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CRITICAL RACE THEORY IN THREE ACTS: RACIAL
PROFILING, AFFIRMATIVE ACTION, AND THE DIVERSITY
VISA LOTTERY

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Abstract

The usual debates surrounding multiculturalism pit individual rights against group grievances in a variety of contexts including racial profiling, affirmative action, and the diversity visa lottery—often with seemingly contradictory results. Liberals typically favor affirmative action but decry both racial profiling and the diversity visa lottery, while many conservatives hold the opposite view. Critical race theory provides a unique alternative to stock liberal and conservative arguments, allowing one to draw meaningful and persuasive distinctions among these seminal issues surrounding law enforcement, education, and immigration policy.

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I. INTRODUCTION: RACIAL PROFILING—LAW ENFORCEMENT, EDUCATION, AND IMMIGRATION

A. *Racial Profiling Pre and Post-9/11*

In March of 2000, I wrote a short essay entitled *Racial Profiling: "Driving While Mexican" and Affirmative Action* for a talk I gave at the University of Michigan School of Law. The piece decried the lack of nuance in the arguments raised by both the right and left concerning the issue of racial profiling.¹ Little did I know that just a year and a half after that talk, the terrorist attacks of September 11, 2001 would breathe new life into the debate, only this time scrutinizing those of Arab and Muslim descent—especially non-U.S. citizens.² In the year since 9-11, I have thought quite a bit about two of the three panel topics for this year's symposium, racial profiling and immigration policy,³ but I have paid little mind to the third, affirmative action.

B. *Critiquing Three Types of Racial Profiling Through the Lens of Critical Race Theory*

And so, today, I would like to discuss all three—the use of race in law enforcement, affirmative action in higher education, and the diversity lottery in immigration law—as aspects of a single, broader concept called *racial profiling*. This concept encompasses the issue of when race should be used as a factor in determining public policy. While we typically associate *racial profiling* with the narrow

¹ See Victor C. Romero, *Racial Profiling: "Driving While Mexican" and Affirmative Action*, 6 MICH. J. RACE & L. 195, 202 (2000) [hereinafter Romero, *Racial Profiling*] (noting that the difference between liberal and conservative opinion concerning race is not whether to consider race as a factor, but rather, when to consider race).

² See, e.g., David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 957 (2002); Victor C. Romero, *Proxies for Loyalty in Constitutional Immigration Law: Citizenship and Race After September 11*, DE PAUL L. REV. (forthcoming 2003) [hereinafter Romero, *Proxies*]; Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575–76 (2002); Adrienne Katherine Wing, *Reno v. American-Arab Anti-Discrimination Committee: A Critical Race Perspective*, 31 COLUM. HUM. RTS. L. REV. 561 (2000); Michael J. Whidden, Note, *Unequal Justice: Arabs in America and United States Antiterrorism Legislation*, 69 FORDHAM L. REV. 2825 (2001); see also Natsu Taylor Saito, *Symbolism Under Siege: Japanese American Redress and the "Racing" of Arab Americans as "Terrorists"*, 8 ASIAN L.J. 1, 11–17 (2001) (characterizing the experiences of both citizens and non-citizens of Arab and Muslim descent and comparing them to that of Japanese Americans).

³ See, e.g., Victor C. Romero, *Decoupling Terrorist from Immigrant: An Enhanced Role for the Federal Courts Post 9-11*, J. GENDER, RACE & JUST. (forthcoming 2003).

circumstance of motoring stops, racial profiling is behind public policy discourse on affirmative action and immigration policy as well. After examining the contours of *racial profiling* in each of these three areas, I assert that critical race theory provides a principled alternative to stock liberal and conservative perspectives on the issues, which often lead to conflicting results in similar cases.

C. *Laying the Foundation for the Critique: Defining Liberal and Conservative*

At the outset, setting forth working definitions of *liberal* and *conservative* (though admittedly simplistic) might be useful. By *liberal*, I refer to those who believe that individuals should be free to pursue their own happiness as long as they do no harm to others. Therefore, if one's activity adversely affects another, a liberal would permit government intervention to correct that harm.⁴ While a *conservative* might agree with the goal of maximizing individual freedom, she would be loathe to assign that task to the government. Instead, her faith rests in *laissez-faire* approaches to wealth maximization and the pursuit of happiness, seeking government enforcement only to protect against clear attacks on that pursuit by criminal elements in society in turn.⁵

With that, we are ready to examine profiling in law enforcement, university admissions, and immigration policy.⁶

⁴ See, e.g., THE OXFORD COMPANION TO PHILOSOPHY 483 (Ted Honderich ed., 1995) (“[L]iberalism is distinguished by the importance it attaches to the civil and political[] rights of individuals. Liberals demand a substantial realm of personal[] freedom . . . which the state should not intrude upon, except to protect others from harm.”); JOHN STUART MILL, ON LIBERTY 13 (The Liberal Arts Press, Inc. 1956) (1859) (“The only part of the conduct of anyone for which he is amenable to society is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.”); JEREMY WALDRON, LIBERAL RIGHTS, COLLECTED PAPERS 1981–1991 36 (1993) (explaining that “liberals are committed to a conception of freedom and of respect for the capacities and the agency of individual men and women”).

⁵ See, e.g., THE OXFORD COMPANION TO PHILOSOPHY, *supra* note 4, at 156 (defining conservatism as an approach that “seeks to preserve the status quo rather than engage in wholesale revolution or overthrow existing institutions”); ANGELA D. DILLARD, GUESS WHO’S COMING TO DINNER NOW? 77 (2001) (describing an effort among so-called multicultural conservatives to recover “older political sensibility[ies]” that focused on assimilation and integration by stressing patriotism, loyalty, and “American” values); see also THE AMERICAN CONSERVATIVE UNION, STATEMENT OF PRINCIPLES (commenting that under Conservative ideology, capitalism and political conservatism are compatible concepts), available at <http://www.conservative.org/acucontents/about/principles.shtml> (last visited Nov. 22, 2002).

⁶ For more on the author’s views concerning racial profiling in the motoring and admissions contexts, see Romero, *Racial Profiling*, *supra* note 1, at 196–201 (describing the dichotomy between liberal and conservative sentiment as the topic turns from racial profiling to affirmative action).

II. ACT ONE: RACIAL AND ETHNIC PROFILING IN LAW ENFORCEMENT

Whether one favors the pejorative *Driving While Black* (or Brown) or *Flying While Arab* (or Muslim), the stock liberal argument against racial and ethnic profiling in the law enforcement context is that stereotypical assumptions—that people of color are more apt to commit crime—violate the liberal tenet that each person should be treated as an individual, not as a member of a group.⁷ Every innocent individual of color that is stopped on the highway or frisked at the airport is stigmatized by society's suspicion attending a police search.⁸

Professor David Harris shares the story of Larry Sykes, the head of the Board of Education in Toledo, Ohio, bank vice-president, and respected civic leader, who was pulled over for no articulated reason on his drive home from an economic development conference in Cleveland.⁹ Despite his having been dressed in a crisp business suit and having presented his license, registration, and insurance papers, all of which were in order, Mr. Sykes was told to get out of his car and the officer began frisking him.¹⁰ When Mr. Sykes asked him for an explanation, the officer said, “[y]ou can’t be too careful. You might have a gun.”¹¹ When Mr. Sykes asked why he would have a gun, the officer replied, “Look, I’m just trying to get home tonight,”¹² implying that Mr. Sykes might pull a gun out and shoot him. Embarrassment turned to humiliation when, realizing that the over six-foot tall Mr. Sykes would not fit in the patrol car, the officer ordered Mr. Sykes to stand next to the car with his legs spread and arms on the roof, palms down.¹³ Just then, Mr. Sykes’s conference colleagues drove by in a chartered bus and recognized him, leading some to comment that Mr. Sykes must have done something wrong for the police to have detained him.¹⁴

Targeting individuals of color perpetuates the stereotype that minorities are more likely than whites to commit crime. Liberals would argue that even if this were true—a dubious proposition itself

⁷ See *id.* at 198.

⁸ See DAVID A. HARRIS, PROFILES IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK 94–99 (2002) (hereinafter HARRIS, PROFILES) (commenting on the personal costs that race-prompted actions have on the individuals).

⁹ See *id.* at 91–92.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 93.

given enforcement biases¹⁵—it would not excuse applying the stereotype to a particular individual, who may very well be innocent, as Mr. Sykes’s story illustrates all too vividly.

A conservative critique, on the other hand, would emphasize the correlation between race and crime, making it the professional responsibility of law enforcement to use this along with many other factors to determine one’s propensity for crime.¹⁶ Writer Dinesh D’Souza might call such a calculus “*rational* discrimination”¹⁷ because, while individual profiling is based on generalized statistics, there is a sufficient enough nexus between race and criminal behavior that to ignore the issue would be foolhardy.¹⁸

Applied to Mr. Sykes’s situation, the argument might suggest that Mr. Sykes and his ilk should not be offended, since the officer was doing his job based on a reasonable assumption that race (and perhaps in Mr. Sykes’s case, his imposing height and formal dress) suggested that he might fit a drug kingpin profile. As Border Patrol Agent Juan Lopez commented when asked about whether he was offended by co-workers mistaking him for an undocumented immigrant or drug courier: “Do I get offended? . . . No, I don’t. Th[ese] guys are doing their job.”¹⁹ Conservative ideology supports this statistics-based approach to government intervention when an identifiable group poses a threat to law-abiding citizens.

¹⁵ For instance, if our society cares so much about winning the war on drugs, why do we not police the dormitories of privileged private high schools and universities in addition to patrolling the streets of the urban ghetto? For more on the racial biases inherent in profiling, see Tim Wise, *We Show Our True Colors in Wake of Tragedy*, ST. LOUIS POST-DISPATCH, Mar. 13, 2001 (“[T]he FBI insists there is not “profile” of a school shooter. Come again? White boy after white boy uses classmates for target practice, and yet there is no profile? Imagine if all these killers had been black: Would we hesitate to put a racial label on the perpetrators? Doubtful.”), available at <http://www.commondreams.org/views01/0313-02.htm>, and see Romero, *Proxies*, *supra* note 2.

[G]iven the importance of profiling in the war against terrorism, shouldn’t we advocate profiles in other law enforcement contexts, which would require us to strictly scrutinize white, rural schoolchildren in the school shooting (a.k.a. “Columbine”) context; rich, white males for white collar crimes such as embezzling; and disenfranchised white male spies like Aldrich Ames in the counterespionage game? To the extent that disloyalty encompasses a general disrespect for our criminal laws, racial profiling of whites should occur if the statistics suggest links between ethnicity and specific crimes.

Id.

¹⁶ See DINESH D’SOUZA, *THE END OF RACISM: PRINCIPLES FOR A MULTIRACIAL SOCIETY* 260–61 (1995) (“[E]veryone knows that young blacks are convicted of a high percentage of violent crimes, and since most Americans are highly risk-averse to crime, they have good reason to take precautions and exercise prudence.”).

¹⁷ *Id.* at 259.

¹⁸ *Id.* at 260–61.

¹⁹ Jim Yardley, *Some Texans Say Border Patrol Singles Out Too Many Blameless Hispanics*, N.Y. TIMES, Jan. 26, 2000, at A17.

In sum, racial profiling in law enforcement pits the liberal's concern for preserving human individuality and dignity against the conservative's belief that statistics provide rational bases for targeted law enforcement to serve the good of society as a whole.²⁰

III. ACT TWO: AFFIRMATIVE ACTION AS RACIAL PROFILING

Interestingly, our hypothetical liberal and conservative switch positions on the use of racial profiling in the context of university admissions programs. Affirmative action, in the context of university admissions programs, is the system of using racial minority status as a positive factor in determining which applicant to accept.²¹ The act of giving extra points to minority applicants in order to remedy widespread societal discrimination is the crux of the liberal argument favoring this policy. For instance, because standardized tests are skewed in favor of white students, failure to compensate for that disparity perpetuates racial privilege.²²

Conservatives discredit such policies by alleging that they amount to reverse racism and that they lead to the disproportionate denial of more qualified white students in favor of unqualified or less qualified people of color.²³ Anti-affirmative action advocates assert

²⁰ See RANDALL KENNEDY, *RACE, CRIME AND THE LAW* 10, 19–20 (1997). Professor Randall Kennedy specifically argues that African-Americans should welcome strict enforcement in their communities because most criminals who plague such areas are themselves African-American. See *id.* at 19–20.

[T]he principal injury suffered by African-Americans in relation to criminal matters is not overenforcement but underenforcement of the laws. Whereas mistreatment of suspects, defendants, and criminals has often been used as an instrument of racial oppression, more burdensome now in the day-to-day lives of African-Americans are private, violent criminals (typically black) who attack those most vulnerable without regard to racial identity.

Id.

²¹ See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 314 (1978) (holding that while quotas based solely on race or ethnicity are unconstitutional, an admissions program may consider racial and ethnic diversity as a positive factor); see also WEBSTER'S NEW WORLD DICTIONARY 22 (3d Coll. ed. 1994) (defining affirmative action as "a policy or program for correcting the effects of discrimination in the employment or education of members of certain groups, as women, blacks, etc.").

²² Indeed, "one study shows that white students, *regardless of their socioeconomic background*, perform better on the LSAT than African-, Asian-, Latino-, and Native-Americans of any socioeconomic background except for upper income Asian-Americans." Victor C. Romero, *Broadening Our World: Citizens and Immigrants of Color in America*, 27 CAP. U. L. REV. 13, 21 (1998) (citing Chris Klein, *Law School Diversity Hinges on Race Policy but Study Says that Bar Pass Rates Among Races are Close*, NAT'L L.J., Jan. 27, 1997, at A1).

²³ See Ann C. McGinley, *The Emerging Cronyism Defense and Affirmative Action: A Critical Perspective on the Distinction Between Colorblind and Race-Conscious Decision Making Under Title VII*, 39 ARIZ. L. REV. 1003, 1029 (1997) (recognizing the common belief that under-qualified minorities take the jobs of more qualified whites due to affirmative

that students should be judged on their individual merits, not on their racial group affiliations.²⁴ Thus, government has no particularly strong incentive in creating a policy that sacrifices individual effort in favor of appeasing minority group interests.

In comparing racial profiling in the context of motoring stops and affirmative action, it is interesting to note the position switch taken by our hypothetical liberal and conservative protagonists. Liberals eschew group identification as relevant in deciding whether to stop a motorist, while embracing the salience of race in correcting past societal discrimination. Conservatives, though, discount individual complaints by those racially profiled by police but welcome the arguments of white graduate students like Allan Bakke²⁵ and Cheryl Hopwood,²⁶ who claim to have experienced discrimination due to affirmative action programs in educational settings.²⁷

IV. ACT THREE: THE DIVERSITY LOTTERY IN IMMIGRATION POLICY

Just as our hypothetical liberal's and conservative's opinions switch sides when the diversity debate shifts from law enforcement profiling to affirmative action, so too do their views on the Diversity Visa Immigration Lottery.²⁸ Conservatives generally favor the lottery,²⁹ while liberals do not.³⁰

action programs); *see also* Jody David Armour, *Hype and Reality in affirmative Action*, 68 U. COLO. L. REV. 1173, 1176 (including, as a motive for conservative denial of continued racial disadvantage of minorities, the desire to identify affirmative action as an unreasonable preference of under qualified minorities to qualified whites).

²⁴ Jodi Miller, Note, *Affirmative Action: "Democracy in Free Fall": The Use of Ballot Initiatives to Dismantle State-Sponsored Affirmative Action Programs*, 1999 ANN. SURV. AM. L. 1, 20 (1999) (noting that the underlying theory behind affirmative action undermines the belief that one should be evaluated on one's merits).

²⁵ *Bakke*, 438 U.S. 265; *see* Akhil Reed Amar & Neal Kumar Katyal, *Bakke's Fate*, 43 UCLA L. REV. 1745, 1750–54 (1996). The latest addition to the affirmative action debate is the opinion by the Sixth Circuit, approving the University of Michigan School of Law's affirmative action policy. *See Grutter v. Bollinger*, 288 F.3d 732 (6th Cir.), *cert. granted*, 123 S. Ct. 617 (2002).

²⁶ *Hopwood v. Texas*, 78 F.3d 932 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996).

²⁷ *See* Amar & Katyal, *supra* note 25, at 1751 (discussing Justice Powell's disavowal of minority quotas that exclude non-minority students from competing for specific admissions slots); Linda F. Wightman, *The Role of Standardized Admission Tests in the Debate About Merit, Academic Standards, and Affirmative Action*, 6 PSYCHOL. PUB. POL. & L. 90, 91–94 (2000) (explaining that the white plaintiffs in *Bakke* and *Hopwood* had been denied admission to professional schools while minority individuals with lower test scores were admitted under affirmative action policies).

²⁸ To review two thoughtful pieces written by Steve Legomsky, *see* STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 238–41 (3d ed. 2002) [hereinafter LEGOMSKY, REFUGEE LAW] and Stephen H. Legomsky, *Immigration, Equality and Diversity*, 31 COLUM. J. TRANSNAT'L L. 319 329–30 (1993) [hereinafter Legomsky, *Diversity*].

²⁹ *See* Frank H. Wu, *The Limits of Borders: A Moderate Proposal for Immigration Reform*, 7

The diversity visa lottery allows for the allotment of thousands of visas per year to persons from nations that do not send many immigrants to the United States. As the term *lottery* implies, the names of prospective immigrants are selected randomly from among the applicants. This process is unlike other forms of immigration that require that one demonstrate requisite family or employment ties to the United States.³¹ In furtherance of this criterion, lottery applicants submit a one-page form, which provides the most basic identification information.³² Like those who try their luck at Las Vegas casinos, very few of these visa applicants prevail. Of the 8.7 million applications filed in 2001 and the 13 million in 2000,³³ only about 50,000 were selected for diversity visas.³⁴

Why do diversity visas exist? The other avenues of immigration—through familial relations, employment opportunities, and refugee

STAN. L. & POL'Y REV. 35, 53 (1996) (describing the emphasis conservatives put on the race, cultural identity and political power of immigrants when determining who should be allowed to immigrate).

³⁰ See *id.* It is more difficult to assess the diversity lottery from conservative and liberal viewpoints after September 11, 2001 because so many people from both political persuasions are either restrictionist or expansionist on the issue of immigration. For example, one conservative pundit, Brenda Walker of the restrictionist group Project USA, wrote in the *Washington Times* that the diversity lottery leads to the importation of many alien and divisive cultures in the name of multiculturalism, forgetting, of course, that the prime beneficiaries of the program are Europeans. Brenda Walker, *Diversity's Deceptions*, WASH. TIMES, Sept. 5, 2002, at A19 ("There is surely no more ill-conceived program in all of Washington than the visa lottery . . . Presumably based on the highly questionable idea that all cultures are equal, the policy opens our national door to 'underrepresented' nations to increase America's diversity still more."), available at 2002 WL 2917588. My interpretation of Ms. Walker's position is that she would favor the program if it was restricted to certain white Europeans only. See PETER BRIMELOW, ALIEN NATION 208 (1996). For useful critiques of Brimelow's book, see Hiroshi Motomura, *Whose Alien Nation?: Two Models of Constitutional Immigration Law*, 94 MICH. L. REV. 1927 (1996); Kevin R. Johnson, *Fear of an "Alien Nation": Race, Immigration, and Immigrants*, 7 STAN. L. & POL'Y REV. 111 (1996). Given this background, rather than focusing on the desirability of diversity visas post-9/11, I concentrate instead on the lottery as a specific form of racial profiling, which allows me to compare the lottery with racial profiling in the contexts of motoring and admissions.

³¹ See 8 U.S.C. §§ 1151(a), 1153(a)–1153(b) (2000); see also Immigrant Petitions 8 C.F.R. § 204.1–204.5 (2002) (describing the procedures required to file for family-sponsored or employment-sponsored petitions).

³² See Diversity Immigrants, 22 C.F.R. § 42.33(b)(1)–(b)(4) (2002) (describing the requirements of the petition).

³³ See George Carenbauer, *Reform the Troubled Diversity Visa Lottery* (reporting that the Diversity Visa Immigration Lottery accounts for seven percent of all legal immigration, and of the millions that apply, only 50,000 are selected for permanent residence), at <http://www.ilw.com/cgi-shl/pr.pl>.

³⁴ See 8 U.S.C. § 1151(e) (2000) (setting the original number of chosen immigrants for each year at 55,000). While the original figure was about 55,000, this number was effectively reduced to approximately 50,000 by the Nicaraguan Adjustment and Central American Relief Act. Nicaraguan Adjustment and Central American Relief Act, Pub. L. 105-100, § 203(d), 111 Stat. 2193, 2199 (1997).

status—reflect values that our country has long held dear. Underlying these immigration categories are the virtues of family reunification, economic contribution, and protection from persecution.³⁵ But what value is preserved through the diversity lottery? For our hypothetical conservative, the diversity visa might be seen as a way of correcting the imbalance wrought by the large influx of Asian and Latin-American immigrants since the mid 1960s. In 1965 Congress abolished the national origins quota system that had pegged new immigration from a certain country to the number of United States residents of the same heritage.³⁶ Because these quotas disproportionately benefited Europeans, shelving the system adversely impacted their post-1965 immigration prospects, leading instead to an overwhelming growth in Asian and Latin-American family-based immigration.³⁷ Thus, the diversity lottery modestly offsets this new influx by allocating many of the 50,000 annual visas to European nations with low immigration rates.³⁸

³⁵ See Legomsky, *Diversity*, *supra* note 28, at 323, 333 (explaining that when the demand for visas exceed the total number allotted, “certain priorities must guide the nation”—familial bonds and job skills strengthen a nation, while, in contrast, admitting refugees saves individuals from persecution).

³⁶ See Immigration and Nationality Act, Pub. L. No. 89-236 sec. 2, § 202(a), 79 Stat. 911 (1965) (repealed 2000); see also S. REP. NO. 89-748, at 3328–30 (1965) (expressing that the “principal purpose” and “primary objective” of the bill is to abolish the national origins quota system and to replace it with a new system for the allocation of immigrant visas).

³⁷ See Legomsky, *Diversity supra* note 28, at 332, 333 (recognizing that “prioritizing family unity tends today to produce high numbers of Asian and Hispanic immigrants” which in turn lowers the previously high percentage of European immigrants). A brief historical note is appropriate here: In early American immigration policy many groups were excluded from entry because of their race or national origin. This began with the limitations on southern/eastern Europeans and later proceeded to Asians, who were the most prominent undesirables. These limitations were implemented through the specific mention of certain groups (such as the Chinese Exclusion Act) or through the use of race-neutral, but racially discriminatory quota systems (such as the National Origins Quota System). *Id.* at 326–27. When the National Origins Quota System was abandoned in 1965, a large influx of Asians and Latinos began to immigrate. From then on, these groups benefited from the family-based immigration laws to initiate so-called “chain migration,” which is the successive immigration of generations of families from the same country. *Id.* at 28–29. To this day, most family-based immigration comes from Asia and Latin America. See *id.* at 328. Even before the diversity lottery was created in 1990, Congress had long allocated visas for certain groups to offset the influx of Asians and Latinos. Certain immigrant visas, for example, were reserved for the Irish. In 1990, Congress codified this practice through the diversity lottery program, allocating a fixed number of visas per year to those non-citizens from low-volume sending states. It has been touted as a *diversity lottery* because it diversified the immigrant stream by offsetting Asian and Latino immigration with Europeans and Africans. For more on diversity immigration see LEGOMSKY, *REFUGEE LAW*, *supra* note 28, at 235–41, and see T. ALEXANDER ALEINIKOFF, DAVID A. MARTIN & HIROSHI MOTOMURA, *IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY* 290–92 (4th ed. 1998).

³⁸ See DEBRA L. DELAET, *U.S. IMMIGRATION POLICY IN AN AGE OF RIGHTS* 94 (noting that

Again, we see the conservative co-opt that liberal's affirmative action argument, claiming that Europeans without the requisite stateside ties require such a program so that they can enter the United States and thereby diversify the stream of mostly Asian and Latino immigrants.³⁹ In response, we see the liberal adopt the conservative position on affirmative action: Each person is an individual—or, as Professor Stephen Legomsky puts it, “[c]ountries don’t immigrate. People do.”⁴⁰

V. WHAT A CRITICAL RACE THEORY PERSPECTIVE BRINGS TO THE ANALYSIS

How might one make sense of these seemingly contradictory positions held by our hypothetical liberal and conservative in the three policy arenas previously discussed? On the one hand, the liberal asserts individuality over group characteristics in the law enforcement and immigration contexts (which the conservative eschews), while favoring the group over the individual in the affirmative action debate (which the conservative rejects).

In my view, Critical Race Theory (CRT) provides a principled basis for navigating these difficult policy choices. In their recent book, *Crossroads, Directions and a New Critical Race Theory*, Professors Frank Valdes, Jerome Culp, and Angela Harris identify three mainstream myths that CRT challenges. First, CRT questions whether color-blind policies will ever lead to an elimination of racism.⁴¹ In the now famous words of Justice Blackmun in his dissenting opinion in the *Bakke* case, “[i]n order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must

“over 25,000 of a total of approximately 34,000 diversity visas were granted to individuals from Europe). For the fiscal year of 2003, one-third of the diversity visas were allotted to European natives. See U.S. DEPT OF STATE, RESULTS OF THE DIVERSITY IMMIGRANT VISA LOTTERY (DV-20030) (June 18, 2002), <http://www.state.gov/r/pa/prs/ps/2002/11248.htm> (last visited Feb. 22, 2003).

³⁹ See Legomsky, *Diversity*, *supra* note 28, at 333 (“The position is that a diversity program is just affirmative action for Europeans, a remedy for past discrimination.”); Kevin R. Johnson, *Race and the Immigration Laws: The Need for Critical Inquiry*, in *CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY* 187, 193 (Francisco Valdes et al. eds., 2002) [hereinafter Johnson, *Critical Inquiry*] (“In the Immigration Act of 1990, Congress responded to the shift in the racial demographics of immigration after 1965 by creating a ‘diversity’ visa program that operates as an affirmative-action program for white immigrants.”).

⁴⁰ Legomsky, *Diversity*, *supra* note 28, at 334.

⁴¹ Valdes et al., *Battles Waged, Won, and Lost: Critical Race Theory at the Turn of the Millennium*, in *CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY* 1 (Francisco Valdes et al. eds., 2002).

treat them differently.”⁴²

Second, CRT rejects the idea that racism is perpetuated today by extremist individuals and theorizes instead that societal systems are to blame for the continuation of racism. As the authors put it, “CRT describe[s] and critique[s] not a world of bad actors, wronged victims, and innocent bystanders, but a world in which all of us are more or less complicit in sociolegal webs of domination and subordination.”⁴³

Third, CRT challenges the notion that one can combat racism without simultaneously considering other forms of oppression, such as sexism, homophobia, and classism.⁴⁴ A critical race approach is therefore multidimensional and works to eliminate discrimination and subordination in its various forms.⁴⁵

How would CRT analyze racial profiling within the three dimensions I have identified? Like the liberal and unlike the conservative, CRT would favor affirmative action but reject race-based law enforcement and the diversity lottery. These similar results are achieved, however, for different reasons. Rather than relying on flexible notions of liberal individualism or group experience—which we have seen, may be co-opted by conservatives in other contexts—based on the three tenets described earlier critical race theorists embrace policies that acknowledge the relevance of race-based remedies, the institutional and unconscious nature of American racism, and the need to simultaneously consider other forms of discrimination in fixing a remedy.

Hence, critical race theorists would favor affirmative action because it recognizes that the current so-called merit system of admissions to institutions of higher education disproportionately discriminates against people of color. Further, without a conscious consideration of how racial groups are affected, such discrimination will continue unabated despite the surface appearance of *neutral* standards. Such theorists would also believe that affirmative action policies should apply to challenge the sexism, homophobia, and classism that continue to infect our society.

In contrast, by preserving the status quo, racial profiling and the diversity lottery perpetuate white supremacy.⁴⁶ Racial profiling in

⁴² Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 407 (1978) (Blackmun, J., dissenting).

⁴³ Valdes et al., *supra* note 41, at 2.

⁴⁴ *Id.*

⁴⁵ *See id.*

⁴⁶ *See, e.g.,* Johnson, *Critical Inquiry*, *supra* note 39, at 192 (explaining that racially based

law enforcement disproportionately targets people of color for arrest and conviction. This results in one third of all African-American males being under some form of criminal justice supervision.⁴⁷ Similarly, the diversity lottery increases the number of Europeans in the United States, thereby adding to the privileged racial class in a concrete, numerical sense, and it reinforces the majority western culture.⁴⁸

In closing, I believe that critical race theorists⁴⁹ help us carefully explore questions of racial profiling in a variety of contexts, adding principle and substance to what often appear to be paradigm shifts of convenience espoused by theorists on the left and right. Like other outsiders, “race crits”⁵⁰ challenge undeserved privileges enjoyed by the few in an effort to uphold an equality principle enshrined in a Constitution⁵¹ that, in theory, should apply to the many.

immigration laws reinforce the “subordination” of minority groups and maintain white privilege in the United States).

⁴⁷ See Sandra Bass, *Policing Space, Policing Race: Social Control Imperatives and Police Discretionary Decisions*, 28 SOC. JUST. 156, 166 (2001) (attributing this large disparity to the effect of the war on drugs); see also FLOYD D. WEATHERSPOON, *AFRICAN-AMERICAN MALES AND THE LAW: CASES AND MATERIALS* 232 (1998) (expressing concerns over the disproportionate impact of the “war on drugs” on the black community).

⁴⁸ It could be argued that the diversity lottery shatters the myth that non-citizens are either yellow (Asian) or brown (Latino), and not white (European) or black (African). See, e.g., Natsu Taylor Saito, *Alien and Non-Alien Alike: Citizenship, “Foreignness,” and Racial Hierarchy in American Law*, 76 OR. L. REV. 261 (1997). However, like the co-option of *diversity* by conservatives to justify a lottery that intends Europeans to be its primary beneficiary, one has to question whether such an argument truly subscribes to an anti-subordination principle that would lead to the betterment of non-United States citizens vis-à-vis United States citizens.

⁴⁹ For more on CRT, see RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* (2001); *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. 2000).

⁵⁰ In the literature, “race crits” is a term that refers to critical race theorists. See, e.g., Harold A. McDougall, *For Critical Race Practitioners: Race, Racism and American Law (4th Ed.)* By Derrick A. Bell, Jr., 46 HOW. L.J. 1, 11 (2002) (using the term “race crits” to mean “critical race theorists”); Lewis D. Solomon, *Symposium: Defining the Corporate Constituency: Humanistic Economics: A New Model for the Corporate Constituency Debate*, 59 U. CIN. L. REV. 321, 330 (1990) (identifying “crits” and proponents of the critical legal studies movement).

⁵¹ The equal protection clause of the Fourteenth Amendment provides that “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST., amend. XIV, § 1. The Supreme Court has held that the Fifth Amendment’s Due Process Clause ensures that the federal government will observe the equal protection principle described in the Fourteenth Amendment. See *Bolling v. Sharpe*, 347 U.S. 497 498–99 (1954) (ruling that segregated schools in the District of Columbia were in violation of Equal Protection Clause guarantees).