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# Race And Wealth Disparity: The Role Of Law And The Legal System

## **Cover Page Footnote**

The authors thank Ivy A. Flores, John B. Lough, Jr., Professor Daniel M. Schneider, and Professor Leon Trakman for their helpful comments and support. Special thanks to Jennifer Alesio, for superlative research assistance and incisive commentary.

## RACE AND WEALTH DISPARITY: THE ROLE OF LAW AND THE LEGAL SYSTEM

*Beverly Moran\* and Stephanie M. Wildman\*\**

Many authors in the forthcoming book *Race and Wealth Disparities: A Multidisciplinary Discourse* assume that law plays some role in the creation and maintenance of wealth disparities based upon race.<sup>1</sup> Yet some lawyers, judges, legislators, professors, and law students would strongly dispute that view. Many legal workers, like other Americans, believe in a legal system that aspires to, and often achieves, neutrality in matters of class and equality in matters of race.<sup>2</sup> They do not view law and the legal system as one way that American society polices race and wealth disparities. Because American law seems removed from race and wealth concerns, legal workers see no place for such considerations in their education or practice.

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\*\* Copyright © 2007 by Stephanie M. Wildman, Professor of Law and Director, Center for Social Justice and Public Service, Santa Clara University. The authors thank Ivy A. Flores, John B. Lough, Jr., Professor Daniel M. Schneider, and Professor Leon Trakman for their helpful comments and support. Special thanks to Jennifer Alesio, for superlative research assistance and incisive commentary.

1. *RACE AND WEALTH DISPARITIES: A MULTIDISCIPLINARY DISCOURSE* (Beverly Moran ed., forthcoming 2007). Most of the chapters in this text, by authors from disciplines ranging from sociology and psychology to history, economics, and literary criticism, consider the relevance of law to their discipline. See, e.g., Tony N. Brown & Daniel B. Cornfield, *A Selective Review of Sociological Perspectives on the Relationship Between Race and Wealth*, in *RACE AND WEALTH DISPARITIES, supra* (laws effecting unionization); William J. Collins & Robert A. Margo, *Racial Differences in Wealth: A Brief Historical Overview*, in *RACE AND WEALTH DISPARITIES, supra* (laws that prohibited blacks from owning property); M. Elizabeth Kirkland & Sheila R. Peters, “*Location, Location, Location*” *Residential Segregation and Wealth Disparity*, in *RACE AND WEALTH DISPARITIES, supra* (laws that enforced segregation); Dr. Roland Mitchell & Dr. Reavis L. Mitchell, *History and Education: Mining the Gap*, in *RACE AND WEALTH DISPARITIES, supra* (public education laws and segregation); Cecelia Tichi, *Wealth Whiteout: Creative Writers Confront Whites’ Downward Mobility in America’s Newest Gilded Age*, in *RACE AND WEALTH DISPARITIES, supra* (bankruptcy and property taxation); Kenneth K. Wong, *Federalism and Equity: Evolution of Federal Educational Policy*, in *RACE AND WEALTH DISPARITIES, supra* (“No Child Left Behind” federal legislation).

2. See, e.g., Terry Carter, *Divided Justice*, NAT’L B. ASS’N MAG., Jan./Feb. 1999, at 16-17 (reporting that 80.7 percent of white attorneys and 59.1 percent of black attorneys polled were “hopeful” that the justice system would eliminate racial bias).

In response to the prevalent view that American law and legal institutions are class and color blind, this Article provides examples of how legal institutions sometimes do create and maintain racialized wealth disparities. The Article offers examples of this phenomenon by examining a sequence of federal judicial decisions, the federal taxing statutes, the role of legal education, and access to legal services. These examples are instructive because they cut across a broad spectrum of components of the American legal system. By revisiting issues of race and wealth in different legal settings from the Constitution to federal cases, the tax system, and legal education and practice, this Article confirms that race and wealth are both involved in legal outcomes and ignored by legal actors and institutions in a systematic way. Legal actors and citizens of all vocations need to look more critically at the American legal landscape and critique the influence of race and wealth.

America's foundational aspirations toward equality and neutrality allow legal actors to ignore the effect that race and wealth disparities have upon law and the legal system, even when those actors acknowledge how often law fails to achieve these ideals. Legal realists,<sup>3</sup> critical legal theorists,<sup>4</sup> critical race theorists,<sup>5</sup> feminist theorists,<sup>6</sup> and others have noted the contradiction between legal doctrines and legal realities. Yet, despite its contradictions and failures, the urge towards equality and neutrality creates opportunities for change. As E.P. Thompson observed, "people are not as stupid as some . . . suppose them to be. They will not be mystified by the first man who puts on a wig."<sup>7</sup> For Thompson, neutrality and equality provide opportunities to redress an unequal class system even while these concepts also protect ruling class interests. Thompson reasons that a "partial and unjust" law cannot gain pop-

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3. See, e.g., KARL N. LLEWELLYN, *JURISPRUDENCE: REALISM IN THEORY AND IN PRACTICE* (1962); MAX RADIN, *LAW AS LOGIC AND EXPERIENCE* (1940).

4. See, e.g., MARK KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* (1987); GARY MINDA, *POSTMODERN LEGAL MOVEMENTS: LAW AND JURISPRUDENCE AT THE CENTURY'S END* (1995).

5. See, e.g., *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* (Kimberlé Crenshaw et al. eds., 1995); *CRITICAL RACE THEORY: THE CUTTING EDGE* (Richard Delgado & Jean Stefancic eds., 2d ed. 2001); RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* (2001).

6. See, e.g., CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* (1989); MARI J. MATSUDA, *WHERE IS YOUR BODY? AND OTHER ESSAYS ON RACE, GENDER AND THE LAW* (1996); PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE & RIGHTS* (1996).

7. English judges wear wigs, so Thompson's reference is to the role of law (represented by the man in the wig) in perpetuating or combating injustice. See E.P. THOMPSON, *WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT 262-63* (1975).

ular support and so is not useful in maintaining class hierarchy.<sup>8</sup> Thus, the aspiration for universality and equity can sometimes force law to follow its “own logic and criteria of equity.”<sup>9</sup>

#### THE AMERICAN CONFLICT BETWEEN EQUALITY, NEUTRALITY, AND ASSIGNED RACE ROLES

From its beginnings, the American legal system has articulated two distinct, yet contradictory, views of human relations. The Declaration of Independence aspired to equality among people and neutral application of law.<sup>10</sup> Yet at the same time, Article I, section 2 of the United States Constitution provided that the census shall count “the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.”<sup>11</sup> This constitutional provision allocated roles by race for the construction of political rights: Indians outside American society; black slaves; and white male full citizens, whether free or bound for a term of years.

Ironically, neutrality and equality can support subordination and hierarchy. Anatole France illustrated this point when he sarcastically applauded the majestic equalitarianism of the law, which “forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread.”<sup>12</sup>

In 1943, Robert Hale echoed France’s sentiment, as he wrote about the law’s role in creating unequal bargaining relationships and unequal wealth effects. Hale explained that wealth gives its owner control over his or her own life and leisure and over other people’s lives as well.<sup>13</sup> Hale illustrated this control of the wealthy

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8. *Id.*

9. *Id.* Thompson allows that a legal system may not achieve neutrality and fairness:

It is true that certain categories of person may be excluded from this logic (as children or slaves), that other categories may be debarred from access to parts of the logic (as women or, for many forms of eighteenth-century law, those without certain kinds of property), and that the poor may often be excluded, through penury, from the law’s costly procedures.

*Id.*

10. “We hold these truths to be self-evident, that all men are created equal; that they are endowed by their Creator, with certain unalienable Rights, that among these are life, liberty and the pursuit of happiness.” THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

11. U.S. CONST. art. I, § 2, cl. 3.

12. Anatole France, *Le Lys Rouge [The Red Lily]*, reprinted in JOHN BARTLETT, FAMILIAR QUOTATIONS 655 (1980).

13. Robert L. Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603, 626-28 (1943).

over the working classes through the greater bargaining power that capital has over labor, especially low-skilled workers.<sup>14</sup> This unequal bargaining power leads to the inequitable distribution of wealth as those with control over capital can extract work from others without just compensation.<sup>15</sup> As seen in Hale's work, legal neutrality claims that law has no effect on this wealth distribution.<sup>16</sup> Instead, law simply protects property rights and freedom of contract.<sup>17</sup> Under this concept of legal neutrality, other institutions, for example the market, fuel the wealth distribution occasioned by unequal bargaining power.

Hale rejected the claim that legal neutrality has no wealth effects. Rather, Hale pointed out that legal rules lead to particular wealth distribution patterns and that different legal rules create different wealth distribution patterns while still protecting property rights and freedom of contract.<sup>18</sup> For Hale, the allegedly neutral system of American property and inheritance laws does more than merely protect private property and freedom of contract; these laws also give property owners power over workers to the detriment of most Americans.<sup>19</sup>

Sixty years after Hale, Stephen J. Rose, in a book and poster depicting the interrelationships of income, wealth, occupation, race, gender, and household type, showed that five percent of the United States population owns sixty percent of the nation's wealth.<sup>20</sup> Using an icon representing 160,000 people as its primary unit, the left side of the poster portrayed the American population by income up to \$125,000.<sup>21</sup> Ninety-three percent of the American population earned at or below this \$125,000 mark.<sup>22</sup> Ninety-three percent of the American population is able to fit within the physical frame of the approximately two by three foot poster.<sup>23</sup>

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14. *Id.* at 626-27.

15. *Id.* at 627-28.

16. *Id.* at 626.

17. *Id.*

18. *Id.* at 628. "Bargaining power would be different were it not that the law endows some with rights that are more advantageous than those with which it endows others." *Id.* at 627-28.

19. *Id.* at 627-28.

20. STEPHEN J. ROSE, *SOCIAL STRATIFICATION IN THE UNITED STATES: THE NEW AMERICAN PROFILE POSTER 25* (2000); see also generally Collins & Margo, *supra* note 1.

21. ROSE, *supra* note 20, at 25.

22. *Id.*

23. *Id.*

In order to expand the chart at the same 160,000 people per icon scale and include those who earn combined incomes of up to \$300,000, the poster must add eight feet in height.<sup>24</sup> Few icons populate this extended chart representing people who earn more than \$125,000 annually.<sup>25</sup> In order to reflect the 150,000 households with more than \$1 million in yearly income, the poster must grow three stories high.<sup>26</sup>

Although Rose's poster tells a different story, the American myth perpetuates the idea that anyone can climb those three stories in one lifetime. This belief coexists with public rules and private practices that have tied wealth to race for generations. As a result, non-whites are even less likely to move out of poverty than whites.

The disparate, distributional result that ties race and wealth has been supported throughout American history by government programs. The United States began as a slave nation, and the end of slavery did not break the tie between race and wealth. Most people are aware of the failures of the post-Civil War Reconstruction and the emergence of the Jim Crow system of segregation.<sup>27</sup> Few are as aware of how the liberal New Deal tied race and wealth. The New Deal introduced the notion of an economic safety net into American politics. As such it pulled many Americans from poverty. But the New Deal also excluded agricultural and domestic workers from that economic safety net because those occupations served as a "neutral" proxy for race.<sup>28</sup> After World War II, the government continued to enrich its citizens based on race through the Federal Housing Administration, which made home

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24. *Id.*

25. The Y axis (the vertical line running along the left hand side of the poster) shows income up to \$125,000. The X axis shows the U.S. population in increments of 160,000 up to ninety-three percent of the population. *Id.*

26. *Id.*

27. Angela P. Harris, *Equality Trouble: Sameness and Difference in Twentieth-Century Race Law*, 88 CAL. L. REV. 1923, 1931-33 (2000).

28. See MARTHA R. MAHONEY, JOHN O. CALMORE & STEPHANIE M. WILDMAN, *SOCIAL JUSTICE: PROFESSIONALS, COMMUNITIES, AND LAW* 451-571 (2003) [hereinafter MAHONEY, ET AL., *SOCIAL JUSTICE*] (discussing livelihood and the economic safety net); see generally IRA KATZNELSON, *WHEN AFFIRMATIVE ACTION WAS WHITE: AN UNTOLD HISTORY OF RACIAL INEQUALITY IN TWENTIETH-CENTURY AMERICA* (2005) (reporting how U.S. social programs favored whites); William E. Forbath, *Constitutional Welfare Rights: A History, Critique, and Reconstruction*, 69 FORDHAM L. REV. 1821 (2001); Joel F. Handler, "Constructing the Political Spectacle": *Interpretation of Entitlements, Legalization, and Obligations in Social Welfare History*, 56 BROOK. L. REV. 899 (1990).

ownership available to working class whites, while excluding black buyers through redlining and other exclusionary practices.<sup>29</sup>

These government programs increased white family well-being significantly while systematically excluding blacks, Indians, and others. Yet, because each program based exclusions on seemingly neutral factors, many whites have never understood the role their race played in their rise from poverty to middle class status.

Hale argues that contract law is driven by bargaining power and made up of seemingly class neutral rules that actually shift bargaining power to owners of capital and away from labor. Favoring the wealthy over workers is not the stated justification for these rules. Instead, proponents justify these rules as the most efficient means of supporting an important social goal called freedom of contract. The rules ignore the fact that, without true bargaining power, there can be no freedom of contract. Thus the rich and the poor share in the same freedoms which somehow mysteriously tend to favor the wealthy. The New Deal developed seemingly race-neutral rules that actually shifted wealth away from blacks and towards whites. These rules were not presented as part of an effort to bring the white working class into the middle class while leaving black America in Depression conditions for another forty years. Yet, by restricting benefits to whites either explicitly—as in the federal home mortgage arena—or implicitly—as in Social Security—these government programs helped ensure that government benefits would enforce an income and wealth gap between white Americans and their non-white counterparts. These gaps, first between the wealthy and everyone else (which is enforced by contract law among other legal rules) and between black wealth and white wealth (perpetuated by historical gaps in government benefits), occur in a wide range of assets, including access to education.

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29. For more on the private and public practices that operated to deny black Americans home ownership, see generally Collins & Margo, *supra* note 1, and Kirkland & Peters, *supra* note 1. See also generally SHERYLL CASHIN, *THE FAILURES OF INTEGRATION: HOW RACE AND CLASS ARE UNDERMINING THE AMERICAN DREAM* (2004); DOUGLAS S. MASSEY & NANCY DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* (1993); MELVIN L. OLIVER & THOMAS M. SHAPIRO, *BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY* (1995); Margalynne Armstrong, *Race and Property Values in Entrenched Segregation*, 52 U. MIAMI L. REV. 1051 (1998); Martha R. Mahoney, *Segregation, Whiteness, and Transformation*, 143 U. PA. L. REV. 1659 (1995); Florence Wagman Roisman, *Teaching Important Property Concepts: Teaching About Inequality, Race, and Property*, 46 ST. LOUIS U. L.J. 665 (2002).

**FACIAL NEUTRALITY REINFORCING HIERARCHY IN JUDICIAL  
DECISION-MAKING**

Two judicial decisions announced twenty-five years apart illustrate how equality and neutrality can veil the reinforcement of existing wealth inequities. *Rodriguez v. San Antonio School District*<sup>30</sup> and *Hopwood v. Texas*<sup>31</sup> both concerned the Texas public education system. *Rodriguez* dealt with elementary and secondary education;<sup>32</sup> *Hopwood* grappled with higher education in the state's premier law school.<sup>33</sup>

*Rodriguez* challenged the practice of funding local school districts through property taxes.<sup>34</sup> In a property tax system, rich school districts are able to raise more funds through taxation than poor districts. Because rich districts include land and buildings with higher property values, these districts are able to raise greater funding while putting less tax burden on each taxpayer within the district. As Douglas Reed explained, "property-rich districts could generate significant revenues for education (at relatively low tax rates), while property-poor districts could produce only very small amounts of revenue (while taxing themselves at comparatively high rates)."<sup>35</sup> This uneven and unequal funding scheme led three law professors to argue that state wealth, rather than school district wealth, was a better measure of funding per student.<sup>36</sup> The professors urged that "children are classless . . . no child of tender years is capable of meriting more or less than another."<sup>37</sup> The Edgewood School District's budget, where Mr. Rodriguez's children attended school, spent only two-thirds as much money per student as compared to the Alamo Heights School District's per-student expenditures.<sup>38</sup> The residents of the Edgewood District were

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30. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 12 (1973).

31. *Hopwood v. Texas*, 78 F.3d 932 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996).

32. See generally Wong, *supra* note 1, for further discussion of elementary and secondary education.

33. Access to education provides a form of wealth. See Mitchell & Mitchell, *supra* note 1.

34. *Rodriguez*, 411 U.S. at 4-5.

35. Douglas S. Reed, *Twenty-Five Years After Rodriguez: School Finance Litigation and the Impact of the New Judicial Federalism*, 32 LAW & SOC'Y REV. 175, 175 (1988).

36. JOHN E. COONS, WILLIAM H. CLUNE III & STEPHEN D. SUGARMAN, *PRIVATE WEALTH AND PUBLIC EDUCATION 2* (1970); Edward B. Foley, *Rodriguez Revisited: Constitutional Theory and School Finance*, 32 GA. L. REV. 475, 481 (1998).

37. COONS, CLUNE & SUGARMAN, *supra* note 36, at 419.

38. *Rodriguez*, 411 U.S. at 11-12.

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predominantly Mexican-American; in contrast, the residents of Alamo Heights were predominantly “Anglo.”<sup>39</sup>

Although the factual record fully apprised the Supreme Court concerning the wealth and ethnic differences between the Edgewood and Alamo Districts, the majority explicitly rejected a link between the “property-poor districts” and race. Instead the majority declared: “Nor does it now appear that there is any more than a random chance that racial minorities are concentrated in property-poor districts.”<sup>40</sup> Citing a Connecticut-based study, the majority also rejected associating economic disadvantage and “property-poor” districts.<sup>41</sup> In ruling against the funding challenge, the majority wrote:

In sum, to the extent that the Texas system of school financing results in unequal expenditures between children who happen to reside in different districts, we cannot say that such disparities are the product of a system that is so irrational as to be invidiously discriminatory. . . . The complexity of these problems is demonstrated by the lack of consensus with respect to whether it may be said with any assurance that the poor, the racial minorities, or the children in overburdened core-city school districts would be benefited by abrogation of traditional modes of financing education.<sup>42</sup>

Thus, in 1973 the Supreme Court let Texas continue to fund its school districts through local property taxes, thereby ensuring that rich school districts would spend more on their elementary and secondary school systems than poor school districts. The Court refused to find any connection between wealth and race or ethnicity, nor did it find a connection between wealth and educational resources.

In 1996, the Fifth Circuit decided *Hopwood v. Texas*,<sup>43</sup> a challenge to the admissions policy at the University of Texas School of Law. Children who attended kindergarten in Texas at the time *Rodriguez* was decided were twenty-five years old when the *Hopwood* litigation began. Thus, Texans who were in the applicant pool to attend the University of Texas Law School grew up in an educational system that had allowed vast differentials in their publicly funded education because of *Rodriguez*. In addition, these

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39. *Id.* at 12.

40. *Id.* at 57.

41. *Id.* at 23.

42. *Id.* at 54-55, 56.

43. 78 F.3d 932 (5th Cir. 1996).

Texan applicants grew up shortly after the University of Texas desegregated, although for the vast majority of its history the University of Texas was a segregated institution.<sup>44</sup>

Even though the University of Texas and its law school had ended de jure segregation, enrollment at the University remained predominantly white.<sup>45</sup> During the *Hopwood* era, the law school embarked on an affirmative action plan meant to address this de facto segregation.<sup>46</sup>

In *Hopwood*, the Fifth Circuit characterized the question before it as whether “in order to increase the enrollment of certain favored classes of minority students, the University of Texas School of Law discriminates in favor of those applicants by giving substantial racial preferences in its admissions program.”<sup>47</sup> The court rejected the University of Texas Law School’s admission policy as unconstitutional because it produced an entering class containing students who did not meet a supposedly neutral and objective standard of merit.<sup>48</sup> The court’s reliance on supposedly neutral tests did not reflect the race and class issues inherent in the Texas public school system.

Both *Rodriguez* and *Hopwood* reflect a kind of neutrality. As Anatole France might have said, in *Rodriguez* the law is equalitarian and neutral when it allows all parents to spend whatever funds they want on their children’s education, so long as they have the money to do so. Further, the law remains neutral when the graduates of under-funded schools are subject to the same tests as graduates of well-funded schools in order to gain admission to the state university’s law school. Each decision reflects a theoretical neutrality that together create a real world differential in access to public education at the primary, secondary, and graduate levels.

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44. The famous Supreme Court decision in *Sweatt v. Painter*, 339 U.S. 629 (1950), challenged that segregation and served as one of the building blocks in the litigation strategy that led to *Brown v. Board of Education*, 347 U.S. 483 (1954). See also A’Lelia R. Henry, *Perpetuating Inequality: Plessy v. Ferguson and the Dilemma of Black Access to Public and Higher Education*, 27 J.L. & EDUC. 47, 66-71 (1998) (discussing the cumulative negative effect of *Rodriguez*, *Hopwood*, and other “color-blind” holdings on higher education for black students).

45. *Hopwood v. Texas*, 861 F. Supp. 551, 556 (W.D. Tex. 1994), *rev’d in part and dismissed in part*, 78 F.3d 932 (5th Cir. 1996).

46. *Hopwood*, 78 F.3d at 935-38.

47. *Id.* at 934.

48. In 1993 resident (Texan) white applicants had a mean grade point average of 3.53 and a law school admissions test score of 164. Mexican Americans averaged 3.27 and 158, respectively; blacks averaged 3.25 and 157. *Id.* at 937 n.7.

The law acknowledges that a rule allowing only whites to enter the University of Texas is not neutral.<sup>49</sup> But the Fifth Circuit employed the shield of neutrality by demanding that the University of Texas employ an admission policy for local Texas residents that heavily relied on test scores.<sup>50</sup> Many view the use of test scores as neutral, even though the judges received evidence of these tests' race and class bias.<sup>51</sup> Further, the differences in educational opportunity on the primary and secondary levels meant that there would be different test scores by race even if the tests themselves had no race bias.

From a doctrinal perspective, *Rodriguez* and *Hopwood* illustrate Hale's two observations that (1) neutrality can mask redistributive effects, and (2) different rules could create different wealth effects without harming fairness, freedom of contract, or property ownership. Read together, *Rodriguez* and *Hopwood* offer a microcosmic view of children denied educational opportunities under the guise of neutral law.<sup>52</sup>

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49. See *Sweatt v. Painter*, 339 U.S. 629, 634 (1950) ("It may be argued that excluding petitioner from that school is no different from excluding white students from the new law school. This contention overlooks realities.").

50. *Hopwood*, 78 F.3d at 962.

51. For more on testing and bias, see NICHOLAS LEMANN, *THE BIG TEST: THE SECRET HISTORY OF THE AMERICAN MERITOCRACY* (1999); William C. Kidder & Jay Rosner, *How the SAT Creates "Built-in Headwinds": An Educational and Legal Analysis of Disparate Impact*, 43 SANTA CLARA L. REV. 131, 133-34 (2002) (describing how the process of selecting and developing SAT questions exacerbates that test's disparate impact on African-American and Chicano test-takers); Daria Roithmayr, *Deconstructing the Distinction Between Bias and Merit*, 85 CAL. L. REV. 1449 (1997).

52. For further discussion of the race and class implications of *Rodriguez*, see generally Goodwin Liu, *The Parted Paths of School Desegregation and School Finance Litigation*, 24 LAW & INEQ. 81 (2006), arguing that *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189 (1973) and *Rodriguez* together presented the opportunity to fuse school finance litigation and desegregation, though the Court rejected that opportunity. See also Susan H. Bitensky, *We "Had a Dream" in Brown v. Board of Education . . .*, 1996 DET. C. L. REV. 1, 16 (arguing that *Rodriguez* must be overturned in order for the United States to realize the full promise of *Brown*); Michael Heisse, *Equal Educational Opportunity, Hollow Victories, and the Demise of School Finance Equity Theory: An Empirical Perspective and an Alternative Explanation*, 32 GA. L. REV. 543, 575 (1998) (discussing how *Rodriguez* forced proponents of school finance equity at the federal level into state court battles for adequacy); Paula J. Lundberg, *State Courts and School Funding: A Fifty-State Analysis*, 63 ALB. L. REV. 1101, 1145 (2000) (arguing that the states which are less urban, have a higher per-capita income, and have greater state constitutional protection have been and will be more likely to reject the *Rodriguez* holding and invalidate their own funding schemes); Denise C. Morgan, *The Less Polite Questions: Race, Place, Poverty and Public Education*, 1998 ANN. SURV. AM. L. 267 (arguing that to improve public education contrary to the traditional litigation preceding and including *Rodriguez*, litigation that is capable of fusing race, poverty, and space must be encouraged).

STATUTORY LAW: RACE, WEALTH, AND TAXES

As the discussion of *Rodriguez* and *Hopwood* above illuminates, American legal institutions sometimes create seemingly neutral rules that actually enforce race and wealth roles. For example, access to education is a type of wealth.<sup>53</sup> The *Rodriguez* and *Hopwood* decisions each articulate neutral rules that, when combined, distribute public education in skewed ways. Yet, as Hale pointed out, the unequal distribution of wealth is hard to detect. Neutral rules serve to mask unequal wealth distribution and to make the skewed distribution possible.<sup>54</sup>

Until now this Article has looked at a series of rules and government policies that purported to be race and class neutral, such as freedom of contract and law school admissions. This Article now turns to a law that does not purport to represent class neutrality: the federal tax code. There are a number of reasons to consider tax laws as statutes with both race and wealth effects. The first and most obvious reason that the United States tax system might have both race and wealth effects is that the system clearly implicates both income and wealth distribution. At its most basic level, the gift and estate tax laws explicitly tax large estates as they pass from generation to generation, and the income tax uses progressive rates as income rises. A second reason for expecting to see differences based on race and wealth in the United States taxing statutes is that both the income gap between blacks and whites and the wealth gap are dramatic in this country.<sup>55</sup> Because both the income and wealth gaps are so extreme by race,<sup>56</sup> effects of the intersection of race and wealth might appear more readily in a statute that deals directly with income and wealth.

The observations contained in the paragraphs above argue that the American tax system is both race-neutral as written and race- and wealth-sensitive as structured. In fact, as one would expect, it turns out that the United States tax system has a series of rules that result in blacks and whites at the same income level, education level, marital status, number of children, and region of residence paying very different amounts of federal income tax, with blacks

53. For more on education as a form of wealth, see generally Wong, *supra* note 1, and Mitchell & Mitchell, *supra* note 1.

54. Hale, *supra* note 13, at 628.

55. ROSE, *supra* note 20; see also Beverly Moran & William Whitford, *A Black Critique of the Internal Revenue Code*, 1996 WIS. L. REV. 751, 770.

56. See generally Moran & Whitford, *supra* note 55.

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paying more.<sup>57</sup> This differential by race is achieved through a number of mechanisms. One way that the distribution is achieved is through the technical rules and how those rules interact with how people live.<sup>58</sup> Another way the distribution is achieved is through the silence that allows the rules to play out differently by race without any movement toward reform.<sup>59</sup> A third factor that helps maintain wealth distribution by race is the shaping of public opinion so that Americans accept rules that favor the wealthy as neutral rules that favor us all.<sup>60</sup>

Technically, the distribution of tax benefits to whites and away from blacks is achieved through a series of credits, exclusions, and deductions that all work so that the greatest benefits go to people who fit a white profile and the lowest benefits go to people who fit other profiles.<sup>61</sup> A quick example of this phenomenon is apparent in the bundle of benefits that apply to home ownership.<sup>62</sup>

A vast gap in home ownership exists between whites and blacks.<sup>63</sup> The gap in home ownership is a direct result of a wide range of government policies from the creation of the Republic to date.<sup>64</sup> Thus, it can hardly be argued that home ownership is a voluntary act or that black people have purposefully eschewed home ownership. Instead, black people are now, and have been, consistently shut out of the home ownership market by a series of laws, rules, and private policies.

The Internal Revenue Code gives tremendous benefits to home ownership. The cost of financing a home is completely deductible for most Americans. Property taxes that support local schools are also deductible. If the house goes up in value, the owners can draw money out of the house through borrowing, not pay any tax on the receipt of the borrowed funds, and deduct the payment of mortgage interest. When the owner sells the home, the gain realized from any increased value or equity is usually received completely tax-free.

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57. *Id.* at 754-55.

58. *Id.* at 754.

59. *Id.* at 753-54.

60. *Id.* at 752.

61. The home mortgage interest deduction presents one example of this phenomenon. *See id.* at 754; *see also* Beverly Moran, *Setting an Agenda for the Study of Tax and Black Culture*, 21 U. ARK. LITTLE ROCK L. REV. 779, 783 (1999); William C. Whitford, *Remarkable*, 76 N.C. L. REV. 1639, 1645 (1998).

62. Moran & Whitford, *supra* note 55, at 775-83.

63. *See generally* Collins & Margo, *supra* note 1; Kirkland & Peters, *supra* note 1.

64. *See generally* Collins & Margo, *supra* note 1.

The combination of the tremendous tax benefits for home ownership and the private practices and policies that kept blacks from that home ownership<sup>65</sup> shows how the intersection of a neutral law with a race-charged situation compounds race effects. The intersection of the law and the reality of how people live allows the race-neutral law to change wealth outcomes by race.

As E.P. Thompson might tell us, the intersection of race and wealth in the United States tax laws is best achieved if the law is supported by public opinion. For example, support for such concepts as freedom of property and freedom of contract helps mask how the law serves to create wealth based on bargaining power. In the case of tax legislation, manipulation of public opinion and societal ignorance of racial hierarchy both contribute to attitudes that veil recognition of the tax law's role in maintaining wealth disparities.

One illustration of how public relations can manipulate public opinion for political ends in federal tax legislation is provided by Marjorie Kornhauser.<sup>66</sup> Her article presents an early example of the still-current political phenomenon of small, well-financed groups influencing tax legislation through lobbying, the media, and rhetorical appeals to the "common man."<sup>67</sup> Kornhauser shows Americans reacting completely outside their class interests when dealing with tax policy.<sup>68</sup>

Kornhauser's work concerns the repeal of certain public reporting requirements that made information on wealthy taxpayers' income accessible to the general public.<sup>69</sup> Kornhauser opines that the average American had nothing to lose from the public reporting requirement.<sup>70</sup> In contrast, wealthy Americans felt vulnerable in the face of public revelations of their holdings.<sup>71</sup> Even though they represented a numeric minority, the campaign the wealthy mounted against the disclosure rules gained wide popular support.<sup>72</sup> The wealthy were able to construct a story that resonated

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65. CASHIN, *supra* note 29, at 3-38.

66. See generally Marjorie E. Kornhauser, *Shaping Public Opinion and the Law in the 1930's: How a "Common Man" Campaign Ended a Rich Man's Law 2* (Tulane Public Law Research Paper No. 06-02, 2006) available at <http://ssrn.com/abstract=880383>; see also generally Collins & Margo, *supra* note 1; Kirkland & Peters, *supra* note 1.

67. Kornhauser, *supra* note 66, at 2.

68. *Id.* at 58.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* at 58-59.

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with average Americans who came to identify with those wealthy taxpayers but were actually harmed by the provision.<sup>73</sup>

Contemporary debates over the estate tax present a more current example of the same crossover identification phenomenon. The estate tax is nothing if not a tax that directly targets upper class families seeking to make intergenerational wealth transfers. Yet, even when commentators assured the public that only one percent of the population would ever confront the gift and estate tax, a mass abolition movement arose against the so-called “death” tax.<sup>74</sup>

What Professor Kornhauser’s work illustrates and what the public outcry against the “death tax” reflects is how the great American cultural urge toward neutrality and equality masks, as Hale and France both suggested, a tremendous class-based privilege. The cultural concern for equality and neutrality serves as both a strength and weakness. In its best light, the culture fosters empathy with those less fortunate and a willingness to sacrifice for the greater good. At its worst, it supports a type of silence that prevents Americans from seeing, and therefore discussing, ways to actually achieve that neutrality and equality. This silencing dynamic is evident in legal education.

#### LEGAL EDUCATION: TRAINING GROUND FOR CONTINUED SILENCE

Wealth disparities and race both play marginal roles in the law school curriculum.<sup>75</sup> Although all first year law students study sub-

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73. *Id.*

74. The estate tax currently affects less than 1 percent of families, and it is the most progressive tax in the country because its impact is almost entirely on the nation’s richest families . . . . At the moment, the government imposes a tax of about 46 percent on estates worth more than \$2 million, or more than \$4 million in the case of couples.

Edmund L. Andrews, *G.O.P. Fails in Attempt to Repeal Estate Tax*, N.Y. TIMES, June 9, 2005, at C1.

75. bell hooks describes class in America as the subject the culture does not address. “Nowadays it is fashionable to talk about race or gender; the uncool subject is class.” BELL HOOKS, *WHERE WE STAND: CLASS MATTERS* vii (2000) (grieving that greed sets “the standard for how we live and interact in everyday life”). Her comment is reminiscent of Patricia J. Williams’s description of race as the elephant in the room that gets tiptoed around, also not discussed. PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 49 (1991). Although both wealth and race tend to be ignored in law school classrooms, several good casebooks are available on these subjects, including DERRICK BELL, *RACE, RACISM AND AMERICAN LAW* (5th ed. 2004); EMMA C. JORDAN & ANGELA P. HARRIS, *ECONOMIC JUSTICE: RACE, GENDER, IDENTITY AND ECONOMICS* (2005); and JUAN PEREA, RICHARD DELGADO, ANGELA P. HARRIS & STEPHANIE M. WILDMAN, *RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA* (2d ed. 2007).

jects that raise wealth and race issues, legal educators rarely teach those subjects in ways that raise those concerns. Instead, legal pedagogy adopts a mode of “perspectivelessness,” reinforcing the ideal that legal discourse is objective and analytical.<sup>76</sup> Perspectivelessness supports the myth of legal neutrality. Although legal scholars like Hale have been very explicit about the role of wealth in American law,<sup>77</sup> and critical race theory has been equally explicit about the role race plays in American legal institutions,<sup>78</sup> both topics remain relegated to boutique seminar courses. Students can, and often do, study law for three years without ever considering either wealth or race as legitimate topics of study.

The omission of race and wealth disparities from the core law school curriculum reinforces its invisibility in other parts of the profession, thereby supporting the kinds of judicial decisions and statutes discussed in the preceding sections. As E.P. Thompson observed, “class is something which in fact happens.”<sup>79</sup> When class just “happens” in the law school classroom without any study or comment, legal educators train the next generation of lawyers to ignore these fundamental issues of fairness and their implications for democracy.<sup>80</sup>

A student writing exercise provides one example of the absence of basic knowledge about wealth disparity within the context of legal education. Upon finishing a unit on work and care giving, which included readings on the United States’ economy and how it is managed to ensure unemployment, law students taking a Social Justice Law class spent three minutes on a free write exercise, answering the question: “What is class?” Several essays discussed physical classroom space. Other students wrote about “class” as

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76. Kimberlé Williams Crenshaw, *Foreword: Toward a Race-Conscious Pedagogy in Legal Education*, 4 S. CAL. REV. L. & WOMEN’S STUD. 33, 35 (1994).

77. See, e.g., Cass R. Sunstein, *Why Does the Constitution Lack Social and Economic Guarantees?*, 56 SYRACUSE L. REV. 1, 20 (2005) (supporting the idea that the Nixon appointments to the Supreme Court removed the potential for a progressive understanding of wealth distribution); see also Hale, *supra* note 13, at 626.

78. See generally CRITICAL RACE THEORY: THE CUTTING EDGE (Richard A. Delgado & Jean Stefancic eds., 2d ed. 1999); CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberlé Crenshaw et al. eds., 1996).

79. E.P. THOMPSON, *THE MAKING OF THE ENGLISH WORKING CLASS* 9 (1964); see also Martha R. Mahoney, *Class and Status in American Law: Race, Interest, and the Anti-Transformation Cases*, 76 S. CAL. L. REV. 799, 805 (2003) (arguing that “when law ignores class while claiming to protect white workers, it gives authority to the claim that whites are harmed by the advent of people of color”).

80. See Stephanie M. Wildman, *Democracy and Social Justice: Founding Centers for Social Justice in Law Schools*, 55 J. LEGAL EDUC. 252, 255-56 (2005) (describing the connection between democracy and social justice issues like class and race).

conduct, in the sense of classy, or snobby, or being embarrassed by a lack of “classiness.” Thus, even in the context of readings and discussions of wealth disparities, these students’ initial reaction to the term “class” was to envision meanings disconnected from wealth. When asked whether they spoke much about class and wealth disparities in law school, the students answered “No.”

The silence on wealth and class in the law school classroom is not limited to one school or one classroom.<sup>81</sup> Indeed, that silence is so pervasive that it impacts student career choices, and reduces the number of law students who aspire to work for social justice. Several studies of legal education note that students enter law school with a desire to work in the public interest.<sup>82</sup> Yet by the time these same students graduate, they have changed their vision of success toward a corporate practice devoid of social justice issues.<sup>83</sup>

Class implicates relationships and power so that, while social stratification statistics give a snapshot of one aspect of class or wealth, these statistics fail to convey the ways people experience class, how they identify themselves and others, or how power structures become replicated.<sup>84</sup> Wealth’s invisibility in legal education is part of how class “happens.” When class just “happens,” the failure to pay attention replicates and reinforces existing structures.<sup>85</sup> The replication and reinforcement of these existing structures influences the development of law, legal theory, and the next generation of legal professionals.

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81. Margaret Montoya illustrates another example of missed learning opportunities for the whole class, because prevailing assumptions in the classroom prevented the recognition of wealth disparities. See Margaret E. Montoya, *Mascaras, Trenzas, y Grenas: Un/Masking the Self While Un/Braiding Latina Stories and Legal Discourse*, 17 HARV. WOMEN’S L.J. 185, 192 (1994).

82. See ROBERT GRANFIELD, *MAKING ELITE LAWYERS: VISIONS OF LAW AT HARVARD AND BEYOND* 3 (1992) (describing students’ changing view of career goals); ROBERT STOVER, *MAKING IT AND BREAKING IT: THE FATE OF PUBLIC INTEREST COMMITMENT DURING LAW SCHOOL* 13 (1989) (reporting that one-third of beginning first-year law students said they hoped to work in public interest jobs and one-sixth of graduating third years expressed the same hopes; the number of students who expressed commitment to public interest jobs dropped by half during law school).

83. See STOVER, *supra* note 82, at 13. Note, however, that corporate law practice need not be disconnected from social justice work. Bob Egelko, *14 S.F. Law Firms Pledge Free Work for Poor Clients: Judicial Nudge Prompts Commitment*, S.F. CHRON., Dec. 15, 2000, at A26 (describing the successful effort of Chief Judge Marilyn Hall Patel, U.S. District Court in San Francisco, and Chief Justice Ronald George, California Supreme Court, with the Bar Association of San Francisco to encourage law firms to commit a percentage of attorney time to pro bono work).

84. See Mahoney, *supra* note 79, at 805.

85. *Id.*

Income and wealth inequalities exist for many reasons; law is only one of those reasons. Yet, as this Article shows, law is not a trivial reason. In many ways legal rules, especially those rules that claim to support equality and neutrality, can mask the means for supporting wealth and power differentials of all sorts. Legal education disserves the very people who need to understand both how law supports and undercuts equality and neutrality. Legal education ignores the issues of race, class, and inequality through the silence on these issues that permeates many classrooms. As a result, future leaders lack the training that they need to even imagine how law supports or undercuts true equality, much less how to address those issues in any serious way.

**ACCESS TO LAWYERS AND THE LEGAL SYSTEM:  
A FORM OF WEALTH**

This Article offers different definitions of wealth. Some view income as a proxy for wealth. The discussion of the racial roles assigned by the Constitution makes race a type of political wealth, defining who has a say in forming the elected government. The discussion of *Rodriguez* and *Hopwood* addressed education as a form of wealth. The racial allocation of government benefits in the discussion of the federal tax laws illustrates how tax laws are structured. These tax laws create wealth transfers from blacks with less wealth to whites with more wealth, and the public financing of housing does the same by reducing blacks' access to the funds needed to purchase housing and other types of wealth.

Access to lawyers and the legal system is another form of wealth. A typical view of the provision of legal services would see legal services as a value-free commodity that is governed by the market. But as Hale pointed out, legal rules have tremendous impact on the protection of property rights, the creation of bargaining power, and the determination of wealth distribution.<sup>86</sup> Just as legal rules act to concentrate other types of wealth, such as education, housing, and tax benefits, legal resources are yet another type of wealth that remains unevenly distributed by class and race. Reginald Heber Smith decried the notion of "one law for the rich and another for the poor."<sup>87</sup> Indeed, Smith viewed freedom and equal access to justice as inextricably intertwined.<sup>88</sup>

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86. See Hale, *supra* note 13, at 628.

87. REGINALD HEBER SMITH, *JUSTICE AND THE POOR* 3 (1919).

88. *Id.*

Like Smith, President Jimmy Carter charged that legal resources are inappropriately apportioned. President Carter complained that “ninety percent of lawyers serve only ten percent of the population.”<sup>89</sup> In a recent study by the National Legal Aid and Defenders Association, researchers found that in California alone there was roughly one legal aid attorney for every 10,000 economically disadvantaged Californians.<sup>90</sup> Equal justice under law is a disregarded ideal when access to lawyers is so skewed.<sup>91</sup>

The availability of lawyers to bring social justice cases on behalf of individuals and communities affects both the nature of cases that are brought into court and the legal rules that prevail. Cruz Reynoso provides an example of the importance of lawyers for the protection and creation of wealth with his description of a New Mexico program established to increase the number of Native American lawyers.<sup>92</sup> “Soon we started seeing cases coming out of Arizona . . . in which Native American tribes sued to receive water that they were entitled to under treaties. Rights mean nothing if nobody enforces them.”<sup>93</sup> Access to lawyers empowered the Indian community and allowed it to achieve rights that were previously not enforced because of a lack of legal resources.<sup>94</sup> But Indians are not the only poor people who are in need of legal services. In New Jersey, it is estimated that less than one percent of all tenants have lawyers to help them in landlord tenant court.<sup>95</sup>

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89. GRANFIELD, *supra* note 82, at 4 (1992).

90. See Deborah L. Rhode, *Access to Justice*, 69 FORDHAM L. REV. 1785, 1786 (2001); Jose Padilla, *Surviving 40 Years of Poverty Law Practice: Salvaging Justice*, Address at Santa Clara University Law School (Oct. 16, 2006).

91. A study released by Legal Services of New Jersey on October 13, 2006 finds that over the past year nearly 120,000 low-income New Jersey residents attempted to receive free legal assistance, but were turned away due to a lack of resources. Legal services providers are worried that the data underrepresent the problem because many low-income people do not attempt to receive legal services when they need them. The report, “People Without Lawyers: New Jersey’s Civil Legal Justice Gap Continues,” also found that ninety-nine percent of defendants in landlord-tenant eviction cases at state courts were not represented by a lawyer. Kate Conscarelli, *Poor Jerseyans Have Limited Access to Legal Aid, Study Finds*, THE STAR LEDGER, Oct. 13, 2006.

92. Cruz Reynoso, *Educational Equity*, 36 UCLA L. REV. 107, 111 (1988).

93. *Id.* Lawyers are not, however, a panacea for the ailments of disempowered communities. Marc Galanter, in a classic article, explains how the legal system is stacked against the “have-nots” in society. See generally Marc Galanter, *Why the “Haves” Come out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95 (1974).

94. See Ralph W. Johnson, *Indian Tribes and the Legal System*, 72 WASH. L. REV. 1021, 1031 (1997) (noting that as “tribes have gained greater access to legal counsel, courts have increased their focus on Indian issues”).

95. See Conscarelli, *supra* note 91.

How different would landlord-tenant relationships in New Jersey, or in any other state, look if the parties approached the court with equal access to legal resources?

The United States spends only \$300 million on legal services to serve over forty million poor citizens.<sup>96</sup> By contrast, “[a] single law firm, which represents maybe a hundred or so corporate clients, earned . . . [one billion dollars].”<sup>97</sup> The total profits of a half dozen law firms exceed the total federal, state, and local expenditures for legal representation for the poor.<sup>98</sup>

### CONCLUSION

Louis Brandeis once warned that: “We can have democracy; in this country; or we can have great wealth concentrated in the hands of a few, but we can’t have both.”<sup>99</sup> In the United States, race and wealth are so intertwined that the wealthy few are also almost invariably white. If Brandeis is correct, and democracy cannot exist alongside concentrated wealth, then perhaps wealth concentrated by race presents an even greater threat than wealth that is concentrated through more random means.

Most disciplines seem to believe that law plays a role in creating and maintaining wealth and race disparities. This Article shows that from the origins of the nation when the United States Constitution explicitly established racial roles to the present, government policy often directed wealth from Indians and blacks towards whites. This Article discussed one ironic aspect of legal method that helps legal institutions and doctrines play their role in maintaining race and wealth hierarchy—the aspiration to equality and neutrality. The examples of seemingly neutral rules having race and wealth effects included Texas public education as sustained by *Rodriguez* and *Hopwood*; the color-blind federal tax laws; the law school classroom and its replication of silence on matters of class; and access to justice as measured by the availability of lawyers’ services.

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96. Justice Earl Johnson, Jr., *Equal Access to Justice: Comparing Access to Justice in the United States and Industrial Democracies*, 24 *FORDHAM INT’L L.J.* 583, 583-84 (2000).

97. *Id.*

98. *Id.*

99. JOSEPH R. CONLIN, *THE MORROW BOOK OF QUOTATIONS IN AMERICAN HISTORY* 48 (1984).

This Article also reflects different definitions of wealth. Human beings held as slaves provided a form of wealth to their owners.<sup>100</sup> Access to education develops human capital and is another form of unevenly distributed wealth in this nation.<sup>101</sup> Similarly, access to legal services is denied to the poorest Americans. Home ownership, the bedrock of wealth for the American middle class, is very skewed by race as a result of long-term public and private policies. Thus, while other disciplines have a more focused definition of wealth, the legal landscape invites a more encompassing view.

Richard Delgado has urged those in the legal academy to learn from other disciplines in their effort to promote social change.<sup>102</sup> He noted, for example, that post-colonial literature, searching for ways to oppose imperial forces in Africa, Asia, and Latin America, developed chronologically parallel to the civil rights tradition in the United States, but “without much interchange between the two.”<sup>103</sup> Law and legal institutions need assistance from other disciplines to reveal the inconsistencies contained in the legal system and ultimately to hold that system accountable.

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100. See Anthony Paul Farley, *Accumulation*, 11 MICH. J. RACE & L. 51, 54 (2005) (urging that the rule of law supports the primal scene of accumulation).

101. See generally Mitchell & Mitchell, *supra* note 1; Wong, *supra* note 1.

102. Richard Delgado, *Si Se Puede, But Who Gets the Gravy?*, 11 MICH. J. RACE 9, 18-19 (2005).

103. *Id.* at 19.