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Why I Will Not Stop Teaching Law Students to Think Critically About Race: The Attack on Teaching About the Role of Race in Law

LeRoy Pernell[1]

In 2022, the Florida Legislature passed the "Individual Freedom Act" (IFA). (HB7). HB 7 prohibits "training or instruction that espouses, promotes, advances, inculcates, or compels . . .student[s] or employee[s] to believe eight specified concepts. These eight concepts were as follows:

> 1. Members of one race, color, national origin, or sex are morally superior to members of another race, color, national origin, or sex.
>
> 2. A person, by virtue of his or her race, color, national origin, or sex is inherently racist, sexist, or oppressive, whether consciously or unconsciously.
> 3. A person's moral character or status as either privileged or oppressed is necessarily determined by his or her race, color, national origin, or sex.
> 4. Members of one race, color, national origin, or sex cannot and should not attempt to treat others without respect to race, color, national origin, or sex.
> 5. A person, by virtue of his or her race, color, national origin, or sex bears responsibility for, or should be discriminated against or receive adverse treatment because of, actions committed in the past by other members of the same race, color, national origin, or sex.
>
> 6. A person, by virtue of his or her race, color, national origin, or sex should be discriminated against or receive adverse treatment to achieve diversity, equity, or inclusion.
> 7. A person, by virtue of his or her race, color, sex, or national origin, bears personal responsibility for and must feel guilt, anguish, or other forms of psychological distress because of actions, in which the person played no part, committed in the past by other members of the same race, color, national origin, or sex.
> 8. Such virtues as merit, excellence, hard work, fairness, neutrality, objectivity, and racial colorblindness are racist or sexist, or were created by members of a particular race, color, national origin, or sex to oppress members of another race, color, national origin, or sex.[2]

Florida was not the first state to pass laws seeking to censor what is taught about race, the role that race has played in *inter alia* our legal system and the possible ways of combating that influence. At least 14 state legislatures have passed similar laws.[3]

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[2] Order Granting in Part and Denying in Part Motions for Preliminary Injunction, *Pernell, et. al. v. Florida Board of Governors of the State University System, et. al*. Case No. 4:22cv304-MW/MAF, November 17, 2022, pages 3-4

Many, if not most, of these legislative enactments, focused on several common themes; shielding any suggestion that responsibility for current institutional racism or consequences of past racism from being borne by anyone not currently "guilty" of individual racism, rejection of affirmative action or the suggestion that affirmative action may be a justifiable and desired remedy. Indeed, as in the Florida legislation, it is vaguely forbidden to make anyone feel "guilt, anguish or distress" because of the history of racism.

As applied to state universities and state law schools in particular, Anti- CRT laws represent not only a forced denial and a "thought gag" on both teaching and scholarship but also a forced adoption of the state-approved interpretation and doctrine on the roles and remedies for racial inequities.[4] A specific target of this class of legislation has been Critical Race Theory.[5]

As someone who has been involved in legal education teaching for over 40 years and as someone who was drawn to legal education as an alternative to a career more directly devoted to litigation concerning racial justice, so that others might be encouraged to explore critically both what race has meant to our legal system and how we might collectively counter its negative influence, the "Stop W.O.K.E act" presents a real and present danger. Thus, in August of 2022 I agreed to be the lead named plaintiff in *Pernell, et. al. v. Florida Board of Governors of the State University System, et. al. Case No. 4:22cv304-MW/MAF*, with representation by the NAACP Legal Defense Fund, The American Civil Liberties Union, and the law firm Ballard Spahr.[6] On November 17, 2022, Judge Mark Walker, United States District Court, issued a preliminary injunction barring the Florida Board of Governors of the State University System, from the enforcement of this act. It is the first decision of its kind to halt suppression of thought surrounding Critical Race Theory.

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[3] Arkansas, Senate Bill 627 (April 2021). Arizona, H.B. 2906 (June 2021), Georgia, H.B. 1084 (January 2022), Iowa, House File 802 (March 2021), Idaho, H.B. 377 (April 2021), Kentucky, S.B.1 (January 2022), Mississippi, S.B. 2113 (January 2022), North Dakota, H.B. 1508 (November 2021), Oklahoma, H.B. 1775 (January 2021), South Carolina, H.B. 4100, South Dakota, H. B. 1012 (January 2022), Tennessee, S.B. 2290 (February 2022), Texas, H.B. 3976 (March 2021), and Virginia, H.B. 127 (January 2022).Hereinafter Anti- CRT laws.

[4] Throughout this article the emphasis has been placed on the impact of these laws on combating racism. However, as in the case of Florida, the legislative intent is often to embrace a wider range of injustices; the discussion of which is declared *verboten* - including sexism and national origin. However, as in Florida the central intent of the Anti- CRT laws is aimed at race and movements originating in community concerns over racism, such as Black Lives Matter. The governor of Florida promoted and named HB 7 as the Anti-W.O.K.E. Act. So-called "woke" speech is defined as "alert to racial or social discrimination or injustice," and characterized by the Legislature as speech concerned with civil rights, "privilege" and "oppression," and even more broadly, "diversity, equity, and inclusion. See, e.g., 2/1/22 House State Affairs Committee at 01:02:00.590- 01:02:29.070. The phrase "Woke" originated from African American vernacular english but has been gradually co-opted by right wing players to be used as an insult. Kate Ng, "*What is the history of the word 'woke' and its modern uses*?" https://www.independent.co.uk/news/uk/home-news/woke-meaning-word-history-b1790787.html, See also, Merriam- Webster, "*Words We're Watching - Stay Woke - The new sense of 'woke' is gaining popularity*" https://www.merriam-webster.com/words-at-play/woke-meaning-origin

[5] See, Governor DeSantis Announces Legislative Proposal to Stop W.O.K.E. Activism and Critical Race Theory in Schools and Corporations," Ron DeSantis (Dec. 15, 2021), https://www.flgov.com/2021/12/15/governor-desantis-announces-legislative-proposal-to-stop-w-o-k-e-activism-and-critical-race-theory-in-schools-and-corporations.

[6] *Pernell, et. al. v. Florida Board of Governors of the State University System, et. al*. Case No. 4:22-cv-304, Northern District of Florida, Tallahassee Division

As of the date of this writing the case is on appeal to the United States Court of Appeals, Eleventh Circuit.

This article is not about that case or its specifics as it applies to me. Rather, this article will explore the national effort to legislatively suppress Critical Race Theory and the teaching of the significance of race as a pedagogical tool and to demonize those who support and promote the importance of such teaching in our legal education system – particularly at this time. This article will explore the Critical Race Theory (CRT) connection to the educational development of the African American community as well as its role in providing both a voice for a community often historically voiceless and a vital cog in bringing about transformative change.

This article will also look behind the egalitarian façade used to "justify "these laws through false fears and somewhat disingenuous declarations of a "Color-Blind", Post-Racial Society.

Part I Teaching the Slave to Read - The Relationship Between "Critical Reading" and Empowerment – From Slavery to Emancipation

"Among other things, that it was unlawful, as well as unsafe, to teach a slave to read…. It would forever unfit him to be a slave. He would at once become unmanageable, and of no value to his master."[7]

-Frederick Douglass

"It was contrary to the revealed will of God that one man should hold another slave".

-James Curry's, a slave, discovery upon reading the Slaveholder's Bible,
The Liberator, January 10, 1840

After 1831, all slave states, including Florida, passed laws against teaching slaves to read and write. The slaveholder's fear of education for the slave was, in large part a fear that with education comes understanding and commitment to rejection of the yoke of slavery. But fear of the literate slave was not simply a reluctance for your slave to read and write his or her own name or read for themselves instructions on how to perform day to day task. It was the understanding that comes with reading. An understanding that brings with it the tools for not only grasping the nature of your subjugation but its inconstancies with espoused principles of liberty and humanism. Understanding and analysis of learning fuels political awareness and most of all action. Reading was never solely about "ABCs", arithmetic and basic chores. It was about power, social change and self-determination.

The drive to understand in a critical way the social and political reality of slavery and post-slavery life was always an integral part of the need and desire to read. Indeed, viewed from the perspective of the slaveholder, Black literacy by its very nature created "discontentment" when the slave understood his or her true relationship with the law.[8]

The political power which flows from comprehending through reading fueled the determination of a people yet in slavery to defy a system even where the penalty might be death.[9]

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[7] Frederick Douglass, LIFE OF AN AMERICAN SLAVE, Belknap Press of Harvard, 1988 ed., p.58

[8] In the words of Hugh Auld, slaveholder to Frederick Douglass, after reacting with rage upon finding out that Mrs. Auld was teaching Frederick Douglass to read, "if you teach a Nigger how to read, there would be no keeping him…. It would make him discontented and unhappy". *Id*. It is ominously ironic that this same sentiment is expressed by the opponents of Critical Race Theory, i.e., discussion and exploration of the impact of race on the legal system will "depress"" anger" or upset African American students.

[9] "…Back then, if they'd catch you writing, they would break you if they had to cut off your finger, *but still the old-time folks knew they would be free*…" [emphasis added], Anonymous, BULLWHIP DAYS: THE SLAVES REMEMBER,

The abolitionist newspaper *The Liberator* in June,1840 told the narrative of the former slave James Curry, reporting that when the slaveholder's family was away on the Sabbath he would sneak into the main house and, with his self-taught reading skills, learn from the slaveholder's bible that "it was contrary to the revealed will of God that one man should hold another slave". This was critical race theory at its most basic level.

The battle to read for slaves was not only a desire to learn but also a symbol of resistance[10] tied to equipping the captive with an understanding of the disconnect between law and religion espoused values of liberty and the reality of slavery. Consequently, anti-slave literacy laws were enacted to counter the threat of revolution spurred by what a slave might read.[11]

The need and role of critical-analysis education skills was only enhanced by the advent of emancipation.[12] Professor Williams tells the story of Harry McMillian, newly freed slave. In 1863 McMillian appeared before the American Freedmen's Inquiry Commission and was asked whether the newly freed slaves preferred to have the land divided among themselves into self-governing plots or to have white people govern them. In response, after noting that "the black people have a good deal of sense but they do not know the law," he went on to state:

> "Probably with the children that are coming up no white men will not be needed…They [freed slaves] are learning to read and write – some are learning lawyer, some are learning doctor, and some are learning minister; and reading books and newspapers they can *understand the law [emphasis added]* …"[13]

Particularly with the return of African American soldiers who had fought for their freedom in the Civil War, the demand for literacy as a vehicle for challenging accepted norms for a recently enslaved people, grew to a fever pitch. In 1865 an African American First Sergeant John Sweney, writing, after the war, to Brigadier General Clinton B. Fisk, demanded that a school be established for his regiment. In his letter he made a specific link between reading, writing and political empowerment. He explicitly indicated that once taught to read Black people "would have knowledge of the workings of government and would be able to petition for their rights."[14]

In a strange juxtaposition many of those opposed to African American enhancing their understanding of America's political and legal system through enhanced critical literacy, turned to "uber-literacy" as a tool for disenfranchisement. From the 1890's through the 1960's, states, mainly in the south, introduced the construct of "literacy tests" as a tool to intimidate African

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James Mellon, ed. P. 190, Avon Books,1990. See also, Marion Wilson Starling, THE SLAVE NARRATIVE, p. 244, Howard Press, 1988.

[10] See, Heather Andrea Williams, SELF-TAUGHT, P. 11, University of North Carolina Press 2005

[11] As early as 1740, following the Stono Rebellion. statutory prohibitions against teaching a slave to read were enacted to counter slave escapes and rebellion. *Id.at 13.* These statutes gained strength and frequency following the Nat Turner rebellion of 1831. See in general, Paul Finkelman, ed., STATE SLAVERY STATUTES, University Publications of America, 1989.

[12] Williams*, supra*, note 10 at 34.

[13] Williams, *supra* 10 at 43

[14] Williams, supra 10 at 52

American in particular from voting through the use of often bizarre reading and writing barriers. Realizing that despite the historic opposition to black literacy, the African American community was intent on applying critical understanding to the ballot box. The literacy test ploy based itself on requiring reading "skills" way beyond what was available to Black citizenry in general.[15]

In *Lassiter v. Northampton County Board of Elections*[16] the United States Supreme Court upheld North Carolina's use of a literacy test. In doing so the Court appeared to gloss over the application of a Grandfather Clause which had the effect of allowing thousands of white North Carolinians to vote without taking the test which ostensibly claimed to apply to all voters.[17]

But the suppression of reading and understanding promoted by the Anti- CRT laws, generate an even deeply and more insidious throwback. These laws serve to promote, and attempt to maintain, a Plantation Mentality.

The concept that faculty of color, particularly African American faculty, must remain silent about, and that students cannot read or discuss, systemic racial injustice in the 21st century, is painfully reminiscent of the plantation structure of centuries past. Plantation mentality is loosely defined as a "mentality according to which an organization or society is divided into a ruling elite and a class of workers treated as inferior, especially along racial lines."[18] Perhaps more impactfully here, the term "Plantation Mentality":

> [C]aptures both the perpetuation and mutability of racial ideology and practices in American culture. Most obviously, those who talked about the "plantation mentality"

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[15] "After completing the application and swearing the oaths, you had to pass the actual "Literacy Test" itself. Because the Freedom Movement was running "Citizenship Schools" to help people learn how to fill out the forms and pass the test, Alabama changed the test 4 times in less than two years (1964-1965). At the time of the Selma Voting Rights campaign there were many different tests in use across the state. In theory, each applicant was supposed to be given one at random from a big loose-leaf binder. In real life, some individual tests were easier than others and the registrar made sure that Black applicants got the hardest ones." - Bruce Hartford, THE SELMA VOTING RIGHTS STRUGGLE & THE MARCH TO MONTGOMERY, Westwind Writers; Illustrated edition (2014), See also, Bruce Hartford, *Voter Registration in Alabama Before the Voting Rights Act, https://www.crmvet.org/info/alvrhow.htm*

[16] 360 U.S. 45 (1959)

[17] "Finally, it cannot be said that the North Carolina scheme of exemptions from the educational test bestowed no benefit upon the class of applicants selected for preferential treatment. The United States Census Report for North Carolina reveals a potential white male voting population of 700,404 in 1940 (6th Census, United States, Characteristics of the Population of North Carolina). Of this number, more than 134,692 were over 53 years of age and presumably might have been eligible for registration under the "Grandfather Clause." Report reveals that in 1930 the total potential white, male voting population was 549,845. Of this number, more than 200,101 were over 43 years of age and presumably old enough to have sought registration under the "Grandfather Clause." The United States Census Report for North Carolina reveals a potential white, male voting population of 865,837 in 1950 (1950 United States Census of Population for North Carolina). Of this number, more than 81,696 were over 63 years of age and presumably might have been eligible for registration under the North Carolina "Grandfather Clause."', *Brief o Appellant, Lassiter v. Northhampton Count Board of Elections*, 1959 WL 101420 (1959) at 26

[18] https://en.wiktionary.org/wiki/plantation_mentality#:~:text=Noun,inferior%2C%20especially%20along%20racial%20lines.

> referred to white racist attitudes that promoted white domination and black subservience, which they construed as reminiscent of slavery and sharecropping[19]

Professor Green describes by anecdote the connection between slavery and white domination and the current, modern racial positioning encompassed by the concept of Plantation Mentality.

> "The struggle was we didn't have a water fountain! No water fountain in 1965!" Sally Turner, a mother of twelve and retired worker who had labored at the Farber Brothers automobile accessories plant in Memphis from the 1960s to the 1980s, raised her voice to a shout when she responded during a 1995 oral history interview to a query about why she had risked her job to help organize a union in her shop. Seated in her living room, surrounded by family photographs of her twelve children, Turner recounted how she and other African American women workers had complained about the lack of drinking water in the sweltering, non-airconditioned plant. The white manager had reacted, she exclaimed, by giving them "one of them country buckets I already done left in Mississippi! They goes out in this hardware store and buys a bucket and a dipper. A dipper! And brought it back there and had everybody dipping!" For Turner, the bucket and dipper purchased by the white male plant manager became emblematic of what she and other black Memphis workers perceived as their urban white employers' efforts to perpetuate in the city the plantation relations of the South's rural history, whether the relations of the sharecropping system of the recent past, which many had directly experienced, or those of master and slave, shared in the cultural memories of slavery. It represented *un*freedom[20]

Unfreedom. To be denied the ability to read and learn because governmental persons and entities, themselves the heirs of a legacy of slavery, Jim Crow laws and discrimination, have deemed your history as "unworthy" and "upsetting" is the height of *unfreedom*.

[19] Laurie B. Green, BATTLING THE PLANTATION MENTALITY: MEMPHIS AND THE BLACK FREEDOM STRUGGLE (THE JOHN HOPE FRANKLIN SERIES IN AFRICAN AMERICAN HISTORY AND CULTURE), The University of North Carolina Press; Annotated edition (2007) p. 2.

[20] Id. at 1, footnote omitted.

Part II - The Campaign Against Critical Race Theory

"The harvest is past, the summer is ended, and we are not saved"
Jeremiah 8:20

Professor Derrick Bell addressed the despair and frustration of achievements-not -gained in his ground-breaking AND WE ARE NOT SAVED. Subtitled "The Elusive Quest for Racial Justice"[21], this work ushered in a new generation of critical thinking designed to question the accepted norms associated with the Civil Rights Movement and to explore the entrenched nature of institutional racism. Through the innovative avatar Geneva Crenshaw, Professor Bell engaged in a face-to-face discussion with the "Founding Fathers" in the midst of the Constitutional Convention of 1787, as to the failure of the framers' concepts of liberty, justice and equality to make a truly transformative change in the political, economic and social condition of the African American community in the 20th Century. Law's ultimate failure to defeat systemic racism requires a critical analysis as to the shortcomings of law and the importance of reorientation of legal values away from property promotion and toward humanism. Much of the Founders failure of concepts is lodged, in Professor Bell's view, with the inherent conflict of the Constitution in its failure to denounce slavery.[22] Another constitutional scholar suggests that Lincoln's Emancipation Proclamation was accomplished only by Lincoln's ignoring a "broken constitution".[23]

AND WE ARE NOT SAVED was not the first time that Professor Bell had explored the analysis that would subsequently become the foundation of Critical Race Theory. In 1976 Bell questioned whether civil rights gains were primarily symbolic and failed to properly assess "the economic and political conditions that influence the progress and outcome of any social reform improvement."[24]

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[21] Derrick Bell, AND WE ARE NOT SAVED, Basic Books, 1987

[22] Geneva Crenshaw, speaking to the Founders states:

> "For now in my own day, after two hundred years and despite bloody wars and the earnest efforts of committed people, the racial contradiction you sanction in this document remains and threatens to tear this country apart". *Id*. at 37
>
> ……
>
> …{T]he real problem of race in America is the unresolved contradiction embedded in the Constitution and never openly examined, owing to the self-interested attachment of some citizens of this nation to certain myths-myths that I hope my Chronicles will allow us to examine in detail. *Id.* At 49

[23] See, Noah Feldman, THE BROKEN CONSTITUTION: LINCOLN, SLAVERY, AND THE REFOUNDING OF AMERICA, Farrar, Straus and Giroux (2021)

[24] Derrick A. Bell Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE. L.J. 470, 512-513 (1976).

The questions raised by Bell in 1976 coincided with the emerging doctrine of Critical Legal Studies (CLS).[25] Unlike CLS,[26] Critical Race Theory (CRT) focuses on race, as opposed to class. As outlined by Professor Khiara Bridges, key aspects of the of CRT that distinguish it from CLS include; Recognition that race is not biological but a social construct, Racism in American jurisprudence and society is not an aberration but a normal, systemic and structural feature, and as a consequence racism is not confined to " a few bad apples", and that Critical Race Theory, through its scholarship, should address the real-life experience of people of color, including as preserved through storytelling.[27]

Professor Kimberle Crenshaw, who coined the term "Critical Race Theory, has noted that CRT critiques how "the social construction of race and institutionalized racism perpetuates a racial cast system that relegates people of color to the bottom tiers."[28] Critical Race Theory goes beyond the limits of both mainstream scholarship and CLS to speak directly "to and about black

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[25] Emerging out of a conference held at the University of Wisconsin-Madison in 1977, the theory of Critical Legal Studies posited that law and social bias are so intertwined that the former primarily serves to support the interest of the latter. As a result, law inherently favors the interest of wealthy privilege over the interest of the underprivileged. Similar to the disenchantment that the original proponents of Critical Race Theory felt regarding the ultimate shortcomings and often negation of Civil Rights successes, Critical Legal Studies proponents maintained a broader rejection of "gains" in Civil Rights and the Anti-Vietnam War efforts, and often supported an overthrowing and deconstruction of the traditional legal structure. Drawing on a wide range of philosophies from Max Weber to Michel Foucault. Much of the concepts of CLS draws its strength also from the works of Jacques Derrida, generally credited with the theory of deconstruction. *See,* Jacques Derrida, *VOICE AND PHENOMENON: INTRODUCTION TO THE PROBLEM OF THE SIGN IN HUSSERL'S PHENOMENOLOGY (STUDIES IN PHENOMENOLOGY AND EXISTENTIAL PHILOSOPHY),* Northwestern University Press, 2010 (originally published 1967)

[26] "The central tenet of the critical legal studies movement—insofar as there is one—is that law and legal consciousness mask the collective choices implicit in existing social arrangements. By making institutions appear fair and rational, law induces ideological consent to hierarchical systems. Litigation and legal change, in this view, also entrench oppression by making remaining inequities seem inevitable and even just", Review, *The Battle Ground of Experience: And We Are Not Saved: The Elusive Quest For Racial Justice. By Derrick Bell.* 101 HARV. L. REV. 849, note 2 (1988), See generally Critical Legal Studies Symposium, 36 STAN. L. REV. 1 (1984)

[27] See, Khiara Bridges, Chapter 6 *The Legal Construction of Race*, CRITICAL RACE THEORY: A PRIMER (CONCEPTS AND INSIGHTS) 1st Ed. Foundation Press, (2019). Professor Bridges further goes on to point out the following divergence between Critical Legal Studies (CLS) and Critical Race Theory (CRT):

> "However, while many aspects of CLS were appealing to the nascent critical race theorists, they were disquieted by some of CLS's claims and rhetorical moves. First, they were disturbed by the crits' wholesale rejection of the possibility that law could be valuable to the subordinated. To the crits, the law was nothing more than a technique of alienation and a tool for sustaining hegemonic dominance. Consistent with this conception of law was the belief that legal rights could serve no real role in the liberation of subordinated people. Indeed, crits suggested that winning rights might thwart liberation goals: being granted rights that had been fought for might make the marginalized self-satisfied, blinding them to—or making them patient with—the fact that the rights had not actually relieved them of their marginalization. Yet, this critique of rights did not ring true to the burgeoning critical race theorists. In fact, it struck many of them as tone-deaf to black people's specific historical experience with rights."
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> *Id.* Chapter 2, at pp. 26-27

[28] See, Janel George, *A Lesson on Critical Race Theory*, 46 HUMAN RIGHTS MAGAZINE, No.2 (2021)

people".[29] In rejecting total embracing of the "deconstruction" approach of Critical Legal Studies, Crenshaw notes:

> CLS scholars often appear to view the trashing of legal ideology "as the only path that might lead to a liberated future." Yet if trashing is the only path that might lead to a liberated future, black people are unlikely to make it to the CLS promised land.[30]

The central tension between the traditional approach to civil rights legal analysis and Critical Race Theory, and, indeed at the heart of the currently legislative attack on thinking critically about race – the focus of this article, is expressed by Crenshaw as two distinct rhetorical visions, which she terms the "expansive view" and the "restrictive view".[31] The expansive view focuses on substantive achievements as the measure of success for law application. Achievement is measured by whether oppressive conditions are eradicated by legal change. The expansive view is goal oriented and eschews change limited to, and measured by, the "fairness" of the process.

The" limited view" confines itself to corrective process change. Its central tenet is that law that is race neutral is "fair law" and the achievement of "fair law" is the ultimate measure of reformative success.[32]

Even though, as suggested later, the attack on teaching about the significance of race in American jurisprudence is more than a rejection of CRT, Crenshaw's "expansive view – limited view" encompasses the heart of the Anti- CRT laws. The "expansive view" embraced by CRT addresses remediation of the impact of law and policy that serve as the root cause of harm caused by and suffered from racial societal perceptions that are not necessarily the result of animus or intentional racial subjugation. Consequences have meaning far beyond intent.

The denial of corrective responsibility for racial injustice, even when such occurs under the guise of neutral law, inherent in the application of the "limited view", can only happen if there is a collective societal disconnect between history and current reality filtered through the fractured lens of intent. While it may be true that intent is not necessarily inherited, the same cannot be said for knowingly enforcing systems built upon racial domination.

The refusal to recognize that systemic racism is just as pernicious as activity motivated by racial hate, is a form of collective amnesia. This dominant cultural amnesia allows for individuals to take the position "I am not responsible for the acts of my ancestors. Therefore, I am not responsible to correct their mistakes". This convenient amnesia regarding the connection between the past and the present takes great comfort and obtains much support from the juridical failure of modern Equal Protection doctrine to provide meaningful relief to the current victims of

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[29] Kimberle Williams Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law,* CRITICAL RACE THEORY, The New Press, 1995, Kimberle Crenshaw, Neil Gotanda, Gary Peller, Kendall Thomas., ed., p.110

[30] *Id.*

[31] Id. at 105

[32] "The primary objective of anti- discrimination law [under the limited view] according to this vision, is to prevent future doing rather than to redress present manifestations of past injustice. 'Wrongdoing", moreover is seen primarily as isolated actions against individuals rather than as a social policy against an entire group" *Id*. at 105.

systemic racism, absent the satisfaction of virtually unobtainable proof of current intent to discriminate.

The heart of the failure of modern equal protection doctrine to serve as a force for relief from the impact of racial injustice, and the doctrinal support for cultural amnesia lies in the 1976 United States Supreme decision in *Washington v. Davis.*[33] In *Davis* the Court found that as to a legislative enactment, neutral on its face as to race, a plaintiff alleging a violation of Equal Protection under the Fourteenth Amendment, must prove a racially discriminatory intent in order to prevail.[34]

Since *Davis* the burden of proof of purpose has been a lodestone around the neck of the victims of racial inequality who lack the means and wherewithal to prove purposeful discrimination in the *de facto* settings.[35] But most troublesome and germane to the continued legal justification for systemic racism, is the failure to recognize that it is the consequences of racism, not the motivation that causes suffering. Professor Charles R. Lawrence addressed this by noting that injury of racial inequality "exists irrespective of the decisionmaker's motives."[36]

The opponents of CRT take solace in *Davis* because it allegedly prevents "innocent people" from bearing the costs of remedying a harm that they "did not cause". Once again, this conceptualization sees the "harm caused" as some version of a societal scienter. As Professor Lawrence notes this view of reality, with the support of the United States Supreme Court, leaves

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[33] 426 U.S. 229 (1976)

> "[W]e have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another. Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution' Id. At 242.

[34] The Court reiterated its "intent/purpose" test for facially neutral laws *in Village of Arlington Heights v. Metropolitan Housing Development Corp*, 429 U.S. 252 (1977). In an action by a nonprofit real estate developer which had contracted to purchase a tract of land in order to build racially integrated low and moderate income housing challenging the local authorities' refusal to change the tract from a single-family to a multi-family classification because the impact was racially discriminatory, In denying relief the court stated " Absent a pattern as stark as that in *Gomillion [v. Lightfoot*, 364 U.S. 339 (1960)] or *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)], impact alone is not determinative, Id. at 564…. Respondents simply failed to carry their burden of proving that discriminatory purpose was a motivating factor in the Village's decision Id. at 270

[35] The court itself noted that "[p]roving the motivation behind official action is often a problematic undertaking. *Hunter v. Underwood*, 471 U.S. 222, 228 (1985). In this case the Court stretched its rule to find "intent" regarding language in the Alabama Constitution which worked to suppress Black voters, in racist speeches made at the 1901 state constitutional convention.

[36] Charles r. Lawrence III, *The Id, The Ego, And Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 319 (1987). Professor Lawrence goes on to state:

> Does the black child in a segregated school experience less stigma and humiliation because the local school board did not consciously set out to harm her? Are blacks less prisoners of the ghetto because the decision that excludes them from an all-white neighborhood was made with property values and not race in mind? *Id*.

no room for relief – only the comfort of believing "it is not my problem if I didn't intend for it to happen"[37]

The tentacles of legal deniability of responsibility for addressing the harm caused by racial injustice goes beyond a restrictive interpretation of the Equal Protection Clause. In *Wards Cove Packing Co. v. Atonio*[38] the Court considered a cannery company's creation and maintenance of a *de facto* plantation system where predominantly White workers were hired in the skilled positions and predominantly Nonwhite cannery workers were hired into unskilled positions. Rather than an Equal Protection claim (there being no state action), Plaintiffs sought relief under Title VII. Proof of unlawful discrimination was offered via statistical evidence of disparate impact stemming from the method used for selecting a segregated work force. Relying on what had up to that time been canon, the plaintiff's sought to apply the formula of *Griggs v. Duke Power Co*.[39] *Griggs* had held even if there is no discriminatory intent, an employer may not use a job requirement that functionally excludes members of a certain race if it has no relation to measuring performance of job duties.

Despite the fact that *Griggs* approved the use of statistical data in order to establish disparate impact in violation of Title VII[40], the Court in *Wards Cove* found that statistical data showing disparate impact will not establish a prima facie case of a Title VII violation if the "challenged practice serves, in any significant way, legitimate employment goals of employer."[41].

In so deciding, Professor Linda Greene notes that the Court may have "rewritten the two most important principles in Title VII law.[42]

> First, "[t]he Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. Second, to limit the extent to which employment policies create "built in headwinds" against protected groups, "Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question[43]

[37] "[By] acting as if this imaginary world was real and insisting that we participate in this fantasy, the Court and the law it promulgates subtly shape our perceptions of society. The decision to deny relief no longer finds its basis only in raw political power or economic self-interest; it is now justifiable on moral grounds. If there is no discrimination, there is no need for a remedy; if blacks are being treated fairly yet remain at the bottom of the socioeconomic ladder, only their own inferiority can explain their subordinate position." Id. at 325. [footnote omitted]

[38] 490 U.S. 642 (1989)

[39] 401 U.S. 424 (1971)

[40] In Griggs North Carolina census statistics showed that, while 34% of white males had completed high school, only 12% of Negro males had done so. Similarly, with respect to standardized tests, the EEOC in one case found that use of a battery of tests, including the Wonderlic and Bennett tests used by Griggs, resulted in 58% of whites passing the tests, as compared with only 6% of the blacks. Additionally, between July 2, 1965, and November 14, 1966, the percentage of white employees who were promoted but who were not high school graduates was nearly identical to the percentage of nongraduates in the entire white work force. 401 U.S. at 430-432.

[41] 490 U.S. at 659

[42] Linda S. Greene, *Race In The 21st Century: Equality Through Law?* 64 TUL. L. REV. 1515 (1990)

[43] Id. at 1522

The critics of CRT use cases such as *Davis* and *Wards Cove* as the legal launch pad for their contention that Critical Race Theory scholars see race everywhere and in a "post-racial" society[44],this over-sensitivity to race is not and should not be a proper lens through which to see "fairness". But the attack on Critical Race Theory is more than ideology or cultural. The attacks have a deep political root that evolved itself into a discrediting of the moral center of CRT and a vilification of its proponents.

> *"Men who fear demons see demons everywhere."*
> — Brom,[45]

The linking of the Anti- CRT laws to a direct attack on Critical Race Theory is an undisguised, and race-based attempt to portray CRT scholars as part of a "lunatic fringe". This characterization of scholars of color did not, however, begin with these laws. The political demonization of Critical Race Theory began with the political attack on Lani Guinier. Lani Guinier was a Yale Law School graduate who was inspired by Constance Baker Motley to be a Civil Rights lawyer[46]. After clerking for the Hon. Damon Keith of the United States Court of Appeals for the Sixth Circuit, she served as an assistant to Drew S. Days in the Civil Rights Division of the United States Attorney General. She later became head of the Voting Rights project of the NAACP Legal Defense Fund. She subsequently became part of the faculty at the University of Pennsylvania Law School where she continued her focus on voting rights.

It was her work on voting rights and affirmative action that led President Bill Clinton to nominate her to be an assistant attorney general in the voting rights division. This nomination occurred despite the fact that her view on voting rights and her concern that the interests of minority voters are inevitably trampled by those of the white majority, were widely known

[44] "Post Racial" has been defined generally "to describe a society or time period in which discussions around race and racism have been deemed no longer relevant to current social dynamics" URBANDICTIONARY.COM , Many see the election of Barack Obama, the first African American United States President as the dawning of a "post-racial" society. Whether such exist appears, ironically, to be a matter of racial perspective. Many Whites have seemed willing to declare post-racialism because of Obama, such as did Chris Matthews the NBC News commentator when he announced "He [Obama] is post-racial by all appearances. You know, I forgot he was black tonight for an hour". MSNBC's Matthews on Obama: "I Forgot He Was Black Tonight" | RealClearPolitics". www.realclearpolitics.com. Retrieved 2016-01-02. A 2014 Washington Post/ABC News Poll showed that 50% of White Americans believe that the justice system treats persons fairly regardless of race, while only 10% of African Americans support that view. Balz, Dan; Clement, Scott (2014-12-26). "On racial issues, America is divided both black and white and red and blue". The Washington Post. ISSN 0190-8286. Retrieved 2016-01-02. As discussed below, this perception may have radically changed in the wake of George Floyd.

[45] Brom, THE CHILD THIEF, Harper Voyager (2009)

[46] Schudel, Matt (January 11, 2022). "Law professor's Justice Dept. nomination became a Clinton-era controversy". Washington Post. p. B6

through a series of articles which argued for alternatives that would give greater weight to minority interest.[47]

Guinier's central thesis is that the Black vote is largely ineffective in the face of solidified white majority vote, and consequently true policy change under political systems largely defined by geographic boundaries is an illusion (made worse by largely unchecked gerrymandering). Her concerns in this area are largely in line with the result-orientation measures articulated by Professor Crenshaw and other Critical Race Theorists.

Professor Guinier suggested that a permanent majority should not always win and that a permanent minority should not always lose. Given the likely permanency of the Black vote as a minority vote in electoral systems built around where you live as opposed to who you are, Guinier suggested that perhaps the concept of "one person, one vote" is inadequate. Like other concepts discussed earlier, and noted by CRT, fairness in process often disguises unfairness in results.

Guinier's scholarly work became political fodder almost immediately upon her nomination. Smarting from the political controversy stemming from the prior failed Supreme Court nomination of Clarence Thomas, political opposition forces, largely Republican, began demonizing Guinier with largely false claims that she was a "Quota Queen"[48] (a vailed racist comparison to the race stereotype meme of "Welfare Queen"). This attack was launched despite the fact that at no time did Guinier advocate for a "Quota System" for the counting of Black votes.

Opposing political party antipathy towards a presidential nomination is certainly no surprise. What was surprising, however, was despite the fact that Guinier's scholarship was well-known prior to her nomination; and indeed, her nomination resulted largely from the recognition she received for her scholarship, President Bill Clinton withdrew her nomination after only two months and called Professor Guinier views "anti-democratic[49]".

The vilification of Critical Race Theory resurfaced when President Donald J. Trump in September 2020, issued an executive order banning federal contractors from conducting racial sensitivity training, emphasizing his desire to stop "efforts to indoctrinate government employees with divisive and harmful sex- and race-based ideologies." Chief among the concepts that Trump considered as efforts to "indoctrinate" recipients of federal funds was Critical Race Theory.[50]

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[47] See, Lani Guinier, *Keeping The Faith: Black Voters In The Post-Reagan Era, 24* HARVARD CIVIL RIGHTS-CIVIL LIBERTIES LAW REVIEW 393 (1989*);* Lani Guinier, *No Two Seats: The Elusive Quest For Political Equality* 77 Va. L. Rev. 1413 (1991); Lani Guinier, *The Triumph Of Tokenism: The Voting Rights Act And The Theory Of Black Electoral Success,* 89 Mich. L. Rev. 1077 (1991)

[48] Bolick, Clinton (1993) "Clinton's Quota Queens," Wall Street Journal op-ed, April 30, 1993

[49]Savage, David G. (June 5, 1993). "Guinier's Ideas Viewed as Largely Theoretical : Nominee: In her 'academic' article on voting rights, the conclusions she reaches appear to be tentative". Los Angeles Times
William T. Coleman Jr., a former Secretary of Transportation under President Gerald Ford, stated that the withdrawal was "a grave [loss], both for President Clinton and the country. The President's yanking of the nomination, caving in to shrill, unsubstantiated attacks, was not only unfair, but some would say political cowardice." William T. Coleman Jr, *Three's company: Guinier, Reagan, Bush,* Baltimore Sun, Jun 07, 1993

[50] See, Appendix A.

President Trump's Executive Order was the culmination of conservative efforts of right-wing "Think Tanks" such as the Manhattan Institute.[51] It's Senior fellow, Christopher Rufo, is widely credited with targeting Critical Race Theory and demonizing its existence.[52] President Biden repealed the Trump Executive Order on his first day in office.[53]

Despite making Critical Race Theory the center of attack in the Trump Executive Order and in the Anti- CRT laws, based on that order, there is little to no citation to specific statements or positions exposed by Critical Race scholars that would support the contentions of deleterious intent or impact caused by CRT. The major contention of the CRT detractors appears to be the assertion that CRT personally accuses White Americans of being inherently racist. In order to reach this conclusion, CRT detractors conflate individual racism with the systemic or institutional racism. This amalgamation occurs only if you ignore the consequence-of-racism focus central to the CRT position as discussed earlier by scholars such as Crenshaw.

There is an opprobrium associated with racist conduct that is the result of intent to discriminate that is widely shared and admitted by all including the most conservative viewpoints. No one likes to be called a racist.[54] The tag is considered derogatory.[55] Yet, that appellation is largely associated with intentional expression or actions. However, there is also a distinction between "racist" as a state of being and "racist actions" as a state of consequence.

Racist actions, as a focus of justice, is not now nor has it ever been a matter limited to motivation. In the context of Professor Crenshaw's "expansive view" the impact of actions or inactions that have a negative racial consequence is just as pernicious as conduct caused by personal bigotry. Professor Imani Perry expressed the concept by what she called "post-intentional racism."[56] Perry contends that danger of racism cannot be confined to a matter of intent.[57]

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[51] The Manhattan Institute, founded in 1977 describes its mission as a think tank to develop and disseminate new ideas that foster greater economic choice and individual responsibility.

[52] "The goal [of attacking Critical Race Theory] is to have the public read something crazy in the newspaper and immediately think 'critical race theory,'" Trip Gabriel, *He Fuels the Right's Cultural Fires (and Spreads Them to Florida,)* THE NEW YORK TIMES, April 24, 2022

[53] See, Appendix B.

[54] See, Jay Ooi, *Why I don't call people racist (even when they are)*, https://www.shoesoff.net/content/why-i-dont-call-people-racist

[55] "[R]acist carries baggage beyond its dictionary meaning. To be a racist is considered not just a matter of bland categorization but of evil, a charge only somewhat less damning than being called a pedophile, as chilling a prospect in modern American life as being tarred as a communist was in the late 1940s and early 1950s.", John McWhorter, *Racist Is a Tough Little Word* , THE ATLANTIC, https://www.theatlantic.com/ideas/archive/2019/07/racism-concept-change/594526/

[56] See, Imani Perry, MORE BEAUTIFUL AND MORE TERRIBLE: THE EMBRACE AND TRANSCEDENCE OF RACIAL INEQUALITY IN THE UNITED STATES, (New York University Press, 2011)

[57] "Perry argues that contemporary understandings of racism cannot be reduced to intentional acts of bigotry, beliefs in biological determinism, or even subconscious prejudices, instead we must rely on a thicker analysis, one that accounts for the structural, psychological, and cultural dimensions of racism." Marc Lamont Hill, NOBODY, (Atria Books, 2016)

Case in point; racial profiling. Racial profiling, as employed by law enforcement, is not, in theory, an intentional reflection of racial animus but pretends to be based on social science. It is, in fact, more often a reflection of America's basic racial fears. The Black and Brown male in particular is often stereotyped as drug dependent (or dealing), bedecked in gold chains, dark glasses, and amoral. This image has replaced earlier embodiments of crime symbolized by caricatures of cauliflower eared, broken nosed, Caucasian mugs, or slick-haired, leather wearing, Italian youths ala West Side Story.[58] The hysteria over Black crime is reflected not only in the hearts and minds of the citizenry but in the words and deeds of politicians.[59]

Racial Profiling attempts to justify its existence, and to otherwise convert individual racial animosity into "good policing" by reliance on suspect social science.60 Critical Race theorist are demonized for "racializing" "good police work". But the victims of racial profiling know a simple truth. No amount of false correlation between race and criminal propensity can remove the target that virtually all African Americans and many Latinos feel on their backs from day to day living.[61] Attempts at "sanitizing" racial profiling when facing constitutional review, do little eliminate the need for the impact analysis endemic in Critical Race Theory.[62]

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[58] In 1989 the so-called "Central Park Jogger Case" captured the attention of the nation. A highly publicized case, it involved the alleged rape of a white woman by Black teenage males. As noted,

> "[r] ace, hysteria and hype have surrounded the jogger case from day one. For many whites, the near-fatal beating of the 30-year-old investment banker symbolized their fear of black crime." "Justice in Black and White, NEWSWEEK, August 13, 1990, p.36

[59] Former New York City Mayor Edward Koch has stated, "For many Whites, crime has a black face." NEW YORK TIMES, May 22, 1987. Regarding the 1989 alleged rape of a Central Park Jogger, financier Donald Trump publicly called for the death penalty. NEWSWEEK, Id.

[60] Professor David A. Harris details the shortcomings concerning the statistical justifications for racial profiling:

> As appealing as this argument [targeting Blacks on the basis of supposed higher crime involvement] may sound, it is fraught with problems because its underlying premise is dubious at best. Government statistics on drug offenses, which are the basis for the great majority of pretext traffic stops, tell us virtually nothing about the racial breakdown of those involved in drug crime.
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> ….
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> Lamberth's study in Maryland showed that among vehicles stopped and searched, the "hit rates – the percentage of vehicles searched in which drugs were found – were statistically indistinguishable for blacks and whites. [Citing to Report of John Lamberth of Temple University] David A. Harris, *The Stories, the Statistics and the Law: Why "Driving While Black" Matters*, 84 Minn. L. Rev. 265,276 (1999)

[61] A 1998-99 study conducted by the Attorney General of New York of 175,000 stop and frisk actions by New York police (including the Street Crime Unit – the unit responsible for the death of Amadou Diallo on February 4, 1999, after being shot 41 times) showed that African American and Latinos were targeted. African Americans made up 62.7 percent of all those stopped by the Street Crime Unit but are only 25.6 percent of the population.
The individual accounts of racial profiling encounters lend an often-chilling face to the statistical evidence. One such notable account that has formed the basis of subsequent legal action is that of Robert Wilkins, an African American in Maryland in 1992. Maryland State Police stopped Wilkins, a Harvard Law School graduate, while he was driving home from a funeral. Although the purported reason for the stop was speeding, the officers seized upon the situation to immediately ask for permission to search the vehicle. Wilkins refused permission and he and his family, were then subjected to a 30-minute detention while drug-sniffing dogs were used. After nothing was found Wilkins was then given a speeding ticket and he and his family was released.

Critical Race Theory is also, consequently, blamed, derided, and "outlawed" for making White Americans feel bad about consequences of racism that they did not intend and in their minds did not cause. Once again, this concept of responsibility or the lack thereof is linked to a definition of racism that is dependent on being only operational in the presence of active and personalized hatred based on race. The systemic racism, which is much of the focus of CRT, looks to what some would call a "post-civil rights" re-branding of the traditional concept.

Eduardo Bonilla-Silva[63] describes this new racism as "color-blind racism."[64] Professor Bonilla-Silva further refines 21st century racism in the context of structures, as opposed to overt animus:

In a subsequent class action civil suit, it was learned through discovery that Maryland police were directed, through written memorandum, to look for drug couriers described as being "predominantly black males and black females". Despite an agreed settlement in the Wilkins case under which the department agreed not only to pay damages but also to monitor the race and ethnicity associated with traffic stops, the Maryland State Police were again sued for a continuing pattern of racial profiling.
The Wilkins case brings home a key aspect of the history of racial profiling. There has been since the beginning of the association of presumed social science to race based norms, an alleged linkage between race and drug trafficking. The widely held belief that drug trafficking and usage is significantly and proportionally greater among African Americans and Latinos

[62] In *Whren v. United States*, 517 U.S. 806 (1996) The Court sought to justify the targeting of persons because of race as consistent with the Fourth Amendment, if a "reasonable police officer" objectively would have found probable cause for a stop/arrest on a non-race-related basis. The dismay of such avoidance of legal responsibility for race motivation conduct is not lost on CRT and apparently did not escape the notice of Justice Sotomayor in her dissent in *Utah v. Strieff*, 136 S.Ct. 2056 (2016)

> Although many Americans have been stopped for speeding or jaywalking, few may realize how degrading a stop can be when the officer is looking for more. This Court has allowed an officer to stop you for whatever reason he wants—so long as he can point to a pretextual justification after the fact*. Whren v. United States*, […]. That justification must provide specific reasons why the officer suspected you were breaking the law, Terry, […]but it may factor in your ethnicity, *United States v. Brignoni–Ponce*, […]where you live*, Adams v. Williams*, 407 U.S. 143(1972), what you were wearing, United States v. Sokolow, 490 U.S. 1, 4–5,(1989), and how you behaved, Illinois v. Wardlow, 528 U.S. 119, 124–125(2000). The officer does not even need to know which law you might have broken so long as he can later point to any possible infraction—even one that is minor, unrelated, or ambiguous*. Devenpeck v. Alford*, 543 U.S. 146, 154–155(2004); *Heien v. North Carolina*, 574 U.S. 54, (2014)."
>
> "By legitimizing the conduct that produces this double consciousness, this case tells everyone, white and black, guilty and innocent, that an officer can verify your legal status at any time. It says that your body is subject to invasion while courts excuse the violation of your rights. It implies that you are not a citizen of a democracy but the subject of a carceral state, just waiting to be cataloged."

[63] Professor of sociology, Duke University. Recipient of the American Sociological Association's Cox-Frazier Award.
[64]Nowadays, except for members of white supremacist organizations, few whites in the United States claim to be "racist." Most whites assert they "don't see any color, just people"; that although the ugly face of discrimination is still with us, it is no longer the central factor determining minorities' life chances; and, finally, that, like Dr. Martin Luther King Jr., they aspire to live in a society where "people are judged by the content of their character, not by the color of their skin." More poignantly, most whites insist that minorities (especially blacks) are the ones responsible for whatever "race problem" we have in this country. They publicly denounce blacks for "playing the race card," for demanding the maintenance of unnecessary and divisive race-based programs, such as affirmative action, and for crying "racism" whenever they are criticized by whites.3 Most whites believe that if blacks and

> I regard racism as a structure, that is, as a network of social relations at social, political, economic, and ideological levels that shapes the life chances of the various races. What social scientists define as racism is conceptualized in this framework as racial ideology. Racism (racial ideology) helps to glue and, at the same time, organize the nature and character of race relations in a society. From this vantage point, rather than arguing about whether the significance of race has declined, increased, or not changed at all, the issue at hand is assessing if a transformation has occurred in the racial structure of the United States. It is my contention that despite the profound changes that occurred in the 1960s, a new racial structure —the new racism for short—is operating, which accounts for the persistence of racial inequality.[65]

Critical Race Theory is also attacked and demonized as "unamerican". Former President Donald Trump, during the Presidential campaign debate declared CRT unamerican (while the "Proud Boys" apparently are the essence of Americanism).[66] Support for this contention purportedly comes from statements from CRT scholars which allegedly question the racial neutrality of historic Constitutional interpretation and the history of application of egalitarian principles when it comes to race in America.[67] However, such criticism fails to account for several things.

One, racism and the problems caused by racism, are not simply political or issues of legal analysis. Bell's essential premise in AND WE ARE NOT SAVED is that traditional legal analysis has not by itself brought about transformative change. Recognizing this is not a declaration that legal doctrine and American jurisprudence is wrong but, rather, that alone it is inadequate. Why would seeing the need for more substantive action with more tangible results be unamerican? The United States Constitution has been amended twenty-seven times.

Two, if it is unamerican to point out that the history of the constitution and American law in general has not been race neutral, then all understanding of American history, inclusive of slavery and Jim Crow must likewise be dismissed as unamerican. This felt need to re-write and sanitize American history explains much of the ire that has been expressed concerning matters such as the 1619 Project – a favorite target of CRT haters.[68]

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other minorities would just stop thinking about the past, work hard, and complain less (particularly about racial discrimination), then Americans of all hues could "all get along"

…

[Color-Blind Racism] acquired cohesiveness and dominance in the late 1960s, explains contemporary racial inequality as the outcome of nonracial dynamics. Whereas Jim Crow racism explained blacks' social standing as the result of their biological and moral inferiority, color-blind racism avoids such facile arguments. Instead, whites rationalize minorities' contemporary status as the product of market dynamics, naturally occurring phenomena, and blacks' imputed cultural limitations. For instance, whites can attribute Latinos' high poverty rate to a relaxed work ethic ("the Hispanics are manana, manana, manana —tomorrow, tomorrow, tomorrow") or residential segregation as the result of natural tendencies among groups'

Eduardo Bonilla-Silva, RACISM WITHOUT RACISTS,1-2, Fifth Ed. Rowman & Littlefield 2018 [footnotes omitted]

[65] *Id*. at 18

[66] Victor Ray, *Trump calls critical race theory 'un-American.' Let's review*, THE WASHINGTON POST, October 2, 2020.

[67] See, Samuel Kronon, Nate Hochman *Is Critical Race Theory un-American?* 31 RELIGION & LIBERTY, no. 1 (2021)

[68] The 1619 Project is a journalistic endeavor of the New York Times, and is described as

Three, "unamerican" was the same label that was put on Dr. Martin Luther King and Rosa Parks.[69]

> "In 1963, most Americans disapproved of the [the march on Washington], many congressmen saw it as potentially seditious, and law enforcement from local police to the FBI monitored it intensively (under code name Operation Steep Hill). Indeed, it was after King's speech at the March on Washington that the FBI—with President Kennedy's approval—decided to increase their monitoring of the civil rights leader. With the FBI describing King as "demagogic" and "the most dangerous . . . to the Nation . . . from the standpoint . . . of national security," Attorney General Robert Kennedy signed off on intrusive surveillance of his living quarters, offices, phones and hotel rooms, as well as those of his associates.'[70]

Accusations of Martin Luther King, Rosa Parks and other now-revered champions of civil rights as being traitors manifested itself not only in public opinion polls but in governmental targeting.[71] At one point, Dr. King, following a speech in Michigan, had been called a traitor so many times that he finally said "We're going to have a question and answer period, and… if you think I'm a traitor, then you'll have an opportunity to ask me about my traitorness".[72]

The other "shoe", of course, to the accusation of traitor is "if you hate your country, you should leave it". That status quo rallying cry has been hurled at every political/social move throughout the history of this country.[73]

Closely aligned with the accusation of traitor is the almost equally maligning epithet of labeling Critical Race proponents as Marxist. There is a strong temptation to dismiss this denouncement as pseudo- "red baiting" but considering that such assertions sometimes come even from those

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> "[A]n ongoing initiative from The New York Times Magazine that began in August 2019, the 400th anniversary of the beginning of American slavery. It aims to reframe the country's history by placing the consequences of slavery and the contributions of black Americans at the very center of our national narrative.
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> See, Nikole Hannah-Jones, THE 1619 PROJECT: A NEW ORIGIN STORY, One World (2021)

The Project has been criticized by some because of its suggestion of the prominence that slavery played in the American revolution. Yet, a number of historians have pointed to the economic importance of maintaining slavery, already outlawed in England, to the colonial future. See, for example, Phillip Goodrich, SOMERSETT: BENJAMIN FRANKLIN AND THE MASTERMINDING OF AMERICAN INDEPENDENCE, philgoodrichauthor.com (2020)

[69] See, Jeanne Theoharis, A MORE BEAUTIFUL AND TERRIBLE HISTORY: THE USES AD MISUSES OF CIVIL RIGHTS HISTORY, Beacon Press,2018

[70] Jeanne Theoharis, *Don't Forget That Martin Luther King Jr. Was Once Denounced as an Extremist*, TIME MAGAZINE, January 12, 2018

[71] Supra, note 69 at 173 - 186.

[72] King, "The Other America" Speech at Grosse Pointe High School, March 14, 1968

[73] ""It's America, you got no right to deceive it / It's the best there is, you'd better believe it / Good men gave their lives so we could live to see it / It's America, love it or leave it."
"It's America" by Jimmie Helms
It should be remembered here former President Donald Trump's July 14, 2019, infamous tweet to several Progressive Democrat legislators of color that "Why don't they go back and help fix the totally broken and crime infested places from which they came."

who profess to be objective and even supportive of the right to teach Critical Race Theory, a closer examination of this claim is warranted.

Beyond the demagoguery from the political supporters of Anti- CRT laws, some assert analysis of CRT theory as essentially embracing Marxism. Such assertions are based on a profound misreading of Critical Race Theory.

The error comes largely from tracing a path to CRT that winds through Critical Legal Studies.[74] As mentioned earlier, Critical Legal Studies from its inception posited that law and social bias intertwined to the economic disadvantage of the underprivileged so that law works for the betterment of the wealthy.[75] This demarcation based on wealth creates, in the view of CLS a permanent underclass that will persist without deconstruction of current legal norms. This theory is derived primarily from the works of scholars such as Roberto Mangabeira Unger, Robert W. Gordon, and Duncan Kennedy[76]and expands upon the deconstructionist theories of Jacques Derrida[77], Michel Foucault[78] and others.

Critical Legal Studies while perhaps influenced by "Marxist ideas" was never Marxist doctrine.[79] Its kinship to Marxism lies almost exclusively in its "Legal Realist" position that while law claims to have as its central value the protection of societal interest, it in actuality protects and serves the interest of the wealthy to the detriment of the non-wealthy. This protection of wealth over the interest of others, is so ingrained in current legal structure as to be immutable. Thus, the conflict is between the "oppressed and the "oppressor". In the face of such permanence change cannot happen without "deconstruction" of systems *ala* Derrida.

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[74] See, Abigail B. Balkan, Enakshi Dua, THEORIZING ANTI-RACISM: LINKAGES IN MARXISM AND CRITICAL RACE THEORIES, University of Toronto Press, 2014

[75] Supra, note 25.

[76] See, Duncan Kennedy and Karl E. Klare, "A Bibliography of Critical Legal Studies," 94 Yale L.J. 461 (1984)

[77] Derrida, Jacques; Spivak, Gayatri Chakravorty (1997). OF GRAMMATOLOGY. Baltimore: Johns Hopkins University Press.1997

[78] Foucault, Michel; Howard, Richard; Cooper, David, MADNESS AND CIVILIZATION: A HISTORY OF INSANITY IN THE AGE OF REASON (Reprint ed.). London: Routledge (2001)

[79] Rob Hunter*, Critical Legal Studies and Marx's Critique: A Reappraisal*, 31 YALE J.L. & HUMAN. 389 (2021)

> The Critical Legal Studies (CLS) movement was not Marxist. In the 1970s and 1980s, participants in the first wave of the movement criticized legal liberalism from a variety of radical and anti-establishment positions. Many participants claimed the mantle of the Legal Realists or acknowledged them as an influence. They presented their task as the demystification and destabilization of legal liberalism. However, despite notable scholarship (and a certain amount of notoriety), by the mid-1990s no less of a critical luminary than Duncan Kennedy had pronounced the movement moribund. CLS included figures who were sympathetic to or considered themselves Marxists, but their influence and their engagement with Marx ebbed with the changing trajectory and fortunes of the movement. Other figures--including some of the most prominent ones, such as Roberto Mangabeira Unger--rejected Marxism as an untenably monocausal, teleological, and structurally rigid theory of society. Id. at 390-391 (footnotes omitted)

What strikes many as "Marxist" is the idea of legal systems driven by economic "class". At the center/starting point of any Marxist analysis is economically defined "class".[80] However, not all conceptualization of social/political division in American society is economic class based.

CLS, like Marxism, divides the oppressed and the oppressor along economic class lines. However, Critical Race Theory does not. It is this very fundamental conception that principally separates CRT from CLS. While Critical Race Theory often describes oppression in terms of race and finds such oppression division to be persistent to the point of near permanency, CRT does not equate or express such division in terms of economic class. A major concern of CRT scholars has been that Marxist class division does not properly address the consequences of systematic racism that impact community of color regardless of class. An example of the failure of economic class division as the determinant of racial oppression is police policies of racial profiling. The use of race as a determinant of probable cause cannot be economically class defined. As indicated in Harris's study, discussed earlier, the phenomena of "Driving While Black", statistical data supports the conclusion that African Americans suffer race-based invasions of privacy regardless of economic status.

The linking of Critical Race Theory to Marxism appears to be as much a political ploy as it is the product of any theoretic analysis. Few things arouse American political fear like "red-baiting".[81] The political mileage gained by "Red Scare" tactics has not escaped the notice of political enemies. Christopher F. Rufo[82], one of the leaders of the anti-critical race theory movement has said:

> "The goal is to have the public read something crazy in the newspaper and immediately think 'critical race theory.' We have decodified the term and will recodify it to annex the entire range of cultural constructions that are unpopular with Americans."[83]

A successful linkage of CRT to Marxism requires an extension of logic that postulates that if both concepts are based on the permanency of division between oppressed and oppressor then both concepts must equal each other. This faulty syllogism ignores the uniqueness of racism as a source of oppression totally distinct from economic class. It also requires, in its trip through CLS, an attenuation[84] that ignores why Derrick Bell and others divorced themselves from Critical Legal Theory in 1989.[85]

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[80] The Communist Manifesto begins "[T]he history of all hitherto existing society is the history of class struggles", Karl Marx, Friedrich Engels, THE COMMUNIST MANIFESTO: 1888 TRANSLATED EDITION (THE POLITICAL CLASSIC OF KARL MARX AND FRIEDRICH ENGELS), Booklover's Library Classics (2022)

[81] See, Shannon Prince, *Marxism is the new false flag to plant upon critical race theory*, THE HILL, November 4, 2021, https://thehill.com/opinion/education/580081-marxism-is-the-new-false-flag-to-plant-upon-critical-race-theory/

[82] Christopher F. Rufo is a senior fellow and director of the initiative on critical race theory at Manhattan Institute, https://www.manhattan-institute.org/expert/christopher-f-rufo

[83] Supra, note 81.

[84] We recognize attenuation as a constitutional analysis doctrine. See, *Wong Sun v. United States*, 371 U.S. 471 (1963), There is no reason not to do the same here. The connection of Marxism to CRT is too strained to

There is yet another disturbing aspect of the Marxism accusation. There is an implication that Legal Scholars of Color's theories are derivative of European dogma and not to be credited to the unique history and perspective of people of color. Sadly, such dismissive treatment is not unprecedented.

Franz Fanon was famous as a psychoanalyst and social philosopher and was known for his writings on behalf of the national liberation of colonial peoples. His critiques influenced subsequent generations of thinkers and activists. His *A Dying Colonialism*[86], *Black Skin, White Masks*[87], and *Wretched of the Earth*[88], is considered canon for his breakthrough analysis of race and colonialism. He perceived colonialism as a form of domination whose necessary goal for success was the reordering of the world of people of color. Yet his writing was often linked to Marxism.[89] However, Fanon, like the later CRT scholars, writing went beyond Marxist class-based theory to speak with his own voice drawn from his observations of anti-colonial struggles of Africans, Vietnamese and Algerians. Though his concepts shared some of the principles of socialism he never viewed himself as a Marxist.[90]

Historically, attempts at painting intellectuals of color with the brush of Marxism or even communism, was often at odds even with Black intellectuals who explored such ideology but ultimately rejected its application to the African American experience.[91]

Dr. Martin Luther King Jr. was infamously accused of being a communist by the FBI in an effort to discredit and minimize his impact on civil rights.[92] Those accusations did not stop with J. Edgar Hoover and have as recently as the presidency of Donald J. Trump, been reissued.[93]

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reasonably put the appellation of the former on the latter – unless you are already predisposed to do so -like the adage that describes predisposed vision as "if you are a hammer then everything appears to be a nail."

[85]On July 8, 1989, more than twenty scholars "who were interested in defining and elaborating on the lived reality of race, and who were open to the aspiration of developing theory" gathered together at a workshop in Madison, Wisconsin. The 1989 workshop, which was spearheaded by Kimberle Crenshaw and organized by her, Neil Gotanda, and Stephanie Phillips, also included as its participants Anita Allen, Taunya Banks, Derrick Bell, Kevin Brown, Paulette Caldwell, John Calmore, Harlon Dalton, Richard Delgado, Linda Greene, Trina Grillo, Isabelle Gunning, Angela Harris, Mari Matsuda, Teresa Miller, Philip T. Nash, Elizabeth Patterson, Benita Ramsey, Robert Suggs, Kendall Thomas, and Patricia Williams. Angela Onwuachi-Willig, *Celebrating Critical Race Theory At 20*, 94 IOWA L. REV. 1497 (2009)

[86] Grove Press, 1965

[87] Grove Press, 1952

[88]Grove Press, 1968

[89] Dennis Forsythe, *Frantz Fanon -- The Marx of the Third World*, 34 PHYLON 160 (1973)

[90] Ken Olende*, Fanon, Marx and Black Liberation,* REVIEW OF AFRICAN POLITICAL ECONOMY (2019) https://roape.net/2019/10/15/fanon-marx-and-black-liberation/

[91] See, Richard Wright, *I Tried to Be a Communist,* THE ATLANTIC, August 1944

> "I felt that Communists could not possibly have a sincere interest in Negroes. I was cynical and I would rather have heard a white man say that he hated Negroes, which I could have readily believed, than to have heard him say that he respected Negroes, which would have made me doubt him."

[92] Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities, THE FBI, COINTELPRO, AND MARTIN LUTHER KING, JR.: FINAL REPORT OF THE SELECT COMMITTEE TO STUDY, GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, 1976

So then, what to make of the demonization? Proponents of the Anti- CRT laws have labeled Critical Race Theory as the "evil", although as discussed below, the intent and impact of these attempts go far beyond the teaching of CRT. The assertion that Critical Race Theory is somehow connected to accusations of racism-by-birth[94], is not only a misdirect but not justified by CRT exploration of the significance that race has played in the social and political development of law. As Professor Patricia J. Williams notes:

> It evacuates the meaning of critical race theory as an academic discussion, one that began decades ago in law schools. This definitional theft treats the mere discussion of race as a disease and a poison. It lifts the topic of race from the contentious to the deadly..[95]

As Williams notes, the villainization of CRT is largely an attack on, and a play to, emotions. On the one hand, the attack purports that CRT wants you to "feel bad" about racism (as if being made to feel bad about racism is a wrong thing), on the other hand, the attackers want to appeal to a moral, emotional outrage personified by images of threatening "militants".[96]

The misunderstandings about Critical Race Theory make it an easy target. But even more significantly, using the effigy of CRT disguises that the most significant and dangerous aspects of these efforts that the attack is on much more than an academic theory.

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[93]Kristine Phillips*, In the latest JFK files: The FBI's ugly analysis on Martin Luther King Jr., filled with falsehoods*, THE WASHINGTON POST, November 4, 2017

[94] Identical language in both the Trump Executive Order and legislation such as HB7 prohibits the teaching of "Divisive concepts" meaning concepts that (1) one race or sex is inherently superior to another race or sex; (2) that the United States is fundamentally racist or sexist; (3) an individual, by virtue of his or her race or sex, is inherently racist, sexist, or oppressive. *Supra, Note* 47. Without much support it is claimed that this type of "biological determinism" flows from Critical Race Theory and divide America.

> "Our Founding documents rejected these racialized views of America, which were soundly defeated on the blood-stained battlefields of the Civil War. Yet they are now being repackaged and sold as cutting-edge insights. They are designed to divide us and to prevent us from uniting as one people in pursuit of one common destiny for our great country" *Id. at note* 47.

[95] Patricia J. Williams, *How Not to Talk About Race,* THE NATION, October 18, 2021

[96] "[C]ritical race theory has become: an effigy. … It is a million Willie Hortons dressed up as teachers hired to feast on the brains of kindergartners, killing their innocence". Williams, *id*.

Part III – Trying to Silence the Unique Voice

For there they that carried us away captive required of us a song; and they that wasted us required of us mirth, saying, Sing us one of the songs of Zion…. - Psalms 137

" to remember what America needed to remember, not just what it wanted to recall…"[97]

African Americans history is a perspective for singing a song of experience and assessment of societal, political and legal reality that speaks to context without the limits of a restricted framework that either ignores of seeks to obscure the experience of slavery and racial suffering. It is not necessarily a happy song; nor an expected one. It is impossible to talk about racial justice and transformative change if discussions about the consequences of race and legal policy as both applied in the past and operational today are not considered.

The legislative enactments under consideration here are more than an attack on Critical Race Theory. They are attempts to limit, obliterate and sanitize the experiences of people of color who are at the "bottom of the well"[98] because such experiences are unhappy and inconsistent with a" Post-Racial" perception that values to form of egalitarianism over the substance day to day reality. The results of racism are not eliminated by simply declaring their non-existence.

The thrust of Anti- CRT laws is not just to attack Critical Race Theory or create a colorblind society by decree, but to go beyond such steps to punish anyone from learning that systemic racism exists and to prohibit consideration of what can be done to end it. It is an attack on, and an attempt to silence the voice of communities of color in their song of experienced injustice. The silencing of the narrative of people of color is destructive of transformative change.

The assault of efforts like the legislation in question here is represented by the basic concept enunciated in the Trump executive order, which prohibit the teaching of what it calls, divisive concepts.

> "Divisive concepts" means the concepts that (1) one race or sex is inherently superior to another race or sex; (2) the United States is fundamentally racist or sexist; (3) an individual, by virtue of his or her race or sex, is inherently racist, sexist, or oppressive, whether consciously or unconsciously.
>
> (4) an individual should be discriminated against or receive adverse treatment solely or partly because of his or her race or sex; (5) members of one race or sex cannot and should not attempt to treat others without respect to race or sex; (6) an individual's moral

[97] Lonnie G. Bunch III, A FOOL'S ERRAND: CREATING THE NATIONAL MUSEUM OF AFRICAN AMERICAN HISTORY AND CULTURE IN THE AGE OF BUSH, OBAMA, AND TRUMP, p. 5, Smithsonian Books, 2019

[98] *See*, Derrick Bell. FACES AT THE BOTTOM OF THE WELL, New York, NY: Basic Books, 2018

> character is necessarily determined by his or her race or sex; (7) an individual, by virtue of his or her race or sex, bears responsibility for actions committed in the past by other members of the same race or sex; (8) any individual should feel discomfort, guilt, anguish, or any other form of psychological distress on account of his or her race or sex; or (9) meritocracy or traits such as a hard work ethic are racist or sexist, or were created by a particular race to oppress another race. The term "divisive concepts" also includes any other form of race or sex stereotyping or any other form of race or sex scapegoating.[99]

While this language, common in virtually all the legislative attempts, appears to the surface world to be reflective of egalitarian principles purportedly basic to American justice, its actual subsurface impact is much more chthonic. By proscribing promotion of the idea that unconscious racism, the story cannot be told how the impact of supposed race-neutral laws and legal principles can have a profound racially disparate impact. While such "impact analysis" is a central tenet of Critical Race Theory, as discussed earlier, its significance goes beyond CRT and is central to the ability of Black and Brown people to tell their story through narrative, and by doing so bring about change.

Narrative is the tool[100] by which marginalized people can express the impact of law on their daily lives.[101] By its nature, narrative promotes perspectives concerning the existence of racism throughout society, including the actions of individuals whose perspectives on race come from their own racial background and history. The existence of such racially oppressive perspectives, particularly when they are not the product of intentional conviction or action, can often only be

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[99] Executive Order on Combating Race and Sex Stereotyping, supra, note 50. It also is reflected in the oppressive language also contained in the order that would punish anyone for making another "feel discomfort, guilt, anguish, or any other form of psychological distress on account of his or her race or sex," Sec.2 (a)(8). The concept that anyone should be stifled in talking about racism because it causes feelings of discomfort is reminiscent of the song from THE WIZ:

> "*Now when you talking to me*
> *Don't be crying the blues*
> *'Cause don't nobody bring me*
> *No bad news*
> *You can verbalize and vocalize*
> *But just don't bring me the clues*"
> "No Bad News", The Wiz: The Super Soul Musical "Wonderful Wizard of Oz" music and lyrics by Charlie Smalls (1974)

[100] While narrative "storytelling" is characteristic of Critical Race Theory, See, *Storytelling, Counter-storytelling, and "Naming One's Own Reality*", CRITICAL RACE THEORY: THE CUTTING EDGE (Richard Delgado ed.), Temple University Press, 1995 at p. 37, its use goes far beyond, and is not limited to, CRT. See, for example, Roberta Rosenthal Kwall, "*Author-Stories:" Narrative's Implications For Moral Rights And Copyright's Joint Authorship Doctrine* 75 S. CAL L. REV. 1 (2001), Lori D. Johnson, Melissa Love Koenig, *Walk The Line: Aristotle And The Ethics Of Narrative*, 20 NEV. L. J. 1037 (2020).

[101] See, David O. Friedrichs, Narrative Jurisprudence and Other Heresies: Legal Education at the Margin, NARRATIVE AND THE LEGAL DISCOURSE (Deborah Charles Publications ed., 1991)

exposed through the narrative that would be vilified as a "divisive concept".[102] Narratives rather than being divisive, enhance our understanding of how supposedly neutral standards work and what effect such standards have on communities.[103]

Silencing the narrative voice because it exposes systemic racism, is a silencing of people who otherwise do not have a voice that can be heard and be an effective counter-narrative against a systemically racist official story.[104] Illustrative of this is the importance of the "counter-story narrative" in combating race-infused "stop and frisk".[105]

In 1967 the Black community of Akron, Ohio experienced, as did many communities, police interdiction with African Americans by way of on the street confrontations and stops often followed by a search.[106] Despite the concerns raised by the NAACP Legal Defense Fund in its *Amicus* brief[107], the United States Supreme Court in *Terry v. Ohio*[108] determined that where police observe unusual conduct which the officer believes leads him reasonably to conclude that criminal activity may be afoot, the officer may stop the individual and, if further, the officer reasonably believes that person with whom he is dealing may be armed and presently dangerous;, the officer is entitled to conduct carefully limited search of outer clothing in attempt to discover weapons which might be used to assault the officer. In so deciding, the Court does not resolve the question of the appropriateness of such stops if the officer's racial perspective of the individual played a role in the stop or the conclusion of danger to the officer or others.

More than two decades later the issue is raised again, and again unanswered, in *Illinois v. Wardlow.*[109] In *Warlow* a young Black man fled upon seeing police officers patrolling the neighborhood. Using his "flight" as a basis for reasonable suspicion, the police chased and apprehended him, and a subsequent frisk revealed a firearm. The police narrative, that a person fleeing the police presents an objective basis for reasonable suspicion, while appearing race-neutral in fact disguises the fact that the counter-narrative of the African Community regarding reasonable response to the appearance of police is very different when the narrative of a young African American is considered. As noted by the amicus brief of the Legal Defense Fund, in this case, the prosecutorial narrative that when citizens face unwanted police attention, the innocent

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[102] "Stories can change the legal status quo by challenging its assumptions and creating a new way of looking at the world .... [S]tories demonstrate that standards that seem neutral in the abstract are rarely so in practice. Stories can build bridges across gaps of race, class, gender, sexual orientation, and other differences. Circulating the stories and perspectives of the "other" can open the eyes of the majority to those perspectives. They can also make possible coalitions across oppressed groups and social change. Personal experience almost always makes a concept more powerful than abstractions" Binny Miller, *Telling Stories About Cases and Clients: The Ethics of Narrative,* 14 GEO. J. LEGAL ETHICS 1, 20 (2000)

[103] Jane B. Baron, *Resistance to Stories*, 67 S. Cal.L. Rev. 255,259 (1994)

[104] Baron notes: "While the connection between storytelling and power is significant for all lawyers (indeed, for all people), it has particular significance for those who lack power or who represent those who do", Baron, Id. at 266

[105] See, Nicole Smith Futrell, *Vulnerable, Not Voiceless: Outsider Narrative In Advocacy Against Discriminatory Policing*, 93 N.C. L. Rev. 1597, 1617-1633 (2014)

[106] *Terry v. Ohio*, 392 U.S. 1 (19868) at note 3

[107] *Terry v. Ohio*, Brief for the N.A.A.C.P. Legal Defense and Educational Fund, Inc., as Amicus Curiae, 1967 WL 113672

[108] *Supra,* note 106.

[109] 528 U.S. 119 (2000)

walk away but the guilty flee,[110] is at odds with the Black community counter-narrative that minority citizens fear law enforcement officers because of systemic harassment and abuse. Nonetheless, the Court appears deaf to this voice and concludes that fleeing may reasonably be interpreted from the cultural perspective of police to indicate suspicion that criminal activity "is afoot" and that a stop consistent with the Fourth Amendment may be made.

The voice and narrative of communities of color as to police stops and frisk that were not only unreasonable in the eyes of those communities but largely conducted in complete disregard to the Fourth Amendment parameters of *Terry*, have not remained silent. Systemic racism that paints a suspicion target on Black and Brown Americans solely because of race, became a narrative loudly proclaimed as part of the infamous "Stop and Frisk "initiative of New York City.

During the period of New York City's aggressive "stop and frisk" initiative (2002-2012), more than 4.7 million were subjected to stops by the police. On average, more than 85 percent of these stops were of innocent people producing no criminal charges. About 85 percent of those stopped were black or brown.[111]

In *Floyd* the district court issued a 127 page opinion with over 780 footnotes, holding that regarding the constitutional challenge to the New York "Stop and Frisk " program, plaintiffs' expert were more reliable than the City's experts; officers violated plaintiffs' Fourth and Fourteenth Amendment rights in various encounters; New York City officials ignored obvious need for better supervision, monitoring, training, and discipline; City's practices under policy were sufficiently widespread that they had force of law; plaintiffs provided sufficient basis for inference of City's discriminatory intent in applying its policy; policy depended on express racial classifications; and City officials demonstrated deliberate indifference to equal protection violations.[112] The extraordinary length of the opinion and the depth of its factual findings, reflected the importance and detail of the narrative. In this civil class action, the Court heard the stories of the community as it recounted how race played a commanding role. As a result of narratives that included both named plaintiffs and members of the class the court moved beyond the issue of individual racism to address the impact of systemic racial injustice. The Court stated:

> This case is also not primarily about the nineteen individual stops that were the subject of testimony at trial. Rather, this case is about whether the City has a policy or custom of violating the Constitution by making unlawful stops and conducting unlawful frisks[113]

The significance of cases like *Floyd*, for purposes of this article, is that it graphically demonstrates what is to be loss if we cannot teach and learn about the role of systemic racism in our understanding of "race-neutral" doctrine. The development of constitutional doctrine in the area of criminal procedure, has been largely "sanitized" by removal of recognition of the voices

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[110] *Warlow v. Illinois*, Brief of the NAACP Legal Defense & Educational Fund, Inc. as Amicus Curiae in Support of Respondent, No. 98-1036 (1999)

[111] *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013)

[112] *Id*. at 664-667

[113] *Id*. at 556

of people of color raised in the era of reform. The consequence is a creation of a myth of color-blind procedural justice.[114]

Perpetuation of the myth was not necessarily accidental. In the landmark decision of *Miranda v. Arizona*[115], Chief Justice Warren's earlier draft of the Court's opinion specifically referenced that the problem of illegally obtained confessions involved "Negro defendants [who] were subjected physical brutality – beatings, hangings, whippings employed to extort confessions.[116] The final draft removed race-specific references, presumably to garner a majority vote.[117]

Racial justice was the "song" sung by those seeking transformative constitutional change, at least in the area of criminal procedure, but the response reflected by judicial decision, was mute or silent as to this cry. Yet the Supreme Court's first foray into due process oversight was a case of racial horror.[118] It also established the basic principles of right to counsel and effective assistance of counsel in a case that was intensely racial by nature.[119]. Likewise, modern principles of exclusion of illegally seized evidence in state convictions flowed from the racial context of *Mapp v. Ohio*.[120]

Can there truly be legal education if instructors are prohibited from teaching law's racial past and its racial present? It is hard to deny the currency of racial concern when it's considered that *Floyd* occurs over 80 years after *Brown* and *Powell*.

The challenge for both student and teacher is to understand that racism is not simply a problem of intent but is, in its most modern sense, a matter of consequence generated by perception. If crying out against racial false perceptions is outlawed for suggesting that we, as individual members of society, bear responsibility for and should feel "guilt, anguish, or other forms of psychological distress because of actions, in which the person played no part, committed in the past", then we as members of society are suppressed in our desire and ability to personally make transformative changes regarding those perceptions. The Court in *Floyd* was very distressed and felt societal guilt in the wholesale violation of Fourth Amendment rights of Black and Brown citizens convicted of any crime. The Court experienced psychological distress in learning about the hanging and torture of Arthur Ellington in *Brown.* A nation is anguished by the death of George Floyd.

Legal education has faced significant introspective, watershed moments at the end of the 20th Century and into the 21st as a result of the release of the *MacCrate Report*, and *Best Practices in*

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[114] LeRoy Pernell, *Racial Justice and Federal Habeas Corpus as Postconviction Relief from State Convictions*, 69 MERCER LAW REVIEW 453 at 459 (2018)

[115] 384 U.S. 436 (1966)

[116] Bernard Schwartz, SUPERCHIEF: EARL WARREN AND HIS SUPREME COURT – A JUDICIAL BIOGRAPHY, New York University Press; Unabridged edition (1983)

[117] See, Louis Michael Seidman, *Brown and Miranda*, 80 CAL. L. REV. 673, 751 n. 254

[118] In *Brown v. Mississippi* - 297 U.S. 278 (1936) the Supreme Court found for the first time that a state criminal conviction was to be overturned based on a denial of due process, where a Black was hung twice and beaten until he confessed. At trial the deputy who administer the battering freely admitted that he did so but said it "was not too much for a Negro" at 284.

[119] *Powell v. Alabama* ,287 U.S. 45 (1932)

[120] 367 U.S. 643 (1961)

Legal Education and the *Carnegie Report*[121] . All three publications have as their central focus the recognition of the need for legal education to better prepare law graduates for the actual practice. In this context, the reports understand legal education as preparing its students for a "helping" profession in which success is ultimately measured by the end- product of the value received as opposed to the abstraction of legal concepts as the final destination of success. [122] Yet the consumer-oriented curricula reform, characterized by enhanced experiential learning, ultimately only has true meaning when the end of justice and the actual needs of communities served are met.[123] As to the significance of race in meeting practical community needs, *the MacCrate Report* notes as to racial equality [t]he goal of equal opportunity within the profession is still a long way from realization."[124]While not specifically mentioning race, the *Best Practices* report states that law schools "are not producing enough graduates who provide access to justice."[125]

It is the Carnegie Report that perhaps is having the greatest (out of the three) impact on re-formulation of legal education. The Carnegie Foundation for the Advancement of Teaching was founded in 1905. It describes its mission is as being "committed to developing networks of ideas, individuals, and institutions to advance teaching and learning."[126] Unlike the *MacCrate* and *Best Practices* reports, the *Carnegie Report* fails to acknowledge racial disparities within the profession, nor did it mention the problem of access to justice for marginalized communities"[127]. At least one Canadian observer, looking at this study of 16 law schools, notes that in making law students "think like lawyers", the Carnegie Report found that law schools often suggest that:

> Issues such as the social needs or matters of justice involved in cases do get attention in some case-dialogue classrooms, but these issues are almost always treated as addenda. Being told repeatedly that such matters fall, as they do, outside the precise and orderly "legal landscape," students often conclude that they are secondary to what really counts for success in law school —and in legal practice. In their all-consuming first year,

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[121] In 1992 the American Bar Association's Task Force on Law Schools and the Profession issued the "McCrate Report", *ABA Section of Legal Educ. And Admissions to the Bar, Report on The Task Force on Law Schools and the Profession: Narrowing the Gap (1992)*. In 2007 the Clinical Leal Education Association published *Roy Stuckey et al., Best Practices for Legal Education: A Vision and a Road Map 1-5 (2007).* That same year the Carnegie Foundation published, Carnegie Foundation for the Advancement of Teaching, *Educating Lawyers: Preparation for the Profession of Law* [Hereinafter the Carnegie Report]. The Carnegie Report has been referred to as "the best work on the analysis and reform of legal education," William Sullivan et al., EDUCATING LAWYERS FOR THE PROFESSION OF LAW (2007).

[122] See, Michelle J. Anderson, *Legal Education Reform, Diversity, and Access to Justice,* 61 RUTGERS L. REV. 1011 (2009)

[123] Id.

[124] MacCrate Report, supra, note 118 at 27. The MacCrate Report goes on to indicate as an essential value that "a lawyer should be committed to . . . Striving to Rid the Profession of Bias Based on Race, Religion, Ethnic Origin, Gender, Sexual Orientation, Age or Disability, and to Rectify the Effects of These Biases" Id. at 216-17

[125] Roy Stuckey et al., Best Practices for Legal Education: A Vision and a Road Map, Supra, note 118 at 24.

[126] See, Doug Ferguson, *What Is the Carnegie Report and Why Does It Matter?* SLAW Magazine, May 21. 2014, https://www.slaw.ca/2014/05/21/what-is-the-carnegie-report-and-why-does-it-matter/

[127] Anderson, Supra, note 119, at 1022.

> students are told to set aside their desire for justice. They are warned not to let their moral concerns or compassion for the people in the cases they discuss cloud their legal analyses.[128]

The ability and opportunity of law faculty to speak to the underlying impact on, and consequences for, disadvantaged and marginalized communities of laws and legal policies is at the core of legal learning.[129] Suppression of that ability is the consequence of the restrictive laws under discussion here. If legal education is to involve more than the creation of "legal mechanics", then experiential learning must gear the lawyer to solve real problems for real people and not simply to attempt to comfort the distressed with nostrums of fair process.

The ability to teach the basic building blocks or "hornbook law" are effectively forbidden by a provision which outlaws the teaching that " [a] person, by virtue of his or her race, color, national origin, or sex should be discriminated against or receive adverse treatment to achieve diversity, equity, or inclusion."[130] While purportedly claiming to "protect" individuals from discrimination this is intended to and does proscribe teaching about affirmative actions and its value despite judicial recognition in basic constitutional law that such ameliorative tools are appropriate in order to combat the consequences of racial discrimination.

To suppress the teaching of affirmative action the laws in question must villainize affirmative action by separating the concept from its history, purpose, and most importantly prior judicial analysis. Miscast as a device that inflicts "adverse treatment" on another (*sub silentio* Caucasians), because of race, affirmative action has become the *cause celebre* for forces intent on rolling back civil rights progress.

In reality, affirmative action is a deep-rooted, remedial concept in American law. Its origins date back at least to General William Tecumseh Sherman's "Forty Acres ad a Mule" policy of 1865[131] which was aimed not at punishing whites but as a practical solution for the lack of resources suffered by the victims of slavery. Federal civil rights measures, ultimately leading to

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[128] Ferguson, Supra, note 126.

[129] Note American Bar Association, Interpretation 206-2 of Standard 206, Standards and Rule of Procedure for Approval of Law Schools:

> *In addition to providing full opportunities for the study of law and the entry into the legal profession by members of underrepresented groups, the enrollment of a diverse student body promotes cross-cultural understanding, helps break down racial, ethnic, and gender stereotypes, and enables students to better understand persons of different backgrounds. The forms of concrete action required by a law school to satisfy the obligations of this Standard are not specified. If consistent with applicable law, a law school may use race and ethnicity in its admissions process to promote diversity and inclusion. The determination of a law school's satisfaction of such obligations is based on the totality of the law school's actions and the results achieved. The commitment to providing full educational opportunities for members of underrepresented groups typically includes a special concern for determining the potential of these applicants through the admission process, special recruitment efforts, and programs that assist in meeting the academic and financial needs of many of these students and that create a favorable environment for students from underrepresented groups.*

[130] Supra, note 2.

[131] Anderson Bellegarde François, *The Brand of Inferiority: The Civil Rights Act Of 1875, White Supremacy, and Affirmative Action* 57 HOW. L.J. 573 (2014)

affirmative action, had roots also in Presidential attention from Franklin Delano Roosevelt in his Executive Order 8802, prohibiting discrimination regarding defense contracts[132] and later by Harry S. Truman in the form of Executive Order 9808, in 1945[133], issued following the brutal beating and blinding of Isaac Woodard, a decorated African American World War II veteran.[134] Presidential action, establishing affirmative action as a desired remedy for racial and gender injustice flowed consistently and across party lines from 1961 to 1979.[135]

Judicial endorsement of affirmative action as an appropriate remedy for past discrimination also has a long history. In the area of the workplace, in *United Steelworkers of America v. Weber*[136], the Supreme Court recognized that Title VII permitted voluntary, race-conscious affirmative action. There the Supreme Court considered the claims of white employees that collective bargaining agreement, approved by the relevant union, violated Title VII. The approach of the plaintiffs of reverse discrimination, was a tactic to be repeatedly used against affirmative action over the ensuring decades. Like the Anti-CRT statutes under discussion here, the attack asserted a "white victim" class that was never truly substantiated. The real victims were those persons of color who had suffered past discrimination as recognized by the Court. The Court specifically

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[132] See, Terry H. Anderson, THE PURSUIT OF FAIRNESS: A HISTORY OF AFFIRMATIVE ACTION Oxford University Press (2004)

[133] Executive Order 9808 established the President's Committee on Civil Rights.

[134] See, Richard Gergel, UNEXAMPLED COURAGE: THE BLINDING OF SGT. ISAAC WOODARD AND THE AWAKENING OF PRESIDENT HARRY S. TRUMAN AND JUDGE J. WATIES WARING, Sarah Crichton Books; 1st Edition (2019)

> On February 12, 1946, Woodard was on a Greyhound Lines bus traveling home after being. When the bus reached a rest stop just outside Augusta, Georgia. he asked the bus driver if there was time for him to use a restroom. The driver grudgingly acceded to the request after an argument. Woodard returned to his seat from the rest stop without incident, and the bus departed. The bus stopped in Batesburg (now Batesburg-Leesville, South Carolina), near Aiken. Though Woodard had caused no disruption (other than the earlier argument), the driver contacted the local police who forcibly removed Woodard from the bus. After demanding to see his discharge papers, a number of Batesburg policemen, including Deputy Shull, took Woodard to a nearby alleyway, where they beat him repeatedly with nightsticks. They then took Woodard to the town jail and arrested him for disorderly conduct, accusing him of drinking beer in the back of the bus with other soldiers. During the course of the night in jail, Shull beat and blinded Woodard, who later stated in court that he was beaten for saying "Yes" instead of "Yes, sir"
>
> What did happen with certainty is the next morning when the sun came up, Sergeant Isaac Woodard was blind for life. During the course of the night in jail, Shull beat and blinded Woodard, who later stated in court that he was beaten for saying "Yes" instead of "Yes, sir"

[135] 1961 - Executive Order 10925, issued by President Kennedy - Established the concept of affirmative action by mandating that projects financed with federal funds "take affirmative action" to ensure that hiring and employment practices are free of racial bias.
1965 – U.S. Executive Order 11246 and Executive Order 11375, issued by President Johnson - required that contractors take affirmative action to ensure that "protected class, underutilized applicants" are employed when available, and that employees are treated without negative discriminatory regard to their protected-class status.
1971 – Executive Order No. 11625, issued by President Nixon - clarified the Secretary of Commerce's authority to implement Federal policy in support of the minority business enterprise program, including affirmative action.
1979 – U.S. Executive Order 12138 – issued by President Carter - required government agencies to take affirmative action in support of women's business enterprises

[136] 443 U.S. 193 (1979)

concluded that the plan, rather than attempting to create a racial balance was, instead, aimed at a history of manifest racial imbalance.[137]

While *United Steelworkers of America v. Weber* addressed the validity of a voluntary, union negotiated, affirmative action plan, judicial remedies regarding involuntary imposition of affirmative action in the workplace were addressed in *Local 28, Sheet Metal Workers' International Ass 'n v. EEOC*[138] and *United States v. Paradise*[139].

In *Local 28* the union engaged for years in discriminatory practices that excluded non-White workers from union membership. The district court found the Local 28 guilty of racial discrimination in violation of Title VII. To remedy past discrimination The Court held that Title VII did not prohibit courts from ordering, in appropriate circumstances, affirmative race-conscious relief as a remedy for past discrimination[140].

In response to civil actions brought by the NAACP, court orders were entered against the Alabama Department of Public Safety regarding its discriminatory promotional scheme. In *Paradise,* a plurality opinion, the Court held that a court ordered affirmative action plan for promotions did not impose an "absolute bar" to white advancement, was narrowly drawn to include only specific ranks in the department. Further such a compulsory plan was "required in light of the Department's long and shameful record of delay and resistance".[141]

Even though the scrutiny to be applied regarding affirmative action plans and orders was raised in *Adarand Constructors, Inc. v. Pena*[142] to the strict scrutiny standard,[143] the Court has consistently recognized that affirmative action is a viable remedy – particularly in matters of discrimination in the workplace.

The issue of affirmative action in higher education has had a similar history, although public perception is that such is more tied to achieving diversity instead of remedying past discrimination. Such a perception is bolstered by the university arguments made in defense of affirmative action programs for admissions in *Regents of the University of California v. Bakke,*[144] *Grutter v. Bollinger,*[145] *Gratz v. Bollinger,*[146] *Fisher v. University of Texas (Fisher*

[137] Id. at 208
[138] 478 U.S. 421 (1986)
[139] 480 U.S. 149 (1987)
[140] Supra, note 138 at 444.
[141] Supra, note 139 at 185.
[142] 515 U.S. 200 (1995)
[143] Id. at 227.
[144] 438 U.S. 265 (1978) Upheld affirmative action, allowing race to be one of several factors in college admission policy.
[145] 539 U.S. 306 (2003) held that a student admissions process that favors "underrepresented minority groups" does not violate the Fourteenth Amendment's Equal Protection Clause so long as it takes into account other factors evaluated on an individual basis for every applicant.
[146] 539 U.S. 244 (2003) Although as to the undergraduate program , the University's point system's "predetermined point allocations" that awarded 20 points towards admission to underrepresented minorities was unconstitutional, in a majority opinion joined by four other justices, Justice Sandra Day O'Connor held that the Constitution "does

I)[147] *Schuette v. Coalition to Defend Affirmative Action*[148] and *Fisher v. University of Texas (Fisher II).*[149]

The Anti- CRT laws position that the teaching of affirmative action is to be outlawed because affirmative action somehow causes "a person, by virtue of his or her race, color, national origin, or sex [to] be discriminated against or receive adverse treatment to achieve diversity, equity, or inclusion" seeks to find support in these cases by alleging that Whites who are not admitted at a university/college level are victims of "reverse discrimination". Yet to date[150] the Court has not found that to be so. Rather, despite the limitations of strict scrutiny there is no prohibition on affirmative action as a judicial remedy.

The inability of many to see the use (and teaching) of affirmative action as remedial is caused in no small part by failure of "plaintiffs", in the form of universities and colleges, to develop a record of past discrimination on their own part. The higher education cases cited above were all based on voluntary affirmative action programs developed for diversity purposes with no voice of the victims of past discrimination by those same institutions being firmly established. Without the historic victims of racism being present and heard from it is much easier to claim that Whites are being unjustly sacrificed.

Professor Ralph Smith wrote about this following the *Bakke* decision:[151]

> The Court's reticence to approve without equivocation the affirmative action programs and policies before it may not be unrelated to one of the salient characteristics of litigation of the reverse discrimination genre-the absence of a real party in interest. In each of the suits, the parties to the litigation were an aggrieved white and the predominantly white institution which sponsored the challenged policy. Although consistent with the traditional two-party adversarial model, the alignment is seriously flawed as applied in this instance, since it excludes the minority beneficiaries of the program or policy being challenged from participation as a principal in the litigation.
>
> This exclusion is a matter of no small import. The minority beneficiaries have a tangible and significant stake in the outcome of the controversy. More importantly, they have an interest that is different in specie from that of the other litigants. Theirs is the only

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not prohibit the law school's narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body."

[147] 570 U.S. 297 (2013) voided the lower appellate court's ruling in favor of the University and remanded the case, holding that the lower court had not applied the standard of strict scrutiny.

[148] 572 U.S. 291 (2014) held that the Fourteenth Amendment's Equal Protection Clause does not prevent states from enacting bans on affirmative action in education.

[149] 579 U.S. ___ (2016) found that the University of Texas at Austin's undergraduate admissions policy survived strict scrutiny.

[150] It is recognized that as of the writing of this article the United States Supreme Court is scheduled to release a new opinion on affirmative action in higher education. See, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 980 F. 3d 157 (1st Cri. 2020) cert. granted, 142 S. Ct. 895 (2022)

[151] Ralph Smith, *Affirmative Action in Extremis: A Preliminary Diagnosis of the Symptoms and the Causes*, 26 WAYNE LAW REVIEW 1337 (1980)

> interest which is best served by placing into the record all the facts which could offer conceivable justification for the affirmative action effort.
>
> As could be expected, the plaintiff has no interest whatsoever in setting forth the facts which tend to undergird the very effort being challenged. What is often overlooked, however, is that the defendant institution also may have little incentive to reveal the full details of the situation which precipitated the affirmative action effort. In some instances, the institution simply may be indifferent to the outcome.[152]

What this ultimately speaks to is the importance of faculty, particularly faculty of color, to recognize or be that missing voice.[153] The Anti- CRT laws prevent student from hearing the perspective of real parties in interest if recognition of systemic racism history and the full nature of available remedies are taboo.

As can be gleaned from the above there is nothing outré about affirmative action as a remedy. It is canon. No self-respecting Constitutional Law or Civil Rights course can legitimately fail to include this topic and to note there is logic in supporting its value as has been enunciated by the courts, the legislatures, and the President of the United States.

The song of history and the voice of the marginalized should not be subject to silencing or structuring because they sound out inconvenient truths.

"Censorship reflects a society's lack of confidence in itself"

- Potter Stewart –

"'We do not destroy the heretic because he resists us. . . . We convert him, we capture his inner mind, we reshape him"

– George Orwell, 1984

The essence of a law professor's job is help train potential lawyers to be more than mechanics of the law and to instead develop critical analysis skills.[154] That is no less true for those who would teach about the significance of race in our legal systems. Part and parcel of that responsibility is to have the academic freedom to analyze and criticize legal systems. It is that freedom, to the

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[152] Id. at 1343 (footnote omitted)

[153] See also, Lawrence, *When the Defendants are Foxes Too: The Need for Intervention by Minorities in "Reverse Discrimination" Suits Like Bakke*, 34 GUILD PRAC. 1 (1976)

[154] Bruce Fein, former associate deputy attorney general United States Department of Justice, writes:

> The purpose of legal education and the profession of law is to advance justice — the end of government and of civil society, as James Madison, father of the Constitution, instructed in Federalist 51. As gifted Harvard Law School enrollees, that devotion to justice in lieu of power, wealth, or celebrity is imperative. The Bible instructs, "To whom much is given, much will be required."

Bruce Fein, HARVARD LAW RECORD, September 14, 2020, https://hlrecord.org/purpose-of-law-and-legal-education/

extent that it represents free expression, which is under attack from the Anti -CRT enactments. The attempt of the Anti- CRT laws to censor both content and viewpoint of those who would teach about the significance of race, has substantial First Amendment ramifications.

The United States Supreme Court has long recognized that First Amendment rights apply to school settings.[155]It's equally recognized that faculty in higher education also enjoy rights of freedom of speech.[156] The application of free speech and thought protection extends to matters of content and viewpoint.[157]

The thrust of the Anti- CRT laws is to forbid the teaching of subjects not approved by the state and to dictate the viewpoints that may be shared in courses that are taught in order to make such consistent with state-approved thought.

The focus of the Anti- CRT laws on Critical Race Theory, a doctrine largely exposed by professors and scholars of color, as well as its attack on views of history and political structures that represent *inter alia* the voice of communities of color critical of structural systems, represents the singling out for disfavor a class of individuals and the censorship of the views that they hold. Such identification and suppression of "unpopular" (as defined by government) views, runs directly afoul of long-protected First Amendment interest. In *Keyishian v. Board of Regents of University of State of N. Y.*[158] the Supreme Court found that punishment, by way of dismissal, of faculty members for refusing to sign a certificate that said they were not, nor had ever been communist[159] was violative of the First Amendment largely due to vagueness. The Court stated:

> When one must guess what conduct or utterance may lose him his position, one necessarily will 'steer far wider of the unlawful zone…. For '(t)he threat of sanctions may deter almost as potently as the actual application of sanctions. The danger of that chilling effect upon the exercise of vital First Amendment rights must be guarded against by sensitive tools which clearly inform teachers what is being proscribed.[160]

So too, the Anti- CRT laws impose unknowable standards and allow for unfettered enforcement discretion regarding prohibition of teaching that causes persons to "feel guilt, anguish, or other forms of psychological distress."[161]

In *Kevishian* the Court also noted that in the context of state intervention in the classroom:

> Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is

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[155] *Tinkers v. Des Moines Indep. Cmty Sch Dist*., 393 U.S. 503,506 (1969)

[156] See, *Meriwether v. Hartop*, 992 F. 3d 492, 503 (6th Cir. 2021):

> "the state may not act as though professors or students shed their constitutional rights to freedom of speech or expression"

[157] See, *Turner Broadcasting Sys., Inc. v. F.C.C*. 512 U.S. 622 (1994) and *Reed v. Town of Gilbert*, 576 U.S. 155 (2015)

[158]385 U.S. 589 (1967)

[159] As discussed earlier an intended but false epithet often hurled at Critical Race scholars.

[160] Supra, note 158 at 604 (citations omitted)

[161] Supra, note 2.

> therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.[162]

Against this First Amendment concern the Court have balanced a recognized role of state universities to determine, *substantively* what subjects must be taught.[163] However such a role does not of necessity allow the state to dictate what cannot be taught.[164]

Attempts by government to proscribe the content of speech because the government disagrees with the content of the speech is prohibited by established constitutional doctrine.[165] So too, when government attempts to censor speech because it disagrees with the viewpoint of the teacher, such is an even more "egregious form of content discrimination".[166] As example, consider the consequences of viewpoint discrimination as it pertains to the significance of race in the criminal justice system, when discussing pretrial release.

Advocating that a defendant's race may have as much to do with the terms and conditions of bail as prior record, nature of the charge and community ties, flies in the face of the accepted standards for pretrial release outline in *Stack v. Boyle*[167], Federal Criminal Rule 46[168] or its state procedural rule equivalent. Yet, data supports the proposition that race is nonetheless an overwhelming factor in our bail system.[169] The Anti- CRT laws would make teaching of this impermissible.

In *Rosenberger v. Rector and Visitors of University of Virginia*[170] the Court struck down the university's denial of funding to a university student organization which published newspaper with a Christian editorial viewpoint. In doing so the Court held that ideologically driven attempts to suppress a particular point of view are presumptively unconstitutional.[171]

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[162] Supra, note 158 at 603.

[163] *Widmar v. Vincent*, 454 U.S. 263 (1981). The Court determined that the university policy of excluding religious groups from the university's open forum policy whereby university facilities were generally available for activities of registered student groups was violative of First Amendment. Although recognizing a university interest in what is offered and who may teach subjects, such state action is subject to strict scrutiny.

[164] "The Constitution forbids a State to enforce certain exclusions from a forum generally open to the public, even if it was not required to create the forum in the first place." Id. at 267-268

[165] See, *Reed v. Town of Gilbert*, 576 U.S. 155 (2015)

[166] Id. at 168

[167] 342 U.S. 1 (1951)

[168] Rule 46, Federal rules of Criminal Procedure

> Release from Custody; Supervising Detention
>
> …
>
> (b) During Trial. A person released before trial continues on release during trial under the same terms and conditions. But the court may order different terms and conditions or terminate the release if necessary to ensure that the person will be present during trial or that the person's conduct will not obstruct the orderly and expeditious progress of the trial.

[169] Wendy Sawyer, *How race impacts who is detained pretrial*, PRISON POLICY INITIATIVE, https://www.prisonpolicy.org/blog/2019/10/09/pretrial_race/#:~:text=Most%20of%20these%20studies%20find,defendants%20compared%20to%20white%20defendants.

[170] 515 U.S. 819 (1995)

[171] Id. at 830. Earlier the court stated;

The language in *Rosenberge*r opens, in *dicta*, a concept that supporters of the Anti- CRT laws claim constitutionally justifies its attempts at censorship. The *Rosenberger* Court dealt specifically with an attempt to curb the expression of private citizens delivered in a public forum created by the state. In doing so it noted that while not being able to viewpoint discriminate against a private citizen, a state may restrict its own "state speech", under what the Court calls "different principles".[172] The suggestion of the application of different principles is indicative that a reading of "state speech" to mean complete authority to prohibit university faculty may be an overreach.

This sense of overreach is supported by the Court's language from an earlier opinion in *Hazelwood School District v. Kuhlmeier*.[173] In deciding that a school principal's decision to censor student articles in a school sponsored newspaper was permissible because the paper, in that instance was not a public forum and that the articles inappropriately invaded privacy rights of pregnant students, the Court noted that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are *reasonably related to legitimate pedagogical concerns".*[174] (emphasis added).

It is significant to note that *Hazelwood* in addition to linking censorship of a high school newspaper to the need for legitimate pedagogical concerns goes further to note that the university class may be different when it comes to stifling the views of professors.[175]

The concept that a state university professor's views are somehow "state controlled, state-university speech" has never been so determined by the United States Supreme Court.[176]

Perhaps the clearest word from the United States Supreme Court concerning the First Amendment protection of college/university faculty to teach in areas of expertise without government suppression, is that which is found in *Sweezy v. State of N.H. by Wyman*.[177]

In *Sweezy* a college professor was convicted of contempt for failing to answer questions from the New Hampshire Attorney General regarding *inter alia* allegedly subversive lectures made to a humanities class at the University of New Hampshire. The "McCarthy Era" New Hampshire Attorney General was empowered by the legislature to investigate subversive activity.

> "The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." Id. at 829

[172] Id. at 834

[173] 484 U.S. 260 (1988)

[174] Id. at 273

[175] Id. a note 7:

> "We need not now decide whether the same degree of deference is appropriate with respect to school-sponsored expressive activities at the college and university level."

[176] See, *Searcey v. Harris*, 888 F.2d 1314 (11th Cir. 1989). In *Searcey* the court

[177] 354 U.S. 234 (1957)

Specifically, Sweezy refused to answer a question as to whether he had told the class that socialism was inevitable in the United States[178]

Sweezy asserted a First Amendment objection to these questions. Following his conviction for contempt, Sweezy's case was reviewed by the New Hampshire Supreme Court which concluded:

> [T]he…right to lecture and the right to associate with others for a common purpose, be it political or otherwise, are individual liberties guaranteed to every citizen by the State and Federal Constitutions but are not absolute rights[179]

The United States Supreme Court disagreed with the New Hampshire court and concluded that Sweezy's fundamental right to lecture as a professor was protected and that, for reasons of Due Process, he could not be punished for refusing to answer chilling questions regarding the exercise of that right.[180]

Although part of a larger discussing on the relationship between the academic freedom and the first amendment,[181] an analysis of the *Sweezy* opinion shows a recognition of the necessary free speech protection for higher education faculty. As noted by Professor Robert C. Post:

> In these lectures Sweezy did not play the role of a citizen; he was not participating in public discourse. He was an expert communicating knowledge to his students and thereby to the public. It was his function as a university employee to communicate this knowledge. The state attorney general's interrogation threatened to suppress *both Sweezy's* communication of expert knowledge to the public *and* Sweezy's ability to function effectively in a state organization.[182]

The core concept of *Sweezy*, as expressed by Professor Post, should not be lost in its application to the Anti- CRT laws. The professor who teaches about the significance of race is communicating knowledge based on her or his expertise. Given the nature of experience that professors bring to the classroom such imparting of expertise creates a fundamentally different dynamic than exist with grade schoolteachers. Law professors in particular provide training in a terminal degree setting and educates students who, subject to the bar examination, will directly (in most instances) enter the profession and provide immediate professional assistance to the public.

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[178] Id. at 243. He was also asked 'Did you in this last lecture on March 22 or in any of the former lectures espouse the theory of dialectical materialisms?" Id.

[179]100 N.H. at page 113, 121 A.2d at pages 791, 792

[180] "The State Supreme Court thus conceded without extended discussion that petitioner's right to lecture and his right to associate with others were constitutionally *250 protected freedoms which had been abridged through this investigation" *Sweezy*, supra note 174 at 250.

[181] Although the United States Supreme Court has not specifically enumerated academic freedom as an individual right encompassed by the First Amendment, *Sweezy* makes a strong case for its constitutional importance. See Also, *Keyishian v. Board of Regents*, supra, note 158.

[182] Robert C. Post, DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM, Yale University Press 2012, p. 83

It is that same special relationship that largely undercuts the "state speech" argument that proponents of the Anti- CRT laws make in regard to the pronouncements of *Garcetti v. Ceballos.*[183]

Garcetti involved a deputy district attorney who was disciplined for writing a memorandum, in his official capacity, supportive of dismissal of criminal charges due to governmental misconduct. In refusing to recognize that a state employee, acting in his official capacity, speaks or writes pursuant to his or her duties, such persons are not speaking as private citizens for First Amendment purposes. State negative action "simply reflects the exercise of employer control over what the employer itself has commissioned or created."[184] This recognition of "state speech" is not unlimited. In language particularly relevant to this article, the Court indicated:

> "There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence. We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching."[185]

The role of state employees performing non-teaching duties is far different from professor and instructors in a higher education setting. This is particularly so where it is the very essence of academic teaching, particularly in law, to raise questions, explore both traditional and non-traditional concepts and to prepare graduates to be discerning architects of legal and societal change. Repeating the state "party" line does not create an advocate – but a bureaucrat instead. Lower courts that have considered the cautious limitations expressed by the *Garcetti* majority appear to agree.[186]

Implicit in the analysis of the application of the First Amendment to Professors – particularly Professors of color, laboring under the yoke of the Anti- CRT law is this unalienable truth. Silencing those who would speak to the significance of race is a silencing of expertise, experience and training of those who can best make a positive, transformative change.

[183] 547 U.S. 410 (2006)
[184] Id. at 422
[185] Id. at 425
[186] See, *Meriwether v. Hartop*, Supra, note 156

Conclusion

"When you see something that is not right, not fair, not just, you have to speak up. You have to say something; you have to do something."

Rep. John Lewis -

Law faculty, like faculty in other disciplines, are often engaged in esoteric and sometimes abstract contemplations of theory, doctrine and analytical skills. But just as often, if not more often, law faculty serves as the catalyst for transforming students into advocates and the gifted into agents of transformative change. Law faculty have a special role and voice. Like DuBois "Twoness", The law professor of color must teach from her or his experience both as a legal scholar and as one who must often think deeply about their position vis a vis their racial community experience.[187] The unique voice of this double-consciousness is under attack and in danger of suppression by the Anti- CRT laws. This attack is not accidental, but a calculated attempt to shift the focus of public awareness away from the unresolved, negative consequences of racial disparity evidenced by grim statistics disparate economic, political and legal system positioning as well as, in an age of increased and more accurate real-time media vivid reminders of racial injustice.

Declaring an end to racial injustice by forbidding its discussion is doomed to failure and has been shown throughout history to be ill-conceived.[188] So too, villainizing the victim or those who speak out on the victim's behalf does not move any system, legal or otherwise, closer to a just society.[189]

But yet, this is exactly what the Anti- CRT laws attempt to do. It's version of racial suppression through intimidation may result in in many important voices being silenced by fear and non-institutional support. But I do not, in good faith believe that I can agree to be one of the silenced.

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[187] "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 two-ness, – 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"
W.E.B. DuBois, THE SOULS OF BLACK FOLK; ESSAYS AND SKETCHES. Chicago, A. G. McClurg, 1903, p. 2

[188]
You may write me down in history
With your bitter, twisted lies,
You may trod me in the very dirt
But still, like dust, I'll rise.
Maya Angelou, "Still I Rise", AND STILL I RISE: A BOOK OF POEMS. Random House (1978)

[189] See, William Ryan, BLAMING THE VICTIM, Vintage, Revised ed. edition (1976)

In the pantheon of heroes many have inspired and are rightfully held up for their articulate protestation of injustice. Such heroes are well deserving of the accolades that we now recognize,

For me, regarding speaking out on and teaching about racial justice, I have a particular hero that may not be perhaps recognized as much as Dr. Martin Luther King, Malcolm X or even the late John Lewis.

> On a hot summer day in 1955 Sumner Mississippi, Mose Wright stood up in a hostile courtroom and said, "Dar He" (there he is) There the white men who took my nephew.

The nephew was Emmit Till. Mose Wright had to flee for his life after that testimony. But this Black farmer, with no higher education, stood and spoke about what he saw that was not right.

If Mose Wright could declare "Dar He", maybe I can do the same about race in our legal system, regardless of the threatened consequences[190], how can I stop teaching law students to think critically about race?

[190] The "Stop W.O.K.E. Act" 1000.05 Fla. Stat. (2022) specifically requires, regarding Florida higher education that:

> 6)(a) The State Board of Education shall adopt rules to implement this section as it relates to school districts and Florida College System institutions.

Such rules include the possibility of termination of position. Additionally, the Act allows for the ineligibility of funding for those state universities who do not take action against faculty who are deemed to be in violation of the Act.

Appendix A

Executive Order on Combating Race and Sex Stereotyping

Issued on: September 22, 2020

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Federal Property and Administrative Services Act, 40 U.S.C. 101 et seq., and in order to promote economy and efficiency in Federal contracting, to promote unity in the Federal workforce, and to combat offensive and anti-American race and sex stereotyping and scapegoating, it is hereby ordered as follows:

Section 1. Purpose. From the battlefield of Gettysburg to the bus boycott in Montgomery and the Selma-to-Montgomery marches, heroic Americans have valiantly risked their lives to ensure that their children would grow up in a Nation living out its creed, expressed in the Declaration of Independence: "We hold these truths to be self-evident, that all men are created equal." It was this belief in the inherent equality of every individual that inspired the Founding generation to risk their lives, their fortunes, and their sacred honor to establish a new Nation, unique among the countries of the world. President Abraham Lincoln understood that this belief is "the electric cord" that "links the hearts of patriotic and liberty-loving" people, no matter their race or country of origin. It is the belief that inspired the heroic black soldiers of the 54th Massachusetts Infantry Regiment to defend that same Union at great cost in the Civil War. And it is what inspired Dr. Martin Luther King, Jr., to dream that his children would one day "not be judged by the color of their skin but by the content of their character."

Thanks to the courage and sacrifice of our forebears, America has made significant progress toward realization of our national creed, particularly in the 57 years since Dr. King shared his dream with the country.

Today, however, many people are pushing a different vision of America that is grounded in hierarchies based on collective social and political identities rather than in the inherent and equal dignity of every person as an individual. This ideology is rooted in the pernicious and false belief that America is an irredeemably racist and sexist country; that some people, simply on account of their race or sex, are oppressors; and that racial and sexual identities are more important than our common status as human beings and Americans.

This destructive ideology is grounded in misrepresentations of our country's history and its role in the world. Although presented as new and revolutionary, they resurrect the discredited notions of the nineteenth century's apologists for slavery who, like President Lincoln's rival Stephen A. Douglas, maintained that our government "was made on the white basis" "by white men, for the benefit of white men." Our Founding documents rejected these racialized views of America, which were soundly defeated on the blood-stained battlefields of the Civil War. Yet they are now being repackaged and sold as cutting-edge insights. They are designed to divide us and to prevent us from uniting as one people in pursuit of one common destiny for our great country.

Unfortunately, this malign ideology is now migrating from the fringes of American society and threatens to infect core institutions of our country. Instructors and materials teaching that men and members of certain races, as well as our most venerable institutions, are inherently sexist and racist are appearing in workplace diversity trainings across the country, even in components of the Federal Government and among Federal contractors. For example, the Department of the Treasury recently held a seminar that promoted arguments that "virtually all White people, regardless of how 'woke' they are, contribute to racism," and that instructed small group leaders to encourage employees to avoid "narratives" that Americans should "be more color-blind" or "let people's skills and personalities be what differentiates them."

Training materials from Argonne National Laboratories, a federal entity, stated that racism "is interwoven into every fabric of America" and described statements like "color blindness" and the "meritocracy" as "actions of bias."

Materials from Sandia National Laboratories, also a federal entity, for non-minority males stated that an emphasis on "rationality over emotionality" was a characteristic of "white male[s]," and asked those present to "acknowledge" their "privilege" to each other.

A Smithsonian Institution Museum graphic recently claimed that concepts like "[o]bjective, rational linear thinking," "[h]ard work" being "the key to success," the "nuclear family," and belief in a single god are not values that unite Americans of all races but are instead "aspects and assumptions of whiteness." The museum also stated that "[f]acing your whiteness is hard and can result in feelings of guilt, sadness, confusion, defensiveness, or fear."

All of this is contrary to the fundamental premises underpinning our Republic: that all individuals are created equal and should be allowed an equal opportunity under the law to pursue happiness and prosper based on individual merit.

Executive departments and agencies (agencies), our Uniformed Services, Federal contractors, and Federal grant recipients should, of course, continue to foster environments devoid of hostility grounded in race, sex, and other federally protected characteristics. Training employees to create an inclusive workplace is appropriate and beneficial. The Federal Government is, and must always be, committed to the fair and equal treatment of all individuals before the law.

But training like that discussed above perpetuates racial stereotypes and division and can use subtle coercive pressure to ensure conformity of viewpoint. Such ideas may be fashionable in the academy, but they have no place in programs and activities supported by Federal taxpayer dollars. Research also suggests that blame-focused diversity training reinforces biases and decreases opportunities for minorities.

Our Federal civil service system is based on merit principles. These principles, codified at 5 U.S.C. 2301, call for all employees to "receive fair and equitable treatment in all aspects of personnel management without regard to" race or sex "and with proper regard for their . . . constitutional rights." Instructing Federal employees that treating individuals on the basis of individual merit is racist or sexist directly undermines our Merit System Principles and impairs the efficiency of the Federal service. Similarly, our Uniformed Services should not teach our heroic men and women in uniform the lie that the country for which they are willing to die is fundamentally racist. Such teachings could directly threaten the cohesion and effectiveness of our Uniformed Services.

Such activities also promote division and inefficiency when carried out by Federal contractors. The Federal Government has long prohibited Federal contractors from engaging in race or sex discrimination and required contractors to take affirmative action to ensure that such discrimination does not occur. The participation of contractors' employees in training that promotes race or sex stereotyping or scapegoating similarly undermines efficiency in Federal contracting. Such requirements promote divisiveness in the workplace and distract from the pursuit of excellence and collaborative achievements in public administration.

Therefore, it shall be the policy of the United States not to promote race or sex stereotyping or scapegoating in the Federal workforce or in the Uniformed Services, and not to allow grant funds to be used for these purposes. In addition, Federal contractors will not be permitted to inculcate such views in their employees.

Sec. 2. Definitions. For the purposes of this order, the phrase:

(a) "Divisive concepts" means the concepts that (1) one race or sex is inherently superior to another race or sex; (2) the United States is fundamentally racist or sexist; (3) an individual, by virtue of his or her race or sex, is inherently racist, sexist, or oppressive, whether consciously or unconsciously;

(4) an individual should be discriminated against or receive adverse treatment solely or partly because of his or her race or sex; (5) members of one race or sex cannot and should not attempt to treat others without respect to race or sex; (6) an individual's moral character is necessarily determined by his or her race or sex; (7) an individual, by virtue of his or her race or sex, bears responsibility for actions committed in the past by other members of the same race or sex; (8) any individual should feel discomfort, guilt, anguish, or any other form of psychological distress on account of his or her race or sex; or (9) meritocracy or traits such as a hard work ethic are racist or sexist, or were created by a particular race to oppress another race. The term "divisive concepts" also includes any other form of race or sex stereotyping or any other form of race or sex scapegoating.

(b) "Race or sex stereotyping" means ascribing character traits, values, moral and ethical codes, privileges, status, or beliefs to a race or sex, or to an individual because of his or her race or sex.

(c) "Race or sex scapegoating" means assigning fault, blame, or bias to a race or sex, or to members of a race or sex because of their race or sex. It similarly encompasses any claim that, consciously or unconsciously, and by virtue of his or her race or sex, members of any race are inherently racist or

are inherently inclined to oppress others, or that members of a sex are inherently sexist or inclined to oppress others.

(d) "Senior political appointee" means an individual appointed by the President, or a non-career member of the Senior Executive Service (or agency-equivalent system).

Sec. 3. Requirements for the United States Uniformed Services. The United States Uniformed Services, including the United States Armed Forces, shall not teach, instruct, or train any member of the United States Uniformed Services, whether serving on active duty, serving on reserve duty, attending a military service academy, or attending courses conducted by a military department pursuant to a Reserve Officer Corps Training program, to believe any of the divisive concepts set forth in section 2(a) of this order. No member of the United States Uniformed Services shall face any penalty or discrimination on account of his or her refusal to support, believe, endorse, embrace, confess, act upon, or otherwise assent to these concepts.

Sec. 4. Requirements for Government Contractors. (a) Except in contracts exempted in the manner provided by section 204 of Executive Order 11246 of September 24, 1965 (Equal Employment

Opportunity), as amended, all Government contracting agencies shall include in every Government contract hereafter entered into the following provisions:

"During the performance of this contract, the contractor agrees as follows:

1. The contractor shall not use any workplace training that inculcates in its employees any form of race or sex stereotyping or any form of race or sex scapegoating, including the concepts that (a) one race or sex is inherently superior to another race or sex; (b) an individual, by virtue of his or her race or sex, is inherently racist, sexist, or oppressive, whether consciously or unconsciously; (c) an individual should be discriminated against or receive adverse treatment solely or partly because of his or her race or sex; (d) members of one race or sex cannot and should not attempt to treat others without respect to race or sex; (e) an individual's moral character is necessarily determined by his or her race or sex; (f) an individual, by virtue of his or her race or sex, bears responsibility for actions committed in the past by other members of the same race or sex; (g) any individual should feel discomfort, guilt, anguish, or any other form of psychological distress on account of his or her race or sex; or (h) meritocracy or traits such as a hard work ethic are racist or sexist, or were created by a particular race to oppress another race. The term "race or sex stereotyping" means ascribing character traits, values, moral and ethical codes, privileges, status, or beliefs to a race or sex, or to

an individual because of his or her race or sex, and the term "race or sex scapegoating" means assigning fault, blame, or bias to a race or sex, or to members of a race or sex because of their race or sex.

2. The contractor will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice, to be provided by the agency contracting officer, advising the labor union or workers' representative of the contractor's commitments under the Executive Order of September 22, 2020, entitled Combating Race and Sex Stereotyping, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

3. In the event of the contractor's noncompliance with the requirements of paragraphs (1), (2), and (4), or with any rules, regulations, or orders that may be promulgated in accordance with the Executive Order of September 22, 2020, this contract may be canceled, terminated, or suspended in whole or in part and the contractor may be declared ineligible for further Government contracts in accordance with procedures authorized in Executive Order 11246, and such other sanctions may be imposed and remedies invoked as provided by any rules, regulations, or orders the Secretary of Labor has issued or adopted pursuant to Executive Order 11246, including subpart D of that order.

4. The contractor will include the provisions of paragraphs (1) through (4) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor, so that such provisions will be binding upon each subcontractor or vendor. The contractor will take such action with respect to any subcontract or purchase order as may be directed by the Secretary of Labor as a means of enforcing such provisions including sanctions for noncompliance: Provided, however, that in the event the contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction, the contractor may request the United States to enter into such litigation to protect the interests of the United States."

(b) The Department of Labor is directed, through the Office of Federal Contract Compliance Programs (OFCCP), to establish a hotline and investigate complaints received under both this order as well as Executive Order 11246 alleging that a Federal contractor is utilizing such training programs in violation of the contractor's obligations under those orders. The Department shall take appropriate enforcement action and provide remedial relief, as appropriate.

(c) Within 30 days of the date of this order, the Director of OFCCP shall publish in the Federal Register a request for information seeking information from Federal contractors, Federal subcontractors, and employees of Federal contractors and subcontractors regarding the training, workshops, or similar programming provided to employees. The request for information should request copies of any training, workshop, or similar programing having to do with diversity and inclusion as well as information about the duration, frequency, and expense of such activities.

Sec. 5. Requirements for Federal Grants. The heads of all agencies shall review their respective grant programs and identify programs for which the agency may, as a condition of receiving such a grant, require the recipient to certify that it will not use Federal funds to promote the concepts that

(a) one race or sex is inherently superior to another race or sex; (b) an individual, by virtue of his or her race or sex, is inherently racist, sexist, or oppressive, whether consciously or unconsciously; (c) an individual should be discriminated against or receive adverse treatment solely or partly because of his or her race or sex; (d) members of one race or sex cannot and should not attempt to treat others without respect to race or sex; (e) an individual's moral character is necessarily determined by his or her race or sex; (f) an individual, by virtue of his or her race or sex, bears responsibility for actions committed in the past by other members of the same race or sex; (g) any individual should feel discomfort, guilt, anguish, or any other form of psychological distress on account of his or her race or sex; or (h) meritocracy or traits such as a hard work ethic are racist or sexist, or were created by a particular race to oppress another race. Within 60 days of the date of this order, the heads of agencies shall each submit a report to the Director of the Office of Management and Budget (OMB) that lists all grant programs so identified.

Sec. 6. Requirements for Agencies. (a) The fair and equal treatment of individuals is an inviolable principle that must be maintained in the Federal workplace. Agencies should continue all training that will foster a workplace that is respectful of all employees. Accordingly:

(i) The head of each agency shall use his or her authority under 5 U.S.C. 301, 302, and 4103 to ensure that the agency, agency employees while on duty status, and any contractors hired by the agency to provide training, workshops, forums, or similar programming (for purposes of this section, "training") to agency employees do not teach, advocate, act upon, or promote in any training to agency employees any of the divisive concepts listed in section 2(a) of this order. Agencies may consult with the Office of Personnel Management (OPM), pursuant to 5 U.S.C. 4116, in carrying out this provision; and

(ii) Agency diversity and inclusion efforts shall, first and foremost, encourage agency employees not

to judge each other by their color, race, ethnicity, sex, or any other characteristic protected by Federal law.

(b) The Director of OPM shall propose regulations providing that agency officials with supervisory authority over a supervisor or an employee with responsibility for promoting diversity and inclusion, if such supervisor or employee either authorizes or approves training that promotes the divisive concepts set forth in section 2(a) of this order, shall take appropriate steps to pursue a performance-based adverse action proceeding against such supervisor or employee under chapter 43 or 75 of title 5, United States Code.

(c) Each agency head shall:

(i) issue an order incorporating the requirements of this order into agency operations, including by making compliance with this order a provision in all agency contracts for diversity training;

(ii) request that the agency inspector general thoroughly review and assess by the end of the calendar year, and not less than annually thereafter, agency compliance with the requirements of this order in the form of a report submitted to OMB; and

(iii) assign at least one senior political appointee responsibility for ensuring compliance with the requirements of this order.

Sec. 7. OMB and OPM Review of Agency Training. (a) Consistent with OPM's authority under 5 U.S.C. 4115-4118, all training programs for agency employees relating to diversity or inclusion shall, before being used, be reviewed by OPM for compliance with the requirements of section 6 of this order.

(b) If a contractor provides a training for agency employees relating to diversity or inclusion that teaches, advocates, or promotes the divisive concepts set forth in section 2(a) of this order, and such action is in violation of the applicable contract, the agency that contracted for such training shall evaluate whether to pursue debarment of that contractor, consistent with applicable law and regulations, and in consultation with the Interagency Suspension and Debarment Committee.

(c) Within 90 days of the date of this order, each agency shall report to OMB all spending in Fiscal Year 2020 on Federal employee training programs relating to diversity or inclusion, whether

conducted internally or by contractors. Such report shall, in addition to providing aggregate totals, delineate awards to each individual contractor.

(d) The Directors of OMB and OPM may jointly issue guidance and directives pertaining to agency obligations under, and ensuring compliance with, this order.

Sec. 8. Title VII Guidance. The Attorney General should continue to assess the extent to which workplace training that teaches the divisive concepts set forth in section 2(a) of this order may contribute to a hostile work environment and give rise to potential liability under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq. If appropriate, the Attorney General and the Equal Employment Opportunity Commission shall issue publicly available guidance to assist employers in better promoting diversity and inclusive workplaces consistent with Title VII.

Sec. 9. Effective Date. This order is effective immediately, except that the requirements of section 4 of this order shall apply to contracts entered into 60 days after the date of this order.

Sec. 10. General Provisions. (a) This order does not prevent agencies, the United States Uniformed Services, or contractors from promoting racial, cultural, or ethnic diversity or inclusiveness, provided such efforts are consistent with the requirements of this order.

(b) Nothing in this order shall be construed to prohibit discussing, as part of a larger course of academic instruction, the divisive concepts listed in section 2(a) of this order in an objective manner and without endorsement.

(c) If any provision of this order, or the application of any provision to any person or circumstance, is held to be invalid, the remainder of this order and the application of its provisions to any other persons or circumstances shall not be affected thereby.

(d) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department, agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(e) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(f) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

Appendix B

JANUARY 20, 2021

Executive Order On Advancing Racial Equity and Support for Underserved Communities Through the Federal Government

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered:

Section 1. Policy. Equal opportunity is the bedrock of American democracy, and our diversity is one of our country's greatest strengths. But for too many, the American Dream remains out of reach. Entrenched disparities in our laws and public policies, and in our public and private institutions, have often denied that equal opportunity to individuals and communities. Our country faces converging economic, health, and climate crises that have exposed and exacerbated inequities, while a historic movement for justice has highlighted the unbearable human costs of systemic racism. Our Nation deserves an ambitious whole-of-government equity agenda that matches the scale of the opportunities and challenges that we face.

It is therefore the policy of my Administration that the Federal Government should pursue a comprehensive approach to advancing equity for all, including people of color and others who have been historically underserved, marginalized, and adversely affected by persistent poverty and inequality. Affirmatively advancing equity, civil rights, racial justice, and equal opportunity is the responsibility of the whole of our Government. Because advancing equity requires a systematic approach to embedding fairness in decision-making processes, executive departments and agencies (agencies) must recognize and work to redress inequities in their policies and programs that serve as barriers to equal opportunity.

By advancing equity across the Federal Government, we can create opportunities for the improvement of communities that have been historically underserved, which benefits everyone. For example, an analysis shows that closing racial gaps in wages, housing credit, lending opportunities, and access to higher education would amount to an additional $5 trillion in gross domestic product in the American economy over the next 5 years. The Federal Government's goal in advancing equity is to provide everyone with the opportunity to reach their full potential. Consistent with these aims, each agency must assess whether, and to what extent, its programs and policies perpetuate systemic barriers to opportunities and benefits for

people of color and other underserved groups. Such assessments will better equip agencies to develop policies and programs that deliver resources and benefits equitably to all.

Sec. 2. Definitions. For purposes of this order: (a) The term "equity" means the consistent and systematic fair, just, and impartial treatment of all individuals, including individuals who belong to underserved communities that have been denied such treatment, such as Black, Latino, and Indigenous and Native American persons, Asian Americans and Pacific Islanders and other persons of color; members of religious minorities; lesbian, gay, bisexual, transgender, and queer (LGBTQ+) persons; persons with disabilities; persons who live in rural areas; and persons otherwise adversely affected by persistent poverty or inequality.

(b) The term "underserved communities" refers to populations sharing a particular characteristic, as well as geographic communities, that have been systematically denied a full opportunity to participate in aspects of economic, social, and civic life, as exemplified by the list in the preceding definition of "equity."

Sec. 3. Role of the Domestic Policy Council. The role of the White House Domestic Policy Council (DPC) is to coordinate the formulation and implementation of my Administration's domestic policy objectives. Consistent with this role, the DPC will coordinate efforts to embed equity principles, policies, and approaches across the Federal Government. This will include efforts to remove systemic barriers to and provide equal access to opportunities and benefits, identify communities the Federal Government has underserved, and develop policies designed to advance equity for those communities. The DPC-led interagency process will ensure that these efforts are made in coordination with the directors of the National Security Council and the National Economic Council.

Sec. 4. Identifying Methods to Assess Equity. (a) The Director of the Office of Management and Budget (OMB) shall, in partnership with the heads of agencies, study methods for assessing whether agency policies and actions create or exacerbate barriers to full and equal participation by all eligible individuals. The study should aim to identify the best methods, consistent with applicable law, to assist agencies in assessing equity with respect to race, ethnicity, religion, income, geography, gender identity, sexual orientation, and disability.

(b) As part of this study, the Director of OMB shall consider whether to recommend that agencies employ pilot programs to test model assessment tools and assist agencies in doing so.

(c) Within 6 months of the date of this order, the Director of OMB shall deliver a report to the President describing the best practices identified by the study and, as appropriate, recommending approaches to expand use of those methods across the Federal Government.

Sec. 5. Conducting an Equity Assessment in Federal Agencies. The head of each agency, or designee, shall, in consultation with the Director of OMB, select certain of the agency's programs and policies for a review that will assess whether underserved communities and their members face systemic barriers in accessing benefits and opportunities available pursuant to those policies and programs. The head of each agency, or designee, shall conduct such review and within 200 days of the date of this order provide a report to the Assistant to the President for Domestic Policy (APDP) reflecting findings on the following:

(a) Potential barriers that underserved communities and individuals may face to enrollment in and access to benefits and services in Federal programs;

(b) Potential barriers that underserved communities and individuals may face in taking advantage of agency procurement and contracting opportunities;

(c) Whether new policies, regulations, or guidance documents may be necessary to advance equity in agency actions and programs; and

(d) The operational status and level of institutional resources available to offices or divisions within the agency that are responsible for advancing civil rights or whose mandates specifically include serving underrepresented or disadvantaged communities.

Sec. 6. Allocating Federal Resources to Advance Fairness and Opportunity. The Federal Government should, consistent with applicable law, allocate resources to address the historic failure to invest sufficiently, justly, and equally in underserved communities, as well as individuals from those communities. To this end:

(a) The Director of OMB shall identify opportunities to promote equity in the budget that the President submits to the Congress.

(b) The Director of OMB shall, in coordination with the heads of agencies, study strategies, consistent with applicable law, for allocating Federal resources in a manner that increases investment in

underserved communities, as well as individuals from those communities. The Director of OMB shall report the findings of this study to the President.

Sec. 7. Promoting Equitable Delivery of Government Benefits and Equitable Opportunities. Government programs are designed to serve all eligible individuals. And Government contracting and procurement opportunities should be available on an equal basis to all eligible providers of goods and services. To meet these objectives and to enhance compliance with existing civil rights laws:

(a) Within 1 year of the date of this order, the head of each agency shall consult with the APDP and the Director of OMB to produce a plan for addressing:

(i) any barriers to full and equal participation in programs identified pursuant to section 5(a) of this order; and

(ii) any barriers to full and equal participation in agency procurement and contracting opportunities identified pursuant to section 5(b) of this order.

(b) The Administrator of the U.S. Digital Service, the United States Chief Technology Officer, the Chief Information Officer of the United States, and the heads of other agencies, or their designees, shall take necessary actions, consistent with applicable law, to support agencies in developing such plans.

Sec. 8. Engagement with Members of Underserved Communities. In carrying out this order, agencies shall consult with members of communities that have been historically underrepresented in the Federal Government and underserved by, or subject to discrimination in, Federal policies and programs. The head of each agency shall evaluate opportunities, consistent with applicable law, to increase coordination, communication, and engagement with community-based organizations and civil rights organizations.

Sec. 9. Establishing an Equitable Data Working Group. Many Federal datasets are not disaggregated by race, ethnicity, gender, disability, income, veteran status, or other key demographic variables. This lack of data has cascading effects and impedes efforts to measure and advance equity. A first step to promoting equity in Government action is to gather the data necessary to inform that effort.

(a) Establishment. There is hereby established an Interagency Working Group on Equitable Data (Data Working Group).

(b) Membership.

(i) The Chief Statistician of the United States and the United States Chief Technology Officer shall serve as Co-Chairs of the Data Working Group and coordinate its work. The Data Working Group shall include representatives of agencies as determined by the Co-Chairs to be necessary to complete the work of the Data Working Group, but at a minimum shall include the following officials, or their designees:

(A) the Director of OMB;

(B) the Secretary of Commerce, through the Director of the U.S. Census Bureau;

(C) the Chair of the Council of Economic Advisers;

(D) the Chief Information Officer of the United States;

(E) the Secretary of the Treasury, through the Assistant Secretary of the Treasury for Tax Policy;

(F) the Chief Data Scientist of the United States; and

(G) the Administrator of the U.S. Digital Service.

(ii) The DPC shall work closely with the Co-Chairs of the Data Working Group and assist in the Data Working Group's interagency coordination functions.

(iii) The Data Working Group shall consult with agencies to facilitate the sharing of information and best practices, consistent with applicable law.

(c) Functions. The Data Working Group shall:

(i) through consultation with agencies, study and provide recommendations to the APDP identifying inadequacies in existing Federal data collection programs, policies, and infrastructure across agencies, and strategies for addressing any deficiencies identified; and

(ii) support agencies in implementing actions, consistent with applicable law and privacy interests, that expand and refine the data available to the Federal Government to measure equity and capture the diversity of the American people.

(d) OMB shall provide administrative support for the Data Working Group, consistent with applicable law.

Sec. 10. Revocation. (a) Executive Order 13950 of September 22, 2020 (Combating Race and Sex Stereotyping), is hereby revoked.

(b) The heads of agencies covered by Executive Order 13950 shall review and identify proposed and existing agency actions related to or arising from Executive Order 13950. The head of each agency shall, within 60 days of the date of this order, consider suspending, revising, or rescinding any such actions, including all agency actions to terminate or restrict contracts or grants pursuant to Executive Order 13950, as appropriate and consistent with applicable law.

(c) Executive Order 13958 of November 2, 2020 (Establishing the President's Advisory 1776 Commission), is hereby revoked.

Sec. 11. General Provisions. (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) Independent agencies are strongly encouraged to comply with the provisions of this order.

(d) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

JOSEPH R. BIDEN JR.

THE WHITE HOUSE,

January 20, 2021.

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