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## Adding Salt to the Wound: Affirmative Action and Critical Race Theory

Carlos J. Nan\*

Using quotas instead of quality to select people for jobs and promotions rewards the dumb, lazy, and unambitious at the expense of the smart, talented, and ambitious.<sup>1</sup>

I can't turn around without hearing about some 'civil rights advance!' White people seem to think the black man ought to be shouting 'hallelujah!' Four hundred years the white man has had his foot-long knife in the black man's back - and now the white man starts to *wiggle* the knife out, maybe six inches! The black man's supposed to be *grateful*? Why, if the white man jerked the knife *out*, its still going to leave a scar!<sup>2</sup>

Born in Queens, New York to two immigrant parents, I am well aware of the difficulties and concerns of inner-city communities of color. By the time I was nine years old, I was living in California — raised solely by my mother, an immigrant from the Carribean. Despite limited funds and limited opportunities, I have worked very hard to get where I am today — a working law student with a Bachelor's Degree in both Political Science and History.

Ignoring my perseverance and determination, to many I am merely an "affirmative action baby." After all, affirmative action explains my success and simultaneously gives the government a pat on the back for its alleged efforts. Moreover, affirmative action provides an acceptable explanation for the failures and disappointments of frustrated, non-minority individuals.

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Ultimate thanks goes to the author's mother, Sonia Bido, for her love, support, understanding, and guidance, without whom he never would have accomplished any of his endeavors or dreams.

1. Allen C. Ornstein, *Quality, Not Quotas*, Soc'y, Jan./Feb. 1976 at 10, 17.
2. MALCOLM X, THE AUTOBIOGRAPHY OF MALCOLM X, 273 (1964).

As cries of reverse discrimination grow louder with each labeling of "affirmative action baby," society has become more critical and skeptical of these remedial policies. This growing skepticism is necessary, however, to demonstrate the inadequacies of affirmative action and the burden it places on people of color.

Advocates of the program<sup>3</sup> argue that affirmative action addresses historic as well as current discrimination. Further, they argue that affirmative action diversifies homogenous institutions and places of employment. Another goal of affirmative action policies is to provide role models for disadvantaged and underrepresented communities.

Opponents attack these arguments alleging "reverse discrimination."<sup>4</sup> They criticize affirmative action for being psychologically deleterious to its intended beneficiaries.<sup>5</sup>

The actual problems of affirmative action, however, are appropriately addressed in a fairly new movement of legal scholarship. The self-proclaimed Critical Race Theory (CRT),<sup>6</sup> has vociferously criticized affirmative action programs — not on their alleged uncon-

3. See, e.g., Alan D. Freeman, *Racism, Rights and the Quest for Equality of Opportunity: A Critical Legal Essay*, 23 HARV. C.R.-C.L. L. REV. 295, 362-63 (1988) (questioning the equality of opportunity ideology underlying Western culture which "rationalizes hierarchy, justifies disproportionate access to goods and power, . . . shames those at the bottom into internalizing inadequacy" and allows only limited use of race-conscious remedies to even out the playing field but not to achieve racially proportional results); Randall Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 HARV. L. REV. 1327, 1328 (1986) (concluding that affirmative action should be retained because it essentially combats racial hierarchy); LAWRENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1521-24, 1569 (2d ed. 1988) (discussion of affirmative action and "benign" classification in areas of race and sex).

4. See e.g., Morris B. Abram, *Affirmative Action: Fair Shakers and Social Engineers*, 99 HARV. L. REV. 1312 (1986) (arguing color-conscious remedies worsen divisions within society, and go against original principals of the civil rights movement to promote an equal opportunity society); A. BICKEL, *THE MORALITY OF CONSENT* 133-34 (1974) (arguing that affirmative action divides society, reduces productivity and promotes inequality); Lino A. Graglia, *Special Admissions of the "Culturally Deprived" to Law School*, 119 U. PA. L. REV. 351, 352 (1970) (contending that "[d]iscrimination in favor of some racial or ethnic groups necessarily is or appears to be discrimination against others."); Martin Schiff, *Reverse Discrimination Re-Defined as Equal Protection: The Orwellian Nightmare in the Enforcement of Civil Rights Law*, 8 HARV. J. L. & PUB. POL'Y, 627, 628 (1985) (asserting that Title VII has been interpreted to mandate discriminating quotas - a perversion of "equal protection" into "reverse discrimination"); THOMAS SOWELL, *CIVIL RIGHTS: RHETORIC OR REALITY?* 37-38 (1984) (maintaining that "civil rights" has changed from a demand for equal opportunity regardless of race, religion, or gender to a demand for equality of results in economic performance and rewards, through preferential or compensatory treatment because of race, religion, or gender).

5. See, e.g., Carter, *The Best Black and Other Tales*, RECONSTRUCTION 6 (1990).

6. Richard Delgado & Jean Stetancic, *Critical Race Theory: An Annotated Bibliography*, 79 VA. L. REV. 461 (1993). For purposes of this article, I will refer to Critical Race Theory as CRT.

stitutionality or "unfairness," but rather on their slow pace and ineffectiveness. This article will highlight CRT's contributions to the debate over affirmative action, and will subsequently examine the effectiveness of an affirmative action policy from a CRT perspective.

Part I of this article will lay out a legislative history of affirmative action and the Supreme Court's numerous interpretations. In addition to a historical backdrop, this section will discuss the effectiveness of the program in relation to its intended beneficiaries. Presumably, implementation of affirmative action programs will result in a society free of bias and racial imbalance. Statistics prove otherwise. Part II of the Article will define CRT and discuss the diverse views held by some of its core members in relation to affirmative action. Part III will analyze affirmative action from a CRT perspective, as well as provide an alternative outlook to the racial dilemma by suggesting a culturally nationalistic agenda.

## I. Historic Overview of Affirmative Action

### A. *How It All Began and What It Has Evolved Into*

The legal requirement for affirmative-action programs can be traced back to Title VI<sup>7</sup> and VII<sup>8</sup> of the Civil Rights Act of 1964.<sup>9</sup> Title VII of the Civil Rights Act prohibits discrimination on the basis of race, color, religion, national origin, or sex, by private as well as public employers.<sup>10</sup> Congress, in 1972, passed the Equal Employment Act of 1972<sup>11</sup> giving the Equal Employment Opportunity Commission (EEOC) the power to enforce the Civil Rights Act.<sup>12</sup> Under the Act, the EEOC investigates complaints, initiates legal proceedings where there is substantial evidence of discrimination, enjoins defendants engaging in unlawful behavior, and orders appropriate affirmative action programs.<sup>13</sup>

Shortly after the effective date of the Civil Rights Act of 1964, President Lyndon B. Johnson issued executive order No. 11246.<sup>14</sup> This order prohibited discrimination on the basis of race, color, religion, national origin, or sex in all organizations receiving federal

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7. 42 U.S.C. § 2000d to d-4a (1988).

8. 42 U.S.C. § 2000e to e-17 (1988).

9. 42 U.S.C. §§ 1971, 1975a-d, 2000a (1988).

10. 42 U.S.C. § 2000e to e-17 (1988). *See also* GREGORY SQUIRES, *AFFIRMATIVE ACTION: A GUIDE FOR THE PERPLEXED* 6 (1977).

11. *See supra* note 8.

12. *See supra* note 8.

13. *See supra* note 8.

14. Exec. Order No. 11246, 3 C.F.R. 339 (1964-1965 Compilation), *reprinted in* 42 U.S.C. § 2000e (1988).

contracts of over \$10,000.<sup>15</sup> Furthermore, it required affirmative action plans of all contractors with contracts of \$50,000 or more and employing 50 or more people.<sup>16</sup>

The specific requirements of affirmative-action plans issued by executive order No. 11246 are specified by Revised Order No. 4. The order requires that affirmative action be taken in setting "goals" and "timetables" for the employment of minority group members in job categories where they are presently "under-utilized."<sup>17</sup> In other words, affirmative action means more than mere passive non-discrimination:

It means that various organizations must act positively, affirmatively, and aggressively to remove all barriers, however informal or subtle, that prevent access by minorities and women to their rightful places in the employment and educational institutions of the United States.<sup>18</sup>

During the 1960's, whites appeared to agree that the disadvantaged deserved more positions and promotions in educational institutions, as well as the workplace.<sup>19</sup> Presumably, this occurred because opportunities were opening up for everyone.<sup>20</sup> By the late 70's through the 80's, however, job competition had tightened, and those accustomed to holding privileged positions in the race for good jobs, pay, and education, grew less inclined to give up their advantage.<sup>21</sup> Attitude surveys revealed a growing reservation toward affirmative action programs.<sup>22</sup> In fact, the prevailing attitude of the

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15. *Id.* See also Robert P. Schuwerk, *The Philadelphia Plan: A Study in the Dynamics of Executive Power*, 39 U. CHI. L. REV. 723 (1972) (arguing that the Philadelphia Plan, an affirmative action plan requiring that federal government contractors achieve minority employment goals, conflicts with Title VI and VII of the Civil Rights Act of 1964 and therefore is beyond the power of the executive branch).

16. Exec. Order No. 11246, *supra* note 14.

17. See *supra* note 14. See also DERRICK BELL, *RACE, RACISM, AND AMERICAN LAW*, 645 (2nd ed. 1980) ("The executive order has been uniformly upheld by the courts. In the leading case, *Contractors Ass'n. of Eastern Pa. v. Secretary of Labor*, the Third Circuit approved goals and timetables in the so called 'Philadelphia Plan,' developed by the Secretary of Labor under Executive Order 11246. The Philadelphia Plan required bidders on certain federally assisted projects in the Philadelphia area to submit with their bids an affirmative action program, including specific goals for hiring minority group workers in six skilled crafts. No bidder would be awarded a contract unless his affirmative action goals met standards which had been set at public hearings"(footnotes omitted)).

18. NIJOLE BENOKRATIS & JOE FEAGIN, *AFFIRMATIVE ACTION AND EQUAL OPPORTUNITY: ACTION, INACTION, REACTION* 1 (1978).

19. CLARISE STASZ, *THE AMERICAN NIGHTMARE* 37-38 (1981).

20. *Id.*

21. *Id.*

22. Cf. Aric Press & Ann McDaniel, *A Right Turn On Race?*, NEWSWEEK, June 25, 1984, at 29. See THOMAS EDSALL & MARY EDSALL, *CHAIN REACTION: THE IMPACT OF RACE, RIGHTS AND TAXES ON AMERICAN POLITICS* 186 (1991) ("In public opinion polls, whites are opposed to black preferences in hiring and job promotion by a mar-

majority of the American public was that equality had been achieved, and more importantly, that the previously disadvantaged were now gaining on the once privileged.<sup>23</sup> Consequently, affirmative action programs became coterminous with "‘reverse discrimination,’ a policy that prevented white males from getting their equal due."<sup>24</sup> In other words, policies that offer special advantages to women and people of color allegedly discriminate against white men on the basis of their sex and race.<sup>25</sup> The Supreme Court took this very view when it decided *Regents of the University of California v. Bakke*.<sup>26</sup>

In *Bakke*, a white male applied for admission to the Medical School of the University of California at Davis and was denied admission twice.<sup>27</sup> He claimed that the school denied him the right to admission on a discriminatory basis because the school reserved 16% of its seats for minorities.<sup>28</sup> The Supreme Court granted certiorari to decide the issue of whether strict scrutiny of racial classifications should be relaxed when they are employed for the asserted purpose of aiding a minority group.

The Court's opinion was indicative of society's perception of affirmative action. No clear majority opinion emerged from the case.<sup>29</sup> Four justices, Brennan, White, Marshall, and Blackmun, believed the Davis plan was completely constitutional.<sup>30</sup> Four other justices, Stevens, Rehnquist, Stewart, and Chief Justice Burger, did not decide on a constitutional issue, but rather agreed that the Davis program violated Title VI of the Civil Rights Act of 1964.<sup>31</sup> Therefore, Justice Powell's remaining vote formed the majority.

Justice Powell agreed with the Brennan group that Title VI proscribes only those racial classifications that violate the Equal Protection Clause.<sup>32</sup> In other words, Justice Powell agreed that the equal protection clause permits the use of race-conscious criteria in

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gin of 81 to 11, and are against reserving openings for blacks at colleges by a margin of 69 to 22").

23. See *supra* note 1.

24. STASZ, *supra* note 19, at 38.

25. *Id.*

26. 438 U.S. 265 (1978).

27. *Id.* at 276-77.

28. *Id.* at 275, 277-78.

29. *Id.* at 267.

30. *Id.* at 355-379.

31. *Bakke*, 438 U.S. at 408-21.

32. *Id.* at 287.

determining admissions to state-supported institutions.<sup>33</sup> Unlike the Brennan group, however, Justice Powell contended that a lesser standard of scrutiny could not be applied.<sup>34</sup> Justice Powell stated that there was no "principled basis for deciding which groups would merit 'heightened judicial solicitude' and which would not."<sup>35</sup> Justice Powell held that the "guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal."<sup>36</sup> Consequently, Justice Powell applied a strict scrutiny standard which the Davis plan failed to pass.<sup>37</sup> As a result the program was held to be unlawful.<sup>38</sup>

Six cases that followed *Bakke* illustrate the Court's consideration of race-conscious remedies with regards to voluntary implementation of affirmative-action programs by private employers, set-asides, lay-offs, hiring, and promotions in places of employment. In *United Steelworkers of America v. Weber*,<sup>39</sup> the Supreme Court confronted the issue of whether Title VII forbids private employers from implementing voluntary affirmative action programs which provide preferences to racial minorities.<sup>40</sup> In *Weber*, an affirmative action plan was negotiated between Kaiser Aluminum and Chemical Corporation and the steelworkers union, United Steelworkers of America.<sup>41</sup> The plan reserved fifty percent of all openings in an on-the-job training program for African-Americans until the percentage of African-American skilled craft workers in the plant roughly approximated the percentage of African-Americans in the local labor force.<sup>42</sup> The Court did not reach the constitutional issue since there was no state action.<sup>43</sup> Therefore, the Court's only concern was whether the program violated Title VII.<sup>44</sup> A majority of the Court upheld the plan by rejecting the literal meaning of Title VII.<sup>45</sup>

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33. *Id.* at 287-320. Justice Powell also believed that the equal protection clause permits the use of race-conscious criteria if used to diversify the institution's student body. *Id.* at 311-15.

34. *Id.* at 290-91.

35. *Id.* at 296.

36. *Bakke*, 438 U.S. at 289-90.

37. *Id.* at 305-20.

38. *Id.*

39. 443 U.S. 193 (1979).

40. *Id.* at 197.

41. *Id.* at 197-98.

42. *Id.* at 198-99.

43. *Id.* at 200.

44. *Weber*, 443 U.S. at 200.

45. *Id.* at 201-02 (citing *Holy Trinity Church v. United States*, 143 U.S. 457, 459 (1892) ("a thing may be within the letter of the statute and yet not within the statute because not within its spirit, nor within the intention of its makers")).

In *Fullilove v. Klutznick*,<sup>46</sup> the U.S. Supreme Court upheld the "Minority Business Enterprise" (MBE) provision of the Public Works Employment Act of 1977 which required that applicants receiving federal funds for state and local building projects spend at least 10% of the money for buying goods or services from minority business enterprises.<sup>47</sup> The Court reasoned that Congress had the right to take measures to remedy the effects of past discrimination and that these measures need not be colorblind.<sup>48</sup> Congress need only proceed with programs narrowly tailored to achieve its objectives.<sup>49</sup> The Court concluded that the set-aside was sufficiently tailored to the valid congressional objective of redressing past congressional discrimination, and therefore, did not violate equal protection.<sup>50</sup>

In *Wygant v. Jackson Board of Education*,<sup>51</sup> the Court struck down a collective bargaining agreement which granted African-American teachers greater protection from lay-offs than white teachers.<sup>52</sup> The Court applied a strict scrutiny standard<sup>53</sup> and found that the Board of Education had not shown a sufficiently compelling governmental interest.<sup>54</sup> The Court held that an employer must have a "strong basis in evidence for its conclusion that remedial action was necessary."<sup>55</sup> In addition, the means chosen must be narrowly tailored to the achievement of that interest. In this case the Court found that racially influenced lay-offs were not sufficiently narrowly tailored.<sup>56</sup> Nevertheless, a majority of the

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46. 448 U.S. 448 (1980).

47. *Id.* at 454 (citing Public Works Employment Act of 1977, 91 Stat. 116, *codified as amended* at 42 U.S.C. 6705(f)(2) (1976 ed., Supp. II)).

48. *Id.* at 482. The Court noted that Congress has the broadest remedial powers of all organs of government which enable it to use the lure of federal funds to induce voluntary compliance with "federal statutory or constitutional antidiscrimination provisions." *Id.* at 483-84. *See also* *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 18-21 (1971); *McDaniel v. Barresi*, 402 U.S. 39, 41 (1971); *North Carolina Bd. of Educ. v. Swann*, 402 U.S. 43 (1971).

49. *Fullilove*, 448 U.S. at 490.

50. *Id.* at 492.

51. 476 U.S. 267 (1986).

52. *Id.* at 272-73. As a result of the layoff provision of the collective bargaining program, "during the 1976-1977 and 1981-1982 school years, nonminority teachers were laid off, while minority teachers with less seniority were retained." *Id.* at 272.

53. The court asked whether the lay off provision was a narrowly tailored means of achieving a compelling governmental interest. *Id.* at 274.

54. *Id.* at 279-84. The Court rejected the basis upon which the Sixth Circuit Court of Appeals had upheld the layoff provision: providing minority role models for minority students to alleviate the effects of societal discrimination. *Wygant*, 476 U.S. at 274.

55. *Id.* at 277. "Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy." *Id.* at 276.

56. *Id.* at 283-84. The Court found that the Board could have adopted less intrusive means such as establishing hiring goals. *Id.*



Court agreed that public employers may sometimes voluntarily embark upon a race-conscious scheme to remedy past employment discrimination.<sup>57</sup>

In *Local 28 of the Sheet Metal Workers International Ass'n v. EEOC*,<sup>58</sup> the Court upheld a court-ordered, race-conscious remedy,<sup>59</sup> pursuant to Title VII, against a union found guilty of intentionally discriminating in its hiring practices against non-whites.<sup>60</sup> The Supreme Court ruled that courts may order "affirmative race-conscious relief as a remedy for past discrimination"<sup>61</sup> where there is "persistent or egregious discrimination, or where necessary to dissipate the lingering effects of pervasive discrimination."<sup>62</sup>

In *United States v. Paradise*,<sup>63</sup> the Court followed its reasoning in *Sheet Metal Workers*,<sup>64</sup> upholding a court-ordered, numerically based hiring goal as a remedy for proven past discrimination.<sup>65</sup> In *City of Richmond v. J.A. Croson Co.*,<sup>66</sup> the City of Richmond, relying on *Fullilove*, established a plan requiring contractors awarded city construction contracts to subcontract at least thirty percent of their work to minority business enterprises.<sup>67</sup> The Court, however, reaffirmed the plurality view in *Wygant*,<sup>68</sup> and applied a strict scrutiny standard. The plan failed this standard because there was insufficient evidence of past discrimination.<sup>69</sup> Justice O'Connor's opinion held that:

a generalized assertion that there has been past discrimination in an entire industry provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy. . . . While the States and their subdivision may take remedial action when they possess evidence that their own spending practices are exacerbating a pattern of prior discrimination,

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57. *Id.* at 280-82.

58. 478 U.S. 421 (1986).

59. In this case, the remedy consisted of the court requiring the union to have 29% minority membership by a certain date, appointing an administrator to supervise procedures for recruiting and admitting minorities, and imposing civil contempt penalties for failure to achieve the percentage goals. *Id.* at 432-35.

60. *Id.* at 444-47.

61. *Id.* at 445.

62. *Id.*

63. 480 U.S. 149 (1987).

64. 478 U.S. 421 (1986).

65. *Paradise*, 480 U.S. at 185-86.

66. 488 U.S. 469 (1989).

67. *Id.* at 477-80.

68. *Id.* at 494 (finding "that the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification").

69. *Id.* at 501-02.

they must identify that discrimination, public or private, with some specificity before they may use race-conscious relief.<sup>70</sup>

Taken together, these cases illustrate the Court's desire to limit affirmative action by requiring any race-conscious program to be narrowly tailored and to remedy specifically identified patterns of past discrimination. Accordingly, affirmative action should not be used to correct broad social discrimination. Although resulting jurisprudence appears to be a step forward in resolving race problems in the United States, the cases merely create a compromise which provides some but not enough relief to those who claim to have been discriminated against. More importantly, these cases illustrate the Court's attempt to paint a facade of colorblind reasoning and interpretation of an allegedly colorblind Constitution.

### *B. Affirmative Action in Practice: The Myth of the American Dream*

You say things are getting better, but it always turns out that you mean in relation to the way they were for us. You compare blacks to blacks, not blacks to whites. If you did the latter, you'd find little or no progress, so you don't. You don't because you're caught in a mindset that finds it natural and normal that whites should be over blacks — that there should be a gap in educational achievement, health, longevity, and well-being, so that the only issue is whether things are getting a little better at the bottom.<sup>71</sup>

Given the perceived improvement in employment, educational opportunity, public attitudes, and legislation, it would seem logical that political, economic, and social inequality would have diminished. There should be an increasing proportion of minorities with better jobs and higher salaries than several decades ago. In fact, some signs of improvement should have appeared in all economic and social measures since the legislation of the 1960's.<sup>72</sup> Moreover, high rates of employment and educational opportunities should be spread evenly across racial, ethnic, and sex groupings because of affirmative action programs which require affirmative preference in hiring and admissions. However, statistical evidence shows otherwise.<sup>73</sup>

The actual effects are clear-cut when examining income trends over the past thirty years. In 1991, for instance, 67.2 million fami-

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70. *Id.* at 498, 504.

71. Richard Delgado, *Derrick Bell and the Ideology of Racial Reform: Will We Ever Be Saved?*, 97 YALE L. J. 923, 932 (1988) (book review).

72. *See, e.g.*, The Civil Rights Act of 1964 and the Voting Rights Act.

73. BILL CLINTON, ECONOMIC REPORT OF THE PRESIDENT 380 tbl. B-28 (1993).

lies of all races earned a median income of \$35,939.<sup>74</sup> White families account for 57.2 million families, earning a median income of \$37,783.<sup>75</sup> In other words, white families earned \$1,844 over the median income of all races combined.<sup>76</sup> African-American families, on the other hand, account for 7.7 million families earning a median income of \$21,548<sup>77</sup> — a difference of \$14,391 compared to the median income of all races, and \$16,235 less than what white families earned!<sup>78</sup>

Unfortunately, the disparity between perception and reality does not end here. The dominant culture assumes, whether liberal or conservative, that affirmative action has been improving the economic well-being of people of color. In fact, some argue that minorities are gaining on the "once-privileged."<sup>79</sup> Another look at the Economic Report of the President, however, clearly demonstrates otherwise.

Between 1971 and 1991, the median income of African-American families increased by \$1,197,<sup>80</sup> as opposed to white families whose median income rose by \$4,058.<sup>81</sup> Furthermore, the income gap between races has widened, although the predominant belief is that people of color are gaining on whites.<sup>82</sup> In 1971, the difference between families along racial lines totaled \$3,374.<sup>83</sup> However, in 1991 the gap had widened by an additional \$2,861.<sup>84</sup>

According to the Economic Report of the President there is no indication that white families are being economically disadvantaged, particularly as a result of the alleged racial advancements of the 1960's. In light of this data, to claim "reverse discrimination" is ludicrous. The key to success, as Clarise Stasz argues, "is to pick the right family to be born into - one whose lineage includes many of Anglo-Saxon heritage, with a father (and better, mother too) who has a good job . . . [However], most of us have already missed out on this surefire formula by the moment of birth."<sup>85</sup>

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74. *Id.*

75. *Id.*

76. *Id.*

77. CLINTON, *supra* note 73.

78. *Id.*

79. Ornstein, *supra* note 1.

80. CLINTON, *supra* note 73 at 380, tbl. B-28.

81. *Id.*

82. EDSALL, *supra* note 22 at 186.

83. CLINTON, *supra* note 73, at 380, tbl. B-28.

84. *Id.*

85. STASZ, *supra* note 19, at 84 (1981).

## II. Critical Race Theory Defined and Its Perspectives on Affirmative Action

Critical Race Theory, formulated in the mid-1970's,<sup>86</sup> officially began in the summer of 1989 with a workshop held outside Madison, Wisconsin.<sup>87</sup> The movement is comprised of scholars, generally of color, who have realized that the alleged gains of the Civil Rights Movement of the 1960's have been ineffective. As a result, these scholars explore new approaches to the racial problems faced by this country.<sup>88</sup> Some of the themes considered by CRT include, but are not limited to, critiques of liberalism;<sup>89</sup> insistence on "naming one's own reality;"<sup>90</sup> revisionist interpretations of American civil rights law;<sup>91</sup> intersections of race, sex, and class;<sup>92</sup> cultural nationalism/separatism;<sup>93</sup> and, responses to criticism and

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86. See Delgado & Stefancic, *supra* note 6.

87. Richard Delgado, *Rodrigo's Chronicle*, 101 YALE L. J. 1357, 1363 n.18 (1992) (book review).

88. See Delgado & Stefancic, *supra* note 6. See also, Richard Delgado, *Enormous Anomaly? Left-Right Parallels in Recent Writing About Race*, 91 COLUM. L. REV. 1547, 1548 n.5 (1991).

89. Most, if not all, CRT writers are discontent with liberalism as a means of addressing the American race problem. Sometimes this discontent is only implicit in an article's structure or focus. At other times, the author takes as his or her target a mainstay of liberal jurisprudence such as affirmative action, neutrality, color blindness, role modeling, or the merit principle . . . .

Delgado & Stefancic, *supra* note 6, at 462.

90. On the way critical race theorists define themselves, Delgado says:

Many Critical Race Theorists consider that a principal obstacle to racial reform is majoritarian mindset — the bundle of presuppositions, received wisdoms, and shared cultural understandings persons in the dominant group bring to discussions of race. To analyze and challenge these power-laden beliefs, some writers employ counterstories, parables, chronicles, and anecdotes aimed at revealing their contingency, cruelty, and self-serving nature.

*Id.*

91. Delgado states:

One recurring source of concern for Critical scholars is why American antidiscrimination law has proven so ineffective in redressing racial inequality — or why progress has been cyclical, consisting of alternating periods of advance followed by ones of retrenchment. Some Critical scholars address this question, seeking answers in the psychology of race, white self-interest, the politics of colonialism and anticolonialism, or other sources.

*Id.*

92. *Id.* at 463 ("Other scholars explore the intersections of race, sex, and class, pursuing such questions as whether race and class are separate disadvantaging factors, or the extent to which Black women's interest is or is not adequately represented in the contemporary women's movement.").

93. *Id.* ("An emerging strain within CRT holds that people of color can best promote their interest through separation from the American mainstream. Some believe that preserving diversity and separateness will benefit all, not just groups of color. We include here, as well, articles encouraging black nationalism, power, or insurrection.").

self-criticism.<sup>94</sup> The core scholars who have written on these themes include Derrick Bell, Kimberle Crenshaw, Richard Delgado, Charles Lawrence, Mari Matsuda, and Patricia Williams.<sup>95</sup>

Importantly, not all CRT scholars adhere to a particular philosophy of thought. "CRT lacks a formal structure . . ."<sup>96</sup> For instance, some scholars support affirmative action programs, but are critical of either their effectiveness or focus their writing toward challenging its opponents.<sup>97</sup> On the other hand, a few scholars are skeptical and suspicious of the program and its intended purpose.<sup>98</sup>

According to Patricia Williams, an advocate of affirmative action policies, affirmative action "is an act of verification and of vision. It is an act of social as well as professional responsibility."<sup>99</sup> Robin Barnes, a CRT proponent who also strongly advocates for affirmative action, believes it benefits a broad class of minority citizens. In her view, the benefits of affirmative action include "a measure of reparation (albeit small) for past injustice, greater economic efficiency by providing poor, working poor, middle class, and upper middle class Blacks educational, employment, and business opportunities, and improved opportunities for integration and diversity."<sup>100</sup> In fact, Barnes believes that women, people of color, and the disabled "are entitled to the preferences not only to remedy past discrimination and abate the effects of today's exclusionary practices, but also to stem the tide of perpetual domination that has been the prerogative of the 'normal' white male for all too long."<sup>101</sup>

In contrast, CRT skeptics of affirmative action question the program's effectiveness. For Derrick Bell, affirmative action is "the latest contrivance the society has created to give blacks the sense of equality while withholding its substance."<sup>102</sup> In fact, Bell suggests that affirmative action policies are intended to benefit African-

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94. *Id.* ("Under this heading we include works of significant criticism addressed at CRT, either by outsiders or persons within the movement, together with responses to such criticism.")

95. See Delgado & Stefancic, *supra* note 6.

96. Delgado & Stefancic, *supra* note 6, at 463.

97. See, e.g., PATRICIA WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 121 (1991); Robin Barnes, *Politics and Passion: Theoretically a Dangerous Liaison*, 101 *YALE L. J.* 1631 (1992).

98. See, e.g., DERRICK BELL, *AND WE ARE NOT SAVED* 140-61 (1987) [hereinafter *WE ARE NOT SAVED*]; Derrick Bell, *Xerxes and the Affirmative Action Mystique*, 57 *GEO. WASH. L. REV.* 1595 (1989) [hereinafter *Xerxes*]; Richard Delgado, *Affirmative Action as a Majoritarian Device: Or Do You Really Want to Be a Role Model?*, 89 *MICH. L. REV.* 1222 (1991).

99. WILLIAMS, *supra* note 97, at 50.

100. Barnes, *supra* note 97, at 1647.

101. *Id.* at 1649.

102. *Xerxes*, *supra* note 98, at 1598.

Americans only to the extent that their gains do not threaten or impinge on the status of whites.<sup>103</sup> Bell writes:

Those who wield effective control in the nation make, when considered necessary, that amount of social adjustments that will help to siphon off sufficient discontent to enable the societal status quo to be maintained . . . . [T]oken or cosmetic gains are extended under the *formal* Constitution, while, under the *operational code*, of the unwritten basic law, no real redistribution of wealth, prestige, or social power takes place.<sup>104</sup>

In addition, Richard Delgado contends that affirmative action programs were "designed by others to promote their purposes, not ours."<sup>105</sup> In his view, "affirmative action serves as a homeostatic device, assuring that only a small number of women and people of color are hired and promoted."<sup>106</sup>

Bell and Delgado's skepticism of remedial policies allegedly intended to benefit the disadvantaged are the most controversial in CRT scholarship. The dominant culture assumes that people of color should be grateful, or at least optimistic about the progress the United States has made in its alleged attempt to ameliorate its racial problem. The writings of Bell and Delgado reflect a distrust in the purportedly democratic system of the United States. This perspective is nothing new to the political and social scientist or historian.<sup>107</sup> However, such writings and concepts are a novelty to legal scholarship. For this reason, my analysis of CRT and its perspective on affirmative action will focus upon the legal scholarship of Professors Bell and Delgado.

### III. Affirmative Action Analyzed

The 1993 Economic Report of the President<sup>108</sup> provides evidence that affirmative action programs have been, for the most part, ineffective.<sup>109</sup> Moreover, the report illustrates that arguments of "reverse discrimination" are undoubtedly futile.<sup>110</sup> In fact, claims of reverse discrimination would be valid:

only if preferential affirmative action required the "niggerization" of white males - to use with apologies that cruel term that

103. See WE ARE NOT SAVED, *supra* note 98, at 140-61.

104. Arthur Miller, *Pretense and Our Two Constitutions*, 54 GEO. WASH. L. REV. 375, 375 (1986), *quoted in Xerxes*, *supra* note 98, at 1599.

105. Delgado, *supra* note 98, at 1226.

106. *Id.* at 1224.

107. ROBERT ALLEN, BLACK AWAKENING IN CAPITALIST AMERICA (1990); FRANTZ FANON, THE WRETCHED OF THE EARTH (1965); MALCOLM X, MALCOLM X SPEAKS (George Breitman ed. 1965).

108. CLINTON, *supra* note 73.

109. See *supra* notes 73-84 and accompanying text.

110. See *supra* notes 73-84 and accompanying text.

connotes the spirit and effects of the caste system. But in what sense are we planning to systematically insult white males and put them in the lowest caste in society? In what sense does preferential affirmative action plan to decrease the life span of white males and their wives and children? Is this policy geared to making white males hate themselves and be ashamed of their physical appearance? Will it make white male unemployment double that of blacks and will it reduce white male salary to 60% of that of blacks? Will it confine white males to ghettos where there are more rats than people and no hope? To truly reverse the discriminatory process would require all of that. Obviously, none of that is contemplated or possible. The term "reverse discrimination" houses a big lie.<sup>111</sup>

Furthermore, white males have benefited from their own affirmative action for over 200 years.<sup>112</sup> "[C]ritics neatly take our eyes off the system of arrangements that brought and maintained them in power, and enabled them to develop the rules and standards of quality and merit that now exclude us, make us appear unworthy, dependent (naturally) on affirmative action."<sup>113</sup>

The standards of merit set by white males are also questionable. The usual excuse given by employers or academic administrators is that there are not enough "qualified" minorities carrying the requisite merits to capably handle the duties of the vacant position. Bell notes, however, that such assertions are incredulous or discriminatory at best as these employers and administrators:

know that the qualifications they insist on are precisely the credentials and skills that have been long denied to people of color. Those credentials, moreover, are often irrelevant or of little importance and therefore serve mainly as barriers to most minorities and a great many whites as well.<sup>114</sup>

In fact, Delgado argues, "[m]erit sounds like white people's affirmative action . . . . A way of keeping their own deficiencies neatly hidden while assuring that only people like them get in."<sup>115</sup>

CRT, however, acknowledges that there are advantages to being a racial or ethnic minority.<sup>116</sup> For example, the values of "double consciousness," termed by W.E.B. DuBois,<sup>117</sup> provide people of color with the ability to see society in terms of two perspectives. One perspective is the world as seen from the eyes of the

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111. DANIEL C. MAGUIRE, *A NEW AMERICAN JUSTICE: ENDING THE WHITE MALE MONOPOLIES* 169, 170 (1981).

112. Delgado, *supra* note 98, at 1225.

113. *Id.*

114. Xerces, *supra* note 98, at 1605.

115. Delgado, *supra* note 87, at 1364.

116. See *Id.* at 1365-67; Barnes, *supra* note 97, at 1652-58.

117. W.E.B. DuBois, *THE SOULS OF BLACK FOLKS* 16-17 (1903), cited in Delgado, *supra* note 87, at 1366 n.37.

oppressor in which people of color are exploited and dehumanized.<sup>118</sup> The other perspective is seen from the eyes of the oppressed in which their own values and cultures are revered.<sup>119</sup> In other words, minority status is viewed as an affirmative qualification.<sup>120</sup> For example, "[a] black professor who can alleviate the racism of his white students and inspire learning and hope in his black students is a better teacher for that."<sup>121</sup>

Nevertheless, Delgado claims that even if "double consciousness" is ever recognized as a valuable asset, whites will deny it exists, or insist they have it as well.<sup>122</sup>

Delgado also questions the diversity argument for affirmative action:

In law school admissions, for example, majority persons may be admitted as a matter of right, while minorities are admitted because their presence will contribute to "diversity." . . . The assumption is that such diversity is educationally valuable to the majority. But such an admissions program may well be perceived as treating the minority admittee as an ornament, a curiosity, one who brings an element of the piquant to the lives of white professors and students.<sup>123</sup>

Delgado, moreover, attacks the role model argument for affirmative action.<sup>124</sup> Being a role model requires that you "uplift your entire people";<sup>125</sup> complete the duties required in the job description, as well as assist your community whenever it affects your position or that of your employer; conform into behavior that will encourage the community of color to adopt majoritarian social mores; and lie to your community about how they too can achieve the "American Dream" because the arms of opportunity are open and waiting to welcome them.<sup>126</sup> The program, instituted, arranged, and produced by "others"<sup>127</sup> appears to work against people of color much like cream to coffee. "[I]f you pour too much cream in it, you won't even know you ever had coffee. It used to be hot, it becomes

118. *Id.*

119. *Id.*

120. Derrick Bell, *Bakke, Minority Admissions and the Usual Price of Racial Remedies*, 67 CAL. L. REV. 3, 7 (1979).

121. MAGUIRE, *supra* note 111, at 173.

122. Delgado, *supra* note 87, at 1367. See also Randall Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745 (1989).

123. Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561, 570 n.46 (1984).

124. Delgado, *supra* note 98, at 1226-31.

125. *Id.* at 1226-27.

126. *Id.* at 1227-28.

127. *Id.* at 1226.



cool. It used to be strong, it becomes weak. It used to wake you up, now it puts you to sleep."<sup>128</sup>

So where does that leave people of color? All this cynicism about a program which was allegedly intended to benefit the least advantaged and about how it has actually patronized communities of color, has destroyed any hope of amelioration of the country's racial problem. Where do people of color go from here? The first step, according to CRT, is to expect nothing but the worst from the dominant culture.<sup>129</sup> History provides enough evidence of what white people have accomplished, not only for themselves, but for society in general.<sup>130</sup> In addition, assuming *arguendo* that the dominant culture has an interest in ending the racial dilemma and healing the wounds they have inflicted upon communities of color, that interest will be limited such that programs implemented to assist people of color do not infringe on whites' property interest or status.<sup>131</sup> Furthermore, attempts by the dominant culture to ease the racial dilemma should be critically scrutinized as only a vehicle to calm racial tensions and prevent civil disorders, rather than as a reparation for the destruction and mayhem inflicted upon communities of color.<sup>132</sup> The statistics provided in this article, illustrating the dramatic "advancements" reached by affirmative action and civil rights legislation,<sup>133</sup> should provide sufficient evidence to persuade a person of color to look at the dominant culture and their alleged interests in alleviating the racial crisis with a suspicious eye.

The second step CRT advances is to "take our own program, with our own goals, our own theoretical grounding, and our own managers and call it 'Affirmative Action.'"<sup>134</sup> In other words, people of color should pursue a culturally nationalist objective.

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128. MALCOLM X, *supra* note 107, at 16.

129. Delgado, *supra* note 98.

130. Delgado, *supra* note 87, at 1371-73.

131. *Xerces*, *supra* note 98, at 1602 ("It is a paradox, but while your people's struggle in the courts for racial justice has given substance to some basic rights, the Constitution remains a document that secures vested property interests rather than personal freedoms for either blacks or whites. To the extent that your affirmative action policies threaten property interests of identifiable whites, they will not be upheld."). See also WE ARE NOT SAVED, *supra* note 98, at 140-61.

132. Healing the scar, as opposed to only "jerk[ing] the knife out." See *supra* note 2 and accompanying text. See also *Xerces*, *supra* note 98, at 1604 ("The . . . Court's liberal precedents actually protected the economic and political status quo by responding to the pleas for justice by blacks and other severely disadvantaged groups just enough to siphon off discontent, thereby limiting the chances that the existing social order would pay more than minimal costs for the reforms achieved.").

133. See *supra* text accompanying notes 73-84.

134. Delgado, *supra* note 98, at 1226.

It is necessary for us to develop a new frame of reference which transcends the limits of white concepts. It is necessary for us to develop and maintain a total intellectual offensive against the false universality of white concepts . . . . By and large, reality has been conceptualized in terms of narrow point of view of the small minority of white men who live in Europe and North America. We must abandon the partial frame of reference of our oppressors and create new concepts which will release our reality, which is also the reality of the overwhelming majority of men and women on this globe. We must say to the white world that there are things in the world that are not dreamt of in your history and your sociology and your philosophy.<sup>135</sup>

The bottom line being, that only people of color can comprehend the history, experiences, and dilemmas faced by their community. Therefore, people of color are in a better position to theorize, evaluate, access, confront, tackle, and resolve the problems encountered within their community.

In order to reach this intellectual level, whites, and in particular people of color, must accept the reality that this country, along with its Constitution, statutes, court-made laws, politics, economy, and social mores and attitudes, is not color-blind, but rather race-conscious. Malcolm X appropriately stated:

Being here in America doesn't make you an American. Being born here in America doesn't make you an American. Why, if birth made you American, you wouldn't need any legislation, you wouldn't need any amendments to the Constitution, you wouldn't be faced with civil rights filibustering in Washington, D.C., right now. They don't have to pass civil-rights legislation to make a Polack an American.<sup>136</sup>

The problem white society, and in particular white liberals, have in grasping this concept is twofold. Gary Peller, a white law professor who has contributed to CRT scholarship explains:

Within the white community, the conflict over race traditionally has been structured around an opposition between white supremacists who supported segregation, and white liberals and progressives committed to integration and civil rights reform. *To white liberals and progressives, looking through the prism of integrationist ideology, a nationalist conception of racial identity was understood to distinguish backward, ignorant whites from cosmopolitan, educated whites.* Whites who took race as central to their self-identity thereby expressed a commitment to racial supremacy, whereas whites who opposed racism understood that opposition to require the transcendence of racial identity in favor of integration and color-blindness. In other words, most white liberals and progressives, projecting themselves as the enlightened avant garde of the white commu-

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135. LERONE BENNETT, *THE CHALLENGE OF BLACKNESS* 35-36 (1972).

136. MALCOLM X, *supra* note 107, at 26.

nity, automatically *associated race nationalism with the repressive history of white supremacy*, and never developed either a consciousness or a political practice that comprehended racial identity and power as centrally formative factors in American social relations.<sup>137</sup>

Therefore, since race-consciousness or cultural nationalism, as perceived by the white community, is an ideology equated with white supremacy, the solution must be neutrality and color-blindness through an integrationist ideology.<sup>138</sup> Consequently, affirmative action policies are problematic for whites because they create a tension between their convictions of tolerance and color-blindness as represented through their perceived universal and neutral standards of merit, and the use of race-conscious programs as a means to remedy past discrimination. "Affirmative action has been characterized as merely an exceptional remedy for past injustice, rather than an affirmative right rooted in present social circumstances. It has been characterized as temporary and only necessary to achieve integration, at which time equal opportunity can take over."<sup>139</sup> In fact, "conservatives utilize the very rhetoric of tolerance, color-blindness, and equal opportunity that once characterized progressive discourse to mark the limits of reform."<sup>140</sup>

Peller, however, explains:

[I]ntegrationists, organizing their perception of racial justice around images of objectivity, rationality, and neutrality, never considered whether this language for distinguishing the worthy from the unworthy itself might serve to help justify racial domination - if not to its victims, then at least to white beneficiaries who need to believe that their social positions are the result of something more than the brute fact of social power and racial domination.<sup>141</sup>

Whites fail to comprehend that their utopian solution of a color-blind society through their form of integration "actually increases

137. Gary Peller, *Race Consciousness*, 1990 DUKE L. J. 758, 761 (emphasis added).

138. *Id.* at 770-71. According to Peller, the integrationist ideology holds that the cure for discrimination is equal treatment according to neutral norms. And at the institutional level, integrationism obviously means an end to the social system of racial segregation. In sum, the cure for racism would be equal treatment on an individual level and integration on an institutional level. In any event, integrationists believed the two would go hand in hand. Once neutrality replaced discrimination, equal opportunity would lead to integrated institutions; experience in integrated institutions would, in turn, replace the ignorance of racism with the knowledge that actual contact provides . . . . Integrationists are committed to the view that race makes no real difference between people, except as unfortunate historical vestiges of irrational discrimination. In an extreme form of the integrationist picture, the hope is that when contact occurs between different groups in society, not only race, but all "ethnic identity will become a thing of the past." *Id.* (citations omitted).

139. *Id.* at 776.

140. *Id.* at 762.

141. *Id.* at 778.

the white community's control over the black one by destroying institutions, and by absorbing black leadership and coinciding its interests with those of the white community . . . ."<sup>142</sup>

Race consciousness is a problem within the white community, particularly the liberal community, because, in their eyes, it creates a false sense of superiority which in turn results in the subjugation of people of color. Historically, white race consciousness forces people of color to feel inferior. The civil rights movement, however, made some whites realize that their position was not the result of racial superiority but rather brute force. Nonetheless, whites were not willing to give up their undeserved status. All they were willing to do is drop the notion of conscious racial superiority and relieve themselves of guilt through limited integration, thereby compelling people of color to assimilate into white culture.

Race consciousness for people of color, on the other hand, does not imply the annihilation of the white populace or the superiority of communities of color over caucasians, as it does for whites. Rather, it is a "commitment to the vitality of the [community of color] as a whole and to the economic and cultural health of [each respective community's] neighborhoods, schools, economic enterprises, and individuals."<sup>143</sup>

## Conclusion

Affirmative action programs have proven effective to a limited degree, but they have also proven quite burdensome for communities of color. As implemented, affirmative action has been wrongly utilized as a tool by the dominant culture to rid itself of guilt and responsibility for its inhumane and criminal actions. The program has created a facade of equal opportunity in the face of worsening racial conditions and disparities.<sup>144</sup> This facade simultaneously denies communities of color autonomy and self-determination.

The solution lies in re-evaluating affirmative action programs and their ramifications. People of color should note that affirmative action programs have not been used or implemented in their best interest. Further, reliance on a program created and structured by the same power structure which is the cause of the problem is illogical. Communities of color should create their own programs to adequately further their interests. And if affirmative action policies

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142. *Id.* at 783 (quoting Robert S. Browne, *A Case for Separatism*, in *SEPARATION OR INTEGRATION: WHICH WAY FOR AMERICA: A DIALOGUE* 7-15 (R. Browne & B. Rustin eds. 1968)).

143. *Id.* at 845.

144. *See supra* notes 73-84 and accompanying text.

are to continue, they should not be perceived or implemented to remedy past discrimination, for purposes of diversity, or to create role models. Affirmative action should be implemented as an affirmative right, justly deserved by people of color for their struggle in overcoming the racism, oppression, and exploitation they have encountered, while simultaneously contributing to this country's wealth and status. In addition, affirmative action programs should be perceived as reparations for past and current exclusion from the benefits reaped by those who did nothing, but received everything.

Well I am one who doesn't believe in deluding myself. I'm not going to sit at your table and watch you eat, with nothing on my plate, and call myself a diner. Sitting at the table doesn't make you a diner, unless you eat some of what's on that plate.<sup>145</sup>

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145. MALCOLM X, *supra* note 107, at 26.