

The Practical Implications of Unexamined Assumptions[†]: Disrupting Flawed Legal Arguments to Advance the Cause of Justice

Teri A. McMurtry-Chubb^{††}

I. INTRODUCTION

At a point early in the first semester of my first year of law school, the entire 1L class gathered together for the last session of our mandatory legal reasoning course. We were a class of slightly more than 100 students with approximately 30 students of color, the majority of whom were African American. As per usual, most of us were seated in close proximity to one another. There was safety and security in our numbers, and we had tacitly and explicitly agreed to be vigilant for the inevitable racist comments that our White classmates had been making since orientation week. I recall the events of the day, a chain reaction of actions that unfolded like a piece of origami revealing creases and cracks in what had previously appeared to be a functional and cohesive law school educational experience. One of my African American classmates, “Charles,” raised his hand to address publicly the private comments of a

[†] Professor of Law, Mercer University Walter F. George School of Law. The author owes a debt of gratitude to Professors Lorraine Bannai and Anne Enquist at Seattle University School of Law. I intend this Article to be a continuation of the conversation they began in *(Un)Examined Assumptions and (Un)intended Messages: Teaching Students to Recognize Bias in Legal Analysis and Language*, as well as numerous conversations between us about the nature of privilege and power. 27 SEATTLE U.L. REV. 1 (2003).

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group of mumbling 1Ls, all of them White and in close proximity to him. Apparently, these mumblers wondered aloud, at low volume, about Charles' abilities to sit in the same room as them, in a seat they believed he had stolen from a more deserving White candidate.

In an act of bravery and hubris that only a brand new 1L could have mustered, Charles demonstrated that the key learning outcomes of our legal reasoning course had not been lost on him. He pointed out that all of us had gained admission to a public, land-grant university in a state where the majority of the residents were White. The institution was required by state law to admit 70% of its residents to the law school, leaving the remaining 30% of admissions slots for more competitive out-of-state candidates. Through a series of incisive points that shredded our classmates' unexamined assumptions, Charles built the argument that the 30 students of color in a class of slightly more than 100 had competed for admission in a more competitive pool than their in-state White counterparts. He continued in his reasoning that the White students, not the students of color, occupied seats that they did not quite deserve. As Charles concluded his remarks, the room fell silent and the professor dismissed us early. Our class would go on, like every other law school class, to grow together, fight together, and construct our professional identities in an environment where our right to occupy any of the seats available to us remained contested, in-flux, and constantly shifting. When I have encountered my White classmates elsewhere in the world, now established lawyers and academics, I have noticed their startled glances at my occupying seats next to them at national conferences, CLEs, and on hiring committees. I have experienced the uncomfortable laughter, the looks of incredulity tinged with bitterness that seem to ask how I graduated, how I got to where they are, and whether my presence in some way diminishes their accomplishments and makes mine meaningless.

This Article is an interrogation of the ongoing journey to belonging while simultaneously critiquing what it means to belong. It uses the law school classroom as a laboratory to study students' relationship with difference in their lived experience as law students, and in the professionalization and instructional experiences that train them to become practicing attorneys. The research detailed in this work considers the link between the unexamined assumptions students bring with them to law school about race, class, gender, and sexuality, and the flawed legal arguments students make based on those assumptions. Through an empirical study of students' motion and appellate briefs on issues involving affirmative action in law school admissions submitted in a required legal writing course, this work seeks to reveal how legal

education both prepares and fails to prepare students to represent diverse client groups in a manner that helps rather than harms. In doing so, it engages radical, critical pedagogies to: (1) reflect the inequities in the societal and educational environments that law students encounter; and (2) to dismantle the law school classroom as an incubator for professional practices that subvert the cause of justice.

II. TEACHING LEGAL WRITING AS A PRACTICE OF LIBERATION

Reading and writing are access points to literacy in any discipline.¹ The practice of legal communication is the demonstration of legal literacy and the exercise of power.² All legal writing is transactional, in that it facilitates action. When a lawyer writes a demand letter on behalf of a client, the recipient is faced with negotiating a settlement or proceeding to litigation. When a lawyer files a motion, she invites the court to take some action on her client's behalf. Wielding legal communication is the currency of law practice. How that practice is taught is the site of battle in the legal academy; the legal writing classroom is the battlefield. Traditionally, legal writing instruction has not escaped the debate plaguing writing instruction in the academy as a whole. The question persists as to whether writing instruction is a vehicle to simply represent disciplinary knowledge or a means by which to acquire it.³ Legal writing has been mistakenly viewed as “an anti-intellectual pursuit ancillary to the doctrinal study of law.”⁴

Legal writing is the only class in the legal academy consistently encapsulated in a “program,” administered by a director, and staffed primarily by contract faculty.⁵ Legal writing professors, overwhelmingly

1. TERI A. MCMURTRY-CHUBB, *LEGAL WRITING IN THE DISCIPLINES: A GUIDE TO LEGAL WRITING MASTERY* (2012).

2. See generally Kathryn M. Stanchi, *Resistance is Futile: How Legal Writing Pedagogy Contributes to the Law's Marginalization of Outsider Voices*, 103 DICK. L. REV. 7 (1998); see also Teri A. McMurtry-Chubb, *Still Writing at the Master's Table: Decolonizing Rhetoric in Legal Writing for a "Woke" Legal Academy*, 21 THE SCHOLAR (forthcoming 2019) (exploring how legal writing instruction supports student replication of inequities without giving them the tools to critique the process); Lucille A. Jewell, *Old School Rhetoric and New-School Cognitive Science: The Enduring Power of Logocentric Categories*, 13 LEGAL COMM. & RHETORIC: J. ALWD 39, 73 (2016) (“Expert advocates will choose language that will affect the shape of legal categories, assert control over legal texts, and influence the way that rules interact with facts on the ground.”).

3. Teri A. McMurtry-Chubb, *Toward A Disciplinary Pedagogy for Legal Education*, 1 SAVANNAH L. REV. 69, 74 (2014).

4. *Id.* at 76.

5. ASS'N OF LEGAL WRITING DIRS. & LEGAL WRITING INST. ANNUAL LEGAL WRITING SURVEY, REPORT OF THE 2016–2017 Survey 8, 11 (2017) [hereinafter ALWD/LWI Survey 2016–2017], <https://www.lwionline.org/sites/default/files/Report-of-the-2016-2017-Survey.pdf> [<https://perma.cc/J2BP-U4SX>]. Note: Most law professors of legal writing responsible for the first-year

women and overwhelmingly White,⁶ are often employed at a status lesser than tenure-track⁷ and have limited autonomy over the subject-matter of their classes.⁸ Far from the deafening siren-call of academic freedom, this lack of autonomy is a lullaby, urging legal academicians to marginalize legal writing in the curriculum and the women who teach it. This marginalization is not only the result of patriarchal hiring practices in the academy, but also the patriarchal ordering of the curriculum. Legal writing is “women’s work” and devalued, as it requires attentiveness to students, multiple assessments, and burdensome grading loads.⁹ It is also a feminized subject within the curriculum, seen as lacking the substance of the core “masculinized” 1L curriculum.¹⁰

Viewed as peripheral to the “substantive” law school curriculum, law students and non-legal writing faculty see legal writing as a transmission point for legal reasoning and analytical processes to law students—primarily as these tools serve writing exercises in other parts of the curriculum.¹¹ Patriarchy requires legal writing professors be treated the same, as servants to the substantive work of the academy, rather than as scholars and teachers of legal writing as a viable discipline in its own right.¹² Legal writing is rarely seen as a space to problematize legal

writing curriculum are employed under presumptively renewable 5-year contracts, which meet the requirements of ABA Standard 405(c). *Id.* at v, 11.

6. Teri A. McMurtry-Chubb, *On Writing Wrongs, Legal Writing Professors of Color and the Curious Case of 405(c)*, 66 J. LEGAL ED. 575 (2017); Lorraine K. Bannai, *Challenged X.3: The Stories of Women of Color Who Teach Legal Writing*, 29 BERKELEY J. GENDER L. & JUST. 275 (2014); Teri A. McMurtry-Chubb, *Writing at the Master’s Table: Reflections on Theft, Criminality, and Otherness in the Legal Writing Profession*, 2 DREXEL L. REV. 41 (2009).

7. ALWD/LWI 2016–2017 Survey, *supra* note 5, at 11.

8. Pamela Edwards & Sheilah Vance, *Teaching Social Justice Through Legal Writing*, 7 J. LEGAL WRITING INST. 63, 79–80 (2001); *see also* Kathryn Stanchi, *The Problem with ABA Standard 405(c)*, 66 J. LEGAL ED. 558 (2017) (detailing the lack of job stability and growth potential for law professors of legal writing).

9. *See, e.g.*, Kathryn M. Stanchi & Jan M. Levine, *Gender and Legal Writing: Law Schools’ Dirty Little Secrets*, 16 BERKELEY WOMEN’S L.J. 1, 5 (2001).

10. Deborah Jones Merritt & Barbara F. Reskin, *Sex, Race, and Credentials: The Truth About Affirmative Action in Law Faculty Hiring*, 97 COLUM. L. REV. 199, 258–68 (1997).

11. Legal Writing Directors routinely discuss how law school administrators place the responsibility for all student writing competencies in the curriculum on legal writing programs. Such competencies include exam taking, brief writing for moot court competitions, and essay exam strategies for bar passage.

12. *See* Linda L. Berger, Linda H. Edwards, & Terrill Pollman, *The Past, Presence, and Future of Legal Writing Scholarship: Rhetoric, Voice, and Community*, 16 J. LEGAL WRITING INST. 521 (2010) (charting legal writing as a discipline); Kristen Konrad Robbins, *Philosophy v. Rhetoric in Legal Education: Understanding the Schism between Doctrinal and Legal Writing Faculty*, 3 J. ASS’N LEGAL WRITING DIRS. 108 (2006) (examining legal writing as contextualized in rhetoric as a discipline and the problems this poses for law professors of legal writing); Michael R. Smith, *The Next Frontier: Exploring the Substance of Legal Writing*, 2 J. ASS’N LEGAL WRITING DIRS. 1 (2004) (detailing the disciplinary scholarship of legal writing).

language as a source of power,¹³ to study how lawyers create and employ analytical and reasoning processes in ways that preserve unequal power relationships. These processes, when left unchallenged, operate to enshrine the systemic inequities that undermine the cause of justice.

Thus, a legal writing classroom that operates as a place of liberation must expose the context in which writing instruction occurs and provide opportunities for students to grapple with the inequities that context creates. The legal academy is an elitist, classist space,¹⁴ further marred by structural inequality in hiring,¹⁵ student admissions,¹⁶ and curricular design.¹⁷ Legal writing occurs in this context, and is unique in that its particular curricular requirements allow a professor to create a litigation universe in which instruction occurs. In this sense, the legal writing classroom operates as a site to expose the inequitable context in which writing instruction occurs, a context mirrored by society as a whole, where students formulate unexamined assumptions based on race, class, gender, and sexuality. Simultaneously, it can engage critical pedagogies,¹⁸ to disrupt the flawed arguments that students make as a result of their unexamined assumptions, and teach them how to employ legal reasoning and analytic processes in the service of justice.

III. THE CONTEXT: RESEARCH OVERVIEW

Law professors have intermittently debated whether the core, mandatory law school curriculum is an appropriate place to raise issues

13. *But see* Stanchi, *supra* note 2; Lorne Sossin, *Discourse Politics: Legal Research and Writing's Search for a Pedagogy of Its Own*, 29 NEW ENG. L. REV. 883 (1995).

14. *See generally* WENDY LEO MOORE, *REPRODUCING RACISM: WHITE SPACE, ELITE LAW SCHOOLS AND RACIAL INEQUALITY* (2008).

15. *See generally* PRESUMED INCOMPETENT: THE INTERSECTIONS OF RACE AND CLASS FOR WOMEN IN ACADEMIA (Gabiella Gutierrez y Muhs et al. eds., 2012).

16. Eboni S. Nelson, Ronald Pitner, & Carla D. Pratt, *Assessing the Viability of Race-Neutral Alternatives in Law School Admissions*, 102 IOWA L. REV. 2187 (2017).

17. Alina S. Ball, *Disruptive Pedagogy: Incorporating Critical Theory in Business Law Clinics*, 22 CLINICAL L. REV. 1 (2015); Anibal Rosario-Lebrón, *If These Blackboards Could Talk: The Crit Classroom, A Battlefield*, 9 CHARLESTON L. REV. 305 (2015); Shiela I. Vèlez Martínez, *Towards an Outcrit Pedagogy of Anti-Subordination in the Classroom*, 90 CHI.-KENT L. REV. 585 (2015); SpearIt & Stephanie Smith Ledesma, *Experiential Education as Critical Pedagogy: Enhancing the Law School Experience*, 38 NOVA L. REV. 249 (2014); Marc-Tizoc González, *Education and Pedagogy: Counter-Disciplinarity in the Critical Education Tradition in Lat Crit Theory*, 8 SEATTLE J. FOR SOC. JUST. 107 (2009); Anthony V. Aliferi, *Against Practice*, 107 MICH. L. REV. 1073 (2009); Denise Pacheco & Veronica Nelly Velez, *Maps, Mapmaking, and Critical Pedagogy: Exploring GIS and Maps as a Teaching Tool for Social Change*, 8 SEATTLE J. FOR SOC. JUST. 273 (2009); Francisco Valdes, *Outsider Jurisprudence, Critical Pedagogy and Social Justice Activism: Marking the Stirrings of Critical Legal Education*, 10 ASIAN L.J. 65 (2003).

18. *See* Francisco Valdes, *Recalling Race, Gender and Sexuality: Outcrit Reflections on Legal Education, Social Identities and the "Rule of Law"—A Call Toward Collective Insurrections*, 5 GEO. J. GENDER & L. 881 (2004). Critical pedagogies include a range of feminist, anti-racist, anti-imperialist, anti-capitalist pedagogies, which are also collectively referred to as anti-colonial pedagogies.

of power and privilege.¹⁹ The debate itself is a function of power and privilege. Failure to problematize what is taught and how it is taught in the core curriculum ensures that the subject-matter and its attached pedagogies will remain normalized and regarded as neutral, even as they replicate systems of power and privilege. For this reason, I have constructed the required curriculum of my legal writing courses in a manner that invites students to struggle with their relationship to systems of power and their ability to replicate them as they learn legal analytic and reasoning processes. In each course, I employ situational/positional anti-racist and feminist pedagogies that aim to reflect the unexamined assumptions students make and employ in structuring legal arguments.

The course that is the focus of the research discussed in this Article covers the second half of the required year of legal writing. Its design seeks to expose students' situation/position in comparison to me (as an African American woman law professor and lawyer), each other (as law student peers and participants in our fictional law firm), and potential clients within a given set of parameters, namely the assignment requirements for each motion and appellate brief. The research I discuss in this Article is rooted in research that took place over a six-year period, and involves six case files that create a fictional legal universe in which students simulate the practice of law. Each case file tackles a social justice issue and requires students to grapple with their own implicit and explicit biases to make effective legal arguments. Students picked the side they wished to represent on a motion, and then switched sides when on appeal.

The following are brief descriptions of each litigation universe by topic, case file summary, and the social justice dilemmas it engages:

19. See, e.g., Kim Forde-Mazrui, *Learning Law Through the Lens of Race*, 21. J.L. & POL. 1 (2005).

Academic Year (“AY”) 2012–2013

Topic	Summary	Social Justice Dilemmas
Hostile Work Environment claim based on same-sex harassment and religion/national origin (Motion for Summary Judgment)	A Muslim-American man was harassed at work by a White male on or around the anniversary of 9/11.	The relationship of sex, sexuality, sexual orientation and identity performance in sexual harassment claims; choices involved in litigating discrimination using intersectional identity theories

AY 2013–2014

Topic	Summary	Social Justice Dilemmas
Indian Child Welfare Act case involving the adoption of Indian triplets to an African American family (Motion for Summary Judgment)	Mother and father of triplets were both members of the Georgia Tribe of Eastern Cherokee. Mother relinquished rights to children without formal consent of the father. The tribe intervened to block the adoption.	Federal tribal recognition vs. tribal and cultural identity; the role of historical memory in crafting legal arguments and reading legal precedent about Indigenous sovereignty

AY 2014–2015

Topic	Summary	Social Justice Dilemmas
Admissibility of rap lyrics in a criminal trial as proof of guilt (Motion in Limine; Motion to Suppress)	Member of a rap group and principal songwriter was accused of raping his ex-girlfriend. Prosecutor alleged that the lyrics to the song in question provided a script to the rape and served as an admission.	The effect of legal decisions on what constitutes culture; the legal and historical reasons African Diasporic cultural forms are criminalized; the connection of cultural criminalization to the prison industrial complex; evidentiary rules, the Fourth Amendment, and the perpetuation of racial stereotypes

AY 2015–2016

Topic	Summary	Social Justice Dilemma
Hostile Work Environment claim based on colorism and racial harassment (Motion for Summary Judgment)	Dark skinned Afro-Latinx woman harassed at work for failure to conform to European beauty standards.	Notions of professionalism as they collide with cultural norms; the effect of assimilation on workplace culture, job performance, and promotion

AY 2016–2017

Topic	Summary	Social Justice Dilemma
Freedom of Expressive Association claim brought by a student organization against a law school (Motion for Injunction)	LGBTQIA advocacy group limited full membership and leadership positions to monogamous homosexuals. School derecognized the group as a student organization on grounds that the membership policy discriminated against heterosexual, bisexual, transgendered, and gender non-binary students.	Student affinity groups and the limits of inclusion; the ability of school administrators to regulate group identity; decentering cis heterosexual identity; uncovering gender identity performance

AY 2017–2018

Topic	Summary	Social Justice Dilemmas
Challenge to law school legacy admissions policy on grounds that it created an impermissible, unconstitutional racial quota and unconstitutional race-conscious admissions for White students (Motion for Injunction)	African American male was denied admission despite admissions indicators that placed him in the top 3% of the admissions pool, while legacy admits were predominantly White and admitted with the lowest indicators of all members of the entering class over a seven-year time period.	Commonly held beliefs of who benefits from Affirmative Action policies; the role of race in legacy admissions policies; the university as a space to preserve and transfer wealth; class and perceived qualifications for law school admissions

I created each litigation universe based on issues debated on social media, news items, and concerns that students brought to me about

problems they encountered as they moved through their social and educational communities. Each case file consists of letters, e-mails, social media posts, depositions, discovery documents, pleadings, and multimedia items. In developing the case files, I cast the participants to a cause of action against stereotype and build detailed experiences in which they interact. The 2017-2018 case file on legacy admissions in law school is illustrative.

IV. THE CASE: LEGACY ADMISSIONS AS AFFIRMATIVE ACTION

Over the years, I have become increasingly concerned about the racial rhetoric around who belongs in law school and who does not, often expressed as “somebody took a seat” from someone more deserving. The “somebody” who “took the seat” is usually cast as a racial and ethnic minority. The “somebody” from whom the seat was taken is usually White. Framing law school admissions in this manner is detrimental to students’ physical, emotional, and psychological well-being.²⁰ Of note is the phenomenon “stereotype threat,” or the belief by a person with a stereotyped identity that they will in some way prove the stereotype if they fail to perform adequately in a situation that engages the stereotype.²¹ For example, African American students perceived as beneficiaries of Affirmative Action in an educational environment are stereotyped as socially and intellectually unqualified. Burdened with these stereotypes, African American law students may believe that poor grades or otherwise sub-par law school performance proves the worst stereotypes about the intellectual inferiority of African Americans.²²

In his foundational text on stereotype threat, *Whistling Vivaldi: How Stereotypes Affect Us And What We Can Do*, psychologist Claude Steele argues that conditions that limit or facilitate how a person moves throughout their life can be ascribed based on identity (i.e., race, class, gender, sexuality).²³ Communities organize around various identities, which express their history and the struggle between group members for resources available to community members to attain “the good life.”²⁴

20. CLAUDE M. STEELE, WHISTLING VIVALDI: HOW STEREOTYPES AFFECT US AND WHAT WE CAN DO 130–31 (2010); Sha-Shana Crichton, *Incorporating Social Justice in the 1L Legal Writing Course: A Tool for Empowering Students and Improving Learning*, 24 MICH. J. RACE & LAW (forthcoming 2019).

21. STEELE, *supra* note 20, at 5–7.

22. *Id.* at 48–54 (discussing stereotype threat with respect to Black students and graduate admissions testing); *Id.* at 53–59 (discussing stereotype threat as manifested in Black students during secondary school test performance).

23. *Id.* at 3.

24. *Id.*

Stereotypes attached to these identities determine what obstacles the community members who have them encounter when seeking the resources available to them.²⁵ The greater a person's perception that a stereotype will act to limit her access to resources, the greater the threat that stereotype poses.²⁶ When a person is placed in a situation where her performance, or lack thereof, can confirm a stereotype, she experiences the pressure of how confirmation could ultimately lead to lack of resources, which usually leads to her failure to perform up to standard.²⁷

From this vantage point, law school arguably is a community organized around White, male racial wealth identity.²⁸ As an institution, it reflects the history of its creation as a professionalizing space for White, wealthy males to preserve and perpetuate wealth, wealth transfer, and wealth distribution.²⁹ In this space, then, White male wealth is normalized as the established identity, one that carries with it positive stereotypes of worthiness and qualifications for success.³⁰ The addition of White women and people of color into law schools introduced the patriarchal institution to the societal battles over access to resources, such as educational and legal opportunity, and brought with it competing racial identities ordered in relation to elite White malehood.³¹ Within law schools, students struggle against and with each other for access to “the good life,” the route to which is made easier by high law school tier, high grades, and high class rank. Admissions are where the struggle for access to the good life begins. The rhetoric and action of who is worthy of a seat and who is not is organized, in part, around racial identity and its attendant stereotypes. For African American law students, the pressure not to confirm stereotypes of their unworthiness for admission and success is high and could lead to their underperformance in law school.

Steele posits that stereotype threats can be minimized by (1) a critical mass of community members to whom a negative stereotype is attributed, and (2) cues that reinforce identity safety—the idea that having a particular identity is not detrimental in a particular

25. *Id.*

26. *Id.* at 68–69.

27. *Id.* at 51–62, 74–76.

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

29. See Higdon, *supra* note 28; Jewell, *supra* note 28.

30. See, e.g., Lani Guinier, *Lessons and Challenges of Becoming Gentlemen*, 24 N.Y.U. REV. L. & SOC. CHANGE 1 (1998).

31. McMurtry-Chubb, *supra* note 3, at 76–78; Meera E. Deo et. al., *Struggles & Support: Diversity in U.S. Law Schools*, 23 NAT'L BLACK. L.J. 71 (2010); Russell G. Pearce, *White Lawyering: Rethinking Race, Lawyer Identity, and the Rule of Law*, 73 FORDHAM L. REV. 2081 (2005).

environment.³² My goal was to make my case file on legacy admissions such a cue—to inject doubt into all law students’ perceptions of their worthiness, or lack thereof, to occupy space in a law school classroom, and engage them in legal communication strategies that did not replicate stereotypes around law school admission and performance. Doing so was important not only for students as they navigated through law school, but also as future graduates who would interact with diverse client populations and serve as gatekeepers to hiring and promotion at their respective places of employment.

The law school in my fictional litigation universe is located in West Virginia. According to the 2010 census, the state demographics were as follows: 93.9% White; 3.41% Black; 0.67% Asian; 0.2% Native American; 1.2% Hispanic or Latino; and 1.46% two or more races.³³ The law school is an academic unit within a state land-grant institution and must accept the majority of applicants (60–70%) from West Virginia, which results in less stringent admissions standards for state residents. Accordingly, a disproportionate amount of admitted applicants are White and the majority of those reside in the State; non-resident admissions account for the non-White students in each entering law school class. Additionally, weight is given to legacy applicants, defined as those applicants with a relative who graduated from the law school and/or its attendant university. Because of admissions policies and state demographics, the majority of legacy admits are White. Legacy admits are admitted with lower Undergraduate Grade Point Averages (“UGPAs”) and LSAT scores than any other category of admits.

West Virginia was hit hard by the national economic downturn in 2008.³⁴ The law school suffered from declining admissions and an inability to place graduates in gainful employment. Thus, the president of the university, who was formerly the dean of its law school, gave the law school a mandate to increase alumni engagement and create opportunities for alumni giving. By 2010, the mandate impacted the law school’s admissions policies by shifting the focus to legacy admissions. The rationale behind the change in policy was that legacy admissions

32. STEELE, *supra* note 20, at 147–51.

33. *Population of West Virginia: Census 2010 and 2000 Interactive Map, Demographics, Statistics, Quick Facts*, CENSUS VIEWER, <http://censusviewer.com/state/WV> [<https://perma.cc/YR2H-7PZU>] (last visited Apr. 19, 2019)

34. *See West Virginia Poverty Rate Up, Has Not Decreased Since Great Recession*, W. VA. CTR. BUDGET & POL’Y (Sept. 13, 2018), <https://wvpolicy.org/west-virginia-poverty-rate-up-has-not-decreased-since-great-recession/> [<https://perma.cc/K7EU-S89B>]; Sean O’Leary, *Has the Recession Changed West Virginia’s Economy?*, W. VA. CTR. BUDGET & POL’Y (Aug. 12, 2010), <https://wvpolicy.org/has-the-recession-changed-west-virginias-economy/> [<https://perma.cc/AZL3-NJPX>].

would engender goodwill among university and law school alumni, which, in turn, would encourage them to monetarily support the institution and maintain its “core values.” Moreover, the pipeline of legacy admits would eventually create a larger donor pool. Since 2010, the target class size for entering 1Ls was 100 students. Because the law school consistently has a bar passage rate of 95% or more and is competitively ranked, it virtually assures an entering class with LSAT and UGPAs above the national average.

The university and law school are located in Harpers Ferry, West Virginia, the site of slavery abolitionist John Brown’s infamous raid on the federal arsenal. The admissions literature tells the story of a university built in 1850 by enslaved labor, recounts the events of John Brown’s raid, and boasts about its student chapter of the United Daughters of the Confederacy (est. 1902), which hosts an annual university-wide remembrance of Confederate Memorial Day on April 26. The university prides itself on its balance of Confederate and Unionist views from the time of the Civil War, as demonstrated by its racial affinity groups (i.e., the Black Law Students’ Association (“BLSA”); the National Asian Pacific American Law Student Association (“NAPALSA”); the Native American Law Students’ Association (“NALSA”); and the Chicano/Hispanic Law Students’ Association (“CHLSA”)). The university also awards scholarships to the descendants of coal miners to honor their sacrifices and contributions to the Industrial Revolution. This scholarship is specifically designated for the law school, and covers the cost of tuition, fees, books, and room and board for three years. It is awarded to West Virginia residents and non-residents, regardless of legacy status.

Xavier Benton, an African American male, is a resident of West Virginia. His father is a professor at the University of Maryland, and both of his parents are graduates of Howard University. Howard University is a public Historically Black College or University (“HBCU”). Had Xavier chosen to attend Howard University School of Law, he would have been a legacy applicant. He is not a legacy applicant at the West Virginia law school. When he applied to the West Virginia law school in 2015, he was employed as a Biomedical Engineer with a medical technology company.

Xavier graduated with honors from the chemical engineering program at Howard University, with a concentration in biotechnology and biomedicine. He was attracted to the law school because of its national recognition in Intellectual Property Law, and his desire to pursue a career as an intellectual property attorney. Despite his 3.75 UGPA, which was in 75th percentile of all applicants in the law school admissions

pool, and his 168 LSAT, also in the 75th percentile, he was not granted admission. After learning from his father about the weight given to legacy applicants in university admissions, he looked into the practice at the university and law school where he applied. Subsequently, Mr. Benton sued the university. In essence, his argument is that a legacy admit (a White person) took his seat.

In crafting Mr. Benton's narrative, I intentionally made him the beneficiary of a non-white educational system, an HBCU, both through his parents and as a graduate. My intention, in part, was to introduce students to the history of HBCUs as parallel knowledge networks to predominately and historically White institutions, the majority of which make up the colleges and universities in the United States. While this may seem like a small thing, many law students have no idea that HBCUs exist, no understanding of why they were founded, and no knowledge about the extensive professional and legacy networks of HBCU graduates.³⁵ I wanted the class to see Mr. Benton as product of privilege in his space, in contrast to what that meant for him as he entered a predominately White university and its law school.

V. PARTICIPANT DESCRIPTION AND METHOD³⁶

Participants in this study were first semester, second-year law students ("2Ls") enrolled in a required legal writing course. Students do not self-select the section of legal writing that they want, but are randomly assigned to a section by the law school registrar. From AY 2012-2018, each course enrolled 25-32 students. Each student was required to write a motion brief and appellate brief in a simulated practice environment. The complete data set for this study is approximately 192 students and 576 papers. During the semester where I implemented the legacy admissions case file, the class size was 28 and generated 84 motion and appellate briefs. Twenty-eight of those submissions were mandatory rough drafts of the motion briefs, and the remaining submissions were the

35. See, e.g., Mary E. Wright, *Single/Majority Race Charter Schools: Charting a New Course in the Aftermath of the Failed Mandates of Brown v. Board of Education*, 9 RUTGERS RACE & L. REV. 1, 15-18 (2007). Wright builds the argument that because of the persistence of *de facto* school segregation and the perceived inferiority of Black students, White students have little opportunity to interact with Black students or concern themselves with Black students' education. *Id.*; see also *High School Counselors and Their College Knowledge: A Sad State of Affairs for HBCUs*, MSI UNPLUGGED (Oct. 4, 2016), <https://msisunplugged.com/2016/10/04/high-school-counselors-and-their-college-knowledge-a-sad-state-of-affairs-for-hbcus/> [<https://perma.cc/4WHU-SSQT>] (noting the inability of high school counselors to provide individualized college counseling and information about HBCUs to prospective students).

36. The author received IRB approval for this project through the Mercer University Office of Research Compliance.

final work product for the motion and appellate brief assignments, respectively.

The course was guided by learning outcomes and performance criteria for each week, and the assessment criteria for each assignment were keyed to the learning outcomes and performance criteria. The assessment criteria were specific and governed by genre and discourse theory, theories that govern how written communication in a discipline is constructed (genre) and how that communication becomes a part of the major conversations practitioners are having in the discipline (discourse). Each assessment criterion was grouped according to the skills a student should demonstrate in constructing effective briefs. For example, students were assessed on how well they were able to build and utilize an analytical framework sufficient to resolve the legal issues in the brief in a manner favorable to their client. The students' work-product revealed their ability to build and utilize effective analytical frameworks in the face of their unexamined assumptions about the parties to the fictional cause of action.

The guiding methodology for this project is two-fold in its construction and draws from scholarship that explores: (1) writer acculturation through genre into a discourse community; and (2) the Color-Blind Racial Attitudes Scale ("CoBRAS").³⁷ Writer acculturation through genre into a discourse community concerns challenges to writers as they learn the norms and requirements of a discourse community (disciplinary community) that is new to them.³⁸ It seeks to measure how a writer, in constructing the various genres (pieces of writing) common to a given discipline (in this case, legal briefs), demonstrates socialization into the "institutionalized norms" of a discourse community by how they construct various parts of their writing.³⁹ The premise of this part of the methodology is that how a student constructs key parts of a genre reveals their level of socialization into the institutionalized norms of a discourse community—the student's "mastery of the community's linguistic, rhetorical, and topical conventions."⁴⁰

For this research project, I examined the "Argument" sections of student motion and appellate briefs. My aim was to ascertain the

37. Helen A. Neville et al., *Construction and Initial Validation of the Color-Blind Racial Attitudes Scale (CoBRAS)*, 47 J. COUNSELING PSYCHOL. 59, 61–62 (2000).

38. CAROL BERKENKOTTER ET AL., *The Initiation of a Graduate Student into a Writing Research Community*, in TEXTUAL DYNAMICS OF THE PROFESSIONS: HISTORICAL AND CONTEMPORARY STUDIES OF WRITING IN PROFESSIONAL COMMUNITIES 192 (Charles Bazerman & James Paradis eds., 1991).

39. *Id.*

40. *Id.*

relationship between how students drafted the Argument sections, and what their construction reveals about how students interpret, replicate, and reflect the institutionalized norms for legal reasoning and analytic processes. Because this study unsettles the norms of the legal academy as an institution, it further problematizes legal reasoning and analytic processes that reflect those norms as vehicles to replicate race, class, gender, and sexuality inequities—legally and societally.

The second part of the methodology, which utilizes the CoBRAS, provides an approach to investigate how the legal reasoning and analytic processes on display in the Argument sections of motion and appellate briefs demonstrate a student's unexamined assumptions about race, class, gender, and sexuality. CoBRAS is a scale developed by psychologists to measure "color-blind racial attitudes"—attitudes that suggest that a person's race is irrelevant to their experiences in the world. These attitudes are commonly expressed as "I don't see color."⁴¹ Psychologists have found color-blind racial attitudes detrimental to mental health.

As early as 1997, the American Psychological Association decried such attitudes as "[ignoring] research showing that, even among well-intentioned people, skin color . . . figures prominently in every-day attitudes and behavior. Thus, to get beyond racism and other similar forms of prejudice, we must first take the differences between people into account."⁴² Initial studies on color-blind racial attitudes showed that their existence indicates closely held racist beliefs.⁴³ The research findings that inform the CoBRAS development uncover color-blindness as a lens through which people view and interpret the world around them.⁴⁴ It also shows that color-blind attitudes are connected to race and gender biases.⁴⁵

Psychologists operated under the following assumptions in developing CoBRAS:

- (a) racism exists on structural and ideological levels; (b) racism creates a system of advantages for Whites, mainly White elite, and disadvantages for

41. Most recently Howard Schultz, the former CEO of Starbucks, came under fire for stating publicly that "I didn't see color as a young boy . . . [a]nd I honestly don't see color now." Eugene Scott, *Howard Schultz Said He's Colorblind. That Suggests a Deep Ignorance About America's Race Problems*, WASH. POST (Feb. 13, 2019), https://www.washingtonpost.com/politics/2019/02/13/howard-schultz-said-hes-color-blind-that-suggests-deep-ignorance-about-americas-race-problems/?utm_term=.e5c308a70201 [https://perma.cc/9SB2-QV58]; see also Zak Cheney-Rice, *Howard Schultz Doesn't 'See Color': History Doesn't Care*, N.Y. MAG. (Feb. 19, 2019), <http://nymag.com/intelligencer/2019/02/nobody-cares-howard-schultz.html> [https://perma.cc/F7JT-E76P].

42. Neville, *supra* note 37, at 60.

43. *Id.* at 60, 63, 66, 67–68.

44. *Id.* at 68.

45. *Id.*

racial and ethnic minorities; (c) denial of these realities is the core component of color-blind racial attitudes; (d) people across racial groups can maintain a color-blind perspective; and (e) color-blind racial attitudes are cognitive in nature; they are part of a cognitive schema used to interpret racial stimuli.⁴⁶

Utilizing empirical research, interdisciplinary scholarship, and expert advice, the CoBRAS creators generated the questions for the participants spanning five studies, whose answers would form the basis for and help to calibrate the scale.⁴⁷ They then grouped their findings in three factors for measurement: (1) Racial Privilege (indicating lack of awareness about white privilege); (2) Institutional Discrimination (indicating limited awareness of how institutional discrimination functions); and (3) Blatant Racial Issues (indicating lack of awareness to blatant discrimination).⁴⁸

The study detailed in this Article uses the CoBRAS test items as factors by which to correlate language in the Argument sections of student legal briefs set in a litigation universe on legacy admissions and affirmative action. My approach aims to show how students' unexamined assumptions about race, class, gender, and sexuality are reflected in their legal reasoning and analytical processes. The main assumption that guides my use of CoBRAS as an approach is that law school operates as a color-blind environment that normalizes White male racial wealth identity, which, in turn, perpetuates inequities based on privilege and power. Subjects in the curriculum are usually taught without reference to race, class, gender, and sexuality, unless the professor and administrators explicitly designate the class as one that tackles those items (i.e., a subject-matter specific seminar or survey course).

In building the Argument sections of legal briefs, lawyers draft analytical frameworks that consist of a synthesis of the relevant and controlling legal authorities and use that framework as the criterion for building arguments favorable to their clients for each discrete legal issue. The process of synthesis is complex and requires the drafter to identify, categorize, read, and comprehend the controlling and relevant legal authority, and pull from it the legal propositions for which the case stands. These steps occur before the drafter interprets those propositions and decides which ones to use and how to use them to build effective analytical frameworks for each legal issue their client's case implicates. In this sense, the drafter's process mirrors a court's process in developing

46. *Id.* at 61 (citations omitted).

47. *Id.* at 61–68.

48. Neville, *supra* note 37, at 63.

and creating case law. The legal propositions in any given case are based on a court's own analytical framework, which it cobbled together from legal authorities that it deemed relevant, and applied that analytical framework to fact or law within a given set of legal parameters. Throughout this process, the drafter is in dialogue with the case law while simultaneously privy to the court's dialogue with the various implicit and explicit texts the court used to resolve the legal issues before it.

At its core, drafting an analytical framework for a legal brief is a "meaning-making" exercise. It is an exercise based on the drafter's dialogue with the texts they deem relevant, that expresses the drafter's interpretations of legal propositions, or "rules," applicable in a given context. How the drafter chooses to interpret these legal propositions as communicated in an analytical framework is also an expression of group or institutional identity, namely how the drafter identifies themselves "with a group or a cause or a tradition."⁴⁹ In their foundational study on multilingual communities, *Acts of Identity: Creole-Based Approaches to Language and Ethnicity*, sociolinguists Robert LePage and Andr e Tabouret-Keller explore "how the individual's idiosyncratic behaviour reflects attitudes towards groups, causes, [and] traditions, but is constrained by certain identifiable factors; and how the identity of a group lies within the projections individuals make of the concepts each has about the group."⁵⁰

These tenets of LePage and Tabouret-Keller's study are applicable to discourse communities, and the study of how new entrants acculturate to them.⁵¹ The drafter's act of identifying which authority to choose and which categories to place it in reflects their attitudes toward the parties to a cause of action and the cause of action itself, constrained by the parameters of the litigation universe and the assignment requirements. Consequently, the group identity, law students moving toward professionalization as attorneys, is guided by how the act of employing reasoning and analytic processes fits within the parameters of what is commonly expected in a legal writing class (part of the core curriculum), specifically as it fits within the traditions of the law school and its members.

In this context, litigation universes that directly engage issues of power and privilege are disruptive, in that they add a group identity, the group that is the subject of the study, on top of students' group identity

49. ROBERT B. LEPAGE & ANDR E TABOURET-KELLER, *ACTS OF IDENTITY: CREOLE-BASED APPROACHES TO LANGUAGE AND ETHNICITY* 2 (1985).

50. *Id.* The process of identifying is picking out "a particular person, category or example." *Id.*

51. BERKENKOTTER ET AL., *supra* note 38, at 192-93, 200.

as law students. This is precisely why some law professors oppose introducing “controversial” topics into the core curriculum, or, alternatively, why failure to plan thorough integration of these topics into the curriculum is detrimental to law students and law professors.⁵² Accordingly, student interpretations of legal authorities are an expression of how they view the category or group to which they belong as it relates to the subject of their study. To the extent that the traditions of the law school work to normalize White capitalism and patriarchy, subject identities that are different from and in opposition to the same are subverted to institutional norms in the meaning-making exercise of drafting an analytical framework. The universe available to students as they constructed their analytical frameworks provides some insight into this process.

VI. THE LEGAL REASONING AND ANALYTICAL UNIVERSE: *BAKKE* AND ITS PROGENY

The oft-maligned *Regents of the University of California v. Bakke*,⁵³ is the foundational legal precedent for cases involving race-conscious admissions.⁵⁴ Because students read this case as student-practitioners

52. Edwards & Vance, *supra* note 8, at 74–76.

53. 438 U.S. 265 (1978).

54. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978). Justice Marshall’s opinion encapsulates the main conflict that burdens *Bakke*. He notes:

I agree with the judgment of the Court only insofar as it permits a university to consider the race of an applicant in making admissions decisions. I do not agree that petitioner’s admissions program violates the Constitution. For it must be remembered that, during most of the past 200 years, the Constitution as interpreted by this Court did not prohibit the most ingenious and pervasive forms of discrimination against the Negro. Now, when a state acts to remedy the effects of that legacy of discrimination, I cannot believe that this same Constitution stands as a barrier. Three hundred and fifty years ago, the Negro was dragged to this country in chains to be sold into slavery. Uprooted from his homeland and thrust into bondage for forced labor, the slave was deprived of all legal rights. It was unlawful to teach him to read; he could be sold away from his family and friends at the whim of his master; and killing or maiming him was not a crime. The system of slavery brutalized and dehumanized both master and slave. The denial of human rights was etched into the American Colonies’ first attempts at establishing self-government. When the colonists determined to seek their independence from England, they drafted a unique document cataloguing their grievances against the King and proclaiming as “self-evident” that “all men are created equal” and are endowed “with certain unalienable Rights,” including those to “Life, Liberty, and the pursuit of Happiness.” The self-evident truths and the unalienable rights were intended, however, to apply only to white men. . . . Thus, even as the colonists embarked on a course to secure their own freedom and equality, they ensured perpetuation of the system that deprived a whole race of those rights. . . . In their declaration of the principals that were to provide the cornerstone of the new Nation, therefore, the Framers made it plain that “we the people,” for whose protection the Constitution was designed, did not include those whose skins were the wrong color. As Professor John Hope Franklin has observed Americans “proudly accepted the challenge and responsibility of their new political freedom by establishing machinery and safeguards that insured the continued enslavement of blacks.”

and not as scholars, it bears some recounting to contextualize their reasoning and analytical work for the legacy admissions case file.

In 1968, the Medical School at the University of California-Davis opened with a class of fifty students.⁵⁵ Three years later in 1971, the class size increased to 100 students.⁵⁶ Between 1971 and 1973, the faculty developed a special admissions program to operate in tandem with its regular admissions program.⁵⁷ The special admissions program was specifically designed to address the underrepresentation of disadvantaged students in the entering class.⁵⁸ Under the regular admissions program, prospective students submitted their applications in the July preceding the Fall class they wished to enter.⁵⁹

Due to the large volume of applications, the medical school used a pre-screening process to tighten the viable pool of applicants.⁶⁰ Applicants with grade point averages of less than 2.5 on a 4.0 scale were rejected.⁶¹ One-sixth of the applicants were invited for personal interviews.⁶² After the interviews were completed, the interviewers and other members of the admissions committee ranked each interviewee on a scale of 1 to 100.⁶³ The rankings took into account: (1) interview summaries, (2) MCAT scores, (3) general GPA, (4) GPA in science courses, (5) letters of recommendation, (6) extracurricular activities, and (7) geographical data.⁶⁴ In 1973, a perfect admission score was 500, whereas in 1974, a perfect admission score was 600.⁶⁵ The full committee made offers of admission on a rolling basis.⁶⁶ The chair of the committee placed names on a waiting list.⁶⁷ These names were not ranked in order of preference, but the chair was free to include people who were deemed to possess "special skills."⁶⁸

A special admissions committee predominantly composed of racial and ethnic minorities ran the special admissions program.⁶⁹ The 1973 application form asked candidates to indicate whether they wanted to be

Id. at 387-89 (Marshall, J., dissenting in part, concurring in part).

55. *Id.* at 272.

56. *Id.*

57. *Id.* at 272-73.

58. *Id.* at 272.

59. *Id.* at 273.

60. *Bakke*, 438 U.S. at 273.

61. *Id.*

62. *Id.* at 273-74.

63. *Id.* at 274.

64. *Id.*

65. *Id.*

66. *Bakke*, 438 U.S. at 274.

67. *Id.*

68. *Id.*

69. *Id.*

considered as “economically and/or educationally disadvantaged’ applicants”; the 1974 application form asked candidates whether they wanted to be considered as members of a minority group (Blacks, Chicanos, Asians, and American Indians).⁷⁰ If the applicant answered “yes” to any of these questions, then the committee considered them for admission under the special admissions program.⁷¹

No policy defined “disadvantaged”; rather, the chairperson of the special committee screened each application to assess whether the applicant demonstrated “economic or educational deprivation.”⁷² Aside from this process, the path to admission for candidates followed pretty much the same as for applicants considered under the general admissions process.⁷³ The main differences were that applicants considered for special admissions did not have to meet the 2.5 or above GPA requirement, and one-fifth of special admissions applicants (as opposed to one-sixth of regular applicants) were granted an interview.⁷⁴

After the interviewing process, the special admissions committee assigned a score to special admissions applicants and then forwarded the most desirable candidates to the regular committee.⁷⁵ No further ranking or scoring occurred at this point; special admissions applicants were not considered in comparison to general admissions applicants.⁷⁶ However, the general admissions committee could reject applicants that did not meet course requirements or whose applications had further deficiencies.⁷⁷ The special admissions committee recommended applicants until the sixteen seats reserved for special admissions candidates were filled.⁷⁸ No White people were admitted under the special admissions program during the time in question, despite designating themselves as disadvantaged.⁷⁹

Allan Bakke applied to the medical school in 1973 and 1974, and was considered under the general admissions program in both years.⁸⁰ He was rejected in both years and was not placed on the waiting list.⁸¹ In 1973 and 1974, applicants with significantly lower GPAs and admission

70. *Id.*

71. *Id.*

72. *Bakke*, 438 U.S. at 274–275.

73. *Id.* at 275.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Bakke*, 438 U.S. at 275.

79. *Id.* at 276.

80. *Id.*

81. *Id.*

scores than Mr. Bakke were admitted to the medical school under the special admissions program.⁸²

In assessing whether Mr. Bakke suffered discrimination under the University of California's admissions policy, the Supreme Court of the United States discussed whether the policy constituted an impermissible unconstitutional racial quota. It also evaluated the efficacy of race-conscious admissions as a whole. The Court's foundation for its analytical framework evaluating the University of California's admission policy as a racial quota was the Fourteenth Amendment, namely, its provision that: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."⁸³ The Court perceived itself to have consistently held that rights guaranteed by the Fourteenth Amendment are individual, personal rights and must be applied to individuals equally.⁸⁴ Classifications of individuals that are based on race and ethnic background are racial classifications.⁸⁵ Of these types of classifications, the Court has stated historically that: "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality."⁸⁶ For this reason, racial classifications are suspect classifications and subject to a strict scrutiny analysis under the United States Constitution.⁸⁷

Although the provision itself was cast in race-neutral terms,⁸⁸ Congress' immediate purpose in enacting the Fourteenth Amendment was to ensure that newly freed slaves were given the equal protection under the Constitution that was previously denied to them.⁸⁹ However, the legal development of the Equal Protection Clause coincided historically with immigration, and the increasing divide between ethnic and racial minorities and majority groups in power.⁹⁰ Thus, the Supreme Court has read the Equal Protection Clause broadly to include all ethnic groups who face unequal treatment and discrimination at the hands of the state.⁹¹ Its application is universal regardless of race, ethnicity, or culture, and is not dependent upon minority-status as a static, fixed variable.⁹²

82. *Id.*

83. *Id.* at 289.

84. *Bakke*, 438 U.S. at 289-90.

85. *Id.* at 288-89.

86. *Id.* at 290-91.

87. *Id.*

88. *Id.* at 293.

89. *Id.* at 291.

90. *Bakke*, 438 U.S. at 292.

91. *Id.* at 292-93.

92. *Id.* at 293-99.

Because the terms “majority” and “minority” change in accordance with history and politics, the *Bakke* Court determined that it would be ill-considered for it to grant preferential treatment to a group based on its status at a particular historical period.⁹³ As it pertains to White people, all White people have a distinct racial and ethnic make-up and each group can demonstrate historically a point at which it was the minority or majority.⁹⁴ Therefore, to fix any one group’s discrimination in time would serve to grant it preferential treatment even when that group was no longer historically disadvantaged.⁹⁵

The Court explained that a court could not assess justice in terms of preferential treatment.⁹⁶ In doing so, it would have to grant benefits to one group and advance their status at the expense of another group.⁹⁷ Moreover, it would be inequitable for one group to bear the cost of redressing a wrong to another group not of its own making.⁹⁸ The inequities the burdened group would have to bear would increase racial tensions and support the notion that certain groups are incapable of advancing in society as individuals without preferential treatment.⁹⁹ Therefore, the Court concluded that the equal application of Constitutional rights requires that an individual be protected from racial classifications because they burden personal rights, not because the individual belongs to a particular group.¹⁰⁰

Viewed in this manner, diversity is broader than ethnic diversity, and that more expansive definition of diversity is a compelling state interest.¹⁰¹ Admissions decisions that take diversity into account must not burden one group at the expense of another, or impermissibly infringe upon individual rights.¹⁰² When the state utilizes a racial classification to achieve an arguably compelling interest, that classification must be necessary to achieve the state’s interest.¹⁰³ A state can achieve a compelling interest in diversity by using race and ethnicity as a “plus factor,” along with other admissions criteria, and evaluating all applicants in the same pool.¹⁰⁴ Using race and ethnicity in this manner

93. *Id.* at 295.

94. *Id.* at 295–96.

95. *Id.* at 296–97.

96. *Bakke*, 438 U.S. at 298.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* at 299.

101. *Id.* at 314–15.

102. *Bakke*, 438 U.S. at 314.

103. *Id.* at 314–15.

104. *Id.* at 316–17.

allows for each applicant to be treated individually in admissions decisions in accordance with the Constitution.¹⁰⁵

Returning to its consideration of the problem before it, the Court found the medical school's special admissions policy to be a dual-admissions policy that narrowly viewed diversity in terms of race and ethnicity. Accordingly, it found that the policy did not encompass the expansive diversity that would constitute a compelling state interest protected by the United States Constitution.¹⁰⁶ Applicants considered under the special admissions policy were isolated from competing with the students in the general admissions pool because a certain amount of seats were set aside for them.¹⁰⁷ The Court denounced their treatment as inequitable when compared to those applicants considered under the general admissions pool because special admissions applicants had the ability to compete for all of the general admissions slots in addition to those reserved under the special admissions program.¹⁰⁸ Thus, by using such a racial classification in its admissions decisions, the state violated the individual rights of those applicants who fell outside of the classification in contravention of the Equal Protection Clause of the Fourteenth Amendment.¹⁰⁹

The Court next tackled the issue of whether race-conscious admissions were categorically constitutional. The Court found it constitutional for a university to set diversity in its student body as a goal, as such a goal is part and parcel of the First Amendment to the United States Constitution and covers a university's exercise of academic freedom.¹¹⁰ A university may "determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study."¹¹¹ Diversity as a goal is applicable at the undergraduate, graduate, and professional school levels.¹¹² Of professional schools in particular, the Supreme Court opined that:

The law school, the proving ground for learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts. Few students and no one who has practiced law would choose to study in an academic vacuum removed from the interplay of ideas and the exchange of views with which the law is concerned.¹¹³

105. *Id.* at 318.

106. *Id.* at 315.

107. *Id.* at 320.

108. *Bakke*, 438 U.S. at 320.

109. *Id.*

110. *Id.* at 312.

111. *Id.*

112. *Id.* at 313.

113. *Id.* at 314.

The Court made similar observations for medical schools, as doctors also interact with all segments of a community.¹¹⁴

A state's efforts to address, remediate, and eliminate identified discrimination is a substantial interest, but a state may not utilize a classification to these ends that disadvantages another group absent concrete findings of the discrimination alleged.¹¹⁵ If a state uses a suspect classification, it must show that its purpose in doing so is "substantial" and that the classification used is necessary for it to achieve its purpose.¹¹⁶ Absent these findings, the state's purpose is neither substantial nor compelling.¹¹⁷

The medical school in *Bakke* articulated the following purposes for its special admissions program:

- (i) "reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession"; (ii) countering the effects of societal discrimination; (iii) increasing the number of physicians who will practice in communities currently underserved; and (iv) obtaining the educational benefits that flow from an ethnically diverse student body.¹¹⁸

With respect to (i), the court struck down any attempt by the University to remedy historic deficits through guaranteed percentages of traditionally disfavored minorities in each entering class.¹¹⁹ As discussed in detail in its analysis of the special admissions program, the Court again reiterated that preference for an individual simply because of that individual's membership in a particular group is unconstitutional on its face.¹²⁰ As for (ii), the Court found that the University had neither defined "societal discrimination," nor produced any data to show specific acts of societal discrimination that it sought to address with its special admissions policy.¹²¹ Because the University could not identify and prove discrimination had occurred, it could not justify burdening a group of unaffected individuals to remedy the wrong.¹²²

In considering (iii), the Court found that the University presented no data to show that a person's membership in a minority group correlated to their desire to help members of a minority group upon attaining a medical degree.¹²³ An applicant's statement that they had an

114. *Bakke*, 438 U.S. at 314.

115. *Id.* at 307–09.

116. *Id.* at 305.

117. *Id.* at 308–09.

118. *Id.* at 306 (citation omitted) (quoting the Brief of Petitioner at 32, *Bakke*, 438 U.S. 265 (No. 76-811)).

119. *Id.* at 307.

120. *Bakke*, 438 U.S. at 307.

121. *Id.*

122. *Id.* at 307–10.

123. *Id.* at 310.

interest in helping minority communities after graduating from medical school did not actually mean that they would do so.¹²⁴ Lastly, the Court found that (iv) reflected a valid and constitutionally permissible goal. However, it also explained that diversity is a broad concept not solely expressed in racial or ethnic terms.¹²⁵ Because the University could not show that its special admissions program (a racial classification) was necessary to achieve diversity broadly conceived, and that the policy was the only way to achieve diversity, then (iv) also failed to pass Constitutional muster.¹²⁶

A key criticism that scholars have of *Bakke* is that the Supreme Court's opinion turns the Fourteenth Amendment on its head.¹²⁷ As the Court explains, the Fourteenth Amendment was part of the constellation of Civil War Amendments. The impetus for these Amendments was to address slavery and invidious racial discrimination as it pertained to the newly freed enslaved, and to imbue them with the rights of White citizens. Because the system of white supremacy facilitates and preserves systems such as slavery and discrimination, the suspect racial classification at issue then was whiteness and the racial benefits it bestowed upon White people to the detriment of people of color. The Court's opinion in *Bakke* made the race and ethnicities of people of color suspect and subject to strict scrutiny Constitutional analysis, thus de-historicizing the history of white supremacy and its legacy of discrimination in the United States. For many scholars, *Bakke* marks the beginning of the Court's color-blind jurisprudence, which employs legal reasoning and analytic processes to normalize whiteness as outside of race until it is beset by anti-discrimination law.

However, as the controlling tenets of *Bakke* serve the interests of white supremacy, its precedential framework is explicit that all racial classifications are suspect, which would include "White" as a racial classification. Although the United States Supreme Court has considered affirmative action litigation since *Bakke*, the first case in which it engaged the question directly in a post-secondary educational setting was *Grutter*

124. *Id.*

125. *Id.* at 314–15.

126. *Bakke*, 438 U.S. at 315–16.

127. See generally TIM MCNEESE, *REGENTS OF THE UNIVERSITY OF CALIFORNIA V. BAKKE: AMERICAN EDUCATION AND AFFIRMATIVE ACTION* (2006); HOWARD BALL, *THE BAKKE CASE: RACE, EDUCATION AND AFFIRMATIVE ACTION* (2000); see, e.g., Angelo Guisado, *Reversal of Fortune: The Inapposite Standards to Remedial Race-, Gender-, and Orientation-Based Classifications*, 92 NEB. L. REV. 1 (2013); Marvin H. Lett, *Grutter, Gratz, and Affirmative Action: Why No "Original" Thought?*, 1 STAN. J. CIV. RTS. & CIV. LIBERTIES 417 (2005); Marcia G. Synott, *The Evolving Diversity Rationale in University Admissions: From Regents v. Bakke to the University of Michigan Cases*, 90 CORNELL L. REV. 463 (2005).

v. Bollinger.¹²⁸ The Court’s opinion in *Grutter*, and subsequently *Schuetz*¹²⁹ and *Fisher*,¹³⁰ reinforced *Bakke*’s foundational tenets, namely a law school’s interest in obtaining a diverse student body, a university’s freedom over its educational decisions is constitutional,¹³¹ and the “suspect” nature of all racial classifications.¹³² Of racial classifications, the Court stated: “[w]e apply strict scrutiny to all racial classifications to ‘smoke out’ illegitimate notions of race by assuring that [the government] is pursuing a goal important enough to warrant the use of a highly suspect tool.”¹³³

Based on *Bakke* and its progeny, it is evident that the Court’s analytical treatment of race is color-blind—all racial classifications are suspect. The litigation universe involving legacy admissions explores whether students would extend color-blind attitudes to “White” as a racial category as they constructed their analytical frameworks from the relevant case law. In other words, would their analytical frameworks indicate an awareness of white privilege and power at work in the law school’s admission policy or would they continue to normalize its presence? The legacy admissions litigation universe inverts the facts in *Bakke*. It involves an African American claimant alleging that a White, legacy admit took his seat. The universe is set in a state with an overwhelmingly White population where residents are favored in admissions decisions in every academic unit. The university consistently celebrates and observes its history and traditions, which are rooted in Confederate ideals. Furthermore, the university implemented a law school admissions policy that explicitly favors White students as legacy admits and shields them from competing with the rest of the admissions candidates. Student work-product, with a focus on student motion briefs, reveal whether students’ unexamined assumptions about whiteness led them to make flawed legal arguments.

VII. THE UNEXAMINED ASSUMPTIONS & FLAWED LEGAL ARGUMENTS

CoBRAS uses twenty-six statements to scale the degree of color-blind racial attitudes that a person or group holds. The CoBRAS testing

128. 539 U.S. 306, 328 (2003).

129. *Schuetz v. Coal. to Defend Affirmative Action*, 572 U.S. 291 (2014).

130. *Fisher v. Texas*, 570 U.S. 297 (2013) [*Fisher I*]; *Fisher v. Texas*, 136 S. Ct. 2198 (2016) [*Fisher II*].

131. *Grutter*, 539 U.S. at 328–29.

132. *Id.* at 326.

133. *Id.*

statements with the highest correlation to the three main factors for measurement on the scale are as follows: (1) Racial Privilege: “White people in the U.S. have certain advantages because of the color of their skin”; (2) Institutional Discrimination: “social policies, such as affirmative action, discriminate unfairly against white people”; and (3) Blatant Racial Issues: “social problems in the U.S. are rare, isolated situations.”¹³⁴

The Argument sections of the motion brief that students submitted for the legacy admissions universe contain language that, when correlated to the CoBRAS testing statements and factors, provide a window into how students reproduce color-blind attitudes in their legal reasoning and analytic processes. Student submission of motion briefs, both draft and final submissions, marks the first and largest comprehensive submission of student work-product in the legal writing course. It is the first time that students grapple substantively and practically with the meaning-making exercise of analytical framework building.

In the Benton brief Argument sections where students drafted an analytical framework for the race quota and race conscious admissions issues, they categorized Mr. Benton as belonging to the group “African American” and made that racial category the suspect classification that was subject to a strict scrutiny analysis. Additionally, they described “diversity” as only being advanced by the existence of racial and ethnic minorities. Both interpretations are incorrect, as Mr. Benton is the claimant in the litigation universe who alleged that the legacy admits, overwhelming White, were responsible for his inability to gain admission to the law school. Thus, the actual racial category that is the suspect classification subject to strict scrutiny analysis is “White,” the category to which the majority of legacy admits belong.

Students who interpreted the law of the case so as to not analyze all racial classifications as suspect classifications evidenced their lack of awareness of white privilege and power as they exist and as they operate on an institutional level. In essence, they saw race only as it attached to Mr. Benton, and not to the category of legacy admits. One student brief espoused these color-blind ideals by stating:

All Americans have certain unalienable [sic] rights that are guaranteed and the right to be judged based on their character, not the color of their skin or their affiliation with a group[,] be it ethnic, political, or religious, is an essential and pivotal right. Dr. King epitomized this ideal when he declared “[M]y four little children will one day live in a nation where they will not

134. Neville, *supra* note 37, at 62–63.

be judged by the color of their skin, but by the content of their character.”¹³⁵

With respect to the university brief Argument sections on race quotas and race-conscious admissions, students failed to engage the concept of whether legacy admissions constituted a racial classification. On a superficial level, a student’s failure to discuss this concept may seem like a viable strategy. In representing the university, the goal is to avoid a strict scrutiny analysis by casting legacy admissions as something other than a racial classification. To this end, the majority of students cast it as an economic classification, subject only to rational basis review.

However, good briefs anticipate the counter-arguments the opposing party will make and seek to neutralize them. It would be in a student-advocate’s best interest, and demonstrate a student’s implementation of the key concepts I taught in the class, to address the racial classification arguments in a manner most favorable to the university. A student’s failure to do so demonstrates their default to color-blind arguments, arguments that deny the existence and significance of race, because these arguments serve the university interest in perpetuating white privilege and power.

Advocates for the university were also unable to connect the legacy admits to the stated goals of the law school legacy admissions policy, namely to increase the amount of alumni donors and preserve the core values of the institution. On the contrary, students indicated by the language in their analytical frameworks that admitting legacy admits did not further “diversity,” which made it unconstitutional. Diversity of a student body is often a stated goal when the admissions policy seeks to admit a greater number of racially and ethnically “diverse” students or “minority” students. However, the law school in the legacy admissions litigation universe never stated diversity as a goal; it could not, because the majority of applicants it desired to admit were White.

Not only is this argument fatal to the university, but it is also an inaccurate interpretation of the law. When a suspect classification is at issue, the policy utilizing it must be narrowly tailored to support a compelling state interest. Arguably, for this litigation universe, the state interest is the economic viability of its university. The main question for the student-advocates to answer in their arguments was whether circumstances exist under which an economic interest can be a compelling one. Students who interpreted the law in a manner that cast the compelling state interest only in terms of minority students again

135. The IRB permissions that allow me to use the student data in this study prevent me from disclosing the student work product that is the source of this information.

racialized Mr. Benton's status as an African American, rather than discussing the circumstances under which whiteness could serve a state's compelling interest other than "diversity." Their interpretation indicated lack of awareness of white privilege and power as it exists and as it functions on an institutional level.

The tables that follow show the correlation of student language in briefs to the three CoBRAS factors. The research findings are separated into motion brief drafts where the students represented Mr. Benton, the university, and then a summation of all findings. There are twenty-eight student briefs total: each draft submission averages about five to seven pages; the final motion brief submissions average fifteen pages; and the final appellate brief submissions average twenty-five pages. Each brief addresses the racial quota and race-conscious admissions issues (termed generally as "racial classification" in the tables below). Thirteen students submitted motion brief drafts on behalf of Mr. Benton. Fifteen students submitted motion brief drafts on behalf of the university.

Table 1 – Benton Motion Brief Draft Submissions

Argument Section Issues	CoBRAS Factor 1	CoBRAS Factor 2	CoBRAS Factor 3	No rating
Racial Quota & Race Conscious Admissions	Racial Privilege <i>White people in the U.S. have certain advantages because of the color of their skin</i>	Institutional Discrimination <i>Social policies, such as affirmative action, discriminate unfairly against white people</i>	Blatant Racial Issues <i>Social problems in the U.S. are rare, isolated situations</i>	<i>Indicates no evidence of color-blind attitudes</i>
Racial Classification	9 (69.23%)	9 (69.23%)	3 (23.07%)	1 (7.69%)

Note: n= 13

Table 2 – University Motion Brief Draft Submissions

Argument Section Issues	CoBRAS Factor 1	CoBRAS Factor 2	CoBRAS Factor 3	No rating
Racial Quota & Race Conscious Admissions	Racial Privilege <i>White people in the U.S. have certain advantages because of the color of their skin</i>	Institutional Discrimination <i>Social policies, such as affirmative action, discriminate unfairly against white people</i>	Blatant Racial Issues <i>Social problems in the U.S. are rare, isolated situations</i>	<i>Indicates no evidence of color-blind attitudes</i>
Racial Classification	10 (66.66%)	12 (80%)	0 (0%)	3 (20%)

Note: n=15

Table 3 – Draft Submission Summary Results

Argument Section Issues	CoBRAS Factor 1	CoBRAS Factor 2	CoBRAS Factor 3	No rating
Racial Quota & Race Conscious Admissions	Racial Privilege <i>White people in the U.S. have certain advantages because of the color of their skin</i>	Institutional Discrimination <i>Social policies, such as affirmative action, discriminate unfairly against white people</i>	Blatant Racial Issues <i>Social problems in the U.S. are rare, isolated situations</i>	<i>Indicates no evidence of color-blind attitudes</i>
Racial Classification	19 (67.85%)	21 (75%)	3 (10.71%)	4 (14.28%)

Note: n= 28; White (n=24); African American (n=2); Latinx (n=1); Asian (n=1); Men (n=18); Women (n=10)

In between the deadlines for the motion brief draft and final submissions, students have a week or more of individual, one-on-one conferences with me. After they have turned in their motion briefs, I evaluate them and provide feedback. Subsequently, class instruction on

appellate litigation ensues, and students have two weeks of individual, one-on-one conferences with me to work on revisions and edits. Each conference lasts anywhere from twenty to forty-five minutes. They serve as a point of disruption for students' unexamined assumptions, along with the critical pedagogies discussed *infra*.

The results in the tables below show that student edits and revisions to their motion brief and appellate brief drafts, respectively, reflected their growing awareness and function of white privilege and power in the final brief submissions. In the briefs where Mr. Benton was a client, students more frequently drafted their analytical frameworks to be inclusive of all racial categories and were careful to avoid attaching race only to non-White racially and ethnically diverse students. For those advocating for the university, their analytical frameworks engaged the racial classification issue and characterized a state's compelling state interest in an educational context as broader than its interest in racial and ethnic diversity.

Table 4 – Benton Motion Brief Final Submissions

Argument Section Issues	CoBRAS Factor 1	CoBRAS Factor 2	CoBRAS Factor 3	No rating
Racial Quota & Race Conscious Admissions	Racial Privilege <i>White people in the U.S. have certain advantages because of the color of their skin</i>	Institutional Discrimination <i>Social policies, such as affirmative action, discriminate unfairly against white people</i>	Blatant Racial Issues <i>Social problems in the U.S. are rare, isolated situations</i>	<i>Indicates no evidence of color-blind attitudes</i>
Racial Classification	4 (30.76%)	4 (30.76%)	0 (0%)	9 (69.23%)

Note: n= 13

Table 5 – University Motion Brief Final Submissions

Argument Section Issues	CoBRAS Factor 1	CoBRAS Factor 2	CoBRAS Factor 3	No rating
Racial Quota & Race Conscious Admissions	Racial Privilege <i>White people in the U.S. have certain advantages because of the color of their skin</i>	Institutional Discrimination <i>Social policies, such as affirmative action, discriminate unfairly against white people</i>	Blatant Racial Issues <i>Social problems in the U.S. are rare, isolated situations</i>	<i>Indicates no evidence of color-blind attitudes</i>
Racial Classification	0 (0%)	5 (33.33%)	0 (0%)	10 (66.66%)

Note: n= 15

Table 6 – Final Submission Summary Results

Argument Section Issues	CoBRAS Factor 1	CoBRAS Factor 2	CoBRAS Factor 3	No rating
Racial Quota & Race Conscious Admissions	Racial Privilege <i>White people in the U.S. have certain advantages because of the color of their skin</i>	Institutional Discrimination <i>Social policies, such as affirmative action, discriminate unfairly against white people</i>	Blatant Racial Issues <i>Social problems in the U.S. are rare, isolated situations</i>	<i>Indicates no evidence of color-blind attitudes</i>
Racial Classification	4 (14.28%)	9 (32.14%)	0 (0%)	19 (67.85%)

Note: n= 28; White (n=24); African American (n=2); Latinx (n=1); Asian (n=1); Men (n=18); Women (n=10)

The research findings for the final appellate brief submissions are similarly striking and show an even greater awareness of the role of

race—whiteness—in the legacy admissions litigation universe. The overwhelming majority of the class moved beyond color-blindness in drafting the analytical frameworks in the Argument sections of their appellate briefs—a dramatic shift from where they began in their motion brief draft submissions.

Table 7 – Benton Appellate Brief Final Submissions

Argument Section Issues Racial Quota & Race Conscious Admissions	CoBRAS Factor 1 Racial Privilege <i>White people in the U.S. have certain advantages because of the color of their skin</i>	CoBRAS Factor 2 Institutional Discrimination <i>Social policies, such as affirmative action, discriminate unfairly against white people</i>	CoBRAS Factor 3 Blatant Racial Issues <i>Social problems in the U.S. are rare, isolated situations</i>	No rating <i>Indicates no evidence of color-blind attitudes</i>
Racial Classification	1 (6.66%)	1 (6.66%)	0 (0%)	13 (86.66%)

Note: n= 15

Table 8 – University Appellate Brief Final Submissions

Argument Section Issues Racial Quota & Race Conscious Admissions	CoBRAS Factor 1 Racial Privilege <i>White people in the U.S. have certain advantages because of the color of their skin</i>	CoBRAS Factor 2 Institutional Discrimination <i>Social policies, such as affirmative action, discriminate unfairly against white people</i>	CoBRAS Factor 3 Blatant Racial Issues <i>Social problems in the U.S. are rare, isolated situations</i>	No rating <i>Indicates no evidence of color-blind attitudes</i>
Racial Classification	1 (7.69%)	2 (15.38%)	0 (0%)	10 (76.92%)

Note: n= 13

Table 9 – Appellate Brief Final Submission Summary Results

Argument Section Issues	CoBRAS Factor 1	CoBRAS Factor 2	CoBRAS Factor 3	No rating
Racial Quota & Race Conscious Admissions	Racial Privilege <i>White people in the U.S. have certain advantages because of the color of their skin</i>	Institutional Discrimination <i>Social policies, such as affirmative action, discriminate unfairly against white people</i>	Blatant Racial Issues <i>Social problems in the U.S. are rare, isolated situations</i>	<i>Indicates no evidence of color-blind attitudes</i>
Racial Classification	2 (7.14%)	3 (10.71%)	0 (0%)	23 (82.14%)

Note: n= 28; White (n=24); African American (n=2); Latinx (n=1); Asian (n=1); Men (n=18); Women (n=10)

Although it is not possible to provide data for all six years of this study in this Article, the results explained here are consistent for each case file. Just as with the legacy admissions litigation universe, students evidenced a lack of awareness around difference, whether it involved indigenous sovereignty and survival, colorism, LGBTQ humanity and autonomy, or culture, which improved from assignment to assignment during the course of the semester. The change in student attitudes, which allowed them to interrogate and challenge their unexamined assumptions about race, is directly related to the critical pedagogies I employed throughout the semester.

VIII. THE CRITICAL PEDAGOGIES

The law school is a “White” space,¹³⁶ a colonized space grounded in Western (White) norms that are neutralized and work to exclude non-Western ways of knowing and being.¹³⁷ In their article, *Decolonizing Law*

136. See generally WENDY LEO MOORE, REPRODUCING RACISM: WHITE SPACE, ELITE LAW SCHOOLS & RACIAL INEQUALITY (2008).

137. McMurtry-Chubb, *supra* note 1; BELL HOOKS, TEACHING TO TRANSGRESS: EDUCATION AS THE PRACTICE OF FREEDOM 29–30 (1994). Hooks states:

School, Canadian legal scholars Roderick McDonald and Thomas McMorrow argue that “casting the efforts of would-be-power brokers of law school in the language of colonization raises the question of how the identity of each law school is forged, both through and in spite of attempts at control.”¹³⁸ The authors “present law school as a site that its colonizers seek to control with their distinctive ethos, and that its members, most importantly professors and students, have the power, if not always the will, to resist.”¹³⁹ They name intellectual colonization,¹⁴⁰ professional colonization,¹⁴¹ market colonization,¹⁴² colonization by consumerism,¹⁴³ and colonization by the herd¹⁴⁴ as “interconnected forms of contemporary colonization of law school.”¹⁴⁵

Acceptable teaching practices in the core curricular offerings at the law school reinforce it as a Western colonial space, and embody what revolutionary and scholar Paulo Freire has described as the banking model of education.¹⁴⁶ In his foundational work on critical pedagogy, *Pedagogy of the Oppressed*, Freire delineates ten main tenets of the model:

- (a) the teacher teaches and the students are taught;
- (b) the teacher knows everything and the students know nothing;
- (c) the teacher thinks and the students are thought about;
- (d) the teacher talks and the students listen—meekly;
- (e) the teacher disciplines and the students are disciplined;
- (f) the teacher chooses and enforces his choice, and the students comply;
- (g) the teacher acts and the students have the illusion of acting through the action of the teacher;

If we examine critically the traditional role of the university in the pursuit of truth and the sharing of knowledge and information, it is painfully clear that biases that uphold and maintain white supremacy, imperialism, sexism, and racism have distorted education so that it is no longer about the practice of freedom. The call for a recognition of cultural diversity, a rethinking of ways of knowing, a deconstruction of old epistemologies, and the concomitant demand that there be a transformation in our classrooms, in how we teach and what we teach, has been a necessary revolution – one that seeks to restore life to a corrupt and dying academy.

Id.

138. Roderick A. McDonald & Thomas B. McMorrow, *Decolonizing Law School*, 51 ALBERTA L. REV. 717, 719 (2014).

139. *Id.* at 719.

140. *Id.* at 720.

141. *Id.* at 722.

142. *Id.* at 725.

143. *Id.* at 728.

144. McDonald & McMorrow, *supra* note 138, at 731.

145. *Id.* at 719.

146. PAULO FREIRE, *PEDAGOGY OF THE OPPRESSED* 73 (2012).

- (h) the teacher chooses the program content, and the students (who were not consulted) adapt to it;
- (i) the teacher confuses the authority of knowledge with his or her own professional authority, which she and he sets in opposition to the freedom of the students; [and]
- (j) the teacher is the Subject of the learning process, while the pupils are mere objects.¹⁴⁷

Of banking education, Freire writes that “[its] capability to minimize or annul the students’ creative power and to stimulate their credulity serves the interests of the oppressors, who care neither to have the world revealed nor see it transformed.”¹⁴⁸

Critical, anti-colonial pedagogy seeks to reveal and complicate the legal academy’s relationship with white supremacy, patriarchy, and other colonial practices, by making students agents in transforming the world as it exists into a world that they desire.¹⁴⁹ It creates liberatory educational spaces by uniting students and teachers in making knowledge, making meaning, together.¹⁵⁰ Critical pedagogy is an intentional and humanizing pedagogy.¹⁵¹ It poses problems for students and teachers to solve jointly, problems that reveal the structure, function and implementation of colonization.¹⁵² Ultimately, “problem-posing education, as a humanist and liberating praxis, posits as fundamental that the people subjected to domination must fight for their emancipation. . . . Problem posing education does not and cannot serve the interests of the oppressor.”¹⁵³ At its core it is disruptive.

Throughout the legal writing course detailed in this article, I employ critical pedagogies to disrupt students’ normalization of the legal academy as a White space, a Western-colonized space, especially as it normalizes whiteness as the sole lens through which to understand and employ legal reasoning and analytical processes. A discussion of each key critical pedagogical practice follows.

A. Case Reading Dialogues

Successful reading practices hinge upon a reader’s ability to recognize the genre (type of writing), and to familiarize themselves with its parts and the purpose they serve within the whole of the document.

147. *Id.* at 73.

148. *Id.*

149. *Id.* at 73, 83.

150. *Id.* at 72.

151. *Id.* at 75.

152. FRIERE, *supra* note 146, at 83–86.

153. *Id.* at 86.

For a reader to engage with any type of writing, they must anticipate what types of information they will encounter in a type of writing, as well as where the information is likely to occur in the writing. For example, if a reader clicks on a blog post, they expect to see the name of the blog, the navigation for the blog article they clicked on, a way to access archived blog posts, and navigation to posts that precede and come after the blog post they are reading. If a reader clicks on a blog post and finds 280 characters of text and an outline of a bird colored blue, they know they have not accessed a blog, but Twitter.

Effective legal practitioners are effective readers. They interrogate statutory, regulatory, and case law to determine how courts have interpreted the relevant issues each raises in the context of a client problem they must solve.¹⁵⁴ To this end, they know what information is contained in a case: facts; issues (express or implied); an analytical framework or frameworks (built from a court's synthesis of legal authorities); and the court's use of the analytical framework to analyze the relevant facts—all to resolve the parties' dispute, all contained in majority, concurring, and dissenting opinions. They also interpret the cases in context, in a context that challenges the assumptions they have about difference by inviting them to solve problems related to it. Case reading dialogues, heavily annotated cases from the relevant legal authority, invite students to this dialogical textual engagement.

B. Model Case Briefs

Legal writing has a symmetry in that the composition of legal genres (e.g., cases, legal memoranda, and legal briefs) contain analytical frameworks the writer develops from synthesized legal authority, and uses to analyze facts and/or law relevant to the parties' cases. Readers enter into the process of writing by translating their dialogue with the texts they read into a form that allows them to consider the meaning that

154. See Elizabeth Flynn, *Reconciling Readers and Texts*, in LANGUAGE CONNECTIONS: READING AND WRITING ACROSS THE CURRICULUM 139–40 (Toby Fulwiler & Art Young eds., 1982). Flynn argues that readers require context for written texts to be successful readers, and that readers make sense of written materials through dialoging with the text. *Id.*; see also Anne Falke, *What Every Educator Should Know About Reading Research*, in LANGUAGE CONNECTIONS: READING AND WRITING ACROSS THE CURRICULUM 127–29 (Toby Fulwiler & Art Young eds., 1982). Falke posits that educators should develop questions to help the reader with the literal, interpretative, and critical comprehension of written materials. At the literal stage, readers try to figure out what the text means. *Id.* The interpretative stage is where the reader determines the relationship of the text to facts, ideas, and other relevant information. *Id.* At the critical comprehension stage, readers gain enough mastery over the text to apply it in a variety of contexts. *Id.*

they make from the text.¹⁵⁵ In this context, the case brief facilitates how students transform information from a particular case into a workable model that mirrors the work they will do in the Argument sections of their briefs.

After asking students to complete case briefs for the significant cases in the constellation of authorities for a particular litigation universe, I provide them with my model case briefs for the same. Doing so serves two purposes. First, it allows students to see how I have interpreted the cases in comparison and contrast to how they interpreted them. Second, students see how case briefs illuminate the essential facts and analytical frameworks in play for a discrete set of legal issues, and how legal writers can use the major legal propositions from each case as building blocks for their own analytical frameworks. The exchange of work-product between the students and me is a joint knowledge-making endeavor. Together, we begin to work through possible solutions to the client's issues by considering the resulting outcomes from applying the frameworks available to us in multiple ways.

C. Secondary Source Reading and Multi-Media Sources

Integrating secondary and multi-media sources into the course broadens student perceptions of who can make knowledge, and pushes them to examine how knowledge changes when filtered through the requirements of a particular expertise. It gives students the opportunity to think about how expertise has bearing on how litigators interpret legal authority. Digital media that highlights debates about the subject-matter in the litigation universe exposes students to a realm of experiences. By standing as legal writers in an interdisciplinary community of knowledge-makers, students are positioned to view their briefs as part of the knowledge-making endeavor of that community.

Furthermore, their exposure to a realm of experiences complicates their relationship to me as their professor. There is a societal tendency to view White people as neutral and objective when discussing all topics, but people of color as biased, especially when it relates to racial issues.¹⁵⁶

155. See, e.g., Bruce Peterson, *In Search of Meaning: Readers and Expressive Language*, in LANGUAGE CONNECTIONS: READING AND WRITING ACROSS THE CURRICULUM 107-08 (Toby Fulwiler & Art Young eds., 1982).

156. See, e.g., Barbara J. Flagg, 'Was Blind But Now I See': *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 954 (1993) ("The colorblindness principle also grows out of the historical development of race relations in the United States, in which, until quite recently, race-specific classifications have been the primary means of maintaining the supremacy of whites. In reaction to that experience, whites of good will tend to equate racial justice with the disavowal of race-conscious criteria of classification.").

Incorporating a myriad of experiences throughout the course counterbalances student tendencies to dismiss my point of view as biased, insignificant, and marginal.

D. In-Class Drafting Sessions

Using their case authority and the model case briefs I have provided, I turn the classroom into a drafting laboratory. It establishes the learning process as collaboration in real time. We draft an “objective,” non-persuasive synthesis of legal authorities as a class, and then consider how to discuss the issues involved in a manner most favorable to the assigned client. Our joint drafting sessions dissipate many students’ fears about the writing process; as they see me and their peers work through building an analytical framework, they become emboldened to take risks in their thinking and try out new ideas.¹⁵⁷

Because each litigation universe assigned in the class involves issues that arise around difference, students struggle to make sense of and interpret legal precedent in light of their assumptions about race, class, gender, and sexuality.¹⁵⁸ They do so as a class, which creates a dialogue that problematizes those items that the legal academy seeks to normalize—namely, how legal education and legal practice can work to replicate inequalities involving difference. For example, our in-class drafting session for the Argument sections of the student legal briefs challenged students’ assumptions about the role of merit in admissions, legacy admissions as race-neutral, and race-neutral admissions as something other than affirmative action, which most perceived as giving non-White students an unfair advantage.

E. Expert Interviews

I use expert witness interviews to give students experience interacting with non-legal professionals whose expertise they will need during litigation. I “hire” an expert that possesses knowledge that would be helpful to students in resolving their client’s legal issue and schedule the interview for a class session. The experts are actual experts in their field, not actors. To help students prepare for the interviews, I place them in three interviewing groups: a group to establish the expert’s background

157. See, e.g., Peter Schiff, *Responding to Writing: Peer Critiques, Teacher-Student Conferences and Essay Evaluation*, in LANGUAGE CONNECTIONS: READING AND WRITING ACROSS THE CURRICULUM 163 (Toby Fulwiler & Art Young eds., 1982).

158. See, e.g., Peterson, *supra* note 155, at 111–14. Peterson argues that shared meanings about texts can only be derived from group discussion. *Id.*

as an expert (background information group); a group to identify the scope of the expert's knowledge as it relates to the litigation universe (preliminary knowledge investigation group); and a group to develop the case theory and verify connections between what the expert can give and the issues in the litigation universe (theory development and investigation group). Each group is provided a digital space to develop and post questions, and to see the questions from the other groups. Each student is responsible for asking at least one question.

This exercise is collaborative in preparation and in action. When students conduct the interview, they must listen to their classmates' questions, listen to the answer the expert provides, and determine whether the answer requires them to modify any questions they planned to ask. During the interview, I become one of the students, and ask follow-up questions to the expert that cover items the students may have missed. As a class, we make connections between the legal and evidentiary requirements for the legal issues in our litigation universe. For example, I asked our university development and alumni professionals to serve as experts for the legacy admissions litigation universe. Through our interview questions, they provided information about whether legacy admits give more money as alumni than non-legacy admits, which is directly applicable to whether the law school admissions policy was narrowly tailored to its goal of increasing alumni donations.

I also use the interview as an opportunity to challenge students' perceptions of who can be an expert. Incidents abound where professionals of color are questioned about their status as professionals or about their right to occupy spaces that professionals usually occupy.¹⁵⁹ Accordingly, I primarily ask women and men of color to serve as experts for my legal writing class. Year after year, students are shocked to see licensed professionals, PhDs, and the like—all people of color. Year after year, students of color thank me privately for providing examples of professionals of color for their majority White classmates.

F. Conceptual Grading Rubrics

At the start of the class, I provide students with a comprehensive list of learning outcomes and performance criteria delineated by class, week,

159. Consider the recent case of Dr. Fatima Cody Stanford, an African American doctor on a Delta flight. When Dr. Stanford gave assistance to her seatmate who was hyperventilating, Delta flight attendants allegedly asked her for her medical license and questioned whether the license belonged to her. Christine Hauser, *'Are you Actually an M.D.?: A Black Doctor is Questioned as She Intervenes on a Delta Flight'*, N.Y. TIMES (Nov. 2, 2018), <https://www.nytimes.com/2018/11/02/us/delta-black-doctor-racial-profiling.html> [<https://perma.cc/W9C4-AGN7>].

and topic. In advance of each assignment, graded or ungraded, I also provide the students with grading rubrics that are not a task list, but that discuss the concepts students should expect to glean from each week of class. In the rubric sections that cover drafting an analytical framework, students are urged to think about the legal reasoning and analytic processes in a wider context, instead of drafting “rules” within an organizational paradigm (i.e., CREAC, IRAC).¹⁶⁰ For example, one learning outcome in the analytical framework rubric states that students should “develop effective strategies to draft an analytical framework sufficient for an Argument section of a legal brief.”¹⁶¹ One of the performance criteria listed under it states that a student’s work product should demonstrate that they “appreciate the difference between how legal authors and non-legal authors in the disciplines present and communicate authorities in the genres that they commonly produce,” and “recognize the persuasive synthesis of legal authorities as the analytical framework for building arguments on behalf of their client.”¹⁶²

G. Individual Student Conferences

Individual student conferences occur in my legal writing course to help students work through drafts that eventually become final graded assignments. They also help students to use graded assignments as a jumping-off point as they prepare drafts for the next graded assignment. To help students prepare for their conferences with me, I ask them to submit an agenda to me for the conference, so that I may know their purpose for our meeting. In this sense, the conferences are student-directed, yet structured. Prior to the week conferences are scheduled, I direct students’ attention to the learning outcomes and performance criteria for the conferences, which designates them as a continuation of, rather than a break in, learning. The conferences serve as a point for students to process the class instruction and interactions up to the time of the conference. It is often in these conferences that the students and I make sense of the class readings, handouts, and the litigation universe in the context of their work product.

Individual student conferences also serve as space for students to voice their concerns with me about their progress in the class. Because we tackle issues that arise around difference, the conferences are sources

160. For a criticism of rigid organizational paradigms like IRAC, see Laura P. Graham, *Why-Rac? Revisiting the Traditional Paradigm for Writing About Legal Analysis*, 63 U. KAN. L. REV. 681 (2015).

161. TERI A. MCMURTRY-CHUBB, *TEACHER’S MANUAL, LEGAL WRITING IN THE DISCIPLINES: A GUIDE TO LEGAL WRITING MASTERY* (2012).

162. *Id.*

for students to “check-in,” to reveal their anxieties and fears about the subject matter of the litigation universe. For example, more than a handful of White male and female students who came to individual conferences about the legacy admissions litigation universe self-identified as legacy admits to the law school where I teach. In light of our studies, they expressed concerns over whether they were “qualified” to be students given the racial preference they received. This opened avenues to discuss merit and the efficacy of race-based law school admissions, including those favoring White applicants.

Furthermore, the relationships that I forge with students during their individual conference extend beyond the duration of the class. Students become engaged with issues related to their particular litigation universe, a curiosity that persists as they take other courses, graduate, and begin their formal law practice. For example, students who litigated in the legacy admissions universe have come by my office and e-mailed me about the Harvard affirmative action case, *Students for Fair Admission v. Harvard*.¹⁶³ Many have followed the news, read the pleadings in the case, and have gone so far as to discuss with me how the arguments lawyers made in the case support notions of color-blindness.

IX. CONCLUSION

This research project has the potential to change how we view the preparation of law students for law practice. As such, it has significant implications for how we approach diversity, equity, and inclusion in legal education and the law. Legal education touts diversity—equity and inclusion less so—as aspirational goals, but has largely focused efforts to achieve the same in admissions and faculty hiring. The Supreme Court has emphasized the benefits of “diversity” as if those benefits were equal to all students and burdened none of them. Justice O’Connor’s adoption of the benefits that flow from a diverse student body from the University of Michigan’s petition for certiorari in *Grutter* remain the justification for race-conscious law school admissions.¹⁶⁴

The University argued that its admissions policy “promot[ed] ‘cross-racial understanding,’ help[ed] break down racial stereotypes, and ‘enabl[ed] [students] to better understand persons of different races.’”¹⁶⁵

163. The Crimson News Staff, *Here’s What Happened in the Harvard Admissions Trial Today*, HARV. CRIMSON, (Oct. 16, 2018), https://www.thecrimson.com/article/2018/10/16/what-happened-today/?fbclid=IwAR2n3Sv9qDI5ia676_HEH4JrHl86U9zeUYWTZIT3dbk-s9-BmvmRBOjvQtA [https://perma.cc/6MXD-88LU] (providing daily and weekly updates of the trial).

164. *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003).

165. *Id.*

It further stated that “these benefits [we]re ‘important and laudable,’ because ‘classroom discussion is livelier, more spirited, and simply more enlightening and interesting’ when students have the ‘greatest possible variety of backgrounds.’”¹⁶⁶ However, these “benefits” are not benefits to “diverse” students, non-White and racialized, in the law school student body. In actuality, they place the onus on non-White racially and ethnically diverse students to justify their existence, their qualifications to occupy a seat in the law school class, by promoting cross-racial understanding, breaking down stereotypes, and being the catalysts for more lively and spirited classroom conversation.¹⁶⁷ These expectations continue to render invisible the whiteness and Western colonial ideals on which legal education is based and perpetuates.

The Supreme Court has further reinforced the view that enough “diversity,” enough non-White racial and ethnic students, will somehow turn the tide to make law schools more socially inclusive spaces. Justice O’Connor echoed this sentiment in the majority opinion for *Grutter* when she stated:

As part of its goal of “assembling a class that is both exceptionally academically qualified and broadly diverse,” the Law School seeks to “enroll a ‘critical mass’ of minority students[]” . . . defined by reference to the educational benefits that diversity is designed to produce.

* * *

The Law School does not premise its need for critical mass on “any belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue. To the contrary, diminishing the force of such stereotypes is both a crucial part of the Law School’s mission, and one that it cannot accomplish with only token numbers of minority students. Just growing up in a particular region or having particular professional experiences is likely to affect an individual’s views, so too is one’s own, unique experience of being a racial minority in society, like our own, in which race unfortunately still matters. The Law School has determined based on its experience and expertise, that a “critical mass” of underrepresented minorities is necessary to further its compelling interest in securing the educational benefits of a diverse student body.”¹⁶⁸

166. *Id.*

167. See, e.g., Teri McMurtry-Chubb, *The Chronicle of the Disappeared White Law Professors: The Real Meaning of Diversity and Affirmative Action in Legal Education and an Exercise in Critical Race Theory*, in 2 *CONTROVERSIES IN AFFIRMATIVE ACTION* 323–26 (James A. Beckman ed., 2014) (discussing how students of color “qualify” themselves for admission to law school in the context of a fictional “Law School Admissions Pageant”); Carole J. Buckner, *Realizing Grutter v. Bollinger’s “Compelling Educational Benefits of Diversity”—Transforming Aspirational Rhetoric Into Experience*, 72 *UMKCL REV.* 877 (2004) (discussing the experiences of non-White racial and ethnic students in light of Justice O’Connor’s statements in *Grutter*).

168. *Grutter*, 539 U.S. at 329–30, 333 (citations omitted).

However, as Claude Steele demonstrates in *Whistling Vivaldi*, critical mass alone may not be adequate to reduce the negative effect of stereotypes. He writes, “critical mass and an approach that values what diversity can bring to a setting may go some distance in making minority identities feel more comfortable there.”¹⁶⁹

Likewise, cues that lessen stereotype threat serve as lenses by which similar cues are interpreted.¹⁷⁰ For example, an educational setting with a large number of non-White racial and ethnic students, but with no non-White racial and ethnic professors might not send a message to prospective students that the environment is “identity safe.” In contrast, an educational environment with robust programming that demonstrates appreciation for its non-White racially and ethnically diverse student body may help students to feel more “identity safe,” even in the absence of non-White racially and ethnically diverse professors.¹⁷¹ Of this phenomenon, Steele writes, “if enough cues in a setting can lead members of a group to feel ‘identity safe,’ it might neutralize the impact of other cues in the setting that could otherwise threaten them.”¹⁷²

Law professors, lawyers, and law students can point to cases in the core law curriculum, the class discussion of which obscured the existence of difference and made them feel marginalized, insignificant, and unsafe.¹⁷³ Such cues as these are negative, or “features of a setting that signal [something bad will happen to you as result of your identity].”¹⁷⁴ Thus, the context of an environment, a color-blind environment or any environment blind to difference, can itself be a threatening identity cue.¹⁷⁵

Steele’s insights into Justice O’Connor’s presence on the Court are instructive here. He recounts that “O’Connor’s early days on the Supreme Court were saturated with these [negative] cues—not hate speech, not overt prejudice from her colleagues, just ordinary features of

169. STEELE, *supra* note 20, at 147.

170. *Id.*

171. *Id.* at 151. Steele provides an example of this concept in an educational setting. He states:

To illustrate this reasoning in relation to minority schooling, one might expect stereotype threat to be more present for minority students at schools and colleges with more identity threatening cues (small numbers of minority students, an intensely elite academic atmosphere, few minority faculty, etc.) than it is at schools and colleges with fewer identity-threatening cues (ample mass, a variety of ways of being successful, visible minority leadership, etc.).

Id.

172. *Id.* at 147.

173. See, e.g., Margaret E. Montoya, *Mascaras, Trenzas, Y Grednas: Unmasking the Self While Un/Braiding Latina Stories and Legal Discourse*, 15 CHICANO-LATINO L. REV. 1 (1994).

174. STEELE, *supra* note 20, at 150.

175. *Id.* at 150–51.

the Court and its context that signaled contingencies based on her gender—everything from the paucity of women’s restrooms to stereotype-laden questions from reporters.”¹⁷⁶ Developing a curriculum that purposefully and effectively tackles issues that arise around difference would serve as a positive context cue to lessen stereotype threat and aid us in creating diverse, equitable, and inclusive law school environments.

Lastly, the Supreme Court has perpetuated the idea that “student body diversity promotes learning outcomes, and ‘better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals.’”¹⁷⁷ The Court also has espoused the belief that “these benefits are not theoretical but real, as major American businesses have made clear that the skills needed in today’s increasingly global marketplace can only be developed through exposure to widely diverse people, culture, ideas, and viewpoints.”¹⁷⁸ The study in this Article suggests that the presence of non-White racial and ethnic bodies in law school classrooms do not, and cannot, in and of themselves, promote better learning outcomes, prepare all students for a globally diverse workforce and society, and help them to shape professional identities beyond the touch of white supremacy, patriarchy, and capitalism.

In sum, rarely have law schools mapped and studied their curricula to assess how it perpetuates inequities and reinforces hierarchies. This and more are required to address the law and lawyers’ inability to fully serve racially and ethnically diverse client groups. As this study teaches us, legal educators and employers cannot take for granted that students leave law school with the skills to advocate effectively for historically marginalized, underrepresented groups, even as they matriculate successfully through law school. A heart for justice is not sufficient to do justice. Rather, law schools must actively develop interventions in their core curricula that directly and explicitly engage students around issues of power and privilege. Until then, students will not act with agency to transform law practice and its societal impact in ways that challenge their unexamined assumptions and allow them to make arguments in the service of justice.

176. *Id.* at 151.

177. *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003).

178. *Id.*