

“HOLD YOUR (UN)SCHOLARLY TONGUE”: DISMANTLING SIR RACISM’S ‘ACADEMIC FREEDOM’ SHIELD

ZAMIR BEN-DAN*

TABLE OF CONTENTS

I. INTRODUCTION.....	160
II. THE ORIGINS AND PURPOSES OF ACADEMIC FREEDOM.....	164
A. THE 1915 DECLARATIONS OF PRINCIPLES ON ACADEMIC FREEDOM AND ACADEMIC TENURE	164
B. FURTHER AAUP COMMENTS ON ACADEMIC FREEDOM	167
C. ACADEMIC FREEDOM VS. THE FIRST AMENDMENT	168
1. The Supreme Court’s Treatment of Academic Freedom as It Relates to Free Speech.....	168
2. The Necessity of Distinguishing Academic Freedom from Constitutional Free Speech	172
III. ACADEMIC FREEDOM DOES NOT PERMIT BLATANTLY RACIST SPEECH IN THE TWENTY-FIRST CENTURY	173
A. DEFINING BLATANTLY RACIST SPEECH.....	174
B. BLATANTLY RACIST ACADEMIC SPEECH IN THE TWENTY- FIRST CENTURY THOROUGHLY DEFILES THE SCHOLAR’S SPIRIT.....	176
1. Plainly Racist Intellectual Ideas Are Not New	176
2. Plainly Racist Academic Speech Impedes the Quest for Truth	205
IV. THE HARMS OF PLAINLY RACIST ACADEMIC SPEECH	206
A. SOCIETAL HARM: ABUSES AGAINST NONWHITE PEOPLE.....	207

* Assistant Professor of Law, Beasley School of Law at Temple University.

1. Historical Abuses.....	207
2. Contemporary Abuses	210
B. SOCIETAL HARM: THE DELEGITIMIZING OF ACADEMIA.....	215
C. INDIVIDUALIZED HARM: SOCIAL AND PSYCHOLOGICAL DISADVANTAGING OF NONWHITE STUDENTS.....	220
D. INSTITUTIONAL HARM: PERPETUATION OF RACIAL HIERARCHY WITHIN THE LAW SCHOOL SPACE	222
E. INSTITUTIONAL HARM: COMPROMISING OF ABILITY TO OFFER QUALITY EDUCATION	224
V. CONCLUSION.....	225

I. INTRODUCTION

In January 2022, the dean of the University of Pennsylvania Carey Law School initiated a disciplinary process against longtime professor Amy Wax for allegedly violating university guidelines. Dean Theodore Ruger asserted in a letter launching the process that, among other things, Wax had made blatantly racist remarks to individual students, to classes she had taught, and to the public sphere in various forms.¹ Reactions to the letter were mixed. Supporters of Dean Ruger’s actions have argued that Wax’s conduct was extreme and caused significant harm.² Those who came to Wax’s defense have contended that punishing Wax for her remarks infringes on her free speech rights and has a chilling effect on academics.³ The Wax debacle ignited a longstanding debate regarding the contours of academic freedom. Wax herself lamented that the dean’s efforts to punish her, if successful, “will eviscerate academic freedom as we know it.”⁴

To a degree, Wax has a point: for much of America’s intellectual history, academia has been the home for blatantly racist intellectual thought. The development of academic freedom in America during the early twentieth century coincided with one of the worst periods of race relations

¹ Letter from Theodore W. Ruger, Dean & Bernard G. Segal Professor of L., Univ. of Pa. Carey L. Sch., to Vivian L. Gadsden, Chair, Fac. Senate, Univ. of Pa. Carey L. Sch. (June 23, 2022) (on file with author) [hereinafter Penn Law Dean’s Report].

² See, e.g., Surayya Walters, *Should Amy Wax Be Fired?*, PENN POL. REV. (Aug. 22, 2022), <https://pennpoliticalreview.org/2022/08/should-amy-wax-be-fired> [https://perma.cc/YC95-2FSN].

³ See, e.g., Adam Steinbaugh, *Penn Caves to Pressure, Initiates Disciplinary Proceedings Against Tenured Law Professor Amy Wax*, FOUND. FOR INDIVIDUAL RTS. & EXPRESSION (Jan. 18, 2022), <https://www.thefire.org/news/penn-caves-pressure-initiates-disciplinary-proceedings-against-tenured-law-professor-amy-wax> [https://perma.cc/9F5P-NLXC].

⁴ Ed Whelan, *Penn Law School Versus Academic Freedom and Amy Wax*, NAT’L REV. (Feb. 13, 2023, 3:27 PM), <https://www.nationalreview.com/bench-memos/penn-law-school-versus-academic-freedom-and-amy-wax> [https://perma.cc/FX7G-XHHC].

in the United States.⁵ The Ku Klux Klan, the most infamous white supremacist gang in America, reached its peak in the early 1900s with four million members spanning forty-eight states.⁶ Black people faced two to three lynchings per week,⁷ the eugenics movement was in full swing, and the nation was deeply segregated. In the intellectual world, it was axiomatic that racial equality was anathema to democracy.⁸ Academic scholarship was almost unanimous in its endorsement of white supremacy, coupled with disparagement of Black people and nonwhite immigrants.⁹ Nonwhite intellectuals were often disregarded by the white intellectual world, and those who did receive attention often did so through scholarship that reinforced white supremacy and promoted the cultural inferiority of Black and Brown communities. As early articulators understood it, this traditional academic freedom was not only tolerant of blatantly racist ideas, but also equated the espousal of such ideas with the quest for truth, and the ideas produced served as a basis of continuing oppression in the United States.

In contemporary times, societal attitudes toward race have undergone significant changes. Race itself is universally recognized in the scientific community as a social construct that has no inherent influence on the quality of humankind.¹⁰ Most Americans profess to oppose racism and reject overt manifestations of it. The eugenics movement has mostly dried up. Rigid de jure segregation has become a thing of the past. The spectacted lynchings of the early twentieth century are no longer prevalent. Public utterance of plainly racist ideas has largely vanished from most professional spaces, and civilians that engage in overtly racist behavior that becomes public often face backlash and repercussions. Professions across America, including academia, have diversified racially. However, the academic space remains the one place where blatantly racist thoughts can still be published and uttered with impunity. Defenders of this “right” of academics to spew plainly racist intellectual ideas almost uniformly ground their arguments in some mishmash of academic freedom and the First Amendment.

⁵ JAMES W. LOEWEN, *LIES MY TEACHER TOLD ME: EVERYTHING YOUR AMERICAN HISTORY TEXTBOOK GOT WRONG* 167–70 (2d ed. 2007).

⁶ *Id.* at 165.

⁷ LEON F. LITWACK, *TROUBLE IN MIND: BLACK SOUTHERNERS IN THE AGE OF JIM CROW* 284 (1998).

⁸ *See infra* Part III.B.4.ii.

⁹ *Id.*; *see infra* Part III.B.4.iii.

¹⁰ JAMES C. KING, *THE BIOLOGY OF RACE* 118 (1981) (“Race is a concept of society that insists there is a genetic significance behind human variations in skin color that transcends outward appearance. However, race has no scientific merit outside of sociological classifications. There are no significant genetic variations within the human species to justify the division of ‘races.’”). Professor Ian F. Haney Lopez has also written extensively on race as a social construction. *See, e.g.,* Ian F. Haney Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 *HARV. C.R.-C.L. L. REV.* 1, 10–16 (1994).

Traditional academic freedom protects plainly racist academic speech, assuming an all-white intellectual community and assuming that racial hierarchy is necessary for democratic existence. If, however, society has drastically changed, then understandings of academic freedom must also evolve as well. More importantly, if America is to reach its purported goal of achieving racial equality for all, then plainly racist intellectual ideas can no longer have a home anywhere in America, especially not within academia. The knowledge generated in academic spaces influences the general public and shapes laws and public policies. Thus, universities have a responsibility to ensure that the ideas they generate have scholarly support and the potential to benefit society at large. Plainly racist intellectual ideas in the twenty-first century have neither of these qualities, thereby rendering traditional academic freedom both severely outdated and a real danger to the academic project.

Academic freedom in the twenty-first century mandates a more contemporary conception: it requires recognition that publicly expressed societal attitudes toward race have changed for the better since the early twentieth century, and that blatantly racist ideas are destructive to society. This contemporary academic freedom is intolerant of plainly racist ideas, as such ideas are unscholarly and untrue and only serve to harm historically marginalized members of society. Contemporary academic freedom accounts for a more racially diverse world and intellectual community and rejects hierarchy on the basis of race. In essence, whereas traditional academic freedom was consistent with America's primitive, early-twentieth-century values of white superiority and exclusivity, contemporary academic freedom aligns with America's currently articulated values of racial equality and inclusivity.

These limits on academic freedom are both warranted and appropriate. Academic freedom, whether traditional or contemporary, has never been content neutral. What academics are allowed to say, as well as the nature of dissenting intellectual positions, have always been subject to regulation by their peers. Professional competence also cabins academic freedom: an intellectual who spouts old, disproven ideas as truth calls into question their competence as an academic. Academic freedom does not protect a science professor who in their professional capacity claims that tobacco is good for human consumption, nor does it shield a geology professor who asserts that the Earth is flat. Ideas that express human superiority and inferiority based on race in the twenty-first century are on the same wavelength as flat-earth science. As such, they do not fall within the ambit of contemporary academic freedom.

This Article contends that academic freedom does not protect blatantly racist academic speech in the twenty-first century. On paper, academic freedom is designed to protect the genuine pursuit of knowledge and the

quest for truth: it does not bestow upon intellectuals an unqualified right to proffer palpably false ideas supported by distorted, falsified, or otherwise unscientific sources. Scholars and thinkers must reject the utterance and publication of plainly racist intellectual ideas from their academic colleagues: simply disagreeing with them is not enough. Invoking academic freedom as a justification for the proffering of inarguably inflammable rhetoric not only does the concept of academic freedom a profound injustice, but also helps to preserve racism in America.

This Article emphasizes legal academia, which has been a particularly dangerous hub for plainly racist intellectual thought given the historic role of law in perpetuating and preserving overt racism in America. Up until midway through the twentieth century, the law was used to actualize the overtly racist academic ideas of scholars and thinkers of the day. Court systems erected the judicial architecture necessary to sustain chattel slavery, Native American colonization, the Old Jim Crow, and xenophobic immigration policies. Blatantly racist academic ideas were the basis for racialized oppression then and continue to be now. Law professors that espouse plainly racist intellectual ideas in their professional capacities contribute to promote both the nature and legacy of American law being a tool for racial subjugation. To achieve a more just society, legal academia must do its part to dismantle racial hierarchy, which begins by completely disavowing plainly racist intellectual ideas.

This Article limits its focus by arguing that academic freedom in the twenty-first century does not cover blatantly racist speech from professors either inside or outside the classroom. This Article distinguishes between the First Amendment and academic freedom: while there is some interplay, they are not interchangeable. This Article is not a call for censoring academic speech solely because it may be controversial. It is generally important to foster discussion and debate on significant issues to facilitate societal progress. However, academic freedom is not absolute: it exists for a particular purpose. A scholar that undermines that purpose in their work should not be able to claim its protections. This Article contends that, especially in the context of legal academia, blatantly racist academic speech is unscholarly speech espousing falsehoods, and a scholar who publishes or publicly utters plainly racist statements in their professional capacity undermines the contemporary purpose of academic freedom.

This Article proceeds in three additional parts. Part II discusses the origin of academic freedom in America, illuminating its designated purpose as a protection for the honest pursuit of knowledge and truth. The tortured history of academic freedom, notwithstanding the written articulations of academic freedom in the early-twentieth century, facially provides a good framework in which a central argument can be made. As such, Part II divorces the language of the 1915 Declaration of Principles on Academic

Freedom and Academic Tenure (“1915 Principles”) from its historical context and adopts it as a standard by which the applicability of academic freedom can be determined. Part II also differentiates academic freedom from the First Amendment and stresses the importance of keeping the two concepts distinct.

Using the language and framework of the 1915 Principles, Part III argues that plainly racist academic speech does not fall within the ambit of academic freedom in the twenty-first century. Part III first defines “plainly racist academic speech.” It then demonstrates that plainly racist academic ideas are old, untrue, and unscholarly. In showing that such ideas are nonnovel, Part III features a lengthy excavation of the history of plainly racist intellectual ideas over a five-century timeframe.

After establishing that plainly racist academic speech is false and unscholarly, Part IV demonstrates how it is harmful. Part IV discusses both past and present harms of plainly racist academic speech and examines harms to society, individual persons, and universities. Part IV also addresses arguments in favor of affording plainly racist academic speech the safeguards of academic freedom.

II. THE ORIGINS AND PURPOSES OF ACADEMIC FREEDOM

A number of scholars have reviewed the history of academic freedom in the United States in detail, noting its German origins and how it has been modified in America. Scholars have discussed academic freedom as defined by the American Association of University Professors (“AAUP”) and academic freedom as envisioned by the United States Supreme Court. This Part first briefly explores the origin and judicial treatment of academic freedom, with an emphasis on the underlying idea behind academic freedom: the pursuit of knowledge and the quest for truth.

A. THE 1915 DECLARATIONS OF PRINCIPLES ON ACADEMIC FREEDOM AND ACADEMIC TENURE

The concept of academic freedom in America was birthed in the early 1900s.¹¹ Prior to that, American colleges and universities existed to “instruct young men in received truths, both spiritual and material.”¹² In the late-nineteenth century, American scholars gravitated toward the idea of expanding and advancing knowledge and learning instead of merely

¹¹ Denise S. Smith & Michael A. Katz, *Academic Freedom in an Age of Assessment and Accountability*, 22 *MIDWEST L.J.* 1, 3 (2008).

¹² Robert C. Post, *Academic Freedom and Legal Scholarship*, 64 *J. LEGAL EDUC.* 530, 530 (2015).

regurgitating what was already known.¹³ This new direction clashed with the tradition of university owners and regulators to monitor the contents of both written scholarship and material taught in the classroom.¹⁴ Professors who promoted ideas contrary to the desires and interests of ownership and management risked being censured or terminated.¹⁵

To address this problem, American professors founded the AAUP in 1915.¹⁶ After its founding, the AAUP published the 1915 Principles.¹⁷ Walter Metzger identified and explained in depth the German origins of academic freedom: teaching freedom, or *Lehrfreiheit*; learning freedom, or *Lernfreiheit*; and the university’s right to regulate its own affairs, or *Freiheit der Wissenschaft*.¹⁸ The 1915 Principles focused solely on “teaching freedom.”¹⁹ However, it took an expansive view that covered research, instruction, and comments on matters of public concern. Its conception of academic freedom went beyond the individual instructor or intellectual. Academic freedom, as conceived by the authors, was “not the absolute freedom of utterance of the individual scholar, but the absolute freedom of thought, of inquiry, of discussion and of teaching, of the academic profession, that is asserted by this declaration of principles.”²⁰

A fair facial reading of these principles makes clear that academic freedom was designed to protect the scholar’s genuine inquiries and pursuits for purposes of advancing knowledge. Underlying the idea of academic freedom was that “progress in scientific knowledge is essential to civilization.”²¹ Professors had a responsibility to “deal at first hand . . . with the sources of knowledge; and to impart the results of their own and of their fellow-specialists’ investigations and reflection, both to students and to the general public, without fear or favor.”²² The report described the importance of “complete and unlimited freedom to pursue inquiry and publish its results.”²³ Colleges and universities should be “intellectual experiment

¹³ *Id.*

¹⁴ *Id.* at 531.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 531–32.

¹⁸ Walter P. Metzger, *Profession and Constitution: Two Definitions of Academic Freedom in America*, 66 TEX. L. REV. 1265, 1269–71 (1988).

¹⁹ *Id.* at 1271–72; Edwin R. A. Seligman et al., *Appendix I: 1915 Declaration of Principles on Academic Freedom and Academic Tenure*, in AAUP POLICY DOCUMENTS & REPORTS 291, 292 (10th ed. 2006) [hereinafter 1915 Principles].

²⁰ *Id.* at 300.

²¹ *Id.* at 294 (emphasis added).

²² *Id.* (emphasis added)

²³ *Id.* at 295 (emphasis added).

station[s], where new ideas may germinate.”²⁴ Throughout the 1915 Principles, the emphasis was on protecting a scholar’s “quest for truth.”²⁵

With regards to research and classroom instruction, the 1915 Principles explain the conditions under which a scholar can legitimately invoke academic freedom as a shield against reprimand. Only scholars who “carry on their work in the temper of the scientific inquirer” can invoke its protections.²⁶ A professor’s conclusions must be “gained by a scholar’s method and held in a scholar’s spirit; that is to say, they must be the fruits of competent and patient and sincere inquiry, and they should be set forth with dignity, courtesy, and temperateness of language.”²⁷ These statements demonstrate the framers’ intent to ground the purpose of academic freedom in the quest for knowledge and the pursuit of truth. Academic freedom has the most validity as a concept when the scholars who invoke it act in good faith in research and in writing.

Regarding public statements, dubbed “extramural utterances,” the 1915 Principles in general protect scholars who speak on matters of public importance outside of their particular expertise.²⁸ This provision, as Metzger noted, was controversial from its inception and has worked to create a “comprehensive shield” for scholars.²⁹ However, the 1915 Principles carved out an important limitation: “In their extramural utterances, it is obvious that academic teachers are under a peculiar obligation to avoid hasty or unverified or exaggerated statements, and to refrain from intemperate or sensational modes of expression.”³⁰ By highlighting “unverified or exaggerated statements,” the framers evinced a continuous intention to discourage academics from making statements without regard to their truth. If indeed a scholar is “under a peculiar obligation to avoid hasty, unverified or exaggerated statements,” then that scholar would be under a duty not to make statements that are verifiably false.

In this regard, the scholars’ obligation to be truthful regarding the research they conduct, the instruction they give, and the conclusions they reach is the same obligation they have to the comments they make on matters of public concern outside of their areas of expertise. Because the quest for truth underlies all aspects of academic freedom, this Article makes little distinction between extramural utterances and either instruction or

²⁴ *Id.* at 297 (emphasis added).

²⁵ *Id.* at 294.

²⁶ *Id.* at 298.

²⁷ *Id.*

²⁸ *Id.* at 299.

²⁹ Metzger, *supra* note 18, at 1275.

³⁰ 1915 Principles, *supra* note 19, at 299.

research. Scholars have an obligation to adhere to the truth in all their professional expressions. Academic freedom offers collective protection for college and university intellectuals: in exchange, intellectuals are to be diligent in adhering to the quest for truth in their research, teaching, and public comments.

B. FURTHER AAUP COMMENTS ON ACADEMIC FREEDOM

In 1940, the AAUP published another Statement of Principles on Academic Freedom and Tenure (“1940 Principles”).³¹ Nearly two hundred educational institutions and organizations endorsed the 1940 Principles.³² One of the earliest endorsers, the Association of American Law Schools, signed on in 1946.³³ The 1940 Principles reiterated the same ideas enshrined in the first statement. In their extramural utterances, scholars should “at all times be accurate” and “should exercise appropriate restraint” when they “speak or write as citizens.”³⁴ This is because the public “may judge their profession and their institution by their utterances.”³⁵ The quest for truth remained a central component of academic freedom in the 1940 Principles.

In 1964, the AAUP issued a clarifying report called Committee A Statement on Extramural Utterances.³⁶ The report reaffirmed the protections afforded scholars in commenting publicly on matters outside of their areas of expertise and discouraged the use of public utterances to disqualify professors from their positions.³⁷ Nonetheless, the report also reiterated the “special obligations of faculty members . . . to be accurate.”³⁸ This statement was revised in 1989 to make the contents gender-neutral, but otherwise remained the same.³⁹ Academic freedom in 1989, therefore, meant the same in 1915, 1940 and 1964: the right of scholars to pursue knowledge, seek truth, and proffer conclusions “gained by a scholar’s method and held in a scholar’s spirit” without fear of reprisal.⁴⁰ Uttering

³¹ See generally *1940 Statement of Principles on Academic Freedom and Tenure with 1970 Interpretive Comments*, in AAUP POLICY DOCUMENTS AND REPORTS 13 (11th ed. 2015) [hereinafter 1940 Principles].

³² *Id.*; Post, *supra* note 12, at 532.

³³ 1940 Principles, *supra* note 31, at 16.

³⁴ *Id.* at 14.

³⁵ *Id.*

³⁶ AAUP, *Committee A Statement on Extramural Utterances*, 51 AAUP BULLETIN 29 (1965).

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Committee a Statement on Extramural Utterances*, in AAUP POLICY DOCUMENTS & REPORTS 32 (10th ed. 2006).

⁴⁰ 1915 Principles, *supra* note 19, at 298.

verifiably false intellectual ideas, even in extramural speech, goes beyond the bounds of academic freedom as envisioned by the framers of both sets of principles and the subsequent clarifying reports.

C. ACADEMIC FREEDOM VS. THE FIRST AMENDMENT

Importantly, the framers of the 1915 Principles saw a clear difference between the First Amendment and academic freedom. In fact, the 1915 Principles omit any mention of the First Amendment. The term “free speech” appears nowhere in the document. At the time the AAUP was formed and the principles published, professors did not have a right to free speech that states were required to acknowledge. The constitutional right to free speech was not made applicable to the states until 1925,⁴¹ and the Supreme Court expressly held in 1876 that the First Amendment held no restriction on state authority.⁴² Thus, the rationale behind academic freedom could not have been grounded in the First Amendment or any similar idea that professors could say whatever they wanted without repercussion. The logic behind academic freedom was to protect professors from being punished for making scholarly claims or public remarks that offended those in power. It was this very problem that brought the founders of the AAUP together.⁴³

1. The Supreme Court’s Treatment of Academic Freedom as It Relates to Free Speech

Despite the lack of connection between the origins of academic freedom and the Constitution, the U.S. Supreme Court has generally venerated academic freedom in its precedents. In a 1957 decision, the Supreme Court noted the “essentiality of freedom in the community of American universities” given “the vital role in a democracy played by those who guide and train our youth.”⁴⁴ In 1967, the Court declared that America “is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned.”⁴⁵ In 1972, the Court once again invoked America’s “dedication to safeguarding academic freedom.”⁴⁶ Advocates for expansive views of academic freedom latch on to certain phrases in the Court’s precedents, such

⁴¹ *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

⁴² *United States v. Cruikshank*, 92 U.S. 542, 551–52 (1876).

⁴³ 1915 Principles, *supra* note 19, at 291–92, 299.

⁴⁴ *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

⁴⁵ *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967).

⁴⁶ *Healy v. James*, 408 U.S. 169, 180–81 (1972).

as the need to avoid “impos[ing] any strait jacket upon the intellectual leaders in our colleges and universities”⁴⁷ and “cast[ing] a pall of orthodoxy over the classroom.”⁴⁸ However, these statements should be read in the context of the challenged action: all three cases stemmed from attempts by state governments to stifle speech they found objectionable, irrespective of the truth.⁴⁹

The Supreme Court has never held that individual scholars have a specialized First Amendment right to academic freedom. Todd DeMitchell and Vincent Connelly noted that academic freedom as a constitutional right is “not consistently proclaimed by the courts.”⁵⁰ J. Peter Byrne declared that the First Amendment protects academic freedom but conceded that there exists “no adequate analysis of what academic freedom the Constitution protects or of why it protects it.”⁵¹ Even scholars who argue for a First Amendment right to academic freedom are unable to point to any clear statement from the Court defining what the right is or how it functions.

The Court has never struck down state action on any grounds resembling a so-called constitutional right to academic freedom. David Rabban correctly pointed out how the Supreme Court’s cases that mentioned academic freedom were nonetheless “based on traditional constitutional doctrines. The few opinions that invoked academic freedom did so more for rhetorical effect than as an aid to constitutional analysis.”⁵² Despite its glowing tribute to the concept, the Keyishian Court did not invalidate the action in question on any constitutionalized theory of academic freedom. DeMitchell and Connelly observed that Keyishian was decided “on Fourteenth Amendment vagueness and First Amendment right of association grounds rather than the free speech grounds associated with the academic freedom of professors.”⁵³

Additionally, the Court’s treatment of academic freedom suggests that, to the extent that academic freedom is a particularized First Amendment right, it is a right belonging to the university as a whole and not to the

⁴⁷ *Sweezy*, 354 U.S. at 250.

⁴⁸ *Keyishian*, 385 U.S. at 603.

⁴⁹ Jeannie Suk Gersen, *Academic Freedom and Discrimination in a Polarizing Time*, 59 HOUS. L. REV. 781, 788 (2022).

⁵⁰ Todd A. DeMitchell & Vincent J. Connelly, *Academic Freedom and the Public School Teacher: An Exploratory Study of Perceptions, Policy, and the Law*, 2007 B.Y.U. EDUC. & L.J. 83, 83 (2007).

⁵¹ J. Peter Byrne, *Academic Freedom: A “Special Concern of the First Amendment,”* 99 YALE L.J. 251, 252–53 (1989).

⁵² David M. Rabban, *Functional Analysis of “Individual” and “Institutional” Academic Freedom Under the First Amendment*, 53 L. & CONTEMP. PROBS. 227, 236 (1990).

⁵³ DeMitchell & Connelly, *supra* note 50, at 91.

individual professor.⁵⁴ The Court's conception of academic freedom in *Sweezy* centered around the "community of American universities" and included not just instructors, but pupils as well: "Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding"⁵⁵ Justice Frankfurter's concurrence regarding the "four essential [academic] freedoms" are all specific to the university, not to the individual professor.⁵⁶ In *Keyishian*, the Court referenced academic freedom as having "transcendent value to all of us and not merely to the teachers."⁵⁷ The Court's decision in *Healy* related to the academic freedom of students, not professors.⁵⁸

Some scholars have argued that the Supreme Court recognized a constitutional academic freedom right for individual professors.⁵⁹ The problem with this argument is that it is undermined by the Court's own summary of its precedents in *Sweezy* and *Keyishian*. In 1990, the Court rejected the University of Pennsylvania's attempt to withhold from the Equal Employment Opportunity Commission peer review materials regarding the tenure process for a former professor who was alleging discrimination.⁶⁰ The university heavily grounded its claim on a First Amendment right of academic freedom in *Sweezy* and *Keyishian*.⁶¹ The Court, however, framed this "right" as pertaining to university discourse.⁶² The Court further deemed the University's reliance on those cases to be "somewhat misplaced" because those cases were about the government "attempting to control or direct . . . speech engaged in by the university or those affiliated with it."⁶³ Given that *Sweezy* and *Keyishian* contain the Court's strongest pronouncements in favor of academic freedom, the Court's construction of those precedents is inconsistent with any claimed right for individual professors separate and apart from their university.

In any event, tacitly underlying the Court's endorsement of academic

⁵⁴ See Todd A. DeMitchell, *Academic Freedom—Whose Rights: The Professor's or the University's?*, 168 EDUC. L. REP. 1, 17 (2002); see also Byrne, *supra* note 51, at 257 ("Academics traditionally have conceived of academic freedom in the United States as a right of individual teachers. Beginning no later than 1978, however, the Court has developed a concept of constitutional academic freedom as a qualified right of the institution to be free from government interference in its core administrative activities.").

⁵⁵ *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

⁵⁶ *Id.* at 263 (Frankfurter, J., concurring).

⁵⁷ *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967).

⁵⁸ *Healy v. James* was about a college's refusal to officially recognize a student group.

⁵⁹ Stacy E. Smith, *Who Owns Academic Freedom?: The Standard for Academic Free Speech at Public Universities*, 59 WASH. & LEE L. REV. 299, 317–24 (2002); Rabban, *supra* note 52, at 230.

⁶⁰ See generally *Univ. of Pa. v. EEOC*, 493 U.S. 182 (1990).

⁶¹ *Id.* at 195–97.

⁶² *Id.* at 197–98.

⁶³ *Id.* at 197 (emphasis added).

freedom is the assumption that scholars are actually pursuing knowledge and seeking truth in their studies. The Court noted in *Keyishian* that America’s future “depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth ‘out of a multitude of tongues, [rather] than through any kind of authoritative selection.’”⁶⁴ In *Healy*, Justice Douglas remarked in a concurrence that “[s]tudents as well as faculty are entitled to credentials in their search for truth.”⁶⁵ In the education context, the Court reversed the dismissal of a public school teacher for publishing a letter criticizing the school for its funding decisions, concluding that the termination was impermissible “absent proof of false statements knowingly or recklessly made.”⁶⁶ Truth lies at the center of academic freedom: if “those who guide and train our youth”⁶⁷ spew lies devoid of scholarly support in their capacities as academics and instructors, democracy would be substantially undermined.

This tacit assumption marks an important distinction between academic freedom and constitutional speech, a distinction recognized by the 1915 Principles: while the Supreme Court has expressly ruled that truth is irrelevant when it comes to the constitutional right to free speech,⁶⁸ it impliedly recognized that truth must undergird any promise of academic freedom. As Adam Sitze correctly noted, “academic speech generally pursues the true to the exclusion of the false, whereas the First Amendment doesn’t permit public authorities to criminalize otherwise harmless speech on the basis of falsity alone.”⁶⁹ Thus, even if individual scholars have a specialized First Amendment right to academic freedom, a scholar that offers plainly false and unscholarly ideas and speech cannot claim its protections. A specialized First Amendment right for individual academics to utter plainly false and unscholarly ideas in their intellectual capacity does not exist.

⁶⁴ *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (emphasis added) (quoting *United States v. Associated Press*, 52 F. Supp. 362, 372 (1943)).

⁶⁵ *Healy v. James*, 408 U.S. 169, 197 (1972) (Douglas, J., concurring) (emphasis added).

⁶⁶ *Pickering v. Bd. of Educ.*, 391 U.S. 563, 574 (1968).

⁶⁷ *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

⁶⁸ *See NAACP v. Button*, 371 U.S. 415, 444–45 (1963) (“For the Constitution protects expression and association without regard . . . to the *truth*, popularity, or social utility of the ideas and beliefs which are offered.”) (emphasis added); *see also* *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 271 (1964).

⁶⁹ Adam Sitze, *The University in the Mirror of Justices*, 33 *YALE J. L. & HUMANS* 175, 176 (2021).

2. The Necessity of Distinguishing Academic Freedom from Constitutional Free Speech

As academic freedom had no relation to the First Amendment at the time the 1915 Principles were drafted, so too should academic freedom and constitutional free speech be viewed today as distinct concepts. Three reasons demand this visualization. First, as noted earlier, while the truth might be irrelevant when it comes to the constitutional right to free speech, the truth is supposed to matter when it comes to academic freedom.⁷⁰ Former Yale Law School dean Robert Post offered this apt analogy:

Although the First Amendment would prohibit government from sanctioning an editorialist for the New York Times if he were inclined to write that the moon is made of green cheese, no astronomy department could survive if it were unable to deny tenure to a young scholar who was similarly convinced.⁷¹

To modify this example in reference to extramural utterances, it would be an embarrassment to academia if a university could not prohibit a law professor from publicly stating in their professional capacity that the moon is made of green cheese. Sitze writes that constitutionalizing academic freedom works to validate the concept “on grounds that are at best incomplete and uncertain, and that at worst introduce into it a subtle but decisive powerlessness—an inability to decide between true and false—that, taken to its logical conclusion, obscures and undoes the academe’s innermost sense and purpose.”⁷² Put another way, academic freedom would become meaningless and destructive if it protected any and every claim by intellectuals, regardless of its veracity or scholarly nature.

Second, while the First Amendment prohibits the compulsion of speech and sets no bounds on dissenting viewpoints (on paper), academic freedom both compels speech and bounds dissent.⁷³ Scholars are judged by the quality of their academic speech: on that basis, they are awarded or denied tenure and other academic opportunities.⁷⁴ Additionally, scholarly dissent must “be cognizable as an exercise of disciplinary competence.”⁷⁵

⁷⁰ Both the 1915 Principles and the 1940 Principles reference the advancement of truth as a central purpose of academic freedom. 1915 Principles, *supra* note 19, at 294–95, 298; 1940 Principles, *supra* note 31, at 14.

⁷¹ Post, *supra* note 12, at 533.

⁷² Sitze, *supra* note 69, at 177.

⁷³ Post, *supra* note 12, at 533, 535.

⁷⁴ *Id.* at 533.

⁷⁵ *Id.* at 535.

As Post noted, “Continuity is maintained because dissenters must first be sufficiently socialized into existing disciplinary practices that their criticisms can be formulated in a manner that is intelligible to members of a discipline.”⁷⁶ Put another way, dissenting views should also be “gained by a scholar’s method and held in a scholar’s spirit.”⁷⁷ This is consistent with the original purpose of academic freedom, which was to prevent interference by persons outside of the scholarly community. The scholarly community itself, however, can and should have the power to regulate what is scholarly, what qualifies as legitimate extramural speech, and what qualifies as a disregard of the quest for truth to the extent that censure is warranted.⁷⁸

Third, the First Amendment only applies to public institutions: private institutions are not state actors and are therefore unbound by free speech protections. Thus, blending academic freedom and the First Amendment gives greater academic protections to intellectuals at state-run universities than those at private universities. No legitimate policy reason justifies this disparate treatment. A scholar that disregards the truth in their research, teaching, or extramural utterances should not be allowed to claim the protections of academic freedom, regardless of whether they teach at a public or private college or university. The scholarly communities in either type of institution should be equally empowered to regulate the bounds of academic speech within the walls of their respective universities.

III. ACADEMIC FREEDOM DOES NOT PERMIT BLATANTLY RACIST SPEECH IN THE TWENTY-FIRST CENTURY

There have been hundreds of law review articles written about academic freedom. Most of the articles focused on professional academic freedom versus “constitutional” academic freedom,⁷⁹ whether or not that right belongs to the individual professor, the institution, or both,⁸⁰ and what might be needed to protect it.⁸¹ However, scholarly treatment of false academic speech, particularly within the context of extramural utterances,

⁷⁶ *Id.*

⁷⁷ *Id.* at 533.

⁷⁸ *See, e.g.,* Megill v. Bd. of Regents, 541 F.2d 1073, 1085–86 (5th Cir. 1976) (“Throughout our review of the record, we were always cognizant of the important free speech considerations inherent in the safeguarding of academic freedom. But Dr. Megill’s case [(termination for uttering palpably false statements)] does not in any way threaten the preservation of academic freedom.”).

⁷⁹ *See generally, e.g.,* Metzger, *supra* note 18.

⁸⁰ *See generally, e.g.,* Rebecca Gose Lynch, *Pawns of the State or Priests of Democracy? Analyzing Professors’ Academic Freedom Rights Within the State’s Managerial Realm*, 91 CAL. L. REV. 1061 (2003).

⁸¹ *See, e.g.,* Richard J. Peltz, *Penumbra Academic Freedom: Interpreting the Tenure Contract in a Time of Constitutional Impotence*, 37 J. COLL. & U.L. 159 (2010).

has been surprisingly thin. This Article attempts to place a bound in the context of racism: the utterance of plainly racist academic speech produces no new knowledge, is of no assistance in any quest for truth, and constitutes exaggerated and unverified extramural speech. Further, while academic speech is supposed to serve a societal good, blatantly racist academic speech has historically contributed to the brutal subjugation of human beings, shameful government policies, and unspeakable violence, among other harms. It is significantly responsible for contemporary racism and is a primary reason why race remains a divisive issue in America.

This Part begins by defining blatantly racist academic speech. It then demonstrates that plainly racist academic speech is both nonnovel and unscholarly. To establish that plainly racist academic speech produces no knowledge, this Part offers a detailed history of plainly racist academic speech. It then uses that history to show that blatantly racist academic speech is antithetical to any quest for truth.

A. DEFINING BLATANTLY RACIST SPEECH

For purposes of this Article, blatantly racist speech is false speech that unambiguously expresses that a human being is inferior partly or solely because of their race. Ideas of this kind are not just untrue, but they are devoid of credible support. Blatantly racist academic speech is false speech uttered by an academic, scholar, or intellectual in their professional capacity that unambiguously expresses that a human being is inferior partly or solely because of their race. Statements claiming that the “culture” of an entire race is inferior to the “culture” of another race fall within this definition because no race of people is monolithic: thus, statements regarding the “culture” of an entire race are judgements based on stereotypes. This definition distinguishes obviously racist speech (for example, “White people are intellectually superior to Black people”) from arguably racist expressions such as opposition to affirmative action, in which a person can theoretically claim to favor racial equality while opposing affirmative action.⁸² Plainly racist rhetoric is like Justice Stewart’s test for obscenity as articulated in *Jacobellis v. Ohio*: a person knows it when that person hears

⁸² To be clear, the author believes that opposition to affirmative action is racist. Nonetheless, the idea for this Article is to establish a definition of “plain racism” that, if satisfied, does not allow the declarant to even superficially claim that his or her views are not racist. As an example, geophysicist Dorian Abbot opposes affirmative action, but reportedly favors a diverse pool of applicants selected on merit. See Michael Powell, *M.I.T.’s Choice of Lecturer Ignited Criticism. So Did Its Decision to Cancel*, N.Y. TIMES (Oct. 20, 2021), <https://www.nytimes.com/2021/10/20/us/dorian-abbot-mit.html> [https://perma.cc/M8M3-GKNB]. On its face, this position is not inconsistent with the idea that no race of people is superior or inferior.

it.⁸³ Anyone can make plainly racist statements regardless of whether they are racist or just racially prejudiced.

By this definition, critical race theory does not classify as plainly racist academic speech. Critical race theory does not expressly or impliedly deem white people inferior to nonwhites, and no scholarly critical race theorist has ever asserted such in writing or in public speech. Rather, critical race theory is an intellectual approach to analysis of American institutions that concludes that systemic racism infects and influences social and political movements as well as law.⁸⁴ A simple Google search can produce facts, data, and statistics that support the idea of entrenched, institutionalized racism.⁸⁵ Intellectuals who subscribe to critical race theory can rely on true information and reputable statistics to buffer the arguments they make and the new ideas they produce. Thus, while critical race theory may be controversial, it is certainly not unscholarly.

By contrast, some academics have alleged that certain racial groups are less intelligent, less desirable, or otherwise less worthy than other groups solely based on race.⁸⁶ Other professors have published—or attempted to publish—pieces that argue the same.⁸⁷ Scholars who make such assertions,

⁸³ *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964).

⁸⁴ See, e.g., *Critical Race Theory*, LEGAL DEF. FUND, <https://www.naacpldf.org/critical-race-theory-faq> [<https://perma.cc/Q9G4-3P7T>].

⁸⁵ A search of “racism in housing,” for example, generated dozens of articles about the topic, including: Rashawn Ray, Andre M. Perry, David Harshbarger, Samantha Elizondo & Alexandra Gibbons, *Homeownership, Racial Segregation, and Policy Solutions to Racial Wealth Equity*, BROOKINGS INST. (Sept. 21, 2021), <https://www.brookings.edu/essay/homeownership-racial-segregation-and-policies-for-racial-wealth-equity> [<https://perma.cc/X2CG-24SG>]; Danyelle Solomon, Connor Maxwell & Abril Castro, *Systemic Inequality: Displacement, Exclusion, and Segregation*, CTR. FOR AM. PROGRESS (Aug. 7, 2019), <https://www.americanprogress.org/article/systemic-inequality-displacement-exclusion-segregation> [perma.cc/CG8R-NX6A]; Janice G. Asare, *How Systemic Racism Is Baked into the Fabric of American Housing*, FORBES (Feb. 1, 2022, 7:00 PM), <https://www.forbes.com/sites/janicegassam/2022/02/01/how-systemic-racism-is-baked-into-the-fabric-of-american-housing/?sh=2e34a9d0430f> [perma.cc/ZCA9-SRXN]; and Terry Gross, *A ‘Forgotten History’ of How the U.S. Government Segregated America*, NPR (May 3, 2017, 12:47 PM), <https://www.npr.org/2017/05/03/526655831/a-forgotten-history-of-how-the-u-s-government-segregated-america> [perma.cc/BSX7-LRSN].

⁸⁶ For example, Professor Wax has been accused of engaging in overtly racist and xenophobic expression and behavior, including public statements that America would “be better off with more whites and fewer nonwhites”; intimating that Black people are less intelligent and more inherently prone to crime than other groups of people; and claiming that the scientific establishment is being “poisoned” by Indians and South Asians; and alleging that nonwhite “cultures” are “not equal in preparing people to be productive in an advanced economy.” Penn Law Dean’s Report, *supra* note 1.

⁸⁷ See, e.g., Larry Alexander, *Michael Perry and Disproportionate Racial Impact*, 23 J. CONTEMP LEGAL ISSUES 469 (2022). This piece was submitted to the Emory Law Journal for publication after the journal extended to Prof. Alexander to write a piece honoring Professor Michael Perry.

be it in scholarship, teaching, or extramural utterances, engage in plainly racist academic speech.

B. BLATANTLY RACIST ACADEMIC SPEECH IN THE TWENTY-FIRST CENTURY THOROUGHLY DEFILES THE SCHOLAR'S SPIRIT

There is a reason the concept is known as “academic” freedom: the scholar has freedom insofar as their utterances and research are academic. The guidelines developed in 1915 and reaffirmed in 1940 and 1970 demonstrate rather clearly that academic freedom does not bestow upon intellectuals an unqualified right to say anything irrespective of truthfulness or scholarliness. Academic freedom exists to promote new ideas, advance knowledge, and seek truth. This section demonstrates that plainly racist academic speech in the twenty-first century defiles the “scholar’s spirit” in that it consists of no new ideas, produces no knowledge, and impedes any legitimate quest for truth. Therefore, academic freedom does not protect the academic expression of plainly racist ideas.

1. Plainly Racist Intellectual Ideas Are Not New

Ideas regarding racial superiority and inferiority come from a long line of racist and racially prejudiced scholars, academics, and intellectuals. From before the founding of the American republic, academics and thinkers throughout western civilization created an intellectual framework that justified racial hierarchy and the accompanying systems of oppression. Racist intellect was not limited to the United States because white supremacy was a global system, and the teachings and writings of European scholars and thinkers outside of America nonetheless helped to shape public thought and policy in America. Blatantly racist intellect has spanned centuries and predates Christopher Columbus’ arrival to the Western Hemisphere.

This section examines the history of racist academic speech beginning in the late-fifteenth century. The author’s use of “academic speech” is not limited to the speech and writings of university professors, but will

The journal took issue with the quality of the scholarship and the nature of some of its claims and requested Prof. Alexander to revise it. Upon his refusal to revise, the journal withdrew their offer to publish. The journal caught flack for its refusal to publish. *See, e.g.,* Gail Heriot, *The Emory Law Journal Finds My Distinguished Colleague’s Words “Hurtful and Unnecessarily Divisive,”* REASON (Jan. 4, 2022, 7:42 AM), <https://reason.com/volokh/2022/01/04/the-emory-law-journal-finds-my-distinguished-colleagues-words-hurtful-and-unnecessarily-divisive> [perma.cc/ET3Y-MRRQ]. The author, however, takes the view expressed in this blog post: John K. Wilson, *In Defense of the Emory Law Journal*, ACADEME BLOG (Jan. 10, 2022), <https://academeblog.org/2022/01/10/in-defense-of-the-emory-law-journal> [perma.cc/F98R-VX8F].

encompass other scholars, philosophers, and public thinkers whose views were published and whose words were influential. The words of politicians and government officials are excluded from consideration of “academic speech” unless there is some indication that the politician was a scholar of some sort before ascending to office.⁸⁸ This historical account of racist academic speech is by no means exhaustive. Rather, this chronicle seeks to provide a sufficiently detailed storyline across many centuries that establishes a clear relationship between blatantly racist academic speech and the systems of oppression that evolved in America. At the heart of racial subjugation systems then and now lies the basic intellectual idea that whites are superior to nonwhites, with Black people as the most inferior race.

a. The Origin of Racist Intellect

The first intellectual defense of the enslavement of African people was offered in 1453 by Portuguese scholar Gomes Zurara. In his book, *The Chronicle of the Discovery and Conquest of Guinea*, Zurara argued that Prince Henry, whose cousin commissioned Zurara to write the book, engaged in the slave trade of people of African ancestry not to get rich, but out of the benevolent desire to civilize barbaric Africans through Christianity.⁸⁹ This assertion was false: Prince Henry sought to profit from the Arab slave trade by cutting out the Arabs and going to the “southern source of gold and Black captives.”⁹⁰ The book, however, served to justify Prince Henry’s slave trading actions.⁹¹ The racist ideas in Zurara’s book would serve as the basis for the oppression of nonwhites for the next few centuries.⁹² After Europeans began colonizing the Americas, Spanish priest and historian Bartolome de Las Casas was one of the first thinkers to suggest transporting Africans to the Americas to replace Native Americans as slaves.⁹³

Lending a helping hand to the development of racist ideas was Al-Hasan Ibn Muhammad al-Wazzan al-Fasi, an educated Arabic scholar who was born in Spain, educated in Morocco, kidnapped by Italians, converted

⁸⁸ By “scholar,” the author is referring to a person who specializes in a particular area of study, or a person who has done significant research in a matter and writes on it.

⁸⁹ IBRAM X. KENDI, *STAMPED FROM THE BEGINNING: THE DEFINITIVE HISTORY OF RACIST IDEAS IN AMERICA* 22–25 (2016).

⁹⁰ *Id.* at 22.

⁹¹ *Id.* 22–25.

⁹² *Id.* at 25.

⁹³ *Id.* at 26–27.

to Christianity, freed, and then renamed “Leo Africanus” by the pope.⁹⁴ In 1526, Africanus produced his “greatest” work, *Della descrittione dell’Africa*, (Description of Africa).⁹⁵ In the book, he likened Black people to wild animals, primitive and oversexualized.⁹⁶ He claimed to have based the assertions in his book on his travels to various African lands, but there is serious doubt that he actually made the expeditions and did not just copy the works of European scholars who were actually present.⁹⁷ It made no difference; Africanus’ book was also widely read throughout Europe, and the racist ideas he spouted were soaked up and adopted.⁹⁸

The intellectual barbarizing of Black people was relentless. French philosopher Jean Bodin claimed in 1576 that hypersexualized West Africans and apes cohabitated, giving birth to “monsters in Africa.”⁹⁹ The hot climate common in many parts of the African continent was blamed for keeping Black people uncivilized.¹⁰⁰ Cambridge University professor William Perkins characterized the brutal enslavement of Black people as a caring relationship between beneficent masters and savage animals.¹⁰¹ English author John Pory translated Leo Africanus’ *Description of Africa* into English in 1600, allowing English-speaking scholars and intellectuals to learn Africanus’ racism.¹⁰² Pory would later serve as the speaker of the first legislature in America—in Jamestown, Virginia in 1619, the time and place where American slavery began.¹⁰³

Given the vital role the Church played in society during most of the second millennium, scholars and intellectuals—who were oftentimes clergymen—would turn to the Bible to promote racism and justify oppression. In 1578, English travel writer and historian George Best offered the first articulation of the “Curse of Ham” theory, the racist idea that Black people were ordained to be cursed because of the sins of Noah’s dark-complexioned son Ham.¹⁰⁴ Professor Paul Baynes, who succeeded William

⁹⁴ See Abdellah Boussouf, *Hasan al-Wazzan: Leo Africanus or the Oppressed Legend*, MOROCCO WORLD NEWS (May 23, 2019, 9:42 PM), <https://www.morocoworldnews.com/2019/05/274028/hasan-al-wazzan-leo-africanus-morocco> [perma.cc/63D7-4TB5]; *Leo Africanus*, BRITANNICA, <https://www.britannica.com/biography/Leo-Africanus> [https://perma.cc/H8R3-MWHK].

⁹⁵ KENDI, *supra* note 89, at 28.

⁹⁶ *Id.* at 28–29.

⁹⁷ *Id.* at 29.

⁹⁸ *Id.*

⁹⁹ *Id.* at 31.

¹⁰⁰ See *id.* at 29, 31 (“Writers like [Robert] Gainish applied climate theory to the dark skins of Africa and the light skins of Europe.”).

¹⁰¹ *Id.* at 33.

¹⁰² *Id.* at 34.

¹⁰³ *Id.* at 38.

¹⁰⁴ *Id.* at 32.

Perkins at Cambridge University, argued that slavery was a curse for sin.¹⁰⁵ In his introduction to the translated version of *Description of Africa*, John Pory claimed the same.¹⁰⁶ English cleric and author Edward Topsell compared Black people to apes, as did many other clergy-scholars in his day.¹⁰⁷ Thomas Cooper, Samuel Purchas, and other clergymen were also writers who promoted the “Curse of Ham” justification for anti-Black racism.¹⁰⁸ English minister and philosopher William Ames argued that it was pious and morally right for “inferiors” to submit to the authority of “superiors.”¹⁰⁹ English theologian Richard Baxter argued, rather unpopularity in his day, that enslavers should Christianize enslaved Black people to make them more submissive and docile.¹¹⁰

Intellectual groups organized in the West also contributed to racist scholarship. The Royal Society, an intellectual entity founded in London in 1660, included the likes of Robert Boyle, whose book *Of the Nature of Whiteness and Blackness* was read by scholars in both Europe and America.¹¹¹ The book rejected both the Curse of Ham and climate theories of racism.¹¹² Instead, it argued that lightness—that is, whiteness—was “the chiefest color,” while Blackness was an abnormal deviation.¹¹³ English scholar Isaac Newton, the eventual president of the Royal Society, built on this theory, averring that whiteness was the central color and all other colors inferior.¹¹⁴ In 1683, clergyman and Harvard College president Increase Mather and his son, clergyman, and intellectual Cotton Mather, founded the Boston Philosophical Society. The first formal intellectual association in colonial America, it provided a space for the nurturing of racist scholarship for four years.¹¹⁵

Cotton Mather built on the work of Baxter and other intellectuals who came before him in his works.¹¹⁶ Mather argued that enslavement was more beneficial for Black people than freedom.¹¹⁷ Mather also encouraged enslavers to Christianize the Black people they enslaved, and enslaved

¹⁰⁵ *Id.* at 33.

¹⁰⁶ *Id.* at 34.

¹⁰⁷ *Id.* at 37.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 39.

¹¹⁰ *Id.* at 48–49.

¹¹¹ *Id.* at 44–45.

¹¹² *Id.* at 45.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 55.

¹¹⁶ *Id.* at 48.

¹¹⁷ *Id.* at 63–64.

Africans to submit to the authority of their “masters.”¹¹⁸ Mather would become the most published author in America in the 1700s, and his scholarship on racial hierarchy and slavery proliferated throughout colonial America.¹¹⁹ His argument that masters should convert their slaves to Christianity was seconded by scholars such as Scottish minister James Blair, who founded the College of William & Mary with slavery proceeds.¹²⁰ While enslavers at first rejected advice to Christianize enslaved Black people out of fear that they could sue for their freedom, they eventually became receptive to the idea of teaching a version of the gospel that emphasized submission.¹²¹

Some scholars and intellectuals endorsed polygenesis, the theory that different races descended from different stocks as opposed to having all originated from one person, to justify racism.¹²² Polygenesis was the product of Europeans doubting the creation story: some intellectuals refused to believe that Africans and Native Americans came from the same human stock as whites.¹²³ Italian thinker Lucilio Vanini claimed in 1616 that Africans and monkeys came from the same stock, while whites came from a different stock.¹²⁴ French theologian Isaac La Peyrere endorsed polygenesis in his 1655 work *Men Before Adam*.¹²⁵ English philosopher John Locke ran with their ideas, positing that Africans were subhuman and of different stock than whites because they were the progeny of African women and apes.¹²⁶ As intellectualism continued to increase, polygenism-versus-monogenesis would be a recurring academic debate.

Plainly racist academic speech was birthed in the mid-1450s and developed in the 1600s. Be they “scientific,” religious, or otherwise, theories of race all emphasized the superiority of whites over nonwhites, especially over Africans. As such, ideas regarding white superiority to Black people are not new: these ideas are over five hundred years old. These ideas were both regurgitated and further developed during the Enlightenment, a major period of intellectual and philosophical discourse in Europe during the late-seventeenth and early-eighteenth centuries.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 64.

¹²⁰ *Id.*

¹²¹ *Id.* at 73–74.

¹²² *Id.* at 50.

¹²³ *Id.* at 50–51.

¹²⁴ *Id.* at 51.

¹²⁵ *Id.*

¹²⁶ KEHINDE ANDREWS, *THE NEW AGE OF EMPIRE: HOW RACISM AND COLONIALISM STILL RULE THE WORLD* 8 (2021).

b. Enlightenment: The Continuation of Racist Intellect

The Enlightenment mainly brought in a rehashing of old racist ideas. German philosopher Immanuel Kant theorized that Black people were “lazy, indolent and dawdling”¹²⁷ and gave instruction for how to beat African slaves most effectively: “[U]se a split bamboo cane instead of a whip, so that the ‘negro’ will suffer a great deal of pains (because of the ‘negro’s’ thick skin, he would not be racked with sufficient agonies through a whip) but without dying.”¹²⁸ In Kant’s eyes, Native Americans were wholly uncivilized while Asians were intellectually stunted.¹²⁹ By contrast, Kant philosophized that “the White race possess all the motivating forces and talents in itself.”¹³⁰ While Kant eventually condemned colonization in his later writings, he remained a staunch defender of white superiority and saw nonwhites as barbaric savages.¹³¹

Swedish scientist Carl von Linnaeus, the so-called father of anthropology, created a race-based classification system that affixed moral characteristics to specific races. Unsurprisingly, the white race was “ingenious,” “sanguine,” and “governed by law,” while Black people were “crafty,” “lazy,” and “careless.”¹³² German physician Johann Blumenbach coined the term “Caucasian” for white people after seeing the white southern slope of Mount Caucasus, claiming that the most beautiful race of man originated there.¹³³ Neither of them were the first intellectuals to come up with taxonomies emphasizing racial hierarchies. In 1677, economist William Petty created one of the first taxonomies of human beings, with certain Europeans at the top and Africans from Guinea at the bottom.¹³⁴ French physician Francois Bernier created a taxonomy in 1684 that split humans into four races, with Europeans as “the first race.”¹³⁵

French philosopher François-Marie Arouet, also known as Voltaire, also promoted racial hierarchy with whites at the top and Black people at the bottom. An adherent to polygenism (in his 1756 book *Essay on Universal History*, he became “the first prominent writer in almost a century

¹²⁷ Immanuel Kant, *Of the Different Human Races*, in *THE IDEA OF RACE* 3, 17 (Robert Bernasconi & Tommy L. Lott eds., 2000).

¹²⁸ See Errol A. Henderson, *Hidden in Plain Sight: Racism in International Relations Theory*, 26 *CAMBRIDGE REV. INT’L AFFS.* 71, 83 (2013).

¹²⁹ Kant, *supra* note 127.

¹³⁰ ANDREWS, *supra* note 126, at 4.

¹³¹ *Id.* at 6.

¹³² *Id.* at 8; Terrance Carney, *Dr. Joy DeGruy Leary: Post Traumatic Slave Disorder*, YOUTUBE (Sept. 12, 2016), https://www.youtube.com/watch?v=BGjSday7f_8.

¹³³ *Id.*

¹³⁴ KENDI, *supra* note 89, at 55.

¹³⁵ *Id.* at 55–56.

daring enough to suggest polygenesis”),¹³⁶ Voltaire viewed nonwhites as both distinct and inferior to white people.¹³⁷ He viewed the difference between whites and nonwhites as much too vast to allow for peaceful coexistence or racial equality.¹³⁸ He theorized that Black people were “barbaric heathens . . . for whom human bondage seemed the logical but regrettable extension of the race’s many shortcomings.”¹³⁹ Voltaire’s racism was present not only in his theoretical writings, but also in his works of fiction and poetry.¹⁴⁰ To some degree, Voltaire’s writings were influenced by his economic endeavors: he held investments in companies that profited from colonialism and the transatlantic slave trade, including the French East India company.¹⁴¹

Reflecting the continuing faceoff between polygenism and monogenism, French naturalist Georges-Louis Leclerc, Comte de Buffon espoused monogenism.¹⁴² However, he agreed with Voltaire on the inferiority of nonwhites to whites.¹⁴³ Buffon was original in this regard: he argued that whites were the original race of man that “degenerated” into other races by way of climate change and diet.¹⁴⁴ The further nonwhite the person was, he claimed, the more they had degenerated.¹⁴⁵ He too imagined a taxonomy of races, one that put the nationals of certain African countries on par with monkeys and rendered the rest of them as “between the extremes of barbarism and of civilization.”¹⁴⁶ However, he theorized that the problems of Africans could be fixed if they moved to Europe: it would allow their skin to become white and their intellect to grow.¹⁴⁷

Scholars in the American Philosophical Society, the second formal intellectual group founded in the United States, consumed racist Enlightenment thinking and writings.¹⁴⁸ Intellectuals such as founder Benjamin Franklin and Declaration of Independence author Thomas

¹³⁶ *Id.* at 84.

¹³⁷ Gianamar Giovannetti-Singh, *Racial Capitalism in Voltaire’s Enlightenment*, 94 HIST. WORKSHOP J. 22 (2022).

¹³⁸ KENDI, *supra* note 89, at 84.

¹³⁹ Giovannetti-Singh, *supra* note 137, at 23 (quoting ANDREW S. CURRAN, *THE ANATOMY OF BLACKNESS: SCIENCE & SLAVERY IN AN AGE OF ENLIGHTENMENT* 148 (2011)).

¹⁴⁰ *Id.* at 30–31, 36.

¹⁴¹ *Id.*

¹⁴² KENDI, *supra* note 89, at 85.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 85–86.

¹⁴⁵ *Id.* at 9; Lee Alan Dugatkin, *Buffon, Jefferson and the Theory of New World Degeneracy*, 12 EVOLUTION: EDUC. & OUTREACH (2019).

¹⁴⁶ KENDI, *supra* note 89, at 85–86.

¹⁴⁷ *Id.* at 86.

¹⁴⁸ *Id.* at 80, 86.

Jefferson soaked up these writings in the 1770s and introduced those ideas into America.¹⁴⁹ Modern academic beliefs in white superiority are qualitatively no different than the intellectual ideas of Kant, Voltaire, Buffon, and other Enlightenment thinkers.

c. Racist Academic Thought After the Enlightenment

By the time the Enlightenment ended in the 1700s, the concept of white superiority became official dogma throughout America. Racist Enlightenment thinking influenced Benjamin Franklin. Franklin famously proposed his Albany Plan of Union, arguably inspired by his observation of the Iroquois’ democratic governance.¹⁵⁰ When begging colonial leaders to adopt his plan, Franklin remarked: “It would be a strange thing if six nations of ignorant savages should be capable of forming a scheme for such a union and be able to execute it in such a manner as that it has subsisted ages and appears insoluble; and yet that a like union should be impracticable for ten or a dozen English colonies.”¹⁵¹ Regarding Black people, Franklin was a slaveowner for a while before opposing it in his old age.¹⁵² He deemed enslaved Black people to be “dark, sullen, malicious, revengeful, and cruel in the highest [d]egree.”¹⁵³ Adopting Enlightenment ideas was profitable for Franklin, who made money not only from subjugating Black people but also from slavery-related advertisements in the paper he edited, the *Pennsylvania Gazette*.¹⁵⁴

Enlightenment thinking rubbed off on Thomas Jefferson, who studied under Scottish intellectual William Small and read the racist writings of Newton and Locke.¹⁵⁵ In 1785, Jefferson philosophized that Black people had “a very strong and disagreeable odour,” “require[d] less sleep,” and lacked in reason and imagination as compared with whites and that their grief was “transient.”¹⁵⁶ Jefferson would later conclude “as a suspicion only” that people of African ancestry were “inferior to the whites in the endowments both of body and mind.”¹⁵⁷ While Jefferson made some

¹⁴⁹ *Id.*

¹⁵⁰ LOEWEN, *supra* note 5, at 109.

¹⁵¹ *Id.*

¹⁵² VanJessica Gladney, *Benjamin Franklin, PENN & SLAVERY PROJECT* <https://pennandslaveryproject.org/exhibits/show/slaveownership/earlytrustees/benfrank> [<https://perma.cc/EV88-VQTT>].

¹⁵³ KENDI, *supra* note 89, at 96.

¹⁵⁴ Gladney, *supra* note 152.

¹⁵⁵ KENDI, *supra* note 89, at 90–91.

¹⁵⁶ THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 139, 143 (William Peden ed., Univ. of N.C. Press 1982) (1785).

¹⁵⁷ *Id.* at 143.

pronouncements against slavery, he “owned” over six hundred Black people in his lifetime.¹⁵⁸ And while Jefferson looked favorably on the American and French revolutions, he vilified the Haitian Revolution as a campaign led by “cannibals.”¹⁵⁹

Enlightenment thinking renewed climate-based rationalizations for white superiority. James Bowdoin, founder of the American Academy of Arts and Sciences, claimed that the hot climates in Africa physically and mentally wrecked its residents, while cooler climates—where whites lived—were conducive to physical and mental development and excellence.¹⁶⁰ John Morgan, founder of the University of Pennsylvania’s medical school, also believed that climate made whites superior and “beautiful.”¹⁶¹ Princeton theologian and eventual president Samuel Smith borrowed from Buffon and other preceding race-climate theorists to argue that hot climates caused ailments in Black people, while cooler climates protected white people from ailments.¹⁶² Similar to Buffon, he argued that Black people could overcome their deficiencies by assimilating with white society and adopting their phenotypical characteristics.¹⁶³

The debate between polygenesis and monogenesis returned in the 1800s as polygenesis became the origin theory of defenders of chattel slavery. On the polygenesis side were the likes of scientist Samuel Morton, who argued in his 1839 book *Crania Americana* that white people were smarter because they had bigger skulls,¹⁶⁴ anthropologist and surgeon Josiah Nott, who claimed in the *American Journal of Medical Science* in 1843 that biracial women were the product of “two distinct species” and were therefore “bad breeders,”¹⁶⁵ Harvard professor Louis Agassiz, who contended that Black adults had the same brain as white fetuses,¹⁶⁶ and naturalist Peter Browne, co-founder of the Franklin Institute, who concluded based off his large collection of hairs that whites and Black people were of different human stock.¹⁶⁷ On the monogenesis side of the debate were the likes of author Hinton Helper, who rejected polygenesis,

¹⁵⁸ *Slavery FAQs – Property*, JEFFERSON MONTICELLO, <https://www.monticello.org/slavery/slavery-faqs/property> [https://perma.cc/4USQ-4QTZ].

¹⁵⁹ KENDI, *supra* note 89, at 123.

¹⁶⁰ *Id.* at 113.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.* at 113–14.

¹⁶⁴ *Id.* at 179–80.

¹⁶⁵ *Id.* at 180–81.

¹⁶⁶ Saima S. Iqbal, *Louis Agassiz, Under a Microscope*, HARV. CRIMSON (Mar. 18, 2021), <https://www.thecrimson.com/article/2021/3/18/louis-agassiz-scrut> [https://perma.cc/J6N9-2AF7].

¹⁶⁷ KENDI, *supra* note 89, at 188–89.

but did not believe in “the unity of races,”¹⁶⁸ abolitionist William Garrison, who believed in immediate abolition but gradual equality,¹⁶⁹ and abolitionist Frederick Douglass, who in critiquing one particularly racist work, fell victim to the intellectual thought of his day and adopted racist academic theories of Black inferiority due to climate and culture.¹⁷⁰

That abolitionists of both races could nonetheless accept Black inferiority as truth speaks to a racist environment sustained by bigoted intellect. After all, “[t]here was a virtual consensus among scholars . . . that racial equality did not exist.”¹⁷¹ French intellectual Arthur de Gobineau exemplified this consensus in his work *The Inequality of Human Races*. Published between 1853 and 1855, this work of monogenesis argued that all civilizations originated from Europe and were dependent upon the existence of whites.¹⁷² Gobineau contended that only whites could birth and foster civilization, and that racial mixing was destructive to society.¹⁷³ In the polygenism world in 1855, Josiah Nott and Egyptologist George Gliddon authored *Types of Mankind*, an eight-hundred-page book that became the antebellum authority for the inferiority of Black people.¹⁷⁴

Enlightenment thinking was also reflected in the medical research and scholarship in antebellum times that unscientifically emphasized Black inferiority. Academic journals printed “research” promoting myths about African biology and blaming Black people for their health conditions,¹⁷⁵ even in the face of physician accounts detailing the decrepit conditions enslaved people were kept in.¹⁷⁶ All of the qualities of sound research were routinely absent from so-called scientific narratives.¹⁷⁷ Some doctors made up diseases to justify racial hierarchy. For example, Benjamin Rush, the so-called father of psychiatry, diagnosed Black people with negritude, an allegedly mild form of leprosy that caused the skin to blacken.¹⁷⁸ As medical ethicist Harriet Washington noted: “There certainly was no provision for

¹⁶⁸ *Id.* at 207.

¹⁶⁹ *Id.* at 168, 229.

¹⁷⁰ *Id.* at 199–200.

¹⁷¹ *Id.* at 179.

¹⁷² IDUS A. NEWBY, *JIM CROW’S DEFENSE: ANTI-NEGRO THOUGHT IN AMERICA, 1900-1930*, at 9–10 (1965).

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 8; KENDI, *supra* note 89, at 197–99.

¹⁷⁵ HARRIET A. WASHINGTON, *MEDICAL APARTHEID: THE DARK HISTORY OF MEDICAL EXPERIMENTATION ON BLACK AMERICANS FROM COLONIAL TIMES TO THE PRESENT* 32 (2006).

¹⁷⁶ *Id.* at 30.

¹⁷⁷ *Id.* at 32.

¹⁷⁸ Judith Warner, *Psychiatry Confronts Its Racist Past, and Tries to Make Amends*, N.Y. TIMES (Apr. 30, 2021), <https://www.nytimes.com/2021/04/30/health/psychiatry-racism-black-americans.html> [<https://perma.cc/2UN5-7ZXU>].

removing ethnocentric bias—this ‘science’ was the embodiment of ethnocentric bias. This science served a critical political purpose, for it provided a biological and ethical rationale for enslavement.”¹⁷⁹

The creation of slavery-related mental disorders also served to justify slavery and racial superiority. For example, psychologist Samuel Cartwright theorized in 1851 that Black people suffered from two mental disorders.¹⁸⁰ The first, called drapetomania, was an illness that purportedly caused enslaved persons to run away from slavery.¹⁸¹ The key to curing this illness ranged from “whipping the devil out of them”¹⁸² to amputating toes to hamper mobility.¹⁸³ The second illness, called dysaesthesia aethiopica, reportedly made Black people lazy, reckless, criminally bent, idle, and a danger to themselves and to others.¹⁸⁴ This illness was “the natural offspring of negro liberty” and mainly “infected” free Black people as well as those enslaved on “badly-governed plantations.”¹⁸⁵

As Cartwright’s writings averred, both of these so-called diseases established that the subjugation of Africans was a matter of divine ordainment, and that enslavement was for Black people’s benefit. These ideas constituted the central tenet of the southern governments that would secede from the Union a decade later. Indeed, Confederate vice president Alexander Stephens said as much in a speech one month before the Civil War began:

Our new government is founded upon . . . the great truth that the negro is not equal to the white man; that slavery subordination to the superior race is his natural and normal condition. This, our new government, is the first, in the history of the world, based upon this great physical, philosophical, and moral truth.¹⁸⁶

This “great truth” of Black inferiority made the Civil War and its potential implications fascinating for English academics. Anglo-Saxon

¹⁷⁹ WASHINGTON, *supra* note 175, at 32–33.

¹⁸⁰ Samuel Cartwright, *Diseases and Peculiarities of the Negro Race*, 11 DEBOW’S REV. (1851).

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ Michael Coard, *Drapetomania: Compliant Blacks Sane, Resisting Blacks Insane*, PHILA. TRIB. (Mar. 15, 2019), https://www.phillytrib.com/commentary/drapetomania-compliant-blacks-sane-resisting-blacks-insane/article_0087a2d0-1acb-5364-870c-1205212e0a13.html#:~:text=Cartwright%2C%20a%2058%2Dyear%2D,want%20to%20escape%20or%20otherwise [https://perma.cc/8Y6T-KQC9].

¹⁸⁴ Cartwright, *supra* note 180.

¹⁸⁵ *Id.*

¹⁸⁶ Alexander H. Stephens, Confederate Vice President, Cornerstone Speech (Mar. 12, 1861).

superiority became the topic of English scholarship at least a decade prior to the war.¹⁸⁷ The British government had considered recognizing the Confederacy during the civil war for economic reasons, but many English scholars saw the war as a cataclysm in which the future of humanity was at stake.¹⁸⁸ At the close of the war, Goldwin Smith, the Regius Chair in History at Oxford University, opined that figuring out what to do with freed Black people would “be a great difficulty” because democracy based on “the splendid principles of [the American] Republic” was not possible with Black people milling about.¹⁸⁹ Smith would later write in the early months of the Reconstruction Era that American democracy may be better off if Black people left the country en masse.¹⁹⁰

d. Intellect and the Global “Religion of Whiteness”

The plainly racist academic thought that sustained slavery provided an intellectual environment that reinvigorated white supremacy in the decades after abolition. A new “religion of whiteness” arose in the 1880s throughout the world.¹⁹¹ In America, fervent observance of this new religion led to Jim Crow segregation, voter disenfranchisement, eugenics, and xenophobic immigration policies that targeted and excluded Asians. Buttressing this new religion were European scholars, thinkers, so-called scientists, and other experts arguing that the key to democratic survival was racial homogeneity—that is., the exclusion of nonwhite groups. The foregoing discussion once again demonstrates that intellectual ideas regarding racial superiority and inferiority are nonnovel.

e. The Intellectual Thrashing of Reconstruction

One central conclusion drawn by scholars of the “religion of whiteness” was that the Reconstruction Era was an epic disaster that proved the folly of multiracial democracy.¹⁹² Some scholars, like Edward Freeman, expressed their disdain for racial equality toward Black people privately. In a letter to a friend and fellow academic, Freeman remarked on “the n[-----]s who swarm here [in America],” writing that, “the women and children are yet stranger than the men. Are you sure that they are men? I find it hard

¹⁸⁷ MARILYN LAKE & HENRY REYNOLDS, DRAWING THE GLOBAL COLOUR LINE: WHITE MEN’S COUNTRIES AND THE INTERNATIONAL CHALLENGE OF RACIAL EQUALITY 51 (2008).

¹⁸⁸ *Id.* at 53–54.

¹⁸⁹ *Id.* at 54.

¹⁹⁰ *Id.* at 54–55.

¹⁹¹ *Id.* at 1–2.

¹⁹² *Id.* at 6–7.

to feel that they are men acting seriously: tis . . . easier to believe that they are big monkeys dressed up for a game.”¹⁹³ In a second letter, he spoke of how it was a mistake to confer citizenship on “these great black apes.”¹⁹⁴ In a third letter that reaffirmed his belief in Anglo-Saxon superiority, he wrote that America “would be a grand land if only every Irishman would kill a negro, and be hanged for it.”¹⁹⁵

Other scholars, like British professor and politician James Bryce, published books and articles lambasting Reconstruction and its racial equality efforts. In 1888, Bryce published his major work, *The American Commonwealth*, in which he argued that Reconstruction bestowed “the gift of suffrage to a Negro population unfit for such a privilege.”¹⁹⁶ In Volume II, published in 1889, Bryce drummed up the corruption narrative, arguing that Reconstruction symbolized “the lowest point” in American politics and featured government money being stolen as well as widespread fraud by Black people.¹⁹⁷ He surmised that Black suffrage produced “incredible mischief,” and it was only through white redemption of state governments that Black people and their white Republican allies were restrained from being able to “play these pranks further.”¹⁹⁸ Bryce attributed eventual Black people’s irrelevance in politics after Reconstruction to being “unspeakably inferior” and “discouraged by finding themselves unfit to cope with a superior race.”¹⁹⁹ The forceful suppression of Black voters was merely characterized as “Negroes [being] roughly handled,” and the more civil disenfranchisement achieved through the drafting of new state constitutions throughout the South was favorably cast as “services to civilization.”²⁰⁰

Bryce revised *The American Commonwealth* between 1893 and 1895 and published a third edition with additional content.²⁰¹ In it, he again cast Black people as showing “the childishness as well as lack of self-control which belongs to the primitive peoples.”²⁰² He grappled with the argument that Black people should be deported from the country, concluding that it was deemed impractical due to the necessity of Black labor in the South.²⁰³

¹⁹³ 2 WILLIAM RICHARD WOOD STEPHENS, *THE LIFE AND LETTERS OF EDWARD A. FREEMAN* 234 (1895).

¹⁹⁴ *Id.* at 236.

¹⁹⁵ *Id.* at 242.

¹⁹⁶ 1 JAMES BRYCE, *THE AMERICAN COMMONWEALTH* 308 (1888).

¹⁹⁷ 2 JAMES BRYCE, *THE AMERICAN COMMONWEALTH* 831–32 (1889).

¹⁹⁸ *Id.* at 901.

¹⁹⁹ *Id.* at 715.

²⁰⁰ *Id.* at 901.

²⁰¹ LAKE & REYNOLDS, *supra* note 187, at 49.

²⁰² 2 JAMES BRYCE, *THE AMERICAN COMMONWEALTH* 496 (3d ed. 1899).

²⁰³ *Id.* at 515.

He endorsed the use of literacy tests for the second time,²⁰⁴ having first encouraged their use in his 1891 *North American Review* article, *Thoughts on the Negro Problem*.²⁰⁵ That literacy tests potentially excluded many whites from being able to vote was no problem. Bryce lauded the discretionary nature of the test, noting that officials could provide easier tests to whites and harder tests to Blacks.²⁰⁶ He endorsed segregation as the best solution for the “Negro problem.”²⁰⁷

Bryce’s book was widely read and positively received not only among academics, but also among the press and politicians. British jurist and constitutional theorist Albert Dicey echoed Bryce’s sentiments on the ideas of racial equality, arguing that it was inappropriate in places where certain races have not “reached a certain stage of civilization.”²⁰⁸ Princeton professor Woodrow Wilson, who would later become one of America’s most racist presidents, labeled Bryce’s book “a great work, worthy of heartiest praise.”²⁰⁹ The book was read by English speakers around the world and became “a compulsory reference work for nation-builders and political science students.”²¹⁰

Other academics piled on with similarly gloomy recollections of Reconstruction. One such academic was Columbia professor John Burgess, “a founding father of graduate education in the United States [who] led the transformation of Columbia University into a leading institution in political science and history.”²¹¹ In his 1902 work *Reconstruction and the Constitution, 1866-1876*, Burgess called Reconstruction “the most soul-sickening spectacle Americans have ever been called upon to behold.”²¹² He cast Reconstruction as an evil on par with southern secession and vilified Congress for the “great wrong to civilization” of giving Black people the right to vote.²¹³ He justified white redemption of the South through massive violence as a natural product of overreach by the federal government.²¹⁴

²⁰⁴ *Id.* at 511–12.

²⁰⁵ James Bryce, *Thoughts on the Negro Problem*, 153 N. AM. REV. 641, 654–55 (1891).

²⁰⁶ BRYCE, *supra* note 202, at 512–13.

²⁰⁷ LAKE & REYNOLDS, *supra* note 187, at 66, 69 (quoting and citing BRYCE, *supra* note 202, at 505, 507).

²⁰⁸ *Id.* at 67–68 (quoting Albert V. Dicey, *Democratic Assumptions–IV*, 53 NATION 46, 47 (1891)).

²⁰⁹ Woodrow Wilson, *Bryce’s American Commonwealth*, 4 POL. SCI. Q., 153, 153 (1889).

²¹⁰ LAKE & REYNOLDS, *supra* note 187, at 74.

²¹¹ Shepherd W. McKinley, *John W. Burgess, Godfather of the Dunning School*, in *THE DUNNING SCHOOL: HISTORIANS, RACE, AND THE MEANING OF RECONSTRUCTION* 49, 49 (John David Smith & J. Vincent Lowery eds., 2013).

²¹² JOHN W. BURGESS, *RECONSTRUCTION AND THE CONSTITUTION, 1866-1876*, at 263–64 (1902).

²¹³ *Id.* at 133.

²¹⁴ *Id.* at 296–97.

Burgess' use of language "added credibility to, and possibly encouraged the use of excessively racist rhetoric in, other histories of Reconstruction."²¹⁵

Burgess' most prominent student, Columbia professor William Dunning, took the racist pseudo-narrative of Reconstruction to the next level. Dunning would eventually become "the most influential historian of the post-Civil War Period," producing over forty scholarly articles and two books about Reconstruction, including his dissertation.²¹⁶ In his writings, Dunning portrayed white southerners as being righteously indignant about Republican efforts to "degrade the Caucasian race as the inferiors of the African negro."²¹⁷ He also cast Black suffrage as a colossal disaster that compromised any chance of Reconstruction working.²¹⁸ He even trumpeted chattel slavery's usefulness to America, writing as follows: "[S]lavery had been a modus vivendi through which social life was possible; and that, after its disappearance, its place must be taken by some set of conditions which, if more humane and beneficent in accidents, must in essence express the same fact of racial inequality."²¹⁹

Dunning's largest contribution, however, was to foster a whole school of academics—the "Dunning School of Reconstruction"—to spread the Reconstruction pseudo-narrative in colleges and universities throughout the country.²²⁰ Many of Dunning's students went into academia themselves and produced works that expanded on his theories. Dunning's most famous students had, over a forty-five-year period, "edited the journals, sat on the executive councils, or assumed the presidency of at least two major historical associations[, and in total] published to wide acclaim more than one hundred books, six hundred articles, and a thousand book reviews."²²¹ School textbooks that mentioned Black people at all gave the Dunning School's account of Reconstruction.²²² Praise for this anti-Reconstruction scholarship was almost universal among historians and academics up until

²¹⁵ See McKinley, *supra* note 211, at 63.

²¹⁶ James S. Humphreys, *William Archibald Dunning: Flawed Colossus of American Letters*, in *THE DUNNING SCHOOL: HISTORIANS, RACE, AND THE MEANING OF RECONSTRUCTION* 77, 81 (John David Smith & J. Vincent Lowery eds., 2013).

²¹⁷ WILLIAM ARCHIBALD DUNNING, *RECONSTRUCTION: POLITICAL AND ECONOMIC, 1865-1877*, at 117 (1907).

²¹⁸ Humphreys, *supra* note 216, at 82–83.

²¹⁹ William Archibald Dunning, *The Undoing of Reconstruction*, *ATLANTIC* (Oct. 1901), <https://www.theatlantic.com/magazine/archive/1901/10/the-undoing-of-reconstruction/429219> [<https://perma.cc/6V89-GXHW>].

²²⁰ See generally John Harelson Hosmer, *The Dunning School and Reconstruction According to Jim Crow* (1983) (Ph.D. dissertation, University of Arizona) (on file with the University of Arizona Libraries).

²²¹ *Id.* at 3–4.

²²² KENDI, *supra* note 89, at 287.

the mid-1940s.²²³ Even in the decades when Dunning’s theories would finally be criticized as racist, historians and academics continued to praise Dunning’s and his students’ written works as quality scholarship.²²⁴ Moreover, several scholars in southern history continued to adhere to the Dunning narrative into the 1980s.²²⁵

Academics who espouse plainly racist intellectual ideas continue the tradition established by Bryce, Burgess, and the Dunning School academics. They remain adherents to the “religion of whiteness” birthed in the 1880s and 1890s and thus subscribe to ideas that are not new.

f. The Intellectual Defense of Racial Violence and Subjugation

Along with the intellectual vilification of Reconstruction came the academic justification of chattel slavery, lynchings, and Jim Crow segregation. The basic “truth” was that Black people were not people. This was reiterated by works such as Henry Stanley’s 1878 book *Through the Dark Continent*, which depicted Africans as barbarians.²²⁶ Stanley’s book inspired novelist Joseph Conrad to write his “classic” work *Heart of Darkness*, which reemphasized the same ideas about Black barbarity.²²⁷ In his 1900 book *The Negro a Beast*, Professor Charles Carroll became the first of many southern professors to call Black people “beasts.”²²⁸ Anthropologist Earnest Hooten likened Black people to monkeys in his 1931 project *Up From the Ape*.²²⁹ Even scholars purportedly friendly to Black people, like NAACP co-founder Mary Ovington and sociologist Laura Addams, denigrated Black women as sexually irresponsible and primitive.²³⁰

Explanations of what made whites superior and nonwhites (especially Black people) inferior varied across disciplines. Some scholars, like psychologist Marion Mayo, paleontologist and naturalist Henry Osborn, ethnologist Thomas Waterman, and anatomist Robert Bean, asserted variations of Darwin’s evolutionary hypothesis as the explanation.²³¹ Geologist Ellen Semple particularly became the scientific authority on race-climate theory, endorsed by intellectual giants such as sociologist Edward

²²³ Hosmer, *supra* note 220, at 4–8.

²²⁴ *Id.* at 9–24.

²²⁵ *Id.* at 24–46.

²²⁶ KENDI, *supra* note 89, at 269–70.

²²⁷ *Id.*; see generally JOSEPH CONRAD, *HEART OF DARKNESS* (1899).

²²⁸ KENDI, *supra* note 89, at 291.

²²⁹ *Id.* at 333–34.

²³⁰ *Id.* at 303.

²³¹ NEWBY, *supra* note 172, at 22–23, 26–27, 30–31.

Ross and psychologist Granville Hall.²³² Other scholars, like osteologist Robert Shufeldt, took the anatomy and physiology route, contending that the physical features of Black people made them inferior and subhuman.²³³ Yet other scholars, like psychologist Gustave LeBon, historian Lothrop Stoddard, and sociologist William Thomas, argued racial superiority and inferiority from the lens of psychology.²³⁴

Thomas' theories in particular "provided rational and scientific justification for racial discrimination and segregation," having made "more plausible the assertion that Southern race policies were expressions of biological law and racial instinct rather than bigotry and prejudice."²³⁵ Intellectuals did not just espouse white supremacist ideas, but they also expressly endorsed the Old Jim Crow era itself as a solution to the "Negro Problem":

Sociologist John Moffatt Mecklin was convinced that segregation was necessary to preserve white civilization in the South. [Sociologist] Howard Odum felt that Negroes did not deserve to be enfranchised because of their inability to vote intelligently or to understand public policies. Princeton biologist Edwin Grant Conklin believed that "every consideration should lead those who believe in the superiority of the white race to strive to preserve its purity and to establish and maintain the segregation of the races."²³⁶

Scholars of the Old Jim Crow era also defended chattel slavery. Postbellum defenses of slavery began after Reconstruction with intellectuals like Dunning arguing that chattel slavery provided a successful model for coexistence between Black and white people.²³⁷ American statistician Frederick Hoffman argued in 1896 that Black people were physically and mentally healthier during slavery than they were after emancipation.²³⁸ In his 1918 book *American Negro Slavery*, historian and Dunning School star Ulrich Phillips transformed slavery from a brutal system of subjugation for Black people and profits for rich white people to a ward system in which dependent savages were delicately provided and

²³² *Id.* at 27–29.

²³³ *Id.* at 42–43.

²³⁴ *Id.* at 44–45, 47–48.

²³⁵ *Id.* at 48.

²³⁶ *Id.* at 49–50.

²³⁷ DUNNING, *supra* note 217; Dunning, *supra* note 219.

²³⁸ KENDI, *supra* note 89, at 281–82.

cared for by generous white people.²³⁹ Other historical accounts of the “peculiar institution” depicted Black people as naturally-born slaves who benefitted immensely from being exposed to benevolent white masters.²⁴⁰ Because slavery “was a benevolence,” abolition was an atrocity that led to another atrocity (the Civil War), which then led to another atrocity (emancipation of Black people), which then led to the biggest atrocity of all: Reconstruction and Black suffrage.²⁴¹

Academics and intellectuals also defended the frequent lynchings of Black people during the nadir. Brown University sociologist Lester Ward argued in his 1903 book *Pure Sociology* that “Black men who lusted after and raped White women and the White mobs who lynched them in retaliation were both ordered by their racial nature to do so.”²⁴² Wellesley College economist James Cutler averred in his 1905 book *Lynch Law* that white mobs acted in “their sovereign capacity” in killing Black people.²⁴³ Politicians like President Roosevelt, South Carolina governor Benjamin Tillman, Arkansas congressman John Tillman (who has no apparent relation to Benjamin), and South Carolina congressman James Byrnes repeated the claims of academics like Ward.²⁴⁴ That in truth most lynchings were not the product of Black men raping white women was irrelevant because it made for good scholarship and good politics.²⁴⁵

Unfortunately, the racist intellect of the day infected the scholarship of Black academics as well as white ones. Black scholars of the day did the anti-racism cause no favors in adopting white academic explanations for higher arrest and imprisonment rates for Black people.²⁴⁶ Educator William Thomas parroted racist talking points and vilified Black people in his book *The American Negro: What He Was, What He Is, and What He May Become*. Although the book earned him wide praise among white Americans, Black America condemned it and permanently shunned him.²⁴⁷ Black sociologist and historian William Edward Burghardt (“W.E.B.”) DuBois and the newly founded American Negro Academy, the first national entity for Black intellectuals, argued that the key to racial equality was in fixing “the immorality, crime, and laziness among the Negroes

²³⁹ *Id.* at 287.

²⁴⁰ NEWBY, *supra* note 172, at 70–71.

²⁴¹ *Id.* at 70–79.

²⁴² KENDI, *supra* note 89, at 296–97.

²⁴³ *Id.*

²⁴⁴ *Id.* at 296; NEWBY, *supra* note 172, at 137–39.

²⁴⁵ NEWBY, *supra* note 172, at 138 (citing a 1942 study that concluded that “only 17 percent of Negroes lynched between 1889 and 1941 were even accused of rape”). The percentage of lynched Black people who actually raped a white woman was likely much smaller.

²⁴⁶ KENDI, *supra* note 89, at 282.

²⁴⁷ *Id.* at 289–90.

themselves.”²⁴⁸ DuBois also scapegoated Black people on the health front, claiming in his 1899 book *The Philadelphia Negro* that Black people suffered from high mortality rates due to poor hygiene.²⁴⁹

Generally, however, Black academics and scholars waged war against some of the racist intellectual thoughts of the day. They refuted with particular vigor the slavery-as-positive narrative popularized by white historians, casting slavery as “the severest form of bondage in world history, the consummate sin in the American past.”²⁵⁰ Black historians like Carter Godwin Woodson and DuBois compiled histories of chattel slavery that recounted its horrors and excoriated white academics for their pseudo-historic works.²⁵¹ They also noted the accomplishments of ancient African civilizations and their influence on ancient Greece and Rome as proof of the fallacy of Black inferiority.²⁵² DuBois mounted one of the earliest challenges to the Dunning School’s version of Reconstruction.²⁵³ On certain occasions, Black scholars even checked each other. For example, accomplished physician Dr. Rebecca Cole rebutted DuBois’ blaming of high mortality rates among Black people on poor hygiene. She called him out for conducting erroneous research and put the blame on white doctors who did not properly care for Black patients.²⁵⁴

Nonetheless, a few Black scholars were no match for the abundance of scholarship “establishing” Black inferiority. Further, while Black scholars were generally invisible, those that did not internalize and endorse white intellectual narratives were thoroughly dismissed as dishonest and subjective.²⁵⁵ That whites were superior to nonwhites, especially Black people, was a maxim of early-twentieth-century intellect that few dared to dispute.²⁵⁶ Twenty-first-century scholars who espouse plainly racist views would have felt right at home in the early 1900s.

²⁴⁸ *Id.* at 282–83.

²⁴⁹ See Coley Veitenhans, *Rebecca J. Cole (1846-1922)*, BLACKPAST (Nov. 17, 2007), <https://www.blackpast.org/african-american-history/cole-rebecca-j-1846-1922> [<https://perma.cc/4VDJ-MX6U>].

²⁵⁰ John David Smith, *A Different View of Slavery: Black Historians Attack the Proslavery Argument, 1890-1920*, 65 J. NEGRO HIST. 298, 298–301 (1980).

²⁵¹ *Id.* at 299–300.

²⁵² *Id.* at 300.

²⁵³ See generally W.E.B. DU BOIS, BLACK RECONSTRUCTION IN AMERICA, 1860-1880 (1935).

²⁵⁴ Leila McNeill, *The Woman Who Challenged the Idea that Black Communities Were Destined for Disease*, SMITHSONIAN MAG. (June 5, 2018), <https://www.smithsonianmag.com/science-nature/woman-challenged-idea-black-communities-destined-disease-180969218> [<https://perma.cc/W4Y7-26HE>].

²⁵⁵ KENDI, *supra* note 89, at 267, 300–01.

²⁵⁶ NEWBY, *supra* note 172, at 49.

g. The Intellectual Advocacy for Xenophobia

Scholars and academics adhering to the “religion of whiteness” also argued that European countries needed to close their borders to migrants from Asia. The anti-Asian attitude in academia spawned in response to *National Life and Character: A Forecast*, written by British lawyer Charles Pearson.²⁵⁷ Published in 1893, the book adopted Bryce’s outlook on racial homogeneity, claiming that “coloured labour and white labour cannot exist side by side.”²⁵⁸ However, the book also bucked the trend of late-nineteenth-century scholarship, predicting that groups and countries of color all over the world will inevitably rise and become advanced civilizations independent of European influence and control.²⁵⁹ He particularly envisioned China expanding far beyond its borders and becoming a world power.²⁶⁰

This book “became a call to arms” for white men throughout the world.²⁶¹ Scholars and scientists were quick to either disparage the book or to warn of the dangers of allowing nonwhites, particularly Asians, from entering Eurocentric nations. English writer Lawrence Neame wrote extensively on the dangers of Asian immigration, writing that “[t]he real Asiatic Peril is the acquisition . . . of the right of entry to lands now closed.”²⁶² British sociologist Benjamin Kidd dismissed the book, opining that Pearson’s conclusions were the product of misfocusing his observations and analyses.²⁶³ William Fitchett, founder of the Methodist Ladies’ College in Melbourne, called Pearson a race traitor.²⁶⁴

President Roosevelt found the book impactful but disagreed with Pearson’s conclusions that nonwhite nations would advance while the white race would decline.²⁶⁵ Having been influenced by academic giants such as Freeman and Burgess, Roosevelt firmly endorsed racial hierarchy and believed racial equality was impossible because nonwhites were primitive.²⁶⁶ He trumpeted the greatness of white superiority in his academic works, including his 1889 book *Winning of the West*.²⁶⁷ He also

²⁵⁷ LAKE & REYNOLDS, *supra* note 187, at 75–76; *see generally* CHARLES H. PEARSON, *NATIONAL LIFE AND CHARACTER* (1893).

²⁵⁸ PEARSON, *supra* note 257, at 16.

²⁵⁹ LAKE & REYNOLDS, *supra* note 187, at 75–76.

²⁶⁰ *Id.* at 86–87.

²⁶¹ *Id.* at 77.

²⁶² L. E. NEAME, *THE ASIATIC DANGER IN THE COLONIES 2* (1907).

²⁶³ BENJAMIN KIDD, *SOCIAL EVOLUTION* 313 (1894).

²⁶⁴ *Id.* at 92 (quoting from W. H. Fitchett, *Review of Reviews*, at 150 (Aug. 15, 1900)).

²⁶⁵ *Id.* at 95–96, 98–104.

²⁶⁶ *Id.* at 100–01.

²⁶⁷ *Id.* at 100.

promoted racial purity and believed that whites having large families “[was] not simply a source of personal satisfaction [but] crucial to national greatness.”²⁶⁸

From a political standpoint, Pearson’s book drove Roosevelt to adopt positions he would eventually take as president. After reading historian and naval officer Alfred Mahan’s book *The Influence of Sea Power Upon History*, Roosevelt became an advocate for expanding America’s naval power and dominion beyond its borders for the purpose of containing nonwhites.²⁶⁹ He demanded that the U.S. interfere in nearby islands and territories inhabited by nonwhites, which the U.S. government eventually did in the 1890s and 1900s in places like Puerto Rico, Cuba, and the Philippines.²⁷⁰ He justified U.S. control over the Philippines on racist grounds, declaring them “unfit for self-government” and surmising that “savage anarchy” would take root in the absence of American supervision.²⁷¹ As president, Roosevelt would forcibly take over a strip of Panamanian land for purposes of constructing a major canal.²⁷²

As a testament to the racism of the time, many critics of U.S. interventionism were opposed for equally bigoted reasons. American historian and attorney James Schouler opposed interventionism solely out of a concern that it would make more nonwhites America’s responsibility.²⁷³ Famed scholar Andrew Bryce also disapproved of interventionism, averring that territorial expansion could only succeed if there was minimal contact between greater and lesser races.²⁷⁴ Endorsement of Anglo-Saxon superiority on both sides of the academic aisle made Cuban nationalist Jose Perez, who fought for Cuban independence in the 1890s, wary of U.S. interventionism.²⁷⁵

In 1901, Roosevelt praised Australia as a model nation for white countries to follow.²⁷⁶ That year, Australia enacted legislation to both bar immigration of nonwhite persons and to expel thousands of Pacific

²⁶⁸ *Id.* at 96.

²⁶⁹ *Id.* at 99.

²⁷⁰ *Id.* at 104–05.

²⁷¹ Theodore Roosevelt, *The Strenuous Life: Speech before the Hamilton Club* (Apr. 10, 1899).

²⁷² See Christopher J. Kshyk, *Roosevelt’s Imperialism: The Venezuelan Crisis, the Panama Canal, and the Origins of the Roosevelt Corollary*, 7 *INQUIRIES J.* (2015); NCC Staff, *After a Century, the Panama Canal Still Symbolizes Executive Power*, NAT’L CONST. CTR. (Aug. 15, 2021), <https://constitutioncenter.org/blog/the-panama-canal-still-symbolizes-executive-power> [<https://perma.cc/GW28-2SYG>]; see also THE PANAMA DECEPTION (Empowerment Project 1992).

²⁷³ LAKE & REYNOLDS, *supra* note 187, at 106.

²⁷⁴ *Id.* at 111.

²⁷⁵ *Id.* at 106–07.

²⁷⁶ *Id.* at 111–12.

Islanders living in the country.²⁷⁷ The newly ratified Australian constitution was drafted specifically to deal with the race problem, and the writings of scholars such as Bryce, Burgess, and Dunning provided plenty of motivation for the government’s actions.²⁷⁸ Australian politicians used their writings to warn their colleagues about the danger of racial heterogeneity.²⁷⁹ Australia’s racist immigration legislation served as a model for similar laws that would be passed in Eurocentric countries, including the United States.²⁸⁰

Academics, scholars, and “experts” contributed to the anti-Asian sentiments that ultimately led to prohibitive legislation. The Immigration Restriction League, an anti-immigration organization created in 1894, was founded by academics and had several professors on its national committee.²⁸¹ British historian Lancelot Lawton wrote about Japanese beliefs, specifically that they belong in “the van of enlightened nations” before remarking that Japan’s “present social system, which has remained practically untouched by Western influences, is defective inasmuch as it conduces to, if it does not actually promote, the worst forms of immorality.”²⁸² In his dissertation titled *The Japanese Invasion*, sociology professor Jesse Steiner claimed that racial differences made coexistence between Americans and the Japanese impossible.²⁸³ Harvard professor Archibald Coolidge wrote in his widely read book *The United States as a World Power* that intermarriage between whites and Asians (or any other nonwhites) was bad for society.²⁸⁴ Historian Alfred Mahan thought that it was “perfectly reasonable for Americans to dread the introduction of another race problem.”²⁸⁵ Historian and political scientist Theodore Lothrop Stoddard argued in his 1920 book *The Rising Tide of Color Against White Supremacy* that immigration of nonwhites needed to be limited to avoid a

²⁷⁷ *Id.* at 137–38.

²⁷⁸ *Id.* at 139–40.

²⁷⁹ *Id.* at 139–41.

²⁸⁰ *Id.* at 312–15.

²⁸¹ *Id.* at 313; *Immigration Restriction League*, EUGENICS ARCHIVE, <https://www.eugenicsarchive.ca/database?id=5233dbb05c2ec500000000c0>; Adam S. Cohen, *Harvard’s Eugenics Era*, HARV. MAG. (2016), <https://www.harvardmagazine.com/2016/03/harvards-eugenics-era> [https://perma.cc/538L-T5WY].

²⁸² 2 LANCELOT LAWTON, *EMPIRES OF THE FAR EAST: A STUDY OF JAPAN AND OF HER COLONIAL POSSESSIONS, OF CHINA AND MANCHURIA AND OF THE POLITICAL QUESTIONS OF EASTERN ASIA AND THE PACIFIC* 748–50 (1912).

²⁸³ J. F. STEINER, *THE JAPANESE INVASION: A STUDY IN THE PSYCHOLOGY OF INTER-RACIAL CONTACTS* v–vi (1917).

²⁸⁴ LAKE & REYNOLDS, *supra* note 187, at 269–70 (quoting and citing A. C. COOLIDGE, *THE UNITED STATES AS A WORLD POWER* 64–66, 76–77 (1908)).

²⁸⁵ *Id.* at 276.

race war.²⁸⁶

Anti-Asian bias was a feature of late-nineteenth- and early-twentieth-century scholarship. Contemporary academics who offer blatantly racist intellectual ideas are in the mold of Mahan, Stoddard, Lawton, and other intellectuals who came before them. The views of such contemporary academics are essentially a regurgitation of a racist dogma over a century old.

h. The Intellectual Endorsement of Eugenics

The roots of eugenics lie in *On the Origin of Species by Means of Natural Selection, or the Preservation of Favoured Races in the Struggle for Life*, the 1859 magnum opus of English scientist Charles Darwin. While Darwin's book primarily examined animal species,²⁸⁷ he made mention of "savage races of men" and deemed southern Africans "the lowest savages."²⁸⁸ Other intellectuals, particularly English philosopher Herbert Spencer, developed Darwin's ideas further; Spencer originated the phrase "survival of the fittest" and argued in his 1864 book *Principles of Biology* that human behavior was both inheritable and marked the difference between the superior white race and the inferior races.²⁸⁹ Darwin himself would expressly endorse white superiority in his 1871 book *Descent of Man*.²⁹⁰ His theory regarding evolution became "the chief scientific authority for racists in [America]" by the dawn of the twentieth century.²⁹¹

Darwin's cousin and fellow scientist Francis Galton gave "new emphasis" to Darwin's ideas as the originator of eugenics, the idea that personality traits are based on genetics and consequently heritable.²⁹² While the eugenics movement in America was not entirely racist, race played a major role in determinations of which people were "superior stock" versus inferior.²⁹³ Galton firmly believed, like scores of intellectuals before him, that the pursuit of racial equality in western societies was a fool's errands.²⁹⁴

²⁸⁶ *Id.* at 314–15 (citing LOTHROP STODDARD, *THE RISING TIDE OF COLOR AGAINST WHITE WORLD-SUPREMACY* 259 (1920)).

²⁸⁷ See Rutledge M. Dennis, *Social Darwinism, Scientific Racism, and the Metaphysics of Race*, 64 *J. NEGRO EDUC.* 243, 243–46 (1995).

²⁸⁸ KENDI, *supra* note 89, at 209–210.

²⁸⁹ *Id.* at 210.

²⁹⁰ *Id.* at 211.

²⁹¹ NEWBY, *supra* note 172, at 12.

²⁹² Dennis, *supra* note 287, at 246.

²⁹³ See, e.g., *Eugenics and Scientific Racism*, NAT'L HUM. GENOME RSCH. INST., <https://www.genome.gov/about-genomics/fact-sheets/Eugenics-and-Scientific-Racism> [<https://perma.cc/F2WJ-CPH4>].

²⁹⁴ Dennis, *supra* note 287, at 246.

He first contended the existence of a link between race and intelligence in 1869, during the Reconstruction Era in America. Galton would articulate his theory of eugenics in 1883, arguing that white civilizations worldwide should “rid the world of all naturally unselected peoples, or at least stop them from reproducing.”²⁹⁵

Galton’s call was heard around the world, especially in the United States. Before becoming president, Theodore Roosevelt picked up the eugenics mantle in his 1897 book *American Ideals and Other Essays Social and Political*, writing that the white race needed to have “good breeders as well as[] good fighters.”²⁹⁶ In 1901, Professor Edward Alsworth Ross spoke of “race suicide,” his term for the declining white birth rate, in a speech before the American Academy of Political and Social Science.²⁹⁷ The words of Roosevelt and Ross would travel far and wide, with politicians from Australia quoting Roosevelt about the need to increase white birth rates in their country.²⁹⁸ Sociologist John Moffatt Mecklin and anatomist Robert Bennett Bean spawned a “new” movement of scholars and academics using skull measurements, intelligence tests, and other “scientific” methods to conclude that Black people were intellectually inferior to whites.²⁹⁹

The writings of intellectuals like Darwin, Spencer and Galton also inspired wealthy white people to explore the African continent to find the missing link between Black people and apes. American businessman Samuel Verner traveled to the Congo, where he would encounter and “buy” a Congolese man for a pound of salt and a bolt of cloth.³⁰⁰ That man, Ota Benga, was subsequently taken to America where he was put on display at the St. Louis World Fair in 1904; he was part of an exhibit designed to “educate” attendees about the gaps in the human evolutionary chain.³⁰¹ His next stop was the monkey house in the Bronx Zoo in 1906, where he became a popular attraction.³⁰² A New York Times editorial criticizing the outrage of Black ministers demanding Benga’s release from the zoo emphasized the racist theories birthed during Enlightenment: “Whether they are held to be

²⁹⁵ KENDI, *supra* note 89, at 210.

²⁹⁶ THEODORE ROOSEVELT, *AMERICAN IDEALS, AND OTHER ESSAYS, SOCIAL AND POLITICAL* 294 (3d. ed. 1899).

²⁹⁷ See generally Edward A. Ross, *The Causes of Race Superiority*, 18 ANNALS AM. ACAD. POL. & SOC. SCI. 67 (1901).

²⁹⁸ LAKE & REYNOLDS, *supra* note 187, at 157–58.

²⁹⁹ NEWBY, *supra* note 172, at 38–39.

³⁰⁰ Richard Stockton, *Ota Benga’s Tragic Life as the Bronx Zoo’s Human Exhibit*, ATI (Dec. 17, 2018), <https://allthatsinteresting.com/ota-benga/2> [<https://perma.cc/3NUU-EPGJ>]; Pamela Newkirk, *The Man Who Was Caged in a Zoo*, GUARDIAN (June 3, 2015, 12:59 AM), <https://www.theguardian.com/world/2015/jun/03/the-man-who-was-caged-in-a-zoo> [<https://perma.cc/KQQ2-ZB73>].

³⁰¹ *Id.*

³⁰² *Id.*

illustrations of arrested development, and really closer to the anthropoid apes than the other African savages, or whether they are viewed as the degenerate descendants of ordinary negroes, they are of equal interest to the student of ethnology, and can be studied with profit.”³⁰³

University of Chicago professor Charles Davenport took Galton’s ideas to the next level, establishing the Eugenics Record Office in New York and training dozens of eugenicists.³⁰⁴ The following year, he published a widely read book, *Heredity in Relation to Eugenics*, averring the genetic basis of certain characteristics and linking said characteristics to certain races. Predictably, more positive traits were linked to Europeans and more negative traits to nonwhites.³⁰⁵ This book was used in America and in European nations as a college and medical school textbook.³⁰⁶ It further helped the eugenics movement become mainstream.³⁰⁷

Other professors and academics contributed significantly to America’s eugenics movement. Harvard chair of psychology William McDougall, one of the most respected psychologists in the 1920s, was “a powerful advocate of racial purity,”³⁰⁸ theorizing that allowing interracial relationships led to the birth of inferior humankind.³⁰⁹ Harvard professor Edward East also countenanced against miscegenation, arguing that Black people were “possessed of undesirable transmissible qualities both physical and mental,” which justified racial separation from whites.³¹⁰ University of California professor Samuel Holmes called for sterilizing members of undesirable nonwhites in America.³¹¹ Other professors involved in the eugenics movement included educator and research director Henry Goddard, who translated the precursor to the IQ test in English for eugenic purposes,³¹² Harvard professor Robert Yerkes, who taught courses and published materials emphasizing eugenic ideas and developed “a now infamous intelligence test that was administered to 1.75 million U.S. Army enlistees

³⁰³ *Id.*

³⁰⁴ KENDI, *supra* note 89, at 301–02.

³⁰⁵ See generally CHARLES DAVENPORT, *HEREDITY IN RELATION TO EUGENICS* (1911).

³⁰⁶ See, e.g., *Charles Davenport’s Heredity in Relation to Eugenics*, UNIV. OF MO.: SPECIAL COLLECTIONS & ARCHIVES, <https://library.missouri.edu/specialcollections/exhibits/show/controlling-heredity/america/heredity> [<https://perma.cc/XT45-J4BX>].

³⁰⁷ KENDI, *supra* note 89, at 302.

³⁰⁸ LAKE & REYNOLDS, *supra* note 187, at 319.

³⁰⁹ See generally WILLIAM MCDUGALL, *THE GROUP MIND* (1920); see also generally WILLIAM MCDUGALL, *ETHICS AND SOME MODERN WORLD PROBLEMS* (1924).

³¹⁰ EDWARD M. EAST, *MANKIND AT THE CROSSROADS* 133 (1923).

³¹¹ See generally SAMUEL J. HOLMES, *A BIBLIOGRAPHY OF EUGENICS* (1924).

³¹² LAKE & REYNOLDS, *supra* note 187, at 320 (citing HENRY H. GODDARD, *HUMAN EFFICIENCY AND LEVELS OF INTELLIGENCE* vii, 1 (Princeton Univ. Press 1920)).

in 1917” that “helped fuel the drives to sterilize ‘unfit’ Americans,”³¹³ and Princeton professor Carl Brigham, who “proved” the intellectual superiority of whites over Black people and other nonwhites in a report that he himself would admit was “without foundation.”³¹⁴ Paul Popenoe, the editor of the *Journal of Heredity*, and University of Pittsburgh professor Roswell Johnson, called racial segregation “a social adaptation with survival value” in a popular textbook they authored.³¹⁵

While a resident anthropologist at the American Museum of Natural History, attorney and scientist Madison Grant wrote *The Passing of the Great Race*, a book which glorified whiteness and cautioned against the decline of “Nordic stock” in America due to racial intermingling and intermarriage.³¹⁶ The book drew significantly from the scholarship of Henry Osborn and other racist academics who preceded him.³¹⁷ At the time, Grant was the vice president of the aforementioned Immigration Restriction League.³¹⁸ The book was a best-seller and was reprinted several times after its original publication in 1915.³¹⁹ Media outlets and politicians alike praised the book, and congressmen quoted from the book in legislative debates.³²⁰ Yale professor Ellis Huntington venerated the book as a warning “that America is seriously endangering her future by making fetishes of equality, democracy, and universal education.”³²¹ In short, Grant’s book “provided intellectual inspiration for the ‘resurgent racism’ of the post-war years . . . [and] stirred the imagination of many literate people[], including politicians.”³²²

Professor Dorothy Roberts captured the influence of these scholars and their works on both the public and on government in her book *Killing the Black Body*:

Ordinary Americans attended lectures and read articles in popular magazines on the subject. Those devoted to studying eugenics joined organizations such as the

³¹³ Cohen, *supra* note 281.

³¹⁴ LAKE & REYNOLDS, *supra* note 187, at 320 (citing CARL C. BRIGHAM, *A STUDY OF AMERICAN INTELLIGENCE* 184, 205, 209–210 (Princeton Univ. Press 1923)).

³¹⁵ NEWBY, *supra* note 172, at 35.

³¹⁶ *See generally* MADISON GRANT, *THE PASSING OF THE GREAT RACE: OR THE RACIAL BASIS OF EUROPEAN HISTORY* (1916).

³¹⁷ NEWBY, *supra* note 172, at 22–23.

³¹⁸ LAKE & REYNOLDS, *supra* note 187, at 313.

³¹⁹ DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* 64 (1997).

³²⁰ *Id.*

³²¹ *Id.*

³²² LAKE & REYNOLDS, *supra* note 187, at 313–14.

American Eugenics Society, the American Genetics Association, and the Human Betterment Association. The Reader's Guide to Periodical Literature listed 122 articles under "eugenics" between 1910 and 1915, making it one of the most referenced topics in the index. At most American colleges courses on eugenics were well-attended by students eager to learn how to apply biology to human affairs. The American Eugenics Society reached a less erudite audience by sponsoring Better Babies and Fitter Families contests at state fairs across the country.³²³

Scholars who proffer plainly racist academic ideas live on in the spirits of Galton, Davenport, Brigham, and many others in proclaiming that Black people are intellectually inferior to other racial groups. Declarations of "clear individual and group differences in talent, ability and drive"³²⁴ between racial groups is a classic eugenic trope. While the words of such scholars may have changed in shape and in form, there is no difference in substance between their anti-intellectual ideas and those of the eugenicists who came before them.

i. The Slow and Incomplete Decline of Racist Intellectual Thought

Adolf Hitler's Nazi German racial purity agenda made intellectuals rethink race and eugenics.³²⁵ Slowly realizing both the falsity of existing theories of race and the danger of such theories being weaponized against other white people, scholars who once espoused racist views would later renounce those views.³²⁶ Professor Edward Ross was one such academic who went from being a prominent eugenicist to a scholar professing to have "shed all [his] color prejudices."³²⁷ The American Anthropological Association officially repudiated racism in 1938.³²⁸ Growing numbers of academics, scientists and other learned professionals began publicly denouncing the idea of racial superiority, both in speeches and in widely published statements and proclamations.³²⁹ Gunnar Myrdal's famous work,

³²³ ROBERTS, *supra* note 319, at 62.

³²⁴ See Penn Law Dean's Report, *supra* note 1.

³²⁵ LAKE & REYNOLDS, *supra* note 187, at 350.

³²⁶ *Id.*

³²⁷ EDWARD A. ROSS, SEVENTY YEARS OF IT 276 (1936).

³²⁸ KENDI, *supra* note 89, at 342–343.

³²⁹ LAKE & REYNOLDS, *supra* note 187, at 350–51.

An American Dilemma, cast white racism as a moral problem in need of an immediate solution.³³⁰

In the 1960s, academia in America began to grow and diversify. In response to student protests, academic departments and classes specializing in studying Black people and other nonwhites sprang up in college campuses across the country.³³¹ Educational institutions hired more nonwhite professors.³³² The Reconstruction pseudo-narrative popularized by Bryce, Burgess and the Dunning School would be increasingly rejected, and eventually their “scientific” methods criticized.³³³ Scholars like John Henrik Clarke produced much scholarship revealing the greatness of ancient African civilizations, challenging the academic treatment of African history and debunking myths of Black inferiority and Christopher Columbus discovering America.³³⁴ In 1988, Professor Molefi Asante of Temple University established the first Black Studies doctoral program in the nation.³³⁵ The following year, critical race theory (“CRT”) was born as an intellectual school of thought.³³⁶ Race-conscious scholarship started to get published in academic journals, while racist academic speech became more covert and now employs dog whistles in its contents. In 1994, over two thousand Black female scholars gathered at the Massachusetts Institute of Technology (MIT) for the first conference of Black female intellectuals in American history.³³⁷

This is not to say that blatantly racist academic speech ceased to be after the 1930s; but it is far less ubiquitous, and the responses to it far more critical than they were in the 1910s and 1920s. In 1975, Harvard biologist Edward Wilson revived eugenic ideas about links between biology and social behavior.³³⁸ While such “science” would have been accepted as gospel in the early-twentieth century, Wilson’s article was criticized by several academics, including Harvard evolutionary biologist Stephen

³³⁰ KENDI, *supra* note 89, at 349–50. Gunnar Myrdal was chosen by the Carnegie Foundation to study America’s race problem. Ironically, the Carnegie Foundation didn’t consider Black scholars for this endeavor; they were shut out for allegedly “being too subjective and biased to study Black people.”

³³¹ See ABDUL ALKALIMAT, *THE HISTORY OF BLACK STUDIES 178–190* (2021).

³³² *Id.* at 201, 205, 207–08, 228–29, 240.

³³³ Hosmer, *supra* note 220, at vi–vii.

³³⁴ See *Honoring the Legacy of Dr. John Henrik Clarke*, HUNTER COLL., <https://www.hunter.cuny.edu/communications/pressroom/news/honoring-the-legacy-of-dr.-john-henrik-clarke> [<https://perma.cc/VT28-BRNA>]; see also generally JOHN H. CLARKE, *CHRISTOPHER COLUMBUS AND THE AFRIKAN HOLOCAUST: SLAVERY AND THE RISE OF EUROPEAN CAPITALISM* (1992).

³³⁵ KENDI, *supra* note 89, at 442–43.

³³⁶ *Id.* at 443–44.

³³⁷ *Id.* at 453–54.

³³⁸ *Id.* at 431–32.

Gould.³³⁹ In 1994, political scientist Charles Murray and Harvard professor Richard Herrnstein published *The Bell Curve*, a book which revived the eugenic argument that there were differences in levels of intelligence among racial groups that were partly based on genetics.³⁴⁰ The book generated much criticism from scholars and writers.³⁴¹

In 1995, author Dinesh D'Souza published *The End of Racism*, a book that dismissed the prevalence of white supremacy and faulted "Black culture" for the continued struggles of Black people.³⁴² Unsurprisingly, the book offered severe distortions of America's history of racial oppression and relied on false information to support its ultra-conservative conclusions.³⁴³ In 2011, London School of Economics professor Satoshi Kanazawa penned an article called *Why Are Black Women Less Physically Attractive Than Other Women?*³⁴⁴ Published in *Psychology Today* before being retracted,³⁴⁵ the article purported to use science to make an argument as old as chattel slavery and Jim Crow.³⁴⁶

j. Moral of the Story

Beginning in the fifteenth century, plainly racist intellect generated bigoted thoughts and legitimated systems of oppression. Plainly racist academic speech from modern scholars today are iterations of the racist speeches and writings of pre-Enlightenment intellectuals, Enlightenment thinkers, post-Enlightenment academics, and "religion of whiteness" scholars. They continue in the tradition of Murray and Herrnstein in repeating discredited arguments regarding race and intellect. They live in the D'Souza mold in attributing existing social problems to the "cultures"

³³⁹ *Id.* at 432.

³⁴⁰ *Id.* at 456–57.

³⁴¹ See, e.g., Stephen Jay Gould, *Curveball*, NEW YORKER (Nov. 28, 1994), <https://chance.dartmouth.edu/course/topics/curveball.html> [<https://perma.cc/HU6J-TQVJ>]; Noam Chomsky, *Rollback*, Z MAG. (1995), <https://chomsky.info/199505> [<https://perma.cc/3AV7-T4L9>]; Nicholas Lemann, *The Bell Curve Flattened*, SLATE (Jan. 18, 1997, 3:30 AM), <https://slate.com/news-and-politics/1997/01/the-bell-curve-flattened.html> [<https://perma.cc/976L-Z7E3>].

³⁴² KENDI, *supra* note 89, at 460–61.

³⁴³ See Paul Finkelman, *The Rise of the New Racism*, 15 YALE L. & POL'Y REV. 245, 246–82 (1996) (reviewing DINESH D'SOUZA, *THE END OF RACISM* (1995)).

³⁴⁴ Tishushu, *Here Is the Psychology Today Article by Kanazawa...*, TUMBLR (May 16, 2011), <https://tishushu.tumblr.com/post/5548905092/here-is-the-psychology-today-article-by> [<https://perma.cc/5HPQ-6RPE>].

³⁴⁵ Mikhail Lyubansky, *Beauty May Be in Eye of Beholder but Eyes See What Culture Socializes*, PSYCH. TODAY (May 16, 2011), <https://www.psychologytoday.com/intl/blog/between-the-lines/201105/beauty-may-be-in-eye-beholder-eyes-see-what-culture-socializes> [<https://perma.cc/3FRL-MPUS>].

³⁴⁶ Tishushu, *supra* note 344.

of nonwhite people. From the words of Zurara to Kanazawa, such ideas are nonnovel.

2. Plainly Racist Academic Speech Impedes the Quest for Truth

The question of whether race plays any role in the quality of human beings was put to bed in 2000, when then-President Bill Clinton announced the “completion of the first survey of the entire human genome.”³⁴⁷ It was a project that brought in several academic disciplines and fields as well as “[m]ore than a thousand researchers across six nations.”³⁴⁸ Those thousand-plus researchers concluded that “in genetic terms all human beings, regardless of race, are more than 99.9 percent the same.”³⁴⁹ Efforts to disprove this fact by some academics, like University of Chicago geneticist Bruce Lahn, fell flat.³⁵⁰ It is beyond scientific cavil at this juncture that no biological, genetic, or other scientific differences exist between human beings based upon race. Professor Dorothy Roberts reaffirmed as much in her groundbreaking work *Fatal Invention*.³⁵¹

Of course, the falsehoods in racist intellect were apparent throughout history. Many scholars and academics, like Voltaire, Ben Franklin, and Thomas Jefferson, were financially motivated to spout lies about Black people and nonwhite people. Jefferson declared in *Notes on the State of Virginia* that Black people smelled bad and were unattractive, and in later writings declared that white people engaging in interracial relationships “produce[d] degradation to which no lover of his country, no lover of excellence in the human character, can innocently consent.”³⁵² Ironically, he said all this while sexually assaulting a Black teenager for years, an action he would not have engaged in if he actually believed the things he said and wrote.

Moreover, there was always knowledge available to dispute claims of Black inferiority. Kehinde Andrews provides an Enlightenment-era example with Immanuel Kant, who was presented with evidence disputing his belief in Black inferiority and chose to ignore it.³⁵³ Intellectuals arguing race-climate theory, the theory that climate was responsible for producing

³⁴⁷ KENDI, *supra* note 89, at 474–75.

³⁴⁸ *READING THE BOOK OF LIFE; White House Remarks on Decoding of Genome*, N.Y. TIMES (June 27, 2000), <https://www.nytimes.com/2000/06/27/science/reading-the-book-of-life-white-house-remarks-on-decoding-of-genome.html> [<https://perma.cc/56WK-FBMA>].

³⁴⁹ *Id.*

³⁵⁰ KENDI, *supra* note 89, at 475.

³⁵¹ *Id.* at 475–76; *see generally* DOROTHY E. ROBERTS, *FATAL INVENTION: HOW SCIENCE, POLITICS, AND BIG BUSINESS RE-CREATE RACE IN THE TWENTY-FIRST CENTURY* (2011).

³⁵² KENDI, *supra* note 89, at 117–18.

³⁵³ ANDREWS, *supra* note 126, at 5.

inferior and superior races, made no logical sense when one considered the presence of white people on the African continent or the presence of Native Americans in hot and cold climates.³⁵⁴ During the zenith of anti-Black intellect in the early-twentieth century, Columbia professor Franz Boaz delivered the commencement address for Atlanta University in which he recounted the advances of ancient African civilizations.³⁵⁵ Boaz and a number of Black intellectuals averred the same in their scholarship.³⁵⁶ This information logically rebutted pseudo-narratives of global history that Africa never accomplished anything. Therefore, information disproving the myth of Black inferiority was available; white scholars just chose to ignore it to promote racism.

Academics who spout plainly racist intellectual ideas continue in the tradition of ignoring the truth and peddling fables on matters of race. They are forced to rely on patently false information, unintellectual sources, or distortions of the works of others to set forth their conclusions because academically appropriate sources offer no support to plainly racist intellectual ideas.³⁵⁷ An argument regarding the racial inferiority of nonwhite people would be tantamount to a scholar arguing in present times that smoking tobacco does not cause cancer by relying on outdated data from the early 1900s: the argument would be both objectively false and unsupportable in an academic manner. Academic freedom is not designed to protect the making of unacademic claims and conclusions.

Academic freedom is about the enhancement and preservation of knowledge and the quest for truth. The advancement of inarguably racist views, especially without scientific support, neither enhances knowledge, preserves knowledge, nor supports the quest for truth. Hence, arguments that blatantly racist statements are protected by academic freedom today are meritless.

IV. THE HARMS OF PLAINLY RACIST ACADEMIC SPEECH

Blatantly racist intellectual speech is unscholarly and has no value in the academic space. Nonetheless, defenders of a professor's "right" to publicly engage in plainly racist academic speech argue that censoring such speech endangers academic freedom to such a degree as to outweigh its harms. Defenders frequently attempt to cast the harms as "mere discomfort"

³⁵⁴ NEWBY, *supra* note 172, at 32.

³⁵⁵ KENDI, *supra* note 89, at 295–96.

³⁵⁶ Smith, *supra* note 250, at 300.

³⁵⁷ See, e.g., Joe Patrice, *Law School Professor Amy Wax Cites Wikipedia and We Need to Stop Pretending Tenure Was Made for This*, ABOVE THE L. (Aug. 26, 2019), <https://abovethelaw.com/2019/08/law-school-professor-amy-wax-cites-wikipedia-and-we-need-to-stop-pretending-tenure-was-made-for-this> [https://perma.cc/BRT8-96GD].

and as individual people simply being “offended.”³⁵⁸ Instead of shutting down blatantly racist academic speech, defenders argue that those who oppose such speech should debate and rebut it. Defenders claim that disallowing professors to publicly espouse plainly racist views would empower racist intellectuals and their allies.

These arguments are not valid. This Part properly identifies the harms of blatantly racist academic speech, discussing two societal harms, an individualized harm, and two institutional harms specific to law schools. The two societal harms are (1) continued abuses against nonwhite people and (2) the delegitimizing of academia. The individualized harm is psychological distress and trauma for nonwhite persons, particularly students. The institutional harms to law schools are (1) the continuing affirmance of racial hierarchy within the law school space, and (2) the increased difficulty of the university to deliver quality education to its students. In discussing these harms, this Part refutes arguments that academic freedom permits scholars to publicly espouse blatantly racist ideas.

A. SOCIETAL HARM: ABUSES AGAINST NONWHITE PEOPLE

Blatantly racist academic speech contributed to historical abuses against nonwhite groups in America and continue to do so today. While the above narration has examined the dominant intellectual ideas over five-and-a-half centuries, there was little direct discussion about the impact of those ideas on American society. This subsection first discusses the historical impact of those ideas.

1. Historical Abuses

Plainly racist intellectual ideas set the foundation for white supremacy in colonial America. It exalted whites as the superior race and provided the academic justification for chattel slavery and the dehumanization of Black people. In adopting racist Enlightenment thinking, the United States went from several slaveholding colonies to an independent slaveholding nation. The U.S. Constitution was written to protect chattel slavery,³⁵⁹ an institution legitimized by racist Enlightenment scholarship. The English colonists had already taken land from Native Americans since their arrival in 1607. White attitudes toward Native Americans soured greatly in the 1800s and served

³⁵⁸ See generally, e.g., Heriot, *supra* note 87.

³⁵⁹ Paul Finkelman, *Affirmative Action for the Master Class: The Creation of the Proslavery Constitution*, 32 AKRON L. REV. 423, 423–25 (1999).

as justification for further conquest via westward expansion.³⁶⁰ Congress and the Supreme Court cloaked both Native American conquest and chattel slavery in legitimacy through the legislative enactments and the drafting of judicial opinions.³⁶¹

The academic scholarship of Bryce, Burgess, the Dunning School academics, and other professors and experts validated the racism of the time and contributed to bigoted government policies. With Bryce's blessing, states across the South followed Mississippi's example and enacted literacy tests.³⁶² The Supreme Court would bless the use of literacy tests in 1898 and declared itself powerless to review the actions of election officials for constitutional compliance in 1903.³⁶³ Also taking cues from leading academics, the Court upheld racial segregation as consonant with the Fourteenth Amendment.³⁶⁴ Segregation spread rapidly throughout the country through the work of both public and private forces, leading to social, psychological, and economic effects that are present in contemporary times.³⁶⁵

The writings and speeches of scholars and experts also helped move government in a xenophobic direction. Congress had already banned Chinese immigration in 1882 and would renew that ban periodically for over sixty years.³⁶⁶ President Roosevelt negotiated a Gentlemen's Agreement in 1907 to restrict Japanese immigration,³⁶⁷ but America's part

³⁶⁰ LOEWEN, *supra* note 5, at 123–24.

³⁶¹ For nineteenth-century statutes regarding Native Americans, see, e.g., Civilization Fund Act of 1819, ch. 85, 3 Stat. 516 (1819); Indian Removal Act of 1830, ch. 148, 4 Stat. 411 (1830); and General Allotment Act of Feb. 8, 1887, ch. 119, 24 Stat. 388 (1887). For statutes regarding enslaved Africans, see, e.g., Naturalization Act of 1790, ch. 3, 1 Stat. 103 (1790); Act of Feb. 12, 1793, ch. 7, 1 Stat. 302 (1793); and Act of Sept. 18, 1850, ch. 60, 9 Stat. 462 (1850). For nineteenth-century Supreme Court cases regarding Native Americans, see generally, e.g., Johnson v. M'Intosh, 21 U.S. 543 (1823); United States v. Rogers, 45 U.S. 567 (1846); and *Ex parte* Crow Dog, 109 U.S. 556 (1883). For Supreme Court cases regarding enslaved Africans, see generally, e.g., Prigg v. Pennsylvania, 41 U.S. 539 (1842); Jones v. Van Zandt, 46 U.S. 215 (1847); and Dred Scott v. Sanford, 60 U.S. 393 (1857).

³⁶² LAKE & REYNOLDS, *supra* note 187, at 62–63.

³⁶³ See generally Williams v. Mississippi, 170 U.S. 213 (1898); see also generally Giles v. Harris, 189 U.S. 475 (1903).

³⁶⁴ See generally Plessy v. Ferguson, 163 U.S. 537 (1896).

³⁶⁵ See generally, e.g., RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA (2017).

³⁶⁶ Chinese Exclusion Act of 1882, Pub. L. No. 47-126, 22 Stat. 58; see, e.g., Scott Act of 1888, Pub. L. No. 50-1064, 25 Stat. 504; Geary Act of 1892, Pub. L. No. 52-60, 27 Stat. 25. Congress finally repealed the Chinese Exclusion Act in 1943. Magnuson Act of 1943, Pub. L. No. 78-199, 57 Stat. 600.

³⁶⁷ *Gentlemen's Agreement*, DENSHO ENCYCLOPEDIA, https://encyclopedia.densho.org/Gentlemen's_Agreement [<https://perma.cc/PX2A-L5CM>]; Letter from Theodore Roosevelt, President, to Victor Metcalf, Secretary of Commerce and Labor (Nov. 27, 1906) (on file with the Theodore Roosevelt Center).

of the bargain fell through due to persistent anti-Japanese attitudes in the western states.³⁶⁸ California enacted land loss legislation in 1913, barring Asian immigrants from possessing land.³⁶⁹ Several states followed suit, and the Supreme Court upheld land loss statutes in four separate cases in 1923.³⁷⁰ In 1917, Congress banned emigration from Asia except for Japan and the Philippines,³⁷¹ and in 1924, Congress enacted more prohibitive legislation that included Japan.³⁷² The racially discriminatory 1924 statute would remain valid for another forty years.³⁷³ The Supreme Court in 1922 and 1923 upheld whiteness as the standard for U.S. citizenship and unqualified Japanese and Indians from consideration.³⁷⁴ In 1927, the Court extended Plessy to Chinese children (and by extension to all Asian American children).³⁷⁵ Academic scholarship, in short, is responsible for some of the most destructive immigration laws and discriminatory statutes ever enacted in America.

The influence of eugenic scholars like Galton, Ross, and Stoddard would have catastrophic consequences both within and without America. In America, over seventy-thousand women would be sterilized under eugenic programs and laws, the majority of them being nonwhite women.³⁷⁶ The Supreme Court gave the eugenics movement a boost in a 1927 decision upholding the forcible sterilization of persons deemed undesirable.³⁷⁷ Beyond America’s borders, their works found an audience in Hitler and Nazi Germany, which would later become responsible for sterilizing tens of thousands and killing over fifteen million people, including six million European Jews. Hitler praised America’s xenophobic immigration policies and considered Madison Grant’s book his “bible.”³⁷⁸

This narration of historical abuses against nonwhite people demonstrates the true power of plainly racist academic ideas. Slavery,

³⁶⁸ LAKE & REYNOLDS, *supra* note 187, at 177–78.

³⁶⁹ *California Law Prohibits Asian Immigrants from Owning Land*, EQUAL JUST. INST., <https://calendar.eji.org/racial-injustice/may/3> [<https://perma.cc/Z87M-2P9X>].

³⁷⁰ *See generally* Terrace v. Thompson, 263 U.S. 197 (1923); Porterfield v. Webb, 263 U.S. 225 (1923); Webb v. O’Brien, 263 U.S. 313 (1923); Frick v. Webb, 263 U.S. 326 (1923).

³⁷¹ Immigration Act of 1917, Pub. L. No. 64-301, 39 Stat. 874.

³⁷² Immigration Act of 1924, Pub. L. No. 68-139, 43 Stat. 153.

³⁷³ The racial quotas and other problematic parts of the statute were repealed by the Immigration and Nationality Act of 1965, Pub. L. No. 89-236, 79 Stat. 911.

³⁷⁴ *See generally* Ozawa v. United States, 260 U.S. 178 (1922); United States v. Thind, 261 U.S. 204 (1923).

³⁷⁵ *See generally* Lum v. Rice, 275 U.S. 78 (1927).

³⁷⁶ Abdallah Fayyad, *America’s Shameful History of Sterilizing Women*, BOS. GLOBE (Sept. 18, 2020, 12:25 PM), <https://www.bostonglobe.com/2020/09/17/opinion/americas-shameful-ongoing-history-sterilizing-women> [<https://perma.cc/KT8R-VBVV>].

³⁷⁷ *See generally* Buck v. Bell, 274 U.S. 200 (1927).

³⁷⁸ KENDI, *supra* note 89, at 311.

colonization, subjugation, exclusion, and the death of millions of people resulted from the operationalization of these ideas. Unfortunately, it took Hitler's genocide against Europeans for white intellectuals en masse to finally begin denouncing those ideas. Now, America professes to recognize the wrongs of slavery, exclusionary immigration laws, and overt white supremacy. However, a society cannot denounce these human atrocities in earnest if they continue to hold on to the roots that gave rise to them.

A key thread in this history of abuses is the use of law to actualize plainly racist ideas over the last few centuries. It is this reality that makes legal academia an especially dangerous vehicle for peddling blatantly racist ideas. The graduates of law schools will become attorneys and judges in all the courtrooms across America. Many graduates of law school enter politics and become legislators and heads of executive branches at the state, local, and federal levels. Legal academics help to shape public opinion and provide rationales to judges rendering decisions. Permitting plainly racist ideas to flourish in legal academia will allow these ideas to persist in the courtroom, influence policymaking, and remain in society despite proclamations to the contrary.

2. Contemporary Abuses

Plainly racist intellectual ideas continue to negatively impact nonwhite people. Ideas of white superiority and Black inferiority impact education, housing, media coverage, and other aspects of American society. One racist intellectual idea that has endured is the idea of Black criminality, especially among Black men. After slavery, this rationale served to justify the arbitrary overrepresentation of Black people in the criminal judicial system as well as the violent lynchings of the late 1800s and early 1900s.

Today, Black people remain the perpetual face of crime in America, and contemporary policing practices reflect this. Studies have consistently shown that Black people in cities across the country are more likely to be stopped and frisked, arrested, and both threatened with and subjected to physical force than white people.³⁷⁹ Similar patterns exist with the youth: Black minors are more likely to be arrested than similarly situated white persons.³⁸⁰ Black motorists are more likely to be stopped and searched than

³⁷⁹ See, e.g., U.S. DEP'T OF JUST., CONTACTS BETWEEN POLICE AND THE PUBLIC, 2015 (2018), <https://bjs.ojp.gov/content/pub/pdf/cpp15.pdf> [<https://perma.cc/XEN3-YSV7>].

³⁸⁰ *Report to the United Nations on Racial Disparities in the U.S. Criminal Justice System*, SENT'G PROJECT (Apr. 19, 2018), <https://www.sentencingproject.org/publications/un-report-on-racial-disparities> [<https://perma.cc/E2CU-Y423>].

white drivers.³⁸¹ Black people are several times more likely to be killed by police than white people.³⁸² These disparities are not reflective of actual crime commission: while police officers are more likely to search Black and Brown drivers than white drivers, they are less likely to find contraband among nonwhite drivers.³⁸³ Existing disparities in non-lethal uses of force on Black people versus white people cannot be explained by increased Black resistance against police; controlling for behaviors that include encounter statistics and civilian behavior, Black people are still more likely than whites to have force used against them.³⁸⁴

The U.S. Supreme Court’s empowering of police over the past five-plus decades gives police mistreatment of Black people the force of law. Since the Court’s landmark decision in *Terry v. Ohio*,³⁸⁵ the list of justifications for a police stop has metastasized and now includes a slew of innocuous behaviors.³⁸⁶ Police departments across the country have abused the *Terry* decision and created entire stop-and-frisk programs, victimizing mainly Black people and Latinos.³⁸⁷ Other police-related precedents personify the Court’s anti-Black bias. For example, Diana Donahue persuasively demonstrates how the Court’s third-party consent doctrine is racially biased and gives the police “a tool to discriminate against those who live in underprivileged African American neighborhoods.”³⁸⁸ By excluding the subjective motivations of officers from judicial review,³⁸⁹ the Court permits racially motivated pretextual stops insofar as the trial court credits whatever “objective” reason the police provide at the hearing. Even when the police engage in behaviors that are assumed or understood to be illegal, the Court’s qualified immunity jurisprudence consistently shields them

³⁸¹ See generally Emma Pierson, Camelia Simoiu, Jan Overgoor, Sam Corbett-Davies, Daniel Jenson, Amy Shoemaker, Vignesh Ramachandran, Phoebe Barghouty, Cheryl Phillips, Ravi Shroff & Sharad Goel, *A Large-Scale Analysis of Racial Disparities in Police Stops Across the United States*, 4 NATURE HUM. BEHAV. 736 (2020).

³⁸² Ryan Gabrielson, Erica Sagara & Ryann Grochowski Jones, *Deadly Force*, in *Black and White*, PROPUBLICA (Oct. 10, 2014, 11:07 AM), https://www.propublica.org/article/deadly-force-in-black-and-white?utm_source=et&utm_medium=email&utm_campaign=dailynewsletter [<https://perma.cc/PAV7-A2VQ>].

³⁸³ Pierson et al., *supra* note 381, at 739.

³⁸⁴ Roland G. Fryer, Jr., *An Empirical Analysis of Racial Differences in Police Use of Force*, 127 J. POL. ECON. 1210, 1213–14 (2019).

³⁸⁵ See generally *Terry v. Ohio*, 392 U.S. 1 (1968).

³⁸⁶ Brett G. Stoudt, Michelle Fine & Madeline Fox, *Growing Up Policed in the Age of Aggressive Policing Policies*, 56 N.Y. L. SCH. L. REV. 1331, 1334–35 (2012).

³⁸⁷ See generally, e.g., *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013). The sitting judge found the NYPD’s stop-and-frisk program unconstitutional because it discriminated against Black and Brown people.

³⁸⁸ Diana R. Donahue, *Not-So-Great Expectations: Implicit Racial Bias in the Supreme Court’s Consent to Search Doctrine*, 55 AM. CRIM. L. REV. 619, 620, 647–56 (2018).

³⁸⁹ See, e.g., *Whren v. United States*, 517 U.S. 806, 811–13 (1996).

from civil liability.³⁹⁰ At the root of racialized police oppression and a Supreme Court willing to condone it are the blatantly racist ideas espoused by academics for hundreds of years.

A related idea, rooted in precolonial scholarship and amplified during chattel slavery, was the danger Black men posed to white people, especially white women. The intellectual key to averting this harm was white control of Black behavior. During chattel slavery, slave codes required Black people to submit to the authority of white civilians and empowered white civilians to apprehend and discipline Black people.³⁹¹ During Reconstruction and Old Jim Crow, white civilians controlled Black people through violence. Lynchings in particular were justified on the grounds that Black men indiscriminately raped white women, a claim belied by the facts. As the infamous 1955 murder of Emmett Till showed, not even Black children and adolescents were safe.³⁹² In modern times, this control is exemplified via the “Karen Syndrome,” i.e., white people calling the police on Black people for innocent behavior.³⁹³ Amy Cooper’s false claim that “an African American man . . . is . . . threatening me and my dog”³⁹⁴ evidenced her well-founded belief that the Black man recording her would be apprehended and effectively controlled.³⁹⁵

Psychological studies show that Americans of all races have internalized ideas of Black criminality and dangerousness. Black men are typically viewed as taller, heavier, stronger, more muscular, and more

³⁹⁰ See generally, e.g., *Kisela v. Hughes*, 138 S. Ct. 1148 (2018); *Wilson v. Layne*, 526 U.S. 603 (1999); *Anderson v. Creighton*, 483 U.S. 635 (1987).

³⁹¹ See, e.g., *An Act for the Better Ordering and Governing Negroes and Other Slaves in This Province*, in 7 THE STATUTES AT LARGE OF SOUTH CAROLINA 397, 399 (David J. McCord ed., 1840) (“And it shall be further enacted by the authority aforesaid, That if any slave who shall be out of the house or plantation where such slave shall live, or shall be usually employed, or without some whiter person in company with such slave, shall refuse to submit or undergo the examination of any white person, it shall be lawful for any such white person to pursue, apprehend, and moderately correct such slave; and if any such slave shall assault and strike such white person, such slave may be lawfully killed.”).

³⁹² See *Emmett Till Abducted and Murdered in Mississippi Delta*, EQUAL JUST. INITIATIVE, <https://calendar.eji.org/racial-injustice/aug/28> [https://perma.cc/RFS2-HMGP].

³⁹³ See, e.g., Daniel Victor, *When White People Call the Police on Black People*, N.Y. TIMES (May 11, 2018), <https://www.nytimes.com/2018/05/11/us/black-white-police.html> [https://perma.cc/HN3N-NAR8]; Jeffery C. Mays & Sean Piccoli, *A White Woman, Teresa Klein, Called the Police on a Black Child She Falsely Said Groped Her*, N.Y. TIMES (Oct. 12, 2018), <https://www.nytimes.com/2018/10/12/nyregion/woman-calls-police-black-boy-brooklyn.html> [https://perma.cc/7UQC-HH9A].

³⁹⁴ NO MUSIC NO LIFE, *Amy Cooper Full Video*, YOUTUBE (May 26, 2020), <https://www.youtube.com/watch?v=W0FByIEjXI> [https://perma.cc/ZK97-ZWAF].

³⁹⁵ See Nefertiti Ankra, Zamir Ben-Dan, Julia Jenkins & Takiya Wheeler, *When White People Call the Cops on Black People, They Lay Bare Classic US Racism*, TRUTHOUT (June 15, 2020), <https://truthout.org/articles/when-white-people-call-the-cops-on-black-people-they-lay-bare-classic-us-racism> [https://perma.cc/8CLK-E43C].

capable of harm than similarly situated whites, and police use of force against Black men is consequently more likely to be seen as justified than similar force against white men.³⁹⁶ Black faces are more likely to invoke feelings of danger in others than white faces.³⁹⁷ Police typically speak less respectfully to Black people versus white people, and police officers are more likely to see Blacks as criminals than whites.³⁹⁸ Black drivers are more likely to be killed in car chases than white drivers, even though car chases of white drivers are more likely to involve more serious crimes.³⁹⁹

Ideas of Black criminality and dangerousness impact the youth as well. Adults see Black girls as less innocent and more grown-up than white girls.⁴⁰⁰ Black girls are viewed as more independent, more knowledgeable about sex and other adult topics, and less in need of nurturing, protection, comfort, or support.⁴⁰¹ Similar research exists with respect to Black boys.⁴⁰² Black boys are more likely to be seen as threats than white boys, and innocuous items were more likely to be identified as weapons when Black boys were holding them than when white boys were holding them.⁴⁰³ Black children were more likely to be perceived—and misperceived—as angry than white children.⁴⁰⁴ Teachers are more likely to label Black students as troublemakers than white students, and they are more likely to view Black students’ misbehavior as demonstrative of a pattern than white students’

³⁹⁶ See generally John Paul Wilson, Kurt Hugenberg & Nicholas O. Rule, *Racial Bias in Judgments of Physical Size and Formidability: From Size to Threat*, 113 J. PERSONALITY & SOC. PSYCH. 59 (2017).

³⁹⁷ See generally Luca Guido Valla, Francesco Bossi, Rossana Calì, Verity Fox, Samrah Imtiaz Ali & Davide Rivolta, *Not Only Whites: Racial Priming Effect for Black Faces in Black People*, 40 BASIC & APPLIED SOC. PSYCH. 195 (2018).

³⁹⁸ See generally Rob Voigt, Nicholas P. Camp, Vinodkumar Prabhakaran, William L. Hamilton, Rebecca C. Hetey, Camilla M. Griffiths, David Jurgens, Dan Jurafsky & Jennifer L. Eberhardt, *Language from Police Body Camera Footage Shows Racial Disparities in Officer Respect*, 114 PROCS. NAT’L ACAD. SCIS. 6521 (2017).

³⁹⁹ See Thomas Frank, *Black People Are Three Times Likelier to Be Killed in Police Chases*, USA TODAY (Dec. 1, 2016), <https://www.usatoday.com/pages/interactives/blacks-killed-police-chases-higher-rate> [https://perma.cc/4MN6-NWCK].

⁴⁰⁰ See generally REBECCA EPSTEIN, JAMILIA J. BLAKE & THALIA GONZÁLEZ, *GIRLHOOD INTERRUPTED: THE ERASURE OF BLACK GIRLS’ CHILDHOOD* (2017), <https://genderjusticeandopportunity.georgetown.edu/wp-content/uploads/2020/06/girlhood-interrupted.pdf> [https://perma.cc/5A4Z-452X].

⁴⁰¹ *Id.* at 1.

⁴⁰² *Id.*

⁴⁰³ See generally Andrew R. Todd, Kelsey C. Thiem & Rebecca Neel, *Does Seeing Faces of Young Black Boys Facilitate the Identification of Threatening Stimuli?*, 27 PSYCH. SCI. 384 (2016).

⁴⁰⁴ See generally Amy G. Halberstadt, Alison N. Cooke, Pamela W. Garner, Sherick A. Hughes, Dejah Oertwig & Shevaun D. Neupert, *Racialized Emotion Recognition Accuracy and Anger Bias of Children’s Faces*, 22 EMOTION 403 (2022).

misbehavior.⁴⁰⁵

Racist ideas regarding Black criminality and dangerousness have cost lives. Such ideas are what made Sergeant Joseph Chavalia fire blindly into a bedroom and kill twenty-six-year-old Tarika Wilson and injure her one-year-old son during a botched SWAT team raid of her residence in Lima, Ohio.⁴⁰⁶ Such ideas are what made Officer Timothy Loehmann kill twelve-year-old Tamir Rice within seconds of arriving at the park where he was playing with his toy gun.⁴⁰⁷ Such ideas are what made George Michaels, Travis McMichaels, and William Bryan murder Ahmaud Arbery while he was jogging one morning.⁴⁰⁸ And such ideas help explain why neither Chavalia nor Loehmann faced any criminal penalties. Moreover, had one of Ahmaud's murderers not released video of the homicide over two months after the crime,⁴⁰⁹ the three men likely would not have been prosecuted either.

Racist ideas regarding Black criminality and dangerousness have also impacted relevant judicial decision-making. In jurisdictions where dangerousness is an explicit bail factor, Black defendants are more likely to either have bail set or be remanded than white defendants.⁴¹⁰ In places where dangerousness is not an explicitly enumerated factor, like in New York, considerations of dangerousness are implicitly factored into judicial bail determinations to the detriment of Black defendants.⁴¹¹ Prosecutors are consistently harsher on Black defendants than similarly situated white defendants, and judges are more likely to impose harsher sentences on Black defendants than white defendants.⁴¹² Plainly racist intellectual ideas contributed to racial disparities in the criminal judicial system; and the

⁴⁰⁵ *Id.*; see also generally Jason A. Okonofua & Jennifer L. Eberhardt, *Two Strikes: Race and the Disciplining of Young Students*, 26 PSYCH. SCI. 617 (2015).

⁴⁰⁶ See, e.g., Christopher Maag, *Police Shooting of Mother and Infant Exposes a City's Racial Tension*, N.Y. TIMES (Jan. 30, 2008), <https://www.nytimes.com/2008/01/30/us/30lima.html> [<https://perma.cc/3T3W-MTAT>].

⁴⁰⁷ Shaila Dewan & Richard A. Oppel Jr., *In Tamir Rice Case, Many Errors by Cleveland Police, Then a Fatal One*, N.Y. TIMES (Jan. 22, 2015), <https://www.nytimes.com/2015/01/23/us/in-tamir-rice-shooting-in-cleveland-many-errors-by-police-then-a-fatal-one.html> [<https://perma.cc/PSK5-52DX>].

⁴⁰⁸ See Richard Fausset, *What We Know About the Shooting Death of Ahmaud Arbery*, N.Y. TIMES (Aug. 8, 2022), <https://www.nytimes.com/article/ahmaud-arbery-shooting-georgia.html> [<https://perma.cc/35DZ-NWTL>].

⁴⁰⁹ *Id.*

⁴¹⁰ See Cynthia E. Jones, "Give Us Free": Addressing Racial Disparities in Bail Determinations, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 919, 943–44 (2013).

⁴¹¹ INSHA RAHMAN, NEW YORK, NEW YORK: HIGHLIGHTS OF THE 2019 BAIL REFORM LAW 8 (2019), <https://www.vera.org/downloads/publications/new-york-new-york-2019-bail-reform-law-highlights.pdf> [<https://perma.cc/ZM3W-6YR2>].

⁴¹² MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 115–16, 130 (New Press 2012).

Supreme Court protects the manifestations of those ideas by prosecutors and judges as long as neither set of actors admit that their decisions are racially motivated.⁴¹³

Plainly racist intellectual ideas played a central role in white America’s historical subjugation of nonwhite people, and it continues to perpetuate racial inequality today. Academic freedom may have been a safe haven for blatantly racist intellectual speech in the twentieth century, but it does not serve as a refuge for blatantly racist intellectual speech in the twenty-first century, especially among legal academics.

B. SOCIETAL HARM: THE DELEGITIMIZING OF ACADEMIA

On the one hand lies the real dangers that blatantly racist academic speech poses to society. On the other hand lies the dangers that the protection of anti-intellectual falsehoods poses to academia itself. Defenders of a scholarly right to utter plainly racist ideas generally do not try to vouch for the veracity of those ideas. In fact, many defenders will freely admit that the ideas themselves are false and offensive.⁴¹⁴ Moreover, defenders of this “right” don’t even reference the purposes of academic freedom, the pursuit of knowledge and the quest for truth.⁴¹⁵ Herein lies the problem: if academic freedom is supposed to be about knowledge production and truth-seeking, one cannot defend a professor who engages in unscholarly speech without making a mockery of the concept.

⁴¹³ See generally *Armstrong v. United States*, 517 U.S. 456 (1996); *McClesky v. Kemp*, 481 U.S. 279 (1987).

⁴¹⁴ For example, Brown University economist Glenn Loury called Amy Wax’s claims about Asians “outrageous.” Glenn Loury, *Amy Wax – Freedom of Inquiry on the Line*, GLENN LOURY SUBSTACK (Aug. 22, 2022), <https://glennloury.substack.com/p/amy-wax-freedom-of-inquiry-on-the#details>. UPenn Professor Jonathan Zimmerman denounced Wax’s conclusions while defending her “right” to offer them.

⁴¹⁵ For example, the words “truth” and “knowledge” appear nowhere in the statements that Foundation for Individual Rights in Education (“FIRE”), the Academic Freedom Alliance (“AFA”), the National Association of Scholars (“NAS”) and the American Council of Trustees and Alumni (“ACTA”) drafted in support of Amy Wax. Graham Piro, *Penn Law Dean Asks for ‘Major Sanction’ Against Professor Amy Wax, Creating Tenure Threat for All Penn Faculty*, FOUND. FOR INDIVIDUAL RTS. & EXPRESSION (July 13, 2022), <https://www.thefire.org/news/penn-law-dean-asks-major-sanction-against-professor-amy-wax-creating-tenure-threat-all-penn> [https://perma.cc/EC7Q-ZEMX]; Letter from Keith Whittington, Chair of Acad. Comm., Acad. Freedom All. to Amy Gutmann, President, Univ. of Pa. (Jan. 18, 2022) (on file with author); *NAS Urges the University of Pennsylvania Law School to Affirm Amy Wax’s Freedom of Speech*, NAT’L ASS’N SCHOLARS (Jan. 20, 2022), <https://www.nas.org/blogs/article/nas-urges-the-university-of-pennsylvania-law-school-to-vindicate-amy-wax> [https://perma.cc/V6LC-9PP2]; *ACTA’s Statement on Penn Law’s Decision to Formally Investigate and Impose a Major Sanction on Professor Amy Wax*, AM. COUNCIL TRS. & ALUMNI (July 22, 2022), <https://www.goacta.org/2022/07/actas-statement-on-penn-laws-decision-to-formally-investigate-and-impose-a-major-sanction-on-professor-amy-wax> [https://perma.cc/275U-X6UB].

Defending intellectuals that espouse unscholarly falsehoods—which plainly racist academic speech is—essentially compromises the legitimacy of academia as a whole. Academic freedom is supposed to be a societal good. It was constructed not to enshrine individual professors with a specialized right to unqualified speech, but to protect intellectual insiders from outside power and influence, particularly from high capitalist robber barons. The basis of its value to democracy is its focus on knowledge production and truth, and insofar as that focus is maintained, academic freedom benefits society. As construed by defenders of this “right,” however, academic freedom morphs into a societal evil that eschews the advancement of knowledge and sanctions unscholarly politics and prejudice. It becomes a vehicle for transmitting outside power and influence while undermining the academy’s internal ecosystem of truth-finding and self-governance. Palpably false and anti-intellectual ideas become as valuable as truth and actual knowledge. This framing would make academic speech no more important than bar conversations and dialogues at the dinner table.

When academic speech devolves to this level, there remains no reason for society to take academia seriously. Burton Leiser argues that academic freedom “include[s] the freedom to teach what is false, if one honestly believes, after careful investigation and inquiry, that it is true.”⁴¹⁶ Such a claim, however, only applies to ideas that are not demonstrably false at the time a scholar proffers them. An educator teaching in 1915 that tobacco has no ill health effects on the human body is quite differently situated from an educator who teaches similarly in 2015. While the claim is false in both time periods, science has evolved to the extent that such a claim is demonstrably false in 2015, whereas it might not have been so in 1915. To say that academic freedom permits the teaching of verifiably false ideas does a major disservice to the academic project.

Some defenders of the scholarly “right” to utter plainly racist ideas argue that the appropriate alternative is to debate such ideas.⁴¹⁷ This

⁴¹⁶ Burton M. Leiser, *Threats to Academic Freedom and Tenure*, 15 PACE L. REV. 15, 60, (1994).

⁴¹⁷ See, e.g., Robert Maranto & Wilfred Reilly, *University of Pennsylvania: Don't Fire Amy Wax, Debate Her Views*, REALCLEAR EDUCATION (May 6, 2022), https://www.realcleareducation.com/articles/2022/05/06/university_of_pennsylvania_dont_fire_amy_wax_debate_her_views_110732.html [<https://perma.cc/2XRH-9F3A>]; Jonathan Zimmerman, *My Amy Wax Problem*, INSIDE HIGHER ED (July 25, 2022), <https://www.insidehighered.com/views/2022/07/26/amy-wax-can-speak-her-mind-not-demean-students-opinion> [<https://perma.cc/3T94-W868>]; Jonathan Zimmerman, *Don't Just Revile Amy Wax -- Rebut Her*, INSIDE HIGHER ED (July 30, 2019), <https://www.insidehighered.com/views/2019/07/31/people-should-marshall-facts-refuting-seemingly-bigoted-comments-opinion> [<https://perma.cc/F7XL-WNEM>]; Jonathan Zimmerman, *What's Wrong with the Attack on Amy Wax*, INSIDE HIGHER ED (Sept. 13, 2017),

argument is problematic for several reasons. First, it erroneously assumes that academics that espouse blatantly racist ideas nonetheless act in good faith. It presupposes that plainly racist intellectuals are as committed to the quest for truth as any other intellectual and presumes that they are open to changing their views in face of sufficient evidence to the contrary. History provides ample reason to question the sincerity of these scholars. Critical race theory scholar Richard Delgado rightly noted that adopting “a ‘they’re well-meaning but ignorant’ attitude is another impotent response in light of the insidious psychological harms of racial slurs.”⁴¹⁸

Second, this argument erroneously assumes that the general public is both knowledgeable enough to distinguish false ideas from the truth and dedicated to ensuring that truth prevails. The very essence of racism disproves this fact: despite race being proven to be a mythological concept, it remains the basis of a system of oppression that has produced and reproduced harm for nonwhite persons. Racism remains a fixture in society because whites benefit from its existence to varying levels: at a basic minimum, whites are privileged by unearned advantages accrued because of race. The persistence and permanence of racism evinces a willingness by white society to protect the lies necessary to sustain it. Academics who give voice to these lies add legitimacy to them and embolden the persons who spout them.

Third, even if the public was sufficiently motivated to combat racism, it can be easily misled and manipulated. The current furor over critical race theory illustrates this well. The architects of the anti-critical race theory movement, particularly Manhattan Institute fellow Christopher Rufo, freely admitted to fomenting the opposition as a strategic counter to the racial reckoning of 2020.⁴¹⁹ Critical race theory was—and is—a graduate-school level framework for examining the role of race in law and society; it was never taught in K-12 schools.⁴²⁰ Yet the ideas of Rufo and others caused parents across America to descend on school board meetings, freaking out

<https://www.insidehighered.com/views/2017/09/14/academics-may-not-agree-what-amy-wax-says-should-defend-her-right-say-it-essay> [<https://perma.cc/5U3B-4ZSQ>].

⁴¹⁸ Richard Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 147 (1982).

⁴¹⁹ See Daniel Golden, *Muzzled by DeSantis, Critical Race Theory Professors Cancel Courses or Modify Their Teaching*, PROPUBLICA (Jan. 3, 2023, 7:00 AM), <https://www.propublica.org/article/desantis-critical-race-theory-florida-college-professors> [<https://perma.cc/644N-UF6M>].

⁴²⁰ See Rashawn Ray & Alexandra Gibbons, *Why Are States Banning Critical Race Theory?*, BROOKINGS INST. (Nov. 2021), <https://www.brookings.edu/articles/why-are-states-banning-critical-race-theory> [<https://perma.cc/7EXU-AY4K>].

about nonexistent school indoctrination.⁴²¹ This is not to mention all the laws debated and passed in state legislatures across the country,⁴²² nor to mention the executive order that then-President Donald Trump signed in September 2020 prohibiting the teaching of anti-racism in federal agencies, federal institutions, and entities funded by federal dollars.⁴²³ Opposition to critical race theory and “wokeness” has translated to victory for anti-CRT politicians at the polls.⁴²⁴ The “debate false ideas” argument, in essence, assumes good faith without legitimate reason and depends on a nonexistent reality of a general public dedicated to the truth.

Fourth, academic freedom does not require debating plainly un scholarly views or verifiably false extramural utterances any more than it would require debating the astronomy professor—or law professor—who believed in a green-cheese moon. That a scholar’s objectively bogus assertions can be refuted with facts is beside the point: un scholarly conclusions are unworthy of academic debate. The aims of academic freedom—the pursuit of knowledge and the quest for truth—require that palpably false ideas not be entertained. No scholar can legitimately claim to be advancing knowledge and pursuing truth by spouting palpably false ideas.

Taking this argument to its logical conclusion, academic freedom as envisioned by defenders of this “right” should also permit students to proffer anti-intellectual ideas without repercussion. After all, “constitutional academic freedom” includes students as well as educators.⁴²⁵ Ordinarily, a college or graduate student who submits a research paper consisting of false information and utilizing falsified, distorted, or academically disreputable sources would certainly fail the assignment, most likely fail the class, and would be subject to discipline by the university, up to and including dismissal. Under the defenders’ framing of academic freedom, however, the appropriate response would be to not punish the student, but to debate the student’s ideas and to refute the student’s

⁴²¹ See, e.g., VICE News, *Florida Banned Critical Race Theory, but Can’t Define What It Is*, YOUTUBE (July 28, 2021), <https://www.youtube.com/watch?v=ln6NVLANvLc> [<https://perma.cc/82LL-VCCF>].

⁴²² See Sarah Schwartz, *Map: Where Critical Race Theory Is Under Attack*, EDUC. WEEK (June 11, 2021), <https://www.edweek.org/policy-politics/map-where-critical-race-theory-is-under-attack/2021/06> [<https://perma.cc/YR5H-4H3Y>].

⁴²³ See Exec. Order No. 13950, 85 Fed. Reg. 60683 (Sept. 28, 2020).

⁴²⁴ See, e.g., David Smith, *How Did Republicans Turn Critical Race Theory into a Winning Electoral Issue?*, THE GUARDIAN (Nov. 3, 2021, 2:28 PM), <https://www.theguardian.com/us-news/2021/nov/03/republicans-critical-race-theory-winning-electoral-issue> [<https://perma.cc/8HHC-QGLU>].

⁴²⁵ 1915 Principles, *supra* note 19, at 292; *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) (“Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding.”) (emphasis added).

conclusions. Of course, there is no university in America that would respond to academic dishonesty by students in this manner. If academic freedom is to have any worth, they shouldn't respond that way. If students were free to act accordingly, academia would cease to serve any worthwhile purpose. Academic dishonesty from students is unacceptable; academic dishonesty by educators, given the influence they have in society, is even more intolerable.

Academic dishonesty by legal educators is perhaps the most objectionable of all because it is antithetical to everything that law should be about. Much of legal education focuses on knowing the law and following rules, such as ethical codes of conduct. Academic dishonesty is completely unethical, and to the extent that law can be visualized as a societal device designed to protect and advance the public good, academic dishonesty violates that as well. Additionally, legal education is about preparing students for an important profession, a profession that requires those within it to exercise discretion, decide judicial matters, draft rules and statutes, and otherwise engage in activities that have tremendous impact on both individual lives and society as a whole. Academic dishonesty within the law school dishonors the mission of legal education and increases the chances of graduating lawyers that ultimately dis-serve the profession.

Defenders of the scholarly right to utter plainly racist extramural ideas employ the classic floodgates argument and contend that if academic freedom is not deemed to cover plainly racist academic speech, then virtually all academic speech would be endangered and academia itself delegitimized.⁴²⁶ Such an argument, however, is unconvincing when speaking of unscholarly, plainly false speech. Using Robert Post's example of an astronomy professor who believed that the moon is made of green cheese, it would be ludicrous to argue that placing such a professor's ideas outside of the ambit of academic freedom would endanger the concept. Why? Because such ideas are not just false: there are no credible sources that would support them. A college or university that granted such an astronomy scholar tenure would obviously lose legitimacy; but a college or university that was unbothered by any professor—like a law professor—publicly espousing belief in a green-cheese moon would also risk losing legitimacy.

Defenders of the “right” caution readers against proving offensive scholars' point that opponents simply seek to silence dissenting views.⁴²⁷ This only becomes true, however, if society chooses to adopt this framing of the issue. Frankly, there is no reason to do that. A scholar that engages in

⁴²⁶ See, e.g., Loury, *supra* note 414; Whelan, *supra* note 4.

⁴²⁷ See, e.g., *Don't Just Revile Amy Wax – Rebut Her*, *supra* note 417; *What's Wrong with the Attack on Amy Wax*, *supra* note 417.

plainly racist academic speech does not offer an unpopular opinion based on rigorous study: that scholar offers demonstrably false expertise and relies on unscholarly sources for their assertions. In the extramural context, a scholar that engages in blatantly racist academic speech speaks without regard to the truth, making unverified and exaggerated statements. In no other educational context would this qualify as research or speech that should be protected academically. Forget college students: if a grade school student submitted a research paper with similar claims and sourcing, that student would fail the assignment, and deservedly so. It is illogical to posit that this kind of scholarship nevertheless falls within the ambit of academic freedom because the declarant is a professor; and if indeed it is protected, then it speaks volumes about the legitimacy of academia today.

C. INDIVIDUALIZED HARM: SOCIAL AND PSYCHOLOGICAL DISADVANTAGING OF NONWHITE STUDENTS

The societal harm of continuous racial abuses also works individualized harms on nonwhite people. Racial profiling has led to “emotional and psychological distress, anxiety, alienation, and a weakened sense of belonging.”⁴²⁸ Experiencing racial microaggressions is linked to “low self-esteem, increased stress levels, anxiety, depression, and suicidal thoughts.”⁴²⁹ It leads to feelings of “anger” and “hopelessness,” and makes nonwhite people more likely to suffer from health ailments and abuse dangerous substances.⁴³⁰ Experiences with racism have “been implicated in the development of several stress-related diseases . . . [and] psychiatric disorders.”⁴³¹ Exposure to racist speech more particularly can affect self-esteem and cause “negative psychological symptoms . . . [that] include fear, stress, and depression.”⁴³² Richard Delgado noted that racial stigmatization causes people of color to “feel ambivalent about their self-worth and identity.”⁴³³ The physical, emotional and psychological health of Black people and other nonwhite people are adversely impacted by systemic and contemporary racism, both of which racist academic speech served to

⁴²⁸ Tino Plümecke, Claudia S. Wilopo & Tarek Naguib, *Effects of Racial Profiling: The Subjectivation of Discriminatory Police Practices*, 46 ETHNIC & RACIAL STUD., 811, 813 (2023).

⁴²⁹ Bronfenbrenner Center for Transnational Research, *The Detrimental Effects of Microaggressions*, PSYCH. TODAY (Oct. 5, 2021), <https://www.psychologytoday.com/us/blog/evidence-based-living/202110/the-detrimental-effects-microaggressions> [https://perma.cc/3762-8LDY].

⁴³⁰ *Id.*

⁴³¹ Shawn O. Utsey, *Assessing the Stressful Effects of Racism: A Review of Instrumentation*, 24 J. BLACK PSYCH. 269, 270 (1998).

⁴³² Jeannine Bell, *Restraining the Heartless: Racist Speech and Minority Rights*, 84 IND. L.J. 963, 967 (2009).

⁴³³ Delgado, *supra* note 418, at 137.

legitimate.

Delgado expounded specifically on the harms of racial insults, noting that the clearest direct harm is “[i]mmediate mental or emotional distress.”⁴³⁴ Racial insults are far worse than regular insults because they invoke painful histories of racial subjugation and violence.⁴³⁵ The racial insult is “always a dignitary affront, a direct violation of the victim’s right to be treated respectfully.”⁴³⁶ Racial insults encourage feelings of inferiority and manifest failure in nonwhite adults.⁴³⁷ Racial insults are not only negatively impactful on nonwhite adults, but also adversely affect nonwhite children. Nonwhite children “come to question their competence, intelligence, and worth.”⁴³⁸ Available responses to racial insults range from wholly ineffective to damaging; aggressive responses lead to the offended party being demonized and labeled.⁴³⁹

In light of these documented effects, it is disingenuous to reduce the individualized harms of plainly racist academic speech to nonwhite students merely being “offended” and “uncomfortable.” Being exposed to extreme racial bias can have, and has had, devastating effects on nonwhite people. Students of color who encounter scholars that spew plainly racist academic speech do not simply describe their reactions to such speech as “being uncomfortable”: they feel demeaned and powerless and understand that there is likely no recourse for the harm they suffered.⁴⁴⁰ This racial injury reaffirms their lack of belonging and reproduces all of the abovementioned effects. The scholar’s continued presence also undermines any faith a reasonable party could have in their ability to educate and fairly treat nonwhite students.

This raises another problem with the “debate false ideas” argument: it fails to consider the burden that nonwhite students (and other responders) would be saddled with. As Delgado aptly noted, a “[m]ore speech” approach to combating palpably racist expression “frequently is useless because it may provoke only further abuse or because the insulter is in a position of authority over the victim.”⁴⁴¹ In the context of academia, both have validity: scholars and professors that proffer plainly racist false ideas further abuse,

⁴³⁴ *Id.* at 143.

⁴³⁵ *Id.*

⁴³⁶ *Id.*

⁴³⁷ *Id.* at 146.

⁴³⁸ *Id.*

⁴³⁹ *Id.* at 146–47.

⁴⁴⁰ For example, a nonwhite student who experienced Amy Wax’s engagement in blatantly racist academic speech described feeling “devastated” and “powerless.” Another student described feeling “stunned” and doing everything within her power to avoid crying because “everything about that really hurt.” Penn Law Dean’s Report, *supra* note 1.

⁴⁴¹ Delgado, *supra* note 418, at 146.

and they are certainly in positions of authority over students. Arguing for the academic protection of such ideas also fails to consider the impact on nonwhite students and intellectuals of knowing that some scholars believe that plainly racist academic speech reminiscent of the eighteenth century should be heard. Simply put, the debate itself is unacademic, exhausting, and unproductive, and it serves to re-traumatize nonwhite people.

Simplistically classifying the harms of blatantly racist academic speech as “discomfort” ignores the societal and individualized harms it causes. However, even if mere discomfort were the appropriate manner to describe the individualized harm caused, academic freedom should still offer no protection. Discomfort arising from exposure to scholarly ideas and different viewpoints is not the same as discomfort caused by unscholarly speech laced with unjustified disrespect. Plainly racist academic speech produces no knowledge and is not the result of the rigorous study of scientific or scholarly materials. Such views add nothing new to existing conversations about race: they are false views in the vein of a long line of other scholars committed to white supremacy and racial inequality. Discomfort that arises from scholarly debate is acceptable; discomfort for discomfort’s sake is not.

D. INSTITUTIONAL HARM: PERPETUATION OF RACIAL HIERARCHY WITHIN THE LAW SCHOOL SPACE

Like every other facet of American society, law school and the legal profession are culturally biased. Renee Allen characterizes law schools as “white spaces” that operate in a manner so as to “reproduce structures of inequality.”⁴⁴² Law is taught without connection to America’s racial history and context, effectively ignoring the experiences of nonwhite groups and training future professionals to be blind to racism’s contemporary manifestations.⁴⁴³ Assessments of tenure are often rooted in the ability of nonwhite academics to conform to the ideals of white academics.⁴⁴⁴ Law schools, in essence, subtly but powerfully perpetuate the myth of white superiority, and plainly racist academic speech by legal scholars makes it obvious that “whiteness is the norm and everything else is an other.”⁴⁴⁵

Blatantly racist intellectual thought negatively impacts nonwhite members of the law school space—students, but also faculty and staff—

⁴⁴² Renee Nicole Allen, *From Academic Freedom to Cancel Culture: Silencing Black Women in the Legal Academy*, 68 *UCLA L. REV.* 364, 371–72 (2021). Allen focuses her article on Black women, but many of the conclusions she draws, including those referenced in this article, can apply to nonwhite persons in the academy generally, to varying degrees.

⁴⁴³ *Id.*

⁴⁴⁴ *Id.* at 376–80.

⁴⁴⁵ *Id.* at 372.

because it reinforces the position that true academic freedom is only for white scholars. As discussed above, racial insults are unique in scope and in effect; they constitute an assault on the very humanity of the nonwhite listener.⁴⁴⁶ As envisioned by advocates of traditional academic freedom, the utterance of these insults is deemed perfectly acceptable for academic discourse.⁴⁴⁷ Efforts by nonwhite students and faculty to hold an overtly racist scholar accountable religiously fail, emboldening the scholar in their racism and signaling to affected students and faculty that their outrage—and their humanity—is meaningless.⁴⁴⁸ An educational space in which overt racial insults by faculty are permitted in the name of “academic freedom” is a space where nonwhite persons—students, staff, and faculty—are unwelcome.

Moreover, insulating plainly racist intellectual ideas under the guise of academic freedom necessarily devalues anti-racist scholarship and the scholars—usually nonwhite—dedicated to its production. Allen notes how law schools routinely question the academic legitimacy of critical race theory and discourage scholarship on topics of race and gender.⁴⁴⁹ This behavior is consistent with traditional academic freedom: what Allen notes is no different than when white scholars were dismissive of scholarship that challenged assumptions of white superiority in the nineteenth and early-twentieth centuries.⁴⁵⁰ Even for law schools that do not affirmatively discourage anti-racist scholarship, permitting blatantly racist academic speech in the name of academic freedom equalizes racist intellectual speech and anti-racist intellectual speech. Anti-racist thought can have no value in a law school space that accords it the same protections as racist thought.

Racism remains a controversial topic that merits responsible discussion and debate. However, deeming plainly racist intellectual speech worthy of academic protection in the law school space invariably lowers the quality of debate to the point of making it unscholarly. As explained above, a scholar that spews plainly racist ideas is no longer engaged in an academic enterprise: the proffering of demonstrable falsehoods cannot be squared with any quest for truth. The anti-racist intellectual in turn must choose between correcting the lies and refusing to engage with comments or writings that qualify as scholarship under a traditional academic freedom regime. Legal academia, and academia in general, places no other kind of scholar in such a bind. Thus, academia sends a clear message that racism in

⁴⁴⁶ See discussion in Part III.C.

⁴⁴⁷ See, e.g., Press Release, Acad. Freedom All., AFA Sends Letter to Penn on Amy Wax Case (Jan. 18, 2022) (on file with author).

⁴⁴⁸ Allen, *supra* note 442, at 369–70.

⁴⁴⁹ *Id.* at 378.

⁴⁵⁰ See KENDI, *supra* note 89, at 267, 300–01.

America does not merit the same qualitative debate as other topics.

All of these effects—the minimizing of nonwhite students, staff and faculty, the devaluing of anti-racist scholars and scholarship, and the delegitimizing of academic debates regarding racism—work to maintain racial hierarchy within the law school space. Law schools and other academic institutions cannot disavow racial hierarchy and white supremacy while shielding plainly racist speech under the guise of “academic freedom.”

E. INSTITUTIONAL HARM: COMPROMISING OF ABILITY TO OFFER QUALITY EDUCATION

After spuriously declaring in 2018 that she never had Black students graduate in the top half of her classes, Amy Wax was removed from teaching mandatory first-year courses.⁴⁵¹ After her latest op-ed and the resulting backlash, Wax saw very low enrollment in her classes for the 2022–2023 academic year.⁴⁵² These two facts demonstrate an institutional harm of blatantly racist academic speech: it adversely impacts the law school’s ability to deliver a quality education to its students. For nonwhite students, permitting the espousal of blatantly racist intellectual ideas in the classroom converts the classroom into a non-academic space in which their very humanity is under assault. In such a space, learning for the nonwhite student becomes unfeasible at a minimum.

Additionally, a professor who proffers plainly racist ideas in their professional capacity compromises their ability to function because students will increasingly refuse to take their courses. If that professor is teaching a required course, nonwhite students are forced to learn from a professor who devalues their existence—and who will give them a grade for the course. That professor becomes a poor reflection of the university because that professor is a part of the institution: the professor’s plainly racist academic speech is the university’s speech as well. Ironically, even students who are sympathetic to the professor become hesitant to take classes with the professor for fear of being called out by their classmates.⁴⁵³

⁴⁵¹ Isaac Chotiner, *A Penn Law Professor Wants to Make America White Again*, NEW YORKER (Aug. 23, 2019), <https://www.newyorker.com/news/q-and-a/a-penn-law-professor-wants-to-make-america-white-again> [<https://perma.cc/MR9P-89P7>].

⁴⁵² Jared Mitovich, *Amy Wax’s Classes See Sharp Decline in Enrollment as Penn’s Investigation Nears Second Year*, DAILY PENNSYLVANIAN (Dec. 5, 2022, 11:06 PM), <https://www.thedp.com/article/2022/12/penn-law-amy-wax-course-popularity> [<https://perma.cc/RT4L-8W42>].

⁴⁵³ See, e.g., Josh Blackman, *A Letter from a Current UPenn Law Student in Support of Amy Wax*, REASON (Jan. 18, 2022, 5:13 PM), <https://reason.com/volokh/2022/01/18/a-letter-from-a-current-upenn-law-student-in-support-of-amy-wax> [<https://perma.cc/S5ZB-QMSB>].

In compromising their ability to function, a professor that espouses plainly racist academic ideas not only disadvantages students, but also disadvantages their colleagues who are then forced to pick up the slack. If that professor was one of two professors that regularly taught contracts to first-year law students, removing that professor from teaching imposes a burden on the law school to either replace that professor or to only have one section of contracts, which in turn burdens the other professor with a larger class size. If that professor is the only contracts professor, the law school bears the burden of finding a replacement, since contract law is most likely a required course. If that professor teaches any specialty courses, nonwhite students interested in taking those courses are forced to choose between the real possibility of being exposed to racial trauma and foregoing a class that may be important to their professional ambitions. A professor that proffers blatantly racist academic ideas limits their own functionality, and both students and fellow professors bear the cost.

Finally, a professor that espouses plainly racist intellectual ideas is likely to miseducate their students. On the one hand, spouting false ideas as truth in an educational space does students an obvious disservice. On the other hand, refusal to discuss race in the classroom is miseducation by omission: such a professor demonstrates an inability to provide well-rounded academic instruction in a time when society demands more inclusivity. Several legal scholars have written on the importance of teaching about race in the law school classroom.⁴⁵⁴ However, an intellectual that engages in blatantly racist academic speech not only would not view inclusive teaching as important, but also would be incapable of doing so. In the context of legal academia, such a professor would be unable to meaningfully elucidate the role that race played and continues to play in law. Either way, students that sit under that professor are dis-served.

V. CONCLUSION

Traditional academic freedom, which assumes an all-white intellectual space and resists the deconstruction of racial hierarchy, is severely outdated and has no place in the twenty-first century. Contemporary academic freedom, which is responsive to a modern society, is truly about the pursuit of knowledge and the quest for truth. To claim that academic freedom permits plainly racist academic speech in the twenty-first century, in either research, teaching, or extramural statements and expressions, advances neither goal. A traditional vision of academic freedom is a sword against

⁴⁵⁴ See generally, e.g., Deborah Zalesne, *Racial Inequality in Contracting: Teaching Race as a Core Value*, 3 COLUM. J. RACE & L. 23 (2013); Paul Finkelman, *Teaching Slavery in American Constitutional Law*, 34 AKRON L. REV. 261, 274 (2000).

racial progress and a shield against meaningful accountability: it lacks any value worth saving and is self-destructive, harming the academic project altogether. For the sake of society and itself, academia would do well to adhere to the language of the 1915 Principles and deny blatantly racist intellectual thought a haven.