



Alabama Law Scholarly Commons

Essays, Reviews, and Shorter Works

Faculty Scholarship

2000

Two Ways to Think about Race: Reflections on the Id, the Ego, and Other Reformist Theories of Equal Protection Essay

Richard Delgado

University of Alabama - School of Law, rdelgado@law.ua.edu

Follow this and additional works at: https://scholarship.law.ua.edu/fac_essays

Recommended Citation

Richard Delgado, *Two Ways to Think about Race: Reflections on the Id, the Ego, and Other Reformist Theories of Equal Protection Essay*, 89 *Geo. L.J.* 2279 (2000).

Available at: https://scholarship.law.ua.edu/fac_essays/62

This Article is brought to you for free and open access by the Faculty Scholarship at Alabama Law Scholarly Commons. It has been accepted for inclusion in Essays, Reviews, and Shorter Works by an authorized administrator of Alabama Law Scholarly Commons.

Two Ways to Think About Race: Reflections on the Id, the Ego, and Other Reformist Theories of Equal Protection

RICHARD DELGADO*

INTRODUCTION

In one of the most influential Critical Race Theory articles ever written,¹ Professor Charles Lawrence posited a new way of looking at discrimination. *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, published in the *Stanford Law Review* during the middle years of Critical Race Theory's ascent, takes forceful issue with the requirement of purposeful intent that pervades much of U.S. antidiscrimination law.² This requirement, which demands that a litigant seeking redress for racial discrimination show that the defendant intended to handicap the plaintiff on the basis of race, bars recovery if the defendant inadvertently acted in a way that harmed the plaintiff.³

This requirement makes little sense, Lawrence asserts, because the source of much racism lies in the unconscious mind.⁴ Individuals raised in a racist culture, without knowing it, absorb attitudes and stereotypes that reside deep in their psyches and influence behavior in subtle, but pernicious ways.⁵ When such behavior takes the form of racial discrimination and the cultural meaning of the behavior is plain, Lawrence argues that the law should expand to encompass this subtler, more unconscious form of discrimination.⁶ This expansion will bring law into conformity "with the learning of twentieth century psychology"⁷ and enable it to tap the "considerable, and . . . well respected body of knowledge and empirical research concerning the workings of the human psyche and the unconscious."⁸ According to Lawrence, consideration of "the division of the mind into the conscious and the unconscious"⁹ and the role of such psychoanalytic entities as primary process (or id) and secondary process (or ego) will help

* Jean Lindsley Professor of Law, University of Colorado-Boulder. J.D. 1974, University of California-Berkeley (Boalt Hall).

1. Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

2. *Id.* at 318 (tracing the doctrine's roots to *Washington v. Davis*, 426 U.S. 229 (1976)). Recent decisions have reaffirmed the requirement in a host of areas. *See, e.g.*, *Shaw v. Reno*, 509 U.S. 630, 642 (1993) ("[The Equal Protection Clause's] purpose is to prevent the states from purposefully discriminating . . . on the basis of race.").

3. *See, e.g.*, *Hunter v. Underwood*, 471 U.S. 222, 227-28 (1985); *Davis*, 426 U.S. at 239-41.

4. Lawrence, *supra* note 1, at 321-26, 328-44.

5. *Id.* at 328-44.

6. *Id.* at 324.

7. *Id.*

8. *Id.* at 329.

9. *Id.* at 331.

us understand and combat racist stereotypes, beliefs, taboos, and behavior.¹⁰

To his great credit, Lawrence succeeded in focusing attention on a major irrational feature of the law of racial remedies—namely, the requirement of intent. His article prompted scholars to reexamine the nature of racism,¹¹ and nonscholars to reflect on how their actions might unintentionally be harming persons of minority races. It also may have played a part in Congress's decision, a few years later, to eliminate or soften the intent requirement in a number of federal antidiscrimination statutes.¹² In addition, the article wielded influence well beyond civil rights: Scholars have cited it in calling attention to the role of unconscious discrimination in areas as diverse as critical lawyering,¹³ environmental law,¹⁴ legal history,¹⁵ immigration law,¹⁶ disability law,¹⁷ and First Amendment theory.¹⁸

As felicitous as Lawrence's article was, it captured only a partial truth about race and racism. Ideal factors—thoughts, discourse, stereotypes, feelings, and mental categories—only partially explain how race and racism work.¹⁹ Material factors—socioeconomic competition, immigration pressures, the search for profits, changes in the labor pool, nativism—account for even more,²⁰ especially today. Beginning in the 1980s, this country witnessed a decisive turn to the right, featuring a vigorous attack on affirmative action, a weakening of federal and state race-remedies law, a movement toward color-blind alternatives, and a shredding of the welfare net by which poor people and immigrants managed to stave off misery.²¹ In such a climate, a continuing focus on psychoanalytic understandings of race

10. *Id.* at 323, 334, 387-88.

11. Lawrence's article is one of the most cited in recent years. See Fred R. Shapiro, *The Most-Cited Law Review Articles Revisited*, 71 CHI-KENT L. REV. 751, 775 (1996).

12. See, e.g., Civil Rights Act of 1991, 42 U.S.C. § 2000e-2(k)(1)(A) (2000) (establishing unlawful employment practice through a showing of disparate impact).

13. See, e.g., Eric K. Yamamoto, *Critical Race Praxis*, 95 MICH. L. REV. 821, 846 n.117 (1997).

14. See, e.g., Alice Kaswan, *Environmental Justice: Bridging the Gap Between Environmental Laws and "Justice"*, 47 AM. U. L. REV. 221, 237 n.64 (1997).

15. See, e.g., Sumi Cho, *Redeeming Whiteness in the Shadow of Internment*, 40 B.C. L. REV. 73, 151 n.402 (1998).

16. See, e.g., Nancy A. Root & Sharyn A. Tejani, *Undocumented: The Roles of Women in Immigration Law*, 83 GEO. L.J. 605, 609 n.19 (1994).

17. See, e.g., Peter D. Blanck & Kelly W. Marti, *Attitudes, Behavior, and the Employment Provisions of the ADA*, 42 VILL. L. REV. 345, 350 n.20 (1997).

18. See, e.g., John T. Nockleby, *Hate Speech in Context*, 42 BUFF. L. REV. 653, 666 n.47 (1994).

19. By "ideal" factors, I mean ones that seek to explain events in terms of ideas, thoughts, emotions, categories, and language. At times, I use the term "discourse analysis" as synonymous with this type of approach.

20. By "material" factors I mean ones that turn on tangible events in the social or physical world. For a classic exposition of this approach to racial analysis, see DERRICK BELL, *RACE, RACISM AND AMERICAN LAW* (4th ed. 2000), and Derrick Bell, Comment, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 518-19 (1980) [hereinafter Bell, *Interest-Convergence Dilemma*].

21. See, e.g., JEAN STEFANCIC & RICHARD DELGADO, *NO MERCY: HOW CONSERVATIVE THINK TANKS AND FOUNDATIONS CHANGED AMERICA'S SOCIAL AGENDA 7-135* (1996).

sacrifices both analytical clarity and strategic precision.²²

The purpose of this Essay is twofold: first, to recall Critical Race Theory to its materialist roots, and second, to encourage it to consider making common cause with the incipient movement for economic democracy.²³ I begin by demonstrating, through examples and argument, that idealist theories like Lawrence's, which explain racial dynamics in terms of thoughts, words, and internal urges, are analytically incomplete.²⁴ I will then argue that attending to the material side of race and racism confers a number of benefits, while at the same time avoiding numerous drawbacks associated with the idealist approach.²⁵ Finally, I will demonstrate that the approach I have recommended enhances the analysis of certain recurring social problems.²⁶

I. "IT'S NOT YOUR ATTITUDE THAT BOTHERS ME . . ."

A. THE GREAT DIVIDE

Imagine that two businessmen pass a group of homeless people begging for change on a downtown sidewalk. 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 people may have overheard the remark and had their feelings hurt. He points out that we must all strive to purge ourselves of racism, classism, and sexism; that thoughts have consequences; and that how you speak makes a difference. The first businessman mutters something about political correctness and makes a mental note not to let his true feelings show in front of his friend again.

Or imagine that a task force of highly advanced extraterrestrials lands on earth and approaches the nearest human being it finds—a homeless person relaxing on a city park bench.²⁷ They offer him any one of three magic potions. The first is a pill that will rid the world of sexism. The second, one that will cure racism. The third, one that will cure classism (negative attitudes toward those of lower status than oneself). Introduced into the water system, each pill will cure one of the three scourges effectively and permanently. The homeless person, unsurprisingly, 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? They may hear fewer unkind remarks; a few more passersby may slip them a quarter.

22. See *infra* notes 48-71, 74-75 and accompanying text (explaining why discussing race and racism in these terms is an analytic error); *infra* notes 86-139 and accompanying text (explaining why it is a strategic error).

23. See *infra* notes 44-46 and accompanying text (explaining that early Critical Race Theory was largely materialist in orientation).

24. See *infra* notes 48-71 and accompanying text.

25. See *infra* notes 54-85, 115-38 and accompanying text.

26. See *infra* notes 88-114 and accompanying text.

27. See RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION (forthcoming 2001) (using similar example).

However, if inherent features of our capitalist system ineluctably produce poverty and class segregation, the system will continue to create new generations of the poor.²⁸ Individual homeless people may feel better, but the free enterprise system, which is built on the idea of winners and losers, will continue to produce new homeless people every day.²⁹

What about racism? Suppose the obliging extraterrestrials leave behind a second pill that eliminates unkind thoughts, stereotypes, and misimpressions harbored by some individuals toward persons of other races. Perhaps an enterprising entrepreneur develops “The Ultimate Diversity Seminar,” capable of producing the same result. The President’s civil rights advisor prevails on all the nation’s school systems to introduce this seminar into every K-12 classroom, and the major television networks feature it on prime time.

Would life improve very much for people of color? This hypothetical poses an issue that squarely divides Critical Race Theory—indeed, that divides civil rights activists in general. One camp, which we might call “idealists,”³⁰ holds that racism and discrimination are matters of thinking, attitude, categorization, and discourse. According to idealist thinkers, race is a social construction, not a biological reality. Hence, we may erase discrimination by purging the system of its underlying images, words, attitudes, and scripts that convey the message that certain people are less worthy, less virtuous, and less American than others. These writers analyze matters like hate speech³¹ (the topic of another well-known article by Lawrence³²), media representations of race,³³ census categories,³⁴ and issues such as essentialism,³⁵ intersectionality,³⁶ and the Western

28. Compare Richard Delgado, *Rodrigo's Roadmap: Is the Marketplace Theory for Eradicating Discrimination a Blind Alley?*, 93 Nw. U. L. REV. 215 (1998) (arguing that equality guarantees are at war with themselves, incapable of complete effectuation under capitalistic system), with discussion *infra* notes 38-43 and accompanying text (discussing materialist view of race and holding that racial hierarchy is an intrinsic aspect of Western capitalism); see also Bell, *Interest-Convergence Dilemma*, *supra* note 20, at 526-28 (same).

29. See Bell, *Interest-Convergence Dilemma*, *supra* note 20, at 526-28 (arguing that free enterprise system is largely unconcerned with social equity); Delgado, *supra* note 28, at 231-42 (same).

30. See *supra* note 19 (explaining my use of this term).

31. See generally MARI MATSUDA, CHARLES LAWRENCE III, RICHARD DELGADO & KIMBERLÉ CRENSHAW, *WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT* (1993); Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 459-66.

32. Lawrence, *supra* note 31, at 459-66.

33. See, e.g., Margaret M. Russell, *Race and the Dominant Gaze: Narratives of Law and Inequality in Popular Film*, 15 LEGAL STUD. F. 243, 245-47 (1991).

34. See Luis Angel Toro, “A People Distinct from Others”: *Race and Identity in Federal Indian Law and the Hispanic Classification in OMB Directive No. 15*, 26 TEX. TECH. L. REV. 1219, 1225-38 (1995).

35. See, e.g., Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 585-615 (1990).

36. See generally Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365; Kimberlé W. Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139.

canon.³⁷

A contrasting school, the racial realists³⁸ or economic determinists, holds that though attitudes and words are important, racism is much more than having an unfavorable attitude toward members of other groups; material factors are necessary to the analysis of racial discrimination. For realists, racism is a means by which society allocates privilege, status, and wealth.³⁹ Racial hierarchies determine who receives tangible benefits, including the best jobs, the best schools, and invitations to parties in people's homes. Members of this group point out that prejudice sprang up with slavery. Previously, educated Europeans held generally positive attitudes toward Africans, recognizing that African civilization was highly advanced with vast libraries and centers of learning.⁴⁰ These materialists point out that conquering nations generally demonize their subjects in order to rationalize exploiting them.⁴¹ For example, Anglo settlers in California and the Southwest began to circulate notions of Mexican inferiority only when the settlers came to covet Mexican lands and mining claims.⁴²

For materialists, then, understanding the ebb and flow of racial progress and retrenchment requires an examination of economic, international, and labor conditions prevailing at a given period. This analysis requires the consideration of which groups are in socioeconomic competition with each other, which countries are Cold War or military rivals of the United States, which groups are trying to immigrate, legally or illegally, and which minority groups are accepting or resisting assimilation. Moreover, what is true for subordination of minorities is also true for the relief of it: Civil rights gains for communities of color coincide with the dictates of white self-interest. Little happens out of altruism alone.⁴³

In the early years of Critical Race Theory, the realists were in a large

37. See, for example, the celebrated debate between Stanley Fish and Dinesh D'Souza. *Compare* STANLEY FISH, THERE'S NO SUCH THING AS FREE SPEECH (1994), with DINESH D'SOUZA, ILLIBERAL EDUCATION: THE POLITICS OF RACE AND SEX ON CAMPUS (1991).

38. See generally Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363 (1992) (discussing racial realism—the view that racism is a permanent feature of the American landscape, that black-over-white ascendancy and the need for profits drive it, and that peaks of progress are always followed by periods of retrenchment). At times, I use the terms “material” or “economic determinism” as synonymous with “racial realism.”

39. See Bell, *Interest-Convergence Dilemma*, *supra* note 20, at 523. See generally Bell, *supra* note 38.

40. See, e.g., LESLIE G. CARR, “COLOR-BLIND” RACISM 5-7, 16 (1997); CAREY MCWILLIAMS, BROTHERS UNDER THE SKIN 252-53 (rev. ed. 1964); RANDALL ROBINSON, THE DEBT: WHAT AMERICA OWES TO BLACKS 16-25 (2000).

41. See, e.g., JUAN F. PEREA, RICHARD DELGADO, ANGELA P. HARRIS & STEPHANIE M. WILDMAN, RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA 291-320 (1999); 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, 1273-75 (1992).

42. Richard Delgado & Jean Stefancic, *California's Racial History and Constitutional Rationales for Race-Conscious Decision Making in Higher Education*, 47 UCLA L. REV. 1521, 1534-45, 1540-41 (2000); Delgado & Stefancic, *supra* note 41, at 1273-74.

43. See Bell, *Interest-Convergence Dilemma*, *supra* note 20, at 525.

majority. Scholars such as Girardeau Spann questioned whether our much vaunted system of civil rights remedies ended up benefiting people of color.⁴⁴ In a classic article, Derrick Bell posited that civil rights advances for blacks always coincide with the interests of elite whites, audaciously selecting *Brown v. Board of Education* as his principal example.⁴⁵ In recent years, however, the idealists and discourse analysts have gained force. Perhaps inspired by Lawrence's article and drawing from European philosophers—such as Derrida and Foucault, who emphasize the role of text and social power in the construction of official knowledge—many contemporary racial theorists work almost entirely in the realm of thought and discourse.⁴⁶

Yet race and racism are not entirely like leprechauns—things that would cease to exist if we stopped thinking about them. Rather, they are more like poverty, which would continue to exist and perhaps intensify if we did not think about it at all. It may be true, as Derrida said, that all we know is text.⁴⁷ However, events have a logic of their own as well, which we ignore at our peril.

B. AN IMPROBABLY CLEVER MALEVOLENCE: ON THE RELATION BETWEEN IDEAL AND MATERIAL FACTORS IN UNDERSTANDING AMERICA'S RACIAL PREDICAMENT

Critical Race Theory aside, most good recent writing about race deals with its material side. Although the occasional book or article on hate speech,⁴⁸ media stereotypes,⁴⁹ or the social construction of race⁵⁰ does appear, books like Randall Robinson's *The Debt*,⁵¹ which discusses the case for black reparations, Melvin L. Oliver and Thomas M. Shapiro's *Black Wealth/White Wealth*,⁵² which deals with the black-white wealth gap, and David Cole's *No Equal Justice: Race and Class in the American Criminal Justice System*⁵³ represent the cutting edge of civil rights thought.

44. See generally GIRARDEAU A. SPANN, RACE AGAINST THE COURT (1993) (documenting the futility of law reform through Supreme Court litigation); Girardeau A. Spann, *Pure Politics*, 88 MICH. L. REV. 1971 (1990) (same).

45. Bell, *Interest-Convergence Dilemma*, *supra* note 20, at 522-524.

46. See *supra* notes 31-37 and accompanying text (citing sources). Also notice the heavy representation of discourse analysis in Latino/a Critical Theory. See, e.g., Symposium, *Difference, Solidarity, and Law: Building Latina/o Communities Through LatCrit Theory*, 19 CHICANO-LATINO L. REV. 1 (1998); Symposium, *LatCrit Theory: Naming and Launching a New Discourse of Critical Legal Scholarship*, 2 HARV. LATINO L. REV. 1 (1997).

47. See generally JACQUES DERRIDA, OF GRAMMATOLOGY (Gayatri Chakravorty Spivak trans., 1976) (highlighting centrality of text in human knowledge).

48. See, e.g., HENRY LOUIS GATES ET AL., SPEAKING OF RACE, SPEAKING OF SEX (1994).

49. See, e.g., ETHNIC AND RACIAL IMAGES IN AMERICAN FILM AND TELEVISION (Allen L. Woll & Randall M. Miller eds., 1987).

50. See, e.g., PAUL GILROY, AGAINST RACE (2000).

51. See generally ROBINSON, *supra* note 40.

52. MELVIN L. OLIVER & THOMAS M. SHAPIRO, BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY (1995).

53. DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM (1999). For other books in this materialist vein, see RODNEY HERO, FACES OF INEQUALITY (1999), and ALAN TONELSON, THE RACE TO THE BOTTOM (2000).

And for good reason. Although, as will be explained below, ideal factors do play a part in any antiracist agenda,⁵⁴ material and socioeconomic factors are responsible for virtually all of the twists and turns of racial history, including changes in consciousness. The myth of Negro inferiority, for example, only arose with the highly profitable slave trade. Prior to that, Europeans regarded Africans with curiosity or respect.⁵⁵ Similarly, before conquest, early contacts with Spanish and Mexican residents of the Southwest did not produce antagonism or hostility.⁵⁶ Relatively good relations prevailed between Anglo settlers and the Spanish-speaking populations of California and the Southwest. Even intermarriage was common.⁵⁷ However, when these Anglo settlers needed to displace them from their lands, mainstream society demonized Mexicans and Mexican-Americans as lazy, dirty, and unintelligent.⁵⁸ Later, during wartime, Bracero—or guest worker—programs welcomed them as field laborers to take the places of Anglo workers needed for war industries or military service.⁵⁹ Consciousness changed accordingly.⁶⁰ Italians and Irish immigrants were first regarded as nonwhite, even black.⁶¹ However, when they agreed to cooperate with elite forces by swearing allegiance to the Democratic Party and agreeing to join forces in oppressing blacks, consciousness changed and they were admitted to the white race.⁶² During World War II, the United States demonized Nazis by depicting them as inhuman and monsters.⁶³ After the war, the nation welcomed German scientists, such as Werner von Braun, who were needed for the Cold War competition with Russia.⁶⁴

Histories of the depiction of racial minority groups show that media images of blacks shift according to social need. In one era, the happy Sambo reassures mainstream America that blacks are happy with their lot. In another, images of terrifying, larger-than-life black men—often with designs on white women—justify oppression.⁶⁵ The same is true with other minority groups. In one period, Asians are depicted as devious and tricky. In another, they are hardworking and clever. In yet another, they are depicted as hapless Charlie Chans. The depic-

54. See *infra* notes 74-76, 84-85 and accompanying text (explaining role for discourse analysis and analysis of racist speech and imagery in broader antiracist agenda).

55. See *supra* notes 40-42 and accompanying text.

56. See, e.g., McWILLIAMS, *supra* note 40, at 121-25.

57. *Id.*

58. PEREA, DELGADO, HARRIS & WILDMAN, *supra* note 41, at 310-25; Delgado & Stefancic, *supra* note 41, at 1273-74.

59. PEREA, DELGADO, HARRIS & WILDMAN, *supra* note 41, at 314-19; Delgado & Stefancic, *supra* note 41, at 1274.

60. PEREA, DELGADO, HARRIS & WILDMAN, *supra* note 41, at 314-15, 319.

61. *Id.* at 447, 451, 453.

62. *Id.* at 450-53.

63. *But see generally* ROBERT J. LIFTON, *THE NAZI DOCTORS* (1986) (demonstrating that many German citizens and professionals considered that they were merely carrying out orders).

64. See *generally* LINDA HUNT, *SECRET AGENDA: THE UNITED STATES GOVERNMENT, NAZI SCIENTISTS, AND PROJECT PAPERCLIP, 1945 TO 1990* (1991).

65. See Delgado & Stefancic, *supra* note 41, at 1262-67, 1276.

tions vary depending on society's needs.⁶⁶ During times of intergroup conflict, Indians are vicious and bloodthirsty; in another, noble lovers of nature.⁶⁷ These images are almost impossible to change through words alone. Yet when the material conditions that call them forth change, the images readily give way to the next versions.⁶⁸

It seems illogical to try to explain all this in terms of unconscious forces and Freudian impulses because the content of our unconscious would shift often and suddenly. Moreover, society may be intensely racist toward one group—for example, the Chinese—at exactly the time it welcomes another—such as the Japanese or Mexicans—with open arms.⁶⁹ One could, of course, insist that the vast checkerboard of attitudes, media images, and stereotypes is a function of simultaneous changes in the unconscious minds of hundreds of thousands of Americans. However, this way of thinking is not parsimonious. If racism were mainly, or even largely, an unconscious malevolence, like sibling rivalry or the Oedipal complex, why would it vary and shift over time and by minority groups? And why would it favor one group at one time only to disfavor it only a short time later?⁷⁰

Lawrence's article, *The Id, the Ego, and Equal Protection*, is the logical end point of discourse analysis and demonstrates the limitations of that approach. To see how this is true, consider an example from another area of study that exhibits a similar interplay between material and ideal factors—namely, the concept of the teenager. As with race, where racial categories mark minor, objective differences among human beings,⁷¹ teenagers also comprise an objectively distinct group. Throughout history, there have always been young people between the ages of twelve and twenty. However, until relatively recently, they bore no special term or label any more than people between the ages of thirty-two and forty-one, or fifty-nine and sixty-seven do today. They performed chores, attended school, went through adolescence, and grew into adults. They had no special clothing styles, music, cosmetics, or slang words. No school of therapy catered to their special needs.

Probably as a result of an implicit, but unheralded marketing decision, “teenagers” became a self-conscious category consisting of young people with extra time on their hands, whose main purpose in life was consumption and the development of prescribed relationships with each other, their parents, and members of the opposite sex. Are teenagers real? Of course—just as real as race

66. *Id.* at 1270-73.

67. *Id.* at 1267-70.

68. *Id.* at 1275-82.

69. See Richard Delgado, *Derrick Bell's Toolkit: Fit to Dismantle That Famous House?*, 75 N.Y.U. L. REV. 283, 291-93 (2000).

70. *Id.*

71. These differences amount to a minute fraction—perhaps one percent of one percent—of our genetic inheritance. See generally CHRISTOPHER JENCKS & MEREDITH PHILLIPS, *THE BLACK-WHITE TEST SCORE GAP* (1998).

is. A young teenager driving an SUV can kill you. A shift in teenage fashion can bankrupt or enrich entire industries. The development of the category “teenagers” brought very real social consequences. Yet, as parents know, those consequences are to a large extent impervious to exhortations to rethink the category or our attitudes toward it. That task, now, must entail taking into account material and social forces such as mass marketing, television, the cosmetics and clothing industries, violent video games, and a multitude of tangible factors that shape the behavior of young people between the ages of twelve and twenty. Discourse analysis, exhortation, and the preaching of more wholesome attitudes will yield, at best, small changes. If commercial forces are what create and maintain the category, an attack on teenage ills must take these forces into account.⁷² The remainder of this Essay argues that much the same is true with race and that “the structures of oppression determine racist ideas,”⁷³ not the other way around.

Because racist ideology and social structures do reinforce each other, challenging the first is not entirely pointless. However, the relationships between discourse and material conditions, thoughts and economic coercion, stereotypes and racial subordination are more complex than the discourse analysts may realize. Material changes precede and facilitate changes in racial consciousness.⁷⁴ The attitude—racism—then justifies the result: The victim, who is a member of another race, deserved his treatment.⁷⁵ Dominant forces, including the media, propagate that attitude. Then groups with little to gain from racial oppression—bystanders, blue-collar workers, and the unemployed—join in mindlessly without receiving any real benefit in return. This is the point at which discourse analysis becomes genuinely useful—namely in explaining how those with little stake in racial hierarchy nevertheless participate in it.⁷⁶

Discourse analysis is also helpful in showing how stereotypes and narratives shape legal outcomes, causing legal redress to become more difficult for a

72. As a thought experiment, consider what might happen if every parent reduced their teenager’s allowance to five dollars a week and Congress raised the minimum age for employment to twenty. Might not the category “teenager” virtually disappear over the next few years?

73. CARR, *supra* note 40, at 1-2.

74. See *supra* notes 54-64 and accompanying text.

75. *Id.*

76. These groups, gaining little economically from the system of racial subordination, may nevertheless reap psychic benefits. For instance, they may tell themselves that even if they are not members of the corporate elite, they are at least better off than the blacks. See Bell, *Interest-Convergence Dilemma*, *supra* note 20, at 525-26 (discussing psychic rewards of racism). For a recent article that explores one aspect of this phenomenon, see generally Ian F. Haney López, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 YALE L.J. 1717 (2000). Haney López posits that institutional actors follow taken-for-granted routines, or scripts, that lead them to engage in racist behavior even when they are convinced their acts are not racist at all. See *id.* at 1785-86. Without excessive psychologizing or positing of hidden entities, Haney López shows how actors with little obvious stake in racism nevertheless end up perpetuating it. *Id.* at 1827-28. His analysis, thus, can be seen as a bridge between Lawrence and the idealist-discourse analyst school, and the position taken in this Essay.

litigant of color.⁷⁷ For example, in 1957, a married couple, Gilbert and Nancy Gonzalez, sued a large supermarket chain for pain, suffering, medical expenses, and lost income when they consumed food “unfit for human consumption”⁷⁸ purchased at a Colorado store. In preparing dinner one evening, Nancy had opened a can of peas, then “poured them into a clean sauce pan, warmed them, and served them to Gilbert and herself on clean plates,”⁷⁹ along with other food they were having for dinner that night. After eating a portion of the peas, Gilbert discovered a bug in the remaining portion. Both felt sick and disgusted.⁸⁰ Gilbert experienced intense nausea, which exacerbated an ulcer condition, while Nancy, who was pregnant, suffered nausea and vomiting.⁸¹ In ruling in favor of the store chain, the trial judge questioned the cleanliness of the Gonzalez’s home, suggesting that the condition of the peas resulted from poor sanitation in the house.⁸² Thus, the judge’s ruling reinforced and drew on prevailing social narratives of Mexicans as unclean. The Gonzalezes eventually won vindication in the state supreme court,⁸³ but it seems unlikely that a Euro-American family would have received such harsh treatment in the trial court.

The sequence, then, is as follows: We treat minorities badly because we stand to gain material advantage. We then develop and propagate attitudes and beliefs that justify what we have done; other actors, including legal ones, join in.⁸⁴ Oppression entrenches, making the next round of exploitation that much easier to carry out. “Racism,” Lawrence writes, “is a disease.”⁸⁵ True, but it is also a fever. Treating racism’s symptoms—discrimination—without attending to the forces that create and maintain it—economic oppression—inhibits understanding and postpones the moment when we will develop effective strategies for resisting it.

II. BROADER VISTAS, MORE EFFECTIVE RESISTANCE: ADVANTAGES OF THE MATERIALIST VIEW

Not only does the materialist view enable one to understand racial history in a

77. Richard Delgado & Jean Stefancic, *Norms and Narratives: Can Judges Avoid Serious Moral Error?*, 69 TEX. L. REV. 1929, 1957 (1991).

78. *Gonzalez v. Safeway Stores, Inc.*, 363 P.2d 667, 668 (Colo. 1961). I thank Tom Romero for pointing out this case to me.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* at 669.

83. *Id.*

84. See, e.g., Anthony V. Alfieri, *Race Prosecutors, Race Defenders*, 89 GEO. L.J. 2227, 2236-43 (2001) (pointing out influence of habit, stereotype, and preconception on trials of race cases); Gerald Lopez, *The Work We Know So Little About*, in CRITICAL RACE THEORY: THE CUTTING EDGE 592 (Richard Delgado & Jean Stefancic eds., 1999) (same).

85. Lawrence, *supra* note 1, at 321; see also Charles R. Lawrence III, *Each Other’s Harvest: Diversity’s Deeper Meaning*, 31 U.S.F. L. REV. 757, 760 (1997) (analogizing racism to a disease); Charles R. Lawrence III, *Race, Multiculturalism, and the Jurisprudence of Transformation*, 47 STAN. L. REV. 819, 837 (1995) (same).

way that the idealist view does not, it also enables one to combat racism and economic inequality more effectively. Thus, instead of seeking an accommodation with the intent requirement by searching for a ghost in the machine and pronouncing the requirement satisfied when we find it, Lawrence could take a more direct approach. He could pronounce the requirement an evasion and challenge it as unnecessary. He might assert that the point of antidiscrimination law is to dismantle governmental programs that subordinate minorities⁸⁶ and that other common-law countries do not require intent in their antidiscrimination law.⁸⁷ This approach would focus attention on the victim, rather than the perpetrator and his internal motivations.⁸⁸ It might point the civil rights community in a more useful direction, so that the current conservative backlash would not continue to sweep the land and meet such little effective resistance. Instead of looking for more refined levels of intent and unconscious motivation—a ghost in the machine—why not look to see what the machine is doing and take steps to dismantle it?

How might materialist analysis differ from the idealist version? Imagine that a Democratic President enacts deep cuts in welfare programs vitally important for the black and Latino poor. Discourse analysis might hold that the President and his advisors harbored unconscious racism. A materialist might reason that the President wanted to be reelected and feared a conservative backlash,⁸⁹ that he feared no Cold War or third-party competition,⁹⁰ or that the threat of mass protests is slight today because minorities are divided and lack effective leadership.⁹¹

Or consider the analysis of hate crimes and hate speech.⁹² For Lawrence and other idealists (and myself on occasion), such incidents are evidence of racial hatred and, in the case of hate speech's defenders, a mistaken view of the scope of free speech. A materialist would point out that hate speech and hate crime are means by which members of the majority race keep people of color insecure and

86. See Ruth Colker, *Antisubordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1008-10 (1986).

87. Colleen Sheppard, *Equality Rights and Institutional Change: Insights from Canada and the United States*, 15 ARIZ. J. INT'L & COMP. L. 143, 157-58 (1998) (citing Canadian antidiscrimination law, which does not require proof of intent).

88. See Alan D. Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critique of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1055 (1978) (criticizing American antidiscrimination law for taking the perpetrator's perspective, rather than that of the victim).

89. See Stefancic & Delgado, *supra* note 21, at 87.

90. See Bell, *Interest-Convergence Dilemma*, *supra* note 20 at 524. See generally MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGES OF AMERICAN DEMOCRACY* (2001).

91. On the crisis in black leadership, see CORNEL WEST, *RACE MATTERS* (1994). However, note that the movement for economic democracy is vital and growing and suffers no lack of leadership. See *infra* notes 140-43 and accompanying text.

92. See, e.g., MATSUDA, LAWRENCE, DELGADO & CRENSHAW, *supra* note 31; Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982). For a recent comprehensive overview of this subject, see generally RICHARD DELGADO & JEAN STEFANCIK, *MUST WE DEFEND NAZIS? HATE SPEECH, PORNOGRAPHY, AND THE NEW FIRST AMENDMENT* (1997).

off balance—in short, they are tools of social control.⁹³ Materialists would also point out that hate speech is more effective the smaller the audience and that the constant rain of minor harassment, move-in violence, and defacement of property is what maintains much segregation in housing, the workplace, and schools.⁹⁴

Consider also how differently an analysis of *McCleskey v. Kemp*⁹⁵ might proceed. An adherent of the unconscious-racism position might reason that the criminal justice system unconsciously devalues black life, perhaps because of internalized myths and narratives of black criminality.⁹⁶ A more material analysis would point out that society uses incarceration and execution as control devices, similar to slavery.⁹⁷ It would point out that incarceration is a means of manipulating the labor pool and of disenfranchising black men from voting for candidates like Jesse Jackson.⁹⁸ As David Cole has pointed out, the criminal justice system requires plea bargains and guilty pleas by blacks, otherwise the system would fall by its own weight.⁹⁹

Or consider how a discourse analyst-idealist would explain the demise of the civil rights era of the sixties. The analyst would probably explain the demise in terms of changes in the national psyche: America grew tired of blacks. Racism, held in abeyance for a brief time, then reasserted itself; a backlash set in as whites felt themselves losing ground to blacks and Chicanos.¹⁰⁰ But when one's view is broadened to include material factors, a different set of explanations comes into view. If *Brown v. Board of Education*¹⁰¹ and other civil rights breakthroughs were, in fact, cases of interest convergence, then one is led to ask how and why that convergence dissipated. As Bell¹⁰² and Mary Dudziak¹⁰³ have pointed out, when the United States was in the early stages of an intense Cold War against the forces of international communism, a few highly publicized civil rights breakthroughs would assure the uncommitted Third World that the United States had their interests at heart. However, an implicit premise of

93. Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 NW. U. L. REV. 343, 387 (1991).

94. For a graphic example, see *R.A.V. v. City of St. Paul*, 505 U.S. 377, 379 (1992) (cross burned in yard of black family that had recently moved into neighborhood).

95. 481 U.S. 279, 297 (1987) (holding that disproportionate number of black men executed in state of Georgia compared to whites did not constitute provable discrimination).

96. See, e.g., Sheri Lynn Johnson, *Unconscious Racism and the Criminal Law*, 73 CORNELL L. REV. 1016, 1026-30 (1988) (arguing that unconscious racism accounts for disparities in criminal law, particularly in capital cases).

97. See COLE, *supra* note 53, at 182-87; Alfieri, *supra* note 84, at 2223-24.

98. For a discussion of the way felony convictions disenfranchise many black men under state laws, see Virginia E. Hench, *The Death of Voting Rights: The Legal Disenfranchisement of Minority Voters*, 48 CASE W. RES. L. REV. 727, 784 (1998).

99. See generally COLE, *supra* note 53 (positing that criminal justice system would fail unless balanced on the backs of blacks).

100. On the recent backlash against affirmative action, see CHARLES LAWRENCE III & MARI MATSUDA, *WE WON'T GO BACK* (1998).

101. 347 U.S. 483 (1954).

102. Bell, *Interest-Convergence Dilemma*, *supra* note 20, at 524.

103. DUDZIAK, *supra* note 90, at 100-02.

the bargain was that blacks would embrace America, display conspicuous patriotism, serve in the armed forces, and, above all, abjure communism.¹⁰⁴ For a time, this worked: The black community ostracized Josephine Baker, Paul Robeson, and even W.E.B. DuBois, founder of the NAACP, for flirting with communism.¹⁰⁵ Blacks' loyalty was rewarded: *Brown* and other civil rights era breakthroughs ushered in a period of genuine advances for many in the African-American community.

This lasted for less than ten years. Late in the sixties, black power, Stokely Carmichael, and the Panthers arrived on the scene.¹⁰⁶ The civil rights movement, until then prayerful, mannerly, and nonviolent, stopped repeating the narratives of Americanism, faith, love, brotherhood, and patience. Malcom X preached that white men were satanic.¹⁰⁷ Panthers took up guns and taught that the black community possessed an inherent right of self-defense.¹⁰⁸ A new generation of black leaders began quoting Marx, Mao Tse Tung, and Che Guevara.¹⁰⁹ The implicit bargain in which black loyalty would purchase much-publicized favors was broken. The establishment responded in two ways: with lethal force against the Panthers¹¹⁰ and with money.¹¹¹ The federal antipoverty program and the Ford Foundation poured millions of dollars into minority communities. Formerly radical leaders such as Denver's Corky Gonzales received grants and patronage jobs that they could dispense to their friends.¹¹² African-American well-being surged a second time, but black radicalism suffered a blow from which it has yet to recover. Around this time, popular discourse and images of blacks also changed. From being noble warriors in the Martin Luther King mold, they became, in the eyes of the media and the creative community, sharp, hip hucksters and welfare mothers having too many children in order to reap the benefit of government programs.¹¹³ Moynihan's and Oscar Lewis's "culture of poverty" notions swept the nation.¹¹⁴

Discourse analysis tells you that race is socially constructed; what it neglects

104. *Id.* at 11, 154, 268 n.17.

105. On Paul Robeson, see generally MARTIN DUBERMAN, PAUL ROBESON (1988); see also Peter J. Perla, *From Left to Center: The Appropriation of Anti-Communist Rhetoric by the Black Press and Leading Black Opinion-Makers, 1946 Through 1948*, at 95-118 (Apr. 1, 1992) (unpublished thesis, University of Colorado-Boulder) (on file with author) (discussing the downfall of DuBois and Robeson in the NAACP).

106. See, e.g., DAVID RAY PAPKE, HERETICS IN THE TEMPLE 106-33 (1998).

107. See ALEX HALEY, THE AUTOBIOGRAPHY OF MALCOLM X, at 251 (1966).

108. See generally PAPKE, *supra* note 106 (describing the Panthers' turn to militancy and self-defense).

109. See *supra* notes 106-07.

110. See PAPKE, *supra* note 106, at 130-31.

111. See CARR, *supra* note 40, at 101-02.

112. See ERNESTO B. VIGIL, THE CRUSADE FOR JUSTICE: CHICANO MILITANCY AND THE GOVERNMENT'S WAR ON DISSENT 21-22 (1999).

113. See Delgado & Stefancic, *supra* note 41, at 1267.

114. See DANIEL PATRICK MOYNIHAN, THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION (U.S. Dep't of Labor, 1965) (detailing pathologies of that institution as a cause of black poverty and lack of upward mobility); see also OSCAR LEWIS, FIVE FAMILIES (1959) (same, for Mexican-American families).

to tell you is how that happens and why. Focusing ever more closely on the contents of America's collective psyche will not provide the answer. Repeatedly exhorting white people to sanitize their thoughts about minorities will not do much to improve their condition either. However, sometimes even small changes in the material structure of an institution will set things on a better course. Imagine a school that contains seventy-five percent white and twenty-five percent Mexican-American children. The white children come from affluent homes. They wear better clothes, their mothers pack them more generous lunches, and they arrive in the family cars rather than the school bus, which frequently breaks down and is late. Noticing these differences, the white children taunt the Chicano children, making fun of their shabby, unstylish clothes and commenting on their peculiar or skimpy lunches.

Lawrence has written about playground racism,¹¹⁵ and a follower of his would no doubt find the cause of this case of discrimination rooted in the poor racial attitudes of the white children, their lack of guidance at home, and their teachers' failure to model and enforce nonracist behavior. A materialist, however, would suggest that the school find the children clean clothing, warm lunches, and buses that run on time. The latter interventions might well turn out to be easier and more effective, whereas focusing on thoughts, attitudes, and categories (Is the term "Chicano" inherently pejorative? Is "Spanish-speaking" any better?) is unlikely to prompt one even to consider them.

A further advantage of the materialist approach is that it enables one to look at the other side of the equation—namely, white privilege.¹¹⁶ With idealism and discourse analysis, all of the emphasis is placed on attitudes, usually those of white people, toward blacks and other racial minorities. However, white privilege—that collection of favors, courtesies, exceptions, and other benefits that accrue to Euro-Americans on account of their whiteness—accounts for much of the unequal distribution of wealth, status, and well-being in society.¹¹⁷ Racial hierarchy, as Adrienne Davis put it, is like a hydra-headed monster.¹¹⁸ One head consists of outright oppression of minorities, the other of white privilege—the system by which whites look out for and reinforce each other's interests. Lopping off one head while leaving the other intact will do little to render society more equal.¹¹⁹ Lawrence's psychological approach ignores this other source of rampant inequality. Of course, a determined idealist might posit a second set of unconscious impulses that lie in wait inside white people's heads

115. Lawrence, *supra* note 31, at 482-83.

116. On white privilege, see CRITICAL WHITE STUDIES: LOOKING BEHIND THE MIRROR 273-75, 291-99, 306-09, 315-18, 323-26, 331-32, 619-25, 654-57 (Richard Delgado & Jean Stefancic eds., 1997) and *infra* notes 118, 121-23.

117. See CRITICAL WHITE STUDIES, *supra* note 116, at 291-99.

118. See Stephanie M. Wildman & Adrienne D. Davis, *Making Systems of Privilege Visible*, in PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA 7, 19-20 (Stephanie M. Wildman ed., 1996).

119. See *id.*

until the perfect opportunity arises and then issue forth in the form of behavior benefiting other whites. But this, too, is not parsimonious. Moreover, it ignores that white privilege is less an attitude than a means of reinforcing class and color solidarity.

With outright racism, capitalists bring their lowest level of employees into competition with each other by finding ever-cheaper sources of labor, such as *braceros* from Mexico or black scabworkers, to break strikes.¹²⁰ With white privilege, the opposite happens: Whites construct solidarity and advantage at the top. Coined in recent years by feminist scholars such as Peggy McIntosh,¹²¹ Barbara Flagg,¹²² and Stephanie Wildman,¹²³ white privilege had other names earlier in our history: Manifest Destiny, the Monroe Doctrine, noblesse oblige, and old-boy networks (by which indifferent students from good families gained admission to elite schools). All these systems do not merely illustrate the same attitude taking different forms throughout history. Although each may have been accompanied by attitudes such as elitism or favoritism toward one's own, they were primarily aspects of a larger system of economic and class exploitation. As such, their redress requires much more than introspection, a change of attitudes, or resolutions to be inclusive. Rather, interlocking structures of privilege that benefit a few at the expense of the rest must be confronted.¹²⁴

Idealist analysis also obscures how the oppressed are sometimes complicit in their own oppression. Recall the devil's bargain by which the black community agreed to embrace official patriotism, support America's role in wars, and purge itself of radicals and socialists in return for a few, largely symbolic breakthroughs.¹²⁵ Some minority people do, of course, come to harbor feelings of self-doubt, even self-loathing. How could they not in a system that teaches them lessons of their own inferiority, ugliness, and lack of worth every day? Yet if we were to analyze W.E.B. DuBois's banishment from the NAACP¹²⁶ or reformer Corky Gonzales's sudden conversion to poverty warrior¹²⁷ as simple attitude shifts, we would surely overlook forces shaping important chapters in America's racial history.¹²⁸

This approach to racial problems also impairs the formation of coalitions among outgroups.¹²⁹ Suppose that two groups—for example, blacks and Latinos—are being

120. See CARR, *supra* note 40, at 160; Delgado & Stefancic, *supra* note 42, at 1532-45.

121. PEGGY MCINTOSH, *WHITE PRIVILEGE AND MALE PRIVILEGE: A PERSONAL ACCOUNT OF COMING TO SEE CORRESPONDENCES THROUGH WORK IN WOMEN'S STUDIES* (1988).

122. BARBARA J. FLAGG, *WAS BLIND BUT NOW I SEE: WHITE RACE CONSCIOUSNESS AND THE LAW* (1998).

123. *PRIVILEGE REVEALED*, *supra* note 118.

124. See PEREA, DELGADO, HARRIS & WILDMAN, *supra* note 41, at 1118-23.

125. See *supra* notes 100-14 and accompanying text.

126. See generally Perla, *supra* note 105 (describing banishment of leading black figures).

127. See *supra* note 112 and accompanying text.

128. See *supra* notes 100-14 and accompanying text (pointing out how the establishment responded decisively to some black and Chicano leaders' flirtation with communism).

129. See Delgado, *supra* note 69, at 302-06 (discussing coalitions among outgroups and impediments to their formation).

oppressed in the same way. Under discourse analysis, the blacks might reason that whites have a bad attitude toward them because of deep-seated associations with the color black.¹³⁰ For their part, the Latinos might explain their unfair treatment in terms of white people's association with the color brown. Both groups would then launch campaigns, including diversity seminars, exhortation, teaching, and passionate writing aimed at persuading white people to stop associating brown and black with negative characteristics. It would be easy for the two groups to fail to notice that they are complaining about the same structure of inequality and thereby lose an opportunity to join forces in confronting it.

III. DISADVANTAGES OF THE IDEALIST POSITION

In addition to forfeiting the above-mentioned advantages—opportunities for coalition, greater insight into the structures of oppression, and parsimony—the idealist approach suffers a number of outright disadvantages. One is the risk that courts may abandon strict scrutiny for state measures that disadvantage minorities. If race is a matter of attitude, a mere social construction, then it is not immutable.¹³¹ We might decide at any time to think in a more wholesome fashion about it. Perhaps, indeed, society has already begun to do so. Do not most color-blind conservatives believe that society contains very little overt racism? Unless Lawrence and other discourse analysts are prepared to accept this possibility, they should consider broadening their concept of race and racism to include structural, material-interest-serving means by which one group subordinates another.

Discourse analysis also gives encouragement to black and Latino conservatives who see themselves as having made it by their own efforts.¹³² If race and racism are, essentially, matters of attitude, then the success of one black entrepreneur, athlete, or musician is evidence that those attitudes no longer exist—at least in that person's business or region. However, if racism is an interlocking set of structures by which one group maintains advantages over another, then tokenism and "contradiction-closing" cases can be seen as additional instruments in maintaining that ascendancy.¹³³ Efforts should not flag merely because a momentary breakthrough is announced.

130. On this psychoanalytic theory, which links racism with fear of dirt and excrement, see JOEL KOVEL, *WHITE RACISM: A PSYCHOHISTORY* 54, 95-96 (1970).

131. On immutability as a criterion for suspect classes, see LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1615-16 (2d ed. 1988). The materialist view may resonate with some judges because of its similarity to law and economics, with which many judges are familiar. See generally RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (1972).

132. See, e.g., RICHARD RODRIGUEZ, *HUNGER OF MEMORY: THE EDUCATION OF RICHARD RODRIGUEZ* (1982) (describing disdain for affirmative action and other handouts, and urging self-reliance, individual effort, and conventional achievement); SHELBY STEELE, *THE CONTENT OF OUR CHARACTER* (1990) (same).

133. On contradiction-closing cases—cases in which a legal breakthrough arrives, as though by magic, when the gap between our ideals and a pervasively racist reality grows too large—see Derrick A. Bell, *The Supreme Court, 1984 Term: Foreword: The Civil Rights Chronicles*, 99 HARV. L. REV. 4,

Moreover, the theory of unconscious discrimination, unlike materialist analysis, can easily be turned against blacks. Perhaps the black-dominated Richmond City Council in *Croson* unconsciously disliked whites and harbored a payback mentality, as Justice Sandra Day O'Connor suggested.¹³⁴ Analysis of race and racism in attitudinal terms could easily produce more opinions in that vein. We could see more speculation that measures aimed at benefiting groups of color are really unconsciously aimed at instituting a "racial spoils system."¹³⁵ It is difficult to rebut an accusation that one harbors a particular motive. Lawrence's discourse analysis could open the door to the examination of supposedly illegitimate motives harbored by individuals working for racial justice.

Additionally, the search for a culpable actor—one who is malevolently motivated—reinforces a perpetrator perspective that sees racism as a series of isolated actions and not an integrated system that elevates one group at the expense of another.¹³⁶ It ignores that race is the normal science of American life, not the aberrant, blameworthy exception, and how it serves as a valuable, if unstated, homeostatic mechanism for maintaining and replicating social relations.¹³⁷ Finally, the logical end point of analysis of racism in psychoanalytic terms is a therapeutic approach that views racism as a medical problem or disease. As such, its cure, logically, would be medical, educational, or psychological treatments aimed at eradicating it. This would be so intrusive that both liberals and conservatives might be expected to object.

Even setting aside these objections, Lawrence's psychoanalytic approach lacks a coherent standard. His article proposes a "cultural meaning" test,¹³⁸ in which behavior that society would understand as racist would constitute evidence of an actor's unconscious intent and expose it to official sanction. This social-meaning test would be difficult to apply in light of the growth of nonblack minority populations such as Latinos and Asian-Americans and the recent arrival of large immigrant populations. These changes, and the concomitant breakdown of the black-white binary paradigm of race,¹³⁹ render the search for consensus on an action's singular meaning essentialist and quixotic. Whether an action or structure contributes to material oppression seems a much more

32 (1985). Such cases legitimate a generally indifferent legal system, permitting dominant society to believe that it is fair and just. *See id.*

134. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 480-86 (1989).

135. *Id.* at 510-11.

136. *See* CRITICAL RACE THEORY: THE CUTTING EDGE, at xvi-xvii, 563 (Richard Delgado & Jean Stefancic eds., 2d ed. 2000); Alan Freeman, *Antidiscrimination Law*, 64 TUL. L. REV. 1407, 1412-13 (1990).

137. On the homeostatic function of legal rules ensuring that society contains exactly the right amount of racism, see generally Richard Delgado & Jean Stefancic, *The Social Construction of Brown v. Board of Education: Law Reform and the Reconstructive Paradox*, 36 WM. & MARY L. REV. 547 (1995).

138. *See* Lawrence, *supra* note 1, at 355-81.

139. On the critique of the black-white paradigm of U.S. race relations, see, for example, Juan F. Perea, *The Black/White Binary Paradigm of Race: The "Normal Science" of American Racial Thought*, 85 CALIF. L. REV. 1213 (1997).

fruitful, and ultimately, worthy way of addressing America's most intractable and complex problem: race.

CONCLUSION

On November 30, 1999, over 50,000 citizens, young and old, gathered in Seattle to demonstrate outside the meeting hall where the World Trade Organization (WTO) was holding a conference on global policy.¹⁴⁰ The protesters were calling attention to the failure of global capitalism to consider workers' rights, occupational safety, and exploitation of Third World women and children in overseas factories and assembly plants.¹⁴¹ About the same time, organizations of university students were demanding that their schools stop doing business with athletic shoe and sport apparel factories that manufacture goods in foreign plants under sweatshop conditions.¹⁴² One year after the Seattle protest, a second protest was held outside the next WTO meeting in Prague, Czech Republic. Echoing some of the themes from the first gathering, the protesters called for unionization, workers' rights, and environmental regulation of international polluters.¹⁴³ Other demonstrations in Washington, D.C.; Chiang Mai, Thailand; Philadelphia, Pennsylvania; Melbourne, Australia; and Toronto, Canada hammered away at the same themes.¹⁴⁴

Economic issues, and especially global economic democracy, promise to be the issues of our age, just as Freudian theories and individualist conceptions of the self dominated the early years of the last century. Psychoanalytic theories of race, never full or adequate explanations, now are emerging as anachronisms, while materialist interpretations offer not only a better understanding of history, but also a means by which the long-awaited synthesis of race and class in American society may emerge and civil rights scholars may join hands with the dynamic movement for economic democracy. It is time to move away from limited conceptions of racism located in the individual psyches of particular perpetrators and to begin the search for broad structures that submerge people of color, workers, and immigrants, and replace these structures with ones that can fulfill our unkept promises of democracy, equality, and a decent life.

140. Luis Cabrera, *Protests Put New Activists in Spotlight: Demonstrations Weren't a Fluke, Organizers Say*, DAILY CAMERA (Boulder, Colo.), Nov. 25, 2000, at A15 [hereinafter *Protests Put New Activists in Spotlight*]; Luis Cabrera, *WTO Protests Left Mark on Seattle: A Year Later, Police Gird for Thursday's Globalization Protest*, DAILY CAMERA (Boulder, Colo.), Nov. 25, 2000, at A13 [hereinafter *WTO Protests*].

141. See *Protests Put New Activists in Spotlight*, *supra* note 140; *WTO Protests*, *supra* note 140.

142. Liza Featherstone, *The Student Movement Comes of Age*, NATION, Oct. 16, 2000, at 23.

143. See *Protests Put New Activists in Spotlight*, *supra* note 140; *WTO Protests*, *supra* note 140.

144. *More Protests of Anti-Globalization*, DAILY CAMERA (Boulder, Colo.), Nov. 25, 2000, at A15.