

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

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Abstract: The purpose of this paper is to critique the system of CLE using Critical Race Theory as an analytical lens in an effort to reveal possible reasons for the exclusion of bias and discrimination from CLE offerings in the legal profession.

A profession is characterized by individual preparation through a distinct pre-professional college curriculum, formal and informal learning required throughout working life, and the profession is regulated through a set of professional standards or codes, accreditation, and/or licensure (Queeney, 2000). These characteristics are predicated upon the belief that the profession's knowledge base is continually advancing and, to stay current, professionals such as attorneys must continue their education (Queeney, 2000). The need for continuing professional education (CPE) is often based on the desire to protect clients or society from ill-informed or poorly prepared professionals (van Loo & Rocco, 2006). 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. CPE has become a key strategy in delivering information with the intent of 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" (Weingand, 1999, p. 3). Both theory and practice surrounding CPE have been fragmented with programs being mandated seemingly at a whim rather than according to evidence of need. Effectiveness or producing a desired result is often used as the justification for a program without stating the criteria for evaluating effectiveness. Robertson, Umble, and Cervero (2003) found that CPE that is based on a needs assessment and is contextually relevant can produce outcomes such as improved knowledge, skills, and behavior. However these outcomes are context specific.

Members of the professions make up more than 25% of the workforce and are the primary decision makers for the major institutions and establishments of American society (Cervero, 1988). The special recognition given to members of the professions is a result of leadership roles derived from their technical knowledge and skills. The public has come to heavily rely on professionals to provide crucial services that are necessary to survive in today's global economy. Cervero (1988) maintains that because the public relies on professionals for crucial services, these professionals have a significant amount of control over the lives of people in our society.

CPE or as the legal profession calls it continuing legal education (CLE) helps to ensure quality of life for consumers of legal services in our society. CLE is mandated in 40 states. Among these 40 states, only 5 require coursework addressing bias and discrimination in the profession (Graber & Baca, 2004). The purpose of this paper is to critique the system of CLE using Critical Race Theory (CRT) as an analytical lens in an effort to reveal possible reasons for the exclusion of bias and discrimination from CLE offerings in the legal profession. The questions that guided this critique were: Why has the legal profession in most states chosen to

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exclude bias and discrimination from its mandated CLE offerings? In spite of statistics, which indicate that race is a significant issue in the legal system, why is race not addressed? How are race, discrimination, and bias addressed when included in CLE offerings? First we present an overview of CRT, then CLE and offerings on race, discrimination, and bias. This is followed by a critique of the CLE system using CRT. We close with our thoughts and suggestions for the future of CLE based on the analysis.

Critical Race Theory

Ladson-Billings and Tate (1995) first used CRT to theorize race to analyze school inequity. Then Ladson –Billings (1998) asked the question, “Just what is critical race theory and what is it doing in a nice field like education?” catching the attention of adult educators. In 1999, Peterson introduced CRT to the field of adult education informed by the work of Ladson-Billings (1998), Bell (1981), and Guinier (1998), observing “What is needed is a more thorough examination of racism in adult education” (p. 88). “Racism is any attitude, action, or institutional structure or any social policy that subordinates persons or groups because of their color. It is different from racial prejudice, hatred, or discrimination because it involves the *power* to carry out systematic discriminatory practices in a broad and continuing manner” (Sue, 2003, p. 31). Power is the foundation of racist structures and “*the ability to take life is the most effective form of power*” (Lenski, 1986, p. 243). Power becomes “identified with justice and the rule of right” (Lenski, 1986, p. 245) and is legitimized through legislation and the building of consensus in educational, religious, and social institutions (Rocco & Gallagher, 2004). “By manipulating the law and consensus, the powerful shift the foundation of their power from force (or might) to justice (or right)” (Rocco & Gallagher, 2004, p. 34). Legitimized power has the capacity to cause events and control resources (Clegg, 1989). In other words, legitimized power creates a system of oppression “which prevent[s] some people from learning,” from using effective interpersonal skills, from communicating with others, and interferes with the ability of others to listen (Young, 1990, p. 38). Oppression consists of processes that result in the replication of injustice in society (Young, 1990).

An analysis of the processes that replicate injustice and racism form the basis of CRT (Delgado & Stefanic, 2001). For instance, one of the key themes of CRT is that racism is ordinary and pervasive. The ordinariness of racism means that all those who hold power or privilege (Rocco & Gallagher, 2004) are racists and do not acknowledge their views or actions as racist but normal, typical, and part of the status quo. The status quo is further reinforced by the interest convergence of “white elites (materially) and working-class people (psychically)” (Delgado & Stefanic, 2001, p. 7) who work together by consensus to maintain the status quo. Interest convergence, as explained by critical race theorists, maintains that Whites are only willing to change the power differential when there is a clear benefit to the interests of Whites. The power held by the White elite results from their control of material resources and capital. Although the working class people do not share these resources, they derive psychic benefit from the existence of a subordinate racial group. The social construction of “race and races [which] are products of social thought and relations...[not] biological or genetic reality” (Delgado & Stefanic, 2001, p. 7) sustains a system of differential racialization. For instance, while African Americans are overrepresented in the penal system, Spanish speaking people are increasing in numbers because they too have been racialized and profiled by society. The third tenet is a critique of liberalism implying that liberalism focuses on deliberate, incremental change in the legal system and society while CRT demands radical, systemic change. Liberalism rejects the notion that traditions and social practices in and of themselves carry inherent value. Liberalism

argues that social practices and traditions must be constantly evaluated and adjusted for the benefit of society as a whole. Liberalism embraces that notion of universal dignity. As such, it argues that everyone should have access to the basic necessities of life (McGowan, 2007).

Continuing Legal Education

The American Bar Association's standing committee on CLE and the commission on racial and ethnic diversity in the profession of law have noted that bias in the workplace and in the administration of justice is a current issue in the profession (Graber & Baca, 2004). The committee noted that at least 22 state task forces have found bias in the legal profession to be a serious problem. The perception of bias in the legal system has served to undermine its effectiveness. Courts and judges must not only be fair but also cultivate the perception of fairness. The public trust and confidence in the legal profession and the criminal justice system has been seriously eroded. Thus, it is crucial that judges and lawyers are conscious of their behaviors and work to ensure that fairness and equal justice are never compromised (Graber & Baca, 2004). Nevertheless, most state bar associations do not address racial bias in their CLE. Consider the following statistics that undeniably speak to the connection between race and the legal system:

- Half of all the prisoners in the U.S. (49.4% in 1996) are African American, although African Americans represent only 12% of the U.S. population (Walker, Sphon, & Delone, 2000).
- The incarceration rate for African American men is seven times the rate for White men (Walker et al., 2000).
- About 40% of the people currently on death row and 53% of all the people executed since 1930 are African American (Walker et al., 2000).
- African American and Hispanic jurors acquit more than White jurors (Markowitz & Jones-Brown, 2000).
- African American and Hispanic offenders receive harsher treatment than White offenders at every step of the justice system (United States Justice Department, 2000).
- 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 (Walker et al., 2000).

Only 5 of the 40 states that mandate CLE require coursework in the elimination of bias in the profession as part of their ethics and professionalism requirements. These states include California, Minnesota, Oregon, Washington, and West Virginia. California requires 25 hours of CLE every 36 months with at least 1 hour related to the elimination of bias in the legal profession based on but not limited to sex, color, race, religion, ancestry, national origin, blindness or physical disability, age, and sexual orientation. Minnesota mandates 45 hours of CLE every 3 years with at least 2 hours related to the elimination of bias. Oregon mandates 45 hours of CLE every 3 years with at least 9 hours devoted to professional responsibility. Professional responsibility is defined to include legal ethics and professionalism and educational activities related to the role of lawyers concerning racial and ethnic issues, gender fairness, disability issues, and access to justice. Washington mandates 45 CLE hours every 3 years with a minimum of 6 hours related to ethics. Ethics is broadly defined to include professionalism and professional responsibility, substance abuse, anti-bias, and diversity training. West Virginia mandates 24 hours of CLE each year with at least 3 hours in legal ethics, law enforcement management, substance abuse, or the elimination of bias in the legal profession (Graber & Baca,

2004). 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 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. Given that the state bar controls the contents of mandated CLE, a state's bar has the power to at least begin to raise awareness of the reality of race in the legal system through the inclusion of the topic in its requirements.

A Critical Race Theory Analysis

Consider the themes of Critical Race Theory and how they play out with regards to CLE: a) race and racism are ordinary, b) interest convergence, c) differential racialization, and d) liberalism. 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. The state bars, along with most people, do not see the "injustices" now occurring in the criminal justice systems as problematic. Most people rationalize that those who are arrested and prosecuted deserve it – they are criminals who deserve their fate and race has very little (if anything) to do with their fate. As such, from the perspective of CLE program planners, there is no problematic issue here to address through CLE. This may explain the absence of a sense of urgency to address race in CLE and why the issue of bias is so broadly defined in those 5 states that mandate bias awareness in CLE.

Interest convergence would suggest 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? U.S. economy is primarily service sector with legal services accounting for a significant percentage provided to the market. The issue of interest convergence and the criminal justice system is probed by posing the following questions:

1. Does morality-based legislation strengthen solidarity for White believers and religious fanatics? Does it help draw lines between us and them – saved and unsaved?
2. Do the enormous profits in the privatized prison-building industry provide a partial reason?
3. Do felony convictions and disenfranchisement benefit the Republican Party by taking Black voters off the rolls?
4. 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? (Delgado & Stefanic, 2005, p. 14)

In posing these questions, Delgado and Stefanic (2005) suggested that racism benefits the existing White power structure both economically and psychologically. Thus, there is no motivation to seriously address the issue of race within the legal system through CLE because to do so would threaten the interest of the White members of the bar.

CRT maintains that society has historically treated the races (Black, Native American, Hispanics, Asians, 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 that is frequently dismissive and condescending towards the client, offender, accused. This is why certain plea bargains are unacceptable while others are acceptable. Thus, the White members of the bar have no real motivation to address this issue because such differential treatment of people of color through the criminal justice system serves as a means to exact desired behavior.

CRT questions the liberalism that would presumably, on its face, be a friend in the fight for racial justice. CRT is 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 (Delgado & Stefanic, 2005). 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 and control it and treats it as if it is a benign and benevolent actor – it 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 and the use of them to effectively address the issue. Thus, CLE programs developed with “liberal” support would address existing structures and their needed rehabilitative changes to improve their performance. Given the first CRT theme that racism is pervasive and ordinary, such an approach would not result in any real change.

In Summary

Liberalism has raised the dilemma that exists between its stated goal of racial equality and its reluctance to confront white privilege (Taylor, 1999). “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” (Ladson-Billings, 1998, p. 27). Crenshaw (1988) suggests “the development of a distinct political strategy informed by the actual conditions of black people” (p. 1387). 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 (Crenshaw, 1988). To do so, race, racism, and the historic and social context in which they operate should always be at the center of the debate. Adult 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, CRT 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.

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