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## Character and Fitness in America's Neo-Redemptive Era

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## CHARACTER AND FITNESS IN AMERICA’S NEO-REDEMPTIVE ERA

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<sup>‡</sup> This Article was authored prior to the events that occurred on and after October 7, 2023, which called the world to confront the plight of the Palestinian people and the way that the Western settler colonial machine will do anything to maintain its power, even manufacturing consent for wholesale indiscriminate killing. See Haggai Matar, *How October 7 Has Changed Us All — and What It Signals for Our Struggle*, +972 MAG. (Nov. 8, 2023), <https://perma.cc/DCH2-KT86>; Nicole Narea, *How the US Became Israel’s Closest Ally*, VOX (Oct. 13, 2023), <https://www.vox.com/world-politics/23916266/us-israel-support-ally-gaza-war-aid> (on file with CUNY Law Review).

In the wake of this global reckoning, government entities, academic institutions, billionaires, and business executives alike have exhibited terrifying acts of censorship and suppression of anyone who vocalizes solidarity with Palestine—be they students, wage workers, lawyers, academics, politicians, or celebrities. Amy Goodman, *The Palestine Exception to Free Speech: Censorship, Harassment Intensifies on Campus Amid Gaza War: Transcript*, DEMOCRACY NOW! (Oct. 27, 2023), [https://www.democracynow.org/2023/10/27/palestine\\_legal\\_campus\\_censorship\\_ryna\\_workman](https://www.democracynow.org/2023/10/27/palestine_legal_campus_censorship_ryna_workman) (on file with CUNY Law Review); Chris McGreal, *Pro-Palestinian Views Face Suppression in US amid Israel-Hamas War*,

GUARDIAN (Oct. 21, 2023, 5:00 AM), <https://perma.cc/QY4A-FQZR>; Akela Lacy, *Public Defenders Get Restraining Order to Block Their Own Union from Voting on Gaza Statement*, INTERCEPT (Nov. 17, 2023, 9:22 PM), <https://perma.cc/Y5CF-B242>; Nima Shirazi, *Solidarity with Palestine Is Not a Crime*, NATION (Oct. 16, 2023), <https://www.thenation.com/article/society/palestine-censorship-rallies-banned/> (on file with CUNY Law Review); Shannon Power, *Celebrities Who Faced Consequences for Public Support of Palestinians*, NEWSWEEK (Nov. 22, 2023, 8:03 AM), <https://perma.cc/CM8A-M7WH>.

This McCarthyism redux is a timely illustration of the exact warnings this Article issues about the use of existing institutional fixtures to excise liberative dissent. Many students are afraid of vocalizing pro-Palestinian support because the repercussions have been so harsh and destructive, in part due to the unrelenting intimidation of the Zionist propaganda and doxxing campaign. See Yasmeen Altaji, *'Career on the Line': US Students Fear Job Backlash for Protesting Israel*, AL JAZEERA (Nov. 2, 2023), <https://perma.cc/RM6R-65GB>; Montse Reyes, *Death Threats and Job Losses: This Is What It's Like for Pro-Palestine Students and Activists to Be Doxxed Right Now*, RECKON (Dec. 11, 2023, 11:00 AM), <https://perma.cc/FDV4-9J44>.

As a microcosm of the issues this article discusses, even CUNY Law Review underwent months of internal organizing, including conversations with the authors, in order to publish their statements about the violence in Palestine. See Nick Leiber, *Human Rights Attorneys Grapple with the Law's Promises and Failures amid Calls to Prevent Genocide in Gaza: A Reading List*, CUNY L. REV. (Nov. 22, 2023), <https://perma.cc/KJ5P-8M2T>; Leora Johnson & Salimah Khoja, *A Statement of Reflection and Solidarity with Palestinian Liberation*, CUNY L. REV. (Jan. 12, 2024), <https://perma.cc/73F8-WXAZ>.

The Law Review's hesitance, despite its history of signing and issuing statements in past moments of moral import, is in part a consequence of the ways that the power structure in the legal profession, including the Character and Fitness, is horrifyingly successful at chilling the liberative actions of future lawyers. See @\_SAFECAMPUS, X, [https://twitter.com/\\_SAFECAMPUS/status/1747219796054220910](https://twitter.com/_SAFECAMPUS/status/1747219796054220910), available at <https://ibb.co/hyVp1Bs>. (For an overview of CUNY Law Review's recent history of signing on to and issuing statements, see Letter from CUNY L. Students for Just. in Palestine & CUNY L. Jewish L. Students Ass'n to CUNY L. Student Gov't Ass'n (Dec. 2, 2021), <https://perma.cc/8TUE-TE4V> (noting support for CUNY Law's Boycott, Divestment, and Sanctions ("BDS") Resolution); Statement in Solidarity with Nerdeen Kiswani, CUNY Sch. of L. Student Gov't (June 27, 2021), <https://perma.cc/FMU2-FAEL> (noting support for Palestinian-American student Nerdeen Kiswani as she faced harassment by CUNY Law administration); Letter from CUNY Sch. of L. Student Orgs. to Félix V. Matos Rodríguez, Chancellor, CUNY et al. (Mar. 25, 2021), <https://perma.cc/9RJ7-7NVQ> (noting support for the removal of a CUNY Law dean accused of inflicting racial harm); Letter from CUNY Sch. of L. Student Orgs. to Mary Lu Bilek, Dean, CUNY Sch. of L. et al. (Mar. 26, 2021), <https://perma.cc/Q6WL-9ADW> (noting support for the same); Letter from CUNY Sch. of L. Student Orgs. to Eduardo Capulong, Interim Dean, CUNY Sch. of L. (Oct. 8, 2021), <https://perma.cc/2MED-KJXN> (noting support for staff workers as they fought against remote work request denials); *Demand for Compensation and Call for Solidarity*, CUNY L. REV. (Dec. 6, 2023), <https://perma.cc/7WXQ-35BT> (noting support for law review staff members to be compensated for their labor); *CUNY Law Review Statement on Last Week's Supreme Court Rulings*, CUNY L. REV. (July 4, 2023), <https://perma.cc/RWW5-LHN7> (discussing the Supreme Court's dismantling of affirmative action); *CUNY Law Review Statement on Dobbs*, CUNY L. REV. (June 25, 2022), <https://perma.cc/2AAU-XGP2> (discussing the Supreme Court's dismantling of abortion care); *CUNY Law Review Statement of Solidarity with the Black Lives Matter Movement*, CUNY L. REV. (June 7, 2020), <https://perma.cc/G5V3-S4QH> (affirming solidarity with the Black Lives Matter movement)).

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## INTRODUCTION

The Character and Fitness process is the last major institutional hurdle that aspiring attorneys must overcome to gain licensure to the legal profession.<sup>1</sup> A process held out to determine “moral” character, the Character and Fitness often goes uninterrogated, instead flattened into just a quotidian and inconvenient aspect of the profession’s admission procedures.<sup>1</sup> However, the normalization of both the process and exist-

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This is an important instance of institutions breaking the fourth wall between themselves and issues of real violence and oppression. We must interrogate our own reliance on institutional power in order to see clearly the road we must tread—stony though it may be—toward the just future we deserve. We must think imaginatively about how to break trends and empower the oppressed. We will not be perfect, but we must be better today than we were yesterday. *Free Palestine*.

<sup>1</sup> NAT’L CONF. OF BAR EXAM’RS. & AM. BAR ASS’N, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS 2021 vii-x (2021).

<sup>1</sup> Mike Allen, *The Nation: A Question of Character; Beyond the Bar Exam*, N.Y. TIMES (July 11, 1999), <https://www.nytimes.com/1999/07/11/weekinreview/the-nation-a-question->

ence of the Character and Fitness obscures the reality that this unscientific process neither has particularized, inherent value to the profession<sup>2</sup> nor is an accurate tool of determining the moral or ethical principles of potential attorneys.<sup>3</sup> Instead, the advocacy of racial justice organizers and the scholarship of critical legal theorists in recent years<sup>4</sup> have exposed the true nature of the Character and Fitness as a tool of exclusion, which molds the legal field and law in the White<sup>5</sup> man's image.<sup>6</sup>

The White male legal field of the late 1800s to early 1900s was very explicit, if not boastful, about the use of character entry requirements to restrict disfavored and oppressed racial and political groups from having any formalized access to the legal profession.<sup>7</sup> Besides be-

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of-character-beyond-the-bar-exam.html (on file with CUNY Law Review) ("All kinds of people are flying below the moral-character radar because too often that element of admission is a rubber stamp." (quoting lawyer Richard A. Zitrin)); Leslie C. Levin et al., *The Questionable Character of the Bar's Character and Fitness Inquiry*, 40 LAW & SOC. INQUIRY 51, 51 (2015).

<sup>2</sup> See Levin et al., *supra* note 2, at 78-79; *Konigsberg v. State Bar of Cal.*, 353 U.S. 252, 262-63 (1957) ("The term 'good moral character' has long been used as a qualification for membership in the Bar and has served a useful purpose in this respect. However the term, by itself, is unusually ambiguous. It can be defined in an almost unlimited number of ways for any definition will necessarily reflect the attitudes, experiences, and prejudices of the definer. Such a vague qualification, which is easily adapted to fit personal views and predilections, can be a dangerous instrument for arbitrary and discriminatory denial of the right to practice law." (footnote omitted)).

<sup>3</sup> Levin et al., *supra* note 2, at 51 (examining admissions records of 1,343 Connecticut bar applicants and their subsequent disciplinary records, and finding that "while some bar application data are associated with an elevated risk of future discipline, the predictive power of the data is extremely low").

<sup>4</sup> See generally Deborah L. Rhode, *Moral Character as a Professional Credential*, 94 YALE L.J. 491, 493 (1985); Carol M. Langford, *Barbarians at the Bar: Regulation of the Legal Profession Through the Admissions Process*, 36 HOFSTRA L. REV. 1193 (2008); Troy Closson, *New York Is Pushed to Stop Asking Aspiring Lawyers About Long-Ago Crimes*, N.Y. TIMES (Sept. 6, 2022), <https://www.nytimes.com/2022/09/06/nyregion/criminal-record-new-york-bar.html> (on file with CUNY Law Review).

<sup>5</sup> Throughout this Article, we have chosen to capitalize the "w" in "White" when referring to said people and ideologies. Taking into consideration the fact that the creation of Whiteness itself is a project, we believe in the importance of naming Whiteness as a racial identity, refusing the option for "White people to sit out of conversations about race[,] [which] removes accountability from White people's and White institutions' involvement in racism." *Glossary Item: White, white*, THE DIVERSITY STYLE GUIDE, <https://perma.cc/KTY8-YCLG> (last visited Dec. 14, 2023).

<sup>6</sup> LISA G. LERMAN & PHILIP G. SCHRAG, *ETHICAL PROBLEMS IN THE PRACTICE OF LAW* 826 (4th ed. 2016) (noting that "many of the Christian white males who dominated the profession until after World War II believed that only people like themselves had the proper character to be lawyers").

<sup>7</sup> *Id.* ("The exclusion of so many people from the legal profession may have been rooted in economic self-interest and social elitism . . . . For example, California in the 1800s barred nonwhites, women, and noncitizen immigrants from becoming lawyers.").

ing a field that often grants economic and wealth advantage,<sup>8</sup> the law also offers access to power-making and power-conferral in society—power that White and conservative elites are uninterested in sharing.<sup>9</sup> Understanding the Character and Fitness process as a political tool of exclusion and control contextualizes its employment by White and right-wing elites to ensure that the law remains a tool for the profit of White supremacy and the capital class.

This Article tracks and examines the contemporary deployment of the Character and Fitness process to gerrymander a legal profession that not only is hostile to the work of liberationists but also measurably impacts the demographic and ideological representation amongst lawyers, the administrators of people’s everyday legal lives and our political futures. Part I introduces the historical conflict between the Reconstruction, Redemption, and White grievance politic,<sup>10</sup> establishing a framework for understanding the weaponization of the Character and Fitness and urgency of abolishing its use. Part II discusses how law facilitated the Redemption enterprise, leading to the establishment of the modern Character and Fitness system. Part III recounts how the 2020 Uprisings saw one of the largest mobilizations for racial justice in history,<sup>11</sup> a momentary offering of a race-conscious political promise that had the ability to radically transform the country.<sup>12</sup> Unfortunately, the neoliberal control of political systems<sup>13</sup> cut short any potential change and quickly ushered in a Neo-Redemptive era of White grievance politic through alt-right, “Make America Great Again” (“MAGA”) conservatism.<sup>14</sup> Part IV argues that the Character and Fitness is continuing its exclusionary tradition through its most recent use as a political purity test to maintain the right-wing capture of legal systems in our current “Whitelash”<sup>15</sup> era. To

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<sup>8</sup> See *id.* (“Competition from more lawyers would produce lower fees for everyone.”).

<sup>9</sup> See *infra* Part II.

<sup>10</sup> The phrase “White grievance politic,” discussed throughout this Article, refers to the painting of White people as having lost their perceived social standing and being owed vengeance. It is a line of rhetoric that often emerges as a response to people of color gaining positions of power. See, e.g., John Harwood, *Led by Trump, GOP Increasingly Casts White People as Racism’s Victims*, CNN (Feb. 6, 2022, 2:09 PM), <https://perma.cc/GV28-AK5Z>.

<sup>11</sup> Larry Buchanan et al., *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), <https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html> (on file with CUNY Law Review).

<sup>12</sup> Rebecca Zietlow, *A Third Reconstruction*, 81 MD. L. REV. 351, 351-52 (2021).

<sup>13</sup> Rafal Soborski, *Challenging Neoliberal Hegemony: Ideology for 21st Century Progressives*, GLOBAL-E (Aug. 15, 2019), <https://perma.cc/W4EN-J9LC>.

<sup>14</sup> Rachel M. Blum & Christopher Sebastian Parker, *Panel Study of the MAGA Movement*, MAGA STUDY, <https://perma.cc/45MC-95EK> (last visited Dec. 14, 2023).

<sup>15</sup> See Chaz Arnett, *Black Lives Monitored*, 69 UCLA L. REV. 1384, 1428 (2023) (defining “Whitelash” as “a fierce and swift response by White Americans to hold onto power when faced with greater demands for diversity and growing calls for racial equity”).

further this argument, we analyze several high-profile instances of right-wing political elites utilizing entry requirements for the legal profession in an attempt to block politically disfavored groups and individuals from access.

As these current examples reveal that the legal profession's use of the Character and Fitness furthers this country's descent into our Neo-Redemptive Era, this Article concludes by imploring readers to call into question the continued legitimacy of the Character and Fitness. It asks us all to continue to see the legal profession as a space that clearly metes out power, and because of that, we carry an even greater moral imperative to invite all peoples to participate in shaping that legal power for all of our futures.

## I. RECONSTRUCTION, REDEMPTION, AND WHITE GRIEVANCE POLITIC

This Article recontextualizes the Character and Fitness as a Neo-Redemptive device to maintain a White hegemonic power. For us to put forth this argument, we find it important to define and explain the historical periods of the Reconstruction and the Redemption, as well as how theorists have understood America's racial politic as a perpetual cycle of these histories: Substantial movements for racial progress are choked by White violence in the form of legal and extrajudicial backlash. By foregrounding that repeating arc, this Part makes it easier to understand both the use *and* the choice of the Character and Fitness to support this most current iteration of White grievance politic.

### A. Reconstruction

The Reconstruction Era was a period in American history between the end of the Civil War and 1877 that constituted a Second Founding of the United States, where Black communities made strides in establishing genuine democratic structures and subverting the White apartheid social order.<sup>16</sup> This era was punctuated with legal, political, and social progress during which Black people accessed a variety of rights and freedoms that had previously been unthinkable. Black people obtained birthright citizenship, enjoyed access to public accommodations, and established abundant economic boomtowns.<sup>17</sup> Thousands of Black men held local and state office for the first time, while also entering into U.S. Congress:

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<sup>16</sup> Historian Eric Foner on the 'Unresolved Legacy of Reconstruction': Transcript, NPR (June 5, 2020, 1:42 PM), <https://perma.cc/G3N2-R25K> [hereinafter *Foner NPR Transcript*]; Eric Foner, *The Supreme Court and the History of Reconstruction—and Vice-Versa*, 112 COLUM. L. REV. 1585, 1586 (2012).

<sup>17</sup> Tiffany R. Wright et al., *Truth and Reconciliation: The Ku Klux Klan Hearings of 1871 and the Genesis of Section 1983*, 126 DICK. L. REV. 685, 697-98 (2022).

Sixteen Black men served in the House of Representatives and two in the Senate.<sup>18</sup> In the wake of this progress, unwillingly humbled White southerners mounted resistance, taking forms such as the Ku Klux Klan, a White terrorist organization founded in 1866.<sup>19</sup> Yet Reconstructionists remained ardent, passing new constitutional and federal protections.

During this period, the United States ratified the Reconstruction Amendments—the Thirteenth, Fourteenth, and Fifteenth Amendments to the United States Constitution, which ended slavery outside of prisons, established equal protection under the law, and prohibited voter disenfranchisement on the basis of race, respectively.<sup>20</sup> Furthermore, Congress passed the Ku Klux Klan Act of 1871, which was enacted to address the genocidal violence that White Southerners meted out to Black people for having the audacity to choose freedom.<sup>21</sup> This paradigmatic shift in White rule fostered an earnest possibility of recreating America as a true multiracial democracy.<sup>22</sup> This dream, however, would never be realized.<sup>23</sup>

### B. *Redemption*

Aggrieved White “Redeemers,” outraged at the moves towards Black equality, saw it as their duty to avenge White rule.<sup>24</sup> They, thus, responded with a terrifying whiplash of depraved physical and legal violence to usher in the new moral mantle of “Redemption.”<sup>25</sup> Barbarous White mobs lynched scores of Black people with aplomb; burned schools, houses, and churches to ash; tortured, sexually assaulted, and brutalized Black women and children; and razed prosperous Black

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<sup>18</sup> Foner *NPR Transcript*, *supra* note 17.

<sup>19</sup> Jared A. Goldstein, *The Klan’s Constitution*, 9 ALA. C.R. & C.L.L. REV. 285, 295 (2018).

<sup>20</sup> U.S. CONST. amends. XIII–XV; *see also* Foner, *supra* note 17, at 1586 n.1.

<sup>21</sup> *United Brotherhood of Carpenters, Local 610 v. Scott*, 463 U.S. 825, 839 (1983) (Blackmun, J., dissenting) (“The Ku Klux Klan Act was the Reconstruction Congress’ response to politically motivated mob violence in the postbellum South designed to intimidate persons in the exercise of their legal rights.”); *see also* Wright et al., *supra* note 18, at 703.

<sup>22</sup> EQUAL JUST. INITIATIVE, *RECONSTRUCTION IN AMERICA: RACIAL VIOLENCE AFTER THE CIVIL WAR, 1865-1876* 6 (2020), <https://perma.cc/79WH-3V2K>.

<sup>23</sup> *See* W.E.B. DUBOIS, *BLACK RECONSTRUCTION* 30 (1st ed. 1935) (“The slave went free; stood a brief moment in the sun; then moved back again toward slavery. The whole weight of America was thrown to color caste.”).

<sup>24</sup> Wright et al., *supra* note 18, at 699.

<sup>25</sup> *Id.* at 699–701. Though this era was called the “Redemptive” Era, nothing, of course, is redeeming about White violence. This era is reflective of the racist and regressive domination of White supremacy, and it may do well to be termed as “Retrenchment” Era instead.



towns to the ground.<sup>26</sup> That frenetic terrorism was interlocked with legal approval. “Two themes are clear,” scholar Tiffany Wright notes: “First, the violence was often perpetrated by state actors—police officers, teachers, state militia members, and politicians. Second, state courts were unable—or unwilling—to address the rampant and gruesome racial terrorism.”<sup>27</sup>

State courts were soon affirmed when, in 1877, Southern Democrats and Northern Republicans struck a deal to abdicate federal oversight of Southern compliance with civil rights statutes in exchange for delivering the Republicans a presidency, returning “home rule” to the White supremacists who had dominated the South before the war.<sup>28</sup> This compromise marked the official end of Reconstruction.<sup>29</sup> In this new Redemptive Era, America was plunged into a rapid imposition of apartheid laws, including the Black Codes, vagrancy laws, voter suppression laws, and segregation policies.<sup>30</sup> The Supreme Court took further steps to undermine the Reconstruction Amendments through decisions such as the *Slaughter-House Cases*,<sup>31</sup> *United States v. Cruikshank*,<sup>32</sup> and *Plessy v. Ferguson*.<sup>33</sup>

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<sup>26</sup> EQUAL JUST. INITIATIVE, *supra* note 23, at 34, 70-71; Danny Lewis, *The 1873 Colfax Massacre Set Back the Reconstruction Era*, SMITHSONIAN MAG., <https://perma.cc/2FGA-RWHA> (Apr. 13, 2023).

<sup>27</sup> Wright et al., *supra* note 18, at 699.

<sup>28</sup> Sumi Cho, *Redeeming Whiteness in the Shadow of Internment: Earl Warren, Brown, and a Theory of Racial Redemption*, 40 B.C. L. REV. 73, 162-63 (1998); see also Foner *NPR Transcript*, *supra* note 17 (“[T]he north retreats itself from the ideal of equality and begins to accept this, as you might say, the white southern view of racial superiority of whites. This is a period when social Darwinism becomes more important in American thought, you know, the notion . . . [of] survival of the fittest. And those at the top of society are there because they’re the superior ones. And those at the bottom, it’s just nature that’s put them there, and nobody can change that.”).

<sup>29</sup> Tsahai Tafari, *The Rise and Fall of Jim Crow: Presidents and Their Role in Civil Rights*, PBS: THIRTEEN, [https://www.thirteen.org/wnet/jimcrow/struggle\\_president.html](https://www.thirteen.org/wnet/jimcrow/struggle_president.html) (last visited Dec. 18, 2023) (on file with CUNY Law Review).

<sup>30</sup> See David Pilgrim, *What Was Jim Crow*, FERRIS STATE UNIV., <https://perma.cc/9K2C-7M2R> (last visited Dec. 18, 2023).

<sup>31</sup> 83 U.S. 36, 77-79 (1872) (holding that the Constitution’s Privileges and Immunities Clause does not protect citizens’ rights from infringement by state governments). This decision gave former Confederate states full, unchecked control over protecting the rights of Black citizens, leaving formerly enslaved people “at the mercy of their former masters.” Michael A. Ross, *Justice Miller’s Reconstruction: The Slaughter-House Cases, Health Codes, and Civil Rights in New Orleans, 1861-1873*, 64 J.S. HIST. 649, 650 (1998).

<sup>32</sup> 92 U.S. 542, 554-55 (1875) (holding that the Fourteenth Amendment does not protect against constitutional violations by private actors, effectively barring the federal government from prosecuting White supremacist terrorism against Black people under the Enforcement Acts); see also discussion *infra* Section II.C.

<sup>33</sup> 163 U.S. 537, 551-52 (1896) (upholding the constitutionality of the “separate but equal” doctrine), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

Within a generation, Reconstruction had been effectively nullified by the White backlash of the Redemptive Era, which saw White people re-establish their hegemony and exclude Black people from power. This backlash effectively relegated the Reconstruction Amendments to no more than words on a page as nearly all of the promise of the Second Founding was rescinded. As Justice Earl Warren would later remark:

When the Democrats in the [1877 Compromise] traded the presidency to the Republicans for the muting of the newly acquired rights of the black people who had so recently been enfranchised, the Supreme Court then, in keeping with the national mood, in one case after another, beginning with Slaughter House cases and the Civil Rights cases, limited the rights of the blacks until finally the case of *Plessy v. Ferguson* held that the states could by statute separate blacks from whites in public transportation providing the accommodations were equal.<sup>34</sup>

Indeed, Reconstruction historian Eric Foner noted that “the Redeemers moved in the final decades of the nineteenth century to put in place new systems of political, class, and race relations,” and that “[t]hey shared . . . a commitment to dismantling the Reconstruction state, reducing the political power of blacks, and reshaping the South’s legal system in the interests of labor control and racial subordination.”<sup>35</sup> All the while, Redeemers waged propaganda campaigns to retell the promises of Reconstruction into tales of liberal government overreach in need of a redemptive arc.<sup>36</sup> This propaganda, along with de jure and de facto violence, will be played out time and again in each new epochal iteration.

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<sup>34</sup> EARL WARREN, *THE MEMOIRS OF CHIEF JUSTICE EARL WARREN* 293 (1977).

<sup>35</sup> ERIC FONER, *RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION 1863-1877*, at 587-88 (updated ed. 2014).

<sup>36</sup> See EQUAL JUST. INITIATIVE, *supra* note 23, at 98 (“The Union prevailed as victors in the Civil War, but white Southerners and supporters of the Confederacy won the narrative war by distorting memory of the conflict and the Reconstruction period that followed. In the South, Reconstruction was largely documented as a vengeful period in which Northern political interests imposed illegitimate rule and Black dominance on a beleaguered but determined white South that ultimately regained its rightful claim to self-rule. As early as 1866, Edward Pollard’s book, *The Lost Cause*, praised the Confederate rebellion as a constitutional and noble cause.”); see also DUBOIS, *supra* note 24, at 347 (“One cannot study Reconstruction without first frankly facing the facts of universal lying; of deliberate and unbounded attempts to prove a case and win a dispute and preserve economic mastery and political domination by besmirching the character, motives, and commonsense, of every single person who dared disagree with the dominant philosophy of the white South.”).

C. *White Grievance Groundhog Days*

The Reconstruction of 1865 and the 1877 Redemptive backlash repeatedly return throughout America's history: the 1950s and 1960s Civil Rights Era, the 2008 election of Barack Obama, the present-day Black Lives Matter movement, and the innumerable less storied victories for racial equity.<sup>37</sup> Historian Peniel Joseph laments that the country replays an "unfortunate pattern, one that finds [Redeemers], generation after generation, winning the narrative war that defines America's tenuous political reality, shapes our professed moral compass, and guides our economic priorities."<sup>38</sup> Redeemers also rely on the law and those that have been entrusted with its command to look the other way and erase, sanction, or advance the brutalization White supremacy entails.<sup>39</sup> "When people's movements successfully challenge and disrupt racist structures and institutions, and contest the narratives of racial subordination," Charles Lawrence writes, "the plunderers will respond with new law. The new laws will inflict new forms of violence and compose new narratives to make the new violence seem just."<sup>40</sup>

These tactics are emblematic signals of Redemptive eras, and indeed, this country seems to find itself in yet another Redemptive era after the 2020 Uprisings in response to the police murder of George Floyd.<sup>41</sup> Throughout this Article, we will refer to this post-Floyd arc as the Neo-Redemptive Era.<sup>42</sup>

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<sup>37</sup> Peniel E. Joseph, *The Perils and Promise of America's Third Reconstruction*, TIME (Sept. 15, 2022, 6:00 AM), <https://time.com/6211887/america-third-reconstruction/> (on file with CUNY Law Review).

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

<sup>39</sup> Wright et al., *supra* note 18, at 699-700.

<sup>40</sup> Charles R. Lawrence III, *The Fire This Time: Black Lives Matter, Abolitionist Pedagogy and the Law*, 65 J. LEGAL EDUC. 381, 387 (2015).

<sup>41</sup> *See This Day in History: George Floyd Is Killed by a Police Officer, Igniting Historic Protests*, HISTORY (May 24, 2021), <https://perma.cc/J3KM-F33P>. While this era has commonly been summarized as the Floyd era, it is important to recognize that it represented a culmination of decades of police brutalization of countless Black people and people of color, including women, transgender people, children, and men. *See generally* ANDREA RITCHIE, INVISIBLE NO MORE: POLICE VIOLENCE AGAINST BLACK WOMEN AND WOMEN OF COLOR (2017).

<sup>42</sup> This moniker is intended to apply to any contemporary period where White re-trenchment to racial progress creates de jure and de facto policies that pull from the constitutive threads that were emblematic of the original Redemptive Era of 1871. We also note that the term "Neo-Redemption Era" appears two other times in literature, though its use is more specific to the post-Obama period. *See* Kimberley S. Johnson, *The Neo-Redemption Era? APD in the Age of #Black Lives Matter*, 6 POL., GRPS., & IDENTITIES 120, 121 (2018); Steen Miles, Opinion, *Neo-Redemption Era*, CHAMPION (May 1, 2013), <https://perma.cc/S9ZM-AT9E>.

As we describe in this Article, this post-Floyd America strongly exhibits key elements, if not direct parallels, to the White grievance tactics of the first Redemption. For instance, though we do not mark a distinctive moment where the Neo-Redemptive Era begins, we see the insurrection on January 6, 2021 as an event that has stunning corollaries to the climactic elements that punctuated the end of the original Reconstruction Era.

On Easter Sunday in 1873, after a federal judge ruled for a radical Republican in a contested Louisiana election against a racist Southern Democrat, a mob of White insurrectionists marched on a local courthouse.<sup>43</sup> A group of Black people gathered to protect the court's promise of equitable legal power.<sup>44</sup> The White mob burned the courthouse to the ground, and even after the Black defenders surrendered, the White mob hunted down and killed between 62 and 153 of them.<sup>45</sup> After some members of the White mob were held accountable under the Enforcement Act of 1870, the Redemptive Supreme Court ruled that the Act was unenforceable against these White domestic terrorists in the landmark case *United States v. Cruikshank*.<sup>46</sup>

Even more parallel to January 6 was the lead-up to the presidential election of 1876. The conservative Democrat candidate, Samuel Tilden, flirted with the idea of assuming the presidency over radical Republican Rutherford B. Hayes, in spite of Tilden's lack of popular support and the active suppression of Black votes by Southern Democrats.<sup>47</sup> Tilden's candidacy symbolized the White recapture of the South; he ultimately finagled the "1877 Compromise," conceding the election in exchange for Hayes's promise to end Reconstruction.<sup>48</sup> In the lead-up to this compromise, apoplectic White mobs fought vigorously to ensure that their Redemptive savior, Tilden, assumed the presidency no matter the cost,

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<sup>43</sup> See Robert J. McWhirter, *The Supreme Court v. the Gettysburg Address Part 2: How the United States Supreme Court Gutted the Fourteenth Amendment and the Cause of Racial Equality for 100 Years*, ARIZ. ATT'Y MAG., Sept. 2017, at 34; *This Day in History: April 13, 1873: Colfax Massacre*, ZINN EDUC. PROJECT, <https://perma.cc/U2EF-B5YK> (last visited Dec. 18, 2023).

<sup>44</sup> See McWhirter, *supra* note 44, at 34.

<sup>45</sup> *Id.*

<sup>46</sup> 92 U.S. 542, 551 (1875); see also Cherie L. Deogracias, *Race, Reconstruction, and the RICO Act: Using the Racketeer Influenced and Corrupt Organizations (RICO) Act in Prosecutions Against White Supremacist Organizations in America*, 20 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 306, 320-321 (2020).

<sup>47</sup> CBS Sunday Morning, *Voter Fraud, Suppression and Partisanship: A Look at the 1876 Election*, YOUTUBE, at 2:40-5:50 (Oct. 25, 2020), <https://www.youtube.com/watch?v=rWdqTR2YkAU>.

<sup>48</sup> *Id.* at 7:21-8:02; *This Day in History: March 4, 1877: Hayes Takes Office in 1877 Compromise*, ZINN EDUC. PROJECT, <https://perma.cc/76QB-3L23> (last visited Dec. 14, 2023).

coalescing to act out their violent tantrums on Black people and political sites of power alike.<sup>49</sup> In fact, in 1876, a White murderous mob descended on a center of Black political power in Hamburg, South Carolina to express their anger that White men would lose power under free and fair elections.<sup>50</sup> An October 2020 CBS documentary recounts:

There was violence throughout the South against African American voters to try to make it impossible for them to vote. . . . If there had been a fair election in the South, there's no question Hayes would have won by a large margin. . . . There were Democratic newspapers with headlines, "March to Washington to install Tilden as president." There were Republicans saying, "We're on the verge of another civil war." "Tilden or Blood." This idea that if Tilden's not counted in, we might have another war . . . to fight here. . . . There were key Democrats who asked Tilden to take the oath of office anyway.<sup>51</sup>

These White mobs of 1873 and 1876 bear a striking resemblance to those of the January 6, 2021 insurrection. Journalist Kimberly Atkins Stohr of the *Boston Globe* remarked in 2022:

The very same Confederate flags that waved in opposition to Reconstruction efforts then were unfurled during an insurrection less than two years ago. The very votes contested that day were from places where the turnout of Black and Brown people made the difference: Detroit; Milwaukee; Philadelphia, and[] Atlanta. Racial slurs were hurled at U.S. Capitol Police officers. And the insignias of White nationalist groups were proudly displayed on many of the rioters' clothing.<sup>52</sup>

Lastly, our marking of this era as Neo-Redemptive is in keeping with the wisdom of other scholars and historians who have plotted the Reconstructive arcs on contemporary timelines. For example, legal scholar Robert V. Ward Jr. explicitly named *Shelby County v. Holder*,<sup>53</sup> the 2013 Supreme Court case that rendered the Voting Rights Act essen-

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<sup>49</sup> See Lois Beckett, 'The Past Is So Present': How White Mobs Once Killed American Democracy, *GUARDIAN* (Feb. 22, 2021, 6:00 AM), <https://perma.cc/3RGM-K44Q>.

<sup>50</sup> *Id.* ("The attack on the Capitol, [historian Wayne O'Bryant has] said, was 'almost identical' to the way white extremists staged a riot in Hamburg during the high-stakes presidential election of 1876.").

<sup>51</sup> CBS Sunday Morning, *supra* note 48, at 5:25.

<sup>52</sup> Kimberly Atkins Stohr, *Jan. 6 Committee Leaves Crucial Lessons About Race Unspoken*, *EMANCIPATOR*, <https://perma.cc/V56N-D9EJ> (Dec. 20, 2022, 8:28 PM).

<sup>53</sup> 570 U.S. 529 (2013).

tially inert, as the end of the Second Reconstruction.<sup>54</sup> Additionally, historian Peniel Joseph has defined the period between the election of President Obama and January 6 as the Third Reconstruction.<sup>55</sup>

## II. LAW AS A COMMUNICATION OF “REDEMPTIVE” POWER: THE BACKLASH AGAINST DEMOCRATIZATION AND THE RETURN OF WHITE SUPREMACIST LEGAL HEGEMONY

Law is not an agnostic pronouncement of absolute truths and morality; rather, it is a vehicle—one with the ability to perpetrate violence<sup>56</sup>—by which to siphon power and prescribe moral relativity.<sup>57</sup> American law, its jurisprudence, and its administration have been inseparably fused with White supremacist ideological ventures,<sup>58</sup> providing recursive justification for its use to subjugate marginalized peoples and, in particular, Black communities.<sup>59</sup> Legal scholar William Chin states, “Whites have wielded power, and under white dominance, law has been wielded to perpetrate atrocities against African Americans.”<sup>60</sup>

The Civil War brought conflicting visions of America to a head, after which the fight for legal power grew too intense to yield to principles of democracy. The Reconstruction period was characterized by fierce resentment among Southern White people and increasingly, as it wore on, Northern White people and lawyers in particular.<sup>61</sup> The Reconstruction Amendments charged lawyers with implementing the promise of freedom for Black Southerners, despite the virulent resistance of White Southerners.<sup>62</sup> This created a “war of ideas” that moved the overt vio-

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<sup>54</sup> Robert V. Ward Jr., *The Second Reconstruction Is Over*, 7 *TOURO L.J. RACE, GENDER, & ETHNICITY* 75, 75 (2015).

<sup>55</sup> Joseph, *supra* note 38.

<sup>56</sup> William Y. Chin, *Legal Inequality: Law, the Legal System, and the Lessons of the Black Experience in America*, 16 *HASTINGS RACE & POVERTY L.J.* 109, 110 (2019) (“Law can become the continuation of war by other means. ‘Lawfare’ is the strategy of using law in lieu of the military to achieve an ‘operational objective.’” (footnotes omitted)).

<sup>57</sup> See *id.* at 112 (“[L]aw is a tool, and like any tool, it can be used for good or evil depending on who wields power.”).

<sup>58</sup> Lawrence, *supra* note 41, at 385 (“[T]he law employs deeply rooted racist ideologies and narratives to justify human oppression and structural inequality, and how we internalize, repress, and deny those narratives so that we can deny our participation in human carnage and our responsibility for redressing injury.”).

<sup>59</sup> Chin, *supra* note 57, at 110 (“The operational objective of Whites has been to undermine black resistance to white supremacy. To achieve this objective, Whites used law as a counterinsurgency tool to pacify the African American population.” (footnote omitted)).

<sup>60</sup> *Id.* at 112.

<sup>61</sup> See generally Norman W. Spaulding, *The Discourse of Law in Time of War: Politics and Professionalism During the Civil War and Reconstruction*, 46 *WM. & MARY L. REV.* 2001 (2005).

<sup>62</sup> *Id.* at 2002.

lence of Civil War battlefields to the abstract violence of deciding the dignity of Black people in courtrooms up to and including the United States Supreme Court.<sup>63</sup> This war continued long after White Americans had grown tired of the animosity that still characterizes the American legal dialogue addressing the fundamental question of race.<sup>64</sup> “Chastened and exhausted by this intraprofessional strife,” scholar Norman Spaulding states, “elite lawyers gradually converged on a conservative view of the Reconstruction Amendments stressing constitutional continuity with respect to federalism principles and the irrelevance of federal law to the condition of blacks in the South.”<sup>65</sup>

Redeemers ushered in new installments of their regime in the form of legal administration and lawmaking. As Spaulding notes, the postbellum professionalization of lawyers forced the delegitimizing of the Reconstruction Amendments:

[Professionalization] was equally important in freeing up southern lawyers to “redeem” their state laws from the forced egalitarianism of the preceding decade. . . . By the 1890s, the fruit of their work was firmly entrenched, *de jure* racial subordination. Thus, modern professional organization did not simply coincide with the retreat from Reconstruction in the 1870s, it also played an important role in the undoing of Reconstruction.<sup>66</sup>

Given the destructive capacities of legal administration, the concerted attention paid to those to whom hegemonic powers offer their control is no coincidence. There has been an intentional project to exclude non-White voices from participation within law-creation. As the seminal critical race theory (“CRT”) scholar Derrick Bell notes, “[S]ome positions [within law] have historically been oppressed, distorted, ignored, silenced, destroyed, appropriated, commodified, and marginalized—and all of this, not accidentally. Conversely, the law simultaneously and systematically privileges subjects who are white.”<sup>67</sup> As will be discussed later in this Article, not only does this uncomfortable history of the legal field underscore the need to have liberative lawyers in the profession; it is also part of the developmental logic of character tests, and thus their illegitimacy.

This White capture of the law has been so routinized that its operation often goes unnoticed or unquestioned, creating a false sense of

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<sup>63</sup> See *id.* at 2051-53.

<sup>64</sup> See *id.* at 2002.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 2102-03 (footnotes omitted).

<sup>67</sup> Derrick A. Bell, *Who's Afraid of Critical Race Theory?*, 1995 U. ILL. L. REV. 893, 901 (1995).

White logic as legal neutrality.<sup>68</sup> Considering the tendency of legal jurisprudence and its exercise to be read through a hegemonic lens, those who access the law with a committed praxis to radically transform it also recognize its power to create broad liberative change. Indeed, Bell announces, “It is our hope that scholarly resistance will lay the groundwork for wide-scale resistance. We believe that standards and institutions created by and fortifying white power ought to be resisted.”<sup>69</sup> It is this resistance, which CRT theorists articulate as a Reconstructionist vision,<sup>70</sup> that the White power structure attempts to quell both outside and inside the legal machine, often through restricting marginalized communities’ access to the annals of the profession itself.

The adoption of character requirements, culminating in its final form of Character and Fitness, is one such attempt to suppress the forfeiture of White legal control to democratic governance by disenfranchised communities.

#### A. *The Origin of “Character and Fitness” Systems*

The Character and Fitness system was designed not to ensure integrity or accountability in the legal profession, but to obscure their absence. As Professor Deborah Rhode put it, “Throughout its history, the moral fitness requirement has functioned primarily as a cultural show-piece. [However,] [i]n that role, it has excommunicated a diverse and changing community, variously defined to include not only former felons, but women, minorities, adulterers, radicals, and bankrupts.”<sup>71</sup> In early America, the public had enormous distrust for lawyers’ “blood-suck[ing]” practices.<sup>72</sup> Lawyers have an enormous amount of power over people’s lives and liberty, and there was a popular sentiment that people should have that power themselves, rather than untrustworthy

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<sup>68</sup> See Christine Metteer Lorillard, *Stories That Make the Law Free: Literature as a Bridge Between the Law and the Culture in Which It Must Exist*, 12 TEX. WESLEYAN L. REV. 251, 256 (2005) (“Because the law is derived from stock stories of shared cultures, it is law written to an audience characterized as ‘we.’ Traditional legal standards and reasoning are usually found to reflect the white, male voice, which emphasizes ‘rationality, abstractism . . . and universal and objective thinking.’” (footnotes omitted) (quoting Daniel Farber & Suzanna Sherry, *Telling Stories out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807, 810 (1993)).

<sup>69</sup> Bell, *supra* note 68, at 901.

<sup>70</sup> *Id.* at 899 (citing Angela P. Harris, *Foreword: The Jurisprudence of Reconstruction*, 82 CAL. L. REV. 741, 743 (1994)) (“There is, as this description suggests, a good deal of tension in critical race theory scholarship, a tension that Angela Harris characterizes as between its commitment to radical critique of the law (which is normatively deconstructionist) and its commitment to radical emancipation by the law (which is normatively reconstructionist).”).

<sup>71</sup> Rhode, *supra* note 5, at 493.

<sup>72</sup> *Id.* at 496.



lawyers. A representative theory after the Revolution was that because lawyers have power over people's "fortunes, reputations, domestic peace . . . nay, our liberty and life itself . . . [t]heir character must be not only without a stain, but without suspicion."<sup>73</sup> A number of colonies attempted to ban the legal profession altogether.<sup>74</sup> Fearing that the legal profession would be abolished, state bar associations introduced the "Character and Fitness" requirements as a performative charade to mislead the public into believing such systems would tame the plutocratic nature of the legal field.

Recognizing that such requirements were anti-democratic and restricted power over the law to the privileged and well-connected, pro-democracy and anti-lawyer law reformers again mounted challenges to the exclusivity of the legal system.<sup>75</sup> Yielding to organized pressure again, "[f]rom 1820 through the Civil War, bar admission requirements became increasingly less stringent—due to the perceived elitism of extant admission practices as contrary to democratic ideals."<sup>76</sup> During this period, Jacksonian visions of democracy encouraged opening the legal profession to nearly all White men in America.<sup>77</sup> By comparison, while the first Black person was admitted to practice law in 1844, by 1865, there were only ten Black lawyers, all of whom were men, in the entire country.<sup>78</sup>

*B. The Establishment of the Modern Racially Exclusive Character and Fitness System*

During Reconstruction, Black people had begun to enter legislatures in considerable numbers,<sup>79</sup> and several were also beginning to practice law.<sup>80</sup> Every former Confederate state admitted at least one African American person to its bar.<sup>81</sup> However, during the Redemptive Era, White supremacists expelled Black people from both of these sites of power and put in place measures to ensure that democracy and equal

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<sup>73</sup> *Id.* at 507-08 (quoting GEORGE SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS 172 (3d ed. 1869)).

<sup>74</sup> *Id.* at 496.

<sup>75</sup> See Spaulding, *supra* note 62, at 2019-20.

<sup>76</sup> Matthew A. Ritter, *The Ethics of Moral Character Determination: An Indeterminate Ethical Reflection upon Bar Admissions*, 39 CAL. W. L. REV. 1, 6 (2002).

<sup>77</sup> Aaron M. Clemens, *Facing the Klieg Lights: Understanding the "Good Moral Character" Examination for Bar Applicants*, 40 AKRON L. REV. 255, 260 (2007).

<sup>78</sup> Joseph Gordon Hylton, *The African-American Lawyer, the First Generation: Virginia as a Case Study*, 56 U. PITT. L. REV. 107, 108-109, 177 n.39 (1995).

<sup>79</sup> Foner *NPR Transcript*, *supra* note 17.

<sup>80</sup> Angelica Cesario, *Black Legal Pioneers That Changed History*, LAWLINE (June 13, 2020, 1:30 PM), <https://perma.cc/T7RA-Y5BP>.

<sup>81</sup> Hylton, *supra* note 79, at 109.

distribution of power were virtually inaccessible to Black people.<sup>82</sup> The same antipathy towards genuine equity that caused White Northern lawyers to fail to bring the democratic promise of the Reconstruction Era into reality caused lawyers to instead usher in the anti-democratic regimes of the Redemptive Era.<sup>83</sup> As Professor James Fox Jr. noted of this era, “[I]t was Black attorneys in the South who were the lawyers most willing to risk themselves to challenge White supremacy in court. This is also why it became so important to Whites that they control the profession of law itself.”<sup>84</sup> In order to retrench the White male hegemonic control over the law, they created the modern Character and Fitness system in the decades to come.

As White American society re-calcified and sought to further stabilize its power structures, Character and Fitness systems continually adapted to rebuff additional groups calling for equal access to legal power. In her study of the Character and Fitness system, Professor Leslie Levin found that “[n]ativist and ethnic prejudices during the 1920s and economic pressures during the Great Depression fueled renewed calls for barriers to entry to the legal profession and resulted in efforts to stiffen ‘character’ screening.”<sup>85</sup> Around this time, “the profession tried to preserve its homogeneity and superior social status by requiring citizenship and imposing ‘character’ tests.”<sup>86</sup> These character tests developed into the modern Character and Fitness system, whose discriminatory impact has persisted even without explicit biases.

The Character and Fitness system is an extremely effective tool for social repression, especially under the guise of colorblindness, even outside the United States. Legal scholar Aaron Clemens remarks that while the American Character and Fitness system developed with somewhat separate goals and pressures than the British system, one “striking similarity” between the two was that they utilized a “facially neutral character requirement to deny admission to undesirables. The British used it to exclude members of the lower classes, while the American bar’s character requirement placated those who wanted to totally ban lawyers. The

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<sup>82</sup> Olivia B. Waxman, *The Legacy of the Reconstruction Era’s Black Political Leaders*, TIME (Feb. 7, 2022, 4:16 PM), <https://time.com/6145193/black-politicians-reconstruction/> (on file with CUNY Law Review); Darius J. Young, *Henry S. Harmon: Pioneer African American Attorney in Reconstruction-Era Florida*, 85 FLA. HIST. Q. 177, 192 (2006) (detailing the experiences of the first generation of Black attorneys in Florida and elsewhere in the South during and after Reconstruction).

<sup>83</sup> See Spaulding, *supra* note 62, at 2002, 2019.

<sup>84</sup> James W. Fox Jr., *Intimations of Citizenship: Repressions and Expressions of Equal Citizenship in the Era of Jim Crow*, 50 HOW. L.J. 113, 136-137 (2006).

<sup>85</sup> Leslie C. Levin, *The Folly of Expecting Evil: Reconsidering the Bar’s Character and Fitness Requirement*, 2014 BYU L. REV. 775, 781-82 (2015).

<sup>86</sup> *Id.* at 781 (quoting RICHARD L. ABEL, AMERICAN LAWYERS 6 (1989)).

requirement was used to exclude recent immigrants, Jews, women, and ethnic minorities from bar admission.”<sup>87</sup>

C. *The Consequential Lack of Diversity in the Legal Profession*

Like most oppressive systems in American history, the Character and Fitness system has led to present-day disparities in the distribution of power amongst social groups.<sup>88</sup> These disparities are glaring in our direly non-diverse legal profession, which does not accurately represent the people of this country. Research shows that existing Character and Fitness requirements have “had a substantial negative impact on the number of poor, female or minority lawyers.”<sup>89</sup> In 2022, while the United States population was approximately 13.6% Black, only about 5% of lawyers were Black.<sup>90</sup> Likewise, the United States was 19.1% Hispanic, while only 6% of lawyers were Hispanic.<sup>91</sup> In contrast, while the United States was 58.9% White, 81% of lawyers were White.<sup>92</sup> The Character and Fitness system has been overwhelmingly successful at accomplishing its original goals of maintaining White hegemony.

This system has been similarly deployed against those with diverse viewpoints that threaten the status quo. Deborah Rhode’s research reviewed that “[a]pplicants who have denounced government policy, law school administrators, bar certification processes, or the ABA Code of Professional Responsibility have not found favor with local committees.”<sup>93</sup> Admission requirements have also targeted those conservative society labeled as outcasts, “non-conformists of various hues: radicals, religious fanatics, divorcees, fornicators, and any individual who chal-

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<sup>87</sup> Clemens, *supra* note 78, at 260 (footnotes omitted).

<sup>88</sup> See, e.g., Denise Lu et al., *Faces of Power: 80% Are White, Even as U.S. Becomes More Diverse*, N.Y. TIMES (Sept. 9, 2020), <https://www.nytimes.com/interactive/2020/09/09/us/powerful-people-race-us.html> (on file with CUNY Law Review) (detailing racial disparities in positions of power).

<sup>89</sup> Benjamin Hoorn Barton, *Why Do We Regulate Lawyers?: An Economic Analysis of the Justifications for Entry and Conduct Regulation*, 33 ARIZ. STATE L.J. 429, 444 (citing ABEL, *supra* note 87, at 85-108; David E. Bernstein, *Licensing Laws: A Historical Example of the Use of Government Regulatory Power Against African-Americans*, 31 SAN DIEGO L. REV. 89, 90-92 (1994); Richard B. Freeman, *The Effect of Occupational Licensure on Black Occupational Attainment*, in OCCUPATIONAL LICENSURE AND REGULATION 165-79 (Simon Rottenberg ed., 1980); Walter Gellhorn, *The Abuse of Occupational Licensing*, 44 U. CHI. L. REV. 6, 18-19 (1976); Daria Roithmayr, *Barriers to Entry: A Market Lock-In Model of Discrimination*, 86 VA. L. REV. 727, 759-60 (2000)).

<sup>90</sup> *QuickFacts: United States*, U.S. CENSUS BUREAU, <https://perma.cc/V9SV-6NT3> (last visited Dec. 16, 2023); AM. BAR ASS’N, ABA NATIONAL LAWYER POPULATION SURVEY: LAWYER POPULATION BY STATE (2022).

<sup>91</sup> U.S. Census Bureau, *supra* note 91; AM. BAR ASS’N, *supra* note 91.

<sup>92</sup> U.S. Census Bureau, *supra* note 91; AM. BAR ASS’N, *supra* note 91.

<sup>93</sup> Rhode, *supra* note 5, at 568.

lenged the profession's anticompetitive ethical canons."<sup>94</sup> The Character and Fitness has been a cruelly effective tool for preventing democratic access to the legal profession and is continually weaponized today to maintain the oppressive status quo, as further discussed below.

### III. THE RACIAL RECKONING OF GEORGE FLOYD: THE RECONSTRUCTION THAT WASN'T

This Article focuses on the period from after the George Floyd protests to present day as the timeline under which to examine the weaponization of the Character and Fitness and access to the legal profession more broadly. The attempt at racial reckoning that the protests spurred marked the beginning of a new Reconstructive arc. This periodic framing helps us contextualize the contemporaneous spate of public right-wing attacks on the "moral character" of potential lawyers as a Neo-Redemptive tool, unintendedly undermining its legitimacy.

The racial justice protests of 2020 served as an invitation for Reconstruction to have another chance at realization.<sup>95</sup> Possibly the largest political movement in American history,<sup>96</sup> thousands and thousands of people took to the streets as the country saw various racial and ethnic solidarities expressing support for the tenets of the Black Lives Matter movement.<sup>97</sup> In the wake of the protests, America saw the most votes cast in a federal election in its history.<sup>98</sup> New congressional legislation was introduced, including the Justice in Policing Act, addressing police misconduct,<sup>99</sup> and Third Reconstruction, a resolution introduced to counter the predation of neoliberal economics.<sup>100</sup> Police departments across the country were under deep scrutiny for their racial terrorism,<sup>101</sup> with calls to not simply defund them, but to abolish them altogether.<sup>102</sup>

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<sup>94</sup> *Id.* at 502.

<sup>95</sup> Zietlow, *supra* note 13, at 352.

<sup>96</sup> Buchanan et al., *supra* note 12.

<sup>97</sup> *Id.*; Kim Parker et al., *Amid Protests, Majorities Across Racial and Ethnic Groups Express Support for the Black Lives Matter Movement*, PEW RSCH. CTR. (June 12, 2020), <https://perma.cc/7GRT-4WM9>.

<sup>98</sup> William Barber II & Jonathan Wilson-Hartgrove, Opinion, *A Cry of 'I Can't Breathe' United a Generation in a Gasp for Justice*, N.Y. TIMES (May 21, 2021), <https://www.nytimes.com/2021/05/21/opinion/george-floyd-death-william-barber.html> (on file with CUNY Law Review).

<sup>99</sup> George Floyd Justice in Policing Act, H.R. 1280, 117th Cong. (2021).

<sup>100</sup> H.R. Res. 438, 117th Cong. (2021).

<sup>101</sup> See Ram Subramanian & Leily Arzy, *State Policing Reforms Since George Floyd's Murder*, BRENNAN CTR. FOR JUST. (May 21, 2021), <https://perma.cc/SJR9-WSWV>.

<sup>102</sup> See Keeanga-Yamahtta Taylor, *The Emerging Movement for Police and Prison Abolition*, NEW YORKER (May 7, 2021), <https://perma.cc/2PRV-K4RY>; Maya King, *'The World*

Scores of educational and professional programs, corporate and financial institutions, and governments released statements expressing new commitments to reparations and racial equity.<sup>103</sup> And we witnessed the *first ever* Black senator elected from the state of Georgia.<sup>104</sup> There were new possibilities on the horizon, and many saw this moment as the time to finally have America reckon with its racial past.<sup>105</sup>

Yet, just *one day* after the Senate election, this Reconstructive arc was overtaken by Redeemers. The insurrection of January 6, 2021 saw thousands of people, mostly White men,<sup>106</sup> some led by White supremacist paramilitary groups, storm the U.S. Capitol under the spell of former President Donald Trump's aggrieved polemic on the 2020 election.<sup>107</sup> Prominent historians have noted January 6's connection to the parallel efforts that cut short the vision of the Reconstructive South.<sup>108</sup> This swift recapturing solemnly proves that Reconstructive changes require persis-

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*Is Looking at Us': Minneapolis Puts 'Defund the Police' to a Vote*, POLITICO (Sept. 22, 2021, 4:30 AM), <https://perma.cc/6L5F-QEQ7>.

<sup>103</sup> See, e.g., Tracy Jan et al., *Corporate America's \$50 Billion Promise*, WASH. POST, <https://www.washingtonpost.com/business/interactive/2021/george-floyd-corporate-america-racial-justice> (Aug. 24, 2021, 7:03 PM) (on file with CUNY Law Review); Inti Pacheco & Stephanie Stamm, *What CEOs Said About George Floyd's Death*, WALL ST. J. (June 5, 2020, 9:42 AM), <https://www.wsj.com/articles/what-executives-said-about-george-floyds-death-11591364538> (on file with CUNY Law Review); Matt Barnum & Kalyn Belsha, *Protests, Donations, Lesson Plans: How the Education World Is Responding to George Floyd's Killing*, CHALKBEAT, <https://perma.cc/GNH2-76PV> (June 2, 2020, 7:21 PM); Adam Beam, *11 US Mayors Pledge to Pay Reparations for Slavery to Small Groups of Black Residents*, USA TODAY, <https://perma.cc/56T5-3K25> (June 20, 2021, 1:35 PM); Press Release, Ass'n of L. Firm Diversity Pros., Association of Law Firm Diversity Professionals Statement on the Murder of George Floyd and Racism (June 3, 2020), <https://perma.cc/5HJU-QVFV>.

<sup>104</sup> Isaac Chotiner, *Learning from the Failure of Reconstruction*, NEW YORKER (Jan. 13, 2021), <https://www.newyorker.com/news/q-and-a/learning-from-the-failure-of-reconstruction> (on file with CUNY Law Review).

<sup>105</sup> Ailsa Chang et al., *Summer of Racial Reckoning*, NPR (Aug. 16, 2020, 9:00 AM), <https://perma.cc/R9YM-SJJW>.

<sup>106</sup> Anthony Conwright, *American Myths Are Made of White Grievance—and the Jan. 6 Big Lie Is Just the Latest*, MOTHER JONES, <https://perma.cc/B53Q-9WVG> (last visited Dec. 19, 2023); Sabrina Tavernise & Matthew Rosenberg, *These Are the Rioters Who Stormed the Nation's Capitol*, N.Y. TIMES, <https://www.nytimes.com/2021/01/07/us/names-of-rioters-capitol.html> (May 12, 2021) (on file with CUNY Law Review).

<sup>107</sup> Sandhya Dirks, *At the Jan. 6 Hearings, Race Isn't Discussed Much. Still, It's a Central Issue*, NPR (Aug. 23, 2022, 5:23 AM), <https://perma.cc/X49B-8JPC>. See generally *Indictment, United States v. Trump*, No. 1:23-CR-00257-TSC (Aug. 1, 2023).

<sup>108</sup> See Chotiner, *supra* note 105 (quoting Eric Foner's distinct comparisons between the White grievance reaction of January 6 and the White rebellion against the Reconstruction era itself, complete with armed mobs seeking to storm capitals and overthrow the government); Beckett, *supra* note 50 (quoting Wayne O'Bryant's discussion of the similarities between January 6 and the Hamburg riot in response to the 1876 presidential election).

tent commitment in order to transform the country's White rule into racial equity.<sup>109</sup> Unfortunately, this commitment is often unrealized.

#### A. *The Post-Floyd Neo-Redemptive Era*

The post-Floyd Neo-Redemptive Era is composed of White grievance visits from Redemptions past, baked into the modern monsters of our post-COVID American politic: the deranged MAGA campaign to "Stop the Steal" of the decidedly won 2020 election;<sup>110</sup> the dishonest invention of the anti-CRT "crisis";<sup>111</sup> the investment in QAnon post-trutherism;<sup>112</sup> the feverish attempts to suppress the Black vote;<sup>113</sup> the rise in anti-LGBTQ+ laws;<sup>114</sup> the thinly veiled movement for White parental comfort culminating in book bans;<sup>115</sup> and the end of *Roe v. Wade*<sup>116</sup> and affirmative action,<sup>117</sup> to name a few. All of these grievances have come

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<sup>109</sup> Chotiner, *supra* note 105 ("Changing a regime based on slavery to one based on racial equality, that was a pretty big job to do. And it required force. President Grant was elected in 1868 with the slogan, 'Let us have peace.' He wanted reconciliation. Three years later, he's sending troops into South Carolina to crush the Ku Klux Klan. You can't have peace when the other side is out there acting as a terrorist body, assassinating people if they try to vote and things like that. So the tragedy of Reconstruction is that the commitment to enforce it waned much too soon." (quoting Eric Foner)).

<sup>110</sup> See Tom McCarthy, *How Republicans Are Trying to Prevent People from Voting After 'Stop the Steal'*, *GUARDIAN* (Apr. 7, 2021, 3:00 AM), <https://perma.cc/9JQX-YUZR>.

<sup>111</sup> "CRT" refers to critical race theory, a people of color-led scholarship with "an orientation around race that seeks to attack a legal system which disempowers people of color." Bell, *supra* note 68, at 900. While the anti-CRT movement disingenuously sought to mislabel as CRT any teachings around America's racial history and present, this misnomer was chosen intentionally by its architect Christopher Rufo in order to frighten White people into mobilization. Eric Petterson, *The (White) Washing of American History*, 17 *FLA. A&M U. L. REV.* 1, 3-7 (2022).

<sup>112</sup> See generally Kris Hartley, *Owning the Libs: Post-Truth in Right-Wing Political Discourse*, 5 *INT'L REV. PUB. POL'Y F.* 64 (2023); Tim Smith Laing, *Following QAnon into the Age of Post-Post-Truth: The Conspiracy Theory Is the Midwife of a Monstrous New Era*, *ECONOMIST*: 1843 *MAG.* (Aug. 14, 2018), <https://perma.cc/G6MM-2GJ7>.

<sup>113</sup> Will Wilder & Stuart Baum, *5 Egregious Voter Suppression Laws from 2021*, *BRENNAN CTR. FOR JUST.* (Jan. 31, 2022), <https://perma.cc/T9GB-HLR5>; Eugene Robinson, Opinion, *Trump Is Trying to Disenfranchise Black Voters. The GOP Isn't Stopping Him*, *WASH. POST* (Nov. 19, 2020, 4:08 PM), <https://www.washingtonpost.com/opinions/trump-is-trying-to-disenfranchise-black-voters-the-gop-isnt-stopping-him/2020/11/19/44194a2e-2a9f-11eb-92b7-6ef17b3fe3b4> (on file with CUNY Law Review).

<sup>114</sup> Press Release, Hum. Rts. Campaign, Roundup of Anti-LGBTQ+ Legislation Advancing in States Across the Country (May 23, 2023), <https://perma.cc/72CD-UFLU>.

<sup>115</sup> See Phelton Moss, *Book Bans: An Act of Policy Violence Promoting Anti-Blackness*, *NAACP: THE CRISIS* (May 15, 2023), <https://perma.cc/7SWV-QX22>; Esther Wang, *Conservative White Parents Want the Freedom to Ban Books*, *NEW REPUBLIC* (Nov. 16, 2021), <https://perma.cc/X2E6-5EW3>.

<sup>116</sup> 410 U.S. 113 (1973), *overruled by* *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022).

<sup>117</sup> See *Students for Fair Admissions, Inc. v. Harvard Coll.*, 600 U.S. 181 (2023).

together under the new bogeyman of the apoplectic White-wing's "War on Woke," a movement made from the same "resentment that produced the racial terrorism of Reconstruction, the pro-lynching Red Summer of 1919, and the pro-segregation states' rights movement."<sup>118</sup> This war is a barely disguised regurgitation of past government campaigns (like the Red Scare, War on Drugs, and War on Crime) to punish people of color, racial justice truth tellers, and all other "undesirable" dissidents from the White male hegemony.<sup>119</sup>

Just as in the Redemption of old, purveyors of the law have been active in promulgating this new Redemptive Era.<sup>120</sup> From late 2020 through the authoring of this Article, the White conservative power structure has systematically leaned on legal institutions to both promote propaganda and crack down on politically disfavored peoples. Four months after the George Floyd protests, Trump issued Executive Order 13950, banning racial sensitivity trainings for government employees and federal contractors with claims to inoculate "our Republic" from the infection of "woke."<sup>121</sup> After the 2020 presidential election, 49 state legislatures introduced over 440 voter suppression bills in efforts to quell the voting power of 55 million people.<sup>122</sup> During the year and a half immediately following the Floyd protests, dozens of jurisdictions intro-

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<sup>118</sup> Michael Harriot, *War on Wokeness: The Year the Right Rallied Around a Made-Up Menace*, GUARDIAN (Dec. 21, 2022, 1:00 AM), <https://perma.cc/E573-JGF3>. Florida governor and Harvard-trained lawyer Ron DeSantis is largely credited with advancing this "War on Woke." *Id.* It is important to note that "woke" is a term first used within the Black community in the 1930s to stay aware of White systems of control and violence. *Id.*; Aja Romano, *A History of "Wokeness,"* VOX (Oct. 9, 2020, 10:00 AM), <https://perma.cc/KP62-5983>.

<sup>119</sup> See generally James L. Gibson, *Political Intolerance and Political Repression During the McCarthy Red Scare*, 82 AM. POL. SCI. REV. 511 (1988); Nkechi Taifa, Opinion, *Race, Mass Incarceration, and the Disastrous War on Drugs*, BRENNAN CTR. FOR JUST. (May 10, 2021), <https://perma.cc/U2HA-TW82>; *1. National and Local War on Crime*, UNIV. OF MICH.: DETROIT UNDER FIRE, <https://perma.cc/A2C5-VLHC> (last visited Dec. 22, 2023).

<sup>120</sup> Redeemers were "advocates of utilizing the government against democracy." Smithsonian Nat'l Museum of Afr. Am. Hist. & Culture, *The Third Reconstruction: America's Struggle for Racial Justice in the Twenty First Century*, YOUTUBE, at 4:50-4:59 (Sept. 22, 2022), <https://www.youtube.com/watch?v=bzH27WC6xYY&t=6s>.

<sup>121</sup> Exec. Order No. 13950, 3 C.F.R. 60683 (2020); see also Petterson, *supra* note 112, at 15-16. Trump proudly proclaimed, "I BANNED efforts to indoctrinate government employees with divisive and harmful sex and race-based ideologies." Donald J. Trump (@realDonaldTrump), X (Sept. 22, 2020, 6:53 PM), <https://perma.cc/HXC8-6KGH>. "Unfortunately," the executive order states, "this malign ideology is now migrating from the fringes of American society and threatens to infect core institutions of our country." Exec. Order No. 13950, 3 C.F.R. 60683 (2020). This order was reversed by President Biden. Exec. Order No. 13985, 3 C.F.R. 7009 (2021).

<sup>122</sup> POOR PEOPLE'S CAMPAIGN, THIRD RECONSTRUCTION AGENDA TO HEAL THE NATION: END POVERTY AND LOW WAGES FROM THE BOTTOM UP 5 (2022).

duced legislation banning the teaching of CRT in schools.<sup>123</sup> This was accompanied by record-breaking attempts to ban books on race and queerness; there were over 1,200 challenges in 2022 alone, which doubled the already record-breaking total of 2021.<sup>124</sup> There have also been a record number of anti-LGBTQ+ bills (over 520) that have been introduced and considered in states across the country in 2023 alone—all in attempts to entirely eradicate queer existence.<sup>125</sup> Further, “parental rights” bills were introduced in at least thirty-two states across the country in the first half of 2023.<sup>126</sup> Neo-Redeemers have also weaponized concepts such as “academic freedom” and “free speech” to silence campus movements and institutionally punish their proponents.<sup>127</sup> Joann Mickens, executive director of Parents for Public Schools, stated, “I believe that much of what we’re seeing today is no different than the violence and the opposition to the Civil Rights movement.”<sup>128</sup>

Indeed, with the racial consciousness from the Floyd protests at an all-time high, Redemptive politic is delivering its rebuttal—all marked with a particular topsy-turvy war on reality by way of gaslighting oppressed peoples and undermining their truths.<sup>129</sup> We next discuss how

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<sup>123</sup> Rashawn Ray & Alexandra Gibbons, *Why Are States Banning Critical Race Theory?*, BROOKINGS INST., <https://perma.cc/MMT6-73NB> (last visited Dec. 16, 2023).

<sup>124</sup> *Book Ban Attempts Reach Record High in 2022*, *American Library Association Report Says*, PBS NEWSHOUR (Mar. 23, 2023, 10:58 AM), <https://perma.cc/YF3M-AS3F>; see also Wang, *supra* note 116 (“And as in the past, the racism of white conservative parents and their current obsession with ‘critical race theory’ is quickly merging with a sex and gender panic to become a sort of fascist politics, one where the white, straight, nuclear family is cast as under attack.”).

<sup>125</sup> Press Release, Hum. Rts. Campaign, *supra* note 115.

<sup>126</sup> Jackie Valley, *32 States and Counting: Why Parents Bills of Rights Are Sweeping US*, CHRISTIAN SCI. MONITOR (Mar. 24, 2023), <https://perma.cc/ZS6R-3KCE>.

<sup>127</sup> John M. Herbert, *Academic Free Speech or Right-Wing Grievance?*, 2 DIGIT. DISCOVERY 260, 267-69 (2023); John K. Wilson, *Conservatives Have Turned Against Academic Freedom Again. Here’s Why.*, WASH. POST (Sept. 26, 2022, 6:00 AM), <https://www.washingtonpost.com/made-by-history/2022/09/26/conservatives-repress-free-speech-campuses/> (on file with CUNY Law Review); Robin Hackett & Javier Rivera, *Free Speech and Academic Freedom in the Era of the Alt-Right*, 118 RADICAL TCHR. 31, 34-35 (2020); see also Victor Ray, *Weaponizing Free Speech*, INSIDE HIGHER ED (June 29, 2017), <https://perma.cc/HZ7N-3ASL>; FOUND. FOR INDIVIDUAL RTS. & EXPRESSION, *SCHOLARS UNDER FIRE: ATTEMPTS TO SANCTION SCHOLARS FROM 2000 TO 2002 2* (2023), <https://perma.cc/MRG3-DSYA> (reporting that the largest number of scholars targeted at once was in 2021, when the conservative organization Turning Point USA targeted sixty-one professors on the organization’s “Professor Watchlist”).

<sup>128</sup> Valley, *supra* note 127.

<sup>129</sup> The war on reality is fueled by the “post-truth phenomenon” in which “[t]he airing of grievances and punishment of political enemies is as far as post-truth ventures intellectually or strategically, and any glimmer of discursive coherence is intended only to bolster the plausibility of weaponized claims in the minds of aggrieved parties searching for their safe identitarian harbor.” Hartley, *supra* note 113, ¶¶ 4, 11.



this theme is reflected in the recent weaponization of the Character and Fitness by public figures attempting to suppress law student activism and their ability to participate in lawmaking.

#### IV. WEAPONIZATION OF CHARACTER AND FITNESS IN OUR NEO-REDEMPTIVE ERA

As a continuation of the political project of the Character and Fitness, a key aspect of our current Neo-Redemptive Era surrounds the right-wing hegemony's post-Floyd interest in controlling the demonstration and dissemination of liberationist ideas, which are categorized as politically "left" ideologies. In the three years since the 2020 protests, there have been several high-profile instances of institutionalists using the threat of denying entry to the legal profession as a device to quell dissent. This is a Neo-Redemptive tactic to punish Reconstructionist visions and restrict access to the legal profession to the White-power project and its sympathizing hegemonies (such as racial capitalism, settler colonialism, carcerality, and patriarchy). Thus, as potential legal professionals are becoming more interested in exposing law's ability to enact violence on the marginalized, the power structures respond with censure and censorship.

Below, we explore how the Character and Fitness system is employed against law students pushing to center civil and racial justice as part of legal consciousness at the University of California, Berkeley, School of Law ("Berkeley Law"); Stanford Law School; and the City University of New York School of Law ("CUNY Law"). We also discuss Florida governor Ron DeSantis's use of anti-immigration law to legitimate restrictions on undocumented people's participation in the legal profession.

##### A. *Backlash at Berkeley Law*

On August 21, 2022,<sup>130</sup> nine law student organizations at Berkeley Law ratified a bylaw<sup>131</sup> to no longer platform any speaker who promotes a viewpoint that promulgates an Israeli apartheid or settler colonial state.<sup>132</sup> This bylaw was adopted with the intent to remain in solidarity with movements to promote safety and justice in Palestine.

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<sup>130</sup> Berkeley L. Students for Just. in Palestine (@berkeleylawforpalestine), INSTAGRAM (Aug. 21, 2022), [https://www.instagram.com/p/Chh\\_43tpLnm/](https://www.instagram.com/p/Chh_43tpLnm/).

<sup>131</sup> Statement of Solidarity, Berkeley L. Students for Just. in Palestine, <https://perma.cc/S9D3-7VDD> (last visited Dec. 20, 2023).

<sup>132</sup> International humanitarian organizations, such as the United Nations, Amnesty International, and Human Rights Watch, have published extensive reports detailing how the political nation-state of Israel has fomented an apartheid regime against Palestinian inhabitants

*“[I]n the interest of protecting the safety and welfare of Palestinian students on campus, [insert organization name] will not invite speakers that have expressed and continued to hold views or host/sponsor/promote events in support of Zionism, the apartheid state of Israel, and the occupation of Palestine.”*<sup>133</sup>

With the adoption of this bylaw, the students were well within their constitutional prerogatives.<sup>134</sup> Despite his opposition to the students, Dean Erwin Chemerinsky himself noted that the adoption of this bylaw by the student groups constituted nothing more than viewpoint choice; under the First Amendment, they cannot be sanctioned.<sup>135</sup> “A student group has the right to choose the speakers they invite on the basis of viewpoint . . . Jewish law students don’t have to invite a Holocaust denier,” Chemerinsky opined.<sup>136</sup>

Yet, unfortunately, it is highly politically disfavored to advocate for Palestinians’ rights to freedom of movement, shelter, citizenship, and life.<sup>137</sup> Due to its political interests, the current American establishment has made speaking on behalf of Palestinian rights not just a third-rail topic, but a civic suicide that brings with it a freight-load of institutional

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such that it runs afoul of international human rights laws. See Michael Lynk (Special Rapporteur), *Rep. on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967*, 10-18, U.N. Doc. A/HRC/49/87 (Aug. 12, 2022); Amnesty Int’l, *Israel’s Apartheid Against Palestinians*, AI Index MDE 15/5141/2022, 11-13 (2022), <https://perma.cc/5LPT-5EQZ>; *A Threshold Crossed: Israeli Authorities and the Crimes of Apartheid and Persecution*, HUM. RTS. WATCH (Apr. 27, 2021), <https://perma.cc/2684-9FW5>; see also ‘Accusing Israel of Apartheid Is Not Anti-Semitic’: Holocaust Historian, AL JAZEERA (Aug. 27, 2023), <https://perma.cc/6AQ3-WG5U>; *A Regime of Jewish Supremacy from the Jordan River to the Mediterranean Sea: This Is Apartheid*, B’TSELEM: THE ISRAELI INFO. CTR. FOR HUM. RTS. IN THE OCCUPIED TERRITORIES (Jan. 12, 2021), <https://perma.cc/9FJ2-SYZJ>.

<sup>133</sup> Berkeley L. Students for Just. in Palestine, *supra* note 131, at slide 3.

<sup>134</sup> Zoha Khalili, *Should We Ban Solidarity—and Student Groups—to Avoid Offending Israel Apologists?*, 54 U. PAC. L. REV. 706, 711 (2023).

<sup>135</sup> See Vimal Patel, *At Berkeley Law, a Debate over Zionism, Free Speech and Campus Ideals*, N.Y. TIMES (Dec. 21, 2022), <https://www.nytimes.com/2022/12/21/us/uc-berkeley-free-speech.html> (on file with CUNY Law Review).

<sup>136</sup> *Id.*

<sup>137</sup> See generally PALESTINE LEGAL & CTR. FOR CONST. RTS., THE PALESTINE EXCEPTION TO FREE SPEECH: A MOVEMENT UNDER ATTACK IN THE US (2015), <https://perma.cc/7UFY-A77L> (detailing the suppression of such advocacy in the United States). It is clear that this same censorious fervor is not meted out to political projects that engage in formalistically similar activities without the same weight of government or institutional backlash. See Nora Barrows-Friedman, *Israel Lobby Fabricates Anti-Semitism Crisis at Berkeley*, ELEC. INTIFADA (Oct. 16, 2022), <https://perma.cc/3BGS-PDUW>. Dylan Saba, a Palestinian advocate and attorney at Palestine Legal, notes that national Jewish campus organization Hillel is “a Zionist organization that holds these commitments in their charter without backlash and furor from university administrators.” *Id.*

and state-sanctioned eviction from civic life.<sup>138</sup> Thus, it was unsurprising that in the wake of the bylaw, there were widespread calls from prominent politicians<sup>139</sup> to investigate<sup>140</sup> and defund both the student organizations and Berkeley Law itself,<sup>141</sup> harnessing the White grievance backlash typified in Redemptive periods.

Interestingly, the White hegemonic power structure also sought to use the legal fixture evaluating professional eligibility—Character and Fitness—against the students. Indeed, the adoption of the bylaw may have largely gone unnoticed if not for a fallacious op-ed written on September 28, 2022 by attorney Kenneth L. Marcus,<sup>142</sup> who would go on to advocate for scrutinizing the students’ moral fitness.<sup>143</sup> Marcus, a Trump

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<sup>138</sup> See Murtaza Hussain, *The Real Cancel Culture: Pro-Israel Blacklists*, INTERCEPT (Oct. 4, 2020, 7:00 AM), <https://perma.cc/Z46F-FMM5>; *US: States Use Anti-Boycott Laws to Punish Responsible Businesses*, HUM. RTS. WATCH (Apr. 23, 2019, 12:00 AM), <https://perma.cc/5T5E-LTZ5>; N.Y. Exec. Order No. 157 (2016).

<sup>139</sup> Press Release, Kevin McCarthy, McCarthy Condemns Antisemitism at Berkeley Law School (Nov. 7, 2022), <https://perma.cc/XCT3-SYM8>.

<sup>140</sup> Attorney Gabriel Groisman sent a complaint on November 18, 2022 to the U.S. Department of Education (“DOE”) Office for Civil Rights claiming religious, racial, or ethnic anti-Jewish discrimination in violation of Title VI of the Civil Rights Act. See Letter from Gabriel Groisman, LSN Law, P.A., & Arsen Ostrovsky, Int’l Legal F., to U.S. Dep’t of Educ. Off. for C.R. (Nov. 18, 2022), <https://perma.cc/5EXA-L53U>. The DOE subsequently opened an investigation on December 13, 2022. See Letter from U.S. Dep’t of Educ. Off. for C.R. to Gabriel Groisman, LSN Law, P.A., & Arsen Ostrovsky, Int’l Legal F. (Dec. 13, 2022), <https://perma.cc/7TMA-Z9HT>. Josh Gottheimer sent a letter to the Secretary of the DOE on November 1, 2022, stating, “I respectfully ask you to report to Congress on whether and how federal taxpayer dollars are used to discriminate against Jewish and pro-Israel students at UC Berkeley.” Letter from Josh Gottheimer, Cong. Representative, 5th Dist. N.J., to Miguel Cardona, Sec’y, U.S. Dep’t of Educ. (Nov. 1, 2022), <https://perma.cc/T75Y-W3JE>.

<sup>141</sup> Dion J. Pierre, *Congressional Candidate Vows to Strip UC Berkeley of Funding over Anti-Israel Ban*, WORLD ISR. NEWS (Oct. 6, 2022), <https://perma.cc/42TH-VY54>; Press Release, Congressman Brad Sherman, Congressman Brad Sherman’s Statement Condemning the Abhorrent Decision by Berkeley Student Groups to Exclude Jewish and Pro-Israel Speakers (Oct. 31, 2022), <https://perma.cc/L39S-56SC> (urging “Berkeley Law to stand with its Jewish students and cease funding to any student organizations that effectively bar Jewish speakers and students from participating”); Press Release, Zionist Org. of Am., ZOA Condemns Antisemitic, Anti-Israel Bylaw at Berkeley Law – Urges That Participating Student Groups’ Recognition Be Revoked (Aug. 31, 2022), <https://perma.cc/75Z4-NFU8> (quoting Susan B. Tuchman, the director of the Zionist Organization of America’s (“ZOA”) Center for Law and Justice, who announced, “The ZOA calls on Berkeley Law to revoke the recognition of [Students for Justice in Palestine] and the other student groups that have adopted this anti-Israel, antisemitic bylaw. Having pledged to violate Berkeley Law’s commitments and values, they don’t deserve the privileges and benefits that the law school affords them.”).

<sup>142</sup> Kenneth L. Marcus, *Berkeley Develops Jewish-Free Zones*, JEWISH J. (Sept. 28, 2022), <https://perma.cc/ZCS3-ZD6S>.

<sup>143</sup> Kenneth L. Marcus, *Is the Tide at Berkeley Beginning to Turn?*, JEWISH J. (Oct. 4, 2022), <https://perma.cc/HRW6-U8H3>.

appointee, formerly served as the civil rights chief of the Department of Education (“DOE”), though he was not serving at the time of this incident.<sup>144</sup> During his tenure at the DOE, Marcus swung the weight of the administrative state to crush activism on student campuses that critiqued Israeli occupation.<sup>145</sup> Even after leaving his office in disgrace, he continued his campaign against these Berkeley Law students, maliciously reframing democratic student decision-making in support of human rights as a bid to create “Jewish-free zones.”<sup>146</sup> Pulling from the Redemptive playbook, Marcus manufactured a crisis to which he then offered his own solution.<sup>147</sup> In a subsequent October op-ed, Marcus linked readers to the California State Bar Association’s website and issued a warning: “[R]emind these groups that their future application for bar membership is contingent upon a moral character determination. Adoption of discriminatory bylaws is hardly evidence of high moral character.”<sup>148</sup> With this threat, Marcus sought to use the existing punitive and neoliberal setup of the Character and Fitness to stop potential lawyers from engaging in Reconstructionist reimaginings of law school.

Marcus’s contributions to the general Neo-Redemptive Era cannot be overstated. Marcus spent much of his larger legal career working to entrench White supremacist hegemony through the erosion of anti-discrimination protections for race, gender, sexual orientation, civil rights, disability, and immigration.<sup>149</sup> He was appointed by Neo-Redemptive figurehead Trump to federal office, intent on eroding educational diversity. He then went on to recast the Palestinian justice movement at Berkeley Law as a threat that required a Redemptive response. Regardless of the veritable lawfulness of the students’ activities, or their moral truth, their move for liberationist advancement threatened the exercise of hegemonic cooptation, control, and exertion of power. As Dylan Saba, Palestinian advocate and attorney for Palestine Legal, notes, these authoritarian crackdowns on student expression pose a very

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<sup>144</sup> Barrows-Friedman, *supra* note 138.

<sup>145</sup> Erica L. Green, *Education Dept.’s Civil Rights Chief Steps Down amid Controversy*, N.Y. TIMES, <https://www.nytimes.com/2020/07/27/us/politics/kenneth-marcus-education-department.html> (July 28, 2020) (on file with CUNY Law Review).

<sup>146</sup> *Id.*; Marcus, *supra* note 143.

<sup>147</sup> See DUBOIS, *supra* note 24, at 347 (“One cannot study Reconstruction without first frankly facing the facts of universal lying; of deliberate and unbounded attempts to prove a case and win a dispute and preserve economic mastery and political domination by besmirching the character, motives, and commonsense, of every single person who dared disagree with the dominant philosophy of the white South.”).

<sup>148</sup> Marcus, *supra* note 144.

<sup>149</sup> Letter from The Leadership Conf. on Civ. & Hum. Rts. et al. to Senators (Jan. 11, 2018), <https://perma.cc/V89U-BTJE>.

real threat to the ability to organize politically itself.<sup>150</sup> Thus, Marcus's use of the Character and Fitness was indeed an attempt to anesthetize Reconstructionist inclinations to fight against injustice in the hopes of restriking the balance in favor of White legal administration.

*B. Stifling Speech at Stanford Law*

On March 9, 2023, the Federalist Society, a deeply conservative, neoliberal power player in legal politics,<sup>151</sup> held an event at Stanford Law School on "Covid, Guns, and Twitter"<sup>152</sup> with Fifth Circuit Court of Appeals judge Kyle Duncan.<sup>153</sup> Judge Duncan, a Trump appointee, has used the power of his pen to issue several rulings against access to contraception, abortion rights, voting rights, affordable health care, and LGBTQ+ existence.<sup>154</sup> Given his track record of disavowing civil rights, many Stanford Law students vigorously protested Judge Duncan's presence<sup>155</sup>—a necessary signal that the discourse of law cannot be divorced from its real-world violence and that the promulgators of such legal violence must be held accountable.

Immediately following these social justice protests, Neo-Redemptive ire quickly took the shape of weaponizing the profession's moral character requirements. Several prominent federal and state actors took decided action to constrict the students' access to the legal profession. Key in their attempts to discredit the students was the use of the Redemptive propaganda of reframing actions for freedom as violent, supercilious, and/or nonsensical. Indeed, Judge Duncan himself com-

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<sup>150</sup> Nate Orbach, *Anatomy of a Scandal: Unraveling the Myth of 'Jewish-Free Zones' at UC Berkeley*, 972 MAG. (Oct. 26, 2022), <https://perma.cc/55K7-NCB3> ("If the constitution protected people from discrimination . . . for holding political views, then the status quo would be permanently held in place, because no one would be allowed to organize politically.").

<sup>151</sup> See Lisa Fanning, *The Corporate Roots of Conservative Legal Thought*, THE [F]LAW (Nov. 7, 2022), <https://web.archive.org/web/20230326084203/https://theflaw.org/articles/the-corporate-roots-of-conservative-legal-thought/> (on file with CUNY Law Review).

<sup>152</sup> *Events: The Fifth Circuit in Conversation with the Supreme Court: Covid, Guns, and Twitter*, STANFORD L. SCH., <https://perma.cc/GAW5-7RJQ> (last visited Dec. 20, 2023).

<sup>153</sup> For Judge Duncan's past events and commentary through the Federalist Society, see *Contributors: Kyle Duncan*, THE FEDERALIST SOC'Y, <https://fedsoc.org/contributors/stuart-kyle-duncan> (last visited Dec. 20, 2023) (on file with CUNY Law Review).

<sup>154</sup> James Larock, *The Worst Trump Judge in America Is Kyle Duncan: The Judge Who Turned a Student Protest into a National Story*, BALLS & STRIKES (Aug. 3, 2023), <https://perma.cc/SMS7-XPA2>; *Judicial Nominations, Stuart Kyle Duncan*, ALL. FOR JUST., <https://perma.cc/6XPD-CLCR> (last visited Dec. 20, 2023).

<sup>155</sup> Joe Patrice, *Federal Judge Calls Stanford Law Students 'Appalling Idiots' After Refusing to Answer Their Questions*, ABOVE THE L. (Mar. 13, 2023, 3:46 PM), <https://perma.cc/Y99N-G35V>.

plained that the students' "illiberal mindset" and "barbarism" made them "unfit to be members of any bar."<sup>156</sup>

U.S. Senator Ted Cruz of Texas gives up that gambit, labeling these students as "burn-it-all-down left-wing radicals" that need to be stopped for fear of disrupting the profession.<sup>157</sup> On March 16, 2023, Senator Cruz penned a letter to the Texas Supreme Court demanding that, in light of the Stanford incident, the court scrutinize the moral character of prospective Texas bar applicants from Stanford who may have been engaged in the protests.<sup>158</sup> He rhetorically asks "whether these students are fit to practice law in the State of Texas," stating that "these students' tantrum raises a fair question as to whether they can be trusted to dispassionately defend clients that might have ideological opinions different from their own."<sup>159</sup> By upturning the question of whether the students themselves would be able to protect their clients' dignity, Senator Cruz implements a common Redemptive tactic to obfuscate that the students *were* animated by the interests of dignity; those like Judge Duncan (and lawyers such as Senator Cruz himself) have been the ones actively stripping people of their dignity through conservative legal actions that curtail human rights.<sup>160</sup> Regardless, Senator Cruz finally concludes with a plea for the court to exercise its Redemptive reflex to quell the entry of Reconstructionist visions through the Character and Fitness—not only for the instant year, but for years to come: "To that end, I would ask that the Texas Board of Bar Examiners, in discharging their duties of assessing the character and fitness of prospective bar applicants, take par-

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<sup>156</sup> Rod Dreher, *Exclusive: US Judge Kyle Duncan Interview*, ROD DREHER'S DIARY (Mar. 12, 2023), <https://roddreher.substack.com/p/exclusive-us-judge-kyle-duncan-interview> (on file with CUNY Law Review).

<sup>157</sup> *Angry Children at Stanford Law School Shout Down a Federal Judge, Biden's Out-of-Control Budget & DOD Caught Leaking Classified Docs to Spin Chinese Spy Balloon, Verdict with Ted Cruz*, at 9:10 (Mar. 13, 2023) (available on Apple Podcasts) ("[Stanford Law is] trying to train social justice warriors, . . . Occupy Wall Street, burn-it-all-down left-wing radicals, . . . Antifa. They're not trying to train lawyers. Attorneys present arguments in front of judges.").

<sup>158</sup> Letter from Ted Cruz, Senator, Tex., to Nathan Hecht, Chief Justice, Tex. Sup. Ct., & Augustin Rivera Jr., Chair, Tex. Bd. of L. Exam'rs. (Mar. 16, 2023), <https://perma.cc/967Z-GP2N>.

<sup>159</sup> *Id.*

<sup>160</sup> For example, Senator Cruz has introduced a bill to bar federal funding that would support the use of people's personal pronouns and preferred names in workplaces. Shepard Price, *Ted Cruz Bill Would Bar Federal Funds to Enforce Preferred Pronouns. Critics Call Out His Preferred Name*, HOUS. CHRON., <https://www.houstonchronicle.com/politics/texas/article/ted-cruz-preferred-name-pronouns-trans-bill-18525846.php> (Dec. 1, 2023, 12:41 PM) (on file with CUNY Law Review).

ticular care with students who have graduated from Stanford Law in class years 2023, 2024, or 2025.”<sup>161</sup>

Dishearteningly, but perhaps not surprisingly, conservative Texas Supreme Court Chief Justice Nathan Hecht<sup>162</sup> responded to Senator Cruz’s petition only three weeks later, acquiescing to his demands.<sup>163</sup> Expressing distrust that schools [read: schools with strong liberative presences] would furnish information on protesting students of their own volition,<sup>164</sup> Justice Hecht notes that his court’s administrative board “is planning to add questions to the bar application to inquire of applicants directly concerning incivility and violations of school policies.”<sup>165</sup> The Texas high court’s swift imposition of an additional legal barrier in response to liberative expressions of solidarity is a reflection of the Redemptive tendency to use legal instruments to mete out punishments.<sup>166</sup>

Senator Cruz was soon joined by the conservative attorney general of Montana, Austin Knudsen. On May 16, 2023, Knudsen petitioned the Montana Supreme Court to sanction Stanford Law students’ advocacy by “delaying or rejecting applications and requiring remedial education

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<sup>161</sup> *Id.*

<sup>162</sup> Nathan Hecht has deep connections to Ted Cruz’s conservative causes and crusades. Ted Cruz endorsed Nathan Hecht’s reelection campaign for the chief judgeship in 2014, which Hecht ultimately won. Ted Cruz exclaimed, “For decades, Chief Justice Hecht has led the judicial conservatives on the Texas Supreme Court, and I’m proud to endorse him.” David Yates, *Cruz Endorses Hecht for Texas Supreme Court*, LEGAL NEWSLINE (Feb. 18, 2014), <https://perma.cc/6PSB-L9HZ>.

<sup>163</sup> Letter from Nathan L. Hecht, Chief Justice, Tex. Sup. Ct., to Ted Cruz, Senator, Tex. (Apr. 7, 2023), <https://perma.cc/ZMY7-2BDV> [hereinafter Hecht Letter].

<sup>164</sup> *See id.* The letter stated, “The Board has historically relied on law schools to report disciplinary matters that should be considered in determining an applicant’s character and fitness for admission to the Texas bar. School reactions to recent violations of free-speech policies suggest that reliance is not justified.” *Id.* Given the timing, this was a clear dig at Tirien Steinbach, the Stanford Law associate dean of diversity and inclusion who courageously defended the students’ actions toward Judge Duncan and stepped down from her position not long after. Karen Sloan, *Stanford Law Assistant Dean Embroiled in Judge’s Free-Speech Controversy Steps Down*, REUTERS (July 20, 2023, 4:34 PM), <https://www.reuters.com/legal/government/stanford-law-assistant-dean-embroiled-judges-free-speech-controversy-steps-down-2023-07-20/> (on file with CUNY Law Review).

<sup>165</sup> Hecht Letter, *supra* note 164.

<sup>166</sup> Senator Cruz’s crusade does not end there; Cruz penned another letter to the president of Stanford University and the dean of Stanford Law School on March 14, 2023. Along with demanding that the school itself sanction the students, Cruz also placed in his letter a call for the school to report the students to Character and Fitness committees. Letter from Ted Cruz, Senator, Tex., to Marc Tessier-Lavigne, President, Stanford Univ., & Jenny Martinez, Dean, Stanford L. Sch. (Mar. 14, 2023), <https://perma.cc/GCR3-5ZJA> (“The eyes of the American legal community are now upon Stanford Law to see whether the school will, in fact, defend the principles of free speech and free inquiry. I can only hope it will.”).

in professional conduct responsibilities.”<sup>167</sup> Perhaps most telling of Knudsen’s Redemptive motivations is his chagrin for leftist student activism in the legal profession. “[T]he atmosphere today in our law schools too often appears geared not toward the preservation of society and the rule of law but precisely toward its opposite: transforming it into a dystopia of mob rule and fanatical intolerance,” he wrote.<sup>168</sup> Commentary by the Heritage Foundation covering Knudsen’s letter praised his efforts to protect American institutions and norms “such as free speech, fact-based decision-making, individualism, and Anglo-American legal principles,” which they laughably claim have “created the most benign and beneficial form of government in human history.”<sup>169</sup> Knudsen affixes this moral responsibility of protecting the neoliberal bastion of the legal profession to the Character and Fitness committees, warning them, “You have an important role to play in countering this trend, and the most obvious and pressing way for you to play that role is by explicitly incorporating respect for free speech generally, and campus speech in particular, into Character and Fitness evaluations. I hope and trust that you will do so.”<sup>170</sup> These employments of the Character and Fitness system once again serve to advance Neo-Redemptive visions of the profession.

### C. Capitulation at CUNY Law

On May 12, 2023, CUNY Law student Fatima Mousa Mohammed delivered her class’s graduation speech, after being chosen by her peers to be their class speaker.<sup>171</sup> During her speech, Fatima educated listeners on Reconstructionist understandings of the law as a manifestation of White supremacy that presupposes legal neutrality.<sup>172</sup> She explained that, to the contrary, it is incumbent on the new crop of prospective law-

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<sup>167</sup> Letter from Austin Knudsen, Att’y Gen., Mont., to Mike McGrath, Chief Justice, Mont. Sup. Ct. (May 16, 2023), <https://perma.cc/GF9U-3DGD> [hereinafter Knudsen Letter].

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

<sup>169</sup> Hans A. von Spakovsky & J. Christian Adams, *Montana Attorney General Fights to Keep Revolutionary Extremists out of Legal Profession*, HERITAGE FOUND. (June 6, 2023), <https://perma.cc/48D6-RH8D>.

<sup>170</sup> Knudsen Letter, *supra* note 168.

<sup>171</sup> Molly Thomas-Jensen & Evan Henley, N.Y.C. Bar Ass’n C.R. Comm., *Statement Concerning CUNY’s Response to Fatima Mohammed’s CUNY School of Law Commencement Speech*, N.Y.C. BAR ASS’N (July 18, 2023), <https://perma.cc/3ALW-D7M6>.

<sup>172</sup> *In CUNY School of Law Commencement Speech, Students for Justice in Palestine (SJP) Activist Fatima Mousa Mohammed Says: America Is an Empire with Ravenous Appetite for Destruction, Violence; Israel Murders Young and Old, Encourages Lynch Mobs; Israel and America Will Fall*, MEMRI TV (May 12, 2023), <https://www.memri.org/tv/sjp-activist-fatima-mohammed-cuny-law-school-commencement-speech-america-israel-empire-destruction>.



yers to take a critical lens to legal practice, including by defending the rights of oppressed Black, Brown, and Palestinian peoples and speaking out against the “fascist NYPD,” deplorable conditions on Rikers Island, and settler colonialism.<sup>173</sup> A twenty-four-year-old of Yemeni heritage,<sup>174</sup> Ms. Mohammed’s rebuke of the White capture of legal institutions received the full weight of the oppressive Redemptive machine.<sup>175</sup>

Two weeks after Ms. Mohammed’s speech, the CUNY Board of Trustees released a statement, caving in to the pressure of Redeemer critique, to condemn her social justice appeal under the legal designation of “hate speech.”<sup>176</sup> Alumni from the CUNY Law class of 1986 sent an open letter expressing their condemnation of the “hateful, antisemitic commencement speech.”<sup>177</sup> One of the authors lamented, “They’re pushing a political agenda. I don’t know . . . how it prepares people for practicing law.”<sup>178</sup> Republican Representative Mike Lawler of New York introduced bill H.R. 3773 to pull federal funding from schools that “authorize, facilitate, provide funding for, or otherwise support any event promoting Anti-Semitism on campus.”<sup>179</sup> Senator Ted Cruz joined

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<sup>173</sup> *Id.*

<sup>174</sup> *Occupied Thoughts: Defending Palestine Free Speech: The Case of Fatima Mohammed*, FOUND. FOR MIDDLE E. PEACE, at 4:15 (Aug. 2, 2023), <https://fmep.org/resource/defending-palestine-free-speech-the-case-of-fatima-mohammed>; Ginia Bellafante, *She Attacked Israel and the N.Y.P.D. It Made Her Law School a Target*, N.Y. TIMES (June 2, 2023), <https://www.nytimes.com/2023/06/02/nyregion/cuny-law-speech-mohammed.html> (on file with CUNY Law Review).

<sup>175</sup> Ms. Mohammed received a torrent of death threats and harassment, both online and in real life. Found. for Middle E. Peace, *supra* note 175, at 6:50-7:30; Press Release, Council on Am.-Islamic Rels., CAIR-NY Condemns CUNY Board of Trustees, Elected Officials for ‘Dishonest and Dangerous’ Attacks on Student Leader (May 31, 2023), <https://perma.cc/2KA4-KFDZ>; see also Jonathan Greenblatt (@JGreenblattADL), X (May 30, 2023, 6:08 PM), <https://twitter.com/JGreenblattADL/status/1663668697578328069?s=20>; Ritchie Torres (@RitchieTorres), X (May 28, 2023, 9:21 PM), <https://twitter.com/RitchieTorres/status/1662992469489795074?s=20>. For information on and critique of Jonathan Greenblatt and the Anti-Defamation League (“ADL”), see Alex Kane & Jacob Hutt, *How the ADL’s Israel Advocacy Undermines Its Civil Rights Work*, JEWISH CURRENTS (Feb. 8, 2021), <https://perma.cc/4JGJ-KPTG>. New York Mayor Eric Adams, who forgot that he was in attendance during the speech, characterized it as “words of negativity and divisiveness” seven days later. Eric Adams (@NYCMayor), X (May 29, 2023, 3:06 PM), <https://perma.cc/EUH4-XCZX>.

<sup>176</sup> *Statement from the Board of Trustees and Chancellor of the City University of New York*, CUNY (May 30, 2023), <https://perma.cc/BJ6C-AYW8>.

<sup>177</sup> Carl Campanile, *First Graduates of CUNY Law Slam School’s Descent into Hotbed of Hate After Commencement Speech*, N.Y. POST, <https://perma.cc/JBY4-79P8> (June 1, 2023, 7:28 PM).

<sup>178</sup> *Id.*

<sup>179</sup> H.R. 3773, 118th Cong. (2023); see also Sahar Tartak, *National Review: What Would Happen If We Defunded Antisemitic Schools?*, CONGRESSMAN MIKE LAWLER (June 5, 2023), <https://perma.cc/6CEY-LQF9>.

the backlash, issuing a warning to his White conservative base about the kinds of people who are attempting to breach the profession: “City University of New York class day speaker slanders Israel & enthusiastically celebrates antisemitism. Cheers on open borders & releasing violent criminals from jail. And decries the ‘fascist NYPD.’ This is a LAW school. Paid for with tax dollars.”<sup>180</sup>

Further, Neo-Redeemers once again decided to use the Character and Fitness system as a cudgel of punishment, with several groups calling for Ms. Mohammed to be prevented from entering the legal profession. On June 4, 2023, the Lawfare Project, an organization that works to protect Zionism on college campuses,<sup>181</sup> sent a letter to the First Department of New York State’s Appellate Division, demanding that it reject Ms. Mohammed’s prospective Character and Fitness application.<sup>182</sup> Mischaracterizing Ms. Mohammed’s Palestinian activism as “profound animosity towards the Jewish community,” the Lawfare Project posited that her “views are fundamentally incompatible with the ethical obligations and principles upheld by the legal profession and leave no question that [she] lacks the character and fitness to practice law.”<sup>183</sup> They ultimately concluded with a Redemptive recommendation: “[C]onsequently, we strongly urge the First Department to reject any future application by Ms. Mohammed to practice law in the State of New York.”<sup>184</sup> Similar Zionist organizations such as the Zionist Organization of America<sup>185</sup> and United with Israel<sup>186</sup> also called for her disqualification.

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<sup>180</sup> Ted Cruz (@tedcruz), X (May 28, 2023, 5:19 PM), <https://twitter.com/tedcruz/status/1662931647891734531>.

<sup>181</sup> *The Campus Civil Rights Project*, THE LAWFARE PROJECT, <https://perma.cc/B9S7-D46H> (last visited Dec. 20, 2023).

<sup>182</sup> Letter from Brooke Goldstein, Exec. Dir., The Lawfare Project, & Benjamin Ryberg, Chief Operations Officer, The Lawfare Project, to Members of the Comm. on Character & Fitness, N.Y. App. Div. First Dep’t (June 4, 2023), <https://perma.cc/UGG8-Z546>.

<sup>183</sup> *Id.*

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

<sup>185</sup> In a particularly vile screed against Ms. Mohammed, the Zionist Organization of America called for “the New York State Court System (and similar entities in all other states) to disqualify Fatima Mohammed from obtaining a law license in New York and elsewhere, because she lacks the requisite good character to become a member of the New York State bar or any other state bar.” Press Release, Zionist Org. of Am., ZOA Demands Action on SJP’s Fatima Mohammed’s Murder-Inciting, Antisemitic, Anti-American CUNY Law Commencement Speech (June 1, 2023), <https://perma.cc/EB6X-JGRN>.

<sup>186</sup> United with Israel, the largest international “pro-Israel” organization community, wrote an op-ed that put out a call for their constituents to send in a letter to the Character and Fitness committee: “Please join The Lawfare Project and ZOA in demanding that this Jew-hating, anti-American graduate be barred from practising law in the state of New York—and, for that matter, anywhere else in the United States.” *ACT NOW! Antisemitic, Anti-American Law Graduate Calling for Insurrection Must NOT Practice in US—Danger to So-*

The Lawfare Project's efforts were followed by Republican city councilwoman Inna Vernikov,<sup>187</sup> who submitted a letter on June 7, 2023, to the Second Department's Committee on Character and Fitness to join in declaring Fatima Mohammed unfit to practice law.<sup>188</sup> In her letter, she writes, "Recognizing that Ms. Mohamed [sic] may very well be within her First Amendment right to say the things she said, the hate and intolerance we saw on display from her address demonstrates that she is unfit for admission to the New York Bar. . . . How could she fairly represent a police officer? A Jewish New Yorker? A veteran? A patriotic American?"<sup>189</sup> Indeed, Vernikov is implicitly signaling the types of people that she believes are more deserving of that First Amendment protection and, in doing so, weaponizes not only her power as a councilmember but also her positionality within the profession to constrict and control access to it. Pulling on the same moral strings as Montana Attorney General Knudsen's letter to the Montana high court, Councilwoman Vernikov exhorts, "As an admitted member of the New York Bar . . . , I consider it my duty to bring this potential candidate's moral character deficiencies to your attention."<sup>190</sup>

Furthermore, Warren S. Hecht, an appellate attorney in New York who has also been a member of the New York State Bar Committee on Courts of Appellate Jurisdiction, wrote his own op-ed showing how the use of the Character and Fitness is an intentional project.<sup>191</sup> "Some believe that it is time to take a new approach," he pens, before picking out several statements in Ms. Mohammed's speech to make his claim that Ms. Mohammed would not be able to uphold the Constitution or "practice law in a competent, ethical, or professional" manner, as required by New York's Character and Fitness application.<sup>192</sup> Hecht claims that her call for the fall of oppressive, hegemonic political orders (such as capitalism, racism, imperialism, and Zionism) would likely show that "she believes that the government, including the legal system as it exists,

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ciety, UNITED WITH ISR. (June 8, 2023), <https://perma.cc/BV9C-FSZX>; *About Us*, UNITED WITH ISR., <https://perma.cc/5AXN-H9S3> (last visited Dec. 20, 2023).

<sup>187</sup> *District 48: Inna Vernikov: Biography*, N.Y.C. COUNCIL, <https://perma.cc/7QKZ-ADF8> (last visited Dec. 17, 2023).

<sup>188</sup> Letter from Inna Vernikov, N.Y.C. Councilmember, to Muriel Gennosa, Counsel, Comm. on Character & Fitness, N.Y. App. Div. Second Dep't (June 7, 2023), *available at* Inna Vernikov (@InnaVernikov), X (June 7, 2023, 2:50 PM), <https://twitter.com/InnaVernikov/status/1666517921487618048>.

<sup>189</sup> *Id.* (alterations omitted).

<sup>190</sup> *Id.*

<sup>191</sup> See Warren S. Hecht, *Lack of Character*, QUEENS JEWISH LINK (June 14, 2023), <https://perma.cc/T8R9-P9QE>; LEAVEWORTHY (N.Y. State Bar Ass'n Comm. on Cts. of App. Jurisdiction), Spring 2010, at 1.

<sup>192</sup> Hecht, *supra* note 192.

should be overthrown.”<sup>193</sup> Thus, Hecht claims, Ms. Mohammed fails questions 44 and 45 of the questionnaire, two questions that push applicants to pledge loyalty to the United States and New York State constitutions.<sup>194</sup> He then untruthfully claims that her factual statements about Israel, Rikers, and the U.S. military were deceitful. Hecht lastly points readers to send petitions to disqualify Ms. Mohammed to the New York Appellate Division.<sup>195</sup>

The draconian responses to Ms. Mohammed’s brave proclamations critiquing the law exemplify Neo-Redemptive expressions of control. Reflecting on the exponential rise in anti-liberationist vitriol, Amal Thabateh of Palestine Legal explains:

We’re seeing [it become] more and more severe, and escalate, because there’s a growing fear. We’re seeing that Zionist groups and organizations are . . . sort of coming to terms with the fact that . . . they are not winning the arguments on the merits. . . . Their tactics are failing, and movements are growing. . . . As support for Palestine grows, the opposition targets the advocacy more severely because they’re realizing that they are sort of losing control of public opinion.<sup>196</sup>

#### D. *Fascism in Florida*

Aside from employing the Character and Fitness process directly, Neo-Redeemers have used whitewashed “moral” logic to entirely exclude the participation of non-White peoples from the profession, rationalizing these actions as curtailing criminal character. For example, on May 10, 2023, Florida Governor Ron DeSantis, who is a torchbearer for the Neo-Redemptive movement, signed the anti-immigration S.B. 1718<sup>197</sup> into law in furtherance of his concerted “War on Woke.”<sup>198</sup> Just

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<sup>193</sup> *Id.*

<sup>194</sup> *Id.*; N.Y. STATE SUP. CT. APP. DIV., APPLICATION FOR ADMISSION TO PRACTICE AS AN ATTORNEY AND COUNSELOR-AT-LAW IN THE STATE OF NEW YORK 18, <https://perma.cc/2DWX-8V6Z>. It is important to note that Question 44 and 45 of the New York Character and Fitness challenge privacy, freedom of speech, and freedom of association rights. It is entirely proper to condemn these questions, which are tainted with McCarthyist principles of weeding out dissidents that question the legitimacy of America. All of this is separate and apart from whether Hecht’s uncharitable analysis of Ms. Mohammed’s speech is accurate.

<sup>195</sup> Hecht, *supra* note 192.

<sup>196</sup> Found. for Middle E. Peace, *supra* note 175, at 24:10-25:07.

<sup>197</sup> See *What Does Florida’s SB 1718 Do?*, ACLU OF FLA., <https://perma.cc/Y9MK-CUEV> (last visited Dec. 20, 2023). The initial version of the bill included a further blockade to education by nullifying in-state college tuition for undocumented children, but interestingly, because of economic benefit of having ‘educated’ immigrants (anything for capital), the Florida legislature did not support it. Brandon Girod, *Florida House Passes Sweeping New*

a few of the disturbing edicts include: criminalizing interstate travel of undocumented people,<sup>199</sup> canceling out-of-state licenses from undocumented people from other states,<sup>200</sup> forcing hospitals that accept Medicaid to now ask patients about their immigration status,<sup>201</sup> requiring private employers with more than twenty-five employees and all public agencies to screen their employees' immigration status,<sup>202</sup> and forcing undocumented immigrants who are detained to relinquish a DNA sample.<sup>203</sup> Intriguingly, S.B. 1718 *also* repealed a previous 2014 statute that had allowed certain undocumented people to become lawyers.<sup>204</sup> What is the repeal of attorney admission doing snuck into this larger xenophobic suite of laws? The answer is particularly poignant and revealing of White grievance tactics given the legal history of the 2014 law's passage.

Section 454.021 of the Florida statute became law in 2014 to vindicate Jose Godinez-Samperio, an undocumented immigrant who petitioned the Florida Supreme Court to grant him admittance into the legal

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*Immigration Bill. Here's What's in SB 1718*; PENSACOLA NEWS J., <https://perma.cc/4A3W-QRFJ> (June 26, 2023, 10:08 AM).

<sup>198</sup> DeSantis pronounced in his victory speech in the 2022 Florida gubernatorial election, "Florida is where woke goes to die." Emily Mae Czachor, *"Florida Is Where Woke Goes to Die," Gov. Ron DeSantis Says After Reelection Victory*, CBS NEWS (Nov. 9, 2022, 2:33 PM), <https://perma.cc/X3ZA-ZW7B>; *see also* Amanda Becker, *Why DeSantis' War on 'Woke' Isn't Winning in the GOP Primary*, 19TH NEWS (Aug. 17, 2023, 6:00 AM), <https://perma.cc/F9C8-R9QK>; *Florida's "Terrifying" Anti-Immigration Crackdown Sets Stage for Gov. Ron DeSantis's Presidential Run*, DEMOCRACY NOW! (May 23, 2023), [https://www.democracynow.org/2023/5/23/ron\\_desantis\\_florida\\_immigration\\_crackdown](https://www.democracynow.org/2023/5/23/ron_desantis_florida_immigration_crackdown) (on file with CUNY Law Review).

<sup>199</sup> FLA. STAT. § 787.07(1) (2023).

<sup>200</sup> *Id.* § 322.033.

<sup>201</sup> *Id.* § 395.3027.

<sup>202</sup> *Id.* § 448.095(2).

<sup>203</sup> *Id.* §§ 943.325(3), (7).

<sup>204</sup> Section 454.021(3) allowed for a specified categorization of undocumented minors to become lawyers:

Upon certification by the Florida Board of Bar Examiners that an applicant who is an unauthorized immigrant who was brought to the United States as a minor; has been present in the United States for more than 10 years; has received documented employment authorization from the United States Citizenship and Immigration Services (USCIS); has been issued a social security number; if a male, has registered with the Selective Service System if required to do so under the Military Selective Service Act, 50 U.S.C. App. 453; and has fulfilled all requirements for admission to practice law in this state, the Supreme Court of Florida may admit that applicant as an attorney at law authorized to practice in this state and may direct an order be entered upon the court's records to that effect.

FLA. STAT. § 454.021(3) (repealed 2023). It is unsurprising that this repeal is part of a larger suite of draconian xenophobic laws that includes an increased carceral sweep, including the creation of new felonies regarding identification.

profession upon passing the bar exam in 2011.<sup>205</sup> The Court's per curiam opinion found that the court did not have the legal authority to proscribe eligibility for "public benefits" of bar membership over a current federal prohibition absent the enactment of a state law.<sup>206</sup> Members of the court, however, appeared to volley a strong hint to the Florida legislature to create a legislative fix.<sup>207</sup> The concurring opinion truly explained the moral importance of undocumented access to the legal profession. Justice Jorge Labarga, who authored the concurrence, engaged in consistent discussion of how moral character animates the decisions about inclusion in the legal profession at its core:

[T]he effect an applicant's unlawful presence has on the applicant's record of moral character should be evaluated with two questions in mind: does the public need to be protected from the conduct at issue and does the applicant's unlawful presence reflect moral turpitude or cause a reasonable person to have substantial doubts about the applicant's honesty, fairness, and respect for the rights of others and the law.<sup>208</sup>

Refuting<sup>209</sup> the assertion of a prior 2006 Georgia case ruling that one's status as undocumented has an "undeniable bearing on that applicant's character and fitness to practice law,"<sup>210</sup> Justice Labarga draws contrast to his own Latine<sup>211</sup> political heritage in order to reveal the Redeemer logic behind xenophobic barriers to the profession:

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<sup>205</sup> John Kennedy, *Trailblazing Migrant Lawyer Got His Chance from Florida Lawmakers. Now, GOP Wants Door Closed*, TALLAHASSEE DEMOCRAT (Mar. 23, 2023, 5:07 AM), <https://perma.cc/EMS8-JMGM>.

<sup>206</sup> Fla. Bd. of Bar Exam'rs. Re: Question as to Whether Undocumented Immigrants Are Eligible for Admission to the Bar, No. SC11-2568 (Fla. Mar. 6, 2014), at 10 (per curiam).

<sup>207</sup> *Id.* at 17.

<sup>208</sup> *Id.* at 19.

<sup>209</sup> See *id.* at 21-22 (Labarga, J., concurring) ("First, unlawful presence is not a criminal offense and does not involve moral turpitude. . . . Moreover, unlawful presence does not prevent an individual from performing the obligations and responsibilities of an attorney; does not in and of itself cause a reasonable person to have substantial doubts about an individual's honesty, fairness, and respect for the rights of others and for the laws; does not affect an individual's trustworthiness; and does not affect an individual's reliability. Thus, unlawful presence in this country is not in and of itself a disqualifying factor for admission to The Florida Bar.").

<sup>210</sup> *Godoy v. Off. of Bar Admissions*, No. 05-CV-0675-RWS, 2006 WL 2085318, at \*5 (N.D. Ga. July 24, 2006).

<sup>211</sup> A note on usage of this term: "[L]anguage has continued to evolve to reflect the changing values of our society and it became common in Latin America to use Latine when referring to a group of people rather than Latino, as using the -e ending isn't masculine or feminine." *A Brief Explainer on Latine and Latinx*, HISP. EXEC. (June 5, 2023), <https://perma.cc/W5SU-KT9L>. Because it is gender neutral, "Latine is [also] used when re-

When I arrived in the United States from Cuba in 1963, soon after the Cuban Missile Crisis—the height of the Cold War—my parents and I were perceived as defectors from a tyrannical communist regime. Thus, we were received with open arms, our arrival celebrated, and my path to citizenship and the legal profession unimpeded by public policy decisions. Applicant, however, who is perceived to be a defector from poverty, is viewed negatively because his family sought an opportunity for economic prosperity. It is this distinction of perception, a distinction that I cannot justify regarding admission to The Florida Bar, that is at the root of Applicant's situation.<sup>212</sup>

Indeed, Justice Labarga explains that whether a bar applicant is rendered as a dutiful deserter of leftist politic or an invader subverting the White capitalist regime is what determines their character and thus ease of access to the profession.

Access to law practice builds power, and it would certainly do so amongst oppressed peoples. Latine advocates have stressed that undocumented residents are hindered significantly without access to attorneys of the same background, one sharing that “attorneys who are immigrants themselves[] not only know and understand the immigration process, but know what it feels like to navigate it.”<sup>213</sup> The DREAM Bar, which submitted an amicus brief on Godinez's behalf, also importantly noted how the Florida Supreme Court itself acknowledged in 1949, “[L]aw practice is so intimately connected with the exercise of judicial power in the administration of justice.”<sup>214</sup> Thus, as a response to a potential increase in marginalized community power, DeSantis's repeal of Section 454.021 ensured that *no* undocumented person will be able to become a lawyer in Florida, and even some with residency will be prevented.<sup>215</sup> This shines light on Governor DeSantis's Neo-Redemptive need to capture and solidify White legal control by repealing undocumented access to the legal profession in Florida altogether.

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ferring to a group of people of multiple genders or for someone identifying as nonbinary, gender fluid, genderqueer, bigender, agender, and gender nonconforming.” *Id.*

<sup>212</sup> *Fla. Bd. of Bar Exam'rs.*, No. SC11-2568, at 26 (Labarga, J., concurring).

<sup>213</sup> Danielle Prieur, *A Florida Student's Plan to Become a Lawyer May Be Crushed by an Immigration Bill*, WFSU (Apr. 25, 2023, 7:19 AM), <https://perma.cc/GVR9-ANQV>.

<sup>214</sup> Brief for DREAM Bar Association as Amicus Curiae in Support of Bar Applicant's Amicus Brief on Issues Presented by the Florida Supreme Court at 5, *Fla. Bd. of Bar Exam'rs.*, No. SC11-2568 (alteration in original) (quoting Petition of Fla. State Bar Ass'n, 40 So. 2d 902, 907 (Fla. 1949)).

<sup>215</sup> The new deletion will become effective on November 1, 2028. *CS/CS/SB 1718—Immigration*, FLA. S., <https://perma.cc/FB4G-AL45> (last visited Dec. 17, 2023).

Leaving little to the imagination, DeSantis directly addressed this inclination by stating in a February 2023 Jacksonville press conference, “They’re letting illegal aliens<sup>216</sup> become licensed attorneys in Florida. It’s like, ‘How could you be violating the law and then be practicing the law?’ So we’re going to end that practice.”<sup>217</sup> DeSantis paints migrants of color as unlawful and thus inherently of “bad” character to justify their exclusion from the profession. Yet, as has been discussed endlessly, “unlawfulness” is clearly not a disqualification for being a member of the bar. White lawyers have repeatedly had no qualms about legitimizing lawlessness in order to preserve their power pursuits.<sup>218</sup> Rather, it is the possibility of a Reconstructionist retaking of the law that DeSantis and his fellow Neo-Redeemers wish to quash. Thus, DeSantis’s words are clear articulations of the commitment to regulate access to the profession through character evaluations in a manner that cements White hegemonic control.

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<sup>216</sup> Beyond the legislation, even the usage of this term itself carries with it the great weight of a long history of racist othering. See Keith Cunningham-Parmeter, *Alien Language: Immigration Metaphors and the Jurisprudence of Otherness*, 79 *FORDHAM L. REV.* 1545, 1577, 1579 (2011) (“Through constant, uncritical repetition, the *illegal alien* metaphor has transformed immigrants into a monolithic group of criminal strangers who must be captured, convicted, and expelled. . . . Because ‘illegal alien’ is facially ambiguous . . . the term enables speakers to express racialized concerns in a race-neutral way.”).

<sup>217</sup> First Coast News, *Gov. DeSantis Speaks in Jacksonville About Immigration*, YOUTUBE, at 13:30-13:43 (Feb. 23, 2023), <https://www.youtube.com/watch?v=BAU1wRj56eA>.

<sup>218</sup> See Hannah Grabenstein, *Read the Full Georgia Indictment Against Trump and 18 Allies*, PBS (Aug. 15, 2023), <https://perma.cc/EEQ2-QB5S> (discussing alleged RICO violations by Rudy Giuliani and other Trump lawyers stemming from conspiracy to subvert democratic process); Press Release, U.S. Dep’t. of Justice, Justice Department Challenges Racially Discriminatory Provisions of New Mississippi Law Targeting Hinds County (July 12, 2023) (detailing a Department of Justice complaint challenging a Mississippi law that created a separate unelected White court system over majority-Black Hinds County); Kimberlee Kruesi, *Tennessee Governor Signs Off on Eliminating Community Boards with Police Oversight Power*, ASSOCIATED PRESS (May 18, 2023), <https://apnews.com/article/tennessee-police-teachers-bill-lee-6e41966f8d36ab56b16f68c257f5c07e> (on file with CUNY Law Review) (discussing Tennessee’s replacement of police community review boards with committees unable to directly investigate police misconduct); Maegan Vazquez, *Alabama Congressional Map Struck Down Again for Diluting Black Voting Power*, WASH. POST (Sept. 5, 2023), <https://www.washingtonpost.com/politics/2023/09/05/alabama-congressional-map/> (on file with CUNY Law Review) (discussing a judicial ruling that Alabama law diluted Black voting power in violation of the Voting Rights Act). See generally Eric Foner, *The Capitol Riot Reveals the Dangers from the Enemy Within*, NATION (Jan. 8, 2021), <https://perma.cc/AF2R-3ERX> (“The events of January 6 are the logical culmination of the disrespect for the rule of law nurtured by the Trump presidency, evidenced in the glorification of armed neo-fascist groups, most notoriously until now at Charlottesville; the whipping up of anti-mask and anti-lockdown riots in Michigan and other states; and the refusal to accept the clear results of the presidential election.”).



## CONCLUSION: A WAY FORWARD

As these recent examples show, the Character and Fitness is a convenient and dangerous legal fixture that helps advance our entrenchment in this Neo-Redemptive Era. Its historical origin and resultant structure have seeded fertile ground for White hegemony to continually retrench its exclusive domination over marginalized people and liberative political views. This structural fortification allows for anti-Reconstructionist forces to control legal power and expel disfavored peoples from the profession through the moral-washing of a “character” determination. The full history of the legal profession reveals that no Character and Fitness system was necessary before the introduction of disfavored groups into the pool of aspiring lawyers. If we acknowledge the screening of disfavored groups as the oppressive, anti-democratic master’s tool that it is, the unnecessary and unacceptable nature of our Character and Fitness system comes into focus. These analyses lead us to recognize the urgency for Reconstructionists and anyone working to develop America into a genuine democracy to earnestly evaluate the existence of the Character and Fitness altogether.

Neo-Redeemers have already mapped out the long vision of recapturing the legal profession. The increased criminalization of liberative dissent will only strengthen the punitive processes of this legal paper-bag test and play into the goals of safeguarding a neoconservative legal police force. After the Stanford protests, Judge Duncan warned conservatives of “woke” encroachment: “[I]t doesn’t seem to matter as much right now, [but] just wait five or ten years. Then they will have percolated up through the ranks and will be calling the shots.”<sup>219</sup> In June 2023, the Heritage Foundation put out a national call for “officials in the states to block bar membership to those who seek to tear down and destroy our institutions and our constitutional rights.”<sup>220</sup> In August 2023, State Attorney General Knudsen issued support for a ballot initiative that would have the effect of allowing the conservative legislature in Montana determine who can be attorneys,<sup>221</sup> after expressing dissatis-

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<sup>219</sup> Dreher, *supra* note 157.

<sup>220</sup> von Spakovsky & Adams, *supra* note 170.

<sup>221</sup> Transfer Bar Admission Rulemaking Authority from State Supreme Court to State Legislature Initiative, Const. Initiative No. 124 (CI-124) (Mont. 2024), [https://sosmt.gov/wp-admin/admin-ajax.php?juwpfisadmin=false&action=wpfd&task=file.download&wpfd\\_category\\_id=26&wpfd\\_file\\_id=57610&token=4da10c4cd65766c3798549896424f7a9&preview=1](https://sosmt.gov/wp-admin/admin-ajax.php?juwpfisadmin=false&action=wpfd&task=file.download&wpfd_category_id=26&wpfd_file_id=57610&token=4da10c4cd65766c3798549896424f7a9&preview=1) (on file with CUNY Law Review). This ballot initiative was put forth by a right-wing, election-denier family. Arren Kimbel-Sannit, *Proposed Ballot Measure Would Strip Supreme Court’s Ability to Determine Who Can Become a Lawyer in Montana*, MONT. FREE PRESS (Aug. 8, 2023), <https://perma.cc/KPR6-2XJU>.

faction with the state's "liberal" high court.<sup>222</sup> And, in September 2023, the American Bar Association proposed a new "free expression" rule<sup>223</sup> for law schools, which has the potential to quell leftist dissent—a move recently praised by the Federalist Society in an event moderated by the Florida Supreme Court Chief Justice Carlos G. Muñoz.<sup>224</sup> Knudsen recognizes that "we are at a turning point for the integrity of the legal profession"<sup>225</sup>—indeed, perhaps the new beginning of an even more gerrymandered and segregationist one.

Neo-Redeemers have made much headway, but it is not a foregone conclusion. It is incumbent on Reconstructionists to weaken Redeemer apparatuses, and efforts are already in the works. Legal scholars have written articles pushing back against the exclusionary nature of the Character and Fitness, scrutinizing the discriminatory and chilling effects that character tests create.<sup>226</sup> Liberation advocates, both within and outside of the profession, started a movement to expand access in the legal profession to people of color, the formerly incarcerated, the systems-impacted, and the politically disenfranchised, including demanding total

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<sup>222</sup> Peter Christian, *Montana AG Says 'Liberal Lawyers Own the State Supreme Court,'* NEWSTALK KGVO (Dec. 12, 2022), <https://newstalkkgvo.com/montana-ag-says-liberal-lawyers-own-the-state-supreme-court/> (on file with CUNY Law Review).

<sup>223</sup> Memorandum from Am. Bar Ass'n Strategic Rev. Comm. to Am. Bar Ass'n Council of the Section of Legal Educ. (Aug. 17, 2023) ("A law school shall adopt, publish, and adhere to written policies that encourage and support the free expression of ideas. A law school's free expression policies must: (1) Protect the rights of faculty, students, and staff to communicate ideas that may be controversial or unpopular, including through robust debate, demonstrations, or protests; and (2) Proscribe disruptive conduct that hinders free expression by preventing or substantially interfering with the carrying out of law school functions or approved activities, such as classes, meetings, interviews, ceremonies, and public events.").

<sup>224</sup> Karen Sloan, *Federalist Society Panelists Endorse Proposed Law School Accreditation Rule on Free Speech*, REUTERS (Sept. 18, 2023, 2:33 PM), <https://www.reuters.com/legal/government/federalist-society-panelists-endorse-proposed-law-school-accreditation-rule-free-2023-09-18/> (on file with CUNY Law Review); *Academic Freedom and Freedom of Expression: Will the Proposed Accreditation Standard Support Freedom of Thought at Law Schools?*, THE FEDERALIST SOC'Y, <https://perma.cc/8DY4-PZ9G> (last visited Dec. 17, 2023).

<sup>225</sup> Knudsen Letter, *supra* note 168.

<sup>226</sup> See generally Rhode, *supra* note 5; Langford, *supra* note 5; Harvard L. Sch. Ctr. on the Legal Pro., *Character and Fitness*, PRACTICE MAG., Mar. 2018; Tarra Simmons, *Transcending the Stigma of a Criminal Record: A Proposal to Reform State Bar Character and Fitness Evaluations*, 128 YALE L.J.F. 759 (2019); CAROLINE COHN ET AL., STANFORD CTR. ON THE LEGAL PRO. & STANFORD CRIM. JUST. CTR., UNLOCKING THE BAR: EXPANDING ACCESS TO THE LEGAL PROFESSION FOR PEOPLE WITH CRIMINAL RECORDS IN CALIFORNIA (2019), <https://perma.cc/6XLB-9UFX>; Elizabeth Bodamer & Debra Langer, *Justice-Impacted Individuals in the Pipeline: A National Exploration of Law School Policies and Practices*, L. SCH. ADMISSION COUNCIL, <https://perma.cc/X8GR-M7N9> (last visited Dec. 17, 2023).

admission reform.<sup>227</sup> In March 2023, the New York State Appellate Division eliminated some of the discriminatory portions of the criminal history question on the character questionnaire, a minute acquiescence to the work of advocates.<sup>228</sup> In September 2023, the New Jersey Supreme Court announced a revision on their character application that eliminates inquiry into present mental health diagnoses and treatment.<sup>229</sup> Law students have also mounted challenges against Character and Fitness corollaries on law school admissions applications, in one instance successfully pushing CUNY Law to remove the criminal history question from its application.<sup>230</sup> These movements are modest, but with a full view of the Redemptive playbook, the only true path forward is to remove their tool altogether through the complete abolition of character questionnaires.<sup>231</sup> There is *no* other course that the current conception of the Character and Fitness can take; it must be abolished wholesale in order for the legal system to foster the seeds of liberation and live up to its promise of equal justice for all.

Those committed to the spirit of liberation must follow in these Reconstructionist footsteps and join the fights against hegemonic fixtures within the legal field. This is not simply about expanding the demographics of lawyers; this is for the future “ways we organize our lives, vindicate rights and build solidarity.”<sup>232</sup> We may not know all the answers, but we do know that the legal profession belongs to the people.

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<sup>227</sup> See Ernie Smith, *New Association Seeks to Clear Path to Law Practice for Former Inmates*, ASS’NS. NOW (Aug. 2, 2019), <https://perma.cc/G2N5-UD2A>; Closson, *supra* note 5; *All Things Considered: The Character and Fitness Evaluation to Practice Law Is Discriminatory, Advocates Say: Transcript*, NPR (June 2, 2023), <https://perma.cc/34YV-HTDZ>.

<sup>228</sup> Press Release, N.Y. State Unified Ct. Sys., Presiding Justices of NY’s Appellate Division Announce Changes to Question 26 of Bar Admission Questionnaire (Mar. 16, 2023), <https://perma.cc/WNC8-2NUW>.

<sup>229</sup> Notice—*Supreme Court Limits Inquiries About Mental Health on the Character and Fitness Questionnaire in the Bar Admissions Process*, N.J. CTS. (Sept. 21, 2023), <https://perma.cc/YN86-9Y79>.

<sup>230</sup> Elise Hanks Billing, *Students Lead Movement to Remove Criminal History Question from CUNY Law Application*, CUNY SCH. OF L. (May 18, 2022), <https://perma.cc/82CH-KEH8>.

<sup>231</sup> See generally UNLOCK THE BAR, THE CASE FOR ABOLISHING THE CHARACTER AND FITNESS PROCESS (2022).

<sup>232</sup> *Id.* at 6.