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(Dis)Proving Racism: A Rebuttal to Klippenstein’s Critical Review of the Law Society of Ontario’s Report on Challenges Facing Racialized Licensees

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Document Commented On: Murray Klippenstein, [Critical Review of the Challenges Report](#)

On January 8, 2020, Murray Klippenstein published a [Critical Review of the Challenges Report](#) (Critical Review). In it, he argues that the Law Society of Ontario’s (LSO’s) March 11, 2014 final report on [Challenges Facing Racialized Licensees](#) (Challenges Report) should be rejected because it is “driven by a particular political ideology” and “methodologically invalid” (at 15). And, as Mr. Klippenstein indicates in his Critical Review, his ultimate purpose is undoing LSO initiatives geared towards promoting equality in the legal profession—modest initiatives which, somehow, receive adamant opposition from certain members of the legal profession.

Some have lauded Mr. Klippenstein’s Review as a “[comprehensive demolition](#)” of the foundation for the Law Society’s equality initiatives. It is not. His argument is flawed, repetitive, and, ironically, reflects his clear ideological commitment, *not* to free speech, free thought, or evidence-based policy, but to a post-racial fantasy, i.e., a worldview that “enduring racial inequality is not the effect of race or racism” (Khiara Bridges, [Critical Race Theory: A Primer](#) (2019) at 5). My rebuttal responds to both his assertions about supposed methodological flaws in the Challenges Report, and his fundamental misunderstanding of the social construction of race. It builds on [my critique](#) of the campaign to repeal the LSO’s Statement of Principles (SOP) requirement for Ontario lawyers and paralegals.

While this argument focusses on Mr. Klippenstein’s Critical Review of the LSO’s Challenges Report, it has broader implications. Survey data with varying degrees of formality and rigour is often used to gauge potential systemic problems within institutional settings, from [law firms around the world](#) to the [articling process in Alberta, Saskatchewan, and Manitoba](#). Accordingly, Mr. Klippenstein’s purported deference to evidence-based policy has implications not only for the LSO, but for all spaces in which anti-oppression initiatives are contemplated.

The Red Herring: Selectively Requiring Sociological Evidence for Equality Policymaking

First things first: discussing whether the LSO has sufficient evidence to promote inclusion—the main point of Mr. Klippenstein’s Critical Review—is a red herring. The LSO rarely, if ever, requires rigorous sociological research to support its initiatives. It does not, for example, have to perform a multi-year ethnographic study on continuing professional development to *prove* that it maintains lawyers’ competence; it can simply mandate this “[basic component of a lawyer’s education](#)”, as law societies do across the country. And if Mr. Klippenstein and his allies in the [StopSOP slate](#) want to pretend that they are simply issuing in a new era of “evidence-based

regulation,” then that objective will slam head-first into their concurrent objective of decreasing LSO fees. Studies cost money. The more rigorous the study, the greater the cost.

Rather, Mr. Klippenstein’s purported insistence on evidence-based policy-making by the LSO is a *pretextual pivot*. He and his allies are passing around a hot potato of so-called “neutral” principles upon which to base their objection to equality initiatives by the LSO, their real motivation. The following dialogue, which reflects StopSOP’s evolving critique of equality initiatives, illustrates how this rhetorical pivoting will, I suspect, be never-ending:

Law Society: We are mandating annual diversity journaling to promote reflection on racism in the legal profession.

Mr. Klippenstein: A mandated statement violates free speech! ([Nov. 2, 2017](#))

Law Society: Ok. If your concern is *forced speech*, we’ll make the statement optional.

Mr. Klippenstein: An optional statement is just virtue signalling! ([June 28, 2019](#))

Law Society: Ok. If your concern is *low impact policy*, we’ll collect data on diversity to assess impact.

Mr. Klippenstein: You don’t have sufficient evidence to justify data collection! ([Jan. 8, 2020](#))

And on, and on, and on....

These objections aren’t tied together by free speech, free thought, or evidence-based policymaking (indeed, if their concern is *lacking evidence*, one would think *collecting evidence* would be an unassailable initiative). Rather, they unite in opposition to equality. For example, Mr. Klippenstein is silent about how the LSO already regulates speech—including racist speech—with respect to lawyer advertising ([Rules of Professional Conduct](#), s 4.2-1, commentary 7), just as he is silent about how virtually none of the LSO’s initiatives have rigorous sociological evidence justifying them. He seems, therefore, to be motivated by denying racism in the legal profession, full stop.

As a result, the complete response to Mr. Klippenstein’s Critical Review is that it is irrelevant. The LSO does not need peer-reviewed sociological evidence to justify any initiative that it adopts. In other words, even if he were right that the Challenges Report is methodologically flawed, that would simply mean that the LSO’s evidentiary foundation for its equality initiatives is *the same* as its foundation for every other initiative it adopts. Indeed, if his real concern was a supposed lack of evidence for LSO initiatives, one would think that the LSO’s equality initiatives—motivated by multiple years of research, extensive consultation, and several reports—would have been one of the last targets for his scrutiny.

To be clear, I do not oppose evidence-based policy. Generally speaking, I support making policy decisions grounded in evidence. But if someone tells me they are unwilling to support basic anti-

racism policies at law firms because they doubt systemic racism exists, I would not tell them to conduct a survey. I would tell them to read a book, ideally one that explains how “systemic racism” refers, not to *the number of racists* in the profession, but to *the type of racial effects* otherwise neutral policies and cultures produce (see e.g. *CN v Canada (Canadian Human Rights Commission)*, [1987] 1 SCR 1114 at 1139, per Dickson C.J.). The published views of StopSOP slate benchers and its allies—who interpret “systemic racism” as “[a moral castigation instead of the description of a problem](#)”—reflect this fundamental misunderstanding. For example, according to [Bencher Sam Goldstein](#), equality advocates think that Ontario lawyers “are all racists.” Rather, as Khiara Bridges observes, individual racists are “irrelevant in the grand scheme of things, as they play a miniscule role” in the broader context of systemic racism (*Critical Race Theory: A Primer* at 148-149). I, therefore, echo Bencher Malcolm Mercer’s [recent remarks](#) that “[t]he right question is not whether a particular report is flawed or not. The right question is whether discrimination exists in legal workplaces, both direct and indirect, and whether the law society ought to address discrimination in legal workplaces.”

The Goldilocks Problem: Is the Legal Profession’s Current Amount of Racism “Just Right”?

As I just explained, “systemic” racism refers to racism’s *character*, not *quantity*. That said, assuming for the sake of argument that the issue really was about how racist the legal profession is—Mr. Klippenstein’s misunderstanding—leads me to another point in rebuttal to his Critical Review. Mr. Klippenstein concedes that prejudice “undoubtedly exists” in the legal profession (at 5), that racialized lawyers receive more “disrespectful remarks by judges or other lawyers” to a “statistically significant” degree (at footnote 12), and that 40% of racialized respondents identified racial barriers in practice (at 9-10). Yet he calls this “an unacceptable basis for serious policy-making by the Law Society, in particular the policy initiatives which are currently being implemented” (at 15). Why? Why aren’t these uncontested findings sufficient to promote equality in the legal profession?

Mr. Klippenstein’s position is effectively that the current amount of racism in the legal profession—like the temperature of Goldilocks’ third bowl of porridge—is “just right.” I disagree. Any modern institution in a democratic society should adopt an anti-racist agenda. Because racism—no matter its particular prevalence—is bad. It is always bad, even on criteria Mr. Klippenstein purports to value. Racism undermines merit. It compromises lawyers’ competence. Though lawyers often disagree on myriad controversies, racism should be one of the few things all lawyers can unite against.

Briefly considering the specific policy initiatives Mr. Klippenstein objects to further illustrates the absurdity of his resistance. Jared Brown—one of Mr. Klippenstein’s StopSOP allies—[calls these initiatives](#) “illiberal” and “authoritarian”. But what do these initiatives actually entail? With the Statement of Principles now repealed—itself a modest requirement that lawyers annually reflect on their professional and human rights obligations, write it down, and show no one (unless they want to, of course)—the [remaining equality initiatives](#) proposed by the LSO’s Working Group on Challenges Faced by Racialized Licensees include (at 2-4):

- Consulting stakeholders to develop anti-racism policies;

- Requiring workplaces to maintain anti-racism policies;
- Encouraging workplaces to conduct anti-racism surveys;
- Measuring workplace diversity;
- Creating Continuing Professional Development programs relating to anti-racism;
- Increasing mentorship and networking opportunities for racialized licensees; and
- Reviewing existing procedures for processing discrimination complaints.

In sum, Mr. Klippenstein opposes basic anti-racism initiatives, despite conceding the existence of racism in the profession. Seemingly, however much racism currently exists in the legal profession is a tolerable amount unworthy of even just basic anti-racist efforts: *adopting* anti-racist policies and *monitoring* their implementation.

Point-By-Point Rebuttal

The two points above are sufficient to dispose of Mr. Klippenstein’s Critical Review, namely, it should be rejected because (1) he selectively applies an evidentiary threshold to equality initiatives that is satisfied by few, if any, Law Society programs; and (2) he concedes that there is racism in the profession, which already justifies anti-racism initiatives. But Mr. Klippenstein’s substantive critique of the Challenges Report is also deeply flawed, and I feel compelled to respond to it, especially if it will be relied upon to roll back equality initiatives at the LSO—during Black History Month, of all times!

Rather than independently respond to the 12 objections Mr. Klippenstein lists in his Critical Review (at 2-3), I have regrouped them thematically since many of them are redundant, advancing the same point repeatedly with alternate phrasing. In total, Mr. Klippenstein advances six—not twelve—discrete objections to the Challenges Report. I address each in turn, with references to the two points I raised above, where relevant.

Many of the points below concern survey methodology. Though I am no expert in survey methodology, Mr. Klippenstein’s analysis nevertheless contains glaring errors demanding the following rebuttal.

Low Response Rate

Mr. Klippenstein’s first objection is that the Challenges Report should be rejected because it had a low response rate (at 3). This is his favourite point; he makes it six times. Specifically, he argues that:

- The Challenges Report is not representative because *the overall response rate was small* (at 3);
- The Challenges Report is not representative because *the racialized response rate was small* (at 3-4);
- The Challenges Report is flawed because *the low overall response rate was not explained in the Report* (at 4-5);

- The Challenges Report is not representative because, despite corrective adjustments, *the overall response rate remained small* (at 8-9);
- The Challenges Report is misleading because it was not representative; and it was not representative because *the overall response rate was small* (at 9-10);
- The Challenges Report cannot be relied on for policymaking because it was misleading; and it was misleading because it was not representative; and it was not representative because *the overall response rate was small* (at 14).

I concede that, generally speaking, a higher response rate typically enhances inference reliability. That said, Mr. Klippenstein’s series of “low response rate” objections—the bulk of his Critical Review—are his weakest argument.

First, Mr. Klippenstein claims that the response rate to the survey was “low” without ever identifying how “high” it would need to be to legitimately inform LSO policymaking. He simply asserts that a 6.3% response rate renders the survey insufficiently reliable. Yet, with no meaningful discussion of other statistical criteria (e.g. confidence level, confidence interval, standard deviation, etc.), his critique of 6.3% is baseless. Surveys [routinely poll less than 5% of a population](#) and properly extrapolate on that population’s characteristics. Indeed, to extrapolate on all 235,000,000 adults in the United States, Pew Research Center polls typically sample [only 1500 people](#)—a sample of just 0.0006% of the adult population.

Second, Mr. Klippenstein is, ultimately, making an argument about *rigour*. But this begs the question: how much rigour is required to justify Law Society action? As explained above in my “red herring” argument, most if not all Law Society initiatives lack *any* survey evidence, let alone surveys with purportedly low response rates. To the extent the Challenges Report was not as rigorous as possible, Mr. Klippenstein’s conclusion—that the Challenges Report cannot support policy-making—presupposes that the level of rigour *he wants* is the level of rigour the *Law Society needs* to justify action.

Third, an obvious solution to a low response rate in a *voluntary* survey is making the survey *mandatory*. However, for anyone familiar with the [ongoing equality debate](#) at the LSO, this solution may result in resistance based on specious free speech grounds. And if it is either practically unfeasible, or constitutionally impermissible, to study racism, it is, according to the selective evidentiary demands of Mr. Klippenstein, impossible to justify anti-racist initiatives.

Fourth, Mr. Klippenstein uses the allegedly low response rate, not only to question the study’s findings, but to make findings of his own. Despite criticizing the supposedly faulty methodology of the Challenges Report, Mr. Klippenstein draws some surprising inferences from the report—a report, which he paradoxically sees as *insufficient* for *proving* systemic racism, yet *sufficient* for *disproving* systemic racism. Predictably, Mr. Klippenstein does not cite any statistical textbooks—as he does elsewhere in his Critical Review—to support the logical leaps described below. Initially, Mr. Klippenstein speculates:

It may be that the reason for the extremely low survey response rates ... is that the great majority of lawyers and paralegals in the province are not all that concerned about “racism” in the professions, *perhaps because we have progressed to the point where the*

legal professions are characterized more by openness and equality and opportunity than by “systemic racism.” (at 5; emphasis—and scare quotes—in original)

Later, speculation becomes probability:

[B]ased on the very low response rate, there was *probably a very large number of* racialized licensees who had something quite different to say on this issue. (at footnote 22; emphasis added)

And at one point, probability approaches certainty:

Surely, if a substantial proportion of lawyers and paralegals in the professions, especially those who self-identify as “racialized,” felt that “systemic racism” was a serious issue, more than 9.6% of the racialized licensees would have responded to the survey. (at 5; emphasis added)

This point must be reduced to its essence to appreciate its absurdity. According to Mr. Klippenstein, 40% of racialized survey respondents reporting racial barriers in the profession *cannot prove systemic racism*, while many busy lawyers ignoring emails from the Law Society about a voluntary survey *disproves systemic racism*. Put differently, Mr. Klippenstein argues that the *responses* of those who answered the survey are “almost certainly” biased (at 6), while the *silence* of those who ignored the survey “gives good reason” (at 5) to believe that the legal profession does not suffer from systemic racism. Such self-serving inferences in a memo directed at challenging faulty methodology is ironic, to say the least.

Could the response rate for the survey have been higher? Of course. But was it too low for statistical analysis, and is such analysis even needed to justify LSO policymaking? Absolutely not.

Participation Bias

Mr. Klippenstein’s second objection is that the Challenges Report should be rejected because the respondents of the survey “were *not* a random sample of the population” (at 6, emphasis in original). I concede that random sampling is required for statistically rigorous extrapolation of observations from *samples* to *populations*. But I still have multiple responses to Mr. Klippenstein’s claim.

First, a semantic point. Mr. Klippenstein’s critique is not really about *sample randomization*, but rather, [*participation bias*](#). The survey was sent to *all licensees*, which is, all things being equal, better than sending it to *a sample* of hopefully representative licensees. Typically, survey data is collected from a randomized sample because it is impractical to poll, for example, the entire Canadian population. But in the context of a manageable population size—like LSO licensees—a random sample can be substituted with the full licensee population. Of course, *who responds* can compromise the ultimate reliability of the survey. But that is, more precisely, understood as an issue of participation bias.

Second, Mr. Klippenstein fundamentally misunderstands the LSO’s attempt to correct for overrepresentation of racialized survey respondents. The initial response rate included a greater proportion of racialized candidates than exist in the profession. For this reason, the survey company weighted racialized responses less, to correct for this discrepancy. Mr. Klippenstein critiques this solution because it is still anchored in a small sample pool. But this correction was not addressing the *size* of the sample, it was addressing the *ratio* of racialized and non-racialized respondents. He simply does not understand the concern this correction was directed towards. And when he claims that the data may have been skewed by overzealous racialized licensees over-responding, he clearly misunderstood how this correction was specifically intended to address some of the participation bias concerns he raises.

Third, my red herring rebuttal above similarly applies here. Designing the survey to perfectly insulate it from participation bias is ideal. But the level of scrutiny we apply to the survey in this regard depends on the threshold of rigour the LSO demands in its processes—which is, as discussed above, a non-existing threshold for the LSO’s various programs.

Fourth, as I have already noted, participation bias could be addressed by making the survey, which was sent to all licensees, *mandatory* rather than *voluntary*. But, again, I suspect a mandatory survey would prompt [another “free speech” lawsuit](#) by Mr. Klippenstein.

Fifth, Mr. Klippenstein’s bias critique is one-sided. Specifically, he claims that those who responded to the survey were a “special group” (at 6) predisposed to having “concerns about racial prejudice” (at footnote 6). To be clear, I agree that voluntary surveys risk biased participation. But notice who Mr. Klippenstein isolates as that group: racialized lawyers hoping to exaggerate racism in the profession, *not* non-racialized lawyers hoping to diminish it. Either could have happened. Given the massive effort non-racialized lawyers have invested in resisting equality initiatives at the LSO—including [seeking a carve out](#) for the Statement of Principles from the Working Group’s other recommendations, [seeking a conscientious objection exemption](#) for the Statement of Principles, penning myriad articles objecting to the Statement of Principles (e.g., [1](#), [2](#), [3](#), [4](#), [5](#), [6](#), [7](#), [8](#), [9](#), [10](#), [11](#), [12](#)), [suing the Law Society](#) for a declaration of the Statement of Principles’ unconstitutionality, [creating a benchers slate](#) dedicated to repealing the Statement of Principles and, lastly, Mr. Klippenstein drafting his [Critical Review](#)—I have serious doubts that the only bias concern is with racialized lawyers.

This asymmetric bias critique is well-known to racialized communities and critical race theorists. As Nikole Hannah-Jones—creator of the ground-breaking “[1619 Project](#)”—recently observed at a Martin Luther King Jr. Day event in New York ([at 4:16:10](#)), “... so many white editors think that Black folks who want to write about race are biased, but white people who refuse to write about race are not.” To the contrary, Khiara Bridges explains: “The idea that white people are unjustly enriched by institutional/structural racism may be a motivation for them to deny its existence”, especially for “those individuals whose positive perceptions of themselves were more fragile” (*Critical Race Theory: A Primer* at 154). I concede the voluntary sampling risks bias; I reject that this bias is exclusively—or even mostly—produced by racialized licensees. Indeed, if non-racialized licensees are motivated enough to pen countless op-eds, sue the Law Society, and spend their free time writing a memo denying the existence of systemic racism, I think they could manage a 20-minute survey.

Leading Questions

Mr. Klippenstein's third objection is that the Challenges Report should be rejected because "many of its questions were framed with a highly emotional undertone or in a suggestive way" (at 6). In his view, this framing was leading, and steered respondents into falsely linking their experiences with racism (at 7). I have three responses to this point.

First, Mr. Klippenstein's only elaboration on how the survey questions—or, more precisely, the *three* survey questions he lists—were "suggestive" appears to be that they were phrased positively. Specifically, he lists positively phrased statements to which survey respondents replied with agreement or disagreement—e.g., "Your employment environment is not very diverse"—and then concludes that, "[c]learly", these questions were "biased" (at 7). Seemingly, Mr. Klippenstein would have preferred that this question instead be phrased: "Is your employment environment diverse?" This seems fair, given concerns about [acquiescence bias](#). But Mr. Klippenstein cherry-picks three survey statements where "acquiescence" might increase racism findings, without acknowledging that other positively phrased statements in the survey would do the opposite, e.g., "being racialized is an advantage in many employment situations" (Challenges Report at 63). Further, other questions were open-ended. Indeed, one of the key findings in the Challenges Report—that *40% of racialized licensees* experienced ethnic/racial barriers, while only *3% of non-racialized licensees* did—was based on an open-ended question: "For each factor, please indicate if you have experienced it as a barrier or challenge at any time during your entry to practice" (Challenges Report at 37). With this in mind, while the phrasing of questions in the survey are open to valid criticism, Mr. Klippenstein's presentation of this concern is misleading.

Second, Mr. Klippenstein never elaborates on how the three survey questions he lists were "highly emotional". Those questions—about which respondents indicated their agreement or disagreement—were:

- i. You have been subjected to prejudicial attitudes on the part of other legal professionals, based on your racialized status.
- ii. Your employment environment is not very diverse.
- iii. Your beliefs or cultural practices preclude you from participating in many of the social networking functions of Ontario legal firms.

What is so "highly emotional" about "prejudicial attitudes", "not very diverse", and "beliefs or cultural practices"?

Third, my red herring rebuttal described above applies yet again. Neutral phrasing in a survey may be ideal. But when the LSO often acts without *any* evidence in non-equality areas, survey methodology criticisms relating to equality initiatives are less persuasive.

Source Confidentiality

Mr. Klippenstein’s fourth objection is that the Challenges Report should be rejected because part of the report’s methodology included interviews with licensees without disclosing “their identity or anything about their backgrounds” (at 10). I have two responses.

First, Mr. Klippenstein acknowledges that source confidentiality was “[p]resumably” maintained “to encourage frankness from individuals who considered themselves vulnerable in their careers in the professions” (at 11). Nevertheless, Mr. Klippenstein dislikes that the profiles of these interviewees are described “ambiguously” (at 10). But, in a Canadian legal market woefully lacking in racialized representation, detailed description of mostly racialized informants would, I suspect, risk their identification, undermining the “frankness” needed for candidly discussing racial barriers in practice.

Second, Mr. Klippenstein improperly collapses evidentiary thresholds *in law* with qualitative methods *in research*. Some of the individuals interviewed for the Challenges Report were associated with organizations representing different racialized constituencies in Canadian legal practice (Challenges Report, at 3 and Appendix B). Mr. Klippenstein objects to these interviews because they were considered “in a way that no court would come anywhere close to tolerating” (at footnote 23). But interviews are a well-recognized method in qualitative research. And distinct standards, understandably, apply to interviewees in qualitative research and expert witnesses in court.

Ideological Bias

Mr. Klippenstein’s fifth objection is that the Challenges Report was “driven by a particular political ideology” and therefore should be rejected (at 15). As a critical race theorist whose doctoral research concerns the formation of social identity, this is my favourite objection. Mr. Klippenstein actually argues that the report’s mere use of the term “racialized” demonstrates “politically motivated interference in the work of the opinion survey technicians” (at 12), and the “intrusion of ‘identity’ politics or ideology into the survey” (at footnote 26), which “in itself was probably an important factor affecting and skewing the response rates to the survey” (at 12). Indeed, he claims that simply invoking That-Which-Must-Not-Be-Named—racialized—rendered the results “essentially useless” (pg. 13). Mr. Klippenstein’s arguments provide an opportunity to problematize his many racial misunderstandings.

Ideology Cuts Both Ways

First, Mr. Klippenstein attempts to conceal his own ideological posture by retreating to what he considers to be “neutral” terminology. In his view, the Challenges Report should have used “visible minority” (at footnote 27) because “racialized” imports the “political theory” of “social constructionism” (at footnote 24). Implicitly, then, Mr. Klippenstein prefers “visible minority” because, in his view, that term, as he understands it, opposes—or, at least, resists—social construction. Accordingly, his preferred term does not *lack* ideology. It simply endorses a *different* ideological stance, i.e., that race is not, or may not be, socially constructed.

There simply isn't an apolitical term for describing racial identity. For this reason, Mr. Klippenstein's ideological bias critique is self-defeating. He is not neutrally critiquing *the fact* that the Law Society's vocabulary purportedly reflects a particular ideology. He is critiquing *which* ideology was chosen, because it's not *his*.

In any event, the LSO's use of the term "racialized" hardly reflects a commitment to the ideological fringe of the legal profession when the term is often used in legal circles, including by the Supreme Court of Canada (see *R v Le*, [2019 SCC 34](#) at paras 59, 70, 72, 75, 81, 88-89, 94, 97, 167, 173, 245, 260, and 307).

Mr. Klippenstein's Phantom Ideology

Second, Mr. Klippenstein is notably vague—indeed, contradictory—with respect to his own racial ideology. His Critical Review presents multiple conflicting accounts of how racial identity should be theorized:

- **Social construction:** Mr. Klippenstein says he is not "all in" on the view that race is socially constructed (at footnote 24), leaving one to wonder whether he is *partially* in to the role of social influence on racial categorization.
- **Self-Identification:** Mr. Klippenstein criticizes the Challenges Report for relying on "self-identification" (at footnote 26), yet thinks the report should have had respondents *self-identify as visible minorities*. He's simply passing the buck from "racialized" to "visible minority", as if the latter is uncontested. Unless the LSO vets each participant for the survey individually, any survey would functionally rely on "self-identification".
- **Genetics:** Mr. Klippenstein describes his children as "genetically 50% Caucasian and 50% Taiwanese", gesturing at a genetic theory of racial identity, despite the "widely accepted consensus among evolutionary biologists and genetic anthropologists" that "biologically identifiable human races do not exist" (Sandra Soo-Jin Lee, Joanna Mountain & Barbara A Koenig, "The Meanings of 'Race' in the New Genomics: Implications for Health Disparities Research" [\(2001\) 1 Yale Journal of Health Policy Law & Ethics 33](#) at 39).

Ironically, in the course of critiquing a conception of racial identity as socially constructed, Mr. Klippenstein makes its social construction apparent, as he oscillates between various overlapping and contradicting conceptualizations of racial identity, mirroring "the sometimes absurd lengths that racial states will go in order to maintain a semblance of coherence for legal race classifications" (Cressida Heyes, "Changing Race, Changing Sex: The Ethics of Self-Transformation" [\(2006\) Journal of Social Philosophy 37:2 266](#) at 271).

Additionally, Mr. Klippenstein's purported refutation of social construction is spurious (at footnote 28). He claims that Professors Omi and Winant—authors of the foundational text, [Racial Formation in the United States](#)—have "moved on" from a social construction theory of race because they acknowledge that "visible body differences" inform racialization. This, again, fundamentally misunderstands the meaning of social construction (and the thesis of a book about racial *formation*). That race is socially constructed, or formed, does not mean that all markers of race are invisible; rather, it means that the social significance attached to those markers is a

product of the human imagination. Indeed, I have never come across a theorist who, despite viewing race as socially constructed, rejects the role that visible markers play in that construction. Critical race theorist Ian Haney-López, for example, defines race as “a vast group of people loosely bound together by historically contingent, socially significant elements of *their morphology and/or ancestry*” (“The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice” (1994) 29:1 [Harv Civil Rights-Civil Liberties Law Review](#) 1 at 7, emphasis added). And while the process of racialization is complex, skin colour—which is, of course, visible—undoubtedly plays a role in racial categorization (Joshua Sealy-Harrington & Jonnette Watson Hamilton, “Colour as a Discrete Ground of Discrimination” (2018) 7:1 [Canadian Journal of Human Rights](#) 1 at 7).

Race is Socially Constructed

Third, Mr. Klippenstein suggests that one simply *is* “a member of an ethnic or visible minority” (at 12). But this, of course, presupposes that the boundaries of each ethnic or visible minority category are uncontested. Who qualifies as a visible minority? For example, if someone “[passes](#)” as white, are they part of an *invisible* minority? If such a person was “unsure” about whether they qualified as a “visible minority”, would their uncertainty equally render Mr. Klippenstein’s preferred terminology unusable?

The historical litigation of racial identity in the United States illustrates the flaw in Mr. Klippenstein’s position. Most states in America historically applied the “one drop rule”, which held that “anyone with a known Black ancestor is considered Black” (Christine B. Hickman, “The Devil and the One Drop Rule: Racial Categories, African Americans, and the U.S. Census” (1997) 95:5 [Michigan Law Review](#) at 1163). In stark contrast, Ohio applied a “preponderance of blood” rule (*Gray v State*, 4 Ohio 354; *Monroe v Collins*, 17 Ohio St. 665) and Michigan and Virginia each applied a 3/4 “predominance of white blood” rule (*People v Dean*, 4 Michigan 406; *Jones v Commonwealth*, 80 Virginia 538). Simply put, who qualified as “Black”—when governments were forced to actually adjudicate race—varied widely.

Understanding race as a social construct is not some new ideological theory, but the long-accepted understanding of racial formation amongst those who actually study race across various disciplines, including biology, sociology, anthropology, and critical race theory. Indeed, that race is socially constructed “began to gain wide acceptance in the 1940s”; it is the understanding of racial formation endorsed by various organizations, including the United Nations Educational, Scientific, and Cultural Organization and the American Anthropological Association; and it was confirmed by the Human Genome Project’s finding that “all persons, irrespective of racial ascription or identification, share 99.9% of the same genes” (*Critical Race Theory: A Primer* at 123-124).

Mr. Klippenstein objects to a social construction account of race because it “brings with it a lot of baggage” about how race, fundamentally, is a political scheme of oppression and power (footnote 24). This is not *baggage*; it is *reality*. While various states applied different “tests” for adjudicating racial identity, the underlying political motivation was always to “identify and stigmatize the members of a group and to justify the group’s subordination” (Kenneth L. Karst, “Myths of Identity: Individual and Group Portraits of Race and Sexual Orientation” (1995) 43

[UCLA Law Review 263](#) at 291). The logic of white supremacy—not biology—is the thread that ties these contradictory methodologies together.

In sum, race *is* socially constructed. And to the extent Mr. Klippenstein objects to this “ideology” in the Challenges Report, he is swimming against a harsh tide of facts to do so. I concede that, to the extent people have different understandings of what it means to be “racialized”, this term can complicate how the resulting data should be interpreted. But using “visible minority” doesn’t solve this concern. Indeed, no study on race *could* solve the problem of racial ambiguity—a necessary consequence of the fluidity of socially constructed race.

Conflict With Prior Study

Mr. Klippenstein’s sixth objection is that the Challenges Report should be rejected because a study from a decade earlier—the [Kay Report](#)—“revealed little evidence of racial prejudice” (at 7). I have four responses to this objection.

First, Mr. Klippenstein misrepresents the Kay Report. He isolates a truncated passage about how the “slight differences” between racial groups “remain statistically insignificant” (at 8). He does so without including the immediately following sentence about statistically significant disparities regarding disrespectful remarks by judges and other lawyers (which he relegates to his footnote 12). Neither does he mention any of the Kay Report’s discussion of (1) how aggregating racial groups “is likely to mask the more extreme experiences of specific communities” (Kay Report at 67); (2) how aggregating respondents who self-identified in “ethnic/cultural/racial communities” with those who self-identified as “other”/“Canadian” may have diluted racism findings (Kay Report at 118); or (3) how “[f]urther research is needed to examine the contrasting experiences of people from different racialized communities” (Kay Report at 118). The Kay Report’s observation that, despite some progress, “[l]awyers of racialized communities are disadvantaged in earnings, promotions, and partnerships”, “encounter discrimination by clientele”, and “express lower levels of job satisfaction” is also omitted (Kay Report at 118).

Second, the red herring rebuttal. Purportedly conflicting studies on the *extent*—not the *existence*—of racism in the profession already exceed the evidentiary threshold underlying the vast majority of Law Society initiatives. This supposed conflict simply does not support Mr. Klippenstein’s opposition to basic anti-racist initiatives in the profession.

Third, the Goldilocks rebuttal. Mr. Klippenstein concedes (at footnote 12) that even the Kay Report found that there was a “statistically significant” difference between racialized and non-racialized lawyers regarding “disrespectful remarks by judges and other lawyers.” Isn’t that, in itself, *enough* racism to justify modest equality initiatives? Mr. Klippenstein’s position rests on existing racism levels being “just right”, even if that racism is exhibited by the arbiters of our justice system.

Fourth, blunt comparison of supposedly conflicting conclusions about “racial prejudice” cannot reliably undermine the persuasiveness of the Challenges Report. The two reports occurred 10 years apart, surveyed different populations, employed distinct methodologies, and asked different questions. I agree that optimally rigorous qualitative research situates its observations in

the context of prior research. But Mr. Klippenstein’s analysis—based on one other study which he claims reaches a vastly different conclusion from the Challenges Report—is hardly an adequate review of the research on racism in the legal profession.

Conclusion

Mr. Klippenstein concludes that the Challenges Report is “methodologically invalid, seriously misleading, and driven by a particular political ideology, and was and is an unacceptable basis for serious policy-making by the Law Society, in particular the policy initiatives which are currently being implemented” (at 15). To the contrary, as I have explained above:

1. Red Herring: Mr. Klippenstein’s Review is a distraction. He selectively demands sociological evidence for equality initiatives, but not others. Accordingly, even if the Challenges Report were methodologically flawed, that fails to prove that equality initiatives are not worthwhile.
2. Goldilocks: Given that Mr. Klippenstein repeatedly concedes the existence of racial prejudice in the legal profession, his opposition to modest anti-racism initiatives is predicated on the perverse view that the current amount of racism is “just right”.
3. Rebuttal: Mr. Klippenstein’s six substantive criticisms are unpersuasive. They misunderstand basic principles of statistics and qualitative research and they allege that the Challenges Report is driven by ideology when, to the contrary, it is Mr. Klippenstein who appears committed to post-racial dogmatism.

Mr. Klippenstein’s critique of the Challenges Report does not undermine the worth of modest anti-racism initiatives at the Law Society. And, to be frank, it is exhausting how much time, effort, and money has been invested—largely by racialized licensees—in “proving” there is sufficient racism in the legal profession to warrant modest LSO initiatives, rather than in strategizing innovative ways through which to tackle the racism we all know is there, even if we disagree on its precise character and amount. Whether a space is more or less racist cannot negate the moral worth of basic anti-racist initiatives that, at a bare minimum, monitor racial inequality.

Despite Mr. Klippenstein’s beliefs, the legal profession in Canada is not post-racial. For example, in 2019, [a judge](#) discredited a witness for having a Nigerian accent, while in 2018 [another judge](#) announced her fear of “big dark people” to a room full of law students. And rather than take modest steps towards addressing the conceded racism in the profession, Mr. Klippenstein instead argues that the underrepresentation of racialized lawyers is due to the fact that “not all sub-cultures in the Ontario population equally value the legal professions as a career” (pg. 14)—what Bencher Sam Goldstein described in a [\(now deleted\) tweet](#) as our lacking “culture of learning.” As Fanon astutely observed long ago: “The simplicity of the Negro is a myth created by superficial observers” (*Black Skin, White Masks* (1952) at 48).

There is nothing “critical” in a review that denies systemic racism and resists modest equality initiatives. Let us stop debating whether racism exists, and start strategizing how to address it.

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