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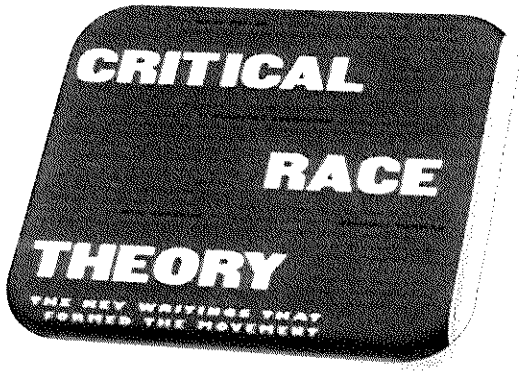

Critical Race Theory Part 1:

What is CRT?

March 9, 2023

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ON CRITICAL RACE THEORY
VICTOR RAY

INTRODUCTION

WHY CRITICAL RACE THEORY MATTERS

The law, in its majestic equality, forbids rich and poor alike to sleep under bridges, to beg in the streets, and to steal their bread.

ANATOLE FRANCE[1]

WHAT IS CRITICAL RACE THEORY?

"Not everything that is faced can be changed; but nothing can be changed until it is faced."[2] James Baldwin wrote those words to convey the intellectual's role in laying bare a nation's faults. Critical race theory is a body of scholarship that faces America's brutal racial history, recognizes the parts of that history that remain unchanged, and works toward changing the rest.

Racism is America's central political fault line. Critical race theory shows how this fault line runs through the American legal system. Critical race theory developed, in part, to explain why the monumental legal victories of

the civil rights movement—for instance, the *Brown v. Board of Education* decision outlawing state-sponsored school segregation—didn't always lead to lasting improvements in the lives of people of color in the United States.[3] By the late seventies and early eighties it was clear that a backlash to the civil rights movement was gaining traction. Several trends supported this conclusion. Schools that had been forced to open their doors to Black students in the wake of the *Brown* ruling were resegregating. This resegregation continues, with some public schools now equally or more segregated than before *Brown*.[4] The best evidence shows that discrimination against Black men in entry-level jobs hasn't decreased since the late 1980s, and emerging businesses are increasingly segregated.[5] The impact of antidiscrimination law in the workplace is also waning (or reversing) as occupational desegregation stalled in the 1980s.[6] Conservative think tanks waged an all-out war on affirmative action in higher education, characterizing policies designed to (slightly) intervene in decades of explicit exclusion from white colleges as reverse racism.[7] It might be tempting to diagnose policies like affirmative action and school desegregation as failures because racial equality is still elusive in schools and workplaces. But these policies successfully opened educational opportunities and jobs that were formerly closed to most Black Americans. Policies designed to create racial equality weren't targeted by

white hostility because they didn't work. They were targeted because they *did*.

Hoping to explain the backlash to the civil rights victories, a group of law students and legal scholars—including Kimberlé Crenshaw, Richard Delgado, Mari Matsuda, Patricia Williams, Kendall Thomas, Phillip T. Nash, and Neil Gotanda, among others—turned to the writings of Derrick Bell, a gifted lawyer who worked on landmark civil rights cases and wrote a pathbreaking casebook on race and the law.[8] Bell was the first tenured Black professor at Harvard Law School, but his considerable personal achievements never clouded his vision of collective struggle as the terrain on which individual plaudits are built. After years of protesting over Harvard Law's refusal to hire more faculty of color, Bell left, and "the School suffered a 100% reduction in its tenured minority faculty."[9]

Despite Bell's monumental contributions to the larger civil rights struggle, stagnating and reversing racial progress led him to question the ultimate efficacy of the movement's legal strategy. Bell worried that his work was contributing to what the historian Jelani Cobb called "a more durable system of segregation," as new forms of seemingly race-neutral exclusion emerged to undermine civil rights gains.[10]

Bell began to critique the intellectual underpinnings of the civil rights movement he contributed to, arguing that

structural racism was malleable, intractable, and a constitutive feature of American law. Drawing on Bell's work, and in reaction to the critical legal studies movement, these burgeoning critical race theorists critiqued existing explanations of the relationship between race and the law as inadequate to understand racial backlash and enduring racial inequality. Critical legal scholars argued that, despite its neutral pretensions, the law was a tool of the economically powerful. But critical legal scholars largely ignored how race shaped legal precedent. Critical race theorists extended this critique, showing how the law often forwarded white prerogatives. After all, members of the judiciary claimed that the law remained racially neutral while deciding what fraction of blood made one white or Black or Indian.[11] The judiciary claimed no bias while divvying up ballot access, the rights protected by suffrage, or access to citizenship. The judiciary claimed impartiality while allowing neighborhoods and cities to segregate schools and hoard resources. And courts claimed to fairly decide what evidence juries could see in discrimination cases where employees were called by racial slurs, or co-workers hung nooses on colleagues' desks. Rather than seeing the law as separate from racial power—a neutral arbiter or umpire just calling balls and strikes—these critical race theorists understood the law as a tool that *occasionally* empowered people of color but usually advanced whites' racial interests.

Since critical race theory's genesis as an insurgent intel-

lectual movement in the late 1970s, the framework has spread beyond legal scholarship to parts of the social sciences and humanities. Although the theory developed as a critique of the veneer of race neutrality in the law, critical race legal theorists developed a broad framework for thinking about race. This framework includes foundational social science concepts—that race is a social construction, racism is primarily structural, social life is made up of intersecting identities. They also developed techniques that remain more contested, such as critical race theorists' use of narratives and parables to explain the impact of racial inequality. Critical race theory builds upon ideas that were central to and often developed by Black activist scholars—borrowing and formalizing these concepts into general descriptions that were easy to apply to related fields. Many of the intellectual precursors of critical race theory also shaped related intellectual traditions. For instance, W.E.B. Du Bois, the towering intellectual and first Black Harvard PhD, is a foundational figure in the disciplines of African American studies, sociology, and history. Race shapes social life, so it makes sense that social science and humanities disciplines share basic assumptions about the impact of race and racism. Kimberlé Crenshaw, who has been credited with coining the term "critical race theory," claims the framework is a "verb" because it is a broadly adaptable attempt to explain how racism is produced and maintained.[12]

Critics have treated this intellectual cross-fertilization

as evidence of a nefarious attempt to take over classrooms. These critics misunderstand how academic exchange works, with ideas regularly crossing porous disciplinary boundaries. Many of the ideas attributed to critical race theory are in fact just plain honesty about America's long-standing structural racism. Historians who study urban development and sociologists who study contemporary patterns of segregation may both conclude that racism is a structural feature of cities manifested in unequal work locations, access to housing, or commute times, and even in where environmental toxins are most likely to show up.[13] These scholars reach these conclusions not because they are critical race theorists but because a dispassionate examination of the evidence makes such conclusions hard to ignore.

WHITE BACKLASH IS ALSO A RACIAL RECKONING[14]

Given its roots as an insurgent intellectual framework explaining racial retrenchment, critical race theory became a perfect target for contemporary racist backlash. The Black Lives Matter protests following George Floyd's murder in 2020 were the largest civil rights protests in American history, with record numbers of white Americans expressing support for Black Lives Matter.[15] The scale, demands, and impact of these protests rattled contemporary guardians of the racial status quo. Following the protests, antiracist books topped bestseller lists, sports teams dropped racist names

and mascots, and colleges and universities (once again) stated their commitments to diversity. Corporate public relations departments were not immune to these political pressures, with companies like Quaker Oats dropping the stereotypical images such as Aunt Jemima (which they had used for over a century). In the years since George Floyd was murdered, the idea that the country experienced a reckoning became almost cliché.

White backlash is also a reckoning. Historically, backlashes have attempted to roll back progress created by progressive social movements. The anti–critical race theory moral panic is part of a contemporary backlash. White parents protested physical desegregation following the civil rights movement and now some white parents are protesting a perceived slight desegregation of the curriculum in response to Black Lives Matter.

Racial ignorance is central to the current moral panic, but as a number of scholars have shown, some white Americans work hard to maintain their ignorance of racial reality.[16] In one of his many classic articles, the critical race philosopher Dr. Charles Mills asks us to "imagine an ignorance that resists. Imagine an ignorance that fights back."[17] Ignorance of America's racial history and of the causes of present-day racial inequality is a primary weapon in the current attacks on critical race theory. Former president Trump's claim that critical race theory was destroying the fabric of America, and white parents tearfully protesting a

body of scholarship that is by and large not taught in elementary schools, are ignorance fighting back.

The state legislatures outlawing the teaching of critical race theory are trying to legally mandate racial ignorance by banning discussions of structural racism. According to *Education Week*, at the time of this writing "41 states have introduced bills or taken other steps" that target the teaching of critical race theory or curtail discussions of racism and sexism in the classroom.[18] Some of the laws don't explicitly mention critical race theory, but public statements from state legislators and governors often indicate that critical race theory—and ideas that opponents conflate with critical race theory, like diversity programs and white privilege—are the target. The goal of these laws is to make talking about the structural causes of racial inequality more difficult. The impact of these laws is already being felt, as there are reports of classes being canceled, conservative groups filing freedom of information requests for syllabi, increased targeted harassment of professors, and a general chilling effect among scholars who teach about race and ethnicity.

A number of bitter ironies are lost on those attacking critical race theory. First, the legislation spawned by this moral panic attempts to outlaw discussions of racism that make some white Americans uncomfortable. Outlawing teaching about racial inequality ironically confirms critical race theory's central claim that aspects of American law are

entwined with racism. Second, critical race theorists analyze dog whistles—racially coded language like Ronald Reagan's infamous "welfare queen"—that emerged to signal racial animus once explicit slurs became taboo. The moral panic has, in some quarters, turned "critical race theory" itself into a dog whistle that stands in for a host of alleged pathologies associated with people of color. Third, many critics who claim that critical race theory is "tear[ing] apart a national fabric" are conceding the point that racism is central to American history.[19] To the extent that racism is woven into the American fabric, this is true, as critical race theory aims to get it out. Critical race theory doesn't want to destroy America, but it does want to squarely reckon with the way American racism has destroyed lives.

Leading critics of critical race theory are operating in bad faith. Bad faith is hard to intuit, because sincerely held political differences can invoke strong emotions and resolving conflict often requires trust in an opponent's honesty. But the leading promoter of the anti–critical race theory moral panic, Christopher Rufo, explained the bad faith of the strategy himself. Rufo is a failed candidate for Seattle City Council and a former employee of the Discovery Institute (a group that promotes intelligent design in schools as an alternative to evolutionary theory) who has been credited with taking the moral panic mainstream.[20] According to *The Washington Post*, Rufo took to Twitter and announced the plan:

> We have successfully frozen their brand—"critical race theory"—into the public conversation and are steadily driving up negative perceptions. We will eventually turn it toxic, as we put all of the various cultural insanities under that brand category. . . . The goal is to have the public read something crazy in the newspaper and immediately think "critical race theory." We have decodified the term and will recodify it to annex the entire range of cultural constructions that are unpopular with Americans.[21]

The goal here isn't to inspire reflection or clarify the causes of racial inequality. Rather, by conflating a host of ideas conservative activists don't like—diversity, white privilege, antiracism—with critical race theory, they hope to induce an almost Pavlovian rejection of thought and replace it with anger to inspire the conservative base.

Somewhat paradoxically, part of taking these attacks seriously means not attempting to directly refute or debunk many of the lies about critical race theory spread by bad-faith actors. The history of prior racist movements is instructive here. According to Linda Gordon, during the second rise of the Ku Klux Klan in the 1920s, some in the media thought that exposing the Klan would help hobble the movement. Accordingly, the New York *World* published a national exposé of the Klan. Of course, many found the Klan repulsive. Nonetheless, engagement from the mainstream press *increased* Klan membership as their ideas were spread and seemingly legitimated.[22] More recently, mainstream publications like *The New York Times* and left-of-center magazines like *Mother Jones* refused to learn from this history, interviewing and profiling media-savvy members of the so-called "alt-right," and in the process helping to mainstream their ideology.[23] Movements opposed to racial equality recognize that publicity—regardless of the truth of the claims—can potentially bring them converts. Purveyors of the current moral panic around critical race theory aren't concerned with accurately representing scholarly claims—they want engagement that confers public legitimacy and allows them to further muddy the waters about the causes of racial inequality. This book is not an act of debunking, and it doesn't give bad-faith critics the attention and legitimacy they desperately crave but don't deserve.

CRITICAL RACE THEORY SHOWS HOW RACE HAS BEEN FOUNDATIONAL TO THE LAW

Racial slavery shaped America's Constitution, and the nation's early democratic pretensions belie the reality that the republic was a slaveocracy.[24] Democracy for white men was premised, in part, on Black enslavement. The Constitution's infamous three-fifths compromise added a proportion of Southern states' enslaved populations (who were not considered citizens and could not vote) to the enslavers'

national political power. This compromise over Black lives paid immediate political dividends, with twelve of the nation's first eighteen presidents holding fellow humans as their property.[25] Early presidents recognized and worried about the destabilizing role of racial conflict. In his *Notes on the State of Virginia*, which was widely read in early U.S. history, Thomas Jefferson claimed Black people were unassimilable. He thought that the fledgling nation would likely be riven by a race war if Black people weren't deported "beyond the reach of mixture." Before becoming the Great Emancipator, Abraham Lincoln echoed Jefferson, and fantasized that sending Black Americans to Africa would help solve at least one of the country's race problems.[26]

Racism also shapes America's immigration laws. America's first immigration law, the 1790 Naturalization Act, limited citizenship to "free white persons." Just perusing the names of subsequent immigration laws, such as the Chinese Exclusion Act or the Asiatic Barred Zone Act, one is struck by the brazenly racial terminology, relics from a time before lawmakers were compelled to cloak their exclusionary goals. Instead, modern anti-immigration policy uses plausibly deniable language about cultural or linguistic differences.

Eugenicist thought heavily influenced immigration policy, most notably in the Immigration Act of 1924, which created "a hierarchy of desirability" for Europeans hoping to move to the United States.[27] The eugenics movement,

which feared "racial degeneracy" and "mongrelization" if the national stock was diluted by "undesirable" immigrants, suborned science and policy to their goals of racial purity. Although eugenics is now considered a pseudoscience, the movement was helmed by esteemed scientists of the time. These researchers claimed the mantle of objectivity while using their credentials and the imprimatur of the world's top universities to launder scientific racism.[28] The 1924 law drew on eugenics, making Asians ineligible for citizenship. The law also created strict national-origin quotas, setting a specific cap on immigrants from each country. Lawmakers based these quotas upon the percentage of foreign-born residents in the United States in the 1890 census, not the 1910 census. Because it used the 1890 census data, the law excluded more people whom legislators considered undesirable.[29]

Although the 1924 Immigration Act studiously avoided using the word "race," the law's intent was clear to observers and imitators. In *Mein Kampf*, Hitler claimed that the United States' race-based immigration policy was superior to Germany's. Hitler's admiration for American race law was actualized in the Nuremberg Laws, which drew on American jurisprudence to define who counted as Jewish.[30] In a kind of geopolitical eugenic synergy, Jews fleeing Nazi Germany's application of eugenic laws were stymied by America's immigration exclusions when the *St. Louis*, a ship carrying nine hundred refugees, was turned away.[31]

The immigration quotas of 1924 were overturned by the Immigration and Nationality Act of 1965. Yet the politics that championed racial exclusion haven't disappeared. Jeff Sessions, who served as President Trump's first attorney general and a longtime Alabama senator, praised the 1924 Immigration Act as model legislation to which the nation should return.[32]

America's major political realignments have also pivoted on the role of race in the polity.[33] Following the Civil War, the period known as Reconstruction saw a flowering of political progress, with Black representatives elected to Southern legislatures, the extension of voting rights to Black men, and the growth of Black political and social organizations. The Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution were designed to protect Black rights: outlawing slavery, granting birthright citizenship and equal protection of the law, and protecting Black men's suffrage, respectively. W.E.B. Du Bois lauded the period of Reconstruction as a "brief moment in the sun" for Black Americans, and the historian Eric Foner went so far as to call the Reconstruction amendments a "Second Founding" that reshaped the nation by writing Black people's full citizenship into the Constitution.[34] But that moment in the sun was indeed brief, as the shade of Redemption fell across the South in 1877, just twelve years after the end of the Civil War. White Northern and Southern politicians again sacrificed Black social and political rights for white

political unity. A bargain over the contested 1876 election handed victory to the Republican Rutherford B. Hayes in exchange for the withdrawal of Northern troops from the occupied South.[35]

Redemption facilitated nearly a century of systematic white supremacist violence. Jim Crow was a system of total social control designed to reinforce Black subjugation through nearly every aspect of daily life. Segregation ensured a ritual obedience reinforced through acts both big and small. Drinking fountains and bathrooms were separated. Courtrooms divided Bibles so white and Black oaths didn't mingle. And to ensure whites' shoes wouldn't step on Black footprints, railroads segregated boarding stairs.[36] Black Americans' constitutional rights were (once again) stripped, often through the selective application of allegedly race-neutral laws such as poll taxes and literacy tests. Black people deviating from these intricate Jim Crow strictures could be murdered, and their killers could be relatively comfortable in their impunity. Vigilante terrorism enforced the elaborate system of social control—night rides, the burning of Black homes and businesses, beatings, and lynchings. This terrorism was sometimes tacitly, and sometimes openly, supported by the state.

Civil rights movement activists challenged the murderous regime of Jim Crow with audacity, bravery, and the moral force of nonviolence. And the activists won, overturning decades of Jim Crow by creatively undermining

the logic of white supremacy. Victory was enshrined in the Civil Rights Act, the Fair Housing Act, and the Voting Rights Act, laws that attempted to guarantee rights that were, in some cases, *already granted* by the Reconstruction amendments or prior civil rights acts. That is, white lawmakers had often undermined, ignored, or found elaborate workarounds when white supremacist goals conflicted with the Constitution.

This brief historical sketch isn't meant to be comprehensive. But it should make it clear that racism has been an always-contested feature of American law and policy. Racism was by no means an unfortunate deviation from high-minded ideals, an unfortunate quirk, an aberration, or a mistake. Racism is a basic organizing principle in America's political history and part of a larger system of white supremacy. For much of that history, the upholding of racist ideals was treated by some legal practitioners as obvious, natural, normal, and unbiased. Just as some Americans opposed the abolition of slavery and the Reconstruction amendments' extension of Black rights, others have never stopped fighting against the gains of the civil rights movement. Given the centrality of race to America's founding documents and political history, it is no surprise that ideas about race (and racism) would also shape the subsequent path of American law.

FIGHTING AGAINST RACISM IS *ALSO* CENTRAL TO AMERICAN HISTORY

America's racial history is not simply a story of domination. At each point along this historical trajectory, Black political thinkers (and their antiracist allies) consistently refused the narcotic mythology of America's racial innocence and steady progress. The historian Robin D. G. Kelley calls the work these thinkers produced "freedom dreams"—a body of emancipatory Black thought that may be America's most authentic political philosophy.[37] These freedom dreamers include writers, poets, abolitionists, and activists who are simultaneously the deepest believers in the possibility of human freedom and the nation's most incisive (and realistic) critics.

Freedom dreams have always felt threatening to the beneficiaries of structural racism. Contemporary attacks on critical race theory are part of a long history that sees antiracist thought generally, and Black American political thought specifically, as dangerous and un-American. Prior to the Civil War, the state of Georgia was so incensed by William Lloyd Garrison's antislavery activism that it offered a bounty for his capture and hoped to put him on trial for his abolitionist agitating. During Jim Crow, anti-lynching activists such as the pioneering journalist Ida B. Wells and the NAACP's executive secretary Walter White risked their lives to report on the brutal ritualized murders of Black

Americans.[38] At the height of the civil rights movement, a coalition of white and Black students protesting segregation, known as Freedom Riders, were firebombed and beaten for audaciously challenging segregation by sitting together on buses. And America's greatest prophet of nonviolence, Dr. Martin Luther King Jr., was repeatedly attacked, arrested, accused of subversion, surveilled, encouraged to commit suicide by the FBI, and ultimately murdered for challenging America's racial divisions.

In each of these cases, opponents of racial equality sought not simply to destroy antiracist messengers but to make understanding and fighting against racism unthinkable. Beyond their activism, Dr. King, Garrison, and Wells developed a written body of antiracist thought that was threatening to white power. Opponents (who apparently feared intellectual honesty) misrepresented Black thinkers and their allies by developing conspiracy theories about their motivations and using the law to silence them (for instance, by arresting Dr. King). Critical race theory builds on the work of these activist-thinkers. And contemporary attacks on critical race theory are updated versions of prior campaigns attempting to silence antiracist thought. The harms attributed to critical race theory (disturbing white children, undermining the nation) are truly astounding (and defy any sense of reality). Critical race theory's opponents have revived the misrepresentations, conspiracies,

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and falsehoods used to discredit prior generations of scholars and activists.

Attacks have greeted critical race theory throughout its history. Whenever powerful people feel the need to refute the premise that racism is central to American life (typically because current events threaten to confirm that premise), critical race theory jumps from the confines of academic journals and into the news. For instance, conservatives attempted to paint President Obama as a radical by circulating a video where he introduced Professor Bell when he was speaking at Harvard.[39] These attacks are always framed as a response to the allegedly dangerous ideas put forward by critical race theory. But in truth, there has never been a structural explanation of racial inequality that was pleasing to guardians of the racial status quo.

In her recent book *The Sum of Us,* Heather McGhee argues that the zero-sum battles over race and racism that have shaped American history hurt white people, too. McGhee uses the evocative historical metaphor of draining public swimming pools following the outlawing of segregated public accommodations. Rather than share their pools with Black Americans, white cities and towns often chose to close the pools or pave them over. To deny Black Americans access to leisure and fun, they destroyed their own leisure and fun, losing public works, spaces to socialize, and places to play.[40] Like a kid who flips the checker-

board when they lose a king, faced with a choice between playing by the rules and sharing, or destroying the game, policy makers have often chosen the latter.

Caveats

The people and organizations who weaponized critical race theory are engaged in a very different project than the one you will find in this book. As Adam Serwer has written about the controversy over the 1619 Project (which is often conflated with critical race theory), the debate isn't over facts: the debate is over who has the power to define the past in hopes of shaping the future.[41]

No book of this size could possibly cover the full body of scholarship on critical race theory. In my work, I say I apply "ideas from critical race theory to classic sociological questions." I phrase it this way because critical race theory didn't originate in the social sciences (although, as I show, we sociological race scholars share some intellectual precursors and central ideas), and I am not a legal scholar. This book focuses on empirical research in the social sciences to highlight the key tenets of critical race theory. Each chapter explains a central concept from critical race theory, such as the idea that races are social—not biological—creations (chapter 1), that racism is endemic and structural (chapter 2), and that whiteness is a form of property (chapter 6). I take this approach for two reasons. First, critical race theory started in the law but has been interdisciplinary

from the outset, drawing on history and the social sciences. Second, this book is one answer to several requests from critical race theorists such as Kimberlé Crenshaw to expand beyond the law.[42] Scholars such as Devon Carbado and Daria Roithmayr ask for ideas from critical race theory to be measured against social science findings that can allow theorists to confirm, refute, or revise their thinking.[43] This book shows the usefulness of this approach, arguing that critical race theory matters because it provides a better explanation for the resilience of racial inequality than individualist theory describing racism as a negative personal quirk.[44]

Although the scholarship claiming some relation to critical race theory is broad, practitioners have intense disputes over disciplinary, methodological, and epistemological issues. For instance, some think hypotheses derived from critical race theory shouldn't be tested, while others (like myself) think they should.[45] And the continued utility of concepts such as intersectionality and identity politics is debated among academics and the general public. Scholars recognize that knowledge creation is a communal project that proceeds through attempts to resolve these disagreements, in hopes of producing a better shared understanding of the world. Despite these disagreements, critical race theorists recognize that racism is a structural feature of American society, and they share a commitment to racial equality.

CRITICAL RACE THEORY AN INTRODUCTION

CHAPTER II

Hallmark Critical Race Theory Themes

RICHARD DELGADO & JEAN STEFANCIC

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

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

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

Will the lives of poor people like him improve very much the next day? Perhaps not. Passersby may be somewhat kinder, may smile at them more often, but if something inherent in the nature of our capitalist system ineluctably produces poverty and class segregation, that system will continue to create and chew up victims, irrespective of our attitudes toward them. Individual street people may feel better, but they will still be street people. And the free-enterprise system, which is built on the idea of winners and losers, will continue to produce new ones every day.

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

Would life improve very much for people of color?

A. Interest Convergence, Material Determinism, and Racial Realism

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

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

A contrasting school—the "realists" or economic determinists—holds that though attitudes and words are important, racism is much more than a collection of unfavorable impressions of members of other groups. For realists, racism is a means by which society allocates privilege and status. Racial hierarchies determine who gets tangible benefits, including the best jobs, the best schools, and invitations to parties in people's homes. Members of this school of thought point out that antiblack prejudice sprang up with slavery and capitalists' need for labor. Before then, educated Europeans held a generally positive attitude toward Africans, recognizing that African civilizations were highly advanced with vast libraries and centers of learning. Indeed, North Africans pioneered mathematics, medicine, and astronomy long before Europeans had much knowledge of these disciplines.

Materialists point out that conquering nations universally demonize their subjects to feel better about exploiting them, so that, for example, planters and ranchers in Texas and the Southwest circulated notions of Mexican

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

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

In 1954, however, the Supreme Court unexpectedly gave them everything they wanted. Why just then? Bell hypothesized that world and domestic considerations—not moral qualms over blacks' plight—precipitated the pathbreaking decision. By 1954 the country had ended the Korean War; the Second World War was not long past. In both wars, African American soldiers had performed valiantly in the service of democracy. Many of them returned to the United States, having experienced for the first time in their lives a setting in which cooperation and survival took precedence over racism. They were unlikely to return willingly to regimes of menial labor and social vilification. For the first time in years, the possibility of mass domestic unrest loomed.

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

Bell's article evoked outrage and accusations of cynicism. Yet, years later, the legal historian Mary Dudziak carried out extensive archival research in the files of the U.S. Department of State and the U.S. Department of Justice. Analyzing foreign press reports, as well as letters from U.S. ambassadors abroad, she showed that Bell's intuition was largely correct. When the Justice Department intervened

on the side of the NAACP for the first time in a major school-desegregation case, it was responding to a flood of secret cables and memos outlining the United States' interest in improving its image in the eyes of the Third World.

Since Bell first propounded interest convergence, critical race theorists have applied it to understand many of the twists and turns of minority legal history, including that of Latinos. (See, e.g., Richard Delgado, Rodrigo's Roundelay: Hernandez v. Texas and the Interest-Convergence Dilemma, 41 Harv. C.R.-C.L. L. Rev. 23 [2006].) Others have sought to apply it to the current world situation as the United States struggles to strengthen the hand of moderate Islam vis-à-vis its more fundamentalist faction.

> American leadership in the 21st century. . . . means a wise application of military power, and rallying the world behind causes that are right. . . . That's why I will keep working to shut down the prison at Guantanamo. It is expensive, unnecessary, and only serves as a recruitment brochure for our enemies. . . .
>
> The world respects us not just for our arsenal; it respects us for our diversity, and our openness, and the way we respect every faith. . . .
>
> His Holiness, Pope Francis, told this body from the very spot that I'm standing on tonight that "to imitate the hatred and violence of tyrants and murderers is the best way to take their place." When politicians insult Muslims, whether abroad or our fellow citizens, when a mosque is vandalized, or a kid is called names . . . that's . . . just wrong. It diminishes us in the eyes of the world. It makes it harder to achieve our goals. It betrays who we are as a country.
>
> *President Barack Obama, State of the Union address, 2016*

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B. Revisionist History

Derrick Bell's analysis of *Brown* illustrates a second signature CRT theme. Revisionist history reexamines America's historical record, replacing comforting majoritarian interpretations of events with ones that square more accurately with minorities' experiences. It also offers evidence, sometimes suppressed, in that very record, to support those new interpretations. Revisionist historians often strive to unearth little-known chapters of racial struggle, sometimes in ways that reinforce current reform efforts. (See, e.g., *Lobato v. Taylor* and *Mabo v. Queensland*, two land-reform cases cited in chapter 5.) Revisionism is often materialist in thrust, holding that to understand the zigs and zags of black, Latino, and Asian fortunes, one must look to matters like profit, labor supply, international relations, and the interest of elite whites. For the realists, attitudes follow, explain, and rationalize what is taking place in the material sector.

The difference between the materialists and the idealists is no minor matter. It shapes strategy on decisions of how and where to invest one's energies. If the materialists are right, one needs to change the physical circumstances of minorities' lives before racism will abate. One takes seriously things like unions, immigration quotas, the prison-industrial complex, and the loss of manufacturing and service jobs to outsourcing. If one is an idealist, campus speech codes, tort remedies for racist speech, media stereotypes, diversity seminars, healing circles, Academy Awards, and increasing the representation of black, brown, and

Asian actors on television shows will be high on one's list of priorities. A middle ground would see both forces, material and cultural, operating together so that race reformers working in either area contribute to a broad program of racial reform.

> Racial insults are in no way comparable to statements such as, "You are a God damned . . . liar," which [a standard guide] gives as an example of a "mere insult." Racial insults are different qualitatively because they conjure up the entire history of racial discrimination in this country.
>
> *Taylor v. Metzger, 706 A. 2d 685, 695 (N.J. 1998), citing Richard Delgado, Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling, 17 Harv. C.R.-C.L. L. Rev. 133, 157 (1982)*

C. *Critique of Liberalism*

As mentioned earlier, critical race scholars are discontented with liberalism as a framework for addressing America's racial problems. Many liberals believe in color blindness and neutral principles of constitutional law. They believe in equality, especially equal treatment for all persons, regardless of their different histories or current situations. Some even managed to convince themselves that with the election of Barack Obama, we arrived at a postracial stage of social development.

> The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth, and in power. . . . But in view of the constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful.
>
> *Justice John Harlan, dissenting, in Plessy v. Ferguson, 163 U.S. 537, 545 (1896)*

Color blindness can be admirable, as when a governmental decision maker refuses to give in to local prejudices. But it can be perverse, for example, when it stands in the way of taking account of difference in order to help people in need. An extreme version of color blindness, seen in certain Supreme Court opinions today, holds that it is wrong for the law to take any note of race, even to remedy a historical wrong. Critical race theorists (or "crits," as they are sometimes called) hold that color blindness of the latter forms will allow us to redress only extremely egregious racial harms, ones that everyone would notice and condemn. But if racism is embedded in our thought processes and social structures as deeply as many crits believe, then the "ordinary business" of society—the routines, practices, and institutions that we rely on to do the world's work—will keep minorities in subordinate positions. Only aggressive, color-conscious efforts to change the way things are will do much to ameliorate misery. As an example of one such strategy, one critical race scholar proposed that society "look to the bottom" in judging new laws. If they would not relieve the distress of the poorest group—or, worse, if they compound it—we should reject

them. Although color blindness seems firmly entrenched in the judiciary, a few judges have made exceptions in unusual circumstances.

> We are mindful that the Supreme Court has rejected the "role model" argument for reverse discrimination. . . . The argument for the black lieutenant is not of that character. We doubt that many inmates of boot camps aspire to become correctional officers, though doubtless some do. . . . The black lieutenant is needed because the black inmates are believed unlikely to play the correctional game of brutal drill sergeant and brutalized recruit unless there are some blacks in authority in the camp. This is not just speculation, but is backed up by expert evidence that the plaintiffs did not rebut. The defendants' experts . . . did not rely on generalities about racial balance or diversity; did not, for that matter, defend a goal of racial balance. They opined that the boot camp in Greene County would not succeed in its mission of pacification and reformation with as white a staff as it would have had if a black male had not been appointed to one of the lieutenant slots. For then a security staff less than 6 percent black (4 out of 71), with no male black supervisor, would be administering a program for a prison population almost 70 percent black. . . .
>
> We hold . . . that . . . the preference that the administration of the Greene County boot camp gave a black male applicant for a lieutenant's job on the ground of his race was not unconstitutional.
>
> *Judge Richard Posner, Wittmer v. Peters, 87 F.3d 916, 919–20 (7th Cir. 1996)*

Crits are suspicious of another liberal mainstay, namely, rights. Particularly some of the older, more radical CRT scholars with roots in racial realism and an economic view

of history believe that moral and legal rights are apt to do the right holder much less good than we like to think. In our system, rights are almost always procedural (for example, to a fair process) rather than substantive (for example, to food, housing, or education). Think how that system applauds affording everyone equality of opportunity but resists programs that assure equality of results, such as affirmative action at an elite college or university or efforts to equalize public school funding among districts in a region. Moreover, rights are almost always cut back when they conflict with the interests of the powerful. For example, hate speech, which targets mainly minorities, gays, lesbians, and other outsiders, receives legal protection, while speech that offends the interests of empowered groups finds a ready exception in First Amendment law. Think, for example, of speech that insults a judge or other authority figure, that defames a wealthy and well-regarded person, that divulges a government secret, or that deceptively advertises products, thus cheating a large class of middle-income consumers. Think of speech that violates the copyright of a powerful publishing house or famous author.

Moreover, rights are said to be alienating. They separate people from each other—"stay away, I've got my rights"—rather than encouraging them to form close, respectful communities. And with civil rights, lower courts have found it easy to narrow or distinguish the broad, ringing landmark decision like *Brown v. Board of Education*. The group that supposedly benefits always greets cases like *Brown* with great celebration. But after the singing and

dancing die down, the breakthrough is quietly cut back by narrow interpretation, administrative obstruction, or delay. In the end, the minority group is left little better than it was before, if not worse. Its friends, the liberals, believing the problem has been solved, go on to a different campaign, such as saving the whales, while its adversaries, the conservatives, furious that the Supreme Court has given way once again to undeserving minorities, step up their resistance. (See Gerald N. Rosenberg, The Hollow Hope: Can Courts Bring About Social Change? [2d ed. 2008].)

Lest the reader think that the crits are too hard on well-meaning liberals, bear in mind that in recent years the movement has softened somewhat. When it sprang up in the 1970s, complacent, backsliding liberalism represented the principal impediment to racial progress. Today that obstacle has been replaced by rampant, in-your-face conservatism that co-opts Martin Luther King, Jr.'s language; finds little use for welfare, affirmative action, or other programs vital to the poor and minorities; and wants to militarize the border and make everyone speak English when businesses are crying for workers with foreign-language proficiency.

Other conservatives have seized on President Barack Obama's election to declare that America is now a post-racial society, so that it is time for blacks and other minorities to stop complaining and roll up their sleeves like anyone else. Welfare payments, they say, merely create dependency and idleness. Because most critical race theorists believe things are more complicated than that, many of them have stopped focusing on liberalism and its

ills and have begun to address the conservative tide. And a determined group maintains that rights are not a snare and a delusion; rather, they can bring genuine gains, while the struggle to obtain them unifies the group in a sense of common venture.

D. Structural Determinism

Everyone has heard the story about Eskimo languages, some of which supposedly contain many words for different kinds of snow. Imagine the opposite predicament—a society that has only one word (say, "racism") for a phenomenon that is much more complex than that, for example, biological racism; intentional racism; unconscious racism; microaggressions; nativism; institutional racism; racism tinged with homophobia or sexism; racism that takes the form of indifference, coldness, or implicit associations; and white privilege, reserving favors, smiles, kindness, the best stories, one's most charming side, and invitations to real intimacy for one's own kind or class.

Or imagine a painter raised by parents and preschool teachers who teach him that the world contains only three colors, red, blue, and yellow; or a would-be writer who is raised with an artificially low vocabulary of three hundred words. Children raised in smoggy Mexico City are said to paint pictures with a brownish-yellow, never blue, sky. These examples point out the concept that lies at the heart of structural determinism, the idea that our system, by reason of its structure and vocabulary, is ill equipped to redress certain types of wrong. Structural determinism, a powerful notion that engages both the idealistic and the

materialistic strands of critical race theory, takes a number of forms. Consider the following four. (A fifth, the black-white binary, comes in for discussion in chapter 5.)

1. Tools of Thought and the Dilemma of Law Reform

Traditional legal research tools, found in standard law libraries, rely on a series of headnotes, index numbers, and other categories that lawyers use to find precedent. (With computerization, this reliance is somewhat less acute than it was formerly, but the problem still persists.) Suppose that no case is on point because the lawyer faces a problem of first impression—the first of its kind—requiring legal innovation. In such situations, commercial research tools will lead the lawyer to dead ends—to solutions that have not worked. What the situation calls for is innovation, not the application of some preexisting rule or category. Even when a new idea, such as jury nullification, was beginning to catch on, the legal indexers who compiled the reference books and indexing tools may have failed to realize its significance. When Sir William Blackstone's *Commentaries on the Laws of England* laid down the basic structure of liberal/capitalist thought, this served as a template for future generations of lawyers, so that legal change thereafter came slowly. Once the structure of law and legal categories takes form, it replicates itself much as, in the world of biology, DNA enables organisms to replicate. In some respects, the predicament is the old one about the chicken and the egg. It is hard to think about something that has no name, and it is difficult to name something unless one's

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interpretive community has begun talking and thinking about it.

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

2. The Empathic Fallacy

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

One difficulty with this approach is that it may be physically dangerous to talk back. Much hate speech is uttered in several-on-one situations, where talking back would be foolhardy. At other times, it is delivered in anonymous or cowardly fashion, such as graffiti scrawled on the bulletin board of a minority-student group or an unsigned note in the mailbox of a student of color. In these instances, more speech is, of course, impossible.

But a more basic problem is that much hate speech is simply not perceived as such at the time. The history of racial depiction shows that our society has blithely consumed a shocking parade of Sambos, coons, sneaky Japanese, exotic Orientals, and indolent, napping Mexicans—images that society perceived at the time as amusing, cute, or, worse yet, true. How can one talk back to messages, scripts, and stereotypes that are embedded in the minds of one's fellow citizens and, indeed, the national psyche? Trying to do so makes one come across as humorless or touchy. The idea that one can use words to undo the meanings that others attach to these very same words is to commit the empathic fallacy—the belief that one can change a narrative by merely offering another, better one—that the reader's or listener's empathy will quickly and reliably take over. (See Richard Delgado & Jean Stefancic, Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?, 77 Cornell L. Rev. 1258 [1992].)

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

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

> One of the reasons for avoiding excessive sentences is that the empathy required of . . . citizens in a democracy . . . is stunted when parents are away in prison. "[W]ithout regular comforting, physical contact and sensory stimulation from birth, the biological capacity for sociality—the precondition for empathy and conscience—cannot develop . . . and [e]mpathy requires the nurturing required by early social relationships." Breaking up families by sending fathers and mothers to prison for unnecessarily long terms sows the seeds of problems for the next generation, particularly when, as is sometimes the case, the ex-prisoner becomes a "monster."
>
> *Jack B. Weinstein, Senior Judge, U.S. District Court, Eastern District of New York, Adjudicative Justice in a Diverse Mass Society, 8 J. L. & Pol'y 385, 410 (2000)*

Classroom Exercise

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

that governs least. You then offer a counterexample to one of the other person's propositions, for example, a case of governmental intervention that worked.

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

3. Serving Two Masters

Derrick Bell has pointed out a third structure that impedes reform, this time in law. To litigate a law-reform case, the lawyer needs a flesh-and-blood client. One might wish to establish the right of poor consumers to rescind a sales contract or to challenge the legal fiction that a school district is desegregated if the authorities have arranged that the makeup of certain schools is half black and half Chicano (as some of them did in the wake of *Brown v. Board of Education*).

Suppose, however, that the client and his or her community do not want the very same remedy that the lawyer does. The lawyer, who may represent a civil rights or public interest organization, may want a sweeping decree that names a new evil and declares it contrary to constitutional principles. He or she may be willing to gamble and risk all. The client, however, may want something different—better schools or more money for the ones in his or her neighborhood. He or she may want bilingual education or more black teachers, instead of classes taught by prize-winning

white teachers with Ph.D.s. A lawyer representing a poor client may want to litigate the right to a welfare hearing, while the client may be more interested in a new pair of Sunday shoes for his or her child. These conflicts, which are ubiquitous in law-reform situations, haunt the lawyer pursuing social change and seem inherent in our system of legal remedies. Which master should the lawyer serve? Do similar conflicts arise in the political realm? For example, does a black president or senator, by the very nature of his or her role, have to downplay his or her blackness in fulfilling obligations to the country as a whole?

Classroom Exercise: Who Should Call the Shots?

Professor Hamar Aziz is a physicist of Egyptian descent who teaches at a major research university. Aziz recently attempted to fly to an international conference in Geneva but was turned aside at the local airport by TSA officials who told him that his name was on a no-fly list. Aziz, who missed an opportunity to present his latest paper, is furious and wants you to help redress the harm he has suffered and make sure that it does not happen again to him. In short, he wants the government to take his name off the list so that he can fly once again. Your research shows that the no-fly list is full of errors and results in the grounding of many innocent passengers, some of whom, like Aziz, merely happen to have the same name as someone who has attracted the attention of the authorities. Aziz is the perfect candidate to challenge the list, since he has a sparkling record, is a former Marine officer and Boy Scout

troop leader, and was an alternate to the U.S. Olympic team in the long jump. Aziz, however, is mainly interested in getting himself off the list. Should you take his case?

4. Race Remedies Law as a Homeostatic Device

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

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

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

Monteiro v. Tempe Union High School District, 158 F.3d 1022, 1039 (9th Cir. 1998) (Before Monteiro, a nearly unbroken string of decisions rejected relief for minority plaintiffs subjected to racist slurs and struck down campus speech codes.)

COMMENT

BROWN v. BOARD OF EDUCATION AND THE INTEREST-CONVERGENCE DILEMMA

*Derrick A. Bell, Jr.**

After Brown v. Board of Education *was decided, Professor Herbert Wechsler questioned whether the Supreme Court's decision could be justified on the basis of "neutral" principles. To him* Brown *arbitrarily traded the rights of whites not to associate with blacks in favor of the rights of blacks to associate with whites. In this Comment, Prof. Derrick Bell suggests that no conflict of interest actually existed; for a brief period, the interests of the races converged to make the* Brown *decision inevitable. More recent Supreme Court decisions, however, suggest to Professor Bell a growing divergence of interests that makes integration less feasible. He suggests the interest of blacks in quality education might now be better served by concentration on improving the quality of existing schools, whether desegregated or all-black.*

IN 1954, the Supreme Court handed down the landmark decision *Brown v. Board of Education*,[1] in which the Court ordered the end of state-mandated racial segregation of public schools. Now, more than twenty-five years after that dramatic decision, it is clear that *Brown* will not be forgotten. It has triggered a revolution in civil rights law and in the political leverage available to blacks in and out of court. As Judge Robert L. Carter put it, *Brown* transformed blacks from beggars pleading for decent treatment to citizens demanding equal treatment under the law as their constitutionally recognized right.[2]

Yet today, most black children attend public schools that are both racially isolated and inferior.[3] Demographic patterns, white flight, and the inability of the courts to effect the necessary degree of social reform render further progress in implementing *Brown* almost impossible. The late Professor Alexander Bickel warned that *Brown* would not be overturned but, for a whole array of reasons, "may be headed for — dread word — irrelevance."[4] Bickel's prediction is premature in law where the *Brown* decision remains viable, but it may be an accurate assessment of its current practical value to millions of black children who have not experienced the decision's promise of equal educational opportunity.

Shortly after *Brown*, Professor Herbert Wechsler rendered a sharp and nagging criticism of the decision.[5] Though he welcomed its result, he criticized its lack of a principled basis. Professor Wechsler's views have since been persuasively refuted,[6] yet within them lie ideas which may help to explain the disappointment of *Brown* and what can be done to renew its promise.

In this Comment, I plan to take a new look at Wechsler within the context of the subsequent desegregation campaign. By doing so, I hope to offer an explanation of why school desegregation has in large part failed and what can be done to bring about change.

I. PROFESSOR WECHSLER'S SEARCH FOR NEUTRAL PRINCIPLES IN BROWN

The year was 1959, five years after the Supreme Court's decision in *Brown*. If there was anything the hard-pressed partisans of the case did not need, it was more criticism of a decision ignored by the President, condemned by much of Congress, and resisted wherever it was sought to be enforced.[7] Certainly, civil rights adherents did not welcome adding to the growing list of critics the name of Professor Herbert Wechsler, an outstanding lawyer, a frequent advocate for civil rights causes, and a scholar of prestige and influence.[8] Nevertheless,

* Professor of Law, Harvard University. This Comment is a later version of a paper presented at a Harvard Law School symposium held in October 1978, to commemorate the 25th anniversary of Brown v. Board of Educ., 347 U.S. 483 (1954). I wish to thank Professors Owen Fiss, Karl Klare, Charles Lawrence, and David Shapiro for their advice and encouragement on this piece.

[1] 347 U.S. 483 (1954).

[2] Carter, *The Warren Court and Desegregation*, in RACE, RACISM AND AMERICAN LAW 456–61 (D. Bell ed. 1973).

[3] *See* Bell, Book Review, 92 HARV. L. REV. 1826, 1826 n.6 (1979). *See also* C. JENCKS, INEQUALITY 27–28 (1972).

[4] A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 151 (1970).

[5] Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). The lecture was later published in a collection of selected essays. H. WECHSLER, PRINCIPLES, POLITICS, AND FUNDAMENTAL LAW 3 (1961).

[6] *See, e.g.*, Black, *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 (1960); Heyman, *The Chief Justice, Racial Segregation, and the Friendly Critics*, 49 CALIF. L. REV. 104 (1961); Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1 (1959).

[7] The legal campaign that culminated in the *Brown* decision is discussed in great depth in R. KLUGER, SIMPLE JUSTICE (1976). The subsequent 15 years is reviewed in S. WASBY, A. D'AMATO & R. METRAILER, DESEGREGATION FROM BROWN TO ALEXANDER (1977).

[8] Professor Wechsler is the Harlan Fiske Stone Professor of Constitutional Law Emeritus at the Columbia University Law School. His work is reviewed in 78 COLUM. L. REV. 969 (1978) (issue dedicated in Professor Wechsler's honor upon his retirement).

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Professor Wechsler chose that time and an invitation to deliver Harvard Law School's Oliver Wendell Holmes Lecture as the occasion to raise new questions about the legal appropriateness and principled shortcomings of *Brown* and several other major civil rights decisions.[9]

Here was an attack that could not be dismissed as after-the-fact faultfinding by a conservative academician using his intellect to further a preference for keeping blacks in their "separate-but-equal" place. Professor Wechsler began by saying that he had welcomed the result in *Brown*; he noted that he had joined with the NAACP's Charles Houston in litigating civil rights cases in the Supreme Court.[10] He added that he was not offended because the Court failed to uphold earlier decisions approving segregated schools. Nor was he persuaded by the argument that the issue should have been left to Congress because the Court's judgment might not be honored.[11]

Wechsler did not align himself with the "realists," who "perceive in law only the element of fiat, in whose conception of the legal cosmos reason has no meaning or no place,"[12] nor with the "formalists," who "frankly or covertly make the test of virtue in interpretation whether its result in the immediate decision seems to hinder or advance the interests or the values they support."[13] Wechsler instead saw the need for criteria of decision that could be framed and tested as an exercise of reason and not merely adopted as an act of willfulness or will. He believed, in short, that courts could engage in a "principled appraisal" of legislative actions that exceeded a fixed "historical meaning" of constitutional provisions without, as Judge Learned Hand feared, becoming "a third legislative chamber."[14] Courts, Wechsler argued, "must be genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved."[15] Applying these standards, which included constitutional and statutory interpretation, the subtle guidance provided by history, and appropriate but not slavish fidelity to precedent, Wechsler found difficulty with Supreme Court decisions where principled reasoning was in his view either deficient or, in some instances,

[9] *See* Wechsler, *supra* note 5, at 31–35.

[10] Wechsler recalled that Houston, who was black, "did not suffer more than I in knowing that we had to go to Union Station to lunch together during the recess." *Id.* at 34.

[11] *Id.* at 31–32.

[12] *Id.* at 11.

[13] *Id.*

[14] *Id.* at 16.

[15] *Id.* at 15.

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nonexistent.[16] He included the *Brown* opinion in the latter category.

Wechsler reviewed and rejected the possibility that *Brown* was based on a declaration that the fourteenth amendment barred all racial lines in legislation.[17] He also doubted that the opinion relied upon a factual determination that segregation caused injury to black children, since evidence as to such harm was both inadequate and conflicting.[18] Rather, Wechsler concluded, the Court in *Brown* must have rested its holding on the view that "racial segregation is, *in principle*, a denial of equality to the minority against whom it is directed; that is, the group that is not dominant politically and, therefore, does not make the choice involved."[19] Yet, Wechsler found this argument untenable as well, because, among other difficulties, it seemed to require an inquiry into the motives of the legislature, a practice generally foreclosed to the courts.[20]

After dismissing these arguments, Wechsler then asserted that the legal issue in state-imposed segregation cases was not one of discrimination at all, but rather of associational rights: "the denial by the state of freedom to associate, a denial that impinges in the same way on any groups or races that may be involved."[21] Wechsler reasoned that "if the freedom of association is denied by segregation, integration forces an association upon those for whom it is unpleasant or repugnant."[22] And concluding with a question that has challenged legal scholars, Wechsler asked:

> Given a situation where the state must practically choose between denying the association to those individuals who wish it or imposing it on those who would avoid it, is there a basis in neutral principles for holding that the Constitution demands that the claims for association should prevail?[23]

In suggesting that there was a basis in neutral principles for holding that the Constitution supports a claim by blacks for an associational right, Professor Wechsler confessed that he had not yet written an opinion supporting such a holding. "To write it is for me the challenge of the school-segregation cases."[24]

[16] *Id.* at 19.

[17] *Id.* at 32.

[18] *Id.* at 32–33.

[19] *Id.* at 33 (emphasis added).

[20] *Id.* at 33–34.

[21] *Id.* at 34.

[22] *Id.*

[23] *Id.*

[24] *Id.*

II. The Search for a Neutral Principle: Racial Equality and Interest Convergence

Scholars who accepted Professor Wechsler's challenge had little difficulty finding a neutral principle on which the *Brown* decision could be based. Indeed, from the hindsight of a quarter century of the greatest racial consciousness-raising the country has ever known, much of Professor Wechsler's concern seems hard to imagine. To doubt that racial segregation is harmful to blacks, and to suggest that what blacks really sought was the right to associate with whites, is to believe in a world that does not exist now and could not possibly have existed then. Professor Charles Black, therefore, correctly viewed racial equality as the neutral principle which underlay the *Brown* opinion.[25] In Black's view, Wechsler's question "is awkwardly simple,"[26] and he states his response in the form of a syllogism. Black's major premise is that "the equal protection clause of the fourteenth amendment should be read as saying that the Negro race, as such, is not to be significantly disadvantaged by the laws of the states."[27] His minor premise is that "segregation is a massive intentional disadvantaging of the Negro race, as such, by state law."[28] The conclusion, then, is that the equal protection clause clearly bars racial segregation because segregation harms blacks and benefits whites in ways too numerous and obvious to require citation.[29]

Logically, the argument is persuasive, and Black has no trouble urging that "[w]hen the directive of equality cannot be followed without displeasing the white[s], then something that can be called a 'freedom' of the white[s] must be impaired."[30] It is precisely here, though, that many whites part company with Professor Black. Whites may agree in the abstract that blacks are citizens and are entitled to constitutional protection against racial discrimination, but few are willing to recognize that racial segregation is much more than a series of quaint customs that can be remedied effectively without altering the status of whites. The extent of this unwillingness is illustrated by the controversy over affirmative action programs, particularly those where identifiable whites must step aside for blacks they deem less qualified or less deserving. Whites simply cannot envision the personal responsibility and the potential sacrifice inherent in Professor Black's conclusion that true equality

[25] *See* Black, *supra* note 6, at 428–29.
[26] *Id.* at 421.
[27] *Id.*
[28] *Id.*
[29] *Id.* at 425–26.
[30] *Id.* at 429.

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for blacks will require the surrender of racism-granted privileges for whites.

This sober assessment of reality raises concern about the ultimate import of Black's theory. On a normative level, as a description of how the world *ought* to be, the notion of racial equality appears to be the proper basis on which *Brown* rests, and Wechsler's framing of the problem in terms of associational rights thus seems misplaced. Yet, on a positivistic level — how the world *is* — it is clear that racial equality is not deemed legitimate by large segments of the American people, at least to the extent it threatens to impair the societal status of whites. Hence, Wechsler's search for a guiding principle in the context of associational rights retains merit in the positivistic sphere, because it suggests a deeper truth about the subordination of law to interest-group politics with a racial configuration.

Although no such subordination is apparent in *Brown*, it is possible to discern in more recent school decisions the outline of a principle, applied without direct acknowledgment, that could serve as the positivistic expression of the neutral statement of general applicability sought by Professor Wechsler. Its elements rely as much on political history as legal precedent and emphasize the world as it is rather than how we might want it to be. Translated from judicial activity in racial cases both before and after *Brown*, this principle of "interest convergence" provides: 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. Racial justice — or its appearance — may, from time to time, be counted among the interests deemed important by the courts and by society's policymakers.

In assessing how this principle can accommodate both the *Brown* decision and the subsequent development of school desegregation law, it is necessary to remember that the issue

of school segregation and the harm it inflicted on black children did not first come to the Court's attention in the *Brown* litigation: blacks had been attacking the validity of these policies for 100 years.[31] Yet, prior to *Brown*, black claims that segregated public schools were inferior had been met by orders requiring merely that facilities be made equal.[32] What accounted, then, for the sudden shift in 1954 away from the separate but equal doctrine and towards a commitment to desegregation?

I contend that the decision in *Brown* to break with the Court's long-held position on these issues cannot be understood without some consideration of the decision's value to whites, not simply those concerned about the immorality of racial inequality, but also those whites in policymaking positions able to see the economic and political advances at home and abroad that would follow abandonment of segregation. First, the decision helped to provide immediate credibility to America's struggle with Communist countries to win the hearts and minds of emerging third world peoples. At least this argument was advanced by lawyers for both the NAACP and the federal government.[33] And the point was not lost on the news media. *Time* magazine, for example, predicted that the international impact of *Brown* would be scarcely less important than its effect on the education of black children: "In many countries, where U.S. prestige and leadership have been damaged by the fact of U.S. segregation, it will come as a timely reassertion of the basic American principle that 'all men are created equal.'"[34]

Second, *Brown* offered much needed reassurance to American blacks that the precepts of equality and freedom so heralded during World War II might yet be given meaning at home. Returning black veterans faced not only continuing discrimination, but also violent attacks in the South which rivalled those that took place at the conclusion of World War I.[35] Their disillusionment and anger were poignantly expressed by the black actor, Paul Robeson, who in 1949 declared: "It is unthinkable . . . that American Negroes would

[31] *See, e.g.*, Roberts v. City of Boston, 59 Mass. (5 Cush.) 198 (1850).

[32] The cases are collected in Larson, *The New Law of Race Relations*, 1969 WIS. L. REV. 470, 482, 483 n.27; Leflar & Davis, *Segregation in the Public Schools — 1953*, 67 HARV. L. REV. 377, 430–35 (1954).

[33] *See* Bell, *Racial Remediation: An Historical Perspective on Current Conditions*, 52 NOTRE DAME LAW. 5, 12 (1976).

[34] *Id.* at 12 n.31.

[35] C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 114 (3d rev. ed. 1974); J. FRANKLIN, FROM SLAVERY TO FREEDOM 478–86 (3d ed. 1967).

go to war on behalf of those who have oppressed us for generations . . . against a country [the Soviet Union] which in one generation has raised our people to the full human dignity of mankind."[36] It is not impossible to imagine that fear of the spread of such sentiment influenced subsequent racial decisions made by the courts.

Finally, there were whites who realized that the South could make the transition from a rural, plantation society to the sunbelt with all its potential and profit only when it ended its struggle to remain divided by state-sponsored segregation.[37] Thus, segregation was viewed as a barrier to further industrialization in the South.

These points may seem insufficient proof of self-interest leverage to produce a decision as important as *Brown*. They are cited, however, to help assess and not to diminish the Supreme Court's most important statement on the principle of racial equality. Here, as in the abolition of slavery, there were whites for whom recognition of the racial equality principle was sufficient motivation. But, as with abolition, the number who would act on morality alone was insufficient to bring about the desired racial reform.[38]

Thus, for those whites who sought an end to desegregation on moral grounds or for the pragmatic reasons outlined above, *Brown* appeared to be a welcome break with the past. When segregation was finally condemned by the Supreme Court, however, the outcry was nevertheless great, especially among poorer whites who feared loss of control over their public schools and other facilities. Their fear of loss was intensified by the sense that they had been betrayed. They relied, as had generations before them, on the expectation that white elites would maintain lower class whites in a societal status superior

[36] D. BUTLER, PAUL ROBESON 137 (1976) (unwritten speech before the Partisans of Peace, World Peace Congress in Paris).

[37] Professor Robert Higgs argued that the "region's economic development increasingly undermined the foundations of its traditional racial relations." Higgs, *Race and Economy in the South, 1890–1950*, in THE AGE OF SEGREGATION 89–90 (R. Haws ed. 1978). Sociologists Frances Piven and Richard Cloward have also drawn a connection between this economic growth and the support for the civil rights movement in the 1940's and 1950's, when various white elites in business, philanthropy, and government began to speak out against racial discrimination. F. PIVEN & R. CLOWARD, REGULATING THE POOR 229–30 (1971). *See also* F. PIVEN & R. CLOWARD, POOR PEOPLE'S MOVEMENTS 189–94 (1977).

[38] President Lincoln, for example, acknowledged the moral evil in slavery. In his famous letter to publisher Horace Greeley, however, he promised to free all, some, or none of the slaves, depending on which policy would most help save the Union. SPEECHES AND LETTERS OF ABRAHAM LINCOLN, 1832–65, at 194–95 (M. Roe ed. 1907).

to that designated for blacks.[39] In fact, there is evidence that segregated schools and facilities were initially established by legislatures at the insistence of the white working class.[40] Today, little has changed. Many poorer whites oppose social reform as "welfare programs for blacks" although, ironically, they have employment, education, and social service needs that differ from those of poor blacks by a margin that, without a racial scorecard, is difficult to measure.[41]

Unfortunately, poorer whites are now not alone in their opposition to school desegregation and to other attempts to improve the societal status of blacks: recent decisions, most notably by the Supreme Court, indicate that the convergence of black and white interests that led to *Brown* in 1954 and influenced the character of its enforcement has begun to fade. In *Swann v. Charlotte-Mecklenburg Board of Education*,[42] Chief Justice Burger spoke of the "reconciliation of competing values" in desegregation cases.[43] If there was any doubt that "competing values" referred to the conflicting interests of blacks seeking desegregation and whites who prefer to retain existing school policies, then the uncertainty was dispelled by *Milliken v. Bradley*,[44] and by *Dayton Board of Education v. Brinkman (Dayton I)*.[45] In both cases, the Court elevated the concept of "local autonomy" to a "vital national tradition":[46] "No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process."[47] Local control, however, may result in the maintenance of a status quo that will preserve superior educational opportunities and facilities for whites at the expense of blacks. As one commentator has suggested, "It is implausible to assume that school boards guilty of substantial violations in the past will take the interests of black school children to heart."[48]

As a result of its change in attitudes, the Court has increasingly erected barriers to achieving the forms of racial balance relief it earlier had approved.[49] Plaintiffs must now prove that the complained-of segregation was the result of discriminatory actions intentionally and invidiously conducted or authorized by school officials.[50] It is not enough that segregation was the "natural and foreseeable" consequence of their policies.[51] And even when this difficult standard of proof is met, courts must carefully limit the relief granted to the harm actually proved.[52] Judicial second thoughts about racial balance plans with broad-range busing components, the very plans which civil rights lawyers have come to rely on, is clearly evident in these new proof standards.

There is, however, continuing if unpredictable concern in the Supreme Court about school boards whose policies reveal long-term adherence to overt racial discrimination. In many cases, trial courts exposed to exhaustive testimony regarding the failure of school officials to either desegregate or provide substantial equality of schooling for minority children, become convinced that school boards are violating *Brown*. Thus far, unstable Supreme Court majorities have upheld broad desegregation plans ordered by these judges,[53] but the reservations expressed by concurring Justices[54] and the vigor of those Justices who dissent[55] caution against optimism in this still controversial area of civil rights law.[56]

[39] *See* F. PIVEN & R. CLOWARD, POOR PEOPLE'S MOVEMENTS 187 (1977). *See generally* Bell, *supra* note 33.

[40] *See* C. VANN WOODWARD, *supra* note 35, at 6.

[41] Robert Heilbruner suggests that this country's failure to address social issues including poverty, public health, housing, and prison reform as effectively as many European countries is due to the tendency of whites to view reform efforts as "programs to 'subsidize' Negroes. . . . In such cases the fear and resentment of the Negro takes precedence over the social problem itself. The result, unfortunately, is that the entire society suffers from the results of a failure to correct social evils whose ill effects refuse to obey the rules of segregation." Heilbruner, *The Roots of Social Neglect in the United States*, in IS LAW DEAD? 288, 296 (E. Rostow ed. 1971).

[42] 402 U.S. 1 (1971).

[43] *Id.* at 31.

[44] 418 U.S. 717 (1974) (limits power of federal courts to treat a primarily black urban school district and largely white suburban districts as a single unit in mandating desegregation).

[45] 433 U.S. 406 (1977) (desegregation orders affecting pupil assignments should seek only the racial mix that would have existed absent the constitutional violation).

[46] *Id.* at 410; 418 U.S. at 741–42.

[47] 418 U.S. at 741.

[48] *The Supreme Court, 1978 Term*, 93 HARV. L. REV. 60, 130 (1979).

[49] *See generally* Fiss, *School Desegregation: The Uncertain Path of the Law*, 4 PHILOSOPHY & PUB. AFF. 3 (1974); Kanner, *From Denver to Dayton: The Development of a Theory of Equal Protection Remedies*, 72 NW. U.L. REV. 382 (1977).

[50] Dayton Bd. of Educ. v. Brinkman (Dayton I), 433 U.S. 406 (1977).

[51] Columbus Bd. of Educ. v. Penick, 99 S. Ct. 2941, 2950 (1979).

[52] Austin Independent School Dist. v. United States, 429 U.S. 990, 991 (1976) (Powell, J., concurring).

[53] Dayton Bd. of Educ. v. Brinkman (Dayton II), 99 S. Ct. 2971 (1979); Columbus Bd. of Educ. v. Penick, 99 S. Ct. 2941 (1979).

[54] *See* Columbus Bd. of Educ. v. Penick, 99 S. Ct. 2941, 2952 (1979) (Burger, C.J., concurring); *id.* at 2983 (Stewart, J., concurring).

[55] *See id.* at 2952 (Rehnquist, J., dissenting); *id.* at 2988 (Powell, J., dissenting). *See also* Dayton Bd. of Educ. v. Brinkman (Dayton II), 99 S. Ct. 2971, 2983 (1979) (Stewart, J., dissenting).

[56] The Court faces another difficult challenge in the 1979 Term when it reviews whether the racial balance plan in Dallas, Texas, goes far enough in eliminating one

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At the very least, these decisions reflect a substantial and growing divergence in the interests of whites and blacks. The result could prove to be the realization of Professor Wechsler's legitimate fear that, if there is not a change of course, the purported entitlement of whites not to associate with blacks in public schools may yet eclipse the hope and the promise of *Brown*.

III. Interest-Convergence Remedies Under Brown

Further progress to fulfill the mandate of *Brown* is possible to the extent that the divergence of racial interests can be avoided or minimized. Whites in policymaking positions, including those who sit on federal courts, can take no comfort in the conditions of dozens of inner-city school systems where the great majority of nonwhite children attend classes as segregated and ineffective as those so roundly condemned by Chief Justice Warren in the *Brown* opinion. Nor do poorer whites gain from their opposition to the improvement of educational opportunities for blacks: as noted earlier, the needs of the two groups differ little.[57] Hence, over time, all will reap the benefits from a concerted effort towards achieving racial equality.

The question still remains as to the surest way to reach the goal of educational effectiveness for both blacks and whites. I believe that the most widely used programs mandated by the courts — "antidefiance, racial balance" plans — may in some cases be inferior to plans focusing on "educational components," including the creation and development of "model" all-black schools. A short history of the use of the antidefiance strategy would be helpful at this point.

By the end of the 1950's, it was apparent that compliance with the *Brown* mandate to desegregate the public schools would not come easily or soon. In the seventeen border states and the District of Columbia, fewer than 200 thousand blacks were actually attending classes with white children.[58] The states in the deep South had not begun even token desegregation,[59] and it would take Supreme Court action to reverse

race schools in a large district that is now 65% black and Hispanic. Tasby v. Estes, 572 F.2d 1010 (5th Cir. 1978), *cert. granted sub nom.* Estes v. Metropolitan Branches of Dallas NAACP, 440 U.S. 906 (1979).

[57] *See* p. 526 *supra*.

[58] P. Bergman, The Chronological History of the Negro in America 561 (1969).

[59] *Id.* at 561–62.

the years-long effort of the Prince Edward County School Board in Virginia to abolish rather than desegregate its public schools.[60] Supreme Court orders[61] and presidential action had already been required to enable a handful of black students to attend Central High School in Little Rock, Arkansas.[62] Opposition to *Brown* was clearly increasing. Its supporters were clearly on the defensive, as was the Supreme Court itself.

For blacks, the goal in school desegregation suits remained the effective use of the *Brown* mandate to eliminate state-sanctioned segregation. These efforts received unexpected help from the excesses of the massive resistance movement that led courts to justify relief under *Brown* as a reaffirmance of the supremacy of the judiciary on issues of constitutional interpretation. *Brown*, in the view of many, might not have been a wise or proper decision, but violent and prolonged opposition to its implementation posed an even greater danger to the federal system.

The Supreme Court quickly recognized this additional basis on which to ground school desegregation orders. "As this case reaches us," the Court began its dramatic opinion in *Cooper v. Aaron*,[63] "it raises questions of the highest importance to the maintenance of our federal system of government."[64] Reaching back to *Marbury v. Madison*,[65] the Court reaffirmed Chief Justice Marshall's statement that "[i]t is emphatically the province and duty of the judicial department to say what the law is."[66] There were few opponents to this stand, and Professor Wechsler was emphatically not one of them. His criticism of *Brown* concluded with a denial that he intended to offer "comfort to anyone who claims legitimacy in defiance of the courts."[67] Those who accept the benefits of our constitutional system, Wechsler felt, cannot deny its allegiance when a special burden is imposed. Defiance of court orders, he asserted, constituted the "ultimate negation of all neutral principles."[68]

For some time, then, the danger to federalism posed by the secessionist-oriented resistance of Southern state and local of-

[60] Griffin v. County School Bd., 377 U.S. 218 (1964).

[61] Cooper v. Aaron, 358 U.S. 1 (1958).

[62] P. Bergman, *supra* note 58, at 555–56, 561–62.

[63] 358 U.S. 1 (1958).

[64] *Id.* at 4.

[65] 5 U.S. (1 Cranch) 137, 177 (1803).

[66] 358 U.S. at 18.

[67] Wechsler, *supra* note 5, at 35.

[68] *Id.*

ficials provided courts with an independent basis for supporting school desegregation efforts.[69] In the lower federal courts, the perceived threat to judicial status was often quite personal. Surely, I was not the only civil rights attorney who received a favorable decision in a school desegregation case less by legal precedent than because a federal judge, initially hostile to those precedents, my clients and their lawyer, became incensed with school board litigation tactics that exhibited as little respect for the court as they did for the constitutional rights of black children.

There was a problem with school desegregation decisions framed in this antidefiance form that was less discernible then than now. While a prerequisite to the provision of equal educational opportunity, condemnation of school board evasion was far from synonymous with that long-promised goal. Certainly, it was cause for celebration when the Court recognized that some pupil assignment schemes,[70] "freedom-of-choice" plans,[71] and similar "desegregation plans," were in fact designed to retain constitutionally condemned dual school systems. And, when the Court, in obvious frustration with the slow pace of school desegregation, announced in 1968 what Justice Powell later termed "the *Green/Swann* doctrine of 'affirmative duty,'"[72] which placed on school boards the duty to disestablish their dual school systems, the decisions were welcomed as substantial victories by civil rights lawyers. Yet, the remedies set forth in the major school cases following *Brown* — balancing the student and teacher populations by race in each school, eliminating one-race schools, redrawing school attendance lines, and transporting students to achieve racial balance[73] — have not in themselves guaranteed black children

[69] *See, e.g.*, Goss v. Board of Educ., 373 U.S. 683 (1963) (struck down "minority to majority" transfer plans enabling resegregation of schools); Bush v. New Orleans Parish School Bd., 188 F. Supp. 916 (E.D. La.), *aff'd*, 365 U.S. 569 (1961) (invalidation of state "interposition acts"); Poindexter v. Louisiana Financial Comm'n, 275 F. Supp. 833 (E.D. La. 1967), *aff'd per curiam*, 389 U.S. 215 (1968) ("tuition grants" for children attending private segregated schools voided).

[70] These plans, requiring black children to run a gauntlet of administrative proceedings to obtain assignment to a white school, were at first judicially approved. *See* Covington v. Edwards, 264 F.2d 780 (4th Cir.), *cert. denied*, 361 U.S. 840 (1959); Shuttlesworth v. Birmingham Bd. of Educ., 162 F. Supp. 372 (N.D. Ala.), *aff'd*, 358 U.S. 101 (1958).

[71] Green v. County School Bd., 391 U.S. 430 (1968) (practice of "free choice" — enabling each student to choose whether to attend a black or white school — struck down).

[72] Keyes v. School Dist. No. 1, 413 U.S. 189, 224 (1973) (Powell, J., concurring in part and dissenting in part).

[73] *See, e.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971); Green v. County School Bd., 391 U.S. 430 (1968).

better schooling than they received in the pre-*Brown* era. Such racial balance measures have often altered the racial appearance of dual school systems without eliminating racial discrimination. Plans relying on racial balance to foreclose evasion have not eliminated the need for further orders protecting black children against discriminatory policies, including resegregation within desegregated schools,[74] the loss of black faculty and administrators,[75] suspensions and expulsions at much higher rates than white students,[76] and varying forms of racial harassment ranging from exclusion from extracurricular activities[77] to physical violence.[78] Antidefiance remedies, then, while effective in forcing alterations in school system structure, often encourage and seldom shield black children from discriminatory retaliation.

The educational benefits that have resulted from the mandatory assignment of black and white children to the same schools are also debatable.[79] If benefits did exist, they have begun to dissipate as whites flee in alarming numbers from school districts ordered to implement mandatory reassignment plans.[80] In response, civil rights lawyers sought to include entire metropolitan areas within mandatory reassignment plans in order to encompass mainly white suburban school districts

[74] *See, e.g.*, Jackson v. Marvell School Dist. No. 22, 425 F.2d 211 (8th Cir. 1970). There were also efforts to segregate students within desegregated schools by the use of standardized tests and achievement scores. *See* Singleton v. Jackson Mun. Separate School Dist., 419 F.2d 1211 (5th Cir.), *rev'd per curiam*, 396 U.S. 290 (1970); Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967), *aff'd sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969).

[75] *See, e.g.*, Chambers v. Hendersonville City Bd. of Educ., 364 F.2d 189 (4th Cir. 1966). For a discussion of the wholesale dismissal and demotion of black teachers in the wake of school desegregation orders, see materials compiled in 2 N. DORSEN, P. BENDER, B. NEUBORNE & S. LAW, ENERSON, HABER, AND DORSEN'S POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 679–80 (4th ed. 1979).

[76] Hawkins v. Coleman, 376 F. Supp. 1330 (N.D. Tex. 1974); Dunn v. Tyler Independent School Dist., 327 F. Supp. 528 (E.D. Tex. 1971), *aff'd in part and rev'd in part*, 460 F.2d 137 (5th Cir. 1972).

[77] Floyd v. Trice, 490 F.2d 1154 (8th Cir. 1974); Augustus v. School Bd., 361 F. Supp. 383 (N.D. Fla. 1973), *modified*, 507 F.2d 152 (5th Cir. 1975).

[78] For a recent example, see the account of racial violence resulting from desegregation in Boston in Husoch, *Boston: The Problem That Won't Go Away*, N.Y. Times, Nov. 25, 1979, § 6 (Magazine), at 32.

[79] *See* N. ST. JOHN, SCHOOL DESEGREGATION 16–41 (1975).

[80] *See* D. Armor, White Flight, Demographic Transition, and the Future of School Desegregation (1978) (Rand Paper Series, The Rand Corp.); J. Coleman, S. Kelly & J. Moore, Trends in School Segregation, 1968–73 (1975) (Urban Institute Paper). *But see* Pettigrew & Green, *School Desegregation in Large Cities: A Critique of the Coleman "White Flight" Thesis*, 46 HARV. EDUC. REV. 1 (1976); Rossell, *School Desegregation and White Flight*, 90 POL. SCI. Q. 675 (1975); R. Farley, School Integration and White Flight (1975) (Population Studies Center, U. Mich.).

where so many white parents sought sanctuary for their children.[81]

Thus, the antidefiance strategy was brought full circle from a mechanism for preventing evasion by school officials of *Brown's* antisegregation mandate to one aimed at creating a discrimination-free environment. This approach to the implementation of *Brown*, however, has become increasingly ineffective; indeed, it has in some cases been educationally destructive. A preferable method is to focus on obtaining real educational effectiveness which may entail the improvement of presently desegregated schools as well as the creation or preservation of model black schools.

Civil rights lawyers do not oppose such relief, but they clearly consider it secondary to the racial balance remedies authorized in the *Swann*[82] and *Keyes*[83] cases. Those who espouse alternative remedies are deemed to act out of suspect motives. *Brown* is the law, and racial balance plans are the only means of complying with the decision. The position reflects courage, but it ignores the frequent and often complete failure of programs which concentrate solely on achieving a racial balance.

Desegregation remedies that do not integrate may seem a step backward toward the *Plessy* "separate but equal" era. Some black educators, however, see major educational benefits in schools where black children, parents, and teachers can utilize the real cultural strengths of the black community to overcome the many barriers to educational achievement.[84] As Professor Laurence Tribe argued, "[J]udicial rejection of the 'separate but equal' talisman seems to have been accompanied by a potentially troublesome lack of sympathy for racial separateness as a possible expression of group solidarity."[85]

This is not to suggest that educationally oriented remedies can be developed and adopted without resistance. Policies necessary to obtain effective schools threaten the self-interest of teacher unions and others with vested interests in the status quo. But successful magnet schools may provide a lesson that

[81] *See, e.g.*, Milliken v. Bradley, 418 U.S. 717 (1974). In Los Angeles, where the court ordered reassignment of 65,000 students in grades four through eight, 30–50% of the 22,000 white students scheduled for mandatory busing boycotted the public schools or enrolled elsewhere. U.S. COMM'N ON CIVIL RIGHTS, DESEGREGATION OF THE NATION'S PUBLIC SCHOOLS: A STATUS REPORT 51 (1979).

[82] Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

[83] Keyes v. School Dist. No. 1, 413 U.S. 189 (1973).

[84] S. LIGHTFOOT, WORLDS APART 172 (1978). For a discussion of the Lightfoot theory, see Bell, *supra* note 3, at 1838.

[85] L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-15, at 1022 (1978) (footnote omitted).

effective schools for blacks must be a primary goal rather than a secondary result of integration. Many white parents recognize a value in integrated schooling for their children but they quite properly view integration as merely one component of an effective education. To the extent that civil rights advocates also accept this reasonable sense of priority, some greater racial interest conformity should be possible.

* * *

Is this what the *Brown* opinion meant by "equal educational opportunity"? Chief Justice Warren said the Court could not "turn the clock back to 1868 when the [fourteenth] Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written."[86] The change in racial circumstances since 1954 rivals or surpasses all that occurred during the period that preceded it. If the decision that was at least a catalyst for that change is to remain viable, those who rely on it must exhibit the dynamic awareness of all the legal and political considerations that influenced those who wrote it.

Professor Wechsler warned us early on that there was more to *Brown* than met the eye. At one point, he observed that the opinion is "often read with less fidelity by those who praise it than by those by whom it is condemned."[87] Most of us ignored that observation openly and quietly raised a question about the sincerity of the observer. Criticism, as we in the movement for minority rights have every reason to learn, is a synonym for neither cowardice nor capitulation. It may instead bring awareness, always the first step toward overcoming still another barrier in the struggle for racial equality.

[86] Brown v. Board of Educ., 347 U.S. 483, 492 (1954).

[87] Wechsler, *supra* note 5, at 32.