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PREFACE: CRITICAL RACE THEORY AND SCHOLARLY ANALYSES OF RACE IN FRANCE

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This special issue of *La Revue des Droits de l'Homme*¹ represents an extremely important event in the development of scholarship race and the law in France, where there has been a tendency to avoid fulsome scholarly analyses of race. The articles in this issue engage with race as a historical and sociological phenomenon that exists in the social world, rather than as a discredited political category. These articles will also be an extremely important contribution to trans-national scholarly discussions of race and racism. Some of the essays in this collection are informed by a careful and scholarly reading of Critical Race Theory (CRT). Thus it is useful for readers of this collection to have an account of CRT and its scholarly genealogy. Of course, this genealogy is only partial, and comprehensive reviews of the scholarship are also available. (Bridges, 2018)

Scholarly interest in the concept of race, and in the legal and historical processes that create and sustain racial ideologies and racial inequality, has increased markedly in recent years. These lines of inquiry have spread across national borders. In the United States and Europe in particular there has been increased interest in explorations of the legacies of slavery and colonialism for present-day social inequality and national identity, with CRT being among the most influential of these bodies of scholarship.

At the same time, the political reaction to scholarship and teaching which explores race and the law, and CRT in particular, has been intense, and has also moved across national borders. In the United States, a Presidential Executive Order, now rescinded, prohibits the teaching of “divisive concepts” in government-sponsored training exercises, while American state legislatures have proposed and enacted bills to prohibit public schools from teaching: 1) that one race is inherently superior to another, 2) that an individual’s self-worth is determined by their race or sex, 3) that American

* Lawrence D. Biele Professor of Law and Affiliate Professor of History, Harvard University. Dernier ouvrage paru : *Representing the Race. The Creation of Civil Rights Lawyer*, Harvard, Harvard University Press, 2014. I would like to thank Duncan Kennedy for sharing his comments on a prior draft of this preface.

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political and societal institutions are inherently racist or sexist, or 4) that ideas of merit or hard work were deliberately created by one race to dominate another. Many of these bills also attempt to prohibit teachers from exploring certain aspects of important historical topics such as segregation and slavery. The proponents of these enactments have argued that they prohibit the teaching of ideas associated with Critical Race Theory (CRT), and American conservative media has given extensive coverage to these assertions. However, most of the prohibited teachings bear little resemblance to CRT scholarship, and the current wave of reaction seems to have been set in motion by a single political activist who selectively read a few texts and interpreted them in ways that are entirely at odds with what he claimed he had read. Executive Order 13950, 2020; Cinelas, 2021; Wallace-Wells, 2021)

That fact did not prevent the reaction from spreading to the United Kingdom, where the equalities minister condemned the ideas of “white privilege and inherited white guilt” which she associated with “critical race theory.” In France, government officials have attacked efforts by scholars or state actors study race, claiming that these are American imports that threaten French Republican traditions. The state president for instance, has criticized intellectuals for promoting “(...) la tradition anglo-saxonne qui n’est pas la nôtre,” [Anglo-Saxon traditions . . . which is not ours]² including “certaines théories en sciences sociales totalement importées des États-Unis d’Amérique” [certain social science theories entirely imported from the United States] of “séparatisme islamique”³ [Islamist separatism], while the education minister has blamed “ce communautarisme qui d’ailleurs nous vient d’ailleurs, qui souvent vient de modèles de société, qui n’est pas le nôtre” [ideas that often come from elsewhere, from a model of society that is not ours]⁴ for justifying and contributing to terrorism. (Trilling, 2020; La République en actes, 2020; Durand, 2020).

At this moment, it is quite important to distinguish the actual scholarship on race and the law which has provoked increased interest in recent years from invented caricatures of the scholarship, which politicians and activists

² Discours du Président de la République sur le thème de la lutte contre les séparatisme, du 2 octobre 2020 : <https://www.elysee.fr/front/pdf/elysee-module-16114-fr.pdf> (consulté le 13 juil. 2021). English quotation from official English translation, found here : <https://www.elysee.fr/en/emmanuel-macron/2020/10/02/fight-against-separatism-the-republic-in-action-speech-by-emmanuel-macron-president-of-the-republic-on-the-fight-against-separatism>

³ *Ibid.*

⁴ Interview de monsieur Jean-Michel Blanquer, ministre de l’éducation nationale et de la jeunesse à Europe 1 le 22 octobre 2020 sur l’attaque terroriste contre Samuel Paty, le terrorisme et le grenelle de l’éducation : <https://www.vie-publique.fr/discours/276970-jean-michel-blanquer-22102020-lattaque-terroriste-contre-samuel-paty> (consulté le 13 juil. 2021)

have mobilized to manage the fears and anxieties that have arisen because of demographic changes within various nations. Conservative politicians and activists have invented an entirely new construct which they call CRT and has nothing to do with the scholarship on the subject, and which has been selected solely for its political effect.

At the same time, it is impossible to entirely separate scholarship on race and the law from politics, because scholars of race and the law have viewed themselves as politically engaged, although they do deserve to have their scholarship accurately represented. Indeed, these scholars believed that it was their engagement with inequality in the social world that separated their scholarship from more conventional modes of writing. For them, it is impossible to write seriously about race from a purely positivist point of view. Their purpose was not merely to describe the racial world, but also to change it. (Crenshaw *et al.*, 1995)

From whence did the growing interest in race and the law arise? The first story that one can tell of these developments involves the contention, advanced by a number of scholars writing in the late 1980s and 1990s, that race, and its interaction with law, was a subject worthy of study. These scholars began by rejecting biological or natural ideas of race, which many of them called “essentialist.” In the parlance of the day, scholars began to examine race as a “social construction” – a product of social and historical processes. Thus the task of scholarship was to map, explore and explain these processes. (Guillaumin, 1995; Lopez, 1994; Omi and Winant, 1986). Scholars began to examine the role of law in creating, maintaining, and altering the ideologies, practices and perceptions that make up the concept that we call race. As one well-known account put it, “[h]uman fate still rides upon ancestry and appearance. The characteristics of our hair, complexion, and facial features still influence whether we are figuratively free or enslaved.” (Lopez, 1994).

Even though these scholars accepted the critique of race as an artificial, invented concept, they argued, based on their own experiences and social science investigation, that race as a useful category survives that critique and remains worthy of serious analysis. They pointed out that even in nations that imagined themselves to be colorblind, all one had to do was to take notice of who holds political, economic and social power to understand that race is present, even, and especially, in societies that pride themselves on its absence. One of the most pernicious effects of race as an ideology was to hide its very existence. Scholars set themselves to the task of explaining this absence. Moreover, scholars argued, the persistence of race was not the product of some other explanatory variable, such as class or nation. Race was

worthy of study on its own terms, and operated independently of other social forces.

Even earlier than this, beginning in the 1970s, scholars also began to re-examine the universalizing legal frameworks of nations whose legal regimes purported to guaranty equality without regard for race. In the United States in particular, scholars critiqued the equality guarantees of the Fourteenth Amendment of the United States Constitution – and the legal framework that liberal constitutional scholars had derived from the Amendment’s Equal Protection clause. Derrick Bell, for instance, retold the story of modern Equal Protection frameworks as one that could not be understood without considering race. He argued that Equal Protection triumphs such as the 1954 Brown v. Board of Education decision, which declared school segregation unconstitutional, could only be understood by considering how that decision served the interests of those Americans who regarded themselves as white. (Bell, 1980) Other scholars focused on the narrative structure of legal argument, arguing that only by paying attention to the subject position of the speakers or writers could one fully understand the stakes behind claims to law’s universality. Some of these scholars turned to storytelling and personal experience to communicate fully what could not be stated in conventional legal argument. (Williams, 1991; Bell, 1987; Delgado, 1989)

Other scholars focused on the American constitutional doctrine of “colorblindness,” which began to predominate in constitutional analyses during the 1980s. Colorblindness is the proposition that law and public policy should not recognize race at all, except as a narrow remedy available only for specific victims of discrimination and only when it can be shown that state actors themselves have acted because of racial prejudice. Indeed, some European nations, notably France, embrace a form of colorblindness in their own legal systems and public policies.

Scholars responded to this call for colorblindness and nonracial frameworks in at least two ways. The first was to identify and analyze existing racial inequality that persists, despite the insistence on nonracial policy. How could one explain differential access to jobs, housing and political power, the different law enforcement public policies applied to areas populated by black and white citizens, and the unwillingness white citizens to occupy the same schools and neighborhoods as blacks, without some recognition of the concept of race in public policy? (Massey and Denton, 1993). In more recent years, scholars have identified these types of differentials as “racial disparities.”

This line of scholarship has also critiqued facially neutral and non-racial

governmental policies as incorporating hidden racial assumptions. For example, a more recent line of scholarship has focused on the creation of the concept of “risk” as part of federal housing policy during the American New Deal. This scholarship demonstrates that the federal government defined risk on the basis of ideas of neighborhood stability, and that these ideas were defined, in part, based on race. Governmental housing supports were based on the notion that riskier neighborhoods were the ones that were integrated (or populated by blacks). The result was a massive redistribution of wealth (in the form of housing values and assets) based on race, and a hiding of this redistribution behind purportedly race-blind public policies such as the promotion of neighborhood stability. (Gordon, 2005; Rothstein, 2017). These public policies redistributed access to housing, education and other resources based on race while masking that process behind purportedly non-racial explanations. These policies are among the best-documented instances of what was coming to be called “structural racism” – which is the proposition that societal institutions can foster race-based advantage and disadvantage in ways that are not reducible to the prejudices of individuals.

A second way that scholars responded to the call for nonracial frameworks of analysis was to identify colorblindness itself – the insistence that public policy not recognize race – as an ideology. In doing so, scholars drew on insights from critical theory, and in particular Critical Legal Studies, which had called attention to the instability and malleability of the language of legal decisionmaking and to the structure of legal language. (Kennedy, 1997) Legal reasoning, in the CLS mode of analysis, often serves the purpose of legitimating existing legal and social institutions, and masking the availability of alternative institutional arrangements. (Crenshaw, 1988) In the American context, CLS was attacked in some quarters as importing French ideas of language and structure derived from thinkers such as Jacques Derrida, that were asserted to be antithetical to American pragmatic legal culture. Nonetheless, scholars of race found frameworks that focused on language and structure to be useful, although CRT scholars differentiated themselves from CLS by arguing, from the perspective of racial minorities, that universalizing discourses of rights retained some usefulness. (Crenshaw, 1988; Williams, 1991; Matsuda, 1987)

Scholars of race argued that the insistence on nonracial colorblindness in state policy was in fact an ideology that fostered, masked, and legitimated race-based advantage and disadvantage. The language of colorblindness in legal decisionmaking, it was argued, did not amount to a simple effort not to recognize race. Colorblindness, instead, helped mask the subtle racial imagery that courts deployed when they invoked the concept – imagery which identified specific races, marked one race as superior to another, and

advanced a particular racial vision of an ideal society. (Gotanda, 1991) Other scholars extended this line of argument, for instance, noting the tendency of law and public policy to advantage and disadvantage persons based on race, and to hide this process. This has led to a reification of the socially constructed idea of “whiteness,” and has caused law to extend its protection to whiteness as a form of property. (Harris, 1993) Some scholars began to denote the differential advantages that law creates for some over others as “white privilege.”

In addition, the current wave of interest in race and the law has been fostered by work that examines and critiques race-based and other forms of social identity. It should be noted at the outset that this work was preceded by interventions from scholars such as Paul Gilroy and Stuart Hall in Britain and Michel Foucault in France, whose work helped to destabilize familiar ideas of subjectivity and identity. (Hall 1997; Gilroy 1993; Foucault 1978) Scholarship influenced by Foucault stirred much controversy in the United States, and was criticized for importing French theories into American settings. Scholars of race and law pushed this process of destabilization in new directions, with the most prominent intervention coming under the label of “intersectionality.” At the outset, it is important to distinguish the scholarly development of intersectionality from the debate around the term in politics and on social media, which has rendered it nearly unintelligible. (Coaston, 2019)

In scholarship, intersectionality was originally propounded for the purpose of rejecting ideas concerning the naturalness of racial groups, and the naturalness of “women” as a unified group. Intersectionality incorporated critical theory in that it focused on the language of legal reasoning as an exercise of power. Initially the scholarship focused on the tendency of legal doctrine to reject claims that black women were discriminated against specifically as black women, rather than as blacks or women separately. Intersectional analyses claimed that state and private actors, in allocating resources, rendered certain parts of larger groups invisible. Law and public policy, for instance, were redistributing resources and power within groups by not recognizing that groups such as “blacks” or “women” were in fact coalitions in which different portions of the group – black men for instance, or white women — had differential access to power. (Crenshaw, 1989, 1991)

This analysis was easily extended to a host of other groups that were organized along the lines of religion, nationality, sexual orientation, gender, etc. and to destabilize group identity by recognizing that these groups were in fact coalitions of persons with differential access to power. Even groups that were not specifically thought to be disadvantaged, for instance, white

Americans, were supplied with an often unrecognized racial identity through the mechanisms of law and public policy. “Whiteness” emerged as a new site for scholarly investigation. Newer scholarship has furthered the critique of naturalized racial and other identities. What is often taken as fixed or natural identities, this scholarship argues, are often nothing more than performances, in which individuals act out roles against the backdrop of the presumed natural identity. Law and public policy, these scholars argue, are often an integral part of defining and redefining the accepted contours of these performances. (Carbado and Gulati, 2001, 2013)

Much of the above scholarship was produced by scholars located in the United States, although some of the theoretical insights that buttressed it were formulated by scholars located in Europe – a fact that has stirred some controversy in America. What accounts for the recent spread of interest in race and the law, and CRT in particular, across national borders? One might note, first, the recent increase in interest in the history and legacy slavery and colonialism in a number of nations. These particular pasts, and their legacies, have come to be seen as closely connected to present-day questions of disadvantage and national identity. In addition, migration to and within both Europe and the United States has made it impossible to ignore the question of whether and how national identities are inextricably bound up in race. Finally, it should be evident that scholarly ideas move across borders, as they always have, and are then adapted to the histories and social circumstances of particular societies. It is impossible to keep them out. This special issue is further evidence of that unavoidable conclusion.

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