Critical Race Theory and the Struggle at the Heart of Legal Education

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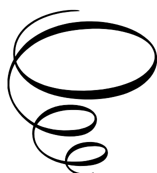
A View from the Inside

By

Paul Zwier

Cambridge Scholars Publishing



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many projects we did together in Africa, Mexico, China, the Middle East, and Russia.

Finally, and most importantly, my deep gratitude to my best friend and partner, Marlene D. Zwier, for your continual love and support. Your deep sense of justice and compassion run through me in my work in legal education and in so much more.

INTRODUCTION

TAKING CRITICAL RACE THEORY SERIOUSLY: CONSERVATIVES AND FOUNDATIONALIST BELIEFS IN LAW

PAUL J. ZWIER[1]

When historians look back at the killings of young Black people and police officers from 2016 to the present, will they say the US was in a race war? When considered in light of other political events, will this period be seen as the start of a revolution? Was Americans' faith in their foundational beliefs so shaken that the rule of law lost its grounding, and there was nothing left but to take matters to the streets?

It wasn't as if there weren't a devastating number of shootings even the year before. In *Grace* by Cody Keenan, the chief speech writer for President Obama described the days before the funeral for the nine Black people killed in a Charleston church that year:

[1] When I first came to Emory University in 2003, Harold Berman welcomed me and we struck up a friendship. I knew of his wonderful inventive history *Western Legal Tradition*, but being his colleague gave me fresh incentive to give it a close read. I am reminded of it now as I think about this project of a modern legal history of critical race theory. Berman's view was that by rejecting a periodization of the history of law, often grouped as a nationalistic story of a particular country's legal development from tribalism to its period of triumph, one could better see both the rise and the fall of (or revolution against) a country's law and government. He thought that with the secularization of American law, the US was on the verge of a revolution. Forty years later, that revolution seems even more imminent. I believe critical race theory may present an accelerating force toward that revolution. Or it at least helps clarify whether the US is on the cusp of rejecting its foundationalist beliefs: beliefs in democracy, liberalism, and the rule of law. See Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge, MA: Harvard University Press, 1983), v–viii, 520–21.

> "Jesus." The anguish and helplessness at some faraway slaughter felt familiar to all of us by now. We'd been through mass shootings many times. Immigrants in Binghamton. Soldiers at Fort Hood. A congresswoman and her constituents in Tucson. Schoolkids in Newtown. Movie goers in Aurora. Sikh worshippers in Oak Creek. Christmas shoppers in Clackamas. Other Americans in other towns with ordinary names that had become shorthand for tragedy.
>
> In 2015 alone, there would be more than three hundred mass shootings in America, defined as four or more people shot in one event, not including the shooter. The country had become so numb to the bloodshed that only the most horrifying ones seemed to be uncommon.
>
> They were usually over in minutes. Sometimes the killer was dead. It was irreversible. For all the power of the presidency, there was little a statement could do but show some moral clarity and give a frightened and grieving community some reassurance that the world would keep spinning.[2]

In 2016, Trump was president and the tragic shootings kept coming. There were more shootings of unarmed Black people by white vigilantes and white police. There was also a steady drumbeat of shootings of police officers, some white and some Black. There were shootings of Black people and Jews in churches, and shootings of Asians in massage parlors, and shootings of children and teachers in schools. There were shootings until the US was numb. Were Americans just generally gun-crazy? Or, as the narrative presented the cases, were whites inherently and intractably racist?

There was a name for a theory that described what was happening when race was a factor, especially when the shootings were directed at Black people. That theory was called critical race theory, or CRT for short. CRT said society was filled with racists and their racism was unconscious, implicit, institutional, and systemic. Whites who denied they were racist were racist. Their failure to do something to stop the shootings demonstrated their indifference and therefore complicity in the racism directed at Black people.

"Black Lives Matter" became the slogan students used to describe their angst. The anger and fear were genuine and calls for a meaningful response urgent. A counter-movement began to push back on CRT. These tried to tell the story of Antifa: that anarchists and others bent on chaos and destruction were responsible for the violence.[3] A movement called "Occupy" preceded this time. Occupy protesters seemed more concerned with anarchy and

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[2] Cody Keenan, *Grace: President Obama and Ten Days in the Battle for America* (New York: Sugar23books, 2022), 31–32.

[3] James Stout, *A Brief History of Anti-Fascism*, https://www.smithsonianmag.com/history/brief-history-anti-fascism-180975152/.

called for the end of government, which they thought was inevitably corrupted by elite interests.[4] They gave reason for some in the countermovement to tie themselves to a slogan "to put America first." For them it was in part a return to the law-and-order movement of the '60s. By 2020 some felt the election was stolen and stormed the Capitol. This group had a variety of motivations. Some were religious, with hints of Christian nationalism. Some were responding to Trump's lie that the election had been stolen and they needed to lead a revolution to keep the Democrats from taking over. They seemed to believe the lie by racist concerns that Black Democrats had rigged elections. In the middle were those who wondered whether these years were really that different from other times in history in which racial tensions had boiled to the surface. These people tried to urge restraint.[5]

This book is an attempt understand how these evens and movements were impacting legal education. It tries to try to slow down my (our) legal educator's thinking and address the concerns of law students. Legal educators are concerned about the attitudes of the public at large but also their role as lawyers in how best to respond. How do lawyers cope with all the shootings of Black people? How should they think about our justice system and the rule of law as case after case wrestles with issues of race? In a way, legal educators are particularly qualified to guide the discussion of these issues. They are, first and foremost, historians who study the current history of cases and case law to see what lessons are emerging. Yet the telling of any history is subject to perspective biases, hindsight biases, and hierarchical biases, so their role as historians may not be sufficient for the passion and emergency nature of the setting.

Historians are not the only ones interested in studying current events. Sociologists and anthropologists will also likely tell of the cultural forces in play. They will tell of groups that were less patient and more radical, who demanded answers from authorities about what was occurring. Some argued that "Black Lives Matter" and did not want to hear "All Lives Matter" or "Police Lives Matter." Sociologists might characterize these group members as tribal and apolitical, and see connections to other forces that are even philosophical and theoretical.

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[4] History, *Occupy Wall Street Begins*, https://www.history.com/this-day-in-history/occupy-wall-street-begins-zuccotti-park.

[5] In his address to the American Association of Law Schools (AALS) titled "How Law Schools Can Make a Difference," Erwin Chemerinsky, president of AALS, cautioned law students to be patient and see law as an instrument of gradual, orderly change. See https://www.aals.org/about/publications/newsletters/aals-news-winter-2022/2022-aals-presidential-address/.

Maybe they will tell of others who expressed a renewed interest in their beliefs about God and the problem of evil. How much of what was happening was just a confirmation of human frailty, irrationality, and even sinfulness? How much of it was racism? What percentage was politics by corrupt politicians who said and did whatever it took to stay in power? Maybe it was even politics as usual. Did American politics cross the line to partisanship?[6] Is there a difference?

At times the current collective angst among law students is palpable. Some are worried we are on the brink of a civil war. They wonder what will keep us united. Do we have enough of a common sense of ourselves, or our values, or the story of who we are and what makes us great? Some feel our foundational beliefs are no longer shared. We may no longer believe in democracy, at least in a democracy that is inclusive of all religions, minorities, and identities. We may no longer believe in the principle of equality for all, especially if it threatens the liberty and property interests of the majority.

Those in legal education are alert to these events. As "jurisprudes," they focus on the law. I am one of them. What role do the courts and juries play in sorting out the chaos of human behaviors and motivations? Questions about law often involve issues of free speech or press. Maybe democracy best sorts out these matters through the politics of elections and then legislation. Some wonder what role universities, and especially law schools, should play in sorting out the values that are fundamental to those who want to govern. Where are our shared values or shared religious beliefs? Where should they be formed: church, school, university, home? Shouldn't our values lead us to the methods, processes, and principles for ending violence? What are we being taught and what are we teaching about law? Which legal foundations are keeping us together and which ones are pulling us apart?

Whether as citizen or educator, our thinking is fast, but we have the unsettling feeling that we should think more slowly and more carefully.[7]

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[6] Jean Edward Smith, *John Marshall: Definer of a Nation* (New York: Henry Holt & Co., 1996), 284–85.

[7] Daniel Kahneman, *Thinking, Fast and Slow* (New York: Farrar, Straus & Giroux, 2011). Trial lawyers know the importance of slowing down one's thinking when confronting horrific events and trying to make meaning out of them. For example, consider one lawyer's approach to jury selection in an important case:

> A former USA Quinn partner demonstrated a jury selection technique he used on behalf of a defendant in a civil case, though it just as easily could be used in a criminal case involving a criminal defendant. He took race out of the equation. To determine whether the prospective jurors could keep an open mind until they heard from the defendant, he told them to imagine they

There seems to be a lot at stake. Life's tragedies and violence influence our fundamental or foundationalist beliefs. They make us re-examine our faith in our institutions. Experience influences the way we see our law and the institutions that administer it. Life not only changes our politics; it also has the potential to change our fundamental ideas of justice. It is vital, then, for legal educators to keep up: to discuss a "current" history of these events and institutions to help students understand our history and help them shape their belief in law. Our history teaches us lessons so that we do not repeat our mistakes.

Yet writing a current history is an interdisciplinary challenge. There always seem to be more killings to make sense of. They are not confined to just one region. What is happening is not just a southern problem. In the summer of 2022 in which I am writing, a young Black man in Grand Rapids, Michigan, has been killed by a police officer.[8] The next week, that killing was followed by killings in Buffalo, New York, where ten Black people were shot by a white teenager with a manifesto to kill Black people. Days before the Michigan shooting were the school shootings in Uvalde, Texas, in which twenty-one children were killed.[9] Uvalde is a community near Houston, Texas, where a young Hispanic teen first killed his own grandma, then went to school and kept killing. There was immediate criticism from the community that the police did not act quickly enough in responding to the violence. The old saw was again put forward: "The only way to stop a bad guy with a gun is a good guy with a gun." This led politicians to call for

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were sitting on a case in which the defendant was seen in a room with a knife in his hand, and the front of his shirt was covered in blood. The victim was dead, lying face-up with blood all over the front of his chest. He told the prospective jurors to raise their hands if they thought the defendant had murdered the victim. When a few raised their hands, he paused and said, "Before the rest of you raise your hands, let me add a fact: the defendant is a doctor and the setting is an operating room. And the doctor is an EMT, and the victim was transported there by ambulance. Do you see how important it is to wait to hear all the facts, both to determine who caused the death and the mindset and intent of the defendant in his actions to try to save the victim's life?" The jurors nodded. He said, "You will hear some dramatic facts in this case, but I need you to promise to follow the judge's instruction to keep an open mind until you hear all the facts of the case. Please raise your hand if you promise to keep an open mind."

[8] Luke Vanderploeg and Mitch Smith, "Michigan Police Officer Charged with Murder after Killing Black Motorist," *New York Times*, June 9, 2022, https://www.nytimes.com/2022/06/09/us/patrick-lyoya-grand-rapids-shooting-charging-decision.html.

[9] https://www.texastribune.org/series/uvalde-texas-school-shooting/.

everyone to mourn and support the families of the victims instead of politicizing the situation. Regardless, politics, guns, and police are continually in the news spotlight. It is hard to think this is just life as usual.

An important part of examining and evaluating these events will be the impact of cultural events on our views of law and our willingness to include others' thoughts and feelings in formulation of law. We leap to make sense of our feelings and imagine how we would feel if we were the parents of those children or the parents of the shooter. If we are not careful, our politics, our personalities, and potentially, our personal and group interests will start to shape our understanding of what occurred. There is the potential for legal decision-makers—whether judges in the high court or lower court, or jurors, or administrators, or ombudsmen—to stereotype the parties involved, to deceive themselves that they are being neutral, fair, and reasonable. We may miss the individual context in which a particular party has been acting and impose our values and politics on them unfairly.

In Buffalo, a poet is angry.[10] She rejects calls for calm. She speaks out of her anger. She says her anger, and the anger of Black people, is valid. In her poetry, she calls for protests, demonstrations, and, at a minimum, honest discussions in the community. Her poetry also demands change. In the words of John Lewis, we need "good trouble," and, for some, even violence is needed to obtain justice for the victims of historical racism.

In the spring and summer of the same year, FBI director Wray offers a special address for the police killed already in 2022 in the line of duty.[11] He is concerned that over seventy police officers have been killed, a significant increase from 2021. Police departments are having trouble employing police. According to some news commentators (on Fox, not their news programming), the Congressional hearings on the January 6 insurrection would have been better spent on understanding the violence of Antifa and the burning of US cities.

Between the start of 2021 and summer of 2022, the politics of police reform has seemingly made a U-turn, from the more radical kinds of reform to more support and affirmation of the tough job police face in keeping "us all" safe.[12] The outpouring of support in cities from San Francisco to Atlanta

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[10] Buffalo Poet Laureate Jillian Hanesworth, https://buffalonews.com/watch-now-poet-jillian-hanesworth-at-buffalos-march-for-our-lives/video_f908e0ca-9db7-50ad-b915-8177991de44c.html.

[11] Director Wray's 2022 National Police Week Address, https://www.fbi.gov/video-repository/director-wrays-police-week-address.mp4/viewhttps://www.fbi.gov/news/press-releases/press-releases/fbi-releases-2022-statistics-on-law-enforcement-officers-killed-in-the-line-of-duty.

[12] California elections in San Francisco send a clear message on police reform.

has impacted the politics of state and mayoral elections. In Chicago, the number of police killed by gangs is rising. There is also ongoing MS-13 violence and drugs.[13] The FBI has an MS-13 gang member atop its most-wanted list. For some, rising crime is tied to cartels, immigrants, gangs, race. Renewed funding of police is on the ascent.

In Illinois, one candidate for governor calls for reinstatement of the death penalty for anyone who kills a cop. In Detroit, the politics covers the spectrum. On one side, the politics is "Defund the Police." On the other side, there are calls for more police and better support for them.[14]

January 6

The House Select Committee on the January 6, 2021, riot at the US Capitol puts squarely before the public the politicization of the rule of law of the Constitution itself. John Hansen, Trump's lawyer, pleads the fifth for advice he gave then-President Trump about whether then-Vice President Pence should either not certify the states' electoral results or investigate them, holding off the election results in the process. Interpretation of the

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[13] "Inside the FBI: Top Ten Fugitive Yulan Adonay Archaga Carias," https://www.fbi.gov/audio-repository/inside-the-fbi-top-ten-fugitive-yulan-adonay-archaga-carias-040522.mp3/view. ("MS" stands for Madre Salva, gangs from El Salvador, and "13" stands for loyalty to Mexican drug cartels, Trece or eme.)

[14] See, e.g., Jennifer Henderson, "Detroit Police Officer Killed after Being 'Ambushed' while Responding to a Gunfire Call," *CNN*, July 8, 2022. https://www.cnn.com/2022/07/08/us/detroit-loren-courts-killed/index.html. Henderson quotes James White, the Chief of Detroit Police, and Governor Witmer, concluding,

> Michigan Gov. Gretchen Whitmer said US and Michigan flags throughout the state will be lowered on the day of Courts' interment and another date the family chooses. "Michigan is heartbroken by the loss of Officer Loren Courts. Officer Courts was a dedicated public servant and proud Detroiter. Yesterday, he made the ultimate sacrifice in the line of duty," she said in a statement.
>
> The Detroit Police Department has lost nine officers in the line of duty since 2015, according to the Michigan Law Enforcement Officers Memorial Monument Fund.
>
> White said he needs the lawmakers and the courts "to step up" because "it's getting a little bit old hearing about what everyone's going to do. It's time to do it. We are reeling, but we are resolute in our mission to protect and serve this community."
>
> "The reality of it is this is beyond Detroit's issue. This is the country's issue and the relationship with law enforcement. It's this you know, anti-law enforcement conversation."

Constitution has never been more political. Is there a neutral way to determine its meaning, or is it all subject to partisan politics? Of course, discussion of the Constitution in the context of January 6 can't avoid race. Disallowing votes from Wisconsin, Atlanta, and Pennsylvania is based on suspicion that the heavily majority-Black votes from those areas were the product of race politics. Voting machines were infiltrated by foreign actors, whether Venezuelan or even Martian, but require the states to set aside votes from heavily Black-voting districts to set aside the election results. Were Trump and Hansen dismissive of the votes of Black voters partly because of racism?

Law Schools

What a time to go to law school and teach in American law schools! It's not hard to imagine that law students and future judges and politicians will expect their professors to help them sort through these events and understand how they can best work in the justice system. And indeed, how do law schools best prepare lawyers to be advocates, judges, and legislators, in the face of such events? How do professors teach in an environment where democracy is teetering, and teach the theories of law that provide fundamental, common understandings of law and the rule of law that undergird a liberal democracy? How do law schools and legal educators understand critical race theory and its role in critiquing the rule of law and the American justice system? At stake, then, is not only fundamentalist principles for legal educators but also fundamentalist principles for the future players in our system of justice.

This book is an attempt to try to deconstruct our thinking and address the concerns of law students. They are concerned about the attitudes of the public at large but also their role as lawyers. How do lawyers cope with all the changes? How should they think about our justice system and the rule of law?[15]

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[15] Of course, no history is objective, and this one has its own perspective of CRT. I will discuss the changes I experienced throughout my teaching career with CRT and legal theory on a number of fronts. My perspective is that of a legal educator on the verge of retirement after forty years of teaching in legal education. I consider myself a kind of "everyman" representative of teachers of law since 1982. As a result, this book is an examination of my own career as a legal educator teaching students how to think about law and their role in it and how to "think like a lawyer." My hope is that reflecting on my own journey of teaching law will provide insight for others in the justice system on how they, too, see their foundationalist beliefs in democracy and the rule of law.

In discussing justice and the rule of law, this book will touch on the topics of policing methods and gun control laws, especially as they relate to attempts to outlaw the sales of guns to those with mental illness. It will address how race and racism impact legal reform efforts in these areas. This book will touch on these issues, but they will be collateral to the discussion of its broader topic: How does our justice system—our courts and legislatures—deal with issues of race? On a closely related subject, it will examine the differences between political arguments about race as a basis for legislation and the struggle of our justice system to develop a non-

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I have been a law professor since 1981. I am a graduate of a small, religiously affiliated college, now Calvin University. I was a history and philosophy major in college. My professors in philosophy at Calvin included Nicholas Woltersdorff (Kant), Alvin Plantinga ("God and Other Minds," philosophy of religion), Evan Runner (Rousseau, Schleiermacher, Fichte, Hegel), and Richard Mouw (ethics). The history professor who most influenced my thinking was Ron Wells, who specialized in the history of Ireland and its religious disputes, as well as the history of California and the role that both Mexico and Native Americans played in the state's formation and politics. To this day, their teaching pervades my thinking of law, religion, and culture.

I draw on the disciplines of both philosophy and history to inform my understanding of the justice system and the law I teach. I don't have any formal degree in philosophy or a PhD in history, but like many of my law-teaching colleagues, I see my duties in teaching the common law as including reading in these areas to learn how law develops and how it ought to develop. Before starting my teaching career as a professor, I studied as a clinical fellow at Temple University School of Law. That study led to an LLM degree. My coursework in the program perhaps gave me a unique (if not privileged) perspective on teaching law. While we read the realists, the critical legal theorists, and law and economics, my colleagues and I were at the forefront of the "experiential" learning movement in legal education. I was both a clinician and a teacher of trial advocacy and negotiation skills, mentored by Joseph Harbaugh, whom some regard as one of the founders of clinical law skills in legal education, and Anthony Bocchino, who was fast becoming an outstanding teacher in the fields of trial advocacy and practical evidence. I had learned expertise in the substantive law of torts, evidence, and corporate law. Although no longer teaching in a clinic when I entered teaching on a tenure track in the fall of 1981, I taught skill courses in law school as well as torts and corporate law. Teaching torts for forty years gave me a front-row seat to theoretical law and movements that impacted the subject matter. I learned, along with my students, about fundamentals of common-law theory, the realist movement, the rise of critical legal studies, law and economics, law and feminism, vulnerability theory, law and sociology, law and psychology, and law and religion.

On the skills side, I continued to hone my understanding of negotiation theory and ADR. I worked closely with trial lawyers through the National Institute for Trial Advocacy (NITA) and became director of public programming at NITA.

political basis of law in the courts. Perhaps changes are needed in the justice system, in the ways that courts determine the law that should be applicable in cases dealing with race, and in the ways jury members deal with their role as fact finders. The book will suggest some reforms.

Implicated in the discussion will be the role that legal education plays in teaching about the law and issues of race. It will therefore take stock of and try to grapple with critical race theory and how it should be thought about as part of the legal education of lawyers. Discussing CRT will give us the opportunity to examine our very foundationalist beliefs in the Constitution, the rule of law, and the role of due process in our justice system. It will give us the opportunity to explore the difference between adjudication, or law in the courts, and legislation, or law most often thought of as derived from politics. Of course, important topics that cross over between adjudication and legislation will be our foundationalist assumptions concerning the structure and fairness of our democracy, voting issues embedded in our beliefs in federalism, and a bifurcation of legal sources for voting rules between the federal government and states.

Of course, I am not the only one concerned about these matters. A lot of soul searching is happening in legal education these days. Educators at American law schools are asking questions: how could law-trained representatives at both the state and federal level pay so little attention to foundationalist[16] values and legal standards seemingly vital to democracy? For example, how could Josh Hawley and Ted Cruz, graduates of Yale and Harvard law schools and clerks for Supreme Court justices, foment "the Big Lie" that the election was stolen, all to curry favor with a president seemingly devoid of any obligations to the law, the Constitution, or a peaceful transition of power?[17] How could state legislatures from Georgia, Arizona, Pennsylvania, and Texas enact voting restrictions that substantially

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[16] Woltersdorff argues that critique of a nation's justice system involves religion because one must examine the foundationalist beliefs that serve as nonrational bases for any epistemology or justice system. Nicholas Woltersdorff, *Justice in Love* (Grand Rapids, MI: Eerdmans, 2011), 28.

[17] Jason Lemon, "Josh Hawley and Ted Cruz Should Be Disbarred, Over 8,000 Lawyers and Law Students Say" (petition initiated by Yale Law students), https://www.newsweek.com/ted-cruz-josh-hawley-should-disbarred-over-5700-lawyers-law-students-say-1560537. Law deans and law professors also condemn Hawley and Cruz and attack on the capital: https://www.jurist.org/news/2021/01/thousands-of-lawyers-and-law-students-petition-to-disbar-us-senators-josh-hawley-and-ted-cruz/.

impact access to voting for minority communities, despite no evidence of widespread voter fraud?[18]

Especially troubling to legal educators are the related and underlying issues of racism and voting. To progressives, new election laws appear bent toward the suppression of Black voters. They worry about how white law representatives could so easily discard democracy in their efforts to place their party above free and fair elections. How can they so readily propose laws that seek to deny the counting of the votes of all citizens? Conservatives counter they espouse only neutral values: they criticize the legal decisions that secured the election for Biden as lacking a fair and transparent review of potential election fraud. They argue that they value secure borders, conservative judges, nation-first military and economic policies, and "family values."

Still, say progressives, at what point did law-educated politicians in the US decide voting was a secondary value, thereby elevating other values they found more important? To those on the left, it appeared conservatives were toying with dictatorship, or even fascism, if their leaders willingly traded populist values for values that upheld democracy and ensured the fair vote counting of all citizens.[19] Are conservatives simply abandoning democracy in a racist/populist appeal to power? On the right, politicians protested it was they who were concerned for the integrity of our voting. They used the Constitution to locate control of voting in the states and state legislatures. It was state legislatures, they said, whose power was being usurped by the federal government. To them, the grab of power was by liberals intent on imposing a secular socialism that had the potential to impact human liberty.

Liberal progressives blame recent electoral outcomes in Virginia on misuse of critical race theory as a point of conservative attacks. Democrats argue that conservatives misrepresented CRT as a cover for "replacement theory," a false argument that CRT is a strategy to replace white leaders in society with minorities, including immigrants.[20] The gauntlet has been

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[18] Conservatives argued these changes just returned states to pre-COVID rules and better ensured the integrity of the voting process.

[19] "Josh Hawley Responds to Critics," https://www.semissourian.com/story/2859441.html.

[20] To some, it is difficult to take "replacement" arguments seriously; however, it is the theory the white gunman in the Buffalo shooting described above espoused. He seemed to be referring to theories propagated by Tucker Carlson on Fox. What role, then, do free speech and free press doctrines have, through social media, on the rise of racism and its relationship to violence? During Trump's presidency, Charlottesville, Virginia, and the University of Virginia were the site of political protests from the far right, signaling, for some, a return of the Ku Klux Klan and

thrown down: Vote for progressives and they will take your job. Vote for conservatives and they will take your vote, life, and property, with impunity.

The Buffalo killings took place after the Virginia election, but the shootings of George Floyd and Ahmaud Arbury were in the political background. In the Virginia election, the argument surfaced that elites were teaming up with Black people to "replace" whites in their jobs. Some felt "replacement" fears were implicit in the political argument that children homeschooled during the COVID-19 pandemic (and supervised by their parents) were subjected to educational experiences that made them learn about and feel bad for the history of white oppression of Black people. These kids, they said, were being softened up to accept a lesser role in society. As preposterous as this argument sounded to many in politics, the argument does seem to have had some impact on the outcome of the Virginia governor's election. Some placed blame on the teaching of critical race theory in public schools. Virginia, after all, had voted overwhelmingly for Biden in the 2020 election. By 2022, the same voters seemed to have shifted dramatically back toward Trump.

Therefore, we must look carefully at where critical race theory originated. Should we take it seriously? How have legal education and the judges and lawyers it has produced since the Civil Rights Act of 1964 come to understand it? How should law teachers teach and advocate about race, democracy, and law? How has the justice system responded to charges that it is not neutral but "institutionally" structured to discriminate against Black people? Maybe both the government and the justice system should be more proactive in eliminating racist effects, including by trying to police individual speech and attitudes that may carry racist thinking.

Legal education is sometimes shaken by politics. CRT first rose in legal education, in part, following the pending impeachment of Richard Nixon. Legal educators not only put renewed emphasis on the "ethics" of the lawyers who represented the president but also looked at race. After all, Richard Nixon had seemingly used race to defeat the likes of George McGovern. He invoked a "southern strategy" to turn southern Democrats into Republicans. He pointed to the progressive activist Warren Court and cases like *Brown v. Board of Education*, which concerned the integration of public schools, and *Gideon v. Wainwright*, which provided legal representation to anyone (including Black people) accused of committing felonies and eliminated prayer in the public schools. Despite a landslide election, a paranoid Nixon was mistrustful of the political forces that had

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other white supremacist politics. Was the country really still debating white supremacist politics? Or were politicians merely using gun rights and states' rights as a cover for racist politics?

led to his election. He ordered the Watergate break-in to try to ensure Democrats couldn't mount an electoral challenge to his election. How could a lawyer, supported by other lawyers, have such contempt for the electoral process and engage in such dirty tricks? Martin Luther King Jr. was assassinated. Racism, along with the protest of the Vietnam War, played a role at the Democratic Convention in Chicago.[21]

As during the Nixon era,[22] many in legal education saw in Trump the same forces at work. Trump was disdainful of the electoral process. In his

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[21] https://www.history.com/this-day-in-history/protests-at-democratic-national-convention-in-chicago.

[22] This isn't the first time troubling political events have prompted US legal education to reform. Post-Watergate curriculum reform efforts led many law schools to re-examine the courses they taught, especially on ethics and professional responsibility. Legal education tried to assist in ridding the US of lawyers like those involved in the cover-up of Richard Nixon's role in the Watergate break-in at the Democratic headquarters in Washington, DC. At the time, legal educators asked how lawyers could be so complicit in illegal, anti-democratic behavior that interfered with issues of voting integrity and abuse of office and instigate a criminal cover-up. Legal educators took the questions and criticism to heart.

The outrage from Congress to Watergate was bipartisan. The American legal establishments both at the national and state levels also responded to the criticism. (See Leslie C. Levin, "The MPRE Reconsidered," *Kentucky Law Journal* 86, no. 2 [1997]: Article 5, https://uknowledge.uky.edu/klj/vol86/iss2/5.) The bar set up a separate exam on professional responsibility. Law schools quickly took up the cause and instituted either mandatory professional responsibility courses or made teaching of the topic pervasive throughout the curriculum. Law schools tried to root out values in lawyers who too willingly traded personal power for rule of law and responsibilities to the Constitution.

Curriculum reform was especially pervasive in law schools with a diminishing population of law students interested in the law, who hoped to attract more students. (See A. Kenneth Pye, "Legal Education in an Era of Change: The Challenge," *Duke Law Journal* 191, no. 2 [1987].) These law schools also had their own incentives for curricular reform. With the simultaneous rise of the administrative state, there was a need for new courses and a greater need for lawyers. The Civil Rights Act of 1968 aimed to provide the legal framework for leveling the playing field of life for people of color. Other new changes included the Voting Rights Act and Title 7 and addressed issues of discrimination in the workplace. Government got into the business of trying to end poverty by building public housing, integrating schools, outlawing red lining by banks, and, for a time, allowing for some affirmative action initiatives by educational institutions and municipal and state governments. The three-year curriculums at most law schools examined and dissected the promise and failures of each of these laws and regulations. Holdings by the Supreme Court that limited the Voting Rights Act (such as that discrimination must be tied to existing

arguments against illegal immigration, Antifa, and the protest movement, he invoked race to mount challenges against the results of the election. Progressives in law schools, in particular, saw a need to teach better values to legal graduates to combat the popular shift in values that traded democracy for power.[23]

The reforms of legal education enacted during the Nixon era were quickly met by rising criticism, especially from political conservatives. Linking these reforms with Marxism and labeling them un-American (especially when taught in high school history classes), a countermovement against critical race theory initially polarized the academy as well as the body politic. But then the debate seemed to disappear. Many progressives in the academy saw gradual progress on race-related legal issues through the actions of the Supreme Court and various legislative initiatives that declared a war on poverty and promoted fairness in employment, housing, and education. Perhaps some of these changes, however, were illusions. In any event, for a time, legal educators taught about race and the Constitution and race in civil rights, labor and employment, and law and economics; but seldom did they challenge the law as such. CRT now claims the law itself is racist.

Until the recent election in Virginia, the CRT debate had largely been assimilated into a postmodern pluralistic theory of jurisprudence wrapped in constitutionalism. Ironically, it is conservatives who have often made the educational system the setting for teaching and learning citizenship values. According to conservative theorists, virtues should be taught. One would think inclusive democracy, civility, and anti-racism ought to qualify as virtues that conservatives like Senators Haley and Cruz would support. Liberals ask at what point conservatives began to tolerate racism and

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discrimination, not to acts in the past) prohibit race discrimination cases in the workplace that rely simply on disparate impact theories.

[23] Prominent examples are UCLA School of Law (see https://law.ucla.edu/academics/centers/critical-race-studies), New York City Law School, and Yeshiva University's Cardoza School of Law. According to the website the *College Fix*, the *Washington Beacon* reports first-years must choose one of three classes on CRT, crosscultural negotiation, or indigenous rights in the Americas (see https://www.thecollegefix.com/top-ranked-law-school-to-mandate-critical-race-theory-course-for-graduation/). Harvard and Vanderbilt advertise first-year course offerings. Others, like Emory, are studying whether to institute a required course on critical race theory or integrate it into the first-year courses. (See also Janel George, "Lesson in Critical Race Theory," *ABA*, January 12, 2021, https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/civil-rights-reimagining-policing/a-lesson-on-critical-race-theory/.)

abandon democratic values for other political ends.[24] Despite legal education's experience with the difficulties of teaching morality and values to adults, shouldn't it at least try to instill these values in its law school curriculum?

Yet as troublesome as the voting rights disputes are, equally as troubling is the evidence of institutional bias in the outcomes of criminal cases that provides more force to the current crisis in legal education. In that regard, CRT takes on an almost religious zeal in its critique of both the justice system and the legal educators responsible for forming its practitioners' values. CRT attempts to expose the lack of coherence and completeness in legal education's understanding of what it is teaching as the rule of law and what it means by *justice*.

It is hard to explain to those outside legal education the impact that news of white police officers' shootings of Black people had on law schools. Students rightfully began to ask questions. How can white police officers escape any criminal accountability for their actions? There was much angst at law schools about how the US legal system "permits" such obvious acts of racism to continue.[25] Any improvements in rights and access to justice Black people attained after the civil rights movement of the '60s were washed away by new waves of racism and institutional bias. There is no doubt that the movement for curricular reform in legal education is based

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[24] Some say it dates back to Nixon, then was embraced by Reagan. See the University of Michigan, http://umich.edu/~lawrace/votetour10.htm:

> Kevin Phillips, analyzing 1948–1968 voting trends, viewed these rebellious Southern voters as ripe for Republican picking. In *The Emerging Republican Majority* (New Rochelle, NY: Arlington House, 1969), he correctly predicted that the Republican party would shift its national base to the South by appealing to whites' disaffection with liberal democratic racial and welfare policies. President Nixon shrewdly played this "Southern strategy" by promoting affirmative action in employment, a "wedge" issue that later Republicans would exploit to split the Democratic coalition of white working class and black voters. (See John Skrentny, *The Ironies of Affirmative Action* (U Chicago Press, 1996). This strategy soon produced the racial party alignments that prevail today.

[25] See "In Memoriam," https://www.reneeater.com/on-monuments-blog/tag/list+of+unarmed+black+people+killed+by+police:

> The universe shrank
> when you went away.
> Every time I thought your name,
> stars fell upon me.
> —Henry Dumas (poet, social activist, teacher)

This site lists over forty young Black people killed by police since 2015.

on genuinely held fears about a slide toward populism and racism that threatens US democracy.[26] As a result of these recent events, it is important to look carefully at the relationship between these cases and CRT. We must carefully examine the complexities of the justice system, and the US common-law version of it, to determine how the system makes findings of racial animus the driving results in individual cases.

As we look at individual cases, we will confront the jury as the finder of facts, as well as the decider of sanctions and damages. We will see how the jury trial has the potential to be racially biased. How are trial lawyers dealing with this potential? What methods might be developed to combat it? Of course, the jury is guided by the judge, who uses the judge's experience in interpreting rules regarding evidence and experts and in guiding the jury to reach a fair decision. We must also look carefully at how jury members wrestle with their own experiences with racism as they listen to the evidence and how the jury uses its collective "common sense" to decide questions of fact. Here, CRT has much to offer, and it can be a tool for measuring racial bias. As helpful as it has been in putting a spotlight on the jury, we must also see its limitations. How does CRT propose to go beyond recognizing the potential for racism if it is to stay within some form of rule of law? While race can play a role, is there another effective way for the American justice system to right itself without throwing out the common-law way of processing: without turning to revolution?

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[26] The *Washington Post* has sought to keep statistics of fatal shooting by police since 2015 at https://www.washingtonpost.com/graphics/investigations/police-shootings-database/. What one sees in these statistics depends on one's political perspective. The steady rate of overall shootings, approximately one thousand per year, speaks to the argument that things are not getting better. Also holding steady is the disproportionate number of fatal shootings of Black people and Hispanics. Although only 13 percent of Americans are Black, deaths of Black people account for 37 per million of the population, compared to twenty-seven per million for Hispanics and 15 per million for whites. Conservatives are quick to point out it is difficult to factor racism into the statistics because the deaths occur overwhelmingly in urban areas where there are higher percentages of Black people and in "high crime" neighborhoods, where poverty affects the number of suspects who may turn to crime or arm themselves for protection. Of course, progressives respond that poverty is a result of racism, including institutional racism. See Statista.com's reporting of trends from 2017: https://www.statista.com/statistics/585152/people-shot-to-death-by-us-police-by-race/. (Neither data set includes information on the race of the police officers involved in the shootings.) Conservatives argue Black communities are as entitled to safe streets, protection from domestic violence, and drug enforcement as any other community.

Legal education is now reclaiming the origin story, using CRT to reform its curriculum. It is not only high school educators who have embraced critical race theory as a tool for combating the shift in values.[27] In fact, the critical legal theory (CLS) movement of the ’60s spawned critical race theory and is used as an authority for teaching CRT in the high school. Yet as we will see, while CLS and CRT can be more fully explored at a graduate-school level, they both can advance understanding of law only so far before they are challenged by the question of what will constitute a future neutral and principled rule of law. We will be on guard, then, for where critical theories themselves promote a political view of wokeness and anti-racism and elevate to supreme, even religious, status racial equality and reparations among the values undergirding law.

The project will attempt an intellectual history of CRT. Chapter 1, “Black Studies and the Black Lives Matter Movement,” will show the connection between early Black studies movements and CRT. It will also describe the role that Black student activism played in raising CRT to the forefront of legal education. It will take on Florida Governor DeSantis’s battle over making an AP course in African American Studies.

Chapter 2 takes a more sociological and theoretical turn. We will look at three different intellectual histories impacting the American system of justice. It will use the lens of the controversy in Florida over the College Board’s AP course in African American Studies to examine the issues imbedded in teaching Black history, confronted first in legal education. This chapter will explore the history of critical race theory as a tool for examining how legal educators came to teach about law and race, and whether law performed its neutral fact-finding and law-applying function. We will explore a brief history of Derrick Bell and the development of his version of CLS. We will then look at modern proponents Richard Delgado, Kimberlé Williams Crenshaw, and Ibram Xolani Kendi. Finally, we will

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[27] For some, the debate in high school education is exacerbated by the question of whether students are mature enough to learn about the “dark side” of US history. See Ross Douthat, “A Case for Patriotic Education,” *New York Times*, July 11, 2021. Douthat argues that although one inevitably must learn about failings in the family, it is important to first try to instill a foundation of care and values before teaching about divorce, abandonment, and betrayal. He urges US high schools to learn lines of poetry such as Ralph Waldo Emerson’s “Here once the embattled farmers stood / And fired the shot heard round the world” before they learn about systemic racism. Legal educators don’t have the same sensitivities as graduate students, who should have learned the US’s darker history by the time of their legal education. Still, it may be a shock even to these law students to learn the explicit racism in Supreme Court decisions, including the *Dred Scott* case and others that Derrick Bell teaches.

look at how universities start to teach about anti-racism through the thinking of Robin DiAngelo. This will help us understand how CLS has not only emphasized a historical critique of past legal decisions but also given birth to the ideas of "anti-racism." Anti-racism posits that laws that disproportionately affect Black people are racist. If the disparate impact is tolerated once it is revealed, then the law must be condemned.

In chapter 3, "A Modern Postmodern (MPM) Intellectual History of CRT: Cultural Influences and Changes in Jurisprudence after the Warren Court," we will discuss how CRT will spawn, for a time, legal attempts to overcome the racism of the past through affirmative action and programs to rebalance the disparate impact past systems may have had. We will look at how higher education has been brought into these efforts with attempts to admit students and provide courses that account for the history of educational inequality and income inequality. We will consider whether well-intentioned adherence to redressing past discriminations is inevitably undermined by the collective critiques of other "law and" theories. Practicalities will test theory in legal education. I will also examine a recent case before the Supreme Court to issues of how best to consider race in matters of admissions to law schools.

To examine the dialogue between CRT and the "law and" theories, we will also track the main adversaries of CRT, who propose various underlying neutral principles that give the law and its processes legitimacy: law and economics (Richard Posner in particular), law and sociology, law and process, public choice theory born out of positivism, and the rise, with Robert Bork, of Catholic natural law theory and originalism. Here, we will turn to vulnerability theory to find a principle that may reunite legal educators around theory and rhetorical strategies and strategies for jury selection that can reground the common law in its foundationalist processes. Otherwise, our ability to unite and believe in the fairness of the jury system is badly shaken.

In chapter 4, "Teaching Civil Discourse: The Forgotten Justification for Academic Freedom on Campus," we will examine how the values of academic freedom affect the teaching of race and racism in higher education and law schools. How do Supreme Court pronouncements about free speech affect rising concerns that universities and law schools should be places of equity and inclusion? Should free speech take precedence over helping students feel like they "belong," or should higher education implement speech codes to help minority students demand that faculty and students make them feel like they belong? If higher education is a major factor in addressing the income and inequality gap between races, then getting these values to work together is of vital importance. This chapter will propose that

free speech and unfettered expression of values lead to a better understanding of different groups and creative solutions to seemingly intractable problems, and they shouldn't be seen as in conflict with helping students feel included.

In chapter 5, we look at the US law regarding the country's "common-law" status and understand how reason and experience compete for the two vital components of its judicial decision-making: applying law and the role of the judge, and finding facts and the role of the jury. We will look closely at O. W. Holmes and his role in describing the foundational principles undergirding the common law. We will use CRT to ask whether he was racist in his thinking and therefore must be discarded for his optimistic presentation of the neutral principles behind the common law. We will conclude that although his case decisions show some less than anti-racist leanings, he nonetheless articulates a progressive and principled perspective that is important to legal education's understanding of the rule of law.

In a postscript, we will examine the issue of race in the civil context, as opposed to the criminal context, looking closely at what CRT might elucidate about teaching lawyers advocacy skills. We will look at how legal processes for determining law and facts create an opening for the use of common sense, common experiences, experts, and credibility determinations that create the potential for racial bias to affect the process. Again, we will see that both rhetorical strategies and jury selection methods can correct for these effects and teach the jury to base its decisions on evidence and law. This section will urge lawyers to bear witness to jurors of their calling as citizens: to call them to their better selves, eschewing racism in favor of evidence-based fact-finding and common understanding of what equal justice under the law requires.

This book is part memoir; it is how I saw and reacted to the political, cultural, and intellectual events of my college and law school education, and it is also based on conversations with and the scholarship of my colleagues during my thirty-five years teaching at three law schools. I would be remiss not to acknowledge the wonderful teaching I received from faculty at Calvin University (then Calvin College): Richard Mouw, Alvin Plantinga, Nick Wolterstorff, and especially Ron Wells. In law school, my understanding of law was shaped by Greg Ogden, T. Gerald Treece, and James McGoldrick.

My colleagues at the National Institute for Trial Advocacy who continue to teach me about the world of trial advocacy include Frank Rothschild, Ed Stein, Bill Hunt, Michael Washington, JoAnne Epps, Tom Jackson, Ann Williams, Mike Ginsberg, Brad Kessler, Alex Barney, and, most especially, Brian Johnson.

CHAPTER 1

BLACK STUDIES AND THE BLACK LIVES MATTER MOVEMENT

As a result of a protest of Black students and faculty at San Francisco State University in the 1960s, San Francisco State was the first university to create a Black Studies curriculum.[1] In his recent book *The History of Black Studies*,

[1] The following is an excerpt from the introduction and conclusion of *The History of Black Studies* by Abdul Alkalimat (Pluto Press: London, 2021), 1–2.:

> This book tells the history of Black Studies, familiar to many as the campus units that teach college-level courses about African-American history and culture. This book will present a comprehensive survey of all such programs, but Black Studies has been more than that.
>
> The term "Black Studies" emerged in the 1960s but, as this book will demonstrate, Black Studies developed over the entire course of the twentieth century and into the twenty-first century. This book defines Black Studies as those activities:
>
> - that study and teach about African Americans and often Africans and other African-descended people;
> - where Black people themselves are the main agents, or protagonists, of the study and learning;
> - that counter racism and contribute to human liberation;
> - that celebrate the Black experience; and
> - that see it as one precious case among many in the universality of the human condition.
>
> Each of these five points will be considered further along in this introduction.
>
> Now is an appropriate time to write and read a history of Black Studies because colleges and universities across the USA have been celebrating the fiftieth anniversaries of the founding of their Black Studies programs. Campuses are bringing together the alumni, faculty, and community activists who helped found their respective programs. Each has its own particularity but, to draw larger conclusions, we need to consider frameworks that can be used to compare and talk about all these local histories.

Abdul Alkalimat defines Black studies and traces the curriculum's core educational purpose. He sees three purposes: demonstrating race as an artificial construct, combating attempts by "whites" to demonstrate Black

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This is also a moment when the generation who founded Black Studies at mainstream colleges and universities is moving into retirement and facing health challenges and mortality. This brings with it a crisis of both individual and institutional memory loss, a crisis that calls for activities to capture local accounts of the founding and development of Black Studies on each campus.

Finally, Black Studies faces threats. The economic downturns of 2008 and 2020, the latter due to the coronavirus pandemic, have put pressure on higher education. Before then, endowments and public funding kept higher education relatively insulated from economic pressure. But for more than a decade, tuition increases and limits to financial support have impacted Black enrollment as well as support for Black programs.

The resurgence of racism contributes to this daunting atmosphere, both as a broad social reaction and at the highest levels of political leadership. All in all, the most fundamental negative obstacle facing Black people all over the world at this moment hinges on the concept of race.

Science has discredited race as a concept (American Anthropological Association 1998; important studies include Gould 1996; Lewontin, Rose, and Kamin 1984; Prewitt 2013). It is a term that posits a biological and hierarchical classification of humans, *Homo sapiens*. On this concept rests the practice of racism: large and small prejudicial beliefs, words, and actions that are systematized, institutionalized, persistent, and more or less violent. A liberal justification for the use of the concept of race argues that race is socially constructed. But this falls woefully short. Race is nothing less than a socially constructed lie.

Race serves as a good example of Alfred North Whitehead's fallacy of misplaced concreteness: an abstract idea that does not fit reality (Whitehead 1985 [1925]). Racism exists, but races do not. But as the sociologist W.I. Thomas observes, "If men define situations as real, they are real in their consequences" ("Thomas Theorem" 2018). Racism infects virtually all areas of scholarship and public policy. Black people are systematically lied about as a justification for their continued exploitation and marginalization in American society.

Racism can be understood as some combination of three false ideas: deficit, difference, and dependency. The deficit idea centers on denying that Black people can reason and think just as well as anyone else. The concept of human reason itself has even been claimed by Eurocentric thinkers as originating in Greece and Rome (see Blaut 1993). Of course, this is self-serving. It also contradicts what we know about the mind and the brain. Any human brain has the same structures or centers that mobilize both thinking and feeling.

intellectual inferiority (as in the book *The Bell Curve*[2]), and combating white beliefs that Black people have a preference for emotion over reason. Black studies is a discipline meant to respond to studies of Black people purportedly showing that Black people have more deficits, are different, and are more dependent than other races. Black studies programs are committed to producing research that combats the scholarship of deficits, difference, and dependence.

Black Studies programs also had a paradoxical mission. The programs aimed to study the scholarship of Black people, regardless of its carefulness or balance, as examples of how Black people saw themselves; but the programs also demonstrated that all statements about race were artificial (based on social constructs) and therefore should be seen as common characteristics among humans. As a result, even when a corresponding view arose among Black scholars that "whites" think differently from Black people—both emotionally and in their preference for using reason—these Black scholars needed to be affirmed as examples of Black people trying to share their individual experiences, regardless of whether they also attributed whites' ways of thinking and acting to their race. Alkalimat says that such views are clearly based on a lie:

> This is not simply a view held by so-called white people (another socially constructed lie), but a fallacy based on limited understanding of how the diversity of experience falls under the universal category of being human (for more on Robert Park, see Raushenbush and Hughes 1992). . . . Perceptual differences can be found in great diversity between Black people and whites, as well as among Black [peoples] from different countries and different regions within the USA and different classes. The key is to always find the link between particularity and universality by which every community can be regarded as fully human.[3]

Here is where some might see a contradiction in the missions of Black studies. Although the author may be correct in seeing the overall mission of Black Studies as combating racism on both sides, he nevertheless confirms an "anti-racist" mission to affirm Black scholars and to affirm Black people' cultural differences caused by their experience of slavery. For example, he argues that some Black scholars point to evidence that some whites in the US have viewed Black people as being more innately sexual, possessing larger sexual organs, and being more often antisocial and violent. These

[2] Richard J. Herrnstein and Charles Murray, *The Bell Curve: Intelligence and Class Structure in American Life* (New York: Simon & Shuster, 1994).
[3] The History of Black Studies by Abdul Alkalimat (2021), 5.