

## Towards an Understanding of Critical Race Theory: Dispelling False Claims and Misrepresentations

Shiv Narayan Persaud

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# **TOWARDS AN UNDERSTANDING OF CRITICAL RACE THEORY:**

## **DISPELLING FALSE CLAIMS AND MISREPRESENTATIONS**

Shiv Narayan Persaud \*

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### **ABSTRACT**

The Article discusses critical race theory as a paradigm shift, and further dispels the notion that it promotes a form of Marxism. With the rise of political attitudes toward seeking legislation to denounce CRT, it is incumbent upon those in legal studies to investigate and bring the value of CRT into the forefront. The purpose of this Article is to open a new discussion on these issues, rooted in promoting cultural competency in the legal profession.

### **AUTHOR'S NOTE**

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INTRODUCTION .....	81
II. THE EVOLUTION OF CRITICAL RACE THEORY .....	86
A. Race and Racism.....	86
B. Grounding Of Critical Race Theory .....	88
1. Colonization and Control of Slaves.....	88
2. Racism and the Criminalization of Blacks From Slavery and Beyond.....	95
C. Critical Race Theory.....	101
III. CRITICAL RACE THEORY IS MARXISM – AN ERRONEOUS CLAIM.....	108
IV. CRITICAL RACE THEORY AND CULTURAL COMPETENCY IN LEGAL PRACTICE.....	112
V. DISCUSSION AND CONCLUSION .....	116

## INTRODUCTION

The recent catapulting of Critical Race Theory<sup>1</sup> (CRT) into the forefront of national discourse and debate has stirred a wide-ranging set of erroneous claims, distortions, and modes of resistance.<sup>2</sup> Motivated by political self-interest and in search of prominence, some politicians hasten to condemn CRT as Marxism,<sup>3</sup> fostering their

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<sup>1</sup> The term “Critical Race Theory” (CRT) was coined by Kimberlé Crenshaw, a Columbia University law professor and distinguished professor of law at the University of California, Los Angeles. Crenshaw developed the term Critical Race Theory to distinguish their association’s focus on the intersection on race, gender, sexuality in law. See Janel George, *A Lesson on Critical Race Theory*, AM. BAR ASS’N (Jan. 11, 2021), [https://www.americanbar.org/groups/crsj/publications/human\\_rights\\_magazine\\_home/civil-rights-reimagining-policing/a-lesson-on-critical-race-theory/](https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/civil-rights-reimagining-policing/a-lesson-on-critical-race-theory/) [<https://perma.cc/YDA7-P75M>] (noting that the term CRT originated with Professor Crenshaw); *Kimberle W. Crenshaw: Isidor and Seville Sulzbacher Professor of Law*, COLUM. L. SCH., <https://www.law.columbia.edu/faculty/kimberle-w-crenshaw> [<https://perma.cc/X5HH-ZQCF>] (last visited Nov. 25, 2022) (discussing Professor Crenshaw’s credentials). Influenced by the works of Professor Derrick Bell on race and racism in law, Professors Crenshaw, Bell and a few other legal scholars—Regina Austin, Richard Delgado, Cheryl Harris, Charles Lawrence, Mari Matsuda, Kendall Thomas, and Patricia Williams—formed an association to further explore and analyze race and racism as they intersect with gender, sexuality and other minority groups in the production and reproduction of inequality through law. See Linda S. Greene, *Critical Race Theory: Origins, Permutations, and Current Queries*, 2021 WIS. L. REV. 259, 259-62 (2021) (noting the participation of Regina Austin, Charles Lawrence, Mari Matsuda, and Kendall Thomas in the association’s meetings); George, *supra* note 1 (noting the participation of Richard Delgado, Cheryl Harris, and Patricia Williams).

<sup>2</sup> “[During the Trump Administration] Critical Race Theory itself was not President Trump’s target . . . [H]is target was the critical literacy project of the racial justice movements. His aim was to maintain a regime of ‘compulsory racial illiteracy,’ a state in which people would lack the capacity to challenge the racial status quo.” Greene, *supra* note 1, at 267 (footnotes omitted). According to Professor Greene, “[a]dvocacy that demands a constitutional right is at the core of struggles against racism. Thus, these attacks on CRT are part of a movement to sustain a system in which Black, Brown, and the white poor are miseducated and undereducated in an increasingly carceral public school system and state.” *Id.* (citation omitted).

<sup>3</sup> “Rep. Mark Green (R-Tenn.) is urging the U.S. Air Force Academy to remove an instructor from her position . . . after she wrote an op-ed explaining why she teaches critical race theory in her classroom.” Dominick Mastrangelo, *GOP Rep Demands Air Force Academy Professor be Removed for Teaching Critical Race Theory*, HILL (July 8, 2021, 11:08 AM), <https://thehill.com/homenews/house/562051-gop-rep-demands-air-force-academy-prof-be-removed-for-penning-op-ed-backing/> [<https://perma.cc/J8ED-A54Q>]. “Green, a graduate of West Point and

distorted views and claims in the mobilization of supporters into resistance groups that unwittingly—or consciously—militate against an understanding of CRT and its impact on understanding social relations and societal inequality.<sup>4</sup>

Formulated by legal scholars seeking to address and resolve the underpinnings of racism in law and public policy,<sup>5</sup> CRT, once confined within the hallways and classrooms of academe—particularly colleges of law—has emerged as a controversial political issue without clear policy significance.<sup>6</sup> While it remains distorted and misrepresented,

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Army veteran of two decades, said he knows firsthand how the instruction cadets receive during their training leaves ‘a lasting impact.’” *Id.* Green was further quoted: “[i]f we want servicemembers who are proud to defend this country, we must not denigrate the very principles upon which it was founded’ . . . ‘Making them ashamed of their country only decreases morale, retention, and unit cohesion. [CRT] is a Marxist ideology . . . .”” *Id.*

<sup>4</sup> “The theory was established in the ‘70s and ‘80s but isn’t widely taught outside of college and universities, but rhetoric used by conservatives in Congress and in state legislatures — that people’s children are being ‘indoctrinated’ by CRT — has been effective in catalyzing a groundswell of indignation.” Marty Johnson, *Critical Race Theory Becomes Focus of Midterms*, HILL (July 22, 2021, 6:00 AM), <https://thehill.com/homenews/house/564218-critical-race-theory-becomes-focus-of-midterms/> [<https://perma.cc/6R6V-8BRM>].

<sup>5</sup> Critical Legal Studies the “antecedent movement [to CRT] in modern legal culture . . . . [D]iscovered that legal scholars from three overlapping communities or groups—women, people of color, and women of color—were profoundly disaffected [with CLS’s tendency] to slight ‘minority’ scholars and communities even as it dedicated itself to improving the lot of the oppressed.” Francisco Valdes, *Latina/o Ethnicities, Critical Race Theory, and Post-Identity Politics in Postmodern Legal Culture: From Practices to Possibilities*, 9 LA RAZA L.J. 1, 6 (1996) (footnotes omitted). “Critical Legal Studies, as a relatively direct precursor of [CRT], therefore contained or indicated lessons that recent events or dialogs suggest may not have been fully appreciated among RaceCrits themselves.” *Id.* Thus, CRT “may have been insufficiently attentive to the interplay of patriarchy and white supremacy in the shaping of race and racialized power relations. Its interrogation of ‘race’ perhaps left important ‘intersections’ unexplored.” *Id.* at 5 (citing Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991)).

<sup>6</sup> *See, e.g.*, Greene, *supra* note 1, at 67 (noting former President Trump’s attacks on racial justice movements); Mastrangelo, *supra* note 3 (noting a Tennessee State Representative’s attack on CRT). CRT “puts race at the centre of critical analysis. Race has no necessary epistemological valence in itself, we are told, but depends on the context and organization of its production for its political effects.” Richard A. Jones, Ph.D., *Philosophical Methodologies of Critical Race Theory*, 1 GEO. J. L. & MOD. CRITICAL RACE PERSP. 17, 17 (2008) (quoting KAY ANDERSON, *RACE AND THE CRISIS OF HUMANISM* 198 (2007)). As noted by Professor Lackland Bloom, Jr., “[c]ritical race scholars have documented a wide range of instances,

CRT seems to serve as a catalyst for politicians and purveyors of social-political indifference seeking to gain or retain power and control through divisiveness.<sup>7</sup> Consequently, CRT has emerged as an instrument for propagandizing the public,<sup>8</sup> generating fear that CRT's instructional approach will proliferate in schools' educational curricula and thereby warp or disrupt the thoughts and minds of predominantly White students.<sup>9</sup>

Although CRT may appear to share some parallels with Marx's dialectical method as it relates to the production and reproduction of

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often through narrative method, in which race has apparently influenced the way an individual has been treated, either by government officials, or by members of the dominant culture." Lackland H. Bloom, Jr., *Hopwood, Bakke and the Future of the Diversity Justification*, 29 TEX. TECH L. REV. 1, 45 (1998) (citations omitted). Professor Bloom notes that a "commonly cited example is the case of a black student or professor stopped and questioned by the police in a middle-class, white, suburban neighborhood near a university campus for no apparent reason other than race." *Id.* (citation omitted).

<sup>7</sup> "On September 17, 2020, Donald Trump spoke at the so-called 'White House Conference on American History.' . . . to 'clear away the twisted web of lies' propagated by 'the left.'" Elizabeth S. Anker & Justin Desautels-Stein, *Introduction to the Symposium: The Stakes for Critical Legal Theory*, 92 U. COLO. L. REV. 945, 945 (2021) (citing *Remarks by President Trump at the White House Conference on American History*, TRUMP WHITE HOUSE ARCHIVES (Sept. 17, 2020, 2:54 PM) <https://trumpwhitehouse.archives.gov/briefings-statements/remarks-president-trump-white-house-conference-american-history/> [<https://perma.cc/SL59-ABXE>]). "In order to demystify these ideological poisons, Trump charged historians with the task of standing up against the toxic propaganda machine of . . . [CRT], a 'Marxist doctrine holding that America is a wicked and racist nation.'" *Id.*

<sup>8</sup> "[CRT] has been around for decades, but has just recently caught the ire of the GOP . . . . [T]he issue has gained traction with parents and school boards across the country, at least in part because of the rhetoric used by conservatives – that children are being 'indoctrinated' by critical race theory." Marty Johnson, *Republicans Unveil Bill to Ban Federal Funding of Critical Race Theory*, HILL (Aug. 10, 2021, 11:58 AM), <https://thehill.com/homenews/senate/567152-republicans-unveil-bill-to-ban-federal-funding-of-critical-race-theory/> [<https://perma.cc/4FHG-3YZJ>].

<sup>9</sup> "Many legislators who press for laws to forbid curricula on racism and sexism in the schools identify the enemy as [CRT]." Rob Taylor, Ph.D., *Headlines on School Law*, 48 QUINLAN SCH. L. BULL. 1, 2 (2021). "Kimberle [sic] Crenshaw describes the theory as 'an approach to grappling with a history of white supremacy that rejects the belief that what's in the past is in the past, and that the laws and systems that grow from the past are detached from it.'" *Id.* "One serious critic, Patricia Morgan, a Republican legislator from Rhode Island, called critical race theory 'a divisive, destructive, poisonous ideology that makes white males oppressors . . . and it makes everyone else the victims.'" *Id.*

relations of domination, this Article aims to demonstrate that CRT is not Marxism.<sup>10</sup> In contrast to Marx's ideas, proponents of CRT have grounded their arguments on societal relations of racial and gender inequality and the production-reproduction of social injustice through law.<sup>11</sup> As Crenshaw et al. explain:

Critical Race scholarship . . . is . . . unified by two common interests. The first is to understand how a regime of white supremacy and its subordination of people of color have been created and maintained in America, and, in particular, to examine the relationship between that social structure and professed ideals such as “the rule of law” and “equal protection.” The second is a desire not merely to understand the vexed bond between law and racial power but to *change* it.<sup>12</sup>

Unlike Marx, CRT scholars do not focus attention and analysis on class dynamics—class formation, class exploitation, class consciousness, and class conflict.<sup>13</sup> Instead, CRT scholars place

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<sup>10</sup> “CRT’s use of materiality . . . has deep philosophical roots . . . CRT looks at the material circumstances of ‘people on the ground,’ and this emphasis on materiality is an important methodological tool.” Jones, *supra* note 6, at 29. “Rather than theorizing about how legal concepts structure the realities of justice and equality, crits deploy a material analysis, where practices structure and maintain ideologies.” *Id.* at 29-30.

<sup>11</sup> “Marx understood that political systems purporting to be deducible from necessary first principles, are, in actuality, contingent mechanisms resulting from protecting the practices of material production.” *Id.* at 30 (citation omitted). In contrast, “[p]ractitioners of CRT understand that jurisprudence is not objectively separable from the structural materialities of production of the society in which it is practiced. CRT’s materialist orientation deemphasizes the theoretical, while vaunting critique of the material modes of production as structuring mechanisms for creating and maintaining dominant/subordinant relationships.” *Id.* *But see* Antony Paul Barley, *When the Stars Begin to Fall: Introduction to Critical Race Theory & Marxism*, 1 COLUM. J. RACE & L. 226, 240 n.61 (2012) (quoting Gill Gott, *Race, Rights and Reterritorialization*, 1 COLUM. J. RACE & L. 302, 311 (2012)) (“CRT theorizes rights and politics from a ‘place in the world’ of political subjecthood. Marxism provides an impetus to think dialectically about rights in light of patterns and systems of accumulation. Everyone who works critically on race and law can benefit by addressing these polarities.”).

<sup>12</sup> CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT xiii (Kimberlé Crenshaw et al. eds., 1995) [hereinafter CRENSHAW ET AL.] (emphasis in original).

<sup>13</sup> As Marx himself stated, “[t]he history of all hitherto existing society is the history of class struggles.” KARL MARX & FREDRICK ENGELS, *MANIFESTO OF THE COMMUNIST PARTY: PRINCIPLES OF COMMUNISM* 33 (Foreign Languages Press 2020) (1848) (footnote omitted). Marx then elaborated in the *MANIFESTO* on the various aspects of class. *See generally id.*

analytical emphasis on race and the consequences of racism in American society. In explaining this emphasis, Crenshaw et al. write:

With its explicit embrace of race-consciousness, Critical Race Theory aims to reexamine the terms by which race and racism have been negotiated in American consciousness, and to recover and revitalize the radical tradition of race-consciousness among African-Americans and other peoples of color—a tradition that was discarded when integration, assimilation and the ideal of color-blindness became the official norms of racial enlightenment.<sup>14</sup>

As this Article aims to clarify, Marx focused his analysis on class domination—not race or gender—as the primary source of inequality and injustice in society.<sup>15</sup> Hence, the Marxist label is an intentional distortion made in an attempt to generate fear in listeners and create a misrepresentation CRT, so as to stifle discussion and debate on the subject.<sup>16</sup>

Furthermore, this Article elucidates the claim that CRT is grounded in the actualities of American society from which race emerged, grew, and was sanctioned legally, thereby becoming a crucial instrument of social control in the process of producing and reproducing indifference, inequality, and population segmentation.<sup>17</sup> In addition, this Article

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<sup>14</sup> CRENSHAW ET AL., *supra* note 12, at xiv.

<sup>15</sup> “Like Marx, critical race theorists therefore want us to care about the subordinated . . . Critical race theorists thus reject the view that racism can easily be rooted out of our lives.” Angela P. Harris, *Compassion and Critiquer*, 1 COLUM. J. RACE & L. 326, 329-30, 333 (2012) (footnote omitted) (noting Marx’s analysis of capitalism and prediction of the proletariat revolution are “still riveting to contemporary theorists” because of “his skill at describing suffering and evoking compassion”).

<sup>16</sup> Some Critical Race Theorists do consider themselves “neo-Marxist” in that they have adapted elements of Marx’s critical analytical approach in their assessments and criticisms of unequal justice under the law. But, as Crenshaw et al. make clear, “there is no canonical set of doctrines or methodologies to which [Critical Race Theorists] all subscribe.” See CRENSHAW ET AL., *supra* note 12, at xiii. This overlap between Critical Race Theory and neo-Marxism may be due in part to the fact that CRT “has its origins in the critical legal studies (CLS) movement . . . CLS was the product of a group of left-leaning scholars, including neo-Marxists . . .” Sean Walton, *Why the Critical Race Theory Concept of ‘White Supremacy’ Should Not be Dismissed by Neo-Marxists: Lessons from Contemporary Black Radicalism*, 12 POWER & EDUC. 78, 79-80 (2020) (citations omitted).

<sup>17</sup> “[CRT] offers a unique opportunity to synthesize many of the currents of postrealist thought, such as critical and feminist legal studies, law and literature, and . . . a more communitarian version of process theory . . . [CRT] is a microcosm of a vast spectrum of the American experience to which postrealist



addresses CRT as a paradigm shift, a distinctive analytical academic approach to understanding the impact of race and racism that fosters the acquisition of cultural competency in legal education and practice in an ever-expanding multicultural America.<sup>18</sup>

## II. THE EVOLUTION OF CRITICAL RACE THEORY

### A. Race and Racism

*Webster's Dictionary* defines racism as “a belief that race is a fundamental determinant of human traits . . . and that racial differences produce an inherent superiority of a particular race,” or, alternatively, “the systemic oppression of a racial group to the advantage of another.”<sup>19</sup> The categorization of people by race is not a recent

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frameworks have . . . responded.” See Anthony E. Cook, *Symposium on Race Consciousness and Legal Scholarship: The Spiritual Movement Towards Justice*, 1992 U. ILL. L. REV. 1007, 1007 (1992). Professor Cook also gives the following personal experience:

It was the common-sense frame imposed by years of White supremacy that made everything associated with Blackness the object of contempt, ridicule, and disdain. Because most of the Whites in the community had placed their kids in private academies, the racial population of my high school [in Mississippi] was sixty percent Black and forty percent White. This meant that simple majoritarianism would result in all-Black student councils, homecoming courts, and year-book inductees. To counter this outcome, our school implemented what I did not recognize at the time to be a massive affirmative action program for Whites. If the student council president was Black one year, his or her successor had to be White. The same was true of homecoming queen and other elected positions.

*Id.* at 1013.

<sup>18</sup> CRT's ability to shed light on the topic of racism in the law can be observed in Richard A. Jones' article:

Proponents of CRT . . . argue that . . . the U.S. justice system continues to systematically underserve many racialized groups . . . . [Proponents] have . . . not only challenged the basic assumptions and presuppositions of the prevailing paradigms . . . but also confronted the relative silence of legal radicals . . . who 'deconstructed' liberalism, yet seldom addressed the role of deep-seated racism in American life.

Jones, *supra* note 6, at 17 (quoting Cornel West, *Foreword, in CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* xi (Kimberlé Crenshaw et al. eds., 1995)).

<sup>19</sup> *Racism*, THE MERRIAM-WEBSTER DICTIONARY (2022).

phenomenon; it began in the 1600s to classify kinds and types of stock.<sup>20</sup> Race gradually gained popularity as a means to classify humans in the 1800s, during the latter period of colonization and slavery.<sup>21</sup>

According to the *Modern Dictionary of Sociology*, race is “[a]n anthropological classification dividing mankind (HOMO SAPIENS) into several divisions and subdivisions (or subraces). The criteria for labeling the various races are based essentially on physical characteristics of size, the shape of the head, eyes, ears, lips, and nose, and the color of skin and eyes.”<sup>22</sup> This definition illustrates that the concept of race focuses primarily on biological characteristics when grouping and categorizing humans.<sup>23</sup> Such classification schema stemmed from the works of Johann Friedrich Blumenbach, who is credited as the father of physical anthropology.<sup>24</sup> Blumenbach’s classification by race served to promote and legitimize white superiority and dominance over non-white cultural groups.<sup>25</sup> While Blumenbach’s classification of race began as a form of differentiation based on physical-biological characteristics, the dominant elites in society utilized it to construct and promote a hierarchal scale of civility and intelligence based on physical characteristics and pigmentation of skin color, in which Whites are ranked at the apex and those of darker skin

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<sup>20</sup> See Audrey Smedley, “Race” and the Construction of Human Identity, in *THE MEANING OF DIFFERENCE* 40, 43 (Karen E. Rosenblum & Toni-Michelle C. Travis eds., 5th ed. 2008).

<sup>21</sup> *Id.*

<sup>22</sup> GEORGE A. THEODORSON & ACHILLES G. THEODORSON, *A MODERN DICTIONARY OF SOCIOLOGY* 328 (Apollo ed. 1970).

<sup>23</sup> Some cultural anthropologists rallied against the biological classification of people using physical characteristics and argued instead that culture, and not biology, determines someone’s race. See Michael Omi & Howard Winant, *Race and Ethnicity*, in *THE SOCIAL CONSTRUCTION OF DIFFERENCE AND INEQUALITY: RACE, GENDER, AND INEQUALITY* 21 (Tracy E. Ore ed., 5th ed. 2011).

<sup>24</sup> “Blumenbach . . . frequently called the father of physical anthropology . . . proposed one of the earliest classifications of the races of mankind . . . His research in the measurement of craniums led him to divide mankind into five great families—Caucasian, Mongolian, Malayan, Ethiopian, and American.” JOHANN F. BLUMENBACH, *THE NEW ENCYCLOPAEDIA BRITANNICA* 303 (2d ed. 1985). See HELEN TAYLOR GREENE & SHAUN L. GABBIDON, *RACE AND CRIME* 1 (Jerry Westby et al. eds., 2012) (“The first racial categorization of humans is credited to German Johann Friedrich Blumenbach.”).

<sup>25</sup> See GREENE & GABBIDON, *supra* note 24, at 1 (“[B]lumenbach’s typology became the standard across Europe, with Europeans placing themselves at the top of the hierarchy and linking racial differences to biological factors.”) (citation omitted).

are ranked toward the base.<sup>26</sup> This classification became the fuel that ignited and propelled relations of social discrimination that resulted in the birth of racism.

As a result of this early racial classification and its use in creating social hierarchies, physical characteristics and skin color became the rationale for the practice of racism in dominating, oppressing, and exploiting non-white cultural groups.<sup>27</sup> Today, racism is manifested in various forms of victimization, open hostility, and unequal justice under the law—including murder of black individuals and other ethnic minorities—all of which exemplify relations of domination by one race over the others. Such manifestations serve to inform the formulation of CRT.<sup>28</sup>

## B. Grounding Of Critical Race Theory

### 1. Colonization and Control of Slaves

To fully grasp CRT, it is first necessary to understand the societal structure, forces, and relations out of which the theory emerged. CRT's foundation can be traced to the system of slavery and its accompanying oppressive laws that laid the social-structural foundation of relations of domination and exploitation, which produced and reproduced socio-economic inequality that fostered discrimination and oppression

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<sup>26</sup> See Smedley, *supra* note 20, at 44 (noting how the European emphasis “on the physical features of the New World populations” led them to conclude that “the Africans and Indians and their descendants were lesser forms of human beings, and that their inferiority was natural and/or God-given.”).

<sup>27</sup> See generally Nina G. Jablonski, *Skin Color and Race*, 175 AM. J. PHYSICAL ANTHROPOLOGY 437 (2021), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8247429/> [<https://perma.cc/8QMY-VBD7>] (tracing the history and development of the association between skin color and race and the implications of this association on society).

<sup>28</sup> For example, “[t]he intersection of race and criminal law and enforcement has . . . received considerable attention in US media, academic, and public policy discussions. Media outlets . . . have extensively covered a series of incidents involving the killing of unarmed black males by law enforcement and private citizens.” Darren Lenard Hutchinson, “Continually Reminded of Their Inferior Position”: Social Dominance, Implicit Bias, Criminality, and Race, 46 WASH. U. J. L. & POL’Y 23, 23 (2015) (citations omitted) (noting “the killing[s] of Michael Brown, John Crawford, III, Jordan Davis, Eric Garner, Trayvon Martin, and Tamir Rice.”). See also Alex Meier, ‘Say Their Names’: Stories of Black Americans Killed by Police, ABC7 N.Y. (June 7, 2020), <https://abc7ny.com/breonna-taylor-death-say-her-name-his-black-man-killed/6236298/> [<https://perma.cc/F377-JGL4>] (noting the continuing pattern of violence across the United States against people of color by law enforcement).

through the concentration of power, wealth, and decision-making in the hands of the land owning elites<sup>29</sup> and their immediate supportive subordinates.<sup>30</sup> To maintain their dominance in society, the elites constituted the ruling class through the direct and indirect purchase of political power, which they used to perpetuate the unequal distribution of resources and regulate societal relations through the unequal dispensation of justice.<sup>31</sup> In the process of producing and reproducing relations of domination, the elites utilized their power and influence to subjugate racial and ethnic minorities and White women through indoctrination, exploitation, and legal means.<sup>32</sup> David Delaney explains that “[t]he spatiality [connection between geographic space and power] of U.S. slavery was centered on the plantation and was chiefly concerned with control—control of a planter over slaves, control of

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<sup>29</sup> C. WRIGHT MILLS, *THE POWER ELITE* 3-4 (1956) (discussing qualifications and characteristics of the “power elite”).

<sup>30</sup> “Slavery decisions almost uniformly favored the ‘peculiar institution’ and gave precedence to the interests of slave owners over those of slaves seeking freedom through litigation.” DERRICK BELL, *RACE, RACISM AND AMERICAN LAW* 28 (6th ed. 2008) [hereinafter BELL, *RACE, RACISM AND AMERICAN LAW*]. “The constitutional provisions protecting slavery . . . certainly limited the Court’s discretion in this field, but the decisions went beyond even constitutional requirements in what were apparently conscious efforts to protect all property rights, including those in humans.” *Id.*

<sup>31</sup> “[CRT]’s basic premises are that race and racism are endemic to the American normative order and a pillar of American institutional and community life . . . suggest[ing] that law does not merely reflect and mediate pre-existing racialized social conflicts and relations.” Athena D. Mutua, *The Rise, Development and Future Directions of Critical Race Theory and Related Scholarship*, 84 *DENV. U. L. REV.* 329, 333 (2006) (citation omitted). “Instead law, as part of the social fabric and the larger hegemonic order, constitutes, constructs and produces races and race relations in a way that supports white supremacy.” *Id.* at 333-34 (citations omitted).

<sup>32</sup> “[CRT] . . . arose . . . as a challenge to the ideology of colorblindness in law . . . assert[ing] that race, like eye color, is and should be irrelevant to the determination of individuals’ opportunities . . . [CRT] argues that legal colorblindness operates as if a colorblind society already exists and has always existed in the United States.” *Id.* at 334 (footnotes omitted). “In doing so,” as noted by Professor Mutua, “it ignores and cements the racial caste system constructed in part by law . . . [I]t maintains the oppressive conditions and lack of opportunities for subordinated groups that continue to be structured by the historical and modern use of race in law and throughout the society . . . amount[ing] to . . . ‘colorblind racism.’” *Id.* at 334-35 (footnotes omitted).

planters as a class over their less diligent members, and control of whites generally over the lives of blacks.”<sup>33</sup>

By way of indoctrination and domination, minorities and White women found themselves subordinated to white men.<sup>34</sup> Furthermore, while White women found themselves subordinated to White men, they in turn were ranked higher than, and contributed to the domination of minorities, especially African-Americans, who found themselves subjugated in nearly every respect—socially, politically, and economically.<sup>35</sup>

In the process of imposing white dominance, owners and plantation overseers inflicted hardships and physical cruelties against African-Americans for failure to comply or adhere to their demands and wishes.<sup>36</sup> “The picture that emerges from slave narratives is one of

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<sup>33</sup> DAVID DELANEY, RACE PLACE, AND THE LAW: 1836-1948 41 (1998).

<sup>34</sup> “While the racial convergence between white men and white women should not elide how white male patriarchy has systematically subordinated white women . . . the privileging dimensions of intersectional whiteness in the lives of white women should be named.” Devon W. Carbado & Cheryl I. Harris, *Intersectionality at 30: Mapping the Margins of Anti-Essentialism, Intersectionality, and Dominance Theory*, 132 HARV. L. REV. 2193, 2234 (2019).

<sup>35</sup> “White women have long benefitted from and negotiated their lives in ways that reproduce white in-group favoritism. When white men think about [their families], . . . they are thinking about white women. And when white women think about [their families], . . . they are thinking about white men.” *Id.* at 2236-37 (footnotes omitted). See also Darlene C. Goring, *Silent Beneficiaries: Affirmative Action and Gender in Law School Academic Support Programs*, 84 KY. L. J. 941, 972 (1996) (noting that “one of the resources that causes contention between white women and minorities [in 1996] is affirmative action” and that “[m]any would argue that affirmative action programs helped white women obtain those promised levels of political and economic freedom[,]” while “Blacks and other minority groups have not been as fortunate.”).

<sup>36</sup> The imposition of white dominance inflicted by slave owners is exemplified by this quote from Cheryl Harris:

‘Slaves’ and ‘women’ were . . . subordinated categories; however, they were unequal to white men for different, although related, reasons. The disability of race differed from the disability of gender: slaves were not free individuals, but a class completely outside the social compact, while women were within the polity but not the public sphere. Still, neither could acquire or hold property . . . . [This exclusion] was based on distinct ideological premises and justifications, and had different impact on race and gender . . . . Because the subordination of white women took the form of protection of the ‘weaker sex,’ white women’s agency was severely constrained. Yet they were permitted to have a derivative relationship to power denied to Black women . . . . [which] reflected

simple terrorism.”<sup>37</sup> One such narrative is the autobiography of Fredrick Douglass, in which he described a common example of the use of force and physical cruelty:

Covey [whom slaves termed the “negro breaker”] finding out where I was, came to me; and, after standing over me a while, he asked me what the matter was. I told him as well as I could, for it was with difficulty that I could speak. He then gave me a savage kick in the side, which jarred my whole frame, and commanded me to get up . . . . I made an effort to rise, but fell back in the attempt . . . . The brute now gave me another heavy kick, and again told me to rise . . . . I again staggered and fell to the ground . . . . While down, in this sad condition, and perfectly helpless, the merciless negro breaker took up the hickory slab . . . and with the sharp edge of it, he dealt me a heavy blow on my head which made a large gash, and caused the blood to run freely . . . .<sup>38</sup>

Male slaves were not the only ones physically abused by plantation owners and overseers. Female slaves also received severe punishment. Douglass described one such incident of cruelty against his aunt Esther:

Esther’s wrists were firmly tied, and the twisted rope was fastened to a strong staple in a heavy wooden joist above, near the fireplace. Here she stood, on a bench, her arms tightly drawn over her breast. Her back and shoulders were bare to the waist. Behind her stood old master, with cowskin in hand, preparing his barbarous work with all manner of harsh, coarse, and tantalizing epithets. The screams of his victim were most piercing. He was cruelly deliberate, and protracted the torture, as one who was delighted with the scene. Again and again he drew the hateful whip through his hand, adjusting it with a view of dealing the most pain-giving blow . . . . Each blow, vigorously laid on, brought screams as well as blood.<sup>39</sup>

In addition to physical punishment and starvation, slaves suffered severe indoctrination to make them passive, obedient, and submissive

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in microcosm the larger social forces at play which produced structural and ideological incentives for white women’s alliance with white male power. Even after slavery, the racist patriarchal order that emerged from slavery also undermined alternative configurations and meanings of race and gender.

Cheryl I. Harris, *Finding Sojourner’s Truth: Race, Gender, and the Institution of Property*, 18 CARDOZO L. REV. 309, 321-22 (1996).

<sup>37</sup> DELANEY, *supra* note 33, at 40.

<sup>38</sup> FREDERICK DOUGLASS, MY BONDAGE AND MY FREEDOM 126-27 (Modern Library ed. 2003) (1855).

<sup>39</sup> *Id.* at 38.

to the dominant white group.<sup>40</sup> The severity and intensity of this indoctrination impacted their psyche and caused them to view themselves with distaste and develop self-perceptions of inferiority that carried over into the period of emancipation through the present day.<sup>41,42</sup> Frantz Fanon captured the process and impact of indoctrination and dehumanization in his book *Black Skin White Masks*,<sup>43</sup> where he meticulously outlined how the colonized black community not only sought approval of their degree of civility from Whites they emulated, but also sought recognition from the white sector as a way of distancing themselves from their blackness, their “jungle status.”<sup>44</sup> Fanon’s work closely parallels that of Nella Larsen and W. E. B. Du Bois: Nella Larsen was the New York Public Library’s first Black female graduate and the first African-American woman to receive a Guggenheim Fellowship.<sup>45</sup> She joined a circle of Black intellectuals that included W. E. B. Du Bois, whose work *The Souls of Black Folk* launched perhaps

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<sup>40</sup> “[S]laves’ beatings occurred because slaves found themselves in an uncertain command of authority either between persons of authority within the household or between their master and someone to whom they had been hired out. Contests for dominance . . . prompted a scramble for dominance . . . [where] slaves took all the whacks.” Lea S. VanderVelde, *The Last Legally Beaten Servant in America: From Compulsion to Coercion in the American Workplace*, 39 SEATTLE U. L. REV. 727, 774 (2016). Professor VanderVelde further notes that “[b]oth masters could order the slave to obey him. Whichever master the slave did not obey beat the slave for disobedience.” *Id.* (citing Sally Greene, *State v. Mann Exhumed*, 87 N.C. L. REV. 701, 731 (2009)).

<sup>41</sup> The development of this self-perception is highlighted by Gerald A. Foster:

Socially, . . . slavery established rules both written and unwritten for black/white relations . . . . Politically, slavery was the bait that helped spark the American Revolutionary War . . . . Psychologically, due to the human and cultural degradation of blacks, the nation began to institute laws . . . that engendered the deep self hate in blacks that persists to this day.

Gerald A. Foster, Ph.D., *American Slavery: The Complete Story*, 2 CARDOZO PUB. L. POL’Y & ETHICS J. 401, 420 (2004).

<sup>42</sup> *Id.* at 417.

<sup>43</sup> See generally FRANTZ FANON, *BLACK SKIN, WHITE MASKS* (Charles Lam Markmann trans., Grove Press 1967) (1952).

<sup>44</sup> *Id.* at 18.

<sup>45</sup> See Bonnie Wertheim, *Nella Larsen*, N.Y. TIMES (2018), <https://www.nytimes.com/interactive/2018/obituaries/overlooked-nella-larsen.html> [<https://perma.cc/WG2X-HJA2>] (providing background to the life of Nella Larsen).

one of the best-known authors on race and race relations pertaining to Black Americans.<sup>46</sup>

In yearning for white acceptance, Fanon's explications of the colonized psyche lend support to Nella Larsen's portrayals in her novel *Passing*, an exposé on the ethical perception of skin color and its social utility in gaining assimilation among Whites.<sup>47</sup> Larsen illustrated how two Black women of lighter complexion chose different paths, with one seeking acceptance in white social circles and the other in black.<sup>48</sup> In so doing, Larsen brought to the fore the cognitive conflict associated with skin color and self-worth as lived and experienced by Black individuals.<sup>49</sup>

The *New York Times*' review of *Passing* "noted that 'Larsen is quite adroit at tracing the involved processes of a mind that is divided against itself, that fights between the dictates of reason and desire.'"<sup>50</sup> Similar to Fanon and Larsen, Du Bois illustrated the complexity of self-perception and self-worth as lived by black individuals. This is how Du Bois explains the inner turmoil:

[T]he Negro is a sort of seventh son, born with a veil, and gifted with second-sight in this American world,—a world which yields him no true self-consciousness, but only lets him see himself through the revelation of the other world. It is a peculiar sensation, this double-consciousness, this sense of always looking at one's self through the eyes of others, of measuring one's soul by the tape of a world that looks on in amused contempt and pity. One ever feels his twoness,—an American, a Negro; two souls, two thoughts, two unreconciled strivings; two warring ideals in one dark body, whose dogged strength alone keeps it from being torn asunder.

The history of the American Negro is the history of this strife,—this longing to attain self-conscious manhood, to merge his double self into a better and truer self. In this merging he wishes neither of the older selves to be lost. He would not Africanize America, for America has too much to teach the world and Africa. He would not bleach his Negro soul in a flood of white Americanism, for he knows that Negro blood has a message for the world. He simply wishes to make it possible for a man to be both a Negro and an American,

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<sup>46</sup> See generally W. E. B. DU BOIS, *THE SOULS OF BLACK FOLK* (Project Gutenberg eBook ed. 1996) (1903), <https://www.gutenberg.org/files/408/408-h/408-h.htm> [<https://perma.cc/T833-GADF>].

<sup>47</sup> See generally NELLA LARSEN, *PASSING* (Thadious M. Davis, ed., Penguin Books 2003) (1929).

<sup>48</sup> See generally *id.*

<sup>49</sup> See generally *id.*

<sup>50</sup> Wertheim, *supra* note 45.



without being cursed and spit upon by his fellows, without having the doors of Opportunity closed roughly in his face.<sup>51</sup>

These extended quotes from Du Bois serve to bring to the surface the difficulties of Blacks in adapting and assimilating into a White-dominated society,<sup>52</sup> one in which they often find themselves alienated and disenfranchised because of their skin color—a visible trait that readily exposes them to prejudices, discrimination, and negative stereotypes which contribute to distrust, victimization, hate crimes, social inequality, and injustice.<sup>53</sup>

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<sup>51</sup> DU BOIS, *supra* note 46, at 5.

<sup>52</sup> As one scholar summarized:

Du Bois thus anticipated as early as 1903 the cultural pluralism of the 1920s and at least one version of the multiculturalism of our own time. To struggle for legal and political equality and against legally enforced segregation did not in his mind contradict the need to affirm and develop a positive African-American identity, as assimilationists claimed, but was an essential precondition for its full attainment. Nor was equality a goal so unlikely to be attained that blacks should give up on America and separate themselves completely from whites. Although most African-Americans have come to accept, at least implicitly, Du Bois's dual agenda of public equality and ethnic self-realization, no one since has put the case for a positive dualism—or benign hyphenization of 'African-American'—as clearly and effectively.

James U. Blacksher, *Majority Black Districts, Kiryas Joel, and Other Challenges to American Nationalism*, 26 CUMB. L. REV. 407, 443 n.156 (1996) (quoting George M. Fredrickson, *An American Giant*, 1994 DISSENT 289, 289-94 (1994)).

<sup>53</sup> Blacksher continues his analysis, stating:

“The experience of Negroes in America has been different in kind, not just in degree, from that of other ethnic groups. It is not merely the history of slavery alone but also that a *whole people* were marked as inferior by the law. And that mark has endured. The dream of America as the great melting pot has not been realized for the Negro; because of his skin color he never even made it into the pot.” It may be true, as Justice Thomas contends, that some individual African Americans can find a measure of personal dignity and respect by claiming to have joined the ‘mainstream’—that is, white—American society. However, most black persons would find assimilation more difficult. It is doubtful that any one black person will experience true equality and full acceptance until the African American people *as a whole* have the stigma of inferiority lifted from them and are accepted as full partners in American peoplehood.”

Undoubtedly, the consequences and residual effects of slavery are far reaching, reflected in the policies, politics, and law promulgated and enforced by societal architects that continue to stereotype and discriminate against African-Americans.<sup>54</sup> It is both pre- and post-emancipation social-structural relations and arrangements of racism and discrimination embedded in law, law-enforcement, and unequal dispensation of legal justice that influenced Professor Derrick Bell's writings that launched CRT.<sup>55</sup>

## 2. Racism and the Criminalization of Blacks From Slavery and Beyond

During the period of slavery and afterwards, African-Americans were legally considered as chattel, stripped of their freedoms and all other rights as human beings.<sup>56</sup> African-Americans were also subject to various forms of brutality and were sometimes put to death for infractions such as attempting to escape bondage or being accused of

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*Id.* at 422-23 (emphasis in original) (footnotes omitted) (quoting Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 400-01 (1978) (Marshall, J., concurring and dissenting)).

<sup>54</sup> See Dawinder S. Sidhu, *The Unconstitutionality of Urban Poverty*, 62 DEPAUL L. REV. 1, 12-14 (2012) (footnotes omitted) (noting that “African-Americans continue to face persistent discrimination in employment, housing, lending, education, and the acquisition of everyday goods, among other facets of everyday life. Verbal harassment and hate crimes are also part of the contemporary African-American experience.” This ultimately “produces interracial economic disparities that incite further discrimination and more segregation.”).

<sup>55</sup> Derrick Bell wrote several books pertaining to CRT and referred to his first two publications as “allegorical stories.” See, e.g., BELL, RACE, RACISM AND AMERICAN LAW, *supra* note 30; DERRICK BELL, SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM (2004); DERRICK BELL, CONFRONTING AUTHORITY: REFLECTIONS OF AN ARDENT PROTESTER (1994) [hereinafter BELL, CONFRONTING AUTHORITY]; DERRICK BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM (1992); DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE (1987).

<sup>56</sup> “‘Though slaves were occasionally tried in courts and tribunals, the chattel slavery system gave slaveholders almost total control over their ‘property,’ including the manner in which slaves were punished.’” Michael Brazao, *The Death Penalty in America: Riding the Trojan Horse of the Civil War*, 4 MOD. AM. 26, 27 (2008) (quoting Charles J. Ogletree, *Making Race Matter in Death Matters*, in FROM LYNCH MOBS TO THE KILLING STATE: RACE AND THE DEATH PENALTY IN AMERICA 57 (Charles J. Ogletree & Austin Sarat eds., New York Univ. Press 2006)).

raping White women.<sup>57</sup> In many Southern states, even after securing freedom from one colonial owner, former slaves could be recaptured and sold to another plantation for continued enslavement, as exemplified in the much-cited *Dred Scott Case*.<sup>58</sup> Regarding Justice Taney’s racist and prejudicial answer to whether the Constitution granted African Americans, such as Dredd Scott, any rights as citizens, Professor Bell wrote:

Blacks on the other hand, were not included and were not intended to be included under the word “citizens” in the Constitution, and thus can claim none of the rights and privileges of that document. Rather, he said that blacks were always considered “a subordinate and inferior class of beings,” they had been subjugated by the dominant race, and, whether emancipated or not, they remained subject to their authority. They had, he found, no rights or privileges but those whites might choose to grant them.<sup>59</sup>

In the above quote, Bell elucidates that Whites dictated the terms and conditions of Black existence. Another much-cited case of subjugating Black people to white domination is that of *Plessy*, in which the Supreme Court upheld the constitutionality of racial segregation based on its interpretation of the “separate but equal” doctrine.<sup>60</sup> The decision was significant because it gave Whites legal support to enforce

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<sup>57</sup> “[I]n southern states, capital punishment was still used for crimes related to spreading discontent among free black people, insubordination among slaves, and even attempted rape by a black person against a white person.” *Id.* at 28 (quoting MATTHEW B. ROBINSON, *DEATH NATION: THE EXPERTS EXPLAIN AMERICAN CAPITAL PUNISHMENT* 19-20 (Pearson Education Inc. 2008)).

<sup>58</sup> *See generally* *Scott v. Sanford*, 60 U.S. 393 (1857).

<sup>59</sup> BELL, *RACE, RACISM AND AMERICAN LAW*, *supra* note 30, at 32.

<sup>60</sup> *See Plessy v. Ferguson*, 163 U.S. 537, 550-52 (1896). *Plessy* was brought by Homer Plessy—a black man who could pass for white—who agreed to ride in the white section of an East Louisiana railway train. After refusing to move to the black section, he was arrested, charged, and sentenced for violating Louisiana’s Separate Car Act, one of the state’s Jim Crow laws. *See id.* at 541-42. Justice Henry Billings Brown wrote in the “heart of the opinion”: “[T]he underlying fallacy of the plaintiff’s argument . . . [is] the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If [true] . . . it is not . . . anything found in the act, but solely because the colored race chooses . . . that construction” Louis H. Pollak, *Race, Law & History: The Supreme Court from “Dred Scott” to “Grutter v. Bollinger”*, 134 *DAEDALUS* 29, 35 (2005) (footnote omitted) (quoting *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896)). Pollak states that “Justice Brown was a typical member of the white establishment . . . [who] ‘accepted . . . without reservation’ the ‘late nineteenth century prevailing opinion . . . that the Negro and Caucasian races were distinctly separate, with the Caucasian race assumed to be superior.’” *Id.* (citation omitted).

their ideas concerning white supremacy and the separation of the races.<sup>61</sup> Furthermore, this decision allowed law enforcement officials to take action against African-Americans who sought basic services that were reserved for Whites.<sup>62</sup>

The oppressive and inhumane nature of laws under slavery are widely documented, first in designating Black individuals as private property, and then as three-fifths of a human being.<sup>63</sup> These laws served to produce, as well as define, White relations and supremacy over Black people.<sup>64</sup> Most of these laws were oppressive and exploitative.<sup>65</sup> Besides

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<sup>61</sup> See generally Pollak, *supra* note 60 (discussing the impact of Plessy v. Ferguson).

<sup>62</sup> GREENE & GABBIDON, *supra* note 24, at 384.

<sup>63</sup>

[T]he Constitution [of 1787] directly sanctioned slavery in six provisions . . . [giving] the South a strong claim to ‘special treatment’ for its peculiar institution. The three-fifths clause also gave the South extra political muscle—in the House of Representatives and in the Electoral College—to support that claim.

Paul Finkelman, *Race, Slavery, and Federal Law, 1789-1804: The Creation of Proslavery Constitutional Law Before Marbury*, 14 U. ST. THOMAS L.J. 1, 4-5 (2018).

<sup>64</sup> Finkelman also notes:

[S]lavery was a controversial constitutional issue from the very beginning . . . . In a nation that struggles over monuments to the Confederate States of America—a putative nation dedicated to slavery and white supremacy—to the proposition that all men are *not* created equal . . . slavery also shaped the early development of our Constitutional law.

*Id.* at 1-2 (emphasis in original) (footnotes omitted).

<sup>65</sup>

“Lawfare” is the strategy of using law in lieu of the military to achieve an “operational objective.” The operational objective of Whites has been to undermine black resistance to white supremacy. To achieve this objective, Whites used law as a counterinsurgency tool to pacify the African American population. A variety of methods were used to control Blacks. One was restricting their access to information and keeping them ignorant . . . . A second method was preventing Blacks from associating with each other. Whites passed laws prohibiting slaves from congregating because of fears of insurrections and rebellions . . . . A third method was surveilling and infiltrating the African American community . . . . A fourth method was disarming Blacks . . . . A fifth method was attempting to prevent Blacks from receiving military training . . . . To counter Black freedom, Jim Crow laws were enacted across the South . . . . The Ku Klux Klan (KKK) formed during the post-Civil War period to maintain white supremacy. The KKK employed acts

being inhumane, many laws were modified into Black Codes,<sup>66</sup> *Jim Crow* laws,<sup>67</sup> and lynching.<sup>68</sup> For example, the 1740 Negro Act in South Carolina “prohibited the assembly of more than seven slaves without a White chaperone and granted immunity to White persons that killed ‘rebellious Negroes.’”<sup>69</sup> “The stated legislative objective was to keep

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of intimidation, violence, and terrorism to subjugate Blacks . . . .

Law enforcement also terrorized African Americans.

William Y. Chin, *Legal Inequality: Law, the Legal System, and the Lessons of the Black Experience in America*, 16 HASTINGS RACE & POVERTY L.J. 109, 110-14 (2019) (footnotes omitted).

<sup>66</sup> Black Codes were laws and ordinances enacted shortly after the Civil War designed to limit the actions and freedom of emancipated slaves Erika K. Wilson, *The Legal Foundations of White Supremacy*, 11 DEPAUL J. FOR SOC. JUST. 1, 3 (2018). See also Hutchinson, *supra* note 28, at 75-76.

<sup>67</sup>

Those [Jim Crow] laws backed up the Alabamian who told the disfranchising convention of his state that no Negro in the world was the equal of “the least, poorest, lowest-down white man I ever knew.” . . . The Jim Crow laws put the authority of the state or city in the voice of the street-car conductor, the railway brakeman, the bus driver, the theater usher, and also into the voice of the hoodlum of the public parks and playgrounds. They gave free rein and the majesty of the law to mass aggressions that might otherwise have been curbed, blunted, or deflected. The Jim Crow laws, unlike feudal laws, did not assign the subordinate group a fixed status in society. They were constantly pushing the Negro farther down.

Pollak, *supra* note 60, at 40.

<sup>68</sup> Ida B. Wells chronicled how blacks were lynched. In her autobiography she wrote:

The latest culmination of this war against Negro progress is the substitution of mob rule for the courts of justice throughout the South. Judges, juries, sheriffs, and jailors in these states are all white men, and thus makes it impossible for a Negro to escape the penalty for any crime he commits. Then whenever a black man is charged with any crime against a white person these mobs without disguise take him from the jail in broad daylight, hang, shoot or burn him as their fancy dictates . . . . In the past ten years over a thousand black men and women and children have met this violent death at the hands of a white mob.

CRUSADE FOR JUSTICE: THE AUTOBIOGRAPHY OF IDA B. WELLS 86 (Alfreda M. Duster ed., 2nd ed. 2020) (1970). Perhaps the best-known story of lynching is that of Emmett Till. See generally MAMIE TILL-MOBLEY & CHRISTOPHER BENSON, DEATH OF INNOCENCE: THE STORY OF THE HATE CRIME THAT CHANGED AMERICA (2003).

<sup>69</sup> Gelsey G. Beaubrun, *Talking Black: Destigmatizing Black English and Funding Bi-Dialectal Education Programs*, 10 COLUM. J. RACE & L. 196, 205 (2020)

slaves in ‘due subjugation and obedience.’”<sup>70</sup> All of these laws and systematic conditions contributed to the reproduction of relations of white domination and supremacy.<sup>71</sup> Oppressive laws even extended into the field of education.<sup>72</sup> During slavery, white plantation owners denied Blacks access to education due to the fear of revolt.<sup>73</sup> Furthermore, during the post-slavery period, White policymakers enacted laws to deny or restrict Black people from acquiring quality education that would enable them to compete with Whites for employment in high-paying jobs, as exemplified through the landmark case of *Brown v. Board of Education*.<sup>74</sup>

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(quoting Nicholas May, *Holy Rebellion: Religious Assembly Laws in Antebellum South Carolina and Virginia*, 49 THE AM. J. LEGAL HIST. 237, 241-42 (2007)).

<sup>70</sup> *Id.*

<sup>71</sup> Importantly:

Protecting slavery was . . . a central aspect of the drafting and adoption of the US Constitution. Those scholars and judges who profess to support ‘original intent’ . . . must come to terms with a Constitution and early constitutional law that was designed and implemented to protect slavery and support a nation for white people only.

Finkelman, *supra* note 63, at 26.

<sup>72</sup> See Kevin D. Brown, *Brown v. Board of Education: Reexamination of the Desegregation of Public Education from the Perspective of the Post-Desegregation Era*, 35 U. TOL. L. REV. 773, 779-80 (2004) (noting that although America had been desegregated for over thirty years when the article was written, “African-Americans still lag far behind non-Hispanic whites “ with respect to “political, economic, educational and social status, and health conditions.”).

<sup>73</sup> For example, “[t]he colonial legislature of South Carolina enacted the Negro Act of 1740, a ‘compulsory illiteracy’ act, making South Carolina the first state to forbid and criminalize educating enslaved persons.” Beaubrun, *supra* note 69, at 204 (citations omitted).

<sup>74</sup> An important aspect of the *Brown* decision is the Kenneth and Mamie Clark doll study which showed that the relations of white domination was reproduced in the psyche of the black child who continued to select the white doll as good, with acceptable qualities over the black doll. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 n.11 (1954). In one review of racial equality in education, Charles Lawrence wrote:

The intensity of the southern defiance of *Brown* is the best evidence that the poor and working class southern whites who were immediately affected did not believe in the Court’s 1954 version of racial justice . . . . Although poor whites had only their whiteness to distinguish them from blacks, when their interest in white supremacy conflicted with a broader national agenda unrelated to race, it was temporarily subordinated by the white elite . . . . Professor [Derrick] Bell’s thesis that *Brown* reflected the interests

Of interest, and also regarding White domination of Blacks, is the denial of Black politicians from participation in the promulgation of legislation, especially legislation discriminating on the basis of race, as evidenced by the case of Georgia.<sup>75</sup> White politicians, intent on retaining their dominance, were assisted by the KKK in using terror, intimidation, physical abuse, and even murder of Black politicians to ensure their power and control over the decision-making process and the state's predominantly black population.<sup>76</sup>

Within the last four decades, the war on drugs, racial profiling, and sentencing guidelines have resulted in the continued discrimination and oppression of Blacks and other minorities who face unequal protection under the law.<sup>77</sup> The foregoing discussion of systemic inequality

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of the white elite has been taken one step further by some observers. For them the idea of equal opportunity established by *Brown* affirmatively advances racism. Equal opportunity is a myth that ignores the tremendous advantages that whites still retain and preserves racial barriers in the form of unfair economic competition.

Charles R. Lawrence III, "*Justice*" or "*Just Us*": *Racism and the Role of Ideology*, 35 STAN L. REV. 831, 838-39 (1983) (footnotes omitted) (reviewing DAVID L. KIRP, *JUST SCHOOLS: THE IDEA OF RACIAL EQUALITY IN AMERICAN EDUCATION* (1982)).

<sup>75</sup> Henry McNeal Turner and thirty-two other African Americans were "elected to the Georgia legislature in 1868 during the Reconstruction era" but were "boldly expelled" by the white majority less than two months after taking office. Following litigation in federal and state courts, the Supreme Court of Georgia held that "Black people did indeed have a right to hold office in Georgia." Thereafter, by "January 1870, the [Union Army general] and commanding general of the District of Georgia, Alfred Terry, began what has become known as 'Terry's Purge' by removing ex-Confederates . . . and reinstating the Black legislators." Megan McClure & Martha Saenz, *Georgia Lawmaker Reflects on Legacy of Early Civil Rights Legend*, STATE LEGIS. MAG. (Feb. 8, 2021), <https://www.ncsl.org/bookstore/state-legislatures-magazine/georgia-lawmaker-reflects-on-legacy-of-reconstruction-era-legend-magazine2021.aspx> [<https://perma.cc/2YBF-W459>].

<sup>76</sup> "Most African Americans were Republicans in this era, and during the next election cycle Redeemer Democrats . . . won majorities in both houses. They enacted harsh recriminations against Republicans and African Americans using terror, intimidation and the Ku Klux Klan, leading to complete disenfranchisement of the Black population by the 1890s." *Id.*

<sup>77</sup> "[S]tate legislative branches of government have passed laws that have resulted in the mass incarceration of African-American males. The enforcement of statutes by the judicial system has also resulted in African-American males being disproportionately impacted by such laws." Floyd D. Weatherspoon, *The Mass Incarceration of African-American Males: A Return to Institutionalized Slavery, Oppression, and Disenfranchisement of Constitutional Rights*, 13 TEX.

provides a glimpse into the realities that served as the bedrock in the evolution of CRT.

### C. Critical Race Theory

CRT gained its inspiration from the works of Derrick Bell, a civil rights lawyer and a law professor at Harvard, Oregon, and New York Universities' colleges of law.<sup>78</sup> A prolific writer on legal issues, Bell focused on the role of race and the impact of racism on the law and the unequal dispensation of justice.<sup>79</sup> As the foremost proponent of CRT, Bell said:

My writing was at the forefront of a new school of legal thought now known, and mostly accepted, as critical race theory. Practitioners, often through storytelling and a more subjective, personal voice, examine the ways in which the law has been shaped by and [continues to shape] issues of race.<sup>80</sup>

Contrary to what some politicians, political advocates, media reporters, talk show hosts, and their lay followers claim, CRT is not generally taught in the nation's public school system.<sup>81</sup> CRT does not

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WESLEYAN L. REV. 599, 604 (2007). Professor Weatherspoon notes the similarities between slaves and modern African-American men, noting that the latter are also “disproportionately impacted by sentencing guidelines, state voting laws, law enforcement policies, prosecutorial abuse, and the death penalty[,]” and “are also denied equal educational opportunities.” *Id.* (footnotes omitted). Moreover, “[t]he government’s ‘War on Drugs’ has resulted in a disproportionate number of African-Americans being sentenced to prison . . . . [The ‘War on Drugs’] is suggested . . . [to be] a present-day Black Code that results in African-American males being targeted and sentenced to prison for extended periods of time.” *Id.* at 605-06 (footnotes omitted). Professor Weatherspoon concludes that “[i]f this trend continues, it is projected that there will be more African-American males in prison than were enslaved between 1820 and 1860[,]” and “[p]resently, there are more African-American males in prison than in college.” *Id.* at 606 (footnotes omitted).

<sup>78</sup> “Most significant in [the CRT] movement . . . was Bell’s ability to marshal popular support for [CRT] storytelling in the early 1990s . . . . The acceptance of Bell and [CRT] was made possible through storytelling[,]” and “[o]nce Bell and other [CRT] storytellers . . . reached beyond an academic audience and addressed the public . . . story-telling became popularized.” Bernie D. Jones, *Critical Race Theory: New Strategies for Civil Rights in the New Millennium?*, 18 HARV. BLACKLETTER L.J. 1, 4-5 (2002).

<sup>79</sup> *Id.*

<sup>80</sup> BELL, CONFRONTING AUTHORITY, *supra* note 55, at 171 n.10.

<sup>81</sup> See, e.g., Bryan Anderson, *Critical Race Theory is a Flashpoint for Conservatives, But What Does it Mean?*, PBS, <https://www.pbs.org/newshour/education/so-much-buzz-but-what-is-critical-race-theory> [<https://perma.cc/C22U->



promote racism in its use of the dialectical methodological approach.<sup>82</sup> Instead, it utilizes the dialectical method in its assessment of American jurisprudence that aids the production-reproduction of relations of domination and social inequality.<sup>83</sup>

CRT proponents acknowledge that class differentiation is very much a part of the American structural and social-cultural milieu, but argue that class is less of a factor than race in the production-reproduction of unequal justice.<sup>84</sup> Hence, proponents examine race as it is utilized by the predominantly White elites in power who control the instruments and apparatuses of governance to create and enforce policies that produce

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J4P5] (last updated Nov. 4, 2021, 9:18 AM); Phil McCausland, *Teaching Critical Race Theory Isn't Happening in Classrooms, Teachers Say in Survey*, NBC (July 1, 2021, 6:23 PM), <https://www.nbcnews.com/news/us-news/teaching-critical-race-theory-isn-t-happening-classrooms-teachers-say-n1272945> [https://perma.cc/D6HE-WWSY]; Caitlin O'Kane, *Head of Teachers Union Says Critical Race Theory Isn't Taught in Schools, Vows to Defend "Honest History"*, CBS (July 8, 2021, 12:07 PM), <https://www.cbsnews.com/news/critical-race-theory-teachers-union-honest-history> [https://perma.cc/WU7V-DF83]; Erin Richards & Alia Wong, *Parents Want Kids to Learn About Ongoing Effects of Slavery – But Not Critical Race Theory. They're the Same Thing.*, USA TODAY, <https://www.usatoday.com/story/news/education/2021/09/10/crt-schools-education-racism-slavery-poll/5772418001/> [https://perma.cc/2YCW-KD7U] (last updated Nov. 3, 2021, 3:39 PM).

<sup>82</sup> See generally George, *supra* note 1.

<sup>83</sup>

Unlike many philosophical works on race that demand a more enriched and critical conversation with whites . . . CRT is adamant about its radical activism, which challenges not only the idea of white privilege but the property rights that whites maintain. Unlike the more apologetic investigations of race in philosophy, which thrive by its constant attempts to draw whites into thinking about race, CRT's racial inquiries are driven by the actual function of racism in American society—not the anti-racist re-socialization of whites.

Tommy J. Curry, *Will the Real CRT Please Stand Up? The Dangers of Philosophical Contributions to CRT*, 2 THE CRIT: CRITICAL STUD. J. 1, 3 (2009) (footnote omitted).

<sup>84</sup> “Beyond the class struggles Marx uses to criticize capitalism, crits deploy . . . material expropriation of sex in maintaining patriarchy, . . . race in the maintenance of white supremacy, and the law for maintaining white privilege . . . . Because material conditions structure the conceptual, political, legal, and social relations . . . crits focus on practices rather than theories.” Jones, *supra* note 6, at 30. See also Cook, *supra* note 17, at 1008.

and reproduce White domination over minority populations.<sup>85</sup> They discuss and analyze race as it is encoded in laws that discriminate against Black people and other communities of color.<sup>86</sup> They ground their arguments in the core social realities of domination as lived and experienced by Black people and other communities of color, under laws designed to promote and uphold relations of domination through a legal-judicial system that dispenses justice unequally based on race.<sup>87</sup> CRT theorist Derrick Bell's book *Race, Racism and American Law* demonstrates this social reality of justice inequality by providing

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<sup>85</sup> See Mutua, *supra* note 31, at 336 (noting that “[a] central theme of [CRT] . . . is to explore the ways in which legal colorblindness . . . has not only allowed law to ignore the social and institutional structures of oppression created historically and recreated presently in law and practice but also has blunted efforts to dismantle the racial caste system, working instead to maintain it. [CRT’s] main goal is the liberation of minorities . . . its stance is one of ‘antissubordination.’”); *contra* Jeffrey J. Pyle, *Race, Equality and the Rule of Law: Critical Race Theory’s Attack on the Promises of Liberalism*, 40 B.C. L. REV. 787, 788-89 (1999) (footnotes omitted) (“Critical race theorists attack the very foundations of the liberal legal order, including equality theory, legal reasoning, Enlightenment rationalism and neutral principles of constitutional law. These liberal values, they allege, have no enduring basis in principle, but are mere social constructs calculated to legitimate white supremacy. The rule of law, according to critical race theorists, is a false promise of principled government, and they have lost patience with false promises. For them, the practice of law is just another front in the fight to achieve racial ‘liberation.’”).

<sup>86</sup> Richard Delgado, a leading CRT theorist, has described two factions of CRT theorists: idealists and realists. Whereas idealists view racism as a problem to be solved through shifting attitudes and social teachings, realists advocate for “chang[ing] the physical circumstances of minorities’ lives” and dismantling “entrenched racial disparities in education, employment, housing, healthcare access, policing and incarceration, and immigration, among others.” Theanne Liu, *Ethnic Studies as Antissubordination Education: A Critical Race Theory Approach to Employment Discrimination Remedies*, 11 WASH. U. JURIS. REV. 165, 168 (2018) (quoting RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* 20 (3d ed. 2017)).

<sup>87</sup> “[CRT] endeavors to account for the voices of people of color by exploring the systemic and pervasive nature of racism in society and scrutinizing the ways in which current rights jurisprudence fails to attend fully to the ubiquity of racialized attitudes both in society . . . and . . . the legal system itself.” Stephen Shie-Wei Fan, *Immigration Law and the Promise of Critical Race Theory: Opening the Academy to the Voices of Aliens and Immigrants*, 97 COLUM. L. REV. 1202, 1202 (1997).

numerous examples of court decisions in which race factored into the increased severity of punishment.<sup>88</sup>

Bell's findings and arguments find support in a study published in *Notre Dame Law Review*, subsequently cited in *The Color of Justice*.<sup>89</sup> As the authors of *The Color of Justice* state:

[Rachlinski et al.] found that judges, like most other individuals, “harbor implicit racial biases.” . . . [In the study of 128 judges,] [s]eventy-four of the 85 white judges, and 14 of the 43 African American judges, demonstrated a “white preference,” but the white judges expressed significantly stronger white preferences than did the African American judges. The remainder of the African American judges either expressed no preference at all or expressed a black preference.<sup>90</sup>

Accordingly, one of the main tenets of CRT is:

[T]o explore the ways in which legal colorblindness, in supplanting overt legal racial ordering, has not only allowed law to ignore the social and institutional structures of oppression created historically and recreated presently in law and practice but also has blunted efforts to dismantle the racial caste system, working instead to maintain it. Critical Race Theory's main goal is the liberation of minorities and other socially subordinated people; its stance is one of “antisubordination.”<sup>91</sup>

Relying on their understanding of how social injustice for people of color is produced and reproduced through law over time, CRT proponents call into question the color-blind approach to judicial sentencing for its inherent racial bias.<sup>92</sup> Their approach, likened to the

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<sup>88</sup> Bell also argued that changes in society—from slavery to emancipation, industrialization, wars, changes in immigration policies, and globalization, along with changes in judicial discretions—ushered in some changes to racism in law and judicial decisions, but as he argued, some of the legal reforms to racist policies were eroded through reverse discrimination court challenges. *See generally* BELL, RACE, RACISM AND AMERICAN LAW *supra* note 30. And, as Bell stated further, “[t]he sense of so many whites that their racial standing is more important than social improvement poses a serious barrier for those urging social reform in the areas of housing, poverty, public health, and prison reform.” *Id.* at 54.

<sup>89</sup> SAMUEL WALKER ET AL., *THE COLOR OF JUSTICE: RACE, ETHNICITY, AND CRIME IN AMERICA* 296 (5th. ed. 2012) (citation omitted).

<sup>90</sup> *Id.* at 296.

<sup>91</sup> Mutua, *supra* note 31, at 336 (citations omitted).

<sup>92</sup> *See* Harvey Gee, *Changing Landscapes: The Need for Asian Americans to be Included in the Affirmative Action Debate*, 32 GONZ. L. REV. 621, 646 (1997) (footnotes omitted) (arguing that the color-blind approach is “fallacious” because

“color of crime,” reveals the disparity in the distribution of justice along the color line, one in which White offenders receive lighter sentences while Black people and other people of color receive harsher penalties for the same—or lesser—offenses.<sup>93</sup> CRT proponents argue that by dispensing unequal justice along the color line, judges’ decisions serve to reproduce “white supremacy”<sup>94</sup> by reproducing racial domination which relegates and subjugates communities of color into the lower socio-economic strata of society.<sup>95</sup>

Academics Brewer and Heitzeg called attention to such unequal dispensation of justice in their article *The Racialization of Crime and Punishment*:

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it applies a European American majority’s standards, ignores the “realities of continued social racism and prejudice[.]” and does not consider social racism’s influence “on a court’s understanding and interpretation of legal doctrine”). *See also* Mutua, *supra* note 31, at 334 (citations omitted) (noting that CRT arose “as a challenge to the ideology of colorblindness in law”).

<sup>93</sup>

A number of methodologically sound studies have concluded that African American and Hispanic offenders are sentenced more harshly than whites . . . [Spohn and DeLone] concluded that judges’ sentencing decisions reflect “stereotypes of dangerousness and culpability that rest, either explicitly or implicitly, on considerations of race, gender, pretrial status, and willingness to plead guilty.”

WALKER ET AL., *supra* note 89, at 292, 294 (citation omitted). *See also* Celesta A. Albonetti, *Sentencing of Federal Cocaine Trafficking/Manufacturing Defendants: Assessing Direct and Conditioning Effects of Defendant’s Race/Ethnicity and Gender on Length of Imprisonment*, 21 J. GENDER RACE & JUST. 1, 12 (2017) (reciting studies illustrating that African-American and Hispanic defendants received significantly longer sentences than white defendants). *Contra*, I. Bennett Capers, *Critical Race Theory and Criminal Justice*, 12 OHIO ST. J. CRIM. L. 1, 3 (2014) (footnotes omitted) (noting that while CRT “scholars have increasingly turned to research on implicit biases to support their claims[.]” CRT has its own “detractors.” For example, Critical Race Theory “has been criticized for being separatist, and insufficiently prescriptive in offering solutions to structural problems.”).

<sup>94</sup> “While America has eliminated overt race-conscious laws that favor whites, the law continues to play a critical role in maintaining white supremacy today.” Wilson, *supra* note 66, at 3. *See generally* Rose M. Brewer & Nancy A. Heitzeg, *The Racialization of Crime and Punishment: Criminal Justice, Color-Blind Racism, and the Political Economy of the Prison Industrial Complex*, in RACE AND CRIME 380-388 (Jerry Westby et al. eds., 2012).

<sup>95</sup> Bloom *supra* note 6.

In this era of color-blind racism, there has been a corresponding shift from de jure racism codified explicitly into the law and legal systems to a de facto racism where people of color, especially African Americans, are subject to unequal protection of the laws, excessive surveillance, extreme segregation, and neo-slave labor via incarceration, all in the name of crime control.<sup>96</sup>

In addition to questioning color-blind justice, CRT proponents' analytical focus on race and the production-reproduction of inequality challenges *the culture of poverty* thesis<sup>97</sup> that stereotypes and stigmatizes Black people and other people of color.<sup>98</sup> CRT proponents claim that the culture of poverty as a causal factor to black criminality is a product of the relations of White domination through racial segmentation of the population<sup>99</sup> from the time of slavery, emancipation and thereafter—a practice of de jure and de facto segmentation<sup>100</sup> which at times resulted in the overt brutality of Black people and the destruction of their communities.

Overall, CRT appears to be more of an emerging theory that is still in a stage of infancy.<sup>101</sup> While CRT possesses elements of an established theory in its conceptual, observational, and analytical approach, CRT proponents have neither constructed nor formalized these elements into a theory that can be tested and validated through empirical research.<sup>102</sup> Indeed, CRT legal scholars have published numerous works on race and

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<sup>96</sup> Brewer & Heitzeg, *supra* note 94, at 380.

<sup>97</sup> Oscar Lewis, perhaps the best-known proponent of the Culture of Poverty, explained that “[p]eople in a culture of poverty produce little wealth and receive little in return. Chronic unemployment and underemployment, low wages, lack of property, lack of savings, absence of food reserves in the home and chronic shortage of cash imprison the family and the individual in a vicious circle.” Oscar Lewis, *The Culture of Poverty*, 215 SCI. AM. 19, 21 (1966).

<sup>98</sup> See Suzanne M. Spencer-Wood & Christopher N. Matthews, *Impoverishment, Criminalization, and the Culture of Poverty*, 45 HIST. ARCHAEOLOGY 1, 4 (2011) (citation omitted) (discussing the ways in which racial and economic profiling “continu[e] the long tradition of making poverty a crime”).

<sup>99</sup> *Id.*

<sup>100</sup> See Brewer & Heitzeg, *supra* note 94, at 380 (noting the shift in society from de jure to de facto racism and their respective effects).

<sup>101</sup> See BELL, CONFRONTING AUTHORITY, *supra* note 55, at 111 (remarking that CRT is a “new approach to legal theory pioneered by minority scholars”).

<sup>102</sup> Derek Layder noted that “someone who starts out by developing a full or general theory may wish to encourage its use in empirical investigation either to throw some light on the empirical information itself or to confirm, develop or negate various aspects of the theory.” DEREK LAYDER, SOCIOLOGICAL PRACTICE: LINKING THEORY AND SOCIAL RESEARCH 14 (1998).

the law, often using different methodological approaches and varied interpretations of race and racism.<sup>103</sup> Yet widespread acceptance of their works lag among their peers. Perhaps Derrick Bell explained this phenomenon best when he said “[m]y publications were looked upon warily by faculty members who judged my area of civil rights peripheral to the main body of law, and my style of storytelling to be less rigorous than the doctrine-laden, citation-heavy law review pieces they favored.”<sup>104</sup>

Given its current status among legal scholars, CRT can best be described as a paradigm shift: a change in the scholarly thinking and analysis of race, racism, and the law.<sup>105</sup> *Webster’s Dictionary* defines paradigm as “a philosophical and theoretical framework of a scientific school or discipline within which theories, laws, and generalizations and the experiments performed in support of them are formulated . . . .”<sup>106</sup> Similarly, as Thomas Kuhn described in his widely referenced book, *The Structure of Scientific Revolutions*, “[a] paradigm is what the members of a scientific community share . . . some accepted examples of actual scientific practice—examples which include law, theory, application, and the instrumentation together—provide models from which spring particular coherent traditions of scientific research.”<sup>107</sup> Kuhn explained that a paradigm shift occurs when an old paradigm loses its degree of explanation and a large number of members of the scientific community subscribe to a fundamental change in the concepts and experimental practice of a discipline.<sup>108</sup> As it relates to legal studies, a paradigm shift would occur when legal scholars question the validity of the “color blind justice” paradigm, as CRT’s proponents have

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<sup>103</sup> See Curry, *supra* note 83, at 43-44 (“Because the philosophical profession is content to give the application of any Continental or American philosophical perspective towards race the title of ‘critical race theory,’ the field in many respects remains thematically oriented rather than grounded in the particular methodological or genealogical approach necessary to substantiate its claim of specialization.”).

<sup>104</sup> BELL, *CONFRONTING AUTHORITY*, *supra* note 55, at 39 (footnote omitted).

<sup>105</sup> “Critical race theory developed as a protest literature in legal scholarship, and the critical race theorists fueled activism in the law school environment . . . . [T]heorists hoped to use their scholarship in engaging theory with practice.” See Bernie D. Jones *supra* note 78, at 89.

<sup>106</sup> *Paradigm*, MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY (11<sup>th</sup> ed. 2003).

<sup>107</sup> THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 10, 176 (2nd ed. 1970).

<sup>108</sup> See *id.*

done.<sup>109</sup> In Part IV, I argue that through a paradigm shift, CRT proponents have challenged the so-called sanctity of color-blind justice which, in actuality, provides profound analytical insights into the importance and necessity of cultural competence in legal practice.

### III. CRITICAL RACE THEORY IS MARXISM – AN ERRONEOUS CLAIM

It is erroneous to assume or promote the falsity that CRT is Marxism.<sup>110</sup> Unlike the proponents of CRT, Marx did not analyze

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<sup>109</sup> For example, Nigel Stobbs states:

One of the reasons that it is difficult to establish which institutions, processes, and rules are caught within the ambit of “the adversarial system” is that there is such a strong and necessary streak of pragmatism in the law. Because of that inherent pragmatism, it is probably not surprising that law should be prominent among the disciplines that see themselves governed by such a predominantly scientific phenomenon as the conceptual paradigm. At various stages, lawyers, political theorists, and legal academics have sought to equate law with the natural sciences . . . . The legitimacy of extending the paradigm concept to the social sciences and beyond can be observed in the long history of scholarship dedicated precisely to that objective. Social scientists have always desired to define their disciplines as mature sciences in some sort of revolutionary, paradigm shifting phase or crisis, rather than as pre-scientific ideologies . . . . Kuhn held that science does not seek “true” theories looking for an ultimate picture of reality. The tests of science need to be linked to workability and falsifiability. Therefore, scientific conjectures are always tentative in nature.

Nigel Stobbs, *The Nature of Juristic Paradigms: Exploring the Theoretical and Conceptual Relationship Between Adversarialism and Therapeutic Jurisprudence*, 4 WASH. U. JURIS. REV. 97, 118-20 (2011) (footnotes omitted).

<sup>110</sup> As noted in the Introduction of this Article, some politicians, without substantiating their public statements, openly declare that CRT is Marxism, an erroneous claim which is then mimicked by their supporters. See Sharif Paget, *Black Lawmakers Walk Out as Mississippi Senate Passes Legislation Described as a Critical Race Theory Bill*, CNN POL., <https://www.cnn.com/2022/01/21/politics/black-senators-mississippi-senate-walk-out/index.html> [https://perma.cc/EH4Y-SRH7] (last updated Jan. 21, 2022, 10:12 PM) (remarking that CRT “has become politicized and has been attacked by its critics as a Marxist ideology that’s a threat to the American way of life”). While Marx’s dialectical philosophy and economic analysis may have influenced and served to guide some critical race theorists’ thinking and explications, to claim that CRT is Marxism is to underplay and discount the influence and contributions of other social theorists (e.g., race and gender theorists) on the development of Critical Race Theory—especially since Marx focused his analysis on class and not the

race<sup>111</sup> and gender relations in society, or the impact of race and gender<sup>112</sup> as instruments of societal inequality and injustice. Instead, Marxist theory focuses on the capitalist modes of production and the exploitation of wage-labor in the pursuit of profit and the accumulation of capital.<sup>113</sup> For Marx, through the exploitation inherent in the production and reproduction of capital accumulation, society became separated into two distinct competing class formations: the bourgeoisie and the proletariat.<sup>114</sup> According to Marx, between these two unequal

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impact of race and gender on the production-reproduction of social inequality and injustice. *See* discussion *supra* Part II.

<sup>111</sup> Perhaps the answer resides in the fact that during the period in which Marx wrote, race as a concept of analysis was not in vogue, and slaves, as chattel, were viewed as devoid of humaneness. As Marx himself noted about the slave, “[t]he master can sell him, bequeath him, let him out on hire as a slave, just as any personal chattel or cattle. If the slaves attempt anything against the masters, they are also to be executed.” KARL MARX, 1 CAPITAL: A CRITIQUE OF POLITICAL ECONOMY, 522 (Friedrich Engels ed., Samuel Moore & Edward Aveling trans., Progress Publishers 2015) (1887) [hereinafter MARX, CAPITAL VOL. 1].

<sup>112</sup> *See* Heather Brown, *Marx on Gender and the Family: A Summary*, 66 MONTHLY REV. (June 1, 2014), <https://monthlyreview.org/2014/06/01/marx-on-gender-and-the-family-a-summary/> [<https://perma.cc/UT7V-3GX4>] (observing that “Marx did not write a great deal on gender, and did not develop a systematic theory of gender and the family”).

<sup>113</sup> KARL MARX, 3 CAPITAL: A CRITIQUE OF POLITICAL ECONOMY, 633 (Friedrich Engels ed., International Publishers 2010) (1894) [hereinafter MARX, CAPITAL VOL. 3]. As Marx himself explained:

We have seen that the continual tendency and law of development of the capitalist mode of production is more and more to divorce the means of production from labour, and more and more to concentrate the scattered means of production into large groups, thereby transforming labour into wage-labour and the means of production into capital. And to this tendency, on the other hand, corresponds the independent separation of landed property from capital and labour, or the transformation of all landed property into the form of landed property corresponding to the capitalist mode of production.

*Id.* at 633 (footnote omitted). *See also*, MARX, CAPITAL VOL. 1, *supra* note 111, at 541-42.

<sup>114</sup> “Society as a whole is more and more splitting up into two great hostile camps, into two great classes directly facing each other: Bourgeoisie and Proletariat.” MARX & ENGELS, *supra* note 13, at 34. Engels noted in the English edition of the COMMUNIST MANIFESTO: “[b]y bourgeoisie is meant the class of modern Capitalists, owners of the means of social production and employers of wage-labour.” *Id.* at 33 n.32. Engels also noted that “[b]y proletariat [is meant], the class of modern wage-labourers who, having no means of production of their own, are reduced to selling their labour-power in order to live.” *Id.*



social formations resides a dwindling middle class of petty bourgeoisie, and below the proletarian class are the lumpenproletariat.<sup>115</sup>

Concentrating his analyses on the political economy, class, class formations, and class conflict, Marx argued that, in the process of capital accumulation, the bourgeoisies not only established their dominance over the proletariat, but also produced the types of social relationships that reproduced relations of exploitation and bourgeoisie dominance.<sup>116</sup> These relationships furthered capital accumulation and the capitalist modes of oppression. Marx explained the process this way:

Capitalist production . . . of itself reproduces the separation between labour-power and the means of labour. It thereby reproduces and perpetuates the condition for exploiting the labourer. It incessantly forces him to sell his labour-power in order to live, and enables the capitalist to purchase labour-power in order that he may enrich himself. It is no longer a mere accident, that capitalist and labourer confront each other in the market as buyer and seller . . . . Capitalist production, . . . under its aspect of a continuous connected process . . . of reproduction, produces not only commodities, not only surplus-value, but it also produces and reproduces the capitalist relation; on the one side the capitalist, on the other the wage-labourer.<sup>117</sup>

Marx went on to describe capitalist relations as one of exploitation and domination that gave rise to antagonism and class conflict.<sup>118</sup> He argued that the capitalist mode of accumulation gave rise to a class

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<sup>115</sup> The petty bourgeoisie includes “small tradespeople, shopkeepers, and retired tradesman generally, the handicraftsmen and peasants . . .” *Id.* at 41. The lumpenproletariat was considered by Marx to be the “‘dangerous class,’ the social scum, that passively rotting mass thrown off by the lowest layers of old society.” *Id.* at 44 (footnote omitted).

<sup>116</sup>

The bourgeoisie, wherever it has got the upper hand, has put an end to all feudal, patriarchal, idyllic relations. It has pitilessly torn . . . the motley feudal ties that bound man to his “natural superiors,” and has left remaining no other nexus between man and man than naked self-interest, then callous “cash payment.” . . . The bourgeoisie has torn away from the family its sentimental veil and has reduced the family relation to a mere money relation.

*Id.* at 35-36.

<sup>117</sup> MARX, CAPITAL VOL. 1, *supra* note 111, at 407 (footnotes omitted).

<sup>118</sup> “The history of all hitherto existing society is the history of class struggles.” *See* MARX & ENGELS, *supra* note 13, at 33 (footnote omitted).

struggle to eradicate societal inequality and injustice.<sup>119</sup> He predicted that a proletarian revolt would then lead to a classless society.<sup>120</sup>

As to the attribution of CRT linkages to Marxist theory, it should be emphasized that Marx wrote at a time when most of world's societies were considered developing, or underdeveloped—an epoch in history when conquest, colonization, and the birth of industrialization served to shape and reshape societal relationships.<sup>121</sup> During this historical period, race, racism, and their influences and impacts on social relations and societal problems were not distinctly defined or clearly articulated, therefore, Marx did not address master-slave relations as based on racism:<sup>122</sup>

The capitalist mode of production differs from the mode of production based on slavery, among other things, by the fact that in the value, and accordingly the price, of labour-power appears as the value, or price, of labour itself, or as wages.<sup>123</sup>

The slave-owner buys his labourer as he buys his horse. If he loses his slave, he loses capital that can only be restored by new outlay in the slave-mart . . . . It is accordingly a maxim of slave management, in slave-importing countries, that the most effective economy is that which takes out of the human chattel in the shortest space of time the utmost amount of exertion it is capable of putting forth.<sup>124</sup>

Race and racism did not emerge as societal forces that generated hostility and social inequality until after his death.<sup>125</sup> How then, can claims that CRT is Marxism be valid? Since the days of Marx, the dynamics of world population configurations have changed

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<sup>119</sup> See *id.* at 41-46 (discussing the uprising of the proletariat against the bourgeoisie and the resulting aftermath).

<sup>120</sup> See *id.*

<sup>121</sup> Marx is said to have written and published from 1832-1875. See generally *Karl Marx: Role in the First International*, ENCYCLOPAEDIA BRITANNICA, <https://www.britannica.com/biography/Karl-Marx> [<https://perma.cc/SJ2R-4NVJ>].

<sup>122</sup> *Id.*

<sup>123</sup> MARX, CAPITAL VOL. 3, *supra* note 113, at 21 (citation omitted).

<sup>124</sup> MARX, CAPITAL VOL. 1, *supra* note 111, at 179.

<sup>125</sup> Marx died in 1883. See *Karl Marx: Role in the First International*, *supra* note 121. As explained in Part II of this Article, the use of race as a means of classifying individuals did not gain traction until the 1800s, and it was not until the 1900s that major works were written about the experiences of people of color in America. See discussion *supra* Part II.

considerably.<sup>126</sup> Globalization, technological advances, and patterns of migration and accommodation ushered into nation-states new modes of domination and discrimination, all of which influence and support the construction of CRT.<sup>127</sup>

#### IV. CRITICAL RACE THEORY AND CULTURAL COMPETENCY IN LEGAL PRACTICE

By their analytical focus and explanations of race, racism, and the law, CRT scholars have delved into some of the myths of equal rights and justice under the law.<sup>128</sup> They have challenged the legitimization of race-based social inequality through law and the judicial system.<sup>129</sup> Although their academic approaches have generated and continue to generate varying degrees of controversy, their questioning of the unequal distribution of justice under the law has undoubtedly expanded the frontier of legal education, especially as it pertains to the preparation and training of students to be competent legal practitioners in an ever-expanding multicultural American society:<sup>130</sup>

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<sup>126</sup> See generally Chantal Thomas, *Race as a Technology of Global Economic Governance*, 67 UCLA L. REV. 1860 (2021).

<sup>127</sup> “In 1995, leading scholars of [CRT] called for attention to the need to ‘generate an adequate account of the connections between racial power and political economy’ within mainstream legal scholarship on globalization.” *Id.* at 1864 (footnote omitted). Professor Thomas further notes that “many scholars set about establishing the baseline for inquiry into a ‘race approach to international law[.]’ Important work was completed during this time although this project “remains incomplete.” *Id.* (footnotes omitted).

<sup>128</sup> See generally John A. Scanlan, *Call and Response: The Particular and the General*, 2000 U. ILL. L. REV. 639 (2000).

<sup>129</sup> “[CRT]’s challenge to racial opposition and the status quo sometimes takes the form of storytelling, in which writers analyze the myths, presuppositions, and received wisdoms that make up the common culture about race, and that invariably render blacks and other minorities one-down.” *Id.* at 659. Moreover, “[a]ccording to Bell, ‘[t]he narrative voice, the teller, is important to critical race theory in a way not understandable by those whose voices are tacitly deemed legitimate and authoritarian.’” *Id.* (quoting Derrick Bell, *Who’s Afraid of Critical Race Theory?*, 1995 U. ILL. L. REV. 893, 907 (1995)).

<sup>130</sup>

[E]xposure to [CRT] itself arguably enables . . . students to enter the world of practice with a self-consciously critical lens through which to approach issues of racial (in)justice . . . [E]ventually train[ing] our legal system to ask and answer these issues . . . thereby transforming the norms underlying . . . deeply entrenched . . . problems faced by people of color.

Our justice system prides itself in dispensing justice impartially without regard to the individual. But who determines the meaning of impartiality? Is it possible to be impartial with a one-dimensional mind without an awareness and understanding of a double consciousness? . . . [A] reasonable person cannot truly entertain the notion of impartiality if he or she is not fully competent to assess another's culture independently of his or her own ethnocentricities.<sup>131</sup>

Given our nation's multicultural complexities, "an impartial individual, in evaluating facts cross-culturally, should be mindful of his or her own cultural beliefs so that these do not impinge on a defendant's belief system or create false expectations on the part of the defendant."<sup>132</sup>

Cultural competence is not simply cultural neutrality or color blindness; it means being able to see and understand things from the defendant/accused perspective.<sup>133</sup> In short, one cultural group's ethnocentric view of societal relations tilts toward a myopic application, resulting in a dominating and distorted effect, whether intended or unintended, on the misperceptions of another culture within society,

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Sheila R. Foster, *Critical Race Lawyering: Foreword*, 73 *FORDHAM L. REV.* 2027, 2028 (2005).

<sup>131</sup> Shiv Narayan Persaud, *Is Color Blind Justice Also Culturally Blind? The Cultural Blindness in Justice*, 14 *BERKELEY J. AFR. AM. L. & POL'Y* 23, 50 (2012) (footnotes omitted).

<sup>132</sup> *Id.* (footnote omitted).

<sup>133</sup> In *Mak v. Blodgett*, during the sentencing phase of the defendant's conviction for murder and aggravated assault, "[d]efense counsel failed to present any mitigating evidence regarding [the defendant's] background, family relationships or cultural dislocations that might have affected his behavior." 970 F.2d 614, 617 (9th Cir. 1992). The court noted that "[t]he district court found there was 'substantial and important mitigating evidence readily available,' including testimony of family members to show [the defendant's] human qualities, and expert testimony . . . to show the effects of cultural conflict on young Chinese immigrants." *Id.* One scholar argues:

It is no coincidence that cases on appeal for interpreter issues and failure to present mitigating cultural evidence are filed in conjunction with ineffective assistance of counsel claims. Thus cultural awareness is not merely about ensuring fair representation of LEP [Limited English Proficiency] and cultural minority litigants, it is also a matter of professional responsibility.

Annette Wong, Note, *A Matter of Competence: Lawyers, Courts, and Failing to Translate Linguistic and Cultural Differences*, 21 *S. CAL. REV. L. & SOC. JUST* 431, 434 (2012) (footnote omitted).

unless there are attempts to understand cross-cultural relations without bias and subjectivity.<sup>134</sup>

Today, cultural competence in legal practice seems to have taken on greater significance, especially since aspersions and indignities cast against immigrant groups are on the rise, particularly by politicians seeking notoriety or reelection, several of whom use such phrases as “criminals”, “terrorists”, “rapists,” “gangsters,” and “bad-hombres” to stigmatize members of non-white immigrant groups.<sup>135</sup> This begs the question of whether someone from the stereotypic immigrant group can acquire competent legal defense and receive fair sentencing, especially if they are from a lower socio-economic strata? Valid data that would help provide an answer to this specific question are not available. However, published information suggests that the answer is no.<sup>136</sup> As Walker et al. state:

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<sup>134</sup> I’ve discussed the means of appropriately attempting to acquire such an understanding in my work *Is Color Blind Justice Also Culturally Blind? The Cultural Blindness In Justice*. There, I explain that:

In ethnically diverse societies such as ours, understanding an individual’s existence within the context of the dominant culture starts with an objective view of the accommodations made and integrated into his or her cultural uniqueness and identity. Colloquially phrased, “walk[ing] a mile in the moccasins” of another person may be more beneficial than an armchair assessment of his culture and society. Being able to put oneself in the cultural context of the perceived stranger helps to reduce one’s ethnocentric biases and subjectivity, while facilitating greater understanding and objectivity. In sum, a true appreciation of the *alien* culture is more likely to occur when the individual observer participates and becomes saturated in the cultural context and realities – the wants, needs, fears, interactions and exchanges – of the perceived stranger. Such is the process of acquiring cultural competence.

Persaud, *supra* note 131, at 28 (emphasis in original) (footnotes omitted).

<sup>135</sup> See Ernesto Sagás & Ediberto Román, *Fear, Loathing, and the Hemispheric Consequences of Xenophobic Hate*, 29 U. MIAMI INT’L & COMP. L. REV. 1, 34 (2021) (noting the hate speech used by former President Trump at his rallies); see also James M. Cooper, *The United States, Mexico, and the War on Drugs in the Trump Administration*, 25 WILLAMETTE J. INT’L L. & DISP. RESOL. 234, 244 (2018) (discussing the views and language used by former President Donald Trump to describe Mexicans).

<sup>136</sup> See, e.g., Sagás & Román, *supra* note 135, at 19-20 (detailing the numerous examples of discriminatory legal judgments issued against non-white immigrant populations in U.S. history, such as the mandatory internment of Japanese immigrants during the 1930’s, and how this connects with more modern anti-immigrant punitive policies issued under the Trump Administration).

It is important to note . . . that discriminatory treatment during the pretrial stage of the criminal justice process can have profound consequences for racial minorities at trial and sentencing. If racial minorities are more likely than whites to be represented by incompetent attorneys or detained in jail prior to trial, they may, as a result of these differences, face greater odds of conviction and harsher sentences.<sup>137</sup>

With regards to sentencing, the authors identified research data from Chicago, Kansas City, and Miami indicating “that judges’ sentencing decisions reflect ‘stereotypes of dangerousness and culpability that rest, either explicitly or implicitly, on considerations of race, gender, pretrial status, and willingness to plead guilty.’”<sup>138</sup>

The paucity in the number of competent legal practitioners appears to be symptomatic of how colleges of law across the nation prepare students to practice law.<sup>139</sup> The primary focus tends to be on preparation for the bar exam, rather than a consideration of the multi-cultural nature of our society and the need to educate and train students on cultural competency and the law.<sup>140</sup>

Encouraging open debate on our society’s multi-cultural realities could aid in preparing law students for culturally competent legal practice.<sup>141</sup> While some legal scholars may be quick to dismiss CRT as

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<sup>137</sup> WALKER ET AL., *supra* note 89, at 231.

<sup>138</sup> *See id.* at 292-94 (citation omitted).

<sup>139</sup> *See* Teresa Biviano, *Practical Lawyering: Intervention in Law School Curriculum Requirements to Prepare New Lawyers for Ethically Competent Practice*, 30 GEO. J. LEGAL ETHICS 619, 628-29 (2017) (citation omitted) (discussing the contrast between law students’ perception of their own preparedness to practice law in an ethically competent manner versus how practicing attorneys perceive recent graduates to be lacking “‘key practical skills at the time of hiring’”).

<sup>140</sup> *Cf.* Debra Chopp, *Addressing Cultural Bias in the Legal Profession*, 41 N.Y.U. REV. L. & SOC. CHANGE 367, 384-85 (2017) (discussing the American Bar Association’s revision to its Standard 302(d) on learning outcomes for law students to include “cultural competency” as one of the listed professional skills an ABA law school may, but is not required to, teach, and how this revision may inspire law schools to devote more time to the topic as part of their curriculum).

<sup>141</sup> I’ve discussed the importance of such preparation for representing a cross-cultural defendant, along with potential means of acquiring cultural competency in my work *Is Color Blind Justice Also Culturally Blind? The Cultural Blindness in Justice*. There, I explain that:

In order to develop an empathic understanding with a cross-cultural defendant, the culturally competent professional must [also] actively participate in the defendant’s culture. In addition to attending training programs, the culturally competent may benefit from involvement in neighborhood justice initiatives, such as

one-dimensional, they would be hard pressed to deny its contribution to a more comprehensive understanding of the law and the distribution of unequal justice along the color line.<sup>142</sup> “The impartiality and effectiveness of the justice system can be enhanced through cross-culturally competent professionals through whom the defendant would have an opportunity to fully present him or herself fairly to the legal system devoid of cultural biases and contradictions.”<sup>143</sup> In this regard, embracing CRT as an approach can be a starting place for cultural understanding instead of a scapegoat for division.

## V. DISCUSSION AND CONCLUSION

Since 1965, the influx of immigrants to the United States—through the relaxation of immigration laws, residual effects of America’s foreign wars, refugee admissions, and illegal immigration—has added to the color complexities of race and the reproduction of inequality in society.<sup>144</sup> Mostly people of color, these immigrants have contributed to

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mentoring . . . . There is perhaps no greater way to learn about a defendant’s culture than to walk in the defendant’s shoes. By declining to fully embracing neighborhood justice programs such as mentoring, the dominant societal culture has failed to understand not only the African-American culture, but almost every other minority culture.

Persaud, *supra* note 131, at 60-62 (footnotes omitted).

<sup>142</sup> “Critical race theory has made tremendous strides in articulating a deeper understanding of social justice; in articulating an evolving understanding of slavery, colonialism, Jim Crow, the Civil Rights movement, criminal law, post-racialism, identity politics, etc.” Nick J. Sciullo, *Social Justice in Turbulent Times: Critical Race Theory & Occupy Wall Street*, 69 NAT’L LAW. GUILD REV. 225, 230 (2012) (footnotes omitted).

<sup>143</sup> Persaud, *supra* note 131, at 50 (footnote omitted).

<sup>144</sup> See David B. Oppenheimer, Swati Prakash & Rachel Burns, *Playing the Trump Card: The Enduring Legacy of Racism in Immigration Law*, 26 BERKELEY LA RAZA L. J. 1, 2-4, 23, 37-40 (2016) (“To understand immigration law in the United States, one must examine the history of racial exclusion and inequality . . . . The earliest family members for another of us crossed the Atlantic during the mid-seventeenth century as part of the early English settlement of North America . . . . Another one of us is a second-generation South Asian-American whose parents immigrated to the United States after the Immigration Act of 1965 relaxed quotas for individuals for many Asian nations . . . . The U.S. desperately needed each of these immigrant groups for economic reasons, and each group experienced sustained exploitation, discrimination, and diminished legal status in its new home. However, members of several of these groups eventually experienced and/or brought about some degree of integration into the social, political, and economic mainstream of the United States, either through evolving definitions of

the expansion of the minority population and brought with them their ethnic, cultural, and national identities that threaten the status quo relations of White domination.<sup>145</sup>

With the same rights and privileges granted all citizens, including equal justice under the law, the growing multicultural population is viewed as a threat to the relations of White domination, as manifested in the complexities of racism and social inequality.<sup>146</sup> This expansion of the minority population has already prompted alternative approaches to the reproduction of white socio-political relations of domination, and fueled the victimization of ethnic groups by those who see their growing numbers as the nemesis to the perpetuation of white hegemony:<sup>147</sup>

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‘White’ (in the case of Irish Catholics, Italian Catholics, and Eastern European Jews), or through relaxing the significance of Whiteness as a critical factor for broader acceptance (in the case of Chinese and Japanese individuals).”)

<sup>145</sup> Joe R. Feagin, *White Supremacy and Mexican Americans: Rethinking the “Black-White Paradigm”*, 54 RUTGERS L. REV. 959, 968, 976-77, 982 (2002) (citations omitted) (“Each new immigrant group is usually placed by dominant whites somewhere in the white-to-black hierarchy of wealth and power, as well as in the corresponding white-to-black status continuum. The socio-racial hierarchy and status continuum have long been imbedded in white minds and practices. As whites have viewed the social world, the racial hierarchy and status continuum run from ‘highly civilized’ whites to ‘uncivilized’ blacks, from high intelligence to low intelligence, from privilege and desirability to lack of privilege and undesirability. Moreover, the character of the racial oppression faced by an entering group varies depending on its timing of entry, its region of entry, its size, economic resources, cultural characteristics, and physical characteristics. Thus, in the case of Latino and Asian immigrants, whites particularly accent their being culturally ‘alien’ and ‘foreign.’”). See also Suzanne Gamboa, *1965 Immigration Act That Diversified U.S. Still Reshaping America*, NBC, <https://www.nbcnews.com/news/latino/1965-immigration-act-diversified-still-reshaping-u-s-n434511> [<https://perma.cc/J6W7-G8EM>] (last updated Sept. 28, 2015, 12:11 AM) (noting that “[h]alf of immigrants, 51 percent, who arrived since 1965 are from Latin America and a quarter are from Asia”).

<sup>146</sup> See U.S. CONST. amend. XIII, § 1; U.S. CONST. amend. XIV, § 1; U.S. CONST. amend. XV, § 1. See also Feagin, *supra* note 145, at 962 (discussing commentary that perceives non-white immigration as a threat to white dominance). Cf. Bill Ong Hing, *Beyond the Rhetoric of Assimilation and Cultural Pluralism: Addressing the Tension of Separatism and Conflict in an Immigration-Driven Multiracial Society*, 81 CALIF. L. REV. 863, 866 (1993) (“These enormous changes in the demographic composition of America have focused debate on what it means to become an American . . . . The discussion, however, implicates society far beyond the realm of proposed federal immigration policy . . . . [I]t strikes at the very heart of our nation’s long and troubled legacy of race relations.”).

<sup>147</sup> Feagin, *supra* note 145, at 962, 976-77 (discussing the perceived threat to white hegemony threatened by the “browning of America” through non-white



[M]ulticulturalism challenges the premise that America is a white, English-speaking, Western Christian nation. Not only did Native American tribes long pre-date the arrival of white Christians, but the early European settlers spoke Spanish, German, Dutch, French, and Polish in addition to English. Before Chinese exclusion laws became permanent near the turn of the twentieth century, about 300,000 Chinese had entered the country. Filipinos established a community in Louisiana as early as 1565. Spanish-Portuguese Jews, the Sephardim, settled in the New World in the mid-1600s. Mexicans, initially propelled by Mexico's historical territorial claims in the Southwest, have long-established patterns of migration to the United States. Over 9.5 million Africans were captured and brought to the western hemisphere as slaves. In the first decade of this century, about 2 million Italians, 1.6 million Russians, and 800,000 Hungarians immigrated. In short, the heritage of the United States does not derive solely from people who are white, English-speaking, Christian, and European. Nonwhite peoples have a long history in America, most of which is unflattering to [] white, European Christians . . . . The genocide of Native Americans, brutal enslavement of African Americans, and exploitation and oppression of Asian and Latino Americans are harsh reminders of our nation's past. In spite of the oppression, people of color have contributed to America's history and development and are a vital part of its heritage.<sup>148</sup>

Recently, several state legislatures have rushed to promulgate race-based policies that seek to disenfranchise and oppress communities of color while disclaiming that such policies are discriminatory.<sup>149</sup> Under the guise of bringing about fairness to the electoral process, lawmakers in some states have rushed restrictive voting policies through their legislatures that, in effect, discriminate against racial minorities by making it harder for them to vote.<sup>150</sup> Critics argue that legislators encode

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immigration, leading to anti-immigrant actions). *See Hing, supra* note 146, at 906-07 (discussing a strategy white supremacists use to spread resentment towards non-white immigrants and make it easier for hate violence towards people of color).

<sup>148</sup> *Hing, supra* note 146, at 876-77 (footnotes omitted).

<sup>149</sup> *See, e.g., U.S. Supreme Court Backs Voting Restrictions in Arizona*, 31 WESTLAW J. PROF. LIAB. 10 (2021) (noting that Republicans enact voter suppression state laws to make it harder for racial minorities to vote).

<sup>150</sup> *See, e.g., Alexander Bolton, Democrats Torn Over Pushing Stolen-Election Narrative*, HILL (Jan. 22, 2022, 5:53 AM), <https://thehill.com/homenews/senate/590873-democrats-torn-over-pushing-stolen-election-narrative/> [<https://perma.cc/2ZXH-P2CX>] (discussing President Biden's concerns over Republican state legislatures' efforts to "turn the will of the voters into a mere

these laws to discourage and disenfranchise minority voters from participating in the electoral process, thereby ensuring their retention of power and, in short, reproducing their power and domination.<sup>151</sup> In addition to enacting laws to reproduce their power, many states have also revised their electoral districts to ensure that the predominantly White members of the majority party can retain power.<sup>152</sup>

Many legal scholars agree that CRT contributes to our understanding of how the complex intersections of race, ethnicity,

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suggestion, something states can respect or ignore” by making it more difficult to vote and altering who counts the votes).

<sup>151</sup> “[M]any Blacks see Republican-led efforts to enact stricter election laws as a new twist on the old tactic of disenfranchisement.” See Niall Stange, *The Memo: Biden Looks for Way to Win Back Deflated Black Voters*, HILL (Jan. 23, 2022, 12:00 PM), <https://thehill.com/homenews/administration/590760-the-memo-biden-looks-for-way-to-win-back-deflated-black-voters/> [<https://perma.cc/UU22-7QR6>] (discussing the tendency of Black voters to “overwhelmingly” vote Democrat given “the party’s support for the civil rights struggle and the calculated efforts of leading Republicans . . . to capitalize on white backlash”).

<sup>152</sup> The revision of electoral districts to favor one party, known as gerrymandering, has occurred for years. Nonetheless, it seems the 2020 election has inspired a new wave of racial gerrymandering in Republican-controlled states, to keep minority-preferred Democrats from being elected in historically Republican states. As described by Odujinrin:

Gerrymandering, particularly racial gerrymandering, is a foundational step in ensuring that minority voters are left without representation and disenfranchised by a system that purports to be fair and free. The 2020 election concluded with many seat flips by a slim margin of votes, along with the record voter turnout and resulting litigation, which suggests that the battle of redistricting following the 2020 census is bound to be an intense one. Already, the fight between restricting and expanding voting rights is underway. State legislators have introduced more than 425 bills aimed at restricting voter laws in forty-nine states. These bills are being introduced at an alarming rate—from February 2021 to March 2021, 108 restrictive voting bills were introduced—a forty-three percent increase from the previous month. Of the 425 bills, thirty-three have been signed into law in nineteen states. To counter, 843 bills have been introduced with provisions aimed at expanding equal access to voting in forty-seven states, and “25 states [have] enacted 62 laws with provisions that expand voting access.” This flurry of activity signals one thing: the fight for fair and free access to voting is stronger than ever.

Laura Odujinrin, *The Dangers of Racial Gerrymandering in the Frontline Fight for Free and Fair Elections*, 12 U. MIA. RACE & SOC. JUST. L. REV. 164, 167-68 (2022) (footnotes omitted).

gender, and the law reproduce social inequality in society.<sup>153</sup> Critics of CRT, however, claim that racial policies, practices, and patterns of discrimination are social constructions of America's historical past and not symptomatic of today's socio-structural realities.<sup>154</sup> But, when the relations of racial differentiation and inequality are reproductively inculcated in the nation's psyche through *de jure* and *de facto* policies and regular partisan political propagandizing, why then should such discriminative relations of domination be relegated into the backwaters of history?<sup>155</sup> CRT scholars contend that such relegation would conceal the discriminative policies and practices that served to reproduce white

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<sup>153</sup> “The contribution of CRT to this tradition of criticism has been to focus specifically on how law affected race relations . . . . CRT sought to show that liberal legalism claimed to promote *racial* equality but in fact perpetuated racial inequality.” Chantal Thomas, *Critical Race Theory and Postcolonial Development Theory: Observations on Methodology*, 45 VILL. L. REV. 1195, 1198-99 (2000) (emphasis in original).

<sup>154</sup> See Pyle, *supra* note 85, at 792-95 (offering criticisms of CRT and its proponents). “Because evidence plays little role in the race-crits’ description of black disadvantage, they feel no need to explain the economic and political progress of black Americans during the last thirty years.” *Id.* at 794. (footnote omitted).

<sup>155</sup> See, e.g., Mastrangelo, *supra* note 3 (discussing Tennessee Rep. Mark Green’s remarks condemning CRT as a “Marxist ideology” that makes servicemembers “ashamed of their country” and how he urged the U.S. Air Force Academy to remove a professor teaching CRT to cadets); Taylor, *supra* note 9 (“Many legislators who press for laws to forbid curricula on racism and sexism in the schools identify the enemy as ‘critical race theory.’ . . . One serious critic, Patricia Morgan, a Republican legislator from Rhode Island, called [CRT] ‘a divisive, destructive, poisonous ideology that makes white males oppressors . . . and it makes everyone else the victims.’”); Alisha Ebrahimji, *Texas School District ‘Postpones’ a Black Author’s School Visit Because Parents Claim His Books Teach Critical Race Theory*, CNN, <https://www.cnn.com/2021/10/07/us/katy-isd-book-critical-race-theory-trnd/index.html> [https://perma.cc/G8D9-CHQK] (last updated Oct. 7, 2021, 3:58 PM) (discussing how Texas law forbids schools from teaching CRT); Aris Folley, *Ocasio-Cortez Knocks McCarthy After He Claimed Critical Race Theory ‘Goes Against Everything’ MLK Taught*, HILL (July 13, 2021, 5:23 PM), <https://thehill.com/homenews/house/562822-ocasio-cortez-knocks-mccarthy-after-he-claimed-critical-race-theory-goes/> [https://perma.cc/G6R3-5PT4] (discussing how House Minority Leader Kevin McCarthy “claimed in a recent interview that teachings of [CRT] ‘go against everything’ . . . Martin Luther King Jr. taught” and how Rep. Ocasio-Cortez responded by pointing out the GOP’s efforts to gut “the very Voting Rights Act King worked for” and quoting King’s own 1967 statement that “‘the white people of America believe they have so little to learn’ . . .”).

relations of domination and inequality—many of which are already codified and legally enforced.<sup>156</sup>

Our society is one in which the cultural assimilation “melting pot” has literally run out of gas and become relegated to some archaic intellectual past. This has given way to a multicultural society with distinct ethnic and co-ethnic enclaves, an abundance of social-cultural variations, and various gradations of skin color. In a democracy such as ours, will there be a day when we will all be perceived as equal under a system of color-blind justice for all? Even the clairvoyant cannot visualize the true answer without having “profound insights” of cultural competence.<sup>157</sup> Perhaps the answer lies when Lady Liberty can cry with silent lips, “I lift my lamp beside the golden door[, for hate has now been vanquished from these shores!]”<sup>158</sup>

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<sup>156</sup> See Bobbi K. Dominick, *Critical Race Theory and Workplace Diversity Efforts*, IDAHO STATE BAR (July 1, 2022), [https://isb.idaho.gov/blog/critical-race-theory-and-workplace-diversity-efforts/\[https://perma.cc/8RWP-R47Y\]](https://isb.idaho.gov/blog/critical-race-theory-and-workplace-diversity-efforts/[https://perma.cc/8RWP-R47Y]) (discussing the impact of a Trump-era executive order barring workplace diversity training with “purported CRT concepts,” and implying that, without CRT in diversity training, it is difficult to target racial bias in the workplace).

<sup>157</sup> “Awareness of the cultural influences on [an individual or cultural group] can contribute to the understanding of present, and . . . future . . . behaviors while serving in the overall balance of society’s well-being and harmony.” Persaud, *supra* note 131, at 42 (citation omitted).

<sup>158</sup> Emma Lazarus, *The New Colossus*, NAT’L PARK SERV. (Nov. 2, 1883), <https://www.nps.gov/stli/learn/historyculture/colossus.htm> [<https://perma.cc/KH7Z-UCVR>].