

from: Critical Race Theory by Richard Delgado + Jean Stefancic

SUGGESTED READINGS

- Brooks, Roy L. & Mary Jo Newborn, *Critical Race Theory and Classical-Liberal Civil Rights Scholarship: A Distinction without a Difference*, 82 Cal. L. Rev. 787 (1994).
- Calmore, John O., *Critical Race Theory*, Archie Shepp, and Fire Music: *Securing an Authentic Intellectual Life in a Multicultural World*, 65 S. Cal. L. Rev. 2129 (1992).
- Critical Race Theory: The Cutting Edge* (Richard Delgado & Jean Stefancic eds., 2d ed. 2000).
- Critical Race Theory: The Key Writings That Formed the Movement* (Kimberlé Crenshaw, Neil Gotanda, Gary Peller & Kendall Thomas eds., 1995).
- Haney López, Ian F., *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 Harv. C.R.-C.L. L. Rev. 1 (1994).
- Harris, Angela P., Foreword: *The Jurisprudence of Reconstruction*, 82 Cal. L. Rev. 741 (1994).
- Hayman, Robert L., Jr., *The Color of Tradition: Critical Race Theory and Postmodern Constitutional Traditionalism*, 30 Harv. C.R.-C.L. L. Rev. 57 (1995).
- Omi, Michael & Howard Winant, *Racial Formation in the United States: From the 1960s to the 1990s* (2d ed. 1994).
- Race and Races: Cases and Resources for a Diverse America* (Juan Perea, Richard Delgado, Angela Harris, & Stephanie Wildman eds., 2000).
- Special Issue on *Critical Race Theory*, 11 Int'l J. Qual. Stud. Ed. 1 (1998).
- Symposium: *Critical Race Theory*, 82 Cal. L. Rev. 741 (1994).

CHAPTER II

Hallmark Critical Race Theory Themes

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

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

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

Will the lives of poor people like him improve very much the next day? No. Passersby may be somewhat kinder, may smile at them more often, but if something inherent in the nature of our capitalist system ineluctably produces poverty and class segregation, that system will continue to create and chew up victims. Individual street people may feel better, but they will still be street people. And the free enterprise system, which is built on the idea of winners and losers, will continue to produce new ones every day.

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

Would life improve very much for people of color?

A. Interest Convergence, Material Determinism, and Racial Realism

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

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

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

Materialists point out that conquered nations generally demonize their subjects to feel better about exploiting them, so that, for example, planters and ranchers in Texas and the Southwest circulated notions of Mexican inferiority at roughly the same period that they found it necessary to take over Mexican lands or, later, to import Mexican people for

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

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

In 1954, however, the Supreme Court unexpectedly gave them everything they wanted. Why just then? Bell hypothesized that world and domestic considerations—not moral

qualms over blacks' plight—precipitated the pathbreaking decision. By 1954 the country had ended the Korean War; the Second World War was not long past. In both wars, African American servicemen had performed gallantly in the service of democracy. Many of them returned to the United States, having experienced for the first time in their lives a setting in which cooperation and survival took precedence over racism. They were unlikely to return willingly to regimes of menial labor and social vilification. For the first time in decades, the possibility of mass domestic unrest loomed.

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

Bell's article was greeted with outrage and accusations of cynicism. Yet, ten years later, the legal historian Mary Dudziak carried out extensive archival research in the files of the U.S. Department of State and the U.S. Department of Justice. She analyzed foreign press reports, as well as letters from U.S. ambassadors abroad, all showing that Bell's intuition was correct. When the Justice Department intervened on the side of the NAACP for the first time in a school desegregation case, it was responding to a flood of secret cables

and memos outlining the United States' interest in improving its image in the eyes of the Third World.

B. Revisionist History

Detrick Bell's analysis of *Brown* illustrates a second signature CRT theme, revisionist history. Revisionist history reexamines America's historical record, replacing comforting majoritarian interpretations of events with ones that square more accurately with minorities' experiences. It also offers evidence, sometimes suppressed, in that very record, to support those new interpretations. Revisionism is often materialist in thrust, holding that to understand the zigs and zags of black, Latino, and Asian fortunes, one must look to things like profit, labor supply, international relations, and the interest of elite whites. For the realists, attitudes follow, explain, and rationalize what is taking place in the material sector.

The difference between the materialists and the idealists is no minor matter. It shapes strategy on decisions of how and where to invest one's energies. If the materialists are right, one needs to change the physical circumstances of minorities' lives before racism will abate. One takes seriously matters like unions, immigration quotas, and the loss of industrial jobs to globalization. If one is an idealist, campus speech codes, tort remedies for racist speech, diversity seminars, and increasing the representation of black, brown, and Asian actors on television shows will be high on one's list of priorities. A middle ground would see both forces, material and cultural, operating together and synergizing each other,

so that race reformers working in either area contribute to a holistic project of racial redemption.

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

Taylor v. Metzger, 706 A.2d 685, 695 (N.J. 1998).

C. Critique of Liberalism

As mentioned in chapter 1, critical race scholars are discontent with liberalism as a framework for addressing America's racial problems. Many liberals believe in color blindness and neutral principles of constitutional law.

The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth, and in power. . . . But in view of the constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful.

Justice John Harlan, dissenting in Plessy v. Ferguson, 163 U.S. 537 (1896).

words. Children raised in smoggy Mexico City are said to paint pictures with a brownish-yellow, never blue, sky. These examples point out the concept that lies at the heart of structural determinism, the idea that our system, by reason of its structure and vocabulary, cannot redress certain types of wrong. Structural determinism, a powerful notion that engages both the idealistic and the materialistic strands of critical race theory, takes a number of forms. Consider the following three. (A fourth, the black-white binary, is taken up in chapter 5.)

1. Tools of Thought and the Dilemma of Law Reform

Traditional legal research tools, found in standard law libraries, rely on a series of headnotes, index numbers, and other categories that lawyers use to find precedent. (With computerization, this reliance is somewhat less acute than it was formerly, but the problem still persists.) Suppose that no case is on point because the lawyer faces a problem of first impression, requiring legal innovation. In such situations, legal categories will lead the lawyer to dead ends—to solutions that have not worked. What is required is innovation, not the application of some preexisting rule or principle. Even when a new idea, such as jury nullification, is beginning to catch on, the legal indexers who compile the reference books and indexing tools may fail to realize its significance. When Sir William Blackstone's *Commentaries on the Laws of England* laid down the basic structure of liberal/capitalist thought, this served as a template for future generations of

lawyers, so that legal change thereafter came slowly. Once the structure of law and legal categories is set, it replicates itself much as, in the world of biology, DNA enables organisms to replicate. In some respects, the predicament is the old one about the chicken and the egg. It is hard to think about something that has no name, and it is hard to name something unless one's interpretive community has begun talking and thinking about it.

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

2. The Empathic Fallacy

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

One difficulty with this approach is that it may be physically dangerous to talk back. Much hate speech is uttered in several-on-one situations where talking back would be

foolhardy. At other times, it is delivered in anonymous or cowardly fashion, such as graffiti scrawled on the bulletin board of a minority association, or an unsigned note left in the box of a student of color. In these instances, more speech is, of course, impossible.

But a more basic problem is that much hate speech is *not perceived as such* at the time. The history of racial depiction shows that our society has blithely consumed a shocking parade of Sambos, coons, sneaky Japanese, and indolent, napping Mexicans—images that were perceived at the time as amusing, cute or, worse yet, true. How can one talk back to messages, scripts, and stereotypes that are embedded in the minds of one's fellow citizens, and, indeed, the national psyche? The idea that one can use words to undo the meanings that others attach to these very same words is to commit the empathic fallacy—the belief that one can change a narrative by merely offering another, better one—that the reader's or listener's empathy will quickly and reliably take over.

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

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

One of the reasons for avoiding excessive sentences is that the empathy required of . . . citizens in a democracy—is stunted when parents are away in prison. "[W]ithout regular comforting, physical contact and sensory stimulation from birth, the biological capacity for sociality—the precondition for empathy and conscience—cannot develop . . . and [e]mpathy requires the nurturing required by early social relationships. Breaking up families by sending fathers and mothers to prison for unnecessary long terms sows the seeds of problems for the next generation, particularly when, as is sometimes the case, the ex-prisoner becomes a monster."

Jack B. Weinstein, Senior Judge, U.S. District Court, Eastern District of New York, *Adjudicating Justice in a Diverse Mass Society*, 8 J. L. & Pol'y 385, 410 (2000).

Classroom Exercise

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