

Critical Race Theory

An Introduction

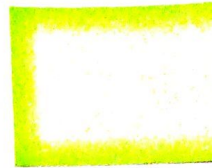
THIRD EDITION

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NEW YORK UNIVERSITY PRESS
New York



NEW YORK UNIVERSITY PRESS
New York
www.nyupress.org

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Library of Congress Cataloging-in-Publication Data

Names: Delgado, Richard, author. | Stefancic, Jean, author.

Title: Critical race theory : an introduction / Richard Delgado and Jean Stefancic ; foreword by Angela Harris.

Description: Third edition. | New York : New York University Press, [2017] | Includes bibliographical references and index.

Identifiers: LCCN 2016047077 | ISBN 9781479846368 (cl : alk. paper) | ISBN 9781479802760 (pb : alk. paper)

Subjects: LCSH: Race discrimination—Law and legislation—

United States. | Critical legal studies—United States. | United States—Race relations—Philosophy.

Classification: LCC KF4755 .D454 2017 | DDC 342.7308/73—dc23

LC record available at <https://lcn.loc.gov/2016047077>

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Manufactured in the United States of America

10 9 8 7 6 5 4 3 2 1

Also available as an ebook

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 merely having a bad day? Next suppose that the responses are from people 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 people of color, then what do you think? Suppose the person of color is from a group other than your own?

Sometimes actions like these stem from 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 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]; Michael Luo, "Whitening" the Résumé, N.Y. Times, Dec. 5, 2009.) A fourth-grade teacher, shortly before beginning a unit on world cultures, passes out a form asking the children to fill out where their parents "are from." The bright child who*

raised her hand earlier hesitates, knowing that her parents are undocumented entrants who fear being discovered and deported.

A. What Is Critical Race Theory?

The critical race theory (CRT) movement is a collection of activists and scholars engaged 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, setting, group and self-interest, and emotions and the unconscious. Unlike traditional civil rights discourse, which stresses 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.

After the first decade, critical race theory began to splinter and now includes a well-developed Asian American jurisprudence, a forceful Latino-critical (LatCrit) contingent, a feisty LGBT interest group, and now a Muslim and Arab caucus. Although the groups continue to maintain good relations under the umbrella of critical race theory, each has developed its own body of literature and set of priorities. For example, Latino and Asian scholars study immigration policy, as well as language rights and discrimination based on accent or national origin. A small group of American Indian scholars addresses indigenous people's rights, sovereignty, and land claims. They also

study historical trauma and its legacy and health consequences, as well as Indian mascots and co-optation of Indian culture. Scholars of Middle Eastern and South Asian background address discrimination against their groups, especially in the aftermath of 9/11. (See, e.g., Khaled A. Beydoun, *Between Indigence, Islamophobia and Erasure: Poor and Muslim in "War on Terror" America*, 105 *Calif. L. Rev.* — [2016]. On the diffusion of critical race theory to other disciplines and nations, see chapter 7.)

B. Early Origins

Critical race theory sprang up in the 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, put their minds to the task. They were soon joined by others, and the group held its first workshop at a convent outside Madison, Wisconsin, in the summer of 1989. Further conferences and meetings took place. Some were closed sessions at which the group threshed out internal problems and struggled to clarify central issues, while others were public, multiday affairs with panels, plenary sessions, keynote speakers, and a broad representation of scholars, students, and activists from a wide variety of disciplines.

C. Relationship to Previous 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, Michel Foucault, 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, César Chávez, 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. The group also incorporated skepticism of triumphalist history and the insight that favorable precedent, like *Brown v. Board of Education*, tends to erode over time, cut back by narrow lower-court interpretation, 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 historical wrongs, as well as the insistence that legal and social theory lead to

practical consequences. CRT also shared with it a sympathetic understanding of notions of community and group empowerment. From ethnic studies, it took notions such as cultural nationalism, group cohesion, and the need to develop ideas and texts centered around each group and its situation.

D. Principal Figures

The late Derrick Bell, formerly at Harvard Law School but serving as visiting professor of law at New York University when he died in 2011, became the movement's intellectual father figure. Most famous for his interest-convergence thesis, Bell authored many of CRT's foundational texts.

Alan Freeman, who taught at the State University of New York at Buffalo Law School, wrote a number of leading articles, including one that documented how the U.S. Supreme Court's race jurisprudence, even when seemingly liberal in thrust, nevertheless legitimized racism. Kimberlé Crenshaw, Angela Harris, Cheryl Harris, Charles Lawrence, Mari Matsuda, and Patricia Williams were major early figures, as well. Leading Asian scholars include Neil Gotanda, Mitu Gulati, Jerry Kang, and Eric Yamamoto. The top American Indian critical scholar is Robert Williams; prolific Latinos of a critical persuasion include Laura Gomez, Ian Haney López, Kevin Johnson, Gerald Lopez, Margaret Montoya, Juan Perea, and Francisco Valdes. Influential black scholars include Paul Butler, Devon Carbado, Lani Guinier, and Angela Onwuachi-Willig. The reader will find their ideas discussed frequently throughout this primer.

The movement counts a number of fellow travelers and writers who are white, notably andré cummings, Nancy Levit, Tom Ross, Jean Stefancic, and Stephanie Wildman. (See also the discussion of critical white studies in chapter 5.)

E. Spin-Off Movements

Although CRT began as a movement in the law, it has rapidly spread beyond that discipline. Today, many scholars in the field of education consider themselves critical race theorists who use CRT's ideas to understand issues of school discipline and hierarchy, tracking, affirmative action, high-stakes testing, controversies over curriculum and history, bilingual and multicultural education, and alternative and charter schools. (See, e.g., *Foundations of Critical Race Theory in Education* [Edward Taylor, David Gillborn & Gloria Ladson-Billings eds., 2d ed. 2015].) They discuss the rise of biological racism in educational theory and practice and urge attention to the resegregation of American schools. Some question the Anglocentric curriculum and charge that many educators apply a "deficit theory" approach to schooling for minority kids.

Political scientists ponder voting strategies coined by critical race theorists, while women's studies professors teach about intersectionality—the predicament of women of color and others who sit at the intersection of two or more categories. 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. Sociologists, theologians, and health care

specialists use critical theory and its ideas. Philosophers incorporate critical race ideas in analyzing issues such as viewpoint discrimination and whether Western philosophy is inherently white in its orientation, values, and method of reasoning.

Unlike some academic disciplines, critical race theory contains an activist dimension. It tries not only to understand our social situation but to change it, setting out not only to ascertain how society organizes itself along racial lines and hierarchies but to transform it for the better. On the spread of critical race theory to other countries, such as Australia, Brazil, India, New Zealand, South Africa, and the United Kingdom, see chapter 7.

F. Basic Tenets of Critical Race Theory

What do critical race theorists believe? Probably not every writer would subscribe to every tenet set out in this book, but many would agree on the following propositions. First, 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, for the dominant group. The first feature, ordinariness, means that racism is difficult to address or cure because it is not acknowledged. 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 an immigration dragnet in

a food-processing plant that targets Latino workers or the refusal to hire a black Ph.D. rather than a white college dropout, which 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 whites (psychically), large segments of society have little incentive to eradicate it. Consider, for example, Derrick Bell's shocking proposal (discussed in chapter 2) 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 from 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 what 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 truths, 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 consequences. Critical

writers in law, as well as in 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. In one era, Muslims are somewhat exotic neighbors who go to mosques and pray several times of day—harmless but odd. A few years later, they emerge as security threats.

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 supervision. In one age, Middle Eastern people are exotic, fetishized figures wearing veils, wielding curved swords, and summoning genies from lamps. Later, after circumstances change, they emerge as fanatical, religiously crazed terrorists bent on destroying America and killing innocent citizens.

Closely related to differential racialization—the idea that each race has its own origins and ever-evolving history—is the notion of intersectionality and antiessentialism. No person has a single, easily stated, unitary identity. A white feminist may also be Jewish or working class

or a single mother. An African American activist may be male or female, gay or straight. A Latino may be a Democrat, a Republican, or even 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 antiessentialism, the voice-of-color thesis holds that because of their different histories and experiences with oppression, black, American Indian, Asian, and Latino 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, or Asian friends. Many enjoy watching black or Latino entertainers and sports figures and listening to rap music. Still, by every social indicator, racism continues to blight the lives of people of color, including holders of high-echelon jobs, even judges. Police-community encounters are daily reminders that this continues to happen.

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, 163, 165 (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 suffer rejections, often for vague or spurious reasons. Even highly placed black or Latino lawyers or executives may attract suspicion while riding a commuter train or upon arriving at their offices earlier than usual. The prison population is largely black and brown; chief executive officers, senators, surgeons, and university

presidents are almost all white. In recent years, almost all Oscar-winning actors have been white. Poverty, however, has a black or brown face: black families command, on the average, about one-thirteenth 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. Studies using the Implicit Association Test (IAT) show that a large percentage of American citizens harbor negative attitudes toward members of groups other than their own. 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 are covered later in this book.

H. Organization of This Book

Critical Race Theory: An Introduction addresses, in simple, straightforward language, the foregoing and additional ideas characteristic of critical race jurisprudence. Chapter 2 presents four large themes in that body of thought—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 antiessentialism. It also considers cultural nationalism and its opposite—the idea that minorities should attempt to assimilate and blend into mainstream society. Do immigrants weaken American solidarity and identity?

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 by analogy to blacks? Chapter 5 explores this issue, as well as whiteness 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, if so, what it consists of. Chapter 5 also looks at the scholarship of other racial groups such as LatCrits, critical Asian writers, feminists, and LGBT theorists.

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 the Right have leveled at this 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 of the issues on the movement's agenda, including hate speech, campus climate, criminal justice, racial profiling,

merit, affirmative action, poverty, immigration, national security, and globalization. A concluding chapter hazards some predictions on the country's racial future and CRT's role in it.

The reader will find in each chapter questions for discussion 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 1

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.)
1. 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?
4. Why have scholars in the field of education, particularly, found CRT's teachings helpful?
5. Is racism essentially a cognitive error—a product of ignorance or lack of experience—and so correctable through teaching and learning?
6. If you are a community activist, what lessons from this chapter could you apply to your daily work?
7. Have you read any books, published before 1989 perhaps, that were works of critical race theory, even if they were not designated as such?

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CHAPTER VII

Critical Race Theory Today

What is the situation of critical race theory today? In some respects, the movement is thriving. Dynamic sub-disciplines, such as the Latino-critical movement, queer-crit (LGBT) studies, and a fledgling group of Muslims with a critical orientation challenge civil rights thinkers to reconsider the ways they conceptualize equality, civil rights, and national security. Critical race theory is taught at many law schools and has spread to other disciplines and countries. Some judges incorporate its ideas into opinions, often without labeling them as such. Lawyers use critical race theory techniques to advocate on behalf of clients and to expose bias within the system. In this chapter, we discuss some of these developments and the impact that CRT seems to be having on national discourse. We analyze some of the internal struggles that are playing out within the group and examine a few topics, such as class, poverty, the wealth and income gaps, crime, campus climate, affirmative action, immigration, and voting rights, that are very much on the country's front burner.

A. Right-Wing Offensive

The decade of the nineties saw the beginning of 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, employment and educational set-asides, and immigration. They also lobbied energetically against hate-speech regulation, welfare, and governmental measures designed to increase minorities' political representation in Congress. Some of the backers of these conservative initiatives were former liberals disenchanted with the country's departure from color-blind neutrality. Others were nativists concerned about immigration or national security hawks worried about the threat of terrorism.

Critical race theorists took part in all those controversies. They also addressed identity issues within critical race theory, intergroup coalitions, and the use of empirical methods in theorizing and confronting discrimination.

B. Front-Burner Issues

Though the American economy advanced rapidly during the Reagan and Clinton years, it began sagging with the dot-com bust and later the bursting of the housing bubble and collapse of the finance industry during the Bush years. Without training in the emerging fields of technology and global marketing, minority communities had begun falling further and further behind. But with the economic down-

turn and weak recovery that followed, they fell even further. They had few natural allies. The Democratic Party courted them less assiduously than it had in former times; the labor movement had lost force; and the country lacked the spur of Cold War competition to enforce antidiscrimination norms rigorously. Postracialism and neoliberal politics that sought to split the difference ("triangulate") between conservative and liberal policies did little to relieve black misery. Politicians and TV ideologues inveighed against the evils of undocumented immigration, heightening suspicion of Latinos, even ones whose families had been here for generations. After 9/11, Muslims fared even worse, including a rain of insults, surveillance, and even physical attacks on Middle Eastern-looking persons and mosques.

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, even hostility.

1. Race, Class, Welfare, and Poverty

A 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 proposed? 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. These practices also excluded blacks from sharing in the appreciation in real estate property values that some eras have witnessed. Confinement to certain neighborhoods, in turn, limits where black and Latino 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 also contains a class element: critics of tests such as the SAT have shown that many of the questions 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; another is his or her zip code.

Other critical race theorists ponder the distribution of environmental dangers and biohazards. 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 or near minority communities or on Indian reservations. Inadequate or poisoned water systems seem almost always to sicken the occupants of cities like Flint, Michigan, not Beverly Hills or Scarsdale. 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. They note that global warming is producing flooding in impoverished native villages in Alaska and small islands in the far Pacific. 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, 186 n.1 (4th Cir. 1999)

How should critical observers see 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 safety net to prevent people at the bottom from slipping into permanent poverty. Today, those programs command much less support than they did formerly. Some writers believe that the reason is that the public sees 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 prospects 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—except, perhaps, for the rural kind—usually lasts only for a generation or two, even for white immigrant families. Not so for black or brown poverty—it is apt to last forever. By the same token, middle-class or professional status for blacks, browns, or American 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 few very low grades in school. But a general theory of race and economics remains elusive, at least for now. Interest in the topic is rising, however, especially among the millennial generation of young adults.

In the meantime, a few legal scholars have been pointing out how universal programs such as the G.I. Bill, federal housing supports, or even Social Security end up widening the gap between whites and blacks. The programs fall on already-plowed ground. Whites are more able to take advantage of them than blacks are. Sometimes the programs contain hidden preferences and assumptions that enable whites to benefit more from them than people of color can. The same is likely to happen if society retires affirmative action based on race for a version based on socioeconomic disadvantage, as many writers have suggested. This approach is popular with defenders of the

color-blind approach—scholars and commentators who wish that society would stop thinking in terms of race but instead focus on efficiency, class, merit, and other means of ordering society.

2. Policing and Criminal Justice

Another set of contemporary issues has to do with addressing racism in the criminal justice system. On any given day, over 60 percent of the black men in the District of Columbia are enmeshed in that 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 crit 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,

sometimes under new ordinances that penalize belonging to a gang or associating with a known gang member. Crack-cocaine offenses still receive harsher penalties than those for 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 does 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 they are more likely than whites to be perpetrators of crime or members of vicious gangs. Both practices penalize law-abiding people of color and alienate the young.

The 48 declarations submitted by the City in support of its plea for injunctive relief paint a graphic portrait of life . . . in an urban war zone. The four-square-block neighborhood, claimed as the turf of a gang variously known as Varrio Sureño Town, Varrio Sureño Treces (VST), or Varrio Sureño Locos (VSL) is an occupied territory. Gang members . . . congregate on lawns, on sidewalks, and in front of apartment complexes at all hours of the day and night. They display a casual contempt for notions of law, order, and decency—openly drinking, smoking dope, sniffing toluene, and even snorting cocaine laid out in neat lines on the hoods of residents' cars. The people who live in Rocksprings are subjected to loud talk, loud music, vulgarity, profanity, brutality, fist-fights and the sound of gunfire echoing in the streets. . . . Area residents have had their garages used as urinals; their homes

commandeered as escape routes; their walls, fences, garage doors, sidewalks, and even their vehicles turned into a sullen canvas of gang graffiti.

... The people of this community are prisoners in their own homes.

People ex rel. Joan R. Gallo v. Acuna, 14 Cal. 4th 1090, 929 P.2d 596, 601 (1997) (upholding an injunction against members of an alleged "criminal street gang" under which the youths—all or most of whom were Latinos—would be forbidden from gathering with each other or their friends in a public place)

Other critical race scholars urge jury nullification to combat the disproportionate incarceration of young black men. In this practice, the jury, which in most large cities will contain people of color, uses its judgment, sometimes ignoring 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. (See also discussion of antisnitching campaigns in chapter 4.)

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 required to sentence the man to a long term. On noticing that the man's 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 nonrepeat 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, 24, 25, 33 (D. Mass. 1998)

Still others examine the recent wave of prison building, including the outsourcing of incarceration to private entrepreneurs. They analyze who profits from this social trend. They also question why sentences in the United States are so long—among the longest in the world—and

punitive in orientation rather than rehabilitative. The Prison-to-College Pipeline, initiated by the John Jay College of Criminal Justice, seeks to help inmates acquire skills that will enable them to make a successful reentry to postprison life.

States are beginning to heed these suggestions, in part out of interest convergence. In many states, the prisons are so crammed full that judges have ordered early release for some prisoners. A few states pay so much to operate their prison system—an amount nearly equal to what they spend on public education—that their budgets are under severe strain.

One scholar, Paul Butler, proposes that the values of hip-hop music and culture could serve as a basis for reconstructing the criminal justice system so that it is more humane and responsive to the concerns of the black community. That program of reconstruction needs to start soon. Police shootings and killings of unarmed black men have risen so rapidly that even a leading medical journal recognizes them as growing health concerns. Civil rights scholars, critics, and community activists have been demanding changes in police training and culture, and civilian review boards. A vigorous “Black Lives Matter” movement has been pressing for change. Many campus activists have taken up the cause, as well.

Imprisonment for a felony often leads to disenfranchisement under state laws that deprive felons of the right to vote, even after serving their time. We take up the question of voting rights in a subsequent section.

3. Hate Speech, Language Rights, and School Curricula

Additional issues have to do with speech and language. 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. An early article 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 and concluded by urging 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 this idea. 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 ("no recovery for mere offense") 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.

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 ... "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)

As this book went to press, students on several dozen campuses were demonstrating for "safe spaces" and protection from racially hostile climates with daily insults, epithets, slurs, and displays of Confederate symbols and flags. Some campuses are reevaluating the possibility of rules and policies aimed at protecting equal educational opportunity. These "campus climate" issues are prompting serious reconsideration among university administrators, and for good reason. With affirmative action under sharp attack, universities need to assure that their campuses are as welcoming as possible. At the same time, a new generation of millennials seems to be demonstrating a renewed willingness to confront illegitimate authority.

Hate speech on the Internet is posing a difficult problem. Blogs, tweets, cartoons (for example, of a disliked figure, such as the Prophet Muhammad), and other messages in this medium are inexpensive and easy to circulate, often anonymously. They enable those who dislike a person or race to find others of like mind, so that reinforcement builds, often unopposed. Society polarizes, with groups distrusting each other and believing the other side wrong-headed. Of course, counterspeech is easy and inexpensive on the Internet. Still, the ready availability of an avenue

for replying to a vituperative message has not completely solved the problem.

A second 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 populations, squarely confronts a growing tide of nativist sentiment that also includes immigration controls and restrictions on the provision of government services to noncitizens. 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, not a sign of deficiency, and that many foreign countries are happily multilingual and not at all balkanized. Although over half of American states have enacted English-only measures over the past 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, 990, 991 (Ariz. 1998)

In 2006, Arizona voters passed a new English-only law designed to meet the court's objections.

Arizona, of course, has been the site of considerable anti-immigrant ferment. With a large Spanish-speaking population and a long border with Mexico, the state recently enacted one of the country's most overtly anti-immigrant laws. A 2010 statute empowered local police to request documentation of immigration status from persons with whom they come into contact and suspect may be undocumented. The state boasted, as well, a large and shifting contingent of unofficial border vigilantes who claimed to assist law enforcement in reporting and arresting unofficial entrants. Many carried out their functions with a zeal that suggested that their main motivation is dislike of the foreign-born, even law-abiding individuals merely looking for honest work. The state overplayed its hand: the bill was so heavy-handed that the Supreme Court struck down most of it. Not deterred, the Arizona legislature enacted a second bill eliminating courses of Mexican American Studies (MAS) in schools like those in Tucson. The Tucson program had been popular and so successful that over 90 percent of its students graduated, many going on to college. The anti-MAS statute is also under review right now (see chapter 4).

4. Affirmative Action and 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 demand 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, and, hence, its practice did not violate the Equal Protection Clause of the Fourteenth Amendment. The Supreme Court agreed with the railroad, establishing the principle of separate-but-equal that lasted until the *Brown* decision of 1954.

Justice Harlan's scathing dissent rebuked the majority's decision. He pointed out that history and custom rendered preposterous the blithe denial that anything impermissible 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 its earlier interpretation of equality, 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 arrived

with President Lyndon Johnson's Executive Order 11246 in 1965. Soon a host of federal and state agencies, including schools and universities, followed suit.

By the midseventies, affirmative action had become so unpopular in certain circles 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 cast doubt on this so-called diversity rationale, a Supreme Court decision from Michigan, *Grutter v. Bollinger*, reaffirmed Bakke's essential lesson. Public universities, if they see fit, may operate narrow affirmative action programs aimed at creating a diverse intellectual climate.

Conservatives, however, have not abandoned the struggle. Beginning with position papers, op-ed columns, and books, writers of this persuasion have been arguing that affirmative action balkanizes the country, stigmatizes minorities, violates the merit principle, and constitutes reverse discrimination. Some, such as the authors of *The Bell Curve*, have 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 public referenda and initiatives aimed at declaring affirmative action illegal in particular states.

Civil rights organizations and progressive educators have sought to counter each of these efforts. Progressive scientists challenged the premises of *The Bell Curve* and similar neoeugenicist tracts, showing how they rest on discredited science. Critical race theorists have launched a thoroughgoing attack on the idea of conventional 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 has resonated with certain liberals who equate fairness with color blindness and equal opportunity, rather than equal results (see chapter 2).

CRT's critique of merit takes a number of forms, all designed to show that the notion is far from the neutral standard that its supporters imagine it to be. Several writers critique standardized testing, demonstrating that tests like the SAT or LSAT are coachable and reward people from high socioeconomic levels who can afford to pay for expensive test-prep courses (see chapter 6). Law-test scores predict little more than first-year grades—and those only modestly—and do not measure other important qualities such as empathy, achievement orientation, or communication skills. These writers point out that merit is highly situational. 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 defines 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 emerge.

A UCLA educator, Richard Sander, advanced a different critique. He argues that affirmative action in law schools merely places blacks in settings where they are in over their heads and fail at high rates. Without the lift of the unseen hand, minorities would attend schools further down the pecking order and be happier and more successful. Defenders counter that minority graduates of top schools who were admitted under affirmative action programs are, on the whole, well adjusted and successful in school and in later life. These schools have more resources, alumni networks, and smaller classes than ones further down the line, so that students of color who enroll there generally have good experiences and go on to contribute significantly to society.

Some current critics urge abolishing race-based affirmative action in favor of a version based on economic class. Such a program, they say, would help all kids who grew up poor, not just minorities. It would also be in harmony with the current vogue of color-blind remedies and approaches to race and racism. Most educators, however, 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. One scholar proposed that any institution tempted to implement an affirmative action plan of this type also take into account advantage, or white privilege (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 grade point average from an inner-city school and an SAT score 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 César Chávez's religion-based, collectivist ideas to organize urban neighborhoods.

Candidate B is a son of a white, suburban family who sent him to a private school and to Europe during his junior year. This student has a 3.3 grade point 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 of this book, 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 to urge that admissions officers discount, or penalize, the scores of candidates like B, thus clearing a way for ones like A. This measure would reduce the

number of lackadaisical admits, clearing the way for even larger numbers of students of all races who have suffered real disadvantage and are eager to further their education.

Recently, mainstream organizations, including the American Bar Association, have been considering deemphasizing standardized tests, including the SAT and its law-school version, the LSAT, on the grounds that they only imperfectly predict occupational or professional success and discriminate against minorities.

In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity. All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training. . . . Access to legal education (and thus the legal professions) must be inclusive of talented and qualified individuals of every race and ethnicity, so that all members of our heterogeneous society may participate in the educational institutions that provide the training and education necessary to succeed in America.

Grutter v. Bollinger, 539 U.S. 306, 332-33 (2003)

5. Globalization and Immigration

A fifth issue that is very much at the forefront of critical race theory currently is international globalization. A globalizing economy removes manufacturing jobs from inner cities (often to other countries), 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. A globalizing economy often includes free-trade agreements, like NAFTA, which can decimate the economies of a weaker nation such as Mexico. At the same time, however, globalization offers opportunities for minorities to form coalitions with American blue-collar workers and unions that face similar issues—loss of jobs and a weakening wage structure. Some critics believe that the situations of domestic minorities and peer workers in Third World countries are linked and must be addressed together and that hypercapitalism is doomed to produce periodic crises and financial downturns during which minority fortunes, like those of the working poor, suffer. The development of *maquiladoras* on the Mexican side of the U.S. border brings many of these problems into high relief.

History suggests that the scholars who call attention to these global developments 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, fearful, and disorganized. Indian leaders such as Rigoberta Menchú and Subcomandante Marcos have led resistance movements in many Latin American countries, calling attention to the need for economic

democracy and land reform. American corporations often oppose these changes. Many Latino-critical scholars and even Pope Francis have taken stands in support of the indigenous movements.

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 industrial operations will relocate overseas to defeat unions, workplace regulations, welfare, and other programs of interest to U.S. minorities. Accordingly, some critics have begun reading or rereading the body of literature known as postcolonial studies in an effort to understand how their movement might dovetail with these other forces.

Another prominent 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 racist 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, gangs, 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 mirror shows how American society really thinks of its own citizens of color and would treat them if it were not for the courts.

As we write, civil rights scholars have been challenging racial profiling of Latino-looking immigrants, local ordinances aimed at immigrants, lawless border vigilantes, and the privatization of immigration detention. They also have been asking who benefits from increased immigration enforcement and prison building. They have also been questioning whether the high degree of suspicion and surveillance that the national intelligence establishment devotes to Middle Eastern-looking people and Muslims is merited or even makes sense in law enforcement terms. It alienates the very community whose cooperation the authorities need in keeping tabs on threats to national security. It allows real terrorist groups in the Middle East to make propaganda capital at our expense. And it recalls unsavory chapters in U.S. history such as World War II-era internment of an entire domestic minority merely on the basis of the suspicion that a small subgroup might be harboring unpatriotic thoughts and plans. One recent scholar notes the way presidential rhetoric in the War on Terror echoes old themes from the days of Indian frontier wars.

6. Voting Rights

As mentioned, aggressive policing and incarceration create large numbers of civilians who are ex-cons and unable to vote. But in addition to "felon disenfranchisement," communities of color suffer another kind 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 vote that way as well, minorities are apt to be outvoted.

The Supreme Court has recently approved voting requirements that have a disproportionate effect on minority voting. Until the country's demographic makeup shifts even more decisively, efforts must continue to counter 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 is required to engage in exchanges of votes or favors to register an infrequent victory.

With recent cutbacks in the protection of minorities in voting (*Shelby County v. Holder*), all these matters take

on increased urgency. Since 2013, southern officials no longer need to secure federal "preclearance" when they change voting rules. Many have seized on this opportunity to require photo identification, relocate registration offices to distant locales, and limit voting hours in ways that are likely to fall heavily on minority citizens wishing to vote.

C. Identity

As mentioned earlier (see chapter 2), a great divide separates two broad types of current critical race scholarship. One (the materialist or "real world" school) writes about issues such as globalization, immigration, nativism, the wealth divide, race and class, and the criminal justice system. In broad agreement with Derrick Bell's view of race as expressing material interests of elite groups, members of this persuasion set out either to understand, analyze, criticize, or change conditions that afflict communities of color in their effort to secure better, more prosperous lives.

Discourse analysts, by contrast, focus on 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 center on categorical thinking. They are likely to examine the role of ideas, thoughts, feelings, unconscious discrimination, stereotype threat, and implicit associations and their implications for judicial reasoning. The lines are not rigid; some writers ponder, for example, both hate speech and the social construction of race, or unconscious discrimination and the overt, in-your-face kind. For example, 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 lifestyle has been firmly marginalized by that church? Others analyze the internal makeup of the Latino group, many of whom have an indigenous heritage as well as a European one. Should they designate themselves as "Indian" on U.S. Census forms? Should they check the "other race" box and, in the space following it, write in the word "mestizo"? We have already mentioned the controversy over whether American racial thought incorporates a black-white binary. If so, does attachment to that binary marginalize Asians, Latinos, and American 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 crits in the materialist group are growing 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. The discourse analysts, for their part, 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: Panel on the Intersection of Race and Body Image

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 people of color, both young and old, and that the pressure to conform to Eurocentric standards of beauty and physical appearance makes these problems especially acute for minority women, many of whom have little chance of meeting them (see chapter 5). 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.

D. Critical Empirical Analysis

In recent years, psychologists and other social scientists have been developing new tools to understand racial oppression and its effects. On the basis of work by Claude Steele, Joshua Aronson, and others, empiricists have

attempted to learn how stereotype threat impairs the ability of minority test-takers to do their best work and how to combat it. To this point, courts have been slow to apply the teachings of this new form of knowledge, even though it would seem to promise insight into the reasons for the minority-white test gap.

Due to the sparseness of the evidence . . . the court is unable to determine whether stereotype threat explains any part of the gap between Caucasian and underrepresented minority LSAT scores. . . . Professor Steele does not quantify the effect of stereotype threat; nor, at least according to this report, has he performed any research on the LSAT. If there is evidence showing that stereotype threat accounts for some of the LSAT gap, it was not produced in this case.

The . . . argument . . . assumes all members of the underrepresented minority groups have suffered adversity entitling them to some degree of upward adjustment in their UGPA and LSAT scores. . . . Every law school applicant is an individual whose personal history is unique. . . . [T]he court is unable to determine whether stereotype threat explains any part of the gap between Caucasian and underrepresented minority LSAT scores.

Grutter v. Bollinger, 137 F. Supp. 821 (E.D. Mich. 2002)

Other social psychologists study implicit associations, the near-automatic connections that almost every person who grows up in American society draws between race and personal qualities, such as cleanliness, attractiveness, goodness, and a tendency to obey the law. Many Americans have taken the implicit association test, which is online, and learned that they harbor negative attitudes

toward minorities, foreigners, or women. Unlike stereotype threat, implicit association research has been slowly making inroads into the thinking of lawyers and judges.

Testimony that educates a jury on the concepts of implicit bias and stereotypes is relevant to the issue of whether an employer intentionally discriminated against an employee. . . .

Rule 702 simply requires that: (1) the expert be qualified; (2) the testimony address a subject matter on which the factfinder can be assisted by an expert; (3) the testimony be reliable; and (4) the testimony "fit" the facts of the case. . . .

All of these factors are satisfied here. Dr. Greenwald is qualified. His opinions are based on reliable methodologies and consist of relevant subject matter. Finally, Dr. Greenwald's testimony is likely to provide the jury with information that it will be able to use to draw its own conclusions. Therefore, the Court finds that, provided sufficient foundation is laid at trial, Dr. Greenwald's expert testimony is helpful enough to survive the admissibility threshold.

Samaha v. Wash. St. Dept. of Tran., U.S. Dist. Ct., E.D., Wash., Jan. 3, 2012, WL 11091843 at 4.

Still others have been applying social-dominance theory and the work of Jim Sidanius and his colleagues in an effort to understand why humans seem to exhibit a drive to control and dominate their fellow citizens. And a few build on the work of Charles Pierce and Peggy Davis to theorize how microaggressions construct a world in which minorities and women are constantly on the defensive. A handful of court opinions dealing with workplace discrimination find that a constant rain of small insults on the job amounts to redressable discrimination.

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 person 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? Is racial subordination so profitable and familiar that society is unlikely ever to give it up?
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 operation? And why do most large corporations favor it?
4. Why should a light-skinned son of a black neurosurgeon with an SAT score 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 a white police officer sees two young black or Latino males walking down the sidewalk with no obvious destination or reason for being there, is it OK for the officer to ask them where they are going? Is it insulting and disrespectful to do so, even if the officer asks politely?
7. The nation's prisons and jails are full of minority inmates, especially young men. Is that racist, and if so, what should be done about it?
8. How do you feel about black jurors who engage in jury nullification? Did our system do something similar in the South when courts failed to convict white killers of black civil rights protesters?
9. If corporations and government agencies locate 50 percent of the biohazards (such as sanitation plants) in minority communities and 10 percent in white ones, is that fair? Suppose that land is cheaper in the minority neighborhood, so that the decision seems economically rational. Is that a good reason for locating these facilities there? Suppose that minority people have flocked to these areas because of the well-paying jobs they offer or because housing is cheaper there.
10. If a U.S. corporation pays a Thai woman \$1.10 per hour to work a ten-hour shift in a hot, noisy factory, and the prevailing rate in Thailand is \$1.00 per hour for an eleven-hour workday, is that fair? Suppose that she insists that she wants to work there? What is a fair minimum wage in a developed country such as the United States?

11. Blacks, Chicanos, and Asians are constantly outvoted by whites in elections, but is anything wrong with that? Shouldn't the majority rule?
12. Latinos are now 17 percent of the U.S. population and outnumber blacks as the largest ethnic minority group. Where do Latinos figure into the civil rights equation? Are they more like blacks? Whites? American Indians? Asian Americans? And who decides? Should they qualify for affirmative action and other government programs?
13. Many of us like to think that society is less racist now than before, at least in a raw sense. But hate speech seems to be increasing in the age of blogs, websites, and talk radio. If so, what is the solution? Don't conservative radio personalities and anonymous users of the Internet have the right to say what they think?
14. The British and French colonial administrators wielded power over large native populations through a variety of strategies, including co-opting local elites by giving them midlevel jobs in the colonial administration and preaching Western superiority. Now that the U.S. population is beginning to resemble that of a colonial state, with a minority of whites and a preponderance of people of color, will these same neocolonial strategies find use once again? Is this already happening?
15. Most people today believe that hate speech ought to be discouraged. Even if one is angry at another individual, we think it is wrong to call him by a name marking an ethnic slur ("You ____"). Suppose a

rapper uses the same word. Is that hate speech? Why or why not?

16. What should a social activist do if his or her school or other organization refuses to hire minorities, denies domestic-partner benefits to gay couples, and refuses to explore renewable sources of energy to run its campus or building?

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