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THE HISTORY AND CONCEPTUAL ELEMENTS OF CRITICAL RACE THEORY

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While the roots of the scholarship of critical race theory (CRT) can be traced to earlier writings, the first meeting occurred in the summer of 1989 in Madison, Wisconsin. Twenty-three legal scholars of color met for a weeklong workshop (Crenshaw, 2011).[1] As with any intellectual movement, CRT was born out of the confluence of historical developments of the time and the need to respond to those developments. Thus, in order to understand the scholarship produced by CRT, it is necessary to start with those historical events.

THE HISTORY BEHIND CRITICAL RACE THEORY

The Supreme Court's unanimous 1954 opinion in *Brown v. Board of Education* overturned the doctrine of "separate but equal" embraced by the Court in its infamous 1896 *Plessy v. Ferguson* decision. In *Brown*, the Court struck down statutes that authorized racial segregation of public school students, which existed in 21 states, because the statutes violated the equal protection clause of the Fourteenth Amendment. This Amendment was added to the Constitution in 1868. In its 1873 decision in the *Slaughterhouse Cases*, the first opinion addressing the reach of the Fourteenth Amendment, the Court originally stated that its "one pervading purpose … [was] the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made free-man and citizen from the oppressions of those who had formerly exercised unlimited dominion over him" (Slaughterhouse Cases, 1873).[2]

The *Brown* decision ushered in a dramatic 15-year period of unprecedented legal, political, economic, and educational measures directed towards dismantling the structures of racism and oppression instituted as a result of segregation. The Court quickly followed its opinion in *Brown* with a string of decisions which struck down segregation practices by governmental entities that involved public parks, beaches, golf courses, transportation, and other public facilities. Ten years after *Brown*, Congress passed the

Civil Rights Act of 1964, the most sweeping civil rights legislation in the nation's history, followed the next year by passage of the Voting Rights Act and the Elementary and Secondary Education Act. In 1968, Congress passed the Fair Housing Act, outlawing discrimination in the real estate industry. In that same year, the Supreme Court issued another major school desegregation decision, *Green v. New Kent County* (1968). Frustrated by the lack of progress in the dismantling of dual school systems, one for whites and the other for people of color, in *Green* the Court ordered school districts to eliminate segregation root and branch in all aspects of their public schools and to do so immediately. Also, many selective higher education institutions established affirmative action admission policies in the mid- to late 1960s, which brought large numbers of black and other minority students to their campuses. Furthermore, governmental units, as well as private entities, established set-aside programs for minority contractors and race conscious hiring and promotion plans in order to increase the diversity of their contractors, workforces, supervisors, and managers.

The inauguration of Richard Nixon in 1969 quickly led to changes in the justices who sat on the Supreme Court bench. By the end of his first term, Nixon had appointed four justices to the Court, and these justices were decidedly less sympathetic to the concerns and interests of underrepresented minorities.[3] Thus, as Nixon started his second term, a far more conservative Supreme Court was in place. As a result, the Court began to halt, and then reverse, many of the hard-won legal victories obtained for underrepresented minorities.

The first major indication of this change in direction of the Supreme Court was its 1973 decision in the case of *Keyes v. School District No. 1* (Skiba et al., 2009). In *Keyes*, the Court concluded that an unconstitutionally segregated school system was not one where the students attended racially identifiable schools, *de facto* segregation. Rather it was one where the racially identifiable schools resulted from intentional conduct by school authorities directed toward segregating the schools. Thus, many *de facto* segregated schools were not unconstitutionally segregated. In addition, establishing the existence of a dual school system became a complicated and arduous affair for black plaintiffs. Petitioners for black schoolchildren had to comb through mounds of government documents and interview countless witnesses to prove that the segregated schools resulted from discriminatory motives.

The *Keyes* decision was followed the next year by the Court's decision in *Milliken v. Bradley* (1974), which dealt the deathblow to the hopes of ever successfully desegregating America's public schools. In a five to four decision,[4] with all four Nixon justices in the majority, the Supreme Court rejected a lower court's inter-district school desegregation remedy for the Detroit public school system. According to the lower court, in a school system where 63 percent of the student body was black, there were not enough white students to successfully desegregate the schools (Milliken v. Bradley, 1974, p. 765). So the lower court reassigned many of Detroit's students to suburban school systems, even though there was no evidence of actions by the suburban schools that fostered segregation in Detroit. The lower court felt justified in doing this because it had found that the State of Michigan was also responsible for the segregation in Detroit public schools. Since school district boundary lines were products of decisions by the State, the lower court reasoned that these boundaries should not limit a desegregation remedy. However, the Supreme Court concluded, in general, that a school desegregation remedy was limited to the offending school system and overturned the lower court inter-district desegrega-

tion order. As a result of the *Milliken* decision, most of the nation's major urban school districts such as Atlanta, Chicago, New York, Newark, and Philadelphia could not be effectively integrated, because there were not enough white students left in the districts (Bell, 1980; Coleman, 1975).

In the Court's 1976 *Washington v. Davis* decision, a case that behind *Brown v. Board of Education* may be the most significant race discrimination decision in the past 116 years, the Court was presented with the need to determine what constitutes unconstitutional race discrimination. In this case, the Court addressed a challenge by black police officers to the use of a written civil service exam designed to test verbal ability, vocabulary, reading, and comprehension, because blacks were far more likely to fail the exam than whites. Five years earlier, in another case of first impression, the Court addressed the definition of what constituted employment discrimination under Title VII of the 1964 Civil Rights Act. In *Griggs v. Duke Power Co.* (1971), the Court concluded that a complainant could establish a *prima facie* case of employment discrimination by establishing that a given employment policy or practice, such as requiring a high school diploma or successfully passing a standardized general intelligence test, produced a discriminatory effect on minorities. An employer could rebut the *prima facie* case of discrimination by showing that the employment policy or practice was related to successful job performance. However, in *Washington v. Davis* (1976),[5] the Court rejected discriminatory effects as the basis of determining unconstitutional discrimination. Instead, the Court concluded that only governmental actions motivated by discriminatory intent violated the Constitution. In justifying its decision to reject discriminatory effects, the Court stated:

> A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white …
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> (p. 248)

To emphasize just how far reaching a decision that based unconstitutional discrimination on proof of discriminatory effects could be, the Court included a footnote that quoted portions of a law review article. The article suggested that the discriminatory effect analysis could invalidate "tests and qualifications for voting, draft deferment, public employment, jury service, and other government-conferred benefits and opportunities … sales taxes, bail schedules, utility rates, bridge tolls, license fees, and other state-imposed charges" (p. 248, n. 14). The Court pointed out that "it has also been argued that minimum wage and usury laws as well as professional licensing requirements would require major modifications in light of the unequal-impact rule" (p. 248, n. 14).

The Supreme Court followed up *Washington v. Davis* with its decision two years later in *Bakke v. Regents of the University of California* (1978). In *Bakke*, the Court struck down an admission plan adopted by the University of California at Davis Medical School because it reserved 16 of its 100 admissions seats for blacks, Native Americans, Hispanics, and Asians. The justices split on the decision, with four justices willing to uphold the admissions plan against challenges under the equal protection clause and Title VI

of the 1964 Civil Rights Act, which prohibits discrimination in federally funded programs. Four other justices concluded that Title VI barred any consideration of race in the admissions process. They also felt that it was unnecessary to address the equal protection challenge. Justice Powell provided the deciding opinion.

Before turning to his analysis of the admissions plan, Powell addressed the governing purpose behind the equal protection clause. He rejected the Court's original statement of the purpose of the Fourteenth Amendment in its 1873 *Slaughterhouse Cases* decision. Powell also rejected the argument first articulated by the Supreme Court in footnote 4 of a famous 1942 opinion, *U.S. v. Carolene Products Co.*, that the purpose of the clause was to protect discrete insular minorities who required extraordinary protection from the majoritarian political process. Such an understanding would require the Supreme Court to be more differential to measures intended to benefit minority groups, like blacks and Latinos, than it would be to measures that would harm those groups. Rather, Powell concluded that the purpose of the equal protection clause was to protect the rights of individuals, regardless of race. As a result, for Powell, the use of racial classifications that disadvantaged whites would receive the same strict scrutiny that the use of racial classifications that disadvantaged underrepresented minority groups would receive.

For Powell in order for colleges and universities to consider race in the admissions process they needed to have a constitutionally permissible and substantial reason. Powell concluded that reducing the historical deficit of traditionally disfavored minorities in medical school and the medical professions, countering the effects of societal discrimination on minorities, and increasing the number of physicians who would practice in currently underserved minority communities were not sufficiently compelling reasons to justify the consideration of race. The only rationale Powell found worthy was obtaining the educational benefits that flow from an ethnically diverse student body. Thus, Powell concluded that an admission plan that took account of race or ethnicity as one factor among many in an effort to obtain a diverse student body would survive challenges under both the equal protection clause and Title VI. However, one that reserved a certain quota of admissions seats for members of these groups would not.

THE EMERGENCE OF CRITICAL RACE THEORY

All of the law professors who met at the original CRT workshop taught in predominantly white law schools and most of them were among the first persons of color hired to teach at their respective institutions. Consistent with Powell's opinion in *Bakke*, the faculties that hired them were allowed to give positive considerations to their candidacy because of their race in making the hiring decision. Many of these professors had also participated in various Critical Legal Studies (CLS) conferences.

In the late 1970s, a movement composed of predominately white neo-Marxist, New Left, and counter-culturalist intellectuals emerged within the legal academy. CLS sought to expose and challenge the view that legal reasoning was neutral, value-free, and unaffected by social and economic relations, political forces, or cultural phenomena. Rather CLS pointed out that the law tends to enforce, reflect, constitute, and legitimize the dominant social and power relations through social actors who generally believe that they are neutral and arrive at their decisions through an objective process of legal reasoning. Thus, for CLS proponents, American law and legal institutions tend to serve and to legitimize an oppressive social order. CLS scholars also effectively demonstrated that

legal decisions were indeterminate, incoherent, and deeply embedded in both politics and the personal biases of the deciding judges.

The first meeting of CRT emerged out of a sense that, while CLS had developed some very significant insights about how the legal process worked, the movement did not adequately address the struggles of people of color, particularly blacks. As Harlan Dalton pointed out in a special issue of the *Harvard Civil Rights–Civil Liberties Law Review* devoted to minority critiques of CLS, there was an absence of a positive program for how to address the concerns of people of color on the part of many CLS scholars. This was one of the central difficulties that scholars of color had with the movement (Dalton, 1987; Matsuda, 1987). In addition, CLS scholars were too dismissive of legal rights. For people of color, it was legal rights and their enforcement by the Supreme Court that led to the end of segregation, anti-discrimination legislation, and voting rights for people of color.

Beyond the sense of frustration with CLS, major legal and political events shaped the first meeting of CRT. George Bush handily defeated Michael Dukakis in the November 1988 elections. Bush's inauguration in January of 1989 assured the continued appointment of conservative judges like the ones Ronald Reagan had selected, including Supreme Court justices, to the federal bench for the foreseeable future. Also, during its 1988–89 term, the Supreme Court issued seven major opinions that further restricted or eliminated hard-won legal gains for underrepresented minorities. These decisions made it more difficult for minority plaintiffs to win employment discrimination lawsuits under Title VII, created uncertainty regarding the validity of many consent decrees to resolve claims of discrimination, narrowed the interpretation of certain civil rights statutes, and limited the situations where discrimination plaintiffs could collect attorney's fees (Spann, 1990). However, the most significant of these decisions was the Court's opinion in *City of Richmond v. Croson* (1989). In that decision, the Court struck down the set-aside program for minority contractors established by the city of Richmond, Virginia, the former capital of the Old Confederacy. Blacks made up over 50 percent of the population of Richmond. Over the five years before the adoption of the set-aside program, however, the City had only awarded 0.67 percent of the dollar volume of its prime construction contracts to minority businesses (pp. 479–480). Despite Richmond's long history of discrimination against blacks and figures regarding the awarding of prime construction contracts, the Supreme Court concluded that the set-aside program discriminated against the rights of non-minority contractors under the equal protection clause. For the first time in the 121-year history of the equal protection clause, a majority of the justices followed Justice Powell's proclamation: that the purpose of the equal protection clause was to protect the rights of individuals. As a result, the Court concluded that strict judicial scrutiny would apply to the use of racial classifications by state and local governmental entities, regardless of the race of the beneficiaries. In doing so, the Supreme Court concluded that there was little constitutionally significant difference between segregation statutes that confined minorities to inferior schools and various governmental policies and programs adopted to dismantle the continuing societal effects on these minority groups of America's history of racial discrimination. By depriving governmental entities of the ability to institute policies and programs that took account of race as a means to dismantle the continuing effects of racial oppression and the ability to order private parties to do the same, the Court was freezing into place the status quo of prior discrimination.

While the Supreme Court's decision in *City of Richmond* specifically addressed set-asides for minority contractors created by state and local governmental units, the Court's

rationale suggested that race conscious hiring and promotion plans enacted by governmental entities, as well as affirmative action admissions programs instituted by selective colleges and universities, were also constitutionally suspect. As a result, the rationale of the *City of Richmond* decision called into question the very legal grounds for the consideration of race in the hiring process that brought many of these scholars of color to their legal institutions. Furthermore, it cast doubt upon the affirmative action admissions programs that continued to bring most of their students of color to their law schools. Thus, the first meeting of CRT was held at a time of crisis for these scholars. It was also clear that the Supreme Court and the federal courts had turned from friend of people of color to foe.

While the legal scholars who met at the first CRT meeting were looking for a community of like-minded individuals, they were also motivated by a desire to understand how a regime of white supremacy and its subordination of people of color had been created and maintained in America. More importantly, they wanted to develop the understandings that would change it. These legal scholars sought to comprehend how the signature statement of civil rights rhetoric, to judge individuals "by the content of their character, not the color of their skin," was turned on its head. They wanted to understand how this rhetoric, which had been so effective for underrepresented minorities in the 1950s, 1960s, and early 1970s, could now be used to strike down the very programs instituted to help America undo the effects of its history of racial oppression. Basically, what distinguished these CRT scholars from conventional liberal scholarship about race and inequality was a deep dissatisfaction with the traditional civil rights discourse. Thus, their mission necessarily required understanding the very foundational ideas of traditional legal discourse and formulating criticisms of those ideas.

CHALLENGING THE NEUTRALITY AND ABILITY OF TRADITIONAL CIVIL RIGHTS DISCOURSE IN THE LAW

One important aspect of CRT seeks to reveal that the conceptions of racism and racial subordination as understood by traditional legal discourse are neither neutral nor sufficient to overcome the effects of centuries of racial oppression on people of color. Indeed, the appearance of neutrality primarily operates to obscure the fact that the perspective of the white majority is embedded within this view. In addition, the concept of discrimination is so limited that remedies for it cannot adequately recognize all forms of discrimination nor overcome the continuing effects that it has had on our society.

In a 1978 article, which legal scholars of color found to be one of the best-written CLS pieces, Alan Freeman pointed out that the view of racism and racial oppression embedded in traditional legal thinking is that of the perpetrators of racial oppression, as opposed to its victims. In a 1987 article, Charles Lawrence noted that the Supreme Court's definition of race discrimination as the product of consciously racially motivated decision making is inadequate because it overlooks the impact of unconscious forms of racism. Derrick Bell's interest convergence principle and racial realism went a step beyond Lawrence. In his interest convergence principle, Bell asserted that blacks only make substantial progress against racial oppression when their interests align with those of white elites. From this interest convergence principle comes Bell's racial realism—that racism is an integral, permanent, and indestructible part of American society.

The Victim's Perspective and the Perpetrator's Perspective

The victim's perspective and the perpetrator's perspective were introduced in an article written by Alan Freeman (1978). When the Supreme Court addresses an issue for the first time, there is no prior judicial opinion to guide the decision of the justices. Thus, in cases of first impression, the Supreme Court is left to choose which legal principle will govern. In the 1976 case of *Washington v. Davis*[6] noted above, the Court was presented with the need to choose between using discriminatory effects or discriminatory intent as the means by which to determine what constitutes unconstitutional race discrimination for purposes of the equal protection clause. The Court concluded that discrimination is the result of actions that are motivated by a discriminatory intent.

Given the definition of discrimination articulated by the Court in *Washington v. Davis*, actions motivated by racially neutral justifications which, nevertheless, generate a disproportionately negative impact upon racial minorities are not considered to be discriminatory. Thus, for example, application of various educational policies and procedures such as the use of high-stakes tests as part of the requirements to obtain a high school diploma, minimum competency tests for teachers, various disciplinary policies and procedures, using seniority to determine teacher layoffs, and ability skills grouping, which disadvantage the educational and employment opportunities of underrepresented minorities more than majority individuals, normally survive a discrimination legal challenge. The reason they do is because what constitutes discrimination is based on whether the actions by the perpetrators are motivated by discriminatory intent, not whether such actions or decisions have a discriminatory effect upon underrepresented minority populations. Since educational officials can usually justify their educational policies and practices with reference to legitimate educational concerns, these practices are seldom struck down by federal courts. As a result, regardless of the extent of the negative disparate impact of school policies and practices upon underrepresented minorities, federal courts will tend to view such outcomes as the unfortunate result of racially neutral decision making.

Freeman's article noted how the distinction between defining discrimination in terms of the effects of actions as opposed to the intent that motivated the actions represented a distinction between the victim's perspective of discrimination as opposed to the perpetrator's perspective. For victims, "racial discrimination describes the actual social existence as a member of a perpetual underclass. This perspective includes both the objective conditions of life (lack of jobs, lack of money, lack of housing) and the consciousness associated with those objective conditions" (Freeman, 1978, pp. 1052–1053).

Thus, for the victims, if racial discrimination is eliminated, then there would be some significant changes in the conditions of life that were associated with racial discrimination. These changes would include substantial improvements in their employment and educational opportunities, income, wealth, and ability to obtain adequate affordable housing. In contrast, the perpetrator's perspective views racial discrimination as the result of conscious discriminatory actions by individuals, not as a social phenomenon. From the perpetrator's perspective, society needs to eliminate its villains, those whose actions are motivated by racial animus. Thus, racial discrimination is the fault of a limited group of individuals; however, those who are not perpetrators are innocent and share no responsibility to ameliorate the problems caused by racism. Once the actions of the misguided perpetrators have been remedied, then what remains in terms of the socioeconomic order is presumed to be the just condition of society. The point of Freeman's

piece was to establish that the legal system's view of racism and race discrimination was neither neutral nor objective.[7] Rather it represented the courts choosing the perspective of the perpetrators regarding what is considered discrimination over that of the victim.

Unconscious Discrimination Does Not Exist in Traditional Legal Discourse

Charles Lawrence, in his pathbreaking article "The Id, the Ego, and Equal Protection Clause: Reckoning with Unconscious Racism" (1987), extended the critique of the concept of discrimination that Freeman had made. Lawrence pointed out the inherent failings of a legal system that views race discrimination as a product of conscious racial decision making. As Lawrence notes, the Supreme Court's race discrimination jurisprudence views apparently neutral actions that are not motivated by conscious racial animus as legal. This motive-centered approach makes it difficult, if not impossible, for victims to prove discrimination. Perpetrators can easily hide improper discriminatory purposes. In addition, the behavior of individuals normally results from a combination of a number of different motives. As a result, there are likely to be racially neutral motives to explain a person's actions, as well as racially discriminatory ones. However, the injury of racial inequality suffered by the victims exists regardless of the motives of the actors. For example, the harms inflicted upon underrepresented minority schoolchildren who are constrained in low-achieving, under-resourced schools, provided with less skilled teachers or systematically left out of gifted and talented classes, exist regardless of the reasons provided by the educational officials for allowing these circumstances to occur.

Lawrence rejects the dichotomy of the Court's race discrimination jurisprudence, which views actions motivated by discriminatory intent as illegal, but actions motivated by racially neutral considerations that generate a negative discriminatory effect as legal. Drawing on insights from psychology, Lawrence argues that:

> Americans share a common historical and cultural heritage in which racism has played and still plays a dominant role. Because of this shared experience, we also inevitably share many ideas, attitudes and beliefs that attach significance to an individual's race and induce negative feelings and opinions about nonwhites. To the extent that this cultural belief system has influenced all of us, we are all racists. At the same time, most of us are unaware of our racism. We do not recognize the ways in which our cultural experience has influenced our beliefs about race or the occasions on which those beliefs affect our actions. In other words, *a large part of the behavior that produces racial discrimination is influenced by unconscious racial motivations.*
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> (Lawrence, 1987, p. 322, emphasis added)

There is a fundamental difference between the way traditional legal discourse views individuals and the way that Lawrence sees them. For traditional legal discourse, individuals are products of self-determination. Individuals become who they are through interacting with the world and learning about the world on their own. Thus, individuals come to develop their own ideas and act based solely on their self-determined motivations. In contrast, Lawrence views individuals as products of culture. Rather than individuals coming to know what they know as the result of an individualized learning process, individuals are acculturated into a dominant cultural system of beliefs about race and ethnicity. Thus, defining racial discrimination as the product of intentionally motivated decision making is inadequate. Such a narrow view of discrimination fails to address a

large part of the potent aspects of racism, which are the products of unconscious motivations derived from an acculturation process into the dominant cultural set of beliefs that view people of color more negatively than whites.[8]

Interest Convergence Principle

Professor Derrick Bell, the first tenured black professor at Harvard Law School, pointed out the limitation of the Supreme Court's decisions to dismantle the effects of America's history of racial discrimination with his pathbreaking idea of the interest convergence principle. Bell first put forth his principle as a dilemma in 1980, when he did a retrospective review of the Supreme Court's school desegregation jurisprudence (Bell, 1980). Bell stated:

> The interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites. However, the fourteenth amendment, standing alone, will not authorize a judicial remedy providing effective racial equality for blacks where the remedy sought threatens the superior societal status of middle and upper class whites.
>
> It follows that the availability of fourteenth amendment protection in racial cases may not actually be determined by the character of harm suffered by blacks or the quantum of liability proved against whites. Racial remedies may instead be the outward manifestations of unspoken and perhaps subconscious judicial conclusions that the remedies, if granted, will secure, advance, or at least not harm societal interests deemed important by middle and upper class whites.
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> (p. 523)

Bell went on to show that the Court's decision in *Brown v. Board of Education* could easily be justified in terms of advancing the interest of elite whites as opposed to protecting the constitutional rights of black schoolchildren. In *Brown*, attorneys for both the NAACP and the federal government made the argument that segregation of people of color provided the Soviet Union with a huge rhetorical advantage in trying to garner support from the independent nations that were emerging or would emerge in Africa and Asia (Dudziak, 1988). Thus, Bell noted that the *Brown* decision immediately improved America's credibility in its struggle against communism for the hearts and minds of people in emerging third world countries. Bell also pointed out that many elite whites understood that the South could not make the transition from a plantation economy to an industrialized economy without discarding segregation. Thus, substantial economic progress in the southern states depended upon rejecting segregation. Third, Bell noted that the segregation decision could help to assuage the disillusionment experienced by blacks with so many having recently participated in World War II's efforts to assure freedom and equality in Europe, yet finding it denied to them at home.

Bell also applied his theory of interest convergence to President Abraham Lincoln's decision to issue the Emancipation Proclamation. He pointed to Lincoln's September 1862 letter to the editor of the *New York Times*, Horace Greely, written shortly before Lincoln announced his intention to issue the Proclamation. In the letter Lincoln explained: "What I do about slavery and the colored race, I do because I do believe it helps to save the Union. I shall do less whenever I shall believe that what I am doing hurts the cause, and I shall do more whenever I believe that doing more will help the cause" (Bell, 2008,

p. 22). Bell goes on to note that three reasons justified Lincoln issuing the Proclamation, which had nothing to do with the interest of the black slaves. First, as the war dragged on, Lincoln's military advisers urged emancipation as a way to disrupt the Southern economy, which relied on slave labor. Second, there were indications that foreign governments might be willing to recognize the Confederacy and supply it with financial aid and arms. However, foreign abolitionists in these countries might oppose such an effort if the North made abolition one of its war objectives. Third, with the enlistment of whites in the Union army lagging, emancipation could open up the opportunity to enlist thousands of black soldiers. As Bell concludes, abolition of slavery had to wait until it coincided with the best interest of elite whites.

Racial Realism

The interest convergence principle is inherently conservative, because it strongly implies another point about the centrality of racism in American society and law: that it is permanent. Bell had spoken of the principle of racial realism earlier, and the tenor of his 1987 book *And We Are Not Saved: The Elusive Quest for Racial Justice* suggested this point. However, racial realism took center stage in Bell's 1992 book *Faces at the Bottom of the Well: The Permanence of Racism*. In it Bell rejected the hopes of civil rights organizations, the black community, and social justice advocates by asserting that "racism is an integral, permanent, and indestructible component of this society" (Bell, 1992, p. ix). As Bell goes on to state:

> Black people will never gain full equality in this country. Even those herculean efforts we hail as successful will produce no more than temporary "peaks of progress," short-lived victories that slide into irrelevance as racial patterns adapt in ways that maintain white dominance. This is a hard-to-accept fact that all history verifies.
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> (p. 12)

Bell suggests one obtains a certain freedom from knowing the truth. He further argues that blacks should struggle against racial oppression even though, ultimately, the struggle is futile, because the struggle will empower blacks.

CRITICAL RACE THEORY STRATEGIES TO DEMONSTRATE THE LIMITED ABILITY OF TRADITIONAL LEGAL DISCOURSE TO ADEQUATELY REVEAL THE NATURE OF RACIAL OPPRESSION

CRT scholars sought to expose the limited ability of traditional legal scholarship to adequately reveal how integral racism and racial subordination are in the everyday lives of people of color. CRT authors employed techniques of chronicles, storytelling, and counter-narratives to point this out. Cheryl Harris's (1993) article discussing the concept of whiteness as property is an excellent example of this critique.

Chronicles, storytelling, and counter-narratives

Many dominant group members presuppose that racial or ethnic inequality is the result of cultural problems of minority groups or the lack of adequate enforcement of existing discrimination laws. However, because social and moral realities are socially constructed, they are indeterminate and subject to multiple interpretations. One way to demonstrate

that racial and ethnic phenomena are interpreted differently based on the positionality of your particular group in the social hierarchy is to tell stories, parables, chronicles, or narratives. Thus, CRT scholars use chronicles, storytelling, and counter-narratives to undermine the claims of racial neutrality of traditional legal discourse and to reveal that racism and racial discrimination are neither aberrant nor occasional parts of the lives of people of color. Rather racism and racial discrimination are deep and enduring parts of the everyday existences of people of color. Thus, chronicles, storytelling, and counter-narratives are used to make visible the racial biases that are deeply embedded in the unstated norms of American law and culture.

Several CRT authors tell stories to convey the ubiquitous nature of racism and racial discrimination. Nor is the solution to continuing racial oppression and subordination merely the better enforcement of existing anti-discrimination laws. Because discrimination comes in many forms, such as institutional, unconscious, and cultural, which are not addressed by current antidiscrimination laws, those laws are inadequate. Some of the early examples and uses of chronicles, storytelling, and counter-narratives include Derrick Bell's book *And We Are Not Saved: The Elusive Quest for Racial Justice* (1987), Patricia Williams's book *Alchemy of Race and Rights: Diary of a Law Professor* (1987), and Richard Delgado's *Rodrigo Chronicles: Conversations about Race in America* (1995).

Cheryl Harris's 1993 article "Whiteness as Property"

While our concept of race is socially constructed and, thus, represents a state of mind, in this article Cheryl Harris conceptualizes whiteness as an intangible property interest and speaks of how the legal system protected a vested interest in white skin. Harris discusses the story of her light-skinned grandmother, who passed as white in the 1930s in order to gain employment at a department store that catered to upper middle class whites. Harris uses this story to go on to note that being white means gaining access to a set of public and private privileges that allow for greater control over the critical aspects of one's life. As a result, whiteness automatically carries with it greater economic, political, and social security. Harris goes on to argue that American law has long protected the settled expectations based on white privilege and thereby converted whiteness into a valuable property interest that, "although unacknowledged, now forms the background against which legal disputes are framed, argued and adjudicated."

INTERSECTIONALITY

Another concept associated with CRT is intersectionality. This concept was first articulated by Kimberlé Williams Crenshaw, one of the principal organizers and founders of CRT, in a 1991 *Stanford Law Review* article. Crenshaw noted that identity-based politics has been a source of strength, community, and intellectual development. However, one of the problems with such politics is that it often conflates or ignores intragroup differences. Crenshaw goes on to note:

> Feminist efforts to politicize experiences of women and antiracist efforts to politicize experiences of people of color have frequently proceeded as though the issues and experiences they each detail occur on mutually exclusive terrains. Although racism and sexism readily intersect in the lives of real people, they seldom do in feminist and antiracist practices. Thus, when the practices expound identity as women or person

> of color as an either/or proposition, they relegate the identity of women of color to a location that resists telling.
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> (p. 1242)

Crenshaw points out that, frequently, the experiences of women of color are the result of the intersection of patterns of racism and sexism. As a result of this intersectionality, discourse shaped by women of color tends to get marginalized in discussions about the issues that impact women and people of color. In her discussions about intersectionality, Crenshaw notes that other characteristics such as class or sexuality also are important in shaping the experiences of women of color. Thus, her focus on intersections of gender and race is only meant to highlight the need to take account of the multiple identities when considering how to restructure the social world.

CONCLUSION AND FUTURE DIRECTION

CRT major success in changing the debate about the role of race in American jurisprudence can be seen in the comparison of the Supreme Court's justifications for school desegregation with its rationale for approving affirmative action. School desegregation and affirmative action are similar in that both involve integrating students. In *Brown*, the Court explained its rationale for striking down segregation statutes by approvingly quoting the district court opinion in the Kansas case:

> Segregation of white and colored children in public schools has a detrimental effect upon the colored children … [f]or the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. *Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children.*
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> (Brown, 1954, p. 494, emphasis added)

Thus, in *Brown*, the Court viewed black people as psychologically damaged because of segregation. As a result, white students who attended desegregated schools with blacks could expect to receive little, if any, educational benefit from a diverse classroom. Nor was there any reason to incorporate the perspectives and understandings of blacks into the education process, because those were the consequences of the detrimental effect suffered by blacks as a result of their separation from whites. However, consistent with the rationale of critical race theorists, a majority of the justices in *Grutter* concluded that obtaining a critical mass of underrepresented minorities with a history of discrimination improves the educational environment for all students. Thus, having everyone exposed to the different perspectives and points of view of minority groups with a history of discrimination is beneficial to all students.

Unfortunately, beyond affirmative action for selective higher education programs, the Supreme Court did not either fundamentally change the legal definition of race discrimination, which is still limited to actions motivated by discriminatory intent, or expand the ability to use racial classifications to ameliorate the conditions of underrepresented minorities in other contexts. Thus, as an intellectual movement, CRT succeeded beyond all realistic expectations at the time of its founding. However, its ultimate impact on American race jurisprudence has been limited.

In education, CRT remains extraordinarily useful. Ladson-Billings and Tate (1995) provided the initial introduction in their seminal piece. They used CRT tenets and research "as an analytic tool for understanding school inequality" (p. 48). Since that time, CRT analysis has been honed by numerous other authors. Each author enhanced the relevance of a CRT perspective on past, present, and future educational issues. More specifically, in the field of education, CRT can be used to question the variables chosen (or ignored) in quantitative research as well as establish counter-narratives in qualitative research.

Moving onward, educational issues like school re-segregation, the school-to-prison pipeline, and special education studies will be able to utilize CRT in their assessment of educational policy. As an example, the normalcy of racism tenet helps one understand why schools continue to become more and more segregated (with or without intent). *Brown* (1954), while politically expedient, provided few if any tools for significant social change. Without affirmative measures forcing change in student populations, the status quo would inevitably revert to a pre-desegregation era. The school-to-prison pipeline and special education labels merely facilitate the reversion. These, and myriad other educational issues, are part of the responsibility borne by the newest wave of CRT scholars who are challenged to carry the baton forward.

NOTES

1 Those attending that meeting were: Anita Allen, Taunya Banks, Derrick Bell, Kevin Brown, Paulette Caldwell (New York University), John Calmore, Kimberlé Crenshaw, Harlon Dalton, Richard Delgado, Neil Gotanda, Linda Greene, Trina Grillo, Isabelle Gunning, Angela Harris, Mari Matsuda, Teresa Miller, Philip T. Nash, Elizabeth Patterson, Stephanie Phillips, Benita Ramsey, Robert Suggs, Kendall Thomas, and Patricia Williams.

2 The Court was actually speaking about the purposes of the three Amendments added to the Constitution after the Civil War, the 13th, 14th and 15th Amendments.

3 Nixon appointed Warren E. Burger as Chief Justice (1969–86), Harry Blackmun (1970–94), Lewis F. Powell, Jr. (1972–87), and William H. Rehnquist (1972–2005). (Reagan elevated Rehnquist to Chief Justice in 1986.)

4 The four Nixon-appointed justices and Justice Potter Stewart constituted the five-person majority.

5 The equal protection clause of the Fourteenth Amendment only applies to actions by states and local governments, not the federal government. Washington v. Davis involved a claim of discrimination by the federal government. Thus, the equal protection clause did not apply. Instead, the Court addressed the issue of race discrimination as part of the due process clause of the Fifth Amendment. The following year in Village of Arlington Heights v. Metropolitan Housing Development Corp., the Court adopted the same intent test to determine unconstitutional discrimination under the equal protection clause that it articulated in Washington v. Davis.

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7 In an early article, Brown (1993) contrasted the difference between the view of public education held by the courts and that of an Afrocentric educator's.

8 For further analysis, see Harvard University, the University of Virginia, and the University of Washington's work on implicit bias at https://implicit.harvard.edu/implicit/ (last retrieved on June 20, 2012).

REFERENCES

Bakke v. Regents of the University of California, 438 U.S. 265 (1978).

Bell, D. (1980). Brown v. Board of Education and the interest convergence dilemma. *Harvard Law Review*, *93*(3), 518–533.

Bell, D. (1987). *And we are not saved: The elusive quest for racial justice*. New York: Basic Books.
Bell, D. (1992). *Faces at the bottom of the well: The permanence of racism*. New York: Basic Books.
Bell, D. (2008). *Race, racism, and American law* (6th ed.). New York: Aspen Publishers.
Brown v. Board of Education, 347 U.S. 483 (1954).
Brown, K. (1993). Do African-Americans need immersion schools? The paradoxes created by the conceptualization by law of race and public education. *Iowa Law Review*, *78*(4), 813–882.
City of Richmond v. Croson, 488 U.S. 469 (1989).
Coleman, J.S. (1975). Recent trends in school integration. *Educational Researcher*, *4*(7), 3–12.
Crenshaw, K. (1991). Mapping the margins: Intersectionality, identity politics, and violence against women of color. *Stanford Law Review*, *43*(6), 1241–1299.
Crenshaw, K.W. (2011). Twenty years of critical race theory: Looking back to move forward. *Connecticut Law Review*, *43*(5), 1253–1352.
Dalton, H.L. (1987). The clouded prism: Minority critique of the critical legal studies movement. *Harvard Civil Rights–Civil Liberties Law Review*, *22*(2), 435–447.
Delgado, R. (1995). *Rodrigo chronicles: Conversations about race in America*. New York: New York University Press.
Dudziak, M.L. (1988). Desegregation as a cold war imperative. *Stanford Law Review*, *41*(1), 61–120.
Freeman, A.D. (1978). Legitimizing racial discrimination through antidiscrimination law: A critical review of Supreme Court doctrine. *Minnesota Law Review*, *62*(6), 1049–1119.
Green v. New Kent County, 391 U.S. 430 (1968).
Griggs v. Duke Power Co., 401 U.S. 424 (1971).
Harris, C. (1993). Whiteness as property. *Harvard Law Review*, *106*(8), 1709–1791.
Ladson-Billings, G., & Tate, W.F. (1995). Toward a critical race theory of education. *Teachers College Record*, *97*, 47–68.
Lawrence, C.R., III (1987). The id, the ego, and equal protection clause: Reckoning with unconscious racism. *Stanford Law Review*, *39*(2), 317–388.
Matsuda, M.J. (1987). Looking to the bottom: Critical legal studies and reparations. *Harvard Civil Rights–Civil Liberties Law Review*, *22*, 323.
Milliken v. Bradley, 418 U.S. 717 (1974).
Plessy v. Ferguson, 163 U.S. 537 (1896).
Skiba, R.J., Eckes, S.E., & Brown, K. (2009). African American disproportionality in school discipline: The divide between best evidence and legal remedy. *New York Law School Law Review*, *54*, 1072–1104.
Slaughterhouse Cases, 86 U.36, 71 (1873).
Spann, G.A. (1990). Pure politics. *Michigan Law Review*, *88*(7), 1971–2033.
U.S. v. Carolene Products Co., 304 U.S. 144 (1942).
Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977).
Washington v. Davis, 426 U.S. 229 (1976).
Williams, P. (1987), *Alchemy of race and rights: Diary of a law professor*. Cambridge, MA: Harvard University Press.