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Awakening the Law: A LatCritical Perspective

Berta Esperanza Hernández-Truyol*

I. INTRODUCTION

The law is asleep; it needs “awakening”—a concept deployed across myriad disciplines to denote attaining a deep consciousness about and connection with the human condition, human actions, and their consequences.¹ The outcome of an awakening is a realization of raw truths that allows seeing realities otherwise obscured by our perceptual playbooks—learned narratives that create rote scripts in our minds founded upon family, culture, religion, and a skewed majoritarian version of “history and tradition” among other factors. Awakening deconstructs the learned myths that perpetuate the status quo and its false claim to neutrality.²

The goal of an awakening is the bettering of human existence. Interestingly, although the law is central to the creation of systems of order that affect humanity, the awakening conversation, so far, is nonexistent in

* Berta Esperanza Hernández-Truyol, Stephen C. O’Connell Chair, University of Florida Levin College of Law. My deepest thanks to the participants at the LatCrit Biennial Conference for their valuable comments during the presentation of this work. Many thanks to Professor Jonathan Cohen, University of Florida College of Law and Solangel Maldonado, Eleanor Bontecou Professor Law, Seton Hall University School of Law, for their comments on an earlier draft. Much appreciation for the invaluable research assistance of Jordan Grana (UF ‘22), Meagan McGurl (UF ‘22), and William Bacharach (UF ‘23). Much gratitude to Victoria A. Redd for her assistance with the production of this essay for publication. Finally, I am very grateful for the University of Florida Levin College of Law Summer Research and Sabbatical Program that provides robust support for intellectual endeavors. Thanks to the SJSJ editors who worked diligently on this essay. One note on structure: the SJSJ’s standards require capitalization of all racial descriptors except for “white.” However, I have asked that all racial descriptors be capitalized, so this work does not fully reflect the Journal’s standards.

¹ See *infra* Part II. Awakening in the law will encompass awakening of those who create, enforce, and apply/interpret the law.

² See *infra* Part II; Peter Amato, *The Theory of Awakening: A Classic Grounded Theory* 99 (2016) (Ph.D. dissertation, Saybrook University) (ProQuest).

law. Notwithstanding that void, or perhaps because of it, the law, patently, is asleep, a state in which awareness of and vigilance to dignitarian affronts and other injustices is impossible. The slumbering law perpetuates the far-from-just legal status quo and often results in unjust privations and inequitable processes and norms. The law is ripe for an awakening that nourishes dignity and justice for all. This essay strives to start the important conversation about awakening the law.

Throughout history, and still actively in the twenty-first century, every day we encounter intentional but unawakened moves to subordinate, marginalize, and exclude others. The law plays either the protagonist or a lead accomplice role in creating and implementing these unjust hierarchies. Examples of present-day subordination and marginalization for which the law is directly responsible range from the voter suppression movements to the anti-transgender movements, from the attacks on reproductive rights to the assault on Critical Race Theory (CRT), from the killing of George Floyd to the loss of lives, families, and freedoms at the southern border. These realities beg for an awakening of the law, for the introduction, integration, and application of an awakened paradigm to law as well as to legal processes and structures.

This essay utilizes a LatCritical lens to initiate the conversation concerning *Awakening the Law*. LatCrit principles of anti-subordination, multidimensionality, and rotating centers³ provide necessary pillars to support the initial stage of the *Awakening the Law* project. With the purpose of crafting both a theoretical framework and a methodology for such an uncharted undertaking, this essay first addresses the general idea of *awakening*. Next, it discusses the historically created structural challenges encountered in theorizing awakening the law. To this end, this essay provides a brief overview of the historic creation of power hierarchies, as

³ *LatCrit–Latina & Latino Critical Legal Theory*, LatCrit.org [hereinafter LatCrit Website].

well as of social and legal movements that, throughout history, have nudged the law to awakening yet have encountered resistance from those who seek to perpetuate the status quo. This essay provides two recent examples that demonstrate the law is asleep: the killing of George Floyd and the disparate burdens of COVID-19 based on race, ethnicity, gender, and sexuality. These narratives provide the background framework to conceptualize an awakened law through a LatCritical lens.

Finally, to provide an example of awakening praxis, this essay closes by applying the proposed paradigm to one of the most contentious constitutional issues of our time: the collision between religious rights on the one hand and liberty rights—particularly, privacy, intimacy, and equality rights—on the other. Specifically, this essay examines the recent and disquieting case of *Fulton v. City of Philadelphia*⁴ to show that notwithstanding much input by interest groups and civil society,⁵ the outcome evidences an asleep law. The analysis utilizes the proposed paradigm to illustrate the application of the awakening model. This essay concludes that the time is ripe for Awakening the Law.

II. AWAKENING

A. The Concept

Awakening is a concept that embraces reaching intentional consciousness. As such, it dovetails with the idea of attaining a critical consciousness,⁶ a model originally developed by Paulo Freire to foster literacy among the oppressed.⁷ To be sure, everyone, not just the oppressed,

⁴ *Fulton v. Philadelphia*, 141 U.S. 1868 (2021).

⁵ See Adam Feldman, *Amicus Briefs on the Merits for the 2020 Supreme Court Term*, THE JURIS LAB (June 3, 2021), <https://above.thelaw.com/2021/06/amicus-briefs-on-the-merits-for-the-2020-supreme-court-term/> [<https://perma.cc/HPE4-DVAU>].

⁶ Alexis Jemal, *Critical Consciousness: A Critique and Critical Analysis of the Literature*, URB. REV. 602, 603–06 (2017).

⁷ See PAULO FREIRE, *PEDAGOGY OF THE OPPRESSED* 35 (30th ed. 2000).

needs to awaken or develop consciousness. For example, to attain liberation for the oppressed who because of their location are aware of injustice, it is imperative that the oppressors and the privileged remove their blinders and recognize their role in the system of “social injustice, unfair distribution of resources and opportunities, and inequity”⁸ Awakening or attaining consciousness entails a “critical social analysis of [a circumstance such as] inequality and taking action to reduce [the problem such as] inequality [in order to] unlock[] human agency,” that is, to experience liberation.⁹

Myriad disciplines embrace the awakening paradigm. Indeed, the notion of awakening is widely accepted and has been advanced in the context of political science,¹⁰ religion,¹¹ psychology,¹² education,¹³ economics,¹⁴ and sociology,¹⁵ but, surprisingly, is wholly lacking in law. To be sure, the related mindfulness movement has reached the law, but mindfulness pertains to the individual’s personal state of mind—to the self—not necessarily society and certainly not to the discipline.¹⁶

⁸ Jemal, *supra* note 6, at 617.

⁹ See generally Saliha Kozan et al., *Awakening, Efficacy, and Action: A Qualitative Inquiry of a Social Justice-Infused, Science Education Program*, 17 ANALYSES SOC. ISSUES & PUB. POL’Y 205 (2017).

¹⁰ See, e.g., Hsin-Yi Yeh, *Using an Awakening Narrative to Leave Behind a Former National-Identity: An Investigation of the Conversion of National-Identity in Taiwan*, 22 NATIONS & NATIONALISM 542 (2016).

¹¹ See, e.g., Nancy Young & Jessica Finnigan, *Mormon Feminist Perspectives on the Mormon Digital Awakening: A Study of Identity and Personal Narratives*, 47 DIALOGUE: J. MORMON THOUGHT 47 (2014).

¹² See, e.g., SHEFALI TSABARY, *A RADICAL AWAKENING* (2021) [hereinafter SHEFALI]; TARA BRACH, *RADICAL ACCEPTANCE: AWAKENING THE LOVE THAT HEALS FEAR AND SHAME* (2003).

¹³ See, e.g., Kozan et al., *supra* note 9.

¹⁴ See, e.g., Alexis Habiyaemye, ‘Angola-mode’ Trade Deals and the Awakening of African Lion Economics, 25 AFR. DEV. REV. 636 (2013).

¹⁵ See, e.g., Patrick Michael Casey, *Conversion to Islam: Narratives of Awakening, Continuity, and Return*, 34 SOC. F. 752 (2019).

¹⁶ See, e.g., RHONDA V. MAGEE, *THE INNER WORK OF RACIAL JUSTICE: HEALING OURSELVES AND TRANSFORMING OUR COMMUNITIES THROUGH MINDFULNESS* (2019) (showing that mindfulness pertains to the individual’s personal state of mind).

The formulae of awakening in the various fields have commonalities. Across disciplines, awakening entails interrogating the status quo¹⁷—a non-neutral position presented as objective truth—often by listening to and analyzing narratives and counternarratives, in particular those voices that have been excluded, erased, or marginalized. In questioning the status quo, awakening demands an examination of whether there exists an ingroup and an outgroup to ascertain whose narrative the status quo confirms and whose narrative the status quo omits or erases. The analysis must query whether patterns of action or proposed actions include the voices of all interested/affected persons and why the action or proposed action fails to include the voices of all those affected. The investigation locates the relevant site of power and examines whether some affected voices are excluded, silenced, or marginalized.¹⁸ Thus, to awaken the law, one needs systematically to explore and identify the existence of sites of power, exclusion of voices, and presence of hierarchies.

Awakening is an ongoing process that first requires awareness of a problem/concern. Upon recognition of a problem, awakening entails naming, reflecting upon, and solving it.¹⁹ Thus, to develop the awakening paradigm in law requires, first the recognition and acknowledgement of a problem, and next, analyzing, questioning, and resolving it. In finding solutions, it is imperative to reject any locations in which there exist inequities not only in law, its creation, interpretation, and application, but also in legal systems, and take action to reduce the unearthed inequities.²⁰ In other words, it requires introspection of the locations where justice is lacking.

¹⁷ Melissa Summer, “*You Are a Racist*”: *An Early Educator’s Racialized Awakening*, 105 SOC. STUD. 193 (2014). See Jonathan R. Cohen, *Open-Minded Listening*, 5 CHARLOTTE L. REV. 139, 150 (2014).

¹⁸ See generally Summer, *supra* note 17.

¹⁹ See generally *id.*

²⁰ Kozan et al., *supra* note 9.

Significantly, in the process of interrogation, interrogators must be aware of and acknowledge their own biases; that is, interrogators must be awakened. For example, in making laws, lawmakers need to become aware of their own predispositions, those fixed in their perceptual playbooks, in order not to embed their personal biases in law. Similarly, law enforcers and judges need to interrogate their actions and positions to ensure they are not the result of biases rooted in their perceptual playbooks.

An important element of awakening for everyone, including interrogators, is that awakening recognizes and embraces the reality that each and every person is guided by what I label our perceptual playbook—the collection of systems of beliefs,²¹ cognitive scripts,²² created and passed down by families, religious traditions, cultures, the societies in which we live as well as by the law, the legal system, and its developed jurisprudence. Each of our perceptual playbooks is imbued with ideas, theories, and tropes that not only define us as individuals but guide how we perceive human interactions and delineate how we comprehend society and the world.²³ Awakening entails the realization that we operate based on our playbooks; it implicates an awareness that each of our perceptual playbooks constitutes the foundation for our viewpoints. Having the realization that the perceptual playbooks are ingrained in us and define our thoughts, our viewpoints, we must engage in a critically conscious analysis of what the foundations for the perceptual playbooks are—a naming of the myriad foundations—an

²¹ See generally SHEFALI, *supra* note 12.

²² Anna Welpinghus, *The Imagination Model of Implicit Bias*, 177 PHIL. STUD. 1611, 1622 (2020).

²³ See, e.g., Berta Esperanza Hernández-Truyol, *Hope, Dignity, and the Limits of Democracy*, 10 NE. U. L. REV. 624 (2018); Berta Esperanza Hernández-Truyol, *Latina Multidimensionality and LatCrit Possibilities: Culture, Gender, and Sex*, 53 U. MIAMI L. REV. 811 (1998-99) [hereinafter Hernández-Truyol, *Latina Multidimensionality*]; Berta Esperanza Hernández-Truyol, *Borders (En)Gendered: Normativities, Latinas, and a Latcrit Paradigm*, 72 N.Y.U. L. REV. 882 (1997) [hereinafter Hernández-Truyol, *Borders (En)Gendered*]. See also Russell K. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093 (2008).

interrogation of their consequences, and action as necessary to resolve the tensions in the foundations of inequitable beliefs.²⁴

What does all this mean? For interrogators, it signifies that they must be not only cognizant of, but also engage in, the deconstruction of their perceptual playbooks. Only with this process will the interrogator be capable of crafting appropriate and relevant questions that can guide finding a just solution to the problem at hand. Moreover, awareness of the playbooks is critical for the interrogator to analyze the responses received in a conscious—an awakened—manner as opposed to a habitual manner based on their ingrained playbook scripts.²⁵

A specific example illustrates the process of awakening. Hsin-Yi Yeh utilized an awakening narrative to study the conversion of national identity in Taiwan from Chinese to Taiwanese.²⁶ Viewing nationalism as a “civil religion” and “[b]ecause people’s national identities represent something fundamental about their ‘selves’[.]” Yeh considers the change in identity as a “significant event/process.”²⁷

Yeh studied self-reports (narratives) of national conversions from Chinese to Taiwanese and illustrated how persons viewed the process as an awakening.²⁸ The reports exposed how textbooks, by adopting and teaching the status quo as fact, endorsed a particular (and skewed) perspective of history—a narrative of Chinese superiority. After awakening, converts to Taiwanese identity viewed the *pre-awakening* self, which once accepted the idea of Chinese superiority, as ignorant and passive.²⁹ The pre-awakening

²⁴ See generally Hernández-Truyol, *Hope, Dignity, and the Limits of Democracy*, *supra* note 23; Hernández-Truyol, *Latina Multidimensionality*, *supra* note 23; Hernández-Truyol, *Borders (En)Gendered*, *supra* note 23.

²⁵ See generally Hernández-Truyol, *Hope, Dignity, and the Limits of Democracy*, *supra* note 23; Hernández-Truyol, *Latina Multidimensionality*, *supra* note 23; Hernández-Truyol, *Borders (En)Gendered*, *supra* note 23.

²⁶ Yeh, *supra* note 10, at 542.

²⁷ *Id.* at 543.

²⁸ *Id.*

²⁹ *Id.* at 548.

self accepted the status quo—Chinese superiority—created by the perceptual playbooks learned and internalized from family, religion, culture, and society.³⁰ In contrast, converts to Taiwanese identity described the *post-awakening* self as knowledgeable and active.³¹ The awakened self pursued the truth unmasked by the interrogation and critical deconstruction of the scripts contained in the perceptual playbooks that ingrained and normalized the idea of Chinese superiority.³² The post-awakened self debunked the status quo-endorsing narrative by engaging in critical analysis of history.³³

A particularly telling narrative about which Yeh writes is the story of a teacher, Lai, who after critical interrogation and deconstruction of their nationalism playbook, awakened.³⁴ Upon awakening, Lai understood that they had internalized the status quo that was taught: China's normativity and Taiwan's erasure.³⁵ Lai proceeded to teach those "truths" as a history teacher.³⁶ Once awakened, Lai apologized to their students for teaching history with many mistakes—"fake history lessons;" Lai realized that what they taught was not history but politics.³⁷

Significantly, Lai's narrative parallels the current assault on CRT.³⁸ As explained by its proponents, CRT is an important body of scholarship that focuses on the U.S. history of subordination of Persons of Color (POC).³⁹ The CRT perspective unveils how that subordination is embedded in the fabric of the country, including law as well as legal and other institutions,

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 550.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 549.

³⁸ See, e.g., Stephen Sawchuk, *What is Critical Race Theory, and Why Is It Under Attack?*, EDUC. WKLY. (May 18, 2021), <https://www.edweek.org/leadership/what-is-critical-race-theory-and-why-is-it-under-attack/2021/05> [<https://perma.cc/P5WX-9JY2>].

³⁹ *Id.*

with the consequence of an enduring racial hierarchy.⁴⁰ One goal in revealing the history of racial hierarchy as well as other locations of subordination—gender, ethnicity, religion, class, ability—is to show that the status quo in law is replete with inherent biases. CRT exposes the inherent racial biases of the existing legal system, seeks to eliminate the hidden and patent partiality with that revealed knowledge base, and proposes a dismantling of the existing biased systems and a reconstruction of the law and legal structure that promotes equality and justice for all. In short, CRT teaches the systemic impacts of racial subordination that had been at best ignored and at worst erased from the prevalent history narratives contained in books and embraced and taught in this country. Indeed, as Yeh showed with respect to nationalism, CRT shows that, with respect to race, what has been and continues to be taught as history is actually “not history but politics.”⁴¹

Notwithstanding the factual accuracy of CRT’s historical narrative about racial subordination, anti-CRT sentiments are high and anti-CRT mandates are proliferating.⁴² CRT antagonists seeking to teach not history but a particular perspective on race and consequently erase “history,” are legislating against hurting the feelings⁴³ of those privileged and benefitted

⁴⁰ See generally NIKOLE HANNAH-JONES, *THE 1619 PROJECT: A NEW ORIGIN STORY* (2021); KIMBERLÉ CRENSHAW ET AL., *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* (1995); RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* (2017).

⁴¹ Yeh, *supra* note 10, at 549.

⁴² David Theo Goldberg, *The War on Critical Race Theory*, BOSTON REV. (May 7, 2021), [https://bostonreview.net/articles/the-war-on-critical-race-theory/\[perma.cc/MR9C-YTJ7\]](https://bostonreview.net/articles/the-war-on-critical-race-theory/[perma.cc/MR9C-YTJ7]); see also Sarah Schwartz, *Map: Where Critical Race Theory Is Under Attack*, EDUC. WKLY. (Dec. 3, 2021), <https://www.edweek.org/policy-politics/map-where-critical-race-theory-is-under-attack/2021/06> [https://perma.cc/BM7Q-LWCK].

⁴³ LatCrit Website, *supra* note 3; see, e.g., Bill No. A08253, 2021-2022 Reg. Sess. § 1 (N.Y. 2021) (describing a proposed amendment, § 801-b, to existing NY education law); see also TENN. CODE ANN., tit. 49, ch. 6, pt. 10, § 51 (effective July 1, 2021), <https://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=HB0580>. In Florida the legislature just passed, and the governor signed, the so-called “Stop Woke Act”

by the prevailing history narrative—those who want to retain the tainted status quo. Indeed, the anti-CRT movement seeks to expunge an unseemly and very long chapter, one still being written, on the unfortunate side of the U.S. history on race. The assault urges, and in some instances requires, the telling of fake history lessons that erase actual occurrences of anti-Black actions.⁴⁴ Awakening unveils the raw truth of the erasure and subordination effected by the anti-CRT legislation; awakening exposes the flawed dominant racial history narrative embedded in history books and popular imagination.

B. Perceptual Playbooks and Knowledge Gaps

Beyond a realization of raw truths through a deconstruction of the biased perceptual playbooks, awakening requires accepting knowledge gaps—admitting, even to ourselves, that there are things we do not know. Moreover, it requires resisting filling such knowledge gaps with learned perceptual playbooks’ fabricated knowledge—a trope that allows us to navigate uncharted waters without deep analysis.

A significant way that awakening will disrupt injustice is by unveiling locations of unconsciousness.⁴⁵ This essay exposes stereotypes, implicit biases, and structural biases as three locations of unconscious biases in

which includes a section providing that “It shall constitute discrimination . . . to subject any student or employee to training or instruction that espouses, promotes, advances, inculcates, or compels such student or employee to believe any of the following concepts . . . A person, by virtue of his or her race, color, sex, or national origin, bears personal responsibility for and must *feel guilt, anguish, or other forms of psychological distress* because of actions, in which person played no part, committed in the past by other members of the same race, color, national origin, or sex.” Chapter 2022-72 Committee Substitute for House Bill No. 7, at 5 (Fla. 2022) (emphasis added).

⁴⁴ See Letter from Robin E. Steenman, Chair, Moms for Liberty, to Penny Schwinn, Comm’r of the Tenn. Dep’t of Educ. (June 30, 2021) (on file with Tennessee Department of Education).

⁴⁵ See generally Hernández-Truyol, *Hope, Dignity, and the Limits of Democracy*, *supra* note 23; Hernández-Truyol, *Latina Multidimensionality*, *supra* note 23; Hernández-Truyol, *Borders (En)Gendered*, *supra* note 23.

perceptual playbooks that ingrain preconceptions as truths.⁴⁶ An exploration of these three sites allows an entry to their dismantling and enables conscious revealing of raw truths.

“[A] stereotype is a fixed, over generalized belief about a particular group or class of people.”⁴⁷ Perceptual playbooks use stereotypes—sexualized, classed, abled, racialized, religioneed, ethnicized, and discriminatory (SCARRED)—to create a persona of outsiders (or insiders).⁴⁸ That stereotype interferes with true knowledge about a particular individual or group. Stereotypes—usually negative and subordinating—based on race, sex, and gender, as well as on religion, ethnicity, ability, and class (and often in combination of any number of the categories) fill in knowledge gaps by creating automatic associations based on the stereotype. Psychological studies have shown that these gap fillers activate in human brains even if persons “disavow the normative content” of the stereotype.⁴⁹

The pervasive phenomenon of implicit bias⁵⁰ dovetails with stereotyping. It is the process by which individuals unconsciously link stereotypes or negative/positive connotations to a class of persons.⁵¹ Implicit bias creates a

⁴⁶ See generally Hernández-Truyol, *Hope, Dignity, and the Limits of Democracy*, *supra* note 23; Hernández-Truyol, *Latina Multidimensionality*, *supra* note 23; Hernández-Truyol, *Borders (En)Gendered*, *supra* note 23.

⁴⁷ Dr. Saul McLeod, *Stereotypes*, SIMPLYPSYCHOLOGY (2017), <https://www.simplypsychology.org/katz-braly.html> [<https://perma.cc/QR7K-CYK4>].

⁴⁸ Tamar Szabó Gendler, *On the Epistemic Cost of Implicit Bias*, 156 PHIL. STUD. 33 (2011).

⁴⁹ *Id.*

⁵⁰ See Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, 102 PSYCH. REV. 4, 19 (1995).

⁵¹ See Kathleen Osta & Hugh Vasquez, *Implicit Bias and Structural Racialization*, NAT’L EQUITY PROJECT, <https://www.nationalequityproject.org/frameworks/implicit-bias-structural-racialization> [<https://perma.cc/Y6SW-CAQP>] [hereinafter Osta & Vasquez, *Implicit Bias*]; see also Kathleen Osta & Hugh Vasquez, *Don’t Talk about Implicit Bias Without Talking About Structural Racism*, NAT’L EQUITY PROJECT, <https://medium.com/national-equity-project/implicit-bias-structural-racism-6c52cf0f4a92> [<https://perma.cc/W2VM-7524>] [hereinafter Osta & Vasquez, *Don’t Talk*].

“[pre-]disposition for skewed evaluations, without intention, which may persist despite conflicting intentions or beliefs.”⁵²

“Implicit biases come from culture. [They are] the thumbprint of the culture on our minds. Human beings have the ability to learn to associate two things together very quickly—that is innate. What we teach ourselves, what we choose to associate is up to us.”⁵³ As the quote suggests, there are two parts to the way that implicit bias manifests in society. The first part is the implicit association (having the bias itself) and the second part is the influence this bias has on behavior (acting on the bias).⁵⁴ Most people have implicit associations, no matter how hard they try to avoid these biases. Not everyone, however, acts on these biases although it takes conscious mental work—awakening—to avoid acting on one’s biases.

Implicit biases are learned;⁵⁵ nobody is born with distinct sentiments toward any particular person or group. Yet, implicit bias affects everyone regardless of how vigorously people try to avoid it. The biases, which are an embedded part of our perceptual playbooks, come from life experiences as informed by culture, religion, family, school, society, and so forth.⁵⁶ Implicit biases result from the internalization and embrace of the daily messages delivered by the world that surrounds us about who belongs and who does not; who is intelligent and who misses the mark; who is strong and who is weak; who is violent and who is passive—in sum, who is “normal” and who deviates from that norm.⁵⁷ It is beyond peradventure that the messages embedded in our perceptual playbooks are SCARRED thereby providing the foundation for our implicit biases.

⁵² Welpinghus, *supra* note 22, at 1629.

⁵³ CATHERINE HILL ET AL., WHY SO FEW? WOMEN IN SCIENCE, TECHNOLOGY, ENGINEERING, AND MATHEMATICS 78 (2010).

⁵⁴ Jules Holroyd, *Responsibility for Implicit Bias*, 43 J. SOC. PHIL. 274, 275 (2012).

⁵⁵ See generally *id.*

⁵⁶ Osta & Vasquez, *Implicit Bias*, *supra* note 51; see also HILL ET AL., *supra* note 53.

⁵⁷ See Osta & Vasquez, *Implicit Bias*, *supra* note 51.

Implicit bias is often categorized (some say wrongly) as spontaneous, unconscious reactions to certain groups of people and situations.⁵⁸ However, implicit bias is often more than spontaneous decision-making.⁵⁹ It can constitute the deployment of “considered decisions,”⁶⁰ such as when someone’s experiences and ideas—their perceptual playbooks—inform their decisions, especially when they are making quick decisions about which they need to feel untroubled and at ease. For example, implicit bias can range from the way people react to strangers when meeting for the first time, to influencing the selection of job candidates,⁶¹ to shaping which groups are most frequently killed by law enforcement.⁶²

Thus, the implicit biases embedded in our perceptual playbooks have consequences. Such biases can be the basis for determining who gets jobs or other economic opportunities, educational opportunities, and healthcare, to name a few of the locations in which implicit bias effects inequality. *Awakening* exposes these realities so they can be transmogrified to render justice and fairness a reality.

Structural bias, juxtaposed to implicit bias, is the *institutional* foundation for subordination of others and perpetuation of SCARRED inequities.⁶³ Structural bias refers to the institutional patterns, policies, practices, and arrangements that privilege some and subordinate others based on identity characteristics.⁶⁴ For example, in a study on leader categorization,

⁵⁸ Welplinghus, *supra* note 22, at 1618.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ Yasir Billoo, *Implicit Bias and Its Application in the Life of a Lawyer*, 93 FL. BAR J. 10, 11 (2019).

⁶² L. Elizabeth Sarine, *Regulating the Social Pollution of Systemic Discrimination Caused by Implicit Bias*, 100 CAL. L. REV. 1359, 1366 (2012).

⁶³ See generally Peggy McIntosh, *White Privilege: Unpacking the Invisible Knapsack*, PEACE & FREEDOM MAG. 10–12 (July/Aug. 1989); William M. Wiecek, *Structural Racism and the Law in America Today: An Introduction*, 100 KY. L. J. 1 (2011).

⁶⁴ Osta & Vasquez, *Don't Talk*, *supra* note 51; Wiecek, *supra* note 63, at 5–7.

researchers found that “Whiteness” is viewed as an attribute of a leader.⁶⁵ Thus, persons belonging to the ingroup are perceived and judged as either (a) better or more competent than, or (b) preferred to persons belonging to the outgroup. As a consequence, persons in the outgroups are excluded from the benefits that insiders obtain and even take for granted be it education, housing, employment, healthcare, or fair treatment at the hands of the law. The dominant narrative—the dominant perceptual playbook—utilizes the outcomes of “others” having less, privations effected by the structural biases in the first place, as confirmation of their implicit biases (i.e., superiority) and as justification for inequality.

Thus, structural bias works together with implicit bias. In this context, affinity bias—the tendency to “gravitate toward people like ourselves in appearance, beliefs, and background,”⁶⁶—is especially harmful to outsiders. In reality and in everyday life, this translates to the designers of social structures deploying affinity biases to benefit the ingroup and subordinate or deprive the outgroup of benefits. To end the endemic disparities of established systems, the system creators and administrators must recognize that their privileged position works to the detriment of “others”—those neither creators of nor participants in the creation of the systems—and be willing to dismantle these hierarchical and biased structures. For example, lawmakers need to become aware of the biases embedded in their perceptual playbooks before they can author laws that can truly achieve just outcomes for all. Both implicit bias and the structures founded upon those biases need awakening.

Thus, awakening consists of critically conscious analysis that exposes the series of assumptions, and patterns of behavior embedded in each of our perceptual playbooks as well as on the structural playbooks created by and

⁶⁵ Ashleigh Shelby Rosette et al., *The White Standard: Racial Bias in Leader Categorization*, 93 J. APPLIED PSYCH. 758 (2008).

⁶⁶ See *What is Affinity Bias?*, LEAN IN, <https://leanin.org/education/what-is-affinity-bias> [<https://perma.cc/9T5U-Z7RV>].

based upon the perceptual playbooks of those in power. Deconstructing perceptual playbooks will allow persons to arrive at raw truth⁶⁷—a truth that eschews learned dualities of good/bad; right /wrong; proper/improper; superior/inferior. For example, in the process of awakening, much as Lai did, I have reached awareness that my individual culture is not the “truth.” In my case, it translates to the “raw truth” that marianismo and machismo are *not* the “correct and only” way to express or perform gender roles; that SCARRED binaries are constructed to maintain the status quo and enforce continued control over the disempowered; that many sexuality and other tropes—racial, gendered, religious, etc.—that set up hierarchies are simply the heteropatriarchy asserting its power; and that bowing to any trope reflects internalized oppression.⁶⁸

Awakening is a life-long process of critical deconstruction of our thoughts grounded upon our learned perceptual playbooks. Every new knowledge or circumstance requires interrogation: how is this knowledge/situation informed by an existing perceptual playbook and what are the impacts of the existing playbook? Awakening allows us to pierce the veil of our individual, internalized perceptual playbooks. That awareness opens the road to liberation. Through awakening, we expose a false self, based on inherited tropes. In awakening, we give birth to an authentic self who becomes cognizant of existing patterns, interrogates those patterns and their sources, systemically challenges and dismantles the playbooks, and creates new narratives/counternarratives.⁶⁹ This evaluation is critically necessary for individuals, communities, societies, and the law.

⁶⁷ Amato, *supra* note 2, at 99.

⁶⁸ Hernández-Truyol, *Borders (En)Gendered*, *supra* note 23, at 882–927; Berta Esperanza Hernández-Truyol, *Latinas—Everywhere Alien: Culture, Gender, and Sex*, in *CRITICAL RACE FEMINISM: A READER* 57 (Adrienne Wing ed., 2d ed. 2003); Hernández-Truyol, *Latina Multidimensionality*, *supra* note 23.

⁶⁹ SHEFALI, *supra* note 12 (“On day 5, Shefali looks at the cycle of belief system, leading to a condition, which leads to a thought, which leads to a feeling, which leads to behavior.”).

Awakening is a process of truth and reconciliation⁷⁰ imbued with continuous cycles of progression and regression.⁷¹ The cycles are clear in the not-yet-completed journeys towards racial, sex, sexuality, economic, and ability justice, to name a few. In these arenas we see progress and retrenchment—concepts addressed in the next section.

III. THE LAW SLEEPS

It is patent that throughout the history of the United States, even before its formation, the law has been asleep. To be sure, a review of history reveals cycles of semi-awakenings—the ebbs and flows of progress and retrenchment.⁷² Yet, the state of sleep has resulted in the entrenchment of the biased perceptual playbooks of the conquerors, the founding fathers, and those who have been in socioeconomic, political, and legal power.

A. A Brief History of Racial Subordination

The history of European colonialism in the Americas, much as the recent murder of George Floyd and COVID experiences, is a history of violence—cultural/ethnic, medical, and spiritual.⁷³ Despite the romanticized Thanksgiving narrative, racial/ethnic violence has been present since the first pilgrims at Plymouth Colony.⁷⁴

For example, the materials used in U.S. schools to teach the country's early history dialectically frame the lands taken by European colonists as

⁷⁰ *Id.* (Day 1, Viral Wisdom).

⁷¹ Amato, *supra* note 2, at 99.

⁷² Claire Bugos, *The Myths of the Thanksgiving Story and the Lasting Damage They Imbue: In Truth, Massacres, Disease and American Indian Tribal Politics Are What Shaped the Pilgrim-Indian Alliance at the Root of the Holiday*, SMITHSONIAN MAG. (Nov. 26, 2019), <https://www.smithsonianmag.com/history/thanksgiving-myth-and-what-we-should-be-teaching-kids-180973655/> [<https://perma.cc/HE8Y-9ZCY>]. See also Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

⁷³ *Id.*

⁷⁴ *Id.*

virginal,⁷⁵ a disingenuous move as the lands that would come to be referred to as North and South America were densely populated.⁷⁶ That population was decimated as Natives suffered catastrophically high death tolls as a result of diseases spread during the Columbian Exchange.⁷⁷ In establishing a hierarchy that survives to date, colonizers viewed themselves as superior to the Native population, a view that opened the door to taking Native land.⁷⁸ Considered “barely human—as ‘heathens’ not readily open to Christianization, they could be forcefully removed in order to make room for the newcomers.”⁷⁹ This biased view of White superiority and, consequently, Native inferiority was not only socioeconomic, it was entrenched in law.⁸⁰ Hence the national perceptual playbook was early established and ingrained in the social and legal fabric of the United States creating the complex web of implicit and structural bias still being unearthed and challenged today.

Conceptualizations of racial supremacy over disparate groups was not limited to the treatment of Native Americans. The Colonies, in response to a shift away from White indentured servants to enslaved Sub-Saharan Africans, adopted a racialized caste system.⁸¹ The growth of slavery culture

⁷⁵ John Ydstie, ‘1491’ Explores the Americas Before Columbus, NPR: ALL THINGS CONSIDERED (Aug. 21, 2005, 12:00 AM), <https://www.npr.org/2005/08/21/4805434/1491-explores-the-americas-before-columbus> [https://perma.cc/XY4B-EMKD].

⁷⁶ Simon Lewis et al., *Colonization of Americas Led to so Much Death It Caused a Period of Global Cooling*, NEWSWEEK (Dec. 8, 2021), <https://www.newsweek.com/americas-colonization-christopher-columbus-native-indigenous-death-global-1313097> [https://perma.cc/XS5R-FV86].

⁷⁷ Ydstie, *supra* note 75.

⁷⁸ Lewis et al., *supra* note 76.

⁷⁹ *Id.*

⁸⁰ Johnson v. McIntosh, 21 U.S. 543, 588 (1823). See generally ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSE OF CONQUEST (1990).

⁸¹ Tally Botzer, *Myths and Misunderstandings: Slavery in the United States*, AM. CIV. WAR MUSEUM (Aug. 15, 2017), <https://acwm.org/blog/myths-and-misunderstandings-slavery-united-states/> [https://perma.cc/C34B-M3SU].

in the Colonies⁸² made ownership of enslaved persons a mark of status.⁸³ The Constitution, a founding document written by and for land owning White men (often slaveholders), was designed with only that power dynamic in mind and has remained relatively consistent in reinforcing the imprint of racial hierarchy in the legal playbooks for almost 200 years.⁸⁴

The early relationship of White male privilege and power results in the racialized and gendered structural bias in law and legal culture of today.⁸⁵ In the context of race, the mere existence of slavery is evidence of an unawakened law—the idea that one human being can own another is an unawakened injustice. The idea that the non-White color of a person’s skin makes them something less than human, merely chattel, is further evidence of unawakening. The Three-Fifths Clause, counting slaves as three-fifths of a person simply to ensure slave owners’ higher representation in Congress was intentional but asleep; it was unawakened: unconscious, and unjust.⁸⁶ The Three-Fifths Clause treated the lives of enslaved Black persons as bargaining chips for proportional regional political power.

Finally, although enslaved persons were theoretically set free,⁸⁷ racial oppression persisted and, throughout history, cycles of racial progress marked by White backlash exist with each cycle serving to solidify the

⁸² Russell R. Menard, *Making a ‘Popular Slave Society’ in Colonial British America*, 43 J. INTERDISC. HIST. 377, 379 (2013).

⁸³ *Id.* at 395 (only after completion of the Jacksonian Revolution was the conceptualization of the political power base expanded to include non-landowning White men); see Stanley L. Engerman & Kenneth L. Sokoloff, *The Evolution of Suffrage Institutions in the New World*, 65 J. ECON. HIST. 891 (2005).

⁸⁴ Engerman & Sokoloff, *supra* note 83, at 9; see also Kenneth B. Nunn, *Law as a Eurocentric Enterprise*, 15 LAW & INEQ. 323 (1997).

⁸⁵ See, e.g., *March 2020 Snapshot: Diversity of the Federal Bench: Current Statistics on the Gender and Racial Diversity of the Article III Courts*, AM. CONST. SOC’Y (Feb. 24, 2020), <https://www.acslaw.org/judicial-nominations/diversity-of-the-federal-bench-march-2020/> [https://perma.cc/NN8R-L9AY].

⁸⁶ See HANNAH-JONES, *supra* note 40, at 169.

⁸⁷ See U.S. Const. amend. XIII (codifying the Emancipation Proclamation).

formulated hierarchy of worth of certain persons.⁸⁸ With the freeing of enslaved persons came White fears—based on stereotypes (ingrained in perceptual playbooks) that persist to date—and led to the creation of the KKK and other organizations aimed at intimidating Black people and continuing Black peoples' subordination.⁸⁹ The legal end of slavery also resulted in the proliferation of Black Codes, repressive laws that limited the rights and permitted continued labor exploitation of Black persons.⁹⁰ The Reconstruction era that opened political office to Black persons and saw an increase in Black business ownership⁹¹ resulted in sociopolitical and legal backlash—events like the Tulsa Massacre⁹² and the passage of Jim Crow laws.⁹³ The Civil Rights Movement resulted in brief individual and collective moments of attenuated consciousness as well as legal reform.⁹⁴ But the awakenings did not take hold; it looks more like sleep-walking. Sixty years later, we are still awaiting much needed change as the killing of

⁸⁸ See, e.g., *Brotha Kaba*, BLACK AWAKENING MOVEMENT (Aug. 31, 2015), <https://blackawakeningmovement.com/meetings/brotha-kaba-2/> [<https://perma.cc/DYE8-WK3D>]; *Cycle of White Backlash in Chart*, BLACK AWAKENING MOVEMENT (Aug. 31, 2015), <https://blackawakeningmovement.com/meetings/cycle-of-white-backlash-in-chart-4/> [<https://perma.cc/T2L6-SG53>].

⁸⁹ See *White Southern Responses to Black Emancipation*, PBS WUFT: AMERICAN EXPERIENCE, <https://www.pbs.org/wgbh/americalexperience/features/reconstruction-white-southern-responses-black-emancipation/> [<https://perma.cc/R7MP-EWHS>].

⁹⁰ Nadra Kareem Nittle, *How the Black Codes Limited African American Progress After the Civil War: The Black Codes Effectively Continued Enslavement for African Americans by Restricting Their Rights and Exploiting Their Labor*, HISTORY.COM (Jan. 28, 2021), <https://www.history.com/news/black-codes-reconstruction-slavery> [<https://perma.cc/8GCE-AQ5E>].

⁹¹ *Reconstruction*, HISTORY.COM, <https://www.history.com/topics/american-civil-war/reconstruction> [<https://perma.cc/3M5U-C4LJ>].

⁹² *Tulsa Race Massacre*, HISTORY.COM (May 26, 2021), <https://www.history.com/topics/roaring-twenties/tulsa-race-massacre> [<https://perma.cc/JCC3-X6E2>].

⁹³ *Jim Crow Laws*, HISTORY.COM (May 26, 2021), <https://www.history.com/topics/early-20th-century-us/jim-crow-laws> [<https://perma.cc/54S5-TYS4>].

⁹⁴ Civil Rights Act of 1964 & 7, 42 U.S.C. § 2000e (1964).

George Floyd and the COVID-19 pandemic's disparate health outcomes confirm.

B. Progress and Backlash of Race, Gender, and Sexuality

The progress/backlash model is not limited to race. Women obtaining the right to control their bodies led to anti-abortion activism that we might soon see succeed in eviscerating women's autonomy.⁹⁵ The ruling of *Smith*⁹⁶ led to RFRA.⁹⁷ The *Obergefell*⁹⁸ ruling led to a proliferation of state RFRA's,⁹⁹

⁹⁵ *Roe v. Wade* held that women had a right to choose to terminate a pregnancy until viability. *Dobbs v. Jackson Women's Health* challenges a Mississippi law that bans abortions after 15 weeks and could overturn *Roe*. Commentators believe that the Court will uphold the Mississippi law. See Adam Liptak, *The Supreme Court Seems Poised to Uphold Mississippi's Abortion Law*, N.Y. TIMES (Dec. 1, 2021), <https://www.nytimes.com/2021/12/01/us/politics/supreme-court-mississippi-abortion-law.html> [<https://perma.cc/H2GS-Q3WP>]. A leak of a draft opinion in *Dobbs*, while not the final opinion, reveals that five justices, Alito, Thomas, Gorsuch, Kavanaugh, and Coney Barrett, appear prepared to overrule *Roe* and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). Josh Gerstein & Alexander Ward, *Supreme Court has Voted to Overturn Abortion Rights, Draft Opinion Shows*, POLITICO (May 3, 2022, 2:14 PM), <https://www.politico.com/news/2022/05/02/supreme-court-abortion-draft-opinion-00029473>. See also Draft Opinion at p.5. *Read Justice Alito's Initial Draft Abortion Opinion Which Would Overturn Roe v. Wade*, POLITICO (May 2, 2022, 9:30 PM), <https://www.politico.com/news/2022/05/02/read-justice-alito-initial-abortion-opinion-overturn-roe-v-wade-pdf-00029504> (draft providing that "[w]e hold that *Roe* and *Casey* must be overruled.").

⁹⁶ *Emp. Div., Dep't of Hum. Res. of Or. v. Smith*, 494 U.S. 872 (1990) (religious beliefs do not excuse compliance with an otherwise valid law prohibiting conduct that government is free to regulate).

⁹⁷ Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (Nov. 16, 1993) (codified as 42 U.S.C. §§ 2000bb-2000bb4) [hereinafter RFRA of 1993] (creating strict scrutiny tests to ensure protection of religious freedom).

⁹⁸ *Obergefell v. Hodges*, 576 U.S. 644 (2015) (holding that the Due Process Clause of the Fourteenth Amendment guarantees the right to marry as one of the fundamental liberties it protects, and that analysis applies to same-sex couples as well as opposite-sex couples).

⁹⁹ In *Obergefell v. Hodges*, the Court held the Fourteenth Amendment protects same-sex marriage. See *id.*

with an interesting intersection with *Hobby Lobby*¹⁰⁰ having utilized the Federal RFRA to erode women's access to full healthcare. Just in 2020, the *Bostock*¹⁰¹ case, which held that the term sex in Title VII included protection of gays, lesbians, and transgender persons, led to an explosion of anti-trans bills across the country.¹⁰² The election of a Black president and more recently, Black and Jewish senators in Georgia, have opened the floodgates of voting restriction laws across the states.¹⁰³ Desperation caused by illness, poverty, hunger, political unrest, and authoritarianism has resulted in massive migrations around the globe that have been met by nativistic resistance and very unawakened outright cruelty. These moves underscore that awakening is not the same as intentionality; consciousness is not the same as knowing. All these moves are as intentional as they are unconscious.

C. Social and Legal Nudges to Awakening

Notwithstanding the ebbs and flows of consciousness, there have been social and legal nudges that have inspired periodic attempts at awakening. For example, social and racial justice *movements* have prodded awakenings including the emancipation,¹⁰⁴ anti-miscegenation,¹⁰⁵ civil rights,¹⁰⁶

¹⁰⁰ *Burwell v. Hobby Lobby Stores, Inc.*, 572 U.S. 683 (2014) (holding that Congress intended for the RFRA to apply to corporations, consequently allowing exclusion of conception from health coverage).

¹⁰¹ *Bostock v. Clayton Cty.*, 140 U.S. 1731 (2020) (holding that title VII prohibition of discrimination on the basis of sex includes prohibition against discrimination in employment against gay and transexual persons).

¹⁰² Legislative Tracker: Anti-Transgender Legislation, <https://freedomforallamericans.org/legislative-tracker/anti-transgender-legislation/> [<https://perma.cc/528B-2HUV>].

¹⁰³ Fredreka Schouten, *Voter Rights Under Attack: 19 States Passed this Year Laws to Restrict Voting, New Tally Finds*, CNN POLITICS (Oct. 4, 2021, 1:38 PM), <https://www.cnn.com/2021/10/04/politics/voting-laws-restrictive-map-october/index.html> [<https://perma.cc/ZXZ7-RA4J>].

¹⁰⁴ *Emancipation Movements*, SLAVERY & REMEMBRANCE: A GUIDE TO SITES, MUSEUMS, AND MEMORY, <http://slaveryandremembrance.org/articles/article/?id=A0077> [<https://perma.cc/5Q2B-ZKX2>].

feminist,¹⁰⁷ queer,¹⁰⁸ social and criminal justice movements.¹⁰⁹ To be sure, each of these movements has seen/triggered backlashes as noted above. Similarly, and sometimes parallel to the social movements, legal theoretical movements—legal realism,¹¹⁰ crits,¹¹¹ femcrits,¹¹² racecrits,¹¹³ queer crits,¹¹⁴ discrits,¹¹⁵ class crits,¹¹⁶ and latcrits¹¹⁷—have worked to awaken the law by revealing, through conscious critical analysis, how social, gendered, racial and ethnicized, sexualized, abled, classed, religioned, and multidimensional

¹⁰⁵ *On This Day: Supreme Court Rejects Anti-Interracial Marriage Laws*, NAT'L CONST. CTR. (June 12, 2021), <https://constitutioncenter.org/blog/today-in-supreme-court-history-loving-v-virginia> [<https://perma.cc/A5J8-7WCB>].

¹⁰⁶ *Civil Rights Movement*, HISTORY.COM (Oct. 27, 2009), <https://www.history.com/topics/black-history/civil-rights-movement> [<https://perma.cc/V9CW-N87J>].

¹⁰⁷ Constance Grady, *The Waves of Feminism, and Why People Keep Fighting Over Them, Explained: If You Have No Idea Which Wave of Feminism We're In Right Now, Read This.*, VOX (July 20, 2018, 9:57 AM), <https://www.vox.com/2018/3/20/16955588/feminism-waves-explained-first-second-third-fourth> [<https://perma.cc/MQE7-UR4P>].

¹⁰⁸ Christina B. Hanhardt, *Queer History*, ORG. OF AM. HISTORIANS, <https://www.oah.org/tah/issues/2019/may/queer-history/> [<https://perma.cc/7YAA-AWNR>].

¹⁰⁹ Aldon Morris, *From Civil Rights to Black Lives Matter: Protest Expert Aldon Morris Explains How Social Justice Movements Succeed*, SCI. AM. (Feb. 3, 2021), <https://www.scientificamerican.com/article/from-civil-rights-to-black-lives-matter1/> [<https://perma.cc/3WUC-BZWC>].

¹¹⁰ *See generally* WILLIAM W. FISHER ET AL., *AMERICAN LEGAL REALISM* (1993) (law is enmeshed with social issues).

¹¹¹ *See generally* ROBERTO UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* (1986) (law is imbued with social biases that serve the interests of those in power, maintain subordination of the marginalized and vulnerable, and maintain the hierarchy of the status quo).

¹¹² *See, e.g.*, CATHERINE MACKINNON, *FEMINISM UNMODIFIED* (1987) (exposes mail as norm).

¹¹³ *See generally supra* note 40.

¹¹⁴ *See, e.g.*, NIKKI SULLIVAN, *A CRITICAL INTRODUCTION TO QUEER THEORY* (2003) (unveiling sexualized hierarchy favoring heteropatriarchy).

¹¹⁵ *See, e.g.*, DAVID J. CONNOR & BETH FERRI, *DISCRIT* (2016) (unmasking the scripts embedding dis/ability).

¹¹⁶ *See, e.g.*, Athena D. Mutua, *Introducing ClassCrits: From Class Blindness to a Critical Legal Analysis of Economic Inequality*, 56 BUFF. L. REV. 859 (Dec. 2008).

¹¹⁷ *See, e.g.*, LatCrit Website, *supra* note 3.

biases are part of the fabric of the law. Justice can only be achieved by dismantling law's flawed foundation.

Recent social realities support the grave need for awakening the law. Indeed, many have referred to the tragic narrative of George Floyd as a moment of racial awakening.¹¹⁸ The filming of the treatment of Floyd by the police created a collective gasp; only one wholly unconscious could remain with a knee on a human being's neck after hearing—over twenty times—a plea: “I can’t breathe!”¹¹⁹ Deservedly, the killing of George Floyd sparked local (U.S.) and global widespread outrage and protests against racism.¹²⁰ The differential treatment of racial minorities and non-racial minorities, such as sexual minorities, at the hands of law enforcement became a cry for justice and yet another nudge for the law to emerge from slumber.¹²¹

Indeed, significant actions taken in response to the protests suggest at least a conscious blink to America's history of institutional racism. For example, across the South, governments removed Confederate monuments

¹¹⁸ See, e.g., Gregory Scott Parks, ‘*When They See Us*’: *The Great Awakening to Black Humanity*, 21 U. MD. L.J. RACE RELIGION GENDER & CLASS 1 (2021); Gentrix Shanga, *How Black Lives Matter Became a Multicultural Awakening*, ABC NEWS (July 9, 2020, 2:57 PM), <https://abcnews.go.com/US/black-lives-matter-multicultural-awakening/story?id=71635471> [<https://perma.cc/QJL6-C9DM>]; Justin Worland, *America's Long Overdue Awakening to Systemic Racism*, TIME (June 11, 2020), <https://time.com/5851855/systemic-racism-america/> [<https://perma.cc/B5MF-8JAX>]; Daniel Payne, *George Floyd, One Year Later: White America: Awakened?*, POLITICO (May 25, 2021, 5:00 AM), <https://www.politico.com/news/2021/05/25/white-people-racial-justice-activism-george-floyd-490545> [<https://perma.cc/JV6L-8FJV>].

¹¹⁹ Maanvi Singh, *George Floyd: George Floyd Told Officers ‘I Can’t Breathe’ More than 20 Times, Transcripts Show*, GUARDIAN (July 9, 2020), <https://www.theguardian.com/us-news/2020/jul/08/george-floyd-police-killing-transcript-i-cant-breathe> [<https://perma.cc/Y6AZ-Y433>].

¹²⁰ *How George Floyd Died, and What Happened Next*, N.Y. TIMES (Nov. 1, 2021), <https://www.nytimes.com/article/george-floyd.html> [<https://perma.cc/4L8E-YNKP>].

¹²¹ *Id.*

from public lands.¹²² Nascar banned the Confederate flag from its events.¹²³ Cities painted the slogan Black Lives Matter on their streets.¹²⁴ Mayors of many major cities, like Philadelphia and New York, made promises of “accountability” and police reform.¹²⁵ Congressional democrats wore Kente cloth and, in a show of “solidarity,” knelt for the same time period that Officer Derek Chauvin’s knee had remained on George Floyd’s throat.¹²⁶ Corporations across America issued statements on the importance of Black lives; Netflix created a Black Lives Matter playlist on their streaming service, and Yelp created a “Black-Owned” category for restaurants.¹²⁷

Such actions are signposts to an awakening regarding the U.S. institutional race-based injustice. As of March 2022, it is unclear how much long-term social or legal awakening will result from the 2020 protests.¹²⁸ A little over half of all American states have instituted some measures of

¹²² Keeanga-Yamahatta Taylor, *Did Last Summer’s Black Lives Matter Protests Change Anything?*, NEW YORKER (Aug. 6, 2021), <https://www.newyorker.com/news/our-columnists/did-last-summers-protests-change-anything> [<https://perma.cc/H8XJ-FS3M>].

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Why Were U.S. Democrats Wearing Ghana’s Kente Cloth?*, BBC NEWS (June 9, 2020), <https://www.bbc.com/news/world-africa-52978780> [<https://perma.cc/4MKE-6Q6X>]. This move faced severe criticism from activists. See Jon Skolnik, *Nancy Pelosi Shrugs Off Criticism After Thanking George Floyd for “Sacrificing Your Life for Justice,”* SALON (Apr. 21, 2021, 8:16 PM), <https://www.salon.com/2021/04/21/nancy-pelosi-shrugs-off-criticism-after-thanking-george-floyd-for-sacrificing-your-life-to-justice/> [<https://perma.cc/U49A-TLE3>].

¹²⁷ *Netflix Introduces a Black Lives Matter Category*, HARPER’S BAZAAR (June 12, 2020), <https://www.harpersbazaar.com/culture/film-tv/g32837611/black-lives-matter-movies-netflix/> [<https://perma.cc/XD7D-XV7Q>]; see also Tara Lewis, *Yelp Teams Up with My Black Receipt to Support Black-Owned Businesses*, YELP (June 18, 2020), <https://blog.yelp.com/news/yelp-teams-up-with-my-black-receipt-to-support-black-owned-businesses> [<https://perma.cc/63DZ-RJYM>].

¹²⁸ Andrew R. Chow, *Police Killings Didn’t Decline After George Floyd’s Murder*, TIME (May 13, 2021, 6:30 AM), <https://time.com/6046645/police-killings-2021/> [<https://perma.cc/UGM6-9JE4>]; see generally Ram Subramanian & Leily Arzy, *State Policing Reforms Since George Floyd’s Murder*, BRENNAN CTR. FOR JUST. (May 21, 2021), <https://www.brennancenter.org/our-work/research-reports/state-policing-reforms-george-floyds-murder> [<https://perma.cc/U4VD-K2C4>].

police reform¹²⁹ including banning chokeholds, heightening legal standards on permissible use of force or lethal force by police, requiring state-wide reporting of police misconduct and use of force incidents, and increasing sanctions for abuse of police force.¹³⁰ Two locations, New York and Colorado, ended qualified immunity for police officers through legislation.¹³¹ Some localities are experimenting with alternative visions of policing, including using non-police first responders such as social workers to respond to non-violent emergencies as a means of lessening openings for police violence.¹³² Colorado's Attorney General investigated race-based profiling and police brutality in the Aurora Police Department to ensure compliance with Colorado's new police reform laws, and aspires to reform the department as a model for all of the state's police officers.¹³³

However, even if those moves can be considered an awakening, a little under half of states in the United States remain fully asleep with no police reform at all.¹³⁴ Moreover, federal police reform seems unlikely, given recent political gridlock,¹³⁵ abandoning many Americans in the racial caste system of policing. It is impossible to predict whether this patchwork of police reform has deconstructed and reconstructed the perceptual playbooks of racial hierarchy—whether the country has experienced a true awakening—or whether it is simply a brief, passing reactive moment to untold brutality.

¹²⁹ Subramanian & Arzy, *supra* note 128.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ Russell Berman, *What the Rest of America Can Learn from Colorado*, ATLANTIC (Sept. 22, 2021), <https://www.theatlantic.com/politics/archive/2021/09/police-reform-consequences/620150/> [<https://perma.cc/YE6A-NYYR>].

¹³⁴ *Id.*

¹³⁵ Becky Sullivan, *With Slow Progress on Federal Level, Police Reform Remains Patchwork Across US*, NPR (Apr. 27, 2021, 3:48 PM), <https://www.npr.org/2021/04/27/990580272/with-slow-progress-on-federal-level-police-reform-remains-patchwork-across-u-s> [<https://perma.cc/QF75-Y3PS>].

Similarly, the COVID-19 pandemic, with its disparate impacts based on the CDC's "social determinants of health,"¹³⁶ should effect an awakening not only about racial, ethnic, gender, and sexuality structural biases, but also about the inefficacy of a single trait focus on a complex, multidimensional population. Viruses do not know race or ethnicity; yet, the pandemic has revealed that health certainly does. CDC data from 2020 established that Black, Latine, and Native people disproportionately suffer from COVID-19 with rates of contraction, hospitalization, and death greater than their proportionate representation in the general population.¹³⁷

"Social determinants," the average socioeconomic differences between non-White and White Americans, are the major cause of COVID-19's disparate racial and ethnic impact.¹³⁸ This social hierarchy can be traced to the early days of the republic. It originated in the time of conquest and comprises part of the country's social and legal playbook. In the context of the pandemic, Black and Latine persons are more likely to work "essential" jobs, such as hospital custodial jobs and grocery store jobs, that do not offer the luxury of working from home.¹³⁹ Moreover, they are more likely to live in crowded housing, reside in densely populated areas, and rely on public transport.¹⁴⁰

¹³⁶ See *Introduction to COVID-19 Racial and Ethnic Health Disparities*, CTRS. FOR DISEASE CONTROL & PREVENTION (Dec. 10, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/racial-ethnic-disparities/> [https://perma.cc/64F3-EBKK].

¹³⁷ *Health Equity Considerations and Racial and Ethnic Minority Groups*, CTRS. FOR DISEASE CONTROL & PREVENTION n.2, <https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/race-ethnicity.html#fn2> [https://perma.cc/SRD9-MRWF] [hereinafter *Health Equity Considerations*]; Daniel Wood, *As Pandemic Deaths Add Up, Racial Disparities Persist—And in Some Cases Worsen*, NPR (Sept. 23, 2020, 1:01 PM), <https://www.npr.org/sections/health-shots/2020/09/23/914427907/as-pandemic-deaths-add-up-racial-disparities-persist-and-in-some-cases-worsen> [https://perma.cc/2QXK-WR3E].

¹³⁸ *Health Equity Considerations*, *supra* note 137, at n.2.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

Black and Latine persons also confront other barriers to obtaining healthcare access. Language barriers, for example, or being unable to afford to take time off of work, limit access to necessary healthcare.¹⁴¹ The healthcare system itself discriminates against POC in myriad ways, worsening healthcare outcomes even in non-pandemic times.¹⁴² And, of course, simply experiencing racism, whether on an individual or institutional level, presents many health risks that worsens the impact of COVID-19 on the body.¹⁴³ All of these factors and more contribute to a racially disparate outcome in COVID-19 statistics.

Recent studies also show disparate COVID-19 outcomes along the lines of sex. On a global scale, COVID-19 fatalities are disproportionately—60%—men;¹⁴⁴ some research suggests that compared to women, men’s immune system responses are inferior at combatting COVID-19.¹⁴⁵ However, in other contexts, COVID-19 has disparately harmed women. For example, first-choice N95 personal protection equipment (PPE) masks are designed in ways that successfully fit 95% of all men but only 85% of all women.¹⁴⁶ Such a reality reveals an alarming state of slumber as women make up about “three-quarters” of all essential healthcare workers in America.¹⁴⁷ Additionally, initial surveys expose an alarming increase in rates of domestic violence during the pandemic due to the isolating effects

¹⁴¹ *Id.*

¹⁴² *Id.*; Yin Paradies, *A Systematic Review of Empirical Research on Self-Reported Racism and Health*, 35 INT’L J. EPIDEMIOLOGY 889 (2006).

¹⁴³ See *Health Equity Considerations*, *supra* note 137, at n.2.

¹⁴⁴ Rick Harrison, *Sex Differences in COVID-19 Immune Responses Affect Patient Outcomes*, WOMEN’S HEALTH RSCH. AT YALE (Aug. 26, 2020), <https://medicine.yale.edu/whr/news-article/sex-differences-in-covid-19-immune-responses-affect-patient-outcomes/> [<https://perma.cc/LEV7-G4S7>].

¹⁴⁵ *Id.*

¹⁴⁶ Danielle A. D’Annibale et al., *Viewing the COVID-19 Pandemic Through a Sex and Gender Lens*, 30 J. WOMEN’S HEALTH 457 (2021).

¹⁴⁷ *Id.*

of quarantines and social distancing;¹⁴⁸ women make up the majority of victims.¹⁴⁹ Finally, some studies indicate that clinical trials of vaccines failed to account adequately for gender and sex variables.¹⁵⁰

Like other minority groups, LGBTQ people suffer disproportionately from COVID-19 due to social determinant factors.¹⁵¹ Among other social determinants of health, LGBTQ people are notably more likely to work in healthcare and restaurant service industries, have less income on average, and suffer from more comorbidities than their non-LGBTQ counterparts.¹⁵² Thus, LGBTQ people have suffered greater mental health issues and experienced more COVID-19-related job losses than their non-LGBTQ counterparts.¹⁵³

The violence suffered by Floyd unveiled, for many, structural racial disparities in criminal justice.¹⁵⁴ The COVID-19 pandemic has unveiled structural biases in healthcare, education, employment, and housing. These historical events (with all the fields in which they unfold being regulated by law) have spurred awareness about the injustice ingrained in perceptual

¹⁴⁸ Karen Nikos-Rose, *COVID-19 Isolation Linked to Increased Domestic Violence, Researchers Suggest: Financial Stress Contributes*, UC DAVIS (Feb. 24, 2021), <https://www.ucdavis.edu/news/covid-19-isolation-linked-increased-domestic-violence-researchers-suggest> [<https://perma.cc/K5TS-HDVA>]; Jeffrey Kluger, *Domestic Violence Is a Pandemic Within the COVID-19 Pandemic*, TIME (Feb. 3, 2021, 11:15 AM), <https://time.com/5928539/domestic-violence-covid-19/> [<https://perma.cc/CXJ9-8XDJ>].

¹⁴⁹ Nikos-Rose, *supra* note 148; Kluger, *supra* note 148.

¹⁵⁰ Emer Brady et al., *Lack of Consideration of Sex and Gender in COVID-19 Clinical Studies*, 12 NATURE COMM. OPEN § 6 Discussion (2021), <https://www.nature.com/articles/s41467-021-24265-8#Sec6> [<https://perma.cc/D77P-R4ZD>].

¹⁵¹ Lindsey Dawson et al., *The Impact of the COVID-19 Pandemic on LGBT People*, KFF POLLING (Mar. 11, 2021), <https://www.kff.org/coronavirus-covid-19/poll-finding/the-impact-of-the-covid-19-pandemic-on-lgbt-people/> [<https://perma.cc/LN2G-AS6Y>].

¹⁵² *Id.*; see also *COVID-19 and the LGBTQ Community: Vaccinations and the Economic Toll of the Pandemic*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/resources/covid-19-and-the-lgbtq-community-vaccinations-and-the-economic-toll-of-the-pandemic> [<https://perma.cc/XXR7-W84G>] [hereinafter *COVID-19 and the LGBTQ Community*].

¹⁵³ *COVID-19 and the LGBTQ Community*, *supra* note 152.

¹⁵⁴ See, e.g., Payne, *supra* note 118; Singh, *supra* note 119.

playbooks. However, these recent events are in no way isolated. As the earlier review of history revealed, the foundations for the structural biases that led to George Floyd's killing and disparate COVID-19 outcomes are longstanding in the United States.

This brief historical narration, including more recent events, exposes how the law itself constitutes a perceptual playbook that is (as this essay has revealed with respect to individual perceptual playbooks) far from neutral. Embedded in every perceptual playbook are the predominant social, cultural, religious, political, economic and educational perceptions, belief systems, and cognitive scripts prevalent and accepted in its environment. The law is no exception. Institutionally ingrained in the law are both the individual perceptual playbooks of those who have made, administered, enforced, and interpreted the law as well as the structural legal playbooks created by these legal actors throughout history, dating to the time of conquest.

IV. AWAKENING THE LAW – A LATCRITICAL FRAMEWORK

Having the foundation for what an awakened law requires, it is appropriate to envision the process by which the law can reach the desired awakened state. This essay proposes a novel awakened paradigm that is both methodological and substantive. The methodological aspect of the process consists of a REDeS (Spanish for nets) formula, the deployment of which leads to awakening the law by exposing its biases. REDeS consists of the following steps: (1) *Recognition* of the legal quandary—what is the concern; (2) *Exposure*—investigating and unveiling whether and, if so, how the legal quandary is biased; (3) *Deliberation* on the predicament—consideration of the bias and listening to narratives and counternarratives to ascertain the gravamen of the concern; and (4) proposal of a *Solution* that eliminates the unearthed injustice. This process bares the perceptual playbook upon which the quandary relies to appear neutral and considers alternatives that do not embed bias into law.

The REDeS methodology is to be applied to the substantive framework which comprises one essential factor and three pillars that together create an analytical checklist for an awakened law. The essential factor is dignity. Although the word dignity is absent from the U.S. Constitution, some cases, notably cases on queer rights, embrace dignitarian rights.¹⁵⁵ That constitutional textual void notwithstanding, it is significant that international human rights law, which is part of U.S. law,¹⁵⁶ and I often utilize to develop, expand, and transform LatCritical ideas and concepts,¹⁵⁷ centers dignity.¹⁵⁸ If a law is a blind affront to dignitarian rights, it is asleep. Dignity—a concept that captures the uniqueness of the human spirit—is how every human should be treated simply because of their humanity. Thus, there needs to be recognition of the disparate respect for dignity a law may have, an exposure of the denial of dignity in those laws, a deliberation about how to modify the law so that everyone’s dignity is respected, and a search for a solution that embraces dignity for all. A law that does not respect dignity is asleep.

Beyond the essential element of *Dignity*, the three substantive pillars of an awakened law are *Antisubordination*, *Multidimensionality*, and

¹⁵⁵ See generally *Lawrence v. Texas*, 539 U.S. 558 (2003) (holding that the Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct violates the Due Process Clause); see also *Obergefell v. Hodges*, 576 U.S. 644 (2015) (holding that the Due Process Clause of the Fourteenth Amendment guarantees the right to marry as one of the fundamental liberties it protects, and that analysis applies to same-sex couples as well as opposite-sex couples).

¹⁵⁶ See generally *Paquete Habana*, 175 U.S. 677 (1900) (holding that the capture of fishing vessels as prizes of war violates international law and is binding when integrated with U.S. law).

¹⁵⁷ See generally Hernández-Truyol, *Borders (En)Gendered*, *supra* note 23; Berta Esperanza Hernández-Truyol, *The Gender Bend: Culture, Sex and Sexuality—A LatCritical Human Rights Map of Latina/o Border Crossings*, 81 IND. L. J. 1283 (2008); Berta Esperanza Hernández-Truyol, *Globally Speaking—Honoring the Victims’ Stories: Matsuda’s Human Rights Praxis*, 112 MICH. L. REV. FIRST IMPRESSIONS 99 (2014).

¹⁵⁸ See generally Hernández-Truyol, *Hope, Dignity, and the Limits of Democracy*, *supra* note 23.

*Marginability*¹⁵⁹—all foundational concepts of LatCrit theory.¹⁶⁰ Thus, the acronym DAMM constitutes the substantive checklist factors for an awakened law deploying the REDeS methodology.

Specifically, an anti-subordination analysis acknowledges the existence and nature of hierarchies and hierarchical ideologies and assumptions that effect subordination. Anti-subordination unearths the many hierarchical systems of beliefs embedded in both individual and structural perceptual playbooks that consequently allow the unconscious privileging of some over others that an awakened law eschews. Significantly, consciousness is not synonymous with intentionality. To be sure, laws and large swaths of our legal system were intentionally crafted to exclude, marginalize, and disempower those considered less important, and even less human, than the empowered who control the systems of law and governance and historically placed themselves at the top of the biased hierarchy.¹⁶¹ Consciousness is awareness—awakenedness—that the law as intentionally crafted is unjust.

Once the reality of biased hierarchies is exposed, multidimensionality analysis allows a multilayered exploration of the possible locations of bias in the perceptual playbooks with respect to all the aspects of identity. Multidimensionality acknowledges that a person is the sum of their identities, not an isolated identity factor at a time as unawakened law myopically insists.¹⁶² The framework recognizes that one person may be privileged in one aspect of identity (White or male or White male) but subordinated in another (sexuality, economics, ability). If we focus only on sex, there can be either privilege (male) or subordination (female, non-

¹⁵⁹ “Marginable” is a word coined by the author to encompass marginalized and vulnerable people. Berta Esperanza Hernández-Truyol, *Glocalizing Women’s Health and Safety: Migration, Work and Labor*, 15 SANTA CLARA J. INT’L L. 48 (2017).

¹⁶⁰ See generally LatCrit Website, *supra* note 3.

¹⁶¹ See *supra* Part II.

¹⁶² The author coined the term “multidimensionality” in 1994. See Berta Esperanza Hernández-Truyol, *Building Bridges—Latinas and Latinos at the Crossroads: Realities, Rhetoric and Replacement*, 25 COLUM. HUM. RTS. L. REV. 369 (1994); see generally *supra* notes 23, 68, & 156.

binary); if we focus only on race, there is privilege (White) and subordination (POC); if we focus only on sexuality, there can be privilege (heterosexuality) and subordination (LGBTQ+); if we focus only on gender identity, there can be privilege (cis) and subordination (trans), and so forth. Once there is recognition of the myopia of law, its exposure reveals the multidimensional reality of humans' existence. The deliberative part of the process then considers the specific context of the tension being analyzed, the bias imbued in any of the factors pertinent to the particular concern or conflict, and seeks to find a solution that is awakened: considering the pertinent elements and deploying an awakened analysis.

Finally, marginability recognizes the effects of the perceptual playbooks in establishing hierarchies. This portion of the analysis exposes that those outside of the playbook-created hierarchies are vulnerable to and marginalized by the ingrained biases embedded in the individual and structural playbooks. The deliberative stage considers how to correct the marginalization and vulnerability of the out-groups and places the interests of those whom the perceptual playbooks have excluded, ignored, and even erased from a place at the legal table, at the center. Such positionality effects an awakening that will enable justice.

Deploying the REDeS methodological exploration of the LatCritical-based substantive DAMM factors serves to awaken the law. It provides a framework to enable a radical deconstruction of the structural and individual biases forming the foundation of the perceptual playbooks that have rendered the law asleep. The analysis, at a structural level allows the recognition of the bias in the institutions of law, its exposure, and due deliberation in which a radical reconstruction of the existing systems is possible. Such process enables the creation of a fair system where equality and justice can be a reality.

On the individual bias level, the process provides the framework for the parallel scrutiny of the actions of those involved in making, interpreting, and enforcing the law. The paradigm enables a radical deconstruction of the

implicit and structural biases that plague the law and legal system; it effects the recognition and exposure of the skewed perceptual playbooks upon which the somnolent law is based and provides the grounds for deliberation by considering multiple narratives and histories that allow solutions to effect a just—awakened—reconstruction of law.

V. AWAKENING: REDES PRAXIS – THE FULTON EXAMPLE

How does this paradigm work on the ground? The recent *Fulton*¹⁶³ case provides a magnificent example of a legal system that is asleep. It plainly shows that knowledge is not consciousness, that intentionality is not awakedness.¹⁶⁴ Indeed, notwithstanding much input by interest groups and civil society—at eighty-one amicus briefs, the *Fulton* case had the most amicus briefs filed during that term¹⁶⁵—the decision reflects a law that is asleep.

In *Fulton*, the Supreme Court, notwithstanding a contract to the contrary and notwithstanding state law prohibiting discrimination, concluded that Catholic Charities (CC), a religiously affiliated institution, was within its rights to refuse to place children for fostering with married couples of the same sex.¹⁶⁶ The *Fulton* Court, unsurprisingly, put its weighty thumb on the side of the religiously affiliated institution.¹⁶⁷ Surprisingly, it was a unanimous decision.¹⁶⁸ Unsurprisingly, the decision is asleep; it replays myriad lines from the dominant perceptual playbook: *Fulton* elevates religion over all other interests, and it ignores/erases all others' rights/interests; it entrenches marginalization of the marginalized; it perpetuates vulnerability; it preserves hierarchies of power. Significantly, those whose interests are erased are disempowered: children and non-

¹⁶³ *Fulton v. Philadelphia*, 141 U.S. 1868 (2021).

¹⁶⁴ See *supra* Part II.

¹⁶⁵ See Feldman, *supra* note 5.

¹⁶⁶ *Fulton*, 141 U.S. at 1868.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

heterosexuals—groups who are viewed as less than, as outsiders, and as undeserving others.

Deploying REDeS, it is easy to *recognize* the decision's failing across all the elements of the paradigm. First, the decision offends the dignity of many, including the children who will languish in foster systems and be deprived of a loving home as well as of those who want to be foster parents but are denied their rights simply because of whom they love. Next, the Court's decision is an affront to anti-subordination principles. For one, the decision subordinates all other interests to religion and ignores that, while religion is a right at issue, so are myriad other rights, including the rights to equality and liberty, in particular liberty rights to privacy and intimacy, that under the Court's analysis are, if not trammelled, erased. Indeed, the Court's myopic approach does not even contemplate the multidimensional interests before it. For example, the Court fails to consider the best interests of the child and the interests of potential foster parents who themselves are more than a single identity (LGBTQ) but are also individuals or couples who desire to provide an important and necessary societal service: caring for children. And, certainly, the Court fails to consider that the persons excluded from fostering are members of a group that, throughout history, has been and continues to be vulnerable and marginalized.

A critical deconstruction of the Court's monocular approach *exposes* the lack of respect for dignity, but also the Court's failure to consider the subordination effected by its ruling as well as the multidimensionality of not only the persons but also the rights that are central to an awakened decision. There are potential foster parents who are experiencing prohibited discrimination on the basis of sex.¹⁶⁹ Yet, for the Court, they remain invisible; only CC's interests were center stage. The decision also exposes the subordination of some interests (parent-child, family, equality) to others (religion) as well as the hierarchy of power involved in the case (church

¹⁶⁹ *Bostock v. Clayton Cty.*, 140 U.S. 1731 (2020).

over others). Moreover, there are children who are being left without foster parents. These children may be poor, of color, differently abled, and they are being deprived of love by potentially caring parents. Yet, for the Court they remain invisible, perhaps because they are historically marginalized and vulnerable. Only CC's interests were considered which again, not only shows hierarchical preferences but also effects dignitarian harms.

With the recognition and exposure of the additional interests, it is possible to *deliberate* about how to respect and honor all interests involved. With that fuller information base, it is possible to reach a solution that considers all stakeholders, including the subordinated, and the marginable. With the information matrix produced by the analysis, an awakened law could have crafted a *solution* that protects the rights and interests involved in the conflict. The Court's solution simply and short-sightedly utilized unawakened playbooks (and thereby reinforced individual and structural biases), protected only the interest of the litigant located at the top of the established structure, and perpetuated the status quo.

The REDeS analysis would have brought the ignored rights of children, and potential parents to the table. The proposed paradigm would recognize the conflict in telling only part of the story, it would expose all the elements and include the narrative of the CC and the counternarrative of exclusion, subordination, and myopia of rights; it would deliberate the problem with all the information before it, and it would solve the problem in the pursuit of justice centering the marginable's needs and conditions. An awakened analysis by justices who care about justice and act differently once awakened might have reached a different decision, one that promotes justice for the well-being of children and the dignity of all families. The process would be an awakened one, not one that ignores myriad rights at stake.

VI. CONCLUSION

Awakening the law is a complex, dynamic, and continuous process. Historically we have experienced cycles that include progress and backlash; we are living it now with the attacks on CRT and on voting rights—attacks that seek to obscure a painful history of racial inequality, marginalization, vulnerability, and subordination.¹⁷⁰ The more the individuals' and institutions' biases are unveiled, together with the revelations of how these biases are embedded in the norms that pose as neutral, the more the perceptual playbooks that pose as nonaligned with any ideology can be critically deconstructed to eliminate their inherent injustice.

Because of the multiple layers of what we call law, any awakening must be analyzed at myriad levels—all the performative spaces of law in family, schools, and in the legal structures in society, the legislative, the executive, and the judicial. At each of these levels, the awakening must occur at individual and structural points. For example, at the legislative level, the individual legislators need to be awakened to the truth of the specific concern, such as racism, and the collective needs to be awakened to the truth to pass an awakened law that can confront racism at the structural level. Similarly, at the executive level, which includes the agencies of the administrative state, the leaders must be awakened before the structures they run can be awakened to deliver justice. The same is true for the judiciary where the individual judges as well as a fair and just interpretation of the law needs to be awakened.

It is a challenging aspect of the awakening the law process that the onus rests largely on those who suffer under the law—the marginable and disempowered—to expose the false truths of the legal playbook that are

¹⁷⁰ Marokey Sawo & Asha Banerjee, *The Racist Campaign Against 'Critical Race Theory' Threatens Democracy and Economic Transformation*, ECON. POL'Y INST. WORKING ECONS. BLOG (Aug. 9, 2021, 9:35 AM), <https://www.epi.org/blog/the-racist-campaign-against-critical-race-theory-threatens-democracy-and-economic-transformation> [<https://perma.cc/LB2W-9J2A>].

embedded in the law. Awakening the law is a dynamic and complex matrix that includes unearthing and deconstructing not only the implicit bias of individuals who make, administer, enforce, and interpret the law but also the structural bias in law that has resulted from such implicit biases.¹⁷¹

Awakening the law entails multiple phases. First, there needs to be a realization that the law is asleep. Second, it is necessary to unveil the rootedness in law of the biased narratives, the historic inequalities and inequities embedded in the law. Third, to engage in the awakening project, it is imperative that there be an understanding, acceptance of, and deliberation about the social, economic, religious, cultural, and political influences on the prevalent history and legal narratives—the far from neutral climate regarding race, sex, gender, ethnicity, religion, economics, ability, education, etc. that has articulated and entrenched a skewed and biased version of history. The perceptual playbooks of the lawmakers, enforcers, and interpreters have created the legal perceptual playbooks that institutionalize the unjust, unawakened law in the books. Only with an awakened law can the legal system find solutions to the ingrained injustices in the legal perceptual playbooks to pave the way for law to attain its justice potential.

Moreover, those privileged by the existing systems need to recognize their privilege, expose its nature, deliberate on its consequences, and participate in crafting solutions that always include the interests of the marginable—those who have been disadvantaged and subordinated by the privilege of the few—in resolving injustice. Simultaneously, such awakening allows the shifting of the gaze toward those who, in the eyes of the law, have been disposable or dispossessed, in order to enable a move towards just legal norms and structures.

¹⁷¹ See *supra* Part IV.

Awakening is an ongoing process. It is both concrete and aspirational.¹⁷² The outcome of awakening is a system where law is synonymous with justice. Awakening is not perfection; it is openness to a just reality. It is a dynamic way to analyze socioeconomic, political, and legal processes in a quest for justice; an ongoing process of examination and self-examination at every level that involves law that foresees constant change with changed circumstances. Once the legal perceptual playbook is deconstructed, the law will have transformative potential. An awakened law analyzes the levels of consciousness and action that produce the potential for change at one or more socioecosystemic (individual, institutional) levels.¹⁷³

¹⁷² As new technologies arise, recognition of the pitfalls is imperative. The so-called AI and its inability to recognize Black skin has resulted in death, and its inability to recognize women has resulted in denial of economic benefits.

¹⁷³ See generally Jemal, *supra* note 6.