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## Race Across the Curriculum: A Team-Taught Course on Law and Race in America

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EDWARD A. PURCELL, JR.

# Race Across the Curriculum: A Team-Taught Course on Law and Race in America

Introduction

66 N.Y.L. SCH. L. REV. 125 (2021–2022)

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## INTRODUCTION

### I. INTRODUCTION

Faculty members at New York Law School have long been moved by the continuing problems of race relations in America and by questions of how law and legal education might be able to contribute to their amelioration.<sup>1</sup> During the 2015–2016 academic year, a group of more than twenty members of the NYLS faculty began a cooperative project to develop a new kind of team-taught course that would allow us to join together in exploring those problems and attempting to answer those questions. After two years of discussions and preparations we were ready to begin offering a course entitled “Race, Bias, and Advocacy” (RBA) in the fall 2017 semester, and in the fall 2022 semester we will be presenting the course in its sixth iteration.

Our hope is that the course we developed will provide a step in enabling us and our students to engage more effectively with race-related problems and ultimately produce better informed teachers and more skilled practicing lawyers.<sup>2</sup> We designed the course both to encourage participating faculty members to deepen their own understanding of the role that race has played in the various legal fields in which they are specialists and to spark practical insights that would better prepare our students to deal with racial issues in the many different roles they might play in law, politics, and government. Drawing on the widest possible range of sources—not just cases and statutes but also memoirs, historical studies, social theories, empirical research, and the personal experiences of teachers and students—the course is also intended to encourage frank and vigorous discussion while at the same time ensuring a safe space for those who may feel for whatever reason uncomfortable or marginalized. Equally, the course is intended to give both students and teachers an opportunity to consider the most effective ways that law and lawyers might begin to address racial issues and help alleviate racial biases and inequalities in our society.

In addition, we also hope that the course may help lead American law schools to fill a gap that often exists in their curricula. Many or most schools offer courses on race that are defined relatively narrowly by doctrinal fields, historical periods, or jurisprudential theories. Rarely do such courses focus on the ways in which race is embedded in our daily lives, in law and the legal system, and in the everyday practice of law across the spectrum of professional work. Even more rarely do they try to address those critical legal and social realities by drawing on the collective knowledge and diverse experiences of faculty members who specialize in a wide range of legal fields.

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1. Ever since the murder of George Floyd in May 2020, there has been a resurgence of the Black Lives Matter (BLM) movement and a sharply increased interest in the impact of racism in America and its role in the law. Teachers and scholars at all levels of American education have responded with an explosion of ideas about how to study, teach, and deal with issues of race relations in the United States. We hope that this collection of essays, together with those many other contributions, can be a worthwhile supplement to this general effort.
  2. For introductory material on the subject of race in the law and law schools, see, for example, Erin C. Lain, *Racialized Interactions in the Law School Classroom: Pedagogical Approaches to Creating a Safe Learning Environment*, 67 J. LEGAL EDUC. 780 (2018); Jean Koh Peters & Susan Bryant, *Talking About Race*, in *TRANSFORMING THE EDUCATION OF LAWYERS* 375–410 (Susan Bryant et al. eds., 2014). For more general information on race in the United States, see AFR. AM. POL’Y F., <https://www.aapf.org/> (last visited Apr. 27, 2022).

This Issue is intended to accomplish two goals. The first is to describe what we consider an innovative intellectual and pedagogical project and to outline the nature of the specific course that the project generated. We hope that this might inspire colleagues at other schools to develop their own similar team-taught courses that address the complex problems of racial bias and inequality—or one or more of the many analogous problems that stem from other kinds of prejudice, inequality, and discrimination—that exist in contemporary America.<sup>3</sup>

The second goal is to describe the content and approach employed in some of the class sessions in the course and to suggest some potential starting points for planning similar courses. The essays within this Issue are meant to illustrate some of the subjects and approaches that might be adopted in such a course.<sup>4</sup> They are experimental models that represent our continuing efforts to break new ground in broadening and deepening the discussion of race and the law for teachers and students. Each of these contributions is designed to provoke further participatory explorations by asking probing questions and encouraging student and faculty exchanges on difficult subjects. We hope that each essay will increase awareness of the intertwined connections that exist between race and law and inspire creative thinking about possibilities for both social and legal change in the future.

This Introduction is intended to serve the first of these two goals and the individual essays that follow are intended to serve the second.

## II. THE NATURE OF THE RACE, BIAS, AND ADVOCACY PROJECT

The relationships that exist between “law” and “race” in America are complex and changing, and they vary on any number of levels. One of those levels involves the very meaning of the word race itself. Changing and varied concepts of race together with the increase of ethnic, religious, linguistic, and cultural diversity in the American population profoundly complicate the overall issue of race in America.<sup>5</sup>

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3. We are aware of two somewhat similar courses offered at other law schools. One, for example, is at the University of Denver Sturm College of Law, and addresses racial issues. See Alexi Nunn Freeman & Lindsey Webb, *Positive Disruption: Addressing Race in a Time of Social Change Through a Team-Taught, Reflection-Based, Outward-Looking Law School Seminar*, 21.2 U. PA. J.L. & SOC. CHANGE 121 (2018). The American Bar Association also in 2022 mandated curricula “on bias, cross-cultural competency, and racism.” REVISED STANDARDS FOR APPROVAL OF LAW SCHOOLS (SECTION OF LEGAL EDUC. & ADMISSION TO THE BAR, AM. BAR ASS’N 2022).
  4. Our course includes a number of additional topics, and countless other topics could be incorporated, some of which we hope to add to the course in the future. One such topic, for example, is intellectual property law where prior practices often exploited Black performers and where currently the concept of “race” itself is making a formal comeback as an explicit categorization in pharmaceutical patent applications. See Jonathan Kahn, *Revisiting Racial Patents in an Era of Precision Medicine*, 67 CASE W. RESV. L. REV. 1153 (2017); K.J. Greene, *Intellectual Property at the Intersection of Race and Gender: Lady Sings the Blues*, 16 AM. U. J. GENDER, SOC. POL’Y & L. 365 (2008).
  5. See, e.g., ARIELA J. GROSS, *WHAT BLOOD WON’T TELL* (2008); ROBERT S. CHANG, *DISORIENTED* (1999); IAN F. HANEY LÓPEZ, *RACISM ON TRIAL* (Harvard Univ. Press 2003); Elizabeth M. Iglesias, *Identity, Democracy, Communicative Power, Inter/National Labor Rights and the Evolution of LatCrit Theory and Community*, 53 U. MIAMI L. REV. 575 (1999). In 2014, the *Journal of Critical Mixed Race Studies* began publication, highlighting the expansion of scholarly inquiries into the nature, extent, and

## INTRODUCTION

Indeed, the growing recognition of the diversity that marks different ethnic and national origin groups that have commonly been lumped together as “Hispanic,” “Latinx,” or “persons of color” suggests another fascinating subject for detailed study. Thus, innumerable variations of a course on law and race are possible and desirable.<sup>6</sup> For relatively well-known historical reasons and the continuing press of present-day controversies, however, the idea of race in America often invokes images of a “Black/white” dichotomy, and the participants in the RBA project decided to focus for the most part on that more specific race-based issue.

Another of the different levels in the relationship between law and race involves the countless number of fields and sub-fields of law that exist and the multiplying range of specific and often highly technical legal areas that are marked by their own distinctive issues, doctrines, assumptions, and practices. The course at NYLS began with the basic idea that it would be particularly valuable to draw together a group of faculty members from such widely varied fields in a cooperative intellectual effort, each participant exploring in his or her respective field two common and complexly related issues: the impact of race on law and the impact of law on race. The idea was to encourage teachers to develop new and sharper insights into their own special fields and to share their findings—however compatible or conflicting they might prove to be—with one another and with their students.

The course that resulted seeks to explore three basic hypotheses as they apply in those many different legal fields. The first is that the “neutral” and “colorblind” nature of the formal law does not necessarily mean that the law is always and invariably neutral and colorblind in terms of its sources, content, applications, and consequences. There are many fields of law where race is never formally mentioned and is not recognized in the issues, concepts, principles, and doctrines that define each field’s content. Nonetheless in point of fact, race may be a relevant and perhaps even a highly significant factor in terms of the implicit assumptions, standard operations, and practical consequences of the law in those fields.

The second hypothesis is that whatever relationships exist between law and race in those many distinctive legal fields are likely to differ from one another in any number of ways. The relationships between law and race, in other words, are not only complex and changing but also likely varied by doctrinal fields and areas of practice. To fully understand the relationships between law and race, then, an examination of many different legal fields followed by thoughtful and informed cross-field comparisons seems essential.

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significance of multiracial “mixing” and providing a platform for further work in the area. *See, e.g.*, G. Reginald Daniel et al., *Emerging Paradigms in Critical Mixed Race Studies*, 1 J. CRITICAL MIXED RACE STUD. 1 (2014).

6. The law’s treatment of Native Americans and Mexican Americans, for example, presents a variety of such problems. *See, e.g.*, Carole Goldberg, *What’s Race Got to Do With It?: The Story of Morton v. Mancari*, in RACE LAW STORIES 237–72 (Rachel F. Moran & Devon W. Carbado eds., 2008); Ian F. Haney López & Michael A. Olivas, *Jim Crow, Mexican Americans, and the Anti-Subordination Constitution: The Story of Hernandez v. Texas*, in RACE LAW STORIES, *supra*, at 273–310.

The third hypothesis is that the complex problems of law and race in America exist in large part because of certain underlying structures, conditions, assumptions, and practices that are embedded in our society. Thus, a broad and inclusive approach that addresses all manners of social, psychological, political, and cultural factors is also necessary. The more we understand the relationships between law and its surrounding social context, the better able we will be to direct our efforts to mobilize the law and help bring about beneficent change.

Thus, we believe that this course promises a variety of advantages to law professors and students. It poses fascinating intellectual challenges, encourages new and illuminating scholarly research, promotes substantial and stimulating intra-faculty and faculty-student cooperation, and enables teachers to bring exciting new possibilities and practical insights to their students. It gives faculty members whose fields do not formally address racial issues the opportunity to explore their fields with fresh eyes, adding a potentially incisive new social focus to their thinking that may reveal ignored or wholly unrecognized connections between race and the law in their areas of expertise. This effort promises to increase the awareness of faculty and students about the facts of racial bias and their legal significance, even when those facts may be invisible to both casual observation and the formal law.

Further, by identifying the existence of racial bias and inequality in their varying forms and tracing their impact in many diverse fields, the course highlights the ways in which such biases and inequalities become mutually reinforcing and compound their deleterious consequences in daily life. Housing discrimination, for example, contributes to numerous other race-based disadvantages that affect other areas of life including schooling, employment opportunities, access to health care, availability of consumer facilities, and community relations with the police. All of those complex consequences and interrelationships suggest, in turn, the need for varying kinds of legal remedies in different legal fields and for broader remedies that would work across a wide range of fields.

### III. THE NATURE OF THE RACE, BIAS, AND ADVOCACY COURSE AT NYLS

The Race, Bias, and Advocacy course at NYLS examines whether and to what extent race and racial factors help shape the contours of the law and influence the operations of the American legal system. Although cases, statutes, treaties, and constitutional provisions are surely relevant, the course does not focus primarily on the formal rules of law as such but rather on the social sources, technical operations, and practical consequences of those rules. It seeks to examine whether and to what extent unacknowledged racial factors influence contemporary processes, doctrines, and results in a range of legal fields that, on their face, do not have explicit or apparent racial content or significance.

The course interrogates the relationships that exist between race and law not only where race is or may be an intentional source of unequal justice but also where unequal justice arises from inequalities whose ultimate sources lie outside the formal law—the implicit, structural, institutional, psychological, and cultural biases that are

## INTRODUCTION

embedded in American society and that help to shape understandings and interpretations of the formal law. Such biases are or may be found to operate in some part on any or all actors in the legal system like judges, jurors, lawyers, prosecutors, witnesses, or litigants.<sup>7</sup> Thus, the course explores both the social structures and conditions that underlie such biases and the formal legal doctrines and practices that reflect, instantiate, or give effect to those biases.

Consequently, the course does not focus on either the history of race relations in America or the substantive law that explicitly addresses race and racial issues. It is not designed to duplicate substantive courses that address such subjects as constitutional equal protection, anti-discrimination laws, or general legal history. Instead, its focus is on the formal law's sources, operations, and consequences—that is, on the way that the American legal system actually functions. This includes examining what lawyers can do in their everyday practice to recognize and deal effectively with continuing situations where racial bias of one kind or another is or may be influencing the legal system.

By exploring these issues, the course seeks to prepare students to deal more effectively with a variety of practical lawyering problems. These include the kinds of difficulties they will likely encounter in representing diverse clients in a variety of fields, as well as their professional and ethical obligations as lawyers working to improve the law and legal institutions whether they are acting as lawyers, legislators, judges, planners, government officials, social activists, or policymakers.

Much of the course explores the role of lawyers as advocates in all the varying roles they fill. Because lawyers must make choices in dealing with every problem they face, they must often deal in some ways, consciously or not, with racial issues, express or implicit. While individual classes in the course can naturally cover only limited aspects of their topics, they seek to address potential choices that lawyers face involving the practical operations of both our legal system and our society. That surrounding context shapes the work of lawyers and the options available to them, but it does not necessarily determine the nature of the choices they can make. Contexts also create alternatives, and the course is designed to help students learn about choosing among those possible alternatives, just as lawyers from the nation's beginning—with widely varying, practical goals—made their own choices, many of which they successfully embedded in the law and some of which remain with us today.

More particularly, then, the course raises and explores five critical questions:

1. Whether, how, and to what extent does race shape or influence the law and the legal system?
2. Whether, how, and to what extent does law shape or influence attitudes and assumptions about race?

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7. See, for example, Edward A. Purcell, Jr., *Exploring the Interpretation and Application of Procedural Rules: The Problem of Implicit and Institutional Racial Bias*, 169 U. PA. L. REV. 2583 (2021) and the sources cited therein.

3. Whether, how, and to what extent does the law in different substantive areas cause, encourage, or allow differential racial consequences?
4. Whether, how, and to what extent does the principle of “neutral” and “colorblind” law either prevent racial discrimination or help mask and facilitate it?
5. How, to what extent, and in what ways do lawyers confront racial issues in their practice, and how should they respond to the many race-related problems and challenges they are consequently likely to face?

#### IV. THE ORGANIZATION, STRUCTURE, AND CONTENT OF THE RACE, BIAS, AND ADVOCACY COURSE AT NYLS

The Race, Bias, and Advocacy course incorporates a meaningful role for as many faculty members as possible, and to date more than thirty of us have participated in one or more of its iterations. As currently structured, one faculty member serves as the course supervisor who is responsible for course administration, attending and moderating all class meetings, preparing and grading two midterm exams, and computing final grades. The other participating faculty members, sometimes singly and sometimes in pairs, prepare and lead at least one class session. Sometimes participants invite one or more outside guests with expertise in the subject under discussion to join their class session.

The demands of the course on students are quite heavy, and as a result in 2019 the Law School changed the credits given from two to three. In addition to relatively heavy reading requirements, students are assigned three separate and substantial writing assignments: two take-home exams and one extensive research paper. The two take-home exams (given in the sixth and thirteenth weeks and due in class the following week) require the students to write six-page essays responding to difficult, analytical questions based on the course readings and class discussions. The research paper requires students to select and work with one of the participating faculty members,<sup>8</sup> submit outlines and drafts as assigned by the advisors, and complete a minimum twenty-five-page research paper by the last day of the semester’s examination period.

Grading is determined as follows. The course supervisor grades the two take-home exams and gives credit for classroom contributions. The research paper is graded by the student’s faculty advisor and reviewed by a team of three other participating faculty members. The grade that the faculty advisor gives to the paper is presumptively the final grade on it, and the review team makes changes only to ensure basic uniformity in the grading standards for the class as a whole. In computing final grades the research paper counts for 50 percent, the take-home exams for 20 percent each, and class participation during the semester for 10 percent.

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8. No one faculty member may serve as advisor to more than two students.

## INTRODUCTION

The course itself is divided into two basic parts. The initial part of the course is designed to introduce students to some basic concepts and theories about race, bias, and the law, and the second is designed to explore the relationships between race and law in a variety of specific legal fields. All individual classes include appropriate supplementary reading assignments and other materials, and many use simulations and practical exercises of various kinds.

### *A. Part I: History, Theory, and Empirical Groundings*

The first part of the course is covered in three class sessions. The first examines various types of racial bias, their impact on law and legal practice, and potential solutions for resulting inequalities. Reading assignments deal particularly with the concept of implicit bias, and students are sometimes asked to complete a personal assessment for implicit racial bias prior to class and discuss those assessments during class.<sup>9</sup>

The second class focuses on some of the ways that race influences the law in practice while, at the same time, remaining for the most part “invisible” to the formal law. It shows how facially discriminatory racial concepts and rules have disappeared from American law but raises the question of whether, to what extent, and in what ways discriminatory attitudes, concepts, and values involving race continue to lurk within contemporary legal formalities and influence the shape of legal doctrines and the operations and results of legal processes.

The third class examines ideas that have been advanced to explain enduring racial inequalities. It considers the strengths and weaknesses of explanations suggested by contemporary empirical research and asks whether and how knowledge of these theorized mechanisms could be useful to lawyers committed to addressing racial inequality. In this third class, student teams also consider case studies of different situations that a civil rights/activist lawyer might encounter. The students then prepare to discuss the extent to which persistent racial inequality is or may be involved in each situation and how they might plan to remedy the results of that inequality.

### *B. Part II: Specific Fields of Law and Practice*

The second part of the course is devoted to exploring the relationship between race and law in specific legal areas or fields. The fourteen-week structure of the semester system should mean that the course can cover only eleven specific legal fields in each iteration, but so far in its first five years it has addressed in changing combinations a total of sixteen separate subjects.<sup>10</sup> In the individual classes, the specific topics covered and the specific teaching techniques employed have evolved over the years, but all have retained the course’s focus on the problems of race and law.

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9. PROJECT IMPLICIT, <https://implicit.harvard.edu/implicit/selectatest.html> (last visited Apr. 30, 2022) (review “Preliminary Information” before scrolling to bottom of page and clicking “I wish to proceed” and then choose “Race IAT”).

10. When participating faculty members retire or take leave, other faculty members, including newly appointed members, are invited to join the course and develop their own new classes.

1. *Housing*. The Housing class discusses the extent of overt racial discrimination that existed during the early decades of the twentieth century, traces the passage of civil rights legislation on housing, and considers the difficulties of challenging apparently neutral land-use regulations that both confirm and encourage the continuance of segregated housing patterns.
2. *The Internet and Big Data*. The Internet and Big Data class discusses the increasing number of “automated” decisions that affect daily life—credit scores, access to credit, behavioral ad-targeting, parole and sentencing determinations, allocation of police resources, and so forth. It considers the use of complex algorithms and large data sets on the Internet and examines the extent to which the data feeding these artificial intelligence tools often result in race- and gender-based discrimination.
3. *The Tax System*. The Tax System class considers the racial, economic, and gender identities of taxpayers and the biases that operate through tax benefits such as low capital gains tax rates, bonuses in the joint return for married taxpayers, the home mortgage interest deduction, and the gift tax exclusion. It considers the fact that taxpayers of color are substantially less likely to be able to use many tax benefits and it suggests that in the zero-sum world of tax burdens, people of color are, in turn, subsidizing the federal budget.
4. *Special Education*. The Special Education class reviews statistics showing that students of color are disproportionately represented in special education populations and asks whether, how, and to what extent racial bias played a role in those results. Students consider various hypothetical situations involving disproportional racial treatment from the perspective of advocates for both parents and school districts.
5. *Access to Justice*. The Access to Justice class examines racial exclusion, discrimination, implicit bias, and underrepresentation in limiting access to the justice system. It considers the role of such factors as the doctrine of standing, methods of jury selection and exclusion, rules and practices that restrict or deny access to counsel, disparate impositions of costs and fees, and the underrepresentation of minorities in the legal profession, bar associations, and judiciary.
6. *Criminal Law Enforcement*. The Criminal Law Enforcement class focuses on the Fourth Amendment and the law and practical real-world consequences of stop and frisk policies, giving particular attention to New York City’s stop and frisk policy carried out by the city’s police department as its agent and held unconstitutional by a

## INTRODUCTION

federal judge in 2013.<sup>11</sup> It also explores the impact of stop and frisk on both individuals and communities, the extent to which the practice is used disproportionately against Blacks and Latinos, the law that governs the police power to restrain people's liberty (by stopping them) and invade their privacy (by frisking them), and what lawyers and other advocates can do to effect meaningful change.

7. *Criminal Prosecution*. The Criminal Prosecution class considers how the race of a victim and the accused may affect the outcome of a criminal case. It focuses on the prosecutor's role in promoting racial justice in the community and on measures available to combat implicit bias. In particular, it examines the role of prosecutorial discretion, the potential for implicit bias at various stages of a proceeding, problems of eyewitness misidentification with an emphasis on cross-racial misidentifications, racial bias in jury selection, and the impact of race in formulating trial strategies.
8. *Corporate Law*. The Corporate Law class surveys four areas of controversy in corporate law related to race, democracy, and diversity. The first area examined involves the way that the corporate form has historically been instrumental in transferring land and wealth to elite white investors; the second area covers recent legal initiatives mandating greater diversity on corporate boards of directors; the third area discusses efforts to achieve greater corporate workplace diversity and inclusion, especially through shareholder movements; and the fourth area concerns the issue of corporate political speech in response to the spread of voter suppression laws.
9. *Immigration Law*. The Immigration Law class addresses race and other social factors affecting immigration law and the ways in which the government relies on "suspect classifications," supposedly designed to protect racial and ethnic minorities, to actually reject discrimination claims of certain immigrant groups. The class focuses on the law which has a disparate impact on communities of color and Muslims and the way it affects lawful immigrants, temporary visa holders, and even citizens.
10. *Family Law*. The Family Law class examines child welfare systems intended to help children who have experienced abuse or neglect. It examines the significant racial and socioeconomic disparities in these systems throughout the country, including reports of abuse and neglect of children placed in foster care. It provides an introduction to child welfare law, proposals for addressing explicit and implicit bias, and the various roles attorneys play in related proceedings.

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11. See *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013).

11. *Processes of Negotiation and Settlement.* The Processes of Negotiation and Settlement class discusses the effects that race has on settlement offers and ultimately on the kinds of deals that are made in negotiation or that follow from failures in negotiation. After reviewing the findings of research about the role of bias in negotiating, the class engages in an in-class negotiation exercise.
12. *The Legal Profession.* The Legal Profession class considers the history and impact of racism in the legal profession. It focuses on how difficult it has been for certain groups to enter the profession and the barriers, both explicit and race-neutral, that exist. It considers how those barriers have prevented Black Americans (and other groups) from entering the profession, and how various barriers have prevented them from obtaining influential and leadership positions.
13. *Cross-Cultural Lawyering.* The Cross-Cultural Lawyering class discusses problems created by the fact that lawyering is commonly cross-cultural in the sense that no two people share the exact same set of experiences and cultural assumptions. Students are asked to identify the various cultures and cultural assumptions that influence them, and the class seeks to identify and develop practical techniques and habits to use as lawyers in their everyday interactions with clients.
14. *Legal Education.* The Legal Education class focuses on how race, implicit bias, and power dynamics affect legal education and the learning that takes place in the law school classroom. It addresses the ways in which law schools inculcate in students the language of law and power as well as the often unconscious racial and gender assumptions that lie behind much law school pedagogy.
15. *Judicial Decision-Making.* The Judicial Decision-Making class considers the likelihood that judges, like other human beings, may harbor racial biases. These biases can cause judges to treat non-white criminal defendants and others different than white defendants and to resolve legal disputes in a discriminatory fashion.
16. *Anti-Racist Tools for Criminal Defense Advocacy.* The Anti-Racist Tools for Criminal Defense Advocacy class considers methods of disrupting the ideologies and routinized processes that generate systematically-biased criminal justice outcomes. It explores a number of tools and concepts that defense lawyers can use to counteract implicit biases—beginning with their own biases—at various stages of the criminal process while also identifying strategies for attacking structural racism through both individual representation and impact litigation.

## INTRODUCTION

### V. THE OPPORTUNITY FOR SIMILAR COURSES

The basic idea behind the Race, Bias, and Advocacy project could inspire any number of widely varied courses, and any school could pursue one or more similar projects adapted to its own particular resources and the interests of its faculty and students. The idea could readily be applied, for example, to courses focusing on other minority groups or on such social factors as class, gender, and sexual orientation. Indeed, the course could focus on issues involving the interconnectedness of some or all of those factors.<sup>12</sup> Similarly, the idea could be applied to any set of legal subjects and fields. The NYLS version obviously touches on many but does not exhaust the topics and approaches that are possible and promising. The fundamental point is that such focused faculty projects and team-taught courses create intellectual excitement, serve profoundly important social goals, and stimulate innovative thinking, teaching, and scholarship.

All that is required to begin such a project is an interested group of faculty members willing to join in such a cooperative, intellectual project. As few as five or six participants could work well. It is likely, moreover, that the development of a successful course would encourage others to join the course in subsequent years. At NYLS, the first iteration of the course drew in four additional faculty members; the second another two; the third and fourth one more each; and the fifth three more. Thus, by the time of its most recent iteration, well over thirty faculty members have participated in the course at one or more of its offerings.

Similarly, the structure of such courses could take any number of forms, and the content could vary widely. There exists a virtually unlimited number of specific legal topics and areas to explore, and a vast range of readings and studies available to provide initial source materials for most of them. Such courses also offer exciting opportunities for incorporating experiential learning techniques into the classroom by the creative development of simulations, practical exercises, and any number of possible cooperative student projects.

At NYLS the course has been a great success on many levels, and we hope to expand and improve it in future years. We believe that it will continue to provide an exciting source of intellectual stimulation, classroom innovation, more sophisticated lawyering, and eventually beneficent social and legal change.

### VI. THE ESSAYS IN THIS ISSUE

The nine essays collected here are designed to explain and develop some of the themes that the Race, Bias, and Advocacy course seeks to explore. They are divided into four Parts.

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12. E.g., Catherine Powell & Camille Gear-Rich, *The "Welfare Queen" Goes to the Polls: Race-Based Fractures in Gender Politics and Opportunities for Intersectional Coalitions*, 108 GEO. L.J. 105, FORDHAM L. LEGAL STUD. RSCH. PAPER No. 3605810 (2020); Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (1989); Kathy Davis, *Intersectionality as Buzzword: A Sociology of Science Perspective on What Makes a Feminist Theory Successful*, 9 FEMINIST THEORY 67 (2008).

Part I contains two essays that explore the basic problem the course addresses: the ways in which race has remained a powerful and discriminatory factor in American law despite becoming formally invisible to it.

In my essay I trace the evolution of the legal visibility of race from the seventeenth to the twenty-first centuries and suggest some of the ways that the contemporary idea that the law is and should be “colorblind” serves to both underwrite and mask continuing racial discrimination and inequalities in the American legal system.<sup>13</sup> Frank Munger and Carroll Seron’s essay examines the invisible role race plays in continuing to shape the underlying political and social forces that have constructed a legal framework that sustains racial inequality.<sup>14</sup> It argues that these ongoing institutional structures and patterns not only have roots in the past but also create new mechanisms that continue to foster racial bias and white dominance in the law today.

Part II contains three essays that explore the significance of race in specific legal areas. Richard Marsico’s essay examines the legislative history of the Individuals with Disabilities Education Act (IDEA) and shows that Congress was well aware of racial discrimination in special education when it passed the IDEA in 1975 and later twice amended the law, but that it also made only limited efforts to address the racial problem.<sup>15</sup> The essay then identifies critical racial inflection points where the discretion that local educators exercise over decisions regarding special education and the economic resources that parents need to ensure appropriate educational treatment for their children combine to produce differential racialized outcomes. It concludes by suggesting a number of changes that Congress, school districts, and state and local governments—singly or in combination—could make to reduce the discriminatory impact of race in the operation of special education programs.

Ann Thomas’ essay examines the substantial and long-term racial wealth gap that exists in the United States and traces that gap in significant part to the federal tax system.<sup>16</sup> The essay explains why and how the federal tax code is colorblind on its face but not in its racial impact. Focusing on racial disparities in homeownership and the benefits that the tax system confers on homeowners, it identifies eight separate tax benefits that have predominantly benefitted whites and shows how those benefits have fostered and entrenched a substantial intergenerational wealth advantage of whites over Blacks. Looking to the tax expenditure budget, it finds that trillions of dollars have been invested in homeownership through this system to the detriment of residential tenants. Further, the essay notes how a variety of other social and institutional factors have long discouraged or prevented Blacks from becoming homeowners and thus being able to take advantage of the benefits the tax system

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13. Edward A. Purcell, Jr., *Race and the Law: The Visible and the Invisible*, 66 N.Y.L. SCH. L. REV. 141 (2021–2022).

14. Frank W. Munger & Carroll Seron, *Law and the Persistence of Racial Inequality in America*, 66 N.Y.L. SCH. L. REV. 175 (2021–2022).

15. Richard D. Marsico, *The Intersection of Race, Wealth, and Special Education: The Role of Structural Inequities in the IDEA*, 66 N.Y.L. SCH. L. REV. 207 (2021–2022).

16. Ann F. Thomas, *The Racial Wealth Gap and the Tax Benefits of Homeownership*, 66 N.Y.L. SCH. L. REV. 247 (2021–2022).

## INTRODUCTION

offers. The essay concludes with several proposals for reform that would help bring greater racial equality to the tax code.

Lenni Benson's essay explores the role of race and color in American immigration law and history.<sup>17</sup> It contrasts the way that law and popular attitudes welcomed immigrants regarded as "white" while harshly restricting those regarded as "non-white." The essay traces changes in the formal law from 1790 when Congress limited citizenship to "white" people through the overtly racist restrictions that marked immigration law well into the twentieth century. Then, noting how the formal law abandoned explicitly racial restrictions and became "colorblind" in the second half of the twentieth century, it explains how new legal, conceptual, and administrative techniques developed and allowed government officials to continue to restrict immigrants from disfavored countries whose populations are predominantly dark-skinned. It concludes by warning of the dangers that racially discriminatory exclusionary laws and practices—especially recent mass governmental deportation campaigns—pose for all Americans.

Part III contains two essays that focus more particularly on how two professors deal with racial issues in their individual class sessions. Richard Chused's essay describes his class on land-use planning with a particular focus on zoning laws and regulations.<sup>18</sup> It demonstrates how an ostensibly neutral regulatory system operates in ways that hide the nation's racist history while continuing to bring racially discriminatory results. The class explores the racial origins of zoning, how those origins became embedded in zoning practices that created segregated housing patterns, and contemporary efforts to develop possible antidotes. Students learn how the continuation of segregated housing patterns today find their roots in a century-old zoning practice involving the combination of government sponsored redlining, the racial biases and economic interests of the white real estate industry, and the proliferation of institutionally sponsored racial covenants that matured and ripened into a system that efficiently sustained segregated housing patterns.

Lynn Su's essay outlines a class exercise that she uses involving a hypothetical robbery of a victim who is a white woman and an accused perpetrator who is a Black male.<sup>19</sup> It highlights a common inflection point in many criminal cases—the validity of eyewitness testimony in cross-racial identifications. The exercise is designed to awaken students to one of the specific ways that race plays a critical, if often overlooked, role in the criminal justice system and to encourage them to develop a habit of critical thinking about the impact of race and bias in legal practice.

Part IV concludes with two essays of a more general nature. Penelope Andrews' essay argues that the United States should establish a Commission on Recognition

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17. Lenni B. Benson, *Seeing Immigration and Structural Racism: It's Where You Put Your Eyes*, 66 N.Y.L. SCH. L. REV. 277 (2021–2022).

18. Richard Chused, *Strategic Thinking About Racism in American Zoning*, 66 N.Y.L. SCH. L. REV. 307 (2021–2022).

19. Lynn Su, *Unpacking the Teaching Potential of a Hypothetical Criminal Case Involving a Cross-Racial Eyewitness Identification*, 66 N.Y.L. SCH. L. REV. 339 (2021–2022).

and Reconstruction similar to South Africa's Truth and Reconciliation Commission.<sup>20</sup> It argues that such a commission could serve three goals: enabling the United States to officially recognize the harms racism has caused, exploring concrete policies to ameliorate and end the nation's social and racial inequalities, and working toward a societal consensus about the nature of the just and equitable society that Americans have long strived for.

Finally, Kris Franklin's essay returns to the basic theme explored in the first two essays, the "seen" and the "unseen" in American law.<sup>21</sup> It urges us to teach our students to look not just for what is immediately visible in any situation but also for what may be present though unspoken and unseen. The essay argues that, to accomplish this, we should seek to uncover and highlight the contextual factors that have infused the premise of white supremacy into our law and that continue to keep many of its deleterious consequences unseen and unremedied. The essay encourages us to bring that knowledge to our students, enrich their understanding of what law actually does and does not do, and discuss how they can use their own knowledge—and imaginations—to envision what is not yet present in law.

## VII. CONCLUSION

We hope that our experience with this NYLS faculty project may prove helpful to other teachers in both colleges and law schools across the country. Our further hope is that it suggests a promising way for faculty members to cooperate in generating exciting new team-taught courses that can address the complex and challenging relationships that exist between law and race in a wide variety of areas and, most broadly, between law and the whole of the society that surrounds and shapes it.

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20. Penelope Andrews, *A Commission on Recognition and Reconstruction for the United States: Illusory or Inspirational?*, 66 N.Y.L. SCH. L. REV. 359 (2021–2022).

21. Kris Franklin, *Meditations on Teaching What Isn't: Theorizing the Invisible in Law and Law School*, 66 N.Y.L. SCH. L. REV. 387 (2021–2022).