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## Reckoning with Structural Racism in Legal Education: Methods Toward a Pedagogy of Antiracism

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# RECKONING WITH STRUCTURAL RACISM IN LEGAL EDUCATION: METHODS TOWARD A PEDAGOGY OF ANTIRACISM

*Doron Samuel-Siegel\**

*Abstract:*

*There is an empty quality to much of what passes as “diversity, equity, and inclusion” work in legal education. Despite a robust body of scholarship on teaching law consistent with the goals of antiracism, many legal educators struggle to put theory into practice. This Article responds to that struggle, offering a holistic, methodical approach to a pedagogy of antiracism whose goal is twofold: create conditions in which racially minoritized students learn to their full potential, free from the harms of traditional legal education; and equip all students, regardless of identity, to contribute to the dismantlement of structural racism. Absent such pedagogy, legal educators fail to carry out our commitments to students and to equal justice under law, and ignore central duties imposed by ABA accreditation standards. Those standards require an educational setting where all students can learn and, ultimately, become practitioners who carry out what the Model Rules of Professional Conduct call the “special responsibility for the quality of justice.”<sup>1</sup>*

*Specifically, this Article describes a five-part pedagogy of antiracism that may be used by legal educators of all experience levels, together with a variety of concrete strategies for putting it into practice. While this methodological superstructure may*

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<sup>1</sup> MODEL RULES PRO. CONDUCT, pmb1. (AM. BAR ASS’N 2020).

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take somewhat different forms depending on an educator's identity and experience, its core strategies include: (A) understanding antiracism and developing cultural proficiency; (B) understanding and accounting for students' identities and experiences; (C) teaching substance truthfully and in context; (D) implementing inclusive teaching processes; and (E) being actively accountable for choices and harms. By adopting this pedagogy in ways both intentional and continual, law teachers have the potential to counteract the effects of structural racism and contribute to conditions for its dismantlement.<sup>2</sup>

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## I. INTRODUCTION

There is an empty quality to much of what passes as “diversity, equity, and inclusion” work in legal education. Indeed, we hear routinely that the United States engaged in a period of “racial reckoning” in the wake of the gruesome murder of George Floyd by then-police officer Derek Chauvin on May 25, 2020,<sup>3</sup> and law schools were among the many institutions to issue statements, convene reading groups and working groups, and set about drafting diversity plans. But rare are the efforts to reform legal education that might approach the sort of settling of accounts implied by the invocation of the word “reckoning.”

Many law teachers<sup>4</sup> are engaged in efforts to reckon genuinely with structural racism.<sup>5</sup> They recognize that, to play a role in the kind of systemic reform necessary to “eliminate root and branch all vestiges of racial discrimination,”<sup>6</sup> those of us who teach in law school must do more than acknowledge racism’s existence and avoid acts of interpersonal racism. Rather, we must examine—and, for some, change—what we know and the ways we think about ourselves; develop a practice of learning about our students and being accountable to their needs; and modify both what we teach and how we teach it. In other words, we must pursue a pedagogy of antiracism.

Many esteemed scholars have written extensively over the last forty years about what it takes to teach law consistently with the goals of antiracism and/or diversity, equity, and inclusion, with the volume of scholarship

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<sup>3</sup> See John Eligon, Tim Arango, Shaila Dewan & Nicholas Bogel-Burroughs, *Derek Chauvin Verdict Brings a Rare Rebuke of Police Misconduct*, N.Y. TIMES (Apr. 20, 2021), <https://www.nytimes.com/2021/04/20/us/george-floyd-chauvin-verdict.html>.

<sup>4</sup> Some who teach law have the title “professor;” still others are called “instructors.” In some law schools, people whose title is “librarian,” “advisor,” or “counselor” teach law, as well. To ensure this article’s references are as inclusive as possible, I have chosen to use the terms “law teachers” and “legal educators” interchangeably to refer to all who are engaged in providing legal education directly to law students.

<sup>5</sup> Structural racism is a society-wide web of social, economic, and political systems that advantages people racialized as white and disadvantages those who are not, as discussed further below, *infra* Part II(A)(1).

<sup>6</sup> *Milliken v. Bradley*, 418 U.S. 717, 782 (1974) (Marshall, J., dissenting).

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increasing significantly in the past decade.<sup>7</sup> Subject-specific articles are increasingly abundant, as well.<sup>8</sup> Despite this robust body of work, as well as their own good faith efforts, many legal educators express a sense of struggling to “put it all together” or “put it into practice.”<sup>9</sup> It is in response

<sup>7</sup> See, e.g., Kimberlé Williams Crenshaw, *Toward a Race-Conscious Pedagogy in Legal Education*, 11 NAT'L BLACK L. J. 1 (1988); Frances Lee Ansley, *Race and the Core Curriculum in Legal Education*, 79 CALIF. L. REV. 1511 (1991); Okianer Christian Dark, *Incorporating Issues of Race, Gender, Class, Sexual Orientation, and Disability into Law School Teaching*, 32 WILLAMETTE L. REV. 541, 552-53 (1996); Margalynne J. Armstrong & Stephanie M. Wildman, *Teaching Race/Teaching Whiteness: Transforming Colorblindness to Color Insight*, 86 N.C. L. REV. 635 (2008); Sean Darling-Hammond & Kristen Holmquist, *Creating Wise Classrooms to Empower Diverse Law Students: Lessons in Pedagogy from Transformative Law Professors*, 25 BERKELEY LA RAZA L. J. 1, 13 (2015); Meera E. Deo, *Faculty Insights on Educational Diversity*, 83 FORDHAM L. REV. 3115 (2015); Palma Joy Strand, *We Are All on the Journey: Transforming Antagonistic Spaces in Law School Classrooms*, 67 J. LEGAL EDUC. 176, 202 (2017); Erin C. Lain, *Racialized Interactions in the Law School Classroom: Pedagogical Approaches to Creating a Safe Learning Environment*, 67 J. LEGAL ED. 780, 788-92 (2018); Russell A. McClain, *Bottled at the Source: Recapturing the Essence of Academic Support as a Primary Tool of Education Equity for Minority Law Students*, 18 MD. L.J. RACE, RELIG., GENDER & CLASS 139 (2018); Amy H. Soled & Barbara Hoffman, *Building Bridges: How Law Schools Can Better Prepare Students From Historically Underserved Communities to Excel in Law School*, 69 J. LEGAL ED. 268, 290-91 (2020); Nicole P. Dyszlewski, *Introduction*, in INTEGRATING DOCTRINE AND DIVERSITY: INCLUSION AND EQUITY IN THE LAW SCHOOL CLASSROOM xiii-xiv (Nicole P. Dyszlewski, Raquel J. Gabriel, Suzanne Harrington-Steppen, Anna Russel & Genevieve B. Tung eds., 2021); Phil Lord, *Black Lives Matter: On Challenging the Soul of Legal Education*, 54 TEX. TECH L. REV. 89 (2021); Bennett Capers, *The Law School as White Space*, 106 MINN. L. REV. 7 (2021); TERI A. MCMURTRY-CHUBB, STRATEGIES AND TECHNIQUES FOR INTEGRATING DIVERSITY, EQUITY, AND INCLUSION INTO THE CORE LAW CURRICULUM (Wolters Kluwer 2022); Catherine Bramble & Rory Bahadur, *Actively Achieving Greater Racial Equity in Law School Classrooms*, 71 CLEVELAND STATE L. REV. 709 (2022).

<sup>8</sup> See K-Sue Park, *Conquest and Slavery in the Property Law Course: Notes for Teachers*, GEORGETOWN LAW FACULTY PUBLICATIONS AND OTHER WORKS (2020); Alfred L. Brophy, *Integrating Space: New Perspectives on Race in the Property Curriculum*, 55 J. LEGAL EDUC. 319 (2005); Jamal Greene, *Originalism's Race Problem*, 88 DENV. U. LEGAL REV. 517 (2011); Martha Chamallas, *The Architecture of Bias: Deep Structures in Tort Law*, 146 U. PA. L. REV. 463 (1998); Armstrong & Wildman, *supra* note 7, at 667-69 (offering suggestions for torts and constitutional law); Cheryl L. Wade, *Attempting to Discuss Race in Business and Corporate Law Courses and Seminars*, 77(4) ST. JOHN'S L. REV. 901 (2003); Cynthia Lee, *Making Black and Brown Lives Matter: Incorporating Race into the Criminal Procedure Curriculum*, 60 ST. LOUIS U. L.J. 481 (2016); Elizabeth Berenguer, Lucy Jewel & Teri A. McMurtry-Chubb, *Gut Renovations: Using Critical and Comparative Rhetoric to Remodel how the Law Addresses Privilege and Power*, 23 HARV. LATINX L. REV. 205 (2020); Teri A. McMurtry-Chubb, *Still Writing at the Master's Table: Decolonizing Rhetoric in Legal Writing For a "Woke" Legal Academy*, 21 SCHOLAR 255 (2019) [hereinafter *Master's Table*]; Portia Pedro, *A Prelude To a Critical Race Theoretical Account of Civil Procedure*, 107 VA. L. REV. 143 (2021); Shirin Sinnar, *The Lost Story of Iqbal*, 105 GEO. L. J. 379 (2017); Brooke D. Coleman, *#SoWhiteMale: Federal Civil Rulemaking*, 113 NW. U. L. REV. 407 (2018); Jeremiah A. Ho, *Uncovering Bias: Teaching Contracts Critically*, in INTEGRATING DOCTRINE AND DIVERSITY: INCLUSION AND EQUITY IN THE LAW SCHOOL CLASSROOM 119, 121 (Nicole P. Dyszlewski, Raquel J. Gabriel, Suzanne Harrington-Steppen, Anna Russell, & Genevieve B. Tung eds., 2021); Deborah Zalesne, *Racial Inequality in Contracting*, 3 COLUM. J. RACE & L. 23, 24-27 (2013); *IP Interrupted: Diverse Voices in Intellectual Property*, 32 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 302 (2022).

<sup>9</sup> Excellent resources for putting it all together exist, including especially, MCMURTRY-CHUBB, *supra* note 7; Dyszlewski, *supra* note 7, at xiii-xiv.

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to this expression of struggle that I offer the pedagogy of antiracism described in this Article.

What does it mean to strive to teach a pedagogy of antiracism? As conceived here, a pedagogy of antiracism is committed to counteracting the effects of structural racism as well as creating conditions for its dismantlement.<sup>10</sup> More specifically, it is an approach to educating law students that accomplishes two central goals. The first of these goals is to create conditions in which racially minoritized students<sup>11</sup> learn and grow to their full potential, free from the harms wrought by traditional legal education. The second goal of this pedagogy is to equip all students, regardless of identity, to contribute to the dismantlement of structural racism should they choose to do so.

Is a pedagogy of antiracism necessary? Some readers, especially those who lack personal experience with the day-to-day impacts of racism, might wonder. It is necessary, indeed. This is especially so because traditional approaches to legal education can be harmful to racially minoritized students and interfere with their ability to thrive.<sup>12</sup> As such, failing to pursue this pedagogy means failing in our commitment to educate students, as well as our specific duty under ABA accreditation Standard 301 to create an educational setting where *all* law students can learn and, in turn, become effective legal practitioners.<sup>13</sup>

Indeed, traditional approaches to law teaching impose disproportionate cognitive burdens on racially minoritized students that can inhibit

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<sup>10</sup> This conception flows from the definition of antiracism—the act of fighting against racism—as discussed further below, *infra* Part II(A)(1).

<sup>11</sup> My intention in opting for the terminology “racially minoritized” is to emphasize the experience of having been systematically excluded and oppressed. The verb, “minoritize,” is a more complete and precise description in this setting than nouns such as “minority” or “student of color” because it accounts for the reality that structural inequality and marginalization, not inherent characteristics, create “minority” status. *See, e.g.,* Syk Sotto-Santiago, *Time to Reconsider the Word Minority in Academic Medicine*, 12 J. BEST PRAC. HEALTH PRO. DIVERSITY 72, 73 (2019) (citing Michael Benitez, *Resituating culture centers within a social justice framework: Is there room for examining whiteness?*, in CULTURE CTR. HIGHER EDUC. 119 (L.D. Patton ed., 2010)).

<sup>12</sup> *See infra* Parts II(B) discussing solo status and stereotype threat, II(C) discussing racial microaggressions, and II(D) discussing decontextualization and false neutrality.

<sup>13</sup> ABA Standards and Rules of Procedure for Approving Law Schools, Standard 301 Objectives of Program of Legal Education (2021-22) (“A law school shall maintain a rigorous program of legal education that prepares its students, upon graduation, for admission to the bar and for effective, ethical, and responsible participation as members of the legal profession.”). What is more, this work soon will be explicitly essential to the enterprise of ABA-accredited legal education when the new ABA Standard 303(c) goes into effect. It states that “law school[s] shall provide education to law students on bias, cross-cultural competency, and racism: (1) at the start of the program of legal education, and (2) at least once again before graduation.”

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performance on exams and other assessments,<sup>14</sup> impose particularized risks of health issues such as loss of appetite, increased blood pressure, and depression;<sup>15</sup> and often invalidate the experiences and emotions of racially minoritized students by presenting the law through a decontextualized lens.<sup>16</sup> Furthermore, data such as disparate bar passage rates indicate that law schools likely are not meeting the academic needs of minoritized students as effectively as those of white students.<sup>17</sup> Perhaps unsurprising in light of the foregoing, racially minoritized students self-report feeling a lesser sense of belonging in their law school communities than do white students,<sup>18</sup> and are much more likely to feel that their law schools are failing to counteract stigma.<sup>19</sup>

What's more, traditional approaches to legal education do not prepare all students to participate in the dismantling of structural racism. A legal education that does not teach the law in its racial context cannot be said to equip practitioners in any meaningful sense for professional lives that include knowledgeable pursuit of racial equity under law.<sup>20</sup> In fact, many students self-report a dearth of preparedness, with significant percentages believing their schools "place very little emphasis on . . . equity or privilege" and also "very little emphasis on skills to confront discrimination and harassment."<sup>21</sup>

A pedagogy of antiracism is necessary, indeed. Toward that end, my thesis is that to pursue effectively a pedagogy of antiracism, legal educators should engage an intentional, continual process-oriented methodology that

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<sup>14</sup> See *infra* Part II(B) discussing solo status and stereotype threat.

<sup>15</sup> See *infra* Part II(D)(1) discussing racial microaggressions.

<sup>16</sup> See *infra* Part II(C) discussing decontextualization and false neutrality.

<sup>17</sup> See *New ABA Data Indicate Minorities Lagging in Bar Passage Rates*, ABA (July 5, 2021), <https://www.americanbar.org/news/abanews/aba-news-archives/2021/07/bar-passage-rates/> (indicating 2020 first-time test taker rates of 88% for white graduates, 66% for Black graduates, 76% for Hispanic graduates, 78% for Native American graduates, and 80% for Asian graduates).

<sup>18</sup> *Law School Survey of Student Engagement 2020 Annual Survey Results*, INDIANA U. CNTR. FOR POST-SECONDARY RES. 9, <https://lsse.indiana.edu/wp-content/uploads/2020/09/Diversity-and-Exclusion-Final-9.29.20.pdf> (reporting 31% of white students "strongly agree that they are part of the community," while just 21% of Black students, 21% of Native American students, 26% of Asian American students, 28% of Latinx students, and 25% of Multiracial students strongly agree with that statement).

<sup>19</sup> *Law School Survey of Student Engagement 2020 Annual Survey Results*, INDIANA U. CNTR. FOR POST-SECONDARY RES. 13-14, <https://lsse.indiana.edu/wp-content/uploads/2020/09/Diversity-and-Exclusion-Final-9.29.20.pdf> (reporting that, by racial categories, 18 to 36% of students don't believe their schools emphasize equity and privilege, and 14 to 36% of students don't believe their schools emphasize anti-discrimination skills).

<sup>20</sup> See *infra* Part II(C). Lawyers are duty-bound to pursue racial equity since its absence undermines "the quality of justice." See MODEL RULES PRO. CONDUCT, preamble (AM. BAR ASS'N 2020) ("A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.").

<sup>21</sup> *Law School Survey of Student Engagement 2020 Annual Survey Results*, INDIANA U. CNTR. FOR POST-SECONDARY RES. 10.



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bolsters the thriving of racially minoritized students and prepares all students to counteract structural racism.<sup>22</sup> While this process may take modestly different forms for different educators depending on identity and experience, this Article’s contribution is a five-component methodology for achieving a pedagogy of antiracism: (A) understanding antiracism and developing our own cultural proficiency; (B) understanding and accounting for our students’ identities and experiences; (C) teaching substance truthfully and in context; (D) implementing inclusive teaching processes; and (E) being actively accountable for our choices and harms. To flesh out the methodology, I offer examples throughout the Article, synthesizing and concretizing based on both the literature and my own experience as a law teacher.<sup>23</sup>

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<sup>22</sup> Some might ask why I center antiracism in this project. Why not explore a pedagogy of equity writ large, one that accounts for multilayered inequity arising from the complexity of multiple identity categories and forms of oppression? My choice to focus on racism and antiracism flows from the conviction that achieving wide-ranging equity requires that we first attend to the specific constituent parts of inequity. In this instance, white supremacy in the United States—the driving force behind racialization and racism—is a particular brand of oppression, and requires a particularized response. It is beyond dispute that privilege and oppression have been apportioned along numerous dimensions in addition to race—gender, ethnicity, disability, religion, sexual orientation, and others—“[y]et,” as Ta-Nehisi Coates put it, “America was built on the preferential treatment of white people.” TA-NEHISI COATES, *WE WERE EIGHT YEARS IN POWER: AN AMERICAN TRAGEDY* 197 (2018). While often well-intentioned, efforts to take a broader “diversity, equity, inclusion” focus (or, more recently, a focus on “belonging”), end up serving as an offramp for people and institutions unwilling to undertake the very specific and often extreme brand of discomfort that attends grappling with the particular origins, harms, and persistence of structural racism in the U.S.

In this project, I elect not to offer that offramp. Instead, this work is specific to racism. It opts not to adopt what Coates called the “raceless anti-racism [that] marks the modern left[‘s]” theory that a rising tide lifts all boats. TA-NEHISI COATES, *WE WERE EIGHT YEARS IN POWER: AN AMERICAN TRAGEDY* 197 (2018). Certainly, the methodology offered here has much to offer a broader pedagogy of equity. Indeed, many of the strategies I explore are relevant to a pedagogy of equity writ large—from achieving cultural proficiency to counteracting stereotype threat, teaching law in context, and apologizing for harms. However, this Article is a space for exploring a particular inquiry about racism and antiracism in legal pedagogy.

<sup>23</sup> While I continue to have much to learn, I joined the ranks of full-time law faculty in 2013. (In the four preceding years, I taught Contract Drafting each Spring as an Adjunct Assistant Professor of Law at the University of Richmond. In those years, I was a firm lawyer and later a non-profit executive). I came to the faculty as a white person with a commitment to antiracism and basic awareness of anti-Black racism, both born mostly of personal study and membership in an interracial family. But, in 2013, I had only a vague grasp of the ways in which, like the law itself, legal education is both a product and a producer of structural racism.

As I set about learning to be a more effective teacher, I searched for ways to align my teacher-self with my desire to contribute to the dismantlement of structural racism. This Article is one outgrowth of that journey—a journey that is ongoing. It is a product of what I have thus far learned from other teachers and scholars across time and place; what I have gained from dialogue with colleagues on the faculty and staff at Richmond Law; and my own efforts, attempts, successes, and failures as a teacher to date. But, most importantly, it is a product of the incalculable gifts of wisdom, trust, honesty, and courage given to

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In so doing, this project offers a methodological gateway to those educators who may not yet be steeped in the literature, as well as an invitation to educators already aspiring for antiracism to use a methodology to bolster their coherence, agility, and efficaciousness over the long term. In sum, my hope is to offer two additions to the scholarly conversation: a methodological superstructure to support antiracist legal educators of all experience levels, and a set of observations and examples that grow directly from my study, observation, trial, and error.

To accomplish this Article's goals, I will offer a pathway to the five-component methodology, beginning in Part II by exploring five categories of barriers that often stand in the way of the methodology. Part III, in turn, outlines the pedagogy itself in the form of information and strategies legal educators can use to transcend those five sets of barriers. Aside from the five-part methodological backbone of this project, none of the specific barriers, strategies, or examples I offer are intended to be comprehensive. Rather, my aim is to explore a sampling of ideas—a sampling that will serve as an invitation to further study and a jumping-off point for comprehensive action.

To put this method into practice, I suggest each teacher create a personal approach with the five-part methodology at its heart. Teachers can think of the strategies described here as a menu of options, first selecting those best suited and most urgent in light of their needs, and perhaps adding additional strategies incrementally. It is my conviction that a pedagogy which returns regularly to the five areas this Article addresses—that strives to transcend the barriers with intentionality and concrete action—has potential to be a pedagogy of antiracism.

Before proceeding, it must be acknowledged that we law teachers are all at different points on the ongoing journey toward antiracism. We also are likely to incur unequal costs in pursuit of an antiracist pedagogy. This variety of experiences and prospective costs makes it challenging to write an article for a universal audience. For instance, law teachers like me who identify as white might in some cases find ourselves at a relatively early stage of progress toward antiracism thanks to the privilege of limited personal experience with the daily effects of racism.<sup>24</sup> Regardless of our development

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me over the years by students of all identities. So many students have shared themselves with me, challenged me to do better, and invested in me as a collaborator. In so doing, they have extended generosity that has played and continues to play an irreplaceable role in my ongoing journey toward a pedagogy of antiracism—generosity for which I am deeply grateful.

<sup>24</sup> Some teachers, particularly those who are white, also describe feeling burdened by their fear of the consequences of making good faith errors. Acknowledging those feelings, striving to understand them, and pushing ahead despite them is part and parcel of what this methodology invites teachers to do,

as antiracist educators, we white teachers certainly are likely to incur comparatively lower costs—psychic costs, costs associated with professional rank and status, etc.—as a result of adopting such a pedagogy.

On the other hand, due to the impacts of racism in their own lives, law teachers who are racially minoritized may have developed relatively greater awareness of the barriers and strategies this Article explores. What's more, racially minoritized teachers often have been expected to carry disproportionate shares of antiracist work in their institutions, and in turn suffered the unequal psychic costs and professional risks associated with that disproportion. Further, the costs and risks associated with adopting antiracist pedagogies while also navigating the impacts of racism in one's own life are likely to be heightened for those who are racially minoritized.

As described above, my hope here is to offer a methodology that has relevance for all law teachers, regardless of personal experience with racism or individual progress toward antiracist pedagogy. While the methodology itself can be adopted by all, some readers will no doubt find certain segments less relevant than others, or some suggested strategies too personally costly to adopt. I hope each reader will find some value in what follows as they pursue their own approach to antiracism in law teaching. Together, may we nurture the thriving of racially minoritized students and bolster the ability of all students to counteract structural racism.

## II. BARRIERS TO A PEDAGOGY OF ANTIRACISM

To pursue a pedagogy of antiracism, law educators must transcend a series of barriers that can stand in the way of the pedagogy; this Part offers a sampling of such barriers. While this list of barriers is not exhaustive, awareness of them can serve as a foundation for the strategic choices each legal educator will make on the journey to a pedagogy of antiracism.

This part will take up barriers that can inhibit each of the five components of the methodology of antiracist pedagogy: (A) barriers within us as teachers; (B) barriers arising from our students' psychological and cognitive experiences; (C) barriers arising from the substance we teach; (D) barriers arising from the processes we use to teach; and (E) barriers to accountability. Exploring these barriers will, in turn, prepare us to engage strategies capable of transcending them. Those strategies are the subject of Part III. First, let us begin by looking within ourselves.

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specifically in the form of the process for overcoming barriers within ourselves, *see infra* Parts II(A) and III(A).

### A. Barriers Within Us

A pedagogy of antiracism seeks to ensure racially minoritized students thrive and to equip all students to participate in the dismantling of structural racism. This work, just like all the work of antiracism, begins from the inside—it begins with one’s belief system and willingness to take responsibility for bringing about equity.<sup>25</sup> Only once we understand how unearned privilege operates; assess our biases and, for some, fragility; and reckon with our imperfect pursuit of equity—only then can we do the external work of teaching all students equitably and antiracistly. This work is difficult and can be uncomfortable; it requires us to take risks and be willing to be accountable for our mistakes.<sup>26</sup> Barriers that may exist within law teachers to varying degrees—depending on identity, experience, and antiracist development—include lack of cultural proficiency, lack of practice and comfort, and implicit or unconscious bias. Each will be discussed in turn.

#### 1. Lack of Cultural Proficiency

Essential to the work of antiracist pedagogy is a continuous effort to build what has come to be called cultural proficiency. Without it, we are not equipped to teach all students well and prepare them for the pursuit of equal justice under law.<sup>27</sup> Cultural proficiency requires one to engage in a process that is inward-focused and ongoing; this process is the first step in forming and nurturing one’s ability to teach antiracistly.<sup>28</sup> Indeed, to be effective in antiracist pedagogy, one must be able to talk knowledgeably and comfortably about race and racism; believe in all students on their own terms, rather than in comparison to an imagined norm; and see oneself as an agent of change.

Cultural proficiency refers to the “values and behaviors of an individual that enable that . . . person to interact effectively in a diverse

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<sup>25</sup> See, e.g., *Being Antiracist*, NATIONAL MUSEUM OF AFRICAN AMERICAN HISTORY AND CULTURE, <https://nmaahc.si.edu/learn/talking-about-race/topics/being-antiracist> (last visited Jul. 11, 2022) (“When we choose to be antiracist, we become actively conscious about race and racism and take actions to end racial inequities in our daily lives. Being antiracist is believing that racism is everyone’s problem, and we all have a role to play in stopping it.”).

<sup>26</sup> See, e.g., Ansley, *supra* note 7, at 1559 (“If teachers intend to open this scary space, they need to be ready to make it reasonably safe and bearable for all members of the enterprise and *be willing to take a few lumps in the process*.”) (emphasis added).

<sup>27</sup> See, e.g., Anastasia M. Boles, *Seeking Inclusion from the Inside Out*, 11 CHARLESTON L. REV. 209, 214 (2017) (suggesting the cultural proficiency paradigm is a helpful tool in the effort to make legal education more inclusive, supportive, and diverse).

<sup>28</sup> See, e.g., Anastasia M. Boles, *The Culturally Proficient Law Professor: Beginning the Journey*, 48(1) N.M. L. REV. 145, 150 (2018).

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environment.”<sup>29</sup> Proficiency is the most mature step on a developmental spectrum; the spectrum begins with cultural destructiveness, then proceeds through various stages including cultural blindness, cultural competence, and, ultimately, proficiency.<sup>30</sup> Cultural proficiency is not a static end point, but a state of being that requires constant attention, self-assessment, and evolution. One engaged in the ongoing work of cultural proficiency can, in so doing, become equipped to provide culturally proficient instruction—i.e., “a way of teaching in which instructors engage in practices that provide equitable outcomes for all learners.”<sup>31</sup> To pursue cultural proficiency, one likely must also transcend the second common barrier: lack of practice and comfort talking about race, racism, and white supremacy.

## 2. Discomfort and Lack of Practice, Often Manifesting in Fragility

To engage a pedagogy of antiracism, one must not only develop facility with cultural proficiency writ large but must also be capable very specifically of the act of talking about race, racism, and white supremacy. While this proposition might seem simple, many people—people who identify as white in particular—find it to be quite the opposite. Indeed, many law teachers find it challenging to engage meaningfully with race’s role in the law.<sup>32</sup> Some have suggested that the challenge arises because “the first time many faculty members . . . are forced to consider and articulate their stance on identity is in the classroom.”<sup>33</sup> This experience may be particularly common for “those who view themselves and their disciplines as identity neutral.”<sup>34</sup> In sum, for

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<sup>29</sup> Boles, *supra* note 27, at 215 (quoting KIKANZA NURI-ROBINS, DELORES B. LINDSEY, RANDALL B. LINDSEY, & RAYMOND D. TERRELL, *CULTURALLY PROFICIENT INSTRUCTION: A GUIDE FOR PEOPLE WHO TEACH* (3rd ed. 2012)).

<sup>30</sup> Boles, *supra* note 28, at 151.

<sup>31</sup> Boles, *supra* note 27, at 215 n.28 (quoting KIKANZA NURI-ROBINS, DELORES B. LINDSEY, RANDALL B. LINDSEY, & RAYMOND D. TERRELL, *CULTURALLY PROFICIENT INSTRUCTION: A GUIDE FOR PEOPLE WHO TEACH* (3rd ed. 2012)).

<sup>32</sup> *E.g.*, Derisa Grant, *On ‘Difficult’ Conversations*, *INSIDE HIGHER ED.* (July 15, 2020); Armstrong & Wildman, *supra* note 7, at 638. Regardless of the cause, white people often express the sentiment that “talking about race is difficult.” Kayon Murray-Johnson and Jovita M. Ross-Gordon, “*Everything Is About Balance*”: *Graduate Education Faculty and the Navigation of Difficult Discourses on Race*, 68 *ADULT ED. Q.* 137, 137 (2018). Some consider race a taboo subject; others attribute their avoidance to fear of undermining the amicability of group environments; eliciting stressful emotions; or bringing into view pre-existing imbalances of power and privilege among participants. *Id.* at 137-38. Many are concerned that their lack of knowledge about racialization and racism makes them prone to speak offensively or otherwise cause harm unintentionally. *Id.* at 137.

<sup>33</sup> Grant, *supra* note 32.

<sup>34</sup> *Id.*

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many legal educators, these discussions manifest as difficult because they are so unpracticed.<sup>35</sup>

In the classroom, teachers' discomfort and lack of practice can play out in a number of ways. For instance, educators sometimes respond to this discomfort by consciously avoiding discussion of race and racism altogether.<sup>36</sup> Others attempt to autocratically control such discussions, while some might find their discomfort so strong that it blinds them—rendering them likely to utterly fail to recognize when a discussion invokes race or racism.<sup>37</sup>

This discomfort can manifest in a particular way when experienced by white people. Dr. Robin DiAngelo coined the term “white fragility” to describe the phenomenon.<sup>38</sup> DiAngelo defines white fragility as “a state in which even a minimum amount of racial stress becomes intolerable, triggering a range of defensive moves” that aim to “reinstate white racial equilibrium.”<sup>39</sup> In other words, since white people are generally insulated from discomfort based on race,<sup>40</sup> they are rarely tasked with thinking about or discussing racism or the advantages that accrue to white people due merely to whiteness.<sup>41</sup> As a result, they do not generally possess a well-developed toolkit for thinking about, talking about, and acting on such information.<sup>42</sup> Engaging with race and racism is not only something white people are inexperienced at doing, it is also something they have incentive to avoid. Acknowledging the existence of the unearned privilege that racism creates, for instance, requires white people to rethink the veracity of common narratives of merit, individualism, and personal accomplishment. Taken together, the lack of experience engaging with race and the painful truths that emerge from such engagement result in white fragility. When fragility is triggered, white people are likely to display defensive moves such as shifting attention away from the harms of racism and the implications of white privilege to focus instead on the blamelessness of whites.<sup>43</sup>

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<sup>35</sup> *Id.*

<sup>36</sup> Lain, *supra* note 7, at 788-92.

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

<sup>38</sup> Dr. Robin DiAngelo, *White Fragility*, 3 INT'L. J. CRITICAL PEDAGOGY 54, 54 (2011).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 55.

<sup>41</sup> *Id.*

<sup>42</sup> Some might argue that white people also have incentive to avoid talking about and acting on racism since doing so leads inevitably to the recognition that white people experience certain unearned privileges purely as a function of racialization. Disgorging such privileges is part and parcel of pursuing an equitable society.

<sup>43</sup> DiAngelo, *supra* note 38, at 119.

Lack of practice and comfort discussing race, and, for some, the fragility that emerges therefrom, inhibit law teachers' ability to teach a pedagogy of antiracism. The same is true of the next barrier for discussion—unconscious or implicit bias.

### 3. Unconscious or Implicit Bias

In addition to the conscious skills and thought processes that may play a role in our effectiveness as architects of antiracist pedagogy, we also face barriers unconscious in nature. Implicit bias is a commonly discussed example. Unconscious mental processes are quick, intuitive cognitive processes characterized by an automatic quality.<sup>44</sup> Implicit bias is one type of unconscious reasoning; it is an “unconscious mental process[ ] based on implicit attitudes or implicit stereotypes that are formed by one’s life experiences and that lurk beneath the surface of the conscious.”<sup>45</sup> It flows from the functioning of our cognitive categorization system known as “schema.”<sup>46</sup>

Schemas are the categories into which we place the stimuli we encounter in the world—a sort of simplified filing system in our brains that allows us to shortcut the process for reacting to those stimuli.<sup>47</sup> “For example, people develop racial schemas which trigger implicit and explicit emotions, feelings, positive or negative evaluations, and thoughts or beliefs about the racial category, such as generalizations about their intelligence or criminality.”<sup>48</sup>

Stereotypes are a type of schema.<sup>49</sup> And, like all schemas, they “can facilitate the rapid categorization of people and allow us to ‘save cognitive resources.’”<sup>50</sup> This efficiency comes with costs, however, such as “bias in

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<sup>44</sup> See, e.g., DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* 20-21 (2011) (describing two common modes of thinking, one which “operates automatically and quickly, with little or no effort and no sense of voluntary control” and a second that “allocates attention to the effortful mental activities that demand it”).

<sup>45</sup> Nicole E. Negowetti, *Judicial Decisionmaking, Empathy, and the Limits of Perceptions*, 47 AKRON L. REV. 693, 706 (2014) (citing Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CALIF. L. REV. 969, 975 (2006)).

<sup>46</sup> Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1498-99 (2005) (citing SUSAN T. FISKE & SHELLEY E. TAYLOR, *SOCIAL COGNITION* 98 (2d ed. 1991)).

<sup>47</sup> *Id.*

<sup>48</sup> Negowetti, *supra* note 45, at 708.

<sup>49</sup> Kang, *supra* note 46, at 1500; Negowetti, *supra* note 45, at 710 (citing Susan T. Fiske, *Stereotyping, Prejudice, and Discrimination*, in 2 THE HANDBOOK OF SOCIAL PSYCHOLOGY 367 (Daniel T. Gilbert, Susan T. Fiske, & Gardner Lindzey eds., 4th ed. 1998)).

<sup>50</sup> Negowetti, *supra* note 45, at 710 (quoting Susan T. Fiske, *Stereotyping, Prejudice, and Discrimination*, in 2 HANDBOOK OF SOCIAL PSYCHOLOGY 367 (Daniel T. Gilbert, Susan T. Fiske, & Gardner Lindzey eds., 4th Ed. 1998)).

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our perceptions and judgments” causing characteristics such as race to influence us in ways we might not consciously intend.<sup>51</sup> This reality is compounded by the evidence that “people pay more attention to information that is consistent with a stereotype and less attention to stereotype-inconsistent information, that people seek out information that is consistent with the stereotype, and that people are better able to remember information that is consistent with the stereotype.”<sup>52</sup> These risks are further exacerbated when people consider themselves objective or unbiased since such a self-perception can increase the risk of discriminatory behavior.<sup>53</sup>

The presence of implicit bias has been demonstrated regardless of identity. Thus, notwithstanding that most law teachers presumably are consciously committed to non-discrimination and express support for equity,<sup>54</sup> implicit bias remains a barrier to a pedagogy of antiracism precisely because of its unconscious nature. This barrier, together with our potential lack of cultural proficiency and discomfort discussing race, must be overcome if we are to strive for a pedagogy of antiracism. So, too, must we take into account the barriers our students experience.

*B. Barriers that Arise from Our Students’ Psychological and Cognitive Experiences*

Since one of the two central goals of a pedagogy of antiracism is the thriving of racially minoritized law students, strategies for achieving this pedagogy must account for barriers that inhibit our students’ thriving. We will consider two such barriers here—numeric isolation and stereotype threat. These barriers have the potential to be overcome—social scientists and educators have demonstrated as much.<sup>55</sup> The more knowledgeable and cognizant we are of these barriers, the more intentional we can be about employing strategies capable of counteracting them.<sup>56</sup>

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<sup>51</sup> *Id.* (citing Donald C. Nugent, *Judicial Bias*, 42 CLEV. ST. L. REV. 1, 10 (1994)).

<sup>52</sup> *Id.* at 710-11 (2014) (citing Susan T. Fiske, *Stereotyping, Prejudice, and Discrimination*, in 2 THE HANDBOOK OF SOCIAL PSYCHOLOGY 367, 371 (Daniel T. Gilbert, Susan T. Fiske, & Gardner Lindzey eds., 4th ed. 1998)).

<sup>53</sup> Eric Luis Uhlmann & Geoffrey L. Cohen, “*I Think It, Therefore It’s True*”: *Effects of Self-Perceived Objectivity on Hiring Discrimination*, 104 ORG. BEHAV. & HUM. DECISION PROCESSES 207, 211 (2007).

<sup>54</sup> *See, e.g.*, Law Deans Antiracist Clearinghouse Project, American Association of Law Schools, [https://www.aals.org/about/publications/antiracist-clearinghouse/?utm\\_source=email&utm\\_medium=informz&utm\\_campaign=AALS](https://www.aals.org/about/publications/antiracist-clearinghouse/?utm_source=email&utm_medium=informz&utm_campaign=AALS) (compiling antiracist resolutions adopted by law faculties from around the U.S.).

<sup>55</sup> *See infra* Part III(B).

<sup>56</sup> Numeric isolation and stereotype threat are not a comprehensive list of psychological and cognitive experiences that may have relevance for our students. Other dynamics, such as racial trauma and stigma



## 1. Solo Status Due to Numeric Isolation

Numeric isolation is one barrier to students' thriving that an antiracist pedagogy would account for. Racially minoritized law students are numerically isolated. According to the American Bar Association, data submitted by accredited law schools from the Fall of 2020 indicated that, of a total of 38,202 first-year law students enrolled that year, 2,975 (7.8%) identified as Black or African American, 5,084 (13%) identified as Hispanic, and 2,551 (13%) identified as Asian.<sup>57</sup>

The consequences of numeric isolation are far from insignificant, as social scientists have documented.<sup>58</sup> Students who experience “solo status”—i.e., students who are the only or one of just a few members of their identity group in a classroom setting, perform less well on learning and performance measures than they do when not experiencing solo status.<sup>59</sup> To be clear, solo status is its own inhibitor of success; it suppresses students' performance *even* when other potentially detrimental factors (such as discrimination and stereotype threat) are controlled for.<sup>60</sup> What's more, the negative effects of solo status are especially potent in public performance settings,<sup>61</sup> such as Socratic dialogues. In addition to its detrimental effects on learning and performance, solo status has been shown to cause some of the same harms as stereotype threat,<sup>62</sup> the barrier to which we now turn.

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consciousness, may also be at play for some. I focus on these two because of their pervasiveness, but encourage readers to explore the scholarship on others. *See, e.g.*, MCMURTRY-CHUBB, *supra* note 7, at 41-66 (discussing racial trauma); Elizabeth C. Pinel, Leah R. Warner & Poh-Pheng Chua, *Getting There is Only Half the Battle: Stigma Consciousness and Maintaining Diversity in Higher Education*, 61 J. SOC. ISSUES 481, 482-83 (2005) (theorizing it is “quite reasonable to expect that arriving at a predominantly [w]hite campus would have [a] profound effect on the stigma consciousness levels of academically stigmatized ethnic minority students).

<sup>57</sup> Statistics: Enrollment Data 2019-2021, 2020 IL Enrollment by Gender & Race/Ethnicity (Aggregate), ABA, [https://www.americanbar.org/groups/legal\\_education/resources/statistics/](https://www.americanbar.org/groups/legal_education/resources/statistics/) (last visited July 11, 2022).

<sup>58</sup> Mischa Thompson & Denise Sekaquaptewa, *When Being Different Is Detrimental: Solo Status and the Performance of Women and Racial Minorities*, 2 ANALYSES SOC. ISSUES & PUB. POL'Y 183, 184 (2002).

<sup>59</sup> *Id.* at 184, 187, 194. The detriments of solo status are not shared by members of high-status or privileged groups, even when they are the only members of their group in a given learning or work setting. In other words, the effects of solo status stem not just from numerical underrepresentation but arise from that in combination with membership in a disadvantaged or low-status group.

<sup>60</sup> *Id.* at 186, 191.

<sup>61</sup> *Id.* at 188.

<sup>62</sup> *See id.* at 193 (including concern their performance will be generalized to others who share their identity and a resulting tendency to exercise heightened caution in classroom settings).

## 2. Stereotype Threat

Stereotype threat is a separate psychological dynamic different from solo status. Thanks to the seminal work of Professor Claude M. Steele, stereotype threat has come to be widely understood as a psychological dynamic that people experience when they fear confirming negative stereotypes about their identity group.<sup>63</sup> That is, an individual who is aware of a negative stereotype about their<sup>64</sup> identity group can experience a cognitive burden that arises from that awareness. That burden is stereotype threat. That burden, in turn, can impair the individual's ability to perform up to their potential in learning and testing environments.<sup>65</sup>

One way to think of stereotype threat is that it causes those experiencing it to multi-task—they must *both* perform the relevant activity *and* combat the cognitive burden caused by the fear of confirming negative stereotypes.<sup>66</sup> Thus, threat-affected students while taking exams, for instance, fear that a poor performance on those exams will not only reflect negatively on them as individuals (an experience common to exam-takers regardless of identity), but will also confirm in the minds of others the stereotype that people in that identity group are less intelligent or less capable than people in other groups (an experience unique to members of negatively stereotyped groups).<sup>67</sup> One effect of stereotype threat is to transform any frustration into “a plausible sign that you can't do the work, that you don't belong there. And it discourages your taking on academic challenges, for fear you'd confirm the fixed limitation (e.g., on intelligence) alleged in the stereotype.”<sup>68</sup>

Stereotype threat has been documented by social scientists through laboratory and field tests over nearly three decades.<sup>69</sup> More than “a fuzzy, unmeasurable, psychological phenomenon,”<sup>70</sup> the threat “affects working memory, cognition, and mental processing . . . undermin[ing] the capacity

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<sup>63</sup> Claude M. Steele, *A Threat in the Air: How Stereotypes Shape Intellectual Identity and Performance*, 52 AM. PSYCH. 613, 617-18 (1997).

<sup>64</sup> For purposes of both inclusivity and simplicity, I have chosen to use “they” as a singular, gender-neutral pronoun throughout this Article.

<sup>65</sup> Steele, *supra* note 63, at 620-21.

<sup>66</sup> See, e.g., David Sparks, *Reducing Stereotype Threat in the Science and Mathematics Classroom: An Overview of Research, Best Practices, and Intervention Strategies*, in 7 CURRENTS IN TEACHING & LEARNING 4, 6 (2016) (comparing stereotype threat to adding a ball to a juggler's routine, increasing the difficulty and reducing the amount of concentration they can apply to each ball).

<sup>67</sup> Steele, *supra* note 63, at 617-18.

<sup>68</sup> CLAUDE M. STEELE, WHISTLING VIVALDI: AND OTHER CLUES TO HOW STEREOTYPES AFFECT US 168 (1st ed. 2010).

<sup>69</sup> See, e.g., Steele, *supra* note 63, at 617-18 (citing research dating back to the 1980s).

<sup>70</sup> Russell A. McClain, *Helping Our Students Reach Their Full Potential: The Insidious Consequences of Ignoring Stereotype Threat*, 17 RUTGERS RACE & L. REV. 1, 20 (2016).

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of the brain to process information.”<sup>71</sup> And the threat is not “a passing threat that happens just on tests,” rather, it has daily, far-reaching impacts and the potential to “get more disruptive over time.”<sup>72</sup>

Importantly, stereotype threat does not derive from any internal doubt one might have about their abilities.<sup>73</sup> While the threat can be created, or “primed,” by a number of different stimuli, the data indicate it is heightened when the threatened person believes that a particular activity measures their capacity in the stereotyped domain.<sup>74</sup> What is more, the threat is especially potent where the threatened student is learning in a domain with which they identify strongly, as is the case with law students who have chosen to enroll in a law school with a desire to make a career in the profession.<sup>75</sup>

Professor Russell McClain argues convincingly, for instance, that Black students enter law school already experiencing stereotype threat,<sup>76</sup> and the law school experience is “riddled with opportunities for stereotype threat to take hold and flourish.”<sup>77</sup> For example, law schools enroll racially minoritized students in limited numbers, “triggering the threat by making them feel as though they do not belong.”<sup>78</sup> Law schools also implicitly frame much of students’ work as tests of intelligence, and contribute to students’ self-doubt by offering limited, if any, formative assessment or individualized feedback.<sup>79</sup> Indeed, like anyone subjected to chronic stereotype threat in a given domain, law students are at risk of “disidentifying” from the law school experience (i.e., retreating from one’s self-identification as a future lawyer so as to protect oneself from the discouragement and disruption the threat brings on).<sup>80</sup>

Having considered barriers to antiracist pedagogy that are internal to ourselves as teachers and that might affect our students, we turn now to barriers that arise from the very substance of the courses we teach.

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<sup>71</sup> *Id.* at 20-21.

<sup>72</sup> STEELE, *supra* note 68, at 177.

<sup>73</sup> Steele, *supra* note 63, at 614.

<sup>74</sup> *Id.* at 620 (noting the threat has been shown to be more impactful when students believe a test is intended to be diagnostic of their abilities than when students believed a test is non-diagnostic).

<sup>75</sup> McClain, *supra* note 7, at 173.

<sup>76</sup> *Id.* at 170-73.

<sup>77</sup> McClain, *supra* note 70, at 35.

<sup>78</sup> McClain, *supra* note 7, at 171-72.

<sup>79</sup> *Id.* at 171-72.

<sup>80</sup> Steele, *supra* note 63, at 614.

*C. Barriers that Arise from the Substance We Teach*

In addition to the barriers founded in our own and our students' identities and experiences, the substance we choose to teach is often a barrier to a pedagogy of antiracism. Specifically, this section explores the decontextualization and false neutrality that traditionally attend law teaching. These approaches can cause racially minoritized students to experience alienation and other inhibitors to learning, and all students to miss the opportunity to prepare for the work of countering structural racism.<sup>81</sup> As with each of the barriers addressed in this Part II, this discussion prepares us to explore in Part III strategies for transcending them.

First, traditional law school classes tend to abstract legal doctrine and practice from the contexts in which they arise and operate.<sup>82</sup> Relatedly, traditional approaches to the substance of legal teaching imply falsely that legal analysis is a neutral or objective act.<sup>83</sup> Together, decontextualization and false neutrality ignore the roles of race, power, and privilege in the making of law and interpretation of law; downplay or ignore the relevance of identity, emotion, and personal experience in legal analysis; and fail to make sufficient space for reform-minded critiques in the classroom. From teachers' decontextualization and enforcement of false neutrality, students glean that analyses informed by racialized realities, emotion, morality, or reform-mindedness are not central to the enterprise of learning the law nor, by extension, practicing it.<sup>84</sup>

In reality, race is always present in any classroom and is inseparable from the substance of the law and conventions of lawyering.<sup>85</sup> Furthermore, whiteness "is embedded in what we teach, and in the common law system we have inherited."<sup>86</sup> Despite this, many law teachers fail to acknowledge race's existence or role, and "the whiteness of the curriculum goes unsaid and unremarked upon."<sup>87</sup> They consider race a topic of mere corollary importance, one that is separate from the foundational curriculum and whose

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<sup>81</sup> Shaun Ossei-Owusu, *For minority law students, learning the law can be intellectually violent*, ABA JOURNAL (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) (quoting Patricia Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerprinting as the Law's Response to Racism*, 42 U. MIAMI L. REV. 127, 129 (1987)).

<sup>82</sup> William M. Sullivan, Anne Colby, Judith Welch Wegener, Lloyd Bond & Lee S. Shulman, *Educating Lawyers: Preparation for the Profession of Law* 6 (2007).

<sup>83</sup> Crenshaw, *supra* note 7, at 2.

<sup>84</sup> See generally Crenshaw, *supra* note 7, at 2.

<sup>85</sup> E.g., Armstrong & Wildman, *supra* note 7, at 661 (observing that race is a "central influence on life in the United States, its legal system, and the practice of law").

<sup>86</sup> Capers, *supra* note 7, at 29.

<sup>87</sup> *Id.*

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coverage would detract from the ability to cover “core” material.<sup>88</sup> Indeed, most legal educators are hesitant to engage with race in their teaching.<sup>89</sup>

This decontextualization was one of the subjects addressed by the Carnegie Foundation for the Advancement of Teaching in its 2007 report, *Educating Lawyers* (“Carnegie Report”). The Carnegie Report noted that the methods used in many law classrooms drill students repeatedly in “first abstracting from natural contexts, then operating upon the ‘facts’ so abstracted according to specified rules and procedures, and drawing conclusions based upon that reasoning.”<sup>90</sup> The case method, for instance, relies on decontextualizing abstractions to deliberately simplify the legal method; it does so by abstracting “legally relevant aspects of situations and persons from their everyday contexts.”<sup>91</sup> Specifically, many law teachers mistakenly consider the subject matter they teach to be “identity neutral” believing it does not invoke questions about race, racism, or structural inequality at all.<sup>92</sup> This purported “color-blindness,” the Carnegie Report explained, leaves unexplored the impact of the law on “full-dimensional people, let alone the job of thinking through the social consequences or ethical aspects” of conclusions of law.<sup>93</sup>

Further, as the Carnegie Report observed with concern, law teachers often fail to make space for students to grapple with their “moral concerns” relevant to the law and legal practice.<sup>94</sup> Students are taught that “thinking through the social consequences or ethical aspects of conclusions” is a mere addendum, “secondary to what really counts for success in law school—and legal practice.”<sup>95</sup> This failure to engage students’ compassion and “moral imagination” can cause students to experience not just confusion, but disillusionment.<sup>96</sup> Students are taught, whether tacitly or explicitly, that their

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<sup>88</sup> See, e.g., Dyszlewski, *supra* note 7, at xiii-xiv (noting most faculty “acknowledge the importance of diversity and inclusion in the curriculum . . . [but] speak about already having too much ground to cover in too few class sessions and not knowing how to weave diversity into their courses”); Alexi Nunn Freeman & Lindsey Webb, *Positive Disruption: Addressing Race in a Time of Social Change through a Team-Taught, Reflection-Based, Outward-Looking Law School Seminar*, 21 U. PA. J.L. & SOC. CHANGE 121, 130 (2018) (“Law professors struggle with fears and pressures when they consider how best to undertake this work, including the need to ‘cover’ the law in a single course in a limited period of time. . .”).

<sup>89</sup> See Armstrong & Wildman, *supra* note 7, at 661; see also, e.g., Ossei-Owusu, *supra* note 81.

<sup>90</sup> Sullivan, Colby, Wegener, Bond & Shulman, *supra* note 82, at 6.

<sup>91</sup> *Id.*

<sup>92</sup> See, e.g., Grant, *supra* note 32.

<sup>93</sup> Sullivan, Colby, Wegener, Bond & Shulman, *supra* note 82 at 6.

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

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

<sup>96</sup> *Id.*

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concerns for justice, their compassion for the people whose lives are impacted by the legal rule under discussion, and their emotional responses arising out of their own personal realities must be suppressed or, at the very least, set aside lest they interfere with their capacity to conduct accurate legal analysis.<sup>97</sup>

Professor Kimberlé Williams Crenshaw coined the term “perspectivelessness” to capture aspects of this problematic dynamic.<sup>98</sup> Law teachers who teach with perspectivelessness subscribe to a belief that legal analysis is “objective,” that it can be conducted without “directly addressing conflicts of individual values, experiences, and world views,” and that legal analysis has no “cultural, political, and class characteristics.”<sup>99</sup> But, Crenshaw explains, this approach fails to reckon with the fact that all legal analysis is, in reality, conducted from the point of view of the analyst.<sup>100</sup> That is, when we observe and interpret legal texts, our vantage point inevitably influences the interpretation.

Most legal educators ignore this reality, instead conveying to students a perspective on doctrine that claims to be objective rather than what it really is: rooted in norms and values associated with whiteness.<sup>101</sup> This way of teaching inculcates a false dichotomy between legal analysis and discourse, on the one hand, and other kinds of knowledge—moral, cultural, emotional, and experiential—on the other.<sup>102</sup>

For instance, some property law teachers teach about racially restrictive covenants without situating them as just one aspect of a broad effort by government officials and other white people to systematically exclude non-white people from homeownership and preserve housing segregation.<sup>103</sup> Another such example arises when criminal procedure teachers fail to

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<sup>97</sup> *See id.*

<sup>98</sup> Crenshaw, *supra* note 7, at 2.

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

<sup>100</sup> Crenshaw, *supra* note 7, at 3.

<sup>101</sup> Master’s Table, *supra* note 8, at 259 (noting that the law and rhetoric taught in the U.S. legal academy is rooted in Western or “Eurocentric ways of knowing and being”); *see also* Crenshaw, *supra* note 7, at 2-3 (noting that, in light of the identity of the jurists and faculty who authored and selected most opinions law students study, the point of view employed in law classes is quite commonly “the embodiment of a white middle-class world view”).

<sup>102</sup> *See* Crenshaw, *supra* note 7, at 3. Furthermore, as Teri McMurtry-Chubb has explained, this approach fails to create a “free-market” of ideas, i.e., an education that presents “multiple, contradictory ideas as catalysts for critical thought and inquiry.” Master’s Table, *supra* note 8, at 265. Instead, when perspectivelessness is combined with the heavy reliance on appellate cases, students are faced with “narrowly drawn legal narratives” that prioritize the status quo over progression or evolution. *Id.*

<sup>103</sup> For source material that provides such context, *see, e.g.*, RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* (2017); COATES, *supra* note 22.

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contextualize Supreme Court doctrine on consensual searches against the backdrop of the “War on Drugs” and its disparate impacts on Black people.<sup>104</sup> The list could go on and on: teaching about health law without addressing disparate medical outcomes based on race; teaching intellectual property law without addressing its uses to deprive racially minoritized artists of ownership of their creations; teaching civil procedure without addressing disparate access to legal representation; teaching legal communication without addressing a variety of rhetorical traditions; etc.<sup>105</sup>

Decontextualization and false neutrality are barriers to antiracist pedagogy because, first, they can inflict an array of harms upon students who are racially minoritized. To begin, law teachers’ unwillingness (or inability) to acknowledge what Professor Patricia Williams called “the elephant in the room”<sup>106</sup> can itself be a source of alienation. Confronted with the “intellectual mismatch of the world’s racial realities on the one hand and the racial silence-cum-neutrality of their legal education,” many racially minoritized law students struggle to confront the injustices their legal education exposes them to with “an emotionally desensitized all-sides-matter approach to law.”<sup>107</sup> Indeed, as Crenshaw explains:

[M]inority students are expected to stand apart from their history, their identity, and sometimes their own immediate circumstances and discuss issues without making reference to the reality that the “they” or “them” being discussed is from their perspective “we” or “us.” Conversely, on the few occasions when minority students are invited to incorporate their racial identity and experiences into their comments, they often feel as though they have been put on the spot. Moreover, their comments are frequently

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<sup>104</sup> For source material that provides such context, *see, e.g.*, MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 35-57 (2020).

<sup>105</sup> Those who take such an approach might explain their choice by arguing, for instance, that subjects such as contract law can be taught purely as a matter of doctrine. This argument holds, for example, that a course in contract law is successful so long as students emerge having learned the rules of making and enforcing agreements, and that it is unnecessary for students to practice analyzing the contexts in which such agreements are made and operate. Ho, *supra* note 8, at 121-22. What is essential under this reasoning is for students to “master contract law in its purest, distilled form, internalize the rules [about] . . . manifesting mutual assent or consideration, answer bar examination questions adequately, and successfully enter the profession.” What this argument fails to acknowledge is that structural inequality, race-based and otherwise, is “built into our laws of modern contracting.” *Id.* at 122. This is true because: “[t]he relational nature of agreement-making and the dynamics of power are always present when two private parties engage in the meeting of minds. Thus, teaching contract law without context misses the mark about the realities of contracting. It ignores the opportunity to explore descriptive observations premised on contributing to a fair and just society and consequently, normative ideas about contracts that further democratic values.” *Id.*

<sup>106</sup> PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 49 (1991).

<sup>107</sup> Ossei-Owusu, *supra* note 81.

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disregarded by other students who believe that since race figures prominently in such comments, the minority students—unlike themselves—are expressing biased, self-interested, or subjective opinions.<sup>108</sup>

Furthermore, as Professor Margaret Montoya observed, “[t]he silencing of racialized information is largely why the law feels alien and alienating to those for whom race or other identity characteristics are reality-defining and often the starting point for legal analysis. Maintaining [such] silence . . . often makes one feel complicit in one’s own marginalization.”<sup>109</sup>

As a result, students may feel strong emotions; may sense that they or their experiences, values, or priorities are not valued in class discussion; and may in turn withdraw from the learning environment.<sup>110</sup> Even if they do not withdraw, a portion of their cognitive energies is devoted to coping with this heightened alienation, leaving less of those energies for the learning tasks at hand.<sup>111</sup>

In addition to the harms wrought on racially minoritized students, decontextualization and false neutrality also disserve students of all identities who care about structural racism. Teachers who fall into the use of these practices often fail to recognize that:

Whether or not [they] explicitly discuss race in their classes, law students are absorbing lessons about race and law. Academic silence regarding race does not mean that race is invisible or absent; rather, many argue, the void left by this silence contains the presumption that the law is for and about [w]hite people or is somehow racially “neutral.”<sup>112</sup>

This silence also produces law graduates with underdeveloped skillsets concerning the roles and relevance of morality, emotion, and justice-seeking in lawyering.<sup>113</sup> Indeed, failing to address “the role of the legal system in perpetuating inequality, [makes] all students suffer from the lost opportunity for dialogue.”<sup>114</sup>

For instance, when we teach criminal law to students of all identities contemplating a career in that field, we are teaching future lawyers who will become participants in a system that over-incarcerates racially minoritized

<sup>108</sup> Crenshaw, *supra* note 7, at 3.

<sup>109</sup> Margaret E. Montoya, *Silence and Silencing: Their Centripetal and Centrifugal Forces in Legal Communication, Pedagogy and Discourse*, 11 U. MICH. J.L. REFORM 263, 308 (2000).

<sup>110</sup> See Lain, *supra* note 7, at 786-87 (noting students may “get[] up to leave the room, withdraw[] from the conversation, or not find[] the words to articulate thoughts”).

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

<sup>112</sup> Freeman & Webb, *supra* note 88, at 124 (citing Armstrong & Wildman, *supra* note 7, at 655).

<sup>113</sup> See Sullivan, Colby, Wegener, Bond & Shulman, *supra* note 82, at 187.

<sup>114</sup> Emily A. Bishop, *Avoiding “Ally Theater” in Legal Writing Assignments*, 26(1) PERSP.: TEACHING LEGAL RES. & WRITING 3, 3 (2017).



people.<sup>115</sup> However, due to the de-emphasis on race, students who come to law school with the intention to participate in systematic reform do not gain knowledge essential to that endeavor.<sup>116</sup> Rather, “at most, we are teaching [them] how to secure a career within the criminal system[,] . . . how to rearrange apples in the cart. Not how to upend it.”<sup>117</sup> Ultimately, by limiting students’ access to knowledge about the role of race in the law, “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 blindfold them.”<sup>118</sup>

In sum, when we relegate race to afterthought under the pretense of “course coverage,” we are engaging in a process that both does harm to racially minoritized students and under-prepares all students to bring about equal justice under law. The barriers created by this substantive selectiveness have the potential to be exacerbated by those resulting from our teaching processes, the topic to which we turn next.

#### *D. Barriers that Arise from the Processes We Use to Teach*

Much as decontextualization and false neutrality inhibit the antiracist potential of the substance we teach, so, too, do some of the processes we employ in the classroom. The choices we make as facilitators of dialogue and discussion have the potential to inhibit students’ learning and eliminate their confidence if they include microaggressions, even if totally unintentional in nature.<sup>119</sup> Meanwhile, passive learning strategies such as the traditional Socratic method fail to maximize student learning,<sup>120</sup> shortchanging all students—and especially racially minoritized students. This section will explore the barriers created by microaggressions and passive learning to prepare us for a discussion of how to transcend them in pursuit a pedagogy that ensures the thriving of minoritized students and the preparation of all students to counteract structural racism.

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<sup>115</sup> Capers, *supra* note 7, at 31.

<sup>116</sup> *See id.*

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

<sup>118</sup> *Id.* at 40-41.

<sup>119</sup> Derald Wing Sue, Christin M. Capodilupo, Gina C. Torino, Jennifer M. Bucceri, Aisha M. B. Holder, Kevin L. Nadal & Marta Esquilin, *Racial Microaggressions in Everyday Life: Implications for Clinical Practice*, 62 AM. PSYCH. 271, 274-75 (2007).

<sup>120</sup> *See infra* Part II(B)(2).

### 1. Racial Microaggressions

One common dynamic that inhibits the effective facilitation of law school classes is the racial microaggression. “Racial microaggressions are brief and commonplace daily verbal, behavioral, and environmental indignities, whether intentional or unintentional, that communicate hostile, derogatory, or negative racial slights and insults to the target person or group.”<sup>121</sup> They are committed typically by people of non-minoritized identities against those who are minoritized.<sup>122</sup>

It has been said that racially minoritized law students experience a “virtual storm of microaggressive conduct” as they navigate their law school experience.<sup>123</sup> Microaggressions can cause recipients to feel unease and discomfort,<sup>124</sup> as well as the sense they don’t belong in the institution and/or that their physical or psychological wellbeing is in danger.<sup>125</sup> The harm that comes from microaggressions has often been described as one of accretion, much in the same way that individual rain drops form a storm—a metaphorical death by a thousand paper cuts.<sup>126</sup>

Psychologist Dr. Derald Wing Sue and his colleagues have elaborated three sub-types of microaggressions: microassaults, microinsults, and microinvalidations.<sup>127</sup> “A microassault is an explicit racial derogation characterized primarily by a verbal or nonverbal attack meant to hurt the intended victim through name-calling, avoidant behavior, or purposeful discriminatory actions.”<sup>128</sup> These behaviors are typically intentional—what many think of as “old fashioned” racism, such as using a racial epithet or consciously choosing to ignore the raised hand of a minoritized student in class.<sup>129</sup> Another example is using derogatory imagery of racially minoritized people on course handouts or visual presentations, such as using an image of a racially minoritized person when discussing a hypothetical case

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<sup>121</sup> *Id.* at 273.

<sup>122</sup> Azadeh F. Osanloo, Christa Boske & Whitney S. Newcomb, *Deconstructing Macroaggressions, Microaggressions, and Structural Racism in Education: Developing a Conceptual Model for the Intersection of Social Justice Practice and Intercultural Education*, 4 INT’L J. ORGANIZATIONAL THEORY & DEV. 1, 5 (2016).

<sup>123</sup> Catharine Wells, *Microaggressions: What They Are and Why They Matter*, 24 TEX. HISP. J. L. & POL’Y 61, 70 (2017); see also MCMURTRY-CHUBB, *supra* note 7, at 6; (noting that “[i]n educational institutions, emotional and psychological violence take the form of microaggressions”).

<sup>124</sup> Osanloo, Boske & Newcomb, *supra* note 122, at 5.

<sup>125</sup> MCMURTRY-CHUBB, *supra* note 7; Strand, *supra* note 7, at 202.

<sup>126</sup> *E.g.*, Dr. Derald Wing Sue, *Microaggressions: Death by a Thousand Cuts*, SCI. AM. (Mar. 30, 2021), <https://www.scientificamerican.com/article/microaggressions-death-by-a-thousand-cuts/>.

<sup>127</sup> Sue, Capodilupo, Torino, Bucceri, Holder, Nadal, & Esquilin, *supra* note 119, at 274-75.

<sup>128</sup> *Id.* at 274.

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

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involving embezzlement.<sup>130</sup> Microassaults are likely less common in law school classrooms than the other forms of microaggressions discussed next.<sup>131</sup>

The second type of microaggression Sue described is the microinsult, which is defined as words, behavior, or environmental conditions that “convey rudeness and insensitivity and demean a person’s racial heritage or identity. Microinsults represent subtle snubs, frequently unknown to the perpetrator, but [that] clearly convey a hidden insulting message to the recipient of color.”<sup>132</sup> Microinsults may appear “superficially benign,” but have marginalizing and harmful effects.<sup>133</sup> One oft-cited example is when a white person tells a Black person the Black person is “articulate.” This is a microinsult because it conveys the underlying message that articulateness is not typical of Black people, and that the person’s communication skills are anomalous and exceptional.<sup>134</sup> Another example that might arise in a law classroom is ignoring a minoritized student’s contribution to a discussion until it is repeated or affirmed by a non-minoritized student.<sup>135</sup>

Finally, Sue’s third type of microaggression is the microinvalidation.<sup>136</sup> “Microinvalidations are characterized by communications that exclude, negate, or nullify the psychological thoughts, feelings, or experiential reality of a person of color.”<sup>137</sup> These communications “dismiss the lived experiences of” minoritized people generally, or specifically “discount their encounters with discrimination and inequity.”<sup>138</sup> Sue and his colleagues explain:

When Asian Americans (born and raised in the United States) are complimented for speaking good English or are repeatedly asked where they were born, the effect is to negate their U.S. American heritage and to convey that they are perpetual foreigners. When Blacks are told that “I don’t see color” or “We are all human beings,” the effect is to negate their experiences as racial/cultural beings. When a Latino couple is given poor service at a restaurant and shares their experience with [w]hite friends, only to be told

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<sup>130</sup> See MCMURTRY-CHUBB, *supra* note 7, at 7-8.

<sup>131</sup> Strand, *supra* note 7, at 202-03.

<sup>132</sup> Sue, Capodilupo, Torino, Bucceri, Holder, Nadal, & Esquilin, *supra* note 119, at 274.

<sup>133</sup> MCMURTRY-CHUBB, *supra* note 7, at 7.

<sup>134</sup> See Sue, Capodilupo, Torino, Bucceri, Holder, Nadal, & Esquilin, *supra* note 119, at 274.

<sup>135</sup> Strand, *supra* note 7, at 203; see also MCMURTRY-CHUBB, *supra* note 7, at 7-8 (providing more examples).

<sup>136</sup> Sue, Capodilupo, Torino, Bucceri, Holder, Nadal, & Esquilin, *supra* note 119, at 274.

<sup>137</sup> *Id.*

<sup>138</sup> MCMURTRY-CHUBB, *supra* note 7, at 8.

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“Don’t be so oversensitive” or “Don’t be so petty,” the racial experience of the couple is being nullified and its importance is being diminished.<sup>139</sup>

In the law classroom, microinvalidations might take the form of tone policing (i.e., when the teacher or others seek to regulate the purportedly “angry,” loud, or animated tone of a person’s voice) or “insisting that society is colorblind, that acts of discrimination are individual and not systemic in nature, and/or that a student [expressing lived experiences with racism] is being ‘touchy’ or ‘too sensitive.’”<sup>140</sup>

By committing or permitting racial microaggressions, whether on purpose or with only the best of intentions, law teachers cause significant harm to racially minoritized law students.<sup>141</sup> Indeed, the “cumulative effects can be quite devastating,” causing self-doubt, frustration, and isolation,<sup>142</sup> as well as loss of appetite, fatigue, increased blood pressure, anger, sadness, and depression.<sup>143</sup> This set of harms is sometimes called “racial battle fatigue”<sup>144</sup> and can be significantly “more problematic, damaging, and injurious . . . than overt racist acts.”<sup>145</sup>

## 2. Passive Learning Strategies

Passive learning strategies such as the Socratic method are another aspect of the teaching process that can inhibit all students’ learning, but especially that of racially minoritized students. Debates about the efficacy of the Socratic method have been ongoing for many years.<sup>146</sup> Advocates value its emphasis on critical thinking and public performance,<sup>147</sup> for instance, while critics cite its anxiety-provoking qualities and risk of

<sup>139</sup> Sue, Capodilupo, Torino, Bucceri, Holder, Nadal, & Esquilin, *supra* note 119, at 275.

<sup>140</sup> MCMURTRY-CHUBB, *supra* note 7, at 8.

<sup>141</sup> See Sue, Capodilupo, Torino, Bucceri, Holder, Nadal, & Esquilin, *supra* note 119, at 27 (documenting evidence of the harms of subtle forms of racism such as microaggressions).

<sup>142</sup> *Id.* (citing Daniel Solorzano, Miguel Ceja & Tara Yosso, *Critical Race Theory, Racial Microaggressions, and Campus Racial Climate: The Experiences of African American College Students*, 69 J. NEGRO EDUC. 60, 69 (2000)).

<sup>143</sup> Erica M. Morales, *Intersectional Impact: Black Students and Race, Gender, and Class Microaggressions in Higher Education*, 21 RACE, GENDER & CLASS 48, 51 (2014).

<sup>144</sup> *Id.*

<sup>145</sup> Sue, Capodilupo, Torino, Bucceri, Holder, Nadal, & Esquilin., *supra* note 119, at 279 (quoting DERLAD WING SUE, *OVERCOMING OUR RACISM: THE JOURNEY TO LIBERATION* 48 (2007)).

<sup>146</sup> See, e.g., Jamie R. Abrams, *Reframing the Socratic Method*, 64 J. LEGAL EDUC. 562 (2015); A. Benjamin Spencer, *The Law School Critique in Historical Perspective*, 69 WASH. & LEE L. REV. 1949 (2012); Christie A. Linskens, *What Critiques Have Been Made of the Socratic Method in Legal Education: The Socratic Method in Legal Education: Uses, Abuses and Beyond*, 12 EUR. J.L. REFORM 340 (2010).

<sup>147</sup> Soled & Hoffman, *supra* note 7, at 290-91.

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reinforcing traditional hierarchies.<sup>148</sup> A more recent addition to the discussion is the concern that the Socratic method is not a form of class-wide active learning.<sup>149</sup> Specifically, this concern is based on the fact that, in the traditional Socratic approach, only one student is learning actively at any given moment, while all others are experiencing passive learning.<sup>150</sup> This concern is especially pertinent for purposes of antiracist pedagogy because, while active learning has been shown to benefit all students regardless of identity,<sup>151</sup> those benefits are magnified for students who are racially minoritized.<sup>152</sup>

Active learning occurs when students “talk about what they are learning, write about it, relate it to past experiences, apply it to their daily lives[,] . . . and make [it] part of themselves.”<sup>153</sup> To engage in active learning with any particular lesson, each student must be “actively involved in tasks of analysis, synthesis, and evaluation—not the observation of other people doing these things.”<sup>154</sup> Research by Professors Michael Schwartz, Gerald Hess, and Sophie Sparrow confirms that the best law teachers

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<sup>148</sup> Jeffrey D. Jackson, *Socrates and Langdell in Legal Writing: Is the Socratic Method a Proper Tool for Legal Writing Courses?*, 43 CAL. WEST. L. REV. 267, 283 (2007).

<sup>149</sup> Bramble & Bahadur, *supra* note 7, at 713; *see also* Soled & Hoffman, *supra* note 7, at 290-91 (suggesting less reliance on Socratic method); Spencer, *supra* note 146, at 2030-31 (taking issue with the proposition that those not engaged in dialogue are fully engaged in the learning).

<sup>150</sup> *See* Spencer, *supra* note 146, at 2030-31 (taking issue with the proposition that those not engaged in dialogue are fully engaged in the learning).

<sup>151</sup> *E.g.*, CHARLES C. BONWELL & JAMES A. EISON, ACTIVE LEARNING: CREATING EXCITEMENT IN THE CLASSROOM 7-19 (1991).

<sup>152</sup> *E.g.*, Elli J. Theobald, Mariah J. Hill, Elisa Tran, Sweta Agrawal, E. Nicole Arroyo, Shawn Behling, Nyasha Chambwe, Dianne Laboy Cintrón, Jacob D. Cooper, Gideon Dunster, Jared A. Grummer, Kelly Hennessey, Jennifer Hsiao, Nicole Iranon, Leonard Jones, Hannah Jordt, Marlowe Keller, Melissa E. Lacey, Caitlin E. Littlefield, Alexander Lowe, Shannon Newmang, Vera Okolo, Savannah Olroyd, Brandon R. Peacock, Sarah B. Picketti, David L. Slagera, Itzue W. Caviedes-Solisa, Kathryn E. Stanchak, Vasudha Sundaravardan, Camila Valdebenito, Claire R. Williams, Kaitlin Zinsli & Scott Freeman, *Active learning narrows achievement gaps for underrepresented students in undergraduate science, technology, engineering, and math*, 117 PROC. NAT'L ACAD. SCI. 6476, 6477 (2020) (meta-analysis accounting for more than 44,000 student records documented a thirty-three percent reduction in achievement gap in examination scores for minoritized students in courses employing active learning versus passive learning courses); *see also* Spencer, *supra* note 146, at 2030 (noting the Socratic method may be especially discouraging for women and people of color) (citing Carol J. Buckner, *Realizing Grutter v. Bollinger's "Compelling Educational Benefits of Diversity"—Transforming Aspirational Rhetoric into Experience*, 72 UMKC L. REV. 877, 911 (2004)).

<sup>153</sup> Arthur W. Chickering & Zelda F. Gamson, *Seven Principles for Good Practice in Undergraduate Education*, AM. ASS'N FOR HIGHER EDUC. BULL. 1, 4 (1987).

<sup>154</sup> Bramble & Bahadur, *supra* note 7, at 719-20 (citing CHARLES C. BONWELL & JAMES A. EISON, ACTIVE LEARNING: CREATING EXCITEMENT IN THE CLASSROOM (1991)).

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prioritize active learning over passive learning.<sup>155</sup> That is, they regularly task students to “write, think, speak, reflect, talk to a peer, or work on a task in a small group.”<sup>156</sup>

The traditional Socratic method—where a teacher leads one student at a time in a question-and-answer process meant to elicit the student’s knowledge of course material—cannot be considered a form of “active learning” according to the education science.<sup>157</sup> This is because, while the student in the dialogue is experiencing active learning—making this method more active than pure lecture—no other student in the room is getting the same benefit.<sup>158</sup> Rather, students not speaking in the dialogue at any given moment are, at most, vicariously active, and unlikely to be engaged in active reflection during each moment of the dialogue.<sup>159</sup> Thus, when law teachers rely heavily on the Socratic method, they are not maximizing the benefits available from class-wide active learning, benefits shown to be magnified for minoritized students.<sup>160</sup>

In addition to the barriers that arise from passive teaching processes such as the Socratic method, as well as the substance we teach and our own and our students’ experiences, the fifth and final set of barriers arises from a meta-concern: that of accountability.

#### *E. Barriers that Arise from Lack of Accountability*

Generally speaking, legal educators face little prospect of meaningful accountability for our work as teachers. This lack of accountability is a serious barrier to the establishment of an antiracist pedagogy. Even if we aspire to teach antiracistly to ensure universal thriving and equip students to participate in the dismantlement of structural racism, many law teachers do not face external expectations to meet these goals. This lack of accountability arises from a dearth of feedback mechanisms and is sometimes reinforced by problematic invocations of academic freedom.

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<sup>155</sup> MICHAEL HUNTER SCHWARTZ, GERALD F. HESS, & SOPHIE M. SPARROW, WHAT THE BEST LAW TEACHERS DO 211 (2013).

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

<sup>157</sup> Bramble & Bahadur, *supra* note 7, 736-38; *see also* Soled & Hoffman, *supra* note 7, at 290-91.

<sup>158</sup> Spencer, *supra* note 146, 2030-31.

<sup>159</sup> *E.g., id.* (“Although the students involved may benefit to some extent, the method is less effective in instilling legal analytical skills vicariously to observers not involved in the discussion, creating diminishing returns as the class grows in size.”)

<sup>160</sup> *E.g.*, Theobald, Hill, Tran, Agrawal, Arroyo, Behling, Chambwe, Cintrón, Cooper, Dunster, Grummer, Hennessey, Hsiao, Iranon, Jones, Jordt, Keller, Lacey, Littlefield, Lowe, Newmang, Okolo, Olroyd, Peacock, Picketti, Slagera, Caviedes-Solisa, Stanchak, Sundaravardan, Valdebenito, Williams, Zinsli, & Freeman, *supra* note 152, at 6477.

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Being accountable means understanding one is likely to be expected to justify one's actions to others, and to suffer negative consequences when those justifications are unsatisfactory.<sup>161</sup> We learn from the psychology literature that one is likely to feel accountable: (i) when one or more observers is present in the course of one's actions; (ii) when one expects that an "action or outcome will be attributable to oneself"; (iii) when one expects it will be necessary to explain or rationalize one's actions; and/or (iv) and when one expects to be evaluated based on one's actions.<sup>162</sup>

However, most law teachers, especially those who have achieved tenure or other long-term job security, are never observed by colleagues in the course of teaching.<sup>163</sup> Many teachers do not face any assessment process aside from student evaluations which, except in the rarest of cases, trigger no adverse employment actions such as demotion, reduced compensation, reduced institutional voting rights, or the like.<sup>164</sup> What's more, when law teachers whose actions inhibit the thriving of racially minoritized students actually do face calls to justify their actions, they sometimes claim that academic freedom makes their actions acceptable.<sup>165</sup>

Adding to this general lack of accountability is the fact that law schools tend to reward faculty principally for their scholarly work, and do not prioritize other work to nearly the same degree.<sup>166</sup> While many law schools

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<sup>161</sup> Jennifer S. Lerner & Philip E. Tetlock, *Accounting for the Effects of Accountability*, 125 PSYCH. BULL., 255, 255 (1999) (reviewing the psychology literature concerning the impact of accountability on social judgments and choices). Accountability can arise from both explicit and implicit expectations that justification will be required and consequential.

<sup>162</sup> Brian P. Gill, Jennifer S. Lerner & Paul Meosky, *Reimagining Accountability in K-12 Education*, 2 BEHAV. SCI. & POL'Y 57, 59 (2016) (citing Lerner & Tetlock, *supra* note 161).

<sup>163</sup> See, e.g., Gerald F. Hess & Sophie M. Sparrow, *What Helps Law Professors Develop as Teachers? An Empirical Study*, 14 WIDENER L. REV. 149, 153 (2008) (empirical data demonstrate just 46% of law teachers have had a colleague observe class and give feedback); Richard L. Abel, *How Should Law Schools Judge Teaching?*, 40 J. LEGAL EDUC. 407, 413 (1990) (empirical data demonstrate just forty-five percent of schools use processes in which colleagues observe tenured faculty teaching).

<sup>164</sup> Abel, *supra* note 163, at 415 (empirical data demonstrate "most schools make no adverse personnel decisions on the basis of teaching and the rest make very few"); see, e.g., Rogelio A. Lasso, *Is Our Students Learning? Using Assessments to Measure and Improve Law School Learning and Performance*, 15 BARRY L. REV. 73, 95 (2010) (observing that scholarly output determines law teacher compensation much more than teaching effectiveness does).

<sup>165</sup> See, e.g., Shannon Dea, *On the Uses and Abuses of 'Academic Freedom'*, UNIV. AFF. (Feb. 8, 2021), <https://www.universityaffairs.ca/opinion/dispatches-academic-freedom/on-the-uses-and-abuses-of-academic-freedom/> (observing trend in recent years of faculty, especially senior faculty, responding to charges they have expressed racism by claiming their actions are protected by academic freedom).

<sup>166</sup> E.g., Robert P. Schuwerk, *The Law Professor as Fiduciary: What Duties Do We Owe to Our Students*, 45 S. TEX. L. REV. 753, 763; see also Lord, *supra* note 7, at 103-104 (exploring the role of U.S. News rankings and scholarly reputation).

tout a student-centered culture, institutional pressure to accomplish effective teaching is often less intense than that to produce successful scholarship.<sup>167</sup>

Together with the four preceding categories of barriers, the lack of accountability must be overcome in order to bring about and nurture a pedagogy of antiracism. A methodical approach to such a pedagogy deploys strategies for transcending each of the barriers and weaves them into an ongoing practice.

### III. TRANSCENDING BARRIERS: STRATEGIES TOWARD A PEDAGOGY OF ANTIRACISM

A pedagogy of antiracism is committed to counteracting the effects of structural racism as well as creating conditions for its dismantlement. It does so by helping racially minoritized students learn and grow to their full potential free from the harms wrought by traditional legal education and preparing all students to dismantle structural racism. As Part II described, there are at least five categories of barriers that, individually and in combination, stand in the way of such a pedagogy. It is to strategies for transcending those barriers—and accomplishing a pedagogy of antiracism—that we turn next.

While a strategic plan might take modestly different forms for different educators,<sup>168</sup> I offer a five-strategy process designed to overcome the central barriers by: (A) understanding antiracism and developing our own cultural proficiency; (B) understanding and accounting for our students' identities and experiences; (C) teaching substance truthfully and in context; (D) implementing inclusive teaching processes; and (E) being actively accountable for our choices and harms. Each of the five subparts that follows offers a set of synthesized explanations and concrete examples from the literature, followed by further synthesis and concretization drawn from my own experience and observation.

#### *A. Transcending Barriers Inside of Us: Develop our Proficiency, Knowledge, Resilience, and Self-Awareness*

Because the work of antiracism begins from the inside, this is where the work of antiracist pedagogy begins as well. We must overcome barriers that inhibit our entry into the work of antiracism such as our underdeveloped cultural proficiency, discomfort and potential tendency toward fragility, and

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<sup>167</sup> See Schuwerk, *supra* note 166, at 763.

<sup>168</sup> As discussed in the Introduction, each of us comes to this work with our own identities and experiences, as well as in a variety of locations vis-à-vis institutional culture, professional status, career trajectory, etc. The five-part process offered here is intended to call attention to the broad contours of a comprehensive methodology. But no such process could claim to be one-size-fits-all.



unconscious biases. By conducting a thoughtful self-assessment, each law teacher can determine what knowledge and skills require burnishing.<sup>169</sup> For some, the first step is to simply learn the fundamentals of race, racialization, and racism. This foundational knowledge in turns equips us to hone cultural proficiency. I will discuss each here in turn.

1. Be Knowledgeable About Racialization, White Normativity, White Supremacy, Structural Racism, and Antiracism

Those unfamiliar with scholarship about race or the experience of racial minoritization may find it useful to begin by pausing to recognize that ours is a racialized society.<sup>170</sup> “A society is racialized when economic, political, and social status and opportunities are determined at least in part using a hierarchy in which people designated as one race are preferred over people designated as another race.”<sup>171</sup> “Designated” as one race is the appropriate terminology because race is a social construct, not a fact of biology.<sup>172</sup> We humans are not “born with” a race, rather we are racialized by our society.<sup>173</sup> This is not to say race does not play a meaningful role in our lives. It does. But it helps to remember that, when we talk about race, what is at play is really an ongoing act of racialization—an act that is conducted by society and by each of us according to the norms to which we have been acculturated.

Many people who are racialized as white think of themselves as having no race, as individuals free of the implications of racialization.<sup>174</sup> This narrative of individualism frames whites as not part of a racial group and, thus, bearing no accountability for historical or contemporary racial inequality.<sup>175</sup> Many white people also experience themselves as a norm against which all others are compared.<sup>176</sup> This myth of white normativity is

<sup>169</sup> See, e.g., Dyszlewski, *supra* note 7, at 6-7.

<sup>170</sup> Eduardo Bonilla-Silva, *Rethinking Racism: Toward a Structural Interpretation*, 62 AM. SOCIO. REV. 465, 467 (1997) (explaining the concept of a “racialized social system”).

<sup>171</sup> Doron Samuel-Siegel, Kenneth Anderson, & Emily Lopynski, *Reckoning with Structural Racism: A Restorative Jurisprudence of Equal Protection*, 23 RICH. PUB. INT. L. REV. 137, 147 (2020).

<sup>172</sup> See, e.g., Elizabeth Kolbert, *There’s No Scientific Basis for Race—It’s a Made-Up Label*, NAT’L GEOGRAPHIC (Mar. 12, 2018), <https://www.nationalgeographic.com/magazine/2018/04/race-genetics-science-africa/>.

<sup>173</sup> Race is “an unstable and ‘decentered’ complex of social meanings constantly being transformed by political struggle.” MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES FROM THE 1960S TO THE 1990S* 55 (2d. ed. 1994). It “is a concept which signifies and symbolizes social conflicts and interests by referring to different types of human bodies” using distinctions that are “at best imprecise, and at worst completely arbitrary.”

<sup>174</sup> See, e.g., Robin DiAngelo, *supra* note 38, at 59.

<sup>175</sup> *Id.* at 58.

<sup>176</sup> *Id.* at 59.

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a view that white people's "perspectives are objective and representative of reality"—whites "represent humanity," while people who are racially minoritized "can only represent their own racialized experiences."<sup>177</sup> One of the many effects of this false mindset is that it masks the reality that white people are, in fact, part of a racialized group who benefit from white supremacy and structural racism. In other words, structural racism is as much about creating advantage for white people as it is about subordinating racially minoritized people.<sup>178</sup>

The specific racialized social system in which we live is one based on white supremacy. In this context, "white supremacy" means the explicit and implicit ideas that whiteness is superior to other racialized identities; that whiteness is normal, neutral, and central; and that white people are entitled to the privileges racism creates for them. White supremacy used in this sense is related but not limited to the extreme ideology of those who self-consciously harbor racial hatred. It refers broadly to "the operation of forces that saturate the everyday, mundane actions and policies that shape the world in the interests of white people."<sup>179</sup>

To so define the term "white supremacy" is to follow in the footsteps of critical race theorists such as Professor Frances Lee Ansley.<sup>180</sup> Ansley described white supremacy as not limited to "the self-conscious racism of white supremacist hate groups."<sup>181</sup> Rather, it is "a political, economic and cultural system in which whites overwhelmingly control power and material resources, conscious and unconscious ideas of white superiority and entitlement are widespread, and relations of white dominance and non-white subordination are daily reenacted across a broad array of institutions and social settings."<sup>182</sup> It is the very mundanity of white supremacy—the "in the

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<sup>177</sup> *Id.*

<sup>178</sup> *E.g.*, William M. Wiecek, *Structural Racism and the Law in America Today: An Introduction*, 100 KY. L.J. 1, 6 (2011). Indeed, white people in roles of leadership or power who have not examined their whiteness are at risk of running racist institutions and racist classrooms. RUTH KING, *MINDFUL OF RACE: TRANSFORMING RACISM FROM THE INSIDE OUT* 41 (2018). This is nearly inevitable, in fact, when white people are "in power positions, surrounded by other whites, feeling like good individuals." *Id.* With the "work of whiteness [left] [un]examined, subordinated groups are left to push against a denied white dominant culture that has the mind-set: Convince me why I should do something differently?" *Id.*

<sup>179</sup> David Gillborn, *Rethinking White Supremacy: Who Counts in 'WhiteWorld'*, 6 *Ethnicities* 318, 320 (2006).

<sup>180</sup> Frances Lee Ansley, *Stirring the Ashes: Race Class and the Future of Civil Rights Scholarship*, 74 *CORNELL L. REV.* 993, 1024 n.129 (1989).

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

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air we all breathe” quality of it<sup>183</sup>—that requires an antidote in the nature of an active purge rather than a mere passive avoidance.

Like white supremacy, racism itself is often misconceived as simply a form of interpersonal animus and bigoted behavior. While interpersonal racism surely exacts untold harm, the fact that our life chances are influenced holistically by how we are racialized is the product of structural racism.<sup>184</sup> From income and wealth, to housing, education, health, and safety, those of us racialized as white are statistically likely to experience advantages compared with those who are not.<sup>185</sup> To highlight just one example: according to the U.S. Census Bureau in 2020, the median income of households identifying as white was \$71,231, while the median income of households identifying as Black was \$45,870.<sup>186</sup> The racism largely responsible for our unequal life chances is structural racism.

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<sup>183</sup> See, e.g., Interview with Beverly Daniel Tatum, PBS, [https://www.pbs.org/race/000\\_About/002\\_04-background-03-04.htm](https://www.pbs.org/race/000_About/002_04-background-03-04.htm) (last visited Oct. 3, 2022) (suggesting notions of racial hierarchy might be thought of “as a kind of environment that surrounds us, like smog in the air. We don’t breathe it because we like it. We don’t breathe it because we think it’s good for us. We breathe it because it’s the only air that’s available.”).

<sup>184</sup> E.g., Ian F. Haney-López, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 YALE L.J. 1717, 1723 (2000) (“[O]rganizational activity that systematically harms minority groups even though the decision-making individuals lack any conscious discriminatory intent . . . may well constitute the greatest source of ongoing harm to minority communities.”); John A. Powell, *Understanding Structural Racialization*, 47 CLEARINGHOUSE REV. 146, 148 (2013) (“A structural theory of racialization gives us the language and vocabulary necessary to talk about and understand why racial disparities persist in almost every area of well-being even as de jure segregation is largely a thing of the past and most white Americans claim not to hold racist viewpoints.”); Wiecek, *supra* note 178, at 6-7 (“White advantage is just as important an outcome [of structural racism] as black subordination, if not more so.”).

<sup>185</sup> Samuel-Siegel, Anderson & Lopynski, *supra* note 171, at 144-45 (compiling sources on an array of statistical disparities based on race).

<sup>186</sup> Income Summary Measures by Selected Characteristics: 2019-2020, U.S. CENSUS BUREAU (Sept. 14, 2021), <https://www.census.gov/library/publications/2021/demo/p60-273.html>. The wealth gap is even more stark, with 2019 data indicating the median net worth of white families is \$188,200 while the median net worth of Black families is \$24,100, i.e., less than fifteen percent of white net worth. Neil Bhutta, Andrew C. Chang, Lisa J. Dettling & Joanne W. Hsu, *Disparities in Wealth by Race and Ethnicity in the 2019 Survey of Consumer Finances*, FED. RESERVE (Sept. 28, 2020), <https://www.federalreserve.gov/econres/notes/feds-notes/disparities-in-wealth-by-race-and-ethnicity-in-the-2019-survey-of-consumer-finances-20200928.htm>. Racial disparities caused by structural racism exist across every imaginable domain. See *Infant Mortality*, CTR. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/reproductivehealth/maternalinfanthealth/infantmortality.htm> (June 22, 2022) (infant mortality); *Working Together to Reduce Maternal Mortality*, CTR. FOR DISEASE CONTROL & PREVENTION (Apr. 6, 2022), <https://www.cdc.gov/healthequity/features/maternal-mortality/index.html>; *Heart Disease Facts*, CTR. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/heartdisease/facts.htm> (heart disease); Anya Kamenetz, *Suspensions Are Down in U.S. Schools, but Large Racial Gaps Remain*, NPR (Dec. 17, 2018), <https://www.npr.org/2018/12/17/677508707/suspensions-are-down-in-u-s-schools-but-large-racial-gaps-remain> (school suspension and expulsion); *Contacts Between Police and the Public*,

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Structural racism is a society-wide web of social, economic, and political systems that advantages people racialized as white and disadvantages those who are not,<sup>187</sup> originating from systems that were intentionally designed to advantage white people.<sup>188</sup> But, to keep operating, structural racism doesn't require anyone to choose to make it happen.<sup>189</sup> Instead, it is "self-perpetuating and will end only through intentional, anti-racist choices changes to social, economic, and political life."<sup>190</sup> For example, structural racism helps us understand why the devastating impacts of the COVID-19 pandemic have been suffered disproportionately by people who are Black, Latinx, or Native American.<sup>191</sup> Systemic racial disparities in access to employment, wealth and income, housing, and healthcare come together to result in disproportionate rates of infection and death.<sup>192</sup>

The existence of structural racism means that inequity and oppression based on racialization cannot be overcome simply by changing individual racist attitudes or even ending individual acts of racism. Indeed, structural deficiencies will continue causing harm until people reform them. That is, antiracism requires structural reform. Thus, "[b]eing antiracist is fighting against racism."<sup>193</sup> In other words, antiracism is, by definition, action oriented. It requires not just any action, but the action of fighting.<sup>194</sup>

Being antiracist results from a conscious decision to make frequent, consistent, equitable choices daily. These choices require ongoing self-awareness and self-reflection as we move through life. In the absence of making antiracist choices, we (un)consciously uphold aspects of white supremacy, white-dominant culture, and unequal institutions and society. Being racist or antiracist is not about who you are; it is about what you do.<sup>195</sup>

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2018—Statistical Tables, U.S. DEPT. JUST., <https://bjs.ojp.gov/content/pub/pdf/cbpp18st.pdf> (threaten and actual use of police force).

<sup>187</sup> Samuel-Siegel, Anderson, & Lopynski, *supra* note 171, at 144-45.

<sup>188</sup> *Id.* at 147.

<sup>189</sup> *Id.* at 148-49.

<sup>190</sup> *Id.* at 152.

<sup>191</sup> See, e.g., Ruqaiyah Yearby & Seema Mohapatra, *Law, Structural Racism, and the Covid-19 Pandemic*, 7 J. L. & BIOSCIENCES 1 (2020).

<sup>192</sup> See, e.g., *id.*

<sup>193</sup> *Being Antiracist*, NAT'L MUSEUM OF AFRICAN AM. HIST. & CULTURE, <https://nmaahc.si.edu/learn/talking-about-race/topics/being-antiracist> (last visited Jul. 11, 2022).

<sup>194</sup> *Id.* Ibram X. Kendi and others have suggested there is no such thing as "being not-racist." IBRAM X. KENDI, *HOW TO BE AN ANTIRACIST* 9 (2019). A person either actively contributes to the dismantling of racism, white supremacy, and race-based inequality, or a person participates in the continuation of racism and racial inequality, even if only by silence or inaction. That is, in your thoughts, actions, and choices, you are either doing racism or you are doing antiracism. There is no middle ground.

<sup>195</sup> *Being Antiracist*, *supra* note 193.

To be antiracist, one must be willing to acknowledge the existence of white supremacy and racism of all forms, as well as be able to think and talk about them. Being antiracist requires more than thinking and talking, though, it requires that we make choices that contribute to the dismantling of structural racism rather than its self-replicating persistence.

## 2. Pursue Cultural Proficiency

In addition to building knowledge of concepts related to race, racialization, and racism, the work of antiracist pedagogy requires a continuous effort to build cultural proficiency.<sup>196</sup> Law teachers who pursue cultural proficiency are engaged in an inward-focused, continuous process,<sup>197</sup> a process that likely is prerequisite to antiracism, especially for those who are not themselves racially minoritized. Regardless of one's identity, knowing oneself, being grounded by an understanding of one's own racial and ethnic identity, and being mindful of one's own history allows a teacher to engage inclusively with students.<sup>198</sup> Thus, cultural proficiency is "the ability to learn about, live productively among, and work efficiently with people whose cultural expectations differ from one's own."<sup>199</sup> Its goals are to "make implicit rules visible, question embedded assumptions, and ultimately create new expectations that meet the needs of all."<sup>200</sup> Cultural proficiency requires constant self-awareness, self-assessment, and ongoing learning.<sup>201</sup>

Specifically, those engaged in the practice of cultural proficiency "value diversity" and learn to "manage the dynamics of difference."<sup>202</sup> To value diversity is to develop awareness of, and exercise an intentionally appreciative mindset toward, the differences among people.<sup>203</sup> "Manag[ing] the dynamics of difference" means effectively facilitating discussion, interaction, and learning in an environment where a variety of perspectives

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<sup>196</sup> See, e.g., Boles, *supra* note 27 (suggesting the cultural proficiency paradigm is a helpful tool in the effort to make legal education more inclusive, supportive, and diverse).

<sup>197</sup> See, e.g., Boles, *supra* note 28, at 150.

<sup>198</sup> See, e.g., Strand, *supra* note 7, at 178.

<sup>199</sup> Elizabeth B. Cooper, *The Appearance of Professionalism*, 71 FLA. L. REV. 1, 42 (2019).

<sup>200</sup> *Id.*

<sup>201</sup> Boles, *supra* note 28 (cultural proficiency "starts at the root of the problem by seeking to dismantle the biased beliefs and hegemonic values of the individual").

<sup>202</sup> See *id.* at 247 (citing RANDALL B. LINDSEY, KIKANZA NURI-ROBINS, RAYMOND D. TERRELL, & DELORES B. LINDSEY, *CULTURAL PROFICIENCY: A MANUAL FOR SCHOOL LEADERS* 2662 (3d Corwin, 2009)).

<sup>203</sup> See *id.* (citing KIKANZA NURI-ROBINS, DELORES B. LINDSEY, RANDALL B. LINDSEY, & RAYMOND D. TERRELL, *CULTURALLY PROFICIENT INSTRUCTION: A GUIDE FOR PEOPLE WHO TEACH* (3rd ed. 2012)).

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and experiences are represented; this includes recognizing that conflict is not inherently negative but can be leveraged for the benefit of all learners.<sup>204</sup>

For some—especially those who are not themselves racially minoritized—pursuing cultural proficiency might also require a mindful adoption of cultural humility. The tenets of cultural humility are: (1) nurturing a lifelong commitment to self-evaluation and self-critique; (2) committing to action that redresses power imbalances; (3) developing mutually beneficial, non-paternalistic advocacy relationships; and (4) stewarding ongoing organization-level development processes that parallel the other three tenets.<sup>205</sup> This approach de-emphasizes “fixing oneself” and, instead, “prioritizes the deep, ongoing identity work required to unlearn and interrupt the hurtful and exclusive performances of the -isms of a highly stratified society.”<sup>206</sup>

Specific examples of ways to do the work of cultural proficiency and humility are abundant.<sup>207</sup> Ongoing self-assessment, reflection, and reading are essential building blocks. Professor Anastasia Boles also suggests threshold strategies such as: seeking out training, striving to mitigate unconscious bias, and learning to recognize and limit microaggressions.<sup>208</sup> Additionally, one should seek to adopt a general posture of respectful curiosity to counter law schools’ “relentlessly performative and competitive culture.”<sup>209</sup> That is, strive to think of oneself as a lifelong learner, one who is humble about their personal proficiency and aware of the persistent need for growth.

### 3. Further Synthesizing and Concretizing

Transcending barriers within us likely is most relevant to people who are not themselves minoritized. To continue synthesizing and concretizing the strategies describe above, consider these examples of particularized

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<sup>204</sup> *See id.*

<sup>205</sup> Jann L. Murray-Garcia & Victoria Ngo, “*I Think He’s Nice, Except He Might Be Mad About Something*”: *Cultural Humility and the Interruption of Scripts of Racial Inequality*, 25 U.C. DAVIS SOC. JUST. L. REV. 73, 89 (2021).

<sup>206</sup> *Id.*

<sup>207</sup> *See, e.g., FYS 101: Cultural Competence and Humility LibGuide*, SYRACUSE UNIV. LIBRARIES, [https://researchguides.library.syr.edu/fys101/cultural\\_competence](https://researchguides.library.syr.edu/fys101/cultural_competence) (last visited July 1, 2022); *Definitions of Cultural Competence*, GEORGETOWN UNIV. CTR. FOR CHILD AND HUM. DEV., <https://nccc.georgetown.edu/curricula/culturalcompetence.html> (last visited July 1, 2022); *Race and Cultural Competence LibGuide*, Bakersfield College, <https://bakersfieldcollege.libguides.com/c.php?g=1061935&p=7721206> (last visited July 1, 2022); *Cultural Competency and Research Positionality*, STANFORD UNIV. SCH. L., <https://guides.law.stanford.edu/culturalcompetencyresearchpositionality/Home> (last visited July 1, 2022).

<sup>208</sup> Boles, *supra* note 28, at 153-54.

<sup>209</sup> Murray-Garcia & Ngo, *supra* note 205.

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action—a list that, like each aspect of this project, is intended as merely a jumping-off point, not a comprehensive action plan.

Read the literature and engage with a variety of media. In addition to the now significant flow of scholarly literature concerning structural racism and antiracism,<sup>210</sup> the internet is teeming with recommended reading lists for those interested in books for general audiences.<sup>211</sup> In addition to consuming as much literature as possible, seek out other sources of information such as journalism prioritizing race and racism—NPR’s *Code Switch* and *The Takeaway* hosted by Melissa Harris-Perry, for instance, as well as The New York Times’ *Race/Related* Newsletter—and films that do the same.<sup>212</sup>

Get trained and engage with colleagues in collaborative learning. While the effectiveness of training programs and collaborative learning communities can vary, nearly any opportunity to discuss relevant topics can hold value, particularly for those new to antiracism. Seek out training opportunities; convene a faculty learning community on topics such as cultural competence, stereotype threat, or comparative rhetoric; volunteer with racial equity organizations; etc. Building relationships with colleagues is often a rewarding benefit of these engagements, broadening access to professional knowledge as well as one’s network of colleagues with shared commitments.

Participate in institutional governance. Some law teachers are expected by their peers and institutional leaders to provide disproportionate quantities of uncompensated labor in antiracism efforts. This inequitable burden is

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<sup>210</sup> For lists, see, e.g., *Law Deans Antiracist Clearinghouse Project*, AM. ASS’N L. SCH., <https://www.aals.org/about/publications/antiracist-clearinghouse/> (last visited Aug. 1, 2022); Vernellia R. Randall, *Racism, Antiracism, and Legal Scholarship*, RACE, RACISM, & THE L., [https://racism.org/articles/defining-racism/stereotypes-bias-and-racism/378-anti-racism/9056-racism-antiracism?acm=%7Bsubtag:subid%7D\\_230](https://racism.org/articles/defining-racism/stereotypes-bias-and-racism/378-anti-racism/9056-racism-antiracism?acm=%7Bsubtag:subid%7D_230) (last visited Aug. 1, 2022).

<sup>211</sup> E.g., *Racial Justice, Racial Equity, and Anti-Racism Reading List*, HARVARD KENNEDY SCH., <https://www.hks.harvard.edu/faculty-research/library-knowledge-services/collections/diversity-inclusion-belonging/anti-racist> (last visited Aug. 1, 2022); *Nineteen Books About Antiracism*, BOSTON UNIV. (June 2022), <https://www.bu.edu/alumni/2022/06/10/blog-juneteenth-reading-list-antiracism/>; *Reading Lists*, CTR. FOR RACIAL JUST. IN EDUC., <https://centerracialjustice.org/resources/reading-lists/> (last visited Aug. 1, 2022); *Anti-Racism Reading List*, VA. LIBR. ASS’N, <https://www.vla.org/anti-racism-reading-list> (last visited Aug. 1, 2022); *Antiracist Reading List*, BOS. PUB. LIBR., <https://bpl.overdrive.com/collection/1086201> (last visited Aug. 1, 2022); *Anti-Racism Reader*, UC BERKELEY, <https://guides.lib.berkeley.edu/c.php?g=1047419&p=7602418> (last visited Aug. 1, 2022).

<sup>212</sup> *Code Switch*, NPR, <https://www.npr.org/podcasts/510312/codeswitch> (weekly podcast); *The Takeaway*, WNYC STUDIOS, <https://www.wnycstudios.org/podcasts/takeaway> (weekday radio show and podcast); *Race/Related*, N.Y. TIMES, <https://www.nytimes.com/spotlight/race> (weekly newsletter). A simple Google search such as “films that center people of color” yields an array of recommendations.

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often borne by racially minoritized law teachers in particular.<sup>213</sup> But, if you are a law teacher who has not been burdened by such disproportion, consider joining committees and other governance structures that center this enterprise. While no such structure is perfect, participating actively nevertheless allows us to benefit from the insights of committed colleagues, develop a practice of mindful inquiry about institutional structures and practices, and take ownership of institutional reform.

Engage with student organizations and programming. Engage regularly with the Black Law Student Association, Latinx Law Student Association, Asian Pacific American Law Student Association, and other student organizations. Consider attending their community-wide programming, requesting to join appropriate email lists, following their social media, and making yourself available as a resource for student leaders. These activities can help teachers learn about students' experiences and priorities and establish open lines of communication with successive generations of students.

Law teachers who engage thoughtfully in the internal work of knowledge-building and cultural proficiency have a strong foundation from which to build strategies that transcend barriers arising from our students' experiences—the topic we explore next.

*B. Transcending Barriers that Arise from Our Students' Psychological and Cognitive Experiences: Counteract the Isolation of Small Numbers and the Negative Effects of Stereotype Threat*

The first goal of a pedagogy of antiracism is to create conditions that ensure the thriving of racially minoritized law students. Transcending two key barriers to our students' ability to thrive—numeric isolation and stereotype threat—is demonstrably achievable thanks to significant guidance from our colleagues in the social sciences.

1. Combat Solo Status and its Effects

Being the only or one of very few members of a marginalized group in a classroom can bring about the effects of “solo status,” e.g., diminished learning and academic performance, feelings of representativeness, and hesitation to take risks.<sup>214</sup> To combat this barrier, the best solution is to take institutional measures to eliminate solo status altogether. Recruitment,

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<sup>213</sup> See, e.g., Taled El-Sabawi & Madison Fields, *The Discounted Labor of BIPOC Students & Faculty*, 12 CAL. L. REV. ONLINE 17 (June 2021).

<sup>214</sup> See *supra* Part II(B).



admissions, and retention practices should be designed to build diverse cohorts in which no student will face this particular brand of structural racism.<sup>215</sup>

Short of eliminating solo status altogether—a goal beyond the scope of most law teachers’ direct responsibility—law teachers can counteract its effects to some extent by using practices that allow solos to develop confidence about their abilities to meet the teacher’s expectations.<sup>216</sup> One way to do this is to ensure all evaluation criteria are stated clearly and objectively and are well known to all students in the class.<sup>217</sup> Teachers can also elevate student confidence and reduce the negative effects of solo status by emphasizing in class that all students are capable of excelling, and demonstrating that each student is valued for what they bring to the table.<sup>218</sup> For instance, teachers can employ group projects in which each student “is assigned one key segment of the material to be learned, such that in order to master the entire lesson, each student is dependent on the input of each of the other students.”<sup>219</sup>

Finally, since the detriments of solo status are exacerbated in public performance settings as compared with private performance, teachers can de-emphasize public performance—such as Socratic dialogue—as an evaluative criterion.<sup>220</sup> Alternatively, teachers might reconceptualize criteria such as class participation to widen pathways for success.<sup>221</sup>

These strategies for counteracting the detriments of solo status complement strategies that can help students overcome stereotype threat, as well, as the next subsection discusses.

## 2. Counteract Stereotype Threat

Regardless of solo status, racially minoritized law students arrive in law school having been at risk for stereotype threat throughout their academic careers,<sup>222</sup> and with varying degrees of coping skills. Since domain

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<sup>215</sup> Thompson & Sekaquaptewa, *supra* note 58, at 194 (observing that placing students into “solo status can be considered a subtle form of institutional sexism/racism”).

<sup>216</sup> *Id.* at 195.

<sup>217</sup> *Id.*

<sup>218</sup> *Id.* at 196-97.

<sup>219</sup> *Id.*

<sup>220</sup> *Id.* at 195.

<sup>221</sup> *Id.*; *see supra* Part III(C) for specific examples of how to reconceptualize participation grades.

<sup>222</sup> Sparks, *supra* note 66, at 6 (noting data indicates students are aware of stereotypes as early as kindergarten-age).

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identification<sup>223</sup> intensifies the threat, there is a high likelihood it will affect racially minoritized students' working memories and other cognitive processes during learning and performance. Fortunately, teachers can take measures to counteract the threat. Social scientists have documented a number of strategies to diminish the threat and help threatened students to overcome its psychological effects.

First, law teachers should strive for what Professor Steele called "optimistic teacher-student relationships."<sup>224</sup> Since students who are aware of negative stereotypes about their academic abilities might worry their teachers hold beliefs about them based on those stereotypes, teachers should alleviate that concern by expressing explicit belief in all students' potential to succeed.<sup>225</sup> Furthermore, in individual interactions, teachers who pair critical feedback with optimism about a student's potential can have a "strongly motivating" effect on threatened students.<sup>226</sup>

These positive effects are especially likely when students trust their teachers.<sup>227</sup> For instance, the data show that teachers can earn trust by assigning work that challenges students, providing regular and constructive feedback, and refraining from inauthentically praising mediocre work or withholding criticism to spare students' feelings.<sup>228</sup> Giving students work that is challenging—not overwhelming in substance or pace, but that challenges them to grow—can not only build trust, but can also counteract the stereotype threat because it shows students they are respected and that the teacher has confidence in their potential to meet the challenge.<sup>229</sup>

Second, Steele encouraged teachers to invoke a growth mindset, noting that "[s]tressing the expandability of intelligence" can help threatened students eschew stereotypical messages of fixed, limited abilities.<sup>230</sup> Growth

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<sup>223</sup> "Domain identification" refers to circumstances where a student is learning about a field with which they identify strongly, as is the case with most law students. McClain, *supra* note 7, at 173.

<sup>224</sup> Steele, *supra* note 63, at 624; Darling-Hammond & Holmquist, *supra* note 7, at 18 (advocating for "positive, warm, and open" relationships between law professors and their students to counteract stereotype threat).

<sup>225</sup> Steele, *supra* note 63, at 624.

<sup>226</sup> Steele, *supra* note 63, at 625; see also Paula J. Manning, *Word to the Wise: Feedback Intervention to Moderate the Effects of Stereotype Threat and Attributional Ambiguity on Law Students*, 18 U. MD. L.J. RACE, RELIG., GENDER & CLASS 99 (2018); see generally Geoffrey L. Cohen, Claude M. Steele, & Lee D. Ross, *The Mentor's Dilemma: Providing Critical Feedback Across the Racial Divide*, 25 PERSONALITY & SOC. PSYCH. BULL. 1302 (1999).

<sup>227</sup> See Sparks, *supra* note 66, at 10.

<sup>228</sup> See *id.*; Steele, *supra* note 63, at 625.

<sup>229</sup> See Steele, *supra* note 63, at 625 (also stressing that work should be presented as challenging, not remedial); Darling-Hammond & Holmquist, *supra* note 7, at 13 (discussing these strategies in the law school context).

<sup>230</sup> Steele, *supra* note 63, at 625.

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mindset is the belief that one can build intelligence and cultivate skills through effort, as well as trial and error.<sup>231</sup> A fixed mindset, on the other hand, is a belief that intelligence is immutable and, unlike muscles, cannot be developed through effort.<sup>232</sup> If a person with a fixed mindset does not succeed in a situation, they might feel they are not good enough to succeed.<sup>233</sup> Encouraging a growth mindset in threatened students may help minimize their susceptibility to negative stereotypes.<sup>234</sup> Relatedly, helping students view their academic undertakings as opportunities to learn and grow—rather than opportunities merely to perform—is another way to help threatened students improve performance.<sup>235</sup>

Third, because negative stereotypes raise the specter of not belonging in the domain, affirming both students' intellectual belonging and their social belonging can be an effective counterweight to the risk of stereotype threat.<sup>236</sup> One way to accomplish this is by giving students opportunities to reflect on their own characteristics, values, and skills, or on topics important to them.<sup>237</sup> There is evidence, for instance, that students who engage in a self-affirmation writing reflection before a test can experience confidence-building effects that result in better performance.<sup>238</sup> Mindfulness practices may also aid in this endeavor.<sup>239</sup>

Similar effects might arise when teachers create opportunities for diverse groups of students to get to know one another well.<sup>240</sup> Such connections create opportunities to normalize the struggles common to all law students and minimize the risk of threatened students drawing the incorrect conclusion that they are isolated in their uncertainties and stresses.<sup>241</sup> Teachers themselves can also normalize academic anxiety by referencing it in class, sharing their own experiences with it, or observing its universality.<sup>242</sup>

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<sup>231</sup> See generally CAROL S. DWECK, *MINDSET: THE NEW PSYCHOLOGY OF SUCCESS* (2007).

<sup>232</sup> See generally *id.*

<sup>233</sup> See *id.* at 34 (“In the fixed mindset . . . the loss of one’s self to failure can be a permanent, haunting trauma.”).

<sup>234</sup> See Steele, *supra* note 63, at 625 (noting that “[s]tressing the expandability of intelligence . . . should help to deflect” the threat).

<sup>235</sup> See McClain, *supra* note 7, at 181.

<sup>236</sup> See Steele, *supra* note 63, at 625.

<sup>237</sup> Sparks, *supra* note 66, at 9.

<sup>238</sup> *Id.*; see *supra* Part III(D) for suggestions on how to put such strategies into action.

<sup>239</sup> McClain, *supra* note 7, at 179-80, 184.

<sup>240</sup> See Darling-Hammond & Holmquist, *supra* note 7, at 14.

<sup>241</sup> *Id.*

<sup>242</sup> See Sparks, *supra* note 66, at 11.

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Finally, “[p]eople from the stereotype-threatened group who have been successful in the domain carry the message that stereotype threat is not an insurmountable barrier there.”<sup>243</sup> Thus, presenting students with positive group examples contributes to threat neutralization.<sup>244</sup> Quintessential examples of this include mentoring programs and other opportunities for students to engage with upper-level students, alumni, and members of the local bench and bar.<sup>245</sup>

### 3. Further Synthesizing and Concretizing

To operationalize further a holistic discipline that prioritizes knowing, challenging, equipping, and believing in our students, consider these additional strategies.

Get to know your students individually and build connections with them. Begin by committing to learn each student’s name—and pronounce it correctly—as early in the semester as possible.<sup>246</sup> Invite students to sign up for introductory meetings or make short introductory videos.<sup>247</sup> Create ongoing ways to invite connection with students, for instance hold periodic one-on-one or small-group meetings in lieu of a regular class meeting;<sup>248</sup> take

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<sup>243</sup> Steele, *supra* note 63, at 625.

<sup>244</sup> McClain, *supra* note 7, at 179, 184.

<sup>245</sup> Even brief interventions like programs where first-year students listen to upper-level students talk about their experiences as first-years and then write reflectively can help neutralize the threat. Darling-Hammond & Holmquist, *supra* note 7.

<sup>246</sup> For instance, set a goal to learn each students’ name by the end of the second-class meeting. With smaller enrollments, this goal is highly attainable. With larger classes, a longer timetable will no doubt be required. To accomplish the goal, study your roster before class, including a photo roster if available. Then, during the first class, ask students to introduce themselves at the start and to say their names again whenever they speak; repeat their names as they do so, intentionally striving to say each student’s name at least a couple of times during the first class meeting. Studying the roster after class and testing yourself to visualize each student can round out the process. Individual meetings also help enormously to deepen knowledge of student names. In place of or in addition to these strategies—and especially for larger class sizes—consider asking students to create a two-minute introductory video. (Microsoft Flip (formerly Flipgrid) is a free resource that facilitates such videos, for example. MICROSOFT FLIP, <https://info.flip.com/> (last visited Sept. 21, 2022)).

<sup>247</sup> Teachers with larger enrollments might consider scheduling small-group introductory discussions (e.g., with six to ten students per group).

<sup>248</sup> One way to accomplish this goal, especially in a course with large enrollment, is to break students up into subsections of, say, ten or fifteen. Plan your lesson for the class session but, instead of executing the lesson just once with the entire class assembled, meet with each subsection separately to execute the lesson. To boost efficiency, you might consider recording a pre-lecture that all students view before their subsection meeting. This pre-lecture approach could allow you to make each subsection meeting shorter than a full class period and devote the entire time to discussion or active exercises. This practice of holding multiple subsection meetings rather than a single class meeting will take up more of your time than usual and will necessitate a repetitiousness with which you may not be accustomed. But there is value in making space for those smaller teacher-to-student ratios. They make it easier for students to participate, for you

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opportunities throughout the semester to ask what students are experiencing in other courses and how their workload is flowing; pause at appropriate moments of class time to acknowledge events happening in the community or in national news that might be affecting students; make your office hours highly accessible in terms of time, location, and expectations, and encourage students to come get to know you even if they don't have a "well-formed" question.

Expect universal success and articulate that expectation frequently. When the semester begins, take time to explicitly frame the course as one designed to achieve a single, overarching, mutual goal—to bolster each student's ability to accomplish their individual professional aspirations.<sup>249</sup> One way to reinforce this assertion is to explain that, while the grading curve means students will earn a wide range of grades in the course, it is nevertheless your expectation that every student, regardless of grade, will emerge from your collaboration equipped to put the course material into practice effectively on behalf of future clients and communities. For instance, you might make this aspiration concrete by announcing that your objective is to help students learn course material so well that you will be able to serve as a strongly positive employment reference for each and every one of them. Remind them of this aspiration repeatedly, but especially at times when grade-related stress is likely to be high.

Minimize the grade implications of public performance by reforming "class participation" grades.<sup>250</sup> If your course grade includes a component based on class participation, professionalism, or the like, consider reframing this portion of the grade to diversify the ways students can demonstrate effectiveness. One way to do this is to base that component of the grade on

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to spot students who may be struggling, and for students to hear each other's voices, just to name a few benefits. If physical space or travel-time concerns are at issue, consider using Zoom or another videoconferencing application.

<sup>249</sup> Some teachers might wonder how to frame theirs as courses designed to bolster each student's ability to accomplish their individual professional aspirations—especially in courses that focus on a narrow doctrinal sliver. The point here simply is that every course plays some role in contributing to students' long-term goals, whether because those students plan to practice in that doctrinal area, or will benefit more generally from the background knowledge, analytical skills, and/or bar exam preparation the course offers.

<sup>250</sup> Other strategies relevant to transcending this public-performance-related barrier include employing effective group exercises and minimizing the use of Socratic dialogue, as discussed below in Part III(D). You might also consider using electronic discussion board-based assignments in lieu of or in addition to class participation grades. For instance, early in the semester, you might assign a discussion board prompt such as "Which part of a case brief do you find most challenging to write? Why?".

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relevant capabilities identified in The Whole Lawyer Study.<sup>251</sup> Published in 2016, this study surveyed more than 24,000 lawyers in the U.S. to, among other goals, “[i]dentify the foundations entry-level lawyers need to launch successful careers in the legal profession.”<sup>252</sup> One of its outputs was a list of ten foundational capabilities law graduates must possess on their first day of practice.<sup>253</sup> These include integrity; respect and courtesy toward others; listening skills; timely response to inquiries and requests; work ethic; effort; attention to detail; and attendance and punctuality.<sup>254</sup> To move away from a heavily public performance-based evaluation, consider evaluating students on these capabilities instead.

Conduct formative assessment with honest feedback, objective scores, and clarity of purposes and expectations. Formative assessment is not only required by the ABA,<sup>255</sup> its benefits for all students are wide-ranging and well-documented.<sup>256</sup> To help students acclimate, ensure students receive feedback from you as early and as often as feasible. Make the purpose of each assignment clear, either by stating it in the written instructions or discussing it in class—purpose statements contextualize the work, helping students understand a given assignment’s role in their ongoing education or future practice, and allowing them to see the formative role of each assignment rather than merely its evaluative function. You can also make expectations transparent through advanced dissemination of grading rubrics.<sup>257</sup> In addition to rubrics, provide individualized comments on each major assignment if your class size permits; if not, provide a class-wide document that lists a single set of comments concerning common themes.<sup>258</sup>

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<sup>251</sup> See generally Alli Gerkman & Logan Cornett, *Foundations for Practice: The Whole Lawyer and the Character Quotient*, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS. (2016) (When I made this change, I dubbed this component of the grade “Additional Foundations for Practice.”).

<sup>252</sup> *Id.* at 1, 4, 35.

<sup>253</sup> *Id.* at 26.

<sup>254</sup> See *id.* at 27.

<sup>255</sup> STANDARDS & RULES OF PROC. FOR APPROVAL OF L. SCH., STANDARD 314 (AM. BAR ASS’N 2021-22).

<sup>256</sup> See, e.g., Julie L. Ross & Diana Donahoe, *Lighting the Fire of Learning in Law School: Implementing ABA Standard 314 by Incorporating Effective Formative Assessment Techniques Across the Curriculum*, 81 U. PITT. L. REV. 657 (2020); Elizabeth M. Bloom, *A Law School Game-Changer: (Trans)Formative Feedback*, 41 OHIO N. L. REV. 228 (2015).

<sup>257</sup> For an in-depth discussion of grading rubrics, their benefits, and how to create them, see Sophie M. Sparrow, *Describing the Ball: Improve Teaching by Using Rubrics—Explicit Grading Criteria*, 2004 MICH. ST. L. REV. 1 (2004).

<sup>258</sup> Another strategy for providing formative assessment in large classes is to assign Multistate Bar Exam-style multiple-choice questions at intervals throughout the semester. After answering the questions, students can use an answer key to self-assess. Teachers might also provide a single class-wide document explaining answers in-depth and suggesting next steps for students with lingering questions.

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Comments should list both aspects of the assignment where students' work is effective and areas where improvement is required.<sup>259</sup>

Teach a growth mindset and reinforce it with explicit self-assessment work and panel discussions. At a time of semester when students have begun to receive feedback and might be experiencing grade-related stress, consider including a lesson on growth mindset, engaging students in a self-assessment exercise, and introducing role models. One way to do this is to assign a pre-recorded lecture that provides an overview of Dr. Carol Dweck's work on mindset, perhaps including an excerpt of her TEDx Talk,<sup>260</sup> and teaches students about education science on student self-assessment. Then assign students an individual exercise in which they complete a self-assessment instrument.

For instance, the instrument might include spaces for students to rate how ready they feel to employ specific knowledge- and skill-sets studied thus far, select from a list of options describing their key barriers to and sources of success, and/or write narrative descriptions of specific strategies they intend to use to reinforce their successes and overcome their barriers.<sup>261</sup> After collecting the assessment instruments, invite students to meet with you for discussion individually or in small groups. Another practice that works in the wake of this process is a panel discussion where a diverse group of upper-class students or local practitioners share tips about achieving success with the course material and/or insights about putting it into practice.<sup>262</sup>

In sum, opportunities abound to overcome the barriers of solo status and stereotype threat. When legal educators combine these strategies with attention to the substance and procedures of our courses—and undertake

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<sup>259</sup> Make it easy for students to see both the positive and the negative comments. For instance, each significant comment might include two subparts, each with its own heading: "Effective" and "Opportunities for Improvement."

<sup>260</sup> Dr. Carol Dweck, *The power of believing that you can improve*, TED (Dec. 17, 2014), [https://www.ted.com/talks/carol\\_dweck\\_the\\_power\\_of\\_believing\\_that\\_you\\_can\\_improve?language=en](https://www.ted.com/talks/carol_dweck_the_power_of_believing_that_you_can_improve?language=en).

<sup>261</sup> I gratefully acknowledge Moji E. Olaniyan, Assistant Dean of Academic Enhancement, University of Wisconsin Law School, whose 2014 conference presentation and materials, *Effective Counseling Through Academic Self-Assessment*, inspired and influenced my development of such a self-assessment instrument.

<sup>262</sup> I often offer such panel discussions during optional lunchtime sessions that frequently yield attendance from as many of two-thirds of the class. Another way to reinforce the growth mindset is to invoke it implicitly when facilitating class. For instance, when a student answers an in-class question erroneously, be honest but also emphasize the student's capability to get there with further work, e.g., "No, that's not right. I see where you are coming from, though. Let's work through this together so you can get to the right place." Then ask a series of follow-up questions until the student is able to answer correctly. I find that students—both the student who is speaking and those who are listening—very much appreciate clarity about whether the students' initial answer was correct or incorrect, and that using the get-there-together procedure allows students to feel respected and, in turn, more willing to take chances.

meaningful accountability mechanisms related to each—we have the potential to accomplish a pedagogy of antiracism. Perhaps most challenging in the minds of many law teachers is that associated with substantive reform, the topic to which we now turn.

*C. Transcending Barriers that Arise from the Substance We Teach: Teach in Context, Acknowledging Structural Racism, and Taking a Broad View of Relevance*

To borrow words from Professor Bennett Capers, “law is haunted by race, even when it doesn’t realize it.”<sup>263</sup> As such, teaching substance in context, with a truthful attention to race’s central role and with a broad view of relevant perspectives, is the third essential component in a process of antiracist pedagogy. Only by doing so can we hope to achieve the goals of the pedagogy—to nurture the thriving of racially minoritized students and equip all students to participate in the dismantlement of structural racism.

Antiracist law teachers should explicitly introduce and facilitate discussions of race, its role in the law, and the law’s role in creating structural racism and reinforcing white supremacy.<sup>264</sup> They should also create space for a wide array of analytical approaches in the classroom. Doing so is crucial to the fundamental truthfulness and comprehensiveness of legal education. Engaging these practices also helps us affirm students’ individual identities, values, and experiences, and in turn creates learning spaces where all students can both thrive<sup>265</sup> and hone their skills as officers of the court.

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<sup>263</sup> Capers, *supra* note 7, at 58.

<sup>264</sup> For insight on how to pursue the strategies discussed in this part while nevertheless avoiding retraumatizing racially minoritized students, *see, e.g.*, Valentina Iturbe-LaGrave, *Pedagogical Strategies to Acknowledge and Discuss Institutional Legacies of Racism*, OFF. OF TEACHING & LEARNING, UNIV. DENVER (June 5, 2020), <https://otl.du.edu/pedagogical-strategies-to-acknowledge-and-discuss-institutional-legacies-of-racism/>; Sarah Katz, *The Trauma-Informed Law Classroom: Incorporating Trauma-Informed Practice into the Pandemic-Age Law Classroom*, 25 U.C. DAVIS SOC. JUST. L. REV. 17, 33-38 (2020); Susan Methot, *A Trauma-Informed Approach to Teaching the Colonization of the Americas*, EDUTOPIA (Jan. 4, 2021), <https://www.edutopia.org/article/trauma-informed-approach-teaching-colonization-americas>. As these sources elucidate, many of the strategies this article discusses are part of a trauma-informed approach that can reduce risks of retraumatizing for minoritized students.

<sup>265</sup> *See, e.g.*, Sparks, *supra* note 66, at 7 (citing D. M. Steele, *Creating identity safe classrooms*, in ENCYCLOPEDIA OF DIVERSITY IN EDUCATION (2012)).



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## 1. Teach Law in Context, Treating Race as Part of the Core, and Valuing an Array of Analytical Wisdom

No law school course can be described fairly as lacking implications related to race.<sup>266</sup> Teaching a subject matter “race neutrally” means teaching it incompletely. Consider, to name just a few examples, the explicit history of racism in constitutional law and the law of real property; the disparate impacts of contemporary criminal procedure, taxation, and corporate governance; and the importance of intercultural communication and rhetorical inclusivity in lawyering skills. What’s more, any standard that purports to be objective or employs a reasonable person conception implicates race. So, too, do the very compositions of the judiciary that decided the cases students study and the legislatures who enacted the statutory law. Race affects access to wealth and private property, the franchise, and legal representation. Indeed, even the population of any given law classroom cannot be said to be the product of a race-neutral system of higher education credentialing and testing.<sup>267</sup>

As such, teachers should strive to be the first to raise these issues, rather than leaving the onus of doing so on the shoulders of students.<sup>268</sup> Opting not to do so fails to affirm the identities, values, and experiences of racially minoritized students, thus creating a risk they will feel invisible, dismissed, or even traumatized.<sup>269</sup> It also sacrifices the possibility of building a

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<sup>266</sup> The absence of an explicit reference to race does not make a discussion, doctrine, or other framework race-neutral or otherwise “objective.” Crenshaw, *supra* note 7, at 4. Rather, the “appearance of perspectivelessness is simply the illusion by which the dominant perspective is made to appear neutral, ordinary, and beyond question.” *Id.*

<sup>267</sup> See, e.g., Frank Fernandez, Hyun Kyoung Ro, & Miranda Wilson, *The Color of Law School: Examining Gender and Race Intersectionality in Law School Admissions*, 128 AM. J. EDUC. 117 (2021); Aaron N. Taylor, *The Marginalization of Black Aspiring Lawyers*, 13 FIU L. REV. 489 (2019); Jeffrey J. Minetti, *A Comprehensive Approach to Law School Access Admissions*, 18 U. MD. L. J. RACE, RELIG., GENDER & CLASS 189 (2018); John Nussbaumer, *Misuse of the Law School Admissions Test, Racial Discrimination, and the De Facto Quota System for Restricting African-American Access to the Legal Profession*, 80 ST. JOHN’S L. REV. 167 (2006).

<sup>268</sup> MCMURTRY-CHUBB, *supra* note 7, at 78; see Fernandez, Kyoung Ro, & Wilson, *supra* note 267; Taylor, *supra* note 267; Minetti, *supra* note 267. In addition to the trauma-informed approaches described by the sources in note 267, law teachers should also take care to avoid what some have called “ally theater.” Ally theater refers to performative actions of people who are members of a dominant group; these actions may seem designed to fight oppression, but in fact stop short of doing work that actually contributes to structural change. Often, what has come to be called ally theater involves the ally—the teacher in this instance—disseminating content that depicts violence against or oppression of members of marginalized groups, but without care to ensure the content is relevant to the coursework and is presented in settings of safety and community that avoid re-traumatizing students who identify with the relevant groups. See generally Bishop, *supra* note 114, at 3.

<sup>269</sup> See, e.g., Ossei-Owusu, *supra* note 81.

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profession with the tools to reform the law's role in creating and reinforcing structural racism.

Concretely, for instance, teachers should be explicit about the ways specific case outcomes, doctrinal trends, and lawyering conventions are products of—or have disparate impacts based on—racialization.<sup>270</sup> Some of these implications may be “hidden” from view for some students, depending on their identity, experiences, and perspective. Examples of such implications are seemingly endless, one might: explore the implications of disparate maternal mortality rates when considering laws regarding reproductive freedom; address the relevance of disparate incarceration rates on felon disenfranchisement; consider the diversity of rhetorical traditions when teaching persuasion and negotiation skills; discuss the role of corporate fiduciaries in monitoring compliance with race discrimination laws; interrogate the meaning of objective standards in the litigation of tort claims or criminal procedure. The list could go on, but the point is that antiracist legal educators should step back routinely from their course material, ask how the subject of study has been shaped by race or can be experienced differently by people based on their race, and be explicit about those matters during the teaching process.

In addition to surfacing impacts and implications that might be hidden, providing factual or historical background for caselaw can help students become aware of the ways race is implicated in areas that might appear unracialized to some.<sup>271</sup> One way to do this is to include readings or other materials that “provide[] context for the interactions that g[a]ve rise to the cause of action,”<sup>272</sup> and humanize specific litigants and others affected by the doctrine under study. The antiracist teacher can transcend typical substantive limitations by assigning reading to accompany the caselaw, such as materials from the court record and/or journalistic or scholarly writing about the parties to the case, the business practices at stake, the results of the litigation, or public policy outcomes attributable to the litigation.<sup>273</sup>

While considering the law's disparate impacts and human implications, past and present, antiracist pedagogy can also engage students to explore their own potential as agents of change. Rather than implying a sense that the law they study in school is the culmination of a now-settled narrative, teachers can help students understand how they will use legal analysis to impact the

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<sup>270</sup> Brophy, *supra* note 8, at 321-22.

<sup>271</sup> *E.g.*, Lee, *supra* note 8.

<sup>272</sup> MCMURTRY-CHUBB, *supra* note 7, at 78.

<sup>273</sup> *Id.* Another example of such contextual reading might be the Law Stories Series from West Academic (access at: <https://www.westacademic.com/series/Law-Stories>).

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law and its future progress, to shape the narrative's future.<sup>274</sup> Doing so can help students begin to conceive of themselves not only as inheritors of existing law, but also as active interpreters and shapers of it.<sup>275</sup>

Teachers who encourage students to conceive of themselves as interpreters and shapers of law can reinforce this conception by welcoming a variety of reactions and perspectives.<sup>276</sup> Critique, emotion, and knowledge derived from lived experiences are examples of in-class contributions historically devalued in many law classrooms. Welcoming such contributions has potential to minimize negative emotions in the classroom, and thus minimize stress. It will also help students build a more robust toolkit of problem-solving systems, which can in turn enable them to “devise better solutions for the problems confronting our society today and tomorrow.”<sup>277</sup>

To this end, law teachers should reject the tendency to frame class work as an exercise in rule application only,<sup>278</sup> and refrain from dismissing students' reactions or regarding students who express emotion as angry or irrational.<sup>279</sup> They should make room for students to express critical commentary about the rules being applied, rather than teaching students that such critiques are breaches of classroom norms<sup>280</sup> or corollary digressions. One benefit of this practice is that it evades the traditional, if unspoken, requirement that racially minoritized students “unrace themselves”<sup>281</sup> or “abstract themselves from their identities . . . if they want to participate in the discussion on its own terms.”<sup>282</sup> Instead, this practice acknowledges that

<sup>274</sup> Darling-Hammond & Holmquist, *supra* note 7 at 61.

<sup>275</sup> See generally Laura A. Webb, *Speaking the Truth: Supporting Authentic Advocacy with Professional Identity Formation*, 20 NEV. L.J. 1079 (2020) (suggesting methods to help students explore the role of lawyers as “meaning-makers” and “truth-tellers”).

<sup>276</sup> For examples of readings relevant to this undertaking, see, e.g., William P. Quigley, *Letter to a Law Student Interested in Social Justice*, 1 DEPAUL J. SOC. JUST. 7 (2007); Dean Spade, *For Those Considering Law School* (Oct. 2010), <http://www.deanspade.net/wp-content/uploads/2010/10/For-Those-Considering-Law-School.pdf>.

<sup>277</sup> Dark, *supra* note 7.

<sup>278</sup> See Crenshaw, *supra* note 7, at 3.

<sup>279</sup> See Bishop, *supra* note 114, at 6.

<sup>280</sup> See Crenshaw, *supra* note 7, at 4-5.

<sup>281</sup> Capers, *supra* note 7, at 41.

<sup>282</sup> See Crenshaw, *supra* note 7, at 4. Rather than creating a sense that students' “cultural and experiential knowledge is not important or relevant”—which can create an experience of marginalization that deepens the alienation most law students experience regardless of identity—teachers should frame “discussions so that the boundaries of acceptable responses [are] not so narrowly constructed. [They should] give students the permission to drop the air of perspectivelessness, to stand within their own identity, and to critique the doctrine or rule directly.” *Id.* at 5-6. This is not to say racially minoritized students should be asked to testify about their experiences—they should not. Rather, teachers should create space for all students to self-determine concerning the relevance of their perspective or experience to the doctrinal discussion at hand. *Id.* at 8.

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legal questions cannot be cabined off from questions of culture, context, or morality, and makes space for students to actually develop the skills necessary to conduct legal analysis with the context of structural racism in mind.<sup>283</sup> This practice also provides opportunities to “challenge majority students’ beliefs that the minority perspective is self-interested and biased while the doctrinal framework and their own perspectives are not.”<sup>284</sup> “[S]uch inclusion and awareness should help students come closer to perceiving a ‘relatively truer truth’” than the common narratives of objectivity or neutrality.<sup>285</sup>

## 2. Further Synthesizing and Concretizing

For some, this component of antiracist pedagogy can feel especially intractable. For those who struggle to understand why traditional approaches are harmful or are looking for a highly accessible entry point: consider empathy. Ask yourself what your students might be thinking and feeling as they learn about any given topic covered in your class.<sup>286</sup> What experience are students having, for instance, while studying topics that could impact them or their loved ones in harmful or oppressive ways, or while studying a history or status quo they desire to change? Each such moment is an opportunity to employ context and a wide conception of analytical relevance to ensure we carry out our duties to students—both our duty to foster their thriving as learners and our duty to equip them to accomplish their professional aspirations.

For additional examples of strategies to transcend the barrier of decontextualized substance and limited analytical relevance, consider the jumping-off points available in culture building and lesson planning.

Build a culture that values students’ aspirations, feelings, and opinions as central to the academic enterprise. Demonstrate to students in as many ways possible that their goals and needs matter—including why they came to law school, what they hope to accomplish and change, and how they feel along the way. For instance, in the first class meeting, consider inviting each student to introduce themselves and share what interests them about the law

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<sup>283</sup> Capers, *supra* note 7, at 34-35.

<sup>284</sup> See Crenshaw, *supra* note 7, at 7.

<sup>285</sup> Ansley, *supra* note 7, at 1579. As it happens, an approach that values multiple perspectives can also help minimize stereotype threat. By valuing “a variety of approaches to both academic substance and the larger academic culture” teachers can demonstrate to threatened students that the environment is one where stereotypes are less likely to be used. Steele, *supra* note 63, at 625.

<sup>286</sup> Or, better yet, be in dialogue with your students so you can know what they are thinking and feeling.

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or how they hope to apply their legal education.<sup>287</sup> In larger classes where making a circuit of the whole room is not feasible, consider using a discussion board or short videos outside of class. Consider revisiting “what brought you here”-style questions late in the semester, going around the room or posting discussion board prompt such as: “What is an example of something you’ve learned this semester that has given you an opportunity to reflect on your own professional aspirations? How have those reflections impacted you?”

In addition to these more personal discussions, invite students’ reactions to substantive lessons. For instance, ask questions such as: “How did you feel as you were reading the material for today’s class?” “Are there questions or concerns that arise for you on this topic but which the opinions we have read do not address?” “What did you think about this topic before entering law school; has your perspective changed?” Some teachers might wonder whether such questions are relevant to legal study but, especially for students who came to the law with hopes of change agency, this practice signals that their hopes, fears, questions, and concerns need not be compartmentalized until some future date when they finally will be free to engage with the law in all its manifestations. Perhaps even more importantly, this practice also helps build an organic pathway to context-building since responding to students’ questions and insights often allows the teacher to provide context-building information and resources.

Plan lessons that go beyond the law’s status quo to engage the law’s imperfect alignment with justice.<sup>288</sup> To concretize this category of strategies, perhaps a subject-matter specific example is ideal. Consider a scenario in which students are engaging with the tort of false imprisonment. Specifically, imagine a fact pattern in which a customer has sued a retailer for false imprisonment after employees detained her in a Texas clothing store. The detention occurred after employees saw her put on a jacket they believed to be store merchandise and leave without paying.<sup>289</sup> In fact, the customer had not shoplifted, but was instead simply putting on a jacket she owned,

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<sup>287</sup> You might conduct this as a single exercise that involves going around the room twice—first for students to offer a brief introduction, and second for students to answer the “what brought you here” question. In smaller classes, you might deepen the exercise during the second-class meeting: Students can be invited to prepare a more in-depth introduction of themselves around three minutes in length. Defer to students as to what information to include, emphasizing that each of us has different priorities and boundaries regarding sharing ourselves in new settings. Consider providing provide them a Social Identity Wheel and Personal Identity Wheel as potential inspiration. For copies of the Identity Wheels, as well as other suggestions for using them, *see, e.g., Social Identity Wheel*, UNIV. MICH. COLL. LITERATURE, SCI., & ARTS, <https://sites.lsa.umich.edu/inclusive-teaching/social-identity-wheel/> (last visited July 28, 2022).

<sup>288</sup> For another example of this sort of strategy, *see* Ho, *supra* note 8, 124.

<sup>289</sup> This example is drawn from a problem I have taught in 1L Legal Analysis & Writing. I am very grateful to my colleague, Professor Tamar Schwartz, who designed and shared this problem.

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which she had purchased in the store on a previous visit—she had arrived at the store wearing the jacket, taken it off and set it down on a merchandise rack while she tried on a store sweater, and then put it back on before leaving without purchasing anything. The statutes and case law permit stores to detain customers suspected of shoplifting provided those detentions are founded on a reasonable belief of theft and conducted in a reasonable manner for a reasonable amount of time.<sup>290</sup>

Teaching this problem with an awareness of its implications for race and racism means bearing a number of considerations in mind. For instance, caselaw is often silent on the potential implications of racial profiling, or even its very existence;<sup>291</sup> one's lived experiences of shopping can differ vastly depending on racial identity;<sup>292</sup> students' likelihood of having experienced unfair treatment while shopping varies based on race;<sup>293</sup> depending on lived experiences, people have an array of convictions about what behavior is "reasonable" when interacting with store merchandise; and, in the Texas jurisdiction where my version of the problem is set, a sizeable proportion of oft-cited cases involve shoppers with surnames that suggest the shopper might be of Latinx heritage.<sup>294</sup>

A traditional way to approach this problem would be to send students out to read the case law, then call on them to synthesize the doctrine and predict whether the store is liable for false imprisonment. The traditional approach likely would not name the races of the customer and employees, explore students' concerns about racial profiling, inquire whether existing case law accounts effectively for disparities shoppers experience based on race, make room for students to share their own experiences as shoppers or retail store employees, nor invite students to critique existing case law based on those experiences.

To accomplish a contextualized, analytically broad approach, a teacher can make various modifications to the conventional teaching method. First, be explicit about the races of the customer and employees in the fact pattern,

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<sup>290</sup> TEX. CIV. PRAC. & REM. CODE ANN. § 124.001 (West 2022); Wal-mart Stores, Inc. v. Resendez, 962 S.W.2d 539, 540-41 (Tex. 1998).

<sup>291</sup> For a discussion of such profiling, see, e.g., Cassi Pittman, "Shopping While Black": Black Consumers' Management of Racial Stigma and Racial Profiling in Retail Settings, 20 J. CONSUM. CULT. 3 (2020).

<sup>292</sup> See, e.g., Jeffrey M. Jones & Camille Lloyd, *Black Americans' Reports of Mistreatment Steady or Higher*, GALLUP (July 27, 2021), <https://news.gallup.com/poll/352580/black-americans-reports-mistreatment-steady-higher.aspx> (noting, for example, 35% of Black Americans have experienced mistreatment while shopping).

<sup>293</sup> See, e.g., *id.*

<sup>294</sup> E.g., *Dillard Dep't Stores, Inc. v. Silva*, 106 S.W.3d 789, 795 (Tex. App. 2003), *aff'd as modified*, 148 S.W.3d 370 (Tex. 2004); *Resendez*, 962 S.W.2d at 540; *H.E. Butt Grocery Co. v. Saldivar*, 752 S.W.2d 701, 704 (Tex. App. 1988).

thus eschewing a colorblind approach that assumes all people to be white unless another race is named. Then, when discussing the caselaw in class or preparing the students for discussion, provide broader context by raising the topic of racial profiling and educating students about its prevalence. Also, invite students to comment on the relationship between the doctrine and racial profiling, and to explore whether the former accounts for the latter. No student or group of students should be asked to testify about or teach others about their own experiences as shoppers, but those who volunteer to share such information can be welcomed. Finally, go beyond merely requiring students to predict who is likely to prevail under the doctrine. Instead, ask students to articulate what advice an ethical legal advisor<sup>295</sup> would give concerning a detention policy that both accounts for the doctrine and minimizes the risk of racial profiling.

Some argue teaching law this way coddles racially minoritized students. Such skeptics assert that students will encounter half-truths, invalidations, and other forms of racism in the “real world” of law practice, thus exposing them to these phenomena in the classroom is an appropriate way to prepare them for practice. But this logic is indefensible for a number of reasons, including that it ignores our duty to be educators. Pursuant to ABA accreditation Standard 301, we undertake the duty to create an educational setting in which all law students can learn and, in turn, become effective legal practitioners.<sup>296</sup> Teaching law stripped of its racial context places racially minoritized students at risk of alienation, invalidation, disidentification, and other harms documented above.<sup>297</sup> Only by transcending this barrier can we

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<sup>295</sup> This presents a nice opportunity to discuss the lawyer’s role as advisor under the Model of Rules of Professional Conduct. MODEL RULES OF PRO. CONDUCT, r. 2.1 (AM. BAR ASS’N 2020) (“In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client’s situation.”).

<sup>296</sup> STANDARDS & RULES OF PROC. FOR APPROVAL OF L. SCH., STANDARD 301 (AM. BAR ASS’N 2021-22) (“A law school shall maintain a rigorous program of legal education that prepares its students, upon graduation, for admission to the bar and for effective, ethical, and responsible participation as members of the legal profession.”).

<sup>297</sup> Indeed, building context is integral to preparing students to identify and contend with bias in legal practice. For further insight on the importance of contextualization, one might look to what psychologists call “racial socialization,” i.e., the ways parents and caregivers teach racially minoritized children to be aware of and prepared for the experience of racial bias. Leslie A. Anderson, Margaret O’Brien Caughy & Margaret T. Owen, “*The Talk*” and *Parenting While Black in America: Centering Race, Resistance, and Refuge*, 48 J. BLACK PSYCH. 475, 477 (2021). Preparation for bias is just one dimension of racial socialization, which also includes inculcating ethnic pride, teaching caution, and instilling a belief in oneself despite external messages to the contrary. *Id.* In other words, effective racial socialization includes *truthful* descriptions of what children are likely to encounter in society, set against a *contextual backdrop* that *validates* children and their experiences. *Id.*

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carry out our duty to create conditions in which all students thrive, as well as prepare all students to develop the knowledge and analytical skills required to counteract structural racism.

*D. Transcending Barriers that Arise from the Processes We Use to Teach: Create a Learning Environment Marked by Inclusivity that Eliminates Microaggressive Behavior and Prioritizes Active Learning*

The fourth component in a process of antiracist pedagogy is ensuring the equity of the processes we use to teach. To create conditions for racially minoritized students to thrive and equip all students to participate in antiracist work, law teachers must build learning environments that both eliminate inequitable interference and maximize academic performance.

Every aspect of course planning and execution is implicated in this component. This includes, to name just a few: developing course objectives;<sup>298</sup> designing inclusive syllabi;<sup>299</sup> assigning and facilitating effective small-group work;<sup>300</sup> and using concrete examples and helping students make connections between concepts.<sup>301</sup> While each of these processes merits exploration, this section will prioritize two categories of teaching process that are at the very core of how to execute a pedagogy of antiracism: classroom facilitation and active learning. Without these pieces in place, no amount of design or intentionality in other aspects of the teaching process will suffice.

1. Facilitate Classrooms Inclusively, Eliminating Microaggressive Behavior

Antiracist pedagogy cannot come to life in the law classroom if teachers create conditions that undermine students' ability to feel seen and respected. Further, to equip all students for work that counteracts structural racism, teachers must model an environment that strives to minimize racism's effects. Specifically, educator-initiated microaggressions must be

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<sup>298</sup> See MCMURTRY-CHUBB, *supra* note 7, at 80.

<sup>299</sup> See, e.g., *Designing an Inclusive Syllabus*, COLUMBIA UNIV., CTR. FOR TEACHING & LEARNING, <https://ctl.columbia.edu/resources-and-technology/resources/designing-inclusive-syllabus/> (last visited June 21, 2022).

<sup>300</sup> See generally SCHWARTZ, *supra* note 155, at 219.

<sup>301</sup> See, e.g., *id.* at 216-20; Nancy E. Dowd, Kenneth B. Nunn & Jane E. Pendergast, *Diversity Matters: Race, Gender, and Ethnicity in Legal Education*, 15 U. FLA. J.L. & PUB. POL'Y 11, 39 (2003) (noting that student survey data suggests "teaching methods that focus disproportionately on the abstract presentation of ideas and concepts should be . . . [replaced with] examples and analogies that can be readily grasped"); see generally Sophie M. Sparrow, *Can They Work Well on a Team? Assessing Students' Collaborative Skills*, 38 WM. MITCHELL L. REV. 1162 (2012).



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eliminated, and those committed by fellow students interrupted. Understanding what microaggressions are and reflecting on examples such as those offered above is an essential starting point for those relatively new to the subject matter.<sup>302</sup> Engaging in the work of cultural proficiency is also relevant to this objective.<sup>303</sup> Indeed, reflecting on one's own assumptions and tendency to conform to dominant norms can help teachers minimize our risk of committing microaggressions.<sup>304</sup> For instance, we should self-assess the degree to which we have internalized the narrative that racially minoritized students suffer from deficits in academic potential, as such "deficit-thinking" can lead to behavior that perpetuates marginalization.<sup>305</sup>

Among the many other practical strategies for avoiding or intervening in microaggressive behavior,<sup>306</sup> features of Professor Erin Lain's framework for effective facilitation of racialized interactions may be a toolkit for minimizing the entry of microaggressions into the law classroom.<sup>307</sup> She suggests law teachers engage in "attunement, authenticity, and power-sharing" when facilitating the classroom.<sup>308</sup>

Attunement is the ability to identify and understand what is happening in the room and to account for students' lived experiences.<sup>309</sup> To achieve attunement, the teacher must: know the students, their backgrounds, self-identity, and goals; notice body language; be sufficiently culturally proficient

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<sup>302</sup> SCHWARTZ, *supra* note 155, at 197-200.

<sup>303</sup> *See supra* part III(A).

<sup>304</sup> Osanloo, Boske, & Newcomb, *supra* note 122, at 11 (explaining that "deficit-laden ideologies suggest differences are perceived as deficits").

<sup>305</sup> *Id.* at 12.

<sup>306</sup> *E.g.*, Heather Miller & Kayla Miskimon, *Microaggressions and Microinterventions in the Classroom*, FLA. STATE UNIV., COLL. OF EDUC. (Mar. 4, 2021), <https://education.fsu.edu/microaggressions-and-microinterventions-classroom>; *Addressing Microaggressions in the Classroom*, ST. MARY'S COLL. OF CAL., THE INTERCULTURAL CTR., <https://www.stmarys-ca.edu/sites/default/files/attachments/files/Adressing%20Microaggressions%20in%20the%20Classroom.pdf> (last visited June 21, 2022); Joel Portman, Tuyen Trisa Bui, Javier Ogaz & Jesús Treviño, *Microaggressions in the Classroom*, UNIV. OF DENVER, CTR. FOR MULTICULTURAL EXCELLENCE, <https://otl.du.edu/wp-content/uploads/2013/03/MicroAggressionsInClassroom-DUCME.pdf> (last visited June 21, 2022); *Guidelines for Discussing Incidents of Hate, Bias, and Discrimination*, UNIV. OF MICHIGAN, CTR. FOR RSCH. ON LEARNING & TEACHING, <https://crlt.umich.edu/publinks/respondingtobias> (last visited Aug. 10., 2022) (includes a link to a worksheet to help teachers think through possible responses to microaggressions).

<sup>307</sup> *See* Lain, *supra* note 7, at 792.

<sup>308</sup> *Id.*

<sup>309</sup> *Id.* at 793 ("Attunement requires the professor to notice implicit interactions, pause the course content, and redirect the dialogue to allow for multiple perspectives to be shared or for the professor herself to share differing views.").

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to be able to conceive of the students' potential thoughts and reactions; and be a diligent student of systemic oppression and racism.<sup>310</sup>

Teaching with authenticity requires teachers to acknowledge they are “cultural being[s] with biases and privileges” who have their own questions and uncertainties about the course material.<sup>311</sup> Such admissions of vulnerability can help flatten the intense hierarchy of the classroom by positioning the teacher as not merely an evaluator of students, but also a co-creator of knowledge.<sup>312</sup>

Finally, to facilitate the particular brand of power-sharing relevant here, the teacher should be aware of and take steps to counteract the power relationships that exist among students by virtue of societal hierarchies.<sup>313</sup> This includes introducing into discussion alternative viewpoints,<sup>314</sup> amplifying the voices of racially minoritized students,<sup>315</sup> and specifically naming harmful student behavior and “assert[ing] the proper social parameters for the class discussion.”<sup>316</sup>

For example, if a student makes a microaggressive comment in class, the teacher can respond by naming the microaggression. If appropriate, the teacher might indicate that the comment made the teacher feel uncomfortable or suggest the matter could benefit from further exploration.<sup>317</sup> Then, before moving on to further facilitation, the teacher might pause for a few moments and invite students to use the time to write their own thoughts, reflections, or questions.<sup>318</sup> Finally, the teacher can encourage more students to share their

<sup>310</sup> *Id.* at 793-94.

<sup>311</sup> *Id.* at 794-95; see also Melissa J. Marlow, *Does Kingsfield Live?: Teaching with Authenticity in Today's Law Schools*, 65 J. Legal Educ. 229, 231 (2015) (offering several definitions of authenticity including one that contains four components: “being genuine, showing consistency between values and actions, relating to others in such a way as to encourage their authenticity, and living a critical life”) (quoting Patricia Cranton & Ellen Carusetta, *Perspectives on Authenticity in Teaching*, 55 ADULT EDUC. Q. 5, 7 (2004)).

<sup>312</sup> Lain, *supra* note 7, at 794-95. For instance, authenticity allows a teacher to name when something made her uncomfortable, so a student need not carry the burden of initiating such a conversation. *Id.* at 795.

<sup>313</sup> *Id.* at 797. Sharing the teacher's power is not central to this strategy, an important caveat since power-sharing has different implications for white teachers than it does for teachers who are racially minoritized and, thus, less likely to benefit from presumptions of authority and competence. *Id.*

<sup>314</sup> *Id.*

<sup>315</sup> Tiffany D. Atkins, *Amplifying Diverse Voices: Strategies for Promoting Inclusion in the Law School Classroom*, 31 SECOND DRAFT 10, 12 (2018). Amplifying might include praising students' contributions, specifically noting the relevance or value of those contributions, and engaging the rest of the class in continued discussion that explores the pathway the student introduced. *Id.*

<sup>316</sup> See MCMURTRY-CHUBB, *supra* note 7, at 78.

<sup>317</sup> Lain, *supra* note 7, at 798.

<sup>318</sup> *Id.* at 196-99. For more on reflective practice in the law school classroom, see, e.g., Freeman & Webb, *supra* note 86, at 141-42.

perspectives in a way that ensures power is distributed throughout the class as evenly as possible.<sup>319</sup> Lain's suggested strategy features the use of short in-class periods of silent written reflection—an example of active learning, which the next subsection explores in greater depth.

## 2. Build in Active Learning Alongside or in Place of Passive Learning; Critical Case Briefing is One Example, and Others Abound

Passive learning methods such as the Socratic method continue to prevail in many law school classrooms.<sup>320</sup> Yet students achieve learning outcomes more effectively through active modes of learning than through passive ones, resulting in higher exam scores and decreased course-failure rates.<sup>321</sup> What's more, according to a Harvard study, the use of active learning can yield higher class-attendance rates and classroom engagement, as well as increase "students' acquisition of expert attitudes toward the discipline" being studied.<sup>322</sup>

Importantly, the science indicates the benefits of active learning are magnified for minoritized students.<sup>323</sup> Minoritized students who are taught in active-learning environments experience disproportionately higher gains in exam scores, for instance, narrowing previously documented scoring gaps by as much as 33%.<sup>324</sup> Related data reveal additional benefits for minoritized students such as increases in: class participation, feelings of belonging, retention rates, and senses of community and self-efficacy.<sup>325</sup>

One example of an active learning technique is critical case briefing.<sup>326</sup> A critical case brief is simply a traditional case brief that is expanded to

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<sup>319</sup> Lain, *supra* note 7, at 798.

<sup>320</sup> *E.g.*, Bramble & Bahadur, *supra* note 7, at 713.

<sup>321</sup> For an overview of such data *see id.* at 721-25.

<sup>322</sup> Louis Deslauriers, Logan S. McCarty, Kelly Miller, Kristina Callaghan, & Greg Kestin, *Measuring Active Learning Versus Feeling of Learning in Response to Being Actively Engaged in the Classroom*, 116 *PROC. NAT'L ACAD. SCI.* 19251, 19251 (2019).

<sup>323</sup> *See generally* Theobald, Hill, Tran, Agrawal, Arroyo, Behling, Chambwe, Cintrón, Cooper, Dunster, Grummer, Hennessey, Hsiao, Iranon, Jones, Jordt, Keller, Lacey, Littlefield, Lowe, Newmang, Okolo, Olroyd, Peacock, Picketti, Slagera, Caviedes-Solisa, Stanchak, Sundaravardan, Valdebenito, Williams, Zinsli, & Freeman, *supra* note 152, at 6476.

<sup>324</sup> *Id.* at 6477.

<sup>325</sup> Bramble & Bahadur, *supra* note 7, at 728.

<sup>326</sup> This technique also helps overcome the substantive barriers of decontextualization and false neutrality discussed in *supra* Part II(C).

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include two additional subsections—critical facts and critical analysis of the outcome and reasoning.<sup>327</sup> Professor Hoang Pham wrote that:

Critical facts are those which indicate the race, gender, class, sexuality, and other identifying characteristics of individuals involved in the case and how those characteristics may have factored into events leading up to, during, and after trial. Critical analysis utilizes the same rule(s) the court applied but with the additional critical facts to provide critical perspectives on the case.<sup>328</sup>

Professors Catherine Bramble and Rory Bahadur also provide a robust set of examples of active learning techniques.<sup>329</sup> Examples include the “pause procedure” in which teachers pause every so often so students can collaborate with classmates to discuss and understand what has been covered,<sup>330</sup> “think-pair-share” exercises in which students are given time to consider a question for themselves, then discuss it with a classmate, and

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<sup>327</sup> Hoang Pham, *The Critical Case Brief: A Practice Approach to Integrating Critical Perspectives in the 1L Curriculum*, in INTEGRATING DOCTRINE AND DIVERSITY: INCLUSION AND EQUITY IN THE LAW SCHOOL CLASSROOM 51, 54 (Nicole P. Dyszlewski, Raquel J. Gabriel, Suzanne Harrington-Steppen, Anna Russel & Genevieve B. Tung eds., 2021). Critical case briefing offers numerous advantages that support a pedagogy of antiracism. First, it increases the active-learning nature of case briefing in various ways, e.g., requiring students to synthesize information from multiple sources, encouraging students to evaluate how the court came to its conclusion, and making space for those students for whom a case invokes personal experiences or emotions to take account of those experiences and emotions in the act of legal analysis. See Chickering & Gamson, *supra* note 153, at 4 (explaining active learning requires analysis, synthesis, and evaluation and happens when the students “talk about what they are learning, write about it, relate it to past experiences, apply it to their daily lives[,] . . . and make [it] part of themselves”). Second, it emphasizes the factual context from which case law arises and the race- and racism-related implications of legal analysis, thus overcoming barriers created by decontextualization and false neutrality. It makes the teacher the one to first raise issues of race as they arise in the material, rather than relying on students to do so, thus appropriately setting the expectation that the discussion will address more than merely the doctrine as the court might have narrowly defined it. See MCMURTRY-CHUBB, *supra* note 7, at 78. Finally, it normalizes the consideration of race and other identities as part of the act of lawyering. Pham, *supra* note 327, at 56. Thus, it has the potential to contribute to students’ preparation for practice that counteracts structural racism.

<sup>328</sup> Pham, *supra* note 327, at 54. Pham suggests teachers should employ this technique in a four-step process: (1) Select for critical case briefing cases that implicate race (or other relevant identities). (2) Using sources such as court filings, journalistic coverage, memoirs or other first-person accounts, for instance, identify critical facts that are missing from the opinion provided in the casebook. (3) Assign students to read the case as well as a supplemental reading selection that provides the missing critical facts along with discussion questions. (4) In class, use the teacher’s preferred pedagogical approaches to discuss the case with attention to the critical facts and analysis. *Id.* at 55-56.

<sup>329</sup> Bramble & Bahadur, *supra* note 7, at 739-45; see also Strand, *supra* note 7, at 85 (describing various strategies used in a Trust and Estates class that are not only active, but also acknowledge the non-neutrality of law and make room for varying perspectives).

<sup>330</sup> Bramble & Bahadur, *supra* note 7, at 739.

finally engage in full-group discussion;<sup>331</sup> and one-minute papers where students reflect on what and how they are learning.<sup>332</sup>

### 3. Further Synthesizing and Concretizing

Building on our non-exhaustive list of practical examples, consider these additional practice-ready suggestions.

Engage in an early-semester classroom-norming exercise. Devote a portion of a class period to a classroom-norming exercise where students are asked to generate answers to questions such as: (i) Think about classrooms where you learn well, ask questions, say what you are thinking, feel free to be yourself, and feel safe taking risks. What is it about those environments that makes you feel that way? (ii) Think about classrooms where you feel hesitant to participate, where you struggle to learn, and/or where you worry that if you say something “wrong” you’ll be judged harshly. What characteristics of those classrooms or environments bring about those barriers?<sup>333</sup> This exercise demonstrates to students that their voices are valued and that they are entitled to and responsible for active learning and co-creation of the learning experience.

Recognize that student comments which assume universality of experience may be microinvalidations that require intervention. For instance, as once happened in my classroom during discussion of the false imprisonment problem described above,<sup>334</sup> a white student might assert that all retail customers are likely to conduct themselves like the customer in the problem (i.e., taking off her jacket to try on a sweater, setting the jacket on a merchandise rack, then redonning the jacket). Recognizing this to be a microinvalidation of students who were raised to avoid such behaviors for fear of the dangerous consequences of racialized phenomena such as “shopping while Black,”<sup>335</sup> the teacher might pause and reflect back to the student with words to the effect of, “It sounds to me like you are describing your experience—thank you for that—but perhaps you didn’t intend to assume all people share that same experience?” Such a response gives the white student an opportunity to revise the statement, if desired, by agreeing that it was one of personal experience. It can also open space for students who experienced the harm of the microaggression to feel validated and, if

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<sup>331</sup> *Id.*

<sup>332</sup> *Id.* at 740.

<sup>333</sup> At the end of the exercise, consider compiling and posting a list of responses in a prominent place such as on your digital learning management platform (e.g., Blackboard).

<sup>334</sup> *See supra* Part III(C).

<sup>335</sup> *See, e.g.,* Pittman, *supra* note 291, at 3.

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they desire, share their own knowledge concerning shopping experiences and coping strategies.

Indeed, whenever a student makes a comment that you recognize as potentially harmful to other students, consider intervening with “I” statements and questions, as in the example of inaccurate universalization above. Authenticity and power-sharing in such a moment might include making clear how the student’s comment impacted you or how you interpreted the comment, and giving the commenter an opportunity to clarify, elaborate, or otherwise repair the potential harm.<sup>336</sup>

Use think-pair-share or group exercise processes in the lead-up to full-class discussions or Socratic dialogues. Before students are expected to perform in a public setting, assign exercises they conduct briefly with a few classmates. In my experience, even brief exercises increase and improve the quality of class participation by refreshing students’ memories of the reading and sharpening the nuance of their questions and comments. In a traditional doctrinal course, where the Socratic method is employed, consider setting aside five minutes at the start of each new case for a think-pair-share exercise where students discuss their independent case briefs, for example. Exercises need not be elaborate—any chance to discuss material actively has value.

In sum, achieving a pedagogy of antiracism in legal education requires teachers to be active in how we teach, in our own self-assessment and development, in response to our students’ experiences, and in pursuit of substantive reform. Finally, it also requires us to become actively accountable for achieving the pedagogy’s dual goals of thriving and preparedness.

*E. Transcending the Barriers to Accountability: Create Effective Feedback Mechanisms, Apologize When We Cause Harm, and Take Responsibility for Meeting Our Students’ Needs*

Accountability has the potential to bolster the likelihood law teachers will execute a pedagogy of antiracism effectively, ensuring the success of, and minimizing harm to, racially minoritized students, and preparing all students to pursue equal justice. Bringing about accountability is a potentially simple task that is nevertheless complicated by the culture of the legal academy, with its tendency to conceive of faculty as transcending supervision. As with each of the five components of a methodology of antiracist legal pedagogy, it is beyond the scope of this article to propose a comprehensive overhaul of accountability in legal education. However, the aim here simply is to highlight the importance of accountability, along with

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<sup>336</sup> See Lain, *supra* note 7, at 794-95.

a few sample mechanisms that could specifically advance the cause of antiracist pedagogy.

1. Partner with Other Committed Teachers to Create Mutual-Accountability Strategies and Goals

First, faculty can partner with one another to create individual plans for overcoming the barriers this article discusses and assessing progress toward individual goals. For a plan to foster accountability, it should include five components: precise expectations, sufficient capabilities, measurement, feedback that is honest and ongoing, and explicit consequences.<sup>337</sup> In the context of a faculty partnership, this means each partner should: (i) set specific expectations for themselves; (ii) assess their own capabilities and set about acquiring the knowledge and skills necessary to meet them; (iii) develop tools to measure progress toward accomplishing those expectations; (iv) solicit ongoing feedback from partners; and (v) decide in advance how they plan to address their own failures to meet expectations. A faculty partnership might involve three members, for example.<sup>338</sup> Each should begin by writing a plan for themselves and sharing it with the rest of the group for feedback. The plan should set out a list of goals that satisfy the “SMART goal” framework—when taken together, the goals should be specific, measurable, achievable, relevant, and time-bound.<sup>339</sup>

For instance, one goal might be to devote at least three hours per week in a given semester to activities specifically committed to the pursuit of cultural competence, e.g., reading, attending events, participating in discussion groups, etc. A second goal might be to include active learning exercises in at least 75% of class meetings for a given semester. And a third goal might be to diminish perspectivelessness and microaggressive behavior by maintaining a journal throughout the semester specifically devoted to reflecting on classroom discussions, their substance, and the occurrence and handling of microaggressions.

Once the plan has been written, the teacher should take note of goals whose achievement require the acquisition or development of new knowledge and skills. As the plan is implemented, the teacher should arrange

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<sup>337</sup> Peter Bregman, *The Right Way to Hold People Accountable*, HARV. BUS. REV. (Jan. 11, 2016), <https://hbr.org/2016/01/the-right-way-to-hold-people-accountable>.

<sup>338</sup> Strive for a partnership that will help each partner grow—not an echo chamber—but without disproportionately burdening any one member to teach the others.

<sup>339</sup> See George T. Doran, *There's a S.M.A.R.T. Way to Write Management's Goals and Objectives*, 70 MGMT. REV. 35, 36 (1981) (originating the S.M.A.R.T. goal framework, which has since been widely adopted in management settings). Each goal need not meet all five criteria, but plan drafters should strive to achieve the criteria to the fullest extent feasible. *Id.*

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for processes that measure progress. For instance, partners might observe class, read the others' journals, meet monthly to discuss activities, design evaluation instruments for partners and students to complete, etc. The plan should also include a component in which each partner makes an agreement with themselves about actions they will take if and when they fail to meet a goal. One important example of an approach to failure is apology.

## 2. When You Cause Harm, Apologize<sup>340</sup>

Lawyers are trained to think of apologizing as a behavior that carries significant risk. This is unsurprising given that we learn an apology can be deemed an admission of guilt and open the apologizer to liability that might otherwise be avoided. As such, lawyers have gained a reputation for being notoriously hesitant apologizers.<sup>341</sup>

As trained lawyers, law teachers likely share this tendency, and perhaps all the more so because of the very hierarchical nature of most law school classrooms. To apologize is to admit vulnerability, and thus potentially cede some degree of authority.<sup>342</sup> Even if fear of liability is not at play, psychological research indicates other barriers to offering an apology include low concern for the harmed party, perceived threat to self-image, and concern one's apology might be ineffective.<sup>343</sup>

However, that same body of research indicates that, when harm has been done, apologizing is one of the most "powerful tools that transgressors can use to resolve an offense, both in their own eyes and in the eyes of the victim."<sup>344</sup> Apologies open the door to forgiveness, which can in turn restore the harmed party's feelings of closeness with the transgressor, increase their willingness to cooperate with the transgressor, and improve their wellbeing

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<sup>340</sup> Special thanks to Eleanor Pittman (Richmond Law Class of 2021) for her research on apology. Much of the content in this subsection draws heavily from Ms. Pittman's research and original drafting.

<sup>341</sup> *E.g.*, Elizabeth Nowicki, *Apologies and Good Lawyering* 2 (July 5, 2009), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1430212](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1430212) (observing that some believe lawyers tend to "disavow apologies as a matter of defense because apologies are viewed as costly admissions of liability"); James Goodnow, *Apologize, Or You'll Be Sorry*, ABOVE THE LAW (Oct. 2, 2020), <https://abovethelaw.com/2020/10/apologize-or-youll-be-sorry/> (noting "[t]he practice of law isn't exactly structured to teach us to give apologies to those we've wronged").

<sup>342</sup> Goodnow, *supra* note 341 (The giver of an apology recognizes implicitly that "the giver and receiver are subject to an equal playing field, governed by rules and norms that are larger than the specific circumstances. . . . By apologizing, we're acknowledging that we did something wrong and that we owe some social debt or obligation to the recipient of the apology.").

<sup>343</sup> Karina Schumann, *The Psychology of Offering an Apology: Understanding the Barriers to Apologizing and How to Overcome Them*, 27 CURRENT DIRECTIONS IN PSYCH. SCI. 74, 75 (2018).

<sup>344</sup> *Id.* at 74. For more on how the benefits of apologizing can outweigh the detriments, *see, e.g.*, Jennifer K. Robbennolt, *Apologies and Settlement Levers*, 3 J. EMPIRICAL LEGAL STUD. 333 (2006); Douglas N. Frenkel & Carol B. Liebman, *Words That Heal*, 140 ANNALS INTERNAL MED. 482 (2004).



more generally.<sup>345</sup> What's more, authenticity, such as that embodied by an apology, can help law teachers position themselves as “fellow thinker[s] and contributor[s] to the classroom community” rather than all-knowing examiners of students' knowledge.<sup>346</sup> Such admissions of vulnerability by teachers can serve as modest disruptions to the conventionally intense hierarchy of law classrooms, in turn creating space where students feel freer to share themselves.<sup>347</sup> For some law teachers, however—particularly those belonging to minoritized groups—the costs of apologies are potentially more complex or unfairly higher, and those costs must be weighed against the potential benefits.

When a teacher does decide to apologize, certain elements are more important than others. Research indicates that the three most important elements to include are: accepting responsibility, articulating the apology, and identifying the specific wrongdoing.<sup>348</sup>

Notably, apologies from teachers to students have the potential to be especially impactful.<sup>349</sup> This is because apologies from higher-status individuals to lower-status individuals are less expected than apologies in the other direction, and thus deemed more credible by most recipients.<sup>350</sup> Thus, in the law school landscape, especially given the role of academic freedom, faculty are in the best possible position to apologize and make it count. Doing so—and especially doing so in lieu of resorting to academic freedom as a shield—is one way to embody our commitment to meeting our students' needs to thrive in the present and be equipped for the future.<sup>351</sup>

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<sup>345</sup> Schumann, *supra* note 343, at 74.

<sup>346</sup> See Lain, *supra* note 7, at 794-95.

<sup>347</sup> *Id.*

<sup>348</sup> Amy M. Bippus & Stacy L. Young, *How to Say “I’m Sorry:” Ideal Apology Elements for Common Interpersonal Transgressions*, 84 W. J. COMM’N 43, 50 (2020).

<sup>349</sup> See Tamar Walfisch, Dina Van Dijk, & Ronit Kark, *Do You Really Expect Me to Apologize? The Impact of Status and Gender on the Effectiveness of an Apology in the Workplace*, 43 J. APPLIED SOC. PSYCH. 1446, 1449 (2013).

<sup>350</sup> *Id.*

<sup>351</sup> Academic freedom is undoubtedly an important set of privileges. Indeed, it facilitates the very freedom to adopt a pedagogy of antiracism. The point here is not to downplay the value of academic freedom, but only to encourage that we resist its use as a shield against accountability for harm we create. Promoting instead a needs-based understanding of academic freedom is likely an ideal approach. Teachers committed to a pedagogy of antiracism should prioritize the needs of students, and thus, of necessity, abstain from a conception of academic freedom that includes the right to inequitably marginalize or contribute to the marginalization of others. “When we invoke academic freedom as a way of defending our own [actions that] make it harder for students, junior colleagues, and disabled or minoritized folks to flourish within universities—and indeed within society—we render universities petty fiefdoms and academic freedom a bludgeon. Why should society defend institutions like that? Why should it permit protections like that?” Dea, *supra* note 165.

### 3. Further Synthesizing and Concretizing

While we likely fail more often than we know, each of us is probably cognizant of our failures at least occasionally. When our cognizance permits, we should take action. We should also establish mechanisms that will help bolster that cognizance.

Apologize as soon as you are able. We all likely experience occasions when we are aware enough—and perhaps courageous enough—to apologize immediately, occasions when we realize the need to apologize only after quiet reflection, and occasions when we come to the realization only because one or more students come to us with concerns. We should apologize as soon as we are able, and do so publicly if the harm we committed was public. If the need to apologize is not immediately apparent during the course of a class meeting, for instance, apologize via email or at the very beginning of the next class.

Again: Get to know your students individually and build connections with them. I have observed that building trust and connections with our students increases the likelihood they will express concerns to us directly. Indeed, we might well consider such expressions to be gifts—gifts of trust, of vulnerability, of believing in our good faith and humanity. The more we cultivate connections with our students, the more we show our own vulnerability, the more likely we are to earn theirs.

Knowing our students also increases the likelihood we will notice when they are troubled or ill-at-ease. For instance, we might be in a better position to notice students' physical cues or behavior changes even when they don't feel comfortable expressing concerns to us verbally. Soliciting feedback from students at various points throughout the semester is also a good way to maintain a high level of attention to their experiences. Feedback forms or surveys can be distributed by teachers at any time, and can provide invaluable insight into students' experiences, needs, and hopes.

Own our duties as ours. Finally, we must make clear to students that they are not the ones responsible for teaching us how to do our jobs in an antiracist manner. When we ask for feedback, we must do so from a place of owning our actions and our duty to do right by our students. It is up to us—not our students—to recognize where we must change or improve and learn how to do so.<sup>352</sup>

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<sup>352</sup> See, e.g., Jasmine Roberts-Crews, *White Academia: Do Better*, MEDIUM: THE FACULTY (June 8, 2020), <https://medium.com/the-faculty/white-academia-do-better-fa96cedel1fc5> (noting white people should not rely on people who are racially marginalized to teach them how to do antiracist work, and observing the harmful burden imposed on racially minoritized people when white people see them as their “go-to racial expert[s]”).

#### IV. CONCLUSION

To be antiracist is to take action that interrupts, dismantles, and reverses the effects of structural racism. To engage in a pedagogy of antiracism in legal education means to counteract the harms racially minoritized law students historically experience in traditional legal education and prepare all students, regardless of identity, to contribute to structural racism's dismantlement. Excellent resources for accomplishing such a pedagogy abound, only some of which have been cited in this Article. Less plentiful in the existing scholarship are recommendations for how to operationalize those resources using a comprehensive methodology, one that works as both a start-up plan and a tool for ongoing strategic action.

To effectuate this methodology, legal educators should be cognizant of the barriers to antiracist pedagogy—barriers that lie within us, that our students experience, that our substance erects, that our procedures solidify, and that our lack of accountability reinforces. In response to each barrier, a wide array of transcendent strategies is available. My mission in this project has been to offer a holistic framework for the pedagogy, including barrier identification and barrier transcendence. Neither the barriers I have described nor the strategies I have suggested are comprehensive. Rather, they are offered as a sampling and, ultimately, an invitation for continued study and action.

It is my hope that, by adopting the five-part methodology and building on it in accordance with each teacher's identity, experiences, and student needs, each of us can pursue effectively a pedagogy of antiracism. Together, through efforts such as these, may we live up to our duties to meet the learning needs of every student and, in turn, contribute to the establishment of equal justice under law.

2022] *TOWARD A PEDAGOGY OF ANTIRACISM* 67APPENDIX A: HIGHLIGHTS OF CONCRETIZED STRATEGIES  
FOR EACH OF THE FIVE COMPONENTS OF ANTIRACIST  
PEDAGOGY

	Objectives	Strategies	Tactics
A	Develop our proficiency, knowledge, resilience, and self-awareness.	(1) Be knowledgeable about racialization, white normativity, white supremacy, structural racism, and antiracism.  (2) Pursue cultural proficiency.	<ul style="list-style-type: none"> <li>▪ Maintain a working knowledge of the basic concepts relevant to racialization and white supremacy.</li> <li>▪ Conduct ongoing self-assessment, self-critique, and reflection.</li> <li>▪ Value diversity and learn to facilitate dialogue among diverse participants.</li> <li>▪ Learn about ways to mitigate unconscious bias.</li> <li>▪ Read the literature and engage with a variety of media.</li> <li>▪ Get trained and engage with colleagues in collaborative learning.</li> <li>▪ Participate in institutional governance</li> <li>▪ Engage with student organizations and programming.</li> </ul>
B	Counteract the isolation of small numbers and the negative effects of stereotype threat.	(1) Combat solo status and its effects.  (2) Counteract stereotype threat.	<ul style="list-style-type: none"> <li>▪ Ensure evaluation criteria are stated clearly and objectively and are well known to all students.</li> <li>▪ Demonstrate that each student is valued for what they bring to the table.</li> <li>▪ Develop teacher-student relationships marked by optimism, trust, and challenge.</li> <li>▪ Express affirmation of academic and social belonging.</li> <li>▪ Introduce role models.</li> <li>▪ Know students individually.</li> <li>▪ Expect universal success; articulate the expectation frequently.</li> <li>▪ Minimize grade implications of public performance by reforming “class participation” grades.</li> <li>▪ Conduct formative assessment with honest feedback, objective scores, and clarity of purposes and expectations.</li> <li>▪ Teach a growth mindset and reinforce it with explicit self-assessment work and panel discussions.</li> </ul>
C	Teach in context, acknowledging structural racism and taking a broad view of relevance.	(1) Teach law in context, treating race as part of the core and valuing an array of analytical wisdom.	<ul style="list-style-type: none"> <li>▪ Be the first to surface “hidden” implications and disparate impacts.</li> <li>▪ Humanize litigants and provide factual and historical background.</li> <li>▪ Invite discussion of change agency.</li> <li>▪ Welcome a range of reactions and perspectives.</li> </ul>

			<ul style="list-style-type: none"> <li>▪ Make room for students to express critical commentary about the rules being applied.</li> <li>▪ Build a culture that values students' aspirations, feelings, and opinions as central to the academic enterprise.</li> <li>▪ Plan lessons that go beyond the law's status quo to engage the law's imperfect alignment with justice.</li> </ul>
D	Create a learning environment marked by inclusivity that eliminates microaggressive behavior and prioritizes active learning.	<p>(1) Facilitate classrooms inclusively, eliminating microaggressive behavior.</p> <p>(2) Build in active learning alongside or in place of the Socratic method; critical case briefing is one example, and others abound.</p>	<ul style="list-style-type: none"> <li>▪ Be aware of the degree to which you might have internalized the narrative that racially minoritized students suffer from deficits in academic potential.</li> <li>▪ Practice attunement, authenticity, and power-sharing.</li> <li>▪ Admit vulnerability.</li> <li>▪ Introduce alternative viewpoints, amplify the voices of racially minoritized students, and specifically name harmful student behavior and enforce classroom norms.</li> <li>▪ Assign critical case briefing.</li> <li>▪ Use the pause procedure and one-minute papers.</li> <li>▪ Engage in an early-semester classroom norming exercise.</li> <li>▪ Recognize that student comments which assume universality of experience may be microinvalidations that need intervention.</li> <li>▪ Use think-pair-share or group exercise processes in the lead-up to full-class discussions or Socratic dialogues.</li> </ul>
E	Create effective feedback mechanisms, apologize when we cause harm, and take responsibility for meeting our students' needs.	<p>(1) Partner with other committed teachers to create mutual-accountability strategies and goals.</p> <p>(2) When you cause harm, apologize.</p>	<ul style="list-style-type: none"> <li>▪ Set specific expectations for yourself.</li> <li>▪ Assess your own capabilities and set about acquiring the knowledge and skills necessary to meet those expectations.</li> <li>▪ Develop tools to measure progress toward accomplishing those expectations.</li> <li>▪ Arrange to engage with faculty partners to solicit ongoing feedback.</li> <li>▪ Decide in advance how you plan to address your own failures to meet expectations.</li> <li>▪ When an apology is needed, apologize as soon as you are able.</li> <li>▪ Again, get to know your students individually and build connections with them.</li> <li>▪ Solicit feedback throughout the semester.</li> <li>▪ Own your duties as yours.</li> </ul>