

# Chapter 1

## From Jim Crow to Affirmative Action and Back Again: A Critical Race Discussion of Racialized Rationales and Access to Higher Education

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In order to get beyond racism, we must first take account of race. (Blackmun, 1978, cited in *Bakke v. Regents of the University of California*, 438 U.S. 265, 407)

Without Affirmative Action it's segregation all over again. What's next, a Jim Crow Law? (African American female high school student, in letter to Judge Friedman, February 9, 2001)<sup>1</sup>

As part of his 1978 opinion in the *Bakke v. Regents of the University of California* case, Justice Blackmun's quotation speaks to the persistence of "problem of the color line" that W. E. B. DuBois identified in 1903. In a letter to Judge Friedman of the U.S. 6th District Court in Detroit, Michigan, the African American high school student's remarks express her worry that the courts will eliminate the single policy in education that aims to account for race. Her comments refer to the University of Michigan's race-conscious admission policy, challenged at the undergraduate and law school levels by White female candidates denied admission to the selective campus (see *Gratz v. Bollinger*, 2003; *Grutter v. Bollinger*, 2003). Taken together, these quotations reveal the "color-line problem" that undergirds affirmative action debates in higher education.

Indeed, U.S. schools continue to limit equal educational access and opportunity based on race (Kozol, 1991; Lewis, 2003). Students of color remain severely underrepresented in historically White colleges and universities, and the few granted access to these institutions often suffer racial discrimination on and around campus (Lawrence & Matsuda, 1997; Smith, Altbach, & Lomotey, 2002; Solórzano, Ceja, & Yosso, 2000). Insidiously usurping civil rights language and ignoring the historical and contemporary realities of communities of color, opponents of affirmative

action claim that accounting for race in higher education discriminates against Whites. This ahistorical reversal of civil rights progress injures students of color under the guise of a color-blind, race-neutral meritocracy. Fifty-one years have passed since the Supreme Court declared that educational opportunity “is a right which must be made available to all on equal terms” (*Brown v. Board of Education*, 1954, p. 493), yet, as noted by Derrick Bell (1987), “we are not saved.”

In this chapter, we outline critical race theory (CRT) as an analytical framework that originated in schools of law to examine and challenge the continuing significance of race and racism in U.S. society. We then describe the CRT framework within the field of education. CRT scholarship offers an explanatory structure that accounts for the role of race and racism in education and works toward identifying and challenging racism as part of a larger goal of identifying and challenging other forms of subordination. Next, with the historical backdrop of *Brown v. Board of Education* (1954), we address the debates over affirmative action in higher education evidenced in *Bakke v. Regents of the University of California* (1978) and *Grutter v. Bollinger* (2003).

### BRIEF INTRODUCTION TO CRITICAL RACE THEORY

CRT draws from and extends a broad literature base of critical theory in law, sociology, history, ethnic studies, and women’s studies. In the late 1980s, various legal scholars felt limited by work that separated critical theory from conversations about race and racism. These scholars sought “both a critical space in which race was foregrounded and a race space where critical themes were central” (Crenshaw, 2002, p. 19). Mari Matsuda (1991) defined that CRT space as “the work of progressive legal scholars of color who are attempting to develop a jurisprudence that accounts for the role of racism in American law and that [works] toward the elimination of racism as part of a larger goal of eliminating all forms of subordination” (p. 1331).

CRT emerged from criticisms of the critical legal studies (CLS) movement. CLS scholars questioned the role of the traditional legal system in legitimizing oppressive social structures. With this insightful analysis, CLS scholarship emphasized critique of the liberal legal tradition as opposed to offering strategies for change. Some scholars asserted that the CLS approach failed because it did not account for race and racism, and this failure restricted strategies for social transformation (Delgado, 1995a; Ladson-Billings, 1998). They argued that CLS scholarship did not take into account the lived experiences and histories of those oppressed by institutionalized racism. Critical race theorists began to pull away from CLS because the critical legal framework restricted their ability to analyze racial injustice (Crenshaw, 2002; Crenshaw, Gotanda, Peller, & Thomas, 1995; Delgado, 1989; Delgado & Stefancic, 2000a).

Initially, CRT scholars focused their critique on the slow pace and unrealized promise of civil rights legislation and articulated their critiques of ongoing societal racism in Black and White terms. Women and people of color asserted that many of their gendered, classed, sexual, immigrant, and language experiences and histories could not be fully understood by the Black/White binary (Williams, 1991). They

noted that a two-dimensional discourse limits understandings of the multiple ways African Americans, Native Americans, Asian/Pacific Islanders, Chicana/os, and Latina/os continue to experience, respond to, and resist racism and other forms of oppression (see Delgado & Stefancic, 1993, 1995; Harris, 1993).

For example, women of color challenged CRT to address feminist critiques of racism and classism through FemCrit theory (see Caldwell, 1995; Wing, 1997, 2000). Latina/o critical race (LatCrit) scholars highlighted layers of racialized subordination based on immigration status, sexuality, culture, language, phenotype, accent, and surname (see Arriola, 1997, 1998; Johnson, 1999; Montoya, 1994; Stefancic, 1998; Valdes, 1997, 1998). Over the years, the CRT family tree expanded to incorporate the racialized experiences of women, Latina/os, Native Americans, and Asian Americans. Branches of CRT such as LatCrit, TribalCrit, and AsianCrit evidence an ongoing search in Chicana/o, Latina/o, Native American, and Asian American communities for a framework that addresses racism and its accompanying oppressions (see Brayboy, 2001, 2002; Chang, 1993, 1998; Chon, 1995; Delgado, 1998; Espinoza, 1998; Espinoza & Harris, 1998; Gee, 1997, 1999; Ikemoto, 1992; Perea, 1998; R. Williams, 1997). In addition, White scholars expanded CRT with WhiteCrit, by “looking behind the mirror” to expose White privilege and challenge racism (see Delgado & Stefancic, 1997).

Rooted in the scholar-activist traditions found in ethnic and women’s studies and informed by theoretical models such as Marxism, internal colonialism, feminisms, and cultural nationalism, today’s CRT offers a dynamic and evolving analytical framework. Scholarship originating from CRT’s roots and branches recognizes the limits of social justice struggles that omit or silence the multiple experiences of people of color.

## OUTLINING CRITICAL RACE THEORY IN EDUCATION

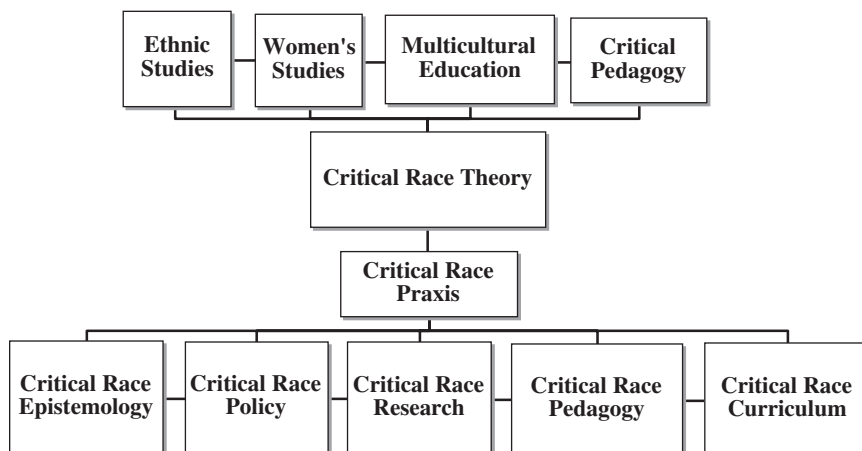
In 1995, Gloria Ladson-Billings and William Tate (1995) introduced CRT to the field of education. Since then other scholars in education, social sciences, and humanities have informed the critical race movement in this area (see Aguirre, 2000; Dixson & Rousseau, 2005; Lopez & Parker, 2003; Lynn & Adams, 2002; Lynn, Yosso, Solórzano, & Parker, 2002; Parker, Deyhle, Villenas, & Crossland, 1998; Solórzano, 1997, 1998; Solórzano & Delgado Bernal, 2001; Solórzano & Villalpando, 1998; Tate, 1994, 1997).<sup>2</sup> For at least the past decade, CRT scholars in education have theorized, examined, and challenged the ways in which race and racism shape schooling structures, practices, and discourses.<sup>3</sup> These scholars and practitioners place special emphasis on understanding how communities of color experience and respond to racism as it intersects with other forms of subordination in the U.S. educational system. Daniel Solórzano (1997, 1998) identified five tenets of CRT in education, as follows

1. *Intercentricity of race and racism with other forms of subordination*: CRT starts from the premise that race and racism are central, endemic, permanent, and a

- fundamental part of defining and explaining how U.S. society functions (Bell, 1992; Russell, 1992). CRT acknowledges the inextricable layers of racialized subordination based on gender, class, immigration status, surname, phenotype, accent, and sexuality (Collins, 1986; Crenshaw, 1991, 1993; Valdes, McCristal-Culp, & Harris, 2002).
2. *Challenge to dominant ideology*: CRT challenges White privilege and refutes the claims that educational institutions make toward objectivity, meritocracy, color-blindness, race neutrality, and equal opportunity. CRT argues that traditional claims of “objectivity” and “neutrality” camouflage the self-interest, power, and privilege of dominant groups in U.S. society (Bell, 1987; Calmore, 1992; Delgado, 2003a; Solórzano, 1997).
  3. *Commitment to social justice*: CRT’s social and racial justice research agenda exposes the “interest convergence” of civil rights gains in education (Bell, 1987; Taylor, 2000) and works toward the elimination of racism, sexism, and poverty, as well as the empowerment of people of color and other subordinated groups (Freire, 1970, 1973; Lawson, 1995; Solórzano & Delgado Bernal, 2001).
  4. *Centrality of experiential knowledge*: CRT recognizes the experiential knowledge of people of color as legitimate, appropriate, and critical to understanding, analyzing, and teaching about racial subordination (Delgado Bernal, 2002). CRT draws explicitly on the lived experiences of people of color by including such methods as storytelling, family histories, biographies, scenarios, parables, *cuentos*, *testimonios*, chronicles, and narratives (Bell, 1987, 1992, 1996; Carrasco, 1996; Delgado, 1989, 1993, 1995a, 1995b, 1996; Delgado Bernal & Villalpando, 2002; Espinoza, 1990; Love, 2004; Montoya, 1994; Olivas, 1990; Solórzano & Delgado Bernal, 2001; Solórzano & Yosso, 2000, 2001a, 2002b; Villalpando, 2003; Yosso, 2005).
  5. *Transdisciplinary perspective*: CRT extends beyond disciplinary boundaries to analyze race and racism within both historical and contemporary contexts (Calmore, 1997; Delgado & Stefancic, 2000b; Gotanda, 1991; Gutiérrez-Jones, 2001; A. Harris, 1994; Olivas, 1990).

We conceive of CRT as a social justice project that works toward realizing the liberatory potential of schooling (Freire, 1970, 1973; hooks, 1994; Lawrence, 1992). Many in the academy and in community organizing, activism, and service who look to challenge social inequality will most likely recognize the tenets of CRT as part of what, why, and how they do the work they do. Indeed, these five themes are not new, but collectively they challenge the existing modes of scholarship in education. Guided by these tenets, we define CRT in education as an analytical framework that examines and challenges the effects of race and racism on educational structures, practices, and discourses.

Each of the scholarly and activist traditions included in Figure 1—ethnic studies, women’s studies, multicultural education, and critical pedagogy—inform our



**FIGURE 1 Genealogy of Critical Race Theory in Education**

CRT framework in education. CRT draws on the strengths these traditions bring to the study of race and racism both in and out of schools. CRT also learns from the blind spots of some of these academic traditions (e.g., the tendency to decenter race and racism in multicultural education and critical pedagogy; see Sleeter & Delgado Bernal, 2002). As Figure 1 indicates (see Yosso, 2005), we acknowledge the scholarly and activist traditions in education and in ethnic and women's studies found in the roots and branches of CRT in the legal field. With the power of historical hindsight and the strength of multiple intellectual and community traditions, we engage CRT as a framework that shapes our praxis (our theoretically informed practice).

Figure 1 also shows epistemology, policy, research, pedagogy, and curriculum as five branches of education informed by CRT. For example, scholars such as Dolores Delgado Bernal (1998, 2002) and Gloria Ladson-Billings (2000, 2003) look to the work of Black and Chicana feminist theorists to examine how race and gender shape knowledge and to conceptualize a critical race epistemology. Similarly, critical race scholars interrogate racism within "race-neutral" schooling policies to examine how educational administrators might engage critical race policy and leadership in secondary and postsecondary education (e.g., Lopez, 2003; Villalpando & Parker, in press).

Over the past decade, most CRT discussions in education publications have focused on critical race research. In particular, scholars have engaged the tenets of CRT to conduct qualitative research designed to identify and challenge the subtle as well as overt forms of racism experienced by students of color (DeCuir & Dixson,

2004; Duncan, 2002a, 2002b, 2005; Fernandez, 2002; Solórzano, Ceja, & Yosso, 2000). They have also questioned the racialized stereotypes embedded in teaching practices (Solórzano, 1997; Solórzano & Yosso, 2001b). Drawing on Paulo Freire's critical pedagogy, they have asserted that a critical race pedagogy can empower marginalized students and teachers of color and help prepare future teachers to engage in education as a liberatory project (e.g., Iseke-Barnes, 2000; Ladson-Billings & Tate, 1995; Lynn, 1999, 2002; Solórzano & Yosso, 2001c). Moreover, extending on ethnic and women's studies traditions, critical race scholars have exposed the ways in which curriculum structures, practices, and discourses tend to omit and distort the histories of people of color and restrict students of color from accessing higher education. They suggest the need to transform schools with a critical race curriculum (e.g., Jay, 2003; Yosso, 2002).

Alongside a growing number of scholars across the country, critical race scholars are asking at least four questions about race and education:

- How do racism, sexism, classism, and other forms of subordination shape institutions of education?
- How do educational structures, practices, and discourses maintain race-, gender-, and class-based discrimination?
- How do students and faculty of color respond to and resist racism, sexism, classism, and other forms of subordination in education?
- How can education become a tool to help end racism, sexism, classism, and other forms of subordination (Montoya, 2002)?

In the remainder of this chapter, we discuss the first two questions in relation to debates over affirmative action in higher education.

### **CHALLENGING RACISM IN TRADITIONAL ACADEMIC STORYTELLING**

At least three legal rationales—color-blind, diversity, and remedial—attempt to explain the need to eliminate or maintain affirmative action. Conservatives challenge affirmative action based on a color-blind rationale, insisting that race-neutral admission policies ensure meritocratic, fair access to higher education. Liberals defend affirmative action policies based on a diversity rationale, arguing that bringing underrepresented minority students into historically White institutions enriches the learning environment for White students. The third or remedial rationale asserts that universities must take affirmative action and grant members of historically underrepresented racial minority groups access to institutions of higher learning as a partial remedy for past and current discrimination against communities of color in general and students of color in particular.

Race, racism, and White privilege shape each of these rationales. Ian Haney Lopez (1996) and other critical race scholars (Harris, 1993; Higginbotham, 1992) define

race as a socially constructed category created to differentiate groups primarily on the basis of skin color, phenotype, ethnicity, and culture for the purpose of showing the superiority or dominance of one group over another. The social meanings applied to race are based on and justified by an ideology of racism. We define racism as (a) a false belief in White supremacy that handicaps society, (b) a system that upholds Whites as superior to all other groups, and (c) the structural subordination of multiple racial and ethnic groups (see Lorde, 1992; Marable, 1992; Pierce, 1995). With its macro and micro, interpersonal and institutional, and overt and subtle forms, racism is about institutional power, and communities of color in the United States have never possessed this form of power.

The systemic oppression of communities of color privileges Whites. We define White privilege as a system of advantage resulting from a legacy of racism and benefiting individuals and groups on the basis of notions of whiteness (Leonardo, 2004; McIntosh, 1989; Tatum, 1997). Legal White privilege can also be viewed from a CRT perspective as a form of property right that supersedes the rights of persons of color in terms of the federal courts' failure to consistently provide remedy for past government-sanctioned discrimination in the form of slavery (with African Americans) and violation of treaty rights in regard to land acquisition (with Tribal Nation Indians; see Harris, 1993). Whiteness intersects with forms of privilege based on gender, class, phenotype, accent, language, sexuality, immigrant status, and surname (Carbado, 2002).

### **Color-Blind Rationale**

As a system of advantage, White privilege supports the construction of "color-blind" stories about race in higher education. CRT scholars refer to stories that uphold White privilege as "majoritarian stories" (Delgado, 1993). Majoritarian stories claim to be race neutral and objective, yet they implicitly make race-based assumptions and form race-based conclusions. For example, majoritarian stories of affirmative action claim that "unqualified" students of color receive "racial preferences" at the expense of "qualified" White students. In this story, all students in the United States compete for university admission on a level playing field, and as a result of raced-based preferences White students are denied admission to universities because underqualified Black or Latina/o students "take" their rightful spot.

The majoritarian storyteller recalls history selectively, minimizing past and current racism against communities of color, disregarding obviously unequal K–12 schooling conditions that lead to minimal college access, and dismissing the hostile campus racial climates that many students of color endure at the college level. Majoritarian storytellers advocate for "color-blind" or "race-neutral" admission policies.

### **Diversity Rationale**

Well-intentioned affirmative action diversity advocates inadvertently support majoritarian stories because they do not acknowledge the historical and ongoing

racism that shapes the experiences of students of color. Advocates of the diversity rationale urge universities to engage in affirmative action to ensure a diverse learning environment at historically White institutions. In this scenario, admitting qualified students of color and White female students adds to the diversity of the college learning environment. Admissions officers then consider race and gender as “plus” factors in deciding between multiple highly qualified candidates.

Advocates argue that the diversity rationale involves at least three benefits: (a) cross-racial understanding that challenges and erodes racial stereotypes, (b) more dynamic classroom discussions, and (c) better preparation for participating in a diverse workforce (see *Grutter v. Bollinger*, 2003). Because of the resistance to enrolling students of color in historically White institutions, the diversity rationale articulates these benefits in relation to White students. The unquestioned majoritarian story within this rationale is that students of color are admitted so that they can help White students become more racially tolerant, live up class dialogue, and prepare White students for getting a job in a multicultural, global economy. How this scenario enriches the education of students of color remains unclear. Seemingly, students of color benefit from merely being present at a predominantly White institution and attending college with White students. The university “adds” their presence so that students of color in turn will “add” diversity to the campus.

### **Remedial and Community Service Rationale**

In the remedial rationale, race-based affirmative action is used as a *remedy to compensate* for past and current racial discrimination against students of color. Extending this argument, the community service rationale asserts that universities include race in their admissions policies to (a) improve the delivery of social services to underserved minority communities in the areas of health care, legal services, education, business, government, and political representation; (b) develop a leadership pool in the minority community; and (c) provide role models for minorities in these communities. Many civil rights activists of the 1960s and 1970s unapologetically asserted these remedial and service rationales as the grounds for race-based affirmative action. Where did these two diverging rationales (i.e., diversity and remedial) come from? Do they link to an earlier time in civil rights history? In attempting to find the connection to the past, we look to the 1954 *Brown v. Board of Education* Supreme Court case.

### ***Brown v. Board of Education***

In the 1954 *Brown* case, the Supreme Court unanimously ruled that separate educational facilities were inherently unequal and ruled this arrangement unconstitutional but did not offer a timetable for school districts to desegregate their schools. In 1955, in *Brown II*, the Supreme Court provided its answer and directed schools to desegregate “with all deliberate speed.” These four words gave



school districts in both the North and the South the mandate to focus their desegregation efforts on the word “deliberate,” thus slowing desegregation to a crawl.

Grounded in an integration rationale, this ruling emphasized that Black students should be allowed to attend school with White students. In *Brown*, integrated or desegregated education took precedence over equal education. In other words, the integration rationale prioritized Black students attending school with White students and seemingly presumed that this desegregation would translate into equal education for Black students. With this historical backdrop, we move forward 24 years to the 1978 *Bakke v. Regents of the University of California* case to ascertain whether and how rationales for equal educational opportunity have changed.

### *Bakke v. Regents of the University of California*

With Title VI of the 1968 Civil Rights Act, the federal government granted colleges and universities the authority to take affirmative action in setting goals and timetables to remedy the racial discrimination found in U.S. society. Less than 10 years later, as the numbers of students of color and women admitted to universities began to increase, the University of California at Davis Medical School denied admission to a White male applicant, Allen Bakke.

In line with affirmative action guidelines, and in an effort to begin to desegregate its medical school, UC Davis had set aside 16 of its 100 slots for underrepresented minority students. Bakke believed his denial to medical school occurred because of this racially conscious admission policy. Lawyers for Bakke argued that setting aside those 16 slots violated their client’s 14th Amendment right to equal protection. Subsequently, Bakke filed a class action lawsuit arguing that UC Davis’ use of race in its admissions racially discriminated against Whites. In the *Bakke* (1978) case, the Supreme Court issued two rulings. In the first, 5–4 decision, the court ruled that preferential racial quotas in the form of 16 admission slots set aside for Blacks, Latinos, and Native Americans violated the Civil Rights Act of 1964, which prohibited discrimination based on race, color, or national origin. In a second de facto majority decision referred to as the Powell Compromise, five justices ruled that race could be used as one factor in setting up affirmative action admission programs.

However, in a series of dissents, four Supreme Court justices (Brennan, White, Marshall, and Blackmun) challenged the first majority opinion (i.e., eliminating quotas) and asserted a remedial rationale: “Where there is a need to overcome the effects of past racially discriminatory or exclusionary practices engaged in by a federally funded institution, race-conscious action is not only permitted but required to accomplish the remedial objectives of Title VI” (*Bakke v. Regents of the University of California*, 1978, italics added). Although challenged in both federal and state courts, the Bakke majority and Justice Powell’s compromise have remained the affirmative action law of the land since 1978. In 2003, the U.S. Supreme Court upheld

the *Bakke* diversity opinion with the *Grutter v. Bollinger* University of Michigan Law School affirmative action case.

### ***Grutter v. Bollinger***

Three parties were involved in the *Grutter* litigation: (a) the plaintiff, Barbara Grutter, a White female applicant placed on the wait list and ultimately denied admission to the University of Michigan Law School; (b) the defendant, Lee Bollinger, the past president of the University of Michigan and former dean of the university's law school; and (c) the "student intervenors," a group that included 41 Black, Chicano/a, Latino/a, Asian American, and other students (high school, college, and University of Michigan law students). The plaintiffs claimed that the University of Michigan's race-conscious admission policy discriminated against "more qualified" White applicants such as Grutter. The university defended its use of race in admissions, arguing that the policy of considering race furthered its goal of realizing the benefits of a diverse student body. The student intervenors—representing a third party rarely included in affirmative action cases—defended the use of race in admissions as a policy necessary to maintain the limited presence of students of color in higher education and to remedy past and current racial and gender discrimination at the University of Michigan. In the end, the Supreme Court, in a 5–4 decision, ruled that the University of Michigan Law School's race-based admissions program was constitutional on the basis of the diversity rationale.

### **Critical Race Counterstories in Higher Education**

Critical race counterstories recount the experiences of socially and racially marginalized people. Counterstories challenge discourse that omits and distorts the experiences of communities of color. While legal remedies avoid taking them into consideration, we assert that critical race counterstories centered on the voices and knowledge of communities of color should be taken into account in higher education policy and practice. Indeed, counterstories can expose, analyze, and challenge the traditional stories of racial privilege often repeated in the halls of academia. Counterstories relating the histories and lived experiences of students of color can help strengthen traditions of social, political, and cultural survival and resistance.

Community histories documented by scholars such as Monica White (2002) and Jerome Morris (2004) function as critical race counterstories outlining the failings of *Brown*. This research shows how the integration rationale led to the closing of multiple all-Black schools in the South and to the displacement of many Black students, teachers, and principals. Instead of desegregation heralding in opportunities for equal education, these scholars explained that many Black communities experienced desegregation as a disruptive and often violent process. White and Morris concluded that desegregation became a long-term detriment to many Black communities.

Indeed, W. E. B. DuBois forewarned, 19 years before the *Brown* decision, the importance of equal schooling versus unequal, integrated schooling:

There is no magic, either in mixed schools or in segregated schools. A mixed school with poor and unsympathetic teachers with hostile public opinion, and no teaching of truth concerning black folk, is bad. A segregated school with ignorant placeholders, inadequate equipment, poor salaries, and wretched housing, is equally bad. (1935, p. 335)

Many activists, while supporting the *Brown* case, supported the notion outlined by DuBois, and many argued for equal educational opportunity for Black students as a remedy as opposed to integration with White students (Bell, 2004; Carter, 1980). Specifically, they believed that the Supreme Court should ensure students of color equal educational opportunities by mandating quality schools, quality teachers, and equal funding in communities of color. The *Brown* case did not mandate these remedies (Bell, 2004; Carter, 1980).

Robert Carter, one of the lead architects of the NAACP legal strategy in the *Brown* case, also believed that the focus on integration as the primary remedy represented a lost opportunity for an equal education remedy: “In the short run, we have to concentrate on finding ways of improving the quality of education in these schools [Black schools], even if it means or results in less effort being expended on school integration” (1980, p. 26). Carter went on to state:

If I had to prepare for *Brown* today, instead of looking principally to the social scientists to demonstrate the adverse consequences of segregation, I would seek to recruit educators to formulate a concrete definition of the meaning of equality in education, and I would seek to persuade the Court that equal education in its constitutional dimensions must, at the very least, conform to the contours of equal education as defined by the educators. (p. 27)

In *Silent Covenants: Brown v. Board of Education and the Unfulfilled Hopes for Racial Reform*, Derrick Bell (2004) indicated his agreement with Carter and laid out a plan. He argued that the *Brown* decision achieved neither equal educational opportunity nor integrated education. In fact, Bell (1987, 2004) noted that, were he a Supreme Court justice, he would have not ruled in the majority in the *Brown* case. Instead of supporting the integration argument, he would have called for an equal education opportunity remedy. Bell explained that, as a Supreme Court justice, he would have ordered relief for the Black plaintiffs in three phases: equalization (all schools within the district must be equalized in terms of physical facilities, teacher training, experience, and salary with the goal of each district, as a whole, measuring up to national norms within 3 years), representation (school boards and other policy-making bodies must be immediately restructured to ensure that those formally excluded from representation have individuals selected by them in accordance with the percentage of their children in the school system), and access (any child seeking courses or instruction not provided in the school in which he or she is assigned may transfer without regard to race to a school where the course or instruction is provided).

Unfortunately, the *Brown* decision did not emphasize the educational equity envisioned by DuBois, Carter, or Bell. *Brown* intended to “integrate,” not necessarily “equally educate,” students of color. Bell’s arguments draw on the lived histories of Black communities that, 50 years after *Brown*, are still struggling for access to an equal education. Without listening to these lived histories, the Supreme Court could not foresee that the onus of eliminating racism in schools would subsequently be placed on those who experienced its subordination (see Love, 2004). Even in voluntary desegregation programs today, students of color bear the burden of busing and integration.

A few consistent patterns surface in analyses of the Supreme Court’s rationales addressing the ongoing “problem” of race in education. For example, the integration rationale in *Brown*, while well intended and a victory devastating to Jim Crow segregation, focused on integrating White schools with students of color. Indeed, it was one-way desegregation, with students of color being bused into previously all-White schools. This connects with the diversity rationale laid out by both the University of Michigan defense in the *Grutter* case and the UC Davis defense in the *Bakke* case. Both of these universities focus on diversifying White universities with students of color. Similarly, the color-blind rationale links the complaints of the White plaintiffs and the split court opinions in both the *Bakke* and *Grutter* cases. However, *Grutter v. Bollinger* differs significantly from *Bakke* and other affirmative action cases because student intervenors were allowed as a third party to the case. A major part of the student intervenors’ argument echoed the four dissenting justices’ remedial rationale in the *Bakke* case. Both the *Bakke* and the *Grutter* cases raise issues about traditional notions of access and equity in higher education.

The community histories of Morris (2004) and White (2002) document some of the counterstories never considered by the Supreme Court in *Brown* (see Love, 2004). The student intervenors in the *Grutter* case likewise presented numerous counterstories of ongoing racial discrimination both on and off university campuses, stories that the court chose to ignore (see Allen & Solórzano, 2001; Solórzano, Allen, & Carroll, 2002; Solórzano et al., 2000). Yet, the majoritarian story about race and the legacy of racism in education remains without legal remedy.

Because the courts in these cases rarely listen to the experiences of communities of color or address the effects of racial discrimination, their legal rationale and, thus, their remedy to educational inequality rely on the majoritarian story. In cases of affirmative action, the majoritarian story informs a diversity rationale generated from Justice Powell’s “compromise” opinion in the *Bakke* (1978) case. Powell argued: “The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element” (cited in *Bakke v. Regents of the University of California*, 1978).

Advocates of affirmative action since the *Bakke* case tend to begin with Powell’s broad definition of diversity in developing policies intended to build and maintain a diverse student population. For example, in the following passage of *Grutter v. Bollinger* (2003), the Supreme Court invoked a diversity rationale to affirm the use

of race in university admissions: “More important, for reasons set out below, today we endorse Justice Powell’s view that a *student body diversity* is a compelling state interest that can justify the use of race in university *admissions*” (italics added).

In reflecting on the “color-blind” rationale against affirmative action, CRT scholars ask (a) Whose experiences inform this rationale? and (b) Whose experiences are silenced? Lisa Ikemoto (1992) asserted that “the standard legal story does not expressly speak to race and class” (p. 487). However, majoritarian stories imbue racism and White privilege in a “race-neutral,” “color-blind” discourse. Opponents of affirmative action are not against special treatment based on race, as long as the beneficiaries of such policies are White. Indeed, Thurgood Marshall’s dissenting opinion in the 1978 *Bakke* case reminds us that the U.S. Supreme Court was consistently unwilling to forbid differential racial treatment. He noted that in the 1896 *Plessy v. Ferguson* case, when the Supreme Court required railroad companies to offer “separate but equal” accommodations for Black and White passengers: “The majority of the Court rejected the principle of color blindness, and for the next 60 years, from *Plessy* to *Brown v. Board of Education*, ours was a Nation where, *by law*, an individual could be given ‘special’ treatment based on the color of his skin.”

Justice Marshall’s note about “special” treatment based on skin color referred to the daily institutionalized privileges afforded to Whites according to Jim Crow statutes that maintained racial segregation. He went on to explain that the race-conscious approach to university admissions and employment had gone into effect only 10 years before the 1978 anti-affirmative action *Bakke* case. In examining the color-blind rationale through a CRT lens, we listen carefully to Justice Marshall’s comments outlining the elusive quest for racial equality in the United States. The majoritarian story outlined in *Bakke* fails to account for the historical realities of racism. Twenty-three years later, the African American female student whose letter opens this chapter seemed to echo Justice Marshall’s concluding remarks in the *Bakke* case. She wondered whether the end of affirmative action would lead back to racial segregation and Jim Crow laws. Similarly, in 1978, Justice Marshall wrote in his *Bakke* dissent:

I fear that today we have come full circle. After the Civil War our Government started several “affirmative action” programs. This Court in the *Civil Rights Cases* and *Plessy v. Ferguson* destroyed the movement toward complete equality. For almost a century no action was taken, and this nonaction was with the tacit approval of the courts. Then we had *Brown v. Board of Education* and the Civil Rights Acts of Congress, followed by numerous affirmative-action programs. Now, we have this Court again stepping in, this time to stop affirmative-action programs of the type used by the University of California. (438 U.S. 265, 402)

In 2005, we share Justice Marshall’s fear. Indeed, the color-blind rationale advocated by the forces primed against affirmative action silences the history of racism in the United States and dismisses the contemporary experiences of people of color.

In reflecting on the diversity rationale supporting affirmative action, CRT scholars again ask whose experiences inform this rationale and whose experiences are

silenced. According to Richard Delgado and Jean Stefancic (1993), majoritarian stories stem from the “bundle of presuppositions, perceived wisdoms, and shared cultural understandings persons in the dominant race bring to the discussion of race” (p. 462). We assert that majoritarian stories also recount gender, class, language, and other forms of privilege. In other words, a majoritarian story privileges the experiences of upper/middle-class Whites, men, and heterosexuals by naming them as natural or normative points of reference.

The unquestioned “standard” or “normative” point of reference reveals the basis for the diversity rationale. By their presence, students of color diversify otherwise White, homogeneous university campuses. This rationale centers White students as the standard or normative students. By default, students of color fulfill the role of enriching the learning environment for White students. The goal is not necessarily to provide access and equal opportunities for students of color but to provide access to diverse groups so that White students can learn in a diverse context.

CRT further challenges us to ask why the *Grutter* case did not address either the remedial or community service rationale. The Federal District Court in Detroit, Michigan; the Sixth Circuit Court of Appeals; and the Supreme Court ignored the student intervenors’ case. In silencing these students, the courts failed to acknowledge the value of the critical race counterstory. Specifically, Justice Rehnquist, writing for the majority in the companion undergraduate case (*Gratz v. Bollinger*, 2003), reaffirmed the district court’s decision to dismiss the intervenors’ claims, and the University of Michigan’s silence about its own institutionalized racism bolstered the Supreme Court’s dismissal. In the words of Justice Rehnquist (*Gratz v. Bollinger*, 2003):

The [District] court explained that respondent-intervenors “failed to present any evidence that the discrimination alleged by them, or the continuing effects of such discrimination, was the real justification for the [law school’s] race-conscious admissions programs” (*Id.*, at 795). We agree, and to the extent respondent-intervenors reassert this justification, a justification the University has *never* asserted throughout the course of this litigation, we affirm the District Court’s disposition of the issue. (539 U.S. 244, 257)

Because the University of Michigan did not listen to the student intervenors, the university’s case in *Grutter* did not address racism and White privilege. Instead, the university maintained the diversity rationale, and the majoritarian story remained unchallenged. Ironically, the court’s ruling upholding affirmative action confirmed that such diverse experiences are a compelling state interest to include in higher education but chose not to address these experiences through the student intervenors’ case.

In *Grutter*, the White female plaintiff failed to mention that White women have benefited from affirmative action more than any other group. Instead, the argument of the plaintiff’s lawyers was based on an assumption that society provides a level educational playing field for all students to compete for law school admission. This position also assumes that racism no longer matters and cannot explain contemporary social inequality.

The student intervenors asserted that racism continues to exist in both its overt and covert forms and that, as long as it remains, policies and practices need to be in place to compensate for the barriers that racism erects in higher education settings. For example, expert witness reports filed on behalf of the student intervenors showed that many undergraduate and law school students confronted a hostile campus racial climate marked by daily incidents of discrimination (see Allen & Solórzano, 2001; Solórzano et al., 2002). Students at three major U.S. universities reported experiencing episodes of racial aggression in academic and social campus spaces. These subtle verbal and nonverbal insults target people of color often automatically or unconsciously (Pierce, 1970, 1974, 1995; Solórzano, 1998; Solórzano et al., 2000). Such layered racial put-downs assume inferiority based on race, gender, class, sexuality, language, immigration status, phenotype, accent, or surname. Accumulation of these incessant episodes of racial aggression causes unnecessary stress to students of color while privileging Whites (see Carroll, 1998; Davis, 1989; Smith, Yosso, & Solórzano, in press).

Students also indicated feeling that their university gives lip service to issues of diversity while maintaining an unwelcoming, exclusionary atmosphere in which students of color are viewed as unintelligent and as taking the place of “more academically qualified” Whites. They described a campus climate wherein Whites enjoy a sense of entitlement and members of racial minority groups are viewed as unqualified, unworthy, and unwelcome (Bonilla-Silva & Forman, 2000). As a result of this negative campus racial climate, students of color internalized feelings of self-doubt, alienation, and discouragement, which led to their dropping classes, changing majors, and even changing schools. The majority of the court in *Grutter* dismissed this position.

The four dissenting justices in the Supreme Court’s *Bakke* (1978) decision did make the remedial argument. Yet, without Justice Powell, they were one vote short of that position being the law of the land. In her dissent in the undergraduate *Gratz v. Bollinger* (2003) case, Supreme Court Justice Ruth Bader Ginsberg raised aspects of the remedial argument but failed to garner the five votes needed to carry this argument for race-based affirmative action. A CRT framework insists that we listen and respond creatively to the words, stories, and silences of the courts, social science, and academia by acknowledging and validating students of color as “holders and creators of knowledge” (Delgado Bernal, 2002, p. 106).

## **DISCUSSION: BATTLING THE PUSH BACK TOWARD JIM CROW IN HIGHER EDUCATION**

To fully understand the ways in which race and racism shape educational institutions and maintain various forms of discrimination, we must look to the lived experiences of students of color both in and out of schools as valid, appropriate, and necessary forms of data. Taking DuBois’s insight from 1935, along with Bell and Carter’s assessments in *Brown*, much work remains to finally achieve equal educational opportunities for students of color. Revisiting the *Grutter v. Bollinger* case



from the perspective of these insights, clearly the goal of affirmative action in higher education cannot merely be diversifying the university and classroom. Heeding these insights, activists such as the student intervenors—while guardedly pleased with the diversity victory—continue to fight for the remedial and community service arguments as the underlying purpose of affirmative action programs. Such programs were initially developed to ameliorate the harmful effects of past and current discrimination and to train professionals of color to work and serve as role models in underserved communities of color.

We assert the need to extend the legacy of *Grutter* to provide equal educational opportunity in higher education admissions as well as in retention, financial aid, and faculty hiring programs. Specifically, we refer to the lack of equal educational opportunity in higher education resulting from past and current discriminatory policies and practices. We are reminded that the remedial and community service justifications for race-based affirmative action dominated the civil rights community discussion before the 1978 *Bakke* case. We believe that these arguments still hold true today, and our research and discourse should reflect that fact.

Although the Supreme Court upheld the need to consider race as one of the factors in university admissions, Delgado (2003b) warned that “a law reform strategy must not rest content with a seeming victory, but remain ever-vigilant for the inevitable backlash” (p. 150). Indeed, an analysis of the *Brown* aftermath shows that certain states and local communities immediately and continuously fought against integrated schools. In fact, some districts closed their public schools for many years in lieu of allowing Black students to enroll under a *Brown* mandate (Bell, 2004). Rather than allow universities to continue with race-conscious admissions policies, as per the *Grutter* case decision, the backlash against affirmative action of any kind has already begun. For instance, the former chair of the University of California Board of Regents, John Moores, made the following statement (and was subsequently criticized for using race as a pretext for his own political agenda by former University of California at Berkeley admissions official Bob Laird):

How did the university get away with discriminating so blatantly against Asians? Through an admissions policy with the vague term “*comprehensive review*.” The policy includes factors like disabilities, low family income, first generation to attend college, need to work, disadvantaged social and educational environment, [and] difficult personal and family situations. This means that a student from a poor background whose parents didn’t go to college is given preference over a kid raised by middle-class, educated parents—all other things being equal. (Laird, 2005, pp. 221–224)

The Supreme Court’s rulings in *Grutter* and *Gratz*, Moores’s comments, and Justice Scalia’s anti-affirmative action dissent in *Grutter* all indicate impending strategies of the anti-affirmative action forces. To detract attention from policies that unfairly advantage White students (e.g., legacy admissions, advanced placement and honors credits, residential preferences), opponents of affirmative action



will probably use the language of the color-blind rationale to engage in the following strategies:

- *Contest the concept of “critical mass”*: The critical mass concept asserts that because students of color add to the diversity of a campus and enrich the education of White students, universities should commit to enriching the education of students of color by ensuring that they are not isolated and marginalized, that is, by admitting, retaining, and graduating a “critical mass” of underrepresented students. Affirmative action opponents claim that such efforts to enhance the education of students of color are too similar to the idea of “quotas,” which a narrow minority deemed unconstitutional in the 1978 *Bakke* decision.
- *Oppose comprehensive admissions*: Comprehensive admissions aim to diminish the current overreliance on grade point average (GPA) and SAT/Law School Admission Test/Graduate Record Examination scores by considering an applicant’s potential in more holistic terms. These efforts acknowledge some of the inequalities built into standardized exams and GPAs weighted according to advanced placement and honors courses completed (Solórzano & Ornelas, 2002, 2004). Applicants are asked to develop a more robust profile that might include an essay about their community service activities, a letter of reference about their ability to overcome personal and economic hardships, or other background information. Opponents of affirmative action charge that comprehensive admission policies disguise racial preferences for students of color. They ignore the racial preferences for Whites hidden in weighted GPAs and standardized tests.
- *Challenge outreach programs*: Outreach programs seek to increase the numbers of underrepresented students at colleges and universities by offering tutoring, summer courses, information seminars, mentoring, and skill-building workshops. Many of the most successful outreach programs, such as Upward Bound and Migrant Education, originated with President Johnson’s “War on Poverty” and the civil rights legislation of the mid-1960s. These programs serve historically underrepresented racial minority groups as well as low-income Whites and first-generation students. Opponents of affirmative action again charge that supporting access to college for communities of color discriminates against Whites.
- *Focus on racial disparities in SAT scores and GPAs of admitted students*: Research shows that the SAT is not a useful indicator of a student’s college or career potential (Oseguera, 2004). Rather than acknowledging this research or eliminating the additional grade points awarded to students in advanced placement and honors high school courses, proponents of the color-blind rationale are likely to spotlight the supposed superiority of White students and some Asian groups over Black and Chicana/o students.
- *Challenge campus retention programs*: Retention programs work to ensure that students make the transition from high school and community college to 4-year institutions successfully. Such programs often offer tutoring, academic counseling, peer counseling, and other types of support to facilitate retention and graduation

of underrepresented students, first-generation students, and low-income students. While many university-funded athletic programs and university-sponsored Greek fraternity organizations offer similar support networks privileging athletes and White middle/upper-class students, only retention programs that target underrepresented students are questioned as discriminatory.

- *Pit Asian Americans against Black, Latino, and Native American students:* While arguing that White students are racially discriminated against by policies that are race conscious, the color-blind rationale also creates a false sense of resentment and animosity between groups of color. Moores's earlier comments demonstrate this strategy of diverting attention away from the actual ways universities discriminate against students of color.

CRT offers a proactive framework that can be used in the ongoing battle to provide equal educational access and opportunity to historically underrepresented students. We need to build on the work outlined in Jean Stefancic and Richard Delgado's (1996) *No Mercy: How Conservative Think Tanks and Foundations Changed America's Social Agenda* and Lee Cokorinos's (2003) *The Assault on Diversity: An Organized Challenge to Racial and Gender Justice* to examine the economic and intellectual roots of anti-affirmative action forces. Subsequently, as outlined briefly earlier, we need to anticipate upcoming attacks on affirmative action. Finally, we need to engage in proactive research efforts to extend arguments for affirmative action. This would mean restating and expanding the *Grutter* decision to read as follows: Student body diversity, compensation for past and current racial discrimination, and improving the delivery of social services to underserved minority communities are compelling state interests that can justify the use of race in university *admissions, outreach, retention programs, financial aid, and faculty recruitment, hiring, and retention.*

If the Supreme Court acknowledges the importance of the diversity rationale, then we must recognize that outreach, retention, financial aid, and faculty recruitment, hiring, and retention programs are the pillars for implementing diversity in higher education. Our research must focus on the goal of racial justice, including addressing the racist barriers that exist before a student applies to college (e.g., access to gifted and talented education programs and advanced placement courses), during the admission process itself (e.g., weighted GPAs and standardized tests), during college (e.g., campus racial and gender climate), and as students apply to graduate and professional school (e.g., graduate examinations).

We must continue to go on the offensive and challenge those admissions criteria that privilege wealth or position and encumber those without it. Indeed, Laurence Parker and David Stovall (2004) asserted that CRT is a "call to work." As critical race educators, we commit ourselves to the remedial and community service rationales by (a) documenting the past and continuing significance of race and racism in the educational lives of students of color and (b) emphasizing the importance of providing professionals of color to serve communities of color.

We must challenge the presence of racism in policies intended to remedy racism. We need to remember that, originally, affirmative action sought to ameliorate the harmful effects of past and current discrimination and provide service and role models to underserved communities. Delgado (2003b) encouraged critical race scholars to “consider that race is not merely a matter for abstract analysis, but for struggle. It should expressly address the personal dimensions of that struggle and what they mean for intellectuals” (p. 151). These struggles should be at the forefront of a critical race analysis of postsecondary education.

## NOTES

Thanks to Heidi Oliver-O’Gilvie and Tommy Totten for editorial assistance on early versions of this chapter.

<sup>1</sup> Although this student signed her letter to the judge, we keep her name confidential.

<sup>2</sup> For discussions of WhiteCrit in education, see the special issue of the *International Journal of Qualitative Studies in Education* edited by Marx (2003).

<sup>3</sup> For instance, William Tate’s 1994 autobiographical article in the journal *Urban Education*, “From Inner City to Ivory Tower: Does My Voice Matter in the Academy?” represents the first use of CRT principles in education. A year later, Gloria Ladson-Billings and Tate wrote an article titled “Toward a Critical Race Theory of Education” in *Teachers College Record*. Two years later, Daniel Solórzano’s 1997 *Teacher Education Quarterly* essay, “Images and Words That Wound: Critical Race Theory, Racial Stereotyping, and Teacher Education,” applied CRT to a specific subfield of teacher education. Also in 1997, William Tate’s “Critical Race Theory and Education: History, Theory, and Implications,” published in *Review of Research in Education*, furthered our understanding of the history of CRT in education. The 1998 special issue on critical race theory in education in the *International Journal of Qualitative Studies in Education* significantly expanded the field (and became the edited book *Race Is . . . Race Isn’t: Critical Race Theory and Qualitative Studies in Education*; see Parker, Deyhle, & Villenas, 1999). Individual scholars also presented papers on CRT at professional conferences across the country and subsequently published their work in various academic journals such as *Urban Education*, the *Journal of Negro Education*, *Educational Researcher*, and the *Journal of Latinos in Education*. In 2002, the journals *Qualitative Inquiry* and *Equity and Excellence in Education* each dedicated a special issue to CRT in education. In 2004, the American Educational Research Association conference symposium “And We Are Still Not Saved: Critical Race Theory in Education Ten Years Later” acknowledged the 10-year anniversary of Tate’s 1994 article officially introducing CRT to education. This symposium led to *Race, Ethnicity, and Education* dedicating a 2005 special issue to CRT. *Educational Administration Quarterly* will soon publish a special issue on CRT and educational leadership (see Villalpando & Parker, in press). Finally, Tara Yosso’s (in press) *Critical Race Counterstories Along the Chicana/Chicano Educational Pipeline* marks the first sole-authored book on CRT in education.

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