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The Soft-Shoe and Shuffle of Law School Hiring Committee Practices¹

Carliss N. Chatman and Najarian R. Peters

“The way to right wrongs is to turn the light of truth upon them.”²
—Ida B. Wells

ABSTRACT

It is in the spirit of Ida B. Wells that we seek to turn the light upon the systemic racism of hiring practices. We believe these practices are indicators of the systemic failures on campuses and in workplaces that prevent them from being antiracist. We seek to use this Essay as a “tool for exposing, analyzing, and challenging the majoritarian stories of racial privilege.”³

Our specific intention is to recognize the largely performative nature of claiming to be committed to an idea while substantively and concretely ensuring the opposite. This Essay is written with specific experiences, patterns, and practices in mind that are directly connected to broader contexts and phenomena. The data and trends on law school faculty hiring, and on the performance of students of color in law school and on bar exams show that acts of discrimination are often obscured by the outcomes of systemic oppression misconstrued as academic achievement.⁴ We wrote this not in the often fraught and silencing tradition of typical legal scholarship; but instead drew from diverse

1. This title references the tradition of minstrelsy, which included both performances by Black actors in stereotypical roles and the use of blackface by white actors. See Kimmika Williams-Witherspoon, *Blacks on Stage: Are We Still Replicating Stereotypes From the Legacy of Minstrelsy*, PRAXIS: J. FOR THEATRE, PERFORMANCE STUD., & CRITICISM, Jan. 17, 2013 AT 1.

2. While documenting the horror of lynching through her writings in *Free Speech and Headlight*, Ida B. Wells faced death threats and numerous attempts to silence her crusade for truth. She lived her life according to a maxim that is as important today as it was in 1892.

3. Daniel Solórzano & Tara J. Yosso, *Critical Race Methodology: Counter-Storytelling as an Analytical Framework for Education Research*, 8 QUALITATIVE INQUIRY 23 (2002).

4. In *The Market for “Lemons,”* George A. Akerlof posits that the decision not to hire minorities for certain types of jobs “may not reflect irrationality or prejudice—but profit maximization. For race may serve as a good statistic for the applicant’s social background, quality of schooling, and general job capabilities.” Akerlof suggests that “good quality schooling,” as opposed to “slum schools” could serve as a substitute for race as a statistic. George A. Akerlof, *The Market for “Lemons”: Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488, 494–95 (1970).



traditions that center narrative, storytelling, and satire (both classical and modern). We wrote this to speak truth to who we are, the roles played, and compromises made.⁵

Most of all, we wrote this with students in mind. Students are very involved on their campuses and contribute an immense amount of time and effort listening to law faculty candidates. Students speak up when faculty use their teaching platforms to espouse harmful rhetoric and when decisions disproportionately and negatively harm marginalized people. Marginalized students often lead the service and contributions on these issues, while also dealing with the everyday challenges law school presents to the average law student. We want students to know that we hear them and see them. We also want students to know that the burden of these structures is not theirs to carry. We hope that by illuminating faculty recruiting and hiring practices we can empower students to refocus and conserve their energy. Ill-conceived meetings and discussions called by administrators and faculty are distractions that devour precious time. All of our students' time and energy matter because their lives matter.

We recognize but do not accept or assume the risk in writing this Essay. We have thought about and have been reminded of how we may face retaliation and other insidious responses. We do not know any Black or otherwise marginalized person in the legal academy whose silence or complicity has allowed them to escape these kinds of harms. Could writing this create more or intensify those barriers? Certainly. But that is why we have said we acknowledge but do not accept or assume the risk.

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5. See, e.g., Margaret E. Montoya, *Mascaras, Trenzas, y Greñas: Un/Masking the Self While Un/Braiding Latina Stories and Legal Discourse*, 15 CHICANA/O-LATINA/O L. REV. 1 (1994).

“We have too many Black and Brown faculty,” said no one ever at any law school. Each year we sit in appointments discussions and hear the same things. The classics—oldies but goodies—from appointments committees are:

- “We can’t find any qualified Black candidates.”
- “There weren’t any in the Faculty Appointments Register (FAR)⁶, we scoured websites and emailed our Black friend yet found no one.” One of our colleagues actually lifted a large binder filled with leaflets from the FAR from one year over her head with both hands and waved it side to side to punctuate this very point in a faculty meeting. Everyone around the room including the Brown and other nonwhite faculty shook their heads in agreement, co-signing. Seeing this made one of us wonder whether the FAR binder was some kind of Bible or holy text, the girth of which triggered an irrational response or hypnosis to accept the rhetorical fuckery that proceeded the lift: Like that table of manila folders⁷ filled with paper that former President Trump used in a press conference to prove he had turned over control of his businesses to his sons or that weird blank book that Trump’s press secretary Kayleigh McEnany gave *60 Minutes* reporter Leslie Stahl.⁸
- “This white candidate is less qualified than all the Black candidates, but [the white candidate] is more interested and a better cultural fit.”
- “Yes, the Black candidate is a Rhodes Scholar with a JD/PhD, but pedigree doesn’t matter for this position. I didn’t even notice where they went to school.”

6. The Faculty Appointments Register (FAR) is produced by the American Association of Law Schools (AALS). It is the primary source of information law schools use to identify potential candidates for entry-level positions. It is an online database where candidates submit their application information, and it produces a one pager of information about the candidate, with hyperlinks to supporting material. The AALS manages the database and only the participating schools have access to the information. The Faculty Recruitment Conference (FRC) is a three-day event in the fall at which law school recruitment teams interview the candidates they are considering. Some schools opt to skip the FRC and interview candidates virtually.

7. Jonathan Lemire, *What Was in Those Folders at Donald Trump’s Press Conference?*, BOS. GLOBE (Jan. 12, 2017, 7:32 PM), <https://www.bostonglobe.com/news/politics/2017/01/12/what-was-those-folders-donald-trump-press-conference/BVq5qgRjAKk2rplCgQEOTN/story.html> [https://perma.cc/YR52-VYAH].

8. Philip Bump, *President Trump’s Paper-Stack Politicking Makes Another Appearance*, WASH. POST (Oct. 21, 2020, 1:14 PM), <https://www.washingtonpost.com/politics/2020/10/21/president-trumps-paper-stack-politicking-makes-another-appearance> [https://perma.cc/5QKX-4AU9].

- “But they probably won’t come here so we should go with the less qualified white candidate.”
- “We can’t expect everyone to understand how to teach in a culturally sensitive way.”
- “Maybe there aren’t any Black scholars for them to cite in their work, and if there are we can’t expect them to cite everything in one article.”

Legal academic hiring follows a script that is steeped in racist practices, because the legal academy is one of the last safe spaces for white supremacist ideas to flow freely under the cover of academic freedom and distorted First Amendment arguments.⁹ Around and around the tables of faculty meetings, heads nod in agreement to the delivery of a homily of regret, confounded but nonetheless resigned to the poised self-reverence that gives the straight-faced and well-meaning faculty the spine to say unspeakable things about how much they tried.¹⁰

They tried.

9. There are many examples of professors using racial slurs and other speech harmful to marginalized students in the classroom. See, e.g., Colleen Flaherty, *A Professor’s ‘Repugnant’ Views*, INSIDE HIGHER ED. (July 24, 2019), <https://www.insidehighered.com/news/2019/07/24/penn-law-condemns-amy-waxs-recent-comments-race-and-immigration-others-call-her> [<https://perma.cc/98L8-5NQD>] (discussing the comments of Professor Amy Wax and the university response). Many have expressed concern that espousing these words and conservative views will make professors victims of “cancel culture.” See John McWhorter, *Academics Are Really, Really Worried About Their Freedom*, ATLANTIC (Sept. 1, 2020) <https://www.theatlantic.com/ideas/archive/2020/09/academics-are-really-really-worried-about-their-freedom/615724> [<https://perma.cc/J6WN-CRXZ>].

10. For a sociological analysis of how affirmative action is practiced in academia, see Adalberto Aguirre, Jr., *Academic Storytelling: A Critical Race Theory Story of Affirmative Action*, 43 *SOCIOLOGICAL PERSPECTIVES* 319, 320, (2000):

First, the stock story “emphasizes the school’s benevolent motivation (‘look how hard we’re trying’) and good faith.” The law school faculty did appear to give the black lawyer a “serious” look, perhaps even more serious than they would a similarly qualified white lawyer. Second, the stock story lessens the possibility that the black lawyer’s “presence on the faculty might have altered the institution’s character, helped introduce a different prism and different criteria for selecting future candidates.” The law school faculty would rather continue to promote the belief that there are very few black lawyers available than assume responsibility for hiring one and altering the complexion of the faculty. Third, the stock story is neutral; “it avoids issues of blame or responsibility.” You cannot blame the law school for not trying to hire a minority person. In the end, the stock story justifies the majority’s view—“there are very few black lawyers out there so let’s not rush into something, let’s wait a while longer.” The wait is an excuse for not doing anything (citations omitted).

They tried—notwithstanding they invited only one Black person for a flyback.

They tried—by naming a hiring line¹¹ after the last nonwhite person who left the school and sought to fill only that line now with trips to the Faculty Recruiting Conference (FRC). It did not occur to them to just look for non-homogeneous (read: not all white) people to fill every open line. They did not see this line naming as microsegregation and definitely not as a form of segregationist tactics or racism. After all, how could white progressives and liberals be segregationists or racists?¹²

They tried—although the vast majority of current faculty do not have PhDs, Visiting Assistant Professorships, or fellowships, there is now an unspoken requirement to have one of these to teach law, unless the candidate is white, in which case all that matters is a desire to teach.¹³

They tried—but still retained the pedigree bias of law school attendance at the T-14—a bias that even those faculty, tenured faculty, and Deans who lack said pedigree still support.

They tried—although doors seem closed to nonwhite practitioners unless they are needed for adjunct positions or legal writing posts—because nonwhite practitioners cannot also be scholars in their minds.

They tried—even though they disregarded their own stated version of diversity and inclusion by hiring disqualified faculty who admit to avoidance, punting, or waiting for Black and Brown students to take the reins when “race” comes up in class.

11. A hiring line is a budgetary allocation for a faculty position.

12. See Eliza Shapiro, *How White Progressives Undermine School Integration*, N.Y. TIMES (Aug. 21, 2020), <https://www.nytimes.com/2020/08/21/nyregion/school-integration-progressives.html> [<https://perma.cc/2WMC-RGLR>]; John Blake, *How 'Good White People' Derail Racial Progress*, CNN (Aug. 2, 2020, 5:03 PM), <https://www.cnn.com/2020/08/01/us/white-liberals-hypocrisy-race-blake/index.html> [<https://perma.cc/QQ74-M2PH>]; Mimi Kirk, *When White Parents Won't Integrate Public Schools*, BLOOMBERG CITYLAB (JAN. 29, 2018, 7:15 AM), <https://www.bloomberg.com/news/articles/2018-01-29/why-white-parents-resist-school-integration> [<https://perma.cc/5ZPJ-RUMM>]. See also THOMAS C. LEONARD, *ILLIBERAL REFORMERS: RACE, EUGENICS, AND AMERICAN ECONOMICS IN THE PROGRESSIVE ERA* (2017).

13. There are reports online for most years of the hiring statistics of entry level candidates. See Brian Leiter, *2019 Entry-Level Hiring Report, the Results (Corrected & Updated, 6/6/19)*, <https://leiterlawschool.typepad.com/leiter/2019/06/2019-entry-level-hiring-report-the-results.html> [<https://perma.cc/9Z4H-NZL9>]. The 2020–21 hiring season data can be found in a living document on PrawfsBlawg, *Entry Level Hiring: The 2021 Report – Call for Information*, PRAWFSBLAWG (Mar. 1, 2021), <https://prawfsblawg.blogs.com/prawfsblawg/entry-level-hiring-report> [<https://perma.cc/3F8H-CX8K>].

They tried—even though they do not understand that race is always in class. It never leaves.

And yet, trying does not fail them when they successfully recruit all white men and women to a faculty that is already filled with all white men and women. They successfully cluster hire¹⁴ for cultural fit and the “good of the community.” A white male voice must be replaced with a white male voice—for the culture.¹⁵ There is succession inherent in that kind of investment because it ensures that the leadership of the future will be as white as the leadership of the past. The white cluster hire is a clear message of stasis, that the river will always be the same even as it changes—in fact, because it changes.¹⁶

Remember this: Even in a pandemic and during a time of racial unrest when it seems like everyone is looking for their Black Lives Matter hire, the pattern of hiring may in fact sustain business as usual as a salve and shield to keep the hordes away from doors of the ivory tower that would bring it down.¹⁷ “Look we hired a Black professor, and she is on the tenure track! Look we hired a Black dean, and she is a lesbian too!” Now queue in the barrage of photo-ops, banquets, and stories to broadcast and showcase

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14. Cluster hiring is hiring faculty groups to increase faculty diversity, or to build a cohort around interdisciplinary research on a particular topic across departments.
 15. Compare Tiffany D. Atkins, *#FortheCulture: Generation Z and the Future of Legal Education*, 26 MICH. J. RACE & L. 115, 122–37 (2020) (Advocating for the diversification of law schools to meet the needs of Gen Z students, Professor Atkins states: “To provide Gen Z students with a legal education that will enable them to make a difference for others—a need deeply connected to their motivators and beliefs—law school culture must shift. Reimagining, reconstituting, and reconfiguring legal education to create a culture of inclusion and activism will be essential and necessary. Engaging in this work ‘for the culture’ means getting serious about diversifying our profession by abandoning exclusionary hiring metrics, embedding social justice throughout the law school curriculum, and adopting institutional accountability measures to ensure that these goals are met.”), with Akerlof, *supra* note 4, at 494 (Stating that the decision not to hire minorities for certain types of jobs “may not reflect irrationality or prejudice—but profit maximization. For race may serve as a good statistic for the applicant’s social background, quality of schooling, and general job capabilities.”).
 16. The Greek philosopher Heraclitus is best known for the phrase “No man ever steps in the same river twice.” For a discussion of Heraclitus’s work, see Leonardo Taran, *Heraclitus: The River Fragments*, SOC’Y FOR ANCIENT GREEK PHIL. NEWSL. (Soc’y for Ancient Greek Phil., Rochester, N.Y.), Dec. 1989, at 12.
 17. Shahed Ezaydi, *The Stress and Frustration of Finding out You Are a Token Hire*, WIRED (Oct. 28, 2020), <https://www.wired.co.uk/article/token-hiring-blm-coronavirus> [<https://perma.cc/DJ94-3X8B>].

something that is nothing short of a moving performance and brief escape from business as usual. The word distraction comes to mind again.¹⁸

Business as usual means that there are always moving goal posts and shifting standards,¹⁹ undisclosed hiring criteria, and people who become part of the faculty in ways that are beyond the known “process.”²⁰ The secrecy of the appointments process keeps these practices in the shadows. To the extent that they did change, law firms, judges, and public interest employers did not abandon these practices by choice—their conduct was exposed as some of the most egregious and insidious forms of racist behavior—and there has been change at least on the surface.²¹ Legal academia has not had

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18. See Toni Morrison, *A Humanist View* 7 (May 30, 1975) (transcript available at https://www.mackenzian.com/wp-content/uploads/2014/07/Transcript_Portland_State_TMorrison.pdf [<https://perma.cc/5JHP-Q2S8>]) (“It’s important, therefore, to know who the real enemy is, and to know the function, the very serious function of racism, which is distraction. It keeps you from doing your work. It keeps you explaining over and over again, your reason for being. Somebody says you have no language and so you spend 20 years proving that you do. Somebody says your head isn’t shaped properly so you have scientists working on the fact that it is. Somebody says that you have no art so you dredge that up. Somebody says that you have no kingdoms and so you dredge that up. None of that is necessary. There will always be one more thing”).
19. See Monica Biernat, Kathleen Fuegen & Diane Kobrynowicz, *Shifting Standards and the Inference of Incompetence: Effects of Formal and Informal Evaluation Tools*, 36 PERSONALITY & SOC. PSYCH. BULL. 855, 856 (2010), describing these phenomena of shifting standards as:
- [S]tereotypes operate as standards against which individual members of stereotyped groups are judged. Because standards differ for members of different groups, subjective evaluations of a man versus a woman or a Black [person] versus a [w]hite [person] are not directly comparable: “Competent” for a woman does not mean the same thing as “competent” for a man; “hardworking” does not mean the same thing when it is applied to a Black [employee] versus White employee. And because of stereotype-based low minimum standards for women and Blacks on such attributes, more evidence of competence or motivation is needed for them to confirm that they do, in fact, possess these qualities.
20. See Wendy G. Smooth, *Intersectionality and Women’s Advancement in the Discipline and Across the Academy*, 4 POL., GRPS., & IDENTITIES 513, (2016); Meera E. Deo, *Trajectory of a Law Professor*, 20 MICH. J. RACE & L. 441, (2015); David B. Wilkins & Mitu G. Gulati, *Why Are There So Few Black Lawyers in Corporate Law Firms?: An Institutional Analysis*, 84 CALIF. L. REV. 493 (1996).
21. See AMERICAN BAR ASSOCIATION, *ABA PROFILE OF THE LEGAL PROFESSION*, 37(2020) (“The percentage of lawyers who are men and women of color—Hispanic, African American, Asian, Native American and mixed race—grew slowly over the past decade. Collectively, the number of lawyers of color grew less than 3 percentage points in the past 10 years, from 11.4% of all lawyers in 2010 to 14.1% of all lawyers in 2020, according to the ABA National Lawyer Population Survey. White men and women are still overrepresented in the legal profession compared with their presence in the overall U.S. population. In 2020, 86% of all lawyers were non-Hispanic whites, a decline from 89% a decade ago. By comparison, 60% of all U.S. residents were non-Hispanic whites in 2019. Nearly all

this illumination. Instead, white academics continue to hide behind the idea that their positions are special. Sometimes, other nonwhite faculty aid in this process by acting as gatekeepers who ascribe to the “we tried” ethos. They sometimes also assist in legitimizing the shifting standards approaches used for minoritized and marginalized candidates. This level of complicity may also entail the same nonwhite faculty refraining from using the same heightened standard for white candidates. The fix is in.

Perhaps the most ridiculous part of the soft-shoe and shuffle of legal academia is the delusion that it is actually sustainable when in fact it faces a crisis of legitimacy as the country continues to change demographically.²² It would be one thing if the shufflers were employing standards in a way that reflects some form of principled consistency. Instead, what actually happens is that a Black candidate is disqualified for being both under and overqualified by the same subjective gaze.²³ The absurdism of it all would be laughable had it not been so effective in the past. And yet, it is exactly their prior success and survival for far too long that has exposed these patterns and practices. Imagine if law school hiring committees were made to open their books and minutes on decisions made about Black candidates who were not hired in the past ten years. Imagine if the discussions exposed process manipulation and unspoken agreements where Black candidates were given a chance to interview, so the committee could check the box showing they tried, but determined that the candidates “just weren’t qualified,” or “as good as” the person the committee wanted in the first place.

These racist decisions last for generations. White academics—especially underqualified white academics—are unmovable. Academia is a revolving door for Black scholars who orbit from position to position in search of the least racist institution, always left with much to be desired. The South is everywhere and nowhere.²⁴ Legal academic hiring follows a script that is so predictable, each hiring season we can tell what our colleagues are going to say and do before they do it. Yet, each season, we are told that we

people of color are underrepresented in the legal profession compared with their presence in the U.S. population. For example, 5% of all lawyers are African American—the same percentage as 10 years earlier—but the U.S. population is 13.4% African American.”).

22. Atkins, *supra* note 15 at 122–37.

23. See Angela Onwuachi-Willig, *Complimentary Discrimination and Complementary Discrimination in Faculty Hiring*, 87 WASH. U.L. REV. 763, 791–93 (2009).

24. See Danielle Purifoy, *The South is Everywhere*, SCALAWAG MAG. (Mar. 18, 2019) <https://scalawagmagazine.org/2019/03/chocolate-cities> [<https://perma.cc/AL35-KJ3C>].

misunderstand racism—that no one has ill intentions. Schools just happen to hire Black candidates only one at a time, if any at all, while exclusively hiring white candidates in clusters. We often wonder: Is the only light in the appointments process a gaslight for most Black academics?

The hiring process is merely evidence of the breathtaking failure of diversity and inclusion in legal academia. This is because failure to achieve these goals is always an acceptable option met only with verbal regrets. We have yet to hear of someone who was fired because of unsuccessful or largely symbolic efforts around diversity and inclusion in legal academia. Instead, there are regular reports of Diversity and Inclusion Director firings and resignations.²⁵ These are typically for not aligning diversity and inclusion with campus culture—for refusing to make change slow and palatable to those in power. The expectation is to try, but never accomplish diversity, inclusion, and equity. The shape of the river in higher education is formed by a tradition of segregation and oppression—and traditions are to be honored, cherished, and changed only by force.

Diversity and inclusion in law schools is a way of talking and writing, but mostly theatre. There is always a litany of meetings and half-baked reporting—devoid of any process improvement or actual strategy. Schools host banquets, over-index photos of Black and Brown faculty and students well above the actual numbers, and organize panels. There are deprioritized agenda items that gain importance only in a crisis. Speakers—so many speakers. Trainings—ill-conceived and ill-received trainings. All this effort is for naught and mostly for show as fewer and fewer nonwhite faculty are hired outside of a small bubble of schools. The goal is to look like you care

25. See, e.g., Vanessa Miller, *New University of Iowa Diversity Head Resigns After Seven Weeks*, GAZETTE (Aug. 16, 2019 12:02 PM), <https://www.thegazette.com/subject/news/education/new-university-of-iowa-diversity-head-tajuan-wilson-resigns-after-one-month-20190815> [https://perma.cc/E6ZB-43PH]; Zaporah Price & Beatriz Horta, *"An Oppressive Status Quo": School of Nursing Director of Diversity, Equity and Inclusion Resigns as Student Frustration Mounts*, YALE DAILY NEWS (Oct. 23, 2020, 4:20 AM), <https://yaledailynews.com/blog/2020/10/23/an-oppressive-status-quo-school-of-nursing-director-of-diversity-equity-and-inclusion-resigns-as-student-frustration-mounts/> [https://perma.cc/83WT-YADJ]; Joe Killian, *Darrell Allison, Chair of Racial Equity Task Force, Resigns From UNC Board of Governors*, PROGRESSIVE PULSE (Sept. 30, 2020), <http://pulse.ncpolicywatch.org/2020/09/30/darell-allison-chair-of-racial-equity-task-force-resigns-from-unc-board-of-governors> [https://perma.cc/T5WW-MZB6]; Elyssa Cherney, *Citing a "Toxic Atmosphere," a Black Admissions Employee Resigns From Loyola University, Prompting a Discrimination Probe and Calls for Racial Justice on Campus*, CHI. TRIB. (Oct. 15, 2020, 3:47 PM), <https://www.chicagotribune.com/news/ct-loyola-university-chicago-racism-complaint-20201015-v4jnl55c5bgbjp2faokehw5itq-story.html> [https://perma.cc/357H-LRTH].

about diversity and inclusion without ever making any real and sustainable change. Besides, if racism was an issue on hiring committees how could we have jobs, right?

To explain this failure—never named, never accounted for, never seen as it is—is to acknowledge that it is actual harm. Diversity and inclusion is harm at inception—at naming—because it is another form of segregation. It repeats the historic pattern of white people, mostly men, deciding when others may have access and individual crumbs, but not exactly equality. Equality is never given. White moderation is the ultimate and strongest form of white supremacy because it has never been checked, challenged, or cut down.²⁶ Diversity and inclusion fits the pattern of moderation—putting the focus on extreme acts and using them to deflect the pervasive and lasting causes of actual harm.²⁷ Diversity and inclusion, like all acts of compromise and moderation, is an inherent stasis of homogeneity with the deprioritized afterthought of looking around and asking: “Who are we missing now that we are all here (and now that the world tells us we should act like we care?)” White supremacy reincarnated as white moderation reveals the Hydra²⁸ that grows stronger when it is cut back. Moderation fueled by diversity and inclusion is a head of the Hydra that has made white supremacy more harmful and insidious on campuses as it drives discrimination just beneath the surface by those who we call and call themselves allies.

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26. Martin Luther King, Jr., *Letter From Birmingham Jail*, 212 ATL. MONTHLY 78 (1963).
27. See Roy L. Brooks, *Life After Tenure: Can Minority Law Professors Avoid the Clyde Ferguson Syndrome*, 20 U.S.F. L. REV. 419 (1986); William A. Smith, Man Hung & Jeremy D. Franklin, *Racial Battle Fatigue and the MisEducation of Black Men: Racial Microaggressions, Societal Problems, and Environmental Stress*, 80 J. NEGRO EDUC. 63, 65–8 (2011); Arline T. Geronimus, Margaret Hicken, Dana Keene & John Bound, “*Weathering*” and Age Patterns of Allostatic Load Scores Among Blacks and Whites in the United States, 96 AM. J. PUB. HEALTH 826, (2006); Ashley S. Felix, Robert Shisler, Timiya S. Nolan, Barbara J. Warren, Jennifer Rhoades, Kierra S. Barnett & Karen Patricia Williams, *High-Effort Coping and Cardiovascular Disease Among Women: A Systematic Review of the John Henryism Hypothesis*, 96 J. URB. HEALTH S12 (Suppl 1 2019); James Hamblin, *Why Succeeding Against the Odds Can Make You Sick*, N.Y. TIMES (Jan. 27, 2017) <https://www.nytimes.com/2017/01/27/opinion/sunday/why-succeeding-against-the-odds-can-make-you-sick.html> [<https://perma.cc/YE8U-DK37>]; Darrell L. Hudson, Harold W. Neighbors, Arline T. Geronimus & James S. Jackson, *Racial Discrimination, John Henryism, and Depression Among African Americans*, 42 J. BLACK PSYCH. 221 (2016); Kathleen C. Light, Kimberly A. Brownley, J. Rick Turner, Alan L. Hinderliter, Susan S. Girdler, Andrew Sherwood & Norman B. Anderson, *Job Status and High-Effort Coping Influence Work Blood Pressure in Women and Blacks*, 25 HYPERTENSION 554 (1995).
28. The Hydra in Greek mythology was a gigantic watersnake-like monster with nine heads, one of which was immortal. Anyone who attempted to behead the Hydra found that as soon as one head was cut off, two more heads would emerge from the fresh wound.

There is something probative here. There is something unmysterious, yet nothing short of a conjuring—a great spiritualism that is the belief in this repetitive trying and failing. It is sacrament and ritual bound in what can be understood only as faith. Meditation and mantra—the same reasons, the same excuses, the same heads nodding in agreement, the same communion²⁹—followed by acts of assuagement and crumb-like sustenance after sin to transubstantiate betrayal after betrayal into relief after an incident, to help people process, and to appear to address the problem without actually addressing it:

a Black visiting professor

a new diversity administrator (sans actual power to do anything beyond the annual diversity celebration and advising of affinity groups)

a new award to a nonwhite alum

a nonwhite graduation keynote

At the worst end of the spectrum is the invocation of Black trauma veiled as attempts to educate. Presentations on lynching, or discussions of slavery highlight the harm to the victims without naming and placing appropriate blame on the perpetrators. We, as Black faculty, are expected to lead these discussions, to share our personal encounters with racism, to give our white colleagues an opportunity to publicly shed empathetic tears and feel better about themselves without ever having to do more than try to change. These events are gruesome, ghastly, triggering, and held to prove that the segregation of today is different, better, or even nonexistent when compared with the violence of the past. Because white supremacy was not eradicated with empty and largely performative integration, the Hydra continues to thrive. Today's segregation persists because we call it diversity and inclusion.

29. The Eucharist, called Communion by some, is a central rite in all sects of Christianity. It commemorates Jesus's Last Supper with his disciples, at which he gave them bread with the words, "This is my body," and wine with the words, "This is my blood." The story of the institution of the Eucharist by Jesus on the night before his Crucifixion is reported in four books of the New Testament. *Matthew* 26:26–28; *Mark* 14:22–24; *Luke* 22:17–20; *1 Corinthians* 11:23–25. It is a memorial action in which, by eating bread and drinking wine (or grape juice), the church recalls what Jesus Christ was, said, and did. Participation in the Eucharist enhances and deepens the communion of believers not only with Christ but also with one another.

What does it mean to be a student in such places?³⁰ How do students navigate these hostile waters? We did not have to ask students; they told us just like generations of students told faculty and administrators before us. In the twenty years since we attended college and law school, absolutely nothing has changed about the Black student experience because the purpose of diversity and inclusion is to change just enough to maintain the status quo. This is what our students said³¹:

“As an African American law student at a predominantly white institution, I feel out of place and treated as an insular minority. During the admissions process we are highly sought after and made to believe that these environments are worth buying into. Upon starting, I was hit with the cruel realization that I belong to a marginalized group who, regardless of the level of professionalism portrayed within the institution, would be looked at as a target of hate and deceit. Every day is an uphill battle having to prove myself to my peers, trying to get them to recognize the concept of intersectionality, and having to combat their inherent biases. I never knew I would be taking on the role as an educator while struggling to grasp the concept of being a student. It’s essentially a hard job I’m paying into, just to be rewarded with a disregard relating to my personal autonomy.”

“White people in this country have a history of not doing the work but wanting all the reward. Law school is no different. During my

30. For a discussion of the views and expectations of Generation Z (students born between 1995 and 2010), see Atkins, *supra* note 15 at 122–37.

31. We have included anonymous comments from our students, but there are many public accounts available. See, e.g., STACY ANNE HARWOOD, SHINWOO CHOI, MOISES OROZCO, MARGARET BROWNE HUNTT & RUBY MENDENHALL, *RACIAL MICROAGGRESSIONS AT THE UNIVERSITY OF ILLINOIS AT URBANA-CHAMPAIGN: VOICES OF STUDENTS OF COLOR IN THE CLASSROOM* (2015); Kendra Fox-Davis, *A Badge of Inferiority: One Law Student’s Story of a Racially Hostile Educational Environment*, 23 NAT’L BLACK L.J. 98 (2010) (Fox describes the similarities between her father’s law school experience in 1967 and hers in 2006. Fox describes her experience of being in a racially hostile educational environment, specifically a required 1L class taught by a professor who argues that Black students are inferior and affirmative action results in unqualified Black students attending elite universities.). In recent years, law students have been more vocal in the face of discrimination on campus. See, e.g., UCLA Law Support Black Students, <https://uclalawprotectblackstudents.com> [<https://perma.cc/4ARU-R7EZ>] (documenting a campaign led by a group of Black students at UCLA School of Law in response to the administration’s failure to protect Black students from racist professors); Joe Patrice, *Law Professor Drops Racial Slur in Class Because Otherwise How Will Black Students Ever Learn About Racism?*, ABOVE THE LAW (Mar. 1, 2018, 9:55 AM), <https://abovethelaw.com/2018/03/law-professor-drops-racial-slur-in-class-because-otherwise-how-will-black-students-ever-learn-about-racism> [<https://perma.cc/QVA5-9Y9N>].

time at a predominately white law school, I experienced students of color going out of their way to fight for resources that are handed to white students. We fight for networking opportunities. We fight for financial aid. We fight for inclusive class discussion. And when it happens, the administration likes to rest on its laurels and attribute these wins to the school as a whole. In actuality, this is the doing of the students of color. The same students who are trying to excel in classes, organizations, journals, and clinics are the students who end up taking on the additional burden of making predominantly white law schools a better environment for students of color.”

“The law feels hopeless right now.”

Our students prove that time and mind spent in stagnant water is a great taking, usurpation, and plunder, and doing so by choice is self-mutilation. Every scenario steeps students and faculty of color in waters that just below the surface are no different than the environments navigated by our ancestors in higher education. We are granted entry with no other change, and that alone is believed to be evidence of progress. This is why we are told we should be happy to be here. It is ungrateful to expect a critical mass. We are unappreciative if we believe that someone other than a Black professor should care about how marginalized students are treated. We are not true scholars if we think freedom of speech does not give our colleagues the ability to use hate speech in the classroom.

Students also told us that administrators, counselors, and professors do not seem surprised when these things happen to them. That means the people they told knew and had heard these things before. Although some, for legal reasons, will deny knowing. They will punt and feign ignorance of patterns and practices that they may not have created but are all too willing to keep alive. They will watch in some vile cases, and with the help of overseers usher other Black and Brown people onto a hamster wheel and cycle of incident management that keeps the river the same.

Managing the river means paying for Black Law Student Association and Latinx Law Student Association banquets and Kente cloth donnings while courting donors at university sponsored cocktail hours who are anti-affirmative action. It means paying for salaries and flybacks of fewer and fewer nonwhite potential faculty. It means punting in faculty meetings. It

means hours of extra work for Black and Brown faculty who students feel they can trust to hear their stories and empathize.³²

Universities blame finances for the slow pace of progress. They are reliant on money from alumni who are against even the changes that allow the river to stay the same. Universities believe that the bird in the hand—the donations from bigoted alumni who fund their endowments—is a worthwhile exchange for the continued caging of Black and Brown students.³³ Alumni want to tread the same waters they remember fondly, to protect the culture and traditions they love, and universities are willing to accommodate. For racist alumni, college and law school were the last places they could be free of Title VII, sexual harassment policies, and other cultural and social advances that punish their worst instincts and habits. Their alma mater put all the burden on their victims and sheltered their worst behavior, so that they may go on to be successful captains of industry filling university coffers for years to come. So, these alumni give freely, and the universities rationalize the acceptance, saying they will use some of the money for recruitment purposes that will include Black and Brown students. This is the psychosis at its best: take money from racists to capture students who will be victimized by the legacy of institutional racism. And it works. Bad religion is a well-oiled machine.

What thinking motivates the straight-faced requests to recruit Black and Brown students to institutions that have insidious and subtle reputations of harming Black and Brown students? Who thinks doing so is ethical, knowing that capturing these students exposes them to pathological messaging that Black and Brown bodies should be grateful to be admitted because they are unqualified and do not deserve to be here? Here? To be grateful here means to be resigned to a particular kind of underdevelopment—a state of de-agency. The outsiders, deemed as such by the social construct of racial categorization designed historically to ensure exclusion, are admitted, then excluded

32. Renee Nicole Allen, *From Academic Freedom to Cancel Culture: Silencing Black Women in the Legal Academy*, 68 UCLA L. REV. (forthcoming June 2021) (framing the extra work Black women professors do as a Black tax they must pay to be in the academy).

33. This represents a strategic failure to convert marginalized students into donors. The narrative of Kwanza Jones and Jose Feliciano's donations to Princeton and denial of entry are illustrative of this phenomenon. See Kwanza Jones, *Prelude to an Open Love Letter to Princeton*, <https://kwanzajones.com/love-letter-to-princeton/> [<https://perma.cc/BB6Y-49S2>]; *A Gift of Belonging: KJSI Pledges 20 Million Dollars to Alma Mater Princeton University*, KWANZA JONES & JOSE E. FELICIANO SUPERCHARGED INITIATIVE, <https://jonesfeliciano.com/a-gift-of-belonging> [<https://perma.cc/45QZ-XZLH>].

through programs of diversity and inclusion. The river is the same because it is shaped by the same traditions and perhaps even the same intentions.

We are new to this. We have not been in academia for many years. We ask why is this still happening if people know it happens? Why is failure always an option if not *the* option? And why are we expected to help carry this burden that white people create on our faculties? Why are we expected to carry this burden in addition to the extra emotional labor we take on to support students who face and absorb daily microassaults and aggressions that our colleagues express great difficulty in recognizing as actual and genuine harm? What does it mean to be harmed in an environment where harm to you is unintelligible and unseen by the majority? What does it mean that when you seek to have your harm addressed you are seen as the aggressor and source of actual harm—the source of a great unsettling? We realize that it is frowned on to reject the harm, the seasoning process that should ensure we know our place. Only ceremonial agitations and acts of microresistance are permitted, like having a conversation, perhaps even a reading group, but nothing uncomfortable and nothing that could create change and prevent harm to Black and Brown students and faculty.

While we are new, what we know is that this river does not change by continuing to act as institutions have always acted. Half-hearted and incremental efforts make the Hydra stronger. The model of a homogenous group (with a few complicit nonwhites mixed in) trying and failing to become non-homogeneous, then rewarding themselves for the effort, is broken. It changes only when we start and successfully execute strategies that result in eliminating homogeneity inclusive of the entire community, with power sharing to match. That would require equity and justice. Misnomers of diversity and equity, diversity and inclusion, or diversity, equity, and inclusion are all shams and deep-shallow fakes³⁴—all invested in keeping the river the same, while using the cover of diversity, equity, and inclusion to draw Black and Brown students into the hostile waters. We do not have to be still and ignore the fact that we are in the same river where the water is foul and murky. There are better waters available to institutions, but more importantly to students and faculty, that are willing to make and live real

34. Deep-shallow fakes is a turn of phrase inspired by what is known as deep fake technology or deep-fakes. U.S. GOV'T ACCOUNTABILITY OFF., GAO-20-379SP, SCIENCE & TECH SPOTLIGHT: DEEPFAKES 1 (2020) ("Deep-fakes can depict someone appearing to say or do something they in fact never said or did.").

change. Sweet water goes down so easily. Sweet water is clear and when you are in it, you can see as much as feel your feet beneath you.³⁵

35. *Exodus 15:22-27* ("So Moses brought Israel from the Red sea, and they went out into the wilderness of Shur; and they went three days in the wilderness, and found no water. And when they came to Marah, they could not drink of the waters of Marah, for they were bitter: therefore the name of it was called Marah. And the people murmured against Moses, saying, What shall we drink? And he cried unto the Lord; and the Lord shewed him a tree, which when he had cast into the waters, the waters were made sweet: there he made for them a statute and an ordinance, and there he proved them, And said, If thou wilt diligently hearken to the voice of the Lord thy God, and wilt do that which is right in his sight, and wilt give ear to his commandments, and keep all his statutes, I will put none of these diseases upon thee, which I have brought upon the Egyptians: for I am the Lord that healeth thee. And they came to Elim, where there were twelve wells of water, and threescore and ten palm trees: and they encamped there by the waters.").