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Fighting Racism in the Twenty-First Century

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> *[F]or several hundred years Negroes have been discriminated against, not as individuals, but rather solely because of the color of their skins. It is unnecessary in twentieth-century America to have individual Negroes demonstrate that they have been victims of racial discrimination; the racism of our society has been so pervasive that none, regardless of wealth or position, has managed to escape its impact. . . . 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.*[1]

As the late Justice Thurgood Marshall noted, twentieth century racism was blatant, intentional, and its existence generally undisputed. The obvious nature of how racism operated in the twentieth century led to the passage of civil rights laws.[2] Twenty-first century racism, on the other hand, is more subtle. It is harder to prove intentional racial discrimination today,[3] and as a result, its existence is widely disputed. The widespread skepticism of the existence of racism in the twenty-first century was the motivating factor for this Symposium issue, entitled *Critical Race Theory: The Next Frontier.*

Critical Race Theory (CRT) examines how the law and legal traditions impact people of color, not as individuals, but as members of a group.[4]

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* Alumni Faculty Fellow and Professor of Law, Washington and Lee University School of Law, Lexington, Va.; B.S., Fordham University; J.D., Georgetown University Law Center; L.L.M. (Taxation), New York University. I would like to thank Professors Devon Carbado, Mechele Dickerson, Mitu Gulati, Rachel Moran, and David Skeel for their insights and helpful comments. I would like to thank Ms. Erin Troy for excellent research assistance and Ms. Linda Newell and the rest of the Washington and Lee University School of Law library staff for work above and beyond the call of duty.

1. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 400 (1978) (Marshall, J., dissenting).

2. *See generally* The Voting Rights Act of 1965, 42 U.S.C. § 1973 (2000); The Civil Rights Act of 1964, 42 U.S.C. § 2000 (2000).

3. *Cf.* Washington v. Davis, 426 U.S. 229, 238–41 (1976) (holding that in order to be successful, plaintiffs had to prove intent to discriminate in equal protection analysis under the Fourteenth Amendment; showing disparate impact based upon race was insufficient).

4. *See* DOROTHY A. BROWN, CRITICAL RACE THEORY: CASES, MATERIALS AND PROBLEMS 2 (2003) ("Specifically, [Critical Race Theory] focuses on the various ways in which the received tradition in law adversely affects people of color not as individuals but as a group.").

Although CRT does not employ a single methodology,[5] it seeks to highlight the ways in which the law is not neutral and objective, but designed to support White supremacy and the subordination of people of color.[6] One of CRT's

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5. *See* CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT xiii (Kimberlé Crenshaw et al. eds., 1995) ("As these writings demonstrate, there is no canonical set of doctrines or methodologies to which we all subscribe."); John O. Calmore, *Critical Race Theory, Archie Shepp, and Fire Music: Securing an Authentic Intellectual Life in a Multicultural World*, 65 S. CAL. L. REV. 2129, 2139 (1992) (describing three methodologies of CRT as "oppositional cultural practice, fundamental criticism, and cultural border crossings"); Emily M.S. Houh, *Critical Interventions: Toward an Expansive Equality Approach to the Doctrine of Good Faith in Contract Law*, 88 CORNELL L. REV. 1025, 1058–59 ("Although critical race scholarship employs no single methodology, some unifying themes and concepts have developed over the past twenty-five years."). Some, however, do propose a single methodology for CRT:

> [CRT] relies on a methodology grounded in the particulars of . . . social reality and experience. This method is consciously both historical and revisionist, attempting to know history from the bottom. From the fear and namelessness of the slave, from the broken treaties of the indigenous Americans, the desire to know history from the bottom has forced . . . scholars to sources often ignored: journals, poems, oral histories, and stories from their own experiences of life in a hierarchically arranged world.

Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2324 (1989).

6. *See* RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION 6–7 (2001) ("What do critical race theorists believe? Probably not every member would subscribe to every tenet set out in this book, but many would agree on the following propositions. First, that racism is ordinary, not aberrational. . . . Second, most would agree that our system of white-over-color ascendancy serves important purposes, both psychic and material."); Kimberlé Crenshaw, *A Black Feminist Critique of Antidiscrimination Law and Politics*, *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 213–14 n.7 (David Kairys ed., 1990) ("Critical race theory goes beyond the liberal race critiques, however, in that it exposes the facets of law and legal discourse that create racial categories and legitimate racial subordination."); Jerome McCristal Culp, Jr., *To The Bone: Race and White Privilege*, 83 MINN. L. REV. 1637, 1638 (1999) ("[T]here are critical race theories. There are many theories that unite and divide everyone who could be accused of being or claim to be members of the critical race theory movement, but there is a common belief in an opposition to oppression."). As one author explains:

> First, critical race theory seeks to expose the entrenchment of White supremacy and the reality of the continued subordination of people of color in the United States (and throughout the world), and to unravel its relationship with the rule of law. More specifically, race crits examine how racial power constitutes and reproduces itself through the apparatuses of law and culture. Second, race crits are not satisfied with merely naming and understanding their observations and discoveries; they also are committed to transforming the relationship between law and hegemonic racial power in order to destabilize that power. Third, like critical legal scholars, race crits continue to reject notions of objectivity and neutrality in the law, and the idea that legal scholarship can and should be so characterized.

Houh, *supra* note 5, at 1058–59.

central tenets is the pervasiveness of racism in American society.[7] At its core, CRT accepts the notion that even in the twenty-first century, if you are a person of color in America, you are the victim of racial subordination.[8]

Given that argument, what is the purpose of the statistical data found in several of the Symposium articles? Is it to prove that subordination and discrimination exist? Why prove something that is a given? This Symposium raises the fundamental question of whether empirical legal scholarship can ever co-exist with CRT.

The argument against the co-existence of empirical legal scholarship and CRT is twofold. First, the use of statistical data privileges data and provides

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7. *See* DERRICK BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM 12 (1992) ("Black people will never gain full equality in this country. Even those herculean efforts we hail as successful will produce no more than temporary 'peaks of progress,' short-lived victories that slide into irrelevance as racial patterns adapt in ways that maintain white dominance."); CRITICAL RACE THEORY: THE CUTTING EDGE xiv (Richard Delgado ed., 1995) (describing the CRT insight "that racism is normal, not aberrant, in American society" while noting that "[b]ecause racism is an ingrained feature of our landscape, it looks ordinary and natural to persons in the culture"); DELGADO & STEFANCIC, *supra* note 6, at 7 ("[R]acism is ordinary, not aberrational—'normal science,' the usual way society does business, the common everyday experience of most people of color in this country."); Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1336 (1988) ("First, racism is a central ideological underpinning of American society."); Culp, *supra* note 6, at 1639 ("White racism in its many guises is deeply buried in the structure of the law and the legal academy.").

8. *See* CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY 2 (Francisco Valdes et al. eds., 2002) ("In its first decade, CRT described and critiqued not a world of bad actors, wronged victims, and innocent bystanders, but a world in which all of us are more or less complicit in sociolegal webs of domination and subordination."); Charles R. Lawrence III, *The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322 (1987) ("Americans share a common historical and cultural heritage in which racism has played and still plays a dominant role. Because of this shared experience, we also inevitably share many ideas, attitudes, and beliefs that attach significance to an individual's race and induce negative feelings and opinions about nonwhites."). Professor Crenshaw further explains:

> Yet the attainment of formal equality is not the end of the story. Racial hierarchy cannot be cured by the move to facial race-neutrality in the laws that structure the economic, political, and social lives of Black people. White race consciousness, in a new form but still virulent, plays an important, perhaps crucial, role in the new regime that has legitimated the deteriorating day-to-day material conditions of the majority of Blacks. The end of Jim Crow has been accompanied by the demise of an explicit ideology of white supremacy. The white norm, however, has not disappeared; it has only been submerged in popular consciousness. . . . The rationalizations once used to legitimate Black subordination based on a belief in racial inferiority have now been reemployed to legitimate the domination of Blacks through reference to an assumed cultural inferiority.

Crenshaw, *supra* note 7, at 1378–79.

support for the notion that numbers are neutral and objective—something that is fundamentally inconsistent with CRT. Second, privileging numbers necessarily refutes the power of narrative.[9] Indeed, the use of narrative in

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9. The use of narrative—the telling of personal stories—is an important feature of CRT. *See, e.g.*, Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CAL. L. REV. 1241, 1268–69 (1993) ("Asian American Legal Scholarship contends that personal narrative is an important tool in addressing the oppression of Asian Americans. Narrative occupies a similar role in both feminist legal theory and critical race theory.") (footnote omitted); Alex M. Johnson, Jr., *Defending the Use of Narrative and Giving Content to the Voice of Color: Rejecting the Imposition of Process Theory in Legal Scholarship*, 79 IOWA L. REV. 803, 804 (1994) ("A methodological format known as Narrative has emerged as the preferred genre of scholarship for scholars of color and others producing Critical Race Theory.") (citations omitted). As Professor Bell explains:

> The 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. The voice exposes, tells and retells, signals resistance and caring, and reiterates what kind of power is feared most—the power of commitment to change.

Derrick A. Bell, *Who's Afraid of Critical Race Theory?*, 1995 U. ILL. L. REV. 893, 907. Professor Delgado likewise notes:

> Stories, parables, chronicles, and narratives are powerful means for destroying mindset—the bundle of presuppositions, received wisdoms, and shared understandings against a background of which legal and political discourse takes place. These matters are rarely focused on. They are like eyeglasses we have worn a long time. They are nearly invisible; we use them to scan and interpret the world and only rarely examine them for themselves. Ideology—the received wisdom—makes current social arrangements seem fair and natural. Those in power sleep well at night—their conduct does not seem to them like oppression. The cure is storytelling (or as I shall sometimes call it, counterstorytelling). As Derrick Bell, Bruno Bettelheim, and others show, stories can shatter complacency and challenge the status quo. Stories told by underdogs are frequently ironic or satiric; a root word for "humor" is humus—bringing low, down to earth. Along with the tradition of storytelling in black culture there exists the Spanish tradition of the picaresque novel or story, which tells of humble folk piquing the pompous or powerful and bringing them down to more human levels.

Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2413–14 (1989) (citations omitted). Professor Matsuda further posits:

> What is it that characterizes the new jurisprudence of people of color? First is a methodology grounded in the particulars of their social reality and experience. This method is consciously both historical and revisionist, attempting to know history from the bottom. From the fear and namelessness of the slave, from the broken treaties of the indigenous Americans, the desire to know history from the bottom has forced these scholars to sources often ignored: journals, poems, oral histories, and stories from their own experiences of life in a hierarchically arranged world.

Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2323–24 (1989) (citations omitted).

CRT has been criticized because of the lack of empirical support for the existence of a distinct voice of color.[10]

The argument in favor of the co-existence of empirical legal scholarship and CRT is, simply put, an attempt to reach out to White America.[11] While some may argue that my effort is inconsistent with CRT, I believe it is more important in the twenty-first century to examine data because many White Americans believe that the passage of civil rights laws in the twentieth century has eliminated all but isolated incidents of racism.[12] In effect, the only people who can be guilty of racist behavior today are the modern-day analogues of Bull Connor.[13] Given that it is no longer acceptable to be overtly racist, the

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10. Consider the comments of Professors Farber and Sherry:

> Because the feminist version of different voice theory is older and therefore better developed than the critical race theory version, we found arguments regarding the voice of color particularly difficult to evaluate. . . . *[C]ritical race theory has not yet established a comparable empirical foundation.* We know of no work on critical race theory that discusses psychological or other social science studies supporting the existence of a voice of color. Most critical race theorists simply postulate the existence of a difference, often citing feminist scholarship for support, and thus implicitly equating a male voice with a white voice.

Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807, 814 (1993) (citations omitted) (emphasis added).

11. Consider Professor Delgado's observation:

> And it [narrative] assists the cause of social transformation because it helps majority-race readers understand how they are both different from us and the same. It helps them acquire the sort of multiple consciousness that comes to us all too easily—and which is the necessary precondition of any form of social healing.

Richard Delgado, *Coughlin's Complaint: How To Disparage Outsider Writing, One Year Later*, 82 VA. L. REV. 95, 98–99 (1996).

12. *See infra* notes 17–22 and accompanying text (noting the general attitude toward racism in White America).

13. *See* Culp, *supra* note 6, at 1639 ("To the traditional legal scholar race, in the words of Neil Gotanda, is simply formal race—race is biologically connected and socially insignificant and racism is something that can only be done by Bull Connor or George Wallace before his salvation."); Rachel F. Moran, *The Elusive Nature of Discrimination*, 55 STAN. L. REV. 2365, 2418 (2003) (reviewing IAN AYRES, PERVASIVE PREJUDICE? UNCONVENTIONAL EVIDENCE OF RACE AND GENDER DISCRIMINATION (2001) and CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY (Francisco Valdes et al. eds., 2002)) ("The simple truth is that once Bull Connor and Lester Maddox are gone, once angry parents are not screaming, 'Two, four, six, eight, we don't want to integrate,' and once spittle isn't running down the faces of civil rights protesters, it is hard to say precisely what discrimination means."). Professor Lazos Vargas notes:

> This is the kind of prejudice that we know and can recognize. I will call such prejudice 'Bull Connor' racism. The image that I wish to draw upon is the TV picture that we have all seen of the Alabama police commissioner, Bull Connor, and the Alabama police, clubbing and hosing down the freedom riders. It is a black and white TV picture—young men in Blues Brothers' outfits and women in nicely coiffed hairdos and Jackie Kennedy pearls—an image that is remote and removed

bulk of racism has gone underground.[14] Unconscious racism is today's enemy.[15] The use of empirical data reaches out to those who are less accepting

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from our present day reality, like TV pictures of *Father Knows Best* and white-hooded Ku Klux Klan characters riding in the night. Such blatant racism was remote from us. It was said to be conduct engaged in only by other (uneducated, mostly Southern, and morally reprehensible) Whites.

Sylvia R. Lazos Vargas, *Deconstructing Homo[geneous] Americanus: The White Ethnic Immigrant Narrative and Its Exclusionary Effect*, 72 TUL. L. REV. 1493, 1524 (1998) (citations omitted).

14. Professors Eisenberg and Johnson observe:

> For the most part, however, old-fashioned, "Bull Connor-style" racism has not been replaced with colorblindness but with subtler manifestations of racial bias. Some social psychologists have labeled this newer racism "aversive racism," documenting the prevalence of subjects who subscribe to a formal norm of equality, but desire to keep their distance from other racial groups, and often covertly disparage those groups. Cognitive psychologists have focused more on stereotypes, observing how thinking and judgment may be altered by stereotypes that the subject would not endorse, and often consciously rejects.

Theodore Eisenberg & Sheri Lynn Johnson, *Implicit Racial Attitudes of Death Penalty Lawyers*, 53 DEPAUL L. REV. 1539, 1541 (2004) (alteration omitted). Likewise, Professor Goluboff notes:

> Sociological, and even legal, theories regarding the nature of contemporary racism demonstrate that it is not as easy to uncover as the old-fashioned Bull Connor variety of the 1950s and 1960s. The general consensus among social scientists is that although racial bias has changed its form since the civil rights movement, it has hardly disappeared. "Symbolic racists" do not express blatantly racist attitudes because it is no longer socially acceptable to do so, while "aversive racists" believe that they are not racist even while holding racist beliefs. Whatever the label, social scientists agree that a major shift has occurred in the ways in which Americans express racist attitudes.

Risa L. Goluboff, *Reckoning with Race and Criminal Justice*, 106 YALE L.J. 2299, 2303–04 (1997) (reviewing JEROME G. MILLER, SEARCH AND DESTROY: AFRICAN-AMERICAN MALES IN THE CRIMINAL JUSTICE SYSTEM (1996)) (citations omitted). Other commentators explain:

> Indeed, the Bull Connor fire hoses and attack dogs are gone, as are the 'Whites only' signs in restaurants. Additionally, with the boost from the early stages of civil rights enforcement and affirmative action, a small Black middle class emerged and America's immigration laws opened doors to a more ethnically and culturally diverse populace. But large racial disparities persist. Comprehensive studies show continuing institutional discrimination against African Americans and other non-White racial groups. The United States has never actually leveled the steeply tilted racial playing field. Yet, as discussed below, America, again, through its courts, is revoking its commitment to the Second Reconstruction. And, as in its divisive past, it is doing so through piece by piece legal acceptance of discrimination.

Eric K. Yamamoto et al., *Dismantling Civil Rights: Multiracial Resistance and Reconstruction*, 31 CUMB. L. REV. 523, 533 (2001) (citations omitted).

15. Professor Lawrence observes:

> A crucial factor in the process that produces unconscious racism is the tacitly transmitted cultural stereotype. If an individual has never known a black doctor or

of the central tenet of CRT, namely that to be a person of color in America is to be subject to racial subordination.[16]

Polls show the skepticism of White Americans concerning the continuing existence of racism.[17] Almost two-thirds of Whites are satisfied with society's treatment of both Blacks and Hispanics, while almost two-thirds of Blacks and slightly more than half of Hispanics are dissatisfied with their treatment.[18]

> lawyer or is exposed to blacks only through a mass media where they are portrayed in the stereotyped roles of comedian, criminal, musician, or athlete, he is likely to deduce that blacks as a group are naturally inclined toward certain behavior and unfit for certain roles. But the lesson is not explicit: It is learned, internalized, and used without an awareness of its source. Thus, an individual may select a white job applicant over an equally qualified black and honestly believe that this decision was based on observed intangibles unrelated to race.

Lawrence, *supra* note 8, at 343 (citations omitted).

16. IAN AYRES, PERVASIVE PREJUDICE? UNCONVENTIONAL EVIDENCE OF RACE AND GENDER DISCRIMINATION 426 (2001) ("Pictures and numbers are the key to convincing whites that unjustified race-contingent behavior persists in the modern marketplace.").

17. *See, e.g.*, Lydia Saad & Frank Newport, *Blacks and Whites Differ About Treatment of Blacks in America Today*, THE GALLUP POLL MONTHLY 58 (July 2001) (reviewing survey results that "underscore first and foremost that a significant perceptural gap continues between the way whites view the situation for blacks in American society today and the way blacks themselves view it"). Other surveys and sources confirm this observation. Consider the following examples:

> On many questions, particularly those related to whether blacks are treated equitably and whether race plays too large a role in the national discourse, blacks and whites seemed to be living on different planets. Blacks were roughly four times more likely than whites to say they thought blacks were treated less fairly in the workplace, in neighborhood shops, in shopping malls and in restaurants, theaters, bars and other entertainment venues.

Kevin Sack & Janet Elder, *Poll Finds Optimistic Outlook But Enduring Racial Division*, N.Y. TIMES, July 11, 2000, at A1.

> In response to a question about how blacks are treated in the United States, 38% of whites said the same as whites, whereas 51% said not very well. In contrast, only 9% of blacks believed they received equal treatment to whites, with 71% believing the treatment to be less than favorable.

Aisha I. Jefferson, *An American Dilemma: Black-White Relations Poll Shows a Lot of Gray Areas*, BLACK ENTER., Aug. 2003, at 24.

> There are major differences in the perceptions of blacks and whites about the status of race relations in this country today. Whites are more positive than blacks on a variety of perceptual measures of how well blacks are faring in our society, and how they are treated in the local community.

THE GALLUP ORGANIZATION, THE GALLUP POLL SOCIAL AUDIT ON BLACK/WHITE RELATIONS IN THE UNITED STATES 7 (1997) [hereinafter 1997 SOCIAL AUDIT], *available at* http://www.visioncircle.org/archive/GallupBlackWhiteRelations 1997.pdf.

18. Consider the following results from Gallup surveys:

> Six of 10 blacks are dissatisfied with the way people of their own race are treated by society. . . . Almost two-thirds of whites—64%—say they are personally

Blacks' appraisal of their treatment is slightly more negative than Hispanics' assessment of theirs. While one-third of Blacks believe that things have gotten better for Blacks during the last ten years, almost 60% of Whites believe that things have gotten better for Blacks over that same time period.[19] Forty-seven percent of Blacks believe they were the victims of unfair treatment in at least one of five situations[20] in the past month simply because they were black.[21] To the extent data can bridge the racial divide, they should be used.[22] Data should not, however, be elevated to the position of being the only acceptable proof of the existence of racial discrimination.

This Symposium seeks to show how empirical scholarship can co-exist with CRT. I believe CRT is broad enough to accommodate this union. Others

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> satisfied with the way blacks are treated in society, while only 34% are dissatisfied. . . . Blacks' appraisal of their current situation in U.S. society is just slightly more negative than Hispanics' assessment of their own treatment: 45% of Hispanics are satisfied with the way Hispanics are treated in society and 54% are dissatisfied. . . . There is, on the other hand, no difference between whites' perceptions of Hispanics' situation in society and whites' perceptions of blacks' situation. Sixty-four percent of whites say they are satisfied with the way Hispanics are treated—the exact percentage of whites who say they are satisfied with the way blacks are treated.

Saad & Newport, *supra* note 17, at 58; *see also* THE GALLUP ORGANIZATION, THE GALLUP POLL SOCIAL AUDIT ON BLACK-WHITE RELATIONS IN THE UNITED STATES: 2001 UPDATE 4 [hereinafter 2001 SOCIAL AUDIT] ("One in four white Americans—and one in ten black Americans—believes that blacks are treated the same as whites in the United States."); *cf.* 1997 SOCIAL AUDIT, *supra* note 17, at 9 ("Three-quarters of whites say that blacks are treated the same as whites, compared to just about half of blacks who perceive equality of treatment . . . .").

19. 1997 SOCIAL AUDIT, *supra* note 17, at 13 ("While about six out of ten whites say that the quality of life for blacks has improved over the past ten years, only about a third of blacks agree.").

20. 2001 SOCIAL AUDIT, *supra* note 18, at 10 ("1. In dealings with the police, such as traffic incidents; 2. In stores downtown or in the shopping mall; 3. On the job or at work; 4. In restaurants, bars, theatres, or other entertainment places; and 5. In neighborhood shops.").

21. *Id.* at 5 ("Nearly half of black Americans (47%) feel that they were treated unfairly in at least one of five common situations in the past month because they were black.").

22. This position, however, is not universally held:

> Together, I suppose, pictures and numbers can prove to whites that prejudice persists by making it visible to them. But insofar as "the visible has a long, contested, and highly contradictory role as the primary vehicle of making race 'real' in the United States, . . ." we can anticipate problems with . . . reliance on them to convince white America that discrimination in retail markets still persists.

Kevin Haynes, *Taking Measures*, 55 STAN. L. REV. 2349, 2353 (2003) (reviewing IAN AYRES, PERVASIVE PREJUDICE? UNCONVENTIONAL EVIDENCE OF RACE AND GENDER DISCRIMINATION (2001) and CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY (Francisco Valdes et al. eds., 2002)).

have written more eloquently than I that as CRT is stretched to include many different types of critiques, CRT runs the risk of becoming unrecognizable. As Professor Rachel Moran has stated, "[a] young field can welcome many approaches as it tests the boundaries of its disciplinary commitments. Eventually, however, a big tent runs the risk of becoming a scholarly three-ring circus."[23] I prefer to view this question through a slightly different lens. As Professor James Hackney has stated, "[d]isunity (a 'big tent') should be the rule, not the exception. The idea is not to paralyze us or have us fall into the quicksand of relativism, but to perhaps make us all . . . a bit less sure of ourselves."[24]

This Symposium volume is unique in one additional way. The articles in this volume address business-related areas: tax law, corporate law, and bankruptcy law. The bulk of CRT literature addresses constitutional law concerns,[25] to the exclusion of business law issues. In my opinion, economic empowerment for people of color will be the battleground of the twenty-first century.[26] CRT therefore needs to turn a critical eye toward economic issues.

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23. Moran, *supra* note 13, at 2381.

24. James R. Hackney, Jr., *The "End" of: Science, Philosophy, and Legal Theory*, 57 U. MIAMI L. REV. 629, 648 (2003); *see also* Devon W. Carbado & Mitu Gulati, *The Law and Economics of Critical Race Theory*, 112 YALE L.J. 1757, 1767 (2003) (describing "CRT's 'big tent' approach"); Kevin R. Johnson, *Roll Over Beethoven: "A Critical Examination of Recent Writing About Race"*, 82 TEX. L. REV. 717, 721–22 (2004) ("[I]n recent years, the [CRT] movement has embraced a 'big tent' approach of the study of race and civil rights."). Professor Moran further observes:

> In part, these [CRT] conflicts and contradictions are the mark of a young field, one that is still emerging and suffering its growing pains. At another level, though, these dilemmas are part of the burden of wanting to offer a "big tent" to those who do scholarship on race, even as views about the relevance of race and appropriate remedies for inequality remain deeply contested.

Moran, *supra* note 13, at 2375–76 (citations omitted).

25. *Cf.* CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT, *supra* note 5, at xiv ("The aspect of our work which most markedly distinguishes it from conventional liberal and conservative legal scholarship about race and inequality is a deep dissatisfaction with traditional civil rights discourse.").

26. *Cf.* Richard Delgado, *Crossroads and Blind Alleys: A Critical Examination of Recent Writing About Race*, 82 TEX. L. REV. 121, 151 (2003) (reviewing CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY (Francisco Valdes et al. eds., 2002) and DERRICK BELL, ETHICAL AMBITION: LIVING A LIFE OF MEANING AND WORTH (2002)) ("Critical race theorists should also examine the relationship between class and race more carefully than they have done. Is the significance of race really declining, and if so, are poverty and the income gap the new civil rights issues of the millennium?") (citations omitted); Cheryl L. Wade, *"We Are An Equal Opportunity Employer": Diversity Doublespeak*, 61 WASH. & LEE L. REV. 1539 (2004) ("Access to capital, industry and technology continues to be the last stage of today's civil rights movement." (quoting from a letter from Rev. Jesse L. Jackson, Sr.)); Alison Bethel, *Civil Rights Agenda Shifts to Money, Jobs; Economic Equality Tops National Urban League Meeting Here*,

While literature currently exists that considers the racial impact of federal tax policy[27] as well as the racial impact of corporate laws,[28] there is virtually no prior scholarship examining the racial impact of federal bankruptcy law.[29]

DETROIT NEWS, July 18, 2004, at 1A ("Economic equality, the top goal of today's civil rights movement, is more complex and elusive."); Curtis Lawrence, *Black Homeownership Pushed*, CHI. SUN-TIMES, June 2, 2004, at 8 ("Middle-class blacks have made great strides financially, but they risk losing their 'precarious' position in the American economy unless they can close a gap of more than 20 percentage points in homeownership rates and become more economically savvy, the National Urban League's president said here Tuesday."); Erin Texeira, *Study on Blacks*, NEWSDAY, Mar. 25, 2004, at A06 ("The problem of the 21st century will definitely be race as well as economics and social and racial equality . . . .").

27. *See generally* David A. Brennan, *Race and Equality Across the Law School Curriculum: Tax Exempt Law*, 54 J. LEG. EDUC. 336 (2004); Dorothy A. Brown, *The Marriage Bonus/Penalty in Black and White*, *in* TAXING AMERICA 45 (Karen B. Brown & Mary Louise Fellows eds., 1996); Dorothy A. Brown, *The Marriage Penalty/Bonus Debate: Legislative Issues in Black and White*, 16 N.Y.L. SCH. J. HUM. RTS. 287 (1999); Dorothy A. Brown, *Race, Class, and Gender Essentialism in Tax Literature: The Joint Return*, 54 WASH. & LEE L. REV. 1469 (1997); Dorothy A. Brown, *Racial Equality in the Twenty-First Century: What's Tax Policy Got To Do With It?*, 21 U. ARK. LITTLE ROCK L. REV. 759, 759–60 (1999); Dorothy A. Brown, *Social Security and Marriage in Black and White*, 65 OHIO ST. L.J. 111 (2004); Dorothy A. Brown, *Split Personalities: Tax Law and Critical Race Theory*, 19 W. NEW ENG. L. REV. 89, 91–93 (1997); Dorothy A. Brown, *The Tax Treatment of Children: Separate But Unequal*, 54 EMORY L.J. (forthcoming 2005); Karen B. Brown, *Missing Africa: Should U.S. International Tax Rules Accommodate Investment in Developing Countries?*, 23 U. PA. J. INT'L ECON. L. 45 (2002); Karen B. Brown, *Not Color- or Gender-Neutral: New Tax Treatment of Employment Discrimination Damages*, 7 S. CAL. REV. L. & WOMEN'S STUD. 223 (1998); Mary Louise Fellows, *Rocking the Tax Code: A Case Study of Employment-Related Child-Care Expenditures*, 10 YALE J.L. & FEMINISM 307 (1998); Laura Ann Foster, *Social Security and African-American Families: Unmasking Race and Gender Discrimination*, 12 UCLA WOMEN'S L.J. 55 (2001); Beverly I. Moran & William Whitford, *A Black Critique of the Internal Revenue Code*, 1996 WIS. L. REV. 751.

28. *See generally* Leonard M. Baynes, *Falling Through the Cracks: Race and Corporate Law Firms*, 77 ST. JOHN'S L. REV. 785 (2003); Leonard Baynes, *Racial Stereotypes, Broadcast Corporations, and the Business Judgment Rule*, 37 U. RICH. L. REV. 819, 872 (2003); Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259 (2000); Steven A. Ramirez, *Diversity and the Boardroom*, 6 STANFORD J. L. BUS. & FINANCE 85 (2000); Steven A. Ramirez, *A Flaw in the Sarbanes-Oxley Reform: Can Diversity in the Boardroom Quell Corporate Corruption?*, 77 ST. JOHN'S L. REV. 837 (2003); Steven A. Ramirez, *The New Cultural Diversity and Title VII*, 6 MICH. J. RACE & L. 127 (2000); Cheryl L. Wade, *Comparisons Between Enron and Other Types of Corporate Misconduct: Compliance with Law and Ethical Decision Making as the Best Form of Public Relations*, 1 SEATTLE J. FOR SOC. JUST. 97 (2002); Cheryl L. Wade, *Corporate Governance as Corporate Social Responsibility: Empathy and Race Discrimination*, 76 TUL. L. REV. 1461 (2002); Cheryl L. Wade, *The Impact of U.S. Corporate Policy on Women and People of Color*, 7 J. GENDER RACE & JUST. 213 (2003); Cheryl L. Wade, *Racial Discrimination and the Relationship Between the Directorial Duty of Care and Corporate Disclosure*, 63 U. PITT. L. REV. 389 (2002) [hereinafter Wade, *Duty of Care*].

29. *But see generally* Robert B. Chapman, *Missing Persons: Social Science and Accounting for Race, Gender, Class, and Marriage in Bankruptcy*, 76 AM. BANKR. L.J. 347 (2002) (exploring

This Symposium volume makes a genuine contribution to the literature by creating the space for scholars who have not previously written about or explored issues of race to do so.[30]

Some scholars in this volume support their theoretical points with empirical data,[31] while others employ the use of narrative.[32] One scholar primarily focuses on the importance of history in understanding our current situation,[33] while others focus on the importance of an interdisciplinary approach.[34] What all of the articles have in common, however, is their focus: They all analyze the impact of tax, corporate, or bankruptcy laws on people of color.

The first section, which addresses CRT and federal tax policy, contains my Article, *Pensions, Risk and Race*,[35] which describes the current preferential tax treatment of employer-provided pension plans and shows empirically that the majority of private sector workers are not covered by their pension plans. The Article shows that White employees are the most likely to be covered and Hispanic employees are the least likely to be

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issues of individual and collective identity, including racial identity, in bankruptcy law and literature).

30. *See, e.g.*, Elizabeth Warren, *The Economics of Race: When Making it to the Middle Is Not Enough*, 61 WASH. & LEE L. REV. 1773, 1773 n.1 (2004) ("I am grateful to Professors Dorothy Brown, Mechele Dickerson and David Wilkins for their strong encouragement that I take on this work."). *See generally* A. Mechele Dickerson, *Race Matters in Bankruptcy*, 61 WASH. & LEE L. REV. 1721 (2004); Donald C. Langevoort, *Overcoming Resistance to Diversity in the Executive Suite: Grease, Grit and the Corporate Promotion Tournament*, 61 WASH. & LEE L. REV. 1613 (2004); David A. Skeel, Jr., *Racial Dimensions of Credit and Bankruptcy*, 61 WASH. & LEE L. REV. 1691 (2004).

31. *E.g.*, Dorothy A. Brown, *Pensions, Risk, and Race*, 61 WASH. & LEE L. REV. 1501 (2004); Warren, *supra* note 30.

32. *See, e.g.*, Devon Carbado & Mitu Gulati, *Race To The Top: Racial Types and Corporate Advancement*, 61 WASH. & LEE L. REV. 1643, 1648–57 (2004) (describing influence of the late Jerome Culp and Marilyn Yarborough); Skeel, *supra* note 30, at 1710–13 (describing his recent car buying experience and the importance of "social capital"); Wade, *supra* note 26, at 1540–45 (describing her attendance at a recent corporate conference). Professor Wade has discussed the importance of and used narrative in several of her previous articles. *See, e.g.*, Wade, *Duty of Care*, *supra* note 28, at 431–35 (analyzing corporate disclosures as storytelling); Cheryl L. Wade, *When Judges Are Gatekeepers: Democracy, Morality, Status, And Empathy In Duty Decisions (Help from Ordinary Citizens)*, 80 MARQ. L. REV. 1, 74–75 (1996) (examining role of jury as source of narratives). Other Symposium participants have also used narrative in their prior scholarship. *See, e.g.*, Dorothy A. Brown, *The LSAT Sweepstakes*, 2 J. GENDER RACE & JUST. 59 (1998) (using narrative to explain causes of racial bias in law school admissions).

33. Skeel, *supra* note 30, at 1691–94. Professor Skeel has previously written about the importance of history in bankruptcy matters. DAVID A. SKEEL, JR., DEBT'S DOMINION: A HISTORY OF BANKRUPTCY LAW IN AMERICA (2001).

34. Langevoort, *supra* note 30.

35. Brown, *supra* note 31.

covered. I conclude by pointing to Professor Derrick Bell's "interest-convergence" thesis[36] and suggest that given the vast percentages of White employees not covered by their pension plans, this might represent a unique opportunity for advocacy groups working on behalf of the elderly and people of color to come together and advocate for pension reform.

The next section addresses CRT and corporate law. Professor Cheryl Wade's Article, *"We Are An Equal Opportunity Employer": Diversity Doublespeak*,[37] observes that there are too few discussions about race and race relations among corporate managers and directors. The rhetoric used in these infrequent discussions revolves around the idea of diversity in the workplace. In recent years, when speaking about employees and race issues, corporate actors have become curiously silent about discrimination and racism. Professor Wade's Article provides several examples of the rhetorical devices used by corporate spokespersons that ignore persisting problems with discrimination and racism by focusing solely on diversity efforts. Diversity rhetoric allows corporate managers to avoid responsibility for enduring discrimination in the workplace. She argues that improving the discourse about race and racism in the corporate setting will not only limit corporate exposure to time-consuming litigation and mediation, but also have the positive benefit of transforming racially-toxic corporate cultures.

Professor Steven Ramirez, in *Games CEOs Play and Interest Convergence Theory: Why Diversity Lags in America's Boardrooms and What To Do About It*,[38] issues a call to arms by focusing on the missed opportunity of the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley").[39] When Congress passed Sarbanes-Oxley, it sought to limit the power of CEOs as a result of several highly publicized corporate scandals. Professor Ramirez argues that racial reformers should have argued to Congress that a lack of diversity contributed to those corporate scandals. Numerous studies show that diverse corporate boards are more likely to scrutinize CEO action

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36. Professor Derrick Bell coined the phrase "interest-convergence" in his seminal article, Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980). He stated that "the interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites." *Id.* The interest-convergence principle is a central tenet of CRT.

37. Wade, *supra* note 26.

38. Steven A. Ramirez, *Games CEOs Play and Interest Convergence Theory: Why Diversity Lags in America's Boardrooms and What To Do About It*, 61 WASH. & LEE L. REV. 1581 (2004).

39. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745.

than corporate boards that lack diversity.[40] Therefore, an interest convergence existed between those who believed that corporate corruption was the result of too much CEO power and those who believed that CEOs and the boards of directors to which they reported were too racially homogeneous. That interest convergence, if properly exploited, should have resulted in Sarbanes-Oxley addressing racial diversity.

Professor Donald Langevoort, in *Overcoming Resistance to Diversity in the Executive Suite: Grease, Grit and the Corporate Promotion Tournament*,[41] considers corporate governance and human resources literature to examine the psychological profile of the type of people most likely to rise up the corporate ladder and whether that type of person is likely to hinder or facilitate diversity efforts within the firm. Professor Langevoort finds three qualities in those who succeed: (1) overconfidence; (2) propensity to take risks; and (3) ethical plasticity. His Article discusses the racial and gender implications of those qualities and suggests, unsurprisingly, that White males are most likely to have those three qualities.[42] If those who succeed inside the firm are more likely to make bad business decisions, then diversity can improve the firm's ability to make better business decisions.[43] Professor Langevoort then uses that information to discuss the numerous ways in which diversity efforts will be resisted by those who are rising up the corporate ladder and describes ways to minimize the resistance.[44]

This section concludes with a pathbreaking Article, *Race To The Top: Racial Types and Corporate Advancement*, co-authored by Professors Devon Carbado and Mitu Gulati. Professors Carbado and Gulati build upon the work of Professor Langevoort and explore the characteristics of the *people of color* who are likely to succeed in corporate America and whether they will engage

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40. Ramirez, *supra* note 38, at 1592 n.53.

41. Langevoort, *supra* note 30.

42. *Id.* at 1629.

43. Although Professor Langevoort does not articulate his argument this way, he is making an interest-convergence type argument. *See supra* note 36 and accompanying text (providing a definition of interest-convergence).

44. Professor Langevoort describes the "window-dressing" activity of certain firms:

> In many industries, we observe relatively low-powered compliance groups, which are likely to police only for fairly egregious violations that unambiguously threaten the firm's self-interest. Beyond that, their task is to create the appearance of attention to legal norms to protect the firm from charges of wholesale indifference. It is largely window dressing.

Langevoort, *supra* note 30, at 1637–38. Professor Langevoort's point is consistent with Professor Wade's analysis of the "doublespeak" tendencies of corporate America. *See generally* Wade, *supra* note 26.

in door-opening or door-closing activities for other workers of color.[45] If the initial success of people of color in corporate America leads to their working in support of their employers' diversity efforts, then we have reason to be optimistic about the diversity efforts' chances for success. Professors Carbado and Gulati argue that corporations play a role in producing certain "racial types" who are most likely to succeed and most likely to engage in door-closing activities for other workers of color. They point out a previously unrecognized obstacle that must be addressed if corporate America's diversity initiatives are to be realized.

The final section addresses CRT and bankruptcy law. Professor David Skeel's Article, entitled *Racial Dimensions of Credit and Bankruptcy*,[46] traces the history of African-Americans' relationship to bankruptcy as potential bankruptcy filers and as attorneys representing bankruptcy filers. He finds that access to the credit markets came slowly and evolved from a reputation-based system to more conventional forms of credit. *Racial Dimensions of Credit and Bankruptcy* documents the durability and elasticity of racial discrimination in the credit markets. Professor Skeel eloquently states that "[a]lthough overt discrimination is less common, more subtle forms of discrimination have endured."[47] Professor Skeel acknowledges the greater access to credit that African-Americans have currently, but a significant part of that credit access takes the form of subprime lending, which is harder to discharge in bankruptcy than other types of credit. Professor Skeel concludes by suggesting several reform initiatives that will benefit subprime borrowers of all racial and ethnic backgrounds.

Professor A. Mechele Dickerson, in *Race Matters in Bankruptcy*,[48] examines the type of person who is most likely to benefit from the provisions of the bankruptcy code. She defines such a person as "the Ideal Debtor." The Ideal Debtor is married; is employed; owns his or her own home; has an employer-provided retirement plan; has high living expenses; has little or no student loan, alimony, or child support debt; and provides support to legally recognized dependants. Statistical data provided in the Article suggest that Whites are more likely to be the Ideal Debtor than people of color. Professor Dickerson concludes by making suggestions for bankruptcy reform that would

45. Carbado and Gulati, *supra* note 32.

46. Skeel, *supra* note 30.

47. *Id.* at 1710.

48. Dickerson, *supra* note 30.

enable "bankruptcy laws [to] better provide fairer and more just benefits to financially strapped Americans of all races."[49]

Professor Elizabeth Warren, in *The Economics of Race: When Making It to the Middle Is Not Enough*,[50] analyzes almost 2000 families in bankruptcy and discusses her findings. The data, published here for the first time, show that regardless of race, families file for bankruptcy protection for similar reasons, such as job loss, medical problems, and divorce. But significant differences arise by race in the likelihood that families will go to bankruptcy court with those problems. Hispanic families are almost twice as likely to file for bankruptcy protection as non-Hispanic White families, and African-American families are more than three times more likely to file than White families.[51] While homeownership is often considered a gateway to economic prosperity and middle class status, the data tell a different story. Hispanic homeowners are three times more likely to file for bankruptcy than White homeowners and African-American homeowners are more than *six* times more likely to file for bankruptcy than White homeowners.[52] Professor Warren argues that predatory lending practices are at least one critical factor, citing data showing that "residents in high-income, predominantly black neighborhoods are actually *more* likely to get a subprime mortgage than residents in low-income white neighborhoods—more than twice as likely."[53] Professor Warren's data should provide a wake-up call for advocacy groups and all who believe that a strong African-American and Hispanic middle class is one measure of racial progress in this country.

It is my hope, first, that all who read these pages will be inspired to examine their scholarly agendas and affirmatively look for ways in which race may be distorting legal doctrine.[54] In addition, I hope all who read these pages will be inspired to look for and then call attention to the unconscious racism that pervades our everyday lives.

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49. *Id.* at 1771.

50. Warren, *supra* note 30.

51. *Id.* at 1784.

52. *Id.*

53. *Id.* at 1790.

54. *Cf.* Jerome McCristal Culp, Jr., *Toward A Black Legal Scholarship: Race and Original Understandings*, 1991 DUKE L.J. 39, 105 ("Everyone has to do black scholarship if it is to succeed.").