

CHAPTER 2

CRITICAL RACE THEORY

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I. WHAT IS CRITICAL RACE THEORY?

ANY discussion of Critical Race Theory (CRT) and its contribution to criminal law would be incomplete without first answering a few questions: What is CRT? And how has CRT contributed to legal scholarship in general?

To begin, CRT is still fairly new, only now approaching its 25th anniversary. Frustrated by the continuing salience of race and racism notwithstanding legal reforms made during the civil rights era of the 1960s, and hoping to build on the inroads made by feminist legal scholars and the Critical Legal Studies movement, a group of scholars convened in Madison, Wisconsin in 1989 to launch what they coined “Critical Race Theory.” The attendees included many individuals who are today considered key scholars in CRT, including Kimberle Crenshaw, Richard Delgado, Mari Matsuda, Kendall Thomas, Patricia Williams, Neil Gotanda, and CRT’s intellectual father, Derrick Bell.

This origin story, however, still leaves unanswered the question: What is CRT? Although there is no single answer—indeed, most CRT scholars eschew the notion of a fully unified school of thought—CRT begins with a rejection of legal liberalism. As one group of CRT scholars put it:

Critical Race Theorists have not placed their faith in neutral procedures and the substantive doctrines of formal equality; rather, critical race theorists assert that both the procedure and the substances of American law, including American antidiscrimination law, are structured to maintain white privilege.¹

¹ Francisco Valdes, Jerome McCristal Culp, and Angela P. Harris, “Battles Waged, Won, and Lost: Critical Race Theory at the Turn of the Millennium,” in *Crossroads, Directions, and a New Critical Race Theory* (2002).

In addition to revealing how the law operates to constitute race and maintain hierarchy, CRT is also committed to challenging racial hierarchy, and indeed hierarchy and subordination in all of its various forms. To that end, CRT insists on progressive race consciousness, on systemic analysis of the structures of subordination, on the inclusion of counter-accounts of social reality, and on a critique of power relationships that is attentive to the multiple dimensions on which subordination exists. Beyond this, a review of the key writings that formed the movement reveals some recurring themes and tenets. First, that “formal,” color-blind laws often serve to marginalize and obscure social, political, and economic inequality. Secondly, that legal reforms that ostensibly benefit minorities occur only when such reforms also advance the interests of the white majority, a requirement most often referred to as “interest convergence.” Thirdly, that race is biologically insignificant; rather, the concept of race is, to a large extent, socially and legally constructed. Fourthly, CRT rejects crude essentialism and recognizes that oppression and subordination operate on multiple axes. For example, a black working-class lesbian in one part of the United States likely experiences oppression differently than a black male investment banker in another part of the United States. Fifthly, that race is often elided in the law; much CRT thus involves making race visible, or as I have described it elsewhere, “reading black.” While there is no one methodology in CRT, much of the literature incorporates personal narrative, or what is often referred to as “legal storytelling.” In addition, in the past decade, CRT scholars have increasingly turned to research on implicit biases to support their claims.

Although CRT is not without its detractors—for example, CRT has been criticized, often unfairly, for being separatist, insufficiently prescriptive in offering solutions to structural problems, and even described as a “lunatic fringe”²—its influence in the legal academy cannot be easily dismissed. It has influenced every area of the law, from anti-discrimination law, to property and environmental law and tax policy, to criminal law and procedure. Courses on CRT are taught at law schools throughout the United States. Its practice has spread internationally, with scholars in such countries as Australia, the United Kingdom, India, and Spain producing CRT scholarship. And it has spawned a plethora of other critical approaches to the law, including LatCrit theory, Asian–American Jurisprudence, Queer Critical Theory, Critical Race Feminism, and even Critical White Studies.

The remainder of this chapter will discuss CRT’s influence on particular areas of criminal law in the United States.

² Richard A. Posner, “The Skin Trade,” *New Republic*, Oct. 13, 1987 (book review).

II. CRITICAL RACE THEORY AND CRIMINAL LAW

Given the stark racial disparities in U.S. prisons, it is little surprise that numerous criminal law scholars have turned to CRT as a way to address such imbalances. Racial and ethnic minorities currently comprise more than 60% of the U.S. prison population. The numbers are even starker when viewed as a percentage of the population. One in every 10 black men in his 30s is in prison or jail, and in many minority communities the ratio is closer to 1 in 4. While much of this disparity is attributable to the so-called “war on drugs” that the government has engaged in throughout the last few decades, this disparity also suggests that civil rights reforms won during the 1960s may have been pyrrhic victories. As many CRT scholars have noted, blacks are incarcerated at a greater rate now than they were in 1954 when *Brown v. Board of Education* was decided, the case that ended de jure racial segregation in schools, and at eight times the rate whites are incarcerated. In fact, racial disparities in incarceration now dwarf other black/white disparities such as in unemployment (2:1); wealth (1:4); out of wedlock births (3:1); and infant mortality (2:1).³

Equally troubling, racial disparities appear at all levels of the U.S. criminal justice system, from which groups are targeted for surveillance during investigations, to the imposition of the death penalty and sentences of life imprisonment without the possibility of parole. For example, statistics from numerous jurisdictions reveal that blacks and Hispanics are frequently targeted for police stops and frisks. Consider recent numbers from New York City, which is one of the few jurisdictions that require officers to make a record of certain stops and frisks. According to recent data analyzing 867,617 stops over a two-year period, blacks and Hispanics constituted over 80% of the individuals stopped, a percentage far greater than their representation in the population. Moreover, of the blacks stopped, 95% were not found to be engaged in activity warranting arrest. When considered as a percentage of the population, the numbers are even more jarring. Stops of whites, if spread across the population of New York City, would amount to stops of approximately 2.6% of the white population during the period. By contrast, stops of blacks, if spread across the population, would amount to stops of approximately 21.1% of the population.⁴ Statistics also reveal disparities in connection with the police stop of vehicles for traffic violations. For example, a report compiled by the Maryland State Police revealed that, during the period examined, African Americans comprised 72.9% of all of the drivers that were stopped and searched along a stretch of Interstate 95,

³ James Forman, Jr., “The Black Poor, Black Elites, and America’s Prisons,” (2011) 32 *Cardozo LR* 791.

⁴ Bennett Capers, “Rethinking the Fourth Amendment: Race, Citizenship, and the Equality Principle,” (2011) 46 *Harvard Civil Rights-Civil Liberties LR* 1.

even though they comprised only 17.5% of the drivers violating traffic laws on the road.⁵ Even though blacks were disproportionately the subjects of searches, the hit rate for blacks—that is, the rate at which contraband was found—was statistically identical to the hit rate for whites. The terms “driving while black” and “driving while brown” have become part of the common lexicon to describe the belief that many officers consider race and ethnicity in determining whom to target for a traffic stop. A similar type of profiling has been documented with respect to individuals who appear to be Muslim, who are often subjected to heightened surveillance and airport screening, and with respect to individuals who appear to be Mexican, who are often targeted and interrogated about their citizenship, ostensibly as a means to identify illegal immigrants.

Lastly, this disparity exists in the imposition of punishment, with numerous studies showing that defendants of color receive harsher punishment than white defendants, and that crimes against victims of color are punished less severely than crimes against white victims. Indeed, one well-known study of capital punishment showed that defendants charged with killing white victims were 4.3 times more likely to receive a death sentence as were defendants charged with killing black victims.⁶ It should be noted that one of the rationales for the promulgation of the U.S. Sentencing Guidelines in 1987, which limited the discretion of judges, was to address racial disparities in sentencing. Unfortunately, in part due to the “War on Drugs” and the 100-to-1 disparity in sentencing guidelines for crack cocaine vis-à-vis cocaine, these disparities have increased, rather than decreased, since 1987.⁷

It is with these disparities in mind that scholars have incorporated CRT as a tool better to understand, question, and challenge substantive criminal law. In doing so, they have found ample support in implicit biases research, which demonstrates that most individuals, including racial minorities, make implicit associations between race and criminality. What follows is a brief discussion of just a few uses of CRT.

1. Defining crimes and discretion

Given that the state’s “police power” has been described as one of the least limitable powers of the government, allowing the state to criminalize whatever conduct it reasonably deems harmful to the public health, safety, welfare, and morals as long as it does not prohibit an individual right guaranteed in the Constitution, it is not surprising that CRT scholars have turned a critical lens to what conduct is criminalized

⁵ Capers, (2011) 46 *Harvard Civil Rights-Civil Liberties LR* 1.

⁶ *McCleskey v. Kemp*, 481 U.S. 279 (1987) (discussing the Baldus study).

⁷ Cf. David P. Mustard, “Racial, Ethnic, and Gender Disparities in Sentencing: Evidence from the U.S. Federal Courts,” (2001) 44 *Journal of Law & Economics* 285; Albert W. Alschuler, “Disparity: The Normative and Empirical Failure of the Federal Guidelines,” (2005) 58 *Stanford LR* 85.

and what conduct is not, and how such criminalization is often drawn along racial lines to serve some social need.

One example of this criticism comes from the CRT scholar Richard Delgado. Borrowing a legal storytelling device from Derrick Bell, the patriarch of CRT, Delgado uses an imagined dialogue between a law professor and a law student interlocutor to make several arguments about race and the social construction of threat. First, that while various ethnic and racial groups, including whites, have always engaged in different types of criminal activity, society marked the crime engaged in by African Americans as particularly dangerous and in need of control. Thus, while Irish-Americans may have been associated with rum-running or Italian Americans with numbers rackets and organized crime, their criminal activity was deemed less threatening to the social order than crimes committed by blacks. Secondly, that the social construction of blacks as criminal, and the accompanying nomenclature “black crime,” was in response to civil rights breakthroughs and successes in the 1960s and early 1970s as a way of limiting black gains. Thirdly, that society’s interest in punishing black crime stands in stark contrast to society’s relative indifference to punishing crimes associated with whites. For example, Delgado’s fictional interlocutor demonstrates that the dollar losses for white-collar crime exceed the dollar losses from all the crimes associated with African Americans by several multiples. Moreover, spread across the population, the average American loses between \$500 and \$1,000 a year to white-collar crimes, compared to a mere \$35 a year for crimes associated with African Americans. Yet white-collar crime is not pursued as vigorously and punished as severely. More to the point, much conduct committed by white-collar individuals that causes extreme harm and *could* be criminalized is simply not made criminal at all, but is subject only to ethical or civil sanctions. All of this adds a racial gloss to the common assumption that the main distinction between civil and criminal conduct is that the latter will incur a formal and solemn pronouncement of the moral condemnation of the community. If this assumption is correct, then the racial composition and interests of that community must be considered. In addition, this adds a racial layer to the ranking of offenses in terms of seriousness. That the definition and ranking of crimes is race-dependent has informed critiques of the grading of crack cocaine offenses vis-à-vis other drug offenses, such as those involving powder cocaine. It has also informed critiques of the ranking of crimes reflected in the Model Penal Code.

CRT scholars have made a similar intervention in problematizing the broad, unchecked discretion that is given to decision-makers in U.S. criminal law. Although this discretion appears at multiple levels—from police officers’ decisions about whom to stop, to a judge’s decision about appropriate punishment—the use and abuse of discretion at the prosecutorial level and how this discretion is informed by implicit biases about race has come in for particular scrutiny. Just as what society chooses to mark as criminal and worthy of punishment is racially informed, so are decisions about whom to prosecute, what charges to file, which pleas offers to make,

and which strategies to pursue at trial. For example, the criminal law scholar Angela Davis persuasively argues that, through the use of discretion, prosecutors not only make decisions that dictate the outcome of cases, but they also contribute to the discriminatory treatment of African Americans as both defendants and victims of crime. Thus, a prosecutor may choose aggressively to prosecute a defendant in a case involving a white victim, but be less aggressive in prosecuting when the victim is from a racial minority. Moreover, such decisions, almost entirely unreviewable, are rarely the product of racial animus or explicit racial favoritism. Rather, they are part and parcel of the implicit biases we all have about race, worth, and crime. As such, one contribution of CRT has been to call attention to such discretion and its racial inflections, and to propose ways to track and curb such discretion.

2. Self-defense

Criminal law scholars incorporating CRT have also challenged the supposed color-blindness and neutrality of criminal law defenses, especially that of self-defense. Far from being racially neutral, such defenses, they argue, are freighted with issues of race, gender, and identity.

The right of self-defense is recognized in every jurisdiction in the United States. Although the elements of the defense vary in details from jurisdiction to jurisdiction, in general, the defense allows an individual to use physical force to defend himself as long as he reasonably believes that such force is necessary to protect himself from the imminent use of unlawful force. Such force may include deadly force, but only if the individual reasonably believes that deadly force is necessary to protect himself from the imminent use of deadly force. Even where the actor is wrong about whether he is facing an imminent attack, or indeed wrong about whether he is being attacked at all, he will have a complete defense as long as his belief, however wrong or mistaken, was reasonable. The reasonableness of his belief is positivist rather than normative. In other words, the reasonableness of his belief does not turn on whether it is morally or empirically right, but rather whether a typical person might hold the same belief.

While on its face this defense would appear to be race-neutral, scholars incorporating the lessons of CRT observe that the defense is in fact racially contingent, since whether a person's belief will be viewed as reasonable will always turn on the race (and other identity characteristics) of the actors. As one scholar observes, most individuals engage in "suspicion heuristics," which in turn are likely to be informed by implicit biases, including implicit biases against stigmatized racial groups. In the case of minority men, this may lead to the association of minority men with criminality, even in the absence of traditional bigotry.

Thus, a prosecutor—with his almost unfettered discretion—may decline to bring charges against a white woman who shoots a black man walking behind her,

mistakenly believing him to be a mugger or, if charges are filed, a jury might acquit, because they deem her race-influenced fear to be reasonable. At the same time, these decision-makers would be likely to reach the opposite conclusion if the man following her were white. In short, the decision-makers would be able to use racial stereotypes and associations with violence to reach a decision that is ultimately race-based. This advantages whites and disadvantages racial minorities, including minority victims. For example, a prosecutor may be more likely to bring charges against a black woman who shoots a man behind her, and a jury more likely to convict; the decision-makers, mostly white, would think her fear of a white man unreasonable, even where the actions of the white man are identical to the actions of the black man.

Accordingly, scholars incorporating CRT have criticized the reasonableness element of self-defense, and its failure to include a normative component, as rewarding “reasonable racists,” “intelligent Bayesians,” and “involuntary Negrophobes,” to borrow terms from one scholar in this field, Jody D. Armour. Nor has this critique been limited to the black/white binary. Indeed, one tenet of CRT is to go beyond the black/white binary. To this end, criminal law scholar Cynthia Lee has demonstrated how the Asian-as-foreigner stereotype and the Latino-as-dangerous stereotype also render self-defense claims racially contingent. More importantly, Lee offers an intervention that has become a mainstay in CRT: she argues that decision-makers in self-defense and provocation cases should engage in race-switching exercises in order to foreground racial biases and thus neutralize them.

In short, scholars argue that rather than insuring equal treatment before the law without regard to race, criminal defenses such as self-defense serve to maintain racial imbalances through the use of such color-blind, but color-dependent, standards as reasonableness.

3. Rape

Building on the tenets of CRT, criminal law scholars have also offered new ways of looking at rape law, including many of the rape reforms won by feminists in the 1970s and 1980s.

Scholars note that historically rape was explicitly racialized in the United States, with many jurisdictions explicitly allowing for harsher sentences, including the death penalty, in cases involving black defendants and white female complainants, and all but ignoring rapes involving black victims. Indeed, in some jurisdictions the whiteness of the accuser was something that had to be “charged in the indictment and proved” at trial.⁸ As the court put it, “Such an act committed upon a black

⁸ *Grandison v. State*, 21 Tenn. (2 Hum.) 451, 452 (1841).

woman would not be punished with death,” since it is the white race of the victim that “gives to the offense its enormity.”⁹ Although these explicit laws became dead letters with the passage of the Fourteenth Amendment to the U.S. Constitution in 1868, indirect laws, and what at least one scholar terms “white letter laws,”¹⁰ continue to inform whether rape will be punished and, indeed, whether in fact a rape has occurred.

With respect to punishment, scholars note that between 1930 and 1967, 89% of the men executed for the crime of rape in the United States were black men, the overwhelming majority of whom were convicted of raping white women.¹¹ Perhaps most telling, during the same period no one was executed for raping a black woman.¹² Thus, even when the elements and possible sentences for rape were explicitly race-neutral, the implementation of those sentences remained racially dependent, allowing for valuations of worth, harm, and culpability based on race.

Scholars incorporating CRT have also pointed to the law of rape itself as facilitating racialized implementation. For example, at common law, whether or not in fact a rape occurred required proof that the accuser “resisted to the utmost.” However, what this meant depended on the race of the victim and the race of the attacker. Minimal resistance often sufficed to prove rape where the defendant was black and the accuser white. Much more was required when both the accuser and defendant were white. Moreover, scholars point out that feminist rape reforms in the 1970s and 1980s perhaps only exacerbated the problem. As a result of feminist reforms, many jurisdictions relaxed the resistance requirement, excusing it when failure to resist was reasonable. But this provided even more discretion to decision-makers, who could conclude that it would be reasonable for a white woman to be afraid to resist a black man, and yet find her failure to resist a white man under similar circumstances unreasonable. Scholars point to a similar indeterminacy in ascribing *mens rea* in rape cases. At least one scholar observes that there appears to be a presumption of intent to rape in cases involving men of color, a presumption of consent where the accuser is a women of color, and a presumption of non-consent where the accuser is a white women.¹³ Again, many reforms won by American feminists in the 1970s and 1980s, including the widespread passage of rape shield laws, appear to exacerbate rather than lessen racial imbalances.

Lastly, scholars incorporating CRT build on the observation that rape was once a property crime against the accuser’s husband or father, adding that racial disparities in rape prosecutions and convictions can be partly explained by considering rape a property crime against a racial group. Rape of a white woman is thus understood

⁹ *Grandison v. State* (n. 8).

¹⁰ Bennett Capers, “The Unintentional Rapist,” (2010) 87 *Washington University LR* 1345 ff.

¹¹ Capers, (2010) 87 *Washington University LR* 1345 ff.

¹² Capers, (2010) 87 *Washington University LR* 1345 ff.

¹³ Capers, (2010) 87 *Washington University LR* 1345 ff.

not only as a harm to her, but also as a harm to the dominant society's interest in preserving white womanhood and white privilege.

4. Jury nullification

Arguing that substantive criminal law itself is racially inflected and thus contributes to racial disparities in incarceration, at least one prominent criminal law scholar has stated that minority jurors should respond by engaging in jury nullification, the common law right of jurors to return a verdict of not guilty even when they believe the government has established its burden of proving all the elements of the crime beyond a reasonable doubt. In so arguing, Paul Butler notes that the right traditionally existed to serve as an important and necessary check on government power, and argues that community-based acquittals would be consonant with that tradition. According to Butler, African Americans are better positioned to determine what conduct in their communities should be punished, based on the costs and benefits to their community, than is “the traditional justice process, which is controlled by white lawmakers and white law enforcers.”¹⁴ Butler draws on several familiar tenets of CRT and the Critical Legal Studies movement, including the tenet that law itself is incapable of neutral determination. He also provides some guidance as to what types of case may be appropriate for nullification based on this cost-benefit analysis, singling out cases involving minority defendants charged with non-violent, *malum prohibitum* offenses such as the distribution of narcotics. Through such nullification, Butler argues, African Americans can “dismantle the master's house using the master's tools”¹⁵ and draw attention to the need to develop non-incarceratory ways to address lawbreaking. Butler, perhaps more than any other CRT/criminal law scholar, exemplifies how employing a racial lens can reveal new aspects to criminal law issues, including issues assumed to be static and settled. Partly as a result of Butler's work, scholars are increasingly exploring the power of juries, both in ways that are race-based and ways that are not.

5. Mass incarceration

Given the disparity rates in incarceration in the United States along the lines of race—approximately 1 in 40 white men will be incarcerated during their lifetime; among black men, the number is 7 in 40—criminal scholars have also turned to CRT better to understand and challenge how and what we punish. While scholars working outside criminal race theory have tended to focus on measurable disparities,

¹⁴ Paul Butler, “Race-Based Jury Nullification,” (1995) 105 *Yale LJ* 677, 679.

¹⁵ Butler, (1995) 105 *Yale LJ* 677, 679.

such as disparities in arrest, charging, and sentencing, scholars deploying CRT have offered broader, more creative critiques. For example, several scholars have used CRT to argue that the traditional utilitarian and retributive rationales for punishment are woefully incomplete and in fact obscure other race-based interests. Traditional retributivism might not acknowledge that the harmfulness of the crime, which in turn dictates the appropriate punishment, has historically been explicitly raced-based and, to a large extent, continues to be race-based. Returning to the law of rape, for example, early laws that set differing punishments for the crime of rape depending on the race of the defendant and the race of the victim, with the death penalty often reserved for black defendants convicted of raping white women, clearly included race as a component in measuring harm. While explicit laws allowing race to play a factor are no longer valid, implicit biases and norms remain extant, allowing for a similar outcome, as studies reflecting charging decisions in rape cases demonstrate. The public outcry in response to rapes involving white victims and men of color further buttresses the notion that racial attitudes inform any retributive analysis. Several scholars refer specifically to the attention given to the rape of a white female jogger in Central Park in 1989. In fact, there were 3,254 other reported rapes in New York City that year, mostly of women of color, including one the following week involving the near decapitation of a black woman in another public park, and one two weeks later involving a black woman who was robbed, raped, sodomized, and thrown down an air shaft of a four-story building.¹⁶ Those rapes, however, were ignored. While rape is just one example, it serves to illustrate how traditional rationales for punishment implicitly allow for the consideration of factors such as race, all of which contribute to racial disparities in punishment. Similarly, scholars point to other factors that might impact traditional rationales for punishment, including the interests of the prison industrial complex or, as I have suggested elsewhere, a desire to “disappear” those who are black, Hispanic, or poor so that we may live in “newly configured, sanitized, and purged cities.”¹⁷

This discussion of CRT and mass incarceration would be incomplete without mention of Michelle Alexander’s bestselling book, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*. Building on the work of sociologist Loïc Wacquant, Alexander puts forward an argument grounded in CRT: that the mass incarceration of African Americans is not an accident or solely a response to law-breaking. Mass incarceration also functions as a means of social control, specifically a way to reinstitute the explicit racial hierarchy that existed in the United States during Jim Crow, that period post-Civil War during which southern states passed laws—including laws limiting voting rights and education—to ensure that newly

¹⁶ Bennett Capers, “Real Women, Real Rape,” (2013) 60 *UCLA LR* 826 ff.; Kimberle Crenshaw, “Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color,” (1991) 43 *Stanford LR* 1241 ff.

¹⁷ Bennett Capers, “Defending Life,” in *Life Without Parole: America’s New Death Penalty?* (2012).

freed blacks would not in fact have equal citizenship. Alexander observes that while it is no longer legally permissible or socially acceptable explicitly to use race as a justification for discrimination, exclusion, and social contempt, it is legally permissible and socially acceptable to use the label “criminal” to engage in these practices. Alexander adds:

Once you’re labeled a felon, the old forms of discrimination—employment discrimination, housing discrimination, denial of the right to vote, denial of educational opportunities, denial of food stamps and other public health benefits, and exclusion from jury service—are suddenly legal . . . We have not ended racial caste in America; we have merely redesigned it.¹⁸

Indeed, one could add that by using criminality, rather than race, to limit citizenship, the United States has been able to present itself to the world as having ended *de jure* racial subordination. Alexander also points to one of the difficulties in addressing racial disparities in incarceration: since racial disparities in incarceration advance the interests of the white majority, mobilizing majority support for real reforms is all but impossible. In other words, until there is interest convergence among whites and people of color for reducing racial disparities in incarceration, change will have to come from within communities of color, not from without. In this sense, Alexander brings her analysis full circle back to Derrick Bell, who first introduced the concept of interest convergence as an animating but unstated principle of civil rights reform.¹⁹

III. LOOKING FORWARD

Kimberle Crenshaw, one of the founders of CRT, offered the following advice to fellow CRT scholars:

We need to determine how to translate our work better, to intervene in ways that help model interventions at the local level, to show people what difference Critical Race Theory makes in their own workplaces and communities. And we need to learn how to demand popular space and make good use of it when we get it.²⁰

All of this is true. Just as it is also true that the racial hierarchies that seeded the birth of CRT still exist. Given that it is impossible to think of the U.S. criminal

¹⁸ Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (2010).

¹⁹ Derrick A. Bell, Jr., “*Brown v. Board of Education* and the Interest-Convergence Dilemma,” (1980) 83 *Harvard LR* 518.

²⁰ Kimberle Williams Crenshaw, “The First Decade: Critical Reflections, or ‘A Foot in the Closing Door,’” in *Crossroads, Directions, and a New Critical Race Theory* (2002).

justice system without thinking “race,” the challenges facing criminal law scholars incorporating CRT are many. Perhaps most importantly, there is still much work to be done to show that criminal law itself is not race-free—from the rationales for punishment to the elements of substantive offenses, and from justification and excuse defenses to punishment. Likewise, there is still work to be done on producing scholarship that can point the way to real reform that matters on the ground.

What appears to be revitalizing the CRT movement is a growing embrace of empirical evidence and social science data. For example, recent studies suggest that there exists a racial empathy gap: when white individuals observe a person receiving a painful stimulus—for example, being pricked with a needle—their reactions through skin conductance tests vary depending on whether the individual observed is white or black. Their physical reflexes were more dramatic when they observed a white individual receiving a painful stimulus, suggesting greater empathy. Other studies have shown similar results, and also tap into stated beliefs; namely, that most individuals assume blacks are more pain-tolerant than whites. What do these racial empathy studies suggest about the reasonableness and necessity of using non-deadly force or deadly force in confrontations involving blacks or involving whites? Or what sentence is appropriate for a defendant who is white versus a defendant who is black? Or how we understand the imposition of the death penalty, or the use of force by law enforcement officers? What do these studies suggest about how we understand the harm of battery, or rape, or domestic violence, in cases involving black victims or white victims? Just perhaps, incorporating these and other studies will be the next frontier in CRT and criminal law.

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