

# Civility as Morally Justified Oppression

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*Contemporary legal education's predominant focus on civility within the Professional Identity Formation (PIF) framework perpetuates systemic racism, cloaking it in a guise of moral certitude. Civility, as an offshoot of moral philosophy, functions as a formidable instrument of oppression, ratifying behavioral norms and ideological constructs imposed by the powerful to sustain society's entrenched hierarchical structures, thereby obfuscating pervasive inequities that undergird the social fabric. This Article critically interrogates the contexts in which civility catalyzes the perception of inhumanity, oppression, and systemic inequity as morally sanctioned, thereby elucidating how civility normalizes brutality and cruelty. Further, PIF's emphasis on individual civility diminishes the imperative of the lawyer's role in societal reformation, excessively valorizing the lawyer's obligations to clients and professional counterparts, and in so doing, fortifies the systemic inequities endemic to legal education and the profession at large. Instead of perpetuating the existing paradigm, PIF pedagogy ought to reorient its focus towards the disruption and dismantling of systemic inequities.*

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## INTRODUCTION

While Professional Identity Formation (“PIF”) in legal education remains a vague and poorly defined concept,<sup>1</sup> one widely accepted norm of the PIF movement is civility in lawyering.<sup>2</sup> This article demonstrates that civility, as a core concept of Professional Identity Formation,

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<sup>1</sup> See Harmony Decosimo, *A Taxonomy of Professional Identity Formation*, 67 ST. LOUIS U. L.J. 1, 2, 10 (2022) (describing Professional Identity Formation as “an infinitely open-ended concept” that is “debatable and so expansive by some accounts as to be almost entirely in the eye of the beholder.”).

<sup>2</sup> See generally *id.*; see also David A. Grenardo, *A Lesson in Civility*, 32 GEO. J. LEGAL ETHICS 135, 138 (2019), explaining:

Civility, which generally means treating others with courtesy, dignity, and respect, comprises an essential trait of a successful lawyer. The importance of civility in practice cannot be overstated. Former United States Supreme Court Justice Sandra Day O'Connor stated that greater civility increases a lawyer's enjoyment of practice and the effectiveness of the justice system, while also improving the public's perception of attorneys. Civility also makes a lawyer a more effective advocate for a number of reasons, including that decision-makers, such as judges, “are more likely to be impressed by an advocate who is courteous and respectful to the decision-maker, opposing counsel, the litigants, and the legal process.”

perpetuates the deeply rooted systemic racism in the legal profession.<sup>3</sup> This holds true despite the sincere, antiracist agendas of its proponents. Even though it is not easy to define PIF precisely, according to the University of Richmond School of Law it “is an ongoing developmental process characterized by self-awareness and the intentional exploration of the values, guiding principles, and well-being practices needed to thrive in legal study and practice. [It] also encourages continual reflection on the attorney’s role in society.”<sup>4</sup> Generally speaking, this Article examines the problematic role the concept of civility plays in PIF given the reality that PIF is measured by normative standards based on the attributes of the dominant group in legal education. This reality perpetuates systems that “discounts people of color and other” marginalized communities.<sup>5</sup> In this way PIF, although well intentioned, perpetuates a systemic structure that perpetuates white supremacy.

Civility itself is ironic. In this Article I frame civility as a set of behavioral norms imposed on society by those who obtained power brutally and uncivilly to ensure that there is never a similar transfer of power. Because of the nature of human social engineering and system justification, even the weak and disenfranchised members of society come to believe in the normativity of civility.

Against that backdrop, civility in America is ironic because historically, the dominant group in America achieved their dominance by the exact opposite of civility: by vicious acts of genocide, ethnic cleansing, and enslavement to acquire land and wealth.<sup>6</sup> Suddenly though, after this

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<sup>3</sup> Scholars have already suggested that Professional Identity Formation is racist. *See, e.g.*, Janet Thompson Jackson, *Wellness and Law: Reforming Legal Education to Support Student Wellness*, 65 HOW. L.J. 45, 76–77 (2021) (explaining that Professional Identity Formation is measured by the norms of the dominant group in legal education and as a result PIF currently “discounts people of color.”); *see also* Decosimo, *supra* note 1, at 9 (explaining that Professional Identity Formation teaches students to “‘fit in’ or assimilate to professional legal culture.”). The systemic racism of this is obvious; the dominant legal culture is a culture where only about 2% of partners in law firms are black despite black people comprising roughly 14% of the U.S. population. *See* NAT’L ASS’N FOR L. PLACEMENT, INC. (NALP), *2020 Report on Diversity in U.S. Law Firms* 5 (Feb. 2021), [https://www.nalp.org/uploads/2020\\_NALP\\_Diversity\\_Report.pdf](https://www.nalp.org/uploads/2020_NALP_Diversity_Report.pdf) [<https://perma.cc/BB87-34KL>]; Mohamad Moslimani, *Facts About the U.S. Black Population*, PEW RSCH. CTR. (Jan. 18, 2024), <https://www.pewresearch.org/social-trends/factsheet/facts-about-the-us-black-population> [<https://perma.cc/2B3H-TU8T>].

<sup>4</sup> *Professional Identity Formation Program*, UNIV. OF RICHMOND SCH. OF L., <https://law.richmond.edu/academics/centers/pif/index.html#q-what-is-professional-identity-formation> [<https://perma.cc/V4D8-K46R>].

<sup>5</sup> Janet Thompson Jackson, *Work, Wellness, and Meaning: Reimagining Legal Education and the First 10 Years of Law Practice*, NALP (Jan. 2022), [https://www.nalp.org/lawyer\\_wellness\\_article#\\_ednref7](https://www.nalp.org/lawyer_wellness_article#_ednref7) [<https://perma.cc/2ETM-YKNP>].

<sup>6</sup> ROBIN DIANGELO, *WHITE FRAGILITY* 15–16 (2018).

brutal, murderous, and uncivil power transfer, civility is peddled as an inevitable and natural characteristic of society.<sup>7</sup>

Furthering the irony is that meaningful societal change usually isn't achieved without some measure of upheaval, discord, and in most cases violence.<sup>8</sup> In other words, imposing civility as a norm in legal education and society at large ensures minimal change to the legal profession. This ensures the legal profession, as one of the whitest and most racially exclusionary professions in the United States, remains a model of systemic racism.<sup>9</sup>

Change, especially systemic change, is difficult. Often it will feel uncomfortable and almost like we are doing the wrong thing.<sup>10</sup> This is because powerful, unconscious mechanisms reinforce systemic status quos.<sup>11</sup> The fact that creating a culture of civility consciously feels comfortable—like a natural, right, or good thing to do—should be the harshest of alarms that we (those members of society who consciously and sincerely believe racial inequity and systemic racism is non-normative) should be moving in the opposite direction.<sup>12</sup> Rather, emotional pain and hurt should be accepted as part of the process of growth. “[Systemic shift] requires . . . the willingness to collaborate with anyone (friend or foe) to positively shift the system so it produces the results closer to what we want and can be sustained as a new normal on the journey to sustainability.”<sup>13</sup>

Initially, this Article identifies the meaning of civility as used in PIF. Next, this Article examines civility in a variety of contexts, demonstrating

<sup>7</sup> See ALEX ZAMALIN, *AGAINST CIVILITY: THE HIDDEN RACISM IN OUR OBSESSION WITH CIVILITY* 3–5 (2021) (“If we think about our daily lives and our relationships with neighbors and friends, the word suggests warmth and affection, forgiveness and humility—and good manners—things to which we should aspire.”).

<sup>8</sup> *Id.* at 9.

<sup>9</sup> See generally Rory D. Bahadur, *Law School Rankings and the Impossibility of Anti-Racism*, 53 ST. MARY'S L.J. 991 (2022) [hereinafter *Law School Rankings*]; *id.* at 1016.

<sup>10</sup> This discomfort is likely similar to the growth or alarm zones of the learning growth model. See Maxwell J. Smith, *The Learning Zone Model*, COMMONS (2022), <https://commonslibrary.org/the-learning-zone-model> [<https://perma.cc/5H7S-2FYM>].

<sup>11</sup> See Neil Hawkins & Laura Asiala, *System Change Is Harder Than It Looks: Systems Shift May Be the Answer*, FRED A. AND BARBARA M. ERB FAM. FOUND. (May 5, 2022), <https://www.erbff.org/blog/systems-change-is-harder-than-it-looks-systems-shift-may-be-the-answer> [<https://perma.cc/SJE7-ACQ9>]. The authors explain that:

Driving a system to a new set point requires great energy and planning; overcoming the feedback processes that preserve the existing system integrity; and identifying, strengthening, and accelerating positive processes that drive the system out of equilibrium—and then establishing these as positive feedback processes that maintain the new set point. This is especially true for the complex systems involved with sustainable development.

*Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

that historically civility is nothing more than a uniquely powerful tool for oppression and dominance. Uniquely powerful because even though civility is an empirically vacuous term, nothing else makes oppression seem quite as divine, natural, altruistic, and morally inevitable. Ultimately, the Article suggests that advocating for civility in legal education weaponizes unconscious bias and system justification, rendering invisible the significant racial harm repeatedly perpetuated by civility and other similar poorly defined offshoots of morality.

#### I. DEFINING CIVILITY IN PIF

Civility on the broadest level means not using physical violence against people.<sup>14</sup> But this definition is irrelevant in the PIF space because it would largely be redundant of the criminal law. For example, if we consider the behavior of the people who violently stormed the Capitol on January 6, 2021, as not civil because it involved acts of violence, then that species of incivility is best left to the criminal law to define and punish. Civility in the PIF sense, however, means something more specific yet simultaneously less well-defined than a lack of violence. In his seminal article, Professor Grenardo defines civility in a broad sense as “treating others with courtesy, dignity, and respect.”<sup>15</sup> Relating this to the legal field, he states that civility includes being “courteous and respectful to the decision-maker, opposing counsel, the litigants, and the legal process.”<sup>16</sup>

Professor Grenardo and the ABA have merged the concepts of professionalism and civility such that civility includes concepts like timeliness and respect for deadlines in the legal process.<sup>17</sup> This article

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<sup>14</sup> Matteo Bonotti & Steven T. Zech, *Understanding Civility*, in *RECOVERING CIVILITY DURING COVID-19*, 37, 48 (2021), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7924096/#FPar1> [<https://perma.cc/L6VE-B2ST>].

<sup>15</sup> Grenardo, *supra* note 2, at 138.

<sup>16</sup> *Id.* (quoting Kevin Dubose & Jonathan E. Smaby, *The Power of Professionalism: Civility as a Strategy for Effective Advocacy*, 79 TEX. B.J. 432, 433 (2016)).

<sup>17</sup> *Id.* at 146, 152; The ABA plays to notions of civility by adhering to common themes:

(1) recogniz[ing] the importance of keeping commitments and of seeking agreement and accommodation with regard to scheduling and extensions; (2) be[ing] respectful and act[ing] in a courteous, cordial, and civil manner; (3) be[ing] prompt, punctual, and prepared; (4) maintain[ing] honesty and personal integrity; (5) communicat[ing] with opposing counsel; (6) avoid[ing] actions taken merely to delay or harass; (7) ensur[ing] proper conduct before the court; (8) act[ing] with dignity and cooperation in pre-trial proceedings; (9) act[ing] as a role model to the client and public and as a mentor to young lawyers; and (10) utiliz[ing] the court system in an efficient and fair manner.

Gary L. Gassman et al., *Defining Civility as an Attorney*, 55 TORT TRIAL & INS. PRAC. L. 557, 558–559 (2020) (citing Donald E. Campbell, *Raise Your Right Hand and Swear to Be Civil: Defining Civility as an Obligation of Professional Responsibility*, 47 GONZ. L. REV. 99, 109 (Nov. 2, 2011)).

disaggregates the civility component of professionalism and instead focuses on the established definitions of civility as a characteristic of communication and behavior.<sup>18</sup> The problem with Professor Grenardo's definition is that it disregards the systemic injustice and racism built into notoriously and historically malleable words like dignity, courtesy, and respect.<sup>19</sup> Words which I argue throughout this Article mean nothing more, at the systemic level, than to behave in a way that prevents white discomfort.

## II. CIVILITY AND SYSTEM JUSTIFICATION

In a previous article, I applied John Jost's research on system justification to carefully explain the systemic racism reflected in legal education and the legal system.<sup>20</sup> The article explained at length how sincerely antiracist people engage in racism in the context of the law school rankings without experiencing any dissonance between their genuinely held beliefs and their racist actions.<sup>21</sup> I do not intend to rehash the contents of that article here. However, understanding what system justification is and explaining why the things we passionately believe to be right serve to further perpetuate systemic racism is important for understanding my critique of civility.

System justification means all members of society are powerfully motivated, at an unconscious level, "to defend, bolster and justify existing social, economic, and political institutions and arrangements because doing so serves fundamental psychological needs."<sup>22</sup> This includes "the security of being able to live in and belong to a society, even if we do so 'wretchedly' as a disfavored group in a society."<sup>23</sup>

Individuals have a psychological need to view their social systems as just, legitimate, and desirable.<sup>24</sup> This leads to the unconscious processing of information to reduce cognitive dissonance, which is the

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<sup>18</sup> For example, Merriam-Webster defines civility as "a polite act or expression," referring to politeness in behavior, speech and the way we treat each other. *Civility*, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/civility?src=search-dict-box> [https://perma.cc/P275-ZUAB]. The Oxford Dictionary has defined civility as "Behaviour proper to the intercourse of civilized people; ordinary courtesy or politeness as opposed to rudeness of behaviour; decent respect, consideration." *Civility*, OXFORD ENG. DICTIONARY (2d ed. 1970).

<sup>19</sup> Others define civility in the legal profession similarly. See Gassman & Olivera, *supra* note 17, at 559 (defining civility as "acting with formal politeness when communicating or working . . .").

<sup>20</sup> See generally *Law School Rankings*, *supra* note 9.

<sup>21</sup> *Id.*

<sup>22</sup> JOHN T. JOST, A THEORY OF SYSTEM JUSTIFICATION 6 (2020).

<sup>23</sup> *Law School Rankings*, *supra* note 9, at 998–99 (citing JOST, *supra* note 22).

<sup>24</sup> *Law School Rankings*, *supra* note 9, at 999–1000 (citing JOST, *supra* note 22).

discomfort experienced when there are two or more conflicting cognitions.<sup>25</sup> When we process information unconsciously, we do not experience dissonance even when our resulting actions are inconsistent with our own moral behavioral guidelines and sincerely held moral beliefs.<sup>26</sup> For example:

For anti-racist Americans, racial equality is consciously normative. So, when an anti-racist American intentionally acts in a racist fashion, they experience dissonance or the sting of conscience. According to Nietzsche, then, this sting of conscience is absent when our conduct, judgment, and decision making is implicit and occurring at the subconscious level because it is unintentional.<sup>27</sup>

Another example of system justification is our continued perpetuation of the myth that America is a meritocratic society, even when it is empirically obvious it is not.<sup>28</sup> It is easier for socially disenfranchised groups to unconsciously believe in meritocracy or conceive of society as a just system.<sup>29</sup> This holds true even in the face of clear evidence to the contrary because it allows the belief that there is a way out of their socioeconomic status rather than accepting the hard truth,<sup>30</sup> which entails an unjust and immoral societal reality that they are powerless to reform and that is responsible for their disenfranchisement.<sup>31</sup>

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<sup>25</sup> See Kendra Cherry, *Cognitive Dissonance and the Discomfort of Holding Conflicting Beliefs*, VERY WELL MIND (Nov. 7, 2022), <https://www.verywellmind.com/what-is-cognitive-dissonance-2795012> [<https://perma.cc/X8ZQ-PC7P>]; see also *Law School Rankings*, *supra* note 9, at 998–99.

<sup>26</sup> *Law School Rankings*, *supra* note 9, at 1002–1003.

<sup>27</sup> *Id.* at 1008.

<sup>28</sup> See *id.* at 1026–1033 (citing empirical studies suggesting the limitations of meritocracy from Shannon K. McCoy et al., *Is the Belief in Meritocracy Palliative for Members of Low Status Groups? Evidence for a Benefit for Self-Esteem and Physical Health via Perceived Control*, 43 EUR. J. SOC. PSYCH., 1, 2 (2013); Shannon K. McCoy & Brenda Major, *Priming Meritocracy and the Psychological Justification of Inequality*, 43 J. EXPERIMENTAL SOC. PSYCH. 341, 346–47 (2007); Virginie Wiederkehr et al., *Belief in School Meritocracy as a System-Justifying Tool for Low Status Students*, 6 FRONTIERS PSYCH. 1, 2 (2015); Ana Filipa Madeira et al., *Primes and Consequences: A Systematic Review of Meritocracy in Intergroup Relations*, 10 FRONTIERS PSYCH. (2019)).

<sup>29</sup> See *Law School Rankings*, *supra* note 9, at 1026–1033.

<sup>30</sup> See *id.*, *supra* note 9, at 1053 (citing Linda Greenhouse, *The End of Racism, and Other Fables*, N.Y. TIMES ARCHIVE, <https://archive.nytimes.com/www.nytimes.com/books/00/06/04/specials/bell-well.html> [<https://perma.cc/P8VV-3D2X>]).

<sup>31</sup> *Law School Rankings*, *supra* note 9, at 1026–33.

The more people believe a society is just, the more they justify the systemic structure of that society.<sup>32</sup> The uncomfortable truth is that religion, which is the source of the belief in a just world for many people, is one of the most powerful drivers of system justification.<sup>33</sup> This is because it “provide[s] ideological cover for the existing social order and communicate[s] that prevailing institutions and arrangements are legitimate, just, and therefore worth obeying and preserving.”<sup>34</sup> And therein lies the rub. The concepts of dignity, courtesy, and respect, which represent civility in PIF, are derived from the concept of morality, which is deeply tied to Judeo-Christian religious norms.<sup>35</sup>

### III. THE DIVINE MORALITY OF CIVILITY

Part of the power of the civility (as it is defined in PIF as “dignity, courtesy, and respect”<sup>36</sup>) rationale is its religious roots and its association with a higher power or morality.<sup>37</sup> Civility is essential to the Judeo-Christian construct of morality and it permeates the Christian religious texts.<sup>38</sup> Gaye Theresa Johnson, who studies the intersection of civility and race at the University of California, Los Angeles, explains that this theory

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<sup>32</sup> *Id.* at 1026–27 (citing Kristin Wenzel et al., *General Belief in a Just World Is Positively Associated with Dishonest Behavior*, 8 FRONTIERS PSYCH. 1, 5 (2017), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5641360> [<https://perma.cc/6ZU4-WRL8>]).

<sup>33</sup> See *Law School Rankings*, *supra* note 9, at 1052 (citing JOST, *supra* note 22).

<sup>34</sup> *Law School Rankings*, *supra* note 9 (quoting JOST, *supra* note 22).

<sup>35</sup> See generally Rory D. Bahadur, *Individual Sovereignty, Freer Sex, and Diminished Privacy: How an Informed and Realistic Modern Sexual Morality Provides Salvation from Unjustified Shame*, 8 ELON L. REV. 245, 254–56 (2016) (describing this link in the context of sexual morality) [hereinafter *Individual Sovereignty*].

<sup>36</sup> See Grenardo, *supra* note 2.

<sup>37</sup> Karen Grigsby Bates, *When Civility Is Used As A Cudgel Against People Of Color*, NPR (March 14, 2019), <https://www.npr.org/sections/codeswitch/2019/03/14/700897826/when-civility-is-used-as-a-cudgel-against-people-of-color> [<https://perma.cc/2QY9-4KDA>] (“It’s always been a situation where people assume that civility is something that’s sort of God ordained”). Additionally, to some extent, Professor Grenardo’s definition of civility in PIF resembles the definition of civility espoused by the Catholic saint LaSalle who was an expert on decorum and civility. JOHN BAPTIST DE LA SALLE, *THE RULES OF CHRISTIAN DECORUM & CIVILITY* 114 (Richard Arnandez trans., Gregory Wright ed.), <https://lasallian.info/wp-content/uploads/2012/12/Christian-Decorum-reprint-2007.pdf> [<https://perma.cc/AK5P-PTDJ>] (“Civility is so demanding . . . that it does not permit you to scandalize anyone in anyway and never allows you to speak ill of anyone.”).

<sup>38</sup> Multiple examples can be found in the Bible (New International Version): *Matthew* 7:12 (“So in everything, do to others what you would have them do to you, for this sums up the Law and the Prophets.”); *Colossians* 4:6 (“Let your conversation be always full of grace, seasoned with salt, so that you may know how to answer everyone.”); *John* 13:34 (“A new command I give you: Love one another. As I have loved you, so you must love one another.”); *Ephesians* 4:2 (“Be completely humble and gentle; be patient, bearing with one another in love.”); *Leviticus* 19:18 (“Do not seek revenge or bear a grudge against anyone among your people, but love your neighbor as yourself. I am the Lord.”).



of divine origin necessarily implies some people are naturally civil, while others need to be civilized.<sup>39</sup>

Civility is not a neutral word divorced from the notion of civilization, as both words are “derived from the Latin word *civis*, which means ‘citizen.’”<sup>40</sup> Civility refers to the behavior of the civilized; “[it] is the art of citizenship; it is the recognition of the reciprocal rights and duties of those who govern and are governed,”<sup>41</sup> and it is the force responsible for making civilizations civilized.<sup>42</sup> Therefore, attempts to gentrify civility by suggesting the term, as deployed in PIF, is a neutral behavioral concept divorced from the systemic hierarchies of civilization or what it means to be civilized is unsustainable.

According to Johnson, people of color end up having to respond to what others define as civil, but they don’t play a part in determining what is and isn’t civil.<sup>43</sup> As a result, “[f]or many people of color in the United States, civility isn’t so much social lubricant as it is a vehicle for containing them, preventing social mobility and preserving the status quo.”<sup>44</sup> But because civility is so tied up with morality and religion, system justification prevents even the people on whom it is used as a weapon of oppression from seeing that it impedes any change in societal hierarchy and perpetuates their oppression.<sup>45</sup>

Because system justification perpetuates the divine normativity of civility so strongly, individuals don’t experience any dissonance between the false stated goals of civility—like protecting the powerless<sup>46</sup>—and its true oppressive nature, even when such dissonance should be obvious. For example, in 1819, after committing genocide to obtain native land, Congress decided to “civilize” the First Peoples by “[assigning religious denominations] to specific tribes. While encouraging the tribes to convert, the hired missionaries also urge[d] them to adopt white styles of dress,

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<sup>39</sup> Bates, *supra* note 37.

<sup>40</sup> David M. Taub, *Civil, Civility and Civilization*, ISLAND NEWS (June 16, 2021), <https://y.ourislandnews.com/civil-civility-and-civilization> [<https://perma.cc/V5WM-L6HF>].

<sup>41</sup> E.g., Larry Schaefer, *History and Civility*, 40 N. AM. MONTESSORI TCHRS ASS’N J. 103, 105–06 (2015). *Id.* at 106.

<sup>42</sup> *Id.* at 110.

<sup>43</sup> Bates, *supra* note 37.

<sup>44</sup> *Id.*

<sup>45</sup> See, e.g., *supra* note 28 and accompanying text (collecting studies that demonstrate how systems of civility invite their acceptance).

<sup>46</sup> See, e.g., *Building on Civility to Prevent Sexual Harassment*, NAT’L ACADS. OF SCIS., ENG’G, AND MED., <https://www.nationalacademies.org/our-work/building-on-civility-to-prevent-sexual-harassment> [<https://perma.cc/G9KQ-VMXN>] (describing the Academies’ belief that civility can reduce incidents of sexual violence and harassment).

housing, and farming.”<sup>47</sup> System justification prevents us from recoiling at the patent irony and dissonance that people who behaved in the most uncivilized and barbaric fashion, engaging in ethnic cleansing to dominate another culture and obtain their land, suggested that civility meant adopting the same religion that rendered the obscenity of their supposedly civil actions invisible.<sup>48</sup>

Terms like morality and civility are nothing more than empty phraseology that justify the systemic racism inherent in society. As Karen Grigsby Bates puts it,

Civility has long been defined by people in power. From the time enslaved Africans were brought to these shores to the civil rights movement up to today, how attached you are to civility depends on where you stand or, in the case of [the] Nashville, Tenn., lunch counter demonstration in 1961, sit.<sup>49</sup>

In the next section, I demonstrate that courtesy, dignity, and respect are meaningless words tied to religion and morality. They are incapable of precise definition and their interpretation reinforces societal power status quos via system justification. Their main purpose is to ensure that all of society feels good about behaving in a way that hinders the open and frank discussion of the fundamental and entrenched inequity of our society.

#### IV. CIVILITY AS A MORALITY DERIVATIVE IS OPPRESSION

Throughout history, and even today, morality and its derivatives like dignity, respect, and civility make the oppression of people of color, women, and socioeconomically disenfranchised groups seem natural and just. These words reflect the reality that concepts incapable of precise definition are often interpreted to maintain the societal status quo. “Might is right” is especially relevant in the legal profession, where African American underrepresentation is notorious and huge.<sup>50</sup> Yet, as part of the

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<sup>47</sup> 1819: Congress Pays Missionaries to ‘Civilize’ American Indians, *Timeline*, NATIVE VOICES, <https://www.nlm.nih.gov/nativevoices/timeline/266.HTML> [<https://perma.cc/3SQS-2P68>].

<sup>48</sup> See *id.*

<sup>49</sup> Bates, *supra* note 37.

<sup>50</sup> Rory D. Bahadur, *Law School Rankings and the Impossibility of Anti-Racism*, 53 ST. MARY’S L.J. 991, 1014-17 (2022). See also AM. BAR ASS’N, *ABA Timeline*, [https://www.americanbar.org/about\\_the\\_aba/timeline](https://www.americanbar.org/about_the_aba/timeline) [<https://perma.cc/86PF-DP95>]. It was not until the middle of the 20<sup>th</sup> century that black lawyers were generally allowed to become members of the ABA, an organization founded in 1878. Consider also how the research findings in support of the C.R.O.W.N. act reinforce the ease with which bias and racism infect the definition of professionalism. The 2023 CROWN Workplace Research Study found:

- Black women’s hair is 2.5x more likely to be perceived as unprofessional.

well-meaning mission of Professional Identity Formation, there is the suggestion that civility involves behaving in a way that reinforces the desirability and normativity of whiteness. The following are but some examples of how civility has been weaponized against disenfranchised people.

#### A. Morally Justified Oppression of African Americans

Christianity, despite its stated egalitarian norms, was used to justify slavery in America: the most immoral, cruel, and barbaric oppression of people of African descent.<sup>51</sup> For example, in 1852 Josiah Priest provided a biblical defense of slavery: “the institution of slavery received the sanction of the Almighty in the Patriarchal age; that it was incorporated into the only national Constitution which ever emanated from God, that its legality was recognized, and its relative duties relegated by our Saviour, when upon earth.”<sup>52</sup>

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- Approximately 2/3 of Black women (66%) change their hair for a job interview. Among them, 41% changed their hair from curly to straight.
  - Black women are 54% more likely (or over 1.5x more likely) to feel like they have to wear their hair straight to a job interview to be successful.
  - Black women with coily/textured hair are 2x as likely to experience microaggressions in the workplace than Black women with straighter hair.
  - Over 20% of Black women 25-34 have been sent home from work because of their hair.
  - Nearly half (44%) of Black women under age 34 feel pressured to have a headshot with straight hair.

CROWN COALITION, <https://www.thecrownact.com/research-studies> [<https://perma.cc/Y4AP-4632>].

<sup>51</sup> See *Individual Sovereignty*, *supra* note 35, at 264.

<sup>52</sup> *Id.* (quoting Zaid Jilani, *How Religious ‘Liberty’ Has Been Used to Justify Racism, Sexism and Slavery Throughout History*, ALTERNET (Apr. 6, 2023), <https://www.alternet.org/2015/04/how-religious-liberty-has-been-used-justify-racism-sexism-and-slavery-throughout-history> [<https://perma.cc/8BXX-MK6Y>]). This should not be surprising because the Bible (New International Version) expressly promotes subjugation and unquestioned obedience to those in power. See, e.g., *Ephesians* 6:5 (“Slaves, obey your earthly masters with respect and fear, and with sincerity of heart, just as you would obey Christ.”); *Colossians* 3:22 (“Slaves, obey your earthly masters in everything; and do it, not only when their eye is on you and to curry their favor, but with sincerity of heart and reverence for the Lord.”); *Hebrews* 13:17 (“Have confidence in your leaders and submit to their authority, because they keep watch over you as those who must give an account. Do this so that their work will be a joy, not a burden, for that would be of no benefit to you.”); *Romans* 13:1–7:

Let everyone be subject to the governing authorities, for there is no authority except that which God has established. The authorities that exist have been established by God. Consequently, whoever rebels against the authority is rebelling against what God has instituted, and those who do so will bring judgment on themselves. For rulers hold no terror for those who do right, but for those who do wrong. Do you want to be free from fear of the one in authority? Then do what is right and you will be commended. For the one in authority is God’s servant for your good. But if you do wrong, be afraid, for rulers do not bear the sword for no reason. They are

Similarly, Richard Furman, elected in 1814 as the first head of the National Baptist Association, wrote to the then Governor of South Carolina, justifying slavery as follows:

“[T]he right of holding slaves is clearly established in the Holy Scriptures;” he specifically cites the “Israelites [being] directed to purchase their bond-men and bond-maids of the Heathen nations; except they were of the Canaanites, for these were to be destroyed. And it is declared that the persons purchased were to be their “bond-men forever;” and an “inheritance for them and their children.”<sup>53</sup>

But using morality and its ill-defined derivatives like decency and civility to oppress people is not only a centuries-old reality. As late as 1959, the trial court’s holding in *Loving v. Virginia* used religion and morality to justify the Virginia ban on Black and white marriages:

Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.<sup>54</sup>

And it is important to understand the mechanism by which words like morality and civility lead to the oppression of people of color by even the most well-intentioned anti-racists and how they perpetuate societal norms. The meanings of those words change constantly, and their acceptable meaning is set by dominant societal norms.<sup>55</sup> These norms

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God’s servants, agents of wrath to bring punishment on the wrongdoer. Therefore, it is necessary to submit to the authorities, not only because of possible punishment but also as a matter of conscience. This is also why you pay taxes, for the authorities are God’s servants, who give their full time to governing. Give to everyone what you owe them: If you owe taxes, pay taxes; if revenue, then revenue; if respect, then respect; if honor, then honor.

System justification offers a powerful explanation for why we feel so uncomfortable acknowledging the support for systemic oppression found in the Bible.

<sup>53</sup> *Individual Sovereignty*, *supra* note 35, at 264 (quoting Jilani, *supra* note 52) (explaining the letter that Richard Furman wrote to the Governor of South Carolina).

<sup>54</sup> *Loving v. Virginia*, 388 U.S. 1, 3 (1967) (citing the Circuit Court of Caroline County’s 1959 decision); *Id.* at 252 (citing Joshua A. Slone, *Comment: Whose Morality is it Anyway?: Recognizing the Tension Between Morality Laws and the Establishment Clause*, 13 GEO. J.L. & PUB. POL’Y 49, 72 (2015)).

<sup>55</sup> Sharika Thiranagama et al., *Introduction: Whose Civility?*, 18 ANTHROPOLOGICAL THEORY 153, 154 (2018) (“There is a long tradition of using civility to silence dissent, excluding people and issues from public discussions . . . [it] can also promote particular white, male, middle-class ways of being in the world.”).

consciously and, because of system justification, unconsciously,<sup>56</sup> perpetuate the status quo and silence dissent.<sup>57</sup>

## B. Israel, Palestine, and The American Native Experience

Recently, Benjamin Netanyahu described the war between Israel and Hamas as the civilized world against the barbarians—defining Israel as part of the civilized world.<sup>58</sup> The Western media is also perpetuating this narrative.<sup>59</sup> This is supposedly so apparent and beyond debate that powerful donors and law firms have targeted university students in the United States—the land of free speech—for challenging that narrative and suggesting the issue is more complex and nuanced than Netanyahu suggests.<sup>60</sup> Donors have also refused to donate to institutions that don't perpetuate this civility versus barbarianism narrative.<sup>61</sup> They have even gone as far as calling for the resignation of university administrators who

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<sup>56</sup> *Law School Rankings*, *supra* note 9, at 999.

<sup>57</sup> Thiranagama, *supra* note 55 (“Civility from this perspective is a conservative favoring of the status quo, standing opposed to all forms of dissent, rebellion, and revolution and in doing so forecloses radical change.”).

<sup>58</sup> David Isaac, *Netanyahu Calls Civilized World to Arms Against ‘Forces of Barbarianism,’* JNS (Oct. 30, 2023), <https://www.jns.org/netanyahu-calls-civilized-world-to-arms-against-forces-of-barbarism> [<https://perma.cc/GN4S-XLJR>]. “‘We will not realize the promise of a better future unless we—the civilized world—are willing to fight the barbarians,’ he said. ‘The barbarians are willing to fight us, and their goal is clear: Shatter that promise and future, destroy all that we cherish, and usher in a world of fear and darkness.’” *Id.* Interestingly, the Merriam-Webster dictionary defines “barbarian” as “of or relating to a land, culture, or people alien and usually believed to be inferior to another land, culture or people . . . or uncivilized person.” *Barbarian*, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/barbarian> [<https://perma.cc/AP6Q-NQDP>].

<sup>59</sup> See Ayesha Arif, *The Complicity of the Western Media in the Palestinian Genocide by Israel*, FRIDAY TIMES (Nov. 9, 2023), <https://thefridaytimes.com/09-Nov-2023/the-complicity-of-the-western-media-in-the-palestinian-genocide-by-israel> [<https://perma.cc/H73B-Q973>] (“These portrayals often suggest that the colonized need to be either ‘civilized’ or eliminated, implying that the world would be improved by their absence. This serves to provide colonizers with a rationale for carrying out genocidal actions.”).

<sup>60</sup> E.g., Rob Copeland, *Warning of ‘Grave’ Errors, Powerful Donors Push Universities on Hamas*, N.Y. TIMES (Oct. 15, 2023), <https://www.nytimes.com/2023/10/15/business/harvard-upenn-hamas-israel-students-donors.html> [<https://perma.cc/Q4LW-9YAV>]; Adam Gabbatt, *Leading US Law Firm Says it Rescinded Job Offers to Students Who Backed Israel-Hamas Letters*, GUARDIAN, <https://www.theguardian.com/us-news/2023/oct/18/student-palestine-letters-harvard-columbia-us-law-firm-jobs-revoked> [<https://perma.cc/2TX4-DSRE>].

<sup>61</sup> See Copeland, *supra* note 60.

question the civility narrative,<sup>62</sup> and have achieved this goal at the University of Pennsylvania.<sup>63</sup>

In support of his civilized versus barbarianism narrative, “[t]he prime minister noted that Hamas carried out ‘the most horrific crimes imaginable’ on [October] 7 when it broke through Israel’s security barrier with the Gaza Strip and murdered, tortured and beheaded its way through Israel’s southern communities.”<sup>64</sup> While the crimes committed by Hamas on October 7 were undoubtedly horrific, Netanyahu’s suggestion that barbarism is the sole province of Hamas subordinates history in favor of the us versus them civility narrative. When did Israel earn the right to the distinction Netanyahu suggests in his narrative, when the modern state of Israel was founded on documented terrorism and ethnic cleansing? If we define terrorism as the use of violence and threats to intimidate or coerce, especially for political purposes,<sup>65</sup> then how should we characterize the actions of the IZL (Irgun) and LHI (Stern Gang) during the formation of the state of Israel? Those groups killed Arabs indiscriminately and “planted bombs in bus stops with the aims of killing non-combatants, including women and children.”<sup>66</sup> What was the Deir Yassin massacre?<sup>67</sup> What is the Nakba?

According to the United Nations, the modern state of Israel was formed by a 1947 resolution in which the state of Palestine was divided into two states, one Jewish and one Arab.<sup>68</sup> The United Nations further explains that the during the Nakba:

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<sup>62</sup> Martha McHardy, *UPenn Crisis Deepens with Calls Growing for President to Resign Over Israel War Row*, INDEP. (Oct. 19, 2023), <https://www.independent.co.uk/news/world/americas/upenn-israel-hamas-war-college-campus-b2432587.html> [<https://perma.cc/RUT4-89SE>].

<sup>63</sup> Stephanie Saul et al., *Penn’s Leadership Resigns Amid Controversies Over Antisemitism*, N.Y. TIMES (Dec. 9, 2023), <https://www.nytimes.com/2023/12/09/us/university-of-pennsylvania-president-resigns.html> [<https://perma.cc/RVP8-MUY2>].

<sup>64</sup> Isaac, *supra* note 58.

<sup>65</sup> E.g., Duncan Gaswaga, *The Definition of Terrorism*, 2 INT’L. J. OF ETHICAL LEADERSHIP 136, 150–51 (citing Yonah Alexander and Alex P. Schmid’s definitions).

<sup>66</sup> BENNY MORRIS, *THE BIRTH OF THE PALESTINIAN REFUGEE PROBLEM REVISITED* 80 (Charles Trip et al. eds., 2d ed., 2004).

And the IZL and LHI also committed more discriminating atrocities . . . [For example], a squad of IZL or LHI gunmen on 10 February 1948 stopped an Arab truck carrying workers near Petah Tikva, took off the passengers, and killed eight and wounded 11 (apparently after robbing them). Another 10 Arabs, one of them a woman, were reportedly murdered (‘probably’) by IZL gunmen, in early February in a grove, where they apparently worked, near Abu al Fadl (‘Arab al Satariyya), west of Ramle.

*Id.*

<sup>67</sup> Adam Zeidan, *Deir Yassin*, BRITANNICA, <https://www.britannica.com/place/Deir-Yassin> [<https://perma.cc/B7VD-TCYE>].

<sup>68</sup> *About the Nakba: The Questions of Palestine*, UNITED NATIONS, <https://www.un.org/unsd/about-the-nakba> [<https://perma.cc/32CL-F3N6>].

Jewish militias launched attacks against Palestinian villages, forcing thousands to flee. The situation escalated into a full-blown war in 1948, with the end of the British Mandate and the departure of British forces, the declaration of independence of the State of Israel and the entry of neighboring Arab armies. The newly established Israeli forces launched a major offensive. The result of the war was the permanent displacement of more than half of the Palestinian population.

As early as December 1948, the UN General Assembly called for refugee return, property restitution and compensation (resolution 194 (II)). However, 75 years later, despite countless UN resolutions, the rights of the Palestinians continue to be denied. According to the UN Relief and Works Agency for Palestine Refugees (UNRWA) more than 5 million Palestine refugees are scattered throughout the Middle East. Today, Palestinians continue to be dispossessed and displaced by Israeli settlements, evictions, land confiscation and home demolitions.<sup>69</sup>

The United Nations special rapporteur on human rights abuses in Palestine concluded on October 14, 2023, that Israel was engaged in ethnic cleansing.<sup>70</sup> But based on the United Nations' definition, Israel has been engaged in ethnic cleansing "for more than 70 years."<sup>71</sup> According to AP News:

Scenes of Palestinians hastily setting up U.N. tents are dredging up painful memories of the mass exodus that Palestinians refer to as the Nakba, or "catastrophe." In the months before and during the 1948 war, an estimated 700,000 Palestinians fled or were expelled from what is now Israel. Many expected to return when the war ended.

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<sup>69</sup> *Id.*

<sup>70</sup> Omar Suleiman, *Commentary: Don't Look Away. Israel's Response is Textbook Ethnic Cleansing*, SALT LAKE TRIB. (Oct. 31, 2023), <https://www.sltrib.com/religion/2023/10/31/commentary-dont-look-away-israels> [<https://perma.cc/SS85-WXUV>].

<sup>71</sup> *Id.*

Seventy-five years later, those temporary tents in the West Bank, Gaza and neighboring Arab countries have become permanent cinderblock homes.<sup>72</sup>

As a result of the Nakba, 5.9 million Palestinians were registered as refugees as of May 2023.<sup>73</sup>

Benny Morris, a former Israeli paratrooper,<sup>74</sup> self-proclaimed Zionist,<sup>75</sup> former professor of history in the Middle East Studies department of Ben-Gurion University, and fierce supporter of the state of Israel,<sup>76</sup> who thinks Arabs are barbarians,<sup>77</sup> explains the following:

Post [19]48 there has been a more or less systematic destruction of villages and eradication of signs of Palestinian presence . . . [and] there was some sort of more or less deliberate effort to eradicate that past.

[Y]ou can look at the whole Zionist enterprise and many Arabs do from 1881 as an invasion of Palestine with the aim of transforming a land which is inhabited by Arabs . . . to change it into a land of Jewish habitation by and large with a Jewish majority. That certainly is true about Zionism. And in that sense you can talk about a Zionist invasion leading up to Arab resistance and various bouts of violence and the biggest one being [the 1948 war] to resist that invasion. But you can also look at the Zionist enterprise as a way of setting up a Jewish state at least in part of Palestine . . . [and] to divide [the land of Palestine]

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<sup>72</sup> Iseabel DeBre & Najib Jobain, *A Tent Camp for Displaced Palestinians Pops Up in Southern Gaza, Reawakening Old Traumas*, AP News (Oct. 21, 2023), <https://apnews.com/article/palestinians-refugees-israel-gaza-hamas-civilians-siege-3f55618a0672c839afe961c8aaa2b7ea> [<https://perma.cc/7HNB-XPCM>].

<sup>73</sup> *UN Marks 75 Years Since Displacement of 700,000 Palestinians*, UN NEWS (May 15, 2023), <https://news.un.org/en/story/2023/05/1136662> [<https://perma.cc/D3QT-YNVM>].

<sup>74</sup> *Benny Morris*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Benny\\_Morris](https://en.wikipedia.org/wiki/Benny_Morris) [<https://perma.cc/3ZPB-BMJG>].

<sup>75</sup> Ari Shavit, *Benny Morris on Ethnic Cleansing*, 26 NEW LEFT REV. 35, 37 (2004) (“Benny Morris says he always was a Zionist”).

<sup>76</sup> *Id.* at 38. Benny Morris also stated that, “from my point of view, the need to establish this state in this place overcame the injustice that was done to the Palestinians by uprooting them.” *Id.* at 43. And explaining that in his view the Palestinians need to be caged: “[s]omething like a cage has to be built for them. I know that sounds terrible. It is really cruel. But there is no choice. There is a wild animal there that has to be locked up in one way or another.” *Id.* at 48.

<sup>77</sup> *Id.* at 49 (“I think the values I mentioned earlier are values of barbarians—the attitude toward democracy, freedom, openness; the attitude toward human life. In that sense they are barbarians. The Arab world as it is today is barbarian.”).



between the two peoples who have a legitimate claim [to the land].<sup>78</sup>

According to Morris, in June of 1948, the Israeli government decided not to let Arabs return to the land they had fled during the war and considered the abandoned Arab property as loot.<sup>79</sup> By mid-1949, the Israeli government began destroying abandoned Arab villages and dividing up the land among Jewish settlers.<sup>80</sup> Taken together, these actions assured that the Palestinian refugees would not be able to return because there would be nowhere and nothing for them to return to. Further, according to Morris, “About 400 villages and towns were depopulated in the course of the war and its immediate aftermath.”<sup>81</sup> Is this ethnic cleansing? According to Morris, the answer is yes.<sup>82</sup> Morris also notes, “[i]n the weeks and months after the termination of hostilities, the Israeli authorities adopted a policy of clearing the new borders of Arab communities . . .” and “the political desire to have as few Arabs as possible in the Jewish State and the need for empty villages to house new immigrants meshed with the strategic desire to achieve ‘Arab-clear’ frontiers and secure internal lines of communication.”<sup>83</sup>

Why are wealthy and powerful businesspeople trying to punish students for exploring the legitimate complexity of the Israeli-Palestinian conflict? Why hasn’t the legal academy responded in force to the silencing of expression, a bedrock freedom, related to the conflict? Why are the media and general population not outraged that we are allowing a core ideal of American democracy, the marketplace of ideas, to be destroyed by wealthy individuals essentially wielding the sanctioning power of

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<sup>78</sup> Watson Inst. Int’l & Pub. Affs., *Benny Morris—The Creation of the Palestinian Refugee Problem, 1947–1949*, YOUTUBE (Apr. 24, 2017), [https://www.youtube.com/watch?v=5I2\\_n6sd-Fo](https://www.youtube.com/watch?v=5I2_n6sd-Fo) [<https://perma.cc/PUS2-Z7NF>].

<sup>79</sup> MORRIS, *supra* note 66, at 171–72, 316–19.

<sup>80</sup> *Id.* at 341.

<sup>81</sup> *Id.* at 342.

<sup>82</sup> In an interview, Morris stated:

There are circumstances in history that justify ethnic cleansing. I know that this term is completely negative in the discourse of the 21st century, but when the choice is between ethnic cleansing and genocide—the annihilation of your people—I prefer ethnic cleansing . . . .

That was the situation. That is what Zionism faced. A Jewish state would not have come into being without the uprooting of 700,000 Palestinians. Therefore it was necessary to uproot them. There was no choice but to expel that population. It was necessary to cleanse the hinterland and cleanse the border areas and cleanse the main roads. It was necessary to cleanse the villages from which our convoys and our settlements were fired on.

Shavit, *supra* note 75, at 42.

<sup>83</sup> Morris, *supra* note 66, at 505.

government?<sup>84</sup> The Supreme Court talks loftily about the unique American formulation of freedom of expression when articulating the mandate of the First Amendment:

To many this is, and always will be, folly; but we have staked upon it our all. . . . [T]hat public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.<sup>85</sup>

The phrase “we the people” becomes empty and meaningless when we silence debate, because “we the people” depends on an informed populace. As an immigrant, I am overcome with emotion every time I read these quoted words from *New York Times v. Sullivan*. They represent so perfectly the uniqueness and beauty of the United States. Men and women have died on battlefields all over the world to preserve this principle, yet conclusory narratives about civilized and uncivilized in the arena of the Israeli-Palestinian conflict are currently threatening this principle.

Why can’t we just say that as a nation, the United States supports the existence of a Jewish state and simultaneously believes its national security interest is best served by supporting and arming a non-Muslim ally in the Middle East? It is because the word “civility” creates absolute notions of right and wrong, reducing our ability to engage in complex analysis. Not only does the claim of civility interrupt our ability to countenance complexity and nuance, but it disrupts participation in one of

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<sup>84</sup> I understand the province of the First Amendment is suppression of free speech by the government and not the suppression of speech by private actors, but when those private actors have the sanctioning power of government and congressional hearings reinforce the actions of private actors, the line between government and private action becomes less clear.

<sup>85</sup> *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (first quoting Judge Learned Hand in *United States v. Associated Press*, 52 F.Supp. 362, 372 (D.C.S.D.N.Y.1943); then quoting Justice Brandeis in *Whitney v. California*, 274 U.S. 357, 356–57 (1927)).

the most American values of all: listening to each other. Notions of civilized and uncivilized are such that they can single-handedly shut down the fundamental and uniquely American marketplace of ideas.

I choose not to discuss this topic in any more detail because I am afraid. I am afraid of being punished and ostracized, like certain students and universities have already been for exploring the complexity of this issue.<sup>86</sup>

But nothing provides evidence of system justification more than the fact that we now live in an era where a two-second internet search should make clear the falsity of suggesting that civility is anything more than a label the powerful use to hide what may be the one true norm of human society: *might is right*.<sup>87</sup> System justification is so powerful that the only narrative that matters is the narrative that perpetuates and justifies the power of the powerful—and in case it isn't clear, *nothing should justify the murder and killing of civilians*.<sup>88</sup>

As Pumla Gobodo-Madikizela, a former member of the Truth and Reconciliation Commission<sup>89</sup> in South Africa, states:

Gross human rights violations almost always “hide” their true natures. Perpetrators of human rights violations redefine morality and start believing they can commit systematic murder and other atrocities “for the greater good.” And so, in addition to the evil component of these crimes, there is also the perspective component . . . The perspective component is the distortion in mental

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<sup>86</sup> E.g., Jonah Valdez, *Columbia Cuts Due Process for Student Protestors After Congress Demands Harsher Punishment*, INTERCEPT (Aug. 29, 2024), <https://theintercept.com/2024/08/29/columbia-campus-protests-gaza-subpoena> [<https://perma.cc/CQ4B-QFST>]; Vimal Patel & Anna Betts, *Campus Crackdowns Have Chilling Effect on Pro-Palestinian Speech*, NEW YORK TIMES (Dec. 17, 2023), <https://www.nytimes.com/2023/12/17/us/campus-crackdowns-have-chilling-effect-on-pro-palestinian-speech.html> [<https://perma.cc/M5YN-CJQW>].

<sup>87</sup> For example, the YouTube video by Benny Morris explaining the creation of the Palestinian Refugee Problem unabashedly describes the incivility of the project. Watson Inst. Int'l & Pub. Affs., *supra* note 78 and accompanying text.

<sup>88</sup> But even this sentiment is not an unassailable moral position. The ability to countenance the bombing of Hiroshima and Nagasaki and any lack of dissonance in this regard illustrates system justification perfectly. And what about Nat Turner's Rebellion of 1831? How should our notions of civility inform the morality of killing of some sixty white people, including women and children, by people enslaved for centuries?

<sup>89</sup> See *The Truth and Reconciliation Commission (TRC)*, APARTHEID MUSEUM (Dec. 21, 2023), <https://www.apartheidmuseum.org/exhibitions/the-truth-and-reconciliation-commission-trc> [<https://perma.cc/2G2N-GZM5>] (“The central purpose of the Commission was to promote reconciliation and forgiveness among perpetrators and victims by the full disclosure of truth.”); Pumla-Gobodo-Madikizela, *Biography*, <https://pumlagm.com/biography> [<https://perma.cc/Q93D-Q536>].

processing that both precedes the evil and is intensified by it.<sup>90</sup>

In a recent conversation I witnessed with a Native student Nickolasa “Nikki” Jackson, she agreed it was plausible to compare the Palestinian struggle to the First Peoples resisting white settlers and the United States army. She suggested that if Natives were still forcibly resisting militarily, they would also be labeled as uncivilized terrorists.

Nikki also made the disturbing observation that, to some extent, the actions of the United States to “civilize” the First Peoples were incredibly efficient.<sup>91</sup> The United States dispossessed people of their land and killed those that stood in the way. But, unlike Israel, it also engaged in a centuries-long cultural genocide by ripping Native children away from their families and indoctrinating them in oppressive boarding schools operated by whites to erase their identity and culture to decimate any sense of community and resistance.<sup>92</sup>

Justice Neil Gorsuch describes the details and horrors of these assimilationist rationales and indicates that the schools transitioned from a boarding school policy to a program promoting the adoption of an “outing system” with the goal of ensuring that “every Indian child was in a white home.”<sup>93</sup> The goal of all of these policies was to crush Indigenous resistance “‘with each successive generation,’ leaving a ‘greater desir[e] to be in touch with the dominant race.’”<sup>94</sup>

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<sup>90</sup> Pumla Gobodo-Madikizela, *Remorse, Forgiveness, and Rehumanization: Stories from South Africa*, 42 J. HUMANISTIC PSYCH. 7, 28 (2002).

<sup>91</sup> Benny Morris also stated, “Even the great American democracy could not have been created without the annihilation of the Indians. There are cases in which the overall, final good justifies harsh and cruel acts that are committed in the course of history.” Shavit, *supra* note 75.

<sup>92</sup> Justice Gorsuch’s concurrence in *Haaland v. Brackeen* speaks to this:

Upon the children’s arrival, the boarding schools would often seek to strip them of nearly every aspect of their identity. The schools would take away their Indian names and give them English ones. The schools would cut their hair—a point of shame in many native communities—and confiscate their traditional clothes. Administrators delighted in the process, describing the “metamorphosis [a]s wonderful,” and professing that, in the main, “the little savage seems quite proud of his appearance.” After intake, the schools frequently prohibited children from speaking their native language or engaging in customary cultural or religious practices. Nor could children freely associate with members of their own Tribe. Schools would organize dorms by the “[s]ize of cadets, and not their tribal relations,” so as to further “br[eak] up tribal associations.”

599 U.S. 255, 300 (2023) (Gorsuch, J., concurring) (internal citations omitted); *see also id.* at 297–306.

<sup>93</sup> *Id.* at 301–302.

<sup>94</sup> *Id.* at 301 (citations omitted).

This cultural genocide was perpetuated until the 1970s, according to Justice Gorsuch.<sup>95</sup> The concept of civility was at the heart of it:

“If you want to solve the Indian problem you can do it in one generation,” one official put it. “You can take all of [the] children of school age and move them bodily out of the Indian country and transport them to some other part of the United States.” This would allow “civilized people” to raise the children, instead of their families or their tribal communities.<sup>96</sup>

Ultimately, this reality reinforces the notion that too often civility is nothing more than a sadistic expression of systemic oppression in which the oppressed agree to obey the oppressor’s demand for appeasement and accept a power imbalance.<sup>97</sup>

### C. Redefining Genocide

Up until World War II and the atrocities committed by Nazi Germany, the word “genocide” did not exist.<sup>98</sup> In 1943, Raphael Lemkin wrote a book explaining the Nazi regime and its grip on Europe in which he coined the term “genocide.”<sup>99</sup> In 1946, at the United Nations General Assembly, the UN recognized genocide as an international crime.<sup>100</sup> At the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, it was officially codified as an independent crime.<sup>101</sup>

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<sup>95</sup> See *id.* at 288, 297. Justice Gorsuch explains that the Indian Child Welfare Act was a “direct response to the mass removal of Indian children from their families during the 1950s, 1960s, and 1970s by state officials and private parties.” *Id.* at 288. He further describes this reality as “the latest iteration of a much older policy of removing Indian children from their families—one initially spearheaded by federal officials with the aid of their state counterparts nearly 150 years ago. *Id.* A policy whose goal was to present “an existential threat to the continued vitality of Tribes.” *Id.*

<sup>96</sup> *Id.* at 303 (emphasis added and citations omitted). In this way, the words of the United States that they care about Palestinian children ring hollow to my student, the daughter of an Indian boarding school survivor.

<sup>97</sup> Thank you to Professor Ali Khan for helping frame the civility issue here. As we discussed this issue at length, he eventually suggested that conceiving of civility as normative or even divine, is a way the dominant reward the dominated for permitting the dominant to live without the threat of constant systemic upheaval.

<sup>98</sup> A. DIRK MOSES, *Raphael Lemkin, Culture, and the Concept of Genocide*, in THE OXFORD HANDBOOK OF GENOCIDE STUDIES 22 (Donald Bloxham & A. Dirk Moses eds., 2010) [hereinafter *The Oxford Handbook*].

<sup>99</sup> *Id.* (citing RAPHAEL LEMKIN, *AXIS RULE IN OCCUPIED EUROPE: LAWS OF OCCUPATION, ANALYSIS OF GOVERNMENT PROPOSALS OF REDRESS* (Joseph Perkovich ed., 2d ed. 1944)).

<sup>100</sup> G.A. Res. 96 (I), The Crime of Genocide (Dec. 11, 1946); see also *The Oxford Handbook*, *supra* note 98, at 37.

<sup>101</sup> G.A. Res. 260 (III), Convention on the Prevention and Punishment of the Crime of Genocide (Dec. 9, 1948).

Article II of the declaration made at the 1948 Convention on the Prevention and Punishment of the Crime of Genocide defines genocide as:

[A]ny of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.<sup>102</sup>

The official definition of genocide in the 1948 Convention describes wrongful physical acts to people that make up the noted groups. However, the original definition of genocide was “acts committed with the ‘purpose of destroying [a human group] in whole or in part, or of preventing its preservation or development.’”<sup>103</sup> The language was broad in order to encompass what is referred to as “cultural genocide.”<sup>104</sup> Cultural genocide is essentially an oppressor aiming not only to kill the people of certain groups, but also to destroy and deny their culture.<sup>105</sup> However, the broad definition and inclusion of cultural genocide in the official definition of “genocide” was voted out by members of the UN.<sup>106</sup>

Civility as an oppressive tool is exposed by the lack of perpetual outrage at the United Nations Convention on Genocide’s (UNGC) strategic exclusion of cultural genocide from the official definition to, in part, attempt to exclude the United States cultural genocide of the First Peoples.<sup>107</sup> As genocide scholar Jeffrey Bachman has noted, “colonial powers had good reason to fear the application of the UNGC to their policies at home (in the case of the US and its treatment of its indigenous peoples) and to those in foreign territories under their control” because “[a]t the time the provisions of the UNGC were being negotiated, France held seventeen [African] colonies . . . [while t]he UK also maintained seventeen African colonies and kept close ties with the apartheid regime in South Africa.”<sup>108</sup> These colonial powers, “represented on the Ad Hoc

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<sup>102</sup> *Id.*

<sup>103</sup> *The Oxford Handbook*, *supra* note 988, at 37 (quoting NEHEMIAH ROBINSON, *THE GENOCIDE CONVENTION: A COMMENTARY* 123 (1960)).

<sup>104</sup> *See id.* at 37–38.

<sup>105</sup> *See id.* at 34, 37.

<sup>106</sup> *Id.* at 38.

<sup>107</sup> *See* JEFFREY S. BACHMAN, *An Historical Perspective: The Exclusion of Cultural Genocide From the Genocide Convention*, *CULTURAL GENOCIDE: LAW, POLITICS, AND GLOBAL MANIFESTATIONS* 45, 48 (Jeffrey Bachman ed. 2019).

<sup>108</sup> *Id.* at 55.

Committee” opposed cultural genocide’s inclusion in the definition, ultimately getting their way.<sup>109</sup>

The definition of genocide clearly contextualizes the systemic inequities of civility; the powerful get to define it,<sup>110</sup> *and the powerless are powerless to partake in the definition of it.*<sup>111</sup> Additionally, any actions the powerless take to shrug off the yoke of oppression reinforced by civility are inherently labelled as uncivil.<sup>112</sup>

#### D. Anecdotally

I have my own example of how civility powerfully reinforces white supremacy. In a recent publication, my co-author and I demonstrated the power of whiteness in validating an incorrect narrative.<sup>113</sup> We pointed out the widespread influence that a white author had on shaping the landscape of learning styles theory in the legal academy.<sup>114</sup> We then demonstrated that certain sources the author relied on did not support or even address the assertion made by the author.<sup>115</sup> We also demonstrated the power and assumed validity of the white male voice and its ability to silence

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<sup>109</sup> *Id.* at 48.

<sup>110</sup> Bachman, *supra* note 107, at 53 (“The result of the negotiations, then, was not a treaty developed from the good faith of the negotiating parties, but rather one that was created in response to the horrors already committed in the first half of the twentieth century, while protecting the interests of the negotiating parties.”); Christopher Powell, *What do Genocides Kill? A Relational Conception of Genocide*, 9 J. of Genocide Rsch. 537 (2007) (“The wording of the convention was shaped by the desire of its framer to not criminalize their own behavior.”).

<sup>111</sup> Bachman, *supra* note 107, at 53 (“The US and Soviet Union were especially influential during the proceedings, but so too were the other colonial powers. Conversely, the territories administered by the colonial powers lacked any influence over the proceedings because they lacked statehood, which meant they were unable to participate in the drafting of the UNGC.”).

<sup>112</sup> Bates, *supra* note 377 (“So the relationship between alleged civilizers and the people they’re ‘gifting’ with civility, [Gaye Theresa] Johnson points out, is ‘inherently undemocratic, unequal and racist.’ And so, pushing back against the status quo will be seen as inherently uncivil by the people who want to maintain it.”). One way to conceptualize this is to consider that those who are the victims of oppression lack the money and political power to disrupt systems of oppression using “civil” methods of the political process, so their only recourse is to resort to methods that those in power deem uncivilized or uncivil such as shouting down a speaker or engaging in violence. Nelson Mandela is a prime example. He used violence to challenge apartheid and was imprisoned on Robbin Island and labeled a “terrorist” by the S. African government. But after apartheid fell, Mandela was finally recognized as a national hero and became President of South Africa. Mandela used the only means available to him to challenge apartheid. White South Africans were not going to provide him with access to the TV or radio airwaves or newspapers they controlled to empower him to condemn their racist government in a “civil” manner.

<sup>113</sup> See generally Rory Bahadur & Liyun Zhang, *Socratic Teaching & Learning Styles: Exposing the Pervasiveness of Implicit Bias & White Privilege in Legal Pedagogy*, 18 HASTINGS RACE & POVERTY L.J. 114 (2021).

<sup>114</sup> See *id.* at 156–60 (2021).

<sup>115</sup> *Id.* at 137.

discussion even when it reflected an incomplete and inaccurate understanding of the literature.<sup>116</sup>

In essence, the article was a strong and frustrated response from two authors of color fighting against the tide of the presumed validity of whiteness. But because the article was direct and did not expend enormous and exhaustive effort adding a layer of reluctant apology, politeness, and diplomacy to our critique of unsupported, racist assertions, it has been cited as evidence that the academic debate surrounding the topic is “vituperative.”<sup>117</sup>

The irony is that if we had been “civil” or covered our critique in polite, apologetic, and diplomatic language, the article would not have had the desired impact. Instead, it would be read calmly and summarily dismissed because the gentle presentation of white supremacist claims would be easily forgotten as an abstract, diffuse academic notion. By instead applying the label vituperative to the debate demonstrates that perceived incivility can subsume the importance of forcing a direct, uncomfortable confrontation with the deeply-rooted power of white supremacy. Our direct approach came across not as well-researched but as uncivil. This is the “damned if you do and damned if you don’t” aspect of civility as it operates at the systemic level to preserve existing power hierarchies.

#### E. CRT Bans, Decorum, and Insurrection

The recent debates about the teaching of critical race theory (CRT) also demonstrate the danger of using civility/preventing white discomfort as the standard for our behavior. These debates demonstrate that the words defining civility in the PIF context are so malleable that they are meaningless outside of their role in buttressing systemic racism. Indeed, the civility case against CRT creates a “paradox” in the “conservative campaign against CRT” because “it rests on a view of free speech that the political right, until now, stridently and correctly rejected: That speech can and should be curtailed because it makes some people feel uncomfortable or threatened.”<sup>118</sup> When the CRT debate “is not about a fixed set of ideas . . . [but] about wanting to avoid certain feelings of discomfort or even shame,” it reveals civility’s role in subordinating even constitutional

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<sup>116</sup> See *id.* at 156–60.

<sup>117</sup> Colin Crawford, *Wild Exaggeration and Vast Potential: Technology’s Limits and Promise in Legal Education*, 10 *LATIN AM. L. REV.* 37, 41 (2023).

<sup>118</sup> Aziz Huq, *The Conservative Case Against Banning Critical Race Theory*, *TIME* (Jul. 13, 2021), <https://time.com/6079716/conservative-case-against-banning-critical-race-theory> [<https://perma.cc/HBR7-5BMN>].



prerogatives.<sup>119</sup> Critics argue that CRT promotes a divisive worldview by emphasizing racial differences and framing society as inherently oppressive and racist.<sup>120</sup> They contend that such a focus can exacerbate racial tensions and undermine unity.<sup>121</sup>

We live in a world where most people oppose CRT without even realizing what it is.<sup>122</sup> Legislative support exists because the voting public is told that CRT makes people feel bad and/or threatened,<sup>123</sup> or in other words, is not civil. This sentiment alone is enough for people to solidify their position against CRT without even choosing to find out what it is. Such is the power of a normative civility that seeks to avoid making people feel bad.

Invoking civility also reinforces the falsity that something is unassailably correct and prevents us from recognizing the inconsistency of our actions and thoughts. For example, Justin Jones, a Black state legislator, was expelled from the Tennessee legislature for “breaking decorum” when he elected to talk about gun control and the Covenant School shooting.<sup>124</sup> The Republican lawmakers justified throwing him out of the legislature and banning him from the floor by describing his actions as “a serious breach of decorum, tantamount to an insurrection, that requires expulsion.”<sup>125</sup> Yet these Republicans and their concerns for civility did not result in them calling for the banning of Donald Trump from office when he incited a violent insurrection on January 6, 2021, or when he boasted about “grabbing ‘em by the pussy.”<sup>126</sup> In other words, what these lawmakers considered indecorous (or uncivil) was shaped

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<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *See id.*

<sup>122</sup> *See, e.g.,* ALAUNA SAFARPOUR ET AL., AMERICAN ATTITUDES TOWARDS CRITICAL RACE THEORY 5–6 (2021), <https://osf.io/preprints/osf/crv95> [<https://perma.cc/H5JU-NBST>] (finding that “a 52% majority of Americans support teaching the legacy of racism versus just 27% who support teaching CRT” while “7 in 10 respondents say[] they aren’t familiar with the theory”).

<sup>123</sup> *See* Huq, *supra* note 118.

<sup>124</sup> Chas Sisk, *Tennessee Lawmakers Debated Expelling Three Democratic House Members*, NPR (Apr. 6, 2023), <https://www.npr.org/2023/04/06/1168490358/tennessee-lawmakers-debat-ed-expelling-three-democratic-house-members> [<https://perma.cc/PP2Q-FQWE>].

<sup>125</sup> *Id.*

<sup>126</sup> *See* Rachel Weiner, et al., *Republican Loyalty to Trump, Rioters Climbs in 3 Years After Jan. 6 Attack*, WASH. POST (Jan. 2, 2024), <https://www.washingtonpost.com/dc-md-va/2024/01/02/jan-6-poll-post-trump> [<https://perma.cc/9KY9-Q>]; Stephanie Kaloi, *Donald Trump Says a ‘Fantastic General’ Praised His ‘Grab ‘Em By The P-y’ Tape Response as the ‘Bravest Thing I’ve Ever Seen,’* YAHOO (Dec. 10, 2023), <https://www.yahoo.com/entertainment/donald-trump-says-fantastic-general-234033856.html> [<https://perma.cc/ZSH8-FS4M>]; *see* Julia Jacobo, *This is What Trump Told Supporters Before Many Stormed Capitol Hill*, ABC NEWS (Jan. 7, 2021), <https://abcnews.go.com/Politics/trump-told-supporters-stormed-capitol-hill/story?id=75110558> [<https://perma.cc/N8XS-APLL>].

entirely by their pre-existing beliefs. Civility did not provide them with a neutral benchmark by which to judge all actions equally. Instead, it was invoked to rationalize their worldview, where civility was malleable enough to include sexual assault while excluding a peaceful protest.

#### F. Catholics and Convicts

In 1988, the University of Miami Hurricanes played the Notre Dame Fighting Irish in a college football game.<sup>127</sup> The Notre Dame students designed and sold a T-shirt with the slogan “Catholics v. Convicts” for the game, which for forty years has been met with a startling lack of media approbation.<sup>128</sup> This game and the t-shirt further illustrate how civility’s flexibility as a morality derivative perpetuates systemic racism.

To understand the t-shirt, you need to understand the history of the University of Miami’s success as a football powerhouse after Howard Schnellenberger became the coach in 1979.<sup>129</sup> Coach Schnellenberger recruited almost exclusively from the inner cities of south Florida.<sup>130</sup> The result was a football team composed of many poor Black athletes. These athletes would not have been able to play elsewhere because they were not the “kind” of athlete that the established programs even considered.<sup>131</sup> However, Coach Schnellenberger recognized their talent and wanted to give them a chance to avoid the fairly hopeless futures, circumstances, and poverty that would historically otherwise be meted out to them.<sup>132</sup>

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<sup>127</sup> Chris Picaro, *Catholics vs. Convicts: How a T-Shirt Sparked a Heated College Football Rivalry*, FANBUZZ (Jul. 26, 2022), <https://fanbuzz.com/college-football/catholics-vs-convicts-rivalry> [https://perma.cc/SC87-4KLF].

<sup>128</sup> *Id.* Even ESPN’s seminal documentary on the controversy approaches the discussion from a business and football lens, rather than focusing on the shirt’s blatant racism. 30 FOR 30: CATHOLICS VS. CONVICTS (ESPN television broadcast Dec. 10, 2016).

<sup>129</sup> Andrea Adelson, *Legendary College Football Coach Howard Schnellenberger Dies at 87*, ESPN (Mar. 27, 2021), [https://www.espn.com/college-football/story/\\_/id/31146243/legendary-college-football-coach-howard-schnellenberger-dies-87](https://www.espn.com/college-football/story/_/id/31146243/legendary-college-football-coach-howard-schnellenberger-dies-87) [https://perma.cc/2KSL-22NG].

<sup>130</sup> See Brian Douglas, *The Miami Effect and Developer Recruiting*, MEDIUM (Aug. 25, 2015), <https://medium.com/@bdougie/the-miami-effect-dev-recruiting-390834f56589> [https://perma.cc/QT32-4DCN] (“His thought was to grab the unwanted talent from the neighborhoods you would drive your Miami Porsche Convertible through. Most prospects had troubles that the top schools did not want to deal with . . .”).

<sup>131</sup> See *id.*

<sup>132</sup> See Anakin Cane, *Miami Hurricanes: Is Hatred for The U Justified?*, BLEACHER REP. (July 20, 2012), <https://bleacherreport.com/articles/422450-the-hatred-for-the-u-justified> [https://perma.cc/YYT2-959G].

The racist reaction to the success of this team was immediate, unadulterated, and fierce.<sup>133</sup> Their speed, talent, ferocity, and celebrations were unprecedented, leading to a backlash from the white establishment who described them as “‘criminals’ and ‘the bad boys of college football’” due to their “swagger”.<sup>134</sup> For years, even after Schnellenberger’s tenure at the school was over, the white establishment of college football had no idea what hit them.<sup>135</sup> The players were called thugs,<sup>136</sup> disgusting, and unsportsmanlike.<sup>137</sup> The sheer joy these players expressed by celebrating their opportunity to play for a major college program was considered a reflection of their poor upbringing and deemed uncouth.<sup>138</sup> In fact, the 1986 team has been called the most hated college football team of all time.<sup>139</sup> The reason for the hatred is that the Miami Hurricanes in the 80s were “[B]lack, brash and ballin’ enigmas.”<sup>140</sup> Consider the following description of the team:

The birth of swag, so they say. When the inmates run the asylum, you get instant chaos and that’s exactly what the Hurricanes hoped to create on the field in the 1980s when ‘The U’ became college football’s bad boys. Then-Sports Illustrated writer Rick Reilly said it best, “*Miami may be the only squad in America that has its team picture taken from the front and from the side.*”<sup>141</sup>

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<sup>133</sup> A news article from 1988 quoted another journalist, saying: “As far as hatred goes: Hey, God hates things, too” when referring to the Hurricanes. Rick Telander, *Pluck of the Irish Spunky Notre Dame Laid Claim to the Top Spot in the National Rankings by Outlasting No. 1 Miami* 31-30, VAULT (Oct. 24, 1988), <https://vault.si.com/vault/1988/10/24/pluck-of-the-irish-spunky-notre-dame-laid-claim-to-the-top-spot-in-the-national-rankings-by-outlasting-no-1-miami-31-30> [https://perma.cc/8RN9-HZGU]; Cane, *supra* note 132. (“[T]he media fed the hatred for years to come”).

<sup>134</sup> Picaro, *supra* note 127.

<sup>135</sup> See Alan Rubenstein, *Miami Football 1986 Most Hated College Football Team of All-Time*, CANES WARNING (July 12, 2020), <https://caneswarning.com/2020/07/12/miami-football-1986-most-hated-college-football-team-of-all-time> [https://perma.cc/CHH5-YPFB] (“Johnson helped Miami rattle the old guard of college football and opponent led by iconic coaches like Joe Paterno of Penn State.”).

<sup>136</sup> Cane, *supra* note 132 (“Terms such as Thug U and Convict U came into college football’s lexicon”).

<sup>137</sup> Christopher Adams, *Miami Hurricanes of the 1990s Remembered with College Football’s New Taunting Rules*, Bleacher Report (Apr. 26, 2010), <https://bleacherreport.com/articles/384685-new-ncaa-taunting-rule-a-reminder-of-the-90s-miami-hurricanes> [https://perma.cc/F24A-QDP7].

<sup>138</sup> See Cane, *supra* note 132.

<sup>139</sup> Rubenstein, *supra* note 135.

<sup>140</sup> J.R. Gamble, *The 80’s Miami Canes Were College Football’s Black, Brash And Ballin’ Enigmas*, SHADOW LEAGUE (Dec. 12, 2014), <https://theshadowleague.com/the-80s-miami-can-es-were-college-football-s-black-brash-and-ballin-enigmas> [https://perma.cc/U2EP-RMXU].

<sup>141</sup> Rubenstein, *supra* note 135 (emphasis added).

But this description reflects the civility narrative of “throwback fans who believe that a receiver should humbly flip the ball to the referee after scoring a TD and a cornerback shouldn’t taunt a receiver and his QB after crushing them with a pick six.”<sup>142</sup> As a result, the “Hurricane’s dark knight, wild, wild west-style domination of the college football landscape in the 80’s” was seen as representative of the “time when the supposed bad guys ruled the land and blasted on America’s beloved and legendary college programs with an AK firing bold, black bullets of football funk.”<sup>143</sup>

The Hurricanes of the 1980s should have been a Cinderella story,<sup>144</sup> but they were the wrong color.<sup>145</sup> The media fueled this racism-driven hate<sup>146</sup> such that older white college football fans of the more traditional college football programs particularly despised the Hurricanes.<sup>147</sup>

Coach Howard Schnellenberger attached the Hurricanes football program to the inner city of Miami, and that is how the University of Miami changed the face of college football.<sup>148</sup> These players were Black, and as a result, they were considered second class; they were angry and hungry for success.<sup>149</sup> For many of them, it was the way out of the hood.<sup>150</sup> But to the white establishment, it came as a shock when, in 1984, the University of Miami Hurricanes defeated the University of Nebraska.<sup>151</sup> At that time, Nebraska was a traditional powerhouse of college football that had won 22 straight games.<sup>152</sup>

<sup>142</sup> Gamble, *supra* note 140.

<sup>143</sup> *Id.*

<sup>144</sup> Cane, *supra* note 132 (“The media could have jumped on . . . the Cinderella story . . . [of] a team almost losing its program to national championship. It could have looked at all the kids from an area torn apart by racial tensions and how the school was able to unite . . . all races: white, black, Hispanic.”).

<sup>145</sup> *Id.* (explaining that “Terms such as Convict U and Thug U are just media disguised terms for N\*\*\*\*\* U and P\*\*\*\*\* U.”).

<sup>146</sup> Community News Releases, *How the Miami Defense of the 1980’s Shook Up the NCAA*, MIA’S CMTY. NEWS (Nov. 15, 2021), <https://communitynewspapers.com/featured/how-the-miami-defense-of-the-1980s-shook-up-the-ncaa> [<https://perma.cc/886Q-4XXH>] (“Commentators like Brent Musburger, Beano Cook and Sports Illustrated’s Rick Reilly were huge critics. Many others in the media described Miami’s players as “thugs” and “outlaws.”) [hereinafter *Miami Defense of the 1980’s*].

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* (“Schnellenberger strengthened ties between the schools and the city by recruiting players from Miami’s ghettos and ethnic neighborhoods.”).

<sup>149</sup> THE U (Rakontur 2009).

<sup>150</sup> *Id.*

<sup>151</sup> Evan Scott Schwartz, *Intense Miami-Nebraska Rivalry Dates Back to Epic 1984 Orange Bowl*, SPORTS ILLUSTRATED (Sept. 16, 2014), <https://www.si.com/college/2014/09/16/miami-nebraska-football-rivalry> [<https://perma.cc/F5V9-2H84>].

<sup>152</sup> Gordon S. White Jr., *Miami is Chosen as No. 1 After Upset of Nebraska*, N.Y. TIMES (Jan. 4, 1984), <https://www.nytimes.com/1984/01/04/sports/miami-is-chosen-as-no-1-after-upset-of-nebraska.html> [<https://perma.cc/MFP2-PAZS>].

From 1985–1988, the University of Miami had a 44-4 record in college football.<sup>153</sup> They beat teams like Oklahoma, Nebraska, and Notre Dame who held more traditional favor in the league. The reality was that the hatred for Miami was because their Blackness “scared the hell out of white America,”<sup>154</sup> and they mocked what “traditional” football was.<sup>155</sup>

The story of the 1988 game begins in 1985, when Miami crushed Notre Dame by 51 points.<sup>156</sup> Nowhere is implicit bias and its unconscious double standard more obvious than in the commentary associated with this game. The commentary largely reflected a sheer hatred of this nouveau riche Miami football team.<sup>157</sup> Here is the Washington Post’s report of the game:

The way Miami mutilated Notre Dame on Saturday, gleefully hacking away until the score was 58-7, wasn't just *cruel* and *unsightly*.

It was stupid . . . .

Compounding the problem, Miami had the *poor taste* to do this on national TV, with millions watching. The last thing you want in that setting is for the network commentators to speak disgustedly of you; judgments like that hang in the air like nooses. Johnson's neck was stretched on CBS by Brent Musburger, Pat Haden and Ara Parseghian . . . and on ABC by Jim Lampley. Haden went the furthest, asserting that Johnson was “*bush*.”

Johnson may well have the best college football team in the country, but in his obsession to impress the AP and

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<sup>153</sup> *Miami Defense of the 1980s*, *supra* note 146.

<sup>154</sup> THE U (Rakontur 2009).

<sup>155</sup> *Id.* It is worth pointing out that Nebraska and Oklahoma played pioneering and significant roles in facilitating black athletes in college football. Cliff Brunt, *Nebraska-Oklahoma Provided Stage for Black Stars in '70s*, THE OAKLAND PRESS (Sept. 16, 2021), <https://www.theoaklandpress.com/2021/09/16/nebraska-oklahoma-provided-stage-for-black-stars-in-70s> [https://perma.cc/8XE6-AAG4] (“Nebraska’s first Black All-American was offensive lineman/linebacker Bob Brown in 1963, and the Huskers fielded the ‘Magnificent Eight’—eight Black players on the two-deep depth chart—in 1964. Nebraska’s 1971 national championship team featured seven Black players with prominent roles.”).

<sup>156</sup> Tony Kornheiser, *51-Point Win Over Irish Could Backfire on Miami*, WASH. POST (Dec. 3, 1985), <https://www.washingtonpost.com/archive/sports/1985/12/03/51-point-win-over-irish-could-backfire-on-miami/2c0b5014-983e-4087-8209-35da3e4dc9c6> [https://perma.cc/TX7K-QQ89].

<sup>157</sup> *Id.*

UPI voters, *he came across as a cold-blooded marauder.*<sup>158</sup>

It did not matter that Notre Dame had done the same to Miami on many occasions.<sup>159</sup> The outrage could be summed up as “how dare Miami beat Notre Dame in the same way Notre Dame routinely beat Miami.”<sup>160</sup> And no one ever complained when Nebraska, Notre Dame, and Oklahoma ran up the score over other teams for years.<sup>161</sup> The problem, according to former Hurricanes player Alonzo Highsmith, was that “we were the school that wasn’t supposed to be doing this.”<sup>162</sup>

According to Notre Dame’s Dr. Richard Pierce, Associate Professor of American Studies, the ease with which the racist t-shirt was accepted by the media represents the racism-based realities of society:

The 1980s were a cauldron of things that were in tension with one another. There’s two different 1980s. There’s Ronald Reagan “say no to drugs” and there’s Miami, which at the time was associated with danger, rebelliousness, and associated with its ethnic diversity. The difference between Miami and Notre Dame represented nothing less than a stark political choice about what American society should look like.<sup>163</sup>

One commentator summed it up as the choice being between the establishment, “Notre Dame and its win-one-for-the-Gipper attitude, and Miami and its anti-establishment win-one-for-the-stripper attitude.”<sup>164</sup>

So, three years after the shellacking of Notre Dame by Miami, Miami traveled to South Bend to play Notre Dame again in 1988.<sup>165</sup> Notre Dame students printed and sold a t-shirt for the game that read “Catholics

<sup>158</sup> *Id.* (emphasis added); *see also* 30 FOR 30: CATHOLICS VS. CONVICTS (ESPN television broadcast Dec. 10, 2016) (The commentator of the game can be heard saying “Of course what surprises me is you would humiliate a coach on the other side of the field who is closing out his career.”).

<sup>159</sup> Rubenstein, *supra* note 135 (“Miami getting criticized for running up the score on Notre Dame . . . was pure hypocrisy. Prior to Miami’s victory over Notre Dame in 1981, the Fighting Irish had an 11 game winning streak. Notre Dame won those 11 games against Miami by an average margin of 21.2 points per game.”).

<sup>160</sup> 30 FOR 30: CATHOLICS VS. CONVICTS (ESPN television broadcast Dec. 10, 2016).

<sup>161</sup> In 1981, for example, Nebraska beat three teams by over 40 points. *See College Football National Champions and Seasons*, SPORTS REFERENCE, <https://www.sports-reference.com/cfb/years> [<https://perma.cc/8WRB-3SPF>] (select an individual year under the “Year” column, then click the “Schedule & Scores” header) (listing scores for 155 years of college football games).

<sup>162</sup> 30 FOR 30: CATHOLICS VS. CONVICTS (ESPN television broadcast Dec. 10, 2016).

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> Picaro, *supra* note 127.

v Convicts.”<sup>166</sup> This racist t-shirt assumed and juxtaposed the norm of the good, religious Notre Dame kid and the racist norm of associating blacks with criminality. The word “Catholics” on the t-shirt reflected what was good and just, while the word “convicts” represented Black Americans as violent, dangerous, and in need of incarceration.<sup>167</sup> It was viewed by the public as good versus evil.<sup>168</sup> Where was the outrage about the blatant hypocrisy “that under the shadow of touchdown Jesus, from the religious school, that’s where the seeds of hatred were born”?<sup>169</sup>

The power imbalance in society, as well as the structures and judgments wrapped up in civility, are displayed perfectly here. Simply because Notre Dame was such an entrenched part of the establishment, all they had to do was deem the Miami players convicts and the program was characterized that way for generations.<sup>170</sup> Despite the blatant racism and hatred fostered by the shirt, it was seen as normal, even desirable, by those in power. For example, Dan Quayle, the former vice president of the United States and an Indiana Senator at the time of the game, requested multiple shirts.<sup>171</sup>

But what if today Notre Dame played Miami, and someone created a shirt with the words “Pedophiles vs. Cinderella?” We now know about the systemic, top-down cover-up of pedophilia in the Catholic Church,<sup>172</sup> and, as previously mentioned, the Hurricanes in the ‘80s can be seen as an unlikely Cinderella story of success for so many underprivileged and disadvantaged youth. The outrage over a Pedophiles vs. Cinderella shirt would be endless.<sup>173</sup> It would be perceived as uncivilized because it lacked “dignity, courtesy, and respect.”<sup>174</sup> And yet, when the dominant social group engaged in analogous conduct by deploying the “Catholics vs. Convicts” t-shirt, the outrage and allegations of incivility were absent.

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<sup>166</sup> *Id.*

<sup>167</sup> 30 FOR 30: CATHOLICS VS. CONVICTS (ESPN television broadcast Dec. 10, 2016).

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> E.g., Brian J. Clites, *The Catholic Church’s Grim History of Ignoring Priestly Pedophilia—and Silencing Would-be Whistleblowers*, CONVERSATION (Oct. 9, 2018), <https://theconversation.com/the-catholic-churchs-grim-history-of-ignoring-priestly-pedophilia-and-silencing-would-be-whistleblowers-102387> [<https://perma.cc/L6YQ-5XNH>].

<sup>173</sup> It would be disingenuous not to note the difference in eras in my comparison. However, even with that reality, the difference in outrage and anger at the two t-shirts would be present, whether both shirts were printed in the 1980s or today in the era of “bad hombres” and “shithole countries.” See Karen Grigsby Bates, *‘Rapists,’ ‘Huts’: Trump’s Racist Dog Whistles Aren’t New*, NPR CODE SWITCH (Jan. 13, 2018), <https://www.npr.org/sections/codeswitch/2018/01/13/577674607/rapists-huts-shitholes-trumps-racist-dog-whistles-arent-new> [<https://perma.cc/ZL U6-KWVH>].

<sup>174</sup> Grenardo, *supra* note 2, at 138.

Professor Grenardo does not acknowledge that “dignity, courtesy, and respect,” are not neutral words but instead are terms deployed differently against people of color. Not only does system justification render this glaring dissonance almost invisible, but it makes us uncomfortable to address it directly.

## V. A NEW MODEL FOR PIF

To be clear, this Article proceeds from the assumption that the leaders of the PIF movement are neither naïve nor racist. As such, it assumes they are capable of recognizing the established reality that the legal profession is a model of white supremacy and systemic racism that needs to change.<sup>175</sup> We can further assume that the insistence on civility as a central principle of the movement is not an intentional attempt to prevent this change, even though it ends up reinforcing the normativity of the current system.

If the PIF movement is serious about reforming legal education and the wider profession, they are going to have to become comfortable with being uncomfortable. True change is always uncomfortable. For the PIF movement to accomplish its goals, it needs to engage in uncomfortable and disruptive pedagogy instead of reinforcing the norms of the current system.

Real change and exercise are comparably uncomfortable.<sup>176</sup> Like exercise, the cliché of “no pain, no gain” applies to systemic change. In its current iteration, the PIF movement is simply encouraging more people to engage in behavior that perpetuates the system. Asking people to be civil, decent, and polite seems so natural and right that it can’t possibly be facilitating the evil of systemic racism. Yet it is precisely the powerful normativity and comfort of these concepts that reveal how strongly they perpetuate the current racist structure of legal education and the profession.

Again, systemic change in societal power structures is brutally uncomfortable.<sup>177</sup> In this country, shifts of power between demographics generally have not occurred without violence. For example, consider the land transfers and power shifts associated with the Native genocide, the

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<sup>175</sup> See *Law School Rankings*, *supra* note 9, at 1016.

<sup>176</sup> See Joshua Cartwright, *Real Change – Should It Feel This Uncomfortable?*, STEVEN AITCHISON, <https://www.stevenaitchison.co.uk/real-change-should-it-feel-this-uncomfortable> [https://perma.cc/4R9K-WED3]; see also Sophia Wushanley, *Real Change is Uncomfortable*, DAILY PENNSYLVANIAN (Mar. 1, 2015), <https://www.thedp.com/article/2015/03/sophia-wushanley-real-change-uncomfortable> [https://perma.cc/WT3X-9ZYW].

<sup>177</sup> See Wushanley, *supra* note 176.



War of Independence, and the Civil War.<sup>178</sup> In this day and age, there is a tendency to redefine the civil rights movement and suggest that a series of peaceful marches miraculously resulted in Black people acquiring more rights than before the marches.<sup>179</sup> That is an absolute patently ahistorical and revisionist reframing, and it ignores the long history of Black suffering. Just ask Emmett Till's<sup>180</sup> family or the victims of the Tulsa Race massacres<sup>181</sup> if the struggle for civil rights suddenly erupted after Martin Luther King Jr. took his pacifist approach. By the end of his life, King himself was convinced that civility was not effective as a strategy to combat racial injustice and many others have critiqued his methods of civility on the same grounds.<sup>182</sup> The civil rights era likely had more to do with Derrick Bell's interest convergence theory than any real altruistic societal change.<sup>183</sup> According to Bell, the interests of powerful America aligned with the needs of people of color, resulting in the civil rights era.<sup>184</sup> These interests converged because to justify its position as the post-Cold

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<sup>178</sup> E.g., Donald L. Fixico, *When Native Americans Were Slaughtered in the Name of 'Civilization,'* HISTORY, <https://www.history.com/news/native-americans-genocide-united-states> [<https://perma.cc/V2GW-9JK9>].

<sup>179</sup> *Victory for Nonviolence*, PBS, <https://www.pbs.org/wgbh/americanexperience/features/freedom-riders-victory-nonviolence> [<https://perma.cc/VH3L-7KV7>] (suggesting that "Gandhian principles of nonviolence could prove effective in the American civil rights movement," and peaceful protest was "the only way it could be done in America.").

<sup>180</sup> Emmett Till, a 14-year-old African American, was brutally murdered for allegedly making advances on a white woman. Emmet Till's accuser later recanted her statement that Emmet Till made advances on her. *Emmett Till Is Murdered*, HISTORY (Feb. 9, 2010), <https://www.history.com/this-day-in-history/the-death-of-emmett-till> [<https://perma.cc/KLU3-TU6U>].

<sup>181</sup> The Tulsa Race Riot was an eighteen-hour massacre of the African American Community in Tulsa, Oklahoma. *The Tulsa Race Massacre: Facts About the Attack*, HISTORY (May 30, 2021), <https://www.history.com/news/tulsa-race-massacre-facts> [<https://perma.cc/3E QV-KMIQ>].

<sup>182</sup> In his "Beyond Vietnam" speech only one year before his assassination, Dr. Martin Luther King said the following:

On the one hand, we are called to play the Good Samaritan on life's roadside, but that will be only an initial act. One day we must come to see that the whole Jericho Road must be transformed so that men and women will not be constantly beaten and robbed as they make their journey on life's highway. True compassion is more than flinging a coin to a beggar. It comes to see that an edifice which produces beggars needs restructuring.

Dr. Martin Luther King Jr., "Beyond Vietnam" Speech, AM. RHETORIC, <https://www.americanrhetoric.com/speeches/mlkatimetobreaksilence.htm> [<https://perma.cc/8YHH-VPML>]; see Kelefa Sanneh, *Martin Luther King, Jr., and the Perilous Power of Black Respectability*, THE NEW YORKER (May 8, 2023), <https://www.newyorker.com/magazine/2023/05/15/king-a-life-jonathan-eig-book-review> [<https://perma.cc/N76N-QX2A>]; see ZAMALIN, *supra* note 7, at 85.

<sup>183</sup> David Shih, *A Theory to Better Understand Diversity, And Who Really Benefits*, NPR (Apr. 19, 2017), <https://www.npr.org/sections/codeswitch/2017/04/19/523563345/a-theory-to-better-understand-diversity-and-who-really-benefits> [<https://perma.cc/KR5V-747X>].

<sup>184</sup> *Id.*

War leader of the free and moral world, America needed to reduce the appearance of injustice in its own house.<sup>185</sup>

Similarly, because the civility narrative is so powerful, Gandhi is also heralded as an example of civility-driven change. Reverence for Gandhi is how the British saved face when violent uprisings in the Indian colony for fifty years made clear to the post-World War II British population that they could no longer control India.<sup>186</sup> So instead, they deified a peace activist to pretend that their love of peace, friendliness, and civility led to Indian Independence.<sup>187</sup>

I am not advocating for violence, or even justifying it, here. My sole purpose in pointing out that change has usually been accompanied by violence is to ensure we are being realistic about how difficult change is. This way we can adopt a realistic approach to effectuating change, embracing the uncomfortable but fundamental normative shifts it involves, and avoiding the frustration that accompanies failures to achieve change as seen throughout our history. Indeed, recognizing that violence has accompanied normative shifts in the past may help forestall future violence as systems are challenged by teaching those in power the importance of hearing minority voices *before* violence is seen as necessary to make change.

So, instead of training us all to behave like the dominant social demographic, effective Professional Identity Formation should include classes that critically address the current power structure and the difficulty of reform. Instead of focusing only on easy behavior (like being nice and decent) that perpetuates systemic injustice, we should ensure that every student is taught the mechanisms of bias. Then, we should equip them with the tools that help them unravel the systemic injustices of the profession when they become lawyers.

For example, all students should at the very least be exposed to Ijeoma Oluo's "So You Want to Talk about Race"<sup>188</sup> and Robin

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<sup>185</sup> *Id.*

<sup>186</sup> Joseph McQuade, *The Forgotten Violence That Helped India Break Free From Colonial Rule*, CONVERSATION (Nov. 19, 2016), <https://theconversation.com/the-forgotten-violence-that-helped-india-break-free-from-colonial-rule-57904> [<https://perma.cc/NT2F-KWME>].

<sup>187</sup> See, e.g., Susmit Kumar, *Hitler, NOT Gandhi, Should Be Given Credit for the Independence of India in 1947*, <https://www.susmitkumar.net/index.php/hitler-not-gandhi-was-the-reason-for-the-1947-indian-independence> [<https://perma.cc/WS64-HTP3>] (arguing that "[p]olitical independence for India was achieved not by Mahatma Gandhi, but rather by Hitler rendering the British Empire a bankrupt entity"); SUSMIT KUMAR, RE-EVALUATING GANDHI: HOW HE DELAYED INDEPENDENCE AND MAINSTREAMED RADICAL ISLAM (2023) (discussing the ways in which Gandhi delayed Indian Independence).

<sup>188</sup> IJEOMA OLUO, SO YOU WANT TO TALK ABOUT RACE (2018). Students can benefit from Oluo's explanation of why individual actions and well-intentioned good hearted individual attempts to rectify racist injustice are ineffective to address systemic problems.

DiAngelo's "White Fragility."<sup>189</sup> Students of color should be taught that their anger and frustration at the system is justified. We should acknowledge that acting civilly is completely at odds with the way they justifiably feel.

Instead, what PIF currently does is shame students of color and the disenfranchised into conforming with the parameters of a white-dominated system by suggesting that civility is natural, justified, and unassailable. As bell hooks once said: "Shaming is one of the deepest tools of imperialist, white supremacist, capitalist patriarchy because shame produces trauma and trauma often produces paralysis."<sup>190</sup>

The current PIF model focusing on civility distracts us from systemic reform and instead makes us focus on individual reform and motivation.<sup>191</sup> Established scholarship reaffirms that this focus on individual behavior not only has no effect on systemic reform, but it reinforces systemic inequities.<sup>192</sup> Two quotes perfectly explain why focusing on individual behavior is ineffective in bringing about change to the profession:

The narcissistic Caucasian notion that black people have been fighting all this time so that white people would have positive feelings towards non-whites fuels the idiotic notion that perpetuates racism because it allows the people playing keep-away with equality to concentrate inwardly

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<sup>189</sup> DIANGELO, *supra* note 6. Students can learn from how DiAngelo lays out why it is difficult to talk about racism and why systemic racism makes white people defensive.

<sup>190</sup> Kwame Sarfo-Mensah, *A Tribute to bell hooks Means Nothing If We're Not Teaching to Transgress*, CITIZEN EDUC. (Dec. 17, 2021), <https://web.archive.org/web/20211218151432/https://citizen.education/2021/12/17/a-tribute-to-bell-hooks-means-nothing-if-were-not-teaching-to-transgress>. In addition to shame, fear is also a driving force behind the paralysis. Students fear that if they speak out against the existing racial order, or work for a law professor who does, they will be ostracized by the legal profession and excluded from elite job opportunities that will enable them to move beyond their current socio-economic position. *See supra* note 86 and accompanying text.

<sup>191</sup> *See* Grenardo, *supra* note 2, at 138.

<sup>192</sup> *See e.g.*, Robin DiAngelo, *Why Can't We All Just Be Individuals?: Countering the Discourse of Individualism in Anti-racist Education*, 6 UCLA J. EDUC. & INFO. STUD. 1, 18 (2010) ("Individualism may be the 'answer' to racism, realized, but it is precisely because that day is not a reality that the Discourse of Individualism is so pernicious . . . [P]ositioning oneself as operating from it, . . . can only function to support and protect white privilege."); *see also* Zachary A. Casey, *Hyperindividualism* in ENCYCLOPEDIA OF CRITICAL WHITENESS STUDIES IN EDUCATION 279-285 (2021) ("hyperindividualism functions to distort structural and systemic manifestations of discrimination and dehumanization to the level of individuals. Organizations and institutions cannot be racist in this view; rather, there . . . must be individuals who have enough power to act on their bigoted beliefs – any notion of systemic racism . . . disappears.").

instead of actually doing the hard work required to correct the persistent problems of white supremacy.<sup>193</sup>

And, “[i]sn’t the call to civility the product of smug insistence that individual moral virtue will magically fix an ailing society? It can’t and it hasn’t.”<sup>194</sup>

This is why I disagree with Professor Grenardo. For example, in a recent article he suggests five rules in support of civility in the legal profession.<sup>195</sup> In particular, Professor Grenardo’s first rule states:

A lawyer shall avoid *disparaging* personal remarks toward all individuals, such as opposing counsel, the opposing party, and all court staff, involved in the legal process. A lawyer shall abstain from any allusion to personal peculiarities and idiosyncrasies of those individuals. *Derogatory* comments about persons involved in the legal process based on race, gender, or other protected personal characteristics are unacceptable. Insults about a lawyer’s work or work product are also unacceptable.<sup>196</sup>

Professor Grenardo’s proposals regarding civility are recommendations for the individual behavior of lawyers as they interact with clients and each other, and as a result, distract us from the difficult and painful systemic reforms needed in the legal profession and ignore that civility has long been a detriment in this regard.<sup>197</sup> At a minimum, Professor Grenardo may be overestimating the efficacy of civility in achieving systemic reform.

As Professor Itagaki argues, civility is “vastly limited” in its usefulness because it “can signal the demand to quell or ignore

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<sup>193</sup> Michael Harriot, *Americans Don't Disagree About What Racism Is ... White People Do*, ROOT (Nov. 20, 2018), <https://www.theroot.com/americans-dont-disagree-about-what-racism-is-white-p-1830573275> [<https://perma.cc/AH3T-MHJZ>].

<sup>194</sup> ZAMALIN, *supra* note 7, at 134 (Beacon Press Boston 2021). The importance of individual behavior is also a bedrock conviction of evangelical Christianity. The Southern Baptist Convention, a denomination born out of racism, has always stressed that the way to salvation is to have a *personal* relationship with Jesus Christ, rather than work to change the systemic ills in society. *See generally* ROBERT P. JONES, *WHITE TOO LONG: THE LEGACY OF WHITE SUPREMACY IN AMERICAN CHRISTIANITY* (Simon & Schuster 2020).

<sup>195</sup> David A. Grenardo, *Civility Rules: Debunking the Major Myths Surrounding Mandatory Civility for Lawyers and Five Mandatory Civility Rules that Will Work*, 37 GEO. J. L. ETHICS 167, 191–92 (2024) [hereinafter *Civility Rules*].

<sup>196</sup> *Id.*

<sup>197</sup> Lynn Mie Itagaki, *The Long Con of Civility*, 52 CONN. L. REV. 1169, 1180 (2021) (“Civility is also an appealing paradigm because of its admonitions of individual behavior rather than institutional changes that shape behavior through legal mandates such as affirmative action or antidiscrimination statutes. Civility can also normalize the violence of ‘repudiation’: the ‘friction’ and ‘jostling’ of intolerance and disrespect.”).

protest, . . . the obfuscation of an intent to silence” and therefore operate as a “codeword[], tool[], or instrument[] that mask a political agenda separate from movements towards full citizenship, equality, dignity, and humanity.”<sup>198</sup> Ijeoma Oluo also perfectly captures the danger of focusing on individual intent and civility:

And those are real and noble goals when we call them what they are—we really should be more kind to each other. But when I look at what is putting me and millions of other people of color at risk, a lack of niceness from white people towards me is very far on the list of priorities. . . . We can get every person in America to feel nothing but love in their hearts, and if our systems aren’t acknowledged and changed, it will bring negligible benefit to the lives of people of color.<sup>199</sup>

Professor Grenardo’s proposals are individualistic and reinforce the narrative that the deeply rooted racism in legal education and the profession is neutral and that disrupting it is immoral.<sup>200</sup> His approach “substitutes the goal of unity and respecting both sides of the aisle over directly confronting systemic racism” and facilitates the maintenance of the status quo.<sup>201</sup> But this superficiality is harmful because “[u]nless we go deeper, the latent power imbalances that disproportionately harm communities of color, which we have been conditioned to perceive as neutral, will remain.”<sup>202</sup>

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<sup>198</sup> *Id.* at 1185.

<sup>199</sup> OLUO, *supra* note 188, at 30–31.

<sup>200</sup> See Sonya Bonneau & Susan McMahon, *Disruptive Lawyering* 101, 25 J. LEGAL WRITING INST. 37, 38 (2021). Professors Bonneau and McMahon explain in the wake of George Floyd’s murder how our typical approach to law school teaching reinforces structural racism:

My teaching has always been focused on helping my students derive, synthesize, and apply legal rules. Deductive reasoning, syllogisms. Crafting analogies to precedents. Premises leading to conclusions. I had co-authored a textbook that emphasized these principles. Those foundations prioritize maintaining the status quo; they emphasize stability and continuity. But the restraints of legal reasoning now felt hollow and broken against the videos on our phones, unable to accommodate the demands of protestors in the streets. What I now saw was that legal reasoning, as I’ve taught it in my legal writing classes, can paint a false veneer of neutrality on rules and precedents and demand that injustices be replicated over and over again.

*Id.*

<sup>201</sup> Alex Zamalin, *Civility Won’t End Racism*, YES! MAG. (Mar. 2, 2021), <https://www.yesmagazine.org/opinion/2021/03/02/racial-justice-civility> [<https://perma.cc/F58F-5VVV>].

<sup>202</sup> Bonneau & McMahon, *supra* note 200, at 39 (2021); see also Lynn Mie Itagaki, *The Long Con of Civility*, 52 CONN. L. REV. 1169, 1182–83 (2021) (“In other words, [civility results in] no material redistribution or even worse, a redistribution that flowed upward, just a friendlier face or personable interactions whatever one’s racist beliefs or society’s racist inequities. The emotional labor of civility was more often extracted from vulnerable populations . . .”).

Rule 1 is the most problematic aspect of Professor Grenardo's proposals because it relies on words like "disparaging" and "derogatory,"<sup>203</sup> without acknowledging that those words have never been applied equally when judging white behavior and the behavior of people of color.<sup>204</sup> Rather, these words are part and parcel of how civility has been interpreted in ways that perpetuate systemic oppression.<sup>205</sup>

An approach to PIF focusing on systemic reform instead of the current model focusing on individual behavior and systemic perpetuation harmonizes with the requirements of ABA Standards and Rules of Procedure for Approval of Law Schools standards 303(b)(3) and 303(c).<sup>206</sup> Section 303(b)(3) requires that students are provided substantial opportunities for "the development of a professional identity,"<sup>207</sup> while 303(c) mandates students have exposure to "bias, cross-cultural competency, and racism."<sup>208</sup> According to Interpretation 303-5 of the ABA Standards, "professional identity focuses on what it means to be a lawyer and the special obligations lawyers have to their clients and *society*."<sup>209</sup>

What if, rather than follow individualistic civility rules, the legal profession doubled down on Standard 303 to increase the focus on a lawyer's obligation to society? This makes sense because lawyers are among the most well-equipped cogs of the societal wheel to facilitate systemic reform. This would mean a significant change in what we currently focus on in PIF pedagogy and even professional responsibility.

It would also be responsive to the mandates of ABA Standard 303(a)(1). Interpretation 303-6 states that legal education (aka the development of the professional legal identity) should involve teaching students "the obligation of lawyers to promote a justice system that provides equal access and eliminates bias, discrimination, and racism in the law."<sup>210</sup> Interpretation 303-7 provides further that students should

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<sup>203</sup> See *Civility Rules*, *supra* note 1966, at 191.

<sup>204</sup> See Bates, *supra* note 37; see also Zamalin, *supra* note 201 ("But more often than not, given the long racist history of Black people being presumed as uncivil—too rowdy, angry, impolite, criminal—the victims of civility have and will continue to be Black citizens."); see *supra* Subpart (IV)(F).

<sup>205</sup> See *supra* Part IV.

<sup>206</sup> 2023-2024 STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS § 303 (AM. BAR ASS'N 2024).

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> *Id.* (emphasis added).

<sup>210</sup> *Id.*

understand their “obligation as future lawyers to work to eliminate racism in the legal profession.”<sup>211</sup>

Teaching students to think like lawyers in the current PIF model simply reinforces the structural inequities present in the legal profession.<sup>212</sup> The current norm and rule-based approach to professionalism should be acknowledged as derivative of power discrepancies which sometimes include racial bias.<sup>213</sup> Instead of convincing students to behave like the dominant norm, we need to make students aware of “the different layers of power and bias underlying legal [norms].”<sup>214</sup> Only when students understand this can they really begin to effectuate systemic change.<sup>215</sup> As Bonneau and McMahon explain, legal professors have a responsibility to develop their students guided by these principles:

[O]ur jobs should not be simply to give students tools to operate within the system as it is. It should be to give them the tools to improve that system from the inside and out, bit by bit. . . . A lawyer trained to see rules as expressions of values, flawed and changeable, as opposed to unyielding decrees, need not abandon legal analysis. Lawyers can both argue *and* effect a change that is positive to this country.<sup>216</sup>

PIF initiatives that suggest civility is a moral, ethical, and natural norm prevent us from digging deeply into the discomfort and emotional pain associated with systemic reform.<sup>217</sup> It discounts the viewpoints and voices of minority students for whom the status quo is unjust. It suggests that their anger at the current inequity of the law and the legal system is deviant and should be suppressed. System justification operates effectively in the legal profession because it makes systemic reform seem so difficult that it makes striving for the goal seem pointless.

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<sup>211</sup> *Id.*

<sup>212</sup> See Bonneau & McMahon, *supra* note 200, at 39 (quoting Teri A. McMurty-Chubb, *Writing at the Master's Table: Reflections on Theft, Criminality, and Otherness*, 2 DREXEL L. REV. 41, 54–55 (2004)) (“Teaching students to ‘think like lawyers,’ as Teri A. McMurty-Chubb pointed out, merely forces students to ‘replicate racist and elitist legal structures as they learn the very process of legal reasoning and analysis.’”).

<sup>213</sup> See Bonneau & McMahon, *supra* note 200, at 40.

<sup>214</sup> *Id.* at 41 (“Once students are attuned to the different layers of power and bias underlying legal rules, they will want to effect change, and legal writing professors are uniquely positioned to help them achieve that goal.”).

<sup>215</sup> See *id.*

<sup>216</sup> *Id.* at 43.

<sup>217</sup> See, e.g., *Civility Rules*, *supra* note 196; Grenardo, *supra* note 2, at 135.

Feeling angry, being uncomfortable, becoming upset, and experiencing real emotional pain are necessary conditions to reducing systemic racism in the legal profession.<sup>218</sup> The heavy emphasis on civility in PIF is inapposite to true systemic racial reform. The decision makers in PIF must realize that “[t]he racial status quo is comfortable for white people.”<sup>219</sup> It is easy to advocate for civility because, like racism, it is comfortable, but it is also an inhibitor of change, and “[c]ivil’ societies have always been violent to minorities, political dissidents, and resisters of the status quo.”<sup>220</sup> The reality is we cannot move forward in race relations if we remain comfortable; “[t]he key to moving forward is what we do with our discomfort.”<sup>221</sup> Hopefully this article illustrates the often-underestimated scale of the real and tangible discrepancies of systemic racism,<sup>222</sup> realities which cannot simply be dismissed as myths.<sup>223</sup>

#### CONCLUSION

Most Americans agree that overt racism and discrimination is wrong. Simultaneously, most Americans believe that civility is divinely normative and that it is a tangible and desirable end unto itself. The reality, though, is that civility is a tool of oppression for maintaining the status

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<sup>218</sup> See OLUO, *supra* note 188, at 51 (“Racial oppression should always be an emotional topic to discuss. It should always be anger-inducing. As long as racism exists to ruin the lives of countless people of color, it should be something that upsets us.”). Ironically some critical religious thinkers suggest that civility is not a Judeo-Christian norm and reaffirm the pain and discomfort necessary for real change, for more discussion on this view, see Brittany Caine-Conley, *Jesus Was a Threat to Civility*, SOJOURNERS (June 29, 2018), <https://sojo.net/articles/jesus-was-threat-civility> [<https://perma.cc/3BCZ-MGCG>] (“let us remember that Jesus was not civil. Jesus was not the picture of passivity and niceness that we like to paint . . . . On [P]assover, Jesus held a march, a protest procession, to counteract the military parade held for Roman Governor Pontius Pilate.”).

<sup>219</sup> OLUO, *supra* note 188, at 14.

<sup>220</sup> Caine-Conley, *supra* note 218. (“[O]ne of Jesus’ 12 disciples died in peace. The others were beheaded, skinned alive, speared and crucified. If only they’d been a bit more civil, perhaps the authorities would have spared them their lives. “*Civil’ societies have always been violent to minorities, political dissidents, and resisters of the status quo.*”) (emphasis added) (internal quotations omitted).

<sup>221</sup> OLUO, *supra* note 188, at 14.

<sup>222</sup> Professor Grenardo acknowledges that systemic racism is a problem in his abstract but underestimates the difficulty of systemic reform by suggesting that increases in individual civility will “significantly [alter] the system.” See *Civility Rules*, *supra* note 196, at 167 (“We are naïve to hope that some lawyers will make substantial changes to their behavior in a profession riddled with systemic incivility just because others in the legal profession kindly ask them to do so. Instead, systemic change requires significantly altering the system—starting with mandating civility.”).

<sup>223</sup> See *Civility Rules*, *supra* note 196, at 189–91. Professor Grenardo suggests that it is merely myth that civility rules “attack racial minorities and women while favoring the elite.” *Id.* The reality is that system justification and systemic racism convince us that this monstrous truth is a myth.



quo. In the legal profession, the status quo is a racist one. Civility is not the concept most people think it is. Rather, it is a construct imposed by the powerful to ensure they stay powerful. And like all doctrines subject to interpretation, civility is wielded as a sanctified weapon to prevent societal power shifts. Civility often hinders change.

The current structure of the legal profession is the result of centuries of systemic injustice and oppression. When we focus on civility in Professional Identity Formation, we are whitewashing and justifying that structure. The more legal education focuses on individual behavior and forms of communication as ways to improve the legal profession, the more we perpetuate this systemic injustice.

Rather than naively pretending that courtesy, formal clothes, and decency will solve anything, part of Professional Identity Formation should expose every law graduate to the magnitude of the systemic inequities of the legal profession. That way, everyone would graduate with an understanding of what true change looks like and a realistic understanding that their individual choices and motivations are largely irrelevant to systemic change.

Systemic change, unlike individual change and motivation, often requires discomfort and disruption. Blindly behaving civilly means reinforcing the behavioral norms of whoever is in power and reinforcing that power structure. We should be teaching students that any group in the minority has a right to feel upset and angry at the systemic historical injustice our legal education and profession represents. Instead, Professional Identity Formation currently stresses that if we behave, talk, write, and act like rich and comfortable members of the dominant group, everything will be just peachy—or dare I say—civil.<sup>224</sup>

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<sup>224</sup> Perhaps the greatest societal irony is that system justification and maintaining the status quo via civility and its derivatives prevents us from appreciating that, even though whites have historically been the violent aggressors in our national story, we've made the case that we all need to fear black people and minorities.