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Essay

Existence as a Threat

ALENA M. ALLEN

There is an ongoing debate in the legal academy about how and whether to integrate race into curricula. For people of color, race impacts their day-to-day lives in ways large and small. In the law school setting, the experience of students of color is often a fraught one. For many students of color, navigating law school is akin to walking a tight rope. This Essay attempts to highlight the myriad challenges facing students of color, and it offers some thoughts about how to create a more inclusive environment.



Existence as a Threat

ALENA M. ALLEN*

Since the beginning of 2021, 122 bills in thirty-three states have been introduced for the purpose of controlling the lessons that teachers teach in the classroom.¹ Legislators across the country purport to view Critical Race Theory as a threat, but, for many minoritized individuals, their presence and very existence is the real threat.²

The current environment is an inflection point in a long simmering debate about race. Two prominent historians, John Hope Franklin and Scott Ellsworth, noted that “the story of the Tulsa race riot is a chronicle of hatred and fear, of burning houses and shots fired in anger, of justice denied and dreams deferred.”³ The devastation in the Greenwood district of Tulsa was horrific. Three hundred people died and 800 more were wounded.⁴ Most of the Black residents were left homeless. Over 1,000 homes were burned, and many businesses were destroyed, including the district’s only hospital.⁵

For nearly 100 years, the Tulsa Race Massacre was, at best, a footnote and, at worst, completely ignored.⁶ The absence of the Tulsa Race Massacre from history books is not an aberration. It is, instead, a troubling norm upon which the current flurry of anti-Critical Race Theory legislation is designed to further entrench. Understanding the gravity of the oppression that people of color have faced for centuries is fundamental to understanding the

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¹ Jeffrey Sachs, *Steep Rise in Gag Orders, Many Sloppily Drafted*, PEN AM. (Jan. 24, 2022), <https://pen.org/steep-rise-gag-orders-many-sloppily-drafted>.

² My sixteen-year-old son is taking Higher Level IB Psychology. A workbook activity provided this prompt: “This part of the brain activates subconsciously when white people perceive a black face.” The correct answer was the amygdala. TRAVIS DIXON, THEMANTIC EDUCATION’S IB PSYCHOLOGY STUDENT WORKBOOK 80 (2017). The amygdala is the part of the brain which plays an important role in threat processing to promote survival. Andrew S. Fox et al., *Extending the Amygdala in Theories of Threat Processing*, 38 TRENDS NEUROSCIENCES 319, 319 (2015).

³ John Hope Franklin & Scott Ellsworth, *History Knows No Fences: An Overview*, in TULSA RACE RIOT 21, 32 (2001).

⁴ John G. Browning, *The Tulsa Race Massacre: Echoes of 1921 Felt a Century Later*, OKLA. BAR J., May 2021, at 24, 27.

⁵ *Id.*

⁶ See Nuria Martinez-Keel, ‘A Conspiracy of Silence’: Tulsa Race Massacre Was Absent from Schools for Generations, OKLAHOMAN, <https://www.oklahoman.com/story/news/education/2021/05/26/oklahoma-history-black-wall-street-left-out-public-schools-tulsa-massacre-education/4875340001> (May 26, 2021, 9:36 AM) (“Oklahoma public schools weren’t instructed to teach about the Tulsa Race Massacre until 2002. Any education on the event before then was inconsistent, at best. In many schools, it was absent for generations.”).

architecture of structural and systemic racism in the United States.⁷ At the founding, “‘we the people,’ for whose protection the Constitution was designed, did not include those whose skins were the wrong color.”⁸ Yet, educating students about how people of color have been oppressed has always been met with fierce resistance.

For example, nearly fifty years ago, James Loewen and Charles Sallis—two young college professors in Jackson, Mississippi—led a team that wrote a textbook that caused a major public controversy.⁹ They wrote to more fully capture how Black people had been treated in Mississippi.¹⁰ In 1974, the Mississippi State Textbook Purchasing Board refused to list the textbook on its list of acceptable titles available for adoption in ninth grade.¹¹ The professors sued and ultimately prevailed after litigation that resulted in the judge ordering the inclusion of the textbook on the list of available adoptions.¹²

Although Loewen and Sallis fought to reframe how history is taught, their efforts did not lead to lasting change. The battle over history continues to rage. The 1619 Project, which “reframe[s] the country’s history by placing the consequences of slavery and the contributions of black Americans at the very center of our national narrative,” was met with swift and seemingly unrelenting backlash.¹³ Despite winning the Pulitzer Prize for her work on the 1619 Project, Nikole Hannah-Jones was offered a position—initially without tenure—at her alma mater, University of North Carolina, only after conservatives orchestrated a campaign against her due to her involvement in the 1619 Project.¹⁴

⁷ See, e.g., Thomas Kleven, *Systemic Classism, Systemic Racism: Are Social and Racial Justice Achievable in the United States?*, 8 CONN. PUB. INT. L.J. 37, 39 (2009) (“Systemic classism and racism are reflected in the entrenched socio-economic inequalities that seem endemic to an economic system organized primarily on the basis of competition for profit. In the United States, in particular, the distribution of wealth and income is highly skewed in general and along ethnic lines.”).

⁸ *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 389 (1978) (Marshall, J., separate opinion).

⁹ JAMES W. LOEWEN ET AL., *MISSISSIPPI: CONFLICT & CHANGE* (James W. Loewen & Charles Sallis eds., 1974).

¹⁰ *Bias Is Charged in Book Rejection*, N.Y. TIMES, Nov. 10, 1974, at 53.

¹¹ *Loewen v. Turnipseed*, 488 F. Supp. 1138, 1143–44 (N.D. Miss. 1980).

¹² *Id.* at 1138–39, 1141.

¹³ *The 1619 Project*, N.Y. TIMES MAG., <https://www.nytimes.com/interactive/2019/08/14/magazine/1619-america-slavery.html> (Sept. 4, 2019); see also Adam Serwer, *The Fight Over the 1619 Project Is Not About the Facts*, ATLANTIC <https://www.theatlantic.com/ideas/archive/2019/12/historians-clash-1619-project/604093> (Dec. 23, 2019, 7:35 PM); Bianca Quilantan, *Obama Education Chief: Trump Sounding ‘Dog Whistle’ in Bashing 1619 Project*, POLITICO (Sept. 24, 2020, 2:54 PM), <https://www.politico.com/news/2020/09/24/trump-dog-whistle-1619-421238>; Connor Perrett, *Trump Threatens to Investigate and Pull Federal Funding from Schools That Teach NYT’s 1619 Project on the Consequences of Slavery*, INSIDER (Sept. 6, 2020, 2:56 PM), <https://www.businessinsider.com/trump-pull-funding-california-schools-1619-project-2020-9> (reporting President Trump’s threat to pull funding from schools that teach the 1619 Project’s curriculum).

¹⁴ Katie Robertson, *Nikole Hannah-Jones Denied Tenure at University of North Carolina*, N.Y. TIMES, <https://www.nytimes.com/2021/05/19/business/media/nikole-hannah-jones-unc.html> (Nov. 9, 2021). After protests, University of North Carolina offered Hannah-Jones a tenured position, but she declined to join its

Battles over educational content highlight the reality that higher education has been designed to be a white space.¹⁵ Deviations from curriculum and practices that prioritize whiteness are destined to be resisted. Although the share of nonwhite students has increased, white faculty remain the norm. In 2018, 76% of postsecondary faculty members were white compared to 55% of undergraduate students.¹⁶ The Association of American Law Schools (AALS) has not released law faculty data that is inclusive of racial makeup in over a decade.¹⁷ The most recent, detailed information that is readily available suggests that “about 7% of all law [professors] are women of color, 8% are men of color, and 24% are white women.”¹⁸ Roughly half of all law professors (that is, 46%) are white men.¹⁹

The diversity of faculty and student bodies impact course and campus climate.²⁰ Climate is the intellectual, social, emotional, and physical environment in which students learn.²¹ Early studies on classroom climate found that course climate did not have to be blatantly hostile in order to negatively impact marginalized students.²² More recent studies have found that microaggressions—brief events that convey negative messages—interfere with marginalized students’ abilities to have successful learning experiences.²³ “Microaggression,” a term first used by Chester M. Pierce in 1970, describes the ever-present, often unintentional, words, actions, or

faculty; instead, she accepted a tenured position at Howard University. Scott Jaschik, *Hannah-Jones Turns Down UNC Offer*, INSIDE HIGHER ED (July 7, 2021), <https://www.insidehighered.com/news/2021/07/07/ni-kole-hannah-jones-rejects-tenure-offer-unc-job-howard-u>.

¹⁵ See Elijah Anderson, “*The White Space*”, 1 SOCIO. RACE & ETHNICITY 10, 10 (2015) (“The Civil Rights Movement is long past, yet segregation persists. The wider society is still replete with overwhelmingly white neighborhoods, restaurants, schools, universities, workplaces, churches and other associations, courthouses, and cemeteries, a situation that reinforces a normative sensibility in settings in which black people are typically absent, not expected, or marginalized when present. In turn, blacks often refer to such settings colloquially as ‘the white space’—a perceptual category—and they typically approach that space with care.”).

¹⁶ *Digest of Education Statistics: 2019*, NAT’L CTR. FOR EDUC. STATS., https://nces.ed.gov/programs/digest/d19/ch_3.asp (last visited Feb. 19, 2022).

¹⁷ The most recent AALS faculty data, accounting for 2020, notes that “minorities” compose 17.2% of law school faculty demographics. ASS’N OF AM. L. SCHS., LEGAL EDUCATION AT A GLANCE: 2020 (2020), <https://www.aals.org/wp-content/uploads/2021/01/2020-Legal-Ed-at-a-Glance.pdf>.

¹⁸ Meera E. Deo, *Investigating Pandemic Effects on Legal Academia*, 89 FORDHAM L. REV. 2467, 2471 (2021).

¹⁹ *Id.*

²⁰ CLEMENT COULSTON & KAITLYN SMITH, NAT’L SCH. CLIMATE CTR., SCHOOL CLIMATE AND INCLUSION 2 (2013), <https://schoolclimate.org/wp-content/uploads/2021/05/sc-brief-inclusion.pdf>.

²¹ *What Is School Climate and Why Is It Important?*, NAT’L SCH. CLIMATE CTR., <https://schoolclimate.org/school-climate> (last visited Mar. 10, 2022).

²² See, e.g., Bernice Resnick Sandler, *The Classroom Climate: Still a Chilly One for Women*, in EDUCATING MEN AND WOMEN TOGETHER: COEDUCATION IN A CHANGING WORLD, 113, 113 (Carol Lasser ed., 1987); Chalsa M. Loo & Garry Rolison, *Alienation of Ethnic Minority Students at a Predominately White University*, 57 J. HIGHER EDUC. 58, 69 (1986).

²³ Dotun Ogunyemi et al., *Microaggressions in the Learning Environment: A Systematic Review*, 13 J. DIVERSITY HIGHER EDUC. 97, 107–08 (2020).

environments that communicate hostility, insult, or invalidation based on membership in a marginalized group.²⁴

In a recent study, researchers examined 258 Black Americans aged eighteen to seventy-one to determine the link between the frequency and distress of microaggressions and posttraumatic stress disorder (PTSD).²⁵ The researchers found that: (1) “the frequency of microaggressions related to Black Americans being in environments that lack Black representation, being treated as low achieving and part of an undesirable culture, and being treated as less valuable, lower status, or nonexistent were significantly associated with PTSD symptoms”; (2) “persistent environmental microaggressions of oppressive messages may result in anxiety, hypervigilance, and fear”; (3) PTSD symptoms “may occur when frequently confronted with messages from others that any successes” are due to affirmative action as opposed to one’s own intellect and ability; and (4) invisibility microaggressions are intertwined with “the perception of Black Americans as less than human.”²⁶

For students of color, higher education is a space defined by microaggressions and, at times, macroaggressions. In contrast to microaggressions, macroaggressions are blatant, obvious, and vicious forms of racism reflected in behavior, law, and institutional policies.²⁷ The impact of navigating educational spaces is most acutely seen in the persistent and troubling completion-rate disparities that exist at both undergraduate and law school levels. The National Student Clearinghouse Research Center’s recent report on six-year college completion rates for the fall 2015 cohort showed that, when examined by race and ethnicity, Asian and white students had much higher completion rates (73.7% and 69%, respectively) than Latinx, Native American, and Black students (50.9%, 46.5%, and 44.3%, respectively).²⁸ Black and Native American students represent the only groups that are more likely to drop out or discontinue enrollment than to complete a degree within six years.²⁹ In the law school setting, marginalized students also have significantly higher attrition rates than their white peers.³⁰

²⁴ Derald Wing Sue et al., *Racial Microaggressions in Everyday Life: Implications for Clinical Practice*, 62 AM. PSYCH. 271, 272–73 (2007).

²⁵ Tahirah Abdullah et al., *Microaggressions and Posttraumatic Stress Disorder Symptom Scores Among Black Americans: Exploring the Link*, 27 TRAUMATOLOGY 244, 247 (2021).

²⁶ *Id.* at 250–51.

²⁷ Chester Pierce, *Offensive Mechanisms*, in THE BLACK SEVENTIES 265, 266 (Floyd B. Barbour ed., 1970).

²⁸ *Completing College National and State Reports*, NAT’L STUDENT CLEARINGHOUSE RSCH. CTR. (Feb. 3, 2022), <https://nscresearchcenter.org/completing-college/> (follow the “Appendix” hyperlink and see Table 4).

²⁹ *Id.*

³⁰ Kylie Thomas & Tiffane Cochran, *ABA Data Reveals Minority Students Are Disproportionately Represented in Attrition Figures*, ACCESSLEX INST. (Sept. 18, 2018), <https://www.accesslex.org/xblog/aba-data-reveals-minority-students-are-disproportionately-represented-in-attrition-figures>.

In 2016, white students comprised 62% of first-year enrollment but only 49% of first-year, non-transfer attrition.³¹ In contrast, 30% of first-year students were from marginalized groups, but they accounted for 44% of first-year non-transfer attrition.³² The attrition rate for white students was 5.1% compared to 8.7% for Hispanic students, 11% for Black students, and 13% for Native American students.³³

Marginalized students trying to navigate the white space of legal education too often encounter hostility toward their presence, value, and contributions. Microaggressions and macroaggressions are commonplace, and Black students report heightened discomfort in the classroom in comparison to their peers.³⁴ Amy Wax, a tenured law professor at the University of Pennsylvania, appeared on *The Glenn Show* and said, “I think the United States is better off with fewer Asians and less Asian immigration.”³⁵ In a prior appearance on the same show, Professor Wax said, “Here’s a very inconvenient fact, Glenn: I don’t think I’ve ever seen a Black student graduate in the top quarter of the class, and rarely, rarely, in the top half.”³⁶ Days before Yom Kippur, a spray-painted swastika greeted students at Yale Law School.³⁷ More recently, Yale was mired in controversy when a second-year law student sent out an invitation to a party, stating:

Sup NALSA Hope you’re all still feeling social! This Friday at 7:30, we will be christening our very own (soon to be) world-renowned NALSA Trap House . . . by throwing a Constitution Day bash in collaboration with FedSoc. Planned attractions include Popeye’s chicken, basic-b---- American-themed snacks (like apple pie, etc.) Hope to see you all there.³⁸

³¹ *Id.*

³² *Id.*

³³ *Id.* at fig.2.

³⁴ Nancy E. Dowd, Kenneth B. Nunn & Jane E. Pendergast, *Diversity Matters: Race, Gender, and Ethnicity in Legal Education*, 15 U. FLA. J.L. & PUB. POL’Y 11, 26 (2003) (explaining that when asked whether class “questions or discussions” at University of Florida College of Law made the student uncomfortable, 43% of African-American students answered affirmatively compared to 28% of white students and 27% of other students).

³⁵ See Susan H. Greenberg, *Penn Law Professor Calls for ‘Fewer Asians’ in the U.S.*, INSIDE HIGHER ED (Jan. 5, 2022), <https://www.insidehighered.com/quicktakes/2022/01/05/penn-law-professor-calls-fewer-asians-us>.

³⁶ See Derek Hawkins, *Penn Law Professor Who Said Black Students Are ‘Rarely’ in Top Half of Class Loses Teaching Duties*, WASH. POST (Mar. 15, 2018), <https://www.washingtonpost.com/news/morning-mix/wp/2018/03/15/penn-law-professor-who-said-black-students-rarely-perform-well-loses-teaching-duties/> (explaining that going forward Wax will only teach elective courses).

³⁷ Jenni Fink, *Swastika, ‘Trump’ Found Spray-Painted on Yale Law School Steps Days Before Yom Kippur*, NEWSWEEK (Oct. 8, 2019, 1:08 PM), <https://www.newsweek.com/yale-swastika-trump-graffiti-yom-kippur-1463907>.

³⁸ Debra Cassens Weiss, *Yale Law School Sought 2L’s Apology for ‘Trap House’ Constitution Day Invitation, Citing ‘Triggering Associations’*, ABA J. (Oct. 18, 2021, 9:16 AM), <https://www.abajournal.com>

At Georgetown University Law Center, the Black Law Students Association called for administrator Ilya Shapiro to be fired.³⁹ Shapiro had tweeted that, because President Biden said he would only consider Black women for nomination to the Supreme Court, his nominee would “always have an asterisk attached. Fitting that the Court takes up affirmative action next term.”⁴⁰ More controversially, he also tweeted:

Objectively best pick for Biden is Sri Srinivasan, who is solid prog & v smart. Even has identity politics benefit of being first Asian (Indian) American. But alas doesn't fit into the latest intersectionality hierarchy so we'll get lesser black woman. Thank heaven for small favors?⁴¹

The experience is not better at schools ranked outside of the vaunted Top 25 *U.S. News & World Report* rankings. At University of San Diego School of Law, the Black Law Students Association wrote an open letter explaining the challenges that they faced navigating law school:

[W]e are tasked with the exorbitant emotional and intellectual burden of educating our colleagues on racial issues or tolerating their prejudice as an “opinion” to be protected under the mantle of freedom of expression. In our pursuit of knowledge, we are alarmed by our peers and professors who use racial epithets in the classroom and perpetuate racial stereotypes as facts rather than misinformed opinions.⁴²

At University of Memphis Cecil C. Humphreys School of Law, the Black Law Students Association demanded, inter alia, the addition of a full-time mental health counselor and the removal of a campus police officer who allegedly harassed Black students and a Black professor.⁴³ At University of Pittsburgh School of Law, an adjunct professor resigned after using the n-word in the context of class discussion,⁴⁴ and, at University of Illinois

/news/article/yale-law-school-sought-2ls-apology-for-trap-house-constitution-day-invitation-citing-triggering-associations.

³⁹ Neil Vigdor, *Georgetown Suspends Lecturer Who Criticized Vow to Put Black Woman on Court*, N.Y. TIMES (Jan. 31, 2022), <https://www.nytimes.com/2022/01/31/us/ilya-shapiro-georgetown-biden-scotus.html>

⁴⁰ Lauren Lumpkin, *Incoming Georgetown Law Administrator Apologizes After Tweets Dean Called 'Appalling'*, WASH. POST (Jan. 27, 2022, 9:25 PM), <https://www.washingtonpost.com/education/2022/01/27/georgetown-law-ilya-shapiro-tweets/>.

⁴¹ Vigdor, *supra* note 39.

⁴² USD Law BLSA (@usdlawblsa), *An Open Letter from University of San Diego School of Law's Black Law Students Association*, FACEBOOK (Aug. 31, 2020), <https://www.facebook.com/usdlawblsa/posts/149088663540498>.

⁴³ Jackson Baker, *Race Becomes Crisis Point at U of M Law School*, MEMPHIS FLYER (Apr. 28, 2021, 4:48 PM), <https://www.memphisflyer.com/race-becomes-crisis-point-at-u-of-m-law-school>.

⁴⁴ Martha Layne, *Pitt Law Adjunct Professor Resigns Over Racial Slur*, PITT NEWS (Oct. 16, 2020), <https://pittnews.com/article/161045/news/pitt-law-adjunct-professor-resigns-over-racial-slur/>.

Chicago School of Law, Black students complained after a professor allegedly referred to Black people as “cockroaches” and referenced the n-word and b-word on a final exam.⁴⁵ The additional work that students of color perform in law school by thinking about whether to tackle an issue related to their race, and sometimes by expending precious energy preparing to rebut a remark, siphons time and energy away from their studies and hinders their ability to succeed.⁴⁶ Thus, it is not surprising that students of color have substantially higher attrition rates than white students or that the legal profession remains overwhelmingly white.⁴⁷

Existing in white spaces has profound consequences beyond achievement or performance gaps. The existing frameworks and structures that marginalized students must navigate, not just in educational settings but in life, either were not designed for them or were specifically designed to keep them out. For example, the legal profession itself was unregulated for generations until increased numbers of immigrants and Black men began applying for admission.⁴⁸ Many accepted gatekeeping constructs, such as the bar exam, have been normalized as neutral arbiters of competence or merit when they were created with the express purpose to exclude.⁴⁹

Although the existing paradigms were not designed to be supportive of students of color, attempts to change the status quo have not been widely supported. Recent attempts by the American Bar Association (ABA) to mandate that law schools demonstratively prove their commitment to diversity and inclusion have been met with derision. Some Yale Law faculty members criticized the proposed changes for not being sound and for infringing upon academic freedom.⁵⁰ Other law professors criticized the changes for

⁴⁵ Erick Johnson, *Exam Question Stirs Outrage at John Marshall Law School*, CHI. CRUSADER (Feb. 20, 2021), <https://chicagocrusader.com/chicago/exam-question-stirs-outrage-at-john-marshall-law-school/> (reporting that a law professor included the phrase “‘n_’ and ‘b_’ (profane expressions for African Americans and women)” on a civil procedure final exam question and later said, “It just didn’t occur to me that I would get this type of reaction. I’m utterly dumfounded and surprised that anyone would have a problem”); Colleen Flaherty, *Bad Education*, INSIDE HIGHER ED (Nov. 10, 2021), <https://www.insidehighered.com/news/2021/11/10/when-suspending-professor-isnt-enough>.

⁴⁶ DOROTHY H. EVENSEN & CARLA D. PRATT, *THE END OF THE PIPELINE: A JOURNEY OF RECOGNITION FOR AFRICAN AMERICANS ENTERING THE LEGAL PROFESSION* 108–09 (2012).

⁴⁷ Eight-five percent of lawyers are white. AM. BAR ASS’N, *PROFILE OF THE LEGAL PROFESSION* 13, (July 2021), <https://www.americanbar.org/content/dam/aba/administrative/news/2021/0721/polp.pdf>. For statistics on attrition, see Thomas & Cochran, *supra* note 30.

⁴⁸ See JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 144–45 (1976) (explaining that middle class, American-born, white lawyers called for higher standards in order to safeguard their professional respectability and status from what they saw as the threat of dilution by the flood of immigrants and Black people into the profession).

⁴⁹ DeShun Harris, *Do Black Lawyers Matter to the Legal Profession?: Applying an Antiracism Paradigm to Eliminate Barriers to Licensure for Future Black Lawyers*, 31 U. FLA. J.L. & PUB. POL’Y 59, 62–63 (2020); see also Kenneth L. Shropshire, *Colorblind Propositions: Race, the SAT & the NCAA*, 8 STAN. L. & POL’Y REV. 141, 146 (1997).

⁵⁰ Comment from Bruce A. Ackerman et al., Yale Law Sch., to the Am. Bar Ass’n Council of the Section of Legal Educ. & Admissions to the Bar (June 23, 2021), <https://www.americanbar.org/content/>

vagueness.⁵¹ Given the lived experiences of students of color and the persistent whiteness of the legal profession, it would seem that there should be widespread agreement that significant change must occur. Yet, change requires one to actually acknowledge that the status quo is problematic.

In many ways, legal academia's warm embrace of principles of diversity, equity, and inclusion stems directly from its ability to disconnect the value of diversity from the wrongs of the past. As Eugene Volokh aptly noted:

Diversity is particularly appealing because of what it is not. It is not based on theories of racial responsibility. It is not based on a vision of group rights, or on a theory that proportional racial representation is an end in itself. It is not based on controversial views of compensation for past discrimination. It does not require a different level of justification for programs that disadvantage whites than for programs that disadvantage minorities. It does not even require a social consensus about the magnitude of present discrimination.⁵²

In legal academia, the norm is to present the core curriculum in a manner in which fundamental principles are not critically examined but are presented as celebrated legal canons that set white racial identity as the standard. The Socratic method often strips away sociocultural context because students are taught that the law is neutral and impartial.⁵³ In some ways, the myth of colorblindness is embedded in legal education. Lurking in the framing of current legal education are common beliefs that are often unstated, namely: (1) that the legal system treats everyone equally and objectively, regardless of race; (2) that there are no built-in systemic biases working to disadvantage minority groups; and (3) that race and ethnicity are not important identifying factors in the eyes of the law (i.e., justice is

dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/comments/2021/june-2021/june-21-comment-yale-law-school.pdf.

⁵¹ Comment from Richard Peltz-Steele et al., to the Am. Bar Ass'n Council of the Section of Legal Educ. & Admissions to the Bar (June 27, 2021), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/comments/2021/june-2021/june-21-comment-law-professors.pdf.

⁵² Eugene Volokh, *Diversity, Race as Proxy, and Religion as Proxy*, 43 UCLA L. REV. 2059, 2059 (1996) (footnote omitted).

⁵³ There are many scholars who challenge the notion that the law is objective. See, e.g., Alena M. Allen, *The Emotional Woman*, 99 N.C. L. REV. 1027, 1035 (2021) (arguing that the objective reasonable person standard entrenches the viewpoint of white men); Wendy Pollack, *Sexual Harassment: Women's Experience vs. Legal Definitions*, 13 HARV. WOMEN'S L.J. 35, 42–44 (1990) (using women's narratives to illuminate the distance between their perceptions of sexual harassment and those embodied in many features of sexual harassment law); Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1378–79 (1988) (advocating for the discussion of latent racism in seemingly neutral norms); see also Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745, 1760, 1771, 1814 (1989).

blind).⁵⁴ Thus, integrating discussions of race in the classroom requires a conscious decision to depart from established norms.

Even when faculty have the desire to change the established norm, they often lack the will. Faculty fear that white students might feel guilt and become defensive.⁵⁵ Faculty also suggest that their reluctance to delve into issues of race stems from lacking the proper vocabulary⁵⁶ or from lacking the time to cover race.⁵⁷ Faculty of color and women already tend to have lower teaching evaluations, so deviating from established norms could subject them to additional vitriol from students or to enhanced scrutiny at the tenure stage.⁵⁸

Angela Onwuachi-Willig described strategic and emotional “silence” as a “key to . . . survival in academia.”⁵⁹ Dean Onwuachi-Willig, a Black female law professor who wears her hair in locs, described her initial hesitancy to fully engage her employment discrimination class while discussing a racial discrimination case about braided hairstyles:

I discovered that I was nervous about voluntarily making myself both a subject and object—of being both highly visible and completely invisible at the same time: being visible as a piece of evidence on display but completely invisible in terms of understanding about my hair, my being. Because of this fear (coupled with my usual worries as a [B]lack female professor), I left many questions unasked, questions that I believed that judges and other lawyers had left unasked and unevaluated for many years. Although seemingly the most powerful person in the room, I felt somewhat powerless in my ability to press my students harder about a race-based analysis

⁵⁴ Kimberly Holt Barrett & William H. George, *Judicial Colorblindness, Race Neutrality, and Modern Racism: How Psychologists Can Help the Courts Understand Race Matters*, in RACE, CULTURE, PSYCHOLOGY, & LAW 31, 32 (Kimberly Holt Barrett & William H. George eds., 2005).

⁵⁵ See, e.g., Carolyn Copps Hartley & Carrie J. Petrucci, *Practicing Culturally Competent Therapeutic Jurisprudence: A Collaboration Between Social Work and Law*, 14 WASH. U. J.L. & POL’Y 133, 165 (2004) (suggesting that most white law students remain “resistant to learning about racism” because of the pervasiveness of racial stereotypes and the desire to preserve racial privilege).

⁵⁶ Madonna G. Constantine, Christina M. Capodilupo & Mai M. Kindaichi, *The APA Multicultural Guidelines on Education, Training, Research, Practice, and Organizational Change: A Brief Overview*, in CLINICAL PRACTICE WITH PEOPLE OF COLOR: A GUIDE TO BECOMING CULTURALLY COMPETENT 1, 7 (Madonna G. Constantine ed., 2007).

⁵⁷ KATHRYN HOPKINS KAVANAGH & PATRICIA H. KENNEDY, PROMOTING CULTURAL DIVERSITY: STRATEGIES FOR HEALTH CARE PROFESSIONALS 12–13 (1992).

⁵⁸ See Meera E. Deo, *A Better Tenure Battle: Fighting Bias in Teaching Evaluations*, 31 COLUM. J. GENDER & L. 7, 14–17, 34–35 (2015); Sylvia R. Lazos, *Are Student Teaching Evaluations Holding Back Women and Minorities?: The Perils of “Doing” Gender and Race in the Classroom*, in PRESUMED INCOMPETENT: THE INTERSECTIONS OF RACE AND CLASS FOR WOMEN IN ACADEMIA 164, 166, 176–78 (Gabiella Gutiérrez y Muhs et al. eds., 2012).

⁵⁹ Angela Onwuachi-Willig, *Silence of the Lambs*, in PRESUMED INCOMPETENT, *supra* note 58, at 142, 143.

of this case—one that many courts have referred to dismissively as just a “hair” case.⁶⁰

Engaging in classroom discussions about race that are brief or isolated is the norm when professors are even willing to engage with issues of race. Although at first it can be considered praiseworthy when a professor devotes a class period to issues of race or gender, in actuality, the practice is problematic because it relegates such discussions to the margins.

The ABA requires law schools to establish learning outcomes. Learning outcomes commonly consist of three aspects of student learning: (1) the acquisition of knowledge (i.e., what professors want students to know), (2) attitudes (i.e., what professors want students to demonstrate), and (3) skills (i.e., what professors want students to be able to do).⁶¹ Standard 302 of the ABA’s Standards and Rules of Procedure for Approval of Law Schools states:

A law school shall establish learning outcomes that shall, at a minimum, include competency in the following: (a) Knowledge and understanding of substantive and procedural law; (b) Legal analysis and reasoning, legal research, problem-solving, and written and oral communication in the legal context; (c) Exercise of proper professional and ethical responsibilities to clients and the legal system; and (d) Other professional skills needed for competent and ethical participation as a member of the legal profession.⁶²

Constructing learning outcomes around understanding how the law perpetuates oppression or how race and other topics can influence interpretation of the law shifts discussions about race from the margins to the center, as a critical skill that must be mastered.⁶³ Law students should understand the historical role that cultural perspectives of the dominant cultural majority have played and how these perspectives shaped the law in order to understand power differentials. Moreover, students should understand how this dynamic impacted the development of the law and the legal system, as well as how it shaped the relationship between litigants. The existing norm of relegating discussions of race to footnotes in colorblind lectures or isolating discussions of race to a delineated class perpetuates the notion that legal academia is a white space. Discussions about race are

⁶⁰ *Id.* at 148. Dean Onwuachi-Willig revisited the case later in the semester and spoke candidly about the coded racism in the case. *Id.*

⁶¹ *Writing Learning Outcomes*, AM. ASS’N L. LIBRS., <https://web.archive.org/web/20150408220051/http://www.aallnet.org/Archived/Education-and-Events/cpe/outcomes.html>.

⁶² ABA STANDARDS AND RULES OF PROC. FOR APPROVAL OF L. SCHS. 2021–2022 § 302 (AM. BAR ASS’N, 2021), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2020-2021/2020-21-aba-standards-and-rules-chapter3.pdf.

⁶³ *See generally* TERI A. MCMURTRY-CHUBB, STRATEGIES AND TECHNIQUES FOR INTEGRATING DIVERSITY, EQUITY, AND INCLUSION INTO THE CORE LAW CURRICULUM (2022).

critical not only to improving the educational experience of students of color but also to training competent lawyers.

As a result of changing demographics and immigration patterns, lawyers are increasingly likely to work with diverse groups.⁶⁴ The underrepresentation of people of color in the legal profession means that many lawyers will serve clients with different cultural frameworks and communication styles who often will have different goals and needs. Clients from underrepresented minority groups often face a lack of sensitivity and awareness on the part of legal service providers, a lack of access to legal services (especially in the area of immigration law), and language barriers. The impact of being represented by a lawyer lacking cross-cultural competency skills was captured by Michelle Jacobs in *People from the Footnotes: The Missing Element in Client-Centered Counseling*.⁶⁵ Jacobs explains how a Black client, DuJon Johnson, expressed anger at the representation that he received from his white lawyers even though his citation was dismissed.⁶⁶ Jacobs explains that the lawyers missed the fact that Johnson viewed the issuance of the citation itself as racial profiling and thus did not understand that he was searching for a different kind of vindication.⁶⁷

In conclusion, there are myriad rationales for incorporating discussions of race throughout the law school curriculum. The willingness of the legal academy to strip historical context away from legal rules perpetuates racism. This approach to legal education preserves legal academia as a white space when the curriculum should adapt to make legal academia and the legal profession a multicultural space.

The Tulsa Race Massacre is a reminder of the atrocities that people of color have faced, and it is a reminder that the legal remedies available to people of color have too often been wholly insufficient. Such discussions of race are not optional. They are vital to achieving justice for all. The demographics of the legal profession are very different from the demographics of the country. With less than 60% of Americans reporting their race as white in the 2020 census,⁶⁸ it is incumbent upon law schools to ensure that lawyers are prepared to understand the struggles and hardships of clients so that they can provide competent representation regardless of their clients' background.

⁶⁴ See, e.g., Eric Jensen et al., *2020 U.S. Population More Racially and Ethnically Diverse Than Measured in 2010*, U.S. CENSUS BUREAU, <https://www.census.gov/library/stories/2021/08/2020-united-states-population-more-racially-ethnically-diverse-than-2010.html> (Mar. 25, 2022); *Foreign Born CPS Data Tables*, U.S. CENSUS BUREAU, https://www.census.gov/topics/population/foreign-born/data/table/s/cps-tables.2019.List_2030222427.html (Oct. 8, 2021).

⁶⁵ Michelle S. Jacobs, *People from the Footnotes: The Missing Element in Client-Centered Counseling*, 27 GOLDEN GATE U. L. REV. 345, 377–91 (1997).

⁶⁶ *Id.* at 364.

⁶⁷ *Id.* at 386–88.

⁶⁸ Jensen et al., *supra* note 64.

