further subordinates racially marginalized groups, not just the student, staff, or faculty member involved. And while academic terrorists should be held accountable for their actions, it allows us to see racism as more than an individual, malicious endeavor.²⁹⁷

Further, when law schools are genuinely invested in anti-racism, the framework can be used to forestall incidents of academic terror and dismantle structural racism. For example, when examining the ways Blackness is a disability in the law school white space as I argue herein, a faculty curriculum committee could: examine the ways Black students experience academic terror when law is taught without regard to race and social context; provide faculty members with resources to incorporate race and social context into existing

294. See Flaherty, *supra* note 275.

295. See Denny, *supra* note 239, at 3 (“Turning to senior faculty in the department, I was waved off from pressing the issue of the environment, warned that someone on the cusp of tenure might not want to rock the boat too much. Besides, as I moved from one veteran colleague to another seeking counsel and support, the same refrain was intoned: It gets better.”).

296. See *id.*

297. See Capulong, King-Ries & Mills, *supra* note 112, at 13.

required courses; recommend an institutional approach that prioritizes an incorporation of race and social context into required courses; and assess the collective, culture trauma that occurs when the evolution of law is taught without regard to social context, when whiteness is accepted as a norm, and when the application of law is regarded as race-neutral.

V. ANTI-RACISM

*I can't believe what you say . . . because I see what
you do*

—James Baldwin²⁹⁸

After the worldwide racial justice protests that resulted from George Floyd's murder at the hands of the police, a broad anti-racism movement seemed within reach. Yet, for many Black people, it is difficult to reconcile public commitments to anti-racism with individual and institutional racist action and inaction.

In this section, after distinguishing anti-racism from "*Antiracism, Inc.*," I examine recent anti-racism statements from law school deans and faculties. Then, I identify prevailing themes to assess whether law schools aspire to dismantle structural racism and tackle academic terror or if the statements are simply appropriations of anti-racism rhetoric for social and economic gain.

A. *Anti-racism and Anti-racist Education*

In his 2019 bestselling book, Ibram X. Kendi provided a framework for interpersonal anti-racism derived from an evolution of his own experiences and ideas about race.²⁹⁹ In 2020, following the murder of George Floyd and the police killing of Breonna Taylor, the book and term were elevated by a national reckoning with race.³⁰⁰ According to Kendi, "[a] racist policy is any measure that produces or sustains racial inequity between racial groups. An antiracist policy is any measure that produces or sustains racial equity between racial groups."³⁰¹ In this anti-racist framework, policy means "written and

298. James Baldwin, *A Report from Occupied Territory*, THE NATION (July 11, 1966), <https://www.thenation.com/article/archive/report-occupied-territory> [https://perma.cc/Q732-MFYV].

299. IBRAM X. KENDI, HOW TO BE AN ANTIRACIST 4–11 (2019).

300. See Erin Aubry Kaplan, '*Antiracist Baby*' helps educate infants about racism. Author Ibram X. Kendi explains how, L.A. TIMES (June 5, 2020, 8:00 AM), <https://www.latimes.com/entertainment-arts/books/story/2020-06-05/ibram-x-kendi-antiracist-baby-q-a> [https://perma.cc/P8C5-CTH3].

301. KENDI, *supra* note 299, at 18.

unwritten laws, rules, procedures, processes, regulations, and guidelines that govern people.”³⁰² There are no “race-neutral” policies.³⁰³ Kendi asserts that “racist policy” is more exacting than terms like structural or institutional racism because “[r]acism itself is institutional, structural, and systemic.”³⁰⁴ And that while all people have the power to discriminate, “racist power” lies with few policymakers.³⁰⁵ Policymakers, supported by racist ideas, use racist power and majority presence to govern racialized spaces.³⁰⁶

Institutions committed to anti-racism do not become anti-racist overnight.³⁰⁷ Instead, genuine commitments follow a continuum involving a move from being an exclusive, segregated institution to a fully inclusive institution.³⁰⁸ “Anti-racism work requires sustained, proactive education and engagement as well as systemic, intentional efforts at micro-and macro-levels.”³⁰⁹ Anti-racist education “explicitly highlights, critiques, and challenges institutional racism. It addresses how racist beliefs and ideologies structure one-on-one interactions and personal relationships. It also examines and challenges how institutions support and maintain disadvantages and advantages along racial lines.”³¹⁰ Anti-racist education: examines historical roots and contemporary manifestations of racial prejudice, explores the influence of race on personal and professional attitudes towards race, identifies and counteracts bias in learning materials, deals with racial tension and conflict, identifies and incorporates anti-racist materials into the curriculum, develops new approaches to teaching using varying cognitive approaches, identifies appropriate assessment procedures and practices, assesses hidden curriculum in order to make it more inclusive, and ensures that policies and practices are consistent with equity goals and that personnel are educated so that they can successfully implement equity programs.³¹¹

302. *Id.*

303. *Id.*

304. *Id.*

305. *Id.* at 19.

306. *Id.* at 20.

307. KENDI, *supra* note 299, at 20.

308. See REG'L ARTS & CULTURE COUNCIL, CONTINUUM ON BECOMING AN ANTI-RACIST, MULTICULTURAL INSTITUTION, <https://racc.org/wp-content/uploads/buildingblocks/foundation/Continuum%20on%20Becoming%20an%20Anti-Racist,%20Multicultural%20Institution.pdf> [<https://perma.cc/T6D7-3QCU>] (last visited Apr. 13, 2023).

309. *Anti-Racism Education, Programs, and Resources*, N.Y. UNIV. (Mar. 1, 2022), <https://www.nyu.edu/life/global-inclusion-and-diversity/anti-racism.html> [<https://perma.cc/AG7G-RKTR>].

310. *Being Antiracist*, NAT'L MUSEUM OF AFR. AM. HIST. & CULTURE, <https://nmaahc.si.edu/learn/talking-about-race/topics/being-antiracist> [<https://perma.cc/7ZSV-KMRZ>] (last visited Apr. 13, 2023).

311. See John W. Kehoe, *Multicultural Education vs. Anti-Racist Education: The Debate in Canada*, 58 SOC. EDUC. 354, 354 (1994).

B. Antiracism, Inc.

While Kendi's framework has been broadly adopted, we should be critical of how academics and others utilize anti-racist discourse.³¹² *Antiracism, Inc.* examines the ways powerful people and institutions incorporate and appropriate anti-racist discourse in ways that advance racism and neutralize legitimate racial justice efforts.³¹³ "Although racial justice and decolonization movements developed a critical language about the relationship between race and power, social actors across the political spectrum weaponize such rhetoric as a counterrevolutionary maneuver against ongoing liberation struggles."³¹⁴ The rhetoric and practice of anti-racist appropriators empowered by law and education, operate to oppose liberation of people of color.³¹⁵ We can distinguish those who are appropriating anti-racist language from those who are anti-racist by examining actions. Anti-racist action is "oriented *against* white domination and *towards* the active engagement with epistemologies, methods, and histories stemming from radical movements by people of color."³¹⁶ When anti-racism efforts are authentic, there is a "coherence between the words and outcomes"³¹⁷

While the prominence of anti-racism in educational vernacular may signal a change in institutional priorities,³¹⁸ it is too early to determine whether anti-racist language will produce anti-racist action in higher education. "The use of powerblind strategies—strategies that purport to be antiracist but in fact reinforce racial hierarchy—is generally obscured by taken-for-granted attitudes toward academic discourse" because "academic argument[s] are generally treated as neutral technologies for conveying information,

312. Anti-racism is not a new academic concept, but few have been publicly critical of Kendi's work post the release of his book. *But see* Anthony Monteiro, *The Invention of Ibram X Kendi and the Ideological Crisis of Our Time*, BLACK AGENDA REP. (Sept. 2, 2020), <https://blackagendaareport.com/invention-ibram-x-kendi-and-ideological-crises-our-time> [<https://perma.cc/W7A5-28U4>] ("[Kendi] disconnects power relations from his understanding of racism; he separates racism from its economic foundations and from the exploitation of labor for profit; he uses the term inequity over structural, systemic and institutional racism.").

313. Felice Blake & Paula Ioanide, *Antiracism Incorporated*, in *ANTIRACISM INC.: WHY THE WAY WE TALK ABOUT RACIAL JUSTICE MATTERS* 17 (Felice Blake, Paula Ioanide & Alison Reed eds., 2019).

314. *Id.* at 17.

315. *See id.* at 19.

316. *Id.* at 20 (emphases in original).

317. *Id.*

318. Meera Deo, *Why BIPOC Fails*, 107 VA. L. REV. ONLINE 115, 122 (2021) ("The push for *antiracism* itself reflects an update in both language and priorities, signaling a shift from protecting diversity to promoting broader action-oriented change." (emphasis in original)).

ideas, and explanations.”³¹⁹ While powerblind strategies support structural racial subordination, “collaborative activist discourses” develop existing critical pedagogies to address racial subordination.³²⁰

In the legal academy, commitments to diversity and cultural competence do not equate to effective racial dialogue and problem solving.³²¹ In fact, a focus on diversity and cultural competence “can even undermine an antiracist agenda.”³²² When marginalized people demand that law schools address academic terror, and law schools respond with diversity initiatives, concerns remain unaddressed and law schools continue to be a Sunken Place. Concerning our obligation to students, “competence means not just a commitment to diversity or cross-culturalism but to antiracism.”³²³ The anti-racist professional identity includes an understanding of race, racism, and racial identity.³²⁴ “[T]he shallow depth of the current focus on diversity and cross-cultural competence [i]s both ubiquitous within the legal academy and conveniently avoid[s] presenting law students with the harder questions about their future professional roles within a legal system founded on race and racism.”³²⁵ “[G]iven the overwhelming whiteness of legal education and the legal profession, the very notion of requiring cross-cultural competence as a learning outcome simply reinforces the standard—but implicit—conception of a legal professional as ‘white.’”³²⁶

C. Anti-racism Statements and Themes

In 2020, motivated by incidents of racial injustice—specifically, George Floyd’s murder at the hands of the police—and student demands, many law schools vowed to become anti-racist via public institutional statements signed by deans and other administrators and faculty resolutions.³²⁷ A review of the deans’ statements³²⁸ reveals

319. Barbara Tomlinson, *Wicked Problems and Intersectionality Telephone*, in *ANTIRACISM INC.: WHY THE WAY WE TALK ABOUT RACIAL JUSTICE MATTERS* 161, 163–64 (Felice Blake, Paula Ioanide & Alison Reed eds., 2019).

320. *Id.* at 166 (writing specifically about the appropriation of intersectionality).

321. *See* Capulong, King-Ries & Mills, *supra* note 112, at 11.

322. *Id.* at 11.

323. *Id.* at 22.

324. *See id.* at 7.

325. *Id.* at 11.

326. *Id.* at 12.

327. *See* ASS’N OF AM. L. SCHS., *supra* note 42; *see also* ALEXIS WESLEY, JILL DUNLAP & GRANBERRY RUSSELL, NAT’L ASS’N OF STUDENT PERS. ADM’RS, INC., *MOVING FROM WORDS TO ACTION: THE INFLUENCE OF RACIAL JUSTICE STATEMENTS ON CAMPUS EQUITY EFFORTS* 3–5 (2021), http://apps.naspa.org/pubs/Moving_From_Words_to_Action_FINAL.pdf [<https://perma.cc/Z5S5-V954>] (evaluating college and university racial justice statements released after George Floyd’s murder).

328. At the time of publication in April 2023, there were 203 deans’ statements and

several themes: curriculum modifications, anti-Black racism, diversity initiatives.³²⁹ While the faculty resolutions echoed many of the themes present in the deans' statements, they primarily focused on anti-Black racism and systemic racism.³³⁰

1. Deans' Statements

The commitments to curriculum modifications were broad.³³¹ Deans vowed to establish centers devoted to exploring racism and the law.³³² Where centers already existed, deans vowed to expand offerings to include online content designed to educate students about pressing issues and provide support.³³³ Deans also established or reconstituted faculty committees dedicated to addressing racial disparities.³³⁴ Implicit in many statements were commitments to no longer ignore race or "America's original sin" in the way we learn and assess law.³³⁵

Most of the deans who made public statements signed on to a letter encouraging the American Bar Association Section on Legal Education and Admission to the Bar Council (Council) to revise curriculum standards to further anti-racism efforts.³³⁶ In summer 2020, characterizing the time as "a unique moment in our history to confront racism that is deeply embedded in our institutions, including in the legal profession . . .," law school deans collectively encouraged the Council to consider "enacting a requirement that every law school must provide training and education of its students with regard to bias, cultural awareness, and anti-racist practices."³³⁷ In advance of the Council's decision a few schools adjusted their curriculum to include a required racism course for the class of 2024.³³⁸ In

22 faculty resolutions posted on the AALS Antiracist Clearinghouse. *See* ASS'N OF AM. L. SCHS., *supra* note 42.

329. Here, I intentionally examine themes without implicating any particular school, dean, or faculty.

330. *See* ASS'N OF AM. L. SCHS., *supra* note 42.

331. *Id.*

332. *See id.*

333. *See id.*

334. *See id.*

335. *See id.*

336. Letter from law school deans to the Council of the ABA Section of Legal Education and Admissions to the Bar (July 30, 2020), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/aug20/20-aug-council-aba-bias-cultural-awareness-anti-racist-practices-edu-training-letter.pdf [<https://perma.cc/8KRP-7FGM>].

337. *Id.*

338. *See, e.g., Cardozo to Adopt Broader Approach to Teaching About Race, Racism and the Law: Changes Include a Required Upper-level Course and Expanded Curricular*

May 2021, the Council released proposed changes to Curriculum Standard 303.³³⁹ The language requires law schools to “provide training and education to law students on bias, cross-cultural competency, and racism: (1) at the start of the program of legal education, and (2) at least once again before graduation.”³⁴⁰ The proposed change was met with criticism.³⁴¹ But, in February 2022, the American Bar Association (ABA) House of Delegates passed the proposed changes with a 348–17 vote.³⁴² According to interpretations of the new Standard 303(c), law schools can demonstrate compliance by requiring all students to “participate in a substantial activity designed to reinforce the skill of cultural competency and their obligation as future lawyers to work to eliminate racism in the legal profession.”³⁴³

About half of the statements specifically committed to confront anti-Black racism with some explicitly marking this as work that should be performed by allies (non-Black people).³⁴⁴ Community

Offerings, CARDOZO L. (June 10, 2021), <https://cardozo.yu.edu/news/cardozo-adopt-broader-approach-teaching-about-race-racism-and-law-changes-include-required> [https://perma.cc/VRH2-PCR5]; Staci Zaretsky, *Top Law School Will Make Race-Related Coursework Mandatory for Graduation*, ABOVE THE LAW (Apr. 9, 2021, 1:00 PM), <https://abovethelaw.com/2021/04/top-law-school-will-make-race-related-coursework-mandatory-for-graduation/?rf=1> [https://perma.cc/6QZ5-7KLJ].

339. Compliance with the ABA standards determines law school accreditation. See *Preface*, in ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2020–2021, AM. BAR ASS’N, https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2020-2021/2020-21-aba-standards-and-rules-preface.pdf [https://perma.cc/5UF8-CNXT] (last visited Apr. 13, 2023); AM. BAR ASS’N STANDARDS COMM., PROPOSED CHANGES TO STANDARDS 205 AND 206, 303 AND 508, AND 507 (2021) [hereinafter AM. BAR ASS’N (COUNCIL’S PROPOSED CHANGES)], https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/may21/21-may-standards-committee-memo-proposed-changes-with-appendix.pdf [https://perma.cc/489T-TZKD].

340. AM. BAR ASS’N (COUNCIL’S PROPOSED CHANGES), *supra* note 339.

341. See Brian Leiter, *Call by ABA for comments on significant proposed changes to standards pertaining to “non-discrimination and equal opportunity” and “curriculum”*, BRIAN LEITER’S L. SCH. REPS. (June 14, 2021), <https://leiterlawschool.typepad.com/leiter/2021/06/call-by-aba-for-comments-on-significant-proposal-changes-to-standards-pertaining-to-non-discrimination-a.html> [https://perma.cc/G6SG-V6PG]; John O. McGinnis, *Why the Lawyers Cartel Is Pushing for Woke Law Schools*, WALL ST. J. (July 15, 2021, 1:01 PM), <https://www.wsj.com/articles/anticompetitive-woke-law-schools-aba-identity-politics-affirmative-action-11626364370> [https://perma.cc/4GGR-PZZ9].

342. Stephanie Francis Ward, *Loan counseling and cross-cultural competency programming will be required from ABA-accredited law schools*, AM. BAR ASS’N J. (Feb. 14, 2022, 12:38 PM), <https://www.abajournal.com/news/article/requirement-for-cross-cultural-competency-programing-in-law-schools-among-changes-approved-by-aba-house-of-delegates> [https://perma.cc/V82F-2FCM].

343. *Id.*; AM. BAR ASS’N SEC. OF LEGAL EDUC. & ADMIS. TO THE BAR, REVISED STANDARDS FOR APPROVAL OF LAW SCHOOLS 300 (2022), <https://www.americanbar.org/content/dam/aba/administrative/news/2022/02/midyear-hod-resolutions/300.pdf> [https://perma.cc/3G2T-JCZV].

344. See ASS’N OF AM. L. SCHS., *supra* note 42 (linking to all dean statements).

dialogue was the most prevalent mechanism proposed for tackling anti-Black racism.³⁴⁵ There was a major focus on listening and seeking to understand the ways laws perpetuate racial injustice.³⁴⁶ Some statements vowed to address anti-Black racism in institutional strategic plans.³⁴⁷ Others committed to creating reading and resource lists, dedicating money to support students interested in racial justice work, and money to support faculty racial justice scholarship.³⁴⁸ Though George Floyd's murder and anti-Black racism were the impetus for the statements, a quarter of the deans' statements did not mention anti-Black racism.³⁴⁹

A majority of the statements committed to various diversity initiatives.³⁵⁰ Initiatives included: establishing a George Floyd scholarship,³⁵¹ creating Diversity, Equity, and Inclusion (DEI) administrator positions,³⁵² promoting existing DEI administrators,³⁵³ establishing a DEI council or task force,³⁵⁴ establishing a dean's task force,³⁵⁵ and updating the diversity website.³⁵⁶ Many of these commitments equated diversity to racial justice.

Unrelated to the identified themes, but important to my assessment here, a minority of deans' statements offered very little in terms of administrative and institutional action.³⁵⁷ And many statements failed to explicitly identify Black staff in their acknowledgment of those affected by racism by explicitly focusing on students and faculty.³⁵⁸ Some spoke of internal examinations of experiences that "do not reflect our own" as if Black people were not a part of the law school community.³⁵⁹ Others encouraged the community to use their "power as lawyers" to effect change, without regard to the barriers that exist for Black lawyers.³⁶⁰ Some relied on student efforts by cosigning Black Law Students Association (BLSA) letters and committing to support existing initiatives like a BLSA racial justice

345. *See id.*

346. *See id.*

347. *See id.*

348. *See id.*

349. *See id.*

350. *See ASS'N OF AM. L. SCHS., supra* note 42.

351. *See id.*

352. *See id.*

353. *See id.*

354. *See id.*

355. *See id.*

356. *See ASS'N OF AM. L. SCHS., supra* note 42.

357. *See id.*

358. *See id.*

359. *See id.*

360. *See id.*

walkathon or an alumni podcast.³⁶¹ Others requested ideas and action items from the community.³⁶² And finally, a few schools offered vague commitments to racial justice advocacy, vowed to “explicitly denounce racism” without providing specific action items, and committed to “stand in solidarity” with those who are marginalized and disenfranchised without providing information about how to accomplish said stand.³⁶³

2. Faculty Resolutions

The faculty resolutions echoed many of the themes in the deans’ statements (diversity initiatives, curriculum modifications).³⁶⁴ But, unlike the deans’ statements, the resolutions demonstrated overwhelming support for structural change.³⁶⁵ All but one of the statements were from faculties of law schools where a dean’s statement was issued.³⁶⁶

The majority of the faculty resolutions vowed to address anti-Black racism by evaluating and dismantling systems of oppression.³⁶⁷ The statements demonstrated an overwhelming commitment to structural change.³⁶⁸ To accomplish this goal, multiple faculties committed to perform a “racial equity audit” to uncover systemic racism within their respective law schools.³⁶⁹ Others committed to broadly evaluate systemic racism in legal education.³⁷⁰ Finally, faculties committed to engage in self-evaluation to uncover and address individual and collective biases.³⁷¹

D. Anti-racist or Antiracist, Inc.?

It is difficult to reconcile what the statements and resolutions say with the ways deans and faculties explicitly and implicitly support academic terrorism. They demonstrate that we have yet to reach “interest convergence”³⁷² in legal academia. Structural racism

361. This is important because, as noted herein, students of color are often burdened with the work of making their institutions better. *See id.*

362. *See* ASS’N OF AM. L. SCHS., *supra* note 42.

363. *See id.*

364. *See id.*

365. *See id.*

366. *See id.*

367. *See id.*

368. *See* ASS’N OF AM. L. SCHS., *supra* note 42.

369. *See id.*

370. *See id.*

371. *See id.*

372. Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence*

prevents law schools from being anti-racist and exposes the “largely performative nature of claiming to be committed to an idea while substantively and concretely ensuring the opposite.”³⁷³ Most of the statements “look more like marketing campaigns than like blueprints for the implementation of specific strategies aimed at tackling issues of race”³⁷⁴ For example, few statements address tackling interpersonal or structural racism.³⁷⁵ Few schools address the barriers to entry to the legal profession.³⁷⁶ No statement or resolution addressed the ways our faculty caste system replicates systems which oppress people of color, especially women.³⁷⁷ If these statements are not followed with concrete action, law schools are engaging in “racial capitalism” by deriving social and economic benefits from George Floyd’s death and the Black Lives Matter movement.³⁷⁸

Individuals and institutions that seek to be anti-racist must evaluate sources and systems of racist power. While the faculty resolutions were explicit in their commitments to structural change, overall, the statements drafted by the most powerful people in the legal academy—law school deans—failed to address racist power.³⁷⁹ They also failed to address the ways existing policies, practices, and traditions keep structural racism alive in the legal academy.³⁸⁰ Deans, as law school policymakers and institutional leaders, should be using existing critical pedagogies designed to address racial subordination to lead the charge in examining the ways Blackness is a disability in the law school white space. And while diversity is certainly important, an overemphasis on diversity as a mechanism for tackling structural racism is a power blind strategy which supports structural racial subordination.

Dilemma, 93 HARV. L. REV. 518, 523 (1980) (“[T]his principle of ‘interest convergence’ provides: The interest of [B]lack in achieving racial equality will be accommodated only when it converges with the interests of whites. However, the fourteenth amendment, standing alone, will not authorize a judicial remedy providing effective racial equality for [B]lack where the remedy sought threatens the superior societal status of middle- and upper-class whites.”).

373. Chatman & Peters, *supra* note 201, at 2 (describing the many ways law schools perpetuate systemic racism in the faculty hiring process).

374. Veronica Root Martinez & Gina-Gail S. Fletcher, *Equality Metrics*, 130 YALE L.J. F. 869, 869 (2021).

375. See ASS’N OF AM. L. SCHS., *supra* note 42.

376. See *id.*

377. Rachel Lopez, *Untitled: The Power of Designation in the Legal Academy*, 73 RUTGERS L. REV. 101, 103 (2021).

378. See Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151, 2153 (2013) (defining racial capitalism as “the process of deriving social or economic value from the racial identity of another person”).

379. See ASS’N OF AM. L. SCHS., *supra* note 42.

380. See *id.*

Anti-racist statements and resolutions alone will not change the structural racism embedded in law schools. During the 2020–2021 academic year, law schools hosted teach-ins,³⁸¹ law review symposiums,³⁸² and faculty workshops³⁸³ focused on racism and racial justice. By geographical region, law schools formed consortia to tackle anti-racism.³⁸⁴ It will be important to continue to assess actions in the coming years and hold law schools accountable for their inaction and when their actions are “antiracist, inc.”

CONCLUSION

*Not everything that is faced can be changed. But
nothing can be changed until it has been faced.*

—James Baldwin³⁸⁵

Like *Get Out*, this Article conceptualizes academic horrors that are far too familiar to Black people. In the legal academy, structural racism is the monster, and under the guise of academic freedom, faculty members inflict academic terror on marginalized people. Academic terror—the overt and covert faculty behaviors directed at racially marginalized people under the guise of academic freedom—is pervasive in institutions steeped in structural racism. Marginalized people are directly and indirectly harmed by incidents of academic

381. See *Teach-In for Racial Justice*, UNIV. CIN. COLL. OF L., <https://law.uc.edu/racial-justice-teach-in.html> [<https://perma.cc/9XXH-KQ6Q>] (last visited Apr. 13, 2023) (organized by Boston University School of Law, Howard University School of Law, Penn State Dickinson Law, Rutgers Law School, University of California, Irvine School of Law, University of Cincinnati College of Law, and Washburn University School of Law).

382. E.g., *Reckoning and Reformation: Reflections and Legal Responses to Racial Subordination and Structural Marginalization*, NW. U.L. REV., <https://northwesternlawreview.org/reckoning-and-reformation-symposium> [<https://perma.cc/5NG7-FKP5>] (last visited Apr. 13, 2023) (including published essays part of a collaboration between *Virginia Law Review*, *Yale Law Journal*, *NYU Law Review*, *Columbia Law Review*, *California Law Review*, *Georgetown Law Journal*, *Northwestern Law Review*, *Michigan Law Review*, *Cornell Law Review*, *Duke Law Journal*, *Pennsylvania Law Review*, and *Stanford Law Review*); *Joint Symposium Description and Call for Proposals*, GEO. L.J. (2021), <https://www.law.georgetown.edu/georgetown-law-journal/wp-content/uploads/sites/26/2021/03/Duke-Law-Race-Symposium-Proposal.pdf> [<https://perma.cc/BW36-QUNC>].

383. See *Hon. Edward D. Re Faculty Workshop Series 2020–2021*, ST. JOHN'S UNIV. SCH. OF L., <https://www.stjohns.edu/law/faculty/hon-edward-d-re-41cba-43l-68hon-faculty-workshop-series> [<https://perma.cc/KRN3-TMVR>] (last visited Apr. 13, 2023) (noting a specific focus on race, racism, and anti-racism); FORDHAM SCH. OF L. CTR. ON RACE, L. AND JUST., https://www.fordham.edu/info/25249/center_on_race_law_and_justice [<https://perma.cc/4UTN-4AGG>] (last visited Apr. 13, 2023).

384. E.g., *New York Area Law School Anti-Racism Consortium*, <https://linktr.ee/LSARC> [<https://perma.cc/4WAX-L64Z>] (last visited Apr. 13, 2023).

385. BALDWIN, *supra* note 52.

terror. While academic freedom has few clearly articulated boundaries, racism is an unquestionable violation of academic freedom in practice. When this boundary is ignored and perpetrators of racial terror are retained and celebrated, marginalized people feel the effects of structural violence. Incidents of academic terror and structural violence make up the system of academic terrorism in the law school Sunken Place.

Are anti-racism efforts addressing structural racism and academic terror? Not really. Statements that espouse commitments to change are an important first step. But we cannot begin to change the legal academy until we face our history. We cannot be anti-racist until we acknowledge and dismantle structural racism in the legal academy. Certainly, this change will not happen overnight, but we can start by changing the things that make law schools white spaces and make Blackness a disability in the legal academy. This includes changing our physical spaces, what we teach, and how we teach. It also includes holding faculty members accountable for incidents of academic terror and treating academic freedom like the privilege it is.

Only time will tell if the anti-racism proclamations of 2020 are a beginning or a killer ending. For now, the legal academy remains a Sunken Place for many Black people. And while there are no guarantees that the legal academy will ever change, as Baldwin powerfully notes, we cannot change what we are not willing to face.