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Race, Rules, and Disregarded Reality

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Race, Rules, and Disregarded Reality

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Exploring issues of racial bias and social injustice in the law school classroom is a modern imperative. Yet, important conversations about systemic inequality in the law and legal profession are too often dissociated from core doctrinal courses and woodenly siloed to the periphery of the curriculum. This dissociation creates a paradigm of irrelevancy-by-omission that disregards the realities of the lived experiences of law students and the clients they will ultimately serve. Using the Federal Rules of Evidence as a launch pad, Professor Deborah Merritt has paved a pathway for incorporating these disregarded realities into doctrinal teaching. Following Professor Merritt's pathway, we can explore the historical context of racial subordination that is normally excluded from instruction in our evidentiary rules and other areas of substantive and procedural law. Through an innovative and disruptive pedagogy, Professor Merritt upends the casebook method of law school teaching. With her groundbreaking "uncasebook" she has prompted deeper thinking about the role of race in law and the function of racial disparities in teaching law. This Article serves dual aims. First, it lauds Professor Merritt's career-long commitment to the goals of equity and inclusion in law teaching and the legal profession. Second, it complements the existing discourse on the role of race and the record of racial disparity in the Rules of Evidence by adding the personal narrative of an outgroup insider. We can do more to promote equity and inclusion in the law school classroom. This Article offers a revealing example of why we must.

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I. INTRODUCTION

I am honored to contribute to this *estschrift* to Professor Deborah Jones Merritt. Professor Merritt has been a constant voice for social equality. Her contributions to the legal profession are both timely and timeless, from her policy initiatives in assessment and licensure reform, to her empirical studies of gender status roles in the legal academy. Merritt’s work looks critically at race, gender, and status in law. Her scholarship offers robust empirical data, illuminates status-based problems, and points us to their potential solutions.

Professor Merritt has been a distinguished law teacher who leaves an indelible mark on legal education. An early crosser of the conjectured divide between doctrinal teaching and skills instruction,¹ Professor Merritt committed herself to training practice-ready attorneys.² Her highly regarded textbook—*Learning Evidence: From the Federal Rules to the Courtroom*—has had a groundbreaking effect on the way students learn Evidence.³ The textbook, hailed as the “uncasebook,” provides an alternative to the case method for learning legal rules without inclusion of any appellate opinions.⁴ In lieu of using cases to teach doctrinal principles, Professor Merritt uses case-based questions to prompt deeper thinking about the structural racism embedded in the Rules of Evidence. Through her book and supplemental materials, Professor Merritt advances a pedagogy for teaching Evidence in a manner that allows students to see law and its intersection with society from a broader perspective. From her model, we can improve not only our teaching, but the quality of justice as well.

In this Article, I, first, aim to unabashedly laud the career and scholarly accomplishments of Professor Merritt, a mentor and role model. Second, I strive to add a dimension of reflective narrative to Professor Merritt’s great work in equity and inclusion. Adding the personal narrative and perspective of what I will later describe as an “outgroup insider” will allow us to more directly explore ways that racial inequities shape our understanding of law from the classroom to the courtroom and beyond.⁵

¹ See, e.g., Linda H. Edwards, *The Trouble with Categories: What Theory Can Teach Us About the Doctrine-Skills Divide*, 64 J. LEGAL EDUC. 181, 181 (2014).

² See generally Deborah Jones Merritt, In Memoriam, *Robert M. Krivoshey: Friend and Teacher*, 79 OHIO ST. L.J. 7 (2018).

³ DEBORAH JONES MERRITT & RIC SIMMONS, *LEARNING EVIDENCE: FROM THE FEDERAL RULES TO THE COURTROOM* (4th ed. 2018).

⁴ Deborah Merritt & Ric Simmons, *Learning Evidence with an Uncasebook*, in *TEACHING EVIDENCE LAW: CONTEMPORARY TRENDS AND INNOVATIONS* 15, 15 (Yvonne Daly, Jeremy Gans & PJ Schwikkard eds., 2021).

⁵ Throughout this Article, I make reference to systemic inequity, systemic inequality, and structural inequality, and use the terms interchangeably. See, e.g., IBRAM X. KENDI, *HOW*

The Article proceeds in three parts. Part II offers a personal narrative account of ways that traditional models for teaching and learning law disregard the experiences of outgroup students. I use my specific experiences to showcase the incongruity between learned legal rules and the real-world context for their application. Part III explores the text, theory, and application of the Federal Rules of Evidence and the extent to which they confound and indoctrinate racial and societal biases. The power differentials implicit in evidentiary rules exclude outgroup realities and elude equal justice and fair trial. Part IV addresses the obligation to view and teach core doctrinal rules from a lens that incorporates diverse experiences. Simultaneously it considers the real obstacles in place that impede our ability to fulfill that obligation. Finally, I highlight Professor Merritt's innovative pedagogical tools that buck traditional legal instruction and provide opportunities for deeper learning from an enlarged perspective.

II. DISREGARDED REALITY

May 25, 2020: a date far less memorable than the event for which it is known. On this date, millions watched a white Minneapolis police officer murder an unarmed, middle-aged, Black man without provocation.⁶ With two other armed police officers standing guard, Derek Chauvin looked stony-eyed into the camera lenses of bystanders with his hands in his pockets as he knelt, for nine minutes and twenty-nine seconds, on the windpipe of a man who the world would come to know as George Floyd.⁷ This act of police violence was neither the first nor the most horrific to be captured on video and broadcast publicly. However, this specific unjustifiable act, done under the guise of law enforcement, opened many eyes to the true state of racial injustice in the United States.

The televised murder of Floyd by police gave way to massive anti-violence protests in cities across the globe.⁸ People of all races and backgrounds came together in the name of racial justice. The reaction to George Floyd's killing—and the many, many, other police killings of unarmed Black men—invigorated

TO BE AN ANTIRACIST 18 (2019) (“‘Institutional racism’ and ‘structural racism’ and ‘systemic racism’ are redundant. Racism itself is institutional, structural, and systemic.”).

⁶ *How George Floyd Died, and What Happened Next*, N.Y. TIMES (May 25, 2021), <https://www.nytimes.com/article/george-floyd.html> [<https://perma.cc/PFN8-V4D7>].

⁷ Eric Levenson, *Former Officer Knelt on George Floyd for 9 Minutes and 29 Seconds—Not the Infamous 8:46*, CNN (Mar. 30, 2021), <https://www.cnn.com/2021/03/29/us/george-floyd-timing-929-846/index.html> [<https://perma.cc/HVE5-NFRH>].

⁸ Zamira Rahim & Rob Picheta, *Thousands Around the World Protest George Floyd's Death in Global Display of Solidarity*, CNN (June 1, 2020), <https://www.cnn.com/2020/06/01/world/george-floyd-global-protests-intl/index.html> [<https://perma.cc/3HDK-Y9HS>].

demands for police reform. Reform proposals included calls to abolish qualified immunity⁹ and defund the police.¹⁰

These organic reform movements were not easily ignored because they included the voices of those not normally victims of social injustice. Thus, the push for reform sounded from varied venues, including colleges, universities, and law schools. Some of the proposed reforms extended beyond policing addressed the way we teach and train future lawyers. An antiracist clearing house was established by five law school deans,¹¹ confederate monuments were removed,¹² and many institutions with slaveholder namesakes were called to be renamed.¹³

These clamorous calls for social justice were prompted by George Floyd's callous murder—a murder that shocked the conscience of a nation. But George Floyd's murder was not shocking to me. It was appalling, frightening, and enraging, but far from shocking. I had seen this day coming. The lens of my life experience foreshadowed the ominous reality of Blackness as an offense punishable by death.

The prevalence of racial injustice and police violence have always been my realities. I am an attorney, a law professor, and a Black woman who was reared in an over-policed inner-city community. I learned soon after my entry into law school that my lived experiences would be disregarded at every turn and ultimately invalidated. At no time was this made clearer than in the late summer of 2014, in the wake of the shooting death of eighteen-year-old Michael Brown. Brown, another unarmed Black victim killed by police, was shot six times at close range by a white police officer in Ferguson, Missouri.¹⁴

⁹ Adam M. Taylor & Ayanna Alexander, *Calls to End Qualified Immunity Boosted by Chauvin's Conviction*, BLOOMBERG L. (Apr. 21, 2021), <https://news.bloomberglaw.com/social-justice/calls-to-end-qualified-immunity-boosted-by-chauvins-conviction> [<https://perma.cc/6R3T-PSM4>]; April Rodriguez, *Lower Courts Agree—It's Time to End Qualified Immunity*, ACLU: NEWS & COMMENT. (Sept. 10, 2020), <https://www.aclu.org/news/criminal-law-reform/lower-courts-agree-its-time-to-end-qualified-immunity/> [<https://perma.cc/VB3F-V3WZ>].

¹⁰ Yoonj Kim, *What 'Defund the Police' Means (and Doesn't Mean) and Where It Came From*, MTV: NEWS (June 16, 2020), <https://www.mtv.com/news/3166793/defund-the-police-history-vs-abolish-the-police/> [<https://perma.cc/3ECY-V8MY>].

¹¹ Angela Onwuachi-Willig, Kim Mutcherson, Carla D. Pratt, Danielle Holley-Walker & Danielle M. Conway, *Law Deans Antiracist Clearinghouse Project*, ASS'N AM. L. SCHS., <https://www.aals.org/about/publications/antiracist-clearinghouse/> [<https://perma.cc/8TLD-7LB4>].

¹² Rachel Treisman, *Nearly 100 Confederate Monuments Removed in 2020, Report Says; More than 700 Remain*, NPR (Feb. 23, 2021), <https://www.npr.org/2021/02/23/970610428/nearly-100-confederate-monuments-removed-in-2020-report-says-more-than-700-remain> [<https://perma.cc/ZA3N-QLPY>].

¹³ Natalie Gontcharova, *It's Time to Rename All the Schools Named After Slave Owners*, REFINERY29 (July 14, 2020), <https://www.refinery29.com/en-us/2020/07/9892176/richard-montgomery-high-school-rename-slave-owner> [<https://perma.cc/GCP2-8HCU>].

¹⁴ U.S. DEP'T OF JUST., DEPARTMENT OF JUSTICE REPORT REGARDING THE CRIMINAL INVESTIGATION INTO THE SHOOTING DEATH OF MICHAEL BROWN BY FERGUSON, MISSOURI POLICE OFFICER DARREN WILSON 4, 7 (Mar. 2015), <https://www.justice.gov/sites/default>

As I stood in line at my bank in the days following Brown's death, a white bank customer ahead of me said, confidently and with all sincerity, that Brown was at fault for his own death because "police officers don't ever bother anybody unless you cause a problem." It was at that exact moment I realized the disheartening disparity of our two realities. Hers: one of police as the savior, always available in times of trouble and need. Mine: one of police as an omnipotent force of authority in whose presence the failure to walk, drive, or speak with full submission came at the cost of catching a case.

My legal education and experience as a trial attorney helped me to see that *she* was who was described as a reasonably prudent person, by whose standard the appropriateness of an accused's conduct would be measured.¹⁵ *She* could be included on a jury of peers. The stark and painful recognition of the incongruity between the objective standards taught in law school and the patently subjective enforcement and execution of those standards was overwhelming. How could a jury ever find a police officer guilty of Michael Brown's murder if the people whom the law identifies as objectively reasonable cannot also see police officers in the same light as members of the communities they police? I left the bank in tears of rage and hopelessness. I don't even remember if I completed the transaction that brought me to the bank that day.

If likened to the COVID-19 virus, Michael Brown's death was the pre-Delta variant of police killings of unarmed Black men. Brown's death drew national attention and was the impetus for the growth and national renown of the Black Lives Matter movement.¹⁶ I vividly remember the way I cringed as I watched Brown's lifeless body lay uncovered for hours on the hot summer concrete, like roadkill. I trembled with confused disgust as police officers denied Brown the simple dignity of the customary cloth drape.¹⁷ Public cries to charge the officer who killed him were met with inaction, just as they would be in the police

/files/opa/press-releases/attachments/2015/03/04/doj_report_on_shooting_of_michael_brown_1.pdf [https://perma.cc/J6ZB-MY52].

¹⁵ See Maria L. Ontiveros, *Adoptive Admissions and the Meaning of Silence: Continuing the Inquiry into Evidence Law and Issues of Race, Class, Gender, and Ethnicity*, 28 Sw. U. L. REV. 337, 337–38 (1999).

¹⁶ *Black Lives Matter Movement*, HOW. UNIV. L. LIBR., <https://library.law.howard.edu/civilrightshistory/BLM> [https://perma.cc/ZTG6-R3AN].

¹⁷ See Julie Bosman & Joseph Goldstein, *Timeline for a Body: 4 Hours in the Middle of a Ferguson Street*, N.Y. TIMES (Aug. 23, 2014), <https://www.nytimes.com/2014/08/24/us/michael-brown-a-bodys-timeline-4-hours-on-a-ferguson-street.html> [https://perma.cc/JT2E-6VCV].

killings of Breonna Taylor,¹⁸ Alton Sterling,¹⁹ and others.²⁰ The boldness of the indignity and the seeming impunity that followed signaled to me that more was to come. And more would come, with few indictments, and even fewer convictions.

It was altogether relieving and unsettling to see one of the officer's responsible for George Floyd's death charged and tried. After Derek Chauvin was convicted of the second-degree murder of George Floyd,²¹ my relief was clouded with skepticism. For me, the vindication of the verdict was poisoned by the unsettling angst that somehow Chauvin's conviction might be overturned on appeal. My thoughts irrationally contemplated some procedural loophole that would allow a *nunc pro tunc* mistrial declaration. That these are my thoughts—the thoughts of a law school graduate, trial attorney, and law professor—are more telling about the conflicting racialized realities of our laws and justice system than about my grasp on the rules of criminal procedure.

Scholars have explored the dysfunctional relationship between police and BIPOC²² communities and presumptions of the reliability of police accounts offered at trial.²³ To be effective in my role of teaching or practicing law, I must consciously wall off my lived truths to accommodate the beliefs of others. This is what I describe as the burden of being an outgroup insider. By my race and background, I am an outgroup member: a person of color whose experience, viewpoint, and needs were not contemplated by the rule drafters, and whose voice has been withheld from the legal system. By my vocation and training, I am an insider: a person who has specialized knowledge of the legal rules that govern our society and the standards by which they are applied. To carry this

¹⁸ John Yang & Courtney Norris, *No Officers Have Been Charged in the Killing of Breonna Taylor. Will They?*, PBS NEWS HOUR (July 23, 2020), <https://www.pbs.org/newshour/show/no-officers-have-been-charged-in-the-killing-of-breonna-taylor-will-they> [<https://perma.cc/VEH3-HPN9>]; Laura Coates, *Indictment Doesn't Even Begin to Bring Justice for Breonna Taylor*, CNN (Sept. 23, 2020), <https://www.cnn.com/2020/09/23/opinions/indictment-doesnt-bring-justice-for-breonna-taylor-coates/index.html> [<https://perma.cc/P7Z3-9FV9>] (reporting that no officers were charged for any homicide offense in the Breonna Taylor killing and one of three officers involved was charged only with the wanton endangerment of Taylor's neighbors).

¹⁹ Colin Dwyer, *Baton Rouge Officers Will Not Be Charged in Alton Sterling's Killing*, NPR (Mar. 27, 2018), <https://www.npr.org/sections/thetwo-way/2018/03/27/597301377/baton-rouge-officers-will-not-be-charged-in-alton-sterlings-killing> [<https://perma.cc/N9AE-L73Q>].

²⁰ *George Floyd: Timeline of Black Deaths and Protests*, BBC NEWS (Apr. 22, 2021), <https://www.bbc.com/news/world-us-canada-52905408> [<https://perma.cc/7FY8-4CFH>].

²¹ *George Floyd: Jury Finds Derek Chauvin Guilty of Murder*, BBC NEWS (Apr. 21, 2021), <https://www.bbc.com/news/world-us-canada-56818766> [<https://perma.cc/3AW8-YP6B>].

²² Meera E. Deo, *Why BIPOC Fails*, 107 VA. L. REV. ONLINE 115, 125–26 (2021).

²³ See, e.g., Montré D. Carodine, “Street Cred,” 46 U.C. DAVIS L. REV. 1583, 1585 (2013); Mikah K. Thompson, *A Culture of Silence: Exploring the Impact of the Historically Contentious Relationship Between African-Americans and the Police*, 85 UMKC L. REV. 697, 699 (2017).

burden daily is one thing, but to perpetuate it through our current system of legal education is another. We can and must do better.

III. RACE AND THE RULES

The Federal Rules of Evidence, the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, and their state equivalents (collectively hereafter “the Rules”), exist to ensure a deliberative judicial process that is fair and focused on credibility, not conjecture.²⁴ Criminal procedure rules intersect with evidentiary rules to screen prospective jurors and exclude or limit the admissibility of evidence unlawfully or improperly obtained.²⁵ The Rules that seek to promote fair trials by exposing and limiting bias at the same time serve to obfuscate bias and power differentials in a manner that can lead to unjust results.²⁶ For decades, scholars have called to the light procedural and evidentiary inequities that impede and undermine the very objectives of the Rules.²⁷ A sobering reality is that the *purpose* of the Rules is often unfulfilled in the *execution* of the Rules.

A. Textualizing Race

Like the collective body of procedural rules, the Federal Rules of Evidence (“FRE”) are intended to apply neutrally to all parties and witnesses in the courtroom.²⁸ Textually, that intent is met as the actual wording of the FRE makes no reference to race or the bias created by race.²⁹ Yet, even in the absence of textualized reference to race, the unsubtle creep of a history of systemic

²⁴ See, e.g., J. Maria Glover, *A Regulatory Theory of Legal Claims*, 70 VAND. L. REV. 221, 221 (2017) (“Procedural law in the United States seeks to achieve three interrelated goals in our system of litigation: efficient processes that achieve ‘substantive justice’ and deter wrongdoing, accurate outcomes, and meaningful access to the courts.”).

²⁵ E.g., FED. R. CRIM. P. 24.

²⁶ Amy Overman & Steven I. Friedland, *Neutrality and the Rules of Evidence*, 57 CRIM. L. BULL. 586 (2021), 2021 WL 4290073 (LRI).

²⁷ See, e.g., Victor D. Quintanilla, *Critical Race Empiricism: A New Means to Measure Civil Procedure*, 3 U.C. IRVINE L. REV. 187, 199 (2013); cf. David M. Tanovich, *Safeguarding Trials from Racial Bias*, POL’Y OPTIONS (Oct. 2, 2018), <https://policyoptions.irpp.org/magazines/october-2018/safeguarding-trials-from-racial-bias/> [https://perma.cc/QG83-5J36].

²⁸ See David L. Faigman, *Looking for Policy in All the Wrong Places: A Comment on the Strategies of “The Race and Gender Crowd” Toward Evidence Law*, 28 SW. U. L. REV. 289, 291 (1999).

²⁹ Montré D. Carodine, “The Mis-Characterization of the Negro”: A Race Critique of the Prior Conviction Impeachment Rule, 84 IND. L.J. 521, 536 (2009); Jules Epstein, *Is Evidence Law Race ‘Neutral?’*, TEMPLE UNIV. BEASLEY SCH. L.: ADVOC. & EVIDENCE BLOG, <https://www2.law.temple.edu/aer/is-evidence-law-race-neutral/> [https://perma.cc/7VJS-Y4Q4].

power imbalances makes its presence known. Those power imbalances have yielded “separate and unequal courtrooms” for racial outsiders.³⁰

Despite the evidentiary objective of excluding evidence that is untrustworthy or that carries a danger of being unfairly prejudicial, the Rules have been insufficient to eliminate or address the real impact of race and racial biases at trial. Jurors may often rely on conscious or subconscious associations with race in a manner that functions as evidence and yet is unregulated and unchecked by the rules of evidence.³¹ The absence of race in the text of the Rules intended for neutrality has left us without a broader definition of which information is and is not evidence to be considered at trial.³²

Professor Jasmine Gonzales Rose, who analyzes the FRE from a critical race theory perspective, urges broadening the interpretation of evidentiary rules in a manner that would explicitly encompass considering and recognizing the impact of racial prejudice in determining whether an item of evidence is objectionable.³³ Professor Rose points out that lawyers often fail to raise arguments against the racially prejudicial effect of evidence proffered.³⁴ Because of differing realities, it is possible that lawyers themselves are not aware of the racially prejudicial impact of certain statements, inferences, or omissions.³⁵ Whether evidence is unfairly prejudicial is determined by the normative sense of the rule makers, and not its subjective effect on factfinders.³⁶

Theoretical semantics support the notion that “unfair prejudice,” as proscribed by the Rules, includes racial prejudice, but the lived experiences of those on the receiving end of all manners of racial prejudice disprove it. Courts rely on insider norming to interpret the terms of evidentiary rules. Insider norming often limits one’s recognition of outgroup differentials or the effect of ingroup normative actions on outgroup members.

One Black law professor describes her experience with ingroup norming:

I was interviewing for a [position] at a [large law firm with] about 150 attorneys . . . [D]uring one of my interviews, a white woman acknowledged [that none of the 150 attorneys was Black] in a roundabout way and then said something to the effect of: “It wasn’t purposeful. We just looked around one day and realized we somehow didn’t have any Black attorneys on staff.”

³⁰ Ion Meyn, *Constructing Separate and Unequal Courtrooms*, 63 ARIZ. L. REV. 1, 22–28 (2021); Mark Spiegel, *The Rule 11 Studies and Civil Rights Cases: An Inquiry into the Neutrality of Procedural Rules*, 32 CONN. L. REV. 155, 189 (1999).

³¹ See Bennett Capers, *Evidence Without Rules*, 94 NOTRE DAME L. REV. 867, 888 (2018).

³² Professor Capers urges a rethinking of what we define as evidence to extend beyond witness testimony and trial exhibits to include information that “functions as evidence” in the minds of jurors, like race, manner of dress, speech, etc. See *id.* at 900.

³³ Jasmine B. Gonzales Rose, *Toward a Critical Race Theory of Evidence*, 101 MINN. L. REV. 2243, 2257 (2017).

³⁴ *Id.*

³⁵ *Id.*

³⁶ MERRITT & SIMMONS, *supra* note 3, at 73.

Several years later . . . I had lunch with a white woman who . . . worked at [a law school] without any women of color on faculty, and she made almost the exact same statement: “We just didn’t realize.”³⁷

In the same way that the lack of diversity went unnoticed in the stark homogeneity of the ingroup law firm and ingroup law faculty, the racially prejudicial effect of an item of evidence can also go unnoticed in the absence of textual reminders. It often does.³⁸ The failure to identify and textualize race-based biases in the application of our evidentiary rules frustrates the purpose of the Rules and the goal of equal justice.³⁹

B. *Characterizing Race*

One great irony of society is that some acts of racial bias can go unnoticed by ingroup members, while race is ever prominent and perceivable. Race is a visible and societal construct.⁴⁰ Race is on display during voir dire, on the witness stand, in photo exhibits, at counsel table, and sometimes on the bench. Because the race of the parties, witnesses, and victims cannot be concealed, attempts to use evidentiary rules to sanitize the presence of race are in vain. During trial, evidence rules combine with subconscious stereotype or personal subscription to race-based norms in ways that can influence the perceptions of jurors and outside observers.⁴¹ Only when we distance ourselves from the aspirational maxim of a post-racial era can we allow ourselves to see that race cannot be suppressed, limited, or barred by rule, despite any stipulation, instruction, or amendment.

If we accept that race cannot be kept out of trial, we can then focus our efforts on preventing the weaponization of race, whether intentional or through passive disregard. Consider the role that perceptions and attitudes about race can play in character assessment. Evidence about a party’s character, also referred to as propensity evidence, can have an undue influence on the jury deciding a case. If permitted, reasonable jurors could use information about a defendant’s past acts or reputation as presumptively determinative of the defendant’s role or responsibility for the claimed offense. Federal Rule of Evidence 404, generally, prohibits admission of character evidence as proof that a party acted in conformity with that character trait.⁴² Professor Merritt

³⁷ Veronica Root Martinez, *On Being First, On Being Only, On Being Seen, On Charting a Way Forward*, 96 NOTRE DAME L. REV. REFLECTION 215, 216 (2021).

³⁸ See Rose, *supra* note 33, at 2252, 2257.

³⁹ See Epstein, *supra* note 29.

⁴⁰ See Howard Winant, *The Theoretical Status of the Concept of Race*, in THEORIES OF RACE AND RACISM: A READER 181, 181 (Les Back & John Solomos eds., 2000).

⁴¹ See Capers, *supra* note 31, at 889–93 (identifying three ways that jurors use race as evidence).

⁴² FED. R. EVID. 404(a) (“Evidence of a person’s character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character trait.”).

describes Rule 404 as a protective evidentiary net that excludes most propensity evidence from the courtroom.⁴³ That some parties experience less protection than others from the net is a manifestation of divergent racial realities.

A party's race can serve as character evidence in and of itself.⁴⁴ Negative race relations are so steeped into the history of the United States that even those who harbor no animosity against any particular race are still susceptible to some degree of unconscious bias.⁴⁵ Those biases may be strongest at the point of the insider-outgroup divide. The less interaction between the two groups, the more reliant each will be on stereotype-based interpretations of the other.⁴⁶ Studies have shown that Black stereotypes act as character evidence in trials decided by predominately white juries.⁴⁷ When the defendant is an outgroup member, the implicit biases of an insider-dominated jury can naturally lead to the jury members forming conclusions about the defendant's character based purely on outgroup stereotypes.⁴⁸ Sadly, such cognitive character assessments of "stereotypical blackness" are not subject to any 404 objection: an example of the contrasting racial realities at play in the application of key evidentiary rules.

Rule 404 is not an absolute ban against the use of character evidence. In criminal trials, a defendant may freely offer evidence of her own pertinent character traits as well as pertinent character traits of the claimed victim.⁴⁹ An insider can understand that evidence of the victim's conduct, knowledge, and consent can be critical elements of the defense. But, to outsiders, especially in police brutality cases like the Derek Chauvin trial, introducing evidence of the victim's character may make it appear as though the victim is on trial instead of the police officer, exacerbating strained racial realities.⁵⁰

In Derek Chauvin's murder trial, Chauvin introduced evidence that at another time his victim had ingested drugs prior to arrest to conceal them from police. This evidence aimed to prove that George Floyd may have acted in like manner on the day of his death, and posed an alternative theory for the cause of death.⁵¹ Evidence of Floyd's prior conduct was admitted as part of a "common

⁴³ MERRITT & SIMMONS, *supra* note 3, at 249.

⁴⁴ See, e.g., Mikah K. Thompson, *Blackness as Character Evidence*, 20 MICH. J. RACE & L. 321, 336 (2015).

⁴⁵ See Sarah E. Fiarman, *Unconscious Bias: When Good Intentions Aren't Enough*, EDUC. LEADERSHIP, Nov. 2016, at 10, 12.

⁴⁶ See Luigi Castelli, Katia Vanzetto, Steven J. Sherman & Luciano Arcuri, *The Explicit and Implicit Perception of In-Group Members Who Use Stereotypes: Blatant Rejection but Subtle Conformity*, 37 J. EXPERIMENTAL SOC. PSYCH. 419, 424 (2001).

⁴⁷ Thompson, *supra* note 44, at 328, 330–31.

⁴⁸ *Id.* at 330–31.

⁴⁹ FED. R. EVID. 404(a)(2).

⁵⁰ See Ted Sampsell-Jones, *Should George Floyd's Past Record Be Admitted as Evidence in Derek Chauvin's Trial?*, DISPATCH (Mar. 22, 2021), <https://thedispatch.com/p/george-floyd-record-chauvin-trial> [<https://perma.cc/VWP5-CDKY>].

⁵¹ Steve Karnowski & Amy Forliti, *Battle Over Floyd's 2019 Arrest Highlights Key Trial Issue*, ASSOCIATED PRESS (Mar. 16, 2021), <https://apnews.com/article/lawyer-ex->

plan” or “modus operandi” under Rule 404(b), over prosecution objections that the evidence was proffered in an attempt to smear the character of the victim.⁵² Regardless of whether Floyd’s conduct was relevant in the trial of his murderer, juror biases and stereotypes about Black men and their use of drugs could come into play. Judges must balance the defendant’s rights with the racial realities of the world in which we live. Whether a victim’s character or behavior is offered to show propensity or for a non-propensity purpose, that conduct can often result in a blame-the-victim mentality and play into stereotypes about people of color.

Despite the very important and complicated constraints on the admissibility of character evidence, it may be harder for outgroup members to perceive the protective aim of the Rules. In the mind of a layperson outgroup member, negative character information about the victim and evidence of a victim’s past crimes are offered to shift the responsibility for police violence from the accused to the accuser.⁵³ Other victims of police or racial violence, adopting this view, could be less likely to come forward to seek redress. Moreover, prosecutors, who understand the ways that past convictions can be used in trial, may be less likely to file charges in claims of police violence when the victim has a criminal record.⁵⁴ A decision not to prosecute lies squarely within prosecutorial discretion. Such a decision may be often based on the prosecutor’s calculation of the likelihood of conviction. The risk of victim criminalization and tactical prosecutorial discretion intersect with the Rules of Evidence in a manner that handcuffs justice because they dissuade victims of police or racial violence from coming forward.

C. Criminalizing Race

The stain of past criminal convictions may also be used as evidence to label a non-party witness as dishonest and untrustworthy.⁵⁵ The rationale for the presumption that a witness with a criminal conviction is inherently unreliable and likely predisposed to lie under oath traces back to common law rules that

officer-wants-jury-hear-2019-george-flyod-arrest-e2c0d37026319a1987cdca47b93b33a0 [https://perma.cc/T8A2-CNXT].

⁵² See Sampsell-Jones, *supra* note 50.

⁵³ See FED. R. EVID. 404(b), 405.

⁵⁴ See Elizabeth Anne Stanko, *The Impact of Victim Assessment on Prosecutors’ Screening Decisions: The Case of the New York County District Attorney’s Office*, 16 LAW & SOC’Y REV. 225, 225, 231–33, 238 (1982); Eric P. Baumer, Steven F. Messner & Richard B. Felson, *The Role of Victim Characteristics in Disposition of Murder Cases*, 17 JUST. Q. 281, 284 (2000).

⁵⁵ Federal Rule of Evidence 609(a)(1) allows admission of a witness’s past convictions for crimes unrelated to truthfulness subject to a balancing analysis of the probative value against the risk of unfair prejudice under Rule 403. In a criminal case in which a witness is also the defendant, Rule 609(a)(1)(A) adds additional restrictions for the use of past crimes to impeach. When the prejudicial effect of the conviction is greater than or equal to its probative evidentiary value, the court will exclude the evidence.

once prohibited convicted felons from testifying in court.⁵⁶ There were also race-based competency rules at common law that prevented Black people, Chinese immigrants, Native Americans, and people of mixed race from giving testimony against a white person.⁵⁷ The embodiment and adoption of the FRE, in theory, abolished these exclusionary standards. In practice, however, rules allowing admission of past crimes evidence continues to disparately impact people of color in pursuit of justice.⁵⁸ There are two significant ways in which the disparate impact is manifested.

First, FRE 609(a)(1) imposes no requirement that the nature of the conviction have any bearing on truthfulness. A felony conviction for child abuse or drunk driving certainly has societal implications, but none of them, logically, should lead to an assumption that the convicted person is incapable of truth telling and giving credible testimony in a case, whether they are a party or non-party. This presumptive attack on credibility poses serious harm to a defendant who must decide whether or not to testify in her own case. The reality that jurors may make harmful inferences when a defendant does not testify at trial is disregarded by the harring influence of Rule 609(a)(1) that may effectually keep the defendant out of the witness stand.⁵⁹

Second, the net effect of race is absent from the calculi that determine the prejudicial weight of a proffered conviction under FRE 403 and 609.⁶⁰ There is abundant data to show that communities of color are policed more heavily than communities that are predominately white.⁶¹ Police presence has been directly proportional to the number of arrests in urban areas.⁶² Race also informs the police decision of who to arrest⁶³ and the nature and severity of the crime cited in the arrest.⁶⁴ Also to be considered is the impact of race on prosecutorial discretion to negotiate and accept plea deals. Prosecutors are statistically more

⁵⁶ MERRITT & SIMMONS, *supra* note 3, at 259.

⁵⁷ Rose, *supra* note 33, at 2247.

⁵⁸ Carodine, *supra* note 29, at 521, 536.

⁵⁹ Anna Roberts, *Reclaiming the Importance of the Defendant's Testimony: Prior Conviction Impeachment and the Fight Against Implicit Stereotyping*, 83 U. CHI. L. REV. 835, 861 (2016).

⁶⁰ Epstein, *supra* note 29.

⁶¹ See, e.g., Barbara Perry, *Nobody Trusts Them! Under- and Over-Policing Native American Communities*, 14 CRITICAL CRIMINOLOGY 411, 416, 430 (2006).

⁶² See Aaron Chalfin, Benjamin Hansen, Emily K. Weisburst & Morgan C. Williams, Jr., *Police Force Size and Civilian Race* 4 (Nat'l Bureau of Econ. Rsch., Working Paper No. 28202, 2020), https://www.nber.org/system/files/working_papers/w28202/w28202.pdf (on file with the *Ohio State Law Journal*).

⁶³ Tammy Rinehart Kochel, David B. Wilson & Stephen D. Mastrofski, *Effect of Suspect Race on Officers' Arrest Decisions*, 49 CRIMINOLOGY 473, 498 (2011) (“[T]he chances of a [non-white] suspect being arrested were found to be 30 percent greater than a White suspect . . .”).

⁶⁴ See, e.g., Michael Braun, Jeremy Rosenthal & Kyle Therrian, *Police Discretion and Racial Disparity in Organized Retail Theft Arrests: Evidence from Texas*, 15 J. EMPIRICAL LEGAL STUD. 916, 919–20 (2018).

inclined to lower, from felony to misdemeanor, the charges against white defendants.⁶⁵ These statistics support the notion that even in a world where communities were equally policed, felony convictions would still disproportionately befall people of color.

The exclusion of race as a consideration in the application of the Rules is yet another example of white normativity and disregarded racial reality.⁶⁶ Because the Rules, deployed for fairness and protection, leave vulnerable a select and identifiable population, scholars pushing for reform criticize them as insufficient measures to exclude or mitigate prejudicial bias in both civil and criminal proceedings.⁶⁷ The plethora of proposed amendments to the Rules includes: explicit jury instruction on racial bias;⁶⁸ a true ban on prejudicial character evidence;⁶⁹ a temporary moratorium on police testimony;⁷⁰ a mandated attorney-led voir dire in federal court;⁷¹ and an instruction acknowledging outgroup norms that depart from white normative standards.⁷²

Perhaps the most viable path to reform—one that requires no amendment to the Rules—is to educate lawyers and judges about Critical Race Theory and how structural racism is embedded into an array of evidentiary rules, including the manner by which those rules are interpreted and applied.⁷³ For it is lawyers who must decide to raise issues of structural bias, and judges must decide how to rule on them. Impeachment is not obligatory under the FRE, and prosecutors could choose to not impeach a defense witness with any crime unrelated to

⁶⁵ See Ilene Nagel Bernstein, Edward Kick, Jan T. Leung & Barbara Schulz, *Charge Reduction: An Intermediary Stage in the Process of Labelling Defendants*, 56 SOC. FORCES 362, 375–77 (1977); Elsa Y. Chen, *The Liberation Hypothesis and Racial and Ethnic Disparities in the Application of California's Three Strikes Law*, 6 J. ETHNICITY CRIM. JUST. 83, 97 (2008); see also Justin Murray, *Reimagining Criminal Prosecution: Toward a Color-Conscious Professional Ethic for Prosecutors*, 49 AM. CRIM. L. REV. 1541, 1562 (2012).

⁶⁶ Rose, *supra* note 33, at 2252 (citing PATRICIA WILLIAMS, *SEEING A COLOR-BLIND FUTURE: THE PARADOX OF RACE* 6 (1997) (defining white normativity as “the implicit belief that white ideas, practices, and experiences are inherently normal, natural, and right”).

⁶⁷ Epstein, *supra* note 29.

⁶⁸ Mikah K. Thompson, *Bias on Trial: Toward an Open Discussion of Racial Stereotypes in the Courtroom*, 2018 MICH. ST. L. REV. 1243, 1244, 1285–1294.

⁶⁹ Chris Chambers Goodman, *The Color of Our Character: Confronting the Racial Character of Rule 404(b) Evidence*, 25 LAW & INEQ. 1, 50–52 (2007) (proposing a ban on the admission of prior bad acts because their admission indirectly allows entry of prohibited character and propensity evidence).

⁷⁰ Carodine, *supra* note 23, at 1614–19 (proposing a temporary moratorium on certain types of police testimony in communities where trust in law enforcement has eroded).

⁷¹ See generally Note, *Black Lives Discounted: Altering the Standard for Voir Dire and the Rules of Evidence to Better Account for Implicit Racial Biases Against Black Victims in Self-Defense Cases*, 134 HARV. L. REV. 1521 (2021).

⁷² Cf. Thompson, *supra* note 23, at 732 (addressing normative conclusions about admission by silence); Rose, *supra* note 33, at 2284 (“The presumption that fleeing from authorities [in Black and Brown communities] is abnormal and deviant is evidence of white racialized reality and raises white normativity and transparency concerns.”).

⁷³ See Rose, *supra* note 33, at 2303.

honesty. Judges can be reminded that they have the discretion to not allow that form of impeachment.⁷⁴

Lawyers, who are well-trained on the prevalence and risks of harmful biases, could decide not to raise evidence that plays into stereotypes. Similarly trained judges could exercise their discretion to refuse to admit evidence that feeds or is fueled by stereotype because of the danger of its misuse. The discretion afforded to lawyers and judges is why those charged with educating and preparing tomorrow's lawyers cannot afford to wait for changes to the Rules to act. Our special obligation for the quality of justice dictates that we must address the ways in which the Rules of Evidence are discordant with racial realities and the goals of antiracism.⁷⁵ We must educate insiders and open their eyes to lived realities that differ from their own.

There is no better place to do this than the law school classroom. Professor Merritt leads by example and provides those who teach Evidence with opportunities to raise issues of racial justice with students. In her text, she addresses the inherent inequities that stem from application of the otherwise neutral Rules. Professor Merritt reminds students that Rule 609 disproportionately affects nonwhite and low-income defendants.

Racial profiling, heightened neighborhood surveillance, and implicit bias subject those defendants to more criminal prosecutions than other citizens. Low-income defendants who cannot pay bail are often pressured into pleading guilty rather than contest the charges against them. Once these defendants have a prior conviction from these pleas, Rule 609 makes future convictions easier to obtain—perpetuating a cycle of disadvantage.⁷⁶

By going beyond the text of the Rules, Merritt makes room for the outgroup voice to be heard by insiders.

IV. THE PARADIGM OF IRRELEVANCE BY OMISSION

Exploring issues of structural inequality in the law school classroom is a modern imperative. The core function of legal education has been teaching students to learn doctrine by dissecting and analyzing codified rules and judicial decisions. Race is often a fundamental, but unstated, assumption upon which that legal doctrine depends.⁷⁷ Starting from the Constitution, “race has played a key role at many critical and formative junctures” in the development of laws and the legal system in the United States.⁷⁸ A history of overt and oppressive

⁷⁴ See FED. R. EVID. 609(a)(1)(A).

⁷⁵ MODEL RULES OF PRO. CONDUCT pmb1. (AM. BAR ASS'N 2020).

⁷⁶ MERRITT & SIMMONS, *supra* note 3, at 273.

⁷⁷ See Deborah Zalesne, *Racial Inequality in Contracting: Teaching Race as a Core Value*, 3 COLUM. J. RACE & L. 23, 27 (2013).

⁷⁸ Frances Lee Ansley, *Race and the Core Curriculum in Legal Education*, 79 CALIF. L. REV. 1511, 1515 (1991).

racism has metastasized to a subconscious racial bias ever present in the culture of law.⁷⁹ Conversations about the role and impact of race and racial exclusion in the law and legal profession are too often dissociated from core doctrinal instruction. Instead, topics of race and racial impact are woodenly reserved for perspective courses like “Race and the Law” and their ilk. Race, racial issues, and racial disputes are central to an educated understanding of our laws and the heritage of our nation.⁸⁰

Even though race has been identified as a key lens for viewing and understanding law,⁸¹ it is often conspicuously absent from foundational core first-year courses.⁸² It is almost as if legal educators had stipulated to some pre-curricular motion in limine to exclude the role of race in property ownership, the rights and bargaining position of parties to contract, and the power-based presumptions that challenge the right to a fair trial. While this suppression goes easily unnoticed by insiders, it leaves outgroup students (and instructors) struggling to attach weight and meaning to their own identities and experiences.

The law school curriculum signals a hierarchy of importance to law students. Courses required in the first year seem to hold the most significance, because they are foundational prerequisites for the rest of the juris doctor degree program. Second in importance, are the required upper-level core courses. These subjects—typically Evidence, Professional Responsibility, Criminal Procedure, and often Constitutional Law II—are important enough to make their completion a condition precedent to law school graduation⁸³ because they will appear on some form of licensure exam, but not so important that one must take them during the first semester or first year of law school. Lowest in the hierarchy are the elective courses, which typically also include the “skills”⁸⁴ and “perspectives”⁸⁵ courses.

⁷⁹ Charles Lawrence III, *Unconscious Racism Revisited: Reflections of the Impact and Origins of the Id, the Ego, and Equal Protection*, 40 CONN. L. REV. 931, 942 (2008).

⁸⁰ Ansley, *supra* note 78, at 1572.

⁸¹ *Id.* at 1521.

⁸² Marsha Griggs, *Building a Better Bar Exam*, 7 TEX. A&M L. REV. 1, 57 (2019) (identifying Civil Procedure, Contracts, Real Property, and Torts as first-year courses uniformly required by ABA-accredited law schools).

⁸³ *Id.* at 32, 57.

⁸⁴ Notre Dame Law School, for example, distinguishes its “skills courses” as those that require law students to “practice the crafts of advocacy and legal writing under simulated conditions.” Included in its skills curriculum are trial advocacy skills, appellate advocacy skills, transactional skills, and universal lawyering skills. *Skills Courses*, UNIV. NOTRE DAME L. SCH., <https://law.nd.edu/academics/experiential-courses/skills-courses/> [<https://perma.cc/66UQ-6ASH>].

⁸⁵ Boston College Law School defines perspectives courses as those that “undertake[] a sustained and rigorous inquiry . . . into the nature and meaning of ‘law’ [and] ‘justice’ through the lenses of . . . humanities or social science.” *Perspectives on Law and Justice Requirement*, BOS. COLL. L. SCH., <https://www.bc.edu/content/dam/bc1/schools/law/top-bar/current-students/Academics/course-selection/perspectives.pdf> [<https://perma.cc/9KWC-3BLW>].

Just as law schools indirectly message the importance of some subjects over others by curricular hierarchy, law professors intuitively convey a significance sub-ranking based on the amount of time devoted to, and the manner of inclusion of, certain topics within each subject. For example, negligence might consume more time and attention in an introductory Torts course, than would battery or invasion of privacy. Likewise, hearsay and propensity rules will out-proportion witness competency and authentication of documents in the Evidence classroom. It follows then, that what we exclude from coverage indirectly signals to our students that those topics are insignificant or of lesser importance. This paradigm of irrelevancy-by-omission disregards the realities of the lived experiences of our students and the clients they will ultimately serve.

A. *Creating Safe Spaces, Not Silos*

When issues of race and social justice are pushed to the periphery of legal education, not only do schools diminish their perceived significance, they also falsely promote a single normative.⁸⁶ The implicit messaging is that acknowledging the racial subordination embedded in the law is optional—to be pursued in accordance with one’s own interest, like the decision to take an elective course in Sports Law or Entertainment Law. Going against that false normative can be costly.

The potential costs are substantial and cannot be easily shouldered by those untenured and without status in the legal academy.⁸⁷ Efforts to incorporate racial and other diverse perspectives into core course teaching can be met with student complaints, poor teaching evaluations, discomfort, defensiveness, and unintentional marginalization of some students.⁸⁸ Political undercurrents may also create understandable trepidation about comingling issues of race with core teaching.⁸⁹ Several state and local lawmaking bodies have outlawed and profoundly misunderstood the teaching or inclusion of critical race theory principles.⁹⁰

Risk avoidance is not the lone obstacle to racially inclusive teaching. There are three other compelling impediments that cannot be ignored. First, law

⁸⁶ Ansley, *supra* note 78, at 1516.

⁸⁷ Lisa Guerrero, *Introduction*, in *TEACHING RACE IN THE 21ST CENTURY: COLLEGE PROFESSORS TALK ABOUT THEIR FEARS, RISKS, AND REWARDS* 3–4 (Lisa Guerrero ed., 2008).

⁸⁸ Okianer Christian Dark, *Incorporating Issues of Race, Gender, Class, Sexual Orientation, and Disability into Law School Teaching*, 32 *WILLAMETTE L. REV.* 541, 558–59 (1996).

⁸⁹ Beth McMurtrie, *‘Be Paranoid’: Professors Who Teach About Race Approach the Fall with Anxiety*, *CHRON. HIGHER EDUC.* (Aug. 13, 2021), <https://www.chronicle.com/article/be-paranoid-professors-who-teach-about-race-approach-the-fall-with-anxiety> [https://perma.cc/YMJ6-PTW9].

⁹⁰ Jack Dutton, *Critical Race Theory Is Banned in These States*, *NEWSWEEK* (June 11, 2021), <https://www.newsweek.com/critical-race-theory-banned-these-states-1599712> [https://perma.cc/59PE-7PPY].

professors are bound by time constraints. Decisions on content to be included or omitted from core courses are largely constrained by credit hour allotment. First-year required courses, almost universally, have shrunk in time allocation from five to six credit hours taught over two semesters, to three to four credit hours taught in one semester.⁹¹ Under these time constraints, law professors are hard pressed to meaningfully cover essential core content and must omit some areas of doctrine.

Second, the scope of bar exam content also influences decisions to cut or cover certain aspects of doctrine under time constraints.⁹² Law students invest substantial time and money to earn a legal education and enter the practice of law. Despite objections to “teaching to the test,” law schools should be invested in ensuring that their graduates are prepared to enter the legal profession. Such entry requires passage of a state bar exam. Moreover, the American Bar Association requires that law schools maintain at least a 75% bar pass rate for its graduates.⁹³

Third in sequence, but not significance, is academic freedom. Law professors enjoy an academic freedom that allows them to engage, without unreasonable restrictions, in the “production, consumption and dissemination of knowledge.”⁹⁴ Some professors simply may not agree that race has the role subscribed by critical race theorists or advanced in this paper. Others may agree that it is important to include the role of race in law school teaching, but feel ill-equipped or unqualified to foster discussions about race from the podium. The same academic freedom that protects those willing to confront “racist ideology and structures” also entitles those who are not to decline such confrontation without repercussion.⁹⁵ A premise of Professor Merritt’s work, this Article, and many others, is that the legal profession will be enriched by incorporating multiple diverse perspectives. That premise would ring hollow if divergent faculty perspectives were singled out and excluded. As long as law schools

⁹¹ E.g., Randal C. Picker, *Revised First-Year Curriculum Allows for New Courses and Smaller Classes*, UNIV. OF CHI. L. SCH. (Oct. 13, 2020), <https://www.law.uchicago.edu/news/revised-first-year-curriculum-allows-new-courses-and-smaller-classes> [<https://perma.cc/4DN7-MKKA>].

⁹² Griggs, *supra* note 82, at 54 (asserting that because “[l]aw school ranking and accreditation decisions are made, at least in part, based on the bar passage rates of its graduates” law professors have both a student-centered and a self-interested reason to ensure their courses reasonably prepare students for the bar exam).

⁹³ *Council Enacts New Bar Passage Standard for Law Schools*, A.B.A. (May 20, 2019), <https://www.americanbar.org/news/abanews/aba-news-archives/2019/05/legal-ed-bar-passage-rate/> (on file with the *Ohio State Law Journal*).

⁹⁴ Patrick Blessinger & Hans de Wit, *Academic Freedom Is Essential to Democracy*, UNIV. WORLD NEWS (Apr. 6, 2018), <https://www.universityworldnews.com/post.php?story=20180404101811251> [<https://perma.cc/S7ZK-KBAD>].

⁹⁵ Manuel Vélez & Stephanie Curry, *Academic Freedom and Equity*, ACAD. SENATE FOR CAL. CMTY. COLLS. (Nov. 2020), <https://www.asccc.org/content/academic-freedom-and-equity> [<https://perma.cc/WM5R-U2A6>].

foster a safe space for inclusive teaching, the expanse of it need not be proscribed or constrained.

And, even where a law school's curriculum does not foster such a space, or where the risks are too great, tools like Professor Merritt's Evidence textbook carve that space by raising issues of racial inequality as part of the text.⁹⁶ Professor Merritt's book addresses the consequences of race in ways that others cannot or would not. Thus, she provides law professors and students the opportunity, and in some cases the "cover," to explore these issues that would otherwise remain in the periphery.

B. *Expanding Our Lens*

When it comes to views on race and structural inequality, we instinctively default to personal experiences that are not empirically quantified.⁹⁷ Those personal experiences form the heuristics for our own biases. Through those biases, we filter information that becomes our lens for justice and social norms. For too long, we have relied innately on our own singular constricted lenses to make assessments about the impact our teaching choices have on the professional identity formation of law students.⁹⁸ By doing the work to expand our individual lenses, we can broaden our teaching in a manner that will incorporate the viewpoints of our students. With expanded views that allow us to see beyond our own biases and privileges, we can begin to look at the law differently.

This type of wide-angle teaching promotes the very contemplative and inclusive analysis that we train law students to perform. Law students may not be consciously aware of how we have become conditioned to view the complexities of the interplay between law and the world in which we live. As our students become cognizant of their own natural myopia, we can use that self-realization as a foray into teaching them about racial justice and the law. Allowing law students to integrate their own experiences with those of others will enlarge their problem-solving skills and, ultimately, make them more effective as advocates.⁹⁹

An expanded lens allows us to see the importance of what we must do to prepare more socially conscience minded lawyers, and why we must do it. But what remains to be seen is *how* we will do it. Status quo dictates virtually every aspect of the legal profession, from legislative proceedings and case precedent to the way we train and license new attorneys.¹⁰⁰ New law professors are heavily

⁹⁶ See, e.g., MERRITT & SIMMONS, *supra* note 3, at 273 (discussing ways that FRE 609 perpetuates a cycle of disadvantage for nonwhites and low-income defendants).

⁹⁷ See Vélez & Curry, *supra* note 95.

⁹⁸ See Eduardo R.C. Capulong, Andrew King-Ries & Monte Mills, *Antiracism, Reflection, and Professional Identity*, 18 HASTINGS RACE & POVERTY L.J. 3, 6 (2021).

⁹⁹ Christian Dark, *supra* note 88, at 551–57.

¹⁰⁰ Marsha Griggs, *An Epic Fail*, 64 HOW. L.J. 1, 42–43 (2020).

influenced by the manner in which they were taught.¹⁰¹ The case-law-dominated, and often Socratic, learning experience has replicated itself for generations.¹⁰² Just as teaching styles and methodologies are passed down, so is content.

C. Uncasing Doctrine

The pride of the podium professor is teaching law students to “think like lawyers” by dissecting and analyzing judicial opinions.¹⁰³ The first-year curriculum in most U.S. law schools is focused heavily on case law reading. The case law method of teaching has endured hosts of criticisms. Some critics claim that the case method takes curricular space at the expense of practice skills.¹⁰⁴ Others argue that law professors’ heavy reliance on judicial decisions that interpret the law rather than on the politicized practices through which codes are enacted implicitly teaches students that litigation is the primary driver of social change and ignores the legislative process.¹⁰⁵ It is one-sided and deprives social justice minded law students of opportunities to learn about avenues to administrative and legislative advocacy.¹⁰⁶ Another consistent criticism of the case method is that it is an ineffective way to learn law.¹⁰⁷

Criticisms notwithstanding, professors need to use case law to teach first-year law students how to read case decisions and derive common law rules.¹⁰⁸ A more optimal teaching mix might combine the ability to extract and digest legal rules (the objective of the case method) with modern pedagogical tools like problem-based teaching, skills assessment, or experiential learning.¹⁰⁹ Even so, teaching a doctrinal law school course without some manifestation of the case method was unheard of.

At least it was unheard of until Professor Merritt disrupted established legal pedagogy with a textbook for a core doctrinal course that contained no appellate

¹⁰¹ See, e.g., Melissa J. Marlow, *Does Kingfield Live?: Teaching with Authenticity in Today’s Law Schools*, 65 J. LEGAL EDUC. 229, 234–35 (2015).

¹⁰² Julia Hernandez, *Lawyering Close to Home*, 27 CLINICAL L. REV. 131, 161 (2020) (“In teaching, law professors primarily rely on judicial decisions that interpret the law . . .”).

¹⁰³ See Deborah Jones Merritt, *Cognition and Justice: New Ways to Think Like a Lawyer*, 69 ARK. L. REV. 47, 65 (2016); see also Michael Maslanka, *Thinking Like a Lawyer: A Back to the Future Proposal for Practitioner Based and Taught Pedagogy*, 97 U. DET. MERCY L. REV. ONLINE 12, 13 (2012).

¹⁰⁴ See LINDA H. EDWARDS, *THE DOCTRINE-SKILLS DIVIDE: LEGAL EDUCATION’S SELF-INFLICTED WOUND* 6–8 (2017).

¹⁰⁵ Hernandez, *supra* note 102, at 161–62.

¹⁰⁶ See *id.*

¹⁰⁷ Merritt & Simmons, *supra* note 4, at 17 (“Reading a series of heavily excerpted judicial opinions is a very inefficient way to learn the law, especially a code-based subject like Evidence.”).

¹⁰⁸ *Id.*

¹⁰⁹ See James Eagar, Comment, *The Right Tool for the Job: The Effective Use of Pedagogical Methods in Legal Education*, 32 GONZ. L. REV. 389, 398 (1996).

opinions. Her book, coauthored with Professor Ric Simmons, upended prior notions that law students could only learn legal rules by combing through case opinions, or excerpts thereof.¹¹⁰ The book was a first of its kind and quickly became a favorite amongst Evidence professors. The text dissects the Federal Rules of Evidence and contains embedded problems that provide students with opportunities to analyze the problems in the context of the Rules.¹¹¹ Because of the response to Professors Merritt and Simmons' textbook, the publisher, WestAcademic, developed a new series—*The Learning Series*—devoted to curating texts in a wide array of disciplines using a similar model.

Like her many other contributions to law teaching, the narrative style of Professor Merritt's textbook equips law professors to engage students in the very necessary conversations about the intersection of race and the rule of law, without the costly risks often associated with such engagement. Through her book, Professor Merritt breaks ground for impactful change in the way we teach the law. Professor Merritt employs cutting edge pedagogical practices—like chunking and working memory—that allow students to engage and retain the substance of the Rules of Evidence and ponder the reasons for, and the impact of, the Rules. The case-based problems and questions in Merritt's book aid professors to build classroom atmospheres where students are not afraid to speak up.¹¹² By using Evidence instead of a “skills” or peripheral course, she shows that this model can be replicated in other core doctrinal courses in ways that will further the goals of improved access to justice and racial equality.

V. CONCLUSION

Professor Merritt's work and insight help us connect our teaching and curriculum to social awareness and the needs of modern practice. Professor Merritt, through her policy advocacy, empirical research, thoughtful scholarship, and skills-based approach to teaching, has created space for pensive conversations about systemic inequality. In addition to her renown as a Constitutional Law scholar, she has tackled, head on, the structural inequities furthered by: governmental response to public health crises;¹¹³ hiring and promotion practices in the legal academy;¹¹⁴ gender gaps in law school

¹¹⁰ *Professors: Ric Simmons*, OHIO ST. UNIV. MORITZ COLL. OF L., <https://moritzlaw.osu.edu/faculty/ric-simmons/> [<https://perma.cc/3H5X-9LTF>].

¹¹¹ See Merritt & Simmons, *supra* note 4, at 22.

¹¹² See MERRITT & SIMMONS, *supra* note 3, at 367–68.

¹¹³ Deborah Jones Merritt, *Communicable Disease and Constitutional Law: Controlling AIDS*, 61 N.Y.U. L. REV. 739, 740 (1986); Deborah Jones Merritt, *The Constitutional Balance Between Health and Liberty*, HASTINGS CTR. REP., Dec. 2016, at 2, 9.

¹¹⁴ Deborah Jones Merritt & Barbara F. Reskin, *The Double Minority: Empirical Evidence of a Double Standard in Law School Hiring of Minority Women*, 65 S. CAL. L. REV. 2299, 2301–02 (1992); Deborah J. Merritt, Barbara F. Reskin & Michelle Fondell, *Family, Place, and Career: The Gender Paradox in Law School Hiring*, 1993 WIS. L. REV. 395, 397 (1993); Deborah Jones Merritt, *The Status of Women on Law School Faculties: Recent Trends in Hiring*, 1995 U. ILL. L. REV. 93, 103–04; Deborah Jones Merritt, *Who Teaches*

enrollment;¹¹⁵ access to justice;¹¹⁶ the manner in which we prepare¹¹⁷ and license¹¹⁸ attorneys for practice; and trial practice and procedural rules.¹¹⁹ Her work models ways that thought-provoking conversations about racism and structural inequality can be advanced by those with inauthentic voices.¹²⁰

Professor Merritt has decorously taught us how to be apprehensive and courageous at the same time. She has neither let her privilege insulate her from outgroup realities, nor has she let it hush her vocal efforts to speak out against inequality and subordination. Despite her exhausting list of accolades and accomplishments, she is not done. An incomplete work for which we can all be grateful.

Constitutional Law?, 11 CONST. COMMENT. 145, 159–60 (1994); Deborah Jones Merritt, *Bias, the Brain, and Student Evaluation of Teaching*, 82 ST. JOHN'S L. REV. 235, 239–40 (2007).

¹¹⁵ Deborah Jones Merritt & Kyle McEntee, *Gender Equity in Law School Enrollment: An Elusive Goal*, 69 J. LEGAL EDUC. 102, 103 (2019).

¹¹⁶ See Deborah Jones Merritt, *What Happened to the Class of 2010? Empirical Evidence of Structural Change in the Legal Profession*, 2015 MICH. ST. L. REV. 1043, 1109–19; Deborah Jones Merritt et al., *Licensing Lawyers in a Pandemic: Proving Competence*, HARV. L. REV. BLOG (Apr. 7, 2020), <https://blog.harvardlawreview.org/licensing-lawyers-in-a-pandemic-proving-competence/> [<https://perma.cc/MQ9K-49QB>].

¹¹⁷ Deborah Jones Merritt, *Hippocrates and Socrates: Professional Obligations to Educate the Next Generation*, 51 WAKE FOREST L. REV. 403, 403 (2016); Deborah Jones Merritt & Daniel C. Merritt, *Responsibility-Rights in the Legal Profession*, 43 ARIZ. ST. L.J. 1257, 1266–67 (2011).

¹¹⁸ DEBORAH JONES MERRITT & LOGAN CORNETT, BUILDING A BETTER BAR: THE TWELVE BUILDING BLOCKS OF MINIMUM COMPETENCE 5 (Dec. 2020), https://iaals.du.edu/sites/default/files/documents/publications/building_a_better_bar.pdf [<https://perma.cc/S62J-4G6D>]; Claudia Angelos et al., *Diploma Privilege and the Constitution*, 73 SMU L. REV. F. 168, 168–69 (2020).

¹¹⁹ MERRITT & SIMMONS, *supra* note 3.

¹²⁰ By inauthentic voices, I reference the “voice-of-color thesis.” The thesis holds that the status and experience of being a person of color brings a presumption of competence to speak about their own experiences with racism in the legal system. See RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* 11 (3rd ed. 2017).