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CRITICAL RACE THEORY: AN ANNOTATED BIBLIOGRAPHY 1993, A YEAR OF TRANSITION

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INTRODUCTION

A little more than one year ago, we published *Critical Race Theory: An Annotated Bibliography*.¹ In it, we (1) traced the history and development of the Critical Race Theory (CRT) movement;² (2) identified ten themes within that movement's corpus that seemed to us central and characteristic;³ and (3) annotated over 200 of the most important Critical Race works, employing a numbering system corresponding to the main themes.⁴

As we were working on the original bibliography, we speculated about a number of matters that we were not able to address in the original article: Would the prodigious output of the Critical Race scholars that we were struggling to describe continue unabated? Would new voices enter the arena? Would the movement change direction, or begin to include new themes other than the ones we found in the original 217 works? Would it attract new criticism, the bibliography perhaps serving as a lightning rod for less-than-friendly commentary? Would the movement stall, having reached its apogee? One of us had written about a similar phenomenon in legal scholarship—the symposium movement⁵—and so we wondered whether a one-year retrospective might begin to supply answers to questions such as these. In particular, we wondered if there would be

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

2. *Id.* at 461.

3. *Id.* at 462-63.

4. *Id.* at 464-516.

5. Jean Stefancic, *The Law Review Symposium Issue: Community of Meaning or Re-Inscription of Hierarchy?*, 63 U. COLO. L. REV. 651 (1992).

anything like an “observer” effect, in which the attention drawn by the annotation or symposium changes the phenomenon described.⁶

This update provides (a) annotations of the principal works of Critical Race scholarship that appeared during a period of approximately one year⁷ following the cut-off for the original bibliography, and (b) commentary and analysis aimed at shedding light on the above questions. Our methodology for choosing, annotating, and headnoting items was similar to that employed in the original bibliography,⁸ with a single exception. Responding to a substantial increase in writing by and about women of color, we added Theme number 11, Critical Race Feminism, to our list.⁹

To be included, a work needed to address one or more themes we considered to fall within Critical Race thought. The eleven themes, together with the numbering system we employ, follow:

1. *Critique of liberalism*. Most, if not all, CRT writers are discontent with liberalism as a means of addressing the American race problem. Sometimes this discontent is only implicit in an article’s structure or focus. At other times, the author takes as his or her target a mainstay of liberal jurisu-

6. See *infra* text accompanying note 40 (addressing this and related questions).

7. This bibliography covers works which came out after the publication deadline for the original bibliography (late 1992) and before January 1, 1994.

8. Delgado & Stefancic, *supra* note 1, at 461-62, 463-64. We entered into a master database every work published by a recognized Critical Race scholar during the period in question. We then read each item to make sure that it did indeed incorporate one or more clearly recognizable Critical themes or ideas. We noted additional works cited or discussed by these authors for possible inclusion. Then we sent a preliminary draft of this update to each author requesting comments and corrections. We also invited suggestions for additional authors and works we might have overlooked.

In addition to our methodology, the numbering scheme for classifying the books and articles is identical to that used in the original bibliography, *id.* at 462-63, with the exception of Theme number 11, which is new to this bibliography. The theme descriptions, which are identical to those used in the original bibliography, have been reprinted with the permission of the authors and the *Virginia Law Review*.

9. Will there one day be a headnote: Critical Race Masculinism (Theme 12)? We have chosen not to create one at this time, although there is a discernible body of emerging writing on this subject. *E.g.*, Brown, *The Social Construction of a Rape Victim: Stories of African-American Males About the Rape of Desiree Washington*, *infra* pp. 165-66; Culp, *Notes From California: Rodney King and the Race Question*, *infra* p. 169.

dence such as affirmative action, neutrality, color blindness, role modeling, or the merit principle. (Theme number 1).

2. *Storytelling/counterstorytelling and "naming one's own reality."* Many Critical Race theorists consider the majoritarian mindset—the bundle of presuppositions, received wisdom, and shared cultural understandings of persons in the dominant group—to be a principal obstacle to racial reform. To analyze and challenge these power-laden beliefs, some writers employ counterstories, parables, chronicles, and anecdotes aimed at revealing their contingency, cruelty, and self-serving nature. (Theme number 2).

3. *Revisionist interpretations of American civil rights law and progress.* One recurring question for Critical scholars is why American antidiscrimination law has proven so ineffective in redressing racial inequality—or why progress has been cyclical, consisting of alternating periods of advance followed by ones of retrenchment. Some Critical scholars address this question by seeking answers in the psychology of race, white self-interest, the politics of colonialism and anticolonialism, or other sources. (Theme number 3).

4. *A greater understanding of the underpinnings of race and racism.* A number of Critical writers seek to apply insights from social science writing on race and racism to legal problems. For example, understanding how majoritarian society sees black sexuality helps explain the law's treatment of interracial sex, marriage, and adoption; knowing how different settings encourage or discourage discrimination helps in deciding whether the movement toward Alternative Dispute Resolution is likely to help or hurt disempowered disputants. (Theme number 4).

5. *Structural determinism.* A number of CRT writers focus on ways in which the structure of legal thought or culture influences its content, frequently in a status quo-maintaining direction. Understanding these constraints results in working more effectively towards racial and other types of reform. (Theme number 5).

6. *Race, sex, class, and their intersections.* Other scholars explore the intersections of race, sex, and class, pursuing such questions as whether race and class are separate disadvantaging factors, or the extent to which black women's interests are or are not adequately represented in the contemporary women's movement. (Theme number 6).

7. *Essentialism and anti-essentialism.* Scholars who write about these issues are concerned with the appropriate unit for analysis: Is the black community one, or many, communities? Do middle- and working-class African-Americans have different interests and needs? Do all oppressed peoples have something in common? (Theme number 7).

8. *Cultural nationalism/separatism.* An emerging strain within CRT holds that people of color can best promote their interests through separation from the American mainstream. Some believe that preserving diversity and separateness will benefit all, not just groups of color. We include here, as well, articles encouraging black nationalism, power, or insurrection. (Theme number 8).

9. *Legal institutions, Critical pedagogy, and minorities in the bar.* Women and scholars of color have long been concerned about representation in law school and the bar. Recently, a number of authors have begun to search for new approaches to these questions and to develop an alternative, Critical pedagogy. (Theme number 9).

10. *Criticism and self-criticism; responses.* Under this heading we include works of significant criticism addressed at CRT, either by outsiders or persons within the movement, together with responses to such criticism. (Theme number 10).

11. *Critical Race feminism.* Here we include works addressing the unique situation of women of color (other than intersectionality (Theme number 6) and essentialism (Theme number 7)), such as reproductive freedom and the social construction of women of color. (Theme number 11).

A final note about our methodology: What follows is a list of articles and books—not of persons, much less members of a school. CRT lacks a formal organizational structure; there are no members as such. Many of the authors whose works we include devote only a portion of their output to Critical jurisprudence. Others are flatly critical of CRT (see Theme number 10) or discuss its place within legal thought in general. Our annotations cannot begin to do justice to the rich body of Critical thought they summarize. We warrant only that the works that follow can shed light on one or more aspects of Critical Race Theory, and we invite readers to study the complete works for themselves.

ANNOTATED BIBLIOGRAPHY

Aleinikoff, T. Alexander, Re-Reading Justice Harlan's Dissent in *Plessy v. Ferguson*: Freedom, Antiracism, and Citizenship, 1992 U. Ill. L. Rev. 961. (Themes 3, 5).

Re-examines Justice Harlan's "our Constitution is color-blind" dissent in *Plessy v. Ferguson*.¹⁰ Responds to conservatives' misappropriation of the phrase, showing that it was not intended as an enshrinement of color-blindness, but as a prohibition against a caste system characterized by white supremacy. Suggests new attention to the concept of "liberty," which has deep roots in the civil rights movement, and may be understood to encompass positive rights as well as anti-caste protection.

Barnes, Robin D., Standing Guard for the P.C. Militia, or, Fighting Hatred and Indifference: Some Thoughts on Expressive Hate-Conduct and Political Correctness, 1992 U. Ill. L. Rev. 979. (Themes 1, 4).

Urges more stringent penalties for perpetrators of race crimes and hate speech. Rejects the view that those who call for such a response are engaging in censorship, since persons who utter targeted racial vilification are not inviting their victims to engage in a dialogue, but are hoping to silence and harass them. Asserts that campus hate speech impairs the university's ability to serve its broad social functions and, ultimately, threatens national productivity if promising students of color leave or become demoralized. Rejects the view that the debate is only about feelings or about merely symbolic concessions to campus activists.

Bell, Derrick, Political Reality Testing: 1993, 61 Fordham L. Rev. 1033 (1993). (Themes 1, 2, 3, 4, 8).

Applies themes from his recent book, *Faces at the Bottom of the Well*,¹¹ to the current political scene. While applauding President Clinton's intention, declared

10. 163 U.S. 537 (1896).

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

in the 1993 State of the Union address, to bring about social reforms, points out and discusses two matters Clinton neglected: (1) the status of black Americans is far worse than that of whites, and (2) white racism blocks reforms that would benefit whites as well as blacks. Discusses scapegoating, tokenism, code words, and the rallying of antiblack sentiment among low-income whites. Illustrates the ineffectiveness of antidiscrimination laws and policies by means of a hypothetical Racial Preference Licensing Act, and shows the fragility of black rights with a hypothetical "Chronicle of the Space Traders."

Bell, Derrick & Erin Edmonds, *Students as Teachers, Teachers as Learners*, 91 Mich. L. Rev. 2025 (1993). (Themes 2, 9, 10).

Critiques Judge Harry Edwards' recent article¹² which charges that law schools have abandoned their mission of teaching practical scholarship. Contends that Edwards fails to acknowledge the contributions of new approaches such as feminism and Critical Race Theory because they depart from traditional legal pedagogy. Proposes that interdisciplinary and critical scholarship offer alternative approaches that address the crisis of ethics in the practice of law, a situation that Judge Edwards finds so disturbing. (Foreword by Derrick Bell, article by Bell and Erin Edmonds).

Brooks, Roy L., *A Critical Race Theory Critique of the Right to a Jury Trial Under Title VII*, 5 U. Fla. J.L. & Pub. Pol'y 159 (1993). (Themes 1, 4).

Analyzes a recent amendment to Title VII of the 1964 Civil Rights Act affording a jury trial in cases that include a demand for compensatory or punitive damages. Warns that the jury-trial provision may not be a positive development because racism is an ingrained, ordinary and normal feature of American life and experience. As a result, jurors are apt to be no fairer than judges in setting damages, and likely worse. Asserts that procedural devices, such as voir dire and post-trial motions, are unlikely to be able to control prejudice on the part of

12. Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992).

jurors because of the cost of employing them and the difficulty of making racism manifest. Consequently, minority plaintiffs now have an even greater chance of losing Title VII lawsuits.

Brown, Kevin, *Do African-Americans Need Immersion Schools?: The Paradoxes Created by Legal Conceptualization of Race and Public Education*, 78 *Iowa L. Rev.* 813 (1993). (Themes 1, 5, 8).

Argues that the current debate over African-American immersion schools (schools that emphasize Black pride and an Afrocentric perspective) does not take account of the real justification for those schools, namely equipping black students to overcome racial obstacles contributing to their own repression at the hands of the dominant culture. Once we lose sight of this justification, there is no good way for the law to resolve the constitutionality of these schools—any solution will lead to a paradox.

Brown, Kevin, *The Legal Rhetorical Structure for the Conversion of Desegregation Lawsuits to Quality Education Lawsuits*, 42 *Emory L.J.* 791 (1993). (Themes 1, 3, 5, 8).

Shows how the Supreme Court in *Freeman v. Pitts*¹³ gives federal courts discretion to relinquish supervision over student assignments yet insist that predominantly black and predominantly white schools are given roughly equal funding. Discusses the historical debate among African-Americans over integrated versus separate education. Highlights the paradoxical nature of the Supreme Court's framework for resolving de jure segregation, namely, that the needs for segregation in the past and desegregation now are both premised on African-American inferiority. Points out that advocates of racial separation today are able to urge that mutual respect and African-American equality support their position.

Brown, Kevin, *The Social Construction of a Rape Victim: Stories of African-American Males About the Rape of Desiree Washington*, 1992 *U. Ill. L. Rev.* 997. (Themes 2, 4, 6, 7).

Uses conversations with African-American males in Indianapolis to show how belief systems operating in the

13. 112 S. Ct. 1430 (1992).

black community helped construct Mike Tyson as a victim, even though he was accused and convicted of raping Desiree Washington. Points out that loyalty to the black community demands that racism trump sexism as the first fight to be won, due to the fundamental belief that justice is white. Argues that this view victimizes African-American women indefinitely, because the racial problem will never be solved. Further argues that African-American men are victimized by the reinforced stereotypes of them as violent and oversexed.

Calmore, John O., *Spatial Equality and the Kerner Commission Report: A Back-to-the-Future Essay*, 71 N.C. L. Rev. 1487 (1993). (Themes 1, 3, 8).

Re-examines the 1968 Kerner Commission's conclusion that the "urban crisis" needed two kinds of solutions: (1) programs to encourage the integration of blacks into white neighborhoods, and (2) programs to improve the quality of life in existing black communities. Urges attention to a "spatial equality" approach, namely redirecting resources to improve housing and enrich life in black communities. Critiques the traditional civil rights focus on integrated housing, showing that whites resist it strongly beyond a certain point, and that the token blacks who are accepted suffer constant stress as well as a loss of community connection. Shows how federal policies, especially after World War II, such as FHA and VA mortgage qualifications, together with other practices such as redlining and neighborhood covenants, made it difficult or impossible for blacks to buy adequate housing. Suggests strategies to assure affordable housing in communities of color as well as integrated housing opportunities.

Chang, Robert S., *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 Cal. L. Rev. 1241 (1993). (Themes 2, 3, 5, 7, 10).

Examines historical and present nativist violence and discrimination along with the Model Minority Myth (which holds that Asian Americans—the Model Minority—adapt to the dominant social groups and achieve success quickly and easily) as mechanisms of oppression targeted specifically against Asian Americans. Demon-

strates how acts of violence are dismissed as isolated incidents, while the Model Minority Myth's denial of such discrimination serves to perpetuate its existence. Argues that the latter device not only disadvantages Asian Americans, but harms other minority groups as well, when their valid claims of racial bias are discounted as failure to strive. Discusses the use and justification of narrative in Asian American outsider scholarship generally. Argues that Critical scholarship must expand to include Asians' narratives and experiences, and that without these, CRT cannot give an adequate account of the experience of any group of color. Concludes by proposing a post-structuralist critique as the most effective locus for the emerging and much-needed Asian American legal scholarship.

Cook, Anthony, *Cultural Racism and the Limits of Rationality in the Saga of Rodney King*, 70 *Denv. U. L. Rev.* 297 (1993). (Themes 1, 3, 5).

Discusses three levels of conscious and unconscious racism—individual, institutional, and cultural—that Cook believes were present in the minds of jurors who acquitted the police officers who beat Rodney King. Shows that intentional individual racism embraces and stems from a rationalist model. Examines the way institutions, through bureaucratic group-think, develop facially neutral norms which can result in racist actions and decisions. Describes how cultural racism is rooted in assumptions of white racial superiority found in Judeo-Christian beliefs, Newtonian science, and the Enlightenment. Argues that the jurors, despite indisputable videotape evidence, could not escape these forces and so voted for acquittal.

Cook, Anthony E., *The Spiritual Movement Towards Justice*, 1992 *U. Ill. L. Rev.* 1007. (Themes 1, 2, 6, 7, 8).

Shows how black strategies for fighting racial oppression shift from accentuating sameness (during Abolition and the Civil Rights Movement) when whites emphasized race-conscious particularism, to praising difference (during the Black Power struggle) when whites insisted on colorblind universalism. Calls for a spiritual movement that will balance the tension between unifying

universalism and a parochial particularism. Hopes that Critical Race Theory will be able to develop such a synthesis.

Crenshaw, Kimberlè W. & Gary Peller, *Reel Time/Real Justice*, 70 *Denv. U. L. Rev.* 283 (1993). (Themes 1, 3, 4, 5)

Describes how defense counsel broke down the videotape of Rodney King's beating into individual still pictures, none of which conclusively showed "excessive force," thereby presenting Rodney King as a threat to police rather than a victim of their brutality. Shows that this process (of divorcing meaning from context) is similar to that which the Supreme Court used in disaggregating the evidence presented by the City of Richmond in *City of Richmond v. Croson*,¹⁴ thereby converting a race-conscious affirmative action case into one of colorblindness and formal legal equality. Declares that in each arena a struggle ensued over which narrative would prevail in interpreting events, exposing the inadequacy of a simplistic "rule of law" to mediate these conflicts.

Crenshaw, Kimberlè W., *Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* (1993).

See Matsuda, Mari J., et al., *Words that Wound: Critical Race Theory, Assaultive Speech and the First Amendment* (1993).¹⁵

Culp, Jerome M., Jr., *Neutrality, the Race Question, and the 1991 Civil Rights Act: The "Impossibility" of Permanent Reform*, 45 *Rutgers L. Rev.* 965 (1993). (Themes 1, 3).

Reviews assumptions in the debate surrounding the passage of the 1991 Civil Rights Act, identifying three fundamental errors: (1) the fixity assumption (belief in a permanent and fixed legal standard), (2) the neutrality assumption (belief that it is possible to develop neutral standards), and (3) the failure to ask "the race question"—viz., take seriously the reality of racism in America. Examines how the Supreme Court deemed race an irrelevant issue in *Wygant v. Jackson Board of*

14. 488 U.S. 469 (1989).

15. See *infra* p. 182.

*Education*¹⁶ and other employment discrimination cases, thus enshrining an official view that is blind to the history of past wrongs against blacks and vigilant against special benefits toward them. Shows how a law and economics approach to Title VII incorporates many of the errors mentioned above, and demonstrates how recent Supreme Court decisions frustrate Title VII's intention to increase the number of black employees. Discusses how the 1991 Civil Rights Act leaves unresolved two critical issues: coverage of small employers and temporary workers, and hiring minorities in professional settings such as the academic marketplace. The combination of a sluggish Congress and a refractory Court implies that blacks' disadvantage in the workplace may well be permanent.

Culp, Jerome M., Jr., Notes from California: Rodney King and the Race Question, 70 *Denv. U. L. Rev.* 199 (1993). (Themes 1, 3, 4).

Points out that California, the most multiracial state, has failed to fulfill its promise of racial justice in the wake of the Rodney King case and the Los Angeles insurrection. Explains the "rules of engagement" by which African-American males are taught to survive in the face of a hostile criminal justice system. Argues that failing to acknowledge race in matters of criminal justice increases racial subordination. Examines the case of a sixty-five-year-old white woman receiving worker's compensation due to her aversion toward black men after she was attacked by an unidentified male she insisted was black. Urges that law and legal remedies should not be racially blind or silent and that "the race question" should be constantly and insistently asked.

Culp, Jerome M., Jr., You Can Take Them to Water but You Can't Make Them Drink: Black Legal Scholarship and White Legal Scholars, 1992 *U. Ill. L. Rev.* 1021. (Themes 2, 4, 6, 9).

Analyzes and compares stories by scholars of color that white legal scholars find comprehensible with those they generally do not. Notes the wide public acceptance of

16. 476 U.S. 267 (1986).

Stephen Carter's *Reflections of an Affirmative Action Baby*¹⁷ and shows that Patricia Williams' *The Alchemy of Race and Rights*¹⁸ is less understood and accepted by whites because it is unconventional, oppositional, and tells stories whites do not like to hear. Concludes that Williams' approach, if heeded by majority race legal scholars, can transform the legal system into one that will take seriously the lives and experiences of black people.

Davis, Peggy C., *Neglected Stories and the Lawfulness of Roe v. Wade*, 28 Harv. C.R.-C.L. L. Rev. 299 (1993). (Themes 3, 6).

Traces the impact of slavery and abolition on the development of family law. Shows that attention to these neglected stories can illuminate recent legal struggles over such issues as parental rights, abortion, contraception, sterilization, and the status of children. Demonstrates that the ideal of family liberty was refined and strengthened through the struggle against slavery and caste oppression. Concludes that the same principles of respect for individuals and the inviolability of life that animated emancipation and Reconstruction can and should shape the developing law of intimate communities.

Delgado, Richard, *Five Months Later (The Trial Court Opinion)*, 71 Tex. L. Rev. 1011 (1993). (Themes 1, 2).

Presents a fictional trial court opinion written by a federal judge upholding the minority hiring programs of several law schools and the American Association of Law Schools. Follows an earlier article by Michael Paulsen¹⁹ in which the same judge overruled a motion for summary judgment brought by the schools when sued by a disappointed white applicant for a law teaching position. Shows how case law and social policies can easily be marshalled to support race-conscious hiring, indeed, that the law schools' "two-pile" procedure might

17. STEPHEN L. CARTER, *REFLECTIONS OF AN AFFIRMATIVE ACTION BABY* (1991).

18. PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* (1991).

19. Michael S. Paulsen, *Reverse Discrimination and Law School Faculty Hiring: The Undiscovered Opinion*, 71 Tex. L. Rev. 993 (1993).

well have been instituted to protect applicants such as the disappointed white.

Delgado, Richard, *The Inward Turn in Outsider Jurisprudence*, 34 *Wm. & Mary L. Rev.* 741 (1993). (Themes 7, 10).

Discusses two movements respecting outsider jurisprudence—the call for standards by which radical feminist or Critical Race scholarship can be judged, and antiessentialism, the tendency of these groups successively to identify smaller subgroups within themselves. Argues that the first movement is premature and potentially harmful, while the second (antiessentialism) is normal and not to be deplored. Argues that both developments are responses to power shifts and concern over paradigm change.

Delgado, Richard, *On Telling Stories in School: A Reply to Farber and Sherry*, 46 *Vand. L. Rev.* 665 (1993). (Theme 10).

Replies to Farber and Sherry's critique of narrative jurisprudence.²⁰ Points out that critics overlook that majoritarians tell stories too (although these seem not at all like stories, but the truth). Points out a number of errors and misstatements in Farber and Sherry's critique, including their mistaken belief that the validity of CRT storytelling rests on the claim of a distinct minority "voice" and that narrative writing poses greater than usual risks of lack of authenticity, typicality, truth, and reasoned analysis.

Delgado, Richard, *Rodrigo's Second Chronicle: The Economics and Politics of Race*, 91 *Mich. L. Rev.* 1183 (1993). (Themes 1, 2, 4).

Rodrigo Crenshaw (the author's fictional alter ego) returns from exile and engages in a dialogue with his mentor about issues of race, in particular the question of whether the economic marketplace is likely over time to eliminate racism because nonracist businesses will drive out ones that discriminate. Rodrigo argues that racism will tend to increase, not decrease, in a capitalist system because of the operation of a widely shared construction or stereotype and because of Western myths

20. See *infra* p. 175.

about salvation and superiority, all operating together in a "neo-crypto theologico double feedback loop" to keep African-Americans and others in a subordinate position.

Delgado, Richard, *Rodrigo's Third Chronicle: Care, Competition, and the Redemptive Tragedy of Race*, 81 Cal. L. Rev. 387 (1993). (Themes 2, 3, 5).

Rodrigo outlines a new civil rights strategy based on love. In his ideal society, caregiving would be socialized, while the productive sector would be relegated to competition and the free market economy. Concentrated caregiving would redeem many whom our society currently ignores. Crossovers from the two sectors would assure a vibrant, productive, and well-equipped caregiving sector, effectively providing for those who now exist "beyond love." Suggests a new mythic framework and a new form of coercion in order to begin moving toward such a society.

Delgado, Richard, *Rodrigo's Fourth Chronicle: Neutrality and Stasis in Antidiscrimination Law*, 45 Stan. L. Rev. 1133 (1993). (Themes 2, 3, 5).

Rodrigo and the professor use an incident at Rodrigo's law school as a springboard for discussing the difficulty of redressing social harms through neutral legal and social rules. Rodrigo argues that in a society such as ours, even a decision maker with the most pristine social conscience and no traces of overt racism will still end up making decisions adverse to minorities of color. Analyzes the cultural background against which our society and legal system render decisions, concluding that it has much more efficacy than law on the books. Notes that even race-conscious rules intended to protect and benefit minorities generally end up making matters worse. Gives a number of cultural and structural reasons for the persistence of racism even in a society whose formal rules condemn it.

Delgado, Richard, *Rodrigo's Fifth Chronicle: Civitas, Civil Wrongs, and the Politics of Denial*, 45 Stan. L. Rev. 1581 (1993). (Themes 1, 2, 9).

Rodrigo and the professor discuss the highly normative turn legal education has taken. They decide that the

intense preoccupation with professional responsibility and vague, aspirational catch phrases like “the role of the good lawyer” are aspects of the “Owl of Minerva” phenomenon and by-products of a profession and a culture in decline. Instead of engaging in denial and normative discussion, they conclude, we would do better to confront our racial and economic problems directly. In this fashion, outsider discourse and insights can break the circle of nonproductive, predictable, normative dialogue that rarely goes anywhere.

Delgado, Richard, *A Shifting Balance: Freedom of Expression and Hate-Speech Restriction*, 78 Iowa L. Rev. 737 (1993).

See Stefancic, Jean & Richard Delgado, *A Shifting Balance: Freedom of Expression and Hate-Speech Restriction*, 78 Iowa L. Rev. 737 (1993).²¹

Delgado, Richard, *Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* (1993).

See Matsuda, Mari et al., *Words That Wound: Critical Race Theory, Assaultive Speech and the First Amendment* (1993).²²

Edmonds, Erin, *Students as Teachers, Teachers as Learners*, 91 Mich. L. Rev. 2025 (1993).

See Bell, Derrick & Erin Edmonds, *Students as Teachers, Teachers as Learners*, 91 Mich. L. Rev. 2025 (1993).²³

Espinoza, Leslie G., *The LSAT: Narratives and Bias*, 1 Am. U. J. Gender & L. 121 (1993). (Themes 4, 9).

Examines actual LSAT questions for test bias, finding that many incorporate stories that are offensive—that degrade women, reinforce stereotypes, or remind outsiders that they are outsiders. Such items bring out socialized self-doubt and hinder performance. Other items encode cultural views, presuppositions, information, or preferences that test-takers of color or from disadvantaged backgrounds may not share. Describes test agencies' resistance to mandated disclosure of tests

21. See *infra* p. 187.

22. See *infra* p. 182.

23. See *supra* p. 164.

and test items, and argues for continuing narrative analysis of test items through public exposure.

Evans, Monica J., *Stealing Away: Black Women, Outlaw Culture and the Rhetoric of Rights*, 28 Harv. C.R.-C.L. L. Rev. 263 (1993). (Themes 1, 2, 8, 11).

Compares the predicament of black women to that described in early African-American escape songs and spirituals. Urges that the messages of those songs, which included resistance and subversion (themes heard only by the slaves) have special force today, when many communities of color live a constructed identity as outlaws. Examines the role of black women as shapers of a positive, outlaw culture—which included theft, passive resistance, noncooperation with the draft, and cheating—as an alternative to their continued subjugation. Uses example of nineteenth century black women's clubs to illustrate how assertion and resistance can subvert the dominant definition of woman and shows how rights discourse is fully consistent with a community-based model of reconstructive theory and practice.

Fair, Bryan K., *Foreword: Rethinking the Colorblindness Model*, 13 Nat'l Black L.J. 1 (1993). (Themes 1, 2, 3, 5).

Shows that racial inequality and color awareness, including government-sponsored or -sanctioned discrimination against blacks and others, are dominant themes in U.S. racial history. Examines the evolution of the antidiscrimination principle and the competing visions of the colorblindness model to reveal the means by which colorblindness today permits the same racial subordination allowed by the separate-but-equal doctrine of *Plessy v. Ferguson*.²⁴ Demonstrates that the Supreme Court analyzes race and gender classifications differently, and suggests that the Court's different treatment of these discrimination cases is unwarranted. Advocates applying the gender classification standard to racial cases for a fairer and more consistent result. Supports his argument by applying to the facts of *City of Richmond v. Croson*²⁵ the Court's ground of differ-

24. 163 U.S. 537 (1896).

25. 488 U.S. 469 (1989).

ence rationale usually applied in sex discrimination cases.

Farber, Daniel A. & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 *Stan. L. Rev.* 807 (1993). (Themes 2, 10).

Evaluates the legal storytelling movement and its claims. Asserts that women and people of color do not write or speak in a special or different voice inaccessible to others. Holds that legal storytelling may be a useful and valid form of scholarship, but that it also has dangers. Stories may be inauthentic, atypical, or untrue. Moreover, they may be used to support a particular interpretation of an event (for example, discrimination in a department store) when other interpretations are equally plausible. Moreover, stories must be adequately tied to legal doctrine and analysis to be useful to lawyers; many that have been offered so far are not. Concludes with a call for a standard for evaluating the new narrative scholarship so that the legal academy will be able to recognize high quality narratives and condemn those that fail to meet the standard.

Flagg, Barbara J., *Was Blind But Now I See: White Race Consciousness and the Requirement of Discriminatory Intent*, 91 *Mich. L. Rev.* 953 (1993). (Themes 1, 4, 5).

Argues for greater Critical focus on whiteness, and in particular the way in which ostensibly race-neutral legal rules end up favoring whites and disadvantaging blacks. Urges that "transparency" be recognized as a defining characteristic of whiteness and that skepticism toward whiteness is overdue. This new skeptical stance toward whiteness can ultimately lead to development of a positive white racial identity, one that sees whiteness not as a racial norm but as merely one racial identity among many. Government decisionmakers (including courts) should adopt the same skepticism, taking responsibility for eradicating the racism that arises from unquestioned application of neutral rules and norms that perpetuate white advantage.

Gordon, James W., *Did the First Justice Harlan Have a Black Brother?* 15 W. New Eng. L. Rev. 159 (1993). (Theme 3).

In 1848, James Harlan, the father of future Supreme Court Justice John Marshall Harlan, appeared in a Kentucky courtroom for the purpose of freeing his thirty-two-year-old slave, Robert Harlan. Robert, a light-skinned, blue-eyed man, had been raised in the household of the Harlan family, given an informal education, and afforded opportunities to travel and make money. Argues that the special treatment accorded Robert by his influential master-family has a simple explanation: Robert Harlan was James Harlan's son, and the first Justice Harlan (the author of the famous dissent in *Plessy v. Ferguson*²⁶) had a black half-brother. Traces the lives of Robert and the other Harlans; reviews the history of miscegenation in the antebellum South; and concludes that the special relation of Robert and the young Justice-to-be may have shaped his dream of a color-blind future—"and by writing about it [he] . . . began the process of creating it."

Greene, Dwight L., *Justice Scalia and Tonto: Judicial Pluralistic Ignorance and the Myth of Colorless Individualism in Bostick v. Florida*, 67 Tul. L. Rev. 1979 (1993). (Themes 1, 8).

Challenges Justice Antonin Scalia's view that ethnic whites are not privileged and cannot be held responsible for the legacy of discrimination against blacks. Uses stories to illustrate ways class and color privilege whites and burden people of color. Shows how twenty years of Republican judicial appointments produced demographically distorted courts. Demonstrates how judges, by virtue of their similar class, ideology, and race, form a cognitive reference group sharing erroneous beliefs about individuals not like them ("pluralistic ignorance"). Shows how judges draw and build on shared myths (e.g., the Lone Ranger and Tonto) to reconcile disparities between the treatment of blacks and whites, particularly in police encounters. Suggests alternatives to "colorless individualism," including developing a more diverse judiciary and using a broader reasonable person stan-

26. 163 U.S. 537 (1896).

dard. Advocates rights training in communities of color so that people can learn how to exercise their rights in encounters with police and "just say no."

Guinier, Lani, Groups, Representation, and Race-Conscious Districting: A Case of the Emperor's Clothes, 71 *Tex. L. Rev.* 1589 (1993). (Themes 1, 5).

Counters arguments by critics of the Voting Rights Act that race-conscious districting and group representation diminish democracy, cause fixation on racial identity, and unfairly dilute the white vote. Defends group representation while questioning whether race-conscious or territorial districting is the most effective way of assuring that all have a voice. Suggests "one-vote-one-value" as an alternative to gerrymandering and winner-take-all elections. Illustrates all these points by means of an analysis of a recent election in a Brooklyn/Queens district.

Guinier, Lani, The Representation of Minority Interests: The Question of Single-Member Districts, 14 *Cardozo L. Rev.* 1135 (1993). (Themes 1, 5).

Focuses on the limits of districting as a method for representing minority interests. Develops two critical assumptions that should underlie a political fairness standard: representing interest constituencies and insuring these constituencies' proportional influence. Discusses three generations of voting rights issues: (1) gaining direct access to the ballot, (2) increasing the number of minorities in elected office, and (3) analyzing how minority group interests are marginalized and diluted even when minorities are elected. Argues that winner-take-all single-member districting has failed to mobilize sustained voter participation, foster useful debate about issues, or go beyond tokenism in promoting opportunities for minorities. Discusses alternative election systems to single-member majority black districts, such as minority influence districts or cumulative voting (which abandons districting altogether). Declares that proportionate interest representation can reduce the legislative power of a prejudiced majority and assure that minority votes are not diluted.

Harris, Cheryl I., *Law Professors of Color and the Academy: Of Poets and Kings*, 68 *Chi.-Kent L. Rev.* 331 (1992). (Themes 2, 9, 11).

Incorporates Chinua Achebe's stories of African kings regarding power and its associated risks. Illustrates similarities between the tribulations Achebe recounts and those of scholars of color today. Argues that it is the duty of scholars of color to expose law's hypocrisy and oppression, despite the risk that doing so may make "the king" angry. Recalls her own ambivalence and double-consciousness as she entered law teaching and the many problems she encountered as a lone black attempting to infuse students with a sense of critical analysis.

Harris, Cheryl I., *Whiteness as Property*, 106 *Harv. L. Rev.* 1707 (1993). (Themes 1, 2, 3, 4, 5).

Investigates the relationship between race and property. Examines how "whiteness," originally a form of racial identity, evolved into a property interest for those who could define themselves as white. Shows how the origins of whiteness as a property interest lie in systems of domination by whites of black and Native American peoples. Argues that the common premise "whiteness" and "property" share—a right to exclude—enabled white identity to become the basis of racial privilege which allocated societal benefits, these arrangements then becoming legitimated in law as a kind of status property. Illustrates how property interest in whiteness was not discarded in *Plessy v. Ferguson*²⁷ and *Brown v. Board of Education*,²⁸ but rather transformed, and that recent affirmative action cases mask the privileging of whiteness in the guise of enshrining the status quo as a neutral baseline. Concludes that focusing on distortions created by property interest in whiteness opens alternative perspectives on the affirmative action debate.

Iglesias, Elizabeth M., *Structures of Subordination: Women of Color at the Intersection of Title VII and the NLRA*. *Not!*, 28 *Harv. C.R.-C.L. L. Rev.* 395 (1993). (Themes 1, 6, 7, 10, 11).

27. 163 U.S. 537 (1896).

28. 347 U.S. 483 (1954).

Takes issue with recent writing that focuses excessively on legal meanings and stories of the oppressed in hopes of improving their condition. Argues instead for attention to questions of institutional power and the structural violence of daily life, as abetted by law. Borrows from liberation theology its commitment to material empowerment of subordinated people. Argues that the potential of approaches such as "sensitivity training" and appeals to empathy has largely been exhausted. Suggests that a better approach for advancing the objectives of Title VII and national labor laws would focus on collective organization of workers and the way in which the legal system operates to keep workers, especially women of color, fragmented and powerless.

Ikemoto, Lisa C., *Traces of the Master Narrative in the Story of African-American/Korean-American Conflict: How We Constructed "Los Angeles,"* 66 S. Cal. L. Rev. 1581 (1993). (Themes 2, 3, 4, 5, 6, 7).

Analyzes how society constructed, explained, and gave meaning to "Los Angeles"—the wave of disturbances that followed the first Rodney King verdict—and especially to the intergroup conflict that supposedly underlay those events. Explores the dynamic behind the many accounts of the L.A. events, noting the way a master narrative defines race oppositionally and in terms of power-laden, interest-serving categories and narratives, including claims of entitlement, racial positioning, constructed identities and racial pairing. Shows that "Los Angeles" has become a metaphor for multiculturalism's failure and impossibility, as well as a justification for racial distancing.

Johnson, Alex M., Jr., *Defending the Use of Quotas in Affirmative Action: Attacking Racism in the Nineties,* 1992 U. Ill. L. Rev. 1043. (Themes 1, 3, 4, 5, 9).

Shows how benign affirmative action programs have failed to improve the lot of African-Americans, and defends racial quotas as a superior means of effecting change. Refutes the myth that quotas benefit unqualified blacks, and argues that the "objective standards" created and applied by the white meritocracy are not objective at all. Insists that, given the history of

discrimination against blacks in the U.S. and the ascription of merit to society's dominant group, mandatory admissions quotas for colleges and graduate schools remain necessary. Points out that the "pool problem" and other arguments against affirmative action programs may themselves often be unconscious expressions of simple racism.

Johnson, Sheri L., *The Language and Culture (Not to Say Race) of Peremptory Challenges*, 35 *Wm. & Mary L. Rev.* 21 (1993). (Themes 1, 4).

Focuses on the defendant's claim that race-based jury selection violates the guarantee of equal protection of the law. Reviews cases concerning the use of peremptory challenges to eliminate jurors of different races in criminal cases, leading up to *Hernandez v. New York*,²⁹ the "court interpreter" case. Argues that courts are insufficiently vigilant in cases where a trait, such as language ability, culture, appearance, or demeanor serves as a pretext for juror exclusion that is in reality race-based. Points out that the makeup of a jury powerfully determines verdicts, especially where the defendant is a member of a racial minority group. Urges that the current approach be replaced by a "Strauder" model of jury selection that would recognize the realities and dynamics of race in the use of jury strikes.

Johnson, Sheri L., *Racial Imagery in Criminal Cases*, 67 *Tul. L. Rev.* 1739 (1993). (Themes 4, 5).

Examines the use of racial stereotypes, both blatant and subtle, in criminal cases. Shows how negative racial imagery and slurs often permeate criminal trials from pretrial publicity, voir dire and opening statements to testimony, closing arguments, jury instructions, and deliberations. Discusses specific stereotypes and fears. Reviews existing remedies that can be used to restrict racial imagery in trials and shows, through examples, how they have been for the most part ineffective. Proposes other measures that could be taken to control racial stereotyping in criminal cases such as code-of-

29. 50 U.S. 352 (1991).

ethics provisions forbidding the use of negative racial imagery, and racial imagery shield laws similar to the rape shield laws. Warns that society may be slow to adopt such measures because self-interest and self-righteousness stand in the way.

Kennedy, Randall, In Praise of the Struggle for Diversity on Law School Faculties, 22 Seton Hall L. Rev. 1389 (1992). (Themes 1, 6, 9).

Praises the movement toward diversity. Uses example of his own institution (Harvard), which did not hire its first black tenured professor until 1969, to show the slow pace of racial progress. Points out that diversification is particularly crucial in the professoriate, since the newcomers can challenge power and conventional notions of authority. Characterizes the core aspiration of the diversity effort as “morally, politically, and intellectually compelling,” and urges that schools avoid criteria for selecting candidates that are themselves tainted with racism (such as Supreme Court clerkships). Encourages diversity proponents not to exaggerate the role of racial discrimination in explaining the paucity of minorities on law faculties, nor to succumb to the credentializing of race and racial voice as criteria for selection.

Lawrence, Charles R., III, Crossburning and the Sound of Silence: Antisubordination Theory and the First Amendment, 37 Vill. L. Rev. 787 (1992). (Themes 1, 2).

Criticizes the Supreme Court’s decision in *R.A.V. v. City of St. Paul*³⁰ as focusing almost entirely on the free-speech rights of cross burners while the victims (the Russ Jones family) are almost entirely absent from the opinion. Notes that courts often ignore the historical significance of cross burning and other forms of hate speech as instruments of terror and repression, transforming an act designed to silence its victims and put them in their place into an invitation to join a public discussion. Discusses the upsurge in racist hate crimes and speech, and argues that the equality principle of

30. 112 S. Ct. 2538 (1992).

*Brown v. Board of Education*³¹ supplies a means of fashioning remedies to control it.

Lawrence, Charles R., III, *Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* (1993).

See Matsuda, Mari J., et al., *Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* (1993).³²

Matsuda, Mari J., Charles R. Lawrence III, Richard Delgado & Kimberlè W. Crenshaw, *Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* (1993). (Themes 1, 2, 3, 4).

Collection of essays on the question of hate speech, embracing tort, regulatory, and constitutional aspects of this problem. Points out that the current near-absolutist paradigm of free-speech protection inadequately protects minorities against the harms of hate speech. Includes a lengthy analytical introduction explaining Critical Race Theory and showing the relation of the emerging anti-hate speech scholarship to that broader movement.

Nunn, Kenneth B., *Rights Held Hostage: Race, Ideology and the Peremptory Challenge*, 28 Harv. C.R.-C.L. L. Rev. 63 (1993). (Themes 1, 4, 5).

Argues that the Supreme Court's recent jury selection cases have failed abjectly to control racism in criminal trials. Attributes this failure to reliance on colorblind principles which substitute procedural for substantive equality, an approach that ends up privileging white over black interests. Concludes with a counternarrative demonstrating that black defendants are situated differently from whites with respect to jury discrimination and that ostensibly neutral treatment silently and effectively contributes to black subjugation. Urges that the use of the peremptory challenge to strike black jurors be prohibited in cases where there is a danger that the trial will be tainted by racism.

31. 347 U.S. 483 (1954).

32. See *infra* p. 182.

Ontiveros, Maria L., Three Perspectives on Workplace Harassment of Women of Color, 23 Golden Gate U. L. Rev. 817 (1993). (Themes 4, 6).

Provides a framework for understanding the roles of race and culture in workplace harassment of women of color. Describes how racism and sexism combine to form an indistinguishable whole from the perspectives of the harasser, the victim, and the legal system. Argues for reform through either a modification of the rules governing sexual harassment, or the creation of a new cause of action for women of color who are harassed at the workplace.

Peller, Gary, Criminal Law, Race, and the Ideology of Bias: Transcending the Critical Tools of the Sixties, 67 Tul. L. Rev. 2231 (1993). (Themes 1, 3, 6, 9).

Examines racial bias of the criminal justice system and the way criminal law interacts with American racism. Discusses the contemporary emphasis on procedure rather than substance in criminal law. Shows how that emphasis, combined with the integrationist model of racial harmony (which discounts race as an arbitrary attribute), limits the range of discourse about race and criminal law. Reviews Black Nationalist position that police conduct in African-American communities resembles colonialism, and calls for community control. Suggests rejection of premises of neutrality in procedural criminal law and an analysis of substantive criminal law as "embodying a culturally particular way of ascribing responsibility and punishment."

Peller, Gary, The Discourse of Constitutional Degradation, 81 Geo. L.J. 313 (1992). (Theme 10).

Replies to Mark Tushnet's critique of contemporary legal scholarship in his article, *The Degradation of Constitutional Discourse*.³³ Takes particular issue with its critique of the integrity of certain authors, such as Derrick Bell, Catharine MacKinnon, and Patricia Williams, and the article's assertion that their writing is lacking in irony and a sense of proportion, thus contrib-

33. See *infra* pp. 187-88.

uting to a "degradation" of legal discourse. Argues that Tushnet's attack itself is not unbiased and is a manifestation of generational and cultural tensions at work in the legal academy.

Peller, Gary, Notes Toward a Postmodern Nationalism, 1992 U. Ill. L. Rev. 1095. (Themes 1, 5, 8).

Discusses tensions between black nationalism and integration, pointing out potential pitfalls in each. Proposes a role for white scholars exploring the roots and voice of the dominant culture, with a view toward coexisting with blacks as different and sometimes alien groups, moving toward a cosmopolitan postmodern nationalism.

Peller, Gary, Reel Time/Real Justice, 70 Denv. U. L. Rev. 283 (1993).

See Crenshaw, Kimberlè W. & Gary Peller, Reel Time/Real Justice, 70 Denv. U. L. Rev. 283 (1993).³⁴

Perea, Juan F., Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English, 77 Minn. L. Rev. 269 (1992). (Themes 1, 3).

Recounts history of U.S. "nativism"—anti-immigrant and anti-minority sentiment aimed at reinforcing the core culture—and shows that the recent English-only movement is a similar demand for conformity. Shows that this movement rests on and disseminates a series of myths such as that national unity depends on a common language and that the only true language of American identity is English. Shows how legal history documenting the relation between the dominant and other cultures with respect to language casts doubt on these myths, indeed that early in our history a variety of languages other than English were deemed official. Argues that the intense nativism of the official English movement and its predecessors is merely a device to exclude unpopular groups from full citizenship, and deserves to be resisted as an unwarranted attack on liberty and the right to equal treatment under the law.

34. See *supra* p. 168.

powell, john a., *Race and Poverty: A New Focus for Legal Services*, 27 *Clearinghouse Rev.* 299 (1993). (Themes 1, 5, 6).

Points out that the work of lawyers for the poor and that of civil rights activists, while valuable and gallant, has not done much to address the unique problems of the black poor. Urges greater attention to the way in which race and poverty intersect. Challenges the assumption that addressing problems of racial injustice will cause poverty to recede; and conversely, that redressing poverty will solve all the problems of the community of color. Shows that inadequate schools, housing, and criminal-justice policies trap many blacks in the lower reaches of income and class. Warns that these problems will require special treatment if they are not to become permanent features of our national landscape.

Ramirez, Deborah A., *Excluded Voices: The Disenfranchisement of Ethnic Groups from Jury Service*, 1993 *Wis. L. Rev.* 761. (Themes 3, 7).

Criticizes the United States Supreme Court decision, *Hernandez v. New York*,³⁵ in which the Court held that it was constitutional to exclude bilinguals from a jury where witnesses were to testify in Spanish. Responds to the plurality's assumption that the potential jurors were challenged only because of deficient responses and not because of their status as bilinguals. Uses psycholinguistic evidence to explain why it is impossible for any bilingual to comply with an instruction to acknowledge only the English interpretation of foreign language testimony when the juror comprehends that foreign language. Argues that *Hernandez* effectively discriminates against Latinos because of the super-correlation between race and language in the Latino community.

Roberts, Dorothy E., *Crime, Race, and Reproduction*, 67 *Tul. L. Rev.* 1945 (1993). (Themes 1, 11).

Shows, through numerous examples, the way race is embedded in the foundation of criminal law (viz., who criminals are, what conduct constitutes a crime, which crimes are most serious). Discusses the eugenics

35. 500 U.S. 352 (1991).

movement and the long history in the U.S. of biological solutions (e.g., sterilization and castration) to control and punish blacks and others deemed "socially inadequate." Focuses on the convergence of race, crime, and reproduction to highlight how new "technologies of power" (e.g., Norplant, biochemical therapies) are being used further to oppress and dominate blacks.

Roberts, Dorothy E., *Rust v. Sullivan* and the Control of Knowledge, 61 Geo. Wash. L. Rev. 587 (1993). (Themes 1, 11).

Discusses the impact of the Supreme Court decision in *Rust v. Sullivan*³⁶ which upheld a regulation prohibiting federally funded family planning clinics from providing information about abortion. Describes the plight of poor and low-income women dependent on these clinics for health care and maintains that the Court inflicted a kind of violence on them. Examines how oppressors use knowledge to maintain their superior position by determining social meanings, controlling educational content, stifling sources of information needed by oppressed groups, and, in the case of the Supreme Court, manipulating purportedly neutral legal doctrine. Explores how the oppressed can use knowledge as a means of liberation. Suggests that a proper constitutional vision would recognize the importance of knowledge for self-determination and affirm a governmental duty to provide it to those dependent on government funds.

Russell, Jennifer M., On Being a Gorilla in Your Midst, or The Life of One Blackwoman in the Legal Academy, 28 Harv. C.R.-C.L. L. Rev. 259 (1993). (Themes 2, 3, 9).

Describes her thoughts and feelings on being confronted by a photograph of a menacing gorilla left anonymously in her faculty mailbox. Attributes the incident to white resentment over the presence of a black woman in the academy and the sense that her appointment must have come at the expense of a white individual who was not selected. Describes her reaction to treatment, as the beneficiary of a "clemency" appointment, at the hands of

36. 500 U.S. 173 (1991).

colleagues and students. Points out that diversity appointments, unaccompanied by structural and attitudinal change on the part of the institution, exact a severe toll on their beneficiaries.

Spann, Girardeau A., *Race Against the Court* (1993). (Themes 1, 3, 5, 8).

Book-length expansion of his earlier article, *Pure Politics*,³⁷ on the political strength and prospects of minorities. Argues that blacks and other minority people have relatively little to gain from Supreme Court litigation, but much to lose. Urges that a habit of bringing grievances to the courts breeds dependency and is apt to lead to disillusionment as courts inevitably turn aside claims that will too radically change the status quo. Suggests that extrajudicial means, including legislative lobbying and grassroots activism, will often offer greater possibilities for advancing the black agenda.

Stefancic, Jean & Richard Delgado, *A Shifting Balance: Freedom of Expression and Hate-Speech Restriction*, 78 *Iowa L. Rev.* 737 (1993). (Themes 1, 3).

Reviews *Striking a Balance: Hate Speech, Freedom of Expression, and Non-discrimination*,³⁸ a recent collection of essays about the treatment of hate speech and hate crimes in many societies. Argues that the experiences of other nations in coping with these problems can shed light on arguments and counter-arguments commonly made in the U.S. debate, including that hate-speech rules are ineffective and that suppressing hateful expression only makes matters worse. Concludes that speech and inclusion, dialogue and community are inseparable—each presupposing, but also threatening, the other.

Tushnet, Mark, *The Degradation of Constitutional Discourse*, 81 *Geo. L.J.* 251 (1992). (Theme 10).

Criticizes recent uses of storytelling in the law as presenting problems of integrity and judgment, reflected

37. Girardeau A. Spann, *Pure Politics*, 88 *MICH. L. REV.* 1971 (1990).

38. *STRIKING A BALANCE: HATE SPEECH, FREEDOM OF EXPRESSION, AND NON-DISCRIMINATION* (Sandra Coliver ed., 1992).

in missteps in literary style and presentation. Concedes that properly employed, stories and narratives serve to connect particular cases and general legal rules. Concludes, however, that this mediation may easily fall short of its promise by overworking authorial authority, by an excess of "style," by self-righteousness and moral superiority, and by cavalier dismissal of alternative interpretations of the event the writer is describing. Further illustrates the pitfalls of story construction by means of the Hill-Thomas hearings and recent Supreme Court opinions. (Reply by Gary Peller follows.)

West, Cornel, *Race Matters* (1993). (Themes 1, 3, 6, 8).

Eight essays dealing with the poverty of current discourse about race. Urges that the "race problem" is not that black people bother and endanger whites through crime and other social pathology (as conservatives believe), nor that blacks somehow fail or refuse to be included or integrated into white society (as many liberals believe). Rather, concludes that the problem of color is constitutive and symptomatic of our national life; its solution will require that all must change, not just blacks. Depicts the rise of both black nationalism and neo-conservatism as responses to failed national policies based on hedonism and racial xenophobia. Calls for visionary leadership, black and white, to rescue U.S. society from its downward spiral and loss of hope.

COMMENTARY

We offer the following observations on the 1993 Critical Race Theory literature:

1. *Quantity*. Readers of the original bibliography might well be curious to know whether the productivity reflected in that collection has continued or declined. If anything, it seems to have increased. Assuming that CRT began as a more or less formal movement around 1980, it has produced about fifteen to twenty significant articles and books each year during the period covered by the first bibliography.³⁹ Last year, however,

39. See *supra* note 1. The first bibliography included 217 items, most of which appeared over a 13-year period, 1980-1992, for an average of about 17 per year.

we counted fifty-two items using the same criteria as employed for the first bibliography. The concern that symposia and bibliographies may signal the beginning of a movement's decline⁴⁰ seems not to be borne out (so far, at any rate) in the case of CRT.

2. *Quality of the output.* It is difficult to devise any sort of objective measure of the quality of a large body of work. CRT articles and books appear to be cited regularly by mainstream and non-mainstream writers. Of the forty-nine law review articles annotated, eighteen appeared in journals ranked in the top twenty by the latest Chicago-Kent survey of faculty scholarship.⁴¹ Three books appeared, each published by a major press.⁴²

3. *Criticism and critical commentary.* The movement drew more criticism than it did in the period covered by the earlier bibliography.⁴³ Much of the criticism centered around narrative jurisprudence (storytelling), with a number of writers raising doubts about the validity, authenticity, and usefulness of that type of scholarship, as well as questioning how story-based writing could be evaluated for purposes of promotion and tenure.⁴⁴ The literature also contained spirited replies to all these queries and challenges.⁴⁵

4. *Assimilation into the mainstream.* At the same time that the movement was attracting and responding to criticism, it was earning a number of measures of acceptance into the mainstream. Several law review symposia and collections of

40. Stefancic, *supra* note 5, at 673 (raising similar possibility in connection with scholarly symposia).

41. Janet M. Gumm ed., *Chicago-Kent Law Review Faculty Scholarship Survey*, 66 CHI-KENT L. REV. 509 (1990).

42. MARI J. MATSUDA ET AL., *WORDS THAT WOUND* (1993) (published by Westview Press); GIRARDEAU A. SPANN, *RACE AGAINST THE COURT* (1993) (published by New York University Press); and CORNEL WEST, *RACE MATTERS* (1993) (published by Beacon Press).

43. In this bibliography, there are seven works which fall under Theme 10 (criticism and self-criticism; responses). In the earlier bibliography, covering 13 years, there were 45, or approximately three per year.

44. See, e.g., Farber & Sherry, *supra* p. 175; see also Edward L. Rubin, *On Beyond Truth: A Theory for Evaluating Legal Scholarship*, 80 CAL. L. REV. 889 (1992).

45. See, e.g., Chang, *supra* pp. 166-67; Culp, *You Can Take Them to Water But You Can't Make Them Drink: Black Legal Scholarship and White Legal Scholars*, *supra* pp. 169-70; Delgado, *On Telling Stories in School: A Reply to Farber and Sherry*, *supra* p. 171; Peller, *The Discourse of Constitutional Degradation*, *supra* pp. 183-84.

articles on non-Critical topics included CRT writers, who were invited, presumably, to give the Critical viewpoint.⁴⁶ One CRT writer (Lani Guinier) was nominated for federal office but withdrew when her writings on voting rights became controversial. Critical Race scholars appeared on panels and programs at the annual meeting of the Association of American Law Schools in a proportion much higher than their representation in the law professoriate at large.⁴⁷ Two book-length readers or anthologies reportedly are in the works.⁴⁸ Finally, as we write, at least one major law review is preparing a symposium issue devoted entirely to Critical Race Theory.⁴⁹

5. *New writers and collaborations.* In 1993, a number of new writers or combinations of writers appeared. CRT old-timers continued to write, but were joined by several notable newcomers, including Asians and women. A number of established scholars collaborated, some for the first time, others with sympathetic whites.⁵⁰ Young scholars published strong pieces in top journals, including *Harvard Law Review*.⁵¹

6. *Mainstream views of CRT: Framing and reframing the movement.* A fascinating phenomenon, about which we find it difficult to be precise in any quantitative sense, is the way in which some writers in the scholarly and journalistic main-

46. *E.g.*, Symposium, *Civic and Legal Education*, 45 STAN. L. REV. 1525 (1993) (containing an article by Richard Delgado); Symposium, *Criminal Law, Criminal Justice, and Race*, 67 TUL. L. REV. 1807 (1993) (containing a number of CRT essays); Symposium, *Legal Education*, 91 MICH. L. REV. 1921 (1993) (containing an article co-authored by Derrick Bell); Colloquy, *Racism in the Wake of the Los Angeles Riots*, 70 DENV. U. L. REV. 187 (1993) (containing articles by several CRT writers); *Redistricting in the 1990s: The New York Example*, 14 CARDOZO L. REV. 1119 (1993) (containing a contribution by Lani Guinier in an issue containing collected articles on non-Critical topics); Symposium, *Regulating the Electoral Process*, 71 TEX. L. REV. 1409 (1993) (containing an article by Lani Guinier); Symposium, *The Urban Crisis: The Kerner Commission Report Revisited*, 71 N.C. L. REV. 1283 (1993) (containing an article by John Calmore).

47. See ASS'N OF AM. LAW SCHOOLS, 1994 PROGRAM OF THE ANNUAL MEETING (1994) (listing speeches and panel presentations). Of the CRT scholars listed in our earlier Bibliography, *supra* note 1, 30 percent, or 19 out of 62, spoke on panels or programs. For law professors in general, the rate was about 7 percent, or 420 speakers out of a professoriate of approximately 6,000.

48. One is being edited by Richard Delgado; the other by Kimberlè Crenshaw, Neil Gotanda, Gary Peller, and Kendall Thomas.

49. Symposium, *Critical Race Theory*, 82 CAL. L. REV. (forthcoming Winter 1994).

50. See, *e.g.*, Bell & Edmonds, *supra* p. 164; Crenshaw & Peller, *supra* p. 168; Stefancic & Delgado, *supra* p. 187.

51. See, *e.g.*, Harris, *Whiteness as Property*, *supra* p. 178.

stream are struggling to characterize and label CRT. Many, of course, read the literature carefully and come to a relatively comprehensive understanding of its themes and goals. But others seem bent on interpreting the movement in a limited or skewed way. Farber and Sherry, for example, focus on narratives and stories, using those terms virtually interchangeably with "CRT," as though storytelling were all that Critical Race thought entailed.⁵² An early critique by Randall Kennedy focused almost exclusively on the "racial voice" issue,⁵³ and a more recent article by Mark Tushnet took a number of feminists and CRT scholars to task for exaggerated, undocumented, anecdotal claims contributing, in his view, to a degradation of constitutional discourse.⁵⁴ Others criticized Derrick Bell for undue pessimism or abjuring legal analysis for science-fiction-style writing.⁵⁵

Running through much of this commentary is a common thread: The writer seeks to portray Critical Race Theory in a way that renders it more manageable, more similar to that which is known. Some mainstream writers portray CRT as a variant of Neo-Marxism⁵⁶ (known, hence not a threat), or as largely concerned with defending the rights thesis in the face of Critical Legal Studies (safe, because a variant of liberalism),⁵⁷

52. See Farber & Sherry, *supra* p. 175. But see Delgado, *On Telling Stories in School: A Reply to Farber and Sherry*, *supra* p. 171 (pointing out this mistake).

53. Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745 (1989).

54. Tushnet, *supra* pp. 187-88. But see Peller, *The Discourse of Constitutional Degradation*, *supra* pp. 183-84 (replying to Tushnet's article).

55. See, e.g., Alan D. Freeman, *Race and Class: The Dilemma of Liberal Reform*, 90 YALE L.J. 1880 (1981) (reviewing DERRICK BELL, JR., *RACE, RACISM AND AMERICAN LAW* (2d ed. 1980)) (Bell's work perceptive but despairing, calculated to chill public interest fervor on the part of readers); John A. Powell, *Racial Realism or Racial Despair?*, 24 CONN. L. REV. 533 (1992) (similar criticism); Farber & Sherry, *supra* p. 175 (legal storytelling in general is prone to focus on graphic tales and anecdotes, ignoring the need to connect them to legal analysis and doctrine).

56. See Farber & Sherry, *supra* p. 175 (Critical Race Theory has no special "voice" of its own but is merely a collection of writers who oppose class oppression); Randall Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745 (1989) (making this and similar criticisms); Jon Wiener, *Law Profs Fight the Power*, THE NATION, Sept. 14, 1989, at 246, 248 (Critical scholars are merely "playing the race card" in new ways); Stephanie B. Goldberg, *The Law, A New Theory Holds, Has a White Voice*, N.Y. TIMES, July 17, 1992, at A3 (mainstream scholar questions whether the new legal scholarship's differences amount to anything more than "politics or class").

57. E.g., Daniel A. Farber & Suzanna Sherry, *The 200,000 Cards of Dimitri Yurasov: Further Reflections on Scholarship and Truth*, 46 STAN. L. REV. 647

or discuss it only in terms of how it makes them feel (viz., cheerful, or pessimistic).⁵⁸

Perhaps many of the above-mentioned features—an increase in the quantity and quality of the writing, an upsurge in criticism, and increasing assimilation into the mainstream occurring simultaneously with efforts to recharacterize the movement—can all be seen as aspects of homeostasis, the dominant scholarly paradigm struggling to maintain itself. This could explain the appearance of sharp, direct criticism, contemporaneous with the appearance of CRT work in mainstream journals. It could explain the increased output of Critical Race writers in response both to the criticism and the newly opened opportunities and would account for the efforts to characterize CRT as something else. If we are right, the next few years of CRT's life will be lively ones as the cross-cutting forces of criticism, co-optation, resistance, and redoubled effort play themselves out. It seems to us that at least four scenarios are possible:

1. *CRT becomes the new civil rights orthodoxy.* Critical Race Theory could supplant the old and become the new civil rights orthodoxy. The voter election proposals put forward by Lani Guinier could be put in place and proven effective. Campus hate-speech rules proposed by Charles Lawrence, Mari Matsuda and others could be adopted, leading the way toward a more general reconsideration of the role of harmful depiction. Kimberlè Williams Crenshaw and Derrick Bell's critiques of color-blindness and the myth of equal opportunity could lead traditional liberals to re-evaluate their own faith in neutrality and incremental reform. They might then help push through legislation that takes race into account and work to level the playing field between whites and people of color. We might begin to take seriously the "Americanized" federal Indian policy advocated by Robert Williams and others⁵⁹ and reform our

(1994).

58. On writers who evaluate CRT scholarship in terms of how it makes them feel (e.g., poignant, moved, depressed, etc.), see Richard Delgado, *The Imperial Scholar Revisited: How to Marginalize Outsider Writing, Ten Years Later*, 140 U. PA. L. REV. 1349, 1366 (1992).

59. See, e.g., Robert A. Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 WIS. L. REV. 219 (annotated in the original bibliography).

approaches to punishment in the directions suggested by the late Dwight Greene.⁶⁰

2. *CRT marginalized and ignored.* The new race scholars could also be merely ignored, as they were in the movement's early days. Traditional civil rights scholars could continue to write about problems of equality from their own perspective, citing mainly each other and ignoring the perspectives of the new scholars.

3. *CRT analyzed, but rejected.* Critical Race Theory has already attracted scrutiny and criticism. This treatment could continue and accelerate; the scholarly mainstream could reject all or most of its tenets and modes of scholarship.

4. *Partial incorporation.* If CRT is taken seriously, we believe a fourth outcome is likely. Some of it will be accepted, while other parts will continue to meet resistance. Mainstream scholars may impose standards, in the manner of Farber and Sherry. Under this scenario, some forms of CRT scholarship, probably including the narrative turn and the critique of neutral jurisprudence, will eventually win approval. More radical features, such as the call for recognizing the status quo as inherently racist rather than only sporadically so, are likely to be rejected. But even if only the former, milder insights of Critical jurisprudence win out, the effort will not be wasted. The liberal approach to civil rights has been generating little excitement, much less real-world progress for African-Americans and other people of color. If the new outsider scholars persist, their work in time may come to seem not so strange and change may come, however slowly.

We are mere bibliographers, not intellectual historians or prognosticators. Still, we look forward, as many other Critical readers, scholars, and sympathizers must as well, to what this movement's contours will look like in five years, when we intend to renew the bibliography once more.

60. See, e.g., Greene, *supra* pp. 176-77; see also Delgado & Stefancic, *supra* note 1, at 489-90.

