# CRITICAL RACE THEORY EXPLAINED BY ONE OF THE ORIGINAL PARTICIPANTS

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*President Donald Trump issued an executive order in September of 2020 seeking to exclude diversity and inclusion training from federal contracts if those trainings contained so-called "divisive concepts" like stereotyping and scapegoating based on race and sex. In the wake of the executive order, attacks on Critical Race Theory (CRT) skyrocketed. However, many of these discussions have mischaracterized CRT. In this Essay, one of the participants of the original CRT workshop held in Madison, Wisconsin in the summer of 1989 provides a historical account of what CRT is and what it sought to accomplish.*

*More than anything, those early CRT meetings were driven by a concern about the racial disparities in the existing socioeconomic conditions of society, despite the legal victories of the civil rights era of the 1960s. This concern was heightened by the Supreme Court. The Court's Equal Protection jurisprudence had frozen the racial disparities in place because it increasingly adopted an approach for resolving racial discrimination along the dictates of colorblindness. Thus, not only were we critiquing racial jurisprudence based on colorblindness, but also arguing that the Equal Protection Clause jurisprudence should recognize a distinction between policies and programs directed towards attenuating racial disparities and those aimed at strengthening them. Such an approach played on the dual applications of race consciousness. The racial consciousness of slavery and segregation and articulated by the Supreme Court in* Brown v. Board of Education *was based on the belief that there was something wrong with Black people. We embraced a different form of race consciousness—one that was consciously aware that the racial disparities of our time were not the result of deficiencies in Black*

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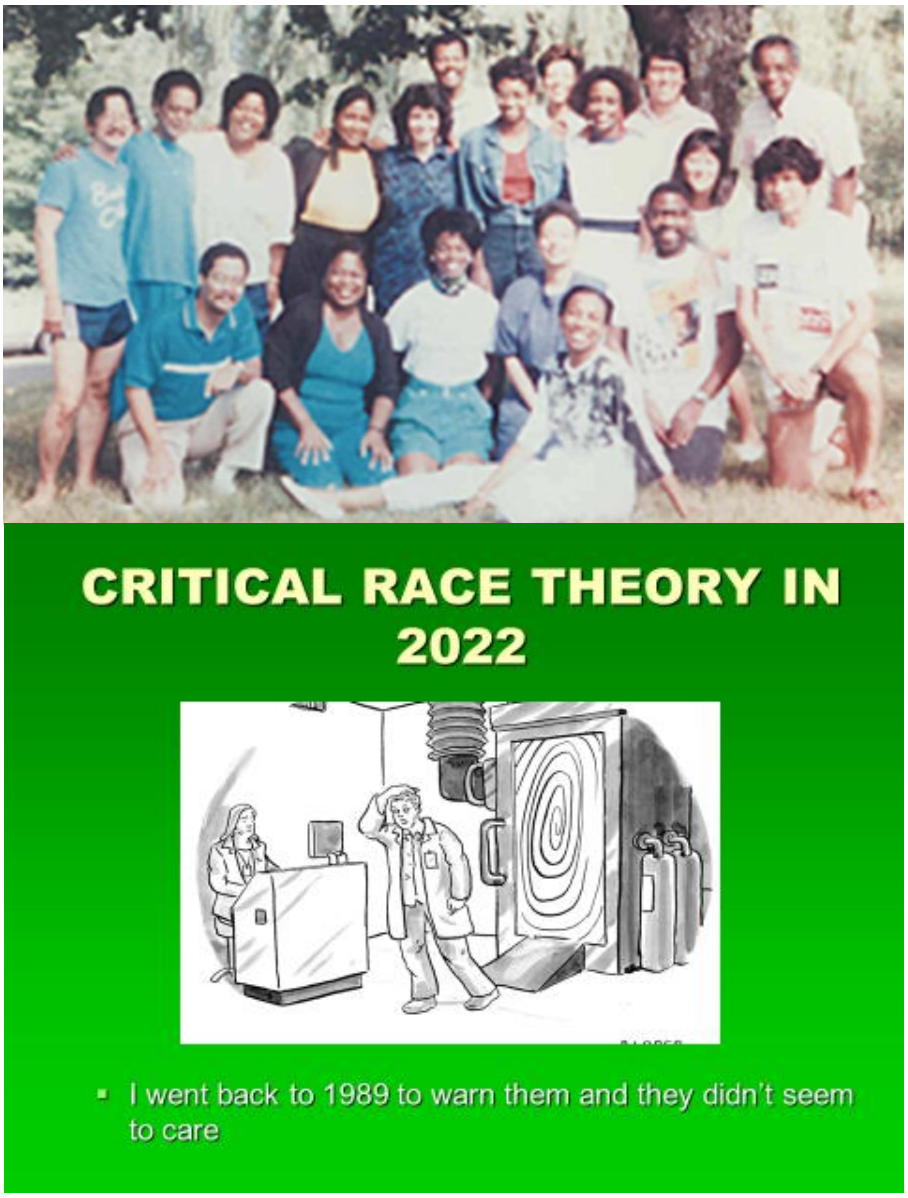
> *people, but the continuing manifestations of our history of racial oppression and subordination. As a result, American society and American jurisprudence needed a race consciousness dedicated to dismantling the policies, programs, and institutional practices that were recreating racial disparities.*




On September 22, 2020, then-President Donald Trump issued

Executive Order 13950, titled "Combating Race and Sex Stereotyping,"[1] which sought to exclude diversity and inclusion training from federal contracts,[2] if those trainings contained so-called "divisive concepts" like stereotyping and scapegoating based on race and sex. "Critical Race Theory" ("CRT") was among the divisive concepts targeted by the President's order. Attacks on CRT have skyrocketed since, partially as a result of the order. An article in *Education Week*, for example, noted that since January 2021, "42 states have introduced bills or taken other steps that would restrict teaching critical race theory or limit how teachers can discuss racism and sexism."[3] These attacks on CRT are aimed at preventing efforts to teach the history of American racial oppression, as well as preventing "diversity, equity, and inclusion" ("DEI") training today. It is part of an antidemocratic assault on the multiracial democracy that America is becoming and seeks to hide the continued and pervasive racial inequality that exists.

I was one of twenty-three legal scholars of color that participated in the original CRT workshop held in Madison, Wisconsin in the summer of 1989.[4]

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[1] Combating Race and Sex Stereotyping, Exec. Order No. 13950, 85 Fed. Reg. 60683, 60685 (Sept. 22, 2020). A portion of the executive order was struck down by the District Court for the Northern District of California. Santa Cruz Lesbian & Gay Cmty. Ctr. v. Trump, 508 F. Supp. 3d 521, 550 (N.D. Cal. 2020) (granting a nationwide preliminary injunction prohibiting the Office of Federal Contract Compliance Programs from implementing, enforcing, or effectuating Section 4 of Executive Order 13950 "in any manner against any recipient of federal funding by way of contract [or] subcontract . . . ."). The order was subsequently rescinded by President Biden on the day of his inauguration. *See* Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, Exec. Order No. 13589, 86 Fed. Reg. 7009, §10 at 7012 (Jan. 20, 2021).

[2] Although most organizations provide their own definitions of DEI to accommodate their individual diversity goals, the Harvard Office for Equity, Diversity, Inclusion & Belonging has compiled a glossary of key DEI terms which some may find helpful. For example, the glossary highlights the differences between terms such as "diversity," "inclusion," and "belonging" or "equity," explaining: "Diversity typically means proportionate representation across all dimensions of human difference. Inclusion means that everyone is included, visible, heard and considered. Belonging means that everyone is treated and feels like a full member of the larger community, is accountable to one another, and can thrive . . . . The principle of equity acknowledges that there are historically underserved and underrepresented populations and that fairness regarding these unbalanced conditions is needed to assist equality in the provision of effective opportunities to all groups." *See* HARVARD UNIV. OFF. FOR EQUITY, DIVERSITY, INCLUSION & BELONGING, HARVARD UNIVERSITY, EQUITY, DIVERSITY, ACCESS, INCLUSION & BELONGING: FOUNDATIONAL CONCEPTS & AFFIRMING LANGUAGE (2021), https://edib.harvard.edu/files/dib/files/oedib_foundational_concepts_and_affirming_language_12.7.21.pdf?m=1638887160 [https://perma.cc/63QE-AJ3Q].

[3] Sarah Schwartz, *Map: Where Critical Race Theory is Under Attack*, EDUC. WK., (Sept. 28, 2022), https://www.edweek.org/policy-politics/map-where-critical-race-theory-is-under-attack/2021/06 [https://perma.cc/95MT-E74D].

[4] The participants in the First Critical Race Theory Workshop were Anita Allen, Taunya Banks, Derrick Bell, Kevin Brown, Paulette Caldwell, John Calmore, Kimberlé Crenshaw, Harlon Dalton, Richard Delgado, Neil Gotanda, Linda Greene, Trina Grillo, Isabelle Gunning, Angela Harris, Mari Matsuda, Teresa Miller, Philip T. Nash, Elizabeth Patterson, Stephanie Phillips, Benita Ramsey, Robert Suggs, Kendall Thomas, and Patricia Williams. I also attended five of the first seven annual workshops: Summer of 1989 in Madison, Wisconsin; Summer of 1990 at Buffalo Law School; Summer of 1991 at the University of Colorado School of Law in Boulder, Colorado;

As a result, I have received numerous requests to discuss those experiences and what CRT is. The regularity of academic and media requests has provided me with the opportunity to reflect on my experiences as a participant in those original CRT workshops. In these reflections, I am not so much adopting the role of an academic discussing my interpretation of a legal issue as much as a participant and firsthand witness of a historical event. One of the first CRT articles that attracted a lot of early attention was Mari Matsuda's piece entitled *Looking to the Bottom: Critical Legal Studies and Reparations*.[5] In her article, Professor Matsuda notes that those "who have experienced discrimination speak with a special voice to which we should listen."[6] In doing so, she points out that there are no neutral explanations of racial events. What people understand about racial issues often depends on their position in the racial and socioeconomic hierarchy, as well as their own interpretations of their race-related experiences.[7] In light of my perspective and the aforementioned importance of centering an author's voice in matters of race, I will provide more biographical information than I otherwise would.

I have never written about my attendance at the CRT workshops, but now is an appropriate time. There are, of course, excellent histories of CRT,[8] but I want to add a different perspective. I graduated from Yale Law School in 1982. This was the time when large corporate law firms and law school faculties were finally beginning to hire a token number of Black law school graduates. In selecting which law firms to interview with, many of my fellow Black students did what I did—study the racial breakdowns of the large law firms in the cities I was interested in moving to after graduation. Our common understanding was that we did not want to go to a firm without any Black lawyers, of whom there were plenty. We also knew—rather, believed—that if a law firm had three Black attorneys, its hiring committee would not be interested in hiring more. We believed that the law firms approached the hiring of Black lawyers with the slogan, "two Black attorneys are company, three are a crowd, four are too many, and five are not

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Summer of 1993 in Oakland, California; and Summer of 1995 at Temple Law School in Philadelphia, Pennsylvania.

5 Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987).

6 *Id.* at 324.

7 *See id.* at 335 ("Those who lack material wealth or political power still have access to thought and language, and their development of those tools will differ from that of the more privileged.").

8 *See, e.g.*, Kimberlé Williams Crenshaw, *Twenty Years of Critical Race Theory: Looking Back to Move Forward*, 43 CONN. L. REV. 1253 (2011) (describing the history of CRT to better understand its relationship to contemporary discourse on race and racism). For a pre-CRT history, see David M. Trubek, *Foundational Events, Foundational Myths, and the Creation of Critical Race Theory, or How to Get Along with a Little Help from Your Friends*, 43 CONN. L. REV. 1503 (2011).

allowed."[9] Thus, our sweet spot were the law firms with one or two Black lawyers. As a result, after graduation I spent four and a half years at Indiana's most prestigious law firm. One of the main reasons I chose that firm was because it was the only law firm of any significant size in Indiana that had a Black person or, for that matter, a person of color as an associate attorney. However, my fellow Black brother would depart eighteen months after I joined, leaving me as the only attorney of color out of over 100 lawyers at the firm for the next three years.

When I joined the Indiana University Maurer Law School faculty in 1987, I was only the third tenured or tenure-track Black person or person of color in the law school's 145-year history.[10] Graduating from Yale Law School put me in good company among Black legal academics. At least twelve Black classmates from Yale went on to become law professors, including at some at the nation's top law schools.[11]

As a graduate of Yale, I was unfamiliar with the machinations at Harvard Law School that preceded the first CRT workshop.[12] In addition, I was new to the legal academy and to racial equality scholarship, having just completed my second year as a tenure-track professor at Indiana. Like so many new legal academics of that time, I was struggling to write my first article, which focused on the termination of school desegregation decrees.[13]

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9 This came from a Gomer Pyle Show that ran from 1964 to 1969. "Two's company, three's a crowd, four's not allowed, and five's dumb, stupid, and ridiculous." *Gomer Pyle, U.S.M.C.: Lou-Ann Poovie Sings Again* (CBS television broadcast Feb. 22, 1967). It was also used as the title of a piece written by KJ Doyle, *Two's Company, Three's a Crowd, Four's Too Many, Five's Not Allowed: The Patriots Backfield is Too Crowded*, GUY BOS. SPORTS (Aug. 31, 2020), https://guybostonsports.com/twos-company-theres-a-crowd-fours-too-many-fives-not-allowed-the-patriots-backfield-is-too-crowded [https://perma.cc/Q6T6-9YC3].

10 I should also note that Jody Armour, the Roy P. Crocker Professor of Law at the USC Gould School of Law, was a highly regarded legal writing instructor when I started at Maurer School of Law in January 1987.

11 Yvette Barksdale at John Marshall; Scott Brewer at Harvard; Sherri Burr at New Mexico State; Alyssa Christmas Rollock at Indiana University-Bloomington; Malina Coleman at Akron; Charisse Heath at Detroit Mercy; Michael Higginbotham at Baltimore; Randall Johnson at Georgia; Randall Kennedy at Harvard; Florise Neville-Ewell at Thomas Cooley; and Kendall Thomas at Columbia. Also, James Bowen was an associate professor at John Jay College in the Department of Political Science.

12 *See* Crenshaw, *supra* note 8, at 1263–68 (providing an overview of the "protracted and very public protest over race, curriculum, and faculty hiring at Harvard Law School" during the early 1980s in the wake of Professor Derrick Bell's departure, reducing the tenured minority faculty percentage to none); *see also* Trubek, *supra* note 8, at 1505–06 ("The story of struggle starts with the battle over appointment of black professors at Harvard as Crenshaw and her cohort of students of color at the Law School battled the liberal establishment and challenged ideas of 'merit' and 'neutral principles' being deployed to explain why a black perspective on law was not a necessary part of the legal curriculum and justify the lack of blacks on the faculty.").

13 Kevin Brown, *Termination of Public School Desegregation: Determination of Unitary Status Based on the Elimination of Invidious Value Inculcation*, 58 GEO. WASH. L. REV. 1105 (1990). The influence of CRT is readily apparent in my second and third articles entitled. *See* Kevin Brown, *Has the Supreme Court Allowed the Cure for De Jure Segregation to Replicate the Disease?*, 78 CORNELL L. REV. 1 (1992) [hereinafter Brown, *Has the Supreme Court*]; Kevin

Thus, while I participated in the CRT discussions held during the first workshop, I was not one of the leading voices articulating the breakthrough ideas. I was very interested in the conversation and knowledgeable of the current state of America's race relations, which served as the unspoken background of our gathering, but not all insights of CRT were readily apparent to me at that time. I occupied a place at the table that the average reader of law review articles would have occupied.[14]

At the age of sixty-six, I know I am coming close to the end of my active academic career. Thus, when I look back, I do so from the perspective of having almost completed my body of academic work. In that reflection, I recognize that those CRT meetings, especially the first ones, were the most significant academic experiences of my life. Those meetings molded the way that I have thought about race and race discrimination for over thirty years. Being over three decades removed from the first CRT workshop shows me that history has validated the concerns that motivated us back then. Time has vindicated us; we were prophets, not heretics.



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

[14] As a legal academic of color, not only did I participate in the first CRT Workshop, but I also took part in the first meeting of the first People of Color Legal Conference. The first such conference was the Midwestern People of Color Legal Scholarship Conference held at Loyola University Chicago School of Law in the spring of 1989 founded by Professor Linda Greene. *See* Linda S. Greene, *From Tokenism to Emancipatory Politics: The Conferences and Meetings of Law Professors of Color*, 5 MICH. J. RACE & L. 161, 161–64 (1999) (discussing the first meeting of the Midwestern People of Color Legal Scholarship Conference in February 1990). I believe that Linda Greene, who is now the Dean of Michigan State University School of Law, and I were the only two to attend both of these initial path-breaking conferences. Due to these early academic experiences, in 1991, I created the first course on Race and Law in the history of Indiana law schools.

## INTRODUCTION

CRT is a practice or a point of view—something that can evolve over time and not something limited to a static or narrow definition.[15] However, what motivated our thinking during those initial meetings were the seemingly unchanging racial disparities in the material aspects of life—family income, family wealth, educational credentials, unemployment, life expectancy, political power, access to health care, and incarceration rates—facing the American Black Community. Those racial disparities were not closing. We also recognized at our initial meeting that the U.S. Supreme Court had put into place a framework for racial justice jurisprudence that would freeze these racial disparities in place.

For purposes of the Introduction of this Essay, I want to define Critical Race Theory as:

> A framework that helps us understand how, as a result of our society's history of racial discrimination, race and racism continue to shape the meaning of racial inequality in our dominant culture, our concepts of equality in law, and our institutional, governmental, and private practices. Because of our failure to appreciate racism's enduring role in our society, America continues to generate racial disparities visible in nearly every aspect of American life, despite civil rights reforms in the 1950s and 1960s. Thus, CRT is a framework motivated by a desire to attenuate this continuous cycle.

In the 1980s, the civil rights era was fading into history, and despite the legal gains achieved by the Black Community during that time, the assumption that Black people should have less was being normalized again. The same assumption that justified slavery and Jim Crow was now being applied not to chattel slavery or de jure segregation, but to the dominance of colorblind thought as the appropriate way to deal with racial issues. This was the case despite the certainty that it would lead to the perpetuation of a socioeconomic and racial hierarchy in American society.

Because our concerns were motivated by a strong sense of injustice, we were primarily speaking to those responsible for the current or future administration of justice in American society: judges, legislators, law professors, attorneys, and law students. But we also knew that Supreme Court opinions not only reflect final solutions to particular social problems in our country, but also function as powerful symbolic declarations to guide, influence, and endorse policies and programs implemented outside of a strictly judicial forum.[16] The Court's opinions, therefore, operate to validate

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15 *See* Crenshaw, *supra* note 8, at 1261 ("CRT is not so much an intellectual unit filled with natural stuff—theories, themes, practices, and the like—but one that is dynamically constituted by a series of contestations and convergences pertaining to the ways that racial power is understood and articulated in the post-civil rights era.").

16 *See* Christopher E. Smith, *The Supreme Court and Ethnicity*, 69 OR. L. REV. 797, 810 (1990)

particular conceptions of society by legitimizing certain concrete social arrangements.[17] As law professors, we already knew that the decisions of the Supreme Court could limit or restrict notions of American racial equality. Supreme Court opinions like *Dred Scott v. Sanford*,[18] *Plessy v. Ferguson*,[19] *Washington v. Davis*,[20] and *Regents of the University of California v. Bakke*,[21] had taught us that cruel lesson. As Justice Robert Jackson, one of the members of the Court for the *Brown* decision, would later write about the Supreme Court, "[w]e are not final because we are infallible, but we are infallible only because we are final."[22] There is an important relationship between dominant American cultural attitudes about racial justice and the law's treatment of issues of racial inequality. So, our message had to have broader appeal. Legal change would only occur along with changing dominant cultural attitudes that rejected the normalization of racial disparities.

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To understand what CRT is about, it is necessary to think back to the

("Because politicians and the citizenry often resist or alter the implementation of judicial decisions, much of the judiciary's importance to society is in making symbolic declarations to guide, influence, and endorse policy made elsewhere in the political system.").

17 *See* Martha Minow, *Foreword: Justice Engendered* to Martha Minow & Donald C. Langevoort, *The Supreme Court, 1986 Term*, 101 HARV. L. REV. 10, 33 (1987) ("[T]he characteristics and experiences of those people who have had power to construct legal rules and social arrangements also influence and reflect the dominant cultural expressions of what is different and what is normal."); *see also* Gerald Torres, *Local Knowledge, Local Color: Critical Legal Studies and the Law of Race Relations*, 25 SAN DIEGO L. REV. 1043, 1050 (1988) (arguing the cloak of solemnity afforded to works of "legal doctrine" operate to render certain assumptions as neutral, thus "validat[ing] particular conceptions of society, both by dictating the kinds of arguments that are persuasive within legal institutions and by legitimizing certain concrete social arrangements").

18 Scott v. Sandford, 60 U.S. 393, 407 (1857) (concluding that no Black person, slave or free, could be a citizen of the United States, so "they had no rights which the white man was bound to respect").

19 The Supreme Court launched the era of de jure segregation by upholding statutes that segregated people by race. In doing so, the Court wrote, "[i]f one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane." Plessy v. Ferguson, 163 U.S. 537, 552 (1896).

20 In rejecting discriminatory effects as the possible trigger for violations of the Equal Protection Clause the Court stated: "A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white." Washington v. Davis, 426 U.S. 229, 248 (1976).

21 Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (finding that a university's admissions policy that reserved spots for certain minority races was effectively a racial quota and violated the Equal Protection Clause).

22 Richard J. Lazarus, *The (Non)Finality of Supreme Court Opinions*, 128 HARV. L. REV. 540, 542 (2014).

racial conditions that existed at the end of the 1980s. The optimism generated by the civil rights era of the 1950s and turbulent 1960s had faded. In addition, we were deeply concerned about the recent decisions of the Supreme Court addressing issues of race discrimination and inequality, especially those rendered during its 1988–89 term.[23] It was clear that the progress of the Black Community towards equality in the important socioeconomic aspects of life had slowed, if not reversed, during the 1980s. And as bad as things had gotten in the ’80s, the ’90s seemed likely to be worse. Part I of this piece will focus on the socioeconomic conditions of the Black Community at the end of the 1980s.

In 1989, we understood that the Supreme Court’s racial equality jurisprudence was increasingly embracing colorblindness as the way to resolve racial disputes. One of the major realizations of CRT, however, was the inherent limits of colorblind thinking in resolving economic, educational, legal, political, and social issues resulting from racial disparities. But in order to understand why CRT objected to colorblindness, it is necessary to go even further back. We need to go to the beginning of the civil rights era to see the Supreme Court thinking that launched American society into the Desegregation Era. Part II of this Essay will focus on the Supreme Court’s desegregation jurisprudence that was primarily articulated in its school desegregation decisions. After all, school desegregation was one of the major societal programs the United States used to address racial disparities. This Part will largely focus on why the logic of the Desegregation Era, derived from the Supreme Court’s opinion in *Brown v. Board of Education*, could *never* deliver America to the promised land of racial equality. The Court’s jurisprudence during the desegregation era embraced a race consciousness that held that Black people had been made inferior as a result of the history of racial discrimination. Thus, the rationale for the desegregation of American society in the *Brown* opinion was necessarily a limited leap forward on the road to racial equality.

As the 1970s unfolded, the Supreme Court increasingly embraced colorblind racial jurisprudence. Colorblindness comes from a particular understanding of individualism which asserts that the proper way to deal with racial issues is to treat people as individuals. Thus, we should

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[23] *See, e.g.*, Patterson v. McLean Credit Union, 491 U.S. 164, 84–85 (1989) (restricting causes of action available to redress on-job racial harassment); Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 650, 659 (1989) (increasing Title VII plaintiffs’ burden of establishing a prima facie case that employment practices have unlawful disparate impact on underrepresented minorities); Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701 (1989) (rejecting *respondeat superior* theory for holding a municipality liable and concluding that such a plaintiff must demonstrate that the harm resulted from a municipality’s custom or policy); Lorance v. AT&T Techs., Inc., 490 U.S. 900 (1989) (requiring evidence of past discrimination in an industry to insulate cities’ minority set-aside programs affecting contracts with that industry against Equal Protection challenges); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (same).

transcend—i.e., ignore—considerations of race. While colorblindness should clearly be the starting point for interpersonal relations, applying the concept to resolve economic, educational, legal, political, and social issues on a national scale tends to preserve the existing race-neutral practices and racial disparities derived from our society's history of racial oppression. If society transcends racial differences, it leaves us with little ability to address the existing race-neutral institutional policies and practices that were developed during a time of racial exclusion and that continue to produce the racial disparities in the important material resources of society today.[24] Thus, central to CRT are critiques of colorblindness.[25] Part III will discuss the criticisms of colorblindness embedded in CRT, including the tendency of colorblindness to cement racial disparities in socioeconomic conditions.

At the end of Part III are several graphs and charts which display the lack of significant progress from 1960 to 2020 in closing racial disparities in many significant socioeconomic indicators, including family income, poverty rates, unemployment rates, percentages of college graduates, incarceration numbers, life expectancy, and family wealth. CRT focuses on these disparities. It does so in order to emphasize both the failure of colorblindness to move our society towards racial equality and to emphasize the necessity of dismantling public and private institutions' policies and programs that perpetuate these disparities. Part IV will discuss some of the principal insights of CRT.

## I

### RACIAL CONDITION OF THE BLACK COMMUNITY IN 1989

The original CRT participants included Asian Americans Neil Gotanda and Phillip Nash, native Hawaiian Mari Matsuda, and Latinx scholars Trina Grillo and the formidable Richard Delgado. However, our thinking was dominated by the Black/white paradigm.[26]

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[24] This is a point Justice Blackmun noted: "In order to get beyond racism, we must first take account of race." *Regents of Univ. of Cal.*, 438 U.S. at 407 (1978) (separate opinion of Blackmun, J.). This is also a point that Justice Kennedy rejected in his opinion in *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 797 (2007) (Kennedy, J., concurring in part and concurring in the judgment) ("The idea that if race is the problem, race is the instrument with which to solve it cannot be accepted as an analytical leap forward. And if this is a frustrating duality of the Equal Protection Clause it simply reflects the duality of our history and our attempts to promote freedom . . . .").

[25] *See* Neil Gotanda, *A Critique of "Our Constitution is Color-Blind"*, 44 STAN. L. REV. 1, 68 (1991) ("Whatever the validity in 1896 of Justice Harlan's comment in Plessy—that 'our Constitution is . . . color-blind'—the concept is inadequate to deal with today's racially stratified, culturally diverse, and economically divided nation. The Court must . . . develop new perspectives on race and culture . . . .").

[26] Thirty years removed from the original CRT meetings, we can see how large the Latinx Community has become in the United States. According to the 2020 census, the 62.1 million

As the 1980s were ending, the assimilationist vision forged during the 1950s and 1960s—with its emphasis on desegregation, race-conscious remedies, and racial balancing—had just about run its course. To understand CRT, it is necessary to start with where the Black Community was in 1989 in terms of socioeconomic statistics. In addition, the Supreme Court's evolving racial equality jurisprudence was freezing those racial disparities in place. Thus, taking stock of where U.S. society stood with respect to racial inequality thirty-five years after *Brown v. Board of Education* and twenty-five years after the Civil Rights Act of 1964 is vital to revealing the contours of CRT.

### *A. Racial Gaps in Socioeconomic Statistics*

Oftentimes, racial statistics come across as dry, meaningless numbers. However, try to make them come alive in your mind. These statistics are intended to capture the material factors of life that most Americans care about: occupation, family income, family wealth, home ownership, educational credentials, involvement in the criminal justice system, access to medical care, political power, and life expectancy.

Examining racial disparities in several important socioeconomic statistics reveals that the 1980s were a difficult time for the Black Community. America's most significant program to bring about racial equality was school desegregation. During the Desegregation Era, there were hundreds of school desegregation decrees issued by courts, many of which continue to bind school districts.[27] However, the push to desegregate American schools in the 1960s and early 1970s had lost virtually all of its forward momentum by the 1980s.[28] One of the most important provisions in the 1964 Civil Rights Act authorized the United States Attorney General to bring school desegregation lawsuits.[29] Thus, while school desegregation

members of the Latinx Community make up 18.7 percent of all Americans. Nicholas Jones, Rachel Marks, Roberto Ramirez & Merarys Ríos-Vargas, *2020 Census Illuminates Racial and Ethnic Composition of the Country*, U.S. CENSUS BUREAU (Aug. 12, 2021), https://www.census.gov/library/stories/2021/08/improved-race-ethnicity-measures-reveal-united-states-population-much-more-multiracial.html [https://perma.cc/2E7L-5A2J].

27 *See* Yue Qiu & Nikole Hannah-Jones, *A National Survey of School Desegregation Orders*, PROPUBLICA, (Dec. 23, 2014), https://projects.propublica.org/graphics/desegregation-orders [https://perma.cc/7AGW-R6YK] (chronicling over 300 open school desegregation decrees); *see also* Halley Potter & Michelle Burris, *Here Is What School Integration in America Looks Like Today*, CENTURY FOUND., (Dec. 2, 2020), https://tcf.org/content/report/school-integration-america-looks-like-today/ [https://perma.cc/6PHR-3598] (finding over 700 districts and charters still subject to legal desegregation orders).

28 *See* GARY ORFIELD & JOHN T. YUN, HARVARD UNIV. C.R. PROJECT, RESEGREGATION IN AMERICAN SCHOOLS 12–13 (1999) (providing data indicating that integration in the South steadily improved up until the 1980s, after which there was a quick and substantial decline that continued for the following decade).

29 Civil Rights Act of 1964, Pub. L. No. 88-352, § 407(a), 78 Stat. 241, 248.

litigation was started by the NAACP Legal Defense and Educational Fund, Inc. ("LDF"),[30] it became largely driven by the desire of presidential administrations. There were only five school desegregation cases initiated in the 1980s by the Reagan and Bush Administrations.[31]

The reach of school desegregation, a remedy for violations of the Equal Protection Clause of the Fourteenth Amendment, was controlled by Supreme Court opinions. The Supreme Court's efforts to desegregate American schools reached its apex in the 1971 opinion in *Swann v. Charlotte-Mecklenburg Board of Education*. The Court held that "school authorities should make every effort to achieve the greatest possible degree of actual desegregation . . . ."[32] Afterwards, however, the Court started to turn away from aggressively pursuing school desegregation. Thus, by the 1980s, school desegregation had largely been curbed, in large part due to Supreme Court decisions like *Keyes v. School District No. 1*,[33] *Milliken v. Bradley*,[34] and *Pasadena City Board of Education v. Spangler*,[35] all of which restricted the reach of school desegregation decrees. Despite all that was done to integrate America's public schools, in 1980–81, the percentage of Black students attending majority-white schools peaked at only 37.1 percent.[36] In addition, the percentage of Black students in schools where the student body was overwhelmingly non-white (90 percent or more) dipped to a low point of 32.5 percent in 1986.[37] By the end of the 1980s, public schools were beginning the process of resegregation.

Racial inequalities, as measured through economic indicators, were also stagnating. In 1980, the median Black family's income was 57.9 percent of a white family's income.[38] This was only slightly up from 55.1 percent in

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30 For an excellent book on the legal strategy that culminated in *Brown v. Board of Education*, see RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY (1976).

31 Qiu & Hannah-Jones, *supra* note 27.

32 402 U.S. 1, 26 (1971).

33 In *Keyes v. School District No. 1*, the Supreme Court limited the determination of unconstitutionally segregated schools to those segregated as a result of intentional governmental conduct, as opposed to de facto segregated schools. This decision made proving school segregation more costly and time consuming and meant that some de facto segregated school systems, nevertheless, passed constitutional scrutiny. Keyes v. Sch. Dist. No. 1, 413 U.S. 189 (1973).

34 418 U.S. 717 (1974) (limiting the reach of school desegregation remedies to the boundaries of existing school districts, thereby making it impossible to successfully create integrated schools in many urban areas with high concentrations of minority students).

35 427 U.S. 424 (1976) (concluding that annual adjustments of school desegregation plans to take into account student mobility exceeded the scope of the constitutional violation).

36 ORFIELD & YUN, *supra* note 28, at tbl.8.

37 *Id.* at 14, tbl.9.

38 Historical Income Tables: Families, Table F-5, Race and Hispanic Origin of Householder—Families by Median and Mean Income: 1947 to 2021, U.S. CENSUS BUREAU, https://www.census.gov/data/tables/time-series/demo/income-poverty/historical-income-families.html [https://perma.cc/2QPA-F9XE] (last updated Aug. 18, 2022) [hereinafter Historical Income Tables: Race and Hispanic Origin of Householder] (all figures adjusted by the Consumer

1965.[39] The percentage of Black people below the poverty line at the start of the 1980s was about 31 percent, and it was approximately the same at the end of the decade as well; this was about three times white poverty rates.[40] The gap between Black people with college degrees and white people with them, moved from 9.9 percent to 10.7 percent, but the ratio, which stood at about 2.25 to 1 in 1980, shrank slightly to 1.95 in 1990.[41] The ratio of Black unemployment to white unemployment increased slightly from 2.27 to 1 to 2.38 to 1.[42] Black homeownership declined slightly from 45.3 percent to 43.9 percent in the 1980s.[43]

In addition to disparities in economic factors, there were also disparities in social factors like crime. The involvement of Black people in the criminal justice system exploded in the 1980s. The homicide rate for Black males ages 14–17 increased nearly 2.25 times and for those ages 18–24, it increased 1.56

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Price Index to reflect the 2021 dollar value). A number of changes to the racial categories have been made since such data began to be collected; for example, beginning in 2003, the current population survey annual social and economic supplements (CPS ASEC) allowed respondents to choose more than one race. *See* Historical Income Tables Footnotes, U.S. CENSUS BUREAU, n.31, https://www.census.gov/topics/income-poverty/income/guidance/cps-historic-footnotes.html [https://perma.cc/KZ32-MT9F] (last updated Aug. 19, 2022). As such, the data from 1965–2000 were taken from the "Black" and "white" categories, while the 2010–2020 data represent the "Black alone or in combination" and "white alone, not hispanic" categories. The percentage of Black family income to white income was calculated from this data.

39 Historical Income Tables: Families, Table F-5, Race and Hispanic Origin of Householder, *supra* note 38.

40 Historical Poverty Tables: People and Families—1959 to 2021, U.S. CENSUS BUREAU, https://www.census.gov/data/tables/time-series/demo/income-poverty/historical-poverty-people.html [https://perma.cc/5W6J-6A4A] (last updated Aug. 29, 2022). The ratio of Black families to white families in poverty was calculated from this data.

41 CPS Historical Time Series Tables, U.S. CENSUS BUREAU (last revised Feb. 24, 2022), https://www.Census.Gov/Data/Tables/Time-Series/Demo/Educational-Attainment/Cps-Historical-Time-Series.Html [https://perma.cc/34A7-P8R8] (tbl. A-2, Percent of People 25 Years and Over Who Have Completed High School or College by Race, Hispanic Origin and Sex: Selected Years 1940 to 2021). The ratio of white college graduates to Black was calculated from this data.

42 Unemployment Rate, Federal Reserve Economic Data, FED. RSRV. BANK OF ST. LOUIS, https://fred.stlouisfed.org/series/UNRATE [https://perma.cc/6DMU-MCVB] (select "edit graph"; modify frequency to "annual" with aggregation method "average"; then customize data by searching and adding lines for "unemployment rate – white" and "unemployment rate – black or african american"). The ratio of Black unemployment to white unemployment was calculated using this data. Prior to 1972, the U.S. Bureau of Labor Statistics reported the unemployment rate by race as either "white" or "negro and other" and, as such, my data begins with the more specific racial delineations. *See* U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 1973 at 226 (94th ed. 1973).

43 For data from 1940–1990, see U.S. DEPT. OF OF HOUS. & URB. DEV. OFF. OF POL'Y DEV. & RSCH., HOMEOWNERSHIP GAPS AMONG LOW-INCOME & MINORITY BORROWERS & NEIGHBORHOODS 85 (2005), https://www.huduser.gov/publications/pdf/homeownershipgapsamonglow-incomeandminority.pdf [https://perma.cc/C5Q2-QET9]. For data from 2010 and 2019, see U.S. CENSUS BUREAU, HOUSING VACANCIES & HOMEOWNERSHIP – ANNUAL ANN. STATS.: 2019, https://www.census.gov/housing/hvs/data/prevann.html&c_year=2019 [https://perma.cc/5EBC-8PAC].

times.[44] The percentage of Black males in prison increased by a staggering 2.79 times in the 1980s, from 200,000 to 558,000.[45] A major driver of the increased incarceration rates of Black males was the crack cocaine epidemic. While First Lady Nancy Reagan was telling everyone "[j]ust say, No!, to drugs," Senator John Kerry was leading efforts in Congress to investigate the CIA's entanglements with the very South American drug trade which was responsible for the distribution of cocaine into Black neighborhoods.[46]

Furthermore, homicide and incarceration rates were accompanied by the vanishing percentage of Black males among Black students in the nation's colleges and universities. In 1976, there were 1,033,000 Black students enrolled in higher education institutions, of which 45.7 percent were males.[47] By 1990, the number of Black women had almost doubled, while the number of Black men had stagnated, leaving males as making up only 36.6 percent of the 1,640,000 Black students in higher education institutions.[48] The aforementioned factors helped to contribute to a tremendous increase in the percentage of Black children born to single mothers. It went from 24 percent in 1965 to 64 percent in 1990.[49]

Even though statistics are just statistics, racial disparities in socioeconomic indicators indicate that the lived experiences of members of the Black Community are different from those of the white non-Hispanic community. These statistics mean that in this country, Black people will:

- struggle more economically;
- be far less likely to live in the average $350,000 home;
- be far less likely to be able to afford basic necessities such as mortgage, rent, groceries, utilities, and car expenses;

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44 In 1980, the percentage of Black male homicide victimization rate for ages 14 to 17 per 100,000 was 26.3. It increased to 59 in 1990 an increase of almost 225%. For those ages 18 to 24, the increase was from 96.7 to 151 or 56%. The Black male homicide rate also climbed dramatically for these age groups. For those ages 14 to17 from 83.8 in 1980 to 194.5 in 1990 or 230% and for ages 18 to 24 from 186 to 190.8 or 56%. *See* James Alan Fox & Marianne W. Zawitz, BUREAU OF JUSTICE STATISTICS, HOMOCIDE TRENDS IN THE UNITED STATES 76, 79 (2010).

45 Robert Pervine, Kevin Brown, Charles Westerhaus & Kynton Grays, *From the 1930s to the 2020s: What Ice Cube's Song "Endangered Species" Meant for Four Generations of Black Males*, *in* FIGHT THE POWER: LAW AND POLICY THROUGH HIP-HOP SONGS 187, 189 (Gregory S. Parks & Frank Rudy Cooper eds., 2022).

46 *See* Robert Parry, *How John Kerry Exposed the Contra-Cocaine Scandal*, SALON (Oct. 25, 2004), https://www.salon.com/2004/10/25/contra/ [https://perma.cc/QA6H-QQ93].

47 Florence B. Bonner, Marie C. Jipguep-Akhtar & Roderick J. Harrison, *Educational Attainments of U.S. Black Males and Females: 1971 to 2003*, *in* INTERNATIONAL ENCYCLOPEDIA OF EDUCATION 799, 800 (Penelope Peterson, Eva Baker & Barry McGraw eds., 2010).

48 *Id.*

49 GEORGE A. AKERLOF & JANET L. YELLEN, BROOKINGS, AN ANALYSIS OF OUT-OF-WEDLOCK BIRTHS IN THE UNITED STATES (Aug. 1, 1996) https://www.brookings.edu/research/an-analysis-of-out-of-wedlock-births-in-the-united-states/ [https://perma.cc/EXQ8-CMJ6].

- be far less likely to be able to afford "luxuries" such as vacations, tutors, or SAT and ACT prep courses for their children;
- be far less likely to pass on to their children a significant amount of wealth in order to provide them a financial head start in life;
- and be far more likely to know family and friends who are incarcerated and who have had negative experiences with the criminal justice system.

Additionally, Black Americans are going to be far more likely to stand by dumbfounded as they see white politicians look them in the eye and hear those politicians say "this kind of (CRT) education hurts my children." Those kinds of statements demonstrate what little regard these politicians have for the accumulated pain of Black children have been dealt by the American education system.

### *B. Supreme Court's Racial Justice Jurisprudence*

It is clear that 1968 was a major turning point in the Supreme Court's racial justice jurisprudence. For law professors watching the Supreme Court, the election of Richard Nixon as president had a dramatic impact. He appointed four justices to the Supreme Court in his first term and replaced Earl Warren with Warren Burger as the Chief Justice.[50] Thus, as Nixon started his second term in 1972, a far more conservative Supreme Court was in place. The Burger Court began to halt, and then reverse, many of the hard-won legal victories obtained for underrepresented minorities. More importantly, the Supreme Court went from a friend of the Black Community's struggle for racial equality to its foe.

Decision after decision, the Burger Court limited the effectiveness of Warren Court decisions that expanded the ability of Black Americans to achieve socioeconomic mobility in America. I have already pointed to the Burger Court's school desegregation jurisprudence, which limited the possible scope of integration.[51] In a pair of decisions, *Washington v. Davis*[52] and *Arlington Heights v. Metropolitan Housing Development Corp.*,[53] the Burger Court severely hampered the ability of the Equal Protection Clause to attack racial discrimination that Black people faced. The Court rejected

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

51 *See supra* notes 32–37 and accompanying text.

52 Washington v. Davis, 426 U.S. 229 (1976).

53 Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977).

discriminatory effects as a potential basis for an Equal Protection claim and instead limited violations to those that resulted from discriminatory intent. In its opinion in *Washington v. Davis*, the Supreme Court made it plain that it was fully conscious of the impact of its decision on racial disparities in socioeconomic conditions. In refusing to adopt discriminatory effects as the trigger for an Equal Protection violation, the Court wrote:

> A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that *may be more burdensome to the poor and to the average black than to the more affluent white*. Given that rule, such consequences would perhaps be likely to follow.[54]

And to drive home the point that a disparate effects holding would upset the racial inequality of the status quo, the Court added a footnote to the end of the above passage that quoted from a law review article, which

> [S]uggests that disproportionate-impact analysis might invalidate "tests and qualifications for voting, draft deferment, public employment, jury service, and other government-conferred benefits and opportunities . . . ; [s]ales taxes, bail schedules, utility rates, bridge tolls, license fees, and other state-imposed charges." It has also been argued that minimum wage and usury laws as well as professional licensing requirements would require major modifications in light of the unequal-impact rule.[55]

Black advocates who wanted to eliminate continuing racial disparities sought these kinds of fundamental changes in the socioeconomic conditions of the Black Community. From the standpoint of a discriminatory effects test for violations of the Equal Protection Clause, the way to significantly reduce the potential expansiveness of such claims was to equalize the racial distributions of the material goods and services of society. What the Court stated in *Washington v. Davis*, rather unequivocally, was that that kind of change would not come from it.[56]

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[54] 426 U.S. at 248 (emphasis added) (citations omitted). It has also been argued that minimum wage and usury laws as well as professional licensing requirements would require major modifications in light of the unequal-impact rule. *See* William Silverman, *Equal Protection, Economic Legislation, and Racial Discrimination*, 25 VAND. L. REV. 1183 (1972); *see also* Harold Demsetz, *Minorities in the Market Place*, 43 N.C. L. REV. 271 (1965) (arguing that any regulations on the market will have disparate effects on discriminated-against members of society).

[55] 426 U.S. at 248 n.14 (alterations in original) (quoting Frank I. Goodman, *De Facto School Segregation: A Constitutional and Empirical Analysis*, 60 CALIF. L. REV. 275, 300 (1972)).

[56] The *Washington v. Davis* decision led to the publication of two of the most important pre-CRT articles that provided the kind of critique of the Court's racial justice jurisprudence that would become the hallmark of CRT. *See* Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978) (describing the limited reach and contradictory reasoning of the Court's antidiscrimination jurisprudence); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection:*

The Supreme Court eliminated all doubt that it was wedded to discriminatory intent instead of discriminatory effects as the trigger for an Equal Protection violation in its *McCleskey v. Kemp* decision decided two years before our initial CRT meeting.[57] In *McCleskey*, the Court upheld the death penalty imposed on a Black Georgia resident who killed a white police officer.[58] It did so in the face of a statistical study of over 700 death penalty-eligible murder cases in Georgia during the 1970s, including McCleskey's, that was introduced into evidence.[59] The Baldus study, even while it took account of over 200 variables that could have explained such relationships on nonracial grounds, showed that a homicide victim's race, and to a lesser extent, a defendant's race, were related to the likelihood of the imposition of the death penalty in a particular case.[60] In one of Baldus's models noted by the majority, the study concluded that, "even after taking account of 39 nonracial variables, defendants charged with killing white victims were 4.3 times more likely to receive a death sentence as defendants charged with killing [Black people]."[61] However, the majority dismissed the Baldus study as insufficient evidence to demonstrate an Equal Protection violation because the study did not provide evidence of discriminatory intent in the specific criminal process that led to McCleskey receiving the death penalty. As the majority would say later in its opinion addressing McCleskey's Eighth Amendment claim, "Even Professor Baldus does not contend that his statistics *prove* that race enters into any capital sentencing decisions or that race was a factor in McCleskey's particular case. Statistics at most may show only a likelihood that a particular factor entered into some decisions."[62] The Court continued, "[a]t most, the Baldus study indicates a discrepancy that appears to correlate with race . . . . Where the discretion that is fundamental to our criminal process is involved, we decline to assume that what is unexplained is invidious."[63]

The racial disparity in the imposition of the death penalty revealed by the Baldus Study was so pronounced, however, that it led Justice Blackmun in a part of his dissent, joined by three other justices, to write:

> At some point in this case, Warren McCleskey doubtless asked his lawyer whether a jury was likely to sentence him to die. A candid reply to this question would have been disturbing. First, counsel would have to tell

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*Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (arguing Equal Protection doctrine must deal with unconscious racism).

57 *See* McCleskey v. Kemp, 481 U.S. 279 (1987).

58 *Id.*

59 *See* David C. Baldus, Charles Pulaski & George Woodworth, *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661, 680 (1983).

60 *See id.* at 680 n.81.

61 481 U.S. at 287.

62 *Id.* at 308 (citations omitted).

63 *Id.* at 312–13.

> McCleskey that few of the details of the crime or of McCleskey's past criminal conduct were more important than the fact that his victim was white. . . . [T]he assessment would not be complete without the information that cases involving black defendants and white victims are more likely to result in a death sentence than cases featuring any other racial combination of defendant and victim. The story could be told in a variety of ways, but McCleskey could not fail to grasp its essential narrative line: there was a significant chance that race would play a prominent role in determining if he lived or died.[64]

The *McCleskey* decision put the Court on the side of ratifying racial disparities in the death penalty. If the Court was ever going to be cognizant of the limitations of discriminatory intent to root out the effects of racial discrimination and adopt discriminatory effects as a trigger for a potential Equal Protection violation, it is hard to imagine a more compelling case than one that involves the governmental process that leads to state-sanctioned executions. In other words, the Court effectively declared that, in terms of the proportionality of punishment for a crime, killing someone white is a far greater crime than killing someone Black. Talk about the need for a Black Lives Matter Movement.

### *C. For the Black Community: The 90s Were Likely to be Worse*

As bad as the racial disparities in the socioeconomic statistics appeared to us in 1989, the situation looked likely to get worse in the 1990s. Ronald Reagan won reelection in 1984 in a landslide. His victory rode on receiving two-thirds of the white vote.[65] However, only about one in eleven Black people who voted cast their ballot for Reagan.[66] While that was a cause of great concern in the 1980s for the Black Community, Reagan's Vice President, George H.W. Bush, won the 1988 election handily with sixty percent of the white vote, but only eleven percent of the Black vote.[67] Thus, it seemed unlikely that the federal government was going to be any more supportive of policies and programs that would attenuate racial disparities during the Bush administration than it was during the Reagan administration. Given the success of the Southern Strategy,[68] Republicans had won five of

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64 *Id.* at 321 (Blackmun, J., dissenting) (citations omitted).

65 *How Groups Voted in 1984*, ROPER CTR. FOR PUB. OP. RSCH., https://ropercenter.cornell.edu/how-groups-voted-1984 [https://perma.cc/A98U-A6SZ].

66 *Id.*

67 *How Groups Voted in 1988*, ROPER CTR. FOR PUB. OP. RSCH., https://ropercenter.cornell.edu/how-groups-voted-1988 [https://perma.cc/3UD8-R6WS].

68 The Southern Strategy was the effort to turn the South into a Republican-dominated region of the country. Since the end of Reconstruction, the South tended to shun the Republican Party as the Party of Lincoln. For much of the late nineteenth and first six decades of the twentieth century, they generally constituted a reliable voting block for Democratic presidential candidates. Due to the Kennedy and Johnson Administrations' support of civil and voting rights for Black people, many white southerners were alienated from the Democratic Party. During the 1968 election,

the last six presidential elections since 1968, a string only interrupted in 1976 in the aftermath of Nixon's resignation as a consequence of the Watergate Scandal.[69] This suggested that presidential appointments to the Supreme Court were likely to continue to be made by Republicans. And, Justice Thurgood Marshall, the former Director-Counsel of the NAACP Legal Defense Fund who led the implementation of the legal strategy that produced the Supreme Court decision striking down de jure segregation, turned eighty in 1989. His failing health was already a great concern. Marshall's replacement was unlikely to be as strong of an advocate for the rights of Black people as he was.

As law professors, we saw the federal courts as center stage. By the late 1980s, the lower federal courts had started rendering opinions terminating some existing school desegregation decrees.[70] It was clear that we had already seen the maximum amount of school desegregation we were likely to see in our lifetimes. The Supreme Court's 1988–89 term proved a disaster for civil rights. In this term, the Supreme Court decided five significant decisions in which the plaintiffs arguing for the legal protection for minority rights lost.[71] The most significant of the decisions was *City of Richmond v.*

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Alabama Governor George Wallace won the electoral votes of five states that had been part of the Confederacy with five others voting for Nixon. The only former Confederate state that the Democratic presidential nominee Hurbert H. Humphrey won was President Johnson's home state of Texas. Nixon won reelection handily in 1972, and while the 1976 election still reflected the country's concerns over Watergate, Ronald Reagan used the Southern Strategy with great success to take the White House in 1980. In the elections of 1984 and 1988, the Republican candidates won all of the electoral votes of the former states of the Confederacy. For a recent article discussing the origins of the Southern Strategy see Bruce Bartlett, *The Western Origins of the "Southern Strategy,"* NEW REPUBLIC (June 29, 2020), https://newrepublic.com/article/158320/western-origins-southern-strategy [https://perma.cc/GF2F-33SV].

69 *See* Amy Tikkanen, *United States Presidential Election Results*, ENCYC. BRITANNICA (Feb. 19, 2021), https://www.britannica.com/topic/United-States-Presidential-Election-Results-1788863 [https://perma.cc/9KUB-J3TF].

70 *See, e.g.*, Brown v. Bd. of Educ., 892 F.2d 851, 886 (10th Cir. 1989) (overturning district court's finding that the Topeka school system is unitary), *vacated*, 503 U.S. 978 (1992); Dowell v. Bd. of Educ., 890 F.2d 1483, 1486 (10th Cir. 1989) (overturning district court-ordered dissolution of desegregation plan), *rev'd*, 498 U.S. 237 (1991); Quarles v. Oxford Mun. Separate Sch. Dist., 868 F.2d 750, 751 (5th Cir. 1989) (affirming district court-ordered dissolution of desegregation decree); Morgan v. Nucci, 831 F.2d 313, 317 (1st Cir. 1987) (partially affirming and partially vacating certain elements of a district court-ordered desegregation decree); Riddick v. Sch. Bd., 784 F.2d 521, 524 (4th Cir. 1986) (per curiam) (affirming district court's refusal to invalidate a challenged pupil assignment plan); United States v. Bd. of Educ., 794 F.2d 1541, 1543 (11th Cir. 1986) (affirming district court-ordered dissolution of desegregation orders).

71 *See* City of Richmond v. J. A. Croson Co., 488 U.S. 469, 498 (1989) (requiring evidence of past discrimination in an industry to insulate cities' minority set-aside programs affecting contracts with that industry against Equal Protection challenge); Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 650, 659 (1989) (heightening Title VII plaintiffs' burden of establishing a prima facie case where employment practices have unlawful disparate impact on underrepresented minorities), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, *as recognized in* Raytheon Co. v. Hernandez, 540 U.S. 44 (2003); Lorance v. AT&T Techs., Inc., 490 U.S. 900, 911 (1989) (narrowing the statute of limitations on when a claim that a seniority system constitutes

*J. A. Croson*, where a majority of the justices of the Court, for the first time, concluded that strict scrutiny applied to Equal Protection challenges, regardless of the race of the beneficiaries.[72] While this opinion on its face only limited the ability of state and local governmental bodies to create government contracting set-aside programs for minority entrepreneurs, its rationale, could, and would, be applied to affirmative action policies used by colleges and universities.[73]

In *Washington v. Davis*, the Court noted that efforts to reshape America's racial socioeconomic structure should be done through the political process, not the courts.[74] However, in *Croson*, the Court was closing the political option of addressing racial disparities by severely restricting the ability of state and local governments to use racial classifications in laws and programs to do so.[75] This inability meant that the effective impact of the Supreme Court's decisions on race was to preserve those racial disparities for generations to come.

For us CRT theorists, it was clear that these disparities resulted from the history of racial oppression that produced the institutions of slavery and segregation. Our society never remedied the negative consequences of those horrendous experiences on the Black Community or eliminated the pervasive idea that Black people are supposed to have less. Since colorblindness discounted the importance of the history of racial discrimination as the cause of socioeconomic racial disparities, it often led to an unspoken tendency to assume that the disparities resulted from some biological, cultural, or socioenvironmental defect of Black people.

Given these realities, it was clear that American society was once again normalizing the same basic idea: Black people deserved less. This is the same idea that justified slavery and segregation, the very causes of the socioeconomic inequality typical of the United States today. Now, this idea was being put in service of justifying the racial disparities in important socioeconomic indicators. This normalization meant that this reality should

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sex discrimination can be filed), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, *as recognized in* Landgraf v. USI Film Prods., 511 U.S. 244 (1994); Patterson v. McLean Credit Union, 491 U.S. 164, 171 (1989) (restricting causes of action available to redress on-job racial harassment to only those involving the making of contracts, not their performance), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, *as recognized in Landgraf*, 511 U.S. 244; Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701, 738 (1989) (rejecting respondeat superior as the basis for imputing Section 1981 claims of employees to state actors).

72 488 U.S. at 508 (applying the compelling interest and narrowly tailored prongs of the strict scrutiny test).

73 *See, e.g.*, Hopwood v. Texas, 78 F.3d 932, 934–35 (5th Cir. 1996) (applying strict scrutiny and thereby proscribing any consideration of race in the admissions process of the University of Texas School of Law), *overruled by* Grutter v. Bollinger, 539 U.S. 306 (2003).

74 426 U.S. 229, 248 (1976) (describing the need for "legislative prescription" to extend the unequal-impact rule).

75 488 U.S. at 508.

be understood by the American public as merely the natural order of things.

The attacks on affirmative action also represented an existential threat to all of us at the initial CRT workshop. We were twenty-three law professors of color in predominantly white law schools. For many of us, we were either the only professor of color or one of two or three on our entire law school faculties.[76] Many of us already felt isolated in our law schools. Ending affirmative action would mean that we would serve out our time in our law schools knowing that very few people of color would join us on our faculties. And the impact of the end of affirmative action on minority law students, especially Black ones, would be devastating. An estimate conducted with data from 1990–91 concluded that without affirmative action, between 75–90% of Black students in the nation's law schools at that time would not have been admitted to any law school to which they applied.[77]

All the while, Black conservatives like Thomas Sowell,[78] Clarence Thomas,[79] and William Julius Wilson[80] were criticizing affirmative action and talking about the declining significance of race as a determinative factor in life. Needless to say, in our reality, race was not declining in its significance, and these types of statements sounded patently ludicrous.

## II

## JOURNEY BACK TO BROWN V. BOARD: THE EMBEDDED LIMITS OF DESEGREGATION

We understood that unless a new way for Americans to understand racial inequality was developed, the racial disparities of the late 1980s would

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76 *See* Richard H. Chused, *The Hiring and Retention of Minorities and Women on American Law School Faculties*, 137 U. PA. L. REV. 537, 538 (1988). In 1986–87, one-third of these law schools had no Black faculty members, one-third had one, and less than a tenth had more than three. *See id.* at 539.

77 Linda F. Wightman, *The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admission Decisions*, 72 N.Y.U. L. REV. 1, 21 (1997) (comparing results of two statistical models on minority admission rates in the absence of affirmative action). The study describes how, in the 1990–91 application year, nearly half of the black applicants were admitted to at least one school to which they applied. The LSAT/UGPA-combined model predicts that only 10% of them would have been admitted to at least one school to which they applied. The Law School Grid Model suggests that only 23% would have qualified for admission to at least one law school in the study. *Id.*

78 *See, e.g.*, THOMAS SOWELL, CIVIL RIGHTS: RHETORIC OR REALITY? 51–53 (1984) (noting that Black people with less education and work experience seem to do worse under affirmative action).

79 *See, e.g.*, Clarence Thomas, *Toward a "Plain Reading" of the Constitution—The Declaration of Independence in Constitutional Interpretation*, 30 HOW. L.J. 983, 995 (1987) (arguing that affirmative action and other race-conscious remedies constitute a cynical rejection of natural law and a rationalization of expansive government powers).

80 *See, e.g.*, WILLIAM JULIUS WILSON, THE DECLINING SIGNIFICANCE OF RACE 144 (2d ed. 1980) (arguing that economic class, not race, best explains the subordination of poor Black people in the modern era).

remain frozen in place for the foreseeable future. This was the task that our CRT group focused on, and we had some of the most intelligent law professors in the legal academy. But, to understand the critiques that CRT developed, we need to go back further than 1989. We need to go all the way back to the beginning of the civil rights era in order to distinguish the thinking of CRT from the thinking which launched the Desegregation Movement. Most Americans, especially in the legal field, view the Supreme Court's 1954 decision in *Brown v. Board of Education* as the beginning of the Civil Rights Era.[81] At the time of the Supreme Court's decision in *Brown*, segregation in public schools was mandatory in seventeen states pursuant to state statute and permissible by statute in four other states.[82] Approximately 40% of the nation's schoolchildren were enrolled in segregated schools in those states.[83]

### *A. Conditions for the Black Community in 1954*

There is no question that striking down segregation statutes was a major step forward on the road to racial equality. The Supreme Court deserves to be celebrated for taking such a courageous step. Had the Court not done what it did, I seriously doubt that I would be in a position to write this essay. However, major Supreme Court opinions reveal their consequences and yield their secrets only with the passage of time and the development of American society. To be fair to the nine justices on the Supreme Court who signed the *Brown* decision, we should recall the conditions that existed at the time for the descendants from the "Dark Continent."[84] We were referred to as Negroes or colored out of respect, and coon, darkie, and even black as an insult. America had not yet experienced the Civil Rights Movement, the Black Consciousness Movement, the Multicultural Movement, the Diversity Movement, nor the Diversity, Equity, and Inclusion Movement. The Court's opinion in *Brown* preceded by ten years the passage of the Civil Rights Act of 1964, which has been the most sweeping piece of civil rights legislation in the country's history.[85] One could certainly argue that without the *Brown*

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81 *See, e.g.*, DIANE RAVITCH, THE TROUBLED CRUSADE: AMERICAN EDUCATION, 1945–1980, at 127 (1983) (describing the *Brown* decision as a historic and startling affirmation of America's egalitarian ideals).

82 *Id.* at 125.

83 *Id.* at 127.

84 For a brief history of the phrase "Dark Continent" as well as its propensity to manifest racial insensitivity with its continued use, see Alicia C. Shepard, *Should NPR Have Apologized For "Dark Continent?"*, NPR (Feb. 27, 2008, 4:09 PM), https://www.npr.org/sections/publiceditor/2008/02/27/75959288/should-npr-have-apologized-for-dark-continent [https://perma.cc/V7F3-WT9N].

85 *See* Joni Hersch & Jennifer Bennet Shinall, *Fifty Years Later: The Legacy of the Civil Rights Act of 1964*, 34 J. POL'Y ANALYSIS & MGMT. 424, 428 (2015) (providing an overview of the creation and endurance of the Civil Rights Act of 1964, especially when compared to previous civil rights legislation which had been systematically stripped of any enforcement power by the Southern

decision, Congress may not have enacted this Act. It also preceded by eleven years the Voting Rights Act of 1965 that helped to secure the right to vote for most Black people living in the South, where the majority of them still resided.[86]

In 1954, even in those places where segregation and conscious racial discrimination were not the law, they still formed part of customary American business, and educational, political, and social practices. Discrimination based on race in employment, merchandising stores, eating establishments, places of entertainment, hotels, and motels was generally accepted as a fact of life. Black workers seldom occupied positions in mainstream businesses above the most menial levels.[87] Even those lower-level management positions were, for the most part, unobtainable.[88] What American society would come to recognize as the glass ceiling in the 1980s and 1990s was a firmly rooted, concrete barrier for Black people that had been established in the 1950s.[89]

### *B. The Court's Rationale in* Brown v. Board of Education *that Started the Desegregation Era*

The Supreme Court's opinion in *Brown* is one of America's legendary shrines of racial equality. However, as we think about the Court's opinion, we must keep in mind that the justices who signed the unanimous opinion written by Chief Justice Earl Warren were products of their time. All nine justices were white men born in the 1800s. Anyone could gather that it was not the decision that could deliver America to a promised land of racial equality.[90] Our society needed to go beyond the limited concept of racial equality that *Brown* had articulated.

In *Brown*, for the first time, the Supreme Court faced the question of what was wrong with segregation when the tangible resources in Black and white schools were equal.[91] In other words, what was wrong with "separate

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Democrats in the Senate).

86 U.S. CENSUS BUREAU, U.S. DEP'T OF COM., SER. P-23, NO. 80, THE SOCIAL AND ECONOMIC STATUS OF THE BLACK POPULATION IN THE UNITED STATES: AN HISTORICAL VIEW, 1790–1978, at 13 (1979), https://www2.census.gov/library/publications/1979/demographics/p23-080.pdf [https://perma.cc/MPV5-WR3Y]. In 1960, 60% of Black people lived in the South and this percentage dropped to 53% in 1970. *Id.*

87 *Id.* at 74 (describing that in 1960, only 13% of Black workers were engaged in white-collar work).

88 *Id.*

89 *See, e.g.*, M. Neil Browne & Andrea Giampetro-Meyer, *Many Paths to Justice: The Glass Ceiling, The Looking Glass, and Strategies for Getting to the Other Side*, 21 HOFSTRA LAB. & EMP. L.J. 61, 68–70 (2003) (describing various ways in which the glass ceiling can apply to Black workers).

90 For an article written within the CRT framework that did this, see Brown, *Has the Supreme Court*, *supra* note 13.

91 Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954) ("We come then to the question presented:

but equal" when there was tangible equality? While it might seem obvious to us today that segregation is inherently wrong, it is only because we live in a post-*Brown* society. It was not so clear in 1954.[92] Examining the Court's rationale for the harm of segregation reveals the built-in limitations of the concept of racial equality that drove the desegregation of American society. What the Court said was:

> To separate [Black students] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. The effect of this separation on their educational opportunities was well stated by a finding in the Kansas case by a court which nevertheless felt compelled to rule against the [N]egro plaintiffs: Segregation of white and colored children in public schools has a detrimental effect on the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the [N]egro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system.[93]

A closer examination of these statements reveals that the Supreme Court based its opinion on the argument that segregation only impairs the mental development of Black children. Furthermore, according to the Court, the impact of the experience of segregation affects the "hearts and minds in ways unlikely to ever be undone."[94] This logically means that Black adults, who had already finished their education in segregated schools, were irrevocably psychologically damaged. And the remedy for these psychological harms was to bring Black children into spaces with white children so that they could enjoy "some of the benefits they would receive in racial[ly] integrated schools."[95]

While school desegregation was primarily used to integrate K-12 education, affirmative action and other race-conscious measures were used to try and close the racial disparities in other socioeconomic indicators.

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Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does.").

92 *See, e.g.*, Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 59 (1955) (arguing that evidence of Congressional purpose and a plain reading of the text would foreclose application of the Fourteenth Amendment to segregation in public schools).

93 *Brown*, 347 U.S. at 494 (second and third alterations in original).

94 *Id.*

95 *Id.* The points I make here, I first made in my second article, which was directly influenced by my attending the first few CRT workshops. *See* Brown, *Has the Supreme Court*, *supra* note 13, at 53 (discussing how the Court's reasoning in *Brown* suggests a belief that segregation made Black people inferior to white people).

President Lyndon B. Johnson was responsible for the passage of major civil rights legislation that played a pivotal role in the desegregation of American society. However, in some of his rhetoric, Johnson also echoed the Court's racial sentiments by providing one of the dominant analogies used to justify affirmative action. In the commencement address Johnson delivered to the graduating class of Howard University in 1965, he said:

> You do not wipe away the scars of centuries by saying: Now you are free to go where you want, and do as you desire, and choose the leaders you please. You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, "you are free to compete with all the others," and still justly believe that you have been completely fair. Thus, it is not enough just to open the gates of opportunity. All our citizens must have the ability to walk through those gates. This is the next and the more profound stage of the battle for civil rights. We seek not just freedom but opportunity. We seek not just legal equity but human ability, not just equality as a right and a theory but equality as a fact and equality as a result.[96]

The Court striking down segregation statutes was an important victory for the Black Community, and President Johnson's insistence on equality in fact and as a result are the core strivings of CRT. However, the Court and the President viewed the harms of segregation and the entire history of racial discrimination that Black people had encountered for centuries as limited only to what it did to Black people. They did not acknowledge the harm this did to white people nor did they acknowledge that race-neutral institutional policies and practices that were developed during the time of this discrimination continued to produce discriminatory effects on Black people. *Brown* was, thus, based on the same race-conscious type of thinking that generated slavery and segregation, a thinking perpetuated by the idea that Black people are inferior. What made *Brown* such a historic break from the dominant racial attitudes about Black people of the past was not its acceptance of Black people as equal to white people. Rather, it was the Court's attribution of Black inferiority to differences in their social environments and cultural attitudes, as opposed to ontological differences of divine will or biology.[97] When American society viewed racial differences as being derived from permanent and immutable causes, desegregation or integration did not make logical sense. The change in the belief of the cause of what made Black people "less than" was comparatively optimistic. If the

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96 For a copy of the speech, see President Lyndon B. Johnson, Commencement Address at Howard University: "To Fulfill These Rights" (June 4, 1965), AM. PRESIDENCY PROJECT, https://www.presidency.ucsb.edu/documents/commencement-address-howard-university-fulfill-these-rights [https://perma.cc/KJ4Q-JXRZ].

97 For a discussion of the historic rationales, both religious and scientific, used to justify the view that Black people were inferior to white people, see KEVIN BROWN, RACE, LAW AND EDUCATION IN THE POST DESEGREGATION ERA 60–72 (2005).

problem with Black people was a deficient social environment and a degenerate culture, then it was not necessary to abandon all hope about the race problem.[98]

What this line of reasoning failed to grasp, and what the desegregation era failed to remedy, was the impact of centuries of oppression of Black people on the mental development of white people, dominant American cultural thinking about race, and race-neutral policies and programs operating in institutions established during the racial exclusion of Black people. If Black people were made to feel inferior as a result of the history of racial oppression, this history would likewise impact the mental development of white people and American society's dominant beliefs about race as well.

Evidence of the impact of segregation on white people was presented to the Supreme Court in *Brown*. In an (in)famous footnote of Chief Justice Warren's opinion, he cited to social science regarding the harm of segregation on Black people.[99] These sources were taken from an amicus brief appended to the appellants' brief and written by social scientists.[100] What was significant about the Court quoting these sources was not what it included, but what it left out. Among other sources, the brief referenced the fact-finding report prepared for the mid-century White House Conference on Children and Youth.[101] Referencing the report, the brief not only noted the harm segregation inflicted on Black schoolchildren, but also that segregation caused psychological harm to the majority group. The report noted:

> With reference to the impact of segregation and its concomitants on children of the majority group, the report indicates that the effects are somewhat more obscure. Those children who learn the prejudices of our society are also being taught to gain personal status in an unrealistic and non-adaptive way. When comparing themselves to members of the minority group, they are not required to evaluate themselves in terms of the more basic standards of actual personal ability and achievement. The

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98 For centuries, politicians, scholars, judges, and commentators justified slavery and segregation based either on Biblical or biological justifications. These rationales made racial difference permanent and so it did not make logical sense to integrate Black people into white society. However, as commentators increasingly pointed to nurture as opposed to nature for the cause of racial differences, improving the social conditions of Black people became a way of closing racial divides. For a fuller explanation of the racial justifications used for slavery and segregation and an explanation of this dynamic see KEVIN D. BROWN, BECAUSE OF OUR SUCCESS: THE CHANGING RACIAL AND ETHNIC ANCESTRY OF BLACKS ON AFFIRMATIVE ACTION 84–88 (2014).

99 *See Brown*, 347 U.S. at 494 n.11 (citing various sources that support the claim that Black children are psychologically harmed by segregation).

100 *See* Appendix to Appellants' Briefs at 1, Brown v. Bd. of Educ., 347 U.S. 483 (1954) (No. 1), 1952 WL 82041.

101 *See id.* at 3 n.2 (referencing KENNETH B. CLARK, THE EFFECTS OF PREJUDICE AND DISCRIMINATION ON PERSONALITY DEVELOPMENT (1950), *reprinted in* TOWARD HUMANITY AND JUSTICE 206–10 (Woody Klein ed., 2004)).

> culture permits and, at times, encourages them to direct their feelings of hostility and aggression against whole groups of people the members of which are perceived as weaker than themselves. *They often develop patterns of guilt feelings, rationalizations and other mechanisms which they must use in an attempt to protect themselves from recognizing the essential injustice of their unrealistic fears and hatreds of minority groups*.[102]

Justice Douglas pointed this out in the first opinion by the Supreme Court addressing affirmative action in higher education. In *DeFunis v. Odegaard*, Douglas dissented from the Court's decision to dismiss as moot the claim of Marco DeFunis against the affirmative action admissions plan of the University of Washington School of Law, which set aside minority applications for separate consideration from those of white students'.[103] In his dissent, Douglas wrote, "[t]he years of slavery did more than retard the progress of [B]lacks. Even a greater wrong was done the whites by creating arrogance instead of humility and by encouraging the growth of the fiction of a superior race."[104]

It is particularly instructive that the social science brief in *Brown* pointed to the need for white people to develop rationalizations and other mechanisms to protect themselves from recognizing the essential injustice of their unrealistic fears and hatred of minority groups.[105] Rationalizations and other mechanisms are still in operation today and function as part of institutional policies and practices that help to maintain racial disparities. This was also a point that Justice Douglas made in his dissenting opinion in *DeFunis*. Douglas agreed with the law school that it acted properly in examining the applications for admissions of people of color separately from those of white applicants. As he put it:

> Since the LSAT reflects questions touching on cultural backgrounds, the Admissions Committee acted properly, in my view, in setting minority applications apart for separate processing. These minorities have cultural backgrounds that are vastly different from the dominant Caucasian. . . . [A] test sensitively tuned for most applicants would be wide of the mark for many minorities.[106]

Thus, the reason to take race into account was to offset the advantage that white applicants had when an admission factor included the use of a culturally biased test. Douglas concluded his opinion by remanding the case to the trial court to resolve the issue of the cultural bias of the LSAT.[107]

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102 *Id.* at 6 (emphasis added) (footnote omitted).

103 416 U.S. 312, 319–20 (1974).

104 *Id.* at 336 (Douglas, J., dissenting).

105 *See* Appendix to Appellants' Brief, *supra* note 100, at 6.

106 *Id.* at 334.

107 *See id.* at 336 (finding that the case should be remanded to consider if the LSAT requirement should be eliminated for people of color).

While a person reading this Essay might think: "Certainly one cannot argue that Black people were not harmed by segregation? What is wrong with candidly admitting that the development of Black schoolchildren were psychologically harmed by their exclusion from contact with whites?" The answer is simple: To the extent that racism is the irrational judgment about the abilities of individuals based on their skin color, remedies proceeding from this presumed "candid recognition" that only Black people suffered harm reinforces those judgments. If Black people were as good as white people, then both Black people and white people would be beneficiaries of remedies for de jure segregation. While segregation deprived Black people of interracial contact with white people, it also deprived white schoolchildren of interracial contact with Black students. By not recognizing this, the Court is reinforcing the notion that white people are indeed superior to Black people. And, if segregation generated unwarranted feelings of inferiority among Black students, presumably, it would generate unwarranted feelings of superiority among white students.

In addition, this belief about the inferiority of Black people would have impacted far more than just the physical separation of Black and white students in different schools. It would have influenced the selection of what curricular materials to teach in public schools, how those materials were taught, and who taught them. In other words, the teaching of racial inferiority of Black people was endemic to all aspects of public school education. By not recognizing these other harms of segregation, the remedies for de jure segregation could not help vindicate the truth that Black people are the equals of white people.[108] By attacking the legality of de jure segregation in public schools, Black people were demanding the rights that always should have been accorded to them. The Court converted those demands into requests for more interracial contact.

The Court never rejected the premise of segregation—that white people were superior to Black people—even as America launched into the desegregation era.[109] This rationale stunted the possibility of the desegregation era to deliver America to the promised land of racial equality.

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[108] *See* Brown, *Has the Supreme Court*, *supra* note 13, at 53 (arguing that the Supreme Court's remedy for de jure segregation was also based on the belief of Black inferiority and, thus, disseminated the same message about the inferiority of Black people that segregation did).

[109] In the Court's second school desegregation termination opinion, Justice Kennedy stated: "The duty and responsibility of a school district once segregated by law is to take all steps necessary to eliminate the vestiges of the unconstitutional *de jure* system." Freeman v. Pitts, 503 U.S. 467, 485 (1992). He then quoted the language from *Brown* discussed earlier in *supra* notes 98–107 and accompanying text. 503 U.S. at 485–86.

## III

### THE UNFOLDING OF THE COLORBLIND ERA

By the 1970s, while the Supreme Court continued to embrace the race-conscious rationale in its school desegregation jurisprudence,[110] it was turning away from this rationale in other areas addressing racial inequality.[111] Outside of its jurisprudence touching on the remedies for school segregation, a fundamental change started to occur in how equality law was interpreted by the Supreme Court. Over a period of about sixteen years before the original CRT participants met, it was apparent that the Court's jurisprudence was moving towards embracing colorblindness as the primary way to deal with issues of racial discrimination.

One of CRT's fundamental breakthroughs was defining colorblindness in the context of the struggle against racial inequality.[112] Colorblindness is tied to a certain understanding of individualism. It is not the only understanding of individualism, but it was becoming the dominant understanding of individualism for purposes of resolving legal claims of racial discrimination.[113] Colorblindness privileges individual self-determination. The notion is that deep inside of you is your true self, and you have a responsibility to discover that part of you and align all aspects of your life with that vision. However, in the pursuit of your goals and objectives, you are not to interfere with your fellow person's ability to do the same. Since the purpose of this view of the individual is to further self-determination, the major obstacles generated by this belief in life's purpose would include other individuals and institutional practices using immutable traits and characteristics to constrain an individual's ability to pursue their self-determined goals and objectives. The way to treat immutable characteristics like race, color, and ethnicity is to transcend—ignore them—so that they do not constrain individual self-determination.

There is nothing wrong with colorblindness when individuals are getting to know one another. As Justices Kennedy and O'Connor stated, "[r]ace-based assignments 'embody stereotypes that treat individuals as the

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110 In the Court's first school desegregation termination opinion, Justice Rehnquist pointed to the same passages in *Brown* noted above when discussing the harm that school desegregation orders were intended to address. *See* Bd. of Educ. v. Dowell, 498 U.S. 237, 257–58 (1991).

111 *See, e.g.*, Washington v. Davis, 426 U.S. 229 (1976) (holding that a facially race-neutral test for police recruiting does not violate the Constitution despite disparate racial impact); Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 270 (1977) (holding that racially disparate impact of a zoning denial does not violate the Equal Protection Clause); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 271 (1978) (invalidating the race-conscious admissions program of a medical school).

112 *See* Gotanda, *supra* note 25, at 2–3 (noting that a colorblind interpretation perpetuates the advantage of white people over others). The substance of Gotanda's article was a vital part of the original CRT workshop.

113 *See id.* at 3 (describing how colorblindness affects major Supreme Court decisions on race).

product of their race, evaluating their thoughts and efforts—their very worth as citizens—according to [their race].'"[114] Indeed, the best way—maybe the only way—to learn about someone else is to learn about their individual experiences, even when those are simply shared group experiences resulting from common race, color, or ethnicity. But when colorblindness is applied to resolve economic, educational, legal, political, and social issues, in a society like the United States where there exist racial disparities attributable to a long history of racial discrimination, the impact of colorblindness can easily become a new way of maintaining racial inequality. Colorblindness allows for the elevation of some Black individuals to the highest positions in our society. And we have seen this in the rise of Black individuals that journalist Eugene Robinson termed "Transcendents"[115]—people like Barack Obama, Tiger Woods, Oprah Winfrey, Colin Powell, the Williams sisters, Kamala Harris, and LeBron James. However, it also freezes in place existing racial disparities because race-based programs that attenuate such disparities are viewed as a form of racial discrimination.

For us at the CRT Workshops, colorblindness had been a helpful way to attack racial discrimination during the civil rights era, a discrimination engendered by the conscious considerations of race throughout much of American history. By 1989 we felt that the successes of the civil rights era had delivered a multitude of legal victories. Nevertheless, socioeconomic racial disparities persisted. This is because preventing only conscious racial discrimination does nothing to correct the race-neutral biases that became embedded in private and public practices during times of racial discrimination. These institutional policies and practices were continuing to generate racial disparities even without intentional considerations of race. Nor did colorblind thinking do enough to help remediate the dominant American cultural beliefs that had normalized the socioeconomic racial disparities. When colorblindness is applied to policies and programs intentionally developed to dismantle the present effects of America's discriminatory past, it rejects them because they are motivated by considerations of race. In other words, colorblindness equates color consciousness directed at furthering racial subordination with color consciousness directed at dismantling the continuing effects of the history of racial subordination. The legal application of colorblindness resulted in preserving the existing racial inequality and meant that racial equality, if working under this legal regime, would not achievable anytime in the foreseeable future, if at all.

We found several shortcomings with the colorblind approach to racial

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114 Miller v. Johnson, 515 U.S. 900, 912 (1995) (quoting Metro Broad., Inc. v. FCC, 497 U.S. 547, 604 (1990) (O'Connor, J., dissenting).

115 EUGENE ROBINSON, DISINTEGRATION: THE SPLINTERING OF BLACK AMERICA 140 (2010) (describing "Transcendents" as a small, but growing group of Black elites).

inequality when applied to economic, educational, legal, political, and social issues.

1. Colorblindness discounts the importance of the impact of history on the present. A belief in people's self-determination, an aspect of colorblindness, makes history less important in the context of explaining the conditions of the present. As a result, while America's history of racial subordination is conceded, its impact on present racial disparities is generally underappreciated.

2. Colorblindness denies the lived experiences of people of color that are shaped by race. If many of a person's opportunities, choices, and experiences are the result of race, ignoring once's race then makes it impossible to comprehend those limitations, choices, and experiences. On a personal level, if you are going to ignore my experiences as a Black person in America, experiences that were significantly shaped by my race, you cannot get to know me as an individual because you are ignoring a large part of how I came to be. You will instead be internalizing an abstract idea of who I am that you have created in your mind and that comes from ignorance of my race-influenced experiences.

3. Colorblindness generates a narrow definition of racial discrimination. Race discrimination is primarily limited to the conscious failure to treat a person as an individual. The effects of other, more important forms of racism, including unconscious, institutional, and cultural racism, as well as stereotyping, are obscured.

4. The color consciousness of many people of color gets labeled as racist. I cannot count the number of times I have heard the questions, "Why do you need a Black Student Union? Why do you need a Black Law Students Union? Why do you need a Black Lawyer's Bar Association? Aren't these racist associations? How would you react to a White Student Union, a White Law Student's Association, or a White Bar Association?" But the reason the affinity organizations were created by people of color is precisely because of America's history of racial discrimination. They are motivated by a desire to help these affinity groups address issues that history created for people of color. This is not self-interest, but the pursuit of a form of justice that recognizes the obligations of American society to right our country's great wrongs. And, if American society won't do it, then the affinity groups must.

5. Colorblindness generates huge resistance to people being labeled as racist, because such a determination means that the person has acted in an immoral manner.

6. Colorblindness can also function to institutionalize the experiences of the majority as the norm across societal measures, including proper behavior, intelligence, meritocratic considerations, and standards of beauty. This was the point of Justice Douglas's dissent in *DeFunis v. Odegaard*.[116]

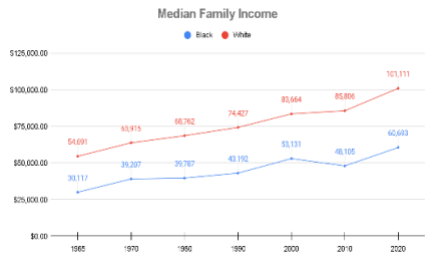
7. The Supreme Court's racial jurisprudence—which limits the concept of race discrimination to discriminatory intent and applies strict scrutiny to race-conscious policies and programs—was created out of a desire to attenuate the continuing effects of racial discrimination but continues to result in cementing existing racial, social, and economic disparities.

To attack the accumulated disadvantages from America's history of racial oppression, what American society needed were color-conscious policies and programs motivated by a desire to dismantle policies and programs that were reproducing racial inequality. As Justice Blackmun so succinctly put in his opinion in *Regents of the University of California v. Bakke*, "[i]n order to get beyond racism, we must first take account of race."[117] This is not colorblind thinking, nor is it the color-conscious thinking employed by the racists of the past. Rather, it is a color-conscious thinking generated by a sense that people of color are unjustly oppressed, not inferior.The last objection to colorblindness is one that can be assessed by looking at how little socioeconomic disparities hvae changed over the more than three decades since the first CRT workshop.

116 *See supra* notes 102–06 and accompanying text.
117 438 U.S. at 407 (1978) (separate opinion of Blackmun, J.).

Figure 1: Charts of the Socioeconomic Conditions of the Black Community from 1960 to 2020

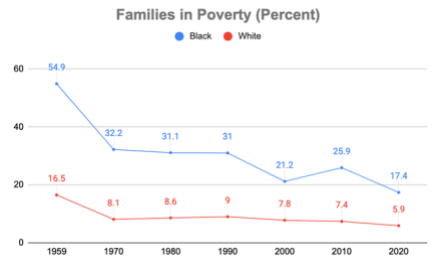
118




Percentage of Black Family Income to White

| 1965 | 1970 | 1980 | 1990 | 2000 | 2010 | 2020 |
|---|---|---|---|---|---|---|
| 55.1% | 61.3% | 57.9% | 58.0% | 63.5% | 56.1% | 60.0% |

119




Ratio of Black Families in Poverty to Whites

| 1959 | 1970 | 1980 | 1990 | 2000 | 2010 | 2020 |
|---|---|---|---|---|---|---|
| 3.33 | 3.98 | 3.61 | 3.44 | 2.72 | 3.50 | 2.95 |

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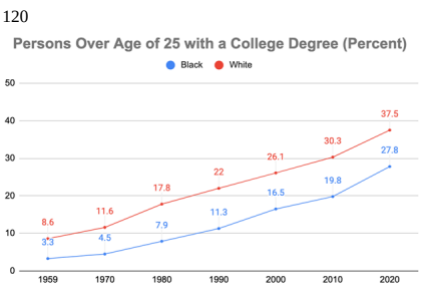
[118] *Historical Income Tables: Families, Table F-5, Race and Hispanic Origin of Householder—Families by Median and Mean Income: 1947 to 2021*, U.S. CENSUS BUREAU, https://www.census.gov/data/tables/time-series/demo/income-poverty/historical-income-families.html [https://perma.cc/W4QH-9STA] (Aug. 18, 2022) (all figures adjusted by the Consumer Price Index to reflect the 2021 dollar value). A number of changes to the racial categories have been made since such data began to be collected; for example, beginning in 2003, the Current Population Survey Annual Social and Economic Supplements (CPS ASES) allowed respondents to choose more than one race. *See Historical Income Tables Footnotes*, U.S. CENSUS BUREAU, n.31, https://www.census.gov/topics/income-poverty/income/guidance/cps-historic-footnotes.html [https://perma.cc/2H7W-PE4X] (Aug. 19, 2022). As such, the data from 1965–2000 were taken from the "Black" and "White" categories, while the data from 2010–2020 represent the "Black Alone or in Combination" and "White Alone, Not Hispanic" categories. The percentage of Black family income to white income was calculated from this data.

[119] *Historical Poverty Tables: People and Families – 1959 to 2021*, U.S. CENSUS BUREAU, https://www.census.gov/data/tables/time-series/demo/income-poverty/historical-poverty-people.html [https://perma.cc/YF9E-NBY6] (Aug. 29, 2022) (tbl. 2, Poverty Status of People by Family, Relationship, Race, and Hispanic Origin). The ratio of Black people to white people in poverty was calculated from this data.

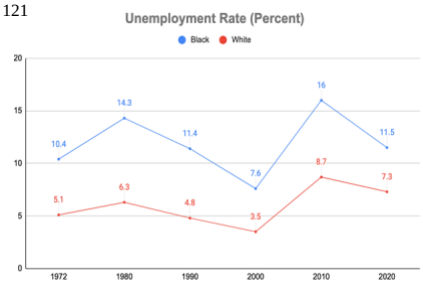
120




Ratio of White College Graduates to Black

| 1959 | 1970 | 1980 | 1990 | 2000 | 2010 | 2020 |
|---|---|---|---|---|---|---|
| 2.60 | 2.58 | 2.25 | 1.95 | 1.58 | 1.53 | 1.35 |

121




Ratio of Black Unemployment to White

| 1972 | 1980 | 1990 | 2000 | 2010 | 2020 |
|---|---|---|---|---|---|
| 2.04 | 2.27 | 2.38 | 2.17 | 1.84 | 1.57 |

120 *CPS Historical Time Series Tables*, U.S. CENSUS BUREAU, https://www.census.gov/data/tables/time-series/demo/educational-attainment/cps-historical-time-series.html [https://perma.cc/23MC-W5H4] (Feb. 24, 2022) (tbl. A-2, Percent of People 25 Years and Over Who Have Completed High School or College by Race, Hispanic Origin and Sex: Selected Years 1940 to 2021). The ratio of white college graduates to Black college graduates was calculated from this data and uses the data from the category white, not white alone, non-Hispanic.

121 Federal Reserve Bank of St. Louis, *Unemployment Rate (UNRATE)*, FED. RSRV. ECON. DATA, https://fred.stlouisfed.org/series/UNRATE#0 [https://perma.cc/D4BZ-X74T] (Jan. 23, 2023) (select "Edit Graph"; modify frequency to "Annual" with Aggregation Method "Average"; then customize data by searching and adding lines for "Unemployment Rate – White" and "Unemployment Rate – Black or African American"). "The Ratio of Black Unemployment to White" was calculated using this data. Prior to 1972, the U.S. Bureau of Labor Statistics reported the unemployment rate by race as either "White" or "Negro and Other" and, as such, my data begins with the more specific racial delineations. *See* U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 1973, at 226 (94th ed. 1973).

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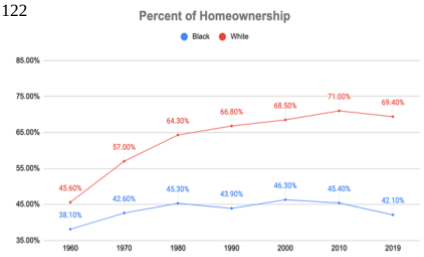


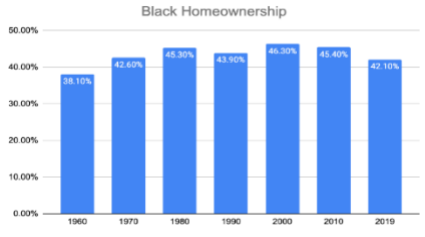


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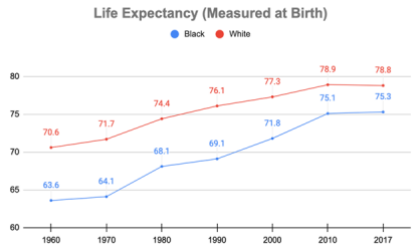


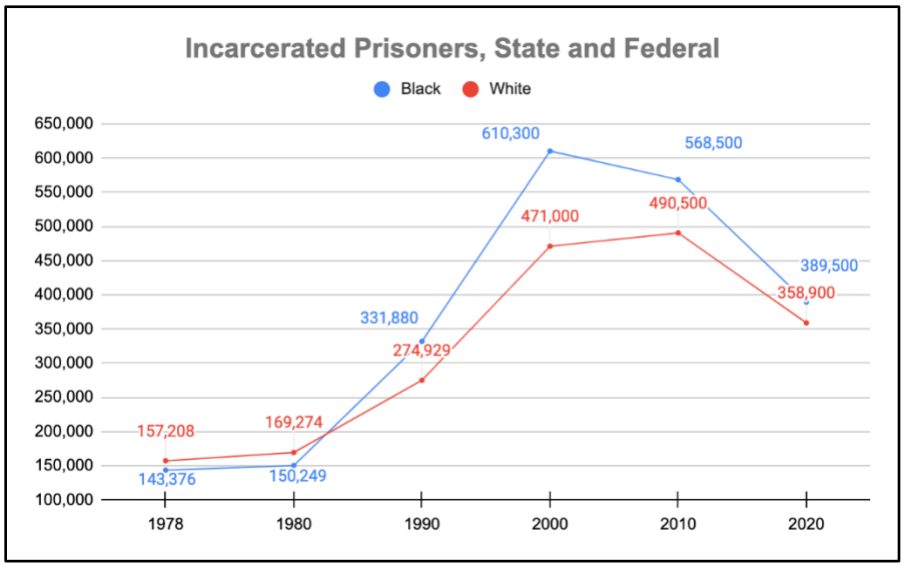

Differences in Life Expectancy, Years (White vs. Black)

| 1960 | 1970 | 1980 | 1990 | 2000 | 2010 | 2017 |
|---|---|---|---|---|---|---|
| 7 | 7.6 | 6.3 | 7 | 5.5 | 3.8 | 3.5 |

122 For data from 1940–1990, see U.S. DEP'T OF HOUS. & URBAN DEV. OFF. OF POL'Y DEV. AND RSCH., HOMEOWNERSHIP GAPS AMONG LOW-INCOME AND MINORITY BORROWERS AND NEIGHBORHOODS 85, exhibit 3-1 (2005), https://www.huduser.gov/publications/pdf/homeownershipgapsamonglow-incomeandminority.pdf [https://perma.cc/8UDE-4GQM]. For data from 2010 and 2019, see *Housing Vacancies and Homeownership—Annual Statistics: 2019*, U.S. CENSUS BUREAU, https://www.census.gov/housing/hvs/data/ann19ind.html [https://perma.cc/GH8V-Z4LN].

123 Nat'l Ctr. for Health Stats., *Health, United States 2020–2021: Table LExpMort*, CTR. DISEASE CONTROL & PREVENTION (2021), https://www.cdc.gov/nchs/data/hus/2020-2021/LExpMort.pdf [https://perma.cc/U2CY-VDMQ]. "The Differences in Life Expectancy in Years" was calculated from this data. As an additional note, life expectancy dropped significantly in 2020, with provisional data reporting that "[l]ife expectancy for Black people was only 71.8 years compared to 77.6 years for White people . . . [and] even lower for Black males at only 68 years." Latoya Hill, Samantha Artiga & Sweet Haldar, *Key Facts on Health and Health Care by Race and Ethnicity*, KAISER FAM. FOUND. (Jan. 26, 2022), https://www.kff.org/report-section/key-facts-on-health-and-health-care-by-race-and-ethnicity-health-status-outcomes-and-behaviors/#:~:text=Provisional%20data%20from%202020%20show,males%20at%20only%2068%20years [https://perma.cc/XQ9T-F37M].

Figure 2: Incarcerated Prisoners from 1978 to 2020[124]




## IV

### CRT CONCEPTS

Our CRT discussions were primarily focused on the structure of the Supreme Court's racial justice jurisprudence, but we recognized that there is an important relationship between racial jurisprudence and mainstream American views on racial inequality. Courts do not operate independently of the cultural values of American society. Rather, there is an exchange between those cultural values and courts' interpretations of the law—they interact with and shape each other. From a color-conscious perspective of attempting to dismantle the continuing structures of racial oppression in our society, it is also necessary to provide a more complete picture to American society of the impact of racial discrimination on our beliefs today.

Our critiques of colorblindness were coupled with our understanding of the theoretical weakness of the color consciousness of the desegregation era that was based on an understanding that Black people were the only ones

124 Prison population statistics by race and ethnicity began to be reported by the DOJ's Bureau of Justice Statistics in 1978. *See* CHET BOWIE, U.S. DEP'T OF JUST., BUREAU OF JUST. STATS., PRISONERS 1925–81, at 4 (1982). For data from 1978 and 1980, see *id.* For 1990, see JAMES J. STEPHAN, U.S. DEP'T OF JUST., BUREAU OF JUST. STATS., CENSUS OF STATE AND FEDERAL CORRECTIONAL FACILITIES, 1990, at 3 (1992). For 2000, see ALLEN J. BECK & PAIGE M. HARRISON, U.S. DEP'T OF JUST., BUREAU OF JUST. STATS., PRISONERS IN 2000, at 10 (2001). For 2010 and 2020, see E. ANN CARSON, U.S. DEP'T OF JUST., BUREAU OF JUST. STATS. PRISONERS IN 2020—STATISTICAL TABLES 10 (2021).

impacted by segregation and colorblindness. As a result, we sought a race consciousness that was motivated by a desire to dismantle the racial disparities that are attributable to America's history of racial discrimination. Having now viewed the racial disparities in socioeconomic statistics, one can see that there has been some, but not significant, improvement in some of the indicators, except for the ratio of Black college graduates to white graduates. In other words, the passage of three decades has borne out our concerns that colorblindness would preserve racial disparities.

One can see how many of the CRT insights developed out of a desire to shift the ways we look at continuing racial disparities in socioeconomic conditions.[125]

**Storytelling/Counter-Storytelling and Naming One's Own Reality**

We used these concepts in CRT in part to demonstrate the impact of race and racial discrimination on the lives that we live. This is a challenge to the colorblind thinking that denies the importance of these experiences.[126]

**Interest Convergence and Racial Realism**

These two interrelated concepts are the product of renowned Harvard Law School Professor Derrick Bell.[127] Bell's theory is that the interest of Black people in achieving racial justice is accommodated only when and for so long as policymakers find that the interest of Black people converges with the political and economic interests of elite white people. Civil rights successes such as desegregation in *Brown v. Board*,[128] or even Lincoln's Emancipation Proclamation,[129] while lauded as landmark benefits for Black people, came only when they included equal or greater (though tangential)

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125 For an early bibliography of CRT writings, see Richard Delgado & Jean Stefancic, *Critical Race Theory: An Annotated Bibliography*, 79 VA. L. REV. 461 (1993). *See also* Richard Delgado & Jean Stefancic, *Critical Race Theory: An Annotated Bibliography 1993, A Year of Transition*, 66 U. COLO. L. REV. 159 (1994) (updating the authors' previous annotated bibliography with new sources from late 1992 to 1993).

126 *See, e.g.*, Margaret M. Russell, *"A New Scholarly Song": Race, Storytelling, and the Law*, 33 SANTA CLARA L. REV. 1057 (1993) (reviewing DERRICK A. BELL, JR., FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM (1992) and PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS (1991)).

127 *See* DERRICK A. BELL, JR., AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE 63–69 (1987) (discussing the various ways in which civil rights litigation has promoted the interests of the white majority); BELL, FACES AT THE BOTTOM OF THE WELL, *supra* note 126, at 92–99 (developing the idea of racial realism as a mode of thinking about race in the United States).

128 *See* Derrick A. Bell, Jr., *The Unintended Lessons in* Brown v. Board of Education, 49 N.Y.L. SCH. L. REV. 1053, 1056 (2005) (citing MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY (2000)) (noting that success in desegregation only came after it was needed to advance U.S. foreign policy interests).

129 *See id.* at 1057 ("[Lincoln] signed the Emancipation Proclamation when he recognized that it would improve the Union's chances in the Civil War by disrupting the Confederate workforce and discouraging European nations . . . from siding with the Confederacy.").

benefits for white people. From his interest convergence principle comes Bell's Racial Realism—a call for acceptance that racism is an integral, permanent, and indestructible part of American society.[130] Racial equality under law, Bell argues, is an unattainable ideal: "We call ourselves African Americans, but despite centuries of struggle, none of us—no matter our prestige or position—is more than a few steps away from a racially motivated exclusion, restriction or affront."[131] The heart of Racial Realism is the belief that, by abandoning the commitment to racial equality and accepting the reality of institutionalized and likely insurmountable subordination, Black people can fully address, appreciate, and cope with the disparities. "We must realize, as our slave forebears, that the struggle for freedom is, at bottom, a manifestation of our humanity that survives and grows stronger through resistance to oppression, even if that oppression is never overcome."[132]

**Whiteness as Property and White Privilege**

Cheryl Harris conceptualized "whiteness" as an intangible form of property which historically has benefited from the protections of the American legal system.[133] Just as a landowner is afforded certain rights and privileges over their estate, so too has white skin granted its holder the ability to vote, travel freely, attend school, obtain work—turning whiteness into a "status, a form of radicalized privilege ratified in law."[134] As a result, whiteness automatically carries with it a greater economic, political, and social security. Most powerful among these privileges—Harris's "conceptual nucleus"[135]—is the fundamental right to exclude. Further, the exclusive rights and benefits conferred by whiteness have been valued all the more because they have been denied to others. As slavery, Jim Crow, and segregation became delegitimized, decisions by lawmakers and the Supreme Court institutionalized other white privileges which ideologically became "part of the settled expectations of whites."[136] The answer to unseat the status quo of the institutionalized property interest in whiteness? An affirmative action system that "creates a property interest in *true* equal opportunity – opportunity and means that are equalized."[137]

**Unconscious Racism**

This concept was introduced into the legal literature by Charles Lawrence's

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130 *See* Derrick A. Bell, Jr., *Racial Realism*, 24 CONN. L. REV. 363, 377 (1992) (noting that Black people are and will be a permanent, subordinate class in American society).

131 *Id.* at 374.

132 *Id.* at 378.

133 Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993).

134 *Id.* at 1745.

135 *Id.* at 1714.

136 *Id.* at 1777.

137 *Id*. at 1786.

1987 article.[138] In reexamining the doctrine of "discriminatory purpose" as established in *Washington v. Davis*,[139] Lawrence points out that all Americans are products of a dominant set of cultural beliefs which includes the devaluation of Black people. He explains racism not as a "conscious conspiracy of a power elite or the simple delusion of a few ignorant bigots," but an irrational, dysfunctional, psychological condition deeply ingrained in Americans as part of a shared common historical experience.[140] For CRT, one of our major concerns was that America had normalized the belief that Black people are supposed to have less material resources in our society. These beliefs impact all of us.[141] For example, Jesse Jackson is reported to have said "[t]here is nothing more painful for me at this stage in my life than to walk down the street and hear footsteps and start to think about robbery and then look around and see it's somebody white and feel relieved."[142] Despite his status as a champion for the rights of Black people, Jackson was exhibiting a thought derived from an unconscious racism towards Black people.[143] Lawrence concludes that, because such attitudes are so deeply fundamental to the American experience, steps towards equality can only commence from the courts' independent scrutiny of government conduct, whether intentionally discriminatory or unintentionally laden with racially discriminatory meaning.[144]

## Institutional Racism

While early CRT organizers understood that the "Whites Only" signs were gone, we also knew that racial power remained in myriad social and institutional practices. There were, or could be, racial power dynamics embedded even in what passed for "knowledge" in academia or "neutrality"

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138 *See* Lawrence III, *supra* note 56.

139 426 U.S. 229, 240 (1976). Lawrence describes the doctrine as "requir[ing] plaintiffs challenging the constitutionality of a facially neutral law to prove a racially discriminatory purpose on the part of those responsible for the law's enactment or administration." Lawrence III, *supra* note 56, at 318.

140 Lawrence III, *supra* note 56, at 330.

141 *See id.* at 322 ("To the extent that this cultural belief system has influenced all of us, we are all racists.").

142 Paul Glastris & Jeannye Thornton, *A New Civil Rights Frontier*, U.S. NEWS & WORLD REP., Jan. 17, 1994, at 38.

143 For a deeper examination of the ramifications of this unconscious stereotype that Black people are more prone to acts of violence, and attempts by non-Black criminal defendants to utilize race-based arguments for establishing reasonableness in self-defense claims, see Jody D. Armour, *Race Ipsa Loquitur: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes*, 46 STAN. L. REV. 781 (1994).

144 *See* Lawrence III, *supra* note 56, at 387 (noting that it is both necessary and appropriate for courts to detect discriminatory behavior). For specific applications of Lawrence's argument, see for example, Jason A. Gilmer, Note, *United States v. Clary: Equal Protection and the Crack Statute*, 45 AM. U. L. REV. 497, 503 (1995); Sheri Lynn Johnson, Comment, *Unconscious Racisms and the Criminal Law*, 73 CORNELL L. REV. 1016, 1017 (1988).

in law.[145] Rather than seeing racism as an irrational deviation from rationality, we began to explore how liberal categories of reason and neutrality themselves might bear the marks of history and struggle, including racial and other forms of social power.

### History of Racial Oppression and the Contributions of Blacks and People of Color

Part of the impact of colorblindness when applied to America's history of racial discrimination is that often the ubiquitous nature of the impact of racial discrimination on American history is deemphasized and the contributions of people of color are underappreciated. The need to discuss history that highlights both the history of racial oppression and the contributions of Black people is critical for people of color.[146]

### The Need for Racially-Conscious Remedies

CRT understood and agreed with Justice Blackmun's statement in *Regents of the University of California v. Bakke*: "In order to get beyond racism, we must first take account of race."[147]

## CONCLUSION

More than anything, in those early CRT meetings we were concerned about socioeconomic racial disparities. This concern was heightened by the Supreme Court's jurisprudence. The Court's Equal Protection jurisprudence had frozen in place the racial disparities we were concerned about as it increasingly adopted a jurisprudential approach for resolving racial discrimination along the dictates of colorblindness. Thus, not only were we arguing that the Equal Protection Clause jurisprudence should recognize a distinction between policies and programs directed towards attenuating racial disparities and those aimed at strengthening them, but also critiquing racial jurisprudence based on colorblindness. Such an approach played on our dual notion of race consciousness. The racial consciousness of slavery and segregation and articulated by the Supreme Court in *Brown v. Board of Education* was based on the belief that there was something wrong with Black people. We sought to generate a different form of race consciousness—one that was consciously aware that the racial disparities of

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145 Gary Peller, *I've Been a Critical Race Theorist for 30 Years. Our Opponents Are Just Proving Our Point for Us*., POLITICO (June 30, 2021, 4:31 AM), https://www.politico.com/news/magazine/2021/06/30/critical-race-theory-lightning-rod-opinion-497046 [https://perma.cc/Q8T2-ZRQ7].

146 *See, e.g.*, Jerome McCristal Culp, Jr., *Toward a Black Legal Scholarship: Race and Original Understandings*, 1991 DUKE L.J. 39 (1991) (discussing the history of legal scholarship and Black people); Derrick A. Bell, Jr., *Black History and America's Future*, 29 VAL. U. L. REV. 1179, 1183 (1995) (discussing the history of Black oppression in the context of growing economic inequality).

147 438 U.S. 265, 407 (1978) (separate opinion of Blackmun, J.).

our time were not the result of deficiencies in Black people, but the continuing manifestations of our history of racial oppression and subordination. The race consciousness needed was one dedicated to dismantling the policies, programs, and institutional practices that were recreating racial disparities.

At the time of the first CRT workshop, I was struggling to write my first article. As any young scholar understands, it just wasn't coming together. However, the first CRT workshop clarified my thinking about race to such an extent that I was able to finish and publish that piece of scholarship. That article articulated a legal theory for school desegregation that did not depend on the notion embraced by the Supreme Court's school desegregation jurisprudence. The theory that I proposed was one that required the Court to view the harm of segregation as one that distorted the value-inculcating function of public schools—turning it into an invidious value inculcation. I argued that segregation meant that public schools were conveying the message that Black students were inferior. By doing so, it corrupted the value-inculcating process of public schools. This harm was one that negatively impacted all students, not just Black ones. Thus, remedies for de jure segregation should be directed towards measures necessary to eliminate the inculcation of this invidious value. While desegregating all aspects of public education would be among the most important remedial measures, it would not be the only one. At the conclusion of the article, I wrote:

> Courts, however, should react favorably to any systematic effort by a school district to address racial bias in its traditional educational program. Although courts should be hesitant about wading into the traditional educational program in an effort to eliminate invidious value inculcation, it is unlikely that a school system will have eliminated invidious value inculcation if it has not attempted to address racial bias in its traditional educational program. Systematic efforts by school districts to reduce bias in their (1) teaching strategies; (2) curriculum, textbooks, and other instructional materials; (3) teacher, staff, and administrator attitudes; and (4) testing procedures should therefore be given significant consideration by federal courts in determining whether unitary status has been achieved.[148]

The anti-CRT legislation, at least in part, is aimed at preventing public schools from instituting precisely the extra-desegregation efforts I urged federal courts to take consideration of thirty-five years ago. American society has before changed dominant cultural ideas that in our society generated group-based oppression. For example, we used to believe that women should not play sports. We used to believe that the LGBTQ+

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[148] Kevin Brown, *Termination of Public School Desegregation: Determination of Unitary Status Based on the Elimination of Invidious Value Inculcation*, 58 GEO. WASH. L. REV. 1105, 1163 (1990).

community should stay in the closet. We used to believe that Black people should be slaves and then that they should be segregated. As those ideas changed, we as a society became more enlightened and inclusive. The path to such change that CRT attempts to bring about requires us, as Americans, not only to discuss our country's history of racial oppression but to generate the consciousness that is necessary to work to disestablish its continuing manifestations and effects. As my good friend Beth K. Whittenbury, the 2021–22 ABA Civil Rights and Social Justice Section Chair, put it at a recent panel discussion:

> Accounting for these histories is not an easy task, by any means. However, these past few years have shown us that hard conversations about social justice remain vital to the well-being and integrity of our societies. We have also found that, often, the courage to face painful social injustices head-on is richly rewarded with new-found solidarity and a strengthened spirit of community. We have also learned a thing or two about the importance and urgency of learning how to hear one another as well as how to speak with one another on sensitive and painful topics. By learning how to have hard conversations together, we are creating a new shared language about our past, present, and future, one that will hopefully allow us to see each other, ourselves, our interconnectedness, and, therefore, our community with greater clarity and with renewed faith and vitality. Lawyers and other members of civil society can play an important role in modeling how to tackle tough public conversations.[149]

[149] Beth K. Whittenbury, Remarks at the South Asian Bar Association and Equality Labs Webinar on Caste Discrimination (2022) (on file with author).