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READING PROFESSOR OBAMA: RACE AND THE AMERICAN CONSTITUTIONAL TRADITION

Stacey Marlise Gahagan* and Alfred L. Brophy**

ABSTRACT

Reading Professor Obama mines Barack Obama's syllabus on "Current Issues in Racism and the Law" for evidence of his beliefs about race, law, and jurisprudence. The syllabus for the 1994 seminar at the University of Chicago, which provides the reading assignments and structure for the course, has been available on the *New York Times* website since July 2008. Other than a few responses solicited by the *New York Times* when it published the syllabus, however, there has been little attention to the material Obama assigned or to what it suggests about Obama's approach to the law and race.

The class began with four weeks of foundational readings followed by four weeks of student-led class discussions. The readings started by discussing the malleability of racial categories and progressed to cases from the nineteenth century on Native Americans and on slavery. The second day's readings shifted to the Reconstruction era and changes in the Constitution and statutory law, as well as the rise of the "Jim Crow" system of segregation and the response of African American intellectuals. The third class covered the Civil Rights revolution and retrenchment. It included reading from such diverse figures as Robert Bork, Martin Luther King, and Malcolm X. The fourth class, "Where Do We Go From Here?," addressed some of the enduring issues of inequality facing our nation, the fragility of the African American middle class, continuing racism against African

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Americans, and a plea for more understanding. After the initial four class meetings, student groups selected additional readings and led class discussions on a variety of race-related topics. The syllabus has suggested topics for the presentations and brief discussion of those topics.

The media has called attention to President Obama's public relationship with Derrick Bell; notwithstanding the option to read Bell's summaries of cases in lieu of the actual opinions, the readings have no overt endorsement of Derrick Bell, Critical Race Theory ("CRT"), or Bell's Interest-Convergence theory. Obama included many critics of CRT and offered readings that seemingly demonstrate his hope for substantially more dialog and perhaps, ultimately, economic uplift of those labeled by some of his readings "the truly disadvantaged." Obama's use of the Martin Luther King, Jr.'s essay *Where Do We Go from Here: Chaos or Community?* as the title of the last group of readings suggests that Obama did not share Bell's vision of the unalterable nature of racism.

The readings, while instructive, are just the starting point of our analysis. Obama's suggested topics encourage students to wrestle with the modern consequences of racism and to question its malleability. Thus, we suggest that the readings and group presentation topics reveal Obama, the teacher, as interested in, but not necessarily aligned with, many of the key questions of CRT. The syllabus fits with the story that Obama focuses on issues that unite Americans while he seeks equal treatment. This may reflect the future of constitutional doctrine related to race.

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Even though we are well into President Barack Obama's second term as president, many wonder about his ideas regarding the jurisprudence of race and what they signal about the future of race in American political and legal thought. Historians trace the intellectual roots of Obama's political and racial ideology in diverse places, from Hawaii to Occidental College, Columbia College, Harvard Law School, the streets of Chicago, and even the halls of the University of Chicago Law School.¹ One analysis in the *New Republic* situates Obama somewhere between Harvard Law Professor Laurence Tribe's orientation towards constitutional doctrine and former University of Chicago Law Professor and former Administrator of the White House Office of Information and Regulatory Affairs Cass Sunstein's skepticism of courts and preference for legislation.²

By wielding classic techniques of intellectual history, such as situating historical actors in their context and looking closely at the ideas of leading liberal intellectuals of the twentieth century,³ Harvard history professor James Kloppenberg analyzed the readings assigned to Obama as a student. Kloppenberg deftly drew inferences about the development of Obama's beliefs from what was taught and read in courses Obama took at Occidental, Columbia, and Harvard.⁴ While there are limits to such methods, there is also much to admire in Kloppenberg's efforts to place Obama in the context of his times, which demonstrate that Obama is not only the product of his times but also a representative of them. Kloppenberg focuses on several key ideas: Obama sought to emphasize the issues that unify Americans, rather than those on which we differ;⁵ and Obama followed African American intellectuals like Ralph Ellison who sought to hold our country to its principles, such as the equality promised in Declaration of Independence and later the Fourteenth Amendment.⁶ Like his

¹ E.g., JAMES KLOPPENBERG, *READING OBAMA: DREAMS, HOPE, AND THE AMERICAN POLITICAL TRADITION* ix–xviii (2010).

² Justin Driver, *Obama's Law: A New Argument About His Legal Philosophy—and Its Troubling Consequences*, *THE NEW REPUBLIC*, June 30, 2011, at 10, available at <http://www.npr.com/article/politics/magazine/89647/obama-legal-philosophy-laurence-tribe>.

³ See, e.g., G. EDWARD WHITE, *THE MARSHALL COURT AND CULTURAL CHANGE, 1815–1835* (1988); William W. Fisher, *Texts and Contexts: The Application to American Legal History of the Methodologies of Intellectual History*, 49 *STAN. L. REV.* 1065 (1998).

⁴ KLOPPENBERG, *supra* note 1.

⁵ *Id.* at 82.

⁶ KLOPPENBERG, *supra* note 1, at 13 (discussing Ellison); see also Eric J. Sundquist, "We Dreamed a Dream": Ralph Ellison, Martin Luther King, Jr. & Barack Obama, *DAEDALUS* 108, 108–24 (Winter 2011).

predecessors, optimism lay at the foundation for Obama. His optimism was grounded in the belief that the fragmentation of recent politics⁷ could be overcome. Obama believed that focusing on a common core of values would lead to a political resolution of differences. Related to this was his belief that race is not the permanent, almost insurmountable barrier it had been for activists of earlier generations.⁸

In March 2012, interest in Obama's early ideas about race—and his connections to Harvard Law Professor Derrick Bell in particular—revived after the rerelease of a video recording of Obama's brief introduction of Bell given at a protest over faculty diversity at Harvard on April 24, 1990.⁹ *Fox News* covered the story extensively and used it to draw connections between Obama and Bell and, by implication, charge Obama with statements that Bell made.¹⁰ *Breitbart.com* went even further with an article entitled *Obama Assigned Bell at University of Chicago*

⁷ DANIEL T. ROGERS, *THE AGE OF FRACTURE* (2012).

⁸ KLOPPENBERG, *supra* note 1, at 82–83, 127.

⁹ See Ben Shapiro, *OBAMA: 'Open up your hearts and your minds' to racist prof*, BREITBART (Mar. 7, 2012), <http://www.breitbart.com/Big-Government/2012/03/07/buzzfeed-selectively-edits-obama-tape> (“[T]his video is a smoking gun showing that Barack Obama not only associated with radicals, he was their advocate.”); see also *Exclusive: Breitbart.com Unveils Unedited Video of Obama and Radical Professor*, FOXNEWS.COM, <http://www.foxnews.com/on-air/hannity/2012/03/08/exclusive-breitbartcom-unveils-unedited-video-obama-and-radical-professor#ixzz1unTHcW00> (Mar. 8, 2012); but see Andrew Golis, *The Story Behind the Obama Law School Speech Video*, PBS.ORG (Mar. 7, 2012, 7:09 PM), <http://www.pbs.org/wgbh/pages/frontline/government-elections-politics/the-story-behind-the-obama-law-school-speech-video/> (stating that contrary to Breitbart's claim to unveiling the video, the tape was part of a PBS documentary before the 2008 election and has been posted “online at [www.pbs.org] and on YouTube since then”).

¹⁰ See, e.g., Todd Starnes, *Obama Harvard Tapes Exposed on Hannity*, FOXNEWS.COM (Mar. 7, 2012), <http://nation.foxnews.com/president-obama/2012/03/07/obama-harvard-tapes-exposed-hannity> (“And when Barack Obama says, open your hearts and open your minds to the words of Professor Derrick Bell and calls him an inspiration and talks about his scholarship, he's talking about some very radical things, so radical that later on, Derrick Bell got into serious trouble when he wrote an essay, a fictional story, called space traders [sic], positing that Americans, white Americans would sell black Americans to space aliens in order to pay out the national debt and that Jews would stand by and let it happen. This is a kind of background Derrick Bell had.”) (quoting Joel Pollak, editor-in-chief of Breitbart.com); *More Obama Harvard Professor Videos Surface*, FOXNEWS.COM, <http://nation.foxnews.com/derrick-bell/2012/03/09/more-obama-harvard-professor-videos-surface> (last visited Aug. 19, 2012); Joel B. Pollak, *The Vetting—Exclusive: Obama Letter to Bell to Blurb 'Dreams from My Father'*, BREITBART (Apr. 26, 2012), <http://www.breitbart.com/Big-Government/2012/04/26/The-Vetting-Obama-Letter-Derrick-Bell-Blurb-Dreams-from-My-Father> (“By the time Obama reached out to [Bell to ask for blurb for *Dreams*], Bell's radicalism was well and widely known. He had just blurbed Louis Farrakhan's book on black self-reliance, *A Torch Light for America*, and praised the Nation of Islam's community education programs.”).

Law School with the inflammatory subtitle, “Barack Obama made his own students at the University of Chicago Law School read some of Derrick Bell’s most radical and racially inflammatory writings.”¹¹ Yet, as David Graham wrote in March 2012 in *The Atlantic*, after surveying the controversy over the video of Obama introducing Derrick Bell: “A better test of Obama’s own legal views would be to look at his teaching career.”¹²

Obama’s intellectual relationship to Derrick Bell and to other faculty who may have served as his mentors during his time at Harvard Law School continues to draw the public’s interest. Some have attempted to gain insight into Obama’s ideas from his “lost law review article”¹³—a case note in the *Harvard Law Review*¹⁴—as well as from an article written by Laurence Tribe while Obama was his research assistant.¹⁵ Such speculation produces pretty low yield ore, as much of it simply draws inferences from a limited set of data. An article in *Politico*, for instance, charged Obama with the content of various abstracts published in the *Harvard Law Review*.¹⁶ Similarly, one blogger tried to draw a negative inference from the number of times that the *Harvard Law Review* volume for which Obama was president has been cited in comparison to other volumes.¹⁷ Perhaps because efforts thus far have produced little more than speculation, there remains

¹¹ Charles C. Johnson, *Obama Assigned Bell at University of Chicago Law School*, BREITBART (Mar. 8, 2012), <http://www.breitbart.com/Big-Government/2012/03/08/obama-made-bell-required-reading-chicago>.

¹² David Graham, *Breitbart.com’s Massive Barack Obama-Derrick Bell Video Fail*, THE ATLANTIC (Mar. 8, 2012, 3:02 PM), <http://www.theatlantic.com/politics/archive/2012/03/breitbartcoms-massive-barack-obama-derrick-bell-video-fail/254213/>.

¹³ Ben Smith & Jeffrey Rensner, *Exclusive: Obama’s Lost Law Review Article*, POLITICO (Aug. 22, 2008, 5:08 AM), <http://www.politico.com/news/stories/0808/12705.html>.

¹⁴ Note, *Tort Law—Prenatal Injuries—Supreme Court of Illinois Refuses to Recognize Cause of Action Brought by Fetus Against Its Mother for Unintentional Infliction of Prenatal Injuries*, Stallman v. Youngquist, 125 Ill. 2d 267, 531 N.E.2d 355 (1988), 103 HARV. L. REV. 823 (1990).

¹⁵ Laurence H. Tribe, *The Curvature of Constitutional Space: What Lawyers Can Learn From Modern Physics*, 103 HARV. L. REV. 1 (1989); see, e.g., F.J. TIPLER, THE OBAMA-TRIBE “CURVATURE OF CONSTITUTIONAL SPACE” PAPER IS CRACKPOT PHYSICS (2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1271310.

¹⁶ See Jeffrey Rensner & Ben Smith, *Obama Kept Law Review Balanced*, POLITICO (June 23, 2008, 4:38 AM), <http://www.politico.com/news/stories/0608/11257.html>.

¹⁷ See Steve Sailer, *How Good Was Obama at Running the Harvard Law Review?*, VDARE.COM (Feb. 12, 2008, 9:47 PM), <http://www.vdare.com/posts/how-good-was-obama-at-running-the-harvard-law-review>.

substantial interest and uncertainty in how Obama sees the relationship between race and the legal system.

I. READING OBAMA'S SYLLABUS FOR "CURRENT ISSUES IN RACISM AND THE LAW"

One source has the potential to provide significantly more insight on Obama's perspective than either the brief case note he wrote while a student or the article for which he served as a research assistant. It is the syllabus for the "Current Issues in Racism and the Law" course he taught in the Fall of 1994 at the University of Chicago Law School.¹⁸ The syllabus contains four weeks of required reading, including excerpts from Derrick Bell's casebook *Race, Racism, and American Law*,¹⁹ and also a series of suggested discussion questions that students could use as starting points for their own class presentations.

The syllabus received a moderate amount of attention on July 30, 2008 when the *New York Times* published the syllabus on its website. The syllabus accompanied an article by Jodi Kantor, *Teaching Law, Testing Ideas, Obama Stood Slightly Apart*,²⁰ alongside commentary by law professors Akhil Reed Amar of Yale, Randy Barnett of Georgetown, John Eastman of Chapman, and Pamela S. Karlan of Stanford.²¹ Those faculty members, whose views span a broad political

¹⁸ Jodi Kantor, *Teaching Law, Testing Ideas, Obama Stood Slightly Apart*, N.Y. TIMES, July 30, 2008, at A1, available at <http://www.nytimes.com/2008/07/30/us/politics/30law.html?ex=1375156800&en=337ecbaa93d25b8c&ei=5124&partner=permalink&exprod=permlink>.

¹⁹ DERRICK BELL, *RACE, RACISM, AND AMERICAN LAW* (3d ed. 1992) (For further discussion of the parts that appeared in the syllabus, see *infra* note 143.).

²⁰ Kantor, *supra* note 18.

²¹ See Jodi Kantor, *Inside Professor Obama's Classroom*, THE CAUCUS (July 30, 2008, 11:11 AM), <http://thecaucus.blogs.nytimes.com/2008/07/30/inside-professor-obamas-classroom/>; Pamela S. Karlan, *Comment to Inside Professor Obama's Classroom*, THE CAUCUS (July 30, 2008, 1:30 PM), <http://thecaucus.blogs.nytimes.com/2008/07/30/inside-professor-obamas-classroom/> (deeming the syllabus to be "relatively well thought out" but commenting on the almost exclusive emphasis on black-white racial issues); John Eastman, *Comment to Inside Professor Obama's Classroom*, THE CAUCUS (July 30, 2008, 11:11 AM), <http://thecaucus.blogs.nytimes.com/2008/07/30/inside-professor-obamas-classroom/> (syllabus evidenced Obama's "deep and nuanced command of the law" containing "reading from across the ideological spectrum"); Randy Barnett, *Comment to Inside Professor Obama's Classroom*, THE CAUCUS (July 30, 2008, 12:15 PM), <http://thecaucus.blogs.nytimes.com/2008/07/30/inside-professor-obamas-classroom/> (syllabus offered balanced perspective of competing ideologies and his exam questions were designed to "ferret out" his students' understanding of the law rather than simply regurgitate "the teacher's viewpoints"); Akhil Reed Amar, *Comment to Inside Professor Obama's Classroom*, THE CAUCUS (July 30, 2008, 11:51 AM), <http://thecaucus.blogs.nytimes.com/2008/07/30/inside-professor-obamas-classroom/> (reviewing the syllabi and exams and commenting on

spectrum, praised the breadth and balance of readings. Randy Barnett, a leading libertarian law professor, said: “The materials assigned were balanced, including several readings by Frederick Douglass, who many modern race theorists have come to disparage as insufficiently radical (as Obama would know), along with an exchange between Harvard law professor Randall Kennedy on the one hand and Charles Cooper (who is now on Senator McCain’s advisory committee) and Texas law professor Lino Graglia on the other.”²² Similar to the assigned readings, Barnett found Obama’s summaries accompanying the class discussion questions “even handed” and “remarkably free of the sort of cant and polemics that too often afflicts academic discussions of race.”²³ However Karlan pointed out, despite Obama’s experiences with the “multiracial and indigenous” groups in Hawaii, the discussion questions solely focused on racial issues affecting black and whites.²⁴ In addition to the commentary Cantor’s article generated on law professor blogs,²⁵ the syllabus has also received occasional attention, such as in David Remick’s 2010 book *The Bridge: The Life and Times of Barack Obama*.²⁶ Discussion surrounding the syllabus resurfaced during the 2012 election season²⁷ with conservative discussion boards deeming it evidence of Obama’s radicalism²⁸ and his connections

the “great deal of moral seriousness” in the materials extending beyond “technical and technocratic legal questions . . . [into] [s]ome of the great mysteries and tragedies of human life and American society”).

²² Barnett, *supra* note 21. We are unsure if Professor Barnett meant Douglass or Booker T. Washington in that quotation. Washington seems to fit better and he, too, appeared on the syllabus.

²³ Barnett, *supra* note 21.

²⁴ Karlan, *supra* note 21.

²⁵ See, e.g., Ann Althouse, *Barack Obama at the University of Chicago Law School*, ALTHOUSE (July 30, 2008), <http://althouse.blogspot.com/2008/07/barack-obama-at-university-of-chicago.html>; Daniel Solove, *When to Turn Down a Tenured Law Professorship Job Offer*, CONCURRING OPINIONS (July 29, 2008), http://www.concurringopinions.com/archives/2008/07/when_to_turn_do.html.

²⁶ DAVID REMNICK, *THE BRIDGE: THE LIFE AND RISE OF BARACK OBAMA* 263 (2010); see also Kevin Brown, *This Is a Time for Hope and Change*, 87 IND. L.J. 431, 444 (2012) (“Many of the writings that Obama used in his course are ones that I have used over the years in mine. So there can be little doubt that he has a black scholar’s understanding about race in America.”); KLOPPENBERG, *supra* note 1, at 69–70 (discussing readings in syllabus).

²⁷ See leevank, *Barack Obama’s Teaching Style: What Conservative Scholars Have to Say*, DAILY KOS (Mar. 9, 2012, 7:10 AM), <http://www.dailykos.com/story/2012/03/09/1072720/-Barack-Obama-s-teaching-style-What-a-CONSERVATIVE-scholar-has-to-say#>.

²⁸ See *Obama: Fanning the Flames of Racism Since 1994*, <https://web.archive.org/web/20120423110217/http://intangiblesoul.wordpress.com/2012/04/06/obama-fanning-the-flames-of-racism-since-1994/> (last visited Apr. 24, 2014, 4:43 PM).

to Critical Race Theory.²⁹ Some of the commentary was remarkably ill-informed, such as one blog post labeled, “Obama didn’t even write his own syllabus.”³⁰ That post contained only the unsupported guess that Bernadine Dohrn wrote it.³¹

The syllabus invites further scrutiny because it offers extended insight into what Obama viewed as key texts on racism and law; it also gives some sense of the topics that Obama thought students should investigate further and present in their group discussions. If we viewed the syllabus solely to see what Obama was assigning, we might even transpose the title of James Kloppenberg’s book *Reading Obama* to “Obama reading.” Or maybe even more apt would be “Obama teaching.” In fact, Kloppenberg suggested that the syllabus was one source that deserved further scrutiny.³² In this article, we analyze the syllabus’ assignments for several purposes: To gain a sense of what Obama thought mattered in the area of racism and law, and, to a lesser extent, to analyze what Obama left out; and we attempt to trace the origins and meanings of Obama’s sources. That is, we grapple with Professor Obama’s syllabus to gauge his mind. Then, we turn to the topics Obama suggested to his students for their presentations. Our goal is to read Professor Obama’s syllabus to understand more about his jurisprudence of race and then use those ideas to enhance our understanding of Obama’s race jurisprudence. We view his ideas as grounded in issues of importance to critical race theory, but, at the same time, we see Obama moving in new directions away from critical race theory. Thus, our concluding section aspires to draw some conclusions about how Professor Obama sought to blaze new paths regarding race and law. Obama was grounded in similar questions as Derrick Bell; however, standing on the shoulders

²⁹ See Charles C. Johnson, *Obama’s Law School Course Description Cited ‘Institutional Racism in American Society,’* THE DAILY CALLER (Sept. 19, 2012, 1:57 AM), <http://dailycaller.com/2012/09/19/obamas-law-school-course-description-cited-institutional-racism-in-american-society/> (citing, among other works, an earlier version of this article).

³⁰ See Ann Barnhardt, *Obama Didn’t Write His Own Syllabus*, RADIO PATRIOT (Mar. 27, 2012, 8:20 PM), <http://radiopatriot.wordpress.com/2012/03/28/barnhardt-on-obies-course-syllabus/> (“Guys, Obama didn’t even write his own syllabus. The prose is sophisticated, the grammar is flawless, and the punctuation is good—heck, there are several semicolons used, and used correctly. In other words, the syllabus is everything that every other sample of genuine Obama-written prose is not. It isn’t the same voice. It isn’t the same author. Period. . . . I think Obama was (and is) so stupid, and such a fraud that he had to have someone else prepare his course for him, including what little bit of lecture he delivered in those four class sessions.”).

³¹ *Id.* (“Who might have prepared a course syllabus and light lecture notes on constitutional race issues with an emphasis toward education and race? Bernadine Dohrn. As in Bill Ayers’ wife.”).

³² KLOPPENBERG, *supra* note 1, at 267–68.

of Professor Bell, Obama sought a pragmatic and political approach for the twenty-first century. We are tempted to call it Critical Race Pragmatism.

A. *The Elements of the Course*

The syllabus provides information on grading, reading assignments, and suggested topics for group presentations. An hour-long group presentation accounted for 40 percent of each student's grade for the course. Each student group selected a topic, provided the class with about fifty pages of reading on the topics, and then led the class discussion for an hour. Another 40 percent of the grade came from a paper of at least twelve pages on a topic of the student's choosing. The primary criterion was that students had "broken some sweat trying to figure out the problem in all its wonderful complexity."³³ Obama also asked for "a thorough examination of the diversity of opinion that exists on the issue or theme."³⁴ The paper did not, however, require research beyond the class material and discussion. The final 20 percent was based on a reading quiz, which required the identification of sources, quotes from the assigned readings, and class participation.

The syllabus provided a list of the required and optional readings for the first four class meetings. The readings are listed in Appendix 1, with bibliographic information to the extent that is available.³⁵ These readings are discussed in section two of this paper to gauge Obama's ideas. After the first four meetings, groups of students took turns leading the weekly seminar discussion around some topic related to the various intersections of "Racism and the Law." Each group selected a maximum of fifty pages of reading for their classmates. Those assignments are not included in the syllabus as it only lists the readings Obama assigned. The syllabus does, however, list twelve topic areas that students might use as the basis for their presentations. Those topics, and Obama's suggested approaches to present the topics, are listed in Appendix 2. We use the suggested group presentation topics in section three to gain further insight into Obama's ideas.

³³ Barack Obama, *Current Issues in Racism and the Law Syllabus—Spring 1994: Seminar Requirements*, at II, available at http://www.nytimes.com/packages/pdf/politics/2008OBAMA_LAW/Obama_CoursePk.pdf.

³⁴ *Id.*

³⁵ See Barack Obama, *Current Issues in Racism and the Law Syllabus—Spring 1994: Reading Assignments* [hereinafter Obama, *Reading Assignments*], available at http://www.nytimes.com/packages/pdf/politics/2008OBAMA_LAW/Obama_CoursePk.pdf.

B. *Obama Teaching: The Reading Assignments*

The assignments for the first four classes were organized first to provide a broad theory about racism and law; the assignments then proceeded, chronologically, from the early Republic through Reconstruction, to the Civil Rights Movement and backlash, to contemporary debate. In this section, we discuss the readings and identify, to the extent possible, what was assigned followed by our interpretation of the meaning of those readings in the next section.

1. Framing the Course: Theory and Pre-Civil War History

The two initial classes presented a historical view shifting to contemporary constitutional law, sociology, and politics for the third and fourth classes. The first class covered “theory” and cases on slavery and Native Americans before the Civil War. The theory section included excerpts from George Fredrickson’s *The Arrogance of Race*,³⁶ Anthony Appiah’s essay on “Racism,” and an excerpt from Appiah’s essay on the *Uncompleted Argument: Du Bois and the Illusion of Race*.³⁷ As with many of the readings, it is unclear whether it was the introduction or another part of Fredrickson’s *Arrogance of Race* that Obama assigned. One of the major themes running through Fredrickson’s work is the importance of racism and racial hierarchy as categories of analysis by themselves; and, also, how those categories declined in importance among people studying race over time. While Fredrickson continued to see the salience of racism and racial hierarchy, he realized that more recent work emphasized interrelatedness of economic and social considerations and racism and the desire for racial hierarchy. Perhaps because his work was the opening assignment in the syllabus, Fredrickson may be particularly helpful in framing Obama’s mission of seeing the nuances of race and the ways that economics, history, and social organization have all worked together to influence it. Similarly, though perhaps somewhat more obliquely, Anthony Appiah’s essay on the varieties of “Racism” may have helped frame the ways that actors interpreted issues of race as indicative of innate characteristics of people.

Appiah seemed to suggest that racial attitudes may change. This perspective provided more flexibility in approaching problems of race than many, like Derrick Bell, had previously allowed. Appiah’s essay on *The Illusion of Race* argued that

³⁶ GEORGE FREDRICKSON, *THE ARROGANCE OF RACE: HISTORICAL PERSPECTIVES ON SLAVERY, RACISM, AND SOCIAL INEQUALITY* (1988).

³⁷ Anthony Appiah, *The Uncompleted Argument: Du Bois and the Illusion of Race*, 12 *CRITICAL INQUIRY*, No. 1, Autumn 1985, at 21–37.

race was less a biological fact but rather, a category that had been culturally imposed, thus suggesting that it can be undone—an argument that likely resonated with Obama’s experiences in Hawaii, in the Pacific, and on the mainland United States. It also appeared as a central theme in Obama’s 2008 “A More Perfect Union” speech in Philadelphia.³⁸ Such an argument stands in stark contrast with Bell’s sense that racism, particularly white on black racism, was a central, and seemingly unchanging, fact of American history and America’s future.³⁹

By contrast with the theoretical beginnings, the readings for the remainder of the first day on Native Americans and slavery imparted the cold reality of past racial atrocities as they were dealt with by the legal system. The readings covered two issues: Andrew Jackson’s plan of Indian Removal and the statute Congress passed to support it. Obama included the response by “Speckled Snake”⁴⁰ and the antecedents to the plan found in Vattel’s *Law of Nations*⁴¹ and Hugh Henry Brackenridge’s *Law Miscellanies*.⁴² Chief Justice John Marshall’s opinion in *Johnson v. M’Intosh*⁴³ dealt with the ideology of colonization and deprivation of Native lands. The latter three sources all justified taking land from societies who did not practice farming.

³⁸ Barack Obama, A More Perfect Union (Mar. 18, 2008), available at <http://www.npr.org/templates/story/story.php?storyId=88478467> (“But I have asserted a firm conviction—a conviction rooted in my faith in God and my faith in the American people—that, working together, we can move beyond some of our old racial wounds, and that in fact we have no choice if we are to continue on the path of a more perfect union.”).

³⁹ See generally DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* (1992).

⁴⁰ Speckled Snake, *Untitled Speech in Response to President Jackson*, in SAMUEL G. DRAKE, *THE BOOK OF THE INDIANS, OR, BIOGRAPHY AND HISTORY OF THE INDIANS OF NORTH AMERICA: FROM ITS FIRST DISCOVERY TO THE YEAR 1841*, at 110 (Boston, Benjamin B. Mussey 9th ed. 1845) (circa 1830).

⁴¹ EMERICH DE VATTEL, *THE LAW OF NATIONS* § 81, at 35–36 (Philadelphia, T. & J.W. Johnson 1844) (1758) (“Those nations . . . who inhabit fertile countries, but disdain to cultivate their lands and choose rather to live by plunder, are wanting to themselves, are injurious to all their neighbours, and deserve to be extirpated as savage and pernicious beasts.”); see also TIM ALAN GARRISON, *THE LEGAL IDEOLOGY OF REMOVAL: THE SOUTHERN JUDICIARY AND THE SOVEREIGNTY OF NATIVE AMERICAN NATIONS* 69–73 (2001) (discussing Vattel’s justification of taking of Native land).

⁴² HUGH HENRY BRACKENRIDGE, *LAW MISCELLANIES* 125–26 (Philadelphia, P. Byrne 1814).

⁴³ 21 U.S. (8 Wheat.) 543 (1823).

The section on slavery included four cases addressing questions about who was a slave and how slaves could be treated. The first, *Gobu v. Gobu*,⁴⁴ was an 1802 North Carolina case that established the presumption cited by later courts that a black man is a slave until proven otherwise.⁴⁵ The next case, *Hudgins v. Wrights*,⁴⁶ articulated a pseudo-scientific approach to determine a supposed slave's ancestry, including the shape of a person's nose and the texture of hair. By explaining the logic the courts used to interpret race, both *Gobu v. Gobu* and *Hudgins v. Wright* illustrate courts' struggle to define racial categories during the era of slavery. *Sawney v. Carter*⁴⁷ demonstrates the court's unwillingness to emancipate a slave without proper written documentation despite the slave's testimony or the testimony of third parties regarding the master's actions to grant his freedom. *State v. Mann*⁴⁸ is one of the best-known cases from the era of slavery—perhaps surpassed only by *Dred Scott*⁴⁹ in notoriety. *Mann* absolves a man from criminal liability for his abuse of a rented slave, Milly. Justice Thomas Ruffin's opinion in *Mann*, often invoked by abolitionists as evidence of the

⁴⁴ 1 N.C. (Tay.) 188, 188–89 (1802) (deeming a person's freedom to be dependent upon his color and refusing to apply the presumption of slavery to persons of mixed blood). The plaintiff “of an olive colour, between black and yellow, had long hair and a prominent nose” sought his freedom from the defendant who found him in her barn when he was eight years old and she twelve. *Id.* at 188. After stating the presumption of slavery applied to all black persons, Judge John Louis Taylor freed the plaintiff due to his mixed blood. *Id.* at 188–89.

⁴⁵ See *Nichols v. Bell*, 46 N.C. (1 Jones) 32, 34 (1853) (citing *Gobu*, 1 N.C. 188 as the first recognition “that if [a man] was black, he was by law presumed to be a slave”). Paul Finkelman's introduction to the 1993 *Chicago-Kent Law Review's* Symposium on the “Law of Slavery” may have brought this obscure case to Obama's attention. See Paul Finkelman, *The Centrality of the Peculiar Institution in American Legal Development*, 68 CHI.-KENT L. REV. 1009, 1014 n.35 (1993).

⁴⁶ 11 Va. (1 Hen. & M.) 134, 139 (1806) (justifying by law and precedent that “all American Indians are *prima facie* FREE” and once the “maternal” genealogy of anyone challenging his freedom “is satisfactorily established” as descending from an Indian, the burden of proof then shifts to the one who claims him as a slave). Because there are no birth records kept for any but whites, Judge Tucker discusses the method of proof that must be used by judges to evaluate whether or not someone claiming freedom is of Indian, white, or African heritage—“a flat nose and woolly head of hair” are “characteristic marks” that “Nature has stamp upon the *African* and his descendants.” *Id.* at 137–39.

⁴⁷ 27 Va. (6 Rand.) 173, 173–75 (1828) (holding that a Court of Equity is powerless to enforce an oral promise of a master to emancipate a slave or to determine by that the actions of a former master intimate a slave's emancipation. The only way to duly emancipate a slave is by “last Will and Testament, or by any other instrument in writing under his or her hand and seal, attested and *proved in the County Court* by two witnesses . . .”).

⁴⁸ 13 N.C. 263 (1830).

⁴⁹ 60 U.S. 393 (1857).

inhumanity of slavery, acknowledges that slavery requires the “uncontrolled authority of the master over the body of the slave.” Though Ruffin was zealously pro-slavery, his honest assessment, ironically, may have ultimately helped to undermine the system of slavery.⁵⁰

The Fugitive Slave Act of 1850⁵¹ is included, as is a brief address by Millard Fillmore regarding the Compromise of 1850, most likely his first annual message.⁵² The Act had important implications for jurisprudence. It cut off the rights of the accused slave to challenge his status as a slave and compelled free people in Northern states to assist in the rendition of slaves.⁵³ There are three excerpts from anti-slavery advocates regarding the Act: Frederick Douglass’ *Is it Right to Kill a Kidnapper*,⁵⁴ *The Right to Criticize*,⁵⁵ and an unidentified speech from Martin Delany. Yet, there are other publications of the jurisprudence around slavery that one might have expected to appear here, such as Henry David Thoreau’s *Civil Disobedience*.⁵⁶ The controversy over the obedience of the Fugitive Slave Act is one of the most often discussed parts of American jurisprudence in the nineteenth century.⁵⁷ The section concludes with the optional reading of *Dred Scott* or Derrick Bell’s synopsis of the case.

⁵⁰ See, e.g., Sally Greene & Eric Muller, *Introduction: State v. Mann and Thomas Ruffin in History and Memory*, 87 N.C. L. REV. 669 (2009); Alfred L. Brophy, *Humanity, Utility, and Logic in Southern Legal Thought: Harriet Beecher Stowe’s Critique of Southern Legal Thought in Dred: A Tale of the Great Dismal Swamp*, 78 B.U. L. REV. 1113, 1132–37 (1998) (discussing abolitionist Stowe’s use of *State v. Mann*).

⁵¹ Fugitive Slave Act of 1850, 9 Stat. 462 (1850).

⁵² Millard Fillmore, First Annual Message (Dec. 2, 1850).

⁵³ ROBERT COVER, JUSTICE ACCUSED: ANTI-SLAVERY AND THE JUDICIAL PROCESS 175–77 (1975); Jeffrey Schmidt, *The Antislavery Judge Reconsidered*, 29 L. & HIST. REV. 797 (2011).

⁵⁴ Frederick Douglass, Editorial, *Is it Right and Wise to Kill a Kidnapper?*, FREDERICK DOUGLASS’ PAPER, June 2, 1854.

⁵⁵ Frederick Douglass, *The Right to Criticize American Institutions*, Speech Before the American Anti-Slavery Society (May 11, 1847).

⁵⁶ Henry David Thoreau, *Civil Disobedience [Resistance to Civil Government]*, 10 THOREAU’S WORKS 131 (1893).

⁵⁷ See, e.g., COVER, *supra* note 53, at 175–91; Alfred L. Brophy, *Utility, History, and the Rule of Law: The Fugitive Slave Act of 1850 in Antebellum Jurisprudence*, in TRANSFORMATIONS IN AMERICAN LEGAL HISTORY 109 (Daniel W. Hamilton & Alfred L. Brophy eds., 2009).

2. Reconstruction to Civil Rights

The second class fast-forwarded past secession and the Civil War to focus on “Reconstruction, Retrenchment, and Jim Crow.”⁵⁸ The readings included the Thirteenth,⁵⁹ Fourteenth,⁶⁰ and Fifteenth Amendments,⁶¹ the Civil Rights Act of 1866,⁶² South Carolina’s Black Codes,⁶³ the Enforcement Act of 1870,⁶⁴ and the Civil Rights Act of 1875,⁶⁵ along with leading Supreme Court cases—the *Slaughterhouse Cases*,⁶⁶ *Civil Rights Cases*,⁶⁷ *United States v. Cruikshank*,⁶⁸ *Giles v. Harris*,⁶⁹ and *Plessy v. Ferguson*.⁷⁰ There were also excerpts from Frederick Douglass on the Civil Rights Cases,⁷¹ an account from 1910 of how few African Americans actually served on juries (perhaps a precursor to realist jurisprudence),⁷²

⁵⁸ See Obama, *Reading Assignments*, *supra* note 35, at II.

⁵⁹ U.S. CONST. amend. XIII.

⁶⁰ U.S. CONST. amend. XIV.

⁶¹ U.S. CONST. amend. XV.

⁶² Civil Rights Act of 1866, ch. 31, 14 Stat. 27–30 (codified as amended at 42 U.S.C. §§ 1981–1982 (1987)).

⁶³ An Act Preliminary to the Legislation Introduced by the Emancipation of Slaves, 1865 S.C. Acts No. 4730–33, available at <http://home.gwu.edu/~jjhawkin/BlackCodes/pdfSouthCarolina.pdf>.

⁶⁴ The Enforcement Act, ch. 114, 16 Stat. 140 (1870).

⁶⁵ Civil Rights Act of 1875, ch. 114, 18 Stat. 335, *invalidated by* The Civil Rights Cases, 109 U.S. 3 (1883).

⁶⁶ 83 U.S. 36 (1872).

⁶⁷ 109 U.S. 3 (1883).

⁶⁸ 92 U.S. 542 (1876).

⁶⁹ 189 U.S. 475 (1903).

⁷⁰ 163 U.S. 537 (1896).

⁷¹ Frederick Douglass, Speech at Lincoln Hall opposing the Supreme Court’s 1883 decision in the Civil Rights Cases (Oct. 22, 1883), available at <http://memory.loc.gov/cgi-bin/ampage?collId=mfd&fileName=24/24004/24004page.db&recNum=6>.

⁷² Gilbert Thomas Stephenson, *Actual Jury Service by Negroes*, in RACE DISTINCTIONS IN AMERICAN LAW 253 (1910); see also Alfred L. Brophy, *Did Formalism Never Exist?*, 92 TEX. L. REV. 383, 399–400, 408 (2013) (discussing the importance of empirical studies of law’s effect in thought of nineteenth and early twentieth-century reformers, such as Realists); Roger A. Fairfax, *Wielding the Double-Edged Sword: Charles Hamilton Houston and Judicial Activism in the Age of Legal Realism*, 14 HARV. BLACKLETTER L.J. 17–44 (1998).

a historian's account of lynching,⁷³ and Bell's summary of the Civil War amendments and Reconstruction.⁷⁴ The readings from the second class concluded with excerpts from Booker T. Washington's *Up from Slavery*,⁷⁵ W.E.B. Du Bois' *The Souls of Black Folk*,⁷⁶ and Marcus Garvey's *Philosophy and Opinions*.⁷⁷ While these selections are not atypical, it would, perhaps, be more common to have an excerpt from C. Vann Woodward's *The Strange Career of Jim Crow*.⁷⁸

Obama moved right from *Plessy* to *Brown*,⁷⁹ without a glance at the cases in the intervening period that set the stage for the Civil Rights triumph in *Brown*—not even some of the well-known stepping stones to *Brown*, such as *Missouri ex rel. Gaines*⁸⁰ or *Shelley v. Kraemer*.⁸¹ Nor is there mention of some of the key criminal procedure precedents, such as the *Scottsboro Boys*.⁸² Also missing is discussion of the federal government's role in promoting segregation and later in promoting integration.⁸³ These nuances are flattened down in Obama's syllabus, as is probably necessary when one moves from 1865 to the 1980s in two classes that attempt to cover the spectrum of race, law, and constitutionalism.

The third class focuses on "Civil Rights and Retrenchment."⁸⁴ It begins with *Brown*, followed by Robert Bork's 1963 *New Republic* article⁸⁵ opposing

⁷³ RALPH GINZBURG, 100 YEARS OF LYNCHINGS (2d ed. 1988).

⁷⁴ DERRICK BELL, RACE, RACISM, AND AMERICAN LAW 30–34 (2d ed.).

⁷⁵ BOOKER T. WASHINGTON, UP FROM SLAVERY (1901).

⁷⁶ W.E.B. DU BOIS, THE SOULS OF BLACK FOLK (1903).

⁷⁷ MARCUS GARVEY, PHILOSOPHY AND OPINIONS (Amy Jacques Garvey ed., 1923).

⁷⁸ C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW (1955).

⁷⁹ *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

⁸⁰ *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938) (holding that Missouri could not satisfy the "separate but equal" mandate by sending blacks to neighboring states to obtain a legal education and maintaining only an all-white law school in the state).

⁸¹ 334 U.S. 1 (1948) (abolishing racially restrictive covenants).

⁸² *Powell v. Alabama*, 287 U.S. 45 (1932).

⁸³ See, e.g., KENNETH JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES (1985); MICHAEL KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004).

⁸⁴ See Obama, *Reading Assignments, supra* note 35, at Reading Packet #2, at III.

⁸⁵ Robert Bork, *Civil Rights—A Challenge*, THE NEW REPUBLIC, Aug. 31, 1963, at 21. Bork challenged the constitutionality of the "public accommodations" provision of the forthcoming Civil Rights Act of

additional federal civil rights statutes, and Martin Luther King's *Letter from a Birmingham Jail*.⁸⁶ It then excerpts the leading desegregation cases of *Cooper v. Aaron*,⁸⁷ *Griffin v. County Board of Prince Edward County*,⁸⁸ *Green v. County School Board*,⁸⁹ *Pasadena Board of Education v. Spangler*,⁹⁰ *Milliken v. Bradley*,⁹¹ *Hills v. Gautreaux*,⁹² and *Milliken II*.⁹³ The reading also included cases on poverty and education (*San Antonio v. Rodriguez*⁹⁴), employment discrimination (*Washington v. Davis*⁹⁵), and housing discrimination (*Arlington Heights v. Metro*

1964 preventing private establishments from denying access to blacks. Bork believed this violated the freedom of assembly rights of racist whites.

⁸⁶ Dr. Martin Luther King, Jr., *Letter from a Birmingham Jail*, THE ATLANTIC MONTHLY, Aug. 1963, at 78.

⁸⁷ 358 U.S. 1 (1958) (rejecting the requested delay by an Arkansas school official to implement a desegregation plan in compliance with *Brown v. Board of Education*, 347 U.S. 483 (1954)). In addition, the Court reiterated the supremacy of the U.S. Constitution and the requisite "obedience of the States to [the principles announced in *Brown*], according to the command of the Constitution" contrary to the assertions by the Governor of Arkansas. *Id.* at 19.

⁸⁸ 377 U.S. 218 (1964) (deeming the County School Board's closing the public schools to all children while financially supporting private segregated schools as denying the constitutional rights of the Negro children of Prince Edward County to attend desegregated public schools).

⁸⁹ 391 U.S. 430 (1968) (rejecting the school system's "freedom-of-choice" plan which did not effectuate desegregation as implemented, but rather propagated its continuance).

⁹⁰ 427 U.S. 424 (1976) (Applying the holding of its earlier decision in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), that courts are limited in their ability to desegregate schools when a school's racial composition was not caused by school district actions but rather by normal patterns of demographic migration. The Court deemed it to be judicial overreaching to "require annual readjustment of attendance zones so that there would not be a majority of any minority in any Pasadena public school . . ."). *Id.* at 2704.

⁹¹ 418 U.S. 717 (1974) (striking down an desegregation injunction in Detroit and surrounding areas that included areas that did not have *de jure* segregation).

⁹² 425 U.S. 284 (1976) (holding metropolitan area remedies are not impermissible as a matter of law).

⁹³ *Milliken v. Bradley*, 433 U.S. 267 (1977) (articulating a three-part test framework to guide district courts as they attempted to remedy segregated school districts).

⁹⁴ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (finding poverty did not merit strict judicial scrutiny in an equal protection challenge to public school financing based on property taxes).

⁹⁵ 426 U.S. 229 (1976) (holding that a racially discriminatory impact of a facially neutral policy is not conclusively in violation of the Due Process Clause), *superseded by statute*, 2 U.S.C. § 1973, *as stated in*, *Chapman v. Nicholson*, 579 F. Supp. 1504 (N.D. Ala. 1984).

*Housing*⁹⁶). Although most of those cases also appeared in Bell's textbook, they are the central texts in constitutional law and one would expect them in any basic course on the subject.

Obama also added three articles from a symposium on *Wards Cove Packing Co. v. Atonio*⁹⁷ in the *Harvard Journal of Law and Public Policy*. The articles, by Lino Graglia,⁹⁸ Charles Cooper,⁹⁹ and Randall Kennedy,¹⁰⁰ spanned a broad spectrum. Unlike Randall Kennedy, Cooper agreed with the Court in *Wards Cove*. Cooper believed *Wards Cove* offered the country a "last clear chance to retreat from quotas in the workplace"¹⁰¹ and a chance to return to the original congressional intent of Title VII.¹⁰² Graglia posits that "[g]ranting racial preferences undermines the ability of blacks to attain [self-respect and the respect of others]."¹⁰³ Graglia focused more attention on the divisiveness of racial preferences. He concluded with an ominous warning that such preferences might lead to the nation tearing itself apart. The grim concluding line of his article is that "Perhaps then America will then finally have paid the full price for the terrible mistake of bringing in Africans in chains."¹⁰⁴ Randall Kennedy's response to Cooper and Graglia¹⁰⁵ argues the merits of a disparate-impact analysis employed by

⁹⁶ *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977) (requiring the plaintiff to prove a racially discriminatory intent or purpose motivated the defendant's decision to deny a change in zoning for a tract of land from single-family to multi-family).

⁹⁷ *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989) (abandoning the business necessity test in employment discrimination cases and altering the plaintiff's burden of proof regarding employment policies that have a disparate impact on minority groups), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074, *as recognized in* *Raytheon Co. v. Hernandez*, 540 U.S. 44 (2003).

⁹⁸ Lino A. Graglia, *Title VII of the Civil Rights Act of 1964: From Prohibiting to Requiring Racial Discrimination in Employment*, 14 HARV. J.L. & PUB. POL'Y 68 (1991).

⁹⁹ Charles J. Cooper, *Wards Cove Packing Co. v. Atonio: A Step Towards Eliminating Quotas in the American Workplace*, 14 HARV. J.L. & PUB. POL'Y 84 (1991).

¹⁰⁰ Randall Kennedy, *Competing Conceptions of "Racial Discrimination": A Response to Cooper and Graglia*, 14 HARV. J.L. & PUB. POL'Y 93 (1991).

¹⁰¹ Cooper, *supra* note 99, at 92.

¹⁰² *Id.* at 88–89.

¹⁰³ Graglia, *supra* note 98, at 76.

¹⁰⁴ *Id.* at 77.

¹⁰⁵ Kennedy, *supra* note 100, at 93.

the Supreme Court in *Griggs v. Duke Power Co.*¹⁰⁶ He challenges the arguments advanced by Cooper and Graglia contending that employers who employ policies that have a racially-disparate impact should be held accountable for these policies because they are a “hindrance that our society faces in its struggle to transcend the gravitational pull of its racist history.”¹⁰⁷ The section concludes with the Civil Rights Act of 1991¹⁰⁸—designed to counteract *Wards Cove* and allow for broader evidence for establishing a *prima facie* case of discrimination.

3. “Where Do We Go from Here?”

The concluding section of Obama’s assigned readings—“Where Do We Go from Here?”—is the shortest of the sections and also the least law-oriented.¹⁰⁹ It begins with a short section from Bell’s textbook on “Employment and Race-Class Conflict”¹¹⁰—a summary of the case-law on employment discrimination—followed by the introduction to Bell’s *Faces at the Bottom of the Well*.¹¹¹ In many ways Bell’s introduction is backward looking, for it questions even the idea of racial equality and whether African Americans have given up too much in the hope for racial equality.

The goal of racial equality is, while comforting to many whites, more illusory than real for blacks. For too long, we have worked for substantive reform, then settled for weakly worded and poorly enforced legislation, indeterminate judicial decisions, token government positions, even holidays. . . . If we are to seek new goals for our struggles, we must first reassess the worth of the racial assumptions on which, without careful thought, we have presumed too much and relied on too long.¹¹²

¹⁰⁶ 401 U.S. 424 (1971).

¹⁰⁷ Kennedy, *supra* note 100, at 98.

¹⁰⁸ Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1079 (1991). “An Act to amend the Civil Rights Act of 1964 to strengthen and improve Federal civil rights laws, to provide for damages in cases of intentional employment discrimination, to clarify provisions regarding disparate impact actions, and for other purposes.”

¹⁰⁹ See Obama, *Reading Assignments*, *supra* note 35, at IV.

¹¹⁰ BELL, *supra* note 19, at 627–32. See *infra* note 126 for further discussion of the edition of Bell’s casebook that Obama used.

¹¹¹ BELL, *supra* note 39, at 1–14.

¹¹² *Id.* at 14.

The introduction to *Faces* provides a summary of Bell's ideas related to the declining civil rights fortunes of African Americans and the difficulty of overcoming white racism and, in many ways, is an overview of his career. Bell's work emerged from a world of Jim Crow—he was born in the 1930s—and is built on his experiences.¹¹³ It is from this vantage point that he deemed white racism intractable and unsusceptible of moral suasion—even as the events of the 1960s suggested otherwise. Thus, much of Bell's scholarship focuses on the ways white racism functions and the difficulty, if not impossibility, of overcoming it. It is an undeniably pessimistic vision of our nation's history.¹¹⁴ Although neither the Preface nor the concluding section of *Faces at the Bottom of the Well* was part of the assigned readings, in both Bell directly addresses the pessimism of his scholarship. Bell suggests that even if there was perhaps no hope that people should continue the struggle, to strive for improvement is part of human character.¹¹⁵

Much of Bell's other writings were left out of the syllabus. For instance, one of Bell's most famous works, *Space Traders*,¹¹⁶ deals in metaphorical terms with contemporary United States society. It hypothesizes the arrival of aliens on earth promising health and riches in exchange for the African Americans.¹¹⁷ This is a thinly veiled story about the slave trade and the covenant with slavery that white

¹¹³ RICHARD DELGADO & JEAN STEFANCIC, *THE DERRICK BELL READER* 3 (2005). One is tempted here to refer to candidate Obama's A More Perfect Union speech in March 2008, *supra* note 38, when he interpreted his minister, Reverend Jeremiah Wright, as a representative of the era of Jim Crow. Reverend Wright, Obama said, spoke as if our society was static; as if no progress had been made; as if this country—a country that has made it possible for one of his own members to run for the highest office in the land and build a coalition of white and black, Latino and Asian, rich and poor, young and old—is still irrevocably bound to a tragic past. This is one instance in which Obama directly confronted the generational divide between people who came to adulthood in the heart of the grim years of Jim Crow.

¹¹⁴ Obama's A More Perfect Union speech, *supra* note 38, offers a different reading of United States' history: "what we know—what we have seen—is that America can change. That is the true genius of this nation. What we have already achieved gives us hope—the audacity to hope—for what we can and must achieve tomorrow."

¹¹⁵ See BELL, *supra* note 39, at 198–200.

¹¹⁶ Bell, *The Space Traders*, in *FACES AT THE BOTTOM OF THE WELL*, *supra* note 39, at 158–94 [hereinafter Bell, *Space Traders*]. Earlier versions of *Space Traders* appeared in Derrick Bell, *After We're Gone: Prudent Speculations on America in a Post-Racial Epoch*, 34 ST. LOUIS U. L.J. 393, 397–400 (1989–1990), and in Derrick A. Bell, Jr., *A Prophecy for the Year 2000*, 42 RUTGERS L. REV. 93, 96–100 (1989).

¹¹⁷ Bell, *Space Traders*, *supra* note 116, at 158–94.

Americans so readily adopted as early as the seventeenth century.¹¹⁸ In the story, the United States is disturbingly eager to accept the aliens' offer. *Space Traders* may be a critique of utilitarian thought and a critique of the law and economics movement as well as racism. Yet, Sean Hannity and Joel Pollak, editor-in-chief of *Breitbart.com*, discussed *Space Traders* in a brief and confused manner as evidence of Bell's supposed anti-American values and charged Obama with subscribing to those ideas.¹¹⁹

Arguably of more significance is that Obama's vision of history and of the future was broader than Bell's. Obama's assigned reading suggested that ideas of race, rather than being fixed, are contingent on society. Moreover, he did not assign some of Bell's most radical work, like *Space Traders*. However, neither did he assign any of the substantial commentary that existed directly addressing and countering Bell's bleak assessment of the future of race relations.¹²⁰ It looks as though he did not directly assign anything on Bell's interest convergence theory—the idea that white people will only support African American civil rights when it is in their best interest.¹²¹ The absence (or at very least minimization) of Bell's interest-convergence thesis from the readings is particularly apt because the interest-convergence theory is so central to Bell's work, and it has been one of the real flashpoints of recent discussions of Bell's indictment of American law.¹²²

The other assignments of the final section (“Where Do We Go from Here?”¹²³) demonstrate Obama's vision was broader than Bell's. They are from

¹¹⁸ See EDMUND S. MORGAN, *AMERICAN SLAVERY—AMERICAN FREEDOM* (1975) (hypothesizing that slavery helped form the basis for white freedom); CHRISTOPHER TOMLINS, *FREEDOM BOUND: LAW, LABOR, AND CIVIC IDENTITY IN COLONIZING ENGLISH AMERICA, 1580–1865* (2010) (discussing ways that slavery provided the economic basis of white society).

¹¹⁹ Starnes, *supra* note 10.

¹²⁰ See, e.g., Randall Kennedy, *Racial Critiques of Academia*, 102 HARV. L. REV. 1745 (1989).

¹²¹ See Derrick Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980) [hereinafter Bell, *Interest-Convergence Dilemma*]. A short version of the interest-convergence theory appeared in section 1.14 of Bell's *RACE, RACISM, AND AMERICAN LAW*, *supra* note 19, at 47–51, but that section does not seem to have been assigned to the students. For more on what sections of Bell were likely included in the readings, see *infra* note 143.

¹²² See Whet Moser, *Derrick Bell, Barack Obama, and Andrew Breitbart: Breaking Kayfabe*, CHICAGOMAG.COM (Mar. 9, 2012, 4:19 PM), <http://www.chicagomag.com/Chicago-Magazine/The-312/March-2012/Derrick-Bell-Barack-Obama-and-Andrew-Breitbart-Breaking-Kayfabe/>.

¹²³ The title of the final section is also title of Martin Luther King, Jr.'s 1967 speech delivered at the Southern Christian Leadership Conference's annual convention in Atlanta and his subsequent book—*Where Do We Go From Here: Chaos or Community?* In addition, during the *Harvard Civil Rights-Civil*

Shelby Steele,¹²⁴ William Julius Wilson,¹²⁵ an excerpt from a book on the *New Black Middle Class*,¹²⁶ and a *National Affairs* article on a conflict at Stanford (over racial identity and a dispute about whether Mozart was black, alleging all creative musicians are black).¹²⁷ Steele's *I'm Black, You're White, Who's Innocent?* presents a stark contrast with Bell: It suggests that the current generation has little connection with the past and, to the extent that it does, it should not be held liable for past racial crimes. Harvard Sociologist William Julius Wilson's *The Truly Disadvantaged*,¹²⁸ published in 1990, offered a call to remember the millions of African Americans who had been left behind economically in the 1970s and 1980s.¹²⁹ Obama had highlighted Williams' work in 1988, before entering law school, in a brief essay entitled, *Why Organize?*¹³⁰ Along those lines, Landry's chapter from *The New Black Middle Class* questions the size of the black middle class and its economic power, while John Bunzel's *Black and White at Stanford* deals with a relatively minor—if heated—controversy around students at Stanford who fought about black identity.

Liberties 1992 Symposium: The State of Civil Liberties: Where Do We Go From Here?, Harvard Law Professor Frank Michelman contributed an article to the symposium addressing one of the suggested group presentation topics: Hate speech. There was substantial academic commentary on the topic following the introduction of the "Collegiate Speech Protection Act of 1991" by United States Representative Henry Hyde's proposal to "deny federal financial assistance to organizations that practice discrimination based on race, color, or national origin." Frank Michelman, *Universities, Racist Speech and Democracy in America*, 27 HARV. C.R.-C.L. L. REV. 339, 341 (1992). Michelman finds the bill as one "not aimed at racial discrimination . . . [but rather] aimed at censorship of expression in our country's institutions of higher education." *Id.*

¹²⁴ Shelby Steele, *I'm Black, You're White, Who's Innocent? Race and Power in an Era of Blame*, HARPER'S.ORG, June 1988, at 44–53, available at <http://harpers.org/archive/1988/06/0023431>.

¹²⁵ WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* (1987).

¹²⁶ Bart Landry, *How Big a Piece?*, in *THE NEW BLACK MIDDLE CLASS* (1987).

¹²⁷ John H. Bunzel, *Black and White at Stanford*, 105 NAT'L AFFAIRS, Fall 1991, at 61, available at http://www.nationalaffairs.com/doclib/20080709_19911055blackandwhiteatstanfordjohnhbunzel.pdf.

¹²⁸ WILSON, *supra* note 125.

¹²⁹ There is a parallel here with the preface of Bell's *FACES AT THE BOTTOM OF THE WELL*, *supra* note 39, which pointed out that some people have made it, but far from everyone. *Id.* at xi.

¹³⁰ *Why Organize?*, ILLINOIS ISSUES (1988), available at <http://illinoisissues.uis.edu/archives/2008/09/whyorg.html> (mentioning University of Chicago sociologist William Julius Williams' work on problems with declining cities and suggesting need for broad-based empowerment). People and local political power were solutions in Obama's mind.

The final section concludes with three pieces from the *New York Times*: one addressing the difficulty of integration; another highlighting merchants' bias against African American shoppers; and the final piece is Cornel West's article in the *New York Times Magazine—Learning to Talk of Race*¹³¹—which appeared in August 1992 in the wake of the Los Angeles Riots. West focused on racial divisions, while pleading for the mutual interest that all Americans had in racial harmony. Here West, in contrast with Bell, emphasized the common mission of Americans. Both are concerned with racial inequality: West appealed to the common interest, whereas Bell was skeptical of the amount of common interest and whether there would be action on those interests:

To establish a new framework, we need to begin with a frank acknowledgment of the basic humanness and Americanness of each of us. And we must acknowledge that as a people—*E Pluribus Unum*—we are on a slippery slope toward economic strife, social turmoil and cultural chaos. If we go down, we go down together. The Los Angeles upheaval forced us to see not only that we are not connected in ways we would like to be but also, in a more profound sense, that this failure to connect binds us even more tightly together. The paradox of race in America is that our common destiny is more pronounced and imperiled precisely when our divisions are deeper. . . . There is no escape from our interracial interdependence, yet enforced racial hierarchy dooms us as a nation to collective paranoia and hysteria—the unmaking of any democratic order.¹³²

West, to be sure, placed a big burden on white America to understand and acknowledge the “flaws of American society.”¹³³ But West differed in his aspirations from Bell; West saw opportunities for discussion—a topic of little interest for Bell. The final words of West's article—and the concluding line of the readings for Obama's syllabus—were “Let us hope and pray that the vast intelligence, imagination, humor and courage in this country will not fail us. Either we learn a new language of empathy and compassion, or the fire this time will consume us all.”¹³⁴

¹³¹ Cornel West, *Learning to Talk of Race*, N.Y. TIMES MAG., Aug. 2, 1992.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

II. THE ORIGINS AND MEANINGS OF THE READINGS: ASSESSING OBAMA'S JURISPRUDENCE

There was a lot of assigned reading (550 pages spread over four class meetings); so it's hard to imagine that any of the ideas being discussed received a lot of attention. Yet, the syllabus invites questions such as: Why did Obama structure the course the way he did? And why did he choose those readings? And what meaning can we extract from those assignments about Obama as a thinker and teacher?

Some contend that the syllabus shows Professor Obama's debt to Derrick Bell and Critical Race Theory; while others think the readings and ideas were drawn exclusively from Derrick Bell. Our reading of Obama's syllabus suggests that Obama embraced a broader philosophy than Bell of racial classifications and of the ability and ways to alter racism. Yet, given the repeated references to Bell in the syllabus, and the focus of late on Obama's relation to Derrick Bell,¹³⁵ it makes sense to look closely at Bell's role in the syllabus.

Obama assigned a lot of readings from Derrick Bell's textbook *Race, Racism, and American Law*; however, Bell is remarkably absent in the first day's readings on theory and history that began to frame the course. Bell's ideological presence was also less evident in the final readings—"Where Do We Go from Here?"—discussing where the law's treatment of race was going.¹³⁶ Obama opened with historian George Fredrickson and philosopher Anthony Appiah, followed by readings and cases on dispossession of the Native Americans and on slavery—suggesting the malleability of the definitions of race.¹³⁷ Arguably, Bell's perception of the permanence of racism was not the undergirding of the course. Moreover, Booker T. Washington—admonishing African Americans to build up their own communities and not try to otherwise push for social progress—appears here alongside his opposite, W.E.B. Du Bois, whose constant drum beat in favor of lawsuits and political activism led the way for the modern civil rights revolution.¹³⁸

¹³⁵ See Starnes, *supra* note 10.

¹³⁶ One place that Bell may have influenced the course was the suggested topics—racial gerrymandering (which had already been approved by the U.S. Supreme Court), race and the criminal justice system, immigration policy, racial bias in the media, welfare policy and reproductive rights, inter-ethnic tensions, reparations, hate speech, affirmative action, and public school financing.

¹³⁷ See Obama, *Reading Assignments*, *supra* note 35, at I-II.A; see *supra* text and notes 36–37 (discussing Frederickson and Appiah).

¹³⁸ See Obama, *Reading Assignments*, *supra* note 35, at II.D.

Immediately after the reading on Du Bois came Marcus Garvey, whose solution to racism was to promote a return to Africa and an early version of what became known in the 1960s as black power.¹³⁹ Conservative University of Texas law professor, Lino Graglia, conservative Supreme Court litigator, Chuck Cooper, conservative economist, Shelby Steele, and Professor Robert Bork are also included in the readings.¹⁴⁰

In other parts of the course, the debt to Bell was greater. The course readings drew upon Bell's textbook,¹⁴¹ yet the syllabus departed in important ways from that book. Obama included more than fifty pages of excerpts from *Race, Racism, and American Law*,¹⁴² about ten pages from Bell's *Faces at the Bottom of the Well*, and

¹³⁹ Adjoa Aiyetor & Adrienne Davis, *Historic and Modern Social Movements for Reparations: The National Coalition for Reparations in America (N'COBRA) and its Antecedents*, 16 TEX. WESLEYAN L. REV. 687 (2010) (discussing historical origins of black power).

¹⁴⁰ See Obama, *Reading Assignments*, *supra* note 35, at III & IV.

¹⁴¹ As with other parts of the syllabus, which lists only the author's name and a short title of the work excerpted or the case name, it is unclear which edition of Bell's textbook Obama drew upon in compiling the readings for his class. Did he use the second edition of *RACE, RACISM, AND AMERICAN LAW*, *supra* note 74, published in 1980 (which was the one current while Obama was in law school) or the third edition published in 1992, *supra* note 19, which was the current one when he taught the course in 1994? There are reasons to suspect each one. For instance, Obama assigned five pages of readings from Bell, "The Legacy of *Washington v. Davis*," which was the heading of section 9.8 in the third edition *Race, Racism, and the Law* (pp. 854–63). However, that section was ten pages long. Thus, he may have copied two pages from Bell's textbook onto each page of his readings. Obama copied two pages from the introduction to *FACES AT THE BOTTOM OF THE WELL*, *supra* note 39. It is fourteen pages long, but the reader section on it was only seven pages long. See Obama, *Reading Assignments*, *supra* note 35, at IV. On the other hand, Section 9.8 in the second edition was titled "*Washington v. Davis* and the Search for Discriminatory Purpose" and was five pages long. *BELL, RACE, RACISM, AND AMERICAN LAW*, *supra* note 19, at 627–32. One wonders if he used the text from the second edition but used the heading from the third edition. It does not appear that the changes were dramatic between the two editions for most of the material excerpted, although the third edition had extensive treatment of *Wards Cove Packing Co. v. Atonio*, 433 U.S. 299 (1989) at 838–48. Because *Wards Cove* was decided in 1989, the 1980 second edition obviously had no discussion of it. The syllabus did, however, have excerpts from three articles on *Wards Cove*. See Graglia, *supra* note 98 (five page excerpt); Cooper, *supra* note 99; Kennedy, *supra* note 100 (five page excerpt).

¹⁴² The excerpts are in Section II.B of the syllabus: "Bell summary" of *Dred Scott*, which may be pages 15–20 in the second edition or 20–26 in the third edition; in section II.C, "Bell, Summary of Civil War Amendments, Reconstruction," which may be pages 30–34 and 83–91 in the second edition or pages 36–44 and 109–21 in the third edition; also in section II.C. "Bell Summary" of *Plessy v. Ferguson*, which may be pages 86–90 in the second edition; in section III, "Bell, The Legacy of *Washington v. Davis*," which may be pages 627–32 in the second edition or 854–63 in the third edition; and "Fair Employment Laws: An Overview," which may be pages 612–15 and some other unknown excerpts from the second edition; and in section IV, "Bell, Employment and the Race-Class Conflict," which is

also excerpts from a number of works that Bell cited; however, the course was significantly different from Bell's books. The theory and history sections (the first class) owe very little, if anything, to Derrick Bell. The second class "Reconstruction, Retrenchment, and Jim Crow" owes more, but perhaps not much more, to Bell, for it has several significant readings that are never or barely mentioned in Bell, such as the South Carolina Black Codes,¹⁴³ Frederick Douglass on the Civil Rights Cases,¹⁴⁴ Ralph Ginzburg's *One Hundred Years of Lynchings*,¹⁴⁵ and Gilbert Thomas Stephenson's *Actual Jury Service*.¹⁴⁶ Some of the other readings in the syllabus are mentioned, but not significantly discussed, in Bell's *Race, Racism, and American Law*, such as Marcus Garvey's *Philosophy and Opinions*.¹⁴⁷ Obama also offered students several of Bell's summaries of key cases as an alternative to reading the cases.¹⁴⁸ Later in the course, he also offered several of Bell's overviews of employment law.¹⁴⁹

Like Bell's casebook, which is self-consciously about "American racism initiated by whites against blacks,"¹⁵⁰ Obama's course focused largely on African Americans; it also emphasized constitutional issues but left out criminal justice. Perhaps most importantly, for the purpose of considering the syllabus' debt (or lack of it) to Bell, Bell's interest-convergence thesis is overtly absent from the readings. It is possible that the optional excerpt from Bell, "Summary of Civil War Amendments, Reconstruction" included several pages on Bell's interest-

likely pages 894–906 in the third edition if Obama copied two pages of text to each page of his readings. BELL, *supra* note 74 (2d ed.); BELL, *supra* note 19; Obama, *Reading Assignments*, *supra* note 35.

¹⁴³ An Act Preliminary to the Legislation Introduced by the Emancipation of Slaves, 1865 S.C. Acts No. 4730–33 (originally published as Volume 13 of The Statutes at Large of South Carolina), available at https://ia600503.us.archive.org/11/items/statutesatlarge013repu/statutesatlarge013repu_bw.pdf.

¹⁴⁴ Douglass, *supra* note 71.

¹⁴⁵ GINZBURG, *supra* note 73. The first edition was published in 1962 and includes newspaper accounts of tortures and lynchings beginning with an account reported on April 17, 1880 of the "First Negro at West Point Knifed by Fellow Cadets."

¹⁴⁶ Stephenson, *supra* note 72.

¹⁴⁷ BELL, *supra* note 19, § 1.16, at 57 n.5.

¹⁴⁸ See Obama, *Reading Assignments*, *supra* note 35, at II.B ("Bell summary" of *Dred Scott*); *id.* at II.C (mentioning "Bell summary" of *Giles v. Harris*, "Bell, Summary of Civil War Amendments, Reconstruction," and "Bell summary" of *Plessy v. Ferguson*).

¹⁴⁹ See *id.* at III (mentioning "Bell, The Legacy of *Washington v. Davis*" and "Bell, Fair Employment Laws: An Overview"); see also *id.* at IV ("Bell, Employment and Race-Class Conflict").

¹⁵⁰ See BELL, *supra* note 19, at xxiii.

convergence thesis. In essence, this theory postulates that white people act collectively in their self-interest rather than according to a moral compass; thus, advances in African American civil rights come only when those advances benefit white people. Much has been written about this thesis; but without entering into debate about its explanatory power in American history, one can observe its important and controversial nature. Certainly parts of the readings—such as the optional excerpt on “Employment and Race-Class Conflict”—rely upon the interest-convergence theory.

In assessing Obama’s jurisprudence, we note what is and is not present in the readings. Obama’s reading selections include both examples of the law as it is written and of the law in action. He included some substantive law (*e.g.*, the black codes and the Civil Rights Act) and also examples of how law functioned (*e.g.*, *100 Years of Lynching* and the “Black Juror”). There are extensive excerpts from the United States Supreme Court’s desegregation decisions; but even in the day dedicated to “Civil Rights and Retrenchment” there are articles that look to how these policies will or should be applied. Really, more than is immediately apparent, much of the syllabus is about the future.

So what is not included? There are no critical race scholars assigned other than Derrick Bell. Mari Matsuda and Richard Delgado are noticeable by their absence.¹⁵¹ The readings are remarkably non-theoretical. A few of the readings—like Frederick Douglas’ *Is it Right to Kill a Kidnapper?* invite some discussion about what is law and should it be obeyed—and others, such as *Actual Jury Service By Negroes* invite discussion of the distinction between law in the books and law in action. But even those are grounded in experience. Thus, there is relatively little assigned reading on jurisprudence. The readings are cases and statutes or historical and sociological essays on race.

The readings, especially for the third day, are largely about cases and primarily focus around school desegregation efforts. Most of the readings written after 1970 are Supreme Court opinions; but the cases on affirmative action such as *Bakke*,¹⁵² *Wygant*,¹⁵³ and *Croson*¹⁵⁴ are noticeably absent. Obviously Obama could

¹⁵¹ Kennedy, *supra* note 120 (discussing primarily works by Derrick Bell, Richard Delgado, and Mari Matsuda).

¹⁵² *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

¹⁵³ *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986), *abrogation recognized by* *Associated Util. Contractors of Md., Inc. v. Mayor & City Council of Baltimore*, 83 F. Supp. 2d 613 (D. Md. 2000).

¹⁵⁴ *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

not possibly cover the full spectrum of opinions and case law in four days of readings. The material on civil rights and retrenchment focused on desegregation in education, but the absence of affirmative action is perhaps somewhat surprising. The cases focused largely around issues involving African Americans; Hispanics appear only in one case, *San Antonio v. Rodriguez*.¹⁵⁵ Asian Americans appear only as the subjects of the *Wards Cove*¹⁵⁶ case.

If we are looking at Obama and Bell, the points of departure from Bell are important. One key tenet of Bell's work is the permanence of racism because racial problems "grow more intractable with time";¹⁵⁷ however, Obama framed the course with readings on the malleability of racial categories, suggesting that racism is not permanent. He concluded with readings on the need to address economic inequality, inquiries about the opportunities for the black middle class, and well-educated students—both white and black. These selections could reflect his perception about the interests of students at the University of Chicago or perhaps some of his own interests. The diversity of readings likely itself gives a glimpse of Obama's mind. The excerpts from people like Booker T. Washington and Robert Bork illustrate at a minimum that Obama was willing to give a wide variety of speakers a chance to be heard. But perhaps their purpose was more than mere props in a debate; maybe they were present in the readings for the insights they might contribute to everyone's understanding.

The best glimpse of Professor Obama's vision in this syllabus may be found in the final assignment. The concluding line of the readings packet suggests even more radicalism than we have seen from Obama; but its call for hope and for a new language of empathy and compassion bespeaks a belief in the possibility of a better future through law: "Let us hope and pray that the vast intelligence, imagination, humor and courage in this country will not fail us. Either we learn a new language of empathy and compassion, or the fire this time will consume us all."¹⁵⁸ The assignments fit with several key themes that characterize Obama's jurisprudence and politics as they relate to race. First, that our nation has high aspirations, embodied in places like the Declaration of Independence and the Fourteenth

¹⁵⁵ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

¹⁵⁶ *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074, *as recognized in* *Raytheon Co. v. Hernandez*, 540 U.S. 44 (2003).

¹⁵⁷ BELL, *supra* note 39, at 9.

¹⁵⁸ West, *supra* note 131.

Amendment's Equal Protection principle. While those promises have not always been fulfilled, Obama—like leaders before him from W.E.B. Du Bois¹⁵⁹ to Ralph Ellison¹⁶⁰—sought to hold our country to those principles. This commitment was explicit in candidate Obama's *A More Perfect Union* speech in March 2008 at the National Constitution Center in Philadelphia, where he spoke of the Constitution's promise of freedom and the Constitution as containing the mechanism for ending slavery.¹⁶¹ Others have noted Obama's fascination with Ralph Ellison,¹⁶² and there are a lot of parallels between Obama's focus on the as-yet unfulfilled promises of the Declaration and Constitution and Ellison's faith in those documents, too. The faith is extraordinary, for as Ellison was growing up in Oklahoma, African Americans were subject to extraordinary violence. Yet, many people in Ellison's community had a faith that the principles of the Constitution might be put into action.¹⁶³ Such faith in the Constitution's promises, particularly the Fourteenth Amendment's Equal Protection Clause, has a long lineage in African American legal thought. Those brave civil rights pioneers of the early twentieth century like Du Bois asked for equal treatment on a regular basis by showing the gross inequalities in treatment of African Americans. It was a powerful and successful argument, grounded in the idea of equal treatment that itself found a home in *Matthew 7:12*, the Golden Rule. For what is the Equal Protection Clause of the Fourteenth Amendment but a secular injunction to "all things whatsoever ye would that men should do to you, do ye even so to them."¹⁶⁴ This is a principle that antedated the original Constitution and the Declaration and that early Americans—particularly those who opposed slavery—had been citing since the seventeenth century.¹⁶⁵ One can trace the revolution in thinking that African American

¹⁵⁹ DAVID LEVERING LEWIS, *W.E.B. DU BOIS, 1919–1963: THE FIGHT FOR EQUALITY AND THE AMERICAN CENTURY* (2001); ALFRED L. BROPHY, *RECONSTRUCTING THE DREAMLAND: THE TULSA RIOT OF 1921*, at 1–23 (2002) (discussing ideas of equality set in motion by the Harlem renaissance).

¹⁶⁰ See, e.g., Alfred L. Brophy, *The Great Constitutional Dream Book*, in 2 *ENCYCLOPEDIA OF THE SUPREME COURT* 360–63 (David S. Tanenhaus ed., 2008) (discussing ideas about equality, which Ralph Ellison labeled "the great constitutional dream book").

¹⁶¹ Obama, *A More Perfect Union*, *supra* note 38.

¹⁶² See KLOPPENBERG, *supra* note 1, at 13 (discussing Obama's affection for Ellison).

¹⁶³ RALPH ELLISON, *Roscoe Dunjee and the American Language*, in *THE COLLECTED ESSAYS OF RALPH ELLISON* (John Callahan ed., 1996).

¹⁶⁴ *Matthew 7:12* (King James Bible).

¹⁶⁵ Alfred L. Brophy, "Ingenium est Fateri per quos profeceris": Francis Daniel Pastorius' *Young Country Clerks Collection and Anglo-American Legal Literature, 1682–1716*, 3 *U. CHI. L. SCH.*

intellectuals wrought by looking from Justice Oliver Wendell Holmes' dismissive treatment of the Equal Protection argument in *Buck v. Bell* as the usual last resort of constitutional argument¹⁶⁶ to its triumph in *Brown v. Board of Education* less than three decades later.¹⁶⁷ This is also the conclusion of modern political theory. James Kloppenberg has shown that Obama was, like many of his generation, deeply affected by John Rawls' political theory. Rawls was able to demonstrate in *A Theory of Justice* that we should judge the morality of action from the perspective of one who is "behind the veil of ignorance," that is one who does not know what their interests are.¹⁶⁸ To take a common example, we should judge the morality of the welfare state from the perspective of one who is unsure of whether she will be a recipient or a payer. While that is most assuredly the way to take self-interest out of an equation, what remains unclear is how to implement that in politics. For everyone indeed knows their position and will, consequently, judge their actions accordingly. That is the problem that Ellison faced. He asked in *Invisible Man*, whether politics could ever "be an expression of love."¹⁶⁹ Or, to phrase it in the way that Obama does, how to get voters to adopt principles based on the Golden Rule, the Declaration, or the Equal Protection principle. This is, indeed, one of the central problems faced by contemporary political theory.

The second part of Obama's post-professor thought that appears in the syllabus is his attempt to solve the problem of self-interest in politics. Where self-interest led Derrick Bell to articulate the interest convergence theory that did not offer much in the way of hope, both Ellison and Obama saw a similar solution: focus on the issues that unite us. Ellison recorded the historical ways that African Americans formed American culture. *Invisible Man* sees the many become one through mixing of African American and white culture. Obama's campaign rhetoric is more forward-looking. It is often about how the themes that unite are

ROUNDTABLE 637, 653, 659 (1996) (discussing Quaker anti-slavery advocacy and their invocation of the Golden Rule).

¹⁶⁶ *Buck v. Bell*, 274 U.S. 200, 208 (1927), *abrogation recognized by Fieger v. Thomas*, 74 F.3d 740, 742 (6th Cir. 1996).

¹⁶⁷ Alfred L. Brophy, *Invisible Man as Literary Analog to Brown v. Board of Education*, in RALPH ELLISON AND THE RAFT OF HOPE: A POLITICAL COMPANION TO *INVISIBLE MAN* 119, at 122–26 (Lucas Morel ed., 2004).

¹⁶⁸ JOHN RAWLS, *A THEORY OF JUSTICE* (1971). See KLOPPENBERG, *supra* note 1, at 89–98 (discussing Rawls and noting connections to Obama).

¹⁶⁹ RALPH ELLISON, *INVISIBLE MAN* 341 (1952).

greater than those that divide and that political action comes from people who united together around common missions, rather than dividing along racial lines.¹⁷⁰

The third part of Obama's thought that appears in the syllabus is related to the Declaration's and the Constitution's foundational promises and to the possible political solution: He has, moreover, an optimism that racism is not permanent and, in fact, progress is being made.¹⁷¹ This optimism was supported by the evidence that generations of Americans had struggled, first to end slavery, and then to end Jim Crow.¹⁷² A fourth element of Obama's thought that appears, somewhat obliquely in the syllabus as in the complete omission of cases from the final section on "Where do we go from here?," is the belief that progress comes from political, not judicial, action.¹⁷³ The Constitution is largely, in Obama's mind, about structuring deliberations rather than right. To be sure, Obama recognizes some

¹⁷⁰ See Obama, A More Perfect Union, *supra* note 38.

I chose to run for president at this moment in history because I believe deeply that we cannot solve the challenges of our time unless we solve them together, unless we perfect our union by understanding that we may have different stories, but we hold common hopes; that we may not look the same and we may not have come from the same place, but we all want to move in the same direction.

See also *id.* ("This nation is more than the sum of its parts . . . out of many we are truly one."). See also RUTH O'BRIEN, *OUT OF MANY, ONE: OBAMA AND THE THIRD AMERICAN POLITICAL TRADITION* (2013).

¹⁷¹ Obama, A More Perfect Union, *supra* note 38 ("[W]hat we have seen—is that America can change. That is the true genius of this nation."); *id.* ("[W]orking together, we can move beyond some of our old racial wounds, and that in fact we have no choice if we are to continue on the path of a more perfect union.").

¹⁷² *Id.* ("[W]ords on a parchment would not be enough to deliver slaves from bondage, or provide men and women of every color and creed their full rights and obligations as citizens of the United States. What would be needed were Americans in successive generations who were willing to do their part—through protests and struggles, on the streets and in the courts, through a civil war and civil disobedience, and always at great risk—to narrow that gap between the promise of our ideals and the reality of their time."); see also BARACK OBAMA, *THE AUDACITY OF HOPE* 85–95 (2006) (talking about the relevance of the Declaration of Independence and the Constitution and how they shape our values).

¹⁷³ Obama, A More Perfect Union, *supra* note 38. Out of the fragmentation of law and politics that had been so racially divisive in the 1970s and 1980s, Obama sought to move in a more positive direction. Constitutional law had not solved the problems; there was no clear meaning. There needed to be political solutions. Cf. KLOPPENBERG, *supra* note 1, at 153–61 (discussing Obama's views on the contingency of the Constitution and how political mobilization was necessary to achieve the promises of the Constitution).

fundamental rights—such as free speech, property, and Due Process.¹⁷⁴ But the Constitution is largely about discussion and making democracy function, rather than outcomes. “[O]ur democracy,” Obama wrote in *The Audacity of Hope*, is “not as a house to be built, but as a conversation to be had.”¹⁷⁵ And the Constitution has a big role to play in that conversation, for “the framework of our Constitution can do is organize the way by which we argue about our future.”¹⁷⁶

A final theme that appears in Obama’s thought is that the legacies of slavery and Jim Crow continue to demand attention.¹⁷⁷ These tenets, which are so prominent a part of Obama’s Philadelphia speech and have received so much commentary, can be found in his reading assignments as well. There were also reading assignments that did not fit neatly with these themes, such as Robert Bork’s essay on the Civil Rights Act of 1964.¹⁷⁸ But some of those reading assignments may also have been about the spectrum of ideas, taking the measures of those with whom you might disagree, seeing what the common ground may be, preparing to compromise, and maybe believing that “society can change.”¹⁷⁹

III. THE MEANING AND ORIGINS OF THE GROUP PRESENTATIONS TOPICS

The initial reading assignments and ensuing class discussions provided students with the necessary case law and theory for the remainder of the class. After the first four class meetings, Obama relinquished control of the reading assignments as the course turned to presentations by student groups with each group assigning up to fifty pages of reading to their classmates. Obama suggested

¹⁷⁴ OBAMA, *supra* note 172, at 86 (focusing on core constitutional values of free speech, property rights, and Due Process).

¹⁷⁵ *Id.* at 92. This invites further speculation on Obama as a legal historian. James Kloppenberg has already linked Obama’s writing about constitutional history in *THE AUDACITY OF HOPE*, *supra* note 172, to the literature on Republicanism in American history that was so popular in the 1980s and 1990s. See Kloppenberg, *supra* note 1, at 153–61.

¹⁷⁶ OBAMA, *supra* note 172, at 92.

¹⁷⁷ Obama, *A More Perfect Union*, *supra* note 38 (“That history helps explain the wealth and income gap between blacks and whites, and the concentrated pockets of poverty that persist in so many of today’s urban and rural communities.”); see also THOMAS SUGRUE, *NOT EVEN PAST: BARACK OBAMA AND THE BURDEN OF RACE* 73 (2010) (discussing William Julius Williams).

¹⁷⁸ Bork, *supra* note 85.

¹⁷⁹ Obama, *A More Perfect Union*, *supra* note 38 (“[W]hat my former pastor too often failed to understand is that embarking on a program of self-help also requires a belief that society can change.”).

about a dozen topics on which students might present, but noted that groups had substantial flexibility in choosing a topic. Based on the class reading assignments, we hypothesize that the debt to Derrick Bell was not nearly as great as one might expect given how much recent public discussion has revolved around Bell; however, when analyzing the suggested group discussion topics, Obama's support of the tenets of Critical Race Theory becomes somewhat more arguable. Recognizing Obama's political aspirations and his reluctance to take controversial positions in matters of race, the allegiance to CRT in the group discussion topics is neither overt nor incontrovertible. While there were non-CRT scholars simultaneously writing about these topics as well, it is interesting to note that ten of the twelve suggested topics reflect the ten key tenets of CRT identified in a 1993 article by Richard Delgado and Jean Stefancic.¹⁸⁰ We posit that student groups researching these topics might have discovered these articles and been exposed to the CRT ideals. Whether they agreed with the ideas advanced by CRT scholars or not, the students would have presented them to the class as part of Obama's mandate "to draw out the full spectrum of views on the issue."¹⁸¹

The syllabus section suggesting group presentation topics provides an enlightening—and up to now relatively unused—perspective on how Obama approached the issues of race and law in the course. Obama reportedly refrained from direct Socratic questioning and instead opted to engage in more discussion and debate with his students.¹⁸² Therefore, the list of required readings really offers only a glimpse of the myriad of possible directions class discussions or viewpoints Obama elicited from his students. While we have made some speculations from the first four days of readings, the twelve suggested presentation topics and Obama's synopsis of the ideas embedded within each topic are even more helpful in understanding Obama's closely held beliefs about race. Appendix two reprints the topics and Obama's discussion of each topic in its entirety.

As with the readings, we have two initial questions: Where did these topics come from and why did he choose these particular topics? In seeking the answers,

¹⁸⁰ Richard Delgado & Jean Stefancic, *Critical Race Theory: An Annotated Bibliography*, 79 VA. L. REV. 461 (1993).

¹⁸¹ Barack Obama, *Current Issues in Racism and the Law Syllabus—Spring 1994: Possible Group Presentation Topics*, available at http://www.nytimes.com/packages/pdf/politics/2008OBAMA_LAW/Obama_CoursePk.pdf [hereinafter Obama, *Group Presentation Topics*]. The group presentation topics are reprinted in Appendix II at the conclusion of this article; however, the introductory material referenced in this footnote is not included in the appendix.

¹⁸² Kantor, *supra* note 18, at A1.

it is arguably relevant that Obama served as an adjunct professor during this time, maintained a position with a local civil rights law firm, and served as a State Senator.¹⁸³ Thus Obama had less time to devote to the preparation of his syllabus and the background reading and scholarship than a full-time professor¹⁸⁴ and Obama likely had real, rather than theoretical, experiences with many of these topics. From the vantage point of one with limited time to develop a comprehensive syllabus, it is likely that Obama drew on the work he performed as a research assistant for Laurence Tribe and as president of the *Harvard Law Review*; however, he may also have relied upon an article published the year before he taught the class by Richard Delgado and Jean Stefancic, *Critical Race Theory: An Annotated Bibliography*,¹⁸⁵ to develop his suggested approaches to the group presentations.

The Delgado and Stefancic article, published in the *Virginia Law Review*, outlines ten fundamental tenets of Critical Race Theory followed by a list of the top one hundred CRT articles and books published in the preceding twenty years. The authors included a brief summary of the main points of each article and identified which of the ten fundamental tenets each included. Among many others, the bibliography included the scholarship of Derrick Bell and Patricia Williams. Obama's relationship with Derrick Bell has already been established, but Obama was also particularly familiar with Williams' work because he published one of her included articles during his tenure as president of the *Harvard Law Review*.¹⁸⁶

We suggest the strong possibility that the Delgado and Stefancic CRT bibliography was a source for Obama's student presentation topics. Ten of the twelve topics suggested by Obama for student presentations (and every suggested subtopic for those ten) appear in Delgado and Stefancic's CRT bibliography.¹⁸⁷ For a class on current issues in racism and law, it is, of course, unsurprising that Obama's syllabus covers the same topics as much of the then leading CRT

¹⁸³ *Id.*

¹⁸⁴ *Id.* Obama reportedly did not produce any academic scholarship during his tenure at the University of Chicago; nor did he participate in any of the famous roundtable discussion held regularly by the full-time faculty members.

¹⁸⁵ See generally Delgado & Stefancic, *supra* note 180.

¹⁸⁶ Patricia Williams' article went through the editing cycle under his supervision as president of the *Harvard Law Review*. See Patricia J. Williams, *Metro Broadcasting, Inc. v. FCC: Regrouping in Singular Times*, 104 HARV. L. REV. 525 (1990).

¹⁸⁷ With the exception of employment discrimination and Native American or Latino issues, the topics of his group presentations—as articulated further in the accompanying synopses—are all contained within this bibliography. See Obama, *Group Presentation Topics*, *supra* note 181.

scholarship. Perhaps Obama was merely drawing from a similar well of cultural ideas as CRT scholars, rather than drawing on their work explicitly. However, an inspection of the topics themselves—and, more importantly, Obama’s suggestions for how student groups might present each topic—reveals important connections with the CRT scholarship.

Therefore, we suggest that Delgado and Stefancic’s CRT bibliography is a good framework for demonstrating Obama’s interest in topics that were also central to CRT. Thus, we rely on their definitions of ten key tenets of CRT to help frame the exploration of the group presentation topics and the potential influence of these tenets on the students’ individual exploration of racism and law in their assigned research papers.¹⁸⁸ As we show below, those tenets were often interlaced in the class discussion questions. Beginning with the ten key tenets of CRT that Delgado and Stefancic outlined, the analysis that follows is based solely on articles and editions of texts that were available to Obama when drafting this syllabus. Thus, these resources are likely those employed by his students as they prepared their chosen topics for presentation in class.

A. *Ten Primary Tenets of Critical Race Theory*¹⁸⁹

1. *Critique of liberalism*: Many CRT theorists find liberalism an ineffective means to address issues of race. While many of the articles to which Delgado and Stefancic attribute this characteristic deal with specific liberal programs, attitudes, or actions designed to promote racial equality—“affirmative action, neutrality, color blindness, role modeling or the merit principle”¹⁹⁰—others merely carry the theme throughout the article.
2. *Storytelling/counter-storytelling and “naming one’s own reality”*: CRT scholars find most mainstream discussions and perceptions of race emanate from the “majoritarian mindset” and the “presuppositions, received wisdoms, and shared cultural understandings”¹⁹¹ that the

¹⁸⁸ Obama did not require or encourage outside research for the students’ papers, which comprised 40 percent of their grade. He asked them to apply the concepts discussed in class and covered in the readings, which would have included the readings assigned by the student groups. *Id.*

¹⁸⁹ Delgado & Stefancic, *supra* note 180, at 462–63. The ten tenets identified are direct citations from Delgado and Stefancic followed by a paraphrase of each tenet.

¹⁹⁰ *Id.* at 462.

¹⁹¹ *Id.* at 462. The “majoritarian mindset” generally refers to the conservative white males’ perspective.

majority brings to any discussion of race. To counteract this mindset and demonstrate an alternative perspective, CRT authors use stories and parables to elucidate the fallacies of the majoritarian mindset.

3. *Revisionist interpretations of American civil rights law and progress*: CRT scholars question the source of the ineffectiveness and cyclical nature of America's attempts to institute and enforce antidiscrimination laws. CRT authors seek explanations in the "psychology of race . . . [and] white self-interest" among other sources.¹⁹²
4. *A greater understanding of the underpinnings of race and racism*: Articles credited with this tenet often look to another discipline—social science—for insight on American society's view of race to see how it affects the way the law is applied. A specific example, included in an article on Obama's syllabus, is: "understanding how majoritarian society sees black sexuality helps explain the law's treatment of interracial sex, marriage, and adoptions."¹⁹³
5. *Structural determinism*: These CRT articles recognize the effect that established legal and cultural structures have on maintaining the status-quo. The authors posit that naming and understanding these "constraints" provides society the freedom "to work more effectively for racial and other types of reform."¹⁹⁴
6. *Race, sex, class, and their intersections*: Are these "separate disadvantaging factors?"¹⁹⁵
7. *Essentialism and anti-essentialism*: Does the black middle class have the same needs and interests as the black urban poor? Do all "oppressed people" have the same interests?¹⁹⁶
8. *Cultural nationalism/separatism*: These CRT scholars assert the belief that the interests and advancement of people of color is best effectuated

¹⁹² Delgado & Stefancic, *supra* note 180, at 462.

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 463.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

- through separation from mainstream American society; and preserving diversity promotes the welfare of all.¹⁹⁷
9. *Legal institutions, critical pedagogy, and minorities in the bar*: These articles discuss the representation of minorities in law school, the bar, and offer alternative CRT pedagogical approaches.¹⁹⁸
 10. *Criticism and self-criticism/responses*: CRT, due to its counter-majoritarian nature, provokes substantial criticism. This final tenet includes this criticism and the subsequent responses from both those within and outside the CRT movement.¹⁹⁹

B. CRT Pedagogy

Within the Delgado and Stefancic CRT bibliography, there are several articles that address the importance of acknowledging—and then teaching—students to identify the racial issues that underlie many aspects of the law.²⁰⁰ One article, Charles Lawrence’s *The Word and the River: Pedagogy as Scholarship as Struggle*,²⁰¹ provides suggestions for how to teach CRT. Lawrence shares the successes he has experienced implementing a “student-centered, student-generated pedagogical method.”²⁰² Lawrence assigned articles by noted CRT scholar Alan

¹⁹⁷ *Id.* at 462.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ See, e.g., Frances Lee Ansley, *Race and the Core Curriculum in Legal Education*, 79 CALIF. L. REV. 1511 (1991); Derrick A. Bell, Jr., *Humanity in Legal Education*, 59 OR. L. REV. 243 (1980); Kimberlé Williams Crenshaw, *Foreword: Toward a Race-Conscious Pedagogy in Legal Education*, 11 NAT’L BLACK L.J. 1 (1989); Jerome McCristal Culp, Jr., *Autobiography and Legal Scholarship and Teaching: Finding the Me in the Legal Academy*, 77 VA. L. REV. 539 (1991); Gerald P. López, *Training Future Lawyers to Work with the Politically and Socially Subordinated: Anti-Generic Legal Education*, 91 W. VA. L. REV. 305 (1989); Gerald Torres, *Teaching and Writing: Curriculum Reform as an Exercise in Critical Education*, 10 NOVA L.J. 867 (1986).

²⁰¹ Charles R. Lawrence, III, *The Word and the River: Pedagogy as Scholarship as Struggle*, 65 S. CAL. L. REV. 2231 (1992). Delgado and Stefancic explain that Lawrence provides tools to law professors to “analyze issues of racial justice more effectively.” Delgado & Stefancic, *supra* note 180, at 499.

²⁰² Lawrence, *supra* note 201, at 2247–50. Each week prior to class Lawrence required students to submit a reflection essay describing their reactions to the readings and to refer to them during class. It is through these personal reflections and subsequent class discussions that Lawrence encourages students to look beyond the way the story of the law is traditionally “told within the dominant discourse [which] has systematically excluded the experiences of people of color and other outsiders and where we are trained to believe that the story told by those in power is a universal story.” *Id.*

Freeman and asked students to “keep Freeman’s challenges in mind as they approached the reading, exercises and discussions throughout the course.”²⁰³ He encouraged his students to wrestle with how to “become effective advocates for liberation while living and working within institutions and cultures that appeared hell-bent on perpetuating racist domination.”²⁰⁴ This same method was advocated by Derrick Bell and employed in the course offered at Harvard during Obama’s first year as a law student.²⁰⁵ Though there is no evidence that Obama read Lawrence, there are similarities between Obama’s method and the “student-centered, student-generated pedagogical method” that Lawrence advanced. Thus, as we have suggested above, Obama may have been relying explicitly on Lawrence or similar works on CRT pedagogy or he was drawing from some other teaching tradition or developing such parallel ideas on his own. Just as Freeman’s work served as a cornerstone for Lawrence’s classes, Derrick Bell’s work provided a starting point for Obama’s course—though as we suggested in Part II, much of the assigned reading—went in different directions from Bell.

C. CRT and the Obama Group Presentation Topics

With the background of the key tenets of CRT, we now turn to Obama’s suggested group presentation topics to suggest how they often reflect those key tenets. We take up each of the dozen topics, which are reprinted in their entirety in the second Appendix. It is an odd list of topics. Some topics, like the all black, all male school, interracial adoptions, and reparations, seem relatively peripheral, albeit interesting. Meanwhile, other important topics, such as affirmative action in higher education and large-scale desegregation of primary and secondary schools are absent.

It would have been unsurprising to see a simple listing of topics, such as “Race and the Criminal Justice System” or “Immigration Policy” followed by directions to explore one aspect of the topics and provide a sampling of alternative viewpoints. However, Obama offered students a set of questions on these potentially controversial topics. For each group presentation topic, Obama provided

²⁰³ *Id.* at 2243. Lawrence describes Alan Freeman’s *Legitimizing Racism Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978), as a “cornerstone text” in his class and later assigned Freeman’s subsequent article, *Race and Class: The Dilemma of Liberal Reform*, 90 YALE L.J. 1880 (1981), which reviews Derrick Bell’s, RACE, RACISM, AND AMERICAN LAW, *supra* note 74. Lawrence, *supra* note 201, at 2242.

²⁰⁴ Lawrence, *supra* note 201, at 2243.

²⁰⁵ See Derrick Bell, *Racial Reflections: Dialogues in the Direction of Liberation*, 37 UCLA L. REV. 1037, 1041–42 (Tracy Higgins & Sung-Hee Suh eds., 1990) [hereinafter Bell, *Racial Reflections*].

a summary and suggestions for framing the class discussion. This commentary potentially provides insight on his perspective—or at least on the points that Obama viewed as controversial—of the issues themselves.²⁰⁶ Obama required each group to meet with him prior to finalizing a presentation topic to review their planned approach to leading the class discussion,²⁰⁷ there is no further evidence available regarding the substance of those meetings. The introductory commentary to each topic is effectively a “pre-reading” exercise designed to shape the research and presentations. The Delgado and Stefancic article often conforms with, or overlaps, Obama’s commentaries; however, we are merely speculating that it was one source that the students may have used in preparing for their group presentation that did not appear in the syllabus.

For each of the twelve discussion topics and the enumerated subtopics, we begin with Obama’s summary and guiding questions from the syllabus. We then discuss the prevalence of each topic in Delgado and Stefancic’s CRT bibliography and choose excerpts or themes from these articles that student groups may have encountered. We also include a sampling of other contemporaneously published (non-CRT articles) that student groups may have drawn from to present alternative perspectives.

1. The All-Black All-Male School

*A number of public school systems, including those in Detroit and Milwaukee, have initiated pilot programs whereby inner-city black males are voluntarily placed in a segregated learning environment, with black male teachers, an Afrocentric curriculum, etc. Proponents say that given the unique problems facing black males, such “self-segregation” contributes to self-esteem and enhances learning performance. Opponents argue that these programs are a betrayal of [Brown v. Board of Education], discriminate against whites and females, stigmatizes black males, and politicizes school curriculums.*²⁰⁸

Obama first suggests that students might address inner-city pilot programs followed by two countervailing inquiries: “Do these programs benefit the

²⁰⁶ See Kantor, *supra* note 18, at A1. Obama refrained from participating in faculty discussions on controversial topics, refused to give his opinion on Lani Gunier’s election restructuring proposals, and declined to support or oppose a controversial anti-gang measure.

²⁰⁷ See Obama, *Group Presentation Topics*, *supra* note 181.

²⁰⁸ *Id.*

educational and emotional development of inner-city black males? Or are they merely a return to the discrimination purportedly overcome by the Supreme Court's decision in [*Brown v. Board of Education*]?" Because the third day of readings included *Milliken*,²⁰⁹ students were familiar with the plight of the Detroit schools and the Supreme Court's restriction of integration remedies. Thus pondering an unorthodox response, such as the all black, all-male public school may have provided an opportunity for renewed debate or for discussing the issue from a different perspective than in a previous class discussion. Similarly, reading the Court's opinions in *Croson* and *Washington Housing Authority* would have provided enough background to present and discuss the potential equal protection challenges that such schools might raise.²¹⁰

A student group selecting this topic should have found several of Derrick Bell's articles on school integration; however, due to the controversy surrounding *Milliken* and Detroit's failed attempts at desegregation, there were also many articles available presenting statistical information regarding the current achievement of black males and potential for alternative solutions such as Afro-centric curricula.²¹¹ Kevin Brown's article, *Do African-Americans Need Immersion Schools?: The Paradoxes Created by Legal Conceptualization of Race and Public Education*,²¹² provides a historical account leading up to the current debate surrounding these issues. Derrick Bell's article, "Brown v. Board of Education and the Interest-Convergence Dilemma,"²¹³ questions the effectiveness of *Brown* as "whites flee in alarming numbers from school districts ordered to implement

²⁰⁹ *Milliken v. Bradley*, 418 U.S. 717 (1974).

²¹⁰ See Kevin D. Brown, *The Dilemma of Legal Discourse for Public Educational Responses to the "Crisis" Facing African-American Males*, 23 CAP. U. L. REV. 63, 126–27 (1994) (discussing the Court's shift in interpreting the Equal Protection Clause from an individualist perspective that applies equally to all people rather than a traditional approach that looks at classes or groups of disadvantaged individuals).

²¹¹ See, e.g., Pamela J. Smith, Comment, *All Black Male Schools and the Equal Protection Clause: A Step Forward Toward Education*, 66 TUL. L. REV. 2003 (1992); see also Brown, *supra* note 210, at 126–27 (discussing the district court's decision in *Milliken* and stating that "[t]he legal justifications given for these schools was that black males are in a crisis situation because of their homicide rates (tendencies toward violence), their unemployment rates (tendencies toward laziness), and their drop out rates (lack of intelligence)").

²¹² Kevin D. Brown, *Do African-Americans Need Immersion Schools?: The Paradoxes Created by Legal Conceptualization of Race and Public Education*, 78 IOWA L. REV. 813 (1993).

²¹³ Bell, *Interest-Convergence Dilemma*, *supra* note 121.

mandatory reassignment plans.”²¹⁴ Bell discusses a perceived detrimental effect on the education of racial minorities resulting from desegregation efforts²¹⁵ and suggests, in the alternative, refocusing on the segregated minority’s quest of “obtaining true educational effectiveness which may entail the improvement of presently desegregated schools as well as *the creation or preservation of model black schools*.”²¹⁶ Obama assigned many cases emphasizing the extreme nature of the steps school boards took to prevent *Brown*’s desegregation mandate (such as Prince Edward County’s closing of their public schools to *all* students for four years).²¹⁷

Obama’s selection of readings emphasizing resistance to desegregation efforts, and no readings assigned to demonstrate any successful efforts, made Bell’s arguments seem more valid. Bell advanced that “some black educators . . . 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.”²¹⁸ In support of this statement, Bell cited a book review published in 1979 of four authors discussing the results of judicially mandated school integration.²¹⁹ Three of the four authors upheld integration as the only viable method for achieving educational equality between all racial groups; however, only Sara Lawrence Lightfoot’s premise of separate all-black schools designed to integrate the support of the black family and community achieved Bell’s praise.²²⁰

²¹⁴ *Id.* at 531.

²¹⁵ *See id.* at 532.

²¹⁶ *Id.* at 532 (emphasis added).

²¹⁷ *See* Obama, *Reading Assignments*, *supra* note 35, at III.

²¹⁸ Bell, *Interest-Convergence Dilemma*, *supra* note 121, at 532.

²¹⁹ Derrick A. Bell, Jr., *Book Review*, 92 HARV. L. REV. 1826 (1979) [hereinafter Bell, *Book Review*] (reviewing RAY C. RIST, *THE INVISIBLE CHILDREN: SCHOOL INTEGRATION IN AMERICAN SOCIETY* (1978); GARY ORFIELD, *MUST WE BUS?: SEGREGATED SCHOOLS AND NATIONAL POLICY* (1978); DAVID J. ARMOR, *WHITE FLIGHT, DEMOGRAPHIC TRANSITION, AND THE FUTURE OF SCHOOL DESEGREGATION* (1978); SARA LAWRENCE LIGHTFOOT, *WORLDS APART: RELATIONSHIPS BETWEEN FAMILIES AND SCHOOLS* (1978)).

²²⁰ *See* Bell, *Book Review*, *supra* note 219, at 1828–29. Bell describes the experiences recounted by Rist of black children voluntarily reassigned to white schools in Portland. Bell warns readers that “[m]any of the experiences will cause the readers to wince,” *id.* at 1829, and concludes his review with “[n]onetheless having observed this phenomenon for a full year during which ill-prepared and outnumbered black children struggled to survive the ‘relief’ transformed into the very opposite of what

This article provides a good example of how Obama's students might have been exposed to interest-convergence theory even though it was not specifically referenced in the assigned readings. Students opting to use Bell's article in their research would have read Bell's interest-convergence theory in the beginning of the article to eventually discover Bell's position on all-black, all-male schools at the end of the article. To support and to counter any advances made by Bell, a student group would have needed to read the sources of Bell's argument and look for counter-arguments. Bell's book review, although dismissive of the three authors advocating school integration, provided sources addressing both sides of the argument. It is, of course, possible that Obama's students found all their readings and sources without ever using Bell. We merely suggest the likelihood that Bell's perspective and his interest-convergence theory would be included—and perhaps influential—in the class discussion.²²¹

2. Interracial Adoptions

*Several states have established regulations that look to place black children up for adoption exclusively with black families. Such policies are supported by black social worker organizations, who argue that same-race adoptions are best for the child, give the child a strong sense of identity, etc. Opponents, including white families interested in adopting black children, say that the policy is racist, and is detrimental to the thousands of unplaced black children currently up for adoption.*²²²

Brown intended, Rist's commitment to integrated schools remains unshaken." *Id.* at 1832. Bell describes Orfield's book as a "veritable military manual of racial balance tactics. It is doctrinaire and uncompromising, leaving little doubt as to the identities of the enemy and the allies." *Id.* at 1834–35. Bell dismisses Armor's work as providing "more proof of the obvious regarding the connection of court-ordered desegregation and White Flight." *Id.* at 1838. After reading Rist's account of the effect on black students in Oregon's voluntary desegregation plan, Bell rejects Armor's suggestion that such a plan is the remedy to White Flight. *See id.* The tone of Lightfoot's review is indicative of Bell's support of her premise. He describes her as "[w]riting in warm, humane terms that exude caring for, and commitment to, children" and appreciates her recognition of the almost magical quality that black families give to education. *Id.* at 1841.

²²¹ In addition to these two articles, Bell wrote many articles regarding school desegregation and reform efforts. *See, e.g.,* Derrick A. Bell, Jr., *The Community Role of Putting Education into Practice*, 17 THEORY INTO PRAC. 114 (1978); Derrick A. Bell, Jr., *The Legacy of W.E.B. Du Bois: A Rational Model for Achieving Public School Equality for America's Black Children*, 11 CREIGHTON L. REV. 409 (1977).

²²² Obama, *Group Presentation Topics*, *supra* note 181.

A search for articles written between 1980 and 1993 discussing interracial adoptions produced eleven results. Obama asked the students to consider state regulations that attempt to exclusively place black children with black families. He provided two of the commonly advanced arguments: “[same-race adoptions] give the child a strong sense of identity” versus “the policy is racist, and is detrimental to the thousands of unplaced black children currently up for adoption.”

Interracial adoptions were cited as an example in the fourth tenet of CRT identified by Delgado and Stefancic; however, none of the one hundred articles in their CRT bibliography had interracial adoptions as a primary theme. Of the eleven articles retrieved by the authors’ search, there were several that addressed the topic tangentially while the rest focused on the history and current implications of the “best interest of the child” test.²²³ None of these articles presented strong arguments in support of placement decisions made exclusively on race or advocate placing children without regard to race.²²⁴ So while there did not appear to be any direct correlation for this presentation topic to the CRT articles and scholars cited by Delgado and Stefancic, an academic bias existed regarding the unnecessarily pervasive role of race in adoption decisions.

3. Racial Gerrymandering

The Voting Rights Act of 1965 was designed to enforce the [F]ifteenth [A]mendment, and ensure the full and equal enfranchisement of minorities in the political process. But with the elimination of such obvious barriers to voting as the poll tax and literacy tests, what constitutes a violation of the Act? Some

²²³ See, e.g., D. Michael Reilly, *Constitutional Law: Race as a Factor in Interracial Adoptions*, 32 CATH. U. L. REV. 1022 (1983) (supporting the consideration of race as a factor but arguing it should not be dispositive); Eileen M. Blackwood, Note, *Race as a Factor in Custody Dispute: Palmore v. Sidoti*, 71 CORNELL L. REV. 209 (1985); Timothy P. Glynn, Note, *The Role of Race in Adoption Proceedings: A Constitutional Critique of the Minnesota Preference Statute*, 77 MINN. L. REV. 925 (1993); Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching in Adoption*, 139 U. PA. L. REV. 1163 (1991) (providing substantial historical information regarding the evolution in interracial adoption policies).

²²⁴ Compare Jo Beth Eubanks, *Transracial Adoption in Texas: Should the Best Interests Standard Be Color-Blind?*, 24 ST. MARY’S L.J. 1225 (1993) (arguing against the use of race when matching children and deeming it harmful rather than beneficial), and Myriam Zreczny, Note, *Race Conscious Child Placement: Deviating from a Policy Against Racial Classifications*, 69 CHI.-KENT L. REV. 1121 (1994) (opposing the use of race in adoption decisions), with Margaret Howard, *Transracial Adoption: Analysis of the Best Interests Standard*, 59 NOTRE DAME L. REV. 503 (1984) (suggesting different effects of interracial adoptions and different approaches by the courts when considering African American children and Native American children).

commentators and courts have insisted that such facially neutral practices as the at-large voting district dilute minority voting strength, and have designed single-member, “super-majority” districts that ensure minorities are elected to various political offices. Others say that the drawing of district lines to ensure the success of minority candidates (as opposed to the ability of minorities to vote) amounts to nothing more than racial gerrymandering, encourages racial block voting, and further isolates blacks and other minorities from the broader political community.²²⁵

In addition to articles from *Cardozo Law Review*’s 1993 Symposium on Districting,²²⁶ student groups choosing this topic had many CRT articles available to discuss and validate the necessity of taking affirmative steps to “ameliorate the continuing social and economic consequences of several centuries of American racism.”²²⁷ The summaries in Delgado and Stefancic’s CRT bibliography identified four articles dealing with this issue,²²⁸ which addressed not only the purpose of the Voting Rights Act and its modern application, but also the manners in which racism continued to penetrate the electoral process.²²⁹ One article spanned more

²²⁵ Obama, *Group Presentation Topics*, *supra* note at 181.

²²⁶ See, e.g., Lani Guinier, *The Representation of Minority Interests: The Question of Single-Member Districts*, 14 CARDOZO L. REV. 1135 (1993) (advancing alternative ideas to race conscious districting that may actually be more effective to prevent voter dilution); Frank J. Macchiarola & Joseph G. Diaz, *The 1990 New York City Districting Commission: Renewed Opportunity for Participation in Local Government or Race Based Gerrymandering?*, 14 CARDOZO L. REV. 1175 (1993) (challenging the perception that the new voting districts amounted only to “race counting”); Bernard Grofman, *Would Vince Lombardi Have Been Right if He Had Said: “When it Comes to Redistricting, Race Isn’t Everything, It’s the Only Thing?”*, 14 CARDOZO L. REV. 1237 (1993) (surveying the previous twenty-five years of litigation surrounding the Voting Rights Act).

²²⁷ T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 COLUM. L. REV. 1060 (1991) [hereinafter Aleinikoff, *Race Consciousness*] (rejecting the notion that a colorblind approach is feasible and instead arguing the need for race-consciousness as a means of remedying past discrimination).

²²⁸ See Delgado & Stefancic, *supra* note 180, at 464 (identifying T. Alexander Aleinikoff, *The Constitution in Context: The Continuing Significance of Racism*, 63 U. COLO. L. REV. 325 (1992) [hereinafter Aleinikoff, *Constitution in Context*]; Lani Guinier, *Keeping the Faith: Black Voters in the Post-Reagan Era*, 24 HARV. C.R.-C.L. L. REV. 393 (1989) [hereinafter Guinier, *Keeping the Faith*]; Lani Guinier, *No Two Seats: The Elusive Quest for Political Equality*, 77 VA. L. REV. 1413 (1991) [hereinafter Guinier, *No Two Seats*]; Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077 (1991) [hereinafter Guinier, *The Triumph of Tokenism*] as articles dealing with “voting rights”).

²²⁹ See Aleinikoff, *Constitution in Context*, *supra* note 228, at 360–62 (admitting that many of the explanations for racial bloc voting would be “plausible” “[i]f we believe we live in a world where racism has been largely eradicated” but ultimately rejecting such explanations due to persistence of

than one hundred pages and outlined the black community's struggle have a "meaningful" vote which the author defined as "a vote capable of electing candidates of a black community's choice."²³⁰

Obama suggested the group presentations center on voter dilution, racial bloc voting, the purported effect of these efforts to isolate minority groups, and determining what constitutes a modern violation of the Voting Rights Act of 1965. Following the publication of the 1990 census, there was an increasing academic interest in the subject—over a dozen articles published between 1990 and 1993.²³¹ Two of these articles, written by Lani Guinier and included in the CRT bibliography, offer the comprehensive analysis Obama sought. These articles were familiar to Obama who "taught Lani Guinier's proposals for structuring elections differently to increase minority representation."²³² These articles identify and analyze the fallacies of many of the modern arguments advanced by various scholars.²³³ Interest-convergence theory permeates the articles as scholars recognize the "pyrrhic [litigation] victories" that are "ultimately emptied of importance."²³⁴ Therefore, we posit that any group opting for this presentation would likely be exposed to CRT and the arguments its scholars advance.

racism in American society); *see also* Guinier, *Keeping the Faith*, *supra* note 228, at 399–400 (discussing the historical purpose of the Voting Rights Act and the Reagan administration's interpretation of the rights afforded under the Act); Freeman, *supra* note 203, at 1082–88.

²³⁰ Guinier, *No Two Seats*, *supra* note 228, at 1415.

²³¹ *See, e.g.*, Binny Miller, *Who Shall Rule and Govern? Local Legislative Delegations, Racial Politics, and the Voting Rights Act*, 102 YALE L.J. 105 (1992) (focusing on the role of local legislative delegations in state legislatures); Adam J. Chill, *The Fourteenth and Fifteenth Amendments with Respect to the Voting Franchise: A Constitutional Quandary*, 25 COLUM. J.L. & SOC. PROBS. 645 (1992) (discussing the constitutionality of drawing minority districts with smaller populations than non-minority districts).

²³² Kantor, *supra* note 18, at A1.

²³³ *See, e.g.*, Guinier, *No Two Seats*, *supra* note 228, at 1416 (arguing the necessity of "a new conceptual approach . . . to structure majoritarian collective decisionmaking [sic] bodies to ensure meaningful minority interest representation and participation at both the electoral and legislative stages of the political process"); Guinier, *The Triumph of Tokenism*, *supra* note 228, at 1079 (rejecting the then current state of the black electoral process that celebrates enfranchisement but "ignor[es] problems of tokenism and false consciousness").

²³⁴ Guinier, *No Two Seats*, *supra* note 228, at 1416. Guinier credits Richard Delgado's "Law of Racial Thermodynamics" as the principle that "racism is neither created nor destroyed but merely has different guises including procedural racism of seemingly neutral or meritocratic rules that predictably handicap blacks." *Id.* at 1416 n.7 (quoting Richard Delgado, *When a Story Is Just a Story: Does Voice Really Matter?*, 76 VA. L. REV. 95, 106 (1990)).

4. Race and the Criminal Justice System

In his introduction to this section, Obama noted: “There are a range of issues in this area that would make interesting group presentations.”²³⁵ In close proximity to Obama’s 1994 class, the impact of race on the criminal justice system was presented and discussed in a variety of forums.²³⁶ Articles addressing race in the criminal justice system had a strong presence in CRT scholarship.²³⁷ Often repeated and challenged in CRT discourse²³⁸ was Judge Harlan’s declaration that “Our Constitution is color blind.”²³⁹

a. Discriminatory Sentencing

*[T]o what degree is race (as opposed, say to poverty and the reduced ability to hire legal assistance) a primary determinant in criminal sentencing? Have such policies as mandatory sentencing guidelines helped to alleviate any bias that may exist, and if not, what other solutions are available?*²⁴⁰

If Obama sought inspiration for subtopics from Delgado and Stefancic’s bibliography, it would have been unnecessary to read many of the article summaries in the CRT bibliography—the mere titles of many articles are instructive and self-explanatory.²⁴¹ The Supreme Court’s rejection of the empirical data offered by the Baldus study²⁴² analyzing Georgia’s capital sentencing system

²³⁵ Obama, *Group Presentation Topics*, *supra* note 181, at 4.

²³⁶ In addition to a lecture series at the end of November 1993, the *Capital University Law Review* held a conference in 1994 to discuss African-Americans and the legal system. From this conference the entire first issue is filled with articles discussing these topics from somewhat disparate perspectives.

²³⁷ Approximately 20 percent of the works included in the Delgado-Stefancic bibliography address various aspects of the criminal justice system.

²³⁸ See, e.g., Neil Gotanda, *A Critique of “Our Constitution is Color-Blind,”* 44 STAN. L. REV. 1, 2–3 (1991) (arguing that “a color-blind interpretation of the Constitution legitimates, and thereby maintains, the social, economic, and political advantages that whites hold over other Americans”).

²³⁹ *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

²⁴⁰ Obama, *Group Presentation Topics*, *supra* note 181, at 4.a.

²⁴¹ See, e.g., Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611 (1985); Sheri Lynn Johnson, *Cross-Racial Identification Errors in Criminal Cases*, 69 CORNELL L. REV. 934 (1984); Sheri Lynn Johnson, *Race and the Decision to Detain a Suspect*, 93 YALE L.J. 214 (1983).

²⁴² Randall L. Kennedy, *McClesky v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388, 1396–1400 (1988) [hereinafter Kennedy, *McClesky v. Kemp*]. Kennedy called the

and its decision to uphold the death penalty in *McClesky v. Kemp*²⁴³ sparked significant academic commentary during this time.²⁴⁴ The Baldus study demonstrated that when a victim is white, the perpetrator of the crime is over 400 percent more likely to be sentenced to death than when the victim is a minority, and black defendants received the death penalty twice as often as white defendants.²⁴⁵ After *McClesky* various authors analyzed empirical data evincing racial bias in death penalty decisions and the sentences imposed under the federal sentencing guidelines,²⁴⁶ one author's analysis focused on "unconscious racism" within the criminal justice system.²⁴⁷ The author, Sherri Lynn Johnson, contended that unconscious racism continued to permeate the system due to "ignorance" or "denial" of its existence, "fear" of its implications, and "denial" of its subsequent effects.²⁴⁸ Johnson compared the psychological rejection of the existence of unconscious racism with Derrick Bell's interest convergence theory: the "legal establishment does not respond to civil rights claims that threaten the status of privileged whites."²⁴⁹

Baldus Study "the most comprehensive statistical analysis ever done on the racial demographics of capital sentencing in a single state." *Id.* at 1388.

²⁴³ 481 U.S. 279 (1987).

²⁴⁴ See, e.g., SAMUEL R. GROSS & ROBERT MAURO, DEATH AND DISCRIMINATION: RACIAL DISPARITIES IN CAPITAL SENTENCING (1988); Sheri Lynn Johnson, *Unconscious Racism and the Criminal Law*, 73 CORNELL L. REV. 1016 (1988) [hereinafter Johnson, *Unconscious Racism*] (discussing the empirical data that support the premise that the Supreme Court has a "blindspot that mars the reasoning of all the recent cases involving both race and criminal procedure"); Kennedy, *McClesky v. Kemp*, *supra* note 242 (focusing on the race-of-the-victim equal protection violation).

²⁴⁵ *McClesky*, 481 U.S. at 286.

²⁴⁶ See, e.g., M. Sharana Gilbert, *Racism and Retrenchment in Capital Sentencing: Judicial and Congressional Haste Toward the Ultimate Injustice*, 18 N.Y.U. REV. L. & SOC. CHANGE 51, 55–56 (1991) (referencing a study by the United States General Accounting Office to draw the "inference that, in the minds of judges and juries, and of the society which spawns them, black life holds less value than white life"); Theresa Walker Karle, *Are the Federal Sentencing Guidelines Meeting Congressional Goals?: An Empirical and Case Law Analysis*, 40 EMORY L.J. 393, at 401–20 (1991) (presenting the results of a statistical analysis of the sentences imposed before and after the sentencing guidelines were enacted).

²⁴⁷ Johnson, *Unconscious Racism*, *supra* note 244.

²⁴⁸ *Id.* at 1027–31.

²⁴⁹ *Id.* at 1030 (citing Bell, *Interest-Convergence Dilemma*, *supra* note 121, at 523–34 and Charles Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 387 (1987)).

McClesky brought the role of race in subjective sentencing to the forefront and, as president of the *Harvard Law Review* during this time, Obama's awareness of the academic commentary surrounding this issue should be assumed. For example, *Hofstra Law Review*'s 1990 "Symposium on Drug Decriminalization" presented divergent views on the most effective ways to regulate, prevent, or punish drug use. Delgado and Stefancic's bibliography includes the *Foreword* to this symposium²⁵⁰ which analyzes the spectrum of arguments and plots them on a grid comprised of metaphoric "carrots" and "sticks" based on their suggested approaches.²⁵¹ Additionally, the *Emory Law Journal* published a statistical analysis of the mandatory federal sentencing guidelines evaluating their effectiveness at meeting the congressional goals espoused during their establishment.²⁵²

An article exploring non-mandatory sentencing, *Black Innocence and the White Jury*,²⁵³ provides an in-depth CRT analysis of the issue of race and its effect on guilt determination, criminal stereotypes, and judicial sentencing.²⁵⁴ The author uses evidence gathered by social scientists to reveal that *most* white subjects did not consciously demonstrate a bias "motivated by hostility" in which they attempted to penalize black defendants at every opportunity.²⁵⁵ While significant bias by white mock jurors against black defendants at the guilt attribution stage was common, once deemed guilty, this same bias was less evident at sentencing, and black defendants did not appear to receive harsher sentences than white defendants.²⁵⁶ These mock studies correlate with findings from actual case studies that demonstrate unfair racial bias primarily in older cases, in cases from Southern states, or in rape cases.²⁵⁷ While the ultimate sentence received by the defendant

²⁵⁰ See Delgado & Stefancic, *supra* note 180, at 489–90 (including Dwight L. Greene, *Drug Decriminalization: A Chorus in Need of a Masterrap's Voice*, 18 HOFSTRA L. REV. 457 (1990), in the bibliography).

²⁵¹ See generally Greene, *supra* note 250.

²⁵² See Theresa Walker Karle & Thomas Sager, *Are the Federal Sentencing Guidelines Meeting Congressional Goals?: Empirical and Case Law Analysis*, 40 EMORY L.J. 393 (1991); see also William Rhodes, *Criminology: Federal Criminal Sentencing: Some Measurement Issues with Application to Pre-Sentencing Guideline Disparity*, 81 J. CRIM. L. & CRIMINOLOGY 1002 (1991).

²⁵³ Johnson, *Black Innocence and the White Jury*, *supra* note 241.

²⁵⁴ See generally *id.*

²⁵⁵ *Id.* at 1637.

²⁵⁶ *Id.* The exception to these mock findings was found when dealing with rape and with subjects from the South who approached both the guilt attribution and sentencing stages with equal hostility. *Id.*

²⁵⁷ *Id.*

had the potential to be race neutral, the author reminds the reader of the role of race in the initial determination of guilt.²⁵⁸

Thus these articles provided Obama's students substantial CRT-influenced background for a group presentation as well as empirical data to support advances made by non-CRT authors regarding the documented racial disparities in sentencing.

b. Criminal Legislation That Targets Minorities?

*Recently, a Minnesota state court held that a criminal statute that punishes possession of crack more severely than possession of cocaine is discriminatory, insofar as crack is the drug of choice in the black community, while cocaine is more popular among the wine and brie crowd. Likewise, some commentators have argued that legislation that imposes additional penalties on women who use drugs during pregnancy are racially biased. Do such arguments have any merit?*²⁵⁹

Obama's commentary on how to approach this issue is similar to six CRT articles on Delgado and Stefancic's bibliography, whose summaries directly address his targeted suggestions.²⁶⁰ CRT scholars asserted that "the war on drugs could more aptly be called a war on the minority populations,"²⁶¹ while non-CRT scholars, likewise, expressed a generalized frustration with the current "ineffective" approach to dealing with drug addictions and the resulting social and general

²⁵⁸ Johnson, *Black Innocence and the White Jury*, *supra* note 241, at 1638.

²⁵⁹ Obama, *Group Presentation Topics*, *supra* note 181, at 4.b.

²⁶⁰ See Regina Austin, *Sapphire Bound!*, 1989 WIS. L. REV. 539 ("discuss[ing] problems facing pregnant, unmarried black women"); Dwight L. Greene, *Abusive Prosecutors: Gender, Race, and Class Discretion in the Prosecution of Drug-Addicted Mothers*, 39 BUFF. L. REV. 737 (1991); Lisa C. Ikemoto, *The Code of Perfect Pregnancy (COPP): At the Intersection of the Ideology of Motherhood, the Practice of Defaulting to Science, and the Interventionist Mindset of Law*, 53 OHIO ST. L.J. 1205 (1992) [hereinafter Ikemoto, *COPP*]; Lisa C. Ikemoto, *Furthering the Inquiry: Race, Class, and Culture in the Forced Medical Treatment of Pregnant Women*, 59 TENN. L. REV. 487 (1992) [hereinafter Ikemoto, *Furthering the Inquiry*]; John A. Powell & Eileen B. Hershenov, *Hostage to the Drug War: The National Purse, the Constitution and the Black Community*, 24 U.C. DAVIS L. REV. 557 (1991); Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419 (1991).

²⁶¹ Powell & Hershenov, *supra* note 260, at 559.

welfare ramifications of drug abuse.²⁶² Student groups would likely include both types of articles and encourage the class to grapple with the more persuasive arguments espoused by each author.

For example, various articles addressed the imposition of additional penalties on pregnant minorities. *Sapphire Bound!* challenged the “rigid economic, social, and political categories that a racist, sexist, and class-stratified society would impose upon [‘young, single, sexually active, fertile, and nurturing black women’]” such applied to Crystal Chambers—a young, single, pregnant black woman discharged from her position as a teacher at the Omaha Girls Club.²⁶³ In an effort to prevent “negative role modeling” for the young girls who attended the Omaha Girls Club, the Club’s policy included dismissal “for single parent pregnancies.”²⁶⁴ The author noted the “policy appeal” of this outcome for those, such as the Club’s white administrators and the court system, who lack an “understanding of the historical oppression of black women and no appreciation of their contemporary cultural practices.”²⁶⁵ Non-CRT authors similarly challenged the judges and legislators who made and enforced such laws. However, rather than seeing the laws as a demonstration of racial bias, non-CRT authors alleged the law attacked women in the name of fetal protection.²⁶⁶

With regard to the issue of prosecution of drug use during pregnancy, CRT authors questioned prosecutorial discretion as applied to selective prosecution of drug-addicted mothers.²⁶⁷ As most of the women prosecuted under these statutes

²⁶² See Louise Marlane Chan, *S.O.S. from the Womb: A Call for New York Legislation Criminalizing Drug Use During Pregnancy*, 21 FORDHAM URB. L.J. 199 (1993); James E. Hopper, *Bright Lines, Dark Deeds: Counting Convictions Under the Armed Career Criminal Act*, 89 MICH. L. REV. 1951 (1991); Victoria J. Swenson & Cheryl Crabbe, *Pregnant Substance Abusers: A Problem that Won’t Go Away*, 25 ST. MARY’S L.J. 623 (1994).

²⁶³ Austin, *supra* note 260, at 555 (discussing the outcome of *Chambers v. Omaha Girls Club*, 629 F. Supp. 925 (D. Neb. 1986), *aff’d* 834 F.2d 697 (8th Cir. 1987), *reh’g denied*, 840 F.2d 583 (1988)).

²⁶⁴ *Id.* at 550 (quoting *Chambers*, 834 F.2d at 699 n.2).

²⁶⁵ *Id.* at 552–53. The district court opinion noted that 90 percent of the girls attending the club were black, 629 F. Supp. at 928, the teachers were black, *id.* at 928, and the Club’s administrators were white, *id.* at 945 n.40.

²⁶⁶ See, e.g., Nancy K. Schiff, Note, *Legislation Punishing Drug Use During Pregnancy: Attack on Women’s Rights in the Name of Fetal Protection*, 19 HASTINGS CONST. L.Q. 197 (1991); Barrie L. Becker, Note, *Order in the Court: Challenging Judges Who Incarcerate Pregnant, Substance-Dependant Defendants to Protect Fetal Health*, 19 HASTINGS CONST. L.Q. 235 (1991).

²⁶⁷ See, e.g., Greene, *supra* note 260; Roberts, *supra* note 260.

were black and addicted to crack cocaine,²⁶⁸ criminal prosecution of these mothers exemplified society's negative perception of this behavior and desire to regulate it.²⁶⁹ CRT scholars argued that the "society" that set the norms and determined who was culpable was generally not the same "society" that was consequently prosecuted.²⁷⁰ Obama's query of the correlation between the reduced ability to hire legal assistance and criminal sentencing was on point according to one CRT scholar who found: Most of the drug-addicted mothers that were prosecuted plead guilty, but "[o]f those who contested the charge none were convicted."²⁷¹

c. Hate Crimes

*A number of states have passed legislation that increase the penalties for crimes that are shown to be racially-motivated. The Supreme Court recently struck down one such law. Were the Supremes right?*²⁷²

Although the CRT bibliography only includes one article—by Alexander Aleinikoff—which specifically references "hate crimes,"²⁷³ there was much scholarly debate surrounding the Supreme Court's holding in *R.A.V. v. City of St. Paul*²⁷⁴ deeming the city's hate-crime statute in violation of the First Amendment's protection of free speech.²⁷⁵ Aleinikoff's article looks at "hate crimes" from the

²⁶⁸ Roberts, *supra* note 260, at 1421 (citing reports by the ACLU, newspaper articles, and state by state case summary on prosecutions against pregnant women).

²⁶⁹ See Ikemoto, *COPP*, *supra* note 260, at 1266–67; see also Powell & Hershenov, *supra* note 260, at 598 (discussing the "singling out of pregnant women for special prosecution" and the effective fear of prosecution that discourages pregnant women from seeking medical care, either prenatally or at birth).

²⁷⁰ See Roberts, *supra* note 260, at 1422 ("[Poor women of color] are . . . the most vulnerable to government monitoring, and the least able to conform to the white, middle-class standard of motherhood."); see also Powell & Hershenov, *supra* note 260, at 598 ("Treating addicted pregnant women as criminals misconstrues the nature of addiction by presumptively concluding that pregnant addicts are intentionally injuring their unborn children.").

²⁷¹ *Id.* at 1268.

²⁷² Obama, *Group Presentation Topics*, *supra* note 181, at 4.c.

²⁷³ Delgado & Stefancic, *supra* note 180, at 464 (listing Aleinikoff, *Constitution in Context*, *supra* note 228).

²⁷⁴ 505 U.S. 377 (1992).

²⁷⁵ See, e.g., Kevin N. Ainsworth, *Targeting Conduct: A Constitutional Method of Penalizing Hate Crimes*, 20 *FORDHAM URB. L.J.* 669 (1993) (suggesting an approach to punish hate crimes that fits

perspective of their continued presence in American society and the increase in reported crimes.²⁷⁶ It includes numerous examples of reported hate crimes followed by a powerful narrative from a Boston police sergeant describing the moment he understood the effect of hate crimes on the life of a family.²⁷⁷ In an effort to enable other non-hate crime targets to comprehend living with the ever-present fear of being the victim of violent crime, the author asked readers to consider the effect on their daily routines and emotional health upon learning that: “several homes in their neighborhood have been burned by an arsonist, or a child down the street was molested on her way home from school by an attacker who escaped.”²⁷⁸

Obama’s reference to the Supreme Court’s decision in *R.A.V.* and merely asked—“Were the Supremes right?”²⁷⁹ The Supreme Court grounded this controversial decision in the First Amendment; therefore, many non-CRT articles addressing this issue focused on the limits of free speech in a detached, academic manner rather than responding with emotional pleas. Consequently, most of the other group presentation topics could not avoid incorporating a CRT perspective on race when presenting alternate viewpoints. Student selecting this topic could have focused entirely on freedom of speech and content-based restrictions. Just comparing the three articles we have cited in this short section (*Hate Crimes*) gives a perspective of the characteristic difference in approach between CRT and non-CRT authors of identifying and focusing on, or not, the underlying impact on and effect of race in the law.

d. Statistical Discrimination/Criminal Profiling

*Is the use of criminal profiles (e.g. black male with Starter Jacket and gold-chain) in establishing reasonable cause inherently discriminatory? (This can be expanded into a discussion of the non-criminal context—i.e. store-owners with door-buzzer).*²⁸⁰

within the constitutional framework of *R.A.V.*); Cass R. Sunstein, *Words, Conduct, Cast*, 60 U. CHI. L. REV. 795 (1993).

²⁷⁶ Aleinikoff, *Constitution in Context*, *supra* note 228, at 344.

²⁷⁷ *Id.* at 346.

²⁷⁸ *Id.* at 346–47.

²⁷⁹ Obama, *Group Presentation Topics*, *supra* note 181, at 4.c.

²⁸⁰ *Id.* at 4.d.

Although several articles in the bibliography touch on this issue, Delgado and Stefancic specifically reference statistical discrimination and criminal profiling in two summaries.²⁸¹ CRT scholars endeavored to prove that race is a “central rather than a marginal factor in defining and explaining individual experiences of the law.”²⁸² Racial stereotyping, and thus racial and ethnic profiling, “ascrib[e] to all members of a group characteristics thought to be possessed by some” the danger of racism influencing the ascribed characteristics is ever-present.²⁸³ However, is the “danger of racism” inherently discriminatory? CRT scholars alleged that the routine practice of businesses and police officers engaging in racial and ethnic profiling of suspected gang membership sacrificed the civil liberties of those with the wrong physical appearance or fashion sense.²⁸⁴

Where social scientists innocuously refer to this type of “rational, race-specific sorting” of people as “statistical discrimination,”²⁸⁵ CRT scholar, Stephen Carter, warned against the lurking and irrational aspects of racism that abound when categorizing people solely on the basis of race.²⁸⁶ Carter reviewed the impact of race in various situations: the Bernard Goetz subway shootings and subsequent acquittal; the shopkeeper who locks her door to potential patrons; the taxi driver who selectively stops for customers; and the liberal who avoids certain neighborhoods at dark. To have a victim there must be an identified transgressor²⁸⁷—yet who was the identified victim and who is the transgressor in each of these situations? Was Bernard Goetz the victim that responded to previous attacks of violence or was it the four youths that he shot? Was it the shopkeeper

²⁸¹ Delgado & Stefancic, *supra* note 180, at 477, 506 (identifying Stephen L. Carter, *When Victims Happen to Be Black*, 97 YALE L.J. 420 (1988), and Margaret M. Russell, *Entering Great America: Reflections on Race and the Convergence of Progressive Legal Theory and Practice*, 43 HASTINGS L.J. 749 (1992)).

²⁸² Russell, *supra* note 281, at 762–63.

²⁸³ See Carter, *supra* note 281, at 429–30.

²⁸⁴ See Russell, *supra* note 281, at 759–62 (describing the racial profiling experiences of African-American and Latino males at Great American Amusement park and their encounters with Great American’s security personnel). Russell discusses the prevalence of gang profiling and the “ostensibly neutral institutional practices . . . [that] in fact represent deeply embedded stereotypes of people of color,” *id.* at 752, and outlines the profiles used by law enforcement officials in Contra Costa County, *id.* at 765–66.

²⁸⁵ *Id.* at 430.

²⁸⁶ See *id.* at 431.

²⁸⁷ *Id.* at 439.

and taxi driver who feared being robbed or the potential customers who were excluded due to racial categorizations? The CRT articles cited suggest alternative views and incorporate many paradigm shifts to demonstrate the seemingly insidious effect of race on our personal, community, and political realities.

5. Immigration Policy

*Much of the recent controversy surrounding the United States' policy towards Haitian refugees centers around the suspicion that blacks in particular, and people of color in general, are subject to a different set of rules when it comes to who is allowed to immigrate into the [U.S.]. At the same time, Latinos have long argued that immigration policy and INS enforcement not only unfairly targets undocumented workers from poor countries, but also increases discrimination in hiring in regard to [U.S.] minorities. These issues could be dealt with either together or separately.*²⁸⁸

The racial issues underlying immigration controversy thus far during Obama's presidency do not differ significantly from those he outlined for his students in 1994. Where Obama's student groups focused on Haitian refugees and Immigration and Naturalization Service (INS) enforcement against Latinos, today the controversies surround federalist issues as to how states enforce immigration policies against targeted racial and ethnic groups. The CRT bibliography includes two articles addressing immigration; the title of Gerald Lopez's article—*Undocumented Mexican Migration: In Search of a Just Immigration Law and Policy*—is directly on point with Obama's suggested discussion topics.²⁸⁹

Basing his “search [for] a just immigration law and policy” on the “push-pull” theory of migration, Lopez began with the basic assumption that “the primary motivation underlying modern mass migration is the desire to survive and prosper.”²⁹⁰ He addressed the popular perceptions regarding the evils of undocumented workers: a one-to-one displacement of American workers for every undocumented alien and the drain on American public service resources by these

²⁸⁸ Obama, *Group Presentation Topics*, *supra* note 181, at 5.

²⁸⁹ See Delgado & Stefancic, *supra* note 180, at 500, 503 (listing Gerald P. Lopez, *Undocumented Mexican Migration: In Search of a Just Immigration Law and Policy*, 28 UCLA L. REV. 615 (1981), and Michael A. Olivas, *The Chronicles, My Grandfather's Stories, and Immigration Law: The Slave Traders Chronicle as Racial History*, 34 ST. LOUIS U. L.J. 425 (1990), in their annotated bibliography).

²⁹⁰ Lopez, *supra* note 289, at 621.

undocumented workers.²⁹¹ Although Lopez advanced significant empirical data to contradict these perceptions, he acknowledged their existence and the resultant “social friction.”²⁹² Lopez found the United States culpable for perpetuating the status quo through its solicitation of immigrant workers “to serve the self-perceived needs of American employers to cheap temporary labor,” lax enforcement of the immigration laws passed to assuage “domestic labor’s demands,”²⁹³ and willingness to ignore the substandard wages and working conditions of the workers to widen the profit margin of U.S. businesses.²⁹⁴

Lauding Derrick Bell’s use of storytelling and narratives, another CRT scholar, Michael Olivas, deemed *The Slave Traders Chronicle* “ahistorical” claiming “this scenario has occurred, and occurred more than once in in our nation’s history.”²⁹⁵ Olivas demonstrated his thesis by exploring the experiences of three distinct ethnic groups that predate Bell’s fictional invasion: the Cherokees, the Chinese, and Mexican agricultural workers. He concluded with a [then] contemporary accounting of the state of immigration: INS set up camps to hold detained undocumented adults and unaccompanied minors without access to “health, educational, and legal services” as a “deterrent to Central American refugees and as ‘bait’ to attract their families already in the United States.”²⁹⁶ The makeshift rafts of approximately 20 thousand Haitian “boat people” were being intercepted at sea: INS granted asylum only to six.²⁹⁷ The (then) current reality of U.S. immigration policy led Olivas to conclude with the ominous statement: “The cycle of United States immigration history continued, and all was ready for the Space Traders.”²⁹⁸

²⁹¹ *Id.* at 631–37. The author points to the origin of and reassertion of the one-to-one displacement theory. *Id.*

²⁹² *Id.* at 631–38. “The[se] accusation[s] manifest[] not only the universal tendency to blame outsiders for societal ills (in this case rising taxes) but, as one observer has noted, the equally pernicious tendency to stereotype aliens, in this instance, as lazy, scheming Mexicans.” *Id.* at 636.

²⁹³ *Id.* at 654.

²⁹⁴ Lopez, *supra* note 289, at 629.

²⁹⁵ Olivas, *supra* note 289, at 429–30.

²⁹⁶ *Id.* at 440–41.

²⁹⁷ *Id.* at 441.

²⁹⁸ *Id.*

In addition to the CRT commentary, there was also significant non-CRT academic commentary on the United States' approach to immigration in the early 1990s that would have provided ample background for Obama's students.²⁹⁹ The history of American immigration policy and the quotas once assigned based on race and country of origin seem more appropriate topics for a middle school research paper, so it is unlikely that Obama was hoping for a mere regurgitation of these facts. As in all the topics on Obama's syllabus, it was the subtle, lurking, insidious nature of racism that Obama encouraged his students to search for, name, and discuss. For example, if only six out of 20 thousand Haitians were granted asylum, as Olivas suggested, then who was granted asylum in greater numbers and why? Was there an element of interest-convergence theory lying beneath the surface? Skeptical scholars were asking these same questions, thus it is likely that Obama's students would ultimately be led to their writings.

6. Racial Bias in the Media

*Observers have long complained about the inaccurate stereotypes that permeate the depiction of minorities in the mass media in general, and the news in particular. Are these complaints well founded, and if so, will FCC guidelines designed to promote diversity, such as those upheld by the Supreme Court in [Metro Broadcasting], solve the problem?*³⁰⁰

Obama's introduction was in response to the controversy over minority preferences afforded by the government. The FCC's preference for minority applicants for broadcasting licenses and for relaxed regulatory standards for sale of failing broadcasting companies to minorities were upheld narrowly in *Metro Broadcasting*.³⁰¹ In an article presumably selected and edited under Obama's tenure as president of the *Harvard Law Review*, CRT scholar, Patricia Williams, directly addressed the questions Obama raised in his suggested approach to discussing racial bias in the media.³⁰² Williams provided examples of "inaccurate stereotypes that permeate the depiction of minorities in the mass media in general, and the

²⁹⁹ See, e.g., Peter H. Schuck, *Continuity and Change: Patterns of Immigration Litigation in the Courts, 1979-90*, 45 STAN. L. REV. 115 (1992); Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Subrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625 (1992).

³⁰⁰ Obama, *Group Presentation Topics*, *supra* note 181, at 6.

³⁰¹ *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990).

³⁰² Williams, *supra* note 186.

news in particular.”³⁰³ She alleged a proximate correlation between the race/heritage of the owner of a station and the station’s programming³⁰⁴ and “executives in the communications industry exercise a power that is not merely concentrated but propagandistic.”³⁰⁵ As minorities entered into the (formerly exclusive) realm of the executives with the power to control the broadcasting, the voices of minorities that were formerly silent began to be heard.³⁰⁶

Three additional articles included in the annotated bibliography addressed the depiction of minorities in the mass media.³⁰⁷ These commentators sought to acknowledge and stop mass media’s perceived tendency to minimize and devalue the role of race and the experiences of people of color.³⁰⁸ While one article explored the historical origins of racially biased media and negative imagery of minority groups,³⁰⁹ another discussed the defamation suit filed by Ruby Clark after her purported portrayal by ABC News as a black prostitute.³¹⁰ All the CRT scholars

³⁰³ *Id.* at 531. For example, Williams recounts watching a news story that included reports of dismal statistics on the math and science performance of inner-city youth. After which four young black males in the audience—students at an inner-city school for youth that excel in science—were asked if they were present to prove the just-reported, dismal statistics were “a lie.” This effectively forced the students to “redeem themselves from the great group of ‘not very good’ by setting themselves apart as ambitious, dedicated, and ‘different’ yet ‘just the same’ as the majority of all other kids at the same time.” Williams asserts that although it was not the stated the majority to which the kids had to prove they were the same as were the normal, achieving white middle class student but “different” than the other inner-city kids. *Id.*

³⁰⁴ *Id.* at 533; see also 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, 1260 (1992) [hereinafter Delgado & Stefancic, *Images of the Outsider*] (offering a brief answer to why those who drew, designed, and promulgated degrading images of various racial groups in the media—“they did not see them as grotesque. Their consciences were clear—their blithe creations did not trouble them.”).

³⁰⁵ Williams, *supra* note 186, at 535.

³⁰⁶ *Id.* at 537.

³⁰⁷ Delgado & Stefancic, *supra* note 180, at 465, 484, 506, 512 (including in the bibliography Regina Austin, *Black Women, Sisterhood, and the Difference/Deviance Divide*, 26 NEW ENG. L. REV. 877 (1992) (analyzing a defamation suit filed by black women v. ABC); Delgado & Stefancic, *Images of the Outsider*, *supra* note 304; Margaret M. Russell, *Race and the Dominant Gaze: Narratives of Law and Inequality in Popular Film*, 15 LEGAL STUD. F. 243 (1991); and Williams, *supra* note 186). Delgado and Stefancic’s summary of Williams’ article notes: “Analyzes the significance of *Metro Broadcasting* and its effect on broadcasting diversity and multiculturalism.” *Id.* at 512.

³⁰⁸ See Russell, *supra* note 307, at 242; see also Williams, *supra* note 186, at 535–37.

³⁰⁹ See generally Delgado & Stefancic, *Images of the Outsider*, *supra* note 304.

³¹⁰ See Austin, *supra* note 260, at 879–85.

appeared to agree that “popular culture has enormous potential not only for entertainment but also for political and social change as well . . . [g]iven the power of mainstream films to reflect and to shape dominant visions of race, law, and equality. . . .”³¹¹

In addition to those articles published by CRT scholars, other articles addressed media culpability for violations of the Fair Housing Act³¹² and the media’s influence in criminal cases.³¹³ Few of these articles specifically citing the decision in *Metro Broadcasting* addressed the “media” *per se*; instead the articles discussed the decision as applied to other areas of race-conscious law making. A survey of these articles would have increased Obama’s students’ understanding of the depth and breadth of race-conscious law making and could have led the class discussion in various directions.

7. Welfare Policy and Reproductive Freedom

*The politics of welfare appears inseparable from the politics of race, despite the oft-quoted statistic that the majority of those on welfare are white. Recently, commentators have been revisiting the issue of child-bearing among the poor, and asking some difficult questions. Should we change welfare policy so that welfare grants no longer increase with each child? Should judges or welfare agencies have the power to restrict the reproductive choices of mothers who are found to have neglected their children, or take drugs during pregnancy? Are commentators who say such policies smack of “racial genocide” misguided?*³¹⁴

Three articles included in the Delgado and Stefancic CRT bibliography³¹⁵ directly addressed Obama’s suggested topic as perceived by women of color.³¹⁶

³¹¹ Russell, *supra* note 307, at 253.

³¹² See, e.g., Debra L. Alligood, Comment, *When the Medium Becomes the Message: A Proposal for Principal Media Liability for the Publication of Racially Exclusionary Real Estate Advertisements*, 40 UCLA L. REV. 199, 209–14 (1992) (discussing the evolution of the regulatory regime of the Fair Housing Act as applied to the media).

³¹³ See, e.g., Tracey L. McCain, *The Interplay of Editorial and Prosecutorial Discretion in the Perpetuation of Racism in the Criminal Justice System*, 25 COLUM. J.L. & SOC. PROBS. 601, 612–22 (1992) “Media speech is a powerful tool for the perpetuation of racist stereotypes about African-Americans and crime . . .” *Id.* at 613.

³¹⁴ Obama, *Group Presentation Topics*, *supra* note 181, at 7.

³¹⁵ See Delgado & Stefancic, *supra* note 180, at 494–95, 505. Delgado and Stefancic’s summaries of these three articles specifically state: (1) Ikemoto, *COPP*, *supra* note 260: “Argues that culturally inscribed norm of the good mother is middle-class, educated, and white, thus women of color are

These articles questioned the motivation behind imposing such restrictions—is it for the greater good of society³¹⁷ or to protect future unborn children?³¹⁸ Obama’s query as to whether these policies “smack of ‘racial genocide’” was echoed by at least one CRT scholar.³¹⁹

There were many articles published in the decade prior to Obama’s class addressing teenage pregnancy, welfare reform, and reproductive freedom. The articles provided a historical context for the then-current state of welfare policy and many articles overlapped other subtopics on the syllabus.³²⁰ Following Obama’s direction to discuss divergent viewpoints, students may have presented the conservative claims that “sterilization reduces the number of persons on Medicaid who will need obstetrical services or contraception, and thereby reduces the

especially likely to become victims of state intervention aimed at assuring compliance with emerging Code of Perfect Pregnancy (COPP),” *id.* at 494; (2) Ikemoto, *Furthering the Inquiry*, *supra* note 260: “Shows that not only gender, but also race, class, and culture are sources of illegitimate discrimination.” *Id.* at 494–95; and (3) Roberts, *supra* note 260: “Demonstrates that this trend in prosecution [of women for pre-natal drug use] weighs heavily on poor, black women, who are more likely than others to be reported to government agencies.” *Id.* at 505.

³¹⁶ See Ikemoto, *Furthering the Inquiry*, *supra* note 260, at 488 (discussing the importance of viewing the issue through the eyes of women of color and women in poverty because the “de facto standard” is the “experience of white middle class women”). From reviewing case reports of medical procedures performed without a woman’s consent, Ikemoto infers the following characteristics of a “good mother”: “self-sacrificing and nurturing . . . altruisti[c] . . . fearless . . . white and middle-class.” *Id.* at 511.

³¹⁷ See *id.* at 492. “[This claim] suggests that the good of the many members of society who would benefit outweighs the good of the few women subject to forced medical treatment. . . . [T]he argument defines the woman’s interests in opposition to society’s.” *Id.*; see also Ikemoto, *COPP*, *supra* note 260, at 1233 (discussing the “excessive sterilization of poor women of color”). “[F]ederal funding of involuntary sterilization sends the message that if anyone is to sacrifice for the good of society it should be women . . . because they are childbearers.” *Id.*

³¹⁸ See Ikemoto, *Furthering the Inquiry*, *supra* note 260, at 493–94; Ikemoto, *COPP*, *supra* note 260, at 1275. “[C]onduct during pregnancy is considered probative of future mistreatment.” In these cases, the court purports to focus on the child’s future well-being. *Id.* (citing *In re “Male” R.*, 422 N.Y.S.2d 819 (Fam. Ct. 1979); *In re Stefanel Tyeshia C.*, 556 N.Y.S.2d 280 (App. Div. 1990)).

³¹⁹ See Austin, *supra* note 260, at 546 (expressing her interest in the “causes of excess death in minority communities or what is the unacknowledged genocide of the poor, black, brown, and red peoples of America”).

³²⁰ See generally Deborah L. Rhode, *Politics and Pregnancy: Adolescent Mothers and Public Policy*, 1 S. CAL. REV. L. & WOMEN’S STUD. 99 (1992) (examining the evolution of public policy and attitude towards teenage pregnancy); Kenneth L. Karst, *Citizenship, Race, and Marginality*, 30 WM. & MARY L. REV. 1, 5–7 (1988) (discussing the consequences of the public’s perception of the “poor” on welfare policy); Molly McNulty, Note, *Pregnancy Police: The Health Policy and Legal Implications of Punishing Pregnant Women for Harm to Their Fetuses*, 16 N.Y.U. REV. L. & SOC. CHANGE 277 (1988).

demand for public resources.”³²¹ Included in one of the CRT articles is Justice Holmes’ commentary regarding forced sterilization:

We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the state for these lesser sacrifices . . . in order to prevent our being swamped with incompetence.³²²

To demonstrate the reality of this perspective, one CRT article included evidence of sterilizations done on poor, non-English speakers, the court’s uncontroverted findings in *Relf v. Weinberger*³²³ that “an indefinite number of poor people have been improperly coerced into accepting a sterilization operation under the threat that various federally supported welfare benefits would be withdrawn unless they submitted to irreversible sterilization,” and the estimation that “thirty to forty-two percent of all Native Americans have been sterilized.”³²⁴

The topic of prenatal drug use overlapped somewhat with the presentation topic “Criminal Legislation that Targets Minorities,” but addressed the issue from a civil, rather than criminal, perspective. In civil court, mothers who engaged in prenatal drug use were less successful in defending a custody challenge.³²⁵ Furthermore, one CRT scholar asserted that “[p]oor Black women have been selected for punishment as a result of an inseparable combination of their gender, race, and economic situation.”³²⁶ This assertion was supported by statistics that black mothers were “ten times more likely than whites to be reported to public health agencies for substance abuse during pregnancy” despite evidence of similar rates of substance abuse between the races.³²⁷ Paralleling Obama’s opening

³²¹ *Id.* at 1232 (citing GENA COREA, *THE HIDDEN MALPRACTICE: HOW AMERICAN MEDICINE TREATS WOMEN AS PATIENTS AND PROFESSIONALS* 181 (1973)).

³²² Ikemoto, *COPP*, *supra* note 260, at 1232 (quoting *Buck v. Bell*, 274 U.S. 200, 207 (1927)).

³²³ 37 F. Supp. 1199 (D.D.C. 1974).

³²⁴ Ikemoto, *COPP*, *supra* note 260, at 1232–33.

³²⁵ *See id.* at 1275; *see* Roberts, *supra* note 260, at 1430. “The most common penalty for a mother’s prenatal drug use is the permanent or temporary removal of her baby.” *Id.*

³²⁶ Roberts, *supra* note 260, at 1424.

³²⁷ *Id.* at 1434. Roberts acknowledges that there are factors that may influence this disparity in reporting; however she concludes, “both public health facilities and private doctors are more inclined to turn in pregnant Black women who use drugs than pregnant white women who use drugs.” *Id.*

statement regarding the impact of race on welfare policies, students focusing on prenatal drug use would have found ample support for this position in the three articles included in the CRT bibliography.

8. Inter-ethnic Tensions

*The L.A. riots, the disturbances in Crown Heights, and boycotts of Korean and Arab grocery stores in inner city communities, indicate that the “browning of America” may increase, rather than decrease, racial tensions in the coming years. What are the sources of some of these tensions? Is the black community alienating potential political allies? Are Latinos, Asians, and other more recent immigrants adopting the racist sentiments of white America in their eagerness to assimilate, or are they victims of unjustified black resentment? A variant of this topic would be to examine the degree to which the bi-polar model of black/white relations is or is not relevant to the struggles and aspirations of other racial minorities.*³²⁸

Delgado and Stefancic’s bibliography provides one CRT article by Kenneth Karst, *Paths to Belonging: The Constitution and Cultural Identity*, that contained the answers to all Obama’s queries.³²⁹ Karst also offered a guided explanation to the variant that Obama suggested to this topic—“examin[ing] the degree to which the bi-polar model of black/white relations is or is not relevant to the struggles and aspirations of other racial minorities.”³³⁰ Karst outlines the three progressive, generalized steps cultural groups must take to assimilate into the majoritarian society: (1) taking part in the institutions and activities previously accessed only by members of the larger society—attending public schools and universities, working, and moving away from culturally segregated neighborhoods; (2) improving the economic position of members of the cultural group which is generally the effect of better paying jobs secured due to higher education; and (3) forming identifiable bonds with those of the majoritarian society with whom the group members now

³²⁸ Obama, *Group Presentation Topics*, *supra* note 181, at 8.

³²⁹ See Delgado & Stefancic, *supra* note 180, at 497. The summary for Karst’s article, *infra* note 331 includes the following: “Analyzes the experience of immigrants and cultural or ethnic minorities. Demonstrates that in responding to the universal need to belong, members of these groups tend to follow one of two paths: either assimilate into the majoritarian society or seek group solidarity.”

³³⁰ See Obama, *Group Presentation Topics*, *supra* note 181, at 8.

live and work.³³¹ Karst identified that “[o]ne of the most pernicious features of the Jim Crow system was that it fed on itself, polarizing Southern society and inhibiting the diversification of identities and attachments.”³³² So although *Brown v. Board of Education* theoretically offered blacks the opportunity to begin the assimilation process, the Jim Crow system effectively prevented it from progressing. Contrary to one of the important premises of CRT scholars, Karst posited that across the United States’ history, all ethnic groups eventually assimilated into the greater American society,³³³ because immigrants quickly learn the importance of assimilation in American society.

Assimilation provides not only better economic opportunities, it provides security.³³⁴ However, the greater American society is comprised of cultural, ethnic, racial, social, and economic groups, each with distinct values and often competing values. Such intercultural conflicts have existed throughout American history and, although emotionally fueled under the guise of preserving distinct cultural values, the underlying competing interests are economic.³³⁵ Is it surprising then, that inter-ethnic tensions continue to exist in ethnically diverse communities that are all competing for the same finite supply of economic opportunities? Despite the economic causes and effects of intercultural clashes, as a cultural group begins to assimilate, it participates in the political process and in order “[t]o carry its influence outside ethnic enclaves—a step necessary for the achievement of many status goals and virtually all welfare goals—the group must form coalitions with other interests.”³³⁶

The wave of “bias crime” in the five years preceding Obama’s class brought this issue to the forefront and—without Obama’s commentary and suggested approach—student groups may have addressed this issue from various

³³¹ See Kenneth L. Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C. L. REV. 303, 333–35 (1986).

³³² *Id.* at 335.

³³³ *Id.* at 333. Karst notes the obvious exception to this has been “until recently” black people who continued to live in segregated communities, attend segregated schools, and live in “racial isolation.” *Id.* at n.200.

³³⁴ *Id.* at 314.

³³⁵ *Id.* at 310. Karst provides numerous examples, such as the 1834 burning of the Ursuline convent that expressed anti-Catholic sentiments, and also the outrage directed at Irish laborers taking jobs from protestant, non-Irish bricklayers. *Id.*

³³⁶ See *id.* at 331.

perspectives.³³⁷ Obama asks his students to consider the sources of the racial tensions that may increase due to the “browning of America” and whether “Latinos, Asians, and other more recent immigrants [are] adopting the racist sentiments of white America in their eagerness to assimilate, or are they just the victims of unjustified black resentment?”³³⁸ It is impossible to avoid noting Obama’s choice of language that factually states the existence of white racism against blacks. If students accepted Obama’s suggested hypothesis of the spreading of white racism “in [immigrants’] eagerness to assimilate,” they were effectively limited to accept the conclusions advanced by CRT scholars.

9. Reparations

*Given the perceived failures of the traditional civil rights agenda in bringing about racial equality in the U.S., a number of black commentators argue that a program of reparations is the only legitimate means of making up for three-hundred plus years of slavery. More recently, some white commentators have also supported a variant of the reparations concept—for example, the government financing a Community Reinvestment funds that would be controlled by the black community and render affirmative action obsolete. Do such proposals have any realistic chance of working their way through the political system? Would there be any legal impediments to such a broadly-conceived reparations policy?*³³⁹

“What significance should we attribute to the struggle for racial justice that African-Americans have waged for the past 300 years with no end in sight?”³⁴⁰ Derrick Bell’s perspective was clear regarding reparations such as affirmative action and minority admissions programs: using such terms “sounds in *noblesse oblige*, not legal duty, and suggests the giving of charity rather than the granting of relief. . . . The recipient class may request benefits, but is not entitled to receive them as a matter of a legally enforceable right.”³⁴¹ Obama referenced “variants of

³³⁷ See Abraham Abramovsky, *Bias Crime: A Call for Alternative Responses*, 19 FORDHAM URB. L.J. 875, 878–81 (1992).

³³⁸ Obama, *Group Presentation Topics*, *supra* note 181, at 8.

³³⁹ *Id.* at 9.

³⁴⁰ Bell, *Racial Reflections*, *supra* note 205, at 1037. These words are taken from the Bell’s introduction of a compilation of student essays on race covering a wide variety of topics.

³⁴¹ Derrick A. Bell, Jr., Bakke, *Minority Admissions and the Usual Price of Racial Remedies*, 67 CALIF. L. REV. 8 (1979) [hereinafter Bell, *Bakke*].

the reparations concept” and asked student to consider the opposition such proposals may face in being implemented.³⁴² Bell’s immediate frustration with any such proposal was the absence of a minority voice in the discussion.³⁴³ Contrary to Bell’s determination—“[B]lack progress in the society only when that progress is perceived as a clear benefit to whites, or at least not a serious risk”³⁴⁴—other contemporaneously published articles questioned the intrinsic value of reparation models for various reasons.³⁴⁵ With the impending independence of South Africa from white majority rule, there was substantial academic discussion surrounding the topic of reparations during this time to guide a student group in addressing the “realistic chance” of reparation measures “working their way through the political system.”³⁴⁶ Subsequent events have demonstrated that the answer to that important question is a resounding no.³⁴⁷

10. Hate Speech

*Universities have begun to promulgate speech codes designed to eliminate racially and sexually offensive speech on campus. Are such codes a reasonable measure to protect minorities from harassment, or is the cure worse than the disease?*³⁴⁸

A popular topic in the years immediately preceding Obama’s seminar, the Delgado and Stefancic CRT bibliography included numerous articles addressing

³⁴² See Obama, *Group Presentation Topics*, *supra* note 181, at 9.

³⁴³ Bell, *Bakke*, *supra* note 341, at 3–7 (lamenting the noticeable absence of minorities in the *Regents of the University of California v. Bakke*, 98 S. Ct. 2733 (1978), litigation and the discussion regarding minority admissions programs in general).

³⁴⁴ *Id.* at 16.

³⁴⁵ See, e.g., Larry Alexander, *What Makes Wrongful Discrimination Wrong? Bias, Preferences, Stereotypes, and Proxies*, 141 U. PA. L. REV. 149, 187–89 (1992). “The case for reparations beyond wrongs narrowly circumscribed both in time frame and in type is quite problematic.” *Id.* at 187; George Rutherglen, *Abolition in a Different Voice*, 78 VA. L. REV. 1463, 1469–70 (1992) (challenging Richard Epstein’s contention that there is “no adequate remedy” nor justification for slavery).

³⁴⁶ Appendix II, Subtopic 10. In addition, the authors’ search on the Westlaw database of legal journal articles published between 1980 and 1993 addressing “race and reparations” produced over 323 results.

³⁴⁷ See ALFRED L. BROPHY, *REPARATIONS PRO AND CON* (2006) (discussing reparations precedents and their unlikely future in politics).

³⁴⁸ Obama, *Group Presentation Topics*, *supra* note 181, at 10.

the topic of “hate speech”³⁴⁹ and University efforts to promulgate and enforce speech codes.³⁵⁰ Commentators focused on the two manners to approach these regulations—First Amendment freedom of speech protection and protection of equality—each triggering a different standard of review and thus potentially producing a different outcome.³⁵¹ A consistently repeated theme in these articles is the divisiveness of the issue amongst civil libertarians who—accustomed to arguing on the same side—were now in adversarial camps.³⁵² One CRT author suggested that racial slurs and epithets were the equivalent of unprotected hate speech,³⁵³ another looked to other countries to find examples of successful and unsuccessful efforts in dealing with hate speech,³⁵⁴ and two others focused on the

³⁴⁹ See Delgado & Stefancic, *supra* note 180, at 482–83, 486, 499, 502, 505. See Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 NW. U. L. REV. 343 (1991) [hereinafter Delgado, *Campus Antiracism Rules*]; 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) [hereinafter Delgado, *Words That Wound*]. “Early article on discourse, focusing on hate-speech.” *Id.* at 486; Charles R. Lawrence, III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431 (1990). “Urges that free speech, properly understood, should not trump equal-dignity concerns at stake in campus speech controversies.” *Id.* at 499; Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim’s Story*, 87 MICH. L. REV. 2320 (1989). “Suggests that an absolutist First Amendment response to hate speech furthers racism.” *Id.* at 502; Jordan J. Paust, *Rereading the First Amendment in Light of Treaties Proscribing Incitement to Racial Discrimination or Hostility*, 43 RUTGERS L. REV. 565 (1991). Paust “praises” Mari Matsuda’s article and “offers further constitutional arguments” regarding hate speech. *Id.* at 505.

³⁵⁰ See Jerome McAlister Culp, Jr., *Diversity, Multiculturalism, and Affirmative Action: Duke, the NAS, and Apartheid*, 41 DEPAUL L. REV. 1141 (1992) (noting Representative Henry Hyde’s belief that “the most important threat to colleges is the use of speech codes to restrain racist and sexist speech and activity on our college campuses. . .”).

³⁵¹ See Delgado, *Campus Antiracism Rules*, *supra* note 349, at 345–47. From a freedom of speech perspective, the University would bear the burden of demonstrating “the interests in protecting the members of the campus community from insults and name-calling is compelling enough to overcome the presumption in favor of free speech . . . [and] there is no less onerous way to accomplish this objective.” *Id.* at 345 (citing numerous cases for support of this standard). However, framed as an Equal Protection claim, the “defenders of racially scathing speech are required to show that the interest in its protection is compelling enough to overcome the preference for equal personhood.” *Id.* at 346 (citing numerous cases for support of this standard).

³⁵² See Lawrence, *If He Hollers Let Him Go*, *supra* note 349, at 434–35; Matsuda, *supra* note 349, at 2326.

³⁵³ *Id.* at 449–57.

³⁵⁴ See Delgado, *Campus Antiracism Rules*, *supra* note 349, at 362–71.

international community's adoption of the International Convention on the Elimination of All Forms of Racial Discrimination.³⁵⁵

The intense response to these speech codes and their supporting academic arguments were documented in Delgado's article, *Campus Antiracism Rules: Constitutional Narratives in Collision*,³⁵⁶ and would have provided an excellent resource to student groups choosing this topic. In addition to the constitutional arguments, CRT authors also focused on the effect of hate speech on "victims, . . . perpetrators, and society as a whole."³⁵⁷ Obama asked his students to consider whether the protections afforded by these speech codes were reasonable or whether "the cure [was] worse than the disease?" The cited authors concurred that eradicating racist speech was paramount,³⁵⁸ deeming the good faith belief that the "best cure for bad speech is good speech, and ideas that affirm equality and the worth of all individuals ultimately will prevail over racism, sexism, homophobia, and anti-semitism because they are better ideas" to be an "empty ideal."³⁵⁹ However, one civil libertarian warned that open-ended endorsements of these restrictions "offer[] no principled way to confine racist speech regulations" and could "warrant the prohibition of all racist speech, and thereby cut to the core of our system of free expression."³⁶⁰

³⁵⁵ See generally Matsuda, *supra* note 349, at 2341–48 ("The international community has chosen to outlaw racist hate propaganda."); Paust, *supra* note 349; Elizabeth J. Defeis, *Freedom of Speech and International Norms: A Response to Hate Speech*, 29 STAN. J. INT'L L. 57 (1992). Defeis is not included in the CRT bibliography. Her article compares the response of the United States to the protection of hate speech as compared with the response of the European Convention.

³⁵⁶ Delgado, *Campus Antiracism Rules*, *supra* note 349, at 358–62.

³⁵⁷ Delgado, *Words That Wound*, *supra* note 349, at 134. "The racial insult remains one of the most pervasive channels through which discriminatory attitudes are imparted." *Id.* at 135; see also Lawrence, *If He Hollers Let Him Go*, *supra* note 349, at 458–66. Lawrence dedicates a section of his article to "Understanding the Injury Inflicted by Racist Speech" and throughout the article recounts personal incidents of hate speech experienced by his students and family members. *Id.*; Matsuda, *supra* note 349, at 2335–41.

³⁵⁸ See Lawrence, *If He Hollers Let Him Go*, *supra* note 349, at 476–83; see also Delgado, *Campus Antiracism Rules*, *supra* note 349, at 374–75; Matsuda, *supra* note 349, at 2321–22. "A legal response to racist speech is a statement that victims of racism are valued members of our polity." *Id.* at 2322.

³⁵⁹ Lawrence, *If He Hollers Let Him Go*, *supra* note 349, at 476.

³⁶⁰ Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Approach?*, 1990 DUKE L.J. 484, 491 (1990).

11. Affirmative Action

Affirmative action, a hotbed of controversy,³⁶¹ was frequently referenced in the CRT annotated bibliography.³⁶² While most authors in the bibliography supported CRT ideals, there were some, such as Stephen Carter, that challenged the perspective generally embraced by CRT scholars, thus providing a springboard for CRT responses to his article. The perspectives of black conservatives, like Carter and Randall Kennedy, were more readily validated by CRT scholars as these authors had similar life experiences as people of color.³⁶³ The future of affirmative action, its costs and benefits, and the rationale behind the remedy were all pervasive themes that Obama's students would have encountered while preparing for a group presentation. The landscape of affirmative action scholarship, like that of race and criminal law, was wide; therefore, Obama divided the topic into three specific areas where there was substantial scholarship and hearty debate.

a. Minority Set-Asides

In Croson, Justice O'Connor argued that many minority set-aside programs are little more than race-based variants of the pork-barrel. Many commentators share this view, noting that minority contractors don't necessarily hire the poor and working-class blacks that suffer most from the legacy of racial discrimination, and are often serve as fronts for white contractors. Other commentators argue that public contracts have been a well-worn path for other immigrant groups to establish a foot-hold in business, and that the courts are

³⁶¹ See Thomas Ross, *The Richmond Narratives*, 68 TEX. L. REV. 389 (1989). "The constitutionality of affirmative action has been perhaps the most divisive and difficult question of contemporary constitutional jurisprudence." *Id.* at 389.

³⁶² See Delgado & Stefancic, *supra* note 180, at 467. Robin D. Barnes, *Politics and Passion: Theoretically A Dangerous Liaison*, 101 YALE L.J. 1631 (1992); Bell, *Bakke*, *supra* note 341; Derrick A. Bell, Jr., *Xerxes and the Affirmative Action Mystique*, 57 GEO. WASH. L. REV. 1595 (1989); STEVEN CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY (1991); Richard Delgado, *Affirmative Action as a Majoritarian Device: Or, Do You Really Want to Be a Role Model*, 89 MICH. L. REV. 1222 (1991); Thomas Ross, *Innocence and Affirmative Action*, 43 VAND. L. REV. 297 (1990); John O. Calmore, *Exploring the Significance of Race and Class in Representing the Black Poor*, 61 OR. L. REV. 201 (1982); Culp, *supra* note 350.

³⁶³ See, e.g., Barnes, *supra* note 362, at 1638–43 (countering positions advanced by Carter in REFLECTIONS, *supra* note 362). Throughout the CRT scholarship, the writings of white conservative voices are dismissed as part of the majoritarian society seeking to maintain the status quo. Similarly, the challenge is often advanced that white civil libertarians are the only voices that are recognized and upheld by the legal academy. See Bell, *Bakke*, *supra* note 341, at 4–6.

*simply changing the rules now that blacks control various levers of government.*³⁶⁴

The decisions rendered in *Fullilove v. Klutznik*³⁶⁵ and *City of Richmond v. J.A. Croson*³⁶⁶ both directly addressed minority set-asides in the realm of government contracts—one upheld and one struck down.³⁶⁷ Obama credited Justice O'Connor with the argument that “many minority set-aside programs are little more than race-based variants of the pork-barrel.” While this language is not present in the *Croson* opinion, Justice O'Connor did appear to reject the remedy of societal discrimination against minorities and repeatedly cited a lack of “probative evidence” of particular discrimination against minorities in Richmond’s construction industry.³⁶⁸ One CRT author deemed this analysis as “denying the actual victimization of black beneficiaries”³⁶⁹ and another contended that “she seems to say that the city council members can’t be trusted because they are black people voting on an affirmative action law.”³⁷⁰ An article not included in the CRT bibliography analyzed the decision from a different perspective contending: “[t]he *City of Richmond* Court bears an uncanny resemblance to the *Lochner* Court, picking and choosing among state policies according to the decisionmakers’ personal visions of the just society.”³⁷¹

Interestingly, although the *Croson* opinion provides a good perspective of the spectrum of the Court’s positions on affirmative action—from Scalia’s adamant opposition to Marshall’s unbridled support³⁷²—neither the opinion, nor a summary

³⁶⁴ Obama, *Group Presentation Topics*, *supra* note 181, at 11.a.

³⁶⁵ 448 U.S. 448 (1980).

³⁶⁶ 488 U.S. 469 (1989).

³⁶⁷ See Ross, *supra* note 362, at 305–06 n.24 (noting that the Richmond set-aside program, rejected by the Court, was modeled after the federal program approved in *Fullilove* and citing Justice O'Connor’s distinguishing the two because “Congress especially is empowered under the fourteenth amendment to address racial discrimination”).

³⁶⁸ See *Croson*, 488 U.S. at 498–500, 503.

³⁶⁹ Ross, *supra* note 362, at 306 (citing language in O’Connor’s opinion referencing “generalized assertions” and “amorphous claims”).

³⁷⁰ Ross, *The Richmond Narrative*, *supra* note 361, at 395.

³⁷¹ Mary C. Daly, *Rebuilding the City of Richmond: Congress’ Power to Authorize the States to Implement Race-Conscious Affirmative Action Plans*, 33 B.C. L. REV. 903, 930 (1992).

³⁷² See *id.*; see also Ross, *supra* note 362, at 306.

by Derrick Bell, was included in the reading list. However, Thomas Ross' article, *The Richmond Narratives*, was included on Delgado and Stefancic's bibliography and would have provided sufficient background to serve as a catalyst for student groups to research other perspectives.³⁷³

b. Class-based, Rather Than Race-based, Affirmative Action in College Admissions

As more and more universities chase after the pool of minority students with high SATs (students who frequently come from middle-class families and have gone to prep schools), some have argued for the replacement of race-based affirmative action with some sort of class/income based test. Such proposals go to the heart of the affirmative action debate, and our contrary understanding of the wrong it's designed to remedy: is it designed to make up for current racial/cultural bias against minorities? Or historical discrimination that has resulted in higher poverty rates, etc. among minorities? Or to promote diversity of viewpoints in the range of [U.S.] institutions?³⁷⁴

The *Bakke*³⁷⁵ and *Defunis*³⁷⁶ decisions brought this issue to the forefront as the nation's elite universities faced challenges regarding their process for enrollment decisions and their rationale for making them. Rather than arguing for the advancement of one measure of affirmative action over another, the CRT articles focused on the value of affirmative action *per se* and the controversy within the academic and political communities that surrounded it. Derrick Bell dismissed any notion of "innocent whites" that were negatively affected by affirmative action decisions.³⁷⁷ Richard Delgado alleged that affirmative action critics strategically

³⁷³ See Delgado & Stefancic, *supra* note 180, at 506. The first sentence of their annotation for the article is: "Analyzes in narrative terms the Supreme Court's opinion in *City of Richmond v. J.A. Croson, Co.*, which struck down a minority set-aside."

³⁷⁴ Obama, *Group Presentation Topics*, *supra* note 181, at 11.b.

³⁷⁵ *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

³⁷⁶ *Defunis v. Odegaard*, 416 U.S. 312 (1974).

³⁷⁷ Bell, *Xerxes and the Affirmative Action Mystique*, *supra* note 362, at 1596. "This obsession with protecting the 'innocent whites' has both overshadowed the need to remedy the economic conditions of discrimination-scarred racial minorities, and obscured the fact that affirmative action remedies serve to maintain a socio-economic status quo in which whites (or some of them) retain the dominant roles." See also Ross, *supra* note 362, at 301.

“label[] problematic, troublesome, and ethically agonizing a paltry system that helps a few of us get ahead, critics neatly take our eyes off the system . . . [unjustified preferences in jobs and education resulting from old-boys network and official laws that lessened the competition] that enabled [whites] to develop rules and standards of quality and merit that now exclude us, make us appear unworthy, dependent (naturally) on affirmative action.”³⁷⁸

Jerome McAllister Culp, Jr. championed the role of affirmative action: “I believe that universities have a role to play in ending the racial apartheid that still exists in this country, and that affirmative action, diversity, and multiculturalism have an important role to play in helping society—including higher education and law schools—achieve that goal.”³⁷⁹ However, Culp noted that “[p]eople use affirmative action as an excuse to increase racial stereotypes”³⁸⁰ and questioned the impact of the programs and the public’s reaction to them.³⁸¹ Per Bell, “[t]he important question, of course, is whether the debilitating effects of racial discrimination can be remedied without requiring whites to surrender aspects of their superior social status.”³⁸²

From a slightly different perspective, an article not included in the CRT bibliography offered the myriad of reasons apart from race that are routinely used to determine university admissions and argues the use of the term “reverse

Within [the] rhetoric [of innocence advanced by whites] affirmative action plans have two effects. They hurt white people, and they advantage undeserving black people. The unjust suffering of the white person becomes the source of the black person’s windfall. Given the obvious power of the rhetoric of innocence, its use and persistence in the opinions of those Justices who seek to deny or severely limit affirmative action is not surprising.

Id.

³⁷⁸ Delgado, *supra* note 362, at 1225.

³⁷⁹ Culp, *supra* note 350, at 1142; *see also* CARTER, *supra* note 362, at 15–17. “I will say it again: I got into law school because I am black. So what?”

³⁸⁰ Culp, *supra* note 350, at 1157.

³⁸¹ Calmore, *supra* note 362, at 204. “[A]lthough America’s underlying premises of individual opportunity, pluralistic politics, and majoritarian values may authentically serve some advancement of the black middle class, for most black poor—particularly the welfare state’s dependent poor and the underclass—these premises simply provide too little, too.” *See also* Barnes, *supra* note 362, at 1645 (“Faced with stigma, feelings of inferiority, and fears of white backlash, many blacks have chosen as the target of their criticism the one set of programs that has helped them to advance. White supremacy goes unchallenged, while affirmative action takes a beating.”).

³⁸² Bell, *Bakke*, *supra* note 341, at 12.

discrimination” is merely a political device designed to generate a negative perspective of quotas or other non-merit devices to devices to determine enrollment standards.³⁸³ Ultimately, the vast majority of articles available in the spring of 1994, would have led student groups seeking to present alternatives to solely race based arguments to find that “affirmative action demands the paradoxical solution of first taking account of race in order to get to a world where it is not taken into account.”³⁸⁴

c. The Meaning of Merit

*With affirmative action increasingly justified on the basis of the desire for a diversity of view-points, the very notion of a fixed meaning to the idea of merit has come under attack? Is the notion of merit inherently political, embodying the preferences of the dominant group? Or is it possible to agree on some common standards by which jobs and university slots are allocated? Does it depend on the task? (e.g. law professors v. airline pilots). Do minorities gain or lose when fixed notions of merit give way to more flexible standards for allocating goods and privileges?*³⁸⁵

A myriad of possible approaches to this topic were contained within the CRT scholarship included in Delgado and Stefancic’s bibliography.³⁸⁶ Addressing the meaning of merit primarily in the context of affirmative action hiring preferences and tenure decisions, as well as whether minority scholars were truly invited into the “inner circle” of the legal academy. If a student group opted for a more academic or scholarly discussion of “merit,” there were articles available to provide such a perspective;³⁸⁷ however, the CRT authors’ personal narratives were, arguably, more captivating.

³⁸³ Philip L. Fetzer, ‘Reverse Discrimination’: *The Political Use of Language*, 17 T. MARSHALL L. REV. 293 (1992). “‘Reverse discrimination’ is a covert political term . . . [which] is an obstacle to change in the lengthy struggle for shared power in American society.” *Id.* at 293. “Are colleges discriminating when they admit football players or musicians while rejecting students with higher SAT scores?” *Id.* at 297.

³⁸⁴ Ross, *The Richmond Narratives*, *supra* note 361, at 389.

³⁸⁵ Obama, *Group Presentation Topics*, *supra* note 181, at 11.c.

³⁸⁶ See Delgado & Stefancic, *supra* note 180.

³⁸⁷ See, e.g., Fetzer, *supra* note 383, at 310 (enumerating the reasons quota systems are viewed as “reverse discrimination”).

For example, in an article focusing on the power of words, Charles Lawrence recounted his experiences as a child during recess. During recess, he dismantled the invisible wall separating him from the white children on the playground—he became one of the inner circle.³⁸⁸ He remembered standing shoulder-to-shoulder in that circle with his white classmates each day as they performed the pre-game ritual of playing “enie menie minie mo.” Lawrence described the physical sensations of waiting to see what *or who* would be caught by the toe during the pre-game ritual of playing.³⁸⁹ This metaphor is a powerful tool—not only to demonstrate the lingering effect of the harm caused by words—because it pulls on a thread common in our humanness of wanting to be included and valued as equal members of the game. Regardless of the advances Lawrence felt he made with his classmates in disassembling the wall, when the pre-game ritual began the menacing wall reassembled.³⁹⁰ Similarly, regardless of the advances minority scholars made within legal academia, the divisive wall was perceived to perpetually reassemble whenever issues of “race” were raised.

In addition to the “fantasy” writings of Derrick Bell, many CRT authors used narratives similar to Lawrence’s to bridge the chasm of race by retelling common experiences from the perspective of a person of color. The CRT scholars consistently perceived that majoritarian scholars and members of the judiciary were purposefully refusing to engage them in academic discourse or the legal process addressing civil rights issues.³⁹¹ The authors advanced many theories for this exclusion: the desire to “control the assumptions underlying [legal] discourse”,³⁹²

³⁸⁸ See Lawrence, *If He Hollers Let Him Go*, *supra* note 349, at 482–83.

³⁸⁹ *Id.* at 482.

³⁹⁰ See *id.* at 483.

³⁹¹ See generally Bell, *Bakke*, *supra* note 341 (discussing the absence of minority voices in the debate surrounding affirmative action admissions to higher education institutions); Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561 (1984) (analyzing the citation practices of majoritarian legal scholars and advancing the claim that they are purposefully not minority scholars). See also his follow up article revisiting the issue ten years later and finding the same evidence, Richard Delgado, *The Imperial Scholar Revisited: How to Marginalize Outsider Writing, Ten Years Later*, 140 U. PA. L. REV. 1349 (1992); Mari Matsuda, *Affirmative Action and Legal Knowledge: Planting Seeds in Plowed Up Ground*, 11 HARV. WOMEN’S L.J. 1 (1988); but see Kennedy, *Racial Critiques of Legal Academia*, *supra* note 120 (criticizing the arguments advanced by Bell, Matsuda, and Delgado).

³⁹² Jerome McAlister Culp, Jr., *Posner on Duncan Kennedy and Racial Difference: White Authority in the Legal Academy*, 41 DUKE L.J. 1095, 1098 (1992) [hereinafter Culp, *Racial Difference*]. Culp references Posner’s many opportunities to cite black legal scholars in his work and his failure to do so deeming black scholars “invisible” to Judge Posner. *Id.* at 1105. Delgado and Stefancic’s bibliography

the preference for articles that represent traditional approaches to legal scholarship,³⁹³ and a lack of appreciation at best, and attempt to silence at worst, of the voices and experiential perspective of minority scholars.³⁹⁴

Derrick Bell's imaginary tales regarding the hiring practices of minorities at Harvard³⁹⁵ did not seem as far-fetched in light of the statistical representation of minority faculty at Harvard law school and comments from a *Washington Post* article the following year that the law school was unable to find any qualified female applicants of color to invite to join the law school faculty.³⁹⁶ While these remarks were criticized as "pure sophistry and at its heart a disguised form of racism,"³⁹⁷ the limited pool of traditionally "qualified" minority candidates cannot be denied.³⁹⁸ Student groups may have gravitated to comments by Richard Posner, a critic of affirmative hiring programs, who questioned its effect on legal scholarship and hiring standards.³⁹⁹ Although purportedly detached from the Chicago law faculty, Obama was one of the few minority professors at the

describes his article as advancing the position that the "refusal to engage scholars of color helps perpetuate the subjugation of black people and black viewpoints." Delgado & Stefancic, *supra* note 180, at 480.

³⁹³ Derrick A. Bell, Jr., *The Final Allegory: Harvard's Affirmative Action Allegory*, 87 MICH. L. REV. 2382, 2388 (1989) [hereinafter Bell, *The Final Allegory*] (alleging that scholars are less likely to be selected for tenured positions "if their approach, voice, or conclusions depart radically from traditional scholarship"); see also Culp, *Racial Difference*, *supra* note 392, at 1099–1101.

³⁹⁴ See Harlon L. Dalton, *The Clouded Prism*, 22 HARV. C.R.-C.L. L. REV. 435 (1987).

³⁹⁵ See Bell, *The Final Allegory*, *supra* note 393, at 2387–88; DERRICK A. BELL, JR., *The Unspoken Limit on Affirmative Action: The Chronicle of the DeVine Gift*, in AND WE ARE NOT SAVED 140–61 (1987); see also Culp, *supra* note 362, at 1162–65 (reporting a similarly grim report on hiring practices of minorities at Duke).

³⁹⁶ Culp, *supra* note 350, at 1156 (citing Christopher B. Daly, *Harvard Law Students Demand Diverse Faculty*, WASH. POST, Apr. 25, 1990, at A3); see also Linda S. Greene, *Tokens, Role Models, and Pedagogical Politics: Lamentations of an African American Female Law Professor*, 6 BERKELEY WOMEN'S L.J. 81, 82 (1990).

³⁹⁷ Culp, *supra* note 350, at 1156.

³⁹⁸ See Kennedy, *Racial Critiques of Legal Academia*, *supra* note 120, at 1765 (challenging Derrick Bell for not engaging in this argument and instead choosing to reject the validity of the conventional standards used to identify "qualified" candidates).

³⁹⁹ See Richard A. Posner, *Duncan Kennedy on Affirmative Action*, 1990 DUKE L.J. 1157 (1990). In addition to his assertions regarding faculty affirmative action programs, Judge Posner asserts that although minority students who are admitted via affirmative action programs may indeed be able to graduate, "they are unlikely to do so with great distinction." *Id.* at 1159; see also Culp, *Racial Difference*, *supra* note 392, at 1097 (responding to Judge Posner's article, *supra*).

University of Chicago during his tenure⁴⁰⁰ and may have had personal insight to share during the class discussion of this topic.

12. Public School Financing

*With white and black middle class families increasingly choosing to exit from the public school system, many local public school districts are on the verge of financial collapse. Some commentators have argued that a school system based on property taxes necessarily creates a separate and unequal school system, and have challenged such school financing systems under state constitutional mandates of equal educational opportunity. How have such suits fared, and what does their success or failure say about the possibilities of bringing about genuine equality of opportunity for generations to come?*⁴⁰¹

Regardless of how ideological aspirations of equality in educational opportunities are touted, choices related to funding those opportunities continue to reveal the limitations to the commitment. After the Supreme Court decided *San Antonio School District v. Rodriguez*⁴⁰² in 1973—determining that public education was not a fundamental right and decisions made on the basis of wealth were not subject to strict scrutiny—the states were given substantial freedom in determining how to best fund their public schools.⁴⁰³ Various funding mechanisms designed by the states were challenged unsuccessfully in the courts until 1989, when three state courts declared their state’s school financing system unconstitutional.⁴⁰⁴ These decisions appeared to rejuvenate those challenging the current funding systems based on property taxes and the resulting disparity in educational opportunities for the state’s entire student populace.

Consequently, this topic generated significant academic commentary as individual states began to wrestle with the constitutionality of their own funding

⁴⁰⁰ See Kantor, *supra* note 18.

⁴⁰¹ Obama, *Group Presentation Topics*, *supra* note 181, at 12.

⁴⁰² 411 U.S. 1 (1973).

⁴⁰³ *Id.* at 29–31, 40.

⁴⁰⁴ Kate Strickland, Note, *The School Finance Reform Movement, a History and Prognosis: Will Massachusetts Join the Third Wave of Reform?*, 32 B.C. L. REV. 1105, 1109 (1991) (noting the decisions in Kentucky, Montana, and Texas “declar[ing] their respective state financing plans unconstitutional on the grounds that significant disparities in school district funding violated their state educational provisions.”).

structures.⁴⁰⁵ However, contrary to the other topics on the group presentation syllabus, neither the titles nor the summaries on the CRT bibliography contained any obvious reference to public school financing. For this presentation topic, Obama encouraged students to look at the results of lawsuits designed to challenge the constitutionality of school finance based on property taxes and to analyze the results to judge the “possibilities of bringing about genuine equality of opportunity for generations to come.” This was the only topic that specifically asked students to apply their analysis to the future rather merely present opinions related to current and past issues.

III. CONCLUSION: CRITICAL RACE PRAGMATISM

Our project was to read Professor Obama’s syllabus to understand his views on race and American constitutional tradition. Several conclusions emerge. First, while Obama saw a lot of important critiques of racism in CRT, he had optimism about the possibility of progress on racial equality and the promises of the Declaration of Independence and the Equal Protection Clause.⁴⁰⁶ Racism in Obama’s mind was no longer immutable. He saw the solution not through separatism or through courts, but through political action focused around common goals. That is, in some ways, his solution to the interest-convergence dilemma identified by Derrick Bell: to expand the interests at stake and to tie the interests of African Americans to other groups struggling for economic and social justice.⁴⁰⁷

The Equal Protection principle would be made real by finding common ground. The goal was to have voters and those in power recognize the merits of the claims of the humble to justice and the shared interests of all societal groups. Obama appears less interested in theory and more interested in pragmatic action. He is a realist, a pragmatist, and a dreamer all at the same time. Viewing Obama’s perspective as a descendant of Bell’s, perhaps Obama’s generation of race

⁴⁰⁵ A search on Westlaw for academic articles written between 1990 and 1993 containing the terms “public school financing” and “property taxes” generated 690 responses.

⁴⁰⁶ Obama’s classmate Kenneth Mack suggested that Obama wanted a route out of Critical Race Theory’s pessimism. KLOPPENBERG, *supra* note 1, at 127.

⁴⁰⁷ In fact, Derrick Bell noted some of these differences between his perspective and Barack Obama’s in an address delivered shortly after Obama’s election, see Derrick Bell, *On Celebrating an Election as Racial Progress*, 36 HUM. RTS. 2, 2 (2009) (asking, “Is Obama’s elevation to the White House more than just another unique moment when the fervent hopes of blacks coincide with the needs of white and other non-whites?”). Thanks to Riki Kotua for bringing this article to our attention.

scholarship should be called critical race pragmatism.⁴⁰⁸ For it joins the sociology of Du Bois and the vision of Ellison to Obama's pragmatism.⁴⁰⁹

Six years into Obama's presidency the pragmatism that seeks compromise and unity is disillusioning to some African American intellectuals.⁴¹⁰ It might have been so for Derrick Bell, too. And yet the mission of democracy continues. Such may be the future of pragmatic racial constitutionalism that joins the interests of African Americans and other racial minorities to the goals of other groups.⁴¹¹ In Obama's mind, there is likely a place for people like Bell. For even as he pushed the importance of discussion in a democracy, Obama acknowledged in *The Audacity of Hope* that there remains a role for people like William Lloyd Garrison, Denmark Vesey, and Frederick Douglas⁴¹²—perhaps signaling the place that future critical race scholarship plays in Obama's world, even as he departs significantly from it.

There is another part of this story, though, and it is about critical race pedagogy. Here Obama is close to the leading CRT scholars.⁴¹³ Following a model

⁴⁰⁸ A number of people have noted the pragmatic elements of Obama's thought. See, e.g., KLOPPENBERG, *supra* note 1, at 17–18; Bart Schultz, *Obama's Political Philosophy, Pragmatism, Politics, and the University of Chicago*, 39 PHILOSOPHY SOC. SCI. 127–73 (2009); Susan Schulten, *Barack Obama, Abraham Lincoln, and John Dewey*, 86 DENV. U. L. REV. 807–17 (2009).

⁴⁰⁹ See also Charles Ogletree, *Understanding Obama from Barry to Barack*, speech at W.E.B. Du Bois Center for African American Thought, Harvard University, Nov. 2011), available at http://www.law.harvard.edu/news/2011/11/17_ogletree_obama.html.

⁴¹⁰ Adolph Reed & Kenneth Warren, *Renewing Black Intellectual History* (2010), <http://www.blackagenda.com/content/where-obamaism-seems-be-going> (interpreting Obama as moving in a decidedly non-radical direction).

⁴¹¹ Obama, *A More Perfect Union*, *supra* note 38 (“This time we want to talk about how the lines in the Emergency Room are filled with whites and blacks and Hispanics who do not have health care; who don't have the power on their own to overcome the special interests in Washington, but who can take them on if we do it together.”).

⁴¹² OBAMA, *supra* note 172, at 98.

⁴¹³ It is exciting to think about how the directions that Obama was moving towards in the 1990s—and continues to work towards now—relate to the directions that scholars who self-consciously work in Bell's tradition are now moving. Many of the other papers in this symposium point towards similar alteration from Bell's primary themes. Juan Perea focuses, as did Bell, on the lessons of history. Thus he looks to how affirmative action was “uncoupled” from its historic purpose in the Great Society. Juan F. Perea, *Doctrines of Delusion: Bakke, Fisher and the Case for a New Affirmative Action*, 75 U. PITT. L. REV. [REDACTED] (2014). Montre Carodine and SpearIt both identify the ways that legal doctrine and economic interest continues to distinguish by race and how that tends to subordinate racial minorities. Montre Carodine, *Contemporary Issues in Critical Race Theory: The Implications of Race as Character Evidence in Recent High Profile Cases*, 75 U. PITT. L. REV. [REDACTED] (2014); SpearIt, *Economic Interest*

set by many CRT scholars,⁴¹⁴ Obama's students appreciated the way he shared personal anecdotes, his engaging personality and his seemingly softer approach to teaching—especially when juxtaposed to other law professors at the University of Chicago.⁴¹⁵ Even the course reading packet purportedly included his own notes in the margins which he comments is the result, as an adjunct, of not having a teaching assistant. “On the other hand” he adds, “my wife tells me that she wouldn't have minded getting the professor's notations on her reading material when she was in law school.”⁴¹⁶ It is impossible to know if these are his notes from when he was perhaps Derrick Bell's student or notes he made in preparation for teaching the course. Whatever the origins of the notes, this allowed his students to begin to build a relationship with the man who would be their teacher.

Good teachers, as Charles Lawrence reminds us, allow their students to find their own answers and have no need to be the center of attention, nor the imparters of wisdom.⁴¹⁷ Such a teacher thoughtfully provides just enough material so the student will find the desired answer; but the student believes the discovery to be solely due to his efforts, his insightfulness, his intelligence, and thus “owns” the new, cherished information. Students rarely appreciate the frustrating experience of searching for these answers in the midst of the process, but the fruit of their labors is a deeper understanding and appreciation of the lessons learned. To learn by discovering, the students must be willing to make mistakes and trust the teacher

Convergence in Downsizing Imprisonment, 75 U. PITT. L. REV. [REDACTED] (2014). Jean Stefancic looks to join critical theory to action. Jean Stefancic, *Discerning Critical Moments: Lessons From the Life of Derrick Bell*, 75 U. PITT. L. REV. [REDACTED] (2014); Richard Delgado takes Bell's theory in another direction in *Law's Violence: Derrick Bell's Next Article*, 75 U. PITT. L. REV. [REDACTED] (2014). Delgado extrapolates from Bell's work to suggest that he might have written about our country's origins in violence and how that shapes our law and our national character. Delgado even suggests that our “originary violence” as he terms it conditions us to later injustice. It may even suggest that some values, like violence, will be so deeply embedded that economic-self interest will not overcome them. George H. Taylor picks up on the possibilities of a better future in developing a sub-theme of Bell: “the possibility of correlation between racial justice and its concrete manifestation, to varying degrees, in the law.” George H. Taylor, *The Object of Diversity*, 75 U. PITT. L. REV. [REDACTED] (2014).

⁴¹⁴ See Jerome McCristal Culp, Jr., *Autobiography and Legal Scholarship and Teaching: Finding Me in the Legal Academy*, 77 VA. L. REV. 539 (1991) (discusses the value of a minority professor's use of personal anecdotes when teaching); see also Lawrence, *supra* note 201.

⁴¹⁵ See Kantor, *supra* note 18 (discussing how well students reacted to Obama's teaching style).

⁴¹⁶ *Id.*

⁴¹⁷ See generally Lawrence, *supra* note 201. Lawrence described his pedagogical approach of asking students the most difficult questions and guiding their struggle to discover the answers as a “well-worn professor's ruse.” *Id.* at 2243.

who is pushing them to delve deeper, think harder, and discover the correct answer. The relationship Obama built with his students, the structure of the assigned readings, the directions to guide the students to complete their paper, and his suggested approaches to the student presentations could be interpreted to have provided such a learning experience about CRT.

There is no overt mention of CRT or interest-convergence or other “radical” theories in Obama’s 1994 syllabus. For someone with lofty aspirations and a tenuous place in the world where race was so important, taking a stand on issues of race had the potential to alienate supporters. The question is thus posed, and future commentary is invited to answer, was CRT the “desired answer” that the Obama intended the students to find? Or that innately guided his own beliefs? It appears as though Obama was already in the class striking out on a pragmatic approach that was rooted in his optimism that politics and morality were bending towards justice. Whatever the answer, the prevalence of presentation topics potentially generating such significant CRT commentary that Obama included on the syllabus suggests that Obama had at least considered, although perhaps rejected, the fundamental tenets of Critical Race Theory as principles influencing “Current Issues in Racism and the Law.”

Appendix 1. Reading Assignments with Additional Bibliographic Information

Students were to focus on readings with an asterisk. The numbers following the “p.” or “pp.” indicated pages in the readings packet. We have added full citations where available and have in a few instances, when it is unclear the work cited, speculated about the most likely source.

I. Theory (First Day)

*George Fredrickson, *The Arrogance of Race: Historical Perspectives on Slavery, Racism and Social Inequality* (1988), pp. 2–10

*Kwame Anthony Appiah, “Racisms,” in *Anatomy of Racism* 3-17 (David Goldberg ed., 1990), pp. 11–20

Kwame Anthony Appiah, “The Uncompleted Argument: Du Bois and the Illusion of Race,” 12 *Critical Inquiry* 21-37 (1985)

II. Historical Foundations**A. Indian Removal**

Vattel, *The Law of Nations*, p. 29

Brackenridge, pp. 30–31 [*Law Miscellanies* 123–25 (Philadelphia, 1814)]

Andrew Jackson, pp. 32–33 Message on Indian Removal (Dec. 6, 1830)

Speckled Snake, *Untitled Speech in Response to a Message Concerning Indian Removal by President Jackson*, in SAMUEL G. DRAKE, *THE BOOK OF THE INDIANS, OR, BIOGRAPHY AND HISTORY OF THE INDIANS OF NORTH AMERICA* 110 (Boston, Benjamin B. Mussey 9th ed. 1845) (circa 1830), p. 34

Act to Provide Exchange of Lands (Indian Removal Act, May 28, 1830), pp. 35–36

**Johnson v. M’Intosh*, 21 U.S. (8 Wheaton) 543 (1823), pp. 37–43

B. Slavery

Gobu v. Gobu, 1 N.C. 188 (1802), p. 47

Hudgins v. Wrights, 11 Va. 134 (1806), p. 43

Sawney v. Carter, 27 Va. (6 Rand) 173, pp. 49–50

**State v. Mann*, 13 N.C. 263 (1830), pp. 51–54

Fugitive Slave Act of 1850, pp. 55–58

Fillmore, Address, p. 59 (First Annual Message, Dec. 2, 1850, on compromise of 1850)

Martin Delany: Excerpt of Speech, p. 60

*Frederick Douglass, *Is It Right and Wise to Kill a Kidnapper*, pp. 61–64

*Frederick Douglass, *The Right to Criticize American Institutions*, pp. 65

**Dred Scott v. Sanford*, 60 U.S. 393 (1857) (or Bell summary), pp. 66–129

C. Reconstruction, Retrenchment, and Jim Crow (Second Day)

Emancipation Proclamation, p. 131

Thirteenth Amendment, p. 132

*South Carolina Black Codes (skim), pp. 133–40, *available at* <http://home.gwu.edu/~jjhawkin/BlackCodes/pdfSouthCarolina.pdf>

Civil Rights Act of 1866, p. 141

Johnson's Veto Message, pp. 142–44 (Veto of the Civil Rights Bill, Mar. 27, 1866)

* Fourteenth and Fifteenth Amendment, pp. 145–46

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* W.E.B. Du Bois, Excerpt from *The Souls of Black Folk* (chap. 2 optional), pp. 289–315

* Marcus Garvey, *Philosophy and Opinions* (1923) (focus on first two speeches), pp. 316–50

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*Bell, "Divining Our Racial Themes," Introduction to *Faces at the Bottom of the Well* (1992), pp. 468–75

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Appendix 2. Suggested Topics for Seminar Presentations

1) **The All-Black, All-Male School**—A number of public school systems, including those in Detroit and Milwaukee, have initiated pilot programs whereby inner-city black males are voluntarily placed in a segregated learning environment, with black male teachers, an Afrocentric curriculum, etc. Proponents say that given the unique problems facing black males, such “self-segregation” contributes to self-esteem and enhances learning performance. Opponents argue that these programs are a betrayal of *Brown v. Board of Education*, discriminate against whites and females, stigmatizes black males, and politicizes school curriculums.

2) **Interracial Adoptions**—Several states have established regulations that look to place black children up for adoption exclusively with black families. Such policies are supported by black social worker organizations, who argue that same-race adoptions are best for the child, give the child a strong sense of identity, etc. Opponents, including white families interested in adopting black children, say that the policy is racist, and is detrimental to the thousands of unplaced black children currently up for adoption.

3) **Racial Gerrymandering**—The Voting Rights Act of 1965 was designed to enforce the Fifteenth Amendment, and ensure the full and equal enfranchisement of minorities in the political process. But with the elimination of such obvious barriers to voting as the poll tax and literacy tests, what constitutes a violation of the Act? Some commentators and courts have insisted that such facially neutral practices as the at-large voting district dilute minority voting strength, and have designed single-member, “super-majority” districts that ensure minorities are elected to various political offices. Others say that the drawing of district lines to ensure the success of minority candidates (as opposed to the ability of minorities to vote) amounts to nothing more than racial gerrymandering, encourages racial block voting, and further isolates blacks and other minorities from the broader political community.

4) **Race and the Criminal Justice System**—There are a range of issues in this area that would make interesting group presentations:

* **Discriminatory sentencing**: to what degree is race (as opposed, say to poverty and the reduced ability to hire legal assistance) a primary determinant in criminal sentencing? Have such policies as mandatory sentencing guidelines helped to alleviate any bias that may exist, and if not, what other solutions are available?

* **Criminal Legislation that Targets Minorities?**: Recently, a Minnesota state court held that a criminal statute that punishes possession of crack more severely than possession of cocaine is discriminatory, insofar as crack is the drug of choice in the black community, while cocaine is more

popular among the wine and brie crowd. Likewise, some commentators have argued that legislation that imposes additional penalties on women who use drugs during pregnancy are racially biased. Do such arguments have any merit?

* Hate Crimes: A number of states have passed legislation that increase the penalties for crimes that are shown to be racially-motivated. The Supreme Court recently struck down one such law. Were the Supremes right?

* Statistical Discrimination/Criminals Profiling: Is the use of criminal profiles (e.g. black male with Starter Jacket and gold-chain) in establishing reasonable cause inherently discriminatory? (This can be expanded into a discussion of the non-criminal context—i.e. store-owners with door-buzzers).

5) **Immigration Policy**—Much of the recent controversy surrounding the United States' policy towards Haitian refugees centers around the suspicion that blacks in particular, and people of color in general, are subject to a different set of rules when it comes to who is allowed to immigrate into the U.S. At the same time, Latinos have long argued that immigration policy and INS enforcement not only unfairly targets undocumented workers from poor countries, but also increases discrimination in hiring in regard to U.S. minorities. These issues could be dealt with either together or separately.

6) **Racial Bias in the Media**—Observers have long complained about the inaccurate stereotypes that permeate the depiction of minorities in the mass media in general, and the news in particular. Are these complaints well founded, and if so, will FCC guidelines designed to promote diversity, such as those upheld by the Supreme Court in *Metro Broadcasting*, solve the problem?

7) **Welfare Policy and Reproductive Freedom**—The politics of welfare appears inseparable from the politics of race, despite the oft-quoted statistic that the majority of those on welfare are white. Recently, commentators have been revisiting the issue of child-bearing among the poor, and asking some difficult questions. Should we change welfare policy so that welfare grants no longer increase with each child? Should judges or welfare agencies have the power to restrict the reproductive choices of mothers who are found to have neglected their children, or take drugs during pregnancy? Are commentators who say such policies smack of “racial genocide” misguided?

8) **Inter-ethnic Tensions**—The L.A. riots, the disturbances in Crown Heights, and boycotts of Korean and Arab grocery stores in inner city communities, indicate that the “browning of America” may increase, rather than decrease, racial tensions in the coming years. What are the sources of some of these tensions? Is the black

community alienating potential political allies? Are Latinos, Asians, and other more recent immigrants adopting the racist sentiments of white America in their eagerness to assimilate, or are they victims of unjustified black resentment? A variant of this topic would be to examine the degree to which the bi-polar model of black/white relations is or is not relevant to the struggles and aspirations of other racial minorities.

10)⁴¹⁸ **Reparations**—Given the perceived failures of the traditional civil rights agenda in bringing about racial equality in the U.S., a number of black commentators argue that a program of reparations is the only legitimate means of making up for three-hundred plus years of slavery. More recently, some white commentators have also supported a variant of the reparations concept—for example, the government financing a Community Reinvestment funds that would be controlled by the black community and render affirmative action obsolete. Do such proposals have any realistic chance of working their way through the political system? Would there be any legal impediments to such a broadly-conceived reparations policy?

11) **Hate Speech**—Universities have begun to promulgate speech codes designed to eliminate racially and sexually offensive speech on campus. Are such codes a reasonable measure to protect minorities from harassment, or is the cure worse than the disease?

12) **Affirmative Action**

* Minority Set-Asides: In *Croson*, Justice O'Connor argued that many minority set-aside programs are little more than race-based variants of the pork-barrel. Many commentators share this view, noting that minority contractors don't necessarily hire the poor and working—class blacks that suffer most from the legacy of racial discrimination, and are often serve as fronts for white contractors. Other commentators argue that public contracts have been a well-worn path for other immigrant groups to establish a foot-hold in business, and that the courts are simply changing the rules now that blacks control various levers of government.

* Class-based, rather than race-based, affirmative action in college admissions: As more and more universities chase after the pool of minority students with high SATs (students who frequently come from middle-class families and have gone to prep schools) , some have argued

⁴¹⁸ There was no number nine in the original.

for the replacement of race-based affirmative action with some sort of class/income based test. Such proposals go to the heart of the affirmative action debate, and our contrary understanding of the wrong it's designed to remedy: is it designed to make up for current racial/cultural bias against minorities? Or historical discrimination that has resulted in higher poverty rates, etc. among minorities? Or to promote diversity of viewpoints in the range of U.S. institutions?

* The Meaning of Merit: With affirmative action increasingly justified on the basis of the desire for a diversity of view-points, the very notion of a fixed meaning to the idea of merit has come under attack? Is the notion of merit inherently political, embodying the preferences of the dominant group? Or is it possible to agree on some common standards by which jobs and university slots are allocated? Does it depend on the task? (e.g. law professors v. airline pilots). Do minorities gain or lose when fixed notions of merit give way to more flexible standards for allocating goods and privileges?

13) **Public School Financing**—With white and black middle class families increasingly choosing to exit from the public school system, many local public school districts are on the verge of financial collapse. Some commentators have argued that a school system based on property taxes necessarily creates a separate and unequal school system, and have challenged such school financing systems under state constitutional mandates of equal educational opportunity. How have such suits fared, and what does their success or failure say about the possibilities of bringing about genuine equality of opportunity for generations to come?