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## Racialized Red Tape: Unraveling Administrative Burdens in Liquor Licensing

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### ABSTRACT

Americans often bemoan ‘red tape’ as cumbersome but necessary formalities within administrative governance. Though frustrating, red tape seems to assuage public confidence by portraying bureaucratic decisionmaking as democratic, thorough, and—most importantly—impartial. This Article counters that passive frame, repositioning administrative procedures as active producers of structural inequity. Drawing on the experiences of small minority-owned businesses seeking to obtain or retain liquor licenses, this Article constructs regulatory bodies as sites that delineate access, agency, and belonging among marginalized groups despite decades of equity interventions. Part I contextualizes liquor licensing within this endeavor, situating it as an unassuming administrative practice that underlies historical and contemporary disparities in spatial and economic autonomy. Part II evaluates the role of state agencies and agents in advancing “racialized administrative burdens,” or the learning, psychological, and compliance barriers that conceal exclusionary practices. Relying on qualitative focused case narratives, Part III interprets how racialized administrative burdens in liquor licensing are both operationalized

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and insulated through normative appeals to neutrality and public safety. Part IV prescribes “historically informed rulemaking” as an analytical framework for rule design and enforcement in contested regulatory domains. This Article invites legal scholars, policymakers, and agency officials to take seriously the distributive properties of bureaucratic procedure.

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## INTRODUCTION

The promise of the American Dream, with its vision of equal opportunity for all, falls short for Black entrepreneurs whose dreams are obstructed by administrative barriers. An endeavor that is both spiritual and material, many small business owners believe that entrepreneurial spirit drives their calling, securing a better future regardless of race or ethnicity.<sup>1</sup> And yet, for far too many Black founders, that promise represents an illusion, one hollowed out by regulatory obstacles within a system that, in retrospect, has failed to extend its full embrace to all.<sup>2</sup> This elusiveness points to a systemic brokenness that, as Professor Regina Austin observed, has led a new generation of entrepreneurs to forge a different path—one not *via* the promises of the American Dream but *in defiance* of the systems that have denied them full inclusion.<sup>3</sup>

The gap between theory and reality that drives Black entrepreneurs to apostasy is particularly evident in liquor licensing, where administrative power is deeply ensconced in the corridors of alcohol regulatory boards and commissions. Liquor licensing, which sits at the intersection of public interest and private enterprise, is among the most heavily regulated sectors of entrepreneurship.<sup>4</sup> The contemporary model is born out of post-Prohibition efforts to reintroduce alcohol markets under extensive state oversight to maintain a sheen of morality. In capturing this ubiquity, the Supreme Court described liquor licensing laws as “pervasive regulatory schemes under which the State dictates and continually supervises virtually every detail of the operation of the licensee’s business.”<sup>5</sup> In the Court’s view, few business enterprises come close to the “complete state involvement” that liquor license regulation entails.<sup>6</sup> Because state and local agencies control whether a license is issued, renewed, or revoked, entry into and survival within the industry depend on continuous governmental approval.<sup>7</sup> Equally restrictive is the broad discretion exercised by agency officials. Instead of being under an obligation to uniformly enforce the rules in all situations, government agencies and the officials who serve in them

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<sup>1</sup> Yochai Benkler & Talha Syed, *Reconstructing Class Analysis*, 4 J. L. & POL. ECON. 731, 734 (2024) (critiquing how theories of class and social mobility overlook structural inequities in the distribution of power and opportunity).

<sup>2</sup> See generally Khiara M. Bridges, *Excavating Race-Based Disadvantage Among Class-Privileged People of Color*, 53 HARV. C.R.-C.L. L. REV. 65 (2018); Deborah N. Archer, *Exile from Main Street*, 55 HARV. C.R.-C.L. L. REV. 788 (2020); Andrea Freeman, *Unconstitutional Food Inequality*, 55 HARV. C.R.-C.L. L. REV. 840 (2020); Monica C. Bell, *Safety, Friendship, and Dreams*, 54 HARV. C.R.-C.L. L. REV. 703 (2019).

<sup>3</sup> See Regina Austin, “An Honest Living”: *Street Vendors, Municipal Regulation, and the Black Public Sphere*, 103 YALE L.J. 2119, 2119 (1994) (“Thus, what is characterized as economic deviance in the eyes of a majority of people may be viewed as economic resistance by a significant number of blacks.”).

<sup>4</sup> *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 184–85 (1972) (holding that state liquor licensing alone does not convert private discrimination into state action); cf. Shelley Ross Saxer, *License to Sell: Constitutional Protection against State or Local Government Regulation of Liquor Licensing*, 22 HASTINGS CONST. L.Q. 441, 444 (1995) (explaining how liquor licensing simultaneously operates as a regulatory privilege and a mechanism of state control).

<sup>5</sup> *Moose Lodge*, 407 U.S. at 184–85.

<sup>6</sup> *Id.*

<sup>7</sup> See, e.g., Aaron L. Nielson, *How Agencies Choose Whether to Enforce the Law: A Preliminary Investigation*, 93 NOTRE DAME L. REV. 1517 (2018).

exercise judgment that, as a practical matter, is insulated from meaningful judicial review.<sup>8</sup> What this structure produces, then, is dependence. Regulators' decisions to grant or deny a liquor license, putatively based on considerations of public health, safety, morals, or general welfare,<sup>9</sup> determine whether a business operates or shuts down. Businesses function in a space where survival hinges on administrative judgment, and where the standards governing that judgment are opaque, subjective, and difficult to challenge. As such, state agents do not merely enforce liquor regulations enacted by legislators; they have the authority to regulate access to entrepreneurial opportunity itself. Far from incidental, liquor licensing authorities determine who may participate in the economy as entrepreneurs owning and operating a business, and, by extrapolation, who is deemed worthy of full inclusion in public economic life with access to the leisure and recreation that it entails.<sup>10</sup>

This Article argues that, in managing the minutiae of everyday decision-making in administrative agencies, officials and the institutions they represent often engage in a critical dispossession of Black entrepreneurs, a harm thus far overlooked in civil rights law and administrative law discourse.<sup>11</sup> To be sure, causes of Black business failure have been a topic of heated discussion on which reasonable scholars differ. Some interpretations focus on deficiencies within the Black business sector,<sup>12</sup> while other theories attribute racial disparities in entrepreneurship to flaws in banking, housing, or political infrastructures.<sup>13</sup> Yet again, others consider business failure to be the inevitable consequence of inequities in education, training, opportunity recognition, management skills, or access to capital, often classified as individual shortfalls.<sup>14</sup> This Article does not attempt to resolve those debates, but instead it brings into view the outsized barrier of something more local and quotidian: the role of the administrative state on lost entrepreneurial opportunity and, hence, economic loss. Liquor licensing offers a clear view into this phenomenon because, within Black neighborhoods, restaurants and nightclubs have historically generated and

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

<sup>9</sup> Saxer, *supra* note 4, at 444.

<sup>10</sup> See, e.g., *BEG Invs., LLC v. Alberti*, 85 F. Supp. 3d 13, 21 (D.D.C. 2015) (nightclub alleging that the conditions on their license were designed to “inhibit[] the free association of young black African Americans” and to suppress ‘urban’ music genres, including R&B, hip-hop and go-go).

<sup>11</sup> Garry D. Bruton, Alexander Lewis, Jose A. Cerecedo-Lopez, & Kenneth Chapman, *A Racialized View of Entrepreneurship: A Review and Proposal for Future Research*, 17 *ACAD. MGMT. ANNALS* 492, 496 (2023) (highlighting the need for scholarly attention to why underrepresented minorities are disadvantaged in entrepreneurship “given that open racial animus is no longer widely expressed in the United States”); Cristina Isabel Ceballos, David Freeman Engstrom, & Daniel E. Ho, *Disparate Limbo: How Administrative Law Erased Antidiscrimination*, 131 *YALE L.J.* 370, 384–401 (2021) (discussing the retrenchment of a civil rights lens within Administrative Procedure Act jurisprudence).

<sup>12</sup> This conversation has been ongoing for decades. See generally Robert E. Suggs, *Bringing Small Business Development to Urban Neighborhoods*, 30 *HARV. C.R.-C.L. L. REV.* 487 (1995).

<sup>13</sup> Professor Mehrsa Baradaran has written extensively regarding the compilation of social, economic, and legal barriers that economically disenfranchise marginalized groups. See generally *THE QUIET COUP: NEOLIBERALISM AND THE LOOTING OF AMERICA* (2024), *THE COLOR OF MONEY: BLACK BANKS AND THE RACIAL WEALTH GAP* (2017).

<sup>14</sup> Wilton Hyman, *Empowerment Zones, Enterprise Communities, Black Business, and Unemployment*, 53 *WASH. U. J. URB. & CONTEMP. L.* 143, 160-162 (1998) (comparing outcomes for the different types of Black-owned businesses).

circulated revenue locally. These establishments shape how the community's leisure dollars are spent and who benefits from the economic ecosystem of employees, contractors, artists, vendors, and other small minority-owned businesses. Because their viability is inseparable from the ability to sell alcohol, access to liquor licensing is a make-or-break threshold, especially for nighttime venues. Yet, despite the visibility of struggle and collective advancement across many spheres of Black life, barriers to liquor licensing go unnoticed—widely recognized among Black entrepreneurs, but by few others, and even then, only anecdotally so.<sup>15</sup>

To make sense of this patterned yet invisible exclusion, integral to this narrative is the fact that state officials impose ‘racialized administrative burdens.’<sup>16</sup> Victor Ray, Pamela Herd, and Donald Moynihan defined the term as an administrative practice “that normalizes and reinforces patterns of racial inequality in public services, simultaneously reproducing disparate treatment while obscuring discrimination because bureaucratic actors are ‘just following the rules.’”<sup>17</sup> Whether promulgated through exercises of discretion, plausibly deniable bias, or facially neutral policy design, racially administrative burdens are the mechanisms through which state agents transform innocuous processes that promote compliance into techniques that reproduce racial inequality.<sup>18</sup> Thus, it is through silence and banality that racialized administrative burdens are most stringent, embedding inequity in ordinary regulatory governance.

Unlike existing inquiries of racialized harm that focus on micro-level (individual bias) or macro-level (structural conditions) analyses, this Article adopts a meso-level (organizational) approach.<sup>19</sup> Directing attention to the organizational level allows us to interrogate the racialized administrative burdens that transform individual agencies into institutions where racial capitalism is both sustained and perpetuated.<sup>20</sup> The meso-level approach has received renewed attention in equity analyses, with Professor Aliyah Saperstein and colleagues likening this worldview to “racial projects” tying individuals to “entrenched bureaucracy, institutional inertia, and the

<sup>15</sup> Angela E. Addae, *Booze, Bars, and Bias: Anti-Blackness in Liquor Licensing Enforcement*, 81 WASH. & LEE L. REV. 1855 (2025).

<sup>16</sup> See generally Grant H. Blume, “As Expected”: *Theoretical Implications for Racialized Administrative Power as the Status Quo*, 33 J. OF PUB. ADMIN. RES. THEORY 30 (2023).

<sup>17</sup> Victor Ray, Pamela Herd, & Donald Moynihan, *Racialized Burdens: Applying Racialized Organization Theory to the Administrative State*, 33 J. PUB. ADMIN. RESEARCH & THEORY 139 (2023).

<sup>18</sup> See also Leslie Book, *Tax Administration and Racial Justice: The Illegal Denial of Tax-Based Pandemic Relief to the Nation's Incarcerated Population*, 72 S.C. L. REV. 667, 689-94 (2021) (summarizing the conceptualization and origins of racialized burdens); Daiquiri J. Steele, *Enforcing Equity*, 118 NW. U. L. REV. 577, 595 (2023) (noting that “racialized administrative burdens evolved once more direct forms of racial discrimination were outlawed”).

<sup>19</sup> Aliya Saperstein, Andrew M. Penner & Ryan Light, *Racial Formation in Perspective: Connecting Individuals, Institutions, and Power Relations*, 39 ANN. REV. OF SOCIO. 359, 367 (2013); see also Alasdair Roberts, *Bridging Levels of Public Administration: How Macro Shapes Meso and Micro*, 52 ADMIN. & SOC. 631, 638-39 (2020).

<sup>20</sup> Racial capitalism is a term that originated in South African traditions and was refined by political theorist Cedric J. Robinson to describe how capitalism depends on racial hierarchies, requiring the social and economic subordination of Black people and other marginalized groups to sustain systems of accumulation and control. See generally Cedric J. Robinson, *BLACK MARXISM: THE MAKING OF THE BLACK RADICAL TRADITION* (2000); andré douglas pond cummings, *The Farcical Samaritan's Dilemma*, 35 J. C. R. & ECON. DEV. 219, 228-32 (2022) (providing an overview of racial capitalism and its evolution).

everyday grind of hiring workers, teaching students, judging cases, or diagnosing patients.”<sup>21</sup> Recognizing the potential of the meso-level realm to offer novel explanations of structural inequality, I respond to calls in the academic literature to take seriously the role of institutions as racial actors.<sup>22</sup> To treat organizations as actors is to examine the practices through which they exercise power, so—combining organizational theory, sociolegal inquiry, and qualitative methods—this Article turns to administrative practices as the unit of analysis. It offers liquor licensing as one example among many that demonstrates how racialized administrative burdens shape citizen-state relationships in general and economic access in particular.<sup>23</sup>

To explore the impact of racialized administrative burdens on minority entrepreneurs, this Article has four main objectives. Part I offers historical context on the longstanding relationship between liquor licensing and economic rights. This relationship is a small part of a storied history of law as a mechanism of control, which has substantially shaped social meaning and commerce.<sup>24</sup> Part II presents a theoretical framework to expand the discourse on race and administrative governance.<sup>25</sup> It introduces racialized administrative burdens as legally salient mechanisms that normalize and reproduce exclusion within bureaucratic structures. Building on the work of

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<sup>21</sup> Saperstein et al., *supra* note 19, at 367.

<sup>22</sup> *Id.* (describing organizations and institutions as “the terrain where official policies, racial stereotypes, and cultural representations collide with individual racial identities and perceptions”); Sophia Z. Lee, *Racial Justice and Administrative Procedure*, 97 CHL.-KENT L. REV. 161, 181–87 (2022) (calling for a fuller examination of how administrative structures advance or disrupt inequality); Michael Omi & Howard Winant, *RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S* 57 (2015) (commenting that, in the U.S., “the state has always regulated capitalist development by means of race-based law and racial policy-making”); Ariela Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South*, 108 YALE L.J. 109, 181 (1998) (examining cases where courts determined an individual’s racial classification and showing that whiteness was constructed and contested in courtrooms); Leslie Book, T. Keith Fogg, & Nina E. Olson, *Reducing Administrative Burdens to Protect Taxpayer Rights*, 74 OKLA. L. REV. 527, 536 (2022) (calling for in-depth examinations of racialized burdens because “burdens that fall disproportionately on traditionally disadvantaged racial or ethnic groups contribute to perpetuating racial inequity and are worthy of additional agency attention”); Emily R. D. Murphy, *Collective Cognitive Capital*, 63 WM. & MARY L. REV. 1347, 1388 (2022) (describing how the state’s consumption of “cognitive capital” through bureaucratic processes disproportionately burdens marginalized groups, with regressive and racialized consequences that perpetuate inequality); Barbara F. Reskin, *Including Mechanisms in our Models of Ascriptive Inequality*, 68 AM. SOCIO. REV. 1, 2 (2003); Vincent J. Roscigno, Diana L. Karafin & Griff Tester, *The Complexities and Processes of Racial Housing Discrimination*, 56 SOC. PROBLEMS 49, 50 (2009).

<sup>23</sup> PEGGY PASCOE, WHAT COMES NATURALLY: MISCEGENATION LAW AND THE MAKING OF RACE IN AMERICA 131–159 (2009) (examining how county clerks who issued marriage licenses enforced miscegenation laws and, in doing so, played a central role in constructing and maintaining racial categories, even when acting without personal animus). As Pascoe observes, “[it] was precisely because marriage license clerks operated a one remove from the center of attention—that is, they carried out their tasks as a matter of bureaucratic routine rather than criminal enforcement, in quiet county offices rather than dramatic courtrooms—that they would come to be so crucial to the enforcement of miscegenation law.” *Id.* at 133.

<sup>24</sup> See, e.g., Joy Milligan, *Plessy Preserved: Agencies and the Effective Constitution*, 129 YALE L. J. 924 (2020); Allison Brownell Tirress, *Exclusion from Within: Noncitizens and the Rise of Discriminatory Licensing Laws*, 49 L. & SOC. INQUIRY 1783 (2024).

<sup>25</sup> In 2020, the *Yale Journal on Regulation* published contributions on the topic of race from over two dozen administrative law scholars. See generally Symposium on Racism in Administrative Law, YALE J. ON REGUL. (2020), <https://www.yalejreg.com/topic/racism-in-administrative-law-symposium/> (last accessed May 2, 2025). I further that conversation by shifting focus to state and local governments and by centering the lived experiences of Black entrepreneurs.

Ray, Herd, and Moynihan,<sup>26</sup> Part II brings forward bureaucratic “red tape” as central to understanding inequity in administrative governance, from environmental protections and higher education to farm lending programs.<sup>27</sup> It thereby challenges the conventional assumption that administrative agencies are passive spaces that apply neutral rules and instead posits that they are influential actors with the ability to disenfranchise marginalized groups.

Part III offers a doctrinal intervention that leverages qualitative tools to categorize three Black entrepreneurs’ battles with racialized administrative burdens.<sup>28</sup> By reconstructing their stories through in-depth interviews and content analyses of court documents, public records, administrative proceedings, and media accounts, Part III advances the growing body of legal scholarship that assesses narrative, lived experience, and institutional context as primary legal sources.<sup>29</sup> Furthermore, the focused case narratives in Part III fortify the link between subordination and the use of police powers as tools to restrict spatial and commercial use.<sup>30</sup>

The same administrative burdens that Black business owners encounter in liquor licensing also exist in education, public safety net access, housing, land use, and healthcare.<sup>31</sup> In this respect, racialized administrative burdens are a feature of regulatory governance, and liquor licensing merely offers a microcosmic view of the state’s broader role in distributing opportunity across racial lines.<sup>32</sup> Part IV reframes the problem of racialized

<sup>26</sup> Pamela Herd & David Moynihan, *Administrative Burdens in the Social Safety Net*, 39 J. OF ECON. PERSP. 1, 129–50 (2025); Ray, Herd, & Moynihan, *supra* note 17.

<sup>27</sup> See, e.g., Dorothy Roberts, TORN APART: HOW THE CHILD WELFARE SYSTEM DESTROYS BLACK FAMILIES—AND HOW ABOLITION CAN BUILD A SAFER WORLD (2022) (describing the procedural hurdles that families face in child welfare agencies); Alyssa Sloan, *Pigford v. Glickman and The Remnants of Racism*, 8 OIL & GAS, NAT. RESOURCES & ENERGY J. 19 (2022) (discussing how a farm lending program was administered in a way that harmed Black farmers); Tanner Corley, *Regulating Beauty: The Licensing of Barbers and Beauticians in Alabama and the Nation*, 2025 ENTERPRISE & SOCIETY 1 (2025) (discussing cosmetology licenses); Krittiya Kanachote, *Legal Violence: The Struggles of Thai Women in Thai Massage Businesses*, *Frontiers* 238 (2024) (discussing massage therapy licensing). See also Sarah J. Adams, *The White Supremacist Structure of American Zoning Law*, 88 BROOK. L. REV. 1225 (2023); Veena Dubal, *The New Racial Wage Code*, 15 HARV. L. & POL’Y REV. 511 (2020-2021).

<sup>28</sup> Katerina Linos & Melissa Carlson, *Qualitative Methods for Law Review Writing*, 84 U. CHI. L. REV. 213 (2017) (“Court decisions alone offer unusually extensive and in-depth perspectives on law, on the actions of various stakeholders, and on the societal context in which these operate.”).

<sup>29</sup> By attending to the voices and experiences of those most impacted by the law, qualitative approaches bring the human dimension into focus. For examples of the use of qualitative methods in legal scholarship to illuminate the lived experiences of everyday people, see OSAGIE OBASOGIE, *BLINDED BY SIGHT: SEEING RACE THROUGH THE EYES OF THE BLIND* (2013); KHIARA M. BRIDGES, *REPRODUCING RACE: AN ETHNOGRAPHY OF PREGNANCY AS A SITE OF RACIALIZATION* (2011).

<sup>30</sup> For example, police presence, particularly in Black entertainment spaces, carries a historical weight and evokes a legacy of racial surveillance and state-sanctioned violence. Prominently visible law enforcement can deter attendance, disrupt business operations, and reinforce the notion that Black nightlife is inherently suspect or dangerous. The Fifth Circuit addressed this dynamic, concluding that police presence, even if used as an intimidation tactic, is constitutional: “Similarly, the passive attendance and visibility of the deputy sheriffs at Club Retro before and during the Paul Wall concert was not a violation of First Amendment rights. The deputy sheriffs had every right to attend the show and park in the parking lot just as any other patron.” *Club Retro LLC v. Hilton*, 568 F.3d 181, 212 (5th Cir. 2009).

<sup>31</sup> Although unquestionably important, these other settings are issues beyond the limited scope of this Article.

<sup>32</sup> For example, this dynamic has been well documented in education policy and practice, where researchers identify administrative burdens as critical to reproducing inequality despite neutral bureaucratic

administrative burdens as the product of regulation built atop sedimented histories of exclusion, control, and moralized governance. These burdens persist because agencies operate without knowledge of the relics embedded in their rulebooks. If the problem is structurally and historically embedded, then so too must be the solution—as will be the case for permitting, benefits administration, and other state-mediated systems. Part IV calls for a proactive approach to reform grounded in “*historically informed rulemaking*”—a framework that enables agencies to account for the newly constructed realities through memory, mapping, and modification. It offers guidance for policymakers charged with equitable administration and legal scholars uniquely positioned to excavate the idiosyncrasies of bureaucratic bias and abuse.

### I. LIQUOR LICENSING AND THE ERASURE OF BLACK ENTREPRENEURS

Liquor licensing provides a representative domain to observe the operation of administrative ‘red tape.’ As a closely supervised sector, it encompasses the administrative challenges Black-owned businesses face compared to applicants from dominant groups, while also highlighting the broader impact of regulatory practices on community economic infrastructures. When Black entrepreneurs engage with liquor licensing agencies in a bid to comply with alcohol laws, they face various obstacles that range from arbitrary denials and abuse of discretion to agency inaction.<sup>33</sup> Far from isolated incidents, these administrative encounters—compounded over individual applications, across states, and across generations—constitute a discrete mechanism that shuts Black-owned businesses out of

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procedures. See, e.g., Asmus Leth Olsen, Jonas Høgh Jeppesen & Donald P. Moynihan, *The Unequal Distribution of Opportunity: A National Audit Study of Bureaucratic Discrimination in Primary School Access*, 57 AM. J. POL. SCI. 587 (2022); Andrene J. Castro & Taryn Goodwin Traylor, *Navigating Racialized Administrative Burdens in Teacher Licensure and Certification*, 126 TEACHERS COLL. REC. 114–46 (2024); Dominique J. Baker & Laila McCloud, *Too Much or Nothing at All: Racialized Administrative Burdens and Higher Education Policy Communication in Texas*, 98 PEABODY J. EDUC. 49–65 (2023); Jennifer A. Mallinen, *The Role of Whiteness in the Disparate Impacts of Needs-Based Public Service Administrative Burdens* (M.A. thesis, Univ. of Colo. Denver 2021); Jackie Pedota, *Institutionalization of a Latinx Campus Cultural Center: Exploring a Case of Racialized Administrative Burdens Faced by Latinx Staff and Students*, 27 J. CASES EDUC. LEADERSHIP 34–46 (2024); Andrea Briceño Mosquera, “*They Asked for More, More, and More Paperwork*”: *Administrative Burdens When Undocumented Youth Claim In-State Resident Tuition Policy Benefits*, 46 EDUC. EVAL. & POL’Y ANALYSIS 623–45 (2024); Kristen A. Copeland, Amy King, Julietta Ladipo, Desiré Bennett, Alexis Amsterdam, Cynthia White, Heather Gerker, & J’Mag Karbeah, *Barriers to Early Childhood Education for Black Families and Calls for Equitable Solutions from a Qualitative Study Using Peer Researchers and an Antiracist Lens*, 69 EARLY CHILDHOOD RES. Q. S26, S26–38 (2024) (finding that Black parents experienced “significant racialized administrative burdens or hoops to jump through” to access early childhood education).

<sup>33</sup> See generally, Addae, *supra* note 15; see also Jonathan Fong, *Midtown Restaurant Closes After Just 1 Year; Owner Said City’s Liquor License Rules Crippled Business*, KSDK.COM (Mar. 29, 2025), <https://www.ksdk.com/article/money/business/small-business/st-louis-rogue-bistro-restaurant-closes-midtown-liquor-license/63-3226c398-d323-47dd-9d2e-c1c4879094b8>; Daniel Johnson, *Black-owned Colorado Bar Battles Liquor License Suspension Amid Allegations of Racial Discrimination*, BLACK ENTERPRISE (Aug. 24, 2023) <https://www.blackenterprise.com/bar-colorado-fighting-racism/>; Mauricio Peña, *DrinkHaus, Greektown Bar Shut Down By City, Closed for Good After Owners Surrender Liquor License*, BLOCK CLUB CHICAGO (Aug. 29, 2019) <https://blockclubchicago.org/2019/08/29/drinkhaus-supper-club-shut-down-after-owners-surrender-licenses/>.

the marketplace and further complicates Black engagement within the alcohol-serving industry. Alongside that is the consuming nature of it all, where state officials facilitate a slow death-by-a-thousand-cuts, adding administrative burden to administrative burden by demanding ever more time, money, and labor from Black applicants seeking to obtain or renew liquor licenses.

Despite its prevalence as an exclusionary device, liquor licenses are rarely at the top of racial and economic justice agendas. Unlike discrimination in housing, education, or the criminal legal system, the effect of a liquor license on a broad segment of society is less obvious. To the contrary, some community advocates consider alcohol a social harm and thus see the strict regulation of its sale as both appropriate and necessary. And justifiably so—alcohol abuse has destroyed families, fueled addiction, and invited criminal activity into Black neighborhoods. However, this perspective ignores the vital role of the licensees, liquor-serving establishments. In many Black communities, liquor-serving establishments like bars, restaurants, and nightclubs act as third places that facilitate socialization and foster community cohesion—oftentimes displacing underground economies by providing regulated, visible spaces for congregation. When access into the sector is restricted for these businesses, both governments and communities have less control over who is permitted to structure and occupy public space. Consequently, residents' leisure spending flows outward instead of circulating locally, draining capital from already fragile commercial sectors. Beyond spatial and economic disorder, the ability to engage in lawful onsite alcohol sales also implicates individual rights that constitute full civic participation in a democratic society: economic mobility, access to public space, cultural expression, and social infrastructure.<sup>34</sup> Ownership, in this context, extends beyond the license to engage in onsite alcohol sales and encompasses the right to exercise control over commercial property, revenue generation, cultivation of community norms and values, and participation in lawful enterprise. Thus, unimpeded access to liquor licensing is a step toward full citizenship for historically disenfranchised and subordinated populations.

Notwithstanding its absence in the social justice discourse, exclusion vis-à-vis liquor licensing is both historical and contemporary. Previous scholarship delineated *why*, for centuries, liquor licensing served as a tool of social control, tracing its function to policing and limiting Black economic activity, regulating Black recreation and congregation, and constraining Black mobility.<sup>35</sup> Now, I turn to the contemporary period to explore *how*, investigating the present-day mechanisms through which state and local

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<sup>34</sup> See, e.g., District of Columbia Human Rights Act, D.C. Code § 2-1402.01 (2012) (providing that “[e]very individual shall have an equal opportunity to participate fully in the economic, cultural and intellectual life of the District . . . including, but not limited to, in employment, in places of public accommodation, resort or amusement, in educational institutions, in public service, and in housing and commercial space accommodations”); Regina Austin, “*Not Just for the Fun of It!*”: *Governmental Restrictions on Black Leisure, Social Inequality, and the Privatization of Public Space*, 71 S. CAL. L. REV. 667(1998).

<sup>35</sup> See Addae, *supra* note 15 (unpacking the extensive historical legacy between race and liquor licensing from the colonial era through the twentieth century).

liquor licensing agencies sustain harms originating in chattel slavery.<sup>36</sup> Administrative burdens seep into regulatory decision-making, inflicting adverse outcomes for powerless groups who are left to bear the brunt of invidious exclusion. On its face, the granting and denying of liquor licenses appear as procedural, routine executive functions. However, underlying this ball-and-strike process, to use a sports analogy, lies a composite of learning, compliance, and financial costs that work together to surveil and impede entrepreneurs of color who interact with administrative agencies.<sup>37</sup> In liquor licensing, these obstacles are pronounced along a clear divide, with tropes influencing license access to entrepreneurs who seek to entertain and serve alcohol to Black consumers.<sup>38</sup> For example, officials routinely subject bars, restaurants, and nightclubs catering to Black clientele to bureaucratic policing or harassment—namely, selective enforcement, heightened scrutiny, excessive conditions, frequent inspections, and arbitrary denials—projecting stereotypes of Black criminality.<sup>39</sup> Dozens of federal district court cases from jurisdictions all over the United States bear out this assertion.<sup>40</sup>

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<sup>36</sup> Former president of the American Sociological Association, Professor Barbara Reskin, urged scholars to move beyond documenting inequality to interrogating its causes in her 2002 presidential address. She specifically encouraged researchers to consider how organizational-level practices reproduce inequality and identified “discrimination lawsuits” as a ripe area for systematic analysis. Barbara Reskin, *Including Mechanisms In Our Models of Ascriptive Inequality*, 68 AM. SOCIO. REV. 1, 14-15 (2003).

<sup>37</sup> Ray, Herd, & Moynihan, *supra* note 17, at 143; *See generally* Pamela Herd & Donald Moynihan, ADMINISTRATIVE BURDEN: POLICYMAKING BY OTHER MEANS (2018). Scholars have explored these costs in examining the relationship between landlords and housing inequality for justice-involved individuals. *See, e.g.*, Dr. Lucius Couloute & Kacie Snyder, *Housing Insecurity Among People with Criminal Records: A Focus on Landlords*, 32 KAN. J.L. & PUB. POL’Y 21, 37-50 (2023) (arguing that housing inequality is shaped by meso-level mechanisms such as discretion, policy enforcement, and cultural signaling, thereby structuring exclusionary outcomes in ways that disproportionately burden individuals with criminal records).

<sup>38</sup> The dense regulatory web is intentional. Today’s liquor licensing frameworks emerged in the aftermath of Prohibition, as states rebuilt alcohol markets in the shadows of temperance-era moral reform.

<sup>39</sup> Delia Goncalves & Laura Wainman, *DC Bar Says Liquor License Was Revoked ‘Without Proper Due Process,’* WUSA9.com (Mar. 25, 2021).

<sup>40</sup> *BEG Invs., LLC v. Alberti*, *supra* note 10, at 20-23 (alleging that the D.C. Alcoholic Beverage Control Board engaged in racially motivated regulatory harassment by conditioning liquor license renewals on costly police detail requirements, retaliating against the business following civil rights litigation, and targeting the venue’s predominantly Black clientele and musical genres associated with Black American culture); *USA Entm’t Grp., Inc. v. Israel*, 2020 U.S. Dist. LEXIS 108471 at \*3-4 (S.D. Fla. June 18, 2020) (claiming that Broward County Sheriff’s Office engaged in excessive and militarized police presence at a Black-owned nightclub, including officers in tactical gear at concerts, which allegedly chilled expressive conduct and contributed to the venue’s closure); *Wallace v. City of Tarpon Springs*, 2007 U.S. Dist. LEXIS 2779 (M.D. Fla. Jan. 12, 2007) (alleging that a Black-owned bar and restaurant was subjected to heightened scrutiny, repeated surveillance, and prolonged conditional use permitting delays by city officials and police, ultimately resulting in business closure); *Ward v. Lenexa, Kan. Police Dep’t*, 2014 U.S. Dist. LEXIS 61614 at \*6-10 (D. Kan. May 5, 2014) (alleging that the Lenexa Police Department conducted at least 70 visits over a five-year span, including tavern checks, early closures, and noise citations that forced the closure of a Black-owned nightclub); *Thames v. City of Portland*, No. 3:16-CV-1634-PK, 2018 WL 2749630, at \*1 (D. Or. Mar. 6, 2018), report and recommendation adopted sub nom. *Thames v. City of Portland*, No. 3:16-CV-01634-PK, 2018 WL 2749570 (D. Or. June 7, 2018) (alleging that Portland’s liquor commission and city officials subjected a Black-owned nightclub to excessive security requirements, retaliatory inspections, wrongful arrest of the owner, and the imposition of a curfew-based abatement plan, forcing the business to close despite a record of full compliance with licensing conditions); *Dewalt v. City of Brooklyn Park*, No. 15-cv-4355, 2017 U.S. Dist. LEXIS 75453 at \*1-11 (D. Minn. May 17, 2017) (alleging that city officials denied a conditional use permit and liquor license to a proposed Black-owned nightclub by narrowly construing restaurant requirements and imposing heightened scrutiny on kitchen equipment and menu offerings); *L.A. Globe v. City of Lansing*, No. 5:01-cv-54, 2003 U.S. Dist. LEXIS 2040, at \*3-5 (W.D. Mich. Jan. 30, 2003) (alleging that city officials

From coast to coast, liquor-governing bodies convert purported safeguards like notice requirements, inspections, and abatement plans into inequality-producing mechanisms in a sustained manner that defies coincidence.<sup>41</sup>

The theoretical and practical stakes of this meso-level inquiry are high. Too often, reformative discussions address individual behavior, focusing on affirmative action, diversity, equity, and inclusion initiatives, and anti-bias training.<sup>42</sup> Yet, reforms aimed at individuals leave intact the organizational frameworks and practices through which inequality is reproduced even in the absence of malicious actors, and all the more when such actors are present. Reform is further complicated as policymakers constrain explicit equity tools, forcing the mechanics of institutional design to take on heightened importance. With increased scrutiny of the administrative state and resistance in the face of diversity initiatives, attention to how agencies structure opportunity is urgent. These political and judicial interventions leave state and local administrative agencies and their agents—all of whom play an integral role in constructing the landscape of economic opportunity—largely absent from mainstream social justice discourse. This Article pushes these key actors toward center stage by formulating a comprehensive understanding of the regulatory mechanisms that may drive economic inequality.

To this end, Part II demonstrates that biased discretionary practices are not simply an effect of malicious individuals, but symptomatic of a much

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targeted a Black-owned nightclub with excessive scrutiny and profiling, culminating in the nonrenewal of its liquor license despite prior approval and compliance with licensing requirements); *Keelen v. Borough of Keansburg*, No. 17-4521(FLW), 2018 U.S. Dist. LEXIS 50417, at \*2-5 (D.N.J. Mar. 27, 2018) (alleging that municipal officials conspired to revoke a longstanding liquor license and force the sale of a Black-patronized bar by invoking narcotics activity as pretext, targeting the establishment's Black clientele and entertainment); *Beverly Hills Suites LLC v. Town of Windsor Locks*, 136 F. Supp. 3d 167, 172-82 (D. Conn. 2015) (alleging that police and municipal officials targeted a hotel and nightclub catering to young Black and Latino patrons with parking lot blockades, exaggerated public safety claims, and liquor license interference, resulting in forced closures and financial harm); *Do Corp. v. Town of Stoughton*, No. 13-11726-DJC, 2013 WL 6383035, at \*1-3 (D. Mass. Dec. 6, 2013) (alleging that a nightclub serving a predominantly Black and Latino clientele faced heightened scrutiny, crowd control enforcement, and eventual license revocation based on associations with hip-hop music and "urban" patrons).

<sup>41</sup> Reginald A. Byron and Vincent J. Roscigno, *Bureaucracy, Discrimination, and the Racialized Character of Organizational Life*, in *RESEARCH IN THE SOCIOLOGY OF ORGANIZATIONS: RACE, ORGANIZATIONS, AND THE ORGANIZING PROCESS* 151, 161 (Melissa Wooten ed., 2019) (likening "unevenness in the application of bureaucratic rules and oversight" to "racialized bureaucratic policing"); *See also* Stephanie Bonnes, *The Bureaucratic Harassment of U.S. Servicewomen*, 31 *GENDER & SOC.* 804, 808 (2017) (defining bureaucratic harassment as "the purposeful manipulation of legitimate administrative policies and procedures, perpetrated by individuals who hold institutional power over others and used to undermine colleagues' professional experiences and careers"). Sociologists have examined this feature of workplace discrimination. *See e.g.*, Reginald A. Byron, *Discrimination, Complexity, and the Public/Private Sector Question*, 37 *WORK AND OCCUPATIONS* 435-437 (2010); Vincent J. Roscigno, *Power, Revisited*, 90 *SOC. FORCES* 349, 350 (2011).

<sup>42</sup> Bernard Bell, *Race and Administrative Law*, *NOTICE & COMMENT*, *YALE J. REG.* (Aug. 10, 2020), <https://www.yalejreg.com/nc/race-and-administrative-law-by-bernard-bell/>. In one example of the colorblind nature of administrative law scholarship, Professor Bernard Bell first expressed his sense that "critical race theorist[s] focus[] much more intently on the impact of governmental policy and the racialized assumptions underlying it, than upon the process by which government policy is created." *Id.* He is skeptical that attention to "process issues, such as reasoned decision-making, ensuring broad-scale participation, transparency, political accountability, and the availability and scope of judicial review" constitutes "fertile grounds for a critique of the administrative state as contributing to racial injustice." *Id.* For Bell, "[t]he more potent critique is likely based on policy analysis of the substance of the actions that agencies take, the decisions they make, and the unexamined assumptions that underlie them." *Id.*

deeper institutional logic. In this context, bureaucracy functions *both* as a tool that has the potential to be wielded by malicious individuals toward nefarious ends or as a system of unequal reproduction, without the need for ill will on the part of the people who operate within it.

## II. BUREAUCRACY AS RACIALIZED AUTHORITY

Organizational behavior and field-level dynamics, which is to say the norms and pressures that influence how organizations relate to one another, shape access to fundamental rights and critical resources.<sup>43</sup> Despite the centrality of these meso-level processes, legal scholars rarely engage institutional theory<sup>44</sup> in analyses about how administrative agencies make decisions.<sup>45</sup> This disconnect is particularly troubling given that, as Professor Bijal Shah observed, the study of administrative agencies “lacks a comprehensive examination of its own contribution to subordination and marginalization,” the reason being an absence of “a robust tradition of critical legal studies.”<sup>46</sup> Rather than taking into consideration systemic dynamics, traditional legal discourse ignores them by attributing racial disparities in regulation to individual bias and isolated bad actors.<sup>47</sup> In practice, this manifests as assumptions so deeply ingrained in the law that courts require plaintiffs to prove intentional racial discrimination by regulatory bodies before granting relief in federal civil rights claims.<sup>48</sup> Because anti-discrimination jurisprudence operates from this individual-centric disposition, even when plaintiffs meet this demanding intent standard, their allegations are yet again reduced to the incidental

<sup>43</sup> Paul J. DiMaggio & Walter W. Powell, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields*, 48 AM. SOCIO. REV. 147, (1983); Michael T. Hannan & John Freeman, *The Population Ecology of Organizations*, 82 AM. J. SOC. 929, (1977).

<sup>44</sup> However, a growing body of legal scholarship leverages insights from organizational sociology to explain inequality and institutional behavior. See, e.g., Atinuke O. Adediran, *The Relational Costs of Free Legal Services*, 55 HARV. C.R.-C.L. L. REV. 357 (2020) (using organizational sociology to explain inequality in nonprofit legal services organizations); Couloute & Snyder, *supra* note 37; Shauhin Talesh, *A New Institutional Theory of Insurance*, 5 U.C. IRVINE L. REV. 617, 21 (2015) (drawing on organizational sociology to understand how organizations and organizational fields influence law); Susannah Camic Tahk, *Crossing the Tax Code's For-Profit/Nonprofit Border*, 118 PENN ST. L. REV. 489, 504 (2014) (drawing on organizational sociology to explain the tax implications of fluidity between nonprofit and for-profit sectors); David Freeman Engstrom, *The Civil Rights Act at Fifty: Past, Present, Future*, 66 STAN. L. REV. 1195, 1201 (2014).

<sup>45</sup> Bijal Shah, *Toward a Critical Theory of Administrative Law*, NOTICE & COMMENT, YALE J. REG. (July 30, 2020), <https://www.yalejreg.com/nc/toward-a-critical-theory-of-administrative-law-by-bijal-shah/>.

<sup>46</sup> *Id.*

<sup>47</sup> See Byron & Roscigno, *supra* note 41, at 151-169; Daniel Borowczyk-Martins, Jake Bradley, & Linas Tarasonis, *Racial Discrimination in the U.S. Labor Market: Employment and Wage Differentials by Skill*, 49 Lab. Econ. 106, 106-27 (2017); Susan T. Fiske & Tiane L. Lee, *Stereotypes and Prejudice Create Workplace Discrimination*, in DIVERSITY AT WORK: CAMBRIDGE COMPANIONS TO MANAGEMENT 13-52 (Arthur P. Brief ed., 2008). A similar deficiency was observed in studies of environmental racism, where identification of harms had been limited to individual, malicious citing decisions. Laura Pulido, *Rethinking Environmental Racism: White Privilege and Urban Development in Southern California*, 90 ANNALS ASS'N AM. GEOGRAPHERS 12, 30 (2000).

<sup>48</sup> *Flores v. Pierce*, 617 F.2d 1386, 1388-90 (9th Cir. 1980) (affirming that liquor license protests against Mexican-American applicants, combined with deviation from “previous procedural patterns,” “ad hoc method of decision making,” and reference to “the large number of Mexican field workers in the area to harvest the grapes” provided sufficient evidence for a jury to find intentional discrimination); *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 97 S.Ct. 555 (1977); *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040 (1976).

misjudgment of well-meaning decision-makers or to occasional misconduct in an otherwise neutral system.<sup>49</sup> By condensing racial discrimination to individual deviations, legal doctrines treat administrative structures and the practices that shape them as incidental instead of causal. Thus, existing legal tools are ill-suited to diagnose and/or remedy systemic bureaucratic harms.

Part II calls for a paradigm shift to account for patterned, race-contingent decisions. It frames administrative regulation as a mechanism that explicitly distributes power, resources, and access to the economy.<sup>50</sup>

#### *A. Recognizing Bureaucracy's Role in Sustaining Exclusion*

Both classical and contemporary scholars agree that bureaucracy is a power structure that reflects and sustains existing social hierarchies, particularly as a neutral and rational system designed to standardize decision-making and remove personal bias.<sup>51</sup> However, the same design features that provide for impartiality also insulate bureaucratic structures from accountability and enable them to administer and control affected groups.<sup>52</sup>

In his seminal 1921 essay, “Bureaucracy,” the German sociologist Max Weber asserts that bureaucracy functions as a system of rationalized control, designed to operate “without regard for persons”<sup>53</sup> while also acknowledging that a bureaucracy is “both an instrument of governance and a structure of domination—one that, in theory should function impartially, but in practice, embeds and reinforces social hierarchies.”<sup>54</sup> Bureaucratic governance, he argues, is characterized by its rigid, rule-based system, where authority is exercised through jurisdictionally defined spheres of influence and rules that define official activities. In contrast to earlier systems of governance rooted in personal rule, nepotism, or arbitrary power, bureaucratic authority is objective and calculable.<sup>55</sup> Under this view, bureaucracy’s fairness stems from its uniform application to all individuals

<sup>49</sup> Fiske & Lee, *supra* note 47, at 13-52; *Desi's Pizza, Inc. v. City of Wilkes-Barre*, No. 3:CV-01-0480, 2006 U.S. Dist. LEXIS 59610, at \*79 (M.D. Pa. Aug. 23, 2006) (“We find that, for present purposes, the Plaintiffs’ evidence is sufficient to allow a jury to find that the Plaintiffs’ have met their burden of establishing a discriminatory motive with respect to their equal protection claim. However, we do not find that the Plaintiffs have produced sufficient evidence that the Defendant City of Wilkes-Barre had a custom or policy of driving out minorities from its communities.”).

<sup>50</sup> Tsedale M. Melaku, *The Awakening: The Impact of Covid-19 Racial Upheaval, and Political Polarization on Black Women Lawyers*, 89 *FORDHAM L. REV.* 2519, 2522 (2021) (describing law firms as white institutional spaces because they control access, resources, and exclude racial minorities from institutional means).

<sup>51</sup> Tom Ginsburg, *The Jurisprudence of Anti-Erosion*, 66 *DRAKE L. REV.* 823, 830 (2018) (describing the benefits of a neutral bureaucracy); Victor Ray & Danielle Purifoy, *The Colorblind Organization*, in *RACE, ORGANIZATIONS, AND THE ORGANIZING PROCESS* (Melissa E. Wooten, ed. 2019) (drawing on Eduardo Bonilla-Silva’s colorblindness theories to explain organizational behavior).

<sup>52</sup> *But see* Anya Bernstein & Cristina Rodríguez, *The Accountable Bureaucrat*, 132 *YALE L.J.* 1600 (2023). Drawing on their qualitative study of agency officials, Professors Bernstein and Rodríguez offer a different perspective, finding that accountability appears in a variety of forms and is inherently infused in agency work by promoting values of deliberation, inclusivity, and responsiveness.

<sup>53</sup> *WEBER’S RATIONALISM AND MODERN SOCIETY: NEW TRANSLATIONS ON POLITICS, BUREAUCRACY, AND SOCIAL STRATIFICATION* (Tony Waters and Dagmar Waters eds., 2015).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

in a predictable manner that produces efficiency.<sup>56</sup> For Weber, bureaucracy's consistency makes it ideal for state governance because "[p]recision, speed, unambiguity, knowledge of the files, continuity, discretion, unity, strict subordination, reduction of friction and of material and personal costs [. . .] are raised to the optimum point in the strictly bureaucratic administration, and especially in its monocratic form."<sup>57</sup> Compared to other tools, he concludes, "trained bureaucracy is superior on all these points."<sup>58</sup> At the same time, Weber cautions that bureaucracy is self-perpetuating, resistant to change, and at times insulated from democratic oversight.<sup>59</sup> What is more, a fully established bureaucracy "is among those social structures which are the hardest to destroy[,]" capable of grafting itself into a power relationship that is "practically unshatterable."<sup>60</sup> While Weber hailed bureaucracy's rule-bound and mechanical nature, these qualities create the conditions through which hierarchies are sustained. Bureaucratic structures position decisions as the predictable—and therefore seemingly inevitable and unquestionable—outcomes of rule application.

Central to Weber's thesis is the displacement of visible choice and the narrowing of opportunities to contest it: decisions come from 'the system,' not a person. He attributes this to a de-emphasis on the agency of the individual bureaucrat. Rather than portray administrative officials as autonomous agents, Weber describes them as mere functionaries operating within a larger institutional order:

[T]he professional bureaucrat is chained to his activity by his entire material and ideal existence. In the great majority of cases, he is only a single cog in an ever-moving mechanism which prescribes to him an essentially fixed route of march.<sup>61</sup>

This "fixed route of march" is a defining characteristic that creates a love-hate relationship with bureaucracy. Because authority is vested in the office in lieu of the individual, it is what makes administrative systems powerful, effective, continuous, efficient, *and* hard to hold accountable. Implementation, therefore, becomes a collective, faceless effort, and outcomes are correspondingly difficult to challenge. Under this arrangement, decisions are justified through a web of rules and norms—no matter how imperfect.

Though Weber's framework explains why bureaucracy is often resistant to change, his ongoing influence—implicit though it might be—

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<sup>56</sup> *See id.*

<sup>57</sup> *Id.*

<sup>58</sup> WEBER'S RATIONALISM AND MODERN SOCIETY: NEW TRANSLATIONS ON POLITICS, BUREAUCRACY, AND SOCIAL STRATIFICATION (Tony Waters and Dagmar Waters eds., 2015).

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

does not fully account for how bureaucratic institutions are actively formed and shaped by racial hierarchies.<sup>62</sup>

### *B. Bureaucracy's Potential as a Site of Repair*

A simple transference of Weberian theory to a United States context excludes the profound implications of the nation's history and how the institution of chattel slavery molded American society, especially its organizational structure. In the United States, bureaucracy did not arise on neutral ground, for agencies were built alongside and, oftentimes, in service of established hierarchies at all levels of the political system. From the nation's inception, racial identity so deeply dictated allocations of second-class citizenship that a parallel society was necessary to accommodate legal and social separation: education, housing, employment, consumption, healthcare, and recreation. In response to this racialized order, Black churches, Black civic organizations, and Black-owned businesses adapted to Black exclusion and subsequently evolved into enclaves for cultural expression and affinity.<sup>63</sup> This pattern extended into education, as Historically Black Colleges and Universities (HBCUs) were established because state laws barred Black students from attending white institutions,<sup>64</sup> forcing philanthropic groups and the federal government to develop alternative pathways for higher learning. Even these parallel institutions were not free from administrative mishandling. For over a century, land grant HBCUs received unequal funding and endured excessive bureaucratic scrutiny at the hands of state agencies.<sup>65</sup>

Modern Black enterprises developed under comparable conditions within a segregated institutional landscape. The enduring dynamics of race are most exemplary in recent litigation involving the administration of a

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<sup>62</sup> See, e.g., John M. Hobson, *Decolonizing Weber: The Eurocentrism of Weber's IR and Historical Sociology*, in MAX WEBER AND INTERNATIONAL RELATIONS 145 (Richard Ned Lebow ed., 2017) (criticizing the theory as Eurocentric).

<sup>63</sup> Melissa E. Wooten, Soapbox: *Editorial Essays: Race and Strategic Organization*, 4 STRATEGIC ORGANIZATION 191, 194 (2006) (describing these institutions as racialized organizations, or "organizations created to sustain the racial separation ideologies that so permeated American economic, cultural, and political systems throughout much of the country's history.")

<sup>64</sup> *Id.*

<sup>65</sup> Recent data reflects the enduring nature of racialized bureaucratic containment. In September 2023, then U.S. Secretary of Education Miguel Cardona and U.S. Secretary of Agriculture Thomas J. Vilsack issued joint letters to sixteen state governors detailing the gross underfunding of historically Black land grant institutions, which they calculated to total nearly \$13 billion. The letters emphasized that under the Second Morrill Act of 1890, states that created separate land-grant institutions for Black students were legally required to distribute funding equitably between their 1862 (predominately white) and 1890 (HBCU) land-grant institutions. The disparities were staggering: Kentucky State University was shorted \$172 million, while Tennessee State University was underfunded by \$2.1 billion. Bureaucratic oversight neglected Black institutions and actively underdeveloped them, creating racial disparities in higher education governance that persist. Katherine Knott, States Underfunded Historically Black Land Grants by \$13 Billion Over 3 Decades, INSIDE HIGHER ED (Sept. 20, 2023), <https://www.insidehighered.com/news/government/2023/09/20/states-underfunded-black-land-grants-13b-over-30-years> (last accessed Feb. 25, 2025). September 18, 2023 Letters from Miguel Cardona and Thomas Vilsack to 16 governors ([https://sites.ed.gov/whhbcu/files/2023/09/Secretary-letter-1890.pdf?utm\\_content=&utm\\_medium=email&utm\\_name=&utm\\_source=govdelivery&utm\\_term=](https://sites.ed.gov/whhbcu/files/2023/09/Secretary-letter-1890.pdf?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=)) last accessed Feb. 25, 2025. See also, Adam Harris, THE STATE MUST PROVIDE: A NARRATIVE HISTORY OF RACIAL INEQUALITY IN HIGHER EDUCATION (2022).

federal farm lending program. In *Pigford v. Glickman*,<sup>66</sup> Black farmers filed a class-action lawsuit against the U.S. Department of Agriculture (USDA), alleging decades of racial discrimination in the administration of farm loans and assistance programs.<sup>67</sup> The lawsuit revealed that the USDA used bureaucratic processes to systematically delay or outright deny funding to Black farmers, subjecting them to the classic ‘run around.’ Lengthy delays resulted in funding arriving too late to be of any use, forcing many Black farmers into foreclosure. Regulatory actions quite literally drove the Black-owned farm out of existence, as over 90 percent of Black farmers lost their land.<sup>68</sup> The *Pigford* litigation ultimately led to a \$1 billion settlement, one of the largest civil rights settlements in U.S. history, revealing just how deeply these historical institutional patterns were operating within modern administrative governance.<sup>69</sup> Because the events that led to the *Pigford* litigation occurred within a federal program that was administered nationally, the patterns were sufficiently visible to attract legal and political scrutiny. Unlike *Pigford*, when comparable harms occur at the local or state level, their effects are far less likely to attract public attention.

To make sense of this continuity, scholars have turned to organizational analysis. In 2019, Victor Ray articulated a Theory of Racialized Organizations that offers an analytic lens.<sup>70</sup> Viewed through this paradigm, the harms in *Pigford* were predictably patterned, as the USDA continued to reproduce racial stratification even as the legal and political landscapes

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<sup>66</sup> Timothy Pigford, et al., v. Dan Glickman, Secretary, United States Department of Agriculture, 182 F.R.D. 341, 342-44 (D.D.C. 1998).

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

<sup>68</sup> Kali Holloway, How Thousands of Black Farmers Were Forced Off Their Land, NATION (Nov. 1, 2021) <https://www.thenation.com/article/society/black-farmers-pigford-debt/> (“In 1920, the number of Black farmers peaked at nearly 1 million, constituting 14 percent of all farmers. But between 1910 and 1997, they lost 90 percent of their property. (White farmers lost only 2 percent in the same period.) As of 2017, there were just 35,470 Black-owned farms, representing 1.7 percent of all farms. The land Black farmers lost, some 16 million acres, is conservatively estimated to be worth \$250 billion to \$350 billion today.”).

<sup>69</sup> Tadlock Cowan & Jody Feder, *The Pigford Cases: USDA Settlement of Discrimination Suits by Black Farmers*, CONGRESSIONAL RESEARCH SERVICE (May 29, 2013), <https://nationalaglawcenter.org/wp-content/uploads/assets/crs/RS20430.pdf>.

<sup>70</sup> Victor Ray, *A Theory of Racialized Organizations*, 84 AM. SOCIO. REV. 26 (2019) (contending that organizational theory considers “organizational formation, hierarchies, and processes as race-neutral” and “race as a personal identity”); Victor Ray, *Why So Many Organizations Stay White*, HARVARD BUS. REV. (2019). For additional commentary on racialized organizations, see Wooten, *supra* note 63, at 193 (“We have unnecessarily conceptualized race as a construct that operates only on the individual, that is, individuals have race and this influences their careers, or firms must employ individuals of a certain race”); Alexandra Kalev, *How You Downsize is Who You Downsize: Biased Formalization, Accountability and Managerial Diversity*, 79 AM. SOCIO. REV. 109, 113 (2014); Roscigno, *supra* note 41; Adia Harvey Wingfield & Renée Skeete Alston, *Maintaining Hierarchies in Predominantly White Organizations: A Theory of Racial Tasks*, 58 AM. BEHAV. SCIENTIST 274 (2014); Melissa E. Wooten and Lucius Couloute, *The Production of Racial Inequality Within and Among Organizations*, 11 SOCIO. COMPASS 1 (2017); Taylor Cox & Stella M. Nkomo, *Invisible Men and Women: A Status Report on Race as a Variable in Organization Behavior Research*, 11 J. ORG. BEHAVIOR 419, 423 (1990). However, much of the early research on race and organizations focused on how one’s personal racial identity impacted their employment or roles in the workplace. See, e.g., James N. Baron, & Andrew E. Newman, *For What It’s Worth: Organizations, Occupations, and the Value of Work Done by Women and Nonwhites*, 55 AM. SOCIO. REV. 155, 162 (1990) (exploring pay gaps in the California state civil service); Lauren B. Edelman, *Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law*, 97 AM. J. SOCIO. 1531, 1532 (1992) (finding that employers enacted visible changes to comply with civil rights laws).

evolved over time.<sup>71</sup> At its core, Ray's theory contends that race is not incidental to organizational functioning but is constitutive of it—a central axis along which power, resources, and opportunities are distributed.<sup>72</sup> He elaborates his claim through four core tenets: (1) racialized organizations enhance or diminish the agency of racial groups; (2) racialized organizations legitimate the unequal distribution of resources; (3) whiteness is a credential; and (4) the decoupling of formal rules from organizational practice is often racialized.<sup>73</sup> If we accept as true Ray's argument that race is formative for organizations, then racialized patterns persist as outcomes through ordinary organizational functioning.

Applying each of Ray's four tenets to the USDA's treatment of Black farmers in *Pigford* reveals how institutional dynamics structured the program's outcomes. To begin, the USDA offices delayed or denied Black farmers' applications for credit, an essential input for large-scale agricultural production, thereby diminishing economic agency. In practical terms, these delays routinely left the loans moot. The district court recounted, "[b]y the time Mr. Brown finally received his loan in May or June 1984, the planting season was over, and the loan was virtually useless to him."<sup>74</sup> Second, compounding these delays, the program rules vested discretion in field-level decision-making by allowing local loan officers to control the distribution of federal funds, legitimizing unequal resource allocation. The court described how local officials used their authority on the ground to mock applicants and foreclose access to the lending program: "When [Mr. Brown] inquired later that month about the status of his loan application, a [Farmers Home Administration] county supervisor told him that the application was being processed. The next month, the same [Farmers Home Administration] county supervisor told him that there was no record of his application ever having been filed and that Mr. Brown had to reapply."<sup>75</sup> Third, the consequences of this discretionary system were reflected in the program's outcomes. The lenders effectively provided timely loan disbursement and support for white farmers, elevating whiteness as the differentiating credential for complete participation in the program. The court quantified this disparity, noting that "[i]n several southeastern states, for instance, it took three times as long on average to process the application of an African American farmer as it did to process the application of a white farmer."<sup>76</sup> Fourth, even when the farmers attempted to challenge these practices, the

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<sup>71</sup> See generally, Eduardo Bonilla-Silva, *RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN THE UNITED STATES* (2010).

<sup>72</sup> Circuit courts have also grappled with the notion of organizations having a racial identity, particularly in determining standing for discrimination claims. *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 473 n.1 (2006) ("We note, however, that the Courts of Appeals to have considered the issue have concluded that corporations may raise § 1981 claims."); cf. *Sheba Ethiopian Rest., Inc. v. DeKalb Cnty., Georgia*, No. 21-13077, 2023 WL 3750710, at \*9 (11th Cir. June 1, 2023) ("In sum, we do not address whether corporations can—or cannot—state a race discrimination claim under section 1981. We hold only that there was no clearly established law in our circuit determining that officials are liable under section 1981 for discriminating against a corporation.").

<sup>73</sup> Ray, *A Theory of Racialized Organizations*, *supra* note 70, at 27.

<sup>74</sup> *Pigford v. Glickman*, CV No. 97-1978, 185 F.R.D. 82, 87 (D.D.C. Apr. 14, 1999).

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

civil rights review processes were fraught with delays, non-responsiveness, and internal cover-ups, leaving the protections on paper inaccessible—a true decoupling of formal rules from reality in a racialized manner. The court portrayed the collapse of the enforcement apparatus starkly: the civil rights office “was dismantled and complaints that were filed were never processed, investigated or forwarded to the appropriate agencies for conciliation . . . In some cases, [the Office of Civil Rights Enforcement and Adjudication] staff simply threw discrimination complaints in the trash without ever responding to or investigating them.”<sup>77</sup> These dynamics, documented in the *Pigford* record, expose the intersection of Ray’s and Weber’s work. While Weber described bureaucratic authority as a rule-bound, impersonal, and neutral form of administration, the *Pigford* litigation uncovers a grim reality: racialized patterns can still emerge without a departure from formal logics. In this sense, *Pigford* extends beyond the Weberian ‘cogs in the machine’ and toward Ray’s framework, where organizations are racialized actors that distribute resources and shape the external environment.

Just as *Pigford* offers an example of how federal agencies function as racialized organizations, empirical studies across workplace settings show similar dynamics at play. For example, in their analysis of over 100 workplace discrimination cases in New York and Illinois, sociologists Reginald A. Byron and Vincent J. Roscigno show how bureaucratic institutions reproduced racialized hierarchies through routine employment practices.<sup>78</sup> First, they found that bureaucratic systems diminish the agency of minorities by rewarding the “ideal worker,” a racialized, gendered, and class-specific prototype that aligns with Eurocentric standards of professionalism.<sup>79</sup> This ideal type positioned whiteness as the primary credential, so employees of color who did not conform to these norms—whether in dress, speech, or demeanor—were disproportionately categorized as unfit, unprofessional, or difficult, creating disparities in hiring, promotion, and retention.<sup>80</sup>

Second, their study confirmed that protocols around discretion likewise shaped how resources and opportunities were distributed.<sup>81</sup> Because discretion was treated as the exercise of professional judgment, any disparities that followed were considered as unintended outcomes than problems requiring intervention.<sup>82</sup> Lastly, Byron and Roscigno found that bureaucracies protect racial hierarchy by permitting and normalizing hostility in organizational culture despite rules to the contrary.<sup>83</sup> In the workplaces they studied, overt harassment—such as the use of epithets—was frequently dismissed as interpersonal conflict instead of organizational failure.<sup>84</sup> The recurrence of discriminatory outcomes across agencies, across

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<sup>77</sup> *Id.*

<sup>78</sup> Byron & Roscigno, *supra* note 41, at 157.

<sup>79</sup> *Id.* at 160–161 (giving the example of an employer offering a Black woman applicant a stocking position instead of a customer-facing sales position despite her prior experience).

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 161–162.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 162–163.

<sup>84</sup> *Id.* at 162–164.

sectors, and across individual cases suggests that a greater phenomenon is at work.

Ray's Theory of Racialized Organizations, *Pigford*, and Byron and Roscigno's findings represent how bureaucratic institutions operate within and in response to the nation's racial history. Although the persistence of this connection is quite clear, the mechanism through which it is immortalized is not. Part II(C) looks to "racialized administrative burdens" for the answer.

### *C. Dissecting Racialized Administrative Burdens*

#### *1. Conceptualizing Racialized Administrative Burdens*

If Victor Ray's Racialized Organizations Theory explains why organizations reproduce racial hierarchy, Administrative Burden Theory helps explain how that reproduction is carried out in practice through three key categories of costs to entrants: learning costs, compliance costs, and psychological costs.<sup>85</sup> Public administration scholars Donald Moynihan and Pamela Herd describe administrative burdens as the tangible and intangible costs incurred by individuals seeking to access government programs and regulatory approvals.<sup>86</sup> Distinguishing among these costs clarifies how administrative processes facilitate sorting along already-stratified lines. The first category, *learning costs*, refers to the cognitive and time-intensive efforts required to understand eligibility criteria and application processes.<sup>87</sup> For example, low-income families seeking housing assistance or federal student aid experience the application as abstruse, making the program inaccessible without external assistance. Beyond understanding the system, individuals must also navigate its technical requirements. *Compliance costs* involve the procedural, financial, and logistical obligations required to fulfill administrative demands, such as extensive documentation, fees, and verification.<sup>88</sup> Compliance costs fall most heavily on individuals with fewer resources and those who face inherent barriers, such as individuals with disabilities or undocumented immigrants. For instance, the digital divide places technological novices at a disadvantage in accessing online-only public services.<sup>89</sup> Even when these hurdles are overcome, contending with

<sup>85</sup> PAMELA HERD & DONALD P. MOYNIHAN, ADMINISTRATIVE BURDEN: POLICYMAKING BY OTHER MEANS (2018).

<sup>86</sup> Denisa Gándara, Rosa Acevedo, Diana Cervantes, & Marco Antonio Quiroz, *Advancing a Framework of Racialized Administrative Burdens in Higher Education Policy*, 95 J. OF HIGHER ED. 718, 721 (2024). A single administrative program can impose compounded learning, compliance, and psychological costs—creating nearly insurmountable barriers for marginalized communities. For example, though the Free Application for Federal Student Aid (FAFSA) is designed to expand access to postsecondary education, the FAFSA has stringent documentation and income verification requirements that preclude program access for low-income students of color. Despite the program's intentions, racialized administrative burdens exacerbate existing gaps in postsecondary educational attainment.

<sup>87</sup> Ray, Herd, and Moynihan *supra* note 17, at 141.

<sup>88</sup> *Id.*

<sup>89</sup> Donald P. Moynihan, Pamela Herd, & Hope Harvey, *Administrative Burden: Learning, Compliance, and Psychological Costs in Citizen-State Interactions*, 25 J. PUB. RES. & ADMIN. THEORY 43, 65 (2015) (discussing types of burdens and mechanisms for alleviating them); Theresa Rocha Beardall, Collin

the system can still carry its own consequences. *Psychological costs* encompass the stress and stigma individuals experience when interacting with impervious bureaucratic systems.<sup>90</sup> In practical terms, individuals experience intangible stressors such as microaggressions and feelings of futility. They may express their disillusionment by refusing to engage with state systems at all, ultimately eroding trust in the public infrastructure and compounding the seemingly insurmountable barriers associated with life on the margins of society.<sup>91</sup>

Building on this framework, Moynihan, Herd, and Ray merge Administrative Burden Theory and Racialized Organizations Theory to explain how day-to-day office work can take on racial meaning.<sup>92</sup> Their concept of “racialized administrative burdens” provides a tangible point of structural harm, locating it in mundane administrative encounters. This explains why a processing delay can mean something different for a Black farmer whose loan application sits unreviewed at the end of planting season compared to a white farmer whose application is reviewed in a third of the time. In their words:

What racialized organization theory contributes to existing research is the capacity to unpack the mechanisms by which administrative practices are racialized. Racialized organizations theory adds a structural lens, which makes such an analysis more feasible, helping to document and explain why marginalized racial groups face more significant frictions when interacting with the state.<sup>93</sup>

In essence, administrative acts acquire racial meaning based on the organizational context in which they occur. Transactions between individuals and state institutions are already filled with assumptions about credibility and trust, or the lack thereof. Race, they argue, is the socially constructed mechanism through which these relationships are defined, creating power dynamics that determine how resources, opportunities, and burdens are distributed. Although racial identity is typically attributed to individuals, it extends to organizations, too. As mentioned above, Historically Black Colleges and Universities (HBCUs) are an obvious example of institutions with a racial identity because the conditions of their founding positioned them as such. The same is true for other organizations where race plays an explicit or implicit role in their conception, from predominantly white institutions (PWIs) to Black-led businesses and nonprofits. Consequently, race is not only a demographic characteristic but also a “constitutive feature of organizational structures,” one that tends

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Mueller, & Tony Cheng, *Intersectional Burdens: How Social Location Shapes Interactions with the Administrative State*, 10 RSF: THE RUSSELL SAGE FOUND. J. OF THE SOC. SCIS. 84, 87 (2024) (noting that administrative burdens are intersectional, varying based on ‘social locations’ such as race, age, immigration status, or criminal legal system contact.).

<sup>90</sup> Ray, Herd, and Moynihan *supra* note 17.

<sup>91</sup> Herd and Moynihan, *supra* note 85.

<sup>92</sup> Ray, Herd, and Moynihan, *supra* note 17, at 140.

<sup>93</sup> *Id.*

toward invisibility within the polity because of the legitimacy conferred by the appearance of neutrality.<sup>94</sup> In this context, racial meanings are ascribed to people, objects, and institutional practices alike. These assignments are not limited to non-white individuals or organizations.<sup>95</sup> White-dominated organizations are just as racialized as non-white organizations because “whiteness” functions as the default against which all other racialized identities are compared.<sup>96</sup> For professional organizations like bar associations or medical societies, whiteness is merely unmarked, meaning that the racial character is assumed or stipulated without a need to label it. The same is not true for their affinity organization counterparts.

That race structures organizations is a tale as old as organizations themselves, but the increased reliance on administrative burdens is a relatively recent response to changing legal constraints. Administrative burdens are—to use Ray, Herd, and Moynihan’s metaphor—“the handmaiden of the racialized state,” conducting the discrete tasks that maintain racial stratification.<sup>97</sup> They are successors of post-Civil War exclusionary devices such as Black codes, vagrancy laws, grandfather clauses, and literacy tests, inheriting and modernizing their underlying sorting function.<sup>98</sup> As mid-twentieth-century civil rights reforms deemed overt racial classifications indefensible as a matter of law, the means of reproducing a stratified society shifted from *de jure* exclusion to ‘impartial’ administrative claims. Ray and colleagues explain that this critical reorientation was invoked to circumvent the new legal order committed to nondiscrimination:

In the formally egalitarian environment, many policies and practices that create racial inequality are facially neutral. . . . Following the Civil Rights movement, which delegitimated direct racial appeals in favor of coded racial language, hiding racist intent became a legal necessity, as open discrimination in public accommodations, voting rights, and schools was outlawed (and sometimes enforced). That is, the mechanisms producing racial inequality adjusted to a new historical context.<sup>99</sup>

For example, amidst resistance to court-ordered school desegregation, opponents rooted their concerns in neighborhood schools, local control, or mandatory busing as dog whistles to avoid explicit racial language. This shift is integral to understanding how administrative burdens escape detection. Racial hierarchies did not disappear—the mechanisms sustaining

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<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* (“Importantly, racialization is not a synonym for non-White. All White or White-dominated organizations are also racialized; White is also a race.”)

<sup>97</sup> *Id.* at 139.

<sup>98</sup> Ray, Herd, and Moynihan, *supra* note 17, at 141; See also Michele Goodwin, *Law and Anti-Blackness*, 26 MICH. J. RACE & L. 261, 282 (2021) (asserting that the racial caste system “never ceased at abolition’s dawn” and the stratification that characterized chattel slavery “endures and evolves”).

<sup>99</sup> Ray, Herd, and Moynihan, *supra* note 17, at 142 (citations omitted).

them changed. With the emergent need for new tools to achieve the same exclusionary outcomes, administrative burdens became an apparatus of choice (an effective apparatus, at that). Unfathomably discrete, racialized administrative burdens operate through a “nominally neutral targeting of cumbersome, routine, bureaucratic minutiae” like paperwork, processing times, compliance requirements, and endless back-and-forth.<sup>100</sup> As a result, racial disparities persist through a confluence of administrative procedures that are race-neutral in form but racialized in function.

*Racialized administrative burdens* provide the theoretical and empirical language to explain disparate outcomes that extend beyond individual bias or abstract structural racism. From a bird’s-eye view, governments are organizational collectives that are “imbued with racial meanings.”<sup>101</sup> On the ground, however, those meanings do not announce themselves, and identifying racialized administrative burdens requires a much more discerning eye.

## 2. Identifying Racialized Administrative Burdens

Racialized administrative burdens are difficult to detect because they are concealed by presumptions of legitimacy. More troubling is that even well-meaning bureaucrats can inflict burdens by faithfully executing prescribed rules—or, just doing their job.<sup>102</sup> As mentioned in Part II(A), bureaucratic systems are presumed legitimate because they appear neutral, and that appearance of neutrality discourages investigation unless disrupted by evidence of non-neutrality, or bias. At the level of state and local administration, where decisions are rarely tracked or reviewed, such instances of non-neutrality remain unaccounted for unless otherwise exposed in costly judicial proceedings.

What might otherwise be dismissed as ordinary “red tape” in fact defines the key characteristics of racialized administrative burdens: (1) the depletion of time through delay, (2) presumptions that marginalized applicants are undeserving, and (3) conditioning benefits on proof of moral or financial worth.<sup>103</sup> However, these burdens are distinct from the ubiquitous experience of “jumping through hoops.” Administrative burdens become racialized when they fall disproportionately on minority groups, and the criteria become unpredictable. Once compliance requirements shift

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<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 140.

<sup>102</sup> *Id.* at 140 (“[R]acialized burdens co-opt bureaucrats who are personally supportive of racial equality but faithfully apply onerous administrative practices into the machinery of structural racism. In such ways, structural racism influences the behavior of even those who reject overt White supremacist ideology.”).

<sup>103</sup> See Gándara et al., *supra* note 86; Christine Jang-Trettien & Daniel Bolger, *Racialized Administrative Burden in Disability Assistance Programs in Two Rural Counties*, 9 Soc. Service Rev. 446, 467-71 (2024) (sharing findings from an empirical study and detailing the amount of time and money applicants expended while attempting to access healthcare); Andrene J. Castro & Taryn Goodwin Traylor, *Navigating Racialized Administrative Burdens in Teacher Licensure and Certification*, 126 TEACHERS COLLEGE RECORD 114 (2024) (commenting on the influence of this phenomenon in teacher licensure and certification); Elizabeth Bell, James E. Wright, II, & Jeongmin Oh, *Does Administrative Burden Create Racialized Policy Feedback? How Losing Access to Public Benefits Impacts Beliefs about Government Get Access Arrow*, 34 J. PUB. ADMIN. RES. & THEORY 432 (2024).

unexpectedly, timelines extend without justification, and the procedural and financial barriers compound, attempts to simply adhere to the rules are detrimental. Technically, these dynamics can be identified through internal audits of processing times or approval rates, but in reality, agencies are unlikely to collect or disaggregate such data by race. Perhaps, the clearest indicator is when the process's overly demanding features effectively foreclose access altogether.<sup>104</sup>

For some applicants, racialized administrative burdens first appear as a delay. By design, racialized administrative burdens paralyze marginalized groups through deliberate depletion, as they exhaust applicants' time, energy, money, and resources in a labyrinth—often before any formal decision is ever made. Wasting one's time is an especially egregious form of harm. Time cannot be recovered, banked, or borrowed. The time conceded to administrative delay—whether weeks, months, or years—has immense consequences for those affected. This was the issue in *Rosemere Neighborhood Association v. U.S. Environmental Protection Agency*, where the Environmental Protection Agency's (EPA) Office of Civil Rights failed to process a single environmental justice complaint in a timely manner over a multi-year period.<sup>105</sup> The plaintiffs, residents of a predominantly Black and Latino neighborhood in Vancouver, Washington, alleged that their complaints regarding discriminatory provision of public services were met with inaction.<sup>106</sup> Despite the EPA's regulatory obligation to accept or reject a complaint within 20 days and issue preliminary findings within 180 days of the investigation, the Office of Civil Rights took more than 540 days to accept the complaint and an additional 600 days to complete the investigation.<sup>107</sup> The Ninth Circuit identified it as a "consistent pattern of delay" for the very office charged with adjudicating civil rights complaints, with the consequences borne entirely by the complainants waiting for relief.<sup>108</sup>

The EPA used a nearly identical strategy in *Padres Hacia Una Vida Mejor v. McCarthy*, where Latino farmworkers in California's San Joaquin Valley waited *seventeen years* for the EPA to respond to their Title VI civil rights complaint.<sup>109</sup> During this time, the plaintiffs, residents of a majority Latino community, were subjected to pollution and hazardous waste. While stuck in administrative doldrums, the EPA flaunted the realm of protection as the farmworkers continued to be subjected to a dangerous level of

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<sup>104</sup> Couloute & Snyder, *supra* note 37, at 30 (arguing that housing inequality for justice-involved individuals is "the product of distinctly relational and organizational processes that reflect broader cultural schemas").

<sup>105</sup> *Rosemere Neighborhood Ass'n v. United States EPA*, 581 F.3d 1169, 1175 (9th Cir. 2009) ("Finally, we note that Rosemere's experience before the EPA appears, sadly and unfortunately, typical of those who appeal to OCR to remedy civil rights violations. As indicated earlier, discovery has shown that the EPA failed to process a single complaint from 2006 or 2007 in accordance with its regulatory deadlines.").

<sup>106</sup> *Rosemere Neighborhood Ass'n v. United States EPA*, No. C07-5080BHS, 2007 U.S. Dist. LEXIS 55938 at \*1 (W.D. Wash. Aug. 1, 2007) ("The Rosemere neighborhood is populated by low-income racial minorities and is characterized by high rates of crime and unemployment.").

<sup>107</sup> *Rosemere Neighborhood Ass'n v. United States EPA*, 581 F.3d 1169, 1171-72 (9th Cir. 2009)

<sup>108</sup> *Id.* at 1171.

<sup>109</sup> *Padres Hacia Una Vida Mejor v. Jackson*, 922 F. Supp. 2d 1057 (E.D. Cal. 2013); *aff'd by Padres Hacia Una Vida Mejor v. McCarthy*, 614 F. App'x 895 (9th Cir. 2015).

environmental degradation. The extended waiting period imposed excessive compliance costs, including the costs associated with (1) plaintiffs' filing a Title VI discrimination complaint with the EPA's Office of Civil Rights, (2) sending a letter to the EPA Administrator, (3) submitting comments on the EPA's Draft Revised Guidance for Investigating Title VI Administrative Complaints, and (4) filing a federal lawsuit.<sup>110</sup> Moreover, the psychological toll—living under constant threat of harm while navigating an unresponsive system—reinforced their marginalization. Although the district court found the EPA's delay “deplorable,” the court did not declare the 17-year delay unlawful.<sup>111</sup>

If time-wasting is one telltale sign of racialized administrative burdens, the presumption of undeservingness is another. Racialized administrative burdens facilitate the unequal distribution of resources by portraying nonwhite groups as fraudulent, undeserving, or dangerous.<sup>112</sup> As implemented, suspicion becomes both the default *modus operandi* and a psychological cost, with applicants then responsible for proving their worth and trustworthiness. Sociologists Blair Sackett and Annette Lareau document this phenomenon in *We Thought It Would Be Heaven: Refugees in an Unequal America*, an ethnographic study of Congolese families navigating public assistance in the United States.<sup>113</sup> They note that race, gender, and socioeconomic status determine the degree of scrutiny, surveillance, and burden applicants must endure:

These systems are not a level playing field. The ‘rules of the game’ are fundamentally unequal according to social class, race, and gender. For working-class and poor families, scrutiny and surveillance are often tied to services. These standards are also deeply racialized in the ways that the rules are constructed and implemented. . . . Indeed, in the United States these burdens for proof of deservingness disproportionately demand time and resources from people of color.<sup>114</sup>

For marginalized populations, measures of deservingness deputize official processes into moral pundits who opine on questions of character and consequential resources.

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<sup>110</sup> *Id.* at 1060.

<sup>111</sup> *Id.* at 1070.

<sup>112</sup> Ray, Herd, and Moynihan, *supra* note 17, at 142–43., at 142–43. For additional commentary on deservingness in the law, see Blair Hendricks, *Small Business Relief in the Time of Covid-19: Deservingness Judgments Lead the PPP to Failure*, 36 J. CIV. RTS. & ECON. DEV. 1, 5 (2022) (“Deservingness judgments are value judgments based on cultural and sociological factors (such as history, politics, or psychology) that influence decisions about who *deserves* resources and assistance”); Doron Dorfman, *[Un]Usual Suspects: Deservingness, Scarcity, and Disability Rights*, 10 U.C. IRVINE L. REV. 557, 596–97 (2020); Noah D. Zatz, *Poverty Unmodified?: Critical Reflections on the Deserving/ Undeserving Distinction*, 59 UCLA L. REV. 550, 556–63 (2012).

<sup>113</sup> Blair Sackett & Annette Lareau, *WE THOUGHT IT WOULD BE HEAVEN: REFUGEES IN AN UNEQUAL AMERICA* (2023).

<sup>114</sup> *Id.* at 11.

Conditional access—where benefits are contingent on proving one’s moral and cultural worth—also informs state-level programs like Oklahoma’s Promise, a statewide program providing college tuition to students whose families make under \$50,000. Whereas the program was designed to expand educational opportunity, it instead imposed hurdles that disproportionately screened out students of color.<sup>115</sup> Two-thirds of eligible students never received the aid—not because they failed to meet academic standards, but because they were unable to comply with the program’s certification requirements.<sup>116</sup> To access the tuition benefit, students needed to complete the Free Application for Federal Student Aid (FAFSA) form, submit parental tax returns, provide citizenship documentation, maintain compliance with conduct requirements, complete a 17-unit core curriculum, and meet GPA requirements.<sup>117</sup> Each certification checkpoint operated as a filter, shrinking the number of students able to successfully navigate the process. Without substantial support from guidance counselors, these requirements proved to be arduous. Beyond the administrative toll, the burdens shaped students’ broader perceptions of government legitimacy and fairness. Compared to students who participated in the program, students who lost access to Oklahoma’s Promise trusted the state government 9.6% less and trusted the federal government 7.4% less.<sup>118</sup> Administrative barriers failed the program’s goals of inclusion and, like the farmworkers in *Padres Hacia Una Vida Mejor*, perpetuated the students’ experiences of exclusion and marginalization.

Racially administrative burdens are frustratingly elusive, lacking the precise doctrinal boundaries that once led Supreme Court Justice Potter Stewart to famously observe, “I know it when I see it.”<sup>119</sup> Yet indeterminacy does not shield communities of color from experiencing tangible, costly harms. Instead, the difficulty in identifying racially administrative burdens exacerbates the harms because invisibility breeds deniability, distorting the lived experiences of many.

### III. NAVIGATING BUREAUCRATIC BLOCKS TO ECONOMIC ACCESS: LIQUOR LICENSING FOCUSED CASE NARRATIVES

Part III turns to extended examples of racialized administrative burdens and their impacts on three Black-owned establishments. Without sustained attention to the experiences of those who have dealt with these formidable barriers, the narrative remains incomplete. We know this to be true because administrative law is especially starved of this human element.<sup>120</sup> As Professor Bijal Shah put it, “projects that focus on how administrative law touches on the human experience are often deemed ‘exceptional,’ (that is, marginal to administrative law), and their relevance devalued on these

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<sup>115</sup> Bell et al., *supra* note 103, at 436.

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

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 438.

<sup>119</sup> *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964).

<sup>120</sup> Shah, *infra* note 45.

grounds.”<sup>121</sup> The focused case narratives expose entrepreneurs’ struggles in light of regulatory pitfalls that dispossess them of critical, finite resources and impose substantial consequences on the communities they serve. By conceptualizing these patterns of administrative inconsistency, Part III substantiates the additional demands, delays, and denials that immobilize Black enterprises all over the nation. Further, by synthesizing these narratives, I materialize abstract accounts of racial harm.<sup>122</sup> In the words of Professor Rebecca Bratspies, “ignoring the racial backstory to key cases often masquerades as even-handed legal neutrality. But editing out the lived reality of the parties and the context in which their dispute arose is actually a highly political choice, one that normalizes [mainstream perspectives] as value-free, objective and neutral.”<sup>123</sup> Rather than reproduce that erasure, I use in-depth interviews, litigation case files, newspaper archives, public records, and administrative filings to investigate the experiences of entrepreneurs who brought civil rights lawsuits against agencies denying the licenses necessary to operate their businesses. Focused case narratives serve as legal evidence and methodological innovation. As evidence, each reveals how administrative burdens operate through formal processes and discretionary acts. As a method, they reframe what counts as legible harm and position those impacted as critical observers and producers of legal knowledge.

Though not exhaustive, these cases represent a range of locations, time periods, and strategies. The three case narratives that follow illustrate how administrative burdens operate at both the individual and organizational level. While the cases of Mr. Quarterman and Mr. Williams center the experiences of business owners as regulatory subjects, the Sheba Ethiopian Restaurant case reveals how race attaches to physical establishments themselves—turning Black spaces into presumed sites of illegitimacy, irrespective of the identities of individual actors.

In compiling these narratives, I exhibit how agencies weaponize the appearance of neutrality, [in]visibility, and compliance to deny Black business owners economic agency. These conceptualizations build on Professor William Y. Chin’s analysis of how anonymous bureaucratic processes can be weaponized against communities of color.<sup>124</sup> Professor Chin focuses on the erasure of accountability in anonymous complaints, and Part III extends the ‘weaponization’ framing to assess how racialized administrative burdens operate.

#### *A. Weaponizing the Appearance of Neutrality*

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<sup>121</sup> *Id.*

<sup>122</sup> Rebecca Bratspies, *Decolonizing Chadha, Notice & Comment*, YALE J. ON REG. (2020), <https://www.yalejreg.com/nc/decolonizing-chadha-by-rebecca-bratspies/>.

<sup>123</sup> *Id.*

<sup>124</sup> William Y. Chin, *Weaponized Anonymity: The Continuing Marginalization of Communities of Color through Racially-Biased Anonymous Processes in U.S. Society*, 22 CONN. PUB. INT. L. J. 1 (2022); William Y. Chin, *Proxy Discrimination: The Misuse of Government Actors as Proxies to Racially Discriminate Against People of Color*, 9 TENN. J. RACE, GENDER & SOC. JUST. 2 (2020).

Facial neutrality is a defining characteristic of racialized administrative burdens. Discretion is both a sword and a shield; on one hand it allows authorities to depart from organizational rules and norms, and on the other hand, it insulates authorities from accountability for those departures. As the discussion of *Quarterman v. City of Springfield* demonstrates below, officials weaponize the appearance of neutrality by disguising extraordinary scrutiny as routine review, although it is anything but.

In *Quarterman v. City of Springfield*, the city's Board of License Commissioners denied Will Quarterman's request to transfer his liquor license.<sup>125</sup> Mr. Quarterman, the biracial owner of Logan's Lounge in Springfield, Massachusetts, applied to sell alcoholic beverages in a new establishment that catered to predominantly Hispanic and Black clientele.<sup>126</sup> His application should have followed standard procedures. Instead, the board scrutinized Mr. Quarterman's application with an extraordinary investigation. Plagued with procedural irregularities and acrimonious commentary, the Board's review reflected their hesitation to approve a nightclub that would attract minority patrons.

The Board hired two private investigators to dig deeper into Mr. Quarterman's background—seeking information far beyond the scope of the liquor license application. The private investigators flagged concerns about Mr. Quarterman's tax returns, an undisclosed interest in his company, and his “posted” status with the Alcoholic Beverages Control Commission (a confidential designation indicating delinquency in payments to liquor distributors).<sup>127</sup> Under normal circumstances, these issues would be immaterial and easily resolved by amending the application or by providing additional documentation.<sup>128</sup> However, in Mr. Quarterman's case, the Board chair sought additional justifications to deny the transfer, urging colleagues to bypass formal channels in search of more damaging information. “We tried the front door,” the Board chair wrote in an email. “Let's try the back.”<sup>129</sup>

The Board's “backdoor” investigation raised concerns, particularly due to additional comments made by the Board chair. In one instance, the Board chair suggested that Mr. Quarterman refrain from playing hip-hop music as a safety precaution—relying on tropes that associate Black entertainment with criminality.<sup>130</sup> In another instance, Mr. Quarterman shared his letters of support during an administrative hearing, to which the Board chair quipped,

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<sup>125</sup> *Quarterman v. City of Springfield*, 716 F. Supp. 2d 67, 70 (D. Mass. 2009). Quarterman did business through State Street Entertainment, Inc., an entity of which he was the President, Treasurer, Director, and Clerk. *Id.*; Peter Goonan, “Springfield City Council approves \$918K to settle Asylum nightclub liquor license dispute and 18 other legal claims,” *MassLive.com* (Feb. 6, 2018, 6:20pm) [https://www.masslive.com/news/2018/02/10-year\\_legal\\_battle\\_springfie.html](https://www.masslive.com/news/2018/02/10-year_legal_battle_springfie.html).

<sup>126</sup> Joint Pretrial Memorandum, *Quarterman v. City of Springfield*, 3:07-cv-30185-MAP Dkt. 52 at p. 1 (D. Mass. Feb. 23, 2010).

<sup>127</sup> *Quarterman v. City of Springfield*, 716 F. Supp. 2d 67, 70–71 (D. Mass. 2009) (noting that the Springfield mayor and the Board chair met with the investigators before the hearing for Quarterman's transfer request, but “[t]he record is silent as to who hired the investigators.”) *Id.* at 70.

<sup>128</sup> *Id.* at 71–72. The board later admitted that tax records and posted status had never previously been used to evaluate liquor license applications, and that other applicants who failed to disclose financial interests had been allowed to amend their filings without penalty.

<sup>129</sup> *Id.* at 72.

<sup>130</sup> *Id.* at 71.

“Are you finished, or do you have another letter from anyone else, like the Urban League or NAACP?”<sup>131</sup> Beyond tone-deaf and condescending, these comments reflected the board chair’s conclusory take: Mr. Quarterman’s establishment was ‘undeserving’ of a liquor license.

In his federal civil rights lawsuit, Mr. Quarterman alleged that the City of Springfield violated the Fourteenth Amendment. He raised both substantive due process and equal protection claims, but this case was a textbook example of the difficulty in using civil rights litigation to challenge administrative burdens.<sup>132</sup> The district court dismissed Mr. Quarterman’s substantive due process challenge on summary judgment, finding that the conduct, while “reprehensible,” was not “sufficiently egregious” and thus fell short of the necessary ‘shock the conscience’ standard.<sup>133</sup> This threshold, which courts have historically reserved for extreme government misconduct, insulates racialized burdens from federal civil liability.<sup>134</sup> The First Circuit reinforced this deference to administrative discretion:

We have held, *with a regularity bordering on the monotonous*, that the substantive due process doctrine may not, in the ordinary course, be invoked to challenge discretionary permitting or licensing determinations of state or local decisionmakers, whether those decisions are *right or wrong*. While we have ‘left the door slightly ajar for . . . truly horrendous situations,’ any permit or license denial, no matter how unattractive, that falls short of being ‘*truly horrendous*’ is unlikely to qualify as conscience-shocking.<sup>135</sup>

The monotony to which the court refers is its refusal to second-guess discretionary administrative decisions. Short of “truly horrendous” and “conscious-shocking” denials, the chances of court intervention are practically zero. Because racialized administrative burdens accumulate through facially neutral, minute, even nitpicky actions, the response to plaintiffs seeking to challenge them is simply ‘no.’ Justifiably so, for courts are constrained by a civil rights framework that prioritizes overtly explicit discrimination and are ill-suited to redress even the most exclusionary administrative decisions—“right or wrong,” as the First Circuit declared. Thus, the court’s position explains why administrative burdens that weaponize the appearance of neutrality are so effective: it secures judicial deference and allows discrimination to evade the parameters of antidiscrimination law.

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<sup>131</sup> *Id.* at 72.

<sup>132</sup> *Id.* at 74.

<sup>133</sup> *Id.* (quoting *Pagan v. Calderon*, 448 F.3d 16, 33 (1<sup>st</sup> Cir. 2006)).

<sup>134</sup> *Id.* at 74 (“The challenged conduct in this case involves a discretionary licensing determination and hence is not subject to due process challenge absent allegations of ‘truly horrendous’ behavior.”)

<sup>135</sup> *Pagan v. Calderon*, 448 F.3d 16, 33 (1<sup>st</sup> Cir. 2006) (citations omitted) (emphasis added).

Though Mr. Quarterman's equal protection claim survived summary judgment,<sup>136</sup> at trial, he did not have enough evidence to show that the Board intentionally discriminated against him.<sup>137</sup> His attorney struggled to articulate the broader structural forces at play, and—perhaps ahead of his time to a fault—he attempted to describe how racialized administrative burdens function. However, Mr. Kesten, Mr. Quarterman's attorney, lacked the precise tools to explain how these burdens operated as meso-level barriers rather than individual acts of bias, though individual bias is required for a successful claim:

MR. KESTEN: Your Honor, I'm not suggesting Williams is a racist. I'm not suggesting these people are racist. The thrust of this case is there was things done with regard to this license that had never been done to anyone else before, and the real concern that people had, the real reason there was a delay and there were no hearing—forget the delay.

The real reason, the real concerns were that there were people who were afraid of hip hop music because when you look at the rationale of the people, I understand you're locked into this issue, but this was a big thing that caused them not to get a license.

THE COURT: Well, I don't know whether it's a big thing or a small thing or a zero thing, but it's a thing.

MR. KESTEN: It's a thing.<sup>138</sup>

The court acknowledged that “a thing” had happened—rules had been applied selectively, and maybe fears about the proposed hip-hop music shaped the licensing decision. But ultimately, the court rejected Mr. Quarterman's argument that hip-hop was a proxy for race.<sup>139</sup> The court's estimation that hip-hop is a neutral art form is contradicted by the consideration of hip-hop in the deliberation process. If truly neutral, the mention of the genre would have no place in the discussion at all. Rather, the board raised questions about hip-hop precisely to convey unspoken meanings about the clientele the establishment is expected to attract, converting hip-hop music into a dog whistle that concealed racialized perceptions. Even so, the court dismissed the argument with a reference to hip-hop that, given the important sociocultural moment at the time of this writing, simply cannot be ignored:

THE COURT: We all know that white Caucasian, young people enjoy hip hop.

<sup>136</sup> To succeed on an equal protection claim, a plaintiff must show that “(1) he was treated differently than other similarly situated supplicants,” and (2) “the differential treatment resulted from a gross abuse of power, invidious discrimination, or some other fundamental procedural unfairness.” *Id.*

<sup>137</sup> The court held that “Plaintiffs have failed to show, by a preponderance of the evidence, that any element of racial discrimination—based either upon the race of the Plaintiff Quarterman, or upon the race of his proposed clientele—played a part in the decision of Defendants to deny Plaintiffs' application to transfer their liquor license.” *Quarterman v. City of Springfield*, 3:07-cv-30185-MAP Dkt. 81 at p. 1 (D. Mass. June 16, 2010).

<sup>138</sup> Transcript of Non-Jury Trial Day Nine, *Quarterman v. City of Springfield*, 3:07-cv-30185-MAP Dkt. 90 at p. 73 (D. Mass. July 9, 2010).

<sup>139</sup> *Quarterman v. City of Springfield*, 3:07-cv-30185-MAP Dkt. 97 at p. 94 (D. Mass. Aug. 3, 2010) (“First, I do have to say that the theory that there was prejudice demonstrated against Mr. Quarterman based on the possibility that he was going to play hip hop music and that hip hop is a code or proxy for race . . . has been entirely unconvincing to me . . .”).

It is a very popular musical mode. It is, as I think has come out during the trial, no more offensive or no more attractive of criminal elements than many, many other types of musical modes going right back to rock and roll and all those types of music that have evolved since then.

It is practiced by some white artists, although primarily minority artists. It was featured on the front page of the *New York Times* Sunday paper—not the front page of the main section but the art section. We have a new hip hop king coming out of Canada who’s half black, half Jewish who is the new star of hip hop. It’s a very dominate mode enjoyed by very many, many people.<sup>140</sup>

At this point in the trial transcript, the discussion shifted to pop culture, where the court invoked the widespread popularity of hip-hop among white audiences as testament to its neutrality. By referencing Drake, a Jewish-Canadian artist who had, at the time, ascended to global superstardom, the court implied that hip-hop’s diverse commercial appeal undermined Mr. Quarterman’s claim that discrimination against the genre was inherently race-based.

In 2025, this exact dynamic between race and hip-hop played out in a high-profile conflict between Drake and Kendrick Lamar, a Pulitzer Prize-winning rapper who is generally considered to be a voice of political and cultural consciousness. As much as Kendrick Lamar’s critique of Drake is about music, it is also about authenticity, cultural ownership, and the industry forces that allow some to profit while others face exclusion. In “Not Like Us,” Kendrick Lamar raps that Drake’s success has been manufactured by the very structures that have historically marginalized Black artists and Black cultural spaces.<sup>141</sup> As journalist Ime Ekpo observes:

The importance of understanding both the history and the ongoing challenges faced by the Black community cannot be overstated . . . Kendrick Lamar’s critique in [Lamar’s] diss track . . . suggests that [Drake’s] collaborations with Black artists from Atlanta are calculated strategies rather than authentic connections.<sup>142</sup>

Kendrick Lamar’s cultural critique and Mr. Quarterman’s legal battle are analogous. Both conflicts comment on the social meaning of hip-hop, differing in their conclusions. Lamar’s critique centers on Black authenticity, turning on the claim that hip-hop music carries a cultural lineage that cannot be divorced from Black identity. Opposite of that, the

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<sup>140</sup> *Id.* at p. 95.

<sup>141</sup> Kendrick Lamar, “Not Like Us.” This song, performed at Super Bowl 59, also won record of the year and song of the year at the 2025 Grammy Awards. Taijuan Moorman, “Kendrick Lamar, Drake Beef Explained After the Super Bowl Halftime Show,” USA TODAY (Feb. 10, 2025), <https://www.usatoday.com/story/entertainment/music/2025/02/10/super-bowl-kendrick-lamar-drake-beef-explained/78381830007/> (last accessed Mar. 6, 2025). 10, 2025), <https://www.usatoday.com/story/entertainment/music/2025/02/10/super-bowl-kendrick-lamar-drake-beef-explained/78381830007/> (last accessed Mar. 6, 2025).

<sup>142</sup> Ime Ekpo, “How Kendrick Lamar Challenged Drake’s Cultural Identity in ‘Not Like Us,’” FORBES (May 7, 2024, 6:42pm EDT), last accessed at <https://www.forbes.com/sites/imeekpo/2024/05/07/how-kendrick-lamar-challenged-drakes-cultural-identity-in-not-like-us/> (Mar. 6, 2025).

court points to Drake to suggest that such a tight connection does not exist—hip-hop’s artists and audiences are too racially diffuse to serve as a proxy for Blackness. In the court’s theoretical view, authenticity is not a meaningful category with sufficient social force as to be generalizable to all mentions of “hip-hop” and, therefore, to carry legal meaning. However, as a normative matter, the invocation of hip-hop in Mr. Quarterman’s deliberations suggests that the association is certainly material enough to shape administrative decisions.

Even if the court had fully embraced the hip-hop-is-a-proxy-for-race argument, it is unclear whether it could have ruled in favor of Mr. Quarterman on that recognition. Given the track record of cases like Mr. Quarterman’s, the Fourteenth Amendment is an improper vehicle for addressing racialized administrative burdens. Officials are granted discretion that permits them to impose procedural roadblocks without explicitly invoking race, thereby sidestepping traditional constitutional scrutiny.<sup>143</sup> In deferring to administrators, courts cannot surgically dissect decisions and comb for inferences of racial discrimination. That the administrative process itself is the mechanism of exclusion further complicates the analysis,<sup>144</sup> and Fourteenth Amendment doctrine remains unresponsive. Equal protection claims require evidence of intentional discrimination, and substantive due process claims must meet the threshold of conscience-shocking government misconduct.<sup>145</sup> Racialized administrative burdens meet the criteria for neither, and thus, remain invisible to the law.

### *B. Weaponizing [In]visibility*

Administrative burdens can emerge from the law’s refusal to acknowledge race at all. I refer to this dynamic as [in]visibility, a double *entendre* describing how Black-owned businesses are simultaneously hypervisible as targets for discrimination and yet invisible when they seek protections under antidiscrimination statutes.<sup>146</sup>

<sup>143</sup> See, e.g., *Dewalt v. City of Brooklyn Park*, 2017 U.S. Dist. LEXIS 75453, \*15 (D. Minn. May 17, 2017) (granting city’s motion for summary judgement on equal protection claim because, inter alia, “the only circumstantial evidence of discrimination is DeWalt’s testimony that City staff members gave him a bad look when he told them that 85% of Gossip’s clientele would be black.”).

<sup>144</sup> *Dewalt v. City of Brooklyn Park*, 2017 U.S. Dist. LEXIS 75453, \*20 (arguing that city’s compatibility metric for evaluating conditional use permit applications was “a euphemism for racial discrimination and conceals the City’s view that black people are noisy, messy, disruptive, and violent.”).

<sup>145</sup> *Cnty of Sacramento v. Lewis*, 523 U.S. 833, 836 (1998).

<sup>146</sup> Racial [in]visibility, as developed in this Article, refers to the paradox by which Black-owned businesses are targeted for regulation but not for protection. This concept draws from—but is distinct from—Nell Irvin Painter’s use of “racial invisibility” to critique the notion that white people often enjoy the comfort of appearing raceless. Nell Irvin Painter, Opinion, *Why 'White' Should Be Capitalized, Too*, WASH. POST (July 22, 2020), <https://www.washingtonpost.com/opinions/2020/07/22/why-white-should-be-capitalized/>. As conceptualized in this Article, racial [in]visibility means that Black-owned businesses, too, experience racelessness—but only when it does not serve them. Similarly, racial [in]visibility invokes Kimberlé Crenshaw’s observations in her foundational work on intersectionality, where legal frameworks designed around singular categories make Black women’s harms invisible. See, e.g., Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL R. 139 (1989).

Racial [in]visibility functions as a type of administrative burden that allows institutions to engage in preferential treatment while denying a discriminatory motive when called to account. Racial [in]visibility builds on existing theories of racialized organizations and colorblind governance by expanding their insights into the bureaucratic domain, describing spaces where race is alternatively prescriptive and disavowed depending on organizational posture.<sup>147</sup> Racial [in]visibility captures the modern iterations of control through administrative abuses that originated in the precolonial era: policing Black communities through surveillance, containment, and exclusion.

The case of *Sheba Ethiopian Restaurant v. DeKalb County* exemplifies the hypervisible-for-punishment-yet-hypovisible-for-protection dichotomy. Founded in 1998, Sheba Ethiopian Restaurant was a Black, Ethiopian American-owned restaurant and late-night venue that served as an anchor for Atlanta, Georgia's East African community.<sup>148</sup> For its predominantly Black immigrant clientele, Sheba functioned as a third space for dining, music, and gathering until 4:00 am.<sup>149</sup> Unfortunately for Sheba, this prominence made the establishment hypervisible to a neighborhood resident who sought to 'clean up' the district. In 2015, the neighbor—who is also a real estate professional—spearheaded a campaign to rid the area of hookah bars and restaurants owned and patronized by residents of Ethiopian descent, establishments she described as “noxious uses.”<sup>150</sup> The resident made her concerns known on Nextdoor (a neighborhood-based social media platform), sharing that she was working with the County Commissioner's office to “determine if there is anything we can LEGALLY do to rid this intersection of these noxious uses.”<sup>151</sup> To advance this goal, she submitted formal complaints to the DeKalb County Commission, which then directed multiple city agencies to investigate.

What followed was a wave of punitive actions from the DeKalb County Fire Marshal's office and the Code Enforcement Division of the Department of Planning and Sustainability. Between December 2016 and March 2017, county officials engaged in behavior that Sheba experienced as menacing: surprise inspections, citations for minor code violations, and repeated threats

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<sup>147</sup> See, e.g., EDUARDO BONILLA-SILVA, *RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN AMERICA*, (5th ed. 2017); Daanika Gordon, *The Police as Place-Consolidators: The Organizational Amplification of Urban Inequality*, 45 *LAW & SOC. INQUIRY* 1, 24 (2020); Marissa Jackson, *Neo-Colonialism, Same Old Racism: A Critical Analysis of the United States' Shift toward Colorblindness as a Tool for the Protection of the American Colonial Empire and White Supremacy*, 11 *BERKELEY J. AFR.-AM. L. & POL'Y* 156, 183-84 (2009).

<sup>148</sup> *Sheba Ethiopian Restaurant, Inc. v. DeKalb County, Georgia*, Case No. 1:17-cv-04400-WMR, Dkt. 1 at 2 (N.D. Ga. Nov. 3, 2017).

<sup>149</sup> The late-night hours reflect East African tradition and culture. As Sheba's attorney expressed during a hearing: “We have always operated after 12:30. All of the permits that have been issued since 1998 – we were operating after 12:30, yes. That's – that's the nature of the business. The Ethiopian community is a late-night community. That's kind of a cultural thing. So it would not be of much assistance to have them close at 12:30.” Transcript of DeKalb County Department of Planning and Sustainability, Zoning Board of Appeals Hearing, June 14, 2017, *Sheba Ethiopian Restaurant, Inc. v. DeKalb County, Georgia*, Case No. 1:17-cv-04400-WMR, Dkt 27-1 at 82 (N.D. Ga. June 1, 2018).

<sup>150</sup> First Amended Complaint, *Sheba Ethiopian Restaurant, Inc. v. DeKalb County, Georgia*, Case No. 1:17-cv-04400-WMR, Dkt. 80 at 19 (N.D. Ga. Sept. 21, 2020).

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

of closure. In a three-week span, inspectors cited Sheba on January 27<sup>th</sup>,<sup>152</sup> February 4<sup>th</sup>,<sup>153</sup> and February 11<sup>th</sup><sup>154</sup>—resulting in seven infractions ranging from “sparklers in champagne bottles” to “failure to comply.”<sup>155</sup> When Sheba could not produce an occupancy certificate issued nineteen years prior, the fire marshal cut Sheba’s occupancy in half—from 199 to 99 patrons permitted in the building at once.<sup>156</sup> Sheba’s attorney admonished the gesture. “I understand that you conducted a general inspection and found no violations, but issued a temporary load capacity number of 99 persons,” the attorney began.<sup>157</sup> He continued:

The owner advised that his capacity is 199 persons and has been for the entire 19 years he has been in business at this location, but he is under the impression that you rejected this number based upon his failure to produce a certificate from the DeKalb County Fire Department. I also understand that you warned that you will be visiting the establishment this weekend and if you find that there are more than 99 persons inside you will be taking action against the restaurant.

Notwithstanding the obvious impact of such a dramatic action taken to reduce the capacity of this restaurant by 100 persons, the owner is interested in being in complete and total compliance.

. . .

Confirm that you have been unable to locate proof of the 199 person load capacity that was provided to this business 19 years ago. While the business should have this documentation, it seems unconscionable[sic] that your department would have no record itself. . . If in fact it has been lost by DeKalb County, it also seems unfair that the business would be punished in the interim, as it has been by your action to provide a random capacity load that severely restricts this business.<sup>158</sup>

For any business, reducing occupancy by 50% overnight has the effect of cutting revenue potential in half. In the food and beverage industry, where

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<sup>152</sup> Sheba Ethiopian Restaurant, Inc. v. DeKalb County, Georgia, Case No. 1:17-cv-04400-WMR, Dkt. 26-2 at 127-29 (N.D. Ga. June 1, 2018) (three citations for “failure to permit construction,” “failure to remove or provide fire/flame propagation performance [sic] certification,” and “occupant load over limit”).

<sup>153</sup> *Id.* at 125,134 (two citations for “operating outside of the letter of entertainment,” one of which is for operating at 4am, five minutes past the 3:55am closing time disclosed on the letter of entertainment).

<sup>154</sup> *Id.* at 130-131 (two citations).

<sup>155</sup> Sheba Ethiopian Restaurant, Inc. v. DeKalb County, Georgia, Case No. 1:17-cv-04400-WMR, Dkt. 1 at 18 (N.D. Ga. Nov. 3, 2017).

<sup>156</sup> *Id.*

<sup>157</sup> Sheba Ethiopian Restaurant, Inc. v. DeKalb County, Georgia, Case No. 1:17-cv-04400-WMR, Dkt. 26-2 at 137-38 (N.D. Ga. June 1, 2018).

<sup>158</sup> *Id.*

margins are razor-thin, this kind of maneuver can turn a viable operation into a failing one. In dealing with the circumstance of a missing occupancy certificate, the fire marshal had multiple options. Rather than grant a temporary variance while the document was located or allow a reasonable timeframe for compliance, the marshal treated discretion as an opportunity for constraint instead of collaboration.<sup>159</sup> These decisions—subtle, objectively defensible, and consequential—are how administrative burdens perpetuate harm even when businesses appear to be ‘in the wrong’ and cannot quite name the injury. The fire marshal’s prophetic words from December 2016 would eventually ring true: “We’re going to close you down. That’s why we’re here.”<sup>160</sup>

Despite Sheba’s attempts to cooperate with the authorities, the county issued a “cease use” order and, in April 2017, revoked Sheba’s business license, liquor license, and certificate of occupancy.<sup>161</sup> Sheba fought tooth-and-nail to stay open, filing administrative appeals and spending almost \$100,000 to comply with the county’s escalating demands.<sup>162</sup> Throughout the entire ordeal, county officials remained in close communication with the neighbor who initiated the campaign. At one juncture, the neighbor had compiled a 17-point list of grounds for ending Sheba’s operations, pleading with county officials to “do what you can to stop that issuance of a business license.”<sup>163</sup> She submitted a proposal to the County requesting more citizen involvement in the special land use permitting process: “The county would not be responsible for investigating these matters, but if residents were to provide evidence of such lawbreaking, that would provide objective evidence that should help the County win in an appeal,” she offered. Upon Sheba’s closure, the neighbor circulated a celebratory email: “At our immediate intersection, we shut down 6 [late night establishments] (talk about proliferation!).”<sup>164</sup> Sheba joined the ranks of nine other Ethiopian restaurants in the district that closed permanently, relocated, lost their lease,

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<sup>159</sup> Notably, the county’s land use code recognizes a more inclusive purpose: to “afford protection to residential uses and other uses so as to protect the public health, safety and welfare while respecting and providing adequate opportunities for nightlife in the county.” DeKalb County Ordinance § 27-746, “Late night establishments,” (2008).

<sup>160</sup> *Sheba Ethiopian Restaurant, Inc. v. DeKalb County, Georgia*, Case No. 1:17-cv-04400-WMR, Dkt. 27-1 at 12 (N.D. Ga. June 1, 2018).

<sup>161</sup> Defendants’ Motion to Strike and Motion to Dismiss Amended Complaint, and Brief in Support at 6, *Sheba Ethiopian Restaurant, Inc. v. DeKalb County, Georgia*, No. 1:17-cv-04400-WMR, (N.D. Ga. Oct. 8, 2020) Dkt. No. 82.

<sup>162</sup> First Amended Complaint, *Sheba Ethiopian Restaurant, Inc. v. DeKalb County, Georgia*, Case No. 1:17-cv-04400-WMR, Dkt. 80 at 30 (N.D. Ga. Sept. 21, 2020). (“Sheba, at great expense (close to \$100,000) hired engineers and other contractors to complete those changes demanded by the County”). This includes a Sheba soliciting a contractor for a sprinkler mandated by the fire marshal. The contractor submitted a quote of \$15,700. *Sheba Ethiopian Restaurant, Inc. v. DeKalb County, Georgia*, Case No. 1:17-cv-04400-WMR, Dkt. 1 at 20 (N.D. Ga. Nov. 3, 2017); *Sheba Ethiopian Restaurant, Inc. v. DeKalb County, Georgia*, Case No. 1:17-cv-04400-WMR, Dkt. 26-2 at 136 (N.D. Ga. June 1, 2018) (showing proposal dated February 16, 2017 for sprinkler coverage, permitting, and equipment rental and deposit of \$7,850 received on Mar. 2, 2017).

<sup>163</sup> First Amended Complaint, *Sheba Ethiopian Restaurant, Inc. v. DeKalb County, Georgia*, Case No. 1:17-cv-04400-WMR, Dkt. 80 at 27-28 (N.D. Ga. Sept. 21, 2020).

<sup>164</sup> *Sheba Ethiopian Restaurant, Inc. v. DeKalb County, Georgia*, No. 1:17-cv-04400-WMR, 2021 U.S. Dist. LEXIS 17692, at 35 (N.D. Ga. Aug. 25, 2021) Dkt. No. 96. (LNEs refers to “late night establishments”).

or struggled to stay afloat after being denied necessary approvals for operation.<sup>165</sup>

Officials justified Sheba's closure by arguing that when the establishment added more tables, hookahs, and a DJ booth, Sheba unlawfully changed its permitted use from a late-night restaurant to a nightclub.<sup>166</sup> Sheba contested this technical determination, arguing that updated décor for the nearly 20-year-old restaurant was merely cosmetic and did not constitute a material change in use. At the hearing, one witness for the county offered an aesthetic judgment: "There are also pictures here that show Queen of Sheba as it looked before when it was a nice, respectable Ethiopian restaurant . . . I also have pictures from inside that show it's clearly a nightclub with pyrotechnics—and I don't see any food on the table. It's all Grey Goose and hookahs."<sup>167</sup>

The comparison of "respectable" with "Grey Goose" is ripe with undertones, with a backstory suggesting that the association is intentionally so. Grey Goose, a popular vodka brand, was manufactured to function in American cultural discourse as a metonym for Black leisure and hip-hop affluence. In the late 1990s, spirits producer Sidney Frank Importing Co. (SFIC) set out to create a superpremium vodka brand—an ambitious endeavor given that vodka, by definition, is an odorless and tasteless neutral grain spirit.<sup>168</sup> To overcome this indistinctiveness, SFIC priced Grey Goose twice as high as competitors, packaged it in an elegant, frosted bottle, and located its production in France to capitalize on that nation's association with luxury goods.<sup>169</sup> In further pursuit of a reputation for refinement, the brand sought to seed the liquor in the aspects of Black entertainment culture that transmit markers of nightlife affluence: VIP tables, hip-hop music videos, and rap lyrics. SFIC punctured this space by sponsoring tours with hip-hop artists such as Bone Thugs-N-Harmony and Lil Jon and the Eastside Boyz, using Black rappers as influencers two decades before the term

<sup>165</sup> Sheba Ethiopian Restaurant, Inc. v. DeKalb County, Georgia, Case No. 1:17-cv-04400-WMR, Dkt. 1 at 22-23 (N.D. Ga. Nov. 3, 2017) (naming Day & Night, Ledet Restaurant doing business as Aroma Lounge, Arif Lounge, Meskerem Ethiopian Restaurant doing business as Luv Lounge, Mint Ultra Lounge, Therapy Lounge, Food Therapy, and Pure. In a letter on behalf of Sheba, the restaurant's attorney mentioned the simultaneous targets: "Parenthetically, I also represent Desta Restaurant, another Ethiopian Restaurant you inspected today, and we wil lbe[sic] meeting with building officials regarding that establishment on Friday morning. Perhaps you can be a part of that meeting and we can resolve both of these issues simultaneously.") Sheba Ethiopian Restaurant, Inc. v. DeKalb County, Georgia, Case No. 1:17-cv-04400-WMR, Dkt. 26-2 at 138 (N.D. Ga. June 1, 2018).

<sup>166</sup> According to the Letter of Entertainment completed by Sheba, having a designated space for dancing seems to be the primary distinction. Sheba Ethiopian Restaurant, Inc. v. DeKalb County, Georgia, Case No. 1:17-cv-04400-WMR, Dkt. 26-2 at 122 (N.D. Ga. June 1, 2018).

A late night establishment is "any establishment licensed to dispense alcoholic beverages for consumption on premises where such establishment is open for use by patrons beyond 12:30 a.m." On the other hand, a nightclub is defined as "a commercial establishment dispensing alcoholic beverages for consumption on the premises and in which dancing and musical entertainment is allowed." Sheba indicated that it was a late night establishment and that it was not a nightclub. *Id.*

<sup>167</sup> Transcript of DeKalb County Department of Planning and Sustainability, Zoning Board of Appeals Hearing, June 14, 2017, Sheba Ethiopian Restaurant, Inc. v. DeKalb County, Georgia, Case No. 1:17-cv-04400-WMR, Dkt 27-1 at 31-32 (N.D. Ga. June 1, 2018).

<sup>168</sup> Seth Stevenson, *The Cocktail Creationist*, NEW YORK MAGAZINE (Dec. 30, 2004), last accessed on Mar. 13, 2026 at <https://nymag.com/nymetro/news/bizfinance/biz/features/10816/>.

<sup>169</sup> *Id.*

became mainstream marketing parlance.<sup>170</sup> The transformation was successful, for Black artists such as Jay-Z, Young Jeezy, Ying Yang Twins, and Nicki Minaj have all referenced the spirit in lyrics celebrating success, pleasure, and autonomy.<sup>171</sup> Like the Adidas sneakers and Kangol hats before it, Grey Goose vodka morphed into generalized cultural perception as a premium “Black” product, despite any connection to ownership.<sup>172</sup>

Referencing the vodka brand in administrative proceedings reinforces the notion that Black people are routinely subject to respectability politics, a survival strategy that mandates conformity and assimilation.<sup>173</sup> Whereas Blackness coded as respectable is tolerable, expressions of Blackness coded as loud or nocturnal become criminal. By drawing on the presence of Grey Goose bottles as support for claims of a material change in use—and more importantly, moral decline to be juxtaposed with a “respectable” establishment—the county’s witness relied on cultural expression as an indicator of deviance and noncompliance with the land use code.

Sheba sued the county in federal court, alleging unlawful racial discrimination under 42 U.S.C. § 1981.<sup>174</sup> To succeed on a § 1981 claim, a plaintiff must demonstrate that they are (1) a member of a racial minority, (2) the defendant intentionally discriminated against them, and (3) the defendant interfered with contractual rights, or other rights stipulated in the statute.<sup>175</sup> The county argued that Sheba lacked prudential standing because it, as a corporation, does not have a race, and thus cannot be considered a racial minority.<sup>176</sup> The Eleventh Circuit agreed because the circuit courts

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<sup>170</sup> Billboard Staff, *Rappers Flock to Grey Goose Tour*, BILLBOARD (Aug. 16, 2002), last accessed on Mar. 13, 2026 at <https://www.billboard.com/music/music-news/rappers-flock-to-grey-goose-tour-74531/>.

<sup>171</sup> “Grey Goose” by Young Jeezy (2003); “Grey Goose” by Ying Yang Twins (2003); “Primetime” by Jay-Z & Kanye West (2011); “Bom Bidi Bom” by Nick Jonas & Nicki Minaj.

<sup>172</sup> Steve Stout, *THE TANNING OF AMERICA: HOW HIP-HOP CREATED A CULTURE THAT REWROTE THE RULES OF THE NEW ECONOMY* 43–44 (2011).

<sup>173</sup> For a thorough discussion of how respectability politics influences the treatment of Black people in America under the law, see Osagie K. Obasogie & Zachary Newman, *Black Lives Matter and Respectability Politics in Local News Accounts of Officer-Involved Civilian Deaths: An Early Empirical Assessment*, 2016 WIS. L. REV. 541 (2016) (describing how community leaders sought to resist racial subordination by countering “negative views of blackness by aggressively adopting the manners and morality that the dominant culture deems ‘respectable’”). Opponents of respectability politics argue that Black people deserve humane and just treatment, regardless of actual or perceived conformity to dominant culture.

<sup>174</sup> 42 U.S.C. § 1981(a): “All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.” As a statutory device intended to promote equity in contracting, Section 1981 has had a pernicious history of implementation and enforcement. See Carliss Chatman, *1981*, 82 WASH. & LEE L. REV. (forthcoming 2025).

<sup>175</sup> *Jimenez v. Wellstar Health Sys.*, 596 F.3d 1304, 1308 (11th Cir. 2010).

<sup>176</sup> *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 263 (1977) (“As a corporation, MHDC has no racial identity and cannot be the direct target of the petitioners’ alleged discrimination”); *Connecticut Gen. Life Ins. Co. v. Johnson*, 303 U.S. 77, 87 (1938) (Black, J., dissenting) (“Corporations have neither race nor color.”); *Domino’s Pizza, Inc. v. McDonald*, 546 U.S. 470, 473 n. 1 (2006) (“Since JWM settled its claims and is not involved in this case, we have no occasion to determine whether, as a corporation, it could have brought suit under § 1981. We note, however, that the Courts of Appeals to have considered the issue have concluded that corporations may raise § 1981 claims.”); *but see Hudson Valley Freedom Theater v. Heimbach*, 671 F.2d 702, 704-707 (1982) (distinguishing *Arlington Heights*

were split on this issue, meaning that courts had not “clearly established” that a corporation could have a race. Since the county officials had not infringed upon a clearly established right, they were entitled to qualified immunity. Once again, Sheba’s racial identity—or in this instance, lack thereof—deemed it enough to punish but not enough to protect. In the administrative context, Sheba was cast as a racially and ethnically legible site of disorder that threatened neighborhood status. Yet, in federal court, Sheba’s Blackness vanished. The county argued that as a corporate entity, Sheba had no race, making it incapable of claiming racial harm under federal civil rights statutes.

By happenstance, Sheba was located in an unincorporated area of DeKalb County. Three years later, in 2020, the city of Brookhaven, Georgia annexed Sheba’s intersection, making it no longer in the jurisdiction of DeKalb County.<sup>177</sup> Subject to a different land use code, Sheba reopened due to sheer luck.

Still, Sheba’s closure resulted in economic, cultural, and social loss.<sup>178</sup> Though some may consider reopening an ultimate victory, Sheba experienced firsthand how administrative burdens combine stereotypes and tropes with access to resources in ways that inflict harm. What originated as a disingenuous concern from a neighbor concluded with substantial deprivations for Sheba. In an interview, Sheba’s counsel explained that litigation of this sort can exceed \$150,000 in attorneys’ fees and related legal expenses, and that would be in addition to the \$100,000 Sheba expended for compliance attempts. As Ray, Herd, and Moynihan argue, such harms reveal the compounded nature of the tremendous costs:

These racialized burdens then add labor, or the frustrations that come from dealing with bureaucracy, all disproportionately stealing time from marginalized groups. . . The daily interruptions and delays caused by racialized burdens make it harder for people of color to exercise personal agency and reflect the state’s ability to impose differential restraints on people’s use of time.<sup>179</sup>

Moreover, like *Quarterman*, the *Sheba* decision also exposes the ontological limits of federal civil rights statutes, as racial harm is more

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and reversing district court’s decision that denied standing for a nonprofit organization that served Black and Hispanic communities and sought to bring racial discrimination claims under §§1981, 1983, and 1985), *Comcast Corp. v. Nat’l Ass’n of African American-owned Media*, 140 S. Ct. 1009, 1013 (2020) (not questioning the standing of a Black-owned corporation to bring a § 1981 claim).

<sup>177</sup> *State Panel Issues Findings on Brookhaven Annexation*, THE CHAMPION (Sept. 4, 2020), <https://thechampionnewspaper.com/state-panel-issues-findings-on-brookhaven-annexation/>.

<sup>178</sup> During an administrative hearing, one of Sheba’s customers attested to the establishment’s role as a third space in the community: “My name is Fazil. I used to live in Dekalb County; but right now I live in Gwinnett County. I mean, Sheba is not only the restaurant; it’s not only the club. It just a social company. People come from all races; that’s where we meet. That’s where we make connections. So that’s why we do the business. Not only a club. We just a social gathering place. We need your help.” Transcript of DeKalb County Department of Planning and Sustainability, Zoning Board of Appeals Hearing, June 14, 2017, *Sheba Ethiopian Restaurant, Inc. v. DeKalb County, Georgia*, Case No. 1:17-cv-04400-WMR, Dkt 27-1 at 20–21 (N.D. Ga. June 1, 2018).

<sup>179</sup> Ray, Herd, & Moynihan, *supra* note 17, at 141.

difficult to detect when the injury operates through ‘raceless’ businesses, organizations, or institutions.<sup>180</sup> The *Sheba* case further illustrates how treating federal litigation as a panacea for racialized administrative burdens is an exercise in futility.

### C. *Weaponizing Compliance*

When regulators exploit applicants’ cooperation to the point of economic or psychological exhaustion, compliance is an administrative burden. What distinguishes the burden of compliance is its shifting sands nature. Processes demand cooperation but advance just far enough to incentivize continued investment and perpetually dangle a carrot of fairness. The applicant adjusts and—critically—incurs additional costs only to confront a new barrier. The unattainable target guarantees defeat. It insulates decision-makers from claims of racial discrimination because compliance leaves a paper trail of ‘reasonable’ requests. Whereas compliance is often portrayed as a survival strategy for Black Americans,<sup>181</sup> racialized administrative burdens weaponize compliance to extract resources and instead *punish* trust in the system.

Take *Volcano Enterprises, Inc. vs. City of Huntsville*, for example.<sup>182</sup> When the owners of The Silver Dollar, a 30-year-old gentleman’s club in Huntsville, Alabama, invited Daryl Williams to purchase their business in 2010, it was the opportunity of a lifetime<sup>183</sup>. Mr. Williams was a veteran in the entertainment industry, having opened his first club in 2000. His premiere venue, Club Volcano, was a popular establishment in Birmingham’s nightlife scene. Building on his success, Mr. Williams was poised to expand north, rebranding the Silver Dollar as Volcano 256—a nod to Huntsville’s area code. He anticipated that the transition would be seamless. The Silver Dollar was well-known in Huntsville, and some of its permits were grandfathered in. He would operate with the same type of liquor license, at the same location, under nearly identical conditions. The only meaningful difference was that the Silver Dollar was white-owned and catered to a predominantly white clientele, while Volcano 256’s ownership and target audience were Black. That distinction, observers suggest,

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<sup>180</sup> *Ultimax Transp., Inc. v. British Airways, Inc.*, 231 F. Supp. 2d 1329, 1338 (N.D. Ga. 2002) (“The plaintiff in this action, however, is not a ‘person’ but a corporation, and discerning the racial identity of a corporation could be quite daunting in many circumstances. . . . [T]he Court concludes that the plaintiff, a corporation owned by an African-American and staffed primarily with African-American employees, does have standing to assert a claim under Section 1981 based on racial discrimination directed at its owner and employees. Further, the racial identity that the parties and the Court assign to that corporation is an African-American or black racial identity.”). *Howard Sec. Services, Inc. v. Johns Hopkins Hospital*, 516 F. Supp. 508, 513 n.11 (D. Md. June 8, 1981) (“Defendant raises the problem of how one would define a corporation as black. The statute is directed solely at racial discrimination, not equal protection in a broader sense, as are the Fourteenth Amendment and § 1983. This is the clearest case for a ‘black’ corporation 100% owned by blacks and a close corporation.”).

<sup>181</sup> F. Lee Francis, *The History of Policing and the Impact on Minority Communities: The Case Against Police Abolition*, 42 MISS. C. L. REV. 18, 33 (2024) (“In the end, the deciding factor of life and death for a black person during an encounter with police is compliance.”).

<sup>182</sup> *Volcano Enterprises v. City of Huntsville*, Case No. CV-13-S-505-NE (N.D. Ala. Sept. 29, 2014).

<sup>183</sup> Telephone interview with Darryl Williams, Volcano 256 business owner in Huntsville, Ala. (Oct. 16, 2025).

triggered a process that beguiled Mr. Williams with the assurance of approval.

Mr. Williams applied for a liquor license three times: first in September 2011, it was denied due to code violations;<sup>184</sup> after hiring contractors to address the concerns, he reapplied in April 2012, only to face another denial for improper zoning.<sup>185</sup> After resolving the zoning issues and obtaining a certificate of occupancy, he reapplied five months later, but the liquor license was denied again—this time due to the potential impact on the surrounding neighborhood, a concern derived from data from the Silver Dollar.<sup>186</sup> By the time Volcano Enterprises filed a federal lawsuit alleging discrimination in the liquor licensing process, Mr. Williams was out \$80,000 and counting.

When Volcano appealed the liquor license denial, the Huntsville City Council meeting offered insights into public officials' and community members' perceptions of the conundrum. One speaker, Wiley Nunn, a friend of Mr. Williams, captured the absurdity of the process. As the minutes reflect, Mr. Nunn asked "why, if there was going to be opposition to this, the City would let Mr. Williams spend all this money?"<sup>187</sup> Mr. Nunn continued, articulating what many Black entrepreneurs intuit but rarely see validated in the public record:

Sgt. Roberts had talked about the permits and stated that after the permits had been issued, they had told Mr. Williams that all he had to do was get things done and it would be good. He stated that he did not believe it was fair to wait until Mr. Williams got to the one yard line and then call a time out and build a wall, not move the goal post but build a wall on the goal line.<sup>188</sup>

Mr. Nunn's metaphor captures the emotional and procedural toll of weaponized compliance. The "goal post" is not merely moved—presumably, still attainable—it is obstructed entirely. Cooperation and investment were, to use a colloquialism, a 'fool's errand,' one both solicited and punished. Upon review, even members of the City Council appeared uneasy. The meeting minutes captured how one sitting councilmember flagged the inherent procedural unfairness—disturbed by the prospect of luring Mr. Williams in without the intent to grant him a license:

[Councilman] stated that he was very concerned about what he felt was fundamental due process. He stated that he had an issue with Mr. Williams having expended a large sum of

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<sup>184</sup> Volcano Enterprises, Inc. v. City of Huntsville, Case No. 5:13-cv-00505-CLS, Dkt. 21-2 at 13 (Oct. 25, 2013).

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

<sup>186</sup> *Id.*

<sup>187</sup> Volcano Enterprises, Inc. v. City of Huntsville, Case No. 5:13-cv-00505-CLS, Dkt. 21-2 at 18 (Oct. 25, 2013).

<sup>188</sup> Volcano Enterprises, Inc. v. City of Huntsville, Case No. 5:13-cv-00505-CLS, Dkt. 21-2 at 18 (Oct. 25, 2013).

money and now they had discovered that they did not want him to operate this club. He asked if there would have been any way along the way that the City could have informed him that this was not going to happen, before he expended a lot of money trying to get the place up to par.<sup>189</sup>

Like the councilmember, Mr. Williams, too, suspects that the city never intended to grant the license in the first place.<sup>190</sup> As he recounted in an interview, the entertainment industry remains racially segregated. Ownership and control are largely reserved for white men, while Black entrepreneurs face overt and covert resistance when attempting to enter the market. Even in cities with sizable Black populations, the most profitable entertainment venues tend to be white-owned and white-patronized, sustained by an informal, deeply entrenched boundary in the industry.<sup>191</sup> This dynamic intensifies the stakes for Black business owners. Gentlemen's clubs are particularly lucrative because, unlike traditional clubs where traffic is limited to weekends, many of these venues operate seven nights a week.<sup>192</sup> For Mr. Williams, the liquor license denial was a barrier to entrepreneurial expansion.<sup>193</sup> Yet, his experience did not differ much from that of those who came before him. From literacy tests administered to would-be Black voters under the guise of 'educational fitness' to calculations of actuarial risk that justify redlining, bureaucratic practices have shaped access and opportunity for generations. Today, administrative burdens occur regardless of the race of the bureaucratic actors.<sup>194</sup> In this contemporary iteration of stratification, weaponized compliance relies on technocratic legitimacy to perpetuate inherited anti-Black sentiments, including values rooted in respectability politics and puritan moral governance that are also held by Black bureaucratic actors.<sup>195</sup>

Volcano's encounter particularly embodies how and why racialized burdens are so difficult to detect. As Ray, Herd, and Moynihan foreground, "policymakers and organizations launder racially disproportionate burdens

<sup>189</sup> Volcano Enterprises, Inc. v. City of Huntsville, Case No. 5:13-cv-00505-CLS, Dkt. 21-2 at 23 (Oct. 25, 2013); Steve Doyle, "Denied a liquor license, strip club owner sues Huntsville for racial discrimination," AL.com (Feb. 20, 2013, 3:59pm), last accessed on Oct. 20, 2025 at [https://www.al.com/breaking/2013/02/denied\\_a\\_liquor\\_license\\_strip.html](https://www.al.com/breaking/2013/02/denied_a_liquor_license_strip.html).

<sup>190</sup> Telephone interview with Darryl Williams, *supra* note 183.

<sup>191</sup> See generally Siobhan Brooks, UNEQUAL DESIRES: RACE AND EROTIC CAPITAL IN THE STRIPPING INDUSTRY (2010).

<sup>192</sup> Telephone interview with Darryl Williams, *supra* note 183.

<sup>193</sup> Mr. Williams stated that this was not the only instance that threatened his business. See, e.g., Kent Faulk, "\$37 million verdict against Club Volcano thrown out by Alabama Supreme Court," AL.COM (May 10, 2014, 2:05pm), last accessed on Oct. 20, 2025 at [https://www.al.com/sport-news/2014/05/37\\_million\\_verdict\\_against\\_clu.html](https://www.al.com/sport-news/2014/05/37_million_verdict_against_clu.html) (describing an overturned default judgment where defendant failed to properly serve notice of the lawsuit).

<sup>194</sup> See, e.g., Kenneth Meier, *Theoretical Frontiers in Representative Bureaucracy: New Directions for Research*, 2 PERSPECTIVES ON PUBLIC MANAGEMENT AND GOVERNANCE 1, 47 (2019); Celeste Watkins-Hayes, *Race, Respect, and Red Tape: Inside the Black Box of Racially Representative Bureaucracies*, 21 J. OF PUB. ADMIN. RSCH. & THEORY i233, i246 (2011); Carolyn Y. Barnes & Julia R. Henly, *They are Underpaid and Understaffed: How Clients Interpret Encounters with Street-level Bureaucrats*, 28 J. OF PUB. ADMIN. RSCH. & THEORY 165, 166-69 (2018).

<sup>195</sup> Ray, Herd, & Moynihan, *supra* note 17, at 140 ("[W]hile shared racial identity between bureaucrats and clients encourage individual workers to use discretion in ways that resist or undermine rules to reduce burdens, policies, and organizations ultimately set the boundaries for discretion.")

through facially neutral rules and via claims that burdens are necessary for reasons unrelated to race. This may be true even if racism is central to public or policymaker views about those justifications.”<sup>196</sup> In other words, as long as a discriminatory motive is concealed by a plausibly valid justification, the neutral rationale supplants the racial harm, and no legal injury has occurred.

Just as with *Quarterman* and *Sheba*, the federal civil rights claims brought in *Volcano* failed. To succeed on a racial discrimination claim under § 1981, a plaintiff must, *inter alia*, compare their treatment to that of someone “similarly situated in all relevant respects besides race.”<sup>197</sup> The court determined that none of the comparators met the ‘similarly situated’ criterion because the white-owned businesses cited as examples were not new applicants under identical timing and regulatory conditions.<sup>198</sup> The requirement for near-perfect comparators presumes a level of uniformity that, by design, racialized administrative burdens disrupt. It is because applicants are treated so differently that similarly situated actors often do not exist. Because courts demand symmetry where agencies create asymmetry, Section 1981 claims are likely incapable of addressing the whimsical maneuvering that characterizes racialized administrative burdens.

Federal civil rights claims treat administrative decisions as neutral baselines, without much consideration of how and for whom rules depart. Instead, to better serve the public, administrative processes must proffer a forward-looking and participatory process that addresses embedded legacies of exclusion.

#### IV. A CALL FOR HISTORICALLY INFORMED RULEMAKING

Civil rights litigation is not, nor should it be, a singular strategy for redressing racial discrimination.<sup>199</sup> *Quarterman*, *Sheba*, and *Volcano* represent the notion that racialized administrative burdens cause substantial injuries, even if those injuries do not rise to the level of unconstitutional conduct under prevailing Fourteenth Amendment jurisprudence. Still, harmful processes that escape constitutional liability do not mean that these harms are legally insignificant. To the contrary, the persistence of injurious administrative processes that are beyond constitutional reach demands alternative modes of legal intervention. Fortunately, agencies can design their own protocols that mitigate racial harm and better comport with the underlying rationale for bureaucratic governance: fairness and consistency.<sup>200</sup> Part IV proposes that administrative agencies adopt *historically informed rulemaking*, an evaluative framework that acknowledges the past while preserving procedural integrity. Historically

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<sup>196</sup> *Id.* at 141.

<sup>197</sup> *Jackson v. BellSouth Telecommunications*, 372 F.3d 1250, 1273-74 (11th Cir. 2004).

<sup>198</sup> *Volcano Enterprises v. City of Huntsville*, Case No. CV-13-S-505-NE at p. 29 (N.D. Ala. Sept. 29, 2014).

<sup>199</sup> Khiara M. Bridges, *The Supreme Court, 2021 Term — Foreword: Race in the Roberts Court*, 136 HARV. L. REV. 23, 26 (2022) (arguing that the Roberts Court fails to remedy racial injuries that do not look like overt, pre-Civil Rights era discrimination).

<sup>200</sup> Thomas Ward Frampton, *The End of Batson? Rulemaking, Race, and Criminal Procedure Reform*, 124 COLUM. L. REV. 1 (2024); Avital Fried, *Equal Standards for Equal Protection: Revisiting Race Discrimination in Jury Selection After SFFA*, 134 YALE L. J. F. 709 (2025).

informed rulemaking takes advantage of administrative agencies' disposition toward routine and procedure. Because the rules, standards, and structure are defined and implemented at the agency level, agencies are uniquely positioned to engage in internal reform. This framework relies on two claims: (1) administrative neutrality is neither historically nor empirically sustainable; and (2) accounting for racialized histories is necessary to fulfill values of fairness and consistency in bureaucratic governance.

If, as Parts I and II argue, racialized administrative burdens may be influenced by micro-level individual prejudice and macro-level systems of exclusion, then the operation of these influences is translated into practice at the meso-level, within organizations. Essentially, organizations convert historical inequities into disparate outcomes, thereby institutionalizing patterns of harm. Thus, an effective intervention must target the meso-level for reform.<sup>201</sup> In the bureaucratic system where individuality is condemned, the lack of individual accountability is especially pertinent. Because there is no 'self,' there is no 'self-scrutiny,'—a dangerous grey area that allows racialized administrative burdens to flourish. Therefore, what is needed is a constructive examination of organizational rules and rulemaking through a framework that does not solely rely upon presumptions of neutrality.<sup>202</sup> Beyond formal changes to procedures, historically informed rulemaking offers guidance on how memory and disparate impact shape institutional accountability.

Though historically informed rulemaking is presented here as a novel conceptual framework, its premise is captured in existing applications.<sup>203</sup> In Washington State, for example, the judiciary adopted General Rule 37 (GR 37) in 2018 to address the limitations of *Batson v. Kentucky*.<sup>204</sup> *Batson* sought to eradicate racial discrimination in jury strikes, but its requirement that defendants show proof of purposeful discrimination proved difficult.<sup>205</sup> GR 37 enabled Washington courts to consider historical patterns of racial bias in jury selection, notwithstanding whether attorneys could offer a race-

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<sup>201</sup> Brooke Harrington & Camilo Arturo Leslie, *Toward a Multilevel Sociology of Fraud*, 118 NW. U. L. REV. 139, 165 (2023) (advocating for the defamiliarization of normalized activities at the meso-level).

<sup>202</sup> Some state presumptions are unreliable because they may “maintain systemic and institutional biases, while justifying them under the guise of empirical neutrality and objectivity.” Ngozi Okidegbe, *How Not to Democratize Algorithms*, 2025 WIS. L. REV. 895, 917 (2025); Ngozi Okidegbe, *To Democratize Algorithms*, 69 UCLA L. REV. 1688, 1727 (2024) (describing information produced by the state “an allure of neutrality”); see also Daniel A. Farber, *Inequality and Regulation: Designing Rules to Address Race, Poverty, and Environmental Justice*, 3 AM. J. OF L. AND EQUITY 2, 3043 (2023).

<sup>203</sup> See, e.g., Washington State’s adoption of General Rule 37, *infra* note 197, Cannabis equity programs are a part of these early applications as well. In fact, there are several lessons from standing up cannabis regulation that would benefit liquor regulation—potentially addressing the harms presented in this Article. Those recommendations are beyond the scope of this Article and will be presented in future scholarship.

<sup>204</sup> *Batson v. Kentucky*, 476 U.S. 79 (1986); WASH. CT. GEN. R. 37 [hereinafter GR 37]; *State v. Jefferson*, 429 P.3d 467 (Wash. 2018) (en banc).

<sup>205</sup> *Batson*, 476 U.S. at 95; David B. Owens, *The Objective Observer: The Washington State Supreme Court’s Remedial Aspirations and Experience on the Ground*, 100 WASH. L. REV. 325 (2025).

neutral justification.<sup>206</sup> Though GR 37 has shortcomings,<sup>207</sup> the process that led to its formation exemplifies historically informed rulemaking and models value-aligned reform. To better understand how historically informed rulemaking might operate in governance, I proffer GR 37 as an example in Part IV(B).

#### A. *What is Historically Informed Rulemaking?*

Historically informed rulemaking serves as a framework that counters presumptions of bureaucratic objectivity. It anticipates racial harm as the expected outcome of administrative contexts derived from legacies of slavery, segregation, and second-class citizenship. Historically informed rulemaking encourages agencies to review internal policies from a reparative posture to mitigate harm from administrative burdens and other forms. Drawing on Ray, Herd, and Moynihan's guidance that administrative practices "must be supported by macro-level policy design and cultural understandings, and meso-level implementation choices"<sup>208</sup> to be effective, historically informed rulemaking requires three interrelated processes: memory, mapping, and modification.

First, memory plays a critical role in how exclusion is embedded in the public domain.<sup>209</sup> As Professor Khiara M. Bridges observes, even in the pre-Civil Rights era, "racial hierarchy was also sustained through facially race-neutral laws and policies that neither had an underlying discriminatory intent nor were discriminatorily applied."<sup>210</sup> The erasure of this historical memory is necessary to the exercise of exclusion.<sup>211</sup> Yet, the effects of over four hundred years of racial subjugation endure, and no industry is exempt. At a minimum, this requires an assessment of origins of statutory authority, enforcement rationales, or antebellum categories of regulation that might indicate institutional disposition. In practice, memory functions as an internal diagnostic to help agencies understand how regulatory discretion was justified and against whom it was deployed. Drawing on earlier examples, state housing agencies are intimately familiar with how actuarial risk mapping, or redlining, was used to segregate communities of color,<sup>212</sup> but business licensing agencies may be less cognizant of how operating

<sup>206</sup> GR 37(h). The list of pretexts includes: (i) having prior contact with law enforcement officers; (ii) expressing a distrust of law enforcement or a belief that law enforcement officers engage in racial profiling; (iii) having a close relationship with people who have been stopped, arrested, or convicted of a crime; (iv) living in a high-crime neighborhood; (v) having a child outside of marriage; (vi) receiving state benefits; and (vii) not being a native English speaker.

<sup>207</sup> Finley Riordon, *The Objective Observer Strikes Out: A Comparative Analysis of Batson Reform in Washington State*, 13 WAKE FOREST J. L. & POL'Y 103, 115–26 (2023) (discussing how GR 37 challenges have been received by courts and on de novo review).

<sup>208</sup> Ray, Herd, & Moynihan, *supra* note 17, at 140.

<sup>209</sup> Dorothy E. Roberts, *Racism, Abolition, and Historical Resemblance*, 136 HARV. L. REV. 37, 46–49 (2022); JACK M. BALKIN, MEMORY AND AUTHORITY: THE USES OF HISTORY IN CONSTITUTIONAL INTERPRETATION (2024); Reva B. Siegal, *The Politics of Constitutional Memory*, 20 GEO. J.L. & PUB. POL'Y 19 (2022); Serena Mayeri, *Reproductive Injustice, Feminist Resistance, and the Uses of History in Constitutional Interpretation*, 33 WM. & MARY BILL OF RTS. J. 519 (2024).

<sup>210</sup> Bridges, *supra* note 199.

<sup>211</sup> Cara McClellan, *Challenging Legacy Discrimination: The Persistence of School Pushout as Racial Subordination*, 105 B.U. L. REV. 641, 688–89 (2025).

<sup>212</sup> Adams, *supra* note 27 at 1226–27.

permits were historically denied to immigrant entrepreneurs.<sup>213</sup> Ray, Herd, and Moynihan emphasize the importance of this type of historical accounting in the pursuit of administrative reform, cautioning that “[u]nderstanding relationships between public organizations and race requires a deeper historical understanding of the roots of burdens, and the racialized soil from which those roots emerge.”<sup>214</sup> Apart from merely acknowledging a painful past, the memory process counters narratives of neutrality. The agency and its agents are placed within—as opposed to external to—a lineage that governs and informs their operations.

Second, against the historical backdrop, agencies must map their institutional record in the contemporary context. This mapping step aligns with Ray, Herd, and Moynihan’s guidance that “[s]tudying racialized burdens therefore requires both retracing the history and origins of particular rules, practices, procedures, policies, or memos that give rise to burdens, while connecting those administrative actions to the historical context in which they emerged.”<sup>215</sup> Mapping, in this sense, might require an audit of existing procedures, disparate outcomes, or incongruent data.<sup>216</sup> In this process, agencies evaluate decisions that rely on vague justifications, such as “seemingly neutral administrative values such as efficiency,” assumptions of “fraud or illegality,” or “lack of deservingness,” based on racial stereotypes and tropes.<sup>217</sup> For instance, a careful mapping exercise in a land use department might reveal that noise ordinance enforcement is disproportionately deployed in gentrifying neighborhoods—once again exposing the modern-day expansion of an exclusionary foundation and reproducing the stereotype that people of color are ‘loud.’<sup>218</sup> Beyond quantitative disparities, mapping includes the qualitative assessment of process. Where race-disaggregated data is unavailable, agencies may rely on alternative indicators such as processing times, frequency of supplemental requests, or deviations from protocol. By tracing multiple vantage points, mapping creates a throughline from procedural deviations to enduring exclusions.

Third, the modification process offers an opportunity to revisit internal rules for which neutrality was previously taken for granted. The modification process need not necessarily result in rules that consider race on its face. However, the racial history—and the agency’s role within it— informs governance in a manner that minimizes harm. Further detailed in Part IV(B), GR 37 is a prime example of such modifications. Depending on

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<sup>213</sup> *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

<sup>214</sup> Ray, Herd, & Moynihan, *supra* note 17, at 147.

<sup>215</sup> *Id.*

<sup>216</sup> This practice is analogous to racial equity audits in the corporate governance context. See Alicia E. Plerhoples, *ESG & Anti-Black Racism*, 24 U. PA. J. BUS. L. 909, 911–12 (2022) (“‘Race audits’ were first proposed in 2011 in the context of municipalities seeking to ‘map the specific impacts of racial disadvantage within a jurisdiction.’ The focus of the audit is not to seek out intentional wrongdoers but to track laws, policies, and procedures that contribute to racial disparities within the municipality.”); Alvin Velazquez, *Making Racial Equity Audits Effective*, 99 CHI.-KENT L. REV. 123, 144–51 (2024); See also Robin A. Lenhardt, *Race Audits*, 62 HASTINGS L.J. 1527 (2011).

<sup>217</sup> Ray, Herd, & Moynihan, *supra* note 17, at 148.

<sup>218</sup> Angela E. Addae, *The Perils of Urban Redevelopment for Black Business Districts*, 57 TULSA L. REV. 171, 194 (2021).

the institution, modification may adopt a range of forms: intervention vis-à-vis modification includes narrowing vague standards or limiting the use of factors that have enabled differential treatment. Because discretion is a necessary tool for administrative officers, protocols for disciplining discretion through defined parameters protect both the agent and constituents. Though modification is an important step, periodic reassessment and evaluation are critical to administrative legitimacy.<sup>219</sup>

One concern about historically informed rulemaking is the inherently subjective nature of ‘history’—who should be entrusted with incorporating historical narratives into administrative procedure? Would unelected agents be more likely to invite politicized interpretations of past wrongs or encourage administrative overreach? However, administrative practices are already driven by unexamined historical assumptions. For liquor licensing regulation, these assumptions originate in geographical and moral frameworks derived from racialized associations between temperance, alcohol, and vice.<sup>220</sup> At the turn of the twentieth century, debates surrounding the Prohibition movement were plagued with depictions of Black Americans as puerile, bestial, and liquor-crazed, vulgarities that now drive alcohol regulation as a sentinel of public order and virtue.<sup>221</sup> Similarly historicized are other regulatory sectors, such as zoning, where cities first devised single-family districts to encode residential segregation in the language of lot size, layout, and density.<sup>222</sup> In Berkeley, California, community builders imagined large, costly lots that only permitted one home as race-neutral alternatives to circumvent the limitations of racially restrictive covenants.<sup>223</sup> The racially restrictive covenants became unenforceable, but the single-family districts remained. Historically informed rulemaking makes explicit *and contestable* these forgotten origins, challenging the false presumption that today’s administrative frameworks are neutral, and it empowers agencies and their representatives to discontinue inequitable practices that may result.

Additionally, historically informed rulemaking operates within existing constraints, conforming to current protocols for notice, records, and review. Put differently, a historically informed posture does not exempt regulated parties of color from scrutiny, nor does it demand leniency that is not generally applied. To the contrary, it reinforces the notion that agencies apply regulatory actions to purported concerns of public safety, morals, and welfare.<sup>224</sup> Acknowledging historical influence better serves these societal values because it helps agents distinguish between discriminatory enforcement and legitimate enforcement. In the absence of these considerations, the same language is used to justify both genuine and

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<sup>219</sup> Rachel E. Barkow, *Bureaucracy and Democracy as Complements*, 105 B. U. L. REV. 1203, 1205 (2025) (“Indeed, attention to institutional design can further democracy by helping to achieve public goals and avoid political pathologies that might undermine them.”)

<sup>220</sup> Brittany Arsiniega, Teresa Cosby, Spencer Richardson, & Kylie Berube, *Race and Prohibition Movements*, 11 TENN. J. RACE GENDER & SOC. JUST. 16, 47-53 (2022).

<sup>221</sup> *Id.*

<sup>222</sup> Adams, *supra* note 27 at 1230.

<sup>223</sup> *Id.* at 1265.

<sup>224</sup> *Id.* at 1214.

insidious regulation. In liquor licensing, the examinations that turn on the “moral character” of an applicant provide an example.<sup>225</sup> Under an 1858 Maryland statute, free Black persons could only obtain a liquor license if three “respectable freeholders” (in other words, white property owners) attested to their “good and temperate habits” and “moral character.”<sup>226</sup> Good ‘moral character’ remains a term of art for liquor licensing, but the assessments of today avoid explicit racial qualifiers while still being informed by historical frameworks. A seemingly straightforward criterion such as ‘prior legal violations’ can allow a decades-old traffic violation or minor infraction to be weighed against an applicant, and how much depends on who is doing the weighing and through what lens. A historically informed reviewer is, at least, better equipped to differentiate between genuine and exclusionary assessment. Absent a historically informed framework, both determinations rely on the same statutory language and generate identical administrative records, resulting in facially indistinguishable pretextual and legitimate denials.

Similarly, historically informed rulemaking filters the decision patterns that perceptions of specific groups produce, including the less detectable intraracial dynamics. This refers to instances in which agency officials engage in the differential treatment of those who share the same racial identity, perpetuating respectability-based hierarchies that also originate from exclusionary logics rather than public safety concerns. One can imagine an instance in which a jazz lounge, associated with quiet dining and genteel audiences, might receive preferential treatment compared to a youth-oriented reggae club. Even if both establishments are Black-owned and cater to Black patrons, administrative judgments may privilege forms of Black expression that better align with dominant culture norms of decorum.

As discussed in Part IV(B), Washington State’s General Rule 37 offers a window into how an institution—the state court, in this instance—incorporated memory, mapping, and modification into procedural reform.

### *B. Learning from Washington’s General Rule 37*

General Rule 37 came about after growing discontent with standards that the U.S. Supreme Court articulated in *Batson v. Kentucky*.<sup>227</sup> In theory, *Batson* prohibits racially motivated peremptory strikes during jury selection. It required defendants to demonstrate that the prosecution exercised a peremptory challenge based on race, after which the prosecutor could offer a race-neutral explanation, and the court would then determine whether purposeful discrimination had occurred. In application, however, *Batson* largely failed to prevent the exclusion of jurors of color. Because of the plethora of race-neutral justifications a prosecutor could draw

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<sup>225</sup> Addae, *supra* note 15 at 1924. See also Benjamin J. Kweskin, *Investigating “Good Moral Character” for Liquor License Applications*, 8 BUS. ENTREPRENEURSHIP & TAX L. REV. 152, 153-57 (2024).

<sup>226</sup> 1858 Md. 55.

<sup>227</sup> *Batson*, 476 U.S. at 95.

from—such as demeanor, communication style, facial hair, physical posture, or criminal history—*Batson* lacked teeth.<sup>228</sup>

In lamenting *Batson*'s shortcomings,<sup>229</sup> the Washington Supreme Court in *State vs. Saintcalle* performed an institutional memory exercise. “Since 1879, the United States Supreme Court has recognized that race discrimination in the selection of jurors violates the Fourteenth Amendment’s guaranty of equal protection,” the court reflected.<sup>230</sup> The Washington Supreme Court reached back 134 years to *Strauder v. West Virginia*,<sup>231</sup> a U.S. Supreme Court case that struck down a state law that barred Black men from jury service. *Strauder* held that such exclusion violated the Equal Protection Clause because it denied Black defendants the right to a jury drawn from a representative cross-section and it stereotyped Black citizens as unfit for civic participation.<sup>232</sup> Though this may appear to be a mere historical footnote, the *Strauder* reference is doing much, much more: it activated memory as a method of rule assessment.<sup>233</sup> By invoking *Strauder*, the court diagnosed *Batson*'s deficiencies by situating them within a longer genealogy of juror exclusion by race.<sup>234</sup> In this moment of self-reflection, the court acknowledged its own complicity in reproducing the status quo.<sup>235</sup> This subtle move transitioned the court from ahistorical adjudication toward historically informed rulemaking.

In addition to drawing on *Strauder* in *Saintcalle*, the Washington Supreme Court engaged in an evaluative mapping process that examined internal practices in relationship to histories of exclusion.<sup>236</sup> For the court, the empirical evidence of its own patterns was “rather shocking”:

In over 40 cases since *Batson*, Washington appellate courts have *never* reversed a conviction based on a trial court’s erroneous denial of a *Batson* challenge. . . . And while this

<sup>228</sup> See, e.g., David C. Baldus et al., *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. PA. J. CONST. L. 3 (2001) (showing discrepancies between the percentage of Black jurors and non-Black jurors struck in Philadelphia trials); Mary R. Rose, *The Peremptory Challenge Accused of Race or Gender Discrimination? Some Data from One County*, 23 L. AND HUM. BEHAV. 695, 698–699 (1999); Kenneth J. Melilli, *Batson in Practice: What We Have Learned About Batson and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447, 462–464 (1996); Jeffrey S. Brand, *The Supreme Court, Equal Protection and Jury Selection: Denying That Race Still Matters*, 1994 WIS. L. REV. 511, 583–589 (1994); Equal Justice Initiative, *Illegal Racial Discrimination in Jury Selection: A Continuing Legacy* (Aug. 2010) (available at <https://eji.org/wp-content/uploads/2019/10/illegal-racial-discrimination-in-jury-selection.pdf>).

<sup>229</sup> *State v. Saintcalle*, 309 P.3d 326, 332 (Wash. 2013). In *Saintcalle*, the court also called out the broader impact of racial discrimination in procedure, noting that it “raises serious questions of fairness” and “undermines public confidence” in state institutions. *Id.* at 332–33 (quoting *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 628 (1991)).

<sup>230</sup> *Saintcalle*, 309 P.3d. at 334.

<sup>231</sup> *Strauder v. West Virginia*, 100 U.S. (10 Otto) 303, 309–10 (1880) (“And how can it be maintained that compelling a colored man to submit to a trial for his life by a jury drawn from a panel from which the State has expressly excluded every man of his race, because of color alone, however well qualified in other respects, is not a denial to him of equal legal protection?”).

<sup>232</sup> *Id.* at 312.

<sup>233</sup> Using memory in this way requires institutions to examine the racial genealogies in their own procedural tools (compliance, codes, etc.), over treating those tools as objective or neutral.

<sup>234</sup> *Saintcalle*, *supra* note 230.

<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

alone does not prove that *Batson* is failing, it is highly suggestive in light of all the other evidence that race discrimination persists in the exercise of peremptories.<sup>237</sup>

By using national and local studies to ‘map’ the contemporary landscape of discrimination in jury selection, the court redefined its role as inheritor and reproducer of the harms that *Batson* was supposed to, but did not, prevent.<sup>238</sup> The court’s reflexivity made this mapping transformative, for it recognized that *Batson*’s flaws were operationalized locally. Notably, this kind of evaluative mapping was only possible because the relevant data existed and the patterns were trackable. Unfortunately, this is an exception, not the rule. In most contexts of administrative harm at the state and local levels, data is neither collected nor disaggregated by race. *Saintcalle* highlights the utility of mapping in historically informed rulemaking and the precondition of data transparency for such mapping to take root.

The court’s engagement in memory and mapping exercises laid the groundwork for the third step, modification. Following *Saintcalle*, the Washington judiciary invited a workgroup to propose revisions to the rules governing peremptory challenges.<sup>239</sup> As a result, the court adopted GR 37, which, *inter alia*, rejected the narrow purposeful discrimination requirement and introduced a broader, historically informed rule. At the heart of GR 37 is the “objective observer” test.<sup>240</sup> A Washington court may now deny a peremptory challenge if “an objective observer could view race or ethnicity as a factor in [its] use.”<sup>241</sup> Moreover, the rule defines this observer as one who is “aware that implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in the unfair exclusion of potential jurors in Washington State.”<sup>242</sup> Indeed, this addition holds space for unintentional or undetectable discrimination—the hallmark of racialized administrative burdens and a significant departure from *Batson*. GR 37 also responds directly to the empirical findings that surfaced during the mapping process.<sup>243</sup> The rule anticipates and places conditions on race-neutral justifications that have been historically weaponized to exclude jurors of color, such as a lack of eye contact. The rule goes on to catalog familiar proxies for discriminatory juror exclusion, “[t]he following reasons for peremptory challenges also have historically been associated with improper discrimination in jury selection in Washington State: allegations that the prospective juror was sleeping, inattentive, or staring or failing to make eye contact; exhibited a problematic attitude, body language, or demeanor; or provided unintelligent or confused answers.”<sup>244</sup>

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<sup>237</sup> *Saintcalle*, 309 P.3d at 334–35 (emphasis in original).

<sup>238</sup> Of note, this mapping was only possible because the data on juror exclusion was readily available. Where data aggregated by race is not collected, quantitative mapping is significantly more difficult. Lack of relevant data also contributes to the invisibility described in Part III.

<sup>239</sup> Riordon, *supra* note 207, at 110–17.

<sup>240</sup> *Id.*

<sup>241</sup> Wash. GR 37(e).

<sup>242</sup> Wash. GR 37(f).

<sup>243</sup> Riordon, *supra* note 207, at 117–18.

<sup>244</sup> Wash. GR 37(i). This established notice of racial proxies would have been informative for the court in *Quarterman*.

Although GR 37 was enacted through judicial reform, its logic extends naturally to administrative agencies.<sup>245</sup> The court tapped into its power as an institution to determine its own procedures, modeling the vast potential of administrative agencies to internally enact reform using mechanisms already within their control. In contrast to legislation and litigation, which are inherently vulnerable to political oscillations, rulemaking permits jurisdictions to engage in justice-oriented interventions that rely on empirical data and offer opportunities to reflect on institutional identity. Historically informed rulemaking positions organizations to recalibrate the momentum of entrenched systems via internal policies without the need to arrive at a legislatively partisan consensus.

#### CONCLUSION

Over the past century, the nation has had to confront the influence of a past that relied on skin color to order society. Though progress has been made in many areas, in other sectors, that confrontation is yet to begin. Administrative bodies offer one such frontier for reform. This Article demonstrates how racialized administrative burdens dismantle economic infrastructures and deplete marginalized communities by foreclosing entrepreneurial opportunity altogether.<sup>246</sup> The focused case narratives reveal a strategy of attrition: Mr. Quarterman spent years navigating a board that was willing to go through the back door to avoid licensing a hip-hop venue; Mr. Williams spent \$80,000 chasing a license the city likely never intended to grant; and the owners of Sheba Ethiopian Restaurant spent close to \$250,000 to resolve mounting demands orchestrated by an aggrieved neighbor. Yet, these harms persist because they operate through a recurring paradox. Black-owned businesses are highly visible for regulation and enforcement, but they are invisible when seeking legal protections. Unfortunately, existing legal tools insufficiently address the entrepreneurs' dilemma. The same Black-owned establishment that attracted weekly inspections and halved occupancy limits became raceless once it filed a grievance under federal civil rights law. With public perceptions of legitimacy and court deference, bureaucracies that perpetuate these harms are, frankly, inviolable. And, with layers of objectivity and faceless bureaucrats, administrative agencies exercise an authority that preserves racial harm with impunity.

Historically informed rulemaking offers a possible path forward. Administrators may adopt this framework as a diagnostic tool that bypasses facial neutrality and instead looks to neutrality in origin. Constituents interfacing with administrative agencies may also find in it the unrealized potential of bureaucratic governance. A heavier burden falls on legal scholars, who are uniquely positioned to excavate and make legible the idiosyncrasies of bureaucratic bias and abuse. Certainly, the impulse in legal

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<sup>245</sup> Cf. Cal. Assemb. B. 3070, 2019-2020 Reg. Sess. (Cal.2020) (taking a legislative route to Batson reform).

<sup>246</sup> Imagine the consequences of, as occurred in *Sheba*; ten businesses shutting down in a single community.

scholarship is to look upward toward Supreme Court doctrine and constitutional or legislative text. However, the machinery of exclusion operates in the spaces where constituents' encounters with the state shape access to economic life—seemingly inconsequential processes like licensing or public benefits allocations. Here, we draw on a liquor license denial in Springfield, Massachusetts (weaponizing the appearance of neutrality), a fire marshal's visit in DeKalb County, Georgia (weaponizing [in]visibility), and a zoning dispute in Huntsville, Alabama (weaponizing compliance). These encounters look too small to theorize and too local to generalize, which is why they have thus far remained unexamined. Yet, it is at this scale where the distance between the promise of the American Dream and its practice is greatest.

Without frameworks like historically informed rulemaking, agencies will continue to directly and indirectly administer foreseeable, longstanding structural inequities. With them, however, agencies assume responsibility for the systems they steward. The task ahead is to make bureaucracy more accountable to the histories it carries and the communities it serves.

# Racial Epithets and Title VII Hostile Work Environment Claims: Case Commentary on *Smith v. P.A.M. Transportation Company* (6<sup>th</sup> Cir. 2025)

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## ABSTRACT

In order to rule fairly in employment discrimination cases, courts cannot adhere to rigid categories of harassment. In *Smith v. P.A.M. Transportation Company*, two African American truck drivers sued their employer under Title VII of the Civil Rights Act after their supervisors—one of whom was also African American—referred to them by the term, “monkey ass.” The plaintiffs also claimed that their supervisors cursed, threatened, and shouted at them while treating white employees with respect. After the district court granted summary judgment in favor of the defendant, the Sixth Circuit reversed. The Sixth Circuit reasoned that “monkey ass” is a racial slur because of its history and usage, that employment discrimination plaintiffs do not need to prove the racial self-identification of workplace comparators, and that the race of the supervisor does not obviate the severity of the harassment without more evidence. In addition, we address the concurring opinion’s use of ChatGPT by exploring whether large language models can help courts determine the meanings of racially sensitive, composite phrases in the context of employment discrimination. Overall, the Sixth Circuit embraced an interpretation of Title VII that acknowledges the nuance and factual complexity of workplace interactions, thus allowing plaintiffs to articulate claims in language that is familiar to them.

## INTRODUCTION

When balancing the interests of justice and efficiency, judges often rely on distinctions that may seem bizarre to the average person. In the case of *Smith v. P.A.M. Transportation Company*, the District Court for the Middle District of Tennessee demonstrated that when a court commits itself to rigid distinctions, plaintiffs will struggle to make claims that can survive summary judgment.<sup>1</sup> In *Smith*, the plaintiffs asserted a Title VII hostile work environment claim based in large part on the usage of racial epithets by their supervisors—one of whom was of the same race as the plaintiffs. But while this provided a complex and challenging set of facts, the U.S. Court of Appeals for the Sixth Circuit ultimately provided a model for handling such

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<sup>1</sup> See *Smith v. P.A.M. Transp., Inc.*, 154 F.4th 375, 387 (6th Cir. 2025).

cases with proper nuance and sensitivity. And in the process, it gave us some food for thought on the use of artificial intelligence tools by judges.

In *Smith*, the plaintiffs, Michael Thomas Smith and Monaletto Sneed, brought a case against their employer, P.A.M. Transportation Company, each alleging race discrimination, retaliation, and hostile work environment claims.<sup>2</sup> Smith and Sneed are both African American.<sup>3</sup> They had two supervisors, one white and one who was also African American.<sup>4</sup> Smith claimed that his supervisors assigned him lengthier and more arduous routes than those assigned to non-African American coworkers.<sup>5</sup> Both testified that their supervisors addressed them with offensive remarks, including the terms “monkey” and “monkey ass.”<sup>6</sup> In addition, Sneed stated that both supervisors “would criticize, threaten, scream at, and curse at him.”<sup>7</sup> For example, Sneed testified that on at least one occasion, the African American supervisor “threatened to ‘write [him] up’ if [he] did not get his ‘monkey A-S-S out there and do the job.’”<sup>8</sup> In contrast to this behavior, the plaintiffs alleged that the supervisors acted professionally toward non-African American employees.<sup>9</sup>

The plaintiffs brought claims under Title VII of the Civil Rights Act of 1964,<sup>10</sup> 42 U.S.C. § 1981,<sup>11</sup> and the Tennessee Human Rights Act,<sup>12</sup> alleging race discrimination, retaliation, and hostile work environment.<sup>13</sup> The district court granted summary judgment in favor of the defendant on all of the plaintiffs’ claims.<sup>14</sup>

Plaintiffs appealed only the grant of summary judgment on their hostile work environment claim, and the Sixth Circuit only considered that claim.<sup>15</sup> Hostile work environment claims are analyzed identically under Title VII, 42 U.S.C. § 1981, and the Tennessee Human Rights Act.<sup>16</sup> To prevail on a hostile work environment claim, a plaintiff must prove five elements: “(1) [he] was a member of a protected class; (2) [he] was subjected to unwelcome [] harassment; (3) the harassment was based on race; (4) the harassment unreasonably interfered with [his] work performance by creating an intimidating, hostile or offensive work environment; and (5) the employer is liable.”<sup>17</sup> The district court had concluded that the plaintiffs could not

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<sup>2</sup> *Smith v. P.A.M. Transp., Inc.*, No. 3:21-cv-00262, 2024 WL 2097102 (M.D. Tenn. May 9, 2024), *rev’d*, 154 F.4th 375 (6th Cir. 2025).

<sup>3</sup> 154 F.4th at 380.

<sup>4</sup> *Id.* at 380–81.

<sup>5</sup> *Id.* at 381.

<sup>6</sup> *Id.* at 381.

<sup>7</sup> *Id.* at 381.

<sup>8</sup> *Smith*, 2024 WL 2097102, at \*44.

<sup>9</sup> *Smith*, 2024 WL 2097102, at \*29.

<sup>10</sup> 42 U.S.C. § 2000e et seq. (2018).

<sup>11</sup> 42 U.S.C. § 1981 (2018).

<sup>12</sup> Tenn. Code Ann. § 4-21-101 et seq. (2023).

<sup>13</sup> 154 F.4th at 382.

<sup>14</sup> *Smith*, 2024 WL 2097102, at \*45.

<sup>15</sup> 154 F.4th at 382.

<sup>16</sup> *Id.* at 383.

<sup>17</sup> 154 F.4th at 382 (quoting *Barrett v. Whirlpool Corp.*, 556 F.3d 502, 515 (6th Cir. 2009)).

demonstrate elements (3) or (4).<sup>18</sup> Consequently, the district court granted summary judgment in favor of the defendant.<sup>19</sup>

The Sixth Circuit reversed the district court's ruling. It recognized that when evaluating complaints about workplace harassment, courts would do well to analyze racial terms in the context of the workplace.<sup>20</sup> The appeals court was particularly critical of the lower court's refusal to recognize well-known racial epithets and its use of rigid racial categories.<sup>21</sup> Judge Jane Stranch's opinion for the Sixth Circuit took a practical approach, assessing legal categories by deferring to common parlance rather than subverting it. This interpretation also makes it easier for plaintiffs to assert cognizable legal claims because they can make their arguments by using language that is familiar to them.

### I. HARASSMENT BASED ON RACE

The Sixth Circuit overruled the district court's holding that the harassment faced by Smith and Sneed was not based on race.<sup>22</sup> In order to prove that harassment was based on race, the plaintiff must show either "(1) direct evidence of the use of race-specific and derogatory terms or (2) comparative evidence about how the alleged harasser treated members of both races in a mixed-race workplace."<sup>23</sup>

#### A. Direct Evidence

Smith and Sneed both claimed that they were the targets of racial harassment because their supervisors had repeatedly called each of them "monkey" and "monkey ass."<sup>24</sup> The district court in *Smith* decided that the terms "monkey" and "monkey ass" did not directly implicate race in their use.<sup>25</sup> Rather, "a factfinder would need to infer that the use of 'monkey ass' was derogatory specifically toward African Americans," thus holding that there was no direct evidence of harassment based on race.<sup>26</sup> The district court stated that although a reasonable person might make the connection between the term "monkey" and a specific race, the fact that a connection needs to be made at all makes the reference indirect.<sup>27</sup>

The Sixth Circuit, on the other hand, pointed out that "[t]he term 'monkey' has an extensive history as a racial slur against African Americans."<sup>28</sup> The court marshaled precedent from multiple circuits holding

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<sup>18</sup> Smith, 2024 WL 2097102, at \*43.

<sup>19</sup> *Id.* at \*45.

<sup>20</sup> *See id.* at 387 ("we have routinely accepted, at summary judgment, plaintiff testimony of disparate, race-based treatment grounded in experience and perception.").

<sup>21</sup> *Id.* at 383–87.

<sup>22</sup> *Id.* at 386.

<sup>23</sup> Smith, 2024 WL 2097102, at \*43.

<sup>24</sup> 154 F.4th at 381.

<sup>25</sup> Smith, 2024 WL 2097102, at \*31.

<sup>26</sup> Smith, 2024 WL 2097102, at \*31.

<sup>27</sup> *Id.* at \*15 n. 43.

<sup>28</sup> 154 F.4th at 383. In Western contexts, imagery associated with monkeys and apes has often been deployed to dehumanize Black people. *See, e.g.*, Wulf D. Hund & Charles W. Mills, *Comparing Black*

that “monkey” is a racial slur.<sup>29</sup> For example, a previous Sixth Circuit case found that African American firefighters suffered racial harassment when they “were assigned to workstations labeled ‘Monkey Island.’”<sup>30</sup>

In the face of these cases, the district court’s reasoning constituted a misreading of Sixth Circuit and Supreme Court precedent.<sup>31</sup> The district court had interpreted language from *Oncale v. Sundowner Offshore Services, Inc.*<sup>32</sup> “as imposing a literal ‘direct evidence’ requirement.”<sup>33</sup> In *Oncale*, the Supreme Court considered whether sex-specific terms could be considered evidence of sex-based harassment.<sup>34</sup> Rather than exclude all evidence of indirect sex-based harassment, the *Oncale* court held that such terms should be considered when they raise “an inference of discrimination on the basis of sex.”<sup>35</sup> Because the word “monkey” and its derivatives “have a long and well-understood history as racial slurs when directed at African Americans,” the Sixth Circuit ruled that use of these terms is enough to raise an inference of discrimination.<sup>36</sup> Therefore, Smith and Sneed presented direct evidence that the harassment they suffered was based on race.<sup>37</sup>

As the Sixth Circuit’s analysis suggests, a literal direct evidence requirement would unreasonably raise the bar for potential plaintiffs.<sup>38</sup> Such a standard would make it nearly impossible for plaintiffs to establish the use of a term as a racial slur where the term does not literally refer to a racial classification. Many racial slurs do not directly refer to race, but are instead

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*People to Monkeys Has a Long, Dark Simian History*, CONVERSATION, Feb. 28, 2016, <https://theconversation.com/comparing-black-people-to-monkeys-has-a-long-dark-simian-history-55102>; WULF D. HUND, CHARLES W. MILLS, & SILVIA SEBASTIANI, SIMIANIZATION (2015). Most recently, this phenomenon became international news when President Donald Trump posted an online video depicting former President Barack Obama and former First Lady Michelle Obama as apes. See Natalie Allison, *Trump Refuses to Apologize Over Video Showing the Obamas as Apes*, WASH. POST, Feb. 6, 2026, <https://www.washingtonpost.com/politics/2026/02/06/donald-trump-obamas-ape-video/>. In some instances, simianization has been deployed to dehumanize other groups: for example, in 2006, Virginia Senator George Allen referred to a dark-skinned South Asian American as “macaca”—a term that refers to monkeys and is an epithet in Francophone countries. Vinay Harpalani, *DesiCrit: Theorizing the Racial Ambiguity of South Asian Americans*, 69 N.Y.U. ANN. SURV. OF AM. LAW 77, 175-77 (2013).

Nevertheless, in other cultural and religious contexts, simianization may carry different meanings: for example, the portrayal of simianized deity Hanuman, the “divine-monkey” in Hindu theology. Mrinalini Mitra, *Reimagining the Myth of Hanuman through Animation*, 18 DENISON J. OF RELIGION 64, 66 (2019). See also Philip Lutgendorf, *Monkey in the Middle: The Status of Hanuman in Popular Hinduism*, 27 RELIGION 311, 327 (1997); PHILIP LUTGENDORF, HANUMAN’S TALE: THE MESSAGES OF A DIVINE MONKEY (2007). Ironically, President Obama himself “always carries the statuette of Lord Hanuma and seeks inspiration from it whenever he feels tired or discouraged.” *Why former US president Barack Obama keeps a Lord Hanuman statuette*, ECON. TIMES, (Sept. 30, 2023), <https://economictimes.indiatimes.com/news/new-updates/why-former-us-president-barack-obama-keeps-a-lord-hanuman-statuette/articleshow/104064191.cms?from=mdr>.

<sup>29</sup> *Id.* at 384.

<sup>30</sup> *Id.* at 384 (citing *Jordan v. City of Cleveland*, 464 F.3d 584, 596–87 (6th Cir. 2006)).

<sup>31</sup> *Id.* at 384.

<sup>32</sup> *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998).

<sup>33</sup> 154 F.4th at 384.

<sup>34</sup> *Oncale*, 523 U.S. at 80.

<sup>35</sup> 523 U.S. at 80.

<sup>36</sup> 154 F.4th at 384.

<sup>37</sup> *Id.* at 385.

<sup>38</sup> See *Id.* at 384.

based on stereotypes and a history of invidious usage.<sup>39</sup> This is the exact kind of harassment that Title VII is meant to protect against.<sup>40</sup>

The use of the term “monkey ass,” however, is complicated by the fact that one of the supervisors who used it was himself African American.<sup>41</sup> The district court seemed to believe that this fact strengthened the defense’s argument that the use of the term did not constitute direct racial harassment.<sup>42</sup> In response, the Sixth Circuit cited precedent holding that “Title VII can be violated by members of the same race or sex as the victim of discrimination.”<sup>43</sup> While it is true that the race of the harasser may matter in some circumstances, Title VII is intended to protect the victim from workplace discrimination.<sup>44</sup>

### *B. Comparative Evidence*

Although it found direct evidence of racial harassment, the Sixth Circuit thought that it was important to critique the district court’s analysis of workplace comparators. The district court rejected the plaintiffs’ comparative evidence.<sup>45</sup> The plaintiffs had testified that they were assigned longer routes and more damaged trucks than their white counterparts.<sup>46</sup> In addition, the plaintiffs claimed that their supervisors subjected them to verbal harassment while speaking to white coworkers in a professional manner.<sup>47</sup>

The district court declined to use any of this evidence as a basis for establishing a hostile work environment claim.<sup>48</sup> First, it held that the employment-related disparities—such as assigning longer routes and damaged trucks—could not be considered forms of “harassment” under Title

<sup>39</sup> For example, the Supreme Court held that a supervisor’s use of the word “boy” when directed toward African American employees served as potential evidence of racial harassment based on the context. *Ash v. Tyson Foods, Inc.*, 546 U.S. 454, 456 (2006) (“Although it is true the disputed word will not always be evidence of racial animus, it does not follow that the term, standing alone, is always benign. The speaker’s meaning may depend on various factors including context, inflection, tone of voice, local custom, and historical usage.”).

<sup>40</sup> *See, e.g., Henson v. Dundee*, 682 F.2d 897, 902 (11th Cir. 1982) (“Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets.”).

<sup>41</sup> Smith, 2024 WL 2097102, at \*31.

<sup>42</sup> *Id.* at \*31 (explaining that the court had less of a reason to believe that “monkey ass” referenced race because “Davis—one of the two individuals that Smith claims called him “monkey ass”—was himself African American”).

<sup>43</sup> 154 F.4th at 385 (quoting *EEOC v. Harvert-Yeargin, Inc.*, 266 F.3d 498, 513 (6th Cir. 2001)). *See also Oncale*, 523 U.S. at 75, 78 (noting that in “context of racial discrimination in the workplace [the U.S. Supreme Court Justices] ha[ve] rejected any conclusive presumption that an employer will not discriminate against members of [their] own race[]” and that “[b]ecause of the many facets of human motivation, it would be unwise to presume as a matter of law that human beings of one definable group will not discriminate against other members of their group.”) (quoting *Castaneda v. Partida*, 430 U.S. 482, 499 (1977)).

<sup>44</sup> *See* 42 U.S.C. § 2000e-2(a)(1). *See also Oncale*, 523 U.S. 79 (“[S]tatutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.”).

<sup>45</sup> Smith, 2024 WL 2097102, at \*32.

<sup>46</sup> *Id.* at \*32.

<sup>47</sup> 154 F.4th at 388.

<sup>48</sup> Smith, 2024 WL 2097102, at \*43–44.

VII.<sup>49</sup> Second, the district court held that even though verbal abuse constitutes harassment, the plaintiffs had not provided a adequate comparator because they had “not established a basis for personal knowledge about the race of the individuals that [they] overheard speaking with Davis.”<sup>50</sup> The district court reasoned that “because [plaintiffs’] protected class is African American—as opposed to Black, importantly—the relevant comparators for him must be non-African American, which is not synonymous with being ‘white.’”<sup>51</sup> It explained that a person may be characterized as “white,” but have enough African ancestry to self-identify as African American.<sup>52</sup>

The Sixth Circuit reversed both of these holdings.<sup>53</sup> First, it held that employment related actions may be considered forms of harassment so long as they contribute to “the pervasive humiliation of an employee.”<sup>54</sup> There are no rigid categories of harassing conduct; rather, courts focus on the experience of the employee in the workplace.<sup>55</sup>

Second, the Sixth Circuit repudiated the district court’s requirement that the plaintiffs demonstrate evidence of their comparator’s racial self-identification.<sup>56</sup> It noted that race and color are often used interchangeably “in common parlance.”<sup>57</sup> Citing Professor Vinay Harpalani’s law review article, *Civil Rights Law in Living Color*, the Sixth Circuit pointed out that “[c]olor terms such as ‘Black’ and ‘White’ commonly designate specific racial groups.”<sup>58</sup> Given that there were several White employees working for the defendant, it is quite possible that the plaintiffs’ claims are true.<sup>59</sup> The fact that the plaintiffs perceived White coworkers had received preferential treatment was enough to establish a genuine issue of material fact.<sup>60</sup> Requiring the plaintiff to demonstrate personal knowledge of the comparator’s race would impose another burden beyond that contemplated by Title VII.<sup>61</sup> As a result, the Sixth Circuit again interpreted the legal language in the context of the workplace.

## II. SEVERE AND PERVASIVE HARASSMENT

The Sixth Circuit further held that the harassment suffered by the plaintiffs was sufficiently severe to survive a motion for summary judgment.<sup>62</sup> After the district court held the verbal abuse suffered by the

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<sup>49</sup> *Id.* at \*43.

<sup>50</sup> *Id.* at \*44.

<sup>51</sup> *Id.* at \*21.

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

<sup>53</sup> 154 F.4th at 388, 391.

<sup>54</sup> *Id.* at 389 (quoting *McNeal v. City of Blue Ash*, 117 F.4th 887, 902 & n.14 (6th Cir. 2024)).

<sup>55</sup> *Id.* at 389.

<sup>56</sup> *Id.* at 387.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* (quoting Vinay Harpalani, *Civil Rights Law in Living Color*, 79 Md. L. Rev. 881, 887–88 (2020)).

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* (“By relying on this narrow conception of racial identity, unadorned by legal precedent, the district court effectively imposed a heightened burden on Plaintiffs beyond what Title VII, § 1981, and the THRA require.”).

<sup>62</sup> *Id.* at 393.

plaintiffs was not motivated by race, it considered whether the uses of the words “monkey” and “monkey ass” rose to the level of severe and pervasive harassment.<sup>63</sup> It decided that these slurs were not severe or pervasive because the plaintiffs’ vague testimony suggested that the terms were used too sporadically “to significantly alter [plaintiffs’] working conditions.”<sup>64</sup>

Conversely, the Sixth Circuit reasoned that courts cannot look at allegedly harassing conduct in isolation; they must consider the totality of the circumstances.<sup>65</sup> In this case, that meant looking at the use of racial slurs in conjunction with the shouts, curses, threats, and employment-related discrimination directed toward the plaintiffs.<sup>66</sup> For example, Sneed’s supervisor called him a “monkey ass” in conjunction with a threat: “you’re going to get your monkey A-S-S out there and do the job or ... I’m going to write you up.”<sup>67</sup> Construing the record in the light most favorable to the plaintiffs, it also appears that these terms were used multiple times.<sup>68</sup> Furthermore, the Sixth Circuit noted that some slurs are so “odious” that a single use—especially when made to an employee by his direct supervisor—can be a sufficient basis for a hostile work environment claim.<sup>69</sup> The emotional experience of the plaintiffs is significant here too; “both testified that the harassment caused them significant anxiety and diminished morale.”<sup>70</sup> Applying a “reasonable person” standard,<sup>71</sup> the Sixth Circuit found that these factors combined to make the alleged harassment sufficiently severe and pervasive.<sup>72</sup>

### III. EMPLOYER LIABILITY

Finally, the plaintiffs must show that the employer was liable for the racial harassment.<sup>73</sup> Even without direct knowledge of the workplace environment, “employers are vicariously liable for harassment by supervisors.”<sup>74</sup> Given that the perpetrators of the racial harassment were the plaintiffs’ direct supervisors, the Sixth Circuit held that the employer was liable.<sup>75</sup>

An employer can rebut a presumption of liability, however, if it can show “(1) that it exercised reasonable care to prevent and correct promptly any racially harassing behavior by its supervisor, and (2) that the plaintiff employee unreasonably failed to take advantage of any preventative or

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<sup>63</sup> Smith, 2024 WL 2097102 at \*44

<sup>64</sup> *Id.* at \*44 (quoting *Cleveland v. So. Disposal Waste Connections*, 491 Fed. App’x 698, 708 (6th Cir. 2012)).

<sup>65</sup> 154 F.4th at 391.

<sup>66</sup> *Id.* at 392–93.

<sup>67</sup> *Id.* at 392.

<sup>68</sup> *Id.* at 392.

<sup>69</sup> *Id.* at 392. *See also* *Woods v. Cantrell*, 29 F.4d 284, 285 (5th Cir. 2022) (holding that “a single incident of harassment, if sufficiently severe,” can be basis for Title VII claim).

<sup>70</sup> *Id.* at 393.

<sup>71</sup> *Id.* at 392, 393.

<sup>72</sup> 154 F.4th at 393.

<sup>73</sup> *Id.* at 393.

<sup>74</sup> *Id.* at 393 (quoting *Barrett v. Whirlpool Corp.*, 556 F.3d 502, 516 (6th Cir. 2009)).

<sup>75</sup> *Id.* at 393.

corrective opportunities provided by the employer.”<sup>76</sup> The plaintiffs in this case testified that they reported the harassment “to management-level employees” and the defendant did not provide any evidence that it acted to prevent or correct the harassing behavior.<sup>77</sup>

The Sixth Circuit therefore ruled that the plaintiffs had demonstrated a genuine dispute of material fact as to every element of a hostile work environment claim, allowing their case to survive the defendant’s motion for summary judgment. It reversed the district court’s ruling and remanded the case.<sup>78</sup>

#### IV. CONCURRING OPINION

In his concurring opinion, Judge Chad Readler largely agreed with the majority, but he contended that the court should not have reached a discussion of comparators because the usage of the words “monkey” and “monkey ass” constituted direct evidence of racial harassment.<sup>79</sup> Additionally, Judge Readler’s opinion is interesting because he tempered the majority’s criticism of the district court by emphasizing the complexity of the issues involved in this case.<sup>80</sup>

Determining whether a composite phrase exhibits racial animus poses some issues for courts. First, composite terms—especially slang—are not typically found in dictionaries. Second, the meaning of these terms is often context dependent. In grappling with these problems, Judge Readler, in his concurring opinion, cited to a ChatGPT query.<sup>81</sup> Judge Readler asked ChatGPT, “What does monkey ass mean?”<sup>82</sup> ChatGPT explained that the insult can be “potentially racial (depending on context),” an “insult or put-down (non-specific),” a phrase “emphasizing someone acting wild or stupid,” or a term “used in joking or aggressive banter.”<sup>83</sup> Judge Readler used the ChatGPT inquiry to demonstrate that it can be difficult to discern the precise meaning of composite phrases used as slang.<sup>84</sup>

A year earlier, Judge Kevin Newsom on the Eleventh Circuit encountered similar questions when it came to discerning the “ordinary meaning” of certain words; he contended that Large Language Models (LLMs) could be part of the solution.<sup>85</sup> In thinking through how a circuit

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<sup>76</sup> *Id.* at 393 (quoting *Clark v. UPS, Inc.*, 400 F.3d 341, 348 n.1 (6th Cir. 2005)).

<sup>77</sup> *Id.* at 394.

<sup>78</sup> 154 F.4th at 394.

<sup>79</sup> *Id.* at 395.

<sup>80</sup> *Id.* at 394–95 (Readler, J., concurring). Judge Readler specifically raises three issues: (1) “how do we assess intent, context, and other relevant considerations in a setting where the individual who purportedly engaged in race discrimination is a member of the plaintiff’s race?” (2) “Does the term ‘monkey ass,’ a phrase understandably not included in traditional dictionaries, have the same racial connotation as the term, ‘monkey?’” (3) “And is there daylight, for the purposes of a race discrimination claim, between the terms ‘black’ and ‘African American.’” *Id.*

<sup>81</sup> *Id.* at 395 (Readler, J., concurring).

<sup>82</sup> *Id.* at 395.

<sup>83</sup> *Id.*

<sup>84</sup> 154 F.4th at 394 (“Does the term “monkey ass,” a phrase understandably not included in traditional dictionaries, have the same racial connotation as the term “monkey?””).

<sup>85</sup> *Snell v. United Specialty Ins. Co.*, 102 F.4th 1208, 1221–22 (11th Cir. 2024) (Newsom, J., concurring) (“Those, like me, who believe that “ordinary meaning” is *the* foundational rule for the evaluation of legal

judge might use an LLM to determine the meaning of a phrase, Judge Newsom provided a number of pros and cons which help ground our discussion of Judge Readler's use of ChatGPT.<sup>86</sup>

Judge Newsom pointed out that an LLM can be particularly helpful when dealing with a composite phrase that cannot be found in a dictionary.<sup>87</sup> The phrase, "monkey ass," is both slang and a composite phrase, meaning that there is no reliable, static repository for its definition.<sup>88</sup> Perhaps LLMs can fill this gap. LLMs are also trained on a wide variety of material that theoretically captures the ordinary meanings of various phrases.<sup>89</sup> This can especially help when it comes to slang because LLMs "learn" the phrases along with their context.

On the other hand, LLM training data excludes all interactions which are not recorded and uploaded online, potentially skewing the resulting interpretations of different words.<sup>90</sup> Current LLMs also train on datasets that can be manipulated by AI researchers and executives.<sup>91</sup> These issues compound to cast doubt on an LLM's interpretation of racially specific terms. For example, employment discrimination cases can be highly dependent on context that ChatGPT does not have access to.<sup>92</sup> Racial terms may also be more frequently used in the kinds of conversations that never make it into an LLM's training material for the reasons noted above. Therefore, while LLMs could be helpful in interpreting statutory language,

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texts should consider—*consider*—whether and how AI-powered large language models like OpenAI's ChatGPT, Google's Gemini, and Anthropic's Claude might—*might*—inform the interpretive analysis."); see also *United States v. Deleon*, 116 F.4th 1260, 1277 (11th Cir. 2024) (Newsom, J., concurring).

<sup>86</sup> Judge Newsom lists the following pros: "1. LLMs train on ordinary-language inputs," "2. LLMs can 'understand' context," "3. LLMs are accessible," "4. LLM research is relatively transparent," and "5. LLMs hold advantages over other empirical interpretive methods." Snell, 102 F.4th at 1226–30 (Newsom, J., concurring). He further lists the following cons: "1. LLMs can 'hallucinate,'" "2. LLMs don't capture offline speech, and thus might not fully account for underrepresented populations' usages," "3. Lawyers, judges, and would-be litigants might try to manipulate LLMs," and "4. Reliance on LLMs will lead us into dystopia." *Id.* at 1230–32.

<sup>87</sup> See *Deleon*, 116 F.4th at 1271–72 (Newsom, J., concurring) ("But because there's no ready dictionary definition of the composite phrase, because by their very nature LLMs aim to capture and reflect how real people ordinarily use both individual words and multi-word phrases, and because, well, I couldn't help myself, I queried ChatGPT.").

<sup>88</sup> Judge Readler's concurring opinion also cited to Urban Dictionary for a definition of "monkey ass." 154 F.4th at 394–95 (Readler, J., concurring). But Urban Dictionary, once a go-to resource for the meaning of slang, is moderated by volunteers with their own biases, making it a generally unreliable source. See Julia Carpenter, *The Slow Decline of Urban Dictionary*, N.Y. TIMES (Dec. 15, 2025) ("The puerile jokes and irreverent snark of the old Urban Dictionary has curdled into a world of vicious, vitriolic vulgarity, racism and sexism."). Nevertheless, Judge Stranch's majority opinion in *Smith* viewed Urban Dictionary as a more reliable source than ChatGPT and pointed out the unreliability of the latter. See 116 F.4th at 385 n.5 ("The concurrence cites a ChatGPT inquiry asking, 'What does monkey ass mean?' Conc. op. at 395. ChatGPT functions as a consolidator of information, synthesizing patterns from a vast body of text, but it does not independently verify the accuracy of any material or its unknown sources. The information provided in the concurrence's permalink to Urban Dictionary speaks for itself.").

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 1231 ("People living in poorer communities (perhaps disproportionately minorities and those in rural areas) are less likely to have ready internet access and thus may be less likely to contribute to the sources from which LLMs draw in crafting their responses to queries.").

<sup>91</sup> See Dara Kerr, *Musk's AI Grok bot rants about 'white genocide' in South Africa in unrelated chats*, GUARDIAN (May 14, 2025), <https://www.theguardian.com/technology/2025/may/14/elon-musk-grok-white-genocide>; see also 102 F.4th at 1231–32 (Newsom, J., concurring).

<sup>92</sup> This could be solved by giving an LLM the facts of the case, but this raises another issue: in providing context to an LLM, judges may be searching for a response that affirms their biases. See Snell, 102 F.4th at 1231–32 (Newsom, J., concurring).

they may not be ideal for determining the meanings of words used in more informal exchanges; courts should be especially careful when using a chatbot's reasoning in a racial harassment case and need to provide the full text of their inquiries and the full text of the LLM's responses in order to ensure transparency.<sup>93</sup>

#### CONCLUSION

The Sixth Circuit's 2025 ruling in *Smith v. P.A.M. Transportation Company* provides model guidance for handling hostile environment cases that involve racial harassment and present complex fact patterns. It is unlikely that a jury will ever hear the case and grapple with its facts, as most cases of this nature settle before trial. But of course, allowing the plaintiffs to defeat a summary judgment motion will drive the settlement value and incentivize employers to ensure that workplaces are free of racial harassment.

In overruling the district court, the Sixth Circuit correctly ruled that the use of terms with "a long and well-understood history as racial slurs" should raise an inference of discrimination even if used by a supervisor of the same race.<sup>94</sup> Of course, that inference can be rebutted by proper evidence, and it is well-known that members of a group also may at times claim racial slurs for friendly colloquial usage among themselves.<sup>95</sup> But in real cases this should be treated a matter of factual dispute. And in cases that involve lesser-known racial epithets, or terms that are usually not racial epithets but can be viewed as such in certain contexts,<sup>96</sup> expert evidence from linguistics, anthropology, or ethnic studies scholars may be helpful to clarify matters.

The Sixth Circuit's position that widely known racial epithets are, on their face, direct evidence of racial discrimination also has broader social implications. It discourages any use of racial epithets in employment settings. While the First Amendment and related protections may limit sanction for using racial epithets in some other settings,<sup>97</sup> the Sixth Circuit's

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<sup>93</sup> See *Snell v. United Specialty Ins. Co.*, 102 F.4th 1208, 1229 (11th Cir. 2024) (Newsom, J., concurring). Judge Readler did not provide the full text of ChatGPT's response, further clouding the reliability of LLMs in this case. See 154 F.4th at 395.

<sup>94</sup> 154 F.4th at 384–85.

<sup>95</sup> See Wyman King, Richard C. Emanuel, Xavier Brown, Niroby Dingle, Vertis Lucas, Anissa Perkins, Ayzia Turner, Destinee Whittington & Qwa'dryna Witherspoon, *Who has the "Right" to Use the N-Word?*

*A Survey of Attitudes about the Acceptability of Using the N-Word and its Derivatives*, 6 INT'L J. OF SOC'Y, CULTURE & LANGUAGE 47, 47 (2018) (noting that ". . . over time, N-word derivatives have become popular terms of endearment by the descendants of the very people who once had to endure the N-word.").

<sup>96</sup> See, e.g., Harpalani, *supra* note 28, at 92 n.75 (2013) (noting how "desi" is commonly used by people of South Asian subcontinental ancestry, usually for ethnic pride but sometimes in derogatory fashion).

<sup>97</sup> See, e.g., Robert C. Post, *Racist Speech, Democracy, and the First Amendment*, 32 WM. & MARY L. REV. 267, 327 (1991) (arguing that "those who advocate . . . regulation [of racist speech] in ways incompatible with the value of deliberative self-governance carry the burden of moving us to a different and more attractive vision of democracy."). For a different perspective on the First Amendment and racist speech, see Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982) (arguing racist speech inflicts concrete psychological and social injury and should be subject to tort liability despite traditional First Amendment protection of offensive speech). See also generally MARI J. MATSUDA, CHARLES R. LAWRENCE III, RICHARD

position does allow more accountability in perhaps the most significant context for adult social interaction: the workplace.<sup>98</sup> And while factual intricacy can always complicate employment discrimination cases,<sup>99</sup> norms that discourage racially offensive language are preferable and promote greater sensitivity and less hostility.<sup>100</sup>

Finally, Judge Readler's use of ChatGPT for his concurrence raised eyebrows among the majority, since the tool is relatively new and judges are grappling with its possibilities and limitations.<sup>101</sup> But the use of artificial intelligence tools by judges, lawyers, and other members of the legal community is rising rapidly.<sup>102</sup> Our discussion of LLM usage is but an initial glance of an issue that will continue to evolve and garner more attention in the future.

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DELGADO & KIMBERLÉ WILLIAMS CRENSHAW, *WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT* (1993).

<sup>98</sup> The Sixth Circuit's ruling in *Smith* is consistent with Professor Robert Post's analysis. See Post, *supra* note 97, at 289 ("... [E]ven if the first amendment were to immunize from legal regulation the circulation of certain racist ideas in newspapers, it would not follow that the expression of those same ideas could not be restrained by the government within the workplace[.]").

<sup>99</sup> See *Scaife v. U.S. Dep't of Veterans Affs.*, 49 F.4th 1109, 1116–17 (7th Cir. 2022) (finding one-time use of n-word in reference to Plaintiff insufficient to support Plaintiff's hostile work environment claim, because 1) racial epithet was not directly stated to Plaintiff; 2) Plaintiff did not find about racial epithet until over six months after it was stated; 3) Person who stated racial epithet was not in supervisory role over Plaintiff, although he was supervisor of different department and had history of racial insensitivity).

<sup>100</sup> The NAACP has taken the position that the n-word should never be used by anyone "in any capacity, or in any artistic endeavor that does not allude to the historical context of the word, or that does not highlight the prejudicial nature of the word." See *NAACP Official Position on the Use of the Word "Nigger" and the "N" Word*, NAACP (2014), <https://naacp.org/resources/naacp-official-position-use-word-nigger-and-n-word>. The NAACP itself was founded as the National Association for the Advancement of Colored People, but due to the arcane nature of the term "colored people", the organization now only goes by the acronym, NAACP, in public usage. See NAACP, <https://naacp.org/> (last visited Apr. 4, 2026) (not including founding name of organization on website). The NAACP's practice regarding its name also underscores the fact that terms which were once not offensive may become so as norms evolve, and vice versa.

<sup>101</sup> See text accompanying *supra* notes 81–93.

<sup>102</sup> See, e.g., Andrew M. Perlman, *The Implications of ChatGPT for Legal Services and Society*, HARV. L. SCH. CTR. ON THE LEGAL PROF.: THE PRACTICE (Mar./Apr. 2023), <https://clp.law.harvard.edu/knowledge-hub/magazine/issues/generative-ai-in-the-legal-profession/the-implications-of-chatgpt-for-legal-services-and-society>; Kalliopi Terzidou, *Generative AI Systems in Legal Practice Offering Quality Legal Services While Upholding Legal Ethics*, 21 INT'L J.L. CONTEXT 431 (2025); John G. Browning, *The Dawn of the "A.I. Judge"?: Generative Artificial Intelligence and Its Impact on the Appellate Courts*, 25 J. APP. PRAC. & PROCESS 341 (2025); Daniel Wu, *Judges are increasingly using AI to draft rulings and prepare for hearings*, WASH. POST, Apr. 2, 2006, <https://www.washingtonpost.com/nation/2026/04/02/judges-ai-hearings-rulings/>

# Addressing the Digital Divide: Postsecondary Schools' Obligation to Provide Accessible Technology in the Classroom

MONIQUE JOHNSON

## I. INTRODUCTION: THE INCREASING THREAT OF TECHNOLOGY IN CLASSROOMS FOR STUDENTS WITH DISABILITIES

Historically, children with disabilities were denied access to education.<sup>1</sup> Until the 1970s, there were no federal protections for students with disabilities. The passage of the Education of Handicapped Children Act of 1975, later amended to the Individuals with Disabilities Education Act (IDEA), established an affirmative “child find” obligation to identify students with disabilities and provide services for such students in elementary and secondary education.<sup>2</sup> While Section 504 of the Rehabilitation Act of 1973 was the first federal law that prohibited disability discrimination, the Act did not carry much weight for ensuring protections for students with disabilities until the passage of the Americans with Disabilities Act (ADA) of 1990.<sup>3</sup> Section 504 and the ADA prohibit disability discrimination and require covered institutions to provide reasonable accommodations to qualified students with disabilities.<sup>4</sup> Section 504 covers all postsecondary institutions that receive federal funding, while the ADA covers public and private colleges and universities.<sup>5</sup> Because of the statutes’ expansive coverage, relatively all public, private, and religious colleges and universities are covered by one or both of the statutes. While the ADA and Section 504 apply at the K-12 level as well as the postsecondary level, the IDEA only applies to the K-12 level. And while the IDEA provides an affirmative obligation for states to find and provide students with disabilities educational services and accommodations, students in postsecondary education must self-identify to colleges and universities, which in turn are only responsible for providing certain accommodations.<sup>6</sup>

Due to this incongruence, students who received disability services and other accommodations under the IDEA may have a heightened expectation

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<sup>1</sup> U.S. DEP’T OF EDUC., A HISTORY OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT, <https://sites.ed.gov/idea/IDEA-History> (last visited Nov. 24, 2024).

<sup>2</sup> Education for All Handicapped Children Act of 1975, Pub. L. No. 94–142, 89 Stat. 773, *repealed by* Individuals with Disabilities Education Act of 2004, Pub. L. No. 91–230, *amended by* Pub. L. 108–446, 118 Stat. 2647 (codified as amended at 20 U.S.C. §§ 1400–1482); 20 U.S.C. § 1412(a)(3)(A).

<sup>3</sup> Nina Golden, *Access This: Why Institutions of Higher Education Must Provide Access to the Internet to Students with Disabilities*, 10 VAND. J. OF ENT. AND TECH. L. 363, 369–70 (2020); Rehabilitation Act of 1973

§ 504, 29 U.S.C. § 794; 42 U.S.C. §§ 12131–12165; 42 U.S.C. §§ 12181–12189.

<sup>4</sup> 42 U.S.C. § 12182(b)(2)(A)(ii); 42 U.S.C. § 12131(2); 45 C.F.R. § 84.68(b)(7).

<sup>5</sup> Rehabilitation Act of 1973 § 504, 29 U.S.C. § 794; Americans with Disabilities Act, 42 U.S.C. § 12131(1); Americans with Disabilities Act, 42 U.S.C. § 12181(7)(J).

<sup>6</sup> Golden, *supra* note 3, at 369-70.

of receiving services when they enroll at a postsecondary institution. As such, lawsuits against colleges and universities for failure to accommodate may increase as students who grew up receiving assistive technology services under the IDEA (and during COVID-19) may have more expectations and aspirations for assistive technology services they should receive while enrolled in a postsecondary program. These expectations are only reasonable as technology and online learning have increasingly penetrated the education system. More and more public and private colleges and universities offer online courses, textbooks, and resources for students.<sup>7</sup> While the incorporation of technology in the classroom has the opportunity to provide students with new opportunities to explore coursework and materials otherwise not available on campus or in physical form, this wave of digital offerings poses new challenges for students with disabilities which prohibit traditional Internet and technology use.<sup>8</sup> Consequently, colleges and universities should consider the implications that providing online classes, coursework and other digital platforms may mean for their compliance with Section 504 and the ADA. Otherwise, postsecondary institutions may face the potential of complaints to the United States Department of Education's Office for Civil Rights ("OCR") or Department of Justice ("DOJ") and/or lawsuits for failure to reasonably accommodate such students and/or disparate impact claims as a result of their technology policies and procedures that disproportionately impact students with disabilities due to inaccessibility.<sup>9</sup> As a result of the increasing role of technology in higher education, public and private postsecondary institutions should reconsider and, if necessary, revise their technology and digital accessibility policies and procedures to ensure that students with disabilities (where and when reasonable) receive the same benefits and educational opportunities as their peers.

## II. THE DEVELOPMENT OF FEDERAL PROTECTIONS FOR STUDENTS WITH DISABILITIES

### *A. Supreme Court Decisions that Gave Rise to Legislative Protections for Students with Disabilities*

In the 1954 *Brown v Board of Education* decision, the United States Supreme Court established the right to equal educational opportunities for all students.<sup>10</sup> The Court stated, "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education."<sup>11</sup> While *Brown* specifically prohibited the segregation of Black

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<sup>7</sup> *Id.* at 384–85.

<sup>8</sup> Amanda Lenhart, *The Ever-Shifting Internet Population: A New Look at Internet Access and the Digital Divide*, PEW RSCH. CTR. (Apr. 16, 2003), <https://www.pewresearch.org/internet/2003/04/16/the-ever-shifting-internet-population-a-new-look-at-internet-access-and-the-digital-divide/>.

<sup>9</sup> See *Payan v. L.A. Cmty. Coll. Dist.*, 11 F.4th 729, 733 (9th Cir. 2021); *Nat'l Ass'n of the Deaf v. Harvard Univ.*, 2019 U.S. Dist. LEXIS 211335, at \*2 (D. Mass. Nov. 5, 2019); *Nat'l Ass'n of the Deaf v. Mass. Inst. of Tech.*, 2020 U.S. Dist. LEXIS 53643, at \*2 (D. Mass. Mar. 27, 2020); 42 U.S.C. § 12188(b)(3)–(5); 42 U.S.C. § 12133; 29 U.S.C. § 794(a).

<sup>10</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

<sup>11</sup> *Id.* at 493.

students in schools, the Court's equal opportunity reasoning inspired two federal court decisions that provided for the equal education of children with disabilities in those jurisdictions. In *Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania (PARC)*, a consent decree enjoined the state of Pennsylvania from denying students with disabilities the opportunity to a free public education.<sup>12</sup> And in *Mills v. Board of Education of the District of Columbia*, the court decided that children with disabilities were not to be excluded from public schools in Washington, D.C.<sup>13</sup> In light of these decisions, Congress decided to take legislative action, and in 1975 Congress passed the Education of Handicapped Children Act of 1975 which was amended to be the Individuals with Disabilities Education Act (IDEA) in 1997.<sup>14</sup>

*B. Federal Protections for Students with Disabilities in Elementary and Secondary Education: individuals with Disabilities Education Act (IDEA) and Free Appropriate Public Education (FAPE)*

The IDEA was amended in 1990 and later amended again in 1997 and 2004 to ensure additional protections for students with disabilities in elementary and secondary education.<sup>15</sup> The IDEA aims to “ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living.”<sup>16</sup> Under the IDEA, “children with disabilities” are children “with mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to in [IDEA] as ‘emotional disturbance’), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities” and “who, by reasons thereof, [need] special education and related services.”<sup>17</sup> A less precise definition is provided for children ages three to nine.<sup>18</sup>

Identifying whether a particular child is eligible for special education and other related services is determined through an evaluative process. IDEA provides for an affirmative obligation to find children with disabilities. This “child find” requirement means that “[a]ll children with disabilities residing in the State . . . regardless of the severity of their disabilities, and who are in need of special education and related services, are identified, located, and evaluated.”<sup>19</sup> In the evaluation, local or state educational agencies must ensure that the “assessment tools and strategies .

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<sup>12</sup> *Pa. Ass'n for Retarded Child. v. Pa.*, 343 F. Supp. 279 (E.D. Pa. 1972).

<sup>13</sup> *Mills v. Bd. of Educ.*, 348 F. Supp. 866 (D.D.C. 1972).

<sup>14</sup> Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, 89 Stat. 773, *repealed by* Individuals with Disabilities Education Act of 2004, Pub. L. No. 91-230, *amended by* Pub. L. 108-446, 118 Stat. 2647 (codified as amended at 20 U.S.C. §§ 1400-1482).

<sup>15</sup> *Id.*; U.S. DEP'T OF EDUC., A HISTORY OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT, <https://sites.ed.gov/idea/IDEA-History> (last visited Nov. 24, 2024).

<sup>16</sup> 20 U.S.C. § 1400(d)(1)(A).

<sup>17</sup> *Id.* § 1401(3)(A).

<sup>18</sup> *Id.* § 1401(3)(B).

<sup>19</sup> *Id.* § 1412(a)(3)(A).

. . . directly assists persons in determining the educational needs of the child are provided.”<sup>20</sup> Without this affirmative obligation it is likely that children with disabilities may not receive the services they need.

Once a child is identified as needing special education services, local or state educational agencies are responsible for ensuring that each child is given an Individualized Education Plan (“IEP”). The IEP provides services that are narrowly tailored to the student’s particular educational needs based on data from the evaluation and input from the student’s IEP team.<sup>21</sup> The IEP team consists of the child’s parents, educators, and others with relevant expertise.<sup>22</sup> IEPs detail the child’s academic achievement and functional performance, set measurable goals, outline the child’s educational placement and detail the type of services the student will receive, for how long, and how often.<sup>23</sup> IEPs also include transition planning for when a student reaches the end of their secondary education. This planning helps students transition from school to adult life.<sup>24</sup> Services that are included under an IEP vary greatly and can include special education and other related services.<sup>25</sup> The IEP team is obligated to meet periodically, but not less frequently than annually, to determine whether the child’s annual goals are being met and if their IEP needs to be revised.<sup>26</sup> To ensure that every student with a disability has access to a free appropriate public education, the IDEA authorizes and provides formula grants to states who are then responsible for carrying out these policies and procedures.<sup>27</sup> As a result of the IDEA, 95% of children with disabilities receive special education services in public and private schools.<sup>28</sup>

*C. Federal Protections for Students with Disabilities in Postsecondary Education: The Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act*

When a student with a disability turns 21 or enrolls at a postsecondary institution they are no longer protected by the IDEA.<sup>29</sup> However, when a student with a disability chooses to enroll at a postsecondary institution, that college or university is likely subject to the provisions of the Americans with Disability Act (“ADA”) of 1990 and Section 504 of the Rehabilitation Act of 1973 (“Section 504”).<sup>30</sup> While the IDEA imposes an affirmative obligation for local and state educational agencies to identify and provide children with disabilities services and accommodations to ensure their equal educational opportunity, the ADA and Section 504 merely require that

<sup>20</sup> *Id.* § 1414(b)(3)(C).

<sup>21</sup> *Id.* § 1414(d)(1)(A)(i).

<sup>22</sup> 20 U.S.C. § 1414(d)(1)(B).

<sup>23</sup> *Id.* § 1414(d)(1)(A).

<sup>24</sup> *Id.* § 1414(d)(1)(A)(i)(VIII).

<sup>25</sup> *See* 20 U.S.C. § 1401(26)(A); 20 U.S.C. § 1414(a)(1)(A).

<sup>26</sup> 20 U.S.C. § 1414(d)(4)(A).

<sup>27</sup> *See* 20 U.S.C. § 1411(a)(2).

<sup>28</sup> NAT’L CTR. FOR EDUC. STAT., FAST FACTS (2022), <https://nces.ed.gov/fastfacts/display.asp?id=59> (last visited Nov. 24, 2024).

<sup>29</sup> *See* 20 U.S.C. § 1412(a)(18)(A).

<sup>30</sup> Rehabilitation Act of 1973 § 504, 29 U.S.C. § 794; Americans with Disabilities Act, 42 U.S.C. §§ 12131-12165 (2000); Americans with Disabilities Act, 42 U.S.C. §§ 12181-12189 (2000).

covered postsecondary institutions provide equal access to students with disabilities and those without disabilities.<sup>31</sup> Without an affirmative duty for postsecondary institutions to find and provide students with disabilities accommodations, students with disabilities attending a college or university must self-identify to the school and request accommodations that the school is not necessarily required to provide.<sup>32</sup> As such, colleges or universities may not have an obligation to provide accommodations to a student who received accommodations throughout their elementary and/or secondary education.

“[A] college, university, or other postsecondary institution, or a public system of higher education” are delegated as programs covered by Section 504.<sup>33</sup> Section 504 states that “[n]o otherwise qualified individuals with a disability . . . shall . . . be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”<sup>34</sup> Title II of the ADA covers all public colleges and universities. Title II of the ADA states that “no qualified individual with a disability shall, on the basis of disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any public entity.”<sup>35</sup> Title III defines undergraduate, or postgraduate private school, or other place of education as a place of public accommodation covered by the statute.<sup>36</sup> As such, Title III of the ADA applies to private colleges and universities. Title III of the ADA provides, “[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation . . .”<sup>37</sup> Altogether, most public and private colleges and universities are covered entities under Section 504 and/or the ADA.

### *What is an Individual with a Disability?*

To receive reasonable accommodations under Section 504 and the ADA, a student must meet the statutory definition of disability. Under both Section 504 and the ADA, an “individual with a disability” is defined as someone who “has a physical or mental impairment that significantly limits one or more major life activities, or has a record of such impairment or is regarded as having such an impairment.”<sup>38</sup> An impairment that “substantially limits” a “major life activity” for the purposes of the ADA and Section 504 is an impairment that limits the ability of an individual to perform a major life activity as “compared to most people in the general population.”<sup>39</sup> When considering whether an impairment substantially limits

<sup>31</sup> 20 U.S.C. § 1412(a)(3)(A); 42 U.S.C. § 12132; 42 U.S.C. § 12182(a).

<sup>32</sup> Katherine Macfarlane, *Accommodation Discrimination*, 72 AM. U.L. REV. 1971, 1994 (2023).

<sup>33</sup> 29 U.S.C. § 794(b)(2)(A).

<sup>34</sup> *Id.* § 794(a).

<sup>35</sup> 42 U.S.C. § 12132.

<sup>36</sup> *Id.* § 12181(7)(J).

<sup>37</sup> *Id.* § 12182(a).

<sup>38</sup> *Id.* § 12102(1); 29 U.S.C. § 705(9).

<sup>39</sup> 28 C.F.R. § 36.105(d)(1)(v) (2016).

an individual's ability to engage in a given major life activity, the condition, manner, and duration under which an individual can perform that activity is considered.<sup>40</sup>

Education-related activities including "learning," "reading," and "communicating" are specifically listed as major life activities under Section 504 and the ADA, however, these examples are not the only applicable major life activities that a student can use to establish their disability. Section 504 and the ADA define a major life activity as including, but not limited to "caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working."<sup>41</sup> "Major bodily functions" are also considered major life activities and include "functions of the immune system, special sense organs and skin; normal cell growth; and digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, and reproductive functions."<sup>42</sup> A student who has an impairment, as defined above, and has a documented medical record of their impairment will be covered under Section 504 and/or the ADA.<sup>43</sup> An individual who is "regarded as having" an impairment will also be protected under these statutes if they are perceived to have the impairment by others.<sup>44</sup> An individual who has a transitory and minor impairment may not be protected under the ADA/Section 504. "A transitory impairment is an impairment with an actual or expected duration of 6 months or less."<sup>45</sup> Both Section 504 and the ADA specify that an individual must be "qualified" to receive protections under the statutes. In the area of education, a "qualified" student is a student with a disability who "meets the academic and technical standards requisite to admission or participation in the recipient's education program or activity."<sup>46</sup>

#### *What is a Reasonable Accommodation?*

Whether a student with a disability is entitled to reasonable accommodations depends on the individual circumstances of the request. All postsecondary institutions that receive federal funding are subject to Section 504. Section 504 requires covered institutions to provide reasonable accommodations and academic adjustments that are "necessary to ensure that such requirements do not discriminate or have the effect of discriminating."<sup>47</sup> Title II of the ADA applies specifically to public colleges and universities and provides students with a disability the ability to request "reasonable modifications to rules, policies, or practices, the removal of

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<sup>40</sup> *Id.* § 36.105(d)(3).

<sup>41</sup> 42 U.S.C. § 12102(2)(A).

<sup>42</sup> *Id.* § 12102(2)(B).

<sup>43</sup> 29 U.S.C. § 794(a); 42 U.S.C. § 12131(2).

<sup>44</sup> 42 U.S.C. § 12102(3)(A).

<sup>45</sup> *Id.* at § 12102(3)(B).

<sup>46</sup> 34 C.F.R. § 104.3(1)(3) (2017).

<sup>47</sup> *Id.* § 104.44(a).

architectural, communication, or transportation barriers, or the provision of auxiliary aids and services.”<sup>48</sup> Although Title II statutorily refers to “reasonable modifications” to policies, practices, and procedures, postsecondary disability practice commonly refers to these protections as reasonable accommodations. As such, a public college or university has the obligation to provide reasonable accommodations to a student with a disability unless the request would “fundamentally alter” the program at issue “or would result in an ‘undue burden.’”<sup>49</sup> Again, only students who are “qualified” for the program or activity are entitled to reasonable accommodations.<sup>50</sup> Private colleges and universities are considered public accommodations that are subject to Title III of the ADA.<sup>51</sup> Private colleges and universities must also provide reasonable accommodations to students with disabilities as long as the accommodation does not fundamentally alter the program or would result in an undue burden to the program.<sup>52</sup> Religious postsecondary institutions are not covered by the ADA and are only subject to Section 504 of the Rehabilitation Act as described above.<sup>53</sup>

Since reasonable accommodations are only available to “otherwise qualified” students under Section 504 and the ADA, postsecondary institutions are not required to provide accommodations to students with disabilities that would fundamentally alter any essential elements of their programs or activities such as attendance or GPA requirements.<sup>54</sup> Additionally, postsecondary institutions are not required to provide accommodations that would result in an undue financial or administrative burden to the college or university.<sup>55</sup> For postsecondary institutions, reasonable accommodations may include adjustments to practices, policies, or procedures that ensure equal access to activities and services for students with a disability.<sup>56</sup>

### *Process Students Need to Follow*

In theory, in order to obtain reasonable accommodations students need to first, identify themselves and their disability to the school, second, request reasonable accommodations, and third, submit documentation of their disability.<sup>57</sup> Typically, requests for reasonable accommodations should be evaluated on a case-by-case basis to determine whether the student provided the necessary documentation and to determine whether the accommodation

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<sup>48</sup> *Id.* § 12182(b)(2)(A)(iii).

<sup>49</sup> *Id.* § 12182(b)(2)(A)(iii).

<sup>50</sup> *Se. Cmty. Coll. v. Davis*, 442 U.S. 397, 405 (1979).

<sup>51</sup> 42 U.S.C. § 12181(7)(J).

<sup>52</sup> 42 U.S.C. § 12182(b)(2)(A)(iii).

<sup>53</sup> Macfarlane, *supra* note 32, at 1994.

<sup>54</sup> *Se. Cmty. Coll. v. Davis*, 442 U.S. at 405.

<sup>55</sup> 42 U.S.C. § 12182(b)(2)(A)(iii).

<sup>56</sup> *Id.* § 12182(b)(2)(A)(ii).

<sup>57</sup> U.S. DEP’T OF EDUC., *Transition of Students with Disabilities To Postsecondary Education: A Guide for High School Educators* (Mar. 2007), <https://www.ed.gov/teaching-and-administration/supporting-students/transition-of-students-with-disabilities-to-postsecondary-education-a-guide-for-high-school-educators> (last visited Nov. 24, 2024).

is reasonable and appropriate based upon the student's disability.<sup>58</sup> Reasonable accommodations may look like "reduced course load, extra time on examinations, and the provision of auxiliary aids and services."<sup>59</sup> Auxiliary aids include "note-takers, readers, recording devices, sign language interpreters, screen-readers, voice recognition and other adaptive software or hardware for computers" and so on.<sup>60</sup> However, universities are not required to provide aids of a personal nature such as eyeglasses, tutors or attendants.<sup>61</sup>

### III. WHEN POSTSECONDARY INSTITUTIONS FAIL TO PROVIDE REASONABLE ACCOMMODATIONS: MAKING A CLAIM UNDER SECTION 504 OR THE ADA

#### *Internal Grievance Procedures*

All postsecondary institutions that are covered by Title II of the ADA and Section 504 are required to have an internal grievance procedure. Therefore, if a student believes they have been discriminated against based on their disability the student may file an internal complaint with their college or university. Public entities including public colleges and universities that employ 50 or more persons are required to "designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under this part, including any investigation of any complaint communicated to it alleging its noncompliance with this part or alleging any actions that would be prohibited by this part."<sup>62</sup> Meanwhile, all federally-funded colleges and universities "that employ fifteen or more persons shall adopt grievance procedures that incorporate appropriate due process standards and that provide for the prompt and equitable resolution of complaints alleging any action prohibited by this part" and employ at least one person to coordinate these efforts.<sup>63</sup> However, there is no requirement for public accommodations, which includes private colleges and universities, to have internal grievance procedures.<sup>64</sup>

#### *Administrative Review and Enforcement*

Claims that are unable to be resolved internally by a college or university can be reviewed administratively by the federal government. Claims made under Title II of the ADA and Section 504 will be reviewed by the U.S. Department of Education, Office for Civil Rights (OCR), while claims made under Title III of the ADA will be reviewed by the Department of Justice (DOJ), Civil Rights Division. Once either office receives a complaint of discrimination, the office has the authority to undertake

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<sup>58</sup> Macfarlane, *supra* note 32, at 1994.

<sup>59</sup> Golden, *supra* note 3, at 406.

<sup>60</sup> U.S. DEP'T. OF EDUC., *supra* note 57.

<sup>61</sup> *Id.*

<sup>62</sup> 28 C.F.R. § 35.107(a) (1991).

<sup>63</sup> 34 C.F.R. § 104.7.

<sup>64</sup> 42 U.S.C. § 12181(7)(J).

investigations and compliance reviews of the alleged conduct at the institution.<sup>65</sup> Following an investigation or compliance review, the Attorney General of the DOJ may file suit to enforce the requirements of the ADA and Section 504.<sup>66</sup> If the college or university is found to have violated the ADA or Section 504, the school could face sanctions including financial penalties.<sup>67</sup>

### *Private Lawsuits*

In addition, claims of disability discrimination may be brought as private lawsuits. Claims brought by students under the ADA or Section 504 are often brought to redress a postsecondary institution's discrimination against an individual student. These suits are either brought on a theory of disparate treatment, failure to accommodate, harassment, or retaliation.<sup>68</sup> However, a disparate impact theory may be used to redress discrimination against a group of disabled students.<sup>69</sup>

### *Failure to Accommodate Claims*

The increased use of technology in college and university classrooms has brought about increasing claims of individual failure to accommodate and disparate impact where disabled students seek redress for digital inaccessibility.<sup>70</sup> In a typical failure to accommodate claim, the student has been refused a reasonable accommodation.<sup>71</sup> In order for a student to prevail on a failure to accommodate claim under Section 504 and the ADA the student must prove by a preponderance of the evidence that (1) they are a qualified individual with a disability, (2) the covered institution knew of the student's disability and (3) that the institution failed to provide a reasonable accommodation for the known disability.<sup>72</sup> The burden is on the student to

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<sup>65</sup> U.S. DEP'T OF JUSTICE, *ADA Designated Investigative Services* (Feb. 2017), <https://archive.ada.gov/investag.htm>;

42 U.S.C. § 12188(b)(1)(A).

<sup>66</sup> 42 U.S.C. § 12188(b)(1)(B); 42 U.S.C. § 12133; 29 U.S.C. § 794(a).

<sup>67</sup> 42 U.S.C. § 12188(b)(3)-(5); 42 U.S.C. § 12133; 29 U.S.C. § 794(a); *see* U.S. DEP'T OF JUSTICE: DISABILITY RIGHTS SECTION, ENFORCING THE ADA: A STATUS REPORT FROM THE DEP'T OF JUSTICE (Jan.–Mar. 2008), <https://archive.ada.gov/janmar08.pdf>.

<sup>68</sup> *See* *Novak v. Bd. of Trs. of S. Ill. Univ.*, No. 12-cv-7-JPG-PMF, 2014 U.S. Dist. LEXIS 90871, at \*17–18 (S.D. Ill. July 3, 2014) (disparate treatment); *Choi v. Univ. of Tex. Health Sci. Ctr. at San Antonio*, 633 Fd. Appx. 214, 215 (5th Cir. 2015) (failure to accommodate); *Guckenberger v. Boston Univ.*, 957 F. Supp. 306, 313 (D. Mass. 1997) (harassment); *Dickinson v. Univ. of N.C.*, 91 F. Supp. 3d 755, 769 (M.D.N.C. 2015) (retaliation).

<sup>69</sup> *See* *Payan v. L.A. Cmty. Coll. Dist.*, 11 F.4th 729, 733 (9th Cir. 2021); *Nat'l Ass'n of the Deaf v. Harvard Univ.*, 2019 U.S. Dist. LEXIS 211335, \*2 (Mass. 2019); *Nat'l Ass'n of the Deaf v. Mass. Inst. of Tech.*, 2020 U.S. Dist. LEXIS 53643, \*2 (Mass. 2020).

<sup>70</sup> Courtney Mullin, Rob Gould & Sarah Parker Harris, *Research Brief: Digital Access for Students in Higher Education and the ADA*, ADA NAT'L NETWORK KNOWLEDGE TRANSLATION CTR., [https://adata.org/research\\_brief/research-brief-digital-access-students-higher-education-and-ada](https://adata.org/research_brief/research-brief-digital-access-students-higher-education-and-ada) (last visited Nov. 24, 2024).

<sup>71</sup> Macfarlane, *supra* note 32, at 2009; *contra* *Enica v. Principi*, 544 F.3d 328, 343 (1st Cir. 2008) (court ruled in employment case that if an employee repeatedly complains that their accommodation is not being implemented or enforced, the employer acts unreasonably if it fails to take steps to ensure that the accommodation is provided).

<sup>72</sup> *Choi*, 633 Fd. Appx. at 215.

prove each of these elements to establish a prima facie case in a failure to accommodate claim.<sup>73</sup>

After a student establishes a prima facie case, the burden shifts to the college or university to demonstrate that the accommodation was unreasonable.<sup>74</sup> In *Wynne v. Tufts University School of Medicine*, the court developed a test for determining whether an academic institution adequately investigated the availability of reasonable accommodations. The court reasoned that “[i]f the institution . . . considered alternative means, their feasibility, cost and effect on the academic program, and came to a rationally justifiable conclusion that the available alternatives would result either in lowering academic standards or requiring substantial program alteration . . . the institution had met its duty of seeking reasonable accommodation.”<sup>75</sup> Therefore, a university seeking to defend against a claim of failure to accommodate can assert either that the accommodation would require a fundamental alteration to the program or service or would result in an undue burden to the college or university.<sup>76</sup>

Postsecondary institutions are not required to provide accommodations that would fundamentally alter any essential elements of their programs or activities including attendance or GPA requirements.<sup>77</sup> In *Guckenberger v. Boston University*, a district court ruled that neither Section 504 or the ADA would “require a university to provide [an accommodation] that the university rationally concludes would alter an essential part of its academic program.”<sup>78</sup> If the student requires an accommodation that would alter the essential elements of the program, they are not a qualified student and a university does not have to provide that accommodation.<sup>79</sup> Postsecondary institutions are also not required to provide accommodations that would result in an undue burden. An undue burden is an accommodation that is significantly difficult or expensive.<sup>80</sup> <sup>80</sup> Factors that determine whether an accommodation would be an undue burden are: (1) the nature and cost of the accommodation, (2) overall financial resources of the site and the effect of this accommodation on those expenses and resources, (3) the administrative or fiscal relationship of the site in question, (4) if applicable, the overall financial resources of the entity, and (5) if applicable, the overall operation of the entity.<sup>81</sup>

Generally, if a college or university follows their established accommodation policies, then courts will defer to the postsecondary institution for what qualifies as a reasonable accommodation at that

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<sup>73</sup> Macfarlane, *supra* note 32, at 2009.

<sup>74</sup> *Wynne v. Tufts Univ. Sch. of Med.*, 932 F.2d 19, 23 (1st Cir. 1991).

<sup>75</sup> *Id.* at 26.

<sup>76</sup> *See Se. Cmty. Coll. v. Davis*, 442 U.S. at 405.

<sup>77</sup> *Id.*

<sup>78</sup> *Guckenberger v. Boston Univ.*, 974 F. Supp. 106, 149 (D. Mass. 1997).

<sup>79</sup> *Mershon v. St. Louis Univ.*, 442 F.3d 1069, 1076, 1078 (8th Cir. 2006) (“Mershon [a student who is wheelchair-bound and sight-impaired from complications of cerebral palsy] has not demonstrated that he was otherwise qualified, with reasonable specific accommodations, to meet the prerequisites for admission into the graduate school program”).

<sup>80</sup> 28 C.F.R. § 36.104 (2007).

<sup>81</sup> *Id.*

particular institution.<sup>82</sup> While public and private colleges and universities are potentially liable for student claims of failure to accommodate made under the ADA, all federally funded institutions are liable under Section 504 for any failure to accommodate claims.<sup>83</sup>

### *Disparate Impact Claims*

In a disparate impact claim, the student must present a prima facie case, as well. In order to do so, the student must: (1) identify a college or university policy or practice that is facially neutral and (2) demonstrate that the policy or practice has a significantly adverse or disproportionate impact on the student or students with a disability.<sup>84</sup> In order to prove such a claim, the student will likely have to provide statistical evidence.<sup>85</sup> The university can then respond by either arguing that the student's claim fails to establish a prima facie case of disparate impact or by demonstrating that the school made sufficient reasonable accommodations for the student with a disability in compliance with Section 504 and the ADA.<sup>86</sup>

In *D.E. v. Regents of University of California*, a student argued that UCLA's "incomplete" policy had a disparate impact on students with disabilities in violation of Title II of the ADA.<sup>87</sup> First, the student identified UCLA's policy that is facially neutral, the university's "incomplete" policy. Under UCLA's "incomplete policy," a student who does not complete a course timely receives an "incomplete" mark on their transcript. Even after a student completes the course, the incomplete indicator remains on their transcript with a letter grade showing that the coursework was not timely completed, at least at first.<sup>88</sup> Second, the student identified how this facially neutral policy had a disproportionate impact on students with disabilities. The plaintiff argued that UCLA's "incomplete" policy "disproportionately affects disabled students, punishing them for requesting reasonable accommodations by permanently 'flagging' their transcripts with incomplete marks."<sup>89</sup> In reviewing the complaint, the court held that the plaintiff must provide evidence to support a claim of disparate impact, and simply stating the presence of a disparate impact is insufficient to establish a claim.<sup>90</sup>

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<sup>82</sup> *Amir v. St. Louis Univ.*, 184 F.3d 1017, 1029 (8th Cir. 1999) (the court determined that the three accommodations that a medical student with obsessive compulsive disorder requested were not reasonable considering the institution's policies).

<sup>83</sup> 42 U.S.C. § 12182(b)(2)(A)(ii); 42 U.S.C. § 12131(2); 45 C.F.R. § 84.68(b)(7) (2024).

<sup>84</sup> See *Doherty v. Bice*, 2020 U.S. Dist. LEXIS 169545, \*16 (S.D.N.Y. 2020).

<sup>85</sup> See *Borwick v. Univ. of Denver*, 2013 U.S. Dist. LEXIS 37763, \*36 (Colo. 2013).

<sup>86</sup> See *Payan v. L.A. Cmty. Coll. Dist.*, 11 F.4th 729, 733 (9th Cir. 2021); 42 U.S.C. § 12182(b)(2)(A)(ii); 42

U.S.C. § 12131(2); 45 C.F.R. § 84.68(b)(7) (2024).

<sup>87</sup> *D. E. v. Regents of the Univ. of Cal.*, 2023 Cal. Super. LEXIS 46821, \*3 (Cal. Super. 2023).

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at \*4.

#### IV. THE INCREASED PRESENCE OF TECHNOLOGY AND THE INTERNET IN POSTSECONDARY CLASSROOMS AND ITS IMPACT ON STUDENTS WITH DISABILITIES

##### *A. Federal Efforts to Address the Rise of the Internet and Protect People with Disabilities*

The rise of the widespread use of the Internet occurred around the same time that the ADA was signed into law.<sup>91</sup> As a result, the ADA provides no requirements for accessibility in technology making the responsibility for accessibility in technology fall on newer statutes, executive agency advisement, and case law. While the federal government has taken steps to enforce protections for people with disabilities, these measures have been largely ineffective especially in postsecondary education.

In 1996, the Department of Justice issued an Opinion Letter which obligated covered entities to provide “effective communications” for people with disabilities. The Opinion Letter stated that the ADA required state governments and places of public accommodation to provide effective communication for people with disabilities regardless of whether they communicated through “print media, audio media, or computerized media such as the Internet.”<sup>92</sup> In 1998, the Rehabilitation Act was amended to address technology. Section 508 was added to the Act and required all federal employers to make their electronic information technology (EIT) accessible to people with disabilities.<sup>93</sup> In 1998 Congress passed the Assistive Technology Act, amended in 2004 to The Improving Access to Assistive Technology for Individuals with Disabilities Act (“The Tech Act”), which provided federal funding through the Department of Education to states to improve accessible technology for people with disabilities. The Tech Act was enacted to promote awareness and access to assistive devices and services so people with disabilities could more fully participate in society.<sup>94</sup> Then the Communications and Video Accessibility Act (CVAA) was signed into law in 2010 and required telecommunications and video programming to be accessible to people with disabilities, including text messaging, email, instant messaging, and video communications.<sup>95</sup> While these laws illustrate a good faith effort on the part of the federal government to address the ever-increasing presence of the Internet and technology in society, these efforts were outpaced by the growth of technology especially in postsecondary education. As universities failed to meet the requirements of accessible technology in their classrooms, the Department of Justice and Department of Education responded with a series of “Dear Colleague” Letters in 2010 and 2011.<sup>96</sup> While “Dear Colleague” Letters do not set legal

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<sup>91</sup> Golden, *supra* note 3, at 383.

<sup>92</sup> Letter from Deval L. Patrick, Assistant Att’y Gen., C.R. Div., to the Hon. Tom Harkin, U.S. Senator (Sept. 9, 1996), <https://www.justice.gov/crt/foia/file/666366/dl>.

<sup>93</sup> Workforce Investment Act of 1998, Pub. L. No. 105-220, 112 Stat. 936 (codified at 29 U.S.C. § 794(d)).

<sup>94</sup> Assistive Technology Act of 2004, 29 U.S.C. § 3001(b)(1).

<sup>95</sup> Twenty-First Century Communications and Video Accessibility Act of 2010, 47 U.S.C. § 613.

<sup>96</sup> OFF. FOR C.R., U.S. DEP’T OF EDUC. & C.R. DIV., DEP’T OF JUST., DEAR COLLEAGUE

precedent, they inform the higher education industry about the Department of Justice and Department of Education's ("DOE") stance on major legal issues as well as the standards and requirements that universities should follow to comply with federal law.<sup>97</sup>

To address digital inaccessibility in higher education, the DOJ and DOE OCR released a joint Dear Colleague Letter in 2010 to all university presidents.<sup>98</sup> The 2010 letter advises university presidents that their institutions cannot require the use of emerging technology in the classroom that is inaccessible to an entire group of individuals with disabilities; doing so is discrimination prohibited by Title II and Section 504, unless the university provides those individuals with accommodations that allow them to receive all the benefits provided by the technology in an "equally effective and equally integrated manner."<sup>99</sup> OCR issued an additional Dear Colleague Letter in 2011 to provide further clarification on substantially equivalent use of technology in the classroom.<sup>100</sup> The 2011 letter states that "as the use of emerging technologies in the classroom increases, schools at all levels must ensure equal access to the educational benefits and opportunities afforded by the technology and equal treatment in the use of the technology for all students, including students with disabilities."<sup>101</sup> The letter was issued in response to complaints against several universities who were using electronic book readers that were inaccessible to students who were blind or had low vision. Furthermore, the letter advises postsecondary institutions that both the ADA and Section 504 prohibit a college or university from requiring electronic book readers in the classroom that are not fully accessible to students with disabilities unless those individuals are provided with accommodations that allow them to receive the same educational benefits.<sup>102</sup> Despite these advisory letters, public and private colleges and universities throughout the country have failed to make their technology accessible even as technology has become an ever-increasing presence in schools, especially after the COVID-19 pandemic.<sup>103</sup>

### *B. The Digital Divide: How Internet and Technology in the Classroom are Harming Students with Disabilities*

Today, 96% of teens use the Internet every day, and the share of teens that report being online "almost constantly" has almost doubled from 24%

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LETTER (June 29, 2010), <https://www.ed.gov/media/document/colleague-20100629pdf> [hereinafter 2010 Dear Colleague Letter]; OFF. FOR C.R., U.S. DEP'T OF EDUC., DEAR COLLEAGUE LETTER (May 26, 2011), <https://www.ed.gov/sites/ed/files/about/offices/list/ocr/letters/colleague-201105-ese.pdf> [hereinafter 2011 Dear Colleague Letter].

<sup>97</sup> See 2010 Dear Colleague Letter, *supra* note 96; 2011 Dear Colleague Letter, *supra* note 96.

<sup>98</sup> 2010 Dear Colleague Letter, *supra* note 96.

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

<sup>100</sup> 2011 Dear Colleague Letter, *supra* note 96.

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

<sup>102</sup> *Id.*

<sup>103</sup> Golden, *supra* note 3, at 384–85; DeVan L. Hankerson & Lydia X. Z. Brown, *Technology as a Civil Right and a Move Toward Disability Justice: Ensuring Digital Access for Disabled Students in the Pandemic*, 13

DREXEL L. REV. 869, 890 (2021).

ten years ago in 2014-2015 to 46% in 2024.<sup>104</sup> This Internet use is not exclusively at home, today the Internet is used regularly in classrooms and especially in higher education. In fact, a vast majority of college students bring and/or use a laptop computer in the classroom.<sup>105</sup> Technology use is not only condoned by many educators in higher education but encouraged as many college educators consider Internet use and related technology a key part of their teaching practices. In fact, many professors use digital materials, websites, online databases and communicate with students via email to run their courses.<sup>106</sup> As a result of the Internet and technology in the classroom, students can collaborate on work in real time and engage with media and course materials with more flexibility and access than ever before.<sup>107</sup>

While computer use, digital materials, electronic readers, and other technological resources that educators use can improve the educational experience of students, technology and Internet use in the classroom poses the risk of making education inaccessible for students with disabilities. And while the growth of technology has brought about assistive technology services for students with disabilities, the development of technology is outpacing the development of accommodations. As a result, students with disabilities may be left behind by their colleges and universities who increasingly use digital resources and technology that are inaccessible. Consequently, a digital divide has arisen for students with disabilities in postsecondary education.<sup>108</sup>

All too often, postsecondary institutions still fail to provide students with disabilities technological accommodations when they incorporate technology and the Internet into the classroom.<sup>109</sup> Many professors use web pages and require online research as a part of their courses (whether online or in person), however, many of these websites and even university and library webpages are not accessible for students with disabilities.<sup>110</sup> Since the Internet and related technology are such fundamental tools in postsecondary education, students whose disabilities prohibit them from using the Internet in a traditional manner are limited in their ability to actively participate in assignments and social groups, conduct research, and gain access to basic course information.<sup>111</sup> Without access to the same digital resources, online research, and college and university websites that their classmates have, students with disabilities are left at a disadvantage.

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<sup>104</sup> *Teens and Internet, Device Access Fact Sheet*, PEW RSCH. CTR. (last visited Nov. 24, 2024), <https://www.pewresearch.org/internet/fact-sheet/teens-and-internet-device-access-fact-sheet/>.

<sup>105</sup> HARVARD UNIV., THE DEREK BOK CENTER FOR TEACHING AND LEARNING, *DEVICES IN THE CLASSROOM*,

<https://bokcenter.harvard.edu/technology-and-student-distraction> (last visited Nov. 24, 2024); Kristen Purcell, Judy Buchanan & Linda Friedrich, *Part III: Bringing Technology into the Classroom*, PEW RSCH. CTR. (Feb. 28, 2013), <https://www.pewresearch.org/internet/2013/02/28/part-iii-bringing-technology-into-the-classroom/> (In 2013, teachers reported not only computers but “cell phones, digital cameras and recorders, e-readers and tablet computers being part of the learning experience”).

<sup>106</sup> Golden, *supra* note 3, at 384–85.

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

<sup>108</sup> Lenhart, *supra* note 8.

<sup>109</sup> Golden, *supra* note 3, at 384–85.

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

<sup>111</sup> *Id.* at 386.

As noted in the 2010 and 2011 Dear Colleague Letters, the ADA and Section 504 apply to computer accessibility and technological resources.<sup>112</sup> As such, colleges and universities who fail to provide Internet and technological accommodations for students with disabilities may face legal challenges under a failure to accommodate or disparate impact theory. Despite this risk, many colleges and universities' still fail to comply with the ADA and Section 504 when it comes to web accessibility in the classroom.<sup>113</sup> As a result, compliance reviews and litigation against colleges and universities in recent years has addressed this very obligation.

*C. Recent Compliance Reviews and Litigation Addressing the Digital Divide and Postsecondary Schools' Obligations to Provide Reasonable Accommodations in the Realm of Technology*

Despite federal laws and guidance, colleges and universities are still failing to provide accessible technology to students with disabilities in violation of the ADA and Section 504. As students who received technology accommodations under IDEA have matriculated to postsecondary institutions, litigation against several prominent universities has arisen. These lawsuits evidence clear civil rights violations against students with disabilities and emphasize the need for change in university and college policies and procedures regarding technology accommodations for students with disabilities.

In 2014 and 2015, OCR came to resolutions with two universities bringing inaccessible IT to the forefront of postsecondary institutions' attention.<sup>114</sup> In both resolutions, OCR found that the universities were in violation of the ADA and/or Section 504 for failing to provide accessible technology to students with disabilities at their respective institutions.<sup>115</sup> In 2014, OCR released a letter in resolution of its compliance review with the University of Cincinnati addressing the university's web accessibility.<sup>116</sup> This letter was important for two reasons. First, the letter indicated a wide range of online services that the university had to update to be in compliance with Title II of the ADA and Section 504. OCR identified web-accessibility policies and training, distance learning, and Blackboard as online services that needed to be reviewed by the university. In particular, OCR pointed out the university's lack of alternative text on images, documents not being posted in accessible formats, lack of captioning on videos, improperly formatted data tables and form fields, and improper color contrasts as

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<sup>112</sup> OFF. FOR CIV. RTS., U.S. DEP'T OF EDUC. & CIV. RTS. DIV., DEP'T OF JUST., *supra* note 96; OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., *supra* note 96.

<sup>113</sup> Golden, *supra* note 3, at 384–85.

<sup>114</sup> Resolution Agreement, University of Cincinnati, Case No. 15-13-6001, Off. for Civ. Rts., U.S. Dep't of Educ. (Dec. 8, 2014), <https://www.ed.gov/sites/ed/files/documents/press-releases/university-cincinnati-letter.pdf>; Resolution Agreement, University of Phoenix, Case No. 08-15-2040, Off. for Civ. Rts., U.S. Dep't of Educ. (June 12, 2015), <https://www.ed.gov/sites/ed/files/about/offices/list/ocr/docs/investigations/more/08152040-b.pdf>.

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

<sup>116</sup> Resolution Agreement, University of Cincinnati, Case No. 15-13-6001, Off. for Civ. Rts., U.S. Dep't of Educ. (Dec. 8, 2014), at 6–11, <https://www.ed.gov/sites/ed/files/documents/press-releases/university-cincinnati-letter.pdf>.

violations.<sup>117</sup> However, the letter does not merely identify these technical deficiencies, it second, explains how these deficiencies impact students with disabilities, thereby humanizing the legal standards.<sup>118</sup> For example, the letter states “[c]aptioning for the audio portion of a video is important, as individuals who are deaf or hard of hearing may not be able to hear the auditory content.”<sup>119</sup> To remedy the ADA and Section 504 violations, the university adopted web accessibility policies, provided training to relevant staff, and conducted reviews of its websites, including a third-party certification to ensure web accessibility going forward.<sup>120</sup>

Similarly, in June of 2015, OCR submitted a resolution letter to the University of Phoenix at the conclusion of an investigation that originated from a student complaint alleging that the university discriminated against her and others on the basis of their disabilities by moving to an inaccessible online platform, “New Classroom,” in violation of Section 504.<sup>121</sup> This letter is important because it referenced the Web Content Accessibility Guideline (WCAG) 2.0 standards as the standard that universities must measure their web accessibility up against. WCAG 2.0 was the international standard for web accessibility at the time.<sup>122</sup> In finding that the university did not abide by the standards of WCAG 2.0, OCR mandated the university audit existing content and functionality, develop a corrective action plan, establish a Disability Technology Help Desk, hire IT Disability Coordinators, and train relevant staff on web accessibility. Not only did the resolution with University of Phoenix call for future remedies, but OCR called for retroactive remedies for students who may have suffered due to the university’s lack of web accessibility since its switch to “New Classroom.” As such, the resolution put in place remedies for students who experienced web inaccessibility due to their disabilities and allowed them the opportunity to redo courses at cost to the university.<sup>123</sup>

While these resolutions paved the way for enforcement of web accessibility in higher education, many universities failed to update their own web accessibility policies and procedures leading to litigation brought by individuals with disabilities. The first prominent lawsuit involving a university failing to provide accessible Internet and technology accommodations to people with disabilities was in 2015 when the National Association of the Deaf filed two class action lawsuits against Massachusetts Institute of Technology (MIT) and Harvard University.<sup>124</sup> While these lawsuits were not brought by students, both lawsuits represent landmark

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<sup>117</sup> *Id.*

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

<sup>119</sup> *Id.* at 9.

<sup>120</sup> *Id.* at 12.

<sup>121</sup> Resolution Agreement, University of Phoenix, Case No. 08-15-2040, Off. for Civ. Rts., U.S. Dep’t of Educ. (June 12, 2015), at 1, <https://www.ed.gov/sites/ed/files/about/offices/list/ocr/docs/investigations/more/08152040-b.pdf>.

<sup>122</sup> *Id.* at 2.

<sup>123</sup> *Id.* at 3–7.

<sup>124</sup> Nat’l Ass’n of the Deaf v. Harvard Univ., 2019 U.S. Dist. LEXIS 211335, at \*2 (D. Mass. Nov. 5, 2019); Nat’l Ass’n of the Deaf v. Mass. Inst. of Tech., 2020 U.S. Dist. LEXIS 53643, at \*2 (D. Mass. Mar. 27, 2020).

legal challenges calling for technological accommodations to be provided to people with disabilities by colleges and universities.

In *National Association of the Deaf v. Harvard University, et al.* and *National Association of the Deaf et al. v. Massachusetts Institute of Technology, et al.*, the National Association of the Deaf sued Harvard and MIT alleging that both universities made a variety of content available to the public via their university websites that were inaccessible to people who were deaf or hard of hearing. The claimants alleged that by failing to provide captioning for audio and audiovisual content, Harvard and MIT deprived deaf and hard of hearing people the benefits of its online content in violation of Title III of the ADA and Section 504.<sup>125</sup>

In 2015, the DOJ filed a statement of interest in both cases stating that the “Plaintiffs’ claim falls squarely within the protections afforded by the ADA and Section 504. Both the ADA and Section 504 currently obligate (MIT and Harvard) to provide effective communication to ensure equal access to its online programming services.”<sup>126</sup> In 2019, the National Association of the Deaf settled with Harvard, and in 2020 with MIT.<sup>127</sup> The settlements set out two of the most comprehensive sets of online accessibility requirements in higher education. Both settlements require the institutions to provide quality captioning services for all online content that are accessible to the public through the universities’ websites.<sup>128</sup> <sup>128</sup> It is important to note that these cases were brought on a general public accessibility theory and not brought by a qualified student who was unable to access an equitable education due to web inaccessibility. While there is a significant difference in these theories, the importance of these settlements cannot be overstated; these settlements represent landmark civil rights victories for people with disabilities and set a precedent for academic institutions to analyze whether their own online content is accessible to people with disabilities and especially their own students.

Despite these historic settlements, litigation and administrative investigations continue today against colleges and universities who continue to violate Section 504 and the ADA by failing to accommodate students’ disabilities in the realm of technology.

In 2021, a student at John Jay College of Criminal Justice, a component college of the City University of New York (“CUNY-JJCCJ”) filed a complaint with the Department of Justice alleging that the university

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<sup>125</sup> *Id.*

<sup>126</sup> U.S. Statement of Interest at 3, *Nat’l Ass’n of the Deaf v. Mass. Inst. of Tech.*, No. 3:15-cv-300024-MGM (D. Mass. 2015), <https://www.cohenmilstein.com/wp-content/uploads/2023/07/NAD-v-MIT-DOJ-Statement-of-Interest-06252015.pdf>.

<sup>127</sup> *Nat’l Ass’n of the Deaf v. Harvard Univ.*, 2019 U.S. Dist. LEXIS 211335, at \*2 (D. Mass. Nov. 5, 2019); *Nat’l Ass’n of the Deaf v. Mass. Inst. of Tech.*, 2020 U.S. Dist. LEXIS 53643, at \*2 (D. Mass. Mar. 27, 2020).

<sup>128</sup> Consent Decree, *Nat’l Ass’n of the Deaf v. Mass. Inst. of Tech.*, No. 3:15-cv-300024-MGM (D. Mass. 2020), <https://www.cohenmilstein.com/wp-content/uploads/2023/07/Order-Final-Approval-of-Settlement-NAD-v-MIT-07212020.pdf>; Consent Decree, *Nat’l Ass’n of the Deaf v. Harvard Univ.*, No. Case 3:15-cv-30023-KAR (D. Mass. 2020), <https://www.cohenmilstein.com/wp-content/uploads/2023/07/Consent-Decree-NAD-v-Harvard-02262020.pdf>.

violated Title II of the ADA.<sup>129</sup> The student with a vision-related disability alleged that the university failed to provide timely and adequate reasonable accommodations and auxiliary aids to them particularly in regards to technology in the classroom. As such, the DOJ investigated the allegations made in the complaint.<sup>130</sup>

At the conclusion of the investigation, the DOJ found that the student was excluded from full participation in the university's science and mathematics course offerings including Calculus I, Software Office Management, Discrete Structures, and Linear Algebra in violation of the ADA. Other than failing to make available to the complainant qualified notetakers, proctors, tutors and other reasonable accommodations and auxiliary aids, CUNY-JJCCJ excluded the student by failing to make technology in its courses accessible.<sup>131</sup> Specifically, CUNY-JJCCJ's Discrete Structures course where instructors assigned students to use WebAssign, a third-party online learning product, to complete assignments and other coursework online, caused the student difficulty in completing course assignments because the website was not capable of fully reading out mathematical and scientific equations and symbols. Additionally, the complainant did not receive usable versions of required textbooks and other course materials in a timely manner when courses began. Consequently, the DOJ determined that the student was not provided equal opportunities and benefits by the university in violation of Title II of the ADA.<sup>132</sup>

The DOJ determined that the university did not have adequate policies and procedures to vet websites during procurement and to ensure that accommodations including a usable version of coursework was provided to students in a timely manner. As a result, the DOJ found the student received poor grades in Calculus I, Software Office Management, Discrete Structures, and Linear Algebra and was delayed in taking more advanced coursework due to the failure of the university to provide adequate accommodations to the student.<sup>133</sup>

Consequently, CUNY entered into a comprehensive Voluntary Compliance Agreement with the United States. CUNY agreed to adopt and implement CUNY-wide policies to ensure the availability of notetakers, proctors, tutors and other relevant individuals with course-specific training and competency in courses, including technology courses, when necessary to provide reasonable accommodations and auxiliary aids to students with visual impairments.<sup>134</sup> The agreement also required the adoption of a CUNY-wide policy to ensure all course materials are available to a student registered with the College's Office of Accessibility Services by the first meeting of the course or within two weeks of the first meeting of the course. And lastly, the university system agreed to implement CUNY-wide policies

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<sup>129</sup> U.S. Dep't of Just., Press Release, Voluntary Compliance Agreement Between the United States of America and The City University of New York at 2 (2022), <https://www.justice.gov/crt/case-document/file/1559471/dl>.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 3.

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

<sup>133</sup> *Id.* at 3–4.

<sup>134</sup> *Id.* at 4.

that ensure third party online learning products, platforms, and applications utilized in CUNY courses are accessible to students with disabilities. Furthermore, the agreement also required CUNY to conduct training and to report compliance with the agreement, Section 504, and the ADA to the DOJ for two subsequent years following the resolution.<sup>135</sup> Not only was CUNY obligated to make these changes, but the student received \$10,000 in compensatory damages and a revision of their grades in Calculus I, Software Office Management, Discrete Structures, and Linear Algebra to pass/fail grades.<sup>136</sup> While this failure to accommodate complaint was resolved administratively, other claims are litigated in court.

In 2023, a jury in Los Angeles, California awarded two blind students compensatory damages and injunctive relief in their lawsuit against the Los Angeles Community College District (“LACCD”) for its failure to provide accommodations in the realm of technology.<sup>137</sup> Originating from a 2017 complaint, *Payan v. Los Angeles Community College District* arose when students Roy Payan and Portia Mason sued LACCD under Section 504 and Title II of the ADA for failing to accommodate their visual disabilities.<sup>138</sup> Payan and Mason alleged that LACCD discriminated against them by failing to provide each of them with accessible online course materials and software. Upon their enrollment at LACCD, the plaintiffs registered for disability accommodations through the college’s Office of Special Services (OSS). Both students received approved accommodations including tape-recorded lectures, preferential seating, materials in electronic text and test-taking accommodations. Of note, both students used the screen reading software “JAWS” to read electronic text in their courses. JAWS works by converting text and images into audio descriptions or a braille display.<sup>139</sup> Despite receiving approved accommodations, both students experienced individual inaccessibility barriers and barriers that extended to all blind students. Both students claim that online (1) class materials, (2) textbooks, (3) education technology, (4) websites, (5) computer applications and research databases at the LACCD library were all inaccessible to them.<sup>140</sup>

Firstly, both Payan and Mason alleged that they took LACCD classes where they were not provided in-class materials including handouts and PowerPoint presentations in an accessible format at the same time as their peers as required by the school’s Alternative Media Production Policy (“AMPP”). Secondly, both students alleged that they were unable to access certain textbooks required for their LACCD courses despite the AMPP’s affirmative duty to proactively evaluate the accessibility of its instructional material. In the case of Payan, OSS’s inability to digitize his math textbook led him to fall behind in the course.<sup>141</sup> Thirdly, despite the AMPP

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<sup>135</sup> *Id.* at 4–6.

<sup>136</sup> *Id.* at 6.

<sup>137</sup> Brown, Goldstein & Levy, BGL Team Secures \$240,000 Jury Verdict for Blind Students in Discrimination Lawsuit Against the Los Angeles Community College District (June 2, 2023), <https://brown-gold.com/news/bgl-laccd-verdict-lawsuit-victory/>.

<sup>138</sup> *Payan v. L.A. Cmty. Coll. Dist.*, 11 F.4th 729, 733 (9th Cir. 2021).

<sup>139</sup> *Id.* at 732.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

requirements and his approved accommodations, Payan took multiple LACCD courses that utilized inaccessible computer programs to facilitate class work. For example, in one math course, Payan was required to complete and submit homework on a website called MyMathLab which was not compatible with screen reading software, causing him to fall behind on his course work. Fourthly, both students identified several of LACCD's website resources that were inaccessible to students with visual impairments including LACCD's front-facing website and its student portal. Fifth, the plaintiffs identified that many of LACCD's library databases for student research were not compatible with screen reading software like JAWS. Mason alleged she was unable to complete a psychology research paper because the professor required use of an inaccessible research database for the assignment.<sup>142</sup>

After a two-day bench trial, the district court found that LACDD violated the ADA and Section 504 and entered a permanent injunction and final judgment for the plaintiffs. The plaintiffs were awarded \$40,000 in compensatory damages. The injunction required that LACCD (1) come into compliance with its Alternative Media Production Policy, (2) evaluate its library databases for accessibility and establish alternatives for students with vision disabilities, (3) designate a Dean of Educational Technology, (4) make the LACCD website accessible to students with vision impairments, and (5) assess educational materials for accessibility before acquisition.<sup>143</sup>

The resolutions and cases involving the University of Cincinnati, University of Phoenix, Harvard, MIT, CUNY, and LAACD are important reminders to colleges and universities that they are accountable under Section 504 and the ADA when it comes to providing accessible technology and digital resources to students. As a result of these cases and others like them, the DOJ and DOE released a "Dear Colleague" Letter on May 19, 2023.<sup>144</sup> The letter identifies various digital technologies and content that need to be accessible for students with disabilities to have equal access to higher education. The letter indicates that websites, third-party online platforms, learning platforms like edX, Coursera, and Kadenze, podcasts and videos, social media, third-party platforms like YouTube, Spotify, and Apple Podcasts, and content including lectures, conferences, sporting events, admissions information, and graduation ceremonies should be provided in accessible formats to students and the public with disabilities.<sup>145</sup> The letter advises colleges and universities that they are obligated to provide equal opportunities for people with disabilities to participate and benefit from their online services, programs, and activities.<sup>146</sup> Despite this guidance, student claims of inaccessibility in coursework, textbooks, university websites, and third-party platforms will continue if postsecondary

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<sup>142</sup> *Id.* at 732–33.

<sup>143</sup> *Id.* at 733.

<sup>144</sup> U.S. Dep't of Just., Civil Rights Division & Dep't of Edu., Office for Civil Rights, Dear Colleague Letter on Online Accessibility at Postsecondary Inst. (May 19, 2023), <https://www.justice.gov/crt/case-document/file/1584491/dl>.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

institutions fail to update their policies and procedures to be in compliance with Section 504 and the ADA.

#### V. HOW POSTSECONDARY INSTITUTIONS CAN PROVIDE ACCESSIBLE TECHNOLOGY TO STUDENTS WITH DISABILITIES IN THE CLASSROOM

To prevent against costly litigation, federal fines, and provide students with disabilities their civil right to an equal education, private and public colleges and universities are well advised to rethink and, if necessary, revise their policies and procedures to provide digital accessibility for students with disabilities. While the University of Cincinnati, University of Phoenix, MIT, Harvard, CUNY and LACCD revised their policies and procedures in order to provide digital accommodations and accessible technology to people with disabilities because of complaints brought against them, postsecondary institutions may benefit from reevaluating and changing their web accessibility policies and procedures proactively. Comprehensive and detailed policies and procedures regarding technology and digital accessibility will provide clear direction for a school's administration, faculty, and students to ensure that all students with disabilities have access to an equal education as required by Section 504 and the ADA.

Additionally, colleges and universities are well-advised to revise their policies due to new developments in law and regulations. In 2024, “[t]he U.S. Department of Justice . . . formally added new language to Title II of the Americans with Disabilities Act that — for the first time — lays out specific technical standards for web content that public colleges and other government entities need to meet.”<sup>147</sup> Therefore, public colleges and universities will need to remedy their existing digital content to meet the new standards. In fact, many schools were only given a year and a half to implement the internationally recognized Web Content Accessibility Guidelines (“WCAG”) 2.1, published in 2018.<sup>148</sup> Changing regulations from the U.S. Department of Health and Human Services will also affect private colleges who receive their funding and require those schools to implement the same WCAG 2.1 accessibility standards.<sup>149</sup> Therefore, by establishing clear web accessibility policies and procedures colleges and universities can avoid governmental sanctions, costly litigation, and provide students with disabilities their civil right to an equitable education.

#### *Proactive Policy Implementation*

A model example of proactive policy implementation is the California State University (“CSU”) system. In 2018, the Chancellor of CSU announced the adoption of a system wide initiative to ensure access to

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<sup>147</sup> Taylor Swaak, *Colleges Must Revise Millions of Web Pages. It Will Be 'Painful.'*, THE CHRON. OF HIGHER EDUC. (Dec. 6, 2024), <https://www.chronicle.com/article/colleges-must-revise-millions-of-web-pages-it-will-be-painful>.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

technology for people with disabilities called the “Accessible Technology Initiative” (“ATI”) as a part of Executive Order 1111 (“E.O. 1111”).<sup>150</sup> E.O. 1111’s purpose was to “make information technology resources and services accessible to all CSU students, faculty, staff, and the general public regardless of disability.”<sup>151</sup> The initiative marked a complete overhaul of CSU’s system. E.O. 1111 instituted policies to ensure that CSU’s websites, apps, and all digital content CSU deploys systemwide are accessible.<sup>152</sup> As a part of E.O. 1111, CSU also developed a procurement process to ensure that all Information and Communication Technology (“ICT”) the university system acquires is accessible. Additionally, CSU’s Accessible Procurement process requires an integrated Information Technology (“IT”) review which conducts a comprehensive check of each system’s functionality and accessibility. CSU also instituted vendor requirements to ensure compliance with its ICT policies. In addition to implementing new accessible policies, E.O. 1111 called for funding, resources, and training to be provided to its faculty, staff, and third parties to ensure compliance with the new policies.<sup>153</sup>

Not only did CSU completely revamp its policies and procedures regarding accessible technology, but its Northridge campus holds an annual CSUN Assistive Technology Conference to provide an interactive setting for researchers, educators, users, and other participants “to share knowledge and best practices in the field of assistive technology.”<sup>154</sup> The conference highlights cutting edge technology and solutions to allow for the full participation of persons with disabilities in all settings including education. With over 5,000 people attending in 2019, prior to the COVID-19 pandemic, the conference is the largest of its kind internationally.<sup>155</sup> Overall, CSU represents a quintessential example of proactive web accessibility policymaking that a college or university can do to ensure compliance with Section 504 and the ADA.

When revising their technology and disability accommodations policies and procedures, colleges and universities may benefit from considering adding several elements to combat the digital divide and ensure digital accessibility for students with disabilities. First, colleges and universities should include a provision that defines and states the university’s obligations under Section 504 and the ADA relating to technology and digital accessibility for students with disabilities. Next, the university should adopt the international web accessibility standard, WCAG 2.1. Thereby, the university should establish a policy and procedure for auditing its own websites and those third-party websites and platforms used by professors and other faculty to ensure that they are accessible or that an alternative platform can be offered to students with disabilities. Additionally, the

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<sup>150</sup> Timothy P. White, Executive Order 1111, CALIFORNIA STATE UNIVERSITY (May 23, 2018) <https://www.calstatela.edu/sites/default/files/eo-1111.pdf>.

<sup>151</sup> *Id.* at 6.

<sup>152</sup> *Id.* at 2–5.

<sup>153</sup> *Id.*

<sup>154</sup> California State University Northridge, *Conference*, [HTTPS://WWW.CSUN.EDU/COD/CONFERENCE](https://www.csun.edu/cod/conference).

<sup>155</sup> *40th Anniversary of the CSUN Assistive Tech. Conf.*, CSUN (last visited March 11, 2026), <https://www.csun.edu/academic-affairs/office-provost/provosts-newsletter/provosts-newsletter-march-2025/40th-anniversary-csun-assistive-technology-conference>.

institution should implement a procurement policy and procedure to determine whether websites, platforms, and other digital resources are accessible or whether an alternative platform can be offered to students with disabilities before procuring that website or platform. More generally, the school should ensure that it has a clear policy for registering for and requesting disability accommodations. Relatedly, the school should provide a clear and reasonable timeframe as to when a student can expect to receive modified digital materials or textbooks if an accommodation is approved after a course has begun. Institutions should also create an office of compliance within their disabilities services offices to ensure compliance with Section 504, the ADA, and the institution's own internal policies while also providing a clear contact for students should they need assistance navigating disability accommodations, especially regarding web accessibility.

Overall, the rise of the Internet and technology has impacted every aspect of society, especially education. As more and more colleges and universities move their class materials, textbooks, research databases, and classes online, postsecondary institutions need to consider the impact of web inaccessibility on students with disabilities. To combat the digital divide and ensure compliance with Section 504 and the ADA, public and private postsecondary institutions need to reconsider and, if necessary, revise their technology and digital accessibility policies and procedures to ensure that students with disabilities receive the same educational benefits and opportunities as their peers.

# A “Perfect Storm”: Convergent Political Forces Threatening the University

RISA L. LIEBERWITZ\*

## I. INTRODUCTION

Academic freedom has long been accepted as essential to faculty’s ability to engage in teaching and research that will fulfill the public mission of the university.<sup>1</sup> Building on the AAUP’s 1915 Declaration of Academic Freedom and Tenure and its 1940 Statement on Academic Freedom and Tenure, universities across the U.S. have internalized the professional norms of academic freedom and the job security of tenure that is needed to protect faculty exercise of this freedom in their teaching, research, public speech, and faculty governance activities. The university’s public mission also depends on protecting its institutional independence from conflicts of interests that could compromise its commitment to serving the public interest.

Starting in the first Trump administration, there have been widespread political attacks on universities and these traditional norms of independence of universities, the exercise of faculty academic freedom, and collective faculty governance. Universities have experienced an onslaught of federal and state legislative and administrative actions that interfere with university autonomy and faculty control over student admissions, academic programs, and faculty appointments. Facing threats and actual massive cuts of federal research funds, many universities have engaged in tactics of appeasement or outright capitulation to political demands.

What explains these recent attacks on higher education and the degree of their success in undermining the values, norms, and goals of universities? This article seeks to answer this question by examining the current moment in the broader context of institutional changes in the university that have occurred since the 1980s, which have weakened the ability and the will of university administrations to resist the current attacks on the traditional norms of university independence and faculty academic freedom.

Section II of the article, “Academic freedom, freedom of expression, and diversity in higher education,” sets forth the origins and adoption of professional norms of faculty academic freedom as central to the university’s ability to fulfill its public mission. This discussion also explores the expansion of faculty and student diversity as being essential to broadening and deepening academic studies and research in universities. Section III, “Corporatization of higher education: Laying the groundwork to weaken academic freedom,” analyzes the “corporatization” of the university since the 1980s, as neoliberal privatization policies have influenced

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<sup>1</sup> The term “university” is used in this article to encompass colleges and universities, unless otherwise noted.

universities to make structural changes modeled on private businesses. Corporatization is marked by major structural changes in universities, including commercialization of academic research and increasingly close relationships with for-profit business, commodification of teaching by a largely contingent faculty, and an expanded university administration that engages in top-down hierarchical decision-making. As the university has adopted structures consistent with an identity as a corporate market actor, these institutional changes have undermined faculty academic freedom and created conflicts of interests with the public mission of the university.

Having weakened the university's values and norms of an independent institution serving a public mission, corporatization has made the university more vulnerable to external political interference. Section IV, "Attacks on Higher Education: Trump's first administration" and Section V, "Escalating Direct Assaults on Higher Education: Trump's second administration" describe and analyze the Trump administration's agenda against universities and its implementation through Supreme Court appointments, Executive Orders, and federal agency use of federal Title VI and Title IX anti-discrimination investigations to coerce universities to enter agreements to dismantle academic programs that engage in education and research in area studies about the Middle East and about racial and gender inequalities. Section IV also discusses the external attacks on public universities at the state level through legislation and regulation modeled on the Trump agenda.

Section VI brings the earlier sections together to analyze how these multiple social, political, and economic conditions created "the 'perfect storm' for the governmental attack on universities." This section also explores the reasons that university administrations have chosen to respond individually, with most engaging in appeasement or capitulation to the Trump administration's demands, rather than engaging in a collective resistance to the attacks. The discussion addresses, as well, the damaging consequences of university administrations' choice. The alternative of resistance is explored through an analysis of collective resistance by faculty and student organizations and unions engaged in multiple tactics against the federal and state government attacks, including litigation and grassroots organizing on campuses.

## II. ACADEMIC FREEDOM, FREEDOM OF EXPRESSION, AND DIVERSITY IN HIGHER EDUCATION

### *A. Origins and expansion of academic freedom*

Current concepts of academic freedom in the US have their origins in the early twentieth century with the founding of the AAUP in 1915. As corporate wealth and power expanded during capitalist industrialization, university administrations were acceding to demands from industrialist donors to discharge faculty whose academic work and public speech did not align with the donors' interests. The AAUP was formed as a collective response to university administrations' actions. This also coincided with the development of social science disciplines, which expanded the scope of

critique of societal conditions. The AAUP’s 1915 *Declaration of Principles*<sup>2</sup> demanded faculty academic freedom and independence from the university administration and financial supporters of the university.<sup>3</sup> The Declaration described a broad scope of academic freedom in teaching, research, and public or “extramural” speech as essential for faculty to fulfill the public mission of the university.<sup>4</sup> Protection of academic freedom, the Declaration further asserts, relies on the lifetime job security of tenure, with due process prior to discipline or dismissal of a faculty member.<sup>5</sup> The Declaration also describes collective aspects of academic freedom through faculty governance, which respects faculty expertise and independence carried out through peer review to evaluate colleagues’ competence and qualifications for faculty appointments and promotion to a tenured status.<sup>6</sup>

The AAUP reiterated its call for faculty academic freedom, tenure, and shared governance in its *1940 Statement of Principles on Academic Freedom and Tenure*,<sup>7</sup> which was issued jointly by the AAUP and the Association of American Colleges (AAU). The strength and endurance of these employment conditions are found in their long-time recognition as the norms of the academic profession that have been internalized by faculty, adopted over the decades in public and private universities throughout the U.S., and endorsed by over 250 academic professional organizations and universities.<sup>8</sup> In this way, academic freedom in its full scope can best be described as a set of “extra-legal” rights developed by the academic profession in the public interest.<sup>9</sup>

In 1967, the US Supreme Court described academic freedom as being “a special concern of the First Amendment.”<sup>10</sup> Despite the Court’s recognition that academic freedom is crucial to creating an environment of free inquiry in colleges and universities, the Court’s interpretations have limited its scope and depth as a constitutional protection for faculty. Several factors explain this. First, the threshold requirement of governmental or “state action” to trigger First Amendment freedoms and due process rights makes constitutional academic freedom inapplicable to private university

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<sup>2</sup> AM. ASS’N OF UNIV. PROFESSORS, *1915 Declaration of Principles*, in POL’Y DOCUMENTS & REP., 3 (11<sup>th</sup> ed. 2015).

<sup>3</sup> Risa L. Lieberwitz, *Faculty in the Corporate University: Professional Identity, Law, and Collective Action*, 16 CORNELL J. OF L. & PUB. POL’Y 263, 269 (2007) [hereinafter Lieberwitz, *Faculty in the Corporate University*].

<sup>4</sup> *Id.*

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

<sup>6</sup> *Id.*

<sup>7</sup> Am. Ass’n of Univ. Professors, *1940 Statement of Principles on Academic Freedom and Tenure with 1970 Interpretive Comments*, POL’Y DOCUMENTS & REP., 13 (11<sup>th</sup> ed. 2015) <https://www.aaup.org/reports-publications/aaup-policies-reports/policy-statements/1940-statement-principles-academic>.

<sup>8</sup> Risa L. Lieberwitz, *Corporatization of Higher Education: A Crisis of Labor and Democracy*, in THE CAMBRIDGE HANDBOOK OF LABOR AND DEMOCRACY, 321 (Angela B. Cornell & Mark Barenberg eds., 2022).

<sup>9</sup> Risa L. Lieberwitz, *The Corporatization of the University: Distance Learning at the Cost of Academic Freedom?*, 12 B.U. PUB. INT. L. J. 73, 89 (2002) [hereinafter Lieberwitz, *The Corporatization of the University*].

<sup>10</sup> *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967). See also, *Sweezy v. New Hampshire*, 354 U.S. 234 (1957) (containing an early development of a concept of academic freedom, without explicitly adopting academic freedom as a constitutional right).

faculty in relation to their university employer.<sup>11</sup> Even in public universities constitutional protection is limited by Supreme Court decisions that significantly narrow the scope of First Amendment protection for public employees vis-à-vis their government employers.<sup>12</sup> This deference to public employers' discretion in disciplining employees for their speech is an outgrowth of the common law doctrine of "employment at will," which gives employers unilateral power to hire or fire "at will" unless limited by constitutional, statutory, or contractual restrictions. The Supreme Court has steadily shifted its constitutional interpretations in public employee speech cases to mirror common law employment at will. In *Garcetti v. Ceballos*,<sup>13</sup> the Court held that public employers may constitutionally discipline or discharge public employees for their speech "pursuant to their official duties."<sup>14</sup> Given the contradiction between this holding and the role of faculty academic freedom in carrying out their duties, the Court suggested that university faculty teaching and scholarship may be excepted from the *Garcetti* holding.<sup>15</sup> The lower federal courts have been mixed in their application of this potential exception.<sup>16</sup>

In contrast, "extra-legal" rights of academic freedom and due process—which can be called "professional academic freedom"—apply equally to faculty in public and private universities.<sup>17</sup> Universities have widely adopted the AAUP's broad coverage of academic freedom to include teaching, research, and extramural speech and association.<sup>18</sup> The broad scope of academic freedom has been essential to protect faculty expression in fraught political times, as many AAUP investigations of alleged violations of academic freedom relate to extramural speech, including recent cases concerning faculty speech on social media.<sup>19</sup> Academic freedom is strengthened by faculty participation in shared governance, which describes faculty as having primary collective responsibility over academic matters, such as academic programs, and shared responsibility over other university matters. The AAUP describes shared governance as "inextricably linked" to academic freedom.<sup>20</sup> Such "intramural speech" enables faculty to engage in

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<sup>11</sup> Lieberwitz, *The Corporatization of the University*, *supra* note 9, at 89.

<sup>12</sup> *Id.* at 89–90. *See also*, *Pickering v. Bd. of Educ.*, 391 US 563 (1968).

<sup>13</sup> *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

<sup>14</sup> *Id.* at 421.

<sup>15</sup> *Id.* at 425. *See*, Mary-Rose Papandrea, Keynote Address: Universities and Unresolved Free Speech Challenges, 23 FIRST AMEND. L. REV. 293, 310–17 (2024).

<sup>16</sup> *See*, AM. ASS'N OF UNIV. PROFESSORS, *Protecting an Independent Faculty Voice: Academic Freedom After Garcetti v. Ceballos* (2023), *citing*, *Heim v. Daniel*, 81 F.4th 212 (2d Cir. 2023); *Meriwether v. Hartop*, 992 F.3d 492, 506–07 (6th Cir. 2021); *Demers v. Austin*, 746 F.3d 402, 406, 412 (9th Cir. 2014); *Adams v. Trs. of the Univ. of N. Carolina-Wilmington*, 640 F.3d 550, 562 (4th Cir. 2011) <https://www.aaup.org/reports-publications/aaup-policies-reports/topical-reports/protecting-independent-faculty-voice#fn6>.

<sup>17</sup> Walter P. Metzger, *Profession and Constitution: Two Definitions of Academic Freedom in America*, 66 TEX. L. REV. 1265, 1291 (1988).

<sup>18</sup> AM. ASS'N OF UNIV. PROFESSORS, *Committee A Statement on Extramural Utterances*, in POL'Y DOCUMENTS & REP., *supra* note 2, at 31; Lieberwitz, *supra* note 8.

<sup>19</sup> AM. ASS'N OF UNIV. PROFESSORS, *Academic Freedom and Tenure: The University of Illinois at Urbana-Champaign* (Apr. 2015), [www.aaup.org/report/UIUC](http://www.aaup.org/report/UIUC).

<sup>20</sup> AM. ASS'N OF UNIV. PROFESSORS, *On the Relationship of Faculty Governance to Academic Freedom*, in POLICY DOCUMENTS AND REPORTS (*supra* note 2), at 125.

collective self-governance that protects faculty freedom to dissent and act independently from the university administration.<sup>21</sup>

Faculty collective autonomy over academic matters is based on the expertise of faculty to engage in policy making, as well as to engage in the peer review process in faculty hiring and promotions.<sup>22</sup> In addition, “academic due process” provides safeguards to faculty in multiple contexts, including rights to appeal from negative promotion decisions, protection against censorship or retaliation by either their colleagues or the administration, and protections of fair investigations and hearings for faculty charged with misconduct that may result in severe sanctions such as suspension or dismissal.<sup>23</sup> Such due process protections are needed along with academic freedom, to deter administrators from bringing or sanctioning non-meritorious charges against faculty. Further, where academic freedom and due process protections are incorporated into university policies, individual employment contracts, or collective bargaining agreements, they may be legally enforceable contracts.<sup>24</sup>

*B. Academic freedom, broader access to higher education, and expanded academic programs*

Realizing the public mission of the university depends on creating broad access to students to pursue their interests. The post-World War II period marked the start of public funding at levels that supported broad national growth in universities and significantly expanded student access to higher education.<sup>25</sup> Although the federal GI Bill created opportunities for returning members of the armed forces to attend universities, the benefits went primarily to white men.<sup>26</sup> In what has been called the “massification” of higher education from 1960 through the mid-1970s, the states expanded the number and size of two-year and four-year public universities, to maintain low tuition levels with state and federal funding.<sup>27</sup> These governmental actions expanded access to a broader range of students, with increased enrollment for working class students, women, and students of color.<sup>28</sup> This more diverse student body brought a wide range of ideas and experience to the university, including their concerns about social justice issues. In the 1960s, this led to student activism, on and off campus, in social movements for civil rights, Black Power, feminism, and resistance to the Vietnam War.<sup>29</sup> These interests led, as well, to student activism concerning the university’s structure and functions, including student demands for their

<sup>21</sup> *Id.* at 123–25.

<sup>22</sup> Lieberwitz, *supra* note 8, at 319.

<sup>23</sup> AM. ASS’N OF UNIV. PROFESSORS, *Recommended Institutional Regulations on Academic Freedom and Tenure*, in POL’Y DOCUMENTS AND REPORTS (*supra* note 2), at 79–90; *supra* note 8, at 322.

<sup>24</sup> AM. ASS’N OF UNIV. PROFESSORS, *Faculty Handbooks as Enforceable Contracts* (2009), <https://www.aaup.org/reports-publications/aaup-policies-reports/topical-reports/protecting-independent-faculty-voice#fn6>.

<sup>25</sup> Risa L. Lieberwitz, *Vulnerability Theory and Higher Education*, 55 THE L. TEACHER 5, 8 (2021) [hereinafter *Vulnerability Theory*]; Lieberwitz, *supra* note 8, at 323.

<sup>26</sup> *Vulnerability Theory*, *supra* note 25, at 8.

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

<sup>28</sup> *Id.* at 9.

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

participation in university decisions in developing new academic programs in gender, race, and ethnic studies.<sup>30</sup> In its 2024 statement *On Eliminating Discrimination and Achieving Equality in Higher Education*, the AAUP emphasized the importance of academic freedom and faculty diversity to make such program expansion possible, which in turn, enables the university to continue on a path toward academic excellence: “Broad representation of faculty members—in terms of gender, race, and ethnicity—is essential to fulfill the promise of academic freedom to deepen existing disciplinary approaches and open new disciplinary paths, including the study of inequality and discrimination, methods for dismantling them, and strategies for reform and fundamental change.”<sup>31</sup>

The post-World War II period in the US also marked the expansion of federal government public funding for academic research, particularly in science and engineering. Since 1960, federal funding has constituted the majority of university research support.<sup>32</sup> Student activism has also addressed academic research, including demands for transparency and ethical accountability in academic research programs.<sup>33</sup>

### III. CORPORATIZATION OF HIGHER EDUCATION: LAYING THE GROUNDWORK TO WEAKEN ACADEMIC FREEDOM AND THE PUBLIC MISSION OF THE UNIVERSITY

Explaining the external attacks on the university by the Trump administrations must begin with a review of the internal institutional changes in the university since 1980s, known as the “corporatization” of the university.<sup>34</sup> While higher education has never been insulated from the power and influence of wealthy donors, the Reagan administration’s neoliberal policies launched a major shift in university goals and structure towards private market interests.<sup>35</sup> Corporatization is marked by major changes in universities throughout the US: expanding administration, shrinking tenure system, top-down hierarchical decision-making, skyrocketing tuition and student debt, close relations with for-profit businesses, commercialization of academic research, and commodification of teaching.<sup>36</sup> These structural changes have moved the university toward an identity as a market actor serving private interests, which conflicts with the public mission of the university.<sup>37</sup> This conflict of interests has undermined the fundamental principles and norms of faculty academic freedom in research, teaching, governance, and extramural speech protected by the job security of tenure.<sup>38</sup> Having weakened the university’s values and norms of

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<sup>30</sup> *Id.*

<sup>31</sup> AM. ASS’N OF UNIV. PROFESSORS, *On Eliminating Discrimination and Achieving Equality in Higher Education*, 52 (2024).

<sup>32</sup> Lieberwitz, *supra* note 8, at 324.

<sup>33</sup> *Vulnerability Theory*, *supra* note 25, at 9.

<sup>34</sup> Lieberwitz, *supra* note 8, at 325; Lieberwitz, *supra* note 3, at 264; Lieberwitz, *supra* note 9, at 74.

<sup>35</sup> Lieberwitz, *supra* note 8, at 324.

<sup>36</sup> *Id.*; *Vulnerability Theory*, *supra* note 25, at 13–19.

<sup>37</sup> *Supra* note 8, at 325; *Vulnerability Theory and Higher Education* *supra* note 25 at 13–19.

<sup>38</sup> *Supra* note 8, at 326; *Vulnerability Theory and Higher Education* *supra* note 25 at 13–19.

an independent institution serving a public mission, corporatization has made the university more vulnerable to external attacks, including political interference by the Trump administration and federal agencies, as well as by state legislation intruding on the university’s autonomy. Corporatization has weakened universities’ ability and resolve to resist these attacks.

The Reagan era launched the attack on “big government” through deregulation and privatization of public functions.<sup>39</sup> In higher education, the policies of privatization had powerful negative impacts. Public funding plummeted and student debt climbed sharply, with negative effects on students whose financial circumstances put pressure on them to pursue higher education as a “return on investment” rather than as an intellectual exploration of a broad range of academic courses, including the humanities.<sup>40</sup> In 1980, Congress passed the Bayh-Dole Act, which gave universities the right to patent their federally funded research results rather than placing them in the public domain.<sup>41</sup> In response, university technology transfer offices were expanded to “scour [university] labs”<sup>42</sup> for faculty research that could be commercialized through university patents, which could then be exclusively licensed to for-profit corporations, including big pharma and agribusiness.<sup>43</sup> The university would share the profits through royalties to the faculty researcher.<sup>44</sup> These arrangements create a conflict of interests for the university and the faculty researcher, whose private financial interests are now at odds with the public mission of the university.<sup>45</sup> “Strategic corporate alliances” create similar conflicts of interests, where universities receive high levels of corporate funding from the likes of Monsanto and Novartis, in exchange for corporate rights of first refusal on exclusive licensing.<sup>46</sup> Studies have revealed the impact of these conflicts of interests, including that corporately financed researchers are significantly more likely than researchers not funded by the corporation to reach favorable results about a corporation’s product – including pharmaceutical products.<sup>47</sup>

Further mirroring a for-profit corporate identity, universities have adopted an internal labor model that shrinks the tenure system and thus the job security that is essential to faculty independence and academic freedom.<sup>48</sup> This institutional change has created a predominately contingent faculty workforce in the US. Nationally, the percentage of tenure-track/tenured faculty positions has plummeted from 78 percent in 1969,<sup>49</sup> to

<sup>39</sup> *Supra* note 8, at 324.

<sup>40</sup> *Supra* note 8, at 324–25.

<sup>41</sup> Risa L. Lieberwitz, *Confronting the Privatization and Commercialization of Academic Research: An Analysis of Social Implications at the Local, National, and Global Levels*, 12 IND. J. OF GLOB. LEGAL STUD. 109, 120 (2005).

<sup>42</sup> *Id.* at 122 (citing DEREK BOK, UNIVERSITIES IN THE MARKETPLACE: THE COMMERCIALIZATION OF HIGHER EDUCATION 141 (2003)).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 124 n.77.

<sup>45</sup> *Id.* at 119–22.

<sup>46</sup> *Id.* at 123–24.

<sup>47</sup> *Id.* at 135–36.

<sup>48</sup> *Supra* note 8, at 327.

<sup>49</sup> Pullias Center for Higher Education, *The Delphi Project on the Changing Faculty and Student Success: National Trends for Faculty Composition Over Time 5* (2013), <https://pullias.usc.edu/download/national-trends-for-faculty-composition-over-time/>.

53 percent in 1987,<sup>50</sup> to 32 percent in 2022.<sup>51</sup> University administrations have grown precipitously, by 140 percent between the years 1976 and 2015, as contrasted with full-time faculty growth of 86 percent in that period.<sup>52</sup> University administrations have used the resulting shift in power to impose unilateral control over faculty and to override collective faculty governance.<sup>53</sup>

Since the 1960s, faculty unionization has grown as a means of regaining collective faculty governance, with a current unionization rate of 52 percent of all public two-year college faculty members and 33 percent of four-year public university faculty members.<sup>54</sup> This has almost solely benefited public university faculty covered by state collective bargaining laws. Due to the 1980 U.S. Supreme Court decision in *Yeshiva University*,<sup>55</sup> private university faculty unionization has been severely limited, with a current rate of 8 percent.<sup>56</sup> The *Yeshiva* Court held that faculty collective autonomy through shared governance made most private university faculty “managerial” employees, excluded from rights to unionize under the National Labor Relations Act.<sup>57</sup> The four dissenting Justices noted the flaw in this reasoning, as faculty had gained collective autonomy from their collective demands for academic freedom, not from university administration and faculty alignment of interests. With the weakening of shared governance and the growing contingent faculty workforce, however, private university faculty unionization has become a greater possibility even under *Yeshiva*.<sup>58</sup> Since 2012, there has been a 56 percent growth rate in private universities, with almost three-quarters of new collective bargaining units composed of only non-tenure-track members.<sup>59</sup>

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<sup>50</sup> Am. Ass’n of Univ. Professors, *The Inclusion in Governance of Faculty Members Holding Contingent Appointments* 206 (2024), <https://www.aaup.org/reports-publications/aaup-policies-reports/topical-reports/inclusion-governance-faculty-members#BTT1>.

<sup>51</sup> Am. Ass’n. of Univ. Professors, *The Inclusion in Governance of Faculty Members Holding Contingent Appointments* 206 (2024), <https://www.aaup.org/reports-publications/aaup-policies-reports/topical-reports/inclusion-governance-faculty-members#BTT1>.

<sup>52</sup> *Supra* note 8, at 327.

<sup>53</sup> *Id.*; *Faculty in the Corporate University*, *supra* note 3, at 303-04; Am. Ass’n. of Univ. Professors, *The 2021 AAUP Shared Governance Survey: Findings on Faculty Roles by Decision-Making Area* (Jul. 2021), <https://www.aaup.org/reports-publications/aaup-policies-reports/topical-reports/college-and-university-governance/2021>.

<sup>54</sup> Risa L. Lieberwitz, *Faculty Unionization and the Continuing Contradiction of Yeshiva*, 110 *ACADEME* 10 (Fall 2024), <https://www.aaup.org/academe/issues/fall-2024/faculty-unionization-and-continuing-contradiction-yeshiva> (citing William A. Herbert, Jacob Apkarian & Joseph van der Naald, *2024 Directory of Bargaining Agents and Contracts in Institutions of Higher Education*, NAT’L CTR. FOR THE STUDY OF COLLECTIVE BARGAINING IN HIGHER EDUC. AND THE PROFESSIONS 1, 21 (2024), <https://www.hunter.cuny.edu/national-center/articles-and-publications/#directory>).

<sup>55</sup> *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 691 (1980).

<sup>56</sup> Lieberwitz *supra* note 54.

<sup>57</sup> 29 U.S.C. §§ 151–169.

<sup>58</sup> Under the Obama administration, the National Labor Relations Board made some progress toward increasing private university faculty rights to unionize by interpreting *Yeshiva* in the context of corporatization trends that have weakened faculty collective governance power in universities. *Pacific Lutheran University*, 361 *NLRB* No. 157 (2014).

<sup>59</sup> Lieberwitz, *supra* note 54.

#### IV. ATTACKS ON HIGHER EDUCATION: TRUMP’S FIRST ADMINISTRATION

In both of his presidential administrations, Trump has steadily expanded his attacks on higher education as part of his broader agenda against racial and gender equality and immigrant rights. The following sections lay out the ways in which the Trump agenda has negatively affected universities’ commitment to furthering such equality goals and more general goals of academic freedom as part of their public mission.

##### A. Trump’s Supreme Court appointments

Trump’s ability to secure a conservative majority on the Supreme Court has resulted in judicial decisions that have advanced his political agenda. While right-wing campaigns against the labor movement began long before the 2016 election,<sup>60</sup> the Trump administration has fueled those efforts to undermine unionization. In its 5-4 decision *Janus v. AFSCME, Council 31*<sup>61</sup> in 2018, the Supreme Court held that union security clauses in public sector collective bargaining violate the First Amendment, thereby constitutionalizing “right to work” laws in public employment.<sup>62</sup> Union security clauses include collective bargaining provisions that require employees who are covered by and benefit from a collective bargaining agreement, but who do not join the union, to pay their fair share of union dues.<sup>63</sup> Public sector unions have survived *Janus*, with some unions able to offset the loss of union security clauses by engaging in active organizing to encourage employees to become union members.<sup>64</sup>

The Supreme Court’s conservative supermajority’s decisions have advanced Trump’s political agenda, even under the Biden presidency. In *Students for Fair Admissions v. Harvard*,<sup>65</sup> the Court held, 6-3, that racially based affirmative action in university student admissions is prohibited under the Fourteenth Amendment Equal Protection Clause and Title VI of the Civil Rights Act of 1964.<sup>66</sup> This holding dealt a direct blow to progress that had been made toward racial diversity in higher education institutions. The Court’s opinion rejected the position that race could be considered as a positive factor to promote diversity in student admissions. As the AAUP

<sup>60</sup> In the first decade of the 2000’s, multiple states adopted legislation weakening state public sector collective bargaining, including Wisconsin’s 2011 elimination of collective bargaining rights for University of Wisconsin system employees. Risa L. Lieberwitz, *Contract as Public Law: The Public Nature of Collective Bargaining*, in VULNERABILITY AND THE LEGAL ORGANIZATION OF WORK, 122, 137-38, M.A. Fineman & J. Fineman eds. (Routledge 2018).

Twenty-six states now have “right to work” laws prohibiting agency shop/fair share fees in public or private unionized workplaces. Nat’l. Conf. of State Legislatures, “*Right-to-Work*” Resources (Dec. 19, 2023), <https://www.ncsl.org/labor-and-employment/right-to-work-resources>.

<sup>61</sup> *Janus v. AFSCME, Council 31*, 585 U.S. 878 (2018).

<sup>62</sup> The Right to Work Foundation and the State Policy Network, which engage in well-funded campaigns for “right-to-work” laws, described its intent to use the *Janus* decision “to deliver a mortal blow” to public sector unions. Risa L. Lieberwitz, *Fighting for Our Rights Today, Building Our Strength for Tomorrow*, 105 ACADEME 8, 12 (2019).

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

<sup>64</sup> Ken Girardin, *The Janus Effect*, Empire Center (Feb. 21, 2023), <https://www.empirecenter.org/publications/the-janus-effect/>.

<sup>65</sup> *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 600 U.S. 181 (2023).

<sup>66</sup> *Id.* at 230.

stated in its analysis of the majority opinion, “While scarcely acknowledging the existence of discrimination against minorities, Chief Justice John Roberts, writing for the majority, emphasized that ‘college admissions are zero-sum. A benefit provided to some applicants but not to others necessarily advantages the former group at the expense of the latter.’”<sup>67</sup> Further, the decision overrode universities’ institutional academic freedom to improve higher education institutions through admissions programs that consider race as one factor in a holistic admissions process that increases diversity of the student body.<sup>68</sup> In her dissenting opinion, Justice Sotomayor explains that “[the] compelling interest in student body diversity is grounded not only in the Court’s equal protection jurisprudence but also in principles of ‘academic freedom,’ which “‘long [have] been viewed as a special concern of the First Amendment.’”<sup>69</sup>

The *SFFA v. Harvard* decision signals the Court’s willingness to interpret constitutional and statutory rights in ways that reinforce the status quo of racial inequality. As Justice Sotomayor stated in her dissenting opinion, “[T]he Court cements a superficial rule of colorblindness as a constitutional principle in an endemically segregated society where race has always mattered and continues to matter. The Court subverts the constitutional guarantee of equal protection by further entrenching racial inequality in education, the very foundation of our democratic government and pluralistic society.”<sup>70</sup>

The Court’s decision has had a major impact on student admissions. Although the overall enrollment of Black and Latino students in universities increased in the year following the *SFFA v. Harvard* decision, Black and Latino enrollment declined or remained flat in almost all highly selective private and public colleges and universities.<sup>71</sup> The Court’s decision also laid the groundwork for Equal Protection and Title VI challenges beyond student admissions programs, with lawsuits seeking to apply the decision to end scholarship programs<sup>72</sup> and diversity, equity and inclusion (DEI) offices and

<sup>67</sup> Am. Ass’n of Univ. Professors, *Students for Fair Admissions, Inc. v. President & Fellow of Harv. Coll.*, quoting Chief Justice Roberts, <https://www.aaup.org/brief/students-fair-admissions-inc-v-president-fellows-harvard-coll-600-us-no-20-1199-june-29-2023>.

<sup>68</sup> *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181 (2023).

<sup>69</sup> Sotomayor, *supra* note 65, at 332. (Sotomayor, joined by Kagan and Jackson, dissenting) (quoting *Grutter v. Bollinger*, 539 U.S. 306, 324, quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 324 (1978)).

<sup>70</sup> Sotomayor, *supra* note 65, at 318–19. (Sotomayor, joined by Kagan and Jackson, dissenting).

<sup>71</sup> Meredith Kolodner and Marina Villeneuve, *After Affirmative Action: Four Takeaways – and Puzzles – From College Admissions Data*, The Hechinger Rep. (Feb. 12, 2026), <https://hechingerreport.org/after-affirmative-action-takeaways-and-puzzles-from-college-admissions-data/>. See also, Johanna Alonso, *The Changing Demographics of Admitted Students*, INSIDE HIGHER ED (Jul. 11, 2025), <https://www.insidehighered.com/news/admissions/traditional-age/2025/07/11/rates-admitted-students-who-are-black-hispanic-have> (Discussing an Urban Institute report with data from 18 colleges and universities showing that after the *SFFA v. Harvard* decision that the share of applicants who were Black or Hispanic increased from fall 2023 to fall 2024, but the percentage of those students admitted decreased.); Anemona Hartocollis, *The University of California Increased Diversity. Now It’s Being Sued*, NEW YORK TIMES (Feb. 3, 2025), <https://www.nytimes.com/2025/02/03/us/affirmative-action-california.html>.

<sup>72</sup> See, e.g., Karen Sloan, *ABA sued over diversity scholarships by conservative group*, REUTERS (Apr. 14, 2025), <https://www.reuters.com/legal/government/aba-sued-over-diversity-scholarships-by-conservative-group-2025-04-14/>; John Wisely, *U-M Alumni Association ends diversity scholarship program*, DETROIT FREE PRESS (Mar. 21, 2025), <https://www.freep.com/story/news/education/2025/03/21/u-m-alumni-association-ends-diversity-scholarship-program/82588500007/>.

programs,<sup>73</sup> as well as state laws banning (DEI) educational programs in public universities.<sup>74</sup> Even without threatened or actual lawsuits, risk averse universities have engaged in “anticipatory obedience”<sup>75</sup> – particularly related to DEI programs, including changing websites, renaming DEI offices, and closing exhibits.<sup>76</sup> As discussed further below, the Trump administration has used unsupported allegations of Title VI violations and has threatened or imposed federal research funding cuts to coerce universities to increase such overly broad self-policing.

### *B. State “Divisive Concepts” laws*

In September 2020, during his first presidential administration, Trump issued an “Executive Order on Combating Race and Sex Stereotyping,”<sup>77</sup> which included a requirement that federal agency heads ensure that agency employees “do not teach, advocate, act upon, or promote in any training to agency employees any of the divisive concepts” listed in the Executive Order (EO). It also requires federal agencies to review grant programs to identify those where the agency might require the funding recipient to certify that it will not use federal funds to promote the listed divisive concepts. Included in the list of “divisive concepts” are items that represent Trump’s hostility towards teaching about the history of race and gender inequalities and their current systemic reality in the US and teaching about the benefits of affirmative action to address those inequalities. The “divisive concept” list is made up of caricatures of these ideas, including teaching that “one race or sex is inherently superior to another race or sex”; “the United States is fundamentally racist or sexist”; “an individual, by virtue of his or her race or sex, is inherently racist, sexist, or oppressive, whether consciously or unconsciously”; “an individual should be discriminated against or receive adverse treatment solely or partly because of his or her race or sex;” and “an individual, by virtue of his or her race or sex, bears responsibility for actions committed in the past by other members of the same race or sex;” and “any individual should feel discomfort, guilt, anguish, or any other form of psychological distress on account of his or her race or sex”.<sup>78</sup>

While this Trump EO was revoked in January 2021 by President Biden,<sup>79</sup> since 2020 many state legislatures have enacted laws that replicate

<sup>73</sup> Anna Griffith, *Anti-DEI Retrenchment and Litigation after Students for Fair Admissions v. Harvard*, (Sept. 2024) (Memorandum, Rutgers University) (on file with Rutgers Center for Law, Inequality, and Metropolitan Equity).

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

<sup>75</sup> Am. Ass’n of Univ. Professors, *Against Anticipatory Obedience* (Jan. 2025), <https://www.aaup.org/reports-publications/aaup-policies-reports/policy-statements/against-anticipatory-obedience>.

<sup>76</sup> See, Sonel Cutler, Aisha Baiocchi, Erin Gretzinger, Maggie Hicks, Christa Dutton, and Jasper Smith, *Tracking Higher Ed’s Dismantling of DEI*, CHRONICLE OF HIGHER EDUCATION (Feb. 10, 2026), <https://uat.brightspot.chronicle.com/article/tracking-higher-eds-dismantling-of-dei>; Am. Ass’n of Univ. Professors, *supra* note 75.

<sup>77</sup> Exec. Order No. 13590, 85 Fed. Reg. 60683 (Sept. 22, 2020).

<sup>78</sup> *Id.*

<sup>79</sup> Joseph Storch, *The President’s Executive Order on Combating Race and Sex Stereotyping: What Colleges and Universities Need to Know*, THE STATE UNIVERSITY OF NEW YORK (Oct. 2, 2020), <https://system.suny.edu/sci/news/10-3-20-eo-on-combating-race-and-sex-stereotyping/index.html>. 2, 2020),

the prohibitions on teaching, advocating, or promoting the same list of “divisive concepts” in public schools. Justified as necessary to counter “critical race theory” (CRT)—attacked as part of right-wing dog whistle politics<sup>80</sup>—these divisive concepts laws started as controls on curriculum and teaching in K-12 public schools and expanded to apply to public universities.<sup>81</sup> As PEN America explains in its 2021 report, “Educational Gag Orders”: “In making a straw man out of CRT, legislators are seeking to dictate and constrict how educators address a wide range of subjects relating to race, diversity, and American history.”<sup>82</sup> Similar to attacks on affirmative action in student admissions, “divisive concepts” redefine the harm of race discrimination to mean the harm to white students who are taught about US racial history and its legacy. The PEN America report quotes the Washington Post in describing “Trump’s combustible formula of white identity politics.”<sup>83</sup>

There have been numerous lawsuits bringing First and Fourteenth Amendment challenges against these laws.<sup>84</sup> In an important case, *Pernell v. Florida Board of the State University System, et al.*,<sup>85</sup> the federal district court issued a preliminary injunction in 2022 based on the viewpoint discrimination and vagueness of the state of Florida’s so-called “Stop W.O.K.E. Act,” which prohibits university faculty from engaging in “instruction” that “espouses, promotes, advances, inculcates, or compels... student[s] or employee[s] to believe [eight specified concepts].”<sup>86</sup> As Judge Mark E. Walker explains in his opinion, “Defendants [Florida Board of Governors of the State University System, et al.] argue that, under this Act, professors enjoy ‘academic freedom’ so long as they express only those viewpoints of which the State approves. This is positively dystopian.”<sup>87</sup> The Eleventh Circuit Court of Appeals reached a decision that

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<https://system.suny.edu/sci/news/10-3-20-eo-on-combating-race-and-sex-stereotyping/index.html>. The EO was enjoined by a federal district court in December 2020. Sheryl Estrada, *Biden Revokes Trump’s Order Limiting Diversity Training*, HIGHER ED DIVE (Jan. 21, 2021), <https://www.hrdiver.com/news/biden-revokes-trumps-order-limiting-diversity-training/593748/>. Further, on January 20, 2021, newly inaugurated President Biden signed an EO revoking the Trump “divisive concepts” EO. *Id.*

<sup>80</sup> Jonathan Friedman & James Tager, *Educational Gag Orders*, PEN AMERICA (Nov. 8, 2021), <https://pen.org/report/educational-gag-orders/#heading-2> (quoting conservative commentator Christopher Rufo’s statement in *The New Yorker* describing critical race theory as “the perfect villain”).

<sup>81</sup> PEN America has published ongoing reports about divisive concepts laws. *See id.*; Jeremy C. Young & Johnathan Friedman, *America’s Censored Classrooms 2022*, PEN AM. (Aug. 17, 2022), <https://pen.org/report/americas-censored-classrooms/>; Jeffrey Adam Sachs and Jeremy C. Young, *America’s Censored Classrooms 2024*, PEN AM. (Oct. 8, 2024), <https://pen.org/report/americas-censored-classrooms-2024/>; *See also*, Jonathan Feingold and Joshua Weishart, *Discriminatory Censorship Laws*, 99 TUL. L. REV. 585 (2025); Jeannie Suk Gersen, *Academic Freedom and Discrimination in a Polarizing Time*, 59 HOUS. L. REV. 781, 796–99 (2022) (analyzing the conflict between academic freedom and anti-discrimination mandates).

<sup>82</sup> Jonathan Friedman & James Tager, *Educational Gag Orders*, PEN AM. (Nov. 8, 2021), <https://pen.org/report/educational-gag-orders/#heading-2>.

<sup>83</sup> *Id.* (citing Michael Sherer, “white identity politics drives Trump, and the Republican Party under him”).

<sup>84</sup> For a list of 16 active lawsuits challenging these state laws, *see* Sachs and Young, *supra* note 81.

<sup>85</sup> *Pernell v. Fla. Bd. of Governors of the State Univ. Sys.*, 641 F. Supp. 3d 1218 (N.D. Fla. 2022).

<sup>86</sup> *Id.* at 1231.

<sup>87</sup> *Id.* at 1230.

left in place the district court’s preliminary injunction pending the defendants’ appeal to the Eleventh Circuit.<sup>88</sup>

V. ESCALATING DIRECT ASSAULTS ON HIGHER EDUCATION:  
TRUMP’S SECOND ADMINISTRATION

The second Trump administration has made frontal attacks against universities using a two-pronged approach. The first prong consists of presidential EOs and federal agency discrimination allegations that target universities. The EOs direct federal agencies to take actions against immigrants, affirmative action, DEI, and dissent. The EOs also incorporate the use of Title VI of the Civil Rights Act of 1964,<sup>89</sup> which prohibits discrimination on the basis of race, color, or national origin in programs or activities of any institution that receives federal funding. Although Title VI does not prohibit religious discrimination, since 2004, federal agency guidance has interpreted Title VI to include religion as part of protected shared ancestry or ethnic characteristics, which would include Muslims, Jews, Hindus, and Sikhs.<sup>90</sup> Trump’s EO 14188, “Additional Measures to Combat Anti-Semitism” (Feb. 3, 2025),<sup>91</sup> directs federal agencies to report about Title VI complaints “related to anti-Semitism...after October 7, 2023,” specifying reports on complaints filed with the Department of Education against K-12 schools and universities.<sup>92</sup> Trump’s EO 13899, “Combating Antisemitism,”<sup>93</sup> issued during his first administration, adopts the International Holocaust Remembrance Alliance (IHRA) definition of antisemitism and its accompanying examples, and requires all federal agencies to “consider” these in Title VI enforcement.<sup>94</sup> As discussed further in the Section V.C of this article, this strengthens federal agencies’ ability to bring Title VI allegations based on protected speech, as the IHRA definition is overly broad in its inclusion as examples of antisemitic speech certain types of criticisms about the state of Israel and Zionism that conflate political critique with antisemitism.<sup>95</sup>

It is highly unusual for the Department of Education (ED) to enforce Title VI by seeking cuts in federal funding to higher education institutions.<sup>96</sup> Yet the second prong of the Trump administration’s attacks on universities cuts federal research funding as a means of pressuring universities to settle unsupported Title VI allegations with agreements that enable the federal

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<sup>88</sup> *Pernell v. Fla. Bd. of Governors of the State Univ. Sys.*, 2023 U.S. App. LEXIS 6591 (11th Cir. 2023).

<sup>89</sup> 42 U.S.C. § 2000(d) (2026).

<sup>90</sup> Letter from Catherine E. Lhamon, Dear Colleague Letter: Protecting Students from Discrimination, such as Harassment, Based on Race, Color, or National Origin, Including Shared Ancestry or Ethnic Characteristics (May 7, 2024).

<sup>91</sup> Exec. Order No. 14188, 90 Fed. Reg. 8847 (Feb. 3, 2025).

<sup>92</sup> *Id.*

<sup>93</sup> Exec. Order No. 13899, 84 Fed. Reg. 68779 (Dec. 11, 2019).

<sup>94</sup> AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS & MIDDLE EAST STUDIES ASSOCIATION, DISCRIMINATING AGAINST DISSENT: THE WEAPONIZATION OF CIVIL RIGHTS LAW TO REPRESS CAMPUS SPEECH ON PALESTINE 7–8 (2025).

<sup>95</sup> See text accompanying notes 154–159, *infra*.

<sup>96</sup> Suzanne B. Goldberg & Olatunde C.A. Johnson, *Campus Crises and the Limits of Title VI*, 126 COLUM. L. REV. F. 1, 21–26 (2026); AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, ON TITLE VI, DISCRIMINATION, AND ACADEMIC FREEDOM 4–5 (2025);

government to intrude on university independence and autonomy. Such agreements have targeted gender, racial justice, and Middle East studies programs.

#### *A. Executive Orders*

With the second Trump administration has come new Executive Orders that weaponize the use of anti-discrimination laws to undermine the equality goals of those laws. EOs attacking affirmative action and DEI are: EO 14281, “Restoring Equality of Opportunity and Meritocracy; EO 14173, “Ending Illegal Discrimination and Restoring Merit-Based Opportunity”; EO 14151, “Ending Radical and Wasteful Government DEI Programs and Preferencing”; EO 14190, “Ending Radical Indoctrination in K-12 Schooling”; EO 14253, “Restoring Truth and Sanity to American History”; and EO 14170, “Reforming the Federal Hiring Process and Restoring Merit to Government Service”.

Eos attacking gender equality are: EO 14168, “Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government,” “ordering all agencies and departments within the Executive Branch to ‘enforce all sex-protective laws to promote [the] reality’ that there are ‘two sexes, male and female,’ and that ‘[t]hese sexes are not changeable and are grounded in fundamental and incontrovertible reality.’”<sup>97</sup> and EO 14201, “Keeping Men Out of Women's Sports.”<sup>98</sup>

Trump’s EOs incorporate the use of Title VI to target expression critical of Israel and Zionism. Like EO 13899, “Combating Antisemitism,” issued in 2019 during Trump’s first administration, EO 14188, “Additional Measures to Combat Anti-Semitism,” issued in February 2025,<sup>99</sup> conflates antisemitism with political criticism of Israel and Zionism. EO 14188 declares that “[it] shall be the policy of the United States” to use “all available and appropriate legal tools” “to prosecute, remove or otherwise hold to account” citizens and noncitizens who engage in activity that the Trump administration labels as “unlawful anti-Semitic harassment and violence.”<sup>100</sup> The EO requires that the Secretary of Education submit an inventory and analysis of all Title VI complaints and administrative actions in OCR “related to anti-Semitism...after October 7, 2023.” Adding to the repression of free speech, EO 14161, “Protecting the United States from Foreign Terrorists and Other National Security and Public Safety Threats”<sup>101</sup> (Jan. 30, 2025), prohibits non-citizens lawfully living in the U.S. from engaging in constitutionally protected speech that the Trump administration may subjectively interpret as expressing a “hostile attitude” toward U.S. “citizens, culture, government, institutions, or founding principles” on penalty of deportation.<sup>102</sup>

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<sup>97</sup> U.S. Dep’t of Educ. Office for Civil Rights, Dear Colleague Letter: Title IX Enforcement Directive (Feb. 4, 2025).

<sup>98</sup> Exec. Order No. 14201, 90 Fed. Reg. 9279 (2025).

<sup>99</sup> EO 14188, *supra* note 91.

<sup>100</sup> *Id.*

<sup>101</sup> Exec. Order No. 14161, 90 Fed. Reg. 8451 (2025).

<sup>102</sup> *Id.*

### *B. Federal Agency investigations*

Title VI investigations increased late in the Biden administration, primarily based on complaints filed alleging that speech in university campus protests that was critical of Israel and Zionism constituted a hostile environment based on antisemitism. Between October 7, 2023 and the end of 2024, the Biden administration’s ED initiated investigations of alleged antisemitism at 65 colleges and universities, twice the number of the 38 investigations of all other types of racial harassment combined.<sup>103</sup> Under the Trump administration, antisemitism investigations against universities have continued, with 38 opened between January and September 2025, while racial harassment investigations appear to have been halted.<sup>104</sup> The ED’s Office for Civil Rights (OCR) conducts an investigation to determine whether the university has fulfilled its obligation to “take prompt and effective steps” to address alleged unlawful discrimination.<sup>105</sup> If OCR finds merit to the complaint, it usually negotiates with a college or university to reach agreement about the steps it will take to remedy any specific issue of discrimination or harassment, such as actions to improve the campus climate, including educational activities or training about protections and prohibitions under Title VI.<sup>106</sup>

Federal agencies have taken additional actions to aggressively implement Trump’s EOs. The ED’s OCR issues “Dear Colleague Letters” (DCLs) interpreting anti-discrimination law, including Title VI of the Civil Rights Act and Title IX of the Education Amendments of 1972,<sup>107</sup> which prohibits sex discrimination in any educational programs or activities that receive federal funding. Although DCLs do not have the force of law, they may be influential with the courts, as well as influencing the conduct of federal fund recipients.<sup>108</sup>

On February 14, 2025, OCR issued a DCL<sup>109</sup> that seeks to apply the US Supreme Court’s *SFFA v. Harvard* decision to DEI programs, an interpretation that goes far beyond the Court’s holding that the Fourteenth Amendment and Title VI prohibit consideration of race as a factor in student admissions.<sup>110</sup> The DCL declared OCR’s intent to use Title VI to investigate universities for DEI programs that “deny students the ability to participate fully in the life of a school” when they “stigmatize students that belong to particular racial groups” based on “crude racial stereotypes,” and teach that students of those racial groups “bear unique moral burdens that others do

<sup>103</sup> AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS & MIDDLE EAST STUDIES ASSOCIATION, DISCRIMINATING AGAINST DISSENT: THE WEAPONIZATION OF CIVIL RIGHTS LAW TO REPRESS CAMPUS SPEECH ON PALESTINE 2, 10–11 (2025).

<sup>104</sup> *Id.* at 1–2, 10.

<sup>105</sup> AM. ASS’N OF UNIV. PROFESSORS, ON TITLE VI, DISCRIMINATION, AND ACADEMIC FREEDOM 4–5 (2025).

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

<sup>107</sup> 20 U.S.C. § 1681 et seq.

<sup>108</sup> AM. ASS’N OF UNIV. PROFESSORS, ON TITLE VI, DISCRIMINATION, AND ACADEMIC FREEDOM 5 (2025).

<sup>109</sup> U.S. Dep’t of Educ. Office for Civil Rights, Dear Colleague Letter: “SFFA v. Harvard” (Feb. 14, 2025).

<sup>110</sup> *Supra* note 108, at 7. Note: The author of this article was a member of the AAUP Committee A on Academic Freedom that drafted this report.

not.”<sup>111</sup> Like the *SFFA v. Harvard* decision, the DCL redefines the harm of racism not to affect students of color, but rather as falling on white students who will be obliged to “bear unique moral burdens” to address the existence or perpetuation of racism.<sup>112</sup> In its report, “On Title VI, Discrimination, and Academic Freedom,” the AAUP Committee A on Academic Freedom and Tenure criticizes the DCL’s characterizations of DEI programs. The Committee A report states: “DEI programs were meant to address precisely those systematic biases based on race, color, and national origin that Congress intended to counteract when it passed the 1964 Civil Rights law. In a perverse reading of DEI, the administration makes it an instance of racial discrimination rather than an attempt to dismantle the structures of discrimination based on race.”<sup>113</sup>

The DCL’s descriptions of DEI also draw from the Trump “divisive concepts” EO issued in 2020.<sup>114</sup> Like the “divisive concepts” federal EO and state laws, the DCL interferes with academic freedom by censoring university programs addressing racism, whether they take place inside and outside the classroom.<sup>115</sup> The illegitimate nature of the February 14, 2025 DCL was revealed by a series of federal district court decisions issuing injunctions against the ED’s use of the DCL, based on the likelihood that plaintiffs would succeed on the merits of their constitutional claims that the DCL was void for vagueness under the Fifth Amendment, constituted viewpoint discrimination under the First Amendment, and failed to follow the notice and comment period required for adopting new regulations under the Administrative Procedures Act.<sup>116</sup> In January 2026, the ED OCR decided to abandon any appeals or attempts to enforce the DCL.<sup>117</sup>

Despite the injunctions against the ED’s DCL, the US Department of Justice doubled down on weaponizing Title VI by issuing its own memorandum for all federal agencies in July 2025, providing “guidance [that] clarifies the application of federal antidiscrimination laws to programs or initiatives that may involve discriminatory practices, including those labeled as Diversity, Equity and Inclusion (‘DEI’) programs.”<sup>118</sup>

<sup>111</sup> Letter from Craig Trainor, Dear Colleague Letter: *SFFA v. Harvard* (Feb. 14, 2025); See also, AM. ASS’N OF UNIV. PROFESSORS, ON TITLE VI, DISCRIMINATION, AND ACADEMIC FREEDOM 7 (2025).

<sup>112</sup> “White students are clearly the protected group at issue according to Trump’s OCR, since they are thought to bear ‘moral burdens’ [for slavery, racism] ‘that others do not.’” AM. ASS’N OF UNIV. PROFESSORS, ON TITLE VI, DISCRIMINATION, AND ACADEMIC FREEDOM 8 (2025).

<sup>113</sup> AM. ASS’N OF UNIV. PROFESSORS, ON TITLE VI, DISCRIMINATION, AND ACADEMIC FREEDOM 7 (2025).

<sup>114</sup> See, text accompanying notes 77–83, *supra*.

<sup>115</sup> U.S. Dep’t of Educ. Office for Civil Rights, Frequently Asked Questions on Dear Colleague Letter About Racial Preferencing (Mar. 1, 2025). After an initial federal district court injunction was issued against enforcing the DCL, the ED posted the following notice: “As a result [of the April 24, 2025 injunction], the Department of Education’s Office for Civil Rights will not take any enforcement action, or otherwise implement, the February 28, 2025, Dear Colleague Letter, associated FAQs, the End DEI Portal, or the certification requirement until further notice.” *Id.*

<sup>116</sup> See Brooke Schultz, *Trump Can’t Require Schools to Certify They Won’t Use DEI, Judge Says*, EDUC. WEEK (Aug. 15, 2025); Matthew Stone, *Trump Can’t Enforce Anti-DEI Directives in Schools, 3 Judges Say* EDUC WEEK (Apr. 24, 2025); See also, National Education Association, et al. v. United States Department of Education, et al., 779 F. Supp. 3d 149 (D.N.H. 2025).

<sup>117</sup> Jessica Blake, *Education Dept. Drops Appeal of Court Order Blocking Anti-DEI Guidance*, INSIDE HIGHER ED (Jan. 22, 2026).

<sup>118</sup> Office of the Attorney General, *Guidance for Recipients of Federal Funding Regarding Unlawful Discrimination* (July 29, 2025).

This DOJ “guidance” is far reaching, describing its views of potentially discriminatory practices such as “unlawful proxies,” where federally funded institutions “intentionally use ostensibly neutral criteria that function as substitutes for explicit consideration of race, sex, or other protected characteristics.”<sup>119</sup> Among its examples of potentially discriminatory proxies, the DOJ memorandum lists “recruitment strategies targeting geographic areas...chosen primarily because of the racial or ethnic composition rather than other legitimate factors.”<sup>120</sup> In other words, the DOJ targets practices that are lawful even under the Supreme Court’s *SFFA v. Harvard* student admissions decision.<sup>121</sup> The broad sweep of the DOJ “guidance” memorandum also draws from “divisive concepts” state laws in describing DEI trainings that may be discriminatory.<sup>122</sup>

The ED issued a February 4, 2025, DCL<sup>123</sup> relying on Trump’s EOs to interpret Title IX in ways that undermine its goal of increasing gender equality. Title IX of the Education Amendments of 1972<sup>124</sup> prohibits sex discrimination in any educational programs or activities that receive federal funding. The ED’s DCL announced that the ED “must enforce Title IX consistent with President Trump’s [January 2025 Executive] Order” “Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government,”<sup>125</sup> which declares a fixed binary biological definition of sex as male and female. Similarly, the DOJ guidance memorandum states, “To ensure compliance with federal law and to safeguard the rights of women and girls, organizations should affirm sex-based boundaries rooted in biological differences,”<sup>126</sup> and that “failing to maintain sex-separated athletic competitions and intimate spaces can also violate federal law.”<sup>127</sup> The Trump administration’s narrow interpretation of “sex” undermines the equality goals of Title IX by denying the existence of “gender identity.” This also violates academic freedom by seeking to coerce universities to affirm a fixed biological meaning of sex. The Trump administration’s coercive actions under the cover of Title IX extend their weaponization of Title VI of the Civil Rights Act.

The attacks on gender equality have resulted in university administrations’ violations of academic freedom. University of Oklahoma put a psychology course instructor on administrative leave after a student complained of religious discrimination because she received a failing grade

<sup>119</sup> *Id.* at 5.

<sup>120</sup> *Id.* See also, Johanna Alonso, *Justice Department Declares DEI Unlawful*, INSIDE HIGHER ED (July 30, 2025).

<sup>121</sup> See, Richard d. Kahlenberg, *New Avenues for Diversity After Students for Fair Admissions*, 48 J. COLLEGE & UNIVERSITY L. 283, 301–06 (2023).

<sup>122</sup> Office of the Attorney General, *Guidance for Recipients of Federal Funding Regarding Unlawful Discrimination* (July 29, 2025), <https://www.justice.gov/ag/select-publications>.

<sup>123</sup> U.S. Dep’t of Educ. Office for Civil Rights, *Dear Colleague Letter: Title IX Enforcement Directive* (Feb. 4, 2025).

<sup>124</sup> 20 U.S.C. § 1681.

<sup>125</sup> U.S. Dep’t of Educ. Office for Civil Rights, *Dear Colleague Letter: Title IX Enforcement Directive* (February 4, 2025).

<sup>126</sup> Office of the Attorney General, “*Guidance for Recipients of Federal Funding Regarding Unlawful Discrimination*” at 6 (July 29, 2025).

<sup>127</sup> *Id.* at 6.

on her essay about gender.<sup>128</sup> Given the interference with the instructor's teaching, even conservatives have found this to be extreme. The Oklahoma governor called the situation "deeply concerning" and a politically conservative commentator stated, "You have to pass students who only cite religious faith for their opinions now or they're victims of discrimination."<sup>129</sup> Gender studies have been under severe attack in Texas. A Texas A&M University Senior Lecturer was discharged based on a student complaint that the faculty member was teaching that gender identity includes transgender status.<sup>130</sup> The university administration ignored the faculty council's finding that the discharge violated academic freedom.<sup>131</sup> Six public university systems, including the University of Texas system, now require reviews of curriculum, syllabi and course content about gender identity.<sup>132</sup>

### C. Federal agencies' use of the "art" of coercive "deals" with universities

In February 2025, the DOJ led the Trump administration's creation of a multi-agency "Task Force to Combat Antisemitism," which also includes representatives from the ED and the Department of Health and Human Services.<sup>133</sup> This Task Force has further politicized the use of Title VI by making allegations of antisemitism on university campuses without following any of the Title VI investigative and other due process requirements to determine whether there is supporting evidence of such claims.<sup>134</sup> Mostly targeting Ivy League universities, the Task Force has escalated even further by using the unproven Title VI allegations as the basis for threatening or imposing massive cuts in federal research funding unless the university enters an agreement that includes institutional

<sup>128</sup> Mark Arsenault, "College Instructor Put on Leave Over Zero Grade for Gender Essay," N.Y. TIMES (Dec. 2, 2025), <https://www.nytimes.com/2025/12/02/us/oklahoma-bible-essay-gender-teasing-zero.html>.

<sup>129</sup> *Id.*

<sup>130</sup> Emma Whitford, "2 Texas A&M Administrators and Professor Out After Viral Video," INSIDE HIGHER ED (Sept. 10, 2025), <https://www.insidehighered.com/news/faculty/academic-freedom/2025/09/10/texas-am-professor-and-administrators-out-after-viral>.

<sup>131</sup> Emma Whitford, "Texas A&M Faculty Council Says Professor's Dismissal Academic Freedom violated," INSIDE HIGHER ED (Nov. 13, 2025), available at <https://www.insidehighered.com/news/quick-takes/2025/11/13/texas-am-faculty-finds-dismissed-profs-academic-freedom-violated>; see also AAUP-TAMU Response to the Firing of Dr. McCoul, AAUP-TAMU BLOG (Sept. 18, 2025), <https://aaup-texas.org/blog/f/aaup-tamu-response-to-the-firing-of-dr-mccoul>.

<sup>132</sup> Emma Whitford, *Texas Systems Review Course Descriptions, Syllabi, as Critics Scrutinize Them*, INSIDE HIGHER EDUC. (Oct. 9, 2025), <https://www.insidehighered.com/news/faculty-issues/curriculum/2025/10/09/texas-systems-review-course-descriptions-syllabi>; Antonio L. Ingram II, *Anti-Truth Movements Post World War II Germany and Contemporary Texas: The Repetition of History and Lessons in Truthful Reconstruction*, 16 DREXEL L. REV. 751 (2024).

<sup>133</sup> Press Release, U.S. Dep't of Just., Justice Department Announces Formation of Task Force to Combat Anti-Semitism (Feb. 3, 2025), <https://www.justice.gov/opa/pr/justice-department-announces-formation-task-force-combat-anti-semitism>; see also Jessica Blake, *Who is Trump's Task Force?*, INSIDE HIGHER ED (Apr. 2, 2025), <https://www.insidehighered.com/news/government/politics-elections/2025/04/02/who-trumps-antisemitism-task-force>.

<sup>134</sup> Michael C. Dorf, *Trump's Columbia Funding Cutoff is Illegal*, THE CHRON. OF HIGHER EDUC. (Mar. 10, 2025), <https://www.chronicle.com/article/trumps-columbia-funding-cutoff-is-illegal>; AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS & MIDDLE EAST STUDIES ASSOCIATION, *DISCRIMINATING AGAINST DISSENT: THE WEAPONIZATION OF CIVIL RIGHTS LAW TO REPRESS CAMPUS SPEECH ON PALESTINE* 23–24 (2025).

changes in areas such as academic programs, university governance and leadership, student admissions processes, and external monitoring.<sup>135</sup> On top of this, the agreements usually include a penalty of millions of dollars that the university will pay to the federal government.<sup>136</sup> It is worth remembering that it is almost unheard of for Title VI investigations to result in the loss of federal funding.<sup>137</sup> Moreover, the Task Force’s “negotiations” process is one of coercion to enter an agreement in exchange for reinstating federal funding, rather than a process following a real investigation and other Title VI due process requirements that could lead to funding cuts.<sup>138</sup>

The politics underlying the Task Force’s coercive measures can be traced back to the Trump EOs that seek to suppress dissent against Trump policies and actions – particularly those concerning Israel and Palestine. Prior to Trump’s second administration, right-wing Republicans in congressional hearings had engaged in political theater, accusing Ivy League universities of antisemitism for not cracking down on student and faculty protests against Israel’s military response in Gaza after October 7, 2023.<sup>139</sup> In his second term, the Trump EOs and federal agency abuse of Title VI have taken this conflation of political protest with antisemitism even further, using unfounded allegations of antisemitism as a pretext for federal funding cuts against universities such as Columbia, Harvard, and University of Pennsylvania, unless they agree to the Task Force’s intrusive demands to make institutional changes, succumb to governmental oversight, and pay a huge ransom to the federal government.<sup>140</sup> Harvard refused to enter an agreement to comply with the Task Force’s demands, which included extreme conditions for the federal government to release the \$2.2 billion in frozen federal research grant funds.<sup>141</sup> Harvard brought a First Amendment challenge against the DOJ and other federal agencies, as did the national AAUP and the Harvard AAUP chapter, with both cases then consolidated in federal district court.<sup>142</sup> In April 2025, the district court issued a permanent injunction ordering the Trump administration to cease

<sup>135</sup> AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, ON TITLE VI, DISCRIMINATION, AND ACADEMIC FREEDOM 8-9 (2025); Chronicle Staff, *Tracking Trump’s Higher-Ed Deals*, THE CHRON. OF HIGHER EDUC. (Aug. 8, 2025), <https://www.chronicle.com/article/universities-are-making-deals-with-trump-heres-how-they-stack-up>.

<sup>136</sup> Chronicle Staff, *supra* note 135.

<sup>137</sup> See note 96, *supra*.

<sup>138</sup> See Katherine Mangan, *Judge Blocks Trump’s Threats to Cut Funds to California*, THE CHRONICLE OF HIGHER EDUCATION (Nov. 15, 2025), <https://www.chronicle.com/blogs/the-trump-agenda/judge-blocks-trumps-threats-to-cut-funds-to-u-of-california>.

<sup>139</sup> See Katherine Knott, *Third Antisemitism Hearing Could Further Disrupt Higher Ed*, INSIDE HIGHER ED (May 22, 2024), <https://www.insidehighered.com/news/government/2024/05/22/key-developments-higher-ed-columbia-u-house-hearing>; Katherine Knott, *3 Presidents on the Hot Seat*, INSIDE HIGHER ED (Dec. 6, 2023) <https://www.insidehighered.com/news/government/2023/12/05/house-republicans-castigate-presidents-harvard-penn-and-mit>.

<sup>140</sup> AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, ON TITLE VI, DISCRIMINATION, AND ACADEMIC FREEDOM 8–9 (2025).

<sup>141</sup> Josh Moody, *Harvard Resists Trump’s Demands*, INSIDE HIGHER ED (Apr. 14, 2025) (“The letters call for changes to governance, hiring and admissions, a ban on masks, and more, including greater scrutiny of international applicants to exclude ‘students supportive of terrorism or anti-Semitism.’” The demands also included “a shutdown of all diversity, equity, and inclusion initiatives; and the reformation of multiple programs ‘with egregious records of antisemitism or other bias.’”).

<sup>142</sup> *President & Fellows of Harvard College v. U.S. Dep’t of Health and Hum. Servs.*, 25-cv-11048, (D. Mass. (2025)); *Am. Ass’n of Univ. Professors v. U.S. Dep’t of Just.*, No. 1:25-cv-10910, (2025).

withholding federal funds from Harvard.<sup>143</sup> Judge Burroughs' opinion drew the curtain back to reveal the reality of the Task Force's use of Title VI allegations of antisemitism as a pretext for cutting funds in order to pressure Harvard to yield to governmental ideological dictates: "The fact that Defendants' swift and sudden decision to terminate funding, ostensibly motivated by antisemitism, was made before they learned anything about antisemitism on campus or what was being done in response, leads the Court to conclude that the sudden focus on antisemitism was, at best...arbitrary and, at worst, pretextual....[T]he government-initiated onslaught against Harvard was much more about promoting a governmental orthodoxy in violation of the First Amendment than about anything else, including fighting antisemitism."<sup>144</sup>

The national AAUP joined other unions and organizations to bring First Amendment challenges against the Trump administration's funding cuts of nearly \$600 million of federal research grants to UCLA.<sup>145</sup> The multi-agency Task Force made extreme and intrusive demands on the University of California system as a condition of reinstating their federal funding. These demands included that the UCLA submit to federal monitoring of its compliance with "academic restructuring" related to curricular changes, DEI programs, hiring practices, and admissions, in addition to increased restrictions on campus protests, and adoption of the EO 14168 concerning "gender ideology."<sup>146</sup> UCLA would also be required to pay \$1.2 billion in return for restoration of the federal grants. In November 2025, the federal district court issued a preliminary injunction ordering the resumption of funding to UC and finding that the federal government violated the First Amendment. The hard hitting first paragraph of District Judge Rita F. Lin's opinion captures scope and depth of the Trump administration's politically motivated attacks and coercive measures against the University of California and more broadly against universities across the nation:

Plaintiffs have submitted overwhelming evidence. Across 74 declarations and more than 700 pages of supporting documents, Plaintiffs show that the Administration and its executive agencies are engaged in a concerted campaign to purge "woke," "left," and "socialist" viewpoints from our country's leading universities. Agency officials, as well as the President and Vice President, have repeatedly and publicly announced a playbook of initiating civil rights investigations of preeminent universities to justify cutting off federal funding, with the goal of bringing universities to

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<sup>143</sup> *President & Fellows of Harvard College v. U.S. Dep't of Health and Hum. Servs.*, 798 F. Supp. 3d 77, 137 (D. Mass. 2025).

<sup>144</sup> 798 F. Supp. 3d at 121–22.

<sup>145</sup> *Am. Ass'n of Univ. Professors*, No. 25-cv-07864-RFL; *See also Federal Court Blocks Trump Effort to Pressure UC System into Political Compliance*, AM. ASS'N. OF UNIV. PROFESSORS, <https://www.aaup.org/federal-court-blocks-trump-effort-pressure-uc-system-political-compliance>.

<sup>146</sup> *Am. Ass'n of Univ. Professors*, No. 25-cv-07864-RFL, at 33–35.

their knees and forcing them to change their ideological tune. Universities are then presented with agreements to restore federal funding under which they must change what they teach, restrict student anonymity in protests, and endorse the Administration's view of gender, among other things. Defendants submit nothing to refute this.<sup>147</sup>

Despite the federal Task Force's failure to follow Title VI due process requirements and failure to supply supporting evidence of unlawful discrimination, several universities including Columbia University, University of Pennsylvania, Brown University, and Cornell University have entered agreements with the federal government.<sup>148</sup> The most notorious agreement was by Columbia University in July 2025, immediately after suspending or expelling students for participation in pro-Palestinian protests<sup>149</sup> and soon after the federal government cut \$400 million in Columbia's federal research funds.<sup>150</sup> Columbia agreed to pay \$200 million to the US government, plus \$21 million to an Equal Employment Opportunity Commission claims fund, in exchange for the government's restoring \$400 million in grant funds and closing pending Title VI and Title VII investigations or compliance reviews.<sup>151</sup> Other agreement provisions take aim at the Trump administration's political targets, including Columbia's agreement to restructure programs and hiring in regional area studies, starting with the Middle East, decrease international student enrollment, ensure that its hiring and admissions do not promote “unlawful DEI goals,” and accept oversight by an external “Resolution Monitor” to ensure its compliance with the agreement.<sup>152</sup> Columbia's and other universities' agreements have been strongly criticized as capitulating to the Trump administration's coercive demands to agree to measures that go beyond any lawful remedies under Title VI, and that are tantamount to the use of extortion to coerce agreement to unconstitutional provisions.<sup>153</sup> The Columbia University chapter of the AAUP described Columbia's agreement as being a “blunt instrument

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<sup>147</sup>American Association of University Professors, et al. v. Trump, et al., 2025 U.S. Dist. LEXIS 224922 (N.D. Cal. 2025), at 7.

<sup>148</sup> Chronicle Staff, *Tracking Trump's Higher-Ed Deals*, THE CHRONICLE OF HIGHER EDUCATION, (August 8, 2025), <https://www.chronicle.com/article/universities-are-making-deals-with-trump-heres-how-they-stack-up>.

<sup>149</sup> AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, ON TITLE VI, DISCRIMINATION, AND ACADEMIC FREEDOM 9 (2025); Francine Diep and Sarah Huddleston, *In Extraordinary Deal with Trump, Columbia U. Agrees to Pay \$200 Million to Restore Funds*, THE CHRONICLE OF HIGHER EDUCATION, (July 23, 2025), <https://www.chronicle.com/article/in-extraordinary-deal-with-trump-columbia-u-agrees-to-pay-200-million-to-restore-funds>.

<sup>150</sup> AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, ON TITLE VI, DISCRIMINATION, AND ACADEMIC FREEDOM 9 (2025).

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

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

<sup>153</sup> Jessica Blake, *Columbia Deal a 'Threat' to Higher Ed, Experts Warn*, INSIDE HIGHER ED, (July 25, 2025), <https://www.insidehighered.com/news/government/politics-elections/2025/07/25/columbia-settlement-offers-warning-higher-ed>; Jameel Jaffer, Alex Abdo, Katy Glenn Bass, Nadine Farid Johnson, and Larry Siems, *What the Columbia Settlement Really Means*, KNIGHT FIRST AMEND. INST. AT COLUMBIA UNIV., (Aug. 4, 2025), <https://knightcolumbia.org/blog/what-the-columbia-settlement-really-means>.

through which the Trump Administration has demonstrated its power to bludgeon American universities into undermining the traditions of free and open inquiry, robust political speech, and shared governance that have long distinguished them.”<sup>154</sup>

It is telling that Columbia also agreed to adopt the IHRA definition of antisemitism and its accompanying examples.<sup>155</sup> Adopted by the first Trump administration in EO 13899, “Combating Antisemitism,”<sup>156</sup> for use by federal agencies, the IHRA definition is an overly broad definition that federal agencies, including the ED and now the multi-agency Task Force, use in evaluating Title VI allegations of antisemitic hostile environment harassment.<sup>157</sup> While including criteria that accurately describe antisemitism, the IHRA definition also includes as examples of antisemitic speech certain types of criticisms about the state of Israel and Zionism that conflate political critique with antisemitism.<sup>158</sup> For example, the IHRA defines as antisemitic speech “denying the Jewish people their right to self-determination, e.g., by claiming that the existence of a State of Israel is a racist endeavor” and speech “applying double standards by requiring of it a behavior not expected or demanded of any other democratic nation.” Using this conflation of political speech with antisemitism opens the door to Title VI allegations targeting speech protected by the First Amendment and academic freedom.<sup>159</sup> Even Kenneth Stern, one of the authors of the IHRA definition, has objected to the “weaponizing” of the definition, arguing that its misuse undermines efforts to detect and combat real instances of antisemitism.<sup>160</sup>

#### VI. THE “PERFECT STORM” FOR THE GOVERNMENTAL ATTACK ON UNIVERSITIES

The attacks on higher education are part of Trump’s broader agenda to dismantle democratic institutions and establish autocratic presidential power. Trump’s ability to advance these goals regarding higher education were made possible by economic, political, and legal developments starting in the 1980s with the resurgence of neoliberal privatization under Reagan,

<sup>154</sup> Columbia University Chapter of the AAUP, “An Agreement That Settles Nothing,” *Academe Blog*, July 29, 2025, <https://academeblog.org/2025/07/29/an-agreement-that-settles-nothing/>.

<sup>155</sup> AM. ASSOC. OF UNIV. PROFESSORS, ON TITLE VI, DISCRIMINATION, AND ACADEMIC FREEDOM 9 (2025).

<sup>156</sup> Exec. Order No. 13899, *supra* note 93.

<sup>157</sup> AM. ASSOC. OF UNIV. PROFESSORS & MIDDLE E. STUD. ASSOC., DISCRIMINATING AGAINST DISSENT: THE WEAPONIZATION OF CIVIL RIGHTS LAW TO REPRESS CAMPUS SPEECH ON PALESTINE 7–8 (2025); AM. ASSOC. OF UNIV. PROFESSORS, ON TITLE VI, DISCRIMINATION, AND ACADEMIC FREEDOM 9 (2025).

<sup>158</sup> AM. ASSOC. OF UNIV. PROFESSORS & MIDDLE E. STUD. ASSOC., DISCRIMINATING AGAINST DISSENT: THE WEAPONIZATION OF CIVIL RIGHTS LAW TO REPRESS CAMPUS SPEECH ON PALESTINE 7–8 (2025); Jason Brownlee, *Efforts to Weaponize Title VI against Pro-Palestine Speech on University Campuses*, 30 TEX. J. ON C.L. & C.R. 52 (2024).

<sup>159</sup> AM. ASSOC. OF UNIV. PROFESSORS & MIDDLE E. STUD. ASSOC., DISCRIMINATING AGAINST DISSENT: THE WEAPONIZATION OF CIVIL RIGHTS LAW TO REPRESS CAMPUS SPEECH ON PALESTINE 7–8 (2025); AM. ASSOC. OF UNIV. PROFESSORS, ON TITLE VI, DISCRIMINATION, AND ACADEMIC FREEDOM 6–7 (2025); Itamar Mann and Lihi Yona, *Defending Jews From the Definition of Antisemitism*, 71 UCLA L. REV. 1150 (2024).

<sup>160</sup> AM. ASSOC. OF UNIV. PROFESSORS COMM. A ON ACAD. FREEDOM AND TENURE, LEGISLATIVE THREATS TO ACADEMIC FREEDOM: REDEFINITIONS OF RACISM AND ANTISEMITISM, 2 (2022).

which led to internal institutional changes to the university through the process of corporatization. Section VI.A. brings together and analyzes the way that these internal changes, combined with the external attacks on the university by post-Obama presidencies, created a “perfect storm” of social forces that have enabled the extreme level of Trump’s current attacks on higher education. Section VI.B analyzes why university administrations have not engaged in collective resistance against these external attacks. Section VI.C then discusses the collective resistance that has occurred by faculty and student organizations and the role of the courts in finding the attacks to be unconstitutional.

*A. Conditions creating the “perfect storm”*

The Reagan era laid the groundwork for a weakening of universities’ ability to withstand the attacks being launched under the two Trump administrations. As discussed in Section III, university corporatization creates an internal threat to universities’ institutional independence and commitment to its public mission. University administrations have embraced the neoliberal obsession with a market-driven economy, putting into place an institutional vision of the “entrepreneurial” university. This corporate model encourages faculty to commercialize research and build closer relationships with industry, commodifies teaching with a largely contingent faculty work force, and expands top-down decision-making by an ever expanding administration. Shifting toward a university identity as market actor has led to institutional changes that undermine the university’s institutional independence, faculty academic freedom and tenure, due process, and shared governance, which are fundamental to fulfilling the university’s public mission.<sup>161</sup> This largely self-inflicted weakening of universities’ independence and public mission has continued with corporatization trends under the ongoing neoliberal policies since the Reagan administration.

The first Trump presidential campaign and election win marked the start of a severe, rightward shift in political and judicial institutions that have added external threats to university independence and faculty academic freedom. Trump’s overtly racist, misogynist, and xenophobic campaign fueled a racially driven backlash against the Obama presidency. In the university context, this backlash is evidenced in the federal and state level attacks on programs and policies adopted in the 1960s, which supported advances toward a more diverse student body and a broadened academic curriculum. In his first administration, with the support of a right-wing Senate majority, Trump was able to secure a conservative Supreme Court.<sup>162</sup> Under the Biden presidency, the Trump impact continued, as the Court

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<sup>161</sup> Risa L. Lieberwitz, *Fighting for Our Rights Today, Building Our Strength for Tomorrow*, 105 *ACADEME* 8, 10–11 (2019).

<sup>162</sup> See, Gerhard Peters and John T. Woolley, *Trump Campaign Press Release – Promises Kept – Another Supreme Court Justice*, THE AMERICAN PRESIDENCY PROJECT (Oct. 26, 2020), <https://www.presidency.ucsb.edu/documents/trump-campaign-press-release-promises-kept-another-supreme-court-justice>.

delivered the demise of affirmative action in student admissions, and state legislatures imported Trump's EO on "divisive concepts" into state laws restricting academic freedom at all levels of public education.

Under the Biden presidency, the "perfect storm" was strengthened by the external political attacks on universities after October 7, 2023. Congressional hearings, beginning in December 2023 revealed the weak defense of academic freedom and protected political speech by university presidents accused of antisemitism for not disciplining students and faculty for their protests against Israel's massive military campaign in Gaza.<sup>163</sup> One of the most distressing displays of such weakness was Columbia University's president Minouche Shafik's performance in front of the House committee, when she named faculty who were being investigated or who would never teach at Columbia again.<sup>164</sup> Having already corporatized the university as a market actor with increasingly close relations with for-profit businesses and conservative wealthy donors and trustees, the university presidents' responses can be understood as appeasement rather than robust support for academic freedom and freedom of expression.<sup>165</sup>

These developments laid the groundwork for Trump's second administration when he unleashed an all-out direct assault on universities. This frontal attack goes to a new extreme of using antidiscrimination law against itself. Following the example of the Supreme Court majority in *SFFA v. Harvard*, the Trump administration has weaponized anti-discrimination law, including Title VI and Title IX, to destroy the goals of civil rights law to undo systemic racial and gender inequalities. Using a combination of political and legal tools of presidential EOs, "Dear Colleague Letters," Title VI investigations, and cuts in federal research funds, federal agencies under Trump have launched a barrage of attacks against universities to put the federal re-interpretation of anti-discrimination into effect.<sup>166</sup> With these tools, Trump and his federal agencies have accused universities of engaging in discrimination by increasing diversity in student admissions and faculty appointments, teaching and research about race and gender, and creating DEI policies and programs.<sup>167</sup> These attacks on universities have been further fueled by federal agencies' unsupported Title VI allegations that conflate antisemitism with political dissent against Israel and Zionism.<sup>168</sup> With the federal multi-agency Task Force's coerced agreements with Columbia University, Brown University, University of Pennsylvania, Cornell University, and others, the weaponization of Title VI

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<sup>163</sup> Knott, *supra* note 139.

<sup>164</sup> Ryan Quinn, *Columbia President Accused of Dishonest Testimony, Throwing Professors 'Under the Bus,'* INSIDE HIGHER ED (Apr. 19, 2024), <https://www.insidehighered.com/news/faculty-issues/academic-freedom/2024/04/19/columbia-president-accused-throwing-profs-under-bus>.

<sup>165</sup> See, Robert Reich, *Academic Freedom The Loser When Big Donors Hound US University Presidents*, THE GUARDIAN (Dec. 12, 2023), <https://www.theguardian.com/commentisfree/2023/dec/12/us-college-donors-influence-gaza-israel>; Rob Copeland, *Warning of 'Grave' Errors, Powerful Donors Push Universities on Hamas*, N.Y. TIMES (Oct. 15, 2023), <https://www.nytimes.com/2023/10/15/business/harvard-upenn-hamas-israel-students-donors.html>.

<sup>166</sup> See text accompanying notes 89–127, *supra*.

<sup>167</sup> See text accompanying notes 108–127, *supra*.

<sup>168</sup> See text accompanying notes 140–147, *supra*.

has been turned into a tool of extortion against higher education institutions.<sup>169</sup>

*B. The choice of capitulation or resistance*

*1. Capitulation and its costs*

In the face of widespread ideological, political, and economic attacks by federal and state governments, university administrations have not joined together to collectively resist the interference with universities’ institutional independence, faculty academic freedom and students’ freedom of expression. Instead, university administrations have maintained an individualistic response to these attacks, choosing to duck and cover, appease Congressional critics and federal agencies, or capitulate to coercive demands to make institutional changes in exchange for the reinstatement of federal research funds.<sup>170</sup>

This individualized institutional strategy was not inevitable. The universities could have chosen to collectively refuse to accede to Trump’s demands. If all or most universities had resisted together, they could have significantly increased their power to push back against Trump and the federal agencies’ unconstitutional and illegal tactics. Rather than Princeton and Wesleyan being among the exceptional cases of university presidents who have publicly opposed Trump’s attacks against higher education,<sup>171</sup> the higher education community could have stood together in their resistance. The statement, “A Call for Constructive Engagement,”<sup>172</sup> signed by many university and college presidents was a starting point for resistance, as it stated the presidents’ commitment to “open inquiry,” and stated that they “oppose undue government intrusion in the lives of those who learn, live, and work on our campuses” and “reject the coercive use of public research funding.”<sup>173</sup> Following this, however, there was no collective action taken by university administrations. It is also positive that seven of the nine universities offered the White House’s “Compact for Academic Excellence” have refused to endorse it.<sup>174</sup> In exchange for the possibility of greater

<sup>169</sup> See text accompanying notes 148–154, *supra*; See also, Rana M. Jaleel and Risa L. Lieberwitz, *The Corruption of Civil Rights and the Capitulation of Higher Ed*, LAW AND POLITICAL ECONOMY PROJECT (Oct. 23, 2025) (“As the AAUP’s Committee A on Academic Freedom and Tenure wrote in its report, *On Title VI, Discrimination, and Academic Freedom*, the Trump administration’s attempt to unmake the Civil Rights Act by hijacking the language of discrimination is nothing less than an attempt to rewrite the history of the nation”); AM. ASSOC. OF UNIV. PROFESSORS, ON TITLE VI, DISCRIMINATION, AND ACADEMIC FREEDOM (2025).

<sup>170</sup> See Alan Blinder, *How Universities are Responding to Trump*, N.Y. Times (Feb. 5, 2026), <https://www.nytimes.com/article/trump-university-college.html>

<sup>171</sup> Zephyr Teachout, *Why are other universities silent in condemning Trump’s attacks on Columbia?*, THE GUARDIAN (Mar. 24, 2025), <https://www.theguardian.com/commentisfree/2025/mar/24/us-universities-trump-columbia>.

<sup>172</sup> Pub. Statement by Am. Ass’n of Coll. and Univ. in Collaboration With Univ. and Coll. Presidents (Apr. 22, 2025).

<sup>173</sup> *Id.*

<sup>174</sup> Alan Blinder, *All but 2 Universities Decline a Trump Offer of Preferential Funding*, N.Y. TIMES (Oct. 20, 2025), <https://www.nytimes.com/2025/10/20/us/politics/universities-funding-compact.html#:~:text=Seven%20of%20the%20nine%20universities%20have%20refused,might%20be%20open%20to%20signing%20on%20quickly>.

federal funding, the compact includes conditions such as agreeing ““that academic freedom is not absolute”” and that they would close ““institutional units that purposefully punish, belittle and even spark violence against conservative ideas.””<sup>175</sup> While some university presidents publicly identified academic freedom as a basis for not endorsing the compact, there was no collective response by the university presidents.<sup>176</sup>

University administrations, faculty, students, and staff should have common interests in resisting the extreme governmental intrusions on the independence and autonomy in academic program development, academic freedom in all subjects – from the humanities to the sciences – and the ability to engage in critical thinking and dissent. Yet, despite widespread calls<sup>177</sup> for collective resistance, university administrations have failed to act together.<sup>178</sup> The same question must be posed for universities’ capitulation to federal and state interference: Why have university administrations failed to engage in collective resistance against the coercive demands that violate their institutional independence, faculty academic freedom, and students’ freedom of expression?

Corporatization of the university may help explain the university administrations’ failure to resist collectively and their individualized responses of appeasement and capitulation. By adopting multiple institutional changes through corporatization, universities have modeled themselves more as private structures with goals similar to for-profit corporations than as institutions with a public mission. Traditional norms essential to fulfilling the university’s public mission – faculty academic freedom and autonomy in teaching, research, governance, and public speech – resonate with the rights and structures of democratic institutions.<sup>179</sup> In contrast, with a corporatized identity as market actors, universities see themselves in competition for market share and market power, rather than as a higher education community dedicated to protecting independence and

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<sup>175</sup> *Id.*

<sup>176</sup> *Id.* But see, Statement by the Am. Council on Educ. and Higher Educ. Ass’n in opposition to Trump Admin. Compact (Oct. 17, 2025), including statements that the Compact “would impose unprecedented litmus tests on colleges and universities as a condition for receiving ill-defined ‘federal benefits’ related to funding and grants. That is why our associations, which span the breadth of the American higher education community and the full spectrum of colleges and universities nationwide, are unified in our opposition to the compact.” The Statement objects to “government control of a university’s basic and necessary freedoms—the freedoms to decide who we teach, what we teach, and who teaches,” but does not use the term “academic freedom.”

<sup>177</sup> See, e.g., Joseph Zuloaga, Matt Luo, & Spencer Davis, *Bollinger Calls for Universities to Take ‘Collective Action’ Against Trump Administration in First Post-Presidency Spectator Interview*, COLUMBIA SPECTATOR (Jan. 21, 2026, 8:53 PM), <https://www.columbiaspectator.com/news/2026/01/21/bollinger-calls-for-universities-to-take-collective-action-against-trump-administration-in-first-post-presidency-spectator-interview/>; Rutgers Adjunct Faculty Union Res., *To Establish A Mutual Defense Compact for the Universities of the Big Ten Academic Alliance in Defense of Academic Freedom, Institutional Integrity, and the Research Enterprise* (Mar. 31, 2025), <https://rutgers-ptlfc.org/2025/03/31/resolution-to-establish-a-mutual-defense-compact-for-the-universities-of-the-big-ten-academic-alliance-in-defense-of-academic-freedom-institutional-integrity-and-the-research-enterprise/>; Ryan Quinn, *As Universities Yield to Trump, Higher Ed Unions Are Fighting*, INSIDE HIGHER ED (Apr. 4, 2025), <https://www.insidehighered.com/news/faculty-issues/labor-unionization/2025/04/04/universities-yield-trump-higher-ed-unions-fight>.

<sup>178</sup> See, Anil Kalhan, *Knowledge and Democracy at Risk: From Florida to Pennsylvania and Beyond*, 16 DREXEL L. REV. 685, 689–702 (2024).

<sup>179</sup> See, *supra* note 8, at 321–22.

academic freedom in furthering their public mission. Further, with this corporate identity, some university administrators have seized the current moment to take actions they desired in any case, such as adopting new restrictions on protests.<sup>180</sup> Moreover, with increased hierarchical governance and weakened shared governance bodies, university administrations do not see themselves as answering to faculty, students, and staff; rather, the administrations’ audiences are Boards of Trustees or Boards of Regents dominated by wealthy corporate donors.<sup>181</sup> At this moment, university administrations’ focus on concerns of trustees and donors has been apparent, as evidenced by the powerful donors at University of Pennsylvania and Harvard who have been publicly critical of the universities for not taking a hard enough stand against students and faculty protesting against Israeli actions in Gaza.<sup>182</sup> This element should not be underestimated as a key part of the “perfect storm” that enabled the Trump administration impose extreme demands by weaponizing Title VI allegations of antisemitism based on protected political dissent against Israel’s national policies and actions.

University administrations’ strategies of appeasement and capitulation have been costly. The wreckage from the “perfect storm” has been broad and deep. With the growth of contingent faculty ranks and the expanded power of university administrations, faculty have become increasingly subject to retaliation for engaging in controversial speech. Following the 2016 presidential election, there was a sharp increase in virulent online targeted harassment against faculty and punitive actions by universities against faculty who express critiques of social inequalities and of the Trump administration.<sup>183</sup> Since that time, faculty have been increasingly afraid to exercise their academic freedom in teaching, research, university governance, and extramural speech. The fear is widespread: fear of pressure by administrators to change their course syllabi and course content; fear of student complaints about their statements in class; fear of retaliatory discipline for engaging in public criticism of Israel or for supporting Palestinian rights; fear of retaliation for engaging in collective protests; fear that international students and faculty will be targeted by the Trump administration; fear of retaliation for criticizing the university administration’s actions; fear of loss of federal funding for academic

<sup>180</sup> AAUP Condemns Wave of Administrative Policies Intended to Crack Down on Peaceful Campus Protest, AAUP (Aug. 14, 2024), <https://www.aaup.org/news/aaup-condemns-wave-administrative-policies-intended-crack-down-peaceful-campus-protest>.

<sup>181</sup> See Alan Blinder & Stephanie Saul, *Wealthy People Have Always Shaped Universities. This Time is Different*, NEW YORK TIMES (Nov. 24, 2025), <https://www.nytimes.com/2025/11/24/us/billionaires-influenceuniversitiestrump.html#:~:text=Some%20billionaires%20have%20been%20allies%20of%20the,Harvard%20and%20the%20University%20of%20Pennsylvania%20leaders>

<sup>182</sup> *Id.*

<sup>183</sup> See, e.g., Press Release, Am. Ass’n of Univ. Professors, Taking a Stand Against Harassment, Part of the Broader Threat to Higher Education (Sept. 7, 2017); *University of Tampa Overreacts to Offensive Tweet*, TAMPA BAY TIMES: EDITORIAL (Sept. 1, 2017), <https://www.tampabay.com/opinion/editorials/editorial-university-of-tampa-overreacts-to-offensive-tweet/2335985/>; Colleen Flaherty, *Trinity Suspends Targeted Professor*, INSIDE HIGHER ED (June. 26, 2017), <https://www.insidehighered.com/news/2017/06/27/trinity-college-connecticut-puts-johnny-eric-williams-leave-over-controversial>; Press Release, American Association of University Professors, Targeted Online Harassment of Faculty (Sep. 7, 2017).

research related to race and gender; and fear of loss of their jobs because of any or all of these occurrences.<sup>184</sup>

Faculty are concerned, as well, about the measures that university administrations have taken to restrict freedom of speech. In addition to university administrators calling in the police to quell campus protests, many universities implemented new “expressive activity policies” in 2024, following campus protests against Israeli military actions in Gaza.<sup>185</sup> These policies add severe restrictions on when and where protests can take place, requirements of advanced registration of protests, and increased discipline against students, faculty, and staff for violating the restrictions on protests.<sup>186</sup> Student protestors have taken the major brunt of these new measures, including long suspensions without due process for engaging in nonviolent protests.<sup>187</sup>

The Trump administration’s attacks on academic programs of racial, ethnic, and gender studies seek to dismantle the advances since the 1960s in disciplinary development that expands knowledge and analysis of essential social, economic, and political structures of inequality. These attacks seek to undermine academic freedom and the disciplinary legitimacy of these areas of studies. As the AAUP Committee A on Academic Freedom has explained in the context of attacks on DEI: “[S]uch attacks can easily reinforce and indeed fuel portrayals of entire fields and disciplines—including ethnic studies, critical race theory, and gender studies—as ‘political’ and ‘ideological’ projects and not serious subjects or research disciplines. When entire fields and subjects related to the study of race and gender, for example, are not considered ‘intellectual’ pursuits, both academic freedom and DEI as social and institutional values are compromised, and the charge of orthodoxy gains purchase.”<sup>188</sup>

The Trump administration’s actions have further unleashed state-level repression of academic freedom. In addition to “divisive concepts” laws, states have proposed or adopted further restrictions on public university

<sup>184</sup> See, e.g., Hannah Richter, *In Red States, Many Academic Researchers Feel Fear – and Resolve*, SCIENCE (Nov. 20, 2025, 5:25 PM), <https://www.science.org/content/article/red-states-many-academic-researchers-feel-fear-and-resolve>; Lee Ann Rawlins Williams, *College Faculty are Under Pressure to Say and do the Right Thing – the Stress also Trickles Down to Students*, THE CONVERSATION (Oct. 22, 2025, 8:15 AM), <https://theconversation.com/college-faculty-are-under-pressure-to-say-and-do-the-right-thing-the-stress-also-trickles-down-to-students-267400>; Michael Shapiro, *It Only Looks Chaotic*, COLLEGEWATCH (Sep. 9, 2025), <https://collegewatch.substack.com/p/it-only-looks-chaotic>; Megan Zahneis & Beckie Supiano, *Fear and Confusion in the Classroom*, CHRON. HIGHER EDUC. (Jun. 9, 2023), [https://www.chronicle.com/article/fear-and-confusion-in-the-classroom?cid=gen\\_sign\\_in&sra=true](https://www.chronicle.com/article/fear-and-confusion-in-the-classroom?cid=gen_sign_in&sra=true).

<sup>185</sup> *Supra* note 180.

<sup>186</sup> Shirin Sinnar, *Campus Protests and the Rule of Law*, 87 L. & CONTEMP. PROBS. 117, 135–57 (2025); *supra* note 180.

<sup>187</sup> See, e.g., Sharon Otterman, *Judge Vacates Punishments of Columbia Students Who Occupied a Building*, N.Y. TIMES (Mar. 3, 2026), <https://www.nytimes.com/2026/03/03/nyregion/columbia-protesters-discipline.html?searchResultPosition=1>; Laura Meckler & Hannah Natanson, *Massive pro-Palestinian College Protests Bring Rare Surge in Discipline*, WASH. POST (May 6, 2024), <https://www.washingtonpost.com/education/2024/05/06/college-protests-suspensions-expulsion-arrests/>; Rachel Treisman, Brian Mann & Jaclyn Diaz, *As Student Protesters Get Arrested, They Risk Being Banned from Campus Too*, NPR (Apr. 29, 2024), <https://www.npr.org/2024/04/29/1247761719/campus-protests-arrests-suspensions>.

<sup>188</sup> AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, *Diversity, Equity, and Inclusion Criteria for Faculty Evaluation*, 3 (Oct. 2024), <https://www.aaup.org/reports-publications/aaup-policies-reports/policy-statements/diversity-equity-and-inclusion>.

teaching and curriculum.<sup>189</sup> The six Texas public university systems have imposed requirements for review and approval of curriculum, syllabi, and course descriptions based on their inclusion of course material related to race and gender.<sup>190</sup> A well-publicized example of the extent of this review is a Texas A&M department chair ordering a faculty member to remove assigned readings of Plato from a module of his Contemporary Moral Problems course that addressed issues of race and gender.<sup>191</sup> University administrators have also discharged tenured and nontenured faculty members for their teaching and extramural speech because of its analysis of political matters<sup>192</sup> or its divergence from the Trump biological definitions of sex.<sup>193</sup>

The damage also includes what cannot be seen. Federal and state governmental attacks on university independence and faculty academic freedom, and university administrators’ restrictions of speech on university campuses have strong chilling effects on students, faculty, and staff.<sup>194</sup> What cannot be measured in any systematic way is the self-censorship that results from such repression. This is exacerbated by the corporatization of the university, as the growing ranks of contingent faculty and the shrinking ranks of faculty on the tenure-track will both be likely to engage in self-censorship. The fear of being placed in the crosshairs of the administration or the government also leads tenured faculty to self-censor, including in the context of faculty governance bodies that have been so weakened by corporatization since the 1980s.

## 2. Resistance

Despite the virulent nature of the attacks on universities, faculty have engaged in collective resistance, including through lawsuits filed by the AAUP, AFT, NEA, and other education organizations and unions challenging federal and state actions.<sup>195</sup> The plaintiffs have been represented

<sup>189</sup> See Emily M.S. Houh, *Ohio: A Case Study in Subnational Authoritarianism*, 16 DREXEL L. REV. 713 (2024).

<sup>190</sup> Antonio L. Ingram II, *Anti-Truth Movements in Post World War II Germany and Contemporary Texas: The Repetition of History and Lessons in Truthful Reconstruction*, 16 DREXEL L. REV. 751 (2024); Katherine Mangan, *Censoring Courses Isn’t the Law in Texas. Public Universities Are Doing It Anyway*, CHRON. OF HIGHER EDUC. (Mar. 5, 2026), <https://www.chronicle.com/article/censoring-courses-isnt-the-law-in-texas-public-universities-are-doing-it-anyway>; Whitford, *supra* note 132.

<sup>191</sup> Emma Whitford, *Plato Censored as Texas A&M Carries Out Course Review*, INSIDE HIGHER ED (Jan. 7, 2026), <https://www.insidehighered.com/news/faculty-issues/academic-freedom/2026/01/07/plato-censored-texas-am-carries-out-course-review>.

<sup>192</sup> Emma Whitford, *Tenure Under Threat*, INSIDE HIGHER ED (Jan. 26, 2026), <https://www.insidehighered.com/news/faculty-issues/tenure/2026/01/26/tenure-under-threat>.

<sup>193</sup> See text accompanying notes 128–131, *supra*.

<sup>194</sup> See, e.g., Laura Saunders, *The Chilling Impact of Censorship in Higher Education*, SOCIAL SCIENCE SPACE (May 26, 2025), <https://www.socialsciencespace.com/2025/05/the-chilling-impact-of-censorship-in-higher-education/>; Amanda Fuchs Miller, *A ‘Dear Colleague’ by Any Other Name*, INSIDE HIGHER ED (Mar. 6, 2026), <https://www.insidehighered.com/opinion/views/2026/03/06/dear-colleague-any-other-name-opinion>; Nell Gluckman, *Noncitizen Professors Testify About Chilling Effect of Others’ Detentions*, CHRON. OF HIGHER EDUC. (Jul. 7, 2025), <https://www.chronicle.com/article/noncitizen-professors-testify-about-chilling-effect-of-others-detentions>.

<sup>195</sup> See text accompanying notes 84–88, 142–147, *supra*; See also, Ryan Quinn, *As Universities Yield to Trump, Higher Ed Unions Are Fighting*, INSIDE HIGHER ED (Apr. 4, 2025), <https://www.insidehighered.com/news/faculty-issues/labor-unionization/2025/04/04/universities-yield-trump-higher-ed-unions-fight>.

by civil rights and public interest organizations including the ACLU<sup>196</sup> and Democracy Forward.<sup>197</sup> The lawsuits have raised First and Fifth Amendment freedom of speech and due process challenges to the Trump administration's Executive Orders and cuts in federal funding to universities. These same organizations have filed lawsuits with First Amendment free speech challenges against OCR's DCLs.<sup>198</sup> Filing these lawsuits with multiple organizational plaintiffs has strengthened solidarity among organizations and unions in the educational, labor, and civil rights communities. Several of these lawsuits have resulted in important victories, with federal district courts issuing preliminary or permanent injunctions against the federal multi-agency Task Force's actions and funding cuts,<sup>199</sup> and against federal agency DCLs.<sup>200</sup> Federal court judges have been brave and principled in writing powerful opinions that explain the constitutional bases for the injunctions.

Litigation challenging state governmental actions has also been a significant part of the collective resistance against state "divisive concepts" legislation and against state universities' repression of speech. The initial challenges at the state level were brought after the first Trump administration, as multiple states enacted such laws. Faculty unions and individual faculty members joined together to file the lawsuit in the *Pernell v. Florida* case, which led to the district court's issuance of a permanent injunction against enforcement of Florida's "STOP W.O.K.E. Act."<sup>201</sup>

Organizational statements by education unions, professional organizations, and civil rights organizations have been important acts of resistance that also supply essential information and analysis to their members and the public regarding the fundamental principles of freedom of speech and association, academic freedom, due process, and shared governance. The AAUP issued statements after the start of the Israeli bombardment of Gaza, calling on university administrations to respect academic freedom and freedom of expression on campuses.<sup>202</sup> The AAUP continued to respond with statements calling out university administrations' escalation of punitive responses.<sup>203</sup> Joint statements and reports have

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<sup>196</sup> See AMERICAN C.L. UNION, *We're Fighting Back Against Efforts to Intimidate Professors into Silence*, <https://www.aclu.org/news/free-speech/were-fighting-back-against-efforts-to-intimidate-professors-into-silence>.

<sup>197</sup> See DEMOCRACY FORWARD, *Broad Coalition of Faculty, Staff, Students, and Unions United to Defend University of California System from Trump-Vance Administration Assault* (Sept. 16, 2025), <https://democracyforward.org/news/press-releases/titlevi-lawsuit/>.

<sup>198</sup> See text accompanying notes 116–117, *supra*.

<sup>199</sup> See text accompanying notes 84–88, 142–147, *supra*.

<sup>200</sup> See text accompanying notes 116–117, *supra*.

<sup>201</sup> See text accompanying notes 84–88, *supra*.

<sup>202</sup> American Association of University Professors, *Academic Freedom in Times of War*, AM. ASS'N OF UNIV. PROFESSORS (Oct. 24, 2023), <https://www.aaup.org/news/academic-freedom-times-war>.

<sup>203</sup> See, e.g., American Association of University Professors, *The AAUP Condemns Escalating Assault on Academic Freedom at Penn*, AM. ASS'N OF UNIV. PROFESSORS (Dec. 19, 2023), <https://www.aaup.org/news/aaup-condemns-escalating-assault-academic-freedom-penn>; Irene Mulvey, *Censorship Will Not Defeat Antisemitism*, AM. ASS'N OF UNIV. PROFESSORS (Dec. 12, 2023), <https://www.aaup.org/news/censorship-will-not-defeat-antisemitism>;

American Association of University Professors, *Polarizing Times Demand Robust Academic Freedom*, AM. ASS'N OF UNIV. PROFESSORS (Nov. 15, 2023), <https://www.aaup.org/news/polarizing-times-demand-robust-academic-freedom>.

strengthened solidarity among the organizations, such as the joint report by the AAUP and Middle East Studies Association.<sup>204</sup>

As important for building a collective resistance against state and federal intrusion and repression is the organizing that has occurred by faculty organizations and unions on public and private campuses, whether or not they are unionized. The collective resistance is also aimed at university administrations’ increased restrictions on speech, punitive actions that have primarily been taken against students protesting Israel’s military actions in Gaza, and university administrations’ capitulation to federal and state demands. Joint organizing is powerful here, as well, with solidarity among educational organizations, unions, civil rights organizations, and shared governance bodies on campus. Through this organizing work, faculty have engaged in teach-ins, protests and demonstrations, and have written newspaper op-eds and letters to the editor, petitions to the administration, faculty senate resolutions, and organizational statements. Faculty resistance has focused on both faculty and student rights of academic freedom, freedom of speech, and due process.<sup>205</sup> This includes advocating for students who have faced draconian discipline for their nonviolent protest activities, including *persona non grata* orders and prolonged suspensions issued without due process.

Through all these activities on campus, organizations including AAUP chapters on unionized and non-unionized campuses have grown as faculty seek collective ways to engage in resistance and to protect academic freedom, due process, shared governance and collective bargaining. These collective actions on individual campuses have also opened up greater cross-campus organizing and mutual support. Building these relationships will be important for current and future collective struggles to protect the

<sup>204</sup> AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS & MIDDLE EAST STUDIES ASSOCIATION, DISCRIMINATING AGAINST DISSENT: THE WEAPONIZATION OF CIVIL RIGHTS LAW TO REPRESS CAMPUS SPEECH ON PALESTINE (2025).

<sup>205</sup> See, e.g., Cornell Daily Sun Opinion Department, *AAUP Statement on the Trump-Cornell Deal*, CORNELL DAILY SUN: GUEST ROOM (Nov. 13, 2025), <https://www.cornellsun.com/article/2025/11/guest-room-aaup-statement-on-the-trump-cornell-deal#:~:text=This%20agreement%20goes%20beyond%20the%20Supreme%20Court%E2%80%99s%20SFFA%20v%2E%20Harvard%20decision%20about%20affirmative%20action%20in%20student%20admissions>; Cornell Daily Sun Opinion Department, *Cornell’s Actions Against Professor Cheyfitz Violate Academic Freedom, Faculty Governance and Due Process*, CORNELL DAILY SUN: GUEST ROOM (Oct. 5, 2025), <https://www.cornellsun.com/article/2025/10/guest-room-cornell-s-actions-against-professor-cheyfitz-violate-academic-freedom-faculty-governance-and-due-process>; Sophia Riley Sim, *‘Take Back Our University’ Rally Unites a Wide Range of Causes, Organizations*, CORNELL DAILY SUN (Aug. 29, 2025), <https://www.cornellsun.com/article/2025/08/the-people-united-will-never-be-defeated-take-back-our-university-rally-unites-a-wide-range-of-causes-organizations>; Dora Gao, *Knight Institute and AAUP file motion to block Trump administration from deporting pro-Palestinian protesters*, COLUMBIA SPECTATOR (Nov. 16, 2025), <https://www.columbiaspectator.com/news/2025/11/16/knight-institute-and-aaup-file-motion-to-block-trump-administration-from-deporting-pro-palestinian-protesters/>; Dora Gao, *Columbia AAUP calls for greater faculty and student input amid leadership transition*, COLUMBIA SPECTATOR (Apr. 6, 2025), <https://www.columbiaspectator.com/news/2025/04/06/columbia-aaup-calls-for-greater-faculty-and-student-input-amid-leadership-transition/>; Anvi Sehc, *AAUP-Penn alleges Title VI office summoned faculty over ‘unsubstantiated’ antisemitism accusations*, THE DAILY PENNSYLVANIAN (Oct. 23, 2025), <https://www.thedp.com/article/2025/10/penn-aaup-orei-statement-targeting-speech>; Sameeksha Panda & Tanisha Agrawal, *‘Kissing the Trump ring’: Penn faculty condemn University’s Title IX settlement*, THE DAILY PENNSYLVANIAN (Jul. 14, 2025), <https://www.thedp.com/article/2025/07/penn-faculty-react-title-ix-resolution>.

fundamental norms, values, and rights that make universities meaningful institutions.

## VII. CONCLUSION

This article has traced important periods in the development of the modern university from the early 1900s to the current moment when higher education is experiencing attacks by federal and state governments. This analysis leads to several concluding observations. First, the university in the US has long dealt with conflicting forces. As industrialization developed in the mid- to late 1800s, this led to an early “perfect storm” of conditions resulting in labor conflict in higher education, where faculty organized and demanded academic freedom in colleges and universities as independent institutions serving a public mission rather than serving the private interests of industry.

Secondly, even during the period of public support and growth and expanded access to universities in the 1960s, this did not mean that the university was free from conflict. To the contrary, the college campus was a contested terrain, as student and faculty activists made successful demands for a voice in campus governance, which led to greater diversity of academic programs to include studies of gender, race, and class.

Third, continued momentum toward greater democratic institutional norms, including broader diversity and collective governance was not inevitable. As the political landscape moved to the right under the Reagan administration, privatization led to a new set of conflicts as universities embraced a neoliberal model of the “entrepreneurial” university that adopted for-profit corporate structures of commercialization, profitable research and teaching, and contingent faculty employment. These changes intensified conflicts of interests between the corporatized university’s private financial interests and the university’s interests in serving a public mission as independent institutions supporting broad academic freedom and strong collective faculty governance. These conflicts of interests also affected faculty engaged in commercializing research and building relationships with for-profit businesses.

Fourth, serious consequences of corporatization include the university’s increased vulnerability to external political interference. Thus, the “perfect storm” of political and economic forces was put into place: corporatization and resulting conflicts of interests; weakened university commitment to institutional independence and faculty academic freedom and collective governance; the Trump administration’s hostility to racial and gender equality; and the rise in campus protests about Israel’s military actions in Gaza. Having weakened the traditional norms and institutional structures to carry out a public mission, university administrations have also failed to oppose the external political attacks against higher education, including federal and state governments’ unconstitutional, unlawful, and coercive use of Title VI and Title IX.

Finally, even in the chaos of the storm, it has become clear how essential collective action is to defend and save the university as an

independent institution with a public mission carried out by faculty exercising academic freedom, job security, and collective self-governance. Failing to stand together to reject the Trump agenda, university administrations have chosen an individualistic path – engaging in anticipatory obedience, appeasement, and outright capitulation to intrusive and destructive demands that destroy the university’s independence, academic freedom, and self-governance. In contrast, faculty unions and professional organizations have shown that there is another choice – that resistance is not futile. Joining together to take collective action through litigation and organizing nationally and at the campus level can successfully push back against unconstitutional and unlawful interference with the fundamental values and norms that support higher education in the public interest.

# Dismantling the Whiteness of Legal Education

DORON SAMUEL-SIEGEL<sup>1</sup>

## ABSTRACT

Whiteness is not merely a racial description. Whiteness operates as allegiance to structural racism. The quiet engine of racial hierarchy, whiteness pervades and shapes traditional legal education, rendering legal pedagogy a structurally racist enterprise. Legal education not only reproduces the racism embedded in the law and legal profession, but also obscures the ways legal doctrine, professional norms, and pedagogical practices normalize, protect, and make invisible the advantages that accrue to whiteness itself. In doing so, it produces lawyers ill-equipped to dismantle structural injustice.

This Article breaks new ground in the scholarship on legal pedagogy by defining whiteness as it operates within legal education, analyzing the ways it manifests across legal pedagogy and professional formation, and offering legal educators a holistic methodology with actionable strategies for dismantling its influence. The Article argues that understanding whiteness requires more than identifying racialized harms to people who are not white; it also requires examining the mechanisms through which legal education preserves and distributes white advantage.

The Article calls on legal educators to acknowledge the whiteness of law and pedagogy, to teach students to critically engage with it, and to equip them to recognize, interrupt, and dismantle its oppressive effects. In doing so, legal education can move beyond reproducing structural racism and align more fully with the broader project of racial justice.

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## INTRODUCTION

Whiteness pervades legal education. It shapes everything from curricular design and norms about the rule of law, to bar exam preparation and approaches to professional competency.<sup>2</sup> For example, whiteness sustains the false belief that race and racism are tangential to most coursework rather than foundational to understanding how law operates in society. It also underlies the failure to prepare law graduates to think systematically about dismantling structural racism. And its influence extends beyond the classroom itself, contributing to insufficient institutional attention to racialized disparities in bar passage rates and to the broader inequities those disparities reproduce within the legal profession.

Whiteness operates as an allegiance to structural racism. As a result of its influence, whether intentionally or not, legal education reproduces structural racism and produces lawyers ill-equipped to contribute effectively to the project of racial justice. Because of structural racism, people who are racialized as white reap unearned benefits, while people who are racially minoritized can experience systematic harms.<sup>3</sup> The consequences of structural racism's reproduction are visible not only in legal education, but

<sup>2</sup> See *infra* Part II.

<sup>3</sup> Doron Samuel-Siegel, Kenneth S. Anderson & Emily Lopynski, *Reckoning with Structural Racism: A Restorative Jurisprudence of Equal Protection*, 23 RICH. PUB. INT. L. REV. 137, 151 (2020) [hereinafter *Restorative Jurisprudence of Equal Protection*] and sources cited therein.

also in the legal reasoning and institutional decision-making that shape democratic life. As renowned civil rights attorney Sherrilyn Ifill has observed with respect to Supreme Court Justices, there is currently a failure to cultivate the kinds of racial literacy, historical understanding, and democratic accountability necessary for principled legal decision-making in a multiracial society.<sup>4</sup> Her observations pertain equally to all lawyers and judges more broadly. Only with such competencies can legal reasoning become sufficiently “robust, complex, mature, and accountable” to counteract entrenched legal structures that have failed to realize the promise of equal protection.<sup>5</sup>

The shortcomings in the judicial reasoning that Ifill critiques are, at least in part, likely byproducts of the Justices’ legal education, which was shaped by whiteness but devoid of explicit training about how whiteness functions and how it might be dismantled.<sup>6</sup> Although today’s lawyers and judges did not create the world that produced these deficiencies, they are now helping to shape the world that follows. Without interruption and dismantlement, legal education will continue reproducing the inequities of structural racism rather than equipping lawyers to challenge them.

Recognizing these dynamics requires closer examination of the role legal education itself plays in reproducing structural racial inequality. Scholarship has long documented the benefits and harms produced by structural racism across societal domains, from wealth,<sup>7</sup> to health,<sup>8</sup> and beyond, and has examined the role of legal education in this dynamic.<sup>9</sup>

<sup>4</sup> Sherrilyn Ifill, *A Court Without the Range: The Reconstruction Court 2.0*, SUBSTACK (June 30, 2025), <https://sherrilyn.substack.com/p/a-court-without-the-range>.

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

<sup>6</sup> See, e.g., Angela Onwuachi-Willig, *Roberts’s Revisions: A Narratological Reading of the Affirmative Action Cases*, 137 HARV. L. REV. 192, 201 (2023) (discussing the Supreme Court’s opinion in *Students For Fair Admissions, Inc. v. President and Fellows of Harvard College* and examining “how the parts of the opinion’s narrative concerning race and admissions have been combined in a way that presumes, assumes, and reinforces the transparent racial lens through which many white people, including nearly all the Justices in the majority, view society”).

<sup>7</sup> In 2021, for instance, white households “made up 65.3% of all U.S. households and held 80.0% of all wealth.” Briana Sullivan, Donald Hays, & Neil Bennett, *Households With a White, Non-Hispanic Householder Were Ten Times Wealthier Than Those With a Black Householder in 2021*, U.S. CENSUS BUREAU (APR. 23, 2024), <https://www.census.gov/library/stories/2024/04/wealth-by-race.html>. In the same year, the “median wealth (\$24,520) [of Black households] was about one-tenth the median wealth of [white households] (\$250,400).” *Id.*

<sup>8</sup> KHIARA M. BRIDGES, *CRITICAL RACE THEORY: A PRIMER* 4 (2019) (noting that Black Americans and Latinx people have higher rates of diseases such as diabetes, cancer, and others, and are more likely to die from such diseases).

<sup>9</sup> E.g., Kimberlé Williams Crenshaw, *Toward a Race-Conscious Pedagogy in Legal Education*, 11 NAT’L BLACK L. J. 1 (1988); Erin C. Lain, *Racialized Interactions in the Law School Classroom: Pedagogical Approaches to Creating a Safe Learning Environment*, 67 J. LEGAL ED. 780, 788-92 (2018); Russell A. McClain, *Bottled at the Source: Recapturing the Essence of Academic Support as a Primary Tool of Education Equity for Minority Law Students*, 18 MD. L.J. RACE, RELIG., GENDER & CLASS 139 (2018); Amy H. Soled & Barbara Hoffman, *Building Bridges: How Law Schools Can Better Prepare Students From Historically Underserved Communities to Excel in Law School*, 69 J. LEGAL ED. 268, 290-91 (2020); Nicole P. Dyszlewski, *Introduction*, in *INTEGRATING DOCTRINE AND DIVERSITY: INCLUSION AND EQUITY IN THE LAW SCHOOL CLASSROOM* xiii-xiv (Nicole P. Dyszlewski, Raquel J. Gabriel, Suzanne Harrington-Steppen, Anna Russel & Genevieve B. Tung eds., 2021); Phil Lord, *Black Lives Matter: On Challenging the Soul of Legal Education*, 54 TEX. TECH L. REV. 89 (2021); TERI A. MCMURTRY-CHUBB, *STRATEGIES AND TECHNIQUES FOR INTEGRATING DIVERSITY, EQUITY, AND INCLUSION INTO THE CORE LAW CURRICULUM* (Wolters Kluwer 2022); Catherine Bramble & Rory Bahadur, *Actively*

Further, this scholarship has only recently begun to focus specifically on the role of whiteness, describing the absence of education about whiteness in law school curricula,<sup>10</sup> and documenting how law schools function as “white spaces” where the people, architecture, curricular substance, and teaching practices preserve white advantage.<sup>11</sup>

Yet, there remains a need for scholarship that examines how whiteness operates within legal education itself and delves deeply into how legal educators might dismantle its influence within law school pedagogy and culture. That need is especially pressing because law schools are duty bound to participate in the eradication of racial injustice. Law schools undertake an obligation to educate lawyers capable of “effective, ethical, and responsible participation as members of the legal profession”<sup>12</sup>—a profession with a “special responsibility for the quality of justice.”<sup>13</sup>

To help legal educators carry out this duty, this Article advances the literature by conducting a novel analysis of how whiteness operates within legal education. It also offers a comprehensive methodology with actionable strategies for dismantling its pervasiveness. The Article argues that understanding whiteness requires more than identifying racialized harms experienced by people who are not white; it also requires examining the ways legal education normalizes, protects, and makes invisible the advantages that accrue to whiteness itself. In centering whiteness, the Article also deliberately shifts focus away from individual blame and toward the ideas, norms, and institutional practices that sustain structural racism. Whiteness, as conceptualized here, is not about condemning particular people or identities, but about examining the ways individuals are socialized within systems that normalize and reproduce racial hierarchy. Because whiteness operates through ideas and practices rather than immutable personal characteristics, legal educators and law students alike possess agency to reject, interrupt, and dismantle it. Studying whiteness therefore opens space not only for critique, but also for meaningful institutional and individual reform.

The methodology of dismantlement offered here is founded in a pedagogy of antiracism. Consisting of five dimensions which focus on educator self-assessment, student needs and experiences, curricular substance, teaching methods, and accountability, the holistic framework guides law teachers by calling attention to these five inflection points on the pathway to dismantlement. Rather than a linear, step-by-step process, the methodology is a panoply of considerations that can empower law teachers to contribute to dismantling whiteness in legal education within their own

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*Achieving Greater Racial Equity in Law School Classrooms*, 71 CLEVELAND STATE L. REV. 709 (2022); Doron Samuel-Siegel, *Reckoning with Structural Racism in Legal Education: Methods Toward a Pedagogy of Antiracism*, 29 CARDOZO J. EQUAL RTS. & SOC. JUST. 1 (2022) [hereinafter *Reckoning with Structural Racism*].

<sup>10</sup> Margalynne J. Armstrong & Stephanie M. Wildman, *Teaching Race/Teaching Whiteness: Transforming Colorblindness to Color Insight*, 86 N. C. L. REV. 635 (2008).

<sup>11</sup> Bennett Capers, *The Law School as White Space*, 106 MINN. L. REV. 7 (2021).

<sup>12</sup> SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, AM. BAR ASS'N, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS (2024–2025) Standard 301(2024).

<sup>13</sup> MODEL RULES OF PRO. CONDUCT, preamble (A.B.A. 2025).

spheres of influence. Indeed, the Article's central prescriptive contribution is a practical and actionable methodology that legal educators can employ to identify, interrupt, and dismantle whiteness within legal pedagogy and professional formation.

For instance, the methodology highlights work that law teachers can do to build knowledge of whiteness itself as well as understand the psychological dynamics that accompany the study of whiteness. The methodology also calls on educators to teach about whiteness across the curriculum and infuse systemic change agency into the culture of legal learning. And it offers strategies to help combat white fragility, reduce racialized disparities in the legal profession, and bolster accountability.

To accomplish its objectives, the Article begins in Part I with a definitional exploration of whiteness and other concepts relevant to dismantlement. Explaining that whiteness operates as an allegiance to structural racism, it illustrates the ideas and ways of being that constitute whiteness, such as entitlement to power, expectations of comfort, and the mythology of racial neutrality. Next, Part II samples the ways whiteness operates in legal education. It identifies ways that whiteness shows up in the substance of the law school curriculum as well as the norms legal educators teach to their students, and demonstrates how whiteness even inhibits the effectiveness of curriculum that addresses race and racism directly. The Article concludes with Part III, where the five-dimensional methodology is described, and where law teachers are offered concrete strategies for employing the methodology to bring about the dismantlement to which this Article aspires.

This project calls on legal educators to acknowledge the whiteness of law and pedagogy; to teach students to critically engage with it; and to equip them to recognize, interrupt, and dismantle the ways whiteness operates. In doing so, legal education can equip law graduates not merely to navigate institutions shaped by whiteness, but to challenge and transform them, thereby aligning legal education more fully with the broader project of racial justice. Accomplishing this work will require legal educators to engage in sustained assessment and reform. The task will not be easy. But only by undertaking it will law schools truly begin playing their part in decommissioning the quiet engine of racial hierarchy.

### I. DEFINING WHITENESS

Whiteness is an idea. It is also a way of being. More precisely, it is a set of ideas and the ways that people inhabit those ideas—often without any harmful intent—enacting them in both their private thoughts and societal spaces. To be clear, whiteness is not about individual people so much as it is about ideas that shape people's perceptions of themselves and others, and the actions that result from those perceptions. Historically, whiteness has been inextricable from structural racism.<sup>14</sup>

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<sup>14</sup> We might theorize a new, reformed version of whiteness that, while retaining certain of its historical attributes, transitions to a way of being that seeks to dismantle rather than perpetuate structural racism.

To prepare for an exploration of how whiteness shapes legal education and how, in turn, legal education reproduces whiteness in the law and legal profession, this Part lays definitional groundwork from which the remainder of the Article proceeds. These definitions are essential because legal educators who wish to understand how whiteness operates within legal education require a shared understanding of what whiteness is and how it manifests. Only with such an understanding will they be equipped to transform the education of lawyers in ways that are not grounded in whiteness and, in turn, have potential to interrupt the reproduction of structural racism.

As such, Part I explains why whiteness must be centered in conversations about legal pedagogy, offers definitional foundations, describes whiteness as conceptualized in this Article, and situates it among the related concepts of white privilege, white supremacy, and structural racism.

#### *A. Why center whiteness?*

This Article centers whiteness, demonstrating its operation in legal education and advocating for its dismantlement there. Centering whiteness both de-centers blame and opens up the possibility for individual agency and action. This is because whiteness is about ideas, not about individual people or their identities. All people, at least to some degree and in certain contexts, arguably have access to enacting whiteness. And while individual people can choose whether to enact whiteness or reject and dismantle it, they cannot choose whether to be socialized in a society in which whiteness dominates.<sup>15</sup> So, studying whiteness is not about “bad” people or apportioning “guilt,” it is about opening up a space for changing ideas. Therefore, this discussion creates a realistic possibility of giving *individual people something to do* to bring about reform. Each of us has the power to change our ideas, and doing so gives us agency to act in the world in a way that nurtures new, better ideas.

Furthermore, the choice to center whiteness flows from the fact that whiteness can be understood not only as a perpetuator of structural racism, but also as a root cause of the uninterrupted persistence of white privilege and white supremacy.<sup>16</sup> Therefore, once society moves away from the ideas of whiteness, the purported, albeit largely unconscious, justifications for privilege and supremacy will fall away. In other words, dismantling

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Such a post-supremacist whiteness would, in theory, function very differently in legal education. See Doron Samuel-Siegel, *Post-Supremacist Whiteness* (draft on file with author). Today’s whiteness, however, is far from a dismantler, and remains complicit in the reproduction of racial hierarchy.

<sup>15</sup> See ROBIN DIANGELO, WHAT DOES IT MEAN TO BE WHITE: DEVELOPING WHITE RACIAL LITERACY 2 (rev. ed. 2016) (explaining socialization and using a metaphor of fish in water to explain the all-encompassing dimensions of socialization).

<sup>16</sup> See *infra* Part I(D); MICHELLE ALEXANDER, THE NEW JIM CROW 23–26, 31–33 (2010) (explaining that conceptions of race as we know them today were developed by European enslavers as a method to buttress the system of white supremacy necessary to facilitate the enslavement of Africans, whiteness fits within this paradigm, but it subsequently gained a life of its own—separate from its role as a justification for white supremacy and, in turn, enslavement).

whiteness has the potential to dismantle the other two phenomena as well, all of which is essential to the project of dismantling structural racism.

### B. Foundational Terminology

In preparation for the discussion that follows, let us define briefly some foundational terminology.<sup>17</sup>

*Race.* The concept of “race” is grounded not in biology but in social and legal constructs.<sup>18</sup> It is not static, but rather a “complex of social meanings constantly being transformed by political struggle.”<sup>19</sup> It “symbolizes social conflicts and interests by referring to different types of human bodies,” distinguishing between people in ways that scientists have long understood to be “at best imprecise, and at worst completely arbitrary.”<sup>20</sup>

*Racialization.* As noted above, because race is not biological, people are not born with a race.<sup>21</sup> Rather, they are racialized by their society.<sup>22</sup> Racialization is the process through which “economic, political, and social status and opportunities are determined at least in part using a hierarchy in which people designated as one race are preferred over people designated as another race.”<sup>23</sup> That is, a person is not born white or Black, for instance, but is instead racialized—or, as some might say, raced—as white or Black. As such, this Article refers to “people raced as [insert racial descriptor]” or “people racialized as [insert racial descriptor].” However, purely for the sake of concision, it often uses simpler constructions such as “[racial descriptor] people” or “people who are [racial descriptor],” which are intended to mean the same.

*Specificity and generality.* Because of its focus on whiteness, this Article at times uses the phrase “people who are not white.” This term is generally problematic because of its potential to signal acceptance of the belief that white racialization is the norm or the default, and that all people

<sup>17</sup> While thorough expositions of these definitions are beyond the scope of this Article, referenced source materials can aid those less familiar with the terms to learn more. One additional comment regarding terminology: This Article speaks in terms of an ambitious eradication goal—the ambition to *dismantle* whiteness in legal education. Some readers might find this choice of language unrealistic, perhaps even naïve or disingenuous. While the likelihood of dismantlement undoubtedly appears chronologically remote, it is this Article’s intention to raise awareness and invite action that will make dismantlement in the long term ever more possible. It is this author’s belief that, in any event, even absent hope of complete transformation, striving toward dismantlement using terms that are explicit and emphatic is an utterly worthwhile endeavor—a vision of a better future is integral to an eventual arrival at such a future.

<sup>18</sup> See, e.g., Elizabeth Kolbert, *There’s No Scientific Basis for Race—It’s a Made-Up Label*, NAT’L GEOGRAPHIC, (Apr. 2018) <https://www.nationalgeographic.com/magazine/2018/04/race-genetics-science-africa/>.

<sup>19</sup> MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES FROM THE 1960S TO THE 1990S* 110 (3d ed. 2015).

<sup>20</sup> *Id.*

<sup>21</sup> See, e.g., Kolbert, *supra* note 18.

<sup>22</sup> See, e.g., Eduardo Bonilla-Silva, *Rethinking Racism: Toward a Structural Interpretation*, 62 AM. SOCIO. REV. 465, 467 (1997) (explaining the concept of a “racialized social system”).

<sup>23</sup> Samuel-Siegel, *Restorative Jurisprudence of Equal Protection*, *supra* note 3, at 147–48 (citing Eduardo Bonilla-Silva, *Rethinking Racism: Toward a Structural Interpretation*, 62 AM. SOC. REV. 465, 467, 469 (1997)).

can or should be categorized as either white or not white.<sup>24</sup> Use of that term in this Article is not intended to signal acceptance of such assertions—it rejects the conception of white racialization as normative or default. Rather, its use here occurs in locations where the relationship with white racialization or the enactment of whiteness is the focal point of the sentence. Generally, we should describe people’s identities with specificity, and as such the Article refers specifically to people as white, Black, Latinx, Native American, or Asian American and Pacific Islander (AAPI), as appropriate. Occasionally, for the sake of concision, the term “people who are racially minoritized” is used to refer collectively to people who are racialized as Black, Latinx, Native American, or AAPI, but only when such generalization is appropriate to the context.

*Teachers and educators.* The article employs “law teacher” and “legal educator” interchangeably to refer to all who are engaged in providing legal education—conceived broadly—directly to law students.<sup>25</sup> While we might refer to law teachers using only the terms “professor,” “faculty,” and “instructor,” these terms risk excluding others who educate law students, many of whom have titles such as “librarian,” “advisor,” “counselor,” “dean,” or “director.” The choice to employ “law teacher” and “legal educator” stems from a desire for inclusivity.

*Structural Racism.* Structural racism helps us understand whiteness because whiteness is, in essence, a means toward the perpetuation of structural racism. This form of racism is a web of policies and practices that operate across societal domains to preserve racial hierarchy without the need for racial animus.<sup>26</sup> Structural racism is why, for instance, people who are racialized as white own more wealth and have longer life expectancies than others.<sup>27</sup> It is a set of entrenched advantages that, though they originated as the products of overt racist animus, now reproduce themselves without any need for interpersonal racism.<sup>28</sup> People acting under the influence of whiteness perpetuate this form of racism because their behavior—largely unwittingly—preserves precisely these advantages. In other words, what makes whiteness whiteness is that its effect is to reproduce structural racism, preserving both its detriments to people who are not white and its benefits for people who are.

With these foundational definitions in mind, let us proceed to explore the definition of the Article’s focal point: whiteness.

<sup>24</sup> See, e.g., Peter J. Aspinall, *Ethnic/Racial Terminology as a Form of Representation: A Critical Review of the Lexicon of Collective and Specific Terms in Use in Britain*, 4 GENEALOGY 1, 8 (2020) (noting that “[n]on-white” defines the ethnic minority population in negative terms—by what it is not—and as a residual population. . . . and sets ‘white’ as the standard, making it openly ethnocentric”); *Race and National Origin*, NATIONAL INSTITUTES OF HEALTH STYLE GUIDE, <https://www.nih.gov.nih-style-guide/race-national-origin> (“Avoid collective reference to racial and ethnic minority groups as non-White unless it was a formal category in a database or research document. Instead, indicate the specific groups.”).

<sup>25</sup> I am a faculty member who is racialized as white and whose title is Professor of Law, Legal Practice.

<sup>26</sup> See generally Ian F. Haney-López, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109(8) YALE L.J. 1717 (2000); DARIA ROITHMAYR, *REPRODUCING RACISM: HOW EVERYDAY CHOICES LOCK IN WHITE ADVANTAGE* (2014).

<sup>27</sup> Samuel-Siegel, *Restorative Jurisprudence of Equal Protection*, *supra* note 3, at 151.

<sup>28</sup> See generally ROITHMAYR, *supra* note 26, at 109 (describing this form of racism as “locked in”).

### C. *Defining whiteness*

Whiteness has been described using an array of definitions.<sup>29</sup> Notwithstanding the definitional variety, this Article takes the novel view that one of the unifying themes in this body of work is that, in all of its manifestations, whiteness has the effect of upholding structural racism. It operates as an allegiance to this systematic form of racism.

While cataloging every definition of whiteness is not necessary for the purposes of this Article, sampling a few of the definitions most relevant to legal pedagogy is instructive. It confirms that whiteness is a set of ideas and ways of being that evidences a commitment, intentional or not, to upholding a race-based system of supremacy and subordination.

*Expectations of power and control.* Whiteness can be understood in part as a collection of attitudes, one of which is an expectation of power and control.<sup>30</sup> In effect, people who are racialized as white are acculturated to anticipate that they generally will have the power to control important aspects of their individual lives without being beholden to the domination of others.<sup>31</sup> In addition to this sense of self-determination, history and experience have conferred upon whiteness an implied legal right to use nearly any means to enforce the domination of white people over those who are not.<sup>32</sup> In other words, whiteness confers a right to life, safety, contracting authority, and property ownership.<sup>33</sup> Furthermore, these rights to self-determination and domination are often experienced as virtually exclusive, meaning that others' rights to the same are subordinate, if they exist at all.<sup>34</sup>

Related to power and control, but on perhaps a more mundane level, whiteness includes an entitlement to be comfortable in any given space.<sup>35</sup> The unabashed entitlement to comfort has manifested recently, for example,

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<sup>29</sup> See, e.g., Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1761 (1993) (whiteness as a valuable asset, like property, which is “based on relations of power, a social construct predicated on white dominance and Black subordination”); Barbara J. Flagg, *Whiteness as Metaprivilege*, 18 WASH. U. J.L. & POL’Y 1, 6 (2005) (“Whiteness not only is a set of unearned privileges, but the capacity to disguise those privileges behind structures of silence, obfuscation, and denial”); IAN HANEY LOPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 112–16 (2006) (whiteness as both an experience of un-raced-ness but also of natural-ness); Eduardo Bonilla-Silva, *The Invisible Weight of Whiteness: The Racial Grammar of Everyday Life in America*, 26 MICH. SOCIO. REV. 1 (Fall 2012) (whiteness as a barrier to empathy and solidarity with people of color); ROBIN DIANGELO, *WHAT DOES IT MEAN TO BE WHITE: DEVELOPING WHITE RACIAL IDENTITY* 167–89 (2016) [hereinafter *WHITE RACIAL IDENTITY*] (whiteness as privilege and normativity); Nancy Leong, *Enjoyed by White Citizens*, 109 GEO. L. J. 1421, 1423 (2021) (whiteness as invisible in American law); see generally John O. Calmore, *Whiteness as Audition and Blackness as Performance: Status Protest from the Margin*, 18 WASH. U. J. L. & POL’Y 99 (2005) (whiteness as setting terms on which all who are not white must perform).

<sup>30</sup> E.g., Harris, *supra* note 29, at 1714 (arguing that whiteness is interrelated with rights of domination and that “[w]hiteness can move from being a passive characteristic as an aspect of identity to an active entity that—like other types of property—is used to fulfill the will and to exercise power.”).

<sup>31</sup> *Id.* at 1713.

<sup>32</sup> See Marissa Jackson Sow, *Whiteness as Contract*, 78 WASH. & LEE L. REV. 1803, 1825 (2022) (“To maintain this racially-casted domination, signatories to the social contract of whiteness continue to negotiate the terms of whiteness to fight the existential threats to that domination . . . [using mechanisms such as] mass incarceration, immigration policy, gentrification schemes and redlining, the destruction and dispossession of land and community utilities, social murder, and systematic killings.”).

<sup>33</sup> *Id.* at 1814–15 (arguing such rights are reserved for people raced as white while people raced as Black have no right to contract, humanity, safety, life).

<sup>34</sup> *Id.*

<sup>35</sup> Robin DiAngelo, *White Fragility*, 3 INT’L. J. CRITICAL PEDAGOGY 54, 55 (2011).

in the argument that public schools should be prohibited from teaching about racism and white supremacy on the grounds that doing so might cause white children to feel discomfort.<sup>36</sup> This comfort entitlement means also that whiteness entails an expectation of ready access to domination of space at will.<sup>37</sup> This occurs because norms associated with whiteness are normalized and considered neutral, meaning that societal spaces routinely operate in ways that acculturate people operating under the influence of whiteness to unthinkingly expect others to conform to their preferences.<sup>38</sup>

These expectations sometimes lead to behaviors that result in domination of spaces of discussion.<sup>39</sup> Such domination can take the form of speaking disproportionately often, interrupting or dismissing speakers who are not white, or presuming to know more than they do about their own experiences, for example.<sup>40</sup> When whiteness dominates spaces in these ways, there are missed opportunities to cede space to people who are not white, or collaborate actively in the reconfiguration of such spaces into equitable ones. By squandering these opportunities—opportunities which those who enact whiteness possess precisely by virtue of their power to dominate—whiteness effectively reinforces the power to dominate.

*Unracing.* Whiteness also includes a tendency to subconsciously believe that whiteness's ways of being and experiencing the world are neutral, normal, merely the product of individuality and in no way the result of structured categories,<sup>41</sup> in other words to experience oneself as what this Article calls “unraced.” To describe this “tendency of whites not to think about whiteness,” Barbara Flagg has coined the term “transparency phenomenon.”<sup>42</sup> She explains that, because most people racialized as white exist in predominantly white settings, they tend to mistakenly believe their traits and behaviors, as well as those of other white people, are race-neutral.<sup>43</sup> In fact, she explains, those traits and behaviors are “closely associated with whiteness,” and the transparency phenomenon causes white decisionmakers to misconstrue the norms and expectations of whiteness as race-neutral rather than what they are—bias that disadvantages people who are not white.<sup>44</sup>

<sup>36</sup> E.g., Bess Levin, *Florida Advances Bill That Would Ban Making White People Feel Bad About Racism, and No, That's Not a Joke*, VANITY FAIR (Jan. 2022) <https://www.vanityfair.com/news/2022/01/florida-sb-148-racism-discomfort?srltid=AfmBOoq4flUTi5-w3ycwNupaqnVF5rltF37xpDD0zWO8kaT-fygVs6A-e>.

<sup>37</sup> See, e.g., Stephanie Bondi, *Students and Institutions Protecting Whiteness as Property: A Critical Race Theory Analysis of Student Affairs Preparation*, 49 J. OF STUDENT AFF. RSCH. & PRAC. 397, 403–04 (2012) (describing empirical findings of white graduate students being disappointed and frustrated when their experiences were not centered in classroom discussions or they perceived the contributions to be undervalued).

<sup>38</sup> See Leong, *supra* note 29, at 1430 (“Default whiteness is deeply normalized, resulting in a society that is so closely tailored to the needs and values of white people that white people can go through life unaware that whiteness is the default. Indeed, many may not even think of themselves in racial terms.”).

<sup>39</sup> See Stephanie M. Wildman, *The Persistence of White Privilege*, 18 WASH. UNIV. J. L. & POL'Y 245, 255–257 (2005) (discussing the “comfort zone of whiteness” and how that leads to domination in conversations and discourse).

<sup>40</sup> See *id.*

<sup>41</sup> DIANGELO, WHITE RACIAL IDENTITY, *supra* note 29, at 175 (articulating the common conception that “[w]hites are ‘just people’—our race is rarely if ever named”); Leong, *supra* note 29, at 1430; BARBARA J. FLAGG, WAS BLIND, BUT NOW I SEE: WHITE RACE CONSCIOUSNESS & THE LAW 1 (1998).

<sup>42</sup> Flagg, *supra* note 41, at 1.

<sup>43</sup> *Id.* at 4.

<sup>44</sup> *Id.* at 4, 29.

Furthermore, the view of whiteness as neutral and unracialized can impact the exercise of institutional leadership. Employing systems that reinforce rather than dismantle the dominance of whiteness contributes to racial hierarchy's preservation. Such systems might include, for example, those related to hiring and retention in employment settings, curricular development and academic success in educational settings, and service pricing and worker training in healthcare settings. When institutional decisions are made as though structural racism does not exist, or as though norms typical of people racialized as white are neutral, they not only permit whiteness to dominate, but squander opportunities to dismantle structural racism.<sup>45</sup>

*Accepting Privilege Unchecked.* These expectations and norms manifest in daily activities related to white privilege, as well. For instance, whiteness includes a tendency to routinely accept privileges that are not equally available to all people. By doing so without also engaging routinely in concomitant efforts to ensure that such privileges are distributed without reference to race, the enactment of whiteness serves as a cog in a machine that reproduces race-based structural inequality. Examples of this brand of hierarchy preservation include, for instance, accepting inequitable employment compensation, being content receiving advantageous public education for their children, or feeling comforted by the presence of law enforcement officials in public spaces. The daily receipt of these privileges without daily efforts to counterbalance them—efforts such as participating in reform of employment practices that have racially disparate impacts or voting to elect leaders who will implement antiracist education and law enforcement policies—is another form of allegiance to upholding structural racism.

In sum, whiteness is a collection of attitudes and behaviors that flow from an entitlement to relative power, comfort, and individuality. And, by being and thinking in these ways, people who enact whiteness not only benefit from racial hierarchy, but also collectively ensure that that very hierarchy is preserved. The people who enact whiteness most commonly are people racialized as white. However, because whiteness is an idea that can be inhabited and enacted, much as a uniform or a role in a performance might be, whiteness is not automatic. Not every person racialized as white necessarily enacts whiteness at all times.

In each of the many manifestations of whiteness described here and elsewhere, whiteness is the quiet engine of racial hierarchy. It is a set of ideas and ways of being that are core to the existence and reproduction of structural racism.

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<sup>45</sup> Flagg, *supra* note 29, at 10 (“The notion of a nonracist (but not antiracist) White—one who ‘is not racist’ but in fact does nothing to dismantle, and enjoys all the benefits of, White supremacy—is dear to the hearts of liberal Whites, and central to the self-perpetuating ideology of White privilege. However, passive White complicity in structures of subordination today is a leading mechanism for the maintenance of White supremacy. Thus, material change in the direction of racial justice requires an end to such complicity.”).

*D. Clarifying further: Whiteness vs. White Privilege vs. White Supremacy*

Whiteness is a root cause of the persistence of both white privilege and white supremacy. But they are three distinct phenomena. Nevertheless, whiteness is often confused with white privilege or white supremacy. This subpart teases them apart so as to build a foundational understanding of each, including their distinctions and interrelatedness. Once we pull them apart, we can clear the way for an analysis that centers whiteness, which is perhaps the least understood and most intractable of the three.

(1) White Privilege

White privilege is a set of unearned advantages—or, as W. E. B. DuBois called them, wages—conferred by society upon people racialized as white.<sup>46</sup> In his landmark 1935 book, *Black Reconstruction in America*, Du Bois described how white laborers of the era, whose economic interests were “practically identical” to those of Black laborers, nevertheless refused to join forces across racial lines.<sup>47</sup> Instead, they chose solidarity with their wealthy white brethren thanks to valuable compensation the wealthy class provided.<sup>48</sup> That compensation came in the form of unearned “wages”—or privileges—of exactly the type we continue to see today: the ability to move freely in public spaces without having their presence questioned, access to the best schools, freedom from unjust law enforcement practices, uninhibited access to voting rights, and plentiful opportunities to see themselves and their communities reflected accurately in media.<sup>49</sup>

Building on Du Bois’s influential work, Peggy McIntosh, writing in 1989, famously used male privilege as an analogue for white privilege, defining the latter as “an invisible package of unearned assets which [one] can count on cashing in each day, but about which [one] was ‘meant’ to remain oblivious. White privilege is like an invisible weightless knapsack of special provisions, maps, passports, codebooks, visas, clothes, tools, and blank checks.”<sup>50</sup>

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<sup>46</sup> W. E. B. DU BOIS, *BLACK RECONSTRUCTION IN AMERICA: AN ESSAY TOWARD A HISTORY OF THE PART WHICH BLACK FOLK PLAYED IN THE ATTEMPT TO RECONSTRUCT DEMOCRACY IN AMERICA, 1860-1880* 700 (1935).

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

<sup>48</sup> *Id.*

<sup>49</sup> Du Bois wrote of white laborers:

They were given public deference and titles of courtesy because they were white. They were admitted freely with all classes of white people to public functions, public parks, and the best schools. The police were drawn from their ranks, and the courts, dependent upon their votes, treated them with such leniency as to encourage lawlessness. Their vote selected public officials, and while this had small effect upon the economic situation, it had great effect upon their personal treatment and the deference shown them. White schoolhouses were the best in the community, and conspicuously placed, and they cost anywhere from twice to ten times as much per capita as the colored schools. The newspapers specialized on news that flattered the poor whites and almost utterly ignored the Negro except in crime and ridicule.

*Id.* at 700–01.

<sup>50</sup> Peggy McIntosh, *White Privilege: Unpacking the Invisible Knapsack*, *PEACE & FREEDOM*, July/Aug. 1989, at 1.

McIntosh identified no fewer than twenty-six examples of the effects of white privilege in her own life.<sup>51</sup> The list included, for example, the ability to “protect [her] children most of the time from people who might not like them,” the ability to “count on [her] skin color not to work against the appearance of financial reliability,” the peace of mind that comes from not needing “to ask of each negative episode or situation [in life] whether it has racial overtones,” the freedom to “criticize our government and talk about how much [she] fear[s] its policies and behavior without being seen as a cultural outsider,” and the presumption of individuality that allows her to “do well in a challenging situation without being called a credit to [her] race.”<sup>52</sup> She observed that her list included both advantages that all members of society should have, such as the ability to select any housing one desires and be treated well there, as well as freedoms that society should desire to banish, such as the freedom to be oblivious to the racialized experiences of people who are not white.<sup>53</sup> In sum, McIntosh explained, white privilege is about “unearned advantage and conferred dominance.”<sup>54</sup>

Since Du Bois and McIntosh, scholars from across disciplines have documented the existence of white privilege and its many manifestations.<sup>55</sup> Any number of privileges exist beyond those McIntosh catalogued based on her own life. For example, white drivers are one-half to one-third as likely to have their car searched by police during a traffic stop as are Black drivers or Latinx drivers, respectively.<sup>56</sup> And this is true despite the fact that illegal narcotics or weapons are found at higher rates during the stops of white drivers.<sup>57</sup>

The ways people interact and present themselves in the world on a day-to-day basis are affected by white privilege as well. For instance, people racialized as white have the ability to align with predominant norms for beauty and professional appearance, should they so choose, without fundamentally altering the appearance of their facial features, skin, or hair.<sup>58</sup> And white people typically have the freedom not to engage in racial codeswitching, thus avoiding the psychological toll that codeswitching

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<sup>51</sup> *Id.* at 1-2.

<sup>52</sup> *Id.* at 2.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 3.

<sup>55</sup> *E.g.*, L. Taylor Phillips & Brian S. Lowery, *Herd Invisibility: The Psychology of Racial Privilege*, 27 CURRENT DIRECTIONS IN PSYCH. SCI. 156, 157 (2018); John Ehrlich & Stuart Woodcock, *What's colour got to do with it? A psychometric assessment of Peggy McIntosh's white privilege*, 50 BRITISH ED. RSCH. J. 2198, 2211-12 (2024).

<sup>56</sup> *See* Nazgol Ghandnoosh, *One in Five: Disparities in Crime and Policing*, SENTENCING PROJECT (Nov. 2, 2023), <https://www.sentencingproject.org/reports/one-in-five-disparities-in-crime-and-policing>.

<sup>57</sup> *Id.*

<sup>58</sup> *See, e.g.*, Leong, *supra* note 29, at 1429 (“In fashion advertisements, most models are still white. Some products are specifically designed to help nonwhite people adhere to the white beauty standard, such as the skin-lightening product ‘Fair and Lovely,’ and eye tape or even eyelid surgery meant for Asian-American women to achieve a double eyelid.”); Shannon Cumberbatch, *When Your Identity is Inherently “Unprofessional”*: Navigating Rules of Professional Appearance Rooted in Cisheteronormative Whiteness as Black Women and Gender Non-Conforming Professionals, 34 ST. JOHN’S UNIV. J. CIV. RTS. & ECON. DEV. 81, 100 (2021).

exacts.<sup>59</sup> Racial codeswitching is a process by which one downplays one's traits or attributes that might depart from dominant racial norms. It involves "adjusting one's style of speech, appearance, behavior, and expression in ways that will optimize the comfort of others"<sup>60</sup> Unbounded by this constraint, white people can communicate in professional settings using language patterns associated with their racial identity without fear they will be judged less competent or otherwise treated unfairly.<sup>61</sup>

An exhaustive list of privileges is beyond the scope of this project, but it bears noting that the list encompasses the most fundamental of life experiences: White people as a group have access to better health care.<sup>62</sup> They are less likely to die in childbirth.<sup>63</sup> They live longer.<sup>64</sup> They make more money from employment.<sup>65</sup> They own more wealth.<sup>66</sup> And they have greater access to high-quality public education for their children than any other racial group.<sup>67</sup> The list could go on lengthily with any number of privileges of significant gravity.

However, perhaps the most significant of the privileges is the subtle yet incalculable freedom to live in a society where whiteness is deemed normative—where whiteness is the default identity and largely invisible to most white people living their day-to-day lives.<sup>68</sup> Put another way by Nancy Leong: "one of the greatest privileges of whiteness is that most of the time

<sup>59</sup> Courtney L. McCluney, Kathrina Robotham, Serenity Lee, Richard Smith, & Myles Durkee, *The Costs of Code-Switching*, HARV. BUS. REV. (Nov. 15, 2019), <https://hbr.org/2019/11/the-costs-of-codeswitching>.

<sup>60</sup> *Id.*

<sup>61</sup> See Courtney L. McCluney, Myles I. Durkee, Richard E. Smith II, Kathrina J. Robotham, & Serenity Sai-Lai Lee, *To Be, or not to Be . . . Black: The Effects of Racial Codeswitching on Perceived Professionalism in the Workplace*, 97 J. EXPERIMENTAL SOC. PSYCH. 1, 2 (2021).

<sup>62</sup> See Nambi Ndugga, Latoya Hill, Alisha Rao, Akash Pilai, & Samantha Artiga, *Key Data on Health and Health Care by Race and Ethnicity*, KFF (Dec. 16, 2025), <https://www.kff.org/key-data-on-health-and-health-care-by-race-and-ethnicity/?entry=executive-summary-introduction> ("Hispanic, Black, and AIAN people fare worse than White people across the majority of examined measures of health and health care and social determinants of health.").

<sup>63</sup> Donna L. Hoyert, *Maternal Mortality Rates in the United States, 2022*, NAT'L CTR. FOR HEALTH STAT., CDC (May 2024), <https://www.cdc.gov/nchs/data/hestat/maternal-mortality/2022/maternal-mortality-rates-2022.pdf> (19 deaths per 100,000 live births among white women versus 49.5 deaths per 100,000 live births among Black women) [Referencing Figure 2].

<sup>64</sup> Latoya Hill & Samantha Artiga, *What is Driving Widening Racial Disparities in Life Expectancy?*, KFF (May 23, 2023), <https://www.kff.org/racial-equity-and-health-policy/what-is-driving-widening-racial-disparities-in-life-expectancy/> ("In 2019, prior to the onset of the pandemic, overall life expectancy was 78.8 years. AIAN people had the lowest life expectancy at 71.8 years, followed by Black people at 74.8. These groups both had lower life expectancies than White people, whose life expectancy was 78.8 years. Hispanic and Asian people had longer life expectancies of 81.9 and 85.6 years, respectively.").

<sup>65</sup> Eileen Patten, *Racial, Gender Wage Gaps Persist in U.S. Despite Some Progress*, PEW RSCH. CTR. (July 1, 2016), <https://www.pewresearch.org/short-reads/2016/07/01/racial-gender-wage-gaps-persist-in-u-s-despite-some-progress/> ("Among full- and part-time workers in the U.S., blacks in 2015 earned just 75% as much as whites in median hourly earnings and women earned 83% as much as men.").

<sup>66</sup> Briana Sullivan, Donald Hays, & Neil Bennett, *Wealth by Race of Householder*, U.S. CENSUS BUREAU (Apr. 23, 2024), <https://www.census.gov/library/stories/2024/04/wealth-by-race.html> ("Households with a White, non-Hispanic householder had 10 times more wealth than those with a Black householder in 2021, according to the U.S. Census Bureau's Survey of Income and Program Participation (SIPP).").

<sup>67</sup> See, e.g., ALLISON FRIEDMAN-KRAUSS & STEVEN BARNETT, RUTGERS SPECIAL REP. ON ACCESS TO HIGH-QUALITY EARLY EDUCATION AND RACIAL EQUITY (2020) (documenting unequal access to high quality early-childhood education); Danielle Wingfield, *The Resurgence of Massive Resistance*, 82 WASH. & LEE L. REV. 259, 269 (2025) (noting "there is a long history of attempts to control what kind of knowledge is prioritized in publicly funded education and who has access to such knowledge").

<sup>68</sup> See, e.g., FLAGG, *supra* note 41, at 1.

white people do not have to think about being white.”<sup>69</sup> Indeed, white privilege includes insulation from thinking about or discussing race or racism at all and, thus, avoiding the discomfort that can flow therefrom.<sup>70</sup>

White privilege persists for any number of reasons. But centrally important is the reality that people who benefit from it have a significant incentive to avoid discussing it, or even acknowledging its existence. Indeed, facing white privilege means one must also, as McIntosh stated with eloquence, “give up the myth of meritocracy. If [the privilege exists], this is not such a free country; one’s life is not what one makes it; many doors open for certain people through no virtues of their own.”<sup>71</sup>

## (2) White Supremacy

While whiteness is a way of being—a set of attitudes and behaviors—and white privilege is a societal practice—a set of unearned advantages ranging from the mundane to the life-saving—white supremacy is the systemic ideology that provides the structural supports for both. It is a societal system of power apportionment that flows directly from ideologies of race-based superiority and inferiority.

As defined influentially by Frances Lee Ansley, white supremacy is a system in which white people collectively possess exclusive power to dominate political, economic, and cultural life, and retain that power because of beliefs about white normativity and entitlement.<sup>72</sup> Historically, it was an explicitly racist system premised upon the alleged superiority of people racialized as white over people who are otherwise racialized.<sup>73</sup> Though the explicit racism of white supremacy has largely receded, with recent decades witnessing a de-mainstreaming of explicit claims of race-based superiority and inferiority, the system of white supremacy erected by those who consciously espoused those notions remains in place.<sup>74</sup> This is no surprise given the reality that, as Charles Mills observes, “power relations can

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<sup>69</sup> Leong, *supra* note 29, at 1427.

<sup>70</sup> DiAngelo, *supra* note 35, at 55.

<sup>71</sup> McIntosh, *supra* note 50, at 2; *see id.* at 3 (“In my class and place, I did not see myself as a racist because I was taught to recognize racism only in individual acts of meanness by members of my group, never in invisible systems conferring unsought racial dominance on my group from birth. . . . The silences and denials surrounding privilege are the key political tool here. They keep the thinking about equality or equity incomplete, protecting unearned advantage and conferred dominance by making these taboo subjects. . . . It seems to me that obliviousness about white advantage, like obliviousness about male advantage, is kept strongly inculcated in the United States so as to maintain the myth of meritocracy, the myth that all democratic choice is equally available to all.”).

<sup>72</sup> Frances Lee Ansley, *Stirring the Ashes: Race Class and the Future of Civil Rights Scholarship*, 74 CORNELL L. REV. 993, 1024 n.129 (1989) (defining white supremacy as “a political, economic and cultural system in which whites overwhelmingly control power and material resources, conscious and unconscious ideas of white superiority and entitlement are widespread, and relations of white dominance and non-white subordination are daily reenacted across a broad array of institutions and social settings.”).

<sup>73</sup> April S. Love, *Recognizing, Understanding, and Defining Systemic and Individual White Supremacy*, WOMEN OF COLOR ADVANCING PEACE AND SEC. 3 (Ashley Clingman-Jackson, et. al. eds., 2022) (“White supremacy is part of the foundation of western society, and racism is the way in which white supremacy survives. This institutional ideology and its structural manifestation and personal belief systems that white people are superior to other races, has long given white people greater access to resources and power.”).

<sup>74</sup> Charles Mills, *White supremacy as sociopolitical system: A philosophical perspective in WHITE OUT: THE CONTINUING SIGNIFICANCE OF RACISM* 36 (Ashley W. Doane & Eduardo Bonilla-Silva Eds. 2004).

survive the formal dismantling of their more overt supports.”<sup>75</sup> Indeed, as Mills notes, even in the current moment, with *de jure* white supremacy out of mainstream fashion, people racialized as white continue to be the country’s “ruling race” and to collectively hold a position of domination over people racialized as Black, Latinx, Native American, or AAPI<sup>76</sup>

Evidence of white supremacy’s continued operation is so ubiquitous as to make demands to prove its existence smack of gaslighting. This was the case even before white supremacist apologia became reemergent in the U.S. public square in recent years.<sup>77</sup> However, to reaffirm the destructive nature of white supremacy and illustrate its departure from professed ideals of U.S. democracy, let us concretize a bit further.

To begin, we can note that white supremacy is the underlying system that makes white privilege feasible.<sup>78</sup> It is the power that white supremacy confers upon people racialized as white that permits the day-to-day advantages of white privilege to persist. As Cheryl Harris explains, even in an era free from *de jure* white supremacy, U.S. law itself ratifies “the settled expectations of relative white privilege as a legitimate and natural baseline.”<sup>79</sup> It is precisely because U.S. society is “structured on racial subordination” that “white privilege be[comes] an expectation.”<sup>80</sup>

It is this structural quality of white supremacy that is the key here. White supremacy is the ideology that shapes the law and legal system, the economic system, even the systems of thought that, in turn allow white people to experience structural freedoms that are not equally available to people who are not white. For example, white people are systematically free from disproportionate incarceration.<sup>81</sup> While they make up 63% of the population, they make up just 33% of those who are incarcerated.<sup>82</sup> Structural maneuvers such as the so called “War on Drugs,” executed by predominantly white legislators and policy makers, lie behind this form of white supremacist domination.<sup>83</sup>

White supremacy also animates the racialized allocation of the freedom to experience privileges of citizenship, such as the rights to contract, vote, and be free from violence.<sup>84</sup> As Marissa Jackson Sow describes, white supremacy designates a “place and space outside of politics (social contracting) and proprietorship (commercial contracting)” to which people

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<sup>75</sup> *Id.*

<sup>76</sup> *See id.* at 40.

<sup>77</sup> *See, e.g., Documenting Hate: Charlottesville*, PBS (Aug. 7, 2018). <https://www.pbs.org/wgbh/frontline/documentary/documenting-hate-charlottesville/> (journalism documenting the “Unite the Right” rally held in Charlottesville, Virginia in 2017).

<sup>78</sup> *See generally* Harris, *supra* note 29.

<sup>79</sup> *Id.* at 1714.

<sup>80</sup> *Id.* at 1730.

<sup>81</sup> NAACP, *Criminal Justice Fact Sheet*, (last visited Jan. 20, 2026) <https://naacp.org/resources/criminal-justice-fact-sheet> (“32% of the US population is represented by African Americans and Hispanics, compared to 56% of the US incarcerated population being represented by African Americans and Hispanics. In 2014, African Americans constituted 2.3 million, or 34%, of the total 6.8 million correctional population. African Americans are incarcerated at more than 5 times the rate of whites.”).

<sup>82</sup> BRIDGES, *supra* note 8, at 3 (noting that, while “white people make up 63% of the U.S., they make up only 33% of those who are presently incarcerated”).

<sup>83</sup> *See generally, e.g.,* ALEXANDER, *supra* note 16, at 31-33.

<sup>84</sup> *See generally* Sow, *supra* note 32.

racialized as Black are consigned. This in essence renders them “nonpersons whom white civilians have the power to contain, detain, expel, or eliminate.”<sup>85</sup> And this nonpersonhood results in any number of harms that are consistent with white supremacist ideology. For instance, an array of research across the U.S. in recent decades establishes that defendants convicted of murdering white victims are significantly more likely to receive the death penalty than defendants convicted of killing a victim who is not white.<sup>86</sup>

Finally, white supremacy manifests in systems of thought that structure everyday cross-racial interactions. Racial microaggressions are one example. Racial microaggression is a term used to refer to brief, common indignities and insults that convey racial hostility or rely on negative stereotypes.<sup>87</sup> For example, a microaggression occurs when a teacher does not affirm the contribution of a Latinx student during a class discussion, but later affirms a similar comment offered by a white student.<sup>88</sup> Scholars recognize such microaggressions as “visible manifestations of the more indiscernible structures and systems of white dominance. . . . [because they] allow us to ‘see’ the racist ideologies that are impacting, shortening, and reducing the quality of the lives of people of color.”<sup>89</sup>

White supremacy, then, is a systematic framework that structures society in a way that values whiteness and that prioritizes the needs of people racialized as white over people who are not so racialized. In so doing, it both employs and reinforces whiteness.

## II. WHITENESS PERVADES AND SHAPES LEGAL EDUCATION

Because whiteness operates as allegiance to structural racism, legal pedagogy shaped by whiteness necessarily participates in the reproduction of racial hierarchy. Until the whiteness of legal education is dismantled, legal education will continue to both reproduce the racism of the law and legal profession and fail to produce lawyers capable of counteracting structural racism.<sup>90</sup>

The duty to interrupt these cycles of structural racism is central to legal education. Indeed, the very first line of the law profession’s Model Rules of Professional Conduct calls upon lawyers to view themselves as system actors who are bound to improve the quality of justice.<sup>91</sup> It states: “A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having *special responsibility for the*

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<sup>85</sup> *Id.* at 1842.

<sup>86</sup> *Death Penalty Sentencing Indicates Pattern of Racial Disparities*, U.S. General Accounting Office (May 1990) <https://www.gao.gov/assets/t-ggd-90-37.pdf>; *Ways that Race Can Affect Death Sentencing*, Death Penalty Information Center [https://deathpenaltyinfo.org/policy-issues/biases-and-vulnerabilities/race/ways-that-race-can-affect-death-sentencing?utm\\_source=chatgpt.com](https://deathpenaltyinfo.org/policy-issues/biases-and-vulnerabilities/race/ways-that-race-can-affect-death-sentencing?utm_source=chatgpt.com).

<sup>87</sup> Derald W. Sue, Christina M. Capodilupo, Gina C. Torino, Jennifer M. Bucceri, Aisha M. B. Holder, Kevin L. Nadal & Marta Esquilin, *Racial Microaggressions in Everyday Life: Implications for Clinical Practice*, 62 AM. PSYCH. 271, 273 (2007).

<sup>88</sup> *See id.* at 274–75.

<sup>89</sup> BRIDGES, *supra* note 8, at 184.

<sup>90</sup> *See* Samuel-Siegel, *Structural Racism in Legal Education*, *supra* note 9, at 6–7.

<sup>91</sup> *See* MODEL RULES OF PRO. CONDUCT, PREAMBLE (A.B.A. 2025).

*quality of justice.*<sup>92</sup> The responsibility for educating lawyers capable of “effective, ethical, and responsible participation as members of the legal profession”<sup>93</sup> lies with law schools, making this work central to their missions.

To proceed accordingly, law teachers must come to recognize how whiteness shows up in legal pedagogy. As such, this Part will explore the way that whiteness’s entitlement to power, control, and domination; expectation of comfort; and perception of white normativity are defining characteristics of the substance legal educators teach and the norms they inculcate across the curriculum. Indeed, the influence of whiteness is present not only in settings often considered to be “race-neutral” but also when law teachers teach explicitly about race and racism. This subpart begins with an exploration of how whiteness shows up in legal pedagogy generally and concludes by noting the powerful hold whiteness has even on typical approaches to specifically teaching about racism.

#### *A. How whiteness shows up in legal pedagogy*

Whiteness pervades legal pedagogy across the curriculum. From falsely unracializing much of the substance of legal coursework, to preserving power, control, and privilege, traditional approaches routinely enact whiteness.

##### (1) Unracializing

Recall that whiteness includes a tendency to see white people as unracialized, and thus to understand traits and behaviors associated with white people as neutral and normative. This attribute of whiteness shows up in legal pedagogy as a belief that most coursework bears no relation to race or racism, as well as a “perspectiveless”<sup>94</sup> approach to conducting legal analysis.

First, unless a course involves race-based discrimination or litigants who are not white, traditional legal pedagogy often does not consider it racialized. That is, many law teachers fail to notice that most every legal doctrine has racialized implications, even if it does not explicitly invoke race. While, in some instances, this dynamic might flow from a professor’s or curriculum designer’s explicit discomfort with discussing race and racism,<sup>95</sup> whiteness likely is a more predominant culprit.

Viewed as such, we can see Flagg’s transparency phenomenon influencing many law teachers’ understandings of case law and doctrine.<sup>96</sup> That is, many law teachers misconstrue legal doctrine as race-neutral rather than what it is—a set of human-created rules and procedures that systematically disadvantage people who are not white.<sup>97</sup> Teachers operating

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<sup>92</sup>*Id.*

<sup>93</sup> STANDARDS AND RULES OF PROC. FOR APPROVING L. SCH., STANDARD 301 OBJECTIVES OF PROGRAM OF LEGAL EDUC. (A.B.A. 2024-25).

<sup>94</sup> Crenshaw, *supra* note 9.

<sup>95</sup> See, e.g., DiAngelo, *supra* note 35, at 57 (describing a tendency among people who are white to fear and avoid discussions of race and racism).

<sup>96</sup> See generally FLAGG, *supra* note 41.

<sup>97</sup> See FLAGG, *supra* note 41, at 9.

under the influence of the transparency phenomenon don't recognize that teaching law as though it is race-neutral is an act of decontextualization.<sup>98</sup>

Indeed, whiteness dominates the law. "What is thought to be objective and neutral is in fact based on white values, norms, and conduct. The . . . failure to recognize and account for this fact . . . can result in silencing, discounting, and further subordinating nonwhite people and their lived experiences."<sup>99</sup>

Unracing shows up in the substance of law courses across the curriculum. For example, it is operating when property law teachers fail to contextualize racially restrictive covenants as part of a widespread effort to systematically prevent Black, Latinx, Native American, and AAPI people from homeownership through the use of law and extra-judicial violence. It shows up when legal writing teachers teach certain rhetorical norms as though they are universal attributes of credibility rather than conventions which are, in reality, grounded in white elitism.<sup>100</sup> Other examples abound, for instance: "teaching about health law without addressing disparate medical outcomes based on race; teaching intellectual property law without addressing its uses to deprive racially minoritized artists of ownership of their creations; [and] teaching civil procedure without addressing disparate access to legal representation."<sup>101</sup>

In addition to unracing's impact on the substance of law courses, it also shapes the analytical habits many legal educators model for their students. Perhaps chief among the ways whiteness shapes these norms is through the practice that Kimberle Crenshaw describes as "perspectivelessness." Perspectivelessness is a way of teaching legal analysis as though it is "objective" in the sense that it is devoid of "cultural, political, and class characteristics," and, as such, can be conducted without "directly addressing conflicts of individual values, experiences, and world views."<sup>102</sup>

Viewed in light of whiteness's penchant for unracing—for viewing white people as the only people who see and interpret the world without a point of view specific to their particular habits, interests, and needs—perspectivelessness can be traced at least in part to the operation of whiteness. Only under a framework that conceives of people with one racial identity as normal and neutral, thus implicitly deeming non-neutral those who are not raced as white, is such exclusionary simplification possible.

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<sup>98</sup> E.g., Samuel-Siegel, *Structural Racism in Legal Education*, *supra* note 9, at 6–7, at 19; Capers, *supra* note 11, at 56 ("We live in a world built on racialized hierarchies and inequality, and much of the reason we live in such a world is because of what we call the law, from Slave Codes to the enshrinement of slavery in the Constitution to the doctrine of manifest destiny to anti-miscegenation laws to the Chinese Exclusion act to zoning rules to qualified immunity to racialized highway construction to so much more. It is the law, after all, that has contributed to why, even now, we are segregated in where we live and where we go to school and whom we love. Quite simply, law is haunted by race, even when it doesn't realize it.")

<sup>99</sup> Alexis Hoag-Fordjour, *White Is Right: The Racial Construction of Effective Assistance of Counsel*, 98 N.Y.U. L. REV. 770, 783 (2023).

<sup>100</sup> See Elizabeth Berenguer, Lucy Jewel & Teri A. McMurtry-Chubb, *Gut Renovations: Using Critical and Comparative Rhetoric to Remodel How the Law Addresses Privilege and Power*, 23 HARV. LATINX L. REV. 205, 212–13 (2020) (discussing such norms and situating them within their racialized context).

<sup>101</sup> Samuel-Siegel, *Structural Racism in Legal Education*, *supra* note 9, at 6–7.

<sup>102</sup> Crenshaw, *supra* note 9, at 2.

In sum, these approaches are characterized by what we might call an “unracing” of law in much the same way that whiteness unraces people. That is, just as whiteness dictates that only people who are not white are deemed racialized at all, so too, whiteness in legal pedagogy dictates that legal doctrine is racialized only when it contemplates race explicitly. And, just as seeing white people as inherently neutral and normative is a flawed perspective, so too, is seeing the law as inherently neutral and normative.

## (2) Preservation of power and control

Let us recall that, in addition to whiteness as unracing, whiteness is also an expectation of power and control. This attribute of whiteness shows up both as a tendency not to prepare law students to be systemic change agents, and as a failure to pay sufficient attention to racialized disparities in student outcomes.

First, the inclination to preserve power and control leads some legal educators not to prepare law graduates to think systematically about how to replace structurally racist systems with equitable ones. In other words, by omitting from much foundational legal pedagogy an emphasis on antiracist change agency, legal educators effectively reinforce the existing power and control held by people who are white. In other words, what law students learn in law school is “more about justifying the status quo—including the racial status quo—than disrupting it,” to borrow Bennett Capers’ description of his own law school experience.<sup>103</sup>

For example, much of legal pedagogy inculcates in students a sense that the act of legal analysis begins with rule synthesis and ends with rule application. That is, the pedagogy misses opportunities to teach students how lawyers can play roles in actually *changing* existing legal rules. As a result, students “come to see themselves not as creative catalysts with potential to contribute to structural reform, but as instrumental rule-appliers.”<sup>104</sup> They develop habits that resemble a “mechanical process that requires finding extant rules and stamping them onto new client matters much as a robotic arm might stamp a preprinted logo onto the next item coming down the assembly line. And the next, and the next.”<sup>105</sup>

Such a process preserves the status quo by combining with unracing to eliminate any discussion of racialized power from the scope of most law school coursework.<sup>106</sup> This process is a missed opportunity to equip law graduates for the dismantlement of systems of racialized inequity, and, as such, it leaves utterly unchallenged the expectation of power and control to which white people are accustomed. In other words, teaching substance in this way is whiteness in action; it amounts to an act of allegiance to structural racism.

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<sup>103</sup> Capers, *supra* note 11, at 12.

<sup>104</sup> Doron Samuel-Siegel, *Operationalizing a Pedagogy of Antiracism in Legal Education*, 35 BERKELEY LATINE J. L. & POL’Y 38, 82 (2026)[hereinafter *Operationalizing a Pedagogy of Antiracism*].

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

<sup>106</sup> Armstrong & Wildman, *supra* note 10, at 648–49 (using the lens of so-called “colorblind” ideology to level this critique).

Additionally, when institutional decision makers conduct their work as though structural racism does not exist, they are permitting whiteness to dominate. Under-attending to racialized disparities in bar passage rates is an example of how this feature of whiteness shapes legal pedagogy. It also demonstrates yet another manifestation of whiteness as entitlement to power and control.

Racial disparities in bar passage rates are a long-standing reality.<sup>107</sup> According to the most recent national data available from the American Bar Association, ultimate passage rates for 2023 law graduates were higher for white test takers than for any other racial identity group.<sup>108</sup> They passed at a rate of 92 percent, while Hispanic test takers passed at a rate of 82 percent, Black test takers passed at a rate of 74 percent, Asian test takers passed at a rate of 87 percent, and Native American test takers passed at a rate of 81 percent.<sup>109</sup>

Law schools are not solely responsible for the factors that create these disparities. For example, data indicates that bar takers' household incomes<sup>110</sup> may be somewhat predictive of bar passage. However, even after controlling for such factors that are largely beyond the control of legal educators, takers who are not white remain more likely to be unsuccessful on the bar exam than those who are white.<sup>111</sup> This leads scholars to conclude that factors such as stereotype threat are instrumental in the persistent disparities.<sup>112</sup>

Unlike their graduates' incomes, law schools certainly are able to equip graduates with tools to counteract stereotype threat.<sup>113</sup> As such, any failure to do so is attributable to a choice not to prioritize the unique needs of students who are not white. While it is of course true that racialized dynamics such as stereotype threat are products of structural racism, institutional decision makers at times think too narrowly about their role concerning such systemic inequity. They metaphorically throw up their hands in a helpless gesture and accept "stock stories" over which they see themselves as having little to no influence, bemoaning structurally inequitable cycles but without looking internally for ways to interrupt

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<sup>107</sup> E.g., Deborah Jones Merritt, Carol L. Chomsky, Joan W. Howarth, Claudia Angelos, *Racial Disparities in Bar Exam Results—Causes and Remedies*, BLOOMBERG L. NEWS (July 20, 2021, at 04:00 ET) <https://news.bloomberglaw.com/us-law-week/racial-disparities-in-bar-exam-results-causes-and-remedies?context=search&index=2>; Scott DeVito, Kelsey Hample & Erin Lain, *Examining the Bar Exam: An Empirical Analysis of Racial Bias in the Uniform Bar Examination*, 55 U. MICH. J.L. REFORM 597, 610-11 (2022).

<sup>108</sup> Am. Bar Ass'n, *Summary Bar Admission Data: Race, Ethnicity, and Gender* (2025), [https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/statistics/2025/2025-summary-race-ethnicity-gender.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/2025/2025-summary-race-ethnicity-gender.pdf).

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

<sup>110</sup> See, e.g., N.Y. State Bd. of Law Examiners & AccessLex Inst., *Analyzing First-Time Bar Exam Passage on the UBE in New York State*, (2021), <http://www.accesslex.org/NYBOLE> (verifying that availability of temporal and monetary resources are statistically significant bar-passage factors).

<sup>111</sup> E.g., Merritt et al., *supra* note 107; N.Y. State Bd. of Law Examiners & AccessLex Inst., *supra* note 110; Scott DeVito, *De-normalizing Racial Bias in the Bar Examination: Two Pragmatic Solutions*, 63 WASHBURN L. J. 23, 31-32 (2023).

<sup>112</sup> Merritt et al., *supra* note 107.

<sup>113</sup> See generally Russell A. McClain, *Helping Our Students Reach Their Full Potential: The Insidious Consequences of Ignoring Stereotype Threat*, 17 RUTGERS RACE & L. REV. 1 (2016) (describing the threat, its impacts on law students, and methods for counteracting it).

them.<sup>114</sup> The result is that law schools simply fail to recognize dynamics such as stereotype threat as actionable.<sup>115</sup> This type of decision making is marked by whiteness in multiple respects—it fails to take account of structural racism and, as a result, it also preserves the power and control that white people have over the legal profession by permitting the bar exam’s racialized gatekeeping to persist relatively undisturbed.

### (3) Leaving Privilege Unchecked

By inculcating a reverence for the Constitution and the rule of law while neither teaching an equally robust skepticism nor instilling a sense of duty to reform racially oppressive structures, legal pedagogy is again shaped by whiteness.<sup>116</sup> In this instance, what is operating is the tendency of whiteness to accept privilege without also engaging routinely in concomitant efforts to ensure such privilege is distributed without reference to race.

When law students learn about the Constitution and the rule of law more generally, they are learning about a set of governance documents and practices that are fundamentally marred by white supremacist roots.<sup>117</sup> White privilege is therefore inherent within them. That is, these documents and practices confer upon people who are white advantages that are not equally available to people who are not.<sup>118</sup>

Much of legal pedagogy accepts the existence of these advantages without remarking upon them or, at most, frames such discussions as public policy sidenotes. Indeed, even where such discussions occur, traditional legal pedagogy does not centralize teaching students to lawyer in a way that reforms existing systems so as to redistribute privilege equitably.<sup>119</sup>

#### *B. How whiteness shows up even when educators teach explicitly about racism*

Even when legal educators do teach in a way that acknowledges the salience of race and racism to legal doctrine and norms, whiteness often gets in the way of telling the story completely. It leads many to center the *oppressive* impacts that racially disparate doctrine and norms have upon people who are not white, but it does so without even mentioning whiteness,

<sup>114</sup> Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2418-21 (1989) (observing a similarly problematic “stock story” blaming a lack of racial diversity among law faculty on insufficient candidate pipelines).

<sup>115</sup> See generally McClain, *supra* note 113.

<sup>116</sup> See Capers, *supra* note 11, at 32 (“[W]e teach students from day one about the majesty of the law—that the law, though it may have some flaws, is something to be revered. We rarely suggest that the law may be flawed at its core.”).

<sup>117</sup> *Id.* (observing that the Constitution itself “locks in white advantage.”).

<sup>118</sup> See generally Ruth Colker, *The White Supremacist Constitution*, 2022 UTAH L. REV. 651 (2022.).

<sup>119</sup> See Armstrong & Wildman, *supra* note 10, at 157-160 (“Quite simply, from the point of view of minority students, the very subjects we teach reflect an “allegiance to a legal system that since its inception has systematically oppressed black people. . . . If the hope of incoming students, minority or otherwise, is to learn the law so that they can help “make America what America must become. . . . fair, egalitarian, responsive to needs of all of its citizens, and truly democratic in all respects, including its policing. . . . we are sure to disappoint them. . . . Instead, we are teaching them a law that has always been inflected with white interests”).

let alone emphasizing the *benefits* white people reap from these very same doctrines and norms.<sup>120</sup>

When they are not taught about the power-preserving impacts of racialized structures, or the fact that structural racism's objective is as much to benefit white people as it is to hurt people who are not, white students are less likely to understand their role in such structures. Teaching about racist inequity only through the lens of race-based oppression—and not the lens of race-based benefits—allows such students to experience themselves as non-relevant bystanders, unimpacted by racist systems, and without a role in dismantling it.

To be clear, teaching about the incalculable harms of race-based oppression could not be more important.<sup>121</sup> But to stop short of teaching about the benefits that accrue to whiteness is to leave out a crucial part of the truth. Indeed, doing so risks obscuring the very engine that keeps the machine of structural racism churning out such harms.

One can see that, when it tells just one part of the story of structural racism, legal pedagogy in effect defers to whiteness's entitlement to comfort and makes invisible white privilege in a manner that is consistent with the purportedly unracialized normativity of whiteness. Ultimately, this failure to be transparent about whiteness preserves its power and control by minimizing the likelihood that students will see its role and risking those students who are themselves white will not gain awareness of the ways in which they are beneficiaries in a system that needs dismantlement.

Until legal educators reform the approaches described in this Part, law schools will continue their complicity in whiteness's allegiance to structural racism. As such, we turn next to reforms designed to bring about the dismantlement of legal education's whiteness.

### III. DISMANTLING THE WHITENESS OF LEGAL EDUCATION

As discussed in Part I, whiteness operates as an allegiance to upholding structural racism. As such, institutions shaped and pervaded by whiteness in the ways described in Part II are, by virtue of their mere day-to-day operation, contributing to the reproduction of systemic racial inequity. They are upholding a race-based system of supremacy and subordination. While this reproduction may occur free of any racial animus or harmful intent, it

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<sup>120</sup> This pattern can be seen, for example, in some of the scholarship that advocates for antiracist legal education. See, e.g., Alfred L. Brophy, *Integrating Space: New Perspectives on Race in the Property Curriculum*, 55 J. Legal Educ. 319 (2005) (centering ways of teaching about how “property law has been used to facilitate racial subjugation”); Amy Gaudion, *Exploring Race And Racism In The Law School Curriculum: An Administrator's View On Adopting An Antiracist Curriculum*, 23 RUTGERS RACE & THE LAW REVIEW 131,136-37 (2021) (describing a faculty resolution that, while important and groundbreaking, characterizes the racism that requires curricular response in terms of its devastating effects but without naming its benefits to whiteness); see also Armstrong & Wildman, *supra* note 10 (noting, for example, that the Supreme Court's framing of *Brown v. Board of Education*, and specifically “use of the term ‘nonsegregated[,]’ obscured the [finding below] that white children’s education was superior, privileging them. So, even though, in *Brown*, the Supreme Court moved beyond white supremacy discourse, the existing white privilege remained unacknowledged, still alive and powerful”).

<sup>121</sup> See generally, e.g., Samuel-Siegel, *Reckoning with Structural Racism*, *supra* note 9 (advocating for a pedagogy of antiracism that will eliminate racialized harms and equip all students to participate in antiracist change).

nevertheless exacts an array of fundamental costs.<sup>122</sup> Until legal educators make active, methodical antiracist reforms, this harmful state of affairs will continue.

Indeed, this Article's proposed pedagogical strategies are not aimed merely at helping students or legal educators navigate institutions shaped by whiteness, but at equipping legal educators to interrupt and ultimately dismantle whiteness's influence within legal education itself. That is, by striving to develop an awareness of whiteness and eliminate its influence from legal pedagogy, legal educators can take a step toward ending law schools' role in perpetuating structural racism. All law teachers should be thinking about whiteness, and all law students are harmed when law teachers are not clear and honest about its operation in the law and legal profession. Only with a sober awareness of whiteness will legal educators collectively be equipped to dismantle it and create a world in which race-based inequity can be replaced with comprehensive equity.

In other words, the underlying contention of this Article is that law teachers' ultimate aim should be to end legal education's complicity in structural racism. And, since dismantling the whiteness of legal education is an essential step toward that end, a holistic methodology for replacing structurally racist pedagogy with antiracist pedagogy is well-suited for this endeavor.<sup>123</sup> Such a pedagogy of antiracism, composed of five dimensions, is derived from a tapestry of scholarly threads which, when aggregated, suggest inflection points on the pathway to antiracist legal pedagogy.<sup>124</sup> Together they provide a nonlinear panoply of considerations that legal educators can employ to bring about a pedagogy that is antiracist, which necessarily includes a pedagogy that abandons whiteness. Specifically, to pursue the pedagogy, legal educators must account for (A) who we are, (B) our students' psychological and cognitive experiences, (C) the substance we teach, (D) the teaching processes we employ, and (E) the impact of accountability structures.<sup>125</sup>

Only a legal profession knowledgeable about whiteness can have a chance to dismantle structural racism, and such a profession is truly possible only if buttressed by a legal educational establishment that teaches explicitly about it. Dismantling whiteness will require a degree of "imaginative capability, moral grounding, mature accountability, and fealty to democratic principles" that have not historically been driving forces in legal pedagogy.<sup>126</sup> The remainder of this Part will explore each of the pedagogy's five dimensions, along with concrete strategies for deploying them to dismantle the whiteness of legal education.

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<sup>122</sup> See generally Samuel-Siegel, *Reckoning with Structural Racism*, *supra* note 9.

<sup>123</sup> *Id.* at 8.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> Ifill, *supra* note 4.

### A. Teacher Self-Assessment

Any commitment to undertake reform should begin with an assessment of oneself. As such, this is where our exploration of the pedagogy begins: Law teachers who wish to dismantle the whiteness of legal pedagogy must begin by looking internally.

Every law teacher has experience with whiteness by virtue of its ubiquity. For some, it is a dynamic that operates within them—a set of behaviors and norms that they have been acculturated to embody; for others, it is a dynamic they observe in the people around them and to which they might have an array of reactions. And just as each legal educator is a unique individual who lives life at the intersection of their identities,<sup>127</sup> so, too, must each educator's self-assessment be uniquely tailored. As such, what follows here is a set of general observations educators may use as a springboard.

Few legal educators teach about whiteness.<sup>128</sup> This may be true for a number of reasons, including educators' lack of knowledge about whiteness as well as their own internal psychological barriers to confronting it head on. Taboos about addressing race, racism, and whiteness also may play a role, considering that law teachers may fear job-related consequences when they address controversial topics. This subpart explores these potential barriers briefly in the next few paragraphs, then offers a sampling of strategies for transcending them.

The first likely barrier to teaching about whiteness is that many legal educators lack knowledge about race generally, and about whiteness in the law and legal pedagogy specifically.<sup>129</sup> Indeed, only recently have a relatively small number of law schools begun to provide explicit instruction about the role of whiteness in the law.<sup>130</sup> As such, most law teachers did not have the opportunity to gain an academic footing in this arena in the formative years of their professional lives. Even those who have given thought to the whiteness they observe in others or experience internally may well have lacked opportunities to study the concept formally and engage with its role in the law and legal profession. Unsurprisingly, teachers tend to avoid engaging in topics where they feel they lack expertise.<sup>131</sup>

Second, psychological dynamics may contribute to the lack of law teaching about whiteness. For instance, for law teachers who are white,

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<sup>127</sup> See generally Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 UNIV. CHI. LEGAL F. 139, 140 (1989).

<sup>128</sup> See Armstrong & Wildman, *supra* note 10, at 651.

<sup>129</sup> See Shaun Ossei-Owusu, *For Minority Law Students, Learning the Law Can be Intellectually Violent*, ABAJOURNAL (Oct. 15, 2020, 11:23 CT), [https://www.abajournal.com/voice/article/for\\_minority\\_law\\_students\\_learning\\_the\\_law\\_can\\_be\\_intellectually\\_violent](https://www.abajournal.com/voice/article/for_minority_law_students_learning_the_law_can_be_intellectually_violent) (observing that “racial literacy is not a highly valued good” among law faculty).

<sup>130</sup> E.g., *Race and the Law: Systems, Structures, and Solutions*, UNIVERSITY OF MINNESOTA SCHOOL OF LAW [https://law.umn.edu/course/6915/race-and-law-systems-structures-and-solutions?utm\\_source=chatgpt.com](https://law.umn.edu/course/6915/race-and-law-systems-structures-and-solutions?utm_source=chatgpt.com) (“This course examines whiteness, racism and their connection to traditional legal topics: property, education, and crime.”); *Critical Race Theory*, DUKE UNIVERSITY SCHOOL OF LAW, [https://law.duke.edu/academics/course/504/?utm\\_source=chatgpt.com](https://law.duke.edu/academics/course/504/?utm_source=chatgpt.com) (indicating that course themes include “whiteness and white privilege”).

<sup>131</sup> See, e.g., Mark Wyatt, *Towards a re-conceptualization of teachers' self-efficacy beliefs: tackling enduring problems with the quantitative research and moving on*, 37 INTERNATIONAL J. OF RESEARCH & METHOD IN EDUCATION 166, 171 (2012) (discussing teachers' self-efficacy beliefs).

psychological experiences related to their own whiteness might inhibit them from teaching about whiteness structurally.<sup>132</sup> People racialized as white can experience psychological costs when they acknowledge their white identity and white privilege, and they often strive to “immunize” themselves from those costs.<sup>133</sup> That is, their moral embarrassment about whiteness leads some to use “identity-management strategies” such as denying the existence of white privilege or even distancing themselves from the existence of whiteness altogether.<sup>134</sup> For educators who experience this psychological dynamic, teaching about whiteness would, by definition, exact the very costs that flow from acknowledgment, imposing a psychological weight many legal educators may feel unprepared to carry.

For law teachers who identify as Black, Latinx, Native American, or AAPI, different psychological costs may arise from teaching about whiteness. One example is the effects that arise from carrying a disproportionate burden to provide institutional labor on matters related to race.<sup>135</sup> This may present a disincentive to teaching about whiteness, which is a topic that may be even more fraught than others related to racialization and racism thanks to dynamics such as “white fragility.”<sup>136</sup> In addition, some legal educators who are Black, Latinx, Native American, or AAPI, may also be navigating complex personal journeys related to whiteness which make teaching about it particularly taxing. For instance, researchers have demonstrated that professionals who are not themselves racialized as white experience the paradoxical requirement to nevertheless strive to enact whiteness in order to be seen as meeting professionalism standards.<sup>137</sup> For educators who experience these psychological dynamics, teaching about whiteness might require an unreasonable quantity of invisible labor.

Third, many legal educators across racial identities see teaching about race and power as a risky endeavor.<sup>138</sup> This perception is not without merit—

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<sup>132</sup> *Id.* at 57 (“Consequently, teachers may concentrate on only “safe” topics about cultural diversity such as cross-group similarities and intergroup harmony, and ethnic customs, cuisines, costumes, and celebrations while neglecting more troubling issues like inequities, injustices, oppressions and major contributions of ethnic groups to societal and human life.”).

<sup>133</sup> Eric D. Knowles, Brian S. Lowery, Rosalind M. Chow & Miguel M. Unzueta, *Deny, Distance, or Dismantle? How White Americans Manage a Privileged Identity*, 9 *PERSPS. ON PSYCH. SCI.* 594, 595 (2014).

<sup>134</sup> *Id.*

<sup>135</sup> See, e.g., Candice Raynor, *Best Practices for Addressing Invisible Labor Among Black Faculty at Predominately White Institutions* (April 2025) (Ph.D. dissertation, Pepperdine University) (Pepperdine Digital Commons) (“Black faculty often serve as unofficial financial aid advisors, student advocates, and mental health counselors . . . [and] are more likely to be asked to serve on diversity-related committees than their White colleagues . . . .”); John King, *The Invisible Tax on Teachers of Color*, *WASH. POST* (May 15, 2016), [https://www.washingtonpost.com/opinions/the-invisible-tax-on-black-teachers/2016/05/15/6b7bea06-16f7-11e6-aa55-670cabef46e0\\_story.html](https://www.washingtonpost.com/opinions/the-invisible-tax-on-black-teachers/2016/05/15/6b7bea06-16f7-11e6-aa55-670cabef46e0_story.html).

<sup>136</sup> See discussion of white fragility, *infra* Part III(D)(2).

<sup>137</sup> See, e.g., Marcus W. Ferguson Jr. & Debbie S. Dougherty, *The Paradox of the Black Professional: Whitewashing Blackness through Professionalism*, 36 *MGMT. COMM’N Q.* 3, 6 (2022) (noting “research has shown that although many Black workers believe they should conform to standards of whiteness, doing so makes them feel as if they are rejecting their blackness . . . , creating an unacceptable choice for Black workers as they attempt to navigate through their performance.”).

<sup>138</sup> Keeshea T. Roberts, *Law Schools Push to Require Anti-Racism Training and Courses*, 46 *HUM. RTS.* 2, 4, (Dec. 2020) (“Another challenge that law professors face is how to discuss these issues in a safe and productive way. The issue of race is not an easy one to discuss. Most of us tend to avoid discussing the roots of racism in the United States because it takes us to a place where we do not want to go.”).

some students and colleagues view this work as lacking objective merit or carrying an inherent political bent.<sup>139</sup> Indeed, perhaps at no time in recent memory have these risks been more verifiable. Recent years have witnessed many state and federal leaders seeking to suppress education concerning the history and present realities of structural racism in the U.S.,<sup>140</sup> as well as penalize educators who decline to participate in the efforts to suppress such knowledge.<sup>141</sup>

This risk might be compounded for law teachers who are not white, for whom there is a widely acknowledged risk of being seen as having a personal stake in the subject matter of structures of racial inequity and being deemed by students or colleagues as pressing a “personal agenda” that does not fit within the bounds of the mainstream curriculum.<sup>142</sup> Such educators are often placed in the difficult position of attempting simultaneously to create a productive learning environment, teach historical and contemporary realities truthfully, and navigate student resistance ranging from silence and disengagement to overt hostility or denial. Some law teachers report experiences with students openly disputing the existence of racism, rejecting classmates’ or professors’ lived experiences of racial inequity, or advancing arguments rooted in racial stereotypes and assumptions of white normativity.<sup>143</sup> The labor associated with managing these dynamics while remaining professionally composed and pedagogically effective can be profound.

Considering this terrain, it is not difficult to see why law teachers might not be teaching about whiteness or might fear reforming the processes of legal education to dismantle its influence. The lack of knowledge,

<sup>139</sup> Kevin Cokley, *Teaching About Race and Racism*, UNIVERSITY OF TEXAS SYSTEM (Jan. 13, 2020) [https://www.utsystem.edu/sites/academy-of-distinguished-teachers/blog/teaching-about-race-and-racism-2020-01-13?utm\\_source=chatgpt.com](https://www.utsystem.edu/sites/academy-of-distinguished-teachers/blog/teaching-about-race-and-racism-2020-01-13?utm_source=chatgpt.com) (“Faculty who teach classes about race are sometimes subject to punishment by students in the form of poor courses evaluations and, in extreme cases, complaints to administrators.”).

<sup>140</sup> Gregory Krieg & Veronica Stracqualursi, *Takeaways From Virginia Gov. Glenn Youngkin’s CNN Town Hall on Public Education*, CNN POLITICS (Mar. 10, 2023, 2:15 PM), <https://www.cnn.com/2023/03/09/politics/glenn-youngkin-town-hall-education-cnntv> (“Youngkin defended the executive order he signed last year banning ‘critical race theory’ from being part of public school curriculum, arguing that children should not be taught that ‘they are inherently biased.’”); Rashawn Ray & Alexandra Gibbons, *Why Are States Banning Critical Race Theory?*, BROOKINGS INST. (Nov. 2021), <https://www.brookings.edu/articles/why-are-states-banning-critical-race-theory/> (“The legislations mostly ban the discussion, training, and/or orientation that the U.S. is inherently racist as well as any discussions about conscious and unconscious bias, privilege, discrimination, and oppression. These parameters also extend beyond race to include gender lectures and discussions.”).

<sup>141</sup> Stephen Sawchuk, *What Is Critical Race Theory, and Why Is It Under Attack?*, EDUC. WEEK (May 18, 2021), <https://www.edweek.org/leadership/what-is-critical-race-theory-and-why-is-it-under-attack/2021/05> (“But social studies educators fear that such laws could have a chilling effect on teachers who might self-censor their own lessons out of concern for parent or administrator complaints.”).

<sup>142</sup> See, e.g., BELL HOOKS, *TEACHING COMMUNITY: A PEDAGOGY OF HOPE* 33 (2003) (“No wonder then that so many white folks find it hard to “listen” to a black woman critic speaking ideas and opinions that threaten their belief systems. In our class discussion someone pointed out that a powerful white male had given a similar talk but he was not given negative, disdainful, verbal feedback. It was not that listeners agreed with what he said; it was that they believed he had a right to state his viewpoint.”).

<sup>143</sup> See Lain, *supra* note 9 (describing dismissive and racially charged classroom interactions during discussions of race and racism); DiAngelo, *supra* note 29, at 57–66 (describing defensive reactions to discussions of racism, including denial and invalidation of racialized experiences); Meera E. Deo, *Faculty Insights on Educational Diversity*, 83 *FORDHAM L. REV.* 3115, 3121–24, 3138–42 (2015) (discussing faculty observations regarding the difficulties of facilitating meaningful classroom conversations about race and the educational challenges that arise in insufficiently inclusive law school environments).

psychological experiences, and material professional threats are real. In light of these barriers, what strategies can law teachers employ to prepare themselves to dismantle the whiteness of legal education? Like any strategic plan, the work begins with self-assessment.

Each legal educator committed to this work can take stock of their own knowledge, experience, capacity, and risk-tolerance. Teachers should begin by assessing their degree of understanding of whiteness generally, its definitions and manifestations. Seek out knowledge from scholars such as those cited in this piece and others. Consider the ways in which whiteness may operate in your own or others' behaviors, thoughts, and assumptions. Take notice of your psychological experiences relating to whiteness. Ask yourself whether you are affected by threats to self-image or risks to job security.<sup>144</sup>

After self-assessment, consider responsive strategies that are reasonable under your professional circumstances. When making this analysis, it may be helpful to explore your own risk tolerance and risk aversion. Pause to consider both methods for minimizing risk, as well as principled arguments for accepting some degree of it. For legal educators who have the privilege to take some risk, extra incentive for doing so may emerge from the reality that law students stand to learn important lessons from observing their teachers taking risks. Law students often tend to be risk averse.<sup>145</sup> And, while all lawyering might be said to entail some degree of risk, for those who desire to take part in antiracist lawyering or other efforts to dismantle structural inequity, risk taking will likely be routine. Thus, by undertaking some degree of tolerable risk, law teachers have an opportunity to lead by example.

The pedagogy this Article advocates requires a growth mindset.<sup>146</sup> And, to implement a growth mindset, one must understand not only where one wants to end up in the future, but where one is now. Knowing one's current state makes it possible to build a methodical strategy for traversing the distance between the present and the aspired-for future.<sup>147</sup>

### *B. Student Experiences and Needs*

Like their teachers, all law students acculturated in the United States are affected by whiteness. It pervades culture, habituating people who are

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<sup>144</sup> This act of self-assessment is more likely to be effective if accompanied by a lack of self-judgment. Recognize that to be a person in the United States likely means being acculturated from the earliest of ages to enact one's relationship with whiteness in ways that might be so ingrained as to be nearly reflexive absent mindful intervention.

<sup>145</sup> E.g., Kaci Bishop, *Framing Failure in the Legal Classroom: Techniques for Encouraging Growth and Resilience*, 70 ARK. L. REV. 959, 960-61 (2018).

<sup>146</sup> See generally CAROL S. DWECK, *MINDSET: THE NEW PSYCHOLOGY OF SUCCESS* (2007).

<sup>147</sup> To aid in this process, consider consulting publicly available self-assessment rubrics designed specifically for higher education teachers. While existing rubrics do not necessarily center whiteness, they nevertheless offer rich insights about the sorts of questions one might ask. E.g. Self-Assessment Rubric for Inclusive Teaching Effectiveness, University of Rhode Island. [https://web.uri.edu/atl/wp-content/uploads/sites/1970/Self-assessment-rubric-for-inclusive-teaching-effectiveness-112823.pdf?utm\\_source=chatgpt.com](https://web.uri.edu/atl/wp-content/uploads/sites/1970/Self-assessment-rubric-for-inclusive-teaching-effectiveness-112823.pdf?utm_source=chatgpt.com); Inclusive Teaching Higher Education Rubric, Virginia Tech [https://www.inclusive.vt.edu/content/dam/inclusive\\_vt\\_edu/inclusive\\_documents/ITRubric\\_2020.pdf?utm\\_source=chatgpt.com](https://www.inclusive.vt.edu/content/dam/inclusive_vt_edu/inclusive_documents/ITRubric_2020.pdf?utm_source=chatgpt.com).

white to enact it, and people who are not white to navigate it.<sup>148</sup> As such, by the time they arrive in law school, most students are steeped in whiteness, many without conscious awareness of its qualities or manifestations.<sup>149</sup> Law teachers committed to racial justice have an opportunity to interrupt this habituation by offering students space to develop the self-awareness, knowledge, and skills to choose alternatives to reproducing whiteness and, in turn, structural racism.

As discussed below, teaching explicitly about whiteness throughout the curriculum is an essential step toward achieving this objective.<sup>150</sup> But, to make this curricular work meaningful, educators should strive to understand the cognitive and psychological experiences students bring to this work. Approaching pedagogical work with awareness about students' experiences and needs will help law teachers to design curricula that are approachable, manageable, and relevant to students' own roles as future lawyers. While sweeping generalizations are risky, this subpart discusses psychological and education literature that offers insights that may well be relevant to a wide array of law students.

For students who are white, significant psychological incentives exist to downplay the realities and salience of whiteness. As such, legal education that addresses whiteness may elicit from them resistance that will need to be overcome. Multiple psychological threats can be triggered when white people reckon with knowledge of whiteness and white privilege, and these threats can result in defensive measures that may inhibit student learning. For example, what psychologists call "meritocratic threat" occurs when people become aware of having privilege and experience fear that their successes are actually products of that privilege rather than their own attributes or work. Relatedly, this threat occurs when people fear that their failures are especially stark because those failures occurred in spite of privilege.<sup>151</sup> Furthermore, "group-image threat" stems from the realization that one's identity group is "guilty of past, or engaged in present, moral wrongdoing against outgroups."<sup>152</sup> As a result of meritocratic and group-image threats, some white people are prone to take measures to maintain a sense of innocence about whiteness,<sup>153</sup> i.e. to deny its existence or distance themselves from its privileges.<sup>154</sup> However, once convinced that white privilege, for example, exists, many white people become more likely to support efforts to counteract it.<sup>155</sup>

Students who are Black, Latinx, Native American, or AAPI may have a variety of past exposure navigating whiteness, as well as potential psychological experiences in settings where whiteness is a subject of study. For many, awareness concerning racism and race-based privilege likely long

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<sup>148</sup> See, e.g., DIANGELO, WHITE RACIAL IDENTITY, *supra* note 29 (explaining socialization and using a metaphor of fish in water to explain "the all-encompassing dimensions of socialization").

<sup>149</sup> See Part I(A), *infra*.

<sup>150</sup> See Part III(C), *infra*.

<sup>151</sup> Knowles, Lowery, Chow & Unzueta, *supra* note 133, at 598-99.

<sup>152</sup> *Id.* at 599.

<sup>153</sup> Phillips & Lowery, *supra* note 55, at 157.

<sup>154</sup> Knowles, Lowery, Chow & Unzueta, *supra* note 133, at 599.

<sup>155</sup> Phillips & Lowery, *supra* note 55, at 159.

pre-dates law school enrollment. However, not all Black, Latinx, Native American, and AAPI students have experience navigating spaces where whiteness predominates,<sup>156</sup> nor does lived experience automatically give students the tools to articulate or navigate them. Even for students with extensive personal experience with whiteness, the dearth of explicit societal discussion and education on whiteness means law courses may be their first opportunity for curricular learning on the subject. Regardless of preexisting awareness, for students who are conscious of personal or communal harms flowing from whiteness and structural racism, such curriculum might provoke strong emotions.<sup>157</sup> It might also trigger the psychological phenomenon known as racial battle fatigue—the stress responses that people who are racially minoritized can experience as a result of racial microaggressions and other encounters with racism.<sup>158</sup>

Legal educators who wish to dismantle the whiteness of legal education should learn about students and account for their diverse needs. Doing so will enable them to tailor pedagogy, including potential student self-assessment and reflection opportunities, that meets students where they are. To aid in their learning, teachers can seek our resources from the authors cited here and others. They might also consult with colleagues whose expertise and job descriptions include student wellbeing and mental health, such as student affairs professionals and counseling center staff.

In addition to insights and strategies gleaned from trained colleagues, law teachers may be able to account for some of the psychological burdens of studying whiteness by making efforts to orient teaching around ideas, not people.<sup>159</sup> That is, teach about whiteness in a way that makes clear it is a set of ideas and ways of being, not an indictment of a group of people or the individual members of that group. Framing whiteness as “a set of ideas that [students] can endorse or oppose and resist” may have positive effects for students of various identities.<sup>160</sup> For instance, this framing may help those who are white to maintain a posture of receptivity to the subject matter, rather than experiencing defensiveness or other manifestations of white fragility.<sup>161</sup> Additionally, this frame may allow students who are Black, Latinx, Native American, or AAPI to feel less necessity to engage in the

<sup>156</sup> E.g., ENID LOGAN, STAYCE BLOUNT, LOUIS MENDOZA, CHAVELLA PITTMAN, RASHAWN RAY & NICOLE TRUJILLO-PAGAN, *Double Consciousness: Faculty of Color Teaching Students of Color About Race*, in TEACHING RACE AND ANTI-RACISM IN CONTEMPORARY AMERICA 123, 128 (Kristin Haltinner, ed. 2014) (noting that some students, for instance Black students who grew up in predominantly Black environments, may not be accustomed to “the chilly climate of academic institutions that privilege hegemonic, patriarchal, and traditional ideals.”).

<sup>157</sup> See, e.g., MIRANDA HASKIE & BRADLEY SHREVE, *Hozho Nahasdlit: Finding Harmony in the Long Shadow of Colonialism. Two Perspectives on Teaching Anti-Racism at a Tribal College*, in TEACHING RACE AND ANTI-RACISM IN CONTEMPORARY AMERICA 91, 93 (Kristin Haltinner, ed. 2014) (describing Navajo students experiencing anger, disbelief, and other intense emotions when learning about the history atrocities against Native Americans).

<sup>158</sup> Kristen J. Mills, Stephen J. Quaye, Neal J. McKinney, Hunter V.J. Jones & Na’eem Allen-Stills, *Investigating Racial Battle Fatigue Among Black College Students Using Photo-Elicitation Methodology*, 62 J. STUDENT AFF. RSCH. & PRAC. 391, 391 (2025).

<sup>159</sup> Cyndi Kernahan, *Teaching About Race and Racism in College Classrooms*, NAT’L EDUC. ASS’N (Feb. 11, 2022), <https://www.nea.org/advocating-for-change/new-from-nea/teaching-about-race-and-racism-college-classrooms>.

<sup>160</sup> *Id.*

<sup>161</sup> See Part III(D), *infra*, for further discussion of white fragility.

disproportionate labor of validating their white classmates and self-censoring to spare white students' feelings.<sup>162</sup>

Fortunately for the purposes of this endeavor, many students arrive in law school at least in part because they want to be agents of systemic change.<sup>163</sup> While they look to legal educators to teach them what it takes to bring that change about and help them build the knowledge and skills to do so, the motivation to change resides in many students long before they enroll, and may well help them cope with the psychological costs that accompany this work.

### *C. Curricular Substance*

To dismantle the whiteness of legal pedagogy, it is necessary not only to engage in teacher self-assessment and develop informed understanding of students' psychological and cognitive experiences, but also to reform the substance of the law curriculum. This subpart discusses teaching explicitly about whiteness and change-agency and equipping all students to transcend the legal profession's barriers to entry. These are offered as examples of how each legal educator has the potential to contribute to dismantlement within their own spheres of influence.

#### (1) Teach explicitly about whiteness throughout the curriculum

The first step toward dismantling the whiteness of legal education is to refuse to participate in the project of unracialing. To do so, law teachers should reject the norm of treating whiteness as invisible. That is, law teachers must supplant the tendency to teach doctrine and convention as though they are unracialed. To do so, it is necessary to first and foremost teach about whiteness, thereby equipping our students to recognize its operation in their own lives and in the law and legal profession.

This work begins when law teachers acknowledge the role of racialization, racism, and whiteness in every sphere of the law and legal profession. When teaching about everything from individual appellate opinions to doctrinal trends, and from lawyering conventions to professionalism norms,<sup>164</sup> create opportunities for students to consider how whiteness is operating in the background. Strive to replace legal analysis pedagogy that enshrines perspectivelessness with pedagogy that embraces historical context, human experiences of the law, and policy implications as central to the core doctrinal curriculum.

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<sup>162</sup> Tabitha Grier-Reed, Alyssa Maples, Anne Williams-Wengerd, & Demetri McGee, *The Emergence of Racialized Labor and Racial Battle Fatigue in the African American Student Network (AFAM)*, 6 J. COMMITTED SOC. CHANGE RACE & ETHNICITY 95, 114–15 (2020) (describing this experience among Black undergraduate students in a predominantly white setting and explaining that it is a form of racialized labor).

<sup>163</sup> See, e.g., Ossei-Owusu, *supra* note 129 (“Students who recognize racial gaps in their learning are not wrong for being frustrated, skeptical or confused. These sentiments make sense, especially since legal education—for reasons that are sensible and illegitimate—is not designed to offer the types of racial literacy that all students should receive.”).

<sup>164</sup> Samuel-Siegel, *Reckoning with Structural Racism*, *supra* note 9, at 49.

Teachers endeavoring to do this work should also adjust traditional approaches for acknowledging racism's role in the law. Law teachers must emphasize the *benefits* that whiteness reaps from doctrines and norms that reproduce structural racism. This is not so much a change in substance as it is in the narrative we build around it. Invite students to think as much about the advantages that accrue to people who benefit from whiteness as the detriments to people who are harmed directly by racial inequity. Doing so has potential to bring home to students the role of whiteness in their own lives and help them begin to conceive more expansively of methods to dismantle it.

In addition to teaching explicitly about whiteness in coursework across the curriculum, courses that provide in-depth treatment of whiteness and its role in the law and legal profession are an important tool in the dismantlement arsenal. Not only does offering such courses serve a signaling function to all students, but it also ensures that a growing number of students grapple with the topic in depth.<sup>165</sup> Creating a cadre of knowledgeable students will both empower them to be well-informed about whiteness, its role and manifestations, and also have a multiplier effect.<sup>166</sup> That is, those students will bring their knowledge to other academic and co-curricular settings throughout the law school, increasing the likelihood that whiteness will be more frequently named and grappled with.

To address the many attributes and manifestations of whiteness most effectively, definitional foundation laying is a logical starting place for such seminars. Further, since most students will enter the course without prior formal study of whiteness and may well be laboring under the false belief that whiteness is normative or neutral, opportunities for self-assessment, discussion, and reflection are essential to the effectiveness of the endeavor.<sup>167</sup>

For example, the course I teach is built around the following description and learning objectives:

The practice and study of law in the U.S. often fail to account for the racialized nature of U.S. society. Among these gaps are explorations of the ways whiteness functions to apportion privilege, normalize inequity, and dictate convention. In this reading group, we will begin to explore the meaning and operation of whiteness in the law and our own lives regardless of racial identity. Specifically, students will: (a) Gain knowledge about historical and contemporary dynamics of racialization and their implications for the law and legal profession. (b) Learn to recognize common definitions and critiques of whiteness and race-based advantage and disadvantage in the U.S. legal system. (c) Practice the skills of critical reading, reflection, self-

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<sup>165</sup> See *id.* at 6–8 (arguing that legal education should equip all students to contribute to the dismantlement of structural racism and emphasizing the importance of intentional antiracist pedagogy).

<sup>166</sup> Cf. *id.* at 8–9 (describing antiracist pedagogy as a process-oriented methodology intended to prepare students to recognize and counteract structural racism across professional contexts).

<sup>167</sup> See *id.* at 31–36 (emphasizing the importance of developing knowledge about white normativity, structural racism, and antiracism as foundational components of legal pedagogy); see Armstrong & Wildman, *supra* note 10, at 635 (arguing that legal education should move beyond colorblindness by engaging students in critical reflection about whiteness, racial normativity, and racialized advantage).

assessment, dialogue, and collaboration. (d) Consider the role of racialization in their own professional identity formation.

We begin by reading definitional materials such as Cheryl Harris' foundational *Whiteness as Property*,<sup>168</sup> and historian Nell Irvin Painter's *The History of White People*.<sup>169</sup> The course is then structured around understanding the manifestations of whiteness as well as the phenomena of white privilege and white supremacy,<sup>170</sup> before turning attention to its role in legal education and the legal profession, and finishing with an opportunity to engage in summative personal reflection.<sup>171</sup>

My central intentions for the course are twofold: to raise students' consciousness of whiteness and its operation in their own lives and in the law and legal profession, and to expose them to key themes and thinkers to which they will be able to turn for continued learning as their journeys progress. As such, in addition to the Harris and Painter pieces, the syllabus includes selections by other key thinkers including James Baldwin,<sup>172</sup> Robin DiAngelo,<sup>173</sup> George Yancey,<sup>174</sup> and Bennet Capers.<sup>175</sup>

Throughout the course, I assign personal reflections which invite students to explore their own awareness of and relationships with whiteness, consider the interaction of professionalism norms based in whiteness with their own professional identity formation, apply what they are learning to other coursework and internship experiences, and identify matters about which they intend to learn more in the future.

Students emerge from the course expressing reflections such as: "I can now appreciate the necessity of acknowledging race—one, as a means of awareness that race implicates a person's worldview, and two, as a means of challenging whiteness as the normative baseline of our society." "I cannot help but feel as though in many ways I live thinking I am not part of the problem and yet I am living according to systems that are structured to oppress." "Whiteness is a tool that has been utilized for hundreds of years, and now we have the responsibility to decide how it will be used in our own lives."

## (2) Teach change-agency

In addition to interrupting whiteness's project of unracing, a legal education that rejects whiteness must account for whiteness's entitlement to power and control and its tendency to accept privileges without engaging in

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<sup>168</sup> Harris, *supra* note 29.

<sup>169</sup> NELL IRVIN PAINTER, *THE HISTORY OF WHITE PEOPLE* (2010).

<sup>170</sup> See Capers, *supra* note 11, at 10–14 (arguing that law schools reproduce whiteness through institutional culture, pedagogy, and assumptions about normativity and belonging).

<sup>171</sup> See Samuel-Siegel, *Restorative Jurisprudence of Equal Protection*, *supra* note 3, at 138–43 (defining structural racism as systemic and self-replicating and emphasizing the importance of contextualizing racial inequality within broader social and historical structures).

<sup>172</sup> JAMES BALDWIN, *The White Man's Guilt*, in BALDWIN: COLLECTED ESSAYS 722 (Toni Morrison ed., 1998) (originally published in *EBONY* 1965).

<sup>173</sup> DiAngelo, *supra* note 35.

<sup>174</sup> George Yancey, "Innocent" White People are also Complicit in the Anti-Black Murders in Buffalo, *TRUTHOUT* (May 17, 2022), <https://truthout.org/articles/innocent-white-people-are-also-complicit-in-the-anti-black-murders-in-buffalo/>.

<sup>175</sup> Capers, *supra* note 11.

concomitant efforts to ensure they are distributed without reference to race. Legal pedagogy enacts this feature of whiteness when it frames foundational coursework with a disproportionate emphasis on the status quo. As such, to pursue dismantlement, legal educators should center from the earliest days of law school lessons and skillsets that enable students to envision themselves as agents of change.

Educators who teach in the first-year curriculum have an especially important duty in this realm. Rather than teaching foundational doctrine in a way that inculcates an uncritical reverence for the Constitution and precedent, they should be explicit about the ways that those sources embody whiteness and reproduce structural racism. Simultaneous with teaching the fundamentals, first-year teachers should teach a concomitant skepticism, model a sense of duty to reform racially oppressive structures, and begin drawing attention to the skills and strategies that bring about change.

To accomplish this goal, law teachers can begin by simply naming early and often for their students the role of lawyers in making change. They can elect not to frame coursework in terms that might lead students to view themselves as instruments in a perpetual cycle of reproducing existing structures. Instead, they can seek opportunities to build a sense that students are creative agents who act in clients' best interests even when those interests have not historically been protected by law. Opportunities for conveying this sense exist across the semester—from course learning outcomes and policies, to reading assignments, classroom discussion methods, and exam questions.

To concretize, educators can draw students' attention to the work of lawyers that resulted in changes to the law. By, for instance, not just assigning appellate opinions but also teaching about the lawyering that made those opinions possible—such as briefs and client counseling skills—teachers can illuminate the instrumental role lawyers have played in the law's development and direction.<sup>176</sup> Looking behind the case law can help students gain a more robust understanding of the role of lawyer as not just receiver and applier of the law, but also shaper of it.

Recent scholarship offers an array of additional recommendations for teaching in a way that helps students see themselves as change agents. First, for instance, law teachers can teach about rule synthesis in a way that bolsters students' sense of agency.<sup>177</sup> Rather than merely experts in *stare decisis*, they can learn to think of themselves as skilled at unsettling the law.<sup>178</sup> Second, they can instruct students to employ critical case briefing.<sup>179</sup> By thinking broadly about the implications of appellate opinions, students can move beyond merely understanding what the law is to understanding

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<sup>176</sup> Sherri Lee Keene & Susan A. McMahon, *The Contextual Case Method: Moving Beyond Opinions to Spark Students' Legal Imaginations*, 108 VA. L. REV. ONLINE 72, 83–85 (2022).

<sup>177</sup> Samuel-Siegel, *Operationalizing a Pedagogy of Antiracism*, *supra* note 104, at 81.

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

<sup>179</sup> Hoang Pham, *The Critical Case Brief: A Practice Approach to Integrating Critical Perspectives in the 1L Curriculum*, in INTEGRATING DOCTRINE AND DIVERSITY: INCLUSION AND EQUITY IN THE LAW SCHOOL CLASSROOM 51, 54 (NICOLE P. DYSZLEWSKI, RAQUEL J. GABRIEL, SUZANNE HARRINGTON-STEPHEN, ANNA RUSSEL & GENEVIEVE B. TUNG EDS., 2021).

what the law could be.<sup>180</sup> Third, even an act as simple as routinely naming the existence of structural racism and the law's role in it without being prompted to do so by students questions<sup>181</sup> is a way to model honest grappling with systemic inequity. And the list goes on.<sup>182</sup>

(3) Teach to reduce racialized disparities in bar passage and professional access

Finally, to excise whiteness from the substance we teach we must reject curricular decisions that in any manner accept existing racialized power distributions. Whiteness expects power and control, and a profession with barriers to entry that disproportionately affect people who are not white preserves such power and control. As such, to dismantle the whiteness of legal education, legal educators must make substantive curricular choices that maximize the likelihood of all law graduates succeeding in the profession.

Preparing law graduates to pass the bar exam is one concrete example of this component of dismantlement. As discussed above, bar exam takers who are white pass at rates higher than all other takers.<sup>183</sup> While many legal educators are working tirelessly to see to it that these gaps are closed, the statistics remain alarming, demonstrating that innovative strategies are necessary. Recognizing that disparate bar passage rates are at least in part a function of whiteness, and that failure to eliminate them is an act of allegiance to structural racism, law teachers committed to antiracism have every incentive to increase the urgency with which they view the problem.

Indeed, some scholars have argued that racialized disparities associated with bar licensing are so entrenched that meaningful antiracist reform may require reconsideration of the bar exam itself. These scholars contend that the bar exam functions less as a measure of minimum competency than as a mechanism for preserving exclusionary professional hierarchies with disproportionate racialized effects.<sup>184</sup>

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<sup>180</sup> See *id.*

<sup>181</sup> See, e.g., Teri A. McMurry-Chubb, STRATEGIES AND TECHNIQUES FOR INTEGRATING DIVERSITY, EQUITY AND INCLUSION INTO THE CORE LAW CURRICULUM: COMPREHENSIVE GUIDE TO DEI PEDAGOGY, COURSE PLANNING, AND CLASSROOM PRACTICE 78 (Wolters Kluwer 2022) (noting the importance of the teacher being the “first [to] raise[ ] the issues of race, class, and gender as they arise. . . and weav[ing] them into the discussion. . . .”).

<sup>182</sup> See, e.g., Scott L. Cummings, *Movement Lawyering*, 2017 U. ILLINOIS L. REV. 1645, 1725-30 (2017); Samuel-Siegel, *Operationalizing a Pedagogy of Antiracism*, *supra* note 104.

<sup>183</sup> See *infra* Part II(B).

<sup>184</sup> While full exploration of bar abolition is beyond the scope of this Article, such critiques further underscore the urgency of confronting the role whiteness plays in legal education and professional gatekeeping. See Deborah Jones Merritt & Logan Cornett, *Building a Better Bar: The Twelve Building Blocks of Minimum Competence*, 98 DENV. L. REV. 413, 417-23 (2021) (arguing that the traditional bar exam poorly measures minimum competence and disproportionately excludes historically marginalized applicants); Andrea A. Curcio, Carol L. Chomsky & Eileen Kaufman, *Testing, Diversity, and Merit: A Reply to Dan Subotnik and Others*, 9 U. MASS L. REV. 206, 221-29 (2014) (discussing racialized disparities in bar passage and questioning the legitimacy of standardized testing mechanisms as gatekeeping devices).

Short of abolition, a significant literature on methods for bolstering bar success is available.<sup>185</sup> While exploring it is beyond the scope of this piece, those who are committed to dismantling the whiteness of legal education should begin by recognizing that eliminating racial disparities in bar success requires institution-wide effort. Expecting Academic Success educators and others whose responsibilities are explicitly bar-related to rapidly bring about this crucial systemic reform is unrealistic. Rather, each legal educator has a role to play.

For instance, as noted above, stereotype threat, unequal academic support, racial isolation, financial inequities, and other structural barriers likely play a role in disparate bar passage outcomes,<sup>186</sup> and all legal educators have a role to play in minimizing its effects.<sup>187</sup> Furthermore, social scientific evidence indicates the importance of bolstering both academic and personal support for law students at risk of experiencing racialized bar-passage disparities.<sup>188</sup> This is especially so in the first year, when the difficulties of transitioning to law school can become magnified if not addressed early.<sup>189</sup>

In sum, the substance of legal pedagogy cannot emerge from the shadow of whiteness until it confronts whiteness head-on, and both prepares students for entry into the profession and equips them to be agents of change. By including explicit instruction about whiteness, preparing students for change agency, and working toward the elimination of racialized disparities in bar passage, legal educators have the potential to dismantle the whiteness of legal pedagogy's substance.

#### *D. Teaching Methods*

While this Article is built on the hope for a future where whiteness no longer shapes legal education, it is imperative that law teachers equip students to navigate present conditions successfully. Doing so is not an endorsement of those conditions, nor a suggestion that adaptation alone can dismantle whiteness. Rather, students must be equipped not only to survive institutions shaped by whiteness, but also to recognize, challenge, and ultimately transform them. Developing a profession—and future professorate—capable of undertaking the dismantlement for which this Article advocates requires preparing students to remain intellectually grounded, professional effective, and committed to antiracist change even while operating within imperfect institutions. As such, this subpart discusses two sample teaching methods that have the potential to accomplish this goal.

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<sup>185</sup> See, e.g., Jason M. Scott et al., *The Imperative to Promote Diversity Post-Students for Fair Admissions Analyzing the Effects of Student-Body Diversity on Attrition, GPA, and Bar Passage in Law Students and Graduates*, 96 J. HIGHER EDUC. 596 (2025); Scott Devito et al., *Examining the Bar Exam: An Empirical Analysis of Racial Bias in the Uniform Bar Examination*, 55 U. MICH. J.L. REFORM 597 (2022); Merritt et al., *supra* note 107; Timothy T. Clydesdale, *A Forked River Runs Through Law School: Toward Understanding Race, Gender, Age, and Related Gaps in Law School Performance and Bar Passage*, 29 L. & SOC. INQUIRY 711 (2004).

<sup>186</sup> E.g., Merritt et al., *supra* note 107.

<sup>187</sup> See generally, McClain, *supra* note 113.

<sup>188</sup> Clydesdale, *supra* note 184, at 761.

<sup>189</sup> *Id.* at 762.

Drawing from these samples, law teachers can build other strategies that will meet the needs of their particular students and institutional context.

(1) Tailor orientations for learning success

Succeeding in today's law schools requires the skills to navigate whiteness and its manifestations in legal education. Failing to equip students for the particular ways that whiteness shows up in legal pedagogy is a missed opportunity to help them maximize their success. This is because manifestations of whiteness such as those discussed above<sup>190</sup> can produce barriers to student learning and introduce challenges to students' professional identity formation. Such barriers include inhibition of participation and learning;<sup>191</sup> disillusionment and alienation;<sup>192</sup> and wellbeing challenges that result from microaggressions and other day-to-day products of minoritization.<sup>193</sup>

To ensure that all students are prepared to learn effectively from legal pedagogy shaped by whiteness, legal educators can implement orientation programs specifically tailored to meet the needs of students who identify as Black, Latinx, Native American, or AAPI. Such programs need not be offered exclusively to students based on their identity, indeed doing so in the current political climate is becoming an increasingly fraught undertaking.<sup>194</sup> Rather, the suggestion here is to be sure that every orientation program includes content that responds thoughtfully to the particular needs of students whose learning may be especially at risk due to the way whiteness pervades the pedagogy. Fortunately, programming that does so also has potential to help all students succeed, making it an endeavor without downside.<sup>195</sup>

For instance, since coming to terms with the unracing of legal pedagogy in their first several weeks of coursework can be a jarring experience, legal educators can orient students to it in advance. Revealing this dynamic to students through a critical lens in an orientation setting can proactively eliminate the jolt of recognition that faces students left to their own devices—a jolt which carries risk of disillusionment and alienation.<sup>196</sup> But eliminating the lonely experience of that jolt is just a start. Educators engaged in orientation should also help students develop tools to experience themselves

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<sup>190</sup> See *infra* Part II.

<sup>191</sup> McClain, *supra* note 113.

<sup>192</sup> See, e.g., Ossei-Owusu, *supra* note 129; Crenshaw, *supra* note 9, at 9.

<sup>193</sup> Sue, Capodilupo, Torino, Bucceri, Holder, Nadal & Esquilin, *supra* note 61; McCluney, *supra* note 87.

<sup>194</sup> See, e.g., Rebecca Beitsch, *DOJ memo presses federal funding recipients to nix DEI*, THE HILL (July 31, 2025, 2:04 PM), <https://thehill.com/homenews/administration/5430267-doj-memo-funding-recipients-dei/>.

<sup>195</sup> While such universal applicability should not be a prerequisite to orientation programming, the hope here is to center the needs of students most likely to be disadvantaged by whiteness while minimizing the risk that such programming will be rendered impossible by so-called “DEI bans” and similar efforts to curtail equity.

<sup>196</sup> See Susan L. Brooks, *Transforming the Law School Matrix*, 2 J.L. TEACHING & LEARNING 101, 107 (2025) (observing that such experiences may result in withdrawal, disengagement, poor performance, and unhappiness with their legal education); Margaret E. Montoya, *Silence and Silencing: Their Centripetal and Centrifugal Forces in Legal Communication, Pedagogy and Discourse*, 33 U. MICH. J.L. REFORM 263, 308 (2000).

as agents in relation to the unracial, rather than people who are powerlessly subject to it. Strategies toward this objective might include methods as simple as reassuring students that upper-level elective courses are available to help build context and grapple with the roles of race and racism. That is, assure students that, even if the 1L curriculum is anemic in this sense, future opportunities exist to build greater context and explore structural reform.

Additionally, first-year orientation programs can engage thoughtfully in efforts to reveal what is hidden from view when it comes to norms that maintain the dominance of whiteness. The traditional Socratic method, for example, can preserve the dominance of whiteness by, for instance, enhancing the likelihood that students experiencing stereotype threat will face undue psychological stress.<sup>197</sup> To mitigate this risk, legal educators can orient students to the method more transparently, modify it, or abandon it altogether. For those who continue to employ the method, legal educators should teach students explicitly what the method is, what its goals are, and how they should engage with it in order to maximize their learning rather than fear or performance anxiety. Explaining both the potential benefits and critiques of the method respects students and begins cultivating their ability both to navigate the method effectively and to think critically about its effects on learning and classroom power dynamics.

As legal educators become increasingly attuned to how whiteness pervades legal pedagogy, they should simultaneously consider how to equip students to succeed in the face of this reality. Until a future in which the whiteness of pedagogy has been dismantled, those committed to dismantlement can work toward it by preparing a generation of law students who will succeed despite its harms.

## (2) Create conditions to reduce white fragility

One side effect of whiteness's tendency to dominate space is "white fragility." Coined by Robin DiAngelo, the term white fragility refers to the tendency of white people to experience discomfort in discussions concerning race and racism.<sup>198</sup> The discomfort flows from the fact that many white people lack practice engaging in such discussions<sup>199</sup>—a logical byproduct of whiteness's tendency to dominate space. This discomfort manifests in defensiveness, withdrawal, or other moves that allow people who experience fragility to return to a state of equilibrium.<sup>200</sup>

It is easy to see, then, that white fragility inhibits the likelihood of productive discussions concerning race and racism. If students who are white experience defensiveness or withdrawal, they are less likely to be open to learning and their reactions are more likely to impede the productivity of classroom discussions.<sup>201</sup> This means that, until law school classrooms are predominantly free of white fragility, the utility of the curricular reforms of

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<sup>197</sup> See McClain, *supra* note 113 (noting that the Socratic method can trigger stereotype threat); Bramble & Bahadur, *supra* note 9, at 730.

<sup>198</sup> DiAngelo, *supra* note 35, at 57.

<sup>199</sup> *Id.* at 57.

<sup>200</sup> *Id.* at 64.

<sup>201</sup> See *id.*

the nature described above is likely to be blunted.<sup>202</sup> As such, by creating conditions that reduce white fragility, legal educators can increase the likelihood of classroom environments that make learning about whiteness possible.

To help students who might experience white fragility overcome it, DiAngelo recommends inviting them to consider first their own internal experiences with the dynamic, before next exploring its manifestations in interpersonal situations, as well as institutional and societal settings.<sup>203</sup> Because white fragility results from a lack of the stamina necessary to engage in discussions that touch on race and racism,<sup>204</sup> giving students space to build that stamina is a pathway to reducing fragility. Doing so can create an incremental pace of learning and reflection that will aid students to encounter the challenges of this work without disruptive disequilibrium.<sup>205</sup>

Law teachers can create conditions in which students get a small taste of the discomfort that occasions white fragility and then help students use effective coping mechanisms to navigate without unhelpful defensive moves DiAngelo describes. Pedagogical techniques that operationalize these strategies are plentiful. For example, one might require students to engage in individual written reflections that call on them to recall personal experiences and reflect on their relevance to systemic dynamics. If class size permits, law teachers can comment on the reflections and note places where students might have more room to explore or reflect. In larger classes, teachers might offer class-wide self-assessment rubric-style documents. An incrementally higher risk endeavor, but which remains relatively low-risk are think-pair-share discussions in which students engage individually, and then with one another, on discussion questions before sharing selected reflections with the whole class.

By designing exercises that incrementally build students' stamina for engaging with discussions of race and racism, law teachers have potential to minimize the operation of white fragility in the classroom.

### *E. Accountability*

In this era of retrenchment and backlash against antiracist reforms,<sup>206</sup> teaching about race and racism carries as much—if not in some instances more—political and legal risk as ever before. Furthermore, many institutions

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<sup>202</sup> See Knowles, Lowery, Chow & Unzueta, *supra* note 133, at 599–601 (documenting the tendency to deny or distance from white privilege).

<sup>203</sup> DiAngelo, *supra* note 35, at 66–67.

<sup>204</sup> *Id.* at 56 (defining white fragility as “the reduced psychosocial stamina that racial insulation inculcates”).

<sup>205</sup> *Id.*

<sup>206</sup> Lis Power, *Fox News' obsession with critical race theory, by the numbers*, MEDIA MATTERS FOR AMERICA (June 15, 2021), <https://www.mediamatters.org/fox-news/fox-news-obsession-critical-race-theory-numbers> (“By labeling everything that has to do with race ‘critical race theory,’ Fox is attempting to shut down conversations about race and racism—which is ironic given the network’s claims that it champions free speech. And even though many conservatives who lambast it don’t have a clue what the theory actually is, their efforts are working as 21 states are either introducing bans or have banned what they call ‘critical race theory.’ Many educators in those states have argued that the bills and laws would essentially ‘whitewash history’ and have criticized legislators for making it difficult to have necessary conversations about race.”).

lack strategic goals or expectations vis-à-vis teaching about structural racism or white supremacy and certainly teaching about whiteness. Meanwhile, other institutions actually prohibit it.<sup>207</sup> Under these circumstances, legitimate questions arise about how to do this work. What measures can legal educators use to ensure that they are pursuing the goals this Article proposes, doing so methodically, making progress, and challenging themselves to carry out an unflagging commitment to dismantlement even in times when institutional leadership may be lacking?

The degree to which individual legal educators and law faculties collectively can engage in the strategies this Article describes may be subject to local policies and pragmatic considerations related to job security. But, regardless of the limitations of the moment, work toward educating all students effectively remains the duty of every accredited law school.<sup>208</sup> And educators—working both individually and collectively<sup>209</sup>—have at their disposal various mechanisms for holding themselves accountable to this standard systematically.<sup>210</sup> Strategic plans and learning outcomes are offered in this subpart as sample ways of getting started.

### (1) Write a strategic plan

Strategic planning is a methodology that originated in the business sector. It is built on a clearly articulated vision for the future, which in turn enables the planner to formulate a list of strategies and tactics calculated to achieve that vision.<sup>211</sup> The beauty of the strategic plan framework for our purposes is that it offers a simple methodology for outcome-driven planning that proceeds from methodical assessment of both the planner and the intended audience.

An effective strategic plan allows the planner to develop “clarity of purpose and direction” and specify tangible “action steps required to accomplish the overall purpose.”<sup>212</sup> At the core of an effective plan is a statement of the planner’s mission and values, both of which flow from a clearly articulated vision. In this instance, the vision is a law school free of the detriments that flow from whiteness. The mission is to dismantle the whiteness of legal education, and this mission is informed by values such as a commitment to educating all students effectively and ensuring all law graduates are prepared to carry out their special duty to bring about justice.<sup>213</sup>

Each educator can build and document a personal strategic plan. It should state the educator’s planned-for mission and relevant values. And

<sup>207</sup> See, e.g., *Dismantling DEI: A Coordinated Attack on American Values*, MOVEMENT ADVANCEMENT PROJECT, <https://mapresearch.org/report/dismantling-dei-a-coordinated-attack-on-american-values>.

<sup>208</sup> STANDARDS AND RULES OF PROCEDURE FOR APPROVING LAW SCHOOLS, Standard 301(a) Objectives of Program of Legal Education (A.B.A. 2024–25) (“A law school shall maintain a rigorous program of legal education that prepares its students, upon graduation, for admission to the bar and for effective, ethical, and responsible participation as members of the legal profession.”).

<sup>209</sup> See, e.g., Samuel-Siegel, *Operationalizing a Pedagogy of Antiracism*, *supra* note 104, at 101 (discussing the benefits of faculty learning communities in the work of antiracist pedagogy).

<sup>210</sup> E.g., Samuel-Siegel, *Reckoning with Structural Racism*, *supra* note 9, at 61–65.

<sup>211</sup> E.g., Robert C. Shirley, *Strategic Planning: An Overview*, 1988(64) NEW DIRECTIONS HIGHER ED. 5, 5 (Winter 1988).

<sup>212</sup> *Id.*

<sup>213</sup> MODEL RULES OF PRO. CONDUCT, preamble (A.B.A. 2025).

then, building from those, it should articulate four or five objectives that the educator will work toward over a designated period of time, for example one, two, or three academic years. Objectives should be specific, measurable, and achievable.<sup>214</sup> And, for each objective, the planner should list a few actionable tactics to employ during the planned-for period.<sup>215</sup>

One might write a plan that is specific to dismantling whiteness within their purview, or instead might choose to build a plan whose mission is broader—for instance, to contribute to the dismantlement of structural racism in the law and legal profession. This plan would make up just one dimension of the educator’s overall plans for a given academic year. Eliminating the pervasiveness of whiteness might be one of the plan’s specific objectives. Here is one example of what a vision statement, a mission statement, and one whiteness-related objective and set of tactics might look like:

- Vision: My long-term vision is a country in which the law and legal profession no longer produce nor reproduce structural racism.
- Mission: My mission as a legal educator is to teach and mentor in such a way that I do not reproduce the harms of structural racism and, instead, equip all of my students to participate in the dismantlement of it.
  - Objective #1: I will make efforts throughout this academic year to make progress toward eliminating the detrimental effects of whiteness in the legal pedagogy within my purview.
    - Tactic A - Knowledge Development: I will devote two hours each week throughout August and September to educating myself about whiteness.<sup>216</sup>

<sup>214</sup> *Hit the mark when you set SMART goals*, IT’S YOUR YALE, <https://your.yale.edu/hit-mark-when-you-set-smart-goals>.

<sup>215</sup> *Id.*

<sup>216</sup> In addition to the sources cited throughout this article, other resources are plentiful. Consider, for example: TONI MORRISON, *PLAYING IN THE DARK: WHITENESS AND THE LITERARY IMAGINATION* (1993); Barbara J. Flagg, *Fashioning a Title VII Remedy for Transparently White Subjective Decisionmaking*, 104 YALE L.J. 2009 (1995); HANEY LOPEZ, *supra* note 29; STEPHANIE M. WILDMAN, WITH CONTRIBUTIONS BY MARGALYNNE ARMSTRONG, ADIRENNE D. DAVIS, AND TRINA GRILLO, *PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA* (1996); RICHARD DELGADO AND JEAN STEFANCIC, EDs., *CRITICAL WHITE STUDIES: LOOKING BEHIND THE MIRROR* (1997); George A. Martinez, *The Legal Construction of Race: Mexican-Americans and Whiteness*, 2 HARV. LATINX L. REV. 321 (1997); THE MAKING AND UNMAKING OF WHITENESS (Birgit Brander Rasmussen, Eric Klinenberg, Irene J. Nexica, & Matt Wray eds., 2001); Flagg, *supra* note 29; GEORGE YANCY, *LOOK, A WHITE! PHILOSOPHICAL ESSAYS ON WHITENESS* (2012); WHITE SELF-CRITICALITY BEYOND ANTI-RACISM: HOW DOES IT FEEL TO BE A WHITE PROBLEM? (George Yancy ed., 2015); Fredrik deBoer, *Admitting that white privilege helps you is really just congratulating yourself*, WASH. POST (Jan. 28, 2016), <https://www.washingtonpost.com/posteverything/wp/2016/01/28/when-white-people-admit-white-privilege-theyre-really-just-congratulating-themselves/>; DAVID R. ROEDIGER, *WORKING TOWARD WHITENESS: HOW AMERICA’S IMMIGRANTS BECAME WHITE* (2d ed. 2005); Rachel Cargle, *When Feminism Is White Supremacy in Heels*, HARPER’S BAZAAR (Aug. 16, 2018), <https://medium.com/harpers-bazaar/when-feminism-is-white-supremacy-in-heels-7e99d27bf5ca>; Sarah Bellamy, *Performing Whiteness*, PARIS REV. (June 8, 2020), <https://www.theparisreview.org/blog/2020/06/08/the-performance-of-white-bodies/>; Simon Clark, *How White Supremacy Returned to Mainstream Politics*, CTR. FOR AM.

- Tactic B - Self-Assessment: I will devote four hours in September to conducting a self-assessment concerning my own relationship with whiteness.<sup>217</sup>
- Tactic C - Getting to know my students: During the first three weeks of classes, I will use a scalable technique to get to know my students individually<sup>218</sup> and reflect on how to meet their needs, particularly as they relate to navigating a legal academy and profession that remain shaped by whiteness.
- Tactic D - Curricular reform: I will identify and apply at least three discreet revisions to the substance and/or processes of my curriculum that are designed to move toward a legal education shaped less by whiteness.<sup>219</sup>

One of the advantages of using strategic planning as a goal-setting framework is that it combines into one accessible undertaking everything from our loftiest idealistic aspirations to our most nuts-and-bolts opportunities for self-direction. But whatever planning tool each educator chooses to employ, it is certain that planning increases the likelihood of success because it provides the tools needed to hold oneself accountable.

Planning transparently for one's students is equally important, as such the next subpart will focus on a key tool for success on that front—learning outcomes.

(2) Use learning outcomes as an opportunity to concretize dismantlement

“Learning outcomes are measurable statements that articulate at the beginning what students should know, be able to do, or value as a result of” a course or program.<sup>220</sup> They bolster educators’ intentionality concerning what and how they teach.<sup>221</sup> They also create transparency by allowing students to develop realistic expectations<sup>222</sup> and permitting other teachers to

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PROGRESS (July 1, 2020), <https://www.americanprogress.org/wp-content/uploads/sites/2/2020/06/WhiteNationalism-report1.pdf>; Leong, *supra* note 29; Tatiana Flores, “*Latinidad is Cancelled*”: *Confronting an Anti-Black Construct*, 3 *LAT. AM. & LATINX VISUAL CULTURE* 58 (2021); Sow, *supra* note 32; Keith H. Hirokawa, *Race, Space, and Place: Interrogating Whiteness Through a Critical Approach to Place*, 29 *WM. & MARY J. RACE GENDER & SOC. JUST.* 279 (2023); Hoag-Fordjour, *supra* note 99.

<sup>217</sup> See *infra* Part III(A).

<sup>218</sup> E.g., Samuel-Siegel, *Reckoning with Structural Racism*, *supra* note 9, at 43–47 (discussing strategies for doing so).

<sup>219</sup> See *infra* Part III(C).

<sup>220</sup> *Setting Learning Outcomes*, CORNELL UNIV. CTR. FOR TEACHING INNOVATION, <https://teaching.cornell.edu/teaching-resources/designing-your-course/setting-learning-outcomes> (last visited July 11, 2023).

<sup>221</sup> E.g., Steven C. Bahls, *Adoption of Student Learning Outcomes: Lessons for Systemic Change in Legal Education*, 67 *J. LEGAL EDUC.* 376, 389–90 (2018).

<sup>222</sup> *Id.* at 381.

pursue consistency.<sup>223</sup> For all of these reasons, they serve naturally as a tool of accountability.

But learning outcomes are more than merely helpful—they are required. To be accredited by the American Bar Association, law schools must articulate and publish them.<sup>224</sup> And, as a result of recent amendments to the accreditation standards, those learning outcomes must be articulated not only at the program level but also for each individual course.<sup>225</sup> Schools are in turn required to use the learning outcomes to measure student attainment.<sup>226</sup>

Course learning outcomes concretize the course's central purposes, provide a basis for assessing students' learning progress, and define the outcomes that are essential to excellence.<sup>227</sup> As such, they are opportunities for educators to both make commitments and set expectations. Learning outcomes can be framed at varying levels of specificity or generality depending on the circumstances under which the law teacher is operating. To ensure that outcomes are aligned closely with generally recognized priorities, one might anchor outcomes to particular ABA standards, school-wide programmatic outcomes, or lawyer professionalism obligations.

For instance, the ABA accreditation standard that requires legal education relating to bias, racism, and cultural competency provides a basis for learning outcomes such as: “Students will be able to identify and articulate ways in which existing doctrine reflects racism and related societal hierarchies and power distributions, such as whiteness, white privilege, and white supremacy.”<sup>228</sup>

The ABA Model Rules of Professional Conduct that imposes on lawyers a duty to serve as an advisor who exercises “independent professional judgment and render[s] candid advice” might inspire outcomes such as: “Students will consider the relevance of disparities in societal and political power for future client representation, and develop skills for accounting for such disparities in pursuit of their client's best interests.”<sup>229</sup>

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<sup>223</sup> *Introduction to Learning Outcomes, Assessment, and Evaluation Standards*, A.B.A., [https://www.americanbar.org/groups/legal\\_education/committees/outcomes-assessments/outcomes-assessments-introduction-and-history/#:~:text=Standard%20302%20specifies%20the%20four,4\)%20and%20other%20professional%20skills](https://www.americanbar.org/groups/legal_education/committees/outcomes-assessments/outcomes-assessments-introduction-and-history/#:~:text=Standard%20302%20specifies%20the%20four,4)%20and%20other%20professional%20skills) (noting the course-level requirements will be effective for the 2026-27 academic year).

<sup>224</sup> *See A.B.A.*, *supra* note 12, Standard 301(b) Objectives of Program of Legal Education (2024-25) (requiring the establishment and publication of learning outcomes designed to prepare students for bar admission and participation in the profession as described in 301(a)).

<sup>225</sup> *See A.B.A.*, *supra* note 223.

<sup>226</sup> *See, A.B.A.*, *supra* note 12, Standard 301(a) Objectives of Program of Legal Education, Standard 315 Evaluation of Program of Legal Education, Learning Outcomes, and Assessment Methods.

<sup>227</sup> *See generally* MICHAEL H. SCHWARTZ, SOPHIE SPARROW & GERALD HESS, *TEACHING LAW BY DESIGN: ENGAGING STUDENTS FROM THE SYLLABUS TO THE FINAL EXAM* 38 (Carolina Academic Press, 2nd ed. 2017).

<sup>228</sup> *See, A.B.A.*, *supra* note 12, Standard 303(c) Curriculum (requiring that law schools “provide education to law students on bias, cross-cultural competency, and racism” at the start of their legal education and on one additional occasion).

<sup>229</sup> *See, e.g.*, MODEL RULES PRO. CONDUCT, Rule 2.1 Advisor (AM. BAR ASS'N. 2025) (“In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, *social and political factors*, that may be relevant to the client's situation.”) (emphasis added).

The ABA accreditation standard requiring law schools to teach about professional identity formation is a foundation for outcomes such as: “Students will reflect on their awareness, perceptions, and experiences of identity-based privilege, and develop skills necessary to account for such privilege in the course of client representation.”<sup>230</sup>

Learning outcomes can also create opportunities for law teachers and students to engage collaboratively in imagining reforms to the legal profession itself. Rather than treating existing professional structures as fixed or inevitable, educators can invite students to critically assess how legal institutions reproduce racial hierarchy and to envision alternative approaches that would move the profession toward greater equity and democratic accountability.<sup>231</sup> In this way, legal pedagogy can cultivate not only professional competence, but also the capacity to participate thoughtfully in reform efforts aimed at dismantling whiteness within legal education and the legal profession more broadly.

In sum, legal educators can erect structures of accountability within their own individual spheres of responsibility; there is no need to await institutional measures that might be slow to come. Through individual strategic planning and thoughtful learning outcomes, each law teacher has the power to make efforts toward dismantling the whiteness of legal pedagogy.

#### IV. CONCLUSION

For so long as the ideas and ways of being that constitute whiteness pervade legal education, the structural racism that it protects will be free to thrive largely undisturbed in the law and legal profession. But the continued injustice of structural racism is inconsistent with lawyers’ “special responsibility for the quality of justice.”<sup>232</sup> As such, law teachers—the people who prepare lawyers to carry out this special responsibility—are duty-bound to interrupt these unjust cycles. Dismantling the whiteness of legal education is essential to that interruption.

Whiteness is, by its very nature, an elusive construct. It thrives on not being noticed or named. However, legal educators can play an integral role in reforming this reality. By not merely noticing and naming, but also methodically critiquing and dismantling whiteness in legal education, they have the power to bring about a legal profession and, in turn, a system of laws, that truly begin a departure from the United States’ long journey of structural racism. By decommissioning the quiet engine of racial hierarchy, law teachers will live up to their obligations to students and, in turn, contribute to the establishment of equal justice under law.

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<sup>230</sup> See *A.B.A.*, *supra* note 12, Standard 303(b) Curriculum (“A law school shall provide substantial opportunities to students for . . . the development of a professional identity.”).

<sup>231</sup> See generally Amna A. Akbar, *Demands for a Democratic Political Economy*, 134 HARV. L. REV. F. 90, 96–101 (2020) (theorizing “non-reformist reforms” that shift power to marginalized communities to build democratic accountability and transform structural inequality).

<sup>232</sup> MODEL RULES OF PRO. CONDUCT, preamble (A.B.A. 2025).

# More than “Just a Misdemeanor”: Why Diversion is Critical for Low Level Youth Offenders

LYNN WILLIAMS & ARIANA M. ELLIS\*

## ABSTRACT

Over the past two decades, juvenile arrests have declined sharply nationwide. Yet, during this same period, policies and penalties governing youth have grown increasingly punitive. Many lawmakers continue to advance “tough on crime” legislation that subjects all youth in the juvenile justice system to the same level of sanction, regardless of the seriousness of their offense or prior legal history. This article argues that juvenile delinquency should be addressed through individualized assessments of both risk and needs, rather than through uniform punitive measures. Unnecessary or disproportionate court involvement, particularly for low-risk youth, can produce significant short- and long-term harms, disrupt developmental trajectories, and ultimately undermine public safety. The discussion highlights several systemic problems associated with placing low-risk youth on probation and reviews model state policies that have successfully reduced costs and recidivism rates. Adoption of similar reforms can strengthen the rehabilitative mission of juvenile courts, mitigate reoffending, and improve youth outcomes. By diverting misdemeanor-level and low-risk youth from probation, courts can conserve resources and focus supervision efforts where they are most effective, on higher-risk youth whose needs require more intensive intervention.

## INTRODUCTION AND PURPOSE

Court-involved youth are in crisis. Local media sound alarms over an increase in carjackings and homicides in many cities among juvenile populations; however, on a national scale, violent crime among youth is actually decreasing.<sup>1</sup> In fact, over the last two decades, the Office of Juvenile Justice and Delinquency Prevention (OJJDP) finds that arrests of juveniles

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<sup>1</sup> OFF. OF JUV. JUST. & DELINQ. PREVENTION, NCJ 305025, TRENDS IN YOUTH ARRESTS FOR VIOLENT CRIMES (2022).

actually declined sharply nationwide, falling 84 percent between its peak in 1996 and 2020.<sup>2</sup> Despite these statistics, the public has expressed outrage and urged officials to impose harsher penalties for teens. In response, many lawmakers are proposing with “tough on crime” legislation for all youth that encounter the juvenile system, regardless of the level of their offense or past legal history. Although these frustrations and knee-jerk demands to “lock up” more youth are understandable, juveniles engaged in delinquent behavior should be individually assessed for both risk and needs. Unnecessary or disproportionate juvenile court involvement, especially for low-risk youth, may create significant short- and long-term negative consequences that can disrupt their life trajectory and ultimately decrease public safety.

This article will discuss several potential problems with placing low risk youth on probation:

1. Juvenile probation does not significantly impact reoffending.
2. Juvenile probation can increase the likelihood of reoffending.
3. Juvenile probation can increase collateral consequences for youth.

Often, individuals believe that probation will decrease future involvement in juvenile court, which places probation as the first-line strategy. However, failure to appropriately assess a youth’s individualized needs and implement alternatives before formal processing can have the opposite effect, actually increasing recidivism. Research has shown that low-level youth offenders who are diverted have better outcomes in education, employment, and are less likely to reoffend than those processed in the justice system.

This article also highlights how diversion is a viable alternative to traditional case processing, which can result in seven benefits for the court, youth, and the community:

1. Diversion can address a youth’s individual needs.
2. Diversion can decrease the stigmatization of court-involved youth.
3. Diversion can save the court system money, allowing limited funds to be used to better assist higher-risk youth.
4. Diversion can save the judiciary valuable court time.
5. Probation officers can have smaller caseloads that can be targeted toward high-risk youth.
6. Diversion can promote both racial and ethnic equity.
7. Diversion can improve long-term outcomes for youth and reduce rates of recidivism.

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<sup>2</sup> OFF. OF JUV. JUST. & DELINQ. PREVENTION, ARRESTS OF YOUTH DECLINED THROUGH 2020 (2022).

The court's critical role in using its discretion to divert low-risk misdemeanor youth from probation can improve the future success of youth while at the same time protecting the community. As a developing national trend, many state jurisdictions have implemented policies to increase the use of juvenile diversion. In March 2024, the Sentencing Project highlighted reform efforts across the nation that created new state policies to divert youth out of the justice system, calling it "America's growing movement."<sup>3</sup> The report reviewed state policies that either mandated or recommended the use of diversion. For example, in Clark County, Nevada, all misdemeanor offenders are diverted to an assessment center where youth and their families are connected to supportive services (e.g., mental health, substance abuse, trauma, food security). The center reported referring more than 1,000 delinquency cases in 2020 alone and that only 17% of youth referred to the program had delinquency cases subsequently filed in juvenile court within a three-year period.<sup>4</sup> Two other jurisdictions were also noted for diverting most misdemeanor-level youth. In Utah, all youth charged with misdemeanors are automatically eligible for diversion unless they have had two prior adjudications or two failed attempts at diversion.<sup>5</sup> Similarly, in San Francisco, all youth charged with misdemeanors are enrolled in a community-based diversion program and are provided with supportive programming (mental health, tutoring, employment, community service, and life skills).<sup>6</sup>

Additionally, the federal Office of Juvenile Justice and Delinquency Prevention recently partnered with the National District Attorneys Association to provide training and technical assistance to juvenile prosecutors and their staff, helping them to pursue diversion and other strategies to reduce offending and improve outcomes for youth and communities.<sup>7</sup>

This article reviews research and evidence in support of using diversion for youth charged with misdemeanors as a viable alternative to formal court processing and probation. Lastly, this article will illustrate how model policies have been implemented in Philadelphia and review the promising results of such policies, including cost savings and decreasing rearrest rates. Adoption of similar policies can support the court's reform efforts, mitigate the risk of reoffending in the future, and improve overall youth success. By diverting misdemeanor youth from probation, both the court and probation staff will have more time and resources to better target interventions with higher-risk, felony-level youth on probation. These efforts can free additional resources that can be used to address community concerns related to violent crimes among youth.

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<sup>3</sup> Richard A. Mendel, *New Report: America's Growing Movement to Divert Youth Out of the Justice System*, THE SENT'G PROJECT (Mar. 20, 2024), <https://www.sentencingproject.org/press-releases/new-report-americas-growing-movement-to-divert-youth-out-of-the-justice-system/>.

<sup>4</sup> *Id.* at 9.

<sup>5</sup> *Id.* at 8.

<sup>6</sup> *Id.* at 9.

<sup>7</sup> OFF. OF JUV. JUST. & DELINQ. PREVENTION, NCJ 255169, SUPPORT FOR PROSECUTORS WHO WORK WITH YOUTH (2022).

## I. THE PROBLEMS WITH PLACING LOW-RISK YOUTH ON JUVENILE PROBATION.

### *A. Juvenile probation does not significantly reduce reoffending.*

On average, 60% of delinquent youth in the U.S. are placed on formal probation.<sup>8</sup> In 2015, the number of youth on juvenile probation reached a staggering 2.5 million.<sup>9</sup> Historically, probation services were originally established by the juvenile courts in the 1920s solely for rehabilitative purposes. Dispositions originally focused on treatment until the youth was deemed to be “cured” or turned age 21 (considered the age of adulthood), whichever came first.<sup>10</sup> In later years, public confidence in this treatment model waned and the focus turned instead to punishment, law, and order. The pendulum swung back and forth between these two polarities with the introduction of process protections, crackdowns on crime, and research on the adolescent brain.<sup>11</sup> To illustrate the difference between these approaches, Cunningham, et al. (2023) distinguishes between two models of probation. The first model is the “compliance-focused model,” which focuses on control, surveillance and punishment, while the second, the “social work model,” emphasizes treatment and rehabilitation.<sup>12</sup> Several studies have found that compliance-focused approaches are not effective because they do not control crime and may actually increase delinquent behavior.<sup>13</sup> Research on juvenile probation has also found that interventions based on fear, deterrence and control can prove to be ineffective.<sup>14</sup> A contemporary approach to probation incorporates an understanding of brain development in adolescents.<sup>15</sup> Thus, a strict compliance approach to probation for juveniles often lacks a developmentally appropriate framework for effective intervention. Young people and their families often, understandably, view probation as punishment. Current probation reform efforts call for a developmentally informed model of juvenile probation that focuses on

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<sup>8</sup> OFF. OF JUV. JUST. & DELINQ. PREVENTION, NCJ 239081, DELINQUENCY CASES IN JUVENILE COURT, 2009 (2012).

<sup>9</sup> OFF. OF JUV. JUST. & DELINQ. PREVENTION, EASY ACCESS TO JUVENILE COURT STATISTICS: 1985–2015.

<sup>10</sup> Charles Puzanchara, Charles Hockenberry, & Melissa Sickmund, *Youth and the Juvenile System: 2022 National Report*, NAT’L CTR. FOR JUV. JUST. (2022), <https://ojjdp.ojp.gov/publications/2022-national-report.pdf>.

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

<sup>12</sup> Kathryn Cunningham, Noah R. Gubner, Kristin Vick, Jerald R. Herting & Sarah C. Walker, *Redesigning Juvenile Probation to Align with Behavioral Health and Positive Development Principles: A Quasi-Experimental Study*, 50 CRIM. JUST. & BEHAV., 1, 6–21 (2023), <https://doi.org/10.1177/00938548221082997>.

<sup>13</sup> See e.g., Anthony Petrosino, Carolyn Turpin-Petrosino & Sarah Guckenburg, *Formal System Processing of Juveniles: Effects on Delinquency*, 6 CAMPBELL SYSTEMIC REV., 1, 1–88 (2010), <https://doi.org/10.4073/csr.2010.1>.

<sup>14</sup> SAMANTHA HARVELL, HANNA LOVE, ELIZABETH PELLETIER, CHLOE WARNBERG, JANEEN BUCK WILLISON, & MARY K. WINKLER, BRIDGING RESEARCH AND PRACTICE IN JUVENILE PROBATION: RETHINKING STRATEGIES TO PROMOTE LONG-TERM CHANGE, (2018), [https://www.urban.org/sites/default/files/publication/99223/bridging\\_research\\_and\\_practice\\_in\\_juvenile\\_probation\\_6.pdf](https://www.urban.org/sites/default/files/publication/99223/bridging_research_and_practice_in_juvenile_probation_6.pdf).

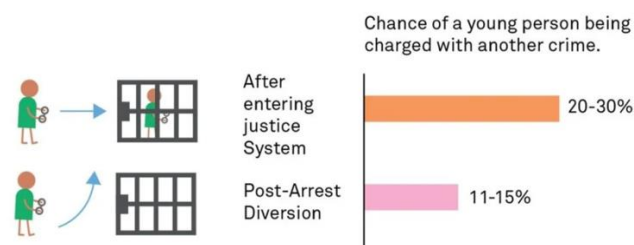
<sup>15</sup> Cunningham, *supra* note 12.

rehabilitation rather than surveillance.<sup>16</sup> These initiatives have been labeled “probation transformation,” with universities like Georgetown University offering training and certificate programs to assist jurisdictions in fundamentally transforming their approach to probation.<sup>17</sup>

*B. Juvenile probation can increase the likelihood of reoffending.*

Increasing reliance on the police and criminal justice system can make youth behavior worse, rather than better. For example, school reform efforts coined the term “the school-to-prison pipeline” which refers to punitive school practices and disciplinary policies that push youth out of school and into the criminal justice system.<sup>18</sup> However, research has found that once an adolescent becomes justice-involved, their risk of recidivism and committing more serious offenses increases.<sup>19</sup> The 2021 Crossroads study followed more than 1,200 youth for five years after their first arrest and found higher rates of recidivism among youth who were formally processed after their first arrest.<sup>20</sup> A Los Angeles County study found that a youth’s chances of being charged with another crime doubles after entering the juvenile justice system.<sup>21</sup> (See Figure 3).<sup>22</sup>

Figure 3.



Probation departments are struggling to provide effective intervention to youth, amid reduced budgets and growing caseloads.<sup>23</sup> For example, a

<sup>16</sup> For a report that offers insights on how to trade juvenile incarceration for community-based prevention, see Taylor Walker, *THE IMPRINT* (April 2, 2019), <https://imprintnews.org/justice/juvenile-justice-2/report-offers-insights-on-how-to-trade-juvenile-incarceration-for-community-based-prevention/34397>.

<sup>17</sup> Transforming Juvenile Probation, GEO. UNIV. Ctr. for Youth Just., <https://cjjr.georgetown.edu/certificate-programs/transforming-juvenile-probation/#:~:text=The%20Transforming%20Juvenile%20Probation%20Certificate,system%2Dwide%20approach%20to%20probation> (last visited February 28, 2026).

<sup>18</sup> Abigail Novak & Abigail Fagan, *Expanding Research on the School-to-Prison Pipeline: Examining the Relationships Between Suspension, Expulsion, and Recidivism Among Justice-Involved Youth*, 68 *CRIME & DELINQ.* 3, 4 (2022), <https://doi.org/10.1177/0011128721999334>.

<sup>19</sup> Edward P. Mulvey, *Highlights from Pathways to Desistance: A Longitudinal Study of Serious Adolescent Offenders*, U.S. Dep’t of Just. (Mar. 2011), <https://www.ojp.gov/ncjrs/virtual-library/abstracts/highlights-pathways-desistance-longitudinal-study-serious>.

<sup>20</sup> Elizabeth Cauffman, Jordan Beardslee, Adam Fine, Paul J. Frisk, & Laurence Steinberg, *Crossroads in Juvenile Justice: The Impact of Initial Processing Decision on Youth 5 Years After First Arrest*, 33 *DEV. AND PSYCHOPATHOLOGY* (Special Issue) 700, 706 (2021), <https://doi.org/10.1017/S095457942000200X>.

<sup>21</sup> *How Los Angeles County Expanded Youth Diversion*, The Annie E. Casey Foundation (Aug. 15, 2022), <https://www.aecf.org/blog/how-los-angeles-county-expanded-youth-diversion>.

<sup>22</sup> *Id.*

<sup>23</sup> Jennifer L. Skeem & Sarah Manchak, *Back to the Future: From Klockars’ Model of Effective Supervision to Evidence-Based Practice in Probation*, 47 *J. OFFENDER REHAB.* 220, 221 (2010), <https://doi.org/10.1080/10509670802134069>.

University of Cincinnati study examined the outcomes of officers and offenders from four Ohio probation and parole sites and found that traditional probation and parole were ineffective interventions.<sup>24</sup> In 1993, Ohio passed House Bill 152, which created the Reasoned and Equitable Community and Local Alternatives to the Incarceration of Minors (RECLAIM Ohio) Program to divert youth from incarceration. RECLAIM funding was allocated to create and implement local programs that target juvenile criminality and other antisocial behaviors. A reevaluation of the program, using data from more than 10,000 youth, found that low-risk youth referred to probation had a “3 percent greater likelihood of reoffending, compared to youth who participated in any other programs.”<sup>25</sup> Additionally, the study found that “low risk youth who were referred to a residential facility and/or substance abuse treatment have a greater likelihood of reoffending in the future compared to their counterparts, 17% and 25% respectively.”<sup>26</sup> Researchers also found that probation officers who received additional intervention training and implemented a risk/needs/responsivity approach beyond a compliance model had a greater impact on recidivism rates.<sup>27</sup> Furthermore, Hartsell, et.al (2022) compared re-arrest rates among diverted youth, youth on probation, and youth whose cases were dismissed and found that youth whose cases were dismissed were less likely to be rearrested than the other groups. Additionally, the study found that youth on probation were more likely to be rearrested than were teen court participants.<sup>28</sup>

*C. Juvenile probation can actually increase collateral consequences for youth.*

Technical violations of youth on probation can increase out-of-home confinements. When youth are placed on probation, they become subject to technical violations for not following the court-approved plan, which can increase collateral consequences. Technical violations are not acquiring new offenses but engaging in nonviolent, noncriminal behavior that violates the terms of either their probation or a court order such as failing to attend school or drug/alcohol use. Approximately 23% of youth are detained solely for technical violations, rather than for committing a new offense.<sup>29</sup> The same report found that status offenses and technical violations resulted in the incarceration of more than 5,000 youth.<sup>30</sup> Technical violations have accounted for 11% of youth in long-term secure facilities.<sup>31</sup> In a two-year

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<sup>24</sup> EDWARD J. LATESSA, BRIAN LOVINS, & JENNIFER LUX, EVALUATION OF OHIO’S RECLAIM PROGRAMS 44 (University of Cincinnati School of Criminal Justice Center for Criminal Justice Research 2014), [https://www.uc.edu/content/dam/uc/ccjr/docs/reports/FINAL%20Evaluation%20of%20OHs%20RECLAIM%20Programs%20\(4-30-2014\)%20.pdf](https://www.uc.edu/content/dam/uc/ccjr/docs/reports/FINAL%20Evaluation%20of%20OHs%20RECLAIM%20Programs%20(4-30-2014)%20.pdf).

<sup>25</sup> *Id.* at 51.

<sup>26</sup> *Id.*

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

<sup>28</sup> Elizabeth N. Hartsell & Abigail Novak, *A Comparison of Re-arrest Outcomes Between Youth in Juvenile Drug Court, Teen Court, Probation, and Dismissed Cases*, 68 CRIME & DELINQ. 1819 (2022).

<sup>29</sup> W. SAWYER, YOUTH CONFINEMENT: THE WHOLE PIE, (Prison Policy Initiative 2009), <https://www.prisonpolicy.org/reports/youth2019.html>.

<sup>30</sup> *Id.*

<sup>31</sup> Puzzanchera, *supra* note 10, at 104.

study of youth on probation, approximately 52% of youth violated the terms of their probation by failing a drug test, skipping school, and garnering a new arrest: the three most common probation violations.<sup>32</sup> Conditions related to drug and alcohol testing were associated with an increased likelihood of failure to comply with probation requirements.<sup>33</sup> The percentage of youth being held in residential settings for technical violations has increased.<sup>34</sup> Failing probation can also be a gateway to incarceration. In Philadelphia, 50% of all youth “failed to comply with the terms of their probations at least once, and about 48% of those youth were committed to a correctional facility after a probation revocation at least once during their time on probation.”<sup>35</sup>

Youth often are given too many requirements to follow while they are on probation, making compliance a practical impossibility. One study found that some youth were subject to as many as nine separate probation requirements.<sup>36</sup> Youth assigned to extensive probation requirements violate those requirements more quickly.<sup>37</sup> Another study found that approximately 80% of youth fail to meet all the requirements of their probation.<sup>38</sup> One study followed more than 18,000 youth and found that 15% of them received a technical violation during their first probation, with Blacks being charged with technical violations more quickly than their White counterparts.<sup>39</sup> These statistics resulted in Philadelphia adopting a juvenile diversion policy that limits supervised youth to only three conditions of probation.<sup>40</sup>

## II. ADOLESCENT DEVELOPMENT AND DELINQUENCY

There is a consensus among researchers that adolescents typically “age out of delinquency.” This reference is to the age-crime curve, which holds that up to 60% of justice-involved youth stop offending by early adulthood due to factors such as brain maturation and developmental maturity.<sup>41</sup> Even though delinquency rises and peaks during adolescence, many young people

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<sup>32</sup> Amanda NeMoyer, Naomi E. S. Goldstein, Rhonda L. McKitten, Ana Prelic, Jenna Ebbecke, Erika Foster & Casey Burkard, *Predictors of Juveniles' Noncompliance With Probation Requirements*, 38 L. & HUM. BEHAV., 580, 584 (2014).

<sup>33</sup> *Id.*

<sup>34</sup> MELISSA SICKMUND, SLADKY, T.J., KANG, W., AND CHARLES PUZZANCHERA. 2017. EASY ACCESS TO THE CENSUS OF JUVENILES IN RESIDENTIAL PLACEMENT. Retrieved April 18, 2024, from the web: <http://www.ojjdp.gov/ojstatbb/ezacjrp/>.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> Allyson L. Dir, Lauren A. Magee, Richelle L. Clifton, Fangqian Ouyang, Wanzhu Tu, Sarah E. Wiehe & Matthew C. Aalsma, *The Point of Diminishing Returns in Juvenile Probation: Probation Requirements and Risk of Technical Probation Violations Among First-Time Probation-Involved Youth*, 27 PSYCH. PUB. POL'Y & L., 283 (2021).

<sup>38</sup> Jyoti Nanda, *Set up to Fail: Youth Probation Conditions as a Driver of Incarceration*, LEWIS & CLARK L. REV., 677, 685, (2022).

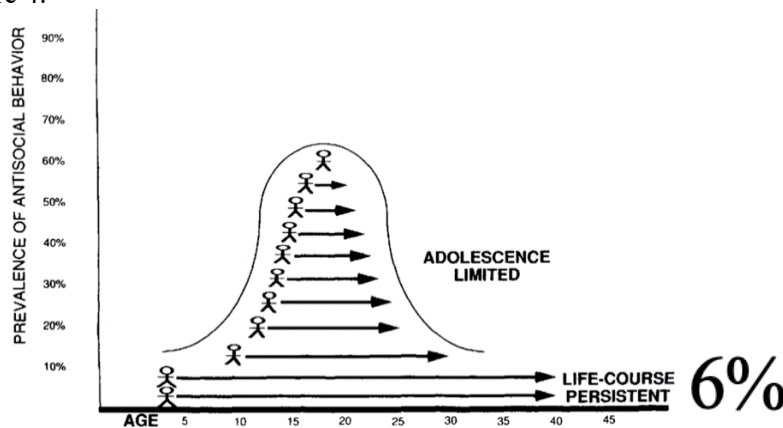
<sup>39</sup> Dir, et al., *supra* note 37.

<sup>40</sup> PHILA. DIST. ATT'Y.'S OFF., PHILADELPHIA DAO INTRODUCTION TO JUVENILE POLICIES (2019).

<sup>41</sup> Duzbayeva Saltanat Bekbolatkyzy, Dzhansarayeva Rima Yerenatovna, Yergali Adlet Maratuly, Atakhanova Gulzagira Makhatovna & Kevin M. Beaver, *Aging out of adolescent delinquency: Results from a longitudinal sample of youth and young adults*, 60 J. OF CRIM. JUST., 108, 108–116 (2019).

who offend would desist naturally after a few years.<sup>42</sup> This phenomenon results in two categories of adolescents: “persisters,” who exhibit delinquent behavior into adulthood; and “desisters,” who cease their delinquent behavior over time.<sup>43</sup> The “desisters” are considered your “typical teenagers.” These youth engage in rebellious behaviors as teenagers and eventually reduce their offending as they approach adulthood, while the “persisters” are a small group that usually begins offending at an earlier age and continues offending through adulthood.<sup>44</sup> (See Figure 4).<sup>45</sup>

Figure 4.



Long-term studies of adolescent offenders support estimates that only a small amount of the juvenile population, around 6% (often called the “chronic six”) will offend across their life spans.<sup>46</sup> These individuals are often referred to as “career criminals” or “chronic offenders” and account for 50% of all offenses and 80% of serious violent offenses.<sup>47</sup> Schumacher and Kurz (1999) found similar results, finding that only 8% of these juveniles accounted for approximately 60% of criminal cases.<sup>48</sup> In a 2016 report, the U.S. Department of Justice cited research by Mulvey (2011) finding that a very small fraction of the individuals who commit crimes, about 2 to 5 percent, are responsible for 50 percent or more of crimes, and observed that: “Sending an individual convicted of a crime to prison is not a

<sup>42</sup> ALEX R. PIQUERO, J. DAVID HAWKINS & LILA KAZEMIAN, CRIMINAL CAREER PATTERNS, IN FROM JUVENILE DELINQUENCY TO ADULT CRIME: CRIMINAL CAREERS, JUSTICE POLICY & PREVENTION 14–46 (Rolf Loeber & David P. Farrington eds., 2012).

<sup>43</sup> Amy L. Byrd, Rolf Loeber & David Pardini, *Understanding Desisting and Persisting Forms of Delinquency: The Unique Contributions of Disruptive Behavior Disorders and Interpersonal Callousness*. 53(4) J. OF CHILD PSYCH. AND PSYCHIATRY 373 (2012).

<sup>44</sup> Terrie E. Moffitt, *Adolescence-Limited and Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy*, 100(4) PSYCH. REV. 674-701 (1993).

<sup>45</sup> Reproduced from *id.* at 675.

<sup>46</sup> PAUL E. TRACY, MARVIN E. WOLFGANG & ROBERT M. FIGLIO, DELINQUENCY IN TWO BIRTH COHORTS, EXECUTIVE SUMMARY iii (U.S. Dep’t of Just. 1985).

<sup>47</sup> MARVIN E. WOLFGANG, ROBERT FIGLIO & THORSTON SELLIN, DELINQUENCY IN A BIRTH COHORT 88 (Univ. of Chi. Press 1972).

<sup>48</sup> MICHAEL SCHUMACHER & GWEN KURZ, THE 8% SOLUTION: PREVENTING SERIOUS, REPEAT JUVENILE CRIME 4 (Sage Publi’n, Inc., 1999).

very effective way to deter crime.”<sup>49</sup> Fairfax-Columbo, et. al. (2019) proposed approaches to juvenile risk assessments that aid in distinguishing “incorrigibility” from “transient immaturity.”<sup>50</sup> Other researchers argue that it is wrong to find any youth incorrigible, due to the developing adolescent brain.<sup>51</sup>

According to the United States Supreme Court, mandatory juvenile life without parole (JLWOP) sentences violate the Eighth Amendment and thus are unconstitutional.<sup>52</sup> The Court cited scientific research that found that adolescent brains are still developing and opined that juveniles are therefore less culpable than adults for their acts.<sup>53</sup> The Court further held that only juveniles that are deemed “incorrigible” or whose crimes represent “irreparable corruption” may be sentenced to JLWOP, although this finding is not a requirement.<sup>54</sup> As of 2023, a majority of U.S. states have banned JLWOP.<sup>55</sup>

### III. THE BENEFITS OF DIVERSION

#### A. Diversion can address a youth’s individual needs.

Justice-involved youth have significantly greater needs than their non-justice involved adolescent counterparts. As many as 70% of justice involved youth have a diagnosable mental health problem.<sup>56</sup> Additionally, 79% of youths diagnosed with one mental health disorder also meet the criteria for two or more diagnoses.<sup>57</sup> Similarly, three-quarters of justice-involved youth also met the criteria for a substance abuse disorder.<sup>58</sup> Ninety-two percent of justice-involved youth reported at least one traumatic experience and 84% reported more than one.<sup>59</sup> The U.S. Department of Justice has outlined risk factors across multiple areas of a child’s life (individual, family, school, peer group, and community) that can increase a

<sup>49</sup> Mulvey, *supra* note 19.

<sup>50</sup> Jaymes Fairfax-Columbo, Sarah Fishel & David DeMatteo, *Distinguishing “Incorrigibility” from “Transient Immaturity”*: Risk Assessment in the Context of Sentencing/Resentencing Evaluations for Juvenile Homicide Offenders, 5(2) TRANSLATIONAL ISSUES IN PSYCH. SCI.132–142 (2019).

<sup>51</sup> Ana Ionescu, *Incorrigibility is Inconsistent with Youth: The Supreme Court’s Missed Opportunity to Cure the Contradiction Implicit in Discretionary JLWOP Sentencing*, 76(2) UNIV. OF MIAMI L. REV. 612-652 (2022).

<sup>52</sup> Miller v. Alabama, 567 U.S. 460, 465 (2012). Montgomery v. Louisiana, 577 U.S. 190, 206 (2016).

<sup>53</sup> *Id.*

<sup>54</sup> Jones v. Mississippi, 593 U.S. 98, 138 (2021).

<sup>55</sup> ANNE TEIGEN, *Juvenile Life Without Parole* (Nat’l Conference of State Legislators 2024), <https://www.ncsl.org/civil-and-criminal-justice/juvenile-life-without-parole>.

<sup>56</sup> Gina M. Vincent, Thomas Grisso, Anna Terry & Steven Banks, *Sex and Race Differences in Mental Health Symptoms in Juvenile Justice: The MAYSI-2 National Meta-Analysis*, 47(3) J. AM. ACAD. CHILD ADOLESCENT PSYCHIATRY 282–90 (2008).

<sup>57</sup> JENNIE L. SHUFELT & JOSEPH J. COCOZZA, YOUTH WITH MENTAL HEALTH DISORDERS IN THE JUVENILE JUSTICE SYSTEM: RESULTS FROM A MULTISTATE PREVALENCE STUDY (Nat’l Ctr. for Mental Health and Juv. Just. 2006).

<sup>58</sup> Linda A. Teplin, Karen M. Abram, Gary M. McClelland, Mina K. Dulcan & Amy A. Mericle, *Psychiatric Disorders in Youth in Juvenile Detention*, 59(12) ARCHIVES OF GEN. PSYCHIATRY 1133–43 (2002).

<sup>59</sup> KAREN M. ABRAM, LINDA A. TEPLIN, DEVON C. KING, SANDRA L. LONGWORTH, KRISTIN M. EMANUEL, ERIN G. ROMERO, GARY M. MCCLELLAND, MINA K. DULCAN, JASON J. WASHBURN, LEAH J. WELTY & NICOLE D. OLSON, PTSD, TRAUMA, AND COMORBID PSYCHIATRIC DISORDERS IN DETAINED YOUTH (Off. of Juv. Just. and Delinq. Prevention 2013).

youth’s chances of offending<sup>60</sup> For example, exposure to poverty is linked with juvenile delinquency.<sup>61</sup> Another example is the “foster care-to-prison” pipeline. This phenomenon refers to the disproportionate number of youths entering the legal system from foster care. By age 17, over 50% of foster children will be arrested, convicted, and detained.<sup>62</sup> Additionally, 90% of children who have been moved to five or more foster care placements will enter the criminal legal system.<sup>63</sup> Furthermore, youth that are placed in group homes are two and a half times more likely to engage in delinquent behavior.<sup>64</sup>

Diversion can address a youth’s unique individual needs, which is a more appropriate response to those needs than is confinement. As discussed in the previous section, the developing adolescent brain makes youth more prone to be impulsive, emotional, and to engage in high-risk behaviors. On the other hand, because their brains are still developing, they are more malleable and capable of change and rehabilitation. Therefore, rehabilitation-focused interventions, such as providing additional services to the family may negate the adverse influences of risk factors. For example, poverty is often seen as a risk factor, but the presence of supportive and involved parents may mediate the negative influence of poverty and reduce a youth’s chance of becoming delinquent.<sup>65</sup> In February 2024, the Office of Juvenile Justice and Delinquency Prevention identified diversion programs as a top priority and identified a best practice as providing age-appropriate, tailored interventions and services to youth and their families in the community.<sup>66</sup> The Urban Institute proposed that local jurisdictions “repurpose juvenile facilities” and redirect the resulting savings to create a “continuum of care” for youth and families in their own community.<sup>67</sup> (See Figure 1).<sup>68</sup>

Figure 1.

<sup>60</sup> MICHAEL SHADER, RISK FACTORS FOR DELINQUENCY; AN OVERVIEW (Off. of Juv. Just. and Delinq. Prevention 2003).

<sup>61</sup> J. DAVID HAWKINS, TODD L. HERRENKOHL, DAVID P. FARRINGTON, DEVON BREWER, RICHARD F. CATALANO & TRACEY W. HARACHI, *A Review of Predictors of Youth Violence*, in SERIOUS AND VIOLENT JUVENILE OFFENDERS: RISK FACTORS AND SUCCESSFUL INTERVENTIONS (R. Loeber & D.P. Farrington eds., 1998).

<sup>62</sup> MARK E. COURTNEY, J. HOOK, A. BROWN, C. CARY, K. LOVE, V. VORHIES, J. LEE, M. RAAP, GRETCHEN CUSICK, T. KELLER, JUDY HAVLICEK, ALFRED PEREZ, S. TERAQ, & N. BOST, MIDWEST EVALUATION OF THE ADULT FUNCTIONING OF FORMER FOSTER YOUTH: CONDITIONS OF YOUTH PREPARING TO LEAVE STATE CARE (Chapin Hall Ctr. for Child. 2004).

<sup>63</sup> Joseph P. Ryan and Mark F. Testa. *Child Maltreatment and Juvenile Delinquency: Investigating the Role of Placement and Placement Instability*, 27(3) CHILD AND YOUTH SERV. REV. 227, 249 (2005).

<sup>64</sup> Joseph P. Ryan, Jane M. Marshall, Denise Herz, and Pedro M. Hernandez, *Juvenile delinquency in child welfare: Investigating group home effects*, 30(9) CHILD. AND YOUTH SERVS. REV. 1088, 1094 (2008).

<sup>65</sup> Shader, *supra* note 60.

<sup>66</sup> OFF. OF JUV. JUST. AND DELINQ. PREVENTION, DIVERSION PROGRAMS OFFER TREATMENT WHILE KEEPING YOUTH OUT OF THE JUSTICE SYSTEM (2024).

<sup>67</sup> SAMANTHA HARVELL, CHLOE WARNBERG, LEAH SAKALA & CONSTANCE HULL, PROMOTING A NEW DIRECTION FOR YOUTH JUSTICE: STRATEGIES TO FUND A COMMUNITY-BASED CONTINUUM OF CARE AND OPPORTUNITY 13, 18 (Urb. Inst. 2019).

<sup>68</sup> Figure 1, in *id.*, following p. 6.



For example, as part of juvenile justice efforts in Michigan, the governor increased access to food assistance for youth and their families. The director of the Michigan Department of Health and Human Services commented, “We can best serve our youth and our communities by reforming the juvenile justice system to provide preventive and intervention services in local communities whenever possible and relying on congregate care facilities only when young people need more intensive care.”<sup>69</sup>

*B. Diversion can decrease stigmatization of court involved youth.*

Court-involved youth who are labeled and stigmatized as delinquents may become a self-fulfilling prophecy. Formal punishment has negative effects on a youth’s self-perception and behaviors. One study found that contact with the justice system can promote delinquency through labeling theory.<sup>70</sup> Tannenbaum (1938) developed the theory of labeling and described it as “a process of tagging, defining, identifying, segregating, describing, emphasizing, making conscious and self-conscious; it becomes a way of stimulating, suggesting, emphasizing, and evoking the very traits that are complained of.”<sup>71</sup> Motz, et al. (2020) explored the lives of twins who were genetically identical, finding that when one had contact with the justice system, delinquency increased.<sup>72</sup> Labeling theory holds that when a youth is

<sup>69</sup> Bob Wheaton, *Michigan to Continue Juvenile Justice Reform Momentum Thanks to Federal Funding Boost*, MICH. HEALTH AND HUM. SERVS. (Mar. 1, 2024), <https://www.michigan.gov/mdhhs/inside-mdhhs/newsroom/2024/03/01/juvenile-grant>.

<sup>70</sup> Ryan T. Motz, J.C. Barnes, Avshalom Caspi, Louise Arseneault, Francis T. Cullen, Renate Houts, Jasmin Wertz & Terrie E. Moffitt, *Does contact with the justice system deter or promote future delinquency? Results from a longitudinal study of British adolescent twins*, 58(2) CRIMINOLOGY, 307, 309 (2020).

<sup>71</sup> Frank Tannenbaum, *The Dramatization of Evil*, in 4 CLASSICS OF CRIMINOLOGY 349 (Joseph E. Jacoby, Theresa A. Severance & Alan S. Bruce eds., 1979).

<sup>72</sup> Motz et al., *supra* note 70, at 320.

labeled adopts the self-identity of that label. For example, youth who are labeled “deviant” will adopt a deviant self-identity and engage in corresponding actions, as opposed to a youth who was not labeled.<sup>73</sup> Labeling can also impact how society views the youth, which can in turn pigeonhole the youth in a particular social role.<sup>74</sup> Therefore, a label of “delinquent” or “juvenile offender” can greatly impact how a youth defines themselves and thus influence their future behaviors. Processing a youth through the justice system can also stigmatize and ostracize them for relatively minor acts that could have been handled in a different and more effective way.<sup>75</sup>

*C. Diversion can save the court money, allowing funding to be diverted to higher-risk youth.*

A 2021 Crossroads research study discussed the financial savings for courts by diverting youth. The researchers wrote, “these results have important implications for juvenile justice policy by indicating that formally processing youth not only is costly, but it can reduce public safety and reduce the adolescent's later potential contributions to society.”<sup>76</sup> The costs of formally processing youths through the system, including monitoring and housing them, often greatly exceed the cost of many diversion programs.<sup>77</sup> For example, Ohio’s Behavioral Health Juvenile Justice (BHJJ) Initiative, a community diversion program for juvenile justice-involved youth ages 10-18 with mental health or substance abuse issues, costs \$5,200 per youth. This is substantially lower than the formal alternative, committing the youth to the Ohio Department of Youth Services (ODYS), the state’s youth prison system, which costs \$196,000.<sup>78</sup>

*D. Diversion can save the Judiciary valuable court time.*

Diverting misdemeanor cases can save the court and judiciary valuable time. The American Bar Association (ABA) recommends case processing time from referral to disposition be no longer than 30 days for detained youth and no more than 60 days for youth on pretrial release.<sup>79</sup> Despite this recommendation, Butts (1997) found that nearly half of juvenile delinquency cases take more than 90 days to process.<sup>80</sup> Longer processing times (greater than 60 days) had higher rates of rearrest than youth with

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<sup>73</sup> RONALD L. AKERS, *CRIMINOLOGICAL THEORIES AND EVALUATION*, 123 (Roxbury Publ’g Co. 3d. ed. 2000).

<sup>74</sup> Andrew J. Dick, Dan J. Pence, Randall M. Jones, H. Reed Geertsens, *The Need for Theory in Assessing Peer Courts*, 47(11) AM. BEHAV. SCI., 1448, 1451 (2004).

<sup>75</sup> RICHARD J. LUNDMAN, *PREVENTION AND CONTROL OF JUVENILE DELINQUENCY* 18 (Oxford Univ. Press 2d ed. 1993).

<sup>76</sup> Cauffman, et al., *supra* note 20.

<sup>77</sup> Petrosino, et al., *supra* note 13.

<sup>78</sup> FREDRICK BUTCHER, JEFF KRETSCHMAR, LIUHONG YANG, DAVID RINDERLE & MARGARID TURNAMIAN, *AN EVALUATION OF THE BEHAVIORAL HEALTH/JUVENILE JUSTICE (BHJJ) INITIATIVE: EXECUTIVE SUMMARY* (BEGUN CTR. FOR VIOLENCE PREVENTION RSCH. & EDUC. 2020).

<sup>79</sup> JEFFREY BUTTS, *DELAYS IN JUVENILE COURT PROCESSING OF DELINQUENCY CASES* (OFF. OF JUV. JUST. & DELINQ. PREVENTION 1997), <https://ojjdp.ojp.gov/library/publications/delays-juvenilecourt-processing-delinquency-cases>.

<sup>80</sup> *Id.*

shorter processing times.<sup>81</sup> A typical hearing takes one to two hours.<sup>82</sup> This average is similar to the results of a study by the National Center for State Courts in Cook County Juvenile Court, which found that juvenile delinquency hearings averaged between 111 and 140 minutes.<sup>83</sup> When cases were weighted to include all events required for the case (initiation, adjudication, disposition, and review time) from start to finish, the estimate rose to 180 minutes (or 3 hours) of judicial time to handle a typical juvenile case from initiation through closure. The Cook County study also cited an assumed normal estimate of 6.5 hours of “bench time.”<sup>84</sup>

*E. Probation officers can have smaller caseloads targeted more toward high-risk youth.*

Diverting low-risk youth from probation will allow probation officers to have smaller caseloads and offer higher-risk youth more targeted and effective interventions. The National Council of Juvenile and Family Court Judges have endorsed the traditional 50-case standard, as well as its successor, the 35-case standard.<sup>85</sup> Recent reform efforts call for a reduction of probation officer caseloads using a needs-based approach that moves from measuring the number of cases to measuring the units of work required for each case. In this approach, workload management is measured using a weighted formula related to the level of need.<sup>86</sup> By diverting youth with misdemeanor offenses, probation officers can better target youth in their caseloads with greater needs.

*F. Diversion can promote racial and ethnic equity.*

Court-involved youth of color are overrepresented at every point in the juvenile justice system (more likely to be arrested, to be formally processed, detained, to be placed on probation, and to be incarcerated).<sup>87</sup> Racial disparities that occur in diversion can greatly impact a youth of color’s life trajectory. Nationally, 48% of cases against white youth are handled informally, compared to only 37% of cases against Black youth.<sup>88</sup> Beardslee, et. al (2019) found that those who received the most lenient dispositions (i.e., sanction or dismissal) decreased self-reported violent offending, as opposed to those who received more punitive dispositions(i.e., adjudication).<sup>89</sup>

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<sup>81</sup>Novak, et. al., *supra* note 18.

<sup>82</sup> Edward Gates, *How Long Do Hearings Last? The Judicial Process*, AM. JUD. SYS. (May 9, 2022), <https://www.ajs.org/how-long-do-court-hearings-last/#:~:text=Notably%2C%20hearings%20are%20shorter%20than,of%20evidence%20and%20available%20evidence>.

<sup>83</sup> HUNTER HURST III, WORKLOAD MEASURES FOR JUVENILE JUSTICE SYSTEM PERSONNEL: PRACTICES AND NEEDS (OFF. OF JUV. JUST. & DELINQ. PREVENTION 1999), <https://ojjdp.ojp.gov/library/publications/workload-measurement-juvenile-justice-system-personnel-practices-and-needs>.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> Puzzanchera, Hockenberry, and Sickmund, *supra* note 10.

<sup>88</sup> Office of Juvenile Justice and Delinquency Prevention, *Manner of Handling by Race*, in STATISTICAL BRIEFING BOOK (2017) (ebook) <https://ojjdp.ojp.gov/statistical-briefing-book>.

<sup>89</sup> Jordan Beardslee, Sarah Miltimore, Adam Fine, Paul J. Frick, Laurence Steinberg, & Elizabeth Cauffman, *Under the Radar or Under Arrest: How is Adolescent Boys' First Contact With the Juvenile Justice System Related to Future Offending and Arrests?* 43 L. & HUM. BEHAV. 342 (2019).

Bernburg and Krohn (2006) found that youth who were formally processed had higher rates of reoffending behaviors in adulthood than those who were not.<sup>90</sup> By implementing a policy of diversion, evidence suggests that reoffending rates would decrease and that, in turn, would impact racial discrepancies in incarceration rates.

*G. Diversion can improve both long-term outcomes for youth and rates of recidivism.*

Diversion study research has shown several positive effects for youth that are informally processed. One study found that official intervention decreases a youth’s chances of graduating high school (educational attainment), which in turn negatively impacts employment, causing a long-term effect on adult crime.<sup>91</sup> In the Crossroads study of over 1,200 youth, youth who were informally processed in the juvenile system were less likely to be re-arrested, less likely to be incarcerated, self-reported less violent behavior, had increased school enrollment, increased employment, decreased affiliations with delinquent peers, were more likely to graduate high school within 5 years, reported more ability to suppress aggression, and had higher perceptions of opportunities than informally processed youth.<sup>92</sup>

#### IV. ASSESSING YOUTH RISK AND NEEDS: THE YOUTH LEVEL OF SERVICE/CASE MANAGEMENT INVENTORY TOOL (YLS/CMI)

The Youth Level of Service/Case Management Inventory (YLS/CMI) is a well-validated measure assessing eight criminogenic areas related to risk and need and used to facilitate effective intervention and rehabilitation of youth.<sup>93</sup> Administering the YLS to all youth eligible for diversion can aid in providing targeted, individualized services to youth and their families. As part of Philadelphia’s diversion efforts, the district attorney’s office incorporated the YLS into its juvenile justice policies and created a corresponding case plan bench card.<sup>94</sup> To avoid the requirement of formal court oversight of recommendations of the YLS, alternatives to administration by the probation department, such as a social worker in the Public Defender’s Office or a local mental health agency, can administer the YLS assessment and assist the youth and family in connecting to services.

#### V. POLICY APPLICATION EXAMPLE AND RESULTS: THE SUCCESS OF PHILADELPHIA’S DIVERSION EFFORTS

The diversion policy proposed in this article is modeled after a juvenile justice policy implemented by the Philadelphia District Attorney’s

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<sup>90</sup> Jon Gunnar Bernburg & Marvin D. Krohn, *Labeling, Life Chances, and Adult Crime: The Direct and Indirect Effects of Official Intervention in Adolescence on Crime in Early Adulthood*, 41 CRIMINOLOGY 1287 (2003).

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

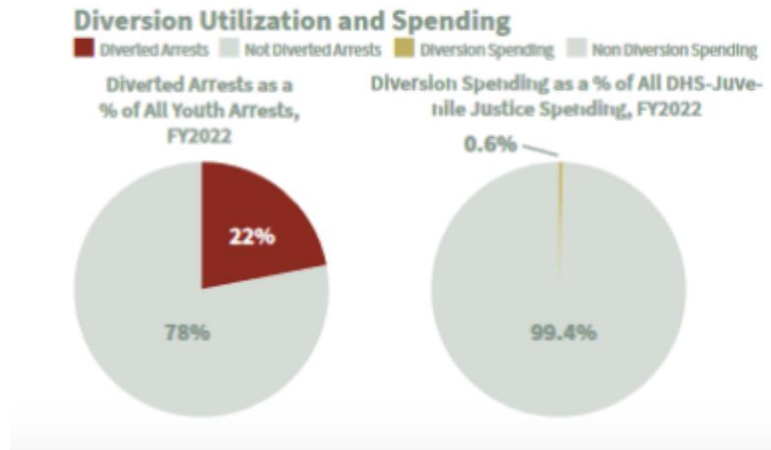
<sup>93</sup> ROBERT D. HOGE & DAVID A. ANDREWS, YOUTH LEVEL OF SERVICE/CASE MANAGEMENT INVENTORY 2.0 (YLS/CMI 2.0): USER’S MANUAL (2011).

<sup>94</sup> PHILA. DIST. ATT’Y.’S. OFF., *supra* note 40.

Office in 2019.<sup>95</sup> A socio-economic report that examined the state of Philadelphia’s juvenile justice system and the subsequent effect of these policies during fiscal years 2017 to 2021 found reduced youth contact with the system and reduced spending after 2019 (total spending declined by 26% while the number of youth served decreased by 46%).<sup>96</sup> Other findings of the study noted increased costs for school districts and for system-involved youth, particularly for residential placements.<sup>97</sup>

The authors’ analysis found that diversion used only 0.6% of the juvenile justice budget, yet yielded significant benefits.<sup>98</sup> For example, in FY2019, just 27% of youth were rearrested after completing diversion, compared to 53% of those who were not diverted.<sup>99</sup> The report concluded: “There is cause for optimism regarding the use of diversion for lower-level juvenile offenses . . . The cost benefit analysis of this alternative to the court for lower-level offenses is clearly evident.”<sup>100</sup> The following figure shows that in FY2022, diversion funding accounted for less than 1% of spending on juvenile justice interventions and that arrests of diverted youth (22%) paled in comparison to arrests of youths who were not diverted (78%).<sup>101</sup> (See Figure 1).<sup>102</sup>

Figure 1.



<sup>95</sup> *Id.*

<sup>96</sup> Dustin Slaughter, *New Report Details Declining Youth Contact with Juvenile Justice System, but Rising Costs and Inefficiency*, PHILADELPHIA DIST. ATT’Y’S OFF. (May 22, 2023), <https://phillyda.org/news/new-report-details-declining-youth-contact-with-juvenile-justice-system-but-rising-costs-and-inefficiency/>.

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

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

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

<sup>100</sup> *Id.*

<sup>101</sup> Dustin Slaughter, *New Report Details Declining Youth Contact with Juvenile Justice System, but Rising Costs and Inefficiency*, PHILADELPHIA DIST. ATT’Y OFF. (May 22, 2023), <https://phillyda.org/news/new-report-details-declining-youth-contact-with-juvenile-justice-system-but-rising-costs-and-inefficiency/>.

<sup>102</sup> *Id.*

The report concluded that diversion is an “... economically efficient strategy for serving justice-involved youth ... Increased investment and utilization may likely yield even greater benefits.”<sup>103</sup> The report closed with evidence-informed recommendations for using taxpayer money more efficiently and improving outcomes for system-involved youth. Three of the recommendations included: reallocating money for initial point of contact of youth to decrease recidivism; increasing investment in diversion for youth charged with lower-level crimes; and for the office to continue to explore safe, high-impact opportunities for diversion expansion for lower-level offenses.<sup>104</sup>

## VI. THE POTENTIAL HARMS OF DIVERSION

Farrell, Betsinger & Hammond (2018) identified two potential harms of expanding diversion programming: increased recidivism and inequitable access and use. Youth may not view diversion as a negative consequence of their delinquency and may feel free to continue to engage in delinquent behaviors.<sup>105</sup> However, Wilson and Hoge (2013) examined results of 45 studies published between 1972 and 2010 and found that the average recidivism rate of diverted youth was significantly lower than youth who were formally processed by the justice system.<sup>106</sup> Several studies have also found that race and gender can negatively impact diversion opportunities.<sup>107</sup> For example, a 2019 national study found that 52% of delinquency cases involving white youth were diverted but only 40% of black youth were diverted.<sup>108</sup> Oftentimes, strategies can create “unintended disparities for youth of color.”<sup>109</sup> A number of jurisdictions have outlined strategies to prevent implicit bias in decision-making processes for youth in the juvenile justice system.<sup>110</sup> Data collection and analysis can be used to guide intervention strategies more effectively to target these disparities. Many jurisdictions are following suit and collecting data to better understand the factors that are driving the disparities and implementing strategies to reduce them.<sup>111</sup> For example, Fairfax County, Virginia, addressed racial inequity in the juvenile diversion process by redesigning their juvenile system using a

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

<sup>104</sup> *Id.*

<sup>105</sup> JILL FARRELL, AARON BETSINGER & PAIGE HAMMOND, BEST PRACTICES IN YOUTH DIVERSION: LITERATURE REVIEW FOR THE BALTIMORE CITY YOUTH DIVERSION COMMITTEE (The Inst. for Innovation and Implementation 2018).

<sup>106</sup> Holly A. Wilson & Richard D. Hoge, *The Effect on Youth Diversion Programs on Recidivism: A Meta-Analytic Review*, 40 CRIM. JUST. & BEHAV. 497 (2013).

<sup>107</sup> See Joshua C. Cochran & Daniel P. Mears, *Race, Ethnic, and Gender Divides in Juvenile Court Sanctioning and Rehabilitative Intervention*, 52 J. OFF. RSCH. IN CRIME & DELINQ. 181, 212 (2015); Christine Alder, *Gender Bias in Juvenile Diversion*, 30 CRIME & DELINQ. 400 (1984).

<sup>108</sup> Richard A. Mendel, *Diversion: A Hidden Key to Combatting Racial and Ethnic Disparities in Juvenile Justice*, THE SENT’G PROJECT (Aug. 2022), <https://www.sentencingproject.org/reports/diversion-a-hidden-key-to-combating-racial-and-ethnic-disparities-in-juvenile-justice/>.

<sup>109</sup> SUBCOMMITTEE ON JUVENILE JUSTICE OF THE SUPREME COURT OF OHIO ADVISORY COMMITTEE ON CHILDREN & FAMILIES, JUVENILE DIVERSION: TOOLKIT FOR JUDICIAL USE (May 2021).

<sup>110</sup> NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, STATE JUSTICE INSTITUTE & NATIONAL JUVENILE DEFENDER CENTER, ADDRESSING BIAS IN DELINQUENCY AND CHILD WELFARE SYSTEMS (2021), <https://www.ncjfcj.org/bench-cards/addressing-bias-in-delinquency-and-child-welfare-systems/>.

<sup>111</sup> Mendel, *supra* note 3, at 11.

data-driven approach and incorporating a structured decision-making framework. Preliminary results are encouraging, with an increase in the number of minority youth being diverted. In 2013, about 19 percent of the African American and Hispanic/Latino youth in Fairfax County were placed on diversion, compared to 44 percent of white youth. In 2017, the percentage rose to 26 and 27 percent for African American and Latino/Hispanic youth respectively, compared to 37 percent for white youth.<sup>112</sup>

#### CONCLUSION

By creating statewide standards and policies for diversion, courts acknowledge the urgency of employing diversion opportunities for youth and avoiding formal processing when appropriate. Furthermore, misdemeanor-level youth and nonviolent offenders are often target populations for diversion.<sup>113</sup> Diversion efforts can prevent reentry of low-risk offenders into the juvenile justice system, which can have long-term detrimental consequences to society, such as harmful effects on youth development, greater recidivism rates, and increases in court expenses. The courts' goals are exemplified by a quote from Kim Foxx, former State Attorney for Cook County, Illinois: "Safety means no empty porches. It's the ability to feel like you can go out on your porch and have a glass of lemonade and not be concerned."<sup>114</sup> Ultimately, we want to feel safe in our communities and to allow all people to live in their neighborhoods without fear. As discussed throughout this article, research finds that long-term public safety needs are not being met by having low-risk youth formally enter the juvenile justice system, which can inadvertently increase recidivism rates. Additionally, valuable and limited court resources are being ineffectively spent on these youth, instead of investing in additional interventions to address the needs of higher-level youth. Although formal processing is necessary in some instances, both the court and the community are urged to find creative ways to hold low-risk youth accountable without resorting to legal sanctions. By implementing policies to offer informal alternatives to court processing for youths charged with misdemeanor offenses, we can steer all of our youth towards success while providing greater protection to the public for generations to come.

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<sup>112</sup> AMBER FARN, IMPROVING OUTCOMES FOR JUSTICE-INVOLVED YOUTH THROUGH STRUCTURED DECISION-MAKING AND DIVERSION (Georgetown Univ. McCourt Sch., of Pub. Pol'y Ctr. for Juv. Just. Reform 2018), <https://towoyouth.newhaven.edu/wp-content/uploads/2020/09/Improving-Youth-Outcomes-at-Referral.pdf>.

<sup>113</sup> *Id.* at 4.

<sup>114</sup> MIRIAM ARONI KRINSKY, CHANGES FROM WITHIN: REIMAGINING THE 21ST-CENTURY PROSECUTOR vii (2022).