

INSTITUTIONAL ANTIRACISM AND CRITICAL PEDAGOGY: A
QUANTUM LEAP FORWARD FOR LEGAL EDUCATION AND
THE LEGAL ACADEMY

Danielle M. Conway

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INTRODUCTION

Quantum Leap, a science fiction series in the late 1980s and early 1990s, featured a PhD-toting physicist who sought to prove that one could time travel within one’s own time.¹ Threatened by the withdrawal of government funding for his accelerator project, Sam Beckett, the show’s protagonist, jumps into the time machine himself to attempt to save the project. Beckett is thrown back in time, usually holding space and time in another person’s body, only leaping—hoping to leap home—after correcting some error in history that, without his intervention, would prove fatal for the person or someone close to the person whom he inhabited as a result of the leap. I am an avid science fiction fan and, more specifically, a fan of the Quantum Leap series for its attempt to show the validity and vitality of *learning* about the lived experiences of others through empathy and the power of *acknowledging* wrongs suffered by others and then *acting* to right those wrongs for the collective benefit of humanity.² Quantum Leap was a love letter to humanity encouraging our current selves to act today to embody empathy and courage to secure a promising future for those who come after us and to imbue them with hope and optimism for a better tomorrow.

When I think about the hopeful storylines in Quantum Leap, it is difficult not to think about Sam Beckett leaping into a historical figure like Justice Roger

* Dean and Donald J. Farage Professor of Law, Penn State Dickinson Law. I write solely in my capacity as a member of the Penn State Dickinson Law faculty. I have had the honor of co-curating the Association of American Law Schools Law Deans Antiracist Clearinghouse Project with four Black women law deans, including Dean Angela Onwuachi-Willig, Boston University School of Law. Dean Onwuachi-Willig asked me to participate in her place at the 50 | 150 anniversaries *Alabama Law Review* Symposium, titled “Our History, Our Future.” I thank the editors and members of the *Alabama Law Review* for enthusiastically welcoming my participation at the symposium and for working diligently to publish this Article. Finally, I thank the Penn State Dickinson Law Antiracist Development Institute and its coalition of chapter contributors, systems designers, editors, and administrators who are working to bring forward the book series titled *Building an Antiracist Law School, Legal Academy, and Legal Profession*, which will be published by University of California Press.

1. Trent Moore, *Prepare for the New “Quantum Leap” Series by Watching These 5 Critical Episodes of the Original*, SYFY (Sept. 19, 2022, 11:22 AM), <https://www.syfy.com/syfy-wire/-5-critical-episodes-quantum-leap-canon> [<https://perma.cc/E3XN-9CLS>].

2. The words “learning,” “acknowledging,” and “acting” are italicized because they represent the foundational elements of any framework for practicing antiracism and institutional antiracism. See Danielle M. Conway, *Antiracist Lawyering in Practice Begins with the Practice of Teaching and Learning Antiracism in Law School*, 2022 UTAH L. REV. 723, 729 (2022) [hereinafter Conway, *Antiracist Lawyering in Practice*].

B. Taney from *Dred Scott v. Sandford*;³ Justices Henry B. Brown⁴ and John Marshall Harlan from *Plessey v. Ferguson*;⁵ Simeon Baldwin, a leader and vitriolic

3. *Dred Scott v. Sandford*, 60 U.S. 393, 407–10 (1856). Roger B. Taney, the fifth Chief Justice of the United States Supreme Court and a pro-slavery Justice, who was nominated by President Andrew Jackson and whose tenure spanned ten presidencies, see Alvin J. Schumacher, *Roger B. Taney*, BRITANNICA, <https://www.britannica.com/biography/Roger-B-Taney> [https://perma.cc/MU4M-GKSG] (last updated Oct. 8, 2023), delivered the majority opinion, which stated in part:

In the opinion of the court, the legislation and histories of the times, and the language used in the Declaration of Independence, show, that neither the class of persons who had been imported as slaves, nor their descendants, whether they had become free or not, were then acknowledged as a part of the people, nor intended to be included in the general words used in that memorable instrument. [*Author's Note:* Justice Taney referred to African-Americans as negroes, a negro of the African race, slaves, the unfortunate race, beings of an inferior order.]

It is difficult at this day to realize the state of public opinion in relation to that unfortunate race, which prevailed in the civilized and enlightened portions of the world at the time of the Declaration of Independence, and when the Constitution of the United States was framed and adopted. But the public history of every European nation displays it in a manner too plain to be mistaken.

They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it. This opinion was at that time fixed and universal in the civilized portion of the white race. It was regarded as an axiom in morals as well as in politics, which no one thought of disputing, or supposed to be open to dispute; and men in every grade and position in society daily and habitually acted upon it in their private pursuits, as well as in matters of public concern, without doubting for a moment the correctness of this opinion.

And in no nation was this opinion more firmly fixed or more uniformly acted upon than by the English Government and English people. They not only seized them on the coast of Africa, and sold them or held them in slavery for their own use; but they took them as ordinary articles of merchandise to every country where they could make a profit on them, and were far more extensively engaged in this commerce than any other nation in the world.

The opinion thus entertained and acted upon in England was naturally impressed upon the colonies they founded on this side of the Atlantic. And, accordingly, a negro of the African race was regarded by them as an article of property, and held, and bought and sold as such, in every one of the thirteen colonies which united in the Declaration of Independence, and afterwards formed the Constitution of the United States. The slaves were more or less numerous in the different colonies, as slave labor was found more or less profitable. But no one seems to have doubted the correctness of the prevailing opinion of the time.

....

The language of the Declaration of Independence is equally conclusive:

It begins by declaring that, “when in the course of human events it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth the separate and equal station to which the laws of nature and nature’s God entitle them, a decent respect for the opinions of mankind requires that they should declare the causes which impel them to the separation.”

It then proceeds to say: “We hold these truths to be self-evident: that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among them is life, liberty, and the pursuit of happiness; that to secure these rights, Governments are instituted, deriving their just powers from the consent of the governed.”

The general words above quoted would seem to embrace the whole human family, and if they were used in a similar instrument at this day would be so understood. But it is too clear for dispute, that the enslaved African race were not intended to be included, and formed no part of the people who framed and adopted this declaration; for if the language, as understood in that day, would

embrace them, the conduct of the distinguished men who framed the Declaration of Independence would have been utterly and flagrantly inconsistent with the principles they asserted; and instead of the sympathy of mankind, to which they so confidently appealed, they would have deserved and received universal rebuke and reprobation.

Yet the men who framed this declaration were great men—high in literary acquirements—high in their sense of honor, and incapable of asserting principles inconsistent with those on which they were acting. They perfectly understood the meaning of the language they used, and how it would be understood by others; and they knew that it would not in any part of the civilized world be supposed to embrace the negro race, which, by common consent, had been excluded from civilized Governments and the family of nations, and doomed to slavery. They spoke and acted according to the then established doctrines and principles, and in the ordinary language of the day, and no one misunderstood them. The unhappy black race were separated from the white by indelible marks, and laws long before established, and were never thought of or spoken of except as property, and when the claims of the owner or the profit of the trader were supposed to need protection. [*Author's Note.* This is an example of a system adopted by institutions and social structures, thus it is disingenuous to put forward that there are no such things as institutions and structures built on racialized hierarchies where white supremacy is deemed to be at the top of such hierarchy.]

This state of public opinion had undergone no change when the Constitution was adopted, as is equally evident from its provisions and language.

Scott, 60 U.S. at 407–08, 409–10. (emphasis added).

4. *Plessy v. Ferguson*, 163 U.S. 537, 550–52 (1896). Henry B. Brown, Associate Justice of the United States Supreme Court and an upholder of racialized hierarchies as well as an anti-Suffragist, see *Henry Billings Brown*, BRITANNICA, <https://www.britannica.com/biography/Henry-Billings-Brown> [<https://perma.cc/GT79-BT2P>] (last updated Feb. 27, 2024), who was nominated by President Benjamin Harrison, *id.*, delivered the majority opinion, which stated in part:

So far, then, as a conflict with the fourteenth amendment is concerned, the case reduces itself to the question whether the statute of Louisiana is a reasonable regulation, and with respect to this there must necessarily be a large discretion on the part of the legislature. In determining the question of reasonableness, it is at liberty to act with reference to the established usages, customs, and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order. Gauged by this standard, we cannot say that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable, or more obnoxious to the fourteenth amendment than the acts of congress requiring separate schools for colored children in the District of Columbia, the constitutionality of which does not seem to have been questioned, or the corresponding acts of state legislatures.

We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it. The argument necessarily assumes that if, as has been more than once the case, and is not unlikely to be so again, the colored race should become the dominant power in the state legislature, and should enact a law in precisely similar terms, it would thereby relegate the white race to an inferior position. We imagine that the white race, at least, would not acquiesce in this assumption. The argument also assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the negro except by an enforced commingling of the two races. We cannot accept this proposition. If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits, and a voluntary consent of individuals. As was said by the court of appeals of New York in *People v. Gallagher*, 93 N.Y. 438, 448: "This end can neither be accomplished nor promoted by laws which conflict with the general sentiment of the community upon whom they are designed to operate. When the government, therefore, has secured to each of its citizens equal rights before the law, and equal opportunities for improvement and progress, it has accomplished the end for which it was organized, and performed all of the functions respecting social advantages with which it is endowed." Legislation is powerless to eradicate racial instincts, or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation. If the civil and political rights of both races be equal, one cannot be inferior to the other civilly or politically. If one race be

inferior to the other socially, the constitution of the United States cannot put them upon the same plane.

Plessy, 163 U.S. at 550–52.

5. *Id.* at 559–60 (1896). John Marshall Harlan, Associate Justice of the United States Supreme Court, was nominated by President Rutherford B. Hayes. *John Marshall Harlan*, BRITANNICA, <https://www.britannica.com/biography/John-Marshall-Harlan-United-States-jurist-1833-1911> [<https://perma.cc/JW9L-L6GZ>] (last updated Oct. 10, 2023). Before his nomination, Associate Justice Harlan was a slaveholder and upheld racialized hierarchies. Charles Thompson, *Harlan's Great Dissent*, BRANDEIS SCH. OF L., <https://louisville.edu/law/library/special-collections/the-john-marshall-harlan-collection/harlans-great-dissent#:~:text=John%20Harlan%20owned%20a%20few,him%20to%20in%20December%201865> [<https://perma.cc/ETX9-6EN6>]. In an incremental, yet politically strategic transformation from slaveholding Democrat to a Republican, Justice Harlan became reformed on the slavery question during the latter part of the Reconstruction period into the Nadir. *Id.* Having become known as “The Great Dissenter,” *id.*, Justice Harlan delivered the sole dissent in *Plessy v. Ferguson*, which stated in part:

The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth, and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage, and holds fast to the principles of constitutional liberty. But in view of the constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed [sic] by the supreme law of the land are involved. It is therefore to be regretted that this high tribunal, the final expositor of the fundamental law of the land, has reached the conclusion that it is competent for a state to regulate the enjoyment by citizens of their civil rights solely upon the basis of race.

In my opinion, the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the *Dred Scott* Case.

It was adjudged in that case that the descendants of Africans who were imported into this country, and sold as slaves, were not included nor intended to be included under the word “citizens” in the constitution, and could not claim any of the rights and privileges which that instrument provided for and secured to citizens of the United States; that, at the time of the adoption of the constitution, they were “considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the government might choose to grant them.” 17 How. 393, 404. The recent amendments of the constitution, it was supposed, had eradicated these principles from our institutions. But it seems that *we have yet, in some of the states, a dominant race,—a superior class of citizens,—which assumes to regulate the enjoyment of civil rights, common to all citizens, upon the basis of race.* The present decision, it may well be apprehended, will not only stimulate aggressions, more or less brutal and irritating, upon the admitted rights of colored citizens, but will encourage the belief that it is possible, by means of state enactments, to defeat the beneficent purposes which the people of the United States had in view when they adopted the recent amendments of the constitution, by one of which the blacks of this country were made citizens of the United States and of the states in which they respectively reside, and whose privileges and immunities, as citizens, the states are forbidden to abridge. Sixty millions of whites are in no danger from the presence here of eight millions of blacks. *The destinies of the two races, in this country, are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law.* What can more certainly arouse race hate, what more certainly create and perpetuate a feeling of distrust between these races, than state enactments which, in fact, proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens? That, as all will admit, is the real meaning of such legislation as was enacted in Louisiana.

Plessy, 163 U.S. at 559–60 (1896) (Harlan, J., dissenting) (emphasis added). *But see infra* notes 77–80 and accompanying text for a nuanced distinction between Justice Harlan’s transformation from pro-slavery Southern Democrat to Radical Republican, on the one hand, and recognizing the existence of and arguable belief in a racialized hierarchy on the other hand.

voice of exclusion of the American Bar Association (ABA) in the 1920s who championed restricting membership to “leading men or those of high promise”;⁶ and Christopher Columbus Langdell, who invented the case method, which remains to this day a mainstay of legal education;⁷ or any one of the many “leaders” in the legal profession who deemed it necessary to exclude Black Americans, Native Americans, immigrants, women, and so many oppressed and marginalized groups and peoples from the legal profession.⁸

6. JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 64 (1976) (“[T]he ‘best men’ used bar associations as a lever of control over professional ethics, educational qualifications, and bar admission.”).

7. *See id.* at 74–86, 93. Langdell’s case method introduced, as innovation, the study of appellate decisions through a Socratic question-and-answer, call-and-response by teacher to students using an “analytical, inductive process.” *Id.* By narrating this method as “science” and conjuring rigor and reason to support the development of pure law, *id.*, Langdell’s case method set the stage for a professional elite to be considered the “best men” capable of mastering the principles of logic and doctrine. *See also* ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S* xiv (The Lawbook Exchange ed. 2001). Overlaying this elitist approach to teaching was the established hierarchy of legal education institutions with Harvard Law School perched atop, overwhelmingly committed to training only rich, white men. *Id.* As for the primacy of the case method, Professor Joan Howarth explains:

By the 1920s and 30s, status among law schools was already determined in part by the degree of focus on bar exams: The elite academic law schools used the case dialogue method instead of lectures; the next tier academic law schools . . . used the case method but to a lesser extent; and the many practice-oriented law schools, where ‘legal education consisted, at most, of preparation for the local bar examination,’ used ‘a lecture-and-text’ method.

JOAN W. HOWARTH, *SHAPING THE BAR: THE FUTURE OF ATTORNEY LICENSING* 24–25 (2023). The singular focus on teaching legal doctrine through the case method ensured the transmission of systemic, structural, and institutional racism, bias, and injustice through the study of American legal doctrine by these “best men.” *See also* Susan Sturm & Lani Guinier, *The Law School Matrix: Reforming Legal Education in a Culture of Competition and Conformity*, 60 *VAND. L. REV.* 515, 520–21 (2007) (“[Law school] culture is remarkably static, non-adaptive, and resistant to change, even in the face of strong pressure from significant constituents of legal education and evidence that law schools are not fulfilling core aspects of their mission. Indeed, for the last 130 years, law schools have been tethered to their traditions. Though the justifications for Langdell’s vision of the law, the legal profession, and legal education have outlived their origin story, the pedagogical structure put in place to implement that vision has endured. That resilience . . . can be explained in large part by the feedback loop between the structure implementing Langdell’s vision and its host culture of competition and conformity.”).

8. *See AUERBACH, supra* note 6, at 66 (“Claiming to be a national organization, [the ABA] functioned as a restricted social club. The admission of [Black lawyers], in the words of its membership chairman, posed ‘a question of keeping pure the Anglo-Saxon race.’ [When three Black men lawyers were inadvertently admitted to ABA membership, white men leaders of the ABA passed a] compromise resolution [that] precluded future associational miscegenation. Prodded by [then National Association for the Advancement of Colored People (NAACP) President Moorefield] Storey, members permitted the three duly elected [B]lack lawyers to remain but provided that all future applicants must identify themselves by race. The association thereby committed itself to lily-white membership for the next half-century[,] [into the mid-1960s at the height of the Civil Rights Movement].”); *id.* at 72 (“Ethnicity was the cement that solidified [the] professional alliance” between the recently arrived and legitimized corporate lawyers and the traditional best men. “[T]he accelerating dangers to American social and legal institutions posed by those who lacked Anglo-Saxon credentials seemed far graver, especially when corporate lawyers were demonstrably eager to defend the stratified professional culture [of which they had become a part].”); *id.* at 73 (“With their opportunity and their success assured by their ethnic origins [the corporate lawyers] joined hands with the traditionalists in an effort to prevent lawyers who lacked the necessary ethnic credentials . . . from gaining access to their firms or to the professional associations which they had come to dominate—or to the Supreme Court.”).

While time-traveling accelerators, string theory, and perpetual energy machines are stuff of unproven and untested hypotheses, they provide a gateway to hope and a vision of a better and more balanced future for all members of society. For law and society, the hope spawned by the democratization of the rule of law through antiracism is not theoretical. The democratization of the rule of law effectively occurred, albeit all too briefly, during the Reconstruction Era through the implementation of the Reconstruction Amendments and the Civil Rights Acts of 1866 and 1875.⁹ It is this gateway to constitutional and legal history that provides a platform of hope for a better and more balanced approach to making law and society work for all by focusing on antiracism as a centering principle in the Reconstruction Amendments of the Second Founding of the United States.¹⁰

A fundamental launchpad for redeeming American society is to look to the historical and contextual goals of the Second Founding—the Reconstruction Amendments—and grasp the lessons about justice and equality for all by focusing on the principles of antiracism. While our nation should deploy teaching and learning strategies at all levels of the American system of education, legal education must be out front leading the way to incorporate antiracism through critical pedagogy. I was pleased to accept the invitation to speak during the *Alabama Law Review* symposium, titled “Our History. Our Future,” as it provided a platform to engage with legal education stakeholders about what we are all missing out on by failing to take a quantum leap in a new direction with critical pedagogy informed by an antiracism lens. The pioneers we celebrated at the symposium, the acknowledgment of the trials and tribulations they faced as the first African-American students to be admitted and to have graduated just 50 short years ago in 1972—Michael Anthony Figures, Booker Forte, Jr., and Ronald E. Jackson—were admittedly on a pathbreaking futurism quest to become lawyers in the State of Alabama and in a larger American society in which law and social norms enforced racial segregation in everyday life. Figures, Forte, and Jackson and their fortitude to become lawyers in the State of Alabama are a testament to what should have been the mission of the legal profession during the Reconstruction Era. It was at this symposium where we witnessed the Quantum Leap-type hope that today’s legal education stakeholders are hungry to experience as teachers and learners.¹¹

Before conveying the necessity of embedding institutional antiracism and critical pedagogy into legal education today and for the future, Part I of this

9. See Danielle M. Conway, *Black Women's Suffrage, the Nineteenth Amendment, and the Duality of a Movement*, 13.1 ALA. C.R. & C.L. L. REV. 1, 25, 34–36 n.182 (2021) [hereinafter Conway, *Black Women's Suffrage*].

10. DANIELLE M. CONWAY, *Embracing Antiracism Unapologetically, in BUILDING AN ANTIRACIST LAW SCHOOL, LEGAL ACADEMY, AND LEGAL PROFESSION* (forthcoming 2024) (on file with author).

11. *First African American Graduates at Alabama Law*, CAPSTONE LAW., 2022, at 24–25.

Article will provide a quantum leap back in time to provide the historical context in which legal education developed in the antebellum and postbellum periods and up to what might be deemed the “Third Founding” represented by the modern Civil Rights Era. In Part II, the Article deals with the problematic anticanon of “colorblindness” as an impediment to progress in legal education and the profession to realize the power and promise of the Reconstruction Amendments, specifically, the Fourteenth Amendment. Part III locates institutional antiracism in the Fourteenth Amendment and introduces the role critical pedagogy plays in fully transforming legal education by moving it to a place in which law teachers and law students are engaged in the co-creation of legal knowledge and act on that knowledge to understand their place in the world and how to change the world by dismantling systems of inequality and oppression. Discovering how to embed institutional antiracism and critical pedagogy is long overdue for legal education and the legal academy, and we only need the commitment to act on behalf of the democratic values of equal justice under law to build the Quantum Leap accelerator that our society—especially the most vulnerable—deserve.

I. A QUANTUM LEAP BACK TO THE START OF FORMAL LEGAL EDUCATION

As institutions, law schools, like colleges and universities, shape and are shaped by the civil, political, legal, and economic norms in which they find themselves. This is true today, as well as at the beginning of the western liberal arts tradition of U.S. higher education that was conceived and sustained at the Founding and Second Founding of the United States.¹² Similarly, law and the

12. See Theocharis Kromydas, *Rethinking Higher Education and Its Relationship with Social Inequalities: Past Knowledge, Present State and Future Potential*, PALGRAVE COMM'NS 1, 3 (Oct. 13, 2017), <https://www.nature.com/articles/s41599-017-0001-8> (Before WWII, “higher education was for those belonging to higher social classes. This model became the kernel of educational policies in Europe and[,] generally, in the western world.”); see also Conway, *Antiracist Lawyering in Practice*, *supra* note 2, at 726 (“The social reality of race embedded in America’s social structure—economic, political, legal—has produced this country’s racial structure . . .”); AUERBACH, *supra* note 6, at 93, 126–29 (“[Law teachers and legal practitioners] . . . were always bound by the strong commitments of their respective institutions (the university law school and the corporate law firm) to the social system, to governance by a legal elite, and to the exclusion of social and ethnic outsiders who[—in the opinion of those elites—]lacked the necessary qualifications for elite membership.”); *id.* at 129 (“[These] []lawyers subscribed rhetorically to the notion of law as a public profession; but invariably they guarded it as a private preserve, practicing caste politics under cover of patriotism and professionalism.”); Lucille A. Jewell, *Bourdieu and American Legal Education: How Law Schools Reproduce Social Stratification and Class Hierarchy*, 56.4 BUFFALO L. REV. 1155, 1156–58, 1165–69 (2008) (explaining that distinctions among members of the legal profession can be viewed in terms of “differences in economic capital . . . differences in power relations in the workplace . . . and ‘symbolic capital’ (levels of prestige and honor assigned based on credentials)” and citing Pierre Bourdieu for his central theme “that educational institutions contribute to societal inequality because those who achieve the most within the system tend to have entered the system with a greater amount of social and monetary resources”); see *id.* (further discussing that “the economic structures that underlie the allocation of power through educational credentials are hidden in the educational system, by narratives that focus on individual merit and ability, measured in [seemingly] objective terms” and punctuating that “Bourdieu was concerned about the ways in which educational pedagogy works to create a collective attitude that causes individuals to docilely accept

legal profession, then and now, shape and are shaped by these norms. Accordingly, the history of the Founding of this nation and the laws that helped to structure it are instrumental in understanding the origin story of formal legal education.

Lawyers and the legal profession feature prominently in the formation and development of the United States.¹³ There can be no sanitized version of who was included in the Founding and in the profession and who was excluded. Lawyers were active in the founding of the American Republic,¹⁴ a nation built on slavery and dispossession;¹⁵ as such, the profession of law and the legal academy have been and continue to be complicit in supporting and perpetuating systemic racial inequality directly attributable to slavery and its aftermath. “In the colonial period and well into the early twentieth century, law practice was exclusively a profession for white males.”¹⁶ The laws passed and the policies implemented were done through a lens and a gaze commanded by that identity.¹⁷ Rich, white men established governments and societal norms in their image and directed resources to benefit their specific interests.¹⁸ They built institutions, including ones devoted to higher education, to meet their needs.¹⁹

their place within the greater social structure, without question”); Angela Onwuachi-Willig, *Roberts’s Revisions: A Narratological Reading of the Affirmative Action Cases*, 137 HARV. L. REV. 192, 198–99 (2023) (discussing narratology and applying the concept to the omission of historical events and historical context in Chief Justice Roberts’s opinion writing for the majority in *SFFA v. Harvard/UNC*; *id.* at 198 (“Narratology . . . can help us understand not only how a telling has been constructed in parts, but also from whose lens the story and its parts have been told and, relatedly, whose perspectives and tellings were not included . . .”)); ERIC FONER, *THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION* xxi–xxv, 2–3.

13. See generally Danielle M. Conway, et al., *Building an Antiracist Law School: Inclusivity in Admissions and Retention of Diverse Students—Leadership Determines DEI Success*, 23 RUTGERS RACE & L. REV. 1 (2021).

14. Thomas G. Wilkinson Jr. & Roger B. Meilton, *Supervising and Regulating the Practice of Law, in THE SUPREME COURT OF PENNSYLVANIA: LIFE AND LAW IN THE COMMONWEALTH, 1684–2017*, at 73 (John J. Hare ed., 2018).

15. JOHN HOPE FRANKLIN & EVELYN BROOKS HIGGINBOTHAM, *FROM SLAVERY TO FREEDOM: A HISTORY OF AFRICAN AMERICANS 194–95* (2011); JOHN P. KAMINSKI, *A NECESSARY EVIL?: SLAVERY AND THE DEBATE OVER THE CONSTITUTION* 4 (1995); see also Sam Erman, *Truer U.S. History: Race, Borders, and Status Manipulation*, 130 YALE L.J. 1188, 1193 (2022) (“The transcontinental empire stretched from the Founding through the closing of the frontier. During these years, white land hunger drove relentless expansion of U.S. borders and control across the continent. No matter that American Indians already occupied the lands; dispossession, betrayal, and extermination were tools ready to hand. The result was settler colonialism, as white settlers from the east slowly occupied and displaced (or killed) Indigenous inhabitants.”).

16. See Wilkinson & Meilton, *supra* note 14, at 82; see also Laura Appleman, *The Rise of the Modern American Law School: How Professionalization, German Scholarship, and Legal Reform Shaped Our System of Legal Education*, 39 N. ENGL. L. REV. 251, 252–54 (2005); RAY BRESCIA, *LAWYER NATION: THE PAST, PRESENT, AND FUTURE OF THE AMERICAN LEGAL PROFESSION* 39 (2024) (stating that “law practice itself was tightly controlled and fairly inaccessible, unless one was white and male”).

17. See Onwuachi-Willig, *supra* note 12, at 199; STEVENS, *supra* note 7, at 93, 100–02; BRESCIA, *supra* note 16, at 51 (“The period of Reconstruction also sought to make good on this promise of equality, until law and lawyers stepped in, once again, to enshrine white supremacy in the legal system through Jim Crow and to protect the use of violence in an effort to terrorize the Black population.”); *id.* at 62.

18. STEVENS, *supra* note 7, at 93, 95; BRESCIA, *supra* note 16, at 2–3, 6.

19. STEVENS, *supra* note 7, at 92, 96, 100.

Rich, white men created a hierarchy to structure American society. This hierarchy scaffolded an ideology adhering to a dominant, white supremacist, imperialist capitalist, patriarchy.²⁰ The DWSICP²¹ uses law to reinforce this scaffolded, racialized hierarchy, which continues to replicate itself for the purpose of maintaining dominance and control.²² Methods to reinforce and scaffold the DWSICP evolve to respond to threats to that status quo.²³ Throughout the centuries, threats to the DWSICP have included freedom to worship, abolitionism, universal self-determination, equality of the sexes, radical republicanism, universal humanism, egalitarian postbellum reforms, Reconstruction, antiracism, antisubordination, and antioppression.²⁴

To repel these threats, the DWSICP, in establishing institutions in American society, used law as a tool for gatekeeping and outright exclusion to guarantee that the legal profession would be a bulwark against ruptures in the status quo.²⁵ Law was a reliable and useful instrument to legalize and enforce slavery, slave codes, and racialized violence and terror. The DWSICP made law complicit by rendering it useless to protect and enforce the civil and political rights of Black people and also people outside the sphere of whiteness and power.²⁶ These groups, whether lower on the racialized hierarchy or outside altogether, were besieged with genocide of Native Americans, the Nadir, Jim Crow segregation, Jane Crow subordination, anti-Black racism, hate, and terror.²⁷ This was the foundation on which formal legal education was built.

20. BELL HOOKS, *AIN'T I A WOMAN: BLACK WOMEN AND FEMINISM* 188–92 (1981).

21. DWSICP refers to the dominant, white-supremacist, imperialist-capitalist patriarchy. STEVENS, *supra* note 7, at 92, 100.

22. STEVENS, *supra* note 7, at 99–100; BRESCIA, *supra* note 16, at 85, 90; Arthenia Lee Joyner, *There is a Future for Black Lawyers*, in *REBELS IN LAW: VOICES IN HISTORY OF BLACK WOMEN LAWYERS* 106–110 (J. Clay Smith Jr., ed., 1998).

23. Onwuachi-Willig, *supra* note 12, at 199–200; BRESCIA, *supra* note 16, at 51.

24. Onwuachi-Willig, *supra* note 12, at 199–200; BRESCIA, *supra* note 16, at 51.

25. See Andrew M. Siegel, “*To Learn and Make Respectable Hereafter*”: *The Litchfield Law School in Cultural Context*, 73 N.Y.U. L. REV. 1978, 2015 (1998) (“The preeminent position given to an examination of the laws pertaining to hierarchical relationships is problematic. From the outset, Reeve and Gould argue that the law accords different rights and responsibilities to individuals based on their gender, age, race, or employment status. Hence, one generation of adult white male professionals was implicitly teaching another generation of adult white male professionals that their privilege was the first principle of the legal system. The first lectures of the Litchfield course affirmed values which lay at the core of both the general Federalist sociopolitical vision and the more specific professional mandate of the Law School: duty, order, and, not the least, hierarchy.”) (emphasis added); see also AUERBACH, *supra* note 6, at 92; Conway, *Black Women’s Suffrage*, *supra* note 9, at 17–18.

26. BRESCIA, *supra* note 16, at 2–3, 48.

27. W.E.B. DU BOIS, *JOHN BROWN* 191, 194–95 (Graphyco Books ed., 2023) (“[T]he majority of [white] Americans seem to have forgotten the foundation[al] principles of their government and the recklessly destructive effect of the blows meant to bind and tether their fellows. We have come to see a day here in America when one citizen can deprive another of his vote at his discretion; can restrict the education of his neighbors’ children as he sees fit; can with impunity load his neighbor with public insult on the king’s highway; can deprive him of his property without due process of law; can deny him the right of trial by his peers, or of any trial whatsoever if he can get a large enough group of men to join him; can refuse to protect or safeguard the integrity of the family of some men whom he dislikes; finally, can not only close the door of opportunity in commercial and social lines in a fully competent neighbor’s face, but can actually count on the national and state governments to help and make effective this discrimination.”); Pauli Murray, *Pauli Murray’s*

Before even getting to the invention of the case method by one of the first movers in the space of formal legal education—Harvard Law School—it must first be acknowledged that entry into the American legal profession was reserved for members of the DWSICP.²⁸ The standards of exclusivity and selectivity were adopted in the antebellum legal profession, which produced lawyers primarily through paid apprenticeships, and in the postbellum period, which saw the relaunch of formal legal education as the new gatekeeping method for entry into the legal profession.²⁹ Postbellum formal legal education overwhelmingly reserved seats in law schools for the benefit of rich, white men in furtherance of the DWSICP.³⁰ Admission into law school and later invitation to the bar remained faithful to the two-pronged standard of demographic and social identity.³¹ The proxies for exclusivity and selectivity amounted to wealth, whiteness, and the male gender.³²

The oldest court in North America, the Commonwealth of Pennsylvania Supreme Court, was founded in 1684, and it, like subsequently established courts, regulated attorney admission to the bar.³³ In the eighteenth century, the preferred method of preparing for law was acceptance to and attendance at one of the Inns of Court in England.³⁴ Those who could not afford to travel to England and study in the Inns stayed in the colonies and paid a fee for the privilege to apprentice with lawyers practicing in the colonies, in their judicial districts and counties.³⁵

The apprenticeship model was, by definition, decentralized, and instruction, which focused on practical training, was far from uniform.³⁶ This decentralization led to lawyer protectionism and balkanization of the practice of law, with a multitude of restrictions affecting a practitioner's admission to

Appeal: For Admission to Harvard Law School, in REBELS IN LAW: VOICES IN HISTORY OF BLACK WOMEN LAWYERS 79–83 (J. Clay Smith Jr., ed., 1998); Joyce Ann Hughes, *Neither a Whisper Nor a Shout*, in REBELS IN LAW: VOICES IN HISTORY OF BLACK WOMEN LAWYERS 90–101 (J. Clay Smith Jr., ed., 1998); Erman, *supra* note 15, at 1193; Onwuachi-Willig, *supra* note 12, at 207 (holding Chief Justice Roberts accountable for failing to acknowledge the relevant contextual historicity of race and racism and their adapting to “prevent Black people from attaining the same protections and rights that he claimed were granted and realized after the Civil War”). This is a flagrant omission by Chief Justice Roberts made possible by his unceasing commitment to formal rules over social, civic, political, and legal realities of, among others, Black people, for example, “the substantive conditions under which Black, Latinx, Asian American, and Indigenous [P]eoples operated from each of those moments on through to today,” thereby supporting the anticanon of colorblindness. *Id.*

28. See Siegel, *supra* note 25, at 2011–13 (“The law, as an institution, had a central place in the Federalist social vision; it was through law that the Federalists hoped to inculcate and protect their core social values: order, hierarchy, and benevolence . . . Federalist thinkers posited a sophisticated ‘legal science’ whose secrets could only be unlocked by a trained priesthood of judges, lawyers, and treatise writers.”).

29. See *id.* at 2015, 2024 n.238; Auerbach, *supra* note 6, at 84–85, 128–29.

30. See STEVENS, *supra* note 7, at 9, 21; see also AUERBACH, *supra* note 6, at 92–93.

31. See STEVENS, *supra* note 7, at 99–102.

32. *Id.*

33. Wilkinson & Meilton, *supra* note 14, at 82.

34. See *id.*

35. See *id.*

36. See *id.*

the bar.³⁷ Competing with the practical training model represented by the apprenticeship model was the Harvard Law School model that sought to professionalize legal education within the university and within the legal profession by deemphasizing the practical training of lawyers and underscoring the teaching of the science of law by scholars.³⁸ As this battle for primacy of law preparation waged, slavery and its enforcement in law kept enslaved and free Black men and women out of the profession; subordination and Jane Crow kept all women out of the profession.³⁹ In the nineteenth century, except for a relatively small number, racism and oppression continued to deny Black people and women the opportunity to apprentice into the profession, attend law school, and gain admission to the bar.⁴⁰

Remarkably, Macon Bolling Allen secured a foothold into the legal profession by becoming the first African-American to be admitted to practice law in the United States, with his admission to the Maine Bar in 1844.⁴¹ His admission came only twenty-four years after Maine became a free state by the enactment of the Missouri Compromise of 1820, while Missouri entered the Union as a slave state.⁴² Allen achieved this remarkable feat at a time when the overwhelming majority of Black people, 4 million out of 4.5 million, were constitutionally enslaved.⁴³ Throughout the nineteenth century, most law schools taught few or no Black students, except at law schools designated as Historically Black Colleges and Universities (HBCUs).⁴⁴ Howard University School of Law was established in 1869 with a mission to graduate Black lawyers

37. *See id.*

38. *See* Rayman L. Solomon, *Law Schools in Dictionary of American History*, ENCYCLOPEDIA.COM (last visited Feb. 20, 2024), <https://www.encyclopedia.com/history/dictionaries-thesauruses-pictures-and-press-releases/law-schools> [<https://perma.cc/HZX8-9ATY>]; *see also* Appleman, *supra* note 16, at 252–54; Susan Katcher, *Legal Training in the United States: A Brief History*, 24 WIS. INT'L. L.J. 335 (2006).

39. Wilkinson & Meilton, *supra* note 14, at 82.

40. *See generally* J. CLAY SMITH, JR., *EMANCIPATION: THE MAKING OF THE BLACK LAWYER, 1844–1944* (1993).

41. *See id.* According to Professor J. Clay Smith, Jr., “the American [B]lack lawyer originated” in Maine. *Id.* at 93. Practicing the fundamental principle of equality, Maine has the distinction of being the first state to admit the first Black lawyer—Macon Bolling Allen—to the bar. *Id.* This was extraordinary leadership by Maine and its citizens because the admission of Macon B. Allen to the bar of the learned profession of the law in 1844 preceded the infamous United States Supreme Court decision in *Dred Scott v. Sandford*, 60 U.S. 393 (1857), authored by Chief Justice Roger Brooke Taney in 1857. As well, the decision to admit Macon B. Allen preceded the expansion of slavery in the southern and western states leading up to the Civil War. Macon B. Allen’s admission to the bar was made possible by the sponsorship of General Samuel Fessenden. *Id.* General Fessenden, born in Freyburg, Maine, was an attorney, a scholar, an American abolitionist, a politician, and a militiaman elected to the rank of major general. *Id.* At the time, eligibility for admission to the bar rested on citizenship and the production of a certificate of good moral character. *Id.* at 93–94. Because Macon B. Allen was a native of Indiana, he applied for admission by examination. *Id.* at 94. With the support of Fessenden and the reliance on his own intellect and hard work, Macon B. Allen passed the examination and was admitted in 1844. *Id.*

42. *See* Missouri Enabling Acts of March 6, 1820, ch. 22, 3 Stat. 545.

43. SMITH, *supra* note 40, at 10.

44. *Id.* at 35; *see also* Patricia Mell, *Not the Primrose Path: Educating Lawyers at the Turn of the Last Century*, 79 MICH. B.J. 846 (2000).

who knew their responsibility was to “emancipate and to protect the interests of [B]lack people and to interpret the newly won rights of [B]lack citizens under the amended Constitution.”⁴⁵

Nine years after the founding of Howard University School of Law, the American Bar Association (ABA) was founded in 1878.⁴⁶ The ABA founded the Association of American Law Schools (AALS) as an auxiliary organization in 1900.⁴⁷ Between 1890 and 1920, free-standing law schools, many with part-time evening programs, enrolled Black students, immigrants, and Jewish students.⁴⁸ This created new opportunities for members of marginalized communities to enter the legal profession. During this period of relative opportunity to access legal education, the ABA and the AALS pushed the Harvard Law School model of professional legal instruction—emphasizing research and scholarship as the measure of a successful law school.⁴⁹ The Harvard Law School model fit the ABA’s ambitions of increasing the prestige and power of the legal profession and, therefore, the two organizations adopted the Harvard Law School model of legal education as the gold standard for admission to the bar.⁵⁰ The ABA and the AALS worked together to become regulators of legal education and to set new standards requiring students admitted to law schools to have completed two years of college and two years of law school to qualify to sit for bar examinations; as well, the law school experience needed to fit the Harvard Law School model, which required three years of graded instruction.⁵¹

The ABA did not cover in expressing its intent behind the new standards. The ABA saw its mission as “rid[ding] society of the night schools to ensure competent public-spirited and ethical lawyers.”⁵² In addition, it expressed the intent to keep certain segments of the population from using the legal profession to “undermine the American way of life.”⁵³ Members of the ABA, influential in judicial, political, and social settings, implemented these policies in their respective states.⁵⁴ Without question, and even intentionally,⁵⁵ these new

45. SMITH, *supra* note 40, at 43.

46. Gerard J. Clark, *Monopoly Power in Defense of the Status Quo: A Critique of the ABA’s Role in the Regulation of the American Legal Profession*, 45 SUFFOLK UNIV. L. REV. 1009, 1011 (2012); see also SMITH, *supra* note 40, at 43.

47. SMITH, *supra* note 40, at 41.

48. See *id.* at 41–42.

49. Solomon, *supra* note 38.

50. SMITH, *supra* note 40, at 42.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. Academia is an edifice built on structural oppression and subordination. See Conway, *Antiracist Lawyering in Practice*, *supra* note 2, at 725 & n.7; see also AUERBACH, *supra* note 6, at 93, 99. That said, academia has the resources to lead in confronting the prevalence of oppression and subordination, to lead on ameliorating these conditions through the development and promotion of colleagues navigating intersectional

standards and policies adversely affected Black students and others similarly situated who sought to enter the legal profession.⁵⁶

To this very point, the ABA and the AALS, as a rule, excluded Black people from their organizations until 1943.⁵⁷ Professor J. Clay Smith discusses the ABA's official exclusion of Black lawyers from the association by giving voice to the "unspoken assumption at the time [] that [B]lack lawyers would not be able to 'advance the science of jurisprudence, promote the administration of justice . . . uphold the honor of the profession of law [or] encourage cordial intercourse among the members of the American Bar.'"⁵⁸ This meant that Black voices were absent from public debate about the legal profession, generally, and on legal education policy, specifically, before and after the formation of the ABA and the AALS, underscoring the dismally low numbers of Black lawyers in the legal profession and the near absence of Black faculty at white law schools prior to 1925.⁵⁹ Even after 1925, and pointedly after 1943, when the color bar was broken at the ABA, the data demonstrates that, among other minoritized groups, Black people are disproportionately underrepresented in the legal profession, in law school faculty ranks, and in the student body.⁶⁰

Those within the sphere of whiteness "in the legal academy are only now reckoning with the reality of systemic racism within our hallowed halls, an insidiousness that many People of Color in the legal academy have always known."⁶¹ "Because of the complicity of the legal profession in providing the scaffolding for slavery, racial hierarchy, racism, and subordination to persist, leaders and members of the legal profession and the legal academy have a special obligation to acknowledge the systemic inequities in our teaching, learning, service, and leadership environments. With acknowledgment comes the obligation to be accountable. Acknowledgment and accountability in how we do law school will demonstrate the will of the members of our profession to rebuild on an Antiracist platform to truly realize the nobility of the legal profession and the commitment to equal justice for all."⁶²

The demographic imagery of law schools is well-documented in class photos, class rolls, and in the laws enforcing the homogeneity of the legal

identities, and to lead on the rebuilding of our institutions using the blueprint of systemic equity. BRESCIA, *supra* note 16, at 132–33; LANI GUINIER ET AL., *BECOMING GENTLEMEN: WOMEN, LAW SCHOOL, AND INSTITUTIONAL CHANGE* 21 (1997).

56. See *Law Deans Antiracist Clearinghouse Project*, ASS'N OF AM. L. SCHS., <https://www.aals.org/antiracist-clearinghouse/> [<https://perma.cc/T7PZ-KTEN>]; BRESCIA, *supra* note 16, at 136–38.

57. SMITH, *supra* note 40, at 41; see also AUERBACH, *supra* note 6, at 63–64.

58. SMITH, *supra* note 40, at 541 (third alteration in original).

59. *Id.* at 41, 65.

60. See generally AM. BAR ASS'N, *ABA PROFILE OF THE LEGAL PROFESSION 2020* 33, 111, 123 (2020), <https://www.americanbar.org/content/dam/aba/administrative/news/2020/07/potlp2020.pdf> [<https://perma.cc/U8BJ-N7AX>].

61. Conway, *Antiracist Lawyering in Practice*, *supra* note 2, at 733 n.39.

62. Conway et. al., *supra* note 13, at 9; see SMITH, *supra* note 40, at 33–41.

profession.⁶³ Certainly, the infinitesimal number of non-white, non-male identifying lawyers able to wage a Herculean campaign to enter law schools, graduate, and wrestle with strong headwinds to be admitted to the bar are historical, social, political, and economic triumphs.⁶⁴ That said, these triumphs provided fuel for the DWSICP to tighten its grip on the entry gates to develop even more effective strategies to continue restricting access to the legal profession to those outside of the DWSICP.⁶⁵

To perpetuate law schools, bar associations, and learned societies as white, male spaces, the DWSICP waged successful, coordinated campaigns to severely limit access to the legal profession for those outside of that sphere.⁶⁶ Native Peoples, Black people, brown people, women, non-Christians, socialists, immigrants, and others not considered within the sphere were excluded.⁶⁷ This is the societal backdrop in which formal legal education developed.⁶⁸ Thus, there are generations of lawyers for whom the white, male reference point is the model representative of a law school, a law faculty, a law firm, a legal organization, a legislature, a bar association, and a learned society.⁶⁹ It follows that the Harvard Law School pedagogy has embedded within it the ideology of the DWSICP, and this has been the anchoring model for formal legal education since its inception. The law has been and continues to be complicit in scaffolding a racialized hierarchy in cunningly disturbing ways, such as in elevating to constitutional levels the contrived concept of colorblindness, which features prominently in modern law and legal education.⁷⁰

II. A QUANTUM LEAP REGRESSION OWING TO A COLOR “BLIND” EYE

Locating comprehensive discussions about equality, justice, and democracy in the Fourteenth Amendment is long overdue. The Fourteenth Amendment symbolized a fundamental reboot to American society, changing the

63. Select almost any predominantly white law school and take a look at class photos, especially before the 1990s. What you will undoubtedly see is an overwhelming number of white men and women comprising the class. I include just a few for illustration: *The Early 20th Century*, UNIV. OF S.C. JOSEPH F. RICE SCH. OF L., https://sc.edu/study/colleges_schools/law/about/history/early_20th_century/index.php [https://perma.cc/B4AZ-TXF3] (Class of 1918 photo); *Class Photos*, WASH. UNIV. IN ST. LOUIS SCH. OF L., <https://law.wustl.edu/about/our-history/class-photos/> [https://perma.cc/P49G-NVWE]; and *Alumni Photo Browse*, UNIV. OF WIS. L. SCH., <https://repository.law.wisc.edu/s/uwlaw/page/alumniphotobrowse> [https://perma.cc/QQM4-YYDG].

64. See SMITH, *supra* note 40, at 33–41.

65. See Bennett Capers, *The Law School as a White Space*, 106 MINN. L. REV. 7, 8–12, 21–28 (2021); Renee Nicole Allen, *Get Out: Structural Racism and Academic Terror*, 29 WM & MARY J. RACE, GENDER & SOC. JUST. 599, 604–06, 615–16 (2023); Onwuachi-Willig, *supra* note 12, at 207.

66. See AUERBACH, *supra* note 6, at 124–29.

67. See Onwuachi-Willig, *supra* note 12, at 207; BRESCIA, *supra* note 16, at 66–68.

68. See BRESCIA, *supra* note 16, at 80–90.

69. See *id.* at 541–46.

70. See *Students for Fair Admissions v. President & Fellows of Harv. Coll.*, 600 U.S. 181, 318 (2023) (Sotomayor, J., dissenting).

constitutional order in America by creating the world's first biracial democracy. The Reconstruction Amendments enhanced the power of the federal government by placing the authority to define the rights of citizens in the federal sphere.⁷¹ Unfortunately, the laudable constitutional pledges contained in the Fourteenth Amendment have not been fulfilled, and worse, these pledges have been erased through the whitewashing of originalist intent to make a permanent change to the status of Black people from enslaved to voting citizens, participating fully in American society.

The meaning and purpose of the Reconstruction Amendments, specifically the Equal Protection Clause, has been hollowed out by the mythology and ideology of, among other non-precedential concepts, colorblindness, as most recently demonstrated by the decision of the United States Supreme Court in *SFFA v. Harvard*⁷² and its companion case *SFFA v. University of North Carolina*.⁷³ The *SFFA* case shows the Supreme Court's will and intent to raise politics over precedent by creating its own record of unsupported facts contrived to reach its holding, while simultaneously: spreading a redeemer's history of slavery and obscuring the straight line connection between slavery and the badges and incidents of slavery during which the DWSICP scaffolded its place and power atop a human hierarchy; manipulating narratives to convey notions of victimhood while rooting systemic racialized ideology throughout American society; and leveraging power over the deployment of law—the Equal Protection Clause—to create an uncritical colorblindness concept that, as applied, promotes protection and enforcement of the DWSICP. First, the Reconstruction Amendments never refer to the contrived concept called colorblindness.⁷⁴ Second, pressing colorblindness into service is a cunning strategy by the DWSICP to whitewash the historicity of racialized, gendered, and intersectional injustice and oppression in American society then and now.

In *SFFA v. Harvard/UNC*, Justice Clarence Thomas makes hay out of colorblindness to brazenly champion it as a longstanding constitutional principle.⁷⁵ It is not. Colorblindness has been deployed since its initial articulation by Justice Harlan as a means to guarantee the scaffolding of a system promoting a DWSICP hierarchy.⁷⁶ Pointedly, while Justice Harlan did state in dissent, “Our constitution is color-blind, and neither knows nor

71. See Conway, *Black Women's Suffrage*, *supra* note 9, at 25.

72. *Students for Fair Admissions*, 600 U.S. at 230 (Thomas, J., concurring).

73. *Id.*

74. See U.S. CONST. amend. XIV.

75. *Students for Fair Admissions*, 600 U.S. at 231 (Thomas, J., concurring).

76. See Onwuachi-Willig, *supra* note 12, at 209 (explaining that Chief Justice Roberts's majority opinion in *SFFA* misrepresents the historicity of race and racism by “offer[ing] a narrative . . . that could ‘justify the world as it is, that is, with whites on top and browns and [B]lacks at the bottom’”); see also Brandon Hasbrouck, *The Antiracist Constitution*, 102 B.U. L. REV. 87, 113–15 (2022); see also EDUARDO BONILLA-SILVA, RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN AMERICA 2–3, 203 (5th ed. 2018).

tolerates classes among citizens,” he also conveyed in the same text that he did not question the supremacy of white people in American society.⁷⁷ The following quotes, when read in context, are critically instructive:

*The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth, and in power. . . . But in view of the constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed [sic] by the supreme law of the land are involved.*⁷⁸

Furthermore, Justice Harlan explicitly addressed his set of beliefs about white supremacy when he wrote:

*There is a race so different from our own that we do not permit those belonging to it to become citizens of the United States. Persons belonging to it are, with few exceptions, absolutely excluded from our country. I allude to the Chinese race. But, by the statute in question, a Chinaman can ride in the same passenger coach with white citizens of the United States, while citizens of the black race in Louisiana, many of whom, perhaps, risked their lives for the preservation of the Union . . . and who have all the legal rights that belong to white citizens, are yet declared to be criminals, liable to imprisonment, if they ride in a public coach occupied by citizens of the white race.*⁷⁹

His use of the word “color-blind” belied his belief that white people—particularly white men—in American society were dominant, holding power over systems and resources to promote narratives and norms of the supremacy of white people and the inferiority of Black people in all spheres of American life—civil, political, economic, and social. Thus, Harlan’s expression of “color-blind” is as hollow as Justice Black’s words in *United States v. Korematsu* about applying rigid scrutiny to government restrictions on the curtailing of civil rights of people of Japanese descent before upholding the very unfounded order of exclusion.⁸⁰

These two writings demonstrate that “colorblindness” is anticanon and is not a timeless feature of constitutional law; it is a judicially constructed device deployed without reference to precedent to thwart the historicity of race-consciousness, the latter being reflected in American societal debates, politics, laws, armed conflicts, policies, procedures, and practices addressing slavery, abolition, emancipation, liberty, and citizenship.⁸¹ Institutional antiracism is the

77. *Plessy v. Ferguson*, 163 U.S. 537, 559–60 (1896) (Harlan, J., dissenting).

78. *Id.* at 559 (emphasis added).

79. *Id.* (emphasis added).

80. *United States v. Korematsu*, 323 U.S. 214, 216 (1944).

81. See Conway, *Black Women’s Suffrage*, *supra* note 9, at 34–40.

constitutional principle that is located in the Fourteenth Amendment.⁸² It is this principle that must be re-engaged to bring forth the constitutional objective of the Second Founding—to liberate society by succeeding in the purpose of bringing forth a multiracial, multicultural, multiethnic, intersectional democracy intended by the Second Founding Framers.⁸³ And, as has recently been stated by Professor Sherrilyn Ifill, the lesson of the Fourteenth Amendment is that it is a durable and resilient amendment that allows every generation to sit firmly within the position of Founders and Framers to lead the next wave of progress in American society.⁸⁴ To prepare the next generation of lawyers to meet these responsibilities and to be accountable to their communities, legal education and the profession have a special duty to engage institutional antiracism and critical pedagogy.

III. QUANTUM LEAP TOWARD PROGRESS: UNAPOLOGETICALLY ENGAGE INSTITUTIONAL ANTIRACISM AND CRITICAL PEDAGOGY

A. *Unapologetically Engage Institutional Antiracism*

Institutional antiracism is a vision, value, strategy, and tool most aligned with the purpose and intent of America's Second Founding and the Reconstruction Amendments.⁸⁵ In order to match the progress that the Reconstruction Amendments promised, and that today's society deserves, it is time to acknowledge the law's complicity in perpetuating systemic racial inequality and intersectional injustice. By acknowledging law's complicity, legal education, the legal academy, and the legal profession can remove the scaffolding that supports racialized, gendered hierarchies that persist in propping up the DWSICP. One approach to do this work is to engage with institutional antiracism in law, legal education, and the profession.

82. See Hasbrouck, *supra* note 76, at 128 (“[T]he Reconstruction Amendments explicitly worked to transform the Constitution into an abolitionist document . . . [T]he culmination of the abolitionist project in the Reconstruction Amendments after decades of publicizing their meanings through litigation and organizing is the original playbook for movement law. Several passages of the Amendments hardwired fundamental protections against racial discrimination and oppression into the Constitution, and while the Supreme Court has all too often looked to its own past interpretations of those provisions rather than the [origins, history, and context of those provisions], this trend can and should be interrupted.”) (footnotes omitted).

83. Cf. CONWAY, *supra* note 10, at 4.

84. Professor Sherrilyn Ifill, Address at the Penn State Dickinson Law Antiracist Development Institute Inaugural Convening (Oct. 13, 2023); see also *Civil Rights Lawyer Sherrilyn Ifill's Keynote Highlights Antiracist Development Institute's "Energizing" Inaugural Convening at Dickinson Law*, PENN STATE DICKINSON L., <https://dickinsonlaw.psu.edu/civil-rights-lawyer-sherrilyn-ifills-keynote-highlights-antiracist-development-institutes> [https://perma.cc/NVG9-8KPH].

85. Compare Hasbrouck, *supra* note 76, at 130–33, and Onwuachi-Willig, *supra* note 12, at 203–04, with *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181 (2023).

Members of the legal profession swear to uphold the American system of laws.⁸⁶ Ascriptive discrimination—meaning discrimination based on qualities beyond one’s control “e.g., race, sex, age, class at birth, religion, ethnicity, and residence”—is embedded in American democratic institutions, despite such discrimination being anathema to the democratic ideal of equality.⁸⁷ The existence of a social reality that permits the promotion of the DWSICP while continuing the oppression and dehumanization of people through the practice of racialized and intersectional injustice is contrary to democracy, a strong rule of law, and American ideals of equality and justice for all. Merely denouncing systemic racial inequality and intersectional injustice without committing action to disrupting it is just another means of maintaining the DWSICP status quo.

It is the requirement to act to disrupt undemocratic and unjust laws, processes, and practices that compels laws schools and the legal profession to engage institutional antiracism.⁸⁸ The necessity to engage institutional antiracism in legal education stems from at least two interdependent mechanisms: first, legal architecture is built upon and scaffolded by systems of inequity that perpetuate racism, sexism, and intersectional injustice;⁸⁹ and second, America’s system of laws is premised on the maintenance of precedent and dominant tradition.⁹⁰ Thus, the very essence of teaching law and then

86. Conway, *Antiracist Lawyering in Practice*, *supra* note 2, at 724–25 nn.5–6.

87. PAUL GOWDER, *THE RULE OF LAW IN THE REAL WORLD* 6 (2016).

88. Conway, *Antiracist Lawyering in Practice*, *supra* note 2.

89. Onwuachi-Willig, *supra* note 12, at 206–08; C.R. Cases, 109 U.S. 3, 26–27 (1883) (Harlan, J., dissenting) (“The purpose of the first section of the act of [C]ongress of March 1, 1875, was to prevent race discrimination. It does not assume to define the general conditions and limitations under which inns, public conveyances, and places of public amusement may be conducted, but only declares that such conditions and limitations, whatever they may be, shall not be applied, by way of discrimination, on account of race, color, or previous condition of servitude. The second section provides a penalty against any one denying, or aiding or inciting the denial, to any citizen that equality of right given by the first section, except for reasons by law applicable to citizens of every race or color, and regardless of any previous condition of servitude. There seems to be no substantial difference between my brethren and myself as to what was the purpose of [C]ongress; for they say that the essence of the law is, not to declare broadly that all persons shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances, and theaters, but that such enjoyment shall not be subject to any conditions applicable only to citizens of a particular race or color, or who had been in a previous condition of servitude. The effect of the statute, the court says, is that colored citizens, whether formerly slaves or not, and citizens of other races, shall have the same accommodations and privileges in all inns, public conveyances, and places of amusement as are enjoyed by white persons, and vice versa. The court adjudges that Congress is without power, under either the [T]hirteenth or [F]ourteenth [A]mendment, to establish such regulations, and that the first and second sections of the statute are, in all their parts, unconstitutional and void.”) (emphasis omitted).

90. Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601, 602 (2001) (“In a system of law that adheres to the doctrine of stare decisis, it is impossible to understand the law as it is today without understanding the law as it has been in the past. Reliance upon binding precedents leads courts to begin every new case with an examination of the past. The resolutions that arise in turn form a foundation for future cases. The doctrine of stare decisis thus creates a seamless web connecting the past to the present and future.”) (footnotes omitted). The author further quotes Oliver Wendell Holmes for the proposition that to know why a rule of law exists, one goes to tradition and to the assumptions of the dominant class. *Id.* This further assumes that the legitimacy of the searcher and the search are evaluated under the auspices of the dominant class. *Id.*

practicing law is to reproduce structures and systems forged in racialized and interlocking systems of oppression.

To pursue institutional antiracism in legal education and in the legal profession means to first acknowledge race, social reality, racialized social structures, and racial ideology. Next, institutional antiracism requires learning about the forms of systemic racism that are established to rationalize, explain, or justify the status quo. Finally, to practice institutional antiracism means to act in ways that challenge and contest systemic racial inequality and intersectional injustice. To be faithful to our special duty to both lead and learn, law schools, the legal academy, and the legal profession must be out front leading on the implementation of institutional antiracism. With respect to legal education and the legal academy, institutional antiracism requires reckoning with several centuries of the DWSICP excluding Black people, Indigenous peoples, women, people of color, immigrants, LGBTQ people, and people with disabilities from apprenticeships, law schools, admission to the bar, and the legal profession.⁹¹ In the nineteenth century, the ABA and the AALS—through policies, customs, and norms—anoined the Harvard Law School model of legal education as the elite standard for legal education and entry into the legal profession. At the same time, both organizations referred to members of groups outside of the DWSICP as “deviants” and “undesirables,”⁹² expressing the view that their entry into the legal profession would undermine its nobility.⁹³ The ABA and the AALS reinforced its DWSICP blueprint by moving the goal posts related to meeting eligibility standards for some groups, while outright excluding Black people from membership until 1943 and 1958, respectively.⁹⁴

The exclusionary conditions wrought by the DWSICP’s blueprint of systemic racial inequality and intersectional injustice in apprenticeships, legal education, and the legal profession provide an uninterrupted through-line to today’s underrepresentation of Black people, Latinx people, Asian people, Native Hawaiians, Pacific Islanders, and Native Americans in law schools and in the legal profession.⁹⁵ Based on the above, it is unsurprising that white people are overrepresented in the legal profession, comprising 79%, compared with their presence in the overall U.S. population, comprising 58.9%.⁹⁶ In contrast, people of color are woefully underrepresented in the legal profession compared with their presence in the U.S. population. For example, Black people make up 5% of the legal profession, but 13.6% of the population.⁹⁷ Similarly, Latinx

91. See AUERBACH, *supra* note 6, at 116–19, 125–29.

92. See *id.* at 116–19; see also Appleman, *supra* note 16, at 257.

93. See AUERBACH, *supra* note 6, at 125–29.

94. *History*, ASS’N AM. L. SCHS., <https://www.aals.org/about/history/> [https://perma.cc/7J94-2EW6].

95. See ABA PROFILE OF THE LEGAL PROFESSION 2023, DEMOGRAPHICS, <https://www.abalegalprofile.com/demographics.html> [https://perma.cc/KN4Q-Y2N4].

96. *Id.*

97. *Id.*

people make up 6% of the legal profession, but 19.1% of the population,⁹⁸ and Asian people are 6% of the legal profession, but 6.3% of the population.⁹⁹ The lack of meaningful representation in law schools and the profession are both symptom and cause of systemic racial inequality and intersectional injustice that maintain the DWSICP. Absent institutional antiracism, the nation will never grapple with the root causes of systemic racial inequality and intersectional injustice, because the marginalized, minoritized, and underrepresented will not be included in discussions and deliberations in those spaces where decisions are being made about the structures organizing American society and how that organization is negatively impacting them. This is the paramount reason to insist that legal institutions—our supposed democratic institutions—be on the frontlines of accountability for engaging institutional antiracism. The best place to begin the engagement with institutional antiracism is in another democratic institution—the education system, including higher education and especially in legal education. To succeed with this engagement requires adopting new methods for teaching and learning, especially in law schools. This is the entry point for the adoption of critical pedagogy in legal education.

B. Unapologetically Engage Critical Pedagogy

The most prominent theorist of critical pedagogy is Paulo Freire, who wrote the groundbreaking work *Pedagogy of the Oppressed*.¹⁰⁰ The very title challenges the origin and pillars of legal education. Critical pedagogy seeks to develop peoples' awareness of how they are in the world and how they are with the world.¹⁰¹ Paulo Freire eschewed the notion of innovative pedagogy, especially as it is used to perpetuate elitism and exclusion. Instead, his vision of critical pedagogy seeks to emancipate students by challenging and inspiring them to engage, critique, and reflect upon the world and their position in it.¹⁰² Freire's critical pedagogy praxis seeks to engage students in negotiating the world by identifying, naming, exposing, and engaging tensions and contradictions inherent in the ongoing relationships between the oppressed and the oppressor.¹⁰³

98. *Id.*

99. *Id.*

100. PAULO FREIRE, *PEDAGOGY OF THE OPPRESSED* (Myra Bergman Ramos trans., 50th anniv. ed.) (2018).

101. *See id.* at 106.

102. *See id.* at 104.

103. *See id.* at 143–44; *see generally* Robert J. Razzante and Breanta Boss, *DEI in the Legal Profession*, 2022 UTAH L. REV. 785, 795 (2022) (application of critical pedagogy in preparing law students for the entry into the legal profession, by engaging, for example, with “tool[s] to facilitate conversations . . . [about] case law [that interrogate] instances in which dominant social groups have leveraged their privileges to shape legal institutions” and the impact of that shaping on society).

In the Introduction to the “50th Anniversary Edition” of *Pedagogy of the Oppressed*, Donald Macedo shares that:

[T]he central goal of Freire’s [work] is to awaken in the oppressed the knowledge, creativity, and constant critical reflective capacities necessary to unveil, demystify, and understand the power relations responsible for their oppressed marginalization and, through this recognition, begin a project of liberation through praxis which, invariably, requires consistent, never-ending critical reflection and action.¹⁰⁴

Three points in this summarization of Freire’s work have significance and relevance for legal education and the legal academy. First, Freire references an “awakening” within the oppressed. The implications of narrative are monumental in that it functions as the antithesis to elitism upon which legal education and the legal profession were built.¹⁰⁵ It contests the notion that those who have been relegated to lower positions on, say, a racialized, gendered hierarchy by the DWSICP do not have the capacity to be part of the teaching and learning enterprise in law schools. Next, the application of critical pedagogy has the capacity to make plain that one can excavate the hidden systems and constructed knowledge about how law shapes and is shaped by society as a tool of oppression to control and dominate the oppressed. And third, critical pedagogy presents an emancipatory framework for locating the oppressed as vital contributors to legal praxis through co-creation of more just, equal, and fair frameworks in support of humanity.

Law schools and the legal academy have a special duty to embed institutional antiracism and critical pedagogy now in order to resist the existential threat to democracy, the assault on the rule of law, and the annihilation of any chance at a social order premised on equality, justice, and fairness.¹⁰⁶ These specific institutions are foundering, from pre-law school entry points to the Supreme Court of the United States, because people do not trust them.¹⁰⁷ For the oppressed in American society, this is nothing new; but for

104. See Donald Macedo, *Introduction to the 50th Anniversary Edition*, in FREIRE, *supra* note 95, at 2.

105. See *id.* at 71.

106. See Danielle M. Conway, *The Assault on Critical Race Theory*, 66 ST. LOUIS UNIV. L.J. 707, 711 (2021); Conway, *Antiracist Lawyering in Practice*, *supra* note 2; see also Erman, *supra* note 15, at 1191–92.

107. Kromydas, *supra* note 12, at 3 (“The purpose of education and its meaning in contemporary western societies has been also criticized . . . , suggesting that education has become a contradictory notion that leaves no space for emancipation since it gives no opportunity for improvisation to students[,] [staff, and faculty]. Thus, the students[, staff, and faculty] feel encaged within the system instead of being liberated [Accordingly, scholars have articulated] the need for recalling the basic notions of education . . . and that education should be integrated by both inculcation and emancipation in order to serve individual intellectual development as well as social progression.”) (citations omitted); *id.* at 6 (noting that scholars have found that the “expansion of higher education has increased income inequality and the aggravation of racial, gender, and class differences” and that “there has been a misrepresentation of the basic notions that characterize the purpose of education, such as critical thinking, justice and equity” and calling attention to the need for “radical structural reform on educational systems worldwide, where the relationship between various social communities and the state is based on social justice and not on power.”); *id.* (scholars have expressed “that the focus on corporate interests in policy making in the US has transformed higher education into a caste

those who believe themselves liberal, fair, and antiracist, the reckoning is real and the crisis looms. Those oppressed by the DWSICP in America have experienced law as a tool of oppression, which directly bears on its illegitimacy in promoting democratic institutions and ideals.¹⁰⁸ To rebuild trust in this nation's democratic institutions, legal education, the legal academy, and the legal profession must engage a value system and proposition that disrupts and dismantles racialized, gendered, and oppressive hierarchies.

The combination of institutional antiracism and critical pedagogy in the teaching and learning in law schools establishes an environment distinct from the origins of formal legal education. Contrary to the banking system of education in law schools, which thrived on a scientific approach to legal instruction whose desired outcome was hyper-specialization serving as an instrument scaffolding socially constructed elitism,¹⁰⁹ critical pedagogy is a

system that reproduces and also intensifies social inequalities.”); *see also* Onwuachi-Willig, *supra* note 12, at 192–97; *Students for Fair Admissions v. President & Fellows of Harv. Coll.*, 600 U.S. 181.

108. *See* Francisco Valdes and Sumi Cho, *Critical Race Materialism: Theorizing Justice in the Wake of Global Neoliberalism*, 43 CONN. L. REV. 1513, 1533–35 (2011) (“Law [has become] central to the consolidation of personal identities, social groups and larger communities into the modern nation-state, even as it is now central to the consolidation of nation-states into an increasingly globalized international socio-legal system, formally based on liberal democratic values, such as liberty, property, equality, dignity, and self-determination. Law, in short, consistently has been at the core of modernity’s constitution. But this historical process also exploited within and across the emergent nation-states the weaknesses of the human being. Laws repeatedly were crafted to prevent the individual human from fulfilling primal needs without paying a stiff price. So law was constructed to facilitate exploitation of the poor by the rich . . . even as the emergent ruling elites proclaimed commitments to diametrically opposite values, again like democracy, equality, and autonomy. Similarly, law was constructed to facilitate the exploitation of the non-white by the white, and of the woman by the man, etc. *Overtly, law was a liberal and democratic force but covertly it was designed to produce and perpetuate particular systems of stratification and subordination.* This was ‘civilization.’ Today, we call it global neoliberalism. From this perspective, we might describe the twentieth century as the time during which humanity perfected its tools and techniques of oppression within the nation-state, and emplaced the conditions for the development of new tools and techniques suited to the imperatives of corporate globalization. During the twentieth century, crude tools like formal (neo)enslavement and explicit exclusion began to give way to the more sophisticated techniques that today travel under the banners of colorblindness (in legal discourses) and post-racialism (in popular discourses). Of course, the crudeness of those rudimentary tools lay in their bare and naked contradiction of the very essence claimed by the identity-obsessed elites of this nation-state for its unique national character: a democracy dedicated in fact to equal justice under law. Their crudity lay in their undisguised, unadulterated hypocrisy but, as such, they also testify to the power of ruling elites over this nation-state in cultural and material terms during those formative decades. It was this type of contradiction—a fundamental and gigantic contradiction—that enabled raced and gendered elites of past centuries simultaneously to proclaim and enact laws purporting noble purposes with systems and structures of outright subjugation and exploitation. This sort of gigantic contradiction—or hypocrisy—accounts for much of the grief and conflict in the histories that follow. This foundational and operational contradiction in the institutionalization of national law gave rise in the past few centuries to the idealized yet simultaneously corrupted form of the modern liberal democracy—corrupted by and because of the systemic, structural dissonance generated constantly by this kind of contradiction (and the imperative of maintaining their force materially and culturally in society).” (emphasis added) (footnotes omitted); *see also* Erman, *supra* note 15, at 1193.

109. Mecedo, *supra* note 104, at 26 (“[T]he dominant effects of the mechanistic ‘banking’ education inevitably create education structures that favor rote learning and necessarily reduce the priorities of education to the pragmatic requirements of capital, anesthetizing students’ critical abilities in order to ‘domesticate social order for [the banking system’s] self-preservation.’ At the other end of the spectrum, the domestication of the social order is achieved by an equally mechanistic approach to education for the rich via the

consciousness-raising pursuit. To reach what Freire called conscientization—the embrace of liberation and emancipation of the oppressed through direct engagement in dialogue—the “oppressed unveil the world of oppression.”¹¹⁰ This Freire describes as the awakening. Upon the awakening, the oppressed engage with praxis—a space in which reflection and action occur simultaneously—to perceive their reality and that of others to then understand the world in order to transform it.¹¹¹

This type of engagement between the DWSICP and the oppressed was never intended by legal education writ large, clearly by virtue of intentional exclusion of those outside of the DWSICP from partaking in apprenticeships or formal legal education.¹¹² The remnants of that exclusion persist and replicate themselves in modern legal education as illustrated by who is not in law school or the legal profession as compared to who has entry.¹¹³ Relatedly, the invention and expansion of the Socratic method and the case method within this exclusive sphere necessarily took on the attributes of study within a racialized, gendered hierarchy.¹¹⁴ For example, law faculty using both methods determined the appellate cases that would be studied. Law students learning through the lens of the authors of those cases and their perspectives and viewpoints reinforced these hierarchies. The theories and doctrines that shaped conventional understandings about “rational” and “objective” statements, analysis, and interpretation of law colored how justice and injustice would be experienced by those at the top of the hierarchy and those at the bottom, respectively. And, finally, rule synthesis, rule application, and case precedent determined how future cases and controversies would be decided in furtherance of the DWSICP. The use of these methods enshrined a worldview that catered to those allowed within the exclusive walls of formal legal education and centered law to promote their self-interested uses directed at scaffolding the DWSICP.

Critical pedagogy would seek to humanize legal education by engaging co-creation of both knowledge and pedagogy between and among those on the

hyperspecialization that, on the one hand, deposits high-level skills and, on the other, discourages the linkages of different bodies of knowledge in the name of ‘pure’ and specialized science that produces a specialist subject who . . . ‘knows very well his own tiny corner of the universe [but] is radically ignorant of all the rest.’”) (second alteration in original) (footnote omitted).

110. FREIRE, *supra* note 95, at 54 (The antithesis would be an “anti-awakening.”).

111. *See id.*

112. *See supra* notes 8, 29.

113. *See* AM. BAR ASS’N, *supra* note 60.

114. *See* Allen, *supra* note 65, at 606–07 (“Anti-Black racism is present in every aspect of American life including the legal academy. Thus, even in academic spaces, ‘to be [B]lack and conscious of anti-[B]lack racism is to stare into the mirror of your own extinction.’”) (quoting Ibram X. Kendi, *The American Nightmare*, ATLANTIC (June 1, 2020), https://www.theatlantic.com/ideas/archive/2020/06/american-nightmare/612457/?utm_source=copy-link&utm_medium=social&utm_campaign=share [https://perma.cc/6CWC-CW8G]) (alterations in original); *id.* at 607 (“[W]hen law is taught without regard to race and social context; . . . when whiteness is accepted as a norm, and when the application of law is regarded as race-neutral”, therein lies the racialized, gendered hierarchy embedded in the institution of legal education.).

oppressor–oppressed spectrum.¹¹⁵ This co-creation would address the tension, conflict, and division that comes from the DWSICP’s exploitation of power to fortify self-interest as against the oppressed, over whom dominion and control are exercised. Taking up antiracism and critical pedagogy simultaneously demonstrate the commitment to praxis that will set future lawyers on the path of liberation and emancipation through solidarity skills building in the mutual project of deploying legal education as a tool for all in becoming human within a truly democratic society.

Critical pedagogy insists on action, for reflection without action is merely performance. And performative, rote teaching supports the DWSICP status quo. Thus, action would include curating inclusive classrooms, co-creating knowledge among teachers and students that is supported by metacognition, opportunities for self-reflection, “after action” reviews, and growth-mindset orientation. Specifically, teaching and learning would become a joint endeavor between teacher and student. Creating problem-posing exercises to incorporate the lived experiences of all students then becomes a signifier of those experiences as sources of knowledge deserving of theorizing. Action would expose deprivation of access to the rule of law and justice and co-create needs-framing exercises that recognize that, yet again, the oppressed are sources of theorized knowledge. As well, action would include co-creating and then advocating in solidarity for narratives from the voices of the oppressed about what is lawyer–professional identity. Antiracism and critical pedagogy can be manifested in various other approaches including,¹¹⁶ but not limited to:

1. Teaching and learning with other disciplines (e.g., history, social sciences, etc.)
2. Collaborative design, network sharing and building, relationship-based coalitions
3. Engaging historicity and context in the teaching and learning of doctrine and skills

115. See FREIRE, *supra* note 95, at 54–55, 65; *id.* at 69 (“A revolutionary leadership must [] practice *co-intentional* education. Teachers and students (leadership and people), co-intent on reality, are both Subjects, not only in the task of unveiling that reality, and thereby coming to know it critically, but in the task of re-creating that knowledge. As they attain this knowledge of reality through common [meaning the act of being in common, i.e., together] reflection and action, they discover themselves as its permanent re-creators. In this way, the presence of the oppressed in the struggle for their liberation will be what it should be: not pseudo-participation [i.e., performative], but committed involvement.”).

116. See Leslie P. Culver & Elizabeth Kronk-Warner, *#IncludeTheirStories: Rethinking, Reimagining, and Reshaping Legal Education*, 2022 UTAH L. REV. 709, 712–13 (2022); L. Danielle Tully, *What Law Schools Should Leave Behind*, 2022 UTAH L. REV. 837, 882–885 (2022); Phyllis C. Taite & Nicola “Nicky” Boothe, *Teaching Cultural Competence in Law School Curricula: An Essential Step to Facilitate Diversity, Equity, & Inclusion in the Legal Profession*, 2022 UTAH L. REV. 813, 825–34 (2022); Anastasia M. Boles, *Pivoting Under Pressure: Cultural Proficiency, Race, and Reforms*, 2022 UTAH L. REV. 871, 874–78, 881 (2022).

4. Engaging inclusive wellbeing across the curriculum and across the institution
5. Democratizing the relationship of the lawyer with the community and with clients
6. Engaging systems design in developing problem-posing as opposed to exclusively problem-solving processes and methods

Because of the centrality of race to the founding of this nation and to its construction of laws that shape and are shaped by society, legal education, the legal academy, and the legal profession must acknowledge the necessity to engage with the social reality of race and racism as legal canon.¹¹⁷ By connecting interdisciplinary boundaries, members of the legal profession develop expertise about how race is socially constructed, how social realities exist, and how these components erect a social structure.¹¹⁸ Social reality means after racial identities are ascribed, those identities are subject to real effects.¹¹⁹ For example, the social reality in America is that racialized social structure awards systemic privileges to whiteness, while simultaneously penalizing those outside of the sphere of whiteness.¹²⁰

If antiracist lawyering is to be understood and undertaken, new entrants to the legal profession as well as its existing members must become critical thinkers about race and racism and how the latter evolves, mutates, and transforms. The critical study of race and racism does not command adherence to an ideology; instead, critical study requires members of the profession to engage in meaningful dialogue about how they are in the world and how they are with the world in a discipline that has an oversized impact on the social, civil, political, and economic direction of society.¹²¹ The objective is to become more aware and more reflective of the social realities impacting the most vulnerable among us until that vulnerability is shouldered by all of us.

Antiracist lawyering, developed through embedding antiracism and critical pedagogy, does not require suspending the use of existing skill sets such as comprehensive research and critical thinking to address the effects of social structures. In fact, antiracist praxis leverages these skills as complementary to the knowledge acquisition that is necessary to perform antiracist lawyering. Examples of antiracist lawyering can include litigation, judicial decision making,

117. See BONILLA-SILVA, *supra* note 76, at 2–8 (describing and theorizing Jim Crow racism, color-blind racism, symbolic racism, laissez-faire racism, and structural racism).

118. See *id.* at 8.

119. See *id.*

120. See *id.* at 9.

121. See BELL HOOKS, *TEACHING TO TRANSGRESS: EDUCATION AS THE PRACTICE OF FREEDOM* 14 (Routledge 1994) (explaining the philosophy of praxis to be “action and reflection upon the world in order to change it”).

legislative drafting and rulemaking, and advocacy. These spaces are ripe for formulating antiracist legal strategies, arguments, and policies.

Law school leaders can build expertise with institutional antiracism and critical pedagogy by developing concrete historical understandings of how racism shapes legal education and the legal profession and how these methods can disrupt systematic inequalities in the law. Leaders can work with students, staff, faculty, and administrators to build sustainable courses that encourage co-created knowledge about the pervasiveness of race in the founding and evolution of law in this nation, and then take strides by developing degree, course, programmatic, and extracurricular spaces to allow the teaching and learning community to develop language, comprehension, and action to deepen discourse and to theorize from lived experiences. The law school is then a resource for teaching and learning delivered with the expectation that experimentation with curricular strategies and content drawing on antiracist theories structured around all lived experiences becomes the norm. Teaching and learning steeped in institutional antiracism and critical pedagogy expand the notion of meaningful contributions by all stakeholders in the community, thereby making the curriculum and the problem-posing a joint exercise accountable to the collective. With this collective investment in curriculum and programming, students as well as faculty, for example, become invested in the theorizing and begin to see themselves as co-creators of knowledge ready to serve as the next generation of Founders and Framers to whom the baton has been passed. These next-gen Founders and Framers will be charged to take up the responsibility to center and recenter the Fourteenth Amendment's blueprint for institutional antiracism with the goal to expand and improve on equality and justice for all.

CONCLUSION

The premise of Quantum Leap is to learn from the mistakes of the past and take action for a better future. This requires reckoning with that past, especially in law, to bring forward knowledge to be used in the present and for the future to structure a new and better democracy. That knowledge is not meant to be sequestered or shelved. Instead, that knowledge is meant to be the basis of liberatory and emancipatory action. Institutional antiracism and critical pedagogy provide opportunities to free our society by practicing freedom in legal education. This freedom from oppression depends on decentering norms that focus on the interests of the DWSICP. Legal education can no longer afford to reproduce racialized, gendered, and unjust intersectional hierarchies at the expense of a democracy that was intended by the Second Founding to be a reboot toward making progress as the first multiracial, multiethnic, multicultural, and intersectional society. The interlocking crises that are causing deep fissures in our democracy have and continue to reverberate wildly in our

law spaces then and now. This is the time to acknowledge, to teach and learn, and to act to course correct our nation, starting with the lawyers. Our institutions will only achieve their democratic purpose by engaging antiracism unapologetically in pursuit of equality and justice for all.