

RICHARD DELGADO  
AND JEAN STEFANCIC

CRITICAL  
**RACE**  
THEORY

AN INTRODUCTION

FOREWORD BY ANGELA HARRIS



# Critical Race Theory

## CRITICAL AMERICA

General Editors: Richard Delgado and Jean Stefancic

*White by Law: The Legal Construction of Race*

Ian F. Haney López

*Cultivating Intelligence: Power, Law, and the Politics  
of Teaching*

Louise Harmon and Deborah W. Post

*Privilege Revealed: How Invisible Preference  
Undermines America*

Stephanie M. Wildman with Margalynne Armstrong,  
Adrienne D. Davis, and Trina Grillo

*Does the Law Morally Bind the Poor? or What Good's  
the Constitution When You Can't Afford  
a Loaf of Bread?*

R. George Wright

*Hybrid: Bisexuals, Multiracials, and Other Misfits  
under American Law*

Ruth Colker

*Critical Race Feminism: A Reader*

Edited by Adrien Katherine Wing

*Immigrants Out! The New Nativism and the Anti-Immigrant  
Impulse in the United States*

Edited by Juan F. Perea

*Taxing America*

Edited by Karen B. Brown and Mary Louise Fellows

*Notes of a Racial Caste Baby: Color Blindness and  
the End of Affirmative Action*

Bryan K. Fair

*Please Don't Wish Me a Merry Christmas: A Critical History  
of the Separation of Church and State*

Stephen M. Feldman

*To Be an American: Cultural Pluralism and the  
Rhetoric of Assimilation*

Bill Ong Hing

*Negrophobia and Reasonable Racism: The Hidden Costs  
of Being Black in America*

Jody David Armour

*Black and Brown in America: The Case for Cooperation*

Bill Piatt

*Black Rage Confronts the Law*

Paul Harris

*Selling Words: Free Speech in a Commercial Culture*

R. George Wright

*The Color of Crime: Racial Hoaxes, White Fear,  
Black Protectionism, Police Harassment, and  
Other Macroaggressions*

Katheryn K. Russell

*The Smart Culture: Society, Intelligence, and Law*

Robert L. Hayman, Jr.

*Was Blind, but Now I See: White Race Consciousness  
and the Law*

Barbara J. Flagg

*The Gender Line: Men, Women, and the Law*

Nancy Levit

*Heretics in the Temple: Americans Who Reject the  
Nation's Legal Faith*

David Ray Papke

*The Empire Strikes Back: Outsiders and the Struggle  
over Legal Education*  
Arthur Austin

*Interracial Justice: Conflict and Reconciliation in  
Post-Civil Rights America*  
Eric K. Yamamoto

*Black Men on Race, Gender, and Sexuality:  
A Critical Reader*  
Edited by Devon Carbado

*When Sorry Isn't Enough: The Controversy over Apologies  
and Reparations for Human Injustice*  
Edited by Roy L. Brooks

*Disoriented: Asian Americans, Law, and the Nation-State*  
Robert S. Chang

*Rape and the Culture of the Courtroom*  
Andrew E. Taslitz

*The Passions of Law*  
Edited by Susan A. Bandes

*Global Critical Race Feminism: An International Reader*  
Edited by Adrien Katherine Wing

*Law and Religion: Critical Essays*  
Edited by Stephen M. Feldman

*Changing Race: Latinos, the Census, and the History  
of Ethnicity*  
Clara E. Rodríguez

*From the Ground Up: Environmental Racism and the Rise of  
the Environmental Justice Movement*  
Luke Cole and Sheila Foster

*Nothing but the Truth: Why Trial Lawyers Don't, Can't, and  
Shouldn't Have to Tell the Whole Truth*

Steven Lubet

*Critical Race Theory: An Introduction*

Richard Delgado and Jean Stefancic



# Critical Race Theory

*An Introduction*

Richard Delgado and  
Jean Stefancic

Foreword by Angela Harris



NEW YORK UNIVERSITY PRESS

*New York and London*

NEW YORK UNIVERSITY PRESS  
New York and London

© 2001 by New York University  
All rights reserved

Library of Congress Cataloging-in-Publication Data  
Delgado, Richard.

Critical race theory : an introduction / Richard Delgado and  
Jean Stefancic.

p. cm. — (Critical America)

Includes bibliographical references and index.

ISBN 0-8147-1930-9 (cloth) — ISBN 0-8147-1931-7 (pbk.)

1. Race discrimination—Law and legislation—United States.

2. Critical legal studies—United States. 3. United States—Race  
relations—Philosophy. I. Stefancic, Jean. II. Title. III. Series.

KF4755 .D454 2001

342.73'0873—dc21

00-012475

New York University Press books are printed on acid-free paper,  
and their binding materials are chosen for strength and durability.

Manufactured in the United States of America

10 9 8 7 6 5 4 3 2 1

*Some men see things as they are and say, why;  
I dream things that never were and say, why not.*  
—Robert F. Kennedy

*In order to get beyond racism, we must first take  
account of race.  
There is no other way.*  
—Justice Harry Blackmun



# Contents

	<i>Acknowledgments</i>	<i>xv</i>
	<i>Foreword by Angela Harris</i>	<i>xvii</i>
I	Introduction	1
	A. What Is Critical Race Theory?	2
	B. Early Origins	3
	C. Relationship to Other Movements	4
	D. Principal Figures	5
	E. Spin-off Movements	6
	F. Basic Tenets of Critical Race Theory	6
	G. How Much Racism Is There in the World?	9
	H. Organization of This Book	11
	<i>Questions and Comments for Chapter I</i>	13
	<i>Suggested Readings</i>	14
II	Hallmark Critical Race Theory Themes	15
	A. Interest Convergence, Material Determinism, and Racial Realism	16
	B. Revisionist History	20
	C. Critique of Liberalism	21
	D. Structural Determinism	25
	1. Tools of Thought and the Dilemma of Law Reform	26

	2. The Empathic Fallacy	27
	<i>Classroom Exercise</i>	29
	3. Serving Two Masters	30
	4. Race Remedies Law as a Homeostatic Device	31
	<i>Questions and Comments for Chapter II</i>	33
	<i>Suggested Readings</i>	34
III	Legal Storytelling and Narrative Analysis	37
	A. Opening a Window onto Ignored or Alternative Realities	39
	B. Counterstorytelling	42
	C. Cure for Silencing	43
	D. Storytelling in Court	45
	E. Storytelling on the Defensive	46
	<i>Questions and Comments for Chapter III</i>	47
	<i>Suggested Readings</i>	48
IV	Looking Inward	51
	A. Intersectionality	51
	B. Essentialism and Anti-Essentialism	56
	C. Nationalism versus Assimilation	59
	<i>Classroom Exercise</i>	63
	<i>Questions and Comments for Chapter IV</i>	64
	<i>Suggested Readings</i>	65
V	Power and the Shape of Knowledge	67
	A. The Black-White Binary	67
	B. Critical White Studies	74
	<i>Classroom Exercise</i>	80
	C. Other Developments: Latino and Asian Critical Thought, Critical Race Feminism, Queer-Crit Theory	81
	<i>Questions and Comments for Chapter V</i>	84
	<i>Suggested Readings</i>	85

VI	Critiques and Responses to Criticism	87
	<i>Classroom Exercise</i>	95
	<i>Questions and Comments for Chapter VI</i>	97
	<i>Suggested Readings</i>	98
VII	Critical Race Theory Today	101
	A. The 1990s	101
	B. Capitalism on the Rampage	102
	1. Unmasking Color Blindness	103
	2. Race, Class, Welfare, and Poverty	107
	3. Globalization	111
	C. Power	113
	D. Identity	120
	<i>Classroom Exercise</i>	121
	<i>Questions and Comments for Chapter VII</i>	123
	<i>Suggested Readings</i>	125
VIII	Conclusion	129
	A. The Future	129
	B. A Critical Race Agenda for the New Century	131
	C. Likely Responses to Critical Race Theory	133
	1. Critical Race Theory Becomes the New Civil Rights Orthodoxy	133
	2. Critical Race Theory Marginalized and Ignored	134
	3. Critical Race Theory Analyzed, but Rejected	134
	4. Partial Incorporation	135
	<i>Classroom Exercise</i>	135
	<i>Questions and Comments for Chapter VIII</i>	137
	<i>Suggested Readings</i>	138
	 <i>Glossary of Terms</i>	 141
	<i>Index</i>	157
	<i>About the Authors</i>	167



## Acknowledgments

We wish to thank the many gallant individuals, historical and contemporary, sung and unsung, who have struggled to make the world a better place. We owe special gratitude to the many writers in the critical race theory, feminist, and critical legal studies communities who have inspired us to think more deeply about social justice than we would have without their teachings. Thanks, as well, to Niko Pfund, past editor in chief at New York University Press, for encouraging us to write this book, and to Anna Frederiksen-Cherry, Peter Lee, Dorothea Reiff, Eugenia Jackson, and Jami Vigil for editorial and research assistance. Diana Stahl, Linda Spiegler, and Cindy Winn prepared the manuscript with precision and dispatch. The University of Colorado Law School, as always, provided us with first-rate facilities and an intellectually stimulating work environment.



# Foreword

*Angela Harris*

In 1982 I was a graduate student in social science at the University of Chicago. I lived at International House, among a vibrant community of American students from African American, Latino/a, South Asian, and other backgrounds, as well as foreign students from Asia, Europe, Africa, and the Americas. We protested and picketed over sanctions for the South African apartheid regime. We saw Michael Jackson moonwalking for the first time on television. Our black male friends got stopped by the police for looking like members of the impoverished African American community that surrounded Hyde Park. We read books in which feminists attacked Freud and Third World women talked back to First World pieties. And we fought with the university administration over our demands for more programs, more resources, and more support for students of color on campus.

In 1983 I was a first-year law student at the University of Chicago. In my entering class of roughly 180 students, there were four African American students, including myself; one

Asian American student; and two Latinos. All of our professors were white, and all but two were male. Even more disorienting, however, than mere demographics was the fact that the lively discourse on racial-ethnic relations, both domestic and international, was gone. None of my professors talked about race or ethnicity; it was apparently irrelevant to the law. None of my professors in the first year talked about feminism or the concerns of women, either. These concerns were also, apparently, irrelevant. Nowhere, in fact, did the cases and materials we read address concerns of group inequality, sexual difference, or cultural identity. There was only one Law, a law that in its universal majesty applied to everyone without regard to race, color, gender, or creed.

Disoriented and unsure of ourselves, a few of us felt that something was profoundly missing in our education, though we could not articulate what the missing something was. We went outside the classroom to look for it. Some of us went to work for the Mandel Legal Aid Clinic. Some of us successfully agitated to get Professor Catharine MacKinnon, the pathbreaking feminist legal scholar, invited to speak (though not invited to join the faculty). Some of us even succeeded in getting permission for Professor Mary Becker to teach a seminar in feminist jurisprudence (though the dean asked us, somewhat bewilderedly, whether men would be excluded from the reading list). In reading groups we began to explore the literature of critical legal studies. But there seemed to be no critical literature on race and the law.

There was, of course, law that had a lot to do with the lives of some communities of color: poverty law, welfare law,

criminal law, immigration law. But there was, seemingly, no language in which to embark on a race-based, systematic critique of legal reasoning and legal institutions themselves. As first-year, then second-year, then third-year law students, we had no inkling of the struggles going on at Harvard Law School over the work and teachings of Derrick Bell, or of the few scholars—one coauthor of this book among them—who had begun to apply the tools of critical theory to the law. We finished our legal educations never having found a place where the sophisticated discourse of racial critique in which we lived our everyday lives could enter the legal canon.

Three years after I got my law degree, in the summer of 1989, I was a first-year law teacher invited to attend the first-ever workshop on something called “critical race theory,” to be held at the St. Benedict Center in Madison, Wisconsin. At that workshop, I discovered what had been missing for me as a student. I met some of the people who, by now, had begun to be recognized across the nation as major intellectual figures: Derrick Bell, Kimberlé Crenshaw, Richard Delgado, Mari Matsuda, Patricia Williams. And I discovered a community of scholars who were inventing a language and creating a literature that was unlike anything I had read for class in three years of law school.

As we enter the twenty-first century, critical race theory is no longer new, but it continues to grow and thrive. The community has grown: scholars not only from the United States but from countries including Canada, Australia, England, India, and Spain now work within the discipline of critical race theory. The literature has grown in breadth and depth:

as this book indicates, not only race-crits but also queer-crits, LatCrits, and critical race feminists seek to reveal and challenge the practices of subordination facilitated and permitted by legal discourse and legal institutions. And, finally, the audience has grown. Critical race theory has exploded from a narrow subspecialty of jurisprudence chiefly of interest to academic lawyers into a literature read in departments of education, cultural studies, English, sociology, comparative literature, political science, history, and anthropology around the country.

That is where this book comes in. Richard Delgado and Jean Stefancic have written a primer for nonlawyers that makes the now sprawling literature of critical race theory easily accessible to the beginner. From the earliest social and intellectual origins of the movement to its key themes and debates to its methods to its future, Delgado and Stefancic offer a lively, lucid guide to critical race theory and a starting place for further reading and thinking. With the help of this book, even students who find their official course reading lists as barren as I did in 1983 will find their way into a rich and important intellectual debate.

Critical race theory not only dares to treat race as central to the law and policy of the United States, it dares to look beyond the popular belief that getting rid of racism means simply getting rid of ignorance, or encouraging everyone to “get along.” To read this primer is to be sobered by the recognition that racism is part of the structure of legal institutions, but also to be invigorated by the creativity, power, wit, and humanity of the voices speaking about ways to change that

structure. As race relations continue to shape our lives in the new century—setting the stage for new tragedies and new hopes—critical race theory has become an indispensable tool for making sense of it all.

Meanwhile, I've saved my 1989 Critical Race Theory Workshop T-shirt. I'm betting it will be worth something someday.



## CHAPTER I

# Introduction

*Think of events that can occur in an ordinary day. A child raises her hand repeatedly in a fourth grade class; the teacher either recognizes her or does not. A shopper hands a cashier a five dollar bill to pay for a small item; the clerk either smiles, makes small talk, and deposits change in the shopper's hand or does not. A woman goes to a new car lot ready to buy; salespeople stand about talking to each other or all converge trying to help her. A jogger in a park gives a brief acknowledgment to an approaching walker; the walker returns the greeting or walks by silently.*

*You are a white person—the child, the shopper, the jogger. The responses are all from white people and are all negative. Are you annoyed? Do you, for even a moment, think that maybe you are receiving this treatment because of your race? Or might you think that all these people are having a bad day? Next suppose that the responses are all from persons of color. Are you thrown off guard? Angry? Depressed?*

*You are a person of color and these same things happen to you and the actors are all white. What is the first thing that comes to your mind? Do you immediately think that you might be treated in these ways because you are not white? If*

*so, how do you feel? Angry? Downcast? Do you let it roll off your back? And if the responses come from fellow persons of color, then what do you think? Suppose the person of color is from a group other than your own? Sometimes actions like these are mere rudeness or indifference. The merchant is in a hurry; the walker, lost in thought. But at other times, race seems to play a part. When it does, social scientists call the event a “microaggression,” by which they mean one of those many sudden, stunning, or dispiriting transactions that mar the days of women and folks of color. Like water dripping on sandstone, they can be thought of as small acts of racism, consciously or unconsciously perpetrated, welling up from the assumptions about racial matters most of us absorb from the cultural heritage in which we come of age in the United States. These assumptions, in turn, continue to inform our public civic institutions—government, schools, churches—and our private, personal, and corporate lives.*

*Sometimes the acts are not micro at all. Imagine that the woman or minority standing alone and ignored at the car sales lot eventually attracts the attention of a salesperson. They negotiate, and she buys a car. Later she learns that she paid almost a thousand dollars more than what the average white male pays for that same car. (See Ian Ayres, Fair Driving, 104 Harv. L. Rev. 817 [1991]).*

### *A. What Is Critical Race Theory?*

The critical race theory (CRT) movement is a collection of activists and scholars interested in studying and transforming the relationship among race, racism, and power. The

movement considers many of the same issues that conventional civil rights and ethnic studies discourses take up, but places them in a broader perspective that includes economics, history, context, group- and self-interest, and even feelings and the unconscious. Unlike traditional civil rights, which embraces incrementalism and step-by-step progress, critical race theory questions the very foundations of the liberal order, including equality theory, legal reasoning, Enlightenment rationalism, and neutral principles of constitutional law.

Although CRT began as a movement in the law, it has rapidly spread beyond that discipline. Today, many in the field of education consider themselves critical race theorists who use CRT's ideas to understand issues of school discipline and hierarchy, tracking, controversies over curriculum and history, and IQ and achievement testing. Political scientists ponder voting strategies coined by critical race theorists. Ethnic studies courses often include a unit on critical race theory, and American studies departments teach material on critical white studies developed by CRT writers. Unlike some academic disciplines, critical race theory contains an activist dimension. It not only tries to understand our social situation, but to change it; it sets out not only to ascertain how society organizes itself along racial lines and hierarchies, but to transform it for the better.

### *B. Early Origins*

Critical race theory sprang up in the mid-1970s, as a number of lawyers, activists, and legal scholars across the

country realized, more or less simultaneously, that the heady advances of the civil rights era of the 1960s had stalled and, in many respects, were being rolled back. Realizing that new theories and strategies were needed to combat the subtler forms of racism that were gaining ground, early writers such as Derrick Bell, Alan Freeman, and Richard Delgado (coauthor of this primer) put their minds to the task. They were soon joined by others, and the group held its first conference at a convent outside Madison, Wisconsin, in the summer of 1989. Further conferences and meetings took place. Some were closed working sessions at which the group threshed out internal problems and struggled to clarify central issues, while others were public, multi-day affairs with panels, plenary sessions, keynote speakers, and a broad representation of students, activists, and scholars from a wide variety of disciplines.

### *C. Relationship to Other Movements*

As the reader will see, critical race theory builds on the insights of two previous movements, critical legal studies and radical feminism, to both of which it owes a large debt. It also draws from certain European philosophers and theorists, such as Antonio Gramsci and Jacques Derrida, as well as from the American radical tradition exemplified by such figures as Sojourner Truth, Frederick Douglass, W.E.B. Du Bois, Cesar Chavez, Martin Luther King, Jr., and the Black Power and Chicano movements of the sixties and early seventies. From critical legal studies, the group borrowed the

idea of legal indeterminacy—the idea that not every legal case has one correct outcome. Instead, one can decide most cases either way, by emphasizing one line of authority over another, or interpreting one fact differently from the way one’s adversary does. It also incorporated the critique of triumphalist history, and the insight that favorable precedent, like *Brown v. Board of Education*, tends to deteriorate over time, cut back by narrow lower-court interpretation and administrative foot dragging and delay. The group also built on feminism’s insights into the relationship between power and the construction of social roles, as well as the unseen, largely invisible collection of patterns and habits that make up patriarchy and other types of domination. From conventional civil rights thought, the movement took a concern for redressing historic wrongs, as well as the insistence that legal and social theory have practical consequences. CRT also shared with it a sympathetic understanding of notions of nationalism and group empowerment.

#### *D. Principal Figures*

Derrick Bell, professor of law at New York University, is the movement’s intellectual father figure. Still active today, Bell teaches, writes occasional law review articles and memoir-type books, delivers speeches, and keeps a number of case-books current. The late Alan Freeman, who taught at the State University of New York at Buffalo law school, wrote a number of foundational articles, including a pathbreaking piece that documented how the U.S. Supreme Court’s race

jurisprudence, even when seemingly liberal in thrust, nevertheless legitimized racism. Kimberlé Crenshaw, Angela Harris, Charles Lawrence, Mari Matsuda, and Patricia Williams are major figures, as well. Leading Asian scholars include Neil Gotanda, Eric Yamamoto, and Matsuda. The top Indian critical scholar is Robert Williams; the best-known Latinos/as, Richard Delgado, Kevin Johnson, Margaret Montoya, Juan Perea, and Francisco Valdes. The reader will find their ideas discussed frequently throughout this primer.

### *E. Spin-off Movements*

Recently, critical race theory has splintered. Although the new subgroups, which include an emerging Asian American jurisprudence, a forceful Latino-critical (LatCrit) contingent, and a feisty queer-crit interest group, continue to maintain relatively good relations under the umbrella of critical race theory, meeting together at periodic conferences and gatherings, each has developed its own body of literature and set of priorities. For example, Latino and Asian scholars study immigration theory and policy, as well as language rights and discrimination based on accent or national origin. A small group of Indian scholars addresses indigenous people's rights, sovereignty, and land claims.

### *F. Basic Tenets of Critical Race Theory*

What do critical race theorists believe? Probably not every member would subscribe to every tenet set out in this book,

but many would agree on the following propositions. First, that racism is ordinary, not aberrational—“normal science,” the usual way society does business, the common, everyday experience of most people of color in this country. Second, most would agree that our system of white-over-color ascendancy serves important purposes, both psychic and material. The first feature, ordinariness, means that racism is difficult to cure or address. Color-blind, or “formal,” conceptions of equality, expressed in rules that insist only on treatment that is the same across the board, can thus remedy only the most blatant forms of discrimination, such as mortgage redlining or the refusal to hire a black Ph.D. rather than a white high school dropout, that do stand out and attract our attention. The second feature, sometimes called “interest convergence” or material determinism, adds a further dimension. Because racism advances the interests of both white elites (materially) and working-class people (psychically), large segments of society have little incentive to eradicate it. Consider, for example, Derrick Bell’s shocking proposal (discussed in a later chapter) that *Brown v. Board of Education*—considered a great triumph of civil rights litigation—may have resulted more from the self-interest of elite whites than a desire to help blacks.

A third theme of critical race theory, the “social construction” thesis, holds that race and races are products of social thought and relations. Not objective, inherent, or fixed, they correspond to no biological or genetic reality; rather, races are categories that society invents, manipulates, or retires when convenient. People with common origins share certain

physical traits, of course, such as skin color, physique, and hair texture. But these constitute only an extremely small portion of their genetic endowment, are dwarfed by that which we have in common, and have little or nothing to do with distinctly human, higher-order traits, such as personality, intelligence, and moral behavior. That society frequently chooses to ignore these scientific facts, creates races, and endows them with pseudo-permanent characteristics is of great interest to critical race theory.

Another, somewhat more recent, development concerns differential racialization and its many consequences. Critical writers in law, as well as social science, have drawn attention to the ways the dominant society racializes different minority groups at different times, in response to shifting needs such as the labor market. At one period, for example, society may have had little use for blacks, but much need for Mexican or Japanese agricultural workers. At another time, the Japanese, including citizens of long standing, may have been in intense disfavor and removed to war relocation camps, while society cultivated other groups of color for jobs in war industry or as cannon fodder on the front. Popular images and stereotypes of various minority groups shift over time, as well. In one era, a group of color may be depicted as happy-go-lucky, simpleminded, and content to serve white folks. A little later, when conditions change, that very same group may appear in cartoons, movies, and other cultural scripts as menacing, brutish, and out of control, requiring close monitoring and repression.

Closely related to differential racialization—the idea that each race has its own origins and ever evolving history—is

the notion of intersectionality and anti-essentialism. No person has a single, easily stated, unitary identity. A white feminist may be Jewish, or working-class, or a single mother. An African American activist may be gay or lesbian. A Latino may be a Democrat, a Republican, or even a black—perhaps because that person’s family hails from the Caribbean. An Asian may be a recently arrived Hmong of rural background and unfamiliar with mercantile life, or a fourth-generation Chinese with a father who is a university professor and a mother who operates a business. Everyone has potentially conflicting, overlapping identities, loyalties, and allegiances.

A final element concerns the notion of a unique voice of color. Coexisting in somewhat uneasy tension with anti-essentialism, the voice-of-color thesis holds that because of their different histories and experiences with oppression, black, Indian, Asian, and Latino/a writers and thinkers may be able to communicate to their white counterparts matters that the whites are unlikely to know. Minority status, in other words, brings with it a presumed competence to speak about race and racism. The “legal storytelling” movement urges black and brown writers to recount their experiences with racism and the legal system and to apply their own unique perspectives to assess law’s master narratives. This topic, too, is taken up later in this book.

### *G. How Much Racism Is There in the World?*

Many modern-day readers believe that racism is declining or that class today is more important than race. And it is certainly true that lynching and other shocking expressions

of racism are less frequent than in the past. Moreover, many Euro-Americans consider themselves to have black, Latino/a, or Asian friends. Still, by every social indicator, racism continues to blight the lives of people of color, including holders of high-echelon jobs, even judges.

I concede that I am black. I do not apologize for that obvious fact. I take rational pride in my heritage, just as most other ethnics take pride in theirs. However, that one is black does not mean . . . that he is anti-white. . . . As do most blacks, I believe that the corridors of history in this country have been lined with countless instances of racial injustice. . . .

Thus a threshold question which might be inferred from defendants' petition is: Since blacks (like most other thoughtful Americans) are aware of the "sordid chapter in American history" of racial injustice, shouldn't black judges be disqualified per se from adjudicating cases involving claims of racial discrimination?

*Federal Judge Leon Higginbotham, in refusing to disqualify himself from hearing a case, Commonwealth v. Local Union 542, International Union of Operating Engineers, 388 F. Supp. 155 (E.D. Pa. 1974).*

Studies show that blacks and Latinos who seek loans, apartments, or jobs are much more apt than similarly qualified whites to be rejected, often for vague or spurious reasons. The prison population is largely black and brown; chief executive officers, surgeons, and university presidents are almost all white. Poverty, however, has a black or brown face: black families have, on the average, about one-tenth of the assets of their white counterparts. They pay more for many products and services, including cars. People of color

lead shorter lives, receive worse medical care, complete fewer years of school, and occupy more menial jobs than do whites. A recent United Nations report showed that African Americans in the United States would make up the twenty-seventh ranked nation in the world on a combined index of social well-being; Latinos would rank thirty-third. Why all this is so and the relationship between racism and economic oppression—between race and class—are topics of great interest to critical race theory and covered later.

#### *H. Organization of This Book*

*Critical Race Theory* addresses, in simple, straightforward language, these and additional themes characteristic of the new critical race jurisprudence. Chapter 2 presents four large themes in critical race theory—interest convergence or material determinism, revisionist interpretations of history, the critique of liberalism, and structural determinism.

Chapter 3 takes up storytelling, counterstorytelling, and the narrative turn in general; chapter 4 addresses the twin themes of intersectionality and anti-essentialism. It also considers cultural nationalism and the opposite notion that minorities should attempt to assimilate and blend into mainstream society.

Does American racial thought contain an implicit black-white binary, an unstated dichotomy in which society comes divided into two groups, whites and blacks, so that nonblack minority groups, such as Filipinos or Puerto Ricans, enter into the equation only insofar as they are able to depict

themselves and their problems as like blacks? Chapter 5 explores this issue, as well as “critical white studies.” Social scientists have long put minority groups under the lens, examining their culture, intelligence, motivation, family arrangements, music, and much more. Recently scholars on both sides of the color line have switched perspective and are examining whites as a group. One topic that critical white studies addresses is whether such a thing as white privilege exists, and what its components are. Chapter 5 also looks at the scholarship of other racial groups such as the LatCrits and critical Asian writers.

As the reader might imagine, critical race theory has come in for its share of criticism. Chapter 6 examines the main challenges that writers from both the Left and Right have leveled at this new approach to civil rights. It also includes responses to those objections. Chapter 7 describes critical race theory’s current situation. It also ponders a few relatively recent issues on the movement’s agenda, including hate speech, criminal justice, merit, affirmative action, poverty, and globalization. A concluding chapter hazards some predictions on the country’s racial future and critical race theory’s role in that future.

The reader will find in each chapter questions for discussions and a short list of suggested readings. We include hypotheticals and classroom exercises where we think these will promote understanding. We also excerpt passages from judicial decisions illustrating the influence of critical race theory. At the end we include an extensive glossary of terms, including many that are not found in this book.

## QUESTIONS AND COMMENTS FOR CHAPTER I

1. Is critical race theory pessimistic? Consider that it holds that racism is ordinary, normal, and embedded in society, and, moreover, that changes in relationships among the races (which include both improvements and turns for the worse) reflect the interest of dominant groups, rather than idealism, altruism, or the rule of law.

Or is it optimistic, because it believes that race is a social construction? (As such, it should be subject to ready change.)

And if CRT does have a dark side, what follows from that? Is medicine pessimistic because it focuses on diseases and traumas?

2. Most people of color believe that the world contains much more racism than white folks do. What accounts for this difference?
3. Is race or class more important in determining one's life chances?

## SUGGESTED READINGS

- Brooks, Roy L. & Mary Jo Newborn, *Critical Race Theory and Classical-Liberal Civil Rights Scholarship: A Distinction without a Difference*, 82 Cal. L. Rev. 787 (1994).
- Calmore, John O., *Critical Race Theory, Archie Shepp, and Fire Music: Securing an Authentic Intellectual Life in a Multicultural World*, 65 S. Cal. L. Rev. 2129 (1992).
- Critical Race Theory: The Cutting Edge* (Richard Delgado & Jean Stefancic eds., 2d ed. 2000).
- Critical Race Theory: The Key Writings That Formed the Movement* (Kimberlé Crenshaw, Neil Gotanda, Gary Peller & Kendall Thomas eds., 1995).
- Haney López, Ian F., *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 Harv. C.R.-C.L. L. Rev. 1 (1994).
- Harris, Angela P., *Foreword: The Jurisprudence of Reconstruction*, 82 Cal. L. Rev. 741 (1994).
- Hayman, Robert L., Jr., *The Color of Tradition: Critical Race Theory and Postmodern Constitutional Traditionalism*, 30 Harv. C.R.-C.L. L. Rev. 57 (1995).
- Omi, Michael & Howard Winant, *Racial Formation in the United States: From the 1960s to the 1990s* (2d ed. 1994).
- Race and Races: Cases and Resources for a Diverse America* (Juan Perea, Richard Delgado, Angela Harris, & Stephanie Wildman eds., 2000).
- Special Issue on Critical Race Theory*, 11 Int'l J. Qual. Stud. Ed. 1 (1998).
- Symposium: Critical Race Theory*, 82 Cal. L. Rev. 741 (1994).

## CHAPTER II

# Hallmark Critical Race Theory Themes

*Imagine that a pair of businessmen pass a beggar on a busy downtown street. One says something disparaging about “those bums always sticking their hands out—I wish they would get a job.” His friend takes him to task for his display of classism. He explains that the street person may have overheard the remark and had his feelings hurt. He points out that we must all strive to purge ourselves of racism, classism, and sexism, that thoughts have consequences, and that how you speak makes a difference. The first businessman mutters something about political correctness and makes a mental note not to let his true feelings show in front of his friend again.*

*Or, imagine that a task force of highly advanced extraterrestrials lands on earth and approaches the nearest human being they can find, who happens to be a street person relaxing on a park bench. They offer him any one of three magic potions. The first is a pill that will rid the world of sexism—demeaning, misogynist attitudes toward women. The second is a pill that will cure racism; the third, one that will cure classism—negative attitudes toward those of lower socioeconomic station than oneself. Introduced into the*

*planet's water system, each pill will cure one of the three scourges effectively and permanently. The street person, of course, chooses classism and throws pill number three into a nearby water department reservoir.*

*Will the lives of poor people like him improve very much the next day? No. Passersby may be somewhat kinder, may smile at them more often, but if something inherent in the nature of our capitalist system ineluctably produces poverty and class segregation, that system will continue to create and chew up victims. Individual street people may feel better, but they will still be street people. And the free enterprise system, which is built on the idea of winners and losers, will continue to produce new ones every day.*

*What about racism? Suppose a magic pill were invented, or perhaps an enterprising entrepreneur developed The Ultimate Diversity Seminar, one so effective that it would completely eliminate unkind thoughts, stereotypes, and misimpressions harbored by its participants toward persons of other races. The president's civil rights advisor prevails on all the nation's teachers to introduce it into every K–12 classroom, and on the major television networks and cable network news to show it on prime time.*

*Would life improve very much for people of color?*

### *A. Interest Convergence, Material Determinism, and Racial Realism*

This hypothetical question poses an issue that squarely divides critical race theory thinkers—indeed, civil rights

activists in general. One camp, which we may call “idealists,” holds that racism and discrimination are matters of thinking, mental categorization, attitude, and discourse. Race is a social construction, not a biological reality. Hence we may unmake it and deprive it of much of its sting by changing the system of images, words, attitudes, unconscious feelings, scripts, and social teachings by which we convey to one another that certain people are less intelligent, reliable, hardworking, virtuous, and American than others.

A contrasting school—the realists or economic determinists—holds that though attitudes and words are important, racism is much more than having an unfavorable impression of members of other groups. For realists, racism is a means by which society allocates privilege and status. Racial hierarchies determine who gets tangible benefits, including the best jobs, the best schools, and invitations to parties in people’s homes. Members of this group point out that prejudice sprang up with slavery. Before then, educated Europeans held a generally positive attitude toward Africans, recognizing that African civilization was highly advanced with vast libraries and centers of learning. Africans pioneered mathematics, medicine, and astronomy long before Europeans had much knowledge of them.

Materialists point out that conquered nations generally demonize their subjects to feel better about exploiting them, so that, for example, planters and ranchers in Texas and the Southwest circulated notions of Mexican inferiority at roughly the same period that they found it necessary to take over Mexican lands or, later, to import Mexican people for

backbreaking labor. For materialists, understanding the ebb and flow of racial progress and retrenchment requires a careful look at conditions prevailing at different times in history. Circumstances change so that one group finds it possible to seize advantage, or to exploit another. They do so and then form appropriate collective attitudes to rationalize what was done. Moreover, what is true for subordination of minorities is also true for the relief of it: civil rights *gains* for communities of color coincide with the dictates of white self-interest. Little happens out of altruism alone.

In the early years of critical race theory, the realists were in a large majority. For example, scholars questioned whether the much-vaunted system of civil rights remedies ended up doing people of color much good. In a classic article in the *Harvard Law Review*, Derrick Bell argued that civil rights advances for blacks always coincided with changing economic conditions and the self-interest of elite whites. Sympathy, mercy, and evolving standards of social decency and conscience amounted to little, if anything. Audaciously, Bell selected *Brown v. Board of Education*, the crown jewel of U.S. Supreme Court jurisprudence, and invited his readers to ask themselves why the American legal system suddenly, in 1954, opened up as it did. The NAACP Legal Defense Fund had been courageously and tenaciously litigating school desegregation cases for years, usually losing or, at best, winning narrow victories.

In 1954, however, the Supreme Court unexpectedly gave them everything they wanted. Why just then? Bell hypothesized that world and domestic considerations—not moral

qualms over blacks' plight—precipitated the pathbreaking decision. By 1954 the country had ended the Korean War; the Second World War was not long past. In both wars, African American servicemen had performed gallantly in the service of democracy. Many of them returned to the United States, having experienced for the first time in their lives a setting in which cooperation and survival took precedence over racism. They were unlikely to return willingly to regimes of menial labor and social vilification. For the first time in decades, the possibility of mass domestic unrest loomed.

During that period, as well, the United States was locked in the Cold War, a titanic struggle with the forces of international communism for the loyalties of the uncommitted Third World, much of which was black, brown, or Asian. It would ill serve the U.S. interest if the world press continued to carry stories of lynchings, racist sheriffs, or murders like that of Emmett Till. It was time for the United States to soften its stance toward domestic minorities. The interests of whites and blacks, for a brief moment, converged.

Bell's article was greeted with outrage and accusations of cynicism. Yet, ten years later, the legal historian Mary Dudziak carried out extensive archival research in the files of the U.S. Department of State and the U.S. Department of Justice. She analyzed foreign press reports, as well as letters from U.S. ambassadors abroad, all showing that Bell's intuition was correct. When the Justice Department intervened on the side of the NAACP for the first time in a school desegregation case, it was responding to a flood of secret cables

and memos outlining the United States' interest in improving its image in the eyes of the Third World.

### *B. Revisionist History*

Derrick Bell's analysis of *Brown* illustrates a second signature CRT theme, revisionist history. Revisionist history reexamines America's historical record, replacing comforting majoritarian interpretations of events with ones that square more accurately with minorities' experiences. It also offers evidence, sometimes suppressed, in that very record, to support those new interpretations. Revisionism is often materialist in thrust, holding that to understand the zigs and zags of black, Latino, and Asian fortunes, one must look to things like profit, labor supply, international relations, and the interest of elite whites. For the realists, attitudes follow, explain, and rationalize what is taking place in the material sector.

The difference between the materialists and the idealists is no minor matter. It shapes strategy on decisions of how and where to invest one's energies. If the materialists are right, one needs to change the physical circumstances of minorities' lives before racism will abate. One takes seriously matters like unions, immigration quotas, and the loss of industrial jobs to globalization. If one is an idealist, campus speech codes, tort remedies for racist speech, diversity seminars, and increasing the representation of black, brown, and Asian actors on television shows will be high on one's list of priorities. A middle ground would see both forces, material and cultural, operating together and synergizing each other,

so that race reformers working in either area contribute to a holistic project of racial redemption.

Racial insults are in no way comparable to statements such as, “You are a God damned . . . liar,” which [a standard guide] gives as an example of a “mere insult.” Racial insults are different qualitatively because they conjure up the entire history of racial discrimination in this country. [Citing Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 *Harv. C.R.-C.L. L. Rev.* 133, 157 (1982).]

*Taylor v. Metzger*, 706 A. 2d 685, 695 (N.J. 1998).

### *C. Critique of Liberalism*

As mentioned in chapter 1, critical race scholars are discontent with liberalism as a framework for addressing America’s racial problems. Many liberals believe in color blindness and neutral principles of constitutional law.

The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth, and in power. . . . But in view of the constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful.

*Justice John Harlan, dissenting, in Plessy v. Ferguson*, 163 U.S. 537 (1896).

An even more extreme version of color blindness, seen in certain Supreme Court opinions today, holds that it is wrong for the law to take any note of race, even to remedy a historical wrong. Critical race theorists (or “crits,” as they are sometimes called) hold that color blindness will allow us to redress only extremely egregious racial harms, ones that everyone would notice and condemn. But if racism is embedded in our thought processes and social structures as deeply as many crits believe, then the “ordinary business” of society—the routines, practices, and institutions that we rely on to effect the world’s work—will keep minorities in subordinate positions. Only aggressive, color-conscious efforts to change the way things are will do much to ameliorate misery. As an example of one such strategy, one critical race scholar proposed that society “look to the bottom” in judging new laws. If they would not relieve the distress of the poorest group—or, worse, if they compound it—we should reject them. Although color blindness seems firmly entrenched in the judiciary, a few judges have made exceptions in unusual circumstances.

We are mindful that the Supreme Court has rejected the “role model” argument for reverse discrimination. . . . The argument for the black lieutenant is not of that character. We doubt that many inmates of boot camps aspire to become correctional officers, though doubtless some do. . . . The black lieutenant is needed because the black inmates are believed unlikely to play the correctional game of brutal drill sergeant and brutalized recruit unless there are some blacks in authority in

the camp. This is not just speculation, but is backed up by expert evidence that the plaintiffs did not rebut. The defendants' experts . . . did not rely on generalities about racial balance or diversity; did not, for that matter, defend a goal of racial balance. They opined that the boot camp in Greene County would not succeed in its mission of pacification and reformation with as white a staff as it would have had if a black male had not been appointed to one of the lieutenant slots. For then a security staff less than 6 percent black (4 out of 71), with no male black supervisor, would be administering a program for a prison population almost 70 percent black. . . .

We hold . . . that . . . the preference that the administration of the Greene County boot camp gave a black male applicant for a lieutenant's job on the ground of his race was not unconstitutional.

*Judge Richard Posner, Wittmer v. Peters, 87 F.3d 916 (7th Cir. 1996).*

Crits are also highly suspicious of another liberal mainstay, namely, rights. Particularly some of the older, more radical CRT scholars with roots in racial realism and an economic view of history believe that moral and legal rights are apt to do the right holder much less good than many would like to think. Rights are almost always procedural (for example, to a fair process) rather than substantive (for example, to food, housing, or education). Think how our system applauds affording everyone equality of opportunity, but resists programs that assure equality of results. Moreover, rights are almost always cut back when they conflict with the interests of the powerful. For example, hate speech, which targets mainly minorities, gays, lesbians, and other outsiders,

is almost always tolerated, while speech that offends the interests of empowered groups finds a ready exception in First Amendment law. Think, for example, of speech that insults a judge or other authority figure, that defames a wealthy and well-regarded person, that disseminates a government secret, or deceptively advertises products, thus cheating a large class of middle-income consumers.

Moreover, rights are said to be alienating. They separate people from each other—“stay away, I’ve got my rights”—rather than encouraging them to form close, respectful communities. And with civil rights, lower courts have found it easy to narrow or distinguish the broad, ringing landmark decision like *Brown v. Board of Education*. The group whom they supposedly benefit always greets cases like *Brown* with great celebration. But after the celebration dies down, the great victory is quietly cut back by narrow interpretation, administrative obstruction, or delay. In the end, the minority group is left little better than it was before, if not worse. Its friends, the liberals, believing the problem has been solved, go on to something else, such as saving the whales, while its adversaries, the conservatives, furious that the Supreme Court has given way once again to undeserving minorities, step up their resistance.

Lest the reader think that the crits are too hard on well-meaning liberals, bear in mind that in recent years the movement has softened somewhat. When the movement started in the mid-1970s, complacent, backsliding liberalism represented the principal impediment to racial progress. Today that obstacle has been replaced by rampant, in-your-face

conservatism that co-opts Martin Luther King, Jr.'s language, has little use for welfare, affirmative action, or other programs vital to the poor and minorities, and wants to militarize the border and make everyone speak English when businesses are crying for workers with foreign-language proficiency. Some critical race theorists, accordingly, have stopped focusing on liberalism and its ills and begun to address the conservative tide. And a determined group of “idealists” maintain that rights are not a snare and a delusion, rather they can bring genuine gains, while the struggle to obtain them unifies the group.

#### *D. Structural Determinism*

Everyone has heard the story about Eskimos who have twenty-six words for different kinds of snow. Imagine the opposite predicament—a society that has only one word (say, racism) for a phenomenon that is much more complex than that. For example: intentional racism; unintentional racism; unconscious racism; institutional racism; racism tinged with homophobia or sexism; racism that takes the form of indifference or coldness; and white privilege—reserving favors, smiles, kindness, the best stories, one's most charming side, and invitations to real intimacy for one's own kind or class.

Or imagine a painter raised by parents and preschool teachers who teach him that the world contains only three colors: red, blue, and yellow; or a would-be writer who is raised with an artificially low vocabulary of three hundred

words. Children raised in smoggy Mexico City are said to paint pictures with a brownish-yellow, never blue, sky. These examples point out the concept that lies at the heart of structural determinism, the idea that our system, by reason of its structure and vocabulary, cannot redress certain types of wrong. Structural determinism, a powerful notion that engages both the idealistic and the materialistic strands of critical race theory, takes a number of forms. Consider the following three. (A fourth, the black-white binary, is taken up in chapter 5.)

### 1. Tools of Thought and the Dilemma of Law Reform

Traditional legal research tools, found in standard law libraries, rely on a series of headnotes, index numbers, and other categories that lawyers use to find precedent. (With computerization, this reliance is somewhat less acute than it was formerly, but the problem still persists.) Suppose that no case is on point because the lawyer faces a problem of first impression, requiring legal innovation. In such situations, legal categories will lead the lawyer to dead ends—to solutions that have not worked. What is required is innovation, not the application of some preexisting rule or principle. Even when a new idea, such as jury nullification, is beginning to catch on, the legal indexers who compile the reference books and indexing tools may fail to realize its significance. When Sir William Blackstone's *Commentaries on the Laws of England* laid down the basic structure of liberal/capitalist thought, this served as a template for future generations of

lawyers, so that legal change thereafter came slowly. Once the structure of law and legal categories is set, it replicates itself much as, in the world of biology, DNA enables organisms to replicate. In some respects, the predicament is the old one about the chicken and the egg. It is hard to think about something that has no name, and it is hard to name something unless one's interpretive community has begun talking and thinking about it.

As a thought exercise, the reader is invited to consider how many of the following terms and ideas, mentioned in this book and highly relevant to the work of progressive lawyers and activists, are apt to be found in standard legal reference works: intersectionality, interest convergence, anti-essentialism, hegemony, language rights, black-white binary, jury nullification. How long will it take before these concepts enter the official vocabulary of law?

## 2. The Empathic Fallacy

Consider, next, how in certain controversies, for example, the one over hate speech, a particular type of tough-minded participant is apt to urge a free-market response: if a minority finds himself or herself on the receiving end of a stinging remark, the solution, it is said, is not to punish the speaker or enact some kind of campus hate speech rule, but to urge the victim to speak back to the offender. "The cure for bad speech is more speech."

One difficulty with this approach is that it may be physically dangerous to talk back. Much hate speech is uttered in several-on-one situations where talking back would be

foolhardy. At other times, it is delivered in anonymous or cowardly fashion, such as graffiti scrawled on the bulletin board of a minority association, or an unsigned note left in the box of a student of color. In these instances, more speech is, of course, impossible.

But a more basic problem is that much hate speech is *not perceived as such* at the time. The history of racial depiction shows that our society has blithely consumed a shocking parade of Sambos, coons, sneaky Japanese, and indolent, napping Mexicans—images that were perceived at the time as amusing, cute or, worse yet, true. How can one talk back to messages, scripts, and stereotypes that are embedded in the minds of one's fellow citizens, and, indeed, the national psyche? The idea that one can use words to undo the meanings that others attach to these very same words is to commit the empathic fallacy—the belief that one can change a narrative by merely offering another, better one—that the reader's or listener's empathy will quickly and reliably take over.

Unfortunately, however, empathy is in shorter supply than we think. Most people in their daily lives do not come into contact with many persons of radically different race or social station. We converse with, and read materials written by, persons in our own cultures. Yet in some sense, we are all our stock of narratives—the terms, preconceptions, scripts, and understandings that we use to make sense of the world. They constitute who we are, the basis on which we judge new narratives—such as one about an African American who is a genius, or a hardworking Chicano who holds three jobs. The idea that a better, fairer

script can readily substitute for the older, prejudiced one is attractive, but falsified by history. Change comes slowly. Try explaining to someone who has never seen a Mexican, except for cartoon figures wearing sombreros and serapes, that most Mexicans wear business suits.

One of the reasons for avoiding excessive sentences is that the empathy required of . . . citizens in a democracy—is stunted when parents are away in prison. “[W]ithout regular comforting, physical contact and sensory stimulation from birth, the biological capacity for sociality—the precondition for empathy and conscience—cannot develop . . . and [e]mpathy requires the nurturing required by early social relationships.” Breaking up families by sending fathers and mothers to prison for unnecessarily long terms sows the seeds of problems for the next generation, particularly when, as is sometimes the case, the ex-prisoner becomes a “monster.”

*Jack B. Weinstein, Senior Judge, U.S. District Court, Eastern District of New York, Adjudicative Justice in a Diverse Mass Society, 8 J. L. & Pol’y 385, 410 (2000).*

### *Classroom Exercise*

Pair off with one other member of your class or study group. Each of you then writes down on a piece of paper five propositions having to do with politics or social reality that you believe to be true, such as that women should have the right to choose whether to have an abortion, that everyone should be judged by the same standards for admission to school, or that the best government is one that governs least. You then offer a counterexample to one of the other person’s proposi-

tions, for example, a case of governmental intervention that worked.

How did the other person react? Did he or she accept your argument and modify her position? What was the force of your “narrative,” and why did it succeed or fail? Then, reverse places and consider your partner’s case against one of your beliefs.

### 3. Serving Two Masters

Derrick Bell has pointed out a third structure that impedes reform, this time in law. To litigate a law reform case, the lawyer needs a flesh and blood client. One might wish to establish rights of poor consumers or unmask the legal principle that a school district is not truly integrated if the makeup of certain schools is half black and half Chicano.

Suppose, however, that the client and his or her community do not want the very same remedy that the lawyer does. The lawyer, who may represent a civil rights or public interest organization, may want a sweeping remedy that names a new evil and declares it contrary to American ideals. He or she may be willing to gamble and risk all. The client, however, may want something different—better schools or more money for existing ones. He or she may want bilingual education or more black teachers, instead of classes taught by prizewinning white teachers with Ph.D.’s. A lawyer representing a poor client may want to litigate constitutional due process and welfare hearings, while the client may be more interested in a new pair of Sunday shoes for her child. These conflicts, which are ubiquitous in law reform situations,

haunt the lawyer pursuing social change and seem inherent in our system of legal remedies. Which master should the lawyer serve?

#### 4. Race Remedies Law as a Homeostatic Device

Some critics (such as Alan Freeman, mentioned above) even argue that our system of civil rights law and enforcement ensures that racial progress occurs at just the right slow pace. Too slow would make minorities impatient and risk destabilization; too fast could jeopardize important material and psychic benefits for elite groups. When the gap between our ideals and practices becomes too great, the system produces a “contradiction-closing case,” so that everyone may see that it is truly fair and just. When social conditions call for a genuine concession, such as affirmative action, the costs of that concession are always placed on minorities—in the form of stigma—or on working-class whites, like Alan Bakke, who sought admission to the University of California at Davis Medical School, least able to incur them.

In her amended complaint, Monteiro alleged that her ninth-grade daughter and other similarly situated African-American students attended a school where they were called “niggers” by white children, and where that term was written on the walls of the buildings in which they were supposed to learn civics and social studies. It does not take an educational psychologist to conclude that being referred to by one’s peers by the most noxious racial epithet in the contemporary American lexicon, being shamed and humiliated on the basis of one’s race, and having the

school authorities ignore or reject one's complaints would adversely affect a Black child's ability to obtain the same benefit from schooling as her white counterparts. . . . It is the beginning of high school, when a young adolescent is highly impressionable and is making decisions about education that will affect the course of her life. . . . [A] school where this sort of conduct occurs unchecked is utterly failing in its mandate to provide a nondiscriminatory educational environment. Accordingly, we find that the complaint sets forth allegations that satisfy the first factor of the test for a Title VI violation.

*Monteiro v. Tempe Union High School District*, 158 F. 3d 1022, 1039 (9th Cir. 1998).

(Before *Monteiro*, a nearly unbroken string of decisions rejected relief for minority plaintiffs subjected to racist slurs and struck down campus speech codes.)

## QUESTIONS AND COMMENTS FOR CHAPTER II

1. If society agreed to think only the kindest of thoughts about people of color, would their condition improve very much? How much, and in the short or the long run?
2. If society agreed to treat everyone, including people of color, exactly the same, would the condition of communities of color improve very much? Again, in the short or the long run?
3. If Indians discovered gold on the reservation or blacks did the same in the inner city, so that the average wealth and family income of Indians and blacks were exactly the same as that of whites, would racism abate? Become more intense?
4. Today more African Americans attend segregated schools than they did when *Brown v. Board of Education* was decided. What does this say about reform through law? About society?
5. Beginning with *Brown* and continuing through the sixties and early seventies, the Supreme Court handed down decision after decision favorable to blacks and other minorities. Now it has been cutting back on affirmative action and weakening enforcement under antidiscrimination laws. What explains the shift?

## SUGGESTED READINGS

- Beard, Charles A., *Economic Interpretation of the Constitution of the United States* (1935).
- Bell, Derrick A., Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 *Harv. L. Rev.* 518 (1980).
- Bell, Derrick A., Jr., *Race, Racism, and American Law* (4th ed. 2000).
- Bell, Derrick A., Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 *Yale L.J.* 470 (1976).
- Crenshaw, Kimberlé W., *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 *Harv. L. Rev.* 1331 (1988).
- Delgado, Richard & Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?*, 77 *Cornell L. Rev.* 1258 (1992).
- Delgado, Richard & Jean Stefancic, *Why Do We Tell the Same Stories?: Law Reform, Critical Librarianship, and the Triple Helix Dilemma*, 42 *Stan. L. Rev.* 207 (1989).
- Dudziak, Mary L., *Desegregation as a Cold War Imperative*, 41 *Stan. L. Rev.* 61 (1988).
- Freeman, Alan D., *Legitimizing Racial Discrimination through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 *Minn. L. Rev.* 1049 (1978).
- Gotanda, Neil, *A Critique of "Our Constitution Is Color-Blind,"* 44 *Stan. L. Rev.* 1 (1991).
- Guinier, Lani, *The Tyranny of the Majority: Fundamental Fairness in Representative Democracy* (1994).

- Hayman, Robert L., Jr., *The Smart Culture: Society, Intelligence, and Law* (1998).
- Lawrence, Charles R., III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 *Stan. L. Rev.* 317 (1987).
- Williams, Robert A., *The American Indian in Western Legal Thought: The Discourses of Conquest* (1990).
- Williams, Robert A., *Documents of Barbarism: The Contemporary Legacy of European Racism and Colonialism in the Narrative Traditions of Federal Indian Law*, 31 *Ariz. L. Rev.* 237 (1989).
- Zinn, Howard, *A People's History of the United States: 1492–Present* (20th Anniversary ed. 1999).



## CHAPTER III

# Legal Storytelling and Narrative Analysis

*Have you ever had the experience of hearing one story and being completely convinced, then hearing an exactly opposite story, equally well told, and being left unsure of your convictions? In an everyday experience, Kim complains to the teacher that Billy has been picking fights on the playground. The teacher listens sympathetically, and is ready to take action against Billy. Fortunately, the teacher listens to Billy's story or that of an impartial third child. It turns out that Billy is not at fault at all; Kim started the trouble.*

*Or have you perhaps had the experience of watching two gifted appellate lawyers arguing a case? You hear the first and are persuaded. You see no way that the court can fail to rule in his or her favor. Then the other lawyer argues the other side, citing different authority, invoking different principles, bringing out different aspects of the same cases that the first lawyer relied on. Your certainty is shaken; now you are unsure which side deserves to win.*

*Or perhaps you have had the experience of discussing a famous case, such as the O. J. Simpson trial or the Clinton-Lewinsky impeachment affair, with a friend. You and she*

*agree on most of the facts of what happened, but you put radically different interpretations on them. You are left wondering how two people can see “the same evidence” in such different lights.*

Critical race theorists have built on everyday experiences with perspective, viewpoint, and the power of stories and persuasion to come to a better understanding of how Americans see race. They have written parables, autobiography, and “counterstories,” and have investigated the factual background and personalities, frequently ignored in the casebooks, of well-known cases such as *Korematsu* (the Japanese internment case). Other scholars have examined narrative theory, in an effort to understand why certain stories work and others do not. Still others study the way trial lawyers consciously or unconsciously construct narratives—theories of a case—that they hope will resonate with the jury and cause it to adopt their interpretations of what happened and reject those of the other side.

The new legal storytellers, such as Derrick Bell and Patricia Williams, draw on a long history that includes slave narratives, tales written by black captives to describe their condition and unmask the gentility that white plantation society extolled. Indians, of course, were great storytellers who used history and myth to preserve culture, bind the group together, and remind it of its common destiny. In Latino society, picaresque novelists made sly fun of social convention, puffed-up nobility, and illegitimate authority. Although some writers criticize CRT for excessive negativity and fail-

ure to develop a positive program, legal storytelling and narrative analysis are clear-cut advances that the movement can claim. Even some minority judges are finding it useful from time to time to insist on the validity of the perspective of color.

By that standard, white judges will be permitted to keep the latitude they have enjoyed for centuries in discussing matters of intellectual substance, even issues of human rights and, because they are white, still be permitted to later decide specific factual situations involving the principles of human rights which they have discussed previously in a generalized fashion. But for black judges, defendants insist on a far more rigid standard, which would preclude black judges from ever discussing race relations even in . . . generalized fashion. . . .

To suggest that black judges should be so disqualified would be analogous to suggesting that the slave masters were right when . . . they argued that only they, but not the slaves, could evaluate the harshness or justness of the system.

*Federal Judge Leon Higginbotham, in refusing to disqualify himself from hearing a case, Commonwealth v. Local Union 542, International Union of Operating Engineers, 388 F. Supp. 155 (E.D. Pa. 1974).*

### *A. Opening a Window onto Ignored or Alternative Realities*

One premise of the new legal storytellers is that members of this country's dominant racial group cannot easily grasp what it is like to be nonwhite. Few have what W.E.B. Du Bois described as "double consciousness." History books, Sunday sermons, and even case law contribute to a cultural

hegemony that makes it difficult for reformers to make race an issue. How to bridge the gap in thinking between persons of goodwill whose experiences, perspectives, and backgrounds are radically different is a great challenge.

Consider the following clash of stories. According to one leading CRT writer, the majority's story of race would probably go something like this:

Early in our history there was slavery, which was a terrible thing. Blacks were brought to this country from Africa in chains and made to work in the fields. Some were viciously mistreated, which was, of course, an unforgivable wrong; others were treated kindly. Slavery ended with the Civil War, although many blacks remained poor, uneducated, and outside the cultural mainstream. As the country's racial sensitivity to blacks' plight increased, federal statutes and case law gradually eliminated the vestiges of slavery. Today, blacks have many civil rights and are protected from discrimination in such areas as housing, public education, employment, and voting. The gap between blacks and whites is steadily closing, although it may take some time for it to close completely. At the same time, it is important not to go too far in providing special benefits for blacks. Doing so induces dependency and welfare mentality. It can also cause a backlash among innocent white victims of reverse discrimination. Most Americans are fair-minded individuals who harbor little racial prejudice. The few who do can be punished when they act on those beliefs.

Yet, coexisting with that comforting tale are others of black, Chinese, Japanese, Latino, Filipino, and Indian sub-

ordination in the United States, a history “gory, brutal, filled with more murder, mutilation, rape, and brutality than most of us can imagine or easily comprehend” (Derrick Bell, *And We Are Not Saved* 217 [1987]). That history continues into the present, and implicates persons still alive. It includes infant death rates among minorities nearly double those of whites, school dropout rates worse than those in practically any industrialized country, and a gap between whites and nonwhites in income, assets, educational attainment, and life expectancy as great as it was twenty years ago, if not worse. It dares to call our most prized legal doctrines and protections shams—hollow pronouncements issued with great solemnity and fanfare, only to be silently ignored, cut back, or withdrawn when the celebrations die down.

How can there be such divergent stories? Why do they not reconcile? To the first question, critical race theory answers, “experience.” (Derrick Bell would add, “interest convergence”—people believe what benefits them.) To the second, it answers that empathy is in short supply. (See the discussion of the empathic fallacy, chapter 2.) Literary and narrative theory holds that we each occupy a normative universe or “nomos” (or perhaps many of them), from which we are not easily dislodged. Talented storytellers nevertheless struggle to reach broad audiences with their messages. “Everyone loves a story.” The hope is that well-told stories describing the reality of black and brown lives can help readers bridge the gap between their worlds and those of others. Engaging stories can help us understand what life is like for others, and invite the reader into a new and unfamiliar world.

“Race may be America’s single most confounding problem, but the confounding problem of race is that few people seem to know what race is.” Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 Harv. C.R.-C.L. L. Rev. 1, 5–6 (1994). In part, what makes race a confounding problem and what causes many people to not know what race is, is the view that the problems of race are the problems of the racial minority. They are not. The problems of race belong to all of us, no matter where our ancestors come from, no matter what the color of our skin. Thus, concluding that race is not an issue in this case because juror 32 is not a member of a racial minority, misses the point. Race is an issue.

*State v. Buggs*, 581 N.W. 2d 329, 344 (Minn. 1998).

### *B. Counterstorytelling*

Some of the critical storytellers believe that stories also have a valid destructive function. Society constructs the social world through a series of tacit agreements mediated by images, pictures, tales, and scripts. Much of what we believe is ridiculous, self-serving, or cruel, but not perceived to be so at the time. Attacking embedded preconceptions that marginalize others or conceal their humanity is a legitimate function of all fiction.

In legal discourse, preconceptions and myths, for example about black criminality, shape mindset—the bundle of received wisdoms, stock stories, and suppositions that allocate suspicion, place the burden of proof on one party or the

other, and tell us in cases of divided evidence what probably happened. These cultural influences are probably at least as determinative of outcomes as the formal laws, since they supply the background against which the latter are interpreted and applied. Critical writers use counterstories to challenge, displace, or mock these pernicious narratives and beliefs. (See, e.g., Richard Delgado, *Rodrigo's Eighth Chronicle: Black Crime, White Fears—On the Social Construction of Threat*, 80 Va. L. Rev. 503 [1994]), pointing out that white-collar and corporate/industrial crime—perpetuated mostly by whites—causes more personal injury, death, and property loss than all street crime combined, even on a per capita basis.)

### *C. Cure for Silencing*

Stories also serve a powerful psychic function for minority communities. Many victims of racial discrimination suffer in silence, or blame themselves for their predicament. Stories can give them voice and reveal that others have similar experiences. Stories can name a type of discrimination; once named, it can be combated. If race is not real or objective, but constructed, racism and prejudice should be capable of deconstruction; the pernicious beliefs and categories are, after all, our own. Powerfully written stories and narratives may begin a process of adjustment in our system of beliefs and categories by calling attention to neglected evidence and reminding readers of our common humanity. Even the

conservative judge Richard Posner has conceded that major reforms in law often come through a conversion process or paradigm shift similar to the one Thomas Kuhn describes and minority storytellers advocate (Richard Posner, *The Problems of Jurisprudence* 459 [1990]).

The philosopher Jean-François Lyotard's concept of the *differend* helps explain the value of narratives for marginalized persons. The *differend* occurs when a concept such as justice acquires conflicting meanings for two groups. A prime example would be a case where a judge seeks to hold responsible an individual who does not subscribe to the foundational views of the regime that is sitting in judgment of him or her. In situations like this, the subordinate person lacks language to express how he or she has been injured or wronged. For example, when contemporary Euro-Americans resist even discussing reparations for blacks on the grounds that no black living today has been a slave and so lacks standing, nor has any white person alive today been a slaveholder, the black who wishes to discuss the question, and is shunted aside, suffers the *differend*. The prevailing conception of justice deprives him or her of the chance to express a grievance in terms the system will understand. Until very recently, women who suffered childhood incest or battered wife syndrome were victims of the *differend*. Narratives provide a language to bridge the gaps in imagination and conception that give rise to the *differend*. They reduce alienation for members of excluded groups, while offering opportunities for members of the majority group to meet them halfway.

### D. *Storytelling in Court*

Attorneys and teachers of clinical law have been applying storytelling and narrative analysis to understand how the dynamics of persuasion operate in the courtroom. They also use them to understand the interplay of power and interpretive authority between lawyer and client. Suppose, for example, the lawyer favors strategy A because it is 60 percent likely to win. The client, however, favors strategy B because it is “truer to his experience” or world. Writers such as Lucy White and Anthony Alfieri show that attention to the narrative side of lawyering can enable lawyers representing the poor and disenfranchised to achieve a better brand of justice. This has prompted some critics to charge that CRT teaches unmitigated manipulation of emotions and playing the race card. For example, when the O. J. Simpson verdict was announced, Jeffrey Rosen, legal affairs writer for the *New Republic*, charged that Johnny Cochrane’s successful defense of his famous client was an outrage and a case of “applied critical race theory.” Despite this and other criticisms, law has been slowly moving in the direction of recognizing the legitimacy and power of narrative. Children and certain other witnesses are permitted to testify in the form of a narrative, rather than through question-and-answer examination. With sexual offense victims, shield laws and evidentiary statutes protect them against certain types of examination, even though the Sixth Amendment’s Confrontation Clause would otherwise permit the other side to attack their narrative forcefully.

*E. Storytelling on the Defensive*

Storytelling, as exemplified by the best-selling books of Derrick Bell, Patricia Williams, and others, has enjoyed a considerable vogue that has even spread to other disciplines. It should not be a surprise, then, that the legal storytelling movement has come in for sharp criticism. Some of it comes from conservatives, like federal judge Richard Posner, who disagree, substantively, with what the critics are saying. But criticism also comes from leftist scholars, like Mark Tushnet, who consider that the *genre* is an ineffective and analytically unsound form of discourse, and from self-professed liberals like Daniel Farber and Suzanna Sherry, whose critiques are discussed in greater detail in chapter 6.

### QUESTIONS AND COMMENTS FOR CHAPTER III

1. Why is it that most of the current crop of legal storytellers are black or brown (Bell, Delgado, Patricia Williams, Matsuda, etc.)?
2. Do white people tell stories, too, but deem them not stories at all, but the truth?
3. If one wanted to change another person's mind about something, say, the death penalty, what would be more effective, an array of statistics or a good story or movie?
4. "Once upon a time . . ." Do stories (at least ones that are well told) cause the reader or listener to suspend disbelief, and, if so, is this a good or a bad thing?
5. Suppose you have a particular account of the world. For example, as a result of experience you have come to believe that virtue is almost always rewarded and that people generally get what they deserve. Social handouts and welfare just make matters worse. Someone tells you a story about a welfare recipient who used her allotment to raise her children, then went to school and became a Ph.D. and owner of a start-up computer company. How do you react?

SUGGESTED READINGS

- Alfieri, Anthony V., *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 *Yale L.J.* 2107 (1991).
- Bell, Derrick A., Jr., *And We Are Not Saved: The Elusive Quest for Racial Justice* (1987).
- Bell, Derrick A., Jr., *Gospel Choirs: Psalms of Survival for an Alien Land Called Home* (1996).
- Delgado, Richard, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 *Mich. L. Rev.* 2411 (1989).
- Delgado, Richard, *When Equality Ends: Stories about Race and Resistance* (1999).
- Law's Stories: Narrative and Rhetoric in the Law* (Peter Brook & Paul Gewirtz eds., 1996).
- Martinez, George A., *Philosophical Considerations and the Use of Narrative in the Law*, 30 *Rutgers L.J.* 683 (1999).
- Matsuda, Mari J., *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 *Harv. C.R.-C.L. L. Rev.* 323 (1987).
- Olivas, Michael A., *The Chronicles, My Grandfather's Stories, and Immigration Law: The Slave Traders' Chronicle as Racial History*, 34 *St. Louis U. L.J.* 425 (1990).
- Ross, Thomas, *The Richmond Narratives*, 68 *Tex. L. Rev.* 381 (1989).
- Symposium: *Legal Storytelling*, 87 *Mich. L. Rev.* 2073 (1989).
- Troutt, David D., *The Monkey Suit and Other Short Fiction on African Americans and Justice* (1998).

White, Lucie E., Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G., 38 *Buff. L. Rev.* 1 (1990).

Williams, Patricia J., *The Alchemy of Race and Rights* (1991).



## CHAPTER IV

# Looking Inward

Because politics also has a personal dimension, it should come as no surprise that critical race theorists have turned critique inward, examining the interplay of power and authority within minority communities and movements. This chapter analyzes three aspects of that interplay—intersectionality, anti-essentialism, and the tension between nationalism and assimilation.

### *A. Intersectionality*

“Intersectionality” means the examination of race, sex, class, national origin, and sexual orientation, and how their combination plays out in various settings. These categories—and still others—can be separate disadvantaging factors. What happens when an individual occupies more than one of these categories, for example, is both gay and Native American, or both female and black? Individuals like these exist at an intersection of recognized sites of oppression. Do such cases require that each disadvantaging factor be considered separately, additively, or in yet some other fashion? Should persons who experience multiple

forms of oppression have their own categories and representation, apart from those that correspond to the separate varieties of discrimination they incur? And what about the role of these “intersectional” persons in social movements such as feminism or gay liberation? Where do they belong? These are all questions that intersectional analysis attempts to address.

*Imagine a black woman. She may be oppressed because of her race. She may also be so because of her gender. If she is a single working mother, she may experience discrimination by virtue of that status as well. She experiences, potentially, not only multiple forms of oppression, but forms unique to her and to others in her class. Suppose that such a person experiences discrimination at her workplace. She arrives one day to find a new supervisor, who, it turns out, does not like black women, believing them lazy and unreliable. So he assigns her disagreeable work, requires her to notify him whenever she leaves her work area, and neglects to advise her of opportunities for promotion for which she is otherwise qualified.*

*She resolves to sue. But on what theory? Suppose she sues for racial discrimination—her supervisor does discriminate against her because she is black. But suppose it turns out that the supervisor does not dislike black men, in fact, treats them well. He likes playing basketball with them after work, discussing sports with them on Monday, and engaging in easy banter with them. Under applicable state and federal antidiscrimination statutes, the supervisor might well fend off*

*a discrimination suit, since he does not discriminate against blacks per se—just against black women.*

*Suppose, then, that she resolves to sue for sex discrimination. She is, after all, a black woman, and her supervisor does discriminate against her because of her sex. Once again, however, she might easily lose. The supervisor might show that he is not biased against women as a class, indeed enjoys having white women working for him. He believes white women attractive and good, reliable workers. He even occasionally dates one.*

Our plaintiff, then, will probably be unable to prove discrimination based on either race or sex. Yet she suffers discrimination based on her black womanhood. This is one aspect of the intersectional dilemma.

*She will face a similar predicament in ordinary politics. Imagine that she wants to join with others in a movement to change society's treatment of people like her. She might look to the feminist movement for support and solidarity. But she is likely to find that the white-dominated movement embraces an agenda and set of concerns that arise out of the white female experience, for example, the glass ceiling, abortion rights, and the election of a female president of the United States. She is more interested in day care reform and Head Start programs for her young children. The feminist movement welcomes her with open arms, for she is one more soldier to add to the ranks. But will its agenda ever fully address her concerns?*

*Imagine, then, that she resolves to join the civil rights movement, hoping to address the type of discrimination that she suffers at work. This time she finds that racism is indeed the primary focus of the group. It supports affirmative action, restructuring the criminal justice system to eradicate racial disparities, and electing black mayors. But while these concerns are ones she shares as a black person, they are not necessarily the ones in the forefront of her consciousness. The male-dominated civil rights movement will welcome her and persons like her, needing their numbers, but until they become a significant force within the group, is apt to afford her concerns scant attention. Movement leaders may even ask her to stuff envelopes, answer the telephone, or make coffee.*

*If she persists in raising her concerns, she may even find herself accused of being divisive. Feminists may tell her to put aside her concerns as a black woman for a moment, in the effort for a “united” sisterhood, while the black men may be so caught up with life-and-death issues, such as disproportionate imposition of the death penalty, or racial profiling of black male motorists, that they react impatiently to her requests to consider her predicament at work.*

When movements for racial justice prioritize broad concerns over those of particular subgroups, many needs, such as those of our hypothetical black woman, may end up going unaddressed. This problem is not confined to a small number. Many races are divided along socioeconomic, political, religious, sexual orientation, and national origin

lines, each of which generates intersectional individuals. Even within groups that are seemingly homogeneous, one finds attitudinal differences. Consider, for example, responses to black criminality. Some in the black community hold that not enough of society's attention goes to law-abiding black citizens who are the victims of crime in black neighborhoods. This get-tough viewpoint embraces what has been called a "politics of distinction" and disavows any identification with black criminality. It wants more, not fewer, police, and harsher, not softer, sentences for black offenders. The opposite perspective within the black community is sometimes called the "politics of identification." Persons of this persuasion identify with the "race rebel" aspect of some black criminals and would support them, at least if they are young, redeemable, and a potential asset to the community. African Americans who hold this view want the police to leave certain black offenders alone and let the community handle them.

Categories and subgroups, then, are not just matters of theoretical interest. How we frame them determines who has power, voice, and representation and who does not. Perspectivalism, the insistence on examining how things look from the perspective of individual actors, helps us understand the predicament of intersectional individuals. It can enable us to frame agendas and strategies that will do justice to a broader range of people and avoid oversimplifying human experience. Another critical tool that has proven useful in this respect is the notion of multiple consciousness, which holds that most of us experience the world in different ways on

different occasions, because of who we are. The hope is that if we pay attention to the multiplicity of social life, perhaps our institutions and arrangements will better address the problems that plague us.

### *B. Essentialism and Anti-Essentialism*

Do all oppressed people have something in common? This question lies at the heart of the essentialism/anti-essentialism debate. On one level, the answer is obvious: Of course all oppressed people have something in common—their oppression. But the forms of that oppression may vary considerably. And if those forms, and the results they inflict in daily lives, vary, it follows that the needs and political strategies of groups fighting for social change will differ from group to group. When a group organizes for social change, it must have a clear concept of what it is fighting to achieve. Essentialism, then, entails a search for the proper unit, or atom, for social analysis and change.

When we think of the term “essentializing,” we think of paring something down until the heart of the matter stands alone. Essentialism has a political dimension. As mentioned in the previous section, the goals of a “unified” group may not reflect exactly those of certain factions within it, yet the larger group benefits from their participation because of the increased numbers they bring. We saw this in the case of the single black mother who sought to identify with a social movement but was thwarted on finding that the priorities of

the two groups most likely to welcome her did not apply to her life experience.

This tension seems inherent in our mode of existence. Large numbers of people motivated for social change have the power to change social practice and perception. This is evident in the early achievements of the women's and civil rights movements. Today, hardly anyone expresses the view publicly that "women shouldn't work outside the home" or "people of color are intellectually inferior to whites." Would these advances in public consciousness have come about if underrepresented subgroups, such as black women, gay men, Latinos/as, or Asian Ph.D.'s, had decided to sit things out?

It takes a multitude of the oppressed to make their voices heard and felt. But what about the voices that do not fit into one category of oppression? Will social progress let them slip through the cracks? These issues are particularly acute regarding inter- and intraminority relations and tensions (see chapter 5). They also explain some of the critics' impatience with liberalism. The reader will recall that CRT takes liberalism to task for its cautious, incremental quality (see chapter 2). When we are tackling a structure as deeply embedded as race, radical measures are required. "Everything must change at once," otherwise the system merely swallows up the small improvement one has made, and everything remains the same.

Ignoring the problem of intersectionality, as liberalism often does, risks doing things by half-measures and leaving

major sectors of the population dissatisfied. Classical liberalism also has been criticized as overly caught up in the search for universals, such as admissions standards for universities or sentencing guidelines that are the same for all. The critics point out that this approach is apt to do injustice to individuals whose experience and situation differ from the norm. They call for individualized treatment—“context”—that pays attention to minorities’ lives instead. This deficiency is apt to be particularly glaring in the case of “double minorities,” such as black women or gay black men, whose lives are twice removed from the experience of mainstream Americans.

Some observers hold that all minority races should compromise their differences and form a united front against racism in general. The danger in this essentialized approach is that certain minority groups, socioeconomic classes, and sexual orientations may end up better off and others worse. Recall how shabbily black women were treated in the civil rights movement of the 1960s, rarely allowed to speak for the group, made to march in the second row, and relegated, with a few exceptions, to support roles. It has only been relatively recently that black women and Latinas have emerged as powerful voices on the American scene. Perhaps the essentialism/anti-essentialism debate sets in when mainstream thought is beginning to see the validity in the larger groups’ complaints. Like an automobile with deferred maintenance, smaller subgroups that have until then remained silent begin bringing suppressed issues to the larger group’s attention. And so the dialectic progresses.

### C. Nationalism versus Assimilation

*Two friends, William and Jamal, are walking down a main street. Both are African Americans and have been close friends since high school. Both have medium brown skin and hazel eyes. Both are graduates of prestigious universities. William wears a business suit and carries a briefcase made by a famous designer. He is a third-year associate at a medium-size law firm. Jamal, who is a music industry executive making twice as much money as William, is wearing a kente cloth and sporting a short Afro. On their way to a lunch date to discuss a new recording contract, they talk about mutual friends, their families, and careers. On arriving at the restaurant, a trendy downtown eating establishment that caters to young professionals, William and Jamal exchange looks and without speaking William enters first and asks the maitre d' for a quiet table for two.*

The two friends illustrate twin poles in the way minorities of color can represent and position themselves. The nationalist, or separatist, position illustrated by Jamal holds that people of color should embrace their culture and origins. Jamal, who by choice lives in an upscale black neighborhood and sends his children to local schools, could easily fit into mainstream life. But he feels more comfortable working and living in black milieux and considers that he has a duty to contribute to the minority community. Accordingly, he does as much business as possible with other blacks. The last time he and his family moved, for example, he made several phone

calls until he found a black-owned moving company. He donates money to several African American philanthropies and colleges. And, of course, his work in the music industry allows him the opportunity to boost the careers of black musicians, which he does.

William also donates to several black causes. And, although he practices law in a white-dominated law firm on behalf of corporate clients, most of whom are white, he does pro bono work whenever possible on behalf of prison inmates, a large majority of whom are African American. He lives in an integrated suburb that is 90 percent white with a smattering of blacks and other persons of color, most professionals like himself.

William and Jamal have discussed their contrasting lifestyles and have agreed to disagree. William believes he is doing more good breaking barriers in the white-dominated legal world and that his work as a lawyer, especially when he is crowned with the partnership he expects in a few years, will enable him to do some real good on behalf of minority clients and businesses. And even though Jamal is currently making more money than he, William believes that his own top salary as a partner will one day match that of his high school friend.

Debates about nationalism versus assimilation figure prominently in current discourse about race. One strand of critical race theory energetically backs the nationalist view, which is particularly prominent with the materialists. Derrick Bell, for example, urges his fellow African Americans to

foreswear the struggle for school integration and aim for building the best possible black schools. Other CRT nationalists advocate gun ownership, on the grounds that historically the police in this country have not protected blacks against violence, indeed have often visited it upon them. Other nationalists urge the establishment of all-black or all-Latino inner-city schools, sometimes just for males on the ground that boys of color need strong role models and cannot easily find them in the public schools. Nationalists of all types question the majoritarian assumption that North European culture is superior.

Latino nationalists emphasize cultural pride, preservation of the Spanish language, and ties with Mexico, Puerto Rico, or other homelands. Both Latino and black nationalists deplore passing—the effort to deracinate oneself and present oneself as white. Latino/a nationalists usually reject the term “Hispanic” because of its association with Spain, the nation that oppressed their ancestors in Mexico and Central and South America. Nationalists honor ethnic studies and history as vital disciplines and look with skepticism on members of their groups who date, marry, or form close friendships with whites or seek employment in white-dominated workplaces or industries. Many Latino nationalists are sympathetic to Rodolfo Acuña’s notion that Latinos in this country constitute an internal colony, and should exploit that colonial status to build solidarity and resistance. Nationalists are apt to describe themselves as a nation within a nation and to hold that the loyalty

and identification of black people, for example, should lie with that community and only secondarily with the United States.

A middle position, embraced by a few sophisticated thinkers, including on occasion Derrick Bell, holds that minorities of color should not try to fit into a flawed economic and political system, but to transform it. In this view, success, symbolized by a high income, token representation, and even a degree of influence, like that which William hopes to achieve, is not worth pursuing if the system itself is unworthy and unjust.

A moderate position that falls between William's and Jamal's views holds that it is permissible for minorities to seek places in professions such as law, medicine, and business, so long as they apply their skills for the benefit of minority communities. In this view, nothing would be wrong with William's having achieved an Ivy League degree and bar certificate. But his practice in a corporate penthouse would be problematic; he should be a criminal or legal services lawyer instead. Or, if business law is his metier, like Jamal, he should be making his skills available to start-up black businesses.

A final intermediate position, one favoring William, holds that a strong U.S. economy benefits everyone. William's success as a black corporate lawyer produces wealth, some of which will trickle down to poor and minority communities; and, in any event, those communities need examples of successful, confident lawyers like William who can make their way anywhere.

*Classroom Exercise*

Divide your class or study group into two or more groups according to the above mentioned positions. Each confers for ten minutes, selects spokespersons, then argues the opposite position from the one they really believe.

#### QUESTIONS AND COMMENTS FOR CHAPTER IV

1. An Asian lesbian has been raising her hand at a meeting of white feminists planning a march to protest the “glass ceiling” in corporate management positions. When she is finally recognized, it turns out she wants to know when the group will discuss racial discrimination in the garment industry.

Is she being divisive?

2. Suppose the group responds that the agenda should reflect only items that concern women “as women,” and not ones that have to do with small factions.

Is the group implicitly adopting a white agenda?

3. Should minorities make an effort to “fit in” in social and work situations? Why or why not?
4. If blacks or Chicanos sit at separate tables in the cafeteria, is that self-segregation? Should whites politely ask if they can join them?
5. Should minorities make an effort to do business with minority firms? Assume that Firm A and Firm B offer the same product or service, but one is run by Mr. Gonzalez and the other by a person whose ancestors came over on the *Mayflower*. Which one should the person of color patronize?

SUGGESTED READINGS

- Acuña, Rodolfo, *Occupied America* (4th ed. 2000).
- Austin, Regina, "The Black Community," Its Lawbreakers, and a Politics of Identification, 65 *S. Cal. L. Rev.* 1769 (1992).
- Bell, Derrick, *Confronting Authority: Reflections of an Ardent Protester* (1994).
- Black Men on Race, Gender, and Sexuality: A Critical Reader* (Devon Carbado ed., 1999).
- Brown, Kevin, Do African Americans Need Immersion Schools?: The Paradoxes Created by Legal Conceptualization of Race and Public Education, 78 *Iowa L. Rev.* 813 (1993).
- Carr, Leslie G., "Color-Blind" Racism (1997).
- Carter, Stephen L., *Reflections of an Affirmative Action Baby* (1991).
- Cottrol, Robert J. & Raymond T. Diamond, The Second Amendment: Toward an Afro-Americanist Reconsideration, 80 *Geo L.J.* 309 (1991).
- Crenshaw, Kimberlé W., Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics, 1989 *U. Chi. Legal F.* 139.
- Critical Race Feminism: A Reader* (Adrien K. Wing ed., 1997).
- Delgado, Richard, Rodrigo's Sixth Chronicle: Intersections, Essences, and the Dilemma of Social Reform, 68 *N.Y.U. L. Rev.* 639 (1993).

- Harris, Angela P., Race and Essentialism in Feminist Legal Theory, 42 *Stan. L. Rev.* 581 (1990).
- Kennedy, Randall, Race, Crime, and the Law (1997).
- MacKinnon, Catharine A., From Practice to Theory, or What Is a White Woman, Anyway?, 4 *Yale J.L. & Feminism* 13 (1991).
- Matsuda, Mari J., When the First Quail Calls: Multiple Consciousness as Jurisprudential Method, 11 *Women's Rts. L. Rep.* 7 (1989).
- Nunn, Kenneth B., Law as a Eurocentric Enterprise, 15 *Law & Ineq. J.* 323 (1997).
- Oquendo, Angel R., Re-Imagining the Latino/a Race, 12 *Harv. BlackLetter J.* 93 (1995).
- Robinson, Randall, *The Debt: What America Owes to Blacks* (2000).
- Spelman, Elizabeth, *Inessential Woman: Problems of Exclusion in Feminist Thought* (1988).

## CHAPTER V

# Power and the Shape of Knowledge

Building on the previous chapter, we now consider further issues dealing with categories and power. Chapter 4 concerned subgroups within civil rights communities. This chapter addresses how we think about race and identity—the black-white binary, critical white studies, and Asian and Latino critical thought. Some of these issues are explosive, controversial, even divisive.

### *A. The Black-White Binary*

One of the more contentious issues in American racial thought today is whether the very framework we use to consider problems of race reflects an unstated binary paradigm or mindset. That paradigm, the black-white binary, effectively dictates that nonblack minority groups must compare their treatment to that of African Americans to gain redress. The paradigm holds that one group, blacks, constitutes the prototypical minority group. “Race” means, quintessentially, African American. Other groups, such as Asians, Indians, and Latinos/as, are minorities only

in so far as their experience and treatment can be analogized to that of blacks.

*Imagine, for example, that Juan Dominguez, a Puerto Rican worker, is told by his boss, "You're a lazy Puerto Rican just like all the rest. You'll never get ahead as long as I'm supervisor." Juan sues for workplace discrimination under a civil rights-era statute designed with blacks in mind. He wins because he can show that an African American worker, treated in similar fashion, would be entitled to redress. But suppose that Juan's coworkers and supervisor make fun of him because of his accent, religion, or place of birth. An African American subjected to these forms of discrimination would not be able to recover, and so Juan would go without recourse.*

The black-white binary is said to operate in everyday culture as well. Imagine that a group of liberal television executives says to each other, "Let's have a minority sitcom." The group is well meaning, but their thoughts immediately go to a program whose central characters are a black family. Later, on second thought, they might add an Asian maid or a Latino teenager who is a friend of one of the family's children. But the essential framework for the program is apt to center around African American problems, in-jokes, and situations. Similarly, history textbooks may devote considerable space to the tremendously significant issue of slavery, but overlook or devote scant treatment to the intense persecution of Chinese in California and elsewhere.

A closely related concept is that of black, or any other kind of, *exceptionalism*. Exceptionalism holds that a group's history is so distinctive that placing it at the center of analysis is, in fact, warranted. Recently when President Bill Clinton convened a group of scholars and activists to lead a yearlong national conversation on race, at its first meeting, the chair, an eminent and elderly African American historian, proposed that the group "for the sake of simplicity" limit its consideration only to African Americans. When other members of the commission protested, he backed down, still insisting that he was right. Because "America cut its eyeteeth" on discrimination and prejudice against blacks, he said, if one understood that sordid history, one would also understand and know how to deal with racism against all the other groups.

Regardless of what one thinks about exceptionalism, critics of the black-white binary do make at least one valid point. The differential racialization thesis, mentioned earlier in this book and subscribed to by most contemporary students of race, maintains that each disfavored group in this country has been racialized in its own individual way and according to the needs of the majority group at particular times in its history. Few blacks will be yelled at and accused of being foreigners or of destroying the automobile industry. Few will be told that if they don't like it here, they should go home. Few will be ridiculed on account of their unpronounceable last names or singsong accent. Few will have a vigilante, police officer, teacher, or social worker demand to see their papers, passport, or green card. By the same token,

few Asian-looking people will be accused of being welfare leeches or having too many children out of wedlock.

Thus, different racial groups can react disparately to racial slurs [and going on to cite cases of blacks and Mexicans subjected to racist epithets]. . . . Due to this distinction, we hold that in an intentional infliction of emotional distress claim arising out of an allegation of racial harassment, the plaintiff's race must shape the objective inquiry into the severity of the distress.

*Taylor v. Metzger*, 706 A.2d 685, 698 (N.J. 1998).

Long preoccupied with issues of identity, American society prefers to place its citizens into boxes based on physical attributes and culture. No science supports this practice; it is simply a matter of habit and convenience. Like other paradigms, the black-white one allows people to simplify and make sense of a complex reality. And, of course, it is helpful in looking at the historical and ongoing relationship between black and white Americans. The risk is that nonblack minority groups, not fitting into the dominant society's idea of race in America, become marginalized, invisible, foreign, un-American.

The black-white—or any other—binary paradigm of race not only simplifies analysis dangerously, presenting racial progress as a linear progression; it can end up injuring the very group, for example, blacks, that one places at the center of discussion. It weakens solidarity, reduces opportunities for coalition, deprives the group of the benefits of the others' experiences, makes it excessively dependent on the approval

of the white establishment, and sets it up for ultimate disappointment. Consider some of the following ways this can happen.

The history of minorities in the United States shows that while one group is gaining ground, another is often losing it. For example, in 1846 the United States waged a bloodthirsty war against Mexico in which it seized about one-third of that nation's land. Later, Anglo lawyers and land-hungry settlers colluded with courts and local authorities to deprive the Mexicans who chose to remain in the conquered territory of their lands, which were guaranteed by the peace treaty. Yet, only a few years later, the North gallantly fought an equally bloody war against the South, ostensibly to free the slaves. During Reconstruction, slavery was disbanded and protective legislation enacted for the benefit of the newly freed blacks. Yet at the very same time, Congress was passing the despised Indian Appropriation Act, providing that no Indian nation would be an independent entity capable of entering into a treaty with the United States. To make matters worse, a few years later, the Dawes Act broke up land held in common by the tribes, resulting in the loss of almost two-thirds of all Indian land. And in 1882 Congress passed the Chinese Exclusion Laws; earlier California had made it a crime to employ Chinese workers.

Binary thinking, which focuses on just two groups, usually whites and one other, can thus conceal the checkerboard of racial progress and retrenchment and hide the way dominant society often casts minority groups against one another to the detriment of both. In the years following the Civil

War, southern plantation owners urged replacing their former slaves with Chinese labor. Congress acquiesced. And immediately after the Civil War, the army recruited newly freed slaves to serve as Buffalo Soldiers putting down Indian rebellions in the West. Consider, as well, Justice Harlan's dissent in *Plessy v. Ferguson*, reproduced in part elsewhere in this book, which sharply rebuked segregation for blacks, but went on to support his point by disparaging the Chinese, who did have the right to ride in railroad cars for whites. And in more recent times, during California's Proposition 187 campaign, proponents for this anti-immigrant measure sought black votes by depicting Mexican immigrants as competitors for black jobs.

In addition to pitting one minority group against another, binary thinking can cause exaggerated identification with whites at the expense of other groups. For example, early in one state's history, Asians sought to be declared white so that they could attend schools for whites and not have to go to ones with blacks. And in the Southwest, early litigators for Mexican Americans pursued an "other white" policy, arguing that segregation of Mexican Americans was illegal because only segregation against blacks was permitted under current law. By the same token, Anglocentric standards of beauty divide Mexican and black communities, enabling those who most closely conform to the Euro-American ideal to gain jobs and social acceptance, and, sometimes, to look down on their darker-skinned brothers and sisters. Finally, "box checking" allows those of white or near-white appearance to gain the

benefits of affirmative action without suffering the costs of being thought of and treated as black or brown.

Black-white or any other kind of binary thinking can also cause a minority group to go along with a certain recurring ploy in which Caucasians select a particular group—usually a small, nonthreatening one—to serve as tokens and overseers of the others. Minorities who fall into this trap hope to gain status, while the whites can tell themselves that they are not racists because they have employed a certain number of suitably grateful minorities as supervisors and directors of human relations.

Finally, dichotomous thinking and exceptionalism impair the ability of groups to form coalitions. For example, neither the NAACP nor any other predominantly African American organization filed an amicus brief challenging Japanese internment in the World War II case of *Korematsu v. United States*. As mentioned earlier, a politically moderate litigation organization of Latinos distanced itself from other minority groups and even from darker-skinned Latinos by pursuing an “other white” strategy during the middle years of the twentieth century. And in Northern California, Asians, Mexican Americans, and blacks recently were at loggerheads over admission to Lowell High School and University of California at Berkeley.

Will minority groups learn to put aside narrow nationalisms and binary thinking and work jointly to confront the forces that suppress them all? It would seem that they have much to gain, but old patterns of thought die hard. If contextualism and critical theory teach anything, it is that we

rarely challenge our own preconceptions, privileges, and the standpoint from which we reason.

Although not as permanent as race or color, an accent is not easily changed for a person who was born and lived in a foreign country for a good length of time. This court cannot give legal cognizance to adverse employment decisions made simply because a person speaks with a foreign accent. The Court would recognize that in some instances a foreign accent may actually prevent a person from performing tasks required for employment or promotion, . . . but otherwise, an employer should not make adverse employment decisions simply because a person possesses an accent resulting from birth and life in a foreign country.

It is the Court's opinion from the evidence and the observation of the plaintiff's speech at trial that his accent did not impair his ability to communicate or prevent him from performing any tasks required of the supervisor of the old dental laboratory. . . . Consequently, this Court finds that the decision to demote the plaintiff from the supervisory position in the old laboratory was made on the basis of his national origin and related accent, and that this decision violated the rights of the plaintiff under the provisions of Title VII.

*Carino v. University of Oklahoma*, 25 *Fair Empl. Proc. Cas.* (BNA) 1332 (W.D. Okla. 1981).

### *B. Critical White Studies*

Another emerging area of critical investigation is the study of the white race. For several centuries, at least, social scientists have been studying communities of color, discoursing

learnedly about their histories, cultures, problems, and future prospects. Now a new generation of scholars is putting whiteness under the lens and examining the construction of the white race. If, as most contemporary thinkers believe, race is not objective or biologically significant, but constructed by social sentiment and power struggle, how did the white race in America come to define itself? Scholars such as Ian Haney López, Alexander Saxton, Theodore Allen, and David Roediger address various aspects of this issue. The physical differences between light-skinned blacks and dark-skinned whites, just to take one example, are much less marked than those that separate polar members of either group. Why then do we draw the categories the way we do? Addressing this question includes examining what it means to be white, how whiteness became established legally, how certain groups moved in and out of the category of whiteness, “passing,” the phenomenon of white power and white supremacy, and the automatic privileges that come with membership in the dominant race.

In the semantics of popular culture, whiteness is often associated with innocence and goodness. Brides wear white on their wedding day to signify purity. Snow White is a universal fairy tale of virtue receiving its just reward. In talk of near-death experiences, patients almost always report a blinding white light, perhaps a projection of a hoped-for positive and benign spiritual force.

In contrast, darkness and blackness often carry connotations of evil and menace. One need only read *Heart of Darkness* by Joseph Conrad to see how strongly imagery

of darkness conveys evil and terror. We speak of a black gloom. Persons deemed unacceptable to a group are said to be blackballed or blacklisted. Villains are often depicted as swarthy or wearing black clothing.

Whiteness is also normative, maybe even a kind of property. It sets the standard. Other groups, such as Indians, Latinos, Asian Americans, and African Americans, are described as *nonwhite*. That is, they are defined in terms of or in opposition to whiteness—that which they are not. Literature and the media reinforce this view of minorities as the exotic other. Minorities appear in villain roles or as romantic, oversexed lovers. Science fiction movies and television programs portray extraterrestrials with minority-like features and coloring.

Literature, then, powerfully reinforces white superiority. What is less well known is that law and courts have done so as well. In the fifty years or so following the Civil War, a large influx of people sought admission to the United States, making immigration policy an issue of great concern. Who was the young country going to let in? In 1790 Congress had limited naturalization (acquisition of United States citizenship) to white men only. With minor modifications, this racial qualification for citizenship remained on the books until 1952.

During the more than 150 years that the requirement remained in place, U.S. courts decided many cases determining who was white and who was not. Are Indians from India white? What about Persians, or light-skinned Japanese? Judges developed two tests—“science” and “common

knowledge”—to decide these questions. Reading the history of these strained, often overtly racist, judicial opinions does much to dispel any notion that the American judiciary is fair, consistent, or just.

The legal definition of whiteness took shape in the context of immigration law, as courts decided who was to have the privilege of living in the United States. As many ordinary citizens did, judges defined the white race in opposition to blackness or some other form of otherness. Whiteness, thus, was defined in opposition to nonwhite, an opposition that also marked a boundary between privilege and its opposite. Only those deemed white were worthy of entry into our community.

Another aspect of the construction of whiteness is the way certain groups have moved into the white race. For example, early in our history Irish, Jews, and Italians were considered nonwhite—that is, on a par with African Americans. Over time, they earned the prerogatives and social standing of whites by joining labor unions, by swearing fealty to the Democratic Party, and by acquiring wealth, sometimes by illegal or underground activity. Whiteness, it turns out, is not only valuable, it is shifting and malleable.

A recent manifestation of white consciousness is its exaggerated form seen in white supremacy and white power groups. With these organizations, white solidarity presents problems and dangers that black solidarity does not. When members of a minority group band together for social and political support, most observers will see that as a natural and proper response against majoritarian pressures. But

what if members of the majority race band together to promote their interests at the expense of those very same minorities? The recent formation of Aryan supremacist and skinhead groups stands as a constant reminder of how easy it is for quiet satisfaction in being white to deteriorate into extremism.

“White privilege” refers to the myriad of social advantages, benefits, and courtesies that come with being a member of the dominant race. Imagine a black man and a white man, equally qualified, being interviewed for the same position in a business. The interviewer is white. The white candidate may feel more at ease with the interviewer because of the social connections he enjoys as a member of the same group. The interviewer may ask the white candidate to play golf later. Under the impression that few blacks golf, and not wishing to offend, he may not invite the black candidate to play. This example becomes especially telling when one considers that most corporate positions of power, despite token inroads, are still held by whites.

According to a famous list compiled by Peggy McIntosh, white people enjoy and can rely on over fifty privileges that attach by reason of having white skin, including the assurance that store clerks will not follow them around, that people will not cross the street to avoid them at night, that their achievements will not be regarded as exceptional or “credits to their race,” and that their occasional mistakes will not be attributed to biological inferiority. Whites, McIntosh writes, benefit from a system of favors, exchanges, and courtesies from which outsiders of color are frequently excluded, in-

cluding hiring one's neighbors' kids for summer jobs, a teacher's agreement to give a favored student an extra-credit assignment that will enable him or her to raise a grade of B+ to A-, or the kind of quiet networking that lands a borderline candidate a coveted position.

This has prompted one commentator to remark that our system of race is like a two-headed hydra. One head consists of outright racism—the oppression of people on grounds of who they are. The other consists of white privilege, a system by which whites help one another. If one lops off a single head, say, outright racism, but leaves the other intact, our system of white over black/brown will remain virtually unchanged. The predicament of social reform, as one writer pointed out, is that “everything must change at once.” Otherwise, change is swallowed up by the remaining elements, so that we remain roughly as we were before. Culture replicates itself forever and ineluctably.

A much more subtle and complex version of white privilege sometimes appears in discussions of the fairness of affirmative action programs. Many whites feel that these programs victimize them, that more qualified white candidates will be required to sacrifice their positions to less qualified minorities. So, is affirmative action a case of “reverse discrimination” against whites? Part of the argument for it rests on an implicit assumption of innocence on the part of the white displaced by affirmative action. The narrative behind this assumption characterizes whites as innocent, a powerful metaphor, and blacks as—what? Presumably, the opposite of innocent. Many critical race theorists and social scientists

alike hold that racism is pervasive, systemic, and deeply ingrained. If we take this perspective, then no white member of society seems quite so innocent. The interplay of meanings that one attaches to race, the stereotypes one holds of other people, and the need to guard one's own position all powerfully determine one's perspective. Indeed, one aspect of whiteness, according to some, is its ability to seem perspectiveless, or transparent. Whites do not see themselves as having a race, but being, simply, people. They do not believe that they think and reason from a white viewpoint, but from a universally valid one—"the truth"—what everyone knows. By the same token, many whites will strenuously deny that they have benefited from white privilege, even in situations (golf, summer jobs, extra-credit assignments, merchants who smile) like the ones mentioned throughout this book.

### *Classroom Exercise*

Imagine a Russian Jew, orphaned at the age of two, who immigrates to the United States at the age of fifteen without a penny or knowledge of English. She attends night school while working as a supermarket bagger during the day, and plans to attend a community college and major in premed studies.

The person is white with blue eyes and blonde hair. Is she privileged? Unprivileged? Privileged in some respects, but not others?

Divide into small groups and argue this question. Then ask yourselves whether white privilege has any application beyond a narrow circle of elite prep school products.

*C. Other Developments: Latino and Asian  
Critical Thought, Critical Race Feminism,  
Queer-Crit Theory*

As the bright lines of the black-white binary have blurred, critical Asian and Latino thinkers have felt freer to put forward their own unique perspectives. Invigorated, perhaps, by the anti-essentialist strand of late-century critical race theory, LatCrit scholars have been calling attention to issues of immigration, language rights, bilingual schooling, internal colonialism, sanctuary for Latin American refugees, and census categories for Hispanics. They reexamine documents such as the Treaty of Guadalupe Hidalgo in search of sources of protection for land, culture, and language rights. Like Asians, they vigorously oppose the English-only movement, and engage in spirited discussions of passing and assimilation (see also chapter 7). They bring to bear the sociological notion of nativism to name and explain the recent spate of measures aimed at foreigners and immigrants. They point out that nativism against Latinos and Asians thrives during times of economic hardship, when the labor supply is glutted, or, as now, when workers are insecure. Both groups staunchly resist the black-white paradigm, but endeavor to maintain friendly relations with African Americans.

Some Asian American writers focus on accent discrimination and the “model minority myth,” according to which Asians are the perfect minority group—quiet, industrious, with intact families and high educational aspiration and achievement. This myth is not only untrue, it is injurious to the numerous Asian subgroups such as Indochinese and

Filipinos who are likely to be poor and in need of assistance. It also causes resentment among other disfavored groups who find themselves blamed for not being as successful as Asians supposedly are.

Allied with the model minority myth is the idea that Asians are *too* successful—soulless, humorless drones whose home country is at fault for the United States' periodic economic troubles. Such was the tragic fate of Chinese American Vincent Chin, who was killed in 1982 by two Detroit auto workers upset with Japan for destroying the U.S. automotive industry by producing better cars. To make matters worse, American courts have sometimes been reluctant to punish such racially motivated crimes against Asians, handing out light sentences. For murdering Chin, the two attackers received a sentence of three years' probation and small fines. Neither of them served a day in jail.

During World War II, when over one hundred thousand Japanese families living on the West Coast were removed to internment camps where they spent years behind barbed wire, many losing farms and businesses in the process, few Americans protested. It turned out later that much of the evidence of disloyalty and espionage was fabricated. Indeed, most Japanese Americans supported the war effort, and many young Japanese Americans served gallantly in the U.S. armed forces, fighting against the Nazis in Europe and serving as interpreters in the battle against Japan. Despite this sorry chapter in U.S. history, the United States was slow to consider compensating the Japanese for their losses. The descendants of Japanese Americans endured a

legacy of suspicion and prejudice. A reparation bill was not enacted until 1988.

Finally, in recent years a number of scholars of color have been examining issues at the intersection of feminism, sexual orientation, and critical race theory. Critical race feminism addresses issues of intersectionality, like those described in chapter 4. It also examines relations between men and women of color, sterilization of black, Latina, and Indian women, and the impact of changes in welfare, family policies, and child support laws. It also analyzes the way the “reasonable man” standard that operates in many areas of the law incorporates a white male bias.

Queer-crit theorists examine the interplay between sexual norms and attitudes, and race. Why are Latino males sometimes depicted as oversexed, or Asian men as sexless or effeminate? Are sex and sexual orientation part of the construction of minority racial status? And what about the civil rights movement or Chicano liberation—are they historically homophobic? Accidentally or inherently so? Are gays and lesbians marginalized by the need of these groups to appear exemplary, all-American? (See chapter 7.)

QUESTIONS AND COMMENTS FOR CHAPTER V

1. If an African American asserts that because of slavery, blacks truly are exceptional and should be given priority over other groups in jobs and social programs, is he or she asserting a form of property interest in blackness? (See Cheryl Harris, *Whiteness as Property*, 106 *Harv. L. Rev.* 1707 [1993]).
2. Does white privilege exist? If so, give an example. Is there such a thing as black, Chicano, or Asian privilege?
3. If slavery is the central, foundational element in blacks' history in the United States, what serves that function for Latinos? For Indians? For Asians?
4. If it is legitimate for a school to have a black or Latino student organization, is it equally legitimate to allow white students to form a white student organization? And use student fees to fund it?
5. Would it not be logical for blacks, Latinos, Asians, and Native Americans to unite in one powerful coalition to confront the power system that is oppressing them all? If so, what prevents them from doing so?

SUGGESTED READINGS

- Allen, Theodore, *The Invention of the White Race*, Vols. 1–2 (1994, 1997).
- Chang, Robert S., *Disoriented: Asian Americans, Law, and the Nation-State* (1999).
- Critical Race Feminism: A Reader* (Adrien K. Wing ed., 1997).
- Critical White Studies: Looking Behind the Mirror* (Richard Delgado & Jean Stefancic eds., 1997).
- Delgado, Richard, *Derrick Bell's Toolkit: Fit to Dismantle That Famous House?*, 75 *N.Y.U. L. Rev.* 283 (2000).
- Delgado, Richard & Jean Stefancic, *The Social Construction of Brown v. Board of Education: Law Reform and the Reconstructive Paradox*, 36 *Wm. & Mary L. Rev.* 547 (1995).
- Flagg, Barbara J., *Was Blind, but Now I See: White Race Consciousness and the Law* (1998).
- Haney López, Ian F., *White by Law: The Legal Construction of Race* (1996).
- Harris, Cheryl I., *Whiteness as Property*, 106 *Harv. L. Rev.* 1707 (1993).
- Hutchinson, Darren L., *Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse*, 29 *Conn. L. Rev.* 561 (1997).
- Ignatiev, Noel, *How the Irish Became White* (1995).
- The Latino/a Condition: A Critical Reader* (Richard Delgado & Jean Stefancic eds., 1998).
- McIntosh, Peggy, *White Privilege and Male Privilege: A*

- Personal Account of Coming to See Correspondences through Work in Women's Studies (1988).
- Perea, Juan F., The Black/White Binary Paradigm of Race, 85 Cal. L. Rev. 1213 (1997).
- Rethinking the Color Line: Readings in Race and Ethnicity (Charles A. Gallagher ed., 1999).
- Roediger, David R., The Wages of Whiteness: Race and the Making of the American Working Class (rev. ed. 1999).
- Ross, Thomas, Innocence and Affirmative Action, 43 Vand. L. Rev. 297 (1990).
- Saxton, Alexander, The Rise and Fall of the White Republic: Class Politics and Mass Culture in Nineteenth-Century America (1990).
- Takaki, Ronald T., A Different Mirror: A History of Multicultural America (1993).
- Takaki, Ronald T., Strangers from a Different Shore: A History of Asian Americans (rev. ed. 1998).
- Valdes, Francisco, Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society, 83 Cal. L. Rev. 1 (1995).
- Wildman, Stephanie, with contributions by Margalynne Armstrong, Adrienne D. Davis, & Trina Grillo, Privilege Revealed: How Invisible Preference Undermines America (1996).

## CHAPTER VI

# Critiques and Responses to Criticism

As Thomas Kuhn has pointed out, paradigms resist change. It should come as no surprise, then, that critical race theory, which endeavors to change the reigning paradigm of civil rights thought, has sparked stubborn resistance. For the first few years of its existence, the media treated critical race theory relatively gently. As the movement matured, however, critics felt freer to speak out. Some of the areas that drew attention are storytelling, the critique of merit, truth and objectivity, and the matter of voice.

In an early article in the *Harvard Law Review*, Randall Kennedy, an African American colleague of Derrick Bell, charged three of the movement's founding figures—Bell, Mari Matsuda, and Richard Delgado—with serious errors and misstatements. In particular, Kennedy challenged the idea that minority scholars enjoyed a certain expertise, or spoke in a unique “voice” about racial issues. He also took the movement to task for accusing mainstream scholars of ignoring the contributions of writers of color. These “voice” and “exclusion” theses are related, as follows.

Kennedy's voice critique questions whether minority

scholars have any particular claim to expertise simply by virtue of who they are. Some blacks, Chicanos, and Indians have little interest in racial liberation or radical movements, Kennedy writes. Others may have the interest, but no particular expertise or insights. At the same time, white people may be vitally interested in race and civil rights and have much to say that is true and valid. To think that subject-matter qualifications follow racial categories is simplistic and wrong.

Kennedy also challenged the exclusion thesis—the charge that mainstream scholars had ignored the contributions of scholars of color—which found its most classic expression in Richard Delgado’s “Imperial Scholar” article. Kennedy reasoned that legal scholarship is like a marketplace. Good articles and books attract “buyers”—recognition, citation, reprintings. Thus, pointing out that articles A, B, and C have fallen into a void tells us nothing about discrimination or exclusion. It is first necessary to establish that those articles were of high quality and deserved recognition, which the mainstream scholars withheld. Kennedy, himself a distinguished civil rights scholar, thus charged his colleagues on the Left with failing to examine their premises, and with taking on the victim’s role when it had not been shown that they deserved better treatment than they had received.

The crits’ responses were not long in coming. In a series of articles, including a special colloquy in the *Harvard Law Review*, critical race theorists and their defenders argued that Randall Kennedy himself was guilty of misstatement and an unsympathetic reading of CRT texts. Leslie Espinoza

charged Kennedy with holding the crits up to the expectations and standards of the old liberal universalist paradigm and failing to grasp the powerful call of context and narrative. Broad social issues like race, Espinoza contended, cannot be fully addressed through enforcement of individual rights. Because Kennedy approached the new movement through older lenses, he missed opportunities to help take racial analysis to a new level. Robin Barnes questioned whether Kennedy's demand for quantifiable proof of discrimination in legal scholarship was realistic, and pointed out that it echoed some of the loaded standards the conservative Supreme Court had been developing in the law of racial remedies, such as proof of intent and straight-line causation of injury.

Mainstream newspapers and magazines also contributed to discourse about critical race theory. A 1992 article by Stephanie Goldberg in the *New York Times* struck a sympathetic note in describing the movement's origins, principal figures, and some of its signature ideas. A few years later, however, the tide turned. The *Wall Street Journal* weighed in with two negative articles, while the *New Republic* reviewed several CRT books in decidedly downbeat fashion. The author of this review, Jeff Rosen, built on an earlier critique by Daniel Farber and Suzanna Sherry that questioned the usefulness of storytelling in the law. They also charged that some critical race scholarship was implicitly anti-Semitic; for his part, Rosen accused CRT of embracing a "vulgar racial essentialism" in which all blacks, for example, were said to think alike. Farber and Sherry returned to both themes in a

recent book entitled *Beyond All Reason*, in which they accused critical race theorists of “radical multiculturalism,” and of hiding behind personal accounts and narratives to advance their points of view, and a lack of respect for truth and traditional notions of merit.

Farber and Sherry begin by observing that Jews and Asians are minority groups, yet have succeeded by conventional standards, achieving high levels of educational and occupational success. If these standards are unfair and biased against minorities, as the crits assert, how can one account for the success of these two groups? Did they cheat or take unfair advantage? Are they unimaginative mimics and drones? All possible explanations are unflattering, therefore the critique of merit is implicitly anti-Semitic and anti-Asian.

Crits replied that if Asians and Jews succeeded despite an unfair system, this is all to their credit. But why should pointing out unfairness in conventional merit standards, like the Scholastic Aptitude Test (SAT), bespeak a negative attitude toward Jews or Asians? In the view of these crits, Farber and Sherry confused criticism of a standard with criticism of individuals who performed well under that standard. Farber and Sherry’s broadside struck others as ahistorical: Jews and some Asians may have had long histories and experiences with racism, but those histories and experiences may not have been the same ones other groups of color such as Indians or blacks suffered.

Farber, Sherry, and a few other mainstream scholars, including Judge Richard Posner, also take sharp issue with the legal storytelling movement. As the reader will recall (see

chapter 3), critical race theorists deploy stories and narratives as a means of building cohesion within minority groups and shattering the mindset created by the stories of the dominant group. Mainstream critics charge that storytelling is a distortion of public discourse (or “lunatic” “radical legal egalitarianism,” as Posner put it), for several reasons. First, the stories critical race theorists tell may not be representative of the experiences of the groups of which they are members. In fact, opponents suspect that the stories are intentionally atypical because they seek to attract the attention and arouse the sympathy of the audience. The audience receives the impression that the experience the storyteller recounts is typical, when, in fact, it may be one in a million.

Yet another argument is that storytelling lacks analytical rigor. Stories can be read in such a manner as to convey several different messages. Because the point of the entire story is open to interpretation, the prospect of a productive public debate is diminished. Farber and Sherry maintain that “if we wish a society to have a conversation about issues of race and gender, unadorned stories may be too ambiguous in their implications to provide a basis for further dialogue” (*Beyond All Reason* 86 [1997]).

A further criticism is that storytelling stifles discussion and debate when the storyteller claims to be in a better position to understand the issue at hand because of his or her background. The “voice of color,” as it is termed, seems to imply that critical race theorists have a deeper understanding of certain issues than their white counterparts. For example, a black storyteller may have a better perspective on

experiencing prejudice when trying to make a purchase at an upscale store than a white storyteller. This issue of “standing” (who has the right to redress a grievance) usually comes into play when white scholars talk and write about racial encounters or other subjects outside their experience. Critical race theorists believe that, while white scholars should not be excluded from writing about such subjects, they are often better addressed by minorities. Farber and Sherry quarrel with this premise. While admitting that “[p]erhaps in some situations race can serve as a ‘useful proxy for a whole collection of experiences, aspirations and sensitivities,’” the work itself, they say, is what creates validity.

Finally, CRT’s adversaries are perhaps most concerned with what they perceive to be critical race theorists’ nonchalance about objective truth. For the critical race theorist, objective truth, like merit, does not exist, at least in social science and politics. In these realms, truth is a social construct created to suit the purposes of the dominant group.

In an effort to show the critical race theorists’ lack of concern with truth, opponents point not only to critical race theorists’ open declarations that truth is socially constructed, but also to a number of allegedly misstated facts. Farber and Sherry specifically point to an incident in which Mari Matstuda declared Robert Gould Shaw, the white commander of the Fifty-fourth Regiment, to be a “Negro colonel.” They then point to an incident in which Patricia Williams deplored that the U.S. Supreme Court had endorsed the right of the states to prohibit blacks from testifying against whites. Of course, one could interpret the above statements so that they

could be true in one context and false in another. For example, in calling Robert Gould Shaw a “Negro colonel,” Matsuda could have been explaining that he was the white leader of a black regiment. In mentioning that the U.S. Supreme Court had endorsed the states’ rights to stop blacks from testifying against whites, Williams might have merely been stating, correctly, that the Supreme Court took no action to set aside the host of state-law cases and legislation that barred blacks (and Asians) from testifying in such fashion.

In addition to responding to outside criticism, critical race theory has engaged in intensive self-criticism, often outside the public view. Some of the issues are ones any new movement might expect to address. What is its practical worth? Why is it not down in the trenches, helping activists deal with problems of domestic violence, poor schools, and police brutality? Why is it so hard on liberals or so disdainful of existing civil rights statutes and remedies? What is the purpose of critique unless one has something better to replace it with?

To these questions, the crits reply that nothing is wrong with on-the-ground activism, but that theory and practice need to work together. Activists need new theories to challenge a social order that treats minority communities and the poor so badly. By the same token, theorists need the infusion of energy that comes from exposure to real-world problems, both as a galvanizing force for scholarship and a reality test for their writing. As for criticizing the existing system, the crits respond that they are indeed at work developing a vision to replace it. They cite Derrick Bell’s theories of cultural and educational self-help, Lani Guinier’s restructuring of

electoral democracy, Charles Lawrence and Mari Matsuda's effort to develop a new theory of hate speech, and Juan Perea's arguments for linguistic pluralism as examples.

A jury found that defendants had engaged in employment discrimination, in part by permitting plaintiffs to be the target of racial epithets repeatedly spoken by a fellow employee. In addition to awarding damages, the trial court issued an injunction prohibiting the offending employee from using such epithets in the future. Defendants argue that such an injunction constitutes a prior restraint that violates their constitutional right to freedom of speech. For the reasons that follow, we hold that a remedial injunction prohibiting the continued use of racial epithets in the workplace does not violate the right to freedom of speech if there has been a judicial determination that the use of such epithets will contribute to the continuation of a hostile or abusive work environment and therefore will constitute employment discrimination.

*Aguilar v. Avis Rent a Car System, Inc.*, 21 Cal. 4th 121, 980 P.2d 846 (1999).

Other questions go to the heart of critical race theory. A persistent internal critique accuses the movement of straying from its materialist roots and dwelling overly on matters of concern to middle-class minorities—microaggressions, racial insults, unconscious discrimination, and affirmative action in higher education. If racial oppression has material and cultural roots, attacking only its ideational or linguistic expression is apt to do little for the underlying structures of inequality, much less the plight of the deeply poor.

Another internal critique raises the question of whether

critical race theory takes adequate account of economic democracy. If the emerging issues of the new century are world trade, globalism, workers' rights, and who shares in the new wealth created by the technology revolution, a movement that has no theory of race and class is apt to seem increasingly irrelevant. A final charge that some critics raise is that the movement has become excessively preoccupied with issues of identity, as opposed to hard-nosed social analysis. Armchair issues such as the social construction of race, the role of multiracial people, "passing," and endless refinements of the anti-essentialist thesis (see chapter 4) may pose intriguing intellectual puzzles, but lie far from the central issues of our age. It seems difficult to imagine W.E.B. Du Bois, if he were alive today, writing a Ph.D. dissertation on passing, or whether a professor should be able to earn tenure based on an article written entirely in the narrative voice. In general, the internal critiques question only the movement's emphasis and allocation of resources. They do not threaten its solidarity, vitality, or ability to generate vital insights into America's racial predicament.

### *Classroom Exercise*

The program coordinator for the regional conference on critical race theory seeks your advice on the following question: the conference committee wishes to include a two hour session, toward the end of the conference, dealing with extremely sensitive internal criticism of the direction the movement has been taking. Should the session be open or closed

to the press? Should it be open only to persons who have participated in the movement for at least five years?

In other words, what should one do about airing “dirty laundry”? One half of your group argues the let-it-all-hang-out position, while the other argues for a secret session.

QUESTIONS AND COMMENTS FOR CHAPTER VI

1. Reconsider the question posed at the end of chapter 1: Is critical race theory too pessimistic?
2. Do CRT's critics make the mistake of holding the new paradigm of civil rights thought up to the standard of the old one? Is this like deeming Martin Luther a heretic because he sought to change the teachings of the Catholic Church, or like judging Jesus by the standards of the Roman Empire?
3. Is it problematic that before about 1985, most of the civil rights literature in law was written by a small circle of white scholars who cited mainly each other and ignored the small, but growing, literature written by scholars of color? Or might it have one or more perfectly logical explanations?
4. Are stories based on firsthand experience, for example, racial discrimination at a department store, irrefutable (because only the author was there), and, if so, how can other scholars build on or criticize them? Are they power moves? Exclusionary? Useful, raw experience or data?
5. Is it a waste of time for a movement that seeks social justice to focus on internal issues of identity and the relations of subgroups within it?

#### SUGGESTED READINGS

- Colloquy, Responses to Racial Critiques of Legal Academia, 103 *Harv. L. Rev.* 1844 (1990).
- Coughlin, Anne M., Regulating the Self: Autobiographical Performances in Outsider Scholarship, 81 *Va. L. Rev.* 1229 (1995).
- Culp, Jerome M., Jr., Autobiography and Legal Scholarship and Teaching: Finding the Me in the Legal Academy, 77 *Va. L. Rev.* 539 (1991).
- Delgado, Richard, The Imperial Scholar: Reflections on a Review of Civil Rights Literature, 132 *U. Pa. L. Rev.* 561 (1984).
- Delgado, Richard, On Telling Stories in School: A Reply to Farber and Sherry, 46 *Vand. L. Rev.* 665 (1993).
- Delgado, Richard, Rodrigo's Book of Manners: How to Conduct a Conversation on Race—Standing, Imperial Scholarship, and Beyond, 86 *Geo. L.J.* 1051 (1998).
- Farber, Daniel & Suzanna Sherry, *Beyond All Reason: The Radical Assault on Truth in American Law* (1997).
- Goldberg, Stephanie, The Law, a New Theory Holds, Has a White Voice, *N.Y. Times*, July 17, 1992, at A23.
- Hayman, Robert L., Jr., & Nancy Levit, The Tales of White Folk: Doctrine, Narrative, and the Reconstruction of Racial Reality, 84 *Cal. L. Rev.* 377 (1996).
- Johnson, Alex M., Jr., The New Voice of Color, 100 *Yale L.J.* 2007 (1991).
- Kennedy, Randall L., Racial Critiques of Legal Academia, 102 *Harv. L. Rev.* 1745 (1989).

Posner, Richard A., *The Skin Trade*, *New Republic*, October 13, 1997, at 40.

Rosen, Jeffrey, *The Bloods and the Crits*, *New Republic*, December 9, 1996, at 27.



## Critical Race Theory Today

What is the situation of critical race theory today? In many respects, the movement is thriving. Dynamic new subdisciplines, such as LatCrit and queer-crit studies, challenge civil rights activists to rethink the ways they conceptualize race and civil rights. Critical race theory is taught at many law schools and is spreading rapidly across disciplines. Some judges incorporate its signature ideas and critiques in opinions, even if sometimes without labeling them as such. Lawyers use critical race theory ideas to advocate on behalf of clients and to expose bias within the system. In this chapter, we expand on some of these themes and discuss the impact that CRT seems to be having on national discourse. We also analyze some of the internal struggles that are playing themselves out within the group, and examine a few topics, such as hate speech, crime, affirmative action, critical lawyering, poverty, and class that are very much on society's—and critical race theory's—front burner.

### *A. The 1990s*

The decade of the nineties saw a vigorous offensive from the political Right. Abetted by heavy funding from conservative

foundations and position papers from right-wing think tanks, conservatives advanced a series of policy initiatives, including campaigns against bilingual education, affirmative action, and immigration. They also lobbied energetically against hate-speech regulation, welfare, and governmental measures designed to increase minorities' political representation in Congress. Many of the backers of these conservative reforms were former liberals disenchanted with the country's departure from color-blind neutrality. Critical race theorists took part in all of those controversies, but especially in three areas: capitalism, wealth accumulation, and distributive justice and domestic issues of power. They also addressed identity issues within critical race theory and intragroup coalitions.

### *B. Capitalism on the Rampage*

Though the American economy advanced rapidly during the Reagan years in the 1980s, the fall of the Soviet empire in 1991 put a new glint in the eye of American capitalists. Military spending was cut back; by the end of the nineties the federal debt had dwindled. A generation of young workers, whose memories of the Great Depression were only stories told by their grandparents, began to form the new economy. Without training in the emerging fields of technology and global marketing, minority communities fell further and further behind. They had few natural allies. The Democratic Party no longer courted them; the labor movement had lost force; and the United States

lacked the spur of Cold War competition to enforce antidiscrimination norms rigorously.

In such an atmosphere, many critical thinkers put their minds to the task of combating what they saw as the country's long slide into racial indifference.

### 1. Unmasking Color Blindness

When Martin Luther King, Jr., issued his famous call for America to put aside its racist past and judge people not by the color of their skin, but by the content of their character, he was echoing a theme with long roots in America's history. More than half a century earlier, in *Plessy v. Ferguson*, Justice John Harlan in a famous dissent protested the majority's formalistic separate-but-equal decision. In *Plessy*, a black man had challenged a railroad's rule prohibiting him from riding in a car reserved for whites. The railroad replied that it had set aside identical cars for black passengers, hence its practice did not violate the Equal Protection Clause of the Fourteenth Amendment. The Supreme Court opinion agreed with the railroad, establishing the principle of separate but equal that lasted until the *Brown* decision of 1954.

Justice John Harlan's scathing dissent rebuked the majority's decision. He pointed out that history and custom rendered preposterous the majority opinion's blithe denial that anything untoward had happened. The railroad's separation of the races occurred against a background that made its symbolism and insult unmistakable. With *Brown v. Board of Education*, the judicial system moved away from formalism, adopting Justice Harlan's position. The new approach,

which looked not merely to whether a law or practice mentioned race, but to its real-world effects, lasted through the sixties and seventies. During this time, the nation adopted affirmative action, which came into being when President Lyndon Johnson issued Executive Order 11246 in 1965. Soon a host of federal and state agencies, including schools and universities, followed suit.

By the mid-seventies, the implementation of affirmative action became so complex that Alan Bakke, who had been denied admission to the University of California at Davis Medical School, sued to declare race-conscious admissions in higher education unconstitutional. The Supreme Court's splintered decision narrowed affirmative action by insisting that universities set aside no formal quota for minorities and that they compare every candidate with every other. If universities were careful to observe these limitations, they could consider race as one factor among many in order to achieve a diverse intellectual environment. Although subsequent decisions, including the Fifth Circuit decision *Hopwood v. Texas* (which abolished race-conscious decision making in higher education in three states), cast doubt on this so-called diversity rationale, at the time we write *Bakke* is still good law.

Conservatives, however, see it differently. Beginning with position papers, op-ed columns, and books, writers of this persuasion have been arguing that affirmative action balkanizes the country, stigmatizes minorities, weakens the idea of merit, and constitutes reverse discrimination. Some, such as the authors of *The Bell Curve*, even argued that minorities

may be biologically inferior to whites, so that disparate representation in selective schools and occupations should come as no surprise. Conservatives followed up their media campaign with a series of lawsuits aimed at declaring affirmative action unconstitutional.

Civil rights organizations and progressive educators sought to counter each of these ideas. Progressive scientists challenged every one of the premises of *The Bell Curve* and similar neo-eugenicist tracts, showing how they rested on discredited 1920s-era pseudoscience. Critical race theory's contribution to the defense of affirmative action has consisted mainly of a determined attack on the idea of merit and standardized testing. Conservatives make points by charging that affirmative action gives jobs or places in academic programs to individuals who do not deserve them. The public receives incompetent service, while better-qualified workers or students are shunted aside. This argument resonated with certain liberals who equate fairness with color blindness and equal opportunity, rather than equal results.

CRT's critique of merit takes a number of forms, all designed to show that merit is far from the neutral principle that its supporters imagine it to be (see chapter 6). Several writers critique standardized testing, demonstrating that tests like the SAT are coachable and reward those from high socioeconomic levels. They predict little else than first-year grades—and those only modestly—and do not measure other important qualities such as empathy, achievement orientation, or communication skills. Other critics point out that merit is highly contextual. If one moves the hoop in a

basketball court up or down six inches, one radically changes the distribution of who has merit. Similarly, if one defines the objective of a law school as turning out glib lawyers who excel at a certain type of verbal reasoning, then one group would appear to have a virtual corner on merit. But if one defined lawyering skills more broadly to include negotiation, interpersonal understanding, and the ability to craft an original argument for law reform, then a different group might well stand out.

One critical scholar addressed the popular suggestion that affirmative action based on race be phased out in favor of one based on socioeconomic disadvantage or class. Most educators believe that such a shift would devastate the chances of communities of color, because the number of poor whites greatly exceeds that of poor minorities. Accordingly, the scholar proposed that any institution tempted to implement an affirmative action plan of this type also take *advantage*, or white privilege, into account (see chapter 5). For example, imagine a university admissions committee comparing two candidates. Candidate A is a Chicano from East Los Angeles with a 3.9 average from an inner-city school and SAT scores of 1050. His college essay recounts that he stepped in when his father went to jail and helped raise his younger siblings. His life objective is to apply Cesar Chavez's religion-based, collectivist ideas to organize *urban* areas.

Candidate B is a son of a white suburban family who sent him to a private school and to Europe his junior year. This student has a 3.3 average from an elite school and an SAT score of 1200. He has no particular educational objective,

but wants to develop an all-around grounding in liberal arts before going to work in his dad's company. His personal essay describes how his effort to make the junior varsity cross-country team strengthened his character. Most admissions officers, like most readers, would undoubtedly favor the Chicano candidate despite his lower test scores, but why? Perhaps it is because we believe that Candidate B has not made the most of his opportunities, while Candidate A seems eager to do so. The author who developed this proposal drew on notions of white privilege established in the critical white studies literature to urge that admissions officers discount, or penalize, the scores of candidates like B, thus clearing the way for ones like A.

## 2. Race, Class, Welfare, and Poverty

A second field on which ideological battles rage is the distribution of material benefits in society. This controversy shades off into the much-debated question of whether race or class is the dominant factor in the subjugation of people of color. Is racism a means by which whites secure material advantages, as Derrick Bell proposes? Or is a "culture of poverty," including broken families, crime, intermittent employment, and a high educational dropout rate, what causes minorities to lag behind?

Critical race theory has yet to develop a comprehensive theory of class. A few scholars address issues such as housing segregation in terms of both race and class, showing that black poverty is different from almost any other kind. Real estate steering, redlining, and denial of loans and mortgages,

especially after the end of World War II, prevented blacks from owning homes, particularly in desirable neighborhoods. It also excluded them from sharing in the phenomenal appreciation in real estate property values that the last few decades have brought. Confinement to certain neighborhoods, in turn, limits where black parents may send their children to school and so perpetuates the cycle of exclusion from opportunities for upward mobility that have enabled many poor whites to rise.

Some race critics focus on discrimination in higher-echelon jobs, and in such fields as the delivery of health services. The critique of standardized testing, as mentioned earlier, also contains a class element: critics of tests such as the SAT have shown that many of the items are class-bound, requiring familiarity with such items as polo mallets or regattas, and that the best predictor of a person's SAT score is his or her father's occupation.

Other critical race theorists analyze the distribution of environmental dangers and bio-hazards. The environmental justice movement analyzes a type of internal colonialism, in which installations such as toxic waste sites, radioactive tailings, and sewage treatment plants are disproportionately placed in minority communities or on Indian reservations. Corporate defenders of these practices argue, as they do in the international arena, that they are merely going to the best market. Sometimes they point out that minority communities welcome the jobs that a sewage treatment plant, for example, would bring. Civil rights activists reply that the marketplace is far from neutral, and that a corporation that

takes advantage of a community's financial vulnerability is engaging in predatory behavior, if not outright racism. A dynamic example of critical race theory in action, the environmental justice movement aims at forging a coalition between the hitherto white-dominated conservation movement and minority communities. If it succeeds, it will have created a truly powerful force for change.

I concur in Chief Judge Wilkinson's well-reasoned opinion of the court. I write separately, however, to memorialize my serious concern with the shabby treatment the African-American residents of Jersey Heights have suffered at the hands of state and federal highway planners and officials.

It is no historical accident that Jersey Heights today is ninety-nine percent African American. Displaced from their downtown neighborhoods by the construction of Route 13 in the 1930s and the original Route 50 in the 1950s, African-Americans in Salisbury relocated to Jersey Heights. As a result of widespread steering practices, Jersey Heights was the only area in which Salisbury's African-Americans could find available housing. According to one plaintiff, Salisbury has had an "unwritten law"—that "if you were a certain pigmentation you had to live west of this [Wicomico River] bridge." . . .

Although the term "environmental justice" is of fairly recent vintage, the concept is not. See Michele L. Knorr, *Environmental Injustice*, 6 U. Balt. J. Envtl. L. 71, 73–76 (1997).

As Ms. Knorr aptly states, "environmental health hazards are unequally distributed in the United States. Millions of people in minority and low-income communities are subjected to greater levels of pollution than Caucasian and wealthy populations because of their race or socioeconomic status. Environmental

injustice occurs, in part, because of the exclusion of these communities in the decision-making process as well as the disproportionate location of pollution.” Knorr, *Environmental Injustice*, U. Balt. J. Envtl. L. at 71–72 (footnotes omitted).

As Justice Douglas pointed out nearly thirty years ago, “as often happens with interstate highways, the route selected was through the poor area of town, not through the area where the politically powerful people live.”

*Jersey Heights Neighborhood Ass’n v. Glendening*, 174 F.3d 180 (4th Cir. 1999).

What about the general problem of the increasing disparity between the household incomes and assets of the top 10 percent of our society, and all the rest? Formerly, the United States relied on redistributive measures such as a progressive income tax, public education, and a welfare net to prevent those at the bottom from slipping into permanent poverty. Today, those programs command much less support than they did formerly. Some believe that the reason the public no longer supports welfare is that they see the recipients of welfare as having black and brown faces—even though more whites receive welfare than do people of color. In short, society tolerates poverty and blighted upward mobility for outsider groups.

Many critical race scholars recognize that poverty and race intersect in complex ways, so that the predicament of very poor minority families differs in degree from that of their white counterparts. White poverty usually lasts for only a generation or two (even for immigrant families); not so for

the black or brown version. By the same token, middle-class or professional status for blacks, browns, or Indians is less secure than for others. Their children can fall from grace with breathtaking speed; sometimes all it takes is one arrest or a single very low grade in school. But a general theory of race and economics remains elusive.

### 3. Globalization

A third issue that is very much in the forefront of critical race theory currently is international globalization. A globalizing economy removes manufacturing jobs from inner cities, creates technology and information industry jobs for which many minorities have little training, and concentrates capital in the pockets of an elite class, which seems little inclined to share it. At the same time, however, it offers opportunities for minorities to form coalitions with American blue-collar workers and unions that face similar issues and have begun to mobilize, as happened in Seattle with the WTO protests. Some critics believe that the situations of domestic minorities and peer workers in Third World countries are linked and must be addressed together.

History suggests that they may be right. Sweatshop and other exploitive conditions in overseas factories generally afflict poor, formerly colonized, people of color, many of them women. Decontextualized free market ideology would hold that American corporations are merely offering these workers the going wage, or maybe even slightly better. Critics point out that the reason these wages are low and the new jobs attractive is that U.S. and European colonialism has

robbed the former colonies of their natural wealth, suppressed the development of local leaders, and conspired with right-wing dictators to keep the people poor and disorganized. If the materialist wing of critical race theory is right, domestic minorities have suffered at the hands of very similar forces. Indeed, their fates are linked with those of their overseas counterparts, since capitalists can always use the threat that investments will relocate overseas to defeat unions, workplace regulations, welfare, and other programs of interest to U.S. minorities.

A final area for critical race analysis is immigration law. The United States tolerates and, in some cases, abets repressive murderous regimes abroad, often in small countries whose wealth it and other colonial powers have already plundered. People from these countries, unsurprisingly, often want to immigrate to the United States or to the prosperous industrialized countries of northern Europe. Although the United States dropped its nativist national origin quota system in 1965, it still limits immigration and polices the southern border with Mexico zealously. Judicial review of immigration policy is sharply limited because of the plenary power doctrine, under which courts grant Congress virtually unlimited power to regulate immigration. Thus, treatment of countries or groups of would-be immigrants that would constitute clear-cut equal protection or due process problems cannot be challenged in court. The resulting harsh treatment of people fleeing poverty, death squads, or repression in their home countries offers what one critical race theorist has called a “magic mirror” into the heart of America. This mir-

ror shows how American society really thinks of its own citizens of color and would treat them if it were not for the courts.

### *C. Power*

Another set of contemporary issues has to do loosely with power: addressing racism in the criminal justice system, increasing voting power and political representation, combating hate speech, and striving for recognition of language rights. On any given day, over 60 percent of the black men in the District of Columbia are enmeshed in the criminal justice system—in jail or prison, on probation or parole, or wanted on a warrant. In East Los Angeles, 50 percent of young Mexican American men suffer the same fate. Black men who murder whites are executed at a rate nearly ten times that of whites who murder blacks. And as most readers of this book will know, the number of young black men in prison or jail is larger than the number attending college.

Many progressive people seek to understand the meaning of these figures and search for ways to combat the conditions that create them. Critical race theory's contribution has taken a number of forms. Building on the work of radical criminologists, one race critic shows that the disproportionate criminalization of African Americans is a product, in large part, of the way we define crime. Many lethal acts, such as marketing defective automobiles, alcohol, or pharmaceuticals or waging undeclared wars, are not considered crimes at all. By the same token, many things that young

black and Latino men are prone to do, such as congregating on street corners, cruising in low-rider cars, or scrawling graffiti in public places, are energetically policed. Crack cocaine offenses receive harsher penalties than those that apply to powder cocaine. Figures show that white-collar crime, including embezzlement, consumer fraud, bribery, insider trading, and price fixing, causes more deaths and property loss, even on a per capita basis, than all street crime combined.

Other CRT scholars address racial profiling, in which the police stop minority-looking motorists to search for drugs or other contraband, and “statistical discrimination” carried out by ordinary people who avoid blacks or Latinos because they believe members of these groups are more likely than whites to be perpetrators of crime. Both practices penalize law-abiding people of color and alienate youths.

Other critical race scholars urge jury nullification to combat the disproportionate incarceration of young black men. In jury nullification, the jury, which in most large cities will contain people of color, uses its judgment, sometimes contravening instructions from the judge, on whether to convict a defendant who has committed a nonviolent offense, such as shoplifting or possession of a small amount of drugs. If the jury believes that the police system is racist or that the young man is of more use to the community free than behind bars, it will vote to acquit.

One federal judge, versed in critical race theory, applied a similar analysis in the case of a black defendant. Under a three-strikes-and-you’re-out type of law, the judge was re-

quired to sentence the man to a long term. On noticing that his two previous offenses had been automobile-connected, the judge declined to do so. Reasoning that racial profiling by the police causes black motorists to be pulled over more frequently than whites, she concluded that the defendant's two prior convictions had likely been tainted by racism. Consequently, she sentenced him to the shorter term appropriate for non-repeat offenders.

The scholarly and popular literature strongly suggest . . . racial disparity in the rates at which African Americans are stopped and prosecuted for traffic offenses. That literature, together with the specific facts about Leviner's record and background, compel me to depart from the Guidelines range. . . .

While the Sentencing Guidelines were designed to eliminate unwarranted disparities in sentencing, and constrain a judge's discretion, they are not to be applied mechanistically, wholly ignoring fairness, logic, and the underlying statutory scheme. . . .

Motor vehicle offenses, in particular, raise deep concerns about racial disparity. Studies from a number of scholars, and articles in the popular literature have focused on the fact that African American motorists are stopped and prosecuted for traffic stops, more than any other citizens. And if that is so, then it is not unreasonable to believe that African Americans would also be imprisoned at a higher rate for these offenses as well.

*Judge Nancy Gertner in United States of America v. Leviner, 31 F. Supp. 2d 23 (D. Mass. 1998).*

Imprisonment for a felony often leads to disenfranchisement under state laws that deprive felons of the right to vote, even after serving their time. But communities of color suffer

another kind of disenfranchisement simply by reason of their numerical minority status. In most elections, except for those of mayors of certain large cities, people of color will be in the minority. Even if they vote as a bloc, if whites do so as well, they are apt to be outvoted. The Supreme Court has recently disapproved redistricting aimed at producing voting units where a majority of color is assured. Until the population's balance changes, alternative means must be sought to avoid constant minority underrepresentation. Cumulative voting, proposed by a leading critical race theorist, would circumvent some of these problems by allowing voters facing a slate of ten candidates, for example, to place all ten of their votes on one, so that if one of the candidates is, say, an African American whose record and positions are attractive to that community, that candidate should be able to win election. The same author has provided a number of suggestions aimed at ameliorating the predicament of the lone black or brown legislator who is constantly outvoted in the halls of power or required to engage in exchanges of votes or favors to register an infrequent victory.

Two final issues have to do with speech, language, and power. One of the first critical race theory proposals had to do with hate speech—the rain of insults, epithets, and name-calling that many minority people face on a daily basis. A pathbreaking article, entitled “Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling,” published in the *Harvard Civil Rights-Civil Liberties Law Review*, documented some of the harms that this type of speech can inflict. It pointed out that courts were already affording

intermittent relief for victims of hate speech under such doctrines as defamation, intentional infliction of emotional distress, and assault and battery. It concluded by recommending a new independent tort in which the victims of deliberate, face-to-face vituperation could sue and prove damages.

Later articles and books built on “Words That Wound.” One writer suggested criminalization as an answer; others urged that colleges and universities adopt student conduct rules designed to deter hate speech on campus. Still others connected hate speech to the social-construction-of-race hypothesis, pointing out that concerted racial vilification contributes to social images and ingrained preconceptions of people of color as indolent, immoral, or intellectually deficient. Although occasional plaintiffs have gained relief through the tort avenue, U.S. courts have treated campus hate speech codes harshly, striking down at least four as violations of the First Amendment. Elsewhere, however, the Supreme Court of Canada upheld that country’s criminal hate speech provision, citing U.S. critical race theorists’ work, while many European and British Commonwealth countries have instituted controls similar to Canada’s.

On the premise that “legal realism” will soon reach First Amendment jurisprudence, sweeping aside mechanical rules and barriers in favor of a broader, more policy-sensitive approach, critical race theorists have been tackling some of the most common policy objections to hate speech regulation, including that more speech is the best remedy for bad speech, that hate speech serves as a pressure valve relieving tension that might explode in an even more harmful manner later,

and that a focus on speech fails to get at the “real problem.” In the meantime, American courts, seemingly influenced by critical race theory writing, have been upholding causes of action brought by minority victims of hate speech under such legal theories as hostile environment. The final chapter to this controversy has yet to be written.

In 1972, plaintiff Carrie Taylor began working as a sheriff’s officer in the office of the Burlington County Sheriff. On January 31, 1992, Taylor, who is African American, was at the Burlington County Police Academy for firearms training. . . . While there, she encountered defendant Henry Metzger and Undersheriff Gerald Isham. Taylor said hello, and, in response, Metzger turned to Isham and stated: “There’s the jungle bunny.” Isham laughed. Plaintiff believed the remark to be a demeaning and derogatory racial slur, but she did not reply. She became a “nervous wreck,” immediately began crying, and went to the bathroom.

In this case, defendant’s remark had an unambiguously demeaning racial message that a rational factfinder could conclude was sufficiently severe to contribute materially to the creation of a hostile work environment. The term defendant used, “jungle bunny,” is patently a racist slur, and is ugly, stark and raw in its opprobrious connotation. . . . See Mari Matsuda, *Public Response to Racist Speech*, 87 Mich. L. Rev. 2330, 2338 (1989) (“However irrational racist speech may be, it hits right at the emotional place where we feel the most pain.”)

*Taylor v. Metzger*, 706 A.2d 685, 691 (N.J. 1998).

Another speech-related issue concerns the rights of non-English-speakers to use their native languages in the

workplace, voting booth, schoolhouse, and government offices. This issue, of great concern to Asian and Latino/a populations, squarely confronts a growing tide of nativist sentiment that also includes immigration controls and restrictions on the receipt of government benefits by foreigners. Critics point out that language is an essential part of culture and identity, that having a French or British accent is deemed a mark of refinement, and that many foreign countries are multilingual without suffering balkanization. Although almost half of American states enacted English-only measures over the last two decades, the tide may be turning: the Arizona State Supreme Court recently declared unconstitutional that state's harshly enforced official English statute as a violation of the First Amendment.

At the outset, we note that this case concerns the tension between the constitutional status of language rights and the state's power to restrict such rights. On the one hand, in our diverse society, the importance of establishing common bonds and a common language between citizens is clear. . . . We recognize that the acquisition of English language skills is important in our society. . . .

However, the American tradition of tolerance "recognizes a critical difference between encouraging the use of English and repressing the use of other languages." . . . If the wide-ranging language of the prohibitions contained in the Amendment were to be implemented as written, the First Amendment rights of [non-English speakers] would be violated.

*Arizona Supreme Court, in striking down that state's English-only amendment, in Ruiz v. Hull, 957 P.2d 984 (Ariz. 1998).*

### *D. Identity*

A great divide separates two broad types of current critical race scholarship. One group (the “real world” school) writes about issues such as globalization, human rights, race and poverty, immigration, and the criminal justice system. These writers are apt to be influenced by and sympathetic to Derrick Bell’s view of race as expressing material interests of elite groups, and they set out either to understand, analyze, criticize, or change conditions that afflict communities of color.

Another group of scholars (“discourse analysts”) focuses on the system of ideas and categories by which our society constructs and understands race and racism. Writers in this camp are apt to emphasize issues, such as identity and intersectionality, that have to do with words and categories. They are likely to examine the role of ideas, thoughts, and unconscious discrimination. The lines are not rigid; some writers address, for example, both hate speech and the social construction of race, or unconscious discrimination and the overt, in-your-face kind. Recently, the second group of scholars has conducted a lively round of discussions dealing with relations inside critical race theory itself, questioning, for example, whether the “essential” LatCrit is a deeply religious Catholic. If so, how does that affect gay or lesbian Latinos/as whose life style remains firmly marginalized by that church? Others analyze the internal makeup of the Latino/a group, many of whom have an indigenous heritage as well. Should they designate themselves as Indian on U.S. census forms? We have already mentioned the explosive controversy over

whether American racial thought incorporates a black-white binary. If so, does hanging on to that binary marginalize Asians, Latinos/as and Indians? Is it, in short, a power move? Do all people of color share something in common, namely, their oppression, or can we only speak of oppressions?

Meanwhile, some in the first group are impatient with the discourse analysts, urging that the country's racial predicament is becoming so acute that devoting energy to how a few highly placed university professors relate to each other or the terms in which they speak is like Nero's fiddling while Rome burns. For their part, the discourse analysts point out that many of our chains are mental and that we will never be free until we throw off ancient restrictions and demeaning patterns of thought and speech and create the discourse to talk about necessary new concepts.

Despite occasional disagreements and differences of emphasis, critical race theory remains a dynamic force on the American legal and cultural scene. The formation of spin-off groups, far from impairing the group's effectiveness or muting its voice, has only added new, vital dimensions to the movement as a whole.

### *Classroom Exercise*

This time you are the program coordinator for the regional student conference on critical race theory. You have just received a letter from a group at one of the area's schools that wishes to have a panel on eating disorders and body image. They point out that eating disorders and body image

distortions are a major source of unhappiness among young and old members of minority communities, and that the pressure to conform to Eurocentric standards of beauty and physical appearance makes these problems especially acute for women of color, many of whom have little chance of meeting them. You are concerned that the press, which is sure to cover your conference, will have a field day with the fatness panel if you allow it to go on.

The class or study group is your program committee. Elicit the pros and cons of the proposal and decide how to deal with it.

## QUESTIONS AND COMMENTS FOR CHAPTER VII

1. Now that you have come this far, revisit the question with which chapter 2 began: Would a determined campaign by every white in this country to be color-blind—to completely ignore the race of other people—eliminate the scourge of racism and racial subordination? Or is racism so embedded in our social structures, rules, laws, language, and ways of doing things that the system of white-over-black/brown/yellow subordination would continue, as though on autopilot?
2. A majority of people of color support affirmative action; a majority of whites oppose it. Why is that?
3. Does affirmative action reward incompetence? If so, why has the country's productivity not slipped during the twenty-five years that the program has been in existence? And why do most large corporations favor it?
4. Why should a light-skinned son of a black neurosurgeon with an SAT of 1080 get the nod over the daughter of a Ukrainian immigrant who works in a furniture factory, had to learn English from scratch, and earned a score of 1250?
5. If the police stop black male motorists 50 percent of the time, and whites only 10 percent of the time, and justify those stops by pointing out that black males commit more crime than whites, is that fair?
6. If corporations and government agencies locate 50 percent of the bio-hazards in minority communities, and 10 percent in white ones, is that fair?

7. If a U.S. corporation pays a Thai woman \$1.10 per hour to work a ten-hour workday in a hot, noisy factory, and the prevailing rate in Thailand is \$1.00 per hour for an eleven-hour workday, is that fair?
8. Blacks, Chicanos, and Asians are constantly outvoted by whites in elections, but is there anything wrong with that? Shouldn't the majority rule?
9. Latinos are nearly 11 percent of the U.S. population and will soon outnumber blacks as the largest ethnic minority group. But what are Latinos, anyway? Are they more like blacks? Whites? Indians? And who decides?

SUGGESTED READINGS

- Armour, Jody D., *Negrophobia and Reasonable Racism* (1997).
- Butler, Paul, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 *Yale L.J.* 677 (1995).
- Calmore, John, *A Call to Context: The Professional Challenges of Cause Lawyering at the Intersection of Race, Space, and Poverty*, 67 *Fordham L. Rev.* 1927 (1999).
- Cameron, Christopher D. Ruiz, *How the Garcia Cousins Lost Their Accents: Understanding the Language of Title VII Decisions Approving English-Only Rules as the Product of Racial Dualism, Latino Invisibility, and Legal Indeterminacy*, 85 *Cal. L. Rev.* 1347 (1997).
- Carrasco, Enrique R., *E-Book on International Finance and Development*, <http://www.uiowa.edu/ifdebook/ebook/main/main.shtml> (2000).
- Chang, Robert S., *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 *Cal. L. Rev.* 1241 (1993).
- Cole, David, *No Equal Justice: Race and Class in the American Criminal Justice System* (1999).
- Cole, Luke & Sheila Foster, *From the Ground Up: Environmental Racism and the Rise of the Environmental Justice Movement* (2000).
- Crawford, James, *Hold Your Tongue: Bilingualism and the Politics of English Only* (1992).
- Delgado, Richard, *Rodrigo's Eighth Chronicle: Black Crime, White Fears—On the Social Construction of Threat*, 80 *Va. L. Rev.* 503 (1994).

- Delgado, Richard, Ten Arguments Against Affirmative Action—How Valid? 50 Ala. L. Rev. 135 (1998).
- Delgado, Richard & Jean Stefancic, Must We Defend Nazis?: Hate Speech, Pornography, and the New First Amendment (1997).
- Delgado, Richard & David Yun, Pressure Valves and Bloodied Chickens: An Analysis of Paternalistic Objections to Hate-Speech Regulation, 82 Cal. L. Rev. 871 (1994).
- Fair, Bryan K., Notes of a Racial Caste Baby: Color Blindness and the End of Affirmative Action (1997).
- Guinier, Lani, The Tyranny of the Majority: Fundamental Fairness in Representative Democracy (1994).
- Harris, Paul, Black Rage Confronts the Law (1997).
- Hernández, Tanya Katerí, “Multiracial” Discourse: Racial Classifications in an Era of Color-Blind Jurisprudence, 57 Md. L. Rev. 97 (1998).
- Hutchinson, Darren L., Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse, 29 Conn. L. Rev. 561 (1997).
- Immigrants Out! The New Nativism and the Anti-Immigrant Impulse in the United States (Juan F. Perea ed., 1997).
- Johnson, Kevin R., Race, the Immigration Laws, and Domestic Race Relations: A “Magic Mirror” into the Heart of Darkness, 73 Ind. L.J. 1111 (1998).
- Kennedy, Randall L., Race, Crime, and the Law (1997).
- The Latino/a Condition: A Critical Reader (Richard Delgado & Jean Stefancic eds., 1998).
- Matsuda, Mari J., Public Response to Racist Speech: Considering the Victim’s Story, 87 Mich. L. Rev. 2320 (1989).

- Matsuda, Mari J. & Charles R. Lawrence III, *We Won't Go Back: Making the Case for Affirmative Action* (1997).
- Matsuda, Mari J., Charles R. Lawrence III, Richard Delgado & Kimberlé Crenshaw, *Words that Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* (1993).
- Moran, Rachel F., *Bilingual Education as a Status Conflict*, 75 Cal. L. Rev. 321 (1987).
- Perea, Juan F., *Demography and Distrust: An Essay on American Language, Cultural Pluralism, and Official English*, 77 Minn. L. Rev. 269 (1992).
- Russell, Katheryn K., *The Color of Crime: Racial Hoaxes, White Fear, Black Protectionism, Police Harassment, and Other Macroaggressions* (1998).
- Stefancic, Jean & Richard Delgado, *No Mercy: How Conservative Think Tanks and Foundations Changed America's Social Agenda* (1996).
- Symposium: *LatCrit: Latinas/os and the Law*, 85 Cal. L. Rev. 1087 (1997); 10 *La Raza L.J.* 1 (1998).
- Yamamoto, Eric K., *Rethinking Alliances: Agency, Responsibility, and Interracial Justice* (1998).



## CHAPTER VIII

# Conclusion

Chapter 7 described critical race theory today. Now, it is time to offer some thoughts on the future. This will include hazarding some predictions on what America's racial landscape may come to look like, as well as the range of problems civil rights activists and theorists may face as we move into the new century. It will also entail a look at some of the choices critical race theory, as a movement, will confront as it moves into that future, as well as at how the liberal establishment may react to CRT.

### *A. The Future*

Imagine a young, female child born in the year 2001. She might be white, black, brown, Asian, or mixed-race. The color does not matter. What sort of world will she inherit?

During her early years, the number of blacks and Latinos will be almost equal, while Asians will be the fastest-growing minority. Whites, however, will continue to be in the numerical majority until about midcentury, and will remain the largest single group into the foreseeable future.

At first, our child is apt to grow up in a segregated neigh-

borhood and attend segregated schools. Courts have been ending desegregation decrees, while conservatives have been lobbying effectively for the end of affirmative action in higher education. U.S. wealth is sharply split between a very well-to-do group at the top of the socioeconomic ladder, and everybody else. If our child is lucky enough to be born into one of the families in the first group, she will grow up in a gated community with excellent services, schools, and private security forces. Otherwise, she will live at a level roughly comparable to a midlevel European country, such as Spain or Great Britain (if white), or a struggling Third World country (if black or brown). The new economy, based on information technology and a large service sector, will do little to alter this distribution of wealth and influence.

A few decades into the century, as our child is approaching adulthood, conditions may change. U.S. minorities of color will grow in numbers and begin, for the first time, to pose political and economic competition for whites. The number of minority judges, business executives, and politicians holding elective office will inexorably increase. At the same time, globalism and the need to cultivate business with developing countries will place a premium on multicultural, multiracial people who can speak other languages and interact easily with their foreign counterparts. Minorities will find new niches in the world economy.

Will this power shift occur peacefully or only after a long struggle? The reader's guess is as good as ours. One school of social science holds that socioeconomic competition heightens racial tensions, at least in the short run. At the

same time, interest-convergence theory suggests that as the world becomes more cosmopolitan and minority status and linguistic competence positive assets, the opposite may occur, much as it has done during wartime. (See Philip A. Klinkner & Rogers M. Smith, *The Unsteady March: The Rise and Decline of Racial Equality in America* [1999].) If so, barriers against minority home ownership, job mobility, and entry to universities and colleges may ease. Colleges and workplaces will try new programs to increase the flow of minorities into the market; scholars and lawyers will find new legal theories, acceptable to courts, allowing this to happen. With luck, our hypothetical child, toward the end of her life, will experience a peaceful transition to a more inclusive, polyglot America. A third Reconstruction, somewhat along the lines of the 1960s, may take place, but more slowly, surely, and irreversibly.

### *B. A Critical Race Agenda for the New Century*

Of course, the peaceful transition described above may not take place—the white establishment may resist an orderly progression toward power sharing and minority inclusion in upper-level and technical jobs, police agencies, and government. As happened in South Africa, the change may be convulsive and cataclysmic. If so, critical theorists and activists will need to provide criminal defense for resistance movements and figures and to articulate theories and strategies for that resistance.

But, assuming that the transition is relatively peaceable,

civil rights activists and scholars will need to address a host of issues as the United States changes complexion. These include the continued deconstruction of race, so that biological theories of inferiority and hierarchy cannot ever again arise. They include further efforts to erase barriers to upward mobility for minority populations, especially old-fashioned tests and limited standards for merit, such as the SAT, that currently stand in the way. They include measures, such as economic boycotts, aimed at increasing minority representation in the media as well as countering publishers, writers, cartoonists, and movie producers who continue to produce demeaning caricatures of minorities. They include rectifying racism in policing and the criminal justice system, so that young minority men have a better chance of going to college than to jail. They include assuring that minority viewpoints and interests are taken into account, as though by second nature, in every major policy decision the nation makes.

Critical race theorists will need to take part in the development of new immigration policies that allow a freer flow of workers and capital, while assuring that the new arrivals do not enter on terms that weaken the ability of current workers to unionize and seek workplace reforms.

They will need to assure that society cease requiring assimilation as a ticket for admission to jobs, neighborhoods, and schools, and that minorities who choose to retain their culture, language, accent, religion, or ways of dress may do so. They will need to pursue zealously the goal of economic democracy, so that the currently disproportionate numbers

of persons of color who suffer intense poverty are provided a decent level of services, health care, and education so that they—or, at least, their children—have a chance of taking part in mainstream American life.

Above all, they will need to marshal every conceivable argument, exploit every chink, crack, and glimmer of interest convergence to make these reforms palatable to a majority that only at a few times in its history has seen fit to tolerate them; then they will need to assure, through appropriate legislation and other structural measures, that the reforms cannot easily be undone.

### *C. Likely Responses to Critical Race Theory*

Assuming that the future goes roughly as we have outlined—with difficulty, resistance, and thinly veiled repression in the short run, but broader vistas beginning a few decades in the future—and assuming that CRT takes on many of the tasks outlined in the preceding subsection, what does the future hold for CRT as a movement? A number of options seem possible:

#### 1. Critical Race Theory Becomes the New Civil Rights Orthodoxy

CRT could become the new civil rights orthodoxy. The voter representation schemes (including cumulative voting, described in chapter 7) put forward by Lani Guinier and others, could be enacted, assuring a larger number of mayors, senators, and members of Congress of color. Courts

could soften their approach to hate-speech regulation, as urged by authors such as Mari Matsuda, Charles Lawrence, and Richard Delgado, perhaps realizing that an increasingly multicultural society cannot tolerate concerted marginalization and browbeating of a substantial segment of its membership. The critique of color blindness may, one day, persuade the U.S. Supreme Court to accept race-conscious measures in employment and education, leveling the playing field for those who have long been excluded from society's bounty. A new "Americanized" federal Indian law policy, as advocated by Robert Williams, might recognize Indian tribes, unequivocally, as sovereign nations. The nation might begin considering reparations toward this group, as well as toward blacks, whose ancestors were enslaved, and Chicanos and Puerto Ricans, whose lands were taken and homelands colonized.

## 2. Critical Race Theory Marginalized and Ignored

The new race scholars could also be ignored, as they were in the movement's early days (see chapter 1). Presidents, college faculties, and commissions on race could go back to seeking counsel from the voices of incrementalism and color-blind philosophies, perhaps out of a desire to engage in denial or to "keep the lid on" as long as possible.

## 3. Critical Race Theory Analyzed, but Rejected

The movement has already drawn its share of detractors who see it as overly radical, inconsistent with Enlightenment philosophy, and a bad example to minority communities. More could be persuaded to this point of view.

#### 4. Partial Incorporation

A perhaps more likely outcome is that some of critical race theory will be accepted by society's mainstream and halls of power, while other parts of it will continue to meet resistance. The narrative turn and storytelling scholarship seem well on their way toward acceptance, as does the critique of merit. More radical features, such as recognition that the status quo is inherently racist, rather than merely sporadically and accidentally so, seem less likely to win out. The need for regulation of hate crime and speech will probably eventually become evident, as it has to dozens of European and Commonwealth nations.

If even the relatively mild insights of critical race theory are adopted, however, the effort will not have been in vain. American society, not to mention its intellectual community, seems receptive to thinking (if not acting) differently about race. Certainly, mainstream liberal civil rights law has been generating little excitement, nor has it provided much in the way of support for minority communities in great need of it. Perhaps if the new outsider scholars—and new converts and fellow travelers—persist, their work in time will come to seem not so strange or even radical, and change may come to American society, however slowly and painfully.

#### *Classroom Exercise*

Write down five predictions for how you see America's racial scene developing twenty-five years from now. Put this paper in a safe place for future reference. Before doing so, compare

notes with three other persons in your class or study group. How many of your predictions overlap? Possible areas you may wish to consider: Will the United States ever have a black president? A Latino/a? An Asian American? Will the United States ever have open immigration, or will it take the opposite direction of greatly limiting immigration? Will minority numbers really exceed those of whites midway in the twenty-first century, as many demographers believe, and what will happen then? Will race and racism ever disappear? Will the Human Genome Project show that the eugenicists and race-IQ researchers were at least partly right and that real, nontrivial differences do mark the races? Intermarriage between blacks and whites is now very low—on the order of 2 percent. Will this increase? Will a crisis cause all racialized minorities to unite in a broad, powerful coalition—and, if so, what sort of crisis could produce that result?

QUESTIONS AND COMMENTS FOR CHAPTER VIII

1. It is said that the arrow of “progress” is as often backward as forward. Which of the scenarios described in this chapter—or yet some other scenario—do you see as most likely for America’s racial future?
2. What role do you see for left political theory, such as CRT, in the possibly turbulent times that lie ahead? What role do you see for yourself?
3. The philosopher Søren Kierkegaard once said that we are doomed to lead life forward, but only to understand it backwards, that is, in retrospect. Is this more or less true of relations among the races? (See chapter 2, discussing the “empathic fallacy.”)
4. Critical race theory seems to be expanding vigorously into other disciplines, such as education, ethnic studies, political science, and American studies—just as it has been coming under withering attack in its home discipline, law. Will the same happen, after a time, in the new disciplines?

## SUGGESTED READINGS

- Appiah, K. Anthony & Amy Gutmann, *Color Conscious: The Political Morality of Race* (1996).
- Bowen, William G. & Derek Bok, *The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions* (1998).
- Carr, Leslie G., “Color-Blind” Racism (1997).
- Dalton, Harlon L., *Racial Healing: Confronting the Fear between Blacks and White* (1995).
- Delgado, Richard, *The Coming Race War? And Other Apocalyptic Tales of America after Affirmative Action and Welfare* (1996).
- Hochschild, Jennifer L., *Facing Up to the American Dream: Race, Class, and the Soul of the Nation* (1995).
- How Race Is Lived in America, N.Y. Times, June 4, 5, 7, 11, 14, 16, 20, 22, 25, 29; July 2, 6, 9, 13, 2000, [www.nytimes.com/race](http://www.nytimes.com/race).
- Klinkner, Philip A. & Rogers M. Smith, *The Unsteady March: The Rise and Decline of Racial Equality in America* (1999).
- Lemann, Nicholas, *The Big Test: The Secret History of the American Meritocracy* (1999).
- Marable, Manning, *Beyond Black and White: Transforming African-American Politics* (1995).
- Oliver, Melvin L. & Thomas M. Shapiro, *Black Wealth/White Wealth: A New Perspective on Racial Inequality* (1995).
- One America in the Twenty-first Century: Forging a New Fu-*

- ture: The President's Initiative on Race, the Advisory Board's Report to the President (1998).
- Orfield, Gary & John T. Yun, *Resegregation in American Schools* (1999).
- Our Next Race Question: The Uneasiness between Blacks and Latinos, *Harper's*, April 1996, at 55.
- Rowan, Carl T., *The Coming Race War in America: A Wake-Up Call* (1996).
- When Sorry Isn't Enough: The Controversy over Apologies and Reparations for Human Injustice (Roy L. Brooks ed., 1999).
- White Reign: Deploying Whiteness in America (Joe L. Kincheloe et al. eds., 1998).



## Glossary of Terms

**Accent discrimination:** Discrimination, for example, by an employer against a worker, on the basis of a foreign-sounding accent; the assumption that native English speakers should not have to make an effort to understand accented English.

**Affirmative action:** Policy that strives for increased minority enrollment, activity, or membership, often with the intention of diversifying a certain environment such as a school or workplace.

**Afrocentrism:** Intellectual position grounded in African values and ethos.

**Americanization:** Effort by social workers to teach immigrants American customs, diets, and hygiene.

**Amicus brief:** Friend of the court document usually filed by an organization with an interest in a case.

**Anti-Semitism:** Attitude or behavior that is discriminatory toward Jewish people.

**Apartheid:** Official separation of the races, as in the former South Africa.

**Aryan race:** Term applied to white people of northern European descent; often used to imply white supremacy.

**Assimilation:** Process of taking on social and cultural traits of the majority race in the nation in which one resides.

**Aversive racism:** Attempts to avoid people of color, or to be formal, correct, and cold in dealings with them.

**Barrio:** Latino neighborhood.

**Bicultural education:** Pedagogical approach that encourages retention of a child's original or family culture.

**Bilingualism:** Policy that emphasizes preservation of native languages.

**Binary paradigm of race:** Pattern of framing race issues in terms of two categories, such as black and white.

**Biological view of race:** Once popular view that humanity is divided into four or five major groups, corresponding to objective and real physical differences.

**Biracial identity:** Identity of a person whose heritage or culture encompasses more than one category.

**Black Panthers:** Radical Black Power organization that sprang up in the 1960s and rejected integration and non-violent change.

**Black-white binary:** Binary paradigm that considers the black-white relation central to racial analysis.

**Borderlands:** Southwestern lands that lie close to the United States' border with Mexico and still retain much Mexican culture and influence.

**Border Patrol:** Federal agency charged with policing the border between the United States and Mexico, as well as Canada.

**Bracero programs:** Official programs that permit entry of temporary Mexican workers, especially for agriculture.

- Call to context:** Belief that social relations and truth require close attention to history, particularity, and experience.
- Campus speech codes:** University and college regulations that provide for discipline of speakers who insult or demean members of the campus community.
- Capitalism:** System in which market forces dictate economic decisions and most property is privately owned.
- Chicanos/Chicanas:** Mexican Americans born in the United States; often a term of pride.
- Chinese Exclusion Acts:** Federal laws that prevented Chinese laborers from entering or re-entering the United States.
- Civil Rights Acts:** Federal statutes guaranteeing nondiscrimination in employment, housing, voting, education, and similar areas.
- Civil rights movement:** Effort to advance the interests of minority communities in achieving equal citizenship.
- Class:** Group of individuals who share a similar socioeconomic status.
- Coalition politics:** Joint approach by minority groups in pursuit of common ends.
- Cognitive dissonance:** Puzzlement at perceiving something that deviates from the expected, such as a black astrophysicist who wins the Nobel Prize, or at an inconsistency between what one knows and how one acts.
- Cold War:** Battle of position between the United States and the former Soviet Union, which began shortly after the conclusion of World War II.
- Colonialism:** European effort to maintain control of weaker

nations; the United States followed similar policy in the Philippines and Latin America.

**Color blindness:** Belief that one should treat all persons equally, without regard to their race.

**Color imagery:** Words, texts, and television images that associate skin color with traits such as innocence, criminality, or physical beauty.

**Conservative backlash:** Reaction of some right-wing persons and corporations to civil rights gains, often including attacks on welfare, affirmative action, and immigration.

**Countermajoritarianism:** View that the court system is free to strike down laws enacted by the majority that are unfair to minority groups.

**Counterstorytelling:** Writing that aims to cast doubt on the validity of accepted premises or myths, especially ones held by the majority.

**Critical legal studies:** Legal movement that challenged liberalism from the Left, denying that law was neutral, that every case had a single correct answer, and that rights were of vital importance.

**Critical race feminism:** Application of critical race theory to issues of concern to women of color.

**Critical race masculinism:** Application of critical race theory to the construction of male norms in society.

**Critical race theory:** Radical legal movement that seeks to transform the relationship among race, racism, and power.

**Critique of rights:** Critical legal studies position that rights are alienating, ephemeral, and much less useful than most people think.

**Cultural defense:** Criminal law strategy that shows that the accused's crime was acceptable in his or her culture.

**Cultural nationalism:** View that people of color owe particular allegiance to their own communities, even above that to the United States.

**Cumulative voting:** Reform in which voters may cast as many votes as there are positions up for election and may concentrate them on one individual if they choose.

**Deconstructionism:** Intellectual approach that targets traditional interpretations of terms, concepts, and practices, showing that they contain unsuspected meanings or internal contradictions.

**Deportation:** Process by which undocumented aliens are expelled to their nation of origin.

**Desegregation:** Policy to integrate the races in schools or housing.

**Determinism:** View that individuals and culture are products of particular forces, such as economics, biology, or the search for high status.

**Differential racialization:** Process by which racial and ethnic groups are viewed and treated differently by mainstream society.

**Discourse:** Formal, extensive, oral or written treatment of a subject; the way we speak about something.

**Discrimination:** Practice of treating similarly situated individuals differently because of race, gender, sexual orientation, appearance, or national origin.

**Disenfranchisement:** Process by which citizens are deprived of voting or other rights of citizenship.

**Diversity:** Policy founded on the belief that individuals of

different races and ethnicities can contribute to workplaces, schools, and other settings.

**Empathic fallacy:** Mistaken belief that sweeping social reform can be accomplished through speech and incremental victories within the system.

**Employment set-asides:** Policies that reserve contracts and jobs for particular minority groups.

**English-only movement:** Movement that seeks to require the use of English in government services, voting, schools, and other settings.

**Epithets:** Pejoratives or slurs used to demean another person or group.

**Equal Employment Opportunity Commission (EEOC):** Federal agency charged with investigating employment discrimination.

**Equal Protection Clause:** Part of the Fourteenth Amendment to the U.S. Constitution that requires that states treat citizens equally.

**Essentialism:** Search for the unique essence of a group.

**Ethnicity:** Group characteristic often based on national origin, ancestry, language, or other cultural characteristic.

**Eugenics:** Attempt to better the quality of the human race, through means such as sterilization, selective breeding, or mass extermination.

**Eurocentrism:** Tendency to interpret the world in terms of European values and perspectives and the belief that they are superior.

**Exceptionalism:** Belief that a particular group's history justifies treating it as unique.

**False consciousness:** Phenomenon in which oppressed people internalize and identify with attitudes and ideology of the controlling class.

**Farmworkers' movement:** Organization spearheaded by Cesar Chavez in the 1960s to improve health and safety standards and employment opportunities for farmworkers, including migrants.

**First Amendment:** Amendment to the U.S. Constitution that provides for freedom of speech, religion, and assembly.

**Formal equality:** Notion that the law shall only provide treatment and opportunity that are the same for all.

**Fourteenth Amendment:** Amendment to the U.S. Constitution that provides for equal protection and due process.

**Gay bashing:** Violence or harsh words aimed at gays and lesbians.

**Gay/lesbian queer legal theory:** Theory that places sexual orientation and liberation at the center of analysis.

**Greaser:** Derogatory term for Mexicans or Chicanos.

**Green card:** Identification card proving that a noncitizen is a permanent legal resident within the United States.

**Hate speech:** Racial slurs and epithets or other harsh language that has no purpose other than to injure and marginalize other people or groups.

**Hegemony:** Domination by the ruling class, and unconscious acceptance of that state of affairs.

**Heterosexism:** Preference for straight relationships and view that same-sex ones are unnatural.

**Hiring quotas:** Policy of setting aside a specific number of slots or jobs for certain groups or people.

**Hispanic:** Term for persons of Iberian or Spanish ancestry; now less used than the terms Latino or Chicano.

**Homophobia:** Prejudice against lesbians and gays.

**Hypodescent:** “One-drop rule” that holds that anyone with any degree of discernible African ancestry is black.

**Identity:** That by which one defines oneself, such as straight, college-educated, Filipina.

**Ideology:** Set of strongly held beliefs or values, especially dealing with governance of society.

**Illegal alien:** Pejorative term for undocumented worker, that is, one who works in the United States without holding of official papers.

**Immersion schools:** Schools that teach a subject, especially English as a second language, with no concession to the learner’s background in it.

**Immigrant analogy:** Belief that racialized minority groups, especially Latinos/as and Asians, will follow the same path of assimilation as white European ethnics.

**Immigration and Naturalization Service (INS):** Federal agency charged with enforcing immigration laws.

**Imperialism:** Political and economic domination of one nation or group over another.

**Indeterminacy:** Idea that legal reasoning rarely, if ever, has exactly one right answer and that politics and social pressures on judges influence outcomes.

**Indian removal:** Policy of relocating eastern Native American tribes to lands west of the Mississippi so that white settlers could take over their homelands.

- Initiative process:** Direct democracy by which citizens vote for laws without the intervention of their elected representatives.
- Integration:** Process of desegregating environments such as public schools or neighborhoods.
- Interest convergence:** Thesis pioneered by Derrick Bell that the majority group tolerates advances for racial justice only when it suits its interest to do so.
- Internment:** Forced confinement of west coast Japanese Americans in relocation camps during World War II.
- Intersectionality:** Belief that individuals and classes often have shared or overlapping interests or traits.
- Judicial review:** Policy under which courts determine whether laws are constitutional.
- Jury nullification:** Process by which a jury acquits a defendant even though the law would technically require conviction.
- Ku Klux Klan:** White supremacist organization originating in the nineteenth-century South that employs lynching, cross burnings, parades, and terrorism to intimidate African Americans, Catholics, and Jews.
- LatCrit theory:** Branch of critical race theory that considers issues of concern to Latinos/as such as immigration, language rights, and multi-identity.
- Latinos/Latinas:** Persons of Latin American ancestry residing in the United States.
- Legal doctrine:** Rule of law derived from a legislative enactment or judicial opinion.

**Legal realism:** Early-twentieth-century forerunner of critical legal studies, which disavowed mechanical jurisprudence in favor of social science, politics, and policy judgment.

**Legal storytelling and narrative:** Scholarship that focuses on the theory or practice of unearthing and replacing underlying rhetorical structures of the current social order, insofar as these are unfair to disenfranchised groups.

**Legitimacy:** Quality of an institution, such as the law, which is viewed as justified and worthy of respect.

**Liberalism:** Political philosophy that holds that the purpose of government is to maximize liberty; in civil rights, the view that law should enforce formal equality in treatment.

**Majoritarianism:** View that majority culture and attitudes should hold sway.

**Manifest Destiny:** Mid-nineteenth-century ideology holding that U.S. territorial expansion was inevitable and just.

**Marketplace of ideas:** Notion that free exchange of ideas best promotes truth and good government.

**Marxism:** Political, social, and economic doctrine of Karl Marx, in particular the view that capitalism exploits workers and promotes inequality.

**Melanin:** Brown or black pigment found in skin or hair.

**Melting pot:** Assimilation metaphor holding that individuals and groups blend together to create a new society.

**Merit:** Individual worthiness; critical race scholars question the view that people may be ranked by merit and that distribution of benefits is rational and just.

- Mestizos/Mestizas:** Person of mixed European and Indian ancestry, especially in Spanish colonized countries.
- Microaggression:** Stunning small encounter with racism, usually unnoticed by members of the majority race.
- Migrant worker:** Individual who moves regularly to find work, especially in harvesting crops.
- Mindset:** State of mind or attitude, often unconscious.
- Miscegenation:** Marriage or cohabitation between individuals of different races; often prohibited by law when one of the parties was white.
- Model minority myth:** Idea that Asian Americans are hard-working, intelligent, and successful and that other groups should emulate them.
- Multiculturalism:** View that social institutions should reflect many cultures.
- Multiple consciousness:** Ability of people of color to perceive something in two or more ways, for example, as a way a member of his or her group would see it and as a white would.
- Multiracial person:** Individual whose ancestry includes persons of different races.
- Nationalism:** View that a minority group may legitimately focus on its own affairs first.
- Nativism:** View that the United States should give priority to its current citizenry and limit immigration.
- Naturalization:** Process of becoming a United States citizen.
- Negrophobe:** One who irrationally fears or dislikes African Americans.

**Normative:** Of, pertaining to, or based on a norm, especially one regarded as broad or universal.

**Nuance theory:** View that one may determine the essential qualities of a group such as women, and that differences from that essential core may be treated as slight variations or shades of difference.

**One-drop rule:** Rule of hypodescent, that any person with discernible black ancestry is black and can never be white.

**Operation Wetback:** Government policy instituted in 1954–59 under which 3.7 million Mexicans were deported in violation of their civil liberties.

**Paradigm:** Reigning system of belief in a discipline that controls what is seen as possible, relevant, and valid.

**Patriarchy:** System of beliefs and practices in which men dominate and control women.

**Perspectivalism:** Belief that a person's or group's position or standpoint greatly influences how they see truth and reality.

**Plenary power doctrine:** Judicial view that congressional enactments concerning immigration are unreviewable by courts because Congress's power is plenary or unlimited.

**Populist movement:** Movement that focuses on the common people or workers.

**Postmodernism:** Critique of modernism, a previous system founded on Enlightenment thinking and philosophy, and capitalism.

**Poststructuralism:** Critique of structuralism, an earlier movement that aimed to determine basic structural ele-

ments of social systems, especially in the social and behavioral sciences.

**Prejudice:** Belief or attitude, usually unfavorable, about a person or group before the facts are known; a pre-judgment.

**Principle of involuntary sacrifice:** Notion, attributed to Derrick Bell, that the costs of civil rights advances are always placed on blacks or low-income whites.

**Privilege:** Right or advantage, often unwritten, conferred on some but not others, usually without examination or good reason.

**Property interest in whiteness:** Idea that white skin and identity are economically valuable.

**Public-private distinction:** Notion that many types of law operate only in the public sector; for example, that one is free to rent a room in one's home to anyone one wants.

**Push-pull theory of migration:** Idea that Mexicans come to the United States in accordance with the demand of the labor market here or in response to adverse conditions in Mexico.

**Race:** Notion of a distinct biological type of human being, usually based on skin color or other physical characteristics.

**Race traitor:** A white person who identifies as black in an effort to subvert white privilege and tacit assumptions that underlie racism.

**Racial fraud and box-checking:** Action on the part of a non-minority person, or one with a very slight connection with

a minority group, to gain the benefit of minority status, as with affirmative action.

**Racialization:** Process of creating a race, such as Latinos; also injecting a racial element into a situation.

**Racial realism:** View that racial progress is sporadic and that people of color are doomed to experience only infrequent peaks followed by regressions.

**Racism:** Any program or practice of discrimination, segregation, persecution, or mistreatment based on membership in a race or ethnic group.

**Reasonable racist:** One who treats members of another group in racist fashion because he or she believes that, statistically, the other group is prone to crime or similar behavior.

**Reconstruction:** Period when society is attempting to redress racial wrongs consistently and in thoroughgoing fashion.

**Redistricting:** Process of redrawing geographical lines of political districts to achieve fairness in voting.

**Redlining:** Policy by insurance companies, banks, and mortgage lenders not to do business with homebuyers or owners in certain areas with heavy minority population.

**Reparations:** Forms of compensation, such as money, given to a group or class of individuals who have been wronged.

**Restrictive covenants:** Legally enforceable limitation on land use or occupancy, often created by the original owner or developer of neighborhoods.

**Reverse discrimination:** Discrimination aimed at the majority group.

- Revisionist interpretation:** View of history or an event that challenges the accepted one.
- Rule of law:** Legal formalism, which some theorists believe is necessary for order, stability, and cohesiveness in a society.
- Segregation:** Separation of individuals or groups by race.
- Separate but equal doctrine:** Rule of law holding that separate but equal facilities for different races are constitutional under the Equal Protection Clause.
- Separatism:** View that a racial minority group should separate itself from mainstream society and pursue its own interests primarily.
- Silencing:** Practice or speech that interferes with ability of others to communicate.
- Social construction:** Process of endowing a group or concept with a delineation, name, or reality.
- Standing:** Rule that confines the person who may bring a lawsuit to the one who suffered the “injury in fact.”
- Status quo:** Current state of things, or way things are, usually said to require a good reason before it is changed.
- Stereotype:** Fixed, usually negative, image of members of a group.
- Stigmatization:** Process of marking a person, thing, or group as an object of shame or disgrace.
- Stock stories:** Tales that a people commonly subscribe to and use to explain their social reality; for example, that African Americans who try hard will be accepted and succeed.
- Structural determinism:** Concept that a mode of thought or

widely shared practice determines significant social outcomes, usually without our conscious knowledge.

**Subordination:** Process of holding or rendering of lesser importance, as through racial discrimination, patriarchy, or classism.

**Title VII:** Federal law that governs employment discrimination.

**Trail of Tears:** Route used for forced removal of certain Native American nations from the southeastern United States to lands west of the Mississippi River.

**Transparency phenomenon:** Ability of whiteness to disguise itself and become invisible.

**Tribal sovereignty:** Legally created doctrine granting certain Indian tribes status of a political nation.

**Unconscious racism:** Racism that operates at an unconscious or subtle level.

**Undocumented worker:** United States immigrant who has not obtained legal status.

**Voice:** Ability of a group, such as African Americans or women, to articulate experience in ways unique to it.

**WASP:** Term for persons of white, Anglo-Saxon Protestant descent.

**Whiteness:** Quality pertaining to Euro-American or Caucasian people or traditions.

# Index

- Accent discrimination, 74; definition of, 141
- Acuña, Rodolfo, and nationalism, 61
- Affirmative action, 104–105; definition of, 141; and white privilege, 79–80, 106–107
- African Americans: and environmental justice, 109–110; and home ownership, 108
- Afrocentrism, definition of, 141
- Aguilar v. Avis Rent a Car System, Inc.*, 94
- Alfieri, Anthony, and clinical lawyering, 45
- Americanization, definition of, 141
- Amicus brief, definition of, 141
- Anti-essentialism, 9. *See also* Essentialism/anti-essentialism debate
- Anti-Semitism, definition of, 141
- Apartheid, definition of, 141
- Aryan race, definition of, 141
- Asian critical legal theory, 6, 81–82
- Assimilation, 59–62; definition of, 142
- Aversive racism, definition of, 142
- Avis. *See* *Aguilar v. Avis Rent a Car System, Inc.*
- Ayres, Ian, 2
- Barnes, Robin, and response to Randall Kennedy, 89
- Barrio, definition of, 142
- Beauty, standards of, 72
- Bell, Derrick, xix, 4, 5, 7, 30–31, 38, 46, 60–61, 87, 93; and *Bell Curve, The*, 104–105
- Brown v. Board of Education*, 18–20; and *We Are Not Saved*, 41
- Bicultural education, definition of, 142
- Bilingualism, definition of, 142
- Binary paradigm of race: definition of, 142; and tokenism, 73. *See also* Black-white binary
- Biological view of race, definition of, 142. *See also* Race
- Biracial identity, definition of, 142
- Black exceptionalism. *See* Exceptionalism

- Black judges, and racial injustice, 10, 39
- Black Panthers, definition of, 142
- Black-white binary, 67–74; definition of, 142. *See also* Binary paradigm of race
- Border Patrol, definition of, 142
- Borderlands, definition of, 142
- Box-checking, 72–73. *See also* Racial fraud
- Bracero programs, definition of, 142
- Brown v. Board of Education*, 7, 18–20, 103–104
- Buffalo Soldiers, 72
- Buying a car, 2
- Call to context, definition of, 143
- Campus speech codes, definition of, 143. *See also* Hate speech
- Capitalism: definition of, 143; in the 1990s, 102–103
- Carino v. University of Oklahoma*, 74
- Categorical thinking: and intersectionality, 51–52; and race, 26–27, 70; and whiteness, 75. *See also* Black-white binary
- Chicanos/Chicanas, definition of, 143
- Chin, Vincent, 82
- Chinese Exclusion Laws, 71; definition of, 143
- Citizenship, racial qualification for, 76
- Civil Rights Acts, definition of, 143
- Civil rights movement, definition of, 143
- Civil rights thought, and critical race theory, 3, 5. *See also* Liberalism; Rights
- Class: and affirmative action, 106–107; definition of, 143; theory of, 95, 107–111
- Classism, and beggar story, 15–16
- Classroom exercises, 29–30, 63, 80, 95, 121–122, 135–136
- Coalitions, 73; definition of, 143; and globalization, 111
- Cochran, Johnny, 45
- Cognitive dissonance, definition of, 143
- Cold War, 19; definition of, 143
- Colonialism: definition of, 143; legacy of, 111–112
- Color blindness, 7; definition of, 144; and judging, 21–23; and liberalism, 105; unmasking, 103–107
- Color imagery, 75–76; definition of, 144
- Color-blind constitution, 21
- Color-consciousness in judicial decisions, 22–23
- Commonwealth v. Local Union 542, International Union of Operating Engineers*, 10, 39
- Conservative(s): and affirmative action, 104–105; agenda, 24–25; backlash, definition of, 144; campaigns, 101–102
- Countermajoritarianism, definition of, 144
- Counterstorytelling, 42–43; definition of, 144; about racial

- subordination, 40–41. *See also* Legal storytelling and narrative
- Crenshaw, Kimberlé, xix, 6
- Crime: defining, 113; white-collar, 114
- Criminal justice system, and minorities, 113–114
- Critical legal studies: and critical race theory, 4–5; definition of, 144
- Critical race feminism, 83; definition of, 144
- Critical race masculinism, definition of, 144
- Critical race theory: and activism, 93; and charge of anti-Semitism, 90; and class, 107–111; and color blindness, 22; and conservative campaigns, 101–102; and context, 58; and critical legal studies, 4–5; criticism of, 87–96; and critique of merit, 90, 105–107; and defense of affirmative action, 105; definition of, 2–3, 144; and economic democracy, 95; and feminism, 5; future of, 129–135; history of, xix–xx, 3–4; and identity, 95; and interest convergence, 16–20; internal critique of, 93–95; and liberalism, 5, 21–25, 57; and material determinism, 16–20; principal figures, 5–6; and racial realism, 16–20; relations within, 120–121; relationship to other movements, 3, 4–5; and revisionist history, 20–21; spin-off movements of, 6; and structural determinism, 25–32; tenets of, 6–9; themes of, 16–32; and theory, 93
- Critical Race Theory Workshop: 1989, xix, xxi, 4
- Critical white studies, 74–80
- Critique of liberalism. *See* Liberalism, critique of
- Critique of merit. *See* Merit, critique of
- Critique of rights. *See* Rights, critique of
- Cultural defense, definition of, 145
- Cultural nationalism, definition of, 145. *See also* Nationalism
- Cumulative voting. *See* Voting
- Darkness, associated with evil, 75–76
- Dawes Act, 71
- Deconstructionism, definition of, 145
- Delgado, Richard, xix, 4, 6, 21, 43, 87, 88, 134
- Deportation, definition of, 145
- Desegregation, definition of, 145
- Determinism, definition of, 145. *See also* Structural determinism
- Determinism, structural. *See* Structural determinism
- Differend, 44
- Differential racialization, 8, 69–70; definition of, 145
- Discourse, definition of, 145. *See also* Identity
- Discrimination: accent, 74; definition of, 145; difficulty of

- Discrimination (*continued*)  
 intersectional claim of, 52–54.  
*See also* Oppression
- Disenfranchisement, definition of, 145
- Diversity, definition of, 145
- Double consciousness, 39–41
- Double minorities, 58
- Du Bois, W.E.B., and double consciousness, 39
- Dudziak, Mary, 19–20
- Economic democracy. *See* Class
- Economic determinists. *See* Materialists
- Empathic fallacy, 27–29; definition of, 146
- Empathy, 28, 41; and sentencing, 29
- Employment set-asides, definition of, 146
- English-only movement, 81; definition of, 146
- English-only statutes, 119
- Environmental justice movement, 108–109
- Epithets, definition of, 146. *See also* Hate speech
- Equal Employment Opportunity Commission (EEOC), definition of, 146
- Equal Protection Clause, definition of, 146
- Espinoza, Leslie, and response to Randall Kennedy, 88–89
- Essentialism, definition of, 146
- Essentialism/anti-essentialism debate, 56–58. *See also* Anti-essentialism
- Ethnicity, definition of, 146
- Eugenics, definition of, 146
- Eurocentrism, definition of, 146
- Exceptionalism, 69–70; definition of, 146
- Exclusion of minority scholarship (exclusion thesis), 88
- False consciousness, definition of, 147
- Farber, Daniel, and critique of critical race theory, 46, 89–92
- Farmworkers' movement, definition of, 147
- Feminism, and critical race theory, 5
- First Amendment, definition of, 147
- Formal equality, definition of, 147
- Fourteenth Amendment, definition of, 147
- Freeman, Alan, 4, 5, 31
- Gay bashing, definition of, 147
- Gay/lesbian queer legal theory, definition of, 147. *See also* Queer-crit theory
- Gertner, Judge Nancy, 115
- Globalization, 111–112
- Goldberg, Stephanie, on critical race theory, 89
- Gotanda, Neil, 6
- Greaser, definition of, 147. *See also* Hate speech
- Green card, definition of, 147
- Greene County boot camp, 22–23
- Guinier, Lani, 93, 133

- Haney López, Ian F., 42, 75
- Harlan, Justice John: and the Chinese, 72; and dissent in *Plessy v. Ferguson*, 21, 103
- Harris, Angela, 6
- Harvard Law School, xix
- Hate speech, 23–24, 27–28, 116–118; and *Aguilar v. Avis Rent a Car System, Inc.*, 94; definition of, 147; jurisprudence in Canada, 117; and *Monteiro v. Tempe Union High School District*, 31–32; remedies for, 117; and *Taylor v. Metzger*, 21, 70, 118; and *Words That Wound*, 20, 116–117
- Hegemony, 39–40; definition of, 147
- Heterosexism, definition of, 147
- Higginbotham, Judge Leon, 10, 39
- Hiring quotas, definition of, 147
- Hispanic, definition of, 148
- Homeostasis, and law reform, 31
- Homophobia, definition of, 148
- Hopwood v. Texas*, 104
- Hydra, two-headed, of race, 79
- Hyposescent, definition of, 148
- Idealists: and identity, 120–121; and social construction of race, 17; and strategies for reform, 20
- Identity, 95, 120–121; definition of, 148
- Ideology, definition of, 148
- Illegal alien, definition of, 148
- Immersion schools, definition of, 148
- Immigrant analogy, definition of, 148
- Immigration and Naturalization Service (INS), definition of, 148
- Immigration law and policy, 76–77, 112–113
- Imperialism, definition of, 148
- Income gap between minorities and whites, 110–111
- Indeterminacy, legal, 5; definition of, 148
- Indian Appropriation Act, 71
- Indian removal, definition of, 148
- Indigenous people's rights, 6
- Initiative process, definition of, 149
- Integration, definition of, 149
- Interest convergence, 7, 16–20, 41; definition of, 149; and Derrick Bell, 18–20
- Internal colonialism, 61
- Internment, definition of, 149
- Intersectionality, 9, 51–56; and claims for discrimination, 52–54; definition of, 149; of race and poverty, 110
- Japanese Americans: internment of, 82–83; and reparations, 83. *See also Korematsu v. United States*
- Jersey Heights Neighborhood Ass'n v. Glendenning*, 109–110
- Johnson, Kevin, 6
- Johnson, President Lyndon, 104

- Judicial review, definition of, 149
- Jury nullification, 114; definition of, 149
- Kennedy, Randall, and critique of critical race theory, 87–89
- King, Martin Luther, Jr., 103
- Korematsu v. United States*, and NAACP, 73
- Ku Klux Klan, definition of, 149
- Kuhn, Thomas, 44, 87
- Language rights, 118–119
- LatCrit theory, 6, 81; definition of, 149
- Latino and Latina critical legal theory. *See* LatCrit theory
- Latinos/Latinas: definition of, 149; and identity, 120–121; and nationalism, 61; and other white strategy, 61, 73
- Lawrence, Charles, 6, 94, 134
- Lawyering, and social change, 30–31
- Legal concepts and categories, 26–27
- Legal doctrine, definition of, 149
- Legal realism, definition of, 150
- Legal research tools, as hindrances to law reform, 26–27
- Legal storytelling and narrative, 9, 37–46; in court, 45; critique of, 46, 90–92; definition of, 150; power of, 43–44. *See also* Narratives and narrative theory
- Legitimacy, definition of, 150
- Liberalism: critique of, 21–25, 57–58; definition of, 150; failure of, 24, 57–58
- Look-to-the-bottom strategy, 22
- López, Ian F. Haney. *See* Haney
- López, Ian F.
- Lowell High School (San Francisco, Calif.), and admissions, 73
- Liotard, Jean-François, 44
- Majoritarianism, definition of, 150
- Manifest Destiny, definition of, 150
- Marketplace of ideas, definition of, 150
- Marxism, definition of, 150
- Material determinism, 7, 16–20. *See also* Interest convergence
- Materialists: and nationalism, 60–61; and strategies for reform, 20; and white self-interest, 17–18
- Matsuda, Mari, xix, 6, 87, 92–93, 94, 118, 134
- McIntosh, Peggy, and white privilege, 78–79
- Melanin, definition of, 150
- Melting pot, definition of, 150
- Merit: critique of, 90, 105–107; definition of, 150
- Mestizos/Mestizas, definition of, 151
- Mexican Americans, and other white policy, 72, 73
- Microaggressions, 1–2; definition of, 151
- Migrant worker, definition of, 151
- Mindset, 42; definition of, 151
- Miscegenation, definition of, 151

- Model minority myth, 81–82; definition of, 151
- Monteiro v. Tempe Union High School District*, 31–32
- Montoya, Margaret, 6
- Multiculturalism, definition of, 151
- Multiple consciousness, 55–56; definition of, 151
- Multiracial person, definition of, 151
- NAACP: and *Korematsu v. United States*, 73; Legal Defense Fund and *Brown*, 18
- Narratives and narrative theory, 37–46; in court, 45; and the differend, 44; and mindset, 42. *See also* Legal storytelling and narrative
- Nationalism, 59–62; black, 60–61; definition of, 151; Latino, 61
- Nativism, 81; definition of, 151
- Naturalization: definition of, 151; and race cases, 76–77
- Negrophobe, definition of, 151
- Nomos, and narrative theory, 41
- Normative, definition of, 152
- Nuance theory, definition of, 152
- One-drop rule, definition of, 152
- Operation Wetback, definition of, 152
- Oppression, 56, 57, 79, 121; economic, 11; and intersectionality, 51–52; and voice of color, 9. *See also* Discrimination
- Paradigm, definition of, 152
- Patriarchy, definition of, 152
- Perea, Juan, 6, 94
- Perspectivalism: definition of, 152; and intersectionality, 55; and white transparency, 80
- Plenary power doctrine, definition of, 152
- Plessy v. Ferguson*, 21, 72, 103
- Politics of distinction, 55
- Politics of identification, 55
- Populist movement, definition of, 152
- Posner, Judge Richard: and critique of legal storytelling, 46, 90–91; and racial preferences, 22–23, 44
- Postmodernism, definition of, 152
- Poststructuralism, definition of, 152
- Poverty, 110–111
- Power, 113–119; between lawyer and client, 45
- Prejudice, definition of, 153
- Principle of involuntary sacrifice, definition of, 153
- Privilege, definition of, 153
- Property interest in whiteness, definition of, 153
- Proposition 187 (California), 72
- Public-private distinction, definition of, 153
- Push-pull theory of migration, definition of, 153
- Queer-crit, 6; theory, 83
- Race: biological view of, 142;

- Race (*continued*)  
 and the black-white binary, 67–74; definition of, 153; and emotional distress, 70; social construction of, 7–8, 17, 42
- Race traitor, definition of, 153
- Racial depiction, 28–29. *See also* Stereotypes
- Racial epithets. *See* Hate speech
- Racial fraud, definition of, 153. *See also* Box-checking
- Racial insults, 21, 118. *See also* Hate speech
- Racial profiling, 114, 115
- Racial realism, 16–20; definition of, 154. *See also* Interest convergence
- Racial reform: and conservatives, 24–25; strategies for, 57–58
- Racialization, definition of, 154. *See also* Differential racialization
- Racism, 16; color-blind remedies for, 7; definition of, 5, 154; and innocence, 80; ordinarieness of, 7; quantity of, 9–11
- Realists. *See* Materialists
- Reasonable racist, definition of, 154
- Reconstruction: and Chinese labor, 71–72; definition of, 154
- Redistricting, definition of, 154
- Redlining, definition of, 154
- Regents of Univ. of Cal. v. Bakke*, 104
- Reparations, definition of, 154
- Restrictive covenants, definition of, 154
- Reverse discrimination, definition of, 154. *See also* Affirmative action
- Revisionist history, 20–21; definition of, 155
- Rights: critique of, 23–24, definition of, 144
- Rosen, Jeffrey, and critique of critical race theory, 45, 89
- Ruiz v. Hall*, 119
- Rule of law, definition of, 155
- Segregation, definition of, 155
- Sentencing guidelines, 115
- Separate but equal, 103; definition of, 155
- Separatism, definition of, 155. *See also* Nationalism
- Serving two masters, 30–31
- Sherry, Suzanna, and critique of critical race theory, 46, 89–92
- Silencing: cure for, 43–44, 58; definition of, 155
- Simpson, O. J., verdict, 45
- Social construction, definition of, 155. *See also* Race, social construction of
- Social justice. *See* Racial reform
- Social well-being of minority groups, 11
- Standardized testing: and class, 108; critique of, 105
- Standing, definition of, 155
- State v. Buggs*, 42
- Status quo, definition of, 155
- Stereotypes: definition of, 155; of racial groups, 8, 28–29
- Stigmatization, definition of, 155

- Stock stories: about African Americans, 40; definition of, 155. *See also* Legal storytelling and narrative
- Stories. *See* Legal storytelling and narrative
- Structural determinism, 25–32; definition of, 155
- Subordination, definition of, 156
- Taylor v. Metzger*, 21, 70, 118
- Three-strikes-and-you're-out nullification, 114–115
- Title VII, definition of, 156
- Trail of Tears, definition of, 156
- Transparency phenomenon, definition of, 156
- Treaty of Guadalupe Hidalgo, 81
- Tribal sovereignty, definition of, 156
- Triumphalism, critique of, 5
- Truth, objective, 92–93
- Tushnet, Mark, and critique of legal storytelling, 46
- Unconscious racism, definition of, 156
- Undocumented worker, definition of, 156
- United States: immigration policy of, 112–113; and war with Mexico, 71
- United States of America v. LeViner*, 115
- University of California at Berkeley, and admissions, 73
- University of Chicago, xvii–xix
- U.S. Department of Justice, and school desegregation, 19–20
- U.S. Department of State, and race relations, 19–20
- Valdes, Francisco, 6
- Voice, definition of, 156
- Voice of color, 9; legitimacy of, to speak about race, 87–88, 91–92
- Voting, 115–116; cumulative, 116; definition of, 145
- Wall Street Journal*, and critical race theory, 89
- WASP, definition of, 156
- Weinstein, Judge Jack B., 29
- Welfare, 110
- White, Lucy, and clinical lawyering, 45
- White privilege, 78–80; and standardized testing, 106–107
- White studies. *See* Critical white studies
- White supremacy groups, 77–78
- White-collar crime, 43
- Whiteness: definition of, 156; and immigrant groups, 77; and innocence, 75, 79–80; legal definition of, 76–77; normativity of, 76, 80
- Whites, identification of other groups with, 72, 73; and *Plessy v. Ferguson* (Harlan dissent), 21
- Williams, Patricia, xix, 6, 38, 46, 92–93
- Williams, Robert, 6, 134
- Wittmer v. Peters*, 22–23
- Yamamoto, Eric, 6



## About the Authors

Richard Delgado is a professor of law at the University of Colorado, Boulder, and author of *The Latino/a Condition: A Critical Reader*, *The Coming Race War: And Other Apocalyptic Tales of America after Affirmative Action and Welfare*, and *Must We Defend Nazis? Hate Speech, Pornography, and the New First Amendment*. Jean Stefancic is a research associate in law at the University of Colorado, Boulder, and author of *No Mercy: How Conservative Think Tanks and Foundations Changed America's Social Agenda*.

