Seattle Journal for Social Justice

Volume 8
Issue 1 *Fall/Winter 2009*

Article 9

November 2009

The Exclusion of Race from Mandated Continuing Legal Education Requirements: A Critical Race Theory Analysis

Lorenzo Bowman

Tonette Rocco

Elizabeth Peterson

The Exclusion of Race from Mandated Continuing Legal Education Requirements: A Critical Race Theory Analysis

Lorenzo Bowman, Tonette Rocco, & Elizabeth Peterson[1]

Forty states mandate continuing legal education (CLE) for practicing lawyers in their jurisdictions.[2] Lawyers who fail to meet the mandated CLE requirements of their jurisdictions are often subject to suspension and, ultimately, disbarment. Given the penalty for noncompliance, almost all practicing lawyers in these jurisdictions take CLE requirements seriously. The complex nature of our society dictates that professionals continue to learn in order to remain abreast of the ever-changing knowledge in their field of expertise. Professionals make up more than 25 percent of the U.S. workforce and are the primary decision makers for the major institutions and establishments of American society.[3] The special recognition given to professionals is a result of the leadership derived from their technical knowledge and skills. Because the public relies on professionals for crucial services, lawyers as professionals have a significant amount of control over our society.

As this paper will illustrate, a great amount of racial disparity exists in how the law treats individuals. CLE has great potential to educate legal practitioners of this disparity and the wide array of ways it is manifested in their profession. However, among the forty states mandating CLE, only five require coursework addressing bias and discrimination in the profession.[4] Even then, these five states define "bias" in a way that consistently fails to adequately address racial bias. Using Critical Race Theory (CRT) as an analytical lens to critique CLE offerings, we suggest that the failure to realize the aforementioned potential is due to an overall tacit acceptance of

racism in the criminal justice system, as well as an interest convergence within state bar associations to maintain the status quo.

First, this article will outline the racial disparities existing in the legal profession and the criminal justice system. Next, it will present an overview of CRT and its principles before outlining the five sets of state CLE requirements regarding bias and discrimination. This is followed by a CRT critique of the CLE offerings. We conclude with suggestions for improving CLE offerings on bias. These suggestions are (1) a needs assessment for each state bar and a corresponding survey of the perceptions of race within its legal community, (2) the requirement of racial bias as a separate topic of CLE, (3) the development of programs to address a bar's specific issues concerning race, and (4) some measurement of success to gauge a program's effectiveness.

I. RACIAL DISPARITIES IN THE LAW

The significance of legal services in the American economy is evident by its continuing growth, especially when compared to the continuing decline of the manufacturing sector. At the end of 2005, the U.S. auto and auto parts manufacturing industry employed about 1.1 million workers and constituted 0.8 percent of our national gross domestic product (GDP).[5] By contrast, the legal services sector employed nearly the same number of people, but contributed to 1.5 percent of the GDP.[6] Thus, while the manufacturing sector and the legal services sector employed roughly the same number of people, the legal services sector contributed nearly twice the value to the U.S. economic output.[7]

In part, this increase in legal services has been fueled by the astronomical increase in the number of criminal defendants. This growth has been due to "get tough" political policies, such as the "war on drugs" or the "three strikes" laws that many states have adopted. In 1979, drug offenders were 6.4 percent of the state prison population; in 2004, they were 20 percent.[8] In federal prisons, drug offenders went from 25 percent of all federal inmates

in 1980 to 47.6 percent of all federal inmates in 2006.[9] It is interesting to note that most drug arrests are for using and not dealing, and although African Americans account for only 15 to 20 percent of the nation's drug users, African Americans account for half to two-thirds of those arrested for drug offenses in most urban areas.[10] Thus, African Americans are being targeted as the culprits of the drug problem in America, while those who deal drugs—the true culprits—are escaping prosecution. The racial demographic breakdown of this increasing prison population is similarly alarming: an estimated 40 percent of state jail inmates are Black, 19 percent are Hispanic, 1 percent are Native American, 1 percent are Asian, and 3 percent are of more than one race/ethnicity.[11] This means that 74 percent are of all state jail inmates in 2006 were People of Color, although they make up approximately 32 percent of the U.S. population.[12] Nationwide, an estimated 16.6 percent of all Black males were imprisoned in 2001 along with 7.7 percent of all Hispanic males, compared with only 2.6 percent for White males.[13] Thus, this increase in the need for legal services is fueled in part by the growth of a criminal justice system that apparently engages People of Color at a disproportionately higher rate. Some may think this is due to higher criminal activity among People of Color, others may consider that People of Color are more likely to be racially profiled and stopped for a minor offense or for no offense simply because dark skin or an exotic look makes them appear suspicious.

While a variety of sources confirm the racial injustices and disproportions occurring in the criminal justice system, state bar associations have yet to respond with remedial or educational steps. At least twenty-two state task forces have found bias in the legal profession and the criminal justice system to such a significant degree as to constitute a serious problem.[14] This reality serves to undermine public belief and confidence in a fair judicial system. Nevertheless, given the relative inaction by state bar associations, it appears as if state bars—along with most people—do not consider the injustices and racial disproportions now occurring in the

criminal justice systems to be problematic. Most people rationalize that those who are arrested and prosecuted deserve it—they are criminals who deserve their fate and race has little (if anything) to do with it. As such, from the perspective of CLE program providers, there is no problematic racial bias issue to address through CLE. Consider the following statistics, which undeniably speak to the connection between race and the legal system:

- Half of all prisoners in the U.S. (49.4 percent in 1996) are African American, despite the fact that African Americans represent only 12 percent of the U.S. population.[15]
- Two-thirds of all youths confined in local detention and state correctional systems are of color even though they account for only one-third of the U.S. adolescent population. Between 1983 and 1997, the number of youths in detention, regardless of race, doubled.[16]
- The incarceration rate for African American men is seven times the rate for White men.[17] According to the U.S. Bureau of Justice, in 2006 there were 3,042 Black male prisoners per 100,000 Black males in the U.S., compared to 1,261 Hispanic male prisoners per 100,000 Hispanic males and 487 White male prisoners per 100,000 White males.[18]
- About 40 percent of the people currently on death row and 53 percent of all the people executed since 1930 are African American.[19] However, there is not a significant difference between races when it comes to crimes that are eligible for the death penalty, according to data from the U.S. Department of Justice.[20]
- African American and Hispanic offenders receive harsher treatment than White offenders at every step of the justice system, from initial detention to bail to sentencing.[21]

- Judges in many jurisdictions impose harsher sentences on racial minorities who murder or rape Whites and more lenient sentences on racial minorities who victimize members of their own racial or ethnic group. While White women are the least likely to be victims of crimes,[22] minority perpetrators of crimes against them receive harsher sentences.

Yet, even in the face of such statistics, most state bar associations do not address racial bias in their CLE. CLE should help to ensure quality of life for consumers of legal services. However, despite the listed statistics and the findings of the various task forces, only five of the forty states mandating CLE require coursework addressing bias and discrimination in the profession.[23]

II. CRITICAL RACE THEORY

The next objective of this paper is to critique the CLE offerings on bias using Critical Race Theory (CRT) as an analytical lens in an effort to reveal possible reasons for the limited offerings on bias and discrimination in the legal profession. The questions that guide this critique are

1. Why has the legal profession in most states chosen to exclude bias and discrimination from its mandated CLE offerings?
2. In spite of statistics, which indicate that race is a significant issue in the legal system, why is race not addressed? and
3. How are race, discrimination, and bias addressed when these topics are included in CLE offerings?

We will first present an overview of CRT and then detail the various CLE requirements that do address race, discrimination, and bias.

An analysis of the processes that replicate injustice and racism forms the basis of CRT.[24] For instance, one of the key themes of CRT is that racism is ordinary and pervasive.[25] The ordinariness of racism means that all those who hold power or privilege are racists and do not acknowledge their views or actions as racist; rather, they see their views as normal, typical, and part

of the status quo. [26] Race is the center of the analysis and it is used to critique educational activities for covert and overt racist policies and practices.[27] The status quo is further reinforced by the interest convergence of White elites (materially, through manipulation of the labor pool) and working-class Whites (psychically, by giving them a reason to feel superior to People of Color) who work together by subtle (even subconscious) consensus to maintain the status quo.[28] Therefore, large segments of society have little to no incentive to eradicate racism. Richard Delgado and Jean Stefancic, two of the chief voices in CRT, argue that most populist movements aimed at eliminating racism have failed for this reason.[29] Interest convergence, as explained by critical race theorists, maintains that Whites are only willing to change the power differential when there is a clear, self-serving benefit. The power held by the White elite results from their control of material resources, political office, and capital. Although the working class people do not share these resources, they derive psychic benefits from the existence of a subordinate racial group.

The social construction of "race and races [which] are products of social thought and relations . . . [and not] biological or genetic reality"[30] sustains a system of differential racialization. Most scientists and scholars agree that the modern day notion of race has no scientific basis. Granted, people with common genealogical origins have certain traits in common, such as skin color, hair texture and color, and even a biological propensity for certain diseases and illnesses; however, such similarities account for only a small portion of the total genetic makeup. There is more genetic variation within races than between them.[31] This fact alone defeats any argument in favor of racial scientific classification. However, people take their learned racial categories seriously, despite the fact that the U.S. Census Bureau has changed its racial categories regularly. Those in charge of creating racial classifications have varied from three to thirty-six different races.[32] For instance, in 1870, the Bureau listed five races (White, colored/Black, colored/mulatto, Chinese, and Indian); in 1950, it switched to three (White,

Black, and other), and then back to five in the 1990s (White, Black, Asian, Hispanic, and Indian).[33] Besides these procedural inconsistencies, these classifications are also practically inconsistent. White and Black are "colors"; Asian represents a large and diverse continent; Hispanic represents people of many colors and appearances who are lumped together for speaking Spanish; and use of the word "Indian" represents a historical mistake. As an example of the effect of this racialization and its inconsistencies, while African Americans are overrepresented in the penal system, Spanish-speaking people are also increasing in numbers. However, this categorization has nothing to do with a genetic conception of race, but instead represents the demonization of a group of people according to changing social constructions.

In order to adequately address the inherent nature of racism in our culture, CRT demands an approach to social change that is fundamentally different from the status quo of liberalism. CRT scholars harshly critique liberalism, arguing that liberalism focuses on deliberate, incremental change in the legal system and society while circumstances demand radical, systemic change. Most CRT scholars agree that liberalism serves to sidestep authentic efforts to eradicate racism. Liberal agendas, such as equal opportunity, colorblindness, and the role model argument for affirmative action, have all failed in their attempt to remedy racism and discrimination.[34] This is because racism is not an accidental occurrence or a simple matter of ignorance that can be remedied with education, exposure, or laws designed to eliminate its continued existence. Indeed, the U.S. Supreme Court has shattered any hope that the liberal agenda can be effective in its goal. In *Adarand Constructors, Inc. v. Pena* (1995) and *City of Richmond v. Croson* (1989), the Supreme Court struck down affirmative action programs or set aside such programs as unconstitutional.[35] While affirmative action as a concept survived one challenge in the University of Michigan's Law School case (2003), it has been so narrowly tailored as to render it without much current significance.[36] In the wake of these

decisions, most CRT scholars agree that liberal ideology and its focus on colorblindness will not have much impact on racism.[37]

III. CLE AND BIAS AWARENESS

While the ABA's Task Force on the Model Definition of the Practice of Law[38] has drafted a model definition which includes minimum qualifications for competence, accountability, and access to justice, the task force recommended that these factors be balanced to determine who should be able to provide services and under what circumstances, leaving each state to develop its own definition. The standards for ethics and professionalism do not include rules on discrimination or bias when dealing with clients. Perhaps as a result, only five of the forty states that mandate CLE coursework include the elimination of bias as part of their ethics and professionalism requirements. These states are California, Minnesota, Oregon, Washington, and West Virginia.[39] Furthermore, the task force encouraged each state to weigh the factors provided in the report in a manner best suited to resolving the harm/benefit equation for its citizens. Unsurprisingly then, each state differs somewhat in its requirements for anti-bias training.

California requires twenty-five hours of CLE every three years, including at least four hours in legal ethics, one hour in substance abuse prevention/detection and treatment, and one hour related to the elimination of bias in the legal profession.[40] All active members of the State Bar of California must comply with these requirements.[41] The one hour anti-bias requirement must relate to the elimination of bias in the legal profession based on (but not limited to): sex, color, race, religion, ancestry, national origin, blindness or other physical disability, age, and sexual orientation.[42] In this manner, California so broadly defines "anti-bias" that it is more likely that the selected CLE experience will not address racial bias. Nevertheless, this California CLE requirement was challenged in *Greenberg v. State Bar of California* (2000) on first amendment grounds.[43]

The court ruled that the requirements did not violate a lawyer's first amendment rights in that state because lawyers were merely "passively exposed to these subjects, without being compelled to manifest any agreement or allegiance to their goals or other political agendas."[44]

Minnesota requires forty-five hours of CLE every three-year period. These hours must include three hours of legal ethics and two hours on the elimination of bias in the legal profession. Bias in the Minnesota justice system was officially recognized in 1993 by the Minnesota Supreme Court Task Force on Racial Bias in the Judicial System. This task force found that all aspects of the Minnesota justice system "from first contact with the police through charging, trial, and sentencing were infected by racial bias."[45] Rule 2(I) of the Minnesota CLE Board defines "courses on the elimination of bias in the legal profession and in the practice of law" as "courses that are directly related to the practice of law that [are] designed to educate attorneys to identify and eliminate from the legal profession and from the practice of law biases against persons because of race, gender, economic status, creed, color, religion, national origin, disability, age or sexual orientation."[46] Again, the definition of bias is so broadly defined that fulfilling the requirement is possible without taking a course that specifically addresses race. Nonetheless, Minnesota attorney Elliot Rothenberg challenged the anti-bias requirement in the state's Supreme Court.[47] Rothenberg claimed that the mandated CLE requirement amounted to "indoctrination" in violation of his first amendment rights.[48] The Minnesota Supreme Court disagreed with his argument and allowed the rule to stand.[49]

Oregon requires forty-five hours of CLE over a three-year period.[50] These hours must include six hours on legal ethics (one of which must be on child abuse reporting and three on the elimination of bias).[51] New bar admittees must complete fifteen CLE credit hours, including ten hours addressing practical skills and two hours addressing legal ethics (one hour of which must be on child abuse reporting and one hour on the elimination

of bias).[52] Oregon CLE Rule 3.2(c) allows attorneys to take any CLE course that is "designed to educate attorneys to identify and eliminate from the legal profession and from the practice of law barriers to access to justice arising from biases against persons because of race, gender, economic status, creed, color, religion, national origin, disability, age or sexual orientation."[53] Again, the rule so broadly defines bias that the CLE requirement can be met without taking CLE courses that directly address the issue of race.

The state of Washington requires its bar members to take forty-five CLE credit hours every three years, of which six hours must be devoted to ethics, professional responsibility, professionalism, anti-bias, and diversity.[54] At least thirty credits must be earned by attendance at face-to-face CLE programs, and up to fifteen hours may be earned by self-study.[55] Regulation 101(n) of the Washington State Board of CLE (2008) states that professionalism "shall include the issues of and training in diversity, anti-bias, and substance abuse in order to improve public confidence in the legal profession and to make lawyers more aware of their ethical and professional responsibilities."[56] While this definition is somewhat inclusive, it still allows lawyers to fulfill the requirement without taking CLE courses that directly target the issue of race. New bar admittees are exempt from these requirements during the year they are admitted and the following year.

The state of West Virginia requires twenty-four hours of CLE every two years.[57] Of the five states that mandate bias awareness as a part of its CLE requirements, West Virginia's rule allows for the broadest definition of the term "bias." CLE rule 5.2 of the West Virginia CLE Rules & Regulations simply mandates that "at least three of such twenty-four hours shall be taken in courses in legal ethics, office management, substance abuse, or elimination of bias in the legal profession."[58] This rule simply gives lawyers a choice of whether or not to take such a CLE course. The fact that it is on a list which includes office management speaks to the lack of importance West Virginia bar policymakers ascribe to the issue.

It is interesting to note that, in those states where bias awareness is mandated in CLE, bias is so broadly defined so as to make it possible to fulfill the requirement without taking courses that address the issue of race in the profession and in the criminal justice system. Thus, it can be concluded that practicing lawyers are not made aware of the significance of race in the criminal justice system and the profession of law in their mandatory CLE requirements. Further, none of the five states that mandate bias awareness require any assessment of learning outcomes. In other words, there is no attempt to determine whether learning has occurred. Thus, there is no way to assess the effectiveness of any of the five mandated CLE programs. Given that the state bars control the contents of mandated CLE, each has the power to begin to raise awareness of the reality of race in the legal system through the inclusion of the topic in its requirements.

IV. A CRITICAL RACE THEORY ANALYSIS

The legal profession in most states has chosen to exclude bias and discrimination from its mandated CLE offerings. This is a startling reality in light of the overwhelming statistics that indicate that racial bias is an issue in the criminal justice system and in the legal profession. According to the American Bar Association (ABA), twenty-two state task forces have found bias in the legal profession to be a serious problem.[59] Nevertheless, the ABA and state bar associations have not responded with decisive policy changes targeting racial bias. CRT provides a viable explanation for this lack of action by focusing attention on the normalizing effect the justice system has on racism.

Race and racism are a part of the American social fabric. They have been woven into its fabric through a unique history that has included slavery and the eugenics movement. As such, race and racism are ordinary to everyday life in America; they are always present in our society. Indeed, the manifestations of racism within the criminal justice system reflect the ordinariness of race and racism in the greater American society. That which

is ordinary does not stand out as an aberration; it is normal and expected. Perhaps because of this normalness, each of the five states that mandate bias awareness in their CLE so broadly define bias as to allow practicing attorneys to avoid offerings which directly target race (if such offerings are in fact available). It is quite likely that this obvious failure to target racial bias is not intentional, despite the well-documented impact on the legal profession and the criminal justice system. The ordinariness of racism in American society renders it invisible to most Whites, including White members of the bar. Since racial discrimination is usually viewed as the act of a single individual—not a system or conditions created by a system—and must be proven by the victim, racial bias or discrimination are hard to prove and to see.[60] Whiteness as a norm is not critically reflected on in law classes, and the role of Whiteness is not considered when evaluating equality in the law,[61] thus creating a system of dysconscious racism. Dysconscious racism is a tacit acceptance of White norms and privileges based on an "impaired consciousness or distorted way of thinking about race."[62] Questioning racial privilege challenges White identity as the benevolent norm. White people as members of the legal profession and Black people as clients, inmates, and offenders is a normal and expected circumstance. This tacit acceptance of the status quo in the justice system may further explain the absence of a sense of urgency to address racial bias in CLE and why the issue of bias is so broadly defined. In those five states that mandate bias awareness in CLE, the broad definitions and diverse offerings render these states' CLE efforts ineffective with regard to addressing racism in the legal profession and the criminal justice system.

The fact that each of the five states that mandate anti-bias CLE differ somewhat in how "bias" is defined is indicative of how race is socially constructed to meet the needs of the dominant culture at a given point in time. The reality is that race is not a concretely defined classification to which individuals are assigned based on scientific criteria. Rather, assignment to such classifications is based on shifting social constructions.[63]

"Bias" is defined by each of the five bar associations to meet the needs of the practice of law in those states. It is not in the interest of bar associations to so narrowly define "bias" so as to solely target race. These bar associations have done the politically correct thing by broadly defining "bias" to include other forms of discrimination that people in their jurisdiction are equally concerned about (if not more concerned about), even though these other forms have not manifested themselves in the legal profession or in the criminal justice system as pervasively as racial bias. In this way, the bar associations have used the politics and policies of liberalism to dilute their regulations, thus evading the possibility of achieving actual social change on the issue of racial bias.

In each of the five jurisdictions that mandate bias awareness in CLE requirements, "bias awareness" is included as a part of "mainstream" CLE offerings. For example, West Virginia offers a CLE course in litigation that carries a total of 10.3 West Virginia CLE credits; only 1.2 hours of credit from this course are allocated to the mandated ethics requirement.[64] As such, CLE presenters are only required to address the designated "bias" topic for one hour in most cases. For example, a six credit-hour CLE offering will typically only require that one hour be devoted to addressing the designated targeted area of bias.

How does such a superficial approach to bias awareness benefit state bar associations? Given the weight of the evidence indicating that race impacts the criminal justice system and the legal profession, public confidence in the profession would erode in the face of obvious silence on this issue. For the five states that have mandated anti-bias CLE, they are now able to argue that they have acted to protect the dignity of the profession. It is in the interest of White bar members to act by responding with some type of anti-bias CLE. In all likelihood, the primary reason for action is interest convergence. The bar associations have acted to protect their own interests, not because of sincere concern for the impact of racism in the profession or on the greater society. Interest convergence also suggests that the White

majority of the bar has something to gain by maintaining an unjust criminal justice system. Who benefits from the continual need for legal representation for the disenfranchised minority offenders? The U.S. economy is primarily devoted to the service sector, with legal services accounting for a greater portion of the GDP of the U.S. than the manufacturing sector.[65] Delgado and Stefancic probe this issue of interest convergence and the criminal justice system even further by posing the following questions:

- Does morality-based legislation strengthen solidarity for White believers and religious fanatics? Does it help draw lines between us and them—saved and unsaved?
- Do the enormous profits in the privatized prison-building industry provide a partial reason?
- Do felony convictions and disenfranchisement benefit the Republican Party by taking Black voters off the rolls?
- Does Black imprisonment allow for the manipulation of the labor pool so that when the job market is weak and Whites fear competition for jobs, they can reduce some of the competition?[66]

In posing these questions, Delgado and Stefancic suggest that racism in the criminal justice system benefits the existing White power structure both economically and psychologically.[67] Thus, there is a subtle set of incentives for White bar members to avoid seriously addressing the issue of race within the legal system through CLE, because to do so would threaten their interests and the existing beneficial system.

Perhaps at the heart of the law's role in interest convergence is the reinforcement it provides for the conception of White superiority over minority defendants. CRT maintains that society has historically treated its defined races (Black, Native American, Hispanic, Asian, etc.) differently based on what was needed of the race at a given point in history. Similarly, the legal profession is now treating People of Color differently based on what society does not want to see from them in the way of crime. In other

words, the differential treatment of People of Color in the criminal justice system is used to control behavior. This explains the nature of the interactions between People of Color, defense attorneys, and prosecutors, which is frequently dismissive and condescending towards the minority client/offender/accused. In public hearing testimony before the Nebraska Minority and Justice Task Force (2004) preceding the issuance of their final report, the following testimony was given:

> And now it's just as bad for young Black women or women of color as it is for men . . . to have a public defender who is so unprepared, uncaring, and really, unsuitable, to stand before a judge, and then you have a prosecutor who comes in . . . and they sit at their table and the snickering, the way the attitude that they go and handle a case [shows] no respect for the individual or for the system.[68]

This type of behavior by defense attorneys, public defenders, and prosecutors is all too common in the practice of law. Such behavior serves to distance People of Color from the criminal justice system and leads to feelings of inferiority for People of Color. Defense attorneys also are frequently complicit in maintaining feelings of inferiority through their condescending interactions with People of Color. Such interactions further perpetuate the notion of the accused's inferiority to the lawyer's superiority, thus allowing the criminal system to be used to exact desired behavior.

Similarly, prosecutorial and judicial discretion is often used to exact desired results from defendants of color. Where criminal behavior is especially threatening to White social order, prosecutorial discretion is often exerted to the maximum extent allowed by law. For example, In the Atlanta courthouse shootings case, *State of Georgia v. Brian Nichols*, the prosecutor refused to plea bargain, arguing the death penalty was appropriate in this case because the victims who received the most attention were the judge, federal agent, and courtroom reporter; all of whom were White.[69] In the end, the state of Georgia spent a tremendous amount of money seeking the

death penalty, only to ultimately sentence the defendant to life in prison, because the jury could not unanimously agree on the death penalty. The state could have had the same outcome with the plea bargain of life offered originally by the defendant. The prosecutor's costly actions were the result of racial bias. Judges in most jurisdictions impose harsher sentences in cases where the victim is White and the defendant is Black or Hispanic, and People of Color receive harsher treatment at almost every step in the criminal justice process.[70] This differential treatment serves as a tool to maintain power and control over People of Color and to allow the criminal justice system to exact desired behavior from People of Color. CLE could be used as a forum to reveal the inconsistencies in cases like *Georgia v. Nichols* as well as the continuing inequities in the criminal justice system and prosecutorial discretion; however, to do so would threaten the interests of the White power structure in society at large and in the profession of law.

CRT questions the liberalism that would presumably be a friend in the fight for racial justice. CRT is instead suspect of liberalism because its effect has historically been to maintain the systems of oppression. For example, liberalism has unwavering faith in our adversarial legal system as a tool to guarantee racial fairness.[71] This faith extends to the ability of voir dire to eliminate biased jurors and in the ability of the criminal justice system to rehabilitate offenders. This liberal agenda separates the legal system from those who populate it and control it, and instead treats it as if it is a benign and benevolent actor, which is dangerously idealistic. Therefore, in those instances in which liberal bar members agree that CLE should address the issue of race, such support is limited to the rehabilitation of existing systems. That these lawyers have faith in the existing systems to effectively address the issues demonstrates the desire of White liberal attorneys to protect their own interests. The reality is that White liberal attorneys benefit from the current criminal justice system; this system ensures a reliable source of clients for them just as it does for all other members of the bar. CLE programs addressing bias have been developed

with "liberal" support. These offerings are superficial at best and are often allotted a minimal amount of time. Furthermore, CLE offerings on bias are often effectively diluted because of optional topic choices. For instance, in West Virginia, someone can choose between a course on law office management or bias.

The CLE offerings in the five states with anti-bias CLE requirements are not aggressive in targeting and eliminating racism in the profession and the criminal justice system. Instead of addressing the elimination of racism, the minimal time required is used to address how improvements can be made within the current criminal justice structure and the legal profession. These programs fall far short of advocating the sweeping change that would be needed to target and address racism.

V. THOUGHTS AND SUGGESTIONS

Continuing Professional Education (CPE) has become a key strategy in securing and maintaining the quality of professional services. CPE may be defined as "the process of engaging in education pursuits with the goal of becoming up-to-date in the knowledge and skills of one's profession."[72] Both the theory and practice of CPE have been fragmented with programs being mandated seemingly at a whim, rather than being implemented as a result of necessity. Effectiveness is often used as the justification for a program but without stating the criteria for evaluating effectiveness. Often, CPE that is based on a needs assessment and is contextually relevant can produce outcomes such as improved knowledge, skills, and behavior.[73] In the area of CLE, we can find no examples of stated criteria for evaluating effectiveness—assessing learning in context does not seem to be a concern for CLE providers.

In order to begin to address the issue of racial bias in the practice of law and in the criminal justice system, each bar association must start with a needs assessment. The nature of the bias issue will differ somewhat from jurisdiction to jurisdiction based on demography. With this in mind, CLE

programs can be uniquely tailored to address regional and state needs. For example, in Maricopa County, Arizona, Native Americans make up a significant percentage of the minority population. Indeed, their presence so taxed the court system that the superior court established a two-track system. A separate court was established to hear Native American DUI and drug cases—a racially insensitive move on the part of the court.[74] Separate courts for different races is an application of the failed "separate but equal" doctrine. Separate courts for Native Americans sends a message of inferiority. The legal profession needs to understand racial differences as well as appropriate interactive responses that are based on notions of fairness and equality.

Second, CLE requirements must clearly mandate race as a separate topic category with no fewer than three CLE hours required per reporting period. The CLE requirement should include racial sensitivity training for all bar members, including members of the judiciary. This requirement is important because most biased behavior is unconscious. To be fully effective, this requirement must then apply to all practitioners; however, due to their level of discretion in administering the law, judges and prosecutors must be especially included. The practitioners must understand their role in perpetuating the racial injustices that currently exist in the profession and the criminal justice system. Each state bar should survey its practicing attorneys to assess the current perception of race within the profession. Differences in perception among attorneys of color and White attorneys should be expected.[75] Nevertheless, the support of attorneys will be important to anti-bias CLE, and this information provides an initial indicator of support.

Last, there must be accountability and a measurement of success. It is recommended that each state bar establish a commission of racial equality and include among its charges the requirement to track and quantify the impact of the mandated CLE anti-bias training on the legal profession and the criminal justice system in the state.

Liberalism has raised the dilemma between its stated goal of racial equality and its reluctance to confront White privilege.[76] "Adopting and adapting CRT as a framework for educational equity means that [CLE decision makers] will have to expose racism in [CLE] education and propose radical solutions for addressing it."[77] K.W. Crenshaw, a professor at UCLA School of Law specializing in race and gender issues, suggests "the development of a distinct political strategy informed by the actual conditions of Black people."[78] She contends that liberal ideology has visionary ideals that should be developed, because more often than not, triumph comes not from insurgency but from resistance and perseverance.[79] To do so, race, racism, and the historic and social context in which they operate, should always be at the center of the debate. Continuing legal education may lay the foundations for the achievement of educational equity by questioning its own assumptions and privileges, by critically examining the racial context in which it functions, and by resisting stereotyping and profiling within its realm.

In summary, critical race theorists would argue that the various state bar associations have not aggressively addressed the reality of race in the legal profession through CLE, because the current state of the criminal justice system serves the needs of the dominant culture and of those who hold power in the bar associations. Therefore, each state bar needs to take several steps to effectuate the change that has been eluded under liberalism. First, it must conduct a needs assessment for its state and survey the perceptions of race within its legal industry. Then, it must mandate racial bias as a separate topic category in CLE requirements and develop programs to address each state bar's specific issues concerning race.

Last, it must devise some measurement of success in order to gauge effectiveness once CLE training has been completed. To accomplish this, CLE program planners must abandon the current focus on functionalism and embrace a critical focus. The functionalist perspective in educational program planning emphasizes the development of technical skills and

knowledge.[80] A critical perspective will force program planners to recognize that the legal profession cannot be understood independent of its relationship to the larger society.[81] Attorneys are required to attend CLE in order to maintain professional knowledge and competency; this has historically been the emphasis for CLE requirements in most bar associations across the country.[82] The emphasis is on the development and enhancement of technical knowledge. However, mastery in CLE cannot be assessed on the basis of technical expertise alone—we must know the ends to which the expertise is being put. Therefore, CLE program planners must embrace the critical perspective in program planning. The critical viewpoint recognizes the need to deal with both the means and the ends of the educational process. Most White attorneys work to maintain the status quo. However, in order to address race and racism in the legal system, attorneys must understand the ends of their work and the best means to reach those ends.

---

[1] Lorenzo Bowman is a member of the adult education faculty at the Univ. of Georgia. Tonette S. Rocco is an Associate Professor and Program Leader of Adult and Human Resource Development at Florida International Univ. Sadly, Elizabeth A. Peterson passed away in January 2009. She was an Associate Professor of Adult Education at National-Louis Univ. at the time of her death. This paper is dedicated to her memory.

[2] SUZANNE E. GRABER & LAWRENCE R. BACA, REPORT TO THE HOUSE OF DELEGATES: RECOMMENDATION, A.B.A. Standing Comm. for Continuing Legal Educ. 4 (Feb., 2004).

[3] RONALD M. CERVERO, EFFECTIVE CONTINUING EDUCATION FOR PROFESSIONALS xvii (Alan B. Knox ed., 1988).

[4] GRABER & BACA, *supra* note 2, at 3.

[5] Richard W. Fisher, *Services in the U.S. Economy: Little Bark, Big Bite*, KIPLINGER BUSINESS RESOURCE CENTER: FORECASTS AND ADVICE FOR LOOKING AHEAD AND STAYING AHEAD (June 2007) *available at* http://www.kiplinger.com/businessresource/summary/archive/2007/Service_Sector_Fisher.html.

[6] *Id.*

[7] *Id*.

[8] Heather MacDonald, *Is the Criminal Justice System Racist?*, 18 CITY J. 12, 12–24 (2008), *available at* http://www.city-journal.org/2008/18_2_criminal_justice_system.html.

[9] *Id.*

[10] Troy Duster, *Pattern, Purpose, and Race in the Drug War: The Crisis of Credibility in Criminal Justice*, *in* CRACK IN AMERICA: DEMON DRUGS AND SOCIAL JUSTICE 260, 264 (Craig Reinarman & Harry G. Levine eds., 1997).
[11] U.S. DEPARTMENT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, CRIMINAL OFFENDERS STATISTICS (2007), http://www.ojp.usdoj.gov/bjs/crimoff.htm [hereinafter *CRIMINAL OFFENDERS STATISTICS*].
[12] U.S. CENSUS BUREAU, 2006 AMERICAN COMMUNITY SURVEY. U.S. CENSUS BUREAU: AMERICAN FACTFINDER (2006), http://factfinder.census.gov/servlet/DTTable?_bm=y&-context=dt&-ds_name=ACS_2006_EST_G00_&-mt_name=ACS_2006_EST_G2000_B02001&-CONTEXT=dt&-tree_id=306&-redoLog=false&-all_geo_types=N&-geo_id=01000US&-currentselections=ACS_2006_EST_G2000_B02001&-search_results=01000US&-format=&-_lang=en (last visited Jan 24, 2008).
[13] *CRIMINAL OFFENDERS STATISTICS*, *supra* note 11.
[14] GRABER & BACA, *supra* note 2.
[15] SAMUEL WALKER, CASSIA SPOHN & MIRIAM DELONE, THE COLOR OF JUSTICE: RACE, ETHNICITY, AND CRIME IN AMERICA 1 (Todd Clear ed., 2nd ed. 2000).
[16] Eleanor Hinton Hoytt, Vincent Schiraldi, Brenda V. Smith, & Jason Ziedenberg, *Reducing Racial Disparities in Juvenile Detention*. PATHWAYS TO JUVENILE DETENTION REFORM, Annie E. Casey Foundation, at 7–10.
[17] WALKER, *supra* note 15.
[18] *CRIMINAL OFFENDERS STATISTICS*, *supra* note 11.
[19] WALKER, *supra* note 15.
[20] *CRIMINAL OFFENDERS STATISTICS*, *supra* note 11.
[21] *Id*.
[22] ELSIE L. SCOTT, VEDA M. SHAMSID-DEEN, & ANDREA BLACK-WADE, MINORITY COMMUNITY VICTIM ASSISTANCE: A HANDBOOK (National Organization of Black Law Enforcement Executives 2008).
[23] GRABER & BACA, *supra* note 2.
[24] Richard Delgado & Jean Stefancic, Presentation Made to John Jay College of Criminal Justice, CUNY: The Role of Critical Race Theory in Understanding Race, Crime and Justice Issues (Dec. 13, 2005). [hereinafter DELGADO & STEFANCIC, *Understanding Race*].
[25] DERRICK A. BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM 13–14 (1992).
[26] Tonette S. Rocco & Suzanne J. Gallagher, *Discriminative Justice: Can Discrimination Be Just?*, *in* ADULT EDUCATION IN AN URBAN CONTEXT: PROBLEMS, PRACTICES, AND PROGRAMMING FOR INNER-CITY COMMUNITIES 29, 34 (Larry G. Martin & Elice Rogers eds., 2004).
[27] Jessica T. DeCuir & Adrienne D. Dixon, *"So When It Comes Out, They Aren't That Surprised That It Is There": Using Critical Race Theory as a Tool of Analysis of Race and Racism in Education*, 33 EDUCATIONAL RESEARCHER 26 (2004).
[28] RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION 7 (2001). [hereinafter DELGADO & STEFANCIC, *CRITICAL RACE THEORY*].
[29] DELGADO & STEFANCIC, *Understanding Race*, *supra* note 24, at 26.
[30] DELGADO & STEFANCIC, *CRITICAL RACE THEORY*, *supra* note 28, at 7.

[31] DELGADO & STEFANCIC, *Understanding Race*, *supra* note 24, at 7.
[32] STEPHEN CORNELL & DOUGLAS HARTMANN, ETHNICITY AND RACE: MAKING IDENTITIES IN A CHANGING WORLD 21–22 (Pine Forge Press 2007) (1948) (citing THOMAS GOSSETT, RACE: THE HISTORY OF AN IDEA IN AMERICA 82 (Oxford Univ. Press 1997) (1963)).
[33] *Id.* at 22.
[34] DELGADO & STEFANCIC, *Understanding Race*, *supra* note 24.
[35] Adarand Constructors v. Pena, 515 U.S. 200 (1995); Richmond v. Croson Co., 488 U.S. 469 (1989).
[36] Grutter v. Bollinger, 539 U.S. 306 (2003).
[37] *Id.*
[38] LISH WHITSON, REPORT TO THE HOUSE OF DELEGATES: RECOMMENDATION, American Bar Association Task Force on the Model Definition of the Practice of Law (2003).
[39] GRABER & BACA, *supra* note 2, at 4–5.
[40] GRABER & BACA, *supra* note 2, at 5.
[41] *Id*.
[42] GRABER & BACA, *supra* note 2.
[43] Greenberg v. State Bar, 78 Cal. App. 4th 39, 42 (2000).
[44] *See id*.
[45] William E. Martin & Peter N. Thompson, *Removing Bias from the Minnesota Justice System*, BENCH & BAR OF MINNESOTA 1 (Aug. 2002).
[46] MINNESOTA STATE BAR ASSOCIATION, RULES OF THE MINNESOTA STATE BOARD OF CONTINUING LEGAL EDUCATION (2008).
[47] In re Rothenberg, 676 N.W. 2d 283, 288 (2004).
[48] *Id*. at 289.
[49] *Id*. at 294.
[50] OREGON STATE BAR, OREGON STATE BAR MINIMUM CONTINUING LEGAL EDUCATION RULES AND REGULATIONS 3.2(a) (2009).
[51] *Id.* at 3.2(b).
[52] *Id.*
[53] *Id.* at 5.5(b).
[54] WASHINGTON STATE BAR ASSOCIATION, REGULATIONS OF THE WASHINGTON STATE CONTINUING LEGAL EDUCATION BOARD 11.2(a) (2008).
[55] *Id.* at 11.2(a)(1), 11.2(a)(3).
[56] WASHINGTON STATE BAR ASSOCIATION, REGULATIONS OF THE WASHINGTON STATE CONTINUING LEGAL EDUCATION BOARD (2008).
[57] WEST VIRGINIA STATE BAR ASSOCIATION, WEST VIRGINIA CONTINUING LEGAL EDUCATION COMMISSION REGULATIONS 5.2 (2008).
[58] *Id*.
[59] GRABER & BACA, *supra* note 2.
[60] *See* Alan Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, *in* CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT 29, 29–40 (Kimberlé Crenshaw, Neil Gotanda, Gary Peller & Kendall Thomas eds., 1995).

[61] *See* Margalynne J. Armstrong & Stephanie M. Wildman, *Teaching Race/Teaching Whiteness: Transforming Colorblindness to Color Insight*, 86 N.C.L. REV. 635, 651–53 (2008).
[62] Joyce E. King, *Dysconscious Racism: Ideology, Identity, and Miseducation*, *in* CRITICAL WHITE STUDIES: LOOKING BEHIND THE MIRROR 128, 128–32 (Richard Delgado & Jean Stefancic eds., 1997).
[63] STEPHEN CORNELL & DOUGLAS HARTMANN, ETHNICITY AND RACE: MAKING IDENTITIES IN A CHANGING WORLD 21–22 (Pine Forge Press 2007) (1948).
[64] WEST VIRGINIA STATE BAR ASSOCIATION, WEST VIRGINIA CONTINUING LEGAL EDUCATION COMMISSION REGULATIONS (2008).
[65] Fisher, *supra* note 5.
[66] DELGADO & STEFANCIC, *Understanding Race*, *supra* note 24.
[67] *Id*.
[68] Dennis R. Keefe & Mark J. Young, *Race and Justice in Nebraska—Why Prosecutors and Criminal Defense Lawyers Should Care,* THE NEBRASKA LAWYER: OFFICIAL PUBLICATION OF THE NEBRASKA STATE BAR ASSOCIATION 11 (June 2004).
[69] *State of Georgia v. Brian Gene Nichols*, No. 2005-SC-29988 (2008).
[70] WALKER, *supra* note 15.
[71] DELGADO & STEFANCIC, *Understanding Race*, *supra* note 24.
[72] Darlene E Weingand, *Describing the Elephant: What is Continuing Professional Education?,* 65th IFLA Council and General Conference (Aug. 1999).
[73] Kathryn Robertson, Karl E. Umble & Ronald M. Cervero, *Impact studies in continuing education for health professional; Update*, 23 THE J. OF CONTINUING EDUC. IN THE HEALTH PROFESSIONS 146 (2005).
[74] Rachel Alexander, *Race-based DUI Courts are not Colorblind Justice*, The Law Offices of Edward A. Loss, III, *available at* http://www.azduiatty.com/race-based-dui-courts-are-not-colorblind-justice.htm.
[75] Lorenzo Bowman, Black and White Attorney's Perspectives on Race, the Legal System, and Continuing Legal Education: A Critical Race Theory Analysis (2004) (unpublished PhD dissertation, Univ. of Georgia, Athens) (on file with author).
[76] Edward Taylor, *Critical Race Theory and Interest Convergence in the Desegregation of Higher Education*, *in* RACE IS . . . RACE ISN'T: CRITICAL RACE THEORY AND QUALITATIVE STUDIES IN EDUCATION 181, 181–204 (Laurence Parker, Donna Deyhle, & Sofia Villenas eds., 1999).
[77] Gloria Ladson-Billings, *Just What Is Critical Race Theory, and What's It Doing in a* Nice *Field Like Education?*, *in* RACE IS . . . RACE ISN'T: CRITICAL RACE THEORY AND QUALITATIVE STUDIES IN EDUCATION 27 (Laurence Parker, Donna Deyhle, & Sofia Villenas eds., 1999).
[78] Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1387 (1988).
[79] *Id*.
[80] CERVERO, *supra* note 3, at 21.
[81] *Id*. at 36.
[82] *Id*. at 21.