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Bennett Capers

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## Essay

# The Law School as a White Space

Bennett Capers<sup>†</sup>

### INTRODUCTION

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.”

—Elijah Anderson<sup>1</sup>

### *Three Beginnings*

Gregory Hayes Swanson already had a law degree from Howard Law School, and was already practicing law in Martinsville, Virginia, when he applied to the law school at University of Virginia. His plan was to obtain a master’s in law at UVA, which he hoped would allow him to transition into teaching law. Unfortunately, even though he was accepted to the law school, the University of Virginia Board of Visitors rejected him, writing:

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<sup>†</sup> Professor of Law and Director of the Center on Race, Law, and Justice, Fordham Law School. This Essay benefited from presentations at colloquia and faculty workshops at the University of Pennsylvania Law School, Arizona State University Law School, and the University of Houston Law Center. For helpful comments, suggestions, encouragement, and feedback, I’m especially grateful to Kaiponanea Matsumura, Erin Scharff, Ben McJunkin, Valena Beety, Angela Banks, Karen Tani, Shaun Ossei-Owusu, Alyssa Dragnich, David Gartner, Joshua Sellers, Leonard Baynes, Emily Berman, Dave Fagundes, Lonny Hoffman, Daniel Morales, Jessica Roberts, Elizabeth Trujillo, Justin Murray, and Gautam Hans. I am also indebted to my fellow panelists at the “Law School as White Space?” event I organized at Fordham Law School: Elijah Anderson, Osamudia James, Meera Deo, Elizabeth Mertz, and Emily Houh. Peter Angelica provided invaluable research assistance, as did my library liaison Alyson Drake. Copyright © 2021 by Bennett Capers.

1. Elijah Anderson, “*The White Space*,” 1 SOCIO. RACE & ETHNICITY 10, 10 (2015).

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The applicant is a colored man. The Constitution and the laws of the State of Virginia provide that white and colored shall not be taught in the same schools.<sup>2</sup>

This was 1950. And getting a master's in law degree from another school in his home state was not an option. Simply put, there was no "colored" law school in Virginia for Swanson to attend. So he sued—his team of lawyers from the NAACP included such heavyweights as Thurgood Marshall—and won.<sup>3</sup> In a way, the tailwinds were in his favor. Though "separate but equal" was still technically the law of the land, civil rights activists had been making headway by showing that most separate educational facilities were anything but equal. Just a few months earlier, the Supreme Court had issued its opinion in *Sweatt v. Painter*, involving the University of Texas Law School's refusal to admit Heman Marion Sweatt because he was Black.<sup>4</sup> Texas had attempted to satisfy the equal part of "separate but equal" by hiring two Black lawyers to teach Sweatt, not at the University of Texas or even in Austin, Texas, but in a few rented rooms in Houston.<sup>5</sup> When Sweatt's legal team pointed out the obvious inequality, Texas offered to create a law school just for Blacks, and even offered a location of three basement rooms a few blocks from University of Texas.<sup>6</sup> Perhaps not surprisingly—though against the headwinds of public sentiment<sup>7</sup>—the Supreme Court ruled in Sweatt's favor.<sup>8</sup> Before *Sweatt*, the Court had decided *Sipuel v. University of Oklahoma*, a case involving the University of Oklahoma's refusal to admit Ada Lois Sipuel, a Black woman, to its law school, solely because of her race.<sup>9</sup> In both *Sweatt*

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2. Eric Williamson, *The Long Walk*, UVA LAW. (Spring 2018), <https://www.law.virginia.edu/uvalawyer/article/long-walk> [<https://perma.cc/C5TZ-YWL4>].

3. *Id.* (citing the court order in *Swanson v. Rector & Visitors of the Univ. of Va.*, No. 30, at 2 (W.D. Va. Sept. 5, 1950)).

4. 339 U.S. 629, 636 (1950).

5. DWONNA GOLDSTONE, *INTEGRATING THE 40 ACRES: THE FIFTY-YEAR STRUGGLE FOR RACIAL EQUALITY AT THE UNIVERSITY OF TEXAS* 91–92 (2006); GARY M. LAVERGNE, *BEFORE BROWN: HEMAN MARION SWEATT, THURGOOD MARSHALL, AND THE LONG ROAD TO JUSTICE* 91–95 (2010).

6. *Sweatt*, 339 U.S. at 633 n.2.

7. *South Ponders Three Segregation Decisions*, EL PASO HERALD POST, June 6, 1950, at 6; Lewis Wood, *Anti-Bias Rulings Hailed, Denounced*, N.Y. TIMES, June 7, 1950, at 27.

8. *Sweatt*, 339 U.S. at 636. The same day, the Court also decided *McLaurin v. Oklahoma State Regents for Higher Education*, ruling that Oklahoma's attempt to provide equal education was inadequate—the university had admitted McLaurin, but required him to sit at a desk just outside the classroom—and ordered Oklahoma to remove the restrictions. 339 U.S. 637, 642 (1950).

9. 332 U.S. 631, 632 (1948).

and *Sipuel*, the Court granted relief to the plaintiffs, though it side-stepped the issue of whether the doctrine of “separate but equal” needed revisiting.<sup>10</sup>

Back in Virginia, with these tailwinds in Swanson’s favor, it is perhaps not surprising that a panel of three judges ruled in his favor.<sup>11</sup>

However, what interests me—*me*, because like Patricia Williams, I am convinced that “subject position is everything in my analysis of the law”<sup>12</sup>—is what happened *after* the court issued an order compelling UVA to admit him. I’m interested in what Swanson said publicly, and what he said privately. When interviewed by *The Washington Post* years later, Swanson’s description of his time at UVA seems politic, seems almost too measured: “[I] fully participated in classroom discussions and used all campus facilities—cafeterias, libraries;”<sup>13</sup> “I attended concerts, lectures and football games but never attempted to attend any social events;”<sup>14</sup> “I was . . . courteously treated.”<sup>15</sup> By contrast, what he divulged privately in letters to his sister seems, well, more honest. He wrote that as he walked to campus, whites would stare at him. “I should like to read their minds,” he told his sister. “Sometimes I think that I do.”<sup>16</sup> He described overhearing a classmate say, “We should get that nigger out of the law school.”<sup>17</sup> And then there’s this from a letter to one of his friends: “I have not been able to detect any perceptible indications of hostility or bias; it is one of those things in the under-current. You can’t put your finger on it, but you know it’s there.”<sup>18</sup>

In 2018, Lolade Siyonbola, a graduate student at Yale University, was working on a paper in the common room of her dormitory.<sup>19</sup> As

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10. The Court’s brief order in *Sipuel* speaks volumes. In granting her motion for mandamus, the Court ruled, vaguely—one pictures a fluttering of hands— “[t]he State must provide [a legal education] for her in conformity with the equal protection clause of the Fourteenth Amendment and provide it as soon as it does for applicants of any other group.” *Id.* at 633.

11. Williamson, *supra* note 2 (citing Swanson v. Rector & Visitors of the Univ. of Va., No. 30, at 2 (W.D. Va. Sept. 5, 1950)).

12. PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 3 (1991) (“Since subject position is everything in my analysis of the law, you deserve to know it’s a bad morning.”).

13. See Williamson, *supra* note 2 (quoting Susanna McBee, *First Negro to Attend U. of Virginia Sees Need for ‘Massive Assistance’*, WASH. POST, Sept. 1, 1958, at A8).

14. *Id.* (quoting McBee, *supra* note 13).

15. *Id.* (quoting McBee, *supra* note 13).

16. *Id.*

17. *Id.*

18. *Id.*

19. Tom Gerkin, *Police Called After Black Yale Student Fell Asleep in Common*

she later told the BBC, “I was working on it for much of the day, and I was exhausted so I thought I’d have a nap.”<sup>20</sup> In other words, she did what many students do in the common room. “This is normal, you know? People sleep there all the time.”<sup>21</sup> But when a white student entered the common room and saw Siyonbola sleeping there, she assumed Siyonbola was an intruder. That Siyonbola didn’t belong. “[Y]ou’re not supposed to be here,” the white student said.<sup>22</sup> The white student also called the police. Siyonbola had heard enough about such incidents to grab her phone and begin recording, resulting in a 17-minute video that has been viewed more than a million times.<sup>23</sup> In the video, it is clear that even after the police arrived and Siyonbola unlocked her dorm room door to show she lived there, the police still wanted more proof that she belonged, demanding to see her Yale ID. “You’re in a Yale building and we need to make sure you belong here,” the officer can be heard saying in the recording.<sup>24</sup> For Siyonbola, and for most of the viewers who saw her video, the video functioned as a different kind of proof, one that the critical race theorist Lolita Buckner Innis might call a “white witness.”<sup>25</sup> For Siyonbola and these observers, the video was proof of the reason why the police were summoned and the reason Siyonbola was interrogated: “They were not sure that I should be there, because I’m a black woman at Yale. Even though I’m there with my laptop open writing a paper.”<sup>26</sup> In fact, Siyonbola’s experience was far from uncommon.<sup>27</sup>

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Room, BBC NEWS (May 10, 2018), <https://www.bbc.com/news/world-us-canada-44068305> [<https://perma.cc/2ZZK-KJYA>].

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. Brandon Griggs, *A Black Yale Graduate Student Took a Nap in her Dorm’s Common Room. So a White Student Called Police*, CNN (May 12, 2018), <https://www.cnn.com/2018/05/09/us/yale-student-napping-black-trnd/index.html> [<https://perma.cc/F5XW-57HE>].

25. Lolita Buckner Innis, *Video Surveillance as White Witness*, AIN’T I A FEMINIST LEGAL SCHOLAR TOO? (Sept. 30, 2012), <http://innisfls.blogspot.com/2012/09/video-surveillance-as-white-witnesses.html> [<https://perma.cc/TAU7-QSDS>] (“[P]rivate people often lose in battles of opposing narratives with public people about what has occurred. In such cases, video surveillance becomes a mostly neutral, unlikely to lie, legitimizing witness.”).

26. Gerkin, *supra* note 19.

27. For a discussion of the rash of recent incidents in which whites have called the police (and worse) on Blacks engaged in the banalities of everyday life, see Sarah Mervosh, *Woman Assaulted Black Boy After Telling Him He ‘Did Not Belong’ at Pool, Officials Say*, N.Y. TIMES (July 1, 2018), <https://www.nytimes.com/2018/07/01/us/pool-patrol-paula.html> [<https://perma.cc/PLZ2-4LAA>]; Aris Folley, *Black Man Asked*

In terms of chronology, my own story falls between that of Swanson's and Siyonbola's. When I first walked through Columbia Law School's entrance on 116<sup>th</sup> Street, I was probably thinking the same thing the handful of other Black students were thinking. A first-generation law student, I had vaguely heard of the Socratic method, I knew I was there to learn how to "think and write like a lawyer." I knew the first-year courses would include Torts and Property and Con Law and Crim, and that somehow those courses would prepare me to "practice law." The goal was to emerge, three years later, fully formed, as a lawyer.<sup>28</sup> And I did learn how to think and talk like a lawyer. By every measure the law school thought mattered, I even excelled. Grades. Honors. Publishing my Note in the *Columbia Law Review*. I mastered the "language of law," even if in doing so I had to "unrace" myself, even if I adopted what Sandy Levinson might call a "bleached out identity."<sup>29</sup> Throughout it all, I was "courteously treated," much like Swanson had been at UVA. And yet like Swanson, I was aware of an "undercurrent." And like Siyonbola, I had the sense that my presence was

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to Leave His Own Pool by Officer in Viral Video, HILL (July 11, 2018), <https://thehill.com/blogs/blog-briefing-room/news/396601-black-man-asked-to-leave-his-own-pool-by-cop-in-viral-video> [<https://perma.cc/LQP9-D94M>]; Nicole Hensley, *Woman Calls Cops on Black 12-Year-Old Boy Delivering Newspapers in Ohio Neighborhood*, N.Y. DAILY NEWS (July 10, 2018), <http://www.nydailynews.com/news/national/ny-news-ohio-child-police-delivering-newspapers-20180710-story.html> [<https://perma.cc/542J-86NN>]; Brandon E. Patterson, *11 More Things You Can't Do While Black (or Brown)*, MOTHER JONES (May 9, 2018), <https://www.motherjones.com/crime-justice/2018/05/11-more-things-you-cannot-do-while-black-starbucks-nordstrom-rack-1> [<https://perma.cc/8K22-H2QA>]; Matt Stevens, *CVS Fires 2 for Calling Police on Black Woman Over Coupon*, N.Y. TIMES (July 16, 2018), <https://www.nytimes.com/2018/07/16/business/cvs-coupon-manager-black-woman-police.html> [<https://perma.cc/X7QA-MDEQ>]; Mihir Zaveri, *A Black Oregon Lawmaker Was Knocking on Doors. Someone Called the Police*, N.Y. TIMES (July 5, 2018), <https://www.nytimes.com/2018/07/05/us/janelle-bynum-police-portland.html> [<https://perma.cc/S6WA-CFDR>]; Karen Zraick, *Man Labeled 'ID Adam' Is Fired After Calling the Police on a Black Woman at Pool*, N.Y. TIMES (July 6, 2018), <https://www.nytimes.com/2018/07/06/us/pool-racial-profiling-white-man.html> [[https://perma.cc/\]\]B9-QQK](https://perma.cc/]]B9-QQK)].

28. See Paul T. Wangerin, *Skills Training in "Legal Analysis": A Systematic Approach*, 40 U. MIAMI L. REV. 409, 409–10 (1986) (analogizing the transformation of a law student to the conversion that happens in the science fiction film *The Invasion of the Body Snatchers*).

29. See Sanford Levinson, *Identifying the Jewish Lawyer: Reflections on the Construction of Professional Identity*, 14 CARDOZO L. REV. 1577, 1601 (1993) (noting that law school is in some respects designed to "bleach out" or make otherwise irrelevant what might be seen as central aspects of self-identity).

provisional, revokable. That Black students were “interlopers, not really belonging.”<sup>30</sup> In short, though I did not have the language for it at the time, I felt that I was a Black person in a white space. Some of this had to do with the portraits of white men—the former law school deans—that lined the main corridor of the law school and that hung in a few lecture rooms, portraits that stared down at me like sentinels guarding entry to knowledge and the gates of the profession. Some of this had to do too with the names that graced the classrooms and the study rooms in the library; even these names *sounded* white. And of course what I was learning felt white, as white as the Latin legal expressions I memorized, as white as the founding fathers, and as problematic as the term “founding *fathers*.” I was certainly aware that what I was learning seemed more about justifying the status quo—including the racial status quo—than disrupting it. Still, I followed the rules. Learned the language. Learned how to think like a lawyer. Though perhaps in the recesses of my mind, the line from an Adrienne Rich poem would have resonated: “[T]his is the oppressor’s language, yet I need it to talk to you.”<sup>31</sup> It was only in my final year that I encountered two of the giants of critical race theory—Derrick Bell, who gave a talk at Columbia and recounted his parable, “The Space Traders,”<sup>32</sup> and Patricia Williams, who had just published *The Alchemy of Race and Rights*.<sup>33</sup> It was only then I started to question everything, including what it means to think like a lawyer. It was only then I began to realize that narrative, too, could be a type of legal scholarship.<sup>34</sup> Still, it would be years more before I’d hear the term “white space” and start to see my time at law school more clearly.

It may seem strange to begin a law review essay with these three stories—Swanson’s, Siyonbola’s, and mine. But if I may channel the novelist Ralph Ellison, “[b]ear with me.”<sup>35</sup> For me, these three stories

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30. Cf. BELL HOOKS, *TEACHING TO TRANSGRESS* 4 (1994) (describing her own experience at integrated schools).

31. ADRIENNE RICH, *The Burning of Paper Instead of Children*, in *THE FACT OF A DOOR-FRAME* 116, 117 (1984).

32. DERRICK BELL, *The Space Traders*, in *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* 158 (1992).

33. WILLIAMS, *supra* note 12.

34. I began to learn, too, that there were ways of writing scholarship that allowed more freedom. That were free-ing. Like jazz. See John O. Calmore, *Critical Race Theory, Archie Shepp, and Fire Music: Securing an Authentic Intellectual Life in a Multicultural World*, 65 S. CAL. L. REV. 2129, 2132–33 (1992); see also Jerome McCristal Culp, Jr., *Autobiography and Legal Scholarship and Teaching: Finding the Me in the Legal Academy*, 77 VA. L. REV. 539 (1991).

35. RALPH ELLISON, *INVISIBLE MAN* 14 (rev. ed. 1992).

are all connected and support an argument I want to make. That argument, for starters, is this: Since their emergence in the 1850s as the dominant means of legal education,<sup>36</sup> law schools have been “white spaces.” And in this moment when the country is undergoing a racial reckoning, when law schools have pledged to look inward and become anti-racist and truly inclusive, it makes sense to begin with acknowledging how law schools continue to function as white spaces.

To make my argument, I begin in Part One by elaborating on the concept of white space as staked out by the sociologist Elijah Anderson and others, adding to it the work of critical race theory scholars on identity performance. In Part Two, I apply the term to law schools and make the argument that for many students of color, law schools are de facto white spaces where students of color, especially Black students, “are typically absent, not expected, or marginalized when present.”<sup>37</sup> On one level, the numbers are the argument. There is a reason why just a few years ago, *The Washington Post* ran a headline describing law as “the least diverse profession in the nation.”<sup>38</sup> But Part Two goes beyond the numbers to identify other aspects of law schools—even law schools at historically Black colleges and universities—that render them white spaces, from what is taught, to how the law is taught, even to their architecture.<sup>39</sup>

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36. On the origins of law schools and the gradual demise of legal apprenticeship, see LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 525–38 (1973).

37. Anderson, *supra* note 1.

38. Deborah L. Rhode, *Law Is the Least Diverse Profession in the Nation. And Lawyers Aren't Doing Enough to Change That*, WASH. POST (May 27, 2015), <https://www.washingtonpost.com/posteverything/wp/2015/05/27/law-is-the-least-diverse-profession-in-the-nation-and-lawyers-arent-doing-enough-to-change-that> [<https://perma.cc/HY4A-P799>]. Vernellia Randall puts it more bluntly, calling law the “whitest profession.” Vernellia Randall, *2004 The Whitest Law School Report*, RACISM.ORG (June 4, 2019), <https://www.racism.org/articles/basic-needs/education/266-education-legal-education/the-whitest-law-schools/2874-the-whitest-law-school-1> [<https://perma.cc/HY4A-P799>] (“In many ways institutional discrimination in law schools is really about maintaining the legal profession as ‘The Whitest Profession.’”); see also Casey C. Sullivan, *What's the Least Diverse Profession in America? The Law*, FINDLAW (Nov. 24, 2015), [https://blogs.findlaw.com/greedy\\_associates/2015/11/whats-the-least-diverse-profession-in-america-the-law.html](https://blogs.findlaw.com/greedy_associates/2015/11/whats-the-least-diverse-profession-in-america-the-law.html) [<https://perma.cc/3PTW-FUCD>] (“When it comes to being the whitest, malest profession in America, the law has everyone else beat.”).

39. To be clear, by “architecture,” I am not limiting myself to the physical building itself. Rather, I use the term “architecture” to encompass the portraits that line the walls, and the legacy names on classroom doors, and much else. Lawrence Lessig famously defined architecture as “the physical world as we find it, even if *as we find it* is simply *how it has already been made*.” Lawrence Lessig, Commentary, *The Law of the Horse: What Cyberlaw Might Teach*, 113 HARV. L. REV. 501, 507 (1999). I cannot think of a better definition.



The end goal of this Essay, however, is not solely to describe law schools as white spaces or to identify where law schools fall short.<sup>40</sup> Nor is the goal simply to challenge law schools to do better. Given that this country is slated to tip from being majority white to majority minority in the year 2044,<sup>41</sup> it should already be taken as a given that law schools must step up. Must do better. Must, at a minimum, get their own houses in order. The end goal of this Essay is at once more ambitious and more simple. It is to check, and even disturb, the very foundations on which most law schools are built. It is to reexamine the walls, and the insulation, that allow some students to thrive while keeping others out. It is to test the air filtration system to make sure it has not become stagnant with time. It is to see where repairs are possible, while recognizing what may be necessary are sledgehammers, wrecking balls, and new tools. An entire demolition. The end goal of this Essay is to dare law schools—to dare all of us—to imagine a new construction, an entirely new law school. In short, the end goal of this Essay is to imagine the law school no longer as a white space (in terms of demographics, or what is taught, or how it is taught), but as a *white space* (as in a blank page, at once empty and full of possibilities). What would it mean to rethink, from the bottom up, what is taught, how it is taught, and to what end? More broadly, what would it mean to create a law school that is cosmopolitan and then some, a place where intellectual curiosity thrives, where change and challenge are celebrated, where education itself is a practice of freedom, and perhaps most importantly, where there is no need to tout inclusivity, because everyone already belongs? These are the questions taken up in Part Three of this Essay.

### I. THE WHITE SPACE

On November 12, 2020, as part of the racial reckoning law schools engaged in following the social justice protests over the summer, I organized a panel at Fordham Law School titled: “The Law

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40. Indeed, the argument that law schools, or more specifically elite law schools, constitute white spaces has already been made, at least by a sociologist who did ethnographic work at two law schools. See *generally* WENDY LEO MOORE, REPRODUCING RACISM: WHITE SPACES, ELITE LAW SCHOOLS, AND RACIAL INEQUALITY 9–64 (2008). Though we reach the same conclusion, our approaches differ. Beyond that, she stops short of reimagining the law school, which is the end goal of this essay.

41. For an argument that this demographic shift will herald changes that we should prepare for now, see Bennett Capers, *Afrofuturism, Critical Race Theory, and Policing in the Year 2044*, 94 N.Y.U. L. REV. 1, 58–60 (2019).

School as White Space?”<sup>42</sup> The question mark was deliberate: I wanted students and alumni to ask themselves the question, rather than answering the question for them. That said, one of the first questions I put to the law professors on the panel, which included Professors Meera Deo, Emily Houh, Osamudia James, and Elizabeth Mertz,<sup>43</sup> was whether the question mark was superfluous. Whether they thought of law schools as white spaces. To a one, they answered in the affirmative and offered their own reasons why, several of which I will explore in Part Two of this Essay. But before making my argument that law schools—even law schools at HBCUs—too often function as white spaces, it makes sense to begin as I did on November 12. Not by recounting now familiar incidents of Blacks being deemed out of place, often by Beckys or Karens,<sup>44</sup> incidents that have been described as “both disturbing and disturbingly common.”<sup>45</sup> Nor by pointing out that “white space” has now become a part of the media’s vocabulary.<sup>46</sup> Rather, I began, as I do here, by setting the stage with Elijah Anderson’s influential article, “The White Space.”

Years before a white employee at a Starbucks in Philadelphia called the police on two Black men who were simply sitting at a table waiting for a business associate, or before Siyonbola was accosted for taking a nap in her dorm’s common area, Elijah Anderson, a professor

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42. I was particularly proud of the poster I helped design, which featured the silhouettes of students, all heading in one direction, with one Black student facing the other direction.

43. The fifth panelist was Elijah Anderson himself. For more on the panel, see Julia Brodsky, *Panel Examines the “White Space” of the Legal World*, FORDHAM L. NEWS (Nov. 22, 2020), <https://news.law.fordham.edu/blog/2020/11/22/panel-examines-the-white-space-of-the-legal-world> [<https://perma.cc/9YPW-AR7A>].

44. For a discussion of the difference, see Damon Young, *The Difference Between a ‘Karen’ and a ‘Becky,’ Explained*, THE ROOT (April 6, 2020), <https://www.theroot.com/the-difference-between-a-karen-and-a-becky-explained-1842708257> [<https://perma.cc/ZC3Z-5PCZ>].

45. Jelani Cobb, *Starbucks and the Issue of White Space*, NEW YORKER (May 27, 2018), <https://www.newyorker.com/magazine/2018/06/04/starbucks-and-the-issue-of-white-space> [<https://perma.cc/M4N8-BC8J>].

46. The following are just a sampling of media discussions: Jamelle Bouie, *White Spaces*, SLATE (Apr. 16, 2018), <https://slate.com/news-and-politics/2018/04/how-raced-spaces-explain-the-philadelphia-starbucks-arrests.html> [<https://perma.cc/78CG-6FSV>]; Julia Craven, *The Burden of Being Black in a White Space*, HUFFPOST (Apr. 24, 2018), [https://www.huffpost.com/entry/starbucks-arrest-shopping-while-black\\_n\\_5ade8e29e4b0df502a4ec117](https://www.huffpost.com/entry/starbucks-arrest-shopping-while-black_n_5ade8e29e4b0df502a4ec117) [<https://perma.cc/X7FY-BR9Z>]; Jesse Williams & Judith Browne Dianis, *Opinion, Starbucks’ Incident Proves ‘Whites Only’ Spaces Still Exist*, CNN (May 29, 2018), <https://www.cnn.com/2018/05/28/opinions/starbucks-white-space-opinion-williams-dianis/index.html> [<https://perma.cc/B4MJ-438Y>]; Cobb, *supra* note 45.

of sociology and African American studies at Yale, turned critical attention to a term that was already known to Blacks: the white space. Focusing on cities, Anderson argued that “public spaces, workplaces, and neighborhoods may now be conceptualized as a mosaic of white spaces, black spaces, and cosmopolitan spaces.”<sup>47</sup> Based on his socio-ethnographic work, Anderson conceptualized a “white space” as any setting in which “black people are typically absent, not expected, or marginalized when present.”<sup>48</sup> They are spaces “which blacks must navigate as a condition of their existence, and where whites belong and black people can be so easily be reminded that they do not.”<sup>49</sup> For whites, “the same settings are generally regarded as unremarkable, or as normal, taken-for-granted reflections of civil society.”<sup>50</sup> Indeed, notwithstanding the fact that Blacks may view these spaces as “homogeneously white and relatively privileged,” whites may consider the same spaces “diverse.”<sup>51</sup> That said, when an unfamiliar Black person enters a white space, whites may notice the disruption in what is expected, especially if the unfamiliar Black person is not “‘in his place’—that is, one who is working as a janitor or a service person or one who has [already] been vouched for by white people in good standing.”<sup>52</sup> For an unfamiliar Black person who is not “in his place,” whites may “immediately try to make sense of the [Black person]—to figure out ‘who that is,’ or to gain a sense of the nature of the person’s business and whether they need to be concerned.”<sup>53</sup>

For her part, the Black person who wants acceptance might find that she has to engage in “a performance, a negotiation, or what some blacks derisively refer to as a ‘dance.’ . . . [I]n effect, they perform to be accepted.”<sup>54</sup> Anderson adds:

When the anonymous black person can demonstrate that he or she has business in the white space, by producing an ID card, or simply passing an initial inspection, the defending “agents” may relax their guard, at least for the time being. They may then advance from concern with the person’s deficit of credibility to his or her provisional status, suggesting a conditional “pass.” . . . [But] this social plateau simply foreshadows further evaluations that typically have little to do with the black person’s essential merit as a person.

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47. Anderson, *supra* note 1, at 10–11.

48. *Id.* at 10. Such spaces may “vary in kind, but their most visible feature is their overwhelming presence of white people and their absence of black people.” *Id.* at 13.

49. *Id.* at 15.

50. *Id.* at 10.

51. *Id.* at 11.

52. *Id.* at 13.

53. *Id.*

54. *Id.*

When venturing into or navigating the white space, black people endure such challenges repeatedly . . . .

[A]s long as the black person is present in the white space, he or she is likely to be “on,” performing before a highly judgmental but socially distant audience . . . .

To be at all successful, they must manage themselves within this space. But the promise of acceptance is too often only that, a promise.<sup>55</sup>

The influence of Anderson’s work is significant. In part because of Anderson, the term “white space” is both academic and mainstream, so much so that when Siyanbola described what it felt like to have police called on her simply for being in her dorm’s common room, she said, “Most of America is comprised of white spaces.”<sup>56</sup> Another student added, “In white spaces like Yale, black students—and all students of color—are forced to navigate spaces not built for them. . . . [And] navigation often means assimilation—insincerely changing actions and beliefs in search of acceptance in a white space. But even that isn’t enough to ‘prove’ we belong.”<sup>57</sup>

Anderson’s work also dovetails the work of several critical race theory scholars when it comes to race, space, and performance. For example, Elise Boddie has written about “the racial identifiability of spaces,” often as a result of a history of exclusion.<sup>58</sup> Devon Carbado and Mitu Gulati introduced the term “working identity” to explain the extra work many people of color must do simply to avoid being stereotyped.<sup>59</sup> Moreover, Anderson’s work thickens Cheryl Harris’s seminal article “Whiteness as Property,” in which she calls attention to the “valorization of whiteness as treasured property in a society structured on racial caste.”<sup>60</sup> Harris writes:

In ways so embedded that it is rarely apparent, the set of assumptions, privileges, and benefits that accompany the status of being white have become a valuable asset—one that whites sought to protect . . . . Even though the law is neither uniform nor explicit in all instances, in protecting settled expectations based on white privilege, American law has recognized a property interest in whiteness that, although unacknowledged, now forms the background against which legal disputes are framed, argued, and adjudicated.<sup>61</sup>

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55. *Id.* at 13–14, 16.

56. A.T. McWilliams, *On Being Black in the White Space of Yale*, SLATE (May 11, 2018), <https://slate.com/news-and-politics/2018/05/on-being-black-in-the-white-space-of-yale.html> [<https://perma.cc/FE54-UJCD>] (quoting Siyanbola).

57. *Id.*

58. Elise C. Boddie, *Racial Territoriality*, 58 UCLA L. REV. 401, 414 n.63 (2010).

59. Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1262 (2000).

60. Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1713 (1993).

61. *Id.* at 1713–14.

Anderson adds to Harris's observation, enriching it. He points out it is not only whiteness that can function as property, but also property that can denote whiteness.<sup>62</sup>

To be sure, Anderson's analysis has its shortcomings. Perhaps most jarringly, Anderson replicates the Black-white binary, and in doing so erases other types of racial diversity.<sup>63</sup> In addition, Anderson conceptualizes cities as having just three types of spaces: There are the white spaces described above. There are also Black spaces, which for Anderson is reflected in the association of Blackness with "the iconic ghetto."<sup>64</sup> Then there are cosmopolitan canopies, which Anderson describes as islands "of racial and ethnic civility in a sea of segregated living."<sup>65</sup>

But in reality, there are a plethora of spaces that are associated with different groups. For example, there are spaces that exude heterosexuality—think of most high school proms. Indeed, proms are but one example, since in reality the norm of heterosexuality—what Adrienne Rich calls "compulsory heterosexuality"<sup>66</sup>—exists almost everywhere. Similarly, there are spaces that are gendered. Think locker rooms. Significantly, a space can be gendered even when people of different genders are present. We tend to think of police departments as male spaces; ditto for the military. But the existence of male spaces extends beyond these examples. When Ruth Bader Ginsburg entered Harvard Law School, then transferred to Columbia Law, she was entering male spaces, as were the thousands of women who came after her. (Her joining the Supreme Court could also be thought of as entering a male space, just as Justice Thurgood Marshall's joining the Court can be thought of as his entering a white space.) Law firms, too, can be thought of as white and male spaces, given the lack of diversity among partners. And, of course, even in spaces that seem numerically diverse, group-identified sub-spaces can still exist, some by choice,

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62. Anderson, *supra* note 1, at 13.

63. On the problem of scholars reproducing the Black/white paradigm, see Juan F. Perea, *The Black/White Binary Paradigm of Race: The 'Normal Science' of American Racial Thought*, 85 CALIF. L. REV. 1213, 1218 (1997).

64. Anderson, *supra* note 1, at 11–13; see also Elijah Anderson, *The Iconic Ghetto*, 642 ANNALS AMER. ACAD. POL. & SOC. SCI. 6, 8 (June 4, 2012). As another observer put it in describing Anderson's conceptualization of the "black space," all Blacks "come from the ghetto and they carry the ghetto with them, representing its putative danger, crime, and poverty." Bouie, *supra* note 46.

65. Anderson, *supra* note 1, at 19; see also ELIJAH ANDERSON, *THE COSMOPOLITAN CANOPY* (2011).

66. See Adrienne Rich, *Compulsory Heterosexuality and Lesbian Existence*, 5 SIGNS (SPECIAL ISSUE) 631, 632–40 (1980).

some by circumstances. Among law students, there are affinity groups such as BLSA, LALSA, APALSA, NALSA, and OUTLaw.<sup>67</sup>

And of course, there are other types of spaces as well. Jewish spaces and Catholic spaces. Poor spaces and wealthy spaces. Progressive spaces and conservative spaces. Ableist spaces, and disabled spaces. The list goes on. My goal is not to create an exhaustive taxonomy of spaces. But I will point to an aspect of these spaces that may not be apparent, that requires knowing, and that is this: what holds together and reinforces each of these spaces are the rebars of history and law. In the area of gender, one has only to think of the Court's decision in *Muller v. Oregon*, upholding limitations on women's ability to work or contract for "the well-being of the race."<sup>68</sup> Or *Hoyt v. Florida* upholding the exclusion of women from jury service,<sup>69</sup> or *Bradwell v. Illinois*, upholding the exclusion of women from the practice of law.<sup>70</sup> And of course race is structurally embedded as well.<sup>71</sup> One has only to think of *Dred Scott v. Sanford*, in which Justice Taney concluded that Blacks were beings "of an inferior order . . . unfit to associate with the white race."<sup>72</sup> Or of the Court's decision in *Plessy v. Ferguson*, enshrining the doctrine of "separate but equal."<sup>73</sup>

Or of the *Insular Cases*,<sup>74</sup> in which the Court gave its blessing to the unequal treatment of Puerto Rico, a decision tinged with racial

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67. The mentioned affinity groups are common across most law schools and support Black, Latinx, Asian American and Pacific Islander, Native American, and LGBTQIA law students.

68. 208 U.S. 412, 422 (1908).

69. 368 U.S. 57, 69 (1961).

70. 83 U.S. 130, 142 (1873).

71. As one scholar has written: "It is hard to understate the central significance of geographical themes—space, place, and mobility—to the social and political history of race relations and antiblack racism in the United States . . . [S]egregation, integration, and separation are spatial processes . . . [and] spatial experiences." DAVID DELANEY, *RACE, PLACE, AND THE LAW: 1836–1948*, at 9 (1998).

72. 60 U.S. 393, 407 (1856).

73. 163 U.S. 537, 537–38 (1896); *id.* at 592 (Harlan, J., dissenting).

74. Of course, the *Insular Cases* are actually a cluster of decisions. See *Huus v. N.Y. & P.R. S.S. Co.*, 182 U.S. 392, 397 (1901) (holding that a vessel engaged in trade between Puerto Rico and New York is engaged in coastal trade and not foreign trade); *Downes v. Bidwell*, 182 U.S. 244, 287 (1901) (holding that Puerto Rico did not become a part of the United States within the meaning of Article I, Section 8 of the Constitution); *Armstrong v. United States*, 182 U.S. 243, 244 (1901) (invalidating tariffs imposed on goods exported from the United States to Puerto Rico after ratification of the treaty between the United States and Spain); *Dooley v. United States*, 182 U.S. 222, 236 (1901) (holding that the right of the President to exact duties on imports into the United States from Puerto Rico ceased after the ratification of the peace treaty between the United States and Spain); *Goetze v. United States*, 182 U.S. 221, 222 (1901) (holding that Puerto Rico

bias.<sup>75</sup> Or *Johnson v. McIntosh*,<sup>76</sup> invoking the “doctrine of discovery” and endorsing “manifest destiny” to consign American Indians to the status of occupants, not owners, of land. Or of the Court’s many decisions, such as *Palmer v. Thompson*<sup>77</sup> and *Memphis v. Greene*,<sup>78</sup> turning a blind eye to the law’s role in enabling and maintaining segregation. For that matter, think of this country’s founding document, which codified inequality while professing its opposite, which ensured not only that its *polis* would be white, but that the country, at least as originally conceived, would be *for* whites. Think too of the constitutional convention itself which, given who was present and who was not, has been described as a “conspicuously ‘white space.’”<sup>79</sup>

In short, white and other spaces are products of both history and law, a point that Anderson elides.<sup>80</sup> There is something else to be said about spaces. To be sure, spaces can be physical places. They can be found on a city’s grid. But they don’t have to be. As other scholars have pointed out, “[S]pace is also meaning. It is expressive and symbolic [and] it is educative.”<sup>81</sup> Space has even been described as “the implicit and explicit dialogue, processes, and practices that define relationships.”<sup>82</sup>

Which brings me back to law schools. On the surface at least, law schools are no longer exclusively male, though the ideology remains masculinist.<sup>83</sup> Once exclusively for the children of the privileged, law

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and Hawaii were not foreign countries within the meaning of United States tariff laws); *De Lima v. Bidwell*, 182 U.S. 1, 200 (1901) (holding that, once Puerto Rico was acquired by the United States through cession from Spain, it was not a “foreign country” within the meaning of tariff laws).

75. Juan R. Torruella, *Ruling America’s Colonies: The Insular Cases*, 32 YALE L. & POL’Y REV. 57, 68 (2013) (“[A] definite tinge of racial bias is discernible in several of the plurality opinions.”).

76. 21 U.S. 543 (1823). For a fascinating discussion of the case, see Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 HARV. L. REV. 1787, 1818–20 (2019).

77. 403 U.S. 217, 227 (1971) (finding no constitutional violation in city’s decision to close all of its swimming pools rather than integrate them).

78. 451 U.S. 100, 129 (1981) (finding no constitutional violation in city’s decision to close a street in a white neighborhood, which had the effect of limiting an adjacent Black neighborhood’s access to a public park).

79. Joe R. Feagin, *Foreword* to WENDY LEO MOORE, *REPRODUCING RACISM: WHITE SPACE, ELITE LAW SCHOOLS, AND RACIAL INEQUALITY* i, ix (2008).

80. Anderson, *supra* note 1.

81. Lua Kamál Yuille, Rúhíyyih Nikole Yuille & Justin A. Yuille, *Love as Justice*, 26 LANGSTON HUGHES REV. 49, 49 (2020).

82. Heidi Lasley Barajas & Amy Ronnkvist, *Racialized Space: Framing Latino and Latina Experience in Public Schools*, 109 TCHR. COLL. REC. 1517, 1521 (2007).

83. See generally LANI GUINIER, MICHELLE FINE & JANE BALIN, *BECOMING GENTLEMEN:*

schools are less so now. But law schools, by almost any definition, are still white spaces.<sup>84</sup> Indeed, the whiteness of some of the top law schools is all the starker because they are adjacent to Black spaces—think the University of Chicago and the South Side, or Yale in New Haven, or Columbia Law School next to Harlem. Beyond these three schools, however, almost all law schools are white in the racial sense Anderson means.<sup>85</sup> Literally, white students predominate, and Blacks are “typically absent, not expected, or marginalized when present.”<sup>86</sup> But the point I want to make goes beyond race, beyond phenotype. In short, even law schools at HCBUs—law schools whose student bodies and faculty are overwhelmingly Black or Brown—are in many ways white spaces. I elaborate upon this below.

## II. THE LAW SCHOOL AS A WHITE SPACE

The goal of this Part is simple: it makes the argument that most law schools are white spaces. For starters, most law schools are white spaces by virtue of their numbers. Black students in particular are rare, especially Black male students.<sup>87</sup> But the larger point is that law

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WOMEN, LAW SCHOOL, AND INSTITUTIONAL CHANGE (1997) (discussing the experiences of women as law students).

84. This is not to suggest that law schools are open spaces in all other respects. Law schools remain ableist, with intolerable but taken for granted hurdles for students who suffer from physical or mental disabilities. Law schools also remain less-than-open when it comes to religion. It is not uncommon for law schools to close school on Christian holidays but remain open on Jewish holidays or Muslim holidays. Finally, notwithstanding that this country is increasingly diverse, all law schools make clear that the language of law is English, with some Latin thrown in. All of this sends an expressive message about who belongs and who does not.

85. Anderson, *supra* note 1.

86. *Id.* at 1.

87. For example, in 2017, the 1L class at Harvard Law School had only 40 Black students out of a total 1L class of 560. Jordan Kennedy, *Update: Black Enrollment at HLS*, HARV. BLACK L. STUDENTS ASS'N (Nov. 30, 2018), <https://orgs.law.harvard.edu/blsa/2018/11/30/update-black-enrollment-at-hls> [https://perma.cc/77SU-HLSJ]. Consider numbers from law schools in New York State regarding the percentage of Black students in their entering classes in 2019. Columbia had the largest percentage of Black students, representing 10.6% of its entering class. The smallest percentages belonged to Cardozo (4.4%), Brooklyn (3.2%), and New York Law School (2.6%). See *Section of Legal Education - ABA Required Disclosures*, A.B.A., <http://www.abarequireddisclosures.org/Disclosure509.aspx> (last visited Sept. 5, 2021) (select year “2019” and selection “JD Enrollment and Ethnicity” under “Compilation - All Schools Data”; then click “Generate Report”). Black men are particularly rare. For example, Brooklyn Law School’s third year class in 2020 contained just one Black male. See *2020 Standard 509 Information Report*, BROOKLYN L. SCH. 2, <https://www.brooklaw.edu/-/media/Brooklaw/Files/Standard-509-Info-Report-2020.pdf> [https://perma.cc/3QNC-L9DW].



schools function as white spaces in other ways as well, including in what they teach, in how they teach, and even in their architecture. As will soon be apparent, I am ultimately using whiteness in a way that goes beyond phenotype.<sup>88</sup> But for the sake of simplicity, it makes sense to begin with demographics and numbers.

#### A. THE NUMBERS

At least from the point of view of students and faculty of color, to claim that law schools are white spaces may be on par with asserting the obvious. One can even imagine a collective “Duh” in response. By contrast, many white students may not think of their schools as white spaces at all.<sup>89</sup> In fact, many may think of their schools as extremely diverse. Part of this difference in perception is attributable to the fact that the country itself is racially segregated. Most whites live in white neighborhoods.<sup>90</sup> Places of worship are racially divided.<sup>91</sup> And notwithstanding the Court’s decision in *Brown v. Board of Education* ending *de jure* segregation,<sup>92</sup> segregation in education remains pervasive and has only increased in the last three decades.<sup>93</sup> As such, for many

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88. The Yale theologian Willie James Jennings provides a useful definition. He uses “whiteness” to denote “a way of being in the world and seeing the world that forms cognitive and affective structures able to seduce people into its habitation and its meaning making.” WILLIE JAMES JENNINGS, *AFTER WHITENESS: AN EDUCATION IN BELONGING* 9 (2020).

89. See Russell K. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093, 1120 (2008) (discussing how different racial groups may perceive a similar event differently).

90. William H. Frey, *Report: Even as Metropolitan Areas Diversify, White Americans Still Live in Mostly White Neighborhoods*, BROOKINGS (Mar. 23, 2020), <https://www.brookings.edu/research/even-as-metropolitan-areas-diversify-white-americans-still-live-in-mostly-white-neighborhoods> [https://perma.cc/AAN6-P6NM].

91. See Kyle Haselden, “11 A.M. Sunday Is Our Most Segregated Hour,” N.Y. TIMES, Aug. 2, 1964, at 9 (“Everyone knows that 11 o’clock on Sunday morning is the most segregated hour in American life.”). Indeed, Martin Luther King made a similar observation in an interview on *Meet the Press* in 1960. See *Meet the Press* (NBC television broadcast Apr. 17, 1960). Seventy years later, religious observance remains very much segregated. See Cathy Lynn Grossman, *Sunday Is Still the Most Segregated Day of the Week*, AM. MAG. (Jan. 16, 2015), <https://www.americamagazine.org/content/all-things/sunday-still-most-segregated-day-week> [https://perma.cc/QQ5C-WP7K]; see also Greg K. Deal, *Diversity Dream: Sunday Still the Most Segregated Day of the Week*, INDEX-JOURNAL (Oct. 17, 2020), [https://www.indexjournal.com/news/diversity-dream-sunday-still-the-most-segregated-day-of-the-week/article\\_d08d89c3-935d-57a5-86dd-31b4f8be17fd.html](https://www.indexjournal.com/news/diversity-dream-sunday-still-the-most-segregated-day-of-the-week/article_d08d89c3-935d-57a5-86dd-31b4f8be17fd.html) [https://perma.cc/Q9FU-EWQW].

92. 347 U.S. 483 (1954).

93. See Erica Frankenberg, Jongyeon Ee, Jennifer B. Ayscue & Gary Orfield, *Harm-*

whites, being in the overwhelming majority may seem natural, taken for granted. For these whites, it is as “taken for granted” as the fact that the U.S. Senate has only three Black members, and has had only a total of eleven Blacks<sup>94</sup> of out almost 2000 in our history.<sup>95</sup> It is as “taken for granted” as entering a high-end restaurant and seeing only white patrons.<sup>96</sup> For many whites, law schools may seem comparatively diverse; certainly many law schools promote themselves as diverse, making sure their websites and promotional brochures show diverse faces, in the process engaging in what Nancy Leong might call a type of identity capitalism.<sup>97</sup> Thinking of the culture wars over affirmative action—from *Grutter v. Bollinger*,<sup>98</sup> to *Fisher v. University of Texas*<sup>99</sup> to the recent suits against Yale and Harvard<sup>100</sup>—students may even see their schools as *too* diverse.

My point is not to weigh in on the merits of affirmative action. But if the question is whether law schools are white spaces, then numbers

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*ing Our Common Future: America's Segregated Schools 65 Years after Brown*, C.R. PROJECT 4 (May 10, 2019), <https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/harming-our-common-future-americas-segregated-schools-65-years-after-brown/Brown-65-050919v4-final.pdf> [https://perma.cc/K4CE-9LGS] (finding that “intense levels of segregation . . . are on the rise once again”).

94. See *Ethnic Diversity in the Senate*, U.S. SENATE., [https://www.senate.gov/artandhistory/history/common/briefing/minority\\_senators.htm](https://www.senate.gov/artandhistory/history/common/briefing/minority_senators.htm) [https://perma.cc/USF2-AW9L].

95. See *Featured Biographies*, U.S. SENATE, <https://www.senate.gov/senators/featured-biographies.htm> [https://perma.cc/KQ8X-HUF2].

96. Cf. Osayi Endolyn, *Trapped in While Dining Out: When White People Make Me Part of Their Show*, WASH. POST (Jan. 7, 2020), [https://www.washingtonpost.com/lifestyle/food/trapped-in-while-dining-out-how-racism-often-makes-me-part-of-someone-elses-show/2020/01/06/4169c6d8-2c11-11ea-bcd4-24597950008f\\_story.html](https://www.washingtonpost.com/lifestyle/food/trapped-in-while-dining-out-how-racism-often-makes-me-part-of-someone-elses-show/2020/01/06/4169c6d8-2c11-11ea-bcd4-24597950008f_story.html) [https://perma.cc/JVL2-VHS4] (discussing the “white gaze” felt by a Black woman in various restaurants, bars, and other public settings).

97. See generally NANCY LEONG, *IDENTITY CAPITALISTS: THE POWERFUL INSIDERS WHO EXPLOIT DIVERSITY TO MAINTAIN INEQUALITY* (2021) (coining the term “identity capitalism”).

98. 539 U.S. 306, 343 (2003) (upholding Michigan Law School’s “narrowly tailored use of race in admissions” as not violating the Equal Protection Clause).

99. 136 S. Ct. 2198 (2016) (finding constitutional University of Texas’s admission policy using race as a factor in their holistic review).

100. *Students for Fair Admissions v. President of Harvard Coll.*, 980 F.3d 157, 203–04 (2020) (ruling that Harvard admission practices were constitutional); see Anemona Hartocollis, *The Justice Dept. Drops a Lawsuit Accusing Yale of Discriminating Against Asian-American and White Applicants*, N.Y. TIMES (Feb. 3, 2021), <https://www.nytimes.com/2021/02/03/us/the-justice-dept-drops-a-lawsuit-accusing-yale-of-discriminating-against-asian-american-and-white-applicants.html> [https://perma.cc/2Q8P-K4]X] (detailing how, with the change in the administration, the Justice Department withdrew its lawsuit against Yale).

have to be part of the answer. For example, in 2019, Latinx students accounted for 12.7% of students at ABA accredited law schools, even though Latinx individuals make up approximately 18.3% of the population in the United States.<sup>101</sup> The number of Black students is even smaller. Blacks make up just 7.94% of law students, though Blacks make up 13.4% of the population.<sup>102</sup> Indeed, the percentage of incoming Black students *decreased* between 2018 and 2019.<sup>103</sup> And even these numbers tell only part of the story.<sup>104</sup> As an analysis by Miranda Li, Phillip Yao, and Goodwin Liu reveals, the Black and Latinx students that are enrolled in law schools are disproportionately enrolled in lower-ranked schools.<sup>105</sup> (Their study also found that women are disproportionately enrolled at lower-ranked schools as well.)<sup>106</sup> At the top 30 law schools, Latinx students make up just 9% of the students; Blacks only 6%.<sup>107</sup> The numbers for Native American law students compared to their population are even more underwhelming.<sup>108</sup>

The findings from a recent survey on diversity and inclusion, conducted by the Law School Survey of Student Engagement, also warrant mention. While 31% of white law students report having a strong sense of belonging at their schools, only 21% of Native American and Black students strongly agreed with the statement that they feel “part of the community.”<sup>109</sup> Women of color were even less likely to feel part of the law school community.<sup>110</sup> Moreover, while only 9% of white students noted they felt uncomfortable being themselves on campus, the

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101. See *Law School Enrollment by Race & Ethnicity (2019)*, ENJURIS, <https://www.enjuris.com/students/law-school-race-2019.html> [<https://perma.cc/8R98-HTZQ>].

102. *Id.*

103. *Id.* (“In 2018, Black students made up 7.91% of total incoming law students, but in 2019, they accounted for 7.57% of incoming law students.”).

104. *Id.*

105. Miranda Li, Phillip Yao & Goodwin Liu, *Who’s Going to Law School*, AM. B. FOUND. (2020), [http://www.americanbarfoundation.org/uploads/cms/documents/who\\_is\\_going\\_to\\_law\\_school\\_policy\\_brief.pdf](http://www.americanbarfoundation.org/uploads/cms/documents/who_is_going_to_law_school_policy_brief.pdf) [<https://perma.cc/C2AA-DDCS>].

106. *Id.*

107. Gabriel Kuris, *What Underrepresented Law School Applicants Should Know*, U.S. NEWS & WORLD REP. (June 8, 2020), <https://www.usnews.com/education/blogs/law-admissions-lowdown/articles/what-underrepresented-law-school-applicants-should-know> [<https://perma.cc/U88T-4VG9>].

108. See *Law School Enrollment by Race & Ethnicity (2019)*, *supra* note 101.

109. See *2020 Diversity & Exclusion: 2020 Annual Survey Results*, LAW SCH. SURV. OF STUDENT ENGAGEMENT 9, <https://lssse.indiana.edu/wp-content/uploads/2020/09/Diversity-and-Exclusion-Final-9.29.20.pdf> [<https://perma.cc/8H83-SWP8>].

110. *Id.* (finding 20% of Black women reported feeling “part of the community”).

percentages of Black and Latinx students who reported feeling uncomfortable being themselves were 25% and 18% respectively.<sup>111</sup>

While the focus of this Part is diversity numbers at law schools, the fact is these numbers are directly related to the diversity numbers in practice, especially at law firms. A recent survey of 238 large firms found that fewer than 5% of associates are Black, a number that drops to 2% for equity partners.<sup>112</sup> By contrast, white lawyers make up almost 90% of the equity partners.<sup>113</sup> All of this contributes to law's reputation as "The Whitest Profession."<sup>114</sup> It also explains why lawyers of color continue to hear, "You don't look like a lawyer."<sup>115</sup>

Again, the numbers are the argument. But they are not the only argument. Again, it is my contention that even majority Black law schools—think, for example, of Howard Law School, the alma mater of Justice Thurgood Marshall, Charles Hamilton Houston, and Pauli Murray—function on some level as white spaces, especially when we think of white as connoting more than race. To make this argument, one has only to think of the law school curriculum, and how law is taught. However, before turning to these aspects, I turn to an aspect of law schools that may at first seem less racially inflected: their architecture.

## B. ARCHITECTURE

In December 2020, Judge David Bernhard of the Nineteenth Judicial Circuit of Virginia made national news when he addressed the issue of whether his court "should permit a jury trial to take place in a courtroom gilded with portraits of jurists, particularly when they are overwhelmingly of white individuals peering down on an African American defendant."<sup>116</sup> The issue for the judge was not that the depicted white judges had ever expressed or exhibited any racial animus.<sup>117</sup> This was different than the ongoing debate over Confederate

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111. *Id.* at 10.

112. Meg McEvoy, *Analysis: Black Workers Are Under-Represented in Legal Industry*, BLOOMBERG L. (June 11, 2020), <https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-black-workers-are-under-represented-in-legal-industry> [<https://perma.cc/5XRK-8ZCX>].

113. *Id.*

114. Randall, *supra* note 38.

115. Tsedale M. Melaku, *Why Women and People of Color in Law Still Hear "You Don't Look Like a Lawyer"*, HARV. BUS. REV. (Aug. 7, 2019), <https://hbr.org/2019/08/why-women-and-people-of-color-in-law-still-hear-you-dont-look-like-a-lawyer> [<https://perma.cc/NJ5J-LR8R>].

116. Commonwealth v. Shipp, No. FE-2020-8, 2020 WL 7638843, at \*1 (Va. Cir. Ct. Dec. 20, 2020).

117. *Id.* at \*1-2.

monuments and what some have even called “cancel culture.”<sup>118</sup> Rather, the issue was the expressive message communicated by the “symbols that ornament the hallowed courtrooms of justice to favor a particular race or color.”<sup>119</sup> It is perhaps being generous to say Judge Bernhard made national news because of the motion before him. It is more likely he made national news—there were articles in *The Washington Post*, *The New York Times*, and other media<sup>120</sup>—because he ruled in favor of the defendant. Expressing concern that “portraits may serve as unintended but implicit symbols that suggest the courtroom may be a place historically administered by whites for whites, and that others are thus of lesser standing in the dispensing of justice,” the judge ruled that henceforth, trials before him would proceed “in a courtroom devoid of portraits in the furtherance of justice.”<sup>121</sup> Judge Bernhard’s decision is noteworthy for its willingness to reckon with the law’s implicit role in this country’s racial history. But the decision is also noteworthy in that it lends its support to an observation a young scholar made years earlier: that courtrooms, too, function as white spaces.<sup>122</sup>

Courtrooms are not law schools, but of course the “unintended symbols” are just as present. Portraits of past deans and prominent jurists “gild” the hallways and the classrooms, sending a message that the law school is “a place historically administered by whites for whites.”<sup>123</sup> The message may not be heard by all, but it is heard by

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118. Ahtra Elnashar, *As Monuments Come Down, Some Say Cancel Culture Is Accelerating*, ABC7 WLJA (July 6, 2020), <https://wjla.com/news/nation-world/as-monuments-come-down-some-say-cancel-culture-is-accelerating> [https://perma.cc/DN3B-A6DC].

119. *Shipp*, 2020 WL 7638843, at \*11.

120. See, e.g., Derrick Bryson Taylor, *Virginia Judge Won’t Try Black Man in Courtroom Lined With White Portraits*, N.Y. TIMES (Jan. 2, 2021), <https://www.nytimes.com/2021/01/01/us/virginia-judge-white-portraits.html> [https://perma.cc/Y8A2-NVQ8]; Justin Jouvenal, *Va. Judge Rules Black Defendant Can’t Get a Fair Trial in Courtroom Largely Featuring Portraits of White Judges*, WASH. POST (Dec. 22, 2020), [https://www.washingtonpost.com/local/legal-issues/courtroom-portraits-judges-ruling/2020/12/22/366c57a8-445e-11eb-975c-d17b8815a66d\\_story.html](https://www.washingtonpost.com/local/legal-issues/courtroom-portraits-judges-ruling/2020/12/22/366c57a8-445e-11eb-975c-d17b8815a66d_story.html) [https://perma.cc/6CVL-PGNX].

121. *Shipp*, 2020 WL 7638843, at \*11.

122. Amanda Carlin, Comment, *The Courtroom as White Space: Racial Performance as Noncredibility*, 63 UCLA L. REV. 450 (2016); see also Bennett Capers, *The Racial Architecture of Criminal Justice*, 74 SMU L. REV. 405 (2021) (noting that neo-classical courtrooms, in particular, owe their origin to the antebellum South and recall a history of segregated courtrooms); cf. JUDITH RESNICK & DENNIS CURTIS, REPRESENTING JUSTICE: INVENTION, CONTROVERSY, AND RIGHTS IN CITY-STATES AND DEMOCRATIC COURTR00MS 137 (2011).

123. *Shipp*, 2020 WL 7638843, at \*11.

some. Consider the description from Adrien Wing, a Black woman, of the first time she entered the Boyd Law Building at Iowa Law School, where she now teaches:

The law school was . . . shiny silver on the outside, gleaming in the winter sun. On the inside, I was struck by its traditional look. Throughout the main-floor lobby and hallways were many oil portraits—dead white males and some living ones. Their eyes stared out, emanating gravitas—wisdom and power. . . . The portraits seemed to say, “We are important. We are the law. This is our world.”<sup>124</sup>

Professor Wing’s experience is far from uncommon. Lani Guinier makes a similar observation in *Becoming Gentlemen*, in which she describes trying to find her voice in a room adorned by “the traditional larger-than-life portraits of white men . . . portraits [that] seemed to speak louder than I ever could.”<sup>125</sup> She later adds that “the gigantic male portraits had captured and frozen in time the alienation from class, race, and gender privilege we had felt as students. . . reminding us that silence was the price of our presence.”<sup>126</sup> Sociologist Wendy Leo Moore also notes the role of portraits in *Reproducing Racism*, her study of law schools. She notes such artwork can send “a tacit (and perhaps unintended) message that legal authority is properly in the hands of white people. People of color can participate as outsiders to the system, as protesters and observers, but not as legal actors.”<sup>127</sup> And it is not just portraits of past deans and jurists that can send messages of exclusion. The same can be said of the names of donors on classrooms, on moot court rooms, on benches, names which too often read as white. On the surface, these names may speak to the generosity of donors; but even these names send expressive messages about who the law school once served, who it serves now, who are its true legatees and beneficiaries. To students of color, even representations

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124. Adrien Katherine Wing, *Lessons from a Portrait: Keep Calm and Carry On*, in *PRESUMED INCOMPETENT: THE INTERSECTIONS OF RACE AND CLASS FOR WOMEN IN ACADEMIA* 356, 359 (Gabriella Gutiérrez y Muhs, Yolanda Flores Niemann, Carmen G. González & Angela P. Harris eds., 2012). At the time, Wing was not yet on the faculty; she was there to present a paper. Later, when she returns to the law school to begin teaching, she again takes notes of the portraits. “Now the portraits seemed to be silently screaming—intruder alert. Who is this woman?!” *Id.* at 360.

125. GUINIER ET AL., *supra* note 83, at 85–86.

126. *Id.* at 86–87.

127. MOORE, *supra* note 40, at 29.

of Lady Justice, almost invariably figured as white, can convey a message about the very whiteness of the law,<sup>128</sup> especially when subjected to a “black gaze.”<sup>129</sup> A “soul sister” she is not.<sup>130</sup>

It perhaps goes without saying that images have a cultural function, “are visual transformations of a certain awareness of the world,”<sup>131</sup> and can convey powerful messages, including ones of belonging. What may be less intuitive is that architecture too has a similar function, especially when we consider architecture expansively as “the physical world as we find it,” to borrow Lawrence Lessig’s definition.<sup>132</sup> Neal Katyal, for example, has written about how architecture can be designed to control crime, in part by excluding undesirable people.<sup>133</sup> Sarah Schindler has also written about architectural exclusion,<sup>134</sup> as has Deborah Archer with respect to highways.<sup>135</sup> Indeed,

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128. See Bennett Capers, *Blind Justice*, 24 YALE J.L. & HUMANS. 179 (2012) (discussing the messages conveyed by the whiteness of Lady Justice); see also Bennett Capers, *On Justitia, Race, Gender, and Blindness*, 12 MICH. J. RACE & L. 203 (2006) (discussing the symbolism of Justitia’s blindfold and the connotation that she is blind to race).

129. For more on the “black gaze,” see BELL HOOKS, *BLACK LOOKS: RACE AND REPRESENTATION* (1992), criticizing how Black people and blackness is portrayed in literature, film, and music; *RACE-ING ART HISTORY: CRITICAL READINGS IN RACE AND ART HISTORY* (Kymberly N. Pinder ed., 2002), analyzing how race impacts visual culture; and *WITH OTHER EYES: LOOKING AT RACE AND GENDER IN VISUAL CULTURE* (Lisa Bloom ed., 1999), demonstrating how art studies can adapt to include anti-racist and feminist perspectives.

130. Cf. Tanya E. Coke, Note, *Lady Justice May Be Blind, But Is She a Soul Sister? Race-Neutrality and the Ideal of Representative Juries*, 69 N.Y.U. L. REV. 327 (1994) (discussing racial diversity of juries).

131. RICHARD LEPPERT, *ART AND THE COMMITTED EYE: THE CULTURAL FUNCTIONS OF IMAGERY* 6 (1996).

132. Lessig, *supra* note 39, at 507. To be sure, it is not only legal scholars who define architecture broadly. One of the seminal monographs on architecture is Bruno Zevi’s *Architecture as Space*. In it, he defines architecture as “like a great hollowed-out sculpture which man enters and apprehends by moving about within it.” BRUNO ZEVI, *ARCHITECTURE AS SPACE: HOW TO LOOK AT ARCHITECTURE* 22 (Joseph A. Barry ed., Milton Gendel trans., Horizon Press 1957) (1948). Zevi also defines architecture as our “environment, the stage on which our lives unfold.” *Id.* at 32.

133. Neal Kumar Katyal, *Architecture as Crime Control*, 111 YALE L.J. 1039 (2002) (discussing architectural mechanisms for crime control).

134. Sarah Schindler, *Architectural Exclusion: Discrimination and Segregation Through Physical Design of the Built Environment*, 124 YALE L.J. 1934, 1939 (2015) (examining “the sometimes subtle ways that the built environment has been used to keep certain segments of the population—typically poor people and people of color—separate from others”).

135. Deborah N. Archer, “White Men’s Roads Through Black Men’s Homes”: *Advancing Racial Equity Through Highway Reconstruction*, 73 VAND. L. REV. 1259 (2020) (detailing the role highway construction has played in segregating cities along lines of race and proposing that jurisdictions consider racial equity impact going forward).

for architectural planning scholars, it is often taken as a given that “monumental structures of concrete and steel” are “a way of engineering relationships among people that, after a time, becomes just another part of the landscape.”<sup>136</sup> What may be less intuitive still is that the same is often true of law school architecture.

To give just one example of how the architecture of law schools can be raced,<sup>137</sup> permit me to focus on the architecture found at many elite law schools: the architecture in the Gothic Revival style, sometimes referred to as Collegiate Gothic. As the architectural historian Joanna Merwood-Salisbury notes, Americans turned to the Gothic Revival style in the nineteenth century “to reinforce their claim as worthy inheritors of the democratic tradition begun in ancient Greece.”<sup>138</sup> There was “an overt link,” she adds, “between the vogue for the Gothic Revival and an emerging American understanding of race and racial difference.”<sup>139</sup> For adherents of the Anglo-Saxon movement and “narrative of American origins, the Gothic style symbolized the racial connection between the new American race and medieval Germanic tribes with Aryan roots.”<sup>140</sup> It “suggested a privileged cultural and racial lineage of which they might claim to be descendants.”<sup>141</sup>

To be sure, most law students may never become aware of this architectural history. But to students of color, first-generation students, and many other outsiders, this architecture does exude a type of privilege and grandiosity that is often associated with whiteness. It conveys not only exclusivity, but also exclusion. It certainly harkens back to a time when students of color were excluded. All of this can leave minority students with the feeling that they are “in the master’s

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136. Langdon Winner, *Do Artifacts Have Politics?*, 109 DAEDALUS 121, 124 (1980).

137. Critical race theory scholars have long argued that we should think of “race” as a verb. See, e.g., Kendall Thomas, *The Eclipse of Reason: A Rhetorical Reading of Bowers v. Hardwick*, 79 VA. L. REV. 1805, 1806–07 (1992) (“[W]e are ‘raced’ through a constellation of practices that construct and control racial subjectivities.”); John A. Powell, *The “Racing” of American Society: Race Functioning as a Verb Before Signifying as a Noun*, 15 LAW & INEQ. 99 (1997).

138. Joanna Merwood-Salisbury, *The “New Birth of Freedom”: The Gothic Revival and the Aesthetics of Abolitionism*, in RACE AND MODERN ARCHITECTURE: A CRITICAL HISTORY FROM THE ENLIGHTENMENT TO THE PRESENT 116, 126 (Irene Cheng, Charles L. Davis II & Mabel O. Wilson eds. 2020).

139. *Id.*

140. *Id.* at 127. For more on the linkage of Gothic architecture with race, see Irene Cheng, *Structural Racialism in Modern Architectural Theory*, in RACE AND MODERN ARCHITECTURE: A CRITICAL HISTORY FROM THE ENLIGHTENMENT TO THE PRESENT, *supra* note 138, at 134, 137–43.

141. Merwood-Salisbury, *supra* note 138, at 127.



house; the master defines our realities—and our possibilities.”<sup>142</sup> It adds weight to the words of Kimberly Mutcherson, the first Black gay woman to be the Dean at Rutgers Law School: “I remember as a student walking through the halls of my predominantly white law school (like most law schools) and being struck by the disruption of my presence. That law school was not built for me, nor could its founders have contemplated future law students like me.”<sup>143</sup>

It is here that I want to support my argument that even law schools at historically Black colleges and universities can come across as white—or at least white aspiring—spaces. Consider Howard University and its law school again. The very first building on Howard’s campus was a composite of Gothic and Second Empire styles.<sup>144</sup> Although the law school, founded in 1869, has changed locations several times, since 1974 it has operated out of buildings acquired from the purchase of Dunbarton College of the Holy Cross.<sup>145</sup> Its architectural style? Collegiate Gothic. All of this can make even a majority-minority law school seem a “white space,” a place for minorities to become facsimiles of white jurists.

This becomes especially true when one combines architecture with what is taught, and how it is taught. These are the topics taken up below.

### C. WHAT LAW IS TAUGHT

Discussions about adding race to the 1L curriculum, and indeed to the entire law school curriculum, seem ubiquitous. In spring 2020, Boston University Law School held an entire conference on the subject.<sup>146</sup> In New York, a consortium of professors from area law schools

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142. Leslie Espinoza, *A Vision Towards Liberation*, 19 CHICANO-LATINO L. REV. 193, 193 (1998).

143. Kimberly M. Mutcherson, *Foreword to 2020 Annual Survey Results, 2020 Diversity and Exclusion*, LAW SCH. SURV. OF STUDENT ENGAGEMENT 4, <https://lsse.indiana.edu/wp-content/uploads/2020/09/Diversity-and-Exclusion-Final-9.29.20.pdf> [<https://perma.cc/8H83-SWP8>].

144. Kent Boese, *Lost Washington: Old Main, Howard University*, GREATER GREATER WASH. (Oct. 2, 2009), <https://ggwash.org/view/3020/lost-washington-old-main-howard-university> [<https://perma.cc/7YJT-VGT4>].

145. See *Our History*, HOW. L. SCH., <http://law.howard.edu/content/our-history> [<https://perma.cc/4KM3-F2MB>].

146. Miriam Fauzia, *BU School of Law Holds Symposium on Racial Inequality in Legal Education*, DAILY FREE PRESS (Boston) (Mar. 1, 2020), <https://dailyfreepress.com/2020/03/01/bu-school-of-law-holds-symposium-on-racial-inequality-in-legal-education> [<https://perma.cc/LA23-3VMA>].

now meets regularly to discuss this topic.<sup>147</sup> Across the country, schools are considering adding mandatory race-consciousness classes to the curriculum.<sup>148</sup> And just recently, Shaun Ossei-Owusu, a law professor at the University of Pennsylvania Law School, made waves in an article for the *ABA Journal*, in which he offered an apologia from a minority law professor to minority students: “I feel compelled to apologize, not because of some personal responsibility, but because the learning of law—particularly for racial minorities—can be intellectually violent. . . . [I]t is also unforgiving, can feel unrelenting and often goes unnamed.”<sup>149</sup> Part of this violence, he wrote, results from the silence of “casebooks and legal authorities” when it comes to “race-conscious messaging.”<sup>150</sup> In its place is “racial silence-cum-neutrality” in legal education and the fact that “racial literacy is not a highly valued good.”<sup>151</sup> Ossei-Owusu joins others in calling for less race-blindness and more race-consciousness in the curriculum.<sup>152</sup>

While these endeavors are important, the argument I make here is somewhat different, and perhaps broader. The problem is not that race is absent from the classroom. It is that the whiteness of the curriculum goes unsaid and unremarked upon. It is like the whiteness of the portraits that line law school hallways, or the whiteness of Lady Justice. The whiteness itself is too often invisible, analogous to what I have elsewhere described as “white letter law.”<sup>153</sup>

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147. Jill Backer, *New York City-Area Law Schools Form Law School Anti-Racism Consortium*, N.Y. L.J. (Jan. 29, 2021), <https://www.law.com/newyorklawjournal/2021/01/29/new-york-city-area-law-schools-form-law-school-anti-racism-consortium> [https://perma.cc/6H63-HSFQ].

148. Keeshea Turner Roberts, *Law Schools Push to Require Anti-Racism Training and Courses*, A.B.A. (Dec. 14, 2020), [https://www.americanbar.org/groups/crsj/publications/human\\_rights\\_magazine\\_home/rbgs-impact-on-civil-rights/law-schools-push](https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/rbgs-impact-on-civil-rights/law-schools-push) [https://perma.cc/44YW-VUSJ].

149. Shaun Ossei-Owusu, *For Minority Law Students, Learning the Law Can Be Intellectually Violent*, A.B.A. J. (Oct. 15, 2020), [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) [https://perma.cc/FT7N-54Q5].

150. *Id.*

151. *Id.*

152. “Legal education is the problem,” writes Ossei-Owusu, “not students.” Similarly, he writes, “Casebooks will not supply you with the robust information you need on issues of racial justice.” *Id.*

153. I first introduced the concept “white letter law” in two earlier articles. See Bennett Capers, *Reading Back, Reading Black*, 35 HOFSTRA L. REV. 9, 19 (2006); Bennett Capers, *The Trial of Bigger Thomas: Race, Gender, and Trespass*, 31 N.Y.U. REV. L. & SOC. CHANGE 1, 7–8 (2006). Unlike black letter law, which brings to mind statutory law, written law, and the easily discernible law set forth as black letters on a white page, “white letter law” suggests societal and normative laws that stand side by side with and often

It is embedded in what we teach, and in the common law system we have inherited. Again, the phrase “taken for granted” comes to mind. It is in the way we teach students that the Constitution is the highest law of the land, with at most a passing reference to the whiteness of its ratifiers and the whiteness of its outlook, and then take as a given that there is no higher public calling than serving in a position—judge, or President—that requires one to “support and defend the Constitution,” however much it is anti-democratic and locks in white advantage.<sup>154</sup> It is the way manifest destiny in property law may be mentioned, but is not seen as a stain on property law itself, or the way we problematize the reasonable person standard in criminal law and tort law, and then move on. As Ion Meyn has recently pointed out, it is even there in the way the rules of civil procedure differ from the rules of criminal procedure, the latter of which has always been raced.<sup>155</sup> Equally important, it is there in what is not taught, or taught only sparingly when professors insist, such as the law of empire. Most troubling, we 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. To be sure, we teach students how to be agents of change, but change at the margins. There is a reason Duncan Kennedy argues that law schools reproduce hierarchy.<sup>156</sup> At bottom, we teach students how to rearrange the apples in the apple cart. We don’t teach students how to upset the apple cart altogether.

Since one of the core courses I teach is criminal law, I will expand a bit on criminal law. Recall that a typical criminal law course covers the rationales for punishment, the *mens rea* and *actus reus* requirements, causation and concurrence, a handful of defenses, and then illustrates the foregoing by doing deep dives into the law of homicide, and the law of sexual assault. There have been significant critiques of

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undergird black letter law but, as if inscribed in white ink on white paper, remain invisible to the naked eye.

154. As numerous scholars have pointed out, the Constitution’s amendment rule—Article V—renders the U.S. Constitution “one of the most inflexible” ever written. See e.g., ZACHARY ELKINS, TOM GINSBURG & JAMES MELTON, THE ENDURANCE OF NATIONAL CONSTITUTIONS 101 (2009); Aziz Huq, *The Function of Article V*, 162 U. PA. L. REV. 1165, 1166 (2014). This locks-in the preferences of the founders, making change by newcomers all but impossible.

155. Ion Meyn, *Why Civil and Criminal Procedure Are So Different: A Forgotten History*, 86 FORDHAM L. REV. 697 (2017); Ion Meyn, *Constructing Separate and Unequal Courtrooms*, 63 ARIZ. L. REV. 1 (2021).

156. Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 J. LEGAL EDUC. 591, 591–92 (1982).

the typical criminal law course, especially insofar as it presents a distorted view of the criminal system, ignoring that ours is a system of misdemeanor and quotidian crimes, and that the plea bargaining system *is* the criminal system.<sup>157</sup> Moreover, there have been calls to add more discussion of abolitionism to criminal law casebooks.<sup>158</sup> But the larger issue is that most professors teach criminal law as a given. Many of us teach it in the hopes that some students will become prosecutors, and others criminal defense lawyers, and others judges. In other words, the aspiration of criminal law is that students will practice criminal law. But this necessarily means students will become participants in the current criminal system, even as the criminal system over-incarcerates such that 1 in 3 Americans now has an arrest record,<sup>159</sup> criminalizes poverty,<sup>160</sup> and polices along lines of race and fosters unequal citizenship rather than equal citizenship.<sup>161</sup> Thus, even the student who comes to law school hoping to right wrongs in the criminal system will likely find that, at most, we are teaching her how to secure a career *within* the criminal system, even if on the side of defense. Again, we are teaching her how to rearrange apples in the cart. Not how to upset it.

Quite simply, from the point of view of minority students, the very subjects we teach reflect an “allegiance to a legal system that

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157. The most sustained critique comes from Alice Ristroph. See Alice Ristroph, *The Curriculum of the Carceral State*, 120 COLUM. L. REV. 1631 (2020).

158. See Amna Akbar, *Teaching Penal Abolition*, LAW & POL. ECON. BLOG (July 15, 2019), <https://lpeproject.org/blog/teaching-abolition> [<https://perma.cc/MK97-TBYZ>].

159. *Barriers to Work: People with Criminal Records*, NAT’L CONF. STATE LEGISLATURES (July 17, 2018), <http://www.ncsl.org/research/labor-and-employment/barriers-to-work-individuals-with-criminal-records.aspx> [<https://perma.cc/P8QA-BYMM>]; *Americans with Criminal Records*, SENTENCING PROJECT, <https://www.sentencingproject.org/wp-content/uploads/2015/11/Americans-with-Criminal-Records-Poverty-and-Opportunity-Profile.pdf> [<https://perma.cc/AX8H-W9EC>].

160. See generally Monica Bell, Stephanie Garlock, & Alexander Nabavi-Noori, *Toward a Demosprudence of Poverty*, 69 DUKE L.J. 1473 (2020). It is telling that the median income of incarcerated individuals prior to their incarceration was just \$19,185, and even less for incarcerated women and people of color. See Bernadette Rabuy & Daniel Kopf, *Prisons of Poverty: Uncovering the Pre-Incarceration Incomes of the Imprisoned*, PRISON POL’Y INITIATIVE (July 9, 2015), <https://www.prisonpolicy.org/reports/income.html> [<https://perma.cc/GWH6-GYGL>].

161. See, e.g., Bennett Capers, *Criminal Procedure and the Good Citizen*, 118 COLUM. L. REV. 653, 686–95 (2018). As Michelle Alexander has argued, this policing functions to maintain white advantage and minority subordination. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010) (arguing that mass incarceration is metaphorically the new Jim Crow because the criminal justice system disproportionately incarcerates Black men).

since its inception has systematically oppressed black people.”<sup>162</sup> 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”<sup>163</sup>—“fair, egalitarian, responsive to needs of all of its citizens, and truly democratic in all respects, including its policing”<sup>164</sup>—we are sure to disappoint them.<sup>165</sup> Instead, we are teaching them a law that has always been inflected with white interests. And of course, what law is taught is deeply connected to how law is taught, a point I take up below.

#### D. HOW LAW IS TAUGHT

Lastly, *how* the law is taught can contribute to the sense that law schools are white spaces. Consider the findings of Elizabeth Mertz, a legal anthropologist and pioneer in the field of law and language. In her book *The Language of Law Schools: Learning to “Think Like a Lawyer,”* Mertz examined transcripts and listened to recordings of contracts classes taught at law schools around the country.<sup>166</sup> She did so to explore whether law school pedagogy has a shared linguistic structure and/or epistemological method that impacts inclusivity for students.<sup>167</sup> Drawing on methods of linguistic anthropology and sociolinguistics, Mertz found common messages across law schools as they teach students to “think like a lawyer.” Specifically, she found that law schools train students to focus on form, authority, and legal-linguistic context, and to discount and even devalue morality, content, and social context.<sup>168</sup>

By way of illustration, consider a typical law school classroom in which the professor uses the Socratic method. From the point of view of the professor, and even some students, the Socratic Method may be viewed as a useful, neutral tool. Indeed, the University of Chicago Law School offers this description:

University of Chicago professors who rely on the Socratic Method today use participatory learning and discussions with a few students on whom they call (in some classrooms, randomly) to explore very difficult legal concepts and

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162. Derrick A. Bell, Jr., *Black Students in White Law Schools: The Ordeal and the Opportunity*, 2 U. TOL. L. REV. 539, 548 (1970).

163. JAMES BALDWIN, *THE FIRE NEXT TIME* 24 (1963) (“[G]reat men have done great things here, and will again, and we can make America what America must become.”).

164. Bennett Capers, *Crime, Legitimacy, and Testilying*, 83 IND. L.J. 835, 880 (2008).

165. Bell, *supra* note 162.

166. ELIZABETH MERTZ, *THE LANGUAGE OF LAW SCHOOL: LEARNING TO “THINK LIKE A LAWYER”* 31–39 (2007).

167. *Id.* at 4–11.

168. *Id.*

principles. The effort is a cooperative one in which the teacher and students work to understand an issue more completely. The goal is to learn how to analyze legal problems, to reason by analogy, to think critically about one's own arguments and those put forth by others, and to understand the effect of the law on those subject to it. Socratic discourse requires participants to articulate, develop and defend positions that may at first be imperfectly defined intuitions. Lawyers are, first and foremost, problem solvers, and the primary task of law school is to equip our students with the tools they need to solve problems. The law will change over the course of our lifetimes, and the problems we confront will vary tremendously. Law professors cannot provide students with certain answers, but we can help develop reasoning skills that lawyers can apply, regardless of the legal question.<sup>169</sup>

Viewed from a different perspective, however, the Socratic Method is far from an unqualified good.<sup>170</sup> As Mertz points out, professors who use the Socratic Method tend to privilege certain information through the practice of “uptake” (responding to student answers by picking up on points the professor deems salient) and “non-uptake” (ignoring or even trivializing other points the professor deems non-salient).<sup>171</sup> Through uptake and non-uptake, the professor “pushes students into a new way of talking, reading, and ‘thinking.’”<sup>172</sup> The professor teaches students what has value in a particular case—details “deemed salient for analogies,” as well as “relevant” legal terms

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169. *The Socratic Method*, U. CHI. L. SCH., <https://www.law.uchicago.edu/socratic-method> [<https://perma.cc/FP3N-P47T>] (excerpting Elizabeth Garrett, *Becoming Lawyers: The Role of the Socratic Method in Modern Law Schools*, 1 GREEN BAG 2D 199, 201 (1998)).

170. As Lani Guinier has observed:

Those who most identify with the institution, its faculty, its texts, and its individualistic perspectives experience little dissonance in the first year. Others—students who bring with them a lesser sense of personal entitlement and an ambivalent identification with the institution; who resist competitive adversarial relationships; who do not see themselves represented on the faculty; who vacillate on the emotionally detached, “objective” perspectives inscribed as “law”; or who identify with the lives of persons who suffer from existing political arrangements—these students experience much dissonance.

GUINIER ET AL., *supra* note 83, at 50–51.

171. MERTZ, *supra* note 166, at 52–56. The professor may even engage in “zero-uptake” by disregarding the student’s response entirely and instead repeating the question. All of this serves to communicate that the student’s original response was valueless. Even worse, with non-uptake and zero-uptake, topics are dismissed without any articulation of why. They are merely left on the cutting room floor. In this way the Socratic Method has its own double edge—it marks topics as off-limits, while simultaneously refusing to acknowledge this marking. I’m indebted to my research assistant Peter Angelica for alerting me to this other aspect of non-uptake.

172. Elizabeth Mertz, *Inside the Law School Classroom: Toward a New Legal Realist Pedagogy*, 60 VAND. L. REV. 483, 494 (2007).

from the text like “appealed” or “reversed”<sup>173</sup>—while simultaneously teaching students to consider other information superfluous or secondary or even “irrelevant.”<sup>174</sup> Through this process—keep in mind that the goal is to put multiple questions to just a few students—each student is pushed to “remain in and master the dialogue.”<sup>175</sup>

In this way, many students are trained to “think like a lawyer.” But it would be more accurate to say these students are trained to think like a particular kind of lawyer, one that brackets or entirely dismisses differences in culture, or social context. Or rather, one that recognizes contextual differences matter only insofar as they “fit into legal categories decreed by precedential tests or statutory requirements.”<sup>176</sup> One more point: In teaching what it means to “think like a lawyer,” the professor is doing so from a chosen position of authority that discourages methodological dissent. Consider again the law school classroom. The prototypical law professor

finds in the particularities of the space which the traditional institution arranges for him (the platform, the professorial chair at the focal point on which all gazes converge) material and symbolic conditions which enable him to keep the students at a respectful distance. . . . Elevated and enclosed in the space which crowns him orator, . . . the professor is condemned to a theatrical monologue and virtuoso exhibition by a necessity of position more coercive than the most imperious regulations.<sup>177</sup>

While all of this may seem par for the course—what law school is about—it also subordinates actual human conflict or pain, moral dilemmas, and social justice. It certainly obfuscates what Robert Cover would call “the violence of the law.”<sup>178</sup> Moreover, this subordination is replicated throughout the law school experience. One has only to consider casebooks, which frequently abridge judicial opinions to omit the facts of a case altogether. Or the law review membership selection process, which tends to emphasize a student’s ability to identify and

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173. MERTZ, *supra* note 166, at 56–59.

174. This is not to suggest that professors disallowed discussion of social context. However, Mertz found that professors who did permit discussion of social context did so only after the serious legal analysis had been conducted. Mertz, *supra* note 172, at 495–96.

175. MERTZ, *supra* note 166, at 51.

176. Mertz, *supra* note 172, at 496–97.

177. MERTZ, *supra* note 166, at 51 (quoting PIERRE BOURDIEU & JEAN-CLAUDE PASSERON, *REPRODUCTION IN EDUCATION, SOCIETY AND CULTURE* 109 (Richard Nice trans., Sage Publications 1977)).

178. Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1629 (1986).

cite the appropriate authority and devalues a student's engagement with, say, the social contexts.<sup>179</sup>

Now consider how this contributes to the law school as a white space. Certainly the "dialogue" students are expected to master is a particular kind of dialogue, in a particular register. Certainly the way of thinking that students are expected to adopt is one that discounts social context, or race, or class. Kimberlé Crenshaw has described it as privileging "perspectivelessness."<sup>180</sup> Or as Mertz puts it, "the language of U.S. law works to create an erasure or cultural invisibility, as well as an amorality, that are problematic in a society seeking to be truly democratic."<sup>181</sup> In a way, students are rewarded for becoming Lady Justice herself, whose blindfold enables her "to avoid the temptation to see the face that comes to the law and put the unique characteristics of the concrete person before the abstract logic of the institution."<sup>182</sup> But blinding oneself to unique characteristics does not make those characteristics disappear. Just as blinding oneself to race does not erase race, it only returns race to the default, to presumed whiteness. For racial minorities, this is especially problematic when the expectation of perspectivelessness "is combined with the fact that what is understood as objective or neutral is often the embodiment of a white middle-class world view . . ."<sup>183</sup> They must erase themselves and "stand apart from their history, their identity, and sometimes their own immediate circumstances" in a way that most white students do not.<sup>184</sup>

To be sure, much is to be gained through the Socratic method and similar methods of teaching law. And under it, many students excel. Women who come to law school speaking "in a different voice"<sup>185</sup> may quickly adapt; "they learn to function as 'social males' and on some

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179. Cf. Mertz, *supra* note 172, at 496 (noting that the "distinctive footnoting conventions used in law reviews" mimics this pedagogy's emphasis on "a high degree of precision in the citation to authority").

180. Kimberlé Williams Crenshaw, *Toward a Race-Conscious Pedagogy in Legal Education*, 11 NAT'L BLACK L.J. 1, 2 (1988).

181. MERTZ, *supra* note 166, at 1-2.

182. See COSTA DOUZINAS & LYNDA NEAD, *Introduction to LAW AND THE IMAGE 3* (Costa Douzinas & Lynda Nead eds., 1999).

183. Crenshaw, *supra* note 180, at 3.

184. *Id.*

185. See CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* 30 (1982) (suggesting that women are socialized to approach issues with an "ethics of care").



level they do become gentlemen.”<sup>186</sup> And many students of color, especially those already experienced in navigating white primary schools and colleges, may have little trouble mastering the linguistic and cognitive method of their professors,<sup>187</sup> or pivoting to what Mari Matsuda calls “multiple consciousness.”<sup>188</sup> Indeed, it has been said that all educational institutions assimilate.<sup>189</sup> But if we are wondering why many students of color do not excel, or about the epistemic violence they experience,<sup>190</sup> then how law is generally taught must bear

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186. GUINIER ET AL., *supra* note 83, at 68. Guinier elaborates that these women do well but may feel alienated:

This subset of women resents the sacrifices of self that law school requires them to make. These women perceive that law school is a “game,” and they learn the rules in order to play, but they are acutely aware of the price they are paying. These women are those who have been described in some of our secondary literature as “bicultural” or “bilingual.” They can act both as “women” and as “gentlemen” and they are acutely conscious of the difference, and of the costs of each.

*Id.* at 67.

187. That said, even for students of color who excel by mastering the language of law, including its cadence, eventually sounding like native speakers, success may come at a different cost. For example, they may feel “doubly-estranged,” neither part of their racial community nor entirely accepted in the white community. Cf. PAUL M. BARRETT, *THE GOOD BLACK: A TRUE STORY OF RACE IN AMERICA* (1999) (describing his experience as a first-generation Black lawyer who finds himself an outsider at a prestigious firm, notwithstanding his efforts to be “the good black”).

188. Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 *WOMEN’S RTS. L. REP.* 7, 8 (1989).

189. In his seminal book *After Whiteness*, the Yale theologian Willie James Jennings writes:

Educational institutions assimilate. They draw people into a way of life by drawing people into sight of ways of life. Such assimilation can be thick or thin depending on how pronounced that way of life is in a curriculum or a social ecology, and in the way the layers of thinking, feeling, and acting move between students, faculty, and administrative staff. This is their glory. Colonialist educational assimilation turned education into an imperialist endeavor, forcing a way of life that would reduce ways of life. Colonialist assimilation draws people down to silent objects even when they speak. They become anticipations of an echo, with variations, but nonetheless an echo. This is an assimilation that hides itself as assimilation. It can be hidden in such practices as critical thinking, or traditioned reflection, or the repetition that makes for skilled execution of a task, gesture, or performance. This is our curse. Echoing in and of itself is not the problem. All education rightly carries an element of the echoing back. The problem here is the absence of reciprocity of echoing that speaks of life aimed at the together.

JENNINGS, *supra* note 88, at 110–11.

190. Gayatri Chakravorty Spivak, *Can the Subaltern Speak?*, in *CAN THE SUBALTERN SPEAK? REFLECTIONS ON THE HISTORY OF AN IDEA* 35–37 (1988) (Rosalind C. Morris ed., 2010) (describing epistemic violence as the product of knowledge produced by in-groups that reinforces the outgroup’s difference and inferiority while ignoring their

part of the blame. The Socratic method, at least as it is employed by many professors, devalues the very things that make these students different: their race, their backgrounds, them. All of this contributes to the “silencing of minority students”<sup>191</sup> and to making minority students feel like “strangers in a strange land.”<sup>192</sup> Some years ago, Peggy Cooper Davis wrote about “law as microaggression.”<sup>193</sup> For many students, especially Black and Brown students, the same can be said about learning the law. In other words, for many, how the law is taught is also a microaggression.

Perhaps no one has been more eloquent in describing what I mean than Margaret Montoya, who early on wrote one of the canonical pieces of critical race theory scholarship, “*Máscaras, Trenzas, y Greñas: Un/Masking the Self While Un/Braiding Latina Stories and Legal Discourse*.”<sup>194</sup> Montoya describes the pressure she felt to assimilate at Harvard Law School, even to literally shed her ethnic clothing. She recounts that on the first day of orientation, she wore a Mexican blouse and jeans on which she had embroidered “the Chicano symbol of the Aguila (a stylized eagle) on one seat pocket and the woman symbol on the other.”<sup>195</sup> However, over time her style of dress changes. She thinks, “[P]erhaps if I dressed like a lawyer, eventually I would acquire more conventional ideas and ideals and fit in with my peers. . . . Chameleon-like, I would dress to fade into the ideological, political and cultural background rather than proclaim my differences.”<sup>196</sup>

While Montoya’s essay touches on several subjects, it is her description of being a first-year law student at Harvard that I want to quote at length.

My memories from law school begin with the first case I ever read in Criminal Law. I was assigned to seat number one in a room that held some 175 students.

The case was entitled *The People of the State of California v. Josefina Chavez*. It was the only case in which I remember encountering a Latina, and she was the defendant in a manslaughter prosecution. The facts, as I think

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subjectivity); see also ANNE MCCLINTOCK, *IMPERIAL LEATHER: RACE, GENDER AND SEXUALITY IN THE COLONIAL CONTEST* 16 (1995) (outlining the ways in which legal institutions foster epistemic violence).

191. Mertz, *supra* note 172, at 508 (finding in her examination of law schools that “female law students spoke less frequently than did male students, and we found an even clearer silencing of minority students”).

192. Bell, *supra* note 162, at 540.

193. Peggy C. Davis, *Law as Microaggression*, 98 *YALE L.J.* 1559 (1989).

194. Margaret E. Montoya, *Máscaras, Trenzas, y Greñas: Un/Masking the Self While Un/Braiding Latina Stories and Legal Discourse*, 17 *HARV. J. L. & GENDER* 185 (1994).

195. *Id.* at 191.

196. *Id.* at 191–92.

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back and before I have searched out the casebook, involved a young woman giving birth one night over the toilet in her mother's home without waking her child, brothers, sisters, or mother. The baby dropped into the toilet. Josefina cut the umbilical cord with a razor blade. She recovered the body of the baby, wrapped it in newspaper, and hid it under the bathtub. She ran away, but later she turned herself in to her probation officer.

The legal issue was whether the baby had been born alive for purposes of the California manslaughter statute: whether the baby had been born alive and was therefore subject to being killed. The class wrestled with what it meant to be alive in legal terms. Had the lungs filled with air? Had the heart pumped blood?

For two days I sat mute, transfixed while the professor and the students debated the issue. Finally, on the third day, I timidly raised my hand. I heard myself blurt out: What about the other facts? What about her youth, her poverty, her fear over the pregnancy, her delivery in silence? I spoke for perhaps two minutes, and when I finished, my voice was high-pitched and anxious.<sup>197</sup>

When I have assigned Montoya's article in a seminar I teach, students are floored. Female students, and students of color, see themselves in Montoya in a way they've never seen themselves in the law. They start to wonder how much they've lost by learning to "think like a lawyer." To a one, they wish they had read Montoya as first year law students, or before starting law school. For me, the story resonates as well, and takes me to my own days as a student. But it also resonates with me as someone who now teaches the law, including Criminal Law. Because as Montoya knows, the very issues she brought to the class discussion are the issues that would prompt "non-uptake" from most professors. As she puts it:

A discussion raising questions about the gender-, class-, and ethnicity-based interpretations in the opinion, however, would have run counter to traditional legal discourse. Interjecting information about the material realities and cultural context of a poor Latina woman's life introduces taboo information into the classroom. Such information would transgress the prevalent ideological discourse [and the] puritanical and elitist protocol governing the classroom.<sup>198</sup>

Again, much is to be gained by the Socratic method and the way many law school subjects are taught. Many of those reading this Essay are products of the Socratic method, as am I. But much is to be lost as well. Perhaps most troubling of all, it narrows the law's gaze, and in doing so narrows its possibilities for real, radical change. Allow me to put this differently: When we limit students' views on what matters, especially when it comes to issues of race and class and sexuality, we limit too their vision of what law can do, and what the law should do. Instead of opening their eyes to law's possibilities, we close them, we

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197. *Id.* at 201-02.

198. *Id.* at 204.

blindfold them.<sup>199</sup> That is the real damage. And it is a damage that is distributed unequally. Some years ago, Lani Guinier wrote that women at law schools are often forced to adapt in order to succeed. They are required, in a very real sense, to become gentlemen.<sup>200</sup> Allow me to make another observation. Non-white students, particularly Black and Brown students, often find that they must unrace themselves, and become white. Almost every Black person of a certain age has heard the term “Oreo,” just as almost every racial minority of a certain age has heard the terms “banana,” “coconut,” “apple” and “Twinkie,” all meant to convey a type of racial remaking, that they have become white on the inside.<sup>201</sup> That is what law school tries to do. That’s what I mean when I say we should acknowledge that most law schools function as white spaces.

One more thing: All of these aspects—the numbers, the architecture, the what, and the how we teach—work in tandem, mutually reinforce one another. Law schools are white spaces, and these are the supports.

### III. REIMAGINING LAW SCHOOLS

To see things as they really are, you must imagine them for what they might be.

—Derrick Bell<sup>202</sup>

Thus far, I have made the argument that for students of color especially, law schools often function as white spaces, spaces where students of color “are typically absent, not expected, or marginalized when present.”<sup>203</sup> And as I have demonstrated, “the law school as white space” goes beyond numbers or mere representation. Too often,

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199. The study of pedagogy published by the Carnegie Foundation reached a similar conclusion. See WILLIAM M. SULLIVAN, ANNE COLBY, JUDITH WELCH WEGNER, LLOYD BOND & LEE S. SHULMAN, *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* 54 (2007) (noting that the case-method of legal pedagogy can communicate to students that issues of justice are peripheral to the law).

200. GUINIER ET AL., *supra* note 83, at 68. Guinier explains that when she was a student at Yale Law School, “a white male professor . . . addressed all of us, male and female, as *gentlemen*,” explaining he was a creature of habit and that the women “too, in his mind, were ‘gentlemen.’” *Id.* at 85.

201. See, e.g., Kat Chow, *Overthinking It: Using Food as a Racial Metaphor*, NPR: CODE SWITCH (Sept. 14, 2014), <https://www.npr.org/sections/codeswitch/2014/09/12/348008432/overthinking-it-using-food-as-a-racial-metaphor> [<https://perma.cc/4YDU-2RPD>].

202. Derrick Bell, *Who’s Afraid of Critical Race Theory?*, 1995 U. Ill. L. Rev. 893, 898.

203. Anderson, *supra* note 1.

law schools function as white spaces in their architecture, in what law is taught, and how law is taught.

All along though, the end goal of this Essay has been normative, not descriptive. It has been to reimagine the law school as a truly inclusive space. It is that goal I take up now. But in reimagining the law school, I also want to reimagine what legal scholarship can be in style and form. To again channel Ralph Ellison, “bear with me.”<sup>204</sup>

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It may seem strange that in an essay about law schools, I find myself thinking about my favorite Colson Whitehead novel. Not *The Underground Railroad*, the novel that won him both the Pulitzer Prize and National Book Award, though I admire that book as well.<sup>205</sup> Rather, my favorite Colson Whitehead novel, and one of my favorite novels by any author, is his first book, *The Intuitionist*.<sup>206</sup> Maybe because in telling the story of a pitched battle within the Elevator Guild between two schools of elevator inspectors—on one side, there are the Empiricists, who base their inspections on measurements and numbers and looking at “the skin of things”<sup>207</sup>; on the other, the Intuitionists, who intuit the health of an elevator by simply riding in them—the novel reminds me of pitched battles between various schools of thought at law schools. Like the battle between the law and economics camp and the law and literature camp.<sup>208</sup> Or the war between the critical legal studies camp and what Robert Williams calls “the Old Farts.”<sup>209</sup> Or the war between critical race theory scholars and, again, “the Old Farts.”<sup>210</sup> *The Intuitionist* is a slim, challenging, ingenious novel, and the meaning of racialized spaces permeates the novel. (The

204. ELLISON, *supra* note 35.

205. COLSON WHITEHEAD, *THE UNDERGROUND RAILROAD* (2016).

206. COLSON WHITEHEAD, *THE INTUITIONIST* (1999).

207. *Id.* at 239.

208. See, e.g., Jane B. Baron, *Interdisciplinary Legal Scholarship as Guilty Pleasure: The Case of Law and Literature*, in *LAW AND LITERATURE: CURRENT LEGAL ISSUES 1999*, at 21 (Michael Freeman & Andrew D.E. Lewis eds., 1999); Richard H. Weisberg, *Literature's Twenty-Year Crossing into the Domain of Law: Continuing Trespass or Right by Adverse Possession*, in *LAW AND LITERATURE: CURRENT LEGAL ISSUES 1999*, at 47 (Michael Freeman & Andrew D.E. Lewis eds., 1999).

209. Robert A. Williams, *Vampires Anonymous and Critical Race Practice*, 95 U. MICH. L. REV. 741, 746–47 (1997).

210. The novel's protagonist Lila Mae makes clear the connection between the Empiricists and whiteness. “White people's reality,” she decides, “is built on what things appear to be—that's the business of Empiricism. They judge them on how they appear when held up to the light, the wear on the carriage buckle, the stress fractures in the motor casing. His skin.” WHITEHEAD, *supra* 206, at 239.

main character, Lila Mae Watson, is the city's first Black female elevator inspector.) But the reason I'm now thinking of the novel, as I think about imagining law schools anew, is not because of the novel's plot line about the friction between the Empiricists and the Intuitionists or the mystery that unfolds when an elevator in a new municipal building plummets without explanation. It is because of another story Whitehead tells alongside that story: the story that James Fulton, the founder of Intuitionism, was secretly working on a design for an elevator capable of true elevation. An elevator without wires, without cables, without shafts, without anything. An untethered elevator.<sup>211</sup>

Thinking about the founder's design for an untethered elevator in *The Intuitionist* prompts me to go beyond simply recasting the law school as a non-white space, a space that is inclusive and feels welcoming to students of color.<sup>212</sup> I want to do more than simply a "search and replace," adding color here and there, substituting "law school as white space" with "law school as a racially diverse space." As a Black man, a gay man, a first-generation lawyer, a first-generation law professor, as someone whose extended family rivals Vice President Kamala Harris's in terms of racial diversity with religious diversity to boot,<sup>213</sup> I also want to imagine the law school in a way that is inclusive along lines of gender and class, religion and sexuality, ability, and disability. I want to reimagine the law school as truly a "cosmopolitan

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211. *Id.* at 221–23.

212. Although this is often the goal of diversity and inclusion efforts, this goal demands too little, and is even problematic. To remake a school as inclusive and welcoming already buys into a propriety assumption. In the context of law schools, it suggests that the people doing the welcoming and including have some proprietary right to include or exclude. It suggests that the school is theirs to begin with. Welcome to *our* school. The gesture may genuinely be well-intended and even magnanimous, but it in fact shellacs a power imbalance. The gesture to include people of color in law schools invariably prompts me to think of W.E.B. DuBois, and to ask, "Your law school? How came it yours?" Cf. W.E.B. DUBOIS, SOULS OF BLACK FOLK 198 (1903) (Jonathan S. Holloway ed., 2015) ("Your country? How came it yours?"). Tressie McMillan Cottom's observation about broadening access is also worth repeating. She notes, "We think that broadening access will broaden access on the terms of the people who have benefited from it being narrowed, which is just so counterintuitive. Broadening access doesn't mean that everybody has the experience that I, privileged person, had in the discourse. Broadening it means that we are all equally uncomfortable, right?" *Tressie McMillan Cottom on the Moral Panics of Our Moment*, N.Y. TIMES: EZRA KLEIN SHOW (Apr. 13, 2021), <https://www.nytimes.com/2021/04/13/podcasts/ezra-klein-podcast-tressie-mcmillan-cottom-transcript.html> [https://perma.cc/UEK6-LBUD].

213. Or maybe simply these markers are irrelevant. Maybe even under Rawls's "veil of ignorance"—his thought experiment in which citizens divest themselves of self-interested knowledge—I would want the same thing. See JOHN RAWLS, A THEORY OF JUSTICE 12, 136–42 (1971).

canopy” where students of different backgrounds can “relax their guard and go about their business more casually,” where it is accepted that the law school space belongs “to all kinds of people.”<sup>214</sup>

I also want to linger on the concept of untethered.<sup>215</sup> What would it mean to imagine a law school untethered from the need for student tuition, i.e., revenue? (Yes, in faculty meetings, we too often think of students as revenue.) Or untethered from the whims and demands of big donors? What would it mean to imagine a law school untethered from the oppression of rankings generally, and the *U.S. News and World Report* rankings specifically, which forces law schools to compete against each other and even prompts some schools to commit criminal acts;<sup>216</sup> which also forces law schools to disperse merit scholarships instead of need-based scholarships? What would it mean to imagine a law school untethered from internal competition, from the ranking of students,<sup>217</sup> which sounds more appropriate for a country fair—the fattest cow!—than a place of intellectual questioning, engagement, and creativity? In short, what would it mean to imagine a

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214. ANDERSON, *supra* note 65, at 3.

215. To be sure, law schools around the country have expressed a commitment to diversity and inclusion, but one senses that they have done so now out self-interest, on par with virtue signaling. Four decades ago, the critical race theorist Derrick Bell observed that “The interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites.” Derrick A. Bell, Comment, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980). Although Bell applied his theory to the Court and its decision in *Brown*, he later extended it to legal rights more generally. See, e.g., DERRICK BELL, *Racial Symbols: A Limited Legacy*, in *FACES AT THE BOTTOM OF THE WELL* 15 (1992). His analysis seems applicable here too. Law schools have made attempts to be inclusive but have drawn the line at changes that may negatively impact their rankings, bottom line, or status. Part of the goal of this essay is to challenge law schools to surrender some of their self-interest. It is to ask schools to “do the right thing.”

216. See Morgan Cloud & George B. Shepherd, *Law Deans in Jail*, 77 MO. L. REV. 931, 932 (2012) (arguing that law schools and their deans may have committed felonies by publishing false information to manipulate their law school rankings). Other law schools respond to rankings pressure by attempting to game the rankings system. See John A. Byrne, *U.S. News Disclosing Less Due to Gaming*, TIPPING SCALES (June 19, 2015), <https://tippingthescales.com/2015/06/u-s-news-disclosing-less-because-of-gaming/> [<https://perma.cc/FS59-LCUA>].

217. GUINIER ET AL., *supra* note 83, at 2 (“Because law school’s educational mission is so intertwined with the goal of selecting students for entry into a competitive profession, much of its pedagogy, including examination formats, is designed to rank students.”).

law school as a truly inclusive place committed to neither molding students into lawyer statesmen nor legal gladiators,<sup>218</sup> but simply letting students *become*?

*The Intuitionist* spurs me to think differently. It spurs me to not just reimagine the law school, but to *radically* reimagine it. To imagine the law school as a *tabula rasa*, a palimpsest, a blank slate. In short, to imagine the law school no longer as a white space (in terms of demographics, or what is taught, or how it is taught), but as a *white space* (as in a blank page, at once empty and full of possibilities). In other words, I want to imagine building a law school from the ground up. Returning to the concept of untethered, I want to imagine a law school untethered from the past. Aware of the past, but not weighed down by it. Not grounded by it. Indeed, I want to imagine a law school without hierarchies, one free of what the Yale theologian Willie James Jennings might call the legacy of “master logics,” which too often “flows through the institutional unconscious like a virus, convincing too many that to commit to an institution is to commit to becoming the master.”<sup>219</sup> For some, such an imaginative exercise may seem out of place in a law review essay. Consider it legal futurism<sup>220</sup> or even Afrofuturism<sup>221</sup> if that helps, or imaginative storytelling, one of the methods of critical race theory.<sup>222</sup> For others, this imaginative exercise may seem a fool’s errand. But I’m a firm believer that “the map to a new world is in the

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218. See generally ANTHONY KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 12, 356 (1993) (lamenting the decline of the lawyer-statesmen ideal; describing the new model of lawyer-gadiator).

219. JENNINGS, *supra* note 88, at 102.

220. See generally David A. Funk, *Legal Futurology: The Field and its Literature*, 73 *LAW LIBR. J.* 625 (1980) (offering an early bibliography of legal futurist writing).

221. For a discussion of the role Afrofuturism can play in shaping the law, see Capers, *supra* note 41.

222. Numerous critical race theory (CRT) scholars employ narrative, both personal and fantastic, in their work. Perhaps most famously, Derrick Bell created Geneva Crenshaw, a time-traveling interlocutor and alter ego, for several of his narrative articles. See, e.g., Derrick Bell, *The Supreme Court 1984 Term Foreword: The Civil Rights Chronicles*, 99 *HARV. L. REV.* 4 (1985) (deploying the character of Geneva Crenshaw to discuss the exploitation and oppression in America from the perspective of an otherworldly, all-powerful court). Other examples of narrative in CRT abound. See, e.g., Harris, *supra* note 60; Montoya, *supra* note 194; Russell K. Robinson, *Perceptual Segregation*, 108 *COLUM. L. REV.* 1093 (2008); Gerald Torres & Kathryn Milun, *Translating Yonnonidio by Precedent and Evidence: The Mashpee Indian Case*, 1990 *DUKE L.J.* 625 (1990); Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 *HARV. C.R.-C.L. L. REV.* 401 (1987); Richard Delgado, *Rodrigo’s Chronicle*, 101 *YALE L.J.* 1357 (1992) (book review). Several CRT criminal justice scholars have also brought “voice,” or a personal narrative that includes insights based on racial experience, to their scholarship. See, e.g., J. Kozinski, *The Case of the Speluncean Explorers*:



imagination.”<sup>223</sup> And if the philosopher Jeremy Bentham could imagine the panopticon;<sup>224</sup> if Filippo Brunelleschi could imagine the Duomo of Florence;<sup>225</sup> if the Wright Brothers could imagine a flying machine;<sup>226</sup> if, returning to elevators, Alexander Miles could imagine automatic elevator doors;<sup>227</sup> if Bridget “Biddy” Mason, a former slave, could imagine a different Los Angeles;<sup>228</sup> and finally, if Christopher Columbus Langdell, the first dean at Harvard Law, could imagine a new way to teach law<sup>229</sup>—then certainly I can imagine a new law school. After all, I come “from sturdy, peasant stock, men who picked cotton and dammed rivers and built railroads, and, in the teeth of the most terrifying odds, achieved an unassailable and monumental dignity.”<sup>230</sup> Beyond that, “[I] come from a long line of great poets, some of the greatest poets since Homer. One of them said, *The very time I thought I was lost, My dungeon shook and my chains fell off.*”<sup>231</sup> Imagining a better world is in my blood. Allow me to go a step further: my position at the margin might even provide me an advantage in imagining what might be.<sup>232</sup> It might even be said that I am “gifted by an ability to imagine a different world—to offer alternative values—if only because

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*Revisited*, 112 HARV. L. REV. 1876 (1999) (retelling the classic legal story of the Speluncan Explorers using the voice of a Black housemaid as a way to criticize the Anglo-American system of justice); Bennett Capers, Essay, *Criminal Procedure and the Good Citizen*, 118 COLUM. L. REV. 653, 656 (2018) (incorporating personal narrative in a discussion of recent developments in criminal procedure). My hope—indeed my hope in all of my scholarship—is for a voice that “exposes, tells and retells, signals resistance and caring, and reiterates what kind of power is feared most—the power of commitment to change.” Bell, *supra* note 202, at 907.

223. ROBIN D.G. KELLEY, FREEDOM DREAMS: THE BLACK RADICAL IMAGINATION 2 (2002).

224. See Jeremy Bentham, *Panopticon, or, the Inspection House* (1787), reprinted in 4 THE WORKS OF JEREMY BENTHAM 39, 40–41 (John Bowring ed., 1843).

225. On the importance of Brunelleschi’s innovation, see ROSS KING, BRUNELLESCHI’S DOME: HOW A RENAISSANCE GENIUS REINVENTED ARCHITECTURE (2000).

226. See generally DAVID MCCULLOUGH, THE WRIGHT BROTHERS (2015) (describing the brothers’ fascination with human flight).

227. See *Alexander Miles*, MY BLACK HISTORY, [http://www.myblackhistory.net/Alexander\\_Miles.htm](http://www.myblackhistory.net/Alexander_Miles.htm) [<https://perma.cc/M5R6-ZR JW>]. For images of Miles’ patent, see U.S. Patent No. 371,207 (issued Oct. 11, 1887).

228. Mason, a former slave, amassed over ten acres in what is currently downtown Los Angeles, building homes and the area’s first African American Episcopal church. For more on Mason, see Dolores Hayden, *Biddy Mason’s Los Angeles 1856–1891*, 68 CAL. HIST. 86, 95–97 (1989).

229. FRIEDMAN, *supra* note 36, at 530–35.

230. BALDWIN, *supra* note 163.

231. *Id.* (alteration in original).

232. As social critics have observed, “[w]ith creativity and an open mind, ‘we can . . . use information from the margin to transform the way we think about the whole.’” See Harlon L. Dalton, *The Clouded Prism*, 22 HARV. C.R.-C.L. L. REV. 435, 444 (1987)

we are not inhibited by the delusion that we are well served by the status quo.”<sup>233</sup>

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It is fall, and I’m honored to have been invited to a law school to talk about my work-in-progress *Afrofuturism, Critical Race Theory, and Imagining a New American Constitution*.<sup>234</sup> But what really excites me is this: while several schools have reinvented themselves to be anti-racist and even function as cosmopolitan canopies, this school has apparently gone further than most, changing its curriculum, and changing its entire approach to legal education. For starters, the school eliminated application fees, realizing that even nominal fees were a barrier to less financially privileged students; they realized too its past practice of allowing applicants to seek a waiver was unsatisfactory, sending the expressive message that such students were solely present under the noblesse oblige of the school. For similar reasons, this law school also secured the ABA’s approval to eliminate the LSAT requirement, which they realized correlates more with the educational attainment and wealth of the applicant’s family—not to mention the applicant’s ability to afford LSAT prep programs<sup>235</sup>—than the applicant’s potential.<sup>236</sup> They were also persuaded by arguments from scholars such as Daria Roithmayr and Erika Wilson that the old admissions criteria were in effect locking-in the advantages in-groups already had and furthering “social closure.”<sup>237</sup> Beyond that, the school

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(quoting bell hooks).

233. Charles R. Lawrence, III, *The Word and the River: Pedagogy as Scholarship as Struggle*, 65 S. CAL. L. REV. 2231, 2239 (1992).

234. As readers may guess, this yet-to-be-written work builds upon a prior article of mine. Capers, *supra* note 41.

235. Mona E. Robbins, Race and Higher Education: Is the LSAT Systemic of Racial Differences in Education Attainment? 7–9 (Summer Program for Undergraduate Rsch., Aug. 20, 2017) (on file with University of Pennsylvania), <https://repository.upenn.edu/cgi/viewcontent.cgi?article=1018&context=spur> [<https://perma.cc/KK5M-ZN75>].

236. See Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Deal*, 84 CAL. L. REV. 953, 987–92 (1996) (showing that the correlation between family income and high school SAT scores is stronger than between SAT scores and college freshman grades); see also GUINIER ET AL., *supra* note 83, at 15 (“The [LSAT] may measure the ability to think quickly and to make strategic decisions with less than perfect information, but it does not measure the full range of skills needed to be a good lawyer.”).

237. See generally DARIA ROITHMAYR, *REPRODUCING RACISM* (2014) (positing that law school admissions tests came to predominate in part because they advantaged certain groups and excluded others, becoming a seemingly neutral tool that locks-in inequality); Erika K. Wilson, *Monopolizing Whiteness*, 134 HARV. L. REV. 2382, 2388–404

took seriously sociologist Tressie McMillan Cottom's observation that "[s]mart is only a construct of correspondence, between one's abilities, one's environment, and one's moment in history."<sup>238</sup> Unwilling to continue "sorting" students for prospective employers, the school also eliminated letter grades, replacing them with high pass, pass, and fail.<sup>239</sup> (The school also recognized that grades were imperfect measurements, and often the product of what behavioral economist Daniel Kahneman might call "noise.")<sup>240</sup> They even revamped their hiring, realizing that their past efforts to diversify their faculty were little more than business as usual and woefully inadequate. Lastly, persuaded that "dismantling racism depends on transforming the built environment,"<sup>241</sup> the school erected a new building. The changes, which were initially met with skepticism across the academy, ultimately generated overwhelmingly positive publicity and enormous praise. In fact, the changes helped the school attract some of the most intellectually curious faculty and students in the world. It also allowed the school to attract the most diverse student body and faculty—along lines of race, class, age, geography, and more—of any law school in the country. I'm excited to see what they've done.

Although the leaves are already turning brilliant reds and golds, it's a surprisingly warm day when I arrive, butterflies in my stomach because I always have butterflies before presenting a work in progress. But all of that fades when I smell the air—the crispness of fall, even though it's almost t-shirt weather—and when I see there are young people playing frisbee in the courtyard, and a toddler being taught to ride a bike by her two fathers, and a few older gentlemen

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(2021) (arguing that to maintain advantage, insiders adopt policies and rules that close off opportunities to other groups to facilitate social closure, and using school segregation to illustrate this point). Sara Mayeux makes a similar point in her recent book *Free Justice*: "Framed as an effort to maintain academic standards, this set of policymaking choices within the profession reinforced its exclusivity. Heightened standards made the path to a legal career lengthier and more expensive, maintaining barriers to entry for members of immigrant and minority groups . . ." SARA MAYEUX, *FREE JUSTICE: A HISTORY OF THE PUBLIC DEFENDER IN TWENTIETH-CENTURY AMERICA* 47 (2020).

238. TRESSIE McMILLAN COTTOM, *THICK: AND OTHER ESSAYS* 27 (2019).

239. As others have observed, "functional merit, meaning the ability to do a job, cannot always be measured by paper-and-pencil tests, whether they are nationally standardized tests like the LSAT . . . or timed, in-class examinations administered at the end of a law school semester." GUINIER ET AL., *supra* note 83, at 6.

240. See generally DANIEL KAHNEMAN, OLIVIER SIBONY & CASS R. SUNSTEIN, *NOISE: A FLAW IN HUMAN JUDGMENT* (2021) (defining noise as unwanted variability, where seemingly objective decisions may be affected by variables as diverse as the weather, time of day, or what the decision-maker had for breakfast).

241. Robin D.G. Kelley, *Preface* to *RECONSTRUCTIONS: ARCHITECTURE AND BLACKNESS IN AMERICA* 11 (2021).

playing checkers while nearby some older women do tai chi. It even looks like there are one or two classes happening outside, with groups of students sitting in circles in the grass, laptops in laps, listening raptly as another student—or is that a professor?—speaks. It's seeing the outdoor classes that makes me stop in my tracks, that makes me realize I don't remember gates. The school must have taken down the wrought iron gates that previously separated the school from the neighboring community. I find myself smiling. I quicken my pace, eager to see what other changes they've made.

And then I see the building, and I wonder if this is how Margaret Schlegel felt when she first saw *Howards End* in E.M. Forster's novel of the same name,<sup>242</sup> or when Angela first saw the brownstone her boyfriend constructed in June Jordan's novel *His Own Where*.<sup>243</sup> When I was last here several years ago, the law school's building was the usual Collegiate Gothic.<sup>244</sup> What stands before me now is, well, something new. A structure unlike anything I've seen before, one with ornamental castings that seem to reflect the red and gold of the changing leaves, that seem to ripple with dappling light, and that at once seem to communicate the majesty of the law, while also acknowledging its imperfections. I remember reading something about this. That the architect—David Adjaye, the Ghanaian-British architect who designed the African American History Museum in Washington, D.C.—insisted he wanted this law school building to feel as if it belonged to the people. "For me, architecture is a social act."<sup>245</sup> He even persuaded the law school to reconsider its original proposal that the new law school look "wholly American." Adjaye argued for something neither wholly American nor wholly European nor a composite of the two; he argued for a building that would have elements from everywhere, and yet seem completely fresh. A building that just is. He insisted too on a

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242. E.M. FORSTER, *HOWARDS END* 208–13 (pocket ed. 1947).

243. JUNE JORDAN, *HIS OWN WHERE* 63–70 (1971).

244. The school's resolve to move away from Collegiate Gothic architecture only strengthened when they realized that white supremacists were touting such architecture as theirs, along with the claim, "Every month is white history month." Cf. Rachel Poser, *He Wants to Save the Classics from Whiteness. Can the Field Survive?*, N.Y. TIMES (Feb. 2, 2021), <https://www.nytimes.com/2021/02/02/magazine/classics-greece-rome-whiteness.html> [<https://perma.cc/GE7N-VMCW>] ("Classics had been embraced by the far right, whose members held up the ancient Greeks and Romans as the originators of so-called white culture. Marchers in Charlottesville, Va., carried flags bearing a symbol of the Roman state.").

245. Calvin Tomkins, *A Sense of Place*, NEW YORKER (Sept. 23, 2013) (quoting David Adjaye), <https://www.newyorker.com/magazine/2013/09/23/a-sense-of-place> [<https://perma.cc/6364-2K5Y>].

building comprised of parts that could easily be re-arranged, extended, or contracted. Perhaps he was familiar with the words of Yale theologian Jennings: “[I]nstitutions, especially educational institutions, as living realities build themselves freshly with every new generation. Like a body replacing cells, institutions can become new while expressing the same form, but even that form can be made something unanticipated—a place of new desire made visible in the world.”<sup>246</sup>

There’s a bounce in my step as I ascend the ramp to the school. Gone are the old steps—they were never convenient to anyone in wheelchairs, or anyone pushing the occasional stroller, or anyone with luggage on rollers (for the rare faculty member rushing off to catch a train to present their paper at another school). Another smile comes to my face when I look past what I assume to be a glass façade and see students of every hue studying in the law school’s atrium, one student in African garb is even napping on a sofa, while nearby other students appear to be engaged in vigorous discussion. Of course, I am assuming they are all students. For all I know, they are students and residents from the surrounding community, exchanging ideas and learning from each other. I recall reading that the school prides itself on being an open school.

And then before I know it, I’m in the law school itself. Though “in” needs explaining since I realize I never passed through a door. Nor was there a security guard to ask me my business. No door and no barrier to entry, I remember reading now. Something about Adjaye wanting to expand on the commitment of a Norwegian architectural firm—maybe Snøhetta’s the name—to creating “keyless” structures, spaces that are always open.<sup>247</sup> Even what I assumed was a glass façade, I realize now, must have been an illusion. And yet the temperature feels perfect. For a moment, I puzzle at how any of this was done, especially since the school prides itself on being completely “green,” even the building was constructed with sustainable materials. But then I remember what the poet Audre Lorde said about the master’s tools, that they could “never dismantle the master’s house.”<sup>248</sup> If new tools had to be forged to dismantle the old law school, maybe those same new tools also allowed this, a law school that doesn’t seem to

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246. JENNINGS, *supra* note 88, at 104.

247. See David Owen, *The Psychology of Space*, NEW YORKER (Jan. 14, 2013), <https://www.newyorker.com/magazine/2013/01/21/the-psychology-of-space> [<https://perma.cc/4C63-CNR6>] (discussing the design of the Oslo Opera house by the Norwegian firm Snøhetta).

248. See AUDRE LORDE, *The Master’s Tools Will Never Dismantle the Master’s House*, in *SISTER OUTSIDER* 110, 110–12 (1984).

have walls separating the school from the community, that seems inviting, that seems perfect?

I promised to give the professor who invited me a call when I arrived so they<sup>249</sup> could escort me to my talk, but I'm a little early, and I'm sure they won't mind if I want to walk around. For a moment I hesitate. As a Black man, I am used to being subject to private surveillance by other people when shopping,<sup>250</sup> when driving,<sup>251</sup> when flying,<sup>252</sup> when walking,<sup>253</sup> on campus,<sup>254</sup> and even when entering my own apartment.<sup>255</sup> Quite simply, I'm used to being "always already

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249. The professor uses the nonbinary pronoun "they," as do a few of their colleagues, who find the freedom from gendered categories liberating. Cf. Jessica A. Clarke, *They, Them, and Theirs*, 132 HARV. L. REV. 894, 897-99 (2019). Their thinking prompted the school to rethink whether it wanted gendered restrooms, which critical theorist Jacques Lacan aptly called "urinary segregation." JACQUES LACAN, *The Agency of the Letter in the Unconscious or Reason Since Freud*, in *ÈCRITS: A SELECTION* 146, 151 (Alan Sheridan trans., Norton 1977). After allowing the students and community to vote, they elected to have gender-neutral restrooms as the default. They may not know this, but their thinking changed my own thinking, and prompted my own speculations about what gender might come to mean in a true utopia. See Bennett Capers, *Future Sex*, N.Y.U. ANN. SURVEY (forthcoming).

250. See, e.g., Michelle Singletary, *Shopping While Black*, WASH. POST (Oct. 31, 2013), [http://www.washingtonpost.com/business/economy/shopping-while-black/2013/10/31/5c7129d4-41a4-11e3-a751-f032898f2dbc\\_story.html](http://www.washingtonpost.com/business/economy/shopping-while-black/2013/10/31/5c7129d4-41a4-11e3-a751-f032898f2dbc_story.html) [https://perma.cc/P6TC-PTA8]; Dana Farrington, *Macy's to Pay \$650,000 in Settlement Over Alleged Racial Profiling*, NPR (Aug. 20, 2014), <http://www.npr.org/sections/thetwo-way/2014/08/20/342005509/macys-to-pay-650-000-in-settlement-over-alleged-racial-profiling> [https://perma.cc/9SQL-QPTN]; J. David Goodman, *Profiling Complaints by Black Shoppers Followed Changes to Stores' Security Policies*, N.Y. TIMES (Oct. 29, 2013), <http://www.nytimes.com/2013/10/30/nyregion/black-shoppers-at-barneys-and-macys-say-they-were-profiled-by-security.html> [https://perma.cc/G5LC-6UXH].

251. See, e.g., *Oliveira v. Mayer*, 23 F.3d 642, 644 (2d Cir. 1994) (describing how police received a report of a robbery when a "private motorist" observed "three dark-skinned males, handling an expensive video recorder" and officers who responded to the report handcuffed the Hispanic men, searched them spread eagle, and only let them go when a canvass of the neighborhood failed to reveal a robbery).

252. Cf. Jamila Bey, *NAACP Travel Advisory: Is 'Flying While Black' The New 'Driving While Black' in the U.S.?*, INDEP. (U.K.) (Oct. 26 2017), <https://www.independent.co.uk/travel/news-and-advice/american-airlines-naacp-travel-advisory-warning-usa-flying-while-black-racist-airlines-america-a7753131.html> [https://perma.cc/KE62-AHYE].

253. See Bennett Capers, *Policing, Race, and Place*, 44 HARV. C.R.-C.L. REV. 43, 60-62 (2009).

254. Teo Armus, *'I Wasn't Surprised. I Was Just Hurt.' A Black Professor Says Campus Police Demanded Proof She Lives in Her Own House*, WASH. POST (Aug. 24, 2020), <https://www.washingtonpost.com/nation/2020/08/24/santa-clara-campus-police-professor> [https://perma.cc/HLV9-QK55].

255. Cf. Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946,

suspect.”<sup>256</sup> But I quickly realize there’s none of that here. The few people who acknowledge me greet me with smiles. In fact, gone are the scowls I remember when I was a student; the students here seem—and I know this sounds odd—happy. Even when I pass groups engaged in heated discussions, the debates seem good natured, illuminating. They seem to embrace bell hooks’ notion of the school as a “place of ecstasy—pleasure and danger.”<sup>257</sup> I almost feel as if I could walk up to a group and join the conversations. I don’t. I keep walking. Passing through the atrium, I realize there is *some* angst—a group of students are railing that the school should do more to support student efforts to abolish the bar exam as antiquated and benefiting those with financial resources<sup>258</sup>—but even this brings a smile, reminding me of protests I participated in during my student days. As I continue to walk and pass by other students engaged in other conversations, I eavesdrop a little, and it warms me to hear John Rawls and Frantz Fanon mentioned in the same conversation. As I keep walking, I hear references to other thinkers too, Ronald Dworkin and Frederick Douglass, Fannie Lou Hammer and Charles Reich, Pauli Murray and the Notorious “RBG,” Janet Halley and Kenji Yoshino and Keeanga-Yamahtta Taylor and Amna Akbar and Manning Marable and Saidiya Hartman and Roberto Unger and Paulo Freire. At the elevator bank, I wait with others for the next elevator, but even waiting is pleasurable. Nearby, two students—one wearing a cowboy hat and boots, the other wearing a hijab—are comparing Kant’s retributivism to Paul Butler’s hip-hop theory of punishment,<sup>259</sup> while another group discusses Aziz Rana’s work on the law of imperialism.<sup>260</sup> Three more students are arguing with each other in Spanish; my own Spanish is rudimentary, but

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959–63 (2002) (describing his own experience being surrounded by the police and pinned against a wall at gunpoint outside his sister’s apartment after a neighbor reported seeing several Black men enter the apartment).

256. Frank Rudy Cooper, *Always Already Suspect: Revising Vulnerability Theory*, 93 N.C. L. REV. 1339, 1363 (2015).

257. HOOKS, *supra* note 30, at 3. Speaking of her own education, she adds: “To be changed by ideas was pure pleasure. But to learn ideas that ran counter to values and beliefs learned at home was to place oneself at risk, to enter the danger zone . . . . School was the place where I could forget that self and, through ideas, reinvent myself.” *Id.*

258. See Deborah Jones Merritt, Carol L. Chomsky, Claudia Angelos & Joan W. Howarth, *Racial Disparities in Bar Exam Results—Causes and Remedies*, BLOOMBERG L. (July 20, 2021), <https://news.bloomberglaw.com/us-law-week/racial-disparities-in-bar-exam-results-causes-and-remedies> [<https://perma.cc/BJQ6-AQMK>].

259. Paul Butler, *Much Respect: Toward a Hip-Hop Theory of Punishment*, 56 STAN. L. REV. 983, 999–1001 (2004).

260. See, e.g., AZIZ RANA, *THE TWO FACES OF AMERICAN FREEDOM* (2010); see also Asli Bâli & Aziz Rana, *Constitutionalism and the American Imperial Imagination*, 85 U. CHI.

I pick up enough to know they're discussing the Treaty of Guadalupe Hidalgo.<sup>261</sup> And then the elevator arrives and since it is capacious enough to fit us all, I get on with the students. The students don't seem to mind. There is certainly none of the discomfort my presence as a Black man sometimes engenders, what the sociologist George Yancy has dubbed "the elevator effect."<sup>262</sup>

Since my talk is on the third floor, that's where I exit the elevator. I don't know whether to call the hallway a hallway or not, it's so wide. Here, the walls really are glass—I touch a wall just to make sure—and as I pass through the corridor, I can see a class in session. It's in the round. Everyone has a seat at the table, no need to move seats around to accommodate the differently-abled. I vaguely remember reading that, like the United Nations, desks are outfitted to allow simultaneous translations, simultaneous transcriptions, and thus reduce language privilege.<sup>263</sup> There are no portraits announcing, "We are important. We are the law. This is our world."<sup>264</sup> In fact, I haven't seen any portraits or legacy names or images of Lady Justice since entering the building. The professor, who moves around the class, seems more like a facilitator than anything else. He certainly has none of the imperiousness of John Houseman in *The Paper Chase*; there's no "uptake" or "non-uptake." I notice too that the exterior wall is also glass; not so students are aware of the world outside, I remember reading, but so students view their studies as part of the world. I linger by the entrance for a moment to listen in, though I sense no one would mind if I walked in and took a seat. It's a Constitutional Law class, I realize. I find myself nodding as the class moves seamlessly from discussing how Article V of the Constitution is in many ways anti-democratic,<sup>265</sup>

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L. REV. 257 (2018).

261. I recall too that the treaty, which ended the U.S.'s war of aggression against Mexico, resulted in Mexico ceding much of its land to the U.S., including what is now Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming. As a concession to Mexico, the treaty recognized some rights of Spanish speaking occupants of the land, including language rights. For more on the treaty and the U.S.'s failure to maintain its promises under the treaty, see Rebecca Tsosie, *Sacred Obligations: Intercultural Justice and the Discourse of Treaty Rights*, 47 UCLA L. REV. 1615, 1625–35 (2000).

262. GEORGE YANCY, *BLACK BODIES, WHITE GAZES: THE CONTINUING SIGNIFICANCE OF RACE* 4–5 (2008).

263. On the problem of English language privilege, see Peter A. Coclanis, *Campus Politics and the English Language*, INSIDER HIGHER ED (June 5, 2018), <https://www.insidehighered.com/views/2018/06/05/often-unspoken-privilege-speaking-english-academe-opinion> [<https://perma.cc/3T8S-LGH6>].

264. Wing, *supra* note 124, at 359.

265. See, e.g., Huq, *supra* note 154, at 1185–87 (engaging with critiques of Article V as counter-majoritarian); SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION*:



to the call in critical race theory for a Third Reconstruction.<sup>266</sup> I move on to the next classroom, where again students are sitting in the round. I immediately recognize the professor as someone I know—who wouldn't recognize her crown-like locs?<sup>267</sup>—and she spots me and waves for me to come in. I'd like to, especially since this class is closer to my subject area. In fact, I remember reading that my friend's course—Criminal Systems—was part of the school's effort to un-silo traditional law school courses. Instead of focusing solely on substantive criminal law, this course allows students to explore at will issues as they come up, from the state's police power in general to Fourth Amendment issues to prosecutorial discretion and ethics to habeas issues. There's even a clinical component. I remember reading that the course attempts to remedy the fact that for too long, law schools have been "key sites for the reproduction of our penal status quo."<sup>268</sup> It makes me wonder about the other courses taught here and wish I had more time to visit them all, especially since the school subscribes to the belief that the "classroom remains the most radical space of possibility in the academy," that teaching should "enable[] transgressions—movement against and beyond boundaries," and that education itself can be "the practice of freedom."<sup>269</sup> A few professors even

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WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) 20–24 (2006) (describing how Article V brings the U.S. close to changeless stasis).

266. Angela P. Harris, *Foreword: The Jurisprudence of Reconstruction*, 82 CALIF. L. REV. 741, 765–66 (1994) (identifying CRT as, in many ways, being engaged in a project of reconstruction and finishing "the unfinished revolutions of the First and Second Reconstructions"). Other CRT scholars and fellow travelers have similarly called for a Third Reconstruction. See, e.g., Paul Butler, *The System Is Working the Way It Is Supposed To: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419, 1474–78 (2016) (joining other scholars and activists in calling for a Third Reconstruction to address institutional racism and inequality); Capers, *supra* note 41, at 59–60.

267. The professor is known for her locs in part because, before entering the academy, she famously rejected pressure from a law firm to straighten her hair, and has long been an advocate of the #FreetheHair movement. For more on Black hair and discrimination, see Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365, 371–72 (analyzing a district court decision that upheld an employer's prohibition on braided hairstyles in the workplace, a decision exemplifying intersectional race and gender discrimination); D. Wendy Greene, *Splitting Hairs: The Eleventh Circuit's Take on Workplace Bans Against Black Women's Natural Hair in EEOC v. Catastrophe Management Solutions*, 71 U. MIAMI L. REV. 987 (2017) (describing court decision that company policy against locs did not constitute racial discrimination).

268. Shaun Ossei-Owusu, *The New Penal Bureaucrats*, U. PENN. L. REV. (forthcoming 2021); see also Ristroph, *supra* note 157 (describing the role criminal law courses play in producing mass incarceration).

269. HOOKS, *supra* note 30, at 12.

actively encourage “incorporating unruly discourse in what are considered rule-bound spaces.”<sup>270</sup> Again, my friend motions me to join her class. I really am tempted, but I have a presentation soon, and I try to convey as much with hand signals. After all, I still need to make my way to the room where I’ll present my work to the faculty and interested students and perhaps others—I hear faculty workshops here are open to members of the public. I resume my way to my presentation room just as a student in her class asks whether we would think of policing as a public good if we take a macro view,<sup>271</sup> and whether one can practice criminal law without legitimizing the criminal system.<sup>272</sup> By now, I’m grinning ear to ear. I really want to stay. But I don’t want to be late. And suddenly, up ahead, there’s my host, waving me to join them. So I make my way to my talk.

### CONCLUSION

It has now become common, almost *de rigueur*, for law schools to commit themselves to being anti-racist and truly inclusive. Indeed, it has become so expected that it may even seem like virtue signaling, “sound and fury, signifying nothing.”<sup>273</sup> I hope not. I hope law schools are sincere.

But my larger hope is that law schools will do more than simply proclaim a goal of anti-racism, or commit to admitting a more diverse student body or hiring more diverse faculty, or commit to incorporating race in their curricula. Even with these changes, law schools will still function as white spaces in terms of what is taught and how it is taught and even in terms of their architecture. My hope is that law schools will have the courage and audacity to reimagine themselves as a different kind of white space—a blank page, a *tabula rasa*—and

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270. Teaching to Transgress, *Still Brave? U.S. Black Feminism as a Social Justice Project*, U. OXFORD, at 17:00 (June 22, 2015), <https://podcasts.ox.ac.uk/still-brave-us-black-feminism-social-justice-project> [<https://perma.cc/NP3F-AU6V>] (podcast lecture by Patricia Hill Collins).

271. India Thusi, *Policing Is Not a Good*, GEO. L.J. (forthcoming 2021) (critiquing the assumption that policing “is a public good, beneficial to most, when the opinions of many Black people suggest otherwise” and arguing for a macro approach that considers “the history, social context, political arrangements, and the contextualized nature of policing”).

272. See PAUL BUTLER, LET’S GET FREE: A HIP-HOP THEORY OF JUSTICE 101–21 (2009) (arguing that good people should not be prosecutors); Nicole Smith Futrell, *The Practice and Pedagogy of Carceral Abolition in a Criminal Defense Clinic*, 45 N.Y.U. REV. L. & SOC. CHANGE 159 (2021) (asking whether one can be a defender without legitimizing a flawed criminal law system).

273. See WILLIAM SHAKESPEARE, MACBETH, act 5, sc. 5 (“It is a tale Told by an idiot, full of sound and fury, Signifying nothing.”).

to untether themselves from so much that weighs them down. That they will reinvent themselves from the bottom up in a way that is cosmopolitan and then some, as a place where intellectual curiosity thrives, where change and challenge are celebrated, where education itself is a practice of freedom, and where there is no need to tout inclusivity, because everyone already belongs. I have limned out my own vision of what such a school might look like, but it need not be the only vision.

There is one final thing to say, something that has run just below the surface of this Essay, but that I have not mentioned explicitly. The focus of this Essay has been law schools, but here is the truth: It is not only law schools that too often function as white spaces, but the law itself. Both the law and the law school are “bound to the same whiteness,” if I may repurpose a line from Jennings.<sup>274</sup> 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. Allow me to go a step further. Much of our comfort with inequality generally—in terms of gender, class, wellbeing—is buttressed by our history of comfort with racial inequality.

All of this is to say it is not just law schools that need to be reimaged from the ground up, but law itself. So this is my true hope: That reimagining law schools is just the first step. The beginning to reimagining the law itself, and forging the law into new tools never before seen. Tools of empowerment and equality like the poet Audre Lorde started to imagine.<sup>275</sup> Maybe even like tools fashioned from the vibranium of *Black Panther*’s Wakanda.<sup>276</sup> Tools to finally “make America

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274. JENNINGS, *supra* note 88, at 83.

275. LORDE, *supra* note 248.

276. This is a reference to the metal in the groundbreaking film *Black Panther*, which power’s Wakanda’s advanced technology. See Andrew J. Hawkins, *Black Panther’s Wakanda Is a Transportation Utopia with a Dash of Reality*, VERGE (Feb. 23, 2018), <https://www.theverge.com/2018/2/23/17044448/black-panther-wakanda-maglev-train-hyperloop-transportation> [<https://perma.cc/T8JA-TX2C>].

what America must become,"<sup>277</sup> if I can channel James Baldwin again. That is the real goal.

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277. BALDWIN, *supra* note 163 (“[G]reat men have done great things here, and will again, and we can make America what America must become.”).