

Critical Race Theory and Criminal Justice

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INTRODUCTION

When the *Ohio State Journal of Criminal Law* invited me to guest edit a symposium issue, the answer was an easy one. For so many of us, this journal feels like home. Choosing a topic was an easy call as well. As it happened, I had recently been asked to write an encyclopedia entry on Critical Race Theory [CRT] and criminal justice for the *Oxford Handbook of Criminal Law*.¹ Writing the entry had whetted by appetite, so to speak. What better than to explore, through a symposium issue, more of what we do. Indeed, given that CRT is celebrating its 25th anniversary, such a symposium topic seemed timely as well.

It also seemed a natural topic given the continuing salience of race throughout the criminal justice system. This is true on the front end, in terms of over-enforcement through racial profiling, such as that demonstrated in *Floyd v. City of New York*,² and under-enforcement through inadequate police services. And race permeates much of what happens in between arrest and sentencing, in terms of the charges brought and plea negotiations, and for the small percentage of cases that go to trial, in terms of jury selection and jury biases. Lastly, race permeates the back end of our criminal justice system. The problem of sentencing disparities has not gone away. And the problem of mass incarceration, or rather society's general indifference to it, is largely unintelligible but for race. There is a reason Michelle Alexander describes the mass incarceration of black and brown people as the new Jim Crow;³ the result, I have observed, is that we now "benefit" by living in newly purged, whiter cities.⁴ As James Forman points out, there is something unsettling about the fact that we incarcerate blacks at a greater rate now than we did at the time of *Brown v. Board of Education*,⁵ and at eight times the rate we incarcerate whites, and that this dwarfs other black/white disparities such as in unemployment

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¹ Bennett Capers, *Critical Race Theory*, in THE OXFORD HANDBOOK OF CRIMINAL LAW 25 (Marcus D. Dubber & Tatjana Hörnle eds., 2014).

² 959 F. Supp. 2d 668, 680 (S.D.N.Y. 2013).

³ MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 4 (2010); see also Michelle Alexander, *The New Jim Crow*, 9 OHIO ST. J. CRIM. L. 7, 7 (2011).

⁴ I. Bennett Capers, *Defending Life*, in LIFE WITHOUT PAROLE: THE NEW DEATH PENALTY 167, 177–80 (Charles Ogletree, Jr. & Austin Sarat eds., 2012).

⁵ 347 U.S. 483 (1954).

(2:1), wealth (1:4), out-of-wedlock births (3:1), and infant mortality (2:1).⁶ This is to say nothing of the disparities we continue to see in the ultimate punishment of death, disparities that were brought to the Court's attention to no avail in *McCleskey v. Kemp*.⁷

Quite simply, race matters. Indeed, given our nation's racial criminal history—for much of this country's history, race determined which witnesses could testify, and which punishments would be imposed—it remains an open question whether an exit from race is even possible. It seems natural then to devote a symposium issue to the interventions CRT has to offer.

Of course, for many readers, this only begs the question. What is CRT? Although there is no single answer—indeed, most CRT scholars eschew the notion of a fully unified school of thought—it is safe to say Critical Race Theory begins with a rejection of legal liberalism. As one group of Critical Race Theory scholars put it:

Critical Race Theorists have not placed their faith in neutral procedures and the substantive doctrines of formal equality; rather, critical race theorists assert that both the procedure and the substances of American law, including American antidiscrimination law, are structured to maintain white privilege.⁸

In addition to revealing how the law operates to constitute race and maintain hierarchy, Critical Race Theory is also committed to challenging racial hierarchy, and indeed hierarchy and subordination in all of its various forms. To that end, Critical Race Theory insists on progressive race consciousness, on systemic analysis of the structures of subordination, on the inclusion of counter-accounts of social reality, and on a critique of power relationships that is attentive to the multiple dimensions on which subordination exists. Beyond this, a review of the key writings that formed the movement reveals some recurring themes and tenets. *One*, that “formal,” color-blind laws often serve to marginalize and obscure social, political, and economic inequality. *Two*, that legal reforms that ostensibly benefit minorities occur only when such reforms also advance the interests of the white majority, a requirement most often referred to as “interest convergence.” *Three*, that race is biologically insignificant; rather, the concept of race is, to a large extent, socially and legally constructed. *Four*, Critical Race Theory rejects crude essentialism and recognizes that oppression and subordination operate on multiple axes. For example, a black working class lesbian in one part of the United States

⁶ James Forman, Jr., *The Black Poor, Black Elites, and America's Prisons*, 32 CARDOZO L. REV. 791, 792–93 (2011).

⁷ 481 U.S. 279, 286–87 (1987).

⁸ Francisco Valdes, Jerome McCristal Culp & Angela P. Harris, *Battles Waged, Won, and Lost: Critical Race Theory at the Turn of the Millennium*, in CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY 1 (Francisco Valdes, Jerome McCristal Culp & Angela P. Harris eds., 2002).

likely experiences oppression differently than a black male investment banker in another part of the United States. *Five*, that race is often elided in the law; much CRT thus involves making race visible, or as I have described it elsewhere, “reading black.” While there is no one methodology in Critical Race Theory, much of the literature incorporates personal narrative, or what is often referred to as “legal storytelling.” In addition, in the past decade, Critical Race Theory scholars have increasingly turned to research on implicit biases to support their claims.⁹

Of course, Critical Race Theory still remains a rather amorphous concept. Indeed, my first question to several of the contributors to this symposium was, “So, do you consider your work as Critical Race Theory work?”¹⁰ Only Sheri Lynn Johnson hesitated before saying yes, and only hesitated for reasons she outlines in her wonderful essay.¹¹ The others readily identified as criminal law and procedure scholars who also identify as CRT scholars, or at least see their work as part of CRT tradition.

One final point about CRT. As Cynthia Lee mentions in her essay, CRT is not without its detractors.¹² For example, Critical Race Theory has been criticized for being separatist, and insufficiently prescriptive in offering solutions to structural problems.¹³ Richard Posner has even described CRT as a “lunatic fringe.”¹⁴ One of the most vocal critics of CRT, Randall Kennedy at Harvard, is singled out for mention in two of the contributions to this symposium.¹⁵ Kennedy’s objections to CRT have received such attention¹⁶ that I asked him if he

⁹ This paragraph comes from my handbook entry. See Capers, *supra* note 1 at 25.

¹⁰ I assumed, based on their work, that they would answer yes, but I did not want to be too presumptuous.

¹¹ Sheri Lynn Johnson, *Batson from the Very Bottom of the Well: Critical Race Theory and the Supreme Court’s Peremptory Challenge Jurisprudence*, 12 OHIO ST. J. CRIM. L., 71 (2014).

¹² Cynthia Lee, *(E)Racing Trayvon Martin*, 12, OHIO ST. J. CRIM. L., 91 (2014).

¹³ See Capers, *supra* note 1.

¹⁴ Richard A. Posner, *The Skin Trade*, NEW REPUBLIC, Oct. 13, 1997, at 40.

¹⁵ Johnson, *supra* note 11 at 72; Armour, *Nigga Theory: Contingency, Irony, and Solidarity in the Substantive Criminal Law*, 12 OHIO ST. J. CRIM. L. 9, 13 (2014).

¹⁶ Some of this attention may be attributable to Kennedy’s race. Paul Butler describes Kennedy as “probably the most influential African-American legal scholar.” Paul Butler, *(Color)Blind Faith: The Tragedy of Race, Crime, and the Law*, 111 HARV. L. REV. 1270, 1273 (1998) (book review). Derrick Bell was even more direct, stating that Kennedy’s “blackness lends his critique a super legitimacy inversely proportional to the illegitimacy bequeathed to critical race theory.” Derrick A. Bell, *Who’s Afraid of Critical Race Theory*, 1995 U. ILL. L. REV. 893, 908. Bell added:

When a black scholar at a prominent law school tells anyone who will listen that other folks of color are deluded about being excluded on the basis of their race; when a black scholar argues against race-conscious legal remedies or hiring policies; when a black scholar contends that there is no hidden “white” normativity or perspective but rather a meritocratic normativity (the companion claim that there is no minority perspective); when a black scholar says these things, all who rarely listen to scholars of

would like to contribute either an independent piece, or, in the alternative, a response to the other contributions. Alas, his prior commitments prevented him from contributing. Not one to be deterred, I briefly contemplated writing a response myself in his voice. Maybe something along the lines of “Against Critical Race Theory” by Bennett Capers writing as Randall Kennedy. Such play with voices and narrative, after all, has a long tradition in CRT—consider the dialogues written by Derrick Bell,¹⁷ or those of Richard Delgado,¹⁸ or consider Paul Butler’s brilliant take on Lon Fuller’s “The Case of the Speluncean Explorers.”¹⁹ Indeed, thinking of this tradition, I’ve often fantasized about writing a legal article under the pseudonym Babo (the “doting” slave in Melville’s *Benito Cereno*), which I suppose blows my cover in case I ever do so. Anyway, rather than writing a response as Randall Kennedy, I will just channel some of his criticism.

To begin, Kennedy is critical of the notion, advanced by a few CRT scholars, that minority academics necessarily have a different perspective than their white colleagues, and that this different perspective is in itself valuable.²⁰ Kennedy also attacks some of the writings of foundational CRT scholars—Kennedy singles out Derrick Bell, Mari Matsuda, and Richard Delgado—and argues that their scholarship relies too heavily on “highly charged rhetoric and imagery,”²¹ and suffers from “significant deficiencies”²² and “empirical weaknesses.”²³ Kennedy also complains that CRT scholarship, or at least some of it, homogenizes people of color in assuming they have similar experiences or viewpoints;²⁴ in other words, that these CRT scholars themselves are guilty of stereotyping people of color.²⁵ While there is more to Kennedy’s critique, this provides a précis. It is fair to say that Kennedy believes that CRT scholars—or at least the three scholars he focuses

color sit up and notice. And take notes. And turn those notes into more fuel for the legitimacy debate that has always attended renegade movements. And critical race theory is renegade in the best sense of the word.

Id. at 908.

¹⁷ Several examples can be found in his reader. See *THE DERRICK BELL READER* (Richard Delgado & Jean Stefancic eds., 2005).

¹⁸ See, e.g., Richard Delgado, *Rodrigo’s Eighth Chronicle: Black Crime, White Fears—On the Social Construction of Threat*, 80 VA. L. REV. 503 (1994); see also RICHARD DELGADO, *THE RODRIGO CHRONICLES: CONVERSATIONS ABOUT AMERICA AND RACE* (1996).

¹⁹ Paul Butler, *The Case of the Speluncean Explorers: Revisited*, 112 HARV. L. REV. 1876, 1917–23 (1999) (reading through the lens of race Lon L. Fuller’s *The Case of the Speluncean Explorers* (62 HARV. L. REV. 616 (1949))).

²⁰ Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745, 1746 (1989).

²¹ *Id.* at 1809.

²² *Id.* at 1749.

²³ *Id.* at 1809.

²⁴ *Id.* at 1778–87.

²⁵ *Id.* at 1787.

on—are too much about “racial victimhood.”²⁶ To put it bluntly, Kennedy criticizes CRT scholars for playing, and overplaying, the race card.

So again, there are supporters of CRT, and detractors. I make no secret about how I come out. I think the contributions have been substantial. CRT has not just added to the conversation. It has shifted the conversation in important ways. The pieces in this symposium issue do the same.

The symposium opens with Cynthia Lee’s *(E)Racing Trayvon Martin*, which tackles one of the most sensationalized cases of the past several years: the trial of George Zimmerman in the shooting death of a black teenager, and Zimmerman’s acquittal based on his claim that he acted in self-defense.²⁷ Lee approaches the case by building on the work of another CRT scholar, Devon Carbado’s seminal *Michigan Law Review* article *(E)racing the Fourth Amendment*.²⁸ Using Carbado’s critique of colorblind ideology as reflected in *Florida v. Bostick*,²⁹ Lee explores how this same ideology came to dominate the Zimmerman trial and how the trial court and its participants, in an attempt to erase race from the trial, in fact engaged in the production of race, perhaps to the detriment of true justice. Lastly, Lee turns to the other racial elephant in the (trial) room: Zimmerman’s own mixed-race background.

Paul Butler, who has built a career on the CRT goal of “dismantling the master’s house using the master’s tools,”³⁰ continues the discussion with his contribution to this symposium, *Stop and Frisk and Torture-Lite*, but shifts focus to state-sanctioned aggressive stop and frisk tactics in minority communities.³¹ In doing so, Butler again demonstrates why he is such a provocative thinker. To be sure, the racial disparities in stop and frisk are by now well known—hence, the expressions describing the white letter offenses³² of “walking while black” and “driving while black.” Butler’s welcome intervention is to examine the expressive message of race-based stop and frisks. He demonstrates that the purpose of, and

²⁶ *Id.* at 1782.

²⁷ Lee, *supra* note 12.

²⁸ Devon W. Carbado, *(E)Racing the Fourth Amendment*, 100 MICH. L. REV. 946 (2002).

²⁹ 501 U.S. 429 (1991).

³⁰ See, e.g., Paul Butler, *Racially-Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 680 (1995) (“My goal is the subversion of American criminal justice, at least as it now exists. Through jury nullification, I want to dismantle the master’s house with the master’s tools.”). On this goal in general and its frequent appearance in CRT scholarship, see I. Bennett Capers, *Reading Michigan v. Bryant*, “Reading” *Justice Sotomayor*, 123 YALE L.J. F. 427 (2014), <http://yalelawjournal.org/forum/reading-michigan-v-bryant-reading-justice-sotomayor>.

³¹ Paul Butler, *Stop and Frisk and Torture-Lite*, 12 OHIO ST. J. CRIM. L. 57 (2006).

³² I first introduced the concept “white letter law” in an earlier article. See I. Bennett Capers, *The Trial of Bigger Thomas: Race, Gender, and Trespass*, 31 N.Y.U. REV. L. & SOC. CHANGE 1, 7–8 (2006). Unlike black-letter law, which brings to mind statutory law, written law, the easily discernible law set forth as black letters on a white page, “white-letter law” suggests societal and normative laws that stand side by side and often undergird black-letter law but, as if inscribed in white ink on white paper, remain invisible to the naked eye. *Id.*

harm caused by, stop and frisk practices have much in common with the purpose of, and harm caused by, torture, particularly what David Luban and other scholars describe as “torture-lite.”

The next contribution, *Batson from the Very Bottom of the Well*, comes from Sheri Lynn Johnson.³³ As noted earlier, Sheri Lynn Johnson was the one contributor who hesitated briefly before joining the symposium. As she writes in her essay, even though she has spent her entire career writing about race and criminal justice, she is not herself a person of color, and one of the central insights of CRT is that perspective matters.³⁴ Johnson writes: “It is an insight to which I totally subscribe, so what am I doing here?”³⁵ Ultimately, Johnson identifies herself as a “fellow traveler,”³⁶ and her essay on *Batson v. Kentucky*³⁷ and its “ugly” progeny, including the recent but largely overlooked *Felkner v. Jackson*,³⁸ shows why fellow travelers like her are both welcome and important. Imagining the perspective of someone at the bottom of the well, Johnson persuasively argues that *Felkner v. Jackson* (like other cases before it) largely eviscerates *Batson*. If *Batson* was a rope to those at the bottom of the well, Johnson argues, the rope is pretty much now threadbare. Consistent with CRT, Johnson also “asks the other question”³⁹: “If discrimination—conscious or unconscious—by prosecutors was and continues to be a problem, why are we not worried about such discrimination when all-white juries are produced by chance or demographics?”⁴⁰

Next, in *Against Racial Violence*, Song Richardson and her co-author Phillip Atiba Goff take on the use of excessive force by the police, and how the use of force is race-dependent.⁴¹ For example, data indicate that black suspects die at the hands of the police at a rate five times greater than white suspects.⁴² In exploring and attempting to understand this disparity, Richardson and Goff address at least some of the criticism leveled at CRT in general: that it is not sufficiently grounded

³³ Johnson, *supra* note 11.

³⁴ Perhaps no one has described this more eloquently than Patricia Williams, who opens her book, *The Alchemy of Race and Rights*, with the line, “Since subject position is everything in my analysis of the law, you deserve to know it’s a bad morning.” PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 3 (1991).

³⁵ Johnson, *supra* note 11 at 72.

³⁶ *Id.*

³⁷ 476 U.S. 79 (1986).

³⁸ 131 S. Ct. 1305 (2011).

³⁹ See Mari J. Matsuda, *Beside My Sister, Facing the Enemy: Legal Theory Out of Coalition*, 43 STAN. L. REV. 1183, 1189 (1991) (proposing “asking the other question” as a method of uncovering and understanding how different forms of subordination interact).

⁴⁰ Johnson, *supra* note 11 at 72.

⁴¹ L. Song Richardson & Phillip Atiba Goff, *Against Racial Violence*, 12 OHIO ST. J. CRIM. L. 115 (2014).

⁴² Joshua Correll et al., *Across the Thin Blue Line: Police Officers and Racial Bias in the Decision to Shoot*, J. PERSONALITY & SOC. PSYCHOL. 1006, 1006 (2007).

or prescriptive. Richardson and Goff ground their analysis of police use of force in extensive social psychological research, including original experimental research conducted for this symposium issue. Relying on this research, Richardson and Goff persuasively demonstrate that unconscious racial bias and self-threats (i.e., status insecurity) explain much of the racial disparity that exists in police use of excessive force. They then offer concrete suggestions for transforming police training and strategies to account for and minimize unconscious biases and self-threats and thus reduce hegemonic racial violence.

The symposium ends with a contribution by another provocateur, Jody David Armour, who offers *Nigga Theory: Contingency, Irony, and Solidarity in Substantive Criminal Law*.⁴³ Perhaps more than any other contribution to this symposium, *Nigga Theory* embraces the *style* of CRT and the attempt to find *new* tools and *new* language—perhaps in contradistinction to Butler’s use of the master’s tools—to dismantle the master’s house.⁴⁴ Borrowing from a variety of sources, ranging from legal theorist James Boyd White to the comedian Chris Rock and rapper Ice Cube, Armour repurposes the words “nigger” and “nigga” to call attention to and critique the need, even within the black community, to distinguish between respectable blacks and “niggas.” He then advances “Nigga Theory” as an “urgent political call to bond with and support” these “black-hearted wrongdoers.”⁴⁵

So there you have it. This is CRT.

Okay, enough of my introduction. Enough of my being a cheerleader. It is time to let the pieces speak for themselves.

You be the judge.

⁴³ Armour, *supra* note 15.

⁴⁴ This itself reflects one of the tensions in CRT. Although some theorists embrace the notion of using the master’s tools, others argue that the use of the master’s tools can only provide fleeting victories. In fact, the source of the line, from the poet Audre Lorde, suggests the latter. See AUDRE LORDE, *The Master's Tools Will Never Dismantle the Master's House*, in *SISTER OUTSIDER: ESSAYS AND SPEECHES* 110, 110–13 (1984).

⁴⁵ Armour, *supra* note 15 at 10.

