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Foreword: Critical Race Theory and Empirical Methods Conference

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SYMPOSIUM

FOREWORD:
CRITICAL RACE THEORY
AND EMPIRICAL METHODS CONFERENCE

*Kimani Paul-Emile**

Everyone seems to be talking about race. From the protests that erupted in cities across the country over the failure of grand juries in Missouri and New York to indict police officers in the killing of two unarmed black men,¹ to the racially charged statements made by the owners of professional sports teams;² and the college fraternity members captured on film singing a racist lynching song;³ race exploded into the nation's collective consciousness. Even the Starbucks Coffee chain's recent "Race Together" campaign, intended to promote discussion about race, sparked a controversy and was quickly withdrawn.⁴ These and other events have propelled race to the top of the national media and policy agendas and made it the topic of dinner table and water cooler conversations throughout the United States. Still, broad disagreement remains, particularly between whites and racial minorities, over what these events mean with respect to contemporary race relations.⁵

This dissonance reveals the country's deep and persistent racial divide. It also raises questions about the operation of race in social relationships and government practices, including the influence of race on public perceptions of criminality and the availability of socioeconomic opportunity—issues

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1. John Eligon & Manny Fernandez, *From Plains to Both Coasts, Fury Boils Over*, N.Y. TIMES, Nov. 25, 2014, at A1; J. David Goodman & Al Baker, *New York Officer Facing No Charges in Chokehold Case*, N.Y. TIMES, Dec. 4, 2014, at A1.

2. John Branch, *Clippers Owner Barred for Life Over Racist Talk*, N.Y. TIMES, Apr. 30, 2014, at A1; Andrew Keh, *Views on Race Again Prompt an N.B.A. Sale*, N.Y. TIMES, Sept. 8, 2014, at A1.

3. Joey Stipek & Richard Perez-Pena, *Oklahoma Inquiry Traces Racist Song to National Gathering of Fraternity*, N.Y. TIMES, Mar. 27, 2015, at A11.

4. Ravi Somaiya, *Starbucks Ends Conversation Starters on Race*, N.Y. TIMES, Mar. 27, 2015, at B3.

5. Bruce Drake, *Ferguson Highlights Deep Divisions Between Blacks and Whites in America*, PEW RESEARCH CENTER (Nov. 26, 2014), <http://www.pewresearch.org/fact-tank/2014/11/26/ferguson-highlights-deep-divisions-between-blacks-and-whites-in-america/>.

that go to the heart of democracy in America. Indeed, despite claims that the election of the nation's first black President signals the declining significance of race, current events lay bare its continued relevance and suggest the need for a means of measuring, analyzing, and addressing the complicated ways in which race and racial bias remain powerful forces in twenty-first-century America.

This is, therefore, a particularly opportune time for the *Fordham Law Review* to publish this Critical Race Theory and Empirical Methods Symposium, which brings together scholars from the law, humanities, and social sciences to engage critically and articulate innovative analytical frameworks for the examination of race and identity. Critical race theory and empirical methods (“eCRT”), as an area of academic inquiry, was born five years ago at a convening of scholars who believed that scholarship on race could benefit from the melding of sophisticated social science research methods with the analytical elegance and political power of critical race theory.⁶

As distinct and independent fields of study, CRT and the social sciences each have contributed much to the analysis of race and identity. Social scientists—particularly in sociology and social psychology of implicit bias—have conducted groundbreaking research that distinguishes the impact of race from that of other variables affecting individuals’ social experiences to demonstrate the ways in which race has a significant, and often negative, independent effect. Thus, in the face of claims that socioeconomic class has become a more meaningful predictor of social mobility than race, these scholars have used statistical analysis to demonstrate that: law enforcement officers are more likely to erroneously identify as criminal faces with features suggestive of black or African American heritage than faces with features suggestive of white ancestry;⁷ when sent emails requesting opportunities to discuss research, university professors across disciplines are more likely to respond to the emails sent by students with stereotypically white names than students with stereotypically black, Latino, or Asian names;⁸ among job applicants with similar qualifications and criminal histories, whites receive job offers at higher rates than blacks and Latinos;⁹ and whites *with* a purported recent felony conviction are more likely to receive a job offer than blacks and Latinos *without* criminal records.¹⁰ These are but a few examples of the ways social scientists have succeeded in using empirical research methods to challenge deeply held assumptions about race and inequality.

6. Osagie K. Obasogie, *Foreword: Critical Race Theory and Empirical Methods*, 3 U.C. IRVINE L. REV. 183, 185 (2013) (describing the original eCRT working groups’ meetings).

7. See Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY SOC. PSYCHOL. 876 (2004).

8. See Katherine Milkman et al., *Temporal Distance and Discrimination: An Audit Study in Academia*, 27 PSYCHOL. SCI. 710 (2012).

9. See Devah Pager et al., *Discrimination in a Low-Wage Labor Market: A Field Experiment*, 74 AM. SOC. REV. 777, 784–86 (2009).

10. *Id.*

The other side of the eCRT equation, CRT, rose to prominence during the 1980s and since has become a tremendously influential intellectual force in legal academia.¹¹ As a theory and practice, CRT aims to illuminate and address the ways in which legal arrangements and social ordering can occlude, and often subvert, efforts to achieve racial justice. Thus, CRT challenges the dominant notion of race as an unfortunate relic of U.S. history that has been largely overcome because of legal developments and social policies intended to increase racial equality. In so doing, CRT posits that racial hierarchies and white privilege are embedded within these laws, policies, and practices such that they reify the very inequities they seek to eliminate.¹² CRT recognizes that the building of coalitions among groups is an integral part of achieving racial justice and endorses the use of narrative or storytelling in legal scholarship as a means of “looking to the bottom”¹³ to acknowledge the experiences of subordinated communities.¹⁴

Among CRT’s many contributions is the acclaimed concept of “intersectionality,” or the idea that various forms of identity (e.g., race, gender, sexual orientation, disability status, etc.) do not exist in isolation, but rather combine to form shifting vectors of privilege and subordination that are historically and contextually contingent.¹⁵ CRT also originated the widely noted theory of “interest convergence,” which asserts that white elites historically have supported efforts to attain racial justice only when

11. See generally Kimberlé Crenshaw, *Introduction*, in *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., 3d ed. 2013); Kimberlé Williams Crenshaw, *Twenty Years of Critical Race Theory: Looking Back to Move Forward*, 43 *CONN. L. REV.* 1253, 1255 (2011).

12. See generally LAURA E. GÓMEZ, *MANIFEST DESTINIES: THE MAKING OF THE MEXICAN AMERICAN RACE* (2007) (discussing immigration and ethnic identity); IAN HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (1997) (discussing race formation); ANGELA ONWUACHI-WILLIG, *ACCORDING TO OUR HEARTS: RHINELANDER V. RHINELANDER AND THE LAW OF THE MULTIRACIAL FAMILY* (2013) (discussing race and family law); PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* (1992) (presenting an autobiographical examination of the intersection of race, gender, and class); Paul Butler, *Poor People Lose: Gideon and the Critique of Rights*, 122 *YALE L.J.* 2176 (2013) (presenting a criminal law-based critique of rights); R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 *N.Y.U. L. REV.* 803 (2004) (discussing race, stigma, and citizenship); Camille Gear Rich, *Marginal Whiteness*, 98 *CALIF. L. REV.* 1497 (2010) (discussing employment discrimination); Russell K. Robinson, *Masculinity As Prison: Sexual Identity, Race, and Incarceration*, 99 *CALIF. L. REV.* 1309 (2011) (discussing race, law, and gender identity).

13. Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 *HARV. C.R.-C.L. L. REV.* 323, 324 (1987).

14. See, e.g., DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* (1992); DERRICK BELL, *RACE, RACISM AND AMERICAN LAW* (6th ed. 2008); Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 *MICH. L. REV.* 2411, 2440–41 (1989); Charles Lawrence III, *Listening for Stories in All the Right Places: Narrative and Racial Formation Theory*, 46 *LAW & SOC’Y REV.* 247, 251 (2012).

15. See generally Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 *STAN. L. REV.* 1241 (1991); Deborah K. King, *Multiple Jeopardy, Multiple Consciousness: The Context of a Black Feminist Ideology*, 14 *SIGNS* 42 (1988).

such efforts benefit them.¹⁶ Thus, progress in achieving racial equality has been limited to moments when their interests “converge” with those of marginalized racial groups.¹⁷

The significant impact of CRT scholarship has been felt both inside and outside the academy. However, as a theory-based field of academic inquiry, CRT has not always sought to provide evidentiary support for its central claims, focusing instead on reframing the debate on race and inequality. In contrast, the methods employed by social scientists enable them to prove their claims by calculating and quantifying the depth and breadth of a problem or harm. However, the frames of analysis typically employed by social scientists are often anemic at best. Thus, in many ways, the social sciences and CRT would appear to be balancing forces, natural allies, and a sure fit: both congruent and complementary. Yet, forming a productive alliance between the two fields has not been without its challenges.

For example, the social sciences’ implicit claims of “objectivity” and embrace of “neutrality” in knowledge production stand in contrast to CRT’s contention that these claims mask hierarchies of power that often cleave along racial lines.¹⁸ Also at odds with CRT organizing principles is the way social science research frequently ignores or fails to capture the structural aspects of racism, focusing instead on the behavior of individuals.¹⁹ Conversely, for some in the social sciences, the ability to isolate the effects of race from that of other variables may be jeopardized by the adoption of a critical orientation or normative frameworks of analysis, which are constitutive features of CRT scholarship.²⁰ Plus, the use of narrative is perceived by some quantitative social scientists as akin to reliance on anecdote and dismissed as an inappropriate source of evidence.²¹

eCRT scholars, while acknowledging these tensions, have gone forward to produce a new, sophisticated, and generative form of scholarship that is self-reflexively attentive to these concerns, but not constrained or inhibited

16. Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 522–23 (1980).

17. *Id.*

18. See generally Dorothy A. Brown, *Fighting Racism in the Twenty-First Century*, 61 WASH. & LEE L. REV. 1485 (2004) (arguing that quantitative analysis provides support for the notions of objectivity and neutrality); Jerome M. Culp et al., *Subject Unrest*, 55 STAN. L. REV. 2435 (2003) (same).

19. See Devon W. Carbado & Daria Roithmayr, *Critical Race Theory Meets Social Science*, 10 ANN. REV. LAW & SOC. SCI. 149, 159 (2014) (observing that emphasis on implicit bias, for example, “assumes that the individual and her unconscious are the primary source of racial inequality”).

20. See generally DANIEL A. FARBER & SUZANNA SHERRY, *BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW* (1997).

21. See, e.g., *id.* (positing that storytelling cannot be substantiated and is therefore inherently unreliable); Richard A. Posner, *The Skin Trade*, NEW REPUBLIC, Oct. 13, 1997, at 40–43 (questioning the reliability and intellectual rigor of scholarship that engages narrative); Jeffrey Rosen, *The Bloods and the Crits: O.J. Simpson, Critical Race Theory, the Law, and the Triumph of Color in America*, NEW REPUBLIC, Dec. 9, 1996, at 27 (arguing that narrative is incompatible with objectivity and truth).

by them. Thus, eCRT begins with the premise that the significant issues raised by CRT could be strengthened by increased reliance on social science research methods that quantitatively and qualitatively measure the structural inequities exposed through CRT analysis. Likewise, eCRT scholars contend that social scientific research on race and identity could profit from the adoption of theoretical frameworks that are more sophisticated than those that currently animate empirical methods.

As a field, eCRT scholarship is as broad as it is deep and has included scholars working at the nexus of CRT and sociology, social psychology, anthropology, economics, law, psychology, business, and political science. The ever-expanding group of scholars who engage in eCRT scholarship approach the endeavor in several ways, including the marshalling of empirical evidence to support theoretical, doctrinal, or normative claims²² and the production of qualitative or quantitative empirical data informed by CRT insights.²³

This symposium showcases the incredible diversity of this literature. The articles that follow are but a snapshot of the remarkable range of substantive issues addressed in this field. In *Police Racial Violence: Lessons from Social Psychology*, L. Song Richardson intervenes in the debate about the use of aggressive policing tactics by law enforcement in minority communities by employing social psychological data to demonstrate the predictability of the excessive use of force by police against people of color.²⁴ Rather than focusing on individual police-citizen interactions, Professor Richardson addresses the way certain policing practices and aspects of policing culture subordinate racial minorities and increase the chance of racial violence, even in the absence of conscious racial animus among police officers. In *"I Do for My Kids": Negotiating Race and Racial Inequality in Family Court*, Tonya L. Brito, David J. Pate, Jr., and Jia-Hui Stefanie Wong draw masterfully from broad-based quantitative studies of the way legal assistance impacts civil court proceedings for low-income litigants. This fresh approach enables them to more clearly

22. See, e.g., DEVON W. CARBADO & MITU GULATI, ACTING WHITE?: RETHINKING RACE IN "POST-RACIAL" AMERICA (2013); Ming Hsu Chen & Taeku Lee, *Reimagining Democratic Inclusion: Asian Americans and the Voting Rights Act*, 3 U.C. IRVINE L. REV. 359 (2013); Kaaryn Gustafson, *Degradation Ceremonies and the Criminalization of Low-Income Women*, 3 U.C. IRVINE L. REV. 259 (2013); Kimani Paul-Emile, *Patients' Racial Preferences and the Medical Culture of Accommodation*, 60 UCLA L. REV. 462 (2012).

23. See generally KHIARA M. BRIDGES, REPRODUCING RACE: AN ETHNOGRAPHY OF PREGNANCY AS A SITE OF RACIALIZATION (2011); Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945 (2006); Tanya Katerí Hernández, *A Critical Race Feminism Empirical Research Project: Sexual Harassment & the Internal Complaints Black Box*, 39 U.C. DAVIS L. REV. 1235 (2006); Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465 (2010); Victor D. Quintanilla, *Critical Race Empiricism: A New Means to Measure Civil Procedure*, 3 U.C. IRVINE L. REV. 187 (2013).

24. L. Song Richardson, *Police Racial Violence: Lessons from Social Psychology*, 83 FORDHAM L. REV. 2961 (2015).

illuminate how economically disadvantaged parties in child support enforcement actions “negotiate” race and gender in these proceedings.²⁵

This symposium also includes several articles that exemplify the melding of empirical research with the rich intersectional approach forged by CRT. In *When Is Fear for One’s Life Race-Gendered? An Intersectional Analysis of the Bureau of Immigration Appeals’s In re A-R-C-G- Decision*, Ange-Marie Hancock skillfully employs a “paradigm intersectionality” approach to examine a breakthrough legal case allowing immigrant women to claim home country abuse as a gendered form of persecution and thus grounds for asylum in the United States. In so doing, she investigates the decision’s effect on immigrant women of color escaping domestic violence, and its ramifications for future asylum litigation and advocacy.²⁶ Ifeoma Ajunwa’s article, *The Modern Day Scarlet Letter*, examines the effects of criminal convictions on formerly incarcerated women of color, focusing on the legal penalties that attach once one has been released from prison.²⁷ She argues persuasively that those in this demographic suffer a compound harm due to their status as women and racial minorities and proposes a model of reentry that is sensitive to their needs. Using food oppression as a framework, in *“First Food” Justice: Racial Disparities in Infant Feeding As Food Oppression*, Andrea Freeman provides a powerful analysis of the structural limitations on African American women’s ability to breastfeed and the negative consequences for both mother and child.²⁸ The author demonstrates how health disparities between African American women and other groups are not the result of personal decisions, but rather a consequence of state policies and legal choices.

Among the many pieces in this symposium are articles that illustrate the complex and sophisticated ways in which eCRT scholars produce and leverage quantitative data to buttress their claims regarding the operation of racial categories in social life. In *Race in the Life Sciences: An Empirical Assessment, 1950–2000*, Osagie K. Obasogie, Julie N. Harris-Wai, Katherine Darling, Carolyn Keagy, and Michael Levesque offer an unprecedented and large-scale quantitative evaluation of articles published in peer-reviewed biological and life sciences journals to investigate whether and to what extent race is deployed as a social construct or, more dangerously, as a biological category.²⁹ The authors show that the idea that race reflects inherent biological differences persists in modern scientific research despite the common assumption that the life sciences had

25. Tonya L. Brito, David J. Pate, Jr. & Jia-Hui Stefanie Wong, *“I Do for My Kids”*: *Negotiating Race and Racial Inequality in Family Court*, 83 FORDHAM L. REV. 3027 (2015).

26. Ange-Marie Hancock, *When Is Fear for One’s Life Race-Gendered? An Intersectional Analysis of the Bureau of Immigration Appeals’s In re A-R-C-G- Decision*, 83 FORDHAM L. REV. 2977 (2015).

27. Ifeoma Ajunwa, *The Modern Day Scarlet Letter*, 83 FORDHAM L. REV. 2999 (2015).

28. Andrea Freeman, *“First Food” Justice: Racial Disparities in Infant Feeding As Food Oppression*, 83 FORDHAM L. REV. 3053 (2015).

29. Osagie K. Obasogie, Julie N. Harris-Wai, Katherine Darling, Carolyn Keagy & Michael Levesque, *Race in the Life Sciences: An Empirical Assessment, 1950–2000*, 83 FORDHAM L. REV. 3089 (2015).

disavowed biological theories of race after the horrors of eugenics and the Holocaust were revealed in the mid-twentieth-century. In *Faculty Insights on Educational Diversity*, Meera E. Deo marshals data from the groundbreaking Diversity in Legal Education Project and argues that, in light of the fact that educational diversity remains the last non-remedial justification for affirmative action as a compelling state interest, jurists and lawmakers would be well served by relying upon faculty perspectives on education diversity rather than simply looking at numerical diversity among law students when making decisions regarding higher education admissions.³⁰

Finally, a number of articles in this symposium offer a sampling of new and captivating possibilities for engagement by eCRT scholars. Paul Gowder, in *Critical Race Science and Critical Race Philosophy of Science*, advances the hypothesis that race, as an observable phenomenon in the social world, calls out for a “critical race philosophy of science” or “critical race science studies,” and lays the foundation for such an endeavor, as well as its benefits for critical race empiricism, social science research, policy making, and other state practices.³¹ By blending narrative methodology with quantitative data analysis, Mario L. Barnes’s article, *Taking a Stand?: An Initial Assessment of the Social and Racial Effects of Recent Innovations in Self-Defense Laws*, presents a pioneering approach to investigating how so-called “stand your ground” laws differently affect whites, blacks, and members of other racial groups, with the goal of informing lawmakers about the potential racial consequences of adopting such laws.³² Borrowing cost benefit analysis methodology from the discipline of economics, Aya Gruber, in *When Theory Met Practice: Distributional Analysis in Critical Criminal Law Theorizing*, evaluates punitive law reform proposals to counter the all-too-common “punitive impulse” in criminal lawmaking.³³ In so doing, she proposes the adoption of a distributional method for progressive criminal law scholarship and demonstrates how it can enable scholars and lawmakers to see more clearly the racial and gender effects of legal change.

eCRT is fast becoming an important intellectual movement in legal academia and not a moment too soon. The current sociopolitical climate makes clear the necessity of this work, not simply as an academic matter, but as an important means of providing lawmakers with the data and analytical lens necessary to make sound policy decisions that address institutional structures of inequality and allow for meaningful racial equality. This interdisciplinary symposium provides a unique opportunity to explore empirical, doctrinal, and critical work in this dynamic, far-

30. Meera E. Deo, *Faculty Insights on Educational Diversity*, 83 FORDHAM L. REV. 3115 (2015).

31. Paul Gowder, *Critical Race Science and Critical Race Philosophy of Science*, 83 FORDHAM L. REV. 3155 (2015).

32. Mario L. Barnes, *Taking a Stand?: An Initial Assessment of the Social and Racial Effects of Recent Innovations in Self-Defense Laws*, 83 FORDHAM L. REV. 3179 (2015).

33. Aya Gruber, *When Theory Met Practice: Distributional Analysis in Critical Criminal Law Theorizing*, 83 FORDHAM L. REV. 3211 (2015).

reaching, and exciting field of scholarship. To be sure, this is only the beginning.