Learning Law Through the Lens of Race

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In the spring of 2003, the University of Virginia community was shocked by a racially motivated assault on a prominent student leader.¹ The crime generated an immediate and powerful response from the university community. At the law school, there was an outpouring of not only concern and outrage, but also creative dialogue and proposals for ways to move forward in a constructive manner. Culminating in the summer of 2003, with strong support from faculty, students and administrators, law school Dean John Jeffries founded the Center for the Study of Race and Law.² Dean Jeffries also appointed me the Center’s Director. The Center aims to promote course offerings addressed to racial issues, and to provide a range of extra-course opportunities to study race and law, including lectures, workshops, panels, and scholarly symposia.³

The University of Virginia is not alone in valuing the study of race and law. In recent decades, the study of race has achieved increasing prominence in the legal academy. Legal scholarship on race, including but not limited to critical race theory, has proliferated,⁴ and the number of law

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³ For a fuller description of the Center’s activities, see http://www.law.virginia.edu/race. See also Forster, supra note 2, at 39–41.

⁴ See Deborah Jones Merritt & Barbara F. Reskin, Sex, Race, and Credentials: The Truth About Affirmative Action in Law Faculty Hiring, 97 COLUM. L. REV. 199, 283 n.255 (1997) ("[T]he influx of female and minority scholars onto law faculties has coincided with a dramatic increase in scholarship drawing upon feminist or critical race theory. Some of those articles are among the most cited and influential works in legal scholarship today."); Susan Westerberg Prager, Special Feature Expectation of the Twenty-first Century Law Library for the Support of Faculty Scholarship: Law Libraries and the Scholarly Mission, 96 LAW LIBR. J. 513, 514 (2004) (stating that with the increase in diversity on faculties, there has also been an increase in scholarship using critical race theory); Devon W. Carbado, (E)Tracing the Fourth Amendment, 100 MICH. L. REV. 946, 964 (2002) (stating that "[a] growing body of literature contests the racial dimensions of Fourth Amendment law"); Kevin R. Johnson, Race
school courses that substantially address race-related issues has noticeably increased. A newer trend in legal education is the emergence of institutionalized programs that promote opportunities in and outside the classroom to engage issues at the intersection of race and law. Indeed, this past February, the University of Florida’s Center for the Study of Race and Race Relations hosted its inaugural Race and Law Curriculum Workshop, which brought together directors of the small but growing number of race and law programs across the country to share ideas, and to encourage the establishment of such programs in other law schools.

This raises the question, why? Why should law schools incorporate race as a substantial component of the curriculum? Put simply, why study race and law? Legal educators have differed on the importance of race to legal education. Skeptics, most of whom would acknowledge the relevance of race to certain topics, such as discrimination and affirmative action, question whether it should be a substantial focus of legal study, especially for lawyers who do not plan to work on civil rights issues. To emphasize race in the law school curriculum, particularly in required courses, detracts from the amount of time law students can spend developing professional skills more pertinent to their career goals.

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7 See Trail & Underwood, supra note 5, at 216. (citing race-related and other humanities/social science-type courses in law schools as part of detrimental trend away from practical courses, which "consumes resources that would otherwise be available for instruction more directly relevant to new lawyers").
In contrast, advocates of race and law teaching and scholarship contend that race is crucially relevant to a broad range of legal fields that extend far beyond civil rights law. Fields such as criminal law, property, health care, and even subjects as ostensibly race-neutral as contracts, corporate law, insurance and tax affect and are affected by racial considerations. They argue that more, not less, of the law school curriculum should address racial issues. Moreover, what is needed is not only specialized courses that focus on race for the benefit of students already or especially interested in those issues. Rather, race should also play a more substantial role in courses of general interest, including the standard first-year curriculum. Furthermore, outside the classroom, greater opportunities are needed for students and faculty to engage over issues at the intersection of race and law through lectures, workshops, academic panels and conferences. The creation of centers, institutes, and other structured programs to promote the study of race and law are warranted to meet this need.

My purpose in this essay is not to engage this debate comprehensively, a debate reflected in a rich and voluminous literature, but rather to propose

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and explain the following three observations about the study of race and law. First, as Part I explains, law can be more adequately understood and evaluated when examined through the lens of race, that is, when considered in view of the role race has had in the development, administration, or consequences of the law. Second, as explored in Part II, the assessment of the relevance of race to law is vulnerable to two distorting biases: race essentialism and race exceptionalism. Race essentialism, for purposes of this essay, refers to the tendency to overemphasize the relevance of race to the merits of laws. To essentialists, the relationship between a law and its racial origins, administration, or impact is so essential that the law’s merits stand or fall on its racial implications, regardless of the law’s value in serving other purposes. By race exceptionalism, I mean the contrary tendency by some to minimize the relevance of race to the merits of a law or doctrine, viewing the law’s relationship to race as exceptional or aberrational, having little or nothing to say about the law’s merits in general with respect to contexts or purposes unrelated to race. Third, as discussed in Part III, the most effective way to gain the benefits of studying law through race while avoiding the twin biases just mentioned is to study race in a sustained, deliberative manner that remains open to and takes seriously a diversity of views, including from the political right and left, and from the economic “top” and “bottom.”

To the extent these observations are plausible, then the study of race and law, properly undertaken, would enhance


The term race essentialism is used by scholars in varying ways, having in common some sense that race is accorded fundamental or foundational significance. The definition I give here is for the limited purpose of describing the approach to appraising law that I discuss in this essay.

Referring to economically privileged people as the “top” and economically or socially disadvantaged communities as the “bottom” borrows from the work of critical race theorists. See, e.g., Derrick Bell, Faces at the Bottom of the Well: The Permanence of Racism (1992); Devon W. Carbado, Race to the Bottom, 49 UCLA L. Rev. 1283 (2002); Mari J. Matsuda, Looking to the Bottom: Critical Legal Studies and Reparations, 22 Harv. C.R.-C.L. L. Rev. 323 (1987); Athena D. Mutua, Shifting Bottoms and Rotating Centers: Reflections on Latcrit III and the Black/White Paradigm, 53 U. Miami L. Rev. 1177 (1999).
significantly the law student’s ability to understand and appreciate the implications of the laws, whichever they may be, by which the student as lawyer will eventually practice and by which our society lives.

A few final points about my methodology and purpose are worth clarifying at the outset. My claims are not substantiated by in-depth research or detailed documentation. Rather, this essay is a thought piece, a synthesis of ideas and observations developed in the course of my own scholarship,12 my teaching, including the subjects of Race and Law, Constitutional Law, and Criminal Law & Procedure; and in the course of my tenure as Director of the Center for the Study of Race and Law. I will also suggest the salience of my points for legal subjects outside my expertise. I will not, moreover, address the question whether programs or specialized courses to study race and law would be appropriate in a world in which race was substantially and adequately addressed in conventional law courses. While complicated questions would arise if race were well integrated into law school curriculums, at present that is not the case at most institutions. My primary purpose is to defend the benefits of studying race and law in whatever forum that can be done. I will suggest, however, that under current circumstances in which the lens of race is underutilized in many courses, institutionalized race and law programs can serve an important role in complementing the law student’s education.

I. THE LENS OF RACE

Skeptics of the value of race to the study of law are likely to accept its relevance for civil rights, especially involving claims of racial discrimination. A more interesting question, then, is what value exists in studying race and law for students who do not plan to practice race or civil rights law. A principal benefit to such a student is gaining the ability to appreciate more fully the potential costs and benefits of laws, including doctrines, principles, and theories, not ostensibly concerned with race.

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Race can inform the evaluation of law in three respects. First, the racial origins of a law are relevant to evaluating the law's merits. That is, to the extent certain laws, justified today in race-neutral terms, may have been developed previously for racially discriminatory purposes, then such laws require closer scrutiny to ensure the race-neutral rationales are adequate by themselves to justify the laws. This point requires further explanation, as it is more complicated than it may initially appear. I do not simply mean that a specific law proven to have been adopted for a discriminatory purpose should be justified by race-neutral reasons. Such a law would be presumptively unconstitutional under the Equal Protection Clause. For example, Alabama's felon disenfranchisement law was held unconstitutional because the law was adopted for the purpose of disenfranchising blacks.\textsuperscript{13} Similarly, school tracking policies, by which schoolchildren were separated into different classes purportedly based on ability, were adopted by some schools to maintain racially segregated classrooms.\textsuperscript{14}

I mean something more, namely, that even a law for which there is no proof of a discriminatory motive requires closer scrutiny if it is similar to a law that was enacted previously or in another jurisdiction for a discriminatory purpose. Depending on other circumstances, there may be reason to suspect that an ostensibly race-neutral law with a discriminatory impact may have been adopted for a discriminatory purpose if it is similar to one that was adopted for such a purpose. The concern is that jurisdictions bent on discriminating may copy the covertly discriminatory laws of other jurisdictions. Consider the spread across the South of race-neutral devices to disenfranchise blacks at the turn of the twentieth century.\textsuperscript{15} Furthermore, even a law sincerely adopted for race-neutral reasons may have been influenced by the existence of similar laws that were adopted for discriminatory purposes. Once laws are created and have been operative for a time, there may be a tendency by other jurisdictions to assume the legitimacy and race-neutral benefits of those laws, without fully appreciating the role race played in their adoption. Later lawmakers


\textsuperscript{15} For accounts of the southern campaign to disenfranchise blacks around the turn of the twentieth century, see J. Morgan Kousser, The Shaping of Southern Politics: Suffrage Restriction and the Establishment of the One-Party South, 1880–1910 (1974); Michael Perman, Struggle for Mastery: Disenfranchisement in the South, 1888–1908 (2001).
may give deferential weight to the value of the previous laws simply because other jurisdictions have adopted them. Felon disenfranchisement laws, for example, once adopted by some states to discriminate against blacks, may later be assumed to be legitimate by law makers in other states who may not be aware of the laws' discriminatory origins. Or states may adopt school tracking policies in part on the assumption that they must be useful if other states have them, even if the other states adopted them because of their discriminatory effect. Indeed, states may feel pressured to adopt certain laws they would not otherwise adopt because of the externality effects of other states' having such laws. For example, a state may decide to adopt a felon disenfranchisement law to avoid attracting convicted felons from states that already have such laws. In sum, the very fact that an ostensibly race-neutral law was adopted by some jurisdictions for discriminatory purposes suggests caution in accepting on face value the adequacy of the law's race-neutral justifications.

In addition to a law's racial origins, a second respect in which a law's relationship to race can inform its merits is the extent to which the law is prone to be administered in a discriminatory manner, even if race had no influence on the law's adoption. The ultimate merits of a law that tends to be used for discriminatory purposes must take account of the cost of its discriminatory abuse. The third respect in which race can inform the assessment of a law, including a law enacted and administered in a race-neutral manner, is that it may have a racially discriminatory impact that counsels against the law in question. In short, an accurate assessment of the value of certain laws, of their costs and benefits, is facilitated by an appreciation of the laws' racial origins, administration, and impact.

Before considering these points for legal fields beyond civil rights, it is worth noting that civil rights laws addressed to traits other than race, such as sex, age, disability or sexual orientation, have been significantly shaped by race. In justifying application of heightened judicial scrutiny to sex-based discrimination, for example, the Supreme Court expressly analogized sex to race and imported the doctrinal developments from race and applied them to sex-based classifications. At the same time, the Court stopped short of applying strict scrutiny to sex-based discrimination, because the Court perceived ways in which race and sex differed. The Court's experience with race thus enhanced, and limited, its approach to

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16 See Frontiero v. Richardson, 411 U.S. 677, 688 (1973) (analogizing sex to race and arguing for application of strict scrutiny to sex-based classifications).

sex. Similarly, in the debate over sexual orientation discrimination, race figures prominently in arguments both for and against civil rights for sexual minorities. And across the range of antidiscrimination laws addressed to other traits, such as religion, age, or disability, the justifications for these protections and the form in which they take have been influenced by the development of laws against racial discrimination. Understanding civil rights law writ broadly is thus enhanced by examining the racial origins of its form and content, and considering the extent to which the analogies to race are persuasive.

The relevance of race, moreover, goes beyond antidiscrimination and other civil rights laws. Consider, for example, the principal doctrines and theories of constitutional law, a field of major historical and contemporary importance, the study of which law schools uniformly require. A central question in constitutional law is the legitimacy of judicial review, the authority of courts to invalidate laws enacted by the politically accountable branches of government. Assessing whether judicial review is worth defending is invaluable informed by examining the historical role that race has served in its development, justification, and impact. Last year the nation commemorated the fiftieth anniversary of *Brown v. Board of Education*. Although *Brown* and its progeny are heralded today, the judicial review exercised by the Court was not then, or now, easily justified by widely accepted approaches to constitutional interpretation, including textualism, originalism, political process theory, and respect for precedent. Yet today virtually no theory of constitutional interpretation can afford not to justify *Brown*. The invalidation of racial segregation is now

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19 See Paul Steven Miller, *Disability Civil Rights and a New Paradigm for the Twenty-First Century: The Expansion of Civil Rights Beyond Race, Gender, and Age*, 1 U. PA. J. LAB. & EMP. L. 511, 513 (1998) (describing development of civil rights laws from "initial focus on race" to other traits such as sex, national origin, religion, age, and disability).


understood in American legal culture as so essential to the legitimacy of American democracy that judicial review must of political necessity be legitimate. *Brown* thus supports the legitimacy of judicial review in principle, and of particular theories of constitutional interpretation that justify it.

It should also be remembered, however, that the second time in American history in which the Supreme Court exercised judicial review was in *Dred Scott v. Sanford*, perhaps the most maligned Supreme Court opinion in American history. The Court invalidated the Missouri Compromise because, the Court concluded, it would unconstitutionally deprive slaveowners of their property rights in slaves, and because blacks had no right under the Constitution to be citizens of the United States. The Court’s exercise of judicial review in *Dred Scott* likely pushed the

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necessity, account for the result in *Brown*.""); RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION 56 (2001) ("[A] constitutional theory is widely thought to be disqualified from acceptance if it could not justify the result in *Brown*."); LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 23 (2000) ("[A]ll constitutional commentators, whether on the left or the right, agree *Brown* was correctly decided, and any theory to the contrary is impossible to sustain."); Michael J. Klarman, Brown, Originalism, and Constitutional Theory: A Response to Professor McConnell, 81 VA. L. REV. 1881, 1930 (1995) ("[I]t is perfectly understandable, if unfortunate, that conservatives have felt compelled to adjust/distort their constitutional theories to accommodate *Brown*."); Michael W. McConnell, Originalism and the Desegregation Decisions, 81 VA. L. REV. 947, 952 (1995) (commenting that constitutional theories not leading to the result in *Brown* are "seriously discredited"); Richard A. Posner, Bork and Beethoven, 42 STAN. L. REV. 1365, 1374 (1990) ("No constitutional theory that implies that *Brown v. Board of Education*... was decided incorrectly will receive a fair hearing nowadays."). *But see* John Harrison, Reconstructing the Privileges or Immunities Clause, 101 YALE L.J. 1385, 1463 n.295 (1992) ("An interpretation of the Constitution is not wrong because it would produce a different result in *Brown*.").

22 60 U.S. 393 (1857).

23 As Professor Peter Appel observes, "[i]t would border on the impossible to catalogue all of the literature critical of *Dred Scott*." Peter A. Appel, The Power of Congress “Without Limitation”: The Property Clause and Federal Regulation of Private Property, 86 MINN. L. REV. 1, 37 n.161 (2001). Professor Mark Gruber catalogues several such criticisms, stating:

Commentators across the political spectrum describe *Dred Scott* as “the worst constitutional decision of the nineteenth century,” “the worst atrocity in the Supreme Court’s history,” “the most disastrous opinion the Supreme Court has ever issued,” “the most odious action ever taken by a branch of the federal government,” a “ghastly error,” a “tragic failure to follow the terms of the Constitution,” “a gross abuse of trust,” “a lie before God,” and “judicial review at its worst.”


25 See *Dred Scott*, 60 U.S. at 450.

26 See id. at 404–05.
nation toward civil war. Like Brown, the racial implications of Dred Scott test the legitimacy of judicial review. Unlike Brown, however, which all legitimate theories of constitutional review must justify, Dred Scott is a case that all constitutional theories must reject.

Two other constitutional doctrines are also instructive: federalism and the state action doctrine. Federalism refers to the constitutional allocation of power between the federal and state governments, each retaining sovereignty within their respective spheres. Federalism is justified, among other rationales, as advancing liberty, civic republicanism, and efficiency of preference satisfaction, by permitting individual states, more responsive to local interests, to protect rights that a plenary national government might not. Conversely, federalism has been criticized as permitting local majorities to subordinate the interests of local minorities, and of tolerating inconsistency across states with respect to rights that are arguably fundamental. Thus, a historic function of federalism was protecting states that permitted slavery, tolerated lynching, and protected segregation from federal interference. Although there are sound reasons to defend “states’ rights,” its popularity as a doctrine by those defending white supremacy suggests reason for pause. At the same time, federalism arguably facilitated the rise of black political power and the civil rights movement. “[O]ne reason for the success of the civil rights movement was that people of color were able to leave the South and resettle in northern cities, where

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28 Graber, supra note 23, at 271–73. Contrasting historical reactions to the judicial review exercised in Marbury to that in Dred Scott, Professor Ariens observes:

Chief Justice Marshall’s only use of the power of judicial review to strike down congressional action is largely accepted as both proper and necessary; the exercise by his successor, Roger Brooke Taney, of the same power in Dred Scott v. Sanford is roundly condemned as one of the worst abuses of power in American history.


they were able to exercise political power.\textsuperscript{30} Whether federalism is, on balance, beneficial, and how strictly it should be applied is a difficult question. A fair assessment of that question, however, should be informed by its role in both protecting and overcoming America’s racial caste system.

The state action doctrine holds that individual rights protected by the Constitution, save one,\textsuperscript{31} are only infringed when the government is responsible for the infringement. A private citizen, school or other organization may, for example, promote particular religious or political beliefs or discriminate against people based on their race or sex, without violating the Constitution. Only when the discrimination is attributable to the government or “state action” is the Constitution implicated. The Court first announced this limitation on the reach of constitutional rights in the \textit{Civil Rights Cases}.\textsuperscript{32} The Court invalidated a federal law that prohibited racial discrimination by privately-owned places of public accommodation, such as inns, restaurants, and railroads. The Court reasoned that Congress could only enforce rights protected by the Fourteenth Amendment, and that Amendment only protects rights against discrimination by government, not private businesses.

In the twentieth century, however, the Court extended the concept of state action to contexts in which the alleged infringement of constitutional rights was committed by private actors. The Court held, for example, that a private political party was a state actor when it conducted an internal primary to select a nominee;\textsuperscript{33} that the validity of a covenant in a private real estate deed or of a private person’s testamentary gift\textsuperscript{34} involved state action; and that the use of peremptory challenges to strike potential jurors constitutes state action even when exercised by a private litigant in a civil action or by a criminal defendant on trial by the state.\textsuperscript{35} Whether the Court’s extension of the state action doctrine in these cases was sound is certainly debatable. Evaluating the Court’s analysis, however, requires

\begin{itemize}
  \item \textsuperscript{30} \textit{Id.} at 838.
  \item \textsuperscript{31} The only constitutional right exempt from the state action doctrine so that it is protected against private as well as government infringement is the right against slavery in the Thirteenth Amendment. \textit{U.S. Const. amend. XIII}, §1. The racial origins of this right are obvious.
  \item \textsuperscript{32} 109 U.S. 3 (1883).
  \item \textsuperscript{34} \textit{See} Shelley v. Kraemer, 334 U.S. 1 (1948).
  \item \textsuperscript{35} \textit{See} Gilmore v. City of Montgomery, 417 U.S. 556 (1974) (finding state action in court enforcement of devise of privately-owned “whites only” park).
  \item \textsuperscript{36} \textit{See} Edmonson v. Leesville Concrete Co., Inc., 500 U.S. 614 (1991).
  \item \textsuperscript{37} \textit{See} Georgia v. McCollum, 505 U.S. 42 (1992).
\end{itemize}
appreciating the Court’s concern over the discriminatory purposes behind the putatively private action, discrimination the Court was endeavoring to remove from society “root and branch.” The “white primary” excluded blacks from participation; the covenant prohibited selling private property to blacks, the Will devised a “whites only” private park, and the peremptory challenges were motivated by race. Justice Thurgood Marshall noted in *Jackson v. Metropolitan Edison Co.*, a case in which the Court held an electric company was not a state actor and, therefore, did not owe its customers due process before terminating service, that the Court surely would have held the utility company a state actor if the customer’s service was terminated because of race. Justice Marshall was probably right that the Court would have found the utility a state actor if it discriminated by race. Whether his ultimate point, that a utility company should be considered a state actor, was also right is less clear, but evaluating the scope of the state action doctrine, and predicting its future development, requires understanding its racial origins and impact.

Evaluating criminal procedures, from police investigations to sentencing, also requires understanding their racial implications. As Professor Michael Klarman has demonstrated, the Supreme Court’s intrusion into the criminal procedures of the states in the early twentieth century, over federalism objections, was prompted by cases involving blatant racial discrimination. A number of scholars also believe that the Court’s expansion of criminal procedural rights in the mid to late twentieth century was motivated to some degree by concerns over racial injustice. The historic and continuing relationship between race and criminal

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42 See David Cole, Foreword: Discretion and Discrimination Reconsidered: A Response to the New Criminal Justice Scholarship, 87 Geo. L.J. 1059, 1060 (1999) (“No doubt influenced by the abuse of the criminal law to reinforce racial subordination and perpetuate segregation, the Supreme Court in the 1950s and 1960s for the first time held that state and local police must generally be governed by the same constitutional constraints that apply to the federal government.”); Stephen F. Smith, The Rehnquist Court and Criminal Procedure, 73 U. Colo. L. Rev. 1337, 1341 n.15 (2002) (observing while questioning “the prevailing orthodoxy . . . that fighting racism was the motivation behind Warren-era criminal procedure”); William J. Stuntz, The Uneasy Relationship Between Criminal Procedure and Criminal Justice, 107 Yale L.J. 1, 5 (1997) (“The post-1960 constitutionalization of criminal procedure arose, in large part, out of the sense that the system was treating black suspects and defendants much worse than white ones.”).
procedure informs contemporary debates over the scope of such procedures. Consider the ongoing debate over laws affording police substantial discretion in maintaining law and order on public streets, such as laws against disorderly conduct, vagrancy, and loitering, including by criminal gangs.\textsuperscript{43} The Court's opinion invalidating such laws as recently as 1997 explicitly mentioned concerns over the risk of discrimination afforded by such laws.\textsuperscript{44} Indeed, not only did race influence the enforcement and ultimate invalidation of vagrancy laws, race likely motivated the historic adoption of some vagrancy laws in the first place.\textsuperscript{45} The discriminatory motivation behind such laws suggests reason for skepticism about the legitimate need for them. Scholars continue to disagree over the virtues of police discretion in maintaining public order, but all agree that the risk of racial discrimination such discretion affords is an indispensable part of the debate. Indeed, defenders of police discretion cite the need to safeguard the interests of minority communities from gang and other criminal activity.\textsuperscript{46} Race is thus used by both sides to defend the merits of their position.

Race illuminates procedures at the courthouse as well. Prosecutorial charging has come under fire both in the War on Drugs, as purportedly biased against black defendants,\textsuperscript{47} and in prosecutions of capital crimes, as


\textsuperscript{44} See Chicago v. Morales, 527 U.S. 41, 56 (1999); Id. at 64 (O'Connor, J., concurring).

\textsuperscript{45} See John Hope Franklin, From Slavery to Freedom: A History of Negro Americas 303 (3d ed. 1967) (describing post-Civil War laws adopted in the South to maintain blacks in role as laboring force, including vagrancy laws designed to force blacks to work).

\textsuperscript{46} See Kahan & Meares, supra note 43, at 1161-63 (arguing that law-abiding members of minority communities want more aggressive policing).

\textsuperscript{47} See Gabriel J. Chin, Race, the War on Drugs, and the Collateral Consequences of Criminal Conviction, 6 J. GENDER RACE & JUST 253, 254 (2002) (stating that "[f]or all categories of crime, the best evidence of discriminatory prosecution exists for drug violations."); Marc Mauer, Felon Disenfranchisement: A Policy Whose Time Has Passed?, 31 WTR HUM RTS. 16, 17 (Winter 2004) (noting "compelling evidence" of "racially disparate prosecution of the war on drugs"); Paul Butler, In
purportedly biased against black defendants and killers of white victims. Regarding drug crime charging, some lower courts have been persuaded of the plausibility of discrimination allegations, and have sought explanations from prosecutors regarding the selection criteria for their charging decisions. Rejecting these courts’ inquiries, the Supreme Court has essentially shielded prosecutors from claims of race-based charging, citing the importance of executive prerogative over enforcement policy. Similarly, in capital crime prosecution, the strictness of the Court’s requirements for proving discriminatory charging has made such charging essentially unreviewable. Whether separation of powers doctrine warrants such a high degree of deference to prosecutorial discretion is a debatable question, but the extent to which such deference permits racial discrimination in charging is surely relevant to answering it.

Inside the courtroom, race has prompted limits on the absolute discretion traditionally accorded peremptory challenges in the selection of jurors. As mentioned previously, race seems to have influenced the Court’s determination that peremptory challenges constitute state action.

Defense of Jury Nullification, LITIGATION, Fall 2004, at 49 (“The evidence that African Americans are subject to discriminatory prosecutions for drug crimes is difficult to dispute.”). See also United States v. Armstrong, 517 U.S. 456, 459 & n.1 (1996) (describing claims in this and other cases that federal prosecutors selectively prosecute black defendants for crack distribution).


49 See Armstrong, 517 U.S. at 459 (describing trial court’s order granting defendant’s motion for discovery of prosecution’s charging criteria); Id. at 461 (describing court of appeals’ affirmance of trial court’s discovery order).

50 See id. at 464 (emphasizing “broad discretion” of prosecutors in charging, a duty that lies within the “special province” of the executive and which is therefore entitled to a strong presumption of regularity); Id. at 469–71 (criticizing and reversing court of appeals decision that permitted discovery against prosecution).

51 As Professor Baldus and colleagues observe, “[i]n McCleskey v. Kemp, 481 U.S. 279 (1987), the Supreme Court established a burden of proof for establishing disparate treatment claims in the capital sentencing context that is impossible to meet in the absence of direct admissions of discriminatory intent by prosecutors or jurors.” David C. Baldus et al., Arbitrariness and Discrimination in the Administration of the Death Penalty: A Legal and Empirical Analysis of the Nebraska Experience (1973–1999), 81 NEB. L. REV. 486, 563 n.211 (2002). See also McCleskey, 481 U.S. at 295 n.15 (observing difficulty of proving discriminatory policy by prosecutors in capital charging given decentralized nature of prosecutors and infinite factual variations involved in each charging decision); Id. at 296 (observing that “wide discretion” accorded prosecutorial charging “suggest[s] the impropriety of our requiring prosecutors to defend their decisions to seek death penalties”).
Equally informative about this line of cases is what they say about the importance of the peremptory challenge itself, a practice long viewed as essential to the selection of an impartial jury. Until the late twentieth century, the Court protected racially-motivated peremptory challenges. In 1986, however, the Court held racially motivated peremptory challenges were *per se* unconstitutional.52 The Court later extended the prohibition to sex-motivated peremptory challenges as well.53

The encroachment on the peremptory challenges in these cases has put the value of that discretion on trial, so to speak. Some justices have insisted that securing an impartial jury requires complete discretion in the exercise of the peremptory challenge.54 A majority of the Court, in contrast, endorses the importance of the peremptory challenge, but believes that permitting its use to strike jurors based on race is outweighed by equal protection concerns. A third position, held by Justice Marshall and other court watchers, is that the usefulness of the peremptory challenge is outweighed by its discriminatory abuse, and that the only way to avoid such abuse is to ban peremptory challenges altogether.55 The doctrinal debate over race-based peremptory challenges has thus prompted a hard look at the real value of such challenges in selecting juries. Their importance is at least undermined to the extent they are used to exclude a racial group from participating in jury service. The fact that some jurisdictions in the past increased the number of peremptory challenges to allow their racially discriminatory use56 counsels scrutiny regarding the number of such challenges that are needed to secure an impartial jury. At the same time, to the extent elimination of peremptory challenges would undermine the impartiality of juries, then the risk of discrimination may be outweighed by the defendant’s right to a fair trial. The merits of the peremptory challenge is difficult to assess, but its use against prospective jurors based on race forces careful attention to its ultimate value.

Race is also central to debates over the imposition of capital punishment. The principal concern is that the death penalty is likely administered in a racially discriminatory manner. Racial bias in the death penalty is, of course, not new. Throughout the nation’s history, especially

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54 See *Batson*, 476 U.S. at 118 (Burger, C.J. and Rehnquist, J., dissenting).
55 See *Batson*, 476 U.S. at 102–03 (Marshall, J., concurring)
56 See *Klaman*, *Racial Origins*, supra note 41, at 81 (stating that some states increased number of peremptory challenges in order to nullify *Norris v. Alabama*, 294 U.S. 587 (1935), in which the Supreme Court prohibited excluding blacks from juries).
in the South, black defendants have been far more likely to be executed than white defendants, for murder and, especially, for rape. Indeed, for some crimes, the death penalty was reserved by statute for blacks only. Supreme Court justices recognized the danger of racial discrimination in death penalty decisions in Furman v. Georgia, in which the Court invalidated then existing capital punishment schemes. The Court has since permitted capital punishment with certain procedural safeguards to guide jury discretion. The seminal work of Professor David Baldus and others has shown, however, that the death penalty continues to be imposed discriminatorily. Their findings, moreover, emphasize that the primary bias is based on race of the victim. That is, as Professor Sam Gross explains, “[t]hose who were charged with killing white victims are far more likely to be sentenced to death than those who were charged with killing black victims.” In McCleskey v. Kemp, the Court accepted that death penalty juries in Georgia may well systematically discriminate against defendants accused of murdering white victims, but the Court declined to invalidate Georgia’s death penalty, noting that with discretion

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58 See BELL, supra note 14, at 339 n.27.
59 408 U.S. 238 (1972).
60 Furman had no majority opinion. Common across the five opinions that found the capital punishment scheme wanting was the degree to which its imposition was either arbitrary or discriminatory. Several justices explicitly noted racial discrimination as a primary concern. Furman, 408 U.S. at 310 (Stewart, J., concurred) (“My concurring Brothers have demonstrated that, if any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race.”); Furman, 408 U.S. at 242, 249-51, 256-57 (Douglas, J., concurring) (concluding death penalty is cruel and unusual because it is disproportionately imposed on the basis of race and other illegitimate factors); Furman, 408 U.S. at 364-66 (Marshall, J., concurring) (criticizing death penalty for being imposed disproportionately on underprivileged minorities, the illiterate, and the poor).
63 Samuel Gross, Remarks at the DePaul University College of Law Race to Execution Symposium 9 (Oct. 24, 2003) (transcript on file with DePaul Law Review), quoted in Emily Hughes, Concluding Thoughts: Speaking to be Understood: Identity and the Politics of Race and the Death Penalty, 53 DEPAUL L. REV. 1675, 1677 (2004). Gross observes that “[n]early half of all homicide victims in the United States are African American,” while “only 12% of those who . . . have been executed in the past 30 some years, have been executed for killings of black victims as compared to about 80% for white victims. A disproportion . . . on the order of a factor of 6.5.” Id. at 8. See also Samuel Gross & Robert Mauro, Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization, 37 STAN. L. REV. 27 (1984) (finding race-of-victim effect in study of eight death penalty states).
comes the risk of its abuse, but that it was up to the legislature to decide whether that risk outweighed the value of jury discretion in administering the death penalty. The Court thus recognized the relevance of race in assessing the appropriate scope of discretion in capital punishment, but left it to the legislature to resolve. Another factor affecting whether the death penalty will be imposed in a given case is the racial composition of the jury, which further calls into question the fairness and consistency of the death penalty system. In sum, legislatures have historically enacted the death penalty for racially discriminatory purposes; juries and possibly prosecutors likely discriminate in selecting whom should receive the death penalty; and whether the penalty is ultimately imposed in a given case depends substantially on the race of the victim, the race of the defendant, and the race of the jurors sitting in judgment. Whether the death penalty is worth maintaining in view of its racial origins, administration, and consequences is a question that can only be answered by careful articulation and demonstration of the death penalty’s value. Indeed, one may legitimately ask whether the United States’ retention of the death penalty, alone among western nations, would be as tenacious if race did not play such a significant role.

An evaluation of education law and practice would also be enhanced by paying attention to race, including for ostensibly race-neutral policies, such as school tracking, school choice plans, and the use of standardized aptitude tests. Although grouping schoolchildren by ability may serve legitimate pedagogical purposes, the increased interest in such policies beginning in the mid-1950s appears, at least in some cases, to have been prompted by a desire to avoid racially integrating school classrooms. Some schools were found to have adopted tracking plans to evade desegregation orders. Similarly, the use of school choice plans appears in some instances to have been motivated by efforts to evade desegregation, which, for some, raises concerns over contemporary school choice

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65 See McCleskey, 481 U.S. at 308–09 (acknowledging risk of racial prejudice in jury decision making but finding degree of risk constitutionally acceptable); Id. at 319 (stating that legislature is more appropriate body to decide validity of state’s death penalty system).


68 See BELL, supra note 14.

69 See Green v. County Sch. Bd. of New Kent County, 391 U.S. 430 (1968) (invalidating school choice plan that was intended to maintain segregated schools).
proposals.\textsuperscript{70} And skepticism over the usefulness of aptitude and other standardized tests is understandable to the extent they may have, on some occasions, been adopted or emphasized for racially discriminatory purposes.\textsuperscript{71} If some of the foregoing education policies would not have been adopted had race not been a motivating factor, then perhaps their non-racial benefits are not particularly strong. Moreover, many of these policies tend to have segregative effects, whether intended or not. Determining whether the overall benefits of these policies outweigh these racial costs requires a reliable estimation of exactly what their benefits are.

The foregoing is but a sketch of the ways in which examining laws through their relationship to race can enhance one's understanding of the laws' merits, including their non-racial costs and benefits. This analysis could be applied across a broad range of legal fields. For example, an assessment of felon disenfranchisement laws, which many states have declined to adopt, is more informed by recognizing that such laws disproportionately exclude blacks from voting and were adopted by some states in the past for that purpose.\textsuperscript{72} Determining whether the more severe penalty for crack distribution compared to powder cocaine is justified would benefit from taking account of the starkly disparate impact the penalty differential has on black people, and of allegations that a desire for the racial impact, or at least indifference to it, influenced the penalty's adoption or retention.\textsuperscript{73} A defense of unfettered choice over alienation of

\textsuperscript{70} See Bruce Fuller et al., Policy Making in the Dark: Illuminating the School Choice Debate, in WHO Chooses? WHO Loses?: CULTURE, INSTITUTIONS, AND THE UNEQUAL EFFECTS OF SCHOOL CHOICE 1 (Bruce Fuller & Richard F. Elmore eds., Teacher's College Press 1996) (suggesting that skepticism toward school choice may also be due to the fact that school choice originally developed in the South as a white response to integration orders); Jim Ryan, School Choice and the Suburbs, 14 J.L. & POL. 459, 465 (1998) (stating skepticism over school choice plans because of where they fit in history of urban and suburban relations); Id. at 460 n.6 citing Molly Tounes O'Brien, Public School Tuition Vouchers and the Realities of Racial Politics, 64 TENN. L. REV. 359 (1997).

\textsuperscript{71} See, e.g., United States v. Fordice, 505 U.S. 717, 736–37 (1992) (noting that the University of Mississippi raised and emphasized ACT scores to discriminate against blacks); See also Richard Delgado, Official Elitism or Institutional Self Interest? 10 Reasons Why UC-Davis Should Abandon the LSAT (And Why Other Good Law Schools Should Follow Suit), 34 U.C. DAVIS L. REV. 593, 599 (2001) (discussing how standardized tests came into wide use because many minorities at the time could not meet the standards).

\textsuperscript{72} See supra note 13.

real property should acknowledge that people have sought common law74 and constitutional protection75 of such choice for the purpose of discriminating against blacks. And an evaluation of state laws that deny "home rule" authority to municipalities is the better for knowing such laws were adopted in some states in order to discriminate against local ethnic groups.76

Race is not, it should be acknowledged, the only useful lens through which to examine law. Considering the relationship of law to other identities, such as religion or sex, would likely generate useful insights as well. The extent to which race and law have been so pervasively and inextricably linked throughout American history, however, suggests that race is one of and possibly the most relevant social lens through which to study American law. It should also be recognized that the study of race and law is complicated. It is fraught with certain risks the student, and teacher, of law will need to navigate. Two biases, to which I now turn, can distort the legal lessons of race.

74 See, e.g., Shelly v. Kraemer, 334 U.S. 1 (1948) (involving claim that common law property rights protected right to discriminate in sale of property).
75 See, e.g., Reitman v. Mulkey, 387 U.S. 369 (1967) (striking down state constitutional amendment that granted unfettered choice in sale or rental of real property on grounds it was enacted through state referendum with the purpose of permitting racial discrimination).
76 "Home rule" refers to the authority gained by many municipal governments by the turn of the twentieth century to adopt local policies without approval or interference from state legislatures. As part of the nativism that swept much of the country in the early twentieth century, state legislatures, particularly in the Northeast and Midwest, which were often controlled by rural, Protestant, Northern European-descent interests, sought to cut back on home rule authority because cities were increasingly dominated by minority ethnic groups, such as Irish, Italians, Jews, and other immigrant groups from Southern and Eastern Europe. See E-mail from Professor Keith Aoki, University of Oregon School of Law, to Kim Forde-Mazrui (Apr. 26, 2005, 12:02 PM) (on file with author and the Journal of Law and Politics). For scholarship on home rule and state restrictions thereof, see GORDON L. CLARK, JUDGES AND THE CITIES: INTERPRETING LOCAL AUTONOMY (1985); JOHN FORREST DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS (5th ed. 1911); David Barron, Reclaiming Home Rule, 116 Harv. L. Rev. 2255 (2003); Richard Briffault, Home Rule, Majority Rule and Dillon’s Rule, 67 Chi.- Kent L. Rev. 1011 (1991); Richard Briffault, Our Localism, 90 Colum. L. Rev. 1 (1989); Cynthia Cumfer, Original Intent v. Modern Judicial Philosophy: Oregon’s Home Rule Case Frames the Dilemma for State Constitutionalism, 76 Or. L. Rev. 909 (1997); Gerald Frug, The City as a Legal Concept, 93 Harv. L. Rev. 1059 (1980); Terrance Sandalow, The Limits of Municipal Power Under Home Rule: A Role for the Courts, 48 Minn. L. Rev. 643 (1964); Kenneth VanLandingham, Municipal Home Rule in the United States, 10 WM. & MARY L. Rev. 269 (1968); George D. Vaubel, Toward Principles of State Restraint Upon the Exercise of Municipal Power in Home Rule, 22 STETSON L. Rev. 643 (1993); Joan C. Williams, The Invention of the Municipal Corporation: A Case Study in Legal Change, 34 Am. U. L. Rev. 369, 437 (1985), cited in E-mail from Professor Keith Aoki, supra.
II. OUT OF FOCUS: THE TWIN BIASES OF RACE EXCEPTIONALISM AND ESSENTIALISM

In examining the law through the lens of race, one ought to be on guard against two biasing tendencies, race essentialism and race exceptionalism. In this essay, race essentialism refers to the tendency by some observers, in evaluating law, to overemphasize the significance of race, to the exclusion of other considerations. Indeed, some race essentialists go as far as imposing a racial litmus test, by which laws are judged acceptable if, and only if, their racial implications are acceptable, regardless of other merits the laws may have. For example, as mentioned previously, theories of constitutional interpretation are per se unacceptable to many if they do not justify the decision in Brown v. Board of Education. Similarly, Justice Marshall's approach to the state action doctrine and the constitutional status of the peremptory challenge seems to approach a racial litmus test. The moral unacceptability of denying a customer electricity because of her race requires treating the utility company as a state actor in order to afford her a judicial remedy. And because litigants will sometimes evade detection in exercising peremptory challenges by race, despite equal protection review, peremptory challenges must be abolished.

A law's racial impact alone can be determinative for a race essentialist in assessing the law's merits. Illustrative is the controversy over the more severe penalties imposed on crack as compared to powder cocaine distribution. For a race essentialist, the simple fact that the penalty structure disproportionately burdens blacks means the penalty structure is unjustified, unfair, and possibly racist. Similarly, in the education context, race essentialists may reject out of hand any form of academic measure, such as the SAT or LSAT, that produces a significant racial disparity. Another example is the so-called "marriage penalty" under the tax code. Some scholars have concluded that the marriage penalty falls disproportionately on black couples. For a race essentialist, the disparate

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77 For further explanation of this essay's use of term race essentialism, see supra note 10 and accompanying text.
79 On Justice Marshall's approach to the state action doctrine and the peremptory challenge, see supra notes 39 and 40 and accompanying text.
80 See, e.g., Brennen, supra note 8, 337; Dorothy A. Brown, The Marriage Penalty/Bonus Debate in Black and White, 65 U. CIN. L. REV. 787, 791 (1997); Beverly Moran & William Whitford, A Black
impact of the tax provision is strong to *per se* proof that it is, at best, bad policy, or, at worst, racially invidious.

Race exceptionalism, conversely, refers to the tendency by some to minimize the relevance of race to an understanding of law. To the exceptionalist, the norm in law and legal discourse is colorblindness or race-neutrality. The racial implications of particular doctrines are viewed as exceptional, not representative of a law or doctrine's general character. Some exceptionalists take a stronger approach, avoiding race in legal discussions as if its inclusion were inappropriate, provocative, inflammatory or just bad form. For them, race, like sex, religion, and politics, is not only taboo in polite conversation, but in legal discourse as well.

Examples of race exceptionalism are less easily described than examples of race essentialism, because exceptionalism tends to be expressed through omission. The exceptionalists' view of race as generally irrelevant to understanding or evaluating law means they are unlikely to mention race in the course of legal discussion. Despite the subtlety of exceptionalism, professors who teach race and law, as well as interested students, have experienced legal discussions in which race, though obviously relevant, seems curiously omitted. Every year, for example, in my Race and Law seminar, I ask students why they are interested in the course. Inevitably several students explain that, in a number of prior courses, they have noticed racial issues lurking in the materials but the professor and other students seemed unaware or uninterested in them. Students have reported having sat through an entire semester of Property, Contracts, or Environmental Law without race ever having been a point of discussion. While these fields may not involve race as substantially as courses on civil rights or constitutional litigation, there are significant controversies involving race that an adequate introduction to these fields should address. If pressed, however, some teachers of those courses might explain that they have limited time, and though the racial implications of these subjects, if any, may be interesting, such implications ultimately lie at the periphery of the subjects. They might say, in short, "the syllabus is full."\footnote{Critique of the Internal Revenue Code, 1996 \textit{Wis. L. Rev.} 751, 797–798 (1996); Beverly Moran, \textit{Setting an Agenda for the Study of Tax and Black Culture}, 21 \textit{U. Ark. Little Rock L. Rev.} 779, 793 (1999); Linda Sugin, \textit{Tax Expenditure Analysis and Constitutional Decisions}, 50 \textit{Hastings L.J.} 407, 450 (1999).}

\footnote{Peggy McIntosh observes a similar resistance to incorporating women's issues into conventional university courses. \textit{See Peggy McIntosh, White Privilege and Male Privilege: A Personal}...
When racial issues do emerge explicitly in discussions of particular doctrines, exceptionalists tend to marginalize them as aberrations, and therefore not probative of the law’s general merits. Students have consistently complained to me that when a racial issue does crop up in various courses, the professor marginalized it, seeming to view it as irrelevant, an emotional side show in an otherwise rational discussion. Even when the relevance of race is taken seriously in evaluating legal doctrines, exceptionalists tend to cabin its relevance to historical contexts. In defending state and local control over education, for example, exceptionalists might argue that legislatures, particularly at the local level, should in general control education policy, the role of courts in the desegregation line of cases notwithstanding. The intrusion by federal courts into local school policy to remedy segregation represented a necessary evil of a by-gone era. States should also have autonomy over family matters, including who can marry whom, and what’s in the best interests of children. Federal court invalidation of antimiscegenation laws and discriminatory child placement policies were justified by historical circumstances that, thankfully, have no application today. Federalism, judicial review, and the state action doctrine, for many race exceptionalists, have been distorted in historical race cases, a return to their original scope is warranted in a post-segregation world. And in the criminal procedure realm, absent direct proof of racial discrimination by a few bad actors, police, prosecutors, and juries should be accorded the broad scope of discretion they have traditionally exercised. Regarding education practice, the legitimacy of race-neutral measures of merit, programs that group children by ability, and school choice plans, ought not be judged by reference to some past policies that may have been prompted by racial bigotry.

These approaches to race and law -- essentialism and exceptionalism -- represent more than simple errors of judgment in assessing the relevance of race to particular laws. In my observation, they are systematic tendencies driven by powerful emotional and political motives. While I am more confident that such biases are operative than I am of their underlying causes, I can offer some potential explanations. For race essentialists, their


motivations seem to include a deep sense of anguish and outrage at the racist laws and practices that pervaded so much of American life for most of our history. Any law or doctrine that facilitated such discrimination is associated with racial injustice. Any law or judicial decision that struck at the heart of white supremacy gains a presumption of legitimacy. With this perspective, essentialists tend to be on guard for any sign of racial infection in law in order to prevent its disease from spreading. For them, recognizing the racial implications of law is necessary to guard against repeating the racial injustice of our past.

Race exceptionalists also claim a strong aversion to historic racial injustice. For them, however, getting beyond race is best achieved by getting beyond it now, that is, by creating a colorblind society through living as such. Injecting race into discussions about contemporary laws seems anachronistic and, worse, threatens to retard progress by reinforcing racialized thinking. For the race exceptionalist, treating race as irrelevant to law helps to ensure that it is, or becomes, irrelevant. Colorblindness represents both an ideal and the means for achieving it.

What explains these different responses to past racial injustice? Part of the explanation is probably attributable to whether people identify with the victims or the perpetrators of past discrimination. Race essentialists are more likely to identify with the victim class of past discrimination, who are primarily blacks and other minorities, resulting in a sense of anger toward those responsible for state protection of racial injustice, elite white males and the laws they designed. Essentialists have developed a keen skepticism of law because of its historic centrality to racial oppression. Race essentialists are often, though not exclusively, people of color.

Race exceptionalists, in contrast, tend to identify more with the perpetrator class that controlled or influenced the laws that protected discrimination. Identifying with the perpetrator class does not mean agreeing with their discriminatory practices. Rather, exceptionalists identify with the perpetrator class as cultural or political forbearers. Indeed, they desire to distance themselves from the discriminatory conduct of their predecessors. To minimize guilt by association with past discrimination and the laws that safeguarded it, exceptionalists tend to emphasize personal responsibility; that they do not personally discriminate in their own lives; and that racially discriminatory laws have been buried with those people that did. Race exceptionalists are often, though not exclusively, white.
Another factor that tends to distinguish these groups is experience with racial identity. People of color, as a numerical minority and as a group whose members are likely to have experienced discrimination, are more likely to be aware of their race. White people, in contrast, are more likely to experience circumstances in which they are the dominant race, both in number and prestige, which is more likely to induce a degree of unawareness about race. The degree to which one is conscious of race will, in turn, affect how relevant one believes race is to understanding the world, which for law students and lawyers is the world of law. Although one's race does not necessarily determine whether one is a race exceptionalist or essentialist, the experience of racial identity tends to allocate whites and minorities into respective camps.

A final point that explains the different approaches is -- each other. That is, adherents to each approach are likely reinforced in their approach as a reaction to adherents of the opposite approach. Race essentialists will tend to emphasize race in response to the minimization of race they perceive in exceptionalists. They may perceive exceptionalist approaches as "sweeping race under the rug," denying the reality of and responsibility for racial discrimination and the way in which law has historically protected it. To the essentialist, exceptionalists wear color-blinders, an approach which is more than naïve: it is potentially dangerous to the extent it fails to understand and correct the harmful racial implications of law. In order to, in some sense, compensate for the minimizing approach to race of the exceptionalist, the essentialist may tend to emphasize the relevance of race beyond its actual import. Conversely, the exceptionalist may see the essentialist as "harping about race," seeing race everywhere, and taking a blaming or accusatory approach toward whites or to those who disagree with them. Exceptionalists believe essentialists stifle discussion about issues that touch on race by labeling skeptics as racist. In order to correct for the perceived exaggeration of race by essentialists, exceptionalists may tend to minimize the relevance of race below its actual import. Entrenching themselves into their ideological approaches, exceptionalists and essentialists each insist that legal issues have, respectively, nothing and everything to do with race.

Whatever underlies these two biases, race exceptionalism and race essentialism, they tend to distort a realistic appraisal of the merits of law. For race exceptionalism, the problem with this approach is that it fails to benefit from the understanding of law that can be gained through examining its relationship to race. Considering the value of judicial review would be impaired without appreciating its role in protecting and later
abolishing the legal subordination of black people. Discussions about federalism miss the elephant in the room if they do not take seriously its relationship to protecting discrimination and facilitating its overthrow. The question when private actors should be treated as government for constitutional purposes cannot be adequately grappled with unless we recognize, as race cases reveal, the ability of a majority collectively to coordinate private power to assume, in effect, the power of law. And assessment of property rights is ill-informed that lacks an understanding of their role in protecting slaveowners’ rights to control others’ lives on account of race, or segregationists to exclude blacks from places of public accommodation, schools, and neighborhoods. The problem with race exceptionalism is that, put simply, sometimes it really is about race.

Race essentialism also loses the benefits of studying law through race, by failing to appreciate the limits of race’s lessons. For example, uncritical acceptance of the Court’s judicial review in Brown may obscure the possibility that Brown may have excessively emboldened the Court’s willingness to invalidate politically legitimate laws. Affirmative action may be illustrative. For supporters of affirmative action, the Court’s invalidation of such policies under the Equal Protection Clause represents activist judicial review, an activism that may have been strengthened by the desegregation cases. Note especially the Court’s strict scrutiny of federal affirmative action, relying explicitly on the dubiously reasoned case of Bolling v. Sharpe, which invalidated segregation in the District of Columbia despite the inapplicability of the Equal Protection Clause to that jurisdiction. The lesson of Bolling may be: be careful what you ask for. And while we can only speculate whether the Court would have reached the same outcome in such controversial cases as Roe v. Wade or Bush v. Gore, it seems plausible that the Court’s determination to invalidate segregation may have contributed to the Court’s subsequent willingness to invalidate other laws without clear constitutional justification. The point is that a race essentialist’s evaluation of Brown based exclusively on the racial morality of its outcome may overlook the long-term implications of Brown for judicial review.

Across other doctrines as well, an emphasis on racial implications may eclipse a recognition of other important values. Regarding federalism, for example, despite its historic role in protecting discriminatory practices, a

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85 Id. at 201 (citing Bolling v. Sharpe, 347 U.S. 497 (1954)).
86 410 U.S. 113 (1973).
plenary, centralized federal government may be worse for the nation long term, including for racial minorities, than one of limited powers. And in the criminal procedure context, the benefits of according discretion to police, prosecutors, and juries, including for racial minorities, may outweigh the risk of discrimination inherent in such discretion. Similarly, in the education context, school choice plans and standardized testing may serve legitimate pedagogical benefits, including for minority schoolchildren, despite the racial origins of earlier policies or the disparate impact of some today. The illuminating light of race in the hands of a race essentialist may blind us to these other considerations. The problem with race essentialism is that, put simply, it is not always about race.

III. FOCUSING THE LENS THROUGH SUSTAINED STUDY

The study of race and law is thus beneficial to an evaluation of various laws, doctrines, and theories, but it is also fraught with risks stemming from the tendency of race to exaggerate or minimize its relevance in many people’s assessment. Because race is such a politically divisive and emotionally difficult topic, analysis often tends toward either of two poles: either people ignore race, or cannot see past race. Both responses are efforts to simplify what is, in fact, a complex reality, and in doing so fail to recognize the actual though limited relationship between race and law. In order to both gain the insights afforded by the study of race and law while avoiding the biases inherent therein, the student of law should engage in an inclusive, candid, and sustained examination of the role race plays with respect to the laws she studies.

By an inclusive study of race and law, I mean a committed willingness to invite a broad range of perspectives and experiences into the discussion, including from race exceptionalists or people reluctant to risk expressing politically incorrect views. Everyone has a racial identity, including those, often but not necessarily white, people who may not devote much or any attention to race. To identify oneself or others in non-racial terms is a legitimate perspective to understand and, indeed, represents a laudable aspiration for American life. Essentialists too, are so for a reason, and their experiences and aspirations ought not be dismissed. New insights are often reached by drawing on previously unexpressed experiences and perspectives. We cannot afford to leave anyone out of the discussion.

The second, related, condition is that the study of race and law, to be fruitful, must be candid. By candid, I mean with a committed willingness to take adverse views seriously and acknowledge legitimate points by
intellectual or political adversaries, even when those points cut against one's own position. It is not enough to include a cross section of perspectives if they are not listened to. All too often, discussions involving race tend to entrench positions against critical inquiry. Oral and written debates about race and law tend to represent alternating advocacy without a genuine effort on either side to listen and incorporate the others' points into a synthesis of new knowledge.

Finally, the process of studying race and law must be sustained. Questions about the relationship between race and law are often deeply complex, such that answers or solutions reached easily or quickly are likely to be ill-informed. The more inclusive, candid, and sustained the inquiry into the relationship between race and law, the more accurately the student of law can understand the merits of the laws with which he will need to work in the course of his career.

To the extent the foregoing is plausible, then law schools ought to incorporate race into law school courses to provide students the opportunity to learn the law through its historic and contemporary relationship to race. Incorporating race into the law school curriculum is not, however, easy or uncontroversial. Two obstacles facing the institutionalization of race in the curriculum are the norms at most law schools of academic freedom over course content and student choice over course selection. Academic freedom accords professors substantial discretion over the issues to cover within the courses they teach. Apart from courses where race is virtually unavoidable, many professors will continue to leave race out of their courses to the extent they perceive race as peripheral or too divisive. Unless law school deans or faculties are prepared to press for attention to race over individual professors' preferences, leaving race to the classroom may leave it absent from many.

Student choice over course selection refers to the norm that, after the first year of law school, students generally have broad discretion over which courses to take in their second two years of study. Such choice has not always been so broad. Law schools used to require more courses. The current breadth of student choice in selecting courses means that those who do not already value the study of race and law can simply select those professors and courses that do not address race. In theory, just as deans could pressure professors to include race in their courses, law schools could require students to take race-related courses. Some undergraduate programs, for example, require some sort of "diversity" course, defined

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broadly. One could, however, anticipate substantial resistance at many law schools by both faculty and students to mandating such a course.

To the extent these realities will leave racial gaps in the curriculum, centers or other structured programs can help to expose students to the racial implications of law. By organizing lectures, panels, workshops, and symposia, institutional programs to study race and law can provide opportunities for students, especially for those whose courses do not adequately address race. Such events may be especially beneficial to students who would be reluctant to take semester-long courses with a dominant focus on race, either because they do not perceive race as relevant to their career goals or because they are uncomfortable engaging such issues. The low risk and time expense of attending a lecture or panel may enable the reluctant student's curiosity to overcome his resistance. The Center at Virginia offers a two-week short course on race and law each year. Students reported learning a great deal from the short course on Critical Race Theory taught by Professor Dorothy Brown in the Spring of 2004. One benefit reported to me by students in the class was the active participation of a conservative student who, while endeavoring sincerely to understand the material, shared his skepticism about much of it. The students reported that everyone in the class engaged the material with greater depth because of the critical exchange. I do not know whether the conservative student would have taken a semester-long course on race and law (some conservative students certainly do), but making time for a one-credit, two-week course may induce some students to experiment who otherwise would not, to the benefit of all concerned. A reluctant student is even more likely to try a one or two hour talk some afternoon or during lunch. Such events can spark discussions among students and faculty alike that extend beyond the event itself, into the hallways, lounges, and eating halls.

A race and law program can also help, indirectly, to introduce race into the classroom. Faculty members who attend program-sponsored events can learn ways in which race ties into topics they teach that they may not have fully realized or appreciated before. Students as well can ask questions in class based on ideas gained from race and law presentations. Having public events in which noted scholars discuss race in the context of various doctrines also lends a degree of legitimacy and relevance to introducing points raised during events into class discussion.

The legitimization of race as relevant to law can also give a degree of safety to professors and students of color who may face dilemmas over discussing race. Minority professors, especially in their pre-tenure years,
are sometimes reluctant to introduce race into their courses even if they believe race is relevant. Students who doubt the relevance of race may assume the professor, because of his racial identity, is pushing a racial agenda at the expense of covering more legitimate legal topics.\textsuperscript{89} Similarly, minority law students may silence their own interest in discussing race for fear of alienating classmates. I have, moreover, been told by students that some minority students, especially black students, refrain from taking race-focused courses for fear that potential employers, reviewing their transcript, may make stereotypical assumptions about minority applicants concerned with racial issues. To the extent a race and law program can lend legitimacy to the study of race and law, professors and students of color alike can introduce or respond to discussions about race with less fear of resentment or marginalization.

Ultimately, the sustained study of race and law, in addition to revealing the nature of particular laws, reveals an important fact about the nature of law itself: Law as law is amoral. Law is power; the justness of the laws that govern a society depends on the moral character of the society that defines and controls their content and administration. A constitutional democracy such as ours still protected slavery and racial oppression for close to two centuries, the great majority of its existence. The same nation has now formally committed itself to racial equality and, spurred by this development, has extended equal rights to people identified by other traits. A survey of constitutional and other legal doctrines throughout our history tells both a story of societal injustice and oppression on the one hand, and of social movements for equality, fairness and justice on the other. An earlier draft of Professor Michael Klarman’s award-winning book on civil rights\textsuperscript{90} was styled, “Neither Hero Nor Villain.”\textsuperscript{91} He was referring to the

\textsuperscript{89} See Devon W. Carbado & Mitu Gulati, \textit{Working Identity}, 85 CORNELL L. REV. 1259, 1284 (2000) (discussing how minority professors may avoid the issue of race for fear that discussing it would result in negative evaluations); Richard Delgado, \textit{The Imperial Scholar: Reflections on a Review of Civil Rights Literature}, 132 U. PA. L. REV. 561, 561 (1984) (discussing common advice to minority professors to avoid issues related to race until they have secured tenure). \textit{See also} Jean Stefancic & Richard Delgado, \textit{ Outsider Scholars: The Early Stories}, 71 CHI.-KENT L. REV. 1001, 1006-07 (1996) (discussing how many minority and feminist professors are warned to write about mainstream topics and stating that students fear recommendations from a particular critical race scholar because it may lose them their job offers).


Supreme Court as an institution that necessarily reflects the cultural values of American society and cannot, therefore, be significantly blamed or praised for decisions that accord with those values, despite the popularity or infamy of such decisions in historical hindsight. The study of race and law reveals, similarly, that law in general is neither hero nor villain, but rather reflects the moral commitments of society. My point is not that law in particular form or content cannot be harmful or helpful. To the contrary, as the study of race and law dramatically reveals, law has great power to uplift or destroy human happiness. My point is to recognize that the source of law’s content, those who bear responsibility for it, are the law makers, understood broadly, and society that vests power in them. The study of race and American law, then, reveals the character of American society. By examining the ways in which law has both reinforced and undermined white supremacy, the study of race and law asks us who we are, as a legal culture, and as a nation.

Recognizing that whether law will advance good or ill depends on its architects has sobering implications for law students and lawyers, including practitioners, judges, and law professors. To be entrusted with the reins of law is a great responsibility. Lawyers have a responsibility to use law for the common good. Through the study of race and law, students and lawyers can better understand the law in order to more effectively design, reform, and implement it in the service of liberty, equality, justice, and human flourishing. The Center for the Study of Race and Law offers itself to the students of the University of Virginia in aid of their training for a life in the law.