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Black And White (Book Review)

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Book Review

Black And White

CRITICAL RACE THEORY: THE CUTTING EDGE. Edited By Richard Delgado.[†] Philadelphia: Temple University Press, 1995. Pp. xvi, 592. $59.95 cloth; $24.95 paper.

CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT. Edited By Kimberlé Crenshaw,[††] Neil Gotanda,[†††] Gary Peller,[††††] and Kendall Thomas.[†††††] New York: The New Press, 1995. Pp. xxxii, 494. $60.00 cloth.

Reviewed by Anthony V. Alfieri[††††††]

"SO MANY DREAMS DEAD."[1]

INTRODUCTION

Critical Race Theory dreams in black and white. No rhapsody of color, only charred history and pale hope. Yet the dreams stamp hard,

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1. YUSEF KOMUNYAKAA, *More Girl Than Boy*, *in* NEON VERNACULAR 62 (1993).

inspiring a jurisprudential movement of diverse scholars and earning an uneasy place in the postwar scholarship of the American legal academy. Having waged both theoretical and practical battles to gain that place, Critical Race theorists are loath to surrender it, a tribute of remembrance to the "barbaric century"[2] of their shared racial oppression. Nor should they yield. Without the pain of memory, there is no struggle. And without struggle, there is no progress.

In this Essay, I consider the progress of Critical Race Theory ("CRT") symbolized by two inaugural collections of accumulated movement scholarship: *Critical Race Theory: The Cutting Edge*[3] and *Critical Race Theory: The Key Writings that Formed the Movement.*[4] Both collections represent important, indeed path-breaking work in American law. Parsing works of this maguitude—together the collections comprise some 77 articles and 1,075 pages—poses uncommon challenges. Chief among these is the summons of inclusion. The articles represent a wide range of scholarship that spans doctrinal, jurisprudential, and interdisciplinary subjects. Such far-reaching coverage defies comprehensive, even-handed treatment.

No less of a hurdle is the demand of relevance. The instant scholarship charts the intellectual history of a movement still in development, advancing from an early vanguard period to a middle period of internal fracture[5] and external siege.[6] Granting each period an equal claim of relevance invites summary treatment, which risks diminishing the full texture of the movement's evolution. A predominantly retrospective focus, as here, reduces the risk of loss.

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2. *See* Cornel West, *Foreword* to CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT xi, xii (Kimberlé Crenshaw, Neil Gotanda, Gary Peller, & Kendall Thomas eds., 1995) [hereinafter KEY WRITINGS].

3. CRITICAL RACE THEORY: THE CUTTING EDGE (Richard Delgado ed., 1995) [hereinafter CUTTING EDGE].

4. KEY WRITINGS, *supra* note 2.

5. *See infra* notes 9-13 and accompanying text.

6. Assaults come from liberal and conservative fronts at home and abroad. *See, e.g.*, Heather MacDonald, *Rule of Law: Law School Humbug*, WALL ST. J., Nov. 8, 1995, at A21 (characterizing CRT as "a dangerous flight from reason and logic in favor of emotion and group solidarity"); 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 (describing CRT as "a stark challenge to the liberal ideal of the rule of law"); Andrew Sullivan, *Truth and Lies in the Language Class*, SUNDAY TIMES (London), Jan. 12, 1997, at 1 (complaining that "critical race theorists are acquiring the blessing of the intellectual and political establishments in a way that bodes particularly ill for the future of race relations").

Beyond the choices of inclusion and relevance, historical renderings of this kind hazard errors of essentialism.[7] Doubtless essentialist errors may take many forms. Within the history and jurisprudence of race in American law, however, two forms seem prevalent. Both translate roughly into empirical claims of fact. The first involves the claim of universality. The second concerns the claim of dichotomy. Both employ fallacies.

The universality claim generalizes from blanket assertions of human nature. To essentialize race under the logic of universality is to suggest that people of color possess certain inherent and immutable character traits. Consider, for example, the image of *dangerous* young black males in contemporary criminal law.

The dichotomy claim, by contrast, distinguishes common or shared categories of the natural world as separate and discrete phenomena. To essentialize race under the logic of dichotomy is to maintain that people of color suffer discrimination as a result of intentional, rather than unintentional, conduct. Consider, for instance, the current distinction between *conscious* and *unconscious* racism governing the statutory standards of civil rights liability.

In each of the above respects, I shall confess error from the outset. At its core, this Essay conceives of Critical Race Theory in terms of a *black/white* paradigm.[8] The early tenor of CRT literature echoes this

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7. Clark Freshman, for example, points to essentialist tendencies in Richard Posner's treatment of CRT. *See* Clark Freshman, *Were Patricia Williams and Ronald Dworkin Separated at Birth?*, 95 COLUM. L. REV. 1568, 1590-91 (1995) (reviewing RICHARD A. POSNER, OVERCOMING LAW (1995)). However, these tendencies seem less pronounced in Posner's more recent commentary on the subject. *See* Richard A. Posner, *Legal Narratology*, 64 U. CHI. L. REV. 737, 743 (1997) (reviewing LAW'S STORIES (Peter Brooks & Paul Gewirtz eds., 1996)).

8. Frank Valdes employs the term "Black/White paradigm" to describe the limitations of traditional CRT analysis in deconstructing the dimensions of race and race-based subordination in a multi-cultural society. *See* Francisco Valdes, *Latina/o Ethnicities, Critical Race Theory, and Post-Identity Politics in Postmodern Legal Culture: From Practices to Possibilities*, 9 LA RAZA LJ. 1, 5-7 (1996). Valdes observes:

> The "Black/White paradigm" thus signifies the reduction of race relations in American society and law to the relations between "white" Euro-Americans to "black" African Americans. Consequently, this paradigm ignores or denies the existence and relevance of persons hued with other colors, such as Asian Americans, Native Americans, and Latinas/os. In addition, this paradigm marginalizes even persons who are hued white or black but who derive from cultural or geographic destinations other than Europe or Africa, such as persons from Caribbean nations, who identify as both black and Latina/o.

Id. at 5 n.19.

For other scholarly critiques of the black-white paradigm, see Juan Perea, *The Black-White Binary Paradigm of Race: The "Normal Science" of American Racial Thought*, 85 CALIF. L. REV. 1213 (1997), 10 LA RAZA LJ. 127 (1997); Deborah Ramirez, *Multicultural Empowerment: It's Not Just Black and White Anymore*, 47 STAN. L. REV. 957 (1995); Richard Delgado, *Rodrigo's Fifteenth*

essentialist dichotomy. Although the tone of subsequent literature weakens that dichotomy, it succeeds only by enlarging the category of black identity. Prodded increasingly by the work of feminist,[9] gay and lesbian,[10] Native-American,[11] LatCrit,[12] and Asian-American[13] scholars entering the Critical Race community, the black identity position no longer exclusively frames CRT evaluative judgment. Yet, the black-white opposition remains vibrant, lacking the means of, and motives for, reconciliation.

A slow progress towards reconciliation, however, may be imminent. While the rhetoric of progress no longer echoes through jurisprudential writings on race, evidence of a gathering course-change gives some reason for hope of amelioration. The change, signified by the instant Symposium, is bound up in the emergence of LatCrit theory.

Whatever the ultimate judgment reached on the merits of LatCrit theory, this Symposium plainly captures an extraordinary moment in the jurisprudence of American law. Even if its full ramifications remain unclear, the moment exhibits both the consolidation and the splintering of Critical Race Theory. For movements of any significant political and jurisprudential import, internal and external ruptures often prove fatal.

Chronicle: Racial Mixture, Latino-Critical Scholarship, and the Black-White Binary, 75 TEX. L. REV. 1181, 1185-1201 (1997) (book review).

9. *See, e.g.*, CRITICAL RACE FEMINISM (Adrien Katherine Wing ed., 1997); Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990); Lea VanderVelde & Sandhya Subramanian, *Mrs. Dred Scott*, 106 YALE L.J. 1033 (1997).

10. *See, e.g.*, Odeana R. Neal, *The Limits of Legal Discourse: Learning from the Civil Rights Movement in the Quest for Gay and Lesbian Civil Rights*, 40 N.Y.L. SCH. L. REV. 679 (1996); Francisco Valdes, *Sex and Race in Queer Legal Culture: Ruminations on Identities & Inter-Connectivities*, 5 S. CAL. REV. L. & WOMEN'S STUD. 25 (1995); Jane S. Schacter, *Skepticism, Culture and the Gay Civil Rights Debate in a Post-Civil-Rights Era*, 110 HARV. L. REV. 684 (1997) (book review).

11. *See, e.g.*, ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT (1990); ROBERT A. WILLIAMS, JR., LINKING ARMS TOGETHER (1997); Robert A. Williams, Jr., *Linking Arms Together: Multicultural Constitutionalism in a North American Indigenous Vision of Law and Peace*, 82 CALIF. L. REV. 981 (1994); Jo Carrillo, *Surface and Depth: Some Methodological Problems with Bringing Native American-Centered Histories to Light*, 20 N.Y.U. REV. L. & SOC. CHANGE 405 (1993) (reviewing EXILED IN THE LAND OF THE FREE (Oren R. Lyons & John C. Mohawk eds., 1992)).

12. *See, e.g.*, Berta Esperanza Hernández-Truyol, *Borders (En)Gendered—Normativities, Latinas, and a LatCrit Paradigm*, 72 N.Y.U. L. REV. (forthcoming 1997); Valdes, *supra* note 8.

13. *See, e.g.*, Keith Aoki, *The Scholarship of Reconstruction and the Politics of Backlash*, 81 IOWA L. REV. 1467 (1996); Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CALIF. L. REV. 1241, 1 ASIAN L.J. 1 (1993); Margaret (H.R.) Chon, *On the Need for Asian American Narratives in Law: Ethnic Specimens, Native Informants, Storytelling and Silences*, 3 UCLA ASIAN PAC. AM. L.J. 4 (1995).

The rise and fall of the Critical Legal Studies movement offers a case in point.

Surprisingly, acknowledging the internal and external challenges brought by LatCrit theory against Critical Race Theory leads to a contrary result. Instead of weakening Critical Race Theory, the challenges seem to broaden its theoretical scope and enlarge its practical relevance, thereby strengthening its oppositional voice in mainstream jurisprudence. This result follows from the complementary motivations and methodologies of LatCrit theory.

Unlike certain orthodox strands of the CRT literature, LatCrit theory encourages cross-racial and multicultural coalition-building. Two values motivate this impulse: the intrinsic norm of community and the instrumental norm of political action. LatCrit's application of underutilized methods of cultural and linguistic investigation to more diverse communities of color makes coalition politics viable and racial reconciliation possible.

The theme of reconciliation—political and spiritual—figures prominently in this Essay. From the beginning, it construes Critical Race Theory as an emerging legal-political *reform* movement of divergent methods and varying goals. Methodologically, the Essay starts from the premise of the postmodern challenge. Vigorously pressed in recent years, the postmodern challenge assails both descriptive and prescriptive modes of legal reasoning. The assault on descriptive methods of legal pedagogy[14] and practice,[15] encompassing formalism and instrumentalism, advances under the charge of incoherence. The attack on similarly controlling prescriptive methods, such as legislative reform and remedial adjudication,[16] rises out of post-Realist anti-foundational instincts. Shared by remnants of the Critical Legal Studies movement, these instincts promote a deep-seated skepticism towards the foundational concepts of racial equality and justice. Applied here, postmodern skepticism precludes Enlightenment faith in the ability to winnow out the objective *truth* about Critical Race Theory, its proponents, or its subjects. At best, postmodernism allows that standard modes of investigation and reasoning may afford a contingent stance from which to offer a perspective on Critical Race Theory—sometimes correct, sometimes faulty, always idiosyncratic.

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14. *See* Pierre Schlag, *Hiding the Ball*, 71 N.Y.U. L. REV. 1681 (1996).

15. *See* Pierre Schlag, *Law as the Continuation of God by Other Means*, 85 CALIF. L. REV. 427 (1997).

16. *See* Symposium, *The Critique of Normativity*, 139 U. PA. L. REV. 801 (1991); *see also* Pierre Schlag, *Values*, 6 YALE J.L. & HUMAN. 219 (1994).

Normatively, the Essay proceeds from a vision of CRT as a legal-political movement of activists *and* ideas dedicated to serving clients and communities of color. That presupposition imagines CRT scholars rushing to enter the fray of legal-political controversy, such as the current disputes over the place of race in crime and criminal justice, the environment, jury selection and deliberation, legal ethics, and court procedure. Put differently, the Essay expects CRT to embrace political engagement on both theoretical and practical planes. What follows then may be fairly described as an activist's critique of activists: political and jurisprudential.

Having given fair warning, it is beneficial quickly to situate this Essay in the larger, ongoing body of work undertaken by others sympathetic to the Critical Race project.[17] For many harboring a shared devotion to the theoretical study of racism and the practical pursuit of racial justice, CRT provides the cardinal framework for understanding the construction of race in American law, culture, and society. For those especially devoted to study of the historical intersection of race and lawyers in American law,[18] CRT demonstrates the utility of interdisciplinary methodologies in deciphering the applied meaning of racial discourse, identity, and power. True to its insurgent history, CRT infuses such methodologies with an oppositional spirit garnered from sustained protest.

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17. *See, e.g.*, Symposium, *Representing Race*, 95 MICH. L. REV. 723 (1997); Robert L. Hayman, Jr. & Nancy Levit, *The Tales of White Folk: Doctrine, Narrative, and the Reconstruction of Racial Reality*, 84 CALIF. L. REV. 377 (1996) (reviewing RICHARD DELGADO, THE RODRIGO CHRONICLES (1995)); Kenneth L. Karst, *Integration Success Story*, 69 S. CAL. L. REV. 1781 (1996) (book review).

18. *See, e.g.*, Alex M. Johnson, Jr., *The Underrepresentation of Minorities in the Legal Profession: A Critical Race Theorist's Perspective*, 95 MICH. L. REV. 1005 (1997); Margaret M. Russell, *Beyond "Sellouts" and "Race Cards": Black Attorneys and the Straitjacket of Legal Practice*, 95 MICH. L. REV. 766 (1997); David B. Wilkins, *Race, Ethics, and the First Amendment: Should a Black Lawyer Represent the Ku Klux Klan?*, 63 GEO. WASH. L. REV. 1030 (1995); David B. Wilkins, *Social Engineers or Corporate Tools?* Brown v. Board of Education *and the Conscience of the Black Corporate Bar, in* RACE, L. & CULTURE 137 (Austin Sarat ed., 1997); David B. Wilkins & G. Mitu Gulati, *Why Are There So Few Black Lawyers in Corporate Law Firms? An Institutional Analysis*, 84 CALIF. L. REV. 493 (1996).

Notwithstanding the above-mentioned work, the overall scarcity of studies investigating the historical interconnections of race and lawyers in American law indicates the continuing neglect of CRT as a source for the development of a jurisprudential framework to understand the rhetoric of race or "race-talk" in legal advocacy, rules of law, and judicial decisions. To be useful, that framework must situate racial rhetoric in particularized criminal and civil case contexts. *See, e.g.*, Anthony V. Alfieri, *Race Trials*, 76 TEX. L. REV. (forthcoming 1998); Margaret M. Russell, *Entering Great America: Reflections on Race and the Convergence of Progressive Legal Theory and Practice*, 43 HASTINGS L.J. 749 (1992).

To ascertain the genesis of that spirit, the Essay opens with a brief genealogy of CRT. First, it tracks CRT's historical rupture with the civil rights movement. Then, it explores CRT's modernist disenchantment with Critical Legal Studies. Finally, it examines CRT's wavering postmodernist renunciation of liberal theory. The Essay next considers the main points of the CRT critique of American law and society. Specifically, it addresses race consciousness and identity, racial power, racialized doctrine and narrative, and modes of race/gender/ethnic intersectionality. Last, the Essay contemplates the CRT espousal of postmodernism, coalition-building, and praxis, analyzing tensions arising from the attempted reconciliation of liberal/postmodern and theoretical/practical commitments to law and legal advocacy.

Constructive engagement in law and legal advocacy demands a liberal faith in reason and incremental reform. Part of that faith entails a tolerance for imperfection and halting progress. Neither faith nor tolerance informs the postmodern sensibility. Like the theoreticians of the Law and Economics and Critical Legal Studies movements, the metaphysicians of law and postmodernism display an impatience with and a distaste for the practical. Rooted in a higher aspiration for law that is laudable, nonetheless, the upshot is a disdain for liberal legalism that condemns the victims of procedural bias and substantive prejudice to hardship. The tensions bearing on the liberal/postmodern and theory/practice divide thus persist unabated.

Although some, Angela Harris most eloquently, exhort CRT activists "consciously to inhabit that very tension,"[19] this admonition comes with little or no reference to the constraints of discursive practices, institutional procedures, or social relations encountered in law and lawyering. Legal activists ignore these constraints at their own peril and at grave risk to their clients and surrounding communities.

Even glancing familiarity with the most ordinary advocacy contexts reveals that the practices of constitutional, statutory, and doctrinal discourse regulate attorney-client speech. Similarly, the institutional procedures of federal, state, and local bureaucracies restrict attorney-client freedom of choice in advocacy. Likewise, the social relationships of class, gender, race, ethnicity, and sexual orientation limit attorney-client as well as judge-client understanding in advocacy settings.

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19. Angela P. Harris, *Foreword: The Jurisprudence of Reconstruction*, 82 CALIF. L. REV. 741, 760 (1994); *see also* Anthony E. Cook, *Reflections on Postmodernism*, 26 NEW ENG. L. REV. 751, 752 (1992) (investigating whether "progressive scholars [can] define postmodernism in a way that simultaneously preserves the hope of progress and transformation . . . and yet remains open and responsive to divergent narratives of oppression").

The task of finding room to maneuver within, and formulating strategies to overcome, juridical constraints on behalf of people of color is CRT's greatest challeuge. The record to date lacks any substantial evidence that CRT aspires to meet that challenge. The continued failure to come to the aid of the subordinated clients and communities it airily celebrates will undermine CRT, just as it does Critical Legal Studies. This type of failure condemns jurisprudential movements not to death, but to irrelevance or, worse, triviality.

I
GENEALOGY

Critical Race Theory offers a jurisprudence grafted from the practical ventures of civil rights advocacy[20] and the theoretical forays of Critical Legal Studies ("CLS") scholarship.[21] This hybrid jurisprudence produces a kind of "left intervention into race discourse and a race intervention into left discourse."[22] Indeed, within CRT, the concrete pragmatics of civil rights advocacy and the abstract interrogations of CLS scholarship converge to form a powerful engine of socio-legal analysis. Despite such convergence, CRT turns away from both civil rights and CLS antecedents, breaking from the liberal ideology of racial consensus dominant in the era of law reform following *Brown v. Board of Education.*[23]

Evidence of this break comes from CRT's rejection of the norms of racial integration. That rejection goes beyond the critique of civil rights advocates for their paternalistic resolution of attorney-client and client-community conflicts over litigation strategy or remedial implementation.[24] Moreover, the rejection skirts the criticism of CLS for its

20. *See, e.g.*, JACK GREENBERG, CRUSADERS IN THE COURTS (1994); MARK V. TUSHNET, THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950 (1987); Jonathan Feldman, *Race-Consciousness Versus Colorblindness in the Selection of Civil Rights Leaders: Reflections upon Jack Greenberg's Crusaders in the Courts*, 84 CALIF. L. REV. 151 (1996) (book review).

21. For a discussion of the rise and fall of CLS, see Richard Michael Fischl, *The Question that Killed Critical Legal Studies*, 17 L. & SOC. INQUIRY 779 (1992); Symposium, *Critical Legal Studies*, 36 STAN. L. REV. 1 (1984).

22. *Introduction* to KEY WRITINGS, *supra* note 2, at xiii, xix.

23. 347 U.S. 483 (1954).

24. For a discussion of the relationship between civil rights attorneys and their clients, see DAVID LUBAN, LAWYERS AND JUSTICE 317-57 (1988); Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470 (1976); William B. Rubenstein, *Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns*, 106 YALE L.J. 1623 (1997).

repudiation of "rights talk."[25] For Critical Race theorists, even the enlightened, liberal discourse of civil rights patronage too often evokes racist ideology.

Nonetheless, like the mainstream civil rights movement, CRT stands as a descriptive and a normative enterprise engaged in critical intervention and transformative remediation.[26] The motive force behind that enterprise is not only an ethical commitment to human liberation, but also a moral aspiration for racial justice. To Critical Race theorists, however, the ripening of moral commitment into ideological critique is a necessary precondition for political empowerment and social transformation. The key to that transformation rests on the formulation of oppositional accounts of race in legal-political discourse.

Fundamentally, the Critical Race project focuses on the interrelatiouship of race and discourse. By exposing racialized narratives embedded within the constitutional, statutory, and common law traditions of American legal discourse, Critical Race theorists seek to ascertain the role of law in the construction of racial hierarchy and racist ideology. To grasp the role of law and its agents (lawyers and judges) in the creation and maintenance of dominant-subordinate race relations, Critical Race theorists search out racialized stories disclosed in sociolegal and cultural contexts. Racialized stories share overt and covert forms. Overtly racialized stories may be found in court opinions, lawyers' closing arguments, and witness testimony. More shrouded, covertly racialized stories may be detected in judges' evidentiary rulings, lawyers' peremptory challenges, and parties' discovery documents.

To their credit, Critical Race theorists eschew crude forms of racialism[27] in rendering those enmeshed textual accounts. Instead, they increasingly gather particularized narratives from individuals and communities of color situated in law-sanctioned hierarchies of race, gender, ethnicity, class, and sexual orientation. CRT gains its oppositional voice and liberating vision by revealing these often suppressed incidents of suffering. The attempt to translate that vision into a theory of racial

25. *Compare* Peter Gabel, *The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves*, 62 TEX. L. REV. 1563 (1984), *with* Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401 (1987).

26. *See* Roy L. Brooks & Mary Jo Newborn, *Critical Race Theory and Classical-Liberal Civil Rights Scholarship: A Distinction Without a Difference?*, 82 CALIF. L. REV. 787 (1994).

27. Racialism refers to "accounts of racial power that explain legal and political decisions which are adverse to people of color as mere reflections of underlying white interest." *Introduction to* KEY WRITINGS, *supra* note 2, at xxiv. Implicit in these accounts is the presumption that "racial interests or racial identity exists [sic] somewhere outside of or prior to law" locked within the instrumental apparatus of the state. *Id.*

jurisprudence and a practice of progressive racial politics without essentializing racial identity or community creates internal tensions that sometimes explode into wider controversy,[28] such as the recent quarrels over voice,[29] story,[30] autobiography,[31] and racial fundamentalism.[32]

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28. Participants in these incendiary controversies sometimes succumb to belligerence, assailing each other for perceived transgressions in demonstrated qualities of integrity, judgment, and tolerance. *Compare* Mark Tushnet, *The Degradation of Constitutional Discourse*, 81 GEO. L.J. 251 (1992) ("The flaws in the stories I discuss are, in the end, failures in integrity and judgment...."), *and* Mark Tushnet, *Reply*, 81 GEO. L.J. 343, 343 (1992) (characterizing Gary Peller's response to his earlier article as "driven by two intellectual failures, misrepresentation and inconsistency"), *with* Gary Peller, *The Discourse of Constitutional Degradation*, 81 GEO. L.J. 313, 314 (1992) ("I believe that the failures of intellectual rigor that mark Tushnet's essay are manifestations of tension about the cultural dynamics underlying his interveution.").

29. Quarrels over voice involve the meaning of authenticity and adequate representation in claims brought on behalf of people of color in legal scholarship. Randall Kenuedy derides the notion of black academic authenticity generally, while chiding CRT scholars specifically for making overblown claims of distinction. Moreover, he scorns the idea of a representative black community. Staking out a pluralist position on black history, he rejects the unitary ideal of a single, cohesive black experience. By contrast, both Richard Delgado and Alex Johnson find a special quality in the voice of color individually and collectively enunciated in CRT scholarship. *Compare* Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745 (1989), *with* Colloquy, *Responses to Randall Kennedy's Racial Critiques of Legal Academia*, 103 HARV. L. REV. 1844 (1990), *and* Richard Delgado, *When a Story Is Just a Story: Does Voice Really Matter?*, 76 VA. L. REV. 95 (1990). *See also* Alex M. Johnson, Jr., *Defending the Use of Narrative and Giving Content to the Voice of Color: Rejecting the Imposition of Process Theory in Legal Scholarship*, 79 IOWA L. REV. 803 (1994); Alex M. Johnson, Jr., *The New Voice of Color*, 100 YALE L.J. 2007 (1991).

30. Disputes about story rise out of the growing use of narrative and storytelling in both feminist and CRT scholarship. Daniel Farber and Suzanna Sherry reprimand CRT scholars and others for advancing descriptive and prescriptive narrative claims without the support of traditional legal and non-legal sources of authority. Furthermore, they challenge the credibility and typicality of such claims. By way of defense, Richard Delgado and William Eskridge contend that narrative and storytelling enable legal scholars to capture the experience of subordination suffered in law as well as in society. *Compare* Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807 (1993), *and* Daniel A. Farber & Suzanna Sherry, *The 200,000 Cards of Dimitri Yurasov: Further Reflections on Scholarship and Truth*, 46 STAN. L. REV. 647 (1994), *with* Richard Delgado, *On Telling Stories in School: A Reply to Farber and Sherry*, 46 VAND. L. REV. 665 (1993), *and* William N. Eskridge, Jr., *Gaylegal Narratives*, 46 STAN. L. REV. 607 (1994). *See also* Marc A. Fajer, *Authority, Credibility, and Pre-Understanding: A Defense of Outsider Narratives in Legal Scholarship*, 82 GEO. L.J. 1845 (1994).

31. Opponents of autobiography attack the swell of self-referential narratives in legal scholarship. In a sharp rebuke, Ann Coughlin argues that these narratives contribute nothing of consequence to legal scholarship beyond anecdotal self-citation. Equally adamant, Richard Delgado and Jerome McCristal Culp assert that autobiographical narratives illuminate larger sociolegal forces of racial oppression impinging upon individuals. These narratives, they insist, demonstrate the availability and, at times, also the futility of particularized strategies of resistance to oppressive conditions in law and the legal academy. *Compare* Anne M. Coughlin, *Regulating the Self: Autobiographical Performances in Outsider Scholarship*, 81 VA. L. REV. 1229 (1995), *with* Richard Delgado, *Coughlin's Complaint: How to Disparage Outsider Writing, One Year Later*, 82 VA. L. REV. 95 (1996), *and* Jerome McCristal Culp, Jr., *Telling a Black Legal Story: Privilege, Authenticity, "Blunders," and Transformation in Outsider Narratives*, 82 VA. L. REV. 69 (1996).

Debates over the authenticity of racial voices, the typicality of racialized stories, the significance of racial autobiographies, and the rise of racial dogma reveal deep fissures in the epistemological underpinnings of academic and practice communities.

At bottom, the conflicts within CRT and the attacks upon it emanate from CRT's own growing antipathy toward the traditional civil rights discourse that animates liberal race reform. To Critical Race theorists, liberal faith in a court-driven, technocratic eradication of racial bias is misplaced.[33] Faith in the rationality of progressive law reform, they argue, rests on principles of neutrality, objectivity, and value-free reasoning. Obtaining a set of nonideological, regulative principles, however, requires a depoliticization of the legal process. Depoliticization, in turn, compels the separation of law and politics. When pushed outside the domain of liberal theory, CLS teaches, the conceptual separation of law and politics collapses in the raw, delegitimating competition for state power.[34] Because of this material inseparability, the depoliticization of law and the liberal state fails. In this way, the CRT politics of race represents a complex variant of the CLS politics of law: power-driven, instrumental, and value-laden.

Critical Race theorists deny the possibility of a consensus-based, formalist, non-instrumental legal process.[35] They instead link the notion of an apolitical juridical process to a naturalistic or a necessitarian vision of white racial dominance.[36] The neutral treatment of racial power hierarchies as normal or necessary, they explain, legitimates racialized forms of speech and inequality, thwarting legal strategies of constitutional

32. The controversy over racial fundamentalism presently exploding in Asian-American legal scholarship echoes the earlier "authenticity" debate embroiling CRT advocates and Randall Kennedy. As before, the debate centers on the meaning of racial experience and the search for a fair representation of that experience. Discerning an emerging exclusionary tendency in CRT scholarship, Jim Chen decries the issuance of academic decrees of racial purity. In perhaps the most acute exchange, Chen and others trade unbridled charges of political extremism and backlash. *Compare* Jim Chen, *Unloving*, 80 IOWA L. REV. 145, 149 (1994), *with* Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CALIF. L. REV. 1241 (1993). *See generally* Colloquy, *The Scholarship of Reconstruction and the Politics of Backlash*, 81 IOWA L. REV. 1467 (1996).

33. *See, e.g.*, Davison M. Douglas, *The Limits of Law in Accomplishing Racial Change: School Segregation in the Pre-*Brown *North*, 44 UCLA L. REV. 677 (1997).

34. *See* DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION 247-49 (1997) (discussing liberal and radical practices of delegitimation).

35. *See* Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Anti-discrimination Law*, *in* KEY WRITINGS, *supra* note 2, at 103, 112-19.

36. *See* Cheryl I. Harris, *Whiteness as Property*, *in* KEY WRITINGS, *supra* note 2, at 276, 277-86.

remediation.[37] But contesting the logic of such hierarchies, they complain, attracts liberal disdain expressed in charges of anti-Enlightenment vulgarity.[38] This conflict can be seen most vividly in the controversy over the liberal canon of color-blind equality. Dedicated to a vision of formal equality, the liberal canon elevates opportunity over outcome. To ensure equal opportunity, the canon emphasizes the value of process and procedural fairness. Fidelity to process requires the removal of bias and prejudice from legal rules, institutions, and systems. The notion of a color-blind process implies that removal in favor of a race-neutral, merit-based perspective. Controversy regularly erupts over the actual extent of that removal and the genuine neutrality of any alternative posture on race in law and in the assessment of legal merit. The next section presents the CRT critique of color-blind equality.

II
CRITIQUE

The CRT critique of color-blind equality combines an analysis of race, power, and the rule of law. The predicate step of that analysis links racial consciousness and power. The second step ties racial identity to policies and practices of exclusion. The third step strips away the racial form and substance of legal doctrine to reveal both a bias toward and an ambiguity of color. Honing in on that ambiguity, the last step of the analysis opens up race and racial identity to a broader, multifaceted investigation integrating gender, ethnicity, and sexual orientation.

A. Color-Blind Equality

Liberal theorists rely on the axiom of color-blindness to deduce the principles of formal equality, opportunity, and merit. The constitutional ideal of color-blindness fashions the categories of equal opportunity and merit as neutral and impersonal, located at a distance from the reach of power.[39] Relying on opportunity and merit, of course, entails the public and private importation of standards. Ministered by largely white-dominated institutions, merit standards operate in a manner apparently free of privilege, yet inimical to the experience and

37. *See* Kendall Thomas, Rouge et Noir *Reread: A Popular Constitutional History of the Angelo Herndon Case, in* KEY WRITINGS, *supra* note 2, at 465, 476-81, 484-90.

38. For a broad accounting of these charges, see Daniel A. Farber & Suzanna Sherry, *Legal Storytelling and Constitutional Law: The Medium and the Message, in* LAW'S STORIES 37, 46-53 (Peter Brooks & Paul Gewirtz eds., 1996).

39. *See Introduction* to KEY WRITINGS, *supra* note 22, at xv (discussing affirmative action).

identity of people of color.[40] Under the regime of liberal legalism, attributions of individual racial animus[41] or institutional enmity[42] go uncontemplated, absent probable evidence of invidious discrimination.

Critical Race theorists challenge the race-neutral ideal of color-blindness and the corollary principles of formal equality, opportunity, and merit. To test the thesis of color-blind constitutionalism, Derrick Bell[43] revisits Herbert Wechsler's attempted postulation of neutral principles in the aftermath of *Brown v. Board of Education*.[44] Wechsler opines that constitutional legitimacy requires a formal, value-free process of adjudication based on the neutral application of forward-looking, generalizable principles.[45] He insists that constitutional legitimacy by design withstands the harsh consequences of social inequality. The constitutional principle of freedom of association illustrates this insulated notion of legitimacy.[46] Despite evidence that the doctrine of associational right has fostered racial inequality in private employment and public education during the decades since the *Brown* decision,[47] constitutional legitimacy lies undisturbed.

Rather than attack Wechsler's neutrality paradigm, Bell seeks to satisfy its constitutional requisites. Accordingly, he asserts that *Brown* clearly enunciates a guiding neutral principle, namely racial equality.[48] What *Brown* lacks, he observes, is the complementary convergence of racial interest around matters of equitable relief and remedial implementation.[49] As a result, the post-*Brown* law reform campaign initially

40. Studies of law student recruitment and placement as well as law faculty hiring show deficits in racial integration under traditional merit standards. *See* Lewis A. Kornhauser & Richard L. Revesz, *Legal Education and Entry into the Legal Profession: The Role of Race, Gender, and Educational Debt*, 70 N.Y.U. L. REV. 829, 930-43 (1995); Deborah Jones Merritt & Barbara F. Reskin, *Sex, Race, and Credentials: The Truth About Affirmative Action in Law Faculty Hiring*, 97 COLUM. L. REV. 199 (1997); Linda F. Wightman, *The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admission Decisions*, 72 N.Y.U. L. REV. 1 (1997).

41. *See* Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, *in* KEY WRITINGS, *supra* note 2, at 46.

42. *See* Derrick Bell, *The Civil Rights Chronicles: The Chronicle of the DeVine Gift*, *in* CUTTING EDGE, *supra* note 3, at 390.

43. *See* Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest Convergence Dilemma*, *in* KEY WRITINGS, *supra* note 2, at 20.

44. 347 U.S. 483 (1954).

45. *See* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 15-20 (1959).

46. *See id.* at 27-34.

47. *See* Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, *in* KEY WRITINGS, *supra* note 2, at 29.

48. *See* Bell, *supra* note 43, at 22.

49. *See id.*

pursued remedies explicitly tailored to implement the mandate of desegregation. When white community defiance frustrated this remedial strategy, the campaign refashioned the anti-segregation mandate to command a discrimination-free environment.[50] This shift generated further acts of evasion in white communities as well as an increasing sense of isolation in black communities.[51] Lamenting this outcome and the uncertain educational benefits extracted from desegregation remedies, Bell urges reconsideration of model black schools, "where black children, parents, and teachers can utilize the real cultural strengths of the black community to overcome the many barriers to educational achievement."[52]

Symbolic of the departure from the liberal integrationist model, Bell's endorsement of model black schools highlights the fact that effective education and racial interest conformity hold central to the fulfillment of the promise of *Brown*. No doubt effective graduate education in law demands the integration of scholars of color into the legal academy. The racial integration of the legal academy is necessary to satisfy the racial balance requirements of anti-segregation edicts and integrationist sympathies. More importantly, it promises to enrich institutions with the cultural strengths of communities of color[53] and to empower students of color to overcome racial and socio-economic barriers surrounding educational achievement.[54] The twin goals of enrichment and empowerment provide the ground for racial interest conformity between white and black academics.

Searching for common ground in the legal academy, Jerome McCristal Culp finds traditional legal discourse and scholarship unreceptive to the inclusion of race or racial autobiography.[55] Culp's findings are unsurprising given that legal discourse prefers formalist, impartial rhetorical structures, and legal scholarship favors detached, impersonal rhetoric. Race, however, eludes formalist structures and induces partisanship. Moreover, it embroils the emotions in personal and passionate declamations.

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50. *See id.* at 26.

51. *See id.*

52. *Id.*

53. *See* K. ANTHONY APPIAH & AMY GUTMANN, COLOR CONSCIOUS 118-38 (1996); Paul Brest & Miranda Oshige, *Affirmative Action for Whom?*, 47 STAN. L. REV. 855, 862-65 (1995).

54. *See* Judith D. Fischer, *Portia Unbound: The Effects of a Supportive Law School Environment on Women and Minority Students*, 7 UCLA WOMEN'S L.J. 81 (1996).

55. *See* Jerome McCristal Culp, Jr., *Autobiography and Legal Scholarship and Teaching: Finding the Me in the Legal Academy*, *in* CUTTING EDGE, *supra* note 3, at 409, 411-12, 415-16.

Like Culp, Deborah Post judges the professional norms, values, and aesthetics of legal education to be hostile to the politics of racial diversity and identity.[56] Post warns that depriving the academy or the profession of the ideals of diversity strips each institution of the ability to recognize and to accommodate difference.[57] Amplifying his prior, more thoroughgoing critique of the diversity practices of the legal academy,[58] Richard Delgado asserts that academic "imperialists" employ several mechanisms, including stereotyping, assimilation, and co-optation, to devalue and blunt Critical Race scholarship.[59] The multifaceted process of institutional marginalization results in the failure of ensconced academics to appreciate "race-ed" stories.

The CRT attack on the precepts of color-blind equality, opportunity, and merit indicates a rejection of the overarching, Enlightenment-based rationality of the liberal tradition.[60] Yet, dispensing with the color-blind trope of race-neutrality entirely[61] risks unleashing narratives expressly concentrated in racial, indeed sometimes racist, ideology. Calls for racialized jury nullification[62] encounter this risk in evoking race-based juror empathy.[63] Whether racial empathy increases juridical sensitivity to the rule of law or the moral value of others remains unsettled.[64] Because the presence of race is inescapable, the answer must rely on the principles of race consciousness to overturn past race-neutral regimes.

B. Racial Consciousness and Power

The liberal canon of formal equality produces a civil rights rhetoric of good faith and universal reason that appears race-neutral, apolitical, and integrationist. Bowing to the imperatives of legal formalism, the rhetoric strives to maintain a veneer of value-free, nonpartisan

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56. *See* Deborah Waire Post, *Reflections on Identity, Diversity, and Morality, in* CUTTING EDGE, *supra* note 3, at 419, 421.

57. *See id.* at 425.

58. *See* Delgado, *supra* note 41.

59. *See* Richard Delgado, *"The Imperial Scholar" Revisited: How to Marginalize Outsider Writing, Ten Years Later, in* CUTTING EDGE, *supra* note 3, at 401, 403-06.

60. For a discussion on the rationality of the liberal tradition, see Gary Gerstle, *The Protean Character of American Liberalism,* 99 AM. HIST. REV. 1043 (1994).

61. *See, e.g.,* Neil Gotanda, *Failure of the Color-Blind Vision: Race, Ethnicity, and the California Civil Rights Initiative,* 23 HASTINGS CONST. L.Q. 1135, 1137-41 (1996).

62. *See, e.g.,* Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System,* 105 YALE L.J. 677 (1995).

63. *See generally* Douglas O. Linder, *Juror Empathy and Race,* 63 TENN. L. REV. 887 (1996).

64. *See id.* at 912. *See generally* Darryl K. Brown, *Jury Nullification Within the Rule of Law,* 81 MINN. L. REV. 1149 (1997).

consensus. Implicit in its language is a distrust of race consciousness and racial power.

Critical Race theorists view race as a socially siguificant category of perception and representation. Acknowledging the cognitive, linguistic, and symbolic import of race and racial difference, they contend, encourages a commitment to political and cultural pluralism. In contrast to the color-blind ideology of integrationism, the concept of multicultural pluralism supports the race-conscious development of norms and discourses of group or community justice. That development admits to a tension between integrationist and black nationalist interpretations of racial domination.

Gary Peller explores integrationist and black nationalist images of racial injustice in communities undergoing public school integration.[65] His exploration reveals how the dynamics of power, subordination, and legitimacy diminish the meaning of black nationalism in civil rights discourse. Duncan Kennedy connects the resulting integrationist ideal to a systemic claim of white entitlement defined by color-blind meritocratic fundamentalism.[66] Posing an alternative theory of cultural subordination in defense of affirmative action, Kennedy sets forth the notion of cultural pluralism to challenge the race-based, ideological content of academic standards.[67] The reigning culture aud ideology of race infect scholarly judgment, he insists, and defeat the claim of rational meritocratic judgment.[68]

The corruption of meritocratic judgment subverts integratiouist norms applicable to people of color whether defined as individuals[69] or as groups.[70] These norms are not without costs. Alex Johnson, for instance, points to the hidden cultural costs of integration.[71] The costs accrue to individuals in hostile environments and to communities in the loss of identifying norms.[72] A different mix of costs, Kevin Brown adds,

65. *See* Gary Peller, *Race-Consciousness, in* KEY WRITINGS, *supra* note 2, at 127.

66. *See* Duncan Kennedy, *A Cultural Pluralist Case for Affirmative Action in Legal Academia, in* KEY WRITINGS, *supra* note 2, at 159.

67. *See id.* at 164.

68. *See id.* at 172.

69. *See generally* Richard Delgado, *Affirmative Action as a Majoritarian Device: Or, Do You Really Want to Be a Role Model?, in* CUTTING EDGE, *supra* note 3, at 355.

70. *See generally* Patricia J. Williams, Metro Broadcasting, Inc. v. FCC*: Regrouping in Singular Times, in* KEY WRITINGS, *supra* note 2, at 191.

71. *See* Alex M. Johnson, Jr., *Bid Whist, Tonk, and* United States v. Fordice*: Why Integrationism Fails African-Americans Again, in* CUTTING EDGE, *supra* note 3, at 362, 363-65.

72. *Id.* at 368-69.

may arise in the context of alternative immersion schools,[73] even when dedicated to an Afro-centric curriculum.[74] Here, the costs amass in establishing an empowering educational culture, rather than in mitigating institutional antagonism.[75]

Both white and black communities suffer the costs of commitment to a race-conscious perspective in the form of perceived racial injustice and exclusion. But the repudiation of race consciousness carries certain costs as well. Peller, for example, mentions the costs of tolerating prejudice and discrimination under the ideology of integrationism.[76] Tolerance of this kind, he explains, stems from the integrationist norms of neutrality and equal treatment.[77] The norms suggest, wrongly, that the march of liberal progress toward universal reason, individual freedom, and collective value-consensus ultimately transcends racial bias.

The integrationist logic of racial transcendence treats surviving discriminatory practices either as accidental distortions in social life uncontrolled by post-segregation remedial decrees or as actually unbiased incidents permissible under prevailing civil rights standards. This logic implies that discriminatory practices spring from acts of ignorance and inadvertence largely curable through rehabilitative education. For rational, fair-minded individuals, the logic goes, such practices seem deplorable or farfetched.

Thus perceived, racial bias dissolves into a cognitive defect or a counterfactual instinct. To the extent that the notion of race and the experience of racial bias forge the "social bonds of identity, recognition, and solidarity,"[78] the integrationist obliteration of bias, feigned or not, hinders the formation of racial community. In this way, liberal integrationist ideology suppresses the emergence of communities of color. The ultimate cost of integrationism, therefore, is the loss of race-conscious community. This result is neither inevitable nor desirable. The optimal result permits integration but preserves racial identity. Conserving identity requires community.

Critical Race theorists relate integrationist ideology to racial power. They find power embedded in color. Unsurprisingly, white is the color

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73. *See* Kevin Brown, *African-American Immersion Schools: Paradoxes of Race and Public Education*, *in* CUTTING EDGE, *supra* note 3, at 373, 383.

74. *See* Sharon Keller, *Something to Lose: The Black Community's Hard Choices about Educational Choice*, 24 NOTRE DAME J. LEGIS. (forthcoming 1997).

75. *See* Brown, *supra* note 73, at 380-82.

76. *See* Peller, *supra* note 65, at 150.

77. *See id.* at 129.

78. *Id.* at 138.

of power-exerted privilege. In this sense, the equation of whiteness to cultural and socioeconomic superiority is simply a function of power. Framed by CRT, whiteness—both as artifact and as metaphor—constitutes a social organizing principle. Ian Haney López examines the doctrinal construction of whiteness and the valuation of white identity.[79] Exploding the notion of racial superiority, he calls for a self-deconstructive white race-consciousness.[80] This injunction commands more than deliberation or reflection in advocacy and adjudication. Plainly, Haney López is after something greater here. In effect, he seeks a sort of categorical redefinition in the customary methods of social construction that requires a sense of cognitive vigilance, what I call elsewhere "self-paternalism."[81]

Thomas Ross pursues a similar analysis, probing the doctrinal rhetoric of affirmative action for the images of white innocence and racism.[82] To Ross, the rhetoric of innocence, often heard through allusions to the "innocent white victim," reveals a powerful and dangerous ideology of unconscious racism.[83] Equating racism with white supremacy, Trina Grillo and Stephanie Wildman explore the false appropriation and mistaken inference of essentialist racial identity.[84] Wildman and Adrienne Davis note that acts of identity appropriation occur under the cloak of lingnistic neutrality and cultural hierarchy.[85] They maintain that a categorical pre-understanding of race, gender, and sexual orientation is basic to social and cultural hierarchy.[86] Derived originally from the work of Paul Ricoeur, the notion of pre-understanding adverts to the ontological structure that mediates interpretive knowledge and method.[87]

79. *See* Ian F. Haney López, *White by Law, in* CUTTING EDGE, *supra* note 3, at 542; *see also* IAN F. HANEY LÓPEZ, WHITE BY LAW (1996).

80. *See* Haney López, *White by Law, in* CUTTING EDGE, *supra* note 3, at 548.

81. *See* Anthony V. Alfieri, *Lynching Ethics: Toward a Theory of Racialized Defenses*, 95 MICH. L. REV. 1063, 1103 (1997).

82. *See* Thomas Ross, *Innocence and Affirmative Action, in* CUTTING EDGE, *supra* note 3, at 551.

83. *See id.* at 557.

84. *See* Trina Grillo & Stephanie M. Wildman, *Obscuring the Importance of Race: The Implication of Making Comparisons Between Racism and Sexism (or Other-isms), in* CUTTING EDGE, *supra* note 3, at 564.

85. *See* Stephanie M. Wildman & Adrienne D. Davis, *Language and Silence: Making Systems of Privilege Visible, in* CUTTING EDGE, *supra* note 3, at 573.

86. *See id.* at 574.

87. *See* Anthony V. Alfieri, *Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative*, 100 YALE L.J. 2107, 2123 n.57 (1991).

Allied with social construction, pre-understanding operates by applying a standard narrative reading to story.[88]

A distorted pre-understanding of racial identity, Haney López points out, signifies a categorical practice grounded not in scientific evidence, but upon common knowledge.[89] For Haney López, the appeal to common knowledge and its installation as a racial test in the statutory jurisprudence of citizenship "shows that race is something that must be measured in terms of what people believe, that it is a socially mediated idea."[90] Ideological measurement must also take account of the impact of scientific racism on popular belief.[91]

Racial pre-understanding assigns a socially constructed category to identify individuals and to invest power in their status and relationships. Molded as a legal artifact, the category is mutable, expanding and contracting to accommodate prejudice.[92] Race, according to Haney López, thus degenerates into an unstable trope used to shield unequal distributions of power. Distributive patterns hinge on the relational construction of race in terms of superior and inferior attributes. Haney López contends that the "hierarchical fantasy" of white identity "perpetuates and necessitates patterns of superiority and inferiority" in society.[93] Those patterns allocate racial power.

Critical Race theorists strive to dislodge the elements of race and racial power entrenched in doctrinal categories. Their endeavors acquire special importance in the fields of employment discrimination and voting rights, where redress hangs on the disclosure of political and socioeconomic inequality and on the demonstration of intentional acts of power-associated discriminatory conduct. Lacking such evidence, the enhancement of minority political power and the enlargement of minority representation in economic decision-making structures slows due to, in part, greater reliance on traditional political and market forces.

Lani Guinier evaluates the possibilities of expanding group representation in voting rights jurisprudence, despite the individualistic

88. *See id.* at 2123-24.

89. *See* Haney López, *supra* note 79, at 544-45.

90. *Id.* at 546.

91. *See generally* MAROUF ARIF HASIAN, JR., THE RHETORIC OF EUGENICS IN ANGLO-AMERICAN THOUGHT 51-71 (1996) (discussing popular eugenic beliefs in race-based biological necessity and African-American strategies of accommodation and opposition); EDWARD J. LARSON, SEX, RACE, AND SCIENCE: EUGENICS IN THE DEEP SOUTH 165-69 (1995) (documenting popular development of eugenics doctrines and movements in the law and society of the Deep South).

92. *See* Haney López, *supra* note 79, at 547.

93. *Id.* at 548.

constraints of liberal legalism.[94] Borrowing from Freudian and cognitive psychology, Charles Lawrence posits unconscious racism as an added, though frequently overlooked, constraint of the liberal legacy.[95] Entrenched under the regime of color-blind constitutionalism, unconscious racism influences a variety of substantive law areas, such as the constitutional doctrine of equal protection. Neil Gotanda regards the metaphor of color-blind constitutionalism as a means of disguising and legitimating otherwise mutable categories[96] of subordination across race and ethnicity.[97] While conceding that the color-blind trope intimates tolerance and diversity, Gotanda derides this implied model of constitutionalism for fostering cultural genocide.[98]

Cheryl Harris reveals evidence of a different sort of genocide in property doctrines.[99] For Harris, property provides space for the convergence of racial and legal status (e.g., slavery). Out of that joinder, whiteness and property take on the functions of identity-based exclusion.[100] Such forms of racialized privilege persist, Linda Greene comments,[101] because of the liberal fusion of formalism and equality in contemporary civil rights discourse.[102] Deducing jurisprudential lines of criticism from Legal Realism, Derrick Bell assails the growing formalism insulating civil rights law.[103]

Critical Race Theory's support of race-conscious, instrumental rules of adjudication implies the rationality of an alternative normative theory of racial justice. Its own critique of normativity, however,

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94. *See* Lani Guinier, *Groups, Representation, and Race-Conscious Districting: A Case of the Emperor's Clothes, in* KEY WRITINGS, *supra* note 2, at 205.

95. *See* Charles R. Lawrence, III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism, in* KEY WRITINGS, *supra* note 2, at 235.

96. Gotanda enumerates several categories of race, including "status-race," exemplified by *Dred Scott v. Sanford,* 60 U.S. 393 (1856); "formal-race," exemplified by *Plessy v. Ferguson,* 163 U.S. 537 (1895); and "historical-race," exemplified by *Bakke v. Regents of University of California,* 438 U.S. 265 (1978). *See* Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind," in* KEY WRITINGS, *supra* note 2, at 257, 262-63.

97. *See* Gotanda, *supra* note 96, at 257.

98. *See id.* at 270.

99. *See* Cheryl I. Harris, *Whiteness as Property, in* KEY WRITINGS, *supra* note 2, at 276.

100. *See id.* at 287.

101. *See* Linda Greene, *Race in the Twenty-First Century: Equality Through Law?, in* KEY WRITINGS, *supra* note 2, at 292.

102. To demonstrate this fusion, Greene cites a recent cluster of formalist Supreme Court opinions in the field of civil rights. *See id.* at 292-99 (citing Patterson v. McLean Credit Union, 491 U.S. 164 (1989); Martin v. Wilks, 490 U.S. 755 (1989); Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989); Patterson v. McLean Credit Union, 491 U.S. 164 (1989); and City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989)).

103. *See* Derrick A. Bell, Jr., *Racial Realism, in* KEY WRITINGS, *supra* note 2, at 302.

cogently demonstrates the shortcomings of normative theory-building.[104] Given this showing, together with the inherent inconstancy of identity positions, the prospects for an intelligible race-conscious method of adjudication seem dim.[105]

C. Racial Identity and Exclusion

The liberal canon stands skeptical of racial identity. Skepticism arises from the juridical demands of evidentiary proof in case-by-case adjudication. The "conventional analytic methods" of proof are integral to liberal legalism.[106] Significantly, the unstable, contextual dynamic of identity resists such demands. When mixed with the components of race, gender, ethnicity, and sexual orientation, that resistance stiffens, leading to misinterpretation and exclusion.[107]

Critical Race theorists seek out racial identity and the socially constructed meaning of race in empirical and anecdotal evidence of exclusion. They discern the imagery and language of exclusion throughout law, culture, and society. Robert Chang, for example, describes the violence against Asian Americans as a manifestation of the nativistic strand of white supremacy,[108] evinced in immigration and naturalization restrictions, disfranchisement, and Japanese-American internment.[109] Chang traces this legacy of discrimination to American immigration and naturalization practices. Indeed, he finds the roots of Asian-American cultural alienation and political powerlessness in long accumulated practices of alien exclusion and denigration.[110] Coupled with evidence of "systemic disfranchisement,"[111] this dual sense of alienation and powerlessness inhibits the voice of Asian-American resistance.

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104. *See* Richard Delgado, *Norms and Normal Science: Toward a Critique of Normativity in Legal Thought*, 139 U. PA. L. REV. 933, 936 (1991).

105. *Cf.* Brian Leiter, *Heidegger and the Theory of Adjudication*, 106 YALE L.J. 253, 281 (1996) (reviewing arguments by Heidegger that "suggest that the prospects for a fruitful *normative* theory of adjudication may be dim").

106. *See* Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, *in* CUTTING EDGE, *supra* note 3, at 283, 283.

107. For a discussion of interpretive contests over identity-based discrimination, see Christopher A. Ford, *Challenges and Dilemmas of Racial and Ethnic Identity in American and Post-Apartheid South African Affirmative Action*, 43 UCLA L. REV. 1953, 2005-08 (1996).

108. *Cf.* Mary L. Dudziak, *Desegregation as a Cold War Imperative*, *in* CUTTING EDGE, *supra* note 3, at 110-21 (illuminating the impact of both reformist and regnant legal developments on American foreigu policy by relocating historical displays of American racism to an international setting).

109. *See* Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, *in* CUTTING EDGE, supra note 3, at 322.

110. *See id.* at 329-31.

111. *Id.* at 331.

Others conduct similar investigations. Richard Delgado, for instance, considers the psychological and sociological harm of racial exclusion and insult.[112] Peggy Davis reconfigures that harm as a form of cognitive microaggression.[113] Descriptively, microaggression captures the deep-seated pain of racial animus experienced at the level of human psychology.[114] Sheri Lynn Johnson links cognition to race, attractiveness, and attributions of guilt and blameworthiness.[115] Haney López presses further, binding racial illusion to the biology of race and, hence, discovering essentialist distortions in the conceptions of racial community and interracial group conflict.[116] Robin Barnes cites the same distortions in the biology of skin color.[117]

For Regina Austin, disclosing and combating the deformities of racial character commands a politics of identification, especially in rebuilding communities of color.[118] Lisa Ikemoto highlights the need for a politics of racial identification by explicating the white supremacist deployment of racial distancing stories and disorder symbols to strengthen racialized claims of entitlement.[119] Robert Williams unravels strands of nativistic violence in the denigration of the Cherokees' discourse of tribal sovereignty and the white narrative pronouncement of tribalism's inferior land rights.[120] Richard Delgado and Jean Stefancic collect these disparate, historical strands of white supremacy to assemble narrative

112. *See* Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling, in* CUTTING EDGE, *supra* note 3, at 159.

113. *See* Peggy C. Davis, *Law as Microaggression, in* CUTTING EDGE, *supra* note 3, at 169.

114. Cognitive limitations of this sort extend to legal agents and decision-makers as well. *See generally* Jody Armour, *Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Prejudice Habit*, 83 CALIF. L. REV. 733 (1995); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995); Steven L. Winter, *Transcendental Nonsense, Metaphoric Reasoning, and the Cognitive Stakes for Law*, 137 U. PA. L. REV. 1105 (1989).

115. *See* Sheri Lynn Johnson, *Black Innocence and the White Jury, in* CUTTING EDGE, *supra* note 3, at 180.

116. *See* Ian F. Haney López, *The Social Construction of Race, in* CUTTING EDGE, *supra* note 3, at 191.

117. *See* Robin D. Barnes, *Politics and Passion: Theoretically a Dangerous Liaison, in* CUTTING EDGE, *supra* note 3, at 337.

118. *See* Regina Austin, *"The Black Community," Its Lawbreakers, and a Politics of Identification, in* CUTTING EDGE, *supra* note 3, at 293.

119. *See* Lisa C. Ikemoto, *Traces of the Master Narrative in the Story of African American/Korean American Conflict: How We Constructed "Los Angeles", in* CUTTING EDGE, *supra* note 3, at 305, 311-13.

120. *See* Robert A. Williams, Jr., *Documents of Barbarism: The Contemporary Legacy of European Racism and Colonialism in the Narrative Traditions of Federal Indian Law, in* CUTTING EDGE, *supra* note 3, at 98.

images of the racial outsider.[121] The dominant systems of legal classification, Delgado and Stefancic contend, such as Library of Congress subject headings, legal periodical indexes, and the West Digest System, exclude and obscure innovations in civil rights discourse by retaining a traditional, white-centered approach to legal categorization.[122]

This historical treatment silences people of color, especially in the political arena. Levied by racially motivated violence, the silence permits nativist myths to flourish. Chang points to these myths in the guise of the "foreign" menace and the "model minority."[123] According to Chang, the conjuring of these myths denies the continuing discrimination suffered by Asian Americans and legitimizes the inferior status of other communities of color and even the economic impoverishment of some white communities.[124] At the same time, Chang maintains, recounting the Asian-American experience of identity-based exclusion and recovering the testimony of survivors gives rise to an insurgent voice of protest against essentialist, myth-making constructions of the racial self and racial community.

Ironically, anti-essentialist protest rises along the periphery of CRT itself. Leveled against the CRT movement as a whole, the protest complains of racial essentialism in the construction of black identity and the black community. Randall Kennedy articulates a version of this accusation when he challenges the claim that black culture and scholarship are racially distinctive.[125] Kennedy's rebuke, however, ignores the chief normative issue raised by Critical Race theorists: the exclusion and exploitation of racial categories in legal storytelling.[126]

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121. *See* Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?, in* CUTTING EDGE, *supra* note 3, at 217.

122. *See* Richard Delgado & Jean Stefancic, *Why Do We Tell the Same Stories? Law Reform, Critical Librarianship, and the Triple Helix Dilemma, in* CUTTING EDGE, *supra* note 3, at 206, 208.

123. *See* Chang, *supra* note 109, at 325-29.

124. *See id.* at 327.

125. *See* Randall L. Kennedy, *Racial Critiques of Legal Academia, in* CUTTING EDGE, *supra* note 3, at 432, 435-36. *But see* Leslie G. Espinoza, *Masks and Other Disguises: Exposing Legal Academia, in* CUTTING EDGE, *supra* note 3, at 451 (challenging Kennedy's critique of CRT).

126. For helpful overviews of legal narrative and storytelling, see NARRATIVE AND THE LEGAL DISCOURSE (David Ray Papke ed., 1991); Kathryn Abrams, *Hearing the Call of Stories*, 79 CALIF. L. REV. 971 (1991) (discussing feminist narratives); Jane B. Baron, *Intention, Interpretation, and Stories*, 42 DUKE L.J. 630 (1992) (exploring storytelling in wills); Jane B. Baron, *Resistance to Stories*, 67 S. CAL. L. REV. 255 (1994) (defending legal storytelling); Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989) (promoting the use of stories in the struggle for racial justice).

Crucial constituents of the law and literature movement tolerate this exclusion.[127] Equally troubling, they fail to account for such exile. Categorical exclusions of this type generally issue from an unchallenged instrumental logic that asserts the narrative credibility, and consequent efficacy, of certain stock racialized stories supplied to audiences composed of majority-race judges and juries.

Critical Race theorists cast suspicion on stock racialized stories. They investigate not only the form and structure of legal argument, but also the stakes of legal narration and the goals of legal storytelling. This investigation uncovers the omission of pivotal interpretive categories from the study of narrative, for example, gender, ethnicity, sexual orientation, and race.

D. Legal Doctrine

The liberal canon severs legal doctrine from its racial and political foundation. Thus severed, doctrine occupies a formalist position of color-blind impartiality. From this culturally detached position, racial hierarchies appear imperceptible and subordinate narratives unfold naturally. Unlike liberal theorists, Critical Race theorists emphasize the utility of naming racial privilege when dealing with legal doctrine. To that end, they envisage narratives and stories as opportunities for "naming one's own reality."[128] Gerald Torres and Kathryn Milun, for example, enumerate the ways of rendering narratives authoritative, explanatory, and relevant.[129] Torres and Milun look to *Mashpee Tribe v. Town of Mashpee*[130] to illustrate the cultural core of evidentiary relevance and reasoning, thereby highlighting the representation, contestation, and inversion of stories in law and legal discourse.[131] Their main focus is the complex process of channeling outsider claims into the "formalized idiom of the language of the state—the idiom of legal discourse."[132] Applied in the Native-American context, this focus highlights the legal translation and evidentiary coding of claims produced by irreconcilable systems of cultural meaning.[133]

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127. *See, e.g.*, STANLEY FISH, DOING WHAT COMES (1989); RICHARD A. POSNER, LAW AND LITERATURE (1988); RICHARD WEISBERG, POETHICS (1992).

128. CUTTING EDGE, *supra* note 3, at 37.

129. *See* Gerald Torres & Kathyrn Milun, *Translating* Yonnondio *by Precedent and Evidence: The Mashpee Indian Case*, *in* CUTTING EDGE, *supra* note 3, at 48.

130. 447 F. Supp. 940 (D. Mass. 1978), *aff'd sub nom.* Mashpee Tribe v. New Seabury Corp., 592 F.2d 575 (1st Cir. 1979). *See generally* JACK CAMPISI, THE MASHPEE INDIANS (1991).

131. *See* Torres & Milun, *supra* note 129, at 48.

132. *Id.*

133. *See id.*

For Torres and Milun, the cultural irreconcilability of state and tribal claims within the dominant juridical system of white racial meaning suggests that certain stories may prove untranslatable.[134] These subordinate stories fit poorly within the cultural-legal categories of mainstream discourse. As a result, the doctrinal knowledge of and the adjudicated truth about subordinate cultures remain incomplete. This insufficiency often renders cultural claims of entitlement illegitimate. Courts' discursive ability to delegitimize the entitlement claims of subordinate cultural communities, Torres and Milun explain, signals the power to privilege specific forms of legal narrative and evidentiary proof.

Juridical privileging of narrative occurs in the very text of judicial opinions. Alert to this inscription, Thomas Ross reads opinions as narrative texts of racist ideology.[135] Citing the Supreme Court's decision in *City of Richmond v. J.A. Croson Co.*,[136] he weighs the compelling narrative logic of abstract principle against the narrative richness of historical description.[137] Logically deduced but decontextualized narratives, Margaret Russell observes, take on an almost cinematic quality, presenting racial stereotypes under the dominant gaze of American racial hierarchy.[138] Behind the pretense of the American gaze,[139] Delgado remarks, lurks a racialized event and a stock cultural story.[140] Omitted from the telling of that story, according to Bell, is an evaluation of the costs and benefits of racial discrimination.[141] Likewise overlooked, Patricia Williams adds, is a recognition of the multiple perspectives embedded in a single story.[142]

Both the law and literature movement and CRT imagine storytelling to occupy a place in legal discourse. The more dominant liberal vision informing the law and literature movement, however, carves a false

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134. *See id.* at 48-49.

135. *See* Thomas Ross, *The Richmond Narratives*, *in* CUTTING EDGE, *supra* note 3, at 38.

136. 488 U.S. 469 (1989).

137. *See* Ross, *supra* note 135, at 39-40.

138. *See* Margaret M. Russell, *Race and the Dominant Gaze: Narratives of Law and Inequality in Popular Film*, *in* CUTTING EDGE, *supra* note 3, at 56, 57.

139. *See generally* ERIC LOTT, LOVE AND THEFT: BLACKFACE MINSTRELSY AND THE AMERICAN WORKING CLASS (1995); DAVID M. LUBIN, PICTURING A NATION: ART AND SOCIAL CHANGE IN NINETEENTH-CENTURY AMERICA (1994).

140. *See* Richard Delgado, *Legal Storytelling: Storytelling for Oppositionists and Others: A Plea for Narrative*, *in* CUTTING EDGE, supra note 3, at 64, 68.

141. *See* Derrick Bell, *Property Rights in Whiteness—Their Legal Legacy, Their Economic Costs*, *in* CUTTING EDGE, *supra* note 3, at 75, 75.

142. *See* Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, *in* CUTTING EDGE, *supra* note 3, at 84, 88.

dichotomy in story that differentiates traditional/legal from oppositionist/nonlegal forms of discourse based on insider and outsider group status.[143] That dichotomy arises from tensions interior to liberal theory that render traditional narratives unstable and open to internal and external contest. Liberal conceptions of community and equality both suffer from such tensions.[144] Understanding how traditional legal discourse overcomes its inherent instability to tell apparently uncontested stories about race requires an analysis of the institutional, relational, and ideological sources of political power.[145] At bottom, power shapes the standards used to evaluate and the techniques applied to translate stories into legal rules governing the treatment of race in American law.[146]

E. Intersectionality

The liberal canon conceptualizes race as a category separate and apart from gender, ethnicity, class, and sexual orientation. This categorical partitioning corresponds to broader patterns of exclusion affecting marginalized groups under liberal regimes.[147] Those patterns compromise the liberal search for even a provisional, adjudicated truth in law and legal reasoning, relegating candor to the contingencies of narrative necessity.[148] Those contingencies—law, institutional procedure, and socio-legal relationship—dictate narratives of partial truth and piecemeal candor. Reaching for an imperializing, moralistic mode of historical narrative[149] to stabilize shifting identity categories discredits the claims of liberal tolerance.[150]

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143. *See generally* Robert A. Ferguson, *Untold Stories in the Law*, *in* LAW'S STORIES, *supra* note 7, at 84 (discussing the integrity of storytelling and the repression of untold stories).

144. For a useful catalogue of tensions central to liberal conceptions of equality and community, see Christopher J. Peters, *Equality Revisited*, 110 HARV. L. REV. 1210 (1997), and Glen O. Robinson, *Communities*, 83 VA. L. REV. 269 (1997).

145. For a discussion on how legal discourse exerts authority and organizes social relationships, see Reva B. Siegel, *In the Eyes of the Law: Reflections on the Authority of Legal Discourse*, *in* LAW'S STORIES, *supra* note 7, at 225.

146. *See* David N. Rosen, *Rhetoric and Result in the Bobby Seale Trial*, *in* LAW'S STORIES, *supra* note 7, at 110.

147. *See generally* Schacter, *supra* note 10, at 719-23 (exploring the relationship between identity categories and equality); Susan H. Williams, *A Feminist Reassessment of Civil Society*, 72 IND. L.J. 417, 420-26 (1997) (discussing alternative conceptions of civil society that disadvantage women).

148. *See generally* Richard K. Sherwin, *Law Frames: Historical Truth and Narrative Necessity in a Criminal Case*, 47 STAN. L. REV. 39 (1994) (examining legal storytelling in light of the disorderly nature of truth).

149. *See* Robin West, *Constitutional Fictions and Meritocratic Success Stories*, 53 WASH. & LEE L. REV. 995, 1007-10 (1996) (discussing the dangers of moralistic historical narrative).

150. *See* Martha Minow, *Stories in Law*, *in* LAW'S STORIES, *supra* note 7, at 24, 32-36.

Critical Race theorists stress the intersectionality of social and cultural categories in law as well as in legal reasoning. Their primary focus centers on the nexus of race and gender, though the categories of ethnicity[151] and sexual orientation[152] increasingly merge into that analysis. The intersection of these categories occurs in contexts where legal actors carry complex representational burdens or inhabit multiple social positions. Black, drug-addicted welfare mothers offer a case in point: not only do they bear the burdens of race, gender, and drug abuse, but they also endure the dehumanization of punitive state welfare measures.

Adopting an anti-essentialist stance, Critical Race theorists increasingly approach identity as the contested product of a socio-legal process of stereotypical character attribution. The components of identity—race, gender, ethnicity, sexual orientation—thus align in a manner that is neither natural nor mutually exclusive. Instead, identity is constructed out of racial and gendered stereotypes,[153] exemplified above in the case of black womanhood.

Kimberlé Crenshaw locates the structural intersectionality of race and gender in dominant political conceptualizations of rape and battering, detecting common elements of racial domination and gender subordination in the black experience of domestic violence.[154] Crenshaw conceives of a culture of opposition fueled by identity politics.[155] Contrary to liberal conceptions of social justice that override identity-based categories of difference, Crenshaw clasps on to difference as a "source of social empowerment and reconstruction."[156] Deploying difference to empower people of color to reconstruct systems of domination and violence, she notes, requires an awareness of the intersecting patterns of

151. *See generally* Symposium, *LatCrit Theory, Latinas/os, and the Law*, 85 CALIF. L. REV. 1087 (1997), 10 LA RAZA L.J. 1 (1997); Symposium, *Difference, Solidarity and Law: Building Latina/o Communities Through LatCrit Theory*, 19 UCLA CHICANO-LATINO L. REV. (forthcoming 1998); Symposium, *LatCrit Theory: Naming and Launching a New Discourse of Critical Legal Scholarship*, 2 HARV. LATINO L. REV. (forthcoming 1997); Symposium, *Representing Latina/o Communities: Critical Race Theory and Practice*, 9 LA RAZA L.J. 1 (1996).

152. *See, e.g.*, Kenneth L. Karst, *Myths of Identity: Individual and Group Portraits of Race and Sexual Orientation*, 43 UCLA L. REV. 263 (1995); Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CALIF. L. REV. 1 (1995); Valdes, *supra* note 10.

153. *See* Margaret E. Montoya, *Border/ed Identities: Narrative and the Social Construction of Personal and Collective Identities*, *in* CROSSING BOUNDARIES: TRADITIONS AND TRANSFORMATIONS IN LAW AND SOCIETY RESEARCH (Austin Sarat et al., eds. forthcoming 1998) (discussing daughter's experience of racialized self-estrangement).

154. *See* Kimberlé Williams Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, *in* KEY WRITINGS, *supra* note 2, at 357, 358.

155. *See id.* at 357.

156. *Id.*

experience and identity in society, especially for women of color combating male violence.

To Crenshaw, the social world furnishes "multiple grounds of identity."[157] Interventions into that world to organize a culture of opposition must build on these disparate grounds. Crenshaw concedes that organizing an oppositional culture entails dealing with issues of physical vulnerability, economic subordination, and political conflict. Failure to resolve these issues, she contends, produces isolation and disempowerment. Reconceiving difference in a guise receptive to multiple identities and organizing around cohort identity groups to engage in politics encourages a culture of opposition and participation.

Dorothy Roberts also discusses race and gender in considering the state's punitive response to drug-addicted black mothers during episodes of a spiraling crack epidemic.[158] Recalling the experience of slavery, Roberts deplores the disproportionate impact of state action on poor black women, citing high rates of punitive criminal prosecutions, the involuntary removal of black children, and coercive sterilization.[159] To Roberts, state disciplinary measures devalue black motherhood and perpetuate racial hierarchy through unconstitutional government intrusions upon individual and family privacy.[160] To fight these incursions, she proposes the design of a new privacy jurisprudence protective of those who are at once fallible and dependent on state largess.[161]

Regina Austin enlarges this proposal, conceiving of a full-blown agenda for black feminist legal scholarship.[162] Sifting the elements of *Chambers v. Omaha Girls Club*,[163] a twin employment and pregnancy discrimination case, Austin augments the Critical Race analysis of racial hierarchy by shifting her focus away from state encroachment on the rights of black women and toward state abandonment of the protection of black women against discrimination.[164] Austin's study of *Chambers*

157. *Id.* at 358.

158. *See* Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy, in* KEY WRITINGS, *supra* note 2, at 384, 386.

159. *See id.* at 388-92.

160. *See id.* at 389. Lisa Ikemoto also explores the ideological celebration and devaluation of motherhood. Charting the path of gender ideology during the late nineteenth and early twentieth centuries, she uncovers long-standing state regulatory practices of intervention in the lives of pregnant women. *See* Lisa C. Ikemoto, *The Code of Perfect Pregnancy: At the Intersection of the Ideology of Motherhood, the Practice of Defaulting to Science, and the Interventionist Mindset of the Law, in* CUTTING EDGE, *supra* note 3, at 478.

161. *See* Roberts, *supra* note 158, at 403-05.

162. *See* Regina Austin, *Sapphire Bound!, in* KEY WRITINGS, *supra* note 2, at 426, 427.

163. 629 F. Supp. 925 (D. Neb. 1986), *aff'd*, 834 F.2d 697 (8th Cir. 1987).

164. *See* Austin, *supra* note 162, at 429.

illustrates the continuing oppression of black women in employment as well as the diversity of black women's cultural practices in the areas of the family and reproductive freedom.

While Richard Delgado makes reference to essentialist theorizing, even among reform-minded oppositional groups,[165] Angela Harris's precise explanation of the interplay of race and essentialism in feminist legal theory isolates the tendency to bracket race and to erase black women from the landscape of gender domination.[166] Paulette Caldwell overcomes this tendency in showing the "interlocking figurations" of race and gender[167] that give shape to the employment discrimination case of *Rogers v. American Airlines, Inc.*[168] This complex configuration, Caldwell notes, also gives rise to the experience of shame.[169]

Caldwell's allusion to shame introduces the concept of spirit injury experienced at the intersection of identity and racialized or sexualized violence. Adrien Wing and Sylke Merchán denote the violence of rape as a spirit injury in Muslim culture.[170] Rousing the American history of slavery and miscegenation, Wing and Merchán delineate the transnational symptoms of rape injury in both physical and spiritual terms: defilement, silence, emasculation, trespass, and pollution.[171]

To be sure, the experience of humiliation conveyed by Jennifer Russell's personal account of racial antagonism in the legal academy[172] constitutes a different order of harm than sexual violence. Nevertheless, the intersectionality thesis demonstrates that the injury of humiliation frequently accompanies racial and ethnic subordination, at times occurring subsequent to assimilation. Margaret Montoya comments that law erects linguistic barriers that effectively mask the pain of bias injuries, thereby silencing outsider narratives of deprivation.[173] To remedy such deprivation, even when it afflicts alleged law breakers, Monica Evans

165. *See* Richard Delgado, *Rodrigo's Sixth Chronicle: Intersections, Essences, and the Dilemma of Social Reform, in* CUTTING EDGE, *supra* note 3, at 242, 243.

166. *See* Angela P. Harris, *Race and Essentialism in Feminist Legal Theory, in* CUTTING EDGE, *supra* note 3, at 253, 255.

167. Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender, in* CUTTING EDGE, *supra* note 3, at 267, 270.

168. 527 F. Supp. 229 (S.D.N.Y. 1981).

169. *See* Caldwell, *supra* note 167, at 275.

170. *See* Adrien Katherine Wing & Sylke Merchán, *Rape, Ethnicity, and Culture: Spirit Injury from Bosnia to Black America, in* CUTTING EDGE, *supra* note 3, at 516, 518.

171. *See id.* at 521-25.

172. *See* Jennifer M. Russell, *On Being a Gorilla in Your Midst, or, The Life of One Blackwoman in the Legal Academy, in* CUTTING EDGE, *supra* note 3, at 498.

173. *See* Margaret E. Montoya, Máscaras, Trenzas, y Greñas*: Un/masking the Self While Un/braiding Latina Stories and Legal Discourse, in* CUTTING EDGE, *supra* note 3, at 529, 538-39.

recommends building a culture of opposition in communities of color founded on the rhetoric of rights.[174]

The production and intersection of racialized stories inside and outside the courtroom often enlists spurious claims of objectivity and truth in defense of narrative exclusion. Both liberals[175] and Critical Race theorists[176] tend to focus their analysis of categorical overlap in identity constructions on trials and the narrative transactions at trials involving lawyers and judges. This focus overlooks the importance of the pretrial activity of law offices, street-level institutions, and clients to case construction.[177] Envisioning the socio-legal process of identity construction as a narrative struggle in these broader terms requires a description of how lawyers, clients, and other legal agents experience narrative competition over conflicting evidence and regulation under legal rules. This view also prompts scrutiny of the interpretive methods used by lawyers to present a client's story that intersects with wider social narratives. The next section considers the resolution of the internal CRT conflict over liberal and postmodern visions of racial equality and emancipation.

III
RECONCILIATIONS

The CRT struggle to reform liberal legalism rises from a long-standing vision of racial equality and emancipation. The failure of integration, the persistence of inequality, and the continuing entailments of bondage manifested in black poverty and punitive cycles of probation, prison, and parole increasingly cloud that vision. The turn to postmodernism in CRT indicates less an abandonment of liberal ideals than a keen disillusionment about the likelihood of their fruition. In this way, the turn seems partial and unresolved. For in the alternative rhetoric of

174. *See* Monica J. Evans, *Stealing Away: Black Women, Outlaw Culture and the Rhetoric of Rights, in* CUTTING EDGE, *supra* note 3, at 502, 510-12.

175. *See generally* Robert Weisberg, *Proclaiming Trials as Narratives: Premises and Pretenses, in* LAW'S STORIES, *supra* note 38, at 61 (discussing the role of narrative in law); *see also* Janet Malcolm, *The Side-Bar Conference, in* LAW'S STORIES, *supra* note 38, at 106 (assessing the impact of narrative transactions between lawyers and judges on the result of a trial).

176. *See, e.g.*, Kendall Thomas, *Rouge et Noir Reread: A Popular Constitutional History of the Angelo Herndon Case, in* KEY WRITINGS *supra* note 2, at 465, 476-81, 484-90.

177. *See generally* Clark D. Cunningham, *The Lawyer as Translator, Representation as Text: Towards an Ethnography of Legal Discourse*, 77 CORNELL L. REV. 1298, 1310-28 (1992) (discussing the pre-trial development of a criminal defense); Herbert A. Eastman, *Speaking Truth to Power: The Language of Civil Rights Litigators*, 104 YALE L.J. 763 (1995) (exploring the importance of pleading to the communication of the plaintiff's story); Binny Miller, *Give Them Back Their Lives: Recognizing Client Narrative in Case Theory*, 93 MICH. L. REV. 485 (1994) (analyzing the role of the client's story in the attorney's development of case theory).

postmodernism, CRT mixes antithetical calls for coalition-building and praxis. The battle to reconcile these competing rhetorics will shape the future of CRT in the academy and in the courts.

A. Postmodernism

The liberal canon deems law and legal reasoning to be the ingredients of a carefully honed craft. The notion of craft connotes a stable juridical universe in which norms are fixed and historical truth is realizable, indeed where "what has been *constructed* is perceived to have been properly *construed*."[178] The performative rhetoric of craft, both in advocacy and in adjudication, interweaves force and persuasion with the "ascription of trustworthiness."[179] Postmodernism, especially the identity-based[180] and culturally contingent[181] version that Critical Race theorists pull and recast from Continental materials,[182] exalts the play of interpretive practices[183] put into the service of justice.[184] Engrafting race and postmodernism in the field of inequality reconfigures the topics of historical truth[185] and human value[186] to accommodate contingency and context. That reconfiguration revives practical commitments to provisional truth claims and localized normative decision making carried out in the face of tentative, and sometimes temporary, identity categories.[187]

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178. John Hollander, *Legal Rhetoric*, *in* LAW'S STORIES, *supra* note 38, at 176, 183.

179. Sanford Levinson, *The Rhetoric of the Judicial Opinion*, *in* LAW'S STORIES, *supra* note 38, at 187, 204.

180. *See, e.g.*, Jody Armour, *Just Deserts* [sic]*: Narrative, Perspective, Choice, and Blame*, 57 U. PITT. L. REV. 525 (1996); Thomas Ross, *The Rhetorical Tapestry of Race: White Innocence and Black Abstraction*, 32 WM. & MARY L. REV. 1 (1990).

181. *See, e.g.*, Patricia J. Falk, *Novel Theories of Criminal Defense Based upon the Toxicity of the Social Environment: Urban Psychosis, Television Intoxication, and Black Rage*, 74 N.C. L. REV. 731 (1996); Cynthia Kwei Yung Lee, *Race and Self-Defense: Toward a Normative Conception of Reasonableness*, 81 MINN. L. REV. 367 (1996).

182. *See* Douglas E. Litowitz, *Some Critical Thoughts on Critical Race Theory*, 72 NOTRE DAME L. REV. 503, 503 (1997).

183. *See generally* J.M. Balkin, *A Night in the Topics: The Reason of Legal Rhetoric and the Rhetoric of Legal Reason*, *in* LAW'S STORIES, *supra* note 38, at 211 (noting the practical, sociological, and critical benefits of legal interpretation and rhetorical invention through topics); Barbara Stark, *The Practice of Law as Play*, 30 GA. L. REV. 1005, 1018 (1996) (discussing legal storytelling as play).

184. *See* Stephen M. Feldman, *The Politics of Postmodern Jurisprudence*, 95 MICH. L. REV. 166, 197-201 (1996).

185. *See* Tracy E. Higgins, *"By Reason of Their Sex": Feminist Theory, Postmodernism, and Justice*, 80 CORNELL L. REV. 1536, 1585, 1587 (1995).

186. Postmodernists treat the topic of normative commitment and value as rhetorical gloss. *See, e.g.*, Schlag, *Hiding the Ball*, *supra* note 14, at 1715-16; Schlag, *Values*, *supra* note 16, at 220.

187. On the practice of identity politics, see Martha Minow, *Not Only for Myself: Identity, Politics, and Law*, 75 OR. L. REV. 647 (1996).

Critical Race theorists, drawing on postmodernism, affirm the contingent, indeterminate, and socially constructed nature of identity categories. Proclaiming legal identity unstable and contradictory, they contend that there is no fixed meaning to "race" apart from social context. But rather than abolish the idea of race or preserve traditional ascriptions, they adopt a new paradigm of cultural pluralism recovered from the "popular memory" of neglected histories of community struggle against racial injustice.[188] This alternative vision of cultural pluralism transforms the character of social space from an apolitical, atomistic realm of isolated individuals to an insurgent, participatory community of connected citizens.

Jayne Chong-Soon Lee advances this popular recovery by locating the possibility of racial resistance in generalized legal contexts,[189] even in the ghettoizing judicial constructions of race.[190] Lee asserts that cultural pluralism precludes conflation of the biological and the racial, and, thus, the reinscription of racial stereotypes and subordination. For Lee, pluralism hinges on the inclusion of racial experiences obtained by granting groups the power of racial self-definition and tolerating the multiple definitions of race that may ensue.[191] Because this self-definitional allowance invites turmoil, it warrants the incorporation of democratic checking mechanisms to insure against community disintegration. Acute circumstances of racial animus or group conflict may prove such mechanisms inadequate to save a community from splintering.

The multiplicity of racial definition under a regime of cultural pluralism, Richard Ford points out, bears on the construction of racially identified political and social space.[192] To Ford, the creation and perpetuation of racially identified spaces, whether for economic-structural or political reasons, holds serious implications for racial harmony.[193] Insofar as pluralism entails elements of community self-definition under a legal conception of space—e.g., exclusionary zouing—the distributive consequences of local racial politics are significant.[194] The segregation of political and social space that results from

188. *See* KEY WRITINGS, *supra* note 2, at 440.

189. *See* Jayne Chong-Soon Lee, *Navigating the Topology of Race*, *in* KEY WRITINGS, *supra* note 2, at 441.

190. *See id.* at 444-46.

191. *See id.* at 441.

192. *See* Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, *in* KEY WRITINGS, *supra* note 2, at 449.

193. *See id.*

194. *See, e.g.*, Milliken v. Bradley, 418 U.S. 717, 740-41 (1974) (stating that a court may not treat local school district boundaries as "mere administrative convenience" in order to effect its view

local racial politics directs traditional conceptions of autonomy and association toward a legal practice of culturally plural political space where the boundaries of race may be redrawn in terms beside desegregation and integration.[195]

The cultural realignment of desegregation and integration requires an effective political language of racial resistance and struggle. That language, Kendall Thomas reminds us,[196] may be culled from the rhetoric of resistance found in the historical trials of contested political rights. Thomas' account of the historic case of *Herndon v. Lowry*[197] deciphers the rhetoric of resistance located at the constitutional intersection of race, culture, and politics. Undertaken to revise constitutional historiography, his account presents a cultural history of Angelo Herndon's political struggle against the State of Georgia to win the right to community organize. For Thomas, the key to the *Herndon* case is the remembrance of resistance to race-inscribed political repression. The key to resistance is coalition-building.

B. Coalition-Building

The liberal canon suggests that coalition-building unfolds naturally out of the obligations and rituals of democratic citizenship. Under the neo-republican vision of liberalism, civic obligations pertain to the community ethos of collective deliberation and universal debate in decentralized public assemblies. Participatory rituals encircle church, school, and local institutions of cooperative self-government. Fulfilling the obligations of self-rule and civic virtue in small groups or associations coincides with a revival of neo-republican values developing adjacent to and sometimes in tandem with liberal frameworks of political theory.[198] Heralded by liberal reformers, the neo-republican vision proffers to cure the political disenfranchisement and underrepresentation of people of color through cross-cultural coalition-building.

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of a desirable racial balance among the schools of a metropolitan area); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973) (finding that residence in a school district that has "less taxable wealth than other districts" does not trigger heightened scrutiny under the equal protection clause).

195. *See* Ford, *supra* note 192, at 449.

196. *See* Thomas, *supra* note 176.

197. 301 U.S. 242 (1937); *see also* Herndon v. Georgia, 295 U.S. 441 (1935); *see generally* CHARLES H. MARTIN, THE ANGELO HERNDON CASE AND SOUTHERN JUSTICE (1976).

198. *See generally* Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1495 (1988) (fashioning republicanism as a means to renovate political communities and to enhance political freedom); Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1537, 1541 (1988) (articulating a theory of "liberal republicanism").

Critical Race theorists approach reformist coalition-building with apprehension. The stylistic allure of neo-republicanism devolves into a distrust well-earned by practices of exclusion.[199] At the same time, the bare admission of methodological commonalities with the CLS movement leaves past quarrels unresolved.[200] Further, charges of CLS-instigated exclusion and exploitation remain unsettled. Even if mediation is available, reconciliation will never come about without correction of the normative and pragmatic deficiencies of the CLS paradigm. The reconstruction of liberalism depends on normative vision and pragmatic advocacy, not merely deconstruction. Under liberal regimes, normative vision must unite conceptions of individual entitlement and community obligation. Pressing this unification in pragmatic advocacy dictates alternative lawyering stratagems linked to community mobilization[201] and ethical precepts based on broadly framed ideals of justice.[202]

The springboard for the normative rehabilitation of CLS is the discourse of civil rights. Kimberlé Crenshaw contends that the indeterminacy and hegemonic function of civil rights discourse in no way prevents self-conscious ideological and political struggle against racism, in spite of the risk of legitimizing court-approved instances of bias and inequality.[203] Mari Matsuda offers the right of reparations in the context of Japanese-American and Native-Hawaiian claims for redress as an example of a critical, transformative discourse grounded in both liberal legalism and historical oppression.[204] More broadly, Harlan Dalton accentuates the importance of rights discourse to the development of a positive, reconstructive program for race reform.[205] Confirming Dalton's pragmatic conception of rights, Anthony Cook adds that a

199. *See* Derrick Bell & Preeta Bansal, *The Republican Revival and Racial Politics*, 97 YALE L.J. 1609, 1610-13 (1988); Wendy Brown-Scott, *The Communitarian State: Lawlessness or Law Reform for African-Americans?*, 107 HARV. L. REV. 1209, 1211-15 (1994).

200. *See* Richard Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?*, 22 HARV. C.R.-C.L. L. REV. 301 (1987) (assailing CLS from the perspective of "minorities"); Robert A. Williams, Jr., *Taking Rights Aggressively: The Perils and Promise of Critical Legal Theory for Peoples of Color*, 5 LAW & INEQ. J. 103 (1987) (questioning whether the renunciation of "rights" discourse by CLS assists people of color in their legal struggles).

201. *See* GERALD P. LÓPEZ, REBELLIOUS LAWYERING (1992).

202. *See* William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083 (1988).

203. *See* Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, *in* KEY WRITINGS, *supra* note 2, at 103.

204. *See* Mari Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, *in* KEY WRITINGS, *supra* note 2, at 63.

205. *See* Harlan L. Dalton, *The Clouded Prism: Minority Critique of the Critical Legal Studies Movement*, *in* KEY WRITINGS, *supra* note 2, at 80-81; *see generally* HARLON L. DALTON, RACIAL HEALING (1995).

reconstructive vision demands a theological center comprised of church teachings.[206] Cook points to the historic role of the African-American church in organizing and mobilizing community opposition to institutional racism.[207] Moreover, he lauds the critical theology of Martin Luther King, Jr., as an important "potential source for alternative conceptions of community."[208] To Cook, critical theology holds the potential for delegitimating authority and for mobilizing a cooperative, participatory community ethos.[209]

Overcoming the justifiable skepticism of Critical Race theorists directed toward republican-minded liberals and CLS activists in order to induce their entry into coalition politics requires the suspension of racial distrust. Scant evidence supports the impulse to set aside suspicion. For people of color, neither empathy nor emotion affords consolation for historical betrayal. The logic of coalition-building boils down to the practical calculations of community organization and mobilization to gain political power. The drive for power commands a problem-solving orientation found in the evolving advocacy traditions of feminist,[210] political,[211] and sometimes affective,[212] lawyering. Those traditions strive to fuse the theory and practice of advocacy into a form of praxis.

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206. *See* Anthony E. Cook, *Beyond Critical Legal Studies: The Reconstructive Theology of Dr. Martin Luther King, Jr.*, *in* KEY WRITINGS, *supra* note 2, at 85.

207. *See id.*

208. *Id.*

209. For a discussion of the National Council of Churches and its Commission on Religion and Race in aiding theology-inspired community mobilization in Mississippi during the 1960s, see JAMES F. FINDLAY, JR., CHURCH PEOPLE IN THE STRUGGLE (1993).

210. *See, e.g.*, Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 BERKELEY WOMEN'S LJ 39 (1985); Susan P. Sturm, *From Gladiators to Problem-Solvers: Connecting Conversations About Women, the Academy, and the Legal Profession*, 4 DUKE J. GENDER L. & POL'Y 119 (1997).

211. *See, e.g.*, GERALD P. LÓPEZ, REBELLIOUS LAWYERING (1992); Symposium, *Political Lawyering: Conversations on Progressive Social Change*, 31 HARV. C.R.-C.L. L. REV. 285 (1996); Symposium, *Poverty Law Scholarship*, 48 U. MIAMI L. REV. 983 (1994).

212. *See, e.g.*, Linda G. Mills, *On the Other Side of Silence: Affective Lawyering for Intimate Abuse*, 81 CORNELL L. REV. 1225 (1996). Linda Mills locates "affective lawyering" within the American tradition of progressive advocacy, especially as expressed in the field of poverty law. *See id.* at 1229 n.14. For Mills, affective lawyering "demands that lawyers understand their own political and social transformation, not intellectually or ideologically, but rather, through their personal experiences of strength and weakness, passion and melancholy, distance and deprivation in all facets of their lives." *Id.* at 1228. In terms of methodology, it demands that advocates meet their "emotionally frightened and politically disempowered" clients at an interpersonal level. *Id.*

C. Praxis

The liberal canon divides theory and practice into rigid categories of discrete analysis. This long-standing division stems from several sources, including the disposition of academic theorists, the nature of advocacy traditions, and the content of legal education, particularly the curricular substance of clinical programs. Although the advent of a theoretics-of-practice movement shows some headway in bridging the theory/practice gap,[213] both the CLS and CRT movements inhibit progress by replicating the theory/practice dichotomy.[214] This joint tendency casts doubt on the likelihood of achieving the fusion of theory and practice in praxis.[215] Yet, Critical Race theorists persevere, marshaling a critique of liberalism embedded in theory and in pedagogy gleaned from the diverse material and spiritual experiences of people of color. Their collective voice challenges the widespread race-privileging recurrent in the structure of law and legal education and, hence, supplies an alternative culture of resistance and a promise of political liberation.

Evaluating the promise of a CRT liberation politics, Derrick Bell meditates on the associations of hope and despair for people of color.[216] Girardeau Spann espouses the hope of a positive politics, notwithstanding the frustrations of thwarted litigation and electoral majoritarianism.[217] Michael Olivas reiterates that hope, summoning suppressed histories of racial and ethnic community struggle for inspiration.[218]

Although Bell ratifies community, he unsettles the unitary notion of racial community. Charting the local history of civil rights litigation in a battery of school desegregation cases, he unearths conflicts ignited by the incommensurable remedial goals of lawyers, clients, and communities.[219] Efforts to reframe these and other goals or to recalibrate

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213. *See* Phyllis Goldfarb, *Beyond Cut Flowers: Developing a Clinical Perspective on Critical Legal Theory*, 43 HASTINGS L.J. 717 (1992).

214. *See generally* John O. Calmore, *Racialized Space and the Culture of Segregation: "Hewing a Stone of Hope from a Mountain of Despair,"* 143 U. PA. L. REV. 1233 (1995) (applying CRT to progressive practice).

215. For proclamations of a Critical Race praxis, see Raneta Lawson, *Critical Race Theory as Praxis: A View From Outside the Outside*, 38 HOW. L.J. 353 (1995); Eric K. Yamamoto, *Critical Race Praxis: Race Theory and Political Lawyering Practice in Post-Civil Rights America*, 95 MICH. L. REV. 821 (1997).

216. *See* Derrick Bell, *Racial Realism—After We're Gone: Prudent Speculations on America in a Post-Racial Epoch*, *in* CUTTING EDGE, *supra* note 3, at 2, 2-3.

217. *See* Girardeau A. Spann, *Pure Politics*, *in* CUTTING EDGE, *supra* note 3, at 21, 28-29.

218. *See* Michael A. Olivas, *The Chronicles, My Grandfather's Stories, and Immigration Law: The Slave Traders Chronicle as Racial History*, *in* CUTTING EDGE, *supra* note 3, at 9.

219. *See* Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, *in* KEY WRITINGS, *supra* note 2, at 5.

tactics, Richard Delgado acknowledges, are unlikely to provide full relief.[220]

For Alan Freeman, the entertainment of conventional relief merely accepts the myths of liberal reform.[221] To escape these myths, Freeman turns to pedagogy, assessing the potential for subversion under two strategies. The first seeks to achieve remedial gains through the "self-conscious manipulation of legal doctrine" without reinforcing juridical legitimacy.[222] The second works to politicize legal doctrine in order "to reveal contradictions and limits, promote public awareness, and even win cases."[223] By Freeman's own judgment, both strategies fail. The alternative, he announces, is to confront the historical underpinnings of legal doctrine and adjudication.[224]

Historical confrontation presents issues of cultural authenticity. Taunya Banks'[225] endorsement of life stories as a pedagogical frame of reference comports with the notion of cultural authenticity. For Charles Lawrence, as well, affirming a pedagogy of subjectivity, story, and narrative affords an authentic form of contextual learning rooted in social and historical texts.[226] John Calmore's vision of oppositional cultural practice is grounded in racial history. Only out of that history, Calmore declares, can a culturally authentic liberating practice successfully emerge.[227]

Like Banks and Lawrence, Calmore's turn to an oppositional cultural practice lays challenge to the universality of white experience as the authoritative standard of conduct and judgment in law and legal education.[228] That oppositional stance, however, is not ungrounded, turning instead to cultural experience, class, and community. Those

220. *See* Richard Delgado, *Beyond Criticism—Synthesis? Left-Right Parallels in Recent Writing About Race, in* CUTTING EDGE, *supra* note 3, at 464, 469.

221. *See* Alan D. Freeman, *Derrick Bell—Race and Class: The Dilemma of Liberal Reform, in* CUTTING EDGE, *supra* note 3, at 458, 460.

222. *Id.* at 462.

223. *Id.*

224. *See id.* Freeman excuses his belated encounter with history by stating: "The task of unmasking, of exposing presuppositions, of delegitimizing, is easier than that of offering a concrete historical account to replace what is exposed as inadequate." *Id.*

225. *See* Taunya Lovell Banks, *Two Life Stories: Reflections of One Black Woman Law Professor, in* KEY WRITINGS, *supra* note 2, at 329.

226. *See* Charles R. Lawrence, III, *The Word and the River: Pedagogy as Scholarship as Struggle, in* KEY WRITINGS, *supra* note 2, at 336.

227. *See* John O. Calmore, *Critical Race Theory, Archie Shepp, and Fire Music: Securing an Authentic Intellectual Life in a Multicultural World, in* KEY WRITINGS, *supra* note 2, at 315.

228. *See id.* at 318.

context-setting factors ground the subjective orientation of people of color directed toward racial reconstruction.

The reconfiguration of the CRT race-conscious vision of an oppositional cultural practice and pedagogy into a transformative strategy of community-based legal and political advocacy falls on the resolution of complicated, and often puzzling, issues of authenticity, difference, and responsibility. No indicia exist to test the authenticity of client or community opposition to the material edifices of racist ideology. Furthermore, the notion of authenticity[229] presents no clear-cut role for the advocate and no strategy for dealing with difference either in legal rights litigation or in political organizing. At a minimum, CRT urges the race-conscious advocate to take responsibility for his acts of speech and silence[230] and to create and to abide by an ethic of narrative authorship in matters of race.[231]

To be of use to clients and communities of color, the ethic of narrative authorship must translate into a practice of advocacy. American legal history proffers advocacy traditions for both private[232] and public[233] realms of lawyering. Evidently, Critical Race theorists find none of these traditions persuasive, for they relegate lawyering to virtual silence. The posture of silence sacrifices opportunities to integrate theory and practice. Without integration, no legal-political praxis will take shape.

Consider briefly the numerous opportunities for inventing a Critical Race praxis currently available in American law and society. Look,

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229. *See generally* Susan G. Kupfer, *Authentic Legal Practices*, 10 GEO. J. LEGAL ETHICS 33, 71-90 (1996).

230. *See* Wendy Brown, *In the 'folds of our own discourse': The Pleasures and Freedoms of Silence*, 3 ROUNDTABLE 185, 197 (1996). Wendy Brown points to silence as "a mode of resistance to power." *Id.* To Brown, "refusing to speak is a method of refusing colonization, refusing complicity in injurious interpellations or subjection through regulation." *Id.* She cautions, however, that the practice of "refusing to speak" in the context of domination, whether asserted as a defense or a strategy for negotiation, fails to offer freedom. *See id.* Silence, in this sense, signifies resistance rather than emancipation. *See id.*

231. *Cf.* ROBERT M. COVER, JUSTICE ACCUSED (1975). Robert Cover's study of the dilemma of the antislavery judge in confronting "the choice between the demands of role and the voice of conscience" evokes the notion of an ethic of narrative authorship. *Id.* at 6. The extension of Cover's analysis of judicial moral-formal performance to the field of race-conscious advocacy illuminates the continuing hard choices at stake and the inevitable dissonance accompanying those choices.

232. *See, e.g.*, MARC GALANTER & THOMAS PALAY, TOURNAMENT OF LAWYERS (1991) (documenting the transformation of large-firm law practice); MICHAEL J. KELLY, LIVES OF LAWYERS (1994) (studying solo and small-firm law practice); CARROLL SERON, THE BUSINESS OF PRACTICING LAW (1996) (describing law practices in large- and small-firm, corporate, and government settings).

233. *See, e.g.*, MARTHA F. DAVIS, BRUTAL NEED (1993) (chronicling the litigation history of the welfare rights movement); MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW (1994) (tracing the course of civil rights litigation through the work of Thurgood Marshall and the NAACP).

for instance, to the intersections of race, crime, and the criminal justice system shown in high-profile and low-order trials.[234] Witness the relationship between race and the environment in locating polluting facilities.[235] Further, note the impact of race on jury selection[236] and deliberation[237] demonstrated through the use of peremptory challenges[238] and nullification.[239] Additionally, observe the unfolding controversy over the ethical regulation of race in federal and state courtrooms and bar associations.[240] Race infects each of these contexts, generating ample opportunities for theoretical and practical experimentation in law and lawyering.

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234. *See generally* JUSTICE WITH PREJUDICE (Michael J. Lynch & E. Britt Patterson eds., 1996); RANDALL KENNEDY, RACE, CRIME, AND THE LAW (1997); MICHAEL TONRY, MALIGN NEGLECT—RACE, CRIME, AND PUNISHMENT IN AMERICA (1995); Symposium, *Criminal Law, Criminal Justice, and Race*, 67 TUL. L. REV. 1725 (1993); Symposium, *Justice and the Criminal Justice System*, 20 HARV. J.L. & PUB. POL'Y 323 (1997); Symposium, *O.J. Simpson and the Criminal Justice System on Trial*, 67 U. COLO. L. REV. 727 (1996); Symposium, People v. Simpson: *Perspectives on the Implications for the Criminal Justice System*, 69 S. CAL. L. REV. 1233 (1996).

235. *See* ENVIRONMENTAL PROTECTION AND JUSTICE 153-239 (Kenneth A. Manaster ed., 1995); *see generally* Lynn E. Blais, *Environmental Racism Reconsidered*, 75 N.C. L. REV. 75, 120-27 (1996); Sheila Foster, *Race(ial) Matters: The Quest for Environmental Justice*, 20 ECOLOGY L.Q. 721, 731-38 (1993); Carolyn M. Mitchell, Note, *Environmental Racism: Race as a Primary Factor in the Selection of Hazardous Waste Sites*, 12 NAT'L BLACK L.J. 176 (1993).

236. *See generally* Nancy J. King, *Racial Jurymandering: Cancer or Cure? A Contemporary Review of Affirmative Action in Jury Selection*, 68 N.Y.U. L. REV. 707, 711-19 (1993); Donna J. Meyer, Note, *A New Peremptory Inclusion to Increase Representativeness and Impartiality in Jury Selection*, 45 CASE W. RES. L. REV. 251, 266-72 (1994).

237. *See generally* Nancy J. King, *Postconviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions*, 92 MICH. L. REV. 63, 75-100 (1993).

238. *See generally* Sheri Lynn Johnson, *The Language and Culture (Not to Say Race) of Peremptory Challenges*, 35 WM. & MARY L. REV. 21 (1993); Kenneth B. Nunn, *Rights Held Hostage: Race, Ideology and the Peremptory Challenge*, 28 HARV. C.R.-C.L. L. REV. 63 (1993); Charles J. Ogletree, *Just Say No!: A Proposal to Eliminate Racially Discriminatory Uses of Peremptory Challenges*, 31 AM. CRIM. L. REV. 1099 (1994).

239. *Compare* Andrew D. Leipold, *The Dangers of Race-Based Jury Nullification: A Response to Professor Butler*, 44 UCLA L. REV. 109, 111 (1996) (characterizing the endorsement of race-based jury nullification as "foolish and dangerous"), *with* Paul Butler, *The Evil of American Criminal Justice: A Reply*, 44 UCLA L. REV. 143 (1996) (arguing that race-based jury nullification serves to combat racism in the American criminal justice system).

240. Discord over the regulation of race through ethical codes resists neat division into opposing race-conscious and race-neutral positions. Paradoxically, proponents and opponents of ethical regulation concede the importance of race-conscious advocacy. Proponents, however, judge race-conscious forms of advocacy to be injurious to lawyers, clients, courts, and the law itself. Opponents consider the same forms of advocacy to be obligatory expressions of the adversarial system, injurious or not. *Compare* Anthony V. Alfieri, *Defending Racial Violence*, 95 COLUM. L. REV. 1301 (1995), *and* Andrew E. Taslitz & Sharon Styles-Anderson, *Still Officers of the Court: Why the First Amendment Is No Bar to Challenging Racism, Sexism, and Ethnic Bias in the Legal Profession*, 9 GEO. J. LEGAL ETHICS 781 (1996), *with* Robin D. Barnes, *Interracial Violence and Racialized Narratives: Discovering the Road Less Traveled*, 96 COLUM. L. REV. 788 (1996), *and* Eva S. Nilson, *The Criminal Defense Lawyer's Reliance on Bias and Prejudice*, 8 GEO. J. LEGAL ETHICS 1 (1994).

CONCLUSION

The writings of CRT build on earlier theoretical and practical struggles to open up alternatives to the paradigm of liberal legalism and its canon of color-blind adjudication. Although those alternative models are not yet fully formed, their outlines may be traced through the ongoing scholarly efforts to recast the meaning of race consciousness and power, racial identity and exclusion, and racialized voice and narrative.[241] The recasting of difference and diversity into a pluralist, multicultural vision invites the friends of CRT to move beyond mere sentiment and altruism toward collaborative experience and commitment. Perhaps then we can dream beyond the colors of black and white.

241. Both of the instant CRT collections reflect transformative scholarly efforts. Equally deserving of praise, the two collections nevertheless differ in their structure and purpose. Structurally, *The Cutting Edge* anthology offers section-by-section summary overviews, issue-oriented commentary, and bibliographies. The sections comprise bundles of closely edited artieles. In this way, *The Cutting Edge* makes an ideal text for an introductory jurisprudence course. It also provides a valuable supplement to a course in a wide variety of substantive and elinical fields.

In the same way, *The Key Writings* anthology furnishes section-by-section summary treatments and well-integrated clusters of articles. Unlike its allied anthology, however, *The Key Writings* forgoes substantial editing, allowing for greater elaboration and stylistic distinction. The resulting density makes *The Key Writings* perhaps more appropriate for an advanced course either in jurisprudence or elsewhere. Unfortunately, limiting the text to this curricular segment narrows the breadth of appreciation for the stunning introductory essay that begins *The Key Writings*, an essay that stands out even among the many compelling works of the CRT literature.