

RICHARD DELGADO
AND JEAN STEFANCIC

CRITICAL
RACE
THEORY

AN INTRODUCTION

FOREWORD BY ANGELA HARRIS

Critical Race Theory

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Richard Delgado and
Jean Stefancic

Foreword by Angela Harris



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*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

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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?

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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 crits (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?

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