

# THE LAW SCHOOL CURRICULUM AND THE MOVEMENT FOR BLACK LIVES

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## Abstract

This Article discusses how faculty can substantively address white supremacy in the law school curriculum as part of the Movement for Black Lives. Because legal education sets how law students are taught to think about public policy and racial justice in the legal system, law schools' failure to educate students critically about white supremacy in the core law school curriculum makes them active participants in the legal system's devaluation of Black lives.

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## INTRODUCTION

Do Black Lives Matter in the law school curriculum? What would it look like if they did? The killings of Breonna Taylor, Ahmaud Arbery, and George Floyd brought with them protests, police response, and political maneuverings as White Americans were forced to grapple with their own fragility<sup>1</sup> and the fragility of Black lives. Black lives—students, staff, faculty, and administrative—remain fragile in U.S. law schools where their presence is used as evidence of racial progress even as

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1. ROBIN D'ANGELO, WHITE FRAGILITY: WHY IT'S SO HARD FOR WHITE PEOPLE TO TALK ABOUT RACISM (2018).

institutional commitments to Black lives stall beyond simple representation.<sup>2</sup> Like most academic institutions, law schools look to the superficial recruitment of Black students and faculty, and hire Black administrative staff, while turning a blind eye to the substantive work of providing inclusive environments that support its Black lives academically through graduation;<sup>3</sup> during the tenure and promotion processes; and through mentorship and sponsorship,<sup>4</sup> wage equity, and transparent hiring practices. As law schools re-open in the midst of a global health pandemic, we must face the pandemic of white supremacy that pervades all levels of law school operations. Black lives in law school are neither fungible and interchangeable, nor valuable only to prove an institution's commitment to diversity, equity, and inclusion (DEI) efforts. Rather, law schools must examine how the manner in which they train law students for law practice either serves or undermines the cause of justice.

#### I. RECRUITMENT, RETENTION, AND THE MOVEMENT FOR BLACK LIVES

Asserting that Black lives matter in law school is a controversial proposition that draws ambiguous affirmation. When Justice Sandra Day O'Connor authored her opinion in *Grutter v. Bollinger*,<sup>5</sup> she revealed how law schools view Black lives in the context of legal education and who benefits from their presence.<sup>6</sup> In examining whether the University of Michigan Law School's affirmative action admissions policy passed Constitutional muster, she wrote:

[T]he Law School's admissions policy promotes "cross-racial understanding," helps to break down racial stereotypes, and "enables [students] to better understand persons of different races." These benefits are "important and laudable," because "classroom discussion is livelier, more spirited, and simply more enlightening and interesting" when the students have "the greatest possible variety of backgrounds."

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2. Aaron N. Taylor, *The Marginalization of Black Aspiring Lawyers*, 13 FIU L. REV. 489, 505–11 (2019).

3. *Id.* at 510.

4. *Id.*; Sponsorship differs from mentorship, in that a mentor acts as a senior advisor because they have "walked" the way their mentees wish to walk. A sponsor acts as an advocate within their sponsee's institution or field to advocate for their interests and advancement. For more on sponsorship see Robin C. Hilsabeck, *Comparing Mentorship and Sponsorship in Clinical Neuropsychology*, 32:2 THE CLINICAL NEUROPSYCHOLOGIST 284 (2018); Manasa Ayyala et al., *Mentorship Is Not Enough: Exploring Sponsorship and Its Role in Career Advancement in Academic Medicine*, 94:1 ACAD. MED. 94 (2019).

5. 539 U.S. 306 (2003).

6. *Id.* at 330–31.

The Law School's claim of a compelling interest is further bolstered by its *amici*, who point to the educational benefits that flow from student body diversity. In addition to the expert studies and reports entered into evidence at trial, numerous studies show that student body diversity promotes learning outcomes, and "better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals."<sup>7</sup>

These "benefits" have not necessarily accrued to Black students. Rather, they make Black students' acceptable presence in law school contingent on their ability to promote cross-racial understanding, break down stereotypes, and contribute enlightenment and interest to the classroom conversation. Black law students are placed in a position to continually prove that they deserve a place in their law school classes, while White students are presumed to belong there. These are the hidden assumptions on which diversity in legal education rests. The benefits that Justice O'Connor wrote about are unidirectional—historically, law schools have not been overly concerned about what benefits, if any, Black students receive from their interactions with White students in law school classrooms, and have not pondered their commitment to Black student success.<sup>8</sup>

DEI professionals have been in high demand to provide resources to help faculty address racial inequities and the macro and microaggressions that polarize their classrooms.<sup>9</sup> However, DEI trainings alone are ineffective to address structural inequities in higher education and the professions.<sup>10</sup> As a preliminary matter, any DEI training that does not differentiate between its White participants and participants of color to meet the separate needs of each is ineffective on its face. First, while every person of color is not an expert on race and gender issues, absent careful and considered study on the same, people of color do have personal experiences with White supremacy and patriarchy that are distinct from their White peers. Forcing people of color to sit through the same DEI training as their White colleagues ignores these experiences, and fails to acknowledge that trauma informed strategies are necessary to negotiate institutional relationships strained by racial macroaggressions,

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7. *Id.* at 330.

8. Jessica C. Harris et al., *Who Benefits?: A Critical Race Analysis of the (D) Evolving Language Of Inclusion in Higher Education*, THOUGHT AND ACTION, Winter 2015, <https://vtechworks.lib.vt.edu/bitstream/handle/10919/84030/EquitySocialJustice.pdf?sequence=1&isAllowed=y> [<https://perma.cc/DJS5-GFRT>].

9. The perspectives that Professor McMurtry-Chubb offers here are based on her experience as a DEI consultant.

10. See, e.g., Frank Dobbin & Alexandra Kalev, *Why Doesn't Diversity Training Work? The Challenge for Industry and Academia*, 10:2 ANTHROPOLOGY NOW 48 (2018).

microaggressions, and racially discriminatory practices.<sup>11</sup> Second, White DEI training participants are often resentful of required trainings and take that resentment out on their colleagues of color explicitly through macro and microaggressions.<sup>12</sup> To the extent that these trainings center whiteness, primarily in attempts to minimize White resentment and soft-pedal discussions of racial inequity, they act in obeisance to white supremacy. Third, without a change in campus culture or an administration willing to make deep substantive changes to every area of law school operations, these trainings are but one drop in an ocean of discriminatory, harmful attitudes and practices. Unless critical interventions are introduced into legal education, it is unlikely that lawyers will cease to replicate inequities in the way they conceptualize, frame, interpret, and apply the law.<sup>13</sup>

## II. THE MOVEMENT FOR BLACK LIVES IN THE CLASSROOM

The foundational pedagogy for any inclusive and equitable classroom should be one that focuses on the relationship between professor and student.<sup>14</sup> This point may seem obvious, but it is paramount when considering faculty requests to “receive training on how to facilitate difficult conversations in the classroom.”<sup>15</sup> On the surface, this request seems reasonable. However, it is a request that actually reinforces racial hierarchies in relationships between Black professors and their peers and Black professors and their students. Black professors and their non-White counterparts do not necessarily have the option of avoiding issues of privilege and power when they enter a classroom setting. On the contrary, students often see their ability to teach them (or not) through the lenses

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<sup>11</sup> See, e.g., William Ming Liu, Rossina Zamora Liu, Yunkyong Loh Garrison, et. al., *Racial Trauma, Microaggressions, and Becoming Racially Innocuous: The Role of Acculturation and White Supremacist Ideology*, 74 *American Psychologist* 1 (2019); Thema Bryant-Davis, *Microaggressions: Considering the Framework of Psychological Trauma* in *Microaggression Theory: Influence and Interpretation* 86-101 (2018)

<sup>12</sup> See, e.g., Michael Mobley & Tamara Payne, *Backlash! The Challenge to Diversity Training*, 46:12 *TRAINING & DEVELOPMENT* 45 (1992).

<sup>13</sup> See, e.g., Teri A. McMurtry-Chubb, *The Practical Implications of Unexamined Assumptions: Disrupting Flawed Legal Arguments to Advance the Cause of Justice*, 58 *WASHBURN L.J.* 531 (2019) (detailing the results of a six-year empirical research study that showed how student attitudes about race, class, gender, and sexuality impacted their ability to formulate viable legal arguments).

<sup>14</sup> Sean Darling-Hammond and Kristen Holmquist, *Creating Wise Classrooms to Empower Diverse Law Students: Lessons in Pedagogy from Transformative Law Professors*, 25 *BERKELEY LA RAZA L.J.* 1, 1, 9, 17–19 (2015) (describing methods law professors use to create inclusive classrooms where all students can succeed).

<sup>15</sup> John D. Vogelsang & Sophia McGee, *Handbook for Facilitating Difficult Conversations in the Classroom* (2015), <http://teach.ufl.edu/wp-content/uploads/2016/07/Handbook-for-Facilitating-Difficult-Conversations2.pdf> [<https://perma.cc/U9GZ-TJSA>] (an example of a guidebook used to facilitate difficult classroom discussions).

of White supremacy and patriarchy.<sup>16</sup> Accordingly, most professors of color do not have the option of avoiding discussions about privilege and power—they are part and parcel of our experience as educators. Yet, throughout our teaching careers, we are placed in environments where our institutions do not recognize this emotional and psychological labor, another dimension of our daily work. Our career success requires that we learn how to facilitate these discussions alone, without any recognition, support, or training by our institutions, or resources for dealing with our own oppression inflicted trauma.<sup>17</sup>

A significant component in creating the best classroom environment is developing meaningful relationships with students.<sup>18</sup> This means understanding who our students are, meeting them where they are, and being clear with ourselves about how much of ourselves we wish to reveal in the education process. Ultimately, the best way to learn how to have difficult conversations in the classroom is to have difficult conversations in the classroom—but with support. Educating educators about appropriate language, key terms, and the foundational tenets for discussing privilege and power is an important first step, but it cannot be the only step. We must create inclusive classroom environments through our willingness to address issues of race and gender discrimination head-on.

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16. See, e.g., Derrick Bell & Richard Delgado, *Minority Law Professors' Lives: The Bell-Delgado Survey*, 24 HARV. C.R.-C.L. L. REV. 349, 349, 359–61 (1989); Teri A. McMurtry-Chubb, *Writing at the Master's Table: Reflections on Theft, Criminality, and Otherness in the Legal Writing Profession*, 2 DREXEL L. REV. 41, 43, 45–46, 49–50 (2009); Lorraine Bannai, *Challenged X 3: The Stories of Women of Color Who Teach Legal Writing*, 29 BERKELEY J. GENDER L. JUST. 275, 279–81 (2014); MEERA E. DEO, *UNEQUAL PROFESSION: RACE AND GENDER IN LEGAL ACADEMIA* (2019); Nantiya Ruan, *Papercuts: Hierarchical Microaggressions in Law Schools*, 31 HASTINGS WOMEN'S L. J. 3, 4, 13 (2019).

17. Anahvia Moody & Jioni Lewis, *Gendered Racial Microaggressions and Traumatic Stress Symptoms Among Black Women*, 43 *Psychology of Women Quarterly* 2 (2019); Monnica T. Williams, Destiny M.B. Printz & Ryan C.T. DeLapp, *Assessing Racial Trauma with the Trauma Symptoms of Discrimination Scale*, *Psychology of Violence* (2018), [https://www.researchgate.net/profile/Monica-Williams/publication/328010708\\_Assessing\\_Racial\\_Trauma\\_With\\_the\\_Trauma\\_Symptoms\\_of\\_Discrimination\\_Scale/links/5bd50d7692851c6b27931976/Assessing-Racial-Trauma-With-the-Trauma-Symptoms-of-Discrimination-Scale.pdf](https://www.researchgate.net/profile/Monica-Williams/publication/328010708_Assessing_Racial_Trauma_With_the_Trauma_Symptoms_of_Discrimination_Scale/links/5bd50d7692851c6b27931976/Assessing-Racial-Trauma-With-the-Trauma-Symptoms-of-Discrimination-Scale.pdf) [https://perma.cc/48DZ-WFVY].

18. See *Why Strong Teacher Relationships Lead to Student Engagement and a Better School Environment*, WATERFORD.ORG (Apr. 29, 2019), <https://www.waterford.org/education/teacher-student-relationships/>.

A. *Teaching the Movement for Black Lives in Criminal Law:  
Grappling with Goetz*

The core legal curricular canon is dense with cases that reiterate to students that Black lives do not matter. *People v. Goetz*,<sup>19</sup> which details Bernard Goetz's shooting of four unarmed young Black men on a New York City subway, is one such case.<sup>20</sup> It evokes strong feelings when taught, and is either memorable to Black law students for how their professor mishandled the classroom discussion by failing to address its racial dynamics, or meaningful because of how their professor embraced a rich discussion on how white supremacy shapes legal definitions of reasonableness in the context of self-defense.<sup>21</sup>

The events that lead Bernard Goetz to shoot Troy Canty (age 19), Darryl Cabey (age 19), James Ramseur (age 18), and Barry Allen (age 19) transpired on Saturday, December 22, 1984, on an IRT express train from the Bronx to lower Manhattan.<sup>22</sup> On that day, the four young men approached Goetz on the train.<sup>23</sup> James and Daryll had screwdrivers inside of their coats, which they had previously used to extract coins from video game machines.<sup>24</sup> Goetz boarded the train and sat down in the rear section of the same car the young men occupied.<sup>25</sup> He was carrying an unlicensed .38 tucked in a waistband holster and had loaded the gun with five rounds of ammunition.<sup>26</sup>

Troy and Barry approached Goetz, and Troy said to him “give me five dollars.”<sup>27</sup> None of the young men, including Troy and Barry, had any visible weapons.<sup>28</sup> At the time Troy spoke to Goetz, Goetz stood and fired four shots—each right after the other.<sup>29</sup> Shot one hit Troy in the chest.<sup>30</sup> Shot two hit Barry in the back.<sup>31</sup> The third shot went through James' arm and into his left side.<sup>32</sup> Goetz fired the fourth shot at Darryl, but missed him.<sup>33</sup> After regarding the young men he had wounded, Goetz then shot

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19. 497 N.E.2d. 41 (N.Y. 1986).

20. *Id.* at 43.

21. Leslie P. Culver, *White Doors, Black Footsteps: Leveraging "White Privilege" to Benefit Law Students of Color*, 21 JOURNAL OF GENDER, RACE & JUSTICE 37, 79–80 (2017).

22. *Goetz*, 497 N.E.2d at 43.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Goetz*, 497 N.E.2d at 43.

27. *Id.* (citation omitted).

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Goetz*, 497 N.E.2d at 43.

33. *Id.*

a fifth bullet at Darryl.<sup>34</sup> It entered the rear of Darryl's side and severed his spinal cord.<sup>35</sup> When the conductor came into the car afterward, Goetz told him that Troy, Darryl, James, and Barry had tried to rob him.<sup>36</sup>

Bernard Goetz fled the subway car where the shooting occurred, and then left the state for Concord, New Hampshire where he spent the holiday.<sup>37</sup> Nine days later, on December 31, 1984, he surrendered to the police in Concord after identifying himself as the New York subway shooter.<sup>38</sup> He later told the police that in shooting the young men he wanted to "murder [them], to hurt them, to make them suffer as much as possible."<sup>39</sup> Goetz also told the police that before shooting Darryl Cabey with the shot that severed his spinal cord he said "you seem to be all right, here's another."<sup>40</sup> Lastly, Goetz told police that "if [he] had . . . more bullets, [he] would have shot them again. . . ."<sup>41</sup>

Upon his return to New York City, Goetz was arraigned on a charge of attempted murder and criminal possession of a weapon.<sup>42</sup> The first grand jury only indicted Goetz on a charge of one count of criminal possession of a weapon in the third degree for the gun he used to shoot Troy, Darryl, James, and Barry.<sup>43</sup> The grand jury also indicted Goetz on a charge of two counts of criminal possession of a weapon in the fourth degree for guns found in his apartment.<sup>44</sup> Neither Goetz nor any of the young men testified, although the jury did hear Goetz's statements to the police.<sup>45</sup> The first grand jury issued no indictment on the attempted murder charge.<sup>46</sup>

The second grand jury indicted Goetz on four charges of attempted murder, four charges of assault, one charge of reckless endangerment, and one charge of criminal possession of a weapon.<sup>47</sup> Troy and James testified before the second grand jury, and again the jury heard Goetz's statements to the police.<sup>48</sup> In his presentation to the second grand jury, the prosecutor instructed the jury that in their consideration of whether Goetz could avail himself of the justification of self-defense, the jury had

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34. *Id.*

35. *Id.*

36. *Id.*

37. *Goetz*, 497 N.E.2d at 44.

38. *Id.*

39. *Id.* (citation omitted).

40. *Id.* (citation omitted).

41. *Id.* (citation omitted).

42. *Id.*

43. *Goetz*, 497 N.E.2d at 44.

44. *Id.* at 44–45.

45. *Id.* at 44.

46. *Id.* at 45.

47. *Id.* at 45.

48. *Goetz*, 497 N.E.2d at 45.

to determine if “Goetz’s conduct was that of a ‘reasonable man in [Goetz’s] situation.’”<sup>49</sup>

Goetz moved to dismiss the charges in the second indictment on several grounds, including grounds that the prosecutor’s jury instructions with respect to self-defense were incorrect.<sup>50</sup> The trial court agreed, reasoning that the standard was not objective as the prosecutor instructed, but “wholly subjective, focusing entirely on the defendant’s state of mind when he used such force.”<sup>51</sup> The Appellate Division affirmed the decision, but gave the state of New York leave to appeal.<sup>52</sup>

The Appellate Court framed the issue as whether the use of deadly force as self-defense is justified under a subjective standard, which focuses on the defendant’s state of mind.<sup>53</sup> It found that the standard for self-defense is both objective and subjective, meaning that the finder of fact must determine if the actions were reasonable to the defendant and reasonable under the circumstances.<sup>54</sup> In the court’s words:

[T]he [l]egislature [did not intend] . . . to allow the perpetrator of a serious crime to go free simply because that person believed his actions were reasonable and necessary to prevent some perceived harm. To completely exonerate such an individual, no matter how aberrational or bizarre his thought patterns, would allow citizens to set their own standards for the permissible use of force. It would also allow a legally competent defendant suffering from delusions to kill or perform acts of violence with impunity, contrary to fundamental principles of justice and criminal law.<sup>55</sup>

Goetz claimed that he perceived that Troy, Darryl, James, and Barry were a threat to him because when Canty asked him “how are you,” moved close to him and smiled, Goetz “knew from the smile on Troy’s face that he wanted to ‘play with [him].’”<sup>56</sup> His perception was also informed by being mugged on two prior occasions, even though he confirmed that none of the young men possessed a gun.<sup>57</sup> In essence, the court’s ruling allowed the jury at Goetz’s trial to decide whether Goetz’s belief that four unarmed young Black men were dangerous was reasonable to him, based on his previous experiences with violence. The

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49. *Id.* at 46.

50. *Id.* at 45.

51. *Id.* at 46.

52. *Id.*

53. *Id.*

54. *Goetz*, 497 N.E.2d at 49–50.

55. *Id.* at 50.

56. *Id.* at 44.

57. *Id.*

court also required the jurors to examine whether Goetz's act of firing a gun, in an enclosed subway car at four unarmed young Black men, was reasonable under the circumstances.<sup>58</sup> Although on its face, the court's clarification of the self-defense standard attempts to do justice, it in no way considers that the "circumstances" under which a jury would evaluate the objective reasonableness of Goetz's actions normalizes young Black men as dangerous. In a society infused with white supremacy, such perceptions are not "aberrational," "bizarre" or "delusional" even though they undermine the cause of justice.

To set the stage for a classroom discussion that seeks to reveal white supremacy in determinations of reasonableness in the use of deadly force against Black people, a professor can contextualize stereotypes about Black men legally and historically when they assign the Goetz case. Short articles, such as the blog post *Antebellum Law is the Precedent for Today's White-on-Black Violence*<sup>59</sup> about the killing of Ahmaud Arbery or Patrisse Cullors' op-ed *On Trayvon Martin's birthday we remember his life and why we fight for black lives*<sup>60</sup> are short, easy reads that provide an alternate lens through which students will read the text of the legal opinion. During the classroom discussion, the professor can show clips of the news footage from the day of the shooting and subsequent interviews with Goetz years later, which are widely available online. The interview clips in particular show how Goetz viewed his actions. For example, in an interview with Dateline NBC twelve years after the shooting, Goetz remarked "society is better off without certain people, whether one believes they should be killed or locked up or used for forced slavery. It's just a matter of one's political point of view."<sup>61</sup>

Lastly, questions to guide the classroom discussion might include:

1. Is the reasonable person standard a race and gender-neutral standard?<sup>62</sup>

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58. *Id.* at 52.

59. Elizabeth Berenguer, Lucy Jewel, & Teri A. McMurtry-Chubb, *Antebellum Law is the Precedent for Today's White-On-Black Violence*, L. PROFESSOR BLOGS NETWORK: RACE AND THE L. PROF BLOG (June 13, 2020), <https://lawprofessors.typepad.com/racelawprof/2020/06/antebellum-law-is-the-precedent-for-todays-white-on-black-violence-by-professors-elizabeth-berenguer.html> [<https://perma.cc/55KT-LG4X>].

60. Patrisse Cullors, *On Trayvon Martin's Birthday, We Remember His Life and Why We Fight for Black Lives*, *Think*, NBC NEWS (Feb. 5, 2018, 12:54 PM), <https://www.nbcnews.com/think/opinion/trayvon-martin-s-birthday-we-remember-his-life-why-we-ncna844711> [<https://perma.cc/YDN4-USKG>].

61. Stone Phillips, *Interview with Bernard Goetz*, YOUTUBE (Feb. 16, 2008), <https://www.youtube.com/watch?v=VVkUytZCzJ8> [<https://perma.cc/U7ES-858M>] (originally on Dateline NBC).

62. Note: I include gender, because I want students to get the connection between white supremacy and patriarchy as applied in discriminatory ways to Black men. For more on the tortured white supremacist, patriarchal and capitalist history of the reasonable person standard,

2. If not, in what ways does the court infuse it with racial and gendered meanings?

3. Given the readings and videos that you have watched, what are some ways that the court could have included the history of informal policing in its determination of whether Goetz acted reasonably under the circumstances?

4. Would including this history have led to a just and equitable result?

5. If Goetz had been a Black man, who shot four White young men under the same circumstances, would the court have reached a similar result? Explain your answer.

By modeling critical reading of the reasonable person standard in a criminal law class, a professor can shape how a student both understands this concept in their other classes and utilizes critical reading methods as they study cases throughout law school.

### III. THE MOVEMENT FOR BLACK LIVES IN LEGAL REASONING

Legal reasoning is a skill that law professors teach across the curriculum. Yet, we do not problematize the fact that legal reasoning is imbedded in Western rhetorical and reasoning forms.<sup>63</sup> In this way, law schools indoctrinate students in the very forms of reasoning that replicate privilege and power.<sup>64</sup> In order to educate students in a manner that helps them critique how reasoning frameworks impact legal outcomes and thwart lawyers' best intentions to "do" justice, we must disrupt this indoctrination. When this disruption occurs early in a law student's career, it can impact that law student's level of critical thinking in all of their law school classes.

Law and legal language are unique in that they instantiate racial and power relations by privileging Western rhetorical and reasoning forms—especially *logos* or logical reasoning.<sup>65</sup> In the practical, day-to-day work of teaching and learning, legal language excludes non-Western epistemologies (ways of knowing) and ontologies (ways of being) by forcing conformity through traditional legal process methods disguised

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see Lucy Jewel, *Does the Reasonable Man Have Obsessive Compulsive Disorder*, 54 WAKE FOREST L. REV. 1049 (2019).

63. See generally Elizabeth Berenguer, Lucille Jewell & Teri A. McMurtry-Chubb, *Gut Renovations: Using Critical and Comparative Rhetoric to Remodel How the Law Addresses Privilege and Power*, 23 HARV. LATINX L. REV. 205 (2020).

64. *Id.*

65. *Id.*

as neutral and universal. In re-thinking our courses, we must work to reframe them in a manner that lays bare the work of white supremacy and exposes how it is a direct threat to effecting justice in Black lives.

A. *Integrating the Movement for Black Lives into Civil Procedure*<sup>66</sup>:  
*Re-Framing Iqbal & Twombly*

*Ashcroft v. Iqbal*<sup>67</sup> and *Bell Atlantic Corporation v. Twombly*<sup>68</sup> are foundational to law students' understanding of how to draft complaints. *Iqbal* reaffirms that legal conclusions in a complaint are not presumed to be true.<sup>69</sup> *Twombly* requires a complaint to contain sufficient factual allegations to "state a claim [for] relief that is plausible on its face."<sup>70</sup> These cases and the rules that they establish are usually taught as non-controversial, straightforward "rules" with no racial dynamic. The case *Equal Employment Opportunity Commission v. Catastrophe Management Solutions, Inc.*<sup>71</sup> is illustrative of how the rules for drafting pleadings are centered in Western reasoning structures that center *logos* and seek to obscure how white supremacy colors legal interpretation and analysis.

Chastity Jones applied for a job with Catastrophe Management Solutions, Inc. (CMS).<sup>72</sup> At the time of her interview, she was wearing her hair in "locs,"<sup>73</sup> or a hairstyle characterized by solid pieces of grouped hairs that are various sizes in width and diameter. CMS offered her the job, but subsequently required that Ms. Jones cut off her locs as a condition of her employment.<sup>74</sup> CMS cited its company grooming policy, which stated in relevant part that "[a]ll personnel are expected to be dressed and groomed in a manner that projects a *professional* and *businesslike* image while adhering to company and industry standards and/or guidelines. . . . [H]airstyle should reflect a *business/professional image*. No *excessive* hairstyles or unusual colors are acceptable[.]"<sup>75</sup> When Ms. Jones refused to cut off her locs, CMS rescinded its offer.<sup>76</sup> In

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66. For scholarship that approaches civil procedure critically, see, e.g., Suzette Malveaux, *A Diamond in the Rough: Trans-Substantivity of the Federal Rules of Civil Procedure and its Detrimental Impact on Civil Rights*, 92 WASH U. L. REV. 455 (2014). The focus of this part of this Article is to give professors one curricular example of how to critically reframe a key concept in a civil procedure course.

67. 556 U.S. 662 (2009).

68. 550 U.S. 544 (2007).

69. *Iqbal*, 556 U.S. at 681.

70. *Twombly*, 550 U.S. at 570.

71. *EEOC v. Catastrophe Mgmt. Sols.*, 852 F.3d 1018 (11th Cir. 2016).

72. *Id.* at 1021.

73. *Id.*

74. *Id.* at 1021–22.

75. *Id.* at 1022 (emphasis added).

76. *Id.*

calling her hair “dreadlocks,” literally dreaded (undesirable) hair, CMS placed it in the category of unprofessional and non-businesslike, excessive and beyond the scope of its acceptable grooming practices.

The Equal Employment Opportunity Commission (EEOC) filed a complaint on behalf of Ms. Jones, alleging that CMS’ actions violated Title VII’s prohibitions on race discrimination.<sup>77</sup> CMS moved to dismiss the EEOC’s complaint, alleging that it failed to state a claim upon which relief could be granted.<sup>78</sup> Citing *Iqbal* and *Twombly*, CMS argued that “[the EEOC’s] complaint lacks both the foundation of a legally viable claim for relief and the factual basis to create even an inference of intentional discrimination. Specifically, [CMS] maintains as its sole contention that a dreadlock hairstyle is not an immutable characteristic, one which indicates race. Therefore, [CMS’] policy of prohibiting such hairstyles is not actionable under Title VII.”<sup>79</sup>

Four averments in the EEOC’s complaint illustrate how white supremacy informs what is a legal conclusion and what is a sufficient factual allegation. The EEOC plead:

[1] [R]ace “is a social construct and has no biological definition.”

[2] “[T]he concept of race is not limited to or defined by immutable physical characteristics.”

[3] [T]he “concept of race encompasses cultural characteristics related to race or ethnicity,” including “grooming practices.”

[4] [A]lthough some non-black persons “have a hair texture that would allow the hair to lock, dreadlocks are nonetheless a racial characteristic, just as skin color is a racial characteristic.”<sup>80</sup>

Although the EEOC later moved to amend its complaint, it maintained that its initial complaint met the pleading standards outlined in *Iqbal* and *Twombly*. It argued:

[The] amended complaint outlines the historical relations between Blacks and Whites in the United States [and] includes an ugly history of degradation of, and discrimination against, Blacks because of the unique texture of their natural hair dating back to the introduction of slavery

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77. *EEOC*, 852 F.3d at 1020.

78. *Id.*

79. Plaintiff’s Brief in Opposition to Defendant Catastrophe Management Solutions’ Motion to Dismiss, *EEOC v. Catastrophe Mgmt. Solutions Inc.*, 852 F.3d 1018 (2016), 2014 WL 4745282, at \*1.

80. *EEOC*, 852 F.3d at 1022 (reformatted for clarity).

in the United States. And, the proposed Amended Complaint goes on to allege due to the larger society's normative standards and expectations that Blacks wear their hair in a manner similar to whites, i.e. straightened, Defendant's application of the policy with the ban on [locs] is discriminatory. Finally, the amended complaint spells out that [n]on-Blacks were not subjected to this broad-brush in the implementation of the Defendant's grooming policy—i.e., that the manner in which they manage the natural construct of their hair, regardless of the style in which they wear it, prohibits their employ. Thus, neutralizing the court's argument that [loc'd] hair is not unique to African Americans and that it is beyond the cavil of Title VII.<sup>81</sup>

Nevertheless, the court granted CMS's Motion to Dismiss, reasoning that based on the allegations in the EEOC complaint, it could not “identify each of the material elements necessary to sustain a recovery under some viable legal theory.”<sup>82</sup>

The court's reasoning illuminates how white supremacy cannot hold space for any racial knowledge that does not place it at the center. Within its Western reasoning paradigms,<sup>83</sup> a hairstyle is just a hairstyle, devoid of cultural meaning or culturally specific grooming practices that best suit its texture. Reframing the pleading rules in the context of white supremacy leads students to question their presentation as neutral, and to understand how legal interpretation is not devoid of value judgments based on misunderstandings about race and gender.

#### IV. BEYOND REPRESENTATION IN THE MOVEMENT FOR BLACK LIVES

Sixteen years after *Grutter*, in 2019, the ABA reported that only 15% of lawyers in the United States are racial and ethnic minorities.<sup>84</sup> The statistics for law professors are equally abysmal. As of 2009, the last year for which the Association of American Law Schools published such data, of the approximately 10,965 law professors in the United States, 409 law professors were Black women (3.73%) and 344 (3.14%) were Black men.<sup>85</sup> Even among these professors you would be hard pressed to find graduates outside of T-14 schools or law schools in the top fourteen of

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81. Memorandum in Support of Motion for Leave to Amend Complaint, EEOC v. Catastrophe Mgmt. Solutions Inc., 852 F.3d 1018 (2016), 2014 WL 4745295, at \*4.

82. *Id.* at 2.

83. Teri A. McMurtry-Chubb, *Still Writing at the Master's Table: Decolonizing Rhetoric in Legal Writing for a “Woke” Legal Academy*, 21 THE SCHOLAR 255 (2019).

84. Nicole Black, *ABA 2019 Report: Lawyer Demographics, Earnings, Tech Choices, and More*, MYCASE, <https://www.mycase.com/blog/2019/08/aba-2019-report-lawyer-demographics-earnings-tech-choices-and-more/> [<https://perma.cc/MNS6-H9L2>] (last modified Aug. 24, 2020).

85. Meera E. Deo, *Looking Forward to Diversity in Legal Academia*, 29 BERKELEY J. GENDER L. & JUST. 352, 356–57 (2014).

the U.S. News and World Report rankings.<sup>86</sup> For example, much is made of the increasing number of Black women law deans over the last three years. However, of their number (twenty-four), only nine (37.5%) did not graduate from a law school ranked in the T-14.<sup>87</sup> This is not to diminish the accomplishments of any of these law deans', which are extraordinary, but to give law schools pause when considering faculty and administrative hiring as a significant DEI effort.

### CONCLUSION

Representation is important—if you cannot see yourself in your teachers, professors, and lawyers, then it is hard to believe that you can aspire to be them one day. But representation is not representation when lawyers and law professors of color are recruited who conform to normative standards that center white supremacist, patriarchal, and

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86. See, e.g., Michael J. Higdon, *A Place in the Academy: Law Faculty Hiring and Socioeconomic Bias*, 87 ST. JOHN'S L. REV. 171, 178–79 (2013); Lucille A. Jewel, *Bourdieu and American Legal Education: How Law Schools Reproduce Social Stratification and Class Hierarchy*, 56 BUFF. L. REV. 1155, 1206–07 (2008).

87. The following law deans have been hired over the last three years at their respective institutions; where they attended law school is noted in parentheses after their name:  
 Angela Onwuachi-Willig, Boston University (University of Michigan Law School)  
 Kimberly Mutcherson, Rutgers-Camden (Columbia Law School)  
 Song Richardson, UC Irvine (Yale Law School)  
 Tamara Lawson, St. Thomas-Miami (University of San Francisco School of Law)  
 Michèle Alexandre, Stetson (Harvard Law School)  
 Marcilynn A. Burke, University of Oregon (Yale Law School)  
 Danielle M. Conway, Penn State-Dickinson Law (Howard University School of Law)  
 Danielle Holley Walker, Howard (Harvard Law School)  
 Renée McDonald Hutchins, University of the District of Columbia (Yale Law School)  
 Verna Williams, University of Cincinnati (Harvard Law School)  
 Camille A. Nelson, Hawaii (LLM Columbia Law School)  
 Joan R.M. Bullock, Texas Southern University Thurgood Marshall School of Law (University of Toledo College of Law)  
 Felicia Epps, University of North Texas—Dallas (Creighton University School of Law)  
 Carla Pratt, Washburn University (Howard University School of Law)  
 Patricia Bennett, Mississippi College School of Law (Mississippi College School of Law)  
 Dayna Matthew, George Washington (University of Virginia School of Law)  
 Eboni Nelson, University of Connecticut (Harvard Law School)  
 Browne Lewis, North Carolina Central (University of Minnesota School of Law)  
 Sean Scott, California Western Law (New York University School of Law)  
 Camille Davidson, Southern Illinois (Georgetown University Law Center)  
 Karen Bravo, University of Indiana-Indianapolis (Columbia University School of Law)  
 Deidré A. Keller, FAMU (Emory University School of Law)  
 Cassandra Hill, Northern Illinois (Howard University School of Law)  
 Latonia Haney Keith, Interim Dean, Concordia University School of Law (Harvard Law School)  
 This list was obtained from Dean Angela Onwuachi-Willig and Associate Dean Catherine Smith via e-mail transmission on 7/31/2020.

hierarchical notions of quality and excellence. As its mirror, representation can neither stand as a sole challenge to imbedded white supremacist and patriarchal practices in professional education, nor as a proxy for the substantive changes needed in professional school curricula to advance the cause of justice.

In sum, the time for performative DEI measures has come to an end. Law schools must move beyond the superficial to examine how they perpetuate inequities in the core curriculum. They must enact critical interventions that underscore the simple truth - Black. Lives. Matter. Without these steps and more, legal education will continue to challenge the fundamental humanity of Black people and question the value of Black lives.